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VOLUME V.

ABATEMENT
TO
INDICTMENT

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CURRENT LAW.

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ABANDONMENT, see latest topical index.

ABATEMENT AND REVIVAL.

The scope of this topic excludes criminal prosecutions,[1] bills of revivor,[2] revival of judgments[3] or of statute-barred causes of action,[4] and the abatement of various writs for defects therein.[5]

§ 1. *Causes for abatement.*[5a]—*The pendency of another action* between the same parties,[6] for the same cause,[7] and where a complete remedy can be secured in one action,[8] is ground for abatement. But the action first commenced is not

1. Indictment and Prosecution, 4 C. L. 1.
2. Equity, 3 C. L. 1210.
3. Judgments, 4 C. L. 287.
4. Limitation of Actions, 4 C. L. 445.
5. See Attachment, 3 C. L. 353, and like titles.

5a. See 3 C. L. 1.

6. The parties to suits for the same cause of action, in different states, must be the same to cause a stay. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 144. A plaintiff cannot be stayed in the prosecution of his action pending a decision of another action to which he is not a party or privy. Sammons v. Parkhurst, 46 Misc. 128, 93 N. Y. S. 1063. A plea by one of two defendants, of former suit pending, cannot be sustained to a bill to restrain a nuisance and for damages, where the former suit is by part only of complainants and is for an injunction only, without claim of damages. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

7. An injunction suit against trespass is no impediment or bar to subsequent expropriation proceedings or the exercise of rights of property acquired thereunder. Xavier Realty v. Louisiana R. & Nav. Co. [La.] 38 So. 427. The fact that a criminal action for a violation of the prohibitory liquor law is pending is no good reason for postponing the hearihg of a civil action to perpetually enjoin the maintenance of a nuisance under the same law. Cowdery v. State [Kan.] 80 P. 953. The service of summons and complaint by an infant plaintiff, by his father as next friend, to which defendant's demurrer that plaintiff could sue only through a guardian ad litem, defendant having taken no proceedings to compel the filing of pleadings or to dismiss, (Ballinger's Ann. Codes & St. § 4972) does not bar a subsequent action for the same cause by a guardian ad litem. Harris v. Fidalgo Mill. Co. [Wash.] 80 P. 289. The owner of land after having brought an action of trespass for damages for the construction and operation of a railroad to a certain date, may subsequently bring another for the continuance, from the date of the former action, of the unlawful acts and for the additional injury of interference with his drainage, since the date of the first suit. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367. A subcontractor may prosecute a petition for a mechanic's lien simultaneously with an action at law against the contractor, in which a part of the contract price still in the hands of the owner for the satisfaction of the lien is attached. Hunt v. Darling [R. I.] 59 A. 398. The right of a receiver of an insolvent national bank, under the national bank act, to administer the affairs of such bank, does not preclude depositors from maintaining a suit against the directors for negligently permitting its officers to loan the bank's assets in violation of such act. Boyd v. Schneider [C. C. A.] 131 F. 223. An action to determine the validity of a paving contract and to enjoin further proceedings thereunder is not barred by the pendency of a suit against the city in the United States circuit court, to recover pay for part of the contract performed before its abandonment by mutual consent. Patterson v. Barber Asphalt Pav. Co. [Minn.] 101 N. W. 1064. A second action on a note, in another jurisdiction, to recover a deficiency, is not barred by a suit to foreclose a mortgage securing the note, in which the property was sold and the proceeds applied on the note, but no formal deficiency has yet been rendered. Foreclosure in Montana and second suit in Utah. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737. A suit for separate maintenance and custody of children, brought by

abated by an action commenced later, between the same parties, in relation to the same subject, in the same or any other court.[9] The identity of the two actions must be made to appear, and is to be determined by an inspection of the records.[10] It will not be inferred that the former action was based on testimony similar to that of the second one, but the evidence must be presented.[11]

If discontinued or otherwise terminated, the suit is no longer pending, and is no further impediment to the maintenance of a second action for the same cause.[12] But, although voluntarily withdrawn, a former suit will prevent the commencement of another suit for the same cause, unless the accrued costs have been paid.[13]

The pendency of a suit in equity is not ground of defense to an action at law. Since the jurisdiction of equity is limited to cases where the law does not afford a complete and adequate remedy, two causes, one at law and one in equity, are ex necessitate, so dissimilar that the pendency of one cannot be pleaded in abatement of the other.[14] But a judge may refuse to proceed with a chancery case, while an action at law between the same parties, involving the same subject-matter, is pending on writ of error;[15] and where a bill is pending in equity to regulate the crossing of a highway over a railroad, a party defendant therein cannot file a petition to regulate the crossing.[16]

The pendency of a suit in a state court is not a bar to one on the same cause of action in a Federal court,[17] and it is immaterial that a counterclaim is set up in the state court, it not appearing that the same defense is not available in the Federal court.[18] But where one of the courts has secured possession or dominion of specific property, the suit in the co-ordinate jurisdiction should be stayed until

the wife, in which the husband filed a cross complaint, praying for a divorce, does not preclude him from bringing an independent suit for divorce, after his cross complaint has been stricken out, with leave to answer or take such other action as he might deem advisable. Cupples v. Cuppies [Colo.] 80 P. 1039. A plea in abatement of former suit pending, in an action for breach of contract by failure to promptly deliver telegram, is properly overruled where the two causes of action are based on the failure to deliver different telegrams. Test is would proof of one sustain other. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517.

8. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367.

9. Flint v. Powell, 18 Colo. App. 425, 72 P. 60.

10. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367.

11. Conner v. Pozo [La.] 38 So. 454.

12. Discontinuance by consent. Lowndes v. Fishburne [S. C.] 48 S. E. 264. Dismissed on motion of defendants and stricken from the docket. Grubbs v. Ferguson, 136 N. C. 60, 48 S. E. 551.

13. Unless plaintiff files an affidavit of inability to do so, from proverty, and he cannot by an offer of payment, or by payment to the officers of the court, defeat defendant's right to insist on his plea. Wright v. Jett, 120 Ga. 995, 48 S. E. 345. Compare Costs, 3 C. L. 940; Stay of Proceedings, 4 C. L. 1549.

14. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

15. Schmid v. Benzie Circuit Judge [Mich.] 101 N. W. 620.

16. Under Act June 7, 1901 (P. L. 531). In re Mifflinville Bridge, 209 Pa. 587, 58 A. 1072.

17. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650; German Sav. & L. Soc. v. Tull [C. C. A.] 136 F. 1; Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737. Suit in Federal court not barred by two suits in state courts for similar relief, all the suits being in personam and there being no conflict over property in custodia legis. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. A suit pending in a state court to set aside a mortgage on a vessel does not bar the assignee of the mortgage from proving the same against the fund in the admiralty court arising from the sale of the vessel for seamen's wages. The Gordon Campbell, 131 F. 963. Proceedings for the removal of a member of a city fire department for failure to pay a bill of a creditor, as required by the ordinances and fire regulations of the city, during the pendency of bankruptcy proceedings involving the same indebtedness, were enjoined until the expiration of twelve months from the termination of the bankruptcy proceedings. In re Hicks, 133 F. 739. And where, after distress by a landlord, the tenant is adjudicated a bankrupt, the distress proceedings are stayed and the landlord required to submit his rights to the bankruptcy court. In re Lines, 133 F. 803. Jurisdiction of state courts over actions brought by the trustee of a bankrupt, to recover the value of property transferred as a preference, under the Federal bankrupt act. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

See extensive note 3 C. L. 3, n. 21, and see, also, note 47 C. C. A. 205.

18. Burk v. McCaffrey, 136 F. 696.

the proceedings in the court first obtaining jurisdiction are concluded, or ample time therefor has elapsed.[19]

If the subject-matter of the controversy has ceased to exist,[20] as by the bar of the statute of limitations[21] or otherwise, the suit will be dismissed.[22] A suit pending to set aside the judgment on which an action is brought is good cause for the postponement of the latter action.[23]

Death of a party[24] before judgment abates the action,[25] unless saved by statutory provisions.[26] If one of several joint defendants in an action at law dies, his death works a severance of parties defendant and an abatement as to the deceased defendant, and (unless plaintiff dismisses as to all but the administrator), the suit will proceed against the living defendants only;[27] or the plaintiff could maintain one action against the executors and another against the survivors;[28] but in equity proceedings, this technical common-law difficulty is avoided by separate decrees, in which, if it becomes necessary, the liability of the executors for costs can be adjusted in the same manner as if they had been sued in a separate action.[29] Generally, if the cause of action survives, the action is not abated by death,[30] nor in Tennessee by death, marriage, or other disability;[31] nor in Wisconsin by the occurrence of any event.[32] Proceedings in bankruptcy do not abate by the death of the alleged bankrupt after petition is filed and before adjudication;[33] nor does an action by a city on tax bills, against one who has conveyed her real estate in a mere dry or naked trust, and the trustee abate by the death of the trustee and a failure to revive against his successor.[34] But a cause of action for personal injuries abates at the death of the injured person, and merges in the cause of action for the death, which is then the only available remedy.[35] An order against a party deceased is not void but voidable, where at the time of entry the fact of the death did not appear of record.[36]

Where, after rendition of judgment against partners, one of them dies, an

19. Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945.

20. See 3 C. L. 7.

21. Where the appointment of an administrator is not completed until after an action for wrongful death has been brought, and two years have elapsed since the accident occurred, the action cannot be maintained and the cause is abated. Archdeacon v. Cincinnati Gas & Elec. Co., 3 Ohio N. P. (N. S.) 45.

22. Action of common council in withdrawing issues from further controversy. Diefenderfer v. State [Wyo.] 80 P. 667. Suit depending on status of plaintiff as stockholder abates if in fact he ceases to have such status. State v. New Orleans Maritime & M. Exch., 112 La. 868, 36 So. 760.

23. Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 444.

24. See 3 C. L. 7.

25. An action to enforce a lien on real estate for amounts accruing through the purchase of lands at tax sales (the conveyance being invalid and ineffectual to pass title), and subsequent payment of taxes to protect interests, abates on the death of plaintiff. Cooper v. Murphy [Ind. App.] 72 N. E. 664. An action by the state to declare a nuisance and abate the keeping of a place for the sale of liquors, is abated by the death of defendant. Action under Rev. Codes 1899, § 7605. State v. McMaster [N. D.] 99 N. W. 58. On the death of the wife, who was joined with her husband as party defendant, because of inchoate dower and homestead interest, in an action to reform a mortgage, the action abates as to her. Thornton v. Scheussler, 140 Ala. 281, 37 So. 237.

26. Proceedings in rem against a steamship for damages for personal injury survive under the statutes of Pennsylvania. The City of Belfast, 135 F. 208. The Illinois abatement statute provides that the death of a sole complainant shall not abate the suit. Prouty v. Moss, 111 Ill. App. 536, citing Keefe v. Crawford, 92 Ill. App. 588.

27. Marcy v. Whallon, 115 Ill. App. 435.

28. Von Arnim v. American Tube Works [Mass.] 74 N. E. 680, citing Cowley v. Patch, 120 Mass. 137.

29. Von Arnim v. American Tube Works [Mass.] 74 N. E. 680.

30. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. Rev. Codes 1899, § 5234. State v. McMaster [N. D.] 99 N. W. 58. Burns' Ann. St. 1901, § 272. Rich Grove Tp., Pulaski County v. Emmett [Ind.] 72 N. E. 543.

31. Shannon's Code, §§ 4568, 4569, 4575. Posey v. Posey [Tenn.] 83 S. W. 1.

32. Rev. St. 1898, § 2800. Fleming v. Ellison [Wis.] 102 N. W. 398.

33. In re Spalding, 134 F. 507.

34. City of Louisville v. Anderson [Ky.] 84 S. W. 573.

35. See Code, §§ 1490, 1491, 1498, 1499, 1500. Bolick v. Southern R. Co. [N. C.] 50 S. E. 689.

36. Prouty v. Moss, 111 Ill. App. 536.

appeal may be prosecuted against the surviving partner;[37] but the personal representative of the deceased partner is a necessary party appellant.[38] In Indiana, on the death of any party to a judgment before appeal, an appeal may be taken by and notice served upon the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment,[39] but only when the cause of action survives.[40]

Disability of a party, happening during the pendency of an action, is not ground for abatement, but the court should take necessary steps to protect the rights of such party.[41] An action brought by a female for damages for personal injuries is not abated by her marriage pending such action.[42]

The *dissolution of a corporation,*[43] *or its consolidation* with another,[44] does not abate an action brought by or against it, but an action may abate for the failure of a foreign corporation to comply with statutory conditions precedent to maintaining actions in the courts of a state.[45]

A *misjoinder* is ground for abatement.[46]

Jurisdiction.[47]—Lack of jurisdiction is ground for abatement,[48] the judgment on a plea to the jurisdiction being either that the writ abate or respondeat ouster. Under the statute of Texas, providing for bringing an action against two or more railroad companies operating in the state in case of damage to property shipped over their lines,[49] a plea to the jurisdiction, alleging that no part of the damage occurred on the line on which the court was situated, and that the allegations of the petition in that respect were false and fraudulent, for the purpose of conferring jurisdiction on the trial court, is a valid plea.[50] It is not ground for abatement that an action was brought against a corporation in a county where it had no office or agent, when a co-defendant is properly suable in such county.[51] Under the Wisconsin statute, giving the circuit court jurisdiction of actions against executors, when the county court cannot afford a remedy as adequate or efficient,[52] the determination by the circuit court that, under the peculiar circumstances of the case, it has jurisdiction, will not be disturbed unless clearly erroneous.[53]

37. Robertson v. Ford [Ind.] 74 N. E. 1.

38. Under § 2463, Burns' Ann. St. 1901. Newman v. Gates [Ind.] 72 N. E. 638.

39. Burns' Ann. St. 1901, § 648. Rich Grove Tp., Pulaski County v. Emmett [Ind.] 72 N. E. 543; Newman v. Gates [Ind.] 72 N. E. 638.

40. Cooper v. Murphy [Ind. App.] 72 N. E. 664.

41. Code Civ. Proc. § 45. Simmons v. Kelsey [Neb.] 101 N. W. 1. See, also, Posey v. Posey [Tenn.] 83 S. W. 1; Fleming v. Ellison [Wis.] 102 N. W. 398.

42. Stevens v. Friedman [W. Va.] 51 S. E. 132.

43. In Michigan, after the annullment of its charter, a corporation continues in existence three years for the prosecution or defense of suits. Comp. Laws, § 8, ch. 230, p. 2627. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. See 3 C. L. 8.

44. Where the petitioning corporation pending condemnation proceedings is consolidated with another, the consolidated corporation succeeds to all the rights, titles and estates of the petitioner, and can prosecute an appeal in its own name from the award of damages. Union Traction Co. v. Basey [Ind.] 73 N. E. 263.

45. Sec. 3, p. 235, ch. 125, Laws of 1901. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

46. Code Civ. Proc. § 484, subd. 9 does not justify the joinder of a cause of action for unlawfully taking and converting a team and buggy and for an assault and battery committed on plaintiff while endeavoring to regain possession. Campbell v. Hallihan, 92 N. Y. S. 413. See 3 C. L. 8.

47. See 3 C. L. 8.

48. Birch v. King [N. J. Law] 59 A. 11; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; State Bank v. Thweatt, 111 Ill. App. 599. A pledgee of stock cannot on account of diverse citizenship sue the corporation in a Federal court for the appointment of a receiver, where the pledgor and corporation are citizens of the same state. Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363.

49. Act May 20, 1899 (Laws 1899, p. 214, c. 125). San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

50. San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

51. Action for injury from the negligence of a servant which may be brought against master and servant jointly in the county where either resides and service had upon the other in the county where he resides. Burns' Ann. St. 1901, § 314. Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183.

52. Rev. St. 1898, § 3845, as amended by Laws 1899, p. 7, c. 5. Lindemann v. Rusk [Wis.] 104 N. W. 119.

§ 2. *Raising objection; waiver.*[54]—The want of necessary parties must be pleaded in abatement;[55] and also extension of time of payment, when it was by a transaction extraneous of the instrument in suit.[56] In Wyoming, an answer seems to be considered the appropriate medium for presenting issuable facts either in abatement or bar of the action;[57] misjoinder of parties or causes of action cannot be raised by demurrer in Iowa, but by motion;[58] and in South Carolina an oral demurrer at the trial will not raise the objection that the action does not survive.[59] Variance between the claim stated in an affidavit for an attachment and the demand set up in the declaration need not be pleaded in abatement, and a plea in abatement in such a case will be treated as a motion to quash the attachment.[60] Where all the facts relied upon by defendant, to show that no jurisdiction was obtained by the process, appear on the record, his remedy is to move for dismissal and not by plea in abatement.[61] Under a statutory provision requiring an abatement of any summons issued in an action for trespass on lands outside of the county, where only one of the counts in a declaration contravenes the statute, a plea in abatement will be limited to quashing the summons as to such count only; and the plaintiff can amend by striking out such count.[62]

An objection that a proceeding is prematurely brought is waived by counsel of respondent appearing and asking that his client's rights be adjudicated;[63] and so is the objection that a claim against decedent's estate was not presented by the proper person, by joining issue and going to trial without raising it.[64] Misjoinder is waived by the defendant, if complaint be not seasonably made in the manner prescribed.[65] And matter in abatement is waived by a hearing of the case on its merits before an auditor, without objection, and not being brought to the attention of the court until the close of the evidence at the trial.[66] But the question of the jurisdiction of the court over the subject-matter[67] and of the person[68] may be raised at any time, and the objection of jurisdiction of the person, when once raised, is not waived by going to trial on the merits afterward;[69] and want of jurisdiction of the subject-matter cannot be waived by defendant, by filing a plea in bar.[70] The plea in abatement must be promptly filed,[71] and comply with the statutes and rules and the rules of good pleading as to form and requisites.[72] New and distinct grounds for abatement cannot be set up by amend-

53. Lindemann v. Rusk [Wis.] 104 N. W. 119.

54. See 3 C. L. 8; also Pleading, 4 C. L. 980.

55. Donovan v. Twist, 93 N. Y. S. 990.

56. The American Home Circle v. Schumm, 111 Ill. App. 316.

57. A pleading regarded as an answer, though called a plea in abatement by the pleader. Tutty v. Ryan [Wyo.] 78 P. 657.

58. Code, §§ 3547, 3548, 3561. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471.

59. Subd. 6, § 165, Code 1902. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

60. Simmons v. Simmons [W. Va.] 48 S. E. 833.

61. Hilton v. Consumers' Can Co. [Va.] 48 S. E. 899.

62. Code 1896, § 4205. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268.

63. State v. Weston [Mont.] 78 P. 487.

64. In re Morgan's Estate [Or.] 78 P. 1029.

65. Code, §§ 2649, 2654. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

66. Chamberlayne v. Mazro [Mass.] 74 N. E. 674.

67. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

68, 69. State Bank v. Thweatt, 111 Ill. App. 599.

70. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268.

71. Being essentially a dilatory plea it must be filed at the first term. Civ. Code 1895, § 5058. Quillian v. Johnson [Ga.] 49 S. E. 801. Rule 17 requires pleas in abatement to be filed five days before the cause stands for trial. Collier v. Grey, 105 Ill. App. 485.

72. A plea in abatement may be stricken off on motion if not supported by depositions taken in conformity to the rules of the court. Scott v. Stockholders' Oil Co., 135 F. 892. A plea in abatement, in an action at law, of a former suit pending, which does not aver whether such former suit is pending at law or in equity, is bad for uncertainty. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016. A plea in abatement to the jurisdiction of the court in an action ex contractu, which is framed on the theory of an action in tort, is demurrable. Seaboard Air Line R. Co. v. Hubbard [Ala.] 38 So. 750. The

ment at the trial term, unless the plaintiff has so amended his pleadings as, for the first time, to make available the new matters of defense.[73] After a plea has been heard on its merits and the action dismissed, it is too late for plaintiff, on a motion to vacate the judgment and reinstate the case, to raise objections to the plea, which he might have raised at the hearing.[74] A cause erroneously dismissed for lack of jurisdiction in a county court was reinstated upon the discovery that the legislature, by special act, had increased such jurisdiction.[75] An officer's return to a writ cannot be falsified by a plea in abatement.[76] In Illinois a plea in abatement is not a proper plea in a proceeding for partition.[77]

§ 3. *Survivability of causes of action.*[78]—In Iowa all causes of action survive the death of the person entitled thereto.[79] So, also, in Indiana, save certain enumerated ones, not including an action for breach of duty by an attorney to his client.[80] Actions ex contractu, as a general proposition, survive, but this is due rather to the substance of the action than its form.[81] A divorced wife who is entitled to recover against her divorced husband for the maintenance of children, whose custody has been awarded to her, can maintain such claim against his estate after his death,[82] and where an action could have been maintained against a trustee for an accounting as to personalty in his possession, the remedy survives against his personal representatives.[83] But a cause of action to have defendant declared a lunatic does not survive the death of defendant;[84] nor a cause of action by the state to declare a nuisance and abate the keeping of a place for the sale of liquors.[85]

Personal actions[86] in tort do not survive at common law against the personal representatives of the tort feasor;[87] but this rule does not apply when the action has been prosecuted to final judgment in favor of the injured party, as then it becomes a debt owing by the injuring party to the party injured.[88] And where the right to bring an action for a conversion vested in a person before his death, it passed to his administrator.[89] A cause of action for personal injuries does not survive in case of the death of the injured person, but merges in the cause of action for the death, which is then the only available remedy,[90] and which survives to the administrator of the party in whose favor it accrues.[91]

plea of garnishment in an action on a note should show its payment to the rightful holder, or a prior adjudication of his right. Brown v. Fisher [Ind. App.] 74 N. E. 632. A plea to the jurisdiction must contain a proper averment of facts, accurately and logically stated, excluding every intendment of jurisdiction. Willard v. Zehr [Ill.] 74 N. E. 107.

73. Quillian v. Johnson [Ga.] 49 S. E. 801.

74. Wright v. Jett, 120 Ga. 995, 48 S. E. 345.

75. County court of Goliad county; Laws of 1895, p. 57, c. 45; 10 Gammel's Laws, 787. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 1158.

76. McDaniels v. De Groot [Vt.] 59 A. 166.

77. Sec. 21, ch. 1, 1 S. & C. Statutes, 258. Monroe v. Millizen, 113 Ill. App. 157.

78. See 3 C. L. 10.

79. Code, § 3443. An administrator appointed in Iowa may prosecute for an injury resulting in death to a resident allen, although the sole heir of deceased is a nonresident alien. Romano v. Capital City Brick & Pipe Co., 125 Iowa, 591, 101 N. W. 437.

80. Burns' Ann. St. 1901, §§ 283-285. Newman v. Gates [Ind.] 72 N. E. 638.

81. Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143. An action by depositors of an insolvent national bank for breach of the implied contract to see that the bank's assets were used in the manner prescribed by law is an action on contract and survives against representatives of deceased directors. Boyd v. Schneider [C. C. A.] 131 F. 223. A suit by a minority stockholder against an officer of a corporation for misappropriation of funds does not abate on his death, but survives against his representatives. Von Arnim v. American Tube Works [Mass.] 74 N. E. 680.

82. Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274.

83. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

84. Posey v. Posey [Tenn.] 83 S. W. 1.

85. Under Rev. Codes 1899, § 7605. State v. McMaster [N. D.] 99 N. W. 58.

86. See 3 C. L. 10.

87. Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143. False representations. Rule not changed by Mills' Ann. St. Colo. § 4810. Stratton's Independence v. Dines, 126 F. 968.

88. City of Anniston v. Hurt, 140 Ala. 394, 37 So. 220.

89. Hagar v. Norton [Mass.] 73 N. E. 1073.

90. See Code, §§ 1490, 1491, 1498, 1499, 1500.

Real actions,[92] such as for injuries and trespasses to land,[93] a claim of damages for the obstruction of a right of way,[94] and the right to redeem from a deed absolute in form, but intended as a mortgage,[95] survive. But where the action is primarily to recover for injury to the person, and the injury to the property is merely an incident, the same does not survive.[96]

§ 4. *Revival and continuation*.[97]—The motion for revivor in behalf of representatives of a deceased party must be made within the time limited by statute,[98] which is not a mere limitation but a condition of the very right to revive that must be strictly complied with.[99] In Arkansas the statutory provisions for the revival of actions in the name of the representatives, on the death of a party pending action,[1] apply as well to causes pending in the supreme court on appeal, as to those in the trial court; and the object of the statute is to fix a time within which it must be revived or abate.[2] Under the California statute providing that, in case of any transfer of interest other than by death or disability of a party, the action or proceeding may be continued in the name of the original party, a mortgage foreclosure may be continued in the name of the original plaintiff for the benefit of one who purchases his claim during the pendency of the proceedings.[3] In Alabama, under statutory provisions requiring that the action must be revived on motion, such motion may be oral and without notice.[4] Under the statutory provisions of Missouri, where plaintiff dies pending an appeal from a justice and defendant does not appear, the action cannot be revived on the mere suggestion of plaintiff's death, without an order for scire facias served on defendant.[5] An action cannot be revived where the suit was for personal injuries and the intestate died during the pendency of the suit;[6] and a claim presented by petition within the jurisdictional period, under the Indian depredation act, by an attorney in ignorance of the death of the party, is not a cause pending and cannot be made the basis of revivor in the name of the administrator after the expiration of the jurisdictional period.[7] Where a mortgage is sought to be fore-

Bolick v. Southern R. Co. [N. C.] 50 S. E. 689; Gallagher v. River Furnace & Dock Co., 2 Ohio N. P. (N. S.) 661.

91. Rev. St. 1899, § 2864. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346; Romano v. Capital City Brick & Pipe Co., 125 Iowa, 591, 101 N. W. 437.

92. See 3 C. L. 10.

93. In South Carolina to and against representatives of deceased persons. Section 2859, Code of Laws of 1902. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675. And against the heirs of defendant, in case of his death pending the action. Under Act 1892 (21 St. at Large, p. 18), but did not prior to this act. Sims v. Davis [S. C.] 49 S. E. 872.

94. Survives the death of the person causing the obstruction. Randall v. Brayton [R. I.] 58 A. 734.

95. On the ground that the defendant has property in his hands as distinguished from a liability to respond in damages; but it survives to grantor's heir and not to the administrator. Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813.

96. Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143.

97. Sec 3 C. L. 10. As to bills of revivor or bills in the nature of bills of revivor, see Fletcher, Eq. Pl. & Pr. §§ 848-886, 962-968.

98. McDonald v. Nashville [Tenn.] 86 S. W. 317. Motion held too late. Omaha Nat. Bank v. Robinson [Neb.] 102 N. W. 613. In Rhode Island, an order to revive an action against the representatives of a defendant must be had within a year after the appointment and qualification of the administrator, unless by consent of the representatives. First Nat. Bank v. Hazie [R. I.] 61 A. 171. In New York, under the statutes providing for the continuance of special proceedings by the representative, in case of the death of the sole party, the report of a referee, stating the account of an assignee for the benefit of his creditors, cannot be filed after the assignee's death, before his personal representative is made a party. Code of Civil Procedure, §§ 755, 757. In re Venable, 93 N. Y. S. 1074.

99. Steinbach v. Murphy [Kan.] 78 P. 823.

1. Kirby's Dig. §§ 6298-6300, 6314, 6315. Anglin v. Cravens [Ark.] 88 S. W. 833.

2. One year, unless by consent. Kirby's Dig. §§ 6314, 6315. Anglin v. Cravens [Ark.] 88 S. W. 833.

3. Anglo-Californian Bank v. Field [Cal.] 80 P. 1080.

4. Code 1896, § 38. Mardis v. Sims, 140 Ala. 388, 37 So. 243.

5. Rev. St. 1899, §§ 756, 758, 761. Chicago, etc., R. Co. v. Woodson [Mo. App.] 85 S. W. 105.

6. Gallagher v. River Furnace & Dock Co., 2 Ohio N. P. (N. S.) 661.

7. Act March 3, 1891 (26 Stat. at L. 851, § 2). Gallegos v. Navajos, 39 Ct. Cl. 86.

closed as against a subsequent grantee, it may be done without a revivor of the action as against the deceased maker of the mortgage and notes, he not being a necessary party.[8] Where, pending appeal from a justice's judgment, the successful plaintiff dies and the case is improperly revived, the defendant may limit his appearance in the circuit court for the purpose of objecting to the jurisdiction and may move to set aside the revivor.[9]

Substitution of parties.[10]—In case of the death of a party, if the cause of action survives, the court may, on motion, allow the continuation of the action against the representative or successor.[11] In case of the death of one of several joint defendants, the administrator cannot be brought in and joined with the other defendants, because, in case plaintiff recovers he would be entitled to different judgments against the administrator and the other defendants.[12] A suit in equity in the name of the committee of an insane person may be revived, upon his death, in the name of his administrator, on motion, without notice or scire facias.[13] After sale, but before confirmation thereof, in an action for foreclosure of a mortgage, in case of the death of defendant, revivor of the action may be had against the heirs.[14] A board whose members' terms of office expire at different times and appointments are made accordingly is a continuous body, and expiration of the term of one member and the appointment of a successor after the granting of a mandamus to compel certain action does not abate the proceedings, but relator may take proper steps to bring in the successor.[15] But a cause of action to have defendant declared a lunatic and to have a guardian appointed for him and his property will not be revived against his administrator after his death.[16] Where, by act of congress, a new district was created and pending actions transferred thereto, an action in which the sole plaintiff had died, being so transferred, was revived in the new district by the administrator.[17] Where, pending a suit to redeem land from a sale on foreclosure, one of the defendants dies, the suit should be revived against his heirs;[18] and also upon the death of one defendant partner, a revival should be had against his representatives, where essential to a complete determination of the issues.[19] A writ of error in a personal action can be brought only by the personal representatives of the deceased, though in real actions an heir at law who shows that he is injured by an erroneous judgment against his ancestor may do so.[20] After motion made to revive an action in the name of defendant's administrator, an appearance by the administrator and filing an answer, alleging that he is such administrator and that the cause has been revived in his name, operate as a waiver of summons and a formal order of revivor.[21]

8. Boatmen's Bank v. First Nat. Bank [Kan.] 79 P. 125.

9. Chicago, etc., R. Co. v. Woodson [Mo. App.] 85 S. W. 105.

10. See 3 C. L. 11.

11. New York Code Civ. Proc. § 757. McGrath v. Weiller, 90 N. Y. S. 490. In Wisconsin, in case of death or disability, within one year, or thereafter on a supplemental complaint. Rev. St. 1898, § 2803. Fleming v. Ellison [Wis.] 102 N. W. 398. In South Carolina, an action against an ancestor for trespass was continued against the heir, under statutory provisions for such survival. Act 1892 (21 St. at Large, p. 18). Sims v. Davis [S. C.] 49 S. E. 872. And in Indiana. Burns' Ann. St. 1901, § 272. Rich Grove Tp., Pulaski County v. Emmett [Ind.] 72 N. E. 543; Newman v. Gates [Ind.] 72 N. E. 638. But the court has no jurisdiction to revive the action against a foreign executor, where none of the assets were within the state and no ancillary letters had been issued there. McGrath v. Weiller, 90 N. Y. S. 420.

12. Marcy v. Whallon, 115 Ill. App. 435.

13. Straight v. Ice [W. Va.] 48 S. E. 837.

14. Civ. Code Prac. § 507. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569.

15. People v. Coleman, 99 App. Div. 88, 91 N. Y. S. 432.

16. Posey v. Posey [Tenn.] 83 S. W. 1.

17. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738.

18. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87.

19. Hausling v. Rheinfrank, 93 N. Y. S. 121.

20. Smith v. Stilwell [Ariz.] 80 P. 333.

21. Cleveland v. Cazort [Ark.] 83 S. W. 316.

ABBREVIATIONS, see latest topical index.

ABDUCTION.

Criminal intent is essential, and this intent must be gathered from the facts in evidence,[22] and when a taking with such intent is accomplished, the offense is complete. That defendant soon returned prosecutrix to her home does not palliate the crime.[23] In a prosecution for abduction, evidence of bigamy on the part of the abductor is inadmissible.[24] A memorandum of the birth of prosecutrix made at the time of her birth is admissible to prove her age.[25] In New York the question whether the person having legal charge of the abducted female consented thereto is one of fact for the jury.[26]

ABETTING CRIME; ABIDE THE EVENT; ABODE, see latest topical index.

ABORTION.

Placing a pregnant woman on an operating table, in a position to be operated on, coupled with evidence of the intent to produce an abortion, is sufficient to constitute an attempt to commit abortion.[27] In order that one may be guilty of administering or prescribing drugs, it is not necessary that he be present at the time they were delivered or taken.[28] In Colorado, malice is not an essential element of the crime,[29] and an indictment for causing the death of the woman need not negative the justifications for producing a miscarriage.[30] That the female consented to the abortion[31] or that she conspired with the police officials and lured defendant to make the attempt[32] does not constitute a defense.

As used in statutes relative to abortion, the word "child" is generally held to mean an unborn child so far developed as to be quick.[33] An intent to destroy such a child may exist without absolute knowledge that such child is "quick,"[34] and if defendant's purpose is to destroy the foetus, and in so doing he kills a

22, 23. State v. Neasby [Mo.] 87 S. W. 468.

24. People v. Cerami, 91 N. Y. S. 1027.

25. So held where parents were unable to write and memorandum was made by neighbors at parents' request. State v. Neasly [Mo.] 87 S. W. 468.

26. Prosecution under Pen. Code, § 282, subd. 1. People v. Cerami, 91 N. Y. S. 1027.

27. Pen. Code, §§ 34, 294, construed. People v. Conrad, 92 N. Y. S. 606.

28. Burris v. State [Ark.] 84 S. W. 723. Instruction held properly refused. Id.

NOTE. The abortionist as an accessory before the fact. The doctrine has been asserted that when the woman consents to, or solicits, an abortion, the one procuring or attempting to procure it, thereby causing her death, is merely an accessory before the fact, especially when he is not present when the act is performed; and that being an accessory before the fact, he cannot be prosecuted until after the conviction of the principal, and since this is impossible because of her death, he is entitled to immunity. See Rex v. Russell, 1 Moody, C. C. 356; Reg. v. Fretwell, 9 Cox, C. C. 152, Leigh & C. C. C. 161, 31 L. J. Mag. Cas. (N. S.) 145, 8 Jur. (N. S.) 466, 6 L. T. (N. S.) 333, 10 Week. Rep. 545. It is to be observed, however, that in each of the above cases the woman herself did the deed, and the accused merely procured the means, and in the latter case he only procured the means under compulsion, so that it could not be said that he used them or caused them to be used. It is now however settled that the abortionist cannot escape liability as an accessory before the fact. Reg. v. Gaylor, 7 Cox, C. C. 253, Dears. & B. C. C. 288, 40 Eng. L. & Eq. 556. See, also, Reg. v. Wilson, Dears. & B. C. C. 127, 26 L. J. Mag. Cas. (N. S.) 18, 2 Jur. (N. S.) 1146, 5 Week. Rep. 70, 7 Cox, C. C. 190.—From note to State v. Power [Wash.] 63 L. R. A. 902, 909.

29. Under Mills' Ann. St. Rev. Supp. § 1209, providing that any one maliciously administering any destructive substance causing death, etc., and who shall use any instrument with the intention to procure a miscarriage shall be imprisoned, etc., the word "maliciously" is not applicable to the offense of abortion. Johnson v. People [Colo.] 80 P. 133. Under such statute an indictment setting forth the offense in the language of the statute is sufficient without charging malice. Id.

30. Mills' Ann. St. Rev. Supp. § 1209, construed. Johnson v. People [Colo.] 80 P. 133.

31. Barrow v. State, 121 Ga. 187, 48 S. E. 950.

32. People v. Conrad, 92 N. Y. S. 606.

33. Pen. Code 1895, § 81, construed. Sullivan v. State, 121 Ga. 183, 48 S. E. 949; Barrow v. State, 121 Ga. 187, 48 S. E. 950.

34, 35. Barrow v. State, 121 Ga. 187, 48 S. E. 950.

child which is "quick," the criminal intent will extend to the consequences of his act.[35] Under a statute making it a crime for any person to aid a pregnant woman in procuring an abortion or to aid any person so intending to procure an abortion, the word "person" as last used means some person other than the pregnant woman.[36]

Evidence.[37]—Testimony tending to show illicit relations between the co-defendant and the female, or proof of conspiracy to destroy the result of such relations, is admissible to show the motive of the crime.[38] Prior unsuccessful attempts to bring about the abortion may be shown.[39] To show knowledge of the fact of pregnancy, and that the child was quick, it is proper to show that the woman told defendant of her pregnancy and that the child had moved.[40] Testimony of the physician who treated the victim just prior to her death as to his opinion of her ailment, derived exclusively from her narration of the cause and history of her complaint, is incompetent.[41] Where the operation results in the death of the woman, testimony of her husband as to a conversation he had with his wife on her return from the visit to defendant during which the operation was performed is admissible.[42] There being evidence that defendant had given prosecutrix instructions how to use the medicine, the testimony of those who carried it to her is admissible to show that defendant procured the medicine and asked them to so carry it.[43] It is competent, upon cross-examination, to ask an approver if he expects to escape punishment because of his taking the witness stand.[44]

Instructions.—The law declaring the offense to be murder, it is not error for the court to refuse to instruct as to the law of manslaughter.[45]

ABSCONDING DEBTORS, see latest topical index.

ABSENTEES.[46]

Statutory proceedings to administer absentees' property after death is presumed from long absence, but irrespective of actual death, do not lack due process of law[47] if the period fixed as raising such presumption be reasonable[48] and the notice likewise,[49] and adequate remedy for the revocation of the proceedings, and assurance of the refunding to the absentee of what may have been distributed, is provided.[50] While numerous attempts to administer absentees' estates under the general law of decedents have proved abortive, it was because the ordinary administration depends for jurisdiction on the actual fact of death and because such administration is not due process of law for such a purpose.[51] The state has un-

36. State v. Parm [Del.] 60 A. 977. An indictment charging defendants with having counseled a pregnant woman who was intending to procure her own miscarriage, held bad. Laws Del. vol. 17, p. 523, c. 226, § 2, construed. Id.

37. See 3 C. L. 13.

38. Barrow v. State, 121 Ga. 187, 48 S. E. 950.

39. Sullivan v. State, 121 Ga. 183, 48 S. E. 949. See 3 C. L. 13. n. 46-48.

40. Sullivan v. State, 121 Ga. 183, 48 S. E. 949.

41. Stevens v. People [Ill.] 74 N. E. 786.

42. Johnson v. People [Colo.] 80 P. 133.

43. Burris v. State [Ark.] 84 S. W. 723.

44. Stevens v. People [Ill.] 74 Ill. 786.

45. Mills' Ann. St. Rev. Supp. 1209, considered. Johnson v. People [Colo.] 80 P. 133.

46. See 3 C. L. 13.

47. Cunnius v. Reading School Dist., 25 S. Ct. 721, 49 Law. Ed. ——; afg. 206 Pa. 469, 56 A. 16, 98 Am. St. Rep. 790.

48. Seven years and upwards is reasonable. Pa. Laws 1885, p. 155, upheld. Cunnius v. Reading School Dist., 25 S. Ct. 721, 49 Law. Ed. ——.

49. Notice by publication for two weeks requiring absentee or one for him to show proof within twelve weeks that he is alive, held sufficient. Cunnius v. Reading School Dist., 25 S. Ct. 721, 49 Law. Ed. ——.

50. Pa. Laws 1885, p. 155, are adequate in this regard. They authorize revocation at any time on proof that absentee is living, prohibit distribution except on giving a bond to refund, provide for protective investment of shares as to which no bond can be or is given, and give an action to recover shares with interest. Cunnius v. Reading School Dist., 25 S. Ct. 721, 49 Law. Ed. ——.

51, 52. See the opinion of Mr. Justice

doubted power to confer such jurisdiction under a special statutory proceeding made to fit the situation[52] and such power was recognized by the civil law and from it long since adopted into Louisiana. These proceedings must strictly follow the prerequisite conditions of fact laid down,[53] and all these facts must be well pleaded in the petition for letters.[54] Notice must be given of such proceedings[55] and it must fully meet the mode of notice, if any, prescribed by statute.[56] A trustee holding funds of the absentee which by such a proceeding would be transferred to administration is so aggrieved as to be entitled to appeal.[57]

Receivership for an absentee's property is not warranted in the case of a bequest to him if living where because of more than seven years' absence unheard of, he was presumably dead before it vested.[58]

The designation of an agent to receive process for an absentee under the New York Code when made abroad need not be dated,[59] and the consul taking it will be presumed to have acted within his jurisdiction, though the place of his residence is not stated.[60]

ABSTRACTS OF TITLE.

A vendor's agreement to furnish an abstract showing a merchantable title is not complied with where the abstract shows a defect which the vendor says he has a release of.[61] A statute requiring the county auditor to search records, and furnish a certificate of conveyances, mortgages, etc., does not make him a public abstractor required to make complete abstracts of specific tracts, but only requires him to search for such instruments as his attention is directed to.[62] An abstract delivered by a mortgagor to a mortgagee is regarded as part of the security for the loan and the mortgagor is not entitled to possession of it until the mortgage is paid.[63] An abstractor is liable after his license to do business has expired for damages occasioned by reason of a defective abstract made while his license was in effect;[64] but for a defect which causes no injury, there is no liability.[65] Where an abstract is made for the exclusive benefit of one party at the instance and expense of another, there is sufficient privity of contract between the abstractor and the person for whose benefit it is made to enable the latter to maintain action for damages suffered by reason of a defect.[66] The measure of damages is such an amount as will compensate for injury resulting from loss of title or impairment

White in Cunnius v. Reading School Dist., 25 S. Ct. 721, 49 Law. Ed. ——. In this opinion a comparison of the common law and civil law jurisprudence on this subject is made and the cases bearing on the constitutionality of such procedure either under general laws or special modes are analyzed and discriminated.

53, 54. In Maryland the petition must state (a) the time and place last heard of by family or friends, (b) that diligent inquiry was made among his family, relatives and friends, (c) that advertisement in and letters to likely last places of residence have produced no information since a date more than seven years prior to petition, (d) that petitioner believes the absentee is dead. Acts 1896, p. 434, c. 246. Lee v. Allen [Md.] 59 A. 184.

55. Lee v. Allen [Md.] 59 A. 184.

56. Record showing grant of letters 17 days after petition makes it invalid. The statute requires publication once a week for four weeks 15 days before appearance day. Act 1896, p. 434, c. 246. Lee v. Allen [Md.] 59 A. 184.

57. Lee v. Allen [Md.] 59 A. 184.

58. Construing Rev. Laws, c. 144. George v. Clark [Mass.] 71 N. E. 809.

59. It must be executed and acknowledged as a deed must be to be recorded. Pierce v. Martin, 89 N. Y. S. 434. Instrument dated 27th, the month being type-written "March", which word was stricken and "February" written, construed as of the earlier month where the later date would necessarily have been false. Id.

60. Pierce v. Martin, 89 N. Y. S. 434.

61. Spooner v. Cross [Iowa] 102 N. W. 1118.

62. Ball. Ann. Codes & St. §§ 417, 418. Dirks v. Collin [Wash.] 79 P. 1112.

63. Equitable Trust Co. v. Burley, 110 Ill. App. 538.

64. Western Loan & Sav. Co. v. Silver Bow Abstract Co. [Mont.] 78 P. 774.

65. Denton v. Nashville Title Co. [Tenn.] 79 S. W. 799.

66. Western Loan & Sav. Co. v. Silver Bow Abstract Co. [Mont.] 78 P. 774.

of the ownership or enjoyment of the property purchased on faith of the abstract,[67] and such injury must have been the direct result of the defect complained of.[68]

ABUSE OF PROCESS; ABUTTING OWNERS; ACCEPTANCE, see latest topical index.

ACCESSION AND CONFUSION OF PROPERTY.

As a general rule the wrongful confusion of goods operates as a forfeiture of the interest of the wrongdoer in all of the goods intermixed,[69] provided that the resulting mass cannot be ratably proportioned among the original owners in accordance with the quantities contributed by each.[70]

It is the duty of a stranger to an execution, whose goods are so intermingled with those of the execution debtor that they cannot be readily distinguished, to designate them to the officer making the levy, and if he fails to do so, the latter may levy upon the whole.[71] If he points out the goods not subject, no demand is necessary to enable him to maintain replevin or trover for those wrongfully seized;[72] but if not, a contrary rule prevails.[73]

One does not lose title to personal property which can be identified by reason of the fact that he is a trespasser.[74] A mortgagor of cattle cannot, by mixing other cattle of like description with them, defeat the mortgages, either in his own favor or that of a subsequent purchaser under him.[75]

Where a lessee under a gas lease mingles the gas from the demised premises with gas belonging to others so as to constitute a confusion of goods, and in consequence is compelled to account to and pay the latter the value of the whole mass, the lessor is not entitled to collect from such other persons the royalty on the gas from his land so mingled with theirs.[76]

Right to recover value of improvements made on lands of another.[77]—As a general rule one in possession of land belonging to another, who, in good faith and under the mistaken belief that he is the true owner, makes permanent improve-

67. Denton v. Nashville Title Co. [Tenn.] 79 S. W. 799.

68. Where there is no causal connection between the loss and the abstractor's fault, there can be no recovery. Denton v. Nashville Title Co. [Tenn.] 79 S. W. 799.

69. Evidence held to show that defendant willfully and indiscriminately intermixed certain logs belonging to plaintiff and the lumber he manufactured out of them with logs and lumber owned by himself. St. Paul Boom Co. v. Kemp. [Wis.] 103 N. W. 259. Where one having the right to cut and remove trees from land within five years cuts trees both before and after a subsequent conveyance of the land, made subject to the contract, and mingles and confuses them but falls to remove them within the five years, the grantee of the land may recover them all under the doctrine of confusion of goods, though those cut before conveyance were personalty, and hence did not pass thereunder. Mengal Box Co. v. Moore [Tenn.] 87 S. W. 415.

For a full discussion of this question, see note, 101 Am. St. Rep. 913.

70. Even if the commingling is malicious and fraudulent, the innocent party is not entitled to the whole mass unless it appears that it cannot be ratably apportioned among the original owners in accordance with the proportion contributed by each. Defendants purchased certain logs stolen from plaintiff and manufactured a part of them into lumber, amounting to 6,000 feet, which they indiscriminately mixed with lumber of their own of similar quality and value. On replevin, the officer seized 20,000 feet. Held, plaintiff was only entitled to ratable proportion and not to whole amount seized. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259.

71. Goods belonging to stepdaughter held not so intermingled with those of debtor, being clothing, pipe, watch chain, etc., as that they could not be readily distinguished. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

72. Not where constable was warned by debtor's stepdaughter, who lived with him, not to take property belonging to her, and where she pointed out such property to him and offered to show him bills and receipts for same. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

73. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

74. Fact that one plants and cultivates oysters on lands of another does not authorize latter to take them for his own use, though he could compel their removal. Vroom v. Tilly, 99 App. Div. 516, 91 N. Y. S. 51.

75. Tootle v. Buckingham [Mo.] 88 S. W. 619.

76. No privity between them. Aiken v. Zahn, 23 Pa. Super. Ct. 411.

77. See 3 C. L. 16.

ments thereon of a character beneficial to the estate, may recover their value when dispossessed.[78] This, however, does not apply to improvements made at a time when he has actual or constructive notice of the superior rights of another,[79] even though he in good faith believed his own title to be the better in point of law.[80]

The right to compensation is not cut off by a tax title, where the holder thereof subsequently acquires the title from the record owner before the expiration of the period for redemption.[81]

A statute giving compensation for improvements to any defendant against

78. Purchaser. Van Tassell v. Wakefield, 214 Ill. 205, 73 N. E. 340. In Michigan an unsuccessful defendant in ejectment who has been in actual, peaceable occupancy of the premises for a period of six years before the commencement of the action, or for a less period under color of title and in good faith, is entitled to compensation for improvements to the extent that they increase the present value of the premises. Comp. Laws, § 10,995. Boucher v. Trembley [Mich.] 12 Det. Leg. N. 184, 103 N. W. 819. No claim can be enforced by one who has not been in possession for six years where his claim is not under color of title. Id. A widow who has without color of title occupied the land for six years prior to the commencement of the action is entitled to compensation for improvements made before and after her husband's death, though he died before he and his family had been in possession for six years. Land occupied by husband and wife as homestead in belief that it was part of adjoining homestead tract. Id. An innocent purchaser of land at an administration sale for a valuable consideration, and without notice of any infirmity in his title, is entitled to full remuneration for his permanent improvements that add value to the lands, for taxes paid thereon, and for the purchase price when the same has gone to extinguish any charge against the land (Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010), and the same constitute a lien on the land which the owner is bound to discharge before he is entitled to be restored to his original rights (Id.). An executor who, at the request or with the knowledge and consent of the owner of property, pays for improvements thereon under the mistaken belief that it belongs to the estate, may, as such executor, reimburse himself from the property. Neil v. Harris, 121 Ga. 647, 49 S. E. 773. But if he pays for such improvements, knowing that the property belongs to another as an advance payment to the latter upon and against his distributive share of the estate, he cannot recover it from her. Id.

Right of vendee on rescission of contract to purchase land: If, on rescission of a contract to purchase land for default on the part of the vendee, the vendor elects to take the land, he must allow for improvements made by the vendee. Lytle v. Scottish American Mortg. Co. [Ga.] 50 S. E. 402. In case the vendor disputes their value or is unwilling or unable to pay for them, there should be an accounting, and the land should be sold and the proceeds applied first to the payment of the amount found due the vendor, any balance going to the vendee. Vendor not required to pay for improvements for which he did not order and which he does not desire. Id. A vendor who is unable to convey a title in accordance with his contract, must, on rescission of the contract, make a fair allowance for improvements placed on the land by the vendee in good faith. Moling v. Mahon [Tex. Civ. App.] 86 S. W. 956. Purchaser of land under contract entitled to compensation for improvements where rescinds because vendor's title falls or he is unable to make conveyance. Dunn v. Mills [Kan.] 79 P. 146. In an action for deceit and false representations brought by a vendee against his vendor for falsely representing that certain lots pointed out were the ones for which the parties were bargaining, held, that the vendee could recover the value of improvements made on the land which were consistent with the use for which he purchased it. Lawson v. Vernon [Wash.] 80 P. 559.

79. Yock v. Mann [W. Va.] 49 S. E. 1019. By one entering without color of title and with knowledge that it belongs to another. Wade v. Keown, 25 Ky. L. R. 1787, 78 S. W. 900. Purchaser from one holding land under deed containing condition against erection of grain elevator thereon, when such an elevator had been erected before sale to him, not a purchaser in good faith so as to be entitled to compensation on reversion of property to original grantor. Van Tassell v. Wakefield, 214 Ill. 205, 73 N. E. 340. A son is not entitled to compensation for improvements to the value of $500 or $600 made by him on land belonging to his father and which he occupied for thirty years on the sufferance of the latter, where the most of them were made after full notice to him that his father would not give him the land. Holsberry v. Harris [W. Va.] 49 S. E. 404. Improvements placed on land by vendee after he knew that vendor would not be able to make a title which would be approved by attorneys in accordance with contract are not made in good faith. Moling v. Mahon [Tex. Civ. App.] 86 S. W. 956. This is not the case as to improvements made after such attorneys reported defects in the title to be cured. Id.

80. One having notice of facts rendering his title inferior to another's, who by mistake of law regards his title as good. Yock v. Mann [W. Va.] 49 S. E. 1019. In the absence of laches, fraud, or other inequitable conduct on the part of the owner. Railroad company which took possession of property, which it was afterwards decided it could not condemn, while litigation to test its rights was in progress. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

81. Under Comp. Laws 1897, § 3961, tax title merges in that acquired from owner. Boucher v. Trembley [Mich.] 12 Det. Leg. N. 184, 103 N. W. 819.

whom a judgment or decree shall be rendered for land does not apply to a defendant in error on appeal who was plaintiff below.[82]

The right to compensation must be pleaded by defendant in order to recover it in the action by which he is dispossessed,[83] but failure to plead his equity in such suit does not estop him from asserting it in an independent suit for that purpose.[84]

ACCESSORIES; ACCIDENT; ACCOMMODATION PAPER; ACCOMPLICES, see latest topical index.

ACCORD AND SATISFACTION.[85]

§ 1. *The accord. A. In general.*[86]—Accord and satisfaction is the acceptance[87] of something agreed upon[88] in settlement of a debt or obligation,[89] or the adjustment of a disagreement as to what is due from one party to another,[90] and

82. Railroad company instituting suit to condemn land already in use by another railroad company, not entitled to compensation on reversal of final judgment in its favor. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

83. Defendant in an action to recover land may not give evidence as to improvements in the absence of a claim therefor in his answer. Carraway v. Moore [Ark.] 86 S. W. 993.

84. Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010. Suit held not to have been brought under Rev. St. 1899, §§ 3075, 3076. Nothing but improvements can be adjudicated under them, and action sought to recover purchase price in addition thereto. Id.

85. This topic does not include cases of Compositions with Creditors (3 C. L. 718), Novation (4 C. L. 838) or of Releases (4 C. L. 1270), except in so far as such transactions are also accords and satisfactions (see 1 C. L. 8, note 43), nor the general law of Payment and Tender (see 4 C. L. 955) or of Contracts (see 3 C. L. 805).

86. See 3 C. L. 17.

87. The legal notion of accord is a new agreement on a new consideration to discharge the debtor, and it is not enough that there be a clear agreement or accord and a sufficient consideration, but the accord must be executed. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550. The discharge of a contract in a different thing from that for which the contract provides is an accord and satisfaction as to the particular payment concerning which the different thing is received. Payment in United States currency of a larger amount estimated in Porto Rican currency, in case of dispute as to the medium of payment. City of San Juan v. St. John's Gas Co., 25 S. Ct. 108.

Note: There can be no accord unless the parties are in possession of the knowledge necessary to adjust the matter understandingly. An acceptance in ignorance of material facts will not constitute an accord and satisfaction. Rued v. Cooper, 119 Cal. 463, 51 P. 704; 2 Pom. Eq. Juris. § 849, p. 1178; 1 Story, Eq. Juris. § 122, p. 131; Scully v. Delamater, 28 F. 114; Roberts v. Eastern Counties R. Co., 1 Fost. & F. 460; Sobieski v. St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863; Lee v. Tarplin, 183 Mass. 52, 66 N. E. 431; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Withers v. Moore, 140 Cal. 591, 74 P. 159; Markel v. Spitter, 28 Ind. 488; Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339; Belt v. American Cent. Ins. Co., 148 N. Y. 624, 43 N. E. 64; Woodford v. Marshall, 72 Wis. 129, 39 N. W. 326.—Adapted from note to Harrison v. Henderson [Kan.] 100 Am. St. Rep. 422-424.

88. In order to constitute an accord and satisfaction, the debtor and creditor must mutually agree as to the allowance or disallowance of the respective claims. Harby v. Henes, 90 N. Y. S. 461, citing Komp v. Raymond, 175 N. Y. 102, 113.

89. It is no compromise if a party knows he has no claim, but deceives the other into believing he has. Thayer v. Buchanan [Or.] 79 P. 343. A settlement of rebates and excesses in premiums paid on an indemnity policy, based on an estimate of the number of employes with an agreement for a subsequent adjustment based upon the actual number of employes and wages paid, held to be an accord and satisfaction. Fidelity & Casualty Co. of New York v. Gillette-Herzog Mfg. Co., 92 Minn. 274, 99 N. W. 1123.

90. An instrument signed by plaintiff, acknowledging settlement in full of all claims for injuries received, constitutes a complete contract, in the absence of fraud, duress, mistake or other vitiating cause (Lanham v. Louisville & N. R. Co. [Ky.] 86 S. W. 680); also where all liability for injuries received is released for a certain sum and the assumption of a physician's bill (Rapid Transit R. Co. v. Smith [Tex.] 86 S. W. 322), or an agreement for employment when such employment becomes possible (Laughead v. Frick Coke Co., 209 Pa. 368, 58 A. 685). A settlement of a controversy between plaintiff and a township board arising out of the flowage of surface water, wherein plaintiff agreed to let the water flow in the natural channel across defendant's farm, made in defendant's absence, does not bind defendant and does not determine the natural channel and flowage of water as between plaintiff

the payment of the amount so agreed upon.[91] One executory agreement is not extinguished by the execution of another between the same parties, nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation.[92] Where there is a contest as to whether a payment made was by way of accord and satisfaction, or was a payment upon another claim, and there is a dispute as to the respective obligations of the parties and their adjustment and satisfaction, the questions are for the jury.[93]

The policy of the law is to enforce settlements and thereby prevent litigation.[94] Litigation over the settlement of an estate may be terminated by agreement among those interested and will be recognized by the courts.[95] But settlements are not to be inferred or presumed except upon substantial showing of facts indicating that the claim in dispute was embraced within the terms of settlement.[96]

The effect of an accord and satisfaction, when executed, is to extinguish the

and defendant. O'Connor v. Hogan [Mich.] 104 N. W. 29. The failure of a minor to reply to a letter proposing that defendants would continue to pay for her board and treatment at a hospital, if she assured them she would make no further demand on account of injuries, did not constitute an accord and satisfaction. Hensler v. Stix [Mo. App.] 88 S. W. 108.

91. See 3 C. L. 17, n. 78, 79. Where an agreement is made for the payment of a fixed annual sum in lieu of damages to plaintiff's premises by defendant's blasting operations, such arrangement being optional with defendant, plaintiff cannot maintain action to recover the specified amount. Andrews v. Wellington, 136 N. C. 336, 48 S. E. 732.

NOTE. Blackstone's definition (3 Bl. 15) that "an accord is a satisfaction agreed upon between the party injuring and the party injured, which when performed is a bar to all actions upon this account," has been frequently approved. Mitchell v. Hawley, 4 Denio [N. Y.] 418, 47 Am. Dec. 260; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Sieber v. Amunson, 78 Wis. 682, 47 N. W. 1126. Other definitions of practically the same import of that in the text are to be found in Perin v. Cathcart, 115 Iowa, 557, 89 N. W. 12; Pulliam v. Taylor, 50 Miss. 257; Bull v. Bull, 43 Conn. 462.

A compromise is based upon a disputed claim, while an accord and satisfaction may be had as to a claim which is not disputed. Bellows v. Sowles, 55 Vt. 399, 45 Am. Rep. 291; Treitschke v. Western Grain Co., 10 Neb. 360, 6 N. W. 427.

A composition is defined as an agreement between an insolvent or embarassed debtor and his creditors, whereby the creditors in consideration of an immediate payment agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole debt. Continental Nat. Bank v. McGroch, 92 Wis. 310, 66 N. W. 606. Whereas an accord and satisfaction is an agreement between the debtor and a single creditor, requiring an extraneous consideration, and which when applied to a liquidated debt will not operate as a discharge of it by a mere partial payment. See Wilson v. Samuels, 100 Cal. 514, 35 P. 148; Bailey v. Boyd, 75 Md. 125; Newell v. Higgins, 55 Minn. 82, 56 N. W. 577; White v. Kuntz, 107 N. Y. 518, 13 N. E. 423, 1 Am. St. Rep. 886; Crawford v. Krueger, 201 Pa. 348, 50 A. 931. Adapted from note to Harrison v. Henderson [Kan.] 100 Am. St. Rep. 392-394.

92. Acceptance of renewal mortgage and note held not to operate as extinguishment of former mortgage and note. White v. Stevenson, 144 Cal. 104, 77 P. 828. Unless intended to so operate. Dawson v. Thigpen [N. C.] 49 S. E. 959.

93. McCormick v. Shea, 94 N. Y. S. 485.

94. McFerran's Case, 39 Ct. Cl. 441. A supplemental agreement, adjusting differences between the parties to a contract, operates as a settlement of their respective rights and obligations. Contract for sawing logs. Moorman v. Plummer Lumber Co., 113 La. 429, 37 So. 17. A settlement reached between husband and wife, after protracted efforts, pending divorce proceedings, relative to the maintenance of children, is binding. Dixon v. Dixon, 107 Mo. App. 682, 82 S. W. 547. The voluntary adjustment of a matter in dispute or litigation, even when protesting against it, effectually terminates the questions or litigation, in the absence of intimidation, fraud or concealment producing such settlement. Fitzpatrick v. Laconia Levee Dist. [Ark.] 85 S. W. 409. Settlement of the liability of one member of a partnership held binding. Langhorne v. McGhee [Va.] 49 S. E. 44.

95. Chauvet v. Ives, 93 N. Y. S. 744. A compromise agreement, between parties claiming under a will and those who claim that the will is void, by which the will was established, except as affected by the agreement, is never a modification of the will, but is a compromise of the rights of parties under the will, and a decree may be entered accordingly. Hastings v. Nesmith [Mass.] 74 N. E. 323. In a suit for damages by an administrator, the sole beneficiary, if under no disability, has a right to settle and accept payment of the unliquidated damages; the authority of the administrator not being exclusive. In a suit for benefit of a widow for damages for the pecuniary injury sustained by her in the death of her husband, a receipt for $200, and a release of defendant from the cause of action, were improperly excluded from evidence. Mattoon Gas Light & Coke Co. v. Dolan, 105 Ill. App. 1.

96. McFerran's Case, 39 Ct. Cl. 441.

antecedent liability;[97] but, in order that a settlement shall operate thus, it must be shown that the subject-matter of the subsequent contention was embraced within the purview of the settlement by the express action and contemplation of the parties.[98] An agreement that all rights of parties under a contract shall cease and determine releases a right of action growing out of such contract;[99] and it is not deprived of such effect by a further clause stating that the contract is abrogated "in consequence of the notice heretofore given," although such notice was of itself ineffectual to terminate the contract.[1]

Full satisfaction and compensation from one of several tort feasors releases them all,[2] unless such release expressly reserves the right to sue the others;[3] but partial satisfaction, not intended and not received as a full settlement, made by one tort feasor, does not release the others.[4] In case of partial satisfaction, however, the other tort feasors are entitled, in an action against them, to have the amount received by the injured party deducted from the whole amount to which he is entitled.[5]

An accord and satisfaction is implied from acceptance and retention of a sum tendered in full, as a draft for a sum less than that due;[6] or a check, knowing that it is sent as payment in full.[7] But the acceptance and deposit, or cash-

97. In a suit brought on a release of an attorney's lien, executed in consideration of an agreement to pay a certain amount, the question of services rendered or the terms of the original employment are immaterial. Burleigh v. Palmer [Neb.] 103 N. W. 1068. An agreement between parties to foreclosure proceedings held to extinguish the debt and ipso facto to cancel the lien. Moody v. Gaston [Tex. Civ. App.] 87 S. W. 224. A compromise settlement with the car company for an ejection by the conductor of a Pullman car, "of all the matters in controversy in this suit," and its payment, operates as a release of the railroad company, even if the conductor is an agent of both companies. Blake v. Kansas City Southern R. Co. [Tex. Civ. App.] 85 S. W. 430.

98. McFerran's Case, 39 Ct. Cl. 441. A settlement of indebtedness by a cashier to the bank, by assigning stock, conveying land and giving a note, held to have reference only to the settlement of indebtedness as shown by the bank's books and not to include a claim against the bank arising from the sale by it of lands conveyed as security. Berner v. German State Bank, 125 Iowa, 438, 101 N. W. 156. In conveying a right of way of a 100-foot strip, the landowner released the company "from all inconvenience and damage incident to the construction and use of said railroad." Held, that the damages released were only such as resulted from the construction and operation of the railroad on the 100-foot strip, and not such as resulted from the company's works elsewhere; and that the release did not bar an action for damages resulting from the company's raising the grade of the highway five feet, for a distance of 3,000 feet in front of plaintiff's lands. Perrine v. Pennsylvania R. Co. [N. J. Law] 61 A. 87.

99. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 77.

1. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 111.

2. Jones v. Chism [Ark.] 83 S. W. 315; Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

3. Hirschfield v. Alsberg, 93 N. Y. S. 617.

4. Bailey v. Delta Elec. Light, Power & Mfg. Co. [Miss.] 38 So. 354.

5. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

6. Brown-Ketcham Iron Works v. Hazen, 4 Ohio C. C. (N. S.) 582.

7. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981; Richardson v. Taylor [Me.] 60 A. 796; Canton Union Coal Co. v. Parlin & Orendorff Co. [Ill.] 74 N. E. 143. Acceptance and retention of proceeds of check for disputed wages tendered with statement of computation and receipt in full to a certain date to be signed and returned or check returned. United States Bobbin & Shuttle Co. v. Thissell [C. C. A.] 137 F. 1. The acceptance of checks in payment of author's royalties, based on a certain price, without objection, is an acquiescence in the publishers' interpretation of the contract and operates as an accord and satisfaction between the parties. In re McBride & Co., 132 F. 285. A remittance of the price of certain eggs purchased as payment in full, and a retention of the amount by plaintiff, there being a bona fide dispute as to the number of eggs purchased, constitutes an accord and satisfaction. Lightfoot & Son v. Edward Hurd & Co. [Mo. App.] 88 S. W. 128. The acceptance and retention by the creditor of a check sent by the debtor in payment of all demands, when there is an honest dispute between them as to the amount due, constitutes an accord and satisfaction. Kelly v. Bullock, 94 N. Y. S. 517. Where a tenant sent to his landlord bills for plumbing repairs, which he claimed should be allowed on rent, and a check for the balance of the rent due, tendered as payment in full, the retaining and cashing of the check and the keeping of the money was an acceptance of the amount in full payment. Cornelius v. Rosen [Mo. App.] 86 S. W. 500; Harby v. Henes, 90 N. Y. S. 461. Accepting final payment for street cleaning, involving a deduction under a liquidated damage clause in the contract, and executing a release, constitutes an accord and satisfaction, regardless of the validity of the liqui-

ing of checks does not operate as an accord and satisfaction, where the circumstances of the transaction show that they were not received in full satisfaction,[8] nor where the evidence fails to show any understanding between the parties to pay or to receive the amount paid in settlement.[9] The appropriation by congress of a smaller amount of a judgment, in full payment of the same, does not compel claimant to accept the same, but, if he does so, his judgment is satisfied;[10] and when there is a disputed claim, the plaintiff cannot be permitted to assert that he did not understand that a sum of money offered in full was not, when accepted, a payment in full. He is bound either to reject the check or, by accepting it, accede to the defendant's terms.[11]

An attorney cannot settle or compromise a suit or claim without special authority; though in rare instances the nature of the business may be such that a power to compromise will be implied.[12] Nor is a bookkeeper, as such, without

dated damage clause, until the release is impeached. Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

NOTE. Retention of sum sent as full payment of an unliquidated claim: The validity of a contract to pay an increased price for milk being in question, the seller notified the buyer that he would hold him to the contract, and that any payments made would only be credited on account. The buyer continued to receive the goods and sent in payment checks for smaller sums accompanied by statements at the foot of which were the words "to check in full." The seller accepted these checks and sued for the balance of his claim. Held, that the facts do not show an accord and satisfaction. Laroe v. Sugar Loaf Dairy Co., 180 N. Y. 367. In New York and in most states the retention, although under protest, of a sum sent as full satisfaction of an unliquidated claim, operates as an accord and satisfaction. Fuller v. Kemp, 138 N. Y. 231. That rule, resting as it must upon an implied acceptance of the offer of compromise, has been adversely criticised in some quarters. 17 Harv. L. R. 272, 469. The appropriation of a remittance, when accompanied by an express rejection of any conditions annexed, seems a conversion rather than an acceptance of the conditions. The principal case breaks away from the harsh New York rule to the extent of holding that such retention cannot be interpreted as an acceptance of the condition when, prior to its making, the buyer is informed that the seller intends to insist upon a definite claim, and that nothing is to constitute a waiver of his rights. See Eames, etc., Co. v. Prosser, 157 N. Y. 289. The distinction from Fuller v. Kemp is slight, but the case shows a tendency in a desirable direction. How far the seller must commit himself in order that an assent may not be implied against him is likely to prove a troublesome question.—18 Harv. L. R. 617.

8. Bankers' Union v. Favalora [Neb.] 102 N. W. 1013. The acceptance by the creditor of a check from the debtor, written as "in full payment," with an immediate notice to the debtor that suit would be brought to recover the balance due, is not an accord and satisfaction. Harby v. Henes, 90 N. Y. S. 461. Nor the acceptance and deposit of a check because it could not be altered in the absence of the party authorized to sign checks, and with a recognition that it did not agree with the amount on the books. Terry & Tench Const. Co. v. Leeson, 84 N. Y. S. 267. Where defendant accepts part of the property shipped under contract at prices different from those agreed upon and rejects part, and mails a check for what he admits to be due, without returning the rejected articles, the deposit of such check by plaintiff, to his own credit, but with an immediate protest as to the correctness of the statement and a demand for the balance due, does not bar plaintiff's right to sue for the balance. Robinson v. Leatherbee Tie & Lumber Co., 120 Ga. 901, 48 S. E. 380. Where the defendant tenders a specific sum, which is refused, and thereupon pays the amount into court, plaintiff's acceptance of that sum from the court does not prejudice his claim to the balance in dispute. Bostrom v. Gibson, 111 Ill. App. 457. Neither does the retention and use of checks by the vendor constitute an accord and satisfaction, though sent with an account of goods delivered and the price, at the foot of which were printed the words "to check in full," where, under a contract, the vendee was to accept the goods at a certain price and continued to accept them, though he repudiated the contract, but was notified that the goods were delivered under the contract and that any check sent would be simply credited on account. Laroe v. Sugar Loaf Dairy Co. [N. Y.] 73 N. E. 61. Where the creditor immediately notifies the debtor that the check will not be received in full settlement, but retains it for 70 days, meanwhile endeavoring to effect a settlement with the debtor, and then returns it, it cannot be held as a matter of law that there is an accord and satisfaction, but the question of unreasonable delay should go to the jury. Fredonia Gas Co. v. Elwood Supply Co. [Kan.] 80 P. 969. Receipt and use by executrix of a check for amount of produce, less advances made to her testator before his death, but insisting that defendant could not retain the advancements, does not constitute accord and satisfaction and executrix may sue for balance. Schermerhorn v. Gardenier, 94 N. Y. S. 253.

9. Goldsmith v. Lichtenberg [Mich.] 102 N. W. 627.

10. Bloodgood's Case, 39 Ct. Cl. 69.

11. Laroe v. Sugar Loaf Dairy Co. [N. Y.] 73 N. E. 61.

12. As in the regular course of pending suits, when an attorney has neither time

special authority thereto, authorized in law to settle matters in dispute between his employers and others.[13] An agent may be specially authorized to settle.[14] A husband or father, who suffers injuries through another's negligence, cannot, by executing a release of damages, deprive his widow or children, in case of death from his injuries, of the right of recovery given them by statute.[15] Satisfaction by a landlord for injuries to a stranger, for which the tenant is solely liable, is no bar to a recovery against the tenant.[16] The board of county commissioners, in Oregon, is authorized to release any debt or damages arising out of the sale of lands to the county for delinquent taxes.[17] A settlement by an employe for a valuable consideration, for injuries afterward resulting in death, and a release of all liability therefor, bars an action therefor by his widow and child.[18] A settlement made by the parents for injuries to a child will, after the child's death from the same injuries, be presumed to have been made for their claim for nursing, care and medical bills, and will not bar an action by the child's administrator to recover for the suffering and anguish endured by the child, for which the parents had no right of action.[19] A contract of accord and satisfaction signed by a wife, after being signed and approved by her husband, is binding upon her,[20] and the husband cannot afterward sue for the loss of the services of his wife.[21] In case of a settlement of damages for injuries received by a minor, however, the burden of proof is upon defendant to show a ratification by the plaintiff, before such agreement can operate as an accord and satisfaction.[22]

(§ 1) *B. The consideration.*[23]—Every accord must rest upon a sufficient consideration,[24] consisting either of benefit to the creditor[25] or detriment to the

nor opportunity to consult his client, whose interests would be imperiled by delay. Fleishman v. Meyer [Or.] 80 P. 209.

13. Grubbs v. Ferguson, 136 N. C. 60, 48 S. E. 551.

14. **Note:** Such an agent has wide powers and is impliedly authorized to do all things necessary to bring about settlement. Hagerman v. Bates, 24 Colo. 71; New York, P. & N. R. Co. v. Bates, 68 Md. 184; Hawkins v. Avery, 32 Barb. [N. Y.] 551; Smith v. Cantrel [Tex. Civ. App.] 50 S. W. 1081; Nickles v. Wells, 2 Utah, 167; Tanner v. Hastings, 2 Ill. App. 283; Nichols & Shepard Co. v. Hackney, 78 Minn. 461; Oliver v. Sterling, 20 Ohio St. 391; Pollock v. Cohen, 32 Ohio St. 514; Chiles v. Stephens, 3 A. K. Marsh. [Ky.] 340; Anderson v. Coonley, 21 Wend. [N. Y.] 279; Lowrey v. Bates, 26 Misc. 407, 56 N. Y. S. 197. But his authority extends only to settlement. Pollock v. Cohen, 32 Ohio St. 514; Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; Chilton v. Willford, 2 Wis. 1, 60 Am. Dec. 399; Melcher v. Exchange Bank, 85 Mo. 362; Congar v. Galena & C. U. R. Co., 17 Wis. 177; City of New York v. Du Bois, 86 F. 889; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480. He cannot sell or dispose of property or pledge it to raise necessary funds. Dearing v. Lightfoot, 16 Ala. 28; Swett v. Brown, 5 Pick. [Mass.] 178; Essick v. Buckwalter [Pa.] 16 A. 849; nor assign the claim. Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Hannon v. Houston, 18 Kan. 561; Welch v. McKenzie, 66 Ark. 251; Hussey v. Crass [Tenn. Ch. App.] 53 S. W. 986. Nor submit it to arbitration. Huber v. Zimmerman, 21 Ala. 488, 56 Am. Dec. 255; Scarborough v. Reynolds, 12 Ala. 252; Mich. Cent. R. Co. v. Gougar, 55 Ill. 503; McPherson v. Cox, 86 N. Y. 472; O'Regan v. Quebec & Gulf Port S. S. Co., 19 New. Br. 528; New York v. Du Bois, 86 F. 889; Carnochan v. Gould, 1 Bailey [S. C.] 179, 19 Am. Dec. 668; Goodson v. Brooke, 4 Camp. 163. Though he can take a mere opinion on the disputed question. Hine v. Stephens, 33 Conn. 504. Whatever action he takes must be on his principal's behalf. Williams v. Johnston, 94 N. C. 633; McCormick v. Keith, 8 Neb. 142; Patterson v. Moore, 34 Pa. 69; Corr v. Greenfield, 134 Pa. 503; Scales v. Mount, 93 Ala. 82; Baird v. Randall, 58 Mich. 175; Middlebury College v. Loomis, 1 Vt. 189.—Adapted from Clark & Skyles on Agency, pp. 655-658.

15. Rev. St. 1899, § 2864, 2865. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976.

16. Hirschfield v. Alsberg, 93 N. Y. S. 617.

17. B. & C. Comp. St. §§ 912, 913, 2518; Laws 1893, p. 28. Multnomah County v. Title Guarantee & Trust Co. [Or.] 80 P. 409.

18. Blount v. Gulf, etc., R. Co. [Tex. Civ. App.] 82 S. W. 305.

19. Meyer's Adm'r v. Zoll [Ky.] 84 S. W. 543.

20. Brundige v. Nashville, etc., R. Co. [Tenn.] 81 S. W. 1248.

21. Savory v. North East Borough, 26 Pa. Super. Ct. 1.

22. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

23. See 3 C. L. 20.

24. Tucker v. Dolan [Mo. App.] 84 S. W. 1126; Frank & Sons v. Gump [Va.] 51 S. E. 358. Settlement of a controversy over an easement to conduct water across another's lands, and as to water rights and the proper construction and use of a ditch, held binding on both parties. Board of Regents of State Agricultural College v. Hutchinson [Or.] 78 P. 1028.

25. An agreement for the re-employment of the servant "for such time only as may be

debtor.[26] But an agreement to pay one liquidated debt is not sufficient consideration to sustain a release of another debt;[27] nor is the forbearance of the collection of a valid indebtedness, merely as a matter of good will and encouragement, sufficient to make a legal and binding settlement of it.[28] The settlement of a liquidated, undisputed liability, by payment of a sum less than that due, lacks consideration and is void,[29] unless there be a new, binding agreement upon a sufficient consideration.[30] But it has been held in Arkansas that an agreement to discharge a debt by the payment of a smaller amount, if fully executed and evidenced by a written receipt for the lesser sum in full satisfaction, constitutes a valid and irrevocable discharge.[31] Courts are prone to uphold, when possible, an agreement to accept less than the debt due in satisfaction thereof, and a very slight consideration will be held sufficient,[32] as a slight benefit to the creditor or slight detriment to the debtor.[33] If the sum due or the debtor's liability[34] is in dispute,[35] or unliquidated,[36] the payment of a sum less than that claimed, upon condition that it is to operate as full payment, is a good accord and satisfaction,[37] even though the asserted claim is without merit or foundation.[38] Where the dispute between the parties relates to the medium of payment, an agreement that payment in United States currency shall extinguish a claim for a larger sum estimated in Porto Rican currency is binding.[39] Under the law of North Carolina, providing that, where an agreement is made for the payment of a less sum than the amount due, the payment of such sum shall be a complete discharge of

satisfactory" to the employer, though vague and indefinite as to duration of employment, constitutes a sufficient consideration for a release of right to sue for damages for injuries. Forbs v. St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562. A note in settlement of a claim against an executor for shortage in accounts, given by his widow to secure dismissal of proceedings against a co-executor, and abandonment of claim against the husband's estate, held valid. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054.

26. The discontinuance of legal proceedings already instituted is sufficient consideration for a compromise agreement between parties; and such agreements are favored by the courts. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054.

27. Siewing v. Tacke [Mo. App.] 86 S. W. 1103.

28. Kinsey v. Meaney, 90 N. Y. S. 327.

29. Bostrom v. Gibson, 111 Ill. App. 457; Tucker v. Dolan [Mo. App.] 84 S. W. 1126; Chamberlain v Smith [Mo. App.] 85 S. W. 645; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100. At common law, the acceptance by a creditor of the debtor's unsecured notes for a less sum than the original debt does not extinguish the debt. Frank & Sons v. Gump [Va.] 51 S. E. 358.

30. Goldsmith v. Lichtenberg [Mich.] 102 N. W. 627.

31. Dreyfus & Co. v. Roberts [Ark.] 87 S. W. 641. This case criticises the common-law doctrine as to the satisfaction of a debt by the payment of a lesser sum.

32. Tucker v. Dolan [Mo. App.] 84 S. W. 1126, citing Jaffray v. Davis, 124 N. Y. 164, 11 L. R. A. 710. The court will not inquire into the adequacy or inadequacy of a compromise fairly and deliberately made. An agreement to settle, without litigation, a disputed claim of infringement for use of certain dredging machinery. Bowers Hydraulic Dredging Co. v. Hess [N. J. Err. & App.] 60 A. 362.

33. Tucker v. Dolan [Mo. App.] 84 S. W. 1126.

34. Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113.

35. Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481.

36. Laroe v. Sugar Loaf Dairy Co. [N. Y.] 73 N. E. 61; Weber v. Board of Com'rs of Ramsey County, 93 Minn. 320, 101 N. W. 296.

37. Chamberlain v. Smith [Mo. App.] 85 S. W. 645; Sims v. Three States Lumber Co. [C. C. A.] 135 F. 1019; Goldsmith v. Lichtenberg [Mich.] 102 N. W. 627. Especially a mutual bona fide dispute arising from facts known to both parties, so that neither has an undue advantage. Thayer v. Buchanan [Or.] 79 P. 343. Where there is a bona fide dispute as to the amount due and a check is tendered by defendant in full satisfaction of the matter in controversy, with an offer to accept service of process if plaintiff is not satisfied, the acceptance of such check without objection is a complete accord and satisfaction; and this is true whether the claim be considered as liquidated or unliquidated. Le Page v. Lalance & Grosjean Mfg. Co., 90 N. Y. S. 676. A bona fide dispute as to the validity of taxes and tax certificates and the rights of the county thereunder is sufficient consideration to support a compromise settlement by the board of county commissioners who are authorized to settle claims due the county arising out of lands sold for delinquent taxes. B. & C. Comp. §§ 912, 913, 2518. Multnomah County v. Title Guarantee & Trust Co. [Or.] 80 P. 409.

38. Fitzpatrick v. Laconia Levee Dist. [Ark.] 85 S. W. 409.

39. City of San Juan v. St. John's Gas Co., 25 S. Ct. 108.

the debt, a partial performance may suffice to make a valid and binding compromise, where the plaintiff is himself to blame for the lack of full performance.[40] A mere payment, however, of what is due does not imply a settlement of disputed facts.[41]

(§ 1) *C. Fraud, mistake and duress.*[42]—An accord and satisfaction may, in a court of law or in equity, be set aside for fraud or misrepresentation in the execution or in the inducement to the execution of the contract.[43] Only fraud in the execution of the release is available in an action at law.[44] If a party does not intentionally and understandingly execute a release, and if his want of intention and understanding is purely by reason of mistake or misunderstanding on his part, then he has no remedy at law; his remedy, if any, is in equity to set aside the release.[45] In composition contracts between an insolvent debtor and his creditor, the utmost good faith must be observed by all parties.[46] A compromise agreement procured by the false and fraudulent statements of the debtor is void,[47] and a release of a claim for damages, procured by promises of employment which the promisor has no intention to fulfill, is voidable for the fraud.[48] Where a compromise settlement of a claim has been procured by fraud, the remedy, at least in the Federal courts, is in equity;[49] also where one is induced to sign a release by a fraudulent representation, and knows what he is signing;[50] but where he is deceived into signing it by the belief that he is signing something else, he may attack the instrument in an action at law.[51] If the setting aside of a written compromise for fraud in drawing it up would leave the parties to further expensive litigation, and relief can be afforded by a reformation of the agreement to correspond with the real intent of the parties, that course will be taken.[52] If parties act under a mistake, the accord and satisfaction may be set aside.[53] If there was a mutual mistake or imposition through fraud, so that there has been included in the settlement an item for which no fair consideration in fact exists, the settlement ought to be held void pro tanto, if the issue is

40. Code, § 574. As where a portion of the pay was to be taken in advertising, some of which had been done, but the plaintiff had failed, after repeated demands, to designate the amount of the advertising. Ramsey v. Browder, 136 N. C. 251, 48 S. E. 651.

41. McFerran's Case, 39 Ct. Cl. 441.

42. See 3 C. L. 22.

43. Brundige v. Nashville, etc., R. Co. [Tenn.] 81 S. W. 1248. In an action for a partnership accounting, the court may set aside for fraud a release barring plaintiff's right to relief. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. A release executed while plaintiff was suffering pain and did not know what she was doing was set aside. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103.

44. Questions of execution of release and of fraud submitted to jury. Sargent Co. v. Baublis [Ill.] 74 N. E. 455.

45. Chicago & Alton R. Co. v. Jennings, 114 Ill. App. 622.

46, 47. Storms & Co. v. Horton [Conn.] 59 A. 421.

48. Rapid Transit R. Co. v. Smith [Tex.] 86 S. W. 322. Where a settlement was made and defendant agreed to give a check immediately, but did not, as neither party had a blank check, and continued to make other promises to send the check, being notified four days before the commencement of suit that plaintiffs would sue if the check was not sent by a certain day, it was held that it could not be said, as a matter of law, that the settlement was conditional upon giving a check at the time or that it was procured by fraud. Wood v. Sherer [Mass.] 71 N. E. 947. And where an alleged release under seal was signed merely by a mark, and plaintiff denied all knowledge of such transaction, its validity was held to be a question for the jury. Clark v. Lehigh Valley R. Co., 24 Pa. Super. Ct. 609.

49. Settlement of life insurance certificate at less than its face value. Stephenson v. Supreme Council, A. L. H., 130 F. 491.

50. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195.

51. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. Evidence that an instrument, stating in capital letters at the beginning that it was a release of all claims, was rapidly and indistinctly read to plaintiff, who was able to read but supposed the instrument was a receipt, was held not to show fraud in procuring the execution of the release. Hartley v. Chicago & A. R. Co., 214 Ill. 78, 73 N. E. 398.

52. Davy v. Davy, 90 N. Y. S. 242.

53. Settlement of claim for damages upon the assurance of the company's physician that the injuries were slight. Great Northern R. Co. v. Fowler [C. C. A.] 136 F. 118.

properly presented.[54] Settled or stated accounts can be opened or corrected only on the ground of fraud, accident, mistake or omission.[55]

§ 2. *Satisfaction or discharge.*[56]—An agreement for an accord and satisfaction, which has never been executed, is ineffectual as an accord and satisfaction.[57] The accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of the pre-existing obligation.[58] Prior claims are presumed to be included in a settlement.[59] But claims not included in a settlement may be subsequently sued on.[60] A release in full for any claim of damages resulting in a suit pending can be filed in satisfaction of the judgment only upon defendant's paying the costs.[61]

§ 3. *Pleadings, issues, and proof.*[62]—Accord and satisfaction is a good plea by a debtor to the action of his creditor.[63] But an agreement to forbear suit on an obligation for a limited time after due, though founded on a sufficient consideration, cannot be pleaded in bar of an action brought within that time, the only remedy being in an action of damages for violation of the agreement.[64] To be good, this plea should state the facts constituting the satisfaction and that plaintiff accepted what was done or offered in satisfaction,[65] and it must show some consideration moving toward plaintiff, that plaintiff received something of value by the new agreement, or it will be bad after verdict.[66] The defense of accord and satisfaction cannot be added by amendment in the circuit court on appeal, when not pleaded in the county court;[67] nor, being a new and distinct defense, after the expiration of the time limited by stipulation for the filing of pleadings.[68] The burden of proving a settlement as an affirmative defense is on the person asserting it.[69]

The presumption of law is that a release is intentionally and knowingly made.[70] Fraud, accident, mistake or omission must be established by "clear and convincing" evidence, and the burden is on the party seeking to impeach the set-

54. Thayer v. Buchanan [Or.] 79 P. 343. In a suit to set aside a compromise of claims to land, evidence held insufficient to sustain a finding of mutual mistake authorizing the relief prayed. Willingham v. Jordan [Ark.] 87 S. W. 424.

55. Chapman v. Liverpool Salt & Coal Co. [W. Va.] 50 S. E. 601.

56. See 3 C. L. 23.

57. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550; Bankers' Union v. Favalora [Neb.] 102 N. W. 1013. An agreement never carried out by the payment of the money, surrender of the contract and delivery of the release contemplated does not amount to an accord and satisfaction. Bandman v. Finn, 92 N. Y. S. 1096. A compromise is no defense if not executed. Russell v. Cassidy, 108 Mo. App. 577, 84 S. W. 171.

58. Laughead v. H. C. Frick Coke Co., 209 Pa. 368, 58 A. 685.

59. Melton v. Rittenhouse, 111 Ill. App. 30.

60. Claims for extra work not considered in the settlement of the amount due on a contract. McFerran's Case, 39 Ct. Cl. 441. A settlement of "all matters in dispute" embraces only such as are in dispute at the time of its execution, and not all matters that might be subjects of dispute thereafter. Hollahan v. Sowers, 111 Ill. App. 263.

61. Naretti v. Scully, 133 F. 828.

62. See 3 C. L. 23.

63. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550.

64. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297.

65. Karter v. Fields, 140 Ala. 352, 37 So. 204.

66. Frank & Sons v. Gump [Va.] 51 S. E. 358.

67. Bankers' Union v. Favalora [Neb.] 102 N. W. 1013.

68. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972.

69. Bray v. Bray [Iowa] 103 N. W. 477. Action for board, room and personal attention. Barber v. Maden [Iowa] 102 N. W. 120. A note given in full settlement of all demands and paid is admissible to prove that there was nothing owing and unpaid, in an action to recover money paid under protest, to secure release from arrest in a suit brought to extort further sums from plaintiff. Grubbs v. Ferguson, 136 N. C. 60, 48 S. E. 551. Where, in an action on a replevin bond, it was stipulated by counsel in open court that the only issue was whether the property had been returned, evidence was not admissible to show an agreement that the return of part of the property was to be accepted as a full discharge of all liability under the bond. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. A promise to execute or perform at a future time would not support the plea of accord and satisfaction. Bankers' Union v. Favalora [Neb.] 102 N. W. 1013.

70. Chicago & Alton R. Co. v. Jennings, 114 Ill. App. 622.

tlement of an account on such grounds.[71] It may be shown to support the good faith of a settlement that services were rendered by one party as claimed.[72]

Parol evidence is not admissible to contradict, vary or add to a written contract in full settlement of all claims for damages, in the absence of fraud, duress, mistake or other vitiating cause;[73] nor to show an additional agreement for employment, besides the complete contract of release contained in a written agreement.[74] But it may be resorted to to identify the subject-matter intended to be covered in a written release under the general word "claims," by showing the circumstances of the transaction;[75] and to explain a release under seal, purporting to have been signed by plaintiff by her mark.[76] General words in a release are to be limited and restrained to the particular words in the recital.[77] Where plaintiff refuses to accept a sum offered as a compromise or equitable settlement, and sues for the full amount of his claim, without any allegation of right to recover the sum offered, he cannot, on failure to establish his claim, recover judgment for the sum offered as a compromise payment.[78] The jury is justified in regarding with suspicion the claim of settlement made by a physician with his patient, at which no third person was asked to be present.[79]

ACCOUNTING, ACTION FOR.[1]

§ 1. *Nature of remedy and jurisdiction of courts.*[2]—Whether in equity or at law under the codes the remedy is equitable at base, applying to mutual or long and complicated[3] single accounts, because of the inadequacy of legal remedies to efficiently settle and adjust them,[4] and especially where the accounts lie between parties standing confidentially or in trust to each other or who have a joint or

71. Chapman v. Liverpool Salt & Coal Co. [W. Va.] 50 S. E. 601; Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622.

72. Action against attorney to recover money collected on certain insurance policies. He admitted collection, and alleged performance of services prior to collection and settlement. Greenlee v. Mosnat [Iowa] 101 N. W. 1122.

73. Lanham v. Louisville & N. R. Co. [Ky.] 86 S. W. 680.

74. Rapid Transit R. Co. v. Smith [Tex.] 86 S. W. 322.

75. Perkins v. Owen [Wis.] 101 N. W. 415.

76. Clark v. Lehigh Valley R. Co., 24 Pa. Super. Ct. 609.

77. Texas & P. R. Co. v. Dashiell, 25 S. Ct. 737.

78. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981.

79. Bray v. Bray [Iowa] 103 N. W. 477.

1. **This topic treats** only of actions to obtain an accounting whether in equity or by means of legal remedies serving the same purpose. The accountability of fiduciaries is pertinent to the topics treating of the rights and liabilities of such fiduciaries. See Agency 3 C. L. 68; Brokers, 3 C. L. 535; Trusts, 4 C. L. 1727, and like topics. The recovery by action of the amount due on an account stated or open account, is a distinct proceeding. See the topic following this.

2. See 3 C. L. 24.

3. Account on a lumbering contract involving 45 reports each pertaining to eight kinds of lumber, covering 360 items and 5,000,000 feet. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

4. Enforceability at law of single items does not oust equity. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295. Where the remedy at law in an action for an accounting is not so complete and adequate as in equity, that alone is ground for equitable jurisdiction. Where the action involved contract, and mutual accounting and the entire transactions of two large mercantile establishments must be examined, and accounts compared. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462. Equity will not take jurisdiction of an accounting where there is no relation of trust and the accounting is not complicated, but is a mere basis for ascertaining damages. Plaintiff sued for an accounting, alleging that he had expert knowledge of the shoe business and a control of trade as traveling salesman; that he was employed by defendants as such and was illegally discharged; that as compensation he was to receive a commission on sales made by the defendants and that they failed to render correct monthly statements as agreed, and prayed an accounting. Holland v. Hallahan [Pa.] 60 A. 735.

common interest,[5] or where there is fraud alleged.[6] Though otherwise triable at law because of the few and simple items, equity may act because the accounts happen to involve a matter of equitable cognizance.[7] The breach of a single contract is usually remediable in damages, though it involves numerous transactions in course of performance and discharge.[8] In the Federal courts it is of persuasive force that in the local courts a reference would be ordered under the code if retained as a law case.[9]

§ 2. *Persons liable and entitled to accounting.*[10]—Any person to whom the accountant stands as a fiduciary or joint owner is entitled to an accounting,[11] if there is no inequitable conduct of complainant or inequitable quality in his suit.[12]

§ 3. *Practice and procedure.*[13]—In the case of administration and guar-

5. Stock brokers and customers. Haight v. Haight & Freese Co., 92 N. Y. S. 934.

Accounts of a partnership may be settled. It often happens that after a settlement of the accounts one accountant may sue the other at law to recover the balance ascertained by the settlement to be due him. Bruns v. Heise [Md.] 60 A. 604. See, also, Partnership, 4 C. L. 908.

Tenants in common against their co-tenants. Hollahan v. Sowers, 111 Ill. App. 263.

Joint enterprises: A complaint alleging that defendant, the owner of certain hay land contracted that complainants should cut, press, and haul the hay for a certain price, that under defendant's direction and pursuant to such contract, plaintiff cut and stacked a part of the hay and baled a portion thereof, but were prevented by defendant from baling and hauling all the hay required by the contract, plaintiffs also alleging that they had expended a certain sum of money in the work for which they claimed a lien on the hay not hauled, and alleging that the defendant had wrongfully taken possession of the hay, warranted an accounting. Woodford v. Kelley [S. D.] 101 N. W. 1069.

6. Complaint charging that the transactions between plaintiffs and defendants were multifarious and complicated, and could not be reached at law; that by mistake, oversight, or fraudulent connivance of the defendants much lumber was credited to the individual account of one of the defendants, etc., is sufficient to give the chancery court jurisdiction. Charlesworth v. Whitlow, Lake & Co. [Ark.] 85 S. W. 423. Will lie against brokers and fiscal agents, who for many years have received and disposed of large amounts of property for which periodical accounts were rendered alleged to have been false and fraudulent. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921.

7. Clouds on title. Gay v. Berkey [Mich.] 100 N. W. 920.

8. A complaint alleging that plaintiff is the inventor of a mechanical appliance; that he confidentially disclosed the same to defendants, one of whom contracted to pay him certain cash royalties and to pay the fees for taking out the patents; that such defendant had installed plaintiff's appliance upon divers plants, and denied plaintiff's right to compensation therefor; that defendants had conspired to and had delayed the granting of letters patent upon plaintiff's inventions; that by defendants' conduct plaintiff had been deprived of all emoluments which otherwise would have accrued from his inventions; and that the amount of his damages and the amount of profits appropriated by defendants cannot be ascertained without an accounting, does not state facts sufficient to entitle plaintiff to an accounting. Griffith v. Dodgson, 93 N. Y. S. 155. Breach of contract to employ salesman, to pay him by commissions, and to render account of sales held remediable at law. Holland v. Hallahan [Pa.] 60 A. 735.

9. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

10. See 3 C. L. 26.

11. See ante, § 1; also Agency, 3 C. L. 68; Brokers, 3 C. L. 535; Estates of Decedents, 3 C. L. 1238; Guardianship, 3 C. L. 1569; Trusts, 4 C. L. 1727; Partnership, 4 C. L. 908.

12. See Equity, 3 C. L. 1212-1218.

NOTE. Accounting for proceeds of illegal business: The plaintiff sues for an accounting against an agent for refusing to pay over the proceeds in an illegal business. Held, bill not maintainable. Woodson v. Hopkins [Miss.] 37 So. 1000. Generally an agent must account for money received in an illegal business. Baldwin v. Potter, 46 Vt. 402; Planters' Bank v. Union Bank, 16 Wall. [U. S.] 483, 499, 21 Law. Ed. 473; Murray v. Vanderbilt, 39 Barb. [N. Y.] 140, 152; Tenant v. Elliott, 1 B. & P. 3; Wilson v. Owen, 30 Mich. 474. The principal case seems to have applied the disputed rule as to the recovery of illegally earned money by one partner from another; such a recovery has been granted. Sharp v. Taylor, 2 Phill. 801; Anderson's Adm'rs v. Whitlock, 2 Bush [Ky.] 398; Brooks v. Martin, 2 Wall. [U. S.] 70, 17 Law. Ed. 732, discredited in McMullen v. Hoffman, 174 U. S. 639, 666, 43 Law. Ed. 1117. Decisions of this class may be reconciled by allowing a recovery (1) where the transaction was merely malum prohibitum and not malum in se. Farley v. Railroad Co., 14 F. 114; (2) after a formal accounting Leonard v. Poole, 114 N. Y. 371, 11 Am. St. Rep. 667, or (3) when the partnership itself was not illegal in its formation. Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706.—5 Columbia L. R. 472.

13. See 3 C. L. 26, 27.

Procedure in accounting at chancery, see Fletcher Eq. Pl. & Pr. 38 (parties), 151 (bill), 321 (answer), 593 (hearing and reference) 743, 750, (decree) 1084 (U. S. Court Rules).

dianship, a special mode of procedure is applicable which in the first instance is usually in probate courts,[14] but resort may be had to equity in proper cases.[15] *A demand* for an accounting should ordinarily be made before suing.[16]

Parties.[17]—All partners are necessary parties to a firm accounting.[18] On accounting of an agent to his principal of the proceeds of property out of which a debt was to be paid, the agent's partner in the ownership of the property is not a necessary or a proper party.[19]

Pleading.[20]—The complaint must plead an account of which equity has jurisdiction,[21] and a demand for and refusal to account.[22] Any matter is proper which repels the presumption of laches.[23]

It is not essential to good pleading that there shall be a prayer for any particular relief. A prayer for general relief is sufficient.[24]

A bill for an accounting of the formation of a corporation may combine all the agreements which led up to the corporation in which parties were concerned,[25] and it is not multifariousness to ask that numerous periodical accounts be surcharged and falsified,[26] or to implead a third person in order to incidentally fasten a trust on property of the accountant which he holds.[27]

Decree for accounting; reference.[28]—The approved procedure in equity on a bill for an accounting is that an interlocutory decree be first entered, finding the facts determining the right to such accounting and directing the basis of the account, and then referring the cause to the master in chancery to state the account.[30] If facts fail to show accountability but yet a wrongful possession, restitution may be ordered.[31]

The case is ripe for accounting if defendant admits accountability and offers to account,[32] and a reference requiring the master to state the accounts between

14, 15. See Estates of Decedents, 3 C. L. 1238; Guardianship, 3 C. L. 1569.

16. Ayotte v. Nadeau [Mont.] 81 P. 145.

17. See 3 C. L. 26.

18. Bruns v. Heise [Md.] 60 A. 604.

19. Lasley v. Delano [Mich.] 102 N. W. 1063.

20. See 3 C. L. 26.

21. If jurisdiction is invoked because the account is long and complicated it must be so alleged. Kaston v. Paxton [Or.] 80 P. 209.

22. Ayotte v. Nadeau [Mont.] 81 P. 145.

23. The allegations of fraud, collusion, and conspiracy on the part of the managing officers of the corporation, who controlled the other officers, are important as explaining the long delay of the plaintiff in seeking a remedy from the defendants. Except for some such explanation, the plaintiff would appear to be bound by the acts of its officers in accepting these accounts and treating them as true, and would be barred by laches in neglecting to bring its suit earlier. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921.

24. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462.

25. A written agreement was made between bankers as promoters, and a number of manufacturers of paper goods, as vendors, for the organization of a corporation, to which the properties of the vendors should be conveyed, fixing the rights of all the parties. A secret agreement was subsequently made by the promoters with a part of the vendors, which gave the latter an advantage and profit over the other vendors. A bill by a party to the first agreement joining all the parties to both agreements and the corporation was not multifarious. Shutts v. United Box Board & Paper Co. [N. J. Eq.] 58 A. 1075.

26. Bill against brokers to surcharge and falsify a large number of monthly statements of account of plaintiff's dealings through a series of years and praying for a correction of errors in the accounts. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921.

27. A bill is not multifarious which seeks to have an accounting on contracts with one of the defendants, where another defendant is joined under allegations that the two have wrongfully taken the funds equitably belonging to the complainant, and fraudulently sought to cover them up by investing them in lands, taking the legal title thereto in themselves, and the bill seeks to fasten a trust thereon for the use of complainant. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

28, 29. See 3 C. L. 27.

30. Hollahan v. Sowers, 111 Ill. App. 263.

31. Where a person is prosecuted for an accounting in regard to trust property, being charged with having obtained possession thereof by fraud, and the charge of fraud fails but the fact of wrongful possession is established, the proper judgment for restoration of the trust property may be rendered. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

32. Where the plaintiff showed that he had an interest in property of which the defendant had control, and defendant recog-

the parties may be then ordered.[33] In proceedings before a referee, due objection and exception must be made before the referee in order to be available on review.[34] Unless the referee reports his evidence, the question whether items allowed were supported cannot be raised.[35] The court will not review questions of fact determined by the referee unless there is a showing that the entire evidence is before it.[36]

§ 4. *Requisites, substance, form and statement of the account.*[37]—The referee may only take into account such matters as are charged in plaintiff's specification.[38] An item covering a promissory note should not be allowed unless the note and title to it is proved and it is produced.[39] In a suit for an accounting for royalties due under a contract, the account should be taken down to the hearing, unless the petition limits the claim to the amount due when it is filed.[40]

ACCOUNTS STATED AND OPEN ACCOUNTS.

§ 1. *Nature and elements of the several kinds of accounts.*[41]—An account stated is a mutually approved casting up of the items of charge and credit arising from a transaction or transactions between parties, the balance shown by the result of which the one owing it expressly or impliedly promises to pay.[42] An account stated is distinct from an accord and satisfaction in that it settles accounts and promises payment.[43] The minds of the parties must meet upon the allowance of each item, and they must mutually concur upon the final adjustment,[44]

nized him as the proper party to settle with, and alleged that he was ready to make a settlement with proper parties, a case for an accounting and settlement on the merits was made. Willlams v. Thweatt [Ark.] 83 S. W. 331.

33. Wilcoxon v. Wilcoxon, 111 Ill. App. 90.

34. Where, on a hearing before the referee, defendant did not object to any evidence on the ground that it was inadmissible under the statute of frauds, such objection was waived. Holt v. Howard [Vt.] 58 A. 797. See more fully Masters and Commissioners, 4 C. L. 614; Reference, 4 C. L. 1257.

35. Holt v. Howard [Vt.] 58 A. 797.

36. In an action where the defendant claimed that various items and classes of items were allowed without evidence. Holt v. Howard [Vt.] 58 A. 797.

37. See 3 C. L. 27.

38. Where, on an accounting, a referee found that certain items claimed by defendant were payments for things not charged in plaintiff's specification, such items were properly disallowed. Holt v. Howard [Vt.] 58 A. 797. Payments applied to discharge matters prior to or not included in the items should be disallowed. Id.

39. McCorkle v. Richards, 112 Ill. App. 495.

40. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

41. See 3 C. L. 27.

42. Harrison v. Henderson, 67 Kan. 202, 72 P. 878. Draft of proposed account prepared by expert was examined, emendations made after conference and then approved as correct. Leinbach v. Wolle [Pa.] 61 A. 248. An instrument which is the result of an agreement relating to past transactions, acknowledging an indebtedness and promising to pay it, is, in effect, an account stated, on which an action may be based. Noyes v. Young [Mont.] 79 P. 1063. Instruction correct which stated that where an agent called in his principal for the purpose of settling the account between them, and submitted the account, and they went over it, and the principal agreed that all charges were satisfactory and the account correct, the agent was entitled to recover the balance in his favor shown by the account. Werckmann v. Taylor [Mo. App.] 87 S. W. 44.

Evidence held insufficient to show an account stated. Allen-West Commission Co. v. Hudgins & Bro. [Ark.] 86 S. W. 289.

Definitions: See 99 Am. St. Rep. 288.

43. Bankers' Union v. Favalora [Neb.] 102 N. W. 1013. See, also, "Accord and Satisfaction," ante.

44. Gillett v. Chavez [N. M.] 78 P. 68. Where there is no mutual examination of each other's items, and a mutual agreement as to its correctness, there is no account stated. Charlesworth v. Whitlow, Lake & Co. [Ark.] 85 S. W. 423. To make an account stated, there must be a mutual agreement between the parties and an assent to the account as rendered. Love v. Ramsey [Mich.] 102 N. W. 279. A mere showing that plaintiff, or some one in his behalf, repeatedly asked defendant to pay the

so that at least no more than mere computation remains to ascertain what is due.[45] The admission of correctness must be by the person to whom credit was actually given.[46] An agent specially deputed thereto may orally settle an account despite a stipulation that it should be settled in writing only.[47]

The consideration is the original transaction between the parties.[48]

Assent may be shown by parol agreement or mere acquiescence from which a promise to pay will be implied by law.[49] Retention without objection is assent[50] but mere silence after repudiation is not.[51] Admissions of correctness disputing the rightfulness of charging the alleged debtor rather than another are not an assent.[52] The mere rendering of an account does not make it a stated one.[53] The statement rendered must be made with a view to settling and adjusting the claim.[54]

amount, and that she stated she would do so, is insufficient to show an account stated. Pavero v. Howard, 93 N. Y. S. 1115.

45. It is sufficient to constitute an account stated if the items constituting the account are settled upon so that nothing remains but a mere matter of computation. Wood v. O'Callaghan [Mich.] 104 N. W. 36.

46. Where an account had been stated for sale of fish. After account was stated defendant claimed an offset thereto consisting of two items, which show plaintiff indebted to defendant. Defendant had kept the account rendered, without apparent objection for a month. Held to show a contract with him and not another. Gorman v. McGowan, 44 Or. 597, 76 P. 769.

47. Where contract provided that "settlement of accounts governed by it are to be consummated only by written approval of said party of the first part from its home office," parties may make a valid settlement under such contract, although the settlement is not made or approved in writing, and is executed by an agent, who, however, was sent to make settlement. Dowagiac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717.

48. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129. If any original item had a consideration it suffices. Patillo v. Allen-West Commission Co. [C. C. A.] 131 F. 680.

49. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129. Any contention or dispute as to its correctness, or denial of liability for any reason, or however groundless, negatives the implication of such promise. Columbia River Packing Co. v. Tallant, 132 F. 271. Proof of an acknowledgment by the defendant that a certain sum was due the plaintiff at a certain time in settlement of the account is sufficient. Letters, part of correspondence between the parties, may be introduced, which may rebut by their statements any inference of an account stated which might arise from defendant's silence after receiving the bill. Hoggson & Pettis Mfg. Co. v. Sears [Conn.] 60 A. 133.

50. Patillo v. Allen-West Commission Co. [C. C. A.] 131 F. 680. The rendition of an account and its retention without objection is but a circumstance to be submitted with other facts to determine whether there has been an account stated. Harrison v. Henderson, 67 Kan. 202, 72 P. 878. When an account stated is sent in the customary way, it is presumed, in the absence of evidence to the contrary, that it was duly received. Dick v. Zimmerman, 105 Ill. App. 615.

This applies only to accounts rendered by the creditor to his debtor, as to the correctness of which the latter has knowledge, and has no application to statements of account rendered by one who is bound by contract to account for sums collected in respect to which he has knowledge but the creditor has not. Vanuxem v. New York Life Ins. Co. [C. C. A.] 122 F. 107.

51. As in an action for losses on sale of cotton on margin, where defendant had, in an interview with a representative of the brokers, denied his liability and called the whole transaction a "bucket shop" affair, where he afterwards received a statement and letter to which he made no reply. Jacobs v. Cohn, 91 N. Y. S. 339. As where the occupant of premises denied all liability as tenant, the retention by him of a bill rendered more than three years after the occupancy is too strained to constitute an account stated. Benedict v. Jennings, 93 N. Y. S. 464. Where liability had been long and persistently denied on the ground that the indebtedness, whatever it was, had been satisfied by subsequent transfer of property, the failure of the person charged to object to the correctness of a statement of account sent him, or to make any reply, does not imply a promise to pay or convert the account into an account stated. Columbia River Packing Co. v. Tallant, 133 F. 990.

52. Where debtor objected, when account was rendered, that the account should be charged to a corporation of which he was manager, instead of to him individually, the creditor cannot claim an account stated on the ground that the debtor did not object to the amount. Love v. Ramsey [Mich.] 102 N. W. 279. Books of account showing goods originally charged to defendant are admissible, as to who was the debtor where there was testimony that defendant saw the entries and made no objection. Upon trial defendant conceded that the amount and price of goods were correct, and that they were delivered; the sole question being to whom was credit given. Id.

53. Gillett v. Chavez [N. M.] 78 P. 68.

54. The mere furnishing by one party to another of a statement of account will not raise the implication of an account stated, though such statement be retained without

An open current account may embrace diverse kinds of transactions and items.[55]

§ 2. *Binding effect, rights and liabilities.*[56]—*An account stated,* in the absence of fraud, error or mistake in its execution, is conclusive between the parties[57] as to all matters adjusted by it,[58] except as they stand in a different right or capacity from that wherein they accounted.[59] It is not an estoppel under all circumstances.[60] An item omitted by mistake, accident or fraud from a settled account may be recovered in an action of assumpsit,[61] but the burden of proving it is on him who claims it.[62] Account stated becomes a new obligation and takes the place of the prior account,[63] and bears interest from its date.[64] Where the amount is definitely ascertained by stating an account, the law implies a promise to pay.[65] The statute of limitation commences to run against an account stated from the time of its statement.[66] Where there was no assent in writing to the account and it is not an open, mutual, running account, limitations can be pleaded to statute-barred items of an account stated.[67] An account stated may be waived, and action brought and defended upon the original account.[68]

An account rendered may amount to admission,[69] but where items of an account have been incurred under different contracts at different times, separate actions may be maintained for the amount due under each single contract.[70]

objection. Harrison v. Henderson, 67 Kan. 202, 72 P. 878. An account between a Roman Catholic bishop and an employe made when there was a succession in the diocese and intended as final settlement was an account stated, though they had previously accounted from time to time, carrying one forward into the other as a mere starting point. De La Cuesta v. Montgomery, 144 Cal. 115, 77 P. 887.

55. Board, washing, service, nursing admittedly rendered during the time charged, running over five years, and an item for money loaned within that period, held all parts of a continuous open current account. Miller v. Armstrong, 123 Iowa, 86, 98 N. W. 561.

56. See 3 C. L. 29.

57. Noyes v. Young [Mont.] 79 P. 1063.

58. Where a statement of account is presented containing the rate of interest on overdue principal, parties will be bound by such rate of interest as where two years after certain mortgages matured, the mortgagee's agent furnished defendant a statement of account, in which interest on overdue principal was computed at 7 per cent per annum. Barnard v. Paterson [Mich.] 100 N. W. 893.

59. An account concerning the business of a firm held not to constitute an account stated as between the senior and junior member. Gillett v. Chavez [N. M.] 78 P. 68.

60. Gillett v. Chavez [N. M.] 78 P. 68. Is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Id. Where an account has been stated between two parties, the presumption is that the stated account is correct, and, when suit is instituted on it, the burden is on the party denying the account to show its inaccuracy, or that it was stated through fraud or mistake. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013.

61, 62. Harman v. Maddy Bros. [W. Va.] 49 S. E. 1009.

63. Harrison v. Henderson, 67 Kan. 202, 72 P. 878; Mincer v. Green, 94 N. Y. S. 15; Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129. An action on a stated account is based on a new promise to pay into which all prior transactions are merged. Columbia River Packing Co. v. Tallant, 133 F. 990.

64. De La Cuesta v. Montgomery, 144 Cal. 115, 77 P. 887.

65. This is not qualified or rendered conditional by a promise on the part of the debtor to pay "when able." Mattingly v. Shortell [Ky.] 85 S. W. 215.

66. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129. See, also, Limitation of Actions, 4 C. L. 445.

67. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129. In an action on an account stated the plea that all the items in the account are barred by limitation is insufficient as a plea of limitation to individual items of the account against which the statute had run when the account was stated. Id.

68. Harrison v. Henderson, 67 Kan. 202, 72 P. 878. Action brought against an attorney where each item was gone into without objection, although defendant claimed an account had been stated, but defended on the reasonableness of charges made. Id.

69. A statement of account in which a purchaser lists articles at what seller claims to be the agreed price is, in the absence of mistake, conclusive evidence that the prices had been agreed upon. Ketchum v. Stetson & Post Mill Co., 33 Wash. 92, 73 P. 1127.

70. Rendering a statement to defendant for the entire amount due under several contracts does not prevent plaintiff from suing on each contract separately, defendant not having accepted, but objected to the account rendered. Copland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501.

A mutual account carries simple interest on annual balances.[71]

§ 3. *Remedies on account stated.*[72]—Where the common law remains, assumpsit lies.[73] In Connecticut what are denominated the "common counts" are a sufficient complaint, as against a demurrer, after plaintiff has filed a proper bill of particulars, if any count is a general statement of the cause of action.[74] Accordingly a complaint was sustained because the cause of action was thus pleaded, regardless of the propriety of a count on account stated added by amendment.[75] It is discretionary to allow an amendment bringing in an additional account.[76] Any counterclaim or defense is bad which in effect falsifies an item contained in the account as stated.[77] If plaintiff tenders unnecessary issues, defendant may answer them.[78] An account stated must be proved as alleged.[79] It is for the jury to say whether particular items had a basis in fact.[80] The verdict of the jury is erroneous on its face where it finds a disputed item due and ignores the only other one, admittedly due.[81]

§ 4. *Remedies on open accounts.*[82]—Most frequently the action as actually brought is grounded on the contract or contracts out of which the account grew.[83] In that case it is not an action on the account.

The action on account is not one on a "contract" within code provisions for suit where performance was to have been.[84]

The assignment or copy which an assignee must file may be written on the bill of items.[85] The items must be clearly stated,[86] but need not be copied in the body of the declaration.[87] One item insufficiently stated among many well stated does not open the petition to general demurrer.[88] Vagueness of items cannot be first challenged at the trial;[89] strict proof according to books of account will be refused if there was no notice to produce them.[90]

71. Holt v. Howard [Vt.] 58 A. 797.

72. See 3 C. L. 29.

73. See Assumpsit, 3 C. L. 348.

74. Gen. St. 1902, § 627. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133.

75. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133.

76. Harrison v. Henderson, 67 Kan. 202, 72 P. 878.

77. Defendant claimed overpayment in one credit and demanded judgment therefor under a counter claim. Aultman, Miller & Co. v. Connors [Wis.] 99 N. W. 904.

78. Where action was instituted by plaintiff upon account rendered and stated for goods, wares, etc., and another paragraph charges that such property was obtained under false pretenses, it is error not to allow evidence of such false pretense, even though account is admitted in the answer. Jewett Bros. & Jewett v. Bentson [S. D.] 101 N. W. 715.

79. No recovery can be had on a quantum meruit, unless the pleadings are appropriately amended. Mattingly v. Shortell [Ky.] 85 S. W. 215. In an action upon an account stated, the plaintiff must stand or fall upon his allegation that an account was stated and agreed upon. Failing that, judgment goes against him, for he may not recover by proving the items of the account. Mincer v. Green, 94 N. Y. S. 15. The judgment against him is no bar to action for goods sold. Id.

80. In an action on an account stated, where a charge was made for services in renewing a note under an alleged agreement with plaintiff, whether such agreement was made and whether or not it was renewed by the defendant and whether the commission charged therefor by it was reasonable, were questions of fact for the jury. Treffinger v. Davis Real Estate Co. [Mo. App.] 85 S. W. 139.

81. Peale v. Shore Elec. Co. [N. J. Law] 60 A. 46.

82. See 3 C. L. 31.

83. See Contracts, 3 C. L. 805; Implied Contracts, 3 C. L. 1690; Sales, 4 C. L. 1318.

84. It is suable in defendant's county. Code, § 613. Bond v. Hurd [Mont.] 78 P. 579.

85. Sleeper v. Gagne, 99 Me. 306, 59 A. 472. Rev. St. 1903, c. 84, § 146. It is as well to have the assignment on the account as on a separate paper. Id.

86. Items for contributive shares of taxes paid held good; item for damage by animals held bad. Bick v. Halberstadt [Mo. App.] 85 S. W. 127.

87. Where the bill of items is annexed it has the same effect as if copied in body of the declaration. Sleeper v. Gagne, 99 Me. 306, 59 A. 472. It is no objection that the creditor's business card is printed on the paper. Id.

88. Bick v. Halberstadt [Mo. App.] 85 S. W. 127.

89. Where, in an action on account, the complaint contained an itemized statement thereof with an affidavit that it was true and correct. Cauthron Lumber Co. v. Hall [Ark.] 88 S. W. 594.

90. Cauthron Lumber Co. v. Hall [Ark.] 88 S. W. 594.

When the account set forth in the complaint is not admitted, the entire business transactions between the parties are open to investigation, within reasonable discretion of the trial court.[91]

In some jurisdictions verification of the account makes prima facie proof if not denied on oath.[92] For this purpose it must be certain,[93] and must bear such internal evidence of authority or knowledge as the law requires.[94] The prima facie case made out by verification is rebutted, if the evidence shows credit to a third person and a transaction by him with defendant.[95] Verifying an account against the agent of an undisclosed principal has no force against the principal.[96]

It is error for court to instruct the jury in an action upon an open account that the plaintiff might recover such sum as the services rendered were reasonably worth.[97] The pleading alleging an open account, no recovery can be had on an account stated.[98] Where a plea was not sworn but might be amended by verifying, the entry of judgment on the pleadings was error.[99] If the account be long and the answer disputes it, the case may be transferred to the equity docket.[100]

In actions upon book accounts in Illinois commenced before justices of the peace, there is no appointment of auditors, but the justice examines parties under oath. Where appeal is taken from judgment of justice, the trial is *de novo*.[101]

ACCRETION; ACCUMULATIONS, see latest topical index.

ACKNOWLEDGMENTS.

§ 1. *Nature, office, and necessity.*[1]—As a general rule, acknowledgment is necessary to entitle an instrument to registration,[2] and if the acknowledgment is void, the registration of the instrument is also void.[3] In Florida, by statute, deeds executed outside the state in order to be entitled to record within the state must

91. Miller v. Carnes [Minn.] 103 N. W. 877. A denial of certain purchases itemized held to admit proof that they were paid by money advanced. Manion v. Manion [Ky.] 85 S. W. 197.

92. In an action upon an open account, proved by the affidavit of plaintiff, it was error to allow defendant to introduce evidence in support of an unsworn plea over objection of plaintiff. Stafford v. Wilson [Ga.] 49 S. E. 800.

93. A verified account, attached as an exhibit to the petition, is properly excluded from evidence where it does not indicate the items thereof, nor their nature, so that it cannot be told therefrom whether it refers to matters that may be proved by a sworn account under the statute or not. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 88 S. W. 449.

94. An affidavit served with the summons to the effect that defendants were justly indebted to the plaintiffs in a certain sum as a balance due for goods sold and delivered was admissible, though it did not state that affiant was agent, attorney, or bookkeeper for plaintiffs. Hirsh v. Fisher [Mich.] 101 N. W. 48.

95. Plaintiff's evidence held to have rebutted it. Kennedy v. Price [N. C.] 50 S. E. 566.

96. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 88 S. W. 449.

97. Miller v. Armstrong, 123 Iowa, 86, 98 N. W. 561.

98. Allen-West Commission Co. v. Hudgins & Bro. [Ark.] 86 S. W. 289.

99. Stafford v. Wilson [Ga.] 49 S. E. 800.

100. Action on an account for money advanced and paid out and services rendered, embracing about 500 items, in which defendant's answer denied he had ever received the benefit of part of the items and alleged that plaintiff had, while employed by defendant as manager, neglected defendant's business, etc. Manion v. Manion [Ky.] 85 S. W. 197.

101. Dickinson v. Morgenstern, 111 Ill. App. 543.

1. See 3 C. L. 31.

2. A tax deed is not entitled to registration unless acknowledged or proven. State v. Harman [W. Va.] 50 S. E. 828.

3. Acknowledgment of deed taken by the grantee. Lance v. Tainter [N. C.] 49 S. E. 211.

be acknowledged before an officer having an official seal.[4] A deed by a married woman and her husband must be acknowledged by her on a privy examination,[5] but a contract for the sale of land need not be,[6] and in Illinois acknowledgment is not necessary to a release of dower,[7] but a chattel mortgage must be acknowledged before a magistrate of the town where the mortgagor resides.[8]

The record of a deed in the handwriting of a deputy clerk who was grantor therein is evidence of due execution, though the deed was not properly acknowledged for record,[9] and a record void because the deed was not properly acknowledged is nevertheless admissible to establish the existence of the deed when lost.[10] Acknowledgment makes an instrument to which it is attached presumptively genuine.[11]

§ 2. *Officers who may take.*[12]—In some states an officer interested in the transaction cannot take an acknowledgment,[13] but an agent procuring a transaction is not so interested as to disqualify him.[14]

§ 3. *Taking and making acknowledgments.*[15]—The power to take and the formalities to be followed in taking acknowledgments are fixed by the laws of the place where taken.[16] In Montana a notary in taking a married woman's acknowledgment to the declaration of a homestead does not act as a judicial officer,[17] nor exercise a function of the state government.[18] Dereliction of an officer in regard to statutory requirements will not prejudice innocent parties.[19]

Persons who may make.[20]—Any person who may lawfully execute an instrument may acknowledge it.[21] Under a statute providing that instruments executed by a corporation must be acknowledged by the president or secretary, the vice president and assistant secretary cannot acknowledge.[22]

§ 4. *Certificate of acknowledgment.*[23]—The form of certificate is generally prescribed by statute.[24] Such statutes are liberally construed, and a substantial compliance therewith is all that is required,[25] and if the two essential elements

4. A deed acknowledged before a justice in California having no official seal is not entitled to record, and its recordation does not make out a prima facie case of its due execution. Norris v. Billingsley [Fla.] 37 So. 564.

5. Deed not so acknowledged held void. Gaskins v. Allen [N. C.] 49 S. E. 919.

6. A contract for the sale of real estate by a married woman, in which her husband joins, need not be acknowledged. Act April 4, 1901 (P. L. 67). Jenkins v. Pittsburg & C. R. Co., 210 Pa. 134, 59 A. 823.

7. Carling v. Peebles [Ill.] 74 N. E. 87.

8. Farson v. Gilbert, 114 Ill. App. 17.

9. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

10. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188.

11. Bill of sale. Metropolitan Lumber Co. v. McColeman [Mich.] 12 Det. Leg. N. 172, 103 N. W. 809.

12. See 3 C. L. 32.

13. Deed of trust acknowledged before the grantee named therein is void. Lance v. Tainter [N. C.] 49 S. E. 211.

14. Agent making a conditional sale. National Cash Register Co. v. Lesko [Conn.] 58 A. 967. An agent who negotiates a loan may take an acknowledgment to a mortgage executed to secure his principal. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382.

15. See 3 C. L. 33.

16. Werner v. Marx, 113 La. 1002, 37 So. 905.

17. Under Civ. Code, §§ 1606, 1609, 1611, 1700. Sackett v. McCaffrey [C. C. A.] 131 F. 219.

18. Sackett v. McCaffrey [C. C. A.] 131 F. 219.

19. Failure of the officer to observe the statutory requirements when taking the acknowledgment of a married woman to the deed of a homestead does not affect the grantee's title if he does not know of such dereliction and the certificate is in due form. Johnson v. Callaway [Tex. Civ. App.] 87 S. W. 178.

20. See 1 C. L. 19.

21. National Cash Register Co. v. Lesko [Conn.] 58 A. 967.

22. Erickson v. Conniff [S. D.] 101 N. W. 1104.

23. See 3 C. L. 33.

24. Under St. Mass. 1894, p. 243, c. 253, prescribing a form of certificate and providing that instruments might be acknowledged in any manner theretofore lawfully used, an acknowledgment in the form sanctioned by Mass. St. 1882, c. 120, is proper. Costello v. Graham [Ariz.] 80 P. 336.

25. Larson v. Elsner, 93 Minn. 303, 101 N. W. 307. Certificate of acknowledgment to an instrument executed by the president of a corporation held a sufficient compliance with the form prescribed by Rev. Civ. Code, § 974, though it was not certified that

to a valid certificate, the identity of the party executing the instrument, and his acknowledgment or admission that he did execute it, are apparent, it is sufficient.[26] A mere clerical error,[27] as a failure to fill in blanks,[28] will not invalidate it, nor will the fact that surplusage is appended to the signature of the officer taking;[29] but there must be a substantial compliance,[30] though a material defect may be cured by conduct of the party making,[31] or by a subsequent acknowledgment in due form.[32] A certificate of an acknowledgment by a trustee need not certify that he is known to be such trustee,[33] and under a statute providing that a notary of one county may take acknowledgments in another, a certificate of an acknowledgment taken in one county by a notary of another is not objectionable because not showing that he was notary of such other county in that state.[34]

§ 5. *Authentication of officers' authority.*[35]

§ 6. *Operation and effect.*[36]—The certificate of acknowledgment raises a

the person making the acknowledgment was the president of the corporation. State v. Coughran [S. D.] 103 N. W. 31. Certificate of acknowledgment of a married woman stating that she, on a "separate examination, apart from her husband," etc., acknowledged, sufficiently shows compliance with Laws 1865-66, p. 95, § 521, providing that such an acknowledgment shall be on a "private" examination. Timber v. Desparois [S. D.] 101 N. W. 879. Letters "N. P." appended to the signature of the person taking gives official character to the certificate and it is not vitiated by the omission from its body of the words "notary public." Leech v. Karthaus [Ala.] 37 So. 696.

26. Larson v. Elsner, 93 Minn. 303, 101 N. W. 307.

27. Omission of name of person making held not to invalidate it. Larson v. Elsner, 93 Minn. 303, 101 N. W. 307.

28. In an acknowledgment by husband and wife, the blanks before and after "he" were not filled in so as to make "they." Trerise v. Bottego [Mont.] 79 P. 1057.

29. The fact that a justice signs a certificate of acknowledgment as "justice and alderman" does not vitiate the certificate; the latter designation will be regarded as surplusage. Wilson v. Braden [W. Va.] 49 S. E. 409.

30. A statute providing that in a certificate of acknowledgment executed by a corporation the officer taking must certify that the person making is the president or secretary, is not complied with by a certificate reciting that they are known to be the vice-president and assistant secretary. Erickson v. Conniff [S. D.] 101 N. W. 1104. In Texas a certificate to a deed executed by a married woman and her husband which does not show a privy examination of the wife or recite that the instrument was explained to her and that she stated she did not wish to retract it is insufficient. Estes v. Turner, 30 Tex. Civ. App. 365, 70 S. W. 1007.

31. Consent to the recordation of the instrument is equivalent to a statement that she did not wish to retract it. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428.

32. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428.

33. A certificate of acknowledgment to a deed executed by a trustee that the grantor was known "to be the person described in and who executed the annexed instrument" is sufficient. Need not be certified that he is known to be such officer. Thomas v. Wilcox [S. D.] 101 N. W. 1072.

34. Lamb v. Lamb [Mich.] 102 N. W. 645.

35. See 3 C. L. 34. Under Rev. St. 1876, § 1436, where an official in Germany certifies to the signatures to a power of attorney, and the American vice-consul certifies to the signature and seal of that officer and to his power to make the acknowledgment, the signatures are proven. Werner v. Marx, 113 La. 1002, 37 So. 905.

36. See 3 C. L. 34.

NOTE. Conclusiveness of certificate: The certificate is to be construed with reference to the instrument to which it is appended, consequently omissions or errors therein, not pertaining to the fact of acknowledgment itself, may usually be corrected by reference to the language of the conveyance. Carpenter v. Dexter, 8 Wall. [U. S.] 513, 19 Law. Ed. 426; Owen v. Baker, 101 Mo. 407, 20 Am. St. Rep. 618; Summer v. Mitchell, 29 Fla. 179, 30 Am. St. Rep. 106; Kelly v. Rosenstock, 45 Md. 389; Milner v. Nelson, 86 Iowa, 452, 41 Am. St. Rep. 506; Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58. Oral evidence, however, is not admissible to prove that an essential fact was by mistake omitted from the certificate. Elliott v. Peirsol, 1 Pet. [U. S.] 328, 7 Law. Ed. 164; Ennor v. Thompson, 46 Ill. 214; Cox v. Holcomb, 87 Ala. 598; Willis v. Gattman, 53 Miss. 721; Wynne v. Small, 102 N. C. 133; Harty v. Ladd, 3 Or. 353. In some states, by statute, the certificate is only prima facie evidence of the facts recited, and its falsity may be shown by extraneous evidence. Tuten v. Gazen, 18 Fla. 751; Romer v. Conter, 53 Minn. 171; Moore v. Hopkins, 83 Cal. 270, 17 Am. St. Rep. 248; Pierce v. Georger, 103 Mo. 540. But in the absence of statutory provision to the contrary, it is usually regarded as conclusive in regard to the matters as to which the officer is required to certify (Pickens v. Knisely, 29 W. Va. 1, 6 Am. St. Rep. 622; Petty v. Grisard, 45 Ark. 117; Graham v. Anderson, 42 Ill. 515, 92 Am. Dec. 89; Pereau v. Frederick, 17 Neb. 117; Heilman v. Kroh, 155 Pa. 1; Banning v. Banning, 80 Cal. 271, 13 Am. St. Rep. 156; Johnstone v. Wallace, 53 Miss. 333, 24 Am. Rep. 699; Mutual Life Ins. Co. v. Corey, 135 N. Y. 326), though the fact that there was no acknowledgment may be shown in contra-

presumption of due execution of the instrument to which it is attached,[37] and is generally held conclusive as to the facts required to be certified to therein,[38] especially as against strangers to the transaction.[39] It is not subject to collateral attack,[40] and can be impeached only by satisfactory evidence,[41] so clear and convincing as to amount to a moral certainty.[42] In Wisconsin the officer taking may testify as to the falsity of his own certificate,[43] but in the absence of a satisfactory explanation that the act was a mistake, such testimony is entitled to but little weight.[44] Evidence of the character of the officer who took an acknowledgment is inadmissible on an issue as to the genuineness of the instrument acknowledged.[45]

An acknowledgment of an authorized signature validates it.[46]

§ 7. *Defects and invalidities.*[47]—As between the parties to an instrument, a defective acknowledgment may be cured by legislation.[48] Such legislation has a retroactive effect,[49] and is not an exercise of judicial power by the legislature,[50] but cannot operate to defeat vested rights.[51]

ACTIONS.

Only general questions relating strictly to Actions are treated. Causes of Action and Defenses and Forms of Action are distinct matters which are treated elsewhere.[52] In order to have an action there must be parties opposed or one party opposing all others in respect to a res in court.[53] A proceeding to obtain a license has been held to come within the purview of the term.[54] Actions are

diction of the certificate (Meyer v. Gossett, 38 Ark. 377; Williamson v. Carskadden, 36 Ohio St. 664; Smith v. Ward, 2 Root [Conn.] 374; Morris v. Sargent, 18 Iowa, 90; O'Neill v. Webster, 150 Mass. 572; Wheelock v. Cavitt, 91 Tex. 679, 66 Am. St. Rep. 920), and as between the parties, oral evidence is always admissible to show that the acknowledgment was obtained by fraud or imposition (Grider v. American Freehold Land Mortg. Co., 99 Ala. 281, 42 Am. St. Rep. 58; Allen v. Lenoir, 53 Miss. 321; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Cover v. Manaway, 115 Pa. 338, 2 Am. St. Rep. 552); but this cannot be shown as against a person innocent of the fraud (Ladew v. Paine, 82 Ill. 221; Johnstone v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Louden v. Blythe, 27 Pa. 22; Pierce v. Fort, 60 Tex. 464). See Tiffany on Real Prop. p. 925, § 405.

37. Evidence held insufficient to overcome this presumption. Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

38. Where a married woman admits on privy examination that her singature to a mortgage was her voluntary act, she could not thereafter impeach the certificate on the ground that her signature was procured by duress. Hall v. Hall, 26 Ky. L. R. 553, 82 S. W. 269.

39. St. 1903, § 507 and § 3760, declaring that except in cases of fraud or mistake it shall not be questioned except in a direct proceeding against the officer and his sureties. Godsey v. Virginia Iron, Coal & Coke Co., 26 Ky. L. R. 657, 82 S. W. 386.

40. Direct provision of Laws 1899, p. 383, c. 389. Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735.

41. A certificate of a married woman to a mortgage of a homestead. McGuire v. Wilson [Neb.] 99 N. W. 244.

42. Not by evidence of a doubtful character nor by a bare preponderance. Bennett v. Edgar, 93 N. Y. S. 203. Evidence held insufficient to prove a forgery. Id.

43, 44. Winn v. Itzel [Wis.] 103 N. W. 220.

45. West v. Houston Oil Co. [C. C. A.] 136 F. 343.

46. Godsey v. Virginia Iron, Coal & Coke Co., 26 Ky. L. R. 657, 82 S. W. 386.

An officer making a false certificate is personally liable for injury resulting. Innocent purchaser relying on certificate of a forged signature. Samuels v. Brand, 26 Ky. L. R. 943, 82 S. W. 977.

47. See 3 C. L. 34.

48. Maxwell v. Lincoln & Fifth Ward Bldg. & Loan Ass'n [Ill.] 74 N. E. 804. Following cases cited in 3 C. L. 34, n. 32. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.

49, 50. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.

51. Cannot affect priority of liens. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.

52. See those titles.

53. Suit to quiet title not without jurisdiction, though party defendant was dead when suit begun. McClymond v. Noble, 84 Minn. 329, 87 N. W. 838. The common-law rule that a suit begun in the name of a dead man is a nullity applies to cases under the Indian depredation act. Gallegos v. Navajos, 39 Ct. Cl. 86.

54. A proceeding to obtain a license to sell intoxicating liquors, under the statute, is a judicial proceeding in the nature of a

civil,[55] criminal,[56] or quasi-criminal[57] in nature. Civil actions are either equitable or legal according to whether the case is cognizable at law or equity.[58]

The manner of commencing[59] an action varies in the different states; in some it is commenced by the issuance of a notice[60] or summons;[61] in others by the service thereof.[62]

Termination.[63]

The independent and separate existence of an action may be terminated by consolidation.[64]

Act of God; Additional Allowances; Ademption of Legacies, see latest topical index.

ADJOINING OWNERS.[65]

The owner of land may put it to any use which is reasonable, considering his interest and that of other persons affected by it.[66] The test to determine whether a particular use is reasonable is to inquire whether it is such a use as the ordinary man would make of his premises;[67] but no one has a right by an artificial structure of any kind upon his own land to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjacent proprietor,[68] nor has one a right to heap up loose earth upon his own land in such manner that if proper precautions are not taken to confine it, it must necessarily escape upon the land of his neighbor.[69] One who in tearing down his building injures the building of his neighbor is liable to him in damages.[70]

civil action. Bryan v. De Moss [Ind. App.] 73 N. E. 156.

55. Prosecutions for the violation of municipal ordinances are civil suits. Fortune v. Wilburton [Ind. T.] 82 S. W. 738; Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42. But see Noland v. People [Colo.] 80 P. 887, where the action is spoken of as being quasi-criminal. See, also, Appeal and Review, 3 C. L. 167; Indictment and prosecution, 4 C. L. 1; and also topics where it is necessary to determine the civil or criminal character of the suit in order to determine matters of procedure; for instance, Bastards, 3 C. L. 496; Contempt, 3 C. L. 795; Habeas Corpus, 3 C. L. 1576; Jury, 4 C. L. 358, etc.

56. Where the punishment prescribed for violating an ordinance is imprisonment to be imposed by a justice of the peace, the suit is in the nature of a criminal proceeding. Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42. A proceeding by a bankrupt's trustee to recover assets, alleged to belong to the bankrupt, from a third person, is not criminal in its nature because the person proceeded against may be punished for contempt if he fails to comply with the court's order. In re Alphin & Lake Cotton Co., 134 F. 477.

57. An action brought by a city for the breach of an ordinance forbidding the erection of wooden buildings within fire limits is quasi-criminal. Noland v. People [Colo.] 80 P. 887. But see ante, Fortune v. Wilburton [Ind. T.] 82 S. W. 738, and Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42, where such actions are spoken of as civil.

58. See Equity, 3 C. L. 1210. As the distinction is now mainly important in determining matters of procedure, the question is treated under the various practice titles, such as Jury, 4 C. L. 358; Trial, 2 C. L. 1907, etc.

59. See 3 C. L. 36.

60. Under the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) an action may be instituted by such notice in a Federal court in Virginia in accordance with the state practice. Leas & McVitty v. Merriman, 132 F. 510. See, also, the topics enumerated under the head Federal Procedure in the Topical Index.

61. Under Code 1899, c. 124, § 5. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434. Under Ky. St. 1903, § 2524, and Code Civ. Prac. § 39, an action is commenced when the petition is filed and the summons issued, though the petition is not verified until later. City of Dayton v. Hirth [Ky.] 87 S. W. 1136. An action to contest a will, when dismissed for want of prosecution and recommenced, will be deemed to have been begun on the date of service of summons issued against the first co-defendant served. Hunt v. Hunt, 2 Ohio N. P. (N. S.) 577.

62. For the purposes of the statute of limitations, Code Civ. Proc. § 398. Metz v. Metz, 90 N. Y. S. 340.

63. See 3 C. L. 36.

64. Allen v. McRae [Wis.] 100 N. W. 12. For the law relative to the consolidation of actions, see Trial, 4 C. L. 1708.

65. See 3 C. L. 36.

66. Where water collected on the roof of one owner and flowed onto the premises of another, undermining the foundation of his buildings, the court properly refused to instruct that ordinary care was not the measure of his duty. Hamlin v. Blankenburg [N. H.] 60 A. 1010.

67. Hamlin v. Blankenburg [N. H.] 60 A. 1010.

68. Huber v. Stark [Wis.] 102 N. W. 12.

69. Where one filled in a ravine, the mouth of which opened on a creek, the bed of which contained valuable deposits of

Notwithstanding a railroad may have been built and is operated by authority of law, an abutting owner may recover for an injury to his property without proof of negligence.[71]

An encroachment by one onto the domain of another, as by projecting the eaves of his building over the boundary, is remediable in equity.[72] One will not be compelled to abate a nuisance in a manner that will cause irreparable damage to his property, even though complete relief cannot be had in any other way.[73] The continuance of the blowing and drifting of the seeds of noxious weeds from the land of one owner to that of an adjoiner will not be enjoined,[74] and if one can recover damages because of such wrong he cannot recover the expense necessary to remove the weeds from his land until the amount is definitely ascertained.[75]

Lateral support.[76]—The right of lateral support is the right to have the land in its natural state supported by the adjacent land. It is an incident to the land, a right of property necessarily and naturally attached to the soil.[77] A landowner does not suffer damages recoverable at law for injury to lateral support of his property until it is so much disturbed that it slides or falls away.[78] One making an excavation on his own land, deeper than the foundation of a building on an adjoining lot, must notify the adjoining owner of the proposed excavation and afford him a reasonable opportunity to protect his property.[79] This rule is applicable to municipal corporations and their contractors,[80] and failure to give such notice is actionable negligence.[81]

Common ways and appurtenances.[82]—A right of way belonging to a railroad company is private property as to an adjoining owner and the latter has no easement thereon of light, air and view.[83] Where one has acquiesced in an interference with his light and air rights for a long period, equity will not grant relief if it will cause irreparable injury to his neighbor.[84]

Measure of damages.[85]—Where an excavation is made in a manner free from negligence, the measure of damages is the injury to the land without regard to buildings or structures thereon,[86] and for injuring an adjoining owner's build-

sand and was owned by his neighbor, the loose earth was washed by the rains onto the sand beds. American Security & Trust Co. v. Lyon, 21 App. D. C. 122.

70. McClelland v. Baum, 91 N. Y. S. 719.

71. Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75.

72. May be enjoined as a continuing trespass. Huber v. Stark [Wis.] 102 N. W. 12.

73. Will not be compelled to remove a passageway over an alley between his hotel kitchen and dining room which tends to retain in the alley odors from the kitchen which go into an adjoining owner's rooms when the wind is in a certain direction. Washington Lodge, No. 54, I. O. O. F., v. Frelinghuysen [Mich.] 101 N. W. 569.

74, 75. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851.

76. See 3 C. L. 37.

Note: Liability for removal of lateral support by dredging the bed of navigable bodies of water, see White v. Nassau Trust Co., 168 N. Y. 149, 64 L. R. A. 275, and note.

77. Jones v. Greenfield, 25 Pa. Super. Ct. 315. The owner of land has an absolute right to the lateral support of his ground in its natural state. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613.

78. Kansas City & N. W. R. Co. v. Schwake [Kan.] 78 P. 431.

Note: It was contended that the original act of excavating which would cause the subsidence of the land was itself the infringement upon the right of lateral support. Though the right of lateral support is a natural right (Schultz v. Bower, 57 Minn. 493, 47 Am. St. Rep. 630), until a man's ordinary enjoyment of his land is interfered with, this right is not infringed (Backhouse v. Bonomi, 9 H. L. Cas. 503). The actionable wrong consists in allowing the land of the adjoining owner to fall, not in excavating on one's own land. Williams v. Kenney, 14 Barb. [N. Y.] 629.—5 Columbia L. R. 167.

79, 80. Gerst v. St. Louis [Mo.] 84 S. W. 34.

81. The publication of ordinances relative to sewers held not to be notice to an owner that an excavation dangerous to his property was about to be made. Gerst v. St. Louis [Mo.] 84 S. W. 34.

82. See 3 C. L. 39.

83. Osburn v. Chicago, 105 Ill. App. 217.

84. Washington Lodge, No. 54, I. O. O. F. v. Frelinghuysen [Mich.] 101 N. W. 569.

85. See 3 C. L. 40.

86. Jones v. Greenfield, 25 Pa. Super. Ct.

ing by making an excavation, it is the permanent depreciation in the value of the building,[87] less the amount such owner would have been obliged to expend to prevent injury to his building had he received timely notice of the proposed excavation.[88] Exemplary damages may be recovered for a malicious interference with property rights.[89]

ADJOURNMENTS; ADMINISTRATION, see latest topical index.

ADMIRALTY.

This topic includes only admiralty jurisdiction and practice. The law of maritime traffic and navigation is treated elsewhere.[90]

§ 1. *Jurisdiction and courts.*[91]—The statutes of the United States giving the Federal courts exclusive jurisdiction in admiralty cases expressly save to suitors in all cases the right of a common-law remedy where the common law is competent to give it.[92] By admiralty cases is meant suits in rem against a vessel.[93] Hence a state court is not deprived of jurisdiction of a suit against a carrier for damages to and loss of goods, merely because the answer alleges that the carriage was by water and that the loss was due to dangers of navigation, from liability for which defendant was exempted by the bill of lading and a general average bond.[94]

A citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of his right to have such suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the constitution.[95] Hence the treaty between Germany and the United States, giving the consular officers of each country exclusive power to determine differences between the captains and crews of vessels of their own nation, and prohibiting the courts of the other country from interfering therein, does not deprive the courts of the United States of jurisdiction to determine the rights of an American seaman who enters and leaves the service of a German vessel within this country.[96] A seaman claiming wages for services is not to be deemed a member of the crew of a ship within such treaty, if he was never legally bound to serve as such for a specified voyage or for a definite period of time.[97]

A court of admiralty may, in its discretion, take jurisdiction of a suit by sea-

315. A map showing the effect of the removal of lateral support held admissible on the question of damages. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613.

87, 88. Gerst v. St. Louis [Mo.] 84 S. W. 34.

89. Interference with a servitude of view and drip. Bernos v. Canepa [La.] 38 So. 438.

90. See Shipping and Water Traffic, 4 C. L. 1450.

91. See 3 C. L. 40.

92. Rev. St. § 563, subd. 8, Comp. St. 1901, p. 457. John Meunier Gun Co. v. Lehigh Valley Transp. Co. [Wis.] 101 N. W. 386.

93. John Meunier Gun Co. v. Lehigh Valley Transp. Co. [Wis.] 101 N. W. 386.

94. May take jurisdiction of and determine questions of general average. Pleadings held not to show case within exclusive jurisdiction of Federal courts. John Meunier Gun Co. v. Lehigh Valley Transp. Co. [Wis.] 101 N. W. 386.

95. The Neck 138 F. 144.

96. Art. 13, Treaty of Dec. 11, 1871, 17 Stat. 928. Suit to recover wages. The Neck, 138 F. 144.

97. Because hired in violation of Act Dec. 21, 1898, c. 28, 30 Stat. 763, Comp. St. 1901, p. 3079, prohibiting payment of wages to seamen in advance, and makes contract invalid in case of its violation. The Neck, 138 F. 144. Treaty above referred to does not exempt German vessels from operation of this act. Id.

men to recover wages from a foreign ship,[98] and will do so where libelants are Americans, and show a strong case for immediate relief,[99] or where they invoke provisions of the statutes of the United States.[1]

Maritime contracts.[2]—In order that a court of admiralty may have jurisdiction of a suit on a contract, it must be maritime in character;[3] but if maritime in character, the court will inquire into all its breaches and all the damages suffered thereby, however peculiar they may be and whatever issue they may involve.[4]

The lien of an oral pledge of freight is properly enforced by libel in admiralty.[5] The Federal statutes relating to the recording of mortgages do not make them, when so recorded, maritime liens enforceable in the first instance in a court of admiralty.[6] Where a court of admiralty has a fund arising from the sale of a vessel in its registry for distribution, and the maritime liens have been paid, the holder of a mortgage which has been recorded in accordance with the Federal statute may prove his claim against the fund, and is entitled to payment therefrom in the order of his priority.[7]

Admiralty courts have exclusive jurisdiction of salvage cases,[8] and of suits to enforce liens given by state statutes, to be enforced by a proceeding in rem, for repairs or supplies furnished to a vessel in her home port.[9]

State courts have jurisdiction of actions on maritime contracts to be performed on the high seas.[10]

Maritime torts.[11]—Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[12] A proceeding in rem by the United States for the purpose of recovering a penalty for violation of the inspection laws is one in admiralty.[13]

98, 99, 1. The Alnwick, 132 F. 117.

2. See 3 C. L. 41.

3. Traffic agreement between railroad company and owner of steamships held not maritime. Graham v. Oregon R. & Nav. Co. 134 F. 454. A contract on the part of a railroad company to furnish cargoes to the libelant and on the part of the libelant to furnish steamships to carry the cargoes so furnished is maritime. Graham v. Oregon R. & Nav. Co., 135 F. 608.

For an exhaustive note as to admiralty jurisdiction in matters of contract, see 66 L. R. A. 193.

4. Immaterial that some provisions are not maritime. Graham v. Oregon R. & Nav. Co., 134 F. 454.

5. Bank of British North America v. Freights, etc., of the Ansgar, 127 F. 859.

6. Rev. St. §§ 4192, 4193, Comp. St. 1901, p. 2837. The Gordon Campbell, 131 F. 963.

7. The Gordon Campbell, 131 F. 963. On hearing of suit in state court to set aside mortgage on vessel, bill was dismissed, and temporary injunction restraining its foreclosure was dissolved. Mortgagee then assigned mortgage. Subsequently appeal was allowed and injunction reinstated on complainant giving bond. While appeal was pending vessel was libeled for seamen's wages in court of admiralty and sold at instance of owner, all liens being transferred to proceeds. Owner then assigned his interest to third person. Held, that pendency of suit in state court did not preclude assignee of mortgage from proving same against fund in admiralty court, or prevent that court from passing on the claim and distributing the fund. Id.

8. Captain of revenue cutter at Nome, when no court there, had no authority to determine rights of salvors, unless as arbitrator by agreement of the parties. Standard Marine Ins. Co. v. Nome Beach L. & T. Co. [C. C. A.] 133 F. 636.

9. Is in nature of maritime lien. Fredericks v. James Rees & Sons Co. [C. C. A.] 135 F. 730.

10. Gill v. North American Transportation & Trading Co. [Wash.] 79 P. 778.

11. See 3 C. L. 41.

12. The San Rafael, 134 F. 749.

NOTE. Admiralty jurisdiction over torts: The supreme court has recognized that when the framers of the constitution provided that the courts of the United States should have jurisdiction in "all cases of admiralty and maritime jurisdiction," they did not necessarily mean that jurisdiction exercised by the English admiralty courts, hampered by the prejudices of common-law judges, but the analogous jurisdiction exercised by the courts of other countries, and more particularly that exercised by the colonial courts. Waring v. Clarke, 5 How. [U. S.] 441, 12 Law. Ed. 226; The Lottawanna, 21 Wall. [U. S.] 558, 22 Law. Ed. 654; Benedict's Admiralty [3d Ed.] §§ 9, 118, 165, 192. Accordingly our courts have refused to limit the jurisdiction of admiralty in cases of contract, as did the English courts, to those made upon the sea and to be performed thereon, but disregarding the test of locality, have assumed jurisdiction over contracts of a mari-

A court of admiralty has jurisdiction of a libel in rem against a vessel for negligently running into and destroying a beacon surrounded by water, though it is built upon piles driven firmly into the bottom.[14] It has jurisdiction to limit liability only in case it could take original cognizance of a suit in rem or in personam to recover the loss or damage upon which the claim is made.[15]

The right to sue in admiralty for wrongful death exists only by virtue of the statutes of the various states,[16] and any defense allowed by such statutes, if successfully maintained, will bar recovery under the libel.[17]

§ 2. *Remedies and remedial rights.*[18]—In the absence of statute, a suit in rem against a ship for personal injuries abates by the death of the libelant.[19] In states where the right of action survives, however, his representative may be substituted and the suit continued in his name.[20] In such case a bond executed to

time nature irrespective of where made or where to be performed. Insurance Co. v. Dunham, 11 Wall. [U. S.] 1, 20 Law. Ed. 90; afg. De Lovio v. Boit, 2 Gall. 397. In matters of tort, however, the locality rule was not called in question, since it was assumed that a tort, unlike the performance of a contract, to be of a maritime nature must be committed upon the sea. The first decision on the question was in 1865, when the supreme court applied the locality test, and held that an injury to an object on the shore caused by a vessel constituted no maritime tort, since the wrong was consummated upon the shore. The Plymouth, 3 Wall. [U. S.] 20, 18 Law. Ed. 125. As a matter of principle it is difficult to see in the case of a contract any more reason than in the case of a tort why the maritime nature of the transaction, rather than the locality test, should determine jurisdiction, whether the tort be to or by a ship. Atlee v. Union Packet Co., 21 Wall. [U. S.] 389, 22 Law. Ed. 619; Philadelphia, etc., R. Co. v. Towboat Co., 23 How. [U. S.] 209, 16 Law. Ed. 433. Though Mr. Justice Story assumed in De Lovio v. Boit, 2 Gall. 397, that the locality rule would still determine the jurisdiction over torts, yet it has been held that admiralty would not take jurisdiction over torts occurring within the locality where the tort was not of a maritime nature, (Campbell v. Hackfeld, 125 F. 696), and if we assume that there may be torts of a maritime nature not happening technically upon the sea (compare Perry v. Haines, 191 U. S. 17, 33, 48 Law. Ed. 73), his argument in that case as to contracts would apply equally well to torts, and no other decisions than the cases following The Plymouth, 3 Wall. [U. S.] 20, 18 Law. Ed. 125, could be found against such a position. A recent case in the supreme court, where a vessel had injured a beacon, a fixture permanently attached to the land, seems to have assimilated torts to contracts and to have made the maritime nature of the offense determine jurisdiction, rather than locality. The Blackheath, 195 U. S. 361, 49 Law. Ed. —. Mr. Justice Holmes sees distinguishing facts, but Mr. Justice Brown gives it this full effect, practically overruling The Plymouth and making the jurisdiction in admiralty in the United States co-extensive with the enlarged statutory jurisdiction of the English admiralty, which extends to "claims for damages by any ship." Admiralty Jurisdiction Act 1861, § 7. If this be the correct interpretation of the decision, the locality rule has been abandoned as to torts and a rule analogous to that adopted in the case of contracts applied. The pure locality test seems to be an arbitrary one, and while the nature of a tort may at times be difficult of determination, there would seem to be no more difficulty in the case of a tort than of a contract. When The Plymouth was decided, admiralty was looked upon as the agency of a centralized government and its jurisdiction regarded with suspicion; otherwise it would seem that the fact that in all the colonial charters as well as in the Virginia Statute of 1660, presumably in the minds of the framers of the constitution, there were words conferring upon the vice-admiralty courts jurisdiction over the "seashore and coasts," might have been used to determine that case in favor of the admiralty jurisdiction, even within the locality test. See Waring v. Clarke, 5 How. [U. S.] 441, 12 Law. Ed. 226. The jurisdiction of our admiralty court is derived from the constitution; it must be determined solely by the courts in construing the constitutional grant, and since the legislature cannot extend that jurisdiction to meet modern necessities (The Lottawanna, 21 Wall. [U. S.] 558, 22 Law. Ed. 654), it is incumbent on the courts to give full effect to the broad terms of the constitutional grant.—5 Columbia L. R. 312.

13. Not a criminal proceeding. The Ben R. Co. [C. C. A.] 134 F. 784.

14. Mere fact that it was not afloat immaterial. United States v. Evans, 25 S. Ct. 46.

15. The San Rafael, 134 F. 749.

16. See Quinette v. Bisso [C. C. A.] 136 F. 825. Court of admiralty has jurisdiction of a suit to recover damages from a vessel at fault for a collision on the high seas for loss of life resulting from the sinking of the other vessel, where a right of recovery for death by wrongful act is given by the statutes of the state to which both vessels belonged. Both part of the territory of such state and subject to its laws. In re Clyde S. S. Co., 134 F. 95.

17. Under La. Civ. Code, art. 2315, contributory negligence is a complete defense. Deceased held not guilty of such negligence. Quinette v. Bisso [C. C. A.] 136 F. 825.

18. See 3 C. L. 42.

19. The City of Belfast, 135 F. 208.

20. May be done under Pa. Act 1851, § 18 (P. L. 674). Suit by stevedore for injuries

relieve the ship will be continued to secure any judgment which such representative may recover.[21]

As a general rule courts of admiralty govern themselves by the analogies of the common-law limitations.[22]

§ 3. *Practice and procedure. A. Pleading, process, etc.*[23]—Corporations have the same right as a natural person to maintain a libel in admiralty, in rem or in personam, and a libel in admiralty will lie against a corporation.[24] The court may properly allow a number of libelants having similar claims to join in and together prosecute an action in rem against the vessel to recover damages alleged to have been sustained by them severally.[25] Courts of admiralty do not encourage litigation by mere volunteers, and therefore one to whom claims for damages have been assigned solely for the purpose of bringing suit thereon has no standing to prosecute them.[26]

In order to obtain leave to maintain a suit in forma pauperis, the Federal statute relating to such suits must be complied with as well as the rules of the admiralty court in that regard.[27]

A citation in a suit in personam must be personally served on the defendant.[28] In case he cannot be found, libelant should proceed by attachment of his property.[29]

It is not error to permit a libel in which a large number of persons join to be signed and verified by their proctor in behalf of those of them who are shown to be outside of the state.[30] On sustaining exceptions to a libel for want of jurisdiction, it is proper to grant leave to amend, if the case is such that facts may be alleged which will bring it within the court's jurisdiction.[31]

A petition to limit liability must state the facts and circumstances by reason of which exemption is claimed, in order to entitle the petitioner to contest the question of fault on the part of the vessel;[32] but a failure to do so cannot be taken advantage of by the adverse parties, where, by stipulation, such proceedings have been consolidated with cross suits between the two vessels, in which the question of liability has been put in issue by the pleadings.[33] In such a proceeding the petition and answer on the one hand and the claims of damages on the other present distinct issues, which are to be separately adjudicated in the order named.[34] The petition for limitation of liability must allege the facts necessary to entitle the

sustained in unloading ship. The City of Belfast, 135 F. 208.

21. The City of Belfast, 135 F. 208.

22. Where nothing exceptional in the case. Donald v. Guy, 135 F. 429. Owner of vessel not debarred by laches from recovering from her pilot the amount of damages paid by her on account of a collision due to pilot's negligence, where suit brought within time allowed by state statute for suing on similar claims. Id.

23. See 3 C. L. 42.

24. Clark & M. Corp. § 261.

25. For failure to keep vessel clean, and to furnish proper food and accommodations. The Oregon [C. C. A.] 133 F. 609.

26. The Trader, 129 F. 462.

27. Under Act July 20, 1892, 27 Stat. 252, 2 Supp. Rev. St. 41, Comp. St. 1901, p. 706, must aver that he is citizen of United States, and make affidavit that he is unable to give security for costs, and that he believes he is entitled to the redress he seeks. Donovan v. Salem & P. Nav. Co., 134 F. 316. Compliance with admiralty rules 4 and 5 of eastern district of Pennsylvania insufficient. Id. When process has issued without required showing, libelant may be allowed to supply the omission under § 2 of the act on a motion to require security being made. Id.

28. Exhibiting original to servant in defendant's family at his residence, and leaving copy with her is insufficient. Walker v. Hughes, 132 F. 885.

29. In accordance with ninth admiralty rule. Walker v. Hughes, 132 F. 885.

30. Practice not one to be commended. The Oregon [C. C. A.] 133 F. 609.

31. If facts exist which show that there is a maritime cause of action. Graham v. Oregon R. & Nav. Co., 134 F. 692.

32. Admiralty rule 56. The Sacramento, 131 F. 373; The Trader, 129 F. 462.

33. The Trader, 129 F. 462.

34, 35. In re Davidson S. S. Co., 133 F. 411.

petitioner, under the statute, to the relief sought.[35] A claimant contesting the right must take issue by answer, which must be full and explicit and distinct to each separate article and allegation as is required in answers to libels.[36] If the answer does not acknowledge the truth of the allegations of the petition, they must be proved.[37] The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for the individual claims sought to be proved,[38] but that issue must also be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit.[39]

Interrogatories[40] may be propounded touching any matter charged in the libel, or any matter of defence set up in the answer.[41] They must be as to material matters,[42] and must be definite.[43] Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial, and are subject to exception.[44]

(§ 3) *B. Evidence, proof, hearing, and decree.*[45]—The proof of the respective parties must conform to the issues tendered by their pleadings.[46] Where a large number of libelants having similar claims are permitted to join in a suit in rem against the vessel for damages for injuries from causes common to all, and which may be proved by the same evidence, it is not essential that each should testify, or that his damage be separately proved.[47]

The court may, when necessary, authorize the employment of a stenographer to take and transcribe the testimony before a commissioner on a reference, and direct that his fees shall be taxed as costs.[48]

In determining the measure of damages in case of death by wrongful act, the Federal courts will be governed by the decisions of the highest court of the state by virtue of whose statutes the suit is brought.[49]

As in the case of other judicial sales, a sale of vessel seized under proceedings in admiralty is not completed until confirmed by the court.[50] A sale not officially confirmed will be set aside and a new sale ordered on an offer of a materially increased bid, notwithstanding the fact that the first purchaser has deposited the amount of his bid in court, and incurred expense on account of his supposed purchase.[51]

36. Admiralty rules 56, 27. Answer held insufficient in certain respects. In re Davidson S. S. Co., 133 F. 411.

37, 38. In re Davidson S. S. Co., 133 F. 411.

39. Claim not stating facts upon which liability is asserted held insufficient. In re Davidson S. S. Co., 133 F. 411.

40. See 3 C. L. 43.

41. Admiralty rule 32, S. D., N. Y. In re Knickerbocker Steamboat Co., 136 F. 956.

42, 43, 44. In re Knickerbocker Steamboat Co., 136 F. 956.

45. See 3 C. L. 43.

46. Barber v. Lockwood, 134 F. 985. Libelants are not entitled to recover on a theory outside of or repugnant to the scope of the libel. Where libel against sanitary district to recover damages to shipping was predicated on the introduction of any current into river which would render navigation more difficult and expensive than it previously was, libelants could not recover on account of the speed of the current on the day when the damages occurred. Corrigan Transit Co. v. Sanitary Dist. [C. C. A.] 137 F. 851. Where sought to hold district under permit by secretary of war authorizing it to introduce current into river, an objection that secretary had no authority to issue permit because statute giving him such power was unconstitutional, held outside the scope of, and repugnant to, the libel. Id.

47. The Oregon [C. C. A.] 133 F. 609.

48. Will do so where parties refuse to stipulate for his employment, and services are necessary if progress is to be made on hearing, as where large number of disputed items of account are involved. Rogers v. Brown, 136 F. 813.

49. Quinette v. Bisso [C. C. A.] 136 F. 825.

50. Purchaser acquires no rights until confirmation. The Sue, 137 F. 133.

51. Order confirming sale entered with memorandum directing clerk to hold decree for five days subject to objection, and if none made, then to enter it of record. New bid before expiration of that time. The Sue, 137 F. 133.

Interest[52] is recoverable as a matter of right on claims arising out of contract,[53] but the allowance of interest by way of damages, as in cases of collision and the like, is in the discretion of the court.[54] This rule does not, however, apply in actions for damages for personal injuries, and interest should never be allowed on the amount awarded in that class of cases.[55]

Costs.[56]—The allowance of costs is discretionary with the court.[57] As a general rule they follow the decree, but the rule may be departed from in cases where circumstances of equity, hardship, oppression, or negligence render it proper to do so.[58] All costs necessarily or properly incurred may be allowed.[59] In the absence of fraud, the right thereto is not barred by reason of the fact that the amount recovered is less than that claimed.[60]

In a proceeding for limitation of liability, where there is an appraisal and a stipulation for value given, the petitioner may deduct from the fund the expenses of administration, not including the costs and expenses of procuring and giving the stipulation, nor the appraisal.[61] He is entitled to but one docket fee.[62] Each person recovering damages is entitled to a separate proctor's fee, payable by the stipulators for costs, and not out of the fund.[63]

Counsel fees may be allowed where there is a fund in court, irrespective of statutory provisions.[64] Proctors representing more than one petition are not entitled to separate docket fees.[65]

A defaulting respondent, who settles the case out of court, is not entitled to have a release, executed by the libelant on such settlement, filed in satisfaction of the judgment against him except on payment of the accrued costs.[66]

§ 4. *Appeals and subsequent proceedings.*[67]—An appeal lies from any final decree in admiralty,[68] and the case is tried de novo.[69] Findings of fact on conflicting evidence will not be disturbed unless clearly against the weight of the

52. See 3 C. L. 44.

53. As on claim for freight. Bethell v. Mellor & Rittenhouse Co., 135 F. 445.

54. Bethell v. Mellor & Rittenhouse Co., 135 F. 445. Whether interest shall be allowed by the court of first instance, or by the appellate court, on account of damage in a collision case. Burrows v. Lownsdale [C. C. A.] 133 F. 250. On adjustment of conflicting claims. The Eliza Lines [C. C. A.] 132 F. 242. The allowance of interest on damages for delay in the transportation of horses depends upon circumstances and rests in the discretion of the court. Libel in personam. La Conner Trading & Transp. Co. v. Widmer [C. C. A.] 136 F. 177.

See, also, The Cumberland, 135 F. 234.

55. Burrows v. Lownsdale [C. C. A.] 133 F. 250.

56. See 3 C. L. 44.

57. Bethell v. Mellor & Rittenhouse Co., 135 F. 445. Entirely under control of court. The Maurice, 130 F. 634. Are wholly within the control of the court, and are allowed upon equitable considerations. The Oregon [C. C. A.] 133 F. 609. Allowance of proctor's fee of $10 in each case held proper, where large number of libelants appeared by same attorney, and cause of action of each was proved by substantially the same witnesses. Id. Allowance of deposition fees for examining witnesses approved. Id.

58. The Maurice, 130 F. 634.

59. Where vessel libeled for collision is held without fault and libel is dismissed at libelant's costs. May include those incident to bringing in new party under rule 59. The Maurice, 130 F. 634. A libelant will be required to pay additional costs incurred by reason of his misstatements and misrepresentations on a hearing before a commissioner to whom the assessment of damages is referred. Required to pay half commissioner's and stenographer's costs on account of misstatements as to health and ability to work. The Elton, 135 F. 446.

60. Right of libelant who recovers damages for collision in which his own vessel was not in fault. The Thomas M. Parsons, 129 F. 972.

61, 62, 63. In re Excelsior Coal Co., 136 F. 271.

64. Allowance equivalent to one docket fee to each proctor who filed petition, held reasonable. The Gordon Campbell, 131 F. 963.

65. The Gordon Campbell, 131 F. 963.

66. Naretti v. Scully, 133 F. 828.

67. See 3 C. L. 44.

68. Whether one to enforce forfeiture or penalty by the United States, or by an informer in his own name. The Ben R. Co. [C. C. A.] 134 F. 784. Lies from dismissal of libel by United States brought for purpose of enforcing penalty for violation of Act Jan. 18, 1897, c. 61, 29 Stat. 489, Comp. St. 1901, p. 3029, relating to inspection of gasoline vessels. Id.

69. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

evidence,[70] where the trial judge saw and heard the witnesses.[71] Where, however, he saw none of them, the entire record will be examined.[72] Since the amount of a salvage award rests largely in the discretion of the trial court, it will not be readjusted where there has been no mistake of fact or application of an unwarranted rule of compensation in arriving at the award.[73]

Sureties on a stipulation for the release of a libeled vessel are not parties to the suit in such a sense as to require them to be joined in an appeal by the claimant from the decree therein, unless some question involving their rights or obligations has arisen in the suit.[74] This is true though such decree is joint in form against the claimant and the stipulators.[75]

As in other cases, the right to review may be waived.[76] Where cross suits between the same parties, one in the circuit court and one in the district court in admiralty, are by agreement tried together on the same evidence, but separate judgments are entered in each court, a subsequent order of the trial judge finding that the causes were consolidated into the admiralty case does not effect a nunc pro tunc consolidation, and the judgment remaining of record in the circuit court is not reviewable on an appeal taken in the admiralty suit.[77]

A general exception to the amount of a finding by a commissioner on a reference is sufficient, where all the evidence is attached to his report.[78] A plain error in a computation by a commissioner may be corrected where it was called to the attention of the trial court, though no formal exception was taken to the commissioner's report on that ground.[79]

A rehearing will not be granted to enable a defeated party to introduce further evidence which was fully known to him and might have been introduced at the original hearing, but was not because counsel deemed it immaterial.[80]

ADMISSIONS, see latest topical index.

ADOPTION OF CHILDREN.

§ 1. *Adoptive acts and proceedings.*[81]—The adoption of children is a statutory proceeding and all recitals of the statute are mandatory.[82] Thus failure to record the instrument of adoption may render the act of adoption void.[83] But

70. As to salvage services. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

71. Unless there is a decided preponderance of evidence against it. Collision. The Edward Smith [C. C. A.] 135 F. 32. Unless clearly unsupported by the evidence, where he saw most of the witnesses. Action for failure of ship to furnish proper treatment to injured seaman. The Svealand [C. C. A.] 136 F. 109. Unless it clearly appears that it is contrary to the evidence. Collision. Jameson v. Lewis [C. C. A.] 131 F. 728.

72. Lazarus v. Barber [C. C. A.] 136 F. 534.

73. Item of freight wholly eliminated. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

74. Stipulation follows appeal, and is subject to the decision thereof. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

75. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

76. Though a decree dismissing a libel by a charterer to recover damages for breach of a charter party is erroneous, it cannot be reversed further than to award costs to the libelant, where, with his acquiescence, a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no review of the judgment in the latter action has been sought. Shotter Co. v. Larsen [C. C. A.] 134 F. 705.

77. Shotter Co. v. Larsen [C. C. A.] 134 F. 705.

78. Merritt & C. Derrick & Wrecking Co. v. Morris & C. Dredging Co., 132 F. 154.

79. The Eliza Lines [C. C. A.] 132 F. 242.

80. Fact not incorporated into agreed statement of facts on which case was tried. Merchants' Banking Co. v. Cargo of The Afton [C. C. A.] 134 F. 727.

81. See 3 C. L. 45.

82. Burnes v. Burnes, 132 F. 485.

83. As under Iowa statute. James v. James, 35 Wash. 650, 77 P. 1080.

while such statutes, being in derogation of the common law, should be strictly construed, their construction should not be so narrow as to defeat the purpose and intent of the legislature.[84] Some statutes provide for the adoption of both adults and minors.[85] The consent of the parent[86] or other person[87] who has or is entitled to the custody of a child is essential.

A judicial order of adoption[88] need not specify the rights which the statute fixes. A jurisdictional finding omitted by the clerk may be supplied nunc pro tunc.[89] The right to attack a decree may be barred by laches.[90] Whether there has been an adoption may be a question of fact.[91]

Conflict of laws.[92]—An adoption under the laws of one state, and valid under those laws, will be recognized and enforced in another state, if not repugnant to its laws or policy.[93] The burden of proving such repugnancy is on the party attacking the decree of adoption.[94]

Contracts of adoption.[95]—A contract to adopt is ineffective unless executed.[96] A deed in which the grantee is described as the grantor's adopted daughter cannot be regarded as an adoption of the grantee as the grantor's legal heir in pursuance of a special act of the legislature authorizing such adoption.[97]

§ 2. *Consequences of adoption.*[98]—Generally, an adopted child has all the rights of a natural child,[99] including the right to inherit from the person adopting

84. Brown's Adoption, 25 Pa. Super. Ct. 259. Document signed by two brothers and their wives adopting a deceased brother's children, acknowledged and recorded as required by statute, held a valid adoption, as to the men, under Missouri statutes, though wives were not separately examined. Burnes v. Burnes, 132 F. 485.

85. So in Louisiana, as in Massachusetts. Succession of Caldwell [La.] 38 So. 140. Act No. 31 of 1872, p. 79, applies only to adoption of minors, has no repealing clause and did not abrogate the provisions of Civ. Code, art. 214, relative to the adoption of adults. Id.

86. In Washington consent of the mother of a child to its adoption by another is necessary only when she is living with her husband, or has custody and control of her child. James v. James, 35 Wash. 655, 77 P. 1082.

87. The Iowa statute does not authorize the adoption of an orphan grandchild, in the custody of its grandparents, by a collateral relative, over the protests of its grandparents. Construing Code, §§ 3250, 3254. Holmes v. Derrig [Iowa] 103 N. W. 973.

88. Order which strictly follows the statute is sufficient, though it does not in terms deprive the natural parents of "all legal rights whatsoever respecting the child." In re Sandon's Will [Wis.] 101 N. W. 1089.

89. Court had power to amend order of adoption from which clerk had omitted finding that child was a resident of the county and within the court's jurisdiction. Ward v. Magness [Ark.] 86 S. W. 822.

90. The widow of a man who adopted a child previous to his marriage cannot, in the capacity of guardian of a child born 19 years after the decree, maintain a petition to revoke the adoption 21 years after the decree and 1½ years after her husband's death, on the ground that the record described him as a resident of Brooklyn, New York, without stating that he was a temporary resident of Pennsylvania. Brown's Adoption, 25 Pa. Super. Ct. 259.

91. Evidence held to warrant finding that child had not been adopted as legal heir under Spanish law in force in Texas prior to 1840. Conrad v. Herring [Tex. Civ. App.] 83 S. W. 427.

92. Note: See collection of cases on decrees of adoption in note to Irving v. Ford [183 Mass. 448] 65 L. R. A. 186; also 17 L. R. A. 435; and 39 Am. St. Rep. 229-231.

93. Adoption by uncle in Louisiana of niece in Massachusetts, under Massachusetts law, enforced in Louisiana. Succession of Caldwell [La.] 38 So. 140. A valid adoption under Iowa law will not be held void in Washington because the natural father of the adopted boy made false statements concerning the death of the boy's mother, and plaintiff would not have adopted the boy had he known the truth, nor because the boy became incorrigible, was sent to a reform school, from which he was afterward taken by his natural mother; nor because plaintiff removed to Washington, and took no steps there to adopt the boy. James v. James, 35 Wash. 655, 77 P. 1082.

94. Burden on party attacking Massachusetts decree to prove there was such a difference in the age of the parties that the adoption was repugnant to Louisiana laws. Succession of Caldwell [La.] 38 So. 140.

95. See 3 C. L. 46.

96. A contract to adopt, not signed by the foster mother and not carried out by foster father, held not to make child an heir or convey property to her, or bind foster father to make her his heir. Bowins v. English [Mich.] 101 N. W. 204.

97. Conrad v. Herring [Tex. Civ. App.] 83 S. W. 427.

98. See 3 C. L. 46.

99. In Louisiana, as in Massachusetts, adopted children have all the rights of legitimate children. Succession of Caldwell [La.] 38 So. 140.

him.[1] But an adopted child can have no greater rights than a natural child,[2] and the rights granted and duties imposed by an adoption are only those granted and imposed by statute.[3] Adopting parents do not inherit from the adopted child.[4] One who adopts a minor as his child and heir has, while living, the same unlimited power of disposition of his property that a natural father has.[5] In the absence of an agreement to leave property to the adopted child, the promise to adopt cannot support a claim beyond the statutory provisions.[6] A child can inherit from a foster parent, though adopted without his knowledge or consent.[7] A child cannot inherit from one person's estate in the dual capacity of a blood relation and as an adopted child, but he can inherit both from his natural and the adopting parent.[8] A child adopted under a statute expressly excluding the right of inheritance from the rights of adopted children may nevertheless inherit from a foster parent whose death was subsequent to the passage of a statute giving adopted children the right of inheritance.[9] In Wisconsin a child duly adopted after execution of his foster parent's will, which makes no provision for him and shows no intention that no provision should be made, is entitled to a distributive share of the estate as though the testator had died inestate.[10]

To establish an exemption from the New York transfer tax under the statute exempting property transferred to a child to whom decedent stood for not less than ten years prior to the transfer in the mutually acknowledged relation of parent, it must be made to appear that the relation of parent and child was mutually acknowledged to exist.[11]

ADULTERATION.[12]

§ 1. *Legislation and regulation.*[13]—Legislation having for its object the

1. In Washington an adopted child is the heir of his adopters to the same extent as though born to them in lawful wedlock. James v. James, 35 Wash. 655, 77 P. 1082. In Texas the only effect of a statutory adoption is to make the child the heir at law of the person adopting him. Logan v. Lennix [Tex. Civ. App.] 88 S. W. 364.

Note: The right of the adopted child to inherit depends to a great extent upon the statutes enacted in the various states, but the courts in construing this legislation draw a distinction between the legal status created by adoption and blood relationship, and hold that the adopted child may inherit from the blood relations of the adopting parent. Schouler, Domestic Rel. § 232; Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788. In Maine, however, a somewhat different result was reached, and it was held that the status of an adopted child was such that under a will it would take as lineal descendant, the legatee having died in the lifetime of the testator.—Warner v. Prescott, 84 Me. 483, 30 Am. St. Rep. 370. Under the Michigan statute (Comp. Laws of 1897, § 8780, sub. 5), which provides that an adopted child shall become and be an heir at law of the person or persons adopting the same as if he or she were in fact the child of such person or persons, an adopted child is the heir of the adopting parent but is not the heir of the adopting parent's kindred. Van Derlyn v. Mack [Mich.] 100 N. W. 278.—3 Mich. L. R. 151.

2. Burnes v. Burnes, 132 F. 485.

3. Logan v. Lennix [Tex. Civ. App.] 88 S. W. 364.

4. Property given to adopted daughter held to pass to next of kin and not to adopted mother. White v. Dotter [Ark.] 83 S. W. 1052. Mistake of fact and of law held not to affect devolution of property. Id.

5. Since there can be no heir of the living. Burnes v. Burnes [C. C. A.] 137 F. 781. The foster parent may disinherit him, or allow him to take a portion or all of his estate, subject to the rights of his wife, to the exclusion of his natural children. Burnes v. Burnes [C. C. A.] 132 F. 485.

6. Will disinheriting adopted child held binding on child. Logan v. Lennix [Tex. Civ. App.] 88 S. W. 364.

7, 8. Burnes v. Burnes, 132 F. 485.

9. Construing Laws 1873, c. 830, and Laws 1887, c. 703. Theobald v. Smith, 92 N. Y. S. 1019.

10. Rev. St. 1898, § 2286, relative to children born after making of will, applies also to children adopted after foster parent's will has been executed. In re Sandon's Will [Wis.] 101 N. W. 1089.

11. No exemption under Laws 1896, c. 908, as amended by Laws 1901, c. 458, where both parties referred to transferee as niece and did not acknowledge her as daughter. In re Davis' Estate, 90 N. Y. S. 244.

12. See 3 C. L. 47. Regulations other than those against adulteration are treated

prevention of fraud in the sale of food containing impurities or extraneous substances is constitutional.[14] Oleomargarine containing a small quantity of a vegetable oil to give it the color of butter is subject to the full tax on artificially colored oleomargarine, under the Federal act.[15]

§ 2. *The offense.*[16]—The sale of milk adulterated by adding thereto a substance containing poison is made a misdemeanor by the Nebraska pure food act.[17] The fact that the seller did not know that the substance added was poisonous is no defense to a prosecution under the act.[18] While it is not a violation of this act to sell a quantity of food for analysis upon demand, since the act makes refusal to comply with such demand a criminal offense,[19] yet a sale freely made in the ordinary course of trade without a demand therefor for the purpose of analysis, is a violation of the act, even though the purchaser intended to analyze it and the seller knew of his intention.[20] Under the Ohio statute it is held that a person who sells or delivers oleomargarine containing coloring matter to any person interested or demanding the same for analysis is guilty of a violation of the section of the statute making it a penal offense to "sell or deliver" oleomargarine so colored.[21]

§ 3. *Enforcement and prosecution.*[22]—An information under the Nebraska pure food act, alleging in substance that defendant unlawfully and knowingly sold milk to which a poisonous substance had been added, as and for pure milk, an article of food, is sufficient without a special allegation of guilty knowledge.[23] Such information sufficiently alleges that the milk was sold as an article of food.[24] The sale of milk which does not conform to the standards provided by the statute is conclusive evidence of a violation of the statute.[25] Where a complaint alleged

in topics Commerce, 3 C. L. 711; Food, 3 C. L. 1433; and Health, 3 C. L. 1590.

13. See 3 C. L. 47.

14. Laws 1893, p. 655, c. 338, and Laws 1900, p. 187, c. 101, regulating sale of milk, valid. People v. Bowen [N. Y.] 74 N. E. 489. Act of June 26, 1895 (P. L. 317), prohibiting adulteration, and defining term food as used therein, held constitutional as applied to adulterated blackberry wine, and title of act held proper. Commonwealth v. Kebort, 26 Pa. Super. Ct. 584.

15. Use of a slight amount of palm oil does not bring the oleomargarine within the proviso of the Federal act making the tax on oleomargarine "free from artificial coloration" less. Cliff v. United States, 25 S. Ct. 1. Finding that use of palm oil was substantially only for coloring purposes not disturbed on appeal. Id.

16. See 3 C. L. 47.

17. Construing Laws 1897, c. 99. Lansing v. State [Neb.] 102 N. W. 254.

18. Lansing v. State [Neb.] 102 N. W. 254.

19. Lansing v. State [Neb.] 102 N. W. 254. But see State v. Rippeth [Ohio] 72 N. E. 298, below.

20. Sec. 4 of the pure food act has no application to such a sale. Lansing v. State [Neb.] 102 N. W. 254.

NOTE: Sale for analysis: The Ohio statute provides under a penalty that no one shall "offer or expose for sale, sell or deliver, or have in possession with intent to sell" oleomargarine containing artificial coloring matter; also that any one having for sale goods included in the act shall, under penalty for refusal, deliver a sample for analysis to any one who demands the same and pays the price. In State v. Rippeth [Ohio] 72 N. E. 298, the defendant delivered oleomargarine containing artificial coloring to an official inspector who demanded the same for analysis and paid the price and it was held that the defendant was guilty on an affidavit charging him with having unlawfully "sold and delivered." (Compare Lansing v. State [Neb.] 102 N. W. 254, supra.)

An act to be punishable must come within the mischief aimed at by the statute. State v. Wray, 72 N. C. 253. The aim is to be gathered from the whole statute. Com. v. Hadley, 11 Met. 66. In the principal case the statute is for the protection of the public against fraud and injury to health. Waterbury v. Newton, 50 N. J. Law, 534; State v. Kelly, 54 Ohio St. 166, 180. One who receives pay from an officer for such a sample only under protest does not sell within the meaning of the act. Dinkelbihler v. State, 4 Ohio N. P. 313. Such a statute is not intended to prevent the sale of a sample in such a case, when it expressly commands it under penalty. Bates Ann. St. § 4200; State v. Dairy Co., 62 Ohio St. 123. This decision may be supported on an indictment charging the having in one's "possession with intent to sell." Bates Ann. St. § 4200.—5 Columbia L. R. 247.

21. State v. Rippeth [Ohio.] 72 N. E. 298.

22. See 3 C. L. 48.

23, 24. Lansing v. State [Neb.] 102 N. W. 254.

25. Construing Laws 1893, c. 338, and Laws 1900, c. 101, relating to sale of impure milk. People v. Bowen [N. Y.] 74 N. E. 489.

a sale of milk rendered impure by the addition of formaldehyde, the exclusion of evidence tending to show there was no formaldehyde on defendant's premises, and that none had been added to the milk by him or his employes was reversible error.[26]

ADULTERY.

Only the criminal offense is included in this topic.

§ 1. *The offense.*[27]—Evidence that defendant had intercourse with his servant six times during seven months is insufficient to sustain an indictment charging habitual carnal intercourse without living together,[28] and the fact that during such time the servant lived in defendant's house does not render defendant guilty under an indictment charging them with living together and having carnal intercourse.[29]

§ 2. *The indictment or information.*[30]—A husband is competent to make an information charging his wife's paramour with adultery.[31] The indictment alleging that defendant was lawfully married to another need not allege that he was not married to the party with whom the crime is alleged to have been committed.[32]

§ 3. *Evidence.*[33]—Former acts of intimacy short of carnal intercourse may be shown if of recent date.[34] Cases dealing with the sufficiency of evidence are shown in the notes.[35]

§ 4. *Practice and trial.*[36]—Newly discovered evidence that daughter-in-law of alleged paramour would testify that she slept with the latter the night the offense is alleged to have occurred warrants a new trial.[37] Where both participants were indicted and on separate trials one was convicted and the other acquitted, the one convicted is entitled to a new trial to obtain the testimony of the other, if it appears that such other will deny the acts of adultery.[38]

ADVANCEMENTS, see latest topical index.

ADVERSE POSSESSION.

§ 1. *Estates and property subject to adverse possession.*[39]—As a general

26. Prosecution under New York milk laws of 1893 and 1900. People v. Bowen [N. Y.] 74 N. E. 489.
27. See 3 C. L. 48.
28, 29. Boswell v. State [Tex. Cr. App.] 85 S. W. 1076.
30. See 2 C. L. 49.
31. Commonwealth v. Barr, 25 Pa. Super. Ct. 609.
32. Lee v. State [Tex. Cr. App.] 83 S. W. 1110.
33. See 3 C. L. 49.
34. French v. State [Tex. Cr. App.] 85 S. W. 4. Where former acts occurred four or five years before the commission of the offense for which defendant is on trial, the evidence thereof is inadmissible. Id.
35. Where prosecutrix contradicted herself as to the number of times the offense had been committed and there was evidence that one of the witnesses was the guilty party, evidence held insufficient to sustain the prosecution. Taylor v. State [Tex. Cr. App.] 87 S. W. 148.
36. See 3 C. L. 51.
37, 38. French v. State [Tex. Cr. App.] 85 S. W. 4.
39. See 3 C. L. 51.

rule all private estates in land are subject to adverse possession; thus an easement may be acquired,[40] but it does not operate as to public property nor as to property held in trust for the public,[41] nor as to land granted by the United States for a particular purpose.[42]

§ 2. *Against whom available.*[43]—Adverse possession does not run against the United States,[44] and prior to the issuance of patent it does not run against an entryman;[45] but where Federal land has been earned and the government holds only the bare legal title, it runs from the time the party who has earned it is entitled to his certificate.[46] It must appear, however, that the party was entitled to the certificate prior to its issue.[47] No rights can be acquired as against the state,[48] except as to land held in private right,[49] unless otherwise provided by statute.[50] Adverse possession runs against a municipality as to its property not held for the benefit of the public,[51] and until the doctrine was denied by statute, it was held in Nebraska[52] and Minnesota[53] that the public rights in streets and highways could be acquired as against municipalities; but as a general rule, adverse possession does not operate as to property held for the benefit of the public;[54] but an estoppel may arise,[55] and a contrary rule prevails in some states,[56] and

40. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921. And see Easements, 3 C. L. 1148.

41. See 2 C. L. 51. See post, § 2. Against whom available. Whether a private right of way over the right of way of a railroad company may be acquired is not decided. Davis v. Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364.

42. Right of way granted to the Northern Pacific Railroad Company, unless a conveyance of the land by that company would have been confirmed by Act April 28, 1904. Northern Pac. R. Co. v. Ely, 25 S. Ct. 302; Northern Pac. R. Co. v. Hasse, 25 S. Ct. 305. Adverse possession cannot ripen into a right which will divert the use and occupation of a right of way granted by congress for a particular purpose. Oregon Short Line R. Co. v. Quigley [Idaho] 80 P. 401.

43. See 3 C. L. 52.

44. Tyee Consolidated Min. Co. v. Langstedt [C. C. A.] 136 F. 124. One by mistake enclosing a portion of government land. Suksdorf v. Humphrey, 36 Wash. 1, 77 P. 1071.

45. Locator of mining claim and entryman on agricultural land stand on the same footing. Tyee Consolidated Min. Co. v. Langstedt [C. C. A.] 136 F. 124. Adverse possession runs against a grantee under the general land laws of the United States only from the date he acquires title. Id. In Alaska adverse possession of a mining claim as against a locater or his successors in interest cannot be initiated prior to issuance of patent. Tyee Consolidated Min. Co. v. Jennings [C. C. A.] 137 F. 863.

46. Where a railroad company has earned land and its title is perfect and nothing remains to be done but receive its certificate. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. [illegible].

47. It is presumed that title was acquired at the date of receiving the certificate. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120.

48. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039; Bright v. New Orleans R. Co. [La.] 38 So. 494. No title by adverse possession can be acquired against the state or general government, nor is land the subject of adverse possession while the title is in the state. Topping v. Cohn [Neb.] 99 N. W. 372.

49. State v. Harman [W. Va.] 50 S. E. 828.

50. Under St. 1903, § 2523, providing that limitations as to actions to recover land apply to actions brought by the commonwealth. Gray v. Soden [Ky.] 86 S. W. 515.

51. Runs against a tax title held by a city. Cass Farm Co. v. Detroit [Mich.] 102 N. W. 848. Runs against the city. Broad v. Beatty [Ark.] 83 S. W. 339. Runs against a county as to swamp lands acquired from the state. Gen. St. 1865, § 7, does not apply. Palmer v. Jones [Mo.] 85 S. W. 1113.

52. In Nebraska where the municipalities own the fee of the streets, prior to the enactment of ch. 79, p. 335, Laws 1899, adverse possession was available as against a municipality. City of Wahoo v. Netheway [Neb.] 102 N. W. 86.

53. Prior to the adoption of ch. 65, p. 65, Laws 1899. Haramon v. Krause, 93 Minn. 455, 101 N. W. 791.

54. Long continued encroachment on a public highway does not destroy the public right. Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52. In Texas by statute it does not run against a county as to lands granted to it for educational purposes. San Augustine County v. Madden [Tex. Civ. App.] 13 Tex. Ct. Rep. 219, 87 S. W. 1056. Not as against a municipal corporation with respect to the public right to an easement in the street. People v. Rock Island [Ill.] 74 N. E. 437.

55. Where a street railroad has used the street for 50 years and expended large sums of money in improvements on a street. People v. Rock Island [Ill.] 74 N. E. 437. Evidence held insufficient to show an estoppel. Vorhes v. Ackley [Iowa] 103 N. W. 998.

56. Actual possession of a strip along a dedicated but unused street gives title. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

where denied, adverse possession already begun is not interrupted by the acquisition of title,[57] and where such property is in the adverse possession of another, only an entry on behalf of the public is justified.[58] Title cannot be acquired against the right of creditors to subject lands devised for the payment of debts until the executor has been exhausted and a return of nulla bona made,[59] nor against persons under legal disability.[60] Thus title cannot be acquired as against a minor,[61] though it is competent for the legislature to provide otherwise,[62] or a married woman,[63] but disabilities cannot be tacked;[64] therefore as against a female minor it operates after marriage.[65]

§ 3. *To whom available.*[66]—Adverse possession runs in favor of the public[67] and of municipalities,[68] and of a corporation, notwithstanding the methods in which it may acquire title are prescribed.[69] An agent may acquire title as against his principal.[70]

§ 4. *Definition and essential elements.*[71]—Possession to be adverse must be hostile, actual, visible, notorious, and exclusive, continuous, and under a claim of title.[72] In some states, additional elements have been made essential in order

57. Under Rev. St. 1899, § 4270, providing that adverse possession shall not run against property held for a public use if it began before a county acquired title, it is not interrupted by the fact that it subsequently acquires title. McGrath v. Nevada [Mo.] 86 S. W. 236.

58. Where the public refrains for the statutory period from opening an alley dedicated to public use, during which period the original owner has been in possession, a stranger to the title is not justified in making an entry. Haramon v. Krause, 93 Minn. 455, 101 N. W. 791.

59. Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

60. Freedman v. Oppenheim, 92 N. Y. S. 878.

61. Parker v. Ricks [La.] 38 So. 687; Vincent v. Blanton [Ky.] 85 S. W. 703. Under Code 1896, § 2807, the bar of the statute is not effective until three years after removal of the disability. Bradford v. Wilson, 140 Ala. 633, 37 So. 295. Adverse possession does not run against minors during minority where there was no ouster of their ancestor or notice of an adverse holding to them. Nugent v. Peterman [Mich.] 100 N. W. 895.

62. This is the effect of a statute containing no clause exempting them. Schauble v. Schulz [C. C. A.] 137 F. 389.

63. Franklin v. Cunningham [Mo.] 86 S. W. 79. Adverse possession can be established as against a married woman only by proof that it commenced prior to marriage or has run since the disability of coverture has been abolished. Broom v. Pearson [Tex.] 85 S. W. 790.

64. Disability of marriage contracted during minority cannot be tacked to the disability of minority. Franklin v. Cunningham [Mo.] 86 S. W. 79.

65. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

66. See 3 C. L. 53.

67. May acquire a highway as against all liens. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

68. Murphy v. Com. [Mass.] 73 N. E. 524. Evidence held to show that possession of land for 40 years by tenants was the possession of a town. Id.

69. Civ. Code, §§ 286, 360, providing that a corporation may obtain title by condemnation and purchase, does not prevent it from acquiring title by prescription. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113.

70. The fact that one acts as agent for another in the care of land does not preclude him from doing an act that constitutes a disseisin or commencement of adverse possession. Carney v. Hennessey [Conn.] 60 A. 129.

71. See 3 C. L. 54. See Tiffany, Real Prop. §96.

72. Roby v. Calumet & C. Canal & Dock Co., 211 Ill. 173, 71 N. E. 822; O'Brien v. Fletcher [Ga.] 51 S. E. 405. Answer alleging title by adverse possession held good as against demurrer. Whitaker v. Jenkins [N. C.] 51 S. E. 104.

Evidence held to show adverse possession for the statutory period and acquisition of title thereby. Arnold v. Limburger [Ga.] 49 S. E. 812; Broad v. Beatty [Ark.] 83 S. W. 339; In re Schmidt [La.] 38 So. 26; Dowdell v. Orphans' Home Soc. [La.] 38 So. 16; Brigham v. Reau [Mich.] 102 N. W. 845; O'Neal v. Bellevue Imp. Co. [Neb.] 101 N. W. 1028.

Easement of way acquired. Wasmund v. Harm, 36 Wash. 170, 78 P. 777. One who used a passway for 30 years acquired an easement. Brown v. Barton, 26 Ky. L. R. 711, 82 S. W. 405. Held to raise a **presumption of grant** from the Spanish government. Ortiz v. State [Tex. Civ. App.] 86 S. W. 45.

Title is established by proof that the owner was disseised and kept out of possession for the legal term by a person or succession of persons occupying the land continuously for that period openly, adversely, and under a claim of right. Murphy v. Com. [Mass.] 73 N. E. 524. Adverse possession of a part of a railroad right of way for 50 years gives title. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677. Possession by a mortgagee for 20 years gives title under Code Civ. Proc. § 379. Becker v. McCrea, 94 N. Y. S. 20. One in actual possession under

to give title under particular statutes, such as claim in good faith under color of title,[73] payment of taxes,[74] inclosure[75] and cultivation of the land.[76] The doctrine implies a possession commenced in wrong and maintained against right,[77] but is distinguished from trespass by the claim of title and right to possession,[78] and presupposes a defect in title and may be invoked where the defect is discoverable in character.[79] All of the essential elements must coexist.[80] The possession must be exclusive.[81] A mere claim of title is insufficient,[82] though coupled with payment of taxes.[83] A possession that has its inception in subordination to the legal title does not become adverse by a mere change in mental attitude.[84]

In some states the doctrine of adverse possession seems to have become confused with estoppel.[85]

§ 5. *Hostility.*[86]—Possession must be under a claim of right[87] inconsistent with rights of the true owner,[88] and hostile to any superior title,[89] whether known

color of title for the statutory period has title. Black v. Cox, 26 Ky. L. R. 599, 82 S. W. 278. Uninterrupted use and occupation under a claim of right for the statutory period gives title. Off v. Heinrichs [Wis.] 102 N. W. 904. Where in ejectment there is evidence that plaintiffs had been in possession under color of title for more than 20 years, it was not error to refuse to grant a nonsuit. Lassiter v. Okeetee Club [S. C.] 49 S. E. 224. Evidence of actual possession under a claim of right for the statutory period is sufficient under Civ. Code 1895, § 3248. Robson v. Shelnutt [Ga.] 50 S. E. 91. Where the owner of land grants a right to build a dam on it, the question of the proper location of the dam is settled by 20 years' adverse user. Roe v. Redner, 46 Misc. 25, 93 N. Y. S. 258.

73. Answer held to allege that defendant while in possession claimed title. Whitaker v. Jenkins [N. C.] 51 S. E. 104. One purchasing land with notice of a prior sale of growing timber thereon is not in adverse possession within 2 Ball. Ann. Codes & St. § 5503. Brodack v. Morsbach [Wash.] 80 P. 275. One who has taken possession in bad faith cannot complain of mere stale demand. Messi v. Frechede, 113 La. 679, 37 So. 600.

74. Evidence held to show payment of taxes by an adverse claimant. Jones v. Hodges [Cal.] 79 P. 869.

75. Evidence held to show that a fence was a substantial inclosure within Code Civ. Proc. § 323. Jones v. Hodges [Cal.] 79 P. 869.

76. Under the express provisions of Code Civ. Proc. § 325, one whose possession is not founded on a written instrument must have been in continuous, uninterrupted possession, paid all the taxes and have fenced or cultivated the land. Nathan v. Dierssen [Cal.] 79 P. 739.

77. Swope v. Ward [Mo.] 84 S. W. 895. Where a father takes possession for his children, of land conveyed to another in trust for them, the children acquire title by adverse possession, though the conveyance in trust was in fraud of creditors of the father. Coke v. Ikard [Tex. Civ. App.] 87 S. W. 869.

78. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382. One who enters under a claim of ownership with an intention to claim the land is in adverse possession. Swope v. Ward [Mo.] 84 S. W. 895.

79. The fact that one claiming adversely has constructive notice of a defect in his title is no defense to such title. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862.

80. McCaughn v. Young [Miss.] 37 So. 839; Chastang v. Chastang [Ala.] 37 So. 799; Maas v. Burdetzke, 93 Minn. 295, 101 N. W. 182; Erickson v. Murlin [Wash.] 80 P. 853. There must be actual possession and occupancy of the premises. Proctor v. Maine Cent. R. Co. [Me.] 60 A. 423.

81. Instruction ignoring necessity of exclusive possession is erroneous. Chastang v. Chastang [Ala.] 37 So. 799. One in possession equally with the holder of the paper title does not hold adversely. Spencer Christian Church's Trustees v. Thomas [Ky.] 84 S. W. 750.

82. A grantee in a deed attempting to convey land which the grantor did not own claimed title to it but did not occupy it. Proctor v. Maine Cent. R. Co. [Me.] 60 A. 423. Under Code D. C. § 111. Johnson v. Thomas, 23 App. D. C. 141.

83. Young v. Grieb [Minn.] 104 N. W. 131.

84. Coberly v. Coberly [Mo.] 87 S. W. 957.

85. 23 years absence by a patentee of real estate, one claiming under a tax deed in the meantime paying taxes and making valuable improvements, held to estop patentee from claiming property. Murphy v. Dafoe [S. D.] 99 N. W. 86. Acquiescence sufficient to create a title by adverse possession "estops" one from questioning the correctness of a boundary. Klinkefus v. Vanmeter, 122 Iowa, 412, 98 N. W. 286.

86. See 3 C. L. 55.

87. Where one in possession tells the holders of the record title that he has purchased the land and proposes to stay on it as long as he lives and challenged them to eject him, he is in adverse possession. Swope v. Ward [Mo.] 84 S. W. 895. One who enters under a void trustee's deed, and notifies the grantor in the trust deed that he has purchased and holds the land as owner, is in hostile possession. McCaughn v. Young [Miss.] 37 So. 839. Under Rev. Codes N. D. 1899, § 3491a, the period begins at the date of possession and not on the date of the first payment of taxes. Schauble v. Schulz [C. C. A.] 137 F. 389.

88. The occupation of a street by a street railroad company was limited to the public right therein and did not invade property

or unknown;[89] therefore a possession which inures to the benefit of the possessor and the owner and is not inconsistent with ownership in either is not adverse.[91] There seems to be a conflict of authority as to whether an admission of title in the United States will destroy the character of the possession as adverse. In Minnesota it is held that the possession is adverse notwithstanding such admission;[92] but a contrary conclusion was reached in Washington,[93] and in Texas such possession depends on whether or not there is an intention to acquire title.[94] Possession under a parol gift[95] or oral contract of sale is adverse.[96] Permissive possession,[97] possession under a license,[98] pursuant to an agreement,[99] or in subordination to the title of the true owner,[1] is not adverse, and will not ripen into title however

rights of abutting owners. It was subsequently held that such occupation was an interference with the easements of light, air and access. Held, the company did not hold adversely to those rights until such determination. Hindley v. Manhattan R. Co., 93 N. Y. S. 53. Where a widow conveys the entire community property to one who takes possession, prescription commences immediately to run in his favor. Jordan v. Richards [La.] 38 So. 206. A mere entry and the moving of a building held insufficient to show that one in possession was not holding adversely. West v. Webster [Tex. Civ. App.] 87 S. W. 196.

89. Use by the owner of a fee is not adverse to a dominant easement until the exercise of such easement is asserted. Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37. Possession by the public of a street does not give it title to the fee where it makes no claim of ownership to the fee adverse to that of the true proprietor. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. One who closed up a street recognized it as such, therefore his possession was not adverse. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. A payment by a street railway company to abutting owners for an interference with their easements of light, air and access, negatives the idea of hostility. Hindley v. Manhattan R. Co., 93 N. Y. S. 53.

90. Cass Farm Co. v. Detroit [Mich.] 102 N. W. 848.

91. Where a manufacturer erects scales on a railroad right of way and the company builds a side track thereto and transports cars to and from the scales for the benefit of both parties. Michigan Mill. Co. v. Ann Arbor R. Co. [Mich.] 101 N. W. 574.

92. One taking possession under the belief that the premises are public land with the intention of acquiring title under the homestead law may acquire title as against the true owner. Maas v. Burdetzke, 93 Minn. 295, 101 N. W. 182.

93. An entry under the mistaken belief that the land is a part of the public domain and subject to entry is not adverse to the true owner. Yesler Estate v. Holmes [Wash.] 80 P. 851.

94. Persons who enter land believing it to belong to the state and having no intention to acquire it from the state are mere squatters as long as they continue in such belief, otherwise if they intend to acquire it. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

95. Gives title after the statutory period. Brown v. Norvell [Ark.] 86 S. W. 306; Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396.

96. Dean v. Gupton, 136 N. C. 141, 48 S. E. 576.

97. Top rail of a fence extending over the line, it being clear that the occupation was permissive. Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52. Evidence held to show that a possession was permissive. English v. Oppenshaw [Utah] 78 P. 476. Possession and use of a part of the easement not in use and not needed for immediate railroad purposes, and consistent with the company's right to reclaim the property when it is needed for the purposes for which it was acquired, will be held to be permissive only. Smith v. Pittsburg, etc., R. Co., 5 Ohio C. C. (N. S.) 194. Whether the necessities of a railroad company require exclusive occupancy of its right of way, and what use of the property by an abutting owner is an interference therewith, are questions of fact. Id. Permission need not be by a contract of renting or leasing. Cobb v. Robertson [Tex.] 86 S. W. 746. An instruction that permissible possession is not adverse should also add that it was with recognition by the possessor of title of the true owner. Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396. An instruction that tells the jury that a road must have been used without the permission of a certain person or those under whom he claims is erroneous when a permission from either would have defeated the title. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. The possession of a daughter who enters on her father's land at his invitation and makes improvements with money furnished by him is not adverse to him. Brettmann v. Fischer [Ill.] 74 N. E. 777.

98. Railroad company under a license from a landowner constructed abutments of a bridge on his land. Nicolai v. Baltimore [Md.] 60 A. 627.

99. Owner agreed that a turnpike company could use land so long as it was used for a certain purpose. Montgomery County v. Bean, 26 Ky. L. R. 568, 82 S. W. 240. The possession of a **tenant holding over** is not indicative of hostility without some proof of claim of ownership. Brady v. Carteret Realty Co. [N. J. Eq.] 59 A. 639. An attornment by one tenant to another with consent of the landlord or negotiations by a tenant relative to leasing from another does not affect the landlord's possession through him. Cobb v. Robertson [Tex.] 86 S. W. 746.

1. Where an adverse possessor acknowledges the title of the true owner, adverse

long continued.[2] In order that a possession originating in the permission of the true owner may become adverse, notice of such a holding must be brought to his attention;[3] but it is immaterial how he acquires such notice,[4] and it may be presumed from circumstances.[5] Adverse possession does not run as between husband and wife during coverture,[6] nor as between co-tenants[7] until ouster,[8] nor as between landlord and tenant.[9] The possession of the life tenant[10] or those claiming under him is not adverse to the remainderman,[11] nor is the possession of the wife of a life tenant under a tax deed adverse to him.[12] The possession of a grantor after the execution of a deed is not adverse,[13] nor is the possession of a vendee under an executory contract of sale until a repudiation of his vendor's title and notice thereof to him;[14] but is adverse as to all except the vendor and is adverse to him from the date he is entitled to a deed.[15] Possession under a mistake as to the boundary is not adverse if there is no intention to claim beyond the true boundary, wherever it may be;[16] but is if one is in possession of and claims up to a certain line,[17] and the mere fact that he does not know he is occupying his neighbor's land does not destroy the character of his possession.[18]

possession does not commence to run until he repudiates it. Olson v. Burk [Minn.] 103 N. W. 335. The possession of an abutter who knowingly encloses a part of the street but makes no claim to title is not adverse. Vorhes v. Ackley [Iowa] 103 N. W. 998.

2. Doris v. Story [Ga.] 50 S. E. 348.

3. The acts of an abutter in accepting and recording a deed for and in taking possession of disputed land cannot be construed as the conduct of a mere licensee, and a title by presumption in favor of such grantee is acquired by continuous, hostile, and adverse possession for twenty-one years. Smith v. Pittsburg, etc., R. Co., 5 Ohio C. C. (N. S.) 194. Entry of widow held not to have been in aid of her right of dower and in subordination of the rights of her husband's heirs. Hooper v. Stuart, 23 App. D. C. 434.

4. Need not be derived from the hostile possessor and it is sufficient if he gets such notice from any source. Howatt v. Green [Mich.] 102 N. W. 734. Where one purchases land in the actual possession of another than his grantor, he is charged with notice of the extent of such possessor's claim of interest. Id. One purchasing land is charged with notice that one in actual possession thereof is claiming adversely. Kennedy v. Maness [N. C.] 50 S. E. 450.

5. Where one is in actual possession for 32 years and paying taxes on property only a few blocks from the residence of the true owner, it is presumed that such owner knows his holding is adverse. Black v. Cox, 26 Ky. L. R. 599, 82 S. W. 278.

6. Cervantes v. Cervantes [Tex. Civ. App.] 76 S. W. 790.

7. Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583. A husband deeded property to his son and wife jointly; after the wife's death the husband entitled to curtesy in his wife's portion occupied it and that belonging to the son. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142.

8. Answer held to allege ouster. Whitaker v. Jenkins [N. C.] 51 S. E. 105. As to what constitutes an ouster, see Tenants in Common and Joint Tenants, 4 C. L. 1672. Brigham v. Reau [Mich.] 102 N. W. 845; Broom v. Pearson [Tex.] 85 S. W. 790. Adverse possession by one co-tenant for the statutory period bars an action for partition. Rhodes v. Cooper, 113 La. 600, 37 So. 527. The possession of one who takes under a deed of the entire tract from a part of the owners, they warranting against all claims, is adverse and not as co-tenant. Wise v. Wolfe [Ky.] 85 S. W. 1191.

9. Evidence held to show that one in possession was not a tenant at sufferance. Thomson v. Weisman [Tex.] 82 S. W. 503. Dispute held not to deprive such possession of its character. Cobb v. Robertson [Tex.] 86 S. W. 746.

10. Morrison v. Fletcher [Ky.] 84 S. W. 548. Not as against heirs of a married woman during the life of her husband entitled to curtesy. Wilson v. Frost [Mo.] 85 S. W. 375.

11, 12. Blair v. Johnson [Ill.] 74 N. E. 747.

13. His covenants raise a presumption that his possession is in subordination to the legal title. English v. Openshaw [Utah] 78 P. 476; Chancellor v. Teel [Ala.] 37 So. 665; Nugent v. Peterman [Mich.] 100 N. W. 895. The possession by a vendor after execution and delivery of the deed is in trust for the vendee, and is not adverse to him until some unequivocal act inconsistent with his rights is brought home to him (Hads v. Tiernan, 25 Pa. Super. Ct. 14); but where the owner of **vacant land** conveys it, the grantee by reason of his legal title will be deemed to be in possession, and the grantor may subsequently acquire a new title by a new and independent adverse possession (Bird v. Whetstone [Kan.] 80 P. 942).

14. Runge v. Gilbough [Tex. Civ. App.] 87 S. W. 832; State v. Harman [W. Va.] 50 S. E. 828.

15. Schauble v. Schulz [C. C. A.] 137 F. 389.

16. Cuyler v. Bush [Ky.] 84 S. W. 579; Suksdorf v. Humphrey, 36 Wash. 1, 77 P. 1071. If one claims only to the true line wherever it may be, his possession beyond it is not adverse. Wilcox v. Smith [Wash.] 80 P. 803. One who encloses land beyond his boundary but claims only to the true line does not hold adversely. Murdock v. Stillman [Ark.] 82 S. W. 834.

The purchase of an outstanding title is an admission that one does not hold adversely to it,[19] and that one does not return the land for taxation is evidence that he does not hold adversely;[20] but the acceptance of a void lease is not a recognition of a superior title,[21] especially where at the time of accepting it he asserted title in himself.[22]

§ 6. *Continuity.*[23]—Possession must be continuous and uninterrupted[24] for the statutory period,[25] except in a country where much of the land is unoccupied,[26] and the continuity must be such that the possessor could be sued as a trespasser at any time during the period.[27] A joint holding by the legal owner with the adverse claimant,[28] or an acknowledgment of the title of the true owner,[29] as by entering into a contract with him for the purchase thereof, breaks the continuity;[30] but a mere dispute as to a boundary,[31] the acceptance of a deed of an al-

17. Cuyler v. Bush [Ky.] 84 S. W. 579. Possession under mistake is adverse if claim is made to the entire tract. Johnson v. Thomas, 23 App. D. C. 141. By reason of a mutual mistake a deed did not cover all the land intended to be conveyed. The grantee occupied up to a line pointed out by the grantor for the statutory period. Held, he acquired title. Lougee v. Shuhart [Iowa] 102 N. W. 1125.

18. Davis v. Braswell [Mo.] 84 S. W. 870. One who purchases and goes into possession of a lot enclosed by a fence possesses adversely a strip erroneously inclosed. Erickson v. Murlin [Wash.] 80 P. 853; Rennert v. Shirk [Ind.] 72 N. E. 546. See 3 C. L. 55, n. 64.

Note: From the standpoint of ease of application, the decision furnishes a method of determination both convenient and practical. Its doctrine is adhered to in many jurisdictions. Woodward v. Faris, 109 Cal. 12; Tex v. Pflug, 24 Neb. 666, 8 Am. St. Rep. 231; Seymour v. Carli, 31 Minn. 81; French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Logsdon v. Dingg, 32 Ind. App. 158; Metcalfe v. McCutchen, 60 Miss. 145. Other courts make the intention of the adverse claimant the basis of his right and hold that if he has possession up to the boundary as located, claiming title to such boundary, even though it be incorrect, his possession is adverse. Preble v. R. Co., 85 Me. 260, 35 Am. St. Rep. 366; Bishop v. Bleyer, 105 Wis. 330; Beckman v. Davidson, 162 Mass. 347; Shotwell v. Gordon, 121 Mo. 482; Mode v. Long, 64 N. C. 433. While not a few courts hold that if the intention is to claim to the boundary as located, only if it is the true boundary, the possession is not adverse. Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63; Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149; Skinker v. Haagsma, 99 Mo. 208; Palmer v. Osborne, 115 Iowa, 714; Small v. Hamlet [Ky.] 68 S. W. 395. The difficulty of applying the tests necessary under these decisions is altogether obviated under the doctrine of the principal case, where the open, visible and continuous possession is the sole standard. But like all rigid rules of law, it must fail to effect justice in particular cases.—3 Mich. L. R. 402.

19. Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583.

20. Doe v. Edmondson [Ala.] 37 So. 424.

21. It is merely evidence of the nature of the possession. Broad v. Beatty [Ark.] 83 S. W. 339.

22. Broad v. Beatty [Ark.] 83 S. W. 339.

23. See 3 C. L. 56.

24. Periodical trespasses, however long continued, will not give title. Huss v. Jacobs, 210 Pa. 145, 59 A. 991; Moore v. Mobley [Ga.] 51 S. E. 351. Instruction held not erroneous as lacking the element of continuity. Campbell Real Estate Co. v. Wiley [Tex. Civ. App.] 83 S. W. 251. Possession for five years, and after an abandonment for several years a possession for six months, another abandonment followed by occupancy for several years is insufficient. Clark v. White, 120 Ga. 957, 48 S. E. 357. An instruction that possession must have been "open, notorious, visible, adverse and under a claim of right for 20 years," excludes the idea of an interrupted or intermittent possession, and is not erroneous as not requiring continuity. Fatic v. Myer [Ind.] 72 N. E. 142. Easement for a private road is acquired by one who uses a well defined track across the land of another to his own, otherwise inaccessible, where such use has been adverse and continuous for more than twenty-one years. Bates v. Sherwood, 5 Ohio Circ. R. (N. S.) 63.

25. Olson v. Burk [Minn.] 103 N. W. 335. Evidence held insufficient to show continuity of possession for 20 years as required by Rev. St. 1898, §§ 4214, 4215. Hemmy v. Dunn [Wis.] 103 N. W. 1095.

26. In such a country continuous possession is not indispensable. Ortiz v. State [Tex. Civ. App.] 86 S. W. 45.

27. Wilson v. Braden [W. Va.] 49 S. E. 409.

28. Chastang v. Chastang [Ala.] 37 So. 799.

29. Olson v. Burk [Minn.] 103 N. W. 335. Where limitations were pleaded as a defense, proof that the defendant had acknowledged a superior title before the statute had run defeats his claim. Weisman v. Thomson [Tex. Civ. App.] 78 S. W. 728. An acknowledgment by one in possession that he intends to purchase from the owner breaks the continuity. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

30. Olson v. Burk [Minn.] 103 N. W. 335.

31. Negotiations for a settlement of a boundary dispute involving offers to purchase the strip does not break the continuity where one persists in claiming title. Clithero v. Fenner [Wis.] 99 N. W. 1027.

leged outstanding interest,[32] the mere fact that there are temporary breaches in an inclosure,[33] an absence from the state of an adverse claimant of wild land,[34] the bringing of an action,[35] or a judgment in ejectment without dispossession,[36] or an action to foreclose a vendor's lien,[37] does not; nor is it broken by the fact that the claimant does not personally occupy.[38] Whether an entry breaks the continuity depends upon the open and not the secret intention of the party making it,[39] and under a statute providing that entry must be followed by possession or action, a mere disturbance of possession is insufficient.[40] The act of the land commissioner of forfeiting land to the state for nonpayment of interest by the vendee on the purchase price while the land is in the adverse possession of another breaks the continuity.[41] In Texas continuity can be interrupted only by the bringing of suit;[42] but a suit by the owner of an undivided interest, on his own behalf and not for the benefit of his co-tenants, does not break the continuity as to them.[43] The levy of an execution against personal property breaks the continuity of possession thereof.[44]

Tacking.[45]—If the source of the title is of record, it is available to every person claiming under it who can connect himself with it,[46] and where successive parties are privies, the possession of one may be tacked to that of the other;[47] thus the possession of an agent may be tacked to that of his principal,[48] and that of one tenant who attorns to another may be tacked to the possession of such other,[49] and that of a grantee to that of his grantor,[50] if it be against some one to whom the grantor held adversely.[51] Interrupted and discontinuous periods cannot be tacked,[52] such as prior and subsequent periods where continuity has been broken.[53] The possession of a trespasser cannot be tacked to that of a claimant under color of title,[54] and the possession of the life tenant does not inure to the benefit of a remainderman.[55]

32. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

33. Jones v. Hodges [Cal.] 79 P. 869.

34. McCaughn v. Young [Miss.] 37 So. 839.

35, 36. Bradford v. Wilson, 140 Ala. 633, 37 So. 295.

37. A judgment in an action to foreclose a vendor's lien on land, through which a street has been dedicated, does not interrupt the adverse use of the street. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

38. If another is in possession for him (Clithero v. Fenner [Wis.] 99 N. W. 1027), or by an overflow causing vacation of the land for a year (Robinson v. Nordman [Ark.] 88 S. W. 592).

39. Murphy v. Commonwealth [Mass.] 73 N. E. 524.

40. Comp. Laws 1897, § 9721, provides that entry must be followed by possession for a year or that action be commenced on such entry within one year after the dispossession. Place v. Place [Mich.] 102 N. W. 996.

41. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039.

42. Possession under a statute defining peaceable possession as one not interrupted by any adverse suit to recover the land. Cobb v. Robertson [Tex.] 86 S. W. 746.

43. Cobb v. Robertson [Tex.] 86 S. W. 746.

44. Under Ky. St. 1903, § 1909, providing that a borrower of personal property acquires title after five years. Saulsberry v. Fitzpatrick [Ky.] 86 S. W. 1118.

45. See 3 C. L. 57.

46. One claiming under an unrecorded deed may tack his possession to that of his grantor whose deed was recorded. Robertson v. Downing Co., 120 Ga. 833, 48 S. E. 429.

47. Grantee in a deed, the calls of which did not describe the entire tract, the possession of which was transferred to him, may tack his possession to that of his grantor. Clithero v. Fenner [Wis.] 99 N. W. 1027.

48. Travis v. Hall [Tex. Civ. App.] 83 S. W. 425.

49. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

50. Robinson v. Nordman [Ark.] 88 S. W. 592; Love v. Turner [S. C.] 51 S. E. 101.

51. Where the owner of contiguous lots conveys one to A and the other to B, in a boundary dispute between A and B, one cannot tack his possession to that of the common grantor. Sluyter v. Schwab [Neb.] 102 N. W. 757.

52. Clark v. White, 120 Ga. 957, 48 S. E. 357.

53. Lawless v. Wright [Tex. Civ. App.] 86 S. W. 1039.

54. Haggart v. Ranney [Ark.] 84 S. W. 703.

55. Under Code, § 152, so as to bar a right to foreclose a mortgage. Woodlief v. Wester, 136 N. C. 162, 48 S. E. 578.

§ 7. *Duration.*[56]—The possession must continue for the statutory period[57] prior to action commenced to recover the land,[58] but it need not have been the period immediately preceding the filing of suit.[59] The period is the subject of statutory regulation and varies in the several states,[60] and in some states is lessened if possession is under color of title.[61] Statutes fixing the period may be retroactive,[62] and do not deprive the owner of due process if a reasonable time is given him within which to recover possession.[63]. Possession to avail under the Texas five-year statute must be under a genuine[64] and duly recorded deed[65] to the possessor.[66] The Arkansas two-year statute applies only where possession is under a tax deed,[67] and the seven-year statute does not run against married women.[68]

The period for the acquisition of an easement corresponds with the local period for quieting title to lands.[69]

§ 8. *Color of title.*[70]—Color of title is anything in writing connected with

56. See 3 C. L. 57.

57. Evidence held to show that one claiming an easement had not used it for the statutory period. Davis v. Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364. Evidence held insufficient to show that one had been in possession under a claim of title for the statutory period. Roby v. Calumet & C. Canal & Dock Co., 211 Ill. 173, 71 N. E. 822. Claim of title by adverse possession is not sustained where the evidence fails to show possession for the statutory period. Jones v. Jones, 213 Ill. 228, 72 N. E. 695. Under Rev. Code Civ. Proc. § 55, conferring title by payment of taxes under color for 10 years, payment of taxes under color for four years is insufficient. Jackson v. Bailey [S. D.] 104 N. W. 268.

58. An answer alleging title by adverse possession for the statutory period, but failing to state that such period was complete before the bringing of the action is demurrable. Gates v. Solomon [Ark.] 83 S. W. 348. Express provisions of Code Civ. Proc. § 321. The holder of the legal title is not barred unless the land has been possessed adversely to him for five years prior to commencing action to recover it. Nathan v. Dierssen [Cal.] 79 P. 739.

59. A plea of possession for 10 years next before the filing of suit does not limit the time of possession to such period. Campbell Real Estate Co. v. Wiley [Tex. Civ. App.] 83 S. W. 251.

60. See 3 C. L. 57, n. 98. Under 2 Ball. Ann. Codes & St. §§ 5503, 5505, purchasers from a surviving husband who have been in open possession and paid taxes for seven years have title as against heirs attempting to recover it more than three years after attaining majority. Biggart v. Evans, 36 Wash. 212, 78 P. 925.

61. Under Pub. Acts 1893 (Act No. 206, p. 391, § 73), providing that no tax deed shall be set aside after the purchaser has been in possession for five years, possession under a void tax deed for such period gives title. Pence v. Miller [Mich.] 12 Det. Leg. N. 110, 103 N. W. 582. Grantor in a security deed has 10 years to redeem, but may be barred in seven if the grantee is in under color of title. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162. Possession under mortgage foreclosure sale and payment of taxes is adverse within Ball. Ann. Codes & St. §§ 5503, 5504; 7 year statute. Cox v. Tompkinson [Wash.] 80 P. 1005. Instructions under the 10 year statute held not conflicting. Campbell Real Estate Co. v. Wiley [Tex. Civ. App.] 83 S. W. 251.

62. Rev. Codes N. D. 1899, § 3491a, is retroactive in so far as it gives effect to adverse possession preceding its enactment. Schauble v. Schulz [C. C. A.] 137 F. 389.

63. Schauble v. Schulz [C. C. A.] 137 F. 389.

64. The five-year statute (Rev. St. 1895, art. 3342) is not available to one deraigning title through a forged deed. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

65. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. One in possession under a deed made to another for his benefit cannot set up as a defense the five-year statute. Weisman v. Thomson [Tex. Civ. App.] 78 S. W. 728. One in possession under a deed made to a third person for his benefit may assert Rev. St. 1895, art. 3342. Thomson v. Weisman [Tex.] 82 S. W. 503.

66. He cannot claim under the record of a deed of his vendor. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

67. Under Sand. & H. Dig. § 4819, an allegation of possession under a purchase is insufficient. Harvey v. Douglass [Ark.] 83 S. W. 946.

68. Sand. & H. Dig. § 4819. Harvey v. Douglass [Ark.] 83 S. W. 946.

69. Wasmund v. Harm, 36 Wash. 170, 78 P. 777; Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921; Evans v. Scott [Tex. Civ. App.] 83 S. W. 874.

70. See 2 C. L. 58.

NOTE. Title bonds as color of title: The confusion in the decisions attempting to define color of title is doubtless due in large part to the varying objects for which it becomes necessary to determine the meaning of the phrase. Its chief importance probably still consists in its connection with the doctrine of constructive adverse possession, which confers the right to acquire title to land not actually owned or occupied (Hasbrouck v. Vermilyea, 6 Cow. [N. Y.] 677; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 72 Am. St. Rep. 269), as well as to bring trespass for entrance upon such land (14 Harv. Law Rev. 389). A second class of cases, however, is becoming steadily larger as a result of special statutes of limitation making color

the title which serves to define the extent of the claim.[71] Thus, a void[72] or a voidable deed,[73] a mortgage foreclosure certificate of sale,[74] or a quitclaim deed not showing that the grantor claimed any interest in the property at the date of its execution,[75] or a foreign will, insufficient to pass title.[76] A deed is color of title only to the land actually described in it,[77] and any description which, unaided by extrinsic facts, satisfies the mind that the land adversely occupied is embraced within it, is sufficient;[78] but a deed containing an insufficient description is not color of title,[79] nor do void condemnation proceedings constitute color.[80]

of title an essential element in the acquisition of title to land actually occupied. Dembitz, Land Titles, § 186. See Thompson v. Cragg, 24 Tex. 582; Finnegan v. Campbell, 74 Iowa, 158. This is especially common in statutes prescribing a comparatively short period of limitation. In some jurisdictions, indeed, the requirement appears to have been made even in the absence of express mention in the statutes. Finally, a third of the main heads under which the discussions may be grouped comprises actions brought under legislative provisions permitting recovery for improvements to land made bona fide and under color of title (Boyer v. Garner, 116 N. C. 125). It is not unnatural that in applying the statutory requirements to an individual case the courts have used language so broad as to be capable of application to cases of a different class. Upon this ground some attempt has been made to explain the conflict of authority as to the necessity of an instrument in writing, the adequacy of a deed void upon its face, and similar disputed questions. Unavailing though this attempt must in part be, it at least throws light upon points not yet hopelessly involved. It is, for instance, generally stated that bonds for title or executory contracts of sale will not give color of title. An examination of the decisions, however, discloses that many of them apply only to cases arising under short limitation statutes (Hardin v. Crate, 78 Ill. 533), a strict construction of which is not inappropriate. In other cases relied upon, the vendee under the executory contract claimed to have acquired a title as against his vendor by adverse possession (Brown v. Huey, 103 Ga. 448; Ormond v. Martin, 37 Ala. 598; Hart v. Bostwick, 14 Fla. 162). Here, plainly, the holding of the vendee was in subordination to the superior title of his vendor and not adverse to it. It does not follow that the written contract should not give color of title as against a stranger, and for the purpose of giving constructive possession (State Bank v. Smyers, 2 Strob. [S. C.] 24; Jones v. Perry, 10 Yerg. [Tenn.] 59, 30 Am. Dec. 430), or of satisfying a special statutory requirement for lands actually occupied (Burdell v. Blain, 66 Ga. 109; Fain v. Garthwright, 5 Ga. 6), it seems that it should. An Arkansas decision has, however, gone so far as to hold that a bond for title does not give sufficient color of title to warrant a statutory recovery against a third party, the real owner, for improvements made upon land under the bona fide belief that the obligor on the bond had good title (Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224). It seems fairer to construe such statutes founded, as they are, upon equitable principles (Cox v. McDivit, 125 Mo. 358; Whitney v. Richardson, 31 Vt. 300), so as to provide for the reimbursement of those who make improvements under a bona fide belief that they have a right to the land, whether their color of title be legal or equitable. To the language of the Arkansas statute indeed such a construction is especially applicable (Seymour v. Cleveland, 9 S. D. 94; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326), but in the interpretation of acts less explicit in terms the same reasoning must apply.—From 18 Harv. L. R. 534.

71. See Cyc. Law Dict., "Color of Title," 168. An allegation in a complaint to quiet title that plaintiffs held under a warranty deed is an allegation that they held under color of title within Ball. Ann. Codes & St. § 5504, providing that a person who pays taxes on vacant property for seven years under color of title shall be deemed the legal owner. Jones v. Herrick, 35 Wash. 434, 77 P. 798. Such defect, if any, could be cured by amendment which would be regarded on appeal as made. Id.

72. Under Code Civ. Proc. § 47, **a void tax deed.** Murphy v. Dafoe [S. D.] 99 N. W. 86; State v. Harman [W. Va.] 50 S. E. 828. An unacknowledged tax deed, unattested and not filed for record within five years after execution, is color of title of all land described therein. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382. An **Indian deed** is color of title under Rev. Code Civ. Proc. § 54, whether or not it is actually void under the laws of the United States. Murphy v. Nelson [S. D.] 102 N. W. 691. A deed by a husband purporting to convey land to which his **marital rights** had attached but before he reduced it to possession as required by Laws 1886, p. 146. Arnold v. Limeburger [Ga.] 49 S. E. 812.

Sheriff's deed made pursuant to an illegal sale. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

73. Deed made in fraud of creditors. Moore v. Mobley [Ga.] 51 S. E. 351.

Unrecorded deed: Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382.

74. Under Ball. Ann. Codes & St. § 5503. Olson v. Howard [Wash.] 80 P. 170.

75. Archer v. Beihl [C. C. A.] 136 F. 113. Complaint in ejectment alleging title under a quitclaim deed held to sufficiently allege that title was claimed under the deed as color of title. Id.

76. Will not properly witnessed. Love v. Turner [S. C.] 51 S. E. 101.

77. Archer v. Beihl [C. C. A.] 136 F. 113. Color of title only to land located within its calls. Marshall v. Corbett [N. C.] 50 S. E. 210.

78. Archer v. Beihl [C. C. A.] 136 F. 113.

Color of title is not an essential element of adverse possession.[81]

§ 9. *Payment of taxes.*[82]—Payment of taxes is, in some states, equivalent to possession of wild and vacant land,[83] and in other states it is only an element of adverse possession under particular statutes.[84] In Illinois payment of taxes must be under color of title made in good faith.[85] Under a statute providing for the payment of all taxes legally assessed, "legally assessed" means assessed under color of legal authority.[86] Actual payment of the taxes for the last year of the statutory period is not necessary.[87] Tax receipts are prima facie evidence that the land was rendered for taxation[88] and that taxes have been paid.[89]

§ 10. *Area of possession.*[90]—One holding without color holds only to the extent of his actual possession;[91] but one holding under color holds within the boundaries called for in his color,[92] whether the color be of record or not;[93] but

79. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691; Pitts v. Whitehead, 121 Ga. 704, 49 S. E. 693; Crawford v. Verner [Ga.] 50 S. E. 958; Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382; Archer v. Beihl [C. C. A.] 136 F. 113.

A **writing** purporting to be an agreement to convey land but containing a description insufficient to identify it is not, in the absence of evidence showing the description applicable to a particular parcel, color of title. Priester v. Melton [Ga.] 51 S. E. 330.

80. Chicago, etc., R. Co. v. Abbott [Ill.] 74 N. E. 412.

81. An absolute title claimed in good faith for the statutory period accompanied by actual adverse possession is sufficient to support an action to quiet title, though there was no color of title. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862.

82. See 3 C. L. 60.

83. Evidence of payment of taxes on land for seven years does not show that title was acquired thereby where it is not shown that they were vacant and unoccupied during all of that time or that possession was taken. Glos v. Miller, 213 Ill. 22, 72 N. E. 714. Kirby's Dig. § 5057, making payment of taxes on vacant and unimproved land equivalent to possession, applies only where the constructive possession so created is exclusive. Townson v. Denson [Ark.] 86 S. W. 661. Kirby's Dig. § 5057, does not require seven years payment of taxes before such payment will be equivalent to possession. Id. Tax receipts misdescribing the land are insufficient to support title by adverse possession under Kirby's Dig. § 5057, providing that wild land is deemed to be in the possession of the person who pays taxes if he have color. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

84. In Texas possession and payment of taxes for five years. Under Rev. St. 1895, art. 3342, one in possession may render for taxation in his own name or in the name of one for whom he is holding. Thomson v. Weisman [Tex.] 82 S. W. 503. The Texas three and five year statutes do not apply unless actual possession is under color of title. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751. Payment of taxes and possession must concur under the Texas five-year statute. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 88 S. W. 534. Where one claiming under the Texas five-year statute claims under a deed purporting to convey an entire interest, he must have paid all of the taxes for the entire five years. Id. Failure to pay taxes for the last year of the period after they are due and prior to action brought is fatal to his claim. Id.

85. The wife of a life tenant who purchases the property at a tax sale does not have color in good faith nor does her grantee with notice. Blair v. Johnson [Ill.] 74 N. E. 747. Payment of taxes alone is insufficient. Chicago, etc., R. Co. v. Abbott [Ill.] 74 N. E. 412.

86. It is immaterial that the taxes for one or more years were illegally assessed. Murphy v. Nelson [S. D.] 102 N. W. 691. Under Code Civ. Proc. § 325, providing that an adverse possessor must pay all taxes for the statutory period, where he pays no taxes but contends that the assessments were illegal, he is not prejudiced by evidence introduced by the holder of the paper title showing payment of void assessments. Nathan v. Dierssen [Cal.] 79 P. 739.

87. Where one had been in possession for the statutory period and had paid taxes for all except the last year, which assessment was not yet due. Murphy v. Nelson [S. D.] 102 N. W. 691.

88. Thomson v. Welsman [Tex.] 82 S. W. 503.

89. Where one has a tax receipt for one year and will testify that he thought he paid taxes until a certain time, it is some evidence that he has paid taxes. Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. A general statement of payment of taxes for 12 years is insufficient to overcome a tax receipt for one of such years held by the opposite party. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

90. See 3 C. L. 60.

91. Chastang v. Chastang [Ala.] 37 So. 799. A railroad company which does not procure its right of way by grant or condemnation acquires title by limitation to no more than it has actual possession of. St. Louis S. W. R. Co. v. Davis [Ark.] 87 S. W. 445.

92. Chastang v. Chastang [Ala.] 37 So. 799. Actual possession of a portion of a tract under an instrument purporting to convey it all is coextensive with the calls of the instrument. Haggart v. Ranney [Ark.] 84 S. W. 703. One who enters **unoccupied land** under a deed acquires posses-

possession of a tract under one deed is not constructive possession of an adjoining tract held under another deed,[94] and actual possession of one of two adjacent tracts described in a deed is not constructive possession of the other as against the true owner unless actual possession has been taken of a part of it,[95] since the real owner in actual possession of a part of a tract has constructive possession of the remainder.[96] Actual possession of one of two or more adjoining tracts of the same owner is possession of all of them.[97] Constructive possession can only apply to land immediately adjacent to a part of that which is in absolute and uncontrolled possession,[98] and where one conveys the portion of which he has actual possession, his constructive possession of the residue ceases.[99] Possession by one of land which he owns is not constructive possession of that which he does not own.[1]

§ 11. *Sufficiency of possession.*[2]—The sufficiency of acts to constitute adverse possession is governed by the facts of each particular case.[3] The ordinary

sion to all the land described. Cuyler v. Bush [Ky.] 84 S. W. 579. The possession of a **tenant under a lease** is coextensive with the terms of the lease, though he has actual possession of a part only. Murphy v. Commonwealth [Mass.] 73 N. E. 524. Actual possession of a part extends to the limits of the grant if the real owner is not in possession of any part. Boynton v. Ashabranner [Ark.] 88 S. W. 568.

93. Recordation of a deed is not necessary to make it color coextensive with its description. O'Brien v. Fletcher [Ga.] 51 S. E. 405; Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 429. But see Civ. Code 1895, § 3587.

Note: In adverse possession actual and notorious possession of the entire land must be shown for the statutory period. Burks v. Mitchell, 78 Ala. 61; Silver Creek Cement Co. v. Union Lime Co., 138 Ind. 297. Under color of title, however, possession of part may be construed as possession of the whole tract described within the instrument that gives rise to the color. Smith v. Gale, 144 U. S. 509, 36 Law. Ed. 521; Dougherty v. Miles, 97 Cal. 568. Washburn on Real Property (6th Ed.) §§ 1954, 1981. A deed need not be recorded to give color of title. Lea v. Polk County Copper Co., 21 How. [U. S.] 495, 16 Law. Ed. 204; Cramer v. Clow, 81 Iowa, 255, 9 L. R. A. 772.—4 Columbia L. R. 605.

94. Broom v. Pearson [Tex.] 85 S. W. 790.

95. Haggart v. Ranney [Ark.] 84 S. W. 703. Where the holder of a junior title enters on land in the possession of the owner of a senior title, his possession is only to the extent of actual inclosure. Cuyler v. Bush [Ky.] 84 S. W. 579. One claiming under a deed to an overlap of a junior survey must show possession of at least a part of the overlap. It is not enough to show possession merely within the limits of his own deed. McLemore v. Lomax [Tex. Civ. App.] 86 S. W. 635.

96. Peden v. Crenshaw [Tex.] 84 S. W. 362.

97. State v. Harman [W. Va.] 50 S. E. 828.

98. Crist v. Boust, 26 Pa. Super. Ct. 543.

99. State v. Harman [W. Va.] 50 S. E. 828.

1. Where a grantee in a deed attempting to convey land which the grantor did not own took possession of a portion which his grantor did own but not of the other. Proctor v. Maine Cent. R. Co. [Me.] 60 A. 423.

2. See 3 C. L. 61.

3. Young v. Grieb [Minn.] 104 N. W. 131. **Possession held sufficient. Cutting fuel, fencing, cultivating.** Miskwabik Development Ass'n v. Croze [Mich.] 12 Det. Leg. N. 133, 103 N. W. 558.

Clearing, fencing and **claiming** to a definite boundary line. King v. See [Ky.] 87 S. W. 758.

Fenced land, **visited it from time to time** and went on the land with another to whom he executed a paper whereby the other was to keep possession for him. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757. One purchased an enclosed lot which erroneously included a narrow strip, built a house, the **drip of the eaves** of which fell on such strip; he also improved it in the same manner as he did the other portion. Erickson v. Murlin [Wash.] 80 P. 853.

Actual possession and **payment of taxes:** Dean v. Gupton, 136 N. C. 141, 48 S. E. 576.

Cultivation, using for **pasture,** etc. Kennedy v. Maness [N. C.] 50 S. E. 450. It is not necessary that one actually reside on the premises. If he lives on adjacent property and **exercises acts of ownership.** Travis v. Hall [Tex. Civ. App.] 83 S. W. 425.

Use of road by the public whenever it saw fit and without asking leave. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874.

Building sheds, on a strip, enclosing it by a high **fence,** etc. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470. **Enclosure** and **cultivation** is sufficient though all the land is not cultivated every year. Johnson v. Thomas, 23 App. D. C. 141.

Possession insufficient: That the top **rail of a fence extends over the bounday.** Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52.

Cutting rails and light wood and **posting notices against trespassers.** Stevens Lumber Co. v. Hughes [Miss.] 38 So. 769.

Payment of taxes; exercise of fitful **disconnected acts of possession** and **cutting of timber** and firewood. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

Grading a strip reserved by the owners

and customary use to which the premises are adapted is generally held sufficient,[4] and neither actual occupation, cultivation nor residence is necessary to constitute "actual possession" of property so situated as not to admit of permanent useful improvement;[5] but where there is no paper title, the possession must be actual so as to clearly acquaint the true owner with the fact that his rights are set at defiance and the extent thereof.[6] There cannot be a constructive and an actual possession of the same tract at the same time.[7] In some states acts which constitute a sufficient possession are enumerated by statute.[8] Possession of wild and vacant land follows the record title,[9] and possession to be adverse must be actual, visible, exclusive and notorious.[10] Adverse possession of a coal estate severed by deed from the fee on the surface must be actual.[11]

for their private use, **putting up sign posts** at the intersection of streets with the names of the streets thereon. Mitchell v. Denver [Colo.] 78 P. 686.

Cutting a few trees in a swamp without it appearing definitely whether the intention was to enter into possession. Dowdell v. Orphans' Home Soc. [La.] 38 So. 16.

Payment of taxes and color and claim of title is insufficient. Jackson v. Boyd & Goldenburg [Ark.] 87 S. W. 126.

Mere possession under a parol gift is insufficient. West v. Webster [Tex. Civ. App.] 87 S. W. 196.

Mere use of a passage over land of another with his knowledge is not adverse. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921. Driving cows into woodland and **occasionally carrying off a fallen tree.** Johnson v. Thomas, 23 App. D. C. 141.

4. Pasturing the land, cutting timber from it and fencing it, held sufficient. Clithero v. Fenner [Wis.] 99 N. W. 1027. Evidence of the sufficiency of possession held for the jury. Illinois Steel Co. v. Jeka [Wis.] 101 N. W. 399.

5. A continued claim evidenced by public acts of ownership, such as one would exercise over property which he claimed to own and would not exercise over property which he did not claim, is sufficient. McCaughn v. Young [Miss.] 37 So. 839. One who purchases land at a mortgage sale, but does not actually reside on it, but exercises control over it, has possession within Ball. Ann. Codes & St. § 5503. Olson v. Howard [Wash.] 80 P. 170.

6. Illinois Steel Co. v. Jeka [Wis.] 101 N. W. 399. Possession must be so notorious "that all who run may see." Love v. Turner [S. C.] 51 S. E. 101. A possession which is adverse and actually known to the true owner is equivalent to one which is open, notorious and adverse. McCaughn v. Young [Miss.] 37 So. 839.

7. Crouch v. Colbert [Mo. App.] 84 S. W. 992. One claiming under a void tax deed is not in adverse possession of lands in the actual possession of another. Kirker v. Daniels [Ark.] 83 S. W. 912. Prescription does not run in favor of tax title while the owner is allowed to remain in possession. Tieman v. Johnston [La.] 38 So. 75.

8. Under Code Civ. Proc. § 48, defining adverse possession among other things as the **use of property for firewood or fencing timber,** the cutting of timber for fuel for the use of his family by an agent who has charge of it is an act of possession. Murphy v. Dafoe [S. D.] 99 N. W. 86. Under the Wisconsin statute (St. 1898, § 4214), providing that if claim to title is not founded on some written instrument, judgment or decree, land is deemed possessed only when **fenced or usually cultivated or improved,** a hostile entry and commencement of improvement indicating a purpose to lay out a lot is sufficient not only as to the particular spot improved but of surrounding land. Illinois Steel Co. v. Jeka [Wis.] 101 N. W. 399. Premises are protected by **a substantial enclosure** within Code Civ. Proc. §§ 369, 370, 372, where they are fenced against everybody except one who does not claim any interest. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563. Where **cultivation, use or enjoyment** is required (Tex. five and ten year statutes), the mere driving of posts around a parcel of land is insufficient. Peden v. Crenshaw [Tex.] 84 S. W. 362. Evidence insufficient to show title under the three or five year statute. William Carlyle & Co. v. Pruett [Tex. Civ. App.] 84 S. W. 372.

Tenant's possession held insufficient to show constructive possession on part of the landlord so as to give him title under the ten-year statute. William Carlyle & Co. v. Pruett [Tex. Civ. App.] 84 S. W. 372. A mere **constructive possession** is not "seisin or possession" within Kirby's Dig. § 5061, providing that one seeking to recover land sold for taxes must have been seised or possessed thereof within two years before commencement of the action. Towson v. Denson [Ark.] 86 S. W. 661.

9. Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. Where a tax sale of wild land is void, a purchaser takes no record title affording presumptive possession. Id.; Love v. Turner [S. C.] 51 S. E. 101.

10. Must be actual. Vincent v. Blanton [Ky.] 85 S. W. 703. A mere claim to possession accompanied by an occasional **cutting of timber, payment of taxes** and **prevention of trespass** is insufficient. Wilson v. Braden [W. Va.] 49 S. E. 409.

Cutting timber from wild land is insufficient. Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. One who after receiving a deed of wild land, **pays taxes** for a long period, **uses timber, mortgages** it, and **offers it for sale,** possesses adversely to the true owner. McCaughn v. Young [Miss.] 37 So. 839.

11. Evidence held insufficient. Huss v. Jacobs, 210 Pa. 145, 59 A. 991.

§ 12. *Pleading, evidence and instructions.*[12]—The facts constituting adverse possession must be pleaded.[13] In pleading title the use of "adverse" is sufficient without the qualifying adjectives "continuous and exclusive."[14] Where peaceable possession is not an element it need not be alleged.[15] A party is not prejudiced by an allegation of adverse possession for a period greater than is necessary.[16] A reply which puts in issue a plea of adverse possession cures a defect in the plea in not alleging adverse possession for the statutory period.[17]

Evidence.[18]—Adverse possession is usually a mixed question of law and fact to be left to the jury under proper instructions;[19] but where the undisputed evidence shows adverse possession, it is proper to direct a verdict.[20] There is no presumption that possession is adverse,[21] and one asserting a title acquired in this manner has the burden of proving all the elements.[22] He must prove continuity of possession,[23] and that the true owner was not under legal disability;[24] but where he has met his burden and want of capacity is set up, the party setting it up has the burden to show that it existed within the statutory period.[25] The elements may be shown by positive acts without declaration of ownership.[26] One holding adversely to the only persons who make any claim to title need not show that he holds adversely to all others.[27] The degree of proof necessary to show that the possession of a co-tenant is adverse is greater than it is where the claimants do not occupy that relation.[28] The cutting of timber[29] or the payment of taxes is a circumstance;[30] but tax receipts which do not identify the land are not evidence.[31]

12. See 3 C. L. 63. See, also, Limitation of Actions, 4 C. L. 445.

13. Rhodes v. Cooper, 113 La. 600, 37 So. 527. An allegation of a prior judgment lien is not an assertion of adverse title. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

14. Jackson v. Snodgrass, 140 Ala. 365, 37 So. 246.

15. Under Code Civ. Proc. §§ 322, 325. Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113.

16. An allegation that title had been acquired by use for 20 years does not preclude one from proving that adverse possession for any period less than 20 years would give title. Wasmund v. Harm, 36 Wash. 170, 78 P. 777.

17. King v. See [Ky.] 87 S. W. 758.

18. See 3 C. L. 64.

19. Evidence held for the jury. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826. On conflicting evidence, the question as to whether one has occupied adversely is for the jury. Georgia Iron & Coal Co. v. Allison, 121 Ga. 483, 49 S. E. 618. Whether the essentials of adverse possession are satisfied by a given state of circumstances is a question for the jury under proper instructions. Illinois Steel Co. v. Jeka [Wis.] 101 N. W. 399.

20. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

21. Monk v. Wilmington [N. C.] 49 S. E. 345.

22. Wilson v. Braden [W. Va.] 49 S. E. 409.

Evidence held insufficient to show adverse possession. Coberly v. Coberly [Mo.] 87 S. W. 957; Nathan v. Dierssen [Cal.] 79 P. 739; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Spriggs v. Simpkins, 25 Ky. L. R. 1788, 78 S. W. 900; Crist v. Boust, 26 Pa. Super. Ct. 543. Under Rev. St. § 2861, presuming possession within the statutory period in the holder of the legal title. English v. Oppenshaw [Utah] 78 P. 476. Under the 10-year statute. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. Findings of fact which do not show adverse possession affirmatively but show negatively that possession was not adverse are insufficient to show title by adverse possession. Wilcox v. Smith [Wash.] 80 P. 803. One witness testified that his father did not live on the land but walked over it once, commenced to clear it and fixed the fences; another testified that he went on and took possession; held insufficient. Freedman v. Oppenheim, 92 N. Y. S. 878. One party to the suit had established prima facie title. Rountree v. Thompson, 30 Tex. Civ. App. 595, 71 S. W. 574.

23. Wilson v. Braden [W. Va.] 49 S. E. 409; Monk v. Wilmington [N. C.] 49 S. E. 345.

24. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. A certificate of title made by a title company is insufficient proof of title. Johnson v. Thomas, 23 App. D. C. 141.

25. Arnold v. Limeburger [Ga.] 49 S. E. 812.

26. Rennert v. Shirk [Ind.] 72 N. E. 546.

27. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

28. Coberly v. Coberly [Mo.] 87 S. W. 957.

29. Chastang v. Chastang [Ala.] 37 So. 799. Testimony of cutting timber by witnesses who could not say where the cutting was done is insufficient evidence. Id.

30, 31. Chastang v. Chastang [Ala.] 37 So. 799.

What is admissible.[32]—Where one claims through the possession of another, all evidence tending to show possession by such other is admissible;[33] but possession cannot be established by family repute,[34] and an application by an administrator to sell land is not evidence of possession of his intestate.[35] Self-serving declarations of the possessor are inadmissible;[36] but declarations tending to show that possession is under a claim of right are.[37] Evidence tending to show that entry was under color of title,[38] or to show or negative a claim of title,[39] or that the possessor did not claim title,[40] or that the real owner was under legal disability,[41] or had made entry during the statutory period,[42] is admissible.

Instructions.[43]—In instructing, the court should define the elements.[44] Elements substantially charged need not be repeated.[45] Too great a burden of proof should not be required.[46]

§ 13. *Nature of title acquired.*[47]—Adverse possession for the statutory period operates as a grant[48] and conveys to the possessor an indefeasible title,[49] which is a defense to all claims whether known or unknown,[50] unaffected by admissions inconsistent with ownership, which, however, are evidence of the character of his possession,[51] or by a subsequent survey,[52] or an abandonment of pos-

32. See 3 C. L. 64.

33. Evidence tending to show adverse possession by a claimant's ancestor and his own possession as heir and successor improperly excluded. Dorlan v. Westervitch 140 Ala. 283, 37 So. 382. Where one claims through the adverse possession of his ancestor, he may testify that he heard him say that he had paid taxes. Chastang v. Chastang [Ala.] 37 So. 799.

34. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

35. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691; Pitts v. Whitehead, 121 Ga. 704, 49 S. E. 693.

36, 37. Swope v. Ward, 185 Mo. 316, 84 S. W. 895.

38. An **intermediate deed** in a chain of title is admissible for the purpose of showing an entry under it as a basis for title by adverse possession. Crist v. Boust, 26 Pa. Super. Ct. 543. A **decree** in proceedings to foreclose a lien on a bridge, the abutments of which were erected on land under license from the owner, is not evidence of adverse possession, the decree not purporting to convey the land. Nicolai v. Baltimore [Md.] 60 A. 627.

39. Where a town was in possession, evidence that no taxes had been assessed against the premises. Murphy v. Commonwealth [Mass.] 73 N. E. 524. A claimant may testify as to the amount of land he claims to own. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382.

40. **A letter** written by one in possession to the holder of the legal title recognizing his interest is admissible. English v. Oppenshaw [Utah] 78 P. 476. Evidence that the owner proposed to the user of a way that he close it to the public. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874.

A **recognition of another as his landlord** is inconsistent with a claim of ownership. Coberly v. Coberly [Mo.] 87 S. W. 957. On an issue as to whether a tenant's possession after the expiration of a lease was adverse, it is immaterial whether the **lease** was to him or to another whose subtenant he was. Brady v. Carteret Realty Co. [N. J. Eq.] 59 A. 639.

41. Ancient deeds containing recitals of **widowhood and heirship** are admissible against an adverse claimant. Wilson v. Braden [W. Va.] 49 S. E. 409.

42. Where a claimant relies on cutting timber, the holder of the legal title should be allowed to show that he also cut. Chastang v. Chastang [Ala.] 37 So. 799.

43. See 3 C. L. 64.

44. "Adverse" and "Claim of right." Evans v. Scott [Tex. Civ. App.] 83 S. W. 874.

45. An instruction requiring that possession be uninterrupted is not erroneous because of the omission of "continuous." Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. An instruction otherwise perfect is not defective because not adding the element of "claim adversely." Vincent v. Willis, 26 Ky. L. R. 842, 82 S. W. 583.

46. Where both parties claimed title by adverse possession, instructions assuming that one had a better right to begin with than the other are erroneous. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382.

47. See 3 C. L. 64.

48. A grant is presumed from possession for the statutory period. Uzzell v. Horn [S. C.] 51 S. E. 253. Not only bars an action to recover the land but it confers title. Franklin v. Cunningham [Mo.] 86 S. W. 79.

49. After adverse possession for the statutory period the possessor may maintain ejectment. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142. The title is sufficient on judicial sale under Civ. Code Prac. § 490. Wise v. Wolfe [Ky.] 85 S. W. 1191.

50. Tax title of which a purchaser of the premises had no notice. Cass Farm Co. v. Detroit [Mich.] 102 N. W. 848.

51. Admissions inconsistent with ownership made after title has been acquired may be considered on an issue as to whether the possession was adverse. Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396. An acknowledgment by one after the period has run that he intends to purchase from the

session;[53] but will not prevail against a bona fide purchaser from the holder of the record title under a sale made when the adverse claimant was out of possession.[54]

ADVERTISING CONTRACTS; ADVICE OF COUNSEL, see latest topical index.

AFFIDAVITS.[55]

Who may make.[56]—Affidavits required by the rules of practice should be made by the party whose knowledge is material, therefore the moving affidavit on motion to amend a pleading,[57] or an affidavit for a commission to take the testimony of witnesses absent from the state,[58] should be made by a party and not by his attorney.

Who may take.[59]—The taking of an affidavit is a ministerial act and may be done by an interested person.[60] In Georgia, by statute, an attorney cannot take

owner is evidence that his holding is not adverse. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

52. A title acquired by adverse possession cannot be prejudiced by a subsequent survey made by the owner's consent for the purpose of finding the true line. Fatic v. Myer [Ind.] 72 N. E. 142. See 3 C. L. 64, n. 96.

53. Title is not lost by the fact that the owner states that he does not claim it, and offers to buy it and his possession ceases to be exclusive. Rennert v. Shirk [Ind.] 72 N. E. 546. The title acquired is not affected by a break in the continuity of possession. Off v. Heinrichs [Wis.] 102 N. W. 904.

54. Especially in a state where by statute the adverse claimant can have his title established of record. Adams v. Carpenter [Mo.] 86 S. W. 445.

55. Includes only general rules. Necessity of affidavits in particular proceedings and their sufficiency in point of substance is treated in titles dealing with the proceeding in question.

56. See 3 C. L. 65.

57. Treadwell v. Clark, 45 Misc. 268, 92 N. Y. S. 166.

58. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. S. 137.

NOTE. Affidavits may be made by the parties in the suit during the progress thereof (1 Barbour, Ch. Pr. 599). The general rule is that an affidavit must be made by the person who has a personal knowledge of the facts, unless a good reason is shown for its being made by some other person (1 Barbour, Ch. Pr. 599; Barry v. Crane, 3 Madd. 472). Upon sufficient cause shown, a substituted affidavit by another person that a party will be allowed, as where the party is sick or absent, or where the suit is conducted by an agent or attorney in fact (1 Barbour, Ch. Pr. 599; Griel v. Buckius, 114 Pa. 187, 6 A. 153). It is held that an attorney may make an affidavit for his client (Abbott v. Zeigler, 9 Ind. 511; McAlpin v. Finch, 18 Tex. 831). Whenever the affidavit relates to the proceedings in the cause, the affidavit should, in general, be made either by the solicitor or by his clerk who has had the principal management of the cause (1 Barbour, Ch. Pr. 599; The Harriet, Olcott, 222, Fed. Cas. No. 6,096). An affidavit on which a motion is founded should not be made by the clerk of the attorney, but by the attorney himself, unless a sufficient excuse is offered for the omission. Chase v. Edwards, 2 Wend. [N. Y.] 283; Ames v. Merriman, 9 Wend. [N. Y.] 498; Bank of Pittsburgh v. Murphy, 64 Hun, 632, 18 N. Y. Supp. 575. The authority of an attorney at law to make an affidavit for his client is presumed, and neither averment nor proof of authority is necessary. Miller v. Adams, 52 N. Y. 409; Simpson v. Lombas, 14 La. Ann. 103. In some jurisdictions it is held that an affidavit which shows that the party making it is an agent of the plaintiff is presumptively made on behalf of the plaintiff. Smith v. Victorin, 54 Minn. 338, 56 N. W. 47; White Sewing Machine Co. v. Betting, 53 Mo. App. 260; Murray v. Cone, 8 Port. [Ala.] 252; Stringer v. Dean, 61 Mich. 196, 27 N. W. 886. See, however, Miller v. Chicago, etc., R. Co., 58 Wis. 312, 17 N. W. 130; Ex parte Bank, 7 Hill [N. Y.] 177. An affidavit made by an attorney need not show the affiant's means of knowledge any further than would be required of the party himself (Anderson v. Wehe, 58 Wis. 615, 77 N. W. 426; Bates v. Robinson, 8 Iowa, 318; Gilkeson v. Knight, 71 Mo. 403). An affidavit stating that the affiant is the treasurer of a corporation sufficiently shows his authority to make it (Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116, 64 N. W. 1053). When the defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it is not made by the defendant himself, and that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability (Griel v. Buckius, 114 Pa. 187, 6 A. 153). See, however, Murray v. Kirkpatrick, 1 Cow. [N. Y.] 210. See Fletcher, Equity Pl. & Pr. § 442.

59. See 3 C. L. 65; see, also, Notaries and Commissioners of Deeds, 4 C. L. 828.

60. Affidavit of renewal of a chattel mortgage in favor of a corporation after it is received and filed by the register of deeds may be sworn to by an officer of the corporation before a notary public who is also an officer and stockholder. Fair v. Citizens' State Bank [Kan.] 79 P. 144. Record of such a mortgage is constructive notice. Id.

an affidavit required of his client unless specially permitted by law,[61] but an affidavit which is the foundation of the proceeding to evict an intruder may be made before any officer authorized to administer an oath.[62] In Texas, by statute, the affidavit in lieu of a writ of error bond may be made before a notary in another state.[63]

Form and requisites.[64]—It is necessary that the affiant be in the personal presence of the officer administering the oath, and it cannot be administered by the use of the telephone, though the officer is familiar with the voice of the affiant.[65] The venue[66] and jurat[67] are essential, but want of venue does not invalidate if it appear of what county the notary is an officer,[68] and the entire paper may be looked to for this purpose.[69] The official character of the officer taking must appear,[70] and in an affidavit made in a foreign state before an officer of such state it must appear in some legal way that the person attesting was in fact authorized to administer the oath,[71] and the fact that the seal of a probate court is affixed is insufficient to show that the person attesting is an officer of that court or is so authorized.[72]

Admissibility of affidavit in evidence and effect thereof.[73]—An affidavit on information and belief is sufficient for some purposes[74] but not for others.[75] Where an affidavit of a subscribing witness to a will is taken in open court, the clerk's certificate thereto need not be authenticated by seal in order to render it admissible in evidence.[76]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.[77]

An affidavit of defense is purely a statutory requirement,[78] and where not re-

61. Under Civ. Code 1895, § 4417, an affidavit by a client before an attorney who is representing him in resisting the collection of a fi. fa. is void. Moultrie Lumber Co. v. Jenkins, 121 Ga. 721, 49 S. E. 678. And does not operate to convert the execution into mesne process returnable to court. Id.

62. Civ. Code 1895, § 4808. Rigall v. Sirmans [Ga.] 51 S. E. 381.

63. Rev. St. § 1895, art. 7, subd. 2. Latimer v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 444.

64. See 3 C. L. 65.

65. Under Rev. St. 1895, arts. 3, 7. Sullivan v. First Nat. Bank [Tex. Civ. App.] 83 S. W. 421.

66. An affidavit of service of summons with notice, which is without venue, is a nullity. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. S. 103.

67. An affidavit for publication to bring in a nonresident defendant to which is appended an unsigned and undated jurat, without evidence aliunde to explain the error, is insufficient. Rumeli v. Tampa [Fla.] 37 So. 563.

68. Affidavit to a list of sales of delinquent lands. Hornage v. Imboden [W. Va.] 49 S. E. 1036. It is presumed that an affidavit was taken within the territorial jurisdiction of the officer taking it. Abrams v. State, 121 Ga. 170, 48 S. E. 965.

69. Hornage v. Imboden [W. Va.] 49 S. E. 1036.

70. Rumeli v. Tampa [Fla.] 37 So. 563. The letters "J. P." appended to a signature affixed to the jurat is sufficient to designate the official character of the person taking. Abrams v. State, 121 Ga. 170, 48 S. E. 965.

71. Affidavit of a plaintiff in error, in forma pauperis, under Civ. Code 1895, § 5613. Ballew v. Broach, 121 Ga. 421, 49 S. E. 297.

72. Howell v. Simpson Grocery Co., 121 Ga. 461, 49 S. E. 299.

73. See 3 C. L. 66.

74. That facts stated in a motion for a new trial are "true to the best of affiant's knowledge and belief" requires such facts to be taken as true. Scheffel v. Scheffel [Tex. Civ. App.] 84 S. W. 408.

75. An affidavit for commission to take testimony of witnesses not in the state, the statements of which as to residence and absence from the state are on information and belief is insufficient. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. S. 137.

76. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722.

77. As to showing of merits in application for relief which rests in discretion, see such titles as Continuance and Postponement, 3 C. L. 801; Defaults, 3 C. L. 1069.

78. Under the Pennsylvania Procedure Act a plaintiff is entitled to judgment for want of an affidavit of defense only in actions on demands which are liquidated, and an affidavit is not necessary in an action to recover damages for breach of contract. Brady v. Osborn Engineering Co., 132 F. 412. In an action of assumpsit on the official bond of a sheriff where the action is founded on misfeasance or negligence, no affidavit is required. Commonwealth v. Milnor, 23 Pa. Super. Ct. 1. In Missouri, in order that a variance may be urged on appeal,

quired, it is immaterial that one filed is insufficient;[79] but where the declaration is supported by an affidavit of merits, all the pleas thereto must be also so supported.[80] A statement setting forth a good cause of action is sufficient to require an affidavit of defense,[81] and statements of material facts in the affidavit of claim are to be taken as true if not denied by the affidavit of defense.[82]

An affidavit of defense may shift the burden of proof to the opposite party[83] or cure an insufficient statement;[84] but it serves its purpose in preventing judgment by default and cannot be offered as evidence of the facts alleged therein;[85] and cannot be considered as evidence on appeal.[86]

The filing of an affidavit of defense invoking every defense except irregularity in the service of summons, amounts to a general appearance.[87]

The office of the affidavit is to prevent a summary judgment and it is not to be subjected to close and technical examination.[88] All that is required is that the facts of defense be averred with reasonable precision and distinctness,[89] but it must state facts sufficient to constitute prima facie a good defense.[90] The averments must form a complete answer to the plaintiff's demand. Every matter of defense must be set forth specifically and with such detail as to show clearly its

the fact must be asserted by affidavit. Rev. St. 1899, § 655. Harrison v. Lakenan [Mo.] 88 S. W. 53.

NOTE. Jury trial: A law requiring that an affidavit of defense be made by the defendant before a jury trial may be had is valid. Dortic v. Lockwood, 61 Ga. 293; Hunt v. Lucas, 99 Mass. 404; Lawrence v. Borm, 86 Pa. 225; Randall v. Weld, 86 Pa. 357; and see Hobbs v. Dougherty County, 98 Ga. 574, 25 S. E. 579. So where a statute provides that if a railroad company sue for instalments of stock, it need not prove such subscription to have been made, unless the defendant shall deny the subscription by plea or answer, verified by affidavit, it is not an invasion of the right of trial by jury. Thigpen v. Mississippi Cent. R. Co., 32 Miss. 347. A requirement that an appellant make oath that he believes injustice had been done him, and that the appeal was not made for the purpose of delay, does not clog the appeal with an onerous restriction. "This is no more than a wholesale regulation; the object, of course, is to administer justice, and no man has a right to complain because he is refused an appeal intended for the purpose of delay, or in a case in which he does not think that he has suffered injustice. It might as well be said that the trial by jury was attacked by a law which should forbid a defendant to put in a dilatory plea, or to plead non est factum, in an action of debt on a bond, without swearing that he believed the matter of the plea to be true. Laws such as these promote justice, and leave the substance of the trial by jury unimpaired, and that is all which is required by these expressions in the constitution that 'trial by jury shall be as heretofore.'" Where a plaintiff has invoked the protection of the statute relieving her from the requirement of giving security for costs, on account of poverty, she is bound by its provisions requiring a dismissal of the action by the court, if the allegation of poverty be found false, and cannot object that she is deprived of the right to trial by jury. Woods v. Bailey, 122 F. 967.—From note to Eckrich v. St. Louis Transit Co. [Mo.] 98 Am. St. Rep. 543.

79. Brady v. Osborn Engineering Co., 132 F. 412; Commonwealth v. Milnor, 23 Pa. Super. Ct. 1.

80. Plea to special count was so supported, others not. Blizzard v. Epkens, 105 Ill. App. 117.

81. Statement in an action for necessaries held sufficient. Davidov v. Bail, 23 Pa. Super. Ct. 579. Statement in an action for goods sold held sufficient to call for an affidavit of defense. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23. To entitle plaintiff to a judgment for want of an affidavit of defense or because it is insufficient, all the essential elements of a complete cause of action must affirmatively appear in the statement and the exhibits made a part thereof. Commonwealth v. Magee, 24 Pa. Super. Ct. 329.

82. Bryan v. Harr, 21 App. D. C. 190.

83. The filing of an affidavit of defense to an action on a promissory note casts the burden of proof on the plaintiff, but does not raise a presumption of forgery or require more evidence than if the general issue had been pleaded. Stewart v. Gleason, 23 Pa. Super. Ct. 325. An affidavit of nonservice having been filed in an action against a surety on a note, recovery cannot be had without proof of service of notice of dishonor. Singer v. Pollock, 91 N. Y. S. 755.

84. Copy of agreement not filed with the statement but was with the affidavit. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23.

85, 86. Kittanning Borough v. Kittanning Consol. Nat. Gas Co., 26 Pa. Super. Ct. 355.

87. Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88.

88. Mutual Life Ins. Co. v. Keen [C. C. A.] 135 F. 677.

89. Held sufficient in an action for the price of goods. Friel v. Custer, 23 Pa. Super. Ct. 466.

relation to the plaintiff's claim,[91] and what is not stated must be regarded as not existing,[92] and if it fails to do so, either from omission of essential facts[93] or manifest evasiveness in the mode of statement, it is insufficient to prevent a judgment.[94] Nothing must be left to inference,[95] and where it is not clear whether an averment is of a fact or of an inference of law from particular facts not set forth, it is bad for uncertainty.[96] Intimations and indirect statements are insufficient,[97] and mere conclusions of law are not to be accepted as established facts simply because so stated.[98] An affidavit restricted to certain allegations is insufficient to require proof of allegations which it does not place in issue.[99] Allegations of set-off must be as specific as those used in a statement of claim,[1] and allegations in general terms are not to be regarded.[2] Where a stranger's affidavit is put in, it must show upon its face sufficient reason why it was not made by the defendant.[3] If a defense is probably good but defectively stated, a supplemental and even a third affidavit may be allowed.[4] The extent of allowing sup-

Held sufficient to prevent judgment in an action on a check. Creery v. Thompson, 26 Pa. Super. Ct. 511. Action to recover the price of liquors. Adulteration alleged. Rheinstrom v. Wolf, 26 Pa. Super. Ct. 559. Affidavit and supplementary affidavit held sufficient in an action on certificates of a beneficial association. Mitchell v. Monumental Mut. Life Ins. Co., 23 Pa. Super. Ct. 584. Action on a promissory note, though not averring in express terms, fraud, accident or mistake. Newell Booth Co. v. Sheldrake, 23 Pa. Super. Ct. 528. Action against a corporation, not for profit. Schwerdfeger v. Columbia Gesang Verein, 26 Pa. Super. Ct. 515. Scire facias sur mortgage. Want of authority to mortgage set up. Kay v. Gray, 24 Pa. Super. Ct. 536. Held to go to the whole of plaintiff's claim on an insurance policy. Mutual Life Ins. Co. v. Keen [C. C. A.] 135 F. 677. Action to recover price of fixtures. Loeper v. Haas, 24 Pa. Super. Ct. 184. Action by a trustee in bankruptcy to recover a preference. Plummer v. Myers, 137 F. 660. To prevent judgment on a promissory note on account of failure of consideration and fraud. Rakestraw v. Woodward, 25 Pa. Super. Ct. 165. In **action against a married woman and her husband** alleged to be trading in the name of the wife, an affidavit by the wife tending to negative liability by any one is good as to both. Van Cott v. Webb-Miller, 25 Pa. Super. Ct. 51.

90. Held to state a defense to assessment insurance contract on the ground of laches. Supreme Council A. L. H. v. McAlarney [C. C. A.] 135 F. 72.

91. Held insufficient in an action for services rendered. Kyler v. Christman, 23 Pa. Super. Ct. 548. Held insufficient in an action to recover price of paper sold. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23.

92. Kyler v. Christman, 23 Pa. Super. Ct. 548.

93. Affidavit of defense admitted facts showing modification of original contract by a supplementary agreement set up by the plaintiff, and upon the validity of which his right of recovery depended. Cramp v. Philadelphia Const. Co., 134 F. 690.

94. Held insufficient in an action on a promissory note. Knight v. Walker Brick Co., 23 App. D. C. 519; Snyder v. Knight, 23 Pa. Super. Ct. 309; Brian v. Merrill, 23 Pa. Super. Ct. 629; Tranter Davison Mfg. Co. v. Pittsburg Trolley Pole Co., 23 Pa. Super. Ct. 46. In an action by an indorsee against the indorsor of a promissory note. Bryan v. Harr, 21 App. D. C. 190. Action for the price of goods. Carnahan Stamping & Enameling Co. v. Foley, 23 Pa. Super. Ct. 643. Action on a written contract. Slater v. Van der Hoogt, 23 App. D. C. 417.

95. Held insufficient in an action for services by an officer of a corporation. Paine v. Berg, 23 Pa. Super. Ct. 577.

96. Held open to this objection in an action for breach of covenant to furnish gas. Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339.

97. Held insufficient in an action by an attorney for professional services rendered. Whiting v. Davidge, 23 App. D. C. 156.

98. Bryan v. Harr, 21 App. D. C. 190.

99. Held insufficient to require proof of appointment of a trustee in bankruptcy. Thompson v. First Nat. Bank [Miss.] 37 So. 645.

1. McFetridge v. Megargee, 26 Pa. Super. Ct. 501; Carnahan Stamping & Enameling Co. v. Foley, 23 Pa. Super. Ct. 643.

2. In this respect the defendant is an actor, and averments must be as specific as those in a statement of claim. Penn Shovel Co. v. Phelps, 24 Pa. Super. Ct. 595.

3. That a disability existed and the circumstances giving rise to such disability. Horsuch v. Fry, 23 Pa. Super. Ct. 509. This rule is applicable to the sworn answer required by the rules of court of Allegheny county in sheriff's interpleader proceedings. Id.

4. Loeper v. Haas, 24 Pa. Super. Ct. 184. The affirmance of an order discharging rule for judgment for want of a sufficient affidavit with permission to plaintiff to move the court below for judgment for so much of his claim as to which the affidavit is deemed by the appellate court to be insufficient, does not abridge the discretionary power of the court below to permit a supplemental or even second and third affidavits, if the defense appear probably good. Kyler v. Christman, 25 Pa. Super. Ct. 74.

plemental affidavits[5] or amendments rests largely in the discretion of the court;[6] but if a supplemental affidavit is not filed within a reasonable time, defendant cannot complain that the entry of judgment for want of a sufficient affidavit was premature.[7]

To entitle a plaintiff to appeal from an order discharging a rule for judgment for want of a sufficient affidavit, he must except to the decision.[8]

AFFIRMATIONS, see latest topical index.

AFFRAY.

An affray is a mutual combat voluntarily engaged in by two or more persons in a public place.[9]

AGENCY.[10]

Agency resulting by operation of law from certain relations as in the case of partnership[11] or marriage[12] and other particular kinds of agencies are elsewhere treated.[13]

§ 1. *The relation between the parties.*[14]—The relation of agent to his principal is founded in greater or less degree upon trust and confidence; it is essentially a personal relation. And contracts of agency, like those creating other personal relations, will not be specifically enforced.[15]

(§ 1) *A. Competency to act as agent or to employ agents.*[16]—A married woman may act as agent of her husband[17] and may appoint an agent.[18] A re-

5. Discretion held not abused. Loeper v. Haas, 24 Pa. Super. Ct. 184.

6. Cramp v. Philadelphia Const. Co., 134 F. 690; Blizzard v. Epkens, 105 Ill. App. 117.

7. McFetridge v. Megargee, 26 Pa. Super. Ct. 501.

8. Commonwealth v. Cavett, 23 Pa. Super. Ct. 57; Chambers v. McLean, 23 Pa. Super. Ct. 551.

9. Instruction in a homicide case held misleading. Reynolds v. Com., 26 Ky. L. R. 949, 82 S. W. 978. See 3 Curr. L. 68, n. 50.

10. This topic follows closely in outline the recently issued and exhaustive work of Clark and Skyles on Agency.

11. A partner is the agent of the firm. Foster v. Murphy & Co. [C. C. A.] 135 F. 47. In commercial or trading firms a partner can bind the firm by the execution of commercial paper. A firm engaged in taking and executing plumbing contracts, and selling fittings and fixtures, held to be such a firm (Marsh, Merwin & Lemmon v. Wheeler [Conn.] 59 A. 410), and this principle applies as well to law firms as to others, a contract for services made with one of a firm of attorneys being a contract with the firm (Dennis v. First Nat. Bank, 33 Wash. 161, 73 P. 1125).

12. See Husband and Wife, 3 C. L. 1669.

13. See Attorneys and Counselors, 3 C. L. 376; Brokers, 3 C. L. 535; Corporations, 3 C. L. 880; Factors, 3 C. L. 1415; Insurance, 4 C. L. 157; Partnership, 4 C. L. 908. And see specific article, 3 C. L. 101.

14. See 3 C. L. 69.

15. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92.

16. See 3 C. L. 69.

17. The wife, like another person, may be made an agent for her husband, and as such impose upon him obligations by his

ceiver has implied power to appoint such agents as are necessary to transact the business committed to him.[19]

(§ 1) *B. Creation and existence of the relation.*[20]—The contract of agency must have the elements essential to the validity of all contracts,[21] must be consistent with public policy,[22] and properly executed.[23] No express terms are required to define the agent's powers.[24] But no valid agency is created by the designation of a party to dispose of property in case of the death of the owner. An estate cannot be administered by an agent appointed in that manner.[25] Agency for a corporation may be conferred and proved as in the case of natural persons.[26] An agreement for the sale of real property, made by an agent, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.[27] But an agent to take an option to purchase real estate is not required to have written authority from his principal;[28] nor an agent to purchase property for his principal.[29]

Agency is a mixed question of law and fact[30] to be determined by the jury

authority, express or implied, precedent or subsequent. Steffens v. Nelson [Minn.] 102 N. W. 871.

18. A married woman, her husband joining, may make a valid power of attorney to convey her lands. In Pennsylvania. Linton v. Moorhead, 209 Pa. 646, 59 A. 264.

19. When a railroad company goes into the hands of a receiver, the power to appoint general agents necessarily goes with the order to conduct the business of the company. Northern Pac. R. Co. v. American Trading Co., 25 S. Ct. 84.

20. See 3 C. L. 69.

21. Merely because one renders gratuitous assistance to a friend, he does not, by so doing, enter into confidential relations or become an agent of the party he so advises. Gray v. Hafer, 2 Ohio N. P. (N. S.) 341, 15 Ohio Dec. 256. Entries in the books of agents of which the principal has no information constitute no contract between the parties nor a modification of one. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

22. Question of agency, whether revocable or irrevocable, has no bearing in a suit under a contract which is invalid as against morality or public policy. Pape v. Standard Oil Co., 2 Ohio N. P. (N. S.) 514. A contract for services in the procuring of government contracts does not necessarily call for corrupt practices, so as to make the contract of employment void as against public policy, even though the agent may misconduct himself thereunder. Kerr v. American Pneumatic Service Co. [Mass.] 73 N. E. 857.

23. In Texas the appointment of an agent to contract for the county for the erection and repair of buildings, etc., must be authorized by the commissioners acting as a body. Sayles' Rev. St. 1897, art. 797. Jackson-Foxworth Lumber Co. v. Hutchinson County [Tex. Civ. App.] 88 S. W. 412. A written agreement by two parties to sell lands is enforceable, although signed by but one of them, if he had authority from the other to sign for him; and such authority may be oral, as where two executors were authorized by will to sell lands of the estate as trustees. Roe v. Smith, 42 Misc. 89, 85 N. Y. S. 527. Agency for collection of certain claims against the United States created by the oral acceptance of a letter containing a proposition to undertake the work. Carlisle v. Barnes, 92 N. Y. S. 917. A written proposition to employ one as an agent, signed by the proposer and accepted, though not signed by the agent, constitutes a binding contract enforceable against both. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92.

24. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. The placing of money in the hands of a party to be paid to a third party constitutes an agency. Commonwealth v. Folz, 23 Pa. Super. Ct. 558.

25. Upon the back of a promissory note was a memorandum directing the disposition of the proceeds in case of the death of the payee, constituting the maker an agent for that purpose. Moore v. Weston [N. D.] 102 N. W. 163.

26. Brown v. British American Mortg. Co. [Miss.] 38 So. 312, citing Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628.

27. Wilson's Rev. & Ann. St. 1903, § 780. A real estate broker, who has lands listed for sale, can only find purchasers and submit propositions to his principal, and cannot make a valid agreement of sale, unless authorized thereto in writing. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118. But a lease made through an agent, executed under seal by both lessee and agent and subsequently assigned by the owner under seal, cannot be attacked as invalid by the lessee who went into possession under it, on the ground of no written authority to the agent to execute the lease. Gleadall v. Kenney, 23 Pa. Super. Ct. 576.

28. Hughes v. Antill, 23 Pa. Super. Ct. 290.

29. Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145.

30. A question of agency as between the owners of the equity in property and the mortgagee; defendant held to be agent of the former and liable to them for rents collected. Rosaler v. Mandeville, 92 N. Y. S. 341.

under proper instructions,[31] when the agent's authority is not in writing.[32] But where there is no conflict in the evidence[33] or the evidence is such that the jury could not find otherwise,[34] the existence of the agency is a question for the court.[35] The extent of an agent's authority, under the power conferred, and what he may do as agent, when the appointment and authority, real or apparent, are admitted, or are not in controversy, are, also, questions of law.[36] But when the agent is in charge of an extensive district and there is no writing limiting his authority,[37] or where there is a dispute as to the authority conferred, the extent of such authority must be found by the trier of fact.[38]

Intermediaries.—A mere intermediary is not an agent and cannot be held liable as such when the capacity in which he acts is disclosed.[39] Dual agencies are void only when the fact of representation of both parties is not known to each.[40] And in the case of neglect of duties devolving upon an employe of two persons jointly, such neglect cannot be made the basis of recovery of damages by one against the other.[41] The master's possession of a vessel is as much for the benefit of the charterer as for the original owner.[42]

(§ 1) *C. Implied agency.*[43]—The fact of agency or its extent may be presumed from the conduct of the parties, or their usual course of business.[44] When

31. Delafield v. J. K. Armsby Co., 90 N. Y. S. 998; Swindell Bros. v. J. L. Gilbert & Bro. [Md.] 60 A. 102; Scull v. Skilton, 70 N. J. Law, 792, 59 A. 457; Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482; Johnson v. Cate [Vt.] 59 A. 830.

32. Lough v. John Davis & Co., 35 Wash. 449, 77 P. 732.

33. Johnson v. Cate [Vt.] 59 A. 830.

34. Phelps, Dodge & Co. v. Miller [Tex. Civ. App.] 83 S. W. 218.

35. In an action against a principal on an alleged contract with his agent, in the absence of any proof of the agent's authority, it is proper for the court to assume, in its charge, that the agent had no authority to bind the principal. Quale v. Hazel [S. D.] 104 N. W. 215. Where an attorney at law, in executing a power to confess judgment, which runs to any attorney at law, merely recites that he is attorney in fact, it will be sufficient, as the court will take judicial notice that he is an attorney at law. Weber v. Powers, 114 Ill. App. 411.

36. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482.

37. A sewing machine agent sold machines upon an agreement to furnish sufficient work to enable defendant to pay for them out of the profits. Singer Mfg. Co. v. Christian [Pa.] 60 A. 1087.

38. Evidence held sufficient to support verdict that the agent had authority to make the agreement in question. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482; Sullivant v. Jahren [Kan.] 79 P. 1071; Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609.

39. Where one bank sent a note to another to procure the signatures of two parties, and the president of the second bank sent it to one of the parties and then returned it, apparently signed by both, to the first bank, held that there was no relation of principal and agent between the first bank and the president of the other; and, although one of the signatures was forged, the second bank was not liable, as the act of its president was outside of its corporate powers; and the president was held not bound as he made no representations. First Nat. Bank v. Commercial Nat. Bank [Tex.] 87 S. W. 1032.

40. A real estate broker, who is negotiating a sale of property, cannot represent both parties without their knowledge and consent. Green v. Southern States Lumber Co. [Ala.] 37 So. 670. Where the agent of the vendor is also president or agent of the purchaser, the effect of the dual agency will authorize the principal to repudiate the transaction. Whitley v. James, 121 Ga. 521, 49 S. E. 600.

41. Complaint was made that cattle had not been sufficiently salted and watered, but it appeared that they had been in the care of a party employed jointly by plaintiff and defendant. N. B. Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37.

42. Brig Maria, 39 Ct. Cl. 39.

43. See 3 C. L. 71. See, also, special article "Agency Implied from Relation of Parties," 3 C. L. 101. Evidence of the management of certain business of a son by the father, with the son's knowledge and consent, held sufficient to warrant a finding that the son was estopped to repudiate the action of the father in executing a mining lease. Jordan v. Greig [Colo.] 80 P. 1045. Where the payee of a note left it in the hands of her father, who attended to all the business connected therewith, it was error, in a suit to collect the note, to exclude evidence of a satisfaction of the deed of trust securing the note, which had been entered on the margin thereof by the father. Dawson v. Wombles [Mo. App.] 86 S. W. 271. Where the employe of defendant was authorized to purchase a machine, which was obviously an experiment, defendant was bound by his contract with the sellers for extra work done on the machine under the employe's direction. Benton v. Moss, 93 N. Y. S. 1113.

44. The relation of principal and agent

a general agent is appointed by a receiver of a railroad company, he will be presumed to have the general powers of such an officer when acting for the railroad itself.[45] Where the statutes impose a legal duty upon the father to support a minor child,[46] the same agency to bind the father for necessaries is to be implied, where there is a total abandonment of a minor child, incapable of supporting itself, as implied in the wife on desertion by her husband.[47] Agency will not be presumed from the mere existence of the marital relation;[48] but, owing to the intimate relation of husband and wife, the agency of one for the other may be presumed upon slight evidence.[49] Once the agency is shown, the relation is presumed to continue.[50]

(§ 1) *D. Evidence of agency.*[51]—If an agent's authority is in writing, that is the best evidence;[52] and his powers must be ascertained from the instrument itself, which will be strictly construed;[53] and the authority conferred is never extended by intendment or construction, beyond that which is given in terms or is absolutely necessary for carrying the authority into effect.[54] A provision in a

implies a grant of the powers necessarily incident to the purposes of the agency, or which, by established usage, may properly be employed in carrying out those purposes. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. An agent has not only the authority which is expressly given, but such as is necessarily implied from the nature of the employment. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 511, 48 S. E. 816. The purchasing agent of a corporation was known as a general officer of it and for 12 or 13 years had conducted transactions similar to those with plaintiff. Batavian Bank v. Minneapolis, etc., R. Co. [Wis.] 101 N. W. 687.

45. Such agent has the power to make special contracts to forward a through shipment by the steamer of a connecting carrier, on a certain day. Northern Pac. R. Co. v. American Trading Co., 25 S. Ct. 84. The application clerk and counterman at the home office of an insurance company, who was authorized to accept risks and cancel policies, held to have prima facie authority to waive in writing a provision in a contract of reinsurance limiting the company's liability on such risks. Northern Ins. Co. v. Associated Mfrs. Mut. Fire Ins. Corp., 90 N. Y. S. 14. Presumption of agency in giving consent for an abutter to the building of a street railway arises after council has acted upon the consent. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393.

46. Comp. Laws Mich. § 4495. Finn v. Adams [Mich.] 101 N. W. 533.

47. Finn v. Adams [Mich.] 101 N. W. 533.

48. McNemar v. Cohn, 115 Ill. App. 31; Francis v. Reeves [N. C.] 49 S. E. 213.

49. French v. Spencer, 23 Pa. Super. Ct. 428.

50. A party who described himself as the duly authorized agent for plaintiff in the affidavit attached to the cognovit in the entry of judgment by confession under the terms of a lease, was the purchaser of the premises at sheriff's sale. Held that he was still acting as agent and held the sheriff's certificate as agent and not as a third person; and an order denying a motion to quash the execution and cancel the certificate was reversed. Parker v. Crilly, 113 Ill. App. 309. After a person has once ascertained the extent of the agent's authority he may, in subsequent dealings, assume that the original authority continues, unless informed to the contrary. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

51. See 3 C. L. 72.

52. American Tel. & T. Co. v. Green [Ind.] 73 N. E. 707; Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142. Construction of an agent's authority under a contract for the sale of real estate. Campbell v. Beard [W. Va.] 50 S. E. 747. A power of attorney is merely the evidence of the agent's authority; and a power to sell all the real property of the principal situated in the parish of Livingston sufficiently describes the property. Rownd v. Davidson, 113 La. 1047, 37 So. 965.

53. Kelly v. Tracy & Avery Co. [Ohio] 73 N. E. 455. A power of attorney in plain and unambiguous terms cannot be explained by parol evidence. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. A power of attorney will be strictly construed in view of its controlling purpose, and the addition of general words will not be construed to extend the authority so as to add new and distinct powers, different from those expressly delegated. Power to recover possession of certain property, by the institution of necessary suits and the employment of counsel, does not include the power to defend the title of the land from subsequent attacks, after possession has been recovered, notwithstanding general terms of authority in the power of attorney. White v. Young [Ga.] 51 S. E. 28. In an action for commissions for negotiating the sale of land, authorized, as alleged, by defendant's agent, whose authority to contract with plaintiff was denied by defendant, the contract between defendant and his agent was admissible, he testifying that it was the only contract he had made for the sale of the land. Quale v. Hazel [S. D.] 104 N. W. 215.

54. If a judgment bond is given, under authority to enter security, become bail and "pledge" certain real estate, a judgment entered thereon is not void but will be limited in its lien and collection to the prop-

written contract of agency, forbidding its change unless such change was approved in writing by the principal, does not prevent the making of a separate verbal contract of agency with reference to another transaction.[55] If the written instrument creating the agency is lost, that fact must be shown, when its terms may be shown by parol;[56] and parol evidence is also admissible to explain terms in a written contract of agency.[57] Where the authority of an agent is not in writing, both the fact and extent of the agency can be proved by parol.[58] The authority of an agent appointed by county commissioners in Texas to contract in behalf of the county in the erection, etc., of public buildings, may be shown by parol, it not being necessary that an order be actually entered on the minutes.[59] Although the word "authority" is too much in the nature of a conclusion to use in a question to a witness, it is at least proper for him to testify that there was no instruction or nothing said or written in regard to the matter by the party claimed to be the principal, to the party claimed to be the agent;[60] and when the agent's authority is merely verbal, the language should be stated to the best of the witness' recollection.[61] Neither direct proof,[62] nor affirmative evidence of a formal appointment,[63] is necessary; but the agency, or the authority, may be shown by facts and circumstances, or from the ratification of the agency.[64] Agency may be proved by circumstances and by the apparent relations and conduct of the parties.[65] Neither the extent,[66] nor the fact of the agency,[67] can be shown by the declarations of the alleged agent; nor by his acts[68] or admissions,[69] unless they

ertles named in the power of attorney. Stokes v. Dewees, 24 Pa. Super. Ct. 471.

55. The principal's general agent agreed orally with the selling agent to pay a commission on the sale of a second-hand machine. Shook v. Marion Mfg. Co. [Mich.] 101 N. W. 657.

56. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43.

57. Morrison Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016.

58. Authority to represent the nonresident owner of a building. Lough v. John Davis & Co., 35 Wash. 449, 77 P. 732; Swindell Bros. v. J. L. Gilbert & Bro. [Md.] 60 A. 102.

59. Jackson-Foxworth Lumber Co. v. Hutchinson County [Tex. Civ. App.] 88 S. W. 412.

60, 61. Jos. Schlitz Brew. Co. v. Grimmon [Nev.] 81 P. 43.

62. Evidence in an action for goods sold held sufficient to establish the agency through which they were bought. Crosno v. J. W. Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275.

63. Roberson v. Clevenger [Mo. App.] 86 S. W. 512.

64. Swindell Bros. v. J. L. Gilbert & Bro. [Md.] 60 A. 102; Roberson v. Clevenger [Mo. App.] 86 S. W. 512. An allegation of agency in the pleadings can be sustained by showing any state of facts which the law recognizes as establishing agency. Turner v. Turner [Ga.] 50 S. E. 969.

65. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

66. White Sewing Mach. Co. v. Hill, 136 N. C. 128, 48 S. E. 575; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816; Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119; Jahren v. Palmer [Kan.] 79 P. 1081. Conversation overheard between the agent and his principal, by telephone, in regard to the transaction in question, is not admissible to prove the extent of the agent's authority, it being mere hearsay. Wilson v. Vogeler [Idaho] 79 P. 508. An attorney's declarations are inadmissible to prove the extent of his authority. West v. A. F. Messick Grocery Co. [N. C.] 50 S. E. 565.

67. Phillips v. Poulter, 111 Ill. App. 330; Sloan v. Sloan [Or.] 78 P. 893; Pederson v. Kiensel [N. J. Law] 58 A. 1088; Excelsior Consumers' Cigar Co. v. Stracherjan, 87 N. Y. S. 489; Higley v. Dennis [Tex. Civ. App.] 88 S. W. 400; Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 72 N. E. 1027. Not even in the case of husband and wife. McNemar v. Cohn, 115 Ill. App. 31. In a suit by a third person against an alleged undisclosed principal. W. K. Niver Coal Co. v. Piedmont & Georges Creek Coal Co. [C. C. A.] 136 F. 179. A statement by one claiming to represent a lodge, that he is "manager, or secretary or something" of the lodge, does not establish his authority to represent it. Castner v. Rinne, 31 Colo. 256, 72 P. 1052.

68. Hutchinson Wholesale Grocery Co. v. Rufus L. McDonald & Co. [Kan.] 80 P. 950; Richards v. Newstifter [Kan.] 78 P. 824; Fourth Nat. Bank v. Frost [Kan.] 78 P. 825, citing Streeter v. Poor, 4 Kan. 412; Lewis v. Bourbon County, 12 Kan. 186; Leu v. Mayer, 52 Kan. 419. The mere fact that one acts as the agent of the owner of a mortgage in collecting interest is not sufficient to show authority to collect the principal and discharge the mortgage. Cornish v. Woolverton [Mont.] 81 P. 4.

69. The admission of a member of a lodge that the trustees had appointed one of their number as agent to sell the lodge's real estate is not competent evidence of such trus-

are brought home to the principal,[70] nor can the powers of the agent be so extended.[71] But declarations made by an alleged agent, against interest, as to the character of the business relations between him and the alleged principal, are as competent, when the agent is made plaintiff's witness, as they would be if he were himself the plaintiff and testifying in his own behalf.[72] While agency cannot be proven by such declarations, they may be considered in connection with letters and subsequent acts;[73] and they are admissible after it has been shown by competent evidence that one is authorized to act for another.[74] The existence of the agency may be shown by the testimony of the agent himself to the fact;[75] and he can testify to facts and circumstances tending to show agency.[76] But as a witness to prove his authority he can testify only to facts, the instructions and directions given him and the sources from which they came, etc., but not to conclusions as to the extent of his authority.[77] The admissions of the principal are competent evidence as to the extent of his agent's authority.[78] Evidence of actual transactions between the parties, tending to show a course of dealing,[79] or letters between the parties tending to show agency,[80] are competent to prove the fact of agency.

Proof of the agency, whether express or implied, must be clear to bind the principal.[81] The burden of proving an agent's authority to waive restrictions on his agency is upon the party setting up such waiver.[82] The liability of the prin-

tee's authority. Castner v. Rinne, 31 Colo. 256, 72 P. 1052.

70. C. F. Blanke Tea & Coffee Co. v. Rees Printing Co. [Neb.] 97 N. W. 627. In the absence of the principal. Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 72 N. E. 1027.

71. A mere traveling salesman, with limited powers, cannot be shown to be a state agent by his own declarations. Aultman & Taylor Mach. Co. v. Cappleman [Tex. Civ. App.] 81 S. W. 1243.

72. W. K. Niver Coal Co. v. Piedmont & Georges Creek Coal Co. [C. C. A.] 136 F. 179.

73. Sessions & Co. v. Isabel, 2 Ohio N. P. (N. S.) 288.

74. Brooke v. Lowe [Ga.] 50 S. E. 146; Hood v. Hendrickson [Ga.] 50 S. E. 994; Higley v. Dennis [Tex. Civ. App.] 88 S. W. 400; Russell v. Washington Sav. Bank, 23 App. D. C. 398.

75. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074; Jahren v. Palmer [Kan.] 79 P. 1081; Jos. Schlitz Brew. Co. v. Grimmon [Nev.] 81 P. 43; Russell v. Washington Sav. Bank, 23 App. D. C. 398.

76. Phillips v. Poulter, 111 Ill. App. 330. The mere fact that an agent to negotiate a loan is an attorney does not make the relation between him and his principal that of attorney and client, so as to render him incompetent as a witness against the borrower as to matters connected with the loan. Turner v. Turner [Ga.] 50 S. E. 969.

77. American Tel. & T. Co. v. Green [Ind.] 73 N. E. 707. Where the authority of an agent is a material question, to be passed upon by the jury, the agent may be examined as to the instructions received from his principal. Brown v. Kirk, 26 Pa. Super. Ct. 157. An agent may testify that he acted in his principal's behalf in a transaction, but his testimony does not bind the latter or affect his rights. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

78. Washburn v. Betz, 94 N. Y. S. 342.

79. Management of affairs of a corporation by its officer. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419; Crosno v. J. W. Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275.

80. Proof of agency by oral evidence, supplemented by letters, held sufficient. Harrison v. Craven [Mo.] 87 S. W. 962.

81. Scull v. Skilton, 70 N. J. Law, 792, 59 A. 457. And in case of husband and wife, the proof must be sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation as wife. Francis v. Reeves [N. C.] 49 S. E. 213. Contract signed J. W. Duntley not shown to be contract of Chicago Pneumatic Tool Co. Railway Speed Recorder Co. v. Chicago Pneumatic Tool Co., 126 F. 223. There being no evidence that the alleged agent had any authority to bind the principal by the contract for the purchase of land, the court did not err in granting a nonsuit. Hood v. Hendrickson [Ga.] 50 S. E. 994. The purchaser of a piano, on a conditional sale, who agreed to insure the same for the seller's benefit, could not rely upon the statement of some one at the store, that he need not do so as it was "insured at the store," without proving the authority of such person to make the statement. Gordeen v. Pearlman, 91 N. Y. S. 420. Surrender of lease is no defense in absence of proof of authority of agent to accept the same. Earle v. Gillies, 92 N. Y. S. 239. An assignment of a claim by an attorney is insufficient proof of ownership of the claim, without proof of the attorney's authority to make the assignment. MacLatchy v. Hannan, 93 N. Y. S. 282.

82. Defendants ordered machines from plaintiff and claimed that their agent made a verbal agreement with them for the sole agency in the county, although the orders for the machines contained the printed state-

cipal can be shown only by proof of the agent's previous authority, or of subsequent ratification;[83] and the burden of showing not only the fact, but also the extent of the authority of an assumed agent, is upon the persons dealing with him.[84] Cases dealing with the admissibility[85] or sufficiency[86] of evidence as to agency in particular instances are grouped in the notes.

(§ 1) *E. Estoppel to assert or deny agency.*[87]—Estoppel is to be distinguished from ratification.[88] Where a party avails himself of the acts and meth-

ment that no agreements with agents would be recognized, except such as were embraced in written orders, or were in writing and accepted at the company's office. White Sewing Mach. Co. v. Hill, 136 N. C. 128, 48 S. E. 573.

83. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816.

84. Where defendant's agent took an order for machinery which defendant refused to accept, it appeared that the agent had authority only to take orders subject to defendant's approval. T. H. Baker & Co. v. Kellett-Chatham Mach. Co. [Tex. Civ. App.] 84 S. W. 661. In an action on a note where the defense is payment to one other than the payee, the burden is on the defendant to show the authority of such person to receive payment. Higley v. Dennis [Tex. Civ. App.] 88 S. W. 400. It not being within the apparent authority of an agent selling a pump to guarantee that a boiler which the purchaser owned and was using would furnish sufficient power to do the work it was then doing and also run the pump, the purchaser, to hold the seller thereon, must show such authority. Lucile Min. Co. v. Fairbanks, Morse & Co. [Ky.] 87 S. W. 1121.

85. The agency cannot be proved by the testimony of another party as to a conversation with the alleged agent, that being mere hearsay. Broadstreet v. Hall, 32 Ind. App. 122, 69 N. E. 415. Where the agent's authority consists in a resolution adopted by an executive committee, in charge of a celebration arranging for the procuring of photographic work for a souvenir, such resolution is not an independent writing determining the scope of the agency, but that must be determined by the conduct and acts of the parties. Galvano Type Engraving Co. v. Jackson [Conn.] 60 A. 127. Evidence that an alleged agent had in various transactions acted as attorney for the party sought to be held is not competent to prove agency. Keegan v. Rock [Iowa] 102 N. W. 805. Where the estate counterclaimed for money alleged to have been received by claimant, as intestate's agent, for sale of a farm, and claimant alleged that he had fully accounted therefor, a writing signed by intestate in which she stated that she had given claimant $1,000, and to make it equal she thereby gave her daughter the same sum, was admissible as tending to show that the sum given to the daughter was a part of the farm money and was given her by claimant at intestate's direction. Vitty v. Peaslee's Estate, 76 Vt. 402, 57 A. 967. Oral evidence that one of two parties, having authority to sell lands, authorized the other to sign for him an agreement to sell a certain tract, is not excluded by the statute of frauds. Roe v. Smith, 42 Misc. 89, 85 N. Y. S. 527.

86. Evidence held sufficient: Of a sale of goods to defendant's authorized agent on defendant's account. Engel-Heller Co. v. Dineen, 91 N. Y. S. 336. To show that an agent, with authority to modify leases, had authority to accept a surrender of a lease and waive a provision therein that no surrender should be valid without the landlord's written acceptance. Goldsmith v. Schroeder, 93 App. Div. 206, 87 N. Y. S. 558. To show that the bookkeeper of defendant was in fact the representative and agent of plaintiff to whom defendant was indebted on a prior transaction. Campbell v. Emslie, 91 N. Y. S. 1069. To establish agency for delivery of notes. Barton v. Hughes, 117 Ga. 867, 45 S. E. 232. To show that the wife appointed her husband as her agent in making a loan, so as to bind her by his knowledge of facts affecting the title to lands involved in the transaction. Francis v. Reeves [N. C.] 49 S. E. 213. To show that it was within the authority of the general manager of a brewery to make a contract for the construction of a pavilion for the sale of beer. Washburn v. Betz, 94 N. Y. S. 342. Where a member of defendant firm testified that he called on plaintiff and told him defendant was dissatisfied with the business and wanted a better understanding, and the contract between the parties was then modified. Held sufficient proof of witness' authority to act as agent. Foster v. Murphy & Co. [C. C. A.] 135 F. 47.

Evidence held insufficient: Jos. Schlitz Brew. Co. v. Grimmon [Nev.] 81 P. 43. Evidence of employment of attorney or ratification of his services, in an action in which judgment was rendered against defendant. Prichard v. Sigafus, 93 N. Y. S. 152. To show authority of agent to settle claim of damages for injury. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609. To show that the husband was the agent of the wife. Succession of Sangpiel [La.] 38 So. 554. Merely showing that one was authorized to collect rent for a landlord is not evidence of authority to make contracts for renting the landlord's property. Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119. Proof that at another time and place the relation of principal and agent existed between the parties does not show actual agency. In the running of a hotel leased by defendant to a third party. Scull v. Skilton, 70 N. J. Law, 792, 59 A. 457. Testimony of a surviving partner, who had little to do with the transaction in question, held insufficient to show that a purchase by an agent of the firm was made without authority. Horowitz v. Hines, 93 N. Y. S. 469.

87. See 3 C. L. 74.

88. See post, § 2D, as to ratification. Steffens v. Nelson [Minn.] 102 N. W. 871. In this case Mr. Justice Jaggard said: The

ods pursued by a mere volunteer in his behalf, he is estopped to deny the agency.[89] A lessee, who enters into possession of premises under a lease executed by an agent, cannot deny the authority of the agent on the ground of his having no written authority.[90] If a principal by his course of dealing holds out one as his agent to receive and credit money on securities and thus induces his creditors to pay money to such person, he is certainly concluded thereby. To permit the principal in such a case to deny the authority of the agent would be to perpetrate a fraud upon the debtor.[91]

(§ 1) *F. Termination of relation.*[92]—An agency for an indefinite time is terminable at will,[93] but when a client gives his attorney a written assignment of a claim, to enable him to settle and adjust conflicting claims as he deems best, it is too late to revoke the attorney's authority after settlements have been made by him.[94] If the contract of agency be for a fixed period,[95] or the agency be coupled with an interest,[96] it is revocable, but the principal will be liable for the damages caused by wrongful revocation.[97] For there is a distinction between the power

proper decision of the question thus presented depends upon consideration of a neglected distinction between ratification and estoppel. Lord Coke said, "the name 'estoppel' or 'conclusion' was given because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." However much this definition may have been criticised as vicious (Everest & Strode on Estoppel, 9-16; Bigelow on Estoppel, 5), it is a brief statement of the effect of the essential principle of estoppel, viz., "that, whenever one of two innocent persons must suffer by the act of a third, he who enables such third person to occasion the loss must sustain it." Lickbarrow v. Mason, 2 T. R. 63; 1 Smith Lead. Cas. 759; Ewart on Estoppel, 9. Ratification, on the other hand, means confirmation. "To ratify is to give sanction and validity to something done without authority." Evans, Principal and Agent (Bedford's Ed.) 90. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct. The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. "This is enough," said Mr. Bigelow, "to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel at best. An estoppel is a legal consequence—a right—arising from acts or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences. The most that acquiescence or ratification can do—and this either may under circumstances do—is to supply an element necessary to the estoppel, and otherwise wanting, as e. g., knowledge of the fact at the time of making a misrepresentation. But each stands upon its own ground, and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct." Bigelow on Estoppel (5th Ed.) pp. 456, 457. And see Reinhart on Agency, 101.

89. Fraternal Army of America v. Evans, 114 Ill. App. 578.

90. Gleadall v. Kenney, 23 Pa. Super. Ct. 576.

91. Dawson v. Wombles [Mo. App.] 86 S. W. 271.

92. See 3 C. L. 75.

93. Macfarren v. Gallinger, 210 Pa. 74, 59 A. 435; John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92. An agency created for the simple payment over of money may be revoked at any time before payment. Commonwealth v. Folz, 23 Pa. Super. Ct. 558.

94. Foot v. Smythe [Colo. App.] 78 P. 619.

95. The revocation of a contract of agency for a fixed period, if permissible, can have no legal effect between the parties, until notified to the agent. Spinks v. Georgia Quincy Granite Co. [La.] 38 So. 824. Where a power of attorney to vote stock is given for a fixed time, for a valuable consideration and as a part of a contract transaction which would not have taken place without the execution of such power, a revocation of such power will be enjoined by preliminary injunction. Rider v. Rider, 114 Ill. App. 202. The law presumes that all general employments are at will merely, and the burden of proving employment for a definite time rests upon him who alleges it. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92.

96. Mere commission or reward for services by an agent does not alone make the agency one coupled with an interest. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92. Dealings between the locator of mining claims and plaintiff held not to create a power coupled with an interest, but a mere power of attorney to sell, revocable at will. Taylor v. Burns [Ariz.] 76 P. 623. A trust deed of a life estate held to operate only as a power of attorney, and, not being coupled with an interest, to be revocable. Angle v. Marshall, 55 W. Va. 671, 47 S. E. 882.

97. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92. Unless there is an express stipulation that it shall be revocable. Rider v. Rider, 114 Ill. App. 202. Where a landlord, having an interest in crops, au-

and the right of revocation. If the principal has expressly or impliedly agreed to retain the agent for a definite time, he has the power, but not the right of revocation;[98] but where there is no express or implied agreement that the agent shall be retained for a definite time, the power and right of revocation coincide.[99] Under the statutes of Wisconsin providing for the recording of a power of attorney and a revocation thereof, and defining the term "conveyance,"[100] a power to convey real estate is not a conveyance and the recording of a revocation thereof does not terminate the power without actual notice to the agent.[1] As a general rule, agency is revoked by the death of the principal, when not coupled with an interest.[2] And the attempted appointment of an agent becomes nugatory upon the death of the principal.[3] But if a gift has been once completed, so as fully to transfer the beneficial interest, according to mutual consent and so as to make a third party a trustee for carrying out the original purposes of the donation, or the donor's agent, the death of the donor leaves the gift unimpaired;[4] and when a deed is delivered by the grantor to a third person, to be held until grantor's death and then to be recorded, such third person is not a mere agent whose authority is revoked by the grantor's death, but he may act after the death of the grantor and carry out the directions given him.[5] The interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself; the power must be grafted on the estate. An interest in the proceeds of the property does not constitute an interest in the thing, the subject-matter of the power.[6] A continuous violation of a stipulation in the contract of agency is good cause for discharge of the agent.[7] The withdrawal of the subject of the agency by the principal terminates the agency.[8] Where factors become

thorized his tenant to sell the entire crop, to collect the proceeds and apply the landlord's portion to the satisfaction of an obligation owing by the landlord to the tenant, an agency coupled with an interest was created and could not be revoked at the will of the landlord. Big Four Wilmington Coal Co. v. Wren, 115 Ill. App. 331.

98. Distinction between the power and right to revoke. Harrison v. Augerson, 115 Ill. App. 226.

99. John L. Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92.

100. Rev. St. 1898, §§ 2237, 2242, 2246. Best v. Gunther [Wis.] 104 N. W. 82.

1. Best v. Gunther [Wis.] 104 N. W. 82.

2. Wittman v. Pickens [Colo.] 81 P. 299. A contract, empowering a corporation to improve and sell real estate, held not to survive the death of the owner or bind his representatives. Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592, citing Hunt v. Rousmanier, 8 Wheat. 174, 5 Law. Ed. 589.

3. The designation of the maker of a note as an agent to dispose of its proceeds in case of the payee's death. Moore v. Weston [N. D.] 102 N. W. 163.

4. An aged husband and wife had their separate bank accounts merged so as to give the whole to the survivor. Augsbury v. Shurtliff [N. Y.] 72 N. E. 927.

Note: The plaintiff sought to foreclose a mortgage given to secure a note. The mortgaged premises were conveyed by the maker of the note to the defendant. After the death of the payee of the note, the defendant, in ignorance of the death, made a payment to the agent of the payee. The agent became insolvent, and never paid this sum to the representatives of the principal. Held, that the death of the principal did not invalidate this payment so as to entitle the plaintiff to foreclose the mortgage. Meinhardt v. Newman [Neb.] 99 N. W. 261. The case follows the rule of the civil law that death ipso facto without notice does not terminate the agency. Such a rule has much in its favor in point of justice. It is followed in some jurisdictions. Cassiday v. McKenzie, 4 Watts & S. [Pa.] 282, 39 Am. Dec. 76. Though it is well settled that a power coupled with an interest survives the death of the principal (Hunt v. Rousmanier, 8 Wheat. [U. S.] 174, 21 Law. Ed. 379), yet a mere naked power is terminated by the death of the principal (Mechem on Agency, § 245). The reason underlying the rule is convincing. As a dead man can do no act, so his heirs and representatives should not be bound by the act of a person whom possibly they do not know and would not trust. Clayton v. Merrit, 52 Miss. 353.—4 Columbia L. R. 597.

5. Thompson v. Calhoun [Ill.] 74 N. E. 775.

6. Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592, citing F. L. & T. Co. v. Wilson, 139 N. Y. 287, 36 Am. St. Rep. 696. The power of sale vested in a trustee in a trust deed is a power coupled with an interest and is not revoked by the death of the grantor; and so is the power of substitution of a new trustee. Frank v. Colonial & U. S. Mortg. Co. [Miss.] 38 So. 340.

7. Macfarren v. Gallinger, 210 Pa. 74, 59 A. 435.

8. An order to an agent, appointed to look after certain property, to deliver the same

insolvent, their agency is terminated thereby and an assignee stands in their place and takes the estate subject to all the equities in favor of third persons, with the further liability that, if he collects money from purchasers who dealt with the agents as principals, he must account for it to the consignors, unless he can show that it is a part of the assets of the insolvent estate.[9] An agency ceases with the death of the agent;[10] and also by the dissolution of a partnership employed as agent.[11] A power of attorney exists in law only for some purpose and when fully executed by the accomplishment of its purpose it is exhausted.[12]

§ 2. *Rights and liabilities of principal as to third persons. A. Actual or implied authority to bind principal.*[13]—An agent has no implied authority to appoint subagents or delegate his powers[14] without his principal's consent.[15] There is no privity of contract between the principal and subagents appointed by an agent of limited powers, acting under special agreement as to compensation.[16] Under the statutory provisions of Montana relative to delegation of powers by an agent,[17] an agent authorized by a master to employ medical assistance for an injured servant has no authority to delegate to a physician employed authority to employ an assistant.[18] A general agent of a corporation may employ a subagent, but he cannot delegate an authority personal to himself, involving the exercise of judgment and discretion.[19]

The principal cannot repudiate acts within the agent's authority,[20] even

to a third party. Scott v. Dewey, 23 Pa. Super. Ct. 396.

9. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

10. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691.

11. Meysenburg v. Littlefield. 135 F. 184.

12. A power of attorney to enter judgment by confession merges in the judgment and nothing further remains to be done under it. Philadelphia v. Johnson, 23 Pa. Super. Ct. 591.

13. See 3 C. L. 76.

14. Roush v. Gesman Bros. & Grant [Iowa] 102 N. W. 495. A person authorized by a corporation to act for it as to the insurance of its property has no authority to appoint subagents whose acts will bind the principal. Insurance Co. of North America v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794.

Note: An indemnity company expressly stipulated in its bond that the latter should be binding only when signed by C., its agent. By mutual arrangement C.'s clerk issued and delivered, C. approving, an unsigned bond, the obligee consenting that C. should sign later. Held, the power to issue such a bond being discretionary, could not be delegated. Cullinan v. Bowker, 180 N. Y. 93. Mechanical and purely clerical acts may be delegated to a subagent. Commercial Bank v. Norton, 1 Hill [N. Y.] 501; Story, Agency, § 14. In matters of insurance, a subagent may perform discretionary acts. Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Arff v. Ins. Co., 125 N. Y. 57, 10 L. R. A. 609. But this is an exception to the general rule which denies such power. Pendall v. Rench, 4 McLean [U. S.] 259; Catlin v. Bell, 4 Camp [N. D.] 183; Mechem, Agency, § 186. The issuing of the bond in the principal case seems within the general rule. Lewis v. Ingersoll, 3 Abb. App. Dec. [N. Y.] 55; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.—5 Columbia L. R. 243.

15. But a real estate agent can turn over to another the lists of lands he holds for sale, that the other may make arrangements with the owners for handling the same, upon an agreement to share the commissions equally. Roush v. Gesman Bros. & Grant [Iowa] 102 N. W. 495. Or can agree with another agent to share commissions, in case the latter secures a purchaser, so long as there is no fraud or concealment of material facts from his principal. Madler v. Pozorski [Wis.] 102 N. W. 892.

16. Brown, Chipley & Co. v. Haigh, 113 La. 563, 37 So. 478.

17. Civ. Code, § 3140. Bond v. Hurd [Mont.] 78 P. 579.

18. Bond v. Hurd [Mont.] 78 P. 579.

19. The agent of a surety company cannot authorize a clerk in his office to pass upon an application and attach the seal of the company to a liquor bond. Cullinan v. Bowker [N. Y.] 72 N. E. 911.

20. Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 N. Y. S. 128. If the principal has, by express act or as a logical result of his words or conduct, impressed upon the agent the character of one authorized to act for him in a given capacity, authority so to act follows as a necessary attribute of the character; and the principal, having conferred the character, will not be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to impose such authority, or that he had given the agent express instructions not to exercise it. T. H. Baker & Co. v. Kellett-Chatham Mach. Co. [Tex. Civ. App.] 84 S. W. 661. Where an agent takes a conveyance of lands to himself, at the request of his principal, who furnishes the consideration, and assumes the payment of liens thereon, such assumption is that of the principal, and he cannot relieve him-

where he acts contrary to instructions.[21] If an agent exceeds his powers by contracting for a price beyond his authority, the party contracted with may nevertheless recover a reasonable price within such authority.[22] The agent has the authority of the principal in all matters within the scope of the agency,[23] and so long as the agent acts merely as such, his acts, legally speaking, are the acts of his principal.[24] A third party cannot repudiate a contract made by an agent in behalf of his principal, when the latter has fulfilled the same in good faith, merely on the ground of a misunderstanding with the agent.[25] When the principal carries on business under an assumed name, he is liable to third persons for the acts of agents within the scope of their authority, to the same extent as if the business had been done in his actual name.[26] Implied powers may arise from a course of dealing[27] or conduct of the parties.[28]

Declarations or admissions of the agent, made without authority, or as to matters outside the scope of his authority,[29] do not bind the principal, but decla-

self from the liability by any language put into the deed from his agent to him. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. An allegation, in pleading, of a settlement and accounting with a party, is supported by evidence of an accounting with his agent. Hayes v. Walker [S. C.] 48 S. E. 989. One who pays money to an authorized agent is entitled to credit therefor; he is not required to trace it into the hands of the principal, and the latter is bound by such payment, even though the agent fails to account for it. Held, that an association was bound by payment made to its secretary, who was in effect its general manager. Indiana Trust Co. v. International B. & L. Ass'n [Ind. App.] 74 N. E. 633. Where an officer of the government, having authority, appropriates private property for public use, admitting it to be private property, an implied contract will arise; and where, in the construction of vessels, a patented process of calking was used, the patentee had a claim against the government. Brook's Case, 39 Ct. Cl. 494. Where an agent, having authority to do so, purchases goods for his principal, the latter is liable to the seller therefor, although the agent wrongfully converts them to his own use. Austin v. Elk Mercantile Co. [Wash.] 80 P. 525. A retailer is responsible for the action of a clerk in delivering to a customer an article different from the one the customer desired to purchase. Block Light Co. v. Tappehorn, 2 Ohio N. P. (N. S.) 553. The mere fact that an agent fails to report to his principal, in accordance with his authority, will not release the principal from liability on the contract made by the agent. Galvano Type Engraving Co. v. Jackson [Conn.] 60 A. 127. Where the surety on an executor's bond authorized his attorney in fact to execute for him, as one of the sureties, "the bond required by the court," and the bond as executed, so far as valid, contained no provision in excess of the statute, although it was informal in certain respects, it was held that the surety was bound by it. Yost v. Ramey [Va.] 48 S. E. 862. Although a contract provides that all settlements of accounts under it are to be consummated only upon approval in writing from the home office, yet a settlement may be made without such approval, by an agent duly authorized to make a settlement in a particular case. Dowagiac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717. A bank is bound by the acts of its cashier, acting in his official capacity. Pease v. Francis, 25 R. I. 226, 55 A. 686. Plaintiff represented by an agent to look after his interests in the division of grain raised by defendant as plaintiff's lessee on shares. Graves v. Walter, 93 Minn. 307, 101 N. W. 297. Contracts may be made by means of telegraphic communications sent by the principal or his agent. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. Payment of rent to an agent discharges the lessee unless the agency has been previously revoked and the lessee notified. Strafford v. Walter, 24 Pa. Super. Ct. 498.

21. Waiver of notice of loss in writing, by an adjuster of an insurance company. Gray v. Merchants' Ins. Co., 113 Ill. App. 537.

22. Galvano Type Engraving Co. v. Jackson [Conn.] 60 A. 127.

23. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

24. Hillard v. Taylor [La.] 38 So. 594.

25. Contract for share in an advertising book. Keniston v. Flaherty, 91 N. Y. S. 568.

26. A corporation by the name of "International Text Book Company" conducted a branch of its business under the name of "International Correspondence Schools." Phillips v. International Text Book Co., 26 Pa. Super. Ct. 230.

27. The authority of an officer of a corporation may be inferred from the general manner in which, for a long time, he has been permitted to conduct its affairs, as well as from the conduct of the business allowed by the directors. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419.

28. One held out by a railroad company as its duly authorized land agent and who transacts its entire land business may bind the company by a contract extending time for payment, or by waiving strict compliance with the provisions of his contract in that respect. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482.

29. The unsworn statements of an agent outside the scope of his agency are not proof of the matters indicted therein as regards his principal. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. The principal is not estopped from laying claim to land simply because its agent for the sale of lands, during

rations and admissions within the agent's authority are binding.[30] But the agency must first be shown.[31] Where the proof is conflicting as to when the agency of the person representing another actually terminated, evidence of all material and relevant declarations of such person, made during the entire period as to which there is evidence tending to show the existence of the agency, should be received.[32] And declarations of the agent as to the extent of his authority are admissible to show the inducing cause of the contract, when followed by independent proof of such agency.[33] Where one authorizes another to speak for him, he may be confronted by testimony as to what his representative said within the scope of his authority; but where the employment is purely mechanical, the master is not bound by what his servant says while at work.[34]

Evidence and proofs.[35]—The admissions or declarations of the agent are received in evidence against the principal, not as admissions or declarations merely, but as parts of the res gestae.[36] The provisions of the Code of Georgia that the declarations of an agent "as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation and constituting the res gestae, or else the agent be dead," are merely declaratory of the law existing when the code was adopted.[37]

(§ 2) *B. Apparent authority and unauthorized or wrongful acts of agent; torts.*[38]—Acts of an agent within the apparent scope of his authority are binding on the principal,[39] and limitations of the agent's authority not brought to the knowledge of third persons do not affect them,[40] though binding as between

a transaction, states that a particular tract does not belong to his principal, but was swamp lands. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120. And a separate agreement, signed by special agents in their individual capacity, is not admissible in evidence to bind the holder of an unconditional promissory note; as an agreement that, if the maker is unable to pay it, he may surrender the life insurance policy for which it was given. Thomas v. H. C. Bagley & Co., 119 Ga. 778, 47 S. E. 177.

30. An admission made by an officer of a corporation, in the performance of his duties and acting within the scope of his authority, binds the corporation; and the presence or absence of the plaintiff, or any one representing him, is immaterial. And the admissions of the vice-president, in the absence of the president and while acting in his stead, will bind the corporation. Vincent v. Soper Lumber Co., 113 Ill. App. 463. Declarations of an agent in the nature of entries made in the regular course of the principal's business are, after the agent's death, admissible against the principal. Turner v. Turner [Ga.] 50 S. E. 969.

31. Sloan v. Sloan [Or.] 78 P. 893; Brittain v. Westall [N. C.] 49 S. E. 54, citing Francis v. Edwards, 77 N. C. 271; Gilbert v. James, 86 N. C. 244; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816; Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390.

32. Porter v. Adams, 115 Ill. App. 439.

33. Singer Mfg. Co. v. Christian [Pa.] 60 A. 1087.

34. King v. Atlantic City Gas & Water Co., 70 N. J. Law, 679, 58 A. 345.

35. See 3 C. L. 78.

36. Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 72 N. E. 1027; Turner v. Turner [Ga.] 50 S. E. 969; Prussian Nat. Ins. Co. of Stettin, Germany, v. Empire Catering Co., 113 Ill. App. 67; Chicago, etc., R. Co. v. Keegan, 112 Ill. App. 338. Declarations of special agents that their representations, outside of the contract in writing which they negotiated, were authorized by their principal are not admissible as a part of the res gestae, such declarations being reduced to writing and showing on their face that they bound the agents only in their individual capacity. Thomas v. H. C. Bagley & Co., 119 Ga. 778, 47 S. E. 177.

37. Civ. Code 1895, § 3034. Turner v. Turner [Ga.] 50 S. E. 969.

38. See 3 C. L. 79.

39. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074; American Tel. & T. Co. v. Green [Ind.] 73 N. E. 707.

40. Browning v. McNear, 145 Cal. 272, 78 P. 722. American Tel. & T. Co. v. Green [Ind.] 73 N. E. 707; Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074; Cullinan v. Bowker [N. Y.] 72 N. E. 911. The duties of the officers and agents of a corporation may be circumscribed or limited by the charter of incorporation, or by by-laws and regulations of the body corporate; but in the absence of specific limitations brought home to the knowledge of those who deal with them, or of which those who deal with them are bound to take notice, the officers of a corporation, as its agents, are authorized to bind the corporation, so long as they act within the ordinary scope of their duties. Russell v. Washington Sav. Bank, 23 App. D. C. 398. One who procures and actively assists another to carry on a business in his name and holds him out to the public as the responsible proprie-

principal and agent.[41] But if such limitations are known to the third party, the principal is not bound beyond the authority actually conferred,[42] and persons dealing with agents of limited powers must generally inquire as to the extent of their authority,[43] especially when dealing with an agent for the first time.[44] Persons dealing with agents are warranted in deducing the scope of the agent's apparent authority from the business he is permitted to conduct,[45] or the manner in which he is permitted to conduct it,[46] or from the nature of the agency.[47] Agency may, under some circumstances, be inferred in favor of a

tor is bound by any contract which that other may make on his behalf, with a third party who has no knowledge of the secret arrangements between them. Ruane v. Murray, 26 Pa. Super. Ct. 187.

41. Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142.

42. The principal has the unqualified right, as between himself and the agent, to define or limit the agent's authority. Cullinan v. Bowker [N. Y.] 72 N. E. 911. If a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of, or an abuse of the authority actually conferred, then, manifestly, the principal is not bound, and it is immaterial whether the agent is a general or a special one. Id. Where defendant knew that plaintiff's agent was a mere hired man employed only to look after cattle, he could not defend against an action for injury to cattle that plaintiff's agent authorized him to put his bulls in the feeding pens with plaintiff's cattle. Trammell v. Turner [Tex. Civ. App.] 82 S. W. 325. When a third party has notice of the agency of the party with whom he deals, he must regard the property which is the subject of their transactions, as the property of the principal, and must confine his dealings strictly within the scope of the agent's authority. Merchants' and Mfrs.' Nat. Bank v. Ohio Val. Furniture Co. [W. Va.] 50 S. E. 880. A general agent cannot waive conditions, etc., in an insurance policy, which, by the very terms of the policy, can be waived only by certain officers of the insurance company. Hutson v. Prudential Ins. Co. of America [Ga.] 50 S. E., 1000.

43. Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701; T. H. Baker & Co. v. Kellett-Chatham Mach. Co. [Tex. Civ. App.] 84 S. W. 661; Sullivant v. Jahren [Kan.] 79 P. 1071. A special power must be strictly pursued, and whoever deals with an agent constituted for a special purpose deals at his peril, when the agent passes the precise limit of his power. Stokes v. Dewees, 24 Pa. Super. Ct. 471. The law presumes that one dealing with an agent knows the extent of his authority. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. A customer of a bank who is credited by the cashier, in his passbook, with sums of money owing him by such cashier, is bound to inquire into the authority of the cashier to do so. Hier v. Miller, 68 Kan. 258, 75 P. 77. One paying a debt, secured by a mortgage, to a supposed agent of the owner of the mortgage, must ascertain the scope of the agent's authority to receive the money. Cornish v. Woolverton [Mont.] 81 P. 4.

44. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

45. Ruane v. Murray, 26 Pa. Super. Ct. 187; Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. Powers habitually exercised by a cashier of a bank with its knowledge and consent. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Where plaintiff had for a long time transacted its business, of a nature similar to the transactions sued on, with a particular representative of defendant. Sloss Iron & Steel Co. v. Jackson Architectural Iron Works, 92 N. Y. S. 1056. Where a person had been represented as the superintendent and general manager of a firm, and had transacted its business from the start, including its financial affairs, and where defendant, for whom the money was borrowed, got it on the note signed by such agent, held, as a matter of law, that he was the legally authorized agent of defendant. Fordsville Banking Co. v. Thompson, 26 Ky. L. R. 534, 82 S. W. 251. Where one has been held out to the world as a general agent, a third party may deal with him as such and bind his principal until notice of revocation of authority is brought home to him. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. Where a firm permits an employe to transact business on his own account, under the name of a company, and holds him out as such company, it is estopped to deny his authority to take notes and transfer them to others dealing with him, in reliance upon his apparent authority. Gardner v. Wiley [Or.] 79 P. 341. Where the apparent manager of a business refers a party, inquiring as to matters connected with pending transactions, to others for his information, the principal is bound by the representations of such parties. Haner v. Northern Pac. R. Co. [Wash.] 81 P. 98.

46. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. A public and long continued course of business dealing by an agent may be safely relied upon by one dealing with a corporation upon the faith thereof; as where the purchasing agent of a corporation was known as a general officer of it and for 12 or 13 years had conducted transactions similar to those with plaintiff. Batavian Bank v. Minneapolis, etc., R. Co. [Wis.] 101 N. W. 687. Where an agent of a manufacturing concern calls on a retailer, takes his order and notifies his principal to ship the goods, a presumption arises, in the absence of evidence of any limitation on the agent's power that he has authority to make the sale. Nebraska Bridge Supply & Lumber Co. v. Owen Conway & Sons [Iowa] 103 N. W. 122.

47. An agent has by inference of law power to do any and all acts necessarily incident

third party from proof of ownership.[48] An agent having negotiable paper in his possession for sale, indorsed in blank or otherwise by his principal, so as to permit transfer of title by delivery, may be regarded, by those having no notice of the agency, as the owner of such paper.[49]

Evidence and questions of fact.[50]—Apparent authority may be shown by showing a custom.[51] While the board of directors or trustees is the usual governing body of all private corporations and entitled to direct and control all its business and to direct its other officers, yet the president and other officers are those who are usually brought into contact with third parties in the conduct of the business of the organization; and custom and usage and the necessities of the social order demand that these executive officers should be regarded as entitled to bind the organization in all matters which such organizations are accustomed to transact through such officers.[52]

Unauthorized and tortious acts.[53]—Acts of an agent without the scope of his authority will not bind his principal unless ratified by him;[54] and where the principal repudiates a transaction as soon as it comes to his knowledge, notifying the other party, he cannot be said to have ratified it.[55] The principal cannot be held liable for the unauthorized acts of his agent simply because those acts were done with the intent to benefit or serve the principal.[56] A person

to the performance of the duty required of him by his principal. American Tel. & T. Co v. Green [Ind.] 73 N. E. 707. As to third parties, the liability of the principal for the acts of his agent is measured not merely by the authority actually given, but by the authority essential to the business of the agency. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. It rests with the principal to determine what character he will impart to his agent, and, having determined and imparted the character, he is held to have intended, also, the usual and legal attributes of that agency. T. H. Baker & Co. v. Kellett-Chatham Mach. Co. [Tex. Civ. App.] 84 S. W. 661. A shipper may rely upon the authority of a station agent to make a special contract of shipment by a particular train, and need not prove any such authority, it being within the scope of his authority as a station agent. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22.

48. As between the owner of hansom cabs and the drivers. Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241; Walton v. Ensign, 6 Ohio C. C. (N. S.) 300.

49. Merchants' & Mfrs.' Nat. Bank v. Ohio Val. Furniture Co. [W. Va.] 50 S. E. 880.

50. See 3 C. L. 81.

51. As a custom among carriers and warehousemen to construe a consignment, under an agreement to hold until freight charges are paid, as creating an agency for collection only. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59 A. 360.

52. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

53. See 3 C. L. 82.

54. Jos. Schlitz Brew. Co. v. Grimmon [Nev.] 81 P. 43; Quale v. Hazel [S. D.] 104 N. W. 215. Unauthorized agreement by superintendent that company would pay for physician's services to employe. King v. Forbes Lithograph Mfg. Co., 183 Mass. 301, 67 N. E. 330. Unauthorized acts of its officers not binding on the corporation. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. A sale of samples by a commercial traveler, except in pursuance of express instructions, confers no title on the purchaser. Hibbard, Spencer, Bartlett & Co. v. Stein [Or.] 78 P. 365. An agent to sell typewriters unlawfully pledged two as security for a loan to himself. Wycoff, Seaman & Benedict v. Davis [Iowa] 103 N. W. 349. A principal is not bound by an unauthorized option given by his agent, unless he ratifies it. Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701. A principal is not bound by any oral agreements or statements made by his agent, not incorporated in the written order for goods, especially when the form of the order warns the vendee that the agent has no authority to make any agreements not printed or written in the order; such as an oral agreement not to sell goods to any other party in the same place. Walter Pratt & Co. v. Meyer [Ark.] 87 S. W. 123. A lease executed by an agent in his own name, under seal, without authority, is voidable but not void. Anderson v. Conner, 43 Misc. 384, 87 N. Y. S. 449. A formal surrender of leased premises is not necessary when the lease is void because of want of power in the agent to make it. Smoot's Case, 38 Ct. Cl. 418. The limit of time within which a real estate broker is required to close a sale begins to run from the date of mailing the letter of authority to him, and not from the time when he received it. Satterthwaite v. Goodyear [N. C.] 49 S. E. 205.

55. Roberts v. Francis [Wis.] 100 N. W. 1076.

56. A local cashier for a railroad company, authorized only to collect freight charges, sell tickets and remit the money, has no authority as agent to cause the arrest of one whom he suspects of having stolen money, and the company is not responsible in dam-

is not bound by the unauthorized acts of another, done without his knowledge,[57] unless he has permitted the alleged agent to hold himself out as such; but the party dealing with him as agent must be deceived to his prejudice by the false representation.[58] The agent cannot bind his principal by fraudulent contracts entered into with full knowledge and connivance of the party who seeks to recover on the contract.[59]

Fraud, misrepresentation or tortious acts by the agent may be imputed to the principal;[60] but the burden of proving the agency is on the plaintiff.[61] And where the agent is guilty of an independent fraud for his own benefit, the law does not impute to the principal notice of such fraud.[62] Where the consideration for a note and mortgage, negotiated by an agent, is contrary to public policy, the obligee therein, if he claims the benefit of it, is bound by the acts of his agent in negotiating it.[63] Under the statutes of Washington forbidding usury, the acts of the agent in loaning money bind the principal and he is held thereby to the same extent as if he had acted in person,[64] and where a broker loaned defendant's money at illegal rates of interest, the transaction was held usurious as against defendant, although he received no part of the commissions and had no knowledge of it.[65] Before a master can be held responsible for the torts of his servant, it must be clearly shown that the latter had express or implied authority to commit the wrong,[66] and the agent must have been at the time engaged in the principal's business and the tort must have been committed while the agent was carrying out such business.[67] Where the wife acts as the agent of the husband, he is responsible for her negligent acts, in the course of her employment, to the injury of a third person.[68] Under the Code of Louisiana, masters are responsible for damages occasioned by their servants only in the "exercise of the functions in which they are employed," and are not liable for collateral torts committed by servants while attending to the duties of their employment.[69] A creditor who employs an attorney only to attach his cred-

ages therefor. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816.

57. Defendant's daughter wrote to a real estate broker, signing defendant's name, making arrangements for the sale of lands, but without defendant's knowledge or consent. Held, that defendant was not bound although the daughter lived in her family. Hickox v. Bacon, 17 S. D. 563, 97 N. W. 847. Husband not bound by unauthorized contract of wife, unless he knew of it or subsequently adopted it. Thompson v. Brown, 121 Ga. 814, 49 S. E. 740.

58. Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390.

59. Pacific Lumber Co. v. Moffat [C. C. A.] 134 F. 836.

60. As where the vendor of land referred the vendee to a third person for information as to the title, and the latter represented the land as unincumbered. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727. Fraudulent representations by the agent, to effect the sale of worthless stock. Campbell v. Park [Iowa] 101 N. W. 861. Fraudulent representations by agents in prospectuses issued to induce the purchase of stock. Briggs v. Foster [C. C. A.] 137 F. 773. Fraud in securing a deed, known to the principal. Cook v. Boyd [Iowa] 99 N. W. 1063.

61. Evidence held insufficient to show that defendant represented certain bonds and coupons to be legal and valid obligations. O'Day v. Bennett, 26 Ky. L. R. 702, 82 S. W. 442. Where plaintiff's horse was run into and killed by a team, by reason of the careless and negligent manner of the driver, a prima facie case of negligence is imputed to the defendant, by showing that he was the owner of the team, without affirmative proof that the driver was his agent or servant. Walton v. Ensign, 6 Ohio C. C. (N. S.) 300.

62. Pursley v. Stahley [Ga.] 50 S. E. 139.

63. A note and mortgage, executed in consideration of an agreement not to prosecute the obligor's son, held unenforceable. Corbett v. Clute [N. C.] 50 S. E. 216.

64. Ball. Ann. Codes & St. §§ 3669, 3671. Ridgway v. Davenport [Wash.] 79 P. 606.

65. Ridgway v. Davenport [Wash.] 79 P. 606.

66. Agents or clerks employed to run a commissary store and to collect amounts due by laborers to a construction company have no authority to cause the arrest of persons for violating a labor contract. Vara v. R. M. Quigley Const. Co. [La.] 38 So. 162.

67. St. Louis, etc., R. Co. v. Grant [Ark.] 88 S. W. 580.

68. McNamar v. Cohn, 115 Ill. App. 31.

69. Civ. Code, art. 2320. Vara v. R. M. Quigley Const. Co. [La.] 38 So. 162.

itor's goods is not liable for the unauthorized act of the attorney in causing the debtor's arrest.[70] A government is not responsible for the tortious acts of its officers without previous authorization or subsequent ratification.[71]

(§ 2) *C. Particular kinds of agencies.*[72]—The powers of a general agent are to be determined by the scope of his agency,[73] while a special agent has only such power as is expressly conferred,[74] or necessarily implied from authority expressly given;[75] and he cannot depart from his strict instructions and bind his principal.[76] The general principles are further illustrated by the cases grouped

70. West v. A. F. Messick's Grocery Co. [N. C.] 50 S. E. 565.

71. Washington L. & T. Co.'s Case, 39 Ct. Cl. 152. Execution of deed by agent, see Tiffany, Real Prop. 937; subscription of corporate stock by agent, see Helliwell, Stock & Stockholders, § 70.

72. See 3 C. L. 83.

73. Hutson v. Prudential Ins. Co. of America [Ga.] 50 S. E. 1000; Cullinan v. Bowker [N. Y.] 72 N. E. 911. The general agent of a railroad company will be presumed to have authority to make a contract for carriage beyond its lines. Northern Pac. R. Co. v. American Trading Co., 25 S. Ct. 84. The president of a bank or the vice-president acting in his stead is its chief representative and entitled to act as its general agent in the transaction of its business. He can employ counsel to appear for it and defend its interests in pending or prospective litigation. Russell v. Washington Sav. Bank, 23 App. D. C. 398. Where a broker is employed to transact all the business of a particular kind of his principal, he is a general agent. Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142. An instruction that "a general agent is defined under the law to be one empowered to transact all his principal's business" is sustained by the authorities, and cannot mislead a jury, as they must understand it to refer only to the kind of business transacted by the principal. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. If a party holds out his agent to the world as a general agent in the transaction of his business, any contract made by him, within the scope of that business, will bind the principal, although there may be, as between principal and agent, a restriction upon the agent's general authority. Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142. The powers of a general agent extend to the doing of all acts connected with the business of his principal, and his authority will be deemed to include all usual means for the effective performance of his duties, in the employment of clerks, or of subordinate agencies, for the performance of acts, where an exercise of the agent's judgment or discretion is not demanded nor presumed. Cullinan v. Bowker [N. Y.] 72 N. E. 911. The general agent of a quarries company, having powers co-extensive with the business of the company, can bind his principal in a contract of release of claim for damages by an employe. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608. A general agency in a particular branch of the principal's business implies no power in connection with any other branch. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396. A deputy is regarded as a general agent of a sheriff, being generally authorized by law to represent the sheriff in all the duties confided to the latter, and can provide for the safe-keeping of goods seized on attachment or execution by committing them to a bailee. Ramsey v. Strobach, 52 Ala. 513. But in Pennsylvania a deputy sheriff has no power, by virtue of his office, to bind the sheriff by the employment of a watchman for goods attached. Munis v. Oliver, 24 Pa. Super. Ct. 64. Insurance agents who are authorized to solicit and sell insurance and deliver policies and collect premiums are of the company and have power to waive conditions in insurance policies. Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500. A depot quartermaster is a general agent of the government in the purchase of supplies, and has the right, when ordered to do so by the quartermaster general, to sell unnecessary supplies. Held, that he had power to make sale of temporary halls, stables and hospitals built for the occupation of troops in camp during the Spanish war. Houser's Case, 39 Ct. Cl. 508.

74. A real estate agent has only limited powers, his business being only to find purchasers and to bring owners and purchasers together. He is a special agent, and must pursue his instructions and act within the scope of his limited powers. If he exceeds them, those who deal with him do so at their peril. Sullivant v. Jahren [Kan.] 79 P. 1071. An insurance broker employed merely to secure a policy of insurance on a particular property is the special agent of his employer. Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142. A bank which is made the lessor's agent to receive payments of rent has authority to receive payments only as provided for in the lease; and the receipt of a payment after the expiration of the lease will not bind the lessor. Indiana Natural Gas & Oil Co. v. Beales [Ind. App.] 74 N. E. 551.

75. When an agent is authorized to do an act for his principal, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. Brittain v. Westall [N. C.] 49 S. E. 54, citing Sprague v. Gillett, 50 Mass. 91.

76. Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142. A person sent to get a horse, by the purchaser, being a special agent, could not bind him by an agreement that the title to the horse should remain in the vendor until paid for. Schenck v. Griffith [Ark.] 86 S. W. 850.

in the notes.[77] An *insurance* solicitor is an agent of the insurer, notwithstand-

77. **Power to sell realty:** Power of executrices of will to make a valid contract for sale of land. Coolbaugh v. Ransberry, 23 Pa. Super. Ct. 97. A broker employed to sell lands has no implied authority to sign a contract to sell on behalf of his principal. Sullivant v. Jahren [Kan.] 79 P. 1071. A written power to sell land does not in itself include the power to option. Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701. A power of attorney authorizing the sale, by quitclaim deeds for such price, upon such terms of credit and to such terms as the attorneys saw fit, of the whole or any part of certain premises, did not authorize the conveyance of a part of the land in consideration of money expended in the defense of a certain suit to recover a part of the land. Brown v. Orange County [Tex. Civ. App.] 13 Tex. Ct. Rep. 138, 88 S. W. 247. A power of attorney, authorizing the sale of lands for cash or notes, does not confer the authority to execute a deed without consideration. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. Where the terms of a power of attorney cannot by any construction be said to authorize the execution of a deed, it will not be presumed that the deed was executed thereunder; nor will the proof of such a power of attorney be in itself sufficient to sustain a finding that the deed was executed without authority. Brown v. Orange County [Tex. Civ. App.] 13 Tex. Ct. Rep. 138, 88 S. W. 247.

Power to buy or sell personalty: Contract held to be one of agency and not of conditional sale. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802. An agency for a fixed period where it is stipulated that the agent is to receive commissions for his services is in the nature of a contract of letting and hiring. Spinks v. Georgia Quincy Granite Co. [La.] 38 So. 824. Authority to purchase goods as agent cannot be implied from special authority to sell goods and devote the proceeds to a particular purpose. Kelly v. Tracy & Avery Co. [Ohio] 73 N. E. 455. A contract which empowered an agent to sell personal property at any price he saw fit, and to pay the owners a fixed price when sold and to retain the balance as his commission, held to be an agency contract. Briggs v. Foster [C. C. A.] 137 F. 773. Authority to sell does not confer authority to mortgage. Wycoff, Seaman & Benedict v. Davis [Iowa] 103 N. W. 349. Authority to sell horses does not imply authority to deal with them in any other way, as to exchange them for other property. Roberts v. Francis [Wis.] 100 N. W. 1076. An agent authorized to conduct purchases and sales cannot, in the course of such transactions, obligate his principal to pay the debt of another by the purchase of lumber at a price sufficiently above the market price to cover the indebtedness owing to the vendor by an insolvent corporation. Pacific Lumber Co. v. Moffat [C. C. A.] 134 F. 836. Where an agent had authority to take notes of responsible parties for machines sold, held, that he had no power to bind his principal by the indorsement of such notes. National Fence Mach. Co. v. Higbleyman [Kan.] 80 P. 568. When an agent is supplied with funds, he cannot purchase on credit, unless, perhaps, such is the well known custom of the trade, or unless the principal, with notice of the facts, ratifies the transaction; but when the authority to buy or sell is given in general terms, without restrictions, the agent can buy or sell for cash or on credit, as he may deem best. When express authority to buy on credit is not given, but he is authorized to buy and no funds are furnished him to enable him to pay cash, he is by implication authorized to buy on the credit of his principal. Brittain v. Westall [N. C.] 49 S. E. 54. Where a person purchases at wholesale, buying at a stipulated price, selling for himself and conducting his business independently, he is in no sense an agent, although conducting a so-called "agency" for the sale of products. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

General sales agents: Construction of contract of agency for sale of goods within a certain territory on commission. Morrison Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016. Contract to give plaintiff the right to sell all the company's product for five years, at a commission of $1 per car, for ice shipped from its plant, held to be an employment to sell on commission and not the creation of the relation of master and servant. Morrow v. Tunkhannock Ice Co. [Pa.] 60 A. 1004. A sales agent whose duties are to take orders within certain territory, and having authority to employ his own salesmen only, cannot employ a salesman and bind his principal to pay him for his services. National Cash Register Co. v. Hagan & Co. [Tex. Civ. App.] 83 S. W. 727. A traveling salesman derives no implied authority from the nature of his employment to sell the samples with which he is intrusted as an aid in the discharge of his duties. Hibbard, Spencer, Bartlett & Co. v. Stein [Or.] 78 P. 665.

Authority to receive payments or collect money: Authority to collect the interest on a note creates no presumption of authority to collect the principal. Higley v. Dennis [Tex. Civ. App.] 13 Tex. Ct. Rep. 609, 88 S. W. 400; Cunningham v. McDonald [Tex.] 83 S. W. 372. An agent to collect a note when due, has no authority to receive payment before maturity, and such payment does not discharge the note. Id. Power to collect cash does not include authority to indorse the principal's name upon commercial paper and collect the same, and the payee may recover the value of checks so indorsed and paid. Goodell v. T. M. Sinclair & Co., 112 Ill. App. 594. An attorney in whose hands a claim is placed, in the absence of any limitation of his authority, is authorized to collect a judgment for the same by execution; and his client is liable for damages by the attorney's wrongful act in issuing and causing the levy of an execution in violation of a stay. Barber v. Dewes, 91 N. Y. S. 1059.

Where a carrier delivers goods to a consignee under an agreement that the latter is to hold them until freight charges are paid, the consignee becomes an agent for collection only. Such is the customary construction of such transactions between warehousemen and carriers. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59

ing a clause in the policy to the effect that he should be the agent of the insured as to all statements and answers made in the application.[78]

A. 360. An authority to collect and settle a claim involves the exercise of a personal discretion, which cannot be delegated, and does not imply authority to submit the claim to arbitration. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782.

Power to make or obtain loans: The mere fact that the principal allows his agent to retain a note and mortgage on which the latter has failed to negotiate a loan does not give rise to an agency to borrow smaller sums of money for a wholly different purpose than that for which the original note and mortgage were executed. Keegan v. Rock [Iowa] 102 N. W. 805. Mortgagees employed an attorney, before taking a mortgage, to see that it was a first lien, and he certified falsely that it was such, whereupon they gave their check to the attorney, payable to the mortgagor. The latter indorsed the check to the attorney to pay off the first mortgage, and he embezzled the money. Held, that the attorney was agent for the mortgagor and he must bear the loss. Trustees of Synod of Reformed Pres. Church v. Livingston [Pa.] 60 A. 154.

Powers with reference to commercial paper: Power given to sign one's name to any note or "like instrument" necessary in the management of an estate held to authorize the signing of his name to the renewal of a note in connection with the business of the estate. Stone v. McGregor [Tex. Civ. App.] 84 S. W. 399.

Corporate and insurance agents: Lessee of hansom cab and horse held bailee and not agent of railroad company. Connor v. Pennsylvania R. Co., 24 Pa. Super. Co. 241. A corporation can act only by agents, and its duly elected officers are, within the scope of their respective duties, its agents to deal with third parties. Russell v. Washington Sav. Bank, 23 App. D. C. 398. The president of a bank has no inherent authority, by virtue of his office, to enter into contracts or agreements which will bind the corporation. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544, citing Stokes v. N. J. Pottery Co., 46 N. J. Law, 237. The secretary of a corporation has no power merely as secretary to make contracts binding the corporation. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. The cashier of a bank has no implied authority to pay his individual debts by crediting them upon the passbook of a customer of the bank and allowing him to check out the full amount, the bank receiving nothing in the transaction. Hier v. Miller, 68 Kan. 258, 75 P. 77. Authority of station agent to accept and hold cattle, intended for transportation, as a depositary during a short delay in shipment. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. A railroad agent, authorized to place cars along the line at points other than stations, to receive freight, has authority to make agreements in behalf of the company to receive such freight to await the arrival of cars, so as to make the company liable to an action for damage to cotton seed by exposure to the elements, while awaiting cars. Georgia S. & F. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961. The fact that a party is a trustee of a lodge does not authorize him to represent it in the making of binding contracts, nor are his declarations binding upon the lodge. Castner v. Rinne, 31 Colo. 256, 72 P. 1052. An initial carrier of stock to be delivered by it to a connecting line, in making the contract of transportation for the connecting line, held to be acting only as agent. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. Drivers of delivery wagons for express companies have no authority, by virtue of such employment, to make special contracts of shipment in behalf of such companies. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22.

78. Held competent, in an action on the policy, to show that the insured gave truthful answers to the agent and the latter wrote false answers in the application. Reilly v. Empire Life Ins. Co., 99 App. Div. 535, 90 N. Y. S. 866. One who requests another to allow him to procure insurance on his property, and does so procure it, through another agency, is an insurance agent under the laws of Iowa. Code, § 1749. Hartman v. Hollowell [Iowa] 102 N. W. 524. The acceptance of notes for the premium and the delivery of the policy, by the agent of an insurance company, puts the policy in full force, the same as though the premium had been paid in cash. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

Miscellaneous special agencies: A written power of attorney to conduct "to final consummation" a pending suit, or to compromise the same, confers no authority to employ counsel, unknown to his principal, and to refer the controversy to referees selected by him and the adverse parties. City of New York & City of Brooklyn v. DuBois [C. C. A.] 132 F. 752. Where a stockbroker agreed with defendant to buy and sell stocks for him and his customers, defendant not knowing the customers, whose transactions were entirely with the broker, it was held that the broker was not the agent of defendant and defendant was not liable for the broker's representations to his customers. Holman v. Goslin, 93 N. Y. S. 126. One authorized to drive another's horse is not thereby made his agent for the purpose of making admissions as to the habits of the horse. Haywood v. Hamms [Conn.] 58 A. 695. The husband may act as agent of his wife, but in order to bind her, he must previously be authorized to do so, or his act must, with full knowledge, be ratified. Francis v. Reeves [N. C.] 49 S. E. 213, citing McLaren v. Hall, 26 Iowa, 297. If one initiates correspondence by telegraph, he selects the telegraph company as his agent, which agency continues throughout the correspondence. Bond v. Hurd [Mont.] 78 P. 579. In the transmission of a telegraphic message, the company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission. Richmond Hosiery Mills v. Western Union Tel.

(§ 2) *D. Ratification by principal.*[79]—One may ratify a previously unauthorized act, done in his behalf which he himself might have and may still lawfully do or might and may still lawfully delegate to another.[80] Ratification may be by mere acquiescence or failure to act,[81] for a considerable length of time,[82]

Co. [Ga.] 51 S. E. 290, citing Brooke v. W. U. Tel. Co., 119 Ga. 694. Where a party individually, and as trustee under her husband's will, appoints agents to manage her personal property or that of the estate, the relation between them is simply that of principal and agents and they do not become trustees of any property to which their principal is entitled. Myer v. Abbett, 94 N. Y. S. 238. A mortgagor procuring insurance on mortgaged premises for the mortgagee as his interest may appear, in accordance with an agreement to do so, is not in any sense the agent of the mortgagee. Agner v. Firemen's Ins. Co., 2 Ohio N. P. (N. S.) 254. A party who obtains money on chattel mortgage, upon property already so mortgaged, is not the agent of the first mortgagee, so as to bind the latter by his representations to the second mortgagee in negotiating the loan. Citizens' State Bank v. Smith, 125 Iowa, 505, 101 N. W. 172. Where it is not alleged or shown that a co-defendant, in a suit to restrain interference with certain ditches, was the agent of the owner of the land, who is plaintiff, or authorized to represent him, and the other defendants are not connected with his statements, the defendants are not estopped to deny plaintiff's right to the use of the ditch, by any representations of such co-defendant. Campbell v. Flannery [Mont.] 79 P. 702. An agency to purchase a certain execution does not imply an authority to purchase the land upon which such execution has been levied. Hood v. Hendrickson [Ga.] 50 S. E. 994. Under a power of attorney contained in a lease but one judgment in ejection can be confessed. Philadelphia v. Johnson, 23 Pa. Super. Ct. 591. The occupancy of premises, after the expiration of a lease, by an unauthorized officer of the United States, will not have the effect of continuing such lease. Smoot's Case, 38 Ct. Cl. 418. It is a general principle that officers of the United States, in their official capacity, are special agents only and must act within their legally prescribed limitations, and a subordinate officer has no authority to bind the government beyond his delegated powers. Houser's Case, 39 Ct. Cl. 508. Where the charter party provided that war risks should be borne by the United States and marine risks by the owners, a quartermaster had no authority, by oral assurances, to make the government liable for any further risks than the charter party provided, attendant upon the delivery to the transport fleet of a cargo of fresh water during a strong wind and a high sea. Donald's Case, 39 Ct. Cl. 357. A statute giving holders of claims against the state the right to sue thereon in the superior court does not render the state liable for negligence of its officers or agents but merely waives its former immunity from suit. Act Wash. March 20, 1895 (Sess. Laws, p. 188). Billings v. State, 27 Wash. 288, 67 P. 583. The words "agency" and "agent," in connection with the "agencies" established by a brewing company for the sale of its products, must be regarded as in the nature of trade-names. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

79. See 3 C. L. 84.

80. The doctrine of ratification must not be confounded with the doctrine of estoppel by acquiescence or laches. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Distinction between ratification and estoppel. Steffens v. Nelson [Minn.] 102 N. W. 871. The directors of a bank may ratify any act done or contract made by the president without authority, which they could have authorized him to do or make. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Contracts entered into by promoters of corporations cannot technically be ratified by a corporation not in existence at the time of the making of the contract, yet if the agreement is a reasonable means of carrying out any of the company's authorized purposes, it may be accepted and adopted by the latter, either at the time of its formation or subsequently. A lease, delivered to a committee for and in behalf of the prospective corporation, which after formation entered into possession under it, was held to have been adopted. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113. Where an agent wrongfully pledges his principal's property as security for a loan to himself, the principal cannot ratify the transaction as there is no benefit to him. Wycoff v. Davis [Iowa] 103 N. W. 349. A husband cannot be held to have ratified and adopted a contract by his wife in her own behalf merely because he paid for part of the work. Thompson v. Brown, 121 Ga. 814, 49 S. E. 740. Where defendant's acts were in no way inconsistent with an oral contract made by him to sell goods on commission, he could not be held as a purchaser on the theory of a ratification of an alleged contract made in his behalf by his wife. Wade v. Wolfson, 90 N. Y. S. 1078. The bringing of an action by the principal against the agent to recover a commission secretly paid the agent by a third party, does not operate as a ratification of the contract, so as to discharge such party from an action for fraud and deceit, whereby the contract was induced. Collusion between agent and third party in the purchase and sale of oil lands to the principal. Barnsdall v. O'Day [C. C. A.] 134 F. 828. The payment into the treasury of a small portion of the money tortiously collected by a consular agent, upon a final settlement of his accounts, is not such a ratification of his acts as makes the government liable for the same. Washington Loan & Trust Co.'s Case, 39 Ct. Cl. 152. The acts of the agent may be shown in connection with proof of a ratification of such acts by the principal. Richards v. Newstifter [Kan.] 78 P. 824.

or by positive acts, such as the adoption,[83] acceptance,[84] execution of a contract made through the alleged agent,[85] or the acceptance of benefits resulting from the unauthorized act.[86] The principal must have full knowledge of all material

81. Where the maker of a note signed the names of two relatives without authority, and the latter, after notice of the fact by the payee, did not repudiate the same until after the maturity of the note and the principal had died insolvent, it was held that they had thereby ratified the signatures. Corner Stone Bank v. Rhodes [Ind. T.] 82 S. W. 739. Ratification will result by operation of law from acquiescence in a sale for an unreasonable length of time after notice of the agent's conduct. What is an unreasonable length of time depends upon the circumstances of the case and is a question for the jury. Length of time held sufficient in this case. Whitley v. James, 121 Ga. 521, 49 S. E. 600. Where a broker effected a sale of goods and sent his principal a memorandum of the terms of sale, which was kept by the latter four months without any repudiation of the contract, there was a ratification of the contract. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. Ratification of an agent's contract may result from failure to object seasonably to the agent's violation of the terms of his contract. Massey v. Greenabaum Bros. [Del.] 58 A. 804. Where the president of a corporation executes, in its behalf and within the scope of its powers, a contract requiring the concurrence of the directors, and they, with knowledge of the fact, do not dissent within a reasonable time, it will be presumed to have ratified the act. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544.

82. Sloan v. Sloan [Or.] 78 P. 893.

83. The giving of an order for the purchase of machinery, upon the negotiations of the agent, is a ratification of his agency up to that point. Benton v. Moss, 93 N. Y. S. 1113. The payment of checks in part payment of purchases made by an agent is a ratification of his contract. The agent bought feed for his cattle on the credit of his principal, who had a mortgage on the cattle. Evans-Snider-Buel Co. v. Hilje [Tex. Civ. App.] 83 S. W. 208. Bringing an action upon a contract made by an agent, the terms of which are known to the principal, is a ratification of it. Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015; Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074. A statement of an account by the bookkeeper of a corporation, which is adopted by the officer that is authorized to make or alter contracts, is binding on the company. Providence Mach. Co. v. Browning [S. C.] 49 S. E. 325. The payment of money by the principal, upon a contract made by an agent for a release of damages for an injury to an employe is a ratification of the contract of release. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608. Sending to the agent of money to pay for purchases made. The principal, in such case, is liable to the vendor, even though the agent wrongfully appropriated the money to apply upon a debt owed him by the vendor. Luttrell v. East Tennessee Tel. Co. [Ky.] 86 S. W. 1124. Ratification of signature to a note, by acknowledgment of the same when shown the signature by the holder of the note. Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334. Where the quartermaster general directs the purchase of a vessel partially constructed, and the quartermaster in charge orders changes and additions that increase the cost, there being an exigency that requires the immediate performance of the work, an approval of his action by the quartermaster general, with full knowledge of the facts, is equivalent to express authority. Moran Brothers Co.'s Case, 39 Ct. Cl. 486.

84. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. The protesting of a general agent's drafts for funds to be used on contracts made is not a repudiation by the principal, but a ratification, where the only reason given for not advancing the money is that it is unnecessary to do so. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

85. A lease of realty, executed under seal by an agent without written authority, may be ratified by a subsequent assignment under seal by the owner to another party and entering into possession under it by the lessee. Gleadall v. Kenney, 23 Pa. Super. Ct. 576.

86. The acceptance of rent, with knowledge of a lease executed by an agent, is a ratification by the principal. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419. Acceptance of the benefits of a contract of purchase, by receiving and disposing of the materials and making payments according to the contract. Swindell Bros. v. Gilbert & Bro. [Md.] 60 A. 102. The acceptance and deposit of a check, taken by a wife for her husband, is a ratification of her act in signing a receipt, and such receipt is evidence against him of payment. Steffens v. Nelson [Minn.] 102 N. W. 871. The retaining of money paid on a settlement, with knowledge of all the facts, is a ratification by the principal of such settlement, although it was made by the agent without authority. Dowagiac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717. Ratification of acts of purchasers of a stock of goods, in behalf of certain creditors, by their interpleading and claiming a fund deposited by the seller. Alexander v. Wade, 106 Mo. App. 141, 80 S. W. 19. If one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty and is bound by its terms as fully as he would be had he negotiated it himself. Dowagiac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717. Collection of rent under a lease, executed by an agent without authority, is a ratification of it. Anderson v. Conner, 43 Misc. 384, 87 N. Y. S. 449. Where defendant admits getting money on a note signed by his agent, he cannot deny liability for the agent's act. Fordsville Banking Co. v. Thompson, 25 Ky. L. R. 534, 82 S. W. 251.

facts at the time of ratification;[87] and his act must also be voluntary.[88] Ratification cannot be partial.[89] Ratification is equivalent to an original grant of authority;[90] and cures any defect in the execution of a power.[91] Ratification is usually a question of fact for the jury.[92]

(§ 2) *E. Undisclosed agency.*[93]—An undisclosed principal may avail himself of a contract made by his agent.[94] Although a mining lease may be so executed by an agent as to bind himself only, yet his principal is entitled to ratify it and sue thereon.[95] An agent contracting in his own name for an undisclosed principal may sue on the contract in his own name.[96]

87. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544; Bank of Commerce v. Miller, 105 Ill. App. 224; Sullivant v. Jahren [Kan.] 79 P. 1071; Steffens v. Nelson [Minn.] 102 N. W. 871; Stewart v. Harris, 91 N. Y. S. 438; Prichard v. Sigafus, 93 N. Y. S. 152; Quale v. Hazel [S. D.] 104 N. W. 215. And the latter must know that he would not be bound without such ratification. Munis v. Oliver, 24 Pa. Super. Ct. 64, citing Pittsburg & Steubenville R. Co. v. Gazzam, 32 Pa. 340; Moore's Ex'rs v. Patterson, 28 Pa. 505; Zoebisch v. Rauch, 133 Pa. 532. Acts relied on as a ratification must be shown to have been done with full knowledge of all the material facts relating to the transaction. Facts not sufficient to show ratification of agency so as to render principal liable for agent's commission. Downing v. Buck [Mich.] 98 N. W. 388. The principal cannot be held to have acquiesced in or ratified any unauthorized understanding with his agent, in the absence of any showing that he had actual knowledge of such understanding. As a statement made by the vendor of a horse, to the agent sent to get it, that the title to the horse was to remain in the vendor until payment was made. Schenck v. Griffith [Ark.] 86 S. W. 850. The acceptance of part of the purchase price of property sold by an agent will not operate as a ratification of an unauthorized transaction, where the principal is not aware of the illegal acts of the agent. Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950. Although a collector has indorsed checks payable to his principal and paid over the money, his principal cannot be held to have authorized the practice when he had no knowledge, and no means of knowing of it. Goodell v. Sinclair & Co., 112 Ill. App. 594. A petition setting up a ratification by the principal of a contract made with his agent must allege full knowledge by the principal of all the facts in order to show ratification. Butler v. Standard Guaranty & Trust Co. [Ga.] 50 S. E. 132.

88. Munis v. Oliver, 24 Pa. Super. Ct. 64, citing Thrall v. Wilson, 17 Pa. Super. Ct. 376; Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544.

89. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074; Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015. A ratification of part of an unauthorized transaction of an agent is a confirmation of the whole. Dowagiac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717. One cannot adopt a part of an unauthorized transaction made in his behalf, which is beneficial, and repudiate the rest. Shafer v. Russell [Utah] 79 P. 559; Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. The contract ratified must be adopted as made. Singer Mfg. Co. v. Christian [Pa.] 60 A. 1087. If a principal elects to affirm a sale made by his agent, he can recover only the actual proceeds thereof. Stewart v. Harris, 91 N. Y. S. 438.

90. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct. The substance of ratification is confirmation after conduct. Steffens v. Nelson [Minn.] 102 N. W. 871.

91. Whitley v. James, 121 Ga. 521, 49 S. E. 600. Restrictions on the powers of an agent can be waived by the principal. White Sew. Mach. Co. v. Hill, 136 N. C. 128, 48 S. E. 575.

92. Quale v. Hazel [S. D.] 104 N. W. 215. Evidence of a ratification of an agent's contract to pay a commission on the sale of a gas engine held sufficient. Meyers v. Brown-Cochran Co., 91 N. Y. S. 72. In an action to recover money loaned to a surety company, through its general agent, evidence held sufficient to justify the submission to the jury of the question of a ratification of the contract. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. Held error to instruct the jury that, if they found that the defendant ratified the settlement in question, they should find for the plaintiff, without stating what acts would amount to a ratification. Morrill v. McNeill [Neb.] 104 N. W. 195.

93. See 3 C. L. 88.

94. The receiver of a telegram may recover from the company for breach of the contract of transmission made by the sender as his agent, though the agency was not disclosed when the contract was made. Manker v. Western Union Tel. Co., 137 Ala. 292, 34 So. 839.

95. The liability of the agent forms a sufficient consideration to the other party, and he is not injured by allowing the principal to come in and ratify and claim the benefits of the contract. Brooks v. Cook [Ala.] 38 So. 641.

96. Husband may sue on a contract with him for the erection of buildings on his

(§ 2) *F. Notice to agent.*[97]—Notice to an agent in the course of his employment is notice to the principal.[98] But the knowledge of an agent's agent, the latter not being also an agent of the principal, is not imputable to the principal.[99] And knowledge or notice not gained by the agent in the course of his employment cannot be imputed to the principal.[1] Nor is there a presumption that the agent has communicated to the principal facts coming to his knowledge as agent, when he has interests in the transaction adverse to those of his principal.[2]

wife's land. Simons v. Wittmann [Mo. App.] 88 S. W. 791.

97. See 3 C. L. 89.

98. Pursley v. Stahley [Ga.] 50 S. E. 139; Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500; Mack Mfg. Co. v. Smoot & Co., 102 Va. 724, 47 S. E. 859. It must be with respect to something material to the business in which the agent is employed. Chester v. Schaffer, 24 Pa. Super. Ct. 162; Marsh v. Wheeler [Conn.] 59 A. 410. Where one directs another to appraise land offered as security for a loan, procure an abstract and determine whether the title is good, he is charged with notice of a recorded mortgage. Field v. Campbell [Ind.] 72 N. E. 260. Notice to an agent who purchases a note that it is tainted with usury. Evidence of notice in this case held insufficient. Haynes v. Gay [Wash.] 79 P. 794. Service of a notice, provided for in the ordinance granting a franchise to a water company, upon the superintendent, held sufficient. Illinois Trust & Sav. Bank v. Pontiac, 112 Ill. App. 545. Where the president of a corporation purchased goods of it for his individual business and had them shipped to his place of business, the knowledge of his agents and clerks as to the terms of the sales made to him was held to be his knowledge. Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 N. Y. S. 128. The knowledge of agents of a bank that a party is insolvent, and that certain transactions with him are intended to give the bank a preference over other creditors, is knowledge of the bank.. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98. Where an agent had knowledge of a simulated conveyance of a homestead by a husband and wife, but elected to loan his principal's money on the security of the land, the agent's knowledge was imputable to the principal and she was estopped thereby. Morrill v. Bosley [Tex. Civ. App.] 13 Tex. Ct. Rep. 529, 88 S. W. 519. One who, through an agent, joins in the redemption of property, is bound by the knowledge which the agent has of the equities in the property. Coombs v. Barker [Mont.] 79 P. 1. Knowledge of a servant or agent of an animal's vicious propensities will be imputed to the master, when such servant or agent has charge or control over the animal. Lynch v. Kineth, 36 Wash. 368, 78 P. 923. False statements made in an application for insurance, with the knowledge and at the suggestion of the agent, will not affect the company's liability on the policy issued thereon. American Ins. Co. v. Walston, 111 Ill. App. 133. Nor when facts claimed to have been suppressed are well known to the agent who solicited the insurance. Agent's knowledge of the use of intoxicating liquor by the insured. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Where a medical examiner is an agent of a life insurance company, notice to, or knowledge possessed by, him of matters material to the risk is notice to the company and prevents forfeiture of the policy for any such matter. Mystic Workers of the World v. Troutman, 113 Ill. App. 84. Knowledge of an insurance agent that the insured is not the owner in fee simple of the land on which the insured building stood is the knowledge of the company, and waives the provision in the policy voiding it, in such case. Johnson v. Aetna Ins. Co. [Ga.] 51 S. E. 339. Where the caretaker of stock rode in the stock car, instead of the caboose, with the knowledge and without the protest of the agent and trainmen of the railroad company, such company cannot defend against an action for damages for injuries received by the caretaker, on the ground of contributory negligence in riding in the stock car. Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014.

99. The knowledge of the agent's agent that rags were stored in principal's building contrary to the terms of his insurance policy. North British & Mercantile Ins. Co. v. Union Stock Yards Co. [Ky.] 87 S. W. 285.

1. Notice by the attorney of a city, given to the attorney of claimant for damages from a defective sidewalk in another suit brought against the owner of the walk, is not such notice as can be made the basis of an action by the city against the owner. Chester v. Schaffer, 24 Pa. Super. Ct. 162. A mere casual communication made to an agent, when no act or transaction of the agency was pending, and having no reference to his principal or his business, is not notice to the principal of the fact communicated. Patterson v. Irvin [Ala.] 38 So. 121.

2. A husband acted as his wife's agent in effecting a conveyance of her land to secure a loan, and on payment of the loan, he took title in his own name. She was not charged with his knowledge. Huot v. Reeder Bros. Shoe Co. [Mich.] 12 Det. Leg. N. 98, 103 N. W. 569. Notice given to the agent, that goods sued for did not conform to the contract, at a time when the agent was acting in antagonism to the principal, and when the defendant knew that the agent would disregard the notice and would not communicate it to plaintiff, was not notice to the principal. Brown v. Harris [Mich.] 102 N. W. 960. Where, in an action in form to administer the property of an insolvent corporation, collusively brought, a receiver is fraudulently ap-

(§ 2). *G. Remedies, pleading, procedure and proof.*[3]—*Third persons* contracting with the agent of an undisclosed principal may, on discovery of the real principal, elect to pursue either principal or agent,[4] but cannot hold both.[5] The appropriation, otherwise than by attachment or execution, of furniture or other property found on demised premises, does not amount to an election by the landlord to hold the agent rather than the principal for the balance of unpaid rent,[6] nor does the rendering of an account to an agent for rent due, or the charging of the account against the agent.[7] When suit is brought against the agent of an undisclosed principal and the agent discloses the principal, who is then brought in as a party defendant, plaintiff, upon establishing his case against them, must elect against which he will take judgment.[8] It is always competent for a person dealing with an agent to show that the latter's acts, in excess of his express authority, are nevertheless within the scope of the authority which the principal has permitted him to assume, or which, by a course of dealing or otherwise, he has been held out by the principal, either to the public in general or to the person dealing with him, as possessing.[9] In an action against an agent of an undisclosed principal and the principal, when disclosed, the testimony of the agent that he bought the goods in his own name, but really for the principal whom he did not disclose, is admissible and sufficient to make a case against both agent and principal.[10] An agent may be contradicted, after proper foundation laid, by showing that he has made contradictory statements as to the matters in issue, even though his statements were no part of the res gestae.[11] It is always competent for the principal to show the scope and extent of the agent's authority.[12]

pointed to carry out the designs of the corporation or its officers, such receiver is to be deemed the agent of the adversaries of the creditors. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

3. See 3 C. L. 90.

4. Where guano was sold to a married man and the vendors sued his wife as a concealed principal, the finding of the jury for the plaintiffs on the facts, where the evidence was conflicting, was not disturbed. Holbrook v. Hodgson Cotton Co. [Ga.] 50 S. E. 916. An undisclosed principal is bound by the acts of his agent, within the scope of his authority, although the party dealing with him may have known the principal under another name. Phillips v. International Text Book Co., 26 Pa. Super. Ct. 230. Where a stockbroker orders the purchase or sale of stocks through a firm of stockbrokers for a client of his, such firm has a right of action against the client, as an undisclosed principal. Kinsey v. Meaney, 98 App. Div. 420, 90 N. Y. S. 327. Where a husband ordered materials for a house built on his wife's lot, without stating to whom they were to be charged, and the wife directed alterations while the work was in progress, she was held liable as an undisclosed principal. Whipple v. Webb, 44 Misc. 332, 89 N. Y. S. 900. Where the authorized agent of an undisclosed principal procures a bond from a surety company, to enable him to procure a liquor tax certificate, the principal is liable to the surety company for a judgment and costs which it is required to pay on account of the agent's violation of the liquor laws. City Trust, Safe Deposit & Surety Co. v. American Brewing Co. [N. Y.] 74 N. E. 948. A principal may be charged upon a written or parol executory contract, entered into by his agent in his own name, within his authority, although the name of the principal does not appear in the transaction and is not disclosed, and the party dealing with him supposed the agent was acting for himself. Id. Where a seller to an agent acting for an undisclosed principal, after delivery, but before seeking to exact payment, learns the identity of the principal, he has an opportunity for investigating and comparing the standings of the agent and principal, just as he would have done if he had known the principal before delivery. Barrell v. Newby [C. C. A.] 127 F. 656.

5. Stockholders executing an order received from another broker who acts for an undisclosed principal, and suffering a loss in the transaction. Barrell v. Newby [C. C. A.] 127 F. 656.

6, 7. Smart v. Masters & Wardens of Nora Caesarea Lodge No. 2, 6 Ohio C. C. (N. S.) 15.

8. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 13 Tex. Ct. Rep. 579, 88 S. W. 449.

9. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

10. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 13 Tex. Ct. Rep. 579, 88 S. W. 449.

11. Sentell v. Southern R. Co. [S. C.] 49 S. E. 215.

Where one ratifies a broker's sale upon the latter's erroneous statement as to the price received and in ignorance of the truth, he may disaffirm or affirm the sale upon discovery of the facts.[13]

A party to a written contract cannot have it rescinded on the ground that certain representations, not embodied in the contract, were made by the agent of the other party to induce him to sign, when the contract has printed on its back a warning that the company will not be bound by any statements not contained in the contract and that no agent has any authority to bind the company by any other representations or statements than such as are contained in the contract.[14]

In seeking to charge the principal with the knowledge of an agent, if the relationship is such that actual knowledge by the principal would be imputed to the agent, such relation should be set out, or knowledge should be alleged in the principal and no mention made of the agent.[15] Actual knowledge should be alleged, and not the facts from which it might be inferred.[16] An allegation that materials were furnished through a specified agent, for which defendant was obligated to pay, is good on general demurrer, inasmuch as it authorized proof of the agent's authority.[17] The fact of estoppel to deny the agency of one who has been permitted to hold himself out as an agent, to the prejudice of a third party, must be both pleaded and proved.[18] A verified account, attached to the petition in an action against an agent of an undisclosed principal, is evidence against the agent only and cannot be used against the principal when disclosed by the agent.[19] Proof of ratification includes proof of agency and authority and may be made under a pleading charging the ratified act to be that of the principal.[20]

§ 3. *Rights and liabilities of agent as to third persons.*[21]—An agent acting within his authority and disclosing his principal is not personally liable.[22] An agent who undertakes to bind his principal but fails to do so because of want of authority binds himself.[23] But this rule needs qualification and cannot be said to be universally true or correct.[24] The great weight of modern authority is that the agent is not personally bound by the contract itself and cannot be held liable in an action thereon.[25] But the party who is misled, or who parts with something of value, or otherwise acquires legal rights, can maintain a special action on the case, under the common-law procedure, or an action upon an implied assumpsit, under the code practice, when the agent has received the con-

12. Lauer Brew. Co. v. Schmidt, 24 Pa. Super. Ct. 396.

13. Stewart v. Harris, 91 N. Y. S. 438.

14. Butler v. Standard Guaranty & Trust Co. [Ga.] 50 S. E. 132.

15. Allegation that "the defendant, to wit, the defendant's agent," knew, etc., insufficient for any purpose. Davis v. Smith [R. I.] 58 A. 630.

16. As to infection of leased premises. Davis v. Smith [R. I.] 58 A. 630.

17. Jackson-Foxworth Lumber Co. v. Hutchinson County [Tex. Civ. App.] 13 Tex. Ct. Rep. 565, 88 S. W. 412.

18. Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390; Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704.

19. Pittsburg Plate Glass Co. v. Roquemore [Tex. Civ. App.] 13 Tex. Ct. Rep. 579, 88 S. W. 449.

20. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074.

21. See 3 Curr. L. 92.

22. Durham v. Stubbings, 111 Ill. App. 10. Action for breach of contract, evidenced by memorandum in writing, for the sale of land, to recover payments made. Gable v. Crane, 24 Pa. Super. Co. 56.

23. Also when one makes a lease for a corporation not yet formed, the lease not being void but binding on the agent. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113. A contract for the sale of land held to have been executed by the vendor individually and not as agent of the owner of the land. Hardman v. Kelley [S. D.] 104 N. W. 272. An unauthorized agent does not render himself personally liable on a contract that is void under the statute of frauds. Morrison v. Hazzard [Tex. Civ. App.] 13 Tex. Ct. Rep. 310, 88 S. W. 385.

24. Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Mechem, Ag. § 550.

sideration, or an action for damages.[26] And the measure of damages is what plaintiff lost, or the amount of money paid out, or the value of services rendered, or special damages sustained on account of the agent's wrong.[27] In Iowa, an insurance agent who effects insurance for an insolvent foreign company, without procuring a certificate from the state auditor, is liable to the insured for the loss, although he did not know of the company's insolvency.[28] The agent is personally liable when he purports to act as principal, the other party having no knowledge of the agency,[29] or when purporting to act as agent, he does not disclose the name of his principal.[30] But the general statement should not be construed as requiring the agent under all circumstances to expressly declare his agency and the name of his principal, regardless of whether the person dealing with him knows the facts or is chargeable with knowledge thereof from circumstances brought to his attention. Where one deals with the agent of a known principal in the regular course of conducting the principal's business by such agent, the presumption, in the absence of any evidence to the contrary, is that the credit is extended to the principal.[31] Under the express provisions of the Mississippi Code, if a party conducts a business as "agent," "factor," "and company," or the like, without conspicuously disclosing by a sign the name of his principal, the property used in his business is liable for his debts.[32] He is personally liable to persons injured by his negligence.[33] An agent who receives money paid on a contract for the purchase of real estate, made by his principal, cannot be held liable in an action by the purchaser to recover the money back on proof of facts which would entitle the purchaser to rescind the contract.[34] But, under some circumstances, the agent having received the money, as long as it is in his possession, an action may be maintained against him to recover it back, if the principal is not authorized to receive it, or if he originally obtained it wrongfully.[35] Although an agent executes an instrument in his own name, he will not be personally bound unless the language clearly shows such intent.[36] Where a shipper contracts with a railroad company to carry a certain number

25. Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; Reinhard, Ag. § 307; Clark on Contracts, 274.

26. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, citing Delius v. Cawthorn, 13 N. C. 90.

27. Where the action proceeds, in pleadings and evidence, on the theory of the agent's personal liability, there can be no recovery on the theory of damages for a false assertion of authority. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

28. Hartman v. Hollowell [Iowa] 102 N. W. 524.

29. When an agent makes a lease under seal in his own name, evidence is inadmissible to show that he executed only as agent and in behalf of his principal. Anderson v. Connor, 87 N. Y. S. 449.

30. And this is so, although the person contracting with the agent knew that he was acting as agent, if the name of the principal is not disclosed. Hunter v. Adoue [Tex. Civ. App.] 86 S. W. 622. Parties who sign a lease to a fictitious corporation, as its president and vice-president, are individually liable for rent on the lease, although it is under seal. Schenkberg v. Treadwell, 94 N. Y. S. 418. But the rule does not apply where no contract relation has been induced or entered into with a third party. American Alkali Co. v. Kurtz, 134 F. 663. The mere fact that it was the custom of a firm of agents not to disclose the names of customers to their principals does not render them liable for the purchase price of all goods sold through their agency, for, if they undertook to guaranty the sales and solvency of purchasers, it should appear in their contract of agency. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

31. Alexander & E. Lumber Co. v. McGeehan [Wis.] 102 N. W. 571.

32. Code 1892, § 4234. Dale & Co. v. Harrahan [Miss.] 37 So. 458.

33. The agent of a nonresident owner of a building, who is in full charge thereof and has authority to make repairs, is liable for injuries to a tenant's infant child, caused by neglect to repair a rotten and unsafe veranda railing. Lough v. John Davis & Co., 35 Wash. 449, 77 P. 732.

34. Gable v. Crane, 24 Pa. Super. Ct. 56, citing Kurzawski v. Schneider, 179 Pa. 500.

35. Gable v. Crane, 24 Pa. Super. Ct. 56.

36. A contract of purchase held to be that of the principal and not that of the agent personally. Frambach v. Frank [Colo.] 81 P. 247.

of cattle, it is immaterial to the company whether the shipper acts for himself alone or as agent for another also.[37]

Evidence, proof and procedure.[38]—When a contract is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it.[39] An agent guaranteeing an account for his employer, and being compelled by agreement to pay the same weekly, becomes in law the assignee of the account and is entitled to sue in attachment in his own name.[40] Money paid by the agent upon the fraudulent representation that the principal had not paid for certain purchases, may be recovered under the common count for money had and received.[41]

§ 4. *Mutual rights, duties and liabilities. A. In general; contract of agency; diligence and good faith.*[42]—The agent must use reasonable care and diligence in the business of his principal,[43] act in good faith,[44] and keep his principal informed as to facts regarding the subject of his agency,[45] and is liable

37. Gulf, etc., R. Co. v. Brown & Williamson [Tex. Civ. App.] 86 S. W. 53.

38. See 3 C. L. 94.

39. A lease made by partners, "lessors, agents of the S. heirs," binds them personally and they may sue on it. Hunter v. Adoue [Tex. Civ. App.] 86 S. W. 622.

40. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257.

41. Johnson v. Cate [Vt.] 59 A. 830.

42. See 3 C. L. 94.

43. In the employment of an agent, the principal bargains for the disinterested skill, diligence and zeal of the agent for his own exclusive benefit. The presumption is, that the principal knows his own interests and object better than the agent; and the agent is bound to carry out the principal's plans. Dazey v. Roleau, 111 Ill. App. 367. A request to an agent from his principal for action in the line of the agency is equivalent to a command. A letter from the principal indicating a preference held to be in the nature of instructions. British American Ins. Co. v. Wilson [Conn.] 60 A. 293. Where a party is made an agent for the payment of money to another, it is his duty to use it as directed or return it to the principal. Commonwealth v. Folz, 23 Pa. Super. Ct. 558. Bankers are held to the exercise of ordinary care in making loans as agents for the lender. Watson v. Fagner, 105 Ill. App. 52.

44. Dazey v. Roleau, 111 Ill. App. 367. Whether a corporation be treated as an enlarged and amplified form of partnership, and the director as managing partner, or whether he is called an agent or trustee, elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position and is essentially within the rule which requires agents, attorneys, bailees, partners, trustees or other fiduciaries, to exercise the highest degree of good faith as to all matters connected with the property committed to their care. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232. Purchase of unimproved farm lands, etc., by an agent in charge thereof. Van Dusen v. Bigelow [N. D.] 100 N. W. 723. Where the eldest son of an aged woman was acting as her general agent, in the transaction of her business, the burden of proof was held to be on him to show that a gift of lands by her to him, was the free, voluntary and uninfluenced action of the grantor, in an action to set aside the deed. Reed v. Reed [Md.] 60 A. 621. The relation of employer and stenographer is not of so confidential a character as to require a higher measure of proof of a claim by the latter against the estate of the former, than is required in ordinary cases. In re Brown's Estate [Pa.] 60 A. 147. Moneys deposited with a stockbroker as security, in the purchase and sale of stocks, a daily account being made up by charging margins and crediting avails of closed transactions, held to constitute an ordinary current account and not a fiduciary or trust fund. Kinsey v. Meaney, 98 App. Div. 420, 90 N. Y. S. 327. When an agent is under no contractual restraint, and no violation of business secrets reposed in him by reason of his agency is involved, he has the right, after the termination of his agency, to influence the policy holders of his former principal to forfeit or transfer their policies to other companies, whether or not such policies were the fruits of the agent's efforts while in his former employment. American Ins. Co. v. France, 111 Ill. App. 382. When an agent has ceased to do new business for his principal but is still engaged in collecting and remitting money due on outstanding mortgages, the relation between them is not such a trust relation as suspends the running of the statute of limitations. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059.

45. Green v. Southern States Lumber Co. [Ala.] 37 So. 670. It is the duty of an agent to keep true and correct accounts between himself and principal and to furnish him detailed and itemized statements of receipts and expenditures, which must be of such a character as to enable the principal to make some reasonable test of their honesty and accuracy. Chicago Title & Trust Co. v Ward, 113 Ill. App. 327. Where an agent rents property, collects rents, pays taxes and sees to repairs, and also gives advice as to value of unimproved farm lands belonging to his principal, a fiduciary relation is established between them, and if the agent purchases such farm lands for himself he must make full disclosures to his principal as to their value; if he conceals such facts the conveyance is void-

for damages resulting from default in either respect.[46] An agent cannot make a profit for himself in the business of his agency.[47] A party cannot act as the agent of another in making a contract for himself.[48] But he may, upon the failure of his principal's negotiations and the termination of his fiduciary relation, make negotiations on his own account in the same matter.[49] And an agent for the collection of rents and the care of lands, who occupies lands adjoining those of his principal, is not estopped by the relationship from acquiring title by adverse possession to a parcel of land near the common boundary.[50] A co-agent under a power to sell is not bound by an unauthorized option given by the other agent, if not given or ratified by himself, and if he purchases the land for himself, he cannot be held as a trustee for the claimant under the option.[51] Where plaintiff, in making a loan to defendant to take up certain other debts, did not act as defendant's agent in purchasing such debts, he was entitled to demand from defendant the full amount of the debts, although he secured them at a discount.[52]

(§ 4) *B. Accounting, settlement and reimbursement.*[53]—All profits and benefits resulting from acts of an agent, whether in accordance with, or in violation of, his authority, belong to the principal.[54] The contract of an agent for his principal is the contract of the principal.[55]

When the principal and agent go over the agent's account as submitted by him, and the principal agrees that the charges are satisfactory and the account correct, the agent is entitled to recover the balance shown in his favor.[56] Where

able. Van Dusen v. Bigelow [N. D.] 100 N. W. 723. An agent retained to obtain a settlement of a claim for damages against a railroad company, who failed to inform his principal of the company's standing offer to settle at a fixed sum, was held not entitled to recover under his contract for services. Haskell v. Smith, 90 N. Y. S. 353.

46. He may be sued by his principal in tort for fraud and deceit. Miller v. John, 111 Ill. App. 56. It is the primary duty of an agent to obey the instructions given to him by his principal. If he deviates therefrom and there is a consequent injury, the fact that the agent intended a benefit to the principal is no defense. Dazey v. Roleau, 111 Ill. App. 367.

47. Humbird v. Davis, 210 Pa. 311, 59 A. 1082; Harrison v. Craven [Mo.] 87 S. W. 962. By purchasing land from his principal, under cover of the name of a third person, and selling again at an advanced price. Moore v. Petty [C. C. A.] 135 F. 668. Or by purchasing lands placed in his charge and concerning whose value, etc., it was his duty to keep his principal informed. Van Dusen v. Bigelow [N. D.] 100 N. W. 723. An agent of a mining corporation, while sinking a shaft on property of plaintiff, discovered a vein on which another vein was located and obtained title to that claim; held, under all the circumstances, not to have made wrongful use of his agency to his principal's disadvantage. Calumet Gold Min. & Mill. Co. v. Phillips, 31 Colo. 267, 72 P. 1064.

48. Hier v. Miller, 68 Kan. 258, 75 P. 77, citing Chrystie v. Foster [C. C. A.] 61 F. 551, 553.

49. As where the principal was negotiating for a concession for an electric line, and the agent held in escrow an assignment by a third party to his principal, of an interest in a horse car line, pending negotiations, but the concession was not granted. Havana City R. Co. v. Ceballos, 131 F. 381.

50. Carney v. Hennessey [Conn.] 60 A. 129.

51. Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701.

52. Aldrich v. McClay [Ark.] 87 S. W. 813.

53. See 3 C. L. 96.

54. Humbird v. Davis, 210 Pa. 311, 59 A. 1082; Schick v. Suttle [Minn.] 102 N. W. 217, citing Snell v. Goodlander, 90 Minn. 533; Smitz v. Leopold, 51 Minn. 455; Hobart v. Sherburne, 66 Minn. 171; Holmes v. Cathcart, 88 Minn. 213, 97 Am. St. Rep. 513, 60 L. R. A. 734; Moore v. Petty [C. C. A.] 135 F. 668. The principal may recover on the contracts made in his behalf by his agent. Keniston v. Flaherty, 91 N. Y. S. 568. Where a written contract has been made by an agent for his principal, with full knowledge by the third party of such agency, the principal can sue on such contract directly, although not named therein. Rea v. Barker, 135 F. 890. Entrance upon or assertion of ownership of lands. Carney v. Hennessey [Conn.] 60 A. 129. Possession of land by the agent inures to the benefit of the principal, in the acquisition of title by adverse possession. Travis v. Hall [Tex. Civ. App.] 83 S. W. 425. Where the agency is established, the reservation of title to property by the agent inures to the benefit of his principal. Bronson v. Russell [Ala.] 37 So. 672.

55. Durham v. Stubbings, 111 Ill. App. 10; Johnson v. Cate [Vt.] 59 A. 830.

56. Werckmann v. Taylor [Mo. App.] 87 S. W. 44. Credit in final accounting for un-

no suggestion is made by the agents that money remitted is in excess of the proceeds of sales, the principal's appropriation of it in partial settlement of accounts is conclusive.[57] In case of the death of the agent who has received money for investment, the burden of showing either payment or accounting rests on his representatives.[58]

(§ 4) *C. Compensation of agent.*[59]—The right to compensation and the amount thereof is usually determinable from the contract between the parties.[60] Where the agent sues for commissions, the burden rests upon him to prove an agreement to pay the commissions.[61] Where an agent relies upon a custom as part of his contract of employment, he must show it to be so certain, continuous, uniform, well-known and of so long standing, that it can be said that the parties contracted with reference thereto.[62] Performance by the agent is a condition precedent to the right to compensation,[63] but modification of a contract,

paid note sold by principal to agent. Hoskins' Adm'x v. Morton [Ky.] 85 S. W. 742.

57. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

58. In re Brown's Estate [Pa.] 60 A. 149. An instruction that if money, for which the estate counterclaimed, was shown to have come into claimant's hands, the burden was on him to account for it as having been paid to intestate or disposed of according to her directions, approved. Vitty v. Peaslee's Estate, 76 Vt. 402, 57 A. 967.

59. See 3 C. L. 97.

60. Claim of agent for commission on direct sales made by principal within agent's district; contract construed. McCay Engineering Co. v. Crocker-Wheeler Elec. Co. [Md.] 60 A. 443. A contract providing for advances by the principal, to be repaid by the agent's commissions, construed. Arbaugh v. Shockney [Ind. App.] 72 N. E. 668. Contract for commissions, to be applied on prior indebtedness, construed. McCormick v. Johnson [Mont.] 78 P. 500. A contract between a bankrupt company and a commercial sales agent construed, and held to entitle the agent to compensation on orders accepted and filled but not on such as were not accepted or were canceled. In re Ladue Tate Mfg. Co., 135 F. 910. An agent may be running a sawmill as such, and not as an independent operator, although he is paid a certain amount per thousand feet sawed. Crosno v. Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275. An agent authorized to improve and sell lands and reimburse himself from the proceeds, is entitled, after the termination of his authority by the death of the owner, to reimbursement and compensation for expenses and services, from the proceeds of the property when sold. Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592.

61. Commissions claimed by an agent employed to sell "investment bond." Contracts held not earned by the negotiation of an exchange of one class of bonds for another. Warwick v. North American Inv. Co. [Mo. App.] 87 S. W. 78. The principal may interpose as a counterclaim, in an action by the agent for his compensation, a claim for profits alleged to have been made by the agent in the course of his employment. Schick v. Suttle [Minn.] 102 N. W. 217. A corporation that sells out and ceases business is not liable for the salary of its president and manager, during the term for which he was elected, in the absence of a definite contract for such time. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. An offer to pay a certain sum for the finding of a purchaser of land at $100 an acre is met by the finding of a purchaser who agrees to take the land at that price, either in cash or on such terms as the owner may desire; and the agent is entitled to his compensation, although the principal refuses to consummate the trade. Guthrie v. Bright, 26 Ky. L. R. 1021, 82 S. W. 985. Evidence held insufficient to establish an agreement to pay an agent, employed to contest a municipal assessment for improvements, a percentage on the entire assessment in case defendant sold the land before the confirmation of the assessment, instead of a percentage on the amount agent succeeded in having deducted from the assessment. Wolfsohn v. Haven, 95 App. Div. 621, 88 N. Y. S. 475.

62. An alleged custom on the part of insurance companies to pay their agents 5 per cent. on the net premiums, whenever they reached $5,000 during the year, or when an agent quit their employ, held not established. American Ins. Co. v. France, 111 Ill. App. 310.

63. Custom and the law have made it necessary that real estate agents should actually procure contracts, in order to earn their compensation. Sullivant v. Jahren [Kan.] 79 P. 1071. Where an agent, employed to sell the entire product of a manufactory makes no sales and is discharged before the end of his term, he can recover nothing from his employer. Morrow v. Tunkhannock Ice Co. [Pa.] 60 A. 1004. If, pending negotiations by an agent with a third person and before their completion, the principal steps in, accepts the benefit of the agent's services and closes the transaction, the agent is entitled to compensation as upon a full performance of his agreement. Emerson v. Nash [Wis.] 102 N. W. 921. An agent may proceed so far in execution of the purpose for which he is employed as to entitle him to his commission and still be far short of consummating a contract upon which an action for specific performance could be sustained against his employer. Sullivant v. Jahren [Kan.] 79 P.

made by the agent,[64] or groundless refusal of the principal[65] to carry it out, will not defeat the agent's right to commissions or reasonable compensation for services rendered.[66] Fraud on the part of the agent destroys his right to commissions.[67] If an agent employs a subagent to do the whole or any part of that which he is employed to do, without the knowledge or consent of his principal, inasmuch as there is no privity between the principal and the subagent, the latter will not be entitled to claim compensation from the principal.[68] The rights as to commissions, of subagents appointed by an agent of limited powers acting under special agreement as to compensation, are controlled by the terms of the actual contract made by the agent with the principal.[69]

(§ 4) *D. Remedies, pleading, procedure, and proof.*[70]—In case of complicated transactions characterized by mistake, oversight or fraud, the court of chancery has jurisdiction of proceedings by the principal to effect a settlement with his agent.[71] But the principal cannot support a bill for recovery of money for an injunction and for a receiver on illegal contracts and dealings by an agent in his behalf.[72] An agent, who fraudulently takes title in his own name to real

1071. In an action by an agent for commissions, evidence held sufficient to show that the sales were made within his territory and that he was entitled to commissions under the terms of his contract. McGeeham v. Gaar, Scott & Co. [Wis.] 100 N. W. 1072.

64. Where an agent, who was working on a monthly salary, upon receiving notice that his compensation would thereafter depend upon a commission, immediately replied by letter declining to continue under such terms, which letter defendant claimed not to have received, but continued the services of the agent, the finding of the jury that the original contract had not been modified was sustained. Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709.

65. Where a company arbitrarily and wrongfully terminates a partially performed contract for the sale of machinery, the agent may sue the company for the breach of contract or for the value of his services rendered. Richardson Machinery Co. v. Swartzel [Kan.] 79 P. 660. Where the principal repudiates all that the agent has done under a definite contract of employment, the agent is not bound by the compensation named in the agreement, but is entitled to whatever his services are worth, to be recovered in an action against the principal. Foot v. Smythe [Colo. App.] 78 P. 619. Where the principal rescinds his contract for the sale of real estate and revokes the agency before the expiration of the time allowed for the consummation of the sale, the agent is entitled to the commission agreed to be paid and can recover the same. Harrison v. Augerson, 115 Ill. App. 226. Where a contract, made with an attorney for five per cent. commission to collect claims against the United States for excessive duties charged was violated by the principal's failing to furnish the attorney with the necessary data, and by the employment of another attorney to prosecute the claims, the plaintiff attorney was held entitled to recover the percentage stipulated without proof of services rendered or their reasonable value. Carlisle v. Barnes, 92 N. Y. S. 917.

66. Although the principal may revoke the agency, he cannot thereby escape liability for a reasonable compensation for any work done by the agent before the revocation. New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550. Where an agent was employed to take charge of and rent real estate, under a contract revocable at the will of the principal, receiving a percentage of the rents as compensation, and the agency was revoked after property had been rented but before any rent had been collected, it was held that the agent was entitled to a reasonable compensation. Id. When an agent sues his principal for damages for nonfulfillment of orders on which commissions were to be paid, he must prove by competent evidence that such sales were made, or liabilities resulting therefrom have been paid by the agent. Telegrams and letters received from a representative of a witness in Europe are incompetent evidence of such sales, being mere hearsay. Kirby Lumber Co. v. Cummings & Co. [Tex. Civ. App.] 87 S. W. 231. In case of a contract of agency for a fixed time, upon commissions, alleged want of due diligence, not complained of or acted upon during the period of employment, is no defense against the agent's claim for commissions. Spinks v. Georgia Quincy Granite Co. [La.] 38 So. 824. Where an agent has by contract the exclusive right to sell certain goods, for a specified time, within a particular territory, and the principal violates the contract by the sale of such goods in the territory specified, and refuses to allow the agent anything therefor, the agent can recover only such actual damages as he can show that he has sustained. LaFavorite Rubber Mfg. Co. v. H. Channon Co., 113 Ill. App. 491.

67. A real estate broker who attempts to represent both parties in a transaction, without their knowledge and consent, forfeits all right to compensation or commissions from either. Green v. Southern States Lumber Co. [Ala.] 37 So. 670.

68. Bond v. Hurd [Mont.] 78 P. 579.

69. Brown, Chipley & Co. v. Haigh, 113 La. 563, 37 So. 478.

estate which he was authorized to purchase for his principal, repudiates the agency, violates the terms of the agency and seeks to speculate off his principal, will be held to be a trustee ex maleficio, as to the real estate so secured.[73] And as to any property purchased as agent, in his own name, he will, in equity, be held to be the trustee of the principal, even though he pays the price himself; and, upon repayment of the money so advanced, he will be required to transfer the property so acquired to his principal.[74] If the agent disposes of his principal's property without authority, the act may be disavowed and set aside by the owner, even in the hands of an innocent purchaser. And if the agent purchases property with his principal's funds, the latter may follow it into the hands of a third person who purchases it for value, though that person be innocent and has no notice of the rights of the principal.[75] The principal retains title to goods in the hands of his agent until sold, and then to the proceeds, at least until paid by the agent, and may pursue both agent and purchaser until he has obtained satisfaction of his debt.[76] The principal may repudiate an unauthorized transaction by his agent and replevy property transferred in such transaction;[77] and he may replevy personal property, pledged by the agent as security for a loan, when unauthorized by himself, without repaying the loan.[78] Principals can pursue both the original buyers and del credere factors for payment, where the latter become indebted to their principals for goods consigned to them and sold on credit.[79] The relation of principal and agent does not prevent an action of tort by the principal against the agent,[80] and in such case the measure of damages is the same as if the relation did not exist.[81] The mere fact that defendant assumed to act as plaintiff's agent would not entitle plaintiff to recover in an action of deceit. The agency must be proved,[82] and the fact that the agent, in case of deviation from his principal's instructions, intended it as a benefit to the principal, is no defense.[83] Among other available remedies, as between principal and agent, illustrated in the notes, is an action for money had and received,[84] for conversion of property of the principal,[85] and for breach

70. See 3 C. L. 99.

71. Charlesworth v. Whitlow, Lake & Co. [Ark.] 85 S. W. 423.

72. Where a money loaner established an agency for the negotiation of loans at extortionate rates, and on contracts void as against public policy, and his agent claimed the business as his own and refused to account. Woodson v. Hopkins [Miss.] 37 So. 1000.

73. Harrison v. Craven [Mo.] 87 S. W. 962.

74. Morris v. Reigel [S. D.] 101 N. W. 1086.

75. Gussner v. Hawks [N. D.] 101 N. W. 898.

76. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529; Gussner v. Hawks [N. D.] 101 N. W. 898.

77. Where an agent without authority exchanged his principal's horses for other property and the principal notified the third party of his repudiation of the trade, he was relieved from tendering a return of the property received before commencing replevin. Roberts v. Francis [Wis.] 100 N. W. 1076.

78. Wycoff v. Davis [Iowa] 103 N. W. 349.

79. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

80. An action based on agent's fraud and deceit. Miller v. John, 111 Ill. App. 56.

81. The damages must be such as are a probable and natural result of the breach. Harrison v. Craven [Mo.] 87 S. W. 962.

82. Action for false and fraudulent representations as to value of lands and concealment of an offer for the same. Brinson v. Exley [Ga.] 49 S. E. 810.

83. Dazey v. Roleau, 111 Ill. App. 367.

84. A right of action accrues to the principal to recover money collected by his agent, whose duty is to remit without an accounting, as soon as the money is paid to him, and the statute of limitations begins to run then. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059. Suit by principal against agent to recover an item of compensation claimed to have been a duplicate payment; claim not established. Pheips, Dodge & Co. v. Miller [Tex. Civ. App.] 83 S. W. 218. An agent for the collection of rents is liable to his principal's grantee for rents collected after the recording of the deed. Dempsey v. Zittel, 90 N. Y. S. 1054. Where long continued dealings between principals and agents have existed, during which consignments have been made to the agents and remittances made by them, with-

of the contract of agency.[86] The profits of an agent's transactions can be recovered by the principal;[87] and where the profit has been made by a fraudulent violation of the agent's duties, the principal may waive the tort and recover for money had and received, or may counterclaim in an action by the agent for compensation.[88] The principal can recover moneys paid out by his agent without authority.[89] A bank holding stock claimed by different persons and willing to account for and deliver it to the parties entitled thereto, is entitled to bring a bill of interpleader.[90]

Evidence.[91]—The existence of the relation of principal and agent may operate as evidence that acts done by the latter are done in behalf of the former.[92] An allegation that defendant made and executed a written contract may be supported by evidence that it was executed in his behalf by his duly authorized agent previously empowered to do so, or that, although the contract was authorized in the first instance, it was nevertheless ratified subsequently by the principal.[93]

AGISTMENT; AGREED CASE, see latest topical index.

AGRICULTURE.[1]

§ 1. *Regulation.*[2]—As the pursuit of agriculture affords peculiar opportunity for imposition and fraud, the subject has become largely regulated by statutes whose validity is sustained as an exercise of the police power.[3] Among others are regulations concerning purchase and sale of seeds,[4] and the growth or suppression of weeds.[5]

out a final accounting, the agents being largely indebted to the principals during the entire time, and the agents finally became insolvent, held, that the assignee could not establish a defense against a suit by the principals, by selecting an arbitrary date to establish an overpayment by the agents, based simply upon the agents' method of bookkeeping. Cushman v. Snow, 186 Mass. 169, 71 N. E. 529. An agent who agrees to pay over a certain sum of money, upon the collection by him of certain notes held, is not liable to his principal, as for a collection of all the notes, when he has allowed a renewal of the balance of the notes after the collection of a part of them. Dickinson v. Motley Co., 90 N. Y. S. 286. Where an agent has made profits by a fraudulent violation of his duties, the principal may waive the tort and sue him for money had and received. Schick v. Suttle [Minn.] 102 N. W. 217.

85. Where a sales agent illegally obtains possession of property and sells it in violation of the specific terms upon which sales were authorized by the owner, an action of conversion will lie against him. Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950. And where lumber was received by agents, under such circumstances that their failure to discover and account therefor would amount to gross negligence, they are liable for its value, unless they can show that they still have the lumber and can account for its loss, whether they are remunerated agents or merely gratuitous bailees. Charlesworth v. Whitlow, Lake & Co. [Ark.] 85 S. W. 423.

86. An action based on disobedience of instructions by agent, resulting in loss to his principal. Dazey v. Roleau, 111 Ill. App. 367.

87. Moore v. Pelty [C. C. A.] 135 F. 668.

88. Schick v. Suttle [Minn.] 102 N. W. 217.

89. As where a bank cashier credited sums, owing by him to a customer of the bank, upon the latter's passbook. Hier v. Miller, 68 Kan. 258, 75 P. 77.

90. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

91. See 3 C. L. 101.

92. Carney v. Hennessey [Conn.] 60 A. 129.

93. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074.

1. See 3 C. L. 137. See, also, the topic Emblements and Natural Products, 3 C. L. 1187.

2. See 3 C. L. 137.

3. Bazemore v. State, 121 Ga. 619, 49 S. E. 701.

4. The state may regulate the sale of **cotton seed** and fix a punishment upon the person who buys in violation of the terms of the statute. Bazemore v. State, 121 Ga. 619, 49 S. E. 701.

An indictment under such a statute need not describe the land on which the seed

In order to claim the protection of the "fertilizer" statutes of Kentucky, one must have complied therewith.[6]

§ 2. *Cropping contracts, products and crop liens.*[7]—The main distinction between a tenant and a cropper is that the former has an estate in the land while the latter has not.[8] Some courts make a further distinction holding that a cropper is a mere servant of the landlord and has no right of ownership in the crop until it is divided;[9] but this distinction is not universal, many courts holding that he has an interest in the crop,[10] which interest has been held sufficient to entitle his widow, after her year's support has been allotted out of it, to maintain conversion against the lessor.[11] The relation existing between the parties,[12] and the rights of each,[13] are governed by the terms of their contract. In those states where the cropper has an interest in the crop, if he dies before it is gathered his personal representatives are entitled to recover his interest, less the loss or damage caused by his death,[14] and the fact that a part of the crop has not been gathered

cotton is grown. Bazemore v. State, 121 Ga. 619, 49 S. E. 701.

5. Under Acts 1901, p. 283, c. 117, making it unlawful for a railroad company to permit Johnson grass to go to seed on its right of way and allowing adjoining owners to recover $25 if it so does, authorizes a recovery of such sum each time the railroad is proved to have allowed such grass to mature and go to seed on its right of way. Gulf, etc., R. Co. v. Henderson & Tompkins [Tex. Civ. App.] 86 S. W. 371. But under the express provisions of such act, such owner cannot recover if he allows the grass communicated to his land to mature and go to seed. San Antonio & A. P. R. Co. v. Burns [Tex.] 13 Tex. Ct. Rep. 250, 87 S. W. 1144. Such act is not unconstitutional as depriving the railroad of property without due process of law. Gulf, etc., R. Co. v. Henderson & Tompkins [Tex. Civ. App.] 86 S. W. 371. Unless there is a nuisance or negligence in permitting weeds to grow and spread seed on adjacent lands, no action will lie except under statute. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851. See, also, Adjoining Owners, 5 C. L. 33; Nuisance, 4 C. L. 839.

6. Where, in a suit for the purchase price of fertilizers, the plaintiff failed to show that he had complied with Ky. St. 1903, § 1822, subsec. 8, the testimony of farmers was held competent, though there was no analysis by the director of the state experimental station. Hardy Packing Co. v. Sprigg [Ky.] 84 S. W. 532.

7. See 3 C. L. 137.

8. Taylor v. Donahoe [Wis.] 103 N. W. 1099. See Landlord and Tenant, 4 C. L. 389.

NOTE. Distinction between cropper and tenant: It is oftentimes quite difficult to determine whether a person who works the land of another on shares is a tenant or a mere cropper. This is a question determinable only by the agreement in each particular case. Johnson v. Hoffman, 53 Mo. 504. It appears from the authorities that the question to be determined in every case of cultivation of land on shares is: Does the contract give the landowner his share as rent or the occupant his share as compensation for his labors? If the former, the person working the land is a tenant. If the latter he is simply a cropper. Williams v. Cleaver, 4 Houst. [Del.] 453; Steel v. Frick, 56 Pa. 172; Adams v. McKesson, 53 Pa. 81, 91 Am. Dec. 183. The difference between a cropper and a tenant is that a tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rents, it is he who divides off to the landowner his share, and until such division the right of property and of possession in the whole is his. A cropper has no estate in the land, and although he has in some sense possession of the crop, it is only the possession of a servant, and is in law that of the landowner, who must divide off to the cropper his share. Harrison v. Ricks, 71 N. C. 7; Gray v. Robinson [Ariz.] 33 P. 712; Haywood v. Rogers, 73 N. C. 320.—From note to Kelly v. Rummerfield [Wis.] 98 Am. St. Rep. 951, 953.

9. Taylor v. Donahoe [Wis.] 103 N. W. 1099.

10. Is not a mere laborer working for hire. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

11. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

12. Taylor v. Donahoe [Wis.] 103 N. W. 1099. One agreeing for one-third of the crop to cultivate the land of another for a "term of service," each party to pay certain expenses, and the contract being called one of employment, held, that it was a cropping contract and did not create the relation of landlord and tenant. Id.

13. Where landlord was entitled to possession until all debts due him by the cropper were paid, held, he could enforce such provision against a mortgagee of the cropper. Tuohy v. Linder, 144 Cal. 790, 78 P. 233.

14. Parker v. Brown, 136 N. C. 280, 48 S. E. 657. Instruction as to the method of calculating the amount of plaintiff's recovery held correct. Id.

does not justify the owner of the land in refusing a demand, by the cropper's representatives, for a portion of the crop.[15] A cropper having the right to use the buildings, farm implements, stock and other personal property of the landlord, his contract is a personal one and is not assignable without the owner's consent.[16] That a cropper's husband lives with her on the farm and devotes his time and labor to raising the crop does not overcome the presumption of ownership by the wife.[17] A cropper holding over after the expiration of his contract becomes a trespasser.[18]

In some states statutes govern the right of a tenant to remove the crop without satisfying all liens.[19]

In some it is a misdemeanor for a cropper to desert.[20]

Cases dealing with the sufficiency of evidence in the various actions are shown in the notes.[21]

Liens.—The sellers of fruit trees under a contract of payment out of crops raised therefrom have no lien on the land whereon the trees are planted.[22]

A cropper having defaulted, the landlord must prove his damage, and the amount thereof is the extent of his lien on the cropper's share,[23] and this, or any lien of the landlord, is waived by allowing the cropper to remove his portion of the crop.[24] The lien for money furnished to gather a crop is subordinate to the landlord's lien for rent,[25] and does not extend to other crops growing on the leased premises.[26] One can enforce his lien only against the property subject thereto, or the proceeds thereof.[27]

§ 3. *Agricultural societies.*[28]

AIDER BY VERDICT, ETC.; ALIBI, see latest topical index.

ALIENS.

§ 1. *Who are aliens.*[29]—Native born children of alien parents are citizens.[30] The political status of an alien is presumed to continue, and the mere fact of long residence in this country is insufficient to overcome this presumption.[31]

15. The representative is entitled to sue for conversion. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

16. Meyer v. Livesley [Or.] 78 P. 670.

17. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892. The owner of the land releasing all right to the crops in consideration of a cancellation of the contract, the title to the crop vests in the cropper and her husband has no title thereto. Id.

18. Kenney v. Apley [Mich.] 102 N. W. 854.

19. **North Carolina:** Under Code, § 1759, providing that a tenant shall not remove the crop until satisfying all liens or giving the lessor 5 days' notice, it is no defense to a violation of this section that defendant had been damaged by a failure of the landlord to comply with the contract, and that such damage amounted to more than the rents and advancements. State v. Bell [N. C.] 49 S. E. 163.

20. A cropper leaving the land without returning is not guilty of a violation of Acts 1900, p. 140, c. 101, which deals with such croppers who have made a second contract, and being arrested, is entitled to a discharge on habeas corpus. Ex parte Harris [Miss.] 37 So. 505.

21. In an action by a landowner to recover possession of a cropper's share of grain raised by him pursuant to a contract to cultivate the land for a share of the crops, held, the evidence was insufficient to sustain a verdict for plaintiff. Graves v. Walter, 93 Minn. 307, 101 N. W. 297.

22. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.

23, 24. Graves v. Walter, 93 Minn. 307, 101 N. W. 297.

25. Goodwin v. Mitchell [Miss.] 38 So. 657.

26. Where money was furnished a receiver. Goodwin v. Mitchell [Miss.] 38 So. 657.

27. In an action to recover proceeds of lien cotton paid after notice, plaintiff could only require defendant to account for the money received from the crop under lien. Rose v. Florence Harness Co. [S. C.] 50 S. E. 556.

28. See 3 C. L. 137.

29. See 3 C. L. 138.

30. Ehrlich v. Weber [Tenn.] 88 S. W. 188. See 3 C. L. 138, n. 30.

§ 2. *Disabilities and privileges.*[32]—Except as to personal property,[33] an alien, under the common law, has no inheritable blood,[34] and, if he takes at all, he must do so under the statutes of the state where the property is, or by the provisions of treaties,[35] treaties being regarded as part of the law of every state.[36] Aliens, whether resident or nonresident, are generally allowed the benefit of statutes allowing damages for wrongful death.[37] A question of preferring a resident over a nonresident claimant will not be considered in an inquiry as to the right of property.[38] Under Rev. St. § 1068, aliens, whose government accords the same privilege to citizens of the United States, may prosecute claims against the United States in the court of claims and this right extends to aliens residing in the colonies of foreign governments,[39] and to corporate as well as to natural persons.[40] In Illinois the conservator of a nonresident alien lunatic may remove his ward's property from the state without showing that it is for the best interests of his ward,[41] and this right is not precluded by the fact that such property is in the hands of a resident conservator whose management is above criticism,[42] nor is such right to be considered as against public policy because if denied the property would escheat to the state upon the death of the alien.[43]

Under the Spanish law, aliens may acquire and possess real property, exercise the industries and take part in all enterprises not reserved, by existing laws and regulations, to Spanish subjects.[44] The Maura decree was an administrative law for the benefit of the state. It did not abrogate nor regulate civil rights, but pertained solely to the acquisition, classification and tenure of state lands.[45]

31. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

32. See 3 C. L. 138.

33. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 73 N. E. 285. This common-law rule has neither been narrowed nor abrogated by statute in Indiana. Id.

34. Ehrlich v. Weber [Tenn.] 88 S. W. 188. See 2 Tiffany, Real Property, p. 1158.

35. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

Kansas: Gen. St. 1899, p. 268, § 1194, providing that heirs of aliens can hold land inherited for three years, construed and held to bar the state from claiming the escheat of property left by a citizen and claimed by alien heirs. State v. Ellis [Kan.] 79 P. 1066.

Tennessee: Code 1858, §§ 1998-2000 are repealed by Acts 1875, p. 4, c. 2 (Shannon's Code, §§ 3659, 3660), and hence the heir or heirs of an alien may take land by descent or otherwise as citizens of the United States. Ehrlich v. Weber [Tenn.] 88 S. W. 188. Acts 1875, p. 4, c. 2, and Acts 1883, p. 330, c. 250, §§ 1, 2 construed, and latter held only to apply in a case in which all of the heirs are aliens. Id.

36. Where complainant bases his claim upon the provisions of a treaty, it is unnecessary for him to make a formal claim of his rights thereunder. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

37. Indiana: Under Burns' Ann. St. 1901, § 285, as amended, providing an action for wrongful death, an administrator appointed in Indiana may sue in the courts of such state for the wrongful death of a resident, although the ultimate distribution of the proceeds of the action will go to a nonresident alien, the laws of the alien's country authorizing a similar recovery in favor of an alien next of kin. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 73 N. E. 285. [This case apparently overrules the former ruling in 70 N. E. 839].

Iowa: An administrator appointed in Iowa may maintain an action in the state for an injury resulting in death to a resident alien, when it affirmatively appears that intestate's sole heir was at the time of said death, and still is, a nonresident alien. Romano v. Capital City Brick & Pipe Co. [Iowa] 101 N. W. 437.

Ohio: Nonresident aliens are entitled to the benefit of a statute providing for an action for unlawful death for the benefit of the next of kin. Rev. St. 6134 and 6135. Naylor v. Pittsburgh, etc., R. Co., 4 Ohio C. C. (N. S.) 437.

Virginia: In Virginia an action for the wrongful death of a resident alien may be maintained for the benefit of his resident alien widow and children residing in another state. Va. Code 1904, § 2902, construed. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449.

38. May v. Disconto Gesellschaft, 113 Ill. App. 415.

39, 40. Philippine Sugar Estates' Case, 39 Ct. Cl. 225.

41, 42, 43. Langmuir v. Landes, 113 Ill. App. 134.

44. Art. 18, Law of November, 1852, art. 38; Law of July 4, 1870. Philippine Sugar Estates' Case, 39 Ct. Cl. 225.

45. Philippine Sugar Estates' Case, 39 Ct. Cl. 225.

As a general rule aliens are amenable to the laws of the country into which they may come, and may be prosecuted for violations of its criminal laws.[46] A citizen of Austria accused of crime in this country may be proceeded against by information.[47]

§ 3. *Immigration, exclusion and expulsion.*[48]—The power to exclude and deport aliens is inherent to government.[49] The statutes providing a penalty for bringing in diseased immigrants apply only to a case where the diseased person is brought in by the vessel as a passenger or voluntarily.[50] The constructions placed upon particular statutes are shown in the notes.[51]

The Chinese exclusion acts are assisted but not controlled by the treaty with China,[52] and have no application to Chinese persons, other than laborers, who were domiciled in this country prior to their adoption;[53] but they do apply to a Chinese person who is a native of and emigrates from Hongkong, a British possession.[54] Recent decisions as to the constitutionality of these acts are given in the notes.[55] One's status as a merchant or laborer is largely to be determined by the work in which he engages after his arrival in this country[56] or, if a minor, after his parents have permanently returned to China.[57] To be a merchant within the meaning of such laws, one must be engaged in buying and selling merchandise in his own name and at a fixed place of business.[58] A proprietor of laundries who incidentally works for himself is not a laborer.[59] A Chinese merchant domiciled in the United States has the right to bring into this country minor children legally adopted by him in China, it being shown that the adoption was bona fide.[60] Placing a Chinese laborer in a detention shed is not a "landing" within the meaning of the law forbidding the master of any vessel from knowingly permitting any Chinese laborer to land,[61] and such Chinese laborer escaping from such confinement without the permission, connivance, knowledge or negligence of such master, the latter is not guilty of violating the statute.[62] The deportation of a

46, 47. State v. Neighbaker [Mo.] 83 S. W. 523.

48. See 3 C. L. 140.

49. United States v. Foong King, 132 F. 107.

50. Section 9 of Act March 3, 1903 (32 Stat. 1215) construed and held not to apply to a case where the deceased immigrant was a stowaway. Cunard S. S. Co. v. Stunahan, 134 F. 318.

51. The provision of section 28 of the immigration act of March 3, 1903, that nothing in such act shall apply to any prosecution or other proceeding begun under any existing acts, applies to those thereafter begun under the old law, based on acts committed before its repeal or amendment. Lang v. U. S. [C. C. A.] 133 F. 201.

52. United States v. Foong King, 132 F. 107.

53. Ex parte Ng Quong Ming, 135 F. 378. Such a person temporarily leaving this country has the right to return, even though he is not included in one of the classes expressly excluded from the operation of such laws. Id.

54. United States v. Foong King, 132 F. 107.

55. Section 13 of the Chinese exclusion act of September 13, 1888, c. 1015 (25 Stat 479) is constitutional. United States v. Foong King, 132 F. 107.

56. A Chinese person entering on a merchant's certificate, but only continuing that occupation for fifteen months, after which he became a laborer, will be deported. Cheung Him Nin v. U. S. [C. C. A.] 133 F. 391. A Chinese person entering under a certificate granted by Chinese authorities and immediately upon his arrival here and continually thereafter engaging in work as a laborer, is liable to deportation. Chin Chio Fong v. United States [C. C. A.] 133 F. 154.

57. United States v. Joe Dick, 134 F. 988.

58. A Chinese person who at the time of his arrest was working as a servant in a boarding house, and who since coming to this country had worked as a cook and as delivery man in a store in which he had no interest, is not a merchant within the meaning of the Chinese exclusion laws. Mar Sing v. United States [C. C. A.] 137 F. 875.

59. United States v. Kol Lee, 132 F. 136.

60. Children admitted where it was shown that they had lived as members of his family and been supported by him in China for several years. Ex parte Fong Yim, 134 F. 938.

61. Act Cong. May 6, 1882, c. 126, § 2 (22 Stat. 59), as amended by Act July 5, 1884, c. 220 (23 Stat. 115), considered. United States v. Seabury, 133 F. 983.

62. United States v. Seabury, 133 F. 983.

Chinese woman will be ordered, though to do so is equivalent to remanding her to perpetual slavery and degradation.[63] A Chinese woman unlawfully in this country does not by her marriage to a Chinese laborer, lawfully here, become entitled to remain here.[64]

Shipowners who have wrongfully brought aliens to this country and have received them back for deportation are not made absolute insurers of the return of the immigrants to the port from whence they came but are simply required to use a faithful and careful effort to carry out the duty so imposed.[65] In a prosecution for violating this duty a stipulation of ultimate facts is as binding on the courts as the specific evidentiary facts set out in such stipulation.[66]

Exclusion.[67]—The power to exclude and deport aliens resides in the Federal government,[68] and congress may entrust the duty of enforcing the laws on this subject to executive officers, acting either alone or in connection with the courts.[69] The Federal courts have no jurisdiction to review by habeas corpus proceedings the decision of a collector denying a Chinaman, claiming to be a citizen, the right to enter, unless an appeal is first taken to the Secretary of Commerce and Labor,[70] and in such a case a decision of affirmance by the latter is no less conclusive on the Federal courts than when the ground on which admission is claimed is domicile or belonging to a class excepted from the exclusion acts.[71] A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can at least make out a prima facie case.[72] The decision of the board of inquiry that an alien is entitled to land is not res judicata of the question.[73]

Registration.[74]—The Chinese exclusion act of 1892, as amended, requiring all "Chinese laborers" then within the United States to register, did not apply to Chinese merchants,[75] nor did it authorize the deportation of a Chinese merchant who continued in such business until after the time for registration had expired and then became a laborer through failure of his business, and was not provided with a certificate of registration.[76] As to the duty of registration, the test is capacity, not merely age.[77] Sickness may excuse a failure to register.[78]

Certificate.[79]—A merchant's certificate not stating the estimated value of his business carried on in China, nor fully establishing his status as a merchant, does

63. United States v. Ah Sou [C. C. A.] 138 F. 775 revg. 132 F. 878.

64. Especially where it was questionable whether the parties regarded the marriage as bona fide is no defense and the alleged husband has applied for a certificate of departure. United States v. Ah Sou, 138 F. 775 revg. 132 F. 878.

65. 26 Stat. at L. 1084, c. 551, construed. Hackfeld & Co. v. United States, 25 S. Ct. 456.

66. So held in regard to a stipulation that escape of immigrants from ship was without fault on the part of defendant. Hackfeld & Co. v. United States, 25 S. Ct. 456.

67. See 3 C. L. 142.

68. United States v. Foong King, 132 F. 107. See, also, United States v. Hung Chang [C. C. A.] 134 F. 19, and cases cited.

69. United States v. Hung Chang [C. C. A.] 134 F. 19, and cases cited. The constitutional guaranty of due process of law is not infringed by a statute making the decision of executive officers on the right of a Chinese person to enter this country conclusive on the Federal courts in habeas corpus proceedings in the absence of any abuse of authority, and this is true though citizenship be the ground upon which the right of entry is claimed. 28 Stat. at L. 372, 390, c. 301, construed. United States v. Ju Toy, 25 S. Ct. 644.

70. Mok Chung v. United States [C. C. A.] 133 F. 166.

71, 72. United States v. Ju Toy, 25 S. Ct. 644.

73. Does not prevent the Secretary of Commerce and Labor from instituting new proceedings within a year thereafter for a retrial of the question. 32 Stat. 1218, 1219, 1220 and 825, construed. Pearson v. Williams [C. C. A.] 136 F. 734.

74. See 3 C. L. 143.

75, 76. United States v. Leo Won Tong, 132 F. 190.

77. The fact that a Chinese laborer was a minor 19 or 20 years old held not to exempt him from registering. United States v. Joe Dick, 134 F. 988.

78. Evidence held insufficient to show that Chinese laborer failed to register because of sickness. Yee Yuen v. United States [C. C. A.] 133 F. 222.

79. See 3 C. L. 143.

not entitle him to enter or remain here.[80]

Deportation; procedure.[81]—A proceeding for the deportation of a Chinese person under the exclusion acts is civil in its nature,[82] and a plea of not guilty puts in issue two questions: First, is defendant a Chinese person or a person of Chinese descent? Second, if so is he entitled to be and remain in the United States?[83] The burden of proving the first issue is on the United States;[84] the burden of proving the second one on the defendant;[85] but upon either issue proof to the satisfaction of the commissioner or court is all that is required,[86] and in a few exceptional cases the facts have been held to raise a presumption that the defendant was entitled to remain.[87] In determining whether defendant is a Chinese person or a person of Chinese descent, his color, dress, language, and manner of wearing his hair may be considered,[88] and government inspectors and interpreters who state their ability to identify Chinese persons may testify, though they have no theoretical knowledge of the science of ethnology.[89] Admissions or statements of a defendant made to the officers by whom he is arrested in answer to questions put by them either before or after his arrest are admissible against him,[90] and the government has the right to call and examine him as a witness.[91] A stipulation that the respondent has the petitioner in his custody and control confers jurisdiction on the court in the same manner as though the petitioner were produced in court.[92] Chinese testimony must generally be corroborated by credible white witnesses,[93] and if to the effect that defendant was born in this country and is a merchant, it is sufficient if supported by the testimony of credible white witnesses that they have seen and known defendant, since he was young, as the child of a resident Chinaman, and that defendant was for years employed in a store as a merchant and was reputed to be a partner therein.[94] After a final order of deportation a Chinese person is not entitled to bail as a matter of right, and an application therefor is addressed to the sound discretion of the court.[95] This discretion should be exercised with careful regard to the evidence and the special circumstances of the case.[96]

New trial and appeal.[97]—As a general rule, a Chinese person, after exhaust-

80. So held where defendant was designated as "Assistant Accountant in Kwong Yu Wing Shop, No. 47 Bonham Strand, Hong Kong." Cheung Pang v. United States [C. C. A.] 133 F. 392.

81. See 3 C. L. 143.

82, 83, 84. United States v. Hung Chang [C. C. A.] 134 F. 19.

85. United States v. Hung Chang [C. C. A.] 134 F. 19; Lee Yue v. United States [C. C. A.] 133 F. 45.

86. United States v. Hung Chang [C. C. A.] 134 F. 19.

Evidence that defendant was born in this country held insufficient to sustain the burden resting on him in view of a previous statement made and signed by him after arrest that he was born in China. United States v. Wong Du Bow, 133 F. 326.

87. Where a proprietor of laundries had resided in this country for 19 years, had lost his certificate and in good faith had obtained a worthless duplicate, it was held that, in view of his apparent good faith and reputable character, the facts raised a presumption that he was entitled to remain. United States v. Kol Lee, 132 F. 136.

88. United States v. Hung Chang [C. C. A.] 134 F. 19. Evidence held sufficient to show that defendant was a Chinese person. Id.

89, 90, 91. United States v. Hung Chang [C. C. A.] 134 F. 19.

92. Though petitioner be actually confined in another district. Ex parte Ng Quong Ming, 135 F. 378; Ex parte Fong Yim, 134 F. 938.

93. Testimony of defendant and two other Chinese witnesses held insufficient to support claim of citizenship in view of prior admission of defendant that he was born in China. Chew Hing v. United States [C. C. A.] 133 F. 227.

94. United States v. Lee Wing, 136 F. 701.

95. United States v. Fah Chung, 132 F. 109.

96. United States v. Fah Chung, 132 F. 109. Where there is apparently no justification for entering the country and defendant entered and remained in plain violation and defiance of the law, bail will not be allowed. Id.

ing his appeal to the Secretary of Commerce and Labor, has the right to appeal to the courts,[98] and this right is not lost by an executory agreement purporting to waive it, and if he appears and demands to be heard on appeal, his status so far involves his statutory right to an appeal as to render the question as to whether his executory agreement amounted to a complete waiver thereof reviewable by the circuit court of appeals.[99] An appeal is the proper proceeding for the review of a judgment of a district court rendered on appeal from an order of a commissioner for the deportation of a Chinese person,[1] but such judgment of the district court will not be disturbed, unless clearly incorrect.[2]

§ 4. *Naturalization.*[3]—It is essential that the prescribed oath be taken.[4] A certified copy of the record of a court showing the admission of an alien to citizenship constitutes a "certificate of citizenship" within the meaning of the statutes making it an offense to use false certificates of citizenship,[5] and such "false certificate" is not limited to one that is forged, but includes one which is false in its recital of facts.[6] In the penal statutes of the United States, making it a crime for one to knowingly use a false or forged certificate of citizenship "purporting to have been issued under the provisions of any law of the United States relating to naturalization," the clause quoted refers to certificates which purport upon their face to have been issued after a compliance on the part of the alien named therein with the naturalization laws and as evidence of that fact.[7] The constructions placed upon particular words in such statutes are shown in the notes.[8]

ALIMONY.

§ 1. *Nature and purpose of the allowance.*[9]—Alimony awarded either pendente lite or upon the final determination of the action is founded upon the marital obligation to support and maintain, and is awarded by the court in enforcement of this obligation and duty.[10] There is no analogy between alimony ordered to be paid to the wife after a separation from bed and board and the sup-

97. See 3 C. L. 144.
98. So held where members of the family of a Chinese merchant domiciled in this country were denied admission. Ex parte Fong Yim, 134 F. 938; Ex parte Ng Quong Ming, 135 F. 378. Appeal had not been dismissed nor anything done in reliance on the agreement. Ah Tai v. United States [C. C. A.] 135 F. 513.
99. Ah Tai v. United States [C. C. A.] 135 F. 513.
1. United States v. Hung Chang [C. C. A.] 134 F. 19.
2. Mar Sing v. United States [C. C. A.] 137 F. 875.
3. See 3 C. L. 145.
4. One foreign born appearing before a state court while yet a minor and making oath that it is his bona fide intention to become a citizen of the United States and renouncing allegiance to all foreign sovereigns is not naturalized. State v. Collister, 6 Ohio C. C. (N. S.) 33.
5, 6. Dolan v. United States [C. C. A.] 133 F. 440.
7. Dolan v. United States [C. C. A.] 133 F. 440. A certificate to sustain an indictment based on such statute (Rev. St. § 5425) need not recite that it is issued under a law of the United States, there being in fact no statute authorizing or requiring the issuance of such certificates. Id.
8. Rev. St. § 5427, dealing with the crime of using a false certificate of citizenship, construed and held that the word "felony" as used therein should be given its popular meaning, in order to give effect to the section in accordance with the manifest intention of congress. Dolan v. United States [C. C. A.] 133 F. 440.
9. See 3 C. L. 146.
10. Shepard v. Shepard, 90 N. Y. S. 982.

port allowed her in a judgment of divorce.[11] The right to the former arises from a marriage not permanently dissolved; while in the case of a judgment of divorce an amount is allowed in the nature of support or pension.[12] Alimony for the maintenance of the wife and support money for children are separate and distinct.[13] Hence acceptance of a gross sum in discharge of a claim for alimony does not preclude application for and allowance of support money for children.[14] In jurisdictions where a wife can claim alimony only when she is plaintiff,[15] she may claim it in a suit by her husband for divorce when she becomes a plaintiff in reconvention by demanding separation from bed and board.[16] Suit money and alimony may be allowed in a suit in equity by the wife relating to realty, where the husband puts in a cross bill praying for divorce.[17]

A court, in granting a divorce, has power to order the payment of alimony to the wife so long as she shall live, and require security therefor, and in such case the obligation, considered personal while defendant lives, is imposed on the security after his death.[18] Though the former wife of a minor under guardianship, who has obtained a divorce with a decree for alimony, be regarded as a creditor of the ward, yet if she has not brought suit against the guardian, nor attached the ward's estate, nor levied an execution, she is not a party aggrieved entitled to appeal from a decree settling the guardian's accounts.[19] In Louisiana, the recording of a judgment for alimony obtained by a wife against her husband in an action for separation from bed and board or for divorce creates a judicial mortgage.[20]

11. State v. Judge of Civ. Dist. Ct. for Parish of Orleans, Division C [La.] 38 So. 14.

12. The first is recovered in Louisiana under Civ. Code, art. 148; the second under art. 160. State v. Judge of Civ. Dist. Court for Parish of Orleans, Division C [La.] 38 So. 14.

13. Konitzer v. Konitzer, 112 Ill. App. 326.

14. Konitzer v. Konitzer, 112 Ill. App. 326. Where the divorce decree awards the custody of minor children to the mother, but makes no provision for their maintenance, the fact that alimony in a gross sum is awarded the mother does not prevent her from recovering from the father, or his estate, for the expense of maintaining the children. Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274.

15. As in Louisiana. Landreaux v. Landreaux [La.] 38 So. 442.

16. Landreaux v. Landreaux [La.] 38 So. 442.

17. Suit by wife to enjoin alleged fraudulent transfer and to cancel deed, and cross-bill by husband for divorce. Moseley v. Larson [Miss.] 38 So. 234.

18. Wilson v. Hinman, 90 N. Y. S. 746.

Note: Commenting on Wilson v. Hinman, supra, a writer in the Michigan Law Review says: "The courts generally hold that the allowance of alimony payable in instalments ceases upon the death of either the divorced husband or wife. Francis v. Francis, 31 Grat. [Va.] 283; Wallingsford v. Wallingsford, 6 Har. & J. [Md.] 485; Casteel v. Casteel, 38 Ark. 478. And this is so even though the allowance is made to the wife during her life. Johns v. Johns, 44 App. Div. [N. Y.] 533; Lockwood v. Krum, 34 Ohio St. 1; Lennahan v. O'Keefe, 107 Ill. 620. In some states the court, in granting alimony, may make it a lien upon the property of the divorced husband when the circumstances seem to justify this action (Harshberger v. Harshberger, 26 Ill. 503; Tolerton v. Williard, 30 Ohio St. 579; Mahoney v. Mahoney, 59 Minn. 357), or may require security to be given (Slade v. Slade, 106 Mass. 499; Lockridge v. Lockridge, 3 Dana [Ky.] 28, 28 Am. Dec. 52; Gunther v. Jacobs, 44 Wis. 354). Alimony due and unpaid to the divorced wife at the time of her death is a vested right which passes to her legal representatives. Dinet v. Eigenmann, 80 Ill. 274; Miller v. Clark, 23 Ind. 370; Knapp v. Knapp, 134 Mass. 353. The statutes give the courts large discretionary power in the matter of alimony, and there are various dicta to the effect that the court may make alimony payable in instalments during the life of the divorced wife binding upon the heir of the divorced husband, but the intention to do so must unequivocally appear. Craig v. Craig, 163 Ill. 176; O'Hagan v. O'Hagan, 4 Iowa, 509. This case is of especial interest because it appears to have squarely raised the point for the first time in the state of New York."—3 Mich. L. R. 323.

19. Leyland v. Leyland [Mass.] 71 N. E. 794.

20. Baker v. Jewell [La.] 38 So. 532.

§ 2. *Jurisdiction and power to award.*[21]—Though the court of the domicile of the marriage may, at suit of the wife, render a decree of divorce against the nonresident husband on constructive service, yet such court is without jurisdiction to render a decree for alimony or costs against the nonresident husband, not served with process and not appearing in the cause.[22] In granting a divorce, the chancellor has also full power to settle and adjust the property rights of the parties.[23] But unless as incidental to divorce or other relief, alimony can be decreed only in cases within the statute.[24] Thus the New Jersey statute, providing that a husband who has abandoned his wife without justifiable cause may be compelled to maintain her, does not warrant an allowance where husband and wife are living apart by mutual agreement.[25] Under New York statutes, where there is no abandonment by the husband, but the wife has been forced to leave him on account of cruel and inhuman treatment, the wife is entitled to temporary alimony in a separation action, without instituting criminal proceedings for abandonment before a magistrate.[26] In Arkansas, an independent action for alimony irrespective of divorce proceedings may be sustained, or alimony may be awarded in a suit for divorce, though a divorce is denied.[27] Under the Texas statute, a court has no authority to order payment of a monthly sum for the maintenance of children as a part of the final decree of divorce.[28] In Kansas where action is brought for divorce and division of property, the court may decree a division of property, though a divorce is refused.[29]

§ 3. *Stage or condition of the divorce proceeding.*[30]—A decree of absolute divorce, with alimony, being obtained by a wife, the alimony allowed becomes a vested property right, and the decree is an adjudication of all questions relating to alimony which were or might have been litigated.[31] Similarly, after an order granting temporary alimony and attorney's fees has been duly passed, the court is without jurisdiction to revise or set it aside on any ground except one based on a change of circumstances subsequent to the granting of the order.[32] A change of circumstances being made to appear, the court has power to make such order, changing the original order, as will be just and equitable.[33] The dismissal of a complaint and counterclaim in a divorce action does not affect an order previously

21. See 3 C. L. 147.
22. Baker v. Jewell [La.] 38 So. 532.
23. Under Rev. St. c. 40, § 17. Heyman v. Heyman, 110 Ill. App. 87.
24. Patton v. Patton [N. J. Eq.] 58 A. 1019.
25. Construing Laws 1902, c. 157. Patton v. Patton [N. J. Eq.] 58 A. 1019.
26. Weigand v. Weigand, 92 N. Y. S. 679.
27. Horton v. Horton [Ark.] 86 S. W. 824.
28. Power conferred by Rev. St. 1895, § 2987, to make provision for children, is to be exercised pendente lite only. Ligon v. Ligon [Tex. Civ. App.] 87 S. W. 838.
29. Demurrer to evidence sustained as to claim for divorce and case retained for hearing as to division of property; procedure proper under Gen. St. 1901, § 5136. Bowers v. Bowers [Kan.] 78 P. 430.
30. See 3 C. L. 148.
31. Goodsell v. Goodsell, 46 Misc. 158, 93 N. Y. S. 1038. No change in fortunes or circumstances of parties appearing, motion of defendant for reduction of alimony four years after reference to take testimony, and motion of wife to reopen reference, denied. Id.
32. An unsuccessful attempt to review the order, made by the husband, and a reversal of a verdict for the wife in a suit for permanent alimony, do not constitute a change of status of the parties. Sumner v. Sumner [Ga.] 50 S. E. 1013.
33. Rev. St. 1898, § 1212. Read v. Read [Utah] 78 P. 675. Divorce, custody of two children, and $900 and other articles as alimony having been awarded, a subsequent order of $5 per week was held proper, in view of the circumstances of the parties. Ostheimer v. Ostheimer [Iowa] 101 N. W. 275. No increase in award of alimony, where husband earned some salary, and he sides had married again and supported his wife and mother. Phillippi v. Phillippi [Mo. App.] 87 S. W. 529. The fact that the husband remarries and offers to take the custody of children is no defense to an application by his former wife, who had obtained the divorce, for an additional allowance for the support of the children. Ostheimer v. Ostheimer [Iowa] 101 N. W. 275.

made for the payment of alimony, though payment was to be in monthly instalments and none was due at the time of such dismissal.[34] In New York where final judgment fails to provide for support and maintenance of children, custody of whom has been awarded to the wife, and fails to reserve power to modify the order, the court has no power thereafter to modify its final decree by incorporating a provision as to support of children.[35] The same rule is applied in Missouri.[36]

The court has power to require the husband to pay the wife alimony for her support pending an appeal by her from a judgment of divorce.[37] Whether such alimony should be allowed in a particular case rests in the sound discretion of the trial court.[38] The denial of a motion for alimony pending an appeal made before the appeal was perfected is not res judicata precluding the granting of a renewed motion after perfection of the appeal.[39]

§ 4. *Reasons for and against. Provisional allowances.*[40]—The purpose of allowing alimony pendente lite is to enable the wife to live meantime and to employ counsel who can properly present her case.[41] The allowance of such alimony is largely discretionary,[42] the respective financial conditions of the parties[43] and the conduct of each[44] being usually the determining factors. Usually the allowance will be made, if the necessary facts be made to appear,[45] whether the wife be

34. Shepard v. Shepard, 90 N. Y. S. 982.

35. Salomon v. Salomon, 101 App. Div. 588, 92 N. Y. S. 184.

36. Where decree of divorce was entered, custody of child given mother, and a monthly allowance awarded, but no provision for maintenance of child was made, the award of alimony could not be increased on grounds connected with support of child. Phillippi v. Phillippi [Mo. App.] 87 S. W. 529.

37. Gay v. Gay [Cal.] 79 P. 885. An interlocutory order granting alimony pendente lite may be made pending an appeal of the cause. Lawrence v. Lawrence [Ala.] 37 So. 379.

38. Evidence held to show appeal was taken in good faith and allowance of alimony held proper. Gay v. Gay [Cal.] 79 P. 885.

39. Gay v. Gay [Cal.] 79 P. 885.

40. See 3 C. L. 148.

41. Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877. A woman placed in jail on her husband's complaint without means of support, is entitled to alimony pending a suit for divorce brought by him, and suit money in a suit brought by her. Harmon v. Harmon [Del. Super.] 58 A. 1042.

42. Allowance of alimony pendente lite discretionary. Lesh v. Lesh, 21 App. D. C. 475. Evidence being conflicting as to fault of wife, discretion of court held not abused by award of temporary alimony and attorneys' fees. Ray v. Ray, 120 Ga. 25, 47 S. E. 570. The awarding of alimony and fixing the amount thereof being matters resting in the trial court's discretion, orders relating thereto will not be disturbed on appeal in the absence of an abuse of discretion. Read v. Read [Utah] 78 P. 675.

Contra: The benefit conferred on the wife by the statute providing that the court must make an allowance for her support, pending divorce proceedings, out of the estate of the husband, suitable to his estate and the condition in life of the parties (Code 1896, § 1495), is a matter of right and not one within the court's discretion. Lawrence v. Lawrence [Ala.] 37 So. 379.

43. Temporary alimony and counsel fees proper where wife owned $700 in stocks, and husband admitted large income and ownership of much property. Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877. Allowance of alimony and counsel fees against complainant proper where it appeared that he had real and personal property and was employed and earning a salary. Jones v. Jones, 111 Ill. App. 396. Under Ky. St. 1903, § 900, a wife who holds all her property under the will of a former husband, which gave it to the children in case she remarried, there being children living, is without means to pay costs of a divorce suit, and hence the husband is liable therefor, though the wife was at fault. McMakin v. McMakin [Ky.] 87 S. W. 1140. Application to have prior agreement between parties, providing for monthly payments for support of children, incorporated in judgment for divorce and alimony, denied because wife had property of her own and justice did not demand such action by the court. Salomon v. Salomon, 101 App. Div. 588, 92 N. Y. S. 184. Motion for temporary alimony and counsel fees in separation suit denied where wife had income for services and enough on hand to pay expenses, and her services, or income therefrom, belonged to defendant, or had been given her by him. Richardson v. Richardson, 94 N. Y. S. 582.

44. Alimony pendente lite and counsel fees not granted where complainant's financial condition was better than defendant's, and evidence tended to show complainant guilty of conduct justifying husband in living apart. Steller v. Steller, 115 Ill. App. 323.

45. Finding of facts held sufficient under Code, § 1291, to warrant allowance of alimony pendente lite and attorney's fees to wife seeking divorce. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

plaintiff or defendant.[46] Alimony may be granted for the payment of past expenses if such payment is necessary to enable the wife to further prosecute or defend her case.[47] The spouses must be living separately during the pendency of the suit for divorce in order to warrant alimony pendente lite.[48] But where suit has been instituted by the wife in good faith, a subsequent reconciliation with her husband and resumption of cohabitation is no bar to an allowance of fees for the attorney's services already rendered.[49] It is held in some states that the merits of the case will not be considered on an application for temporary alimony[50] further than is necessary to determine that the wife is proceeding in good faith, and not for the mere purpose of obtaining money from the husband.[51] But if the answer denies that there ever was a marriage, and that averment appears to be true, no alimony should be allowed.[52]

Permanent allowances.[53]—A court should not decree permanent alimony to a wife living separate and apart from her husband, in the absence of facts showing an obligation of the husband to support her under those conditions.[54] That separation was induced by insanity of the husband is not a defense to a claim for alimony, the wife not being at fault.[55] Refusal of the wife to return to the husband is no bar to her claim for alimony if the causes justifying the original separation remain.[56] Wrongdoing of the wife is a defense against her claim.[57]

§ 5. *Amount, character and duration.*[58]—The amount to be allowed rests in the sound discretion of the court;[59] the husband's means and ability to earn,[60]

46. In a suit for divorce and alimony, or for alimony alone, the court may order an allowance to the wife to insure her an efficient preparation of her case, whether she be defendant or plaintiff. Day v. Day [Kan.] 80 P. 974.

47. Though an order for $300, and $100 monthly, recited that the first sum was for previous unpaid instalments under a former order, held, this was only a reason, and the amount could be regarded as an award for present and past expenses. Gay v. Gay [Cal.] 79 P. 885.

48. Where wife returned to husband a month after filing motion for alimony and thereafter lived with him, she was not entitled to alimony. Fullhart v. Fullhart [Mo. App.] 83 S. W. 541.

49. Fullhart v. Fullhart [Mo. App.] 83 S. W. 541.

50. It is the general rule that alimony pendente lite will be granted without inquiry into the merits. Reed v. Reed [Miss.] 37 So. 642.

51. In action for divorce for cruelty, fact that husband offered use of home to wife pending action was immaterial on application for temporary alimony, since it involved merits. Kolwalsky v. Kowalsky, 145 Cal. 394, 78 P. 877.

52. Defendant could show in defense to application for alimony that at time of alleged marriage defendant was the undivorced wife of another. Reed v. Reed [Miss.] 37 So. 642.

53. See 3 C. L. 149.

54. Order for permanent alimony unwarranted where parties lived apart but there was no finding of desertion by the husband or offer by the wife to live with him. Volkmar v. Volkmar [Cal.] 81 P. 413.

55. Moseley v. Larson [Miss.] 38 So. 234.

56. Where jealousy of husband causing him to doubt and dishonor his wife was cause for which divorce was granted, the fact that she refused to return to him, though he was willing she should, was not cause for refusing alimony, his conduct and belief being unchanged. Thompson v. Thompson [Ky.] 85 S. W. 730.

57. Error to award alimony to plaintiff wife, when she was at fault, and husband had only enough to support himself and was in frail health. Smith v. Smith [Ky.] 86 S. W. 678. Alimony refused wife where she was proved guilty of adultery. Dollins v. Dollins, 26 Ky. L. R. 1036, 83 S. W. 95.

58. See 3 C. L. 150.

59. Barker v. Barker, 136 N. C. 316, 48 S. E. 733. Award of alimony held clearly excessive. Kimbro v. Kimbro [Neb.] 102 N. W. 271. $500 alimony to wife, in suit where husband was given divorce for desertion, held not excessive. Metcalf v. Metcalf [Neb.] 102 N. W. 79.

60. $1,000 held reasonable alimony where husband had farm and personalty and would inherit considerable property and wife had nothing. Thompson v. Thompson [Ky.] 85 S. W. 730. Evidence being conflicting as to income, $8 a week alimony and $25 counsel fees, held proper in separation suit by wife. Dushinsky v. Dushinsky, 94 N. Y. S. 638. Where evidence tending to show earnings of $50 a week was unsatisfactory and husband denied that he earned more than $20 a week, allowance of $12 per week, with leave to apply for more on new papers, held proper. Weigand v. Weigand, 92 N. Y. S. 679. Allowance of $50 for counsel fees in suit for separation not disturbed on appeal, it appearing that husband denied that his income exceeded $20 per week. Id. Income of wife being uncertain and inade-

the wife's lack of means and station in life,[61] the children to be supported,[62] and the source of the property owned by the parties[63] being among the considerations by which the court will be guided. Upon division of the property, one-third is ordinarily held a liberal allowance to the wife in the absence of special circumstances;[64] but under the Washington statute, the awarding of all the community property to one of the parties is authorized.[65] A claim of the husband for personal injuries sustained after separation from his wife is community property, one-half of which may be set aside for the wife on her obtaining a divorce.[66]

§ 6. *Procedure and practice.*[67]—Notice of application for alimony pendente lite is not necessary where the husband has left the state for the purpose of defeating the wife's claim.[68] It is not necessary to make proof of the value of services of counsel where an allowance is made at the close of the trial, since the court may determine the matter from its own experience and the circumstances as disclosed by the record.[69] It is not necessarily error to dismiss a bill, leaving stand until further order an order for alimony.[70] The committee of a lunatic defendant must be made a party to proceedings to fix alimony or adjust property rights.[71] Where permanent alimony allowed an insane party is insufficient owing to the negligence of the defendant's guardian ad litem, who was appointed to make proof of complainant's property on complainant's nomination, a rehearing should be granted.[72] Where the parties agreed upon a sum payable in lieu of the amount awarded, and thereafter a reference was ordered to determine defendant's ability to pay, the court would not pass upon question whether defendant was guilty of contempt pending the reference.[73] A receiver appointed under the New York statute to take charge of the husband's personalty on his refusal to comply with a decree for alimony may properly be required to give bond.[74] An order granting

quate, and husband's income $250 or $300 per month, allmony of $70 per month held not excessive. Read v. Read [Utah] 78 P. 675. Where husband's income consisting of salary, rents, and legal interest on investments amounted to $2925, one-third that amount, $23 per week, was held reasonable alimony, defendant being credited with $8 for rental of premises occcupied by plaintiff. Bennett v. Bennett [N. J. Eq.] 59 A. 245. Alimony allowance of $1,300 per year not disturbed where it appeared that husband had income of $4,000. Edgar v. Edgar, 23 Pa. Super. Ct. 220.

61. Read v. Read [Utah] 78 P. 675.

62. Where wife was given custody of 4 minor children, and it appeared she had assisted in accumulating property, a life estate in half the realty and half the personalty absolutely was held not excessive alimony. Crabtree v. Crabtree [Ky.] 85 S. W. 211. In suit by wife, allowance of rents of $45 per month as alimony held reasonable, she having two children, and the husband having taken with him on separation certain property. Baker v. Baker [Ky.] 85 S. W. 729. Husband's property being worth $75,000 and wife being awarded custody of two minor children, award of $6,500 to defendant wife for their support held justified, and made a lien on plaintiff's property. Taylor v. Taylor [Or.] 81 P. 367.

63. Where wife contributed to partnership business, allowance to her of what she contributed and one-half remainder of assets held proper. Heyman v. Heyman, 110 Ill. App. 87.

64. Where wife was capable, intelligent and in good health, and husband was broken down, addicted to drink, and in poor health, and there were no children, an allowance of more than 1-3 to wife was excessive. Edleman v. Edleman [Wis.] 104 N. W. 56.

65. Where there were no children, and husband had deserted wife and failed to support her, award of all the property amounting to $2300 above incumbrances to the wife was held proper under 2 Ball. Ann. Codes & St. § 5723. Miller v. Miller [Wash.] 80 P. 816.

66. Ligon v. Ligon [Tex. Civ. App.] 87 S. W. 838.

67. See 3 C. L. 152.

68. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

69. Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179.

70. Kozacek v. Kozacek, 105 Ill. App. 180.

71. Frazer v. Frazer, 25 Ky. L. R. 882, 76 S. W. 546.

72. Frieseke v. Frieseke [Mich.] 101 N. W. 632.

73. Goodsell v. Goodsell, 94 App. Div. 443, 88 N. Y. S. 161.

74. Failure to require bond would not excuse husband for refusal to turn over property, and judgment committing him for contempt was therefore proper. In re Spies, 92 App. Div. 175, 86 N. Y. S. 1043.

alimony pendente lite is appealable in some states,[75] but not in others.[76] A refusal to grant permanent alimony is reviewable on appeal in Kentucky, though the court's action in granting a divorce may not be reviewed.[77]

§ 7. *The decree;*[78] *its enforcement and discharge.*[79]—An order directing counsel fees to be paid "to the plaintiff or to her counsel" is inaccurate, but not so irregular as to warrant interference by the appellate court.[80] In an action for divorce and alimony, the court has power to order that the plaintiff retain possession of personal property belonging to the husband until the alimony allowed should be paid;[81] and where a judgment so provides, that part of it which further provides for a specific lien on such personal property may be regarded as immaterial and surplusage.[82] A decree for alimony does not become dormant by failure to issue execution thereon for more than five years.[83] An appeal from a judgment allowing a pension does not suspend the effect of a judgment for alimony before a final decision in the divorce case. If pension be decreed in the final judgment for divorce, it will then succeed the decree for alimony.[84]

Consent decrees; contracts.—A decree for alimony is entered by consent if valid; but if the consent is obtained by coercion or fraud, a court of equity has power to purge the decree of the fraud.[85] One who consents to a decree obligating him to pay certain rents to his divorced wife is bound by the decree though the

75. Barker v. Barker, 136 N. C. 316, 48 S. E. 733. Order for alimony pendente lite and counsel fees is appealable without special leave, under Code D. C. § 226. Lesh v. Lesh, 21 App. D. C. 475.

76. Interlocutory decree allowing alimony pendente lite is not appealable. Lawrence v. Lawrence [Ala.] 37 So. 379.

77. Refusal of circuit judge to grant alimony is reviewable on appeal, though action in granting divorce is not. Thompson v. Thompson [Ky.] 85 S. W. 730.

78. NOTE. Nature of decree for alimony: The decisions of the courts are not entirely uniform as to the nature or status of a decree or judgment for alimony. Probably the majority of the courts regard a judgment for alimony as a debt of record in the same manner as any other judgment for money (Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. Rep. 679; Trowbridge v. Spinning, 23 Wash. 48, 62 P. 125, 83 Am. St. Rep. 817, 54 L. R. A. 204). In Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708, it was held that a judgment for alimony in favor of a woman makes her a judgment creditor of her former husband, and as such she is entitled to avail herself of all the remedies given by the statute to judgment creditors. It bas frequently been held that a decree for alimony has the same force and effect as a judgment at law. Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Sapp v. Wightman, 103 Ill. 150; Frakes v. Brown, 2 Blackf. [Ind.] 295; Tyler v. Tyler, 99 Ky. 31, 34 S. W. 898; Dufrene v. Johnson, 60 Neb. 18, 82 N. W. 107. Though a decree of divorce is regarded as a judgment in rem rather than in personam, still in so far as it decrees alimony and costs, it is regarded as in personam. See the monographic note to De La Montanya v. De La Montanya [Cal.] 53 Am. St. Rep. 182-184. In Kunze v. Kunze, 94 Wis. 54, 68 S. W. 391, 59 Am. St. Rep. 857, it was said that if a decree awarding alimony has the effect of a judgment at law in the state wherein it was entered, an action at law may be maintained on it in another state. Because of the fact that a decree for alimony is often allowed to be subsequently modified on account of changed circumstances, it is sometimes urged that such decrees are not final judgments. Thus it has been held that an alimony decree is not such a debt which can be discharged in bankruptcy. Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty, 195 Ill. 385, 63 N. E. 161, 88 Am. St. Rep. 208; Audubon v. Shufeldt, 181 U. S. 575, 45 Law. Ed. 1009. But the contrary was held in Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769. The courts have also quite frequently held that a decree for alimony is not a debt within the meaning of the constitutional provision, prohibiting imprisonment for debt. In re Popejoy, 26 Colo. 32, 55 P. 1083, 77 Am. St. Rep. 222; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; State v. King, 49 La. Ann. 1503, 22 So. 887; In re Cave, 26 Wash. 213, 66 P. 425, 90 Am. St. Rep. 736. In Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679, it was held that a foreign decree for the future payment of alimony which remains subject to the discretion of the foreign court lacks that conclusiveness of character requisite for enforcement by the courts of another state.—See note to Harding v. Harding (16 S. Dak. 406, 92 N. W. 1080) in 102 Am. St. Rep. 702.

79. See 3 C. L. 153.

80. Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877.

81, 82. Conklin v. Conklin, 93 Minn. 188, 101 N. W. 70.

83. Lemert v. Lemert [Ohio] 74 N. E. 194.

84. State v. Judge of Civ. Dist. Ct. for Parish of Orleans, Division C [La.] 38 So. 14.

85. Griswold v. Griswold, 111 Ill. App. 269.

obligation assumed was not covered by the pleadings or prayer for relief.[86] Since a wife cannot be barred of her potential right of dower in the lands of her husband by a verbal contract, such a contract between the parties to a divorce suit, attempting to settle the question of alimony by obligating the husband to pay the wife a certain sum, is void as to the land, and hence void in toto.[87]

Enforcement.[87a]—The trial court has authority to compel obedience to its orders granting alimony pending an appeal of the case.[88] An allowance of alimony is a judgment for debt,[89] and an action of debt will lie on a decree in equity for the payment of alimony rendered by a chancery court of another state.[90] Such action will lie though the sum adjudged is not a single, stated amount, but an accruing allowance, the decree being enforceable to the amount accrued at the time the action is brought.[91] The statutory powers of a chancellor to enforce a decree for alimony are not affected by a previous agreement, unsanctioned by the chancellor.[92] Where such agreement is not embodied in the decree and is inequitable, it is no defense to a proceeding to show cause for nonpayment of alimony under the decree.[93] In New York execution cannot issue on an order for support of the wife and care and maintenance of the children, pending a suit for separation or divorce.[94] Since an execution is not authorized, supplementary proceedings are also without authority.[95]

Failure of a divorced husband to comply with a decree directing the payment of alimony is prima facie evidence of contempt,[96] and if he seeks to show that the cause of such failure to pay is his inability to do so, the burden is upon him to establish that fact.[97] He must show with reasonable certainty the amount of money he has received, and that this money has been used in paying obligations and expenses, which, under the law, he should pay before making payments on the decree for alimony.[98] The court may discharge one committed for contempt on a showing of actual inability to comply with the decree.[99] That one entitled to alimony under a decree receives assistance from others does not affect the liability of the one against whom the decree is rendered.[1] It is the duty of one ordered to pay alimony, who is unable to comply with the order of the court, to protect himself by applying for a revocation or modification of the decree.[2] Though an allowance is for the wife's maintenance from year to year, the court will enforce payment, by commitment for contempt, for a period greater than one year.[3] A proper demand for payment of alimony is not a prerequisite to a commitment for contempt for failure to pay, when defendant has had an opportunity to pay, notice having been served upon him that contempt proceedings would be

86. Connellee v. Werenskiold [Tex. Civ. App.] 87 S. W. 747.

87. Shemwell v. Carper's Adm'r [Ky.] 87 S. W. 771.

87a. See 3 C. L. 153.

88. State v. Second Judicial Dist. Court [Mont.] 79 P. 13.

89. By Pub. Laws 1902, c. 971, § 5, suits may be brought or executions issued on an allowance for amounts from time to time due and unpaid. Wagner v. Wagner [R. I.] 57 A. 1058.

90, 91. Wagner v. Wagner [R. I.] 57 A. 1058.

92, 93. Silberschmidt v. Silberschmidt, 112 Ill. App. 58.

94. Such order is enforceable by sequestration or contempt proceedings under Code Civ. Proc. §§ 1772, 1773. Weber v. Weber, 93 App. Div. 149, 87 N. Y. S. 519.

95. Code Civ. Proc. § 2435, relative to supplementary proceedings, inapplicable. Weber v. Weber, 93 App. Div. 149, 87 N. Y. S. 519.

96, 97. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

98. Showing by attorney as to income and living expenses of himself and family held insufficient. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

99. Decree for support. Perry v. Pernet [Ind.] 74 N. E. 609.

1. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

2. State v. Second Judicial Dist. Court [Mont.] 79 P. 13.

3. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

instituted on a certain day.[4] An order adjudging a husband in contempt for refusal to pay alimony should not include the costs of the divorce proceeding.[5]

Property fraudulently transferred by defendant in a divorce suit is subject to claims for alimony in the hands of the transferee;[6] and where the transferee executes a mortgage securing the payment of alimony he is not a mere surety, but as to the mortgage stands in the shoes of the transferror.[7] Money in the hands of an administrator belonging to an heir against whom an award of alimony has been made can be reached by the wife in whose favor the decree for alimony was rendered only by garnishment.[8]

Discharge.—A decree for alimony not being a claim provable in bankruptcy, it is not discharged by a final discharge in bankruptcy.[9]

§ 8. *Suits for annulment and actions for separate maintenance.*[10]—Where both husband and wife reside outside the state, the court has no jurisdiction of suit for support brought by wife.[11] A wife may apply for separate maintenance, though she has previously entered into a contract with her husband by which he agrees to support her in a state of separation.[12] A judgment for defendant in a suit by the wife for divorce and alimony on the grounds of cruelty and drunkenness is not a bar to a suit for separate support on the ground of desertion and failure to provide because of habitual drunkenness.[13] In a suit by wife for support under the New Jersey statute, it is proper to require of her a bond for costs.[14] Since the Rhode Island statute denominates a suit for the setting aside of a void marriage a proceeding for divorce, a woman petitioning for such relief may be granted allowances for temporary support, counsel fees and expenses.[15] The supreme court of the District of Columbia has power to grant alimony pendente lite and counsel fees in a suit by the wife for support and maintenance.[16] Counsel fees may be awarded in New York in a suit by the wife for annulment of the marriage.[17] In suits for maintenance and support under the California statute, a periodical allowance should be awarded, rather than a lump sum, in the absence of special circumstances.[18] In a suit for separate maintenance in Indiana, the court may order the payment of a weekly allowance instead of a gross sum,[19] and may authorize the wife to lease or mortgage the husband's realty and apply the proceeds on the decree for alimony.[20] Where in an action for maintenance a wife obtained a decree for a monthly allowance, and thereafter the husband procured a divorce and a discontinuance of the payments at a certain date, but a new trial was granted in the divorce case, the decree for the monthly allowance was enforceable according to its original terms.[21] Hence the allowance of

4. Noncompliance with the decree must in such case be regarded as willful. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

5. Shepard v. Shepard, 90 N. Y. S. 982.

6, 7. Wilson v. Hinman, 90 N. Y. S. 746.

8. Clifford v. Gridley, 113 Ill. App. 164.

9. Lemert v. Lemert [Ohio] 74 N. E. 194.

Note: As to effect of second marriage upon obligation to pay alimony, see collection of authorities in note to Brown v. Brown [31 Wash. 397] 62 L. R. A. 974.

10. See 3 C. L. 154.

11. Dithmar v. Dithmar [N. J. Eq.] 59 A. 644.

12. Patterson v. Patterson, 111 Ill. App. 342.

13. Smith v. Smith [Ind. App.] 74 N. E. 1008.

14. Dithmar v. Dithmar [N. J. Eq.] 59 A. 644.

15. Construing Gen. Laws 1896, c. 195, § 1, and Pub. Laws 1902, c. 971, § 5, in a case where woman petitioned for divorce, husband having been previously married. Leckney v. Leckney [R. I.] 59 A. 311.

16. Its inherent right to do so not divested by Code D. C. § 980. Lesh v. Lesh, 21 App. D. C. 475.

17. In suit to annul marriage for impotency of husband, court has power to allow wife counsel fees pendente lite. Gore v. Gore, 92 N. Y. S. 634; afg. 44 Misc. 323, 89 N. Y. S. 902.

18. Construing Civ. Code, § 137. Kusel v. Kusel [Cal.] 81 P. 295.

19. Smith v. Smith [Ind. App.] 74 N. E. 1008.

20. By express provisions of Burns' Ann. St. 1901, § 6980. Smith v. Smith [Ind. App.] 74 N. E. 1008.

21, 22. Smith v. Smith [Cal.] 81 P. 411.

alimony to the wife in the suit for divorce by the husband is improper.[22] Under a general denial to a complaint for separate support on the ground of desertion and failure to provide because of drunkenness, defendant may put in proof denying drunkenness, desertion and mistreatment, and may prove that plaintiff lived apart from defendant of her own will and did not offer to return nor ask for money.[23] A general allegation of desertion admits proof that the desertion was without cause.[24]

ALTERATION OF INSTRUMENTS.

§ 1. *Definition, distinctions, and what constitutes.*[25]—An alteration which makes an instrument speak a language different in legal effect from that which it originally spoke is material, and when made by one not a stranger to the paper, it is sufficient to avoid the contract as to all parties not consenting thereto;[26] but this does not apply where the party has the power to annul the provision attempted to be altered, irrespective of whether he is consciously and intentionally making such alteration.[27] It is not every alteration of an instrument that will defeat recovery thereon. It must be such an alteration as will materially change the contract of the parties.[28] A mere attempted alteration is not sufficient.[29]

§ 2. *Particular instruments.*[30]—Changes in a negotiable promissory note after delivery which alter the time of payment,[31] place of payment, when none is stated,[32] specie of payment,[33] amount and name of payee,[34] cutting a note from a

23, 24. Smith v. Smith [Ind. App.] 74 N. E. 1008.

25. See 3 C. L. 154.

26. As adding to a promissory note a place of payment, which imports negotiability, whereas, under statute, without words designating place of payment, would not have been negotiable, is a material alteration. Carroll v. Warren [Ala.] 37 So. 687; Bedgood-Howell Co. v. Moore [Ga.] 51 S. E. 420. An alteration of a check by the holder, consisting in a change of the name of the bank on which it is drawn, is a material alteration. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36. A material alteration of a contract is a destruction of a provision thereof and an attempt to foist a new provision on the other party. American Bonding & Trust Co. v. Baltimore, etc., R. Co. [C. C. A.] 124 F. 866. Erasure of the word "trustee" in a deed by the grantee. Flitcraft v. Commonwealth Title Ins. & Trust Co. [Pa.] 60 A. 557. Insertion after execution in a building contract, the time for completion is a fraudulent alteration. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858. Addition of an unnecessary certificate of acknowledgment is not material. Canfield v. Orange [N. D.] 102 N. W. 313.

27. Provision that engineer of railroad might annul one portion of a construction contract without releasing contractor as to others. American Bonding & Trust Co. v. Baltimore, etc., R. Co. [C. C. A.] 124 F. 866.

28. Note was executed at Lyons, Kan., and payable at Marshalltown, Iowa; the words "with exchange" were printed in the note; before it was executed the maker erased these words, but after its delivery the payee without knowledge or consent of the maker rewrote the words "with exchange." This was not a material alteration. First Nat. Bank v. Nordstrom [Kan.] 78 P. 804.

29. As where defendant without the knowledge or consent of plaintiff made an attempted erasure by drawing a pen and ink mark through the words "one hundred and eighty dollars, cash, the receipt of which is hereby acknowledged to Davis & Co." in a building contract, after the failure and refusal of plaintiff to pay the first instalment of $180. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767.

30. See 3 C. L. 155. Effect of alteration in deed, see Tiffany, Real Prop. 880.

31. In an action on a note it was apparent that its date had been changed, and that it had been so altered as to become payable after maker's death, instead of one year after date. Bowers v. Rineard, 209 Pa. 545, 58 A. 912.

32. Carroll v. Warren [Ala.] 37 So. 687.

33. Inserting the word "gold" before dollars in a promissory note is a material alteration. Colby v. Foxworthy [Neb.] 100 N. W. 798.

34. Where the amount in note was changed from $700 to $765, and name of payee from John M. Fudge to Lewis N. Martin. Fudge v. Marquell [Ind.] 72 N. E. 565.

memorandum, limiting its effect as a negotiable instrument,[35] are material alterations. Insertion in building contract, after execution, the time for completion of contract,[36] or the change of name of the bank on which a check is drawn,[37] or the erasure of the word "trustee" in a deed, are material alterations.[38]

§ 3. *Effect of material alteration; rights of parties.*[39]—A material alteration avoids the instrument because, as altered, it no longer represents the agreement among the parties.[40] In general, the other party is released thereby,[41] but parties may be estopped from asserting a material alteration in a written instrument by their conduct.[42] Alterations may be impliedly authorized.[43] Where an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.[44] Mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder; proof of bad faith is essential.[45]

35. A school order for articles for school use was signed by the officers of the district, and recited "Issued by authority of officers of said district and payment guaranteed by them." Beneath the order was a printed certificate by the payee that it had received from the school district an official voucher, containing a recital that the matter was to be left to a vote of the district at an annual meeting, but the matter below the signature was detached, and the order with it detached, was transferred. This removal of the lower portion of the instrument was a material alteration. First Nat. Bank v. Carter [Mich.] 101 N. W. 585.

36. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858.

37. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

38. Flitcraft v. Com. Title Ins. & Trust Co. [Pa.] 60 A. 557.

39. See 3 C. L. 156.

40. Alteration in a note so as to make it payable after maker's death, instead of one year after date, is a material alteration and no recovery can be had thereon. Bowers v. Rineard, 209 Pa. 545, 58 A. 912. Where property was conveyed to a grantee as trustee, and such language appeared in the deed, subsequent erasure of the word "trustee" by the grantee was a forgery, rendering the deed void. Flitcraft v. Com. Title Ins. & Trust Co. [Pa.] 60 A. 557. Where brokers, without the consent of their customer, altered a written contract so as to give them a greater commission, the alteration rendered the entire contract void. Harrison v. Lakenan [Mo.] 88 S. W. 53.

41. American Bonding & Trust Co. v. Baltimore, etc., R. Co. [C. C. A.] 124 F. 866.

42. The written contract between plaintiff and defendant for the construction of a building cast upon the latter the duty of procuring the insurance upon the building during construction. The insurance was to be for their joint benefit. By the acts and statements of plaintiff they were to procure the insurance, which they failed to do. They were estopped from complaining that the defendant had not procured the same. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24. In a contract for the sale of real estate a clause relating to incumbrance provided "that the north walls of the buildings on the above described premises" encroached on the street. One of the counterparts was delivered to the intending purchaser for execution, who in exchange for counterpart signed by the landowner delivered the one left with him for signature with the letter "s" erased from the words "walls" and "buildings," which fact he concealed. Webster Realty Co. v. Thomas, 46 Misc. 139, 93 N. Y. S. 1077.

43. In an action on bonds, one of the defendants claimed an alteration in the bonds, after delivery, by inserting the name of a certain person as obligor. The bonds were given for land sold to the obligors and that after the sale the defendant in question sold part of his interest to the one whose name had been added to the bond. The obligee testified that shortly after they were delivered to him the obligors told him they wanted them back to get some other parties who had come into the deal to sign them, and that the bonds were given back to one of the obligors, and afterwards again delivered to the obligee. Rocky Mount Loan & Trust Co. v. Price [Va.] 49 S. E. 73.

44. This is a statutory provision in some states. Rev. Laws, c. 73, § 141. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959. Where blank spaces in a promissory note in the hands of an innocent holder had been filled out by inserting the rate and date of interest and place of payment. Humphrey Hardware Co. v. Herrick [Neb.] 101 N. W. 1016.

45. Merritt v. Dewey, 115 Ill. App. 503. The alteration of a written contract by a stranger without the privity or consent of the parties interested will not avoid the contract where the contents of same can be ascertained. Colby v. Foxworthy [Neb.] 100 N. W. 798. Where it was claimed that note in suit had been changed since signing, by means of which it had been made to read fifteen hundred dollars, whereas when signed the note read one hundred dollars, or "hundred dollars." Merritt v. Dewey, 115 Ill. App. 503. Defendant purchased an automobile on which there was a chattel mortgage. The mortgage had been altered after execution but by whom or under what circumstances was not disclosed. Defendant was not thereby divested of title to the automobile. Stearns v. Oberle, 94 N. Y. S. 37.

§ 4. *Pleading and evidence.*[46]—A fraudulent alteration of the note sued upon may be shown under the general issue.[47] The answer must allege that the material alteration was made after the execution of the note, which includes both signing and delivery.[48] The burden of proof of a defense of subsequent material alteration of an instrument is held in some states to be on the party asserting it, though the decisions are conflicting.[49] The party claiming an alteration in an instrument is only bound to establish it by a preponderance of the evidence.[50] If, however, there are suspicious circumstances apparent on the face of the instrument, the burden of proof rests upon the party producing it to account satisfactorily for any interlineation which operates a substantial change in the effect of such instrument.[51] Evidence of alteration of an instrument is not admissible until proper foundation therefor has been laid,[52] nor can rate of interest be fixed by a note which has been destroyed by alteration.[53] The fact that an erasure, which does not vary or alter the effect of a negotiable instrument, appears on its face, does not render it inadmissible in evidence.[54]

§ 5. *Curing or ratifying alterations.*[55]

AMBASSADORS AND CONSULS.[56]

Treaties conferring consular jurisdiction are to be reasonably but not liber-

46. See 3 C. L. 157.

47. Gandy v. Bissell's Estate [Neb.] 100 N. W. 803. A general plea of non est factum will authorize the party interposing it to prove that after the execution of the instrument in question it was altered without his consent. Fudge v. Marquell [Ind.] 72 N. E. 565.

48. In an action on a note, an answer admitting that defendant "signed" the note sued on, but averring that thereafter, without his knowledge or consent, the note was materially altered, is insufficient as a statement of defense, as the averment of signature is not equivalent to an allegation of execution, as defendant may have consented to the alteration after signature but before delivery. Bowen v. Woodfield, 33 Ind. App. 687, 72 N. E. 162.

49. Fudge v. Marquell [Ind.] 72 N. E. 565. Evidence not sufficient to establish the defense of alteration by a change in the rate of interest from 7 to 8 per cent. Mathews v. De Werff [Ark.] 83 S. W. 327. The evidence of a party that he does not remember that it contained any provision for a commission, though he read it before signing, is not sufficient to overthrow the plain terms of a contract. Busby v. Compton [Mo. App.] 87 S. W. 109.

Note: The civil-law rule is that alterations in the substantial part of an instrument are presumed to be false and must be accounted for. 4 Mascard Conc. 1261, n. 1-24; Pipes v. Hardesty, 9 La. Ann. 152. In England, such alterations, in the absence of suspicious circumstances, are presumed to have been made contemporaneously with the instrument's execution. Greenleaf on Evidence, § 564. The American decisions seem for the most part to conform to the civil-law rule. Smith v. U. S., 69 U. S. 219, 17 Law. Ed. 788; Jackson v. Osborn, 2 Wend. [N. Y.] 555. Policy would demand that such a principle be applied to negotiable paper. Ely v. Ely, 6 Grav [Mass.] 439; Kennedy v. Moore, 17 S. C. 464. Other American courts presume that the change was made with authority. Hagan v. Ins. Co., 81 Iowa, 321. Since it is hard to say that there is such a uniform experience in such cases as to give rise to a presumption, the better rule seems to be that the time of such alteration should be found by the jury as are ordinary facts in the absence of the presumption. Robinson v. Myers, 67 Pa. 9. In the principal case the suspicious circumstances were such evidence that the alterations were made subsequently as to justify the result in any event. —4 Columbia L. R. 601.

50. Gaskins v. Allen [N. C.] 49 S. E. 919.

51. Messi v. Frechede, 113 La. 679, 37 So. 600. Where, in an action for broker's commissions, plaintiff admitted that he altered the contract of sale, the burden of proof that such alteration was not fraudulent was on him. Robertson v. Vasey [Iowa] 101 N. W. 271.

52. So evidence that an instrument has been altered is inadmissible unless it be shown that the alteration was made after its execution and delivery, as it is presumed that any change made after instrument is drawn was made before execution. Deed of a city lot had been altered by addition in different ink, of the words in the description "100 ft. deep." Gunkel v. Seiberth [Ky.] 85 S. W. 733.

53. A mortgage note providing for ten per cent. interest was changed by an endorsement by the holder so as to draw 8 per cent., and this endorsement was thereafter erased by him annulling the note. There being no rate mentioned in the mortgage, the interest was fixed by Statute. Edwards v. Sartor [S. C.] 48 S. E. 537.

54. Where there was objection to the introduction of the note in evidence because the words "at the rate of eight per cent. per annum" appeared on its face to have been erased. Execution of the note having been admitted. Brown v. Fledwert [Or.] 80 P. 414.

55. See 3 C. L. 158.

56. See 3 C. L. 158.

ally construed.[57] The power of consuls given jurisdiction over the internal order of vessels of their nations, to require the arrest of seamen, is limited to requiring a United States marshal, through requisition presented to his court or judge, to make the arrest.[58] An arrest made by a state officer is a mere irregularity, when being brought on habeas corpus to the court, which on proper requisition would have ordered a marshal to make the arrest it is found that a ground for consular jurisdiction exists.[59] United States consuls are usually authorized to take and conclusively certify acknowledgments made abroad.[60] The consul of a nation may be authorized by our courts to receive a nonresident alien's distributable share of an estate for transmission.[61] A consul will be presumed to have acted within his jurisdiction, though he does not so state.[62]

AMBIGUITY; AMENDMENTS, see latest topical index.

AMICUS CURIAE.

A court has power to hear persons appearing as amici curiae and to receive their evidence in aid of the exercise of the court's discretion and to advise the court of the real facts of the case.[63] An amicus curiae has no power to represent a party in giving a notice of appeal.[64]

AMOTION; AMOUNT IN CONTROVERSY; ANCIENT DOCUMENTS, see latest topical index.

ANIMALS.

§ 1. *Property in animals.*[65]—The modern rule is that a dog is a species of property recognized by law,[66] and may not be killed except for just cause.[67] The death of a domestic animal does not terminate the owner's property in it.[68] He may be required to dispose of the carcass, but he cannot be arbitrarily deprived of his property in it,[69] and he must be allowed a reasonable time within which to remove it.[70]

§ 2. *Personal injuries inflicted by animals.*[71]—The keeper[72] or owner[73] of

57. Contract with American citizen held void because of payment in advance, hence he never came within jurisdiction of consul of ship's nation. The Neck, 138 F. 144.

58. The Act of Congress June 11, 1864 (Rev. St. U. S. §§ 4079-4081; U. S. Comp. St. 1901, p. 2766) impliedly excludes state officers from exercising such power; otherwise they might do so. Dallemagne v. Moisan, 25 S. Ct. 422.

59. Dallemagne v. Moisan, 25 S. Ct. 422.

60. Werner v. Marx, 113 La. 1002, 37 So. 905; Long v. Powell, 120 Ga. 621, 48 S. E. 185.

61. In re Davenport, 43 Misc. 573, 89 N. Y. S. 537.

62. Pierce v. Martin, 89 N. Y. S. 434.

63. As where a proceeding is claimed to be collusive. Sampson v. Commissioners of Highways, 115 Ill. App. 443.

64. One who was not connected with a railway company in any way could not give notice of an appeal from a judgment against it. Southern R. Co. v. Locke [Tex. Civ. App.] 84 S. W. 1069.

65. See 3 C. L. 159.

66. His owner may maintain an action for an injury to him. Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822. In an action involving the ownership of a dog, evidence held insufficient to show that it belonged to plaintiff. Ross v. Healy, 90 N. Y. S. 391.

67. Reed v. Goldneck [Mo. App.] 86 S. W. 1104.

68. Mann v. District of Columbia, 22 App. D. C. 139.

69. Mann v. District of Columbia, 22 App. D. C. 139. Art. 14, § 9 of the police regulations, requiring the carcasses of dead animals to be removed to a place to be approved by the commissioners, has no extra-territorial effect. Id.

70. Mann v. District of Columbia, 22 App. D. C. 139.

71. See 3 C. L. 159.

a domestic animal is liable for personal injuries inflicted by it only when he has notice of its vicious traits[74] or is negligent.[75] The notice must be actual,[76] but circumstances often render the question one of fact.[77] But one who undertakes to keep animals ferae naturae in a place of public resort is liable for injuries inflicted on a person who is not negligent,[78] unless the keeping of such animals is his lawful duty and obligation.[79] One guilty of contributory negligence[80] or who wantonly irritates an animal cannot recover for injuries resulting.[81] One seeking to recover for an injury by a domestic animal must allege[82] and prove the scienter,[83] and also that the animal possessed a particularly dangerous habit which caused the injury;[84] but a complaint under a remedial statute need not mention the statute,[85] nor allege scienter or facts dispensing with the necessity of it.[86] Scienter may be proven by evidence of the reputation of the animal.[87] The reputation

Note: Bees are not ferae naturae and their keeper is not liable absolutely and at all events for injuries they may inflict. Earl v. Van Alstine, 8 Barb. [N. Y.] 630; Parsons v. Manser, 119 Iowa, 88, 93 N. W. 86, 97 Am. St. Rep. 283. But the owner must be held to a knowledge of their vicious propensities, and manage them accordingly with due regard to the rights of others. In placing the hives in any particular place, he must exercise ordinary prudence for the avoidance of unnecessary danger to those likely to make lawful use of the premises or highway near by. Tellier v. Pellant, 5 Rev. Leg. 61; O'Gorman v. O'Gorman, 2 Ir. K. B. Div. 573, 58 Cent. L. J. 283.

As a nuisance: The keeping of bees is not of itself a nuisance and whether it becomes so in any given case is a question to be determined judicially. Town of Arkadelphia v. Clark, 52 Ark. 23, 11 S. W. 957, 20 Am. St. Rep. 154; Olmstead v. Rich, 6 N. Y. S. 826.—From note to Parsons v. Manser [Iowa] 97 Am. St. Rep. 290. See, also, note to the same case, 62 L. R. A. 133.

72. The owner of premises on which a dog is kept by another with his permission is not necessarily the keeper of the dog. McCosker v. Weatherbee [Me.] 59 A. 1019.

73. Under Ball. Ann. Codes & St. § 4949, an allegation that plaintiff was bitten by a dog belonging to defendant is sustained by proof that he belonged to a partnership of which defendant was a member. Grissom v. Hofius [Wash.] 80 P. 1002.

74. That an officer of a corporation that owned a dog said to a witness "Look out for the dog or it will bite you" is insufficient to show the owner's knowledge. Bogodonow v. New York Lumber & Storage Co., 91 N. Y. S. 331.

75. The owner of a horse which kicks a traveler on the street is not liable in the absence of negligence. Miller v. Atlantic Refining Co. [Pa.] 60 A. 306. A servant does not assume the risk of viciousness on the part of an animal furnished him by the master, unless he has knowledge of such viciousness. Hagen v. Ice Delivery Co., 2 Ohio N. P. (N. S.) 592.

76. Must have actual notice of the vicious traits of a dog. Fettman v. Hencken & Willenbrock Co., 91 N. Y. S. 773.

77. Evidence that a dog had bitten persons in the presence of his owner's watchman and had been prevented by the watchman from biting others, held to raise a question for the jury as to the owner's knowledge, actual or imputed. Grissom v. Hofius [Wash.] 80 P. 1002. On a prosecution for keeping a vicious dog, evidence of apparent attacks, though they may have been harmless gambols, when it shows a propensity to attack and bite, raises a question for the jury. Tubins v. District of Columbia, 21 App. D. C. 267.

78. Jackson v. Baker, 24 App. D. C. 100.

79. The keeper of the National Zoological Park is not liable in the absence of negligence. Jackson v. Baker, 24 App. D. C. 100.

80. Passed close to the heels of a horse on the sidewalk without speaking to him. Miller v. Atlantic Refining Co. [Pa.] 60 A. 306.

81. Interfered with a dog while he was eating. Feldman v. Sellig, 110 Ill. App. 130.

82. Ward v. Danzeizen, 111 Ill. App. 163. An allegation that the dog was accustomed to bite is insufficient. Must be alleged that it was accustomed to bite persons. Feldman v. Sellig, 110 Ill. App. 130.

83. Notice to the owner of the vicious traits of his dog must be proven. Feldman v. Sellig, 110 Ill. App. 130. Vicious traits of a horse. Ward v. Danzeizen, 111 Ill. App. 163. A servant injured by a horse, who seeks to recover on the ground that the horse was "wild, vicious and unruly" has the burden to prove such trait. Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844. Testimony as to a complaint made to a policeman by a witness after seeing an attack made by a dog with a view to having the policeman communicate the matter to the owner which he did is admissible. Tubins v. District of Columbia, 21 App. D. C. 267. Proof of knowledge that the animal is fierce or dangerous is proof of scienter. Id.

84. That a horse was accustomed to kick. Ward v. Danzeizen, 111 Ill. App. 163.

85. Under Gen. St. 1902, § 4487, fixing the liability of the keeper for damages done by a dog. Leone v. Kelly [Conn.] 60 A. 136.

86. Leone v. Kelly [Conn.] 60 A. 136.

87. After the introduction of evidence tending to show the vicious traits, further evidence of his reputation is admissible to show his owner's knowledge of his qualities. That a horse was not driven single because of his vicious propensities. Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844.

of an animal for viciousness may be shown by evidence of specific instances when it exhibited vicious traits;[88] but proof of the vicious character of a class of animals is not proof that a particular animal of that class is vicious.[89]

§ 3. *Injuries to property by animals trespassing or running at large.*[90]—One who does not know of the vicious traits of an animal he allows to run at large is not liable for an injury which is not the natural consequence to be anticipated from allowing an ordinary animal to run.[91] In many of the western states no trespass is committed unless cattle break through a fence[92] sufficient to turn cattle of ordinary disposition[93] under ordinary circumstances;[94] but an owner may not willfully drive his cattle on another's land,[95] and this rule does not apply to sheep or swine.[96] In some states failure of adjoining proprietors to maintain a division fence precludes a recovery;[97] but in Iowa the common-law rule applies as to adjoining owners without a partition fence.[98] An agreement with the holder of an invalid title to adjoining property to build a division fence does not preclude a recovery by the true owner,[99] and a coterminous owner who fails to keep up his portion of the division fence is liable if his cattle trespass as a result of his negligence.[1]

The right to recover is not affected because the injury is slight,[2] but one seeking to recover must prove damage,[3] and nominal damages may be recovered though no actual damage is sustained.[4] The measure of damage is the injury caused to the crops or freehold.[5]

Where several dogs belonging to respective owners injure cattle, each owner

88. A horse. Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844.

89. A general statement by a dog dealer that bitches with pups are vicious is insufficient to establish vicious traits in a particular bitch. Cook v. Levintan, 94 N. Y. S. 396.

90. See 3 C. L. 160.

91. Killing of a goat by a mule. Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281.

92. Wilson v. Caffall [Tex. Civ. App.] 83 S. W. 726. On conflicting testimony as to whether a fence is such as the law requires for a legal fence the question is for the jury. Peterson v. Lacey [Iowa] 102 N. W. 153.

93. Where breachy bulls broke through a fence sufficient to turn cattle of ordinary disposition and injured fattening steers, the owner was liable. Trammell v. Turner [Tex. Civ. App.] 82 S. W. 325. Where breachy bulls broke into a yard where there were fattening steers and injured them, expert testimony that the fence was sufficient to turn cattle of ordinary disposition is admissible. Id.

94. Evidence that a pasture was overcrowded and that the feed therein was poor raises a question for the jury where the cattle broke through a fence owned by the owner of the land on whose ground they trespassed. Peterson v. Lacey [Iowa] 102 N. W. 153.

95. Allegation that one has an estate in certain land and that on a certain date defendant drove a large band of sheep onto it and depastured it, states a cause of action. Minter v. Gose [Wyo.] 78 P. 948.

96. Rev. St. 1887, § 1320, does not require a landowner to fence against sheep or swine. Spencer v. Morgan [Idaho] 79 P. 459.

97. In Wisconsin, failure to maintain a division fence if practicable precludes the recovery of damages for a trespass by an adjoiner's cattle. Rev. St. 1898, §§ 1391, 1395. Walls v. Cunningham [Wis.] 101 N. W. 696.

98. Where there has been no legal division of a partition fence, the owner of animals which escape onto adjoining land is liable. DeMers v. Rohan [Iowa] 102 N. W. 413.

99. Holder of an invalid tax title agreed to build his portion of a division fence. Hammond v. Tuttle [Mich.] 103 N. W. 178.

1. Where coterminous owners agree that each shall keep up a part of the division fence and by reason of the failure of one to keep up his portion the hogs of one enter onto the land of the other, the one at fault is liable for damage caused. Collins v. Cochran, 121 Ga. 785, 49 S. E. 771.

2. Peterson v. Lacey [Iowa] 102 N. W. 153.

3. Where cattle broke through a fence—partly on account of plaintiff's and partly on account of defendant's fault and there is no evidence as to what part of the damages was the result of either, there can be no determination of the damages by a jury. Hightower v. Henry [Miss.] 37 So. 745. Evidence held insufficient to show that trespassing cattle did any damage. Arla Cattle Co. v. Burk [Neb.] 102 N. W. 74.

4. Trammell v. Turner [Tex. Civ. App.] 82 S. W. 325.

5. Evidence of sickness of a plaintiff's family is admissible to show why cattle were not driven off as soon as discovered. De Mers v. Rohan [Iowa] 102 N. W. 413.

is liable for the damage done by his dog.[6] Admissions made by the owner of a sheep-killing dog are admissible against him.[7] In Pennsylvania a dog tax is levied to remunerate owners of sheep killed by dogs,[8] and in Rhode Island the town pays the owner his damages and recovers from the owner of the dog[9] in an action in tort.[10] The remedy being statutory must be strictly pursued.[11]

§ 4. *Liability for killing or injuring animals.*[12]—It is a crime to willfully kill the animals of another[13] and a trespass to expose his cattle to a contagious disease.[14] Dogs may not be killed except for just cause,[15] unless otherwise provided by statute.[16] Statutes generally provide that sheep-killing dogs may be killed.[17] A dog is not within a statute making the killing of cattle or other live stock by engines or cars prima facie evidence of negligence.[18] A bailee who negligently injures an animal in his possession is liable to the owner.[19] A proprietor is under no obligation to fence against trespassing animals,[20] nor to keep his premises in a safe condition as to them,[21] and is liable for injuries sustained by them only in case of gross negligence,[22] and not if the injury is the result of an accident;[23]

6. Under Code, § 2340. Anderson v. Halverson [Iowa] 101 N. W. 781. Evidence held for the jury as to the amount of damage caused by one dog. Id.

7. After killing the dog, he remarked that "it would kill no more sheep." Anderson v. Halverson [Iowa] 101 N. W. 781.

8. Under P. L. 68, damages cannot be assessed in favor of a resident of one township for sheep killed in another, and such damages certified to the township in which the sheep were killed. Marcy v. Springville Tp., 24 Pa. Super. Ct. 521.

9. Town of Richmond v. James [R. I.] 61 A. 54.

10. Under Gen. Laws 1896, c. 111, § 17, the town is subrogated to the rights of the sheep owner. Town of Richmond v. James [R. I.] 61 A. 54.

11. Allegations in a declaration by a town under Gen. Laws 1896, c. 111, § 17, of notice to the dog owner of presentation of a claim are improper. Town of Richmond v. James [R. I.] 61 A. 54.

12. See 3 Curr. L. 161.

13. In a prosecution for killing a domestic animal, direct proof of death by violence showing the existence of a criminal act demanding investigation, establishes the **corpus delicti.** Stockbridge v. Territory [Okl.] 79 P. 753. On a prosecution for **poisoning colts,** threats made by the defendant to get even with the owner of the colts for certain grievance is admissible. State v. Sargood [Vt.] 58 A. 971. Evidence as to the conduct of a certain woman whom defendant had attempted to poison, held admissible. Id.

14. It is within the exception of Rev. St. 1895, art. 1194, providing that no person shall be sued except in the county of his domicile, except for * * * trespass for which a civil action in damages will lie. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 353.

15. Reed v. Goldneck [Mo. App.] 86 S. W. 1104.

16. Prior to the enactment of Rev. St. 1899, § 6976, a trespassing dog could not be killed unless it was actually doing injury. Reed v. Goldneck [Mo. App.] 86 S. W. 1104. Where a dog is found at night in the midst of sheep by one who had recently lost animals by the ravages of dogs, it is sufficient upon which to base a conclusion that he had recently been engaged in killing sheep. Id.

17. Under Rev. St. 1899, § 6976, a dog caught killing sheep or under circumstances which indicate that it has recently been so engaged, may be killed by another than the owner of the sheep killed. Reed v. Goldneck [Mo. App.] 86 S. W. 1104.

18. Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822.

19. A horse shoer who beats a horse brought to him to be shod, in such a manner as to cause its death, is liable for its value, and that the horse is uncontrollable and vicious is no defense. Bissell v. York [Mo. App.] 83 S. W. 282. A lessee of cows who agrees to return a like number is liable to the lessor if one dies as the result of negligence. Scott v. Lockwood, 92 N. Y. S. 401.

20. Where a trespassing cow ate nitrate of soda and died, the landowner was not liable. Tennessee Chemical Co. v. Henry [Tenn.] 85 S. W. 401.

21. A proprietor is liable for injuries sustained by a trespassing animal running at large in violation of an ordinance only in case of gross negligence. It is not gross negligence to have an open well on one's lot. McCutchen v. Gorsline [Tex. Civ. App.] 86 S. W. 1044.

22. A railroad company is bound to exercise only ordinary care to prevent injury to cattle by its trains. Georgia Southern & F. R. Co. v. Jones, 121 Ga. 822, 49 S. E. 729. Evidence held insufficient to show negligence by a proprietor where trespassing cattle drank of polluted water and died from the effects. Brimner v. Reed, 23 Pa. Super. Ct. 318. Evidence as to a railroad's negligence in killing a horse held for the jury. Burlington & M. R. Co. v. Campbell [Colo. App.] 78 P. 1072. With respect to the care which locomotive engineers must take of beings on or near the track, a dog is on the same footing with a man and it is presumed that he will get out of the way. Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822.

23. Evidence held to show no negligence

but he cannot wantonly injure them,[24] and in some states he is required to properly guard "attractive nuisances."[25] Railroad companies are liable for injuries to animals resulting from negligent operation or defective construction of their road,[26] as are also municipal corporations for negligent use or defective construction of highways.[27]

The measure of damages for killing an animal is its value,[28] and for injuring one the difference in its value before and after the injury;[29] but in Missouri, by statute, if a proprietor whose fields are not enclosed by a lawful fence injures an animal that has strayed onto his premises, he is liable for double damages.[30]

§ 5. *Contracts of agistment.*[31]—An agister is required to exercise ordinary diligence in caring for animals in his charge,[32] and is liable for damages for injuries to cattle resulting from negligence.[33] Expense incurred in feeding cattle because the pasture was insufficient may be set up in reconvention in an action to recover for pasturing;[34] but a contract for the furnishing of a particular pasture does not create a liability because the pasture was insufficient to maintain a certain number of cattle.[35] A contract to keep cattle in an unlawful inclosure on public lands is void.[36]

The agister's lien is purely statutory.[37] The status of the lien is fixed by the rule of the state where acquired,[38] and will be so enforced in a state where the same rule does not prevail.[39] It is not lost where the owners of the cattle take

where a locomotive ran into mules. Southern R. Co. v. Hoge [Ala.] 37 So. 439.

24. Trespassing on railroad track. Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133.

25. A shed in which nitrate of soda is kept is not an attractive nuisance the maintenance of which made the owner liable for injuries sustained by trespassing animals. Tennessee Chemical Co. v. Henry [Tenn.] 85 S. W. 401.

26. See Railroads, 4 C. L. 1181. Pub. St. 1901, c. 159, § 23 requires a railroad company to fence only against cattle owned or in the custody of adjoining owners. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. The mere fact that bodies of dead cattle are found near the track is not proof that they were killed by the engine or cars of the railway company. Beaudin v. Oregon Short Line R. Co. [Mont.] 78 P. 303. It is not contributory negligence for an owner of animals to permit them to remain in a pasture after discovery that the fence was inadequate to keep them off the railroad's right of way. Chicago, etc., R. Co. v. Bourne, 105 Ill. App. 27.

27. See Highways and Streets, 3 C. L. 1593.

28. On a prosecution for killing an ox, evidence of the habit of the ox of breaking into inclosed fields is irrelevant on the question of his value. Mims v. State [Ala.] 37 So. 354.

29. Where peat in a pasture was set on fire by an engine and cattle burned their legs, the measure of damages is the difference in value of the cattle before and after they were burned. Chicago, P. & St. L. R. Co. v. Willard, 111 Ill. App. 225.

30. Rev. St. 1899, §§ 3294, 3295, 3298. Woods v. Carty [Mo. App.] 85 S. W. 124.

31. See 3 C. L. 162.

32. An agister's agreement to take care of a herd of cattle is an agreement to take ordinary care of them. Darr v. Donovan [Neb.] 102 N. W. 1012. An agister under a contract requiring him to care for cattle "in all respects as he would for similar property of his own" must give them such care as an ordinarily prudent person would under like circumstances. Mattern v. McCarty [Neb.] 102 N. W. 468.

33. Contract of agistment held to require the agister to use reasonable care to feed and protect cattle and to make him liable for negligence. Mattern v. McCarty [Neb.] 102 N. W. 468. "Just remuneration" as used in an agister's contract means the remuneration which the owner would be entitled to recover for the loss of his cattle by the agister's negligence. Id.

34. Not too remote. Scovill v. Melton [Tex. Civ. App.] 85 S. W. 463.

35. Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37.

36. Note given for keeping cattle in an inclosure of more than 160 acres in violation of 23 U. S. Stat. 321 is unenforceable. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614. The fact that the amount of the note was arrived at by common-law arbitration did not cure its invalidity. Id.

37. Does not exist in Oklahoma. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614.

38. Under Sayles' Ann. Civ. St. 1897, §§ 3319, 3326, providing that the lien thereby given shall not impair other liens, the lien of a livery stable keeper is inferior to the lien of a prior mortgagee. Masterson v. Pelz [Tex. Civ. App.] 86 S. W. 56.

them without the agister's consent,[40] nor affected by the fact that the pasturing was done under an express contract as to price,[41] and its superiority over a prior chattel mortgage is not affected where the cattle are taken from the agister without his consent and shipped to a state where a different rule as to priority prevails[42] and the agister may recover in conversion against an innocent purchaser.[43] Though the lien continues after he has parted with possession, he has a right to retain the animals under it,[44] and where they are taken from him without his consent, he may recover them;[45] but if he has no lien, he has no right to retain possession as against one entitled thereto.[46]

§ 6. *Estrays and impounding.*[47]—Cattle breaking through a division fence cannot be retained damage feasant.[48] One who agrees to the retention of his animals pending ascertainment of the damage and refuses to submit to arbitration according to his agreement to do so is liable for the expense of caring for them in the meantime.[49] Municipal corporations have power to make effective ordinances forbidding the running at large of animals, by provisions for impounding and sale,[50] and such legislation is not illegal as providing for the forfeiture of animals impounded.[51] An ordinance providing for the sale of impounded animals unless redeemed by payment of a fine is unconstitutional as to the fine owing to the absence of judicial investigation.[52] But the purchaser's title is not affected because of the invalidity of the provision relative to the fine.[53] Payment of poundage fees[54] and expenses incurred in caring for the animals is a condition precedent to a right to recover them.[55]

§ 7. *Regulation as to care; keeping and protection and health.*[56]—It is not negligence per se to lead an animal ferae naturae on a public street[57] and in the absence of negligence there is no liability for an injury not the probable consequence of the act.[58] The keeping of live stock is under the police regulation of the state[59] and such police regulation extends over the public lands of the United States within the state.[60] The legislature may regulate the keeping of animals with respect to adjacent property.[61] The general welfare clause of the charter of a municipal corporation authorizes it to prevent the running at large of animals.[62]

39, 40, 41, 42, 43. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

44. Under Ky. St. 1903, §§ 2500-2502. Speth v. Brangman [Ky.] 84 S. W. 1149.

45. Form of judgment held proper. Speth v. Brangman [Ky.] 84 S. W. 1149.

46. A guaranty of a note by a mortgagee procured as a condition of surrendering them is void. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614.

47. See 3 C. L. 163.

48. Where an adjoiner's cattle broke through that part of a division fence which it was his neighbor's duty to maintain, they could not be retained by his neighbor until the owner had compensated him for damages suffered. Cotton v. Huston [Mo. App.] 84 S. W. 97.

49. Collins v. Cochran, 121 Ga. 785, 49 S. E. 771.

50, 51. Crum v. Bray, 121 Ga. 709, 49 S. E. 686.

52, 53. Shook v. Sexton [Wash.] 79 P. 1093.

54. Owner of cattle impounded by a de facto officer is liable for poundage fees notwithstanding the inability of the officer to recover from the municipality. White v. Clarkesville [Ark.] 87 S. W. 630.

55. Under Kirby's Dig. § 5451. White v. Clarkesville [Ark.] 87 S. W. 630. Expenses of an officer in caring for impounded animals are not "fees" within the rule governing the right of a de facto officer to fees. Id.

56. See 3 C. L. 164.

57. A bear. Bostock-Ferari Amusement Co. v. Brocksmith [Ind. App.] 73 N. E. 281.

58. Injuries resulting because of the fright of a horse. Bostock-Ferari Amusement Co. v. Brocksmith [Ind. App.] 73 N. E. 281.

59. Spencer v. Morgan [Idaho] 79 P. 459. Rev. St. 1887, §§ 1210, 1211 (The two mile limit law) is constitutional. Walker v. Bacon [Idaho] 81 P. 155; Spencer v. Morgan [Idaho] 79 P. 459. Acts 1898-99, amended by Acts 1900-1901, to prevent stock from running at large in Etowah County, is constitutional. Davis v. State [Ala.] 37 So. 454.

60. Spencer v. Morgan [Idaho] 79 P. 459.

61. Congregation Beth Israel v. O'Connell, 187 Mass. 236, 72 N. E. 1011.

62. Hogs. Crum v. Bray, 121 Ga. 709, 49 S. E. 686.

Where municipalities are required by statute to adopt ordinances to prevent animals running at large, mandamus will issue to compel such action.[63] Dangerous animals may be discriminated against.[64] Laws relative to the regulation of cattle running at large may be special,[65] but have no extraterritorial effect.[66] In some of the southern states stock law districts, to prevent cattle running at large therein, may be created upon the requisite vote of freeholders,[67] or upon a petition of a certain number of them,[68] and the fact that municipal authorities may prevent stock running at large does not deprive the freeholders of their right to petition.[69] Under the Mississippi statute the stock law cannot be put in force in a part of a county on a petition to put it in force in the entire county,[70] and where such action is taken, it is void and the petition is still before the board as if unacted upon and no appeal lies until such action is taken.[71] The petition for an election under the Texas Local Option Stock Law must specify the animals it is desired to restrain,[72] and describe the territory affected.[73] The petition must be acted upon as required by law,[74] and the election must conform to the petition,[75] and notice thereof be posted as required.[76] Violation of these laws is a criminal offense,[77] and subject to prosecution under the provisions of the general penal code, though a justice is also given jurisdiction.[78] A statute prohibiting the running at large of cattle and providing for a lien and enforcement thereof for its violation, provides a civil remedy, and no criminal action can be predicated upon it.[79]

Interstate transportation; quarantine; inspection.[80]—A state may prescribe conditions under which cattle infected with a contagious disease shall be admitted,[81] and the bringing in of such cattle in violation of such conditions may be

63. Act Oct. 1, 1903, § 1 (Acts 1903, p. 365) is mandatory. Huey v. Waldrop [Ala.] 37 So. 380.

64. Cattle with horns. Rev. St. 1899, § 5959. City of Doniphan v. White [Mo. App.] 85 S. W. 400.

65. Under Const. art. 16, §§ 22, 23, may be made applicable to parts of a county other than a political subdivision. Ex parte Tompkins [Tex. Cr. App.] 83 S. W. 379. Counties may be classified on the basis of population for the purpose of enacting statutes relative to cattle running at large. Acts 1903, p. 1342, c. 499, is not special legislation. Murphy v. State [Tenn.] 86 S. W. 711.

66. A resident of one state is not guilty of an offense against the laws of another because his cattle stray across the state line. Beattie v. State [Ark.] 84 S. W. 477.

67. Under Code 1892, §§ 2056, 2060, 2063. Stockton v. Caldwell [Miss.] 38 So. 369. Code 1892, §§ 2055, 2059, providing for the establishment of stock law districts, is constitutional. Ormond v. White [Miss.] 37 So. 834.

68. Stockton v. Caldwell [Miss.] 38 So. 369.

69. Stockton v. Caldwell [Miss.] 38 So. 369. Freeholders not given an opportunity to sign the petition will be counted against. Id.

70. Under Rev. Code 1892, § 2056. Bowles v. Board of Sup'rs of Leflore County [Miss.] 37 So. 707.

71. Bowles v. Townes [Miss.] 38 So. 354.

72. Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382.

73. A petition for a stock law election under Acts 26th Leg. p. 220, c. 128, § 3, must give the boundaries of the precinct in which it is to be held. Cox v. State [Tex. Cr. App.] 88 S. W. 812.

74. Under Acts 26th Leg. p. 220, c. 128, §§ 3, 4, providing that the commissioner's court shall act upon a petition for a stock-law election "at the next regular term thereof," a petition filed during a regular term cannot be acted on at that term. Cox v. State [Tex. Cr. App.] 88 S. W. 812.

75, 76. Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382.

77. Indictment for permitting a hog to run at large held sufficient under Acts 1898-99, p. 683, as amended by Acts 1900-1901, p. 170. Davis v. State [Ala.] 37 So. 454. Indictment for permitting a hog to run at large in violation of Acts 1898-99, amended by Acts 1900-1901, not affected by Acts 1903, Sept. 29. Id.

78. Acts 1898-99, p. 683, amended by Acts 1900-1901, p. 170, creating stock-law districts and giving a justice jurisdiction of a violation thereof, does not give him exclusive jurisdiction but the offender may be prosecuted by indictment. Davis v. State [Ala.] 37 So. 454.

79. Acts 1903, p. 1342, c. 499. Murphy v. State [Tenn.] 86 S. W. 711.

80. See 3 C. L. 165.

81. In the absence of rules prescribed by the live-stock sanitary commission, cattle carrying southern ticks cannot be transported into Kansas. State v. Missouri Pac. R. Co. [Kan.] 81 P. 212. Sections 7451, 7452, Gen. St. 1901, construed. Id.

enjoined.[82] The Federal statute prohibiting the exportation of diseased animals out of quarantined districts applies only to diseased or infected animals,[83] and gives the secretary of agriculture no jurisdiction over animals not affected.[84] Railroads are generally required to furnish cattle yards to restrain cattle offered for transportation prior to being loaded,[85] and are liable for injuries resulting to them because of the defective condition of the yard.[86]

§ 8. *Marks and brands.*[87]—In California, by statute, it is a crime to mark or deface a mark with intent to steal, or prevent identification by the owner.[88] The mark placed on the animal need not be a conventional one, indicative of ownership,[89] and it is immaterial that it is not one calculated to accomplish the purpose intended.[90] Under the Arizona statute providing for the seizure and sequestration of certain unbranded or freshly branded cattle, the ownership of which is questioned, seizure cannot be made unless the ownership is questioned in some reasonable manner,[91] and forfeiture to the territory cannot be declared unless the provisions of the statute as to notice of sale are strictly complied with.[92]

§ 9. *Cruelty to animals.*[93]—Under the police power the time, place and manner of killing animals may be prescribed,[94] and authority to pass ordinances against cruelty to animals may properly be conferred upon municipal corporations, and such authority may be included in powers given in general terms.[95] In some states a willful act, omission or neglect which causes unjustifiable physical pain, suffering or death to an animal is a misdemeanor.[96] A statute making it a crime to so drive a horse as to cause its death is not violated if death results from some other cause.[97]

§ 10. *Crimes against property in animals.*—Theft of animals is either covered by the general law of larceny or by statutory crimes of the same nature.[98] There are various statutory crimes directed against fraudulent dealings.[99] One does not violate a penal statute against driving cattle from their accustomed range unless he does so purposely and willfully.[100]

82. State v. Missouri Pac. R. Co. [Kan.] 81 P. 212.

83. Under 23 Stat. 31 the Secretary of Agriculture cannot prohibit the taking of a horse out of the quarantined district if it is not diseased. United States v. Hoover, 133 F. 950.

84. United States v. Hoover, 133 F. 950. The Federal statute providing that the Secretary of Agriculture may establish rules relative to the transportation of diseased cattle does not empower him to establish rules relative to cattle not diseased. 32 Stat. 791. Id.

85. It is their duty to do so under Pub. St. 1901, c. 160, § 1, requiring them to furnish facilities for transportation of property. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. A station agent with general authority to transact the business of the company at his station has authority to bind the carrier as a depositary by accepting cattle subject to a brief delay in shipment. Id.

86. Cattle escaping from a carrier's yard onto its tracks are not trespassers as to the carrier. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. Evidence held for the jury as to whether cattle temporarily restrained in a railroad company's yard were in the control of the shipper or company. Id.

87. See 3 C. L. 165.

88. Pen. Code, § 357. People v. Strombeck, 145 Cal. 110, 78 P. 472.

89. Slitting the ear is sufficient. People v. Strombeck, 145 Cal. 110, 78 P. 472.

90. People v. Strombeck, 145 Cal. 110, 78 P. 472.

91. Lacey v. Parks [Ariz.] 80 P. 367.

92. Laws 1903, p. 34, No. 26, § 5. Lacey v. Parks [Ariz.] 80 P. 367.

93. See 3 C. L. 165.

94. State v. Davis [N. J. Law] 61 A. 2. It is not a curtailment of a property right to prevent a person from using his animals or fowls as a target, whether to be shot at for amusement or as a test of skill in marksmanship. Id.

95. Acts 1887, p. 161, c. 3775, § 4, confers such authority. Porter v. Vinzant [Fla.] 38 So. 607.

96. Pen. Code 1895, § 703 et seq. Moore v. State, 121 Ga. 194, 48 S. E. 919. Under Cr. Code 1902, § 624, an owner of an animal may be convicted of cruelty to it by proof that it was worked when unfit to labor, with his knowledge and consent. State v. Browning [S. C.] 50 S. E. 185.

97. Evidence held to show that death resulted from disease. State v. Radcliff [Del.] 58 A. 943.

98. See Larceny, 4 C. L. 410.

99. See ante, § 8, Marks and brands.

100. Pen. Code 1895, § 913, is not violated where defendant attempted to prevent cattle from following his herd. Day v. State [Tex. Cr. App.] 82 S. W. 657.

ANNUITIES.[1]

The language employed by a testator must control in construing a clause of a will creating an annuity.[2] One who derives his rights under a compromise agreement between the contestants and proponents of a will, under which a consent decree is entered sustaining the will, except as modified, is not entitled to the benefit of a statute providing that a life tenant or annuitant under a will shall receive his income or annuity from and after the testator's death;[3] nor does a reference to the statute in the compromise agreement give him such right.[4] Trusts to pay annuities, consisting of legacies or payments of successive sums in gross, do not occasion suspension of the power of alienation, the annuities being releasable or assignable.[5] Where executors were authorized by a will to invest such sums as should be necessary to secure payment of annuities, and the will further provided that when a fund ceased to be necessary for that purpose it should be disposed of as residuary property, the annuities could be paid out of the general estate, or by the setting apart of specific sums.[6] On the sale of land under judicial decree for arrearages due under an annuity, the sum due is payable out of the proceeds, but for future arrearages the annuitant must look to the land itself.[7] A corporation not organized to grant, purchase or dispose of annuities, may legally contract to pay in annual instalments during the lives of the vendors for property which it has corporate authority to buy, although corporations not organized to deal in annuities are expressly forbidden to do so,[8] since such a transaction is not a dealing in annuities within the meaning of such a prohibition.[9]

ANOTHER SUIT PENDING; ANSWERS; ANTENUPTIAL CONTRACTS AND SETTLEMENTS; ANTITRUST LAWS, see latest topical index.

APPEAL AND REVIEW.

1. See 3 C. L. 165, 166, where will be found notes on form of instrument required, and apportionment of annuities. See, also, topic Wills. 2 C. L. 2133; Id., 4 C. L. 1863.

2. Clause construed to create annuity for 25 year period and not until children of beneficiary were of age, in case of beneficiary's death. Davis v. People, 111 Ill. App. 207.

3. Such compromise is not a will nor a modification of a will within the meaning of Rev. Laws, c. 141, § 24. Hastings v. Nesmith [Mass.] 74 N. E. 323.

4. Hastings v. Nesmith [Mass.] 74 N. E. 323.

5. Annuities not charged on land or specific funds, but merely made payable in instalments, do not occasion suspension. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

6. Smith v. Havens Relief Fund Soc, 44 Misc. 594. 90 N. Y. S. 168.

7. Claim that surplus should remain as a fund under control of court to secure future payments, held untenable. Walters v. Steele, 210 Pa. 219. 59 A. 821.

8, 9. Burnes v. Burnes [C. C. A.] 137 F. 781.

Scope of title.—All strictly revisory proceedings as distinguished from supervisory remedies[10] or prerogative writs are included herein, excepting certiorari[11] and proceedings in criminal cases.[12] Bills of review and other equitable or legal modes of opening or correcting judgments are not review in the sense here used.[13] The effect of judicial error (Harmless or Prejudicial Error),[14] and the modes of saving one's right to question those errors,[15] are allotted to separate titles.

§ 1. *The right in general. A. Constitutional and statutory provisions; policy of the law.*[16]—Within the constitution and organic law the legislature has power to withdraw[17] or regulate[18] the right of review of judicial proceedings.

10. See Mandamus, 4 C. L. 506; Prohibition, Writ of, 4 C. L. 1084, and the like.
11. See 3 C. L. 667.
12. See Indictment and Prosecution, 4 C. L. 1.
13. See Equity, 3 C. L. 1210; Judgments, 4 C. L. 287.
14. See 3 C. L. 1579.
15. See Saving Questions for Review, 4 C. L. 1368.
16. See 3 C. L. 168.
17. See 3 C. L. 168, n. 33. As a general rule the right of appeal is governed by the law in force when the final judgment is ren-

The right is favored in the law,[19] but, being purely statutory,[20] cannot be extended[21] or denied[22] by the courts.

(§ 1) *B. Waiver, election, transfer or extinguishment.*[23]—A waiver[24] or election[25] to treat a proceeding as valid, or to pursue another remedy for relief,[26]

dered (Kepler v. Rinehart, 162 Ind. 504, 70 N. E. 806), and unless it is evident from the terms of the statute which gives, modifies or takes away the right that it was intended to have a retrospective effect, it has no application to cases in which final judgment was rendered prior to the time such act took effect (Id.). It retroacts on cases pending but in which no final judgments have been rendered. See 3 C. L. 168, n. 36.

18. The method prescribed by the legislature is exclusive and mandatory. City of Greenwood v. Henderson, 84 Miss. 802, 37 So. 745. Section 6495, relating to appeal of motion to dissolve attachment, is not unconstitutional because it gives to defendant the right to appeal which is not given to plaintiff. Cecil v. Grant, 6 Ohio C. C. (N. S.) 65.

19. See 3 C. L. 168, n. 38. In re Hunt's Will [Wis.] 100 N. W. 874. An appellant complying with the law is entitled to have his rights directly passed on. McMichael v. Davis, 113 La. 807, 37 So. 763.

20. Is a strictly statutory right. McGaugh v. Holliday [Ala.] 37 So. 935. Appeals from municipal court. Smith v. Ely, 92 N. Y. S. 310. Does not exist unless expressly provided for. Capaul v. Railway, 26 Ohio C. C. 578, 5 Ohio C. C. (N. S.) 262. See 3 C. L. 168, n. 32. In Alabama an appeal from a decree overruling a motion to dismiss a cross bill for want of equity is not authorized by statute. McGaugh v. Holliday [Ala.] 37 So. 935.

21. Right is wholly of statutory origin and the statutory requirements must be strictly complied with. Appellate court has no jurisdiction unless appeal perfected in manner required by law. Arkansas & O. R. Co. v. Powell, 104 Mo. App. 362, 80 S. W. 336.

22. The right is absolute to appeal from a habeas corpus in a district court to the supreme court if a constitutional question be involved, even though it seems without merit. In re Marmo, 138 F. 201.

23. See 3 C. L. 168.

24. A stipulation by a Chinaman waiving his right of appeal from a commissioner's decision will not be given effect where the appeal was duly perfected and before dismissal he appeared and demanded a trial. Ah Tai v. U. S. [C. C. A.] 135 F. 513.

25. What a husband does is not imputable as recognition and acquiescence by appellant wife. Succession of Theriot [La.] 38 So. 471. A judgment against a town confirming the validity of a sale of bonds will not be reviewed at the instance of a ministerial officer, the corporate authorities having acquiesced in the judgment. Diefenderfer v. State [Wyo.] 80 P. 667. Where a judgment against a town has been acquiesced in by the corporate authorities and complied with as far as possible and are prevented from doing so fully only by the refusal of ministerial officers to do their duty, the fact that such officers have been allowed to give a supersedeas bond and the fact that their terms have expired does not authorize a review. Id. The right of appeal, if any exists, from an order allowing one not a party to the suit to file an original bill in the nature of a bill of review is lost **by answering and permitting the case to go to issue** before appealing. Leggett v. City of Detroit [Mich.] 100 N. W. 566. Defendant may appeal from an order denying a motion to vacate an order for the examination of witnesses, notwithstanding his counsel appears and takes part in the examination. Osborn v. Barber, 93 N. Y. S. 833.

A satisfied decree is not appealable. In re Black's Estate [Mont.] 79 P. 554.

Separable parts of decree: Where an order is severable, acceptance of benefits in part is not inconsistent with appeal from the remainder. Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. S. 606. Redemption of certain lands from tax sale as permitted by a decree on a bill to quiet title does not preclude complainant from appealing from so much of the decree as dismisses the bill in respect to other lands. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. Partial compliance with an order which requires the doing of a series of like but disconnected acts will not preclude the prosecution of error to revise it. Does not raise a question purely moot. Newman v. Lake [Kan.] 79 P. 675.

Payment of judgment on counterclaim, proof of which destroyed plaintiff's right of action, took away plaintiff's right to appeal. King v. Campbell, 107 Mo. App. 496, 81 S. W. 635.

Payment or tender into court: A railroad which pursuant to statute pays or tenders an award for the purpose of taking possession of land condemned does not thereby lose its right to appeal. Appeal by exceptions under Burns' Ann. St. 1901, § 5160. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 631.

A litigant party accepting the benefits of a judgment cannot thereafter appeal therefrom. Receipt by ward of money found to be due him after allowance of guardian's account held to preclude him from appealing from allowance, though amount allowed was same as that admitted by guardian to be due and charged in his account, where determination of amount due necessarily involved consideration of ward's claim that guardian had taken credit for exorbitant commissions and failed to account for certain rents. In re Sachleben, 106 Mo. App. 307, 80 S. W. 737. Foreclosure of a deed of trust by the grantee after judgment in a suit by him setting aside a prior deed by the same grantor does not preclude the defendant (grantor) from appealing, it being in no sense an acceptance of satisfaction by him. New York Store Mercantile Co. v. Thurmond, 186 Mo. 410, 85 S. W. 333. A party who has collected a judgment in his favor cannot appeal therefrom, with a view to recovering more, if he incurs a hazard of recovering less (Bechtel v. Evans

or agreement to abide the event,[27] will deprive the party of his right of review. An existing matter of controversy is essential to any form of review,[28] hence the transfer[29] or extinguishment[30] of the aggrieved party's right is ground of dismissal.[31] The right of review may concur with an action to declare the invalidity of the judgment for facts dehors the record.[32]

(§ 1) *C. Pendency of a former appeal.*[33]—There can be no review while a former proceeding for one identical in scope and operation is pending,[34] unless the pending one be thereby abandoned.[35] After the reversal of a decree in his favor, the appellee or defendant in error may maintain error or appeal to review questions not decided on his adversary's appeal.[36]

§ 2. *The remedy for obtaining review. A. Appeal and error*[37] are the common remedies, the former to review equitable causes,[38] the latter judgments at law;[39] but a writ of error will also lie to review a decree in chancery.[40] The char-

[Idaho] 77 P. 212); but if he incurs no such hazard, he may appeal (Id.). One who has received money collected or paid on a judgment cannot appeal from such judgment, though he received it at the solicitation of appellee and in the belief that it would not affect his right of appeal. Mutual Ben. Life Ins. Co. v. Simpson, 163 Ind. 10, 71 N. E. 131. In obtaining an order staying all proceedings under an order reducing the verdict, except to permit an appeal therefrom, plaintiff does not attempt to enjoy the fruits of such order and at the same time appeal from it as erroneous. Cullen v. Uptegrove & Bro., 91 N. Y. S. 511.

A claimant to the whole of a fund deposited in court does not, by the **receipt of a part thereof to which he was concededly entitled,** forfeit his right to appeal from a judgment awarding the balance to another claimant. No claim made by other party to the part the first claimant received. City of St. Louis v. Nelson, 108 Mo. App. 210, 83 S. W. 271.

Payment of a judgment is not voluntary where petitioner in eminent domain proceedings pays the amount assessed and takes possession. Union Traction Co. v. Basey [Ind.] 73 N. E. 263. Payment by a garnishee of the amount of a judgment against him is not such a voluntary payment upon the judgment against the principal defendant as amounted to an acknowledgment of its validity. Dodds v. Gregson, 35 Wash. 402, 77 P. 791.

26. Where a party institutes a suit in equity to vacate a judgment at law and from a decree rendered modifying such judgment he prosecutes an appeal, he will be barred from further prosecuting error from an adverse ruling on a motion to vacate the same judgment. Kellogg & Co. v. Spargur [Neb.] 100 N. W. 1025.

27. An attorney may stipulate in advance of the trial that there shall be no appeal. Leahy v. Stone, 115 Ill. App. 138. Arbitration agreements providing that there shall be no appeal from the judgment on the award are not against public policy. Hoste v. Dalton [Mich.] 100 N. W. 750.

28. State v. Tallman [Wash.] 80 P. 272.

29. Conveyance of interest in realty before suit by one against whom no personal judgment was rendered. Schneider v. Reed [Wis.] 101 N. W. 682.

30. A suspensive appeal is unnecessary when the party applying for it has by his voluntary action made impossible judicial execution of the order appealed from. Albert Mackie Grocery Co. v. Pratt [La.] 38 So. 250.

31. See post, § 11G.

32. State v. Sommerville [La.] 36 So. 864. Action for nullity of judgment is independent of appeal and reaches that which, being necessarily dehors the record, would not be remedied by appeal. Id. Dismissal of suspensive appeal does not preclude injunction ancillary to such a suit. Id.

33. See 3 C. L. 169.

34. Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105; Newbury v. Getchell & M. Lumber & Mfg. Co., 106 Iowa, 140, 76 N. W. 514.

35. Rule that second appeal will be dismissed if first is pending is inapplicable where the intention thereby to abandon first is clear. Dorman v. McDonald [Fla.] 36 So. 52, limiting DaCosta v. Dibble [Fla.] 33 So. 466. A party taking an appeal with supersedeas may take a second, if within the time during which appeals are by law allowed, without dismissing the first; but **the better practice** is to dismiss the first before taking the second. Robinson v. Arkansas Loan & Trust Co. [Ark.] 81 S. W. 609. An appellant may voluntarily dismiss and take a second appeal within the time limited. Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105, citing Groendyke v. Musgrave, 123 Iowa, 535. Where an appeal is dismissed because of failure to prosecute, no second appeal from the same order or judgment should be allowed unless the order of dismissal reserves the right. Collins v. Gladiator Consol. Gold Min. & Mill. Co. [S. D.] 103 N. W. 385; Maguire v. Goldberger [N. J. Law] 58 A. 167.

36. Guarantee Co. of North America v. Phoenix Ins. Co. [C. C. A.] 124 F. 170.

37. See 3 C. L. 170.

38. Williams v. Miles [Neb.] 102 N. W. 482. Bankruptcy is equitable and error does not lie. Lockman v. Laug [C. C. A.] 128 F. 279. Appeal lies where the purpose of the suit is to remove cloud from title, though jurisdiction was obtained by intervention in an attachment. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943.

39. Reviewable by writ of error and not appeal: Decisions of the county court in the

acter of the controversy and the relief, not the mode of trial, determines what is legal or equitable,[41] and the main judgment gives character to all which is inseparable from it.[42] An act providing a particular method of appeal is generally exclusive,[43] and must be strictly pursued.[44] Ordinarily if an "appeal" is given error will not lie[45] and vice versa.[46] The suing out of a writ of error is the beginning of a new suit.[47] Proceedings by a court reviewing acts of a commissioner finding a party guilty of contempt is not an original proceeding but a review.[48]

Appeal and not exceptions is the proper remedy where the case was tried below on an agreed statement of facts containing no clause authorizing the court to draw inferences of fact.[49]

Bankruptcy proceedings are specially reviewable under the act.[50]

Sometimes a case wrongly brought may be redocketed as if brought by the proper mode.[51]

(§ 2) *B. Certification or reservation*[52] of doubtful or disputed questions[53] is a mode of review in some states.

settlement of decedents' estates. Huffman v. Rhodes [Neb.] 100 N. W. 159. The judgment of a district court in habeas corpus proceedings. In re Greaser [Neb.] 101 N. W. 235. The assessment of costs against an attorney bringing the suit without authority, is an ancillary proceeding and not a civil action. Capaul v. Toledo & W. R. Co., 5 Ohio C. C. (N. S.) 262, 26 Ohio C. C. 578. An order in a pending suit adjudging one not a party guilty of contempt in violating the preliminary injunction therein. Bessette v. Conkey Co. [C. C. A.] 133 F. 165. To review in the supreme court of the United States a judgment of the court of appeals of the District of Columbia in condemnation proceedings. Metropolitan R. Co. v. MacFarland, 25 S. Ct. 28. To review the judgment of a territorial supreme court in an action at law. Comstock v. Eagleton, 25 S. Ct. 210. Conviction of contempt. Bessette v. Conkey Co., 24 S. Ct. 665. Same rule applies where the respondent is a party. In re Christiensen, 24 S. Ct. 729. Error lies to the ninth circuit court of appeals from the district court of Alaska in an action to recover an interest in a mining claim tried to the court without jury. Act relating to territorial appeals and prescribing appeal does not apply. Shields v. Mongallon Exp. Co. [C. C. A.] 137 F. 539.

40. Woodard v. Glos, 113 Ill. App. 353.

41. That an action at law was tried by the court without a jury does not make appeal the proper remedy for review. Oklahoma City v. McMaster, 25 S. Ct. 324.

42. **Taxation of costs** is not severable so that a writ of error will be sustained to review it when appeal is the proper remedy to bring up the case. Jackson v. Butler [Tex. Civ. App.] 86 S. W. 772.

43. Act 1903, p. 577, c. 248, §§ 1 and 4 construed. Lindsay v. Allen [Tenn.] 82 S. W. 171.

44. Arkansas & O. R. Co. v. Powell [Mo. App.] 80 S. W. 336.

45. Order denying an application to sue a receiver finally disposes of the rights of the parties and is appealable. State v. Superior Court of Spokane County [Wash.] 80 P. 195. The remedy in a contested election case is appeal and not error. Jackson v. Butler [Tex. Civ. App.] 86 S. W. 772. The practice of taking an appeal and a writ of error to review the same adjudication is not only permissible but commendable in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. Lockman v. Laug [C. C. A.] 132 F. 1. Where parties injuriously affected by a decree have perfected an appeal therefrom to the appellate court, they cannot, so long as it is pending, prosecute error in the supreme court to review the same decree, though in doubt as to their remedy. Dunbar v. American Tel. & T. Co. [Ill.] 72 N. E. 904.

46. Appeal does not lie from a final judgment of a county court but it may be reviewed on error. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Under Const. art. 6, § 23, and Mills' Ann. St. § 1091, a final judgment of the county court in a proceeding to sell decedent's lands to pay debts may be reviewed on error. Id.

47. Eau Claire Canning Co. v. Western Brokerage Co. [Ill.] 73 N. E. 430.

48. Mau v. Stoner [Wyo.] 76 P. 584.

49. City of Haverhill v. Marlborough [Mass.] 72 N. E. 943.

50. Judgments or orders of a district or circuit court entered in controversies arising in bankruptcy proceedings as distinguished from those entered in bankruptcy proceedings proper are reviewable by the circuit court of appeals only by appeal or writ of error under their general appellate jurisdiction. Bankruptcy Act, § 25a. In re Mueller [C. C. A.] 135 F. 711. In bankruptcy proceedings a litigant has the option, in a proper case, to review the decision by appeal or by a petition for revision as a matter of law. Dodge v. Norlin [C. C. A.] 133 F. 363; In re Friend, 134 F. 778. Judgments or orders in bankruptcy proceedings proper if reviewable under section 25a are not reviewable on petition to revise in matter of law under section 24b, the two provisions being exclusive. Order allowing claim of over $500. In re Mueller [C. C. A.] 135 F. 711.

51. See post, §§ 8, 11G.

52. See 3 C. L. 171. In Rhode Island, motions in arrest of judgment, made in a district court or in the common pleas division of the supreme court, must be certified to

(§ 2) *C. The common remedies*[54] appeal[55] or error[56] must, if adequate[57] or applicable,[58] be invoked and not extraordinary and special modes of review.[59] Otherwise certiorari,[60] prohibition,[61] mandamus,[62] injunction, or other equitable remedy,[63] or habeas corpus,[64] may avail.

the appellate division for decision. Barlow v. Tierney [R. I.] 59 A. 930. Where defendant appears by attorney after default and moves to set it aside, which motion is denied, he can "allege exceptions in writing" and have them transferred to the supreme court. Laws 1901, p. 563, c. 78, § 5. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

53. A question not raised by the pleadings, or ruled upon by the trial court and not presented to court of civil appeals cannot be certified by the latter court to the supreme court. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 153.

54. See 3 C. L. 171.

55. Necessity of expropriation **(eminent domain)** may be reached by appeal. Mandamus, certiorari and prohibition denied. State v. Ellis [La.] 37 So. 209.

Injunction is appealable. State v. Leche [La.] 36 So. 868, citing State v. Sommerville [La.] 36 So. 864. In the District of Columbia an error of a justice of the peace in **overruling a plea to the jurisdiction** may be corrected by an appeal to the supreme court. On ground that defendant is not a resident of the subdistrict. Anderson v. Morton, 21 App. D. C. 444.

What is an "appeal:" The filing of exceptions for a review of the award in proceedings to take land for a railroad under the Indiana law is substantially an appeal. Burns' Ann. St. 1901, § 5160. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 531.

56. Refusal of lower court to make proper order: Refusal of court below to vacate dismissal of appeal to it from inferior court. Mandamus wrong remedy. Lemon v. Oakland Circuit Judge [Mich.] 103 N. W. 843.

57. Mandamus will issue if the remedy by appeal is not plain, speedy and adequate. Under Ball. Ann. Codes & St. § 5756. State v. Hatch [Wash.] 78 P. 796.

58. An appeal in Georgia is a matter of purely statutory right, and lies only when provision is made therefor. Fontano v. Mozley & Co. [Ga.] 48 S. E. 707. An appeal to the superior court from the judgment of the ordinary setting apart or refusing to set apart a homestead lies only when the objections interposed by creditors are those provided for in Civ. Code 1895, § 2836. When other objections are interposed, the remedy is by certiorari. Id.

59. Appeal if it exists and not certiorari or prohibition. State v. Leche [La.] 36 So. 868. Where probate courts are courts of record and are given original jurisdiction in certain matters, their orders and judgments relative to such matters are not subject to collateral attack, but the remedy for one aggrieved is by appeal. Clark v. Rossier [Idaho] 78 P. 358. An improper ruling on application for change of venue is error reviewable by appeal rather than some remedy going only to jurisdiction. Eudaley v. Kansas City, etc., R. Co. [Mo.] 85 S. W. 366; State v. Evans [Mo.] 83 S. W. 447. **Certiorari** will not lie if there is an appeal. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498. Does not lie to correct alleged error of justice of the peace in overruling a plea to the jurisdiction. Anderson v. Morton, 21 App. D. C. 444. Will not lie in Minnesota to review personal property tax judgments; the proper remedy being appeal in the manner provided by law for the review of real estate tax judgments. State v. District Court of Ramsey County [Minn.] 100 N. W. 889. To entitle one to a writ of review from the district court under Code Civ. Proc. § 1941, it must appear that the inferior tribunal was performing some judicial act, that it exceeded its jurisdiction, and that there is no appeal or other speedy and adequate remedy. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498.

A writ of mandamus cannot be made to take the place of an appeal or writ of error. On mandamus to compel signing of bill of exceptions, merits of relator's claim of error will not be considered. State v. Gibson [Mo.] 83 S. W. 472. The remedy for refusal of a court to transfer a cause from the law to the equity docket is by appeal or writ of error, and not by mandamus. Horton v. Gill [Ind. T.] 82 S. W. 718. Mandamus cannot be resorted to if remedy by appeal is adequate. Recor v. St. Clair Circuit Judge [Mich.] 102 N. W. 643. Cattermole v. Ionia Circuit Judge [Mich.] 99 N. W. 1; Skutt v. Wolcott [Mich.] 99 N. W. 405; Wells v. Montcalm Circuit Judge [Mich.] 102 N. W. 1001.

Prohibition will not issue if appeal or error will furnish a complete remedy. People v. District Court of Second Judicial Dist. [Colo.] 77 P. 239; State v. Taliman [Wash.] 80 P. 272.

Habeas corpus does not lie if remedy by appeal is adequate. Gillespie v. Rump [Ind.] 72 N. E. 138. Lies in Federal court in favor of one held by state authority only in case of one confined for an act done or omitted by him under the laws of the nation in pursuance of its authority, or under the laws and authority of a foreign government of which he is a subject. In re Dowd, 133 F. 747.

60. Certiorari lies: Where there is no dispute as to the facts and the only question is the power of the court to make the ruling in question. Berkey v. Thompson [Iowa] 102 N. W. 124. To review a statutory hearing by the city council of election contests, which is a judicial proceeding, there being no review by appeal or error. Staples v. Brown [Tenn.] 85 S. W. 254. Where an order can be taken up only with the judgment and the judgment is not appealable (having already been reviewed). Order allowing certain costs after affirmance of the judgment. State v. District Court [Mont.] 79 P. 410. To review the judgment of an inferior judicatory when no appeal therefrom is given by statute. To review judgment of ordinary setting apart or refusing to set apart homestead, where objections filed by creditors are other than those specified in Civ. Code 1895, § 2836. Fontano v. Mozley & Co. [Ga.] 48 S. E. 707.

Concurrent modes of review may present an election.[65]

In Rhode Island a party attacking a finding of fact which the statement shows was on conflicting evidence by the district court should claim a jury trial and not file exceptions.[66]

A judge should not sit to review the mere exercise of judgment by his predecessor, but should leave the parties aggrieved to their remedy by appeal.[67]

A special term order is properly reviewable by appeal to an appellate court and not by a motion made at another special term presided over by another justice to vacate the former order.[68]

§ 3. *The parties. A. Persons entitled to review*[69] include only those who are parties,[70] of record,[71] aggrieved,[72] by the decree or judgment, or their successors

Appeal and certiorari are concurrent remedies to review judgments of the district court in New Jersey (Marcus v. Graver [N. J.] 58 A. 564); but in Michigan appeal rather than certiorari is the more appropriate remedy to review errors occurring at trials in justice court (Computing Scale Co. v. Tripp [Mich.] 101 N. W. 803). Where the trial court directed an administrator to pay himself a certain compensation for services and attorney's fees, and also certain expenses of alleged distributees and refused to fix the amount for a supersedeas bond on appeal and declined to recognize a supersedeas bond in an ample amount, which was filed; held, that the distributees had not an adequate remedy by appeal and were therefore entitled to a writ of review. In re Sullivan's Estate [Wash.] 78 P. 945.

61. Will not issue to review an order not appealable because the subject-matter of the controversy has ceased to exist. State v. Tallman [Wash.] 80 P. 272.

62. Mandamus and not writ of error the remedy for erroneous refusal of an appeal or supersedeas. Gutierrez v. Territory [N. M.] 79 P. 299; Albright v. Territory [N. M.] 79 P. 719. The proper remedy of appellant in case a lower court dismisses as for want of appealability an appeal to it is by mandamus to compel a hearing. Whether such order was a final one within Code, § 30, not decided because in any case the appeal could not be entertained. Robertson v. Southerland, 22 App. D. C. 595. Where there is no review by appeal or error, mandamus will not lie to review an order of an intermediate court. Smith v. Connor [Tex.] 84 S. W. 815. Where the refusal of a judge to vacate an order is not reviewable on appeal, mandamus will issue to compel him to consider the motion. Code Civ. Proc. § 1085. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

63, 64. A suit in equity to vacate a default judgment will not lie where there is an adequate remedy at law by an appeal from an order denying the motion to set aside the judgment. Stewart v. Snow [Ind. T.] 82 S. W. 696. An appeal is not the proper remedy to obtain relief from a judgment taken through mistake, surprise, etc. Johnston v. Callahan [Cal.] 79 P. 870.

65. After an appeal under the oleomargarine act has been dismissed for want of prosecution, the remedy by certiorari is no longer available. P. L. 1886, p. 107. Maguire v. Goldberger [N. J. Law] 58 A. 167. See 1 C. L. 90, n. 1.

66. Cavanaugh v. Grady [R. I.] 52 A. 1027.

67. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

68. In re White, 91 N. Y. S. 513.

69. See 3 C. L. 172.

70. Must be parties to the action. Houston v. Greensboro Lumber Co. [N. C.] 48 S. E. 738. Petitioners held proper parties and entitled to appeal from order in county seat removal contest either under original order, or order amended nunc pro tunc under which they were granted an appeal after the finding was made and thereafter ordered made parties for the purpose of hearing the contest, which was set for a future day. Reese v. Steele [Ark.] 83 S. W. 335.

Held to be "parties" having the right to appeal: Under Mansf. Dig. § 1267 (Ind. T. Ann. St. 1899, § 769), providing that appeals shall be granted upon the application of either party, an executor may appeal from an order modifying his report and ordering a distribution of the estate in a manner contended by him to be contrary to the will. In re Overton's Estate [Ind. T.] 82 S. W. 766. Stockholders who are served with notice and appear in a proceeding against an insolvent corporation to assess stockholders on their superadded liability. Bennett v. Thorne [Wash.] 78 P. 936.

Held not to have right: An interpleader who makes no attempt to comply with statutory provisions for becoming a party. Handley v. Anderson [Ind. T.] 82 S. W. 716. Witnesses from an order disallowing their fees under Laws 1901, p. 28, c. 31, Ball. Ann. Codes & St. §§ 5185, 4794. State v. Fair [Wash.] 76 P. 731. The subsequent entry of a special appearance does not authorize counsel so appearing to appeal from a default judgment against his client on the ground that he was not properly served. Houston v. Greensboro Lumber Co. [N. C.] 48 S. E. 738.

71. One not a party to the record, whose rights are prejudiced may make himself a party by motion to set aside the judgment and appeal from the denial of his motion, and if not appealable, sue out certiorari. In re Elliott [Cal.] 77 P. 1109. A master in chancery should not be made an appellee on an appeal to review the allowance of fees to him. Symms v. Jamieson, 115 Ill. App. 165. A beneficial party not of record cannot appeal in his own name. Gilray v. Metropolitan Nat. Bank, 113 Ill. App. 485. A guardian ad litem is entitled to take an appeal as the representative of the infant. Harper v. Cilley, 4 Ohio C. C. (N. S.) 55, 25 Ohio C. C. 770. One

in interest;[73] and in proceedings not inter parties, or which may affect other than parties,[74] persons having a litigable interest[75] affected detrimentally may appeal.[76] All parties impleaded by appellant are conclusively regarded as in interest.[77]

made a nominal party to a bill by having his name inserted in the caption thereof but not properly interpleaded may appeal from a decree overruling his demurrer thereto and granting the relief asked as to the subject-matter in controversy, which it appears from the other pleadings that he claims. Necessary party. Preston v. West [W. Va.] 47 S. E. 152.

72. Persons that will in no way be affected by a judgment and which was neither for nor against them cannot prosecute an appeal therefrom. Demarest v. Holdeman [Ind. App.] 73 N. E. 714. A party suffering no loss by reason of a decree. Heidbreder v. Superior Ice & Cold Storage Co. [Mo.] 83 S. W. 469. While, prima facie, the original parties on a record may answer, the supreme test as to whether an appeal statute is satisfied as to an appellant, or party aggrieved, or adverse party, is the possession of some substantial interest adverse to the judgment, a revision of which is sought on appeal. Rev. St. 1898, § 3049. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where, in an action for wrongful death which could be brought by the widow alone, the children were joined and a nonsuit was entered, an appeal by the children separately was quashed. Haughey v. Pittsburg R. Co. [Pa.] 59 A. 1112. Appeal does not lie from a judgment in appellant's favor. In an action to foreclose a trust deed, plaintiff had judgment for the amount of his debt but was denied foreclosure. Murto v. Lemon [Colo. App.] 76 P. 541. One who secures by a judgment or decree all the relief he seeks. Guarantee Co. of North America v. Phenix Ins. Co. [C. C. A.] 124 F. 170. Defendant may not appeal from a judgment dismissing the petition in condemnation proceedings, though such dismissal is had on petitioner's motion and for unsound reasons, and after a refusal of the court to act on defendant's motion to dismiss. Roby v. South Park Com'rs [Ill.] 74 N. E. 125. In a joint and several appeal it is not necessary that both the appellants be agrieved. Mills' Ann. St. § 400, construed. Stratton's Independence v. Midland Terminal R. Co. [Colo.] 77 P. 247.

Held to be parties aggrieved: An executor by an order directing partial distribution of the estate, where there is an issue as to the sufficiency of the estate to meet the distribution without loss to creditors. In re Murphy's Estate [Cal.] 78 P. 960. Beneficiaries of a trust created by a will, by an order refusing probate of the will. In re Fay's Estate [Cal.] 78 P. 340. Parties claiming an interest in the subject-matter, by a judgment purporting to determine that they have no rights therein. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Remonstrants by an order granting a permit to sell liquor. In re Smith [Iowa] 101 N. W. 875. Under Code Pub. Gen. Laws, art. 5, § 60, a trustee holding funds belonging to an absentee, by a decree of the orphans' court appointing an administrator for the absentee. Lee v. Allen [Md.] 59 A. 184. One against whom judgment went has an appealable interest. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752. The principal defendant by a judgment against the garnishee. Badger Lumber Co. v. Stern [Wis.] 101 N. W. 1093. Any party to a foreclosure suit having an interest in the lands may appeal from the appointment of a receiver. Ruprecht v. Henrici, 113 Ill. App. 398.

Parties not aggrieved: Will contestants, not heirs of testator nor related to him, by a denial of their motion for a new trial within Code Civ. Proc. § 938. In re Antoldi's Estate [Cal.] 81 P. 278. The judgment defendant by error in apportioning a correct award between successful parties. Schoppel v. Daly [La.] 36 So. 322. Administrator, by decree to pay to legatee instead of heir; otherwise when he is assignee of the heir. In re Stilphen [Me.] 60 A. 888. Executor, by order allowing claim not contested by heir or creditor. May's Estate, 25 Pa. Super. Ct. 267. The county auditor, by a judgment in certiorari against the board of county commissioners, though he was improperly made a defendant. State v. Boyden [S. D.] 100 N. W. 761. An officer as such, by a judgment which is against the municipal corporation to which he is attached. Defendefer v. State [Wyo.] 80 P. 667.

73. A consolidated corporation succeeding to all the rights of petitioner in eminent domain proceedings. Union Traction Co. v. Basey [Ind.] 73 N. E. 263. **The receiver** of a corporation, if authorized by the court appointing him, may sue out and prosecute a writ of error to review a judgment against the corporation. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

74. Where writ of assistance is issued, one who was not a party at the time of such issue may move to set the order aside and appeal from an order denying his motion. Mills v. Smiley [Idaho] 76 P. 783.

75. The commonwealth may appeal where interested in proceedings to register land titles. McQuesten v. Attorney General [Mass.] 72 N. E. 965. Trustees under a will are entitled to appeal from an order disposing of the property contrary to the testator's intent. Rothschild v. Wise, 92 N. Y. S. 1076. A party who does not voluntarily surrender goods under an attachment in replevin is not deprived of his interest in the property so as to preclude his right of appeal from a judgment in favor of plaintiff in replevin. Culver v. Randle [Or.] 78 P. 394. A legatee. In re Hunt's Will [Wis.] 100 N. W. 874.

76. Not being entitled to maintain a bill for that purpose, an administrator cannot appeal from a decree in a suit to remove cloud from title to real estate owned by the decedent. Strong v. Peters [Ill.] 72 N. E. 369. Intervening heirs may appeal from judgment not mentioning them. In re Anderson's Estate [Iowa] 101 N. W. 510. A trustee holding property of an absentee is a person aggrieved by an order appointing an administrator for

Appellee by stipulation may waive the question of appellant's appealable interest.[78]

(§ 3) *B. Necessary or proper parties to be joined*[79] or brought in[80] include all persons who may be affected by a reversal.[81] Among them are all co-defendants[82] who are joint in interest,[83] and co-parties[84] who decline to join in the review.[85] Successors in title and interest[86] may be substituted,[87] or brought in.

the absentee with a view to distributing his property among his heirs. Lee v. Allen [Md.] 59 A. 184. An heir at law and next of kin who was not cited and did not know of or appear in a will contest in the orphans' court is a person aggrieved by a decree admitting a will to probate and may appeal therefrom to the prerogative court. In re Young's Will [N. J. Eq.] 59 A. 154. Where a referee or master commissioner presents a claim for fees and expenses in the matter of the examination of a complicated guardian's account, and the claim is disallowed, the right of appeal extends to such referee or master. In re Guardianship of Edith K. Gorman, 2 Ohio N. P. (N. S.) 667, 15 Ohio Dec. 204. Judgment in replevin in favor of the administrator of a widow, against administrator of her husband, is adverse to all parties interested as distributees of his estate. Hinn v. Gersten [Wis.] 99 N. W. 338.

77. An appeal will not be dismissed for want of interest in opposing members of a family meeting at the motion of an appellee tutrix who herself brought them in as parties. Succession of Carbajal [La.] 36 So. 41. The original under tutor opposed her, but his successor joined and she then moved to dismiss. Id.

78. Does so by stipulating the questions to be presented. Morrison v. Austin State Bank [Ill.] 72 N. E. 1109.

79. See 3 C. L. 174. Married woman must make her husband appellee where he is interested. Lindebaum v. Coale [Iowa] 99 N. W. 162. An assessor petitioning for inspection of papers of a bank to ascertain the existence of taxable property is a necessary party to an appeal by the bank from an order entered therein. Daily v. Washington Nat. Bank [Ind.] 72 N. E. 260. If there is irregularity in the failure of a particular party to join in suing out a writ of error, such irregularity is cured upon such party subsequently by leave of court becoming a plaintiff in error. Hess v. Peck, 111 Ill. App. 111.

80. Process may be directed to issue against those parties not summoned as appellees where it is necessary to protect appellant's rights. As where, in suit to set aside conveyance as fraudulent, the sums found due those summoned is less than jurisdictional amount, but the various sums decreed against purchaser in favor of all creditors exceeds such amount. Wheby v. Moir [Va.] 47 S. E. 1005.

81. Sons of Peace No. 1 v. Sons and Daughters of Peace [Ga.] 50 S. E. 111. Co-defendants at the trial who would not be affected are not necessary parties. Lamb v. Hall [Cal.] 81 P. 288. All parties plaintiff and defendant must be parties to a writ of error. Fraser v. Fraser, 110 Ill. App. 619. Parties to a foreclosure suit are not necessary to appeal from refusal to quash a writ of assistance and restore the claimant. Foreclosure purchaser and claimant appellant are alone necessary. Ray v. Trice [Fla.] 37 So. 582. Where a judgment of foreclosure has been entered, and a sale thereunder made to one not a party and a writ of assistance issued against a person not a party to the foreclosure suit, notice of appeal from an order granting such writ need not be served on all parties to the foreclosure suit. Mills v. Smiley [Idaho] 76 P. 783. On appeal from an order distributing an insolvent's estate, creditors whose claims have been proved and allowed are necessary parties. Bloomingdale v. Watson [C. C. A.] 128 F. 268. Where, in sequestration proceedings, it has been found that the assets of an insolvent corporation can in no case discharge the liabilities, and a judgment has been rendered against persons charged with the wrongful appropriation of property applicable to the payment of debts, the insolvent corporation, on an appeal from such judgment, is not an interested adverse party, so as to require service upon it of the notice of appeal, under the statute. Rev. St. 1898, § 3049. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

82. A party defendant in default who did not appear below is not a necessary party in error. Gen. St. 1901, § 5020. Hallwood Cash Register Co. v. Dailey [Kan.] 79 P. 158. On appeal from a judgment for defendants for their costs, all must be brought in though it appears that one of them has been discharged in bankruptcy from liability. Bruce v. Myers [Ind. App.] 73 N. E. 710. Failure to join a party who was a joint defendant below and against whom a joint decree was rendered is not a defect of form merely, but one of substance necessitating dismissal. Copeland v. Waldron [C. C. A.] 133 F. 217. All parties to a joint judgment must be brought in, but where the judgment is several and in favor of the defendant in error, alone, the rule has no application. Eccles v. United States Fidelity & G. Co. [Neb.] 100 N. W. 942. In Indiana, vacation appeals must bring in all parties. Where, in an appeal by an administrator, the record is not filed within the time allowed for term time appeals and no stay is procured, the appeal must be treated as a vacation appeal. Holderman v. Wood [Ind. App.] 73 N. E. 199. All parties against whom the judgment was rendered must be made co-appellants. Rich Grove Tp., Pulaski County, v. Emmett [Ind.] 72 N. E. 543; Newman v. Gates [Ind.] 72 N. E. 638.

83. When, in an action on a bond against the principal and his sureties, the petition was dismissed on joint demurrer of all the defendants, the sureties were necessary parties defendant to a bill of exceptions sued out by plaintiff alleging error upon the judgment sustaining such demurrer and dismissing the petition. Green v. Barron [Ga.] 47 S. E. 188.

The suing out of a writ of error is the beginning of a new suit which must implead those who stand as parties at that time.[88] One not cited is not necessary.[89]

§ 4. *Adjudications which may be reviewed either generally or in one of two appellate courts. A. Statutes*[90] may provide for the review of any proceeding of a judicial nature fixing conditions,[91] or may withdraw such right.[92]

(§ 4) *B. Reviewableness may be dependent on the general form or character of the adjudication.*[93]—A decision must amount to the judgment[94] of the court[95] acting within, at least, a semblance of jurisdiction[96] on matters of law or fact as op-

84. One co-party's assignment to the other does not dispense with his being party if he is to bear costs of litigation and answer for his part of a possible judgment. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492.

85. If any co-parties refuse to join, a severance should be asked, and on obtaining it errors should be assigned in the names of those bringing error and scire facias sued out against all the non-joining co-parties and opposing parties to hear such errors. Fraser v. Fraser, 110 Ill. App. 619. All parties to a judgment who are satisfied therewith and whose interests are adverse to appellant's are properly made appellees. Vinall v. Hendricks [Ind. App.] 71 N. E. 682; Risser v. Dungan [Ind. App.] 71 N. E. 974; Canaday v. Yager [Ind. App.] 71 N. E. 977.

86. It is not incumbent on appellee to bring in the legal representative or heirs of a deceased joint appellant, and the appeal may after the death of one proceed as the appeal of the remaining appellants. A proceeding in error may be prosecuted against the personal representatives of a deceased party without revivor. Fortune v. Gilbert [Ill.] 71 N. E. 442. Likewise an appeal from a judgment in a tort action against partners may be prosecuted against the surviving partner. Ritchey v. Seeley [Neb.] 102 N. W. 256. Appeal from an order directing an administrator to file a new bond and removing him from his office for failure to do so, the estate is not a necessary party. Robertson v. Ford [Ind.] 74 N. E. 1; Moore v. Bankers' Surety Co. [Ind. App.] 73 N. E. 607. Where an administrator appeals from an order favorable to the estate and unfavorable to him, he appeals as an individual and the estate represented by him as administrator should be made an appellee. Moore v. Ferguson [Ind.] 72 N. E. 126. The acceptance of service of summons in error by the attorney of record after the decease of his client gives no jurisdiction of error proceedings. Omaha Nat. Bank v. Robinson [Neb.] 102 N. W. 613.

87. Except in case of death or disability, the substitution of a party after rendition of judgment is not necessary to the prosecution or defense of an appeal, unless required by statute. Not under B. & C. Comp. § 38. Not in case of transfer of interest. Culver v. Randle [Or.] 78 P. 394. Where the death of a party is suggested on the record before trial or judgment, the substitution of the personal representative should be made in the trial court and not in the appellate court. Wilkinson v. Vordermark [Ind. App.] 70 N. E. 538.

88. Eau Claire Canning Co. v. Western Brokerage Co. [Ill.] 73 N. E. 430.

89. Brugier v. Miller [La.] 38 So. 404.

90. See 3 C. L. 177.

91. Sayles' Ann. Civ. St. 1897, p. 1929, § 3, providing that no appeal or writ of error shall lie from the county court of Goliad county to the court of civil appeals where the amount in controversy is less than $100, is constitutional. Gulf, etc., R. Co. v. Fromme [Tex.] 84 S. W. 1054.

92. See 1 C. L. 94.

93. See 3 C. L. 177.

94. Brown v. Leary, 91 N. Y. S. 463; Smith v. Ely, 92 N. Y. S. 310; Rankin v. Bush, 92 N. Y. S. 866; Newberry v. Tennant [Ga.] 49 S. E. 621; Muttart v. Muttart, 93 N. Y. S. 468; Vaughn v. Milner [Ga.] 49 S. E. 287. No final decree or judgment entered. Appeal quashed. Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74. An order merely sustaining a demurrer to a bill in equity, not dismissing the bill, is not appealable. Bosworth v. Wilson [W. Va.] 49 S. E. 942. A minute entry on the record of a motion—"Sept. 12, 1902, movant allowed 60 days for a bill of exceptions on the overruling of this motion. Motion overruled"—is not a judgment. Wallace v. Crosthwait [Ala.] 36 So. 622.

95. An order confirming the report of a master in chancery is not a final disposition of the case. Woods v. Woods [Ind. T.] 82 S. W. 878. An appeal will not lie from a verdict. Premature where, in equitable action to subject lands in hands of devisees to debts, reference has been made to a master to determine all equitable issues, and there has been verdict on certain matters submitted to jury, but no order or judgment has been predicated thereon. Code Civ. Proc. § 11. Brock v. Kirkpatrick [S. C.] 48 S. E. 72; Jumeau v. Camp [Fla.] 37 So. 522. Not from findings. B. & C. Comp. § 547. Thornburg v. Gutridge [Or.] 80 P. 100. An order of reference founded on the expressed opinion of the judge, not followed by the sentence of the law thereon, is not appealable. Hill v. Cronin [W. Va.] 49 S. E. 132.

96. Board of Com'rs of Arapahoe County v. Denver Union Water Co. [Colo.] 76 P. 1060; Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806. Erroneous denial of a motion for change of venue does not end the jurisdiction but is an error to be reached by appeal. Eudaley v. Kansas City, etc., R. Co. [Mo.] 85 S. W. 366. The probate court of Maine has jurisdiction in decreeing distribution to construe a will so far as necessary and appeal will therefore lie. In re Stilphen [Me.] 60 A. 888. If the court has jurisdiction of the claim made in plaintiff's bill of particulars it is not abrogated by an amendment joining a separate count with an independent prayer for relief which the court is not com-

posed to matters of discretion[97] such as cost awards,[98] and it must have reached a finality,[99] became of record,[1] and been against appellant's consent or not due to his default.[2] Doubts as to appealability will be resolved favorably to the appeal.[3] It is sometimes said that motion for a new trial is necessary to appeal. This usually means that otherwise certain matters will not be reviewed[4] or that the appeal must be taken to the order on such motion and not from the judgment if certain matters would be reviewed.[5] Decisions other than the foregoing are reviewable under vari-

petent to grant. Anthony v. Smithson [Kan.] 78 P. 454.

97. See post, § 13 F1. Rulings peculiar to province of trial court: Discretionary rulings. Motions denying orders to resettle former orders. In re Locust Ave., 87 N. Y. S. 798; Garofalo v. Prividl, 87 N. Y. S. 467. Order to retax costs. In re Locust Ave., 87 N. Y. S. 798. Order denying the petition of a bondholder for leave to intervene. Land Title & Trust Co. v. Tatnall [C. C. A.] 132 F. 305. Order granting leave to amend. Klinker v. Guggenheimer, 92 N. Y. S. 797. An order denying a motion for reargument. Tucker v. Dudley, 93 N. Y. S. 355.

98. Gray v. Mann [Fla.] 37 So. 161; Commercial Inv. Co. v. National Bank of Commerce [Wash.] 78 P. 910. The rule that an appeal to determine a mere matter of costs will not be entertained applies only to parties to the action and not to sureties on a cost bond. Trumbull v. Jefferson County [Wash.] 79 P. 1105. The rule that a decree or judgment for costs alone is not reviewable applies only to cases in equity and admiralty in which costs are generally discretionary. In actions at law costs are generally a matter of right and a judgment rendered on dismissal denying it may be reviewed by writ of error. Western Coal & Min. Co. v. Petty [C. C. A.] 132 F. 603.

99. Robertson v. Southerland, 22 App. D. C. 595. A final order of a circuit court commissioner is appealable within 30 days after it is filed with the clerk of the district court though it directs the entry of a judgment for the relief awarded. State v. Martin [Minn.] 101 N. W. 303. An order for judgment on payment of jury fee is not final until after entry and payment of the fee. Wolff v. Wilson, 25 Pa. Super. Ct. 266. An order requiring a party to appear for examination, otherwise a commitment for contempt to issue, is not final. Siegel v. Solomon, 92 N. Y. S. 238; Field v. White, 92 N. Y. S. 848. Appointment of commissioners and ordering land sold, after hearing evidence, in partition proceedings, held final. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372. An order dismissing the bill for want of equity unless complainant amends so as to give it equity within two days, does not dismiss the bill and is not appealable. Robertson v. Montgomery Base Ball Ass'n [Ala.] 37 So. 241. A decree in a partition suit adjudicating the rights and interests of parties in the lands involved, ordering partition thereof and appointing commissioners to make the same is interlocutory merely and not final (Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722); but a decree ordering a sale of the property by the commissioners upon their report that partition cannot be made without great prejudice to owners of the land is final (Id.). Appeal by one of two defendants before final judgment as to both is premature. McVey v. Barker, 92 Mo. App. 498. Orders allowing an administrator certain funds for the payment of his own and attorney's services, being entered, in the form of judgments, after the hearing of testimony and the making of findings, will be treated as final for the purposes of appeal. In re Sullivan's Estate [Wash.] 78 P. 945.

1. Must be entered to be final. Hill v. Cronin [W. Va.] 49 S. E. 132. Appeal lies to injunction in liquor nuisance case even though not yet signed. Donnelly v. Smith [Iowa] 103 N. W. 776. Suit dismissed pursuant to compromise and judgment for costs not entered. Musigbrod v. Hartford [Mont.] 76 P. 563. No appeal can be taken from an unrecorded form of decree signed by the judge though it is filed with the clerk. Martin v. Martin [Iowa] 99 N. W. 719.

2. No appeal lies from a **default judgment.** Schwartz v. Flaherty [Me.] 59 A. 737; Hill v. Martin, 88 N. Y. S. 708; Candeloro v. Benvenuta, 88 N. Y. S. 357; Title Guaranty & Trust Co. v. American Power & Const. Co., 88 N. Y. S. 502; State v. Leasia [Or.] 78 P. 328; King v. Rhode Island Co. [R. I.] 60 A. 837; Little Rock, etc., R. Co. v. Castle [Ark.] 86 S. W. 838. Under the municipal court act authorizing an appeal if defendant does not appear, one who does appear does not gain the right to appeal by afterward permitting judgment to go against him by default. Laws 1902, p. 1598, c. 580, § 311. Kerr v. Walter, 93 N. Y. S. 311. Defendant may appeal where plaintiff took judgment without notice after demurrer overruled and failure to answer over. Mathot v. Triebel, 92 N. Y. S. 512. On appeal from a judgment rendered on default the court will examine the evidence to see if it supports the judgment. Brooks v. Delaware, etc., R. Co., 88 N. Y. S. 961. An appeal will lie from a judgment by default in the municipal court of New York though no motion has been made to the justice before whom the inquest was taken to open the default. Potter v. Katzenbach, 88 N. Y. S. 865. A judgment decree, or order entered by consent, is not appealable. King v. King [Ill.] 74 N. E. 89; Weber v. Costigan [Mich.] 102 N. W. 666; New Jersey Building, Loan & Investment Co. v. Lord [N. J. Err. & App.] 58 A. 185; People v. Pernetti, 88 N. Y. S. 714; Reichenberg v. Interurban St. R. Co., 90 N. Y. S. 384; Flewellin v. Lent, 90 N. Y. S. 417; Bernheim v. Bloch, 91 N. Y. S. 40; Clark v. Strong, 93 N. Y. S. 514; Texas Portland Cement & Lime Co. v. Lee [Tex.] 82 S. W. 1025; Chappell v. O'Brien, 22 App. D. C. 190.

3. Preston v. West [W. Va.] 47 S. E. 152.

4. See Saving Questions for Review, 4 C. L. 1368, and New Trial, etc., 4 C. L. 810.

5. See post, § 13D, "Restriction of Review by Character of Judgment or Order."

ous statutes if they determine the "merits."[6] "principles of the cause,"[7] deny a rightful mode of trial,[8] "in effect discontinue the cause"[9] or "prevent judgment,"[10] or if they "change possession"[11] or "affect property rights," or if they would have been "final if rendered as claimed."[12] In some jurisdictions any interlocutory order is appealable by leave of court,[13] and as to some of such orders, even this is needless.[14]

Error will not lie to a judgment rendered pursuant to directions given on remand,[15] but a judgment resulting from election to pursue one of two courses held open by the mandate is appealable;[16] and where a judgment is affirmed with directions, the lower court must construe the same, and, if error is committed in so doing, the judgment is not void but subject to correction on review.[17]

Decisions by nonjudicial tribunals or boards are reviewable only by statute,[18] and statutory remedies are confined to such awards as their terms cover.[19]

Rulings relating to pleadings[20] and process[21] and matters of practice before

6. Intermediate decree upon the merits. Cauthen v. Cauthen [S. C.] 49 S. E. 321. An order granting a change of venue in a civil action involves the merits. Robertson Lumber Co. v. Jones [N. D.] 99 N. W. 1082.

7. An interlocutory decree that is appealable as one adjudicating the principles of the cause is one which adjudicates all the questions raised, and determines the principles and rules by which relief is to be administered so that it is only necessary to apply them to the facts in order to decree the relative rights of the parties in the subject-matter. Hill v. Cronin [W. Va.] 49 S. E. 132. A decree in a suit by an executor against devisees to convene creditors and administer the assets for their payment, made on a report of debts by a commissioner, decreeing debts against the estate and subjecting its lands to their payment, is appealable, since it is final, and adjudicates the principles of the cause. Trail v. Trail [W. Va.] 49 S. E. 431. Appeals are allowable in chancery wherein there is a decree or order adjudicating the principles of the cause. Code 1899, c. 135, § 1. Armstrong v. Ross [W. Va.] 48 S. E. 745. Not from an order of reference, founded on the expressed opinion of the judge, without adjudicating the principles involved. Id.

8. An order referring or recommitting a cause to the master to take and report testimony is not appealable unless it operates to deny a litigant a mode of trial to which he is entitled or is coram non judice. It is discretionary. Davidson v. Copeland [S. C.] 48 S. E. 33.

9. Transfer to another court does not do so. Womack v. Connor [Ark.] 85 S. W. 783.

10. An order in a mandamus proceeding denying relator's application for an order prescribing what particular questions arising in an action shall be tried by a jury is not an order affecting a substantial right determining the action and preventing judgment. Flannigan v. Lindgren [Wis.] 100 N. W. 818. Rulings on motions to amend pleadings do not ordinarily affect any substantial right, nor have appealable finality. Wiesmann v. Shanley [Wis.] 102 N. W. 932. An order denying plaintiff's motion to correct a verdict and enter judgment for him is not appealable as the error may be reviewed on appeal from the final judgment. Wolfgram v. Schoepke [Wis.] 100 N. W. 1054.

11. An appeal lies from a decree appointing a receiver whereby a change in the possession or control of the property is required. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198. Order authorizing sheriff to release sequestered property on bond being furnished. Boimare v. St. Geme [La.] 37 So. 770.

12. A judgment overruling a demurrer to a petition is proper matter for direct exception, as a ruling which would have been final "if it had been rendered as claimed" by defendant. Code 1895, § 5526. Ramey v. O'Byrne [Ga.] 49 S. E. 595. Except in the case of fast writs, the supreme court has no jurisdiction to consider a writ of error until after a final judgment in the court below, or one which would have been final had it been rendered as claimed by the plaintiff in error. Johnson v. Battle [Ga.] 48 S. E. 128.

13. Overruling demurrer. Code D. C. § 226. Starkweather v. Bank, 21 App. D. C. 281.

14. Allowance of temporary alimony. Lesh v. Lesh, 21 App. D. C. 475.

15. Chiles v. School Dist. of Buckner, Jackson County [Mo. App.] 85 S. W. 880.

16. Where a cause is reversed and remanded, the opinion indicating that complainant may take one of two courses, and he elects to take a dismissal, an appeal from a decree then passed dismissing the bill, taken for the purpose of carrying the case to the court of last resort, will be entertained. Clark v. Roller, 23 App. D. C. 453.

17. Cordele Ice Co. v. Sims [Ga.] 48 S. E. 12.

18. The appeal from county court to circuit court is allowed only when the former court acts judicially. Not from revocation of liquor license. Barnett v. Pemiscot County Court [Mo. App.] 86 S. W. 575.

Arbitrator's award. Wilbourn v. Hurt [Ala.] 36 So. 768. In Idaho an appeal does not lie from an **order of a board of equalization.** Humbird Lumber Co. v. Morgan [Idaho] 77 P. 433.

19. Code 1896, § 522, does not cover awards filed with a justice of the peace where no suit is pending. Wilbourn v. Hurt [Ala.] 36 So. 768.

20. Striking out paragraph for punitive damages leaving count for actual damages stand is not appealable. Banner v. Western

the trial[22] are not generally reviewable in the absence of statute unless their effect is to finally determine the action[23] or involve "substantial rights," "merits," etc.[24]

Dismissals,[25] nonsuits,[26] orders to strike cause[27] and the like,[28] are reviewable

Union Tel. Co. [S. C.] 51 S. E. 117. Unless there has been a final termination of the case in the lower court, a writ of error will not lie to an **order striking a plea**, even though its effect may be to entitle plaintiff to a verdict or judgment as a matter of course. Johnson v. Battle [Ga.] 48 S. E. 128. Defendant is not entitled to appeal from an order overruling his plea in abatement in attachment proceedings, but can only appeal on the whole case. Rev. St. 1899, § 407. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771.

Demurrers and rulings thereon: Shannon's Code, § 4889, providing for the allowance of appeals from orders on demurrer applies to equity cases only. Payne v. Satterfield [Tenn.] 84 S. W. 800. An order sustaining a **separate demurrer of two defendants**, no disposition of the case being made as to another defendant, is not a final order. Houston v. Brown [Ind. T.] 82 S. W. 775. Order sustaining **demurrer to special pleas is not final** while case is at issue on a general plea. Wenour v. Fossick, 115 Ill. App. 605.

Order sustaining a demurrer to the complaint is not appealable. State v. Fleming [Wash.] 79 P. 1115; New Jersey Bldg. Loan & Investment Co. v. Lord [N. J. Err. & App.] 58 A. 185; Ernest v. Grand Trunk Western R. Co. [Ind. App.] 72 N. E. 1136; Livingston County Bldg. & Loan Ass'n v. Keach [Ill.] 72 N. E. 769; People v. Severson, 113 Ill. App. 496.

An order overruling a demurrer is not appealable. Belding v. Washington Cornice Co. [Wash.] 79 P. 37; Wenom v. Fossick [Ill.] 72 N. E. 732; Taft v. Mossey [Vt.] 59 A. 166; Wright v. Creamery Package Co. [Vt.] 58 A. 803; Gates v. Solomon [Ark.] 83 S. W. 348; Vaughn v. Milner [Ga.] 49 S. E. 287; Niles v. United States Trust Co., 22 App. D. C. 225; Starkweather v. Bank, 21 App. D. C. 281.

Amendments: A ruling on motion to amend not determinative of the cause will not go up on direct exception in Georgia even if final judgment has been since rendered; the writ must go from the final judgment. A direct bill of exceptions to a ruling made pendente lite, which does not assign error upon any final judgment, though such judgment was rendered, will not be entertained. Kibben v. Coastwise Dredging Co. [Ga.] 48 S. E. 330. The refusal of an amendment on the ground of want of power is appealable. To complaint. Lassiter v. Norfolk & C. R. Co. [N. C.] 48 S. E. 642. Appeal from order **refusing leave to file supplementary petition.** Swift & Co. v. Koutsky [Neb.] 103 N. W. 436.

21. An order overruling a motion to vacate an order of publication against a nonresident defendant is not appealable. Not a final decree disposing of case, nor such an interlocutory order as is appealable under Code, § 226. Chappell v. O'Brien, 22 App. D. C. 190. An order of a justice of the peace quashing a writ of attachment is interlocutory and not appealable to the supreme court while the action remains undisposed of before the justice. United States v. Barnard, 24 App. D. C. 8. Where a corporation defendant pleads to the jurisdiction and files exceptions pendente lite to a judgment overruling the plea, and where, more than 60 days thereafter, the issue arising upon a traverse to the return of service was submitted to the judge without a jury, and determined adversely to defendant, held that there had been no final disposition of the case nor any decision or judgment which would have been a final disposition of the cause, if it had been rendered as claimed, and hence the supreme court had no jurisdiction to entertain a writ of error to review such decisions. Brakelow S. Co. v. West [Ga.] 48 S. E. 693. An order quashing service of summons, personal or by publication, is not reviewable before final judgment. Goldie v. Stewart [Neb.] 99 N. W. 255.

22. If without jurisdiction, an order of recommittal may be reviewed. Davidson v. Copeland [S. C.] 48 S. E. 33. An order denying defendant's motion to require plaintiff, who has been allowed to sue in forma pauperis, to file a prosecution bond. Christian v. Atlantic & N. C. R. Co. [N. C.] 48 S. E. 743. Order denying change of venue. Brown v. Cogdell [N. C.] 48 S. E. 515. Order to produce, for examination, books and papers. Erwin v. Ottawa Circuit Judge [Mich.] 101 N. W. 537; Neubert v. Armstrong Water Co., 26 Pa. Super. Ct. 608. An ex parte order adding new parties defendant. Sundberg v. Goar [Minn.] 99 N. W. 638. But an order denying a motion to vacate such an order is. Id. An order for a continuance against defendant to a cross petition is not appealable. Bussell v. Ft. Dodge [Iowa] 101 N. W. 1126.

Challenge to the array: An order refusing to quash the array of jurors on grounds held to be mere irregularities is not appealable. Merits not involved. Code Civ. Proc. § 344 construed. Rhodes v. Southern R. Co. [S. C.] 47 S. E. 689.

23. Where the trial court sustains a demurrer to an original petition, and at the same time allows an amendment, subject to future demurrer or answer, the case is not finally disposed of, and, therefore, the supreme court has no jurisdiction to pass upon an assignment of error complaining of the sustaining of the demurrer. Steed v. Savage [Ga.] 48 S. E. 689.

24. See preceding paragraph of text.

25. Summary proceedings. Sipp v. Reich, 88 N. Y. S. 960. Neither error nor appeal lies from an order **refusing to dismiss** a suit. Steward v. Parsons, 112 Ill. App. 611. Refusal of the court to act upon a motion to dismiss a petition. Roby v. South Park Com'rs [Ill.] 74 N. E. 125. Error may be prosecuted to an order dismissing a petition for failure to amend as directed by the court. Egan v. New York, C. & St. L. R. Co., 5 Ohio C. C. (N. S.) 482, 26 Ohio C. C. 616. Not from the discharge of a rule to show cause why a suit should

when determinative of the action,[29] otherwise not,[30] and refusals to make such orders are not reviewable.[31]

Directed verdicts,[32] orders directing or arresting judgment or orders for new trial[33] and others of similar operation[34] are not reviewable at common law, since they are often discretionary and are not final. In some states, however, they are made directly appealable.[35]

A reviewable final judgment or decree must be finally determinative[36] of the controversy to the aggrievement of the person claiming review.

not be dismissed for want of jurisdiction. Price v. Davis Coal & Coke Co. [Pa.] 57 A. 769. An order of the district court dismissing an appeal from a justice court judgment is not appealable. Lough v. White [N. D.] 100 N. W. 1084. Where a bill sets up distinct causes of action, a decree dismissing it as to certain of them and retaining it as to the others is final in so far as the dismissal is concerned. Scriven v. North [C. C. A.] 134 F. 366.

26. A judgment of nonsuit which neither provided that plaintiffs take nothing by their writ and that defendant go hence without day, nor dismissed the case with costs to plaintiffs, is not appealable. Lyons v. Rollinson [Mo. App.] 82 S. W. 646. A refusal to grant a compulsory nonsuit is not appealable. Snowman v. Mason [Me.] 59 A. 1019; Cox v. Wilson, 25 Pa. Super. Ct. 635; Queen Anne's R. Co. v. Reed [Del.] 59 A. 860.

27. Refusal to quash a writ of foreign attachment is not a final judgment and is, therefore, not the subject of appeal. Dempsey v. Petersburg Sav. & Ins. Co., 26 Pa. Super. Ct. 633.

28. A writ of error will lie to review the overruling of a motion to reinstate the case after the petition has been dismissed on demurrer. Van Dyke v. Van Dyke [Ga.] 48 S. E. 380. An order vacating and setting aside a verdict and not in terms but in effect granting a new trial is appealable. Eades v. Trowbridge [Cal.] 76 P. 714. Where a state court orders the removal of a case to the Federal court on an insufficient petition, the party aggrieved may appeal to the state appellate court. Illinois Cent. R. Co. v. Jones' Adm'r [Ky.] 80 S. W. 484. An order quashing a writ of garnishment and releasing the garnishee is in effect a final judgment in the garnishment proceeding and reviewable by the supreme court. Recor v. St. Clair Circuit Judge [Mich.] 102 N. W. 643. An order of discharge upon a writ of habeas corpus is not a final order in the sense that an appeal or writ of error may be prosecuted thereon. Magerstadt v. People, 105 Ill. App. 316.

29. Where a bill in equity was dismissed and an order entered discharging a receiver and providing for the payment of costs, every question having been disposed of in so far as the trial court was concerned, it was a final decree. Viquesney v. Allen [C. C. A.] 131 F. 21.

30. An order vacating an attachment is not appealable. Feldman v. Siegel, 87 N. Y. S. 538. Mere written requests to the clerk for dismissal, filed among the papers of the case, are not orders of the court and are not appealable; hence an order refusing to vacate the same is not. Alpers v. Bliss [Cal.] 79 P. 171.

31. The refusal of a motion to dismiss an action on any ground whatever is never appealable. Christian v. Atlantic & N. C. R. Co. [N. C.] 48 S. E. 743.

32. An order refusing to direct a verdict in favor of a cross defendant as to whom the cause was continued is not appealable. Bussell v. Ft. Dodge [Iowa] 101 N. W. 1126.

33. Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565; Foster v. Murphy & Co. [C. C. A.] 135 F. 47; Clement v. Wilson [C. C. A.] 135 F. 749.

34. A motion to vacate a verdict is a motion for new trial and not appealable. Stern v. Bennington [Md.] 60 A. 17. Rules to show cause in cases tried in the district court in New Jersey cannot be brought before the supreme court by appeal. Haag v. Ellzabeth, etc., R. Co. [N. J. Law] 60 A. 515. An order allowing one not a party to the suit to file an original bill in the nature of a bill of review is not appealable. Leggett v. Detroit [Mich.] 100 N. W. 566. No appeal lies from an order of the municipal court opening a default and vacating the judgment founded thereon. Candeloro v. Benvenuta, 88 N. Y. S. 357.

35. Direct bill lies to **directed verdict.** Webb v. Hicks [Ga.] 43 S. E. 738. Order overruling **motion to reject findings** made by a party is not enumerated in Code Civ. Proc. § 1722, amended by Sess. Laws 1899, p. 146, and is not appealable. Johns v. Barnes [Mont.] 78 P. 703. An appeal lies from an order setting aside a verdict and **granting a new trial for a supposed error of law.** Johnson v. Grand Fountain of United Order of T. R. [N. C.] 47 S. E. 463. The **denial in vacation of a motion to dismiss a motion for a new trial** is cause for a separate and independent writ of error. Sumner v. Sumner [Ga.] 48 S. E. 727.

36. A final decree in a chancery case, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court, but it is one which determines the substantial merits of the controversy, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter. Hill v. Cronin [W. Va.] 49 S. E. 132. An appeal can be taken only from some decision or judgment in the nature of definite final determination of some disputed matter. Wells & McComas Council, No. 14, Junior Order United American Mechanics

Orders and adjudications in interlocutory[37] or provisional,[38] extraordinary[39]

v. Littleton [Md.] 60 A. 22. A final judgment is one which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy for which he sues. Tipton v. Harris [Ky.] 82 S. W. 585.

Final: Dismissing a petition for failure to amend as directed. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482, 26 Ohio C. C. 616. A decree for complainant on bill to redeem from a mortgage and ordering a reference. Gentry v. Lawley [Ala.] 37 So. 829. A decree dismissing a bill "out of court" for want of equity is final within Code 1896, § 426, authorizing appeals in chancery. Schwarz, Rosenbaum & Co. v. Barley [Ala.] 38 So. 119. Where partners agree upon liquidators to wind up the business and they proceed by rule to require creditors to show cause why inscriptions purporting to operate as privileges and mortgages should not be canceled, a judgment dismissing such rule, as showing no cause of action. Fitzner v. Noullet [La.] 38 So. 94. Final decree enjoining defendant from entering land, though defendant claimed an interest by purchase after the decree from persons not bound thereby. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062. A decree for plaintiff on a bill to redeem from foreclosure of a mortgage, though it provides for a subsequent accounting of rents and profits. Marquam v. United States Mortg. & Trust Co. [Or.] 78 P. 698. A decree fixing the amount of an insolvent bank's debts and determining the creditor's right to an assessment on stockholders' superadded liability. Bennett v. Thorne [Wash.] 78 P. 936. A default judgment whether legal or void. Jameson v. Simonds Saw Co. [Cal.] 77 P. 662. Orders appropriating money and directing how it shall be paid out. Boyd County v. Arthur [Ky.] 82 S. W. 613. Order allowing justices of the peace compensation for each day's work done by him in supervising the construction of county roads held final. Id. Order of county fiscal court appropriating money to be spent according to the directions of each magistrate is final. Id. An order appointing an administrator. Ex parte Small [S. C.] 48 S. E. 40. A judgment in a suit for trespass dissolving a temporary injunction and directing that the earnings of the property in the hands of a receiver be paid to defendant and that the receiver be discharged. State v. Douglass [Mo. App.] 83 S. W. 87. Judgment in action to recover office held to dispose of issue as to fees collected by incumbent. Jeter v. Gouhenour [Tex. Civ. App.] 84 S. W. 1091. Appealability is **not destroyed** by inclusion in the judgment of an **alternative clause** of an unappealable character. Order to complete a purchase and failing that for attachment for contempt. Podesta v. Moody [N. J. Prerog.] 60 A. 939. A decree in other respects final is not rendered interlocutory by a direction therein contained in aid of the execution of the decree, requiring the defendants to account concerning certain specified matters. Clement v. Ireland [N. C.] 50 S. E. 570, citing Winthrop v. Meeker, 109 U. S. 180.

Not final: Order allowing fees to a master in chancery. Symms v. Jamieson, 115 Ill. App. 165. An order is not final when the substantial rights of the parties remain undetermined. Huffman v. Rhodes [Neb.] 100 N. W. 159. An application for review of a moderator's ruling rejecting an elector's ballot, certified with his findings and decision by the judge of the superior court, under the Connecticut statutes. In re Blake [Conn.] 60 A. 265. That a judgment entered on report of referee directing an accounting by the trustees of a dissolved corporation gave plaintiff a judgment for costs did not render it final, the provision for costs being, a mere irregularity which should have been corrected by motion. Osborn v. Cardeza [N. Y.] 72 N. E. 625. An order directing the resumption of certain payments by a guardian of property to the guardian of the person of a minor. In re White, 88 N. Y. S. 564. A judgment for plaintiff which does not dispose of defendant's counterclaim. Riddle v. Bearden [Tex. Civ. App.] 80 S. W. 1061. Judgment not disposing of all the parties or all the issues, where cause was expressly retained on docket and judgment was held open until the matters reserved could be determined. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 83 S. W. 907. Order discharging an attachment. Ferdinand Westheimer & Sons v. Hahn [Okl.] 78 P. 378. Where action for damages for cutting timber depended on a will, an appeal after court had construed will in accordance with plaintiff's contention and adjudged that they recover such damages as they had sustained, but before damages had been assessed, for which purpose the case was retained, and before final judgment was entered, held premature. Rogerson v. Greenleaf Johnson Lumber Co. [N. C.] 48 S. E. 647. Cannot review an order directing the sale of mortgaged property in a suit to enforce a mortgage debt, no final judgment having been entered. Tipton v. Harris [Ky.] 82 S. W. 585. Refusal to approve account and direction to account further. Sellar v. James, 113 Ill. App. 206. A judgment declaring certain parties to be stakeholders but leaving the amounts due from them to each depositor to be determined. Wilson Hardware Co. v. F. J. & R. C. Duff [Tex.] 85 S. W. 786.

37. The Wisconsin statute allowing appeals from interlocutory judgments, as in the case of final judgments, applies only to such interlocutory judgments as can be entered in actions, and not to interlocutory orders in special proceedings. Kingston v. Kingston [Wis.] 102 N. W. 577. The apportionment of referee's fees is final. Cobb v. Rhea [N. C.] 49 S. E. 161. No appeal lies by an executor from a decree directing him to make return of an order of sale of real estate for payment of debts, etc. Walker's Estate, 25 Pa. Super. Ct. 256. A decree in mortgage foreclosure proceedings declining to determine an intervenor's rights in limine, but permitting him to use the prop-

and special[40] proceedings, are not reviewable except as provided by statute,[41] and

erty pending litigation is interlocutory only and unappealable. Columbia Ave. Trust Co. v. MacAfee Co. [C. C. A.] 136 F. 402. An order making absolute a rule, granted under the Pennsylvania statutes, to bring an action of ejectment within six months, is interlocutory and not appealable. Gabler v. Black [Pa.] 60 A. 257. Order discharging a rule to show cause why an attorney should not enter appearance for a lien claimant and strike off the lien according to agreement. Kurrie v. Cottingham [Pa.] 57 A. 1106. Order appointing receiver. Town of Vandalia v. St. Louis, etc., R. Co. [Ill.] 70 N. E. 662. The code in Maryland authorizes an appeal from an order appointing a receiver. [Code, art. 5, § 25] (Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125), but an order refusing to rescind their appointment is not final in its nature and is not appealable (Id.). Neither an order of a circuit court approving monthly reports of a receiver, nor one directing him to pay expenses incurred by him, made before the coming in of his final account, is final. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 337. In New York an appeal from an interlocutory judgment of the county court will be considered on its merits where the parties have stipulated that it may be regarded as a motion for new trial on exceptions. Russ v. Maxwell, 87 N. Y. S. 1077. Interlocutory orders dissolving injunctions are appealable in Alabama, but this applies only to cases where an injunction has been dissolved by order or decree, and not by the act of complainant. Code 1896, § 428. Robertson v. Montgomery Base Ball Ass'n [Ala.] 37 So. 241. The deliverance of the chancellor that the filing of an amendment by complainant operated as a dissolution of the injunction is not such a dissolution as will support an appeal. Id. The appeal from a refusal of an application to reinstate an injunction, under chancery rule in Alabama, applies only where the injunction was dissolved by order or decree, and not by the act of a party. Code 1896, p. 1224, rule 101. Id. Appeal does not lie to a proceeding ancillary to the main action. Capaul v. Toledo & W. R. Co., 5 Ohio C. C. (N. S.) 262, 26 Ohio C. C. 578.

38. Injunctional orders: The **dissolution of injunction** and sequestration writs on bond adequately large to cover the claim of appellant made in terms reducible to money is not appealable since irreparable damage is not threatened. State v. Brunot [La.] 36 So. 481. In New York the discretion of the supreme court in issuing or refusing an injunction is not unlimited, and facts may be proved which will raise a question of law reviewable by the court of appeals. Penrhyn Slate Co. v. Granville Elec. Light & Power Co. [N. Y.] 73 N. E. 566. Under Pierce's Code § 1048, subd. 3, not from an order vacating a temporary injunction unless it appears that the party enjoined is insolvent. Anderson v. McGregor [Wash.] 78 P. 776. A decree on the merits finding infringement of a patent, awarding a permanent injunction, and directing a reference to ascertain damages and profits is appealable as an interlocutory decree granting an injunction under the seventh section of the court of appeals act. Star Brass Works v. General Elec. Co. [C. C. A.] 129 F. 102. Order striking out that portion of a preliminary injunction order, mandatory in character and dissolving the injunction to that extent, is appealable. Wolf v. Board of Sup'rs of Santa Clara County [Cal.] 76 P. 1108. **Refusal to grant injunction** in liquor nuisance case is appealable by Code, § 4101. Donnelly v. Smith [Iowa] 103 N. W. 776. Though no appeal lies from an order dissolving a preliminary restraining order, where the order is in fact based on the conclusion that no relief can be granted on the bill an appeal will lie though the order does not in terms dismiss the bill. Bailey v. Willeford [C. C. A.] 131 F. 242. Where a temporary injunction is dissolved on a demurrer to the bill being sustained plaintiff is not entitled to appeal from so much of the order only as dissolves the injunction. Frye v. Carstens [C. C. A.] 130 F. 766. An order **refusing to dissolve** an injunction is appealable by express provisions of Code Civ. Proc. § 963, subd. 2. Neumann v. Moretti [Cal.] 79 P. 512. An order denying a motion to vacate an injunction against foreclosing a mortgage by advertisement is not appealable as a final order in a special proceeding. Tracy v. Scott [N. D.] 101 N. W. 905. Under Code Civ. Proc. § 963, subd. 2, appeal lies from an order refusing to dissolve an injunction. Neumann v. Moretti [Cal.] 79 P. 512. A statute allowing appeal from an interlocutory order granting an injunction does not authorize an appeal from an order refusing to dissolve an interlocutory injunction. Dyers & Cleaners' Union No. 10,168 v. Schuettauff, 113 Ill. App. 422.

Receivership orders: An order **appointing a receiver** is appealable (Code 1896, §§ 429, 800) but **not one discharging** or removing him or refusing to do so. Pagett v. Brooks [Ala.] 37 So. 263.

Order allowing alimony pendente lite is a final order, and appealable without special leave. Code D. C. § 226, construed. Lesh v. Lesh, 21 App. D. C. 475.

39. An order denying a motion in a mandamus case that the peremptory writ issue is not appealable. State v. McKellar [Minn.] 99 N. W. 807.

40. Order for examination of judgment debtor in supplementary proceedings is appealable. Ackerman v. Green [Mo. App.] 81 S. W. 509. Order discharging garnishee for any cause. Cummings v. Edwards, Wood & Co. [Minn.] 103 N. W. 709. An order of the appellate division in New York to the Board of Railroad Commissioners to issue a certificate of public convenience is a final order in a special proceeding reviewable in the court of appeals on questions of law. In re Wood [N. Y.] 73 N. E. 561. An order appointing a referee in a proceeding to sell future contingent interests in land is not a final order under the statute authorizing appeals from final orders affecting substantial rights in special proceedings. Kingston v. Kingston [Wis.] 102 N. W. 577. A final order by a district court rendered on an appeal from an order of a village board

then must be finally determinative,[42] work irreparable injury,[43] or affect substantial rights.[44] Orders punishing for contempt[45-47] are not reviewable except as provided by statute.

Orders after judgment[48] are not reviewable separately from the judgment if merely a part or continuation[49] of it; otherwise if they newly[50] determine rights[51]

granting or refusing a liquor license is not reviewable by appeal. Halverstadt v. Berger [Neb.] 100 N. W. 934. No appeal or writ of error lies to review a decision of the interstate commerce commission denying or awarding reparation for an alleged violation of the interstate commerce act. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343. An order confirming a guardian's annual settlement is appealable. Under Sess. Laws 1899, p. 146. In re Scheuer's Estate [Mont.] 79 P. 244.

41. Cohen v. Ridgewood Shirt Co., 84 N. Y. S. 188. In West Virginia, a decree overruling a motion to quash an attachment is an interlocutory, but appealable, decree. Code 1899, c. 135, § 1. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.

42. An order granting a temporary injunction on a complaint alleging irreparable injury, after notice and hearing both sides, cannot be reviewed by the court granting it, but the only method of review possible is in accordance with the statute regulating appeals (Code Civ. Proc. § 335). Jordan v. Wilson [S. C.] 48 S. E. 37. An order made on application of counsel for a receiver, without notice to the creditors, making an allowance for their services to him is not final and, therefore, not appealable. Wilder v. Reed [Or.] 78 P. 1027.

The **determination** of a justice of the district court deciding **when one may take the poor debtor's oath** is not reviewable on bill of exceptions. It is incident to some other proceeding and not directly reviewable. In re Harkness [R. I.] 60 A. 1067. Order **appointing a curator** is not appealable. Not a final decision. Looney v. Browning [Mo. App.] 86 S. W. 564. An **order in proceedings supplementary to execution** requiring a person indebted to the judgment debtor to pay over the fund to apply on the judgment is final and reviewable on error at the suit of the judgment debtor where he opposed it on the ground that the debt was exempt. Duffey v. Reardon [Ohio] 71 N. E. 712.

43. An order requiring a bond for the release of a sequestration does not. State v. St. Paul [La.] 37 So. 964.

44. An order disallowing a chattel mortgage on a bankrupt's property is appealable to the circuit court of appeals under section 24a of the bankruptcy act. In re First Nat. Bank [C. C. A.] 135 F. 62; Dodge v. Norlin [C. C. A.] 133 F. 363. No appeal lies from an order of the appellate division affirming an order of the county court refusing to strike from its records a presentment of the grand jury censuring the board of supervisors for remissness in keeping their records. In re Jones [N. Y.] 74 N. E. 226. An order punishing a witness for contempt for failure to answer questions in proceedings to discover property of a decedent is final and appealable to the court of appeals. King v. Ashley [N. Y.] 72 N. E. 106. An order of reference to take and state an account, made before disposition of a plea in bar of an action, is immediately appealable. Jones v. Wooten [N. C.] 49 S. E. 915.

45, 46, 47. An order refusing to punish as contempt an alleged violation of an injunction is not appealable. People v. Ann Arbor R. Co. [Mich.] 100 N. W. 892. An order in an equity suit adjudging defendant guilty of contempt in violating an injunction cannot be reviewed except on appeal from the final decree in the cause. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 129 F. 96.

Contra: A conviction of one not a party of contempt is a separate order final and reviewable (Bessette v. W. B. Conkey Co., 24 S. Ct. 665), and the same rule applies to the commitment of a party (In re Christensen Engineering Co., 24 S. Ct. 729).

48. Order taxing costs is not within the purview of a statute making appealable final orders after judgment which affect substantial rights. Smith v. Palmer [Wash.] 80 P. 460. **In California by statute** a special order made after final judgment is appealable. Order denying motion, after judgment, for the entry of a different judgment. Rahmel v. Lehndorff [Cal.] 76 P. 659. Appealable orders are deemed excepted to. Code Civ. Proc. § 647. Under Code Civ. Proc. § 939, subd. 3, from order striking from the files affidavits on a motion for a new trial. Gay v. Torrance [Cal.] 78 P. 540. Order denying motion for relief from default in not serving within the statutory period, a notice of intention to move for a new trial, is appealable. Steen v. Santa Clara Valley Mill & Lumber Co. [Cal.] 79 P. 171.

In Washington final orders made after judgment which affect a substantial right are appealable. Under 2 Bail. Ann. Codes & St. § 6500, subd. 7, an order striking so much of a judgment as awarded a recovery against a surety on an attachment bond. Brady v. Onffrog [Wash.] 79 P. 1004.

49. Order denying motion for retaxation of costs after reversal not reviewable. Spiegelman v. Union R. Co., 88 N. Y. S. 478. Order in form of writ of assistance on foreclosure affects no substantial right. Title Guarantee & Trust Co. v. American Power & Const. Co., 88 N. Y. S. 502. An order discharging a levy on execution is not appealable. Hyman v. Segal, 88 N. Y. S. 1036.

50. An appeal will lie from an order awarding a writ of assistance in a foreclosure proceeding, after the sale has been confirmed and deed ordered. Escritt v. Michaleson [Neb.] 103 N. W. 300.

51. An order, after final judgment, refusing to release attached property, is appealable under Rev. St. 1887, § 4807, subd. 3, providing that an appeal may be taken from any special order made after final judgment.

or vacate,[52] modify,[53] or deny vacation or modification[54] of the judgment as distinguished from a default[55] and on some ground not resting in discretion.[56]

Decisions of lower appellate or intermediate courts are reviewable in cases usually prescribed by statute[57] if they possess finality.[58] A judgment of a state

Coey v. Cleghorn [Idaho] 77 P. 331. A judgment vacating a judgment and which also determines all questions which could be tried on a retrial is appealable though no formal order of dismissal of the action was made. Nolan v. Arnot [Wash.] 78 P. 463. An order confirming a sale by a commissioner or foreclosure is final and appealable. Cooper v. Ryan [Ark.] 83 S. W. 328. An appeal will lie from an order awarding a writ of assistance in a foreclosure proceeding after the sale has been confirmed and deed ordered, subject to the conditions of an appeal from an order confirming the sale. Escritt v. Michaleson [Neb.] 103 N. W. 300. An order discharging a rule to set aside a writ of execution is a final order on which an appeal will at once lie. Long v. Lebanon Nat. Bank [Pa.] 60 A. 556, citing Packer v. Owens, 164 Pa. 185. Final order appeal lies from an order allowing or disallowing costs for or against a guardian or his ward. In re Gorman, 2 Ohio N. P. (N. S.) 667, 15 Ohio Dec. 204.

52. Ordinarily an order vacating a judgment is not appealable but if it is a final order affecting substantial rights, an appeal will lie. State v. Tallman [Wash.] 80 P. 272. An order resetting a prior order of discontinuance and vacating it is appealable. Cameron v. White, 92 N. Y. S. 381.

53. An order of the probate court which vacates in part a previous order is appealable. In re Phelps' Estate [Minn.] 101 N. W. 496. Order amending judgment already entered. Code Civ. Proc. § 1722, amended by Sess. Laws 1899, p. 146. State v. District Court of Second Judicial Dist. [Mont.] 79 P. 410.

54. Order denying a motion to vacate a judgment of dismissal is not appealable. Alpers v. Bliss [Cal.] 79 P. 171. An order refusing to vacate a decree of distribution of a decedent's estate made by a district court is an order after judgment and is not appealable. Code Civ. Proc. § 445 (Comp. St. 1887, div. 1). In re Kelly's Estate [Mont.] 79 P. 244. Under the Connecticut statute, a refusal to set aside a judgment of nonsuit is appealable. British American Ins. Co. v. Wilson [Conn.] 60 A. 293.

55. Statute does not include refusal to set aside decree pro confesso (Montgomery Traction Co. v. Harmon [Ala.] 37 So. 371), but as to other decrees than those confessed an appeal lies directly from a decree reversing them upon motion. Motion to reverse required by Code 1899, c. 134, applies only to cases upon a bill taken for confessed. Morrison & Co. v. Leach [W. Va.] 47 S. E. 237. Opening default is not the grant of a new trial from which appeal lies. Breed v. Hobart [Mo.] 86 S. W. 108. An appeal from a default judgment on the ground that defendant had not been properly served, defendant appearing specially for that purpose, is premature. Houston v. Greensboro Lumber Co. [N C.] 48 S. E. 738. An appeal from a default judgment, irregularly entered without notice to one who had appeared will not lie until the irregularity has been first called to the attention of the trial court by motion to set aside. Walton v. Hartman [Wash.] 80 P. 196.

56. An order refusing to vacate a prior appealable order is not appealable unless matters are presented which could not have been on an appeal from the original order. Kent v. Williams [Cal.] 79 P. 527.

57. A judgment of the common pleas affirming a judgment of a justice of the peace on certiorari is not appealable in Pennsylvania. Phoenix Iron Works Co. v. Mullen, 25 Pa. Super. Ct. 547. Orders granting a new trial are not appealable generally to the court of appeals in New York, but only those granting new trials on exceptions, and in no case tried to a jury and reversed can be so appealed unless it appears that the appellate division affirmed the facts. Allen v. Corn Exch. Bank [N. Y.] 73 N. E. 1026. An order of the appellate court reversing in part and affirming in part an allowance to an executor and remanding the case for further proceedings is not reviewable on error from the supreme court in Illinois. Griswold v. Smith [Ill.] 73 N. E. 400. Where the decision of the appellate court is such that nothing remains for the trial court but to carry the mandate into effect, an appeal to the supreme court will lie. Wenham v. International Packing Co. [Ill.] 72 N. E. 1079.

Judgment on appeal from justice's judgment: In forcible entry and detainer is appealable under B. & C. Comp. § 5754. Wolfer v. Hurst [Or.] 80 P. 419. Order sustaining a motion to dismiss an appeal from the justice court is not enumerated under Code Civ. Proc. § 1772, amended by Sess. Laws 1899, p. 146, and therefore is not appealable to the supreme court. Franzman v. Davies [Mont.] 80 P. 251. 2 Mills' Ann. St. §§ 3839-3842, a taxpayer may appeal from the board of county commissioners to the district court, but no other appeal is provided for. Held such statute creates a special proceeding and no appeal lies in such case from the district to the circuit court of appeals under Laws 1891, p. 119, providing that the latter court may review all final judgments of inferior courts of record. Pilgrim Consol. Min. Co. v. Board of Com'rs of Teller County [Colo. App.] 78 P. 617.

58. Dismissal of appeal from an order before judgment as wanting finality itself lacks finality where the whole matter may be reviewed on the judgment. See Robertson v. Southerland, 22 App. D. C. 595. Appeal dismissed from an order of the supreme court dismissing an appeal from an order of a justice of the peace quashing an attachment before judgment on the ground that the order was not final and not appealable, and remanding the cause for further proceedings before the justice. Id. The refusal of the superior court to dismiss

supreme court reversing and remanding an equity case is not final.[59] Such minor court decisions are appealable as provided by statute.[60]

Parts of judgments may be reviewed if severable and complete in themselves.[61] As costs are part of the judgment, the taxation of them is not separately reviewable.[62]

(§ 4) *C. Reviewableness may depend on character or value of action, subject-matter, or controversy.*[63]—The action must be civil in its nature[64] to be reviewable by civil remedies. It must involve questions of law[65] or of fact to be reviewable by the remedies appropriate to each, e. g., error or appeal. In determining whether such an amount is involved as to make appeal or certiorari the proper remedy, the pleadings alone determine.[66]

The case may go either to an intermediate or to the highest court or may or may not be subject to further appeal from the former to the latter if any of the criteria hereafter referred to exist,[67] and the rights on which they stand have not

a recordari granted as a substitute for an appeal from a justice, while not appealable, is, when excepted to, reviewable on an appeal from the court's action in setting aside a verdict and granting a new trial on the ground of an error of law. Refusal not a final judgment. Johnson v. Grand Fountain of United Order of True Reformers [N. C.] 47 S. E. 463. Order of the district court overruling a motion to dismiss an appeal from the justice court is not a final judgment appealable under Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146. Raymond v. Raymond [Mont.] 79 P. 1056. Order of the district court overruling a motion to dismiss an appeal from a justice court is not within Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146. Id. Judgment entered by the district court on direction of the court of appeals pursuant to Mills' Ann. Code § 398, is a judgment of the court of appeals so far as concerns review by the supreme court. Taylor v. Colorado Ironworks [Colo.] 80 P. 129. Statutes in some states provide for an appeal from the clerk to a judge of the superior court; the decision of the question by the judge, and the transmission of his decision to the clerk, after notice of which the parties may proceed according to law. N. C. Code §§ 254, 255. Alfred v. Smith [N. C.] 47 S. E. 597. A decision of the judge of the superior court on reversing a ruling of the clerk sustaining a demurrer is not a final judgment, but operates to remand the case, so far as it is before the judge, to the clerk. Under N. C. Code, §§ 254, 255. Id.

59. Schlosser v. Hemphill, 25 S. Ct. 654.

60. A judgment of the county court directing the removal of a county seat is appealable to the circuit court. Reese v. Steele [Ark.] 83 S. W. 335.

61. Code Civ. Proc. § 1300, distinctly allows appeals from specified parts of orders or judgments. Ziadi v. Interurban St. R. Co., 89 N. Y. S. 606.

62. State v. District Court of Second Judicial Dist. [Mont.] 79 P. 410. An order refusing to allow costs is reviewable only on appeal from the judgment. Musigbrod v. Hartford [Mont.] 76 P. 563.

63. See 3 C. L. 183.

64. Order for the discharge of a prisoner made in a habeas corpus proceeding is appealable. Garfinkel v. Sullivan [Wash.] 80 P. 188. Judgment on an appearance bond (bail) is attracted to the criminal nature of the prosecution and is appealable only as it is. State v. Cox [La.] 38 So. 456; State v. Epstein [Mo.] 84 S. W. 1120. In Ohio in order that a party may be entitled to appeal, the order from which an appeal is sought must be final, be made in a civil action in which the court has original jurisdiction, and the parties must not be entitled to a jury trial. Rev. St. § 5226. Application by a railroad company to define the manner in which another company may cross its tracks is not a civil action. Dayton & U. R. Co. v. Dayton & M. T. Co., 4 Ohio C. C. (N. S.) 329, 26 Ohio C. C. 1. In Illinois an order adjudging a party litigant in contempt of court for a violation of an order entered for the benefit of the adverse party is directly appealable to the supreme court. Swedish-American Telephone Co. v. Fidelity & Casualty Co. [Ill.] 70 N. E. 768.

Criminal appellate procedure is treated in Indictment and Prosecution, 4 C. L. 1. Compare titles treating of quasi-criminal proceedings, such as Bastards, 3 C. L. 496; Contempt, 3 C. L. 795, for the rules respecting such proceedings.

65. The question whether the court has power to grant an additional allowance is a question of law reviewable in the court of appeals. Standard Trust Co. v. New York, etc., R. Co. [N. Y.] 70 N. E. 925. Where the appellate division reverses the decision of the state comptroller assessing a franchise tax not as to the amount but as to the character of a part of the property, a question of law is involved. People v. Morgan [N. Y.] 70 N. E. 967.

66. Wheeless v. Carter [Ga.] 48 S. E. 121. Where, to an action in a county court for less than $50, defendant files a plea of setoff for more than that amount, and judgment is rendered for plaintiff, defendant may appeal to a jury in the superior court. Id.

67. See the matter following and see § 5. If a judgment does not determine title or is for an amount less than $2,500, no appeal lies to the supreme court. Clear Creek Leasing, Min. & Mill. Co. v. Comstock Gold-Silver Min. & Mill. Co. [Colo.] 78 P. 682.

been waived.[68] Thus if a decision is allowed to become a finality when it might be appealed, the appellate jurisdiction ex ratione materiae is ended, and an appeal from an injunction against execution for costs is governed solely by the amount.[69] Unless they exist, no error, however gross, opens the decision of an intermediate court, otherwise the last resort, to further appeal.[70] In Louisiana a reconventional judgment[71] or one dependent on a preceding judgment[72] is attracted to the nature of the principal one and goes where it would. Jurisdiction because of the subject-matter usually prevails over that dependent on the amount,[73] and the existence of one jurisdictional predicate makes others needless.[74]

Particular jurisdictional facts.[75]—Among the criteria prescribed by various statutes to determine appealability are the existence[76] of a constitutional[77] question particularly pointed out,[78] set up,[79] necessary to decision,[80] and adversely

Cases originating before justices of the peace: Under B. & C. Comp. § 548, providing that any party to a judgment may appeal, appeal lies from a judgment in forcible entry and unlawful detainer appealed from a justice of the peace. Dechenbach v. Rima [Or.] 77 P. 391.

68. Though a judgment after rendition cannot be so abated as to render it unappealable, waiver before judgment of a lien which would have resulted from the judgment is not such an abatement (Rhodes v. Frankfort Chair Co. [Ky.] 79 S. W. 768), and may destroy the character or quality which confers appealability (Id.).

69. Muntz v. Jefferson R. Co. [La.] 38 So. 586.

70. Where an intermediate court is the court of last resort where not exceeding a certain amount is involved, a judgment in such an action, though void, will not be reviewed by the supreme court. State v. Superior Court of Lincoln County [Wash.] 77 P. 33. The Colorado supreme court has no jurisdiction to review by error a judgment of the court of appeals where it has no jurisdiction to review by appeal. Taylor v. Colorado Iron Works [Colo.] 80 P. 129.

71. Judgment in reconvention is appealable where the main case would go. Judgment for impleaded third party establishing title held to have been on reconventional demand. Netter v. Reggio [La.] 37 So. 620.

72. The supreme court will not entertain appeal of a suit for nullity of a judgment not appealable to it (Strain's Heirs v. Lyons [La.] 38 So. 483), and coupling with it a demand for collateral relief or damages does not aid the matter (Id.).

73. Title to land controls value. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635. Under Const. art. 4, § 4, and 2 Ball. Ann. Codes & St. § 4650, giving jurisdiction where validity of a statute is involved, the supreme court has jurisdiction of an appeal involving validity of a city ordinance regardless of the amount. Shook v. Sexton [Wash.] 79 P. 1093. The Washington supreme court has jurisdiction of appeals in equitable actions regardless of the amount in controversy. Injunction. Trumbull v. Jefferson County [Wash.] 79 P. 1105; Bennett v. Thorne [Wash.] 78 P. 936. In cases where the supreme court has appellate jurisdiction of the matter in controversy in the lower court, the appealability of order made before or after final judgment does not depend on the amount involved. Sierra Water & Min. Co. v. Wolff [Cal.] 77 P. 1038. In Kansas defendant in forcible entry and detainer may appeal regardless of the amount involved. Burdsal v. Shields [Kan.] 79 P. 1067. A writ of mandate is reviewable regardless of amount involved. Order requiring corporation counsel of a city to approve a cost bill. City of Spokane v. Smith [Wash.] 79 P. 1125.

74. In cases involving construction of revenue laws, the supreme court of Missouri has appellate jurisdiction, even though no constitutional question is involved. City of St. Joseph v. Metropolitan Life Ins. Co. [Mo.] 81 S. W. 1080.

75. See 3 C. L. 184-187.

76. Question already settled: Though the constitutional question involved has been previously decided by the supreme court, it will retain jurisdiction if the appeal was taken before such decision, but not if it was taken afterward. Carpenter v. Hamilton [Mo.] 84 S. W. 863. A constitutional question having arisen in a case, the supreme court has appellate jurisdiction, though the question has already been decided by it in another case. Meng v. St. Louis & S. R. Co. [Mo.] 81 S. W. 907. A question that has been once decided in Illinois will not be ground for a direct appeal in a subsequent case in the absence of special reasons. Griveau v. South Chicago City R. Co. [Ill.] 73 N. E. 309.

77. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727; Griveau v. South Chicago City R. Co. [Ill.] 73 N. E. 309. A contention in a motion for a new trial raising the question as to whether or not a provision of the state constitution is violative of the Federal constitution involves a construction of both constitutions, and hence jurisdiction of an appeal from the judgment is in the supreme court rather than the court of appeals. Case certified from court of appeals on that ground. Lehner v. Metropolitan St. R. Co. [Mo. App.] 83 S. W. 1028. Exemption of homestead involves vested right—may be certified. Myher v. Myher [Mo. App.] 87 S. W. 116. Constitutional or Federal questions also govern in case of "Federal review." See post, this section.

78. To raise a constitutional question so as to give the supreme court appellate jurisdiction, the specific constitutional provi-

or prejudicially decided,[81] the construction[82] of statutes or public regulations, a question[83] or conflict of jurisdiction, or a conflict with,[84] or overruling of,[85] a decision of a co-ordinate court of intermediate appeal,[86] a case involving the revenue[87] or taxes,[88] a case involving freeholds,[89] titles,[90] boundaries,[91] or franchises, or the

sions claimed to have been violated must be pointed out. City of St. Joseph v. Metropolitan Life Ins. Co. [Mo.] 81 S. W. 1080; Shaw v. Goldman [Mo.] 81 S. W. 1223.

79. The constitutional question must have been raised below. State v. Bland [Mo.] 85 S. W. 561. Where judgment was rendered against plaintiff for failure to comply with a statute and he asked a declaration of law that such statute was unconstitutional and excepted to its refusal, a constitutional question is involved. Haag v. Ward [Mo.] 85 S. W. 391. To authorize review in the supreme court on the ground that a constitutional question is involved, such question must be squarely raised, saved by exception, and either embodied in the bill of exceptions or presented by the record. City of Tarkio v. Clark [Mo.] 85 S. W. 329. Fairly preserved in the record. Mere assertion of counsel is not sufficient. Griveau v. South Chicago City R. Co. [Ill.] 73 N. E. 309. If question clearly appears from the pleadings, it is immaterial that the original bill does not expressly state that the statute drawn in question is unconstitutional. Wolf v. Hope [Ill.] 70 N. E. 1082.

80. Where the case may be decided without reference to the statute whose constitutionality is attacked, no constitutional question is involved. State v. Bland [Mo.] 85 S. W. 561. The Colorado supreme court has no jurisdiction to review a district court judgment in a matter appealed from the action of the county commissioners refusing relief against an assessment where the determination of the case may rest on the violation of a statute without invoking a constitutional provision to the same effect. Board of Com'rs of Teller County v. Independence Consol. Gold Min. Co. [Colo.] 79 P. 1012, following Pilgrim Con. M. Co. v. Board of County Com'rs of Teller Co. [Colo.] 76 P. 364.

81. Supreme court has no jurisdiction on constitutional ground, where instructions authorized a verdict by three-fourths of the jury, but the verdict in fact returned was unanimous. Kimble v. St. Louis & S. R. Co. [Mo.] 81 S. W. 887; Meng v. St. Louis & S. R. Co. [Mo.] 81 S. W. 907; Portwright v. St. Louis Transit Co. [Mo.] 81 S. W. 1091; Shareman v. St. Louis Transit Co. [Mo.] 85 S. W. 358; Hensler v. Stix [Mo.] 84 S. W. 894.

82. In an action for land occupied by the way of a railroad and defended by a plea of prescription, questions of taking, expropriation and the statutes thereon are involved. Scovell v. St. Louis S. W. R. Co. [La.] 38 So. 582.

83. Appeal goes direct to U. S. supreme court if jurisdiction of a Federal court "as such" is questioned. See post, "Federal review."

84. To allow review in supreme court, the court of appeals need not expressly reverse its own former decision; it is enough that the decisions are in conflict. Red River, etc., R. Co. v. McKerley [Tex.] 86 S. W. 921. In Indiana, where a petition for a transfer from the appellate to the supreme court is filed on the ground of conflicting decision, the opinion only of the appellate court and not the record in the case is looked to. City of Huntington v. Lusch [Ind.] 71 N. E. 647.

85. Supreme court held not to have jurisdiction to issue writ of error where questions considered in court of appeals in two districts were distinguishable, and hence one did not overrule the other. Hall v. International & G. N. R. Co. [Tex.] 81 S. W. 520.

86. This is ground for certification in some states. See post, § 4E.

87. Question whether license or occupation tax is a tax which may be required as a condition precedent to transaction of business, the ad valorem tax having been paid, does not involve construction of revenue laws so as to give supreme court appellate jurisdiction. City of St. Joseph v. Metropolitan Life Ins. Co. [Mo.] 81 S. W. 1080. A bill to enjoin the enforcement of a municipal assessment involves matters of revenue. Sumner v. Milford, 112 Ill. App. 623. An objection to the statement of the cause of action in a suit to recover a poll tax does not without notice show that a construction of the revenue laws is involved. State v. Holland [Mo.] 85 S. W. 356.

88. **A license case dependent on facts** goes to the court of appeal if the amount suffices to take it there on the facts, the validity of the tax being undisputed. State v. Court of Appeal for Parish of Orleans [La.] 36 So. 472.

89. Easement for use of a switch track involved and entitled the party to appeal to the supreme court. Stratton's Independence v. Midland Terminal R. Co. [Colo.] 77 P. 247. An issue whether land was dedicated as a street involves a freehold. City of Mattoon v. Noyes, 113 Ill. App. 111. Bill to remove cloud from title held not to involve freehold. Getzelman v. Blazier, 112 Ill. App. 648, following Prouty v. Moss, 188 Ill. 84. Issue on plea of liberum tenementum to trespass q. c. f. involves a freehold. Schwartz v. McQuaid, 115 Ill. App. 353. A bill to set aside a conveyance as in fraud of creditors or to declare premises subject to be sold to pay the debts of another than the one in whom the title stands does not involve a freehold. Brockway v. Kizer [Ill.] 74 N. E. 120. A right granted by ordinance to maintain for 50 years a passage from a building to an elevated street railroad is neither a franchise nor a freehold. City of Chicago v. Rothschild & Co. [Ill.] 72 N. E. 698. No freehold is involved in a controversy between the administrator of a decedent's estate and the heirs relative to the sale of land to pay debts. Thomas v. Waters [Ill.] 72 N. E. 820. A suit involving the validity of a tax deed on which the period of redemption has

validity thereof when involved,[92] or title to office,[93] or questions involving civil or political rights,[94] a minimum[95] or maximum amount as prescribed by statute[96] or constitution,[97] "demanded,"[98] "involved,"[99] "in controversy,"[1] or "recovered,"[2]

expired involves a freehold. Glos v. Stern [Ill.] 72 N. E. 1057. The final determination of a suit resulting in the gain or loss of an estate, involves a freehold. Kellogg Newspaper Co. v. Corn Belt Nat. B. & L. Ass'n, 105 Ill. App. 62. A suit to set aside a conveyance between the parties as obtained by fraud involves a freehold. Hursen v. Hursen [Ill.] 70 N. E. 904.

90. A suit to enjoin the collection of tolls on the ground that the toll road company's charter had expired or been forfeited does not involve title to land. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo.] 86 S. W. 170. Action by an unsuccessful defendant in ejectment to recover the value of improvements made by him on the land. Bristol v. Thompson [Mo. App.] 83 S. W. 780.

Liens: A suit to impress realty with a lien or to cancel and set aside a deed thereto involves title to realty, and supreme court has jurisdiction of appeal. Chrisman v. Linderman [Mo. App.] 81 S. W. 461. Where the lien on land created by the suing out of an attachment is waived before judgment, the title to land is not involved. Rhodes v. Frankfort Chair Co. [Ky.] 79 S. W. 768.

Judgment involving a homestead or one incidental to such a judgment goes to supreme court. Durke v. Crane [La.] 36 So. 306. Whether a homestead set off to minors may be sold during the minority because it has increased in value beyond the amount allowed involves title to land. Brewington v. Brewington [Mo. App.] 85 S. W. 640. Supreme court of Missouri, not court of appeals, has jurisdiction of appeal from order quashing execution levy on realty claimed to be exempt as homestead. Lawson v. Hammond [Mo. App.] 81 S. W. 656.

Condemnation proceedings involve title to real estate. City of Tarkio v. Clark [Mo.] 85 S. W. 329; In re Topping Ave. [Mo.] 86 S. W. 190. Where plaintiff claims land occupied by defendant under alleged condemnation and a claim of adverse possession, an appeal lies from a judgment in plaintiff's favor for $132 under a special finding of tenancy, since it settles rights relative to the land. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635.

91. No appeal from Texas court of civil appeals to supreme court in boundary cases. Smithers v. Smith [Tex.] 81 S. W. 283.

92. A defense of ultra vires does not involve a franchise. Clark v. Assets Realization Co., 115 Ill. App. 150; Rostad v. Chicago Suburban Water & Light Co. [Ill.] 71 N. E. 978.

93. Office of school director is an office under the state within Const. art. 6, § 12, conferring exclusive jurisdiction on the Missouri supreme court in cases involving title to such offices. State v. Fasse [Mo.] 88 S. W. 1.

94. Right to be employed, though statutory, is not. State v. Sewerage & Water Board [La.] 37 So. 878.

95. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 854. Where only $100 damages and costs were demanded in a suit on a traverse bond, the court of appeals has no jurisdiction. Caldwell v. McVean [Ky.] 82 S. W. 992. Action on forthcoming bond held to involve more than $200. Brady v. Fraley's Adm'x [Ky.] 84 S. W. 750. Under Ky. St. 1903, § 950, in order that an appeal may lie to the court of appeals, the "value in controversy" must be not less than $200. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635.

96. A judgment in a bankruptcy proceeding reversing a referee's decision relative to a homestead exemption in favor of a creditor whose claim is $2,000 involves over $500 and entitles the party aggrieved to appeal to the circuit court of appeals. Bankruptcy Act, § 25a, subd. 3. Burow v. Grand Lodge of Sons of Hermann of Texas [C. C. A.] 133 F. 708.

97. $2,000 in Louisiana. State v. Sewerage & Water Board [La.] 37 So. 878; Wagner Co. v. Monroe [La.] 37 So. 974.

98. In Illinois, where there was no trial on an issue of fact, appeal or error lies from the appellate to the supreme court if the amount claimed exceeds $1,000. Willard v. Zehr [Ill.] 74 N. E. 107.

99. Tieman v. Johnston [La.] 38 So. 75; Wagner Co. v. Monroe [La.] 37 So. 974; State v. Sewerage & Water Board [La.] 37 So. 878; State v. Board of Assessors [La.] 37 So. 878; Succession of Fullerton [La.] 38 So. 151. No appeal to either of the reviewing courts of Indiana lies in cases not involving more than $50, unless the validity of a franchise, ordinance, or other similar question is involved. Sears v. Carpenter [Ind.] 74 N. E. 244. Where the wife sues for damages for personal injuries and the husband joins, claiming expenses as damages, the **sum total of both demands** is the test of appellate jurisdiction. La Groue v. New Orleans [La.] 38 So. 160. Judgment may be reversed when the amount in controversy is sufficient to give appellate jurisdiction, though the plaintiff in error has been **prejudiced in a sum less** than the jurisdictional amount. But the costs will be allowed defendant. Wallace v. Leroy [W. Va.] 50 S. E. 243. The amount of the judgment remaining after **entry of remittitur** ordered at same term controls as to the amount involved. Merchants' Loan & Trust Co. v. Bradley [Ill.] 71 N. E. 343. The amount in dispute on appeal from a money judgment is the **amount of the judgment and not the amount of the verdict,** the verdict having been reduced in the trial court as excessive. Hensler v. Stix [Mo.] 84 S. W. 894.

Counterclaims: Where, in suit for $200, defendant loses on his plea of payment, but wins on counterclaim for $73, the court of appeals has jurisdiction of his appeal under Ky. St. 1903, § 950, there being $200 involved. Kefauver v. Kefauver [Ky.] 83 S. W. 119. Where defendant denies the existence of a cause of action in favor of plaintiff and pleads a set-off, and plaintiff has judgment,

including[3] or excluding[4] costs,[5] interest, and other items,[6] according to the terms of the statute.

the amount involved is the amount of the judgment plus the amount of the set-off pleaded (Merchants' Loan & Trust Co. v. Bradley, 210 Ill. 128, 71 N. E. 343); but where plaintiff's cause of action is not wholly denied and plaintiff has judgment, the amount involved cannot be greater than the amount of the judgment (Id.). Where an action involves claims and offsets, the amount that determines the jurisdiction of the appellate court, as to plaintiff, is the amount of his claim plus the judgment rendered against him. Longacre Colliery Co. v. Creel [W. Va.] 50 S. E. 430. Where suit is brought for $300 and $270 is tendered into court, the amount in controversy is only $30 and the case is not appealable, the amount in controversy being less than $200. Stewart v. Hanna [Wash.] 76 P. 688.

Shares claimed from a fund or estate: The value of an insolvent estate to be distributed and not the amount provisionally distributed tests the appealability of an annual account. In re New Iberia Cotton Mills Co. [La.] 37 So. 8. In a suit to set aside a conveyance as fraudulent as to creditors, the appeal will not be dismissed because the sum due to those summoned as appellees is less than the jurisdictional amount, where the various sums decreed against the purchaser in favor of several creditors exceeds such amount in the aggregate, where there is a general appearance by counsel for appellees, all of whom have identical interests. In the absence of such appearance, court will direct process to issue against those not served. Wheby v. Moir [Va.] 47 S. E. 1005. In a suit by an heir for collation, the value of the estate and not of one of the shares claimed is the amount involved. Spaun v. Helen [La.] 36 So. 949. Amount held to exceed $2,000 giving jurisdiction to supreme court. Id. The court of civil appeals and not the supreme court has jurisdiction of an appeal by an executor from an order directing him to pay $3,500 to a legatee on account of her distributive share, where she claims no more than that sum, the only question being whether she shall have that or nothing. Held, that no question concerning land was involved. Berkemeier v. Peters [Mo.] 83 S. W. 750. Where the existence of a partnership and the subjection of certain assets to firm debts was involved, the supreme court has jurisdiction, though plaintiff's claim is less than $200.00. Lapp v. Clark's Adm'r [Ky.] 85 S. W. 717. When a partial account of a receiver is appealed, the liability which appellant may be required as stockholder to pay if the account stands is not the amount involved. In re New Iberia Cotton Mills Co. [La.] 37 So. 8.

In an action on a bond the amount involved is not the amount of the penalty but **the damages alleged.** Burnside v. Wand [Mo. App.] 84 S. W. 995.

Fraudulent conveyances: Amount of execution and not value of land is test where judgment creditor assails conveyance as fraudulent. Courtney v. Rigmaiden [La.] 36 So. 704. Where account filed in justice's court contained no claim for interest from date of loss sued for to time of trial as an item of damage, and there were no written pleadings, such interest could not be allowed to the date of the judgment recovered by plaintiff, both in justice's and county court, to which an appeal was afterwards taken, so as to bring the amount in controversy, within the jurisdiction of the court of appeals. Western Union Tel. Co. v. Garner [Tex. Civ. App.] 83 S. W. 433; Robinson v. Lamoureaux [Kan.] 80 P. 595.

The amount involved is fixed by the pleadings: Wall v. Mount [Ga.] 49 S. E. 778. The supreme court has no appellate jurisdiction of an action for damages in which the amount involved is **not susceptible of valuation.** Scheurich v. Southwest Missouri Light Co. [Mo.] 81 S. W. 1226.

Where it appears as a matter of law from the pleadings that there is **no right to recover** certain items claimed, **such items cannot be considered** in calculating the amount involved. Franklin Life Ins. Co. v. Blackwell [Tex. Civ. App.] 87 S. W. 361.

When the sum demanded is not the real amount of damages, **the real sum** and not the sum demanded **will govern** all questions of jurisdiction. Smith v. Chesapeake & O. R. Co. [Ky.] 82 S. W. 410. Where the damages prayed for and shown amounted to $150, an amended complaint alleging $75 additional damages held a mere sham designed to bring the case within Ky. St. 1903, § 950, requiring that the amount in controversy should be $200 or there should be no appellate jurisdiction. Id.

The modes for ascertaining and computing the amount are more fully discussed in Jurisdiction, 4 C. L. 324.

1. In an action to recover personal property, the amount in controversy is the value as found by the trial court, not the value alleged. Graves v. Thompson [Wash.] 77 P. 384. And alleged damages for detention cannot be added for the purpose of determining whether the amount is sufficient. Id. Where the petition in a suit against two persons alleges that each is liable for the amount sought against the other, the aggregate of the amounts claimed from both is the amount in controversy. International & G. N. R. Co. v. Lucas & King [Tex. Civ. App.] 84 S. W. 1082. Amount in controversy is the amount which might be recovered under the petition, not the amount of the recovery had. Gulf, etc., R. Co. v. Fromme [Tex.] 84 S. W. 1054. The test of appellate jurisdiction in West Virginia where plaintiff below is plaintiff in error is the amount actually demanded in the court below, less the amount recovered. Wallace v. Leroy [W. Va.] 50 S. E. 243.

2. Where an appeal is taken from a judgment for the payment of money, the amount in controversy for the purposes of jurisdiction is determined by the amount of the judgment. Astwood v. Wanamaker [Pa.] 58 A. 139. In Iowa where the trial court could consistently have rendered a judgment for over $100, the supreme court has jurisdiction without a certificate, irrespective of

No appeal lies in Kentucky from the grant of a divorce.[7]

Bankruptcy orders[8] and as a rule probate[9] and administration orders,[10] and lunacy or curatorial proceedings,[11] are appealable according to terms of statutes regulating such matters.

Eminent domain proceedings[11a] are covered by statute, as shown below.[11b]

Federal review[12] of state or territorial decisions, or the right to a further appeal from the circuit court of appeals to the United States supreme court, or the right of direct appeal to it, depends on the existence of a real, meritorious, Federal question[13] set up[14] and necessarily involved, and finally[15] decided adversely to ap-

the amount of the judgment actually rendered. Waid v. Waid [Iowa] 99 N. W. 720. Where the damages are susceptible of direct proof and the judgment does not exceed $1,000, no appeal lies from the appellate to the supreme court without a certificate of importance. Amount remaining after remittitur controls. Merchants' Loan & Trust Co. v. Bradley [Ill.] 71 N. E. 343. The supreme court of appeals has no jurisdiction in error unless the judgment is over $100. But an order setting aside a judgment of $100 conferred jurisdiction as the accrued interest on the judgment brought the judgment within the amount limited by statute. State v. Boner [W. Va.] 49 S. E. 944. Reversal of a judgment on directed verdict for defendant in a personal injury case is not appealable, though damages in $15,000 are claimed. Avery v. Nordyke & Marmon Co. [Ind.] 73 N. E. 119.

3. Interest when demanded is included. Appeal from city court of Yonkers. Richardson & Boynton Co. v. Schiff, 87 N. Y. S. 672.

4. An appeal lies in Indiana from the appellate to the supreme court only when the amount in controversy exclusive of costs and interest exceeds $6,000. No appeal where judgment on sustaining demurrer to complaint is affirmed, though damages are laid at $10,000. Crum v. North Vernon Pump & Lumber Co. [Ind.] 72 N. E. 587; Leonard v. Whetstone [Ind.] 72 N. E. 1045.

5. The commissioner's fees are excluded under a statute fixing the amount in controversy "exclusive of interest and costs." Rhodes v. Frankfort Chair Co. [Ky.] 79 S. W. 768.

6, 7. Steele v. Steele [Ky.] 84 S. W. 516.

8. Disallowance of more than $500 of claim for franchise tax against bankrupt corporation is appealable under Bankruptcy act. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858. A judgment confirming a composition is reviewable by appeal under section 25a. In re Friend [C. C. A.] 134 F. 778. See, also, Bankruptcy, 3 C. L. 434.

9. See, also, Wills, 4 C. L. 1863.

10. An order refusing to vacate a decree of distribution and settlement of final account and an order denying an application to vacate an order settling an administrator's account and discharging him are not enumerated in Code Civ. Proc. § 1722, subd. 2, amended by Sess. Laws 1899, p. 146, providing what orders may be appealed from the district to the supreme court in probate matters, and are therefore not appealable. In re Kelly's Estate [Mont.] 78 P. 579. The supreme court has jurisdiction to review the finding of the circuit court on appeal from an order of the probate court fixing the fees of an attorney of an executor and determining from what fund they shall be paid. Ex parte Landrum [S. C.] 48 S. E. 47.

Substantial rights affected: In a proceeding to compel an accounting by an executor of an administrator, the denial of a motion to refer on the ground that the answer did not set up a valid plea in bar, when in fact it did do so, is appealable, since it involved a substantial right of plaintiffs. Jones v. Sugg [N. C.] 48 S. E. 575. Under Gen. St. 1901, § 2994, no appeal lies to the district court from an order of the probate court refusing to revoke letters testamentary or of administration. Graves v. Bond [Kan.] 78 P. 851. Supreme court has only such jurisdiction as is conferred by law under Const. art. 6, § 4, conferring such appellate jurisdiction as may be provided by law. In re Cahill's Estate [Cal.] 76 P. 383. An order denying a motion to vacate an order setting aside a homestead out of the estate of a decedent is not enumerated in Code Civ. Proc. § 963, subd. 3. Id. See, also, Estates of Decedents, 3 C. L. 1238.

11. Prior to the enactment of "an act providing for appeals from probate courts in matters pertaining to lunatics and habitual drunkards" (1905) no such right of appeal existed. State v. McCowen [Kan.] 80 P. 954.

11a. See 3 C. L. 182.

11b. Determination of preliminary questions may be reviewed on error. Pittsburg, etc., R. Co. v. Tod [Ohio] 74 N. E. 172; Dayton & U. R. Co. v. Dayton & M. Traction Co. [Ohio] 74 N. E. 195. Judgment of circuit court confirming inquisition in proceedings by a mining company to condemn land for a railroad is not reviewable. New York Min. Co. v. Midland Min. Co. [Md.] 58 A. 217. No appeal lies from an order refusing to appoint appraisers in proceedings to condemn land for the construction of a dam and dismissing such proceedings. Noblesville Hydraulic Co. v. Evans [Ind.] 72 N. E. 126.

12. See 3 C. L. 190.

13. Defendant carrier, sued in personal injury action by passenger, having claimed immunity because of use of equipment required by interstate commerce commission, the case was one involving a claim of immunity under Rev. St. U. S. § 709, warranting writ of error to Federal supreme court. Mathew v. Wabash R. Co. [Mo. App.] 81 S.

pellant[16] in the decision below. Review is direct in the supreme court if there is a question of construction of the Federal constitution[17] or of treaties,[18] or of the jurisdiction of a United States court "as such."[19] Appeal grounded on a constitutional question goes from the district to the Federal supreme court even in habeas corpus cases.[20] The provision for direct appeal to the supreme court applies to proceedings to compel the production of papers before the Interstate Commerce Commission.[21]

W. 646. Refusal of mandamus to enforce a right claimed under the Federal constitution presents a Federal question. Detroit, etc., R. Co. v. Osborn, 189 U. S. 383, 47 Law. Ed. 860. A finding that a conveyance left no estate in the grantor which would pass by a sale in bankruptcy of his interest in the land presents no Federal question. Ex parte Republic of Columbia, 25 S. Ct. 107. A case involving title under a patent from the United States is not appealable from the circuit court of appeals. Bonin v. Gulf Co., 25 S. Ct. 608.

Denial of comity by one state: Whether a corporate contract was ipso facto void because in contravention of statutes governing foreign corporations and hence unenforceable in another state, held not to involve the full faith and credit clause of the Federal constitution. Allen v. Alleghany Co., 25 S. Ct. 311. Whether the courts of one state should sustain an action upon principles of comity between the states is a question within the exclusive jurisdiction of the state court. Action on corporate contract in contravention of statute regulating foreign corporations. Allen v. Alleghany Co., Id. A decision of a state court that a pleading does not disclose the defense that a note was given in course of business by a foreign corporation without complying with the state statutes involves only a local question. Id.

Where Federal jurisdiction depends only on diversity of citizenship, there is no appeal from the circuit court of appeals. A suit between citizens of different states involving land grants of their respective states is such a case. Stevenson v. Fain, 25 S. Ct. 6.

What constitutes a Federal question is fully treated in the topic Jurisdiction, 4 C. L. 324.

14. When set up below: Federal question first raised by petition for rehearing in highest state court too late to support appellate jurisdiction of Federal supreme court, where state court made no reference to it in denying petition. McMillen v. Ferrum Min. Co., 25 S. Ct. 533. A request for a directed verdict asserting rights under the Federal constitution which, if they exist, entitle the party to such direction, properly saves the Federal question. National Mut. Bldg. & Loan Ass'n v. Brahan, 24 S. Ct. 532. Highest state court may decline to reopen, on second appeal, question of service of summons, which it has upheld on first appeal, without thereby making case for writ of error from Federal supreme court, where claim that service was invalid under Federal constitution was first set up on second hearing in trial court. Western Electrical Supply Co. v. Abbeville Elec. Light & Power Co., 25 S. Ct. 481.

The Federal constitution must be specified: Layton v. Mo., 187 U. S. 356, 47 Law. Ed. 214.

15. Reversal and remand of equity case held not final. Schlosser v. Hemphill, 25 S. Ct. 654. See, also, ante, § 4B.

16. Where the constitutional question was decided in appellant's favor, it confers no jurisdiction at his instance. Empire State-Idaho Min. & Developing Co. v. Hanley, 25 S. Ct. 691.

17. The giving of such effect as res judicata to a judgment as to deprive parties of their property without the finding of a vital question is within the due process clause, and direct appeal lies from the circuit court. Fayerweather v. Ritch, 25 S. Ct. 58. A contention that judgments offered in evidence were rendered without due process of law does not involve the construction of the Federal constitution so as to authorize a direct appeal. Cosmopolitan Min. Co. v. Walsh, 24 S. Ct. 489.

18. That the construction of a treaty is questioned only as bearing by way of argument on the construction of a statute does not authorize direct appeal. Sloan v. United States, 193 U. S. 614, 48 Law. Ed. 814.

19. Dismissal by the circuit court for want of jurisdiction in the state court from which the case had been removed does not raise a question of the jurisdiction of a Federal court as such. Courtney v. Pradt, 25 S. Ct. 208. It is only where the jurisdiction of a United States court as such is questioned that a direct appeal lies from the district to the supreme court. Schweer v. Brown, 25 S. Ct. 15. The objection that an attachment suit in aid of an action at law was not cognizable in a Federal court to which it had been removed because it was equitable in form does not assail the jurisdiction of a Federal court as such. Courtney v. Pradt, 25 S. Ct. 208. A motion to remand to state court not in terms questioning the jurisdiction of the Federal court as such does not authorize a direct appeal. Id.; Remington v. Central Pac. R. Co., 25 S. Ct. 577. Dismissal by Federal court after removal because of insufficient service of process warrants direct appeal. Remington v. Central Pac. Co., 25 S. Ct. 577. Validity of service of process from Federal court on resident director of foreign corporation involves jurisdiction of Federal court as such. Kendall v. American Automatic Loom Co., 25 S. Ct. 768; Board of Trade of Chicago v. Hammond Elevator Co., 25 S. Ct. 740. Question as to jurisdiction arising solely from the application of the rules of procedure as to bringing in parties does not authorize direct appeal. Bache v. Hunt, 24 S. Ct. 547.

Appeals and writs of error from district courts of Alaska are governed by Alaska Civil Code (31 Stat. 414, c. 51), and not by the Territorial Courts Appeals Act (18 Stat. pt. 3, p. 27, c. 80).[22]

(§ 4) *D. Reviewableness may depend on the parties,*[23] as where states or their political subdivisions[24] stand as litigants.

(§ 4) *E. Certifiable or reserved questions and reported cases*[25] usually are predicated on questions of jurisdiction,[26] importance, doubt, or conflict,[27] or several of these.[28] The question[29] and not the case is certifiable, and must be a question of law,[30] and be clearly[31] and concretely put, and be necessary[32] or material to a decision. Reports in Maine are intended to take up the whole case; hence the reporting of questions stipulating for final determination of all others by the trial judge is bad.[33]

§ 5. *Courts of review*[34] *and their jurisdiction* exist by force of statute[35] or

20. In re Marmo, 138 F. 201.

21. Interstate Commerce Commission Co. v. Baird, 24 S. Ct. 563.

22. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539.

23. See 3 C. L. 191.

24. A school district is not a political subdivision of the state within Mo. Const. art. 6, § 12, so as to give the supreme court jurisdiction of an appeal in a case in which such district is a party. School Dist. No. 1, Tp. 24, Range 4, v. Boyle [Mo.] 81 S. W. 409.

25. See 3 C. L. 191. The Vermont statute providing that when exceptions are taken and filed in a cause in county court, the court may, in its discretion, pass the same and the cause to the supreme court before final judgment for determination of the exceptions, has no application to suits in chancery. Taft v. Mossey [Vt.] 59 A. 166.

26. In some states the case is transferred by certification of a jurisdictional fact which is disclosed conferring jurisdiction on another court. See post, § 15B.

27. A difference of opinion between a court of appeals and the supreme court does not authorize certification. Smith v. Conner [Tex.] 84 S. W. 815. A writ of mandamus to compel a court of civil appeals to certify a case to the supreme court by reason of an alleged conflict between its decision and that of another court of civil appeals, will be denied where the supreme court finds that the alleged conflicting decisions are plainly distinguishable. Gen. Laws 1899, p. 170, c. 98, requires court of appeals to certify question in such cases. Shirley v. Connor [Tex.] 80 S. W. 984. The court of civil appeals is not required to certify a case where its conclusion is supported by decisions of the supreme court, though in conflict with decisions of another court of appeals. Stark v. Guffey Petroleum Co. [Tex. Civ. App.] 80 S. W. 1080.

Differences of opinion between courts of appeal on a question of costs, which is largely **on a matter of discretion,** does not authorize certification. Smith v. Conner [Tex.] 84 S. W. 815. Though the constitution provides for the certification of a case to the supreme court when "any one of the judges" of the court of appeals shall deem its decision contrary to its previous decision or the decision of another court of appeals, a case may be certified when the entire court deems its decision contrary to that of another court of appeals. Rodgers v. Western Home Town Mut. Fire Ins. Co. [Mo.] 85 S. W. 369.

28. Judgment affirmed where it appeared that lower court followed decision of supreme court, but question certified to supreme court by Kansas City court of appeals, since it appeared that the decision of the former conflicted with one of the St. Louis court of appeals, and determination of question was important. Evans v. Holman [Mo. App.] 80 S. W. 17.

29. A question "whether there is any evidence in the case that will entitle plaintiff to a verdict" is good. Bauschard Co. v. Fidelity & Casualty Co., 21 Pa. Super. Ct. 370.

30. Citizens' Nat. Gas Co. v. Calvert, 26 Pa. Super. Ct. 312. A reservation which embraces a mixed question of law and fact is erroneous. Coolroth v. Pennsylvania R. Co. [Pa.] 58 A. 808. Where the decision of the appellate division in condemnation proceedings involved only the question as to the sufficiency of the damages awarded to property owners because of the construction of an elevated railroad, there are no questions of law involved entitling plaintiff to a certificate of questions of law to the court of appeals pursuant to Code Civ. Proc. § 190, subd. 2. In re Brooklyn Union El. R. Co., 91 N. Y. S. 158.

31. Must be clearly stated and the facts on which it arises be admitted on the record or found by the jury in order that exceptions may be taken and a review had. Citizens' Nat. Gas Co. v. Calvert, 26 Pa. Super. Ct. 312.

32. One which rules the case so completely that its decision will warrant a binding instruction. Citizens' Nat. Gas Co. v. Calvert, 26 Pa. Super. Ct. 312. A demurrer based on a mere formal defect in a declaration is not certifiable to the supreme court. Miller v. Boyden, 22 R. I. 441, 48 A. 444; Cox v. American Agricultural Chemical Co., 24 R. I. 503, 53 A. 871.

33. La Forest v. Wm. L. Blake Co. [Me.] 60 A. 899. It was entertained in this case but the practice was condemned, and a precedent disavowed.

34. See 3 C. L. 192.

35. The superior court in Pennsylvania has jurisdiction on appeal in mandamus cases, but not where the purpose of the

organic law,[36] and consent of parties will not confer jurisdiction.[37] Therefore, an appeal from a tribunal that was without jurisdiction confers none;[38] but since an appeal affords opportunity for a hearing anew before an impartial tribunal, the fact that one of the members below was disqualified is not a jurisdictional defect so as to prevent jurisdiction from attaching on appeal.[39] As between courts of primary and final appeal,[40] the jurisdiction nearly always depends on the existence of one or more of the criteria mentioned in the previous section.[41]

Appellate jurisdiction must be supported by a sufficient original or antecedent appellate jurisdiction to pronounce the judgment being reviewed,[42] and by orderly procedure efficient to bring up the cause,[43] else it can do naught but dismiss.[44] The appelate jurisdiction of the Federal courts in ordinary litigation is divided between the circuit court of appeals and the supreme court.[45] Error in transferring

writ is to compel inspection of the books of a corporation. Neubert v. Armstrong Water Co., 26 Pa. Super. Ct. 608.

36. The general assembly has no power to create a city court and provide for a direct writ of error therefrom to the supreme court in any municipality other than an incorporated city. A recital in the act that the court is established in a named "city" is not binding on the courts when the municipality is not in fact a city. White v. State [Ga.] 49 S. E. 715. Municipality of Sylvester being a town at the time of the establishment of a city court therein (Acts Aug. 11, Aug. 13, Aug. 15, 1904, Acts 1904, pp. 207, 240, 644, 645) such court is not a constitutional city court, and no writ of error lies therefrom to the supreme court. Id. It is beyond legislative power to change the constitutional courts or their jurisdiction. See Constitutional Law, 3 C. L. 730; Courts, 3 C. L. 970; Jurisdiction, 4 C. L. 324. Under a constitution providing that the supreme court shall have appellate jurisdiction throughout the state and such original jurisdiction as the general assembly may confer, the legislature cannot confer both original and appellate jurisdiction on the supreme court in cases brought before it by appeal from an inferior court. Parkison v. Thompson [Ind.] 73 N. E. 109.

37. Midler v. Lese, 91 N. Y. S. 148. There being no authority for consolidating common-law and admiralty cases, consent of parties to such consolidation and an appeal from the admiralty case will not bring up the action at law. Shotter Co. v. Larsen [C. C. A.] 134 F. 705.

38. Bickford v. Franconia [N. H.] 60 A. 98; Chicago, etc., R. Co. v. Salem [Ind.] 70 N. E. 530. An appeal from a pretended judgment rendered by a person having no judicial powers confers no jurisdiction on the appellate tribunal. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46. An appeal does not lie from a decree by the probate court fixing the mode of use of the streets by a telephone company under § 3461 Rev. St., such court having no authority to fix such mode. Cincinnati v. Queen City Tel. Co., 2 Ohio N. P. (N. S.) 349.

39. Bickford v. Franconia [N. H.] 60 A. 98.

40. Where a decree of the orphan's court following the petition adjudicates matters over which the circuit court has no jurisdiction on appeal, the appeal lies not to the circuit but to the court of appeals. Stonesifer v. Shriver [Md.] 59 A. 139. Appeals from final orders of the county court under the levee act lie to the circuit court and not to the appellate court. Where confirmation of special assessments is involved the appeal is to the supreme court. In re Petition of Wm. McCaleb, 105 Ill. App. 28.

41. See ante, § 4C. The appellate court of Illinois cannot pass upon the validity of a statute. Village of Morgan Park v. Knopf, 111 Ill. App. 571. An appeal in a mandamus case as in other cases lies to the appellate court rather than to the supreme court unless some constitutional or other question is involved authorizing appeal to the supreme court. Watts v. Sangamon County [Ill.] 72 N. E. 11. The appellate term in New York has no jurisdiction to entertain a motion for a new trial upon exceptions ordered to be heard by it in the first instance before judgment. Dickson v. Manhattan R. Co., 91 N. Y. S. 36.

42. Appellate judgment held void. Wilbourn v. Hurt [Ala.] 36 So. 768. On determining that the court below had no jurisdiction, the appellate court has no further power. Texas & P. R. Co. v. Walter Hunt & Co. [Tex. Civ. App.] 85 S. W. 1168. See, also, ante, § 4B, that the judgment must have been made in at least the semblance of jurisdiction to be reviewable.

43. See post, § 6. If the return day be too early, no jurisdiction even to amend the writ is gained. Was returnable to pending term. Barnett v. Hickson [Fla.] 37 So. 210.

44. An appeal taken when not authorized confers no jurisdiction on the appellate court except to make its order of dismissal. Humbird Lumber Co. v. Morgan [Idaho] 77 P. 433. While a district court is not authorized to review judgments of a probate court taken to it on appeal it may hear a motion to dismiss for want of jurisdiction. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558. If any precedent acts are lacking there is no jurisdiction to do aught but dismiss or perhaps supervise the court below. State v. Sommerville [La.] 36 So. 864.

45. A suit involving a treaty of the United States is appealable directly to the supreme court, regardless of the ground of invoking the jurisdiction of the circuit court, and the circuit court of appeals

a case from one division of the court to another is not fatal to the jurisdiction.[46] The action of a Federal court vacating a decree rendered therein is not reviewable in a state court.[47]

A question of the jurisdiction of the appellate court may be raised at any time.[48] In Louisiana the court may decide any questions of fact, affecting its own jurisdiction, from the record if they sufficiently appear there or from facts found on a remand for that purpose.[49] If an appeal might lie to either of two courts there may be a binding election by going to the lower one.[50]

§ 6. *Bringing up the cause. A. General nature and mode of practice.*[51]—The appropriate remedy for review is discussed in another section,[52] as is the transmission and filing of the record on appeal.[53] An appeal where applicable is generally matter of right on compliance with the statutes granting it,[54] while writs of error,[55] certiorari,[56] and the like, are grantable within the judicial discretion of the court or judge to whom application is made, depending on the showing in the petition, assignments, or other necessary application. The suing out of a writ of error is a new suit,[57] while an appeal is a continuance of the action, and pending suits are not affected by legislation relating thereto.[58] Separate writs lie to separate judgments though pronounced in a consolidated trial and combined by consent in one bill of exceptions.[59]

Abatement and revival before taking appeal.—A suit abates and revivor in the trial court is necessary if a party dies before appeal is taken from a decree.[60] The intending appellee may apply for revivor against representatives of his deceased opponent;[61] but a proceeding in error being a new suit, it may be prosecuted without such revivor.[62]

(§ 6) *B. Time for instituting and perfecting.*[63]—Proceedings for review must be taken within the time limited by statute[64] or allowed by the common law.[65]

has no jurisdiction. Suit by Indian to determine rights under patent. Terry v. Bird [C. C. A.] 129 F. 592. Where the circuit court sustained a demurrer to a bill for want of jurisdiction and defendant appealed from so much of the decree as adjudged him liable for the expense of the temporary receivership, no question of jurisdiction is involved. Viquesney v. Allen [C. C. A.] 131 F. 21. Section 24a of the bankruptcy act vests in the circuit court of appeals appellate jurisdiction over all controversies arising in bankruptcy proceedings over which those courts would have had jurisdiction had they arisen in the Federal courts in other cases. Dodge v. Norlin [C. C. A.] 133 F. 363.

46. Stripling v. Maguire [Mo. App.] 84 S. W. 164.

47. Blythe Co. v. Bankers' Inv. Co. [Cal.] 81 P. 281.

48. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786.

49. Dannemann v. Charlton [La.] 36 So. 965.

50. By Laws 1899, p. 172, c. 92, a party taking a cause to the court of appeals waives a right to a review of the same by the supreme court. Blackman v. Edsall [Colo.] 80 P. 1044.

51. See 3 C. L. 193.

52. See ante, § 2.

53. See post, § 10.

54. Simpson v. First Nat. Bank [C. C. A.] 129 F. 257. Appeal from the district court in New Jersey under the act of 1902 is a matter of right. Marcus v. Graver [N. J.] 58 A. 564.

55. A writ of error is a matter for judicial determination upon a consideration of the sufficiency of the grounds for the writ stated in the petition and assignment of errors. Simpson v. First Nat. Bank [C. C. A.] 129 F. 257.

56. Marcus v. Graver [N. J.] 58 A. 564.

57. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

58. Peters v. Harman, 5 Ohio C. C. (N. S.) 650, 27 Ohio C. C. 88. The amendatory act of Mar. 25, 1902, relating to notices in appeal, does not apply to actions pending at the time of its passage. Id. In Ohio unless an act amending appellate procedure expressly provides otherwise, appeals may be taken under the law as it stood at the time the original action was begun. Charles v. Fawley [Ohio] 72 N. E. 294.

59. Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557. But where separate writs were each directed to both judgments and no objection was made till too late to sue out new ones, they were sustained. Id.

60, 61. Ropes v. McCabe [Fla.] 36 So. 715.

62. Ritchey v. Seeley [Neb.] 102 N. W. 256.

63. See 3 C. L. 193.

64. In re Blake [Conn.] 60 A. 265; Hopkins v. Crossley [Mich.] 101 N. W. 822;

The time ordinarily runs from the date when an appealable judgment or order[64]

Lynch v. Herrig [Mont.] 80 P. 240. No exception in case of death of counsel. Farmers' & Traders' Nat. Bank v. Willis [Ga.] 50 S. E. 366. The time and manner of taking an appeal to the court of appeals of the District of Columbia is governed entirely by its rules. Mulvihill v. Clabaugh, 21 App. D. C. 440. An appeal from a decree of foreclosure must be taken within one year. Acts 1899, p. 111, c. 60 Appeal from decree of foreclosure too late, but that from order confirming sale in time. Cooper v. Ryan [Ark.] 83 S. W. 328. Appeal taken within 60 days from entry of an order refusing probate of a will is in time. Code Civ. Proc. § 963, subd. 3. In re Fay's Estate [Cal.] 78 P. 340. Ten days from judgment or filing of findings of fact by the judge; but, under a rule requiring the clerk to enter the refiling of the finding after application to correct, an appeal within ten days from such refiling is seasonable. Boston Furniture Co. v. Thoms [Conn.] 60 A. 689. Under Mills' Ann. St. § 2432, the provision as to time within which order allowing appeal in irrigation cases is mandatory, and the supreme court cannot grant an extension. Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 77 P. 245. A certificate of a jurisdictional question must be certified by the Federal circuit court during the term at which the decree is entered; the court has no jurisdiction to make it subsequently, under Judiciary Act March 3, 1891, § 6. Chamberlin v. Peoria, etc., R. Co. [C. C. A.] 118 F. 32. And a reservation in the decree, reserving the right to make such further order at the foot of the decree as may seem just and proper, does not reserve the right to grant such certificate after the term. Id. If, on denial in vacation of a motion to dismiss a motion for a new trial, no writ of error is sued out and no exceptions are entered pendente lite, it is too late, after the expiration of thirty days from the date of the decision, to bring the question to the supreme court. Sumner v. Sumner [Ga.] 48 S. E. 727. An appeal from an interlocutory judgment not taken within 60 days from judgment entered as provided by Rev. St. 1887, § 4807, will be dismissed on motion. Richardson v. Ruddy [Idaho] 77 P. 972. Unless taken wtihin 60 days after entry of judgment, the supreme court is precluded from reviewing the evidence to ascertain its sufficiency to support the findings of fact. § 4807, Rev. St. 1887. Cunningham v. Stoner [Idaho] 79 P. 228. Appeal must be taken at same term. Finch v. Finch, 111 Ill. App. 481. Five years from final decree is allowed for writ of error in mechanic's lien cases. Gordon v. Sorg, 113 Ill. App. 522. In an equity case tried on depositions, a certification of the evidence must be filed within six months to be reviewed on appeal. National Surety Co. v. Walker [Iowa] 103 N. W. 492. Under Gen. St. 1901, § 3580, proceeding to reverse a judgment against a fraternal benefit association must be commenced within 60 days after rendition. Modern Woodmen of America v. Heath [Kan.] 79 P. 1091. Appeal commenced on Monday following the Saturday which was the last day is not in time though the petition was brought in on Saturday after clerk's office had closed. Gray v. Cooper [Kan.] 78 P. 812. Gen. St. 1901, § 5053, prescribing the time within which error to reverse interlocutory orders discharging an attachment or temporary injunction must be commenced, has no application to proceedings to reverse final judgment in an injunction action. Shanks v. Pearson [Kan.] 78 P. 446. The time (30 days) given to appeal suspensively from divorce does not apply to separation from bed and board. Knoll v. Knoll [La.] 38 So. 523. In Massachusetts exceptions to the finding on the ground that it was not supported by the evidence are taken too late when not taken until 20 days after the decision and on the filing of the bill. Richards v. Appley [Mass.] 73 N. E. 555. Two years in Mississippi. Chambliss v. Wood [Miss.] 36 So. 246. Rev. St. Mo. 1899, § 810, authorizing any judge of the supreme court or of either of the courts of appeals, in cases appealable to said courts, to grant an appeal within one year next after the rendition of final judgment, does not apply where an appeal is already pending when the application is made. Smith v. Flick [Mo. App.] 83 S. W. 73. The Nebraska statute of 1901 shortening the time within which appeals may be taken is valid. Chicago, etc., R. Co. v. Sporer [Neb.] 100 N. W. 813. Under Comp. Laws, § 3425, must be taken within one year from rendition of judgment. Candler v. Washoe Lake Reservoir & G. C. Ditch Co. [Nev.] 80 P. 751. Time for filing in an attachment suit is not extended by the filing of a bill of exceptions after a ruling on the motion to dissolve the attachment. Cecil v. Grant, 6 Ohio C. C. (N. S.) 65. Petition in error to the withdrawal of evidence from the jury and dismissal of suit must be filed within four months from the rendition of the judgment. McCallen v. Lake Shore & M. S. R. Co., 5 Ohio C. C. (N. S.) 366, 26 Ohio C. C. 710. Notice filed three days after entry of judgment of common pleas is sufficient on appeal to circuit. 25 Ohio Laws, 66. Kenton v. Board of Education of Mad River Tp. [Ohio] 71 N. E. 287. Ninety days from determination of motion for new trial. § 1, c. 148, p. 285, Sess. Laws 1903. Rice Fisheries Co. v. Pacific Realty Co. [Wash.] 77 P. 839. In Washington an appeal from an order denying a motion to vacate a tax foreclosure judgment is governed by the revenue statute and must be taken within 30 days from date of the order and is not extended by a petition to reconsider the order. Pedigo v. Fuller [Wash.] 79 P. 1129. Decree in suit by executor against devisees to convene creditors and administer assets for their payment, made on report of debts by a commissioner, decreeing debts against the estate and subjecting lands to their payment, must be appealed from within two years. Trail v. Trail [W. Va.] 49 S. E. 431.

65. There being no provision in the bankruptcy act or general orders fixing the time within which a petition for review of a referee's order must be filed, a reasonable time will be allowed in view of the general purpose of the act to expedite the proceedings. Crim v. Woodford [C. C. A.] 136 F. 34.

66. Where the motion for new trial pre-

becomes a finality[67] on the record,[68] and is computed according to the rules applicable to other procedure.[69] Under the Federal procedure, the writ of error must

sented no additional matters, appeal therefrom must be within the time limited for appeal from the judgment. Moore v. Henderson [Ark.] 85 S. W. 237. The year allowed in Indiana excludes the day on which judgment was rendered and includes the last day of the year. Hoerger v. Citizens' St. R. Co. [Ind. App.] 73 N. E. 1095. An order sustaining a demurrer to one defense where trial proceeded on the others must, in order to be reviewed, be taken to the supreme court within one year from the sustaining of the demurrer. Corum v. Hubbard [Kan.] 77 P. 530. In Massachusetts where the court sustains a demurrer to the declaration and does not direct judgment, the right to appeal is in abeyance until the judgment is rendered. Cummings v. Ayer [Mass.] 74 N. E. 336. The time for an appeal on the merits cannot be counted from the date of overruling an objection to the cost bill. Wadhams v. Allen [Or.] 78 P. 362. See, also, Lemmons v. Huber [Or.] 77 P. 836. Limitation as to right to appeal from a decree overruling a motion to dissolve an attachment begins to run at the date of overruling the motion. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893. A nonappealable decree is carried forward to the date of a later appealable decree, and is reviewable upon an appeal from it. Trail v. Trail [W. Va.] 49 S. E. 431. An appeal from a later decree will not review a former appealable decree, an appeal from which is barred by limitations, nor can the later decree be reversed for errors therein arising from the former appeal. Id. Under Rev. St. § 4262, as amended by Laws 1901, p. 28, c. 28, and Sup. Ct. Rule 13 (26 P. 12), the time within which proceedings in error on motion for a new trial begins to run on the date action is taken on such motion and not from the date of entry of judgment. Conradt v. Lepper [Wyo.] 78 P. 1.

67. The judgment is not final while the judgment is still under control of the trial court by reason of a motion for new trial. Clarke v. Eureka County Bank, 131 F. 145. Date when judgment was entered within meaning of Code Civ. Proc. § 939, determined. In re More's Estate [Cal.] 77 P. 407. If an exception to an order allowing an amendment and retaining the case, made after a judgment sustaining a demurrer has been sustained with directions to allow defects in the petition to be cured, be to a ruling which would have been final, the bill of exceptions should be made returnable to the next term of the supreme court. Cordele Ice Co. v. Sims [Ga.] 48 S. E. 12. An order overruling a motion for a new trial in whole or in part is a final order and proceeding to review the same must be commenced within one year. Civ. Code, § 556. Clyde Mill. & Elevator Co. v. Buoy [Kan.] 80 P. 591. An order entered in the minute book on the last day of the term allowing an attorney's fee to plaintiff's attorney held not to have become complete until spread on the order book and approved and signed by the court on the first day of the succeeding term, so that it was sufficient to object to, and pray for an appeal from, such order on that day. Fristoe v. Gillen [Ky.] 80 S. W. 823. Time runs from signature, not from rendition of judgment. Orleans & J. R. Co. v. International Const. Co. [La.] 37 So. 10. Within ten days from the signing and notification of judgment, and the time begins to run at date of the judgment, if rendered in presence of the parties, and within three days after notification, if rendered in their absence or on default of one party. Code Prac. art. 1131. Simonton v. Mitchel [La.] 37 So. 877. A party to an action may appeal by serving notice within ten days after adjournment of court. Code, § 549. Houston v. Greensboro Lumber Co. [N. C.] 48 S. E. 738. An appeal is premature if brought before a final determination is had or if the judgment be incomplete. Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74. Under 2 Ball. Ann. Codes & St. §§ 5030, 5115, 5071, 5075, a judgment in an equity case does not become final within §§ 5062, 6502, prescribing the time within which appeals may be taken and statements filed and served until the motion for a new trial is disposed of. State v. Chapman [Wash.] 76 P. 525. An appeal from an order sustaining a motion to dismiss an appeal from a justice of the peace for insufficiency of such bond and granting leave to move to amend and cure the defect on account of which the dismissal was ordered, is perfected in time where the bond is filed within twenty days after the denial of such motion. Schrot v. Schoenfeld, 23 App. D. C. 306.

68. The period within which an appeal may be taken begins to run from the entry of the judgment of record, regardless of when announced orally or in writing by the judge. In this case the appeal was taken within six months after the entry of judgment nunc pro tunc, though nearly 18 months after verdict. Stutsman v. Sharpless [Iowa] 101 N. W. 105. In New York where the appellate division reverses a judgment and grants a new trial, a further appeal is in time if taken within the statutory period after the judgment of reversal is entered, though the order granting the new trial was entered first. Wingert v. Krakauer [N. Y.] 73 N. E. 46. When an order dismissing an appeal is entered in circuit court nunc pro tunc, a petition in error to review it may be filed in the supreme court at any time within the statutory period after its actual entry. Charles v. Fawley [Ohio] 72 N. E. 294. Where, after the entry of an informal judgment on plaintiff's behalf, he prepares and has signed and entered a formal one, he is estopped from claiming that the time runs from the informal judgment entry. Herzog v. Palatine Ins. Co. [Wash.] 79 P. 287.

69. See Time, 4 C. L. 1680. Under Code D. C. § 1389, making every Saturday afternoon a holiday for all purposes, Saturdays will be counted as half days in computing the time within which an appeal from deci-

issue in time notwithstanding the time of its allowance.[70] In North Dakota the right to appeal from an order denying a motion for a new trial may be exercised after the time for appealing from the judgment has expired, provided the appeal is taken within the time limited for appealing from such orders.[71] The appellate court has no jurisdiction if an appeal is prematurely taken,[72] and it is premature if brought before performance of any of the necessary conditions.[73] "Fast" or "accelerated" appeals or writs of error are allowed in some jurisdictions and for certain classes of cases.[74] The taking of an appeal is jurisdictional and the court has no power to extend the time therefor or to cure any defect therein.[75]

(§ 6) *C. Affidavits and oaths,*[76] either of good faith[77] or to verify the grounds of appeal, are required in some states. The appellate court has no power to make any order respecting the amendment of the affidavit for appeal or the substitution of one conforming to statute for a defective one.[78] A clerical error however will be disregarded.[79]

(§ 6) *D. Notice, citation or summons.*[80]—Timely[81] and regular[82] service by

sions of the commissioner of patents must be taken. Ocumpaugh v. Norton, 24 App. D. C. 296.

70. The circuit court of appeals is without jurisdiction to review a judgment on a writ of error not issued until more than six months after entry of the judgment though it may have been allowed within that time. Act March 3, 1891, c. 517, § 11. Rutan v. Johnson [C. C. A.] 130 F. 109.

71. King v. Hanson [N. D.] 99 N. W. 1085. The additional time allowed in North Dakota applies only to those orders which require the subsequent settlement of a statement of case for the purpose of review. Id.

72. The fact that appellee granted appellant further time to file his brief does not estop him from urging a motion to dismiss. In re More's Estate [Cal.] 77 P. 407. Where notice of appeal is given prior to entry of the judgment appealed from, the appellate court acquires no jurisdiction. Code Civ. Proc. § 939. Id. That one was furnished a copy of a decree by the clerk of court certifying that the decree was there on file in his office is not a certificate that the decree had been "entered" within Code Civ. Proc. § 939. Id.

73. Order for judgment on payment of jury fee and appeal taken before fee paid. Wolff v. Wilson, 25 Pa. Super. Ct. 266. Appeal by executor from decree ordering him to make return of sale, etc. Walker's Estate, 25 Pa. Super. Ct. 256. Appeal taken before exceptions filed in case tried to court. Miller v. Cambria County, 25 Pa. Super. Ct. 591. An appeal is premature if claimed before the settlement of the case. Sherman v. Sherman [Mich.] 102 N. W. 630.

74. A judgment sustaining a demurrer to a petition cannot be taken up by fast writ of error, since it is not authorized by Civ. Code 1895, § 5540; and exceptions so made will not be considered. Johnson v. Cravey [Ga.] 48 S. E. 424. After judgment sustaining demurrer has been sustained, with directions to allow defects to be cured, a fast writ will not lie to an order permitting the petition to be amended. Cordele Ice Co. v. Sims [Ga.] 48 S. E. 12. A bill of exceptions assigning error upon an order confirming a sale by a receiver, passed before the final decree, is not such a judgment as can be brought up by fast writ of error. Farmers' & Merchants' Bank v. Burwell [Ga.] 48 S. E. 145. The jurisdiction of the supreme court to entertain cases relating to applications for a receiver which can be brought up by fast writ of error is restricted to those in which the application for a receiver has been granted or refused. Id.

75. Moe v. Harger [Idaho] 77 P. 645.

76. See 3 C. L. 196.

77. A prosecution for the violation of a city ordinance being a civil proceeding, the filing of the statutory affidavit is a condition precedent to an appeal from a conviction. Ind. T. Ann. St. 1899, § 2815, considered. Fortune v. Incorporated Town of Wilburton [Ind. T.] 82 S. W. 738. The affidavit for an appeal from a conviction for violation of a city ordinance must be filed with the justice before whom the conviction was had. Must not be filed in the appellate court. Id. An affidavit of appeal filed after judgment is entered may be sufficient, though a substitute judgment be entered. Haseltine v. Messmore [Mo.] 82 S. W. 115. In Missouri no appeal will be allowed unless appellant or his agent shall, during the term at which the judgment was rendered, file in the court his affidavit stating that such appeal is not made for vexation or delay, but because the affiant believes that appellant is aggrieved by the judgment. Rev. St. 1899, § 808. Affidavit that appeal is not taken for vexation or delay, but that justice may be done the plaintiff in the premises, held insufficient. Arkansas & O. R. Co. v. Powell [Mo. App.] 80 S. W. 336.

78. Since does not acquire jurisdiction without it. Arkansas & O. R. Co. v. Powell [Mo. App.] 80 S. W. 336.

79. "Affidavit" prayed for instead of "appeal." Hitt v. Kansas City [Mo. App.] 85 S. W. 669.

80. See 3 C. L. 196.

81. Notice of appeal must be filed and served within the statutory time. Moe v. Harger [Idaho] 77 P. 645. It is not necessary in Alabama to serve citation for appeal within 10 days. State v. United States End. & T. Co. [Ala.] 37 So. 442. A citation is not

the appellant[83] on the opposing parties[84] (or such of them as have appeared[85] by counsel[86] or whose rights will be affected by a reversal[87]) of such notice of appeal, citation, or summons as the practice requires, in due form,[88] properly signed,[89] addressed to the party to be notified,[90] is usually requisite,[91] and the notice with

jurisdictional to the extent that it must be issued within the time prescribed for taking the appeal, and where the appeal has been otherwise properly perfected, the appellate court will grant an opportunity to issue and serve a citation. Lockman v. Lang [C. C. A.] 132 F. 1. No appeal lies in a summary proceeding in Maryland unless immediate notice of intention is given and the evidence has been reduced to writing and transmitted to the appellate court. But a petition praying the rescission of an order approving and passing an administrator's final account and requiring a restatement thereof is not summary. Stonesifer v. Shriver [Md.] 59 A. 139.

82. Notice of appeal is properly served by being "left with a person having charge" of the office under Code Civ. Proc. § 1011, where it is left in a conspicuous place on the desk of appellee's attorney and called to the attention of the person in charge of the office. People v. Perris Irr. Dist. [Cal.] 76 P. 381. Where the summons in error is duly issued and delivered to an officer for service, and the officer as well as the clerk of the court informs plaintiff's attorney that the summons has been served and returned, the attorney may rely upon the presumption that the officer has done his duty. Parker v. Parker [Neb.] 102 N. W. 85.

83. A stranger acting as amicus curiae cannot give notice of appeal. Southern R. Co. v. Locke [Tex. Civ. App.] 84 S. W. 1069.

84. Service of citation on the attorney confers no jurisdiction where defendant in error is a resident. National Cereal Co. v. Earnest [Tex. Civ. App.] 84 S. W. 1101. Sureties on a cost bond filed by a nonresident plaintiff are not parties and need not be served with notice of appeal. Wagner v. Royal [Wash.] 78 P. 1094. Where a petition against a partnership for the purchase price of goods is amended at the trial so as to charge but one individually, notice of appeal need be served only on him. Padden v. Clark [Iowa] 99 N. W. 152. Where in sequestration proceedings it has been found that the assets of an insolvent corporation can in no case discharge the liabilities, and a judgment has been rendered against persons charged with the wrongful appropriation of property applicable to the payment of debts, the insolvent corporation, on an appeal from such judgment, is not an interested adverse party, so as to require service upon it of the notice of appeal, under the statute. Rev. St. 1898, § 3049. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

85. Notice of appeal must be served on all parties appearing in the action and not joining in the appeal. A corporation must be served in an appeal by stockholders on a question relative to holding meetings, management, etc. Willard v. Lucile Dreyfus Min. Co. [Wash.] 78 P. 917. On appeal from an order denying a petition to vacate a judgment, only those who appeared in the proceeding to vacate need be served and not parties in the action in which the judgment was rendered. Ball. Ann. Codes & St. § 6504. Collins v. Kinnear [Wash.] 79 P. 995.

86. An appeal as to nonresidents will not be dismissed on the motion of resident respondents because no notice of intent to appeal was served on them, where they were not represented by counsel. Cauthen v. Cauthen [S. C.] 49 S. E. 321.

87. Beach v. Wakefield [Iowa] 100 N. W. 938. Nonresident distributees of a decedent's estate. In re Pendergast's Estate [Cal.] 76 P. 962. In California, adverse parties who never appeared below are entitled to notice of appeal under Code Civ. Proc. §§ 940, 1014. Johnson v. Phenix Ins. Co. [Cal.] 80 P. 719. In an action by one executor, a notice of appeal need not be served on another executor joined as defendant because he refused to join as plaintiff; he not being an "adverse party" and would not be affected by a reversal. Sprague v. Walton [Cal.] 78 P. 645. Notice need not be served on the next friend of a minor appellant, though the judgment appealed from awards costs against both. Douglass v. Agne [Iowa] 99 N. W. 550. A lessee whose lease has expired and who claims no interest in property title to which is sought to be quieted is not an "adverse party" required to be served with notice of appeal. Merk v. Bowery Min. Co. [Mont.] 78 P. 519.

88. Notice that defendant "has appealed" instead of that "he appeals" is sufficient under Ball. Ann. Codes & St. § 6503, providing that informality or defect in notice is not ground for dismissal. James v. James [Wash.] 77 P. 1082. Where authority of "justice of the peace" and "justice of the peace court" are identical, a notice of appeal signed by the justice gives the appellate court jurisdiction of the justice of the peace court. State v. Justice Court of Tp. No. 1, Gallatin County [Mont.] 78 P. 498. That the notice of appeal is entitled "In the supreme court" is not a fatal irregularity where it clearly indicates the court and judgment appealed from, though the notice must be filed in the district court. Code, § 4115. Douglass v. Agne [Iowa] 99 N. W. 550.

89. Under Ohio Rev. St. 5227, a party may authorize his attorney to sign notice of appeal. Kefauver v. Batdorf, 4 Ohio C. C. (N. S.) 427, 24 Ohio C. C. 664; Kenton v. Board of Education [Ohio] 71 N. E. 287.

90. A notice addressed to one party is not notice to others, though served on the attorney acting for all. In re Pendergast's Estate [Cal.] 76 P. 962. A notice is insufficient as to a party to whom it is not addressed, though served on him. In re Anderson's Estate [Iowa] 101 N. W. 510.

91. An appeal is not taken until notice thereof is filed and served. Moe v. Harger [Idaho] 77 P. 645. Where no notice of appeal is served on an appellee or his attorney, the appeal will be dismissed as to him. Rice v. Bolton [Iowa] 100 N. W. 634. An

return of service is usually required to be filed.[92] Failure to serve one party does not ordinarily affect the appeal as to his co-parties who are properly served.[93] Notice in open court to a party who has appeared obviates necessity of written notice,[94] and appearance cures failure to serve notice.[95] A notice of appeal stating that the parties joining therein severally and separately appeal is equivalent to a separate notice by each appellant.[96]

(§ 6) *E. Application for leave to appeal*[97] or for a writ of error[98] made within the time[99] and in the manner required by law[1] is necessary in some jurisdictions, but not in others.[2] When required, this need does not yield to the pendency of a rehearing.[3] Practice also varies as to the necessity of an accompanying assignment of errors.[4] When required, such assignment must be filed in time.[5]

(§ 6) *F. Allocatur; order for or allowance of appeal; certificate.*[6]—An allowance of the appeal is necessary in all practices where appeal does not go as of right,[7] and in cases where it is doubtful if an appeal of right would lie, one may be

appeal being complete, the appellate court may dismiss it if appellant fails to give the statutory notice to appellee, or fails to prosecute it. Robinson v. Arkansas Loan & Trust Co. [Ark.] 81 S. W. 609. A term time appeal from an order refusing to dissolve an injunction granted at a previous term will not bring up any of the proceedings at the previous trial where no notice of appeal is given. Slusser v. Falin [Ind. App.] 74 N. E. 17. The appeal is perfected by the filing of the transcript with the proper assignments of error thereon within the year, without service of a notice on appellee. Hoerger v. Citizens' St. R. Co. [Ind. App.] 73 N. E. 1095. Where appeal is taken by one of several parties from a justice court judgment, if the others are not notified of the appeal as required by Mills' Ann. St. § 2685, no judgment can be rendered against them at the first term. Miller v. Kinsel [Colo. App.] 78 P. 1075.

92. Filing within the statutory period after service on unnecessary parties is insufficient under Ball. Ann. Codes & St. § 6503. Collins v. Kinnear [Wash.] 79 P. 995.

93. Appeal from a decree of distribution of an estate. In re Pendergast's Estate [Cal.] 76 P. 962. Service of notice of appeal from an order denying a motion for a new trial, on the adverse parties to the motion is sufficient, though a co-defendant is not served. Johnson v. Phenix Ins. Co. [Cal.] 80 P. 719. Notice to co-parties is not necessary unless their rights may be prejudicially affected by the appeal. Ewart v. Ewart [Iowa] 101 N. W. 869.

94. Brady v. Onffroy [Wash.] 79 P. 1004.

95. Stipulation held to amount to an appearance. Valley Lumber Co. v. Struck [Cal.] 80 P. 405.

96. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

97. See 3 C. L. 197.

98. In Florida, a writ of error in a habeas corpus case issued without the allowance thereof either by the trial judge or by a justice of the supreme court is a nullity. Rev. St. 1892, § 1780, as amended by chap. 4920, p. 52, Laws of 1901. State v. Vinzant [Fla.] 38 So. 366.

99. Certificate of importance must be asked and made within 20 days after rendition of judgment. Godfrey v. Wingert, 110 Ill. App. 563.

1. A prayer for an appeal made to a judge in his private office away from the court house without the clerk or docket is not made in open court. Hays v. Philadelphia, W. & B. R. Co. [Md.] 58 A. 439.

2. No written application is necessary in Alabama to appeal; the filing of approved security for costs within ten days suffices. State v. United States Endowment & Trust Co. [Ala.] 37 So. 442.

3. Godfrey v. Wingert, 110 Ill. App. 563.

4. Statement of errors usually required. New England Merchandise Co. v. Miner [Conn.] 58 A. 4. Petition for appeal must assign all the errors relied on for a reversal. Code 1887, § 3464. Hawpe v. Bumgardner [Va.] 48 S. E. 554. The filing of an assignment of errors before or at the time of the allowance of the appeal is indispensable under the eleventh rule of the circuit court of appeals. Lockman v. Lang [C. C. A.] 128 F. 279; Simpson v. First Nat. Bank [C. C. A.] 129 F. 257; Lockman v. Lang [C. C. A.] 132 F. 1. Where in proceedings by appeal and by writ of error to review the same rulings the alleged errors are the same in both proceedings, the filing of a single assignment of errors accomplishes the purpose of the rule and is sufficient to sustain the proceeding requisite to obtain the review. Lockman v. Lang [C. C. A.] 132 F. 1. Application by the party cast need not state that he is aggrieved or that there is error. Lee v. Foley [La.] 37 So. 594.

5. The assignment of errors on an appeal is filed in time when filed on or before the time when the judge signs the citation and approves the bond which he has made the condition of the allowance of the appeal. Simpson v. First Nat. Bank [C. C. A.] 129 F. 257; Lockman v. Lang [C. C. A.] 132 F. 1. The assignment of errors must be presented to the judge at the time of the settling of the bill. Special rule 1 for circuit courts. Selph v. Cobb [Fla.] 38 So. 259.

6. See 3 C. L. 198.

7. The clerk cannot grant an appeal un-

granted.[8] Allowance of an appeal may be revoked at the term at which it was made.[9] The order fixing amount of bond may be construed as allowing a devolutive appeal where the amount is too small for a suspensive appeal.[10] Where a bond is approved for appeal to the supreme court, and the appeal is allowed to the appellate court, there is no jurisdiction in the supreme court.[11] On mandamus to compel the allowance of an appeal, the merits of the judgment appealed will not be investigated.[12] The Federal district court will not allow an appeal from its decision refusing a writ of habeas corpus to one convicted in a state court, where an appeal from the state to the Federal supreme court has been dismissed.[13]

(§ 6) *G. Bonds; security; payment of costs.*[14]—Supersedeas bonds[15] and liability on appeal bonds are treated in other sections.[16] Bond or security for the payment of costs is uniformly required,[17] except as dispensed with by statutes relating to poor litigants[18] or to appeals by administrators[19] or executors,[19a] or by public officers,[20] or public corporations,[21] and must be filed in the court below.[22]

less an authenticated copy of the transcript is presented to him within the time allowed for appealing. Damon v. Hammons [Ark.] 84 S. W. 796. An order on motion in open court and entered on the minutes need not be signed. Knoll v. Knoll [La.] 38 So. 523.

8. Guthrie v. Welch, 24 App. D. C. 562.

9. Werckmann v. Taylor [Mo. App.] 87 S. W. 44.

10. Knoll v. Knoll [La.] 38 So. 523.

11. Sanitary Laundry Co. v. People, 212 Ill. 300, 72 N. E. 434.

12. State v. Sommerville [La.] 37 So. 476; State v. De Baillon [La.] 37 So. 481.

13. Ex parte Look, 134 F. 308.

14. See 3 C. L. 198.

15. See post, § 7.

16. See post, § 17.

17. Omission to file an undertaking as required by Code Civ. Proc. § 1724, renders the appeal ineffectual. Johns v. Barnes [Mont.] 78 P. 703. Appeal bond is essential to the validity of an appeal to the district court from an order of the board of county commissioners. Foresman v. Nez Perce County Com'rs [Idaho] 80 P. 1131. No bond for costs is necessary in the District of Columbia where a supersedeas bond has been given. Daney v. Clark, 24 App. D. C. 487. Statutory regulations of the right to a review upon appeal or otherwise, as regards costs and security for costs, cannot be condemned as class legislation merely because it is more burdensome for some persons than for others to comply therewith. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Reasonable regulations imposing costs and requiring security for costs as incidents of judicial proceedings to redress wrongs or protect rights do not violate the bill of rights entitling every person to "obtain justice freely and without being obliged to purchase it." Id.

18. The right to proceed in forma pauperis is purely statutory. Bradford v. Southern R. Co., 25 S. Ct. 55. There is no right to prosecute a writ of error in forma pauperis from the circuit court of appeals to the supreme court. Act July 20, 1892, applies to suits and not appellate proceedings. Id. Mills' Ann. St. § 676, permitting courts in their discretion to allow persons to sue in forma pauperis does not apply to the court of appeals. Ferrara v. Aurie Min. Co. [Colo. App.] 79 P. 302. Proof of inability to pay costs on appeal, in order to obtain a certificate authorizing an appeal without bond, must be made while the court is actually in session. Emerson v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 82 S. W. 1060. Where such proof is made before the court, there must be an order entered on the minutes showing that the court was in session. Smith v. Buffalo Oil Co. [Tex. Civ. App.] 85 S. W. 481.

19. The statute in Indiana allows administrators to appeal without bond, but extends only to cases involving the settlement of estates. Burns' Ann. St. 1901, §§ 2609-2612. An action by an administrator on a life insurance policy does not involve probate jurisdiction, and an appeal in such case is governed by the civil code. Holderman v. Wood [Ind. App.] 73 N. E. 199. An appeal by an administrator from an order directing him to give a new bond and removing him for failure to do so is governed by the civil code and not by the statute allowing administrators to prosecute appeals without bond. Moore v. Bankers' Surety Co. [Ind. App.] 73 N. E. 607. On appeal by an administrator from an order removing him he is not required to give bond as security for anything more than the costs that may be awarded against him. Fleming v. Kirby [Mich.] 100 N. W. 272.

19a. Chipman v. Wells [Ind. App.] 72 N. W. 172.

20. Where the prosecuting attorney on behalf of the state takes an appeal from a decree of the probate court determining a right to a collateral inheritance tax, no bond or notice is necessary. Humphreys v. State [Ohio] 70 N. E. 957.

21. In Mississippi no bond is required in case of an appeal by a county. Rev. Code 1892, § 93. Jones v. Rogers [Miss.] 38 So. 310. Ball. Ann. Codes & St. § 6505, providing that no bond is necessary when appeal is taken by the state, county, city, etc., does not apply to an appeal by a county auditor on his own behalf. State v. Blumberg [Wash.] 76 P. 272.

22. The court of appeals has no power to set aside its rules relating to appeals, and to permit a bond to be filed in that court in lieu of one required to be filed below.

Where several appeals are taken, a bond must be given in each,[23] and a bond can be considered as that only of the appellant recited in its body as bound to prosecute with effect, and not of all persons signing it.[24] An undertaking in form to answer in a certain sum for the defaults of several defendants constitutes one obligation.[25] In some states the bond is allowed to stand as security on a further appeal.[26] Timeliness in filing and approval is essential.[27] Additional[28] or substituted security may be required to cure inadequateness or defects,[29] but total failure to give a bond is usually deemed so fundamental to jurisdiction as to be incurable.[30] Fixing[31] and approval of the security is primarily for the trial court[32] or other officer

Darlington v. Turner, 24 App. D. C. 573. Bond may not be filed for the first time in the appellate court. Schrot v. Schoenfeld, 23 App. D. C. 421.

23. Under Code Civ. Proc. §§ 1724, 1725, 1731, where appeals are taken from the judgment and from any other appealable order except one denying a new trial, a separate undertaking must be filed for each unless all are included in the same paper and proper reference made. Pirrie v. Moule [Mont.] 81 P. 390. Notice of appeal from a judgment which also enumerated several unappealable orders appealed from, held notice of appeal from the judgment only, and a single bond was sufficient. Wadleigh v. Phelps [Cal.] 81 P. 418. If several parties join in one notice of appeal, stating that they severally and separately appeal, the effect is the same as if there were as many notices of appeal as appellants; and to make the notice effective as to any appellant an undertaking in the sum of $250 under the statute is requisite to each. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

24. Lingle v. Chicago [Ill.] 71 N. E. 590.

25. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

26. The bond required by B. & C. Comp. § 5754, on appeal from the justice to the circuit court is effectual on a further appeal to the supreme court and no further undertaking is necessary. Wolfer v. Hurst [Or.] 80 P. 419.

27. Code, §§ 30, 31, requiring undertaking on appeal from justice to be given within six days is mandatory and provision is jurisdictional. Schrot v. Schoenfeld, 23 App. D. C. 421. Though right to appeal may not be lost if undertaking, which was presented for approval in due time, is retained by court until after prescribed time, it must be presented within such time. Record held not to show that it was so presented. Id. The filing of an appeal bond within twenty days after the close of the term at which a motion for a new trial was overruled, exception taken, and notice of appeal given, is too late, where the judgment was entered and the motion was filed at a previous term. Clements v. Buckner [Tex. Civ. App.] 80 S. W. 235. Where an appeal is perfected by giving notice of appeal and filing an appeal bond, the fact that the bond is filed before the ruling on a motion for a new trial does not vitiate the appeal the notice not being given until after such ruling. Wores v. Preston [Ariz.] 77 P. 617. The court may fix any time not less than 20 days in which to file bond. Day v. Davis, 213 Ill. 53, 72 N. E. 682.

Payment of costs within the specified period is necessary in Michigan. Fees of register for return must be paid within 30 days. Trombley v. Klersy [Mich.] 102 N. W. 736.

28. The remedy of an appellee who regards the security on an appeal bond as insufficient is by motion and rule for additional security. Durham v. Straight [Ky.] 83 S. W. 581. Where the court below erroneously delegated to the clerk the duty of approving the appeal bond, the appellant will be permitted to give a new bond. Hepner v. Hepner, 112 Ill. App. 598.

29. If it incorrectly recites the judgment, the remedy is by motion for a new bond. Rev. St. ch. 110, § 70. Kloeckner v. Schafer, 110 Ill. App. 391. Civ. Code Prac. § 134, providing that the court may at any time permit a pleading or mistake in any respect to be amended, authorizes the substitution of a sufficient appeal bond in an election contest. Galloway v. Bradburn [Ky.] 82 S. W. 1013. 1 Morehead & B. Ky. St. p. 137, providing for the substitution of a sufficient appeal bond, is not repealed by Civ. Code Prac. § 682, nor by the Code of 1877 or of 1851, and hence it authorizes the substitution of a sufficient appeal bond in an election contest Id. Civ. Code Prac. § 682, providing for the substitution of a sufficient bond, and sections 683, 684, providing for the qualification of sureties, do not apply to an appeal bond given in an election contest pursuant to the provisions of Ky. St. 1903, § 1596, subsec. 2. Id.

30. Failure to file bonds as required by Code Civ. Proc. §§ 1724, 1725, 1731, cannot be cured by filing a sufficient bond before the hearing of the motion to dismiss under § 1740. Pirrie v. Moule [Mont.] 81 P. 390. Appeal bond filed held to amount to no bond at all constituting an incurable defect Wadleigh v. Phelps [Cal.] 81 P. 418.

31. Under Rev. St. 1895, art. 1400, a bond for less than double the amount of costs in the court below, and which does not show that the probable costs were fixed by the clerk, is insufficient. Prusiecki v. Ramzinski [Tex. Civ. App.] 81 S. W. 549. In Louisiana there must be a sum fixed by the court to sustain a devolutive appeal and a bond augmented by the statutory one-half for a suspensive one. Pelletier v. State Nat. Bank [La.] 36 So. 592.

32. On appeal from the county court, the judge must approve the bond, and cannot delegate that duty to the clerk. Hepner v. Hepner, 112 Ill. App. 598. Under the rules of the court of appeals of the District of Columbia, the lower court has no power

designated by the statute.[33] Amount,[34] sureties,[35] and terms and conditions of the bond, are largely regulated by statute.[36] An appellant to the superior court must

to approve an appeal bond which, though filed before the expiration of twenty days, is not submitted to it for approval within that time. Mulvihill v. Clabaugh, 21 App. D. C. 440.

33. Under Gen. St. 1901, §§ 1640, 1641, the bond must be filed and approved by the clerk of the board of county commissioners; approval by and filing with the clerk of the district court is insufficient. Board of Com'rs of Trego County v. Cross [Kan.] 79 P. 1084.

34. Texas Rev. St. 1895, art. 1400, requires the appellant to file a bond in double the probable amount of the costs in the trial court, the court of civil appeals, and the supreme court, such amount to be fixed by the clerk of the trial court. Rev. St. 1895, art. 1400. Horstman v. Little [Tex.] 83 S. W. 679. The giving of a bond in double the amount so fixed establishes the right of appeal, and such right is not affected by the fact that the costs afterwards appear to be greater than the clerk supposed they would be. Id. The court of civil appeals has no authority to review the action of the clerk, or to require a bond for a larger amount. Rev. St. 1895, art. 1025, empowering court, on motion to dismiss appeals, to allow defects in substance or form in such bonds to be amended by the giving of new ones, applies only when they are defective, and not where merely insufficient in amount. Id. If the amount be fixed in the order of allowance, it may suffice devolutively when too small to suspensively appeal. Knoll v. Knoll [La.] 38 So. 523.

35. Sureties on a claimant's bond are competent sureties on an appeal bond for the same parties. McClelland v. Barnard [Tex. Civ. App.] 80 S. W. 841. A surety company properly certified may be surety. Eichorn v. New Orleans & C. R. L. & P. Co. [La.] 38 So. 526. If the sole security on the appeal bond is the same person as the security on the claim bond, the plaintiff in execution has obtained no additional security. McMurria v. Powell Bros. & Chason [Ga.] 48 S. E. 354. Appellant should be clearly and without abbreviation named in the bond as principal. "New Orleans & Carrollton Rd. L. & P. Co." held defective but harmlessly so. Eichorn v. New Orleans & C. R. Light & Power Co. [La.] 38 So. 526. The security on any statutory bond for the payment of the eventual condemnation money or to produce the property sued for or levied on cannot be security on a new bond required in a proceeding seeking a review of a judgment adverse to the principal in the first bond since he also is bound by such judgment. Appeal or certiorari is as much for his benefit as for that of principal. Applies where damage bond is given in claim case and judgment is rendered finding property subject and awarding damages on ground that claim was interposed for delay. Woodliff v. Bloodworth [Ga.] 49 S. E. 289. But this does not apply where the effect of the judgment is to relieve the surety from liability on the original bond as where damage bond is given in claim case, and verdict finds property subject but there is no finding that claim was interposed for delay. In such case may be surety on certiorari bond. Id. In case the certiorari is sustained, there is a discharge from liability on certiorari bond, and obligation on claim bond is thereby revived, but in such case the surety can never be liable, as in case of appeals, on both bonds. Id.

36. Where an appeal bond is actually given at the instance of appellant and signed by the security, the appeal should not be dismissed because of appellant's failure to sign it. Sanders v. Matthewson [Ga.] 48 S. E. 946. Bond on appeal from county to superior court reciting that appellant "brings L., and tenders him as security, and they the said appellant as principal and A. as security hereby acknowledge themselves bound," etc., and signed by appellant and L., but not by A., held good, and binding on L. McDermid v. Judge [Ga.] 49 S. E. 800. In any event the defect was a mere irregularity, curable by amendment, and hence it was error to dismiss the appeal. Id. A bond on appeal from the ordinary to the superior court reciting the parties to, and the character of the case, the judgment of the court and the term at which it was rendered, and in which the appellant and his security acknowledge themselves bound generally but not to any named obligee, for the eventual costs of the stated case, is a substantial compliance with Civ. Code 1895, § 4466, the fair implication being that the obligors are bound to the appellee in the terms of the bond. Smith v. Jackson [Ga.] 50 S. E. 930. An obligation to pay "the eventual costs in said case" is a fair equivalent of the statutory words "such further costs as may accrue by reason of such appeal." Id. An appeal bond conditioned to pay all costs accrued in the trial court "or" which may accrue on appeal is insufficient. Deaton v. Feazle [Tex. Civ. App.] 85 S. W. 1167. The bond should describe the judgment appealed from, and a bond merely stating that on a certain day the trial court entered judgment overruling defendant's motion for a new trial, and that appellant has appealed from such order to the court of appeals is defective. Wilkes v. Brown & Co. [Tex. Civ. App.] 80 S. W. 844. Where it is manifest that the bond was intended to secure the respondents, the fact that it erroneously ran to the state is not ground for dismissal, the court being authorized to permit an amendment. Westland Pub. Co. v. Royal [Wash.] 78 P. 1096. A bond conditioned for the payment of costs and damages as provided by Ball. Ann. Codes & St. § 6506, is sufficient as an appeal bond though insufficient in amount to constitute a valid supersedeas. State v. Pendergast [Wash.] 81 P. 324. On appeal from a judgment denying the right to foreclose a delinquency tax certificate, only the bond required under the general provisions of the law relating to appeals is necessary and not the one required by Laws 1903, p. 74, c. 59, § 4, amending Laws 1897, p. 86, c. 71, § 104, conditioned on the payment of taxes,

put the clerk under obligation to forward a proper transcript by paying or tendering his fees.[37] Where a judge requires a bond in an unwarranted amount, as a condition of an appeal, appellant is entitled to mandamus to compel him to accept a bond in a proper amount though such a bond has not been tendered him for approval.[38]

(§ 6) *H. Entry below.*[39]—Where a verbal order for an appeal is given, not in open court, the entry of the appeal must be made within the time limited by statute.[40] An entry stating that the appeal is taken to the "January term" sufficiently indicates that the return day is the first day of the term as the statute prescribes.[41] The requirement in Louisiana that every receivership petition, motion, etc., shall be entered by the clerk in his order book has no application to appeals by or against a receiver.[42]

§ 7. *Transfer of jurisdiction; supersedeas and stay.*[43]—*The transfer* is not accomplished until the appeal is fully perfected[44] by legally sufficient procedure[45] and according to the appropriate remedy.[46] An unappealable order can support no jurisdiction to be transferred.[47]

Supersedeas[47a] of the judicial power of the lower court results with the transfer of jurisdiction,[48] except as necessary to preserve rights pending appellate review.[49]

etc., against the property and that the appeal will be prosecuted with effect. Nolan v. Arnot [Wash.] 78 P. 463. Supersedeas bond given on appeal from decree holding testator to have been trustee for complainant and referring case to an auditor for an accounting, when taken in connection with stipulation that appeal should not be heard until auditor made his report and should be heard in connection with appeal then to be taken, held sufficient to sustain the entire appeal. Darlington v. Turner, 24 App. D. C. 573. An omission from an undertaking, on appeal from a justice of the peace to the supreme court, of a provision that the judgment might be rendered against both the principal and the surety is a radical departure from Code, §§ 30, 31. Schrot v. Schoenfeld, 23 App. D. C. 421. So is an undertaking to pay damages and costs, instead of one to pay the judgment. Id.

37. Does not take an appeal within meaning of statute by merely praying an appeal and filing a bond. Appeal from action of county commissioners in altering public road. Blair v. Coakley [N. C.] 48 S. E. 804.

38. Fleming v. Kirby [Mich.] 100 N. W. 272.

39. See 3 C. L. 200.

40. Hays v. Philadelphia, etc., R. Co. [Md.] 58 A. 439.

41. Swain v. London & L. Fire Ins. Co. [Fla.] 38 So. 3.

42. In re New Iberia Cotton Mills Co. [La.] 37 So. 8.

43. See 3 C. L. 200.

44. Proceedings on the merits held not stayed until bill of exceptions was filed to the trial of plea in abatement in attachment proceedings. Under Rev. St. 1899, § 407. When he appeals from whole case the bill of exceptions includes exceptions on the trial of plea in abatement, and makes one bill. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771. Cause is removed when an authenticated copy of the record is filed in the superior court. Robinson v. Arkansas Loan & Trust Co. [Ark.] 81 S. W. 609.

Jurisdiction is transferred to the appellate court by the acceptance by the proper court or judge of security upon the appeal within the time fixed by the statute. Lockman v. Lang [C. C. A.] 132 F. 1.

45. Where an appeal is prematurely taken the case remains pending in the lower court, and it may retax costs and allow amendments to the pleadings. Gates v. Solomon [Ark.] 83 S. W. 348. See ante, § 6; post, §§ 8, 11.

46. See ante, § 2; post, § 8.

47. Muckenfuss v. Fishburns [S. C.] 46 S. E. 537. Overruling challenge to array is not appealable. Rhodes v. Southern R. Co. [S. C.] 47 S. E. 689. Nonappealable decree of divorce held to terminate the marriage relation from the time it was entered. State v. Leasia [Or.] 78 P. 328. Where the complaint states a cause of action for actual damages and also one for punitive damages, a notice of appeal from the overruling of a motion to strike out the latter does not act as a supersedeas. Borrer v. Western Union Tel. Co. [S. C.] 51 S. E. 117.

47a. See 3 C. L. 200-204.

48. State v. De Baillon [La.] 37 So. 481. Trial court cannot grant ancillary relief, hence cause cannot be redocketed for purpose of filing petition for receiver. Westfall v. Wait [Ind.] 68 N. E. 1009. Final decree inadvertently entered while exceptions are pending takes effect only as an order for a decree, and does not become operative until the exceptions are disposed of. Tyndale v. Stanwood [Mass.] 73 N. E. 540. After a supersedeas bond has been accepted, writ of error allowed, and the citation issued, a motion to increase the bond is within the exclusive jurisdiction of appellate court. Clarke v. Eureka County Bank, 131 F. 145. After an appeal in probate proceedings, application for a rehearing must be made in

But ordinarily the judgment continues valid, binding, and efficient, so that it may be enforced,[50] and is in all respects operative unless[51] and until[52] the appellant gives a bond or security to abide by it if unsuccessful on the appeal, or unless a special order of supersedeas in such matters be allowed,[53] or the necessity thereof be abrogated by statute.[54]

An application[55] seasonably made[56] to a court or judge having authority,[57] and allowance made[58] fixing the amount of the bond, is necessary unless the amount is ascertainable by statute, which confers a stay as of right on complying with its terms.[59] In some instances a counter bond, security or tender is provided for by which the stay is averted.[60]

Aside from those judgments as to which supersedeas is allowed or denied absolutely,[61] the propriety of granting a supersedeas[62] or an appeal which is sus-

appellate court. In re Murphy's Will, 79 App. Div. 541, 81 N. Y. S. 101. After service of notice of appeal from order denying a motion for a bill of particulars in part, the special term is without power to set the order aside or make an order that the order appealed from stand. Ziadi v. Interurban St. R. Co., 89 N. Y. S. 606. Action of the trial court in vacating the judgment subsequent to the taking of the appeal cannot affect the decision of the appellate court. Winans v. Grable [S. D.] 99 N. W. 1110.

49. Pending appeal from an order denying confirmation of a receiver's sale, certificates will be authorized for expenses incident to the preservation of the property. Porch v. Agnew Co. [N. J. Eq.] 57 A. 546. The trial court may in certain cases order the judicial sequestration of the property in controversy after the appeal has been perfected. State v. De Baillon [La.] 37 So. 481.

50. An officer may lawfully proceed under an execution until he is officially notified of a supersedeas or other stay of proceedings. Western Seed & Irrigation Co. v. McDonald [Neb.] 99 N. W. 517.

51. Writ of error from dissolution of injunction does not continue injunction unless supersedeas bond is given. Griffin v. State [Tex. Cr. App.] 87 S. W. 155. An appeal with bond for costs leaves an order discharging a garnishee enforceable. Cummings v. Edwards Wood & Co. [Minn.] 103 N. W. 709. Appeal does not prevent prevailing party in trial court from filing a transcript of the judgment with the clerk and recorder. Mulligan v. Smith [Colo.] 76 P. 1063. Under Code Civ. Proc. § 352, a sale on foreclosure is not stayed on appeal, unless a bond is given as required. Muckenfuss v. Fishburns [S. C.] 46 S. E. 537. In Michigan, under Pub. Acts 1899, Act 243, an appeal in chancery does not operate as a supersedeas unless a bond is filed. Weber v. Costigan [Mich.] 102 N. W. 666.

52. Until an appeal bond is filed execution may issue on the judgment and levy made. Mulligan v. Smith [Colo.] 76 P. 1063.

53. Appeal to appellate term from order of municipal court granting new trial does not stay. Amorisia v. Rando, 88 N. Y. S. 356.

54. Massachusetts: Under Rev. Laws c. 159, § 19, an appeal from a final decree stays proceedings thereunder. Crossman v. Griggs [Mass.] 71 N. E. 560.

55. Appeal to appellate term from order of municipal court granting a new trial does not operate as a stay without an application therefor. Amorisia v. Rando, 88 N. Y. S. 356.

56. In Kentucky an application to vacate an injunction pending appeal must be made within 20 days after the order for continuance. Jackson v. Hardin [Ky.] 86 S. W. 530. A supersedeas issued while the case is subject to dismissal for failure to file transcript is valid. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 86 S. W. 682.

57. A circuit judge in vacation has power to stay proceedings in a county seat removal contest until appeal can be heard. This under Const. art. 7, § 14, giving such courts appellate jurisdiction, and Sand. & H. Dig. § 4896, authorizing temporary orders in vacation in certain cases. Reese v. Steele [Ark.] 83 S. W. 335.

58. Execution of supersedeas bond without issue of supersedeas does not supersede the judgment. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 86 S. W. 682.

59. An action to foreclose a pledge of corporate stock is not within Code Civ. Proc. § 943, providing that a judgment for the delivery of personal property is not stayed by appeal unless the things be placed in custody of the court or sufficient bond given, and therefore appellant on giving the bond required by § 949 is entitled to a supersedeas. Rohrbacher v. Superior Court [Cal.] 78 P. 22. Under Ky. St. 1903, § 1596, subsec. 12, providing for the giving of an appeal bond in election cases, such bond to be conditioned to pay all damages sustained by the appellee, and such section further providing that upon production of the final judgment the successful party may qualify for the office, the giving of the bond operates as a supersedeas and the damages sustained by appellee consist in his being kept out of the office during the pendency of the appeal. Galloway v. Bradburn [Ky.] 82 S. W. 1013.

60. By statute a railroad paying or tendering the award made can in Indiana take possession of lands condemned pending appeal. Burns' Ann. St. 1901, § 5160. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 531.

61. A merely preventative injunction cannot be rendered inoperative by a supersedeas. State v. Superior Court of King County [Wash.] 77 P. 33; Green Bay & M. Canal Co.

pensive[63] is discretionary with the court,[64] the exercise of the right being usually founded on the safeguarding of a right of property,[65] or on the perishable nature of the subject-matter,[66] or precariousness of rights affected, and though a supersedeas has been denied, chancery will grant an injunction preserving the status quo pending decision of an appeal where appellee is proceeding to render nugatory any reversal that may be had.[67] The bond must show who and what are affected by it,[68] must undertake to do what the statute prescribes,[69] and must be properly executed, though failing in this regard a supersedeas may be obtained on filing a sufficient bond in the appellate court.[70] If the amount of the bond is fixed by statute and is jurisdictional, the bond must be in such amount.[71] If the review is de novo, as in equity, the decree or judgment,[72] as well as the jurisdiction, is superseded by the taking of an appeal.[73] But usually in such cases the bond or undertaking to obtain the appeal is made large enough to cover the judgment[74] as well as costs.

The effect of a supersedeas is simply to suspend the judgment,[75] the lower court losing its power only in respect to those things which might trench on the appellate functions,[76] or when the judgment is also stayed which might change

v. Norrie [C. C. A.] 128 F. 896. Pending appeal from the grant of a preventative injunction defendant is not entitled as a matter of right to supersede the order. State v. Superior Court of Pierce County [Wash.] 80 P. 1108. Pending appeal from denial of an application to sue a receiver, the applicant is entitled to a stay of proceedings. State v. Superior Court [Wash.] 80 P. 195.

62. Supersedeas will not be granted where it appears that before a hearing can be had on the appeal the patent which is the subject of the suit will have expired. Timolat v. Philadelphia Pneumatic Tool Co., 130 F. 903.

63. There is no necessity for suspensive appeal when appellant has by his voluntary action made impossible judicial execution of the order appealed from. Albert Mackie Grocery Co. v. Pratt [La.] 38 So. 250.

64. Timolat v. Philadelphia Pneumatic Tool Co., 130 F. 903.

65. An injunction against sale of property by a city granted on behalf of a subordinate public corporation claiming title involves title to property and to its proceeds, and from the dissolution of it on bond a suspensive appeal is allowable. State v. Sommerville [La.] 37 So. 476.

66. Liability to fluctuations in value is not perishability. Code Proc. § 576. Hannay v. New Orleans Cotton Exch. [La.] 36 So. 831.

67. People's Traction Co. v. Central Pass. R. Co. [N. J. Eq.] 58 A. 597.

68. Supersedeas bonds given by several defendants being each in excess of double the amount of the respective judgments, and appearing to have been given in the action in which the judgment was rendered, the appeal will not be dismissed on the ground that the bonds do not properly describe the judgment and are insufficient in amount. International & G. N. R. Co. v. McGehee [Tex. Civ. App.] 81 S. W. 804.

69. Under Ky. St. 1903, § 1596, a bond for appeal in an election case covenanting that appellant will pay the damages adjudged against him on the appeal is insufficient. Galloway v. Bradburn [Ky.] 82 S. W. 1013.

70. So held where bond was ineffectual because of the failure of sureties to justify in proper manner. Nonpareil Mfg. Co. v. McCourtney [Cal.] 76 P. 653.

71. Must be double the amount of the judgment recovered, though the amount of the judgment is paid into court. Pierson v. First Nat. Bank [Wash.] 79 P. 1003. $32.91 less than the statutory amount ($15,032.91) is not a trifle which can be overlooked. Pelletier v. State Nat. Bank [La.] 36 So. 592. [In Louisiana suspension of the judgment is incidental to a suspensive appeal which requires a bond to cover the judgment. See ante, § 6G].

72. An appeal is a continuation of the original suit for the purpose of obtaining a new trial and a new judgment. Bickford v. Franconia [N. H.] 60 A. 98.

73. Highway proceedings. Bickford v. Franconia [N. H.] 60 A. 98.

74. That the bond was fixed for an amount slightly less than the judgment and costs, appellee being present and making no objection, is immaterial. Clarke v. Eureka County Bank, 131 F. 145.

75. An appeal **suspends** the effect of the **judgment as evidence of matters determined,** though execution is not stayed. Di Nola v. Allison [Cal.] 76 P. 976.

76. Suit to correct a judicial record will lie while appeal is pending. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194. Court may compel obedience to its order for payment of allmony pending appeal from divorce decree. State v. Second Judicial Dist. Court [Mont.] 79 P. 13. A record and transcript of judgment may be filed after appeal. Mulligan v. Smith [Colo.] 76 P. 1063. A motion for retaxation of costs being promptly made is not affected by appeal. McDermott v. Yvelin, 92 N. Y. S. 1088.

Appeals from interlocutory orders do not affect the power of the trial court to proceed with the cause with respect to any matter not involved in the appeal. Cuyler v. Atlantic & N. C. R. Co., 132 F. 568. An appeal from order granting a temporary in-

the status quo, for a supersedeas working a stay preserves the status quo[77] of the parties only[78] existing just before the judgment was entered,[79] suspending all proceedings except those necessary to safeguard such status quo,[80] and it is contempt to disobey or transgress it.[81] Self-executing judgments are not stayed by the giving of a supersedeas bond.[82] A supersedeas bond can only stay so much of the judgment as it can affect.[83] Rights dependent on the outcome of the appeal are not suspended but are merely immature.[84] A supersedeas should be modified to meet changing conditions or rights.[85]

The application or motion for a special supersedeas must conform to the statutes.[86]

§ 8. *Appearance,*[87] *entry, and docketing above,* are generally essential; or else some other acts which have the same effect[88] must be done to put the cause into the reviewing court,[89] at or before the time allowed by law.[90] Several appeals

junction has no effect on the main case unless an order staying proceedings is made. Crown Cork & Seal Co. v. Standard Stopper Co. [C. C. A.] 136 F. 184. Appeal from a probate decree directing the sale of land does not bring up the whole case. Tyndale v. Stanwood [Mass.] 71 N. E. 83. Pending an appeal from an order overruling demurrer to answer, no stay having been taken or reply filed, defendant may file note of issue and serve notice of trial. Ward v. Smith, 91 N. Y. S. 905. An appeal from a judgment allowing a pension in divorce proceedings does not suspend a prior judgment for alimony. State v. Judge of Civil Dist. Ct. [La.] 38 So. 14. Appeal from order appointing receiver does not preclude trial of the cause on the merits. State v. Bell [Wash.] 78 P. 908.

77. A suspensive appeal leaves the judgment in status quo. Dannemann v. Charlton [La.] 36 So. 965. On appeal from an order appointing a receiver, a bond superseding him will stand in lieu of him pending a determination of the propriety of his appointment. Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan [Wash.] 80 P. 283.

78. Filing of stay bond on appeal from modification of order in divorce suit awarding custody of child held not to entitle appellant to custody of child pending appeal. In re De Lemos [Cal.] 76 P. 1115.

79. Remelin v. Remelin [Ky.] 87 S. W. 263. A statutory supersedeas in derogation of common law does not restore goods levied on but merely stays sale whilst the lien continues. Rev. St. § 1272 provides for stay of all "further" proceedings. Thalheim v. Camp Phosphate Co. [Fla.] 37 So. 523.

80. Suspensive appeal from dissolution of injunction against trespass on land by oil lessee holds matters in abeyance. State v. DeBaillon [La.] 37 So. 534. Pending it appellant could not sue for possession and a counter injunction. Id. In awarding sequestration on subsequent conditions, the lower court must keep within them and not trench on the matter appealed. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 38 So. 458. After suspensive appeal the trial court may if the status quo is violated sequester the property subject to the appeal to preserve it. State v. De Baillon [La.] 37 So. 534; State v. De Baillon [La.] 37 So. 481. A judgment may not be inscribed after a suspensive appeal. Dannenmann v. Charlton [La.] 36 So. 965. When done it will be canceled. Id.

81. Durham v. Streight [Ky.] 83 S. W. 581.

82. Reese v. Steele [Ark.] 83 S. W. 335. Judgments declaring the vote in a proceeding for the removal of a county seat and directing the removal are not, by their nature, subject to supersedeas by giving a bond which would be a nullity beyond securing the costs. Id.

83. Reese v. Steele [Ark.] 83 S. W. 335. Where it cannot be held for anything except costs, it will only stay the amount so far as they are concerned. Order in county seat contest directing removal of records. Id.

84. An action on an injunction bond does not lie pending appeal from judgment dissolving the injunction, though no supersedeas bond is filed, even where it is provided by statute that a proceeding to reverse a judgment shall not stay execution unless a supersedeas be filed. Tutty v. Ryan [Wyo.] 78 P. 657. See, also, Injunction, 4 C. L. 96. Where a decree granting conditional relief is superseded, the time within which to comply with the conditions is extended until the decree again becomes enforceable in the trial court. Ruzicka v. Hotovy [Neb.] 101 N. W. 328.

85. Where a condemnation proceeding is removed from a state to a Federal circuit court, and after compensation has been ascertained, a writ of error is prosecuted, any supersedeas obtained should be modified so that the petitioner in the proceedings to condemn shall have the same rights which he would have had if the proceedings had remained in the state court. Broadmoor Land Co. v. Curr [C. C. A.] 133 F. 37.

86. Whitaker v. McBride [Neb.] 98 N. W. 877. Supersedeas given after the time has expired is ineffectual. Id.

87. See 3 C. L. 204. Where no notice of an appeal is given defendant and he does not appear in the appellate court, the appeal will be dismissed. Failure to record entry of appeal in chancery order book in compliance with Florida statute making such recording constructive notice to appellee. City of Orlando v. Macy [Fla.] 34 So. 298.

88. Filing the bond must be followed by timely citation and filing of transcript. Chambliss v. Wood [Miss.] 36 So. 246.

89. In many states the filing or return of the appeal papers serves this purpose. As to

should be severally docketed or if docketed together are still regarded as several.[91] An appearance for any other purpose than to dispute jurisdiction of appellee's person is general to the appeal and admits validity of its entry.[92] An appeal may be entered by an attorney at law without written authority to do so.[93] In Colorado a mistaken appeal may be dismissed and redocketed as on error[94] even when it is too late to newly bring error,[95] but not after the reviewing court has decided the case and it has been appealed again.[96] It follows that when appeal is heard without objection and argued to the merits, the error in the mode of review is naught.[97] In Florida if entry be tardy as to some of several interlocutory decrees, it may still avail for those as to which it was timely.[98]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court. Record on appeal.)*[99] *Scope and terminology.*—The "record proper" sometimes designated as the "fundamental record," "judgment roll" or "common law record" includes those matters which are at common law of record ex propria vigore. The "secondary record" includes the various means by which matters not part of the record proper are made of record, by bill of exceptions, settled case, abstract, approved motion for new trial, etc. The "entire record" or record on appeal comprises all that is transmitted to the reviewing court, including both record proper and secondary record.

(§ 9) *A. What the record proper must show.*[1]—That which is a part of the record proper below must appear by such record and its omission cannot be supplied by the secondary record.[2] As a general rule, the jurisdiction of the court below is presumed if it is of general,[3] but not if it is of limited jurisdiction.[4] But the facts necessary to appellate jurisdiction must always appear.[5] On appeal from an in-

such practice, see post, § 11.

90. An appeal to the superior court from the action of the county commissioners in altering a public road should be taken and returned to the next term of court, whether criminal or civil. Code 2039 and Acts 1901, p. 175, c. 28, § 2, construed. Blair v. Coakley [N. C.] 48 S. E. 804. Rules relating to appeals from justice court (Code, §§ 875-883, 565) requiring return to be made to the appellate court and the papers to be filed with the clerk within 10 days after the appeal is taken, etc., apply. Id.

91. Where both parties appeal, the appeal of each must be separately docketed. Orion Knitting Mills v. United States Fidelity & Guaranty Co. [N. C.] 48 S. E. 652. Under Sup. Ct. Rule 30 (64 P. 15) appeals in three cases cannot be docketed as one appeal and the clerk paid for a single cause. Rachofsky v. Benson [Colo. App.] 77 P. 862.

92. Ray v. Trice [Fla.] 37 So. 582.

93. Under Civ. Code 1895, §§ 4417, 4423, requirement of such authority by § 4457 applies only to attorneys in fact. Friar v. Curry, Arrington & Co. [Ga.] 47 S. E. 206.

94. Under express provisions of Mills' Ann. Code, § 388a, if the appellate court has no jurisdiction to review a cause on appeal but would have on writ of error, the appeal will be dismissed and the cause re-entered on the docket as pending on error. Murto v. Lemon [Colo.] 76 P. 541.

95. This should be done though such a length of time has elapsed since the rendition of judgment that a writ of error could not be sued out. Bowling v. Chambers [Colo.] 77 P. 16.

96. It is too late to assert that a cause should have been redocketed on error when the cause comes a second time to the supreme court from a judgment of a district court entered pursuant to the mandate of the court of appeals. Taylor v. Colorado Iron Works [Colo.] 80 P. 129.

97. Though it heard an unauthorized appeal its judgment cannot be assailed for want of jurisdiction where appellees appeared and argued the merits. Taylor v. Colorado Ironworks [Colo.] 80 P. 129.

98. Futch v. Adams [Fla.] 36 So. 575.

99. See 3 C. L. 204.

1. See 3 C. L. 204. An appeal makes the entire record available to appellant and imposes the duty upon him and upon the clerk of the lower court to place the material parts of it in the transcript sent to the appellate court. Dodge v. Norlin [C. C. A.] 133 F. 363.

2. Statements in the bill of exceptions will not aid omission from the record proper of motion for new trial. Griffin v. Wabash R. Co. [Mo. App.] 85 S. W. 111. That which is properly a matter of record cannot be shown by bill of exceptions. That a special judge presided. Arkadelphia Lumber Co. v. Asman [Ark.] 79 S. W. 1060. A recital in the bill itself that the time was extended cannot supply failure of the record proper to show settlement of the bill. Bick v. Williams [Mo.] 80 S. W. 885.

3. Trumbull v. Jefferson County [Wash.] 79 P. 1105.

4. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

termediate court, the steps by which it acquired jurisdiction must appear.[6] The record proper must also show the pleadings[7] and judgment below,[8] the motion for new trial and order thereon,[9] the making of objections,[10] taking of exceptions,[11] the making of the secondary record[12] and the timely taking of all steps necessary to bring up the case for review.[13] The appealable interest of appellant, especially

5. Will not review judgment of district court where amount in controversy is below that required to give it original jurisdiction and record does show requisites necessary to confer jurisdiction by appeal from justice's court. Texas & P. R. Co. v. Jordan [Tex. Civ. App.] 83 S. W. 1105. The facts authorizing a direct appeal must appear from the record, not by a certificate of the trial judge. Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 Law. Ed. 749. The record to sustain a direct appeal from the circuit to the supreme court must contain a certificate that a jurisdictional question was decided or its equivalent, such as a proper specification in the allowance of the writ of error. Filhiol v. Torney, 194 U. S. 356, 48 Law. Ed. 1014. The certificate of the trial judge that the action involves a ground which gives the supreme court jurisdiction is not binding on the latter. Huffman v. Ackarman [Kan.] 81 P. 168. Constitutional question supporting jurisdiction must appear of record or by bill of exceptions. City of Tarkio v. Clark [Mo.] 85 S. W. 329. Amount in controversy. Williamson v. Payne [Va.] 49 S. E. 660.

6. On appeal from the county court in a suit originating in justice court, the record must show how the county court acquired jurisdiction. Albritton v. First Nat. Bank [Tex. Civ. App.] 85 S. W. 1008; Penn Fire Ins. Co. v. Pounder [Tex. Civ. App.] 84 S. W. 666.

7. Nichols v. Weston County Com'rs [Wyo.] 76 P. 681.

8. Gabbart & Co. v. Bauer [Miss.] 38 So. 548; Ropes v. Lansing [Fla.] 38 So. 177; Wallace v. Crosthwait [Ala.] 36 So. 622; Johns v. Barnes [Mont.] 78 P. 703. The clerk's certificate is sufficient, on appeal, to show that there was a judgment in the case. Feller v. McKillip [Mo. App.] 81 S. W. 641.

9. On appeal from grant of new trial must include either in the record proper or in a bill of exceptions under Code 1896, § 434. Randall v. Worthington [Ala.] 37 So. 594. Statement in bill—"The court granted said motion and set aside the verdict of the jury and granted defendant a new trial"—shows no judgment. Id. Motion for new trial must appear in the abstract and recital thereof in bill of exceptions is unavailing. Bailey v. McWilliams [Mo. App.] 85 S. W. 618.

10. Where the plaintiff proposes findings of fact which set forth the whole theory of his case and sets out particularly wherein the evidence is insufficient to support the findings as made, the specifications are sufficient though the particular findings alleged to be unsupported by the evidence are not pointed out. Chapman v. Greene [S. D.] 101 N. W. 351.

11. The bill of exceptions must show that the refusal to charge as requested was excepted to. Hathaway v. Goslant [Vt.] 59 A. 835. The bill of exceptions must show that exceptions were taken. A statement that exception was taken must be held to relate to the time when objection was made. Snowman v. Mason [Me.] 59 A. 1019.

12. The record must show that exceptions were presented to the trial court and acted on. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. Filing of bill of exceptions and allowance of additional time to file must appear by the record. Recital in bill is insufficient. Williams v. Harris [Mo. App.] 85 S. W. 643. There must be a recital or entry in the record to identify the bill of exceptions. Metz v. Sutton [Mo. App.] 85 S. W. 929. Record held to show defendants' bill of exceptions properly identified and authenticated. Martin v. Castle [Mo.] 81 S. W. 426. Abstract must show timely filing of bill of exceptions. Wendleton v. Kingery [Mo. App.] 84 S. W. 102. A bill of exceptions, perfected according to Act October 22, 1902, amending Rev. St. §§ 5301, 5301a, 5302, thereby becomes an original paper within the meaning of § 6716, and a journal entry ordering such bill to be made a part of the record is not necessary in order to entitle it to be considered by the reviewing court. Strauch v. Massillon Stoneware Co. [Ohio] 73 N. E. 211. The record proper must, if in term time, show the filing of the bill of exceptions, and if leave be given to file the bill in vacation, the minute of the clerk in vacation must show the filing within the time allowed. Bick v. Williams [Mo.] 80 S. W. 885. When a judge in vacation makes an order showing that he has executed a bill of exceptions, and so certifies it to the clerk, the latter must record such order in the law order book and attest it. Bill made in vacation under Code 1899, c. 131, § 9. Bank of Ravenswood v. Wetzel [W. Va.] 50 S. E. 886. It is not, however, necessary that such bill, or any part thereof, be literally copied into such book. Sufficient if bill may be identified from order as recorded. Id. The bill is part of the record if it does, by its own matter or character, identify itself as the bill mentioned in the order of court or the judge certifying its execution. Id. A bill of exceptions not made a part of the statement on motion for a new trial cannot be considered. In re Colbert's Estate [Mont.] 78 P. 971. Conflicting affidavits as to whether a stipulation for an extension of time for filing a statement of facts was made will not be considered. Such fact must appear from the record. Humes v. Hillman [Wash.] 80 P. 1104. Must show exceptions to judgment of city court of Gadsden if trial was by court Acts 1900, 1901, p. 1288, § 15. Hoge v. Herzberg [Ala.] 37 So. 591.

13. Either appearance or citation must appear by the record and a recital in a default judgment that defendant was duly cited is insufficient. Shook v. Laufer [Tex. Civ. App.] 84 S. W. 277. Failure of record to

of one not a party to the record, must appear.[14] The rule in equity differs from that which prevails at law, and the complainant to whom relief is granted must preserve in the record the evidence upon which it is based, either by a certificate or evidence or by recitals in the decree finding the specific facts proven on the hearing.[15]

(§ 9) *B. What is part of record proper; necessity of secondary record.*[16] —The office of the bill of exceptions or other secondary record is to make of record that which is not part of the record proper, and it is necessary except to review errors apparent on the face of the judgment roll.[17] The record proper consists of the summons, pleadings, and judgment,[18] and orders made with reference to the record.[19] Proposed pleadings and amendments which have never become pleadings in the action are no part of the record.[20] Other proceedings had below, in order to be reviewed, must be brought into the record by a bill of exceptions,[21]

show that amount of an appeal bond had been fixed by the trial court as required by 2 Ball. Ann. Codes & St. § 6506, is ground for dismissal. In re Drasdo's Estate [Wash.] 77 P. 735. The record need not show how it was transmitted by the clerk to the judge, any safe mode of transmission being sufficient. Davies v. New Castle & L. R. Co. [Ohio] 73 N. E. 213.

14. Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74.

15. Wilcoxon v. Wilcoxon, 111 Ill. App. 90.

16. See 3 C. L. 206.

17. Lethbridge v. Lauder [Wyo.] 76 P. 682; Poor v. Cudlhee [Wash.] 79 P. 1105; Stone v. McClellan [Tex. Civ. App.] 81 S. W. 751; Ball v. O'Keefe [Wash.] 77 P. 382; State v. Justice Court of Tp. No. 1, Gallatin County [Mont.] 78 P. 498; Johnston v. Callahan [Cal.] 79 P. 870; Hecht v. Carey [Wyo.] 78 P. 705; Ivancovich v. Weilenman [Cal.] 78 P. 268; Miller v. Head Camp [Or.] 77 P. 83; Miller v. Enterprise Canal & Land Co. [Cal.] 79 P. 439; Woolverton v. Johnson [Kan.] 77 P. 559; Burnett v. Kirk [Wash.] 80 P. 855; Johnson v. Staley [Ind. App.] 70 N. E. 541; Manley v. Wheeling & Lake Erie R. Co., 4 Ohio C. C. (N. S.) 384, 24 Ohio C. C. 70.

18. Cressler v. Asheville [N. C.] 51 S. E. 53. Affidavit of defense. Brainerd v. Davis, 21 Pa. Super. Ct. 599. Demurrer to the evidence. Chesapeake & O. R. Co. v. Pierce [Va.] 48 S. E. 534. An order on a motion to strike a pleading. Gaston v. Marengo Imp. Co. [Ala.] 36 So. 738. Order for publication of summons is not. McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036. A praecipe for a summons is no part of the record. Palmer v. Palmer, 5 Ohio C. C. (N. S.) 242, 25 Ohio C. C. 660. Papers of which plaintiff makes profert in his declaration and attaches as exhibits. United States v. Bell [C. C. A.] 135 F. 336. Notices of trial are no part of the judgment roll. Sweeny v. Kellogg, 89 N. Y. S. 314. An interlocutory order to become part of the judgment roll must be one which in some way involves the merits or necessarily affects the judgment. Goldstein v. Michelson, 91 N. Y. S. 32. A petition to intervene and become a party in the main case is part of the record. Brannan v. Baxter & Co. [Ga.] 50 S. E. 45.

19. By statute in Tennessee the findings of fact and conclusions of law of the trial court, trying an issue of fact, are made a part of the record when, on request, they are reduced to writing, signed by the judge, and filed. Shannon's Code, § 4684. Tennessee Cent. R. Co. v. Foster [Tenn.] 80 S. W. 585. No bill of exceptions is necessary unless the judgment is challenged upon some other ground than error of law in the conclusions upon the facts found. Id.

20. Plea is filed out of time and is rejected. Muller v. Ocala Foundry & Machine Works [Fla.] 38 So. 64. Amendment offered but disallowed. Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746; Taylor v. McLaughlin [Ga.] 48 S. E. 203; Polsgrove v. Walker [Ky.] 82 S. W. 979. Where, by a consent order, all the pleadings anterior to an amended petition are withdrawn and stricken from the files, the original petition ceases to be a part of the record. Norman v. Central Kentucky Asylum [Ky.] 80 S. W. 781.

21. Assignments of errors at the trial cannot be reviewed in the absence of a bill of exceptions. Conrad v. Broeker [N. J. Err. & App.] 58 A. 1019; Bryant v. Nelson-Frey Co. [Minn.] 102 N. W. 859; National R. Co. of Mexico v. O'Leary [C. C. A.] 126 F. 363. Remarks of counsel complained of as improper cannot be preserved for review by means of ex parte affidavits. Finlay Brewing Co. v. People, 111 Ill. App. 200. A motion and the ruling thereon to require plaintiff to make his complaint more definite and certain prior to the act of 1903 did not become part of the record without a bill of exceptions or order of the court. Act 1903, p. 339, c. 193, §§ 2, 3. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661; Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643. Whether the circuit court was without jurisdiction of an appeal from justice court because of a want of jurisdiction in the justice is determined from the record and not from the justice's docket where that has not been brought in by bill of exceptions. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539. A motion for a new trial and the rulings thereon can be brought in the record on appeal only in a bill of exceptions. The mere fact that the clerk puts into the record what purports to be a motion for a new trial is not sufficient. Salomon v. Ellison, 102 Ill. App. 419. A mere recital in a motion to set aside the judgment cannot perform the office of a statement of the fact incorporated in the bill of

journal entry,[22] or equivalent proceedings,[23] except in the case of certain proceedings subsequent to the judgment.[24] In chancery cases and some special statutory proceedings,[25] the record includes all proceedings and files below,[26] including the testimony, if taken by deposition,[27] or as settled if taken in open court.[28] Stipula-

exceptions. Mahoney v. State [Ind. App.] 72 N. E. 151. Evidence taken down and transcribed by a stenographer is not a part of the record unless made so by a proper bill of exceptions. When and under what conditions a "skeleton bill of exceptions" is allowable. Tracy's Adm'x v. Carver Coal Co. [W. Va.] 50 S. E. 825. In the absence of a bill of exceptions the granting of a motion to strike the complaint cannot be considered. Henry v. Nashville, etc., R. Co. [Ala.] 38 So. 361.

22. In Ohio where a bill of exceptions is perfected in accordance with the act of 1902, it thereby becomes an original paper, and a journal entry ordering it made a part of the record is not necessary. Strauch v. Massillon Stoneware Co. [Ohio] 73 N. E. 211, rvg. 26 Ohio C. C. 73, 4 Ohio C. C. (N. S.) 536. A bill of exceptions cannot be considered unless it is made part of the record by a journal entry. Manley v. Wheeling & Lake Erie R. Co., 4 Ohio C. C. (N. S.) 384, 24 Ohio C. C. 70. An agreed statement of facts, although in writing, signed by counsel for all parties, and filed, does not become part of the record unless brought upon the record by bill of exceptions, or the facts as agreed upon are stated in the journal entry as the court's finding of facts. Goyert v. Eicher [Ohio] 70 N. E. 508. An order of court showing that plaintiff moved the court to require defendant to file a statement of its grounds of defense, that the motion was overruled and the plaintiff excepted, is sufficient. Driver's Adm'r v. Southern R. Co. [Va.] 49 S. E. 1000.

23. In cases not triable de novo on appeal, neither errors of law occurring at the trial, nor the sufficiency of the evidence to sustain the findings can be considered without specifications of error embodied in a statement of the case. Barnum v. Gorham Land Co. [N. D.] 100 N. W. 1079. In Iowa the statutes recognize shorthand notes duly certified as being the equivalent of a bill of exceptions. Where two stenographers were employed on a case and it was stipulated that one of them should certify to all the notes as if he had taken them all, held that the evidence was properly preserved under Code, § 3675. Hofacre v. Monticello [Iowa] 103 N. W. 488. In Pennsylvania where there is no bill of exceptions, it must appear in order to bring exceptions to rulings upon evidence upon the record, that the stenographer's notes have been approved by the judge as correct. Kershner v. Kemmerling, 24 Pa. Super. Ct. 181.

Instructions are no part of the record unless it appears that they were filed. An order to file them is not sufficient (Elrod v. Purlee [Ind.] 73 N. E. 589), and signed by the trial judge. Filing without signing is not enough (Michigan City v. Phillips [Ind.] 71 N. E. 205). Filing several days after the trial is not enough. Speck v. Kenoyer [Ind.] 73 N. E. 896. The mere filing of the charge by the trial judge does not make it subject to assignment of errors. Kinney v. Burnhorn, 23 Pa. Super. Ct. 583. Where the instructions are incorporated in the bill of exceptions, it is not necessary for the trial judge to sign marginal exceptions thereon. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888. Incorporating them into the original bill of exceptions containing the longhand manuscript of the evidence does not bring them into the record. Michigan City v. Phillips [Ind.] 71 N. E. 205. The method prescribed by the legislature is exclusive and mandatory, but where the original instructions filed show that the statute was substantially complied with, a slight discrepancy will be disregarded. Gulf & S. I. R. Co. v. Boswell [Miss.] 38 So. 43.

24. In determining whether the trial court erred in refusing a new trial for misconduct of jury and after discovered evidence, the supreme court will consider depositions taken in support of the motion. Mix v. North American Co. [Pa.] 59 A. 272.

25. Contested election case. Griffith v. Bonawitz [Neb.] 103 N. W. 327. Bankruptcy. In re Robertshaw Mfg. Co., 135 F. 220; Dodge v. Norlin [C. C. A.] 133 F. 363. A case and exceptions are not required on appeal from an order of a surrogate declining to open a decree. In re Gowdey's Estate, 91 N. Y. S. 662. An order of the surrogate should specify the papers used thereon in order that it may appear what should be printed. Rule 41. Id.

26. On appeal from the decision of the district court in a contested election, the entire record should be brought up. Griffith v. Bonawitz [Neb.] 103 N. W. 327. The court of bankruptcy from which an appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal. In re Robertshaw Mfg. Co., 135 F. 220. In the absence of a stipulation, the whole of the record in the strict sense of the word must be transmitted. Id. Where the parties are unable to agree as to its contents, the appellant should file a praecipe with the clerk pointing out specifically what records in his judgment should be certified, leaving it to the appellee to suggest diminution and ask for a certiorari if he deems it necessary. Id. A bill of exceptions has no function and accomplishes no purpose in proceedings in bankruptcy. Dodge v. Norlin [C. C. A.] 133 F. 363. Original papers which were not properly a part of the files in the lower court are not properly made part of the record there and are not properly a part of the files of the circuit court. Strauch v. Massilon Stoneware Co. 4 Ohio C. C. (N. S.) 536, 26 Ohio C. C. 73.

27. Where the evidence is introduced entirely by depositions and written instruments filed in the lower court which by filing become of record, failure to file the stenographer's transcript is immaterial. National Surety Co. v. Walker [Iowa] 101 N. W. 780.

28. Evidence not authenticated by the

tions,[29] interlocutory motions and orders thereon,[30] agreed statement of facts,[31] depositions,[32] proceedings at the trial,[33] motion for new trial and order thereon,[34] affidavits;[35] the opinion of the trial court,[36] and the evidence,[37] are no part of the record proper, and statutes providing for the filing of the reporter's transcript of the evidence does not make it of record,[38] nor do recitals in the motion for new trial make of record the matters recited.[39] Statutes sometimes provide that instructions may be made of record by order,[40] but unless so authenticated

trial judge, though contained in the record, cannot be considered on appeal in the absence of a stipulation that it is the evidence heard on the trial. Darrin v. Hoff [Md.] 58 A. 196. Where the statement of the evidence and rulings is neither allowed by the justice who tried the case, substantiated by affidavit, nor assented to by the appellee, the case is not properly before the supreme court. Rice v. Union R. Co. [R. I.] 58 A. 629.

29. Zunpelman v. Power [Tex. Civ. App.] 85 S. W. 69.

30. A motion to quash condemnation proceedings. City of Tarkio v. Clark [Mo.] 85 S. W. 329. A written motion to exclude evidence and an order denying the same. Holt v. Cave [Tex. Civ. App.] 85 S. W. 309. Order for transfer to another division. Stripling v. Maguire [Mo. App.] 84 S. W. 164. A petition for certiorari. Tompkins v. Newman [Ga.] 47 S. E. 557. Order striking pleas. Lynn v. Bean [Ala.] 37 So. 515. A motion for judgment on the pleadings. Grubbs v. Needles [Ind. T.] 82 S. W. 873. Denial of continuance. Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936. Under rule 29 (64 P. 12), providing that on appeal the papers used on the hearing of a motion must be authenticated by incorporating them into the bill of exceptions, an unauthenticated affidavit printed in the transcript on appeal is no part of the record. People v. Wrin [Cal.] 76 P. 646. Rulings upon motions are not deemed saved for review unless the motion and ruling are made a part of the bill of exceptions. Grubbs v. Needles [Ind. T.] 82 S. W. 873.

31. Smith v. Smith [Mo. App.] 86 S. W. 586; Taylor v. Brotherhood of Railroad Trainmen [Mo. App.] 80 S. W. 306; Woolverton v. Johnson [Kan.] 77 P. 559. A bill of exceptions is not necessary where the case was tried below on an agreed statement of facts signed by the respective parties, and submitted to the court and made a part of its record. American Security & Trust Co. v. Walker, 23 App. D. C. 583.

32. Western Union Tel. Co. v. Kuykendall [Tex. Civ. App.] 86 S. W. 61. Deposition not used below cannot be considered, though included in record. In re Imboden's Estate [Mo. App.] 86 S. W. 263. In a chancery case, where the evidence is taken by depositions, they become a part of the record, and there is no necessity for a bill of exceptions, since the chancellor has the whole record before him and all legal issues are thereby raised for his consideration. Western Coal & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145.

33. Froman v. Wilson [Colo. App.] 78 P. 615. Rulings on evidence at trial of equity case where evidence was taken by a commissioner must be in bill of exceptions. Jennings v. Wyzanski [Mass.] 74 N. E. 347. Argument of counsel. Preston v. Davis, 112 Ill. App. 636; Burt-Brabb Lumber Co. v. Crawford [Ky.] 86 N. W. 702; Mueller v. Kinkead, 113 Ill. App. 132; Finlay Brew. Co. v. People, 111 Ill. App. 200; Paducah R. & Light Co. v. Bell's Adm'r [Ky.] 85 S. W. 216.

34. Williams v. Hawley [Cal.] 77 P. 762; Power v. Fairbanks [Cal.] 80 P. 1075. It is not necessary to incorporate into a bill of exceptions a copy of the journal entry overruling a motion for a new trial. Conradt v. Lepper [Wyo.] 81 P. 307.

35. Eubank v. Eastman [Ga.] 48 S. E. 426; Bracey-Welles Const. Co. v. Terry [Ind.] 82 S. W. 846; Hamilton v. Saunders [Tex. Civ. App.] 84 S. W. 253; Skinner v. Horn [Cal.] 77 P. 904; Soder v. Adams Hardware Co. [Wash.] 80 P. 775.

36. In re Shively's Estate [Ga.] 78 P. 869.

37. Wilson v. Phillipsburg [Kan.] 77 P. 582; Anderson v. McGregor [Wash.] 78 P. 776; Cressler v. Asheville [N. C.] 51 S. E. 53; Hays v. Crutcher [Idaho] 77 P. 620.

38. The official stenographer's transcript though required by statute to be filed is no part of the record unless approved as a bill of exceptions. Illinois Cent. R. Co. v. Howard [Ky.] 85 S. W. 732. A statute providing that the notes of the official stenographer shall be typewritten and filed with the clerk, and shall become a part of the records of the court, does not make them a part of the record proper. Laws 1903, p. 83, c. 58, § 4. Cressler v. Asheville [N. C.] 51 S. E. 53.

39. Scheffel v. Scheffel [Tex. Civ. App.] 84 S. W. 408. Improper argument must be saved by bill of exceptions—recitation in motion for new trial being insufficient. Estes v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 909; Edger v. Kupper [Mo. App.] 85 S. W. 949.

40. Special instruction cannot be reviewed as having been given, unless judge has indorsed thereon whether it was refused or given, as required by statute. Albritton v. First Nat. Bank [Tex. Civ. App.] 86 S. W. 646. The charge of the court and requests for instructions, though required to be filed, are not part of the record proper. Cressler v. Asheville [N. C.] 51 S. E. 53. Where the judgment roll must be certified as an entirety, instructions not appearing in it, but merely in the statement on motion for a new trial, cannot be considered. Butte Min. & Mill Co. v. Kenyon [Mont.] 76 P. 696. Instructions not made a part of the judgment roll but only in the statement on motion for a new trial will not be considered. Dawes v. Great Falls [Mont.] 77 P. 309; Butte Min. & Mill. Co. v. Kenyon [Mont.] 77 P. 319; Spencer v. Spencer [Mont.] 79 P. 320. Instructions not a part of the judgment roll are not open to review. Shropshire v. Sidebottom [Mont.] 76 P. 941.

they must be embodied in the bill of exceptions.[41] Recital in the record proper of matters which are no part of such record are unavailing to supply omissions from the bill of exceptions.[42]

(§ 9) *C. Form, requisites and settlement of secondary record.* 1. *The bill of exceptions.*[43]—In order to preserve exceptions to the action of the trial court in relation to any matter not a part of the record, a bill embodying it must be tendered, authenticated by the trial judge, and filed in the case before the adjournment of the term of court at which the action complained of occurred.[44] This rule applies to any proceedings had in the progress of the case as well as to the action of the court upon trial and judgment.[45] The bill of exceptions in some jurisdictions embraces all matters not part of the record proper,[46] while in others it is confined to specific errors, being used concurrently with other forms of secondary record,[47] while in some separate bills are settled to each alleged error; each

41. Will ignore charge preserved in record but not in bill of exceptions. Southern R. Co. v. Yancy [Ala.] 37 So. 341.

42. Order disposing of motion for new trial must be shown in bill of exceptions and omission is not cured by recital in record proper. Fisher v. Lederer, 115 Ill. App. 289. Date of motion for new trial omitted from the bill of exceptions may be supplied by reference to the record. Lambert v. Lambert [Mo. App.] 84 S. W. 203. Charge must be in bill of exceptions. Southern R. Co. v. Yancy [Ala.] 37 So. 341. Inclusion in the transcript of a petition to make certain papers part of the record and a stipulation that such petition was granted will not take the place of a bill of exceptions. Metropolitan R. Co. v. MacFarland, 25 S. Ct. 28. Objection and exception must appear by the bill and omission is not cured by recitals in record proper. Dupuis Co. v. Cobb, 113 Ill. App. 421.

43. See 3 C. L. 208.

44. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Questions not arising on the record cannot be reviewed without a bill of exceptions. State v. Beimfohr [Mo.] 81 S. W. 162. The office of the bill of exceptions is to set forth those proceedings which are not required to be entered in the record proper. McCord Rubber Co. v. St. Joseph Water Co. [Mo.] 81 S. W. 189. The bill of exceptions becomes a part of the record when signed by the judge, ordered by the court to be filed, and filed. Bill held sufficiently identified by order of court. Id. It is never spread on the record of the court, and no order of the court properly calls for it to be so spread. Id. A bill of exceptions to the remarks of counsel, being properly filed, becomes a part of the record of the case. Colorado Canal Co. v. Sims [Tex. Civ. App.] 82 S. W. 531.

45. Bill of exceptions must be filed at term at which proceedings are had, if previous to one at which final judgment is entered, or exceptions are waived. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Laws 1899, p. 657, c. 275, authorizing judge to allow time to file bills after final judgment, does not apply to wayside bills of this character. Id. Petition and bond for removal to Federal court held not part of record, and assignment predicated on refusal of trial court to receive them and to order removal overruled, where only made part of bill of exceptions filed after final judgment at a subsequent term. Id.

46. The bill of exceptions should contain only the relevant portions of the evidence in narrative form. District of Columbia v. Frazer, 21 App. D. C. 154. Appellant denied recovery of costs on account of breach of rule. Brown v. Insurance Co., 21 App. D. C. 325. Ordinarily in an equity case the bill of exceptions must contain all the evidence (State v. Gibson [Mo.] 83 S. W. 472), but this rule does not apply where the only question proposed to be raised is the jurisdiction of the court. In such case need only embrace that bearing on the question (Id.). Mandamus to compel signing of bill should not be denied on theory that defendants have right to insist that decrees in their favor shall not be disturbed until court has reviewed entire evidence and found merits of the case against them. Id. The facts being contested in an equity case, the bill of exceptions should contain the evidence, though the judge found the facts and stated conclusions of law thereon; and mandamus will not lie to compel the judge to sign a bill omitting such evidence. State v. Jarrott [Mo.] 81 S. W. 876. In attachment proceedings separate bills of exceptions must be filed in the attachment branch of the case and in the remaining portion of the action on the merits. Rev. St. 1899, § 407. Alexander v. Wade [Mo. App.] 80 S. W. 917.

47. Objections to the "exclusion" of evidence must be presented by bill of exceptions, notwithstanding a rule allowing objections to "evidence admitted over objection" to be presented by statement of facts. Home Circle Soc. No. 2 v. Shelton [Tex. Civ. App.] 85 S. W. 320. Rulings on the admission of evidence must be saved by bill of exceptions; not in the statement of facts. Scott v. Llano County Bank [Tex. Civ. App.] 85 S. W. 301. The refusal of the court to grant an order requiring the production of a paper, which is material evidence in the case, after the adverse party has been served with notice to produce it, is reviewable in a motion for a new trial. Not necessary to take advantage of error by exceptions pendente lite. Carrington v. Brooks [Ga.] 48 S. E. 970. The disallowance of an amend-

bill must in such case be in the form appropriate to bring up the particular error,[48] and each complete in itself.[49] The bill of exceptions is ordinarily required to be embraced in one document,[50] and should include all matters essential to the question involved,[51] which were presented to the trial court, and nothing that was not so presented.[52] Unnecessary or immaterial matters should not be included.[53] Papers referred to therein must be annexed or identified beyond doubt.[54] Skeleton bills, that is bills which provide for the subsequent copying by the clerk into and as a part of them of some paper or document, are allowed in some states.[55] Appellant must see that record or abstract contains everything necessary to review,[56] and its omissions will be construed against him[57] and the

ment cannot be properly excepted to in a motion for a new trial. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. A ground of a motion for a new trial which complains that the verdict is contrary to a given charge of the court is in effect a complaint that the verdict is contrary to law. Spearman v. Sanders [Ga.] 49 S. E. 296. The sufficiency of the evidence to sustain the verdict will not be considered upon a direct bill of exceptions. Question may be made in lower court by motion for new trial and decision brought up. Mulherin v. Kennedy [Ga.] 48 S. E. 437. Rulings of court in excluding evidence must be preserved by bill of exceptions and not by statement of facts. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

48. Affirmative charge will not be reviewed on evidentiary bill of exceptions. Atlantic Coast Line R. Co. v. Calhoun [Fla.] 36 So. 361. In respect to a charge given or refused, it must be set out in the ordinary bill of exceptions with the evidence or substance thereof to which it related and the charge that was given thereon. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

49. Evidentiary and ordinary bills must be separately made up (Daytona Bridge Co. v. Bond [Fla.] 36 So. 445), and each must be sufficient in itself (Id.). An exception referring to another exception for its objection will be overruled. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. The court will not refer from one bill of exceptions to another to aid defects claimed on either. Evidentiary and ordinary bills. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445. In reviewing charge it will not look to evidence outside the ordinary bill of exceptions. Maultsby v. Boulware [Fla.] 36 So. 713.

50. Leave to file a bill of exceptions authorizes the filing of as many separate bills as appellant desires. One embracing the evidence and another the ruling directing a verdict. Davis v. Mercer Lumber Co. [Ind.] 73 N. Y. 899. A party can have but one bill of exceptions in the same case. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164. When the judge has signed a bill of exceptions, he has exhausted his statutory power thereto, so far as the party tendering the exceptions is concerned. Id.

51. The bill of exceptions must contain the evidence objected to. A mere reference to the official transcript which is not furnished to the court is not sufficient. Hathaway v. Goslant [Vt.] 59 A. 835. The evidence may properly be stated in narrative form. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888. It is not necessary that the evidence in the bill be transcribed by the official stenographer. Id.; Chicago & S. E. R. Co. v. McEwen [Ind. App.] 71 N. E. 926.

52. Affidavits filed with the clerk upon motion for a new trial and not presented to the court upon hearing should not be embodied in the bill of exceptions. State v. Spiegel, 4 Ohio C. C. (N. S.) 255, 25 Ohio C. C. 552.

53. A bill intended to bring up the ruling of the court directing a verdict need not present the language used by the court in so doing as such a direction is in no sense an instruction. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899.

54. Mere statement in bill that certain numbered instructions were given does not bring in correspondingly numbered instructions copied into the transcript. Newton v. Russian [Ark.] 85 S. W. 407. An exhibit not attached to the bill of exceptions, and erroneously referred to therein, cannot be considered. Insurance policy marked "A" and referred to as "B." Lewis C. Hammel v. Ins. Co. of Penn., 4 Ohio C. C. (N. S.) 380, 24 Ohio C. C. 101. Exhibits attached to a bill and referred to properly in the amended bill but not set out therein are properly a part of the record. Weir v. Jones [Miss.] 37 So. 128. A skeleton bill of exceptions presented to the judge for signature, reciting that the plaintiff "asked the following instructions, to wit: (clerk here set out the several instructions asked by plaintiff in full)," and stating that the court gave certain specified numbered instructions and refused others, held to sufficiently identify the instructions asked, given, and refused, in view of the fact that the clerk was thereby enabled to copy them correctly, there being no contention that they were not properly set out in the transcript. Ford v. Bodcaw Lumber Co. [Ark.] 83 S. W. 346.

55. Practice stated. Tracy's Adm'x v. Carver Coal Co. [W. Va.] 50 S. E. 825. A skeleton bill containing a direction to the clerk to copy the official stenographer's transcript of the parol evidence is insufficient. Rev. St. 1899, § 866, as amended by Acts 1903, p. 105, construed. Forbs v. St. Louis, etc., R. Co. [Mo. App.] 82 S. W. 562.

56. Grabill v. Ren, 110 Ill. App. 587.

57. Peoria Star Co. v. Lambert, 115 Ill. App. 319; Lumbard v. Holdiman, 115 Ill. App. 458; Kiesewetter v. Supreme Tent of Knights of Maccabees of the World, 112 Ill. App. 48; Grondenberg v. Grondenberg, 112 Ill. App. 615.

court will of its own motion refuse to consider a bill not conforming to the rules.[58] As a general rule deficiencies in matters which belong to the bill of exceptions cannot be aided by other parts of the record.[59] A stipulation that objections and exceptions need not be taken at the trial does not dispense with the necessity of inserting them in the bill of exceptions precisely as if they had been so taken.[60] The office of the bill of exceptions is not only to verify the recitals, but to authenticate itself, and to show all facts, including the signature, within the proper time, needed to give the reviewing court jurisdiction.[61] The bill of exceptions must show on its face that it was signed in due time.[62] A defective bill cannot be aided by extrinsic evidence, except in cases expressly provided by statute.[63] In making up statements or bills of exceptions, litigants are not required to use transcripts of the record of the official stenographer.[64]

Settlement, signing, and filing.[65]—The bill must be settled by the judge who tried the case[66] unless provision is made for settlement by his successor.[67] It must be presented during the term[68] or within the time limited by statute or rule,[69] or an extension of such time duly allowed[70] before the expiration of the

58. District of Columbia v. Frazer, 21 App. D. C. 154; Brown v. Insurance Co., 21 App. D. C. 325.

59. Jamison v. Dooley [Tex.] 82 S. W. 780.

60. The Fairbank Co. v. Nicolai, 112 Ill. App. 261.

61, 62. Atkins v. Winter [Ga.] 48 S. E. 717.

63. Supreme court cannot consider an affidavit setting up reasons why a corrected bill was not presented until the return of the judge to the county where the trial was had. Atkins v. Winter [Ga.] 48 S. E. 717. A motion to dismiss will be overruled where it affirmatively appears from the record that the bill of exceptions was tendered in time, though such fact is not recited in the bill itself. Where judgment rendered Oct. 13, and bill signed Nov. 12, 1903. Green v. Valdosta Guano Co. [Ga.] 48 S. E. 984. The fact that a demurrer to the evidence is unnecessarily made a part of the bill of exceptions does not prevent a review of the ruling thereon. Is part of record proper. Chesapeake & O. R. Co. v. Pierce [Va.] 48 S. E. 534.

64. Though Code Civ. Proc. §§ 370, 377 require the official stenographer to attend all sittings and file with the clerk full notes of the proceedings. York v. Steward [Mont.] 76 P. 756. Under Code Civ. Proc. §§ 370, 377, which provides for an official stenographer and makes his notes prima facie correct, litigants in making up statements or bills are not required to obtain transcripts from him. Id.

65. See 3 C. L. 210.

66. Kelly v. Moore, 22 App. D. C. 1; Burch v. Goodenough, 110 Ill. App. 603. Where the case was tried by the judge of another county acting specially he is the proper person to settle the bill of exceptions and he may do so in his own county. Supreme Court of the Independent Order of Foresters v. Knowles, 113 Ill. App. 641. The clerk's certificate cannot authenticate a bill not signed by the judge until after the certificate was made. Nurrenbern v. Daniels [Ind.] 71 N. E. 889. In the absence of some statutory provision, a bill of exceptions will not be regarded as sealed unless it is identified by the certificate of the trial court. Bostwick v. Willett [N. J.] 60 A. 398.

67. Trial judge cannot as his own successor settle bill after his term; he can only do so under the statute continuing his power after term to a time fixed in term. Mowery v. Wilson State Bank [Kan.] 72 P. 539. In order that a trial judge out of office shall have jurisdiction to sign and settle a case made, such jurisdiction must have been preserved by some proper order. Granite State Fire Ins. Co. v. Harn [Kan.] 76 P. 822.

68. Cantlin & Co. v. Miller [Wyo.] 78 P. 295. When the date of adjournment does not appear, it may be presumed to support the bill of exceptions that it was on the latest legal day for adjournment, thus making the signature timely. Might have been continued into August, and bill signed September 14, was hence within 30 days after adjournment. Carroll v. Warren [Ala.] 37 So. 687. Cannot by agreement be signed after beginning of next term. Practice rule 30. Abercrombie v. Vandiver [Ala.] 37 So. 296. In Federal courts it may be settled at any time during the trial term or the term at which judgment is entered, or at any extended time which the court may grant while the judgment remains open. Minahan v. Grand Trunk Western R. Co. [C. C. A.] 138 F. 37. Bill of exceptions showing interlocutory order must be made at the term at which the order was entered unless additional time is allowed. City of Spring Valley v. County of Bureau, 115 Ill. App. 545. The court has no power to allow a bill of exceptions, or to alter or amend one already allowed and filed, after the expiration of the trial term, in the absence of a rule of court authorizing it, or an order or agreement of the parties extending the time, especially after an appeal has been perfected. Kelly v. Moore, 22 App. D. C. 1. An adjourned term after the time of an extension is not a continuation of the regular term for the purpose of signature of the bill. Hayes v. Woodham [Ala.] 36 So. 545.

69. Winklemann v. Schlueter [Mo. App.] 85 S. W. 928; Norman v. Great Western Tall-

time originally limited.[71] Relief in case of accident, mistake, or other excusable neglect, is generally provided.[72] The bill must be approved,[73] and stipulation will not dispense with such approval.[74] Approval must be by the judge, as such,[75] within the time allowed by law,[76] and the approved bill must be filed[77] in the court below after signature,[78] within the time allowed by law;[79] and in some jurisdictions

oring Co. [Ga.] 49 S. E. 782. Civ. Code 1895, § 5539. Jossey v. Brown [Ga.] 47 S. E. 350; Smith v. Emerson [Mo. App.] 80 S. W. 922; Hayes v. Woodham [Ala.] 36 So. 545; Dodds v. Gregson [Wash.] 77 P. 791; Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814; Halstead v. Sigler [Ind. App.] 74 N. E. 257; Stock v. Luebben [Neb.] 100 N. W. 307; Dodds v. Gregson [Wash.] 77 P. 791. Where the last day allowed falls on Sunday, the bill of exceptions may be presented on Monday. Duncan v. Moloney, 115 Ill. App. 522. When the bill is returned for correction, a new starting point is fixed, and hence what is a reasonable time for making the correction is independent of the length of time allowed for the presentation of the original bill. Atkins v. Winter [Ga.] 48 S. E. 717. In case the statute does not fix a time within which the changed bill may be corrected and excepted, plaintiff is entitled to a reasonable time within which to act. Id. What is a reasonable time should be determined as matter of law rather than as matter of fact. Id. Twenty days is a reasonable time, and should be fixed as the limit. Id. Delay of 38 days held unreasonable. Id. Delay in entering final judgment does not postpone the time for filing bills of exception to the overruling of a motion for new trial. St. Paul's Congregation v. Houtz [Ind. App.] 74 N. E. 262. Exceptions will be considered though the clerk failed to present them to the court, it being his duty to do so and the exceptant having no control over him. Goff v. Britton, 182 Mass. 293, 65 N. E. 379. Time to file a general bill will not authorize the filing after time of a special bill. Wagner v. Weyhe [Ind. App.] 71 N. E. 915.

70. It is not necessary that either the application for the extension of the time for filing a bill of exceptions or the order granting it should show that it was for good cause. American Bonding & Trust Co. v. United States, 23 App. D. C. 535. An order extending the time for filing the bill of exceptions need not be made by the judge who presided at the trial. Id. Time allowed without specifying otherwise runs from adjournment of the term. Carroll v. Warren [Ala.] 37 So. 687. An extension of time may be made during the term of trial to a day beyond that term. Minahan v. Grand Trunk W. R. Co. [C. C. A.] 138 F. 37. Where a stated number of days is allowed by order to file bill of exceptions, the day on which the order is dated is excluded. Gates v. Davis [Ky.] 86 S. W. 1132. Counsel who acquiesce in an order fixing the date for filing bill of exceptions at a time when a term would intervene cannot withdraw consent. Hill's Adm'r v. Penn Mut. Life Ins. Co. [Ky.] 85 S. W. 759. Under an order extending the time for filing the bill of exceptions "to" a certain term, it may be filed up to or on the first day of such term, but not thereafter. Bloch Queensware Co. v. Smith [Mo. App.] 80 S. W. 592. Agreeing to postpone settlement beyond ruling on new trial motion is a postponement past the beginning of the "next term," the new trial motion being set for then. Practice rule 30 (Code p. 1200). Birmingham R. & El. Co. v. James [Ala.] 36 So. 464. Under a rule limiting agreements to extend time of settlement of a bill (Code p. 1200), one settled by agreement after beginning of next term will be ignored. Id. A bill of exceptions invalid as to the judgment because tardily settled may be good as to a motion for new trial made at a later term. Id. If extended by agreement beyond the time when the court may settle it, orders after adjournment granting extension are naught. Id. Time given from the overruling during term of motion for new trial extends the making of a bill to the trial as well as to the motion. Gaston v. Marengo Imp. Co. [Ala.] 36 So. 738.

71. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814; Haggelund v. Oakdale Mfg. Co. [R. I.] 60 A. 106; Keyes v. Kennedy [Mo. App.] 83 S. W. 539. Rev. St. 1899, § 728. O'Bannon v. St. Louis & G. R. Co. [Mo. App.] 80 S. W. 321; Moore v. Andrews [Colo.] 81 P. 248.

72. Mistake in fixing the time, resulting from an excusable inadvertence on the part of appellant's attorney. Code Civ. Proc. § 473. Kaltschmidt v. Weber [Cal.] 79 P. 272. Sickness of judge. Roberts v. Bennett [C. C. A.] 135 F. 748. Mistake, accident or unforeseen cause. Mere forgetfulness no excuse. Haggelund v. Oakdale Mfg. Co. [R. I.] 60 A. 106.

73. Atlanta, etc., R. Co. v. Lovelace [Ga.] 49 S. E. 607.

74. Leppel v. District Court of Garfield County [Colo.] 78 P. 682. Certificate by judge that the statement has been agreed on by counsel, but containing no approval by him, is insufficient. Watkins v. Hale [Tex. Civ. App.] 84 S. W. 386. A bill agreed to by the parties and presented by a commissioner appointed to settle it will be considered, it being a copy of the original bill which was disallowed through misunderstanding. Scaplen v. Blanchard [Mass.] 72 N. E. 346.

75. The authority given a referee by the statute to decide any question which arises upon the trial, sign a report, or settle a case, does not relieve the court of its statutory duty to settle the bill of exceptions. Babcock v. Ormsby [S. D.] 100 N. W. 759.

76. Where the statute provides no time it is to be fixed by the judge. State v. Adair [Ind. App.] 73 N. E. 611.

77. In Ohio when the party taking a bill of exceptions has filed it within the statutory period he has performed all the duties imposed on him. Davies v. New Castle & L. R. Co. [Ohio] 73 N. E. 213.

78. And the fact that it was so filed must appear. Elrod v. Purlee [Ind.] 73 N. E. 589. Where the record on appeal shows that the

it is required to be served on the adverse party.[80] The duty of the trial court to approve a truthful bill presented in time[81] will be enforced by mandamus;[82] but an appellate court will not, on mandamus, overrule the statement of the trial judge as to what were the facts.[83] In some states provision is made for authentication by affidavit of bystanders if the judge refuses to sign.[84] A bill duly settled is a record and can only be corrected as such.[85] Every reasonable intend-

judge signed the bill, the presumption arises that he did his duty and filed it after he had signed it. Neighbors v. Davis [Ind. App.] 73 N. E. 151; Pichon v. Martin [Ind. App.] 73 N. E. 1009. Where a bill was signed and filed on the same day it will be presumed that signature preceded filing. Toledo, etc., R. Co. v. Parks [Ind.] 72 N. E. 636.

79. Cooper v. Lazarus [Ga.] 47 S. E. 500; Simpson v. Scroggins [Mo.] 81 S. W. 1129.

80. An acknowledgment of service upon a bill of exceptions does not relate to or bind any person not actually named or sufficiently designated as a defendant in error when the acknowledgment is entered. Sears v. Jeffords [Ga.] 47 S. E. 186; Green v. Barron [Ga.] 47 S. E. 188. Such an acknowledgment will not be construed as an acknowledgment by one thereafter made a party by amendment to the bill of exceptions. Sears v. Jeffords [Ga.] 47 S. E. 186. Objection that the bill of exceptions was not properly served is waived by presenting amendments to it. Fordham v. Northern Pac. R. Co. [Mont.] 76 P. 1040. Court rules requiring the submission of bills to the adverse attorney and subsequently to the judge, and requiring an affidavit of counsel if the bill is not agreed to, are upheld. State v. Adair [Ind. App.] 73 N. E. 611.

81. Must be presented in time. Civ. Code 1895, § 5539. The only exceptions in the statute are the judge's absence from home or his failure by casualty to certify the bill of exceptions. Farmers' & Traders' Nat. Bank v. Willis [Ga.] 50 S. E. 366. Where an ex parte order extending the time for settling a bill of exceptions has been found on hearing to have been fraudulently obtained, the judge may set it aside and refuse to settle the bill because not presented in time. State v. Sornberger [Neb.] 101 N. W. 241.

82. In Massachusetts the prevailing party is entitled, after exceptions by his adversary have been amended, to petition to have the exceptions allowed as filed. Dorr v. Schenck [Mass.] 73 N. E. 532. Mandamus is the remedy when the circuit court improperly refuses to sign a bill of exceptions. State v. Jarrott [Mo.] 81 S. W. 876. Mandamus will lie to compel the judge to sign the bill of exceptions. State v. Gibson [Mo.] 83 S. W. 472. Rev. St. 1899, §§ 727-736, providing the procedure when the court refuses the filing of exceptions, applies only where the judge refuses to sign a bill on the ground that it is not a true statement of the matters excepted to, and not where he refuses because a bill in an equity case does not contain all the evidence, where the only question intended to be raised is that of jurisdiction. Id. The contention that there is no merit in relator's claim of error will not prevent the issuance of the writ. Change of venue. The question must be brought before court in regular way, by bill of exceptions. Id. Mandamus will not lie to compel the trial court to make incompetent evidence (affidavit made on information and belief on motion for new trial) a part of a bill of exceptions. Gay v. Torrance [Cal.] 78 P. 540. On mandamus by a plaintiff in a divorce suit to compel the judge to settle the bill of exceptions defendant cannot intervene and set up special reasons for refusal to settle the bill. Gay v. Torrance [Cal.] 76 P. 717.

83. State v. Spiegel, 4 Ohio C. C. (N. S.) 255, 25 Ohio C. C. 552. What shall be contained in the bill is a matter exclusively for the trial judge to determine. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888. Where it is sought by mandamus to compel the respondent to sign a bill of exceptions and the answer denies said bill to be a true bill and this answer is not denied by any reply, the respondent is entitled upon the pleadings to have the petition dismissed. State v. Spiegel, 4 Ohio C. C. (N. S.) 255, 25 Ohio C. C. 552.

84. A bill verified by bystanders must be prepared, sworn to and filed at the time the occurrence it relates to transpires. Dehougne v. Western Union Tel. Co. [Tex. Civ. App.] 84 S. W. 1066. Statutory requirements necessary to the preservation of a bill of exceptions must be complied with. Mills' Ann. Code, § 385, requires timely notice to the opposite party where a bill is sought to be preserved by affidavits. Froman v. Wilson [Colo. App.] 78 P. 615. Bill signed by bystanders is invalid where there is nothing from the judge to show that he refused to sign or why. Metz v. Sutton [Mo. App.] 85 S. W. 929.

85. Where a party attempts to state his exception in the bill but fails to state it fully, an amendment is proper after the time has passed during which exceptions might be filed. Dorr v. Schenck [Mass.] 73 N. E. 532. Where it is the duty of the trial court to examine and settle bills of exceptions and statements, where once settled and filed, it becomes part of the record and not subject to correction except on a showing of mistake and in no case should it be stricken from the files. Under Code Civ. Proc. §§ 1155, 1173. York v. Steward [Mont.] 76 P. 756. Under Code Civ. Proc. § 650, amendments to a bill of exceptions held to have been agreed to so that presentation to the judge for settlement within 10 days was not necessary. Gay v. Torrance [Cal.] 76 P. 717. Under Code Civ. Proc. §§ 1155, 1173, a bill of exceptions once settled and filed becomes a part of the record, not subject to connection except on a showing of mistake. York v. Steward [Mont.] 76 P. 756. After the bill of exceptions has been certified, the defendant in error cannot have any additional evidence or other matter sent up, except such

ment arising from the record of settlement supports the court's action therein.[86] It may be vacated for defects which vitiate the settlement below.[87]

(§ 9C) 2. *The settled case or statement of facts.*[88]—The case must be settled and approved,[89] unless a statute provides for an agreed case,[90] by the judge who tried the case,[91] within the district,[92] within the time limited by law,[93] rule,[94] or stipulation of parties,[95] or an extension thereof duly granted,[96] and must be

as is a part of the record and on file in the office of the clerk. Jones v. Gill [Ga.] 48 S. E. 688.

86. If the judge's certificate to the bill of exceptions is not dated, the certificate will be presumed to have been made on the day of the acknowledgment of service by counsel for the defendant in error. Under Civ. Code 1895, § 5566, providing that writ of error shall not be dismissed unless it is made to appear that signature was made after the time required by law. Porter v. Holmes [Ga.] 50 S. E. 923. It will be presumed that the acknowledgment of service was made after the bill was certified and within ten days thereof. Bill of exceptions will not be dismissed on ground that it does not affirmatively appear that it was served after the signing of the certificate by the trial judge. Thompson v. Hays [Ga.] 51 S. E. 33. Where the date of the certificate, the date of the acknowledgment of due and legal service, and the date of the filing of the bill of exceptions, are the same, it will be presumed that these steps were taken in their proper chronological sequence. McCain v. Bonner [Ga.] 51 S. E. 36.

87. A motion to strike a bill of exceptions from the files on the ground that it does not contain all the evidence will be overruled where the determination of the errors assigned does not depend upon the weight of the evidence. Determination depends upon construction of will. Union Sav. Bank & T. Co. v. Smith, 4 Ohio C. C. (N. S.) 237, 26 Ohio C. C. 317.

88. See 3 C. L. 213.

89. A statement of facts signed by the parties, but not introduced in evidence or signed or approved by the judge cannot be considered as a statement of facts on appeal. Stone v. McClellan [Tex. Civ. App.] 81 S. W. 751.

90. A written agreement as to facts is not an agreed case provided for by Mills' Ann. Code § 278, and must therefore be made part of the record by bill of exceptions. Wagner-Stockbridge Mercantile & Drug Co. v. Goddard [Colo.] 80 P. 1038. A statement signed by the judge but not by counsel, without a certificate that counsel failed to agree, and not purporting to contain all the facts, cannot be considered as a statement of facts on appeal. Sloan v. Schumpert [Tex. Civ. App.] 81 S. W. 1005.

91. An appellant in New Jersey is not entitled under the act of 1902 to have the stenographer's notes certified as the state of the case, but there should be a statement agreed upon, or in default of agreement the case should be settled and signed by the judge. Boland v. Kaveny [N. J.] 58 A. 99; Esler v. Camden & S. R. Co. [N. J.] 58 A. 113; Van Vechten v. McGuire [N. J. Law] 58 A. 331. An omission to set out a material and necessary fact in the state of the case is no ground for reversal. If appellant is dissatisfied with the statement he should suggest diminution. Van Vechten v. McGuire [N. J. Err. & App.] 58 A. 331. The court entering a decree is without jurisdiction to sign and seal a certificate of evidence presented pursuant to a void order allowing an appeal. And an approval and stipulation of such a certificate by opposing counsel will not confer authority to sign and seal it. Finch v. Finch, 111 Ill. App. 481. In absence of showing of statutory grounds therefor, a case signed by a judge other than the one who tried the case is insufficient. Parks & Woolson Mach. Co. v. Levy, 88 N. Y. S. 993. Approval of brief of evidence held sufficient. Tifton, etc., R. Co. v. Chastain [Ga.] 50 S. E. 105.

92. Cameron-Barkley Co. v. Thornton Light & Power Co. [N. C.] 49 S. E. 76.

93. Robbins v. Mackie [Kan.] 79 P. 170; Rapid Transit R. Co. v. Miller [Tex. Civ. App.] 85 S. W. 439; Daugherty v. Hedricks [Kan.] 77 P. 586; Hildreth v. Thibodeau [Mass.] 71 N. E. 111. Where a party is allowed "to" a certain date to serve a case made, the time expires at twelve o'clock, midnight, on the date preceding the date given. Maynes v. Gray [Kan.] 76 P. 443.

94. State v. Kelly [Minn.] 103 N. W. 15.

95. State v. Kelly [Minn.] 103 N. W. 15. Case filed in appellate court before time set for settlement will be returned to the files to allow appellant to move for its return and settlement if he desires. Hillman v. De Rosa, 90 N. Y. S. 409. Where the time is extended by stipulation, no order is necessary. 2 Ballinger's Ann. Codes & St. § 5062. Dodds v. Gregson [Wash.] 77 P. 791.

96. Under Laws 1903, c. 380, p. 583, if a motion to extend the time for serving a case made is made at the time of rendition of judgment and the extension is then granted it is a sufficient compliance with the requirement that the order be filed with the clerk of court. Howard v. Carter [Kan.] 80 P. 61. When time for serving a case made is extended by the judge under the provisions of Laws 1903, c. 380, § 1, the requirements of the law are satisfied by filing the order of extension with the clerk of court. The filing constitutes notice of the extension. Clark v. Board of Com'rs of Mitchell County [Kan.] 77 P. 284. An extension of time within which to serve a case made, "to" August 10th requires service before the expiration of August 9th. Code Civ. Proc. § 722, including the last day in the computation of time, does not apply to this case. Buck's Stove & Range Co. v. Davidson [Kan.] 79 P. 119. An agreement that the statement may be approved "at any time" does not authorize approval after the tran-

filed in the court below.[97] The date that exhibits are attached to the statement is immaterial so long as they are sufficiently indorsed and marked for identification.[98] Mandamus will lie to compel a judge to settle and sign a properly presented case-made.[99] Provision is usually made for settlement in case of the death or retirement of a judge.[1] The judge may correct his certificate after the expiration of the time to settle the case.[2] It is generally provided that the proposed case, with notice of settlement,[3] be served on the adverse party,[4] who may present amendments or accept the case as proposed,[5] at the time of settlement.[6] Cases dealing with the necessary contents of a settled case are discussed below.[7]

script has gone up. Watkins v. Hale [Tex. Civ. App.] 84 S. W. 386. A case made completed within the time extended under ch. 380, p. 583, Laws 1903, is not invalidated because the order extending the time was not filed with the clerk, the provision requiring such filing being directory, not mandatory. Kansas City-Leavenworth R. Co. v. Langley [Kan.] 78 P. 858. In Michigan an extension of time to settle a case on appeal may be granted by the supreme court beyond the 40 days specified in supreme court rules 8 and 15, and the extension may be conditional. Sherman v. Sherman [Mich.] 102 N. W. 630.

97. Appellant's counsel agreeing that the statement of facts need not be filed within the statutory time contributes to the delay within the meaning of Sayles' Ann. Civ. St. 1897, art. 1382, and hence cannot have the statement considered. Wilson v. Tyler Coffin Co. [Tex. Civ. App.] 82 S. W. 664. Where appellant's counsel might have compelled the filing of a statement of facts within the statutory time, but failed to do se, and the statement is filed after the expiration of such time, it will be stricken on motion. Where mandamus could have been resorted to to compel the filing of the statement within the prescribed time. Id. A statement in an opinion that an order extending the time for filing a statement of facts must thereafter be upon written motion only does not have the effect of a regularly adopted rule of practice. Ft. Worth & D. C. R. Co. v. Roberts [Tex.] 81 S. W. 25. An order granting leave to file a statement of facts within 10 days after adjournment may be entered nunc pro tunc upon oral evidence and the recollection of the judge. Id.

98. Suksdorf v. Humphrey [Wash.] 77 P. 1071.

99. Cadillac State Bank v. Wexford Circuit Judge [Mich.] 102 N. W. 667. But not when presented after expiration of the time fixed by stipulation of parties. State v. Kelly [Minn.] 103 N. W. 15.

1. In Kansas, a trial judge has jurisdiction after the expiration of his term, to sign and settle a case until the time "fixed" for serving, suggesting amendments or settling and signing has expired, and no longer. Robbins v. Mackie [Kan.] 79 P. 170.

2. Under Ball. Ann. Codes & St. § 5060, a judge may correct or supplement his certificate either after the statement has been settled or after the expiration of the time allowed by statute within which to file amendments. In re Halburte's Estate [Wash.] 80 P. 294.

3. Where notice has once been regularly given of the proposed settlement of a statement of facts, which has been continued from time te time, further formal notice is not always required. Dodds v. Gregson [Wash.] 77 P. 791.

4. Case made must show that it has been served within the statutory period or a valid extension thereof. Zinkeisen v. Lewis [Kan.] 80 P. 44.

5. The appellee may accept the appellant's case, or if he adds or rejects anything, the judge settles the case on appeal. Cressler v. Asheville [N. C.] 51 S. E. 53. In Kansas though a statute prescribes the time, after service of a case made, within which amendments may be suggested, the court may with consent of the parties limit it to a shorter period. Robbins v. Mackie [Kan.] 79 P. 170. The trial judge should not settle a statement until it is corrected so as to state the truth as to all matters it purports to contain. Humbird Lumber Co. v. Kootenai County [Idaho] 79 P. 396. Where a proposed statement of case is served on appellee and he serves no amendments, he agrees to its settlement as proposed and further notice to him is unnecessary. Juckett v. Farge Mercantile Co. [S. D.] 100 N. W. 742.

6. A motion to strike exceptions to a referee's refusal to pass on proposed findings of fact and conclusions of law is premature if made before judgment, the remedy being at the time of the settlement of the case on appeal. Underwood v. Greenwich Ins. Co., 90 N. Y. S. 832. Where the statute provides that if appellant's case is not returned by appellee within five days, with objections, it shall be deemed approved, it cannot be corrected after such time. Code, § 550. Barber v. Justice [N. C.] 50 S. E. 445.

7. A history 23 pages long filled with irrelevant details and arguments is in violation of the rule and weakens instead of strengthening a case and thus defeats its own end. Slater v. Slater [Pa.] 58 A. 267. There is no difference between a statement and bill of exceptions in form or substance except that a statement follows a notice of intention to move for a new trial. Juckett v. Fargo Mercantile Co. [S. D.] 100 N. W. 742. The case on appeal is a statement of the exceptions taken at the trial, and so much only of the evidence, charge, or other happenings as is necessary to present the exceptions intelligibly. Cressler v. Asheville [N. C.] 51 S. E. 53. Superfluous matter which can throw no light on the exceptions taken need not be included. Id. A case

A statute providing that the notes of the official stenographer shall be typewritten and filed and shall become a part of the records of the court does not render them conclusive as to the evidence or as to what occurred at the trial, but those matters must still be settled by the judge if counsel disagree in regard to them.[8] Such notes cannot be made to take the place of the case on appeal.[9] They should not be included therein bodily, but their substance only should be stated in narrative form.[10]

(§ 9C) 3. *Abstracts.*[11]—Where the practice of abstracting prevails, the appellant should, in every case,[12] present an abstract containing all that is necessary to an understanding of the matters which he wishes to urge,[13] presenting the evidence with intelligible fulness,[14] and showing the names of the parties, and ... nature of the proceedings, a short abstract of the bill or petition, and the testimony on which the findings are based.[15] And in a total absence thereof, the case will not be considered on its merits.[16] On the other hand, the evidence and proceedings must be condensed as far as practicable,[17] and proceedings and papers

made need contain only so much of the record as presents the alleged error. Wade v. Mitchell [Okl.] 79 P. 95. Notes of official stenographer not made a part of it by Laws 1903, p. 83, c. 58, § 4, providing that they shall be typewritten and filed and shall become a part of the records of the court. A case made containing only a transcript of the stenographer's notes of the evidence presents no question for review. High v. United States [Okl.] 78 P. 100. On appeal from an order granting or refusing a nonsuit or a demurrer to the evidence, only the evidence deemed to be material should be sent up. Cressler v. Asheville [N. C.] 51 S. E. 53. Where plaintiffs excepted to dismissal on the ground that a judgment roll showed a former recovery, it was defendant's duty to add the jugment roll to the case on appeal by proper amendment. Muller v. Bendit, 90 N. Y. S. 433.

8. Laws 1903, p. 83, c. 58. Cressler v. Asheville [N. C.] 51 S. E. 53.

9, 10. Cressler v. Asheville [N. C.] 51 S. E. 53.

11. See 3 C. L. 215.

12. An abstract is required though the appeal or writ of error is by the long form. Mink v. Chesney [Mo. App.] 85 S. W. 924.

13. Hixson v. Carqueville Lithographing Co., 115 Ill. App. 427. An abstract which is a mere index will not be considered. Henion v. Pohl, 113 Ill. App. 100. Abstract not containing the pleadings or judgment is meaningless and the judgment will be affirmed. Metzler v. Crebbin [Colo. App.] 79 P. 301. Where appellant's abstract did not show that evidence offered by him was excluded nor objections to evidence offered by appellee, assignments relative to admission or exclusive of evidence cannot be reviewed. Shilling Mercantile Co. v. Elliott [Colo. App.] 79 P. 179. A rule of court requiring so much of the evidence to be set forth in the abstract as is necessary to present the point relied on is not complied with by incorporation of such evidence in the brief. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. If the abstract is sufficient to permit the decision of the questions raised, the court will not affirm for failure to include all the evidence. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93. No part of the record not embraced in the abstract will be considered and plaintiff in error must abide the consequences of any want of necessary fullness. Macdermid v. Watkins [Colo. App.] 77 P. 253. Errors on which a party depends for reversal must appear by the abstract as the court will not examine the transcript. Gage v. Chicago, 211 Ill. 109, 71 N. E. 877. A claim that the failure of the abstract to show the entry of an appealable decree was due to an oversight of the attorney who prepared the abstract is not a sufficient excuse for failure to file a proper one. Martin v. Martin [Iowa] 99 N. W. 719. The "paper book" in Pennsylvania must contain a statement of the question involved. Rule 17. Roush's Estate, 23 Pa. Super. Ct. 652.

14. Facts necessary to an understanding of the error complained of must appear from the abstract. Cummings v. Smith, 114 Ill. App. 35. An abstract embracing in 10 printed pages evidence covering 113 typewritten pages is too meager upon which to review objections to the exclusion or admission of evidence. Slaughter v. Strouse [Colo. App.] 79 P. 972. The brief of the evidence must contain such an abstract thereof as will obviate the necessity of reading the entire evidence. Hess v. Corwin [Mo. App.] 84 S. W. 141. A judgment in an action for services will be reversed where neither the amount of the services, their value or for whom rendered, appears from the abstract. Crowe v. Walker [Colo. App.] 78 P. 618.

15. O'Donnell v. Clements, 23 Pa. Super. Ct. 447. "Sufficiency of the affidavit of defense" is not sufficient. Devers v. Sollenberger, 25 Pa. Super. Ct. 64.

16. Good v. Bank of Edwardsville [Ill.] 70 N. E. 583; Kellogg Newspaper Co. v. Corn Belt Nat. Bldg. & Loan Ass'n, 210 Ill. 419, 71 N. E. 339.

17. The evidence will not be reviewed where it is apparent that there has been no bona fide effort to brief it as required by law. Hathcock v. McGouirk [Ga.] 47 S. E. 563; St. Amand v. Lehman [Ga.] 47 S. E.

need not be set out in full, but the fact that each was duly had or served must be shown.[18] In South Dakota, failure to serve and file the abstract within the time limited is no reason for striking it from the record.[19]

Supplemental or counter abstracts.[20]—Where an appellee is not satisfied with appellant's abstract, he is entitled to file one supplying the omissions.[21] In some jurisdictions, the abstract must be approved,[22] but where the practice of counter abstracting prevails, approval is usually unnecessary.[23]

(§ 9) *D. Sufficiency of entire record to present particular questions.*[24]—Every presumption favors the correctness of the rulings below,[25] and accordingly

949; Martin v. Castle [Mo.] 81 S. W. 426. An abstract containing the pleadings, exhibits, motions, and judgment in full, and the testimony principally in narrative but to some extent by question and answer, is not too full. New York Store Mercantile Co. v. Thurmond [Mo.] 85 S. W. 333. Where the supreme court rules as to condensing the evidence in the abstract are not observed, the costs of the abstract will not be taxed (Chicago & A. R. Co. v. Bell [Ill.] 70 N. E. 754), and in a flagrant case pro forma affirmance may follow (Olson v. Lund [Iowa] 101 N. W. 1128). The abstract on appeal must be sufficiently full to enable the court to determine therefrom whether or not the errors assigned are well taken and the court will not search the record to determine whether technical objections were well taken. Chaloupka v. Bohemian Roman Catholic First Cent. Union, 111 Ill. App. 585.

18. Abstract must contain an allegation that notice of appeal has been duly served. In re Long's Estate [Iowa] 102 N. W. 501.

19. Juckett v. Fargo Mercantile Co. [S. D.] 100 N. W. 742.

20. See 3 C. L. 216.

21. The correctness of translations of letters in the abstract cannot be put in issue on appeal by a mere denial though there is no proof of their genuineness. Schneider v. Schneider [Iowa] 98 N. W. 159. Where appellee claims anything has been omitted from appellant's abstract, he must supply the deficiency, unless the omitted evidence is in possession of appellant. Downs v. Downs [Iowa] 102 N. W. 431. A supplemental abstract the filing of which was unnecessary will be stricken on motion and the cost of printing it taxed to the party filing it. Wunderlin v. Wunderlin [Iowa] 100 N. W. 37. An additional abstract consisting of a brief and opinion of a master in a case where there is no authority for proceedings before a master is no part of the record. Preliminary injunction granted by the court. Anheuser-Busch Brewing Ass'n v. Rahlf, 213 Ill. 549, 73 N. E. 414. Appellant's abstract will be taken as found; where he fails to specify his objections to respondent's additional abstract in writing so that the clerk may order a certified transcript of the part of the record in dispute in accordance with Rev. St. 1899, § 813, but instead cites the bill of exceptions to show that respondent's abstract is incorrect, to which the court has no access, the appeal being by the short form. Reedy Elevator Mfg. Co. v. Mertz [Mo. App.] 80 S. W. 684. The syllabus in this case states that under such circumstances the abstract as made by "respondent" must be taken as true, which is evidently what the opinion means, though it does not say so. Appellant by treating an additional abstract as filed within the proper time waives the defect. So held where objection was first made during the hearing. Haseltine v. Messmore [Mo.] 82 S. W. 115. When a full transcript is made because of a denial of an additional abstract grounded on a difference as to evidence, either the denial or the printed argument should point out the page in the transcript which sustains the denial. St. & Rules Sup. Ct. § 31. Lundvick v. National Union Fire Ins. Co. [Iowa] 103 N. W. 970.

22. The supreme court will not consider a brief of evidence not approved by the trial judge (Milton v. Savannah [Ga.] 48 S. E. 684), or the judge may indorse his approval on the brief itself at any time before the bill of exceptions is certified. Cannot be approved thereafter. Id. Such approval may be shown by a recital in the bill of exceptions. Id.

23. Abstracts of the record, on which case is submitted on appeal, not excepted to, are admitted to be a true statement of the material substance of the record, and cause will be considered on them alone. Hendry v. Whidden [Fla.] 37 So. 571. An abstract by an appellant under Rev. St. 1899, § 813, need not be authenticated by the clerk, but is conclusively presumed true unless challenged by a counter abstract. Martin v. Castle [Mo.] 81 S. W. 426. If the appellee is not satisfied with appellant's abstract, he should make timely objection. Failure will be treated as a waiver and as an admission that it states the evidence correctly. Watson v. Dilts [Iowa] 100 N. W. 50.

24. See 3 C. L. 250.

25. Pryor v. Walkerville [Mont.] 79 P. 240; Graves v. Norfolk & S. R. Co. [N. C.] 48 S. E. 502; Pichon v. Martin [Ind. App.] 73 N. E. 1009; Manley v. Railway Co., 24 Ohio C. C. 70, 4 Ohio C. C. (N. S.) 384; Squires v. Martin, 5 Ohio C. C. (N. S.) 313, 24 Ohio C. C. 232; Bennett v. Roys [Ill.] 72 N. E. 380; Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489. It follows from this rule that an appeal from a default judgment is useless. Johnston v. Callahan [Cal.] 79 P. 870. Rule applied where record does not contain all the evidence. City of St. Joseph v. Pitt [Mo. App.] 83 S. W. 544; Cravens v. Despain [Ky.] 80 S. W. 456. Burden of showing error is on party alleging the same. Gairdner v. Tate [Ga.] 48 S. E. 907. Error not presumed to avoid effect

the record, to present an alleged error, must not only show the ruling complained of,[26] and objection and exception thereto,[27] but so much of the evidence[28] and

of error shown. Talbott v. Donaldson [Kan.] 80 P. 981. Record should be liberally construed to find its meaning. Gregg v. Barnes Co., 110 Ill. App. 238. After verdict it will be assumed in the absence of legal evidence to the contrary that all claims for consequential damages not legally recoverable were disallowed at the trial. Karnuff v. Kelch [N. J. Err. & App.] 60 A. 364. On appeal in a partition suit, the record being silent, the court will presume that the rights of the parties have changed so that a former suit will not operate as a bar. Miller v. Lanning [Ill.] 71 N. E. 1115. Presumed that questions party refused to answer were proper and that he was properly committed for refusing. Fenn v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 103. In the absence of a case or bill of exceptions, it will be assumed that the question of alimony in a divorce case was voluntarily litigated, though the pleadings do not raise the question. Conklin v. Conklin [Minn.] 101 N. W. 70. Where an order granting a motion for a nonsuit on the ground of variance was passed, but was not entered until after an amendment adjusting the pleading to the proof was allowed, after which the order was filed, it will be presumed that the subsequent filing of the order was under the direction of the judge, nothing appearing to the contrary, and such order will be deemed a judgment that plaintiff has failed to prove his case as laid in the amended petition. Fenn v. Seaboard Air Line R. Co. [Ga.] 48 S. E. 141.

26. Hefferlin v. Karlman [Mont.] 76 P. 757; Ridley v. Mobile & O. R. Co. [Tenn.] 86 S. W. 606; Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936; Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 260. An undisclosed ruling will be presumed to have been in favor of the successful party. Hillman v. De Rosa, 92 N. Y. S. 67; Rickert v. Pollock, 92 N. Y. S. 89; Gairdner v. Tate [Ga.] 48 S. E. 907. Though exceptions to rulings are not necessary in chancery cases, the record on appeal must show that questions presented for review were involved below and adverse rulings made. Ortmeier v. Ivory [Ill.] 70 N. E. 665. Error cannot be assigned in New Jersey on an order striking out a pleading, unless the order is entered on the record at the request of the party against whom it is made. Bowers Hydraulic Dredging Co. v. Hess [N. J. Err. & App.] 60 A. 362. Rulings on motions to strike out pleadings cannot be considered when the bill of exceptions preserves neither the motion nor the ruling thereon. Hatcher v. Branch, Powell & Co. [Ala.] 37 So. 690.

27. Objection, ruling and exception must appear. Saenz v. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59. Ground of objection must appear. Missouri, etc., R. Co. v. Jarrell [Tex. Civ. App.] 86 S. W. 632; Kaestner v. Farmers & Merchants State Bank, 112 Ill. App. 158. A ruling on demurrer will not be reviewed where the grounds thereof are not copied into the record, according to Code, § 3271, as amended by Acts 1899-1900, c. 100. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. No exception taken. Southern R. Co. v. Blevins [C. C. A.] 130 F. 688; Marsh v. Keating [Conn.] 60 A. 689; Hoffman v. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010; Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164; Adams v. Board of Com'rs of Whitley County [Ind.] 72 N. E. 1029; Pearl v. Benton Tp. [Mich.] 100 N. W. 188. Exception to granting of motion for amendment of answer held sufficiently shown. Robinson v. Lampel, 89 N. Y. S. 853. Failure to reserve exceptions to rulings on evidence is not cured by motion for new trial based on the rulings. Brigham v. Davidson [Ala.] 37 So. 738. Where the record shows no objection to a creditor's right to appeal as such from the probate to the district court, an objection on that ground is waived. Appeal of McAlpine [Minn.] 100 N. W. 233.

Rulings on evidence not reviewable, when exceptions thereto were not urged below. Skinner v. Campbell [Fla.] 33 So. 526; Atlantic & B. R. Co. v. Rabinowitz [Ga.] 48 S. E. 326; Everett v. Kemp [Tex. Civ. App.] 80 S. W. 534. No exception to the sufficiency of evidence to support a finding. Hammond v. Doty, 103 Ill. App. 75. Exception to instructions at the time they were given must appear. Chicago Live Stock Commission Co. v. Connally [Okl.] 78 P. 318. Giving of instruction and exception thereto presumed to be contemporaneous. Skow v. Locks [Neb.] 91 N. W. 204. Only objections shown by record to have been made below can be considered. Texas & P. R. Co. v. Birdwell [Tex. Civ. App.] 86 S. W. 1067. The judgment will be affirmed where the errors assigned all relate to matters occurring at the trial, and there is no showing that the motion for a new trial was overruled and exceptions saved, and the respondent insists on such a course. Blattner v. Metz [Mo. App.] 80 S. W. 270. Rulings on pleadings are not reviewable where the judgment entry recites that plaintiff takes a nonsuit with bill of exceptions, on account of rulings on evidence. Sands v. Hickey, 135 Ala. 322, 33 So. 827. Where the record shows no exceptions to the conclusions of law and the brief only attacks the findings, nothing but the sufficiency of the evidence is before the court for review. Delaney v. Shipp [Ind. App.] 72 N. E. 1033. If an exception was taken to the ruling of the court in directing a verdict, that ruling may be reviewed, though no motion for a new trial was made. Wheeler v. Seamans [Wis.] 102 N. W. 28. An assignment to the overruling of a motion to make the complaint more specific cannot be considered where the record does not show that such a motion was made. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695. The insufficiency of the evidence to support the verdict cannot be considered where there was no motion for a new trial before the judgment and the order denying a new trial after judgment was not brought up. Sletten v. Madison [Wis.] 99 N. W. 1020.

proceedings below as to exclude every fair intendment in support of such ruling,[29] and the record must be certified to contain all such matters.[30] This rule has been

28. If evidence is to be reviewed it must appear from bill of exceptions that it is all there. Grand Lodge, Independent Order of Free Sons of Israel v. Ohnstein, 110 Ill. App. 312; Kansas City, etc., R. Co. v. Joslin [Ark.] 86 S. W. 435; Duggan v. Ryan [Ill.] 71 N. E. 848; Young v. Irwin [Kan.] 79 P. 678; Bryant v. Nelson-Frey Co. [Minn.] 102 N. W. 859; Exendine v. Goldstine [Okl.] 77 P. 45; Wade v. Mitchell [Okl.] 79 P. 95. Case made must show that it contains all the evidence. Frame v. Ryel [Okl.] 79 P. 97. Rulings on sufficiency not reviewed unless record contains all the evidence, and such fact appears. Crooks v. Harmon [Utah] 81 P. 95; Landt v. Schneider [Mont.] 77 P. 307; Merk v. Bowery Min. Co. [Mont.] 78 P. 519; Froman v. Wilson [Colo. App.] 78 P. 615. When it is clear that all the evidence is in the record, it will be so treated, though there is no express statement to that effect. Fisher v. Chicago City R. Co., 114 Ill. App. 217. A recital in the record from which it fairly appears that all the evidence has been preserved is sufficient. Young v. Irwin [Kan.] 79 P. 678. A bill of exceptions approved and signed by the trial judge will be presumed to contain all the evidence, it not indicating on its face the omission of any part thereof. Murphy v. Roney [Ky.] 82 S. W. 396. It cannot be assailed by affidavits. Id. "Testimony" is not a proper word to use in a bill of exceptions to show that it contains all the evidence. Crooks v. Harmon [Utah] 80 P. 95.

29. It is not sufficient that the reasons given by the court below are shown to be erroneous. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401. The appellant must so overcome all reasonable inferences on the record favorable to appellee as to make out a material issue of law wrongly decided. Heath v. Sheetz [Ind.] 74 N. E. 505. Record must show error affirmatively and directly and not merely by way of presumption. Swain v. McMillan [Mont.] 76 P. 943; Powers v. Fairbanks [Cal.] 80 P. 1075; Skinner v. Horn [Cal.] 79 P. 597; Strauck v. Massillon Stoneware Co., 4 Ohio C. C. (N. S.) 536, 26 Ohio C. C. 73. Objection to deposition on ground that plaintiffs had no notice that it was to be taken will not be considered where bill of exceptions does not state as a fact that they had no notice. Ward v. Cameron [Tex.] 80 S. W. 69. The rights of the respondent cannot be prejudiced by failure of the appellant to furnish the reviewing court with papers required to be furnished by him. Skinner v. Horn [Cal.] 77 P. 904. An objection that an allowance against a bankrupt's estate was erroneous because not proved within one year after the adjudication of bankruptcy cannot be maintained where the record does not show the date of the adjudication. Buckingham v. Estes [C. C. A.] 128 F. 584. A contention that the court erred in ordering defendant to produce a deed, on the ground that he had no opportunity to plead, answer or demur to plaintiff's motion to require its production, is untenable where the record does not show affirmatively that he had no opportunity. Jenner v. Brooks [Conn.] 59 A. 508. An objection that the limitations pleaded were not applied by the trial court is not available where the amended answer setting them up is not made a part of the record. Falls Branch Jellico Land & Improvement Co. v. Com. [Ky.] 83 S. W. 108.

30. Evidence not reviewed unless bill is certified to contain it all. Lumbard v. Holdiman, 115 Ill. App. 458. Unless the record is testified to contain all the affidavits on which an order was made, it will be presumed there were others supporting the order. Wieczorek v. Adamski, 114 Ill. App. 161. The certificate of the court to a transcript of the stenographer's notes certified by the stenographer as a full transcript, held to show that all the evidence was contained. Mitchell v. Jensen [Utah] 81 P. 165. A statement that the "foregoing case made contains all the evidence introduced at the hearing," made in the form of a certificate signed by the attorneys of plaintiff in error will be treated as part of the case made. Hill v. Gatliff [Kan.] 76 P. 428. Ordinarily the certificate of the trial judge to the bill of exceptions must state that it specifies or contains all of the evidence necessary to a clear understanding of the errors complained of. Dierks v. Smith [Ga.] 47 S. E. 203. But a writ of error will not be dismissed for a failure to comply with this requirement where the only ruling complained of is based on technical objections to the pleadings in the court below, and it appears as a matter of necessary inference that no evidence was introduced. Id. Judge's certificate that record contains all the evidence unavailing if it appears otherwise that certain evidence is omitted. Exendine v. Goldstine [Okl.] 77 P. 45. Certificate insufficient under Ball. Ann. Codes & St. § 5060, where it appeared that depositions were omitted. Kane v. Kane [Wash.] 77 P. 842. On appeal to the appellate term from a judgment of the city court, the facts cannot be reviewed where there is no certificate that the case contains all the evidence. Mayer v. Horenburger, 88 N. Y. S. 966; Empire Trust Co. v. Devlin, 90 N. Y. S. 1066; Hilgert v. Black, 90 N. Y. S. 1067. In the absence of a certificate or stipulation that the appeal book contains all the evidence, review is limited to the exceptions taken by appellant. Jones v. Oppenheim, 91 N. Y. S. 343. Where the case discloses a denial of a motion to set aside the verdict and for a new trial and an exception thereto, the evidence may be reviewed, though there is no certificate. Hochberger v. Baum, 92 N. Y. S. 244. Where the bill itself states that it contains all the evidence, it will be presumed to state the truth in the absence of any showing on its face that there was other evidence not brought in. Abbreviation "etc." will be regarded as used by the witness if possible instead of

applied to rulings relating to jurisdiction,[31] process[32] and pleading,[33] entry and

by the person transcribing his testimony. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888. In order to review alleged error in refusing instructions, it is not necessary that the record expressly state that no instruction given is omitted therefrom where those given and refused are numbered consecutively and it is apparent that all those given are set out. Siegel, Cooper & Co. v. Norton [Ill.] 70 N. E. 636.

31. On a silent record it is presumed that the trial court acted within its jurisdiction. Snider v. Badere [Wash.] 81 P. 302. Record and supplement thereto held not to show that the trial court acted beyond its jurisdiction. Id. Where the amended petition claims a sum within the jurisdiction below and the original does not appear, it will be presumed that it claimed the same amount. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 393. Objection to jurisdiction of county commissioners to establish a road, not pleaded, cannot be considered unless the entire proceedings relative to the establishment of the road appear in the record. Carlson v. Board of Com'rs of Spokane County [Wash.] 80 P. 795. Where the district court is given original jurisdiction in probate matters, the presumption of regularity applies to its proceedings in such matters. Lethbridge v. Lauder [Wyo.] 76 P. 683. It will be presumed that facts authorized the appointment of a special administrator under Rev. St. 1899, § 4542, providing that orders need not recite jurisdictional facts. Id. Error does not lie to review a judgment rendered against a nonresident minor on the ground that no guardian ad litem was appointed for him or requisite answer filed, where the fact of his minority appears only in the praecipe for a summons and not in the record. Palmer v. Palmer, 25 Ohio C. C. 660, 5 Ohio C. C. (N. S.) 242. In the absence of proper evidence as to when a term of the trial court adjourned, it will be presumed that it continued as long as the judge took jurisdiction of matters which could only be considered in term. Southern R. Co. v. Flemister [Ga.] 48 S. E. 160.

32. In Arkansas a recital in a decree that "defendants were duly served with summons herein as required by law" is prima facie evidence of that fact and must be taken as true on appeal in the absence of anything to the contrary in the record. Sand. & H. Dig. § 4191. Love v. Kaufman [Ark.] 80 S. W. 884. Presumed that granting an amendment of summons was in furtherance of justice under Mills' Ann. Code, § 75. Slaughter v. Strause [Colo. App.] 79 P. 972. Error in dismissing an action on the ground that summons had not been served cannot be considered where the motion to dismiss the affidavit in support thereof and the exception to the ruling of the court are not made a part of the record. Bowling v. Chambers [Colo. App.] 77 P. 16. It is not necessary for a defendant, in appearing in a court of record to quash a defective writ commencing an action, to cause the record to recite that his appearance is for that purpose only, in order to avoid a waiver of defect in the jurisdiction of the court. In such case, whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made. Fisher, Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.

33. The meaning imported by pleadings as they appear in the record and not the meaning which parties say was understood controls. Weicker v. Stavely [N. D.] 103 N. W. 753.

Presumptions as to sufficiency: Rulings upon the sufficiency of pleadings will not be reviewed unless the pleadings attacked are in the record. Consol. Stone Co. v. Staggs [Ind.] 73 N. E. 695; Godding v. Rossiter [Colo. App.] 77 P. 1094. Where a portion of a plea is stricken on motion and such portion does not appear in the transcript, the ruling cannot be reviewed. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. Plea as originally made must appear to test its sufficiency. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. The record must preserve the pleadings in exact identity if exceptions referring thereto by line and page are to be considered. Maultsby v. Boulware [Fla.] 36 So. 713. If the sole exception is that there was no cause of action stated, nothing is necessary but the pleading or motion assailed, the exception thereto, and the judgment thereon. Succession of Begue [La.] 36 So. 849. The certificate must unequivocally show that the pleadings in the record are the ones upon which the case was tried. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695. Erroneous overruling of a demurrer to a bad paragraph will reverse, though the complaint contains a good paragraph where it does not appear which paragraph was the basis of the judgment or verdict. Baltimore & O. S. W. R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556; Chicago, etc., R. Co. v. Reyman [Ind.] 73 N. E. 587; Case v. Hursh [Ind. App.] 70 N. E. 818; Norton-Reed Stone Co. v. Steele [Ind. App.] 69 N. E. 198. The supreme court cannot consider an answer to an interrogatory submitted to the jury stating on what paragraph of the complaint their verdict is based. Muncie Pulp Co. v. Davis [Ind.] 70 N. E. 875. Where the declaration is not abstracted, it will be presumed to have been properly drawn and to support a verdict on any theory of the evidence. Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314, 73 N. E. 420. Assignments complaining of the overruling of demurrers cannot be considered when the record does not contain any pleadings embracing the demurrers or any judgment or order disposing of them. United States Fidelity & Guaranty Co. v. Fossati [Tex. Civ. App.] 81 S. W. 1038. An order overruling a demurrer to the reply may be reviewed on a transcript of the record without bringing up the evidence. Talbott v. Donaldson [Kan.] 80 P. 981. Where a petition was objected to on appeal for failure to contain a particular averment, and the evidence was not in the record, it will be pre-

opening of defaults,[34] motions and affidavits,[35] proceedings at trial in general,[36]

sumed that proof of the omitted fact was made at trial. Ashland & C. St. R. Co. v. Lee [Ky.] 82 S. W. 368. When a demurrer is overruled and then withdrawn, the decision on it cannot be reviewed on error; but if the final judgment appears by the record to rest solely on the pleading demurred to, or if a ruling at the trial on the question raised by the demurrer is presented in a bill of exceptions, that can be reviewed on error. Montclair Military Academy v. North Jersey St. R. Co. [N. J. Err. & App.] 57 A. 1050.

Presumptions as to amendments or additional pleadings: On a silent record it is presumed that a complaint was amended to correspond to the proof. Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126. In Washington, amendments to pleadings which might have been made below on motion will be deemed to have been made. Hodges v. Price [Wash.] 80 P. 202. Amendment offered and disallowed must be brought up. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. Grounds of amendment and proposed amendment not in record. Bulte v. Igleheart Bros. [C. C. A.] 137 F. 492. Refusal to grant leave to amend a complaint before answer filed will not be reviewed unless error appears from the record. Stewart v. Winner [Kan.] 80 P. 934. In an appeal from an order sustaining a demurrer, it is presumed that permission to amend was given. Turner v. Hamilton [Wyo.] 80 P. 664. On an appeal from a judgment for plaintiff in an action of conversion for a policy of insurance or its value, an amendment eliminating the prayer for possession will be presumed to have been made before a tender of the policy. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337. On a silent record alleged error in allowing defendant to file a cross complaint is not reviewable. Bell v. Southern Pac. R. Co. [Cal.] 77 P. 1124. Refusal of leave to further plead sustained where no real intention to avail of such leave and no proposed plea was shown in record. Maultsby v. Boulware [Fla.] 36 So. 713.

Presumptions as to pleadings not in the record: Where it appears that the case was tried below on the assumption that the answer was put in issue, it will be so treated on appeal, though no reply appears. Allen v. Aylor [Mo. App.] 86 S. W. 904. Where the original petition stated a cause of action and the amended petition was not in the record, it will be presumed that it is sufficient. Hess v. Trumbo [Ky.] 84 S. W. 1153. Pleas will be presumed to have made the general issue when the record does not show what they were and when the bill of exceptions does not aid it. Bradford v. Boozer [Ala.] 36 So. 716. Where there were written pleadings, the court will not presume oral pleadings authorizing additional recovery. Missouri, etc., R. Co. of Texas v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. The original answer being lost and an amended one filed in the trial court, the absence of the original answer cannot be taken advantage of on appeal. Commonwealth v. Higgins' Trustee [Ky.] 82 S. W. 601.

34. Where an offer to file an answer after the first term is refused by the court on the ground that the case is in default, it will be presumed on appeal that the case had been marked in default on the docket, where the record fails to show whether it had or not. Norman v. Great Western Tailoring Co. [Ga.] 49 S. E. 782.

35. The record must show the motion and the evidence on which the order was based. Motion and affidavits not in record; overruling of motion not reviewed. Foley v. Kane, 114 Ill. App. 544. Motion to dismiss petition cannot be reviewed where motion does not appear in bill of exceptions. St. Louis & O. R. Co. v. Union Trust & Sav. Bank [Ill.] 70 N. E. 651. Where the motion for a new trial is not in the record, though specified in the bill of exceptions, and the clerk below certifies that he can find none, the questions raised by it cannot be reviewed. Sikes v. Norman [Ga.] 50 S. E. 134. A ruling on a motion will not be reviewed unless the record shows the grounds of the motion. Hooper v. State [Ala.] 37 So. 662. The grant of a motion for new trial, the grounds not being specified, will not be reviewed if any ground alleged in the motion is not presented for review. Louisville & N. R. Co. v. Wade [Fla.] 38 So. 49. Motion for new trial—evidence wanting. Davis v. Dinnie [N. D.] 101 N. W. 314. Grounds of motion for new trial based on rulings on evidence not considered, the record not containing the evidence. Hall v. Davis [Ga.] 50 S. E. 106; Buck v. Nicholls Mfg. Co. [Ga.] 50 S. E. 82. Correctness of order denying application for cancellation of judgment cannot be reviewed unless the record contains the evidence on which the order was based. Barto v. Stanley [Wash.] 78 P. 791. An order denying a motion to set aside a default cannot be reviewed where the record fails to show that the affidavits and counter affidavits are brought up. Covault v. Sanders [Ind. App.] 72 N. E. 163. Where the evidence upon which a dismissed suit was reinstated is not preserved, error or abuse of discretion will not be presumed. Union Pac. R. Co. v. Smith [Neb.] 99 N. W. 813. An order made in resettlement of a prior order of discontinuance of an action is not reviewable where the papers on which it was granted are not printed. Cameron v. White, 92 N. Y. S. 381. Where on appeal from an order denying a new trial the case does not show that it contains all the evidence reviewed is limited to the exceptions taken. Iaquinto v. Bauer, 93 N. Y. S. 388. The ruling of the trial court in granting a nonsuit cannot be reviewed where no question is raised on the pleadings and there is no statement of facts in the record. Osborn v. Pioneer Mut. Ins. Ass'n [Wash.] 79 P. 286. An order denying a continuance asked on the ground that plaintiff, whose deposition had been previously taken by defendant, was in no condition to testify, owing to the feeble condition of her mind,

admission,[37] exclusion,[38] and sufficiency of evidence,[39] instructions,[40] findings,[41]

will be affirmed where only a part of the deposition is in the record. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860. An assignment of error that plaintiff's motion for a new trial, on the ground that she had been restored sufficiently to enable her to attend court or to give her deposition, will also be overruled for the same reason. Id.

36. The rules of the trial court will not be regarded on appeal unless they are before the court in the particular record involved. Edwards v. Warner, 111 Ill. App. 32. Bill of exceptions must show rules of court for noncompliance with which ruling was made. Dahms v. Moore, 110 Ill. App. 223. In the absence of proof to the contrary, a court is presumed to have complied with its own rules respecting short-cause calendars. Union Book Co. v. Robinson, 105 Ill. App. 236. Where the record fails to show that a special judge presided, the presumption is that the trial was before the regular judge. Arkadelphia Lumber Co. v. Asman [Ark.] 79 S. W. 1060. Remark of court in limiting evidence will not be reviewed unless it appears from the record to have been made in presence of jury. Burt-Brabb Lumber Co. v. Crawford [Ky.] 86 S. W. 702. Where the record shows that attorneys' fees were allowed "on hearing," it will be presumed that there was evidence sustaining the allowance. Dills v. Auxier [Ky.] 85 S. W. 743. A bill alleging error in accepting disqualified jurors but failing to clearly show the disqualification is insufficient. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401. Where the record does not show that a juror actually sat in the case or that appellant exhausted his peremptory challenges, error in overruling a challenge for cause is not available. Simonds v. Cash [Mich.] 99 N. W. 754. A decision that a juror challenged for actual bias is not incompetent may be reviewed, though all the evidence as to his competency is not incorporated in the bill, if sufficient evidence to show that he was biased is contained. State v. Miller [Or.] 81 P. 363. It will be presumed on appeal that the court ruled correctly in overruling defendant's motion to set aside the swearing of the jury or continue the case on the ground of surprise, in that the court had indicated a different ground of liability in ruling on a previous demurrer to the petition from that on which he proposed to submit the case to the jury, where there is nothing in the record to show that defendant was misled by the ruling on the demurrer. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496.

37. A contention that certain evidence was not admissible because not within the issues cannot be considered in the absence of the complaint. Gottesman v. Heiden, 88 N. Y. S. 957.

Record must show evidence ruled on: Davenport v. Lines [Conn.] 59 A. 603; Carlson v. Hall [Iowa] 99 N. W. 571; Carhart v. Oddenkirk [Colo. App.] 79 P. 303. Agreed statement of facts did not contain testimony. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. Evidence not in record. Wilson v. Huguenin [Ga.] 43 S. E. 857. Evidence objected to must be set out in the motion for a new trial. Hunting & Co. v. Quarterman [Ga.] 47 S. E. 928; Robert Portner Brewing Co. v. Cooper [Ga.] 47 S. E. 631. Evidence must be set forth in such a manner that the question of its admissibility can be decided without reference to other parts of the record. McTier v. Crosby [Ga.] 48 S. E. 355; Johnson v. Perry [Ga.] 48 S. E. 686; Central of Georgia R. Co. v. McClifford [Ga.] 47 S. E. 590. Error in admission of deed in evidence not considered where deed is not properly set forth in the motion for new trial. Benning v. Horkan [Ga.] 48 S. E. 123. Error on admission of written instrument will not be considered unless writing is set forth either literally or in substance in the bill of exceptions, or attached thereto as an exhibit. McNorrill v. Daniel [Ga.] 48 S. E. 680. The record of a motion, in support of which it is objected that secondary evidence was heard must show what was the available best evidence. Brooke v. Augusta Warehouse & Banking Co. [Ga.] 47 S. E. 341. Where error is assigned on the admission of evidence on the ground of irrelevancy, it must be made to appear from the motion that the evidence, even if not material, was of sufficient importance to require a new trial. Hunting & Co. v. Quarterman [Ga.] 47 S. E. 928. Admission of parol evidence as to the contents of "certain papers" will not be reviewed where the record does not show what the papers were. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475. The rule that the admission or exclusion of evidence will not be considered in the absence of a statement of facts does not apply where the pleadings clearly indicate that the excluded evidence was the very foundation of the action, and could not have been supplied by other evidence and that without it the continuation of the trial would have been an idle consumption of time. Castellano v. Marks [Tex. Civ. App.] 83 S. W. 729. An assignment of error on the admission of evidence cannot be sustained where the bill of exceptions fails to show the answer to the question objected to. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226.

Record must show proper objection: Paul v. Delaware, L. & W. R. Co., 130 F. 951; Wilson v. Phillipsburg [Kan.] 77 P. 582. Did not appear from the record that error was committed in the admission of certain evidence. Hennessy v. Kennedy Furniture Co. [Mont.] 76 P. 291. Only such reasons as are assigned in the trial court as objections to the introduction of evidence will be considered on appeal. Pichon v. Martin [Ind. App.] 73 N. E. 1009. A judgment will not be reversed for error in admitting evidence because of its possible effect upon a certain issue unless the record shows without ambiguity that it was objected to for that reason. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. In Florida no objection is allowed in the appellate court to the admissibility or competency of any evidence found

verdict,[42] judgment and relief granted,[43] grant or denial of a new trial,[44] proceedings on intermediate appeals.[45]

in the record of a chancery case, unless the record affirmatively shows that the objection was presented to the chancellor and expressly ruled upon. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56.

Presumptions as to evidence contained in record or sent up on appeal: In the absence of a showing to the contrary, it will be presumed that depositions admitted below were taken under the necessary formalities. Simonds v. Cash [Mich.] 99 N. W. 754. Every paper purporting to be evidence found copied by the clerk into the record in a chancery cause will be presumed by the appellate court to have been offered in evidence in the court below. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56. Where an original document admitted in evidence over the objection that it was not stamped is transmitted with the record, as authorized by the rule, it is immaterial that a copy thereof in the transcript does not show whether it was stamped or not. Sackett v. McCaffrey [C. C. A.] 131 F. 219. If not in the record, it is presumed that a document put in evidence to show the authority of a foreign insurance corporation to do business in the state was the certificate of the superintendent of insurance prescribed by Mills' Ann. St. § 2217. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073.

It must appear that the evidence objected to was in fact admitted: Where the record does not show that certain evidence was admitted and while the court charged on the assumption that it was, the charge was objected to, the appellate court will not presume it was admitted. Spiro v. St. Louis Transit Co. [Mo. App.] 84 S. W. 148. Where record fails to show that written instrument offered in evidence and objected to was admitted or read, it will not be treated as part of evidence on appeal. Thompson v. Cade [Okl.] 79 P. 96. The record must show that objection to the admission of a deposition going only to the manner of taking the same was made by motion to suppress, since such an objection cannot be made for the first time at the trial. In the absence of such showing it is presumed it was first made at the trial. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086. An assignment of error complaining of the admission of certain records in evidence will be overruled where the agreed statement of facts fails to show that they were offered. Morgan v. Oliver [Tex. Civ. App.] 80 S. W. 111. A bill of exceptions showing only that certain evidence was offered and an exception taken, but not that the evidence was admitted, does not present for review a ruling on the evidence. Hausmann v. Trinity & B. V. R. Co. [Tex. Civ. App.] 82 S. W. 1052.

38. Where in an action tried to the court evidence is refused for one purpose, it will be presumed that it was not considered for any other purpose. Rowe v. Johnson [Colo.] 81 P. 268.

Record must show excluded evidence: Affidavits not included. Willey v. The Benedict Co. [Cal.] 79 P. 270. Record must show what was expected to be proved by excluded evidence. Boyd v. West Chicago St. R. Co., 112 Ill. App. 50. Record must show what excluded answer would have been. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032; Long v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 1048; Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957; Emory Mfg. Co. v. Rood, 182 Mass. 166, 65 N. E. 58; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; American Bonding & Trust Co. v. Milstead [Va.] 47 S. E. 853; Leggat v. Carroll [Mont.] 76 P. 805. Exclusion of document not in evidence will not be reviewed. Rieger v. Welles [Mo. App.] 84 S. W. 1136.

Materiality of excluded evidence must appear: Womack v. Gross [N. C.] 47 S. E. 464; Boyce v. Augusta Camp, No. 7,429, M. W. A. [Okl.] 78 P. 322; Womack v. Gross [N. C.] 47 S. E. 464; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Norman v. Hopper [Wash.] 80 P. 551. It will be presumed that evidence which the court withdrew, and instructed the jury to disregard, had no effect on the verdict. Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499. Where offered testimony of a divorced wife against her husband is excluded on the ground that it related to communications made to her during coverture, it will be presumed on appeal that it was properly excluded in the absence of a statement by counsel offering it that it did not relate to such communications. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60. The refusal to allow an attesting witness to a will to testify as to declarations of the testatrix, made when the will was executed, as to why she disposed of her property in a particular manner, is not ground for reversal where the bill of exceptions fails to show what reason she gave him for so disposing of it. Floore v. Green [Ky.] 83 S. W. 133.

39. Rulings on sufficiency of evidence not reviewed unless all the evidence is in the record: Mabinett v. St. Louis, etc., R. Co. [Ark.] 86 S. W. 293; Guarantee Co. of N. A. v. Phenix Ins. Co. [C. C. A.] 124 F. 170; Price v. Price [Ga.] 50 S. E. 91; Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489; Parks & W. Mach. Co. v. Levy, 88 N. Y. S. 993; Kisling v. Barrett [Ind. App.] 71 N. E. 507; Steeley v. Seward [Ind. App.] 73 N. E. 139; Goldsmith v. Lichtenberg [Mich.] 102 N. W. 627; Nash v. Kansas City Hydraulic Press Brick Co. [Mo. App.] 83 S. W. 90; State v. Gavin [Mo.] 81 S. W. 162; State v. Boyle [Mo.] 81 S. W. 161; Pryor v. Wolkerville [Mont.] 79 P. 240; Capaul v. Railway Co., 26 Ohio C. C. 578, 5 Ohio C. C. (N. S.) 262; Conklin v. Conklin [Minn.] 101 N. W. 70; Sivin v. Mutual Match Co., 91 N. Y. S. 771; Delaware Co. Trust, S. D. & Title Ins. Co. v. Lee, 24 Pa. Super. Ct. 74; Mitchell v. Jensen [Utah] 81 P. 165. To leave a map out is fatal. Pittsburg, etc.,

R. Co. v. Greb [Ind. App.] 73 N. E. 620. Facts not disturbed unless affirmatively shown to be wrong. Seiberling & Co. v. Porter [Ind.] 74 N. E. 516. Proof will be presumed of a material fact of which a record not returning all the evidence is silent. Hoge v. Herzberg [Ala.] 37 So. 591. Whether a deed was voluntary or for value cannot be determined unless a copy or sufficient description thereof is embraced in the record. West v. Wright [Ga.] 49 S. E. 285. Where the trial court treats a deed as a voluntary one and plaintiffs in error fail to show that he erred in so doing, the supreme court will also so treat it. Id. Where no evidence is brought up the court cannot assume that a freight brakeman acted without the scope of his authority in ejecting an intruder from the train, the rules of different companies differing in that respect. Seaboard Air Line R. v. Richard [C. C. A.] 136 F. 409. An assignment that a verdict is contrary to the evidence cannot be considered unless all the evidence is in the record. Neder v. Jennings [Utah] 78 P. 482; Whitehead v. Breckenridge [Ind. T.] 82 S. W. 698. Direction of a verdict will not be reviewed where it was based on certain by-laws which are not in the record. Kiesewetter v. Supreme Tent, etc., 112 Ill. App. 48. Appellant's defensive evidence not being in record, court could not say that it did not cure weakness of plaintiff's case. Todd v. McLeod [Mass.] 74 N. E. 344. To present for review a ruling sustaining a demurrer to the plaintiff's evidence, the case made need not contain all the pleadings at any time filed in the case. It is sufficient if it contain the pleadings upon which the trial was had. John Deere Plow Co. v. Jones [Kan.] 76 P. 750. In the absence of an agreed statement of facts, nothing short of the testimony itself will enable the court to form its conclusions as to the facts that are to control its decision. Stipulation that plaintiff's evidence tended to prove certain facts and defendant's tended to prove certain other inconsistent facts is insufficient. Reid v. Forsythe [Md.] 58 A. 204. Evidence in the record will be considered notwithstanding the record also shows a statement by counsel of his purpose to withdraw it, where no order permitting its withdrawal appears. Chicago Terminal Transfer Co. v. Vandenberg [Ind.] 73 N. E. 990. Where the record does not show that it contains all the evidence on which a nunc pro tunc order is sought, no question is presented for review on appeal from the overruling of a motion for such entry. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15. Exhibits used for a collateral purpose by witnesses whose testimony is complete without them and which were not introduced in evidence are not evidence, and questions depending on the evidence can be considered in their absence. White v. Cincinnati, etc., R. Co. [Ind. App.] 71 N. E. 276. A report of the evidence heard by a commissioner may be considered where considered below, though the court below only required the commissioner to report the facts. Page v. Melrose [Mass.] 71 N. E. 787. The determination of a controversy upon evidence closed by an order cannot be reversed upon the merits upon appeal from such order without a bill of exceptions. Jos. Schlitz Brewing Co. v. Washburn Brewing Co. [Wis.] 100 N. W. 832. On appeal from a nonsuit whatever the evidence tends to prove will be taken as established, but to justify reversal the record must contain evidence fairly tending to prove the allegations. In a personal injury action, the negligence of defendant or that it was the proximate cause must not be left to conjecture. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515. Record in election contest, containing copies of ballots introduced as evidence, held complete, there being no agreement of counsel or order of the court that the original ballots should be sent up. Shields v. McMahan [Tenn.] 81 S. W. 597.

Findings of fact not reviewable unless all evidence is in record. Abner Dobie Co. v. Keystone Consol. Min. Co. [Cal.] 78 P. 1050; Paine v. San Bernardino Valley Traction Co. [Cal.] 77 P. 659; In re Brown's Estate [Cal.] 77 P. 160; Neumann v. Moretti [Cal.] 79 P. 510; Bressler v. Kelly [Ind. App.] 72 N. E. 613; Benton v. Beakey [Kan.] 78 P. 410; Darrin v. Hoff [Md.] 58 A. 196; Hill-O'Meara Const. Co. v. Sessinghaus [Mo. App.] 80 S. W. 747; Schilling v. Curran [Mont.] 76 P. 998; Custer County Bank v. Custer County [S. D.] 100 N. W. 424; Spencer v. Commercial Co. [Wash.] 78 P. 914; In re Reed's Estate [Utah] 79 P. 1049. Master's findings. Bakshian v. Hassanoff [Mass.] 71 N. E. 555. Findings by an auditor. In re Penn Gaskell's Estate [Pa.] 57 A. 715; Fowler v. Davis [Ga.] 47 S. E. 951. A finding of fact is conclusive, when the statement on motion for a new trial contains no specification of the insufficiency of the evidence to support it. In re Antoldi's Estate [Cal.] 81 P. 278.

On a silent record, presumption is that judgment was supported by evidence. Score v. Griffin [Ariz.] 80 P. 331; McGregor v. Lang [Mont.] 81 P. 343; Pryor v. Walkerville [Mont.] 79 P. 240. In the absence of a statement of facts, or a finding of the court or jury to the contrary, it will be presumed that proof was made of all facts necessary to sustain the judgment. Varner v. Varner [Tex. Civ. App.] 80 S. W. 386; Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776; Sloan v. Schumpert [Tex. Civ. App.] 81 S. W. 1005; King v. King [Ill.] 74 N. E. 89. Insufficiency of evidence to sustain the judgment may be considered where all material evidence is given in the statement. Handley v. Sprinkle [Mont.] 77 P. 296. In the absence of all the evidence taken before a referee, an objection that various items of the judgment were allowed without evidence will not be reviewed. Holt v. Howard [Vt.] 58 A. 797. Where the judgment in an action tried to the court recites that it was based on satisfactory legal evidence it will be presumed that necessary and proper proof was before the court, there being nothing in the record to show the contrary. Coulbourn Bros. v. Boulton [Md.] 59 A. 711. A decree which recites that the material allegations of the bill are true will not be disturbed upon a question of fact in the absence of a certificate of the evidence. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189. In the absence of a bill of exceptions, a decree supported by the plead-

ings will not be set aside because of special findings, unless unreconcilable therewith. Kupke v. Polk [Neb.] 103 N. W. 321. In the absence of evidence as to the nature and character of the injuries sustained by plaintiff, it will be presumed that a default judgment in his favor was supported by the evidence heard by the trial judge when it was rendered. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Where the evidence is not in the record and the statement of facts in the special finding does not show that as to the defendant moving for a new trial the judgment is excessive, the overruling of the motion on that ground is not cause for reversal. Coy v. Druckamiller [Ind. App.] 73 N. E. 195.

40. Presumptions as to regularity and sufficiency of instructions: That charge was in writing. Johnson v. Melhousin, 105 Ill. App. 367. That charge was free from error. Graves v. Norfolk & S. R. Co. [N. C.] 48 S. E. 502. That instructions were based on testimony. Pryor v. Walkerville [Mont.] 79 P. 240. Instructions to which no objection is made on appeal will be treated as correct. St. Louis, etc., R. Co. v. Brown [Ark.] 83 S. W. 332. Record being silent, presumed on appeal that request for submission of special issues was made. Stahl v. Askey [Tex. Civ. App.] 81 S. W. 79. Failure to object to a verbal charge, in a motion for a new trial, warrants the inference, on appeal, that a written charge was waived. Schwartzlose v. Mehlitz [Tex. Civ. App.] 81 S. W. 68. Where no instructions were given or refused in a case tried by the court, it will be presumed that the court made a proper application of the law to the facts. Manch v. Hornback [Mo. App.] 83 S. W. 536. Where the record contains an agreement that there was evidence to justify the giving of every instruction given, the instructions cannot be reviewed. Forsee v. Hurd [Mo.] 84 S. W. 872. An unchallenged statement by respondent that certain instructions were given, and if given were correct, will be taken as true, nothing being in the record to the contrary. Griffith v. Ridpath [Wash.] 80 P. 820. Where the record does not show that instructions were requested before the commencement of the argument, the presumption is that they were refused because not requested in time. White v. Sun Pub. Co. [Ind. Sup.] 73 N. E. 890. The failure of the court to instruct in a particular manner cannot be assigned as error, where the record does not show that he was requested to rule upon the question. Childs v. Bolton [S. C.] 48 S. E. 618. The record to review refusal of special instructions must show that they were requested after the main charge was delivered. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Where a requested charge appears to have invited an error in the general charge, the error will not be reviewed unless it affirmatively appears that the request was not made until the general charge had been delivered. Texas & N. O. R. Co. v. McDonald [Tex. Civ. App.] 85 S. W. 493.

The giving or refusal of instructions cannot be reviewed unless the record contains the entire charge. Michigan City v. Phillipps [Ind.] 71 N. E. 205; Frank Bird Transfer Co. v. Morrow [Ind. App.] 72 N. E. 189; Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869; Stevenson v. Levinson [Va.] 49 S. E. 974; Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128; Lunsford v. Bailey [Ala.] 38 So. 362. Instructions not in the abstract will not be reviewed. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140. Record must contain whole charge to question refusal of a request as one already given. Netcher v. Bernstein, 110 Ill. App. 484. If instructions given are not in the record they are presumed proper. Swope v. Seattle [Wash.] 78 P. 607; Griffith v. Ridpath [Wash.] 80 P. 820. Where instructions refused are not in the record it is presumed that they were covered by those given and contained in the abstract. Slaughter v. Strouse [Colo. App.] 79 P. 972. The action of the court in setting aside a verdict for misdirection of the jury cannot be reviewed on appeal, where the instructions given are not contained in the record. Rocky Mount Loan & Trust Co. v. Price [Va.] 49 S. E. 73. Only affirmative errors can be considered by reviewing court, where a part of the charge is omitted from the record. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19, 26 Ohio C. C. 59.

Record must contain evidence to which instructions asked or refused relate. Newport News & O. P. R. & Elec. Co. v. Yount [C. C. A.] 136 F. 589; Pryor v. Walkerville [Mont.] 79 P. 240. Instructions presumed proper in absence of evidence unless erroneous under any state of facts. Pryor v. Walkerville [Mont.] 79 P. 240. Where the record does not contain the evidence, instructions given and refused which can be interpreted only by the evidence will not be reviewed. Wilson v. Phillipsburg [Kan.] 77 P. 582. Where bill of exceptions does not show what admissions and declarations were admitted, instruction that declarations of the parties should be received with caution cannot be objected to on appeal. Thompson v. Purdy [Or.] 77 P. 113. Failure to charge on a necessary element of the cause of action will be presumed justified by absence of controversy. Carlson v. Hall [Iowa] 99 N. W. 571. A charge to disregard certain argument of counsel will not be reviewed unless the record shows the facts on which it was based. Creager v. Yarborough [Tex. Civ. App.] 87 S. W. 376. Instructions will be considered only respecting them and the accompanying statement of facts as set out in the bill of exceptions. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445. No assignment can be based on a statement sent out with the jury where it is not placed on the stenographer's notes and hence is not in the record. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79. In Pennsylvania where special instructions are not asked and particular error of law or material misstatement of the evidence cannot be pointed out, review will be made of the general effect of the charge and the judgment affirmed if the charge is correct as a whole. Rider-Ericsson Engine Co. v. Fredericks, 25 Pa. Super. Ct. 72.

41. On a silent record it is presumed that findings necessary to support the judgment were made. Bordeaux v. Bordeaux [Mont.] 80 P. 6; Damon v. Quinn [Cal.] 76 P. 818. Where special issues were found by the

jury it will be assumed that the court found all other issues in favor of the prevailing party. Cobb v. Robertson [Tex.] 86 S. W. 746; Rotan Grocery Co. v. Noble [Tex. Civ. App.] 81 S. W. 586. It is presumed that the trial court in making findings considered all competent evidence introduced (Hereford v. Benton [Colo. App.] 80 P. 499), and only such evidence (Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279). Where the court below finds the facts by consent of the parties, a jury trial being expressly waived, any decision of the supreme court must be made with reference to those facts as found and set out in the case and can rest on them alone. State v. Armour Packing Co. [N. C.] 47 S. E. 411. There is no presumption of facts found in a case where after opening the trial to a jury the facts in issue were stipulated and judgment rendered for defendant on motion to dismiss for want of facts. New York Cement Co. v. Consolidated Rosendale Cement Co. [N. Y.] 70 N. E. 451. On a silent record, findings are conclusive in the absence of a contradictory finding. Miller v. Enterprise Canal & Land Co. [Cal.] 79 P. 439. An assignment based on an alleged erroneous finding will not be considered where the record discloses no such finding. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 260. A decree based on findings and conclusions made on the opening statement is not reviewable unless the statement is preserved in the record. City of Ballard v. Mitchell [Wash.] 80 P. 440; City of Ballard v. Ross [Wash.] 80 P. 440. An appellate court cannot draw inferences or indulge in presumptions in aid of the findings of the trial court. Nance v. Kemper [Ind. App.] 73 N. E. 937. Failure of the trial court to make special findings requested will not be reviewed where it does not appear that the attention of the court was directed to its failure to comply with such request. Simon v. Simon [Kan.] 77 P. 571. Findings are construed with a view to uphold rather than to defeat the judgment, and if from the facts found other facts may be inferred which support the judgment it will be assumed that such inferences were made. Paine v. San Bernardino Valley Traction Co. [Cal.] 77 P. 659. On a silent record, where findings were not filed until the day after the close of the evidence it will be presumed that the court regularly adjourned until that day. Doty v. Jenkins [Cal.] 77 P. 1104. In the absence of a complete record findings of a chancellor incorporated in the decree will be supported by every reasonable presumption and intendment, and it will be presumed that the omitted portions of the record if incorporated in the transcript would sustain the findings and decree. Patterson v. Johnson [Ill.] 73 N. E. 761.

42. In the absence of specific error indicated it will be presumed that the jury followed instructions which were properly granted. Gulf & S. I. R. Co. v. Boswell [Miss.] 38 So. 43. Conditional verdict not reviewed because neither evidence nor instructions were in record. Delaware Co. Trust, S. D. & Title Ins. C., v. Lee, 24 Pa. Super. Ct. 74. Objection to reception of verdict because not unanimous is deemed waived where not made at time of its receipt and where want of unanimity is not preserved in the bill of exceptions. Wores v. Preston [Ariz.] 77 P. 617. An assignment relating to the time and circumstances under which the verdict was received will not be considered where the assignment is not sustained by anything appearing in the record proper and there is no bill of exceptions. Kinney v. Burnhorn, 23 Pa. Super. Ct. 583. In trespass to try title the appellate court cannot say, as a matter of law, that the issue of estoppel pleaded by one of the defendants was sustained by the evidence, where the verdict was a general one for all of them. Wilkins v. Clawson [Tex. Civ. App.] 83 S. W. 732. That jury heeded charge that evidence was admissible for limited purpose only. Indianapolis, etc., R. Co. v. Hubbard [Ind. App.] 74 N. E. 535. Where on a motion to set aside a verdict for misconduct of a juror the court heard evidence but filed no statement of facts, the question cannot be reviewed on appeal. Patch Mfg. Co. v. Protection Lodge No. 215, International Ass'n of Machinists [Vt.] 60 A. 74. Where a verdict is directed in an equity case, and no motion for a new trial is made, and there is nothing in the bill of exceptions or the transcript of the record properly calling in question the correctness of the verdict directed, the court will not consider assignments of error to a decree based on the verdict and substantially following it. Atkins v. Winter [Ga.] 50 S. E. 487.

43. A judgment is presumed to be right and will be affirmed where the record is so imperfect as not to disclose error therein. National Cash Register Co. v. Union Bargain House [W. Va.] 47 S. E. 287. Action of lower court dismissing an action presumed regular. Soder v. Adams Hardware Co. [Wash.] 80 P. 775. It being the duty of the court to enter judgment, and it being fairly inferred that the court ordered it, and that through error of the clerk it was not recorded, it will be held to have been entered. Fitzgerald v. Gore, 105 Ill. App. 242. Whether a prior judgment constitutes a bar cannot be determined in the absence of the judgment roll of the prior action or a copy from the record. Sprague v. Voigtman, 93 N. Y. S. 523. The sufficiency of a judgment roll to justify dismissal under a plea of former recovery cannot be determined where it does not appear in the case on appeal. Muller v. Bendit, 90 N. Y. S. 433; McCleary v. Willis [Wash.] 77 P. 1073. On appeal on the judgment roll it will not be presumed against the judgment, that there was evidence on a point in respect to which there was no finding. Eva v. Symons [Cal.] 78 P. 648. Where a judgment is rendered against a person who has died after service but before judgment, such fact cannot be corrected by appeal or error unless in some proper way the fact of death is made to appear of record. Prouty v. Moss, 111 Ill. App. 536. The appellate court will not reverse an order in lunacy proceedings imposing costs on the lunatic's estate, where there was no testimony taken and no method of showing that the amount was excessive. Brooke's Estate, 24 Pa. Super. Ct. 430. In

(§ 9) *E. Conclusiveness of record and effect of conflicts therein.*[46]—The record imports absolute verity,[47] and cannot be impeached by affidavits[48] or by

the absence of pleadings or findings of fact, the supreme court cannot reverse the judgment. Winans v. Grable [S. D.] 99 N. W. 1110. Where the findings in the record are insufficient to support the judgment and the judgment does not purport to be based on findings it will be presumed there were none to support it. Thomas v. Issenhuth [S. D.] 100 N. W. 436. Where on appeal from a judgment of the circuit court affirming a judgment of a magistrate the case does not show on what ground the magistrate based his judgment, nor the exceptions on appeal to the circuit court, nor on what ground the circuit court based its judgment, the decision of the circuit court will not be reviewed. Moore v. Dean [S. C.] 49 S. E. 840. Where a statute provides that the conclusions and judgment of a municipal court, in a trial without a jury, may be presented for review by bill of exceptions to the supreme court, such judgment cannot be reviewed when the bill discloses no exception to the judgment and what the judgment was. Morey v. Monk [Ala.] 38 So. 265. In reviewing certiorari to a justice's judgment, the presumption is indulged that the court below construed the return in such way as to support the decision which was made. Faulkner v. Snead [Ga.] 49 S. E. 747. In Alabama, where the conclusions and judgment of a municipal court, in a case tried without a jury, may be reviewed on a bill of exceptions, such judgment will not be reviewed unless the bill discloses what the judgment was and exceptions thereto; but the rulings on admissibility of evidence are reviewable. Morey v. Monk [Ala.] 38 So. 265. The terms of the law under which the plaintiff association was chartered not being in the record, and it having failed to show the amount of damages arising from the breach of the bond sued on, a judgment based on the admissions of defendant's pleas was not error of which plaintiff can complain. National Bldg. Ass'n v. Quinn [Ga.] 49 S. E. 312. An objection, in an action to determine the title to land, that a previous judgment dismissing a caveat against the issuance of a patent therefor was a bar to the action cannot be sustained, where the transcript does not contain the record of such previous proceedings. Combs v. Duff [Ky.] 80 S. W. 165. Where on appeal it appears that plaintiff's cause of action was based on written exhibits offered in evidence but not attached to the record and it does not appear on what the judgment in favor of plaintiff is based, the judgment will be reversed. United States Title Guarantee & Indemnity Co. v. Royal, 87 N. Y. S. 457.

44. Presumption favors grant of new trial. Starer v. Stern, 91 N. Y. S. 821. It is presumed that an order granting a new trial was properly made. That motion for new trial was made on affidavits used at hearing and that such affidavits were sufficient to justify the order appealed from. Skinner v. Horn [Cal.] 77 P. 904; Wyckoff v. Pajaro Valley Consol. R. Co. [Cal.] 81 P. 17. If the record does not show on which ground specified in the motion a new trial was granted, the order will be affirmed if it can be sustained on any of them. Miller v. Enterprise Canal & Land Co. [Cal.] 79 P. 439. Denial of new trial cannot be reviewed unless grounds of motion appear. Peoria Star Co. v. Lambert, 115 Ill. App. 319. A grant of a new trial will be presumed to have been based on a bill of exceptions showing that notice of the motion was served and that it was to be moved on the bill. Weed v. Reed [Cal.] 76 P. 652. Under Code Civ. Proc. § 1736, it will be presumed that a statement in the record was used on the motion for a new trial. Mahoney v. Dixon [Mont.] 77 P. 519. The granting of a new trial on a motion based on several grounds will not be reversed if the action can be sustained on any ground assigned where the record does not show on what particular it was granted. Glover v. Ratcliff [Kan.] 77 P. 89. On a silent record it is presumed that evidence taken by a referee was before the trial court in passing on a motion for a new trial. Simon v. Simon [Kan.] 77 P. 571. Where the court was in error in granting a new trial for the ground specified, it will not be presumed that other grounds justified the grant. Dale v. Hodge [Mo. App.] 85 S. W. 929. Grant of new trial will be reviewed where record discloses situation as fully as it appeared to trial court. Busse v. Schaeffer [Iowa] 103 N. W. 947. An order denying a new trial cannot be reviewed where the record shows that the statutory statement containing the grounds on which the motion therefor was heard was not authenticated and did not show the grounds argued or contain specifications of error. Kent v. Williams [Cal.] 79 P. 527.

45. On appeal from a judgment of the county court dismissing an appeal from a justice's court for failure to give the statutory bond, it being made to appear that the pauper's oath filed by appellant in the county court was contested and the transcript failing to disclose the testimony taken on the contest, it will be presumed that such evidence disproved the facts stated in the oath and authorized the dismissal. Cook v. Burson [Tex. Civ. App.] 80 S. W. 871.

46. See 3 C. L. 219.

47. An appellate court must accept the facts as certified by the trial judge, and his statement in the bill of exceptions that it does not contain all the evidence cannot be discredited by an assignment charging error in changing the testimony of a witness as taken by a sworn stenographer. Nacogdoches Grocery Co. v. Rushing [Tex. Civ. App.] 82 S. W. 659. Appellate courts cannot consider anything a part of the statement of facts unless it is properly made a part thereof by the trial court, and they have no power to add to or amend such statement as actually prepared. Certiorari will not lie to bring up a paper which should have been made a part of the statement of facts. Cox v. Thompson [Tex. Civ. App.] 82 S. W. 672. The appellate court must accept matters certified in the bill of exceptions as the absolute truth. Kelly v. Moore, 22 App.

the statement of counsel.[49] In case of conflict, that part of the entire record whose appropriate function it is to present that particular matter prevails.[50]

D. C. 1. In the absence of statute the supreme court has no authority to try a traverse to a return of service of a bill of exceptions, or to refer to the trial court the issue of fact as to the truth or falsity of such return. Civ. Code 1895, § 4988, allowing a traverse to a false entry of service does not apply. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15. The signature of the trial judge to a bill of exceptions imports verity in the absence of anything in the bill to the contrary. Conradt v. Lepper [Wyo.] 81 P. 307. The certificate of the trial judge in settling a case made imports the truthfulness of the statements contained and nothing more. Exendine v. Goldstine [Okl.] 77 P. 45. The record is conclusive on the reviewing court and the parties, and cannot be questioned or corrected. Thompson v. Cade [Okl.] 79 P. 96. A recital in a judgment that certain parties appeared is conclusive. In re Pendergast's Estate [Cal.] 76 P. 962. Stenographer's report of charge as corrected and certified by the trial judge. Toddes v. Hafer, 25 Pa. Super. Ct. 78. As to instructions given. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Cases appealed must be heard and decided upon the record made in the court from which the appeal is taken, rather than upon claims of counsel. Spacek v. Schaub [Mich.] 103 N. W. 546. Incompetent evidence admitted without objection becomes evidence in the case and cannot be taken out by the trial judge's certificate that if it had been called to his attention he would not have admitted it and did not have it in mind when he made the ruling complained of. Rapson v. Leighton [Mass.] 73 N. E. 540. On appeal the certified transcript of the record imports absolute verity and statements of the parties in a verified petition are not available either to dispute the record or to supply anything not therein disclosed. Whisler v. Whisler [Ind.] 70 N. E. 152. The return of the trial justice of the municipal court is conclusive as to what occurred at the trial. Bunke v. New York Telephone Co., 91 N. Y. S. 390. The appellate court will not interfere with the case as settled by the trial judge on his recollection after considering affidavits by counsel as to the happening of a matter not shown by the stenographer's minutes. Burke v. Baker, 93 N. Y. S. 215.

48. Affidavits cannot be received in the supreme court to correct the record as certified by the clerk. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649. In an interference case affidavits will not be received by the court of appeals in contradiction or correction of the record of the proceedings in the patent office. May be received to show or explain material changes which may have occurred in an exhibit after its transmission. Blackford v. Wilder, 21 App. D. C. 1. Record on appeal cannot be impeached by affidavit. Allen v. Aylor [Mo. App.] 86 S. W. 904. The record imports absolute verity and cannot be contradicted by aliunde proof. Transcript and bill of exceptions. Supreme court has no jurisdiction to hear evidence contradicting it. Writ of error will not be dismissed where bill of exceptions and entries thereon show jurisdiction. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15. Statement in record that final judgment was rendered. Wolf v. Hope [Ill.] 70 N. E. 1082. The "case" as settled and certified by the trial judge must furnish the basis of review and cannot be attacked by affidavits. Haidt v. Swift & Co. [Minn.] 102 N. W. 388.

49. An assignment complaining of the overruling of objections to evidence will be overruled for failure of the bills of exceptions to state that the evidence offered was in fact admitted. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140; Barstow Irr. Co. v. Black [Tex. Civ. App.] 86 S. W. 1036. Verity of record cannot be questioned by argument. Winslow v. Guthrie, 113 Ill. App. 50.

50. What appears in the clerk's duly certified transcript of the records and files will be accepted in preference to what appears in the certificate of the judge. Southern R. Co. v. Flemister [Ga.] 48 S. E. 160. But the statement of the judge will control as to matters transpiring during the progress of the trial or in the conduct of the business of the court which are not of record or of file. Where clerk certified that no entry appeared on the minutes showing when a given term of court adjourned, a statement by the judge in an order overruling a motion to dismiss a motion for a new trial, and an averment in a duly verified bill of exceptions that the motion was filed in term, will control. Id. On a question as to the contents of the pleadings, the record proper prevails over a recital in the bill of exceptions. Hawley v. Huth, 114 Ill. App. 29. The statement of facts controls the bill of exceptions. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695. A certificate of completeness overcomes an allegation of incompleteness not accompanied by a showing that what was omitted was pertinent. Succession of Theriot [La.] 38 So. 471. The record controls the "case" on appeal prepared by counsel, where the two are in conflict. Finding of judge as to when motion to dismiss case was made. Blair v. Coakley [N. C.] 48 S. E. 804. The statement of the judge in the case on appeal as to what occurred on the trial must be accepted as importing verity. Will be taken as absolutely true. Cameron-Barkley Co. v. Thornton Light & Power Co. [N. C.] 49 S. E. 76. This rule does not extend to exceptions taken to the refusal of the court to grant a prayer, or to the granting of a prayer for instructions, nor to the assignment of error in the charge of the court where by statute such alleged errors are deemed to have been duly excepted to. Under Clark's Code (3rd Ed.) § 412, subd. 3. Id. Record on appeal prevails over the bill of exceptions. Record showed that bill of exceptions was not filed in time. Held that order of extension contained in bill could not be considered. Allen v. Aylor [Mo. App.] 86 S. W. 904. In case of conflict the record proper controls

The presumption of absolute verity will not be indulged to prohibit correction of an obvious clerical mistake,[51] and the rule does not apply in a case where the official term of the judge who tried the case expired between the rendition of the judgment and the perfection of an appeal and his successor in office caused amendments to be made thereto by writ of diminution.[52] Neither does the recital of the clerk in the record that a particular day was the second day of the term control.[53]

§ 10. *Transmission of proceedings and evidence to reviewing court. A. Form and contents of transcript or return.*[54]—Where both parties appeal, there must be a separate transcript in each case.[55] The rule cannot be waived by consent of counsel.[56] The "transcript or record on appeal" consists of the "record proper," and the "secondary record,"[57] and generally all of such records should be included,[58] though in some states parties indicate by praecipe what shall be included.[59] No praecipe is necessary in Indiana,[60] but where one is filed,[61] papers incorporated in the record but not requested by the appellant in his praecipe are no part of the record.[62] The rules usually require an index to be sent up with

the bill of exceptions as to the character of the judgment. Vickers v. Chisholm [Colo. App.] 79 P. 302. When order book entries made by the clerk as to matters not essential to the judgment are in conflict with the bill of exceptions, the latter will control. Johnson v. Staley [Ind. App.] 70 N. E. 541. The statement in a bill of exceptions as to the dates of trial controls where there is a discrepancy between it and the record made by the clerk. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888. Bill of exceptions may supply date of passing order where it is not shown by the order. Tifton, etc., R. Co. v. Chastain [Ga.] 50 S. E. 105.

51. Substitution of plaintiff for defendant in statement as to who excepted to ruling. Pichon v. Martin [Ind. App.] 73 N. E. 1009.

52. Hays v. Philadelphia, etc., R. Co. [Md.] 58 A. 439.

53. Edwards v. Warner, 111 Ill. App. 32.

54. See 3 C. L. 217.

55. Orion Knitting Mills v. United States Fidelity & Guaranty Co. [N. C.] 48 S. E. 652.

56. Orion Knitting Mills v. United States Fidelity & Guaranty Co. [N. C.] 48 S. E. 652. If only one transcript is filed, the cause will be remanded to enable the parties to comply with the rule. Court will not determine to which party the one filed belongs. Id.

57. Cressler v. Asheville [N. C.] 51 S. E. 53. The entries of continuances and other docket entries, interlocutory judgments, incidental matters, as judgments nisi against witnesses, prayers for instructions, and the charge though in writing and required to be filed, are not a part of the record on appeal unless presented for review by proper exception. Though they are parts of the record of the action. Id.

58. Under Laws 1901, p. 28, c. 31, § 2, providing that any bill of exceptions or statement of facts on file when the record is sent up shall be sent up as a part thereof, such statement or bill properly certified constitutes part of the record in the appellate court. Johnston v. Gerry [Wash.] 76 P. 258. A transcript must contain the complete record. Wade v. Mitchell [Okl.] 79 P. 95. The transcript must contain a copy of the order appealed from. Wolf v. Board of Sup'rs of Santa Clara County [Cal.] 76 P. 1108.

59. The clerk making up a transcript must include every paper requested by either party if it has relation to or leads up to decree. He has no discretion (Anderson v. Long [Fla.] 37 So. 565), but should omit, though requested to include, papers in another though antecedent proceeding and papers not presented till after decision (Ray v. Trice [Fla.] 37 So. 582). While the clerk is without discretion to omit requested papers related to or leading to the judgment, the court will not be a party to abuse his power to make such requests. Id. Pleadings held properly in record in case appealed after change of venue. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145. In Indiana where a change of venue is granted from a county having two courts and a transcript from both is necessary, the clerk of the trial court in making up the record for an appeal properly includes both transcripts. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297. Nothing but matters part of the record proper or made so by bill of exceptions is proper to include in Wisconsin. Rule 7½. Goodhue v. Bohen [Wis.] 99 N. W. 216. On appeal from an order denying a motion, appellant is entitled to a full recital of all papers used on the motion. Davis v. Reflex Camera Co., 90 N. Y. S. 877.

60. Law not changed by Act Mch. 9, 1903. Featherngill v. State [Ind. App.] 72 N. E. 181.

61. A praecipe for a transcript merely without designation of any particular part calls for a complete transcript of the record including the bill of exceptions. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888.

62. Original bill of exceptions should not be incorporated where praecipe calls for transcript. Workman v. State [Ind.] 73 N. E. 917; Makeever v. Blankenbaker [Ind. App.] 70 N. E. 546; City of Alexandria v. Liebler [Ind.] 70 N. E. 512; Boss v. Lang [Ind.] 71 N. E. 120. Praecipe held sufficient. New American Oil & Min. Co. v. Troyer [Ind. App.] 74 N. E. 37; Indianapolis & G. Rapid Transit Co. v. Derry [Ind. App.] 71 N. E. 912. Origi-

the record and to be printed, and marginal references to be made.[63] Copies, not the original files, should be sent up,[64] unless the statute provides for the inclusion of certain original papers,[65] but certification of original papers as transcript confers jurisdiction.[66] Irrelevant matter should not be included in the record on appeal,[67] but a transcript will not be stricken out because it contains documents not properly embraced therein, but appellant will be taxed with the resulting costs.[68] In Georgia any part of a record contained in a transcript transmitted to the appellate court, material to a clear understanding of the errors complained of, will be considered, though the specification was not broad enough technically to require its transmission.[69]

(§ 10) *B. Certification and authentication.*[70]—The transcript must be authenticated by certificate[71] of the clerk,[72] under seal, showing its completeness.[73] The record itself must be signed by the trial judge,[74] but signature of the constituent parts thereof is unnecessary.[75] Amendments to the certificate may be allowed if applied for before final hearing.[76]

(§ 10) *C. Transmission, filing, and printing.*[77]—The transcript must be

nal bill is part of record where called for by praecipe and included in transcript. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942; Baltimore, etc., R. Co. v. Reynolds [Ind. App.] 71 N. E. 250. The original bill of exceptions containing the evidence constitutes and is considered a part of the transcript. Acts 1903, p. 340, c. 193, § 7. Avery v. Nordyke & Marman Co. [Ind. App.] 70 N. E. 888; City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

63. Rules 19(2), 19(3), and 28, 27 S. E. vii, viii. Sigman v. Southern R. Co. [N. C.] 47 S. E. 420.

64. Original statement of facts should not be sent to appellate court except on order of the trial court and then only in special cases. Shirley v. Conner [Tex.] 81 S. W. 284.

65. Ind. Act March 9, 1903. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888.

66. Appeal from county to circuit court. Estate of Shields v. Michener, 113 Ill. App. 18.

67. Supreme court rule 22, 27 S. E. viii. Only enough of the record should be included to show that the case is properly constituted, and this, with the summons, pleadings, verdict, and judgment, and the case on appeal, setting out so much of the proceedings at the trial as will throw light on the exceptions, is all that is necessary. Sigman v. Southern R. Co. [N. C.] 47 S. E. 420. Original papers filed in the court below should remain there for the benefit and security of all parties concerned, the court of appeal acting upon a transcript and not upon the record itself. Martin v. Todd [Ill.] 71 N. E. 852.

68. Motion for continuance and reply thereto and order overruling it, in regard to which no error is assigned, and affidavit and other papers relating to appellant's efforts to obtain bill of exceptions, filed 34 days after adjournment of court. Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 80 S. W. 107.

69. Tifton, etc., R. Co. v. Chastain [Ga.] 50 S. E. 105.

70. See 3 C. L. 218.

71. Wade v. Mitchell [Okl.] 79 P. 95; Zarling v. Perrin Nat. Bank [Ind. App.] 72 N. E. 247.

72. Where authenticated by the judge instead of the clerk, it is a nullity. Bowling v. Chambers [Colo. App.] 77 P. 16.

73. Wade v. Mitchell [Okl.] 79 P. 95. The certificate is invalid if it recites the omission of any requested papers. Anderson v. Long [Fla.] 37 So. 565; Ray v. Trice [Fla.] 37 So. 582. It is not indispensable that it be certified that all the evidence is in the record if the record otherwise shows it. Henline v. Brady, 110 Ill. App. 75. In order that the court of civil appeals may acquire jurisdiction of an appeal, the clerk's certificate to the transcript must show that it contains a true copy of all the proceedings in the cause. Sayles' Rev. Civ. St. 1897, art. 1411, Dist. Ct. Rule 94 (67 S. W. xxvii), construed. Appeal dismissed. Paris, etc., R. Co. v. Armstrong & Brown [Tex. Civ. App.] 83 S. W. 28. A transcript is not sufficiently authenticated unless the clerk's certificate states that it contains all the records and proceedings in the case. Walcher v. Stone [Okl.] 79 P. 771. A certificate showing that the statement to which it is attached did not contain all the facts and proceedings at the trial precludes the supreme court from considering such statement. In re Holburte's Estate [Wash.] 80 P. 294.

74. A signature pasted thereon will not suffice. Yost v. Clark, 25 Pa. Super. Ct. 144.

75. The signature of the trial judge to a special finding is required only for the identification of the paper and is not required where the finding is brought into the record by a bill of exceptions or order of the court. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

76. Ray v. Trice [Fla.] 37 So. 582.

Contra: The clerk of the court below cannot be allowed to correct his certificate to the transcript, especially after the time within which certificate is required to be filed has elapsed. Paris & G. N. R. Co. v. Armstrong & Brown [Tex. Civ. App.] 83 S. W. 28.

77. See 3 C. L. 218. A clerk of court can be compelled by mandamus to deliver a transcript of appeal. State v. Wells [La.] 35 So. 641.

filed in the appellate court[78] within the time prescribed,[79] or an extension thereof duly granted.[80] Failure to file in time is not jurisdictional,[81] but is ground for dismissal.[82] Only so much of the proceedings as is material to some question on which the appeal is predicated should be printed.[83] Original papers made part of the record on appeal cannot be withdrawn for other use even by consent of parties.[84]

(§ 10) *D. Amendment and correction.*[85]—The party presenting a case for review is chargeable with all errors and omissions that the record discloses,[88] and can take no advantage of its omissions.[87] Until the record is actually sent up, the lower court may correct it,[88] and the record on appeal may be corrected in some states in the lower court,[89] especially if leave be granted by the appellate court.[90]

78. The law does not fix the time within which the stenographer's transcript shall be filed in law actions in Iowa. Watson v. Dilts [Iowa] 100 N. W. 50. Where it is impossible to obtain a sufficient transcript to present the errors complained of, it is not proper practice to file an imperfect transcript with a petition in error with the purpose of afterwards procuring a complete transcript and amending the petition in error, there being no reasonable certainty of being able to procure such amended transcript. Zweibel v. Caldwell [Neb.] 102 N. W. 84.

79. Delay in filing appeal bond pending negotiations for compromise is not a want of diligence depriving appellant of the favor of an extension even though the clerk's inability to furnish it was due to the delay. Hillard v. Taylor [La.] 38 So. 594. The date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, determines the term of the appellate court to which the appeal is returnable. Rule 25, Kansas City Court of Appeals. Smith v. Flick [Mo. App.] 83 S. W. 73. Appellant is required to file in the office of the proper appellate court, fifteen days before the first day of the term, a perfect transcript of the record and proceedings in the cause, or, in lieu thereof, a certified copy of the record entry of the judgment appealed from. Rev. St. 1899, § 813. Where appeal granted Nov. 11, the certificate was required to be filed 15 days before the March term, the date of the allowance of the appeal determining the term to which the appeal was returnable under Rule 25, Kansas City court of appeals. Id. A failure to do so is not excused because appellants were misled as to the time within which they were required to file their bill of exceptions. Id. Transcript must be seasonably filed above. If duly cited appellee excuses delay by failing to move for dismissal. Chambliss v. Wood [Miss.] 36 So 246.

80. Extension of time to file transcript cannot be granted after the statutory time has elapsed. Langhorne Johnson & Co. v. Wiley [Ky.] 87 S. W. 266; Louisiana R. & Nav. Co. v. Miller [La.] 38 So. 19.

81. Rev. St. 1887, § 1778, as amended by Sess. Laws 1899, p. 249, requiring papers on appeal from an order of the county commissioners to be transmitted to the district court within five days after service of notice of appeal is not jurisdictional, and failure to do so does not deprive appellant of the benefits of his appeal. Humbird Lumber Co. v. Kootenai County [Idaho] 79 P. 396; McAvoy v. Harkins [Wash.] 81 P. 77.

82. See post, § 11G.

83. Osborne v. Norwalk [Conn.] 60 A. 645. Preliminary pleadings rendered unimportant by the substitution of amended ones should not be included, no reason of appeal being predicated thereon. Id.

84. Jamison v. New York & T. Land Co. [Tex. Civ. App.] 85 S. W. 482.

85. See 3 C. L. 219.

86. Cannot be charged to the stenographer who prepared it. Thompson v. Cade [Okl.] 79 P. 96.

87. An appellant cannot be heard to contend that the record does not show a final judgment disposing of the main case, since that contention is an invitation to dismiss the appeal. Lamont v. Lamont Crystallized Egg Co. [Mo. App.] 81 S. W. 1269.

88. The court of common pleas retains jurisdiction of a case appealed until the record is actually removed to correct a mistake apparent on the face of the record where there is anything to correct it by, in order that the true record may be sent up. Green v. Prince Metallic Paint Co., 25 Pa. Super. Ct. 418. A trial judge has authority to correct the stenographer's report of his charge, and the appellate court cannot go outside the charge as corrected and certified by him. Toddes v. Hafer, 25 Pa. Super. Ct. 78.

89. The record may be corrected by the trial court, after appeal, upon application of appellant. Markle v. Laisle [Iowa] 102 N. W. 780. Motions to amend the records of the circuit court in pending appeal cases must be addressed to, and the amendments made in, that court. Supreme court acts on record as made below, and will not entertain such motions. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649. Proceedings to supply the omission of papers from the record in an appeal from a circuit court to the court of appeals must be taken in the circuit court and not in the court of appeals. Mullins v. Mullins [Ky.] 81 S. W. 687. Generally an amendment of the record of a trial court must be made under an order of that court and not of an appellate court. Request to amend sheriff's return on summons, refused, when made after submission of appeal, sheriff not being produced for examination. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911. Where

Certiorari is often granted to bring up corrections made below.[91] In other jurisdictions the practice is to make corrections in the appellate court,[92] upon suggestion of diminution. In most states the trial court's power over the record ends when an appeal is taken, and no amendments thereof are proper except upon permission first had of the appellate court.[93] Papers not a part of the record, but copied therein by mistake, will be disregarded if such fact is apparent from the record itself or on the clerk's certificate of the fact.[94] Amendments are not allowed after submission.[95] The time for making amendments is usually regulated

material matter has been omitted from the transcript, a supplemental one may be filed on order made allowing it. Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 77 P. 245. An appellant filing a transcript which is insufficient to confer jurisdiction on the appellate court should be allowed to withdraw the same on request. Paris & G. N. R. Co. v. Armstrong & Brown [Tex. Civ. App.] 83 S. W. 28. The omission from the transcript of the appeal bond and indorsements, showing date of filing and approval, may be supplied by supplemental transcript, showing that the bond was filed and approved within the time limited. Stratton's Independence v. Midland Terminal R. Co. [Colo.] 77 P. 247. Failure of a judgment to declare that the complaint was dismissed without prejudice must be remedied by amendment in the trial court. Electrical Equipment Co. v. Feuerlicht, 90 N. Y. S. 467.

90. If error in the record is discovered after transmission to the appellate court, the proper practice is to apply there for a continuance and to the trial court for an amendment. Wolf v. Hope [Ill.] 70 N. E. 1082. Where material matter has been omitted from the transcript, permission may be obtained to withdraw it for correction by the trial court. Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 77 P. 245. Upon timely request, the record may be returned to the trial court to correct a jurisdictional defect apparent therein. State v. Washington Irr. Co. [Wash.] 80 P. 803.

91. An order to "remand for correction" is in the nature of a certiorari to complete the record and does not divest the jurisdiction of the court of appeal. Simonton v. Mitchel [La.] 37 So. 877. Certiorari will issue to compel the incorporation into the case of appellant's exceptions and assignment of errors in so far as they relate to the instructions given or refused. Cameron-Barkley Co. v. Thornton Light & Power Co. [N. C.] 49 S. E. 76. The mistake of appellant's counsel in sending up the stenographer's notes, instead of a properly settled case, does not entitle appellant to a certiorari. Cressler v. Asheville [N. C.] 51 S. E. 53. Omissions of the clerk in copying the record may be supplied by certiorari. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649. Certiorari is the remedy to correct a record not showing the bond correctly. Succession of Theriot [La.] 38 So. 471. Mansf. Dig. § 1273 (Ind. T. Ann. St. 1899, § 775), providing for the issuance of certiorari to complete the record, does not require notice to the opposite party of an application for the writ. Bracey-Welles Const. Co. v. Terry [Ind. T.] 82 S. W. 846. Certiorari will not lie from the court of appeals to correct a record claimed to have been altered since case was heard below, but the correction should be made in the lower court. Not shown that record as it stood was not correctly copied. Bowman v. Ray [Ky.] 80 S. W. 200.

92. The supreme court cannot amend a bill of exceptions or determine whether respondent was entitled to have certain desired matter inserted therein. Jones v. Sioux Falls [S. D.] 101 N. W. 43. A misnomer in the description in the bill of exceptions of one who was a party in the court below may be corrected by amendment. Description of plaintiffs in bill of exceptions as receivers of the "Southern Mutual Loan Ass'n" instead of "Southern Mutual Building & Loan Ass'n." Ramey v. O'Byrne [Ga.] 49 S. E. 595. A motion to strike a statement is addressed to the supreme court and there is nothing upon which it can operate if at the time it is made the transcript is still in the trial court. Johnston v. Gerry [Wash.] 76 P. 258. A suggestion of diminution of the record and a motion to strike out a part of the record will not be entertained unless it is sworn to, and points out the defects therein with the particularity required by the rules. By rule xiv. Clark v. Roller, 23 App. D. C. 453. In the absence of an express reservation of power during the term, a court cannot after a term and after a case is appealed, permit the filing of an amended or supplemental bill of exceptions. Carp v. Hamburg-Bremen Fire Ins. Co. [Mo. App.] 81 S. W. 480. An amendment may be made to a sheriff's return on a writ in the appellate court. Under Rev. St. 1899, §§ 670, 672, 673. Holtschneider v. Chicago, etc., R. Co. [Mo. App.] 81 S. W. 489. Where, through no fault of plaintiff in error, the papers in the cause are not arranged as required by rules of court, the defendant in error will be given time to file briefs and plaintiff in error charged with costs. Matthews v. Nefsy [Wyo.] 78 P. 664.

93. A supplemental opinion of the court below, formulated after reargument ordered by the court of errors and appeals, containing additional reasons for the decree or judgment below, is no part of the record, unless sent up at the request of the court of errors and appeals. Varrick v. Hitt [N. J. Err. & App.] 60 A. 47.

94. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649.

95. The abstract cannot be amended after a petition for a rehearing has been granted. Martin v. Martin [Iowa] 99 N. W. 719. No amendment of the record after submission of the case without objection will be granted, the time for correction being at the

by statute,[96] and in the absence of statute the decisions are conflicting as to whether the doctrine of laches applies.[97]

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals; consolidation; severance.*[98]—Where both parties appeal, the appeal of each constitutes a separate and distinct case in the supreme court.[99] A joint motion for a new trial will not support separate petitions in error, but where it appears from a fair interpretation of the record that separate motions for a new trial by both defendants were denied, the court will not decline to consider separate petitions in error merely because the order reads as though it overruled a joint motion.[1] Where two or more join in a petition in error, no error can be availed of that is not prejudicial to both or all of them.[2] Several claimants in bankruptcy may unite in an appeal from an order affecting them all alike, though their interests are several and distinct.[3] A separate appeal cannot be maintained by a single property owner in a special assessment case where the order allowing the appeal is joint.[4] Several interlocutory orders in the same case may be brought up by a single appeal in Indiana.[5]

(§ 11) *B. Original and cross proceedings.*[6]—The cross assignment of errors is elsewhere treated.[7] The appellee is not entitled to have the judgment reversed where there is no cross appeal.[8] An appellee may, by complaint in the nature of a cross appeal, be relieved from erroneous or unjust conditions imposed by the decree appealed from.[9] Where an appellee in Connecticut files a bill of exceptions under the statute, he cannot by such bill raise the question of the overruling of a demurrer.[10] Since an equity appeal opens up the whole record, a cross-appeal is not essential to entitle an appellee to a reversal of a prejudicial decree.[11]

(§ 11) *C. Amendment of parties.*[12]—Amendment and substitution may be allowed in case of the death of a party[13] or a change of incumbency where the

hearing in the trial court when the transfer is made up. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387.

96. Amendments must be made within the statutory period allowed. Under 2 Ball. Ann. Codes & St. § 5058, the court has no power to permit a proposed statement, filed and served, to be withdrawn for the purpose of amendment though the time for amending has not expired. State v. Linn [Wash.] 76 P. 513. In Washington, by statute, the record may be supplemented at any time prior to the hearing of the appeal. Under Laws 1901, p. 28, c. 31, § 2, may be supplemented so as to show filing, service, and settlement of statement of facts notwithstanding a motion to strike the statement for want of such matters. Johnston v. Gerry [Wash.] 76 P. 258.

97. A delay of two years in moving to withdraw the record for the purpose of having the bill of exceptions amended in the trial court is unreasonable. Freeburgh v. Lamoreaux [Wyo.] 81 P. 97. As no time is fixed by Mansf. Dig. § 1273 (Ind. T. Ann. St. 1899, § 775), laches cannot be imputed to a party applying thereunder for a certiorari to perfect the record. Bracey-Welles Const. Co. v. Terry [Ind. T.] 82 S. W. 846.

98. See 3 C. L. 220.

99. Orion Knitting Mills v. United States Fidelity & Guaranty Co. [N. C.] 48 S. E. 652. Where an execution is levied against two separate tracts of land and two different claims are filed by different persons, each claiming one of the tracts, and the two claim cases are tried together by consent, and one order of dismissal is passed covering both, plaintiff is entitled to sue out a separate bill of exceptions in each case. Cases not merged, and order is in effect equivalent to similar order in each case. Valdosta Guano Co. v. Hart [Ga.] 47 S. E. 212.

1. Goken v. Dallugge [Neb.] 99 N. W. 818.

2. Felsch v. Babb [Neb.] 101 N. W. 1911.

3. Crim v. Woodford [C. C. A.] 136 F. 34.

4. Lingle v. Chicago [Ill.] 71 N. E. 590.

5. Gagnon v. French Lick Springs Hotel Co. [Ind.] 72 N. E. 849.

6. See 3 C. L. 220.

7. See post, § 11E3.

8. Because he was adjudged to have lien on land instead of title to it. Miller v. Wireman [Ky.] 80 S. W. 517.

9. Kupke v. Polk [Neb.] 103 N. W. 321.

10. Gen. St. § 804. State v. Thresher [Conn.] 58 A. 460.

11. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56.

12. See 3 C. L. 221.

13. An appeal need not be stayed to allow the appointment of a successor of a deceased trustee where he had no interest in the only question involved in the appeal. Coffman v. Gates [Mo. App.] 85 S. W. 657. Death of appellee before submission, not suggested, does not render a reversal void, and it may be perfected by revivor. Deppen v. Immohr's Ex'r [Ky.] 84 S. W. 333. The

party is an officer or representative.[14] Where a writ of error is sued out by one entitled to except, all parties in the court below whom the record shows could have united in suing out the writ may be made co-plaintiffs in error by amendment in the supreme court.[15] No notice need be given to the parties so added.[16] Parties added by amendment in the supreme court may unite with the original plaintiff in error in his assignments of error, or they may sever and seek to uphold the judgment.[17]

(§ 11) *D. Calendars; trial dockets; terms.*[18]—An appeal cannot be docketed before the term to which it was taken[19] or before the transcript is filed.[20] If a case is erroneously[21] or prematurely docketed, it will be stricken.[22] Hearing may be postponed to await the event of a suit which will control the decision.[23] Provision is usually made for expediting certain classes of cases.[24]

(§ 11) *E. Forming issues; pleading, assigning and specifying error.* 1. *In general.*[25]—The assignment of errors is appellant's pleading tendering an issue of law. Errors not assigned will not be considered,[26] and when required to be filed below they will not be considered unless so filed and set out in the record[27]

joinder in error of a deceased party does not affect the right to prosecute the proceeding when his sole heirs are named as parties, but his name will be stricken from the title on motion. Johnston v. Little Horse Creek Irrigating Co. [Wyo.] 79 P. 22. A provision that no appeal or writ of error shall abate because of the death of either of the parties, but may be revived, applies only to actions on causes of action which survive. Shannon's Code, § 4575, construed, and held not to apply to action to have defendant declared lunatic. Posey v. Posey [Tenn.] 83 S. W. 1. Motion in the court above to open the record unless executors come in is not the remedy where a party dies before appeal is taken. There must be revivor below. Ropes v. McCabe [Fla.] 36 So. 715.

14. In mandamus against a judge his successor in office may be substituted on appeal. Territory of New Mexico v. Baker, 25 S. Ct. 375.

15. Administrator. Ramey v. O'Byrne [Ga.] 49 S. E. 595. If it appears from the record that one who should have been joined as a defendant in error to the bill of exceptions has not been named as such therein, he may be made a party by amendment, provided he waives service and consents that the case he heard on the merits. Sears v. Jeffords [Ga.] 47 S. E. 186.

16, 17. Ramey v. O'Byrne [Ga.] 49 S. E. 595.

18. See 3 C. L. 221.

19. Erwin v. Benton [Ky.] 84 S. W. 533.

20. Hamilton v. Kentucky Title Co. [Ky.] 79 S. W. 1182; People v. District Court of Denver [Colo.] 80 P. 1069.

21. Farmers' & Merchants' Bank v. Burwell [Ga.] 48 S. E. 145.

22. Garcia v. Brown [Cal.] 79 P. 590.

23. Where a suit is pending to expunge an order of the court below from the record, hearing of an appeal will be postponed until the suit is determined. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194.

24. An appeal will not be advanced because of the magnitude of property rights involved if because of the want of a supersedeas the judgment may be enforced releasing it. Order discharging garnishee releases what he holds. Cummings v. Edwards Wood & Co. [Minn.] 103 N. W. 709. A local option contest is not within a statute providing for the advancement of election contests. Erwin v. Benton [Ky.] 84 N. W. 533. Where the judgment is for money and no extraordinary circumstances or questions of public importance are involved, the case will not be added to the existing calendar, though appellants are entitled to preference. Goldberg v. Markowitz [N. Y.] 72 N. E. 316. An appeal taken within 30 days from an interlocutory decree granting an injunction is entitled to be advanced on the calendar for hearing subject to the rules as to filing briefs. Star Brass Works v. General El. Co. [C. C. A.] 129 F. 102.

25. See 3 C. L. 221.

26. Jones v. United States [C. C. A.] 135 F. 518; Morgan v. Lake Shore, etc., R. Co. [Mich.] 101 N. W. 836; Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2; George v. Wallace [C. C. A.] 135 F. 286; Watke v. Stine [Ill.] 73 N. E. 793; Lucas v. Stonewall Ins. Co. [Ala.] 36 So. 40; Highland Boy Gold Min. Co. v. Strickley [Utah] 78 P. 296; Morris v. Cork [Ind. T.] 82 S. W. 709; Crawford v. Murphy [Tex. Civ. App.] 84 S. W. 1073; Godding v. Rossiter [Colo. App.] 77 P. 1094; Morrison v. Austin State Bank [Ill.] 72 N. E. 1109; Doyle v. Illinois Cent. R. Co., 113 Ill. App. 532; In re Shively's Estate [Cal.] 78 P. 869; Woods v. Woods [Ind. T.] 82 S. W. 878; Dickenson v. Stults [Ga.] 48 S. E. 173.

27. Flersheim Mercantile Co. v. Gillespie [Okl.] 77 P. 183; Norfolk R. & Light Co. v. Spratley [Va.] 49 S. E. 502; El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735; Handley v. Anderson [Ind. T.] 82 S. W. 716; Hole v. Van Duzer [Idaho] 81 P. 109; Gillies v. Clarke Fork Coal Min. Co. [Mont.] 80 P. 370. By Rev. St. 1901, the requirement that appellant file an assignment of errors in the lower court was omitted, but the requirement that the transcript contain such assignment was retained. Held, that filing of such assignment in the lower court was not necessary, but if filed it must be contained in the transcript as part of the record. Santa

in the same form as that in which they were so filed.[28] Errors first assigned in the reply brief are not reviewable,[29] and a stipulation in the reviewing court allowing the filing of a supplemental brief "citing additional points and authorities" does not authorize a new assignment of error.[30] Fundamental or jurisdictional error appearing on the face of the record will be reviewed, though not assigned.[31] The court may in its discretion review errors not assigned.[32] Assignments must name all parties,[33] and be signed by the appellant or his counsel.[34] Assignments cannot be amended after submission except on notice and leave applied for in writing.[35]

(§ 11E) 2. *Proper parties to assign error.*[36]—Only a party aggrieved can assign error,[37] and one in default cannot.[38] Plaintiff cannot contend that one whom he made a defendant was not a proper party to the suit.[39] Appellants but not respondents in North Dakota can specify for review questions of fact in cases tried to the court without a jury.[40]

(§ 11E) 3. *Cross errors.*[41]—The appellee cannot be heard as to errors which he does not raise by cross assignment,[42] or in some states, unless he has

Cruz County v. Barnes [Ariz.] 76 P. 621. The transcript or abstract must contain an assignment of errors and points relied on as required by rules of court. Ferris v. Modern Woodmen of America [Utah] 81 P. 141. Exceptions pendente lite cannot be passed upon unless error is distinctly assigned thereon, either in the bill of exceptions or at the hearing in the supreme court. Sumner v. Sumner [Ga.] 48 S. E. 727.

28. Appellant's assignments of error in his brief not being a correct or even substantial copy of the assignments in the record, they were not considered by the appellate court. Kingston v. Austin Oil Mfg. Co. [Tex. Civ. App.] 81 S. W. 813; Dean v. Cate [Tex. Civ. App.] 87 S. W. 234.

29. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

30. Crane Co. v. Pacific Heat & Power Co. [Wash.] 78 P. 460.

31. Cressler v. Asheville [N. C.] 51 S. E. 53; First State Bank v. McGaughey [Tex. Civ. App.] 86 S. W. 55; Texas & P. R. Co. v. Nelson [Tex. Civ. App.] 86 S. W. 616. Though the supreme court may of its own motion consider an error not assigned which is apparent on the face of the record, it is not bound to do so, and ought not to when the judgment is substantially just. Cole v. Jerman [Conn.] 59 A. 425. Objections to jurisdiction that cannot be waived and may be raised at any time, or considered by the court on its own motion need not be presented by assignment of error. Objection that action is on an assigned contract and that it does not appear that suit could have been maintained by the assignor. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113. Appellate courts may consider without assignments rulings of trial courts which are fundamental in character or which determine a question upon which the very right of the case depends. Ruling sustaining general demurrer is fundamental and reviewable without assignment, though special exceptions might also have been taken. City of San Antonio v. Talerico [Tex.] 81 S. W. 518. Want of equity jurisdiction because of legal remedy need not be assigned. Williams v. Peeples [Fla.] 37 So. 572.

32. The defense of laches may be considered by an appellate court, though not made the subject of an assignment of error. Shea v. Nilima [C. C. A.] 133 F. 209.

33. Parties against whom no relief is sought must be named as appellants in the assignments and not as appellees. Smith v. Peters [Ind. App.] 72 N. E. 1103. An assignment must contain the names in full of all appellants and appellees. Nordyke & Marmon Co. v. Fitzpatrick [Ind.] 71 N. E. 46; Presbyterian Church v. Dyke [Ind.] 71 N. E. 503. The "Estate of S.," not naming the administrator, is not sufficient. Dallam v. Stockwell's Estate [Ind. App.] 71 N. E. 911.

34. Kinkade v. Gibson [Ill.] 70 N. E. 683.

35. Rule 4. Daily v. Washington Nat. Bank [Ind.] 72 N. E. 260.

36. See 3 C. L. 222.

37. City of Chicago v. People ex rel. Gray, 111 Ill. App. 594; Ruhl & Co. v. Nestor, 52 W. Va. 610, 44 S. E. 233. Any party may assign a defect of necessary parties. Rumell v. Tampa [Fla.] 37 So. 563.

38. Assignments raised by a party who failed to plead and against whom judgment was taken by default cannot be considered. City of Lincoln v. Bailey [Neb.] 99 N. W. 830.

39. Hoffman v. Silverthorn [Mich.] 100 N. W. 183.

40. Salemonson v. Thompson [N. D.] 101 N. W. 320.

41. See 3 C. L. 223.

42. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053; Sauter v. Anderson, 110 Ill. App. 574; In re Opening of Summit Ave., 32 N. Y. S. 1027; Miller v. Brooks [Ga.] 47 S. E. 646; Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687; Kern Oil Co. v. Crawford [Cal.] 76 P. 1111; Rodman v. Quick [Ill.] 71 N. E. 1087; Haigh v. Carroll [Ill.] 71 N. E. 317; United States Exp. Co. v. Joyce [Ind.] 72 N. E. 865; News Pub. Co. v. Associated Press, 114 Ill. App. 241; Adams v. Long, 114 Ill. App. 277. The judgment cannot be amended for appellees who made no complaint and sought no remedy. Succes-

cross appealed,[43] and when he does so he is bound by the usual rule as to saving of the question below;[44] but in cross assigning, he may go beyond the errors assigned.[45] Cross errors are not assignable in the Federal courts.[46]

(§ 11E) 4. *Specifications and averments.*[47]—Assignments of error must be definite and specific,[48] and distinct errors must not be grouped in one assignment,[49]

sion of Thomas [La.] 38 So. 519, following Ware v. Convillion, 112 La. 43, 36 So. 220. A ruling on the admissibility of evidence by the appellate court, adverse to respondent, cannot be reviewed on further appeal to the supreme court in the absence of a cross assignment of error. Kantzler v. Benzinger [Ill.] 73 N. E. 874. Where a demurrer has been sustained to a plea filed by the party successful at the hearing, no question can be raised by such party on appeal where he has assigned no cross error upon the ruling. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. An appellant cannot take advantage of the fact that the court did not pass upon a motion and demurrer filed by appellee, as he is not injured thereby. Pearce v. Albright [N. M.] 76 P. 286. Where the appeal is from specified parts of the decree only, and appellant notifies all parties to that effect and that he will have copied into the transcript only such parts of the record as are necessary to review such parts of the decree, the appellate court will not consider an assignment of error by one of the appellees, long after the submission of the cause, concerning another part of the decree, and having no relation to the part appealed from. Allen & Co. v. Maxwell [W. Va.] 49 S. E. 242. The appellate court will not consider the question whether the facts disclosed by a motion to set aside a default judgment and by the evidence on its hearing show a good excuse for defendant's failure to appear and answer, where the finding of the court that they do is not cross assigned as error by plaintiff. Will merely adopt such finding. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Where a direct appeal to the supreme court of the United States is authorized, the whole case is brought up, and accordingly respondent may cross assign nonfederal errors. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142. Where plaintiff appeals, claiming inadequate recovery and the evidence shows that he was not entitled to recover at all, there will be no reversal unless appellee assigns cross errors. Parker v. Supreme Lodge, 115 Ill. App. 501.

43. On appeal by defendant, plaintiff cannot, in the absence of a cross appeal, complain of failure to submit a certain matter as an element of damages. Pullman Co. v. Kelly [Miss.] 38 So. 317. Appellee need not cross appeal in chancery to assail the decree. Parken v. Safford [Fla.] 37 So. 567.

44. Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063. An appellee is not entitled to a reversal on a cross assignment of error complaining of the inadequacy of the verdict in his favor, though he raised the point by a motion for a new trial, where the record fails to show that such motion was called to the attention of, or acted upon by, the trial court, and where he did not perfect an appeal. Gulf, etc., R. Co. v. Larkin [Tex. Civ. App.] 80 S. W. 94.

45. Where on petition to condemn two tracts of land, there is dismissal as to one and judgment as to the other, and the petitioner appeals from the judgment of dismissal, the landowner cannot assign cross errors as to the judgment of condemnation. Chicago & M. Elec. R. Co. v. Chicago & N. W. R. Co. [Ill.] 71 N. E. 1017.

46. Must be independent proceeding. Guarantee Co. of N. A. v. Phoenix Ins. Co. [C. C. A.] 124 F. 170.

47. See 3 C. L. 223.

48. Charouleau v. Shields [Ariz.] 76 P. 821; Bryant v. Nelson-Frey Co. [Minn.] 102 N. W. 859; Guthrie v. Howland [Ind. App.] 71 N. E. 234; Spitzer v. Miller [Ind. App.] 73 N. E. 833; Johnston Glass Co. v. Lucas [Ind. App.] 72 N. E. 1102; Scribner v. Taggart [Iowa] 98 N. W. 798; Candler v. Washoe Lake Reservoir & G. C. Ditch Co. [Nev.] 80 P. 751; Lutlopp v. Heckmann [N. J. Err. & App.] 57 A. 1046; O'Donnell v. Clements, 23 Pa. Super. Ct. 447; St. Louis, etc., R. Co. v. White & Co. [Tex.] 80 S. W. 77; Taylor v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 83 S. W. 738. An exception to an instruction which does not correctly set out the same will not be reviewed. Cowles v. Lovin [N. C.] 47 S. E. 610. In Pennsylvania an assignment to the admission of a letter must contain a copy thereof. Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2. Assignment that an act of the general assembly "is too vague and indefinite to be enforced, and also is contrary to natural law, and violative of natural rights to fish in the sea, and arms thereof" is too indefinite. Prey v. Oemler [Ga.] 47 S. E. 546. Where it is clear from the record that an assignment relates to appellee's amended petition, the omission of the word "amended" in the assignment will be regarded as a clerical error. Guthrie v. Howland [Ind. App.] 71 N. E. 234. In equity general assignments of error are sufficient if they inform the court as to the matters passed upon. Campbell v. William Cameron & Co. [Ind. T.] 82 S. W. 762. Where complaint is made of the charge of the court upon which no specific assignment of error is made, such charge will be considered no further than to determine whether it states an abstractly correct proposition of law. Mulherin v. Kennedy [Ga.] 48 S. E. 437. An assignment that "there is manifest error in the record in the following particulars, to wit:" followed by specifications, is sufficient. Consumers' Gas Trust Co. v. Howard [Ind.] 71 N. E. 493. It is irregular to assign as errors extracts from the opinion of the trial court, especially where it is not indicated that they are extracts. Altoona v. Morrison, 24 Pa. Super. Ct. 417.

49. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Bingham v. Davidson [Ala.] 37 So. 738; Spitzer v. Miller [Ind. App.] 73 N. E. 833; Steen v. Swadley [Ind. T.] 82 S. W. 871; Erie City v. Grant, 24 Pa. Super. Ct.

nor must co-parties join in assignments not affecting all alike[50] unless the exception was joint.[51] Each specification must be complete in itself.[52] Reference to the record for verification is usually required.[53] In New Jersey an assignment of error in fact must conclude with a verification,[54] and an assignment which contradicts the record in matters of fact is improper.[55] In Indiana, matters which are causes for new trial cannot be assigned as independent errors,[56] and only matters properly assignable as grounds for such motion can be considered without independent assignments.[57] In the notes are applications of the rules of definiteness and certainty to assignments respecting pleadings,[58] admission and exclusion

109; Godshalk's Estate, 24 Pa. Super. Ct. 410; Moore v. Bischoff, 25 Pa. Super. Ct. 1; Wabash Ave., 26 Pa. Super. Ct. 305; Masterson v. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227; Peck v. Peck [Tex. Civ. App.] 83 S. W. 257; International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 85 S. W. 1163; Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695. On charge as to fraud in procuring release and on charge as to mistake therein. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Grouping of assignments of error based on different reasons why the verdict is contrary to the evidence is improper. Fort Worth & R. G. R. Co. v. Robinson [Tex. Civ. App.] 84 S. W. 410. Assignment complaining of refusal to give requested charge and of failure to submit issue suggested in requested charge is bad. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362. An assignment on the overruling of several exceptions, presenting more than one question, will not be considered. Ft. Worth & D. C. R. Co. v. Hagler [Tex. Civ. App.] 84 S. W. 692. All the assignments of error may be copied one after another no matter to how many subjects they may relate, but practice is not commendable. Neal v. Galveston, etc., R. Co. [Tex. Civ. App.] 83 S. W. 402. Assignments of error relating to the same subject may be grouped, with propositions under them. Id.

50. Leader v. Mattingly [Ala.] 37 So. 270. A joint assignment by several parties presents no question if the ruling was right as to either of them. Vansell v. Carithers [Ind. App.] 71 N. E. 158. A joint assignment not good as to all the persons joining is good as to none. City of Lincoln v. Bailey [Neb.] 99 N. W. 830; Kupke v. Polk [Neb.] 103 N. W. 321.

51. Coy v. Druckamiller [Ind. App.] 73 N. E. 195. Where a joint and several demurrer is overruled and exception taken jointly, no question is raised by separate assignments of error. Whitesell v. Strickler [Ind.] 73 N. E. 153. Specifications of error must apply accurately to the rulings complained of, separate assignments to a joint exception not being sufficient. Id.

52. Spitzer v. Miller [Ind. App.] 73 N. E. 833. Reference to page elsewhere is not sufficient. Vanderslice v. Donner, 26 Pa. Super. Ct. 319; Winkler v. Hawkes [Iowa] 102 N. W. 418.

53. Winkler v. Hawkes [Iowa] 102 N. W. 418. Errors in record not referred to by page as required. Butte Min. & Mill. Co. v. Kenyon [Mont.] 76 P. 696.

54, 55. Karnuff v. Kelch [N. J. Err. & App.] 60 A. 364.

56. Assignment that facts as found are contrary to law and not supported by sufficient evidence. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000. Refusal of jury trial. Abbott v. Inman [Ind. App.] 72 N. E. 284.

57. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814.

58. An assignment that the court erred in overruling demurrer to several paragraphs of the complaint cannot be sustained if one paragraph be good. Cambridge Lodge No. 9, K. P. v. Routh [Ind.] 71 N. E. 148. An assignment questioning the sufficiency of a complaint in its entirety is unavailing if it contain a good count. Nickey v. Dougan [Ind. App.] 73 N. E. 288. An assignment questioning the overruling as to one paragraph, a demurrer addressed to two paragraphs presents nothing. Pittsburg, etc., R. Co. v. Wilson [Ind. App.] 72 N. E. 666. Separate assignments based on a joint exception to the overruling of separate demurrers to several paragraphs of a complaint raise no question. Johnston Glass Co. v. Lucas [Ind. App.] 72 N. E. 1102; Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 73 N. E. 933. Where after the overruling of a separate demurrer to each of the two paragraphs of a complaint plaintiff dismissed as to one paragraph, a general assignment of error to the overruling of the demurrer is not joint as so much of the demurrer as applied to the dismissed paragraph went out of the case with it. City of Hammond v. Winslow [Ind. App.] 70 N. E. 819. Sufficiency of pleas cannot be considered on appeal where no error is assigned regarding the settling of the pleadings. Cleveland, etc., R. Co. v. Hamilton, 105 Ill. App. 75. Assignment of error in rendering judgment against defendant without proof does not authorize consideration of alleged error in sustaining a demurrer to the answer. Godding v. Rossiter [Colo. App.] 77 P. 1094. An assignment that the court erred in holding that the pleadings set up an executed contract and that the same was prima facie evidence against defendant raises the admissibility of such contract. Altgelt v. Oliver Bros. [Tex. Civ. App.] 86 S. W. 28. Assignments of error which go to the action of the court in sustaining exceptions to the petition and in sustaining a motion to quash the proceedings do not present for review a ruling relative to costs. Hunter v. Adoue [Tex. Civ. App.] 86 S. W. 622. An assignment that court erred in refusing to sustain certain exceptions and demurrers which involved several propositions, held too general. Wat-

of evidence,[59] instructions,[60] sufficiency of evidence,[61] verdicts,[62] findings,[63] judgment[64] and rulings on motions for new trial.[65]

kins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 560. Assignment of error that court below "erred in sustaining appellees' general and special demurrers" to the petition, and in dismissing the action, and rendering judgment against appellant for costs, held not too general to prevent consideration of action of court on the general demurrer, though his action on the special demurrer is not assailed. Stark v. J. M. Guffey Petroleum Co. [Tex. Civ. App.] 80 S. W. 1080.

59. The question of competency cannot be considered on a specification that evidence was insufficient to prove a fact. Williams v. Hawley [Cal.] 77 P. 762. Refusal to strike out testimony received without objection will not be considered if not assigned as error. Dawson v. Proctor [Colo. App.] 79 P. 303. An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him must state what evidence was thus sought to be elicited and that the court was informed thereof at the time of the ruling. City of Macon v. Humphries [Ga.] 50 S. E. 986. In order to properly present for review the question whether or not error was committed in admitting given evidence, the complaining party must make it appear not only that it was admitted over his objection but also what grounds of objection he urged when it was offered. Powell v. Georgia, etc., R. Co. [Ga.] 49 S. E. 759. Where the ruling is proper as to one item of evidence excluded and erroneous as to another, and a single objection was taken to both, the overruling is not well assigned as error. Appeal of Spencer [Conn.] 60 A. 289. An assignment to a ruling on evidence must set forth the evidence admitted or offered and rejected. Toddes v. Hafer, 25 Pa. Super. Ct. 78; Bachert v. Lehigh Coal & Navigation Co. [Pa.] 57 A. 765. It is not enough that the text of the assignment be supplemented by reference to the evidence set out in extenso in the appendix. Pizzi v. Nardello, 23 Pa. Super. Ct. 535. Assignment that court erred in overruling motion to strike out answers to two direct and two cross questions held too general. Bell v. Bates [Tex. Civ. App.] 81 S. W. 551. An assignment on the admission of evidence must state the ground of objection. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41. An assignment of error in allowing questions without showing any objection to the answers is insufficient. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41. An assignment that the court erred in admitting evidence, "which evidence is fully set forth in the bill of exceptions" is too indefinite. Steen v. Swadley [Ind. T.] 82 S. W. 871.

60. Errors must be specifically assigned. Bowles v. Wicker [Ga.] 50 S. E. 476; Kaufman v. Pittsburg, C. & W. R. Co. [Pa.] 60 A. 2; Roth v. Slobodien [N. J. Law] 60 A. 59; Jacksonville & St. L. R. Co. v. Wilhite [Ill.] 70 N. E. 583. An assignment of error to the failure to charge is unavailing when the bill of exceptions fails to show that it was requested. Bingham v. Davidson [Ala.] 37 So. 738. An assignment that the court erred in charging the jury as certified in the printed record without pointing out the particular errors in a charge covering 12 pages is too general. Chase v. Waterbury Sav. Bank [Conn.] 59 A. 37. Where requests to charge are numerous, an assignment that the court erred in refusing to charge as requested is not sufficiently specific. McAllin v. McAllin [Conn.] 59 A. 413; Farrell v. Eastern Machinery Co. [Conn.] 59 A. 611; Central Union Tel. Co. v. Sokola [Ind. App.] 73 N. E. 143. An assignment which merely sets out the language excepted to is sufficient where the objection as clearly appears from such language as it would if the assignment were further elaborated. Best v. Kessler [C. C. A.] 130 F. 24. A general exception to several propositions either given or refused will be overruled if any one was correctly given or refused. Erie R. Co. v. Littell [C. C. A.] 128 F. 546; Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13; Johnson v. Leffler Co. [Ga.] 50 S. E. 488. It must be particularized wherein the instructions were violated. Banks v. McCandless [Ga.] 47 S. E. 332. An assignment of error that a specified portion of the charge is "misleading" is too general to be considered. Riddle v. Sheppard [Ga.] 47 S. E. 201. An exception to a correct charge because of failure to give, in the same connection, some other pertinent legal proposition, is not a good assignment of error. Macon R. & Light Co. v. Barnes [Ga.] 49 S. E. 282; City of Macon v. Humphries [Ga.] 50 S. E. 986. Failure to charge as to a pertinent matter cannot be taken advantage of by assigning error upon a charge correctly instructing the jury as to other matters involved. Atlantic Coast Line R. Co. v. Williams [Ga.] 48 S. E. 404. A complaint that the court omitted to instruct the jury as to pertinent matters to be considered by them is not properly brought up for review by an assignment of error that certain instructions excepted to were incorrect in that the court in the same connection should have charged other propositions of law applicable to the case. Robert Portner Brewing Co. v. Cooper [Ga.] 47 S. E. 631. A general exception to an entire charge on the ground that it is argumentative is untenable. Guertin v. Hudson [N. H.] 53 A. 736. An exception that the court erred in his charge to the jury is too broad to be considered. Sigman v. Southern R. Co. [N. C.] 47 S. E. 420. A specification of error as follows: "The instruction complained of * * * being the entire charge as found on pages 115 to 120 of the transcript, and which the court is asked to consider without compelling the appellant to set it out in full," is not in compliance with the rules of the court of appeals. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. In Pennsylvania, where no particular error can be pointed out, review will be made of the charge as a whole. Rider-Ericsson Engine Co. v. Fredericks, 25 Pa. Super. Ct. 72. Though the

admission of evidence is assigned as error, an error alleged in the charge relating to the admission of such evidence will not be considered where that portion of the charge has not been assigned as error. McCarthy v. Philadelphia & R. R. Co. [Pa.] 60 A. 778. Assignment setting forth a single sentence or clause separate from the context will not be considered unless the quoted portion be self-sustaining and self-explanatory. Cox v. Wilson, 25 Pa. Super. Ct. 635. Objections to charges, expressly stated in the assignments cannot be enlarged by propositions submitted under them. Faubion v. Western Union Tel. Co. [Tex. Civ App.] 81 S. W. 56. An assignment alleging a charge to have been erroneous on a certain ground, whether it was erroneous on another ground will not be considered. Id. Assignment of error in giving charge asked by "defendant" will not sustain claim of error in giving charge asked by plaintiff. Missouri, etc., R. Co. v. Henseriang [Tex. Civ. App.] 86 S. W. 948. Assignment that court erred in submitting failure to deliver second of two telegrams as a basis of recovery, held not to raise question whether it erred in not restricting extent of recovery. Western Union Tel. Co. v. Ridenour [Tex. Civ. App.] 80 S. W. 1030. A complaint that the court should have submitted an issue suggested in a requested improper charge will not be considered on appeal unless specifically made by a proper assignment of error. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362. The judgment will not be reversed because a substantially correct charge is not sufficiently full, where the appellant's brief contains no assignment of error complaining of the refusal of the court to give an additional charge requested by it. Unsell v. Sisk [Tex. Civ. App.] 83 S. W. 34.

61. An assignment that the court erred in directing a verdict is sufficiently specific. Taylor v. McLaughlin [Ga.] 48 S. E. 203; Long v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 1048. That the court erred in directing a nonsuit is a sufficient assignment. Randolph v. Brunswick & B. R. Co. [Ga.] 48 S. E. 396. Sufficiency of evidence to support finding cannot be reviewed in the absence of specification of particulars wherein it is insufficient. Adams v. Hopkins [Cal.] 77 P. 712. Under a statute providing that the final decision of an action is deemed excepted to, an assignment of error that the judgment based on findings is not supported by the evidence is insufficient. Crooks v. Harmon [Utah] 80 P. 95.

62. An assignment that the verdict is contrary to law is too general. Chicago Terminal Transfer R. Co. v. Bomberger [C. C. A.] 130 F. 884. On assignments of grounds for new trial which cover merely the sufficiency or legal effect of the evidence, the court will not consider answers to interrogatories. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552. Error by the jury in computation will not be considered unless distinctly pointed out. Furguson v. Ragon [Okl.] 81 P. 431. An assignment that the verdict for damages is not sustained by the evidence will not raise excessiveness of damages. Ft. Worth & R. G. R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37. Assignment merely that verdict is excessive is too general. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. Assignment that verdict is excessive, outrageous, unconscionable, and in manifest disregard of law and evidence, raises more than one question and is improper. Id.

63. An assignment that the "findings of the court" are not supported by the evidence is good. Burns' Ann. St. 1901, § 568, cl. 6. Parkison v. Thompson [Ind.] 73 N. E. 109. An assignment that the decision is not sustained by the evidence does not require a review as to the weight of the evidence. Bush v. German-American Bldg. Ass'n [Ind. App.] 71 N. E. 914. An assignment that the court erred in its conclusions of law is joint and unless good as to all is good as to none. Wolverton v. Wolverton [Ind.] 71 N. E. 123; Vinall v. Hendricks [Ind.] 71 N. E. 682. An assignment that the "court erred in overruling the defendant's exception to the conclusion of law stated upon the special finding of facts" presents no question for review. Burck v. Davis [Ind. App.] 73 N. E. 192. An assignment of error in overruling a motion for a new trial does not present the question of the sufficiency of the evidence to support the findings. Neils Lumber Co. v. Hines [Minn.] 101 N. W. 959. Where the statute requires a separate exception to each finding of fact or conclusion of law complained of, a mere general exception is insufficient, and its repetition after each assignment of a particular error will not bring the appeal within the statute. Act Mch. 16, 1868 (P. L. 45), relating to appeals from orders of removal of paupers. Franklin Tp. Overseers v. Rayburn Tp. Overseers, 23 Pa. Super. Ct. 522. An assignment that the findings as to the extent of the damage are not sustained by the evidence will not support a contention that the court adopted a wrong theory as to measure of damages. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Where no error is assigned upon the making of a finding, the supreme court will accept the fact found as a fact without considering whether it is supported by the evidence or not. Sherry v. Madler [Wis.] 101 N. W. 1095.

64. Assignment that the verdict and decree "is violative of the vested constitutional rights of the defendants" to the use and enjoyment of the property in dispute under leases from the state is too general. Prey v. Oemler [Ga.] 47 S. E. 546. An assignment that the court erred in rendering judgment against defendant that he take nothing is not sufficiently specific. Watzlavzick v. Oppenheimer [Tex. Civ. App.] 85 S. W. 855. An assignment of error in a decree enjoining an execution sale that the evidence did not show that the land was plaintiff's homestead is not germane to a proposition that such decree was erroneous because the sale was not such a cloud on title as might be enjoined. Mansur & T. Implement Co. v. Graham [Tex. Civ. App.] 85 S. W. 308. That judgment of the district court entered pursuant to an order of the court of appeals may be assailed as void, it must be assigned as error that the court of appeals was without jurisdiction to enter the judgment. Taylor v. Colorado Ironworks [Colo.] 80 P. 129.

65. Assignment "that court erred in over-

(§ 11E) 5. *Demurrers, pleas, and replication.*[66]—An appellee may file in the supreme court a plea in bar of the appeal, based on the statute of limitations.[67] In a proceeding in error it is proper for the defendant in error by way of answer to set up such facts subsequent to the judgment as are claimed to be a waiver of the error complained of.[68] Upon the filing of a plea of prescription by the defendant, the case will be remanded for trial of that plea, the appeal remaining otherwise in statu quo.[69] An answer to appeal under Louisiana practice, praying an amendment to increase the claim of damages, must be filed at least three days before argument.[70]

(§ 11) *F. Briefs and arguments.*[71]—Briefs are generally required by rule of court.[72] The prescribed time of filing and serving is peremptory[73] unless extended.[74] It is generally required that they be printed[75] and served.[76] Statutes and court rules prescribing the form and contents of briefs are insisted on.[77] Among the common requirements is a summary of so much of the record as presents the errors relied on,[78] with references to the record for verification,[79] a sepa-

ruling appellant's motion for a new trial because of the errors herein assigned and which were duly presented therein" is too general. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198. An assignment of error in refusing a new trial for four specific reasons is not multifarious, there being but one error, i. e., that of refusing the new trial. Mix v. North American Co. [Pa.] 59 A. 272. Under Sup. Ct. Rule 12 (4 Pac. x.), that no error will be considered unless clearly pointed out in appellant's brief, an assignment that the court erred in denying a motion for a new trial, though too indefinite, did not preclude consideration of error distinctly pointed out which might be reviewed without a motion for a new trial. Rowe v. Northport Smelting & Refining Co. [Wash.] 76 P. 529.

66. See 3 C. L. 229.

67. Farmer v. Allen [Miss.] 38 So. 38.

68. Charles P. Kellogg & Co. v. Spargur [Neb.] 100 N. W. 1025.

69. Myers v. Lansing [La.] 38 So. 85.

70. Bonnin v. Crowley [La.] 36 So. 842.

71. See 3 C. L. 229.

72. A failure to file a brief is a waiver of the right to be heard. Le Breton v. Swartzel [Okl.] 78 P. 323. A case submitted without oral argument by consent will not be considered unless a printed argument or brief is filed by counsel for each of the parties. Sup. Ct. Rule 10, 39 S. E. vi. Where both parties appeal, must be separate ones in each case, when different questions are involved. Orion Knitting Mills v. United States Fidelity & Guaranty Co. [N. C.] 48 S. E. 652.

73. Court of Appeals rule 3 (75 S. W. v.) providing that an appellee failing to file his brief on time will be required to pay the costs up to the date of filing will not be enforced in the absence of a motion by appellant prior to the submission of the cause. Schnabel v. Waggener [Ky.] 80 S. W. 1125.

74. Showing by counsel for plaintiff in error held insufficient to warrant an extension of time for filing briefs as against a motion to dismiss. Cook v. South Omaha Nat. Bank [Wyo.] 79 P. 18. An application for leave to file a brief in the court of appeals notwithstanding a failure to file it in the lower court within the prescribed time will be denied where no excuse for such failure is offered. Booker v. Anderson [Tex. Civ. App.] 80 S. W. 385.

75. A typewritten brief the imprint being blurred and illegible will not be considered. Lodwick Lumber Co. v. Taylor [Tex. Civ. App.] 87 S. W. 358. In divorce case where defendant did not contest, but court appointed attorney to appear for her, motion by such attorney, on appeal by complainant from decree dismissing bill, for leave to file typewritten brief, denied. Lenoir v. Lenoir, 24 App. D. C. 160.

76. Under a statute making the attorney general the attorney of record for any county, he is entitled to be served in an appeal against a county. McIntosh Hardware Co. v. Flathead County [Mont.] 80 P. 239.

77. Sup. and App. Ct. Rule 22. Woodward v. Dobyzkoski [Ind. App.] 73 N. E. 607; Wolverton v. Wolverton [Ind.] 71 N. E. 123; Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151; Kennedy v. Swisher [Ind. App.] 73 N. E. 724; McCormick Harvesting Mach. Co. v. McCormick [Iowa] 103 N. W. 204. Brief prefaced with assignments of errors in violation of the statute abolishing such practice. Winkler v. Hawkes [Iowa] 102 N. W. 418. A paper filed by appellant containing neither points, propositions nor argument, as required by rule, will not be considered. Sup. Ct. Rules 54 and 56. McCormick Harvesting Mach. Co. v. McCormick [Iowa] 103 N. W. 204.

78. Sup. and Appellate Ct. rule 22. Woodward v. Dobyzkoski [Ind. App.] 73 N. E. 607; Kennedy v. Swisher [Ind. App.] 73 N. E. 724; Todd v. Cage [Ind. App.] 73 N. E. 925; Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151; Barricklow v. Stewart [Ind.] 72 N. E. 128; Webster v. Major [Ind. App.] 71 N. E. 176. Right to judgment on answers to special interrogatories cannot be considered in their absence from the brief. Nurrenbern v. Daniels [Ind.] 71 N. E. 889. Undisputed statements of fact in the brief are consider-

rate assignment or statement of the contentions or alleged errors,[80] a distinct

ed as admissions made at the trial. Territory v. Board of Com'rs of Bernalillo County [N. M.] 79 P. 709. If **rulings on pleadings** are objected to, a concise statement of their contents is necessary. Shatz v. Alexandria Gas Co. [Ind. App.] 73 N. E. 1094; Chicago Terminal Transfer Co. v. Walton [Ind.] 72 N. E. 646; Tuthill Spring Co. v. Holliday [Ind.] 72 N. E. 872. In a copy of the demurrer or its substance if error is predicated on, the order sustaining it is necessary. Citizens' Nat. Bank v. Alexander [Ind.] 73 N. E. 279; Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869; Citizens' Nat. Bank v. Alexander [Ind. App.] 73 N. E. 279. Rule not complied with by reference to place in record where pleading is found. Schreiber v. Worm [Ind.] 72 N. E. 852. Matters depending on **evidence** cannot be considered in the absence of a concise statement of it. Chicago Terminal Transfer Co. v. Walton [Ind.] 72 N. E. 646; Welch v. State [Ind.] 72 N. E. 1043. Ruling on refusal of new trial for newly-discovered evidence. Perdue v. Gill [Ind. App.] 73 N. E. 844. Sufficiency of evidence. Where appellant states there is no evidence and appellee sets out what he claims is sufficient, the question will be reviewed. Tipton Light, Heat & Power Co. v. Dean [Ind.] 73 N. E. 1082. A mere reference to the pages of the record where evidence may be found is not a compliance with a rule which requires the brief to quote the full substance of the evidence. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686. If the **instructions** complained of or a succinct statement thereof are not set out, they will not be considered. Sup. & App. Ct. Rule 22, subd. 5. Woodward v. Dobyzkoski [Ind. App.] 73 N. E. 607; Kennedy v. Swisher [Ind. App.] 73 N. E. 724; Perdue v. Gill [Ind. App.] 73 N. E. 844; Huey & Co. v. Johnston [Ind.] 73 N. E. 996; Barricklow v. Stewart [Ind.] 72 N. E. 128; Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552; Chicago Terminal Transfer R. Co. v. Vandenberg [Ind.] 73 N. E. 990; Chicago Terminal Transfer Co. v. Walton [Ind.] 72 N. E. 646; Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132; Garrigue v. Keller [Ind.] 74 N. E. 523. Rule is not complied with by a statement as to what counsel conceives to be the legal effect of the instruction. Buehner Chair Co. v. Feulner [Ind.] 73 N. E. 816. Omission cannot be supplied in reply brief. Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539.

Misconduct of counsel in argument will not be reviewed in the absence of a statement thereof. Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539. Alleged **misconduct of the jury** supported by affidavits cannot be reviewed in the absence of the substance of the affidavits. Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539. The overruling of a **motion for a new trial** cannot be considered where the causes assigned or a succinct statement thereof are not set out. Chicago Terminal Transfer Co. v. Walton [Ind.] 72 N. E. 646.

79. Huey Co. v. Johnston [Ind.] 73 N. E. 996. Required by rules of court. Butte Min. & Mill. Co. v. Kenyon [Mont.] 77 P. 319. Where the reference to folios of the record is incorrect, the reviewing court is not obliged to and will not search the record. Bird v. Potter [Cal.] 79 P. 970. Objections will not be reviewed where the evidence objected to is not pointed out, no reference is made to the pages where it may be found and the abstract of 128 pages is not indexed. The Fair v. Hoffman [Ill.] 70 N. E. 622; St. Louis & O. R. Co. v. Union Trust & Sav. Bank [Ill.] 70 N. E. 651.

80. The points or errors must be specified. Defects in complaint. Storer v. Markley [Ind.] 73 N. E. 1081; Flickner v. Lambert [Ind. App.] 74 N. E. 263. Appellate Court Rule 22. Pittsburg, etc., R. Co. v. Greb [Ind. App.] 73 N. E. 620. Must be a distinct enumeration of errors relied on. Standley v. Flint [Idaho] 79 P. 815. Assignment held sufficient. Whitney v. Dewey [Idaho] 80 P. 1117. Errors or points not contained in the "statement of points" in appellant's brief will not be considered in Indiana. Pittsburg, etc., R. Co. v. Greb [Ind. App.] 73 N. E. 620. Must specify errors relied on. Rule 10. Grubbs v. Needles [Ind. T.] 82 S. W. 873. Errors not specified will not be considered. Schilling v. Curran [Mont.] 76 P. 998. Appellants' brief must show errors relied on if the applicability of the propositions discussed cannot be determined without an investigation. McIntosh Hardware Co. v. Flathead County [Mont.] 80 P. 239. Substantial compliance with rule is sufficient upon which to deny a motion to strike the brief. Johnston v. Gerry [Wash.] 76 P. 258. At the conclusion of appellant's statement of the case, it was recited that appeal was from the order sustaining a demurrer to which the argument was wholly directed. Held, the brief would not be stricken because not pointing out errors relied on. McKenzie v. Royal Dairy [Wash.] 77 P. 680. Appellant need not assign his reasons in the specifications of error contained in the brief. They belong in the portion devoted to argument. State v. Justice Ct. of Tp. No. 1, Gallatin County [Mont.] 78 P. 498.

Assignment, statement, and proposition under the Texas rule. Assignment: Missouri, etc., R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. Assignment will not be considered where neither it nor the proposition points out the error in the charge complained of. San Antonio Traction Co. v. Sanchez [Tex. Civ. App.] 84 S. W. 849. Several assignments of error consecutively stated followed by a statement that they would be treated as propositions will not be considered. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839. An assignment of error appearing in the record cannot be considered unless copied in the brief. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

Statement: An assignment not accompanied by a statement of facts will not be considered. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504; Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805; International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 85 S. W. 1163; Dieter v. Bowers [Tex. Civ. App.] 84 S. W. 847. To sustain an assignment that a

argument addressed to each,[81, 82] and the citation of authorities.[83] Though the court may consider jurisdictional questions not discussed,[84] all matters not

charge ignored a defense, the statement in the brief must show that there was evidence to sustain such defense. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. The statement in appellants' brief must show reservation of a bill of exceptions. Saenz v. Mumme Co. [Tex. Civ. App.] 85 N. W. 59. An assignment of error complaining of the refusal of a charge will not be considered unless the evidence relied on to warrant it is set out in the brief. Burke v. Holmes [Tex. Civ. App.] 80 S. W. 564. The statement under an assignment of error in a charge should contain the charge in full or in substance and refer to the record for verification. International & G. N. R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847. Instructions not set out in full in the brief of the complaining party as required by rules of court will not be reviewed. Hallwood Cash Register Co. v. Dailey [Kan.] 79 P. 158. Briefs must be full and explicit enough to enable the court to decide the case without reference to the transcript. Krick v. Dow [Tex. Civ. App.] 84 S. W. 245. An assignment to the exclusion of evidence will not be considered where the statement under it does not show what the evidence was. Id.

Proposition: An assignment which is not a proposition of law in itself and is not accompanied by a proposition will not be considered. Taylor v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 260; Taylor v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 83 S. W. 738; El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718; City of San Antonio v. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315. An assignment of error not accompanied by a proposition of law will not be considered. El Paso Elec. R. Co. v. Alderete [Tex. Civ. App.] 81 S. W. 1246. A proposition that "a verdict without evidence to support it is void" will not authorize a review of the evidence if there is some evidence supporting the verdict. Stewart v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 310. The court will not though requested by counsel consider, as propositions under an assignment, the propositions under other assignments. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. A proposition under an assignment of error in a charge which merely states that it is error to ignore a material issue is too abstract. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21. As is a proposition that it is error "to give an instruction against the interest of a party. Id. Propositions in the brief, not based on assignments of error carried into the brief, will not be considered. Missouri, etc., R. Co. v. Ingram [Tex. Civ. App.] 83 S. W. 208. Propositions not embraced in or authorized by the assignments of error to which they refer will not be considered. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258. A subsidiary proposition that, if evidence showed any negligence, it further showed that a joint tort feasor negligently did the act causing the injury, and that, except for a settlement by plaintiff with it, defendant would have been entitled to an action over against it, was not authorized by an assignment of error that the court erred in refusing to direct a verdict on account of the insufficiency of the evidence to show negligence, and because of the evidence of accord and satisfaction. Id. The court will not subdivide or reconstruct assignments of error or propositions in order to reverse for a technical error. Missouri, etc., R. Co. v. Purdy [Tex. Civ. App.] 83 S. W. 37. A proposition under an assignment of error stating that, even if a request to charge was not correct, it was sufficient to call the court's attention to the issue involved, and to require the giving of a proper charge on the subject, cannot be considered in the absence of an assignment alleging that the court should have, in view of the request, given another and proper charge on the subject. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735. Assignments of error which are propositions in themselves need not be followed by propositions. Castellano v. Marks [Tex. Civ. App.] 83 S. W. 729. In the Texas court of civil appeals, the assignments of error are required to be copied into the brief, and each point under each assignment must be stated as a proposition, unless the assignment itself sufficiently discloses the point, in which case it is sufficient to copy the assignment. Rule 30. Neal v. Galveston, etc., R. Co. [Tex. Civ. App.] 83 S. W. 402. A proposition not cognate to the assignment to which it refers, and which states no point which can arise from it, but presents and raises a distinct question, arising from the action of the court upon a matter separate and having no connection with that complained of in the assignment, cannot be considered. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

81, 82. Storer v. Markley [Ind.] 73 N. E. 1081. Court will not make its own investigation as to whether ruling was correct. Duggan v. Ryan [Ill.] 71 N. E. 848; Radichel v. Kendall [Wis.] 99 N. W. 348; Hanson v. Pennsylvania R. Co. [N. J. Law] 60 A. 1101. Merely repeating the substance of the exceptions reserved does not assign or argue the error. Mitchell v. Gambill [Ala.] 37 So. 402. A mere general assertion of error in a ruling does not require a consideration thereof. Davenport, etc., R. Co. v. DeYaeger, 112 Ill. App. 537.

83. Unintelligible citation. Winkler v. Hawkes [Iowa] 102 N. W. 418. Where an assignment is argued in both appellate and supreme courts, it will be reviewed though no authorities were cited in the brief filed in the appellate court or in the original brief in the supreme court. Chicago, etc., R. Co. v. Burridge [Ill.] 71 N. E. 838.

84. City of Tarkio v. Clark [Mo.] 85 S. W. 329. Fundamental defects of jurisdiction. Jurisdictional want of equity in bill. City of Jacksonville v. Massey Bus. College [Fla.] 36 So. 432. Ouster of chancery jurisdiction by existence of legal remedy. Wil-

urged by argument in the brief are deemed waived.[85] New points presented by the reply or supplemental brief will not be considered.[86]

A party has no absolute right to amend his brief, except by the citation of additional authorities,[87] and no other amendment will be allowed unless it appears that it will not involve injustice or inconvenience to the other party.[88]

A scandalous brief will be stricken from the files,[89] and counsel filing them

liams v. Peeples [Fla.] 37 So. 572. Lack of argument will not deprive the court of power to base reversal on exceptions not discussed. Purcell v. Hoffman House, 89 N. Y. S. 975. Where for the purpose of conferring jurisdiction the trial judge certifies that a constitutional question is involved, but no such question in the argument or brief, it will be assumed that if such a question existed it has been waived. Coghlan v. Williams [Kan.] 76 P. 394.

85. Leader v. Mattingly [Ala.] 37 So. 270; Birmingham R. Light & Power Co. v. Brantley [Ala.] 37 So. 698; Bingham v. Davidson [Ala.] 37 So. 738; Bell v. Southern Pac. R. Co. [Cal.] 77 P. 1124; Cole v. Jerman [Conn.] 59 A. 425; Daytona Bridge Co. v. Bond [Fla.] 36 So. 445; MacFarlane v. Southern Lumber & Supply Co. [Fla.] 36 So. 1029; Jones v. Nolan [Ga.] 48 S. E. 166; Tyler v. Justice [Ga.] 48 S. E. 328; New England Mortg. Sec. Co. v. Anderson [Ga.] 48 S. E. 396; Sweeney v. Sweeney [Ga.] 48 S. E. 984; Brantley v. Taylor [Ga.] 49 S. E. 262; Town of Douglasville v. Skinner [Ga.] 49 S. E. 287; Frank & Co. v. Horkan [Ga.] 49 S. E. 800; Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161; Sauter v. Anderson, 110 Ill. App. 574; Sanitary Dist. of Chicago v. Pearce, 110 Ill. App. 592; O'Neil v. Rogers, 110 Ill. App. 622; Melton v. Rittenhouse, 111 Ill. App. 30; Conkey v. Rex, 111 Ill. App. 121; Sanks v. Chicago & A. R. Co., 112 Ill. App. 385; Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415; Mellanson v. Mellanson, 113 Ill. App. 81; Botwinis v. Allgood, 113 Ill. App. 188; Barnes v. Huffman, 113 Ill. App. 226; Pickett v. People, 114 Ill. App. 188; Illinois Central R. Co. v. McMillan, 115 Ill. App. 600; Springer v. Lipsis [Ill.] 70 N. E. 641; Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; Spring Valley Coal Co. v. Buzis [Ill.] 72 N. E. 1060; Welch v. State [Ind.] 72 N. E. 1043; Johnston Glass Co. v. Lucas [Ind. App.] 72 N. E. 1102; People v. Chicago & E. I. R. Co. [Ill.] 73 N. E. 315; Woodhams v. Jennings [Ind.] 73 N. E. 1088; Michigan City v. Phillips [Ind.] 71 N. E. 205; Storer v. Markley [Ind.] 73 N. E. 1081; Parkison v. Thompson [Ind.] 73 N. E. 109; Peden v. Scott [Ind. App.] 73 N. E. 1099; Houghton v. Furbush [Mass.] 70 N. E. 49; Wright v. Perry [Mass.] 74 N. E. 328; Jaroszewski v. Allen, 117 Iowa, 632, 91 N. W. 941; Illinois Steel Co. v. Jeka [Wis.] 101 N. W. 399; Pitz v. Kentucky & N. Distilling & Cattle Feeding Co. [Minn.] 101 N. W. 797; Batty v. Hastings [Neb.] 95 N. W. 866; Sayre v. Johnson [Mont.] 81 P. 389; Incorporated Town of Tahlequah v. Guinn [Ind. T.] 82 S. W. 886; Kapiloff v. Feist, 91 N. Y. S. 27; Jones v. Brinsmade, 93 N. Y. S. 674. Assignments of error in the bill of exceptions. Jones v. Lingo [Ga.] 48 S. E. 190. Grounds of a motion for a new trial not argued. Brice v. Sheffield [Ga.] 48 S. E. 925. Points raised by the motion not urged in the brief or argument. McCullough v. Pritchett [Ga.] 48 S. E. 148. Failure to disclose the ground of objections to the refusal of instructions. Spring Valley Coal Co. v. Buzis [Ill.] 72 N. E. 1060. Where no variance between the evidence and declaration is urged and the declaration is not abstracted, the question of variance is waived. Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314, 73 N. E. 420. Questions presented by demurrer where appellant fails to point out any objection to the pleading demurred to. United States Board & Paper Co. v. Moore [Ind. App.] 72 N. E. 487. Cross assignments of error objecting to the sufficiency of the complaint. Glenn v. Lake Erie & W. R. Co. [Ind. App.] 73 N. E. 861. A finding not specifically attacked in the appellate court will ordinarily be assumed as correct though excepted to in the trial court. Riley v. Allen [Kan.] 81 P. 186. Exception to the allowance of an amendment. Houghton v. Furbush [Mass.] 70 N. E. 49. Errors not presented in the briefs nor oral arguments. Candler v. Washoe Lake Reservoir & G. C. Ditch Co. [Nev.] 80 P. 751. Where the particulars in which the evidence is deemed insufficient to support the findings are not pointed out it will be presumed the decision was justified. Pribble v. Bromley [S. D.] 102 N. W. 298. Errors not pointed out or argued. McKenzie v. Royal Dairy [Wash.] 77 P. 680. When not patently erroneous. Hawkins v. Casey [Wash.] 80 P. 792. Exceptions abandoned upon condition will be treated as waived upon the fulfilment of the condition. Roth v. Adams [Mass.] 70 N. E. 445.

Supreme court of **Illinois** does not consider matters discussed in appellate court and not in supreme court. Hinchcliff v. Rudnick [Ill.] 72 N. E. 691. Errors not argued in appellate court deemed abandoned on further appeal. Central Union Bldg. Co. v. Kolander [Ill.] 72 N. E. 50. Questions discussed in the appellate court where not discussed in the same way in the supreme court. Hinchcliff v. Rudnick [Ill.] 72 N. E. 691.

86. Gage v. Chicago, 211 Ill. 109, 71 N. E. 877; Michigan Sanitarium & Benevolent Ass'n v. Battle Creek [Mich.] 101 N. W. 855; People v. Cole [Mich.] 102 N. W. 856.

87. Under rule 38 of Court of Civ. Apps. (67 S. W. xvi). Peck v. Peck [Tex. Civ. App.] 83 S. W. 257; Neal v. Galveston, etc., R. Co. [Tex. Civ. App.] 83 S. W. 402.

88. Rule 38. Amendment will not be allowed after motion attacking brief for want of conformity to rules has been filed. Neal v. Galveston, etc., R. Co. [Tex. Civ. App.] 83 S. W. 402; Peck v. Peck [Tex. Civ. App.] 83 S. W. 257.

89. Referring to the trial court in dis-

punished.[90] Statements in the briefs as to matters shown by the record, if not questioned, will be taken as true,[91] but statements of facts not appearing of record should not be made,[92] and appellant should not insert a large number of pages of testimony which he deems favorable to his case.[93] The several counsel in a case in Illinois must unite in a single brief.[94]

Refiling briefs from other courts.[95]—Under the supreme court rule in Indiana certified copies of the briefs and argument used in the appellate court may be filed to show what questions were there raised and affidavits are inadmissible for that purpose.[96]

(§ 11) *G. Grounds for dismissing or striking out appeal.*[97]—An appeal will be dismissed for want of jurisdiction,[98] want of litigable right,[99] or real controversy,[1] properly saved below,[2] as where the appeal is for delay only,[3] abstract-

courteous language. Coats v. Seattle Elec. Co. [Wash.] 79 P. 484.

90. Stoll v. Pearl [Wis.] 100 N. W. 1054.

91. Brewer v. Bridges [Ind.] 73 N. E. 811; Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151; Arla Cattle Co. v. Burk [Neb.] 102 N. W. 74.

92. Himrod Coal Co. v. Beckwith, 111 Ill. App. 379.

93. The Fair v. Hoffmann [Ill.] 70 N. E. 622.

94. Rule 15. Thomas v. First Nat. Bank [Ill.] 72 N. E. 801.

95. See 3 C. L. 231.

96. Gunning v. Sorg [Ill.] 73 N. E. 870.

97. See 3 C. L. 232.

98. Where **amount involved** is less than jurisdictional sum. Sears v. Carpenter [Ind.] 74 N. E. 244; Crum v. North Vernon Pump & L. Co. [Ind.] 72 N. E. 587; Leonard v. Whetstone [Ind.] 72 N. E. 1045; Courtney v. Rigmaiden [La.] 36 So. 704; State v. Board of Assessors [La.] 37 So. 878; Wagner Co. v. Monroe [La.] 37 So. 974; State v. Sewerage & Water Board [La.] 37 So. 878; Williamson v. Payne [Va.] 49 S. E. 660; Chapman v. Haley [Ky.] 80 S. W. 190. So held there being no freehold, franchise or constitutional question involved. Beam v. Harrington [Colo.] 79 P. 1013. Appeal involving less than $50 will be dismissed in superior court. Johnson v. Perry [Ga.] 48 S. E. 686. Suit should not be dismissed, only appeal. Id. The appeal will not be dismissed, where the jurisdiction depends in part upon the amount claimed as damages, unless the claim is clearly fictitious. Tieman v. Johnston [La.] 38 So. 75. And the appellate court will take notice of the fact ex proprio motu. Succession of Fullerton [La.] 38 So. 151.

Appeal from **nonappealable order** will be dismissed. Thornburg v. Gutridge [Or.] 80 P. 100; Heinze v. Butte & B. Consolidated Min. Co. [C. C. A.] 129 F. 337; Griswold v. Smith, 214 Ill. 323, 73 N. E. 400; In re Jones [N. Y.] 74 N. E. 226; Toher v. Schaefer, 92 N. Y. S. 795; State v. McKellar [Minn.] 99 N. W. 807; People v. Ann Arbor R. Co. [Mich.] 100 N. W. 892; Halvenstadt v. Berger [Neb.] 100 N. W. 934; Reich v. Dyer [N. Y.] 72 N. E. 922. Discretionary orders. Eggen v. Fox [Wis.] 102 N. W. 1054. As to what orders are appealable, see ante, § 4.

Death of party to cause of action not surviving. Cooper v. Murphy [Ind. App.] 72 N. E. 664.

Appeal to wrong court. Terry v. Bird [C. C. A.] 129 F. 592. In Pennsylvania, the case being erroneously appealed to the superior court, it will be certified to the supreme court for decision. Neubert v. Armstrong Water Co., 26 Pa. Super. Ct. 608.

Suit for an injunction; appeal dismissed, there being no certificate showing case to come within any excepted class giving the court jurisdiction. Hayden v. Stewart [Kan.] 77 P. 697. Where the original tribunal has no jurisdiction, the appellate tribunal acquires none. Bickford v. Franconia [N. H.] 60 A. 98.

99. Frisch v. Ard [Colo.] 81 P. 247. Gas wells played out. State v. Indianapolis Gas Co. [Ind.] 71 N. E. 139. Property sold to one who voluntarily removes obstruction complained of. Dunn v. State [Ind.] 71 N. E. 890. Controversy in summary proceedings determined by cessation of relation of landlord and tenant. Stein v. Kesselgruh, 91 N. Y. S. 64. Cause of action extinguished by affirmance of default. Amorisa v. Rando, 88 N. Y. S. 356. Where the time for issuing the license sought expired. Galvin v. Davidson [Fla.] 37 So. 575; State v. Martin [Fla.] 36 So. 362. Case involving right to an office dismissed where term of office had expired. Jeter v. Gouhenour [Tex. Civ. App.] 84 S. W. 1091; Hamilton v. Ammons [W. Va.] 49 S. E. 128; Riggins v. Richards [Tex.] 80 S. W. 524. Dismissal was without prejudice to right to sue for salary. Id. Sale of stock after appeal from refusal of mandamus to inspect corporate books. State v. New Orleans Maritime & Merchants' Exch. [La.] 36 So. 760. Estoppel to deny interest in those brought in as parties by movant. Succession of Carbajal [La.] 36 So. 41.

The expiration of the term of office involved does not work a dismissal of an appeal from a judgment of ouster in quo warranto, respondent being liable for a fine and costs. Albright v. Territory [N. M.] 79 P. 719. Appeal in habeas corpus proceedings will not be dismissed for lack of interest in relator, where it appears that person detained was never insane and that commitment was void. People v. Bond, 93 N. Y. S. 277.

1. Where there is no contest as to the law or facts and both parties desire affirmance, the case will be dismissed. Davies v. Brooks [Ill.] 72 N. E. 724. Reversal of final decree showing that special appeal was

ness of the question involved,[4] for abandonment of the prosecution,[5] or, unless the defect is waived[6] or excusable,[7] for substantial[8] defect in time or manner of pro-

without right, latter will be dismissed. Wagonhurst v. Wineland, 24 App. D. C. 6. Appeal from decree enjoining sale will be dismissed, the sale having been made by consent. Baker v. Tappan [W. Va.] 49 S. E. 447. Dismissed where want of equity appeared on face of bill. Florida Pkg. & Ice Co. v. Carney [Fla.] 38 So. 602. Appeal by a public officer in a purely personal action by or against him abates with his resignation. In re Lermond's Estate [Cal.] 76 P. 488. Appeal from a judgment entered pursuant to the directions of the appellate court on a prior appeal will be dismissed on motion. Idaho Comstock Co. v. Lundstrum [Idaho] 76 P. 762; Scheffel v. Scheffel [Tex. Civ. App.] 84 S. W. 862. Writ of error dismissed, it not appearing that judgment excepted to hurt appellant. First Nat. Bank v. American Sugar Ref. Co. [Ga.] 48 S. E. 326. Writ of error dismissed where a reversal would be of no benefit to appellant. Garlington v. Davison [Ga.] 50 S. E. 667. Dismissed where territory was taken out of bailiwick of officers whose control of it was sought to be controlled by injunction. Montgomery County v. Montgomery Traction Co. [Ala.] 37 So. 208. Dismissed when appeal involved a question of costs only. Lamona v. Odessa State Bank [Wash.] 76 P. 534. Where the basis of the writ of error is an illegal agreement, the writ will be dismissed. Smith v. Bank [Kan.] 76 P. 858. Appeal was dismissed because of compromise, though owing to defective records of one of the parties, a corporation, authorized corporate action was not provable. In re Pettis [La.] 38 So. 590.

Will not be dismissed because all the relief demanded had been given by the trial court, the merits of the controversy being to some extent involved. Multnomah County v. White [Or.] 81 P. 388. The filing of a second suit for identically the same cause of action is no ground for the dismissal of a writ of error previously sued out to a ruling in the first action. Randolph v. Brunswick & B. R. Co. [Ga.] 48 S. E. 396.

2. A motion to reverse is essential to appellate review of a decree taken for confessed. Morrison & Co. v. Leach [W. Va.] 47 S. E. 237; Cipher v. Bowen [W. Va.] 49 S. E. 128.

3. A suggestion that the appeal is taken only for delay requires consideration of errors not assigned (Ft. Worth & R. G. R. Co. v. Hadley & Alvoid [Tex. Civ. App.] 86 S. W. 932), and in such a case affirmance will be granted only where the absence of error appears from a short and cursory examination of the record (St. Louis, etc., R. Co. v. Carroll [Ark.] 84 S. W. 475). Where the only errors complained of are an instruction in the exact language of one approved by a former decision and the insufficiency of evidence when it is manifest that the evidence, though conflicting, is sufficient, the appeal will be deemed to have been taken for delay. Id. There being no statement of facts and no fundamental error apparent of record, the appeal is manifestly one for delay and an affirmance with 10% damages will be ordered. Van Wormer v. Vaughan [Tex. Civ. App.] 84 S. W. 278.

4. Moot cases. Dunn v. State [Ind.] 71 N. E. 890. No judgment could afford any relief. Bradley v. Voorsanger [Cal.] 76 P. 1031. Dismissed where the constitutional question involved was manifestly only pretended. Griveau v. South Chicago City R. Co. [Ill.] 73 N. E. 309.

5. Wilcox v. Merrill, 26 Pa. Super. Ct. 59; Amorisia v. Rando, 88 N. Y. S. 356. The appeal should be dismissed where the conditions, upon which time to serve a case is extended, are not complied with (Levy v. Fidelity & Deposit Co., 87 N. Y. S. 487), but the failure of appellant to print his abstract and brief while a motion to dismiss is pending does not warrant dismissal (Collins v. Gladiator Consol. Gold Min. & Mill. Co. [S. D.] 103 N. W. 385), nor is an appeal, already taken, abandoned by appellant's causing citation to be recalled and withheld from service until time for taking appeal has elapsed (State v. United States End. & T. Co. [Ala.] 37 So. 442).

Undue delay is ground for dismissal: Gaskill v. Miller [N. J. Law] 58 A. 81; Chicago, etc., R. Co. v. Sporer [Neb.] 100 N. W. 813; Hopkins v. Crossley [Mich.] 101 N. W. 822. Failure for 85 days after decision of supreme court that order is appealable. Hopper v. Livingston Circuit Judge [Mich.] 102 N. W. 629. Failure of appellant to pay the register's fee for return within 30 days. Compiled Laws Mich. § 552. Trombley v. Klersy [Mich.] 102 N. W. 736. Delay in settling case. Sherman v. Sherman [Mich.] 102 N. W. 630. Where appellant filed a petition for a writ of error 6 months after the recovery of judgment but did not have citation issued until a year later, and the transcript was not filed in the appellate court until 3 months later, held, such laches as to require a dismissal of the writ. Swilley v. Blount [Tex. Civ. App.] 82 S. W. 790.

The appeal being dismissed, **damages** are allowable as for a vexatious appeal. Wilcox v. Merrill, 26 Pa. Super. Ct. 59.

6. See post, § 11H.

7. Delay in serving papers is excusable when caused by an accident in printing office (Brief: Hurley v. Kennally [Mo.] 85 S. W. 357), or by failure of the clerk (Langhorne, Johnson & Co. v. Wiley [Ky.] 87 S. W. 266), or stenographer (Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491), to get the transcript out in time, or of the trial court to settle the statement promptly (Castro v. Breidenbach [Cal.] 76 P. 1114), nor will the appeal be dismissed where the papers were mailed in time and delayed in transmission (Record: New York Store Mercantile Co. v. Thurmond [Mo.] 85 S. W. 333), though the contrary has been held where no inquiry was made for 10 days, though there was telephone communication (Statement of facts: Western Union Tel. Co. v. Kuykendall [Tex. Civ. App.] 86 S. W. 61). It is no excuse that party in default is an administratrix. Chipman v. Wells [Ind. App.] 72 N. E. 172. Prematurity

cedure in bringing up the case,[9] or in filing[10] a proper record[11] assigning error.[12]

In the return day of appeal being due to the fault of judge is not ground for dismissal. Orleans & J. R. Co. v. International Const. Co. [La.] 37 So. 10. The fault is that of the judge though counsel wrote the order. Id.

8. The appeal will not be dismissed for delay which causes no harm. Hillard v. Taylor [La.] 38 So. 594. Delay in filing brief is not ground for dismissal where in any event the appeal cannot be submitted for some time thereafter. (Deaton v. Feazle [Tex. Civ. App.] 85 S. W. 1167), or where the only result of a dismissal would be to put appellant to the cost of a new appeal (Hillard v. Taylor [La.] 38 So. 594). Writ of error will not be dismissed because one of several assignments of error cannot be considered because not taken in time. McCain v. Bonner [Ga.] 51 S. E. 36. In the absence of affirmative evidence that judge signed certificate to bill of exceptions after the statutory time, failure to date such certificate is not ground for dismissal. Proter v. Holmes [Ga.] 50 S. E. 923. An appeal will not be dismissed because not docketed within the prescribed time if it is docketed at the first term after the trial below, and before motion to dismiss. Curtis v. Southern R. Co. [N. C.] 49 S. E. 213. A technical and nonprejudicial variance in the title of the appeal papers is immaterial. Boyles v. State [Wash.] 77 P. 198. That judgment sustaining a demurrer is not made a part of the record is not ground for dismissal, the bill of exceptions reciting that the demurrer was heard and sustained. Flanders v. Daley [Ga.] 48 S. E. 327. The withdrawal of one appellant is not ground for dismissal, it not working prejudice to the other appellants. Appellants were sureties on a bail bond. Boyles v. State [Wash.] 77 P. 198. Appeal by township not quashed for naming of township as appellant instead of supervisors. Marcy v. Springville Tp., 24 Pa. Super. Ct. 521.

9. Defects constituting a ground for dismissal. In general: Failure to take appeal within the time allowed by statute. Cooper v. Ryan [Ark.] 83 S. W. 328. Single appeal from several unconsolidated suits. McCosh v. Myers, 25 Pa. Super. Ct. 61. An appeal where error only lies. Bessette v. W. B. Conkey Co. [C. C. A.] 133 F. 165. A writ of error prematurely returnable. Barnett v. Hickson [Fla.] 37 So. 210. Noncompliance with Rev. Codes 1899, § 5630, is ground for dismissal only in appeals taken under that section. Milburn-Stoddard Co. v. Stickney [N. D.] 103. N. W. 752. A writ of error which fails to affirmatively show that exception was taken in due time. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164. Failure to present assignment of errors at the time of the settlement of the bill of exceptions. Special rule 1 for circuit courts. Selph v. Cobb [Fla.] 38 So. 259. Failure to serve assignments of error with bill of exceptions. Hanselman v. Adrlon [Mich.] 102 N. W. 988. A writ of error improperly giving the date of the judgment below may be dismissed without prejudice to a second writ correcting the error. Northern Pac. R. Co. v. Ely, 25 S. Ct. 302.

Bonds. Failure to give and defects therein: Failure to give bond. Foresman v. Board of Com'rs [Idaho] 80 P. 1131. Appeal from order rejecting claim against decedent's estate. Dallam v. Stockwell's Estate [Ind. App.] 71 N. E. 911. Failure to include all appellants. Lingle v. Chicago. 210 Ill. 600, 71 N. E. 590. Bond approved for appeal to wrong court. Sanitary Laundry Co. v. People, 212 Ill. 300, 72 N. E. 434. Failure to give additional security requested by appellate court. Brown v. Wagar, 110 Ill. App. 354. Failure to give corrected bond as requested. Kloeckner v. Schafer, 110 Ill. App. 391. So held where second bond was also defective. Wilkes v. W. O. Brown & Co. [Tex. Civ. App.] 80 S. W. 844. Where **pauper's oath** filed in lieu of the statutory bond is shown to be untrue. Cook v. Burson & Gaines [Tex. Civ. App.] 80 S. W. 871. In such case, on appeal to county court, appellant cannot complain of action of county court in permitting him to prosecute appeal on condition that he file cost bond by the next term, and in dismissing appeal at such term on his failing to do so. Could dismiss at second as well as at first term. Id.

In Louisiana if an appeal be allowed suspensively and the amount of the bond be fixed, the appeal may stand devolutively if the bond be given, though it be for too little to support a suspensive appeal; but if no sum be fixed and the bond be for too little to suspensively appeal, there must be a dismissal. Pelletier v. State Nat. Bank [La.] 36 So. 592. The supreme court of Louisiana will not dismiss for insufficiency of a suspensive bond not fixed by law nor within the cases prescribed by its code. Code Prac. §§ 575, 576. "Perishable" property within the latter section does not refer to fluctuations in value of stock whereby the value may perish. Hannay v. New Orleans Cotton Exch. [La.] 36 So. 831. An appeal may be sustained as devolutive if the amount of the bond was fixed in the order, though prayed for suspensively. Knoll v. Knoll [La.] 38 So. 523.

Defect of parties: Ground for dismissal. Copland v. Waldron [C. C. A.] 133 F. 217; Wilkinson v. Vordermark [Ind.] 70 N. E. 538; Lingle v. Chicago, 210 Ill. 600, 71 N. E. 590; Risser v. Dungan [Ind. App.] 71 N. E. 974; Canaday v. Yager [Ind. App.] 71 N. E. 977; Moore v. Ferguson [Ind.] 72 N. E. 126; Daily v. Washington Nat. Bank [Ind.] 72 N. E. 260; Lindebaum v. Coale [Iowa] 99 N. W. 162; Newman v. Gates [Ind.] 72 N. E. 638; Sons of Peace, No. 1 v. Sons & Daughters of Peace [Ga.] 50 S. E. 111. Failure to bring in heirs of landowner on appeal in drainage case. Rich Grove Tp. v. Emmett [Ind.] 72 N. E. 543. Children cannot appeal from a nonsuit in an action for wrongful death where widow is living. Haughey v. Pittsburgh Rys. Co. [Pa.] 59 A. 1112. Failure to bring in all creditors on appeal from order distributing assets of insolvent corporation. Bloomingdale v. Watson [C. C. A.] 128 F. 268. Want of revivor against representatives of party deceased before appeal. Ropes v. McCabe

[Fla.] 36 So. 715. Failure to make personal representatives of a decedent parties to a writ of error to review a judgment against such decedent. Smith v. Stillwell [Ariz.] 80 P. 333.

Prematurity: No final judgment. Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74; Wright & Valley v. Creamery Package Co. [Vt.] 58 A. 803; Jabine v. Sparks [C. C. A.] 131 F. 440; Bussell v. Ft. Dodge [Iowa] 101 N. W. 1126; Vaughn v. Milner [Ga.] 49 S. E. 287; Jumeau v. Camp [Fla.] 37 So. 522; Haag v. Elizabeth, P. & C. J. R. Co. [N. J. Law] 60 A. 515; Wenom v. Fossick, 213 Ill. 70, 72 N. E. 732; Livingston County B. & L. Ass'n v. Keach, 213 Ill. 59, 72 N. E. 769; Goldie v. Stewart [Neb.] 99 N. W. 255; Leggett v. Detroit [Mich.] 100 N. W. 566; Penniman v. Miners' & Merchants' Bank [Md.] 59 A. 757; Smith v. Ely, 92 N. Y. S. 310; Hallagan v. Tanner [Ind. App.] 70 N. E. 556; Crossin v. Beebe [Mass.] 72 N. E. 65; Robertson v. Montgomery Base Ball Ass'n [Ala.] 37 So. 241. Appeal by executor from decree ordering him to make return of sale, etc. Walker's Estate, 25 Pa. Super. Ct. 256. Order for judgment on payment of jury fee and appeal taken before fee paid. Wolff v. Wilson, 25 Pa. Super. Ct. 266. Appeal taken before exceptions filed to decision of a case tried by court without a jury. Miller v. Cambria County, 25 Pa. Super. Ct. 591. Appeal by one defendant before judgment becomes final as to both. McVey v. Barker, 92 Mo. App. 499.

Want of a notice of appeal constitutes a ground for dismissal (Davis v. Tacoma Ry. & Power Co. [Wash.] 77 P. 209), the appeal not being taken in open court (Lanzilli v. Morisi, 23 App. D. C. 451). An appeal may be dismissed as to an appellee not served. Rice v. Bolton [Iowa] 100 N. W. 634. Failure to bring in appellee who has not entered appearance in vacation appeal. Court of App. Rule 35. Moore v. Banker's Surety Co. [Ind. App.] 73 N. E. 607. Failure to serve notice on principal defendant in mechanic's lien case. Beach v. Wakefield [Iowa] 100 N. W. 338.

Defects not constituting ground for dismissal. In general: Failure to file a motion for a new trial is not ground for dismissal. State v. Shrader [Neb.] 103 N. W. 276. An appeal will not be dismissed, if the entry thereof sufficiently indicates that the first day of the next succeeding term is the return day. As where the entry stated that the appeal was taken "to the January term A. D., 1905, of the supreme court." Swain v. London & L. Fire Ins. Co. [Fla.] 38 So. 3.

Bonds. Failure to give or defects therein: If failure to give bond happens through mistake or accident or is excusable in any view of the matter, it is proper for the trial or appellate court to allow the omission to be cured. Rev. St. 1898, § 3068. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. If the giving of an undertaking is not jurisdictional but depends on an order of the trial court, failure to give bond in the absence of such order is not ground for dismissal. Appeal from an order of the board of county commissioners under Rev. St. 1887, § 1777, as amended by Sess. Laws 1899, p. 248. Great Northern R. Co. v. Kootenai County [Idaho] 78 P. 1078; Kootenai Val. R. Co. v. Kootenai County [Idaho] 78 P. 1080. The appeal should not be dismissed for mere irregularities in the bond, curable by amendment. Name of one appearing on its face as acknowledging himself bound as security was not signed thereto. McDurmid v. Judge [Ga.] 49 S. E. 800. Objection that bond does not conform to rules and only binds appellant for the judgment of the court of appeals is not fatal. La Conner-Trading & Transportation Co. v. Widmer [C. C. A.] 136 F. 177.

Irregularities in citation: The mere **failure to have** citation returned within twenty days and an **alias issued,** if for some reason the original cannot be served on the appellee, is not an irregularity for which the appeal will be dismissed. Raub v. Hurt, 24 App. D. C. 211.

10. Failure to file transcript: Warren v. McGowan [Cal.] 77 P. 909; Ellis v. Moon [Wash.] 78 P. 677; Louisiana Ry. & Nav. Co. v. Miller [La.] 38 So. 19; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 86 S. W. 682. So held where transcript was not filed until two years after rendition of judgment. Berends v. Bellevue Water & Fuel Gas Light Co. [Ky.] 82 S. W. 970.

Bill of exceptions: Where there was no entry on bill showing that it was so filed and plaintiff in error failed in mandamus proceedings to require clerk to make such entry (Cooper v. Lazarus [Ga.] 47 S. E. 500), or a duly authenticated **copy of** the **judgment** appealed from (Bowling v. Chambers [Colo. App.] 77 P. 16) within the time required by law, is ground for dismissal, as is failure to file **abstracts and briefs** in conformity with the rules of the court (Smith v. Stilwell [Ariz.] 80 P. 333). Failure to file 5 copies of printed abstract. Baubletts v. Krug Park Amusement Co. [Mo. App.] 81 S. W. 1179. Where previous motion to dismiss for failure to file briefs had been denied and cause was reset and continued to enable appellant to comply with rules "in respect to the serving of the abstracts, briefs, etc." Ritchie v. Ferrell [Mo. App.] 83 S. W. 1097. If, on appeal to the superior court from the action of the county commissioners in altering a public road, appellant finds that the papers or transcript have not been sent up, and that the case has not been docketed, it is his duty at once to move for the necessary writ or process to perfect his appeal, and, on his failure to do so, the court may, upon the papers being filed and the case docketed, dismiss the appeal. Blair v. Coakley [N. C.] 48 S. E. 804.

Substantial compliance with such laws or rules is all that is required; hence failure to present bill of exceptions within prescribed time is immaterial, appellee having had a reasonable time to examine it before it was presented to the court for signature (Iowa Gold Min. Co. v. Diefenthaler [Colo.] 76 P. 981); nor is the failure to file a schedule within ninety days after the granting of the appeal ground for dismissal, appellant having filed a transcript of the entire record. Schedule required by Civ. Code Prac. § 737, subsec. 4a (Harrigan v. Advance Thresher Co. [Ky.] 80 S. W. 205). Delay in filing papers is not ground for dismissal where it is caused by appellee (Richey v.

Ferrell [Mo. App.] 81 S. W. 1183), or where it is not directly due to the fault of appellant's attorney and has not caused respondent expense or embarrassment (Dean v. Oregon R. & Nav. Co. [Wash.] 80 P. 842). Tardiness in bringing up the transcript will not be regarded as acquiesced in when appellant was not cited. Chambliss v. Wood [Miss.] 36 So. 246.

11. An appeal will be dismissed where the record fails to show the essential facts necessary to give the appellate court jurisdiction. Texas & P. R. Co. v. Jordan [Tex. Civ. App.] 83 S. W. 1105. Indefiniteness and uncertainty will not cause dismissal where it would result in great injury to appellant. Midler v. Lese, 91 N. Y. S. 148. The appeal will be dismissed on motion before the case comes up on the merits in its original order where the record is so imperfect that no other disposition could be made of it at that time. Lanzilli v. Morisi, 23 App. D. C. 451.

Defects in transcript or paper book: Failure to set forth names of parties, nature of proceedings, short abstract of bill, and testimony on which auditor's findings are based. O'Donnell v. Clements, 23 Pa. Super. Ct. 447. No statement of question involved as required by rule 17. Roush's Estate, 23 Pa. Super. Ct. 652; Denvers v. Sollenberger, 25 Pa. Super. Ct. 64. Nothing in record to connect appellant with case. Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74. Exceptions not printed totidem verbis. Moore v. Bischoff, 25 Pa. Super. Ct. 1. Failure to follow rule 27 regarding arrangement of matters in paper book. Id. Appeal from the landlord and tenant act of 1863, the record of the justice's proceedings not being printed in appellant's paper book. Cunningham v. Everett, 24 Pa. Super. Ct. 469. Signature of trial judge pasted on record instead of record itself being signed. Yost v. Clark, 25 Pa. Super. Ct. 144. Paper book in which statement of question involved is two pages in length. Rule 26. H——— v. T——— [Pa.] 57 A. 562. Failure to show judgment. Wabash R. Co. v. Baskerville, 111 Ill. App. 9; Rones v. Lansing [Fla.] 38 So. 177; J. T. Gabbart v. Bauer [Miss.] 38 So. 548. Verdict and judgment. Esler v. Camden & S. R. Co. [N. J. Law] 58 A. 113. Judgment and bill of exceptions. Sherman v. Butcher [N. J. Law] 58 A. 115. Recital of a judgment in the notice of appeal will not supply the lack of it from the record. Smith v. Ely, 92 N. Y. S. 310. No certificate of judgment roll and many improper and irrelevant proceedings incorporated. Goodhue v. Bohen [Wis.] 99 N. W. 216. Transcript not certified. Hiser v. Baker, 115 Ill. App. 12. Certification of transcript insufficient. Paris & G. N. R. Co. v. Armstrong [Tex. Civ. App.] 83 S. W. 28. Where it failed to state that it contained a copy of all the proceedings in the case. Id. Record on appeal from order not containing all motion papers. Hunter v. Campbell, 92 N. Y. S. 311. No index or marginal notes. Whinrey v. Starr [Ind. App.] 74 N. E. 32. In such a case it is optional with the court to dismiss the action, or to postpone its consideration and refer the record to the clerk for the purpose of having it put in the prescribed shape, appellant to pay the costs and an allowance of $5 to the clerk. N. C. Supreme Court rule 20. Sigman v. Southern R. Co. [N. C.] 47 S. E. 420.

Assignments of error: Appeal will be dismissed if assignment of errors does not contain the names of all the parties (Nordyke & M. Co. v. Fitzpatrick [Ind.] 71 N. E. 46; Presbyterian Church of Remington v. Dyke [Ind. App.] 71 N. E. 503), or if it does not give their names in full (Daliam v. Stockwill's Estate [Ind. App.] 71 N. E. 911). Appeal dismissed, assignment of error not being signed by appellent or his attorney. Kinkade v. Gibson [Ill.] 70 N. E. 683. Where parties against whom no relief is sought were made appellees instead of appellants. Smith v. Peters [Ind. App.] 72 N. E. 1103.

Bill of exceptions: Writ of error will not be dismissed because the bill of exceptions does not expressly state that no evidence was introduced before the trial judge on the questions brought up for review, where that fact clearly appears. Jarrett v. City Elec. R. Co. [Ga.] 47 S. E. 927. Where plaintiff seeks to review the ruling in two separate cases by a single bill of exceptions, though they were tried together, the writ of error will be dismissed for want of jurisdiction. Valdosta Guana Co. v. Hart [Ga.] 47 S. E. 212. It is not ground of dismissal that there are two writs of error, when the proceedings are such that two distinct cases are disposed of in the trial court. Martin v. Nichols [Ga.] 49 S. E. 613. A writ of error will not be dismissed because the bill of exceptions fails to specify all the material parts of the record, or for failing to file exceptions pendente lite at a proper time. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124. Deficiency in marginal notes to bill of exceptions held not fatal. Vinall v. Hendricks [Ind. App.] 71 N. E. 682.

Where it appears that **no bill of exceptions** was **allowed** and without such bill there is nothing to review, the cause will be dismissed. J. V. Cantlin & Co. v. Miller & Chapman [Wyo.] 78 P. 295. Where there was no bill of exceptions and stenographer's notes were not approved, held ground for dismissal. Kershner v. Kemmerling, 24 Pa. Super. Ct. 181.

Defects in abstract. Grounds for dismissal: Failure of abstract to contain an allegation of due service of notice of appeal. In re Long's Estate [Iowa] 102 N. W. 501. Failure to show appealable judgment. Martin v. Martin [Iowa] 99 N. W. 719. Lack of an index. Manuel v. St. Louis & S. F. R. Co. [Mo.] 85 S. W. 551. Where the rule as to abstracting the record has not been rigidly enforced for several years, the court will not affirm, notwithstanding error for failure to abstract. Neal v. Brandon & Baugh [Ark.] 85 S. W. 776.

Failure to brief evidence is not ground for dismissing the bill of exceptions, but leaves the case for any disposition which may be properly made without regard to the evidence. Armand v. Lehman [Ga.] 47 S. E. 949.

Failure of record to contain all the evidence: Delaware County Trust, etc., Co. v. Lee, 24 Pa. Super. Ct. 74. Appeal dismissed where the case made did not show that all the evidence introduced was contained

Failure to file briefs[13] within the time specified[14] may lead to dismissal,[15] affirmance,[16] or continuance,[17] at appellee's option. Substantial compliance with the statute or rule is all that is generally required,[18] nonprejudicial[19] or excusable[20] delay not being fatal. Appellee's failure to file a brief does not necessarily lead to reversal.[21] Defects not attributable to appellant are not ground for dismissal.[22] Correction of a nonjurisdictional defect before motion for dismissal cures the error,[23] and where the statute is recent and the practice not well settled, the court in the absence of objection will waive the error and look into the merits.[24] In

therein. McCormick v. Fromme [Kan.] 77 P. 89. The writ of error will be dismissed where the question made by the assignment of error necessarily involves a consideration of evidence not properly brought up. Eubank v. Eastman [Ga.] 48 S. E. 426. That the transcript does not contain a paper which was part of the record, evidence of the respondent is not ground for dismissal. A certified copy should have been furnished by the party introducing it. Coey v. Cleghorn [Idaho] 77 P. 331.

Failure to bring to the reviewing court **exhibits not introduced in evidence** nor kept with the files of the case as exhibits is not ground for dismissal. Gehres v. Wallace [Wash.] 80 P. 273.

12. Failure to assign errors is ground for dismissal (Lockman v. Lang [C. C. A.] 128 F. 279), as is the failure to set forth exceptions and rulings thereon (O'Donnell v. Clements, 23 Pa. Super. Ct. 447). A statement in the bill of exceptions that "plaintiff excepts to said verdict and judgment as being contrary to law is ineffectual. Newberry v. Tenant [Ga.] 49 S. E. 621. Assignments of error being ineffectual to present any question except their own sufficiency, the appeal will be dismissed. Spitzer v. Miller [Ind. App.] 73 N. E. 833. Embodying several matters. Moore v. Bischoff, 25 Pa. Super. Ct. 1. On an appeal from the judgment a motion to dismiss on the ground that the statement in the **motion for the new trial** did not contain a specification of errors is properly denied. Bond v. Hurd [Mont.] 78 P. 579.

13. Miller v. Collier [Ind. App.] 73 N. E. 925; Union Casualty & Surety Co. v. Hickey, 112 Ill. App. 363; Henion v. Pohl, 113 Ill. App. 100; Ft. Worth & D. C. R. Co. v. Hagler [Tex. Civ. App.] 84 S. W. 692; N. Nigro & Co. v. Hodges [Tex. Civ. App.] 85 S. W. 1169. Failure to present so much of record as is essential to review exceptions. Rule 22. Todd v. Cage [Ind. App.] 73 N. E. 925; Chicago Terminal Trf. Co. v. Walton [Ind.] 72 N. E. 646. It is not the duty of the court to search the record. A judgment is presumptively correct, and in the absence of a brief in support of the petition in error the appellate court will dismiss the appeal. Le Breton v. Swartzel [Okl.] 78 P. 323.

14. Stallard v. Hagar [Okl.] 78 P. 323; Le Breton v. Swartzel [Okl.] 78 P. 323; Coats v. Coats [Cal.] 80 P. 694; Wade v. Percival [Ind. T.] 82 S. W. 679. Where less than twenty days elapsed between the time of filing of appellant's brief and notice thereof to appellee, and the submission of the case, appellee not having filed a brief, it was held that appellant's delay had been prejudicial to appellee, and the appeal was dismissed. Dodd v. Presley [Tex. Civ. App.] 81 S. W. 811.

15. See cases in two preceding notes.

16. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Appellant failed to file brief as required by Rule 42 of court of appeals; judgment affirmed without examination of record further than to see that appellee's brief showed affirmation proper. Schulz v. Ruedrich [Tex. Civ. App.] 81 S. W. 324.

17. Failure to serve in time is ground for putting case over term. In re Haase, 91 N. Y. S. 373.

18. Johnson v. Sherwood [Ind. App.] 73 N. E. 180.

19. A few hours' delay will not necessitate affirmance. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345. Where a brief was filed one month after the appeal was perfected but not served until three days later, the delay in filing and serving was held too insignificant to be ground for affirmance. Wood v. Fisk [Or.] 77 P. 128.

20. Motion to dismiss appeal denied where failure to serve appellant's brief and abstract 20 days before cause was docketed was caused by attorney's inadvertent miscalculation of time. Baker v. Independence [Mo. App.] 81 S. W. 501. Appeal dismissed where appellant failed to file a brief in the trial court twenty days before the day set for submission of the cause, and did not offer any excuse for the delay. Booher v. Anderson [Tex. Civ. App.] 80 S. W. 385.

21. Hanrahan v. Knickerbocker [Ind. App.] 72 N. E. 1137.

22. Omission of that which it was an officer's duty to supply. Simonton v. Mitchel [La.] 37 So. 877. Defective citation issued by court. Succession of Henry [La.] 37 So. 756. On appeal from county commissioners to the district court, the appeal bond, requiring approval by the county clerk, was approved by him as "clerk of the district court." Hitchcock County v. Brown [Neb.] 102 N. W. 456.

23. Transcript filed after time prescribed but before motion to dismiss is made. The Kawailani [C. C. A.] 128 F. 879. Defective bonds cured by the filing of proper undertakings before motions to dismiss were heard. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where counsel for respondents having knowledge of defects in an appeal failed to object in season and counsel for appellants promptly cured the defects when noted, the court permitted the appeals to stand, denying motions to dismiss without terms except that appellants were required to submit the appeals on the merits in their order. Id.

certain states the appeal will not be dismissed if within a specified time after the hearing of the motion the appellant moves for its correction;[25] but in all such cases the merits are examined, and unless appellant has good grounds of appeal the dismissal is absolute.[26] All questions essential to a decision must be certified.[27] A motion to dismiss a writ of error will not lie on the ground that no motion for a new trial was made,[28] and on appeal on the judgment roll the question whether it presents reversible error is to be considered on the merits and not on a motion to dismiss.[29] An appeal from a judgment alone will not be dismissed because a former appeal in the same action was dismissed, where it does not appear from what the former appeal was taken.[30] The circuit court of appeals will not dismiss an appeal on motion of the appellant and remand the case with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom which was not known to appellant until after the appeal was taken.[31] The dismissal of an appeal removes the case from the appellate court and places the parties in the same condition as they were before the appeal was taken, no directions as to further proceedings below being proper.[32] Where it appears aliunde the record that the judgment appealed from is void for want of jurisdiction, the better practice is to dismiss the appeal and remit the parties to a motion in the court below to rid themselves if need be of the void judgment in that court.[33] Where an appeal from an order is dismissed, it is conclusive on all questions raised thereunder.[34] Pro forma affirmance is sometimes ordered instead on the same grounds.[35] In order to confer jurisdiction and authorize affirmance on

24. Esler v. Camden & S. R. Co. [N. J.] 58 A. 113; Boughton v. Boughton [Conn.] 58 A. 226.

25. Thirty days allowed. Goodhue v. Bohen [Wis.] 99 N. W. 216.

26. Milwaukee Trust Co. v. Sherwin [Wis.] 99 N. W. 229.

27. Where a question certified cannot be correctly answered either in the affirmative or negative and the court cannot determine without deciding questions not certified whether the judgment should be affirmed or reversed, the appeal will be dismissed. Malone v. Sts. Peter & Paul's Church, Brooklyn, 172 N. Y. 269, 64 N. E. 961.

28. The supreme court will examine the record in such a case to see whether the pleadings sustain the judgment. Eccles v. United States Fidelity & Guaranty Co. [Neb.] 100 N. W. 942.

29. Collins v. Gladiator Consol. Gold Min. & Mill. Co. [S. D.] 103 N. W. 385.

30. Collins v. Gladiator Consol. Gold Min. & Mill. Co. [S. D.] 103 N. W. 385.

31. Strand v. Griffith [C. C. A.] 135 F. 739.

32. In re Silverman's Estate [Wis.] 102 N. W. 891.

33. Disqualification of judge. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913.

34. Muckenfuss v. Fishburns [S. C.] 46 S. E. 537.

35. Failure to file abstract of transcript in accordance with the rules of court. Ross v. Frick Co. [Ark.] 83 S. W. 343. Failure to file certificate of judgment within required time. Smith v. Flick [Mo. App.] 83 S. W. 73. In appeals from justice courts, if appellant fails to docket his appeal in time, the appellee may docket the case, and, upon motion, have the case affirmed, and recover the costs of the appeal. Acts 1899, p. 423, c. 443. Blair v. Coakley [N. C.] 48 S. E. 804. An affirmance of a judgment refusing a new trial results, where there is no approved brief of the evidence, and none of the assignments of error can be decided without reference to the evidence. Milton v. Savannah [Ga.] 48 S. E. 684. Motion to affirm on ground that question involved was manifestly frivolous and that appeal was taken for purposes of delay only (Rule 15, § 2) granted. Raub v. Hurt, 24 App. D. C. 211. Where jurisdiction of the supreme court depends solely on a constitutional question involved and the judgment of the trial court can be affirmed without passing on it, it will be so declared, though the determination withdraws the case from its jurisdiction and constitutes an adjudication on the merits. Gregg v. Board of Com'rs of Lake County [Colo.] 76 P. 376. Failure of appellant to file briefs is ground for affirmance in Indiana. Rule 22, 27 N. E. vi. Johnson v. Sherwood [Ind. App.] 73 N. E. 180), but where some attempt has been made to comply with the rule, the court will review the case, though the rule has not in all respects been strictly complied with (Id.). An abandonment of argument by counsel for plaintiff in error necessitates affirmance. Edwards v. Mason [N. J. Err. & App.] 59 A. 458. Insufficient abstract of record. A. N. Kellogg Newspaper Co. v. Corn Belt Nat. B. & L. Ass'n. [Ill.] 71 N. E. 339; Good v. Bank of Edwardsville [Ill.] 70 N. E. 583. Brief not conforming to rules. McCormick Harvesting Mach. Co. v. McCormick [Iowa] 103 N. W. 204. Excusable delay of appellant in filing his brief will not necessitate affirmance. A few hours. Beuhner v. Creamery Package Mfg. Co. [Iowa]

certificate for nonprosecution of the appeal, the certificate of the clerk must contain or be accompanied by a copy of the judgment, as well as a copy of the appeal bond, if one has been given.[36] In such cases the judgment of affirmance is generally held to be equivalent to a dismissal[37] and vice versa.[38]

(§ 11) *H. Raising and waiver of defects.*[39]—An appeal does not abate ipso facto on failure to file transcript in time but continues till dismissal is ordered.[40] Defects are ordinarily raised by motion in the appellate court[41] to dismiss or affirm,[42] after it has acquired jurisdiction,[43] which motion should as in other cases be made specifically[44] on notice.[45] Affidavits aliunde the record are not usually allowable,[46] though the court may, in investigating its own jurisdiction, examine a transcript not a part of that originally set up.[47] Nonjurisdictional[48] defects,[49] but not jurisdictional ones,[50] are amendable[51] and are waived by delay in object-

100 N. W. 345. Filing abstract not conforming to rule. Olson v. Lund [Iowa] 101 N. W. 1128.

36. Supreme Council A. L. H. v. Anderson [Tex. Civ. App.] 83 S. W. 207.

37. Where on appeal from justice court appellee dockets the case, the judgment of affirmance is equivalent to a dismissal of the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. Blair v. Coakley [N. C.] 48 S. E. 804.

38. In Montana, by statute, the dismissal of an appeal effects an affirmance unless expressly made without prejudice. Code Civ. Proc. § 1741. McIntosh Hardware Co. v. Flathead County [Mont.] 80 P. 239.

39. See 3 C. L. 238.

40. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 86 S. W. 682.

41. After return filed, an appeal can only be dismissed in accordance with the rules and practice of the supreme court. Jordan v. Wilson [S. C.] 48 S. E. 37. Motion to dismiss must be filed within three days after filing transcript. Saxon v. Southwestern Brick & Tile Mfg. Co. [La.] 37 So. 540.

42. A single justice in Massachusetts has power to determine a motion to dismiss a creditor's appeal from a probate decree allowing a guardian's final account. Leyland v. Leyland [Mass.] 71 N. E. 794.

43. A motion to affirm on the ground that the appeal is for delay cannot be heard without docketing the case. Hamilton v. Kentucky Title Co. [Ky.] 79 S. W. 1182.

44. Motion based on incompleteness of record must show what was omitted and that it was pertinent. Succession of Theriot [La.] 38 So. 471. It must specify wherein the appeal bond "is not such as the law requires." Id.

45. Seibert v. Grief [Ky.] 86 S. W. 970. By opposing motion, appellant waives right to object to insufficiency of notice. Bruce v. Myers [Ind. App.] 73 N. E. 710.

46. Change of ownership in the subject-matter after appeal cannot be shown by affidavit in the appellate court. Gordon v. Sorg, 113 Ill. App. 522. A motion to dismiss a writ of error as to certain appellants, who appeared and filed briefs in the appellate court, on the ground of want of interest, and based on ex parte affidavits in conflict with the record, will be denied. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

47. Hannay v. New Orleans Cotton Exch. [La.] 36 So. 831.

48. Appellee may waive for failure to file the transcript in time. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 86 S. W. 682. An objection that an appeal is premature, by claim of appeal and filing of bond prior to the settlement of the case, may be waived by the appellee's neglect to take steps for dismissal. Sherman v. Sherman [Mich.] 102 N. W. 630. The joinder in error of an appellee is a waiver of the failure of appellant to file an appeal bond but not of the jurisdiction of the court. Canaday v. Yager [Ind. App.] 71 N. E. 977.

49. An attempt under Code Civ. Proc. § 954, to cure the defect of failure to file an appeal bond held not to estop appellee to insist on dismissal. Wadleigh v. Phelps [Cal.] 81 P. 418.

50. The appellate court's jurisdiction may be questioned at any time. St. Louis S. W. R. Co. of Texas v. Hall [Tex.] 85 S. W. 786.

Appellee cannot waive, or estop himself to urge, the insufficiency of an affidavit for appeal. Arkansas & O. R. Co. v. Powell [Mo. App.] 80 S. W. 336. Writ cannot even be amended if returned too early. Barnett v. Hickson [Fla.] 37 So. 210.

51. The appellate court having jurisdiction, it may allow defects in the appeal to be cured within the time allowed by statute. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where an appeal bond is filed but not served, the appellate court has jurisdiction to hear the appeal without the defect being cured, no seasonable objection having been made, and there being no other defect in the appeal. Id. The statute of jeofailes of Ohio is applicable to proceedings in error and a petition may be amended in matters of form as any other pleading. Failure to subscribe. Cincinnati, etc., R. Co. v. Bailey [Ohio] 70 N. E. 900. After a proper service of a notice of appeal, the appellate court may permit the correction of mistakes in taking the appeal. Oconto Land Co. v. Mosling [Wis.] 100 N. W. 824. Amendments in appellate procedure are allowed in Wisconsin but only in furtherance of justice and on such terms as will protect the opposite party. Milwaukee Trust Co. v. Sherman [Wis.] 99 N. W. 229.

ing,[52] or by proceeding in the case without objection.[53] Jurisdictional defects are fatal irrespective of the manner in which they are called to the court's attention,[54] and the court will sua sponte notice its want of jurisdiction.[55] Where an extensive examination of the record is involved, the decision of the motion is usually reserved until hearing of the merits.[56] Appellants are generally entitled to dismiss as of course at any time before hearing upon payment of the costs.[57]

§ 12. *Hearing.*[58]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[59]—Judgments at law[60] and judgments or orders brought up on error or like proceedings[61] are reviewed for matter of law only[62] as found in the record and bill of excep-

52. Motion to dismiss plea of abatement, not filed in time. Alling v. Weissman [Conn.] 59 A. 419. A motion to dismiss a petition in error for failure to file a motion for new trial in the lower court is a waiver of objections to the sufficiency of the summons in error. State v. Shrader [Neb.] 103 N. W. 276. A motion to dismiss because of insufficiency of the bond must be made within three days from the filing of the appeal in the supreme court. In re Lindner [La.] 37 So. 720.

53. An irregular writ may be sustained when no objection is made till too late to sue out new ones. Waters Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557. Where parties are permitted to change their position and become plaintiffs in error, defendant in error by joining in error waives the suing out of a new writ by them. Brown v. Keegan [Colo.] 76 P. 1056. An objection that no notice of the filing of the schedule for the partial transcript was served cannot be made for the first time in the brief, the case having been submitted without objection. Particularly where schedule filed distinctly sets out parts of record to be omitted from transcript, and it is apparent that such parts have no bearing on questions relied on for a reversal. Phillips v. Phillips' Adm'r [Ky.] 80 S. W. 826. Motion to dismiss will not lie when appellee has fixed the case for trial. Saxon v. Southwestern Brick & Tile Mfg. Co. [La.] 37 So. 540. Not because transcript was returned after an improper extension to which no objection was made at the time. Hillard v. Taylor [La.] 38 So. 594. Where respondent after settlement of bill of exceptions stipulates for its use by the clerk in preparing the transcript, he waives the objection that the bill was not settled in time. Berz v. Mecartney, 115 Ill. App. 66. Irregularity in notifying defendants of any of the proceedings held waived. Hirsh v. Fisher [Mich.] 101 N. W. 48. Filing of brief addressed solely to the merits waives objections to the notice of the writ of error. Igo v. Bradford [Mo. App.] 85 S. W. 618.

54. Martin v. Martin [Iowa] 99 N. W. 719.

55. Netter v. Reggio [La.] 37 So. 620. Record not showing jurisdiction, the court will dismiss of its own motion. Zinkeisen v. Lewis [Kan.] 80 P. 44. The court of its own motion may dismiss appeal from nonappealable order. Thornburg v. Gutridge [Or.] 80 P. 100.

56. Disposition of a motion to dismiss an appeal in advance of final hearing will be postponed until final hearing where as extensive an examination as on final hearing is required and incidentally substantial rights of the parties may be settled. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 76 P. 366. The transcript will not be examined on a motion to dismiss the appeal. Wolf v. Board of Sup'rs of Santa Clara County [Cal.] 76 P. 1108. The merits of a motion for relief from default in not moving for a new trial within the statutory period cannot be determined on a motion to dismiss the appeal from an order denying such motion. Steen v. Santa Clara Val. Mill & Lumber Co. [Cal.] 79 P. 171.

57. An appellant from a municipal court judgment cannot, by conceding that it cannot prevail, procure a dismissal or withdrawal of the appeal without costs against the objection of respondent, nor can the court in its discretion permit such dismissal. In such case the judgment must be affirmed with full statutory costs. Mallery v. Interurban St. Ry. Co., 92 N. Y. S. 60.

58, 59. See 3 C. L. 240.

60. Rulings on evidence are not ordinarily reached by appeal from eminent domain proceedings unless they caused substantial error. Detroit, etc., R. Co. v. Campbell [Mich.] 103 N. W. 856.

61. One complaining of the rulings and charges of the court by direct exception stakes his right to a reversal upon strictly legal grounds. Little v. Southern R. Co. [Ga.] 47 S. E. 953.

62. An action at law for the recovery of money only, tried since the taking effect of the act of 1903, ch. 201, p. 277, cannot be tried de novo on appeal. Barnum v. Gorham Land Co. [N. D.] 100 N. W. 1079. The only questions that can properly be considered on a reservation are such as pertain to the proper disposition of the cause on the issues formed by the pleadings, and such facts as may be ascertained by agreement, or determined by a finding or verdict. Bronson v. Thompson [Conn.] 58 A. 692. The appeal from the district court to the supreme court in New Jersey under the act of 1902 is limited in its scope to questions of law only. The supreme court will not reverse a judgment of the district court that is based upon its conclusion upon a mixed question of law and fact, if the conclusion is legally inferable from the facts proven. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609. On error to a judgment entered on findings of fact, the court is bound by the findings. Hoffman v. Silverthorn [Mich.] 100 N. W. 183. An assignment based on a

tions.[63] Equitable decrees and orders are usually reviewed de novo,[64] appeal not reaching errors of law.[65] On error from a court trial in the district court in Alaska, rulings on evidence will be examined though the waiver of a jury was not in writing filed but was verbal in open court.[66] In some special proceedings[67] and on appeal from inferior courts,[68] it is provided in many jurisdictions that a trial de novo be had. Subject to limitation of the issues as originally made, the rules of pleading and practice are as in ordinary actions when appeal results in a formal retrial by a court of general superior jurisdiction,[69] and the burden of proof

general exception to findings which cover both conclusions of law and of fact presents no question for review. Leaver v. Kilmer [N. J. Err. & App.] 59 A. 643. The sole object of the bill of exceptions covering proceedings before a justice of the peace is to provide for a review of questions of law. Squires v. Martin, Adm'r, 24 Ohio C. C. 232, 5 Ohio C. C. (N. S.) 313; Kenova Loan & Trust Co. v. Graham [C. C. A.] 135 F. 717. On petition for review in bankruptcy, only questions of law are considered. See, ante, § 2, as to the revisory functions of the several remedies.

63. See ante, § 9.

64. Appeal in chancery opens the whole case. Parken v. Safford [Fla.] 37 So. 567; Chaslavka v. Mechalek [Iowa] 99 N. W. 154; Hartung v. Oldfield [Iowa] 99 N. W. 699; Nandain v. Fullenwider [Neb.] 100 N. W. 296; Farrel v. Bouck [Neb.] 101 N. W. 1018; Jennings v. Wyzanski [Mass.] 74 N. E. 347. Decree will be reviewed on basis of facts admitted by pleadings and which should have been found on evidence. Id. Where a decree dismissing a bill is general, all defenses pleaded are open to defendant on appeal although only one may have been sustained by the trial court in its opinion. American Tube Works v. Bridgewater Iron Co. [C. C. A.] 132 F. 16. Under direct provision of B. & C. Comp. §§ 406, 555, an equity appeal is tried de novo and final decree rendered without reference to findings or conclusions of the trial court. Powers v. Powers [Or.] 80 P. 1058. A cause tried below as one at law cannot be tried on appeal as one in equity. Ayotte v. Nadeau [Mont.] 81 P. 145.

A law case which might have presented equitable features will be regarded as in equity if it was so tried below since the parties cannot disavow the theory adopted by them. See Saving Questions for Review, 4 C. L. 1368.

Divorce is triable de novo. Kane v. Kane [Wash.] 77 P. 842. **Partition** is triable de novo. James v. James [Wash.] 77 P. 1080.

65. Appeal will not reach erroneous rulings in admitting or rejecting evidence. Kennell v. Randall [Neb.] 103 N. W. 677.

66. The Alaska Civil Code (31 Stat. 363, c. 19) and not the practice in circuit courts applies. Shields v. Mongollon Expl. Co. [C. C. A.] 137 F. 539.

67. On appeal from the commissioners' court to the circuit by a taxpayer whose assessment was raised, the circuit may further raise it. Tennessee Coal, Iron & R. Co. v. State [Ala.] 37 So. 433. In Colorado the jurisdiction of the district court on an appeal from the board of county commissioners relative to an assessment is appellate and is governed by the terms of the statute giving the appeal. Board of Com'rs of Arapahoe County v. Denver Union Water Co. [Colo.] 76 P. 1060. In Pennsylvania an appeal from a report of county auditors reopens the whole case. Horning's Case, 26 Pa. Super. Ct. 282. On appeal from the decision of the district court in a contested election, the entire record should be brought up, and it will be considered de novo. Griffith v. Bonawitz [Neb.] 103 N. W. 327.

68. Under Code Civ. Proc. § 1761, a district court tries appeals from the justice court anew and in such case sits as a justice and either party may have reviewed any question raised before the justice and presented to the district court. State v. Justice Court of Tp. No. 1, Gallatin County [Mont.] 78 P. 498. Sess. Laws 1903, p. 34, c. 30, § 1, providing that proceedings before a police judge shall be reviewable in the superior court "by appeal" gives a right of trial de novo. City of Spokane v. Smith [Wash.] 79 P. 1125. An appeal from probate court to the common pleas operates to vacate the probate court's decree and requires a retrial on the merits. Fitts v. Probate Court of East Greenwich [R. I.] 58 A. 801. Appeals from probate courts are usually de novo, and questions may be raised not raised and passed upon in the probate court. Reed v. Whipple [Mich.] 103 N. W. 548. An appeal lies from an inquest taken without jurisdiction and brings up the entire proceedings for review. Horowitz v. Decker, 88 N. Y. S. 217. Where defendant in municipal court offers no evidence, but relies on its motions to strike out the evidence on a material issue and to dismiss, the court on appeal cannot receive evidence to supply omitted proof. Mandelbaum v. New York City R. Co., 90 N. Y. S. 377. See, also, Justices of the Peace, 4 C. L. 372.

69. See Pleading, 4 C. L. 980, and other practice topics. This is the sort of review that commonly follows appeals from inferior tribunals such as "county" courts, justices, etc. The superior court has, on appeal to it from an inferior court, only the power and jurisdiction in the case possessed by the inferior court. Cannot try title to land on appeal from ordinary. Mulherin v. Kennedy [Ga.] 48 S. E. 437. Pleas in abatement cannot be filed unless delay is excused. Adams & Johnson v. Branan [Ga.] 48 S. E. 128: Witt v. Willis [Ky.] 85 S. W. 223. Under Sess. Laws 1889, p. 24, providing for an appeal to the district court from a decision of the county commissioners in reviewing an assessment, the case as made by the pe-

usually abides where it was.[70] On such a retrial, an issue of fact not pertinent to the original proceeding but within the ordinary jurisdiction of the reviewing court and necessarily determinative of the rights of the parties may, it seems, be decided when tried below without objection.[71]

(§ 13) *B. General scope and objects of review.*[72]—Unnecessary points[73] or abstract questions will not be decided, nor any futile review be made.[74] Accordingly errors which may not arise or may be cured on a retrial,[75] questions eliminated by a settlement or change of facts or by other collateral matter,[76] or cured[77]

tition before the commissioners cannot be altered by complaint filed in the district court. Board of Com'rs of Arapahoe County v. Denver Union Water Co. [Colo.] 76 P. 1060.

70. On appeal from establishment of highway, petitioner must prove necessity and remonstrators their damages. Heath v. Sheetz [Ind.] 74 N. E. 505.

71. Where the clerk in a boundary proceeding under the North Carolina Act exceeded his jurisdiction by trying title but no objection was made, an appeal will enable the superior court to try the fact of title. Smith v. Johnson [N. C.] 49 S. E. 62.

72. See 3 C. L. 241.

73. Horst v. Lewis [Neb.] 103 N. W. 460; W. L. Watkins & Co. v. Guthrie & Co. [Miss.] 38 So. 370. Where the evidence requires the verdict, errors in instructions are immaterial. Creary v. Wefel [C. C. A.] 135 F. 304. Where the exception to the conclusions of law presents the same questions as those arising on demurrers to the complaint, a determination of the sufficiency of the complaint is unnecessary. Ross v. Van Natta [Ind.] 74 N. E. 10. Questions argued may be decided where effective to avoid further litigation though their decision is not necessary to a determination of the case. Sargent v. Little [N. H.] 58 A. 44. In Connecticut a bill of exceptions filed by an appellee calls for consideration only when a new trial is advised and not where a new trial will be of no avail. Gen. St. 1902, § 804. Andrews v. Platt [Conn.] 58 A. 458. Assignments of error relating to a count on which appellant had judgment need not be considered. McAllin v. McAllin [Conn.] 59 A. 413. Where an answer to a crossbill sets up the same facts as the original bill, and the general finding is for plaintiff, the court on defendant's appeal will not consider an error in overruling a demurrer to the answer to the cross bill. Bowen v. Gerhold [Ind. App.] 70 N. E. 546.

74. Smith v. Wenz [Mass.] 73 N. E. 651; Scott v. Sheehan [Cal.] 79 P. 353; Littleton v. Burgess [Wyo.] 79 P. 922. The appellate court will not decide which was the legal and which the illegal ballot box in an election district when it appears that a decision either way would not change the result. Schuman v. Sanderson [Ark.] 83 S. W. 940. Judgment satisfied pending appeal. Trumbull v. Jefferson County [Wash.] 79 P. 1105. The giving of a supersedeas bond does not authorize the review of a merely abstract question. Diefenderfer v. State [Wyo.] 80 P. 667. The charge will not be reviewed where all the errors claimed will be covered by a review of the evidence de novo. In a civil case where there is no well founded complaint of the exclusion of evidence, the reviewing court will apply the law to the facts regardless of the judge's charge on trial. Warner v. Talbot [La.] 36 So. 743. Where a judgment is clearly barred in law, the record will not be considered to determine whether it was supported by the evidence or not. Norman v. Central Kentucky Asylum [Ky.] 80 S. W. 781. Question becoming of no practical importance pending appeal. Gas wells played out. State v. Indianapolis Gas Co. [Ind.] 71 N. E. 139. In Pennsylvania where no action is pending and the parties desire the opinion of the court on a case stated, the case stated should be filed in connection with an amicable action so as to show upon the record an actual pending action. Altoona v. Morrison, 24 Pa. Super. Ct. 417; compare Miller v. Cambria County, 25 Pa. Super. Ct. 591. A decree affirming an order of a municipal board fixing a rate for a public service will be reviewed after the year for which the rate was fixed has expired, where the rate once fixed continues in force until changed by law and questions of law are presented which will serve as guides in subsequent proceedings. Boise City Irr. & Land Co. v. Clark [C. C. A.] 131 F. 415.

75. Errors which may be obviated by following the directions of the appellate court on a retrial will not be reviewed. Berg v. Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528. Questions presented by assignments of error, but relating to matters which can be of no practical importance on another hearing, will not be specifically dealt with in event that the judgment is reversed on other grounds which are controlling. Carrington v. Brooks [Ga.] 48 S. E. 970. The propriety of certain acts of a receiver will not be considered where the case must be remanded and such acts must be determined on a new trial. First Nat. Bank v. Cook [Wyo.] 78 P. 1083.

76. Appeal from order on motion to compel prosecution of action after relief sought in action is otherwise obtained. Luikert v. Snyder, 92 N. Y. S. 97. An assignment becomes immaterial when facts transpire after appeal taken which render the ruling right or harmless. Refusal to charge executor for a bond afterward found. Owens v. Owens' Estate, 84 Miss. 673, 37 So. 149. Consideration of the propriety of the dissolution of a temporary injunction restraining the performance of a contract will not be prevented by the fact that the contract has expired by its own terms prior to the taking of the appeal, since liability on the injunction bond depends thereon. Click v. Sample [Ark.] 83 S. W. 932.

77. Question whether original appeal

or merged in a later and final decision,[78] will be ignored. The same matter will not be twice considered merely because twice assigned.[79] That which is necessarily subject to pendency of the appeal cannot make a question or destroy one,[80] nor can mere inability to rectify an error be so regarded as to oust the power of review.[81] When a cross bill of exceptions presents a question which is controlling upon the case as a whole, that question will be first considered and disposed of.[82]

No question not properly saved below,[83] preserved and presented in the record,[84] properly assigned,[85] and briefed and argued,[86] will receive attention, and only such as harm the person appealing or objecting.[87] In some states review extends only to so much of the case as involves the question conferring jurisdiction,[88] and will not extend to the merits unless appellant's contention on the question on which the court's jurisdiction depends is sustained.[89]

Fundamental errors and jurisdictional defects on the face of the record are reviewed at any stage though never before claimed nor urged.[90] An appellate

from order, without bond, operated as supersedeas, where appeal bond was afterwards given within prescribed time in second appeal. Daney v. Clark, 24 App. D. C. 487. If special findings be accepted by a party as established facts, objections based on the admissibility of evidence to establish them will not be considered. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074.

78. Where the trial court on final hearing makes perpetual a preliminary injunction previously granted, the supreme court will not examine into the regularity of the order granting the preliminary injunction. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 P. 451.

79. Assignments to rulings on pleadings were covered by assignment to conclusions on special findings presenting same questions. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

80. Enforcement of a judgment pending appeal is no bar to appellant's right of review. New York Store Mercantile Co. v. Thurmond [Mo.] 85 S. W. 333. If, before appeal, appellee transfers the judgment to his attorney, the appeal will not reach the question whether the transfer is void as being litigious. If void title continued in plaintiff, the appellee and appellant had no interest to support such a question. Kuck v. Johnson [La.] 38 So. 559.

81. Where, on trial of an issue to determine whether a debtor arrested under a writ of capias ad satisfaciendum has made a fraudulent conveyance to hinder and delay the payment of his debts, the trial court directs a verdict for defendant, quashes the writ, and discharges him from custody, it cannot be contended on appeal that the question there raised is purely an academic one, on the theory that the debtor, having once been discharged, cannot be rearrested. Is an argument that erroneous decision below ousts appellate court of jurisdiction. Bokel, Gwynn, McKenney Co. v. Costello, 22 App. D. C. 81.

82. Hill v. Georgia State B. & L. Ass'n [Ga.] 47 S. E. 897. When a case is absolutely controlled by the decision of the assignments of error in the cross bill of exceptions, the writ of error in the main bill will be dismissed, the effect of such dismissal being to allow the judgment complained of in that bill to stand affirmed. Id.

83. See Saving Questions for Review, 4 C. L. 1368.

84. See ante, § 9.

85. See ante, § 11 E.

86. See ante, § 11 F.

87. See Harmless, etc., Error, 3 C. L. 1579.

88. Where the constitution grants appellate jurisdiction of suits involving the constitutionality of any fine or penalty imposed by a municipal corporation, on such appeals, no other question can be considered. City of Crowley v. Ellsworth [La.] 38 So. 199.

89. See 3 C. L. 241, n. 40; Jurisdiction, 4 C. L. 341, n. 78. In Virginia, where the jurisdiction of the supreme court of appeals depends solely on the fact that the constitutionality of a law is involved, the court has no jurisdiction to decide the case on the merits, unless the contention of appellant on the constitutional question is sustained. Const. § 88. Postal Tel. Cable Co. v. Umstadter [Va.] 50 S. E. 259. Where a direct appeal from the circuit court to the Federal supreme court is authorized, the entire case comes up and not merely the question on which jurisdiction is founded. Field v. Barber Asphalt Pav. Co., 24 S. Ct. 784.

90. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. Defect on face of record of judgment. Epping v. Columbus [Ga.] 43 S. E. 803. It is the duty of the appellate court to consider errors apparent on the face of the record, though it fails to show that a motion for a new trial or in arrest of judgment was made in the court below, and though there is no bill of exceptions. Hill-O'Meara Const. Co. v. Sessinghaus [Mo. App.] 80 S. W. 747.

Defects in jurisdiction: Florida Pkg. & Ice Co. v. Carney [Fla.] 38 So. 602. Legal remedy apparent on face of bill. Williams v. Peeples [Fla.] 37 So. 572.

One appearing, accepting service and waiving process cannot allege in error that he was not legally served. Broocks v. Masterson [Tex. Civ. App.] 82 S. W. 822. The sufficiency of an affidavit for appeal from a justice's court to the circuit court cannot be questioned for the first time on appeal to the supreme court. Gerhart Realty Co. v. Welter [Mo. App.] 83 S. W. 278. **Defect of**

court may inquire into the jurisdiction of the court below in order to determine its own jurisdiction,[91] but whether a lower appeal should have been allowed is not reviewable.[92] Questions peculiar to the scope of review in particular courts are treated in the footnotes.[93]

necessary parties: Wasserman v. Metzger [Va.] 47 S. E. 820.

Fundamental sufficiency of a pleading always an open question under Rev. St. 1899, § 602. Ball v. Neosho [Mo. App.] 83 S. W. 777. Under Mansf. Dig. Ark. § 5054 (Ind. T. Ann. St. 1899, § 3259), one filing a demurrer with his answer and failing to present it for consideration may object to the jurisdiction for the first time on appeal. Ansley v. McLoud [Ind. T.] 82 S. W. 908. Under B. & C. Comp. § 72, providing that objections to the complaint not taken by demurrer or answer are deemed waived, except jurisdictional objections, objection to the jurisdiction of the court may be first made on appeal. Kalyton v. Kalyton [Or.] 78 P. 332. Only fundamental defects in pleading may be first questioned. Indiana Natural Gas & Oil Co. v. Beales [Ind. App.] 74 N. E. 551. Where it does not appear that the petition was attacked in the lower court, a judgment in favor of plaintiff must stand unless the petition wholly fails to state a cause of action, even defectively. Pence v. Mercantile Town Mut. Ins. Co. [Mo. App.] 80 S. W. 746. The fact that an issue is defective in that it fails to directly present the causal connection between the negligence of defendant and the damages sustained is not a cause for reversal by the court on its own motion, where both parties acquiesced in the form of the issues, and no exception was taken. Hunter v. Western Union Tel. Co. [N. C.] 47 S. E. 745.

Total failure of evidence on a material issue: Entire absence of aught but hearsay to support verdict may be examined though as hearsay no objection was made. Eastlick v. Southern R. Co., 116 Ga. 48, 42 S. E. 499. The rule that ground for a nonsuit not specified in the motion therefor cannot be considered on appeal in support of the court's action in granting it does not apply where the defect in plaintiff's case is inherent and cannot be cured. Warner v. Warner [Cal.] 78 P. 24.

Verdict excessive in law, because departing from measure and data of damages as prescribed by law. McDonald v. Champion Iron & Steel Co. [Mich.] 103 N. W. 829.

91. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

92. The question of the right to appeal from a justice judgment in forcible entry and unlawful detainer to the district court is one for the district court to pass on in the first instance. Dechenbach v. Rima [Or.] 77 P. 391.

93. An appeal to the circuit court of appeals does not bring before that court the question of the jurisdiction of the circuit or district court, as that question is reviewable only by the supreme court. Fisheries Co. v. Lennen [C. C. A.] 130 F. 533. In reviewing proceedings before justices of the peace and other inferior tribunals acting within their jurisdiction, liberal rules will be adopted. Squires v. Martin, Adm'r, 24 Ohio C. C. 232, 5 Ohio C. C. (N. S.) 313. The supreme court of Massachusetts has power to determine on exceptions whether or not a condition of things in a highway constitutes, as a matter of law, a defect. Upham v. Boston [Mass.] 72 N. E. 946. Oral proceedings in a municipal court are not so closely scrutinized as proceedings of a court of record. Cossel v. Atschul, 91 N. Y. S. 1.

In New York where the appeal is taken from the judgment only under Code Civ. Proc. § 1346, sub. 2, the appellate division can only review questions of law arising on exceptions taken at the trial (Alden v. Supreme Tent, Knights of Maccabees of the World [N. Y.] 71 N. E. 104), but such an appeal brings up the judgment and all questions of law including the rulings of the court during the progress of the trial and exceptions taken thereto, though no motion for new trial is made or order entered thereon (Rollins v. Sidney B. Bowman Cycle Co., 89 N. Y. S. 289). By appealing from a judgment of reversal by the appellate division, the appellant takes the risk not only of the questions considered by that court but also of any and all exceptions appearing in the record. So that if there are any legal errors committed by the trial court the order appealed from must be sustained (Jenks v. Thompson [N. Y.] 71 N. E. 266), whether they were noticed by that court or not, and judgment absolute must be directed against the appellant unless they are absolutely harmless. An order of the appellate division reversing a judgment on the law and the facts and ordering a new trial cannot be reviewed by the court of appeals on the ground that the appellate division had no power to reverse on the facts because plaintiff was entitled as a matter of law to a judgment in his favor, where he failed to ask for the direction of a verdict, and there is any question of fact or credibility of witnesses for the jury. Reich v. Dyer [N. Y.] 72 N. E. 922. The court of appeals is not precluded by a statement in the order of the appellate division that the reversal was on the law and the facts where the record shows that there were no disputed facts. Penrhyn Slate Co. v. Granville El L. & P. Co. [N. Y.] 73 N. E. 566. The finding on a question of title confirmed by the appellate division cannot be reviewed in the court of appeals on the theory that the question is determined by plaintiff's title deeds where no objection was made to their admission. Kennedy v. Mineola, H. & F. Traction Co. [N. Y.] 71 N. E. 102.

In Illinois the determination of a question of fact (Luther v. Crawford, 213 Ill. 596, 73 N. E. 430; Chicago & E. I. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865; Blakeslee's Exp. & V. Co. v. Ford [Ill.] 74 N. E. 135; Hinchcliff v. Rudnick, 212 Ill. 569, 72 N. E. 691; Spring Val. Coal Co. v. Cheaventone, 214 Ill. 314, 73 N. E. 420; Springer v. Lipsis [Ill.] 70 N. E. 641; Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874; Meyer v. Purcell, 214 Ill.

(§ 13) *C. Restriction of review to rulings and issues below.*[94]—Review proper is of course strictly confined to the rulings made[95] and issues joined and decided[96] below.[97] The general rule is that the theory of the case acquiesced in below will be adhered to,[98] and that a correct ruling will be sustained without regard to the wrong or deficient reasons given below.[99]

62, 73 N. E. 392; Kehl v. Abram, 210 Ill. 218, 71 N. E. 347; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Ewen v. Wilbor [Ill.] 70 N. E. 575; Chicago City R. Co. v. Gemmill [Ill.] 71 N. E. 43; Henrietta Coal Co. v. Campbell [Ill.] 71 N. E. 863; or of a mixed question of law and fact (Hartford Fire Ins. Co. v. Peterson [Ill.] 70 N. E. 757), by the appellate court is not reviewable on a further appeal to the supreme court. Where the appellate court finds the facts differently from the trial court and incorporates its findings in its judgment the only question open for review on further appeals is whether the facts found support the judgment. Craver v. Acme Harvester Co. [Ill.] 70 N. E. 1047. It is the duty of the appellate court, on an assignment that the verdict is against the weight of the evidence, to weigh the evidence and determine that question. Illinois Cent. R. Co. v. Smith [Ill.] 70 N. E. 628. Where the supreme court reverses a case because the findings of fact are not sufficiently specific and remands it to the appellate court for specific findings, which the appellate court makes, such findings are conclusive. Martin v. Martin [Ill.] 72 N. E. 418.

94. See 3 C. L. 244.

95. New England Merchandise Co. v. Miner [Conn.] 58 A. 4; Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205; Bakshian v. Hassanoff [Mass.] 71 N. E. 555; Chicago City R. Co. v. Matthieson [Ill.] 72 N. E. 443; Inhabitants of Verona v. Bridges [Me.] 57 A. 797; Mackey v. Northern Milling Co. [Ill.] 71 N. E. 448; Hayward v. School-Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999; Bryant v. Nelson-Frey Co. [Minn.] 102 N. W. 859; McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249, citing Cobbey v. Buchanan, 48 Neb. 391; Hyde v. Hyde, 60 Neb. 502; Hayward v. School-Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999; Smith v. McDonald [Mich.] 102 N. W. 738; Alderton v. Williams [Mich.] 102 N. W. 753. Code Pub. Gen. Laws, Md. art. 5, § 9. Home Friendly Soc. v. Roberson [Md.] 59 A. 279; Colè v. Jerman [Conn.] 59 A. 425; Buckingham v. Estes [C. C. A.] 128 F. 584; Anderson v. Dees [Neb.] 94 N. W. 961; Batty v. Hastings [Neb.] 95 N. W. 866; Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866; Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson [Iowa] 100 N. W. 550; Spier v. Kalamazoo [Mich.] 101 N. W. 846; Canton Co. of Baltimore v. Baltimore & O. R. Co. [Md.] 57 A. 637; Bray v. Bray [Iowa] 103 N. W. 477; Davey v. Davey [Neb.] 103 N. W. 282. When a petition is demurred to on both general and special grounds, and dismissed upon the former only, the supreme court cannot, upon a bill of exceptions sued out by plaintiff in which he assigns error on the ruling adverse to him, undertake to pass upon the sufficiency of the special grounds of demurrer. Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746. Where a demurrer and a motion to dismiss for want of equity are both interposed and the bill is dismissed, the appeal does not reach the demurrer. Jones v. Bright [Ala.] 37 So. 79. Matters reserved for decision are not reviewable. Owens v. Owens' Estate [Miss.] 37 So. 149.

96. Where evidence is introduced on issues not raised in the pleadings, and objected to, the issues will not be considered on appeal. City of Alexandria v. Morgan's Louisiana, etc., R. & S. S. Co., 109 La. 50, 33 So. 65. The court will not look to facts not found below. Louisville Property Co. v. Nashville [Tenn.] 84 S. W. 810. No attempt having been made to support a ground of a motion for a new trial, that ground presented no question for consideration on appeal. Shaw v. Goldman [Mo.] 81 S. W. 1223. The supreme court will not determine as to compensation for improvements which was not at issue below. Riverside Land Co. v. Pietsch [Wash.] 77 P. 195. Sufficiency of notice of expiration of period within which to redeem from mortgage foreclosure not passed on below will not be considered on appeal. David v. Whitehead [Wyo.] 79 P. 19.

97. The consequence of this is that one must join issue or procure a ruling by properly objecting or challenging the court's attention. See full treatment in **Saving Questions for Review,** 4 C. L. 1368.

98. Standard Furniture Co. v. Anderson [Wash.] 80 P. 813; Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79. Case being tried below on theory that complaint stated cause of action for forcible entry, sufficiency of complaint determined on this theory on appeal. Spellmann v. Rhode [Mont.] 81 P. 395; Mollineaux v. Clapp, 90 N. Y. S. 880; Boden v. Scholtz, 91 N. Y. S. 437; Birkett v. Nichols, 90 N. Y. S. 257; Eckes v. Stetler, 90 N. Y. S. 473; Tyng v. Corporation Trust Co., 93 N. Y. S. 928; Fox v. Ralston [Iowa] 102 N. W. 424; Thompson v. Erie R. Co., 89 N. Y. S. 92; Braunberg v. Solomon, 92 N. Y. S. 506; People v. Chicago, etc., R. Co. [Ill.] 73 N. E. 315; Davenport v. Lines [Conn.] 59 A. 603; Daily v. Saginaw B. & L. Ass'n [Mich.] 95 N. W. 326, 10 Det. Leg. N. 226; Battles v. Roberts [Iowa] 95 N. W. 247; Mallory v. Fitzgerald's Estate [Neb.] 95 N. W. 601; Fifer v. Fifer [N. D.] 99 N. W. 763.

See more fully **Saving Questions for Review,** 4 C. L. 1368.

99. San Antonio, etc., R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401; Morelock v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 5. The appellate court will not reverse what appears to have been a correct ruling of the trial court, if correct for any reason apparent of record. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850. Too narrow a reason is not error. O'Keeffe v. John P. Squire Co. [Mass.] 74 N. E. 340. If testimony was properly rejected, the ruling of the court

(§ 13) *D. The extent of the review and the questions reached is measured by the character and effect of the order or judgment.*[1]—A case not otherwise reviewable but certified for review because of a constitutional question will be reviewed on that alone;[2] but where a direct appeal from the circuit court to the Federal supreme court is authorized, the entire case comes up and not only the question on which jurisdiction is founded.[3] A matter incident to an order is reviewable, though an appeal to another order which would have reached it was lost.[4]

Generally speaking, the main or final judgment takes up all intermediate orders and proceedings,[5] but not those subsequent to it[6] or separate parts not

will be sustained, though he may have given an insufficient or even a wrong reason therefor. Barksdale v. Security Inv. Co. [Ga.] 47 S. E. 943. Wrong theory below disregarded if result right. Stark v. Kirchgraber [Mo. Sup.] 85 S. W. 868. The reasons given by the court for its action in granting a new trial are immaterial. Powers v. Fairbanks [Cal.] 80 P. 1075. A general order denying a motion for a new trial after entry of judgment of dismissal for want of prosecution should be sustained on any view which will support it. Fant v. Jones [Tex. Civ. App.] 81 S. W. 338.

See more fully Harmless and Prejudicial Error, 3 C. L. 1579.

1. See 3 C. L. 247. Merits are not reviewable on appeal from dismissal for want of capacity to sue. Thompson v. First Nat. Bank [Miss.] 37 So. 645.

2. When the amount in controversy is such that the appellate court has no jurisdiction to review but there is attached to the case made a certificate of the trial judge that there is a constitutional question involved, no other question will be reviewed. Coghlan v. Williams [Kan.] 76 P. 394.

3. Field v. Barber Asphalt Pav. Co., 24 S. Ct. 784.

4. Acts 1903, p. 577, c. 248, §§ 1, 4, providing for an appeal from a judgment rendered by a chancellor at chambers, is exclusive and hence a writ of error will not lie to review such a decree, but questions so brought up may be considered as collateral to and arising out of matters pending before the court on appeal in the same cause. Lindsay v. Allen [Tenn.] 82 S. W. 171.

5. The case being properly before the supreme court on appeal, all decrees and proceedings therein are subject to consideration and review. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198. An appeal from a judgment brings up a question of validity of allowance of attorney's fees, a part of such judgment. Spencer v. Commercial Co. [Wash.] 78 P. 914. Under a statute providing that on appeal from a judgment intermediate orders involving the merits or affecting the judgment, except an appealable order, may be reviewed, an order striking a pleading is reviewable. Alpers v. Bliss [Cal.] 79 P. 171. The overruling of an objection to the unauthorized acting of an assistant justice is ground for exception to the appellate court. Opie v. Clancy [R. I.] 60 A. 635. A motion to strike a supplemental petition from the files is carried up on appeal, and may be determined in the appellate court in the same manner as in the court having original jurisdiction. Scofield v. Excelsior Oil Co., 6 Ohio C. C. (N. S.) 169, 27 Ohio C. C. 347. An order of a court of chancery sustaining exceptions to an answer for insufficiency is not a final decree. Furthermore, it is not so carried into a final decree, subsequently made in the cause, as to become a part of it and appealable with it. New Jersey B., L. & Inv. Co. v. Lord [N. J. Err. & App.] 58 A. 185. Where a demurrer to a bill is overruled and a hearing is had on an agreed statement of facts and the bill pro forma dismissed, the benefit of the demurrer is impliedly reserved to defendant until the hearing and the questions raised thereby are properly reviewable. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. An appeal carries up all questions on the pleadings. Scofield v. Excelsior Oil Co., 6 Ohio C. C. (N. S.) 169, 27 Ohio C. C. 347. On appeal from a judgment only the review is confined to the exceptions taken at the trial. Denial of new trial not reviewable. Mollineaux v. Clapp, 90 N. Y. S. 880. An order substituting a plaintiff is not brought up. Rogers v. Ingersoll, 93 N. Y. S. 140. An appeal from a final judgment brings up the order denying a motion for a new trial on the ground that the verdict was excessive. Herzog v. Palatine Ins. Co. [Wash.] 79 P. 287. In West Virginia appeal is forbidden for any error which may be corrected upon motion to correct errors in a decree; such proceeding being essentially a substitute for an appeal, an appeal after a refusal to correct brings up the whole decree as fully as an appeal in any other case. George v. Zinn [W. Va.] 49 S. E. 904. On appeal from a final decree, errors may be assigned upon interlocutory decrees, though not embraced in the entry of appeal. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

6. An order denying a motion for new trial made and entered subsequent to the entry of judgment does not go up on appeal from the judgment. Ziesloft v. George V. Blackburne Co., 91 N. Y. S. 8. Order denying motion to amend referee's report dismissing action and to recommit the case does not go up on appeal from final judgment. Spencer v. Huntington, 91 N. Y. S. 561. On appeal from a final judgment, the question whether its entry violated an order staying proceedings is not reviewable. Franklin v. Beegle, 92 N. Y. S. 449.

appealed.[7] Appeals from the grant or refusal of a new trial[8] or other order made in course of trial reach only that which entered into the order itself, and matters not presented thereon cannot be considered on such appeal,[9] but only on appeal from final judgment.[10]

In some states appeal from the order on a motion for new trial and not one from the judgment reaches the facts[11] or the rulings during trial,[12] but a judgment on the pleadings may be reviewed without a motion for a new trial,[13] and on appeal from the judgment only, the record may be examined to determine whether there was any evidence to support the findings.[14] The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself. Motion for new trial and appeal therefrom is not necessary.[15]

An appeal from an interlocutory order brings up only the order itself as it stood at the time of the making thereof[16] and nothing subsequent.

7. Smith v. Smith [Ky.] 85 S. W. 1094. An appeal from specified parts of a decree which are set out in a written notice stating that no other part will be appealed from by appellant, and which are independent and involve only the rights of the appellees named therein, does not bring up for adjudication the whole decree. W. & T. Allen & Co. v. Maxwell [W. Va.] 49 S. E. 242.

8. Bashore v. Parker [Cal.] 80 P. 707.

Order denying a new trial reaches only errors of law occurring at the trial. Green v. Duvergev [Cal.] 80 P. 324. Only those arising on the specifications of insufficiency of evidence and errors of law contained in the bill of exceptions. Williams v. Hawley [Cal.] 77 P. 762. Only those relating to alleged errors of law and whether the findings are supported. Holmes v. Warren [Cal.] 78 P. 954. Granting a nonsuit upon the opening statement of counsel, if improper, is an error of law which may be reviewed on appeal from an order denying new trial. Green v. Duvergev [Cal.] 80 P. 234. Where objection to the introduction of evidence was made at the outset of the trial on the ground that the complaint does not state a cause of action, the sufficiency of the complaint is reviewable on appeal from an order denying a new trial. Ayotte v. Nadeau [Mont.] 81 P. 145.

Not questions arising from the conclusions of law to be deduced from facts found cannot be, nor can questions arising on the sufficiency of the complaint to state facts constituting a cause of action. Williams v. Hawley [Cal.] 77 P. 762.

Not the sufficiency of a pleading. Green v. Duvergey [Cal.] 80 P. 234. Ruling a demurrer. Holmes v. Warren [Cal.] 78 P. 954. Complaint. Frey v. Vignier [Cal.] 78 P. 733; Green v. Duvergey [Cal.] 80 P. 324. Technical objections to the sufficiency of a pleading which might have been raised by special demurrer. Bashore v. Parker [Cal.] 80 P. 707. Motion to strike out a pleading. Green v. Duvergey [Cal.] 80 P. 324. Cross complaint that the findings were not within the issues and that the judgment is not supported by the findings. Bell v. Southern Pac. R. Co. [Cal.] 77 P. 1124.

Not the sufficiency of findings to sustain the judgment. Holmes v. Warren [Cal.] 78 P. 954.

Not the question of proper parties. Lamb v. Hall [Cal.] 81 P. 286.

9. A general demurrer to the evidence cannot be used to inject into a case in the appellate court questions not specifically called to the attention of the trial court. Chinn v. Naylor [Mo.] 81 S. W. 1109. See, also, **Saving Questions for Review,** 4 C. L. 1368. An order sustaining a demurrer is no part of the procedure during the trial and cannot be reviewed on appeal from the denial of a new trial. Grimes v. Erickson [Minn.] 103 N. W. 334.

10. Order made after an unsuccessful appeal, vacating a judgment on the ground of fraud pursuant to 2 Ball. Ann. Codes & St. § 5153 et seq., authorizing vacation for fraud after term time. Post v. Spokane [Wash.] 76 P. 510. A decree establishing due notice is reviewable on an appeal from a decree settling the executor's account and making final distribution but not otherwise. The former decree was embraced in the latter. In re Wilson's Estate [Cal.] 81 P. 313.

11. Where appeal is from the judgment and not from the order overruling motion for a new trial, the sufficiency of evidence will not be determined but only whether there is any evidence to support the judgment. Dawes v. Great Falls [Mont.] 77 P. 309. An appeal from the judgment alone does not bring up the sufficiency of the evidence (Zeisloft v. George V. Blackburne Co., 91 N. Y. S. 8), nor the sufficiency of an affidavit for an order of arrest where a motion to vacate the order was not appealed from (Anker v. Smith, 87 N. Y. S. 479).

12. Rulings made in the course of the trial cannot be reviewed except on appeal from an order overruling a motion for a new trial. Bradford v. Brennan [Okl.] 78 P. 387.

13. Dunn v. Claunch [Okl.] 78 P. 388.

14. Sheldon v. Powell [Mont.] 78 P. 491. Want of evidence to support the judgment may be relied upon and considered upon an appeal from the judgment because a question of law is raised. Beaudin v. Oregon Short Line R. Co. [Mont.] 78 P. 303; Carman v. Montana Cent. R. Co. [Mont.] 79 P. 690.

15. In re Geary's Estate [Cal.] 79 P. 855.

16. On appeal by defendant from an order overruling a demurrer to a bill in equity, granting a temporary injunction and ap-

On appeal from nonsuit or directed verdict, every fact which the evidence tends to prove must be considered as proved.[17] In reviewing a ruling on a demurrer, facts not alleged cannot be considered, though admitted.[18] On appeal from the grant of a preliminary injunction, the bill is treated as on demurrer.[19]

Disallowance of claim in bankruptcy brings up with it the rank or security of the debt.[20] Proceedings before referee do not ordinarily come up on petition to revise in matter of law.[21] On appeal in equity, the trial being de novo,[22] errors in admitting or excluding evidence are not reviewed,[23] and a decision correct on the merits or supported by sufficient legal evidence will be affirmed regardless of such errors.[24] Thus incompetent evidence heard by the chancellor will be presumed to have been disregarded unless it affirmatively appears to have affected the finding.[25] But where it appears that the improper evidence was given weight, the decree must be reversed.[26] In equity appeals the findings must stand or fall upon the pleadings contained in the record,[27] and errors at the trial in re-

pointing a receiver, after the issuance of a rule to show cause, the demurrer and order cannot be considered as before the court except in so far as the demurrer is a return to the rule and an admission of the allegations of the bill for the purpose of the rule. Niles v. United States Trust Co., 22 App. D. C. 225. The appeal will be considered only in so far as it has reference to the allowance of an injunction and the appointment of a receiver. Id. On appeal by beneficiaries of a trust created by will from an order refusing the probate of the will, the validity of the trust clause as to them will not be determined. In re Fay's Estate [Cal.] 78 P. 340. Appeal from interlocutory order does not open up whole record and does not reach other orders now barred from appeal. Dekle v. Barkley [Fla.] 37 So. 581. The setting aside of a nonsuit to permit plaintiff to amend his petition is discretionary and the appellate court will not review the evidence to find an alleged abuse of such discretion in that the evidence would not have sustained a verdict for plaintiff under the petition as amended. Cohn v. Metropolitan St. R. Co. [Mo.] 81 S. W. 846. On appeal from an order granting a preliminary injunction, the only inquiry is whether the discretion of the court was improvidently exercised, the merits not being in issue. Lehman v. Graham [C. C. A.] 135 F. 39; Railroad Commission of Texas v. J. Rosenbaum Grain Co. [C. C. A.] 130 F. 110. Where an order appointing a receiver was affirmed by the appellate court as modified, such order could not be reviewed by the supreme court on appeal from a subsequent interlocutory order. Town of Vandalia v. St. Louis, etc., R. Co. [Ill.] 70 N. E. 662. On appeal from orders of a special term refusing to vacate certain other special term orders, the only question reviewable is whether the orders refusing to vacate were properly made. In re White, 91 N. Y. S. 513. Where unsatisfactory conditions are imposed in permitting the withdrawal of a juror, an appeal from such order does not bring up a ruling in pursuance of which the withdrawal was asked; holding the complaint insufficient. Rawson v. Silo, 93 N. Y. S. 416. An appeal from an order for a sale of a ward's land will not bring up an order confirming a guardian's annual settlement. In re Scheuer's Estate [Mont.] 79 P. 244. Where several interlocutory orders or decrees are made in a case and only certain ones are appealed from, assignments of error based upon those not appealed from cannot be considered. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

17. Allen v. Bell [Mont.] 79 P. 582; Dryden v. H. E. Pogue Distillery Co. [Ky.] 82 S. W. 262. The question is not whether the evidence is sufficient to go to the jury, but whether it is sufficient to entitle the plaintiff to judgment. O'Connor v. Simpson [Wash.] 79 P. 1102. But see Burlington, etc., R. Co. v. Campbell [Colo. App.] 78 P. 1072. A judgment in favor of demurree on conflicting evidence will not be disturbed unless upon a plain legal ground, sufficient to preclude any recovery on the part of the demurree. Demurrer to evidence in action on contract. Barrett v. Raleigh Coal & Coke Co. [W. Va.] 47 S. E. 154. A judgment overruling a demurrer to evidence will be sustained, unless it is contrary to the plain preponderance of the evidence, or is without evidence to support it as to some material question at issue. Mannon v. Camden Interstate R. Co. [W. Va.] 49 S. E. 450. Where a reference to a master was only to determine the amount of rents due a party, an appeal from a decree confirming the master's report will not authorize a review of the party's right to recover rents. Buckingham v. Estes [C. C. A.] 128 F. 584.

18. Maskey v. Lackmann [Cal.] 81 P. 115.

19. Herzberger v. Barrow, 115 Ill. App. 79.

20. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858.

21. In re Pettingill & Co. [C. C. A.] 137 F. 840. See, also, Bankruptcy, 3 C. L. 434.

22. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56.

23. Farrell v. Bouck [Neb.] 101 N. W. 1018.

24. Nickell v. Tracy, 91 N. Y. S. 287; Town of Adel v. Woodall [Ga.] 50 S. E. 481. On appeal the court in Nebraska only considers whether the pleadings and evidence support the judgment. O'Neal v. Bellevue Imp. Co. [Neb.] 101 N. W. 1028.

25. Springer v. Borden [Ill.] 71 N. E. 345.

26. Johnson v. Johnson [Minn.] 99 N. W. 803.

27, 28. Farmers' & M. Nat. Bank v. Mosher [Neb.] 100 N. W. 133.

ceiving or rejecting evidence or upon questions arising on the pleadings[28] and errors merely affecting the verdict are not subject to review, the verdict being merely advisory.[29] Error in decreeing on a verdict is no ground for new trial.[30] In Pennsylvania the appeal in wife desertion cases brought on the statute has the effect merely of a common-law certiorari and brings up only the regularity of the proceedings below,[31] and on appeal in road proceedings the merits are not examinable, and reversal will be had only for defects apparent on the record, jurisdictional errors and errors of law.[32]

(§ 13) *E. Restriction to contents of record.*[33]—Sufficiency of record to permit review of particular questions is elsewhere treated.[34] Except as to matters judicially noticed,[35] appellate review is ordinarily confined to the record, and matters aliunde will not be considered,[36] though some matters arising after the ap-

29. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. Error in instructions. Id. Conduct of counsel in argument and the conduct of the jury. Id.

30. R. J. Booth & Co. v. L. Mohr & Sons [Ga.] 50 S. E. 173.

31. Commonwealth v. Mills, 26 Pa. Super. Ct. 549.

32. Cornplanter Township Road No. 1, 26 Pa. Super. Ct. 20.

33. See 3 C. L. 250.

34. See ante, § 9 D.

35. On appeal in an action on a judgment, the appellate court will take judicial notice of the fact that it has reversed the judgment sued on. Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 444. The appellate courts will take judicial notice of the terms of the district courts of the state. Held that court judicially knew that certain orders were not entered at regular term. Accousi v. G. A. Stowers Furniture Co. [Tex. Civ. App.] 83 S. W. 1104. Where the record shows that certain orders were made at a time when there could be no regular term of court and does not show that they were made at a special term they must be taken and considered as having been made in vacation. Cannot be presumed that they were made at special term. Id. Appellate court will take judicial notice of its former opinion reversing lower court and remanding it back for new trial. Roberson v. State [Fla.] 34 So. 294. Where it does not appear under what particular law a city is organized the supreme court cannot take judicial notice that it was organized under the act of Feb. 11, 1880, but it may look to the terms of that act to support a judgment against the city. Territory v. Socorro [N. M.] 76 P. 283. The appellate court will notice judicially whatever the court of original jurisdiction was bound to judicially notice. Tischner v. Rutledge [Wash.] 77 P. 388.

36. Jenkins v. Barber [Miss.] 38 So. 36. Where the evidence has been lost review cannot be made on affidavits supplied by the parties but a new trial will be ordered. Brody v. Katz, 87 N. Y. S. 452. Affidavits attached to brief showing nonservice are not considered on appeal from order refusing to set aside default. Guase v. Sterling Piano Co., 88 N. Y. S. 532. An affidavit not purporting to have been verified until the day after the order appealed from was entered is not properly part of the record and cannot be considered. Cameron v. White, 92 N. Y. S. 381. Affidavits in support of a motion for a new trial, not embodied in a bill of exceptions or statement of facts, cannot be considered on appeal. Rice Fisheries Co. v. Pacific Realty Co. [Wash.] 77 P. 839. On behalf of the party responsible for the abstract, review is confined to the matters found therein unless some cogent reason appears for departing from the rule. Slaughter v. Strouse [Colo. App.] 79 P. 972; following Strassheim v. Cole, 14 Colo. App. 164, 59 P. 479. Matters not in the record will not be considered. Leppel v. District Court of Garfield County [Colo.] 78 P. 682. Whether disbarment charges should be instituted against one of appellees who had been joined because he had acquired the judgment, litigiously as alleged, depends on matters foreign to the record. Kuck v. Johnson [La.] 38 So. 559. An affidavit filed in the trial court long after an appeal is taken, and brought up as part of a supplemental transcript cannot be considered. Flood v. Libby [Wash.] 80 P. 533. On writ of error to review a judgment the validity thereof may be determined from the entire record, but evidence dehors the record may not be looked to. National Metal Co. v. Green Consol. Copper Co. [Ariz.] 80 P. 397. The supreme court is not at liberty to go outside the statement of facts and to consult references therein to ascertain the contents of a statute of another state or of an opinion of its supreme court. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368. Review must be made on the evidence presented to the court below and the reviewing court cannot consider outside matters, such as the recollection of the judges as to the issues presented by a prior case between the same parties to assist in overturning the judgment. Hoffman v. Silverthorn [Mich.] 100 N. W. 183. In determining the validity of a release introduced in evidence on a retrial after a former appeal, the appellate court cannot look outside the record on the present appeal. Hartley v. Chicago & A. R. Co., 214 Ill. 78, 73 N. E. 398. An objection to the finding and judgment of a lower court which does not relate to the pleadings or appear on the face of the judgment itself can be preserved for review only by an exception duly taken in the trial court and preserved by bill of exceptions, and a recital in the transcript prepared by the clerk that on the judgment being entered the appellant prayed an appeal which was allowed,

peal may be so presented.[37] Records and opinions on former appeals,[38] and rules and opinions of the trial court, are no part of the record.[39] The rule of restriction to the regularly made and transmitted record has no application to original powers of inquiry into facts necessary to decide objections to its own jurisdiction or motions to dismiss,[40] or to decide applications for interlocutory or provisional relief.[41]

(§ 13) *F. Rulings peculiar to province of trial court.* 1. *Discretionary rulings in general.*[42]—The discretion of a trial court is not absolute but is subject to review in case of abuse,[43] but discretionary rulings will not be disturbed unless an abuse of discretion clearly appears.[44] This rule has been applied to

is insufficient. Jones v. Milford [Ill.] 70 N. E. 598. A statement in the condition of an appeal bond filed and approved by the clerk that a decree was entered dismissing the bill does not show that any such decree was actually entered. Livingston County B. & L. Ass'n v. Keach [Ill.] 72 N. E. 769. The supreme court cannot, from statements in counsel's brief, draw any inference of fact opposed to the findings of the trial judge. Hoffman v. Silverthorn [Mich.] 100 N. W. 184. Ambiguous stipulation as to the effect of which parties do not agree will not be considered. Barnard v. Lawyers' Title Ins. Co., 91 N. Y. S. 41. In determining question of fact, court cannot consider what purports to be a transcript of the evidence not made part of the return. Singer v. Pollock, 91 N. Y. S. 755. A paper purporting to be a brief of the evidence, but which is not approved by the trial judge as correct, cannot be considered by the trial court. De Loach v. Planters' & People's Mut. Fire Ass'n [Ga.] 50 S. E. 141.

37. An appellate court has jurisdiction to determine the effect of a discharge in bankruptcy set up by supplemental petition pending an appeal. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986. An appellate court may avail itself of authentic evidence outside the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, or to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled or for other reasons has ceased to exist. Ridge v. Manker [C. C. A.] 132 F. 599.

38. Record on former appeal not considered. Inabinett v. St. Louis, etc., R. Co. [Ark.] 86 S. W. 293. The memorandum of the trial court, though not a substantive part of the findings may be resorted to to interpret them. Johnson v. Johnson [Minn.] 99 N. W. 803. A memorandum of the trial judge attached to but not made a part of the order granting a new trial cannot be considered in determining upon what ground the order was granted, the order being explicit by its own terms (Holland v. Great Northern R. Co. [Minn.] 101 N. W. 608), and may be looked to to ascertain the grounds on which a verdict was set aside (Fox v. Metropolitan St. R. Co., 87 N. Y. S. 754).

39. A rule of the trial court not in the record cannot be considered. Johnston v. Callahan [Cal.] 79 P. 870. Though opinion of district judge is not part of record to show findings of fact unless so ordered it may be examined on petition to revise proceedings in bankruptcy to see what rulings of law were made. In re Pettengill [C. C. A.] 137 F. 840. Statements of fact contained in the brief of counsel and the attached affidavit of a justice, explaining what he meant by his answer, cannot be considered in reviewing the order of the judge of the superior court granting a new trial on certiorari. Faulkner v. Snead [Ga.] 49 S. E. 747.

40. See ante, § 11 H.

41. See post, § 14.

42. See 3 C. L. 264.

43. Enlarging time to take testimony is reviewable if discretion was abused. Lykes v. Beauchamp [Fla.] 38 So. 603. It is abuse to grant it for light reasons when not asked till after time fixed by rules. Id. Denying motion for new trial. In re Colbert's Estate [Mont.] 78 P. 971. If exercised so as to defeat substantial justice. Discretion accorded by B. & C. Comp. § 103, in allowing answers or replies to be made after the time limited by the code. McFarlane v. McFarlane [Or.] 77 P. 837. Questions involving legal discretion requiring a new bond because of alleged insufficiency of the first, to secure an injunction pendente lite in a suit to restrain a city from changing street grade in front of one's property. Swope v. Seattle [Wash.] 76 P. 517. Where order overruling motion for new trial contains nothing to indicate that judge was dissatisfied with verdict or that he had failed to exercise the discretion required of him by law, remarks made by him pending the argument of the motion will not be considered in determining whether he has exercised such discretion. Savannah, etc., R. Co. v. Steinhauser [Ga.] 48 S. E. 698.

44. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126. Matters resting in the discretion of the chancellor. State v. Sunapee Dam Co. [N. H.] 55 A. 899. Questions involving absolute discretion. Smith v. Smith [Cal.] 76 P. 489. In no case will it be held that there has been an abuse of discretion in refusing to approve an exception to an auditor's report, where there is any evidence to support the auditor's finding. Fowler v. Davis [Ga.] 47 S. E. 951. Denial of permission to amend a complaint held an abuse of discretion. Anglo-Californian Bank v. Field [Cal.] 80 P. 1080. Where default is set aside and new trial granted, it is not abusive of discretion to refuse continuance for absence

rulings on motions for a change of venue,[45] motions for continuance,[46] orders relating to pleadings, motions with reference to pleadings[47] or for a bill of particulars,[48] to the granting or refusing to grant a temporary injunction,[49] the refusal of a rule to correct omissions in the transcript on appeal from a justice's judg-

of plaintiff. Wilson v. Pfaffe [Iowa] 103 N. W. 992. Grant of new trial held not abuse of discretion. Clifford v. Latham [S. D.] 103 N. W. 642. When there is an allegation of the court's abuse of its discretion in passing upon the application it is the appellate court's duty to inquire into the facts and if after due consideration, an abuse appears, to correct it and grant a new trial. Attempts to influence jury, misconduct of jury and officers, and after-discovered evidence. Mix v. North American Co. [Pa.] 59 A. 272. The action of the trial court, on motion for a new trial, will be reviewed in some cases where the motion is based on the misconduct of the jury or those connected with it, and the trial court has refused to consider, or has erroneously considered, the application on an uncontested state of facts. Kelly v. Moore, 22 App. D. C. 9. But where the trial court, after hearing the evidence, finds that the charges are not sustained, a judgment on the verdict will not be disturbed. Id.

45. Fitzhugh v. Nicholas [Colo. App.] 77 P. 1092. Refusal to remove a cause to the county in which the essential evidence upon which it depends is located. Eames v. Armstrong [N. C.] 48 S. E. 769.

46. Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308; Banker Min. & Mill Co. v. Allen [Colo. App.] 78 P. 1070; Robertson v. Moore [Idaho] 77 P. 218. Denial of motion. Richardson v. Ruddy [Idaho] 77 P. 972; Hutchinson v. Manchester St. Ry. [N. H.] 60 A. 1011; City of Elgin v. Nofs, 212 Ill. 20, 72 N. E. 43; Southern R. Co. v. State [Ind. App.] 72 N. E. 174; Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722; Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107; A. C. Fulmer Coal Co. v. Morgantown & K. R. Co. [W. Va.] 50 S. E 606. To permit the production of evidence. Knapp v. Order of Pendo [Wash.] 79 P. 209.

47. Allowance of or refusal to allow amendments: Adams v. Hopkins [Cal.] 77 P. 712; Schrot v. Schoenfeld, 23 App. D. C. 421; Senft v. Vanek [Ill.] 70 N. E. 720; Cleveland, etc., R. Co. v. Miles [Ind.] 70 N. E. 985; Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808; Kennett v. Van Tassell [Kan.] 79 P. 665; Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E 987; Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206; Vesey v. Commercial Union Assur. Co., Limited, of London, England [S. D.] 101 N. W. 1074; Kinney v. Craig [Va.] 48 S. E. 864; Great Northern R. Co. v. Herron [C. C. A.] 136 F. 49; Rucker v. Bolles [C. C. A.] 133 F. 858; Murphy v. Plankinton Bank [S. D.] 100 N. W. 614. Refusal of leave to amend a petition, setting up a new and distinct issue, after the introduction of testimony. Allen v. North Des Moines Methodist Episcopal Church [Iowa] 102 N. W. 808. At any stage of the proceeding. Small v. Harrington [Idaho] 79 P. 461. After case had been heard in supreme court and remanded for new trial. Central Sav. Bank v. O'Connor [Mich.] 102 N. W. 280. Greater liberality is allowed in amending answers than complaints. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614. After verdict, when material to the case which has been defectively stated. Code Civ. Proc. 1902, § 194. Sutton v. Catawba Power Co. [S. C.] 49 S. E. 863. After the introduction of evidence. St. Louis S. W. R. Co. v. Hengst [Tex. Civ. App.] 81 S. W. 832. So as to allege venue. Standard Furniture Co. v. Anderson [Wash.] 80 P. 813. Rule not changed by fact that amendment may relate to withdrawal of plea in bar and substitution of one in abatement, or vice versa. Chunn v. City & S. R. Co., 23 App. D. C. 551.

Motions to make more specific: Under Code Civ. Proc. § 60. Mulligan v. Smith [Colo.] 76 P. 1063. More definite. Berg v. Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528.

Granting leave to file a cross complaint as provided by Code Civ. Proc. §§ 442, 937. Alpers v. Bliss [Cal.] 79 P. 171.

Allowing withdrawal of pleadings: O'Connell v. E. C. King & Son [R. I.] 59 A. 926. Granting of leave to withdraw a plea and interpose a demurrer. People v. McDonald [Ill.] 70 N. E. 646.

Motions to strike out: Refusing to strike out a part or all of a pleading. Woodhams v. Jennings [Ind.] 73 N. E. 1088. Refusal to strike amendments to a petition filed after the taking of testimony and while the case is under consideration, to make the petition conform to proofs. Johnson v. Farmers' Ins. Co. [Iowa] 102 N. W. 502.

To compel election between counts: Denial of motion to compel an election between counts of a complaint made at the trial is discretionary; but when the inconsistency appears on the face of the complaint and plaintiff moves for an election before answering, a denial of his motion may be reviewed. Frieze v. Alabama, etc., R. Co., 91 N. Y. S. 81.

48. Llewellyn v. Froehlich, 88 N. Y. S. 966. Motion to require defendant to file a statement of its grounds of defense. Driver's Adm'r v. Southern R. Co. [Va.] 49 S. E. 1000.

49. In refusing to grant an injunction to restrain the cutting of timber, where there is a conflict of evidence as to the insolvency of defendants, and the evidence is insufficient to show irreparable injury, and no other ground for relief is alleged. Stonecipher v. Wilson [Ga.] 47 S. E. 936. Granting temporary injunction. Shields v. Johnson [Idaho] 79 P. 394; Werner Co. v. Encyclopaedia Britannica Co. [C. C. A.] 134 F. 831; Lehman v. Graham [C. C. A.] 135 F. 39; Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331; Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. An order granting a preliminary injunction which merely keeps the property in litigation in statu quo.

ment,[50] the denial of a motion to dismiss,[51] or for a nonsuit,[52] the nonsuiting of a party for failure to answer interrogatories,[53] permitting plaintiff to dismiss,[54] the granting of a jury trial when not demanded[55] or the calling of a jury in a law case after a jury trial has been waived,[56] rulings in regard to the selection of a jury,[57] rulings relating to trial,[58] rulings in regard to the qualification of experts,[59] the allowance of leading questions[60] and cumulative evidence,[61] the order of proof,[62] motions to strike evidence;[63] the action of the court in regard to misconduct of

Shea v. Niiima [C. C. A.] 133 F. 209; Coram v. Ingersoll [C. C. A.] 133 F. 226. Order fixing the amount of the bond. Crown Cork & Seal Co. v. Standard Stopper Co. [C. C. A.] 136 F. 184.

50. Hager v. Knapp [Or.] 78 P. 671.

51. In equity. Lilly v. Eklund [Wash.] 79 P. 1107. Denial of leave to dismiss bill without prejudice after set down for hearing. Lykes v. Beauchamp [Fla.] 38 So. 603.

52. McVeigh v. Ripley [Conn.] 58 A. 701; George L. Storms & Co. v. Horton [Conn.] 59 A. 421; Norman Printer's Supply Co. v. Ford [Conn.] 59 A. 499; Snowman v. Mason [Me.] 59 A. 1019; Pierce v. Barney [Pa.] 58 A. 152; Cavanaugh v. Grady [R. I.] 52 A. 1027. The rule is particularly applicable to trials in courts where no provision is made for preserving an accurate report of the evidence. Id. The denial of a motion to withdraw a juror because of counsel's improper remarks in summing up. Cattano v. Metropolitan St. R. Co., 73 N. Y. 565, 66 N. E. 563.

53. Under Rev. St. 1899, § 3575. Horton v. Driskell [Wyo.] 77 P. 354.

54. Unless it clearly appears that some fundamental rule of a court of equity was violated, or there was an abuse of legal discretion. Where no evidence has been taken, and no hearing had upon the merits, the fact alone that defendant may be subjected to another suit is not a ground for denying a motion to dismiss. Penn Phonograph Co. v. Columbia Phonograph Co. [C. C. A.] 132 F. 808.

55. Knapp v. Order of Pendo [Wash.] 79 P. 209.

56. Under Laws 1903, c. 43. Fleming v. Wilson [Wash.] 80 P. 1104.

57. Determination as to partiality will be interfered with only where the voir dire examination shows as a matter of law that he was biased. Graybill v. De Young [Cal.] 80 P. 618. Examination of jurors upon their voir dire. Sullivan v. Padrosa [Ga.] 50 S. E. 142. A ruling on a motion for a special venire made after the expiration of the time within which it could have been demanded as of right. Refusal to grant motion 3 days before cause was set. Basham v. Hammond Packing Co. [Mo. App.] 81 S. W. 1227. Challenges to jurors. Felsch v. Babb [Neb.] 101 N. W. 1011.

58. Dilatory tactics in making up the issues. Rice v. Bolton [Iowa] 100 N. W. 634. Order for the inspection of books or documents. Harris v. Richardson [Minn.] 100 N. W. 92. The orderly and proper conduct of a trial. Winn v. Itzel [Wis.] 103 N. W. 220. The manner of examining witnesses. Bray v. Bray [Iowa] 103 N. W. 477; Worrell & Williams v. Kinnear Mfg. Co. [Va.] 49 S. E. 988. Refusal to direct an issue in an equity case. Wurster v. Armfield, 90 N. Y. S. 699. Entry of a nunc pro tunc order. Hofacre v. Monticello [Iowa] 103 N. W. 488. In Pennsylvania it is peculiarly within the province of the quarter sessions to determine whether road viewers misbehave themselves, or whether any undue influence was brought to bear upon them and the determination of that question will not be interfered with, except for manifest and flagrant abuse of discretion. Cornplanter Tp. Road, 26 Pa. Super. Ct. 20. Whether a party to a case stated and transferred from the superior court for judgment should, in justice, be relieved from the agreement under which the case was transferred, and allowed to try the facts, is a question for the superior court. Congdon v. Nashua [N. H.] 57 A. 686. Granting or denying of a motion to exclude witnesses, not under examination, from the courtroom. Denial. Griffith v. Ridpath [Wash.] 80 P. 820. Under Code Civ. Proc. § 3371. Finlen v. Heinze [Mont.] 80 P. 918.

59. Gila Val. etc., R. Co. v. Lyon [Ariz.] 80 P. 337; Meyers v. McAllister [Minn.] 103 N. W. 564. Ruling admitting the evidence will not be reversed unless it clearly appears that the witness was not qualified. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857.

60. Josephson v. Sigfusson [N. D.] 100 N. W. 703; Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834.

61. Action in allowing questions asked on cross examination which were contained in former questions to which no objection was made. Beadle v. Paine [Or.] 80 P. 903. Restricting the number of impeaching witnesses and refusing to allow the examination of any additional ones. Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084.

62. McAllin v. McAllin [Conn.] 59 A. 413; Chicago City R. Co. v. Matthieson [Ill.] 72 N. E. 443; Seigle v. Badger Lumber Co. [Mo. App.] 80 S. W. 4. Refusal to admit new evidence on redirect examination. Shafer v. Russell [Utah] 79 P. 559. Reopening case to let in omitted evidence (Work v. Braun [S. D.] 103 N. W. 764), or further evidence (Schilling v. Curran [Mont.] 76 P. 998), or refusal to do so (Knapp v. Order of Pendo [Wash.] 79 P. 209; Alling v. Weissman [Conn.] 59 A. 419; Radichel v. Kendall [Wis.] 99 N. W. 348; Winn v. Itzel [Wis.] 103 N. W. 220). Untimely admission, unless prejudicial. Siegle v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637. Allowing evidence in chief to be introduced in rebuttal. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126; Northern Ala. R. Co. v. Mansell [Ala.] 36 So. 459. Permitting a party to reopen her case after the sufficiency of her evidence has been challenged. Kane v. Kane [Wash.] 77 P. 842.

63. Hetzel v. Easterly, 89 N. Y. S. 154.

counsel,[64] the reference of a case to an auditor[65] and rulings on exceptions to an auditor's[66] or master's report,[67] the matter of submitting special interrogatories to the jury,[68] allowing documentary evidence to be taken to the jury room,[69] the allowance of costs on appeal from a justice's judgment,[70] the refusal to direct a verdict,[71] rulings on motions to set aside judgments[72] or to vacate default judgments,[73] the allowance of alimony[74] or the discharge of an order requiring its payment,[75] the granting[76] or denial of a motion for a new trial,[77] settlement of excep-

64. Improper remarks. McKee v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1013. Refusal to grant new trial because of improper remarks where counsel was admonished and apologized. Parker v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1016; Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

65. Refusal to appoint auditor. Teasley v. Bradley [Ga.] 47 S. E. 925. Refusal of the court to recommit the report of a master. Bakshian v. Hassanoff [Mass.] 71 N. E. 555.

66. Refusal to approve an exception of fact thereto in equity. Fowler v. Davis [Ga.] 47 S. E. 951.

67. An order of the circuit court overruling exceptions to the report of a master for the reason that the record was not printed as required by the rules. Du Bois v. New York [C. C. A.] 128 F. 418.

68. Under Rev. St. 1901, par. 1427. Gila Val., etc., R. Co. v. Lyon [Ariz.] 80 P. 337. Form of special interrogatories. Zimmer v. Fox River Val. Elec. R. Co. [Wis.] 95 N. W. 957.

69. Under Code Civ. Proc. § 1083. Carmen v. Montana Cent. R. Co. [Mont.] 79 P. 690.

70. Flewellin v. Lent, 90 N. Y. S. 417.

71. Refusal to direct a verdict will not be disturbed. Sikes v. Norman [Ga.] 50 S. E. 134.

72. Granting motion under B. & C. Comp. § 103. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94. An application to revoke a final decree of divorce is in the nature of an application to a chancellor. Given v. Given, 25 Pa. Super. Ct. 467.

73. Klepfer v. Keokuk [Iowa] 102 N. W. 515; Carver v. Seevers & Bryan [Iowa] 102 N. W. 518, citing Briggs v. Coffin, 91 Iowa, 329; McQuade v. C., R. I. & P. Ry. Co., 78 Iowa, 688; Meade County Bank v. Decker [S. D.] 102 N. W. 597; Stoll v. Pearl [Wis.] 99 N. W. 906; El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Refusal to set aside. Germania Fire Ins. Co. v. Muller. 110 Ill. App. 190. Setting aside and granting new trial. Wilson v. Pfaffe [Iowa] 103 N. W. 992. Conclusive when attacked only on ground of power, the reasons urged for setting it aside being not disputed. Harkness v. Jarvis [Mo.] 81 S. W. 446. The power given by statute to set aside a judgment by default or by mistake is discretionary. Opie v. Clancy [R. I.] 60 A. 635. Granting or denying a motion and the terms upon which relief will be granted. Walton v. Hartman [Wash.] 80 P. 196. Vacating judgment for mistake, surprise, etc. Hoyt v. Lightbody [Minn.] 101 N. W. 304. An order opening a default without condition will be considered as made on the theory that the party was entitled to it as a matter of right. Cohen v. Meryash, 93 N. Y. S. 529.

74. Not where allowance pendente lite is reasonable, was made after filing of testimony, and was based on affidavits and presumably on testimony referred to therein, and testimony is not before appellate court. Lesh v. Lesh, 21 App. D. C. 475.

75. Because of inability to pay. Smith v. Smith [Cal.] 76 P. 489.

76. Smith v. Tombigbee & N. R. Co. [Ala.] 37 So. 389; Hooper v. Fletcher [Cal.] 79 P. 418; McCauley v. Atchison, etc., R. Co. [Kan.] 79 P. 671; Werthman v. Mason City, etc., R. Co. [Iowa] 103 N. W. 135; Casey v. St. Louis Transit Co. [Mo.] 85 S. W. 357; Hill v. Western Union Tel. Co. [Mo. App.] 80 S. W. 3; Abernethy v. Yount [N. C.] 50 S. E. 696; Unzelmann v. Shelton [S. D.] 103 N. W. 646; Wait v. Robertson Mortg. Co. [Wash.] 79 P. 926; Eggen v. Fox [Wis.] 102 N. W. 1054; Clement v. Wilson [C. C. A.] 135 F. 749. Because verdict not justified by the evidence. Konicek v. R. F. Conway & Co. [Iowa] 99 N. W. 703; Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. [Iowa] 101 N. W. 1124; Miller v. Scovell [Minn.] 101 N. W. 74. For newly discovered evidence. Hunter v. Porter [Iowa] 100 N. W. 53; Chambliss v. Hass [Iowa] 101 N. W. 153; Kleutsch v. Security Mut. Life Ins. Co. [Neb.] 100 N. W. 139. First grant of a new trial upon certiorari from a justice's court, where the verdict was not demanded by the evidence. Walker & Walker v. Hughes [Ga.] 48 S. E. 387. From city court. Brantley v. Taylor [Ga.] 49 S. E. 262. Even where there have been two verdicts in justice court in favor of plaintiff, the supreme court will not interfere with a second grant of a new trial or certiorari, where it appears that there were errors which, in a close case, may have been injurious to the losing party. Faulkner v. Snead [Ga.] 49 S. E. 747. Granting of first new trial where the verdict as rendered was not demanded by the law and the evidence. Solomons & Co. v. Merchants' & M. Transp. Co. [Ga.] 48 S. E. 687. Though based on a single ground, without regard to whether such ground was meritorious. Elliott v. McCalla [Ga.] 50 S. E. 960. Where record shows that verdict not demanded. Smith v. Anderson [Ga.] 50 S. E. 979. Where it does not affirmatively appear that it was not demanded. Smith v. Hightower [Ga.] 51 S. E. 28. For error in an instruction, if there is any doubt about the propriety of such instruction. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71. The rule does not apply where the motion is granted by the successor of the trial judge. Tyler v. Haggart [S. D.] 102 N. W. 682. That a new trial was granted instead of requiring a remittitur of a portion of an excessive verdict.

tions, extension of time to settle bills of exceptions and move for new trial,[78] the

Wait v. Robertson Mortg. Co. [Wash.] 79 P. 926. Discretion of trial court in granting one new trial, if supported by substantial evidence, unless the case is such that no verdict in favor of the party to whom the new trial is granted could stand. Fitzjohn v. St. Louis Transit Co. [Mo.] 81 S. W. 907. It will be presumed, when the contrary is not shown, that the court acted within its discretionary power. Eggen v. Fox [Wis.] 102 N. W. 1054. Where the verdict is sustained by the evidence and it does not appear that a new trial was granted on discretionary grounds, the order will be reversed. Briggs v. Rutherford [Minn.] 101 N. W. 954. Where a motion for a new trial on the ground of errors at the trial and insufficiency of evidence is granted generally and no errors appear and there is sufficient evidence to support the verdict, the order will be reversed. Owens v. Savage [Minn.] 101 N. W. 790. An order granting a new trial generally, one of the grounds of the motion being the insufficiency of evidence, will not be disturbed if the evidence warrants a more favorable verdict for the moving party. Weed v. Weed [Cal.] 76 P. 652. The appellate court will look with less scrutiny on an order granting a new trial than on one refusing to do so (Bloch Queensware Co. v. Smith [Mo. App.] 80 S. W. 592), and is much more reluctant to interfere (Werthman v. Mason City, etc., R. Co. [Iowa] 103 N. W. 135; Louisville & N. R. Co. v. Wade [Fla.] 38 So. 49; Kunz v. Dinneen [S. D.] 100 N. W. 165).

77. Kelly v. Moore, 22 App. D. C. 9; Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78; Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565; Lazier Gas Engine Co. v. Du Bois [C. C. A.] 130 F. 834; Foster v. Murphy & Co. [C. C. A.] 135 F. 47; United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351; Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171; Newport News & O. P. R. & E. Co. v. Yount [C. C. A.] 136 F. 589. Whether the issues are in an ordinary suit in equity, or in a probate appeal. Crocker v. Crocker [Mass.] 73 N. E. 1068. Denial after judgment by default. Copper King of Arizona v. Johnson [Ariz.] 76 P. 594; Central of Georgia R. Co. v. Castellow [Ga.] 49 S. E. 753; Franklin v. Pritchard Bros. [Ga.] 50 S. E. 342. Where evidence, though conflicting, is sufficient to authorize verdict, and motion is on general grounds. Savannah, etc., R. Co. v. Steinhauser [Ga.] 48 S. E. 698; Atlantic & B. R. Co. v. Rabinowitz [Ga.] 48 S. E. 326; New England Mtg. Sec. Co. v. Anderson, Felder & Davis [Ga.] 48 S. E. 396; Kessler v. Hecht [Ga.] 48 S. E. 922; Central of Georgia R. Co. v. Bagley [Ga.] 48 S. E. 179; Central of Georgia R. Co. v. Owen [Ga.] 48 S. E. 916; Revis v. Roper [Ga.] 49 S. E. 291; Georgia & A. R. Co. v. Shiver [Ga.] 49 S. E. 700; Wrightsville & T. R. Co. v. Kelley [Ga.] 47 S. E. 366; Prey v. Oemler [Ga.] 47 S. E. 546. The evidence being conflicting and sufficient to sustain the verdict, and the verdict having been approved by the trial judge. Longmore v. Stegall [Ga.] 49 S. E. 264. Where no error of law complained of. Georgia R. Co. v. Bass [Ga.] 48 S. E. 939; Sharp v. Jones [Ga.] 47 S. E. 901. Where there is some evidence to support the verdict and the trial court is satisfied with it. Blackshear v. Dekle [Ga.] 48 S. E. 311; City of Sparta v. Stewart [Ga.] 47 S. E. 911. Based solely upon the grounds that the verdict was contrary to law and the evidence, and without evidence to support it, where evidence is sufficient to support verdict. Baldwin Fertilizer Co. v. McAllister [Ga.] 49 S. E. 733. Upon finding that the charge of misconduct on the part of counsel and the jury is not sustained. Affidavits and counter affidavits submitted on the question. Evidence conflicting and evidence of misconduct not so strong as to justify inference that judge misapprehended facts or abused his discretion. Desverges v. Goette [Ga.] 48 S. E. 693. Where there is evidence to sustain the findings of the jury unless there was some error of law prejudicial to the rights of the losing party. Riddle v. Sheppard [Ga.] 47 S. E. 201; Cooper v. Rawlings [Ga.] 47 S. E. 198. Being no complaint that any error of law was committed, and evidence being sufficient to authorize verdict. McCowen v. Triplett [Ga.] 47 S. E. 217; Weil v. Carswell [Ga.] 47 S. E. 217; Underwood v. Underwood [Ga.] 48 S. E. 921. Where the evidence is conflicting and authorizes a finding in favor of either party, in the absence of an error of law prejudicial to the losing party. As to terms of contract and whether it had been complied with. Eubanks v. West & Baggett [Ga.] 47 S. E. 194. When the jury have exercised their discretion by granting a partial instead of an absolute divorce for extreme cruelty or habitual intoxication, and the judge has exercised his discretion by overruling a motion for a new trial made by defendant, the supreme court will not interfere. Wolf v. Wolf [Ga.] 48 S. E. 691. On conflicting affidavits as to newly discovered evidence. Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73. For misconduct of counsel. Gorham v. Sioux City Stock Yards Co. [Iowa] 92 N. W. 698; American Electrical Works v. New England Elec. R. Const. Co. [Mass.] 72 N. E. 64; Parker v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1016. For absence of counsel and surprise. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740. Verdict obtained by perjury. Chamberlain v. Olean St. R. Co., 90 N. Y. S. 851. Against weight of evidence. Case must be clear to justify reversal. Lovely v. Grand Rapids & I. R. Co. [Mich.] 100 N. W. 894. Where it presents no question of law. Torphy v. Fall River [Mass.] 74 N. E. 465. For the insufficiency of the evidence. Cutten v. Pearsall [Cal.] 81 P. 25; Sutherland v. Council Bluffs [Iowa] 99 N. W. 572; Miller v. Southern R. Co. [S. C.] 48 S. E. 99. Where there was some testimony on each of the points in issue. Davis v. Southern R. Co. [S. C.] 47 S. E. 723. Newly discovered evidence. Selleck v. Head [Conn.] 58 A. 224; Carlson v. Hall [Iowa] 99 N. W. 571; In re Colbert's Estate [Mont.] 80 P. 248; Edge v. Edge [Neb.] 99 N. W. 644. Surprise or newly discovered evidence. Landeau v. Frazier [Mont.] 76 P. 290. Where the evidence is conflicting, though same judge did not preside at the trial. Spearman v. Sanders [Ga.] 49 S. E. 296.

appointment[70] and removal of court officers,[80] and the allowance of fees,[81] though there appears to be some conflict in regard to this proposition.[82] The rule does not, however, apply to a case where the court has failed or refused to exercise his discretion,[83] or where his decision was in fact based on the law rather than on discretion,[84] or where from the nature of the case he could have no better knowledge of the circumstances than the reviewing court.[85]

(§ 13F) 2. *Questions of fact.*[86]—Generally speaking, questions of fact are not reviewed[87] unless the decision below is wholly unsustained by the evidence,[88]

78. Bishop & Babcock Co. v. Schleuning [S. D.] 103 N. W. 387.

79. Order appointing one of trustees to sell property under deed of trust. Wood v. Grayson, 22 App. D. C. 432. Appointment of a receiver for an insolvent corporation. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132. That a receiver was necessary and his charges reasonable. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722. The appointment of a receiver and the appointment of an attorney for a party, as receiver, where it is not claimed that the appointee is unfit or that he will neglect the duties of his position. Fisher v. Southern L. & T. Co. [N. C.] 50 S. E. 592. An order setting aside an order approving a receiver's final report and discharging him will not be disturbed. Williams v. Des Moines L. & T. Co. [Iowa] 101 N. W. 277.

80. The removal by the probate court of a collector of an estate, to whom letters ad colligendum have been issued. Guthrie v. Welch, 24 App. D. C. 562.

81. An allowance to the attorney of an assignee, made by the chancellor who tried the case and was familiar with the extent and character of the services, though it appears small under the circumstances. Thum v. Kentucky Citizens' B. & L. Ass'n's Receiver [Ky.] 80 S. W. 790. To master in chancery. Symms v. Chicago, 115 Ill. App. 169.

82. The allowance of attorney's fees by the chancellor is subject to review. Callender's Adm'r v. Callender [Ky.] 82 S. W. 372.

83. Refusal of new trial ignoring discretionary grounds. McIntyre v. McIntyre [Ga.] 47 S. E. 501. Where fails to do so through misconstruction of statute. Edwards Loan Co. v. Skinner [Iowa] 102 N. W. 828. Where his action is based on grounds other than discretionary ones, as where he refuses to act for want of power rather than in the exercise of discretion. Refusal of compulsory reference for lack of power. Hart v. Godkin [Wis.] 100 N. W. 1057.

84. Unless the grounds are discretionary, the order may be reviewed as any other. Abernethy v. Yount [N. C.] 50 S. E. 696; Robinson v. Lampel, 89 N. Y. S. 853; Badanes v. Feder, 93 N. Y. S. 478. Granting or refusal of a preliminary injunction where it appears that the court regarded as of controlling importance a view of the law that is erroneous, court thought that denial would not be reviewable. Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331. Where an order refusing a temporary injunction itself discloses that no discretion was exercised but that it was on the ground that plaintiff had no cause of action. Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. Refusal to permit the filing of an answer after time on a misconception of the statute will be reviewed. Edwards Loan Co. v. Skinner [Iowa] 102 N. W. 828. Under Code § 412, providing that the trial judge may entertain a motion on his minutes to set aside a verdict and grant a new trial on exceptions or for insufficient evidence or for excessive damages, the ruling may be reviewed. Abernethy v. Yount [N. C.] 50 S. E. 696. Generally unless the order shows on its face or from its nature or the circumstances that it was founded on discretion it will be presumed to have been on the law and, therefore, reviewable. Order granting new trial. Briggs v. Rutherford [Minn.] 101 N. W. 954; Owens v. Savage [Minn.] 101 N. W. 790; Robinson v. Lampel, 89 N. Y. S. 853; Badanes v. Feder, 93 N. Y. S. 478. Where motion is made on all statutory grounds and the order granting it does not state the grounds on which it is granted, but no costs are imposed, it will be presumed that it was granted on some exception taken at the trial. Robinson v. Lampel, 89 N. Y. S. 853. Where an order granting a new trial specifies no grounds, it will be presumed to have been granted on exception taken during the trial, and, therefore, reviewable. Badanes v. Feder, 93 N. Y. S. 478. Where there is sufficient evidence for plaintiff to warrant submission and decision of the case on the merits, a dismissal not appearing to have been on the merits will be presumed to have been for insufficiency of proof, and, therefore, erroneous. Bernstein v. Bear Lithia Springs Water Co., 90 N. Y. S. 1061. Recommittal to an auditor is usually discretionary, but where it appears that improper evidence was admitted, and there is nothing showing that the refusal to recommit was founded on discretion, it will be presumed the ruling was made because the court deemed there was no error. Tripp v. Macomber [Mass.] 72 N. E. 361.

85. Reasonable notice of taking deposition, under Comp. Laws, 1897, § 10,136. McCall v. Jacobson [Mich.] 102 N. W. 969.

86. See 3 C. L. 271.

87. Durfee v. Seale [Cal.] 73 P. 436; Rohloff v. Fair Haven & W. R. Co. [Conn.] 58 A. 5; Osborne v. Norwalk [Conn.] 60 A. 645; Silverstein v. Gallagher [Conn.] 60 A. 1022; Banks v. McCandless [Ga.] 47 S. E. 332; Friedman v. Verchofsky, 105 Ill. App. 414; E. T. Kenney Co. v. Ruff [Ind. App.] 72 N. E. 622; Borror v. Carrier [Ind. App.] 73 N. E. 123; Tappen v. Eshelman [Ind.] 73 N. E. 688; Chicago Terminal Transf. Co. v. Vandenberg [Ind.] 73 N. E. 993; Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000; Hossier Const. Co. v. National Bank of Commerce [Ind. App.] 73 N. E. 1006; Harndon v. Stultz [Iowa] 100 N. W. 861; Arb v. Farmers' & M.

the wording of this rule varying somewhat in the various jurisdictions.[89] Ap-

Bank [Iowa] 102 N. W. 132; Sands v. Marchionda [Mass.] 71 N. E. 546; Morrill & W. Const. Co. v. Boston [Mass.] 71 N. E. 550; Curran v. Paul Whitin Mfg. Co. [Mass.] 74 N. E. 318; Crusoe Bros. Co. v. Kudner [Mich.] 99 N. W. 788; William Barie Dry Goods Co. v. Casler [Mich.] 101 N. W. 215; Fairfield v. Hart [Mich.] 102 N. W. 641; Cannon v. McIntyre [Mich.] 103 N. W. 530; Shipley v. Belduc [Minn.] 101 N. W. 952; Gould v. Alton [Minn.] 101 N. W. 965; Hutzel v. Leach [Neb.] 99 N. W. 255; Malone v. Garver [Neb.] 92 N. W. 726; Cruse v. Holstein Lumber Co. [Neb.] 97 N. W. 295; Gore v. Herring [N. J. Law] 60 A. 1110; Vail v. Goodman [N. J. Law] 53 A. 692; Cosgrove v. Metropolitan Const. Co. [N. J. Law] 58 A. 82; McLaughlin v. Beck [N. J. Law] 58 A. 1081; Lapat v. Erie R. Co. [N. J. Law] 58 A. 1084; Isetts v. Bliwise [N. J. Law] 60 A. 200; Morgenthau v. Beaton, 88 N. Y. S. 359; Vogel v. Hawthorne, 88 N. Y. S. 1046; Tom Sweeney Hardware Co. v. Gardner [S. D.] 99 N. W. 1105; State v. Coughran [S. D.] 103 N. W. 31; Peterson v. Christianson [S. D.] 101 N. W. 40; Kittoe v. Willey [Wis.] 99 N. W. 337; Hutchins v. Bautch [Wis.] 101 N. W. 671; Tate v. Jerman [Wis.] 101 N. W. 679; Dodge v. Norlin [C. C. A.] 133 F. 363; Burns v. Burns [C. C. A.] 131 F. 238; Lopez v. Collier [C. C. A.] 129 F. 104; San Fernando Copper Mining & Reduction Co. v. Humphrey [C. C. A.] 130 F. 298; West Virginia N. R. Co. v. United States [C. C. A.] 134 F. 198. Except to ascertain that there is evidence to support them. Dilks v. Kelsey [N. J. Law] 59 A. 897. Can be reviewed only when they are essential elements in the determination of questions of law. Kepler v. Lackawanna Lumber Co. [Pa.] 58 A. 284. Where the general finding is not inconsistent with the subordinate facts found and is not controlled by any erroneous view of the law. Hourigan v. Norwich [Conn.] 59 A. 487. As to the intention of a party relative to the place of his residence, in an election contest. Huston v. Anderson [Cal.] 78 P. 626. What is reasonable time to reject stated account is law; what time was taken is fact. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445. Finding concerning notice and quorum of school meeting. Akron Sav. Bank v. School Tp. of Westfield [Iowa] 103 N. W. 968. Whether attorney in case had notice of all proceedings. Williams v. Des Moines Loan & T. Co. [Iowa] 101 N. W. 277. Where an agreed statement of facts on which the case was decided contained the words, "Court may draw such inferences of fact as are warranted," the appeal presents only questions of law as the supreme court cannot draw inferences of fact. Webber v. Cambridgeport Sav. Bank [Mass.] 71 N. E. 567. In proceedings for the allowance of a claim against the estate of a decedent. Mason v. Gaither's Estate [Mo. App.] 80 S. W. 277. The court of appeals is not precluded from reviewing the refusal of a peremptory instruction for defendant by the fact that the jury has found a verdict for plaintiff which has been approved by the trial court. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. Findings in eminent domain proceeding. Detroit, etc., R. Co. v. Campbell [Mich.] 103 N. W. 856. Finding on motion for new trial that jury did not misconduct itself or ignore charge. White Sewing Mach. Co. v. Phoenix Nerve Beverage Co. [Mass.] 74 N. E. 600. A motion for leave to open a default so far as grounded on accident, mistake or misfortune presents a question of fact only for the decision of the superior court. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011. The question whether the consideration for a note transferred by a husband to his wife was so inadequate as to suggest fraud cannot be considered in the face of the verdict of the jury that it was transferred for a valuable consideration and not in fraud of creditors. Trust Co. v. Bendow [N. C.] 47 S. E. 435. Finding of existence of partnership relation reasonably sustained. Cassidy v. Saline County Bank [Okl.] 78 P. 324. Whether an act of a partner in excess of authority was ratified. Id. Whether a partner acted within the scope of his authority. Id. Facts stated in affidavits filed on a motion to rescind an order dismissing a case for want of prosecution. Bond v. Corbin [S. C.] 47 S. E. 374. Whether plaintiff's possession under a mortgage of the subject-matter of an action of trover at the time of its conversion was fraudulent. Aldrich v. Higgins [Conn.] 59 A. 498. Question of sufficiency of possession of real estate to constitute notice. Butler v. Wheeler [N. H.] 59 A. 935. A finding of fact by the circuit court on appeal from a magistrate. Loveless v. Gilliam [S. C.] 50 S. E. 9. In Federal review of state courts. Chrisman v. Miller, 25 S. Ct. 468; Smiley v. Kansas, 25 S. Ct. 289. On petition for review in bankruptcy. Kenova Loan & Trust Co. v. Graham [C. C. A.] 135 F. 717. Whether a bankrupt was insolvent at the time of giving a preference. Kaufman v. Tredway, 25 S. Ct. 33. As to what was the law of another state. Eastern B. & L. Ass'n v. Ebaugh, 185 U. S. 114, 46 Law. Ed. 830. The Federal statute providing that there shall be no reversal in the supreme court or any circuit court on a writ of error for any error of fact is applicable to the circuit court of appeals. Rev. St. § 1011. Paul v. Delaware, etc., R. Co., 130 F. 951.

Questions of law reviewable: Whether an instrument in writing constitutes a lease or a license. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523. The rulings of the trial court consisting of conclusions on the facts found. Peterson v. New York, etc., R. Co. [Conn.] 59 A. 502. A general verdict which may include mixed questions of law and fact is conclusive as to both except so far as they may be saved by some exceptions which the party has taken to the ruling of the court on questions of law. Paul v. Delaware, etc., R. Co., 130 F. 951.

88. If there is any substantial evidence to support it: Schroder v. Aden Gold Min. Co. [Cal.] 78 P. 20; In re Seileck's Will [Iowa] 101 N. W. 453; Schaff & Co. v. First Nat. Bank [Ind. T.] 82 S. W. 700; Ferguson v. Lederer Strauss & Co. [Iowa] 103 N. W. 794; Many v. Logeman [Mo. App.] 80 S. W. 48; Everman v. Eggers [Mo. App.] 80 S. W. 592; Logan v. Metropolitan St. R. Co. [Mo.]

proval by the trial court on motion for a new trial,[90] or the concurrence of several

82 S. W. 126; Bond v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 124; Reed v. Goldneck [Mo. App.] 86 S. W. 1104; Woodard v. Cooney [Mo. App.] 85 S. W. 598; Keller v. Schwartz, 93 N. Y. S. 620; White v. Powell [Tex. Civ. App.] 84 S. W. 836. The fact that there is evidence in the record to support the verdict precludes further review of the denial of a motion for new trial for insufficient evidence. Barricklow v. Stewart [Ind.] 72 N. E. 128. Where one injured in a collision testified that he had looked before going on the track and the company alleged that if he had looked he must have seen the car, the court on appeal cannot say that there was no evidence that he was in the exercise of ordinary care. Chicago City R. Co. v. Barker [Ill.] 70 N. E. 624. Though against the preponderance (Crouch v. Colbert [Mo. App.] 84 S. W. 992; St. Louis S. W. R. Co. v. Byrne [Ark.] 84 S. W. 469; Heinly v. Goldberg, 105 Ill. App. 30; Turner-Hudnut Co. v. Vaupel, 111 Ill. App. 146; Chicago City R. Co. v. McClain [Ill.] 71 N. E. 1103; Fudge v. Marquell [Ind.] 72 N. E. 565), or weight of the evidence (Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755; California Elec. Light Co. v. California Safe Deposit & Trust Co. [Cal.] 78 P. 372; Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593; Ball v. Beaumont [Neb.] 102 N. W. 264; Davey v. Davey [Neb.] 103 N. W. 282; Hehir v. Rhode Island [R. I.] 58 A. 246). That plaintiff is entitled to the sole possession of the property in dispute. Beatty v. Clarkson [Mo. App.] 83 S. W. 1033.

The weight of the evidence will not be passed upon by the reviewing court. Jordan v. Greig [Colo.] 80 P. 1045; Schergen v. Baerweldt Const. Co. [Mo. App.] 83 S. W. 281; Bond v. Wilson [N. C.] 49 S. E. 89; Strickler v. Gitchel [Okl.] 78 P. 94; Richardson v. Penny [Okl.] 78 P. 320; Koon v. Southern Ry. [S. C.] 48 S. E. 86; Stacy v. Cherokee Foundry & Mach. Works [S. C.] 49 S. E. 223. Where there is substantial evidence. Everman v. Eggers [Mo. App.] 80 S. W. 592. If there is evidence reasonably tending to support it. Abbott v. Keller [Okl.] 78 P. 377. If any evidence. Ft. Smith Lumber Co. v. Cathey [Ark.] 86 S. W. 806; Swindell Bros. v. J. L. Gilbert & Bro. [Md.] 60 A. 102; Jones v. American Warehouse Co. [N. C.] 51 S. E. 106. Merely examined to see if there is legal evidence to support the verdict. Unzelmann v. Shelton [S. D.] 103 N. W. 646. Where a peremptory instruction to find for defendant is refused. Blakeslies' Exp. & V. Co. v. Ford [Ill.] 74 N. E. 135. But findings will be reversed when result of misapprehension of force and effect of a group of circumstances. Rosenbloom v. Cohen, 91 N. Y. S. 382. In passing upon the question of variance between the pleadings and proof. Town of Cicero v. Bartelme [Ill.] 72 N. E. 437. In condemnation proceedings the jury is the sole judge of the credibility of witnesses, the weight of evidence and the damage shown. Oregon Short Line R. Co. v. Russell [Utah] 76 P. 345.

The credibility of the witnesses will not be passed upon by the reviewing court. Jordan v. Greig [Colo.] 80 P. 1045; Hess v. Killebrew [Ill.] 70 N. E. 675; Rutherford v. Bath County [Ky.] 80 S. W. 815; Moret v. New Orleans R. Co. [La.] 36 So. 759; Bissell v. York [Mo. App.] 83 S. W. 282; Reed v. Chicago & A. R. Co. [Mo. App.] 87 S. W. 65; Watson v. Gross [Mo. App.] 87 S. W. 104; Schergen v. Baerweldt Const. Co. [Mo. App.] 83 S. W. 281; Estes v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 627; Strickler v. Gitchel [Okl.] 78 P. 94; Mora v. Thomas [Tex. Civ. App.] 86 S. W. 632.

Number of witnesses: That more witnesses testified against the finding than for it will not warrant reversal. Grace v. Moseley, 112 Ill. App. 100; Pate v. Quinn, 115 Ill. App. 513; Rutherford v. Bath County [Ky.] 80 S. W. 815. The judgment will not be reversed merely because the jury chose to believe the lesser number of witnesses. Brierly v. Union R. Co. [R. I.] 58 A. 451. Not because two defendants contradicted plaintiff whose testimony was not improbable and was slightly corroborated by his wife. Meyerson v. Levy, 90 N. Y. S. 1068.

89. Judgment based on conflicting evidence will not be disturbed. Ryder v. Leach [Ariz.] 77 P. 490; Charonleau v. Shields & Price [Ariz.] 76 P. 821; Cavanaugh v. Wholey [Cal.] 76 P. 979; Southern California Inv. Co. v. Wilshire [Cal.] 77 P. 767; Bell v. Southern Pac. R. Co. [Cal.] 77 P. 1124; Gabriel v. Bank of Suisun [Cal.] 78 P. 736; Chapman v. Duffy [Colo.] 79 P. 746; Humphreys v. Brown [Ga.] 47 S. E. 188; Georgia R. & Banking Co. v. Turner [Ga.] 47 S. E. 191; Robert Portner Brewing Co. v. Cooper [Ga.] 47 S. E. 631; Holmes v. Holmes [Ga.] 47 S. E. 962; Dickinson v. Stultz [Ga.] 48 S. E. 173; McLeod v. Morris [Ga.] 48 S. E. 188; Tanner v. Lee [Ga.] 49 S. E. 592; Robertson v. Moore [Idaho] 77 P. 218; Deeds v. Stephens [Idaho] 79 P. 77; Dick v. Zimmerman, 105 Ill. App. 615; Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161; Village of Wilmette v. Brachle, 110 Ill. App. 356; Netcher v. Bernstein, 110 Ill. App. 484; Sauter v. Anderson, 110 Ill. App. 574; Demmer v. American Ins. Co., 110 Ill. App. 580; Ramsaier v. Oetting, 115 Ill. App. 70; Chicago & J. Elec. R. Co. v. Herbert, 115 Ill. App. 248; Russell v. Utter, 115 Ill. App. 604; Griffin v. Smith [Ind. T.] 82 S. W. 684; Winfield Nat. Bank v. Maurer [Kan.] 79 P. 131; Edwards v. Porter [Kan.] 79 P. 159; Board of Railroad Com'rs of Kansas v. Missouri Pac. R. Co. [Kan.] 80 P. 53; Louisville R. Co. v. De Gore [Ky.] 84 S. W. 326; City of Suburban Tel. Ass'n v. Woodworth [Ky.] 86 S. W. 972; Guthrie v. Carney [Ky.] 86 S. W. 1126; St. Landry Wholesale Mercantile Co. v. Teutonia Ins Co. [La.] 37 So. 967; Bissell v. York [Mo. App.] 83 S. W. 282; Laclede Const. Co. v. T. J. Moss Tie Co. [Mo.] 84 S. W. 76; Bray v. Riggs [Mo. App.] 85 S. W. 116; Johnson v. Chilton [Mo. App.] 85 S. W. 648; Edger v. Kupper [Mo. App.] 85 S. W. 949; Sperling v. Stubblefield [Mo. App.] 79 S. W. 1172; Falkinburgh v. Daggs [Mo. App.] 79 S. W. 1176; Bertig-Smythe Co. v. Bonsack Lumber Co. [Mo. App.] 86 S. W. 870; Calderwood v. Robertson [Mo. App.] 86 S. W. 879; Hennessy v. Kennedy Furniture Co. [Mont.] 76 P. 291; Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931; Way v. Sherman [Mont.] 76 P. 942; Scott v. Ford [Or.] 78 P. 742; Rose v. Flor-

verdicts on successive trials, strengthens the presumption in favor of the finding

ence Harness Co. [S. C.] 50 S. E. 556; Thach v. Continental Travelers' Mut. Acc. Ass'n [Tenn.] 87 S. W. 255; Citizen's R. Co. v. Blackman [Tex. Civ. App.] 84 S. W. 242; Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082; Missouri, etc., R. Co. v. Hooten [Tex. Civ. App.] 84 S. W. 1095; Young v. Meredith [Tex. Civ. App.] 85 S. W. 32; Houston Land & Trust Co. v. Hubbard [Tex. Civ. App.] 85 S. W. 474; Houston, etc., R. Co. v. Goodman [Tex. Civ. App.] 85 S. W. 492; Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946; St. Louis S. W. R. Co. v. Kilman [Tex. Civ. App.] 86 S. W. 1050; Gisborn v. Milner [Utah] 79 P. 556; Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012. Under Code Civ. Proc. § 2061, subd. 2, providing for instructions as to how evidence is to be considered. Sarraille v. Calmon [Cal.] 76 P. 497. Setting aside codicil in will contest. French v. French [Ill.] 74 N. E. 403. Party sustained by probabilities contradicted by two witnesses—verdict not disturbed. West Chicago St. R. Co. v. Dean, 112 Ill. App. 10. As to whether removal of a telephone instrument was a discrimination against a subscriber. Crouch v. Arnett [Kan.] 79 P. 1086. A conflict cannot be said to arise simply because one witness has testified contrary to another. Moulton v. Sanford, etc., R. Co. [Me.] 59 A. 1023. In Montana if the conflict is trifling or the evidence preponderates against the findings, the facts will be examined. Under Acts 1903 [2nd Ex. Sess. p. 1], making it the duty of the supreme court to determine questions of fact in certain cases. Bordeaux v. Bordeaux [Mont.] 80 P. 6. An amendment by a judge, of a record nunc pro tunc, to speak the truth, on conflicting evidence as to the facts. Kerr v. Hicks, 131 N. C. 90, 42 S. E. 532. Cannot determine the facts though the findings will not support a judgment for either party. Scott v. Ford [Or.] 80 P. 899. Will be examined only to determine whether there is probative evidence to sustain the verdict. Charles E. Bryant & Co. v. Arnold [S. D.] 102 N. W. 303. Decision of state court on conflicting evidence will not be reviewed in Federal court. Gleason v. White, 25 S. Ct. 782. The rule does not apply where all the material evidence is documentary. Talcott v. Mastin [Colo. App.] 79 P. 973. Such evidence raises a question of law, and findings thereon are not conclusive. Sullivant v. Jahren [Kan.] 79 P. 1071. Where the trial was had entirely upon depositions may consider the same as if originally heard there. Roby v. Roby [Idaho] 77 P. 213. The rule is not changed by a statute providing that the reviewing court "shall examine the evidence and render such judgment as shall be just and proper." Board of Railroad Com'rs of Kansas v. Missouri Pac. R. Co. [Kan.] 80 P. 53.

Where there is sufficient evidence to support it: Carpenter v. Lindauer [N. M.] 78 P. 57. A judgment overruling a motion for a new trial where the evidence is conflicting. Wynn v. J. N. Pease & Co. [Ga.] 48 S. E. 143. Evidence need only tend to prove essential facts. Indianapolis, etc., R. Co. v. Hubbard [Ind. App.] 74 N. E. 535. On a trial de novo, findings of the trial court will not be disturbed merely because incompetent testimony was admitted if there is sufficient competent evidence to support the findings. Cooke v. Cain [Wash.] 77 P. 682. Appellate court can only determine whether there is evidence reasonably sufficient to support the findings of the jury. If so, verdict must be sustained, though court might have reached different conclusion if left to it in first instance. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735. Will set aside the verdict if it is satisfied that the evidence is plainly insufficient to support it. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172. Reversed where record clearly showed that testimony supporting verdict was false and insufficient. Wright v. Kansas City [Mo.] 86 S. W. 452. Verdict resting on testimony of party whose credibility is strongly impeached. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 85 S. W. 28. If the evidence is insufficient to support the verdict, the judgment may be reversed. Chicago City Ry. Co. v. Miller, 111 Ill. App. 446. There must be substantial, reasonable and coherent evidence. Moulton v. Sanford, etc., R. Co. [Me.] 59 A. 1023. When the testimony most favorable to plaintiff will not support a necessary inference. Ising v. Philadelphia & R. R. Co. [N. J. Law] 58 A. 1092. Where the verdict or finding is clearly unsupported. Ruemmeli-Braun Co. v. Cahill [Okl.] 79 P. 260. A mere scintilla of evidence is not enough. Hehir v. Rhode Island Co. [R. I.] 58 A. 246.

Unless manifestly against weight of evidence: Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183; Chicago City R. Co. v. Osborne, 105 Ill. App. 462; Independent Order of Foresters v. Mutter, 105 Ill. App. 518; Tanton v. Boomgaarden, 111 Ill. App. 37; City of Nokomis v. Farley, 113 Ill. App. 161; Steuben County Wine Co. v. McNeeley, 113 Ill. App. 488; Heaton v. Hennessy, 112 Ill. App. 653; Toledo, P. & W. Ry. Co. v. Hammett, 115 Ill. App. 268; Peoria Star Co. v. Lambert, 115 Ill. App. 319; Schoop v. Schoop, 115 Ill. App. 343. A finding that a malt liquor is an intoxicating liquor. Domonick v. State, 6 Ohio C. C. (N. S.) 192, 27 Ohio C. C. 305.

Unless clearly and palpably against weight of evidence: Johnston v. McNiff, 113 Ill. App. 1; Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302; Chicago & A. R. Co. v. Klaybolt, 112 Ill. App. 406; Village of Upper Alton v. Green, 112 Ill. App. 439; West Chicago St. Ry. Co. v. Randolph, 113 Ill. App. 274; Buckley v. Acme Food Co., 113 Ill. App. 210; Tremblay v. Tri-City Ry. Co., 113 Ill. App. 56; Singer Mfg. Co. v. Weil, 115 Ill. App. 384; Humphries v. Raritan Copper Works [N. J. Law] 60 A. 62; Erdman v. Stache, 90 N. Y. S. 375; Lamm v. Metropolitan St. R. Co., 90 N. Y. S. 390; Unzelmann v. Shelton [S. D.] 103 N. W. 647; Promontory Ranch Co. v. Argile [Utah] 79 P. 47. Unless manifestly wrong. Tyler v. Haggart [S. D.] 102 N. W. 682. Unless so against the weight of evidence as to indicate, clearly, want of proper consideration of the evidence, mistake by overlooking material evidence, or prejudice, or some other

below.[91] The presumption in favor of findings of fact in the lower court operates

improper cause. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

Unless clearly against weight of evidence: Howard v. Perrin [Ariz.] 76 P. 460; Illinois Cent. R. Co. v. Haecker, 110 Ill. App. 102; Chicago, R. I. & P. R. Co. v. Nelson, 115 Ill. App. 432; Lamm v. Metropolitan St. R. Co., 90 N. Y. S. 390; Curtis v. Oregon R. & N. Co. [Wash.] 78 P. 133. If the evidence of appellant, sustained by the undisputed facts and circumstances, plainly preponderates over that of the appellee, as shown by the records. Furst v. Galloway [W. Va.] 49 S. E. 146. Finding for plaintiff on demurrer to evidence by defendant will not be disturbed unless it is against the plain and decided preponderance of the evidence or is wholly without evidence to support it. Barrett v. Raleigh Coal & Coke Co. [W. Va.] 47 S. E. 154. The finding of the trial court upon a question of fact, as to which there is conflicting evidence, will be reversed when there is a decided preponderance of evidence against it, and the finding itself is inconsistent with what the evidence, on the whole, shows was intended to be the relation of the parties toward one another. Pearson v. West Virginia Lime & Cement Co. [W. Va.] 49 S. E. 418. Refusal of new trial is not disturbed unless allowing all presumptions the preponderance is so decided as to carry a conviction that the verdict was unjust and wrong. Birmingham Ry., Light & Power Co. v. Lindsey [Ala.] 37 So. 289. Unless so against the weight of evidence as to indicate, clearly, want of proper consideration of the evidence, mistake by overlooking material evidence, or prejudice, or some other improper cause. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

Every presumption in favor of finding of trial court: St. Louis, etc., R. Co. v. Hill [Ark.] 86 S. W. 303; Dick v. Zimmerman, 105 Ill. App. 615; Chaffe v. Barataria Canning Co. [La.] 36 So. 943; McNair v. Moore [S. C.] 50 S. E. 197. Only in the absence of substantial evidence will they be disturbed. Bank of Willows v. Small [Cal.] 78 P. 263. In reviewing the weight of the evidence, the fact that the jury were instructed too favorably for the unsuccessful party will be considered. Colonial Mut. Fire Ins. Co. of Philadelphia v. Ellinger, 112 Ill. App. 302. Though the proof be doubtful, the judgment will not be disturbed. Controversy involving title to real property. Black v. Cox [Ky.] 82 S. W. 278. All conflicts resolved in favor of prevailing party. Lackland v. Lexington Coal Min. Co. [Mo. App.] 85 S. W. 397. A judgment for plaintiff in a street railroad crossing accident case should not be reversed for failure to give a peremptory instruction for defendant, unless after giving plaintiff the benefit of the most favorable construction of all the evidence, and every reasonable inference in his favor that may be drawn therefrom, no other reasonable conclusion can be arrived at than that plaintiff was guilty of such contributory negligence as to preclude recovery. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. Where verdict was set aside on law alone, facts will be resolved in favor of appellee. Johnson v. Holmes [Mass.] 74 N. E. 364. Though the findings below are presumptively right, it is the court's duty to review the evidence whenever its sufficiency is presented to ascertain whether there is a preponderance against the finding. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. Presumption is stronger where the court below acted on oral evidence. The Gladestry [C. C. A.] 128 F. 591; Barton Bros. v. Texas Produce Co. [C. C. A.] 136 F. 355; Melton v. Rittenhouse, 111 Ill. App. 30; Hess v. Killebrew [Ill.] 70 N E. 675; Bartholomew v. Green [Iowa] 102 N. W. 777; Johnson v. Farmers' Ins. Co. [Iowa] 102 N. W. 502; Heyman v. Heyman [Ill.] 71 N. E. 591; Columbia Theatre Amusement Co. v. Adsit [Ill.] 71 N. E. 868; Williams v. Moulton [Mass.] 71 N. E. 808; Evans v. Woodsworth [Ill.] 72 N. E. 1082. Whether injury resulted to reversion by cutting timber. Anderson v. Cowan [Iowa] 101 N. W. 92. To overcome the presumption a preponderance of evidence against facts must clearly appear. Clarke v. Conners [S. D.] 101 N. W. 883; Morris v. Reigel [S. D.] 101 N. W. 1086; First Nat. Bank v. Buetow [Wis.] 101 N. W. 927. Evidence is to be treated as on demurrer to the evidence. Rocky Mount L. & T. Co. v. Price [Va.] 49 S. E. 73.

90. Georgia Ry. & Electric Co. v. Blacknall [Ga.] 50 S. E. 92; Georgia R. & Banking Co. v. Jordon [Ga.] 50 S. E. 123; Thompson v. Stottler [Iowa] 100 N. W. 852; Lovely v. Grand Rapids & I. R. Co. [Mich.] 100 N. W. 894. The supreme court can rarely set aside a verdict dependent on the weight of the evidence and approved by the circuit judge. Code 1899, c. 131, § 9, requiring the evidence to be certified, does not change rule. Buck v. Newberry [W. Va.] 47 S. E. 889. A verdict on conflicting evidence, approved by the trial court, is conclusive. Gaston v. Johnson [Mo. App.] 80 S. W. 276; Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738; Southern Ry. in Kentucky v. Forsythe's Ex'rs [Ky.] 82 S. W. 385. Where he saw and heard the witnesses unless manifestly against the weight of the evidence (Piper v. Andricks, 209 Ill. 564, 71 N. E. 18), or an abuse of discretion appears (Sutherland v. Council Bluffs [Iowa] 99 N. W. 572). Finding of jury in highway proceedings. Speck v. Kenoyer [Ind.] 73 N. E. 896. Undue influence or capacity. French v. French [Ill.] 74 N. E. 403. Personal action in tort for damages. Meyer v. St. Louis & S. R. Co. [Mo. App.] 83 S. W. 267. Where there is sufficient evidence to warrant it. Benning v. Horkan [Ga.] 48 S. E. 123; Holbrook v. Hodgson Cotton Co. [Ga.] 50 S. E. 916. Unless it is manifestly the result of passion or prejudice. Snider v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 530. Will not interfere where trial court has approved verdict by refusing new trial, though court believes that they ought to have found differently. Central of Georgia R. Co. v. Weathers [Ga.] 47 S. E. 956. There being an express denial by defendant of the notice and fraud alleged, the evidence supporting the verdict in his favor, and the

equally in favor of verdicts,[92] findings by the court in law[93] or equity cases,[94] in

finding having been approved by the presiding judge. Buchanan v. Ellison [Ga.] 49 S. E. 724. His approval entitled to weight, though did not preside at trial. Does not carry same force as that of trial judge. Spearman v. Sanders [Ga.] 49 S. E. 296.

91. Vansant v. Miller [Ky.] 80 S. W. 1091; Atwood Lumber Co. v. Watkins [Minn.] 103 N. W. 332; Brown v. Paper Co., 69 N. J. Law, 474, 55 A. 87; Anderson v. Kannon [Neb.] 99 N. W. 824. Where three juries have found same way (Parmly v. Farrar, 204 Ill. 38, 68 N. E. 438; Hinchliff v. Rudnik [Ill.] 72 N. E. 691), except where there is no evidence whatever to support the verdict (Sergent v. Liverpool & L. & G. Ins. Co., 89 N. Y. S. 35). A verdict may be set aside the third time because there is no evidence to support it. Meinrenken v. New York, etc., R. Co., 92 N. Y. S. 1015. Will not be set aside the second time on the ground that it is against the weight of the evidence (Green v. Barnes Mfg. Co. [N. J. Law] 58 A. 171), though this rule will not prevent setting it aside for excessiveness (Green v. Barnes Mfg. Co. [N. J. Law] 58 A. 171). Concurrent findings of two lower courts. United States v. Stinson, 25 S. Ct 426; Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317. Will not interfere where plaintiff has recovered a verdict for the third time, and some new evidence was introduced on the last trial, and the evidence is sufficient to sustain the verdict, which has been approved by the presiding judge, the supreme court will not interfere. Western & A. R. Co. v. Robinson [Ga.] 50 S. E. 978. A judgment having been reversed because of an erroneous directed verdict for defendant, judgment for plaintiff on retrial will not be reversed for refusal of the judge to direct for defendant, the evidence being more favorable to plaintiff than on the first trial. Texas & P. R. Co. v. Shoemaker [Tex. Civ. App.] 81 S. W. 1019. Rule is confined to the effect of the determination by the trier of facts and does not extend to court questions arising from the admitted or uncontroverted facts of the case. Fulton v. Grieb Rubber Co. [N. J. Law] 60 A. 37.

92. Cronenwett v. United States Health & Accident Ins. Co. [Mich.] 103 N. W. 848; Stout v. William Campbell Co. [Ind. App.] 70 N. E. 492; Republic Iron & Steel Co. v. Berkes [Ind.] 70 N. E. 815; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; American Tel. & Tel. Co. v. Green [Ind.] 73 N. E. 707. Verdicts. Perdue v. Gill [Ind. App.] 73 N. E. 844; D. M. Osborne & Co. v. Waterloo [Mich.] 101 N. W. 801; Keys v. Second Baptist Church [Me.] 59 A. 446; Anderson v. Kannon [Neb.] 99 N. W. 824; Fremont Brewing Co. v. Schulz [Neb.] 101 N. W. 234; Davey v. Davey [Neb.] 103 N. W. 282; Berliner v. Interurban St. R. Co., 87 N. Y. S. 455; Borgia v. Gange, 88 N. Y. S. 923; Booth v. Fordham, 91 N. Y. S. 406; Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482; Robinson Mach. Co. v. Hazel Kirk Gas Coal Co., 204 Pa. 177, 53 A. 772. Findings of fact on the trial of a caveat to a will. Struth v. Decker [Md.] 59 A. 727. Probate appeal. Crocker v. Crocker [Mass.] 73 N. E. 1068.

If evidence to support it. Watson v. Fagner, 105 Ill. App. 52; Nichols v. Shaw, 105 Ill. App. 114; Minneapolis Threshing Mach. Co. v. Burton [Minn.] 103 N. W. 335. When the testimony if true justifies it. State v. Fair [Wash.] 76 P. 731. If the instructions and rulings on evidence were proper. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346. Not conclusive if evidence and instructions were disregarded. On an issue of contributory negligence. Woolf v. Washington Ry. & Nav. Co. [Wash.] 79 P. 997. Unless unsupported by, or flagrantly against, the evidence. South. Covington & C. St. R. Co. v. Weber [Ky.] 82 S. W. 986. Unless palpably erroneous. Campbell v. Emslie [N. J. Law] 59 A. 1030.

Unless so clearly against evidence as to denote passion or prejudice: West Chicago St. R. Co. v. Brown, 112 Ill. App. 351; Norfolk Ry. & Light Co. v. Spratley [Va.] 49 S. E. 502; Ingram v. Wishkah Boom Co. [Wash.] 77 P. 34; City of Chicago v. Merwin, 105 Ill. App. 168.

Based on conflicting evidence: Green v. Soule [Cal.] 78 P. 337; Roche v. Baldwin [Cal.] 76 P. 956; House v. Johnson [Colo. App.] 76 P. 743; Fitzhugh v. Brown [Colo. App.] 77 P. 1091; Trawick v. Trussell [Ga.] 50 S. E. 86; Kendrick State Bank v. Northern Pac. R. Co. [Idaho] 79 P. 457; Spencer v. Morgan [Idaho] 79 P. 459; Watson v. Molden [Idaho] 79 P. 503; Chicago & E. I. R. Co. v. Stratton, 111 Ill. App. 142; Moore v. Grachowski, 111 Ill. App. 216; White v. Reed & Morton, 111 Ill. App. 262; Brown v. McNair [Ind. T.] 82 S. W. 677; Zimmerman v. Robinson & Co. [Iowa] 102 N. W. 814; Chicago G. W. R. Co. v. Troup [Kan.] 76 P. 859; Graham v. Troth [Kan.] 77 P. 92; Young v. Irwin [Kan.] 79 P. 678; Garred v. Blackburn [Ky.] 82 S. W. 234; Trimble v. Swinford [Ky.] 86 S. W. 686; Lee v. Huron Indemnity Union [Mich.] 97 N. W. 709; Spacek v. Schaub [Mich.] 103 N. W. 546; Van Slyck v. Arseneau [Mich.] 103 N. W. 571; Butte Min. & Mill. Co. v. Kenyon [Mont.] 76 P. 696; Devencenzi v. Cassinelli [Nev.] 81 P. 41; Strickler v. Gitchel [Okl.] 78 P. 94; Oakes v. Prather [Tex. Civ. App.] 81 S. W. 557; Richmond Passenger & Power Co. v. Steger [Va.] 49 S. E. 486; Rice Fisheries Co. v. Pacific Realty Co. [Wash.] 77 P. 839; Beebe v. Redward [Wash.] 77 P. 1052; Hayes v. Ray [Wash.] 79 P. 495; Go Fun v. Fidalgo Island Canning Co. [Wash.] 79 P. 797; Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126; Hawkins v. Casey [Wash.] 80 P. 792. Unless clearly wrong. Florida Cent. & P. R. Co. v. Usina [Ga.] 50 S. E. 667. Where there is evidence to sustain it. Ashley v. Heinrichs, 105 Ill. App. 102. When the evidence, viewed in the light of the surrounding circumstances so strongly preponderates against the verdict as to amount to a moral certainty that the jury erred in its conclusion, the verdict must be set aside. Mouiton v. Sanford, etc., R. Co. [Me.] 59 A. 1023. Unless clearly against weight of evidence. Curtis v. Oregon R. & Nav. Co. [Wash.] 78 P. 133. Will be set aside where plainly and clearly wrong and when, to allow it to stand, would be a plain injustice to the defendant. Chapman v. Liverpool Salt & Coal

the absence of a statute to the contrary,[95] or by referees,[96] masters,[97] auditors,[98]

Co. [W. Va.] 50 S. E. 601. In reviewing the evidence the court must recognize the existence of certain facts controlled by physical laws and disregard testimony in conflict therewith. Quigley v. Naughton, 91 N. Y. S. 491. Where plaintiff testifies that he looked for an approaching car and did not see it, the alleged physical fact that had he looked he must have seen it is not controlling on the appellate court. Chicago City R. Co. v. Barker [Ill.] 70 N. E. 624. A verdict in a will case stands on the same ground as a verdict in any other jury case. Floore v. Green [Ky.] 83 S. W. 133. Capacity and undue influence. In re McKenna's Estate [Cal.] 77 P. 461; Bailey v. Bailey [Ky.] 82 S. W. 387. Refusal to grant a new trial based on finding of the jury on conflicting evidence. Stowe v. La Conner Trading & Transportation Co. [Wash.] 80 P. 856.

Where jury has viewed premises: Though the evidence for plaintiff is weak, the verdict will not be disturbed, the jury having by consent of parties personally inspected the place where the tort was committed. Atlanta, etc., R. Co. v. Mims [Ga.] 50 S. E. 137; St. Louis & O. R. Co. v. Union Trust & Sav. Bank [Ill.] 70 N. E. 651; Dowie v. Chicago, etc., R. Co. [Ill.] 73 N. E. 354.

Amount of damages: Kuck v. Johnson [La.] 38 So. 559; Gorham v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 574; Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675; Nichols v. Oregon Short Line R. Co. [Utah] 78 P. 866. Though the verdict is for the highest amount justifiable under the evidence. Jennings v. Ingram, 111 Ill. App. 261. A verdict for damages in condemnation proceedings will not be disturbed as excessive where it is less than half what it might have been under the evidence. Board of Levee Com'rs of Yazoo-Mississippi Delta v. Lee [Miss.] 37 So. 747. Objection to the verdict as excessive is not an error in point of law which can be reviewed under the act of 1902. P. L. 1902, p. 565. Roth v. Slobodien [N. J. Law] 60 A. 59. On conflicting evidence as to the amount of damages, the verdict, though high, cannot be set aside where within the scope of plaintiff's testimony. Zelley v. West Jersey & S. R. Co. [N. J. Law] 59 A. 9. Statutory authority to grant a new trial on the ground of excessiveness of verdict will not be exercised unless the injustice is so apparent as to show great abuse of discretion in the trial judge in authorizing the verdict to stand. Act May 20, 1891, P. L. 101. Stauffer v. Reading [Pa.] 57 A. 829. Will not be set aside as excessive unless so excessive as to shock the court's sense of justice. Quigley v. Pennsylvania R. Co. [Pa.] 59 A. 958. Will not be set aside because damages seem too large. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030. Verdict conclusive where no error of law appears on the record. Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171; Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

93. Alabama & G. Lumber Co. v. Tisdale [Ala.] 36 So. 618; Baldridge v. Leon Lake Ditch & Reservoir Co. [Colo. App.] 80 P. 477; Gregory v. Filbeck's Estate [Colo. App.] 77 P. 369; Shelley v. Wescott, 23 App. D. C. 135; Rademacher v. Greenwood, 114 Ill. App. 542; Langdon v. Hughes, 113 Ill. App. 203; Glasscock v. Des Moines Ins. Co. [Iowa] 100 N. W. 503; Summers v. Summers [Ky.] 80 S. W. 1154; Baquet v. New Orleans & C. R., Light & Power Co. [La.] 36 So. 606; Roth v. Forsee [Mo. App.] 81 S. W. 913; Mauch v. Hornback [Mo. App.] 83 S. W. 536; Dowaglac Mfg. Co. v. Hellekson [N. D.] 100 N. W. 717; Gorman v. McGowan [Or.] 76 P. 769; Good v. Smith [Or.] 76 P. 354; Hodges v. People's Bank [S. C.] 50 S. E. 192; Paul v. Delaware, etc., R. Co., 130 F. 951; Streeter v. Sanitary Dist. [C. C. A.] 133 F. 124; York v. Washburn [C. C. A.] 129 F. 564; Eureka County Bank v. Clarke [C. C. A.] 130 F. 325; American Bridge Co. v. Camden Interstate R. Co. [C. C. A.] 135 F. 323. Unless it appears that an obvious error has intervened in the application of the law, or a serious mistake has been made in the application of the law. Dodge v. Norlin [C. C. A.] 133 F. 363. Where the only error assigned is that the judgment is not supported by the evidence, the judgment will be affirmed if upon consideration of the whole record there is sufficient competent evidence to sustain it. Hutzel v. Draper [Neb.] 99 N. W. 263. Review limited to the rulings made during the progress of the trial which are presented by the bill of exceptions. Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124. Where a magistrate refuses to act because of insufficiency of proof without further specification, his decision will be upheld if there is any inadequacy. Refusal to issue body execution. Salsberg v. Tobias, 88 N. Y. S. 967. Errors alleged in findings subject to revision by the circuit court of appeals, that court being limited in that connection to the question whether there is any evidence on which such findings could be made. Paul v. Delaware, etc., R. Co., 130 F. 951. Where writs of error are prosecuted in cases tried to the court on stipulation waiving jury trial, the court of appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on questions of law. Kruger v. Constable [C. C. A.] 128 F. 908. Where the record of a habeas corpus proceeding is such that a fact might have been found either way, the appeal court is not at liberty to interfere with the finding. Meyers v. Clearman [Iowa] 101 N. W. 193. A trial justice having the witnesses before him and hearing them testify is better able to judge of their credibility and fairness than the reviewing court. Morning Journal Ass'n v. Harris, 92 N. Y. S. 316. The supreme court cannot review findings of fact of the circuit court on appeal from a magistrate. James v. Northeastern R. Co. [S. C.] 50 S. E. 504. Where at the conclusion of the trial both parties move for a directed verdict, the court is thereby authorized to find the ultimate facts, and the only inquiries on review are whether there was any proper evidence to sustain its findings and whether the law was correctly applied thereto. Insurance Co. of North America v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794.

Supported by evidence: Bird v. Potter

or auditing judges,[99] or special tribunals,[1] especially where declared by statute to

[Cal.] 79 P. 970; Atkins v. Boyle [Colo.] 80 P. 1067; Hereford v. Benton [Colo. App.] 80 P. 499; Pearsell Mfg. Co. v. Jeffreys [Mo.] 81 S. W. 901; Bankers' Union of the World v. Pickens [Kan.] 79 P. 148; Ortiz v. First Nat. Bank [N. M.] 78 P. 529; Olds v. Traders' Bank of Kansas City, Mo. [Okl.] 78 P. 93; Fleer v. Reagan, 24 Pa. Super. Ct. 170; Wolfe v. Second Nat. Bank [W. Va.] 47 S. E. 243. The decision of the judge as to the competency of a witness, when such competency depends on the determination of a question of fact. Carroll v. Barber [Ga.] 47 S. E. 181. In an election contest if there is evidence legally sufficient to sustain it, though there may be a preponderance of evidence against it. Sand. & H. Dig. § 2698, providing that evidence is to be taken by depositions, and that court shall determine the same as a summary proceeding, does not change rule. Schuman v. Sanderson [Ark.] 83 S. W. 940. The court's finding as to the residence of decedents, in a suit by an administrator, where it is sustained by a preponderance of the evidence. Sommer v. Franklin Bank [Mo. App.] 83 S. W. 1025; Watt v. Amos [Okl.] 79 P. 109.

Conflicting evidence: Larsen v. Allan Line S. S. Co. [Wash.] 80 P. 181; Deeg v. Ettleson [Wash.] 80 P. 437; Wheeler v. Watson [Colo.] 81 P. 269; Farmers' Irr. Ditch Co. v. Consolidated Hillsborough Ditch Co. [Colo.] 81 P. 272; In re Gianelli's Estate [Cal.] 79 P. 841; Columbia Copper Min. Co. v. Duchess Min., Mill. & Smelt. Co. [Wyo.] 79 P. 385; Sheehan v. Scott [Cal.] 79 P. 350; Lake v. Owens [Cal.] 79 P. 589. That representations were false and known to be so. Willey v. Clements [Cal.] 79 P. 850. A judgment overruling defendant's motion for a new trial on the ground that the verdict was contrary to law and the evidence will be affirmed, where the evidence, though conflicting, is sufficient to sustain a finding for plaintiff. Johnson v. Harley [Ga.] 48 S. E. 685. Action on motion to open default. Savings Bank of Santa Rosa v. Schell [Cal.] 76 P. 250.

94. Benson v. Taylor [Ga.] 50 S. E. 348; Bouton v. Cameron [Ill.] 68 N. E. 800; Baumgartner v. Bradt [Ill.] 69 N. E. 912; Van der Aa v. Van Drunen [Ill.] 70 N. E. 33; Spacy v. Ritter, 214 Ill. 266, 73 N. E. 447; Calkins v. Worth [Ill.] 74 N. E. 81; Gannon v. Moles, 111 Ill. App. 19; Johnson v. Farmers' Ins. Co. [Iowa] 102 N. W. 502; Colbert v. Moore [Mass.] 70 N. E. 42; J. Regester's Sons Co. v. Reed [Mass.] 70 N. E. 53; Herlihy v. Coney [Me.] 59 A. 952; Stocker v. Nemaha County [Neb.] 100 N. W. 308; Paige v. Dempsey, 90 N. Y. S. 1019; Byers v. Byers [Pa.] 57 A. 62; Gundaker v. Ehrgott [Pa.] 58 A. 476; First Nat. Bank v. McKinley Coal Co. [Pa.] 59 A. 484; Obney v. Obney, 26 Pa. Super. Ct. 122; Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82; Paulus v. M. M. Buck Mfg. Co. [C. C. A.] 129 F. 594. Where after disagreement of the jury in an equity suit the parties stipulate that the presiding judge find the facts on the evidence heard by the jury, a stenographer's transcript being furnished him, his findings have the same weight as those of a chancellor on oral testimony. Hess v. Killebrew [Ill.] 70 N. E. 675. Where there is uncontradicted evidence supporting it (Coleman v. White [Miss.] 38 So. 336), the supreme court must accept it unless it is clearly and manifestly wrong (Melchoir v. Kahn [Miss.] 38 So. 347). Under the new equity rules in Pennsylvania the findings of the court are like the findings of a master under the old practice. Obney v. Obney, 26 Pa. Super. Ct. 116. That fraud has not been proven. Holt v. Murphy [Okl.] 79 P. 265. Unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

On conflicting evidence: R. Dinwiddie & Co. v. Nash [Ky.] 86 S. W. 517; F. Weikel Chair Co. v. Napper [Ky.] 86 S. W. 528; Flowers v. Moorman & Hill [Ky.] 86 S. W. 545. Are cases where the fact of conflict does not deprive petitioner of a remedy by which to preserve the status until the disputed issue may be submitted to a jury in a trial in which both parties have the right to cross-examine all the witnesses. Injunction. Armand v. Lehman [Ga.] 47 S. E. 949. Will be supported unless clearly erroneous. Jennings v. Wyzanski [Mass.] 74 N. E. 347. Under Code Civ. Proc. § 21, amended by Acts 1903 (2d Ex. Sess.) p. 7, c. 1, providing that on appeal in equity cases question of fact arising on the evidence presented by the record may be determined, a finding will not be disturbed unless against the preponderance of evidence. Finlen v. Heinze [Mont.] 80 P. 918. An appellate court should not reverse on the facts unless there is a reasonable probability that the result will be different on a new trial. Sternaman v. Metropolitan Life Ins. Co., 87 N. Y. S. 904. An appellate court will be slow to reverse a judgment for defendant on the facts in a personal injury case, where the only evidence is the uncorroborated testimony of plaintiff. Hartman v. Interurban St. R. Co., 88 N. Y. S. 352. Where a case is reported to the law court **with a stipulation that it is to be heard as if a verdict had been rendered for plaintiff** and a motion for new trial filed for defendant, all conclusions and inferences of fact which a jury would have been warranted by the evidence in finding for plaintiff must be found by the court for plaintiff. McTaggart v. Maine Cent. R. Co. [Me.] 60 A. 1027.

95. In Indiana by statute appeals in which the court renders judgment for the right party on the whole record are provided for both at law and in equity. Acts 1903, p. 341, c. 193, § 8, directing consideration of facts in cases tried by the court, will be restricted to such cases as where by reason of evidence resting in documents or the clear character of the evidence the finding can as matter of law be said to be wrong. Hudelson v. Hudelson [Ind.] 74 N. E. 504. The appellate court is obliged to weigh the evidence only in cases not triable by a jury. That a case was in fact tried by the court is immaterial. Hanrahan v. Knickerbocker [Ind. App.] 72 N. E. 1137. Does not apply where jury was waived. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287. Applies to cases formerly of exclusively equitable jurisdiction. Parkison v. Thompson [Ind.]

be prima facie correct;[2] but in equity[3] and other cases which are reviewable de novo they are not conclusive.[4]

73 N. E. 109; Chicago, etc., R. Co. v. Woodward [Ind.] 73 N. E. 810. The statute does not contemplate a trial de novo, upon the evidence, nor require the court to weigh conflicting oral testimony; the judgment of the trial court as in other cases will be presumed to be correct and will not be disturbed unless it is affirmatively shown not to be sustained by the evidence, or clearly against the weight thereof. Parkison v. Thompson [Ind.] 73 N. E. 109. An assignment of error in a cause triable by a jury that the court erred in overruling a motion for new trial does not present the question of the sufficiency of the evidence as contemplated by the act. Hoosier Const. Co. v. National Bank of Commerce [Ind. App.] 72 N. E. 473. Where a cause tried by the court is submitted on appeal on all the evidence preserved by the bill of exceptions, the court is required by the statute to determine what is right on the whole case. Acts 1903, p. 341, c. 193, § 8. Sargent Glass Co. v. Matthews Land Co. [Ind. App.] 72 N. E. 474.

In Washington, findings by the court are not, like a verdict, binding upon the supreme court, but are rather advisory. Garfinkle v. Sullivan [Wash.] 80 P. 188.

96. Citizens' Coal Min. Co. v. McDermott [Mo. App.] 84 S. W. 459. Supported by competent evidence. Stephens v. Parvin [Colo.] 78 P. 688.

When based on sufficient evidence and confirmed by the court. Chancellor v. Teel [Ala.] 37 So. 665; Curnen v. Reilly, 90 N. Y. S 974; Fenn v. McCarrell [Pa.] 57 A. 1108; Bierbrauer v. Kuhnel [Wis.] 99 N. W. 1018; In re Lawrence [C. C. A.] 134 F. 843; United States Fidelity & Guaranty Co. v. Hampton [C. C. A.] 134 F. 734.

Of commissioner. Page v. Melrose [Mass.] 71 N. E. 787; Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279; W. & T. Allen & Co. v. Maxwell [W. Va.] 49 S. E. 242; Wolfe v. Second Nat. Bank [W. Va.] 47 S. E. 243.

Referee in bankruptcy. In re Shults, 135 F. 623; In re Royce Dry Goods Co., 133 F. 100.

97. Joslin v. Goddard [Mass.] 72 N. E. 948.

When confirmed. Approved by chancellor. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Torrey v. Dickinson, 111 Ill. App. 524. Though the evidence is such that an opposite finding if found would have been sustained. Joslin v. Goddard [Mass.] 72 N. E. 948. On conflicting evidence. Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. [C. C. A.] 131 F. 579. In the absence of manifest error. Buckingham v. Estes [C. C. A.] 128 F. 584.

98. When confirmed: Relating to compensation of an assignee for benefit of creditors. In re Powel's Estate [Pa.] 57 A. 981. Finding that building for which lien is claimed is a "substantial addition." Dunbar v. Washington Foundry & Mach. Co. [Pa.] 59 A. 434. Based on sufficient evidence. In re Powel's Estate [Pa.] 57 A. 981.

99. Haye's Estate, 23 Pa. Super. Ct. 570; Casely's Estate, 23 Pa. Super. Ct. 646; Hortz's Estate, 26 Pa. Super. Ct. 489. Findings in a complicated accounting based on sufficient evidence. Jackson v. Smyth, 24 Pa. Super. Ct. 545. Only reversed for clear error. Hortz's Estate, 26 Pa. Super. Ct. 489.

When based on sufficient evidence and confirmed. Haye's Estate, 23 Pa. Super. Ct. 570. Finding as to amount of trustee's claim for counsel fees, when confirmed, will not be disturbed in the absence of clear error. Casely's Estate, 23 Pa. Super. Ct. 646.

1, 2. Findings of state corporation commission fixing railroad rates. Const. § 156f. Norfolk & P. Belt Line R. Co. v. Com. [Va.] 49 S. E. 39. On appeal from an order of the board of railroad commissioners issuing a certificate of public convenience, questions of fact will be considered by the New York court of appeals only so far as to determine whether there was evidence to support the findings. In re Wood [N. Y.] 73 N. E. 561. Where after hearing a local assessment has been confirmed by the lower court, it will not be reversed on appeal in the absence of manifest error. Clark v. Chicago, 214 Ill. 318, 73 N. E. 358.

3. Will be deferred to. Myers v. Schuchmann [Mo.] 81 S. W. 618; Jack Harvard Zinc Min. Co. v. Continental Zinc & Lead Min. & Smelt. Co. [Mo. App.] 80 S. W. 12. Supreme court will not interfere with finding that sheriff's return of service of summons was true, where two chancellors refused to believe the only witness who testified that it was false. Smoot v. Judd [Mo.] 83 S. W. 481. While appellate court will review the evidence in a divorce case, the finding of the trial court merits much deference and consideration. Schweikert v. Schweikert [Mo. App.] 83 S. W. 1095. Persuasive only. Goerke v. Rodgers [Ark.] 86 S. W. 837. Evidence will be examined with a view to sustaining the judgment, but if insufficient the judgment will be reversed. Presumption in favor of judgment. Small v. Harrington [Idaho] 79 P. 461. Where there is little or no conflict in the evidence and the finding of the chancellor appears to be erroneous, the decree will be reversed. Shackleford v. Elliott [Ill.] 70 N. E. 745. Findings by the court in a common law case have the same weight as a verdict, but in an equitable case the court will weigh the evidence. Wood v. Howk [Ky.] 79 S. W. 1184. Failure to make special findings of facts and conclusions of law, as required by Rev. St. 1899, § 695, in proceeding to restrain infringement of trade-mark held not reversible error, since such findings are not conclusive. W. A. Gaines & Co. v. E. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648. The conclusions of the trial court derived from the consideration of the testimony of witnesses examined in the presence of the court will not be regarded unless upon the whole record, in view of the position of the trial court in weighing such testimony, they appear to be right. Naudain v. Fullenwider [Neb.] 100 N. W. 296. Notwithstanding the findings of the trial court are always presumptively right in an equitable action, yet it is the duty of the court on appeal to review the evidence when its sufficiency is properly presented to ascertain whether or not there is a clear preponderance against the finding. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. Though the verdict of a jury in an

(§ 13) *G. Rulings and decisions on intermediate appeals.*[5]—Where an intermediate appeal is had, the findings of fact therein made are usually final[6] or at least will be reluctantly disturbed;[7] review in the court of last resort being confined to questions of law.[8] The judgment only of the appellate court and not its opinion is reviewable,[9] and the review is limited to the questions there litigated.[10]

equity case is merely advisory and the appeal court does not review it, a verdict sustaining the finding adds great weight to it and precludes a reversal in the absence of the most cogent reasons. Thompson v. Hardy [S. D.] 102 N. W. 299. Under the practice in Alaska whereby equitable and legal powers are exercised by the one judge in the same trial, his findings are not conclusive as in law actions, because the action was mainly legal, but where made in dispensing equitable relief, they lose their conclusiveness and are open to review as those of a chancellor. Shields v. Mongollon Expl. Co. [C. C. A.] 137 F. 539.

4. Election contest. Shields v. McMahan [Tenn.] 81 S. W. 597.

5. See 3 C. L. 282.

6. Chicago Union Traction Co. v. Newmiller [Ill.] 74 N. E. 410. Proximate cause of death. Triggs v. McIntyre [Ill.] 74 N. E. 400. The supreme court will not pass upon the question whether the facts sustained the conclusion of the probate judge where that question was not considered by the circuit court on appeal to it. Circuit court has power to review all findings of probate court. Code Civ. Proc. § 55. Ex parte Small [S. C.] 48 S. E. 50. Conclusive on excessiveness of verdict. International, etc., R. Co. v. Goswick [Tex.] 85 S. W. 785. The conclusion of a circuit judge on a question of fact on appeal from a judgment of a magistrate is conclusive on the supreme court. Corley v. Evans [S. C.] 48 S. E. 459; Stacy v. Cherokee Foundry & Mach. Works [S. C.] 49 S. E. 223. Finding that judgment not supported by the evidence as to one cause of action is not reviewable. Jones v. Atlantic Coast Line R. R. [S. C.] 49 S. E. 568. "Unanimous decision of appellate division" does not include unanimous decision by general term of city court affirmed by appellate division and by leave appealed higher. Construing Const. art. 6, § 9. Klein v. East River Elec. Light Co. [N. Y.] 74 N. E. 495. In Illinois an affirmance of a judgment by the appellate court is conclusive as to the facts on the supreme court. Amount of damages. Dunn v. Crichfield [Ill.] 73 N. E. 386. Where the appellate court affirms the judgment of the trial court, questions of fact therein are settled, though the affirmance is by a divided court, the two sitting judges disagreeing. Chicago, etc., R. Co. v. Schmitz [Ill.] 71 N. E. 1050. Where there is any competent evidence, which with its reasonable inferences tends to prove the controverted fact, the judgment of the appellate court is final. Illinois Steel Co. v. Olste [Ill.] 73 N. E. 422; Delaware & H. Canal Co. v. Mitchell [Ill.] 71 N. E. 1026.

7. Brignac v. Pacific Mut. Life Ins. Co. [La.] 36 So. 595. Will be done only in exceptional cases. Id.

8. The supreme court of **Illinois** will not consider on appeal from the appellate court whether the weight of the evidence supports the verdict or finding. Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314, 73 N. E. 420; Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874; Chicago & E. I. R. Co. v. Schmitz [Ill.] 71 N. E. 1050; Illinois Terminal R. Co. v. Mitchell [Ill.] 73 N. E. 449; United States Wringer Co. v. Cooney [Ill.] 73 N. E. 803; Chicago, etc., R. Co. v. Crose [Ill.] 73 N. E. 365; Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28; Chicago Union Traction Co. v. O'Donnell [Ill.] 71 N. E. 1015; Chicago City R. Co. v. Lannon [Ill.] 72 N. E. 585. Where the appellate court reverses the circuit court but its judgment recites no findings of facts different from those found by the circuit, the supreme court will presume the appellate court found the same facts as the circuit but differed only in the application of the law. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393. Where the appellate court in Illinois reverses a judgment in favor of plaintiff on questions of law and holds that the facts found are not sufficient in law to sustain a cause of action, such question will be reviewed on further appeal to the supreme court. Kantzler v. Benzinger [Ill.] 73 N. E. 874. Where the appellate court does not incorporate in its judgment any finding of fact, it is presumed that the facts were found the same in that court as in the trial court. People v. Lindblom [Ill.] 74 N. E. 73. On appeal from a judgment or second appeal to the appellate court it will be presumed in the absence of a showing to the contrary that the appellate court looked to its former judgment and directly determined that its former judgment was not res judicata of the matters now presented. Blakeslee's Express & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135. The excessiveness of the verdict is a question of fact not open to the supreme court in Illinois. City of Elgin v. Nofs [Ill.] 72 N. E. 43. Affirmance is necessary in the supreme court of Illinois where there is no ruling in the record on a question of law, the judgment of the appellate court being conclusive on the facts. Luther v. Crawford, 213 Ill. 596, 73 N. E. 430. The **New York** court of appeals will determine whether the evidence warranted submission to the jury where defendant moved for dismissal and it does not appear from the order or judgment that the affirmance by the appellate division was unanimous. Perez v. Sandrowitz [N. Y.] 73 N. E. 228. The unanimous affirmance of a judgment founded wholly on immaterial evidence, every portion of which was duly objected to, will not prevent the consideration of questions raised by exceptions to the rulings by the court of appeals. Woods Motor Vehicle Co. v. Brady [N. Y.] 73 N. E. 674. Where the inferences from uncontradicted evidence all point one way there is no question of fact and the court of appeals has jurisdiction notwithstanding a unanimous reversal by the appellate division. In re Totten [N. Y.] 71 N. E. 748.

9. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347. Error cannot be assigned on the opinions of the appellate courts of Illinois nor

On appeal from district court of a case originating before a justice, the review is of what the district court did and not what the justice did.[11] A party voluntarily assuming a position in the appellate court cannot shift it on further appeal.[12]

(§ 13) *H. Effect of decision on former review in the same case.*[13]—In case of reversal everything decided,[14] and in case of affirmance everything that might have been raised,[15] unless decision thereon is pretermitted,[16] is the law of the case on subsequent review of the same case.[17] Whether right or wrong,[18] the

can the supreme court consider an assignment that the appellate court refused to weigh or consider the evidence on controverted questions of fact presented to that court for its decision. Illinois Cent. R. Co. v. Smith [Ill.] 70 N. E. 628.

10. The supreme court of Illinois considers only such questions as were litigated in the appellate court irrespective of whether they were saved in the trial court. Commonwealth Elec. Co. v. Melville [Ill.] 70 N. E. 1052; Kehl v. Abram, 210 Ill. 218, 71 N. E. 347; Illinois Cent. R. Co. v. Prickett [Ill.] 71 N. E. 435. The appellant cannot raise in the supreme court a question he did not raise in the appellate court though he was appellee there. Columbia Theatre Amusement Co. v. Adsit [Ill.] 71 N. E. 868. Matters assigned but not argued in the appellate court cannot be raised in the supreme court. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; United States Wringer Co. v. Cooney [Ill.] 73 N. E. 803.

11. Simmons v. Chicago, etc., R. Co. [Iowa] 103 N. W. 954.

12. Olcese v. Mobile Fruit & Trading Co. [Ill.] 71 N. E. 1084.

13. See 3 C. L. 284.

14. A judgment of reversal involves only the questions decided. Mutual Life Ins. Co. v. Hill, 24 S. Ct. 538; Harrison v. McReynolds [Mo.] 82 S. W. 120. The opinion of an appellate court upon a question not raised by the pleading is not binding on the intermediate appellate court. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 153. The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal. Hunter v. Porter [Idaho] 77 P. 434.

15. All questions which were or might have been presented on the appeal are settled by the decision. Laughlins' Ex'r v. Boughner [Ky.] 84 S. W. 300; McNeill v. Thompson [Ky.] 84 S. W. 1145.

16. A remark in the opinion that conceding all the facts claimed by a party the court is not clear whether he ought to recover does not prevent other propositions decided in the opinion from being the law of the case. Leicher v. Keeney [Mo. App.] 85 S. W. 920.

17. City of Covington v. Asman [Ky.] 80 S. W. 154; Franz v. Mendonca [Cal.] 80 P. 1078; McNeill v. Thompson [Ky.] 84 S. W. 1145; Second Nat. Bank v. Fitzpatrick [Ky.] 84 S. W. 1150; Leicher v. Keeney [Mo. App.] 85 S. W. 920. Stating the rule and collating many authorities. Halstead v. Sigler [Ind. App.] 74 N. E. 257; Guarantee Co. of N. A. v. Phoenix Ins. Co. [C. C. A.] 124 F. 170; Ludington v. Patton [Wis.] 99 N. W. 614; Farrel v. Bouck [Neb.] 101 N. W. 1018; John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050; Wells & McComas, Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22; New Omaha Thomson-Houston Electric Light Co. v. Rombold [Neb.] 102 N. W. 475; Parrotte v. Dryden [Neb.] 102 N. W. 610; Illinois Central R. Co. v. Seitz, 111 Ill. App. 242; Bostwick v. Mutual Life Ins. Co. [Wis.] 99 N. W. 1042; Skilton v. Coddington, 93 N. Y. S. 460; Heyman v. Southern R. Co. [Ga.] 50 S. E. 342, City of Hickory v. Southern R. Co. [N. C.] 50 S. E. 683; Lewis v. Prichard [W. Va.] 50 S. E. 743; De Loach v. Planters' & People's Mut. Fire Ass'n [Ga.] 50 S. E. 141; Finlen v. Heinze [Mont.] 80 P. 918; James v. E. G. Lyons Co. [Cal.] 81 P. 275; Blankenship v. Whaley [Cal.] 76 P. 235; Brooks v. Western Union Tel. Co. [Utah] 76 P. 881; Brooks v. Barth [Mo. App.] 86 S. W. 873; United States Fidelity & Guaranty Co. v. Blackley, Hurst & Co. [Ky.] 85 S. W. 196; Taussig v. St. Louis & K. R. Co. [Mo.] 85 S. W. 378; Preston v. Price [Ky.] 85 S. W. 1183; Ayer & Lord Tie Co. v. Commonwealth [Ky.] 85 S. W. 1096; Porter v. State [Neb.] 103 N. W. 669; Merritt v. Dewey, 115 Ill. App. 503; Hayward v. Smith [Mo.] 86 S. W. 183; Ridgley v. United States Fidelity & Guaranty Co. [Neb.] 103 N. W. 669; Olney v. Boston & M. R. R. Co. [N. H.] 59 A. 387; Bostick v. Jacobs [Ala.] 37 So. 629; Albright v. Territory [N. M.] 79 P. 719; Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 80 P. 337; Limberg v. Glenwood Lumber Co. [Cal.] 78 P. 728; Raymon v. Glover [Cal.] 78 P. 3; Bailey v. Cascade Timber Co. [Wash.] 77 P. 377; Union Cent. Life Ins. Co. v. Galvin [Ky.] 81 S. W. 239; Chenault v. Quisenberry [Ky.] 81 S. W. 690; Harrington v. Rawls [N. C.] 48 S. E. 571; Vann v. Edwards [N. C.] 47 S. E. 784; Warner v. Grayson, 24 App. D. C. 55. Right to recover concluded by former remand to take and state an account. Nutt v. Knut [Miss.] 36 So. 689. The determination of a legal question by a court becomes the law of the case, unless reversed by an appellate court. Western Union Tel. Co. v. Toledo, 121 F. 734. Where a cause is remanded by the appellate court generally, its judgment is not a final judgment and is not res judicata. Blakeslee's Exp. & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135. Reversal of an order denying a reference to ascertain damages determines that plaintiff is entitled to damages. Periman v. Bernstein, 87 N. Y. S. 862. A case once decided by the supreme court will not be reopened as to questions previously considered unless it is rendered necessary by a change in the views of one or more of the justices participating therein. Jacobs v. Queen Ins. Co. [Wis.] 101 N. W. 1090. Where an assignment of error to the overruling of a demurrer was waived on a prior appeal by not discussing it, the objection to the sufficiency of the complaint will not be considered on a subsequent appeal. Southern Indiana R. Co. v. Moore [Ind. App.] 72 N. E. 479. Where a defendant in error, whose interests were adverse to those of its

principle applies, however, only to the decisions on points necessary to a determination of the case,[19] and cases in which the evidence is the same.[20] And where new evidence was introduced on the second trial, the court will examine as to its effect,[21] and the court will always look into the record on the former appeal to ascertain what facts were then before it in order to determine the extent of the application of the rule.[22] Where the constitutionality of proceedings for a local assessment has been fully considered and confirmed, appellant cannot on a subsequent appeal gather additional facts and frame additional reasons to secure a revision on the ground of the unconstitutionality of the proceedings.[23] Where there has been no change in the status of parties and no property right has vested under the ruling, the court will reverse its first ruling, if clearly erroneous, especially when a constitutional question is involved.[24] The binding effect of the decision on a retrial in the lower court[25] and the effect of appellate decisions as precedents in other cases are elsewhere treated.[26]

§ 14. *Provisional, ancillary, and interlocutory relief*[27] necessary or proper to the due administration of appellate jurisdiction, may be allowed by the reviewing court.[28] The issues appealed will not be decided in advance of hearing in order to protect the property pendente lite.[29] In Louisiana where a bonded release of a judicial sequestration pending appeal is sought, the matter will be remanded for

co-defendants and identical with those of plaintiff in error, did not assign cross error on a question not raised by plaintiff's assignment of errors, but argued the question fully in his brief, such defendant could not, after an adverse decree, sue out an original writ to review the same question. Suburban R. Co. v. City of Chicago [Ill.] 68 N. E. 422. A decision that a declaration did not state a cause of action with sufficient certainty is not a decision that a good cause of action was not stated and will not require such decision on second appeal. Hinchcliff v. Rudnik [Ill.] 72 N. E. 691. A statement in the prior opinion that certain persons were proper parties to an action to prevent "further waste" is not a decision that such action was for waste. Halstead v. Sigler [Ind. App.] 74 N. E. 257. No exception to this rule will be made when the question determined is one of practice and the parties have been guided by it in the second trial. Williams v. Miles [Neb.] 102 N. W. 482.

18. Heller v. Dailey [Ind. App.] 70 N. E. 821.

19. City of Rushville v. Rushville Natural Gas Co. [Ind.] 73 N. E. 87.

20. Seeton v. Town of Dunbarton [N. H.] 59 A. 944; Buehner Chair Co. v. Feulner [Ind.] 73 N. E. 816; Quirk v. Rapid R. Co. [Mich.] 100 N. W. 815; Union Nat. Bank v. Leary, 88 N. Y. S. 652; Globe & Rutgers Fire Ins. Co. v. Robbins & Myers Co., 88 N. Y. S. 996. Decision that plaintiff cannot recover on the facts. Thuis v. Vincennes [Ind. App.] 73 N. E. 1098. That negligent act was not within scope of servant's employment. Gibson v. International Trust Co. [Mass.] 72 N. E. 70. Excessiveness of damages. Rueping v. Chicago & N. W. R. Co. [Wis.] 101 N. W. 710. A holding that the evidence was not sufficient to support the judgment is not binding on the second appeal where the evidence is different on the second trial. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488. It is even on third appeal where no other or different evidence is produced. Meinrenken v. New York C. & H. R. R. Co., 92 N. Y. S. 1015.

21. Hamilton Nat. Bank v. American L. & T. Co. [Neb.] 100 N. W. 202. Mere cumulative evidence of the same facts does not avoid the rule. Westfall v. Wait [Ind.] 73 N. E. 1089.

22. Westfall v. Wait [Ind.] 73 N. E. 1089. In the absence of the notice and record of a prior appeal it will be presumed that it was from the entire judgment. Talcott v. Wabash R. Co., 90 N. Y. S. 1037.

23. Fair Haven & W. R. Co. v. City of New Haven [Conn.] 60 A. 651.

24. Board of School Directors of Buncombe County v. Asheville [N. C.] 50 S. E. 279.

25. See post, § 15F.

26. See Stare Decisis, 4 C. L. 1512.

27. See 3 C. L. 286. In addition to relief in the appellate court, such as does not conflict with the supersedeas may be granted below. See ante, § 7.

28. The Louisiana court of appeals has power to prevent vexatious execution of judgments appealed to it. State v. Leche [La.] 36 So. 868. If appellee proceeds to execute a judgment suspensively appealed, the supreme court may rule him to show cause against the setting aside of such acts. Instituting judicial mortgage after appeal. It need not be done in this case by application to judge who rendered judgment. Dannemann v. Charlton [La.] 36 So. 965. The trial court may in Louisiana sequester lands in dispute pending appeal from injunction against trespass. State v. De Baillon [La.] 37 So. 534. May sequester oil produced from lands pending suspensive appeal from dissolution of an injunction granted to lessee against lessor. State v. De Baillon [La.] 37 So. 481. On appeal by the wife in good faith in a divorce suit where the trial court has not ordered the husband to pay a sufficient sum to defray the expenses of the appeal and the wife has no means the appellate court may tax any deficiency against the

full proofs of conditions,[30] and the appellate court cannot pass a sentence of nullity on a judgment if the grounds for it are not in the record.[31] Relief ancillary to a concurrent remedy before the trial court may be granted by it though it accomplishes that which the reviewing court withdrew.[32]

§ 15. *Decision and determination. A. Affirmance or reversal.*[33]—Assuming the existence[34] and the proper acquisition of appellate power,[35] the revision of the record in the manner and bounds already pointed out[36] will ordinarily lead to an affirmance or reversal according to the absence or presence of error. A profitless reversal[37] or one to allow recovery of nominal damages[38] will not be granted, nor will a judgment be reversed for errors which in no way prejudiced the party complaining;[39] but where the record shows a mistrial, reversal and new trial must follow.[40] Pro forma affirmance is sometimes allowed for failure to properly prosecute the appeal, such affirmance being governed by the same considerations as dismissal and treated with it.[41] It has been said, however, that dismissal rather than affirmance should be ordered where further proceedings on the merits are possible.[42] Pro forma reversals are authorized in some jurisdictions.[43] Reversal or affirmance is usually entire,[44] though a reversal in part of a severable judgment is

husband. Roby v. Roby [Idaho] 77 P. 213.

29, 30. Jennings Heywood Oil Synd. v. Houssiere Latveille Oil Co. [La.] 38 So. 458.

31. State v. Sommerville [La.] 36 So. 864.

32. Injunction in aid of action of nullity after dismissal of suspensive appeal. State v. Sommerville [La.] 36 So. 864.

33. See 3 C. L. 286.

34. See ante, §§ 4, 5.

35. See ante, §§ 6-11.

36. See ante, § 13.

37. Garlington v. Davison [Ga.] 50 S. E. 667. Where effect would be to direct a decree having the same effect. Buster v. Wright [C. C. A.] 135 F. 947. Decree dismissing bill showing lack of jurisdiction on its face. Chamberlin v. Peoria, D. & E. R. Co. [C. C. A.] 118 F. 32. Erroneous order fixing time to file appeal bond will not reverse on error where the case is affirmed on the merits. Day v. Davis, 213 Ill. 53, 72 N. E. 682. Exceptions will not be sustained in any event if the exceptant must ultimately fail on the undisputed facts. Orr v. Oldtown [Me.] 58 A. 914. Where the judgment is the only one possible under indisputable evidence, errors at the trial will not be looked for. Hawke v. Kerr [Neb.] 101 N. W. 1023. On appeal from mandamus to compel payment of officer's salary, abolition of the office will be considered though not raised below. Reed v. Dunbar, 41 Ore. 506, 69 P. 451.

38. Hopedale Elec. Co. v. Electric Storage Battery Co., 89 N. Y. S. 325; White v. Sun Pub. Co. [Ind.] 73 N. E. 890. Where such a judgment would establish plaintiff's title to specific property also, he is entitled to reversal. Rollins v. Sidney B. Bowman Cycle Co., 89 N. Y. S. 289.

39. See Harmless, etc., Error, 3 C. L. 1579.

40. Marcus v. Graver [N. J. Law] 58 A. 564; People v. Wells [N. Y.] 70 N. E. 926. Where an erroneous view of the law is given to the jury, the verdict must be set aside whether the error is chargeable to counsel, the presiding judge, or the supreme court. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387. Where the court cannot say in view of the evidence and instructions that the verdict is right on the evidence, it will not uphold a judgment as being right on the merits notwithstanding erroneous instructions. Nickey v. Dougan [Ind. App.] 73 N. E. 288. Where counsel for plaintiff appellee admits that he has no case unless based on a theory not claimed or set up below, he admits his case away and reversal must follow. Sartor v. Smith [Iowa] 101 N. W. 515. Where a complaint wholly fails to set out a cause of action and cannot be made good by amendment, judgment will be reversed. Harshman v. Northern Pac. R. Co. [N. D.] 103 N. W. 412. If the defect of jurisdiction of a court springs from inexcusable departure from established principles governing the exercise of judicial power, its judgment is erroneous, but not void, and may and ought to be set aside on appeal. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. A final judgment rendered in the absence of a necessary party must be reversed and remanded in order that proper parties may be brought in regardless of how the defect is brought to the attention of the court. Powell v. People, 214 Ill. 475, 73 N. E. 795.

41. See ante, § 11 G.

42. Where dismissal is necessary the judgment should be affirmed only where further proceedings upon the merits would be improper or impossible. Walton v. Hartman [Wash.] 80 P. 196.

43. Failure of appellee to file briefs does not necessarily lead to reversal (Hanrahan v. Knickerbocker [Ind.] 72 N. E. 1137; Dickinson v. Morgenstern, 111 Ill. App. 543), but may in case of great negligence for which no excuse is shown (Moore v. Zumbrum [Ind.] 70 N. E. 800; Union Traction Co. v. Forst [Ind.] 70 N. E. 979; Miller v. Julian [Ind.] 72 N. E. 588.

44. Though a recovery of damages and penalty is reversed for error affecting the penalty alone, the reversal should be in toto. Houston & T. C. R. Co. v. Brown [Tex. Civ. App.] 85 S. W. 44. An erroneous judgment will be reversed as a whole though no errors are assigned as to parts thereof. Town of Newbold v. Douglas [Wis.] 100 N. W. 1040. Where the judgment requires respondent to

proper,[45] but the benefits of reversal will be limited to plaintiffs in error who complained of the judgment.[46] When contradictory verdicts in favor of two several parties are returned, the one which is sustained by the evidence, if either, will be affirmed and the other disposed of as the case may require.[47] The reversal of a final order dismissing summary proceedings carries with it the reversal of a judgment for costs thereafter entered.[48] Reversal in the absence of error is occasionally ordered in the interests of justice.[49] Where the justices are equally divided in opinion, the judgment stands affirmed by operation of law.[50] In Florida a majority is constitutionally required for decision, hence the common-law rule of affirmance by a divided court is abrogated but if the division seems permanent on a full attendance[51] all should vote for affirmance which will be binding only in the instant case and will constitute no precedent.[52]

(§ 15) *B. Transfers and removals and certifications and reservations.*[53] —The Missouri court of appeals will certify cases involving constitutional points to the supreme court.[54] The court will of its own motion transfer a case of which it has no jurisdiction to that court which has.[55] Certification back will not be made where the matter was once decided in the intermediate court and might

write out a formula and also adjusts the interests of the parties in the capital stock of a corporation, a reversal of the judgment in so far as it adjusts the property interests will carry with it the part relating to the formula though there is no appeal from that part. Hunter Smokeless Powder Co. v. Hunter, 91 N. Y. S. 620. Where a joint motion for a new trial is properly overruled as to any one of the defendants, the judgment should be affirmed. Lydick v. Gill [Neb.] 94 N. W. 109. If a judgment against several is bad as to one it must be reversed as to all. Cummings v. Smith, 114 Ill. App. 35; South Side El. R. Co. v. Nesvig [Ill.] 73 N. E. 749. Cannot be reversed in part. Hutchinson v. Sine, 105 Ill. App. 638.

45. If an issue erroneously decided is separable from other issues in the case, an appellate court may order a new trial of such issue only. Osmers v. Furey [Mont.] 81 P. 345. Ancillary proceedings may be separated from the main action, and the former reversed and the latter affirmed.

Action of assumpsit; attachment proceedings ancillary thereto. Mullen v. Camp [Fla.] 35 So. 402. Judgments against property owners for special assessments being several, a reversal as to one has no effect on the others. Harman v. People [Ill.] 73 N. E. 760; Goldstein v. Milford [Ill.] 73 N. E. 758.

46. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Where an appeal by petitioner in condemnation proceedings is only from a part of the judgment awarding damages to one defendant, on dismissing the appeal and affirming the judgment, the supreme court should not direct entry of judgment in favor of other defendants. Port Angeles Pac. R. Co. v. Cooke [Wash.] 80 P. 305.

47. Chicago, St. P., M. & O. R. Co. v. McManegol [Neb.] 103 N. W. 305.

48. Simmons v. Pope, 88 N. Y. S. 122.

49. Collating the cases under Shannon's Code, § 4905, providing for remand when complete justice cannot be done by reason of some defect in the record not due to culpable negligence. Bank of Winchester v. White [Tenn.] 84 S. W. 697. Though, on a demurrer to the declaration being sustained, plaintiff elects to stand thereon and appeals, where the appellate court also holds the declaration to be demurrable, it may give him a second opportunity to amend when the interests of justice seem to demand it. Where readily inferable from declaration that cause of action existed, held that judgment would be reversed and remanded if appellant within ten days would file notice of intention to amend. Otherwise would be reversed. District of Columbia v. Ball, 22 App. D. C. 543.

50. Seaboard Air Line R. v. Jones [Ga.] 47 S. E. 319; Parry v. Johnson [Ga.] 48 S. E. 29; Bank of Unadilla v. Georgia & A. R. Co. [Ga.] 48 S. E. 112; Chicago, etc., R. Co. v. Hamlin, 114 Ill. App. 141; Evening Post Co. v. Smith [Ky.] 81 S. W. 264; Jacobs v. Queen Ins. Co. [Wis.] 101 N. W. 1090; Commercial Bank v. Towers [Fla.] 37 So. 742, citing State v. McClung [Fla.] 37 So. 51; Holton v. Patterson [Fla.] 38 So. 352; Moore v. State [Ga.] 49 S. E. 617. Where there is a principal and a reconventional demand it is a concurrence if a majority agree on the principal, and a majority differently composed agree on the reconventional demand. Losecco v. Gregory [La.] 32 So. 985.

51. State v. McClung [Fla.] 37 So. 51.

52. State v. McClung [Fla.] 37 So. 51, following California where there is a like provision.

If there be less than six judges present a circuit judge should be called in pursuant to Act May 20, 1903, c. 5123. Id.

53. See 3 C. L. 291.

54. Lehner v. Metropolitan St. R. Co. [Mo. App.] 83 S. W. 1028; Bristol v. Thompson [Mo. App.] 83 S. W. 780; Myher v. Myher [Mo. App.] 87 S. W. 116.

55. Netter v. Reggio [La.] 37 So. 620. The court of appeals will not of its own motion raise the question of jurisdiction where the party entitled to raise the question declines to do so. Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191, decree reversed Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238. 46 Law. Ed. 1144

have been further appealed but was not.[56] Where a case is pending on appeal in the superior court, the judge has no power to remand the same for trial to the court from which it was appealed.[57] The losing party in the appellate court after the overruling of his motion for a rehearing is entitled to a transfer of the case to the supreme court in certain cases,[58] but one who procured reversal and a mandate for new trial does not lose merely because he deems himself entitled to a final judgment, and a motion to modify the mandate to direct final judgment is not a motion for a rehearing.[59] On an equal division of judges in the appellate court of Indiana, the cause will be transferred to the supreme court.[60]

(§ 15) *C. Remand or final determination.*[61]—On reversal, the ordinary practice is to remand for a new trial;[62] but if the error is clerical[63] or a mere matter of computation,[64] or if the pleadings show want of jurisdiction or complete lack of merits,[65] or if the appellate court has all the facts before it and can do complete justice,[66] the error will be corrected and the judgment affirmed as re-

56. What the court of appeals has dismissed for supposed want of jurisdiction unappealed further cannot be certified back to it by the supreme court where it has come on appeal direct from the trial court. Muntz v. Jefferson R. Co. [La.] 38 So. 586.

57. Fish v. Du Bose [Ga.] 48 S. E. 915.

58, 59. Standard Pottery Co. v. Moudy [Ind.] 74 N. E. 242.

60. Haughton v. Aetna Life Ins. Co. [Ind. App.] 72 N. E. 652.

61. See 3 C. L. 291.

62. On reversal of a judgment non obstante the cause will be remanded with leave to appellee to perfect his motion for new trial where such a motion was made in connection with his motion for judgment. Nelson v. Grondahl [N. D.] 100 N. W. 1093. Where plaintiff, in deference to an adverse intimation from the court, submits to a nonsuit, he is not entitled on a reversal to a judgment in his favor but must undergo a trial de novo. City of Hickory v. Southern R. Co. [N. C.] 50 S. E. 683. Where the record on appeal in a suit for infringement of patent fails to show any connection between defendant and the act of infringement proved, the court will not remand the case to permit the amendment of the pleadings and the introduction of new evidence to prove such connection, nor to substitute as defendant the party shown to have infringed. National Casket Co. v. Stolts [C. C. A.] 135 F. 534. Where a judgment quieting title on a tax deed is reversed for invalidity of the tax title but plaintiff is entitled to a lien for subsequent taxes paid the case will be remanded for proof of their amount. Green v. McGrew [Ind. App.] 73 N. E. 832.

63. Broll v. Wishert [Tex. Civ. App.] 79 S. W. 1089; New Orleans Terminal Co. v. Teller [La.] 37 So. 624; Hanrick v. Hanrick [Tex. Civ. App.] 81 S. W. 795. Verdict and judgment awarding plaintiff a half interest in land reformed where defendant claimed only one-third. Cummins v. Cummins [Tex. Civ. App.] 81 S. W. 561. A judgment dismissing an appeal from the county court to the circuit court and remanding the cause "for further proceedings in accordance with the findings," was modified into a simple judgment of dismissal. In re Silverman's Estate [Wis.] 102 N. W. 891. Judgment having been erroneously entered for defendant it was reversed and remanded with instructions to enter decree for plaintiff in accordance with his claims on appeal. Meffert v. Dyer [Mo. App.] 81 S. W. 643.

64. St. Louis, etc., R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267; Broocks v. Masterson [Tex. Civ. App.] 82 S. W. 822. Improper allowance of interest may be corrected without reversal. Missouri, etc., R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298; Howard v. Perrin [Ariz.] 76 P. 460; Gerst v. St. Louis [Mo.] 84 S. W. 34.

65. A decree opening an interlocutory order without a showing of the proper circumstances will be reversed unless the bill shows no equity when it will be finally dismissed. Macfarlane v. Dorsey [Fla.] 38 So. 512. Dismissed for want of equity on face of bill. Florida Packing & Ice Co. v. Carney [Fla.] 38 So. 602. Remand will be made where a curative act affecting rights and status of parties was passed after judgment. Curing charters and organization of municipalities. In re Lindner [La.] 38 So. 610. Remand with direction to dismiss. Bill showing no equity. Hendry v. Whidden [Fla.] 37 So. 571. Bill showing full legal remedy. Williams v. Peeples [Fla.] 37 So. 572.

66. Johnston v. Gerry [Wash.] 76 P. 258; Leffingwell v. Miller [Colo. App.] 79 P. 327; Harris-Hearin Fountain Co. v. Pressler [Tex. Civ. App.] 80 S. W. 664; Cox v. Burdett, 23 Pa. Super. Ct. 346. On defendant's appeal in an action for wrongful death, where the lower court erroneously divided the verdict between the widow and minor children and their attorneys, the court of appeals will protect the rights of the minors, set aside the judgment, and enter judgment in accordance with the verdict though the error did not affect defendant. In such case defendant not entitled to costs, where he did not raise the objection in the lower court. Shippers Compress & Warehouse Co. v. Davidson Co. [Tex. Civ. App.] 80 S. W. 1032. The court of appeals has power, on appeal from a judgment in an equitable proceeding, to decide the case on its merits and finally dispose of it. Appeal from dissolution of temporary injunction in suit for trespass. State v. Douglass [Mo. App.] 83 S. W. 87. Where new trial was granted on the erroneous con-

turned,[67] or the party may be required as a condition of affirmance to cure the error by remittitur,[68] and this is the usual practice in correcting an excessive recovery,[69] as where the judgment includes damages established by incompetent evidence, which can be remitted by plaintiff.[70] If it clearly appears that no different

clusion that the evidence was against the findings there should be remand with directions to enter final judgment unless a motion in arrest or non obstante shall be made and sustained. Philadelphia Underwriters' Ins. Co. of North America v. Bigelow [Fla.] 37 So. 210. In Illinois in mandamus the judgment of the appellate court holding that the writ should issue and remanding the cause with orders that its issue should also in terms award the writ, and on further appeal to the supreme court that court will on affirming the judgment enter final judgment awarding the writ and remand the cause with orders to issue it. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393. Where the defendant duly excepted to the granting of an extra allowance, the appellate court may modify the judgment by deducting such allowance. Keuhner v. Metropolitan St. R. Co., 88 N. Y. S. 1055. Where plaintiff appeals from a judgment only in so far as it is unfavorable to him and the unfavorable portion, though unauthorized cannot be eliminated without prejudice to defendant, reversal entire and not modification is necessary. Electric Boat Co. v. Howey, 89 N. Y. S. 210. Where a judgment of the municipal court in replevin erroneously awarded possession it may be modified on appeal by striking out such provision. Levy v. Hohweisner, 91 N. Y. S. 552. Decree dismissing, without prejudice, a bill in equity for specific performance of contract, affirmed with leave to apply to lower court for leave to amend, in view of fact that equities deserving of protection would probably be barred in any other proceeding, decree of affirmance to be made absolute in case complainants did not before mandate went down, elect to apply for such leave. Johnson v. Elkins, 23 App. D. C. 486. Decree modified so as to correct defect in form in failing to adjudge in terms that defendant should pay sum found to be due to complainant, or that complainant should recover it, and affirmed as modified. Eclipse Bicycle Co. v. Farrow, 23 App. D. C. 411.

67. Under Code, § 957, giving court power to render such judgment as shall appear to it ought to be rendered. On reversal of judgment reversing proper order of corporation commission. North Carolina Corp. Com. v. Atlantic Coast Line R. Co. [N. C.] 49 S. E. 191. The appellate court may modify the judgment below. Cox v. Burdett, 23 Pa. Super. Ct. 346; Barber v. Maden [Iowa] 102 N. W. 120. Judgment for more than one penalty will be modified. In re Transfer Penalty Cases, 92 N. Y. S. 322. Judgment for nominal damages cannot be increased to a substantial sum though the proof is clear. Dixon v. James [N. Y.] 73 N. E. 673. The appellate division, on appeal from an interlocutory judgment cannot reverse a finding of fact contrary to that of the trial court, and modify the interlocutory judgment in accordance therewith, though it has power to reverse a finding of fact and order a new trial. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. [N. Y.] 73 N. E. 48. Where it is not possible that the facts will be otherwise on a retrial and sufficient is before the court to advise it, the judgment should be modified and affirmed. Heerwagen v. Crosstown St. R. Co. of Buffalo [N. Y.] 71 N. E. 729.

68. Where the amount of damages awarded evinces passion, prejudice or caprice, the appellate court may require a remittitur as a condition of affirmance. Action for personal injuries. Alabama G. S. R. Co. v. Roberts [Tenn.] 82 S. W. 314. In an action for personal injuries any error in permitting a recovery for items of expenditure alleged but not proved is curable on appeal by remittitur of the amount claimed therefor. Medical attendance. Brown v. St. Louis Transit Co. [Mo. App.] 83 S. W. 310. Judgment affirmed on condition that plaintiff write off attorney's fees, not recoverable because no notice of intent to sue therefor was given. Pritchard v. McCrary [Ga.] 50 S. E. 366. Judgment overruling motion for new trial affirmed on condition that plaintiff would voluntarily write off the recovery of attorney's fees, there being no evidence authorizing their recovery. Minnesota Lumber Co. v. Hobbs & Livingston [Ga.] 49 S. E. 783. Where evidence demanded finding for plaintiffs of five-sixths undivided interest in land, and only effect of sending case back for new trial would be to prolong litigation as to remaining one-sixth, held that judgment would be affirmed provided plaintiff would write off from verdict directed in their favor a one-sixth undivided interest in the land and one-sixth of the amount found by the jury in their favor as mesne profits, but otherwise it would be reversed. Georgia Iron & Coal Co. v. Allison [Ga.] 49 S. E. 618. On appeal by plaintiff from a judgment for insufficient damages, in a case where the justice might with propriety have awarded a larger sum, affirmance will be conditioned on defendant's waiving costs on appeal. Wappus v. Donelly, 91 N. Y. S. 381. Where affirmance is made notwithstanding error involving a trivial sum, appellee's costs will be diminished to the extent of the error. Village of Morgan Park v. Knopf, 111 Ill. App. 571.

69. Wagner v. Ellis [Miss.] 37 So. 959.

70. McDonald v. Smith [Mich.] 102 N. W. 668; Herzog v. Palatine Ins. Co. [Wash.] 79 P. 287. In Maryland plaintiff may release excess of damages over that laid in the declaration and the court of appeals may enter judgment accordingly. Finch v. Mishler [Md.] 59 A. 1009. An error in the admission of evidence which would merely have affected the amount of recovery may be cured by remittitur. Chicago City R. Co. v. Miller, 111 Ill. App. 446. Remittiturs are allowable in the court of appeals of Illinois in actions ex

result could be reached, judgment absolute will follow the reversal,[71] or the case may be reversed with specific directions to the court below as to its corrective action.[72] The court will sometimes suggest amendments to avoid needless litiga-

delicto to such sum as would seem not excessive damages. Chicago City R. Co. v. Gemmill [Ill.] 71 N. E. 43. Where the option is given plaintiff to take a judgment for a less sum than that awarded by the jury and avoid a new trial, the sum should be placed as low as an impartial jury would likely award, and where the same option is given defendant, the sum should be placed as high as an impartial jury would be likely to award under the evidence. Heimlich v. Tabor [Wis.] 102 N. W. 10; Rueping v. Chicago & N. W. R. Co. [Wis.] 101 N. W. 710. Physicians' services improperly included in judgment for infant. Judgment affirmed on condition of striking out amount thereof. Koehler v. Interurban St. R. Co., 88 N. Y. S. 1056. Remittitur and division of costs awarded where appellee was entitled to recover in part. Govern v. Russ [Iowa] 100 N. W. 325; Childs v. Swift, 91 N. Y. S. 768. Damages included for which recovery could not be had in the action. Dundon v. Interurban St. R. Co., 87 N. Y. S. 452. An affirmance may be conditioned on the remittitur of excessive or illegal sums awarded or on consent that the judgment be modified by striking out the objectionable relief. Teasley v. Bradley [Ga.] 47 S. E. 925.

71. Fatal objection to plaintiff's right to maintain action. Denton v. Bennett, 92 N. Y. S. 522; Munch v. New York, 93 N. Y. S. 509. A summons may be held void and quashed and the action dismissed for error in refusing to quash the summons. M. Fisher Sons & Co. v. Crowley [W. Va.] 50 S. E. 422. Judgment for defendant, after his admission of liability for a certain sum in his answer will be reversed and judgment entered for the admitted amount. Rose v. Florence Harness Co. [S. C.] 50 S. E. 556. Where an agreed state of facts, adopted by the trial court as the basis of its findings and spread upon the record, includes all the facts essential to a determination of the controversy, it will be treated as a special verdict upon which the court of review will render the same judgment that the trial court ought to have rendered. National Bank of New Jersey v. Berrall [N. J. Law] 58 A. 189. Where a special verdict is taken and decision of motion for nonsuit reserved, the appellate division by express provision of the code may direct such judgment on the special verdict as the law requires. Code Civ. Proc. § 1187. Sutherland v. St. Lawrence County, 93 N. Y. S. 958. Where counsel for defense stated that no new trial was desired and if a reversal could not be had without a new trial, defendant would waive error, held that, as a new trial would be necessary the error was waived and judgment affirmed. Strong v. Weber [Mich.] 102 N. W. 991. When all the facts are before the appellate court, the case will not be remanded because of an error in the charge, but will be finally disposed of. City of Shreveport v. Youree [La.] 38 So. 135.

72. A decree may be reversed with directions to recommit when based on a report so complicated by the exceptions as to be incorrigible without restating an account. Clark v. Hendricks Co. [W. Va.] 49 S. E. 455. On a certification from the court of appeals, the supreme court may in its discretion remand direct to the district court to admit the raising of important questions. Scovell v. St. Louis S. W. R. Co. [La.] 38 So. 582. On reversal of a dismissal of the complaint on the merits, the court may direct that necessary parties be joined. Bunn & Trawick v. England [Ga.] 50 S. E. 914. A bill wholly without equity will be remanded with directions to dismiss even when not objected to for that reason. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. If judgment is based on an unintelligible or ambiguous instrument there may be a remand with leave to amend. S. D. Moody & Co. v. Spotorno [La.] 36 So. 836. Where suit was upon three items of account, upon the first of which it was held that plaintiff was entitled to recover and upon the other two that he was not, and it was possible, by reason of admissions in appellant's brief as to how the verdict was made up, to eliminate the improper items from the verdict, held that the case would be remanded to the lower court with directions to vacate the judgment there rendered and enter a new one for the amount for which it was held that plaintiff was entitled to recover, reforming the verdict if necessary. Armour & Co. v. Gundersheimer, 23 App. D. C. 210. Where the uncontroverted evidence shows that the case was wrongly decided on a question of fact, the case will not be reversed but remanded with directions. State v. Merchant [Tex. Civ. App.] 85 S. W. 483. If it clearly appears that the evidence does not support the verdict and that a new trial will not change the result, the appellate court will reverse the judgment and remand the case with direction to enter judgment for the adverse party. Ruemmeli-Braun Co. v. Cahill [Okl.] 79 P. 260. On reversal of a judgment non obstante veredicto the court will order judgment on the verdict. Highlands v. Philadelphia & R. R. Co. [Pa.] 58 A. 560. Where the error extends only to the entry of the judgment, reversal will be merely with directions to properly enter the judgment. Gage v. People, 213 Ill. 410, 72 N. E. 1084; Id. 213 Ill. 457, 72 N. E. 1099. Where judgment is rendered upon a materially erroneous statement of account, it will be reversed and the cause remanded with directions to recommit it to a commissioner for a restatement in accordance with the principles announced by the appellate court. Lewis v. Prichard [W. Va.] 50 S. E. 743. Upon the filing by defendant of a plea of prescription, the case will be remanded for trial of that plea. Myers v. Lansing [La.] 38 So. 85. On reversal in an action on a judgment because the judgment sued on has been reversed, the case will be remanded to await final judgment in the other case. Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 444.

tion or error.[73] The power to make final determination is one to be exercised with great caution,[74] and will not be exercised where a retrial may cast new light on the case,[75] and rarely where the appeal is from a judgment not finally disposing of the merits.[76] Remand for further proceedings may be made without decision where necessary to justice.[77] If, by lapse of time, the lower court has lost its power to issue writs of possession in condemnation proceedings, the supreme court will issue them or remand the cause to the court below for that purpose.[78]

(§ 15) *D. Findings, conclusions and opinions on which decision is predicated.*[79]—The purpose of an opinion being to explain and perpetuate the rules of law decided, a written opinion may be dispensed with on affirming a fact case.[80] A mere reference in the opinion to a legal act will not be stricken out on the ground that it might intimate the illegality of the act and thus do harm.[81]

(§ 15) *E. Modifying or relieving from appellate decree.*[82]—An error of the clerk of the appellate court in adding an extra allowance to the judgment in a case where such allowance was not proper is clerical and may be corrected, though

73. Dekle v. Barkley [Fla.] 37 So. 581.

74. Final determination can be made in the appeal court only where the evidence is such that the court can definitely determine the rights of the parties. Avery Mfg. Co. v. Smith [N. D.] 103 N. W. 410. Judgment reversing referee's report had no opinion and hence the grounds of decision and some of the facts were uncertain and doubtful. Horn & Brannen Mfg. Co. v. Steelman, 24 Pa. Super. Ct. 126. Where the evidence is such that a jury trial is appropriate final judgment cannot be rendered for plaintiff on reversal, though it was error to direct a verdict for defendant. Bass v. Rublee [Vt.] 57 A. 965. No final judgment can be rendered on appeal on a demurrer to the evidence where there is no joinder in demurrer in the record. Id. A cause will be remanded when it appears from the record that plaintiff may have a cause of action and to reverse without remanding might produce complications. Durham v. Stubbings, 111 Ill. App. 10.

75. Final judgment on reversal will be rendered only where the evidence is so conclusive that there is no issue of fact. Eastham v. Hunter [Tex.] 86 S. W. 323. Though the supreme court is authorized in certain cases to render such judgment as the lower court should have rendered if jurisdiction is purely appellate, it can do so only when the issue was first determined in the lower court. Hecht v. Carey [Wyo.] 78 P. 705. The court will remand on reversal for failure of proof if it appears that more light may be cast on the case on a retrial. Sauter v. Anderson, 112 Ill. App. 580. Where as a rule of practice it would be proper to remand the cause with directions to enter judgment, if such a course would be manifestly unjust, a new trial will be ordered. Where counsel mistakenly relied on a decision of the supreme court and did not offer certain evidence. Lenz v. Blake-McFall Co. [Or.] 76 P. 356. The supreme court will remand when the record does not advise it how to act justly and intelligently. Rhodes v. Cooper [La.] 37 So. 527.

76. Though the order below was not final, the court will if the whole matter is in the record and the nature of the case permits, finally dispose of the controversy. Harriman v. Northern Securities Co., 25 S. Ct. 493. On appeal from the dissolution of a temporary injunction, the court of appeals has no power to enter final judgment (State v. Smith [Mo.] 86 S. W. 867), and if it shall do so certiorari will issue from the supreme court to vacate it. (Id.)

77. In Maryland where it appears that substantial merits will not be determined by affirmance or reversal, the cause may be remanded without decision for further proceedings. Code art. 5, § 36. Facts unsettled in decree appealed from. Carlin v. Harris [Md.] 59 A. 122. Where the decision on questions of fact in proceedings for the probate of a will is not free from doubt and the result reached below is not entirely satisfactory, the appellate division will send the case to the trial term for a jury trial. In re Warnock's Will, 92 N. Y. S. 643. Ordinarily a judgment for defendant will be affirmed notwithstanding errors at the trial, if it appears that a demurrer to the complaint should have been sustained; but where it appears from the evidence that the right of the matter was not decided and the complaint is amendable, remand will be made for that purpose. Town of Greendale v. Suit [Ind.] 71 N. E. 658. The court will not proceed to inquire whether there was error in finding in favor of certain defendants where the interest of a deceased defendant was not adjudicated as against his personal representative, and the substitution of such representative will still have to be had in the trial court. Wilkinson v. Vordermark [Ind.] 70 N. E. 538. Remand where evidence shows action barred in part but which part is not certain because of evidence regarded as immaterial. Paine v. Dodds [N. D.] 103 N. W. 931. Habeas corpus for child. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler [La.] 38 So. 464.

78. An appeal from condemnation proceedings. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

79. See 3 C. L. 294.

80. Delaune v. Beaumont Irr. Co. [Tex. Civ. App.] 85 S. W. 438.

81. Weir v. Jones [Miss.] 37 So. 128.

82. See 3 C. L. 295.

the motion to correct was not made within 30 days after judgment.[83] A petition to the appellate court for a reversal because, since the judgment, the claim which was the basis of it had been proved in bankruptcy and the debtor discharged, must show the date of the petition in bankruptcy.[84] An appellate decree may be vacated and the cause sent back for the introduction of further testimony where the pleadings are ambiguous and a party has been misled to his prejudice by failing to offer such testimony.[85] Appellate judgment taxing costs cannot be stayed below.[86] The Washington supreme court has jurisdiction to correct its judgment at any time during the term at which it was entered.[87]

(§ 15) *F. Mandate and retrial.*[88]—The mandate is usually withheld for a time fixed by the rules to admit of application for reargument,[89] at the expiration of which time it is, on payment of costs,[90] sent down and filed in the court below,[91] the remittitur transferring jurisdiction to the lower court.[92] It is conclusive upon the court below,[93] and mandamus lies to enforce its commands.[94] A general reversal

83. Hall v. Dineen [Ky.] 87 S. W. 275.
84. House v. Johnson [Colo.] 76 P. 743.
85. McPhee v. Kelsay [Or.] 78 P. 224.
86. Dugue v. Levy [La.] 38 So. 410.
87. Port Angeles Pac. R. Co. v. Cooke [Wash.] 80 P. 305. Appellant will not be permitted to seek a modification as to matters not challenged in his briefs when defeated in his attempt to secure a reversal. Batty v. Hastings [Neb.] 95 N. W. 866.
88. See 3 C. L. 295.
89. In Georgia must be forwarded as soon as practicable after the expiration of ten days from the supreme court's approval of the minutes containing the judgment, unless otherwise ordered. Rule 35, as amended, 108 Ga. vi, 36 S. E. v. Seaboard Air Line Ry. v. Jones [Ga.] 47 S. E. 320. Whether it shall be forwarded earlier is a question addressed to the discretion of the court. Id.
90. When a supplemental affidavit on application for mandate without payment of costs admits that applicant has just received more than $1,000 in settlement of the case, the application will be denied. Texas Cent. Ry. Co. v. Pledger [Tex. Civ. App.] 85 S. W. 470. It will be presumed that failure to file remittitur for four months after the judgment was sent down was because the filing fee had not been paid or for some other reason. Mabb v. Stewart [Cal.] 77 P. 402.
91. Good practice requires that the remittitur be entered upon the minutes of the trial court, but such entry is not necessary to restore its jurisdiction and control over the case. Atlanta, etc., Ry. Co. v. Wilson [Ga.] 47 S. E. 366. The entering of motions by appellee after the filing in open court of the mandate on reversal constitutes a waiver of the statutory notice of the filing of the motion. Crigler & Crigler v. Ford [Ky.] 82 S. W. 599. Where neither party files the mandate on reversal and remand within two years, the action is deemed abandoned. Marks v. Metzger Linseed Oil Co., 113 Ill. App. 475.
92. After a judgment of the supreme court has been pronounced and entered upon its minutes, and the remittitur issued and transmitted to the trial court, and there received the supreme court loses jurisdiction over the case, and can make no further order which will alter or change the judgment pronounced (Seaboard Air Line Ry. v. Jones [Ga.] 47 S. E. 320), except where the remittitur has been transmitted as the result of a mistake, irregularity, inadvertence, fraud, or the like (Id.). Hence a remittitur regularly issued and transmitted in accordance with the deliberate order and judgment of the court cannot be recalled after it has been filed in the office of the clerk of the trial court. Id. The effect of the mandate when it goes down is to remove the case from the supreme court and it is then too late to apply for correction. Monahan v. Monahan [Vt.] 59 A. 176. After the mandate has gone down the supreme court will not entertain a motion that the case be brought forward from the docket of the previous term, and the entry therein made affirming the decree and remanding the case stricken off. Id.
93. Where the judgment of the trial court has been affirmed by the supreme court with direction to amend it in a designated way, and that the costs incident to the writ of error be taxed against the prevailing party in the court below, an order formally making the judgment of the supreme court that of the trial court is not an indispensable prerequisite to the amendment by the trial court. Rusk v. Hill [Ga.] 49 S. E. 261. The amended judgment of the trial court is not the place in which to tax the costs of the writ of error in accordance with the direction of the supreme court. Id. When the decision on appeal settled all questions, leaving nothing to be done but the calculation of interest and the rendition of judgment, the court need not on demand refer the case to a commissioner. Laughlin's Ex'x v. Boughner [Ky.] 84 S. W. 300. Where a judgment is reversed on defendant's appeal and the cause remanded with directions to set aside all orders and decrees and dismiss the cause, a judgment refusing to modify a decree in the same matter, from which plaintiff appeals, must be reversed as a matter of course. Heidbreder v. Superior Ice & Cold Storage Co. [Mo.] 83 S. W. 469. A decree on appeal cannot be varied or examined by the lower court for any other purpose than execution. Decree of lower court held not in opposition to, or in excess of, mandate. Warner v.

leaves the case as though it had not been tried,[95] except as to matters adjudicated on the appeal,[96] and the decision of the appellate court stands as the law of the case on

Grayson, 24 App. D. C. 55. On remand the lower court is bound by the decree of the appellate court, and must carry it into effect according to the mandate. State v. Douglass [Mo. App.] 83 S. W. 87. It cannot vary or examine it for any other purpose than execution. Where, in suit for trespass, judgment dissolving temporary injunction, directing that earnings in hands of receiver be paid to defendant, and that receiver be discharged, was reversed on appeal, and remanded with directions to enter judgment for plaintiff, lower court had no authority to set case for trial on ground that plaintiff's damages had not been determined. Id. No modification of the judgment directed by the appellate tribunal can be made by the trial court. Where a trust as to real estate was declared void and judgment was that it should go to the heir, the trial court had no jurisdiction to modify by marshalling assets so as to impose on such realty a proportion of the expense of administration. In re Pichoir's Estate [Cal.] 80 P. 512. No provision can be engrafted upon it nor can any be taken from it. Id. A technical compliance with the mandate of the reviewing court is not required. Where the reviewing court ordered restitution of a fund in controversy to the prevailing party, the district court can permit one not a party to intervene and show that a portion had been transferred to him during the litigation. Hargis v. Robinson [Kan.] 79 P. 119. After a mandate of "bill dismissed with costs" has been transmitted, the court below has no power to stay judgment and execution. Nothing remains after such a mandate is received except to enforce it according to its terms. Whitney v. Johnston [Me.] 58 A. 1027. Where the mandate after affirmance directs the court to take such further proceedings as right and justice and the laws require, the court below has power to correct a clerical error in computing the amount of the judgment. Ex parte Marks [C. C. A.] 136 F. 168. A remand with instructions limits the functions of the trial court strictly to the execution of the mandate. Ludington v. Patton [Wis.] 99 N. W. 614. Where a case is returned with a mandate defining and limiting the duty of the trial court, such mandate is controlling and prevents the opening up of the case anew. Fair Haven & W. R. Co. v. New Haven [Conn.] 60 A. 651. A judgment not "in accordance" with the mandate of the appellate court on a former appeal will be reversed. Rev. St. Wis., 1898, § 3071. Burnham v. Chase [Wis.] 102 N. W. 940. Remand with directions to proceed in conformity with the appeal court's opinion requires a new trial or not, dependent on whether the opinion determines the whole controversy. In re Maher's Estate [Ill.] 71 N. E. 438.

94. Mandamus is the proper remedy to compel compliance with the mandate of the appellate court. Order placing case on docket for further hearing where mandate required judgment to be entered for plaintiff, held not reviewable by appeal or error. State v. Douglass [Mo. App.] 83 S. W. 87.

95. United States Fidelity & Guaranty Co. v. Board of Education of Somerset [Ky.] 86 S. W. 1120. Judgment on the pleadings may be ordered by the trial court on return of the mandate reversing the judgment and ordering a new trial, where the pleadings present such a state of conceded facts as entitle a party to judgment. Dodge v. United States [C. C. A.] 131 F. 849. Where the question of jurisdiction depends upon the facts, the setting aside of the verdict by the supreme court on account of an erroneous instruction in regard to such facts leaves the case still pending in the lower court. Instruction in regard to legal residence of defendant. Decision does not operate as dismissal. Atlanta, etc., R. Co. v. Wilson [Ga.] 47 S. E. 366. Upon return of the mandate of reversal, the verdict and judgment are vacated and cease to be longer of force. Id. Reversal for an error in instruction as to measure of damages requires a retrial of all issues. Heard v. Ewan [Ark.] 85 S. W. 240. Reversal of a judgment and of a refusal of a new trial opens up the whole case. Meadows v. Osterkamp [S. D.] 103 N. W. 643. A general order for a new trial without any limitations or restrictions entitles the parties to a retrial of all the issues. Corporation of Members of Church of Jesus Christ of Latter Day Saints v. Watson [Utah] 76 P. 706.

96. Unless the new evidence presents a substantially different state of facts to which the law as announced was not applied. Smith v. Day, 136 F. 964. Determination of the appellate court is binding on the parties on another trial. Kent v. Williams [Cal.] 79 P. 527. Judgment entered below in accordance with the law of the case is proper. Gutierrez v. Territory [N. M.] 79 P. 299. The decision of the supreme court on appeal from an order dismissing a bill on demurrer, reversing the order, establishes the bill's sufficiency and on a second trial the only question is whether the evidence sustains the bill. Bixler v. Summerfield [Ill.] 70 N. E. 1059. In Nebraska where a decree in equity is reversed and remanded generally without instructions, the lower court exercises its discretion in the further disposition of the case consistent with the law of the case as expressed in the opinion. Hoagland v. Stewart [Neb.] 100 N. W. 133. Where a commissioner's opinion is not made official, the law of the case is derived from the judgment of the court and the questions necessarily determined thereby. Id. The reversal of an order appointing commissioners to assess damages for change of street grade on the ground that before such an order could be made the issues raised by an amended answer must be tried, authorizes the trial of such issues, though it does not in terms direct it. In re Borup, 92 N. Y. S. 624. Instruction on a retrial held in accordance with the opinion of the supreme court on appeal, though "sole" was substituted for "proximate" cause. Gila Val., etc., R. Co. v. Lyon [Ariz.] 80 P. 337. A decision on appeal that the five-year statute of limitations

retrial[97] in so far as the evidence is in legal effect the same,[98] though the holding was not contained in the mandate issued to the trial court.[99] The entry in the lower court of the rescript from the full court showing that the decree reviewed has been affirmed is not a decree, but only calls for the entry of the proper decree.[1] Plaintiff may discontinue,[2] amendment of pleadings may be allowed,[3] new parties brought in,[4] and additional evidence adduced on the retrial.[5] Appearance to the appeal dispenses

does not apply so as to bar an action on a note is not an adjudication that limitations could not again be pleaded in the action on any ground whatsoever, so as to preclude defendant from setting up limitations to a reply alleging fraud in the procurement of the money on the note and that therefore defendant's discharge in bankruptcy was not a release therefrom. Louisville Banking Co. v. Buchanan [Ky.] 80 S. W. 193. Instructions on retrial based on holdings on the prior appeal are proper. James v. E. G. Lyons Co. [Cal.] 81 P. 275. A decree being reversed and the cause remanded solely for a further accounting between the parties in accordance with the opinion, such opinion was the law of the case on retrial and consideration of questions decided was precluded. Hanrick v. Hanrick [Tex. Civ. App.] 81 S. W. 795. Where a dismissal is reversed and remanded to take an account, the plaintiff's right to recover is no longer open to question. Nutt v. Knut [Miss.] 36 So. 689. Under B. & C. Comp. St. §§ 406, 555, providing that an appeal from a decree in equity shall be tried de novo and final decree entered regardless of findings or conclusions of the trial court, the rights of the parties and questions adjudicated must in subsequent litigation be ascertained from the appellate decree. Gentry v. Pacific Live Stock Co. [Or.] 77 P. 115. The findings and conclusions of the trial court form no part of the appellate decree unless made a part of it. Id.

97. Supreme Court of Honor v. Tracy [Neb.] 101 N. W. 1021; John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050; Curtis v. Zutavern [Neb.] 102 N. W. 77. Nonsuit of plaintiff thereby sustained. Fulton v. Grieb Rubber Co. [N. J. Law] 60 A. 37.

98. Seeton v. Dunbarton [N. H.] 59 A. 944. That there is evidence of negligence to go to jury. Zimmer v. Fox River Val. Elec. R. Co. [Wis.] 101 N. W. 1099. The rule applies only where the facts remain the same. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290. A holding that plaintiff's evidence entitled him to go to the jury is not conclusive that he will be so entitled on retrial, that question depending on the evidence then introduced. Hartley v. Chicago & A. R. Co., 214 Ill. 78, 73 N. E. 398.

99. Empire State-Idaho Min. & Developing Co. v. Hanley [C. C. A.] 136 F. 99.

1. Tyndale v. Stanwood [Mass.] 73 N. E. 540. Where a final decree was not entered in the lower court after decision on review, the supreme judicial court will order the entry of such decree as the rescript calls for to complete the record. Id.

2. After receipt of the remittitur by the court below the plaintiff in term time or vacation may dismiss his suit. Where judgment for plaintiff reversed. Atlanta, etc., R. Co. v. Wilson [Ga.] 47 S. E. 366.

3. Dinsmoor v. Rowse [Ill.] 71 N. E. 1003; Blue v. Campbell [W. Va.] 49 S. E. 909. Amendment held properly allowed in lower court after petition had been held defective by supreme court on general demurrer, there being enough to amend by. Rome Furnace Co. v. Patterson [Ga.] 50 S. E. 928. Supplemental affidavits of defense may be filed on prompt application. Kyler v. Christman, 25 Pa. Super. Ct. 74. Ambiguous statement may be amended. Brown v. Kirk, 26 Pa. Super. Ct. 157. Where defendant as the record stands after reversal is bound to be defeated and be mulcted in costs he should be allowed to amend only on payment of costs then accrued. Klinker v. Guggenheimer, 92 N. Y. S. 797. A garnishee can add good grounds to those held insufficient on motion in arrest of judgment. Union Compress Co. v. A. Leffler & Son [Ga.] 50 S. E. 483. After the case has been placed on the day calendar for retrial, defendant will not be permitted to amend by denying a fact admitted by his original answer. Treadwell v. Clark, 92 N. Y. S. 166. Where the supreme court of the United States on error to a state court reverses and remands a case generally, the practice of the state court as to allowing further amendment prevails. Gadsden v. Thrush [Neb.] 99 N. W. 835. A judgment sustaining a demurrer having been affirmed, with direction that plaintiff be permitted to cure the defect as to misjoinder of causes of action and parties defendant, and an amendment for that purpose having been presented and allowed, the case remains pending in the lower court, which thereafter has jurisdiction to require the strengthening of a bond given under an order appointing a receiver. Cordele Ice Co. v. Sims [Ga.] 48 S. E. 12. Upon the reversal of a judgment overruling a demurrer to the declaration and the return of the remittitur to the lower court, the plaintiff has the right to amend. City of Rome v. Sudduth [Ga.] 49 S. E. 300; Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 930. The rule is otherwise where a judgment sustaining a demurrer is sustained. since in such case there is nothing in the lower court to amend. City of Rome v. Sudduth [Ga.] 49 S. E. 300; Harp v. Southern R. Co. [Ga.] 47 S. E. 206. A suit may still be amended into one at law after docketing a rescript, "Bill dismissed." It is not a final disposition. Crossman v. Griggs [Mass.] 74 N. E. 358.

4. In equity persons not parties to the suit but having an interest therein may be made parties by an amended petition upon the cause being remanded. Bolsen v. Barber Asphalt Pav. Co. [Ky.] 82 S. W. 972.

5. A ruling that the evidence was not sufficient to support the decree calls for a new trial with privilege to make additional proof if possible. In re Maher's Estate [Ill.]

with process below.[6] Restitution on reversal of a judgment can be compelled only from parties to the record, their assignees or personal representatives, and only to the extent that such parties have actually profited by the erroneous judgment.[7] The dismissal of an appeal from an order affirms it but gives it no more vitality than it already had.[8] After affirmance the judgment may be opened below for matter of defense arising after judgment,[9] or to correct clerical mistakes, but not otherwise.[10]

§ 16. *Rehearing and relief thereon.*[11]—Though appellate courts receive petitions for rehearing with reluctance, there is no aversion to the reception of such a motion that calls for any apology to the court in a case where counsel believes his client entitled to a rehearing.[12] In the absence of a statute authorizing applications for rehearings, whether such applications will be entertained, and, if entertained, what disposition shall be made of them, are questions addressed entirely to the sound discretion of the court.[13] No such application will be entertained in any case after the remittitur has been forwarded to the clerk of the trial court, even though presented during the term, and before the remittitur has reached the office of such clerk.[14] A motion based on points not urged upon the hearing,[15] or containing merely a reargument of the same points made on the submission,[16] will not be considered, nor as a rule will amendments of the record be allowed.[17] A rehearing will be granted on motion of the losing party only when it appears that the court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority, and which would require a different judgment from that rendered.[18] The supreme court will, during a term at which a judgment is rendered, and before the remittitur has been forwarded to the clerk of the trial court, when dissatisfied with the judgment, of its own

71 N. E. 438; Lauza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488. Upon the reversal and remanding of a cause, the trial court has power to re-refer the cause to a master to take further testimony. Assets Realization Co. v. Wightman, 105 Ill. App. 618.

6. An appeal is an appearance and on reversal vests jurisdiction in the trial court. Rumell v. Tampa [Fla.] 37 So. 563. Where a guardian ad litem, appointed for a minor on whom a summons had been served, answered and prosecuted an appeal for her, no further process was necessary on return of the case to the circuit court. Norman v. Central Kentucky Asylum [Ky.] 80 S. W. 781.

7. Schnabel v. Waggener [Ky.] 80 S. W. 1125.

8. Brady v. Onffroy [Wash.] 79 P. 1004.

9. Camden Interstate Ry. Co. v. Lee [Ky.] 84 S. W. 332. The dismissal of an appeal from a void order does not impart validity to it. Sullivan v. Gage [Cal.] 79 P. 537. Affirmance was not based on such errors and they were not called to the attention of the reviewing court. Edinburgh Lombard Inv. Co. v. Walsh [Kan.] 79 P. 688. This is not changing the judgment affirmed. Id.

10. After affirmance on appeal, the trial court has no power to alter or modify the judgment. State v. District Court [Mont.] 79 P. 410.

11. See 3 C. L. 298.

12. Pietsch v. Milbrath [Wis.] 102 N. W. 342.

13, 14. Seaboard Air Line R. v. Jones [Ga.] 47 S. E. 320.

15. Rehearing will not be granted on a point not made or referred to in the original briefs. Rules 22 & 23, 55 N. E. vi. Cleveland, etc., R. Co. v. Lindsey [Ind. App.] 70 N. E. 998.

16. City of Chicago v. Cicero [Ill.] 71 N. E. 356; Stoll v. Pearl [Wis.] 100 N. W. 1054. A rehearing will be granted to consider assignments which the court refused to consider on the submission because of a mutual ignorance on the part of counsel and the court of a statute changing the procedure in such cases. Finkbinder v. Ernst [Mich.] 100 N. W. 180.

17. The court on rehearing will not consider an additional record filed by permission but not brought to the attention of the court and not abstracted. Eustace v. People [Ill.] 72 N. E. 1089. The circuit court of appeals will on rehearing permit the amendment of a petition for removal by supplying an averment of citizenship requisite to give jurisdiction, where it appears that the omission was inadvertent and it is shown by stipulation of the parties that the requisite diversity of citizenship existed. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13.

18. Seaboard Air Line R. v. Jones [Ga.] 47 S. E. 320. A decision of the court of civil appeals on a motion of plaintiff in error for judgment in his favor is a matter determined by that court within the meaning of Rev. St. 1895, art. 1030, allowing a motion for a rehearing as to any matter determined by such court. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 661.

motion, order a rehearing of the case.[19] The mere fact that the justices are evenly divided in opinion as to what should be the judgment in a case, as a result of which the judgment of the lower court is affirmed by operation of law, is no reason for granting a rehearing.[20] The grounds should appear on the face of the petition.[21] Under a rule of court providing that the time for serving a petition for a rehearing on the adverse party shall not be extended, a petition not served will be disregarded.[22] Rehearing may be refused by correcting error.[23] In Illinois a motion for rehearing containing any argument whatever will be stricken from the files without consideration.[24] A court will of its own motion strike from its records a motion and brief which contain personal criticisms of members of the court or of its commissioner and of his character and motives in the performance of his official duties.[25] The appellate division on reargument will overrule its prior decision where, since making it, the court of appeals has decided a similar case adversely.[26] On petition for rehearing the judgment of the appellate court may be amended so as to include a reversal of an erroneous interlocutory order and rehearing denied.[27]

§ 17. *Liability on bonds and damages or penalties for delay.*[28]—An undertaking invalid under the statute may be enforceable as a common-law obligation.[29]

A bond conditioned for the payment of condemnation money, judgment and costs found against appellant on final determination in the supreme court is good and enforceable, though the supreme court merely affirmed the judgment rendered below.[30] As against the sureties, the dismissal of the appeal operates as an affirmance.[31] Procuring the modification of a decree is a "prosecution to effect."[32]

Extent of liability.[33]—A surety on an appeal bond in a claim case, where claimant is appellant, is liable not only for costs and any damages that may be assessed for a frivolous appeal, but also for any damages that may be assessed against claimant in the event that it is determined that the claim was interposed for delay only.[34]

An appeal bond in an election contest, conditioned that appellant will perform the judgment if affirmed, renders the surety simply liable for the surrender of the office if the judgment is affirmed.[35]

19, 20. Seaboard Air Line R. v. Jones [Ga.] 47 S. E. 320. The provision of the constitution of Virginia requiring rehearings before the full bench in case of a division of opinion refers only to cases involving the constitution. Funkhouser v. Spahr [Va.] 46 S. E. 378.

21. Rehearing should not be asked as to matters which have been determined and conceded by counsel to be supported by authority. Collins v. Metropolitan Life Ins. Co. [Mont.] 80 P. 1092.

22. Brooks v. Union Trust & Realty Co. [Cal.] 79 P. 843.

23. Reducing verdict. Schoppel v. Daly [La.] 36 So. 322.

24. Rule 30. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 477.

25. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329; Stoll v. Pearl [Wis.] 100 N. W. 1054.

26. Walsh v. Hanan, 87 N. Y. S. 930.

27. Indian River Mfg. Co. v. Wooten [Fla.] 37 So. 731.

28. See 3 C. L. 299. Necessity and sufficiency of security on appeal is treated ante, § 6 (G).

29. Gein v. Little, 89 N. Y. S. 488. Where the bond is unnecessary for perfecting the appeal and ineffectual as a stay and no other consideration appears, it is unenforceable. Mossein v. Empire State Surety Co., 89 N. Y. S. 843. Though given in pursuance of an invalid statute, if the appellant has obtained and the appellee lost rights under it. United States Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652. A bond conditioned for the payment of rents and profits and under which the obligor retains possession may be given effect as a contract, though invalid as a statutory bond. Escritt v. Michaleson [Neb.] 103 N. W. 300.

30. Maloney v. Johnson McLean Co. [Neb.] 100 N. W. 423.

31. Jewett v. Shoemaker [Iowa] 100 N. W. 531.

32. Crane v. Buckley [C. C. A.] 138 F. 22.

33. See 3 C. L. 299.

34. McMurria v. Powell Bros. & Chason [Ga.] 48 S. E. 354.

35. Galloway v. Bradburn [Ky.] 82 S. W. 1013.

The question as to what damages were within the contemplation of the parties when a supersedeas bond was executed is one of law for the court,[36] to be determined from the bond itself and the circumstances under which it was given.[37] The testimony of the sureties as to the nature of the damages which they understood it would cover is irrelevant.[38]

A bond given in an attempted appeal from an order awarding a writ of assistance in a mortgage foreclosure proceeding, conditioned for the payment of rent, is valid, as a contract, where the obligor has, by reason of the bond, retained possession of the premises pending the appeal.[39] Where the bond sued on recites the judgment, it need not be introduced in evidence in an action thereon.[40]

Rights and liabilities of sureties.[41]—Sureties are entitled to appear and interpose any defense which they may have to the rendition of a judgment against them on the bond after affirmance.[42] Though not parties to the suit, they are parties to the record on appeal and are not entitled to notice of a motion for judgment on the bond on affirmance.[43] Any defense operating to prevent the affirmance of the judgment superseded must be there urged and cannot be used to defeat recovery on the bond.[44]

Where the complaint does not allege that the undertaking was sealed, the sureties may raise the defense of want of consideration, though it is not pleaded;[45] but if, on the undertaking being produced, it appears to be sealed, the burden is on the sureties to rebut the presumption of consideration arising from the seal.[46]

A surety company which has retained the premium paid cannot dispute the authority of the officer or agent who signed the bond.[47]

Sureties whose liability has become fixed prior to an adjudication in bankruptcy as to the principal remain liable even though the judgment becomes inoperative as to him.[48]

On reversal appellant is entitled to collateral deposited with the surety.[49]

Forfeiture and enforcement.[50]—An appellate court having no jurisdiction to entertain the appeal has no jurisdiction to enter a judgment on the supersedeas bond.[51] Summary judgment may be entered against the surety on a supersedeas bond in Idaho after notice.[52]

Damages and penalties for delay.[53]—Damages will in some states be awarded where a writ of error is sued out for delay only.[54]

A statute providing for a recovery of ten per cent. damages on the amount superseded on the affirmance of a judgment for the payment of money, the collection of which has been superseded, does not apply where the only pecuniary relief afforded by the judgment was an award of the costs of the action.[55]

36, 37. Waycross Air Line R. Co. v. Offerman & W. R. Co. [Ga.] 47 S. E. 582. Damages for loss of freight held to have been within contemplation of the parties when the supersedeas bond was executed and to be covered by it. Id. Evidence held to have demanded verdict for plaintiff, and court properly directed finding against exceptions of fact to auditor's report. Id.

38. Waycross Air Line R. Co. v. Offerman & W. R. Co. [Ga.] 47 S. E. 582.

39. Escritt v. Michaleson [Neb.] 103 N. W. 300.

40. Cleveland, etc., R. Co. v. Hamilton, 105 Ill. App. 75.

41. See 3 C. L. 299.

42, 43, 44. Jewett v. Shoemaker [Iowa] 100 N. W. 531.

45, 46. Geln v. Little, 89 N. Y. S. 488.

47. Eichorn v. New Orleans, etc., R. Co. [La.] 38 So. 526.

48. Bankruptcy Act July 1, 1898, c. 541, § 16; 30 St. 550; U. S. Comp. St. 1901, p. 3428 St. Louis World Pub. Co. v. Rialto Grain & Securities Co. [Mo. App.] 83 S. W. 781.

49. Jackson v. Lawyers' Surety Co., 88 N. Y. S. 576.

50. See 3 C. L. 299.

51. Montgomery v. Montgomery [Ky.] 80 S. W. 1108.

52. Empire State-Idaho Min. & D. Co. v. Hanley [C. C. A.] 136 F. 99.

53. See Malicious Prosecution and Abuse of Process, 4 C. L. 470.

54. Where no sufficient reason appears. Motion granted. Kessler v. Hecht [Ga.] 48 S. E. 922.

55. Civ. Code, § 764. Oberdorfer v. White [Ky.] 80 S. W. 1099.

APPEARANCE.

§ 1. *General; special; what constitutes each. General appearance.*[1]—The test for determining the character of an appearance is the relief asked; the law looking to its substance rather than to its form, or the name given it by the party appearing,[2] and in a court of record the character of the appearance is to be determined by the record as it stands at the time the appearance is made.[3] An appearance for any other purpose than to question the jurisdiction of the court is general,[4] and in some states an appearance is presumed general unless otherwise specified.[5] By demurring,[6] seeking permission to file an answer,[7] moving to vacate a judgment,[8] or by making a written stipulation as to the date of trial,[9] one enters a general appearance. But the execution of an attachment bond,[10] or of an affidavit of nonresidence,[11] or the filing of a petition for removal from a state to a Federal court,[12] does not have that effect. One appearing specially must confine himself to the objections relating to the jurisdiction over his person, or his appearance will become general.[13] An amended petition reiterating the averments of the original petition and setting up a new cause of action, an answer expressly stating that it is to the original petition does not constitute an appearance to that portion of the amended petition which sets up the new cause of action.[14]

Appeal.[15]—An appeal operates as an appearance which will permit the court below, after reversal, to proceed with the case.[16]

Special appearance.[17]—The service of process being invalid, the defendant may appear specially and defeat the jurisdiction of the court.[18] In most states a special appearance is waived unless all subsequent appearances are so limited;[19]

1. See 3 C. L. 300.
2. Scott v. Mutual Reserve Fund Life Ass'n [N. C.] 50 S. E. 221.
3. It is unnecessary to make the order, plea or motion expressly state that the appearance is only for the purpose of excepting to the jurisdiction. M. Fisher, Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.
4. Scott v. Mutual Reserve Fund Life Ass'n [N. C.] 50 S. E. 221. If the relief prayed affects the merits, or the motion involves the merits, the appearance is general. Id. An unlimited or unqualified appearance is general. Savannah Grocery Co. v. Rizer [S. C.] 50 S. E. 199.
5. Larsen v. Allan Line S. S. Co. [Wash.] 80 P. 181.
6. Pruyn v. Black, 93 N. Y. S. 995; Seydel v. Corporation Liquidating Co., 88 N. Y. S. 1004; Shafer v. Fry [Ind.] 73 N. E. 698; Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513.
7. Defendant moving to vacate a default judgment upon jurisdictional grounds and asking permission to file an answer makes a general appearance. Simensen v. Simensen [N. D.] 100 N. W. 708.
8. Scott v. Mutual Reserve Fund Life Ass'n [N. C.] 50 S. E. 221.
9. A written stipulation, signed by counsel for both parties and filed in court, agreeing that the cause might be set for trial on a certain date, constitutes an unlimited appearance. Markey v. Louisiana & M. R. Co., 185 Mo. 348, 84 S. W. 61.
10. Hilton v. Consumers' Can Co. [Va.] 48 S. E. 899.
11. Dexter v. Lichliter, 24 App. D. C. 222.
12. Gebbie & Co. v. Review of Reviews Co., 134 F. 150.
13. Perrine v. Knights Templar & Masons' Life Indemnity Co. [Neb.] 101 N. W. 1017; Dexter v. Lichliter, 24 App. D. C. 222; Ray v. Trice [Fla.] 37 So. 582. Where an appellee appears generally in the supreme court, and moves to dismiss the appeal upon grounds other than those relating solely to the jurisdiction of his person, he cannot be permitted to question the sufficiency of the recorded entry of appeal to give the appellate court jurisdiction over his person. Id.
14. United States Fidelity & Guaranty Co. v. Carter, 26 Ky. L. R. 665, 82 S. W. 380.
15. See 3 C. L. 301.
16. Rumeli v. Tampa [Fla.] 37 So. 563.
17. See 3 C. L. 301.
18. Dexter v. Lichliter, 24 App. D. C. 222.
19. **Washington:** 2 Ball. Ann. Codes & St. § 4886. Hodges v. Price [Wash.] 80 P. 202; Larsen v. Allan Line S. S. Co. [Wash.] 80 P. 181. This is true, though the special appearance is preserved in the answer. Id.

but a motion made on special appearance being overruled and defendant excepting, his subsequent appearance to the merits waives none of his rights.[20] In New York a party may appear specially in an action in a manner other than as specified for a general appearance by a defendant in § 421 of the Code of Civil Procedure.[21]

§ 2. *Who may make or enter.*[22]—An appearance may be made by a duly authorized attorney[23] or by his agent,[24] and a general or special appearance by an attorney at law is presumptive evidence of his authority to so appear.[25] Appearance as a witness is not an appearance as a party.[26]

§ 3. *Effect.*[27]—A general or voluntary appearance confers jurisdiction of the person[28] and waives a lack of,[29] or any defect in,[30] the process or the service thereof.[31] In condemnation proceedings it waives any question as to the sufficiency of the publication of notice.[32] The general appearance of defendant in a state court does not operate as a waiver of his right to remove to the Federal courts.[33] A general appearance does not relate back so as to validate void proceedings theretofore had.[34]

Under a statute requiring that the answer be filed within a specified time, a special appearance for the purpose of moving to quash the service of summons does not extend the time for answering.[35] Joint debtors being sued as partners, a special appearance by one of them to have the proceedings dismissed because he was not a partner is not equivalent to a plea in abatement requiring replication and proof by plaintiff to meet it.[36] A motion to dismiss on the ground that process was not served does not amount to an appearance waiving the objection.[37]

20. Fisher, Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.

21. Cutting v. Jessmer, 91 N. Y. S. 658.

22. See 3 C. L. 302.

23. Defendants held to be properly before the court, their appearance having been entered by their attorney and they not having objected thereto. Vance v. Lane's Trustee, 26 Ky. L. R. 619, 82 S. W. 297. Where a summons was issued against "the estate of J.," not showing whether J. was dead or alive, the appearance for "the defendant" of an attorney who expressly repudiated any appearance for the trustee of J. could not confer jurisdiction to substitute the trustee as defendant or render judgment against him. McNamara v. Vanderpoel, 88 N. Y. S. 145.

24. Counsel authorizing a person not admitted to practice to appear on the return day, he cannot afterwards contend that there was no appearance. Kerr v. Walter, 93 N. Y. S. 311.

25. Cutting v. Jessmer, 91 N. Y. S. 658.

26. Where a summons issued simply against "the estate of J.," the testimony of a witness that he was a trustee of J. and was there to defend the action was not a voluntary appearance as a defendant, either in an individual or representative capacity. McNamara v. Vanderpoel, 88 N. Y. S. 145.

27. See 3 C. L. 302.

28. Giboney v. Cooper [W. Va.] 49 S. E. 939; Stamey v. Barkley [Pa.] 60 A. 991; Savannah Grocery Co. v. Rizer [S. C.] 50 S. E. 199. Waives all objections thereto. Greenwood Loan & Guarantee Ass'n v. Williams [S. C.] 51 S. E. 272; Perrine v. Knights Templar & Masons' Life Indemnity Co. [Neb.] 101 N. W. 1017; Simensen v. Simensen [N. D.] 100 N. W. 708; Shafer v. Fry [Ind.] 73 N. E. 698; Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513. Waives the right to plead to the jurisdiction. Markey v. Louisiana & M. R. Co., 185 Mo. 348, 84 S. W. 61. Under Municipal Court Act, § 311, authorizing an appeal if defendant does not appear, a defendant who has appeared does not obtain the right to appeal by afterward permitting judgment to go against him by default. Kerr v. Walter, 93 N. Y. S. 311.

29. Giboney v. Cooper & Cooper [W. Va.] 49 S. E. 939; Butman v. Butman, 213 Ill. 104, 72 N. E. 821. Where one voluntarily appeared and demurred. Whitaker v. Hughes, 14 Okl. 510, 78 P. 383.

30. Giboney v. Cooper & Cooper [W. Va.] 49 S. E. 939; Ferrell v. Camden [W. Va.] 50 S. E. 733. Technical defects in summons. Stryker v. Pendergast, 105 Ill. App. 413. Defendant appearing, accepting service in writing, and waiving the issuance of process, he cannot allege in error that he was not legally cited. Broocks v. Masterson [Tex. Civ. App.] 82 S. W. 822.

31. Seydel v. Corporation Liquidating Co., 88 N. Y. S. 1004; Martin v. Crossley, 91 N. Y. S. 712.

32. Orange County v. Ellsworth, 90 N. Y. S. 576.

33. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

34. Simensen v. Simensen [N. D.] 100 N. W. 708.

35. Mantle v. Casey [Mont.] 78 P. 591.

36. Hirsh v. Fisher [Mich.] 101 N. W. 48.

37. Hilton & Allen v. Consumers' Can Co. [Va.] 48 S. E. 899.

APPELLATE COURTS AND JURISDICTION; APPLICATION OF PAYMENTS; APPOINTMENT; APPORTIONMENT LAWS, see latest topical index.

APPRENTICES.[38]

Both at common law and under the Iowa statute, parents of a minor have no right to bind him as an apprentice except during the years of his minority.[39] Continuance in the master's service after the termination of the period for which an apprentice is bound by an indenture amounts to nothing more than a contract of employment,[40] though the provisions of the indenture as to the character of the service to be rendered, and payment and instruction, may be regarded as continuing in force in the absence of other express arrangements.[41] Hence, where an apprentice continues in the service after reaching his majority, the statute regulating the manner of terminating the relation of master and apprentice has no application.[42] Willful disobedience, if established, justifies the discharge of the apprentice or imposition of a penalty.[43] Requiring an apprentice to leave or accept a condition equivalent to a new contract of service amounts to a discharge and justifies the apprentice in leaving.[44] A provision in an agreement that one-half the apprentice reserve should be forfeited if the master deemed a discharge necessary for acts of disobedience, does not make the master the sole judge of what constitutes an act of disobedience.[45] Under the New York statutes providing remedies for breach of an indenture of apprenticeship, an action for specific performance of the indenture and for an injunction restraining service for any other than the plaintiff, will not lie.[46]

ARBITRATION AND AWARD.

§ 1. *The remedy in general.*[47]

§ 2. *The submission and agreements to submit.*[48]—No particular form of submission is necessary; it may be by parol.[49] Only those to be bound by the award need sign the submission,[50] though parties cannot by an agreement antecedent to the arising of a dispute agree to submit it so as to oust courts of all jurisdiction.[51] An agreement requiring the confirmation of a court of competent original jurisdiction is valid, though it provides that there shall be no appeal.[52] A common-law agreement to submit the validity and effect of a contract, or to

38. See 3 C. L. 303.
39. Code, § 3229. Walton v. Atchison, etc., R. Co. [Iowa] 101 N. W. 506.
40, 41. Walton v. Atchison, etc., R. Co. [Iowa] 101 N. W. 506.
42. Code, § 3241, does not apply, but master may discharge in any way he chooses, provided the discharge is justified. Walton v. Atchison, etc., R. Co. [Iowa] 101 N. W. 506.
43. Evidence held not to show willful disobedience. Bradley v. Perkins [Mich.] 101 N. W. 583. Disobedience held to justify discharge. Walton v. Atchison, etc., R. Co. [Iowa] 101 N. W. 506.
44. As where foreman told apprentice to leave, or remain 30 days beyond the period contracted for. Bradley v. Perkins [Mich.] 101 N. W. 583.
45. Bradley v. Perkins [Mich.] 101 N. W. 583.
46. Construing Rev. St. c. 8, § 29; Acts 1871, c. 934; Cr. Code Prac. §§ 927-930. Thomas v. Baird, 94 N. Y. S. 47.
47, 48. See 3 C. L. 303.
49. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.
50. Hoste v. Dalton [Mich.] 100 N. W. 750.
51. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510.
52. Hoste v. Dalton [Mich.] 100 N. W. 750.

submit all matters in dispute to arbitration, may be revoked by either party at any time before the award.[53]

Who may make.[54]—A married woman may submit to a common-law arbitration, where by statute she is given complete power to contract with relation to her own property, though excepted by the statute from those who may make a statutory submission;[55] but not with reference to real estate.[56] An agent to collect and settle a claim has no power to submit the matter to arbitration.[57] An agreement by an infant to submit to arbitration is voidable.[58]

Effect.[59]

§ 3. *The arbitrators and umpire.*[60]—The submission must be made to the persons agreed upon,[61] and upon failure of any of such persons to act, the others have no power, without the consent of both parties, to select a third person in place of person so refusing.[62] Failure of the arbitrator agreed upon in a contract to act, after submission,[63] or failure of the arbitrators to agree, refusal to act or death of a party, arbitrator or umpire, nullifies the arbitration agreement and the jurisdiction of the court attaches,[64] and in the absence of an agreement thereto, the court possesses no power to compel the parties to select other arbitrators.[65]

§ 4. *Hearing and procedure before arbitrators.*[66]—The appraisement must be made within the time named, or within a reasonable time.[67] A party may in the presence of the other deliver to the arbitrators a statement showing his contention as to how the account should be settled.[68]

§ 5. *The award; requisites, validity and effect.*[69]—The award must conform to the submission and cover all matters submitted,[70] and may be made in the

53. Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696.

54. See 3 C. L. 304.

Note: As to power of corporate officers to submit, see Clark & M. Corp. § 264. As to power of guardian ad litem, see note 97 Am. St. Rep. 1001.

55. Hoste v. Dalton [Mich.] 100 N. W. 750.

56. While under Code, § 178, a married woman may, without the joinder of her husband, sue to settle the title to her separate real estate, yet she cannot, in view of Const. art. 10, § 6, authorizing a married woman to convey real estate "with the written assent of her husband" submit the question of title to lands owned by her to arbitration. Smith v. Bruton [N. C.] 49 S. E. 64.

57. By agreement with an agent of the plaintiff to collect and settle an account for the sale of books, the matter was submitted to an attorney for arbitration. While an agent of this character is allowed some discretion in the matter of settlements, the discretion is personal and cannot be delegated to another. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782.

58. A guardian ad litem or next friend of an infant cannot bind him by submission to arbitration, even though the submission be made a rule of court. Millsaps v. Estes [N. C.] 50 S. E. 227.

59, 60. See 3 C. L. 304.

61. Werneberg v. Pittsburg, 210 Pa. 267, 59 A. 1000.

62. Where the parties to an executory agreement for the sale of goods agreed that the price to be paid for the property should be fixed by valuers nominated in the agreement, and the valuers refused to act. Elberton Hardware Co. v. Hawes [Ga.] 50 S. E. 964.

63. Where a contract of a city provided that matters in dispute should be submitted to the director of the department of public works for his determination, which should be final, and after work on the city contract was completed a dispute arose, and the director heard the testimony, but was removed from office before his decision was rendered and he refused to further act. Werneberg v. Pittsburg, 210 Pa. 267, 59 A. 1000.

64. Where arbitrators fail to agree upon an award, the plaintiff is not compelled to submit to another arbitration, but may forthwith bring his action in the courts (Perry v. Greenwich Ins. Co. [N. C.] 49 S. E. 889); but it will not be passed upon by the courts, where there is no fraud or unreasonableness on his part (Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115).

65. Where there is no agreement for resubmission, the authority may be revoked by failure of the appraisers to agree; or when an award is actually made, is subsequently set aside. Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696.

66. See 3 C. L. 304.

67. Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696.

68. Lumbard v. Holdiman, 115 Ill. App. 458.

69. See 3 C. L. 305.

70. A submission to "settle and forever dispose of all questions and controversies arising and existing between the parties," is sufficiently complied with by an award covering the matters in dispute, excepting

alternative.[71] The general rule is where a dispute is submitted by private agreement to a stated number of arbitrators, all must join in the award to give it effect.[72] The award of arbitrators in a common-law arbitration is conclusive, in the absence of such fraud or gross mistake or unfair conduct as would justify the court in setting it aside.[73] When an award has been made, signed and delivered by the arbitrators, their authority is terminated;[74] but an invalid award does not end the submission.[75] It is a general rule that a valid award operates to merge and extinguish all claims embraced in the submission and is binding upon the parties.[76]

Proof of award.—An award can only be proved by the fact itself, and in the absence of any evidence that a final award was made by the arbitrators, it will be presumed that none was made.[77]

Enforcement of award.[78]

Review of award.[79]—Though a submission cannot oust all courts of jurisdiction, the right of appeal may be precluded by agreement.[80] If any great or palpable error, gross mistake or fraud has been committed by the arbitrators or an umpire, that may be ground for opening such award or umpirage. But the mistake must be plain and gross to set aside the award,[81] a distinction being drawn

specifically certain things which were not in condition for final adjudication. Such an award, however, will not prejudice the defendant to an accounting as to the matters excepted from the award. Astwood v. Wanamaker, 26 Pa. Super. Ct. 591. The only issues presented for the consideration of the arbitrators were between the plaintiff on the one part and the other parties named in the agreement on the other, and the award followed the submission. If the defendants desired that any issues between themselves should be decided by the arbitrators, a stipulation to that effect should have been made. Brock v. Lawton, 210 Pa. 195, 59 A. 997.

71. Where the bill was filed to compel delivery of shares of stock or payment of their value, an award on arbitration in the alternative was proper. Brock v. Lawton, 210 Pa. 195, 59 A. 997.

72. But it is competent for the parties to agree that a decision by a majority shall be valid, and such an agreement may be inferred from circumstances. When an arrangement is made for two arbitrators selected by the parties, and a third only in the event that these two cannot agree, it implies an understanding that a determination made by the third or special arbitrator and either of the two others shall be binding. Fish v. Vermillion [Kan.] 78 P. 811.

73. Ridgill Bros. v. Dupree [Tex. Civ. App.] 85 S. W. 1166. Where a person is designated in a contract as final arbitrator, his decision in any matter within his authority under the terms of that agreement is conclusive upon the parties in the absence of fraud or of such gross mistake as would necessarily imply bad faith, or failure to exercise honest judgment. Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703. The award until set aside is conclusive of the rights of all parties in interest. Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206; Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450. Where, under the terms of a building contract, the architect was to render certificates on which payments were to be made, in the absence of proof of fraud or palpable mistake apparent on the face of his award, neither party can show that he decided wrongly on the law or the facts. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

74. They have no jurisdiction to reopen the case and make a new award without the consent of both parties. Brown v. Durham [Mo. App.] 85 S. W. 120.

75. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

76. Where an insurance policy provides in case of disagreement as to amount of loss to goods by fire for arbitration as to such amount, and provides that the award shall "determine the amount of such loss," a valid award thereunder is conclusive as to such amount. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

77. An award cannot be proved by any admissions or statements which the arbitrators may have made during consultation. Miller v. Carnes [Minn.] 103 N. W. 877.

78, 79. See 3 C. L. 305.

80. Hoste v. Dalton [Mich.] 100 N. W. 750.

81. This was an action to obtain possession of a piano awarded to the defendant in a so-called voting contest. The plaintiff claimed that it had received the majority of the votes but that a number of spurious votes were cast and counted by the arbitrators for the defendant. There was no allegation that it was made through misconduct, fraud or mistake. Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206. An award cannot be impeached at law by evidence of misconduct of the arbitrators in becoming intoxicated while performing their duties or other cause not apparent on the face of the award. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901. Where the award is so gross and palpably inadequate as to shock the moral sense, it is sufficient evidence to be sub-

between common-law awards which can be impeached only for matter apparent on their face and statutory awards which may be impeached for extraneous grounds.[82] The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him,[83] or for error in the rejection or admission of evidence,[84] or on merely technical grounds in no wise affecting the merits, where it is apparent the utmost good faith has been observed.[85] In appellate review of a judgment on an award, the findings of the arbitrator have the same standing as those of a court or jury.[86] Upon review of an award of arbitration, the court has the same power to decree payment of interest as in an ordinary case.[87] The burden is on the adverse party to show facts that would relieve him from its legal effect.[88] An award cannot be impeached for fraud in a court of law.[89]

§ 6. *International disputes.*[90]

§ 7. *Statutory arbitration between employers and employes.*[91]

ARCHITECTS, see latest topical index.

ARGUMENT AND CONDUCT OF COUNSEL.

§ 1. *Right of argument and order of same.*[92]—As a general rule the right to open and close the argument rests with the party having the burden of proof.[93]

mitted to the jury on the issues relating to fraud and corruption or partiality and bias. Action on an award of arbitrators for loss on an insurance policy. The award of the arbitrators was $73.50; the verdict of the jury which was supported by the evidence was $750. Perry v. Greenwich Ins. Co. [N. C.] 49 S. E. 889. The court will not set aside an award because the complainant was not notified that the appraisers intended to meet and estimate the damages, where it is shown she was present, and where it is not shown that she was injured by the award. Sterling v. German-American Ins. Co. [N. J. Eq.] 60 A. 200.

82. Billmyer v. Hamburg-Bremen Fire Ins. Co. [W. Va.] 49 S. E. 901.

83. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

84. Lumbard v. Holdiman, 115 Ill. App. 458.

85. As the failure of the arbitrators to deliver a copy of their award to the parties affected thereby. Lumbard v. Holdiman, 115 Ill. App. 458.

86. Jackson v. Smyth, 24 Pa. Super. Ct. 545. And see Appeal and Review, 5 C. L. 121.

87. Ex parte Republic of Columbia, 25 S. Ct. 107.

88. Ridgill Bros. v. Dupree [Tex. Civ. App.] 85 S. W. 1166.

89. Fire Ass'n v. Allesina [Or.] 77 P. 123.

90, 91. See 3 C. L. 306.

92. See 3 C. L. 306.

93. Stevens v. Friedman [W. Va.] 51 S. E. 132. The burden of proof in the whole action lies upon the party who would be defeated if no evidence were given on either side, and hence he has the right to close the argument. Civ. Code Prac. § 526. One excepting to report of commissioners in condemnation proceedings, which is presumptively correct. St. 1903, § 838. Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549. Where judgment must have gone for appellee had no evidence been introduced on either side, appellant is entitled to closing argument. Has burden under Civ. Code Prac. § 526. Mattingly v. Shortell [Ky.] 85 S. W. 215. Where burden of proof is on defendant, he is entitled to the concluding argument. Civ. Code Prac. § 317, subsec. 6. Burden on party who would be defeated if no evidence was given. Id. § 526. Ashland & C. St. R. Co. v. Hoffman, 26 Ky. L. R. 778, 82 S. W. 566. City is entitled to open and close on hearing of objections to confirmation of special assessments for street improvements. Rule not changed by fact that assessment roll is prima facie proof of the correctness of the amount assessed. City of Peru v. Bartels, 214 Ill. 515, 73 N. E. 755. Where the answer admits the claim of the plaintiff, but sets up in one defense that nothing is due, and in another, a novation, defendant is entitled to the opening and close, there being but the one issue. Gerlaugh v. Riley, 2 Ohio N. P. (N. S.) 107, 14 Ohio Dec. 557. Where a de-

In some states defendant is given the right when he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof,[94] or when he admits it of record, except in so far as defeated by proof of the facts alleged in the answer.[95]

Statutory provisions regulating the right to open and close do not take away all the discretionary power of the court as to argument,[96] and his exercise of such power will not be interfered with, except in extreme cases.[97] Some courts hold that defendant cannot, as an absolute right, deprive plaintiff of his right to close by such waiver, but that the matter is largely discretionary.

There is a conflict of authority as to the effect on the right to make a closing argument of a waiver of argument by opposing counsel.[98] Others hold that the allowing of additional argument is prejudicial error.[99]

It is not improper, where plaintiff is represented by three attorneys and defendant by two, to permit the argument to the jury to proceed by alternate arguments for plaintiff and defendant, beginning and ending with an argument for plaintiff.[1]

Depriving a party, having the burden of proof, of final argument, is generally held to be a deprivation of a substantial right necessarily affecting the judgment[2] and reversible error,[3] though in some states no reversal will be granted unless prejudice is clearly shown.[4]

Limiting argument.[5]—The court may limit the time allowed for argument

murrer to a petition for injunction and the appointment of a receiver is considered at the interlocutory hearing when the evidence and the entire case is heard for the purpose of determining whether the plaintiff is entitled to equitable relief, plaintiff is entitled to open and close on the whole case, and it is not error to refuse to allow defendant to open and conclude the argument on the demurrer. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466. In Iowa the question as to which party is entitled to open and close is not to be determined until after all the evidence has been received. Party "then" having the burden of the issue has the right. Code, § 3701. Shaffer v. Des Moines Coal & Hay Co., 122 Iowa, 233, 98 N. W. 111. In determining which party has the burden of proof, only issues which are for the determination of the jury are to be considered. Not issues made by the pleadings which are without support in the evidence or established by the evidence without any conflict. Id. For a discussion of the right to open and close in equity, see Fletcher's Eq. Pl. & Pr. § 692, p. 710. Argument of motions. Id., § 421, p. 441.

94. The fact that counsel stated that he assumed the burden of proving the affirmative of an issue in the case, in no wise alters the status fixed by the pleadings. Cir. Ct. Rule 59. Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719. Must, by admissions in his answer, make out a prima facie case for plaintiff, and thus relieve him from the necessity of introducing evidence. Oral admissions insufficient. Du Bignon v. Wright [Ga.] 50 S. E. 65. Defendant held to have right. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124.

95. Tex. Co. Ct. Rule 31 (67 S. W. xxiii). Bell v. Fox [Tex. Civ. App.] 84 S. W. 384. Defendant had right where he admitted plaintiff's right to recover the amount sued for, although he did not admit the truth of facts alleged in an affidavit of attachment sued out by plaintiff in aid of principal action. Id.

96. Burns' Ann. St. 1901, § 545. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

97. Judgment will not be reversed for refusal of court to permit plaintiff to make closing argument after defendant waives his right of argument, where record does not show anything to prevent opening argument from having been made as complete as possible, and there is nothing but speculation to indicate that verdict would have been different under any argument. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

98. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

99. Held prejudicial error to allow other counsel to further address the jury for plaintiff, even though the one first speaking did not use all the time allotted to him. Arguments limited to one hour on each side and first speaker occupied but thirty minutes. St. Louis, etc., R. Co. v. Vanzego [Kan.] 80 P. 944.

1. Stevens v. Friedman [W. Va.] 51 S. E. 132.

2. Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719.

3. Ashland & C. St. R. Co. v. Hoffman, 26 Ky. L. R. 778, 82 S. W. 566; Mattingly v. Shortell [Ky.] 85 S. W. 215.

4. Shaffer v. Des Moines Coal & Hay Co., 122 Iowa, 233, 98 N. W. 111.

5. See 3 C. L. 306, n. 40.

within reasonable bounds,[6] and his action will not be disturbed unless abuse of his discretion is shown.[7] A liberal allowance should, however, be made.[8]

§ 2. *Opening statement.*[9]—Counsel may make an opening statement, or not, at his own election.[10] As a general rule, when made, it should be confined to a statement of the party's claims and the evidence by which he expects to prove them.[11] Where the statute specifically provides what may be stated, counsel may not, as of right, make any other statements.[12] The latitude to be allowed, however, except in so far as controlled by statute, is largely in the discretion of the trial court, and its action should be upheld except for illegal or gross abuse of discretion.[13]

The pleadings and not the opening statements make the issues.[14] Hence the statement of plaintiff's counsel need not necessarily include all the facts essential to recovery,[15] nor need those referred to be stated with exactness,[16] and the court is not authorized to take the case from the jury or to render judgment upon such statement unless some fact is clearly stated, or some admission clearly made, which evidence relevant under the pleadings cannot cure, and which, therefore, necessarily and absolutely precludes recovery.[17]

6. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 88 S. W. 466. Reasonable time must be allowed counsel, all the circumstances considered. It should not be consumed by colloquys and interruptions. Neumann v. St. Louis Transit Co. [Mo. App.] 84 S. W. 189. Where the time allotted to either side for argument was 15 minutes and where interference by the court and opposing counsel is accompanied by so much discussion as to consume a large part of time allotted, it is reversible error not to grant further time. Id.

7. Counsel cannot complain that time was unequally distributed, where made no objection to allowance, but closed after arguing for 35 minutes of the hour allowed him, stating that he did not have sufficient time to present his case as he wished to, without requesting more time. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 88 S. W. 466. Unless it can be said from review of evidence that time allowed was manifestly too short. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787.

Held not an abuse of discretion: Limiting argument to 45 minutes each and on request allowing defendant 7 minutes more. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787; Id., 115 Ill. App. 209. Limiting time to an hour and a half on each side and requiring it to be made in the evening when the questions of fact were few and questions of law well settled, and no prejudice was shown. City of Elgin v. Nofs, 212 Ill. 20, 72 N. E. 43.

8. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787.

9. See 3 C. L. 307.

10. Statute authorizing it is permissive only. Stewart v. Rogers [Kan.] 80 P. 58.

11. Kirby's Dig. § 6196. Kansas City Southern R. Co. v. Murphy [Ark.] 85 S. W. 428. Statement by counsel for propounders in will contest held proper under Code Civ. Prac. § 317. Rust v. Rust [Ky.] 84 S. W. 1152.

12. Under Colo. Code, § 187, giving him right to state his case and the evidence by which he intends to sustain it, it is not error to refuse to allow him to state his theory of the law applicable to the case. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025.

13. Even if had right to state his theory of law in opening address, it was a discretionary right merely, and no abuse in refusing to allow him to do so, no prejudice being shown. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. The fact that the argument does not proceed in the order prescribed by the statute is not necessarily ground for reversal. The fact that, in a will contest, counsel for propounders first read the will to the jury and stated that it had been executed in the presence of witnesses, and that unless contestants showed that testator was of unsound mind or had been unduly influenced it must stand as his will, that contestant's counsel then stated the case to the jury, and that counsel for propounders thereafter resumed his statement and stated what the evidence would show, held not ground for reversal, notwithstanding Civ. Code Prac. § 317, the substantial rights of contestants not having been prejudiced. Rust v. Rust [Ky.] 84 S. W. 1152.

14. Brashear v. Rabenstein [Kan.] 80 P. 950; Stewart v. Rogers [Kan.] 80 P. 58.

15. Party will not be sent out of court because counsel negligently or ignorantly fails to allude to one or more matters necessary to be proved. Brashear v. Rabenstein [Kan.] 80 P. 950. May state his case as briefly or as generally as he sees fit. Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 P. 308.

16. May be indefinite and ambiguous, and important facts may be left doubtful, or merely suggested, or left wholly to inference. Brashear v. Rabenstein [Kan.] 80 P. 950.

17. Brashear v. Rabenstein [Kan.] 80 P. 950. It is only when such statement shows affirmatively that there is no cause of action or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are the only ones which the party expects or intends to prove,

Statements at variance with the pleadings may be excluded on motion,[18] or they may be taken as admissions for the purposes of the trial.[19]

§ 3. *Kind, extent, and mode of argument or comment during trial.*[20]

Use of pleadings and other writings belonging to the case.[21]—The practice of reading the petition to the jury in the opening statement is not to be commended, but unless prejudice is shown the discretion of the trial court over such matters will not be interfered with.[22]

Remarks during trial.[23]—It is improper to persist in attempts to get matters which have been excluded before the jury[24] or to persistently override[25] or refuse to acquiesce in the rulings of the court,[26] or to attempt to introduce collateral matters by suggestive questions.[27]

Statements of counsel to the court as to what he can prove in asking certain questions which the witnesses are not permitted to answer are not improper, where the jury are informed that they cannot consider such statements as evidence.[28]

Comments on witnesses.[29]—Counsel may arraign the conduct of the parties, and impugn, excuse, justify or condemn motives, so far as they are developed by the evidence;[30] but it is improper to discredit an adversary's witnesses by voluntary statements of damaging facts not in evidence.[31]

that the court is warranted in rendering final judgment upon it. Failure to state case more fully is no justification for withdrawing case from the jury. Reding v. Puget Sound Iron & Steel Works, 31 Wash. 642, 79 P. 308. A variance between statement and pleadings of the party making it is not sufficient ground on which to base a motion for judgment in favor of the opposite party unless facts are therein admitted which preclude the party's right of action or defense as stated in his pleadings. Stewart v. Rogers [Kan.] 80 P. 58.

18. Stewart v. Rogers [Kan.] 80 P. 58.

19. Stewart v. Rogers [Kan.] 80 P. 58. Concession by plaintiff's counsel in discussion before court at opening of trial that action was one solely for damages for nuisance held equivalent to elimination of prayer for equitable relief, where defendant's counsel relied thereon and case was tried as action at law. Van Vechten v. Hudson River Power Transmission Co., 92 N. Y. S. 956.

20. See 3 C. L. 307.

21. See 3 C. L. 308.

22. City of Lexington v. Kreitz [Neb.] 103 N. W. 444.

23. See 3 C. L. 311.

24. Repeatedly asking a question which has been excluded. Quinn v. New York City R. Co., 94 N. Y. S. 560. Action of plaintiff's attorney, in action for breach of contract, in trying to get the proposition of compromise before the jury, held improper but not prejudicial, the evidence having been excluded. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275. Persistent and deliberate attempts to bring before the jury offers of compromise, which have been properly excluded, are ground for a new trial where the evidence in plaintiff's favor is not conclusive. Salter v. Rhode Island Co. [R. I.] 60 A. 588.

25. New trial granted where counsel having been told by the court that reading from decisions was improper, and request made to instruct jury to disregard it, still persisted that his action was proper. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897.

26. Oliver v. Jessup's Estate [Mich.] 100 N. W. 900.

27. Reference to former accidents. Airikainen v. Houghton County S. R. Co. [Mich.] 101 N. W. 264. Fact that defendant insurance company did not pay policy on life of its president. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156.

28. Northern Tex. Const. Co. v. Crawford [Tex. Civ. App.] 87 S. W. 223.

29. See 3 C. L. 309.

30. He may assail the credibility of witnesses when impeached by direct evidence or by inconsistencies or incoherencies in their testimony. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

31. Ground for reversal, when done in regard to sharply contested and very doubtful issue. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 60. Remarks cannot be said to be harmless because plaintiff sued for $10,000 and only recovered $1,500. Id. Argument that railroads ignore rights of citizens, kill and maim at pleasure and then bring in their employes to swear them through, and that defendant's witnesses had to swear the way they did or lose their jobs. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Statement that railroad employes were furnished with prepared statements which they were required to answer "yes" in order to hold their jobs, and if they answered "no" "they walk the plank," held ground for reversal when not excluded on objection, there being evidence that such a statement was prepared but none as to the latter part of the remark. Illinois Cent. R. Co. v. Jolly [Ky.] 84 S. W. 330. Personal injury action reversed because of statement of counsel, over objection: "Suppose you have a case against the railroad company. The entire railroad crew will come into court and try to swear you out of it. That is the way they always do. * * * They

It is not improper to comment on the failure to call certain witnesses[32] or to procure certain evidence.[33]

Comments on evidence, and scope of argument in relation thereto.[34]—Counsel may comment on the evidence in the case,[35] and may draw fair inferences therefrom,[36] but must confine his remarks strictly to the evidence and the arguments

have the case made up for them, and they follow each other and swear to it;" of which there was no proof. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 60. Attacking witness in argument not reversible error where there is some evidence justifying it and objection thereto is sustained. Chicago City R. Co. v. Bennett, 214 Ill. 26, 73 N. E. 343.

32. Held not reversible error to ask why certain witnesses were not called and to state that it was because, if called, they could not help but testify that the sidewalk where plaintiff was alleged to have been injured was defective, though such statement was not strictly warranted by the evidence. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569. Held not reversible error to refer to absence of conductor and all passengers but one who were on the car when plaintiff's cow was killed, and to draw the inference that their evidence would have been unfavorable to defendant, where one of plaintiff's witnesses had been severely criticised. Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264. Where three out of four persons who were working in store of defendant when accident occurred were called as witnesses, but fourth was not, though in the city, and no reason was given why he was not, counsel may argue that his evidence would have been unfavorable to defendant. Lambert v. Hamlin [N. H.] 59 A. 941. Error, if any, in stating that witness was well, instead of that there was no evidence that he was sick, held harmless. Id.

33. Comments on failure to take depositions as to plaintiff's character from his home not objectionable, where number of depositions procured from other places. Lee v. Dow [N. H.] 59 A. 374.

34. See 3 C. L. 309, 310.

35. Plaintiff's statement in his opening, over objection, that the defense would undoubtedly be the same old stereotyped defense, that the mule ran upon the track, and that they did not have time to avoid it, where the court said it was liberal about opening statements, held not reversible error, where appeared that verdict was responsive to evidence. Kansas City Southern R. C. v. Murphy [Ark.] 85 S. W. 428. See this case for list of Arkansas cases on this subject. Documents in evidence are proper subjects of comment or debate with respect to any matter appearing on the face thereof. On issue as to whether brokers had altered certain written contract, held not improper for counsel to comment on fact that it appeared to be in five different handwritings, though attention of witnesses had not been called to that fact. Harrison v. Lakenan [Mo.] 88 S. W. 53. Statement that defendant could have gone to scene of accident and, by experiment, have determined within what distance they could have stopped the train "and brought their witnesses here and had them swear to it," held legitimate. Scullin v. Wabash R. Co., 184 Mo. 695, 83 S. W. 760. It is legitimate argument for counsel in a personal injury action to say that when the defendant filed its first answer it admitted what plaintiff claimed—that he was within a foot of the track—and that it did not withdraw that admission until it found out it was not on its private property, but at a public highway, where it had not the right to run people down without looking for them, as it would in its private way, by which "I mean to say on their own right of way people are trespassers, but on a public highway you and I have just as much right as the railway company, and they are bound to look out for us." Id. Where, in action for rent, there was evidence that premises were rented merely for purpose of getting objectionable competitor of defendant out of business, and the question was a material one, counsel had a right to comment thereon, though testimony of a witness to show such fact had been excluded. Richmond Ice Co. v. Crystal Ice Co. [Va.] 49 S. E. 650.

36. Warranted inferences. Rust v. Rust [Ky.] 84 S. W. 1152. Argument directed to questions of fact involved in the case on trial is germane and essential. Clear Creek Stone Co. v. Carmichael [Ind. App.] 73 N. E. 935. So long as he confines his discussion to the issues and the evidence, he will be guilty of no misconduct, though he may use bad logic and draw erroneous inferences. Supreme Lodge M. W. W. v. Jones, 113 Ill. App. 241. May argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. May make such deductions as he thinks the evidence justifies, and a wide latitude wil be given him in this regard. Supreme Lodge M. W. W. v. Jones, 113 Ill. App. 241. Statements of fact permissible if supported by evidence. Seeton v. Dunbarton [N. H.] 59 A. 944.

Arguments held proper: Where it was claimed that bad construction work impaired the value of a building for a hotel, to say that no abatement of charges to guests had been shown. Matthews v. Farrell, 140 Ala. 298, 37 So. 325. References to the acceptance of an ordinance by the appellant company and its failure to obey it. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 S. E. 780. Remarks as to right of plaintiff to be where he was. Joyce v. Chicago, 111 Ill. App. 443. Where conspiracy to render one unable to perform a contract was declared on, to say that in counsel's opinion defendant greatly desired to rid itself of all competition. Standard Oil Co. v. Doyle, 26 Ky. L. R.

of opposing counsel.[37] Thus, he may not state as a fact matter pertinent to the issues which is not in evidence,[38] state what the evidence of absent witnesses would have been,[39] discuss evidence which has been withdrawn from the jury,[40] or refer to offers of compromise,[41] other similar accidents,[42] or actions,[43] the result of a previous trial,[44] or his own professional experience.[45] He may, however, in-

544, 82 S. W. 271. In a contest it was for counsel for the propounders to state that contestants were not shown to have extended one act of kindness toward testator and that some of the children had washed their hands of the contest. Rust v. Rust [Ky.] 84 S. W. 1152. Remarks held to have been a fair inference to be drawn from the whole evidence, and not to have been such as could have misled or prejudiced the jury, and hence they were not ground for reversal. Phoenix Brewing Co. v. Weiss, 23 Pa. Super. Ct. 519. To argue, when plaintiff is only witness, that she was either injured as she testified or was guilty of perjury. Heltzen v. Union R. Co. [R. I.] 59 A. 918. Reference to certain witnesses of plaintiff as "gentle cutthroats," where evidence showed that they were participants in strike and parties to assaults on strike breakers, and justified conclusion that, though not literally cutthroats, they were willing to become such if they could thereby accomplish the purpose intended by the strike. Sterling v. St. Louis, etc., R. Co. [Tex. Civ. App.] 86 S. W. 655. Statement of counsel that it was duty of conductor to help plaintiff alight, held merely an expression of opinion, and not prejudicial if unwarranted. Louisville R. Co. v. Sheehan [Ky.] 85 S. W. 688. Statement of manner in which defendant's wood was sawed held immaterial, if not supported by evidence, and harmless, particularly where it was changed so as to be satisfactory to defendant. Lee v. Dow [N. H.] 59 A. 374.

37. Tex. Dist. Ct. Rule 39 (67 S. W. xxiii). St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 88 S. W. 509; Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 60. Must be confined to record. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526. Must not discuss matters not in evidence. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. Attempts of counsel, by statements unwarranted by the evidence, to make witnesses of themselves in regard to matters outside the record, are improper. English v. Anderson [Ark.] 88 S. W. 583. In action for damages for polluting cistern, destroying orchard, etc., statements that plaintiff had committed acts himself, and had poisoned his well in order to collect insurance on his wife's life, and that counsel had not proved these facts only because court would not permit it, held reversible error, particularly since verdict for defendant was against preponderance of evidence. Id. It is ground for a new trial to call attention in the opening statement to collateral matters calculated to prejudice the jury. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156. May not introduce into the case, for the purpose of influencing the jurors, evidentiary matter which cannot be or has not been proved. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387. The admission of unsworn statements of irrelevant facts in argument is as fatal as the introduction of evidence to prove them. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14.

38. Abuses his privilege, and exceptions may be taken on the other side which may be good ground for a new trial or reversal. Supreme Lodge M. W. W. v. Jones, 113 Ill. App. 241.

Arguments held improper: Statement that insured had answered in five applications that she did not have heart disease, and that five different physicians had certified that she did not have it, there being no evidence to that effect, held improper. Supreme Lodge M. W. W. v Jones, 113 Ill. App. 241. Reference to difficulties in getting answers to interrogatories, when same were not in evidence and no allusion was made to them on the trial. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. Remark that witness for railroad company came to the trial on passes and was present when his deposition might have been taken, there being no evidence to that effect and it not being a proper subject of comment in any event. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14.

39. Louisville R. Co. v. Sheehan [Ky.] 85 S. W. 688.

40. Coruth v. Jones [Vt.] 60 A. 814.

41. Salter v. Rhode Island Co. [R. I.] 60 A. 588.

42. In suit for personal injuries caused by defective sidewalk, reference to fact that one of the counsel for defendant city had been previously injured by falling on sidewalk, and that they "are now healing the injury by his employment in this suit." City of Lexington v. Kreitz [Neb.] 103 N. W. 444. Reference to plaintiff's discharge and former injuries, and request for punitive damages, held ground for reversal. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526.

43. References to "fake" personal injury suits against railroads, and "fake" settlements by them. International, etc., R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423.

44. The fact that counsel on examining jurors on their voir dire, on appeal from an award by the sheriff's jury in condemnation proceedings, stated to those first called the amount of the award for the purpose of identifying the case, held not prejudicial error, in view of instructions and fact that it did not appear that any of such jurors sat in the case. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Fact that counsel asked each juror whether finding of sheriff's jury would have any weight with him, or influence him in finding value of land under the evidence, not reversible error. Id.

dulge in oratorical flourishes,[46] and may draw upon the facts of history to illustrate a thought or point in his argument.[47]

Appeals to passion, prejudice and sympathy.[48]—Appeals to the jury on considerations other than the merits of the case,[49] or the use of language or arguments calculated to arouse their passion and prejudice against the opposite party, are improper.[50] Thus, it is improper to appeal to them to give plaintiff punitive damages when he is not entitled thereto,[51] or to state that the amount claimed would not compensate counsel for the injuries complained of,[52] or inquire of jurors

Arguments held improper: Statement of counsel that he was satisfied at end of former trial. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024. Reference to fact that case was previously reversed on a technicality, and that defendant was preparing to obtain another reversal, improper. Illinois Cent. R. Co. v. Jolly [Ky.] 84 S. W. 330. On appeal to call attention to the verdict of the jury in another court. Held harmless, because verdict for plaintiff was inevitable. Beatty v. Clarkson [Mo. App.] 83 S. W. 1033. Where question before jury was whether plaintiff was in fact negligent, held error to read from opinion on former appeal a discussion as to whether, on the facts then presented, plaintiff was negligent as a matter of law. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387. To read from a former decision to the jury and insisting upon his right to do so after objection thereto has been sustained. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897.

45. Lee v. Dow [N. H.] 59 A. 374.

46. Remarks that defendant's servants would have handled a car load of steers with more care than they did plaintiff, held mere rhetorical flourish and not beyond the limits of forensic debate. West v. St. Louis S. W. R. Co. [Mo.] 86 S. W. 140.

47. Not reversible error for counsel for plaintiff, in action against railroad for personal injuries, to state that statistics furnished by the interstate commerce commission showed that 60,000 persons were killed or crippled by railroads during past year, and that evidence showed that defendant was reckless or careless, in reply to remarks of defendant's counsel in regard to carefulness of engineers, at least when no prejudice shown. Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536.

48. See 3 C. L. 309.

49. St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 88 S. W. 509.

50. Himrod Coal Co. v. Beckwith, 111 Ill. App. 379. Argument effective in arousing passion and prejudice is wholly indefensible, and, unless it can be seen that it did not result in injury, the judgment ought to be reversed. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Statement that accident occurred through criminal negligence of defendant which was objected to. Kinne v. International R. Co., 90 N. Y. S. 930. Denunciation of defendant, in action for obstructing passway, calculated to prejudice jury. Louisville & N. R. Co. v. Carter [Ky.] 86 S. W. 685. Must set aside the verdict, though remarks were not objected to, where counsel intentionally goes outside of record and indulges in remarks clearly prejudicial, and which must have been made for the purpose of influencing the jury. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526.

51. Statement that corporations must be made to obey the law, like other people, and that the only way to do it was to punish them by giving punitive damages, as they could not be indicted and prosecuted like other people. On objection that this was a misstatement of the law, he stated they could be indicted but not imprisoned, and that he did not ask a verdict because defendant was a corporation but that both parties were equal before the law. Held, legitimate argument. Tutwiler Coal, Coke & Iron Co. v. Nail [Ala.] 37 So. 634.

Arguments held improper: Claim for exemplary damages. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738. Statement that income from $5,000, especially after deducting expenses of litigation, would not be a fair substitute. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22. In suit for damages for alleged negligent killing, statement that "there is no recompense that can in any way compensate a father or parent for the loss of a child," etc., and that jury should give punitive damages, held cause for reversal. Chicago City R. Co. v. Math, 114 Ill. App. 350. Asking the jury to bring in such a verdict as would teach defendant and all similar corporations that their railroads must be run with some regard to the safety of human life and limb, constitutes reversible error when unrebuked and uncorrected by the court after attention has been called to it. Kinne v. International R. Co., 90 N. Y. S. 930. In suit for personal injuries received at railroad crossing, remarks to effect that public was interested in case, and that jury should return verdict so large that it would be to interest of defendant to keep watchman there, held prejudicial, there being no evidence that any one else had ever been injured there through failure to have such watchman, and there being a conflict of evidence as to defendant's negligence. St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 88 S. W. 509. Remarks tending to arouse passion and prejudice against railroad, and request that they bring in big enough verdict to teach it not to indulge in such practices in the future. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526.

52. Attempt to compel opposing counsel to answer or refuse to answer question as to how much he would take to accept alleged injury of plaintiff (Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14), and statement that amount asked would not compensate speaker (Id.). Statement that counsel would

how much they would take for similar injuries,[53] to contrast the poverty of plaintiff and the wealth of defendant,[54] to appeal to race prejudices,[55] or the prejudice against corporations,[56] to state that carriers are accustomed to disregard the rights of the public,[57] to refer to the fact that defendant is insured and that any damages will be paid by the insurance company,[58] or to refer to the probability of an appeal.[59]

Mere abuse is also improper,[60] but remarks not amounting to a misstatement of a material fact, but which are rather the venting of offensive epithets, are not ordinarily a ground for reversal.[61] The court should, however, correct them as a breach of decorum and an offense against its dignity.[62]

Statements of law and reading from decisions or papers pertinent to other cases.[63]—The suggestion of erroneous views of the law by counsel is fatal error unless extracted by the charge.[64]

The practice of allowing counsel to read lawbooks to the jury is dangerous and should not be permitted.[65] The court may and should refuse to allow it when

not have suffered the injury complained of for $25,000. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738.

53. In suit for death of child by wrongful act, reference to sufferings of parents, and as to how much jurors would take under similar circumstances. Excessive damages reduced. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829.

54. Hlmrod Coal Co. v. Beckwith, 111 Ill. App. 379. Telling jury of plaintiff's poverty and seeking to prejudice them against defendant corporation. Illinois Cent. R. Co. v. Seitz, 111 Ill. App. 242. Reference to plaintiff's poor clothing. McKee v. St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013. Statement that juries would not allow corporations to rob poor men of their labor, and the case at bar involved scheme to beat plaintiff out of his labor. Ft. Smith Lumber Co. v. Cathey [Ark.] 86 S. W. 806.

55. Reference to execution creditor as a Jew without a conscience "who would take the last thing you had." Day v. Ferguson [Ark.] 85 S. W. 771.

56. Comments on power of brewing companies in city goverument and their treatment of saloon keepers. Jung v. Theo. Hamm Brew. Co. [Minn.] 104 N. W. 233. Reference to defendant as a rich corporation. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738. Seeking to inflame jury's passions against defendant corporation. Illinois Cent. R. Co. v. Seitz, 111 Ill. App. 242. In a personal injury action, held reversible for counsel for plaintiff to state in his closing argument that the defendant was a soulless corporation, making millions of dollars a day, and to offer to give defendant's counsel $2.50 to let him tell the story of how defendant treated a widow in another suit against it, and further state that he crossed the company's tracks every day, and knew that they ran their cars wild there, and it would be stopped if he had to bring an injunction suit. Where jury not admonished to disregard remarks. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. Where the evidence authorized a verdict for either party, the unrebuked argument of plaintiff's counsel that he did not ask for a verdict because defendant was an irrigation company, though such corporations had swindled people dealing with them, and that defendant was no better than other corporations, constitutes reversible error. Colorado Canal Co. v. Sims [Tex. Civ. App.] 82 S. W. 531.

57. Statement that railroad corporations ignore rights of citizens, kill and maim them at pleasure, and then bring in their employes to swear them through. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Could not be made subject of proof or assumed as matter of common knowledge. Remark that carrier corporations are accustomed to proceed without regard to the rights and feelings of those with whom they deal, held improper, but not so flagrant as to constitute grouud of appeal in absence of objection. Levidow v. Starin [Conn.] 60 A. 123.

58. Reversible error to persist in attempt to get it before jury. Lone Star Brew. Co. v. Voith [Tex. Civ. App.] 84 S. W. 1100.

59. Statement that jury should not give small verdict on theory that defendant would pay it rather than appeal, and that it would appeal anyway. Quirk v. Rapid R. Co. [Mich.] 100 N. W. 815.

60. Is not argument. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738. Statement that defendant "did not have the decency of a rattlesnake." Id.

61. Statement that counsel was tricked by defendant not calling witness subpoenaed by it, and that a certain witness was a perjurer and a villain, not ground for reversal, though not justified by the record. Franklin v. St. Louis, etc., R. Co. [Mo.] 87 S. W. 930.

62. Should protect witnesses from unjust and opprobrious remarks, calculated to result in breach of peace. Franklin v. St. Louis, etc., R. Co. [Mo.] 87 S. W. 930.

63. See 3 C. L. 308.

64. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14. Failure of the court to sustain objection to an erroneous statement of law. Statement of counsel in action for malicious prosecution that defendant must prove plaintiff guilty beyond a reasonable doubt, where objection was overruled. Rullson v. Collins [Ind. T.] 82 S. W. 748.

65. Ray v. Chesapeake & O. R. Co. [W.

objected to.[66] Allowing the reading of good and pertinent law is not ground for reversal,[67] but the contrary is true in case it is bad or not pertinent, unless the error is cured by instructions propounding the sound law on the very points to which such bad law relates.[68] So, too, it is generally held to be reversible error to allow, over objection, the reading of reports of decisions giving evidence or facts involved in decided cases more or less similar to the one at bar.[69] Some courts, however, hold that the judgment will not be reversed in any case unless injury is shown.[70]

It is within the discretion of the court to refuse to allow counsel to read certain sections of the statutes.[71]

Comments on instructions and special interrogatories.[72]—Counsel has no right to advise the jury that he does not intend to ask for any instructions.[73]

He may suggest to the jury the answers he believes should be given to the special interrogatories of the opposite party under the evidence,[74] but may not state that they were propounded merely for the purpose of confusing the jury, and thus obtaining a reversal,[75] or direct the jury to answer them in such a manner as to correspond with the general verdict rather than in accordance with the evidence.[76]

§ 4. *Excuses for impropriety.*[77]—It is immaterial whether counsel deliberately intended to mislead the jury, or whether he believed that he was acting within his rights.[78]

Reversal will not be granted for misconduct, where counsel for both parties are guilty,[79] nor may one complain of improper remarks in reply to, and provoked by, his own argument.[80]

§ 5. *Objections and rulings.*[81]—The control of the argument is within the sound judicial discretion of the trial judge, and it is his duty to keep it within

Va.] 50 S. E. 413. Reading decisions on the complex question as to what constitutes a fixture has a tendency to confuse rather than to enlighten them. Filley v. Christopher [Wash.] 80 P. 834.

66. Ray v. Chesapeake & O. R. Co. [W. Va.] 50 S. E. 413. Held reversible error to read from textbooks and reports. Id. Refusal to allow counsel to read from a decision and to state to the jury that the doctrine there announced should be approved and applied to the case at bar, held not error. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

67, 68. Ray v. Chesapeake & O. R. Co. [W. Va.] 50 S. E. 413.

69. Ray v. Chesapeake & O. R. Co. [W. Va.] 50 S. E. 413. It is never permissible for counsel to read the law from the books when the effect thereof is to bring before the jury the facts of the case decided, or the amount of the verdict, or the comments of the judge upon the facts, or to influence the jury in deciding upon the facts in the case on trial. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387.

70. Williams v. Spokane Falls & N. R. Co. [Wash.] 80 P. 1100.

71. Meyer v. Foster [Cal.] 81 P. 402.

72. See 3 C. L. 309, 310.

73. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. Statement that party has no requests for instructions elicited by court's request to present them and which is directly responsive thereto insufficient to warrant a reversal. Id.

74. Himrod Coal Co. v. Beckwith, 111 Ill. App. 379. May read and discuss interrogatories which the court has indicated he will submit to the jury, pointing out what answers ought to be returned thereto. Clear Creek Stone Co. v. Carmichael [Ind. App.] 73 N. E. 935.

75. Himrod Coal Co. v. Beckwith, 111 Ill. App. 379.

76. Statement that jury should first find general verdict and then answer interrogatories so that answers will dovetail in and agree with it, held improper, but not ground for withdrawing case from jury. Opposite party only entitled to have jury admonished not to consider them. Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

77. See 3 C. L. 311.

78. In reading part of former opinion in same case. Olney v. Boston & M. R. Co. [N. H.] 59 A. 387.

79. Culver v. South Haven & E. R. Co. [Mich.] 101 N. W. 663; Chicago City R. Co. v. Enroth, 113 Ill. App. 285.

80. Defendant cannot complain of statement of plaintiff's counsel that he was satisfied that there were more fake settlements by railroad companies than fake suits against them, where he himself called attention to fact that persons injured by railroads suddenly recovered after getting judgment. International, etc., R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423.

proper bounds.[82] It is his duty, on objection, to exclude improper statements,[83] and to promptly stop counsel when guilty of any misconduct, explain to the jury the impropriety of his remarks, and take steps to prevent its repetition,[84] even though no objection has been interposed.[85]

As in the case of other matters occurring at the trial, that the misconduct of counsel may be reviewed by the appellate court, it must be objected to at the time, a ruling on such objection must be obtained, and an exception taken thereto[86] The ordinary steps to perfect the appeal and to present the matter to the reviewing court must also be taken.[87]

§ 6. *Action of court or counsel curing objection.*[88]—Unless the misconduct is such as to prevent a fair verdict,[89] its harmful influence may generally be cured by the withdrawal of the objectionable remarks,[90] or by the action of the trial court in promptly sustaining an objection thereto,[91] admonishing counsel to de-

81. See 3 C. L. 311.

82. Kansas City Southern R. Co. v. Murphy [Ark.] 85 S. W. 428. The regulation of conduct of counsel in argument is largely in the discretion of the trial court. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024.

83. Illinois Cent. R. Co. v. Jolly [Ky.] 84 S. W. 330.

84. Judgment will be reversed for a failure of duty in this regard which manifestly affects the result. Supreme Lodge M. W. W. v. Jones, 113 Ill. App. 241.

85. Improper argument should be suppressed by the court whether objected to or not. Reference in suit for death of child, to suffering of parents, and as to how much jurors would take under similar circumstances. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. It is his duty, without objection having been made, to prevent counsel from discussing extraneous issues, introducing irrelevant facts, and insinuating erroneous views of the law. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14. He should also at once correct the error, if possible, and if not should discharge the jury and direct a new trial. Id. Under the district court rules of Texas, the court is not required to wait for objections to be made when the rules as to argument are violated, but if not noticed and corrected by the court, opposing counsel may ask leave to present his objections. Rule 41 (67 S. W. xxiii). St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 88 S. W. 509.

86. See Saving Questions for Review, 4 C. L. 1368.

87. See Appeal and Review, 5 C. L. 121.

88. See 3 C. L. 312.

89. Attempts to bring offers of compromise before jury not cured by withdrawal of question and answer, where evidence not conclusive. Salter v. Rhode Island Co. [R. I.] 60 A. 588. A ruling sustaining an objection to counsel's misconduct does not always remove the ill effects thereof. May still have been effective to arouse passion and prejudice. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738. A new trial should be granted notwithstanding such ruling and though the trial court may have done its full duty in the matter, where it appears that the abuse of argument has worked an injustice to one of the parties. Id. The judgment will be reversed where counsel tells the jury of the poverty of his client and seeks to inflame their passions against a defendant corporation, notwithstanding the fact that objections to his remarks are sustained. In opening statement. Illinois Cent. R. Co. v. Seitz, 111 Ill. App. 242. Argument that railroads ignore rights of citizens, and that its employes had to swear as they did or lose their jobs, not cured by sustaining objection and instructing jury to disregard the remark, where plaintiff admitted verdict was excessive by remitting part of it. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Error in calling attention to collateral matters calculated to prejudice the jury. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156. And in seeking to get such matters before the jury is not cured by sustaining objections thereto. Id. Error in reading from opinion on prior appeal, on facts there presented not cured by instruction that the question was for them to decide, whether plaintiff exercised ordinary care, where they were not told to disregard the reference to the opinion (Olney v. Boston & M. R. Co. [N. H.] 59 A. 387), nor by request of counsel to jury to consider what he had read merely as his view of the law (Id.).

90. By his withdrawing them and requesting the jury to disregard them and the court to instruct them to disregard them. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 87 S. W. 867. As where counsel commenced a statement that the income from $5,000, especially when something was deducted for expense of litigation, would not be a fair substitute, and when statement was objected to by defendant, expressed willingness to have it struck out if not proper, and did not finish his statement. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22.

91. City of Lexington v. Kreltz [Neb.] 103 N. W. 444. Where an objection has been sustained by the trial court, it is only for an excessive abuse of the latitude properly allowed counsel in addressing juries, by the use of peculiarly prejudicial language outside of the record, that the judgment will be set aside for such misconduct. Id.

Misconduct cured by sustaining objection: Attacking witness, where the evidence furnishes some ground therefor. Chicago City R. Co. v. Bennett, 214 Ill. 26, 73 N. E. 343. Statement of counsel that he was satisfied

sist,[92] or instructing the jury to disregard it,[93] or by two or more of these combined.[94]

In some cases the error may be cured by remitting a part of a resulting excessive verdict,[95] but this does not apply where the passion and prejudice aroused thereby may have entered into the determination of the issues of fact.[96]

The error of the court in allowing counsel to argue that the jury should award exemplary damages is not cured by the fact that counsel honestly believed he was entitled to them.[97]

The question whether a new trial shall be granted for misconduct of counsel in his remarks to the jury rests in the sound judicial discretion of the trial court,[98] and his action in the matter will not be interfered with on appeal, unless it appears that such discretion was clearly abused.[99]

at end of other trial where verdict was well sustained by evidence. Discretion so exercised as to obviate all objection. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024. Where remark made in response to request of court, and no other relief asked for. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. Improper reference to former accidents in a question where counsel characterized it as entirely improper, and there was no request to refer to it in the charge. Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264.

92. Mild admonitions held not sufficient. English v. Anderson [Ark.] 88 S. W. 583. Reference to difficulty in procuring answers to interrogatories when same were not in evidence and no allusion was made to them on trial cured by direction to counsel to confine himself to the evidence, which he did. American Electrical Works v. New Eng. Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64.

93. Mere admonition of counsel not always sufficient. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. Where court admonishes the jury to disregard certain statements, it will be presumed on appeal that they obeyed the orders. Louisville R. Co. v. Sheehan [Ky.] 85 S. W. 688.

Misconduct held cured by instructions: Statement that juries would not allow corporations to beat poor men out of their labor and that the case at bar was a scheme to beat plaintiff out of his. Ft. Smith Lumber Co. v. Cathey [Ark.] 86 S. W. 806. Statement as to what evidence of absent witness for opposite party would have been. Louisville R. Co. v. Sheehan [Ky.] 85 S. W. 688. Statement that jury should not give small verdict on theory that defendant would pay it rather than appeal, and that it would appeal anyway if possible, where no objection made at the time, and verdict was not excessive. Quirk v. Rapid R. Co. [Mich.] 100 N. W. 815. Erroneous statements of law. Seeton v. Dunbarton [N. H.] 59 A. 944. Remarks as to manner in which interrogatories should be answered held not ground for reversal, where court, on overruling motion to withdraw submission of cause, stated that he would instruct jury to answer them according to evidence, and did so, and counsel failed to request court to admonish jury, when remarks were made, not to consider them. Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

94. An objection by opposing counsel followed by a rebuke from the court and an admonition to the jury to disregard the remarks will generally cure the prejudicial statements. Reference to execution creditor as a Jew without a conscience "who would take the last thing you had." Day v. Ferguson [Ark.] 85 S. W. 771.

Misconduct cured:. Where counsel was stopped, and jury instructed not to consider his language, and he admitted that his language was probably improper, and it not appearing that injury resulted. Texas, etc., R. Co. v. McDonald [Tex. Civ. App.] 85 S. W. 493. Reference to counsel's professional experience where it was immediately withdrawn on exception being taken and jury was instructed to disregard it, and nothing further was said about it by opposing counsel. Lee v. Dow [N. H.] 59 A. 374. Error held not to have prejudiced and misled the jury. Id. Where objection was sustained and jury instructed not to consider remarks. Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582. Reference in personal injury action to plaintiff's poor clothing held not misconduct justifying interfering with action of court in refusing new trial, where counsel was immediately checked and jury admonished to disregard it. McKee v. St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013.

95. See McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829.

96. Remittitur did not cure error since passion and prejudice may have entered into determination of issues of fact. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Error cannot be cured by remittitur where evidence not conclusive on issues of negligence and contributory negligence, and jury may have been influenced thereby. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526.

97. In case where they were not recoverable. Chicago Union Traction Co. v. Lauth [Ill.] 74 N. E. 738.

98. Whether it naturally tended to prejudice jury is peculiarly for trial court to determine, taking into consideration all the circumstances. Jung v. Theo. Hamm Brewing Co. [Minn.] 104 N. W. 233.

99. Held no abuse. Jung v. Theo. Hamm Brewing Co. [Minn.] 104 N. W. 233.

A case will be reversed for improper and necessarily prejudicial remarks.[100] Whether remarks are prejudicial depends upon the peculiar facts of each case.[101]

Waiver.—Misconduct is not waived by the statement of the opposing counsel that he does not care whether the objectionable language is retracted or not, where he accompanies it by a reiteration of his exceptions.[102]

ARMY AND NAVY; ARRAIGNMENT AND PLEAS, see latest topical index.

ARREST AND BINDING OVER.

§ 1. *Occasion or necessity for warrant.*[1]—Peace officers have authority to arrest without warrant in certain cases.[2]

In Missouri a police officer may without a warrant arrest for a *past misdemeanor,* provided such officer has reasonable grounds to suspect a misdemeanor has been committed,[3] and if the necessary facts authorizing the arrest exist, they con-

100. In opening statement. Mattoon Gas Light & Coke Co. v. Dolan, 111 Ill. App. 333.

101. Ft. Smith Lumber Co. v. Cathey [Ark.] 86 S. W. 806. Remarks are not such as to work a reversal for the refusal of the trial court to arrest the same unless the statements are made as of fact, are unsupported by any evidence and are pertinent to the issue, or their natural tendency is to influence the finding of the jury. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. It will be presumed that erroneous arguments were prejudicial in the absence of a showing beyond a doubt that they were not and could not have been. Reversal where remarks were not withdrawn and no specific instruction not to consider them. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14. Conduct of attorney before a jury does not constitute prejudicial error, when it appears that what he said, taken in connection with the remarks of the court in the presence of the jury was calculated to prejudice the jury against him rather than otherwise. American Contracting Co. v. Sammon, 6 Ohio C. C. (N. S.) 121.

See, also, Harmless and Prejudicial Error, 3 C. L. 1579.

102. In response to question addressed to court. Jung v. Theo. Hamm Brewing Co. [Minn.] 104 N. W. 233.

1. See 3 C. L. 312.

2. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343. An arrest by a chief of police, who in conjunction with a deputy sheriff has a warrant therefor, and is assisting the deputy sheriff in making the arrest, is lawful. Lee v. State [Tex. Cr. App.] 85 S. W. 804.

Statutes generally prescribe the conditions under which a peace officer may arrest without a warrant. B. & C. Comp. § 1611. State v. Williams [Or.] 77 P. 965. Gen. St. 1901, § 813. City of Topeka v. Kersch [Kan.] 79 P. 681. Cr. Code Prac. §§ 35-37. Mann v. Commonwealth, 26 Ky. L. R. 723, 82 S. W. 438. The usual provisions are (1) for a crime committed in his presence; (2) for a felony committed although not in his presence; (3) for a felony in fact committed and he has reasonable cause for believing the person arrested to have been the perpetrator. Under such statutes mandamus will not lie to compel an arrest without a warrant for a misdemeanor not committed in an officer's presence. State v. Williams [Or.] 77 P. 965.

Peace officers have at common law the right to **arrest upon view,** without warrant, all persons who are guilty of a breach of the peace or other violation of the criminal laws. Percival v. Bailey [S. C.] 49 S. E. 7. It may be that an offense committed in the full hearing of an officer would be deemed as committed in his view (Id.), and under special circumstances of emergency a peace officer may arrest without a warrant for a breach of the peace not committed in his view, if the officer arrived at the place of disturbance very soon after the offense and found the offender present (Id.). In Kentucky a deputy marshal of a city of the fifth class may arrest without a warrant one committing an offense in his presence. Commonwealth v. Robinson [Ky.] 84 S. W. 319. In Pennsylvania a special police officer in the employ of a railroad company may arrest without a warrant a person who jumps from a car on which he was a trespasser and is about to escape. P. L. 125, 152. Higby v. Pennsylvania R. Co., 209 Pa. 452, 58 A. 858.

3. Rev. St. 1899, § 6212. State v. Boyd, 108 Mo. App. 518, 84 S. W. 191. An ordinance attempting to authorize arrest without warrant of persons suspected of committing misdemeanors is void. Gunderson v. Struebing [Wis.] 104 N. W. 149.

At common law an **escaped felon** could be arrested by any one without a warrant

stitute the authority and protection of the peace officer;[4] but an arrest and detention without warrant where there is no evidence of a criminal act is a violation of the constitutional right of liberty.[5] Though a warrant may lose its force because of its issuance in another county, it may show the existence of such facts as authorize an arrest without a warrant.[6] That an arrest was made without a warrant is not a jurisdictional defect and is waived by an appearance and submission to arraignment without objection,[7] or by a plea to the merits of the charge.[8]

A private person[9] may arrest and detain, until the arrival of an officer, one committing a breach of the peace,[10] or one who he has reasonable grounds for believing has committed a felony.[11] A peace officer has no authority to deputize a private person to arrest another under a warrant.[12]

§ 2. *Privilege from arrest.*[13]—The privilege extends only to protect one from arrest on civil process,[14] and may be waived.[15] A question involving the constitutional privilege from arrest of a U. S. senator will sustain a writ of error from the Federal supreme court to review a conviction in a district court.[16]

§ 3. *Complaint, affidavit, or information to procure warrant.*[17]—A complaint is entitled to liberal construction in justice court,[18] and is not defective in naming an accused John Doe, when the true name is unknown.[19] A complaint made upon information and belief is not sufficient under a requirement of probable cause,[20] but such a defect may be waived by the giving of bail, or asking for continuances.[21] That no complaint was made before arrest is waived by a plea to the merits.[22] In general, a complaint on information and belief only confers no jurisdiction on a magistrate to issue a warrant,[23] though the informer need not have personal knowledge of the facts necessary to convict the defendant,[24] but in some states a warrant may issue if the informer swears that he is informed of them and believes the facts to be true as stated in the information.[25] An information filed by a prosecutor must charge an offense shown by the depositions tak-

(Williford v. State, 121 Ga. 173, 48 S. E. 962), and in Georgia a misdemeanor convict, who has escaped, may be recaptured by any peace officer without a warrant (Id.).

One breaking the peace and indulging in loud cursing within the hearing of women may be arrested without a warrant (People v. Nihell, 144 Cal. 200, 77 P. 916); but an arrest by an officer without a warrant, for seduction, is illegal (Earles v. State [Tex. Cr. App.] 85 S. W. 1).

4. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

5. People v. Breen, 44 Misc. 375, 89 N. Y. S. 998.

6. Smotherman v. State, 140 Ala. 168, 37 So. 376.

7. Hollibaugh v. Hehn [Wyo.] 79 P. 1044.

8. Borough of North Plainfield v. Goodwin [N. J. Law] 60 A. 571. After conviction in a police court and appeal and conviction in district court, one is not entitled to question the constitutionality of a statute authorizing arrest without a warrant on view. City of Topeka v. Kersch [Kan.] 79 P. 681.

9. See 3 C. L. 314.

10. Gray v. State [Tex. Cr. App.] 86 S. W. 764.

11. Cr. Code Prac. § 37. Mann v. Com., 26 Ky. L. R. 723, 82 S. W. 438.

12. Mann v. Com., 26 Ky. L. R. 723, 82 S. W. 438. Unless properly deputized a private citizen cannot justify an arrest merely because he has in his possession a warrant for the person sought to be taken. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

13. See 3 C. L. 314.

14. One who is in a county only for the purpose of giving special bail in an action wherein he had been arrested on a capias is not privileged from arrest for bastardy. Cady v. St. Clair Circuit Judge [Mich.] 102 N. W. 1025.

15. Burton v. United States, 25 S. Ct. 243.

16. U. S. Const. art. 1, § 6. Burton v. United States, 25 S. Ct. 243.

17. See 3 C. L. 314.

18. State v. Clemmenson, 92 Minn. 191, 99 N. W. 640.

19. State v. King [Kan.] 80 P. 606.

20. Const. § 18. State v. McLain [N. D.] 102 N. W. 407.

21. State v. McLain [N. D.] 102 N. W. 407.

22. Borough of North Plainfield v. Goodwin [N. J. Law] 60 A. 571.

23. People v. Preston, 44 Misc. 267, 89 N. Y. S. 889; Hollibaugh v. Hehn [Wyo.] 79 P. 1044.

24. Commonwealth v. Barr, 25 Pa. Super. Ct. 609.

25. Commonwealth v. Barr, 25 Pa. Super. Ct. 609. An arrest may be lawful when made under a warrant issued on complaint sworn to by one who had no actual knowledge of the facts set out in the complaint. State v. King [Kan.] 80 P. 606.

en at the preliminary examination.[26] Where the clerk of the circuit court is ex officio clerk of the county court, an affidavit for warrant is not defective in reciting that it was taken before the clerk of the circuit court.[27] If the examination is to proceed at once, the accused may waive the requirement of a written information,[28] as may one on trial for committing a nuisance.[29]

§ 4. *The warrant and its issuance.*[30]—A warrant is of no force beyond the state of the issuing magistrate;[31] but in some states a warrant issued by a justice of the peace may be served in a county other than that of issuance, if indorsed by a magistrate of such other county.[32] Federal prisoners arrested in a district other than that in which they are indicted may be removed to that district for trial.[33] The issuing of a warrant is a judicial act performed by a judicial officer and is the beginning of a judicial proceeding, but it is not the act of a court.[34] A municipal charter requiring a mayor to see that the ordinances were faithfully executed and conferring jurisdiction to try violators thereof authorizes him to issue a warrant for one violating an ordinance.[35] An assistant justice of the peace, appointed to act during the absence of the regular incumbent, has authority to issue warrants in Rhode Island;[36] such a warrant need not show on its face the inability of the justice to act,[37] and a designation of authority as "Assistant Justice" is sufficient.[38] In Georgia a warrant issued by a justice of the peace must be made returnable before himself or some other judicial officer having jurisdiction in the premises.[39] In California a writ of mandate to compel the issuance of a warrant will be granted only upon the affidavit of one having some particular interest to be subserved by this process, independent of that which he holds with the public at large.[40]

§ 5. *Making arrest and keeping and disposition of prisoner.*[41]—A mere invitation by a police officer to accompany him to the police station, complied with and followed by a search, is not an arrest.[42] An officer is not bound to show his warrant in making an arrest,[43] but unless he, or another with whom he is acting in concert, is in possession of the warrant and in a position to show it upon demand, the arrest is not lawful.[44] A de facto marshal of a municipal corporation is authorized to make an arrest.[45] Only a Federal marshal may make an arrest on the requisition of a foreign consul under a treaty.[46] The motive in-

26. Ex parte Knudtson [Idaho] 79 P. 641.

27. Pruett v. State [Ala.] 37 So. 343.

28. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

29. City of Topeka v. Kersch [Kan.] 79 P. 681.

30. See 3 C. L. 315.

Warrant held sufficient: That defendant willfully cut a person named with a knife and otherwise abused him on the public streets, held sufficient; that defendant willfully abused and shot at a person named on the streets of a town without provocation, held sufficient; a warrant charging that defendant willfully struck and abused C. on the streets of the town without provocation and in violation of the ordinances, sufficiently sets forth the offense. Town of Clinton v. Leake [S. C.] 50 S. E. 541.

31. Ex parte Sykes [Tex. Cr. App.] 79 S. W. 538.

32. Code 1896, § 5219. Smotherman v. State, 140 Ala. 168, 37 So. 373. Code Cr. Proc. arts. 259, 260. Ex parte Sykes [Tex. Cr. App.] 79 S. W. 538.

33. Removal may be to District of Columbia. Hyde v. Shine, 25 S. Ct. 760; Dimond v. Shine, 25 S. Ct. 766.

34. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

35. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

36. Authority of appointment does not lapse by entering on new term. Gen. Laws 1896, c. 228, § 11. State v. Chappell [R. I.] 58 A. 1009.

37. State v. Chappell [R. I.] 58 A. 1009.

38. Gen. Laws 1896, c. 229, §§ 34, 35. State v. Chappell [R. I.] 58 A. 1009.

39. Pen. Code 1895, § 885. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

40. Code Civ. Proc. § 1086. Fritts v. Charles, 145 Cal. 512, 78 P. 1057.

41. See 3 C. L. 316.

42. Gunderson v. Struebing [Wis.] 104 N. W. 149.

43, 44. Adams v. State, 121 Ga. 163, 48 S. E. 910.

45. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

46. Dallemagne v. Moisan, 25 S. Ct. 422.

volved in an arrest does not affect its legality.[47] An officer making an arrest may use sufficient force to subdue the prisoner, though not acting in self defense,[48] being bound to use reasonable judgment in the circumstances,[49] and if assaulted, may defend himself and use such force as may be necessary for that purpose.[50] Force used in attempting to make an unlawful arrest constitutes assault and battery,[51] and the accused may resist with a force proportionate to that being used to detain him,[52] but if such person uses excessive force, the one attempting to arrest may defend himself.[53] An arrest which is illegal, without reference to the knowledge or belief of the party that it is illegal, may afford adequate cause to reduce an unlawful homicide to manslaughter;[54] but one is not justified in shooting an officer who merely announces the intention to arrest him, although the character of the officer does not appear and the arrest would be unwarranted.[55] A police officer failing to execute a warrant for arrest cannot justify absolutely by showing that the magistrate issuing the warrant orally requested him not to serve it.[56] The police have the power and it is their duty to search the person of one lawfully arrested for evidence to prove the charge,[57] or for weapons or valuables,[58] but officers making a lawful arrest are not exonerated thereby from subsequent robbery of the person arrested.[59] The imprisonment of a French seaman under our treaty with France may continue until the expiration of two months.[60]

§ 6. *Preliminary hearing, binding over, or discharge.*[61]—Formerly all inquiry at preliminary examinations might be confined to the prosecution, and the accused was not entitled to offer evidence in his own behalf,[62] but modern statutes generally require that all witnesses produced by the defendant must be sworn and examined.[63] Statutes may expressly authorize a defendant charged with crime to waive a preliminary examination,[64] and an accused out on bail who voluntarily absents himself cannot complain that witnesses were examined in his absence.[65] A justice of the peace,[66] or examining magistrate holding an accused for trial of a misdemeanor need not reduce to writing the evidence introduced or depositions taken unless so requested by the parties,[67] though in general, when a prisoner is arraigned the necessary facts to justify a further detention must be shown by competent proof by depositions or evidence taken in writing.[68] Where one arrested without a warrant is held for trial, the examining magistrate need not return to

The irregularity of an arrest by a state police officer on the requisition of a foreign consul is obviated by an examination into the case by a Federal court. Id.

47. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

48, 49. Sheehan v. West [R. I.] 60 A. 761.

50. Commonwealth v. Crowley, 26 Pa. Super. Ct. 124. The law does not require him to flee to the wall. Id.

51. Mann v. Com., 26 Ky. L. R. 723, 82 S. W. 438.

52. Coleman v. State, 121 Ga. 594, 49 S. E. 716. One about to be arrested unlawfully may resist force with force, proportioned to the character of the assault. Mann v. Com., 26 Ky. L. R. 723, 82 S. W. 438.

53. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

54. Earles v. State [Tex. Cr. App.] 85 S. W. 1.

55. Keady v. People, 32 Colo. 57, 74 P. 892, 66 L. R. A. 353.

Note: For a valuable note on liability for homicide in resisting arrest, see note to Keady v. People [Colo.] 66 L. R. A. 353.

56. People v. McAdoo, 90 N. Y. S. 669.

57. Smith v. Jerome, 93 N. Y. S. 202.

58. Keady v. People, 32 Colo. 57, 74 P. 892, 66 L. R. A. 353.

59. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217.

60. U. S. Rev. St. §§ 4079-4081. Dallemagne v. Moisan, 25 S. Ct. 422.

61. See 3 C. L. 317.

62. Farnham v. Colman [S. D.] 103 N. W. 161.

63. Rev. Code Cr. Proc. §§ 153-158. Farnham v. Colman [S. D.] 103 N. W. 161.

64. Hollibaugh v. Hehn [Wyo.] 79 P. 1044. A waiver results from an accused permitting himself to be arraigned upon an information and pleading thereto. Id.

65. State v. McLain [N. D.] 102 N. W. 407.

66. State v. Clemmensen, 92 Minn. 191, 99 N. W. 640.

67. People v. Zabor, 44 Misc. 633, 90 N. Y. S. 412.

68. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

the trial court a formal written information or any other pleading in the nature of an indictment.[69] To authorize a commitment pending an adjournment of the examination, a proper information in writing must be filed with the magistrate,[70] and a detention of the accused after an adjournment of the examination but without a formal commitment is illegal.[71] An affidavit of a police officer filed with a coroner warranting the facts attending a person's death, though not charging the prisoner with any crime, may justify the commitment of the accused during the preliminary examination.[72] A court having a prisoner in its custody, though out on bail, may change the charge upon which he was arrested so as to fit the facts of the case at any time pending the inquiry.[73] Where it appears that there is no evidence that the crime charged has been committed or where it appears that it has been committed, but there is no evidence of reasonable ground for believing that it was committed by accused, he is entitled to his liberty.[74] After conviction and commitment to prison by a court of competent jurisdiction, one cannot by habeas corpus question the sufficiency of the evidence produced on the preliminary examination.[75] That one under arrest asked for an examination is not admissible on the trial.[76] That one branch of the defense was not presented at the examination raises no inference against the accused unless the jury are satisfied that evidence was then in defendant's possession and would have been put in if true.[77] Where an arrest is without authority of law, mileage fees and costs cannot be taxed against the person arrested.[78]

§ 7. *Custody awaiting indictment or trial.*[79]—A person against whom a complaint for a felony has been filed before a magistrate who can only charge or hold for trial before another tribunal is "charged" with a crime under the Federal constitution and statutes.[80] In Idaho, unless good cause is shown to the contrary, the court will order a dismissal of the prosecution where a person has been held to answer for a public offense if an indictment is not found against him at the next term of court at which he is held to answer.[81]

ARREST OF JUDGMENT; ARREST ON CIVIL PROCESS, see latest topical index.

ARSON.

The crime.[82]—Arson at common law is an offense against the security of the habitation,[83] though at present the statutes in some states make it one against the property.[84] A railroad box-car is a structure capable of affording shelter to human beings.[85] In statutory arson malice is not always essential.[86]

69. Code Cr. Proc. pt. 4, c. 7, § 221. People v. Zabor, 44 Misc. 633, 90 N. Y. S. 412.

70, 71. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

72. People v. Flynn, 44 Misc. 20, 89 N. Y. S. 697.

73. Commonwealth v. Jones, 26 Ky. L. R. 867, 82 S. W. 643.

74. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343. Where the court finds no good reason for believing that an indictable offense has been committed, the accused will be discharged. Myers v. Clearman, 125 Iowa, 461, 101 N. W. 193.

75. Ex parte Knudtson [Idaho] 79 P. 641.

76. State v. Hopper [La.] 38 So. 452.

77. Commonwealth v. Anselvich [Mass.] 71 N. E. 790.

78. Ex parte Sykes [Tex. Cr. App.] 79 S. W. 538.

79. See 3 C. L. 318.

80. U. S. Const. art. 4, § 2, subd. 2; U. S. Rev. St. § 5278. In re Strauss, 25 S. Ct. 535.

81. Rev. St. 1887, § 8212. Loss of the complaint and press of business on the part of the prosecutor is not "good cause." In re Jay [Idaho] 79 P. 202.

82. See 3 C. L. 318, n. 27-31.

83. State v. Lintner [S. D.] 104 N. W. 205; Harrell v. State, 121 Ga. 607, 49 S. E. 703.

84. So held under Pen. Code, §§ 542, 543. State v. Lintner [S. D.] 104 N. W. 205.

85. Pen. Code, §§ 542, 543, construed. State v. Lintner [S. D.] 104 N. W. 205.

86. Rev. St. 1898, § 4400, cl. 2, does not require that the malicious intent to burn the dwelling house shall exist. Colbert v. State [Wis.] 104 N. W. 61.

Indictment and prosecution.[87]—Ownership need not be averred in statutory arson of a particular class of buildings.[88] An allegation of maliciously firing a building whereby a dwelling was burned is sufficient to charge the malicious setting fire to a building by the burning whereof another's dwelling shall be burned.[89] As a general rule an allegation of ownership is sustained by proof of occupancy of the alleged owner under a claim of right.[90]

On a prosecution for willfully and wantonly burning a building, it is incumbent on the state to show an intent, or to show facts and circumstances from which an intent may be inferred; and it is necessary that the jury should find the intent as a fact before the defendant can be adjudged guilty.[91] The admissibility[92] and competency of evidence is largely matter of the general law of criminal evidence.[93] Some preliminary testimony tending to show the corpus delicti should precede the admission of a confession.[94] Statement by prosecutor that there was no dynamite or other explosive in his house is not expert evidence.[95] Cases dealing with the sufficiency of the evidence are shown in the notes.[96] The setting of the fire being denied, instructions referring to the fire "which was set" and to the "setting of the fire" in the building in which the fire originated are objectionable, as assuming that some person set the fire.[97]

ASSAULT AND BATTERY.

§ 1. *Nature and elements of criminal offense.*[98]—An assault is an offer or attempt to do violence to the person of another, with the means at hand of carry-

87. See 3 C. L. 318, n. 32-35.

88. **In Missouri** an information charging the burning of a church building need not allege the ownership thereof. Rev. St. 1899, § 1875, construed. An information charging arson, consisting of the burning of a house of public worship, the property of the General Baptist Church, held sufficient. State v. Hunt [Mo.] 88 S. W. 719.

89. Rev. St. 1898, § 4400, cl. 2, penalizing the willful and malicious setting fire to a building by the burning whereof the dwelling house of another shall be burned in the daytime. Colbert v. State [Wis.] 104 N. W. 61.

90. Harrell v. State, 121 Ga. 607, 49 S. E. 703. Where the indictment alleged the property to be the property of C., whereas he only had the possession and control of it, title being in his wife, held immaterial under Cr. Code, § 128, providing that such an erroneous allegation is immaterial if the offense be clearly described with certainty. Commonwealth v. Napier [Ky.] 84 S. W. 536.

91. State v. Morgan, 136 N. C. 628, 48 S. E. 670.

92. Where the question was as to the value of the property at the time it was insured, evidence as to its value when new held inadmissible. People v. Helwig [Cal.] 80 P. 1030.

93. See Indictment and Prosecution, 4 C. L. 1.

94. Testimony that prosecutor's house was burned and that mule tracks found near it corresponded to tracks made by defendant's mule, held sufficient to render a confession by defendant admissible. Davis v. State [Ala.] 37 So. 676. It being conceded that the building described in the indictment was burned, and there being some evidence that the fire was of incendiary origin, the corpus delicti is sufficiently shown to render a confession by defendant admissible. State v. Rogoway [Or.] 78 P. 987.

95. Does not require a preliminary showing of witness' competency as an expert. Davis v. State [Ala.] 37 So. 676.

96. Evidence as to threats to burn building, former unsuccessful attempt, etc., held sufficient to sustain a conviction of arson in the first degree. People v. Wagner [N. Y.] 72 N. E. 577. Evidence that bloodhounds sought out defendant and that tracks near the burned barn corresponded with those of defendant, even to certain peculiar marks, held sufficient to support a conviction. Tinnan v. State [Tex. Cr. App.] 86 S. W. 753. Evidence that the fire was incendiary, that defendant had an opportunity to commit the crime, and that he cherished ill feelings towards the owner of the property destroyed, does not warrant a conviction. Jones v. Com. [Va.] 49 S. E. 663. Evidence that accused had had unpleasant words with the wife of the owner of the burned property, and that tracks led to defendant's house, held insufficient to convict. Williams v. State [Ga.] 51 S. E. 344.

97. Colbert v. State [Wis.] 104 N. W. 61.

98. See 3 C. L. 319.

ing the intention into execution.[99] A battery is the actual infliction of the injury.[1] Neither mere words, however insulting and abusive, a mere threat or violence menaced, as distinguished from violence begun to be executed,[2] nor mere preparation as distinguished from acts done in execution of the criminal purpose, will constitute an assault,[3] nor will a silent approval of another's acts justify conviction.[4] Several acts which have been held to constitute an assault are referred to in the note.[5] Under the Texas law if there is no violence there must be intent to injure or the assault is not aggravated,[6] and a charge on intent presumed from violence must be supported by proof of violence.[7] Taking indecent liberties with a woman is not aggravated assault unless it be done against her consent.[8]

§ 2. *Defenses.*[9]—If the act complained of was not unlawful, as if it was done by an officer, teacher, parent or other person in authority,[10] or was accident-

99. Clark & M. on Crimes, § 197. State v. Dyer [Del.] 58 A. 947; State v. Wood [S. D.] 103 N. W. 25; State v. Daniel, 136 N. C. 571, 48 S. E. 544; People v. Wells, 145 Cal. 138, 78 P. 470. Aggravated assault. Mapula v. Territory [Ariz.] 80 P. 389. Intent to injure is usually essential (State v. Cruikshank [N. D.] 100 N. W. 697; Jordan v. State [Tex. Cr. App.] 84 S. W. 823), and in assault proper there must be an offer or attempt to injure by violence (State v. Daniel, 136 N. C. 571, 48 S. E. 544). An attempt or endeavor to injure is essential to simple assault. Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520.

1. State v. Dyer [Del.] 58 A. 947; State v. Schmidt [S. D.] 104 N. W. 259.

2. State v. Daniel, 136 N. C. 571, 48 S. E. 544; Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520.

3. Going after weapon. State v. Wood [S. D.] 103 N. W. 25.

4. Commonwealth v. Middleby [Mass.] 73 N. E. 208.

5. Pointing pistol at person not intended. People v. Wells, 145 Cal. 138, 78 P. 470. Shooting at another with intent only to frighten is an assault and battery. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347. Taking hold of woman and expressing desire for sexual intercourse. Gill v. State [Tex. Cr. App.] 85 S. W. 1062. Indecent liberties. Knight v. State [Tex. Cr. App.] 85 S. W. 1067. Where the defendant departs from the highway and drives upon private property of the prosecutor and in passing strikes the prosecutor with a whip, she is guilty of assault and battery. State v. Dyer [Del.] 58 A. 947.

6, 7. Lee v. State [Tex. Cr. App.] 85 S. W. 798.

8. Refusal to so charge was error. Lee v. State [Tex. Cr. App.] 85 S. W. 798.

9. See 3 C. L. 320.

10. Police officer making arrest. Sheehan v. West [R. I.] 60 A. 761. Chastisement administered by a school teacher must be reasonable, and unaccompanied with malice or revenge. State v. Thornton, 136 N. C. 610, 48 S. E. 602.

Note: A teacher for the purpose of correction, occupies the place of a parent (2 Kent, Com. 203; Reg. v. Hopley, 2 Fost. & F. 202; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; State v. Pendergrass, 19 N. C. [2 Dev. & B. L.] 365, 31 Am. Dec. 416; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156, 1 Bl. Com. 453; Stevens v. Fassett, 27 Me. 266; Fitzgerald v. Northcote, 4 Fost. & F. 656; Cleary v. Booth [1893] 1 Q. B. 465, 62 L. J. Mag. Cas. [N. S.] 87, 5 Rep. 263, 68 L. T. [N. S.] 349, 41 Week. Rep. 391, 17 Cox, C. C. 611, 57 J. P. 373; Quinn v. Nolan, 7 Ohio Dec. Reprint, 585; Lower Can. Civ. Code, § 245), and is entitled to exercise reasonable restraint and administer reasonable correction (3 Bl. Com. 120; 3 Salk. 47; Bacon, Abr. tit. "Assault & B." p. 373; Morris' Case, 1 N. Y. City Hall Rec. 52; Reg. v. Hopley, 2 Fost. & F. 202; Cooper v. State, 8 Baxt. [Tenn.] 324, 35 Am. Rep. 704; Marlsbary v. State, 10 Ind. App. 21; Danenhoffer v. State, 69 Ind. 295; Commonwealth v. Ebert, 11 Pa. Dist. Rep. 199; Clasen v. Pruhs [Neb.] 95 N. W. 640; Wilbur v. Berry, 71 N. H. 619; Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387; Cooper v. McJunkin, 4 Ind. 290; Gardner v. Bygrave, 53 J. P. 743; New York Pen. Code, § 223, subd. 4; Minn. St. § 6477 [4]; White's Ann. Tex. Pen. Code, tit. XV, ch. 1, art. 593 [490]; Dowlen v. State, 14 Tex. App. 61; Stephens v. State, 44 Tex. Cr. Rep. 67; Hutton v. State, 23 Tex. App. 387, 59 Am. Rep. 777; Metcalf v. State, 21 Tex. App. 174; Thomason v. State [Tex. Cr. App.] 43 S. W. 1013; Kinnard v. State, 35 Tex. Cr. Rep. 276, 60 Am. St. Rep. 47; White's Ann. Tex. Pen. Code, title XV, ch. 12, art. 682; 3 N. J. Gen. St. p. 3049, § 202), though he has not been regularly or legally appointed (Kidder v. Chellis, 59 N. H. 473), the pupil has reached his majority (Stevens v. Fassett, 27 Me. 266), and the chastisement, through a defect in the pupil's constitution unknown to the teacher, results seriously (Quin v. Nolan, 7 Ohio Dec. Reprint, 585). He is criminally or civilly liable, however, as for an assault or more serious charge if he indulges in immoderate chastisement (1 Hale, P. C. 261; 1 Fost. C. L. 262; 1 Hawk. P. C. 111; Reg. v. Hopley, 2 Fost. & F. 202; 3 Salk. 47; 1 Hume, Cr. L. of Scotland, p. 237; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; State v. Long, 117 N. C. 791; State v. Pendergrass, 19 N. C. [2 Dev. & B. L.] 365, 31 Am. Dec. 416; Commonwealth v. Fell, 11 Hazard, Pa. Reg. 179; Commonwealth v. Randall, 4 Gray [Mass.] 36; Anderson v. State, 3 Head [Tenn.] 455, 75 Am. Dec. 774; Marlsbary v. State, 10 Ind. App. 21; Brisson v. Lafontaine, 8 L. C. Jur. 173; Hathaway v. Rice, 19 Vt. 102; Clasen v.

ally done while doing a lawful act,[11] or if done in the necessary defense of one's self or property,[12] or the person of a member of one's family,[13] there is no offense. Mere opprobrious words do not justify an assault,[14] nor does acting under advice.[15]

§ 3. *Indictment.*[16]—The indictment need not follow the language of the statute,[17] any language fairly describing the offense being sufficient.[18] It may

Pruhs [Neb.] 95 N. W. 640; Patterson v. Nutter, 78 Me. 509, 57 Am. Rep. 818; Lefebvre v. Des Petits Freres, Mont. L. Rep. 6 Super. Ct. 430; Whitely v. State, 33 Tex. Cr. Rep. 172; Spear v. State [Tex. Cr. App.] 25 S. W. 125; Howerton v. State [Tex. Cr. App.] 43 S. W. 1018; Smith v. State [Tex. Cr. App.] 20 S. W. 360), whether the injuries inflicted are of permanent nature or not (State v. Mizner, 50 Iowa, 145, 32 Am. Rep. 128; State v. Boyer, 70 Mo. App. 156). The presumptions favor the view that the teacher exercised a reasonable discretion under all the circumstances (Bolding v. State, 23 Tex. App. 175; Commonwealth v. Randall, 4 Gray [Mass.] 36; State v. Ward, 1 Kan. L. J. 370; Hathaway v. Rice, 19 Vt. 102; Haycraft v. Grigsby, 88 Mo. App. 354), and that the punishment was inflicted with a proper motive (State v. Pendergrass, 19 N. C. [2 Dev. & B. L.] 365, 31 Am. Dec. 416; State v. Thornton [N. C.] 48 S. E. 602; Anderson v. State, 3 Head [Tenn.] 455, 75 Am. Dec. 744; Stephens v. State, 44 Tex. Cr. Rep. 67; Marlsbary v. State 10 Ind. App. 21; Dowlen v. State, 14 Tex. App. 61; 1 Hume, Cr. L. of Scotland, 238; Haycraft v. Grigsby, 88 Mo. App. 354); the presumptions, however, being open to rebuttal (Anderson v. State, 3 Head [Tenn.] 455, 75 Am. Dec. 774; State v. Mizner, 50 Iowa, 145, 32 Am. Rep. 128; Haycraft v. Grigsby, 88 Mo. App. 354). Though a proper motive will not excuse extreme severity and excessiveness (Reg. v. Hopley, 2 Fost. & F. 202; Drum v. Miller, 135 N. C. 204, 65 L. R. A. 890; Haycraft v. Grigsby, 88 Mo. App. 354; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156), a teacher is not liable for mere errors in judgment resulting in injuries not permanent where there is no proof of malice (State v. Pendergrass, 19 N. C. [2 Dev. & B. L.] 365, 31 Am. Dec. 416; State v. Thornton [N. C.] 48 S. E. 602; Commonwealth v. Seed, 5 Clark [Pa.] 78; Vanvactor v. State, 113 Ind. 276, 3 Am. St. Rep. 645; Fox v. People, 84 Ill. App. 270), nor, under the ancient cases, for injuries resulting in death (Fost. C. L. 262; 1 Hawk. P. C. 111; 1 Hale, P. C. 261, 473, 474; J. Kelyng, 28, 65). A punishment inflicted maliciously or in anger (State v. Boyer, 70 Mo. App. 156; State v. Long, 117 N. C. 791; Commonwealth v. Seed, 5 Clark [Pa.] 78; State v. Pendergrass, 19 N. C. [2 Dev. & B. L.] 365, 31 Am. Dec. 416; State v. Thornton [N. C.] 48 S. E. 602; Commonwealth v. Ebert, 11 Pa. Dist. Rep. 199; Commonwealth v. Fell, 11 Hazard, Pa. Reg. 179; Bolding v. State, 23 Tex. App. 175; Reg. v. Hopley, 2 Fost. & F. 202; 1 Hale P. C. 454; 1 Hume, Cr. L. of Scotland, 238; Commonwealth v. Randall, 4 Gray [Mass.] 36; Dowlen v. State, 14 Tex. App. 61; Marlsbary v. State, 10 Ind. App. 21; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; Gardner v. State, 4 Ind. 632; Haycraft v. People, 88 Mo. App. 354; Brisson v. Lafontaine, 8 L. C. Jur. 173; Hathaway v. Rice, 19 Vt. 102; Cooper v. McJunkin, 4 Ind. 290), and without cause (Anderson v. State, 3 Head [Tenn.] 455, 75 Am. Dec. 774; State v. Vanderbilt, 116 Ind. 11, 9 Am. St. Rep. 820; State v. Mizner, 50 Iowa, 145, 32 Am. Rep. 128; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471), or for a cause unknown to the pupil (State v. Mizner, 50 Iowa, 145, 32 Am Rep. 128), cannot be justified. The reasonableness or excessiveness of the punishment where in dispute is generally a question for the jury (State v. Mizner, 45 Iowa, 248, 24 Am. Rep. 769; Commonwealth v. Randall, 4 Gray [Mass.] 36; State v. Boyer, 70 Mo. App. 156; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; Smith v. State [Tex. Cr. App.] 20 S. W. 360; Sheehan v. Sturges, 53 Conn. 481; Quinn v. Nolan, 7 Ohio Dec. Reprint, 585; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Clasen v. Pruhs [Neb.] 95 N. W. 640), taking into consideration all the circumstances of the case such as the nature of the instrument used (Smith v. State [Tex. Cr. App.] 20 S. W. 360; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; Commonwealth v. Seed, 5 Clark [Pa.] 78; 1 Hale, P. C. 261, 454, 473, 474; 1 Hawk. P. C. 111; Fost. C. L. 262; Reg. v. Hopley, 2 Fost. & F. 202, J. Kelyng, 64), the extent of the punishment (State v. Thornton, 136 N. C. 610, 48 S. E. 602), the offense of the pupil and his character and disposition (Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Quinn v. Nolan, 7 Ohio Dec. Reprint, 585; Sheehan v. Sturges, 53 Conn. 481; Haycraft v. Grigsby, 88 Mo. App. 354). —Adapted from note to Drum v. Miller [N. C.] 65 L. R. A. 890.

11. Accidentally striking a person while defending against the attack of another is striking in self-defense. State v. Mount [N. J. Law] 61 A. 259.

12. State v. Sharp [Iowa] 103 N. W. 770; State v. Schmidt [S. D.] 104 N. W. 259; State v. Dyer [Del.] 58 A. 947; Chapman v. State [Tex. Cr. App.] 85 S. W. 1073; Harmon v. State [Tex. Cr. App.] 84 S. W. 831. Apparent necessity is sufficient. Harrison v. State [Tex. Cr. App.] 85 S. W. 1058. Resistance to an officer attempting a legal arrest cannot be self defense. People v. Nihell, 144 Cal. 200, 77 P. 916.

13. Gray v. State [Tex. Cr. App.] 86 S. W. 764.

14. Scott v. State [Ark.] 86 S. W. 1004. Insulting language used by a little child no justification to defendant. McKinley v. State, 121 Ga. 193, 48 S. E. 917.

15. Commonwealth v. Middleby [Mass.] 73 N. E. 208.

16. See 3 C. L. 321.

17. State v. Crulkshank [N. D.] 100 N. W. 697.

18. An information charging that defendant willfully abused and shot at a person named, on the streets of the town named, without provocation, sufficiently charges the offense. Town of Clinton v. Leake [S. C.] 50 S. E. 541.

cover various degrees of assaults,[19] and conviction may be had under a charge of a greater offense, provided it be one which includes assault.[20]

§ 4. *Evidence; instructions; verdict; punishment.*[21]—Though the use of force on another will be presumed to have been without justification or excuse,[22] if the accused introduces evidence of justification, the burden is not thereby shifted to him to establish his defense, but the state will be required to prove beyond a reasonable doubt that the assault was not justified.[23] As in other prosecutions, the admissibility of evidence depends upon its competency,[24] and its relevancy and materiality to the issues involved.[25] Below are cited cases involving proof of intent and malice,[26] ability to commit injury,[27] extent of prosecutor's injuries,[28] threats,[29] and justification.[30] Cases involving the sufficiency of the evidence are mentioned below.[31] Defendant is entitled to instructions covering lesser offenses of which he might under the pleadings and evidence be convicted,[32]

19. Harmon v. State [Fla.] 37 So. 520.

20. Mapula v. Territory [Ariz.] 80 P. 389; State v. Cruikshank [N. D.] 100 N. W. 697. A conviction of assault and battery may be had under an indictment for assault with intent to murder. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347. On prosecution for homicide may be convicted of aggravated assault. Armsworthy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 697, 88 S. W. 215.

21. See 3 C. L. 321.

22. State v. Schmidt [S. D.] 104 N. W. 259.

23. State v. Schmidt [S. D.] 104 N. W. 259; State v. Sharp [Iowa] 103 N. W. 770.

24. Evidence of third person of statements made by wife, in presence of husband, wife refusing to testify, is competent. Joiner v. State, 119 Ga. 315, 46 S. E. 412. For the purpose of contradicting the prosecuting witness, it is incompetent for a justice of the peace to testify to a statement made by the witness, at a hearing before said justice, involving the same state of facts as the case on trial, in which such prosecuting witness was the defendant. State v. Dyer [Del.] 58 A. 947.

25. Evidence that the prosecutor said that he had employed a democrat to represent him and brought the action before a democratic judge was irrelevant. State v. Rattedge [Del.] 58 A. 944. In a prosecution for assault and battery, evidence that the prosecutor had brought a civil action against the same defendant for the same offense is inadmissible. Where the defendant was a state detective, evidence that the prosecutor had attempted to have defendant removed from his office was inadmissible. Id. Where prosecutor was beaten with a stick, he may be asked if he was armed. Tuberville v. State [Miss.] 38 So. 333. Where defendant was on trial for assaulting an officer trying to arrest him, it was immaterial whether he had ever been tried for the prior offense. People v. Nihell, 144 Cal. 200, 77 P. 916.

26. In a prosecution of a school-teacher for whipping a pupil, evidence as to discipline of school before defendant assumed control and a request of committee to be more strict was irrelevant. State v. Thornton, 136 N. C. 610, 48 S. E. 602. Evidence of prior assaults not part of the res gestae is irrelevant. Livingston v. State [Tex. Cr. App.] 83 S. W. 1111.

27. On trial for an assault with a pistol, evidence that defendant discharged his pistol shortly afterwards is relevant, but not that he had brass knuckles on his person when arrested. People v. Wells, 145 Cal. 138, 78 P. 470.

28. Brown v. State [Ala.] 38 So. 268. Evidence that the assaulted person suffered great pain is material, the indictment covering the several degrees of assault. Harmon v. State [Fla.] 37 So. 520.

29. Previous threats, both of defendant and the prosecuting witness, are relevant where the issue is as to which was the aggressor. State v. Atkins [Vt.] 59 A. 826.

30. Where the defendant assaulted a person sent by the sheriff to assist in making a schedule of attached goods, on the question of justification, it is immaterial that the sheriff had a right to demand of defendant to show property attached, the sheriff being informed by defendant that not all of the property in the store was attached. Commonwealth v. Middleby [Mass.] 73 N. E. 208. Evidence of an assault by defendant on prosecutor's wife is proper. Gray v. State [Tex. Cr. App.] 86 S. W. 764.

31. Evidence sufficient to support conviction of: Simple assault. State v. Coleman, 108 Mo. App. 421, 83 S. W. 1096; State v. Stock [Mo. App.] 86 S. W. 269. Aggravated assault. Gill v. State [Tex. Cr. App.] 85 S. W. 1062; Knight v. State [Tex. Cr. App.] 85 S. W. 1067. Assault with deadly weapon. State v. Cruikshank [N. D.] 100 N. W. 697; Tuberville v. State [Miss.] 38 So. 333. Wife-beating. Joiner v. State, 119 Ga. 315, 46 S. E. 412.

Evidence insufficient to convict of aggravated assault. McAfee v. State [Tex. Cr. App.] 83 S. W. 376; George v. State [Tex. Cr. App.] 84 S. W. 1057. To prove assault as principal. Clay v. State [Ark.] 88 S. W. 306.

32. In a prosecution for assault with intent to murder where defendant testified that his intent in shooting the prosecutor was merely to frighten him, a charge on simple and aggravated assault should be given. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347. Where the defendant struck but one blow with a small pistol causing a small bruise, he is entitled to an instruction that he was not guilty of aggravated assault, unless the pistol, as used, was a deadly weapon. Hardin v. State [Tex. Cr. App.] 84 S. W. 591. An instruction on aggravated assault in a prosecution for assault with intent to rob is properly denied. Long v. State [Tex. Cr. App.] 83 S. W. 384.

and instructions are necessary on any matter of self-defense of which there is evidence.[33] Several decisions discussing the form and propriety of particular instructions are referred to in the note.[34]

The verdict must be sufficiently definite to determine the offense of which the defendant is convicted.[35] Punishment for assault and battery in West Virginia may be by fine or imprisonment or both, and is limited in its extent only by the constitutional inhibition against excessiveness.[36]

§ 5. *Civil liability.*[37]—The liability of a master for assault by his servant is elsewhere treated.[38] A person is not responsible for an assault committed by another without his knowledge or consent,[39] and a corporation cannot be guilty of an assault unless at the time it owed some duty to the person assaulted, and the person committing the assault was acting under its authority.[40]

What constitutes.[41]—The same elements must appear in a civil as a criminal assault,[42] and an attempt or endeavor to do violence to the person is necessary,[43] though defendant's intent is immaterial where the acts constituting the assault are themselves unlawful.[44] The assault need not culminate in physical violence.[45]

Defenses.[46]—A property owner may resist another in a trespass upon it,[47] but

33. Armsworthy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 697, 88 S. W. 215; Harrison v. State [Tex. Cr. App.] 85 S. W. 1058; Chapman v. State [Tex. Cr. App.] 85 S. W. 1073. An instruction that the defendant must not use excessive violence in self-defense is wrong where there is no evidence of extreme or excessive violence. Where an indictment for assault with intent to murder was so worded as to preclude a conviction of aggravated assault, if defendant established his right to fire the first shot, he was entitled to a charge of acquittal. Simpson v. State [Tex. Cr. App.] 87 S. W. 826; Harmon v. State [Tex. Cr. App.] 84 S. W. 831.

34. Instruction held correctly refused where instructions given were correct and full. Tuberville v. State [Miss.] 38 So. 333. Where the allegation was that aggravated assault was committed with a hoe handle, inflicting serious bodily injury, it was error to charge jury to convict if they believed assault was committed with premeditated design. Winzel v. State [Tex. Cr. App.] 83 S. W. 187. Instruction as to elements of crime held erroneous. State v. Daniels, 136 N. C. 571, 48 S. E. 544. An instruction on mutual combat is erroneous when the issue is not raised. Chapman v. State [Tex. Cr. App.] 85 S. W. 1073. In a prosecution for assault, evidence that defendant committed a breach of the peace at the store of prosecutor on the occasion of the assault, that an officer was called for by telephone, and that prosecutor attempted to detain defendant by holding his horse, is sufficient to authorize a charge on prosecutor's right to arrest and detain defendant for breach of the peace until an officer should arrive. Gray v. State [Tex. Cr. App.] 86 S. W. 764. Charge on provoking difficulty held erroneous. Pedro v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 721, 88 S. W. 233.

35. Where the issues of simple and aggravated assault are submitted to the jury, the verdict must state which offense is intended. Winzel v. State [Tex. Cr. App.] 83 S. W. 187. Verdict finding defendant guilty of "assault with a dangerous weapon with intent to do bodily harm" does not warrant a judgment and sentence for the felony defined in Rev. Code 1899, § 7145, as an attempt to shoot with intent to do bodily harm. State v. Cruikshank [N. D.] 100 N. W. 697.

36. State v. McKain [W. Va.] 49 S. E. 20.

37. See 3 C. L. 323.

38. See Master and Servant, 4 C. L. 633; Carriers, 3 C. L. 591. See special article immediately following this topic.

39. Though the two were fighting plaintiff. Le Laurin v. Murray [Ark.] 87 S. W. 131.

40. Haggerty v. Potter, 111 Ill. App. 433.

41 See 3 C. L. 323.

42. See 3 C. L. 323, n. 90. Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520.

43. Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520. An action for the willful and wanton but not forcible expulsion of a passenger from a street car by a conductor is not an action for assault and battery. Sommerfield v. St. Louis Transit Co., 108 Mo. App. 718, 84 S. W. 172. In an action for assault and false imprisonment hy a tax collector, question whether plaintiff was improperly treated is for the jury. Kerr v. Atwood [Mass.] 74 N. E. 917.

44. Where the evidence is in dispute, the question whether acts constituting assault are lawful or unlawful is for the jury. Nicholls v. Colwell, 113 Ill. App. 219; Mohr v. Williams [Minn.] 104 N. W. 12. A physician is liable for an assault where he performs a surgical operation on a person not consenting. Plaintiff under influence of anaesthetics. Mohr v. Williams [Minn.] 104 N. W. 12.

45. Pointing a loaded firearm and discharging the same. Kurz v. Doerr [N. Y.] 72 N. E. 926.

46. See 3 C. L. 323.

Note: Authority of teacher to chastise pupil, see note, ante, § 2, "Defenses."

47. The design of the owner in resisting is not material. Slingerland v. Gillespie, 70 N. J. Law, 720, 59 A. 162.

reasonable force must be used in expelling a trespasser,[48] or in reclaiming property.[49] Mere provocation is not a defense,[50] but may be considered in mitigation of punitive damages,[51] if uttered so recent to the time of committing the assault as not to allow "cooling time" to intervene.[52] One who uses excessive force in self-defense is liable,[53] but an officer, using reasonable judgment, is justified in using sufficient force to subdue a prisoner, although the officer is not acting in self-defense.[54] A consent to engage in a mutual combat will not justify an assault,[55] but evidence of mutual consent to fight may be shown in mitigation of damages,[56] and injuries received in a friendly scuffle invited, provoked, or encouraged by plaintiff, are not actionable.[57] A mistake as to the identity of the person assaulted may be a defense where an assault on the person intended would have been justified.[58]

Pleading, evidence and trial.[59]—The sufficiency of complaints,[60] and the propriety of amendments thereto,[61] are discussed in the note. Justification is not admissible under the general issue, but must be specially pleaded.[62]

The burden of a prima facie case is on the plaintiff,[63] but he is not bound to go further and negative justification,[64] and the presumption of innocence applicable to criminal cases does not apply.[65] Res gestae[66] and evidence of previous relations,[67] character and reputation of the parties,[68] provocation,[69] and admissions,[70]

48. Hunt v. Caskey [N. J. Law] 60 A. 42. Lack of information as to validity of plaintiff's proxies not a defense to assault in ejecting plaintiff from stockholders' meeting. Noller v. Wright [Mich.] 101 N. W. 553.

49. Miller v. Sadowsky [Mich.] 101 N. W. 621.

50. Roth v. Slobodien [N. J. Law] 60 A. 59.

51. Mitchell v. Gambill, 140 Ala. 316, 37 So. 290; Le Laurin v. Murray [Ark.] 87 S. W. 131. Damages can never be mitigated below actual compensation. Le Laurin v. Murray [Ark.] 87 S. W. 131.

52. Le Laurin v. Murray [Ark.] 87 S. W. 131.

53. Where a person claiming to act in self-defense fails to use the highest degree of care practicable under the circumstances to ascertain whom he is striking, and fails to strike person intended, he is liable. Crabtree v. Dawson, 26 Ky. L. R. 1046, 83 S. W. 557. Question whether force used in self-defense is excessive, for the jury. Beck v. Minneapolis Union R. Co. [Minn.] 103 N. W. 746.

54. Sheehan v. West [R. I.] 60 A. 761. An officer is also justified in using reasonable force to compel a person under arrest to obey his orders. McNally v. Arnold [Iowa] 103 N. W. 361.

55. Each party must be left to suffer all consequences, civil and criminal. McNeil v. Mullin [Kan.] 79 P. 168.

56. Thomas v. Riley, 114 Ill. App. 520.

57. Nicholls v. Colwell, 113 Ill. App. 219.

58. Crabtree v. Dawson, 26 Ky. L. R. 1046, 83 S. W. 557, 67 L. R. A. 565.

Note: In Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284, the court does not lay down any rule as to the amount of care required of defendant in ascertaining the identity of his apparent assailant, but leaves it to the jury whether there actually was a mistake in regard thereto, and, if there was, then whether or not it was excusable. A similar result was reached in Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615. In James v. Campbell, 5 Car. & P. 372, such an assault was held actionable.—Adapted from a note to Crabtree v. Dawson [Ky.] 67 L. R. A. 565.

59. See 3 C. L. 324.

60. In trespass against a corporation, not necessary to aver evidentiary facts. Haggerty v. Potter, 111 Ill. App. 433. Averments connecting damages with injury sufficient. Pennington v. Caughey, 145 Cal. 10, 78 P. 227.

61. Where assault constituted an implied breach of defendant's contract as a carrier, amendment of complaint to conform to proof showing such breach allowed. Rein v. Brooklyn Heights R. Co., 94 N. Y. S. 636.

62. Mitchell v. Gambill, 140 Ala. 316, 37 So. 290; Thomas v. Riley, 114 Ill. App. 520.

63. In civil actions plaintiff is not bound to prove guilt beyond a reasonable doubt. Preponderance of evidence sufficient. Kurz v. Doerr [N. Y.] 72 N. E. 926. The burden is on plaintiff to show the assault, but not to negative self-defense. Happy v. Prichard [Mo. App.] 85 S. W. 655.

64. The burden is on the defendant to prove justification. Monson v. Lewis [Wis.] 101 N. W. 1094. Plaintiff need not negative self-defense. Happy v. Prichard [Mo. App.] 85 S. W. 655.

65. Kurz v. Doerr [N. Y.] 72 N. E. 926. Held permissible to show subject-matter of altercation as bearing upon the probability of the blow being struck by the defendant without warning and without justifiable provocation. Coruth v. Jones [Vt.] 60 A. 814.

66. Abusive language. Le Laurin v. Murray [Ark.] 87 S. W. 131.

67. Evidence of prior abusive language admissible to explain language used at time of assault. Le Laurin v. Murray [Ark.] 87 S. W. 131.

68. Evidence of plaintiff's general reputation as a pugnacious person admissible. Lowe v. Ring [Wis.] 101 N. W. 381. In an ac-

and evidence going to the amount of damages or extent of injury,[71] are admissible. Sufficiency of evidence is discussed in the note.[72]

Cases involving the measure[73] and excessiveness[74] of damages are cited in the note. Instructions must be based on evidence within the issues.[75] Whether a new trial should be granted or refused upon the ground of excessive or inadequate damages, as in other cases, rests in the sound judicial discretion of the trial court.[76]

LIABILITY OF MASTER FOR ASSAULT BY SERVANT.[1]

[SPECIAL ARTICLE BY WALTER A. SHUMAKER.]

A master is not civilly liable for an assault by his servant on a third person, unless: (1) The act of the servant was within the scope of his employment, or (2) was ratified by the master, or, (3) the master owed to the third person a special duty of hospitality or protection of which such assault was a breach.

tion by a father to recover damages for an assault upon and criminal abuse of minor child, evidence involving the general character of said minor at a time subsequent to the assault complained of is incompetent. Nyman v. Lynde, 93 Minn. 257, 101 N. W. 163.

69. Provocation in mitigation must not be too remote. Davis v. Collins [S. C.] 48 S. E. 469.

70. A plea of guilty in a criminal action for the same offense may be received in a civil action, but only as an admission. But circumstances explaining the plea may be shown by defendant. Risdon v. Yates, 145 Cal. 210, 78 P. 641.

71. Evidence of physician as to cause of pain, competent. Noller v. Wright [Mich.] 101 N. W. 553. Mental suffering is a proper element of actual damages. Happy v. Prichard [Mo. App.] 85 S. W. 655. Evidence that child of defendant, pregnant at time of assault, was small and nervous, incompetent. Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520.

72. Assault and rape—evidence insufficient. Champagne v. Hamey [Mo.] 88 S. W. 92. The question whether the acts of the defendant in a particular case amount to self-defense is for the jury, especially where the evidence is conflicting. Thompson v. Stottler [Iowa] 100 N. W. 852.

73. General damages for an assault accompanied by sexual solicitations do not include injury to reputation. Sletten v. Madison [Wis.] 99 N. W. 1020. Punitive damages may be awarded though trouble arose out of a business transaction. Lowe v. Ring [Wis.] 101 N. W. 381. Malice imputed and considered in assessing punitive damages. Davis v. Collins [S. C.] 48 S. E. 469. Elements of compensatory damages. Miller v. Sadowsky [Mich.] 101 N. W. 621.

74. $500 not excessive where assault and criminal abuse were upon a minor child. Nyman v. Lynde, 93 Minn. 257, 101 N. W. 162. $300 not excessive. Gulbertson v. Hanson [Minn.] 104 N. W. 2. $7,000 not excessive. St. Louis, etc., R. Co. v. Grant [Ark.] 88 S. W. 580. Verdict for $3,000 reduced to $1,000. Hunt v. Caskey [N. J. Law] 60 A. 42.

See, also, Damages, 3 C. L. 1020.

75. A charge taking from the jury relevant facts is erroneous. Britton v. Young [Ind. App.] 74 N. E. 905. An instruction authorizing the combination in one verdict of damages for injuries to the plaintiff, his medical bill, and loss of time, is proper. Happy v. Prichard [Mo. App.] 85 S. W. 655. It is also proper in an action against officers for an assault committed upon plaintiff while under arrest, where there is evidence of the plaintiff's resistance to the authority of the officers with reference to maintaining quiet in the jail, to give an instruction on the duty of such officers to maintain order. McNally v. Arnold [Iowa] 103 N. W. 361. Instruction that suffering and pain, etc., is a part of punitive damages, held good. Roth v. Slobodien [N. J. Sup.] 60 A. 59. An instruction that defendant is presumed innocent until proven guilty properly denied. Kurz v. Doerr [N. Y.] 72 N. E. 326. Instruction as to the burden of proof where justification is a defense, held erroneous. Monson v. Lewis [Wis.] 101 N. W. 1094. Instruction on exemplary damages held erroneous. Johnston v. Wells [Mo. App.] 87 S. W. 70. An instruction that words of provocation may be considered in mitigation of damage erroneous where there is no evidence of provocative words used. Langdon v. Clarke [Neb.] 103 N. W. 62. Instruction on law of mutual combat held erroneous. McNeil v. Mullin [Kan.] 79 P. 168. Where complaint alleged "the commission of an assault and battery in pursuance of a conspiracy between the defendants, etc.," a charge that conspiracy is the gravamen of the complaint is erroneous. Britton v. Young [Ind. App.] 74 N. E. 905.

76. Mohr v. Williams [Minn.] 104 N. W. 12 and see Damages, 3 C. L. 1020.

1. Civil liability only is treated. For a full discussion of criminal liability of master for acts of his servant, see Clark & M. Crimes (2d ed.) 260. The current cases relating to the subject-matter of this article are treated annually in Current Law under the topic Master and Servant (see 4 C. L. 608).

Scope of employment.—It is obvious that in a sense the commission of an assault is rarely within the actual or apparent authority of a servant, and accordingly the earlier cases relieved the master from all liability for wanton or malicious acts not committed by his express authority.[2] The modern rule is, however, well settled that the master is liable for every act of his servant, however willful, if done in the course of his employment and in execution of the master's business.[3] Stated more specifically, if the nature of the employment be such that the servant would under any circumstances be authorized to use force against third persons in the course of such business, the master commits it to the servant to decide the occasion for using force and the degree of force to be used; and if the servant, through misjudgment or violence of temper, goes beyond the necessity of the occasion, and gives a right of action to a third person, he is as to such person acting within the scope of his employment.[4] Thus a watchman or other person employed to protect property,[5] or to keep order on the master's premises,[6] or a servant charged with the protection of the master's property as an incident to other duties,[7] or a servant sent

2. Church v. Mansfield, 20 Conn. 287; Hibbard v. Railroad Co., 15 N. Y. 455; Moore v. Sanborne, 2 Mich. 519; Lindsay v. Griffan, 22 Ala. 629.

3. "A master," says Mitchell, J., in Morier v. St. Paul, etc. R. Co., 31 Minn. 351, 47 Am. Rep. 793, "is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment, and, in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, pro tempore, the master is not liable. If the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all the authorities."

4. Eastern Counties R. Co. v. Broom, 6 Exch. 314; Greenwood v. Seymour, 30 Law J. Exch. 327; Southern Exp. Co. v. Platten [C. C. A.] 93 F. 936; Turner v. North Beach & M. R. Co., 34 Cal. 594; Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213; Savannah St. R. Co. v. Bryan, 86 Ga. 312, 22 Am. St. Rep. 464; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 353; North Chicago City R. Co. v. Gastka, 128 Ill. 613; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Carter v. Louisville, N. A. & C. R. Co., 98 Ind. 552, 49 Am. Rep. 780; Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Sherley v. Billings, 8 Bush [Ky.] 147, 8 Am. Rep. 451; Hanson v. European & N. A. R. Co., 62 Me. 84, 16 Am. Rep. 404; Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Holmes v. Wakefield, 12 Allen [Mass.] 580, 90 Am. Dec. 171; Moore v. Fitchburg R. Corp. 4 Gray [Mass.] 465, 64 Am. Dec. 83; Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Brokaw v. New Jersey R. & T. Co., 32 N. J. Law, 328, 90 Am. Dec. 659; Haver v. Central R. Co., 62 N. J. Law, 282, 72 Am. St. Rep. 647; Rounds v. Delaware, L. & W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Higgins v. Watervliet Turnpike & R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Hoffman v. New York Cent. & H. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312; Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Atlantic & G. W. R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Pennsylvania R. Co. v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520; McClung v. Dearborne, 134 Pa. 396, 19 Am. St. Rep. 708; Redding v. South Carolina R. Co., 3 Rich. [S. C.] 1, 16 Am. Rep. 681; Palmer v. Charlotte, C. & A. R. Co., 3 Rich [S. C.] 580, 16 Am. Rep. 750.

5. Canfield v. Railroad Co., 59 Mo. App. 354; Rogan v. Moore Mfg. Co., 79 Wis. 573; Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650. A watchman has been held to act outside his duties in chastising a person for past trespasses. Brown v. Boston Ice Co. [Mass.] 86 Am. St. Rep. 469.

6. Doorkeeper at theatre. Dickson v. Waldron, 135 Ind. 507. Gatekeeper at fair. Oakland City Agr. Soc. v. Bingham, 4 Ind. App. 383.

7. Shop clerks apprehending suspected thief. Field v. Kane, 99 Ill. App. 1; McDonald v. Franchere, 102 Iowa, 496. Assault by depot hands protecting property. Hous-

to retake property of the master,[8] renders the master liable if he commit an unwarranted assault in executing such duties, and this, though a spirit of malice and vengeance mingles with the servant's sense of duty;[9] but if the servant commit the assault solely for his own malicious purpose, the master is not liable.[10] And where the servant acts wholly outside the scope of his employment, though in the master's interest, as where a servant not authorized to eject trespassers assumes to do so,[11] or a collector assaults the debtor,[12] or a waiter assaults a guest,[13] or an employee doing certain work assaults a person obstructing him therein,[14] the master is not liable. Some courts have exonerated the master where the assault was palpably uncalled for by the particular occasion, as where a watchman shot a trespasser as he was leaving the premises;[15] but the weight of authority as well as the better reason is to the contrary.[16] If the business committed to the servant was such as to be likely to produce an altercation, instruction to the servant not to commit an assault does not relieve the master from liability.[17]

Ratification.—Ratification of the act of a servant is of course equivalent to original authority, and renders the master liable to the same extent as if such authority had been given.[18] To be subject to ratification the wrongful act of the

ton, etc., R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56. Assault on customer who refuses to pay. Bergman v. Hendrickson, 106 Wis. 434. Clerk ejecting alleged spy of rival store. Geraty v. Stein, 30 Hun [N. Y.] 426. Ejecting trespassers from master's premises. Chicago, etc., R. Co. v. Doherty, 53 Ill. App. 283; Illinois Cent. R. Co. v. King, 77 Ill. App. 581, afd. 179 Ill. 91.

8. Denver, etc., R. Co. v. Harris, 122 U. S. 597, 30 Law. Ed. 1146; McClung v. Dearborne, 134 Pa. 396.. Collector sent to retake property conditionally sold. O'Connell v. Samuel, 81 Hun [N. Y.] 357; Levi v. Brooks, 121 Mass. 501. But see McGrath v. Michaels, 80 App. Div. [N. Y.] 458.

9. Illinois Cent. R. Co. v. King, 77 Ill. App. 581, afd. 179 Ill. 91.

10. Mott v. Consumers' Ice Co., 73 N. Y. 543; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Gilliam v. S. & N. A. R. Co., 70 Ala. 268; Central R. Co. v. Peacock, 69 Md. 257; McGilvray v. West End St. R. Co., 164 Mass. 122; Cofield v. McCabe, 58 Minn. 218; Curtis v. Dineen, 4 Dak. 245.

11. **Railroad conductors** have power to eject trespassers from their trains. Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; North Chicago City R. Co. v. Gastka, 128 Ill. 613; Hoffman v. New York Cent. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Marion v. Chicago, etc., R. Co., 59 Iowa, 428, 44 Am. Rep. 687.

Railroad engineers may eject trespassers from the engine. Chicago, etc., R. Co. v. West, 125 Ill. 320; Carter v. Louisville, etc., R. Co., 98 Ind. 552; Galveston, etc., R. Co. v. Zantzinger [Tex.] 44 L. R. A. 553.

Baggageman may eject trespasser from baggage room. Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597.

As to railroad brakemen the decisions are in conflict. That they have implied power to eject trespassers, see Brevig v. Chicago, etc., R. Co., 64 Minn. 168; Hoffman v. New York Cent. etc., R. Co., 87 N. Y. 25; Kansas City, etc., R. Co. v. Kelly, 36 Kan. 655. That they have not, see Illinois Cent. etc., R. Co. v. King, 179 Ill. 91; Marlon v. Chicago, etc., R. Co., 59 Iowa, 428.

Sleeping car porter wantonly assaulting passenger is not acting within scope of employment. Williams v. Pullman Palace-Car Co., 40 La. Ann. 87. Where the porter collected tickets, and assault growing from an altercation as to the return of a ticket was held to be within his employment. Dwinnelle v. New York, etc., R. Co., 120 N. Y. 117, 8 L. R. A. 224. Employer liable for indecent assault by porter on female passenger. Campbell v. Pullman Palace-Car Co., 42 F. 484.

Train master not authorized to eject person from company's grounds. Cent. of Ga. R. Co. v. Morris, 121 Ga. 484, 49 S. E. 606.

12. McGrath v. Michaels, 80 App. Div. [N. Y.] 458. Assault by collector on debtor in altercation over settlement of account. Collette v. Reborl, 107 Mo. 711, 82 S. W. 552. An assault by a collector on one who unheld the debtor in a contention that he had already paid was held beyond the scope of employment. Callahan v. Hyland, 59 Ill. App. 347. Assault by lock keeper on one evading payment of tolls. Ware v. Baratana & L. Canal Co., 15 La. 169.

13. Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659. And see Clancy v. Barker [C. C. A.] 131 F. 161.

14. Assault by employes building fence on persons seeking to obstruct work not within scope of employment. Waaler v. Great Northern R. Co. [S. D.] 100 N. W. 1097.

15. Golden v. Newbrand, 52 Iowa, 59. Shooting trespasser. Holler v. Ross [N. J.] 96 Am. St. Rep. 546.

16. Haehl v. Wabash R. Co., 119 Mo. 325; Alton, etc., R. Co. v. Cox, 84 Ill. App. 202.

17. Servant sent to get property forfeited by nonpayment of price. McClung v. Dearborne, 134 Pa. 396. Ejection of trespasser. Letts v. Hoboken, etc., Co., 70 N. J. Law, 358, 57 A. 392.

18. See Clark & Skyles on Agency, p. 354. See, also, Damages, 3 C. L. 999, as to

servant must have been committed in the master's interest.[19] Mere retention of the guilty servant after knowledge of an unlawful assault by him does not amount to a ratification.[20]

Special duty of hospitality or protection.—An exception to the rule as to servants acting outside the scope of their employment exists in cases where the master owes to the third person a special duty of hospitality or protection. In such case it is usually held that any assault by a servant, being a breach of that duty, renders the master liable. The most common illustration is the relation of carrier and passenger,[21] but the rule is applied with varying strictness to innkeepers,[22] keepers of theatres and other places of public amusement,[23] and also to stores and other places of business to which the public is invited.[24] As to common carriers the law is well settled. The carrier's obligation is to carry his passenger properly and treat him respectfully, and if he intrusts the duty to his servants the law holds him responsible for the manner in which they execute the trust. The carrier is liable to the passenger for every assault by the carrier's servants, without regard to whether it was inspired by malicious motives.[25] If, because the assault was in self-defense or in the proper discharge of duty, the servant is freed from liability, of course the carrier is not liable;[26] but neither abusive language by the passenger,[27] intoxication of the passenger,[28] or minor violations of rules[29] will justify an assault. Whenever ejection from the train is authorized, so much force as is needful for that purpose may be used,[30] but no more.[31]

As to whether persons in other relations involving a duty of hospitality are liable to the same extent involves some doubt, though the better rule seems to be that "the duty due from a carrier to his passenger, from the innkeeper to his guest, and from the theatrical manager to his patron, while perhaps differing in degree, is similar in kind."[32] The contrary view is presented in a recent Federal case,[33] in which the majority opinion holds the rule pertaining to carriers to be inapplica-

ratification subjecting master to punative damages.

19. Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753.

20. Williams v. Pullman Palace-Car Co., 40 La. Ann. 87; Robinson v. Superior Transit R. Co., 94 Wis. 345; Dillingham v. Russell, 73 Tex. 47.

21. Bryant v. Rich, 106 Mass. 188; Chicago, etc., R. Co. v. Flexman, 103 Ill. 548; Fick v. Chicago & N. R. Co., 68 Wis. 471; Terre Haute, etc., R. Co. v. Jackson, 91 Ind. 21; Dwinnelle v. New York, etc., R. Co., 120 N. Y. 122; Sturat v. Brooklyn & C. T. R. Co., 90 N. Y. 588; Pittsburg, Ft. W. etc., R. Co. v. Hinds, 53 Pa. 515; Godard v. Grand Trunk R. Co., 57 Me. 214; Spohn v. Missouri Pac. R. Co., 87 Mo. 74.

Sleeping car companies. Pullman Palace-Car Co. v. Lowe, 28 Neb. 239; Williams v. Palace-Car Co., 40 La. Ann. 421; Nevin v. Pullman Palace-Car Co., 106 Ill. 230.

22. Overstreet v. Mosier, 88 Mo. App. 72; Tonsey v. Roberts, 53 N. Y. Super. Ct. 446; Clancy v. Barker [Neb.] 98 N. W. 440.

23. Dickson v. Waldron, 135 Ind. 507, 34 N. E. 510, 35 N. E. 1.

24. Stores. Swinerton v. Boutiller, 71 Misc. [N. Y.] 640; Mallach v. Ridley, 24 Abb. N. C. 181.

Express office. Richberger v. Express Co., 73 Miss. 170.

25. See cases cited ante. See, also, Craker v. Chicago, etc., R. Co., 36 Wis. 657, where the carrier was held liable for the act of its conductor in kissing a passenger against her will.

26. New Orleans, etc., R. Co. v. Jopes, 142 U. S. 18, 35 Law. Ed. 919; Hayes v. St. Louis R. Co., 15 Mo. App. 583; Moore v. Columbia, etc., R. Co., 38 S. C. 1.

27. Haman v. Omaha Horse R. Co., 35 Neb. 74; Baltimore, etc., R. Co. v. Barger, 80 Md. 23; Coggins v. Chicago, etc., R. Co., 18 Ill. App. 620.

28. Illinois Cent. R. Co. v. Sheehan, 29 Ill. App. 90.

29. Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19; Hanson v. European & N. A. R. Co., 62 Me. 84.

30. Wright v. California Cent. R. Co., 78 Cal. 360; Pennsylvania R. Co. v. Connell, 112 Ill. 295.

31. Chicago, etc., R. Co. v. Herring, 57 Ill. 59; Chicago, etc., R. Co. v. Bills, 104 Ind. 37; Planz v. Boston, etc., R. Co., 157 Mass. 377; Higgins v. Watervliet, etc., R. Co., 46 N. Y. 23.

32. Dickson v. Waldron, 135 Ind. 507. See, also, Mastad v. Swedish Brethren, 83 Minn. 42; Norcross v. Norcross, 53 Me. 169; Pinkerton v. Woodward, 33 Cal. 585; Russell v. Fagan, 7 Houst. [Del.] 392.

33. Clancy v. Barker [C. C. A.] 131 F. 161.

ble to innkeepers and others in similar relation. The reason given for the distinction, viz., that the peculiar liability of carriers is imposed in view of the peculiar dangers attending travel by rail, does not seem altogether sound, for the rules regulating the liability of carriers antedate the dangers of modern travel. And however these dangers may impose stringent rules to avoid accident, they seem irrelevant to malicious assault by the carrier's servant. A strong dissenting opinion [34] and a contrary decision on the same facts by the supreme court of Nebraska [35] considerably weaken the weight of the holding.

ASSIGNMENT OF ERRORS, see latest topical index.

ASSIGNMENTS.

§ 1. *Rights susceptible of assignment.*[36]—Generally speaking, all choses in action which may survive the owner's death may now be assigned.[37] Thus accounts,[38] mortgages [39] and chattel mortgages,[40] tax certificates,[41] or a right of action for taxes paid under protest,[42] mechanics' liens,[43] options to purchase land,[44] or underwriting agreements,[45] are assignable. Negotiable instruments may pass by an assignment without being endorsed.[46] Trading stamps are transferable and may be used and assigned by one not a customer of the company.[47] An Indian nation may assign their rights in a government fund to new members incorporated with them.[48] A part of a claim may be assigned with consent of debtor,[49] but a contract cannot be assigned where its express terms [50] or the law [51] forbids it, except by

34. See opinion of Mr. Justice Thayer, 131 F. 171.

35. Clancy v. Barker [Neb.] 98 N. W. 440.

36. See 3 C. L. 326.

37. 2 Am. & Eng. Enc. Law (2d Ed.) 1017.

38. Sleeper v. Gagne, 99 Me. 306, 59 A. 472; Conroy v. Boeck, 91 N. Y. S. 80.

39. Law v. Smith [N. J. Eq.] 59 A. 327.

40. Burden on mortgagor to show that assignee took with knowledge that the note was tainted with usury. Haynes v. Gay [Wash.] 79 P. 794.

41. Where they were assigned to one to protect a supposed interest in the property, he was entitled to a refundment on the assessments being declared void, though he was not unable to obtain possession of the property. People v. Board of Sup'r of Nassau County, 93 N. Y. S. 344.

42. The fact that the illegality alleged is that there were fraudulent alterations of the assessment roll does not prevent its assignment. Laing v. Forest Tp. [Mich.] 102 N. W. 664.

43. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

44. Option to purchase land adjoining a river for the purpose of developing water power assigned to another who was also securing options. Twin City Power Co. v. Barrett [C. C. A.] 126 F. 302. Option for 30 days to purchase described land for $6,000. Kreutzer v. Lynch [Wis.] 100 N. W. 887.

Contra: An offer under seal and for a valuable consideration to another to sell land at a certain price if paid within 5 years is unassignable though irrevocable. Rease v. Kittle [W. Va.] 49 S. E. 150.

45. Agreement to buy bonds of corporation with bonus of stock at a certain price. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 146.

46. Certificates of deposit. Rivenburgh v. First Nat. Bank, 92 N. Y. S. 652.

47. Notwithstanding that the maker retains title to the paper on which they are printed, the right of redemption is assignable. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368.

48. The Cherokees admitted the Delawares to citizenship and to a share in their lands and funds. Delaware Indians' Case, 38 Ct. Cl. 234. Act of Chickasaw Nation in admitting freedman to citizenship may be repealed before approval of congress. Choctaw Case, 38 Ct. Cl. 558.

49. Where city paid assignee part of claim, it waived its right to object. Gordon v. Jefferson [Mo. App.] 85 S. W. 617.

50. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 77. Contract with a telegraph company for board of trade quotations which could not be assigned. A transfer of the business terminated the contract. Sullivan v. Chicago Board of Trade, 111 Ill. App. 492. Stamping a bill of lading "Nonnegotiable" does not affect its assignability. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134. See note, "Right to prohibit the assignment of a contract," 3 C. L. 231, n. 39.

51. Provision in city charter. It will

operation of law;[52] but one cannot limit the assignability of his outstanding obligations.[53] All judgments may be assigned.[54] So, too, one may assign actions arising out of contract,[55] or of wrongs to property,[56] as a suit to restrain the infringement of a patent.[57] But rights of action arising out of fraud or deceit,[58] or for personal injuries,[59] are not assignable, except in states where, as in Texas, all causes of action are assignable by statute.[60] The claim of a contractor against a city[61] or a claim against a state may be assigned;[62] but claims against the United States cannot be assigned[63] except by operation of law.[64]

Contracts for personal services or otherwise appurtenant to persons or specific property[65] cannot be assigned. It is enough that there is an implied intention to require personal service.[66] The business of an insurance agent,[67] or a contract to pay an annuity for the support of one's father, is not a contract for personal services.[68] So the nature of the contract may show that it is not assignable, as a contract to sell a certain style of printing press exclusively to or through a certain corporation,[69] or a contract made by a land company on conveying land to a glass factory to supply natural gas free of cost;[70] and this may control though the contract is made expressly between the parties and their assigns.[71]

not prevent the assignment of money due on a contract for public work after the contract has been fully performed. Appeal of City of Duluth [Minn.] 101 N. W. 1059.

52. A mortgage provided that it should be nonnegotiable and uncollectible in the hands of any other person than the mortgagee, but it passed to a receiver appointed by a Federal court. Scaife v. Scammon Inv. & Sav. Ass'n [Kan.] 80 P. 957.

53. The transfer of trading stamps will not be enjoined on account thereof. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368.

54. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962. Testimony of two plaintiffs that it has been assigned to one of them establishes such assignment as against the testimony of the defendant. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837.

55. The wrongful refusal of a bank to honor a depositor's check is not a personal wrong but a breach of contract. Robinson v. Wiley [Mass.] 74 N. E. 923. For money had and received. Rines v. New York & Brooklyn Brewing Co., 90 N. Y. S. 362.

56. Action for conversion assignable. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200.

57. Defendant could avail themselves of any equity or defense against the assignor. Haarman-DeLaire-Schaffer Co. v. Leuders, 135 F. 120.

58. Action for recovery of taxes on account of fraudulent alterations in the assessment roll is assignable. Laing v. Forest Tp. [Mich.] 102 N. W. 664.

59. Right of action not assignable before judgment, even to the attorney prosecuting the same, and a statute preserving the right to an executor or administrator does not render them assignable. Weller v. Jersey City, etc., R. Co. [N. J. Err. & App.] 61 A. 459. But a judgment may be assigned immediately after it is recovered. Reynolds v. Cavanagh [Mich.] 102 N. W. 986.

60. Rev. St. 1895 art. 4647. Suit to recover penalty on a liquor dealer's bond. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

61. In absence of any statute. Gordon v. Jefferson [Mo. App.] 85 S. W. 617.

62. Bounties on coyote scalps. Bauer v. State, 144 Cal. 740, 78 P. 280.

63. Rev. St. § 3477. But this was not designed to aid persons to avoid their debts, and where contractors who were embarrassed had assigned their contract to their creditors, who had secured an injunction from a state court forbidding the contractors from collecting on the contract, the Treasury officials could not arbitrarily select between the claimants. People's Trust Co.'s Case, 38 Ct. Cl. 359.

64. Suit by administratrix for salary due deceased as a judge, who had retired. James's Case, 38 Ct. Cl. 615.

65. See 3 C. L. 327.

66. A contract for the installation of electric apparatus, providing that the construction of circuits be under the supervision of the contractor, is for personal services. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 77.

67. The insurance company cannot control the use or transfer of the expiration register which was made by the agent. National Fire Ins. Co. v. Sullard, 97 App. Div. 233, 89 N. Y. S. 934.

68. Father conveyed land to son on agreement to pay off incumbrances and to pay annuity. Hurley v. McCallister [S. D.] 103 N. W. 644.

69. Even where the corporation was dissolved, and another corporation, its successor, was organized in another state, and all rights and property assigned to it. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. [N. Y.] 73 N. E. 48.

70. Neither can the receiver of the glass factory assign it. Sargent Glass Co. v. Matthews Land Co. [Ind. App.] 72 N. E. 474.

71. The express use of the word "assigns" did not control the terms, which showed that it was nonassignable. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 111.

An assignment of future earnings,[72] if limited to amount or time,[73] and if not made for the purpose of defrauding creditors,[74] is valid, or at least good in equity.[75] Its validity is sometimes dependent on its being recorded.[76] The assignment by municipal employees of their salaries is contrary to public policy,[77] unless they have already earned them.[78]

Contingent interests may be assigned[79] as a remainder,[80] rights under a will,[81] money to become due under a contract,[82] though the fund has no actual or potential existence;[83] but the bare possibility of a reverter is not assignable.[84]

§ 2. *Requisites and sufficiency of express assignments.*[85]—An assignment need not be made on a separate paper,[86] nor is any consideration necessary to its validity.[87] No particular form is required to assign claims in bankruptcy.[88] Delivery of a certificate,[89] bill of lading,[90] bank book,[91] draft,[92] or writing, may be sufficient.[93] The acceptance of stock and the payment of the purchase price is sufficient to pass the title to stock,[94] but an executory contract does not pass the title

72. See 3 C. L. 327.

73. Assignment of wages to be earned in future under an existing contract to secure a present debt cannot be enforced as to wages earned after bankruptcy. Leitch v. Northern Pac. R. Co. [Minn.] 103 N. W. 704.

74. For a definite period of six months. Quigley v. Welter [Minn.] 104 N. W. 236. Assignment of wages to be earned under an existing employment, made in good faith and for a valuable consideration, is valid, where there is a reasonable expectation that the wages covered by the contract will be earned; against such an assignment a claim for homestead exemption cannot prevail. Brooks Co. v. Tolman, 6 Ohio C. C. (N. S.) 137.

75. Made by a corporation to secure a loan. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

76. Mace v. Richardson [Me.] 60 A. 701.

77. A city fireman, in consideration of payment to him of a percentage of his monthly salary, promised to collect and turn over to the assignee the whole amount. Mercantile Finance Co. v. Welsh, 91 N. Y. S. 723. An officer who had been wrongfully discharged by a city assigned his claim against the city, and his receiver thereunder was not entitled to the salary earned after the officer's reinstatement, or to the gratuity given him by law because of such removal. People v. Grout, 45 Misc. 742, 92 N. Y. S. 742. See 1 C. L. 222, n. 16.

78. But it was not conceded that a janitor employed by the school board was a public officer. Oberdorfer v. Louisville School Board [Ky.] 85 S. W. 696.

79. See 3 C. L. 328.

80. A remainderman may institute proceedings to have his assignment of his rights to a fellow remainderman set aside where the same was induced by fraudulent representations as to the state of the life tenant's health. Obney v. Obney, 26 Pa. Super. Ct. 116; Obney v. Obney, 26 Pa. Super. Ct. 122.

81. Assigned his share in a certain mortgage in which he had a remainder under his grandfather's will. Dixon v. Bentley [N. J. Eq.] 59 A. 1036.

82. Payment to be made at certain stages of the building and on completion. Campbell v. J. E. Grant Co. [Tex. Civ. App.] 82 S. W. 794.

83. Assignment good as against subsequent creditors. Johnson v. Donohue [Tenn.] 83 S. W. 360.

84. Deed conveyed land in consideration of support of grantor for life by grantee, and in case of failure was to be void. Helms v. Helms [N. C.] 49 S. E. 110.

85. See 3 L. C. 329.

86. An account may be assigned by an indorsement on the bill of items. Sleeper v. Gagne, 99 Me. 306, 59 A. 472.

87. Civ. Code, §§ 1039, 1040, 1083, 1084. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962.

88. The indorsement and delivery of notes which had been proved and allowed will be allowed, as against a written assignment made several years later. In re Sweetser, 131 F. 567.

89. Seat in produce exchange assigned by delivery of certificate with a blank assignment indorsed thereon. Hamblen v. German, 93 App. Div. 464, 87 N. Y. S. 642.

90. The indorsement and delivery of a bill of lading transfers the title to the goods to the vendee, subject only to the right of stoppage in transitu, if the right of no third person has intervened. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134.

91. There is a sufficient delivery where a depositor gives her pass-book to another with an order on the bank for the payment of the deposit on production of the book, though the depositor dies the next day before the presentation of the book or order. McGuire v. Murphy, 94 N. Y. S. 1005.

92. The delivery of drafts to a bank for collection, with direction that when collected the proceeds were to be paid to a person named, constitutes an assignment to such person. Zilke v. Woodley, 36 Wash. 84, 78 P. 299.

93. Decedent executed a writing giving all his property, including bank deposits, to plaintiff, in consideration of the latter's caring for him during his sickness, but reserved the right to hold the property as long as he lived. Rivenburgh v. First Nat. Bank, 92 N. Y. S. 652. Note, "Delivery," 3 C. L. 330.

94. The sale is not invalid because the undisclosed principal of the purchaser could

until the sale is executed.[95] A policy may be retransferred by destruction of assignment and redelivery of policy.[96] The assent of guarantors is necessary for the assignment of a guaranty.[97] A bankrupt cannot assign property after filing his petition in bankruptcy.[98] Where an officer[99] or agent[1] assigns, due authority must be proved. At common law an administrator may assign choses in action.[2] A receiver cannot assign a contract where the original holder could not.[3] Failure of the assignee of a chose in action to give notice of the assignment to the debtor is immaterial as against an attaching creditor.[4] One must give notice to a judgment debtor of an assignment of the judgment.[5]

Record.[6]—The assignment of a mortgage on real property is a conveyance which may be recorded.[7] Filing is not necessary to render an assignment binding as to one who has actual notice of it.[8]

§ 3. *Constructive or equitable assignments.*[9]—Assignments insufficient at law may be good in equity,[10] if that carries out the intent of the parties.[11] The assignment of a verdict to be recovered,[12] of a fund which has no potential existence,[13] or of a debt to accrue under a contract,[14] but not of money to accrue where there is no

not legally acquire the stock. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6.

95. For sale of stock. Osgood v. Skinner, 111 Ill. App. 606. A contract that an attorney shall receive a part of the recovery is executory merely, as the cause of action remains in the client. Weller v. Jersey City, etc., R. Co. [N. J. Err. & App.] 61 A. 459.

96. The legal presumption of continued ownership of an insurance policy under an assignment is rebutted by the assignor's possession of the policy and the failure of the assignee's executor to find the assignment among the papers. Cuyler v. Wallace, 91 N. Y. S. 690.

97. Allegation in pleading that it was assigned with the knowledge and consent of the guarantors is sufficient. Levy v. Cohen, 92 N. Y. S. 1074.

98. Title passes from bankrupt on filing, and receiver cannot transfer the same without an order of the court. Muschel v, Austern, 43 Misc. 352, 87 N. Y. S. 235.

99. The president of a corporation has no authority to assign an account due the corporation unless duly empowered by the directors. Authority to make a loan, payable "out of the first collection following such loan," is insufficient. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

1. Testimony of one that he opened an account at a bank, and proof of a bank book containing an account under a different name, do not show authority for the former to assign the account. Robbins v. Bank of M. & L. Jarmulosky, 90 N. Y. S. 288. Proof that a claim was assigned to plaintiff by an attorney of the assignor is insufficient without proof of the authority of the attorney in fact. MacLatchy v. Hannan, 93 N. Y. S. 282.

2. But in Ohio the power is taken away except in certain cases, and a transfer to a residuary legatee is ineffective. Broadwell v. Banks, 134 F. 470.

3. Sargent Glass Co. v. Matthews Land Co. [Ind. App.] 72 N. E. 474.

4. Milligan v. Plymouth State Bank, 4 Ohio C. C. (N. S.) 585.

5. The entry of the assignment on the records of the court is not notice to defendant, and after paying judgment to plaintiff he cannot be compelled to pay the judgment a second time to the assignee. Work v. Prall, 26 Pa. Super. Ct. 104.

6. See 3 C. L. 331.

7. Real Property Law, § 240, defines "conveyance" as any instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned. Weideman v. Pech, 92 N. Y. S. 493.

8. Statute provided assignment of a cause of action should be filed with the papers in the cause. Kansas City, etc., R. Co. v. Joslin [Ark.] 86 S. W. 435.

9. See 3 C. L. 331.

10. Assignment of interest in the estate of a grandfather, though insufficient at law to pass any interest in the mortgage, will in equity entitle the assignee to the proceeds of the mortgage. Dixon v. Bentley [N. J. Eq.] 59 A. 1036.

11. Where plaintiff's husband was trustee for her, a writing by the husband declaring that all rights and interests purporting to belong to him were the property of plaintiff did not amount to an equitable assignment. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219.

12. The assignment of any verdict to be recovered in a pending action to attorneys for professional services will not be presumed to be fraudulent as against an attaching creditor. Briggs v. Brown, 23 Pa. Super. Ct. 163.

13. Assignment of funds to become due under a railroad contract in consideration of a pre-existing debt, made within four months of bankruptcy, is good as against creditors subsequent to the bankruptcy. Johnson v. Donohue [Tenn.] 83 S. W. 360.

14. A surety on a building contract might take an assignment from the contractor, though he could acquire no lien against the owner; and where the sum due the contractor was less than the sum due from the contractor to the surety, there was consideration, and the fund definitely ascertained. Campbell v. J. E. Grant Co. [Tex. Civ. App.] 82 S. W. 794.

contract, is good in equity.[15] An order,[16] a negotiable draft,[17] or a check in the ordinary form, without presentation,[18] does not constitute an assignment of the fund. But an accepted order[19] or an order to another or a particular fund constitutes an equitable assignment thereof.[20]

§ 4. *Construction, interpretation, and effect.*[21]—The natural and reasonable meaning is taken,[22] and the whole transaction may be considered.[23] A mere option must be enforced before default or within a reasonable time thereafter, or it will not result in an assignment.[24] A devisee of land, subject to a lease, is an assignee of the rents.[25] Unpaid dividends do not pass with an assignment of shares of stock.[26] Assignments may be absolute[27] or for collateral security,[28] which may be shown by the conduct of the parties.[29] But a right to repurchase,[30] or even an

15. An assignment to a creditor of all the proceeds of the future sales of milk to a certain person gives the creditor no title or equitable lien, where there was no contract with the person requiring the delivery of milk. O'Neil v. Helmke [Wis.] 102 N. W. 573. Assignee acquires no lien under an equitable assignment of money to be earned unless the assignor has earned the money and the debtor received notice. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

16. Contractor gave to a firm an order on a railroad, but it was not presented for a year, and then a day later the contractor filed a petition in bankruptcy, and the order was held a preference. Johnston v. Huff, Andrews & Moyler Co. [C. C. A.] 133 F. 704.

17. Borough of Rosselle Park v. Montgomery [N. J. Eq.] 60 A. 954.

18. Garnishment creates a lien superior to that of a check which has not been presented. Love v. Ardmore Stock Exch. [Ind. T.] 82 S. W. 721. See note, "Check, whether assignment of fund," 3 C. L. 332.

19. Contractor for city building secured order in favor of a bank from comptroller for money due. Third Nat. Bank. v. Atlantic City [C. C. A.] 130 F. 751. Where a subcontractor acepts an order from the contractor on the owner, service of notice on the owner makes an equitable assignment of the amount to become due contractor. Wheelock v. Hull, 124 Iowa, 752, 100 N. W. 863.

20. Contractor delivered orders on owner of building for payment of materials furnished, which constituted an equitable assignment of so much of the contract price as was due and unpaid, as against subsequent attaching creditors. Lutter v. Grosse, 26 Ky. L. R. 585, 82 S. W. 278. Orders drawn by a building contractor against the owner in favor of a subcontractor give the latter inchoate rights in the funds, which become absolute on filing the order and notice of lien with the county clerk. Such orders take precedence over a general assignment of the contractor. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299. An order to defendant to pay plaintiff the amount due the drawer at the date of the order constituted an assignment of the drawer's account. Comer v. Floore, [Tex. Civ. App.] 13 Tex. Ct. Rep. 410, 88 S. W. 246.

21. See 3 C. L. 334.

22. Where a contractor, from whom 10 per cent. was reserved until the work was completed, after part performance assigned his contract to another, who was to have all moneys "hereafter accruing," he was entitled to the 10 per cent. earned at the time of the assignment. Ercanbrack v. Faris [Idaho] 79 P. 817. Under an assignment of future wages for "money, supplies and merchandise to me already paid and furnished, and to be hereafter paid, advanced and furnished," an order for money accepted by the assignee may be included, and cannot be reached by trustee process. Mace v. Richardson [Me.] 60 A. 701.

23. Evidence of a contemporaneous oral agreement, of which the written assignment of a seat in a produce exchange was a part, may be admitted to defend a title derived under the assignment. Hamblen v. German, 93 App. Div. 464, 87 N. Y. S. 642.

24. Plaintiff agreed to assign an account to defendant after the payment of a certain sum by instalments, and in case of default the instalments paid were to be applied on the account; defendant defaulted, and after the account was outlawed plaintiff sued defendant for the balance. Frye-Bruhn Co. v. McGowan [Wash.] 80 P. 761.

25. He may sue the lessee for breach of covenant to pay rent and taxes, though the words "assign or assigns" does not appear in the covenant. Broadwell v. Banks, 134 F. 470.

26. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796.

27. A contract transferring certain shares of stock to defendant, held under the evidence to be one of purchase and sale, and not creating any trust in favor of the vendors. Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331. An instrument assigning the income of certain property to another until it should amount to $25,000, and which recited that it was given in consideration of a loan of that sum, was an absolute assignment and not a mortgage. Seymour v. Ryan [Minn.] 101 N. W. 958.

28. Where the assignment expressly stated it was for collateral security, but did not mention the note, the assignee could not hold the assignment as a general collateral security for any sums due, after the original loan had been paid. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

29. Evidence that the debt for which the assignment was given had been reduced by realizing on some collateral did not show an intention to treat the transfer as security. Seymour v. Ryan [Minn.] 101 N. W. 958.

30. Where one sold all his property and

express recital that it is for security, may not be sufficient to show that it is not absolute.[31] An assignment to an attorney of a proportion of the damages prevails over a subsequent assignment, regardless of notice;[32] and in many jurisdictions the first assignee prevails, notwithstanding no notice has been given,[33] as it becomes effective, as between the parties, when made.[34] An assignment carries with it any collateral as a necessary incident.[35] An assignment pending action does not abate the same, but it may be prosecuted to judgment in the name of the original plaintiff,[36] and it cannot result in changing an action at law to a suit in equity.[37] As the assignee acquires only the assignor's interest,[38] unless the thing assigned was collateral to a negotiable note.[39] or was a bill of lading,[40] he takes it subject to all defenses that could have been set up against the assignor at the time of the assignment;[41] but he is not liable for a previous tort of his assignor.[42] An assignment may be set aside on the ground of fraud;[43] but in the absence of contradictory evidence, where a consideration is expressed, it will be presumed bona fide.[44] Where an assignment is made to an attorney so as to settle a claim, the client cannot revoke it after settlements have been made.[45]

business by a bill of sale, but reserved the right to repurchase at the contract price and any money advanced, less money received in the course of the business, and exercised the option, he cannot compel the other party to account for profits, as the sale was absolute. Kerting v. Hatcher, 216 Ill. 232, 74 N. E. 783.

31. Contractor assigned his contract to his surety for security, but treated by the parties as an absolute assignment. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

32. Attorney contracted with owner of real estate to take proceedings to recover damages from city for the taking of land for streets, in consideration of the assignment to him of 8 per cent thereof; a subsequent grantee of the landowner was liable to the attorney. Flannery v. Geiger, 92 N. Y. S. 785.

33. The first assignee of a judgment prevails over a bona fide second assignee, though the assignment was not filed or notice given. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962.

34. Regardless of notice to the debtor. Quigley v. Welter [Minn.] 104 N. W. 236. But see note, "Can subsequent assignees obtain precedence by first giving notice?" 3 C. L. 334.

35. An underwriting agreement, by which bonds with a bonus of stock was to be purchased at a certain price, was with the bonds assigned to a bank, and the latter was held to have the right to require the delivery of the stock. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 146. Bona fide assignees of notes, also become the owners of trust deeds securing them, subject only to equities of makers and of third parties of which they had notice. Kittler v. Studabaker, 113 Ill. App. 342.

36. An assignment to plaintiff's attorney as security for his fees. Mayo v. Halley, 124 Iowa, 675, 100 N. W. 529.

37. By a mere assignment by plaintiff of interests in his claim under the alleged contract, and making the assignees parties defendant. Butterly v. Deering, 92 N. Y. S. 675.

38. The assignment by a vendor of his interest in a land contract vests in the assignee a lien upon the vendor's interest in the land to the extend of the debt secured, and not exceeding the unpaid purchase money. Lamm v. Armstrong [Minn.] 104 N. W. 304. One assigned his right to an accounting under a trust agreement. Sawyer v. Cook [Mass.] 74 N. E. 356.

39. Where one acquires in good faith a negotiable note which was fraudulently issued, he acquires a good title to any collateral security assigned to him, though the latter was nonnegotiable. White v. Dodge [Mass.] 73 N. E. 549.

40. One who takes a bill of lading from a vendee acquires an unassailable title to the goods, notwithstanding the fraud of the vendee, even as against the defrauded vendor. National Bank of Bristol v. Baltimore & O. R. Co., 99 Ind. 661, 59 A. 134.

41. Williams v. Neely [C. C. A.] 134 F. 1. The assignee of a note which provided that the whole was to become due on any default in the payment of interest, who took the same after such default, takes it subject to all defenses. Ray v. Baker [Ind.] 74 N. E. 619.

42. A contract for building a tunnel provided that the contractor should be liable for all damages to abutting property; he contractor became liable in damages, and then assigned his contract to an assignee, who agreed to do everything necessary in order that the assignor might receive all moneys due on the contract. Lockwood v. Naughton Co., 93 N. Y. S. 614.

43. But the New York municipal court is not a court having equitable jurisdiction. Midler v. Lese, 91 N. Y. S. 148. Where a judgment creditor assigned for a consideration a judgment to an attorney of the debtor, who was ignorant that an execution and sale of land had been made thereunder, the creditor was estopped from claiming the land under the sale, as he had assisted in the concealment. Barto v. Davis [Wash.] 79 P. 623.

44. Assignment of a mortgage.. Weideman v. Pech, 92 N. Y. S. 493.

45. Attorney was not to be deprived of his right to compensation for his services. Foot v. Smythe [Colo. App.] 78 P. 619.

§ 5. *Enforcement of assignment and of rights assigned.*[46]—The assignee of a chose in action may sue in his own name,[47] though there is no consideration,[48] or the assignment was for security,[49] or the assignee is merely a trustee for his assignor.[50] But the assignment must be bona fide, and an attorney who takes a claim on shares,[51] or an assignee who takes an assignment made without consideration, and merely for the purpose of bringing suit for the benefit of the assignor, is not a bona fide holder.[52] An assignment by a party to a controversy of his rights therein is ineffectual to enable him to testify.[53] There must be due proof of execution of the assignment,[54] and in Maine for an assignee to sue in his own name he must file with the writ a copy of the assignment.[55]

An assignee of part of a claim may sue to recover the portion assigned,[56] but a single cause of action cannot be split up by several assignments without the consent of the debtor.[57] An assignee may sue to have a contract reformed,[58] and assignees are bound by the results of any action brought by their assignors,[59] and cannot enforce a claim,[60] or a nonnegotiable note where the same was paid in good faith to the assignor before notice of the assignment.[61] An assignee who has knowledge of a defect may not be able to enforce a claim which was good in the hands of the assignor.[62] The assignee of a chose in action [63] must sue in the name of his

46. See 3 C. L. 335.

47. An agent guarantying an account for his employer, and being compelled by agreement to pay the same weekly, becomes in law the assignee of the account, and is entitled to sue in attachment in his own own. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257.

48. Open account. Wallace v. Leroy [W. Va.] 50 S. E. 243.

49. A bona fide assignee of claims as collateral is entitled to sue thereon in his own name. City Bank of New Haven v. Thorp [Conn.] 61 A. 428.

50. Complaint is sufficient which alleges the assignment of a judgment from the owner, though it does not allege that plaintiff is still the owner. Evidence of the assignment of all judgments of assignors is sufficient evidence of assignment of a judgment of prior date, in the absence of the evidence of any other assignment. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962.

51. An agreement whereby an attorney, in consideration of the assignment to him of a non-negotiable chose in action, agrees to enforce collection at his own expense, and pay the assignor one-half of the proceeds, is invalid as against public policy. Slade v. Zeitfuss [Conn.] 59 A. 406.

52. Assignment by a lodge to its officers is colorable only. Coombs v. Harford, 99 Me. 426, 59 A. 529.

53. It is not made in good faith. Verstine v. Yeaney, 210 Pa. 109, 59 A. 689.

54. Positive statement of a witness that an assignment was signed by a given person is sufficient, though it appears he was not present when the instrument was signed. Bauer v. State, 144 Cal. 740, 78 P. 280. In action by an assignee the objection cannot be raised for the first time on an appeal that there was no proof of the assignment. Conroy v. Boeck, 91 N. Y. S. 80.

55. It was sufficient that the assignment was made on the bill of items annexed to the writ. Sleeper v. Gagne, 99 Me. 306, 59 A. 472.

56. Where the assignee of part sued the debtor and the assignee of another part and the assignor, alleging that the two latter would not join as co-plaintiffs, he stated no cause of action against them, and the debtor was entitled to have the same stricken out. Chase v. Deering, 93 N. Y. S. 434.

57. But on appeal, in absence of anything to the contrary in the record, it will be presumed that the debtor consented. Sincell v. Davis, 24 App. D. C. 218.

58. Contract for a lease to a corporation to be formed by one of the parties, and when the corporation was formed the lease was assigned to it. Pittsburgh Amusement Co. v. Ferguson, 100 App. Div. 453, 91 N. Y. S. 666.

59. Rights under a contract assigned, the issue of the existence of the contract having been litigated in a previous action. Butterly v. Deering, 92 N. Y. S. 675.

60. Where the assignee had allowed payment of claims assigned to him as collateral to be paid to the assignor, such payment constituted a defense to an action against the debtor. City Bank of New Haven v. Thorp [Conn.] 61 A. 428.

61. The recording of the mortgage is not notice to the mortgagor, but it is notice to a purchaser from the mortgagor. Cornish v. Woolverton [Mont.] 81 P. 4. Where the assignee sues the person liable, who has made a settlement with the assignor after the assignment, he must allege either that the assignment was filed, or that the person had notice. Kansas City, etc., R. Co. v. Joslin [Ark.] 86 S. W. 435.

62. Where one took an assignment of wages earned knowing that the debtor had no authority to incur any expense beyond the value of the proceeds of mining, he could not enforce the same. Farrell v. Gold Flint Min. Co. [Mont.] 80 P. 1027.

63. Factor who sells in own name and advances price to owner. Ermeling v. Gibson Canning Co., 105 Ill. App. 196. Where plaintiff in an action for conversion assigns her right of action to her attorney as security for advances and attorney's fees, the

assignor in some jurisdictions and the assignor, though only a nominal plaintiff, must be living.[64]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.[65]

§ 1. *Nature of transaction in general.*[66]—A transfer of property to a trustee upon a trust to distribute to creditors is an assignment for the benefit of the latter.[67] So also, under the statutes of some states, the giving of a preference by an insolvent debtor constitutes such an assignment.[68] But such statutes do not apply where the preferences given are those established by law.[69]

§ 2. *Statutory provisions and conflict of laws.*[70]—The national bankruptcy act supersedes all state insolvency laws,[71] except as to cases and persons not within its purview.[72] The assignor being declared a bankrupt, his assignment is invalidated if made within four months of the filing of the petition in bankruptcy,[73] but if not made within such time, it stands, if otherwise valid.[74]

§ 3. *Right to make a general assignment.*[75]—The right of a debtor to make a common-law assignment for the benefit of his creditors exists independent of statute.[76]

action is properly continued in the name of the original plaintiff. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200.

64. Though assignor is only nominal plaintiff, still if he is not living, the suit is a nullity and cannot be cured by amendment. Karrick v. Wetmore, 22 App. D. C. 487.

65. **This topic** treats only of voluntary assignments for the benefits of creditors. For involuntary assignments, see Creditors' Suit, 3 C. L. 976; Insolvency, 4 C. L. 129. See, also, Bankruptcy, 3 C. L. 434.

66. See 3 C. L. 337.

67. As that term is used in St. 1898, § 1694; Gilbert Paper Co. v. Whiting Paper Co. [Wis.] 102 N. W. 20. A trust deed conveying all the property of an insolvent debtor, coupled with an agreement on the trustee's part to convert the same into money and pay and discharge the insolvent's debts, held to constitute a common-law assignment. Lucy v. Freeman, 93 Minn. 274, 101 N. W. 167.

68. Where an insolvent debtor raised money to pay a note by mortgaging all his property, and the same day filed an assignment for the benefit of creditors, held, such payment was within Ky. St. 1903, § 1910, declaring a preference by an insolvent debtor to amount to an assignment for the benefit of creditors. Hines & Co. v. Hays, 26 Ky. L. R. 967, 82 S. W. 1007. See 3 C. L. 337, n. 23.

69. Where a testamentary trustee, who was also a beneficiary, conveyed his interest in the trust estate to a third person, and the grantee reconveyed to the trustee with power to manage and sell the same for legatees, held not to constitute a preferential assignment within the meaning of P. L. 273, providing that such an assignment shall inure to the benefit of all creditors. In re Hart's Estate [Pa.] 60 A. 728.

70. See 3 C. L. 337.

71. Such state laws remain in abeyance so long as the bankruptcy act remains in force. Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956. Hence trustee in bankruptcy cannot avoid assignment for the benefit of creditors merely because the assignee failed to deposit a copy of the assignment in the office of the town clerk, as required by Rev. Laws, c. 147, § 21. Id. But see 3 C. L. 338, n. 34.

72. See Bankruptcy, 3 C. L. 435, n. 71.

73. McDaniel v. Osborn [Ind. App.] 72 N. E. 601.

74. Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956.

75. See 3 C. L. 338.

76. Lucy v. Freeman, 93 Minn. 274, 101 N. W. 167.

§ 4. *Filing, recording or registering; qualifying of assignee, removals and substitution.*[77]—As the right to make the assignment exists independent of statutory provisions, a failure to comply therewith does not render such assignment absolutely void, but only voidable at the instance of creditors and subsequent purchasers in good faith.[78]

§ 5. *Meaning and effect in general.*[79]—Under the statutes of most states the assignment dissolves all liens created on the property within a specified time prior to the assignment.[80]

§ 6. *Legality and equitableness.*[81]—The purpose of the assignment must be legal.[82] An assignment by a corporation must conform to the statutory requirements regulating the transfer of its property.[83] By assenting to the assignment, creditors will be estopped to question the validity thereof.[84] Under the statutes of some states the creditors by commencing an action to enforce their claims may avoid the assignment.[85]

Reservation of property.[86]

Preferences.[87]—In most states an assignment preferring certain creditors is void.[88]

77. See 3 C. L. 338.

78. Lucy v. Freeman, 93 Minn. 274, 101 N. W. 167.

79. See 3 C. L. 338.

80. Under Pub. Laws 1902, p. 61, c. 984, § 4, providing that an assignment for the benefit of creditors shall dissolve any attachment, levy or lien placed on the assigned property within four months prior to the assignment, an attachment bond executed within four months of the assignment is not vacated thereby. Eldred v. Avedisian [R. I.] 60 A. 677.

81. See 3 C. L. 338.

82. An assignment for the benefit of creditors in order to obtain a stay of execution under P. L. 413, 415, authorizing the court to stay execution so that a sale may be made by the assignee, is an improper use of the act, and an application for a stay will be denied. Weist v. Wuller, 210 Pa. 143, 59 A. 820.

83. Under St. 1880, p. 131, c. 118, § 1, an assignment by a mining corporation must be assented to by the holders of two-thirds of the capital stock. Lacy v. Gunn, 144 Cal. 511, 78 P. 30. A previous consent by holders of requisite amount of stock, though made in their capacities as directors, is, as against creditors, equivalent to a subsequent ratification. Id. For assignments by corporations, see, generally, 3 Clark & M. Corp. c. 25.

84. Assenting creditor cannot be heard to say that assignment was fraudulent. McAvoy v. Harkins [Wash.] 81 P. 77. Garnishee alleging that he held the property as an assignee for benefit of creditors can, on demurrer, amend to allege that plaintiff, a creditor, assented to the assignment. Id. Waives all objections to the regularity of the assignment and to the title of the assignee to the assets. Lacy v. Gunn, 144 Cal. 511, 78 P. 30. Assenting creditor held estopped to question title of purchaser because of defects in assignee's title. Id. An assignee of a creditor who has filed his claim by allowing the same to remain on file becomes an assenting creditor, within the meaning of Civ. Code, §§ 3458, 3459. Id. Debtor assigned to sheriff; creditors met, elected assignee and presented claims; held estopped to contest validity of assignment. Lacy v. Gunn [Cal.] 74 P. 156. See 2 C. L. 339, n. 53; 1 C. L. 228, n. 22.

85. Under Code 1883, § 685, if creditors of a corporation commence an action to enforce their claims within sixty days after the registration of an assignment for the benefit of creditors they thereby avoid such assignment. Fisher v. Western Carolina Bank [N. C.] 44 S. E. 601. Such suits in no manner increasing the assets, the plaintiffs therein are not by reason thereof entitled to a lien on the corporation's assets in the hands of a receiver. Id.

86. See 3 C. L. 339, where an extensive note on this subject will be found.

87. See 3 C. L. 340.

88. **NOTE. Preferences to Creditors:** In the absence of statutes forbidding preferences, every debtor has a right, before an assignment for the benefit of creditors, and before contemplation thereof, to prefer one or more of his creditors to the rest. In fact, it is a general rule that a debtor may, while retaining dominion over his property, and not contemplating an assignment, use his property in discharge of his liabilities, and pay one or more creditors to the exclusion of the others. See monographic notes to Benham v. Ham, 34 Am. St. Rep. 856, 857, on lawful and unlawful preferences in assignments for the benefit of creditors; Cutter v. Pollock, 4 N. D. 205, 50 Am. St. Rep. 644; Williams v. Clark, 47 Minn. 53; Barnett v. Kinney, 147 U. S. 476, 37 Law. Ed. 247; Mitchell v. Beal, 8 Yerg. [Tenn.] 134, 29 Am. Dec. 108; Home Nat. Bank v. Sanchez, 131 Ill. 330; Livermore v. McNair, 34 N. J. Eq. 478; Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Warner v. Littlefield, 89 Mich. 329; Sandwich Mfg. Co. v. Max, 5 S. D. 125, 24 L. R. A. 524. It is only when a debtor indicates his intention of taking advantage of the law permitting and regulating general assignments, and putting his property under its protection, that he is denied the right to make preferences among his creditors. Sandwich Mfg. Co. v. Max, 5

§ 7. *Property passing to and rights of the assignee therein.*[89]—All the right, title and interest of the assignor in the property conveyed passes by the assignment to the assignee.[90] Property inherited after the execution of the deed of assignment is no part of the trust estate.[91] The assignee of a general contractor takes subject to the right of laborers and materialmen to subsequently file mechanic's liens for work performed prior to the assignment.[92]

Property transferred or conveyed by assignor.[93]—The property conveyed depends largely upon the description in the instrument of assignment.[94]

§ 8. *Liability of assignee; bond.*[95]—The assignee should be upheld in all of his actions intended for the benefit of the estate and which do not result in injury thereto,[96] but he is liable for all losses occasioned by his negligence.[97] An assignee or trustee continuing the insolvent's business and signing a purchase-money note for material with his own name and the additional word "Trustee," the question whether the sale was made on the trustee's individual credit, or the credit

S. D. 125, 24 L. R. A. 524. It has been held that a debtor, if not prohibited by statute, may, even when insolvent, prefer a creditor in an assignment for the benefit of creditors. Hull v. Jeffrey, 8 Ohio, 390; Grover v. Wakeman, 11 Wend. [N. Y.] 187, 25 Am. Dec. 624; Paul v. Baugh, 85 Va. 955; Perkins v. Hutchinson, 17 R. I. 450; Talley v. Curtain, 54 F. 43; Arthur v. Commercial, etc., Bank, 9 Smedes & M. [Miss.] 394, 48 Am. Dec. 719.

An assignment law does not deprive debtors of their common-law right to prefer creditors. Kavanaugh v. Oberfelder, 37 Neb. 647; Wharton v. Clements, 3 Del. Ch. 209; Woonsocket Rubber Co. v. Felley, 30 F. 808; Hull v. Jeffrey, 8 Ohio, 390; Crow v. Beardsley, 68 Mo. 435; Sandwich Mfg. Co. v. Max, 5 S. D. 125, 24 L. R. A. 524; Manning v. Beck, 129 N. Y. 1, 14 L. R. A. 198. It is only preferences conferred by the assignment that are forbidden, not preferences given by other instruments, and as a separate and independent transaction. Gummersell v. Hanbloom, 19 Mo. App. 274; Lake Shore Banking Co. v. Fuller, 110 Pa. 156. A preference is not invalid except as prohibited by the assignment law. Mackellar v. Pillsbury, 48 Minn. 396; Kavanaugh v. Oberfelder, 37 Neb. 647. The right of a debtor to pay one or more credtors in preference to others, and the right to make a general assignment for the benefit of all of his creditors, ratably, are distinct and independent rights. Sandwich Mfg. Co. v. Max, 5 S. D. 125, 24 L. R. A. 524. From note to Bank of Little Rock v. Frank [Ark.] 58 Am. St. Rep. 65, 86.

89. See 3 C. L. 341.

90. After the assignment the assignor has no further right of control over the property. Gilbert Paper Co. v. Whiting Paper Co. [Wis.] 102 N. W. 20. Assignee takes absolute title. Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325. Under the "Martin Act" (Gen. St. p. 3370), the surplus resulting from a tax sale is properly paid to the owner's assignee, though the latter has conveyed his interest in the land to the purchaser. Gavenesch v. Jersey City [N. J. Law] 59 A. 25.

91. This is true though it is incumbered by a mortgage as security for some of the assignor's debts. Read v. Reynolds [Md.] 59 A. 669. Also the assignee may become a purchaser at a sale under such mortgage, especially where the trust estate could not have been increased or diminished by the price obtained at the sale. Id.

92. So held where subcontractor claiming lien had, at the time of the assignment, an order, amounting to an equitable assignment, for the funds due for his part of the avails. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299. See 2 C. L. 344, n. 43, 44.

93. See 3 C. L. 342.

94. An assignment conveying all the assignee's "property, choses in action of every name, nature and description, * * * except such property only as is exempt by law from attachment," held to convey all the debtor's title to any personal property or assignable rights of action owned or possessed by him, except such as is exempt from execution by Pub. St. 1882, c. 171, § 34. Robinson v. Wiley [Mass.] 74 N. E. 923. Held to include a right of action against a bank for wrongfully dishonoring a check. Id.

95. See 3 C. L. 342.

96. Rochford v. Doty [Wash.] 79 P. 782. Being obliged to pay for property taken by him under an attachment bond, he is not obliged to account therefor to creditors of the assignor. Id.

97. Where assignee mistakenly supposed estate was solvent, and paid note in full, and as a result thereof the creditor allowed his right of action against the indorsers to become barred by limitations, held, assignee was liable for sum negligently paid. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761. The assignment being rendered void because of the assignee's failure to have the same filed and recorded and as a result thereof the property is lost to creditors, a creditor may maintain an action against the assignee for damages without proving his claim before the county court (Huddleson v. Polk [Neb.] 102 N. W. 464), and the amount of damages is the amount which the creditor would have received if the assignment had been valid. (Id.). In such an action it may be shown by the defendant in mitigation of damages that there are other creditors entitled to participate in the assets of the

of the trust estate, is one for the jury,[98] and on this question evidence is admissible as to whether his services were gratuitous or not.[99]

§ 9. *Collection of assets and reduction to money. Sale of assets by assignee.*[1] As a general rule, the assignee has power to sell the property at either public auction or private sale,[2] the purchaser taking the title of the assignor.[3] At a sale at public auction the assignee is the only person who can legally release any bidder from the obligation incurred by his bid.[4] There is nothing to prevent the assignor from buying the property after the assignment, provided it is done fairly and openly and without detriment to the rights of creditors.[5] A sale made by an assignee without an order of court does not release judgment liens.[6]

Validity and setting aside sale.[7]—Unless the assignee is a party thereto, fictitious bids by creditors, made to puff the price, do not render the sale voidable at the election of the purchaser.[8] Inadequacy of price is of itself insufficient to justify setting aside the sale as fraudulent.[9]

§ 10. *Administration of the trust in general.*[10]—As a general rule, the assignee has full authority to sue for and collect such claims as constitute a part of the assets, and to resist the payment of unjust and illegal demands asserted against them,[11] and he may appeal the causes which he brings or defends.[12] In Alabama he cannot maintain an action in his own name for the breach of a verbal agreement for a sale of goods by defendant to the assignor.[13] An order directing an assignee to sue his predecessor for conversion is not a final order and does not bar any defense to the action.[14]

§ 11. *Debts and liabilities of the estate.*[15]—The assignee completing an unfinished contract and suing for the contract price, the defendant may set off a claim growing out of mutual dealings between him and the assignor before the date of assignment.[16]

In Louisiana, where mortgaged real estate is included in a cessio bonorum, the mortgage creditor is authorized to enforce his mortgage by executory process contradictorily with the syndic of the insolvency.[17]

Claim of assignee for compensation and allowance.[18]—An allowance to the assignee of five per cent. of the money handled is reasonable.[19]

insolvent estate, but, to be available, this fact must be affirmatively pleaded in the answer. Id.

98, 99. Megowan v. Peterson, 92 N. Y. S. 611.

1. See 3 C. L. 342.

2. Pub. St. 1882, c. 157, §§ 46-50; Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325.

3. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43.

4. Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325. Creditors combining to puff the price cannot by a stipulation among themselves secure immunity from any risk of being held personally liable for their several offers. Id.

5. Curnen v. Reilly, 99 App. Div. 159, 90 N. Y. S. 974. Where assignee could only obtain bid for $8,500 and assignor procured another to buy stock for him for $9,500 and assignor sold it in eighteen months for $19,031.22 at a cost of $4,000, held, purchase was valid. Id.

6. In re White's Estate, 20 Pa. 627, 59 A. 271. Such judgment creditors are not entitled to participate in fund realized from the sale and in the hands of assignee. Id.

7. See 3 C. L. 343.

8. Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325.

9. Lacy v. Gunn, 144 Cal. 511, 78 P. 30.

10. See 3 C. L. 343.

11. Anderson v. Davis, 55 W. Va. 429, 47 S. E. 157. In a suit to enforce a mortgage on real estate included in a cessio bonorum, the syndic of the insolvency has the legal capacity to urge, on behalf of all the creditors, all defenses which the situation calls for. Trezevant v. Levy's Heirs [La.] 38 So. 589.

12. Anderson v. Davis, 55 W. Va. 429, 47 S. E. 157.

13. Code 1896, §§ 28, 876, do not apply. Snead v. Bell [Ala.] 38 So. 259.

14. Hence a cross complaint by the surety on the bond of the former assignee seeking to have the order set aside is of no merit. Rochford v. Doty [Wash.] 79 P. 782.

15. See 3 C. L. 343.

16. Meeder v. Goehring, 23 Pa. Super. Ct. 457.

17. Trezevant v. Levy's Heirs [La.] 38 So. 589.

18. See 3 C. L. 343.

19. Drey v. Watson [C. C. A.] 138 F. 792.

§ 12. *Presentment and allowance of claims.*[20]—An order granting or refusing the petition of a creditor to be permitted to file his claim for allowance after the expiration of the time limited to do so is a matter within the discretion of the trial court,[21] and in determining the question the court may consider the equities of the petitioner's claim,[22] and its order will not be disturbed on appeal unless there be a clear abuse of discretion.[23] An affidavit to the claim being defective, it cannot be amended after the expiration of the time for filing the claim, so as to relate back.[24] A creditor's affidavit to his claim stating that the account is "correct" is not equivalent to saying that it is "true" and "that the debt is just."[25] It does not constitute a repudiation of the assignment for a creditor to attack its validity without right,[26] or for him to sue on his claim and reduce it to judgment,[27] nor does the latter constitute a withdrawal of a claim which has been filed.[28] The latter remedy is not inconsistent with the prosecution of the claim before the assignee, unless there is an attempt to seize the assigned property on execution.[29]

§ 13. *Classes and priorities of debts.*[30]—In some states the claims of laborers and employees for salary are preferred.[31] A secured creditor is entitled to share in the general assets in the same proportion with other creditors, and without any deduction because of his collateral security.[32] One loaning money upon a third person guarantying payment is not entitled to a preference over such guarantor upon the distribution of the borrower's assets.[33]

§ 14. *Satisfaction and discharge of debts and claims.*[34]—A claim filed is not extinguished by the fact of such filing,[35] or by the payment of a dividend thereon less in amount than the face of such claim,[36] and the creditor many enforce payment of the balance due him by proceeding against his debtor by judgment or by other lawful means;[37] so, too, such creditor may offset his claim against any claim held against him by the assignee,[38] and the latter cannot object thereto on the ground that the creditor thereby increased his dividends.[39] An assignee cannot recover payments made to a creditor by mistake, the creditor having changed his position to his prejudice in reliance thereon.[40] In New York an assignee willfully neglecting to obey a decree for the payment of money is guilty of contempt.[41]

§ 15. *Accounting, settlement and discharge, or failure of trust.*[42]—Where the assignee files an answer to a petition for a citation to account, and the answer

20. See 3 C. L. 344.

21. In re Willard [Minn.] 103 N. W. 562.

22. In re Willard [Minn.] 103 N. W. 562. Where claim was technically a legal one and unjust, held no error in denying petition. Id.

23. In re Willard [Minn.] 103 N. W. 562.

24. Hughes v. Potts [Tex. Civ. App.] 87 S. W. 708.

25. Affidavit held insufficient under Batt's Ann. St. 1895, art. 78. Hughes v. Potts [Tex. Civ. App.] 87 S. W. 708.

26. Duncan v. State Nat. Bank [Miss.] 38 So. 45.

27, 28, 29. Lacy v. Gunn, 144 Cal. 511, 78 P. 30.

30. See 3 C. L. 344.

31. Indiana:. Under Burns' Ann. St. 1901, §§ 7051, 7058, making debts due laborers and employes preferred claims, it must be shown that the labor was performed in connection with the business in which the insolvent debtor was engaged. McDaniel v. Osborn [Ind. App.] 72 N. E. 601.

32. Corbett v. Joannes [Wis.] 104 N. W. 69; Harrigan v. Gilchrist, 121 Wis. 127-344, 99 N. W. 909.

33. Where the officers of a corporation agreed to prefer one loaning the corporation money in case anything happened, held not to give the lender a preference over the individual claims of the officers. In re Kittanning Elec. Light, Heat & Power Co.'s Estate, 210 Pa. 6, 59 A. 266.

34. See 3 C. L. 345.

35, 36, 37, 38. Little v. Sturgis [Iowa] 103 N. W. 205.

39. Little v. Sturgis [Iowa] 103 N. W. 205. It is probable that the other creditors might complain. Id.

40. Where assignee mistakenly supposed estate was solvent and paid note in full and as a result thereof the creditor allowed his right of action against the indorsers to become barred by limitations, held, assignee could not recover. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761.

41. Under Laws 1877, p. 547, c. 466, § 22, as amended by Laws 1894, p. 269, c. 134, supreme court has concurrent jurisdiction with county court to punish him. Laws 1885, p. 626, c. 380. In re Merklen, 44 Misc. 169, 89 N. Y. S. 786.

42. See 3 C. L. 345.

is equivalent to an account, it is error to dismiss the proceedings.[43] In such a case the court should direct that notice be given to creditors, and, if exceptions are filed, should proceed in the usual manner to determine whether the answer is equivalent to an account, and, if not, should direct that the assignee file an account.[44] In New York the report of a referee stating the account of an assignee cannot be filed after the assignee's death and before his personal representative is made a party.[45]

There being a vacancy in the position of assignee, a receiver may be appointed to take charge of and collect the claims,[46] and if no competent person will accept the position as receiver, the court can assign the duty to the master commissioner.[47] An order of discharge being made after a hearing and upon notice is, in effect, a final judgment, and, as such, is binding upon assignors and creditors, and is subject to attack only upon grounds upon which other judgments are assailable.[48]

§ 16. *Rights of creditors under a void assignment, or after the assignee's discharge.*—By recent legislation in Wisconsin the fact that the assignment is void does not enable the creditors to reach the property by attachment or garnishment.[49] The assignee being discharged, a creditor may sue in his own name to set aside a fraudulent conveyance made by the assignor prior to the assignment,[50] and in any event another creditor is the only person who can object to such procedure.[51]

ASSISTANCE, WRIT OF.

The remedy is founded on the principle that a court of equity will, when it can do so justly, carry its decrees into full execution without relying on the co-operation of any other tribunal.[52] Its issuance rests in discretion.[53] The judgment awarding possession is the sole justification of the writ, and it should not issue to require something to be done which the judgment does not require,[54] and in no event should it issue without notice to the person in possession,[55] though he acquired possession under a conveyance executed pending the foreclosure suit.[56] It will issue to put into possession a purchaser at foreclosure sale or any one who by the decree becomes entitled to the possession of the land in controversy,[57] pro

43, 44. Juniata Bldg. & Loan Ass'ns Assigned Est., 24 Pa. Super. Ct. 40.

45. Code Civ. Proc. § 755. In re Venable, 93 N. Y. S. 1074. This is true though the referee had signed the report and had it ready for delivery previous to the death of the assignee. Id. This is not changed by General Assignment Act, § 10 (Laws 1877, p. 545, c. 466). Id. The subsequent appointment of the representative of the deceased assignee's estate in place of the deceased assignee does not validate such filing. Id.

46, 47. Andrews v. Wilson's Assignees, 26 Ky. L. R. 658, 82 S. W. 391.

48. Freeman v. Wood [N. D.] 103 N. W. 392. Complaint in action to set aside held insufficient in that it did not show that the remedy by motion was unavailable or inadequate, or that the new evidence could not have been discovered and presented at the hearing or within one year thereafter, or in what the newly discovered evidence consisted. Id. Order of discharge, though procured by fraud, held not subject to collateral attack and to constitute a defense to an action of conversion by the assignee's successor. Rochford v. Doty [Wash.] 79 P. 782. See Judgments, 4 C L. 287.

49. Laws 1897, p. 742, c. 334, § 2 considered. Gilbert Paper Co. v. Whiting Paper Co. [Wis] 102 N. W. 20.

50. Fidelity Nat. Bank v. Adams [Wash.] 80 P. 284.

51. Assignor cannot. Fidelity Nat Bank v. Adams [Wash.] 80 P. 284. Eq. 482.

52. See Beatty v. De Forest, 27 N. J

53. Baird v. Van Vechten, 44 Misc. 279 89 N. Y. S. 879.

54. If a judgment does not award possession the writ should not issue. Baird v. Van Vechten, 44 Misc. 279, 89 N. Y. S 879.

55. If he is dispossessed under a wri issued without notice he should be restored to possession. Ray v. Trice [Fla.] 38 So 367.

56. Ray v. Trice [Fla.] 38 So. 367.

57. Strong v. Smith [N. J. Eq.] 60 A 66.

viding such purchaser has a clear right to possession.[58] It will issue as against one in possession who entered pending the suit, under any of the parties,[59] or as a trespasser,[60] or against one who conceals his title and represents to the parties that his possession is subject to the suit,[61] or against one in possession under an unrecorded instrument;[62] but not as against one who took possession prior to the filing of lis pendens.[63] One in possession under an instrument not entitled to record may be estopped to assert his right thereunder where he conceals such right during the suit,[64] and the fact that he does not know that his rights under the concealed instrument were not affected by the suit does not affect the force of such estoppel.[65] Such estoppel is not merely for the benefit of the purchaser at the foreclosure sale, but is rather for the benefit of the complainant who in reliance on the concealment has neglected to make the person concealing a party.[66] The issuance or refusal of the writ does not conclude the parties interested except so far as it adjudges the right of possession as a result of the suit.[67]

ASSOCIATIONS AND SOCIETIES.[68]

§ 1. *Definition, nature, and organization.*[69]—A voluntary unincorporated association is not a co-partnership unless engaged in some business as an association.[70]

58. Such right, however need not be established beyond a reasonable doubt. Strong v. Smith [N. J. Eq.] 60 A. 66. Nor as against a party in possession who makes a litigable claim of ownership which was unaffected by the foreclosure decree. Urlan v. Ruhe [Neb.] 103 N. W. 670.

59, 60, 61. Strong v. Smith [N. J. Eq.] 60 A. 66.

62. Laws 1902, p. 531, does not apply to an instrument not entitled to record. Strong v. Smith [N. J. Eq.] 60 A. 66.

63. Baird v. Van Vechten, 44 Misc. 279, 89 N. Y. S. 879.

Note: The writ can issue on the application of no one except a party to the suit (Wilson v. Polk, 13 Smedes & M. [Miss.] 132, 51 Am. Dec. 151); but a purchaser at a sale under a decree is deemed to be a party within the rule (Jones v. Hooper, 50 Miss. 510). It will not issue against any but a party to the suit in which it was sought, or his representative, or one coming into possession pendente lite. Comr. v. Felton, 61 F. 731; Van Hook v. Throckmorton, 8 Paige [N. Y.] 33; Terrell v. Allison, 21 Wall. [U. S.] 289, 22 Law. Ed. 634. See Musgrove v. Gray, 123 Ala. 376, 26 So. 643, 82 Am. St. Rep. 124. It is only allowed when the right is clear. Barton v. Beatty, 28 N. J. Eq. 412; National Building & Loan Ass'n v. Strauss [N. J. Eq.] 49 A. 137. And it is not customary to issue it where there is a bona fide contest as to the right to possession or where the rights of the principal parties have not been fully adjudicated in the principal suit. Van Meter v. Borden, 25 N. J. Eq. 414; Roach v. Clark, 150 Ind. 93, 65 Am. St. Rep. 353; Wiley v. Carlisle, 93 Ala. 238; Knight v. Houghtalling, 94 N. C. 411; Hayward v. Kinney, 84 Mich. 591; Ex parte Jenkins, 48 S. C. 686. Facts showing the necessity of its issue must be presented to the court. Bruce v. Roney, 18 Ill. 67; Oglesby v. Pearce, 68 Ill. 220. There is a difference of opinion concerning the necessity of giving notice therefor. As between the parties and those claiming under them it is said that the defendant is not entitled to notice (Harney v. Morton, 39 Miss. 508); but it is held that the person in possession should have notice of the application for the writ and is entitled to be heard thereon (Blouvelt v. Smith, 22 N. J. Eq. 31; Jones v. Hooper, 50 Miss. 510; Hooper v. Yonge, 69 Ala. 484). See, Fletcher, Equity Pl. & Pr. p. 760.

64, 65. Strong v. Smith [N. J. Eq.] 60 A. 66.

66. Hence the absence of injury to the purchaser does not affect the estoppel. Strong v. Smith [N. J. Eq.] 60 A. 66.

67. Strong v. Smith [N. J. Eq.] 60 A. 66.

68. **Scope of article.** Only cases dealing with voluntary unincorporated associations or membership corporations, organized for purposes not pecuniary, are fully treated, though reference has been made to beneficial associations. For full treatment of the last named, see Fraternal and Mutual Benefit Associations, 3 C. L. 1499. For general corporation law, see Corporations, 3 C. L. 880. For titles closely related to the one here treated, see Joint Stock Companies, 4 C. L. 280; Exchanges and Boards of Trade, 3 C. L. 1397; Building and Loan Associations, 3 C. L. 561; Religious Societies, 4 C. L. 1275.

69. See 3 C. L. 346.

NOTE. Societies and clubs distinguished from corporations: Societies or clubs may be incorporated, but they are

§ 2. *Internal relations, rights, and duties.*[71]—Judicial tribunals will not interfere with the internal government of the affairs of voluntary associations or membership corporations where the action complained of has been taken in accordance with reasonable by-laws and regulations.[72] But disciplinary action, such as suspension or expulsion, is invalid if not taken in conformity with the society's by-laws and statutes governing procedure.[73] Thus suspension of a member entitled to privileges or rights of property, at an illegal meeting, without notice or opportunity to be heard, is illegal,[74] and in such case equity has jurisdiction to grant relief.[75] Procedure of lodges is presumed to have been regular, in the absence of a contrary showing.[76] Procedure in contests of election of trustees of an association is statutory in New York.[77]

The rights of members of a voluntary or unincorporated association are fixed by and depend upon the constitution and articles of association[78] which constitute

often unincorporated. In the latter case, they are merely voluntary associations of persons for some common purpose, usually social, literary, or political. The words "society" and "club" have no very definite meaning in the law. They may be formed for a great variety of purposes, and there is no uniformity in their constitutions and rules. See Com. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340. Though unincorporated, they often resemble corporations in many respects, as, for example, in having the capacity of succession. Unlike a corporation, however, the members of an unincorporated society or club do not form a collective whole, and cannot collectively acquire any rights, or incur any obligations. There is no distinct legal entity apart from the members. White v. Brownell, 3 Abb. Pr. [N. S.; N. Y.] 318; East Haddam Central Baptist Church v. East Haddam Baptist Ecclesiastical Soc., 44 Conn. 259; Lafond v. Deems, 52 How. Pr. [N. Y.] 41; Liggett v. Ladd, 17 Or. 89; Crawford v. Gross, 140 Pa. 297; Curd v. Wallace, 7 Dana [Ky.] 190, 32 Am. Dec. 85. They are generally managed through trustees, who make all necessary contracts, and purchase and hold the property necessary for the purposes of the association. See East Haddam Central Baptist Church v. East Haddam Baptist Ecclesiastical Soc., 44 Conn. 259; Liggett v. Ladd, 17 Or. 89; Crawford v. Gross, 140 Pa. 297; Birmingham v. Gallagher, 112 Mass. 190. The rights and liabilities of the members depend upon the contract under which they have associated. See Waite v. Merrill, 4 Me. 102, 16 Am. Dec. 238 (society of Shakers); Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Mann v. Butler, 2 Barb. Ch. [N. Y.] 362; Leech v. Harris, 2 Brewst. [Pa.] 571; Henry v. Jackson, 37 Vt. 431; Logan v. McNaugher, 88 Pa. St. 103. As a rule, actions cannot, unless permitted by statute, be brought by or against an unincorporated society or club by its name, but must be brought by or against all the members. See Lloyd v. Loaring, 6 Ves. 773; Schuetzen Bund v. Agitations Verein, 44 Mich. 313; Lewis v. Tilton, 64 Iowa, 220; Pipe v. Bateman, 1 Iowa, 369; Curd v. Wallace, 7 Dana [Ky.] 190, 32 Am. Dec. 85. And see Niven v. Spickerman, 12 Johns. [N. Y.] 401.—From Clark & M. Corp., § 22.

70. Organizations whose sole function is promotion of common interests of members are not co-partnerships. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

71. See 3 C. L. 346; see, also, Bolsot on By-Laws [2d Ed.].

72. Stein v. Mark, 44 Misc. 140, 89 N. Y. S. 921. Civil courts are inclined to sustain rules and proceedings, and mere informality in removal, if for a just cause, is no ground for interference by mandamus. Crow v. Capital City Council, 26 Pa. Super. Ct. 416. Where a member of a beneficial association is summoned for trial before a tribunal established by the laws of the association, and the member files an answer, employs counsel and appears at the meeting of the tribunal, but, for purposes of his own convenience, withdraws before his case is reached, and the trial is conducted in his absence in a fair and proper manner, and after conviction he does not ask for a retrial in the manner provided by the laws of the association, he has no standing to maintain a mandamus suit in a civil court to secure his reinstatement. Id.

73. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

74. Meeting not called by quorum of 7 members as required by by-laws, and no notice given. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

75. Mandamus is remedy when member seeks reinstatement, after improper expulsion; in this case member was denied rights without having been expelled. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

76. Presumed that quorum was present at lodge election for one year; and that election was held the following year. Coombs v. Harford, 99 Me. 426, 59 A. 529.

77. Where the affidavits on which the case was submitted consisted largely of conclusions and not facts, the proceedings should be sent to a referee to take the evidence of the witnesses on oral examination, and to report the same to the court, with his opinion. Gen. Corp. Law, § 27. In re Pleasant Valley Soc., 93 N. Y. S. 1106.

78. The relation is contractual, and courts will not interfere unless public interests intervene. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 926.

the contract of membership, and consent thereto is necessary to constitute one a member.[79] In the case of a corporation, members' rights depend upon its powers derived from the state and set forth in its charter and by-laws and regulatory statutes.[80] By-laws inconsistent with the purpose of the corporation, and by-laws which provide for a forfeiture of the rights of membership in case of refusal to abide by such inconsistent by-laws, are unreasonable and invalid.[81] Thus a corporation organized for literary and social purposes cannot enforce by-laws, pledging support to a political organization and providing that only those abiding by such by-laws shall be members.[82] A provision of the regulations of the relief department of a railway, and of a member's contract, that a recovery for injuries or death against the company shall operate as a release of claims against the relief department is reasonable and valid [83] and is binding upon him and his beneficiaries or legal representatives, in case of his death.[84] Mandamus will lie against an incorporated association and its officers at the instance of a member, to compel the performance of an act insuring to the member his rights under the charter and by-laws.[85]

An incorporated beneficial association has inherent power to expel members who violate reasonable by-laws,[86] and are hostile to the association.[87] A by-law providing for expulsion for defamation of officers or members, causing dissensions and disorders in the organization, is reasonable.[88] Failure to pay assessments may terminate membership,[89] the validity of an assessment depending upon the rules and regulations of the association.[90] Courts will not generally prevent a regular expulsion for violation of a reasonable rule,[91] although they may refuse to aid in the enforcement of the rule.[92] A suit for reinstatement may be defeated by

79. Brokers' association which adopted new constitution, changed dues, and transferred assets to new organization, lost its identity, and an old member did not become a member of the new organization unless he assented to new constitution. Konta v. St. Louis Stock Exch. [Mo.] 87 S. W. 969.

80. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

81. Such by-laws infringe state Const. art. 1, § 1; prohibiting disfranchisement or deprivation of rights or property unless by law of the land or judgment of peers. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

82. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

Note: As to the subject-matter of by-laws in general, including conformity to charter and reasonableness, see Boisot on By-Laws, Ch. III., §§ 80-86.

83, 84. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942.

85. The directors of a political club and the custodian of a list of members refused to grant a member an opportunity to inspect the list to institute measures to promote the objects for which the club was organized, and to prevent it from being used to further the political ambitions of any member of the club, and to oppose the election of incompetent public officials. McClintock v. Young Republicans of Philadelphia, 210 Pa. 115, 59 A. 691.

86. Del Ponte v. Societa Italiana di M. S. Guglielmo Marconi [R. I.] 60 A. 237.

87. Member of beneficial association who was hostile, attacking national council, refusing to obey its orders, and urging secession, held properly expelled. Crow v. Capital City Council, 26 Pa. Super. Ct. 411.

88. Newspaper article attacking committee in charge of celebration, causing them to resign, and holding society up to ridicule, held libelous and ground for expulsion under the by-law. Del Ponte v. Societa Italiana di M. S. Guglielmo Marconi [R. I.] 60 A. 237.

89. Under by-laws of a beneficial association providing that a member failing to pay an assessment by prescribed time shall, ipso facto, stand disconnected from the association, one ceases to be a member on default of payment, and loses the right to participate in benefits. Delaney v. Kelly, 92 N. Y. S. 1021.

90. Suspension for refusal to pay an assessment levied to aid certain members out of work to the extent of $14, when the largest payment that could properly be made under the regulations and by-laws was $10, held unjustifiable. Moeller v. Machine Printers' Beneficial Ass'n [R. I.] 60 A. 591.

91. Charging less commission than that fixed by a rule of a stock exchange ground for expulsion, and mandamus will not lie to prevent it. Dickinson v. Board of Trade of City of Chicago, 114 Ill. App. 295.

92. Dickinson v. Board of Trade of City of Chicago, 114 Ill. App. 295.

laches,[93] and where expulsion is for nonpayment of dues, tender of dues, or an attempt to learn their amount, is necessary before a suit for reinstatement can be successfully maintained.[94] One who has forfeited membership in a beneficial association for failure to pay assessments in time cannot thereafter be compelled to pay the assessment.[95] An association is not estopped to deny that a person was ever a member, where such person alleges, in bringing suit to enforce rights of membership, that he did not know of his expulsion for nonpayment of dues, since he could not in such case have been deceived to his injury.[96]

Where the by-laws of a lodge are not strictly complied with, in the giving of a bond by one of its trustees, the acceptance by the lodge of the bond is a sufficient approval,[97] and the sureties on the bond cannot complain after such action by the lodge.[98] The bond of a trustee of a lodge in which annual elections are required, which provides that it shall continue in force so long as the trustee holds office by re-election or otherwise, is valid and enforceable according to its terms.[99] Sureties on a trustee's bond given to secure a lodge are not released from liability by a change or increase in the membership of the lodge,[1] nor by a change in the personnel of the board of trustees, their principal remaining a member thereof.[2] But a change in the by-laws, requiring a different kind of bond, is an implied release of liability on a bond of the former kind.[3]

§ 3. *The association and persons not members.*[4]—Members of an unincorporated association, not engaged in business as an association but organized only to promote common interests of members, are liable on contracts made by the association, if at all, only on the law of principal and agent.[5] Members of a political party, who pay monthly dues, are not personally liable to one employed by trustees to render services in connection with the publication of a party newspaper,[6]

93. Delay of over a year, during which seats, valueless when expulsion took place, became worth $7,500, fatal to relief in equity. Konta v. St. Louis Stock Exch. [Mo.] 87 S. W. 969.

94. Konta v. St. Louis Stock Exch. [Mo.] 87 S. W. 969.

95. Johnston v. Anderson, 23 Pa. Super. Ct. 152.

96. Konta v. St. Louis Stock Exch. [Mo.] 87 S. W. 969.

97. Where the by-laws of a lodge provided that the trustees, before entering upon the duties of their office, should give a joint or several bond to the lodge, with three sureties to be approved by the lodge, the trustees might unite in a joint bond, or each trustee might give a several bond, and an acceptance by the lodge would be a sufficient approval. Coombs v. Harford, 99 Me. 426, 59 A. 529.

98. Approval of bond with two instead of three sureties. Coombs v. Harford, 99 Me. 426, 59 A. 529.

99. Claim that such bond was in force only for term for which trustee was elected—one year—held untenable. Coombs v. Harford, 99 Me. 426, 59 A. 529.

1, 2. Coombs v. Harford, 99 Me. 426, 59 A. 529.

3. By-law requiring joint and several bond of trustee released sureties on several bond of a single trustee. Coombs v. Harford, 99 Me. 426, 59 A. 529.

4. See 3 C. L. 347.

5. Not as members of a partnership. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

NOTE. Unincorporated clubs and societies as principals: When a number of persons become members of a club or society for social, political, religious or charitable purposes, without becoming incorporated, the law does not regard them collectively as a legal entity or artificial person, like a corporation, but merely as so many individuals, and it necessarily follows that the club or society as such cannot appoint or have an agent. Clark & M. Corp. 48. The members may appoint an agent, but in such case he is the agent of the members as individuals, and they are joint principals. Ray v. Powers, 134 Mass. 22; Willcox v. Arnold, 162 Mass. 577. It is well settled, however, that such an association, since there is no community of interest for business purposes, is not a partnership, and one member, or a majority of members, or an agent appointed by one member or a majority of members, has no authority to bind other members, without their assent. Such authority is not implied from the mere fact of membership. Clark & S. Ag., § 25. See, also, §§ 90, 91.

6. Hence action against treasurer not maintainable under Code Civ. Proc. § 1919, authorizing suits against president or treasurer of an unincorporated association of 7 or more, where associates are personally liable to plaintiff. Lightbourne v. Walsh, 97 App. Div. 187, 89 N. Y. S. 856.

since such trustees have no implied power to incur liabilities beyond the amount of the fund provided by the dues.[7] But where such fund is sufficient at the time of the employment of the plaintiff and a portion of it has been diverted to pay off liens on the plant, thus enhancing the value of property of the association, the association is liable.[8] A suit seeking to enforce payment of a debt out of trust funds of an association is not objectionable as one seeking to enforce a personal liability of members.[9]

§ 4. *Actions and litigation.*[10]—At common law unincorporated societies, whether organized for business or other purposes, are not entitled to recognition in the courts in their common name,[11] and cannot sue[12] or be sued[13] in such name. Suit must be brought in the name of the members, or in the name of a few as representing the interests of all.[14] Whether all members of such an association should be made parties should be raised by special, not by general, demurrer.[15] The right to sue an unincorporated association in the name under which it is known is frequently given by statute.[16] Statutes authorizing suits against such associations under the common name do not authorize suits by them under such name.[17] An unincorporated association whose only function is the promotion of common interests of its members, and which is not engaged in any business, as an association, cannot be sued under its common name by reason of a statute authorizing such suit against associations transacting business under a common name.[18] An action for a breach of contract made by such an association for its members must be brought against the members individually.[19] Trustees of an incorporated association, expressly authorized to commence suit on a bond, may sue thereon without joining the corporation, being trustees of an express trust.[20] Under the Maine statute a lodge may sue in the name of its trustees for the time being.[21] An assignment by a lodge to certain officers of a cause of action on a bond without consideration merely to sue for the benefit of the lodge, does not entitle the assignees to maintain the action in their own names.[22]

As to matters incidental to the operation of a voluntary association, members

7. Lightbourne v. Walsh, 97 App. Div. 187, 89 N. Y. S. 856.

8. In accepting the property after payment of liens by its agents, the association ratifies its agents' acts and thereby becomes liable. Hosman v. Kinneally, 90 N. Y. S. 357.

9. Enforcement of benefit on death of member of mutual benefit association. Pearson v. Anderburg [Utah] 80 P. 307.

10. See 3 C. L. 348.

11. It is well settled that, in the absence of a statute otherwise providing, to be entitled to conduct judicial proceedings in court, a party litigant must be either a natural or artificial person. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

12. Pearson v. Anderburg [Utah] 80 P. 307. St. Paul Typothetae, unincorporated association of employers, organized only to promote common interests, cannot sue under association name. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

13. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725; Pearson v. Anderburg [Utah] 80 P. 307.

14. Pearson v. Anderburg [Utah] 80 P. 307.

15. Plant System Relief & Hospital Dept. v. Dickinson, 118 Ga. —, 45 S. E. 483.

16. Held, that defendant could be sued under its name whether incorporated or not. Saunders v. Adams Exp. Co. [N. J. Law] 58 A. 1101.

17. Gen. St. 1894, § 5177 does not authorize suit by St. Paul Typothetae as such. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

18. St. Paul Bookbinders' Union No. 37, organized by employes to protect common interests and not doing other "business," cannot be sued in common name under Gen. St. 1894, § 5177. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

19. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

20. Under Mills' Ann. Code, § 5. Hecker v. Cook [Colo. App.] 78 P. 311.

21. Rev. St. c. 84, § 28. Coombs v. Harford, 99 Me. 426, 59 A. 529.

22. Coombs v. Harford, 99 Me. 426, 59 A. 529.

may restrict themselves to tribunals created by the association;[23] but such a restriction is not binding when the enforcement of a contract or property right is involved.[24] Directors of a labor association, whose duty it is, under the rules and regulations, to decide important questions referred to them by different districts, are not authorized to settle grievances of individual members, and resort to them is not a condition precedent to the maintenance of an action by members for relief from illegal suspension.[25]

In New Jersey the doctrine applicable to service of process on agents of foreign corporations is applied also to agents of foreign unincorporated associations.[26] Thus service must be upon an agent having a representative character respecting the subject-matter of the litigation.[27]

§ 5. *Dissolution and termination.*[28]—Upon a dissolution of an association in the funds of which members have a pecuniary interest, such funds remain, in equity, the property of its members, and they are entitled to have the fund divided between them.[29] An unincorporated Lloyd's association of fire underwriters is subject to adjudication as an involuntary bankrupt.[30]

ASSUMPSIT.

§ 1. *Nature, form and propriety of action.*[31]—Assumpsit will not lie upon a sealed obligation.[32]

23. Pearson v. Anderburg [Utah] 80 P. 307.

24. As enforcement of benefit contract in mutual benefit association; here, resort to association tribunal is not a condition precedent to action in courts. Pearson v. Anderburg [Utah] 80 P. 307. Where property rights in an association are involved, a claimant is not obliged to exhaust the remedies by appeal within the association before bringing suit. Supreme Court of Independent Order of Foresters v. Mutter, 105 Ill. App. 518.

25. Moeller v. Machine Printers' Beneficial Ass'n [R. I.] 60 A. 591.

26. Saunders v. Adams Exp. Co. [N. J. Law] 58 A. 1101.

27. Under P. L. 1903, pp. 545, 546, providing that service upon an unincorporated association may be made upon the president or any other officer for the time being or the agent, manager, or the person in charge of the business of such organization, service upon the local agent and route agent of an express company was held sufficient. Saunders v. Adams Exp. Co. [N. J. Law] 58 A. 1101.

28. See 3 C. L. 348.

29. The "Old Volunteer Fire Department of Detroit" was incorporated by a special act of the legislature, which provided for the uses to which its funds should be devoted. The funds were derived mainly from members. After the purpose of the organization had ceased it dissolved and placed the funds in the hands of a trustee for a special purpose, which failed. Held, such fund did not escheat to the state but should be divided among the persons recognized as members at the time of the dissolution, and the personal representatives of deceased members. Hopkins v. Crossley [Mich.] 101 N. W. 822.

30. Bankr. Act, July 1, 1898, 541, § 4b; 30 Stat. 547. In re Seaboard Fire Underwriters, 137 F. 987.

31. See 3 C. L. 348. See, also, Contracts, 3 C. L. 805; and Implied Contracts, 3 C. L. 1690.

32. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

Note: Assumpsit in the common-law action for the recovery of damages for the nonperformance of a parol or simple contract. Although the action derived its origin from the provisions of the Statute of Westminster the second, and was formerly classed invariably among the actions on the case, it is now generally regarded as a distinct form of action, and in modern statutes and elsewhere is frequently mentioned, even in contradistinction to actions on the case, as belonging to the class of actions ex contractu. Holmes, Common Law, 274-288; Anson, Contracts, 39-42; Ward's Pollock on Contracts, 142-144; Chitty, Pleadings [16th Am. Ed.] 1, iii. According to the strict principles of the common law, assumpsit will lie only on a parol or simple contract. McKay v. Darling, 65 Vt. 639; Wood v. Edwards, 19 Johns. [N. Y.] 205; Codman v. Jenkins, 14 Mass. 93; North v. Nichols, 37 Conn. 375; Johnston v. Salisbury, 61 Ill. 316. But in several states this rule has been changed by statute and assumpsit will now lie where formerly the remedy was by debt or covenant. 2 Enc. Pl. & Pr. 988, 989.

Waiver of tort.[33]—Where the facts authorize such action, a party injured may waive the tort and sue in assumpsit.[34] But an election to proceed on contract is binding and precludes the party so electing from later resorting to an action in tort.[35] A statement by plaintiff in an affidavit in opposition to a motion for a change of venue that the action is in tort is not a binding election to proceed in tort, such statement having had no effect on the court's decision.[36] But where plaintiff obtains a reference on the faith of a formal declaration by him that his action is on contract and not in tort, such conduct is a binding election.[37] Where the gravamen of the complaint is on contract, the fact that there are allegations charging tortious conduct on the part of defendants does not make the action one sounding in tort.[38]

§ 2. *The common counts.*[39]—Wherever the facts are such that the law raises an implied promise, there may be a recovery under the common counts;[40] where the action is based upon an express contract, special assumpsit should be brought.[41] Where an executory contract is set out in the declaration, and no more is shown by the evidence, recovery for the breach cannot be had under the common counts.[42] But where it appears that the contract declared on has been fully performed, and nothing remains to be done by plaintiff, a recovery may be had under the common counts,[43] and the contract may be read in evidence to show its terms and the amount due.[44]

Goods sold and delivered.[45]—Indebitatus assumpsit lies where a contract of

33. See 3 C. L. 348, also Election and Waiver, 3 C. L. 1177.

34. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. The owner of goods wrongfully taken from his possession may sue in tort for damages or waive the tort and sue for their value. Harter v. Pearson, 5 Ohio C. C. (N. S.) 304. Conversion may be waived and the transaction treated as a loan of money; as where one converts to his own use money, or property that by agreement was equivalent to money, placed in his hands for another purpose. Couter v. Pierson [N. J. Law] 61 A. 81.

35. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. After satisfaction of a judgment in assumpsit the right to proceed in tort is gone. Harter v. Pearson, 5 Ohio C. C. (N. S.) 304.

36, 37. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98.

38. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. A complaint alleging that defendants were intrusted with money for a certain purpose, and that after accomplishing such purpose defendants received and retained the money and converted it to their own use should be treated as ex contractu and not ex delicto, and a recovery permitted upon the theory of money had and received under an implied promise to repay it, the allegation of conversion being treated as surplusage. Logan v. Freerks [N. D.] 103 N. W. 426.

39. See 3 C. L. 349.

40. See Implied Contracts, 3 C. L. 1690. Where a payee of a note receives money which in fact belongs to another, the maker having misappropriated it to meet the note, the real owner may bring money had and received to recover from the payee, a promise to repay being implied. Porter v. Roseman [Ind.] 74 N. E. 1105. Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request to make such payment and a promise to repay, and the obligation thus created may be enforced by assumpsit. Barrett v. Armstrong [W. Va.] 49 S. E. 140. An item omitted by mistake, accident, or fraud, from a settled account between individuals, growing out of an ordinary business transaction, may be recovered in an action of assumpsit. Harman v. Maddy Bros. [W. Va.] 49 S. E. 1009. An asylum may recover on a quantum meruit for the expense of keeping an insane person whether the judgment of the county court committing him was or was not void. Hopper v. Eastern Kentucky Lunatic Asylum [Ky.] 85 S. W. 1187.

41. See 3 C. L. 349, n. 12. Where adjacent owners contract for the construction of a party wall at joint expense, and one party pays the entire cost, he may recover the proportion payable by the other under a special count on the agreement. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

42. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

43. Peden v. Scott [Ind. App.] 73 N. E. 1099; Evans v. Howell, 211 Ill. 85, 71 N. E. 854. Indebitatus assumpsit where completed sale and delivery of fruit was shown. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

44. Contract for monument. Peden v. Scott [Ind. App.] 73 N. E. 1099. Action on building contract to recover proportion of cost of party wall. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

45. See 3 C. L. 349.

sale is fully executed and nothing remains to be done but payment of the purchase price.[46]

Use and occupation of land.—Assumpsit lies for the use and occupation of land, though there is no express contract of renting or agreement to pay for the use of the land.[47] But in order to recover in assumpsit, the relation of landlord and tenant not being shown to exist, plaintiff must make out title just as he would in ejectment, the foundation of the action being the appropriation by defendant to his use of plaintiff's property.[48]

Work, labor and materials.[49]—There can be no recovery for labor voluntarily performed, for which there was neither an express nor implied promise to pay.[50] Where, in a suit on a contract, the complaint contains the common counts, there may be a recovery for the value of work and materials furnished, if defendant accepted the work, though plaintiff did not fully perform the contract.[51] The value of medical services rendered a pauper may be recovered from the county on the common counts, if the county requested the rendition of such services.[52]

Money paid.[53]—Indebitatus assumpsit will lie for money paid which in justice and good conscience ought not to be retained.[54] Illegal taxes paid under protest may be recovered under the common counts.[55] Money advanced upon a contract subsequently abandoned by mutual agreement may be recovered under the common counts,[56] and where suit is on the common counts and the evidence shows that money had been advanced, there is no variance, though the bill of particulars is for money lent.[57] Assumpsit on the part of an heir who has paid the liabilities against an estate will not lie to obtain a joint judgment against the residuary heirs for their proportion.[58]

Money had and received.[59]—Wherever one person has in his hands money equitably belonging to another, that other may recover it by assumpsit for money had and received.[60] Thus the action will lie to recover from defendant money received by him from third persons to be returned to plaintiff,[61] or for money paid to defendant to be paid by him to a third person for plaintiff,[62] on default of defendant to perform the agreement. Money had and received lies to recover proceeds of property on which plaintiff had a lien, defendant having knowledge of the lien or of facts showing its existence.[63] The remedy is available where defendant

46. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

47. Illinois Cent. R. Co. v. Ross, 26 Ky. L. R. 1251, 83 S. W. 635.

48. Evidence insufficient to show title. Illinois Cent. R. Co. v. Ross, 26 Ky. L. R. 1251, 83 S. W. 635.

49. See 3 C. L. 350.

50. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938.

51. Matthews v. Farrell, 140 Ala. 298, 37 So. 325.

52. County of De Witt v. Spaulding, 111 Ill. App. 364.

53. See 3 C. L. 350.

54. As where paid under mistake of fact not arising from intentional neglect. Scott v. Ford [Or.] 78 P. 742.

55. Michigan Sanitarium & Benev. Ass'n v. City of Battle Creek [Mich.] 101 N. W. 855.

56. But there could be no recovery where plaintiff violated the contract, which was not abandoned, after making advancements. Murphy v. Dalton [Mich.] 102 N. W. 277.

57. Murphy v. Dalton [Mich.] 102 N. W. 277.

58. Such judgment is enforceable against any one of the defendants who may be again compelled to sue his co-defendants for contribution, thus prolonging the litigation. The remedy is in equity where a distribution may do complete justice. Calhoun v. Tangany, 105 Ill. App. 23.

59. See 3 C. L. 350.

60. Trustee entitled to recover overpayments to a firm creditor who had been partially paid by a member of the firm. Langhorne v. McGhee [Va.] 49 S. E. 44.

61. Money for tickets bought by plaintiff but not used by him. Fottori v. Vesella [R. I.] 61 A. 143. Plaintiff recovered, not what he paid originally, but such sum, less commissions, with interest to date of trial. Id.

62. Clark v. Jenness [Mass.] 74 N. E. 343.

63. Proceeds of cotton on which plaintiff had lien for rent of land. Link v. Barksdale [S. C.] 50 S. E. 189.

receives plaintiff's money without consideration and in consequence of the fraud of a third person, and it is no defense that defendant cannot be restored to his original position.[64] An action for money had and received may be maintained, though defendant has not actually received the money,[65] and it is no objection to the maintenance of the action that equitable principles are to some extent to be applied and that the money sought be recovered is impressed with a trust in the hands of the holder.[66] Unless some specific fund of plaintiff has been diverted by defendant, the action will not lie.[67]

§ 3. *Declaration, pleas, and defenses.*[68]—It is not necessary to state whether a contract declared on is oral or written, even though the law requires it to be in writing; and a statement of its terms is sufficient to show whether the defendant's promise was express or implied.[69] In a transitory action such as for goods sold and delivered, or for services rendered, it is not necessary to lay a venue in the statement of claim.[70] Where in suits commenced by the common counts the real cause of action is such that, to enable the parties to plead correctly and properly try the case, the plaintiff will be required to file by way of amendment a substitute complaint or complete statement of the facts showing the cause of action, the common counts drop out of the case.[71] But in some cases the common counts may remain in the case after the plaintiff has filed a bill of particulars.[72] The office of the bill of particulars in such case is not to supply any necessary allegation of the complaint, without which it would be insufficient upon demurrer, but to furnish a statement of the items of the claims which are generally described by the common counts.[73] After the filing of a proper bill of particulars a complaint containing the common counts is not demurrable for want of particularity; the remedy is by motion to make the bill of particulars more specific.[74] A complaint substantially in the form of a common count in assumpsit for goods sold and delivered and labor and work performed for a certain university upon defendant's promise to pay therefor is sufficient.[75] A statement of claim is sufficient which sets forth a sale and delivery by plaintiff to defendant at a given date of a certain quantity of merchandise, at a specified price, payable at a fixed time, the performance of a certain service upon defendant's agreement to pay the expense thereof, and the whole amount plaintiff believes is justly due from defendant.[76] A complaint alleging in two counts that defendant entered upon plaintiff's land and cut trees, and claiming and seeking to recover the value of the trees, is in assumpsit and not in trespass quare clausum fregit.[77] A suit by an attorney on a contract whereby he was retained to institute a proceeding to recover damages from a city in consideration of an assignment of eight per cent. of the damages recovered is a suit for money had and received to plaintiff's use, and not one to enforce an attorney's lien.[78] The existence of an attorney's lien on the award of damages would not bar a suit on the contract.[79] A complaint for money had and received is not sustained by

64. Mulligan v. Harlam, 92 N. Y. S. 765.

65. The contrary proposition cannot be sustained under the liberal rule of construction of pleadings laid down by the code. Staton v. Webb [N. C.] 49 S. E. 55.

66. Merino v. Munoz, 99 App. Div. 201, 90 N. Y. S. 985.

67. Where defendant, as guardian of complainant's children, collected a debt due complainant from third persons, complainant's remedy against such third persons was unaffected, and the action would not lie. Finn v. Adams [Mich.] 101 N. W. 533.

68. See 3 C. L. 351.

69, 70. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

71, 72, 73, 74. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133.

75. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. S. 443.

76. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

77. Hence Tennessee court had jurisdiction, though trees were cut in Mississippi. West v. McClure [Miss.] 37 So. 752.

78, 79. Flannery v. Geiger, 92 N. Y. S. 785.

proof that the president of the defendant partnership procured payment of the firm's debts with money of the plaintiff corporation, of which the firm president was secretary.[80]

§ 4. *Evidence.*[81]—In an action to recover money received by defendant from plaintiff through the fraud of the third person, evidence of defendant's good faith is inadmissible, a previous demand having been made.[82] An action being tried upon the theory that work, labor and materials were furnished by plaintiffs under the general authority and direction of defendants, and the jury having found such relation to exist, recovery was not upon a quantum meruit, and hence the admission of evidence of actual expenditures was proper.[83]

ASSUMPTION OF OBLIGATIONS; ASSUMPTION OF RISK, see latest topical index.

ASYLUMS AND HOSPITALS.

§ 1. *Officers, their powers, duties and liabilities.*[84]—The board of directors of a state asylum can confer on itself by by-laws no greater power than the statute under which it was organized gives it.[85] A power in the board of directors to elect a physician for a term is not power to remove him before the end of the term,[86] but he may be removed under the provisions of a general law providing for the removal of state officers who neglect or refuse to perform their official duties.[87] Courts will not prescribe rules for the government of state institutions unless those in force are unreasonable or subversive of the purposes for which the institution was established.[88] The power of the New York supreme court to direct officers of an orphan asylum to furnish relatives of persons under its care a copy of the records relative to such inmate is descretionary,[89] and will not be exercised when no possible benefit can result to the relative or inmate.[90]

§ 2. *Maintenance of institutions and support of inmates.*[91]—In New York where an illegitimate child intrusted to a foundling asylum by its mother is indentured out, the indenture will not be canceled at the instance of the mother.[92] The liability of asylums and hospitals for taxes is treated in a separate topic.[93]

§ 3. *Liability of institutions or officers for injuries to inmates.*[94]—Officers acting within the scope of their authority are not personally liable for holding a person regularly committed.[95] A railroad hospital operated by a corporation inde-

80. Powell Hardware Co. v. Mayer [Mo. App.] 83 S. W. 1008.
81. See 3 C. L. 352.
82. Mulligan v. Harlam, 92 N. Y. S. 765.
83. Radel v. Lesher, 137 F. 719.
84. See 3 C. L. 352.
85. Wall v. Board of Directors of Deaf, Dumb and Blind Asylum, 145 Cal. 468, 78 P. 951.
86. Wall v. Board of Directors of Deaf, Dumb and Blind Asylum, 145 Cal. 468, 78 P. 951. That an election of a physician was not held on the date prescribed by the by-laws of a state hospital becomes immaterial on the question of the validity of the election when prior thereto the by-laws had been repealed. Id.
87. Wall v. Board of Directors of Deaf, Dumb and Blind Asylum, 145 Cal. 468, 78 P. 951.
88. Doren v. Fleming, 6 Ohio C. C. (N. S.) 81.
89. Under Laws 1884, c. 438, § 3. In re Shapiro, 92 N. Y. S. 1027.
90. Not at the instance of the mother of an illegitimate child placed beyond her power to regain custody of him. In re Shapiro, 92 N. Y. S. 1027.
91. See 3 C. L. 353.
92. Laws 1872, c. 635, §§ 2, 4. In re Shapiro, 92 N. Y. S. 1027.
93. See Taxes, 4 C. L. 1605.
94. See 3 C. L. 353.
95. Where commitment to state institution was regular and officers acted within the scope of their authority, held, parties participating therein were not liable in damages to person committed. Doren v. Fleming, 6 Ohio C. C. (N. S.) 81.

pendent of the railroad company, though maintained by assessments deducted from the employe's wages, is an organization distinct from the railroad company, and the latter is not liable for negligence of the hospital directors or physicians in treating an employe.[96]

ATTACHMENT.

§ 1. *Definition, nature and distinctions.*[97]—Attachment is a statutory remedy and the local statutes must be consulted, any seemingly general rule being so only by reason of similar enactments in various states. The remedy, while only provisional and ancillary in its nature,[98] is an action at law as distinguished from a suit in equity.[99]

§ 2. *In what actions it will issue.*[1]—The writ will not lie, before judgment, in an action against a national bank,[2] nor in a mechanics' lien suit commenced in a Federal court.[3] In order to bring a case within the attachment law, there must be a debt or claim, the amount of which may be definitely ascertained before the trial by a method of computation provided by the contract, or by the application of some statutory measure of damages plainly suggested by the recitals of the affidavit.[4] A debt, created by the decree of a court of equity for the payment of money only, will sustain the writ.[5] An attachment may be predicated upon an

96. Illinois Cent. R. Co. v. Buchanan [Ky.] 88 S. W. 312.

97. See 3 C. L. 354.

98. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329; Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267; Jewett Bros. v. Huffman [N. D.] 103 N. W. 408. False pretenses which are relied upon solely as a basis for the provisional remedy by attachment are no part of the cause of action and allegations in the complaint relative thereto are mere surplusage. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408. A plea of infancy defeating the action, it dissolves an attachment issued in connection therewith. Wallace v. Leroy [W. Va.] 50 S. E. 243. Under County Ct. Rule 31, giving the defendant the right to open and close on his admission of plaintiff's cause of action except as defeated by proof of the facts of the answer, defendant is entitled to open and close where he admits plaintiff's right to recover the amount sued for, although he does not admit the truth of facts alleged in an affidavit for attachment sued out by plaintiff in aid of the principal action. Bell v. Fox [Tex. Civ. App.] 84 S. W. 384.

99. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267. No writ of attachment can be obtained in a mechanics' lien suit commenced in a Federal court, because proceedings in equity and at law cannot be so combined. Id.

1. See C. L. 354.

2. It is immaterial whether the bank be solvent or insolvent. U. S. Rev. Stat. § 5242 construed. Van Reed v. People's Nat. Bank, 25 S. Ct. 775. This rule is not changed by 22 Stat. at L. 163, ch. 290. Id.

3. In the Federal courts proceedings at law and in equity cannot be so combined. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

4. Pearsons v. Peters [S. D.] 102 N. W. 606.

5. Costs taxed in appellate equity court. Cord v. Newlin [N. J. Law] 59 A. 22.

affidavit which shows facts supportive either of an action of assumpsit or an action ex delicto.[6]

§ 3. *Right to and grounds for the writ.*[7]—The ground for attachment must exist at the time the writ is issued.[8] In some states attachment will lie if the debt or liability which forms the basis of the writ was fraudulently contracted.[9]

Removal from state.—In most states attachment will lie if the debtor is about to leave, or is leaving the state or county with an intent to defraud,[10] or without paying or securing plaintiff's debt,[11] or without leaving sufficient property within the state for the payment thereof.[12] These statutes refer to the debtor's person and if he has left the state and established his residence in another before the writ is sought it will not lie, although he has left property in the state in which the attachment issued.[13]

Nonresidence.[14]—As a general rule attachment may be brought against a nonresident in any court in whose jurisdiction he has property.[15] Temporary absence is not nonresidence justifying attachment.[16] In some states, in certain proceedings, attachment may be made against a nonresident after two non ests.[17] One residing upon an Indian reservation in Idaho is a resident of that state.[18] An uncontradicted recital in a contract, upon which suit is commenced by attachment, that defendant is a foreign company, tends to establish its nonresidence.[19]

Attachment against corporations.[20]—In Ohio foreign corporations are in certain instances exempt from attachment.[21]

6. Where affidavit alleged that defendant was indebted to plaintiff in a sum certain, such sum being obtained from plaintiff by fraud and misrepresentation. May v. Disconto Gesellschaft, 113 Ill. App. 415, afd. 211 Ill. 310, 71 N. E. 1001.

7. See 3 C. L. 355.

8. Murphy, Grant & Co. v. Zaspel [Idaho] 81 P. 301.

9. Affidavit, after stating the material facts and defendant's liability, alleging that defendant "fraudulently contracted the debt and incurred the liability" upon which suit is brought is a sufficient statement of the ground of the attachment under Code 1899, c. 106, § 1, subd. 8. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893. Under such section an affidavit stating the material facts and alleging defendant's liability and that the debt sued on was by him fraudulently incurred is sufficient. Id.

10. Affidavit averring that defendant had stated that he was going to leave the state held insufficient under Code Civ. Proc. § 2906, subd. 2, providing that in such a case there must be an intent to defraud. Franke v. Havens, 102 App. Div. 67, 92 N. Y. S. 377.

11. Under Code, § 3878, subd. 8, making it a ground of attachment that one is about to permanently remove from the state, and refuses to pay or secure the debt due plaintiff, an allegation in a petition that defendant is about to leave the state and defraud his creditors is insufficient. Upp v. Neuhring [Iowa] 104 N. W. 350.

12. A petition charging that defendant was about to remove permanently out of the state is insufficient under Code, § 3878, subd. 3, making it a ground for an attachment that defendant is about to remove his property out of the state, without leaving sufficient property to pay his debts. Upp v. Neuhring [Iowa] 104 N. W. 350.

13. Brooks v. Hutchinson [Ga.] 50 S. E. 926. In Georgia the county is recognized as the division instead of the state. Id.

14. See 3 C. L. 355.

15. Under Code, § 445, attachment may issue against the property of a nonresident who is the defendant in an action in the supreme court of the District of Columbia. Bradford v. Brown, 22 App. D. C. 455.

16. Where defendant left and went into another state to secure employment until his crops should mature, and if the field should prove satisfactory to change his residence, held not a nonresident, his family still remaining within the state. Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549.

17. Under Code Pub. Gen. Laws, art. 9, §§ 24, 43, and 4, two returns of non est, made when the cause of action declared on was a claim for liquidated damages, cannot be utilized as the basis for an attachment issued upon a declaration which proceeds for the recovery of unliquidated damages, as to which cause of action no summons was issued and no returns of non est were made, especially in the absence of the affidavit required by § 4. Stewart v. Chappell [Md.] 60 A. 625. See 3 C. L. 355, n. 19.

18. Coey v. Cleghorn [Idaho] 79 P. 72.

19. Anglo-Wyoming Oil Fields v. Miller [Ill.] 74 N. E. 821.

20. See 3 C. L. 356. See Clark & M. Corp., § 772.

21. Foreign corporations engaged in interstate commerce business in Ohio, but not established in the state, taking advantage of Rev. St. § 148 d, c, are under § 5521 exempt from attachment. Armour Carlines v. Bigalow Fruit Co., 5 Ohio C. C. (N. S.) 161.

Fraudulent transfer or disposition of property.[22]—A conveyance of property made with fraudulent intent to cheat, hinder or delay creditors is ground for attachment.[23] Fraud is an essential element.[24] The fact that the sale hinders the creditors in collecting their debts does not render it fraudulent, unless such hindrance is a part of the intent with which the sale is made.[25] The proceeds of the sale being fraudulently withheld from the creditors, it will be inferred that the sale was fraudulent.[26] In order to have a fraudulent transfer, the debtor must be insolvent,[27] and the question of insolvency at the time of the transfer is generally one of fact for the jury.[28] As to what constitutes a fraudulent conveyance is treated elsewhere,[29] the few cases shown in the notes being kept solely for the purpose of illustration.[30] The burden of proof is on an attaching creditor to show the intent to defraud.[31] Negligence or unskillfulness in farming, by which the debtor wastes his property, is not a ground for attachment where there is no fraudulent intent.[32] There being two defendants and the affidavit not stating which is about to perpetrate the fraud, it will be treated as though in the plural; charging both with the fraudulent purpose.[33]

§ 4. *Attachable property.*[34]—The attachment debtor must have an attachable interest in the property [35] or the latter must be held in fraud of plaintiff's rights.[36] A deed from defendant being void on its face, the property is properly attached under a statute relating to the attachment of property standing in the name of defendant.[37] Neither the vendor of a conditional sale [38] nor his assignee [39] can have an attachment against the property of the purchaser to secure the payment

22. See 3 C. L. 356.

23. Though it be a valid conveyance between the parties and confers a perfect title. Farris v. Gross [Ark.] 87 S. W. 633. A disposal of property for the sole purpose of using the proceeds to pay the transferor's debts is insufficient to sustain attachment on the ground that he had disposed of his property with intent to hinder and delay his creditors. Blakemore v. Eagle [Ark.] 84 S. W. 637.

24. An instruction that if at the time the affidavit for attachment was made, the defendant was not about to convert his property into money for the purpose of placing it beyond the reach of his creditors, then said attachment was illegally sued out, held correct. Bell v. Fox [Tex. Civ. App.] 84 S. W. 384.

25, 26. Farris v. Gross [Ark.] 87 S. W. 633.

27. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771. Attaching creditor must allege and prove the debtor's insolvency. Hicks Co. v. Thomas [La.] 38 So. 148. Under Code Prac. art. 240, subd. 4, an intent to give an unfair preference is ground for attachment. There is an "unfair preference" where the creditor knew or had good reasons to know that the debtor was insolvent and the transaction gives the creditor any advantage over other creditors. Bank of Patterson v. Urban Co. [La.] 38 So. 561.

28. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771.

29. See Fraudulent Conveyances, 3 C. L. 1535.

30. Where the owner of property conveyed it to the surety on his bail bond and the latter did not incur any liability, but 10 months later at the transferror's request conveyed it to the latter's wife, held sufficient evidence of fraud to sustain the attachment. Brady v. Fraley's Adm'x [Ky.] 84 S. W. 750. An appropriation of firm property to the payment of individual debts is a fraudulent conveyance sufficient to sustain attachment. Reynolds v. Radke, 112 Ill. App. 575. Money paid upon legitimate claims, or claims supposed to be legitimate, at a time when the concern is supposed to be solvent, is not paid out in fraud of other creditors. American Eng. Spec. Co. v. O'Brien, 2 Ohio N. P. (N. S.) 550.

31. American Eng. Spec. Co. v. O'Brien, 2 Ohio N. P. (N. S.) 550.

32. Blakemore v. Eagle [Ark.] 84 S. W. 637.

33. Hare v. Cook, 6 Ohio C. C. (N. S.) 73.

34. See 3 C. L. 357.

35. Where one discounted draft and took bill of lading and, on the buyer's refusing to accept the goods or pay the draft delivered the goods to the seller to sell as agent, held, the seller did not acquire a title sufficient to render the goods subject to attachment by his creditors. Mather v. Gordon Bros. [Conn.] 59 A. 424.

36. Property fraudulently transferred is subject to attachment as though no transfer had been made. Rev. Codes, 1899, § 5052, construed. Salemonson v. Thompson [N. D.] 101 N. W. 320. In such a case the levy of the writ is deemed an election by the creditor to treat the conveyance as fraudulent. Id. A creditor may attach property conveyed by the debtor in fraud of creditors. American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 A. 515.

37. Johnson v. Miner, 144 Cal. 785, 78 P. 240.

38, 39. Barton v. Groseclose [Idaho] 81 P. 623.

of the purchase price until the property itself has been exhausted. Where a bank collects a draft and sends it for collection, the fund so realized may be attached in a suit against the owner of the draft.[40] Unless one waives his exemptions,[41] exempt property is not subject to attachment, and the court has the power to set aside a levy made thereon.[42] In Ohio, in actions to recover for necessaries sold, attachment will lie to reach what is otherwise exempt property.[43] A fund of a life insurance company, being derived from assessments for the payment of death claims and being deposited in a bank, is liable to attachment by the beneficiary in a life policy whose claim has been approved.[44] Money proceeds of the sale of land which belonged to wards are subject to attachment in the hands of the clerk after the confirmation of the sale.[45]

Attachment of debts and choses in action.[46]—In many states the statutes provide for the "attachment" of debts due the defendant; this remedy corresponds to that of garnishment and is treated elsewhere.[47] By the common law, shares of stock in a corporation, being in the nature of choses in action, are not subject to attachment,[48] but in many states this rule has been changed by statute.[49] Statutes relating to subjects of attachment have no extraterritorial force.[50]

§ 5. *Procedure in general.*[51]—The procedure being wholly statutory, the local statutes must be consulted,[52] and, as the remedy is in derogation of the common law, must be strictly complied with.[53] As a general rule the application should show compliance with statutory conditions precedent.[54] In Pennsylvania defendant not being personally served, nor a resident of the county, and not hav-

40. Nashville Produce Co. v. Sewell, 121 Ga. 278, 48 S. E. 945; Henry v. Lennox-Haldeman Co., 116 Ga. 9, 42 S. E. 383 and High v. Padrosa, 119 Ga. 648, 46 S. E. 859, held inapplicable to the above case. Id.

41. Where defendant disclaimed ownership and attachment was discharged on motion, and then attached again, held that the first disclaimer did not waive his right to claim an exemption. Coey v. Cleghorn [Idaho] 79 P. 72. See Exemptions, 3 C. L. 1408.

42. Holmes v. Marshall, 145 Cal. 777, 79 P. 534. See Exemptions, 3 C. L. 1408.

43. Physicians service constitute "necessaries." Kraft v. Wolf, 3 Ohio N. P. (N. S.) 105. An allegation in the affidavit of "necessaries, to wit, groceries," held sufficient. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257. Statement in the affidavit that the claim is for rent does not afford ground for a presumption that it is a claim for "necessaries." Hare v. Cook, 6 Ohio C. C. (N. S.) 73.

44. National Park Bank v. Clark, 92 App. Div. 262, 87 N. Y. S. 185.

45. Le Roy v. Jacobsky, 136 N. C. 443, 48 S. E. 796.

46. See 3 C. L. 359.

47. See Garnishment, 3 C. L. 1550.

48. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

49. Code of 1899, ch. 106, § 9, held to make the above change. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. Capital stock in a domestic corporation is subject to attachment, although the certificate of stock be in the possession of the debtor outside of the state. Cord v. Newlin [N. J. Law] 59 A. 22. See Helliwell, Stock and Stockholders, §§ 396-402.

50. Shannon's Code, §§ 5260, 5267, authorizing the attachment of choses in action whether due or not due, and declaring inoperative and void any transfer, sale or assignment thereof after the levy of the attachment, can have no extraterritorial effect, so as to defeat the rights of a bona fide purchaser of a note in the state of Texas. Kimbrough v. Hornsby [Tenn.] 84 S. W. 613.

51. See 3 C. L. 359.

52. Massachusetts: In Massachusetts where mortgaged chattels are in the hands of a bailee of the mortgagor, they can be attached only under a writ of summons and attachment as if unincumbered. Rev. Laws, c. 167, §§ 69-78. Jenness v. Shreves [Mass.] 74 N. E. 312. Cannot be attached by trusteeing the bailee and summoning him to answer. Id. Mortgaged personalty in the possession of the mortgagee cannot be attached under Rev. Laws, c. 167, § 74, providing that mortgaged personalty in the possession of mortgagor may be attached as though unincumbered. Id.

Pennsylvania: The words "before that time" in the foreign attachment act (Act of May 10, 1889, P. L. 183), relate to the time when judgment is about to be taken, and not to the "third term." Sperry v. Styer, 23 Pa. Super. Ct. 607.

53. Dye v. Crary [N. M.] 78 P. 533. Gaining jurisdiction by attachment is strictly a statutory proceeding and the statute must be followed in detail. Jones v. Fuchs, 94 N. Y. S. 57.

54. New York: Section 181 of the tax law, requiring foreign corporations to pay a license tax, does not prohibit the maintenance of an action by the **assignee of a foreign corporation,** hence an application by such assignee for an attachment need not allege compliance with such law. Box

ing appeared in the action, the proceeding must follow the practice which is provided in case of foreign attachment.[55]

Jurisdiction.[56]—The test of jurisdiction is the status of the case at the time the action is commenced, and if there is sufficient in the complaint when it is filed to give the court jurisdiction, the attachment may rightfully issue and no subsequent proceeding in the court can effect its standing.[57]

Necessity of issuance of summons and service thereof.[58]—Issuance of a writ of attachment containing a summons clause is sufficient issuance of a summons.[59] Service must be made within the required time and a court has no authority to extend its jurisdiction by an order extending the time.[60] The service being by publication, the defendant not appearing and no property being attached, the court is without jurisdiction.[61] A general appearance by a nonresident renders harmless all defects in the service of process.[62] The execution of an attachment bond by defendant does not amount to an appearance giving the court jurisdiction to enter a personal judgment against him.[63]

§ 6. *Affidavit and its sufficiency.*[64]—Under the procedure of most states, an affidavit is essential to jurisdiction.[65] The affidavit must be made as near as practicable to the date of the issuance of the writ,[66] and must be sworn to by the plaintiff, his agent or attorney.[67] The secretary of a corporate plaintiff is not, by virtue of his office, the agent of the plaintiff for the purpose of making the affidavit.[68] An affidavit which, except for the heading, states every essential part of the complaint, including prayer for judgment, will serve also as a complaint.[69] A variance between the claim stated in the affidavit and the demand set up in the declaration is fatal,[70] unless it does not affect the character of the claim sued on.[71] Upon a motion to quash the attachment for such variance, the declaration may be

Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. S. 836. Laws 1892, p. 1805, c. 687 not applying to contracts made without the state, the application by the assignee of a foreign corporation for an attachment in an action on a contract need not allege that the contract was made within the state. Id.

55. Sperry v. Styer, 23 Pa. Super. Ct. 607.

56. See 3 C. L. 360.

57. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 P. 40. Where a complaint, when filed, contains sufficient averments to give the court jurisdiction, and an attachment of the defendant's property is rightfully issued thereon, the fact that plaintiff demurred to the answer, thereby admitting allegations of defense, is no ground for dissolving the attachment. Id.

58. See 3 C. L. 360.

59. This under Mansf. Dig. § 4967, providing that a civil action is commenced by filing a complaint and causing a summons to issue thereon. Handley v. Anderson [Ind. T.] 82 S. W. 716.

60. Under Code Civ. Proc. § 638, service of the summons by publication must be commenced within 30 days after the granting of the warrant. Jones v. Fuchs, 94 N. Y. S. 57.

61. State Bank of Chicago v. Theweatt, 111 Ill. App. 599.

62. Where a nonresident makes a general appearance and makes a motion to vacate but does not traverse the allegations of nonresidence, and that he has property in the state, and that the cause of action arose in the state, the attachment will not be dissolved for failure of the affidavit for publication to allege that defendant, by due diligence, could not be found in the state, and because the affidavit did not give the grounds for his belief that defendant was a nonresident. Savannah Grocery Co. v. Rizer [S. C.] 50 S. E. 199.

63. Hilton v. Consumers' Can Co. [Va.] 48 S. E. 899.

64. See 3 C. L. 361.

65. Under Code 1892, § 486 et seq., where a bill in chancery for an attachment does not show that the debtor has any land in the state and does not join any persons having effects, etc., but merely personal property is levied on, and no bond or affidavit is given, the court has no jurisdiction; the proper remedy is sequestration. Advance Lumber Co. v. Laurel Nat. Bank [Miss.] 38 So. 313.

66. Murphy, Grant & Co. v. Zaspel [Idaho] 81 P. 301. An affidavit made 28 days before the commencement of the suit is insufficient, the ground of attachment being that the debt was not secured. Id.

67. P. L. 1901, p. 158. North Penn Iron Co. v. Boyce [N. J. Law] 58 A. 1094.

68. Under P. L. 1901, p. 158. North Penn Iron Co. v. Boyce [N. J. Law] 58 A. 1094.

69. Handley v. Anderson [Ind. T.] 82 S. W. 716.

70. Simmons v. Simmons [W. Va.] 48 S. E. 833.

71. An attachment issued in a suit on a promissory note is sufficient in law, though

resorted to for the purpose of establishing it, and a plea in abatement is not necessary.[72] A plea in abatement to an attachment which sets up only matter of variance, appearing from the declaration and affidavit without the aid of the plea, may be treated as a motion to quash.[73] Upon a motion to dissolve the complaint may be referred to to render the affidavit sufficient.[74] The court having jurisdiction, the sufficiency of the affidavits cannot be questioned in a collateral attack.[75]

Averments in general.[76]—The affidavit is not required to state the facts showing that the plaintiff is entitled to recover in the action as fully as they are required to be stated in the complaint,[77] but it is generally sufficient if the grounds of the action are stated with sufficient certainty to show that the cause of action is such as will permit an attachment to issue.[78] The affidavit being upon information and belief, it should set forth the sources of information and grounds of belief,[79] but being positively sworn to, it is sufficient if it is in the language of the statute.[80]

Averments as to nonresidence.[81]—The defendant being a nonresident, there must be a sufficient allegation of that fact.[82]

§ 7. *Attachment bond or undertaking; terms.*[83]—The undertaking must be signed by the plaintiff or in his name by his authorized agent,[84] and in this connection the fact that the undertaking need not be under seal is important.[85] Attachment being issued against the property of one of several co-defendants, the plaintiff's bond is properly made to such defendant and not to his co-defendents.[86]

the date of the note is stated differently in the petition and the amended petition. Orlopp v. Schueller, 4 Ohio C. C. (N. S.) 611.

72, 73. Simmons v. Simmons [W. Va.] 48 S. E. 833.

74. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304.

75. Rogers v. Ingersoll, 93 N. Y. S. 140.

76. See 3 C. L. 361.

77. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304.

78. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304. Under Civ. Code Proc. § 207, requiring the affidavit to state a cause of action against defendant and to specify the amount and grounds of the claim, an affidavit that defendant is indebted to plaintiff in a certain sum and that plaintiff has a cause of action against defendant based on certain notes, and that defendant is a nonresident but owns certain real estate within the state, is sufficient. Id. Where the ground for an attachment is that the defendant fraudulently contracted the debt or incurred the liability for which the suit is brought, the affiant should state the material facts relied upon to show the existence of such ground, and, if the facts are stated in a vague and uncertain manner and not sufficient to show that the debt was fraudulently contracted or the liability fraudulently incurred, the attachment should be quashed. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.

79. Young v. American Bank, 44 Misc. 308, 89 N. Y. S. 915. Affidavit that defendant had departed with intent to defraud creditors, but not stating on what the affiant's belief was founded; and stating that diligent efforts had been made by his employes to find defendant, but did not state in what the effort consisted, and also stating that the employes had been informed that he had so left, without stating the employes told or who told them, and not containing the affidavits of the employes, is fatally defective. Lassen v. Burt, 92 N. Y. S. 796. An affidavit made by plaintiff's attorney alleging on information and belief that defendant obtained money of plaintiff by a forged draft, that deponent's information was telegraphic communications from his partner and from conversations with a detective, coupled with an affidavit of an employe of plaintiff's attorney that he heard defendant state to the magistrate that he desired to plead guilty, before a United States commissioner, to the charge made by plaintiff and that he did plead guilty, held sufficient to show a cause of action in favor of plaintiff against defendant under Code Civ. Proc. § 636. Mexico City Banking Co. v. McIntyre, 94 N. Y. S. 157.

80. 3 C. L. 361, n. 19. Affidavit that debtor "is actually removing without the limits of said county, or about to remove," being in the language of the statute, is sufficient. Brooks v. Hutchinson [Ga.] 50 S. E. 926.

81. See 3 C. L. 362.

82. An affidavit by an officer of a corporation stating that the affiant has personal knowledge of all facts therein, including the fact that the defendant was a foreign corporation, is a sufficient showing of such fact. Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. S. 836.

83. See 3 C. L. 362.

84. Furness v. Calhoun [S. C.] 50 S. E. 194. A bond signed on behalf of plaintiff by an attorney of record on authority of a telegram from an associate attorney to the effect that plaintiff authorized him to sign the undertaking in his behalf is sufficient. Id.

85. Furness v. Calhoun [S. C.] 50 S. E. 194.

86. Bradford v. Brown, 22 App. D. C. 455.

Liabilities on bond.[87]—All damages sustained by reason of the attachment and which are secured by the undertaking must be assessed and recovered in a civil action upon the undertaking.[88] The attachment suit being dismissed and suit being brought on the bond, the plaintiff is entitled to recover reasonable attorney's fees for defending the attachment suit, together with such other damages as were proximately occasioned by the levy on plaintiff's property.[89] and this is so, though he was personally served in the attachment suit and the plaintiff in such suit paid the costs and returned the property.[90] Such reasonable attorney's fees may be recovered where the liability has been incurred, even though they have not been actually expended before the trial of the suit on the attachment bond.[91]

Actions on bond; evidence.[92]—The opinion of the appellate court in the attachment case is not admissible in evidence in an action on the attachment bond, it being admitted that the attachment was not successfully maintained.[93]

§ 8. *The writ or warrant.*[94]—Under a statute requiring the warrant of attachment to state the grounds thereof, a recital of grounds in the alternative is an irregularity rendering the warrant liable to vacation upon a motion to that effect;[95] but the defect is not jurisdictional, and the warrant is valid until vacated.[96] In New York an attachment not signed by plaintiff's attorney is fatally defective.[97] In New Mexico an alias writ cannot be issued.[98]

§ 9. *The levy or seizure; indemnifying bonds.*[99] *Service of writ.*—The fact that the service of a writ of attachment is informal cannot be taken advantage of by a third person claiming the property.[1] Service of the writ by an officer to whom it was not directed does not affect the validity of the service.[2] The provisions of the New Jersey attachment act with regard to the mode of serving the writ are directory only, and substantial compliance with them is sufficient.[3]

87. See 3 C. L. 362.

88. Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549. Such damages cannot be recovered in the attachment suit. Code, § 356, construed. Id.

89. Oakes v. Smith, 121 Ga. 317, 48 S. E. 942.

90. Roy v. First Nat. Bank [Miss.] 37 So. 641.

91. Oakes v. Smith, 121 Ga. 317, 48 S. E. 942. Where the uncontradicted evidence showed that defendant had incurred a liability for attorney's fees in defending the attachment suit, held, a new trial should be granted, it appearing that the verdict was generally for the obligor in the bond. Id.

92. See 3 C. L. 363.

93. State v. Parsons [Mo. App.] 84 S. W. 1019.

94. See 3 C. L. 363.

95, 96. Rogers v. Ingersoll, 93 N. Y. S. 140.

97. Code Civ. Proc. § 641. Lassen v. Burt, 92 N. Y. S. 796.

98. Dye v. Crary [N. M.] 78 P. 533.

NOTE. Power to issue an alias writ—collateral attack: The court issuing the alias writ of attachment was one of general jurisdiction, but the statute does not in express terms authorize an alias writ. The courts of the various states which have passed on the subject hold divergent views as to the issuing of alias writs of attachment when not provided for by statute, but the weight of authority seems to be in favor of the issuance of such writs. It is difficult to see why they should not issue in some cases, as, when the first writ has expired without being served or when it has been lost by the officer before being returned or when additional property belonging to the debtor has been discovered after the service of the first writ. Elliott v. Stevens, 10 Iowa, 418. Contra, Dennison v. Blumenthal, 37 Ill. App. 385. The dissenting opinion of Mills, C. J., was based on the ground that the granting of the alias writ of attachment was a matter of procedure, and the validity of its issue could not be questioned collaterally. The question is a disputed one, many courts holding that defects in following prescribed forms are jurisdictional and sufficient to reverse the judgment in another suit. Greenvault v. Farmers' and Mechanics' Bank, 2 Doug. [Mich.] 498; Heard v. National Bank, 114 Ga. 291. The supreme court of the United States holds that such irregularities cannot be questioned in a collateral attack. Voorhees v. U. S. Bank, 10 Pet. 449, 9 Law. Ed. 490; Cooper v. Reynolds, 77 U. S. 308, 19 Law. Ed. 931; Needham v. Wilson [U. S.] 47 F. 97; Darnell v. Mack, 46 Neb. 740. The general principles underlying this question are discussed in an article by J. R. Rood in 1 Mich. Law Rev. 645.—From 13 Mich. L. R. 315.

99. See 3 C. L. 364.

1, 2. Hawkins & Co. v. McAlister [Miss.] 38 So. 225.

3. P. L. 1901, pp. 158, 160, construed. Cord v. Newlin [N. J. Law] 59 A. 22.

The levy or seizure.[4]—Suit being brought against partners and the writ being directed against their property, levy may be made upon either their firm or individual property.[5] In an action against three defendants as partners, two of them appearing and the attachment issuing against them, a levy may be made upon the partnership property.[6]

The levy consists in the seizure, actual or constructive, of the property attached,[7] and it is essential to the lien created by the attachment of personal property that the property should be removed and held in the custody of the law.[8] Where goods attached are in a store, they must be removed within a reasonable time after they are ascertained;[9] but such removal need not be made before a schedule is made.[10] Where the property consists of real estate or is in the possession of a third person, the attachment debtor simply having an interest therein, statutes generally provide that the levy may be made by the giving of notice.[11] The same certainty is not required in an attachment levy as is required in an execution levy and sale, because the attached property is subject to further orders of the court before exposed to sale, and a levy sufficiently definite to identify it will hold it until the court can act.[12] A general attachment of all of defendant's real estate within a certain county is sufficient to attach all real estate owned by him and situated in the county.[13] A substantial compliance with the statute is sufficient.[14] Whether all or only a part of the goods in a store are attached is a matter of fact, and in determining the effect to be given to what was done, all the circumstances, including prior negotiations for a bond, may be considered.[15] The naming of the thing levied on is not controlling.[16]

Indemnifying bonds.[17]—In an action upon an indemnifying bond, the obligors cannot inquire into the merits adjudicated in the attachment proceeding.[18] The fact that there were other attachments upon the property does not relieve the obligors from their liability.[19]

4. See 3 C. L. 364.

5. Where suit is brought against H. & R. composing the firm of H. & R. and the writ is directed against the property of H. & R., it authorizes a levy upon either the firm or individual property of H. & R. Kleinsmith v. Kempner [Tex. Civ. App.] 83 S. W. 409.

6. Rogers v. Ingersoll, 93 N. Y. S. 140.

7. Gilbert v. Estate of Yunk, 110 Ill. App. 558, quoting from Smith v. Packard [C. C. A.] 98 F. 793.

8. Gilbert v. Estate of Yunk, 110 Ill. App. 558, quoting from Smith v. Packard [C. C. A.] 98 F. 793. The officer must take actual possession of the goods on the writ of attachment, which is not required when the attachment is made by trustee process. Perry v. Griefen, 99 Me. 420, 59 A. 601.

9. Commonwealth v. Middleby [Mass.] 73 N. E. 208. The fact that the owner of the store and goods told the sheriff that some of the goods in the store were not his may be considered on the question of unreasonable delay in removing the attached goods. Id. The owner of the store and goods cannot testify as to the time it takes to remove them. Id.

10. Commonwealth v. Middleby [Mass.] 73 N. E. 208.

11. **In Kentucky** the levy of an order of attachment on one tract of land by giving the occupant a copy and posting another on it creates a lien on that land and affects the parties to the action, as well as subsequent purchasers. Civ. Code Proc. § 203, construed (Hatcher v. Wagner [Ky.] 87 S. W. 778); but such a levy cannot be extended to another and different tract so as to give a lien on it which would affect a subsequent purchaser, lessee or incumbrancer. Second tract was one-half mile from first (Id.). Levy on promissory note in the hands of a pledgee. Hardon v. Dixon, 91 App. Div. 109, 86 N. Y. S. 346. See Tiffany, Real Prop. p. 1314, § 571, as to the manner of levying on realty.

12. Scott v. Houpt [Ark.] 83 S. W. 1057.

13. American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 A. 515.

14. Levy on corporate stocks. Scott v. Houpt [Ark.] 83 S. W. 1057.

15. Commonwealth v. Middleby [Mass.] 73 N. E. 208. An instruction that "if it had been understood by the owners * * * that nothing was attached but the sugar, * * * some remark of that kind would not have been made," is not an instruction that the question of what was attached depended upon what the owner understood was attached. Id.

16. Where one attached a note due defendant, in the hands of a pledgee, held to attach defendant's interest in such note. Hardon v. Dixon, 91 App. Div. 109, 86 N. Y. S. 346.

17. See 3 C. L. 364, n. 88.

18, 19. Meyer v. Purcell, 114 Ill. App. 472.

§ 10. *Return to the writ.*[20]—In some states the court to which the writ is returnable is designated by statute.[21] Though the description of the property attached be indefinite, the return is sufficient for jurisdictional purposes if it shows that goods of the defendant were attached on the writ in the state fori.[22] A return specifically describing a part of the goods attached is valid as to such part.[23] If the sheriff's return fails to show a legal execution of the writ, the return may be amended according to the facts,[24] but such amendment cannot relate back to the levy so as to cut off the right of an intervening purchaser.[25] An omission, from a return of the service of an attachment, as to whether a copy of the order was left with an occupant is a mere irregularity.[26] Statutory requirements as to the contents of the return must be complied with.[27] Irregularities in the return are not avoidable in a collateral attack.[28] In Maine the filing of a copy of the return in the statutory office is not a part of the process of attaching personal property.[29] The officer is presumed to have performed his duty,[30] and his return is presumed to be true;[31] if it is not, the party's remedy is by an action against him for a false return.[32]

§ 11. *Custody, sale, redelivery or release of attached property.*[33]—A forthcoming bond being given, a sale should not be ordered unless there is danger of probable loss to plaintiff by allowing the property to remain in the defendant's possession until the issues are tried.[34] Attached property being placed in the hands of a receiver and the latter being ordered to sell free from incumbrances, an injunction will lie to restrain a sale under the attachment, but the attachment plaintiffs are entitled to payment out of the proceeds if they have acquired a valid lien on the land.[35] Under a statute authorizing a sale upon the application of a party, an attaching creditor may withdraw his application for sale without thereby dissolving the attachment.[36]

When it is judicially determined, upon the trial of the attachment issue, that the attachment was wrongfully levied, the attachment debtor becomes entitled to a return of the property,[37] or the proceeds of a sale thereof,[38] without waiting

20. See 3 C. L. 365.

21. **Georgia:** Under Acts 1899, p. 389, any officer authorized to issue an attachment under the general law may make it returnable to the city court of La Grange. Brooks v. Hutchinson [Ga.] 50 S. E. 926.

22. Perry v. Griefen, 99 Me. 420, 59 A. 601.

23. So held where the officer attached all of defendant's goods in a certain building, later made a schedule of part and released the rest. Smith v. Wenz [Mass.] 73 N. E. 651.

24. Cord v. Newlin [N. J. Law] 59 A. 22.

25. Where return did not show a levy on all the property. Hatcher v. Wagner [Ky.] 87 S. W. 778.

26. Stillman v. Hamer [Kan.] 78 P. 836.

27. **New York:** Failure of the return to state the reason for failure to make personal service as required by Laws 1902, pp. 1518, 1519, c. 580, is fatal where the defect cannot be cured by reference to the warrant or other paper, and defendant does not appear. Silverman v. Davis, 90 N. Y. S. 405.

28. Stillman v. Hamer [Kan.] 78 P. 836.

29. Hence errors made in such return will not dissolve the original attachment. Perry v. Griefen, 99 Me. 420, 59 A. 601.

30. The return failing to show the manner of making the attachment, the law presumes that the officer performed his duty and complied with the requirements of the law, and the return will be held sufficient in the absence of countervailing evidence. Griffin v. American Gold Min. Co. [C. C. A.] 136 F. 69.

31. So held on a motion to dismiss for want of jurisdiction. Perry v. Griefen, 99 Me. 420, 59 A. 601. So held on appeal from the taxation of costs. Smith v. Wenz [Mass.] 73 N. E. 651.

32. Perry v. Griefen, 99 Me. 420, 59 A. 601; Smith v. Wenz [Mass.] 73 N. E. 651.

33. See 3 C. L. 366.

34. Where the record did not show any necessity for a sale, or that the sureties on the bond were insolvent, held order of sale erroneous. Lee v. Newton [Ky.] 87 S. W. 789.

35. Beardslee v. Ingraham, 94 N. Y. S. 937.

36. Rev. Laws, c. 167, §§ 82-96, construed. Smith v. Wenz [Mass.] 73 N. E. 651.

37. Gilbert v. Estate of Yunk, 110 Ill. App. 558.

38. Under Code, §§ 372, 373, requiring that when the attachment is vacated the sheriff shall deliver to the defendant all the property attached and remaining in his hands, or the proceeds thereof, if it has

for the determination of the other issues in the case;[39] but the failure of the sheriff to redeliver the property is not a default for which the plaintiff in the attachment suit is liable.[40]

§ 12. *Forthcoming bonds and receipts.*[41]—A forthcoming bond takes the place of the possession of the officer,[42] and where it is conditioned that the defendant will perform the judgment of the court, the power of the court or its officers over the property attached ceases, and the plaintiff can look only to the bond for indemnity;[43] but in cases where the bond is to the effect that the judgment of the court shall be performed, or that the property or its value shall be forthcoming and subject to the order of the court, the lien created by the attachment and the power of the court over the attached property subsist.[44] The effect of the bond is, however, largely regulated by statute.[45] Upon the determination of the attachment issue in his favor, the attachment debtor is no longer obligated under his forthcoming bond.[46] A forthcoming bond being conditioned to perform the judgment of the court, the defendant is thereby estopped to raise any question as to the regularity of the attachment,[47] and the validity of the bond does not depend upon the regularity of the attachment.[48] The liability on the attachment bond is one growing out of the contract,[49] and is dependent upon the terms thereof,[50] any action on the bond being, of course, ex contractu.[51] Forthcoming bonds which provide for and express the idea of succession in respect to obligees contemplate that whoever succeeds to the right of control over the right of action involving the subject-matter to which the contract relates shall be the obligee, and have a right of action to enforce the obligation.[52] In those states where an assignment for the benefit of creditors vacates the attachment lien, such an assignment does not vacate the obligation of a forthcoming bond pursuant to which the goods were delivered to the obligee and the attachment dissolved.[53] The amount of the bond

been sold, the sales mentioned have reference to those made before the attachment is vacated. Mamoney v. Tyler, 136 N. C. 40, 48, S. E. 549.

39. Gilbert v. Estate of Yunk, 110 Ill. App. 558.

40. Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549.

41. See 3 C. L. 367.

42. Gilbert v. Estate of Yunk, 110 Ill. App. 558.

43. Lee v. Newton [Ky.] 87 S. W. 789; Brady v. Onffroy [Wash.] 79 P. 1004. A subsequent order of the court discharging the attachment held a nullity. Id. Where such order sought to discharge the surety solely as a consequence following the discharge of the attachment, the order of dismissal does not render the order res judicata as to the surety's liability. Id.

44. Lee v. Newton [Ky.] 87 S. W. 789.

45. Under Rev. Code 1892, § 147, the lien of the attachment is not displaced by the execution of the forthcoming bond. Smith & Co. v. Lacey [Miss.] 38 So. 311.

46. Gilbert v. Estate of Yunk, 110 Ill. App. 558, afd. 214 Ill. 237, 73 N. E. 335; Horstman v. Little [Tex. Civ. App.] 88 S. W. 286.

47. Brady v. Onffroy [Wash.] 79 P. 1004. 2 Ballinger's Ann. Codes & St. §§ 5374, 5376, construed, and the latter section held only to apply to a case where the property was released without the discharge of the writ. Id.

48. Brady v. Onffroy [Wash.] 79 P. 1004.

49. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

50. A forthcoming bond reciting that whereas a writ of attachment issued out of a certain court at the suit of G. and D., plaintiffs; and that by virtue thereof the sheriff has attached the property; and that if the property attached shall be forthcoming in answer to the judgment of the court in said suit, the obligation is to be void, held that the sureties are bound only in the case mentioned, though the bond recites that the same property is also subject to attachment writs in five other cases. Gilbert v. Estate of Yunk, 110 Ill. App. 558, afd. 214 Ill. 237, 73 N. E. 335.

51. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

52. American Surety Co. v. Campbell & Zell Co. [C. C. A.] 138 F. 531. A bond running to a receiver, "his successors and assigns" is not limited to another receiver, but includes succession in corporate control, so that on the termination of the receivership control over the action, the corporation is entitled to prosecute an action on the bond. Id. In such case the termination of the receivership control over the action does not discharge the surety on the bond. Id.

53. Pub. Laws 1902, p. 61, c. 984, § 4, construed. Eldred v. Awedisian [R. I.] 60 A. 677.

often determines the jurisdiction of a court over the action thereon.[54] In an action on a forthcoming bond, an unverified general denial admits the execution of the bond, but denies the other allegations of the petition.[55] A cause of action for wrongful attachment and one against the surety on the attachment bond for a breach thereof cannot be united in one suit.[56]

§ 13. *Lien or other consequences of levy.*[57]—By the levy one acquires a lien for the satisfaction of any judgment that may be recovered in the action.[58] This lien is terminated by a dismissal of the attachment suit,[59] but, if obtained in a state court, it is not lost or terminated by the removal of the cause to a Federal court,[60] and the power to protect and enforce such lien exists in the latter court in like manner as though it had been obtained by a proceeding in that court.[61] A temporary restraining order issued in a suit to stay the attachment proceedings does not operate as a release of the property from the custody of the officer, nor discharge the attachment lien.[62] The lien is lost, however, by the rendition of a simple money judgment, the court failing to enter an order directing a sale of the property.[63] The law does not favor abandonments, and, before an attachment lien will be deemed to have been abandoned, some affirmative act or conduct of the creditor must be shown which is clearly inconsistent with the continuance of the lien.[64] By making an agreement with other attaching creditors to prorate the property, an attachment lienor does not abandon his lien as to that portion of the property upon which the other attachment liens are declared invalid.[65] In the absence of a statutory provision regulating the continuance of an attachment lien, which has been confirmed in a judgment, the duration of the lien is the duration of the judgment itself.[66] A garnishee served under an attachment voluntarily surrendering the property, a judgment against him is not necessary to perfect the attachment lien,[67] nor is the lien defeated because the sheriff fails to make return of such delivery, where he retains custody of the property under the writ.[68]

§ 14. *Conflicting levies, liens and creditors; priorities.*[69]—An attaching creditor is not a purchaser for value,[70] and in the absence of fraud or statutory regulations, he obtains only such rights in the property seized as his debtor had at the time of seizure.[71] His rights, are, however, superior to those of subsequent assignees [72] or purchasers with notice [73] from the defendant.

54. An action against a surety on an attachment bond in the penal sum of $200 is not within the jurisdiction of the superior court. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

55. Dunn v. Claunch [Okl.] 78 P. 388. Held to deny an allegation to the effect that the property was delivered to the defendant, and also one to the effect that defendant had removed the attached property from the territory, and failed to surrender it to be sold to satisfy the judgment pursuant to the terms of the bond. Id.

56. Code, § 267, construed. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

57. See 3 C. L. 367. See 2 Tiffany, Real Property, p. 1314, § 571.

58. 3 C. L. 367, n. 49. Perry v. Griefen, 99 Me. 420, 59 A. 601. Under Code Civ. Proc. § 649, providing the mode of levying on real estate, the effect of the attachment is simply to create a lien on the property. Beardslee v. Ingraham, 94 N. Y. S. 937.

59. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286.

60. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267. So held where service was made by publication and the action was not one for which such service is provided by Federal practice. 18 Stat. 471, construed. Blumberg v. Shaw Co., 131 F. 608.

61. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

62. It merely prevents further proceedings during its continuance. Johnson v. Gillenwater [Ark.] 87 S. W. 439.

63. Moore, Schafer Shoe Mfg. Co. v. Billings [Or.] 80 P. 422.

64. Stillman v. Hamer [Kan.] 78 P. 836.

65. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

66. Stillman v. Hamer [Kan.] 78 P. 836.

67, 68. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

69. See 3 C. L. 368.

70. 3 C. L. p. 368, n. 61. Leonard v. Fleming [N. D.] 102 N. W. 308.

71. Berz v. Mecartney, 115 Ill. App. 66; Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. An unregistered transfer of cor-

Priorities between attachments and mortgages.[74]—The presumption of fraud which arises against a mortgagee who does not take immediate possession is not available to one who attaches the property after the mortgagee has taken possession.[75] Statutes prescribing the method by which a chattel mortgagee may preserve his rights must be strictly complied with.[76]

Priority between attachments and receivers.[77]—The attachment lien is superior to the right of a subsequently appointed receiver for the debtor.[78]

Effect of bankruptcy proceedings.[79]—An adjudication in bankruptcy annuls an attachment lien obtained within four months prior to the filing of the petition,[80] unless the bankruptcy court orders such lien preserved for the benefit of the estate.[81] Bankruptcy proceedings do not affect an attachment lien upon property exempt as against the trustee but not exempt from seizure for the debt upon which the attachment is based.[82] It being conceded that part and possibly all of the property attached is exempt from the bankruptcy proceedings, it may be held under the attachment until the question is determined in the bankruptcy proceedings.[83] An attachment lien being unaffected by bankruptcy proceedings against the debtor, the discharge in bankruptcy does not prevent the attaching creditor from entering up judgment and recovering from the sureties on the forthcoming bond.[84]

porate stock, if made for a valuable consideration and without fraud, vests in the transferee a title superior to that acquired by a subsequent attaching creditor of the transferror. Id. Purchaser at sale held to acquire no title as against a deed delivered before the levy and recorded after the attachment and before judgment. Leonard v. Fleming [N. D.] 102 N. W. 308. Where the vendor of property assigned his claim for payment and an action was subsequently brought against the vendor and the property attached, the vendee when sued by the assignee is not entitled to have the attachment creditors interpleaded. Michigan Sav. Bank v. Coy, Hunt & Co., 45 Misc. 40, 90 N. Y. S. 814. Transfer of property to a secured creditor, the property to be sold and the proceeds applied to the payment of the creditor's debt held not fraudulent and valid as against a subsequent attaching creditor, though the property was not included in the deed of trust given the secured creditor. Blakemore v. Eagle [Ark.] 84 S. W. 637. Where a deed by a husband and wife was made in good faith and was not fraudulent, it was superior to a subsequent attachment by a creditor of the grantors, irrespective of whether the property conveyed was a homestead at the time of the conveyance. Parlin & Orendorff Co. v. Yawter [Tex. Civ. App.] 88 S. W. 407. Property must be taken subject to all lawfully existing liens created by his debtors. Milligan v. Plymouth State Bank, 4 Ohio C. C. (N. S.) 585. Want of notice in the garnishee will not defeat an assignee's interest in the debt in favor of an attaching creditor. Id.

72. An interplea setting up a claim based upon an assignment made after the attachment has been levied is properly denied. May v. Disconto Gesellschaft, 113 Ill. App. 415, 211 Ill. 310, afd. 71 N. E. 1001.

73. A purchaser of land, with notice of an attachment lien thereon takes it subject to such lien, and occupies no better position to contest the validity of the lien than the grantor would have had. Stillman v. Hamer [Kan.] 78 P. 836.

74. See 3 C. L. 369.

75. The presumption of fraud referred to is raised by statute in Nebraska. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

76. Under Pub. St. 1882 c. 161, § 75, requiring a mortgagee of chattels to give a true statement of the amount due to the attaching creditor in order to work a dissolution of the attachment, an excessive statement made through inadvertance does not dissolve the attachment, especially where the value of the property exceeds the amount due. Cousins v. O'Brien [Mass.] 74 N. E. 289.

77. See 3 C. L. 369.

78. National Park Bank v. Clark, 92 App. Div. 262, 87 N. Y. S. 185.

79. See 3 C. L. 370. See, also, Bankruptcy, 3 C. L. 434.

80. See 3 C. L. 370, n. 95. See, also, American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 A. 515.

81. Bankr. Act 1898, c. 541, § 67f. Receivers of Virginia Iron, Coal & Coke Co. v. Staake [C. C. A.] 133 F. 717. See Bankruptcy, 3 C. L. 434.

82. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408.

83. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408. The fact that the warrant of attachment has been levied upon the property of the bankrupt does not authorize the trustee in bankruptcy to intervene in the action in which the attachment issued for the purpose of obtaining possession of the attached property. Id.

84. Smith & Co. v. Lacey [Miss.] 38 So. 311.

§ 15. *Enforcement and dissolution, discharge, vacation, or abandonment of attachment.*[85]—A suit to enforce an attachment lien obtained in a former action in the same court, and to subject the attached property, or the proceeds of its sale, to the satisfaction of a judgment recovered in that action, is merely supplementary to the former action,[86] and is a continuation thereof so far as the question of jurisdiction is concerned.[87] Where the original suit was removed from a state to a Federal court, the fact that the proceeds of the sale of the attached property are not in the actual custody of the latter does not make the second suit an original one.[88] The right of plaintiff to sue in his own and the sheriff's name to enforce the lien is largely statutory.[89] The attaching creditor may be deemed to have abandoned his lien by laches in instituting proceedings to enforce it,[90] or by prosecuting other judicial remedies inconsistent therewith.[91] By a general appearance one waives the right to move to quash the writ.[92]

(§ 15) *A. Validity and grounds for setting aside.*[93]—The affidavit of attachment stating that defendant, a nonresident, has no property subject to execution except that attached, the attachment will not be dissolved on the affidavit of defendant that he is amply able to respond to any judgment that may be recovered.[94]

(§ 15) *B. Procedure.*[95]—It is discretionary with the court to advance the hearing of the attachment issue.[96] In some courts it is necessary to file a declaration in attachment at the term to which the suit is returnable.[97] There being a general attachment and the record not showing what property is claimed to be covered thereby, the plaintiff should make a written motion for judgment particularly describing the property against which judgment is desired,[98] and if such property is claimed to have been conveyed in fraud of plaintiff, the motion should be supported by the affidavit of plaintiff or his attorney to that effect, and that the property was covered by the attachment.[99]

Upon a motion to dismiss or vacate, defendant cannot be permitted to try the cause upon the merits.[1] The motion to vacate need not be made upon the

85. See 3 C. L. 370.

86. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

87. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267. The original suit having been removed from a state to a Federal court, the second suit may be maintained as an incident to the jurisdiction already vested without regard to citizenship or residence of the parties. Id.

88. This because the effect of the former action was to bring the property potentially within the jurisdiction of the Federal court. Hatcher v. Hendrie & B. Mfg. & Supply Co., [C. C. A.] 133 F. 267.

89. New York: Under Code Civ. Proc. §§ 677, 678, providing plaintiff, by leave of the court or judge may bring in his own name and that of the sheriff jointly any action which might be brought by the sheriff to recover a demand attached, the leave of court referred to means the court in which the action is brought, and not the court of which the officer who issued the warrant is a member. Rogers v. Ingersoll, 93 N. Y. S. 140.

90. Delay which cannot give rise to an inference of abandonment, and which results in no advantage to the attaching creditor or injury to the opposing party does not constitute such laches as will bar the right to enforce the lien. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

91. Where defendant died, cause was revived against his administrator and judgment was entered for plaintiff, the latter by proving his claim against the estate was held to have abandoned the attachment levy. Lafferty v. Lafferty [Mich.] 102 N. W. 626.

92. Cord v. Newlin [N. J. Law] 59 A. 22.

93. See 3 C. L. 370.

94. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 P. 40.

95. See 3 C. L. 371.

96. Dickinson v. Morgenstern, 111 Ill. App. 543.

97. Georgia: In a suit by attachment in the city court of Lexington it is necessary to file a declaration in attachment at the term to which the suit is returnable, in like manner as though the suit were in the superior court. Any judgment ordered without such a declaration is a nullity. Callaway v. Maxwell [Ga.] 51 S. E. 320.

98, 99. American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 A. 515.

1. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304. The evidence being conflicting, the court will not on a motion to vacate determine the merits of the contro-

return day.[2] An order vacating a warrant of attachment being made upon the merits, the general rule of practice requiring specification of the irregularity relied upon does not apply.[3] The motion to dissolve should specify the grounds upon which it is based.[4] The notice of such motion stating that it is based upon an affidavit denying the truth of the attachment affidavit, it sufficiently shows that the ground for the motion is the falsity of the latter affidavit.[5] Defendant's affidavit putting in issue the facts alleged in the attachment affidavit, the burden is upon the plaintiff to prove that the attachment affidavit is true.[6] One may move to quash the levy, even though he has made a general appearance in the action.[7] Defendant on a hearing of his motion to dissolve cannot strike out his verified statement that he did not own the property,[8] and such statement is sufficient to defeat the motion.[9] The filing of an amended declaration changing the form of one's action from tort to assumpsit is not an irregularity open to attack by an interpleader whose rights have been acquired pendente lite.[10] In Georgia a plea of breach of warranty or recoupment to an attachment for purchase money in a justice's court need not be in writing.[11] In Illinois there is no statute requiring the reference of an attachment issue to an auditor.[12]

Evidence.[13]—Statements by defendant of his intent to defraud plaintiff are admissible.[14]

Judgment and decree or order.[15]—A judgment obtained against a nonresident, where the jurisdiction rests only upon service by publication and the seizure of defendant's property, has the same conclusive effect, to the extent of his interest in the property seized, as a judgment rendered upon personal service.[15] Judgment in attachment being rendered against defendant prior to the trial of the garnishment issue, such judgment is final only in the sense that it binds such defendant to the extent of any debt due him from, or property held for him by, the garnishee at the time of the service of the attachment writ.[17] A ruling made upon a motion to dissolve an attachment is not res judicata of the facts involved therein, as against one who, though a party to the proceedings at the time of the ruling, is dismissed therefrom by the final judgment entered in the action.[18] An order denying a motion to dissolve upon one ground is not res judicata of the right to have the attachment dissolved upon another ground.[19] An order overruling a motion to quash is an interlocutory,[20] but appealable order,[21] and does not

versy but will deny the motion. Where motion was based on fact that alleged agency did not exist and the evidence was such that the agency might be established on trial, the motion was denied. Norden v. Duke, 94 N. Y. S. 878.

2. Code of Civ. Proc. §§ 2916, 2917, construed. Franke v. Havens, 102 App. Div. 67, 92 N. Y. S. 377.

3. Norden v. Duke, 94 N. Y. S. 878.

4. Hare v. Cook, 6 Ohio C. C. (N. S.) 73.

5, 6. Jones v. Hoefs [N. D.] 103 N. W. 751.

7. Cord v. Newlin [N. J. Law] 59 A. 22.

8, 9. People's Nat. Bank v. Morris [Kan.] 80 P. 586.

10. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, afg. 113 Ill. App. 415.

11. Casey v. Crane & Co. [Ga.] 50 S. E. 92.

12. Though main action is one of account. Dickinson v. Morgenstern, 111 Ill. App. 543.

13. See 3 C. L. 372.

14. The affidavit alleging that defendant was about to transfer his property in fraud of creditors, evidence that after defendant's offer of compromise was rejected he stated that if the suit went against him he would assign or get rid of his property so that there would be little left, is admissible. Schnull v. Cuddy [Ind. App.] 74 N. E. 1030.

15. See 3 C. L. 373.

16. Salemonson v. Thompson [N. D.] 101 N. W. 320.

17. State Bank of Chicago v. Theweatt, 111 Ill. App. 599.

18. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

19. So held where the first motion was based on an offer by defendant to give security and the second motion was based on the alleged falsity of the affidavit. Brady v. Onffroy [Wash.] 79 P. 1004.

20. Simmons v. Simmons [W. Va.] 48 S. E. 833; Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.

21. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893. Id.

preclude a renewal of the motion.[22] Such second motion may be made by one who did not participate in the first.[23]

Appeal.[24]—Where a justice has jurisdiction and renders judgment in favor of the garnishee in an attachment proceeding, the defendant in the original attachment proceeding may appeal therefrom.[25] The dismissal of an appeal from an order purporting to discharge the attachment is in effect an affirmance of the order.[26] Judgment being entered against the defendant and the surety on his forthcoming bond, an order striking from the record so much of the judgment as awarded a recovery against the surety is appealable,[27] and the surety having appeared in the action, a notice of appeal, given in open court, obviates the necessity of service of a written notice of appeal.[28]

§ 16. *Other remedies.*—Where the grounds stated in a petition for attachment are insufficient, a motion to dissolve the writ is not the only remedy; replevin is generally held to lie.[29] In Iowa it is not necessary for defendant in the attachment to give a notice of ownership before bringing replevin.[30]

§ 17. *Hostile and opposing claims to attached property.*[31]—Where property is claimed by lienors, the only question that can be determined in the action is the right of possession.[32] A resident interpleading is not entitled to a preference over a nonresident.[33] The mere right of a simple-contract creditor to have his debt satisfied cannot be asserted by interpleading in an attachment suit.[34] A prior lienor cannot resort to equity to stay proceedings under a subsequent lienor's judgment and recover possession of the property.[35] A claimant is not always confined to the ground upon which he bases his claim.[36] Plaintiff by joining issue on a claim to the property when filed waives his right to have the claim dismissed as improperly filed.[37] One having the mere possession of property cannot, by failing to compel interpleader or by failing to suggest that another is the true owner, bar the rightful owner of the right to assert his title thereto.[38]

Pleading.[39]—The pleadings must not be uncertain or inconsistent.[40]

Evidence and questions for the jury[41]—The self-serving declaration of a husband is inadmissible against his wife in a subsequent attachment suit against him, the wife claiming title adversely to the husband.[42] An attaching creditor

22. Simmons v. Simmons [W. Va.] 48 S. E. 833.
23. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.
24. See 3 C. L. 373.
25. Gilray v. Metropolitan Nat. Bank, 113 Ill. App. 485.
26. Brady v. Onffroy [Wash.] 79 P. 1004.
27. 2 Ball. Ann. Codes & St. § 6500, subd. 7. Brady v. Onffroy [Wash.] 79 P. 1004.
28. 2 Ball. Ann. Codes & St. §§ 5374, 5375. Brady v. Onffroy [Wash.] 79 P. 1004.
29. Held to lie under a statute authorizing replevin for personal property unlawfully detained. Upp v. Neuhring [Iowa] 104 N. W. 350.
30. Code, §§ 3991, 3906, construed. Upp v. Neuhring [Iowa] 104 N. W. 350.
31. See 3 C. L. 373.
32. The priority of liens cannot be determined. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.
33, 34. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, afg. 113 Ill. App. 415.
35. Chattel mortgagees have an adequate remedy at law by replevin to recover possession of the mortgaged property when the same is attached to enforce a laborer's lien, which by Kirby's Dig. § 5011 is subordinate to the mortgage lien. Johnson v. Gillenwater [Ark.] 87 S. W. 439.
36. Where a claimant bases his right on a transfer of the property to him from his tenant in satisfaction of his landlord's lien, if he fails to show a valid transfer he may yet recover on showing a valid lien and that he was in possession at the time of levy. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.
37, 38. Canty v. Wood [Miss.] 38 So. 315.
39. See 3 C. L. 374.
40. Where on attachment of property as belonging to a tenant the landlord filed a claimant's affidavit and a pleading alleging that he was a lienholder in possession of the property at the time it was levied on for supplies advanced while growing the crop, and that in satisfaction of such lien indebtedness the property had been transferred and delivered to him, held sufficient on general demurrer. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.
41. See 3 C. L. 374.
42. Declaration was made in prior attachment suit against husband. Vermillion v. Parsons, 101 Mo. App. 602, 73 S. W. 994.

attacking the conveyance as fraudulent has the burden of proof.[43] The claimant's title being a question of fact, it is for the jury.[44]

Trial.[45]—In West Virginia, where persons claiming the property attached or some interest in it are admitted as parties in the cause, their claim is to be tried by a jury impaneled for the purpose, and it is error for the court to pass upon their claims without the intervention of a jury.[46] Waiver of the right of trial by jury must be by consent entered of record.[47]

§ 18. *Wrongful attachment.*[48]—One seizing property under a void writ[49] or seizing property belonging to a person other than defendant[50] is liable for wrongful attachment.

The bailee of property[51] or a lienor in possession[52] may maintain an action for wrongful attachment, and in the latter case it is not necessary to set out the particulars of the lien in the petition.[53] It is no defense that plaintiff's title was acquired in fraud of execution creditors.[54] Where two attachments are issued at practically the same time and both are subsequently dissolved, a settlement by the defendant with the second attaching creditor does not relieve the first attachment creditor for injuries occasioned by his attachment.[55] Reconvention for damages while the attachment suit is pending is an exceptional remedy, but is allowed in some jurisdictions.[56]

Pleading.[57]—In an action for wrongful seizure, allegations in the complaint stating facts from which both malice and want of probable cause will be inferred are tantamount to specific allegations of malice and want of probable cause.[58]

Evidence and questions of fact.[59]—The officer's return showing the seizure and sale is competent evidence on behalf of plaintiff as tending to establish the

43. Hicks Co. v. Thomas [La.] 38 So. 148.

44. Stone v. Cassidy [Ark.] 87 S. W. 621.

45. See 3 C. L. 374.

46. Code of 1899, ch. 106, § 23. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. In such case it is reversible error to hear and determine the issue upon the petition, and answer thereto, and depositions of witnesses, according to the rules and principles governing courts of equity. Id.

47. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. It cannot be merely inferred from the fact that the court tried the case without objection. Id.

48. See 3 C. L. 374.

49. Where justice's signature was placed on writ without his authority and plaintiff ratified and adopted the issuance and execution of the writ, held plaintiff was liable for wrongful attachment. Sanger Bros. v. Brandon [Tex. Civ. App.] 88 S. W. 431.

50. Farmers' & Traders' Nat. Bank v. Allen-Holmes Co. [Ga.] 49 S. E. 816. If such property is sold under the attachment proceedings the owner is entitled to recover damages for such unlawful seizure and sale. Id.

51. Vermillion v. Parsons, 101 Mo. App. 602, 73 S. W. 994.

52. May maintain conversion. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

53. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

54. Shoup v. Marks [C. C. A.] 128 F. 32.

55. Ceraline Mfg. Co. v. Anthracite Beer Co., 25 Pa. Super. Ct. 94.

56. Iowa: Under Code, § 3887, providing that defendant may, in the attachment suit, interpose a counterclaim for damages on the bond, such counterclaim is not available to him if his right of action therefor has not accrued from damages which he has suffered, but has been acquired by assignment of a cause of action for damages accrued to another person by reason of a levy under attachment in such suit. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279.

NOTE: The doctrine of reconvention is recognized and applied in the following cases. Hencke v. Johnson, 62 Iowa, 555; Campbell v. Chamberlain, 10 Iowa, 337; Lowenstein v. Monroe, 55 Iowa, 82; Cole v. Smith, 83 Iowa, 579; Hardeman v. Morgan, 48 Tex. 103; Baker v. Abbott, 2 Tex. Civ. App. 147; Turner v. Lytle, 59 Md. 199; Raymond v. Green, 12 Neb. 215, 41 Am. Rep. 763; Plunkett v. Sauer, 101 Pa. 356. The general rule, however, is that no action to recover damages for a wrongful or a malicious attachment can be maintained until the final determination of the attachment suit; and the plaintiff, in order to recover, must show that such suit was decided in his favor or that the attachment has been dismissed, dissolved or abandoned. Sloan v. McCracken, 7 Lea [Tenn.] 626. Hansford v. Perrin, 6 B. Mon. [Ky.] 595; Kamer v. Thompson-Houston Elec. Light Co., 95 N. C. 277; Nolle v. Thompson, 3 Metc. [Ky.] 121; Kennedy v. Meacham, 18 F. 312; Dunning v. Humphrey, 24 Wend. [N. Y.] 31.—From note to Tisdale v. Major [Iowa] 68 Am. St. Rep. 266, 267.

57. See 3 C. L. 375.

58. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 50 S. E. 571.

59. See 3 C. L. 375.

value of the goods.[60] Evidence that defendant offered to pay the indebtedness less certain damages is admissible on the issue of malice.[61] Statements by agents are generally admissible.[62]

Instructions.—The general rules as to instructions apply.[63]

Damages.[64]—Unless a malicious motive induced the attachment or there are circumstances of oppression,[65] the damages are confined to reimbursement for the loss.[66] No actual damages being shown, exemplary damages cannot be recovered.[67] The approved measure of damages for the wrongful attachment of personal property is the value of the property when taken,[68] unless the owner replevied the same within a short time after seizure.[69] The market value of a stock of goods wrongfully taken from its owner is to be ascertained by what it would cost to replace the merchandise in his store; that is, the wholesale price plus the cost of carriage from the jobbing market to the place of seizure;[70] but if the goods are old and shopworn, the jobbing price of similar new goods could be only a relevant circumstance.[71] In a suit for damages for wrongful attachment, the plaintiff is entitled to recover reasonable attorney's fees paid in defending the attachment suit both in the trial and appellate courts;[72] but he is

60. Shoup v. Marks [C. C. A.] 128 F. 32.

61. Kleinsmith v. Kemper [Tex. Civ. App.] 83 S. W. 409.

62. In an action to recover goods attached as the property of another, evidence that plaintiff's creditman stated that he knew nothing of any purchase of the stock by plaintiff and that the debtor in the attachment suit told plaintiff nothing, was admissible as tending to show that plaintiff did not purchase the goods prior to the attachment, as alleged, but is inadmissible to sustain the attachment. Carter-Battle Grocer Co. v. Rusing [Tex. Civ. App.] 85 S. W. 449. In such action plaintiff claiming in one count to have been in possession through its agent R. and in another that R., at the time of seizure, owned the property but subsequently assigned to plaintiff, evidence that R. told officer making levy that he had bought the stock, held inadmissible under the first count but competent under the second. Id.

63. In an action to recover goods attached as those of another, an instruction that if defendant's agent was not deceived by statements made to him by plaintiff's agent as to the true ownership of the goods, but relied on his judgment or other information, defendant's plea of estoppel by reason of the statements of plaintiff's agent would not be a good defense, was erroneous as a charge on the weight of the evidence. Carter-Battle Grocer Co. v. Rusing [Tex. Civ. App.] 85 S. W. 449. Such instruction was also erroneous for failure to require that defendants' agent and the officer levying the writ should have been ignorant of the true ownership of the goods prior to the issuance and levy of the writ. Id. These errors were emphasized by the court's refusal to charge that if plaintiff's agent did not make the alleged statements there was no estoppel raised on account thereof. Id.

64. See 3 C. L. 375.

65. State v. Parsons [Mo. App.] 84 S. W. 1019. An attachment being sued out wantonly, recklessly and willfully for the purpose of coercing another to pay money he does not owe, such acts are equivalent to malice, and punitive damages may be recovered. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 50 S. E. 571.

66. State v. Parsons [Mo. App.] 84 S. W. 1019. A brewing company being prevented from filling its orders by an illegal attachment of its beer, it may recover damages for the injuries sustained from the person issuing the attachment. Ceraline Mfg. Co. v. Anthracite Beer Co., 25 Pa. Super. Ct. 94.

67. Lawson v. Goodwin [Tex. Civ. App.] 84 S. W. 279. Where a landlord was entitled to a distress warrant but by mistake sued out an attachment, held, exemplary damages could not be recovered. Id.

68. State v. Parsons [Mo. App.] 84 S. W. 1019.

69. Lawson v. Goodwin [Tex. Civ. App.] 84 S. W. 279.

70, 71. State v. Parsons [Mo. App.] 84 S. W. 1019.

72. State v. Parsons [Mo. App.] 84 S. W. 1019.

NOTE. Attorney's fees as an element of damages: Whether or not counsel fees incurred in defending the suit when a wrongful attachment has been levied should be allowed as an element of actual damages is a question upon which there is a lack of harmony in the adjudications. In some jurisdictions the right to collect attorney's fees as an element of the damages is always recognized. State v. Kerns, 70 Mo. App. 663; Gilkerson-Sloss, etc., Co. v. Yale, 47 La. Ann. 690. This is especially true where the attachment was not sued out in good faith. Littlejohn v. Wilcox, 2 La. Ann. 620. But the counsel fees which can be recovered when the case is tried on its merits embrace only those incurred in procuring a dissolution of the attachment. Adam v. Gomila, 37 La. Ann. 479; Fush v. Egan, 48 La. Ann. 60; State v. Heckart, 62 Mo. App. 427. In other jurisdictions, however, attorney's fees incurred in defending the attachment suit cannot be allowed as part of the damages which may be recovered. Hughes v. Brooks, 36 Tex. 379; Ken-

not entitled to recover for the services rendered by the attorneys on the merits of the case after the dissolution of the attachment.[73]

ATTEMPTS, see latest topical index.

ATTORNEYS AND COUNSELORS.

§ 1. *Admission to practice and license taxes.*[74]—Good character being essential,[75] an applicant guilty of a crime of moral turpitude is not eligible, and when an applicant has been convicted of such crime, a pardon does not restore moral integrity.[76] The applicant should make known all facts affecting his character and moral fitness for a license.[77] A license can be obtained only from the court or body specified for that purpose by statutory or constitutional provision.[78] One is not an attorney who fails to follow his admission by a certificate required by statute and by engaging in practice.[79]

nedy v. Meacham, 18 F. 312; Patton v. Garrett, 37 Ark. 605; Plumb v. Woodmansee, 34 Iowa, 116. Yarborough v. Weaver, 6 Tex. Civ. App. 215. In Texas, at least, a distinction has been made when the attachment is sued out maliciously and without probable cause, in which case attorneys' fees are recoverable. Hughes v. Brooks, 36 Tex. 379. Dickenson v. Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; State v. McKeon, 25 Mo. App. 667; Porter v. Knight, 63 Iowa, 365. However, in an action upon an attachment bond for the wrongful suing out of an attachment, the court may allow attorney fees for services rendered in the entire defense of the action, when such defense tends merely to show the wrongful issuance of the attachment. Union Mill Co. v. Prenzler, 100 Iowa, 540. A recovery in damages of the full amount of the attachment bond does not preclude the taxation of attorney fees as part of the costs. Union Mercantile Co. v. Chandler, 90 Iowa, 650. In some states also the fees will not be allowed unless specially claimed in the complaint. Boggan v. Bennett, 102 Ala. 400; Crofford v. Vassar, 95 Ala. 548; Vorse v. Phillips, 37 Iowa, 428. It has been held that such fees are not an element of damages that can be recovered on the attachment bond. Stringfield v. Hirsch, 94 Tenn. 425, 45 Am. St. Rep. 733. A defendant who is not the owner of any of the property attached cannot, after defeating a recovery on the indebtedness issue, maintain an action to recover attorneys' fees and expenses incurred in defending the suit on the attachment issue. Tebo v. Betancourt, 73 Miss. 868, 55 Am. St. Rep. 573; Adams v. Gillam, 53 Kan. 131. If the defendant in attachment employed no counsel until after judgment by default against him, and then only to make an unsuccessful motion for a new trial, he cannot recover such counsel fees in an action on the attachment bond. Trammell v. Ramage, 97 Ala. 666; Baldwin v. Walker, 94 Ala. 515.—From note to Tisdale v. Major [Iowa] 68 Am. St. Rep. 263, 273.

73. State v. Parsons [Mo. App.] 84 S. W. 1019.

74. See 3 C. L. 376 and see, also, Licenses, 4 C. L. 428.

75. See, also, post, § 3.

76. Embezzlement. People v. Gilmore, 214 Ill. 569, 73 N. E. 737. But see People v. Payson, 215 Ill. 476, 74 N. E. 383.

77. An applicant's failure to advise the court that he has been convicted of crime involving morals is a reprehensible concealment of material fact. People v. Gilmore, 214 Ill. 569, 73 N. E. 737.

78. In California this power is conferred by the constitution upon the district court of appeal. There is nothing in the law as it now exists that purports to authorize the supreme court to make any order of admission. Code Civ. Proc. §§ 277, 279, as amended Feb. 15, 1905. In re Mock [Cal.] 80 P. 64. In California the supreme court has both original and appellate jurisdiction in proceedings for the disbarment of an attorney; it will, however, entertain the accusation as an original proceeding only when the prosecution is instituted on the relation of some one in the public interest. Such as a bar association. In re Ashley [Cal.] 80 P. 1030. A contested application originating in the supreme court will be transferred to the proper district court of appeal. In re Hovey [Cal.] 80 P. 234.

79. Where plaintiff was admitted to the

§ 2. *Duties, privileges and disabilities.*[80]—It is the professional duty of counsel to assist the court in preserving the nisi prius trial from error.[81] By a rule of privilege they are disabled to disclose professional communications from clients,[82] and they cannot exercise the incompatible office of judge.[83] In Vermont it is the settled law that an attorney is not, by virtue of that relation alone, liable for fees accruing in suits brought by him,[84] but he may become so by custom. In some jurisdictions the distinctions between attorneys, solicitors and counsel is preserved.[85]

§ 3. *Suspension and disbarment. Grounds.*[86]—Statutory enumeration of grounds for disbarment excludes all other causes.[87] Procuring admission by concealment of disqualifications,[88] unfitness for the confidential relation to his client or unworthiness of public confidence,[89] lack of such honesty and truthfulness as his profession requires,[90] flagrant disrespect to the courts,[91] attempts to subvert justice,[92] dereliction in a public attorneyship,[93] acts of fraud and dishonesty,[94] false representations to clients[95] and the procuring from them of money by such

bar in 1893, but never filed the certificate required by laws 1899, p. 406, c. 225, with the clerk of the court of appeals, and only practiced a year after admission, he is not an attorney within Code Civ. Proc. § 73, prohibiting buying of choses in action by attorneys with intent to sue thereon. Thompson v. Stiles, 44 Misc. 334, 89 N. Y. S. 876.

80. See 3 C. L. 377.

81. Newport & C. Bridge Co. v. Jutte, 6 Ohio C. C. (N. S.) 189.

82. See Witnesses, 4 C. L. 1943.

83. City courts established by Sess. Laws 1901, p. 110, c. 103, are inferior courts similar to justices courts, a judge of such city court, though disqualified from practising as an attorney in his own court, is not debarred from appearing as an attorney in an action filed in the district court in the first instance. Nichols v. Oregon Short Line R. Co. [Utah] 78 P. 866. See, also, Judges, 4 C. L. 280.

84. Russell's Ex'x v. Ferguson [Vt.] 60 A. 802. Evidence held to show such a custom. Id.

85. In re Hoffecher [Del. Ch.] 60 A. 981. Solicitors and counsel in equity, see Fletcher, Eq. Pl. & Pr. 458, 459, 466, 477.

86. See 3 C. L. 378.

87. In re Collins [Cal.] 81 P. 220. But see State v. Mosher [Iowa] 103 N. W. 105.

88. Previous conviction of crime. People v. Gilmore, 214 Ill. 569, 73 N. E. 737.

89. Evidence held insufficient to justify disbarment. Ex parte Eastham [Or.] 80 P. 1057.

90. The moral delinquencies must be such, however, as shall unfit the person accused for the proper discharge of the trust reposed in him. Among these are the absence of common honesty and veracity, especially in all professional intercourse. State v. Mosher [Iowa] 103 N. W. 105.

91. Maliciously procuring the publication of false charges against a judge, to influence or discredit him in a pending matter is a violation of the oath to maintain the respect due the courts. In re Collins [Cal.] 81 P. 220.

92. It is ground for suspension to encourage a witness in a criminal case to continue in concealment and avoid attendance when it was known he would be required as a witness. State Board of Examiners in Law v. Lane, 93 Minn. 425, 101 N. W. 613. Perjury and subornation of perjury warrants disbarment. In re Lamb, 94 N. Y. S. 331.

93. District attorney who took money from gamblers and saloon keepers for forbearing to prosecute them, and who refused to prosecute a larceny case unless the prosecuting witness would advance money therefor will be disbarred. People v. Anglim [Colo.] 78 P. 687. Acceptance of money by one representing a public prosecutor from a defendant in consideration of a dismissal of the case is ground for suspension or disbarment. Tudor v. Commonwealth [Ky.] 84 S. W. 522.

Note: The right to disbar an attorney arises out of the fact that he is an officer of the court and amenable thereto. In general, dishonest professional conduct, general immorality or such act of crime or vice as may show him unfitted for the confidence reposed in him, as an attorney, will be sufficient ground for disbarment. Baker v. Commonwealth, 10 Bush. [Ky.] 592. An attorney may be considered unfit to practice his profession if he conducts himself so as to bring the courts into public contempt. In re Woolley, 11 Bush. [Ky.] 95. The courts have a common-law right to determine who shall practice before them, and this right is not taken away by a statute enumerating grounds for disbarment. In re Mills, 1 Mich. 392; State v. Laughlin, 10 Mo. App. 1. The contrary, however, has been held in Ex parte Smith, 28 Ind. 47; Kane v. Haywood, 66 N. C. 1; In re Eaton, 4 N. D. 514, 62 N. W. 597. The Anglim case may be distinguished from In re Burnette [Kan.] 78 P. 440, reported in 3 Mich. Law Rev. 232, by the fact that in that case (where the accused failed to appear) there was disbarment without evidence, while in this case evidence was introduced which established the accusations. —From 3 Mich. L. R. 315.

94. People v. Payson, 215 Ill. 476, 74 N. E. 383.

95, 96. People v. Shirley, 214 Ill. 142, 73 N. E. 303. Evidence held to show procuring of money by falsely stating it was nec-

means,[96] bad faith to clients, as by the representation of hostile interests,[97] are ground for disbarment, but entering into a champertous agreement is not, though it transpires that the client's interest was worth more than was paid for it.[98] The loss of that good character which is necessary for admission is ground, though not enumerated among the statutory grounds.[99] The fact of a former conviction is of great force but not of itself ground for disbarment,[1] unless made so by statute.[2] After an attorney has been acquitted of crime he cannot be disbarred because of such crime.[3]

Defense or excuse.[4]—Personal motives of relator are not a defense.[5]

Proceedings in general.[6]—Disbarment proceedings are usually held to be civil,[7] and the procedure need not conform to the constitutional requirements applicable to criminal prosecutions.[8] Petitions in disbarment proceedings must be signed and verified according to statute.[9] The general power of courts of general jurisdiction to entertain disbarment proceedings is not revoked by vesting the power of admission exclusively in the supreme court.[10] A private informer should proceed in the superior court.[11] In Iowa an accusation must be submitted and sanctioned by the court before citing to answer.[12] Accordingly it is error to include a citation in an order directing a committee to prepare charges. This objection, however, is waived by pleading to the merits.[13] A statute empowering the court to direct the drafting of charges does not imply that they shall be based solely on what the court has in mind.[14] In Kansas where the law is similar to Iowa the accusation instituted by a private informer must be sworn, but if the court chooses to act on it the want of a verification is not jurisdictional.[15] The answer must plead ultimate facts and not evidence.[16] Depositions are permissible in such a proceed-

essary for insurance expenses, etc. Id. A solicitor in chancery appointed trustee took funds invested in safe, income-bearing securities, disposed of them, and invested the proceeds in the stock of industrial corporations of which he was the promotor, thereby losing heavily. In re Hoffecher [Del. Ch.] 60 A. 981.

97. Evidence held not to show a corrupt attempt to represent hostile interests. In re Collins [Cal.] 81 P. 220.

98. In re Jones [Utah] 81 P. 162.

99. See Code, § 324. State v. Mosher [Iowa] 103 N. W. 105; People v. Payson, 215 Ill. 476, 74 N. E. 383. Procuring a client to loan money held as guardian on grossly inadequate security and in attorneys real but concealed interest; procuring a client's lien to be subordinated to that of attorney's wife without presenting for decision the question which was prior; procuring clients to loan money on land which accused knew had already been sold on execution and profiting by the transaction. State v. Mosher [Iowa] 103 N. W. 105.

1. People v. Payson, 215 Ill. 476, 74 N. E. 383.

2. A statute providing for removal or suspension of an attorney on production of a record of conviction of an indictable offense does not authorize suspension pending an appeal from conviction with stay. Rev. St. 1899, § 4929. State v. Sale [Mo.] 87 S. W. 967. Writ of prohibition will issue to prevent suspension threatened under such circumstances. Id.

3. People v. John, 212 Ill. 615, 72 N. E. 789.

4. See 3 C. L. 378.

5. People v. Payson, 215 Ill. 476, 74 N. E. 383.

6. See 3 C. L. 378.

7. State v. Mosher [Iowa] 103 N. W. 105.

8. It does not require the charges to be preferred by information or indictment, or require a trial by jury, or a confrontation of the accused with the witnesses against him. State v. McRae [Fla.] 38 So. 605.

9. Under Code Civ. Proc. § 291, it is not necessary that the accusation presented by a committee of a bar association be verified by a member of the committee. A verification stating positively that the charges are true and in the exact language of the statute is sufficient. In re Collins [Cal.] 81 P. 220.

10. Code, § 323 is not repealed by Code, § 309. State v. Mosher [Iowa] 103 N. W. 105.

11. In re Ashley [Cal.] 80 P. 1030.

12. Code, § 326. State v. Mosher [Iowa] 103 N. W. 105.

13. Motion, demurrer and answer. State v. Mosher [Iowa] 103 N. W. 105.

14. State v. Mosher [Iowa] 103 N. W. 105.

15. Gen. St. 1901, § 400. In re Burnette [Kan.] 78 P. 440.

16. People v. Payson, 210 Ill. 82, 71 N. E. 692. Allegations of malice in the informers, of the action taken by a former attorney general, and the enumeration of clients who certified as to honesty, held to subject answer to be stricken as pleading evidence. Id.

ing, it being civil,[17] and the right to confront witnesses has no application.[18] Disbarment cannot be adjudged on default without proof.[19] A reduction of the evidence to writing filed and preserved is accomplished by certifying, filing and transcribing pursuant to order the shorthand report.[20] In Iowa such a proceeding goes up to the supreme court on appeal [21] for trial de novo [22] on the original papers and full transcript.[23] The court should not disbar a lawyer on testimony of a doubtful character.[24] The striking of his name from the roll of solicitors in chancery does not disbar an attorney from practice as an attorney before the law court of Delaware.[25]

Reinstatement [26] should be made by setting aside a judgment not supported by proof.[27]

§ 4. *Creation and termination of relation with client.*[28]—The relation is created by contract with the client or his agent [29] to perform legal services [30] for the client.[31] The relation exists where the attorney is consulted as such and undertakes to act for the person seeking advice.[32] It is not necessary that the attorney should have appeared as such in legal proceedings.[33] It may exist with-

17. Code, § 4684. State v. Mosher [Iowa] 103 N. W. 105.

18. State v. Mosher [Iowa] 103 N. W. 105.

19. Disbarment proceedings were instituted against B by an accusation sworn to upon information and belief. On the day set for the hearing B failed to appear and the court rendered judgment disbarring him from the practice of his profession. Four days later he appeared and asked the court to set aside the judgment. The court refused and B appeals. Held, he should not have been disbarred. In re Burnette [Kan.] 78 P. 440.

Note. The statute provides that if the accused fails to answer the court shall proceed to render such judgments as the case requires. In the opinion of the majority of the court this statute does not mean that a court can disbar an attorney upon default unless the accusation has been substantiated by proper evidence. State v. Shumate, 48 W. Va. 359, 37 S. E. 618; In re Simpson, 9 N. D. 379, 83 N. W. 541; People v. Pendleton, 17 Colo. 544, 30 P. 1041; In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Penobscot County Bar v. Kimball, 64 Me. 140. The right of an attorney to practice law is secured to him by the constitution and laws of the state. He cannot be deprived of his right without a day in court. State v. Start, 7 Iowa, 499; Ex parte Robinson, 19 Wall. [U. S.] 505, 22 Law. Ed. 205. But notice is not necessary when the offense is in the nature of a contempt committed in the presence of the court. In re Woolley, 11 Bush. [Ky.] 95. The minority opinion was based on a literal interpretation of the statute. By refusing to appear he virtually admits his guilt. Ex parte Thompson, 32 Or. 499, 52 P. 570, 40 L. R. A. 194; In re Randel, 158 N. Y. 216, 52 N. E. 1106; In re Wellcome, 23 Mont. 450, 59 P. 445, 3 Mich. L. R. 232.

20. State v. Mosher [Iowa] 103 N. W. 105.

21, 22, 23. Code, § 329. State v. Mosher [Iowa] 103 N. W. 105.

24. Evidence insufficient to show acceptance of sum from defendant in criminal case to secure dismissal. Tudor v. Commonwealth [Ky.] 84 S. W. 522.

25. In re Hoffecher [Del. Ch.] 60 A. 981.

26. See 3 C. L. 379.

27. A judgment disbarring an attorney, unsupported by any evidence except the accusation against him, sworn to upon information and belief, should be set aside upon application. In re Burnette [Kan.] 78 P. 440.

28. See 3 C. L. 379. See, also, post, § 8.

29. Where secretary and treasurer of corporation employed plaintiff who rendered services for the corporation, the latter was liable therefor. Wintner v. Rosemont Realty Co., 91 N. Y. S. 452. The president of a corporation has power to employ counsel to defend an action against the corporation, and bind the corporation for reasonable compensation to the attorney. Campbell v. Pittsburgh Bridge Co., 23 Pa. Super. Ct. 138. An agreement by attorneys of creditors to extend the time of payment on notes and a trust deed does not bind a trustee holding the lands for the creditors subject to certain prior incumbrances. Ray v. Lobdell, 213 Ill. 389, 72 N. E. 1076. That attorneys were retained generally by certain persons is evidence to be considered in determining who is liable for special services, but is not conclusive on the question. Stroley v. Schnepp, 93 N. Y. S. 1082.

Contract for legal services held to have been made by letter and negotiations though no formal written instrument was drawn. Carlisle v. Barnes, 92 N. Y. S. 917.

30. The mere fact that an agent is employed to negotiate a loan is an attorney at law, and in securing the loan performs duties ordinarily performed by an attorney, will not make the relation existing between the borrower and agent that of attorney and client, so as to render the agent an incompetent witness against the borrower as to matters which came to his knowledge pending the negotiation of the loan. Turner v. Turner [Ga.] 50 S. E. 969.

31. Where one assigns all his right in a judgment to an attorney who is to account to the assignor for one-half the amount realized, the attorney is vested with full title and is not agent to collect the judgment. Spangenberg v. Zumstein, 4 Ohio C. C. (N. S.) 406.

32, 33. Sheehan v. Erbe, 92 N. Y. S. 862.

out payment of a fee [34] and continues so long as the the terms of the contract provide.[35] A retainer of one member of a firm of attorneys is a retainer of the firm, in the absence of any express stipulation to the contrary.[36] Sound policy forbids an attorney from appearing for conflicting interests,[37] but he may be agent for different parties as to different parts of a transaction.[38] A contract to pay the attorney of the adverse party to do something or to refrain from doing something which will effect the interest of his client is illegal and void,[39] especially where the attorney is acting under appointment of court to represent the interests of unknown clients.[40] A contract to procure legislative action is not necessarily bad.[41] The relation based on ratification is not found solely on knowledge that one was assisting the original counsel.[42] A client has the right to discharge an attorney at any time but must pay the discharged attorney money due him,[43] and if he be employed on a contingent fee, it should be upon condition that he pay them fair remuneration for services already performed.[44] His authority and employment ceases on the death of his client.[45]

Substitution is necessary when the case goes to a court where the attorney is not admitted.[46] Statutes providing for notice to provide a substitute when the adverse party's attorney ceases to act have no application to a voluntary withdrawal by an attorney and refusal to proceed at the trial.[47] On granting a substitution a condition may be imposed securing the discharged attorney under a contingent contract.[48]

§ 5. *Rights, duties and liabilities between attorney and client; generally; loyalty and good faith.*[49] *Diligence.*[50]—An attorney is liable to his client for a

34. Mack v. Sharp [Mich.] 101 N. W. 631.

35. A contract whereby a corporation agreed to give an attorney "permanent employment" as counsel if he would render certain services and the scheme involved proved a success, was satisfied by his employment thereafter for the period of a year at a fixed salary. Sullivan v. Detroit, etc., R. Co. [Mich.] 98 N. W. 756.

36. Lockwood v. Dillenbeck, 93 N. Y. S. 321.

37. Counsel appeared for the executor or trustee in a suit for the construction of a will and also for a legatee or devisee under the will. Smith v. Jordan [Conn.] 59 A. 507. The attorneys of a bankrupt's trustee in merely making out and presenting formal proof of a claim is not of itself a double employment. In re McKenna, 137 F. 611. A defendant whose position is in fact adverse to that of another defendant cannot act as the latter's counsel, unless, if at all, express authority was shown on the record. Jenkins v. Barber [Miss.] 38 So. 36.

38. Mortgagees employed an attorney before taking the mortgage, to see that that it was a first lien on the property. There was an existing mortgage but the attorney falsely certified that the proposed mortgage was a first lien. The money was given to the attorney by check payable to the mortgagor who endorsed it and directed the attorney to pay the first mortgage but he embezzled it. The mortgagor must bear the loss. Trustees of Synod of Reformed Presbyterian Church v. Livingston [Pa.] 60 A. 154.

39. Steger v. Hume, 97 Tex. 324, 79 S. W. 19.

40. Contract to pay attorneys a certain sum to abandon an appeal by them from a judgment allowing them $2,000 for services held void. Steger v. Hume, 97 Tex. 324, 79 S. W. 19.

41. Stroemer v. Van Orsdel [Neb.] 103 N. W. 1053.

42. Lathrop v. Hallett [Colo. App.] 77 P. 1095.

43. Vincent v. Nassau County, 45 Misc. 247, 92 N. Y. S. 32.

44. Du Bois v. New York [C. C. A.] 134 F. 570.

45. The death of the client deprives the attorney of the right to appear and suggest the death of his client, for the purpose of obtaining an order of revivor, before the appointment of a legal representative. Chicago, etc., R. Co. v. Woodson [Mo. App.] 85 S. W. 105. A power of attorney not coupled with an interest, is revoked by the death of the donor. Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592.

46. In a case begun in the state court but carried to the Federal courts there must be a substitution for an attorney admitted to the state but not the Federal bar. Lincoln Mfg. Co. v. New Haven Clock Co., 135 F. 1023.

47. The validity of a judgment is not affected by a party's counsel without leave of court, announcing their withdrawal from the case, serving on the adverse party and filing with the clerk of the court notice thereof and by refusing to proceed with or participate therein. McInnes v. Sutton, 35 Wash. 384, 77 P. 736.

48. Du Bois v. New York [C. C. A.] 134 F. 570.

49. See 3 C. L. 379.

50. See 3 C. L. 380.

loss resulting from a failure to exercise reasonable diligence, or such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business.[51] Where an attorney undertakes the prosecution of a claim on a contingent fee based on a percentage of the amount collected, it is contemplated that he shall perform whatever services may be necessary.[52] In such a case the failure of a forwarding agency which sent the claim to furnish a bond does not excuse the attorney.[53] If a claim be settled without authority, the question of negligence does not arise.[54]

Dealings between attorney and client.[55]—He owes his client the duty of the utmost loyalty and good faith and should disclose facts within his knowledge essential to his client's full understanding of dealings with him.[56] The burden is on the attorney to show good faith and absence of undue influence,[57] that his dealings were fair and just, that the client acted upon full information, and that no undue advantage was taken.[58] But the law does not prohibit an attorney from dealing with his clients, and contracts when deliberately made are as valid as contracts between other parties,[59] though transactions between them will be closely scrutinized, especially where the attorney acquires any of his client's property,[60] and where he has so acquired title the court will impress the property with a trust in favor of the client,[61] but the client must act promptly.[62] These rules have no application to a charge of negligence in protecting a client's rights in litigation or transactions with others, but applies only where the attorney has obtained prop-

51. Loan of client's money upon insufficient security. Kissam v. Squires, 92 N. Y. S. 873. Failure of attorney employed to examine title to land to learn whether there were mechanics' liens when he knew a building was being put up was a breach of his duty to his client for which he was liable on his bond for resulting damage. Humboldt Bldg. Ass'n Co. v. Ducker's Ex'r, 26 Ky. L. R. 931, 82 S. W. 969.

52. Taking of an appeal was rendered necessary by an erroneous decision of the trial court. Cavanaugh v. Robinson [Mich.] 101 N. W. 824.

53. Cavanaugh v. Robinson [Mich.] 101 N. W. 824.

54. Instruction held bad which implied that it did. Vooth v. McEachen [N. Y.] 73 N. E. 488.

55. See 3 C. L. 380.

56. Where attorney became purchaser of land belonging to the estate for which he was the attorney, without disclosing his purpose to do so, or real value, the sale was annulled. Thweatt v. Freeman [Ark.] 84 S. W. 720.

57. Thweatt v. Freeman [Ark.] 84 S. W. 720.

58. Bingham v. Sheldon, 91 N. Y. S. 917. Evidence held to show relation between plaintiff and defendant such that defendant was subject to the rule. Thweatt v. Freeman [Ark.] 84 S. W. 720. Evidence held to show fraud of attorney in obtaining transfer of lease. Sheehan v. Erbe, 92 N. Y. S. 862. Ratification of acts of attorney held to have been given by client without full knowledge of facts; hence attorney was liable for negligent transaction resulting in loss to the client, notwithstanding such ratification. Kissam v. Squires, 92 N. Y. S. 873. Refusal of instruction on burden of proof on an attorney as to fairness of dealings proper where sole issue was whether contract for compensation of attorneys was made. Werner v. Knowlton, 94 N. Y. S. 1054. In action to recover funds from attorney, proof of relation, of facts tending to show receipt of funds, and that they were not used for intended purpose, is sufficient where defendant introduced no testimony, since burden was on him. Purdy v. Wallace, 93 N. Y. S. 608. Action for fraud growing out of advantage taken of relation of attorney and client cannot be maintained where evidence shows relation did not exist. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

59. Starrett v. Brosseau, 110 Ill. App. 605. Stipulations for the payment of attorneys commissions in mortgages and other securities are valid, but are, nevertheless, subject to the equitable control of the court. Scott v. Carl, 24 Pa. Super. Ct. 460.

60. Stanwood v. Wishard, 134 F. 959.

61. Stanwood v. Wishard, 134 F. 959. Like a trustee and aside from fraud or bad faith he cannot take an adverse interest in the clients property. Where an attorney, by statements and representations made to his clients as to the condition and value of their land, the subject of the litigation, procures the sale thereof to be made to a third party, for whom he is at the same time acting in that capacity and immediately takes a half interest therein for himself, paying one-half of the consideration, the client may set aside the purchase at will. Levara v. McNeny [Neb.] 102 N. W. 1042.

This rule does not apply in the making of a contract to recover an estate by one whose business it is to find estates having no notorious claimant, to hunt up the heirs and recover the estate for them. Adams v. Schmidtt [N. J. Eq.] 60 A. 345.

62. Six years delay held not slothful. Stanwood v. Wishard, 134 F. 959.

erty of the client.[63] The purchase price with interest less the rents and profits must be returned.[64]

Accounting to client.[65]—For breach of duty to pay charges on property, the damages do not include the diminution of price received on foreclosure.[66] Statutory costs awarded to a party in an action belong to him, and his attorney has no interest therein.[67]

§ 6. *Remedies between the parties.*[68]—One may collect so much as an attorney has received by an unauthorized settlement and not thereby preclude himself to sue for the balance.[69] An action to recover moneys paid to attorneys for a specific purpose is not tortwise merely because it is alleged that they converted it.[70] By statute in Alabama a summary judgment may be had against an attorney for failure to pay over money collected by him.[71] An attorney sued while all vouchers and evidence are in his client's hands may have an injunction pending discovery.[72] The attorney sued for money intrusted to him has the burden of proving a direction to use it for a new purpose [73] or a disposal of it per previous agreement.[74] The burden of showing the amount of damages suffered rests upon the client.[75]

§ 7. *Compensation and lien.*[76] *Right to and amount of compensation.*—Performance of the service undertaken is necessary to earn a fee [77] except it be excused or rendered impossible by the client.[78] There can be no recovery beyond that specially contracted for the work done,[79] though assisting counsel are not

63. No application on charge of negligent loan of client's money to a third person. Schreiber v. Heath, 92 N. Y. S. 1043.

64. Levara v. McNeny [Neb.] 100 N. W. 1042.

65. See 3 C. L. 381.

66. Dean v. Radford [Mich.] 104 N. W. 329.

67. The client may satisfy a judgment awarding him costs. Early v. Whitney, 94 N. Y. S. 728.

68. See 3 C. L. 381.

69. Burgraf v. Byrnes [Minn.] 103 N. W. 215.

70. Logan v. Freerks [N. D.] 103 N. W. 426.

71. Held, under evidence in such a proceeding, a general affirmative charge for either party would be improper. Boyett v. Payne [Ala.] 37 So. 585. In such a proceeding, under Code 1896, § 3810, an order of the owner of the judgment to pay the amount of a judgment to a transferee thereof is competent evidence. Id.

72. Shaw v. Frey [N. J. Eq.] 59 A. 811.

73. Logan v. Freerks [N. D.] 103 N. W. 426.

74. Where attorney retained money deposited with him to secure sureties upon an undertaking, his mere statement that the money had been paid over to the sureties was insufficient, in an action to recover, where he had previously asserted a lien on the money. Brenner v. Martin, 91 N. Y. S. 156.

75. Action for settling a claim for less than its face value without authority. Vooth v. McEachen [N. Y.] 73 N. E. 488.

76. See 3 C. L. 381.

77. An attorney who abandons the service for which he was employed, without justifiable cause, is not entitled to compensation. Order of substitution of attorneys in divorce case should have been without requirement as to additional fees, the first attorney having abandoned the case. Cary v. Cary, 97 App. Div. 471, 89 N. Y. S. 1061. Allegations of answer in action for compensation, attempting to set up agreement to proceed without retainer, that plaintiff had unjustifiably abandoned the case, and that he was not entitled to compensation, held insufficient, and judgment on pleadings proper. Pierce v. Newlin, 100 App. Div. 516, 91 N. Y. S. 377. Whether services rendered are within the terms of a contract depends upon its terms. Services in recovery of excessive duties as to which importer had entered protest held within contract and that attorney entitled therefor. Comstock v. Flower [Mo. App.] 84 S. W. 207.

78. A client may not by abandoning a suit commenced at his instigation recover back the retaining fee he paid his attorney for the prosecution of such action, the attorney having performed as far as possible and being ready and willing to continue. Riehl v. Levy, 90 N. Y. S. 441.

79. Cavanah v. Robinson [Mich.] 101 N. W. 824. In an action by attorneys to recover fees due for professional services, on a written contract fixing the fees to be paid, what would be just and reasonable compensation for the services rendered is immaterial. Heiberger v. Worthington, 23 App. D. C. 565. Where a compromise is effected, within a contract between an attorney and client as to the compensation of the attorney, in case the litigation is compromised, it will not be disturbed merely because the client settled with another attorney for similar services for a less amount. Clifton v. Clark, 84 Miss. 795, 37 So. 746. The amount of compensation as fixed by agreement depends upon the construction of the agreement. Agreement construed. Werner v. Knowlton, 94 N. Y.

bound by an agreement of which they had no knowledge that attorneys' fees should be limited to a sum stated.[80] The existence of a contract may be a question of fact,[81] but since the compensation of an attorney is governed by agreement, express or implied, unrestrained by law, the validity of an agreement fixing compensation need not be submitted to the jury in the absence of proof of fraud or overreaching.[82] Extra compensation may be had for services not covered by the contract [83] or included in a payment made.[84] A quantum meruit may be recovered if the client disaffirms authorized work under a contract.[85] If there is no agreed fee the usual and customary fee is due or a reasonable fee,[86] considering the character and efficiency of the services.[87] The court may determine from its own knowledge the value of fees,[88] and will not ignore its own knowledge in passing on evidence,[89] but it is a question of fact not open on appeal.[90]

Contingent fees.[91]—A contract for a contingent fee is not necessarily invalid,[92] and if fair will be followed in adjusting a claim after the client's death.[93]

S. 1054. Rendition of a bill for legal services, not conditioned on payment within a reasonable time cannot be construed as an offer to accept the amount stated therein. Webster v. Loeb [Mo. App.] 86 S. W. 463. Where a contract between attorney and client, after providing for the payment of a fee of $1,000 to the attorney for professional services to be rendered, and specifically what such services were to consist of, concluded with a provision that one-half of the sum should be paid immediately upon the execution of the contract, and the balance at the termination of a pending suit in which the client was interested but to which he was not a party, in event that he should become a party, but was silent as to the time for payment of such balance in event that he should not become a party to the suit, which was settled shortly after the agreement was made, the balance of the fee was payable to the attorney; the proper construction of the contract being that the attorney should receive $1,000 for his services in any event. Whiting v. Davidge, 23 App. D. C. 156.

80. Gates v. McClenahan [Iowa] 103 N. W. 969.

81. Whether there was a contract for each item of service alleged by attorney. Dempsey v. Wells [Mo. App.] 84 S. W. 1015. Entry in attorney's ledger, under proper title, of "Fee $750" is insufficient to prove an agreement to pay such amount. Davis v. Fischer, 90 N. Y. S. 301.

82. Werner v. Knowlton, 94 N. Y. S. 1054.

83. Services rendered in excess of those included in a contract may be recovered. Barcus v. Sherwood [C. C. A.] 136 F. 184.

84. Evidence held to show fee paid was only for services in district court and that attorney was entitled to compensation for services in appellate court. Morris v. Kesterson [Tex. Civ. App.] 13 Tex. Ct. Rep. 417, 87 S. W. 277.

85. If the client unjustifiably repudiates the attorney's work the attorney is not bound by the amount which he had named as his compensation, but is entitled to recover the reasonable value of his services. Foot v. Smythe [Colo. App.] 78 P. 619.

86. In the absence of a contract provision the amount of compensation to which an attorney is entitled is the reasonable value of his services. Dempsey v. Wells [Mo. App.] 84 S. W. 1015. A bill rendered by an attorney for services to his client is competent for the defendant in an action for attorneys services, as some evidence of the value plaintiff himself placed upon the services. Webster v. Loeb [Mo. App.] 86 S. W. 463. Where the only question is, as to the amount due for attorney's fees, **the proper question to be put to an expert** witness is, what is the usual and customary charge for such services as were rendered; but if there is no usual and customary charge for such services, it is proper to ask what such services are reasonably worth. Maneaty v. Steele, 112 Ill. App. 19.

87. A fee must be reasonable considering the services rendered. Where $75 was allowed in court below, $100 for defending an appeal was held excessive. Combs v. Combs, 26 Ky. L. R. 617, 82 S. W. 298. In estimating the value of professional services the amount involved and the results obtained may be considered. Evidence admitted to show value of services rendered and responsibility assumed by plaintiff. Graves v. Sanders [C. C. A.] 125 F. 690. The financial condition of a judgment debtor may be considered in determining the value of services rendered in collection of the judgment. Boyett v. Payne [Ala.] 37 So. 585.

88. The value of attorney's fees can be found by the court without any evidence on the point. Pearce v. Albright [N. M.] 76 P. 286.

89. Value proved at $5,000, cut down to $2,000. Gates v. McClenahan [Iowa] 103 N. W. 969. $2,000 upheld in suit for separate maintenance where husband's estate was from $250,000 to $500,000 and his income $10,000 to $16,000. Hutchinson v. Hutchinson, 105 Ill. App. 349.

90. Where the amount of a trustee's claim for counsel fees has been contested before the auditing judge, and found reasonable, such finding will not be disturbed upon appeal in the absence of clear error. Casely's Estate, 23 Pa. Super. Ct. 646.

91. See 3 C. L. 382.

92. Stroemer v. Van Orsdel [Neb.] 103 N. W. 1053. In Missouri contracts for a proportion of any settlement of a case as compensation are valid. Yonge v. St. Louis Transit Co. [Mo. App.] 84 S. W. 184.

93. Upon the death of the client and the continuance of the suit in the name of the

Such agreements are not champertous where the attorneys are to make no advances or payments,[94] but the purchase or maintenance of a law suit by an attorney is champerty.[95] In an action by an attorney to recover on a contract for compensation, champerty is an affirmative defense which must be pleaded.[96] It is against public policy to stipulate that the client shall not settle without the attorney's consent.[97] He may recover though unsuccessful if failure was due to the client's nonperformance of his promise.[98]

Implied contract.[99]—There is no implied promise to pay an attorney whom one has not employed, because of incidental benefits derived from his services.[1] It is essential that the services be rendered as attorney and not as incident to another relation.[2] On the death of counsel before full performance, recovery may be had for the reasonable value of the services performed in such proportion as they bore to what he undertook.[3] Implied promises to pay an associated counsel do not arise merely from knowledge of it by the client.[4]

Employment of several attorneys, or by several clients.[5]—Attorneys severally employed can each recover.[6] Where an order of substitution directs two substituted attorneys to pay a certain sum to the former attorney, the latter may maintain an action to recover such sum against either of the substitutes without joining the other.[7]

executor the court ought to uphold the contract for contingent fees to the extent at least, of not alowing its existence to influence its action. The Orphans' Court can and will confine the amount to reasonable compensation. Johnston v. Reilly [N. J. Eq.] 59 A. 1044.

94. Granat v. Kruse, 114 Ill. App. 488.

95. An agreement between the holder of a nonnegotiable chose in action and an attorney, by which the latter, in consideration of an assignment of the claim, agreed to enforce the collection thereof by suit, himself to pay all the expenses, and remit to the assignor one-half of the proceeds in full for his services, is invalid, as against public policy. Slade v. Zeitfuss [Conn.] 59 A. 406. See, also, Champerty and Maintenance, 3 C. L. 677. A contract that the attorney shall receive as compensation a part of what may be recovered is not an assignment. Weller v. Jersey City, etc., R. Co. [N. J. Err. & App.] 61 A. 549. An agreement to allow attorneys one-half the amount recovered is not an assignment of one-half the cause of action. Attorneys not parties in interest. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842. Attorneys who bring suit in the name of the client upon the entire cause of action, though entitled by contract to one-half the amount recovered, and proceed to judgment after the question of their interest in the cause of action has been raised, are bound by the judgment. Id. An agreement by an attorney to pay all or some portion of the court costs to accrue in a suit which he is employed to prosecute is champertous. Agreement to pay all costs and take half the recovery in actions to recover excessive duties champertous. Comstock v. Flower [Mo. App.] 84 S. W. 207.

Note: Attorney having contract for contingent fee as party see Knickerbocker v. Worthing [Mich.] 101 N. W. 540; Foy v. Barry, 87 App. Div. 291, 84 N. Y. S. 335; Bradshaw v. Frazer, 113 Iowa, 579, 89 N. W. 579.

96. Comstock v. Flower [Mo. App.] 84 S. W. 207.

97. Weller v. Jersey City, etc., R. Co.]N. J. Err. & App.] 61 A. 459. A settlement made in good faith will be valid. Id.

98. Failure to furnish promised data for use in proceedings to recover excessive or illegal duties was a breach of the contract, and plaintiff could recover the agreed 5 per cent of the recovery without proof of services or their reasonable value. Carlisle v. Barnes, 98 N. Y. S. 917.

99. See 3 C. L. 384.

1. In an action for services rendered, a finding that they were not rendered at the request of defendants negatives the fact of an implied request, as well as of an express request. Merrill v. Gunnison, 145 Cal. 544, 79 P. 67. Evidence held to support such a finding. Id. No recovery for services rendered without knowledge or consent of client. Morris v. Kesterson [Tex. Civ. App.] 13 Tex. Ct. Rep. 417, 88 S. W. 277.

2. A director or officer of a corporation may recover for legal services if they were rendered upon request, and not gratuitously, and under such circumstances that the parties understood, or ought to have understood that they were to be paid for. Taussig v. St. Louis & K. R. Co., 186 Mo. 269, 85 S. W. 378.

3. Johnston v. Bernalillo County Com'rs [N. M.] 78 P. 43.

4. It is consistent with employment of the attorney to assist the counsel at the latter's expense. Lathrop v. Hallett [Colo. App.] 77 P. 1095.

5. See 3 C. L. 385.

6. Prior employment and retainer of one partner is no defense to an action by the other for individual services rendered after dissolution of the partnership. Webster v. Loeb [Mo. App.] 86 S. W. 463.

7. Fenlon v. Paillard, 93 N. Y. S. 1101.

Allowance by court or taxation as costs.[8]—Except as provided by statute[9] or by contract,[10] fees of counsel are not allowed as incident to recovery in an ordinary action,[11] but are often allowed in adjusting the equities of suitors in equity[12] or in the adjustment of rights in a fund or estate diversely charged or claimed.[13] It is commonly provided that counsel appointed for one accused shall be paid from the public funds at a rate prescribed or ordered by the court,[14] and allowance may be made for each trial.[15] Like allowance are sometimes made to attorneys appointed for nonresidents.[16] Statutes authorizing allowances are strictly construed and will not be extended beyond the limits imposed by their clear language.[17] Such fees are not "costs," [18] but being incidental must rest on a valid or-

8. See 3 C. L. 385.

9. Upon failure to prosecute an appeal, the court under act of May 19, 1897 (P. L. 67), awarded an additional attorney fee of $25. Wilcox v. Merrill, 26 Pa. Super. Ct. 59. In Iowa a fee may be taxed in a liquor injunction contempt case besides the ten per cent. for collecting the fine allowed by statute. Code, § 2429. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460. Civ. Code 1895, § 3796 declares that attorney's fees may be allowed if the defendant has acted in bad faith, or been stubbornly litigious. In an action for tort against a carrier for conversion of goods consigned to the plaintiff, in order to recover such attorney's fees the petition must allege in terms such bad faith, etc. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727. In Florida, attorney's fees may be recovered in certain actions against fire and life insurance companies. Acts 1893, c. 4173, p. 101, so providing, was not repealed by Acts 1899, c. 4677, p. 33, and is constitutional. L'Engle v. Scottish Union & National Fire Ins. Co. [Fla.] 37 So. 462.

10. In an action to recover on a bond and for attorneys fees, there was no allegation that the defendant undertook to pay attorney's fees in case of suit, and the bond contained no such stipulation. In the absence of such agreement, counsel fees cannot be awarded either as costs or otherwise. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296. Though, in Georgia, obligations to pay attorneys' fees are declared void by statute, such a promise in a note is enforceable if the statutory notice of intention to sue is given, and the debt is not paid before the return day. Defendant may defeat recovery of such fees by paying the debt. Browne v. Edwards [Ga.] 50 S. E. 110. Since the act of 1900 (Van Epps' Code Supp. § 6185), in order to recover attorney's fees on a note it must be alleged in the pleadings that the statutory notice has been given, and this allegation, if denied, must be proved on the trial. Pritchard v. McCrary [Ga.] 50 S. E. 366.

11. Such allowance may be saved for review by first objecting by exception to the allowance made; and may be reviewed on appeal from the judgment. Spencer v. Commercial Co., 36 Wash. 374, 78 P. 914.

12. In mechanic's lien proceedings. Hess v. Peck, 111 Ill. App. 111. In an action to set aside a deed of trust of certain securities given by a life tenant, it was held that the court had power, within the scope of the decree, to make a proper allowance to the attorney whose services were rendered in support of the deed. Bauernschmidt v. Bauernschmidt [Md.] 60 A. 437. Where partition proceedings are amicable, it is proper to allow the attorneys conducting the proceedings a reasonable fee, and to require the payment of the same by the parties in proportion to their interest in the property involved. Johnson v. Emerick [Neb.] 104 N. W. 169. Litigation designed to diminish a fund cannot be charged on it, though an indirect benefit resulted. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31.

13. **Bankruptcy:** Only reasonable compensation will be allowed attorneys in composition. In re Talton, 137 F. 178. An executor may before probate employ counsel to resist the contest of a will and obtain compensation for such attorneys services from the assets of the estate. Fillinger v. Conley, 163 Ind. 584, 72 N. E. 597. An executor may employ counsel in an ejectment suit, and upon the settlement of the estate he will be entitled to counsel fees not only for the settlement of the estate but also for services in the ejectment suit. Evan's Estate, 24 Pa. Super. Ct. 151. In bankruptcy cases. $200 allowed out of $2,000 recovered. In re Covington, 132 F. 884.

14. In Pennsylvania it is held that the court has no authority to make an order on the county commissioners to pay a sum of money to defend a prisoner indicted for murder. Commonwealth v. Dillen [Pa.] 60 A. 263.

15. Under Code Cr. Proc. § 308, allowing reasonable compensation to attorneys assigned to defend indigent criminals, successive alowances may be made for successive trials at different terms, each allowance being within the statutory limitation. People v. Montgomery, 91 N. Y. S. 765.

16. Duly appointed attorney for nonresident is to be compensated for his services, whether rendered in the circuit court or supreme court; the allowance to be made by the court appointing him. Cochran v. Lee's Adm'r [Ky.] 87 S. W. 769.

17. Where act provided for the allowance of costs and attorney's fees to garnishees in attachment, executions "issued out of any court of record of this state" does not apply to writs of attachment issued by justices of the peace, aldermen and magistrates. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527. An attorney's fee, in addition to the statutory attorney's fee, cannot be allowed in an action for damages for the alleged violation of the covenants of a lease. Spencer v. Commer-

der.[19] Fees on foreclosure of a mortgage need not be prayed and are not a separate cause of action.[20]

The allowance in the ordinary case runs to the receiver or fiduciary, not to the attorney direct.[21] The decree for solicitor's fees in partition fees may be entered in favor of the solicitor, though not a part to the suit.[22] An allowance of a fee should not be made without notice to the party to be charged and an opportunity to be heard as to its reasonableness.[23]

The amount of allowance [24] is the reasonable worth of the services,[25] if none be fixed otherwise. In case of a contract for fees, only so much as will indemnify is recoverable.[26]

Assignments as security.[27]

Lien.[28]—An attorney has a lien on moneys or papers in his hands [29] received by him in the course of his employment, not only for costs and charges in the particular suit, but for any general balance in other professional business.[30] It is a common-law right.[31] It is unaffected by the fact that his client is an executor or trustee,[32] and covers services to decedent as well as to the executor.[33] The lien is for services rendered at the request of his client; an attorney sub-employed by counsel to assist him in a case at his own expense is not entitled to a lien.[34] The right is not at common law or under the ordinary statutes restricted to employments wherein an action was actually begun.[35] There may also be a contract lien [36] or by virtue of a contract as to compensation one may be deprived of a right

cial Co., 36 Wash. 374, 78 P. 914. Rapid Transit Act, § 62, authorizing allowance of fees for additional counsel for the city in condemnation proceedings, does not authorize such allowance to counsel for property owners. In re Rapid Transit Com'rs, 93 N. Y. S. 262.

18. Hence the allowance against the state is not binding on its auditing board. Code Civ. Proc. § 1038. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

19. But where the order appointing a receiver is void for want of jurisdiction, an order awarding counsel fees for the receiver is also void. Sullivan v. Gage, 145 Cal. 759, 79 P. 537. Where, under the Code, requiring the court in proceedings to enforce mechanic's liens to allow costs and attorneys' fees, a contractor who does not establish his lien because the fund due him is exhausted in the payment of subcontractors, is not entitled to them. Stimson v. Dunham, Carrigan, Hayden Co. [Cal.] 79 P. 968.

20. Thrasher v. Moran [Cal.] 81 P. 32.

21. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

22. McMullen v. Reynolds, 105 Ill. App. 386.

23. Combs v. Combs, 26 Ky. L. R. 617, 82 S. W. 298.

24. See 3 C. L. 386.

25. $800 for services was proper, where counsel assisted in recovering $25,000 for the trustee being engaged fifty days. In re McKenna, 137 F. 611. In determining the amount of solicitor's fees, the court should take into consideration the standing and experience of the solicitor, as well as the nature, importance and result of the controversy, and may of its own motion obtain the opinion of other attorneys as to a proper amount. McMullen v. Reynolds, 105 Ill. App. 386. $50 was upheld in an action on a note for $589. Warnock v. Itawis [Wash.] 80 P. 297. Evidence sufficient to show allowance of fees not so unreasonable as to authorize reversal. Dills v. Auxier [Ky.] 85 S. W. 743. $100 for services on appeal held excessive where but $75 was allowed for trial. Combs v. Combs, 26 Ky. L. R. 617, 82 S. W. 298.

26. A provision in a note sued on, for payment of 10 per cent. attorney's fees in case of collection by attorney, is a contract of indemnity, and not for payment of agreed damages; hence where holder had not agreed with his attorneys on amount to be paid for services in collecting the note, recovery can be had only for reasonable value of services. Texas Land & Loan Co. v. Robertson [Tex. Civ. App.] 85 S. W. 1020.

27. See 3 C. L. 385.

28. See 3 C. L. 388.

29. Burleigh v. Palmer [Neb.] 103 N. W. 1068.

30. Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. S. 903; In re McGuires Estate, 94 N. Y. S. 97.

31. In re McGuire's Estate, 94 N. Y. S. 97.

32. Burleigh v. Palmer [Neb.] 103 N. W. 1068.

33. He may retain enough of the money to pay the general balance due him for such services performed for a deceased client, as well as those performed for the representative of the estate of the decedent. Meloy v. Meloy, 24 App. D. C. 239.

34. Lathrop v. Hallett [Colo. App.] 77 P. 1095.

35. Under the New York Code the attorney's llen exists before actual commencement of the action. Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. S. 903,

36. A simple assignment by a married woman without her husband, of an interest in the recovery in a lawsuit, with reference

of lien.[37] In Missouri the lien acquired by an attorney who has a contract for a certain portion of a settlement as compensation, and has given notice of such contract to his client's adversary, is not destroyed by a settlement without the written consent of the attorney.[38] Such settlement renders the adversary who has notice of the contract liable for the amount to which the attorney is entitled,[39] and this amount may be recovered in an action at law.[40] There need not be a verdict or judgment in favor of the client [41] nor is solvency of the client and willingness to pay a defense to such action.[42] There is no attorney's lien outside of statutory provisions in that state.[43]

An attorney's lien is subject to the right of his client to settle,[44] and while a collusive settlement, made to defraud the attorney, may be set aside, an honest settlement will not be interferred with.[45] On the other hand the rights of an attorney will be protected where a settlement is made without his knowledge or consent.[46] An attorney's statutory lien in Missouri on a cause of action is not lost by a settlement between the parties, but attaches to the proceeds of the settlement.[47]

Loss of lien.[48]—The lien continues only while property is in his hands.[49] If he has an interest in a prospective judgment he does not lose it by opposing a disadvantageous one.[50] Where an attorney's lien is released on an agreement for the payment of a certain sum by the client, in an action to enforce such argeement the terms of the original agreement are immaterial.[51]

Enforcement of lien.[52]—A party to an action is only secondarily liable to the attorney of the adverse party for the amount of his lien; namely, only when the adverse party is insolvent and unable to pay.[53] Where a case is settled, attorneys

to her own separate property, and directly for the benefit of that estate, to secure to an attorney reasonable compensation for his services, followed by a successful suit, has the effect to vest the beneficiary with an equity, by reason of which equity will create a lien. Adams v. Schmidtt [N. J. Eq.] 60 A. 345. A married woman had legal capacity to agree to execute a deed of trust on certain lands to secure, for plaintiffs their fees in certain divorce proceedings to be brought by her in case plaintiffs were successful in vesting the title in her as a part of such litigation. Such contract constituted an equitable lien on the property which attached thereon when the title became vested in her by the decree in such proceedings. Patrick v. Morrow [Colo.] 81 P. 242. Contract between attorney and client, as found in receipt given by attorney construed, and held, that mortgage given by client was only to secure attorney in furnishing bond, and not to secure payment of remainder of fee. Sparks v. Walden, 25 Ky. L. R. 1937, 79 S. W. 248. Lien for attorney's fees, given by landowner who contracts for an improvement, in connection with mechanic's lien and notes, is valid. Summerville v. King [Tex.] 83 S. W. 680. But if land on which improvement is built is a homestead, such lien for fees is unenforceable. Summerville v. King [Tex.] 84 S. W. 648.

37. Agreement that one of three plaintiffs was to pay one counsel and other two were to pay attorney of record enforced, attorney of record not being entitled to retain money belonging to the third plaintiff. Radley v. Gaylor, 98 App. Div. 158, 90 N. Y. S. 758.

38, 39. Yonge v. St. Louis Transit Co. [Mo. App.] 84 S. W. 184.

40. Corresponding to trespass on the case; further prosecution of the case is unnecessary. Yonge v. St. Louis Transit Co. [Mo. App.] 84 S. W. 184.

41, 42. Yonge v. St. Louis Transit Co. [Mo. App.] 84 S. W. 184.

43. Conkling v. Austin [Mo. App.] 86 S. W. 911.

44. Lien held good for one-half settlement, not for one-half judgment. Gurley v. Gruenstein, 44 Misc. 268, 89 N. Y. S. 887.

45. Gurley v. Gruenstein, 44 Misc. 268, 89 N. Y. S. 887.

46. Smith v. Acker Process Co., 92 N. Y. S. 351.

47. Under Acts 1901, p. 46, attorney had lien on proceeds of settlement of suit for specific performance of contract for realty, deeds being executed. Conkling v. Austin [Mo. App.] 86 S. W. 911.

48. See 3 C. L. 389.

49. Not after deposit in court. Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co., 209 Pa. 121, 58 A. 277.

50. Where an attorney has been discharged by his client, his interest in the judgment will not be forfeited because he in good faith opposes a settlement between the parties to the judgment, which he deems prejudicial to his interest. Shoup v. Shoup, 25 Pa. Super. Ct. 552.

51. Burleigh v. Palmer [Neb.] 103 N. W. 1068.

52. See 3 C. L. 389.

53. No recovery by plaintiff's attorney from defendant when plaintiff was solvent. Gurley v. Gruenstein, 44 Misc. 268, 89 N. Y. S. 887.

may continue the trial to establish and enforce their lien for compensation.[54] But such right to continue ceases where the adverse party offers to pay costs and compensation to which the attorneys are entitled, tendering a sum for the purpose, and requesting judgment for what is claimed beyond such sum,[55] since the court then has power to determine the amount to which the attorneys are entitled and enforce a settlement and end the case.[56] When the suit is so prosecuted, there can be no recovery for fees unless the evidence is of such a character that a recovery in behalf of the client would have been authorized if the suit were still proceeding for his benefit.[57] An order of continuance to determine and enforce an attorney's lien should not be made where it does not appear that the client is not financially able to pay the attorney.[58] Code remedies for enforcement of attorney's liens are not exclusive, but only cumulative, since courts of equity have always had power to ascertain and enforce liens.[59] Where the attorney had a valid contract interest in proceeds he may sue as for money had and received after it has been paid over,[60] or may at his option enforce any contract lien [61] even against an assignee.[62] Statutory power in a court to determine and enforce an attorney's lien necessarily includes the power to determine whether a lien exists or not.[63] In an action to declare a lien on a contract between a client and a third person, and on money due defendant thereunder, the third person is not a necessary party.[64]

§ 8. *Authority of attorney to represent client.*[65] *Creation, proof and termination of authority.*[66]—Where an attorney appears in an action for a defendant, the presumption is that he was authorized to appear.[67] It is not necessary that the attorney shall have signed pleadings or be of record.[68] The authority of attorneys must be promptly challenged.[69] A statute requiring proof of authority when the opposite party is in default does not apply where only one of two joint adversaries defaults.[70] The existence of authority is a question of fact.[71] A judg-

54. Code Civ. Proc. § 66. Kuehn v. Syracuse Rapid Transit R. Co., 93 N. Y. S. 883. To recover their fees, attorneys are frequently allowed to continue, in their own interest, actions which their clients have settled, abandoned or otherwise prevented their attorneys from completing. While the suit was pending, the defendant paid to the plaintiff a sum of money in full satisfaction of her demand and she signed a paper releasing the company from liability. Atlanta R. & Power Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

55, 56. Kuehn v. Syracuse Rapid Transit R. Co., 93 N. Y. S. 883.

57. As there could have been no recovery on the part of the plaintiff, the attorneys could not recover. Atlanta R. & Power Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

58. Code Civ. Proc. § 66. Smith v. Acker Process Co., 92 N. Y. S. 351.

59. Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. S. 903.

60. Where an attorney contracted to take necessary proceedings to recover damages for the taking of property in street opening proceedings, and to receive one-eighth of the award as compensation, an action against a grantee of the premises to whom the award was paid to recover such agreed compensation is an action for money had and received and not to enforce an attorney's lien. Flannery v. Geiger, 92 N. Y. S. 785.

61, 62. The fact that such grantee took the premises and award subject to the attorney's lien and that the attorney might have enforced the lien does not bar such action on the contract of retainer for money had and received. Flannery v. Geiger, 92 N. Y. S. 785.

63. Code Civ. Proc. § 66, as amended by Laws 1899, p. 80, c. 61, construed. Radley v. Gaylor, 98 App. Div. 158, 90 N. Y. S. 758.

64. Mathor v. Triebel, 98 App. Div. 328, 90 N. Y. S. 903.

65, 66. See 3 C. L. 390.

67. Ebel v. Stringer [Neb.] 102 N. W. 466. A general or special appearance in an action by an attorney is presumptive evidence of the authority of the attorney to so appear. Cutting v. Jessmer, 91 N. Y. S. 658.

68. A party held to have been represented where though other attorneys had signed pleadings, the party's husband, a practicing lawyer, appeared with her knowledge and consent. Wilkie v. Reynolds [Ind. App.] 72 N. E. 179.

69. Authority to appear at trial cannot be raised for first time on appeal. Bray v. Bray [Iowa] 103 N. W. 477. By admitting service of papers on a motion for a new trial by an attorney for defendant without objection, and by serving papers in plaintiff's behalf on such attorney, the objection that the attorney is not the attorney of record is waived. Smith v. Smith, 145 Cal. 615, 79 P. 275.

70. By statutory provision in Michigan Comp. Laws, § 762, it is provided that authority to appear as attorney may be either

ment reciting an appearance by attorney is conclusive as to the appearance of the attorney but not on the question of the attorney's authority to make the appearance.[72] Declarations of the attorney are incompetent to prove the scope of his authority.[73] An attorney acting for a client in a justice court acts as an attorney in fact, and his authority ceases when the case is finally submitted.[74] Authority cannot be revoked after it is executed.[75]

Scope of authority.[76]—An attorney has power to bind his client by acts within his actual or implied authority.[77] Unauthorized acts may be repudiated [78] or ratified,[79] and as to third persons the rule as to apparent authority applies.[80] Notice to an attorney as to matters within the scope of his retainer is notice to the client.[81] The authority of an attorney extends to all acts needful to the prosecution or defense of the suit in which he is retained.[82-87]

written or verbal, and shall be proved in all cases when requested by the opposite party, or where the opposite party fails to appear. Hirsh v. Fisher [Mich.] 101 N. W. 48.

71. Evidence held to justify conclusion that attorney who appeared, conducted the trial, and made affidavit for appeal, was authorized to represent defendant so that a stipulation signed by him was binding. Markey v. Louisiana, etc., R. Co. [Mo.] 84 S. W. 61. Evidence held not to show absolute agreement by attorney to represent plaintiff in action; hence plaintiff not excused from personally attending to prosecution. Harrison v. Oak Cliff Land Co. [Tex. Civ. App.] 85 S. W. 821,

72. Evidence showed no authority to appear. Korman v. Grand Lodge of the U. S., 44 Misc. 564, 90 N. Y. S. 120.

73. West v. A. F. Messick Grocery Co. [N. C.] 50 S. E. 565.

74. Cutting v. Jessmer, 91 N. Y. S. 658.

75. Settlements had been made. Foot v. Smythe [Colo. App.] 78 P. 619.

76. See 3 C. L. 390. Agency of attorney for client. See Clark and Skyles Agency, pp. 1365-1616.

77. Client is bound by acts of attorney representing him in an action to which he has expressly or impliedly consented. Hill's Adm'r v. Penn. Mut. Life Ins. Co. [Ky.] 85 S. W. 759. A bondholder's counsel has no authority as such to waive payment of interest. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228. Client is chargeable with the action, mistake or inadvertence of his attorney. Application for a reissue of a patent with broader claims, made six years after patent granted, the only excuse being that he was unaware of the narrow scope of his claims. In re Starkey, 21 App. D. C. 519. A client is liable for acts of his attorney done in his presence and sanctioned by him. Client held liable for acts of his attorney in inducing a justice to issue a criminal warrant without sanction of prosecuting attorney, as required by Rev. St. 1899, § 2750. Brueckner v. Frederick [Mo. App.] 83 S. W. 775. Unauthorized act of attorney in causing debtor's arrest does not render client liable. West v. A. F. Messick Grocery Co. [N. C.] 50 S. E. 565.

78. A client may repudiate a stipulation made by his attorney not pursuant to general authority, but in the mistaken belief that he had a special authority to make it. Schaefer v. Schoenborn [Minn.] 103 N. W. 501.

79. Where he exceeds his authority and the client takes advantage of it, it is a ratification of the attorney's act and the client is bound thereby. Leahy v. Stone, 115 Ill. App. 138.

80. Where an attorney has apparently full authority to act, without any restriction whatever, the client will be bound by his acts, notwithstanding violation of secret restrictions. As where a client authorized his attorney to settle his claim, which authority was known to the other party, the attorney's act in compromising the claim is binding on the client, though in so doing he violated restrictions the other parties had no notice of. Kelly v. Chicago & A. R. Co. [Mo. App.] 87 S. W. 583.

81. Knowledge by attorney that trustee with power of sale for reinvestment is selling to his own wife is knowledge of his client. Scottish-American Mortg. Co. v. Clowney [S. C.] 49 S. E. 569. The assignee of a judgment was chargeable with the knowledge of his attorney who negotiated the assignment concerning litigation affecting the judgment. Boice v. Conover [N. J. Eq.] 61 A. 159. One who merely deals with a person who, though an attorney, acts for his own interest, is not charged with what the attorney knows. The attorney having been requested to ascertain whether his client would sell a pending application for a patent, bought such application himself, without disclosing the fact that he was acting for any one else, and then at a profit resold and assigned the same to complainant. National Cash Register Co. v. Columbus Watch Co. [C. C. A.] 129 F. 114. Knowledge acquired by an attorney in the course of the performance of his duties as such is notice to the client. Knowledge of existence of mortgage, not of record, acquired by attorney employed to draw up and acknowledge deed, is notice to client. Allison v. Falconer [Ark.] 87 S. W. 639. To bind a principal with knowledge of his attorney, acquired in another transaction, not relating to his client's business, the burden is on the person claiming such notice to show that such knowledge was in the attorney's mind at the time he acted for his client. Knowledge of existence of mortgage. Mathews v. Damainville, 100 App. Div. 311, 91 N. Y. S. 524. Notice by the attorney for the plaintiff in a personal injury action against a munic-

§ 9. *Rights and liabilities to third persons.*[88]—The client is liable for acts of his attorney within the scope of his authority, though such acts are unwarranted by law.[89] An attorney who causes attachment to issue becomes personally liable to the sheriff for fees and charges where the attachment is vacated for legal insufficiency of the papers on which it was granted.[90] An action to recover excessive costs, paid out by an attorney for his client or appropriated to pay himself, before an order reducing costs was made, should be brought against the successful party and not against his attorney.[91]

§ 10. *Law partnerships and associations.*[92]—A member of a partnership engaged in the practice of law has implied authority to bind the firm by a contract for the purchase of law books.[93]

§ 11. *Public attorneys. A. Attorneys general,*[94, 95]—An attorney general with constitutionally defined powers has no power except such as are thus given.[96]

ipality to the attorney for the owner of the property where accident happened in another suit is not such notice as will affect the owner. Chester v. Schaffer, 24 Pa. Super. Ct. 162.

82, 83, 84, 85, 86, 87. An attorney may make a binding stipulation **extending the time for the service of papers.** Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. S. 673. An attorney employed for the purpose of collecting has no implied authority to **extend the time of payment** of claims in his hands. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. The entry of a special appearance does not authorize counsel so appearing to **appeal** from a default judgment against his client. Houston v. Greensboro Lumber Co., 136 N. C. 328, 48 S. E. 738. Where an attorney has appeared for a party throughout the entire proceedings in a case, his authority to sign a notice of appeal is presumed. Kefauver v. Batdorf, 4 Ohio C. C. (N. S.) 427.

Compromise of claim: An attorney employed to bring and prosecute a suit has no power by reason thereof to compromise his client's claim. Kelly v. Chicago & A. R. Co. [Mo. App.] 87 S. W. 583; Fleishman v. Meyer [Or.] 80 P. 209. He may not settle a judgment for less than its face. Burgraf v. Byrnes [Minn.] 103 N. W. 215. An attorney has the power to promise an opposite party to pay her the amount of her claim in consideration of her dismissal of her suit, and such promise is binding on the client. Grand Lodge, Independent Order Free Sons of Israel v. Ohnstein, 110 Ill. App. 312.

Admission of facts: Attorney may bind client by admissions dispensing with formal proof of facts. Everett v. Marston [Mo.] 85 S. W. 540. Cannot bind his client by an admission, not of record, without express authority. In an action for goods sold and delivered, it appeared that defendant's counsel in going over the items in the bill of particulars with plaintiff's counsel in the court room admitted the sales between specified dates. Jefferson Bank v. Gossett, 90 N. Y. S. 1049. May on the brief in the supreme court admit facts. Territory v. Board of Com'rs of Bernalillo County [N. M.] 79 P. 709. Stipulation as to facts by attorney of record is binding on client. J. L. Raper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 49 S. E. 946. May make admissions upon the trial. Preston v. Davis, 112 Ill. App. 636; Harniska v. Dolph [C. C. A.] 133 F. 158.

May in advance of the trial stipulate that the judgment shall be final. Leahy v. Stone, 115 Ill. App. 138.

Cannot employ associate counsel therein at the expense of his client. An attorney may **empower another attorney to appear for him** and the client is bound by such appearance. Reich v. Cochran, 94 N. Y. S. 404; Lathrop v. Hallett [Colo. App.] 77 P. 1095.

May confess judgment: Town of Chalmers v. Tandy, 111 Ill. App. 252. An agreement made in open court by an attorney, who has been retained by the defendant, that a judgment may be taken against his client for a certain sum, is binding upon such client in the absence of fraud, collusion, surprise, or some ground of the same nature. Mericden Hydro-Carbon Arc. Light Co. v. W. A. Anderson, 111 Ill. App. 449.

88. See 3 C. L. 392.

89. Where defendant placed a claim in the hands of an attorney, who recovered judgment thereon, in absence of any limitation of his authority the attorney is authorized to collect the judgment by execution; hence the client is liable for damages sustained by reason of an unlawful levy in violation of a stay. Barber v. Dewes, 91 N. Y. S. 1059.

90. Gadski-Tauscher v. Graff, 44 Misc. 418, 89 N. Y. S. 1019.

91. Rickert v. Pollock, 92 N. Y. S. 89.

92. See 3 C. L. 392. Settlement of accounts on dissolution. See Gillette v. Chavez [N. M.] 78 P. 68.

93. Alley v. Bowen-Merrill Co. [Ark.] 88 S. W. 838.

94, 95. See 3 C. L. 392. Information in equity by Attorney General, see Fletcher, Eq. Pl. & Pr. 90-92.

96. Under Kirby's Dig. art. 6, c. 62, defining the duties of the attorney general of the state of Arkansas, held that in a suit against the State Board of Railroad Commissioners to restrain the collection of taxes on assessments made by them, the attorney general had no power to intervene on behalf of the state. Railroad Tax Cases, 136 F. 233.

Statutes enabling the attorney general to employ assistants do not forbid him to act through an unofficial attorney.[97]

(§ 11) *B. District and state's or prosecuting attorneys.*[98]—Statutes creating the office of county attorney and providing for election to the same must conform to constitutional provisions [99] and elections must conform to valid statutes.[1] A commonwealth's attorney duly elected in a county in which he resides is not disqualified by a subsequent legislative change in the boundaries of the district making him a nonresident,[2] since, though a legislature be given power to abolish the office, it cannot abolish the tenure of any rightful incumbent thereof.[3] County authorities may unless excluded by statute hire attorneys but cannot make them public officers.[4]

It is the province of the county board and not of the county attorney to determine whether the county shall bring an action,[5] and it is his duey to conduct the case.[6] A prosecuting attorney may accept notice of a writ of error in a criminal case and waive the issuance and service of summons in error and enter the appearance of the state.[7] A case which is only criminal in its nature is not a criminal case which the public prosecutor must conduct.[8] In Georgia the constitution imposes upon the solicitor general the burden of representing the state in all caess taken up from his circuit to the supreme court.[9]

A county attorney must be candid, honest and sincere in his official conduct.[10] The law presumes that he acted in good faith in all matters charged against him, and the burden is on the state to show otherwise in quo warranto for official misconduct.[10a] It may bear on the question of good faith in prosecuting a particular offense that he was aware of the general and public violation of law in that regard.[11] A county attorney in Kansas is not obliged to institute proceedings for the punishment of offenders against the prohibitory liquor law upon his own knowledge,[12] but when he receives an information according to the statute he must proceed [13] and cannot await the outcome of a prosecution simultaneously begun under a city ordinance supposedly thought to be more speedy in its administration.[14] In order to mandamus a district attorney the petition must allege and clearly show

97. Appeal in application for the registration of land title could be taken by the attorney general or unofficial attorney. McQuesten v. Attorney General, 187 Mass. 185, 72 N. E. 965.

98. See 3 C. L. 393.

99. Acts 1903, c. 576, extending term of county attorney as fixed by Acts 1899, c. 362, held unconstitutional in part. State v. Trewhitt [Tenn.] 82 S. W. 480.

1. Election of county attorney for one year by county court held regular under Acts 1899, c. 352, an amendment thereto not having become effective. State v. Trewhitt [Tenn.] 82 S. W. 480.

2, 3. Adams v. Roberts, 26 Ky. L. R. 1271, 83 S. W. 1035.

4. County supervisors in New York York may employ attorneys for necessary legal services but cannot create an office of attorney with a regular term and quarterly salary. Vincent v. Nassau County, 45 Misc. 247, 92 N. Y. S. 32.

5. Kerby v. Board of Com'rs of Clay County [Kan.] 81 P. 503.

6. County attorney is authorized to prosecute an appeal from order of fiscal court when so directed by the county court. Jefferson County v. Young [Ky.] 86 S. W. 985. By statutory provision in Kentucky, county attorneys are required to prosecute appeals from orders of the fiscal court when directed to do so by the county court. Ky. St. 1903, § 127. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613.

7. Nichols v. State [Ohio] 73 N. E. 220.

8. A contempt proceeding growing out of a liquor injunction case in Iowa, brought by a citizen, may be prosecuted by any attorney though criminal in its nature. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460.

9. Williams v. State, 121 Ga. 195, 48 S. E. 938.

10. Action to remove a county attorney charged with violating his duty in respect o the enforcement of the prohibitory liquor law State v. Trinkle [Kan.] 78 P. 854.

10a. Evidence held insufficient. Id.

11. State v. Trinkle [Kan.] 78 P. 854.

12. Whenever notified by an officer or other person of any violation of that law, it is his duty forthwith diligently to exercise all the authority conferred upon him by law for the purpose of disclosing, prosecuting and punishing the offender. State v. Trinkle [Kan.] 78 P. 854, following State v. Foster, 32 Kan. 14, 3 P. 534.

13, 14. State v. Trinkle [Kan.] 78 P. 854.

that his refusal to act has been an arbitrary act and not merely a mistake of judgment.[15]

The appointment of assisting prosecutors is generally provided for by statute,[16] thought it is said that a court has inherent power to appoint a temporary substitute for an unwilling public prosecutor,[17] and in the absence or inability of the district attorney the business of the state continues under the direction of substitutes.[18] That a substitute for a district attorney had been previously consulted by citizens in regard to the particular action prosecuted by him does not disqualify him, his private employment having ceased.[19] If a statute prescribes the form of the appointment of assistant county attorneys, such forms must be complied with.[20] When a district attorney insists on a defendant pleading to an information, drawn and subscribed by his deputy in the name of the district attorney, he thereby ratifies such subscription and sanctions it by his official oath.[21] Some official act done is necessary to make one a de facto assistant.[22] The court will take judicial notice of the powers of a deputy appointed under statute [23] and presumes the regularity of his appointment when he has acted as such.[24]

Salaries and compensation are statutory matters.[25] Where, as in California, the statute declares that salaries and fees provided therein shall be in full for all services rendered by him or his deputies, the county attorney cannot claim extra compensation for a deputy or assistant,[26] or the statute be avoided by appointing or allowing for the services of a salaried assistant,[27] nor can the services of such in aiding to perform the district attorney's duties be regarded as his "personal" expenses.[28] Under the Kentucky statutes and constitution allowing the commonwealth attorney fifty per cent. of fines and forfeitures recovered and paid into the

15. Application to compel defendant to institute quo warranto proceedings to test a franchise. Buggeln v. Doe [Ariz.] 78 P. 367.

16. Rev. St. 1898, § 750, does not require statement of cause for appointment of assisting prosecutor, but only when district attorney pro tem is appointed. Colbert v. State [Wis.] 104 N. W. 61.

17. When a state's attorney, though in attendance upon the court, refuses to discharge his duties, the court has the implied power to appoint some other member of the bar to appear before the grand jury during the examination of the evidence to advise them on questions of law and to frame indictments. Taylor v. State [Fla.] 38 So. 380.

18. District judges are authorized to appoint competent attorneys to represent the state in criminal and civil matters pending before their court, when for any cause the district attorney is excused, necessarily absent or sick, etc. State v. Reid, 113 La. 890, 37 So. 866.

19. State v. Reid, 113 La. 890, 37 So. 866.

20. Where statute authorized county attorneys, by consent of commissioner's court, to appoint in writing, not to exceed three assistants, who shall subscribe the oath of office imposed by the constitution, mere verbal authority to one to represent the county attorney is insufficient. Murrey v. State [Tex. Cr. App.] 87 S. W. 349.

21. Motion to set aside the information based on the ground that it was not found, indorsed, or presented as required by law. State v. Guglielmo [Or.] 79 P. 577.

22. One who was verbally appointed assistant county attorney did not become a de facto officer from the mere act of signing an information. Murrey v. State [Tex. Cr. App.] 87 S. W. 349.

23, 24. State v. Guglielmo [Or.] 79 P. 577.

25. In New Mexico salaries are to be paid quarterly. Comp. Laws 1897, § 2578. Territory v. Board of Com'rs Bernallillo County [N. M.] 79 P. 709. Const., § 235, providing that salaries shall not be changed during the term of office is not affected by an act creating another judicial district, the effect of which was to withdraw one of the counties from the district where complainant was commonwealth attorney and lessen the amount of fines and penalties he would have otherwise received, where his salary, $500, and the "percentage" of fines received by him were not changed. Butler v. Stephens [Ky.] 84 S. W. 745.

In Arkansas a deputy prosecuting attorney who secures a conviction in a blind tiger case before a justice is entitled to his statutory fee of $25, though defendant appeals to the circuit court and is again convicted there, for which the prosecutor is entitled to an additional $25. Good v. State [Ark.] 84 S. W. 638.

26. Such as a stenographer employed in writing letters, pleadings, judgments, opinions, etc., see St. 1897, p. 488, c. 277. Humiston v. Shaffer, 145 Cal. 195, 78 P. 651.

27. Humiston v. Shaffer, 145 Cal. 195, 78 P. 651.

28. County Government Act, § 228. Humiston v. Shaffer, 145 Cal. 195, 78 P. 651.

treasury, up to the total amount allowed as yearly compensation, he has a vested interest in judgments for fines and may look to them for compensation.[29]

United States district attorneys acting as such are presumed to have been rightly appointed, where they are in the undisturbed and unquestioned exercise of the powers of such office.[30] The commission of an assistant to a district attorney or the attorney general of the United States may be signed by the solicitor general when acting as attorney general [31] and the court will judicially notice the incumbency of his office.[32] Such an assistant is not disqualified for a criminal prosecution by having been of counsel in a civil suit in the same connection,[33] and a commission to assist in "preparation and trial" is not strictly construed but includes general authority to act in respect to the case.[34] Assistant district attorneys of the United States being officers of the United States courts [35] cannot be punished by any state court for acts within their duties as such officers.

(§ 11) *C. Municipal attorneys.*—A municipality so empowered may by ordinance establish a law department and employ an attorney with exclusive power to represent it as such [36] and thereafter the mayor and council cannot bind it for services of a special attorney.[37] No implied contract can arise against a city which departed from the statutory mode of contracting.[38] City attorneys are confined to the authority conferred on them by law.[39]

ATTORNEYS FOR THE PUBLIC, see latest topical index.

AUCTIONS AND AUCTIONEERS.

License and regulations.[40]

Sale.[41]—If an auctioneer discloses the fact of his agency the law presumes that he contracted on behalf of his principal,[42] and he is not personally liable for failure of title of the goods sold.[43] Being an agent he cannot purchase for himself or for another,[44] and if he does the sale is void.[45] An announcement by the auctioneer that "everything should be as represented or no sale" applies to every

29. Judgments obtained by him while in office, he is entitled to fifty per cent. up to $4,000, though such judgments are not collected until the year has passed; if he has already obtained $4,000, the balance applies on his next year's pay or the pay of his successor. Hager v. Franklin [Ky.] 84 S. W. 541.

30. It is no objection to an indictment that the appointment of a United State district attorney is invalid on the ground that such attorney is not a permanent resident of the district. United States v. Mitchell, 136 F. 896.

31. Such appointment is sufficient if signed by the solicitor general as "Acting Attorney General," it being presumed without a recital that he was at the time properly acting as such under Rev. St. U. S. § 363. United States v. Twining, 132 F. 129.

32, 33. United States v. Twining, 132 F. 129.

34. He may appear before the grand jury. United States v. Twining, 132 F. 129.

35. Petitioner in his official capacity as assistant United States district attorney, procured the production of state court records before a federal grand jury under an ordinary subpoena duces tecum, and thereafter held possession of such records as such attorney, he was not subject to punishment for contempt of the state court for failure to return such records on demand. In re Leaken, 137 F. 680.

36, 37. Ordinance established a law department and denied the liability of the city for services of any attorney other than the corporation counsel and city attorney. Hope v. Alton, 214 Ill. 102, 73 N. E. 406.

38. Bossard v. Grand Forks [N. D.] 102 N. W. 164.

39. Under the Corporation Court Act, authorizing complaints before such courts to be sworn to before the city attorney, who for that purpose should have power to administer oaths, he has no authority to take an affidavit to a complaint for use before any other court. Johnson v. State [Tex. Cr. App.] 85 S. W. 274.

40, 41. See 3 C. L. 394.

See Clark & S. Agency, 1860-1903, as to agency of an auctioneer.

42. Sufficiency of disclosure held for the jury when the principal's name was not disclosed. Mercer v. Leihy [Mich.] 102 N. W. 972.

43. Goods had been stolen. Mercer v. Leihy [Mich.] 102 N. W. 972.

44. Perkins v. Applegate [Ky.] 85 S. W. 723.

45. Long delay by the owner of the goods in repudiating the transaction is immaterial. Perkins v. Applegate [Ky.] 85 S. W. 723.

articles sold.[46] Latent defects relative to the goods sold must be explained.[47] A tender of an article misrepresented by the auctioneer is not necessary to the rescission of the sale if the purchaser complains and the seller refuses to take the article back.[48] A secret agreement between the owner of the goods and the auctioneer that no sale should be made except on a bid satisfactory to the owner is no defense to an action on the auctioneer's bond to recover the purchase price which he refused to turn over.[49]

AUDITA QUERELA; AUSTRALIAN BALLOTS; AUTREFOIS ACQUIT; BAGGAGE, see latest topical index.

BAIL, CIVIL.

Under the statutes of Michigan a defendant arrested under a capias is not entitled to be released from custody upon the justification of his sureties by affidavit without perfecting the bail according to the rules of court,[50] and the fact that the court has not made any rules relating to the perfection of special bail does not entitle defendant to be discharged before the expiration of the time for taking exceptions to the bail,[51] and the court refusing to release defendant unless the sureties appear in court and justify it in effect establishes a rule that the approval by the court of the sureties is necessary to the perfection of the bail.[52] In an action by sureties against the sheriff for a false return of execution against the principal, failure of the sureties to surrender the principal after action begun on the bond may be pleaded in mitigation.[53]

BAIL, CRIMINAL.

§ 1. *Authority to take and right to give bail.*[54]—Bail is defined as meaning "to set at liberty a person arrested or imprisoned, on security being taken for his appearance," [55] and the right to it extends, as a rule, to all non-capital crimes,[56]

46. A horse represented to be sound. Bailey v. Manley [Vt.] 59 A. 200.
47. Where lots are sold from a plat it is incumbent on the owners to explain to the public anything on the plat which without explanation might be misleading. Slingluff v. Dugan, 98 Md. 518, 56 A. 837.
48. Bailey v. Manley [Vt.] 59 A. 200.
49. The sale was made to the highest bidder and there was no claim that a "puffer" had been used. Gregory v. United States Fidelity & Guaranty Co., 45 Misc. 112, 91 N. Y. S. 595.
50. Comp. Laws, §§ 10,000, 10,032, 10,033, 10,036, 10,037, construed. Ludwick v. Perkins [Mich.] 101 N. W. 66.
51. Comp. Laws, §§ 10,000, 10,031, 10,032, 10,033, 10,036, 10,037, construed. Ludwick Perkins [Mich.] 101 N. W. 66.
52. Ludwick v. Perkins [Mich.] 101 N. W. 66.
53. Prividi v. O'Brien, 91 N. Y. S. 324.
54. See 3 C. L. 395.
55. State v. Davis, 27 Utah, 368, 75 P. 857.
56. The vast majority of crimes are bailable, either as matter of right or as matter of discretion. Sutherland v. St. Lawrence County, 91 N. Y. S. 962. An infant convicted of a misdemeanor and committed to the reform school, pending appeal to the supreme court is entitled to bail. Ball. Am. Codes & St. § 6530. Packenham v. Reed [Wash.] 79 P. 786. The only right of defendant when brought before the magistrate in a bastardy proceeding is to furnish bail acceptable to the magistrate, and the sole power of the magistrate is to admit him to bail. Rev. Codes 1899, § 7842. State v. Carroll [N. D.] 101 N. W. 317. In such cases a formal order holding the defendant for bail is unnecessary. Id. A defendant acquitted of a charge of murder in the first degree by virtue of a conviction of murder in the second degree, upon reversal of such conviction, is entitled to bail, since he cannot again be prosecuted for a capital offense. Ex parte Moore [Tex. Cr. App.] 80 S. W. 620.

either while the accused is waiting trial or pending appeal.[57] It is not designed as a satisfaction of the offense when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense.[58] Cash deposits in lieu of bail are provided for by statute in some states.[59]

§ 2. *Making of recognizance and sufficiency thereof.*[60]—A recognizance of bail bond, in general, binds to three things: (1) To appear and answer either to a specified charge, or to such matters as may be objected; (2) to stand to and abide the judgment of the court; (3) not to depart without leave of the court; each of which particulars is distinct and independent.[61] The statement in the bail bond of what is regarded as the offense is, at most, but a recital,[62] and errors and imperfections as to that matter are generally immaterial;[63] but in Texas the bond must specify whether the charge is of a felony or misdemeanor,[64] and a recognizance on appeal must give the same information;[65] must state the punishment assessed;[66] the term and court to which the appeal is taken;[67] and must require defendant to abide the judgment of the appellate court "in this cause."[68] It is not necessary for

57. After an appeal from a judgment admitting appellant to bail, if he gives bond and is liberated his appeal will be dismissed. Ex parte Elmore [Tex. Cr. App.] 88 S. W. 347. Upon refusal of bail by the lower court, pending appeal to the supreme court, habeas corpus in the latter court is the proper practice. Packenham v. Reed [Wash.] 79 P. 786. It is within the discretion of the court to admit to bail pending appeal from an order remanding one held under an extradition warrant. Farrell v. Hawley [Conn.] 61 A. 502.

58. State v. Schenck [N. C.] 49 S. E. 917.

59. Deposit with county treasurer. Code Cr. Proc. § 586. McNamara v. Wallace, 97 App. Div. 76, 89 N. Y. S. 591. Statute does not apply to police justices, and the acceptance of such deposit by a police justice is unauthorized. Id. A magistrate may take bail or a deposit of money for defendant's appearance, upon adjournment of an examination, although the crime charged be punishable by imprisonment exceeding five years, the statute prohibiting bail by magistrates in such cases, referring only to bail after the prisoner is held to answer to the grand jury. Code Cr. Proc. § 557; Sutherland v. St. Lawrence County, 91 N. Y. S. 962. Where a legatee's rights in his legacy are confined to the use of the same for support and maintenance only, he cannot legally deposit it as security for his appearance for examination before a magistrate. Id.

60. See 3 C. L. 396.

61. State v. Schenck [N. C.] 49 S. E. 917.

62. Pernetti v. People, 99 App. Div. 391, 91 N. Y. S. 210.

63. And where a recognizance bond binds defendant to answer an indictment for a violation of a statute, it is not insufficient for merely referring to the statute without describing the offense. State v. Epstein, 186 Mo. 89, 84 S. W. 1120. In Mississippi it is not essential that bonds and recognizances in criminal cases should describe the offense actually committed, but they are valid to hold the defendant to answer for the offense committed, unless discharged by the court. Code 1892, § 1395. Where a bond was conditioned for appearance to answer the charge of robbery and defendant failed to appear to answer a charge of grand larceny, for which he had been indicted, a judgment on the bond in favor of the state was sustained. Smith v. State [Miss.] 38 So. 335.

64. Code Cr. Proc. 1895, art. 309, subd. 3 (Willson's St. Supp. 1897-1900, p. 92, c. 4). Wisdom v. State [Tex. Cr. App.] 86 S. W. 756. A bond, stating that defendant is charged with embezzlement, but not stating the amount, so as to show whether the charge is a felony or a misdemeanor, is insufficient. Nichols v. State [Tex. Cr. App.] 83 S. W. 1113. But a bond that states that defendant was charged with embezzlement of over $50 satisfies the statute, that being a statutory felony. Id. A recital that the charge against the defendant is abortion (State v. Davis, 27 Utah, 368, 75 P. 857), or seduction (Wisdom v. State [Tex. Cr. App.] 86 S. W. 756), is a sufficient statement of the offense charged.

65. A recognizance on appeal from a conviction of misdemeanor must state that appellant was convicted of a misdemeanor (Hannon v. State [Tex. r. App.] 87 S. W. 152; Wisdom v. State [Tex. Cr. App.] 86 S. W. 756), and not undertake to set out the offense in terms. Hart v. State [Tex. Cr. App.] 84 S. W. 592.

66. Code Cr. Proc. 1895, art. 887. Hart v. State [Tex. Cr. App.] 84 S. W. 592; Saufly v. State [Tex. Cr. App.] 83 S. W. 709; Flynn v. State [Tex. Cr. App.] 82 S. W. 509; Gordon v. State [Tex. Cr. App.] 82 S. W. 1037; Hannon v. State [Tex. Cr. App.] 87 S. W. 152; Thomas v. State [Tex. Cr. App.] 87 S. W. 353.

67. Code Cr. Proc. 1895, art. 889, as amended by Acts 27th Leg. p. 291, c. 124 (Russell v. State [Tex. Cr. App.] 84 S. W. 589), but a bail bond conditioned for defendant's "personal appearance before the criminal district court of H. county now in session, and to remain from day to day," sufficiently designates the time, place and court before which he is to appear (Nichols v. State [Tex. Cr. App.] 83 S. W. 1113).

68. The absence of the words "in this

the recognizance to state that the warrant had a proper return signed by the officer serving it;[69] nor to recite the fact that defendant pleaded;[70] nor to particularly describe the magistrate;[71] nor is it vitiated by requiring the defendant to "further do and receive that which the said court shall then consider," those words being mere surplusage.[72] There is no substantial difference between a recognizance at common law and the one provided by the Missouri statute.[73] A bail bond[74] or recognizance on appeal,[75] accepted without authority of law, is void, and a deposit of money accepted, in lieu of bail, without authority of law, cannot be retained.[76] A recognizance must be signed in the presence of the committing magistrate,[77] and be taken while the court is in session;[78] but the signature of the principal is not necessary to bind the surety,[79] and approval of the bond is not necessary.[80]

§ 3. *Fulfillment or forfeiture; discharge; rights and liabilities of sureties.*[81]—The dominion of the bail is a continuance of the original imprisonment,[82] the surety signing a bail bond being, in legal effect, substituted for the jailor.[83] A recognizance of bail is taken to secure the attendance of the party accused to answer the indictment and to submit to a trial and the judgment of the court thereon.[84] These obligations are not mere idle forms, but are required and are made for the purposes expressed in them;[85] and actual appearance in court is necessary to prevent the forfeiture of bail.[86] It is the duty of the bail, when ordered by the court, to produce the prisoner,[87] whether or not the charge set forth in the indictment found is identical with that stated in the bail bond.[88] But bail will be exonerated where the performance of the condition is rendered impossible by

cause" is a fatal defect. Mallard v. State [Tex. Cr. App.] 83 S. W. 1114; Hannon v State [Tex. Cr. App.] 87 S. W. 152. But the use of the words "in this court," instead of "in this cause," will not vitiate the recognizance, when subsequent portions of it show that it was taken in the particular cause. Cassens v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 708, 88 S. W. 229.

69, 70. State v. Russ [Me.] 60 A. 704.

71. A recognizance for appearance of defendant, given upon adjournment of a preliminary examination, is not void for failure to state of what township, county and state the justice is a magistrate, the other records in the case sufficiently showing it. Leis v. State [Kan.] 80 P. 949.

72. State v. Russ [Me.] 60 A. 704.

73. State v. Boehm, 184 Mo. 201, 83 S. W. 477.

74. A justice in Mississippi cannot bind a defendant over to appear at the circuit court on a charge of conspiracy to rob, as that is a misdemeanor and justices have final jurisdiction of such offenses. He must dispose of the case. Code of 1892, §§ 2420, 2421. Smith v. State [Miss.] 38 So. 319.

75. In a case that is non-appealable, as in case of a conviction of simple assault and fine of $5, where appeals are not allowed unless the punishment exceeds $100. Thomas v. State [Tex. Cr. App.] 87 S. W. 353.

76. McNamara v. Wallace, 97 App. Div. 76, 89 N. Y. S. 591; Sutherland v. St. Lawrence County, 91 N. Y. S. 962.

77. State v. Cornell [S. C.] 50 S. E. 22.

78. In the absence of positive evidence of adjournment before the taking of the bond, it will be assumed that the justice's court, as a committing court, was still in session when the bond was approved. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 564.

79. Evidence held insufficient to show that the surety signed an appearance recognizance in the general sessions on condition that the principal should also sign it. State v. Cornell [S. C.] 50 S. E. 22.

80. It is enough that the constable in whose custody the prisoner was, took the bond, released him and placed it with the committing magistrate. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 564.

81. See 3 C. L. 397.

82. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

83. Pernetti v. People, 99 App. Div. 391, 91 N. Y. S. 210; Coleman v. State, 121 Ga. 594, 49 S. E. 716; State v. Schenck [N. C.] 49 S. E. 917.

84. State v. Schenck [N. C.] 49 S. E. 917.

85. State v. Frankgos [Tenn.] 85 S. W. 79.

86. An offer by defendant's attorney to enter a plea of guilty for him affords no defense in a proceeding to forfeit bail. Wells v. Terrell, 121 Ga. 368, 49 S. E. 319; State v. Schenck [N. C.] 49 S. E. 917.

87. Pernetti v. People, 99 App. Div. 391, N. Y. S. 210.

88. If the greater offense named in the bond includes the smaller offense charged in the indictment, or, if the smaller offense named in the bond forms an element of the greater offense named in the indictment, or if the two offenses contain a common element, or if the charge in the indictment is one growing out of the same circumstances, as did the charge on which the bail was taken, the security will, in either case, be required to produce the body of his principal to answer the indictment.

the act of God, the act of the obligee or the act of the law.[89] Not only is it the duty of the surety to produce his principal to answer whatever charge may be made against him, but it is his further duty to see to it that the principal, at all times during the term of the court to which he is bound to appear, is present to answer the call of the court and to do what the law may require.[90]

The continuance of a criminal case does not release the recognizance given for the appearance of the accused,[91] and a mere order to furnish surety in a larger sum for further examination does not supersede the prior bail bond, so as to release the surety thereon.[92]

The bail has a legal dominion over the accused,[93] and may at any time surrender him to the custody of the law, in discharge of their obligation.[94, 95] If the accused refuses to surrender, the bail can seize him and hold him in order to make delivery in discharge of the bond,[96] and in a proper case may get another to make the seizure for him.[97]

Under the code of North Carolina, providing for the surrender of the principal by his sureties, at any time before execution against him,[98] defendant's appearance, conviction and sentence, without his formal delivery to the custody of the sheriff by order of the court, does not exonerate the bail.[99] The bond given on review is merely an appearance bond and it is error to enter judgment on affirmance against the sureties for the amount of the fine.[1]

§ 4. *Enforcement of bond or recognizance.*[2]—A recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture.[3] Moneys deposited in lieu of bail are to be treated as if they had been recovered on a recognizance.[4] Where the condition of the bail

Pernetti v. People, 99 App. Div. 391, 91 N. Y. S. 210; Wells v. Ferrell, 121 Ga. 368, 49 S. E. 319. Surety held responsible for prisoner's appearance to answer to an indictment for perjury, growing out of false swearing at the inquest, the charge of homicide on which he was held to bail having been dismissed. Pernetti v. People, 99 App. Div. 391, 91 N. Y. S. 210. Sureties on a bail bond to answer to a charge of larceny from the person, held bound to produce the defendant to answer an indictment for simple larceny. Wells v. Ferrell, 121 Ga. 368, 49 S. E. 319.

89. Accused prevented from appearing by his removal by the court for trial under indictment in another district. In re Beavers, 131 F. 366, citing Taylor v. Taintor, 16 Wall. [U. S.] 366, 21 Law. Ed. 287.

90. State v. Schenck [N. C.] 49 S. E. 917.

91. State v. Morgan, 136 N. C. 593, 48 S. E. 604. The St. Louis court of criminal correction, under its power to make rules as to the continuance of criminal examinations (Rev. St. 1899, pp. 2541, 2542, § 15) can adjourn such proceedings for more than ten days, without releasing the bail, notwithstanding the general prohibition of adjournments for more than 10 days contained in section 2448, Rev. St. 1899. State v. Epstein, 186 Mo. 144, 84 S. W. 1123.

92. After the commencement of the examination the magistrate ordered the principal to furnish surety in a larger sum, but he left the court without furnishing it, and failed to appear for further examination. The surety was held. People v. Newman, 100 App. Div. 436, 91 N. Y. S. 811.

93. State v. Schenck [N. C.] 49 S. E. 917.

94, 95. State v. Schenck [N. C.] 49 S. E. 917; Coleman v. State, 121 Ga. 594, 49 S. E. 716.

96. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

97. If the surety is a woman, or physically too weak, or if the accused is at a distant point and out of the reach of his bondsman, the bail may lawfully deputize an agent to seize the body and deliver him to the sheriff. Coleman v. State, 121 Ga. 594, 49 S. E. 716, citing Clark v. Gordon, 82 Ga. 613; Pen. Code 1895, § 935; Taylor v. Taintor, 16 Wall. [U. S.] 371, 21 Law. Ed. 287. Without proof of authority another person than the bail cannot authorize a third person to make such arrest. The son of the bail. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

98. Code, § 1230.

99. Defendant appeared, was tried and convicted and ordered to pay a fine and costs. He excepted and appealed, was ordered to give an undertaking for costs of the appeal, and undertaking to stay the execution on the judgment, and one for his appearance at the next term, but failed to give any of the undertakings or to pay the fine and costs. His bail were held. State v. Schenck [N. C.] 49 S. E. 917.

1. Tucker v. Moultrie [Ga.] 50 S. E. 61.

2. See 3 C. L. 398.

3. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

4. Money deposited in lieu of bail for appearance for examination, under Code Cr. Proc. § 192, cannot be recovered, even

bond is violated and the bond is duly estreated, a perfect cause of action against the surety is acquired;[5] and a wise and sound public policy requires a rigid enforcement of these bonds when breached.[6] The provision of the South Carolina code that a forfeited recognizance shall be estreated without delay is merely directory.[7] In proceedings to estreat a recognizance, it must be alleged that the signing was in the presence of the magistrate,[8] and that defendant was called at the door of the court house and failed to answer.[9] In Missouri where defendant, without sufficient excuse, fails to appear, the court must cause the fact to be entered and thereupon the recognizance is forfeited;[10] but the mere noting of a forfeiture is not the final determination of the liability of the defendant and his sureties. It is a mere preliminary step to the issuance of scire facias.[11] The truth of the entry of the forfeiture of a recognizance on the record can be contested only by motion to set aside or vacate the entry, or to reverse the order of forfeiture.[12] In Utah,[13] the district court may direct the district attorney to institute an action on a forfeited bail bond.[14] The office and purpose of the scire facias is to notify the sureties of the default of their principal and afford them opportunity to show cause why execution should not issue against them.[15] In Tennessee a scire facias in proceedings on a forfeited recognizance is not defective merely because it fails to recite "in the name of the state," where it contains every material statement in the form prescribed;[16] nor will it be quashed, because it was issued against the sureties alone.[17] A variance between a bail bond stating that defendant is charged with seduction and a scire facias stating that he was charged with a felony is immaterial.[18] A demurrer to a scire facias in proceedings to enforce a recognizance bond is waived by pleading over.[19] The answer of the bail to the scire facias must be in writing,[20] and cannot contradict or traverse the entry of the forfeiture.[21] In sufficiency of the indictment is no defense to proceedings to forfeit bail for nonappearance.[22] A judgment on a scire facias upon a recognizance of bail is a bar

though an executor deposits funds belonging to an estate. Code Cr. Proc. § 596. Sutherland v. St. Lawrence County, 91 N. Y. S. 962.

5. Kirk v. United States [C. C. A.] 137 F. 753.

6. State v. Frankgos [Tenn.] 85 S. W. 79. A suit or scire facias founded on the forfeiture of a recognizance is a collateral proceeding. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

7. Cr. Code 1902, § 85. A proceeding in 1903 to estreat a recognizance forfeited in 1897 held not barred by laches. State v. Cornell [S. C.] 50 S. E. 22.

8. An allegation that defendant was bound over in a bond signed by two sureties is a sufficient compliance. State v. Cornell [S. C.] 50 S. E. 22.

9. Special proceedings to estreat a recognizance do not fall within rule 60 of the circuit court that, where a party has suffered a nonsuit, all proceedings in a new action shall be suspended until the costs of the former action have been paid, so as to bar the state, because of its failure to pay costs of action by the state against the surety on the recognizance on the civil side of the court. State v. Cornell [S. C.] 50 S. E. 22.

10. State v. Boehm, 184 Mo. 201, 83 S. W. 477.

11. State v. Epstein, 186 Mo. 89, 84 S. W. 1120.

12. An answer denying the truth of the record, though informal, will be treated as such motion, when that appears to have been the intention of defendant. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

13. Sess. Laws 1901, p. 70, c. 69. State v. Davis,, 27 Utah, 368, 75 P. 857.

14. McNamara v. Wallace, 97 App. Div. 76, 89 N. Y. S. 591; State v. Davis, 27 Utah, 368, 75 P. 857.

15. State v. Epstein, 186 Mo. 89, 84 S. W. 112.

16. Acts 1897, p. 183, c. 47. State v. Frankgos [Tenn.] 85 S. W. 79.

17. Under Shannon's Code, § 4484, persons jointly or severally, or jointly and severally bound in the same instrument may all or any of them be sued in the same action. State v. Frankgos [Tenn.] 85 S. W. 79.

18. Wisdom v. State [Tex. Cr. App.] 86 S. W. 756.

19. State v. Epstein, 186 Mo. 89, 84 S. W. 1120.

20. Cr. Code, § 94, subsec. 3 provides that all the proceedings subsequent to the summons shall be the same as in ordinary civil actions. Bonner v. Com. [Ky.] 85 S. W. 1185.

21. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

22. The clause in a recognizance "not to depart the court without leave" is a very significant one. State v. Boehm, 184 Mo. 201, 83 S. W. 477.

to defenses which might have been made against the scire facias,[23] and cannot be released by the court at a later term.[24] In Missouri an appeal in proceedings by scire facias to enforce a recognizance, in a case of felony, lies to the supreme court, though the amount involved was but $600 and costs;[25] and such an appeal is not an original action at law, but a continuation of the criminal proceedings.[26] Where a surety resides in another district from that in which the bond was filed and remains there, his personal liability on the bond must be established in the district where he resides.[27] Under a statute requiring the return of a bail bond to the clerk of the court at which the defendant is required to answer, but not requiring it to be filed,[28] a complaint is not insufficient because it failed to allege the filing of the bond.[29] Defendants in an action on a bail bond, without putting in a plea of non est factum, may raise the objection that the bond was taken when the court was not in session and was void.[30] In an action on a forfeited recognizance, no judgment can be rendered against the bail in the absence of the record from the examining court showing that the accused was held over and was in custody.[31] Under the statutory provisions of Missouri, a judgment for the state, in proceedings to enforce a recognizance bond, is not reversible merely because the scire facias recited a forfeiture on a day other than the one when forfeiture was noted.[32]

§ 5. *Remission of forfeiture and return of deposit in lieu of bail.*[33]—An application for the reduction or remission of the penalty in forfeited recognizances is addressed to the discretion of the court;[34] and is to be exercised only in extreme cases.[35] The refusal of a motion to set aside the entry of forfeiture does not prevent the granting of relief under the statute authorizing a reduction or remission of the penalty in the discretion of the court.[36] Money deposited in lieu of bail is placed in the possession and control of the court, with power to order it paid to the county treasurer in case of default or to return it to the accused or his order, in case of surrender before default.[37] A deposit of money in lieu of bail,[38] which is made by a third person, not as a loan to the accused but as a pledge to secure his release, cannot be assigned by the accused after surrendering himself, so as to give the assignee any right thereto as against the depositor.[39]

BAILMENT.[40]

§ 1. *Definition and mode of creation.*[41]—A bailment is in a sense the holding of goods in trust.[42] It is the delivery of personal property to be held for some

23, 24. State v. Boner [W. Va.] 49 S. E. 944.
25, 26. State v. Epstein, 186 Mo. 89, 84 S. W. 1120.
27. Kirk v. United States [C. C. A.] 137 F. 753.
28. Rev. St. 1898, § 4686. State v. Davis, 27 Utah, 368, 75 P. 857.
29. State v. Davis, 27 Utah, 368, 75 P. 857.
30. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 564.
31. Bonner v. Commonwealth [Ky.] 85 S. W. 1185.
32. State v. Epstein, 186 Mo. 89, 84 S. W. 1120.
33. See 3 C. L. 399.
34. North Carolina Code, § 1205. The action of the court is not reviewable in the supreme court. State v. Morgan, 136 N. C. 593, 48 S. E. 604.
35. Shannon's Code, § 5182. It does not authorize relief merely because the sureties have, in good faith and at much expense, made unavailing efforts to recapture the criminal. State v. Frankgos [Tenn.] 85 S. W. 79.
36. Code, § 1205. State v. Morgan, 136 N. C. 593, 48 S. E. 604.
37. Rev. Laws, c. 217, §§ 78, 79. Way v. Day [Mass.] 73 N. E. 543.
38. Rev. Laws, c. 217, §§ 77-79. Way v. Day [Mass.] 73 N. E. 543.
39. Way v. Day [Mass.] 73 N. E. 543.
40. As to particular kinds of bailments, see such topics as Animals (Agistment) 5

purpose and to be returned when the object of the delivery is accomplished.[43] There is no intent to pass title as there must be in a sale.[44] It is not necessary that there be an express stipulation for the return of the property, although the right to compel their redelivery must exist.[45] Though return in specie is not indispensable,[46] the fact that the contract contemplated a use of the property making such return impossible is to be considered in determining the nature of the transaction.[47]

§ 2. *Rights and liabilities as between bailor and bailee.*[48]—An ordinary bailee is not an absolute insurer, but it is possible for him to change his common-law liability by a special contract,[49] and to fix the measure of liability.[50] But an

C. L. 117; Banking and Finance, 5 C. L. 347; Carriers, 3 C. L. 591; Warehousing and Deposits, 4 C. L. 1820.

41. See 3 C. L. 400.

42. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575.

43. A Delaware statute provides that the property must be the subject of larceny in order to be embezzled by the bailee. 19 Del. Laws, p. 1134, c. 782. State v. Seeny [Del.] 59 A. 48. Within the meaning of article 938, Texas Pen. Code 1895, the intrusting of a horse to an employe is a bailment and the riding to a different place than ordered constitutes sufficient conversion to convict for embezzlement. Wilson v. State [Tex. Cr. App.] 82 S. W. 651.

44. Deburghraeve v. Antenrieth, 24 Pa. Super. Ct. 267. Goods shipped on trial or der with right to test the same for 20 days is a bailment unless goods are longer retained. O'Donnell v. Wing, 121 Ga. 717, 49 S. E. 720. A lease of a piano to be terminated at any time, payment to be made for use of instrument which should become property of lessee on payment of certain sum, is a contract of bailment. Painter v. Snyder, 22 Pa. Super. Ct. 603. Where plaintiff should install a machine to be paid for in three payments, defendant to afford facilities and keep machine insured, it was held the transaction did not come within the definition of bailment but title passed to defendant. Wiliam R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174. The intention of the parties to make a sale as originally expressed does not prevent a change to a bailment while contract is executory. In re Naylor Mfg. Co., 135 F. 206. Intention to make a pledge of stock and not a sale is illustrated in In re McLean-Bowman Co., 138 F. 181. If no other facts appear in the case than that merchandise has been shipped by one party to another to be sold on commission, there is a bailment and not a transfer of title. Williamson & Co v. Prairie Queen Milling Co., 111 Ill. App. 373.

45. A contract to "let, lease and hire" a horse for a definite term, rent to be paid monthly, constitutes a contract of bailment. Porter v. Duncan, 23 Pa. Super. Ct. 58. If there is no provision for the return of the goods or the payment of commissions and the goods are to be paid for when sold, there is a sale and not a bailment. In re Martin-Vernon Music Co., 132 F. 983. But if a sender of goods reserves a right to compel their return,, is to pay commissions for their sale and is to return any advances made by the consignee, the transaction is a bailment. In re Flanders [C. C. A.] 134 F. 560.

46. To constitute a bailment of stock it is not essential that the identical certificates received by the bailee be returned, but valid certificates of the same kind and for an equivalent number of shares must be in the bailee's possession. Bunte v. Schumann, 92 N. Y. S. 806.

47. Where grain is delivered at an elevator which does a general buying and selling business with knowledge that the same will be mixed with other grain and sales be made from the mass, the transaction is a sale, not a bailment. Thompson v. Jordan [Ind.] 73 N. E. 1087.

48. See 3 C. L. 401.

49. But a party agreeing to be responsible for all coal after delivery alongside its docks assumes only the liability imposed by law. Fairmont Coal Co. v. Jones & Adams Co. [C. C. A.] 134 F. 711.

Particular contracts construed: The clause "all of which shall be returned * * * in good order and condition, ordinary wear and tear excepted" did not increase liability of bailee in case of accidental fire. D'Echaux v. Gibson Cypress Lumber Co. [La.] 38 So. 476. A stipulation in a lease that a lessee should not be held liable for damage from the elements does not excuse the want of ordinary care to protect from storm and rain. Sinischalchi v. Baslico, 92 N. Y. S. 722.

NOTE. Warehouseman—Limitation of Liability: The plaintiff stored apples in the defendant's warehouse. During the winter, through the negligence of the defendant, the apples were damaged by freezing. The defendant endeavored to relieve himself from liability by proving that he gave a receipt containing the words "At owner's risk." Held, that the giving of such a receipt did not relieve the defendant from liability for negligence. Denver Public Warehouse Co. v. Munger [Colo. App.] 77 P. 5. A bailee for hire may limit his liability by a special contract and in the absence of fraud, in weight of authority, may contract away his responsibility for any degree of negligence. New Jersey Steam Nav. Co. v. Merchant's Bank, 6 How. [U. S.] 344, 12 Law. Ed. 465. Story on Bailments [9th Ed.] § 22. A contract relieving him from the duty of care he owes must be clear and explicit. The principal case assimilates warehousemen to common carriers and suggests that the term "negligence" should be used, as the New York courts require in

express undertaking by a bailee for hire to carry goods safely does not render him responsible for the mischievous act of a third person.[51] A common carrier becomes responsible as a mere bailee when goods are in its possession after sufficient attempts have been made toward delivery.[52]

In a contract of bailment for hire, reasonable and proper care must be used by the bailee.[53] The bailor, also, undertakes to exercise adequate deligence, skill and

the latter case. Mynard v. S. B. & R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28. Assuming, as, the court does, that there was sufficient notice to introduce this release into the contract, the words "At owner's risk," according to a rational interpretation, would seem to have accomplished that result. (1 Columbia L. R. 265; Id. 488.) 4 Columbia L. R. 598.

50. The words "just remuneration" used in a contract are interpreted to mean the remuneration allowed by law. Mattern v. McCarty [Neb.] 102 N. W. 468.

51. While a picture is being prepared by bailee for safe carriage, it is injured by willful act of a boy, bailee not liable. Jaminet v. American Storage & Moving Co. [Mo. App.] 84 S. W. 128.

52. After holding a shipment of liquor a week with consent of consignee, the carrier is subject as a bailee to Ky. St. 1903, § 2557, subsec. 4. Adams Exp. Co. v. Commonwealth [Ky.] 87 S. W. 1111. See, also, Carriers, 3 C. L. 591.

53. Mattern v. McCarty [Neb.] 102 N. W. 468. In renting a typewriting machine the bailee must use ordinary care. Phillips v. International Text Book Co., 26 Pa. Super. Ct. 230. Bailee returns to starting point with a horse he knows to be sick. Held, that it cannot be said as a matter of law that defendant did not use ordinary care. Haralson v. Hahl [Tex. Civ. App.] 85 S. W. 1008. But failure to have more than one attendant for a check room at which 300 persons check articles of wearing apparel for hire is negligence. Manson v. Pullman Palace Car Porters' & R. Employes Beneficial Ass'n [N. J. Law] 60 A. 1120.

NOTE. Loss of Goods Resulting From Violation Of Ordinance: Defendant in error sent to plaintiff in error some articles to be laundered. While in the possession of the laundry company, the articles were destroyed by fire, which entered the building of plaintiff in error through windows which were not protected by fire-proof shutters, as required by city ordinance. The ordinance provided that "all brick buildings, except dwelling houses, school houses, churches and all strictly fire-proof buildings, shall have fire-proof shutters on every entrance on the rear walls and courts, with openings within forty feet of each other." In this action to recover the value of the articles destroyed, held, that the ordinance was intended primarily for the protection of the public, and that plaintiff in error was, therefore, not liable for the loss of the goods,—the violation of the ordinance, by plaintiff in error, being of "No evidential value upon the question of negligence." Frontier Steam Laundry Co. v. Connolly [Neb.] 101 N. W. 995. It is frequently difficult to decide whether an ordinance is intended for the protection of individuals or for that of the public only. If the ordinance is not for the benefit of individuals, but is intended to protect only the public, a violation thereof furnishes no ground of action to a private individual as against the one charged with violating the ordinance. Redress must be had from the municipality. Flynn v. Canton Co. of Baltimore, 40 Md. 312, 17 Am. Rep. 603; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; Vandyke v. City of Cincinnati & Harbeson, 1 Disney [Ohio] 532; Taylor v. Lake Shore, etc., R. Co., 45 Mich. 74, 40 Am. Rep. 457; Kirby v. Boylston Market Ass'n, 14 Gray [Mass.] 249, 74 Am. Dec. 682; Moore v. Gadsden, 93 N. Y. 12. It might be observed, however, that most of the cases supporting this principal seem to be instances where action was brought against a landowner who had allowed snow or ice to accumulate in front of his premises, contrary to city ordinance, whereby passersby slipped and were injured. In the case under discussion, there was a dissenting opinion, one judge holding that the ordinance was as much applicable to individuals, in the matter of protection, as to the public as a whole. Where ordinances are for the benefit of individuals, there exists a conflict of authority as to the degree of negligence attributable to one whose violation of an ordinance has resulted in loss to another. Some cases go to the extent of holding such violation to be negligence per se. Queen v. Dayton Coal & Iron Co., 95 Tenn. 458, 49 Am. St. Rep. 935, 30 L. R. A. 82; Smith v. The Milwaukee Build. & Trad. Exch., 91 Wis. 360, 51 Am. St. Rep. 912, 30 L. R. A. 504; Billings v. Breinig, 45 Mich. 65; Messenger v. Pate, 42 Iowa, 443; Texas & P. R. Co. v. Brown, 11 Tex. Civ. App. 503; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Siemers v. Eisen, 54 Cal. 418; Correll v. B. C. R. & M. R. Co., 38 Iowa, 120, 18 Am. Rep. 22; Central R. Co. v. Curtis, 87 Ga. 416, 13 S. E. 757. Other courts hold that the violation of an ordinance does not constitute negligence per se, but is competent evidence of negligence to be submitted to the consideration of the jury. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; Conner v. Traction Co., 173 Pa. 602, 34 A. 238; Clark v. Boston & M. R. Co., 64 N. H. 323; Beck v. Vancouver R. Co., 25 Or. 32; Jeffs v. Rio Grande Western Co., 9 Utah, 374; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548; Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 28 Law. Ed. 410; Hanlon v. South Boston Horse R., 129 Mass. 310. Even though defendant has violated an ordinance, that fact alone will not fix his liability unless such violation be shown to have proximately caused the injury of which complaint is made. Philadelphia, Wilmington, etc., R. Co. v. Stebbing, 62 Md. 504; Clisby v. Mobile & Ohio R. Co., 78 Miss. 937; Selleck v. Lake Shore & M. S. R. Co., 93 Mich. 375; Stone v. Boston & Albany R. Co., 171 Mass. 536, 41 L. R. A. 794; Railway Co. v.

prudence in furnishing the hired article,[54] and assumes all ordinary risks incident to the purpose for which the property is to be used.[55] A gratuitous bailee is required to use ordinary care.[56] The same degree of care is required when a bailment is mutually advantageous to both parties.[57] A bailee not being informed or knowing the use of the bailed article cannot be held liable for special damages caused by its delay.[58] When there is no time stipulated for the return of the property, bailed for the purpose of repair, a reasonable time is allowed the bailee for the doing of his work.[59]

When property is destroyed or injured while in the possession of the bailee, the burden is upon him to show reasonable care.[60] But the evidence of bailor must show that the loss of the property occurred before the redelivery to him.[61] When bailee has shown that injury occurred through operation of forces not within his control, the one complaining must disprove asserted cause of loss or show want of reasonable care.[62] A total default in delivery is prima facie evidence of negligence.[63] Burden of proof may be changed by statute.[64]

The law gives to a common carrier a lien upon property bailed to him,[65] also to a bailee who has cared for it,[66] or to one with whom it has been left for repair while the property is in their possession.[67] A bailee who insures the property which he holds has in case of loss the right to indemnify himself to the full extent of his lien out of the amount for which the property is insured.[68] If he has not

Staley, 41 Ohio St. 118, 52 Am. Rep. 74; Butcher v. W. Va. & P. R. R. Co., 37 W. Va. 180, 18 L. R. A. 519; Sowles v. Moore, 65 Vt. 322, 21 L. R. A. 723.—From 3 Mich. L. R. 404.

54. Ordinary diligence must be used by a livery stable keeper in furnishing a team. Stanely v. Steele [Conn.] 60 A. 640.

55. Plaintiff hiring to defendant horses for logging purposes assumes ordinary risks. Alden v. Grande Ronde Lumber Co. [Or.] 81 P. 385.

56. In case of a gratuitous bailee, liberal construction should be given to clause "Don't pay any money out except for stock." Miller v. Dayton [Minn.] 102 N. W. 862.

57. Mattern v. McCarty [Neb.] 102 N. W. 468.

58. Pine Bluff Iron Works v. Boling & Bro. [Ark.] 88 S. W. 306.

59. Dutton v. Shaw [Miss.] 38 So. 638.

60. Sinischalchi v. Baslico,, 92 N. Y. S. 722; Manson v. Pullman Palace Car Porters' & R. Employes' Beneficial Ass'n [N. J. Law] 60 A. 1120. A horse is injured while in bailee's possession. Bailee must show that injury was not caused by his negligence. Powers v. Jughardt, 91 N. Y. S. 556.

61. Emdin v. Haas, 92 N. Y. S. 312. Proof of delivery of cloth to bailee, appearance of spots on its return and sponging on wrong side, held sufficient to throw burden of proof on the defendant. Cossel v. Altschul, 91 N. Y. S. 1.

62. Defendant introduced evidence to show accidental destruction of horses by fire. Burden is then on bailor to show want of ordinary care. Hunter v. Ricke Bros. [Iowa] 102 N. W. 826.

63. Simonoff v. Fox, 91 N. Y. S. 757.

64. Article 2723, La. Civ. Code. D'Echaux v. Gibson Cypress Lumber Co. [La.] 38 So. 476.

65. Nicolette Lumber CoC. v. People's Coal Co., 26 Pa. Super. Ct. 575.

66. Section 3445, Rev. St. of Idaho 1887, as amended by act of Feb. 9, 1899, gives a bailee a lien in the property which he has cared for and protected while the same is in his possession. If two of three tenants in common employ another person to care for the property, the latter is entitled to a lien. Williamson v. Moore [Idaho] 80 P. 227.

67. Dutton v. Shaw [Miss.] 38 So. 638.

68. Johnston v. Charles Abresch Co. [Wis.] 101 N. W. 395.

NOTE. Adoption of insurance policy: Defendant, being engaged in the manufacture, sale, and repairing of carriages, etc., procured a policy of insurance covering its goods and all materials and supplies used in its business, "either its own or held by it in trust or on commission or in storage or for repairs." The insured property, including a carriage belonging to plaintiff which was at defendant's shop for repairs, was destroyed by fire. Defendant, in settling with the insurance company, did not claim to recover the value of the carriage, but only so much as was due it thereon for the repairs, although plaintiff had notified both it and the insurance company, immediately after the fire, of her intention to claim indemnity under the policy. Held, that the policy covered the whole value of the carriage, and that plaintiff could recover of defendant her proportional share of the insurance less the amount due for repairs. Johnston v. Chas. Abresch Co. [Wis.] 101 N. W. 395. Though two of the justices dissented from the holding, it seems to be fully in accord with the great weight of precedent. Warehousemen, commission men, common carriers and bailees generally have such an insurable interest in the bailed goods that they may insure them for their full value, either with or without the knowledge of the owner, and the latter may adopt the contract after the occurrence of

proceeded in accordance with the agreement, he may still have a lien for the benefit accepted by bailor less the damages resulting from breach of the contract.[69] A bailee who has a lien may retain possession until charges are paid or tendered.[70] A tender of actual amount is necessary, although an improper one is demanded.[71] A lienor unless otherwise provided by statute loses his lien on surrender of possession of the property.[72] Statutes may limit the right of possession to a certain time or provide for a lien without possession.[73] A bailee who has a lien may be authorized by statute to sell the property and retain the amount of his claim.[74]

A person cannot be made a bailee against his will, but he has no right to remove the property so as to destroy or injure it.[75] When bailee and bailor have agreed upon a place of storage and the bailee later removes the property without the bailor's consent, the former is liable in case of destruction of property by fire.[76] When a lessee provides for the sale of the increase of his stock and the proceeds are to be divided between lessor and lessee, the lessor is entitled to receive his half as soon as property is sold.[77]

§ 3. *Rights and liabilities as to third persons.*[78]—The purchaser of the bailee gets no better rights than his vendor had,[79] Nor can a carrier have a lien upon goods shipped by a bailee without the owner's authority.[80] The receiver of a consignee has no right to hold bailed property against the owner.[81] If a third person buys from a bailee goods that have been shipped to the latter on a trial order,

the loss, as in this case. See 1 May on Insurance, pp. 80, 95; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 Law. Ed. 868; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 Law. Ed. 730; Pelzer Mfg. Co. v. St. P. Fire & Marine Ins. Co., 41 F. 271; Johnson v. Campbell, 120 Mass. 449; Fire Ins. Ass'n of Eng. v. Merchants' & Miners' Trans. Co., 66 Md. 339, 59 Am. Rep. 162. Defendant in the principal case, being under § 2607, Rev. St. 1898, plaintiff's trustee as to the insurance, and having failed to fulfill his duty to collect the same, was liable for the resulting damages.—From 3 Mich. L. R. 330.

69. By statute (S. D. Rev. Civ. Code, § 2153), plaintiffs were entitled to lien on undelivered hay for compensation due them for services on all the hay part of which had been delivered to bailor. Woodford v. Kelley [S. D.] 101 N. W. 1069.

70. A repairer of machinery has a lien on the property while in his possession for services rendered. Pine Bluff Iron Works v. Boling & Bro. [Ark.] 88 S. W. 306. A bailee under a contract requiring payment when the repairing of machinery is done is entitled to retain possession until the repairs are paid for. Dutton v. Shaw [Miss.] 38 So. 638.

71. Dutton v. Shaw [Miss.] 38 So. 638.

72. When owner of an automobile uses it at pleasure, the keeper of a garage has no lien on it. Smith v. O'Brien, 94 N. Y. S. 673.

73. Statute 1743, Rev. St. of Fla. 1892, limit the right of possession to three months. Replevin may be brought after that time to recover possession by owner. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51.

74. Proof that the bailee had agreed to notify plaintiff of the foreclosure is without the issues where he sues on the theory that the bailee is a custodian of attached property. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 P. 966.

75. A servant is dismissed and furniture removed so forcibly as to injure it. Employe held liable. Behm v. Damm, 91 N. Y. S. 735. A lessee who refuses to remove or accept his own property at the expiration of the lease cannot sue the lessor for conversion if the latter causes the goods to be stored in a warehouse. Browder v. Phinney [Wash.] 79 P. 598.

76. The measure of damages is reasonable market value of the goods. The action that can be brought is one in the nature of a conversion (formerly a special or innominate action). McCurdy v. Wallblom Furniture & Carpet Co. [Minn.] 102 N. W. 873.

77. Lessee can be prevented from disposing of property by an injunction. Price v. Grice [Idaho] 79 P. 387.

78. See 3 C. L. 403.

79. The purchaser of a lessee takes subject to the rights of the lessor. Turnbow v. Beckstead, 25 Utah, 468, 71 P. 1062. Where payment only is a prerequisite to the passing of title, the transaction is held to be a conditional sale within statute requiring filing of the contract for the protection of third persons. Pringle v. Canfield [S. D.] 104 N. W. 223. Unless written evidence of the loan be recorded, property left with a bailee for 5 years without demand for it by the bailor is as to an innocent purchaser or creditor of the bailee to be deemed the property of the bailee. (Ky. St. 1903, § 1909). It has no application where property is taken by execution 3 years after delivery, although after the bond is given two more years elapse. Saulsberry v. Fitzpatrick [Ky.] 86 S. W. 1118.

80. Savannah, etc., R. Co. v. Tolbert [Ga.] 51 S. E. 401.

81. Williams & Co. v. Prairie Queen Milling Co., 111 Ill. App. 373.

the bailment becomes a sale and the vendee gets a good title.[82] A bailee of property has a right to maintain an action and can recover the entire damages.[83] A bailee may insure the property in his possession for the protection of his interest in the same as well as that of the owner.[84] A bailee in possession and control of a conveyance is responsible to a third person for the negligence of his driver.[85] If the proper interpretation of a contract is left doubtful as to whether there is a sale or a bailment, the innocent purchaser should be favored as against the maker of the contract.[86] If an attaching creditor is entitled to the surplus of the proceeds of the sale of goods in the hands of a mortgagee, no claim on the part of the bailor or mortgagor would justify the mortgagee in retaining the goods.[87] A promise by a third party without consideration to restore bailed property to the bailor gives the latter no legal right.[88]

BANKING AND FINANCE.

This article does not treat of depositaries,[89] nor of the bank as a corporation.[90] The taxation of banks and bank stock is treated elsewhere.[91]

§ 1. *The occupation in general; regulation, supervision, control.*[92]—A bank is an institution authorized to receive deposits of money, to lend money and to issue promissory notes, or to perform some one or more of these functions.[93] The right to carry on a banking business through the agency of a corporation is a franchise,[94] and statutory provisions must be complied with.[95] It is competent for the legislature to provide for publicity of the condition and business methods of an

82. Organ is shipped on trial order with the right to test the same for twenty days. Retention of same for more than 20 days or sale of it ends bailment. O'Donnell v. Wing, 121 Ga. 717, 49 S. E. 720.

83. Waggoner v. Snody [Tex.] 85 S. W. 1134. Plaintiff had possession of personal property of another in her trunk. Property destroyed by carrier. She can sue as bailee but only one suit can be brought. Colvin v. Fargo, 94 N. Y. S. 377.

84. Unless there is an understanding to the contrary between bailee, bailor and insurer, the interest of the bailor is included. Johnston v. Charles Abresch Co. [Wis.] 101 N. W. 395.

85. Kelton v. Fifer, 26 Pa. Super. Ct. 603. The owner of property is not responsible for the negligence of the bailee when the former has no right and does not exercise any right of control. Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241.

86. Dicta in Bush v. Export Storage Co., 136 F. 918.

87. Scherzer v. Muirhead, 84 N. Y. S. 159.

88. Smith v. Corrigan [Neb.] 101 N. W. 331.

89. See Warehousing and Deposits, 4 C. L. 1820; also Bailment, 5 C. L. 342.

90. See Corporations, 3 C. L. 880; Foreign Corporations, 3 C. L. 1455.

91. See Taxes, 4 C. L. 1605.

92. See 3 C. L. 403.

93. Cyc. Law Dict. p. 86. Note brokers adopting as a branch of their business the making of loans to their customers on the security of the notes held for sale become engaged in the banking business. In re Samuel Wilde's Sons, 133 F. 562.

94. 3 C. L. 404, n. 12.

95. A certificate of incorporation filed under the act concerning corporations (Revision of 1896, P. L. p. 277) cannot include powers of a banking corporation, or those

instalment investment company,[96] and to make a reasonable classification of corporations, companies and individuals for that purpose.[97]

§ 2. *Associated or incorporated bankers. Corporate existence.*[98]—A bank incorporated under a special charter may forfeit all rights thereunder by proceeding under a general statute.[99] The consolidation of banks is largely governed by statute,[1] a merger under an invalid statute being inoperative and void.[2]

Good will.—A banking corporation may have a good will which, when acquired, constitutes a species of property.[3]

Stock subscriptions and dividends.[4]

Transfer of stock.[5]—Unauthorized action of the directors of a bank in withholding assent to the transfer of stock to a purchaser thereof, preventing the purchaser from reselling the stock before the insolvency of the bank, is not of itself evidence of fraud on the purchaser.[6]

Lien on stock.[7]

General powers.[8]—A state bank upon selling collateral security may guaranty the title, quality, soundness or healthful condition of such security,[9] and, in certain states, may receive deeds of real property as security for past indebtedness as well as for contemplated advances agreed upon.[10]

Reserve fund.[11]

Personal liability of directors and officers.[12] *Actions against wrongdoing officers.*[13]—A court of equity may, at the instance of a stockholder, entertain a proceeding against the bank and its officers and compel it to account for a fraudulent conversion of its funds,[14] and such court may, if necessary for the preservation of the res, appoint a receiver.[15] Cases dealing with the sufficiency of evidence are given in the notes.[16]

Powers of officers and right to represent bank.[17]—*The president* of a bank has, within the scope of his general authority, the right to employ counsel to represent

of a trust company, or such as are intended to derive profit from the loan and use of money. McCarter v. Imperial Trustee Co. [N. Y. Law] 60 A. 223.

96. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14.

97. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. Classification exempting building and loan associations, savings banks, insurance companies, and fraternal beneficiary associations, is not unreasonable. Id.

98. See 3 C. L. 404.

99. So held where bank changed its name pursuant to Act of June 16, 1887. Boor v. Tolman, 113 Ill. App. 322. In such a case the stockholder's liability is that declared by the general law. Id.

1. Banking Law, § 36, referring to the rights of a stockholder who objects to a proposed merger, refers to the actual owner of the stock and not to the one in whose name the shares are while really belonging to another. In re Rogers, 92 N. Y. S. 465.

2. Boor v. Tolman, 113 Ill. App. 322.

3. Lindemann v. Rusk [Wis.] 104 N. W. 119.

4. See 3 C. L. 404.

5. See 3 C. L. 405.

6. Penfold v. Charlevoix Sav. Bank [Mich.] 12 Det. Leg. N. 108, 103 N. W. 572.

7, 8. See 3 C. L. 405.

9. State Bank of Commerce v. Dody [Kan.] 79 P. 1092. May guaranty that cattle are free from disease. Id.

10. A bank organized under the state banking act has such authority under Rev. Codes 1899, § 3230. Merchants' State Bank v. Tufts [N. D.] 103 N. W. 760.

11, 12. See 3 C. L. 406.

13. See 1 C. L. 292.

14. This is true though the right to dissolve such a corporation rests solely in the state. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423.

15. Chandler Mortgage Co. v. Loring, 113 Ill. App. 423. A bill alleging that the assets have been wrongfully converted can be traced by a receiver if appointed, and will be dissipated if a receiver is not appointed, and that the officers of the bank have been discharged in bankruptcy, and that the complainant has received nothing on her investment and that no account has been made with her or her fellow-stockholders, held to make a proper case for the appointment of a receiver. Id.

16. In a suit by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock claimed by the president as his individual property, evidence held sufficient to sustain a finding that the purchase of the stock by a third person was for the use of the president. Dundon v. McDonald [Cal.] 80 P. 1034. Also that the purchase of the stock was not ratified by the bank. Id.

17. See 3 C. L. 407.

the bank in pending or prospective litigation;[18] but in procuring a signature to a note so as to enable another bank to make a loan, he acts without his authority.[19] So, also, in procuring a personal loan he does not bind the bank,[20] and the fact that the bank's directors subsequently pass a resolution to indemnify him therefor gives the lender no rights.[21] In warranting the soundness of another institution in which he is an officer, the president does not represent the bank.[22] A person acting in the place of the president during the absence of the latter has the right to exercise the usual and ordinary functions of the president so far as they are required for the occasion.[23]

The cashier has power to bind the bank by his indorsement, for a consideration passing to the bank,[24] on the bank's paper made for the purpose of transferring the latter;[25] but he has no right or authority to knowingly accept a worthless check on another bank and charge his bank with the amount thereof,[26] or to receive money offered for deposit away from the bank,[27] and if he does so he acts as the agent of the depositor, not of the bank.[28] In order that the statement or admission of a cashier may be taken as the statement or admission of the bank of which he is an officer, he must be acting within the scope of his power or duty as the bank's agent or officer,[29] and the burden is upon the person offering such testimony to establish its admissibility under the rule just stated.[30]

As to whether an officer acts in his official or individual capacity is often a question for the jury.[31]

Unauthorized acts.[32]—Ratification is equivalent to previous authorization.[33]

18. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

19. First Nat. Bank v. Commercial Nat. Bank [Tex.] 87 S. W. 1032. Where he did not act negligently nor made misrepresentations as to the authority of the bank, held not personally liable, the signature being forged. Id.

20. Where money was loaned president and he gave his personal bond for its repayment, held it could not be recovered from the bank, the latter receiving no benefit from the loan. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521.

21. Resolution was without consideration. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521.

22. That such warranty was false is no defense to an action by the receiver of the bank to recover for an overdraft. Earl v. Munce, 133 F. 1008.

23. May employ counsel. Russell v. Washington Sav. Bank, 23 App. D. C. 398. Where in such a case one of four vice-presidents employed counsel, held for the jury whether the employment was for the bank or officer individually. Id.

24. Where by the indorsement the bank obtained money to take up a large indebtedness owing to it by the maker of the note, held a sufficient consideration. First Nat. Bank v. Anderson [Ind. T.] 82 S. W. 693.

25. First Nat. Bank v. Anderson [Ind. T.] 82 S. W. 693.

26. Van Buren County Sav. Bank v. Sterling Woolen Mills Co., 125 Iowa, 645, 101 N. W. 477. Where by agreement between the cashier and president a worthless check was drawn on another bank to cover the president's shortage as treasurer of another concern and credited, together with a good check, to the latter's account, the latter cannot claim both the amount of the good check and that of the bad. Id. Deposits made by the president to cover overdrafts on his account as treasurer must be applied to the benefit of the concern of which he was treasurer and not to the treasurer's individual account. Id.

27. Demarest v. Holdeman [Ind. App.] 73 N. E. 714.

Note: This must be distinguished from the right of a cashier to follow up a delinquent debtor of the bank and exact payment from him at any time and place when and where he may be able to do so.—From Demarest v. Holdeman [Ind. App.] 73 N. E. 714.

28. So held where the cashier made an arrangement to keep books and receive and disburse money for a third person. Demarest v. Holdeman [Ind. App.] 73 N. E. 714.

29. Harrison County v. State Sav. Bank [Iowa] 103 N. W. 121. Where the cashier is called as a witness in an action to which the bank is not a party, it is certainly the general, if not the universal, rule that he does not represent the bank so that his statements there made will be admissible against it in a later litigation to which it is a party in interest. Id.

30. Harrison County v. State Sav. Bank [Iowa] 103 N. W. 121. This is especially true where the statement or admission sought to be proved has reference to a past transaction. Id.

31. As to whether cashier in bank acted in his official capacity or as agent for plaintiff in indorsing note, held a question for the jury. First Nat. Bank v. Anderson [Ind. T.] 82 S. W. 693.

32. See 3 C. L. 408.

33. Where cashier purchased land and an

Official or individual capacity.[34]—An officer of a bank is an agent thereof,[35] and hence any contract executed by him between himself and the bank is presumptively void [36] and may be avoided by the bank,[37] though actual fraud does not exist.[38] An officer borrowing money from the bank cannot escape liability therefor by agreeing to pay usurious interest; [39] but in such case equity will require him to pay the principal sum and legal interest.[40] Money borrowed and invested by a director will not be regarded as an investment for the bank in the absence of evidence that the interest paid by the director does not equal his profits from the use of the money.[41]

Notice to bank from knowledge of officers.[42]—In order that the knowledge of an officer may be imputed to a bank, it must be shown that the knowledge was acquired while he was acting within the scope of his authority,[43] and as an official of the bank.[44]

Winding up.[45]—In some states depositors are entitled to be paid in full before other creditors are entitled to share in the assets of an insolvent bank.[46] Creditors not joining in an application for permission to reorganize, which application contains an erroneous statement that the bank is solvent, are entitled to a preference over those joining therein, the reorganization scheme failing in operation.[47] A claim acquired after the insolvency of a bank cannot be set off against one's indebtedness to the bank.[48] A bank receiver will not be ordered to do that which is impossible.[49]

Reorganization.[50]

Stockholders' individual liability and the enforcement thereof.[51]—By receiving and accepting dividends [52] and by participating in proceedings to reorganize the bank,[53] a corporation may become estopped to deny its power to purchase and hold the stock.[54]

action was begun to compel specific performance by the vendor, a ratification of the cashier's acts held sufficient to allow the bank to maintain the action. Washington State Bank v. Dickson, 35 Wash. 641, 77 P. 1067.

34. See 3 C. L. 409.

35. Northwestern Fire & Marine Ins. Co. v. Lough [N. W.] 102 N. W. 160. See, also, 3 C. L. 409, n. 15.

36. Deed executed by cashier of a state bank to himself as an individual is, in the absence of affirmative evidence of his authority, presumptively void and of no effect. Northwestern Fire & Marine Ins. Co. v. Lough [N. D.] 102 N. W. 160.

37. Agreement by president of bank that maker of note on behalf of another corporation in which both the president and maker were interested should not be liable thereon, held not binding on the bank which discounted the note. Bank of Le Roy v. Purdy, 100 App. Div. 64, 91 N. Y. S. 310.

38, 39. Gund v. Ballard [Neb.] 103 N. W. 309.

40. Will not enforce the usurious contract but will simply require him to do equity. Gund v. Ballard [Neb.] 103 N. W. 309.

41. So held where money was borrowed just before the termination of the bank and was repaid. Lindemann v. Rusk [Wis.] 104 N. W. 119.

42. See 3 C. L. 409.

43. In the absence of evidence of the scope of an employee's authority, notice to him of the dissolution of a firm held not notice to the bank. Marsh v. Wheeler [Conn.] 59 A. 410.

44. Knowledge acquired by an officer while acting for his own interests and adverse to those of the bank cannot be imputed to the latter. Bank of Le Roy v. Purdy, 100 App. Div. 64, 91 N. Y. S. 310.

45. See 3 C. L. 410.

46. Code, §§ 1877-83, so provides. State v. Corning State Sav. Bank [Iowa] 103 N. W. 97.

47. Rumble v. Tyus [Ga.] 51 S. E. 420.

48. Where payment of a certified check was refused after insolvency and the check was returned to the drawer, held, his right of action for the amount of the check or for damages could not be set-off against his indebtedness to the bank. Schlesinger v. Kurzrok, 94 N. Y. S. 442.

49. Where checks drawn on a bank are sent to it for collection and it gives its check on another bank in payment, which check is dishonored and the collecting bank becomes insolvent, the receiver of such bank will not be ordered to return the checks delivered for collection where they have been returned to the drawers as paid. People v. Federal Bank of New York, 94 N. Y. S. 732.

50, 51. See 3 C. L. 411.

52, 53. Hunt v. Hauser Malting Co. [Minn.] 103 N. W. 1032.

54. Whether or not proof of the manner in which the defendant corporation consented to the agreement to reorganize held

A proceeding to assess stockholders of an insolvent bank upon their superadded liability to creditors is an equitable proceeding,[55] and a decree fixing the amount of the bank's indebtedness and determining the creditors' rights to an assessment is final,[56] and the stockholders, having been served, appearing and contesting the proceeding, may appeal therefrom.[57] In South Dakota a stockholder in an insolvent bank is individually liable to a creditor of the bank up to the par value of his shares,[58] and the creditor may proceed against one or more of the stockholders to recover the amount of his indebtedness in an action at law,[59] or may sue the stockholder upon a judgment recovered against the bank.[60] For the purposes of suit the liability of a stockholder is contractual,[61] and accrues at the time the cause of action arises against the corporation.[62] In those states where the law creating the stockholders' liability is silent as to the time when the cause of action accrues, it is held to accrue immediately upon the insolvency, like default, of the banking corporation.[63] The contructions placed upon various statutes [64] and the sufficiency of the pleadings [65] and evidence [66] in suits to enforce a stockholder's liability are shown in the notes.

§ 3. *National banks.*[67] *Powers.*[68]—Questions as to the power of a national bank to buy and hold real estate can only be raised by the Federal government.[69] A national bank has no power to invest its surplus fund in the stock of another national bank,[70] hence, though it purchases such stock and receives dividends thereon,

immaterial. Hunt v. Hauser Malting Co. [Minn.] 103 N. W. 1032.

55. Bennett v. Thorne, 36 Wash. 253, 78 P. 936. In Washington an appeal lies to the supreme court irrespective of the amount in controversy. Id.

56. Bennett v. Thorne, 36 Wash. 253, 78 P. 936.

57. Though the corporation is named as defendant. Bennett v. Thorne, 36 Wash. 253, 78 P. 936.

58. Const. art. 18, § 3, and Civ. Code, § 864, construed. Union Nat. Bank v. Halley [S. D.] 104 N. W. 213.

59. Union Nat. Bank v. Halley [S. D.] 104 N. W. 213.

60. Const. art. 18, § 3, construed. Union Nat. Bank v. Halley [S. D.] 104 N. W. 213.

61. An action to enforce the double liability imposed by Act 1892, p. 156, c. 109, § 85 l is one to enforce a contract within the meaning of Act 1886, p. 307, c. 184, § 170. Coulbourn Bros. v. Boulton [Md.] 59 A. 711.

Contra: Liability of stockholders in national banks. McClaine v. Rankin, 25 S. Ct. 410. See § 3, National Banks.

62. Boor v. Tolman, 113 Ill. App. 322. Not at the time judgment is rendered. Id.

63. So held in Washington. Const. art. 12, § 11, construed. Bennett v. Thorne, 36 Wash. 253, 78 P. 936. [See case for collection of authorities on this point.]

Note: This case must be distinguished from those relating to stock subscription liability, or to national banks, both of which are governed by entirely different principles. The necessity of a call and assessment on unpaid stock subscriptions is based solely on the express contract of the parties. Scovill v. Thayer, 105 U. S. 143, 26 Law. Ed. 968; Terry v. Anderson, 95 U. S. 628, 24 Law. Ed. 365. The contract of the subscriber to the stock is that he will pay upon a demand by the proper authorities of the corporation. And it has been invariably held that as to the stock subscription liability a call or demand must precede the suit. So, in the national bank cases, the amount of liability in any given case is "to be determined by the comptroller of the currency" (Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465]). Kennedy v. Gibbons, 8 Wall. [U. S.] 498, 505, 19 Law. Ed. 476; Sanger v. Upton, 91 U. S. 56, 23 Law. Ed. 220.—From Bennett v. Thorne, 36 Wash. 253, 78 P. 936, 941.

64. California: St. 1903, p. 73, c. 65, repealing the bank commission act of 1878, as amended in 1887 and 1895, without a saving clause as to pending litigation, did not affect an action to enforce an assessment on bank stock pursuant to a prior final judgment under the act decreeing the corporation insolvent, and directing the enforcement of stockholders' liability. Union Sav. Bank v. Leiter, 145 Cal. 696, 79 P. 441.

65. Maryland: In an action to enforce the liability of a stockholder in a banking corporation under Acts 1892, p. 156, c. 109, § 85 l, the affidavit, required by Act 1886, p. 308, c. 184, § 171, being accompanied by an account for money due plaintiff as depositor with the corporation of which defendant was a stockholder, setting forth the dates and amounts of all deposits made and the aggregate thereof, with credit for money withdrawn, it is sufficient without filing plaintiff's bank book or defendant's certificates of stock. Coulbourn Bros. v. Boulton [Md.] 59 A. 711.

66. In an action to enforce a stockholder's liability, evidence considered and held to show that the defendant was the real owner of stock standing in the name of his wife. Hunt v. Reardon, 93 Minn. 375, 101 N. W. 606.

67. See 3 C. L. 412. For the powers of officers to represent bank, unauthorized acts, etc., see ante, § 2.

68. See 3 C. L. 412.

69. Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017.

it cannot be assessed thereon as a stockholder.[71] Stockholders by ratifying a contract estop themselves from subsequently claiming that it was ultra vires.[72]

Violation of banking act.[73]

Dividends.—Directors of national banks can declare dividends only out of net profits;[74] but, with the approval of the comptroller of the currency, assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders by the directors,[75] and dividends so ordered may be made payable in the future, and on the contingency of future collections on such assets.[76] A dividend declared in favor of those who are then shareholders though payable at a future date, severs the fund to be distributed from the assets of the corporation, and the share of each shareholder vests in him as an individual and he does not lose it on ceasing to be a shareholder.[77] Similarly such shareholders may transfer their rights in the dividend with or without a transfer of their shares of stock.[78]

Rights and liabilities of stockholders and the enforcement thereof.[79]—A stockholder of a national bank has the right to inspect the list of stockholders and to make extracts therefrom for the purpose of negotiating for the purchase of stock,[80] and the right being denied and an application being made to the Federal circuit court for a writ of mandamus, the pleadings must show that the matter in dispute exceeds $2,000 in value or the court has no jurisdiction.[81]

In the absence of exceptional circumstances the stockholder's liability is fixed at the date when the bank goes into liquidation[82] and the stockholder may not thereafter transfer his stock and avoid liability thereon.[83] A stockholder remains liable as to creditors after he has sold his stock if he permits his name to remain on the books as a stockholder unless he does all that he can reasonably do to effect a transfer on the stock register.[84] A stockholder is liable even after making an out-and-out sale of his shares and causing the proper transfer to be made on the books of the bank, if the bank was insolvent at the time of the transfer and he knew or ought to have known of such insolvency and the transfer was made to an irresponsible person whose financial condition was known or ought to have been known to the seller;[85] it is essential that all these conditions co-exist.[86] For the purposes of the national banking act the pledgor of stock is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another.[87] The pledgee may, without himself becoming liable to the contingencies of ownership, have the stock transferred in blank by the pledgor;[88] but

70, 71. Shaw v. National German-American Bank, 132 F. 658.

72. Contract by which a national bank assumed all the obligations of an insolvent bank. George v. Wallace [C. C. A.] 35 F. 286.

73. See 3 C. L. 413.

74. Rev. St. U. S. §§ 5199, 5204. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059.

75, 76. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059.

77. By selling his share he does not transfer his interest in the dividend. This notwithstanding Rev. St. U. S. § 5139. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059. So held where the dividend consisted in the return of assets not needed as capital nor for the surplus fund. Id.

78. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059.

79. See 3 C. L. 414. Liability of stockholder of a national bank, see Clark & M. § 806.

80. Under Rev. St. U. S. § 5210, and Laws of New York 1892, p. 1831, c. 688, § 29, and 25 Stat. (U. S.) 436, a shareholder in a national bank located in the city of New York has such right. People v. Consolidated Nat. Bank, 94 N. Y. S. 173.

81. Large v. Consolidated Nat. Bank, 137 F. 168. Averment that plaintiff is the registered owner of ten shares of the capital stock of defendant, held insufficient. Id.

82. Muir v. Citizens' Nat. Bank [Wash.] 80 P. 1007, and cases cited. Liability for an assessment depends upon who was the owner at that date. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461.

83. Muir v. Citizens' Nat. Bank [Wash.] 80 P. 1007, and cases cited.

84, 85, 86. McDonald v. Dewey [C. C. A.] 134 F. 528.

87. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461.

88. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461. In such case the pledgor

he may become liable if he causes the stock to be transferred, on the books of the company, to an irresponsible person.[89] The individual liability of the stockholders extends only to enforceable contracts, debts and engagements of the bank.[90] A married woman becoming a stockholder is subject to the statutory liability for assessments,[91] and the same rule applies to estates of decedents so long as their assets can be reached.[92] The Federal circuit court has jurisdiction of a suit to enforce the liability of stockholders of a national bank which has gone into voluntary liquidation.[93] The remedy of a receiver of a national bank against the trustee and distributees of a decendent's estate to collect an assessment on stock for which the assets of the estate are liable is in equity.[94] The liability of stockholders is not contractual within the meaning of statutes of limitations,[95] and the statute does not commence to run until assessment is made by the comptroller of the currency.[96]

Suits by and against.—A suit which may be brought in a Federal circuit court by or against a citizen of a state because it arises under the constitution, laws or treaties of the United States may for the same reason be brought in such court by or against a national bank located in the same state.[97] A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or to enforce and judicially administer the trust arising from the insolvency and proceedings in liquidation, is a suit arising under the laws of the United States.[98]

State interference and powers of state courts.[99]—National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state, legislative or judicial action, except so far as the law-making power of the government may permit.[1] Under the Federal statutes attachment cannot issue, before judgment, from a state court against a national bank or its property.[2]

Reduction of capital.[3]—The directors of a national bank may, after a reduction of the capital stock of the bank has been allowed on condition that bad and

does not cease to be the owner in the sense intended by law, and until the ownership is in some way divested from the pledgor the latter continues to stand for the stock. Id.

89. Where pledgee of stock had same transferred to an irresponsible employe, who paid no consideration for transfer, the pledgee then made an indorsement on the note which the stock secured, of a sum as proceeds of a sale of the stock made on the day of the transfer, and proved the balance due on the note against the estate of the pledgor, and received dividends thereon, held stock belonged to pledgee. Hulitt v. Ohio Valley Nat. Bank [C. C. A.] 137 F. 461.

90. 21 Am. & Eng. Enc. Law (2d ed.) p. 343, and cases cited. Where a national bank assumes the debts of an insolvent national bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts and engagements" of the insolvent bank, for which its stockholders were liable under Rev. St. § 5151. George v. Wallace [C. C. A.] 135 F. 286.

91. At least in those states where she is not prohibited from owning such stock in her own right. Christopher v. Norvell [C. C. A.] 134 F. 842. Laws of Florida held not to prohibit her assuming such liability. Id.

92. The statutory limitation as to the time for the presentment of claims against the estate does not apply. Rev. St. U. S. § 5152, construed. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817.

93. 19 Stat. 63 construed. George v. Wallace [C. C. A.] 135 F. 286. 19 Stat. 63, giving Federal courts original equity jurisdiction of a creditor's bill against stockholders of a national bank which has gone into liquidation as authorized by Rev. St. § 5220, is not repealed by 22 Stat. 163, nor by 25 Stat. 436. Id.

94. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817.

95. Ball. Wash. Code, § 4800, subd. 3, does not apply to it. McClaine v. Rankin, 25 S. Ct. 410.

96. McClaine v. Rankin, 25 S. Ct. 410.

97, 98. George v. Wallace [C. C. A.] 135 F. 286.

99. See 3 C. L. 414.

1. Van Reed v. People's Nat. Bank, 25 S. Ct. 775.

2. U. S. Rev. St. § 5242, construed. Van Reed v. People's Nat. Bank, 25 S. Ct. 775. This is not changed by 22 Stat. at L. 163, c. 290. Id. Hence jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment. Id.

doubtful assets be charged off and set aside for the benefit of the then stockholders, set aside and charge off such assets to the purpose named,[4] and on so doing, the right to receive the proceeds of the assets thus set apart is irrevocably vested in those who are shareholders on the date of the approval of the reduction of stock by the comptroller of the curreney,[5] and in so charging off the assets the bank may list, in the schedule of charged-off assets, claims which are also and primarily listed at a lesser valuation as part of the capital stock.[6]

Usury by national banks.[7]—By compounding interest oftener than is permitted by the state laws, a national bank charges a higher rate than that allowed, although the compounded interest is less than the state laws permit to be compounded annually.[8] Usury by a national bank works a forfeiture of all interest, but not of the principal,[9] and the bank suing for the entire amount cannot avoid the forfeiture by declaring an election to remit the excessive interest,[10] nor can the bank escape this penalty because the usurious amount was trifling,[11] nor on the theory that the charge is a penalty because of the failure to pay the debt when due.[12] In order to recover double the amount of interest, actual payment must have been made.[13] Payments made on a usurious debt without any agreement as to their application must be applied on the principal.[14]

Winding up.[15]—A national bank in voluntary liquidation is not thereby dissolved as a corporation but continues for the purpose of liquidation and winding up its business;[16] but it is not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee.[17] The tangible assets and the liability of shareholders of an insolvent national bank in the process of liquidation constitute, in the hands of the liquidating agent, an express trust fund for the primary benefit of creditors.[18] On the suit of one or more creditors on behalf of all for the winding up of the affairs of an insolvent national bank, there can be had, if desired, a complete judicial administration of the affairs of the bank, an ascertainment of the valid and subsisting claims against it, an enforcement of the trusts in respect of both the assets and the capital stock, and, finally, the distribution of the avails,[19] and a bill for such comprehensive relief is not multifarious.[20]

§ 4. *Savings banks. Powers and liability of directors.*[21] *Supervisors.*—The fact that the commissioner of banking erroneously construes a report does not render it fraudulent.[22]

3. See 3 C. L. 413, nn. 92, 93.

4. The approval of the comptroller of the currency having been obtained, the directors are simply declaring a dividend from assets in excess of the capital stock. Rev. St. U. S. § 5145. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059.

5, 6. Cogswell v. Second Nat. Bank [Conn.] 60 A. 1059.

7. See 3 C. L. 415.

8. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49.

9. In re Samuel Wilde's Sons, 133 F. 562.

10. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49. In a case where a national bank was held to forfeit all interest for usury, on a new trial being ordered on other grounds the bank could recover lawful interest by relinquishing its claim to the usurious interest. Second Nat. Bank v. Fitzpatrick [Ky.] 84 S. W. 1150.

11, 12. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49.

13. Giving a renewal note by surety held not to entitle him to recover. U. S. Rev. St. § 5198, construed. First Nat. Bank v. Lasater, 25 S. Ct. 296; Lassater v. First Nat. Bank [Tex. Civ. App.] 13 Tex. Ct. Rep. 642, 88 S. W. 429. Nor does payment of such renewal note give the principal a cause of action under such statute. Id.

14. Second Nat. Bank v. Fitzpatrick [Ky.] 84 S. W. 1150.

15. See 3 C. L. 413, n. 5; 3 C. L. 414, n. 17.

16. Muir v. Citizens' Nat. Bank [Wash.] 80 P. 1007, and cases cited.

17. U. S. Rev. St. § 5220, construed. Muir v. Citizens' Nat. Bank [Wash.] 80 P. 1007.

18, 19, 20. George v. Wallace [C. C. A.] 135 F. 286.

21. See 3 C. L. 416.

22. A report to the commissioner of banking containing the items, unadjusted errors in stocks, cash paid, real estate, etc., does not constitute a fraudulent report because the commissioner mistakenly treated such items as assets and reported the bank sound. Penfold v. Charlevoix Sav. Bank [Mich.] 12 Det. Leg. N. 108, 103 N. W. 572.

Rules.[23]—A depositor is bound by all reasonable rules to which he assents in writing [24] or which are printed in the passbook which he accepts and uses.[25] A by-law providing that the bank shall not be responsible for any fraud practiced upon it does not relieve the bank from its duty to exercise ordinary care to prevent payment to the wrong person.[26] The bank agreeing to pay the deposit to the depositor, his order or legal representative, it cannot avoid liability for a payment made upon a forged order to one who had fraudulently obtained possession of the passbook, even by showing that such payment was made in good faith and in the exercise of ordinary care.[27]

Reliance on passbooks.[28]—It is a common rule in savings banks that the depositor shall produce his bankbook in order to draw his deposit, or any part of it, and that production of the book shall be authority to the bank to pay the person so producing it. This is regarded as a reasonable and binding regulation,[29] and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good.[30] The foregoing proposition is not affected by another rule prescribing that if depositors are not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal.[31] The bank being negligent, it is liable even though the depositor was negligent in allowing the book to get out of his possession; [32] nor does such negligence estop the owner from claiming repayment.[33]

Deposits and repayment.[34]—A deposit in trust for a certain person is presumed to belong to such person.[35] An order by a husband and wife requesting that their separate accounts be merged so as to run to either or the survivor of them constitutes an order making them joint owners of the fund.[36] Such order is revocable by either party at any time before presented,[37] and being delivered to the husband for delivery to the bank, he becomes the agent of the wife.[38]

The bank is negligent if it fails to make a physical comparison between a signature to a draft and the signature of the depositor on file in the bank.[39] A

23. See 3 C. L. 416.

24. Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708.

25. By such acceptance and use they become a part of the contract of deposit. Chase v. Waterbury Sav. Bank [Conn.] 59 A. 37.

26. Even though such person presents the deposit book. Chase v. Waterbury Sav. Bank [Conn.] 59 A. 37. Evidence held sufficient to uphold a finding that the bank was negligent in paying money on a forged order. Id.

27. Chase v. Waterbury Sav. Bank [Conn.] 59 A. 37.

28. See 3 C. L. 416.

29. Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708; 2 Morse, Banks & Banking, § 620.

30. Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708; 2 Morse, Banks & Banking, § 620. Where money was withdrawn on a forged signature, the bank was held not negligent where the drawer had the pass book and answered all test questions correctly and the depositor subsequently had possession of the book and made six different deposits without questioning the withdrawal entry. Ferguson v. Harlem Sav. Bank, 92 N. Y. S. 261.

31. Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708.

32. Paid deposit on forged order. Chase v. Waterbury Savings Bank [Conn.] 59 A. 37.

33. Chase v. Waterbury Sav. Bank [Conn.] 59 A. 37.

34. See 3 C. L. 417.

35. Savings Bank accounts standing in the name of "J. F. in trust for M. F., his wife;" "J. F. in trust for M. F.;" and "J. F. or M. F.," held on J. F.'s death to presumptively belong to M. F. In re Finn's Estate, 44 Misc. 622, 90 N. Y. S. 159.

36, 37. Augsbury v. Shurtliff [N. Y.] 72 N. E. 927.

38. Was revoked by death of wife before order was delivered to bank. Augsbury v. Shurtliff [N. Y.] 72 N. E. 927. In an action by the husband to recover possession of the wife's bankbook after her death, held reversible error to nonsuit the plaintiff without submitting the question as to whether such order was delivered by the husband to the bank during the lifetime of the wife. Id.

39. Kelley v. Buffalo Sav. Bank [N. Y.] 72 N. E. 995.

savings bank being ignorant of a depositor's death is only required to use ordinary care in paying a draft purporting to bear his signature.[40]

Action to recover deposit.—The New York banking law requiring the court in an action to recover a savings deposit to make a claimant interpleading a party defendant applies only to claimants claiming a present interest in the fund.[41] In an action to recover a savings deposit the city court of New York may allow parties to interplead and proceed with the cause.[42]

Winding up.—Recent constructions placed upon statutes relating to this subject are shown in the notes.[43]

§ 5. *Loan, investment and trust companies.*[44]—A trust company having the power to execute trusts, loan money, buy and sell securities, etc., has power to execute a note for the benefit of a railroad company which it is financing.[45] Under the laws of Nebraska if a corporation's plan of doing business involves receiving from each of its members a stated sum at stated intervals until a specified amount is received from such members, and investing this money in property for the benefit of its members, it is an instalment investment company.[46] The constructions placed upon statutes relating to the names of trust companies,[47] their power to in-

40. Bankbook was presented at the same time. Kelley v. Buffalo Sav. Bank [N. Y.] 72 N. E. 995.

NOTE. Payment of forged order after death of depositor: One of the rules of the bank provided that "the secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books or duplicates thereof, shall be good and valid payments to the depositors respectively." Another rule provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." The decision is based on the fact that due diligence was not exercised by defendant to ascertain the identity of the party presenting the pass-book, and is in accord with reason and authority. It has quite generally been held, under similar circumstances, that the bank is bound to exercise at least ordinary diligence. Appleby v. Erie Co. Sav. Bank, 62 N. Y. 12; Sullivan v. Lewiston Inst. of Sav., 56 Me. 507, 96 Am. Dec. 500; Ladd v. Augusta Sav. Bank, 96 Me. 510, 58 L. R. A. 288; Brown v. Merrimac River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700. And where the bank has agreed to "Use its best efforts to prevent fraud" it is bound to the exercise of more than ordinary diligence. Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314. See also Kummel v. Germania Sav. Bank, 127 N. Y. 488, 13 L. R. A. 786. In Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418, however, it was held that the bank had a right to pay to any one presenting the pass-book, and that the fact that a receipt was forged was immaterial. Where the depositor is dead, however, it has been held that the rule as to diligence no longer applies, the bank being bound absolutely by the second rule above to make payment to the legal representative, and one of the judges in the present case based his concurrence on this ground. Mahan v. South Brooklyn Sav. Inst., 175 N. Y. 69, 96 Am. St. Rep. 603; Farmer v. Manhattan Sav. Inst., 60 Hun [N. Y.] 462; Padmore v. South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218. But these cases are to be distinguished from the principal case by the fact that in each of the former the bank had notice of the depositor's death. Where, on the other hand, there has been no actual notice of the death and no negligence on the part of the bank is shown, the bank has been held discharged by payment on a forged receipt to one presenting the pass-book. Donlan v. Provident Inst. for Savings, 127 Mass. 183, 34 Am. Rep. 358; Goldrick v. Bristol Co. Sav. Bank, 123 Mass. 320.—3 Mich. L. R. 419.

41. Does not apply to one claiming only a future interest. Banking Law, § 115, construed. Gifford v. Oneida Sav. Bank, 99 App. Div. 25, 90 N. Y. S. 693.

42. This by the express terms of § 115 of the Banking Law. Gottschall v. German Sav. Bank, 90 N. Y. S. 896.

43. Wisconsin: Laws 1903, p. 351, c. 234, does not authorize the commissioner of banking to maintain an action to administer the affairs of an insolvent savings bank as against the creditors of the bank. Bergh v. Security Sav. Bank [Wis.] 100 N. W. 831. Such law does not affect or change Rev. St. 1898, § 3218 et seq. Id.

44. See 3 C. L. 417.

45. Trust companies organized under Rev. St. 1899, § 1427, held to have such power. First Nat. Bank v. Guardian Trust Co. [Mo.] 86 S. W. 109.

46. Laws 1903, p. 269, c. 29, Comp. St. 1903, c. 16, §§ 216, 227, and Cobbey's Ann. St. §§ 6649, 6660, construed. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. Such statutes are not in violation of the Nebraska State Constitution, art. 3 or art. 6, § 1; nor does it give the State Banking Board such arbitrary powers as to be unconstitutional for that reason. Id.

47. Washington: Laws 1903, p. 367, c. 176, providing that no company afterwards authorized under any other act shall use the words "trust" in its name applies to a pre-existing corporation changing its name so as to include such word. State v. Nichols [Wash.] 80 P. 462. In such a case man-

vest their funds,[48] and the liability of stockholders therein,[49] are shown in the notes.

§ 6. *Deposits and repayment; checks, drafts, certificates, receipts.*[50] *Duty to receive deposits.*[50a]—A bank may receive or decline deposits and do business with whom it pleases.[51]

Relation of banker and depositor.[52]—An ordinary deposit is not a loan to the bank,[53] the relation of banker and depositor being that of debtor and creditor.[54] A deposit is a contract of the state where it is made.[55] Bankers are held to be in exercise of ordinary care in making loans as agents for the lender.[56]

Evidence of deposit.[57]—Where a deposit stands in the names of two persons jointly, it will be presumed, in the absence of evidence to the contrary, that their interests are equal,[58] and in such case, as between the depositors, the possession of the bankbook is not evidence of the possessor's dominion over the fund,[59] nor, as between such depositors, is the recognition by the bank of the right of each to withdraw the entire deposit material.[60]

A certificate of deposit is in legal effect a promissory note,[61] transferable by indorsement,[62] or assignment,[63] and the depositary is bound to deliver the deposit to the indorsee [64] or assignee, generally, upon demand being made,[65] and it is in this latter respect that most courts hold that the certificate differs from a promissory note.[66] Where the certificate is payable on its return properly indorsed, demand

damus will not lie to compel the secretary of state to file such amendment to the corporation's articles. Id. Such act does not violate Const. art. 2, § 19, providing that no bill shall embrace more than one subject, and that shall be expressed in the title. Id.

48. Wisconsin: Rev. St. 1898, § 1791h, relating to investments by trust companies, does not refer to funds held by it in the capacity of trustee. In re Allis' Estate [Wis.] 101 N. W. 365.

49. Maryland: Code Pub. Gen. Laws, art. 23, § 85 1 refers to safe deposits, guaranty, loan and fidelity companies, and is applicable to a domestic corporation in incorporated under a special charter to do a safe deposit, trust and fidelity business. Murphy v. Wheatley [Md.] 59 A. 704. Such statute is valid as to domestic corporations, though it be void as to foreign corporations. Id. Acts 1904, p. 597, c. 337, abated all separate actions, commenced after January 1, 1903, and pending at the time the act was passed, to enforce a stockholder's liability. Such act is not unconstitutional as violating the confractural rights of the creditor. Miners' & Merchants' Bank v. Snyder [Md.] 59 A. 707.

50. In this connection see Negotiable Instruments, 4 C. L. 787, and Non-negotiable Paper, 4 C. L. 827.

50a. See 3 C. L. 417, nn. 81, 82.

51. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777.

52. See 3 C. L. 417.

53. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777, overruling Mereness v. First Nat. Bank, 112 Iowa, 11, 83 N. W. 711, 84 Am. St. Rep. 318, 51 L. R. A. 410; Long v. Emsley, 57 Iowa, 11, 10 N. W. 280; Lowry v. Polk County, 51 Iowa, 50, 49 N. W. 1049, 33 Am. Rep. 114.

54. Reed Grocery Co. v. Canton Nat. Bank [Md.] 59 A. 716.

55. A deposit of money by a citizen and resident of New York in a private bank in that state, interest to be paid on the deposit in New York, held a New York contract. Schinotti v. Whitney, 130 F. 780.

56. Wason v. Fagner, 105 Ill. App. 52.

57. See 3 C. L. 418.

58, 59. Tompkins v. McGinn [Tex. Civ. App.] 85 S. W. 452.

60. Is a mere inference. Tompkins v. McGinn [Tex. Civ. App.] 85 S. W. 452.

61. Hanna v. Manufacturers' Trust Co., 93 N. Y. S. 304. Burns' Ann. St. 1901, § 7515, construed. First Nat. Bank v. Stopf [Ind.] 74 N. E. 987.

62. First Nat. Bank v. Stapf [Ind.] 74 N. E. 987.

63. Where instrument of assignment was delivered to third person to deliver to assignee on assignor's death, and the assignor died without revoking it, held, assignee was entitled to instrument and certificates and, on receiving them, the deposits. Rivenburgh v. First Nat. Bank, 92 N. Y. S. 652.

64. Hanna v. Manufacturers' Trust Co., 93 N. Y. S. 304.

65. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777.

66. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777.

NOTE. Certificates of deposit as promissory notes and their negotiability: A certificate of deposit is not an ordinary receipt; in fact, it contains few of the elements of a receipt. It does contain the elements of a promissory note, and the almost universal rule is that such certificates are promissory notes, to be governed in general by the same rules that control instruments of that character. Leaphart v. Bank, 45 S. C. 563, 55 Am. St. Rep. 800, 33 L. R. A. 700. A promissory note is an unconditional promise to pay a certain sum of money absolutely, and these essential elements, a debt of a definite sum and a promise to pay, are present in a certificate of deposit, and

need not be made within the period of limitations.[67] The transfer must be for a consideration,[68] though past service or friendship is sufficient.[69]

Letters of credit.[70]

Repayment of deposits.[71]—A bank by receiving a general deposit assumes no further obligation than to pay the amount received upon demand [72] at its banking house [73] during banking hours.[74] The demand should be made by a check, draft, order, receipt or other writing for the payment of the amount desired, which writing when honored and in the hands of the bank will be evidence of the authority and direction of the depositor to pay as well as evidence of payment.[75] A banker may pay upon an oral order or direction, but under the usages of the banking business he is not required to do so.[76] The bank must account for all money received, the matter of accounting being purely a question of fact.[77] A depositor is liable for payments made on drafts drawn by his duly authorized agent,[78] and the bank may recover therefor, though a part of the money remains on deposit to the credit of the agent.[79] Payment of checks or drafts may be made by giving credit to the depositor or payee,[80] but the mere checking over of public funds to

for this reason it is deemed a promissory note. Renfro v. Merchants,' etc., Bank, 83 Ala. 425; Welton v. Adams, 4 Cal. 37, 60 Am. Dec. 579; Falls Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358; Kilgore v. Bulkley, 14 Conn. 363; Maxwell v. Agnew, 21 Fla. 154; Lynch v. Goldsmith, 64 Ga. 42; Bank of Peru v. Farnsworth, 18 Ill. 563, Laughlin v. Mershall, 19 Ill. 390; Gregg v. Union, etc., Bank, 87 Ind. 238; Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Cassidy v. First Nat. Bank, 30 Minn. 86; Mitchell v. Easton, 37 Minn. 335. While a certificate of deposit is almost universally recognized as a promissory note payable on demand, unless the deposit is a time deposit, yet in one important particular such certificates differ from ordinary promissory notes. A promissory note, payable on demand, is due as soon as it is given, and an action may be brought on it immediately, demand for payment being unnecessary. The courts are divided, however, as to whether this rule holds good with respect to certificates of deposit. Perhaps the weight of authority is to the effect that such certificates are not due until demand for payment is made and the certificate returned. The reason for this is that the bank receives the money not as a real loan, but as a deposit. "No one could desire to receive money in deposit for an indefinite period with the right in the depositor to sue the next moment, and without any prior intimation that he wished to recall the loan": Justice Bronson, in Downes v. Phoenix Bank, 6 Hill [N. Y.] 297, quoted in Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377. In accord with these decisions are Munger v. Albany, etc., Bank, 85 N. Y. 580; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Smiley v. Fry, 100 N. Y. 262; Shute v. Pacific Nat. Bank, 136 Mass. 487; Riddle v. First Nat. Bank, 27 F. 503; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603. The reasoning of these cases has not met with universal approval, and good authority is found for the doctrine that certificates of deposit, being promissory notes, must be in all respects subject to the same rules to which such notes are subject. Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610.—From note to Hillsinger v. Georgia R. Bank, 108 Ga. 357, 75 Am. St. Rep. 42, 46 et seq.

67. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777.

68. In replevin by an indorsee to recover certificates of deposit, the evidence held not conclusive that the transfer was without consideration and void. Sather v. Sexton, 93 Minn. 480, 101 N. W. 654.

69. Sather v. Sexton, 93 Minn. 480, 101 N. W. 654.

70, 71. See 3 C. L. 418.

72. Ex parte Stockman [S. C.] 48 S. E. 736; Elliott v. Capital City State Bank [Iowa] 103 N. W. 777. Unless the banker desires to return a deposit he is under no obligation to seek his creditor for the purpose of making payment. Id.

73. Elliott v. Capital City State Bank [Iowa] 103 N. W. 777.

74, 75, 76. First Nat. Bank v. Stapf [Ind.] 74 N. E. 987.

77. Evidence held sufficient to warrant the deduction of two drafts, drawn by the defendant bank in favor of plaintiff, from the latter's account. Supreme Tent Knights of Maccabees of the World v. Port Huron Sav. Bank [Mich.] 100 N. W. 898.

78. Farmers' Bank of Dearborn v. Fudge [Mo. App.] 82 S. W. 1112. In such case held immaterial whether or not the depositor requested the bank to make the payment. Id. In an action by the bank to recover payments so made, an instruction authorizing a recovery if the third person was defendant's agent or so held out by him is not in conflict with an instruction directing the jury to find for defendant if he did not agree to pay such drafts and the third person's agency was not established. Id. An insruction held not erroneous for referring the jury to the petition for a description of the drafts, the latter being in evidence. Id.

79. Farmers' Bank of Dearborn v. Fudge [Mo. App.] 82 S. W. 1112.

80. The giving of credit to the depositor of checks operates as a payment thereof, though the bank was insolvent at

the depositor's successor in office does not operate as a payment relieving the bank from liability on its bond.[81] A check being returned as paid it is prima facie evidence of the receipt of the sum by the payee.[82] A depositor is not bound by a special custom of which he has no knowledge.[83] A bank being notified that a deposit is claimed by a third person it is bound to hold the money a sufficient length of time to afford such other an opportunity to assert his claim,[84] and if he has a reasonable time allowed him for that purpose, and fails to do so, the bank may pay the deposit to the depositor, without any liability to the adverse claimant.[85] What is a reasonable time is a mixed question of law and fact, which, under proper instructions of the court ought to be submitted to the jury.[86] In the absence of agreement there is no interest on deposit accounts until demand and refusal,[87] or until the bank suspends payment.[88]

Checks.[89]—A check can only be drawn against a depositor's deposit, and not against other indebtedness due the depositor by the bank.[90] Before an ordinary check will operate as an equitable assignment of the funds upon which it is drawn so as to acquire priority over a subsequent attaching creditor, one of three things must appear. First, the check must, on its face, show the intention to appropriate the fund on deposit;[91] or, second, the depositary bank must have had notice in some way of the drawing of the check;[92] or, third, the check must have been made against a particular fund on deposit, and for the whole of such fund.[93] An ordinary check upon one's general account, and not for the whole thereof, does not operate as an assignment of the fund until the check is accepted or certified by the bank.[94] A check not operating as an equitable assignment may be revoked by the maker and any subsequent payment is made at the peril of the bank,[95] though the latter is bound to pay the bona fide holder of a check indorsed in blank, even though notified by the payee that he lost it.[96] The bringing of suit by the drawer against the payee to recover the sum paid him by the bank in disregard of the instructions is not a ratification of the act of the bank.[97] The bank is bound

the time, if the checks would have been paid if payment had been demanded when there were presented. Hubbard v. Pettey [Tex. Civ. App.] 85 S. W. 509. Payee of draft depositing it and receiving credit as a depositor, the proceeds of the draft become the property of the bank, and cannot be recovered by the drawer for a failure of consideration of the draft as between the drawer and payee. Reed Grocery v. Canton Nat. Bank [Md.] 59 A. 716; Miller v. Farm. & Mechanics' Bank, 30 Md. 392, distinguished. The payee of a check indorsing and depositing it and receiving credit for the amount as cash to be checked against, the bank becomes the owner of the check. Aebl v. Bank of Evansville [Wis.] 102 N. W. 329. Where the hand to pay is also the hand to receive, payment may be made by a transfer of credits upon the books of a bank. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765.

81. Bond ran to treasurer of county or his successors. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

82. So held where bank was drawee and payee. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765. It is not conclusive evidence. Id.

83. Kuder v. Greene [Ark.] 82 S. W. 836.

84. Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503. Need not hold it for a time sufficient to enable him to investigate his rights to the deposit and bring suit against the bank to enforce the same. Id.

85, 86. Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

87. Ex parte Stockman [S. C.] 48 S. E. 736.

88. Depositor is entitled to interest from the date of suspension as damages for breach of the contract to pay his checks on presentation, whether they were presented or not. Ex parte Stockman [S. C.] 48 S. E. 736.

89. See 3 C. L. 418-420.

90. Refusal to honor a check against such indebtedness does not render the bank liable in damages. McKnight v. Bank of Acadia [La.] 38 So. 172.

91, 92. Love v. Ardmore Stock Exch. [Ind. T.] 82 S. W. 721.

93. Love v. Ardmore Stock Exch. [Ind. T.] 82 S. W. 721. Check drawn against particular draft held an appropration of sufficient of the proceeds of the draft to pay the check. Parkersburg Mill. Co. v. Farmers' & Traders' Nat. Bank, 26 Ky. L. R. 964, 82 S. W. 1003.

94, 95. Pease & Dwyer Co. v. State Nat. Bank [Tenn.] 88 S. W. 172.

96. Unaka Nat. Bank v. Butler [Tenn.] 83 S. W. 655.

97. Pease & Dwyer Co. v. State Nat. Bank [Tenn.] 88 S. W. 172.

to pay to the payee or indorsee,[98] and payment being refused a bona fide holder may sue to recover the amount of the check.[99] Where a party has a check in ordinary form on general funds in a bank, it is his duty to present such check within reasonable time,[1] and if before presentation a third party attaches or garnishees the money in a proper legal action, he aquires a lien superior to the rights of the payee.[2]

Forged or altered checks and drafts.[3]—As between the depositor and the bank, the latter is held to a knowledge of the signature and handwriting of its customer, and in the absence of some fault on the part of the latter affecting the question of liability, a forged check, whether the forgery was accomplished by material alteration or the forgery of the signature, is honored by the bank at its peril.[4] Changing the name of the bank on which the check is drawn is a material alteration,[5] which it is not the duty of the depositor to foresee.[6] No local custom can give vitality to a forged check.[7]

Overdrafts.[8]—The allowance of overdrafts is a matter resting in the judgment and discretion of the governing body of the bank, unless it delegates the duty to designated officials.[9] Such officers are not liable for losses occurring therefrom provided that they act honestly and prudently.[10] Several officers of a bank wrongfully permitting overdrafts are jointly and severably liable for all loss sustained thereby,[11] and in such case a release of the debtor in consideration of his executing a deed of trust for his creditors does not release the officer.[12]

The assignment of a bank account must be made by the party in whose name it stands, and being in writing, it cannot be proved by parol.[13]

Set-off of debts due bank against deposit. Lien of bank.[14]—There is a conflict as to whether a bank may without notice apply funds of a depositor in extinguishing past due claims held against him.[15] A bank has a lien on all moneys,

98. A bank has no authority to pay the proceeds of checks made payable to the cashier of the bank to the party presenting the check. Kuder v. Greene [Ark.] 82 S. W. 836.

99. Turner v. Hot Springs Nat. Bank [S. D.] 101 N. W. 348.

1, 2. Love v. Ardmore Stock Exch. [Ind. T.] 82 S. W. 721.

3. See 3 C. L. 420.

4, 5. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

6. Where depositor stopped payment on check, drew deposit from bank and deposited money elsewhere, held not bound to notify bank, in which deposit was made, of the existence of the check. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

7. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

8. See 3 C. L. 420.

9. Western Bank v. Coldewey's Ex'x, 26 Ky. L. R. 1247, 83 S. W. 629.

10. Western Bank v. Coldewey's Ex'x, 26 Ky. L. R. 1247, 83 S. W. 629; Cope v. Westbay [Mo.] 87 S. W. 504. Allowing man of considerable means to overdraw account $3,500 and permitting his successor in business, who assumed such debt, to overdraw to the extent of $500, held not to render the officials personally liable. Id.

11. Western Bank v. Coldewey's Ex'x, 26 Ky. L. R. 1247, 83 S. W. 629. Where applications for loans had to be submitted to an advisory committee, held, the president was liable for allowing his son to overdraw his account without the consent of the advisory committee. Id.

12. Western Bank v. Coldewey's Ex'x, 26 Ky. L. R. 1247, 83 S. W. 629. An assignment by "J. B." of a bank account standing in the name of "M. B. & Son," is of itself insufficient to sustain an action thereon by the assignee. Robbins v. Bank of M. & L. Jarmulowsky, 90 N. Y. S. 288.

13. Robbins v. Bank of M. & L. Jarmulosky, 90 N. Y. S. 288.

14. See 3 C. L. 422.

15. That it cannot. Caloham v. Bank of Anderson, 69 S. C. 374, 48 S. E. 293. [By a divided court.]

NOTE. Dishonor of check—Application of funds to depositors debts: A bank may refuse to honor a depositor's check when there is not sufficient funds remaining after offsetting balances due it from the depositor. Commercial Bank v. Hughes, 17 Wend. [N. Y.] 94; Garnett v. McKewan, L. R. 8 Exch. 10. The offsetting claims, however, must be due or the bank is not justified in refusing to honor the check. Fogarties v. State Bank, 12 Rich. Law [S. C.] 518, 78 Am. Dec. 468. The authorities at common law seem uniformly opposed to the view in the principal case; nevertheless it finds support in Louisiana from the adoption there of Roman civil law principles. There an irregular deposit is not subject to set off, or, as it is called, to compensation. Gordon v. Muchler, 34 La. Ann. 604. Where the right exists, as it

notes, and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid.[16]

Deposits received after insolvency.[17]—A deposit made while the bank is insolvent to the knowledge of its officers may be recovered from the bank's receiver [18] in preference to the general creditors,[19] provided that it went to swell the assets of the bank left at the time the bank was closed,[20] and, in the absence of controverting evidence, it will generally be presumed that the deposit did swell such assets,[21] and it is not necessary to trace the identical money into the receiver's hands.[22] The mere fact of insolvency at the time the deposit is received is insufficient to justify a finding of fraud, but the insolvency must be of such a character that it is manifestly impossible for the bankers to continue in business and meet their obligations; [23] and this fact must have been known by the bankers.[24] It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of fraud upon which the plaintiff's cause of action must depend.[25]

General deposits.[26]—Where the money deposited is mingled with other money of the bank, and the entire amount forms a single fund, from which depositors are paid, it is a general deposit.[27]

Special deposits.[28]—A special deposit is created where the money is left for safe keeping and the identical money is returned to the depositor.[29]

Specific deposits.[30]

Trust funds.[31]—A fund being left for a specific purpose, it constitutes a trust fund in the hands of the bank,[32] and the bank is liable if it converts the property to another use.[33] In order to be liable, a bank must have knowledge that the funds deposited are impressed with a trust.[34]

does at common law, there would hardly be a duty to notify unless a custom be shown interpreting the contract or working an estoppel.—4 Columbia L. R. 602.

16. Garrison v. Union Trust Co. [Mich.] 102 N. W. 978.

17. See 3 C. L. 423.

18. Baker v. Orme, 6 Ohio C. C. (N. S.) 289; Western German Bank v. Norveil [C. C. A.] 134 F. 724.

19. Willoughby v. Weinberger [Okl.] 79 P. 777.

20. Where checks on a third bank were deposited in another bank while insolvent and were used by it in settling an indebtedness, and nothing came into the hands of the receiver from such checks, held, the depositor was not entitled to a preference. Willoughby v. Weinberger [Okl.] 79 P. 777.

21. So held where deposit was made in the morning and bank closed 2½ hours later, and at the time of closing had on hand more cash that the day's deposits amounted to. Willoughby v. Weinberger [Okl.] 79 P. 777.

22. Western German Bank v. Norveil [C. C. A.] 134 F. 724.

23. Williams v. Van Norden Trust Co., 93 N. Y. S. 821. Evidence held insufficient to show the above condition. Id.

24. So as to justify the conclusion that they accepted the deposit knowing that they would not and could not respond when the depositor demanded it. Williams v. Van Norden Trust Co., 93 N. Y. S. 821. Knowledge of insolvency is sufficient irrespective of intentional wrong or bad faith. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13.

25. Williams v. Van Norden Trust Co., 93 N. Y. S. 821.

26. See 3 C. L. 423.

27. See 3 C. L. 423, n. 82. Money deposited by a township treasurer in a bank as provided by Rev. St. Ohio, §§ 1513, 1514, 6841 is a general, not a special deposit. In re Smart, 136 F. 974. Where a woman left money in a private bank, stating that she would leave it for a few days, the money consisting of a roll of bills, neither wrapped nor tied, and an ordinary bankbook was given her, and she refused a checkbook, held a general, and not a special, deposit. State v. Dickerson [Kan.] 81 P. 497.

28. See 3 C. L. 423.

29. In re Smart, 136 F. 974. See 3 C. L. 423, n. 86.

30, 31. See 3 C. L. 424.

32. Money deposited under an agreement that it is to be used exclusively for the payment of creditors of a corporation constitutes a trust fund for such creditors. Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776. Order by husband that wife should have a right to draw on the community property deposited in the bank and should have the right of survivorship, held to constitute the bank a trustee for her benefit. Sprague v. Walton, 145 Cal. 228, 78 P. 645.

33. Bank held liable where it receives a deposit with directions to use it to pay a certain contractor for certain machinery, and applies the money to a debt owed it by

Slander of credit or damages for failure to pay checks.[35]—A bank wrongfully refusing to honor a check is liable for the damages resulting therefrom, including interest on the amount of the check until it is paid,[36] though the refusal is due to a mistake in bookkeeping;[37] and the jury may take into consideration the natural and necessary consequences of the bank's breach of contract without proof of special damages,[38] and in the absence of such proof, the law presumes, both in the case of an individual and of a corporation, that substantial damages have been sustained.[39] In an action for damages for refusal to honor a check, the general rules as to the admissiblity and sufficiency [40] of the evidence apply; evidence of the previous dishonor of another check is inadmissible,[41] but plaintiff may show conversations between himself and business men with whom he tried to obtain credit after the dishonor of the check, though he does not allege special damages.[42]

Actions to recover deposits.[43]—A receiver being appointed, a deposit can only be recovered by petition in the receivership action.[44] A suit for a balance of deposits as per passbook will be maintained where there is no plea of want of amicable demand, accompanied by a tender of the balance due.[45] A bank holding a deposit in trust cannot be compelled, in a suit brought against it to recover the fund, to litigate the rights of claimants.[46] Bank deposits are "money lent" within the meaning of statutes of limitations,[47] and such statute does not begin to run against the recovery of the deposit until demand is made for repayment [48] or until the bank discontinues banking operations and suspends payment.[49] The general rules as to the admissibility [50] and sufficiency [51] of the evidence and the cross-examination of witnesses,[52] apply.

Certifications.[53]—A different rule is to be applied as between the drawer and the payee of a check, when the drawer himself, before delivery, causes the check to be certified, from that which obtains when the payee, after delivery to him, obtains

the contractor. Winfield Nat. Bank v. Railroad Loan & Sav. Ass'n [Kan.] 81 P. 202. Petition examined and held to state a cause of action on an implied contract and not in tort. Id.

34. That depositor deposited check payable to him as trustee to his personal account, held not to render the bank liable. Batchelder v. Central Nat. Bank [Mass.] 73 N. E. 1024.

35. See 3 C. L. 424.

36. Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310.

37, 38, 39. Metropolitan Supply Co. v. Garden City Banking & Trust Co., 114 Ill. App. 318.

40. In an action against a bank for dishonoring a check, evidence held sufficient to warrant the submission to the jury of the question whether plaintiff had ratified the act of the bank in charging to plaintiff's account, as agent, the amount of a note given to the bank by plaintiff individually. Sprowl v. Southern Nat. Bank [Ky.] 86 S. W. 1117.

41. Sprowl v. Southern Nat. Bank [Ky.] 86 S. W. 1117.

42. Metropolitan Supply Co. v. Garden City Banking & Trust Co., 114 Ill. App. 318.

43. See 3 C. L. 424.

44. An action cannot be maintained against the receiver. Crutchfield v. Hunter [N. C.] 50 S. E. 557.

45. McKnight v. Bank of Acadia [La.] 38 So. 172.

46. Until the rights of the claimants are settled among themselves, the bank's obligation is fulfilled by holding the fund. Leonard v. Camden Nat. Bank, 70 N. J. Law, 660, 59 A. 143.

47. Civ. Code La. art. 3538 (3503) considered. Schinotti v. Whitney, 130 F. 780.

48. Schinotti v. Whitney, 130 F. 780.

49. Such suspension waives demand. Schinotti v. Whitney, 130 F. 780.

50. A judgment obtained by a depositor in one action is not competent evidence against the same defendant in another action brought by another and different depositor. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13.

51. In an action against a bank to recover the difference between the aggregates of sums deposited and the sums withdrawn, evidence held sufficient to sustain a judgment for defendant. West v. Bank of Caruthersville [Mo. App.] 85 S. W. 601.

52. Where at the time deposit was made a bank examiner told the depositor that the impairment of the bank's capital was only $70,000 or $80,000, which left it solvent, whereas it was later shown to be $371,000, which left it insolvent, held, in an action against the directors for receiving deposits while insolvent, not an abuse of discretion to refuse to permit the examiner to explain the discrepancy on cross-examination. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13.

53. See 3 C. L. 425.

the certification. In the latter case the drawer is discharged from the indebtedness for which the check was given, and the holder can look only to the bank;[54] while in the former case the drawer is not discharged of his indebtedness, but the holder may, in case the bank fails to abide by its obligation, have recourse to his debtor upon the original indebtedness.[55] This rule, however, applies only to the relation between drawer and payee, and has nothing to do with the character or extent of the obligation assumed by the bank by the act of certification.[56]

§ 7. *Circulating notes.*—A bank bill stolen from, or lost by, a bank and fraudulently put into circulation is good as against the bank, in the hands of a bona fide holder for value,[57] and the mere possession of any holder is sufficient to impose the burden of proof on the bank to show the fraud or bad faith of the plaintiff.[58] But neither a thief, nor a finder, nor a holder having good reason to believe that the bill has been stolen or lost can recover,[59] and if by fraud or mistake he does secure payment thereon, he will be required to return the sum so secured.[60]

§ 8. *Loans and discounts.*[61]—"Discounting" as that term is understood in banking must be done with money under the control of the discounter, but belonging, at least in part, to another.[62] In New York the law follows the national bank act and does not impose as a penalty for usury the forfeiture of the principal.[63]

Advances against bills of lading.[64]—A bank advancing money and taking the bills of lading as security, the title to the goods vests in the bank,[65] subject, however, to the terms of the contract between the parties relative to the retransfer of the goods or the payment of profits.[66]

Drafts with bills of lading attached.[67]—A bank discounting a draft with the bill of lading attached, the goods thereby become the property of the bank.[68]

Agreements to honor paper.—A bank having erroneously authorized the giving

54, 55, 56. Schlesinger v. Kurzrok, 94 N. Y. S. 442.

57, 58. Pelletier v. State Nat. Bank [La.] 38 So. 132.

59. Pelletier v. State Nat. Bank [La.] 38 So. 132. One purchasing $10,000 of notes of a solvent bank for $25 held not a purchaser in good faith. Id.

60. Pelletier v. State Nat. Bank [La.] 38 So. 132.

61. See 3 C. L. 426. Where the officers of a bank have knowledge that money paid it by another officer belongs to a third party, the bank's liability to the latter depends upon whether the money was used to pay the officer's individual indebtedness to the bank or to pay the third party's indebtedness. The question of good faith is not involved. Supreme Tent Knights of Maccabees of the World v. Port Huron Sav. Bank [Mich.] 100 N. W. 898.

62. Clark v. Assets Realization Co., 115 Ill. App. 150. The purchase by a New Jersey corporation of the assets of a defunct building and loan association, with its own money, is not "discounting bills, notes, or other evidences of indebtedness," within the meaning of the New Jersey Corporation Act. Id.

63. 3 U. S. Comp. St. 1901, pp. 3454-3493; Laws N. Y. 1870, p. 437, c. 163; Laws 1880, p. 823, c. 567, construed. In re Samuel Wild's Sons, 133 F. 562.

64. See 3 C. L. 426.

65. In re McElheny, 91 App. Div. 131, 86 N. Y. S. 326. Where, under a contract for a letter of credit, the banker held a policy of insurance on the goods, and the latter were destroyed, held entitled to share in the insurance money ratably with other bankers holding other insurance on the goods. Id. So held where goods were imported under a letter of credit, the bill of lading and the consular invoice being made out to the banker. Moors v. Drury, 186 Mass. 424, 71 N. E. 810. This is true, though the importer writes the banker that the goods are to be held as general collateral security for his account. Id.

66. So held where banker was to sell goods, and pay letter of credit, turning proceeds over to borrower. Moors v. Drury, 186 Mass. 424, 71 N. E. 810. Bank to resell goods to borrower on payment of purchase price. In re McElheny, 91 App. Div. 131, 86 N. Y. S. 326.

67. See 3 C. L. 426.

68. One not subject to attachment by a creditor of the shipper. Bank of New Roads v. Kentucky Refining Co. [Ky.] 85 S. W. 1103; Temple Nat. Bank v. Louisville Cotton Oil Co., 26 Ky. L. R. 518, 82 S. W. 253. Where the property was delivered by the banker to the seller for resale, held not to vest title in the latter so as to render it liable to attachment by the seller's creditors. Mather v. Gordon Bros. [Conn.] 59 A. 424. Evidence held sufficient to show that bank discounted draft and did not hold it for collection. Id. Temple Nat. Bank v. Louisville Cotton Oil Co., 26 Ky. L. R. 518, 82 S. W. 253.

of credit may correct the mistake before liabilities have been incurred or losses sustained in consequence thereof.[69]

§ 9. *Collections.*[70]—Commercial paper being forwarded to a bank for collection, the bank acts as a mere agent of the owner,[71] and the latter may revoke the bank's authority and demand a return of the paper at any time before collection,[72] a refusal to comply with such demand operating as a conversion of the paper.[73] A bank taking paper for collection, the title thereto does not pass from the depositor,[74] and the bank's title is measured by that of the forwarder;[75] but the money being collected and credited, the title passes,[76] and the relation between the bank and depositor becomes that of debtor and creditor,[77] and upon the bank becoming insolvent the depositor can only share in the assets pro rata with general creditors.[78] A payment to the bank or its correspondent operates as a payment to the owner of the paper.[79] The obligation to collect requires the bank to accept only money in payment. If it accepts a draft it does so at its peril,[80] though, on the absence of instructions to the contrary,[81] the collecting bank may remit by a check or draft upon itself,[82] and this is true if the bank is insolvent, but is open and and doing business, and there is no fraud between it and the drawee.[83] Special instructions as to the manner of remitting must be followed.[84] The bank is liable for losses sustained by reason of the acts of its agents.[85] Unless the paper is stamped with some indicia indicating that it is forwarded for collection, the owner cannot recover from a subagent to whom it is sent for collection and who treats the agent as the owner.[86] An indebtedness existing in favor of a bank against the forwarder does not constitute

69. Brinton v. Lewiston Nat. Bank [Idaho] 81 P. 112.

70. See 3 C. L. 426. Bank collections, see Selover on Bank Collections.

71, 72, 73. Bank of America v. Waydell, 92 N. Y. S. 666.

74. Garrison v. Union Trust Co. [Mich.] 102 N. W. 978.

75. Bank of America v. Waydell, 92 N. Y. S. 666.

76. Garrison v. Union Trust Co. [Mich.] 102 N. W. 978.

77. North Carolina Corp. Commission v. Merchants' & Farmers' Bank [N. C.] 50 S. E. 308. Under Rev. St. 1898, § 2768, a bank with which a note and mortgage assigned by a husband to his wife in fraud of creditors were placed for collection, and which received a check for the amount due on the note and mortgage, payable to its order, was subject to garnishment for the amount of the check by a creditor of the husband. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068. 3 Am. & Eng. Ency. Law, pp. 819-821, and cases cited.

Contra. Federal Courts: A bank receiving a check for collection is liable as a trustee for the money collected. Holder v. Western German Bank [C. C. A.] 136 F. 90, afg. 132 F. 187.

Georgia: Is a bailee. Nashville Produce Co. v. Sewell, 121 Ga. 278, 48 S. E. 945. Henry v. Lennox-Halderman Co., 116 Ga. 9, 42 S. E. 383, and High v. Padrosa, 119 Ga. 648, 46 S. E. 859, held inapplicable to the above case. Id.

78. North Carolina Corp. Commission v. Merchants' & Farmers' Bank [N. C.] 50 S. E. 308.

79. Porter v. Roseman [Ind.] 74 N. E. 1105.

80. 3 Am. & Eng. Enc. Law, 804. A bank to whom a draft with bill of lading attached is sent for collection, surrendering the bill and taking a draft from the insolvent purchaser as a means of collecting the draft of the seller, which draft was never paid, is liable to the seller for the market value of the goods at the time the purchaser took possession, and not for the face of the draft. People's Nat. Bank v. Brogden [Tex.] 83 S. W. 1098. Motion for rehearing in court of appeals, granted. Id. [Tex. Civ. App.] 84 S. W. 601, in compliance with the views of the supreme court as indicated above.

81. A collecting bank cannot send its own draft in payment contrary to instructions. Holder v. Western German Bank [C. C. A.] 136 F. 90, afg. 132 F. 187.

82, 83. North Carolina Corp. Commission v. Merchants' & Farmers' Bank [N. C.] 50 S. E. 308.

84. The instruction of a bank in sending a check for collection to another bank, "Remit New York exchange," authorizes a remittance only in accordance with custom. Holder v. Western German Bank [C. C. A.] 136 F. 90, afg. 132 F. 187.

85. Where a life insurance company sent renewals on policies to a bank for collection, and the bank permitted the company's agent to collect them, held liable for the agent's failure to deposit the sums collected, especially where the insurance company had no knowledge that the collections were so made. Manhattan Life Ins. Co. v. Firs Nat. Bank [Colo. App.] 80 P. 467. Agent for bank testifying that he collected the amount but failed to account, held to supply omission on part of plaintiff to prove that any amount was collected by the bank. Id.

86. Subagent is entitled to its banker's lien. Garrison v. Union Trust Co. [Mich.] 102 N. W. 978.

the bank a holder of the draft for value, it not discharging or dealing with the draft in any way on the faith thereof.[87]

Duty to preserve rights of parties.[88]—Where a bank receives commercial paper for collection, the law implies a contract upon its part to use reasonable skill and diligence in making the collection,[89] and this contract is supported by a sufficient consideration, whether a collection charge, termed "exchange," be made or not.[90] No custom, general or special, will excuse the want of reasonable diligence.[91] The admissibility of particular evidence in an action to enforce the bank's liability is shown in the notes.[92]

§ 10. *Criminal transactions.*[93]—The crime of embezzlement from a national bank by an officer, clerk or agent involves two general elements: First, a breach of trust or duty in respect to the moneys, properties, and effects in the party's possession, belonging to another; and, second, the wrongful appropriation thereof to his own use.[94] In order to constitute this crime, it is necessary that the property, money or effects embezzled should at the time be in the lawful possession or custody of the accused.[95] Abstraction, under the national banking laws, is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds or credits with intent to injure or defraud it, or some other person or company, and, without its knowledge or consent, or that of its board of directors, converts them to the use of himself, or some other person or company other than the bank.[96] No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished.[97] Willful misapplication as described in the national banking act means a misapplication, willfully and unlawfully made by one of the officers enumerated therein, of the money, funds or credits of the bank, and made with intent to injure the bank, or some other company or person;[98] and it has been held that there must be a conversion of the funds misapplied, to the use and benefit of the wrongdoer, or to the use of some one other than the bank.[99] It is not necessary that the officer so charged should have been previously in the possession or custody of the money, funds, or credits of the bank by virtue of any trust, duty or employment.[1] It will thus be seen that the crime of embezzlement under the national banking act em-

87. This under Negotiable Instruments Law, § 51, providing that an antecedent debt constitutes value. In this case the draft was not yet due. Bank of America v. Waydell, 92 N. Y. S. 666.

88. See 3 C. L. 427.

89. Manhattan Life Ins. Co. v. First Nat. Bank [Colo. App.] 80 P. 467.

90. Manhattan Life Ins. Co. v. First Nat. Bank [Colo. App.] 80 P. 467; 3 Am. & Eng. Enc. Law, 802.

91. The presenting of checks through the clearing house the day after receiving them, instead of having them certified on the same day, was claimed to be a usage, but held not to be reasonable diligence. Bank of Commerce v. Miller, 105 Ill. App. 224.

92. In an action against the bank for failing to give notice of protest, evidence that indorser's address was written on note in the handwriting of the bank's collection clerk held admissible to prove that the note was delivered to the latter. Howard v. Bank of the Metropolis, 93 N. Y. S. 1042.

93. See 3 C. L. 427. See Clark & M. Law of Crimes [2nd Ed.] § 343 (b) p. 503.

NOTE. Application of state statutes to embezzlement by national bank officers: The act of congress creating national banks provides for the punishment of embezzlement of the property of the bank by its officers. It follows that the matter is within the exclusive jurisdiction of the Federal courts, and such embezzlement cannot be punished by a state court, even though a state statute may provide therefor. Commonwealth v. Felton, 101 Mass. 204; Commonwealth v. Ketner, 92 Pa. 372, 37 Am. Rep. 692; State v. Tuller, 34 Conn. 280; Clark & M. Crimes [2d ed.] § 343 (b). In State v. Tuller, supra, a state statute providing for the punishment of embezzlement by a bank officer of the property of the bank's customers deposited with it is applicable to national banks. —From Clark & M. Crimes [2d ed.] § 343 (b) and note to Eggleston v. State [Ala.] 87 Am. St. Rep. 46.

94. Rev. St. § 5209, considered. United States v. Breese, 131 F. 915.

95. United States v. Breese, 131 F. 915.

96. Rev. St. U. S. 5209, construed. United States v. Breese, 131 F. 915.

97, 98, 99. United States v. Breese, 131 F. 915.

1. United States v. Breese, 131 F. 915. The possession required for the crime of misapplication is that one have access to, control over, and management of the funds. United States v. Eastman, 133 F. 551.

braces the offenses of abstraction and willful misapplication, but the converse of the proposition is not necessarily true.[2] The intent to injure or defraud the bank, or some other person or company, and which is an essential element in all of the above mentioned crimes, need not necessarily have been the object or purpose with which the act was done; it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done.[3] An officer of a national bank is not guilty of embezzlement, abstraction or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee,[4] but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank.[5]

The indictment should set forth all the elements of the offense charged with sufficient clearness to apprise the respondent with reasonable certainty of the nature of the accusation and of every substantial feature of the wrong charged against him.[6] An indictment charging a defendant, in different counts, with offenses against two different national banks, of each of which he was an officer, is not necessarily demurrable; but the propriety of such joinder in a given case is left to the discretion of the court, which may compel an election between the counts or direct separate trials.[7] Allegations must be of fact,[8] and must be consistent.[9] An indictment charging that defendant made a false entry in the books of the bank as to the amount withdrawn by a depositor is sufficient if it alleges that the said depositor did not withdraw the specified sum on the day specified in the entry.[10]

Evidence of other transactions by defendant and of a similar nature is admissible on the question of intent.[11]

2, 3, 4, 5. United States v. Breese, 131 F. 915.

6. United States v. Eastman, 132 F. 551. An indictment of an officer of a national bank for misapplication of funds sufficiently alleges his possession thereof by an averment that he was president of the bank, and as such had access to its funds, properties, moneys and credits, with duties to perform in their control, management and application. Id. Such indictment sufficiently alleges the manner in which the misapplication was accomplished where it charges that, having access to the funds and properties of the bank, he willfully, unlawfully, fraudulently, and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. Id. The indictment charging the officer with misapplication of funds and making false entries in the bank's books, it need not allege that the acts were done feloniously, where they are charged to have been done willfully and with intent to defraud the bank. Id. Various objections to an indictment, charging an officer of a national bank with misapplication of funds, on the ground of insufficiency of description of the property, considered, and held not well taken. Id.

7. Rev. St. U. S. §§ 1024, 5209, construed. United States v. Eastman, 132 F. 551.

8. An indictment for making false entries in the books of a bank an allegation that the defendant on said day paid out of and from the funds of said bank the sum of $5,200 is not an allegation of fact, but a conclusion of the pleader. State v Piper [N. H.] 60 A. 742.

9. An allegation in an indictment for making false entries in the books of a bank, that defendant, as such cashier, did not pay out the sum, or any part thereof, does not negative the truth of a prior allegation to the effect that the bank had on the specified day paid out a specific sum. State v. Piper [N. H.] 60 A. 742.

10. Need not allege that the money was not withdrawn from the depositor's account either by him or on his order. State v. Piper [N. H.] 60 A. 432. An indictment under Pub. St. 1901, c. 165, § 32, relating to false entries by a bank officer, should contain at least the following averments: (1) That the respondent was an officer (describing his office) of a loan and banking company organized under the laws of New Hampshire, and engaged in carrying on a loan and banking business (describing the company and its place of business in the state); (2) that, being such officer, he made in a book (describing it) owned and used by the institution in transacting its loan and banking business an entry (describing it); (3) that the entry was false (setting out the facts relied upon to establish its falsity) and was made with intent to deceive the officers of the institution (describing them), or the bank commissioners (naming them); (4) averments of time and place. Id.

11. In the trial of an officer of a national bank for embezzlement, abstraction and misapplication of funds. United States v. Breese, 131 F. 915.

BANKRUPTCY.

§ 1. *The bankruptcy act, amendments, and general orders. Construction of act.*[1]—In all matters pertaining to a construction of the Federal bankruptcy act the holdings of the supreme court of the United States are conclusive.[2]

General orders.[3]—*The forms* set forth in the general orders are not mandatory but are to be used with such alterations as may be necessary to suit the circumstances of any particular case.[4]

§ 2. *Supersession of state laws.*[5]—The national bankruptcy act suspends and supersedes all state insolvency laws [6] which are in their nature bankruptcy acts [7] except as to cases and persons not within its purview.[8]

1. See 3 C. L. 434.
2. Stewart v. Hoffman [Mont.] 81 P. 3, overruling former opinion, Id. [Mont.] 77 P 689.
3. See 3 C. L. 434.
4. Burke v. Guarantee Title & Trust Co. [C. C. A.] 134 F. 562.
5. See 3 C. L. 434.

§ 3. *Occasion for proceeding and acts of bankruptcy. A. In general.*[9] *Insolvency.*[10]—Under the present bankruptcy law a debtor is not insolvent unless his property at a fair valuation and exclusive of any property which he has conveyed, concealed, or removed, or permitted to be conveyed, concealed, or removed with intent to defraud, hinder, or delay his creditors,[11] is insufficient to pay his debts.[12] A stockholder's liability for unpaid stock subscriptions cannot be taken into account as an asset in determining the question of the corporation's solvency.[13] A bankrupt remaining personally liable upon a mortgage upon land conveyed by him, such debt is chargeable as a liability;[14] also sums paid to preserve assets are generally regarded as liabilities.[15]

(§ 3) *B. Disposition of property with intent to hinder, delay, or defraud creditors.*[16] The giving of a lien, valid under the bankruptcy act does not constitute an act of bankruptcy.[17]

(§ 3) *C. A preferential transfer while insolvent.*[18]—An insolvent knowingly preferring a creditor commits an act of bankruptcy.[19] The transaction amounting to a preference, the law presumes that it was done with intent to prefer.[20]

(§ 3) *D. Suffering or permitting while insolvent, the obtaining of a preference through legal proceedings.*[21]—It is not the mere obtaining of a preference through legal proceedings while insolvent that makes the debtor liable as a bankrupt, but it is the failure on his part to have the same vacated or discharged within five days before a sale or final disposition of the property.[22]

(§ 3) *E. General assignment.*[23]—The assignee need not have been appointed by order of a court [24] nor under a state insolvency law.[25]

6. Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956; In re J. H. Alison Lumber Co., 137 F. 643, and cases cited. Pennsylvania act of June 4, 1901, is suspended. Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206.

7. Until proceedings have been begun under the Federal bankruptcy act, the operation of the Georgia insolvent traders' act is not suspended as to a particular case. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466. The Georgia insolvent traders' act is unquestionably an insolvency law, but it lacks one necessary element of a bankruptcy law, viz., provision that after discharge the debtor shall be released from further liability on his debts. Id.

8. Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206. Does not apply to a farmer. Musser v. Brindle, 23 Pa. Super. Ct. 37.

9. See 3 C. L. 435.

10. See 3 C. L. 435. As to the burden of proving insolvency and the evidence admissible on such issue, see post, § 5 C.

11. In re Shoesmith [C. C. A.] 135 F. 684. Proceeds of a fraudulent conveyance being invested in a distant state they should be treated as "concealed assets" and deducted from available assets, for the purpose of determining insolvency. Id.

12. Crandall v. Coats, 133 F. 965; In re Shoesmith [C. C. A.] 135 F. 684; Murphy v. W. T. Murphy & Co. [Iowa] 101 N. W. 486; Hastings v. Fithian [N. J. Err. & App.] 60 A. 350 The evidence must be such as to satisfy the jury that defendant's existing indebtedness is more than the value of his assets at the time the petition is filed. In re McGowan, 134 F. 498; Knittel v. McGowan, Id., but see 137 F. 453, where case is reversed on other grounds. Evidence held to establish insolvency. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247.

13. First Nat. Bank v. The Wyoming Valley Ice Co., 136 F. 466.

14. Grantee took a mere equity of redemption. In re Shoesmith [C. C. A.] 135 F. 684.

15. Instruction that license fee was paid, by purchase of license to preserve license as an asset and that the amount so paid should be charged as a liability on an issue as to the debtor's insolvency held correct. In re McGowan, 134 F. 498. But see McGowan v. Knittel [C. C. A.] 137 F. 453, where case is reversed on other grounds.

16. See 3 C. L. 436.

17. Where a debtor while solvent made an equitable assignment of insurance policies to be issued as security for a loan, but failed to make a delivery and assignment of the policies to the creditor, until after loss, when he was insolvent, the assignment thereof at that time did not constitute an act of bankruptcy. Wilder v. Watts, 138 F. 426.

18. See 3 C. L. 436.

19. Rex Buggy Co. v. Hearick [C. C. A.] 132 F. 310.

20. Rex Buggy Co. v. Hearick [C. C. A.] 132 F. 310. See 3 C. L. 436, n. 91.

21. See 3 C. L. 437.

22. Petition alleging that the debtor's property has been attached in a legal proceeding is insufficient. In re Vetterman, 135 F. 443.

23. See 3 C. L. 437.

(§ 3) *F. Admitting insolvency in writing and willingness to be adjudged a bankrupt.*[26]

§ 4. *Persons who may be adjudged bankrupts and who may petition.*[27]—A natural person engaged chiefly in farming or the tillage of the soil cannot be adjudged an involuntary bankrupt.[28] To bring one within this exemption it is not essential that he should till the soil in person, or that his operations should be limited to agricultural planting, sowing and cultivation of the soil,[29] but such tillage of the soil must be his chief occupation or business and the one upon which he relies for his livelihood and financial welfare.[30] A corporation [31] engaged principally in manufacturing [32] or trading and mercantile pursuits [33] may be adjudged an involuntary bankrupt. The term "trading pursuits" as here used applies only to persons or concerns trading in tangible property or chattels.[34] To come within the provisions of the bankruptcy law as a manufacturer, it is not necessary that the corporation itself perform every operation with or upon the so-called raw material necessary to produce the completed article.[35] It is all-sufficient if it do any one of the several acts necessary to produce such manufactured articles in their completed form.[36] A corporation engaged in keeping an inn or hotel is not principally engaged in trading or mercantile pursuits.[37] A partnership conducting

24. In re Hercules Atkin Co., 133 F. 813.

25. In re Spalding, 134 F. 507. The appointment of a receiver in a judgment creditor's suit against an alleged bankrupt in a state court, because of the debtor's insolvency, constitutes an act of bankruptcy. Id.

26, 27. See 3 C. L. 438.

28. Act 1898, § 41. See 3 C. L. 438, n. 24.

29. Bank of Dearborn v. Matney, 132 F. 75.

30. Bank of Dearborn v. Matney, 132 F. 75. One who receives between $1,500 and $1,800 per year from the products of his farm, and spends $15,000 per year buying and feeding live stock and who becomes indebted to the extend of $50,000 by reason of his live stock transactions is not chiefly engaged in farming. Id. Bankrupt residing on farm of three hundred acres, which he had purchased, but only partially paid for, and cultivating only one-third thereof, spending most of his time and money in dealing in finely bred cattle, held not engaged chiefly in farming. In re Brown, 132 F. 706. Lawyer running a collection business and a farm, making nothing out of the former and his gross income from the farm was $1,800, and his indebtedness arose principally out of his purchase and operation of the farm, held chiefly engaged in farming. In re Hoy, 137 F. 175.

31. A mercantile association organized under Act Pa. 1874 (P. L. 271), providing for "the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association" may be adjudged an involuntary bankrupt. In re Hercules Atkin Co., 133 F. 813.

[The Court holds that it is immaterial whether the association be regarded as a corporation or not, but expresses the view that it comes within the definition of the word "corporation" as used in the Bankr. Act of 1898, § 1, subd. "a," cl. 6.]

32. A construction company engaged in constructing bridges, wharves, bulkheads, and driving piles for foundations for buildings, etc., whenever they could obtain a contract therefor is not a manufacturing concern. In re MacNichol Const. Co., 134 F. 979.

Contra, see 3 C. L. 438, n. 30, 31.

33. A corporation engaged in carrying on a wholesale and retail ice business is engaged chiefly in trading and mercantile pursuits. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466.

34. In re Snyder & Johnson Co., 133 F. 806, following In re Surety Guaranty Trust Co. [C. C. A.] 121 F. 73. Does not include a corporation engaged in soliciting advertisements and placing them in papers at rates previously furnished it. Id.

35. In re Troy Steam Laundering Co., 132 F. 266.

36. In re Troy Steam Laundering Co., 132 F. 266. A corporation whose chief business is laundering collars, cuffs, etc., for the manufacturers before the articles are put on the market is engaged chiefly in manufacturing. Id.

37. In re United States Hotel Co. [C. C. A.] 134 F. 225.

Note: The question as to what occupations are to be classed as trading or mercantile pursuits is a perplexing one in American bankruptcy law. The decisions are so inconsistent that even a marked tendency of any sort is wanting. The question whether innkeepers belong to this category was squarely raised in the case of In re Ryan, 2 Sawyer, 411, 5 Leg. Gaz. 263, 21 Fed. Cas. No. 12,183, where the respondent, who kept a tavern and bar, was adjudged a trader within the meaning of that term as used in the Bankruptcy Act of 1867 (14 Stat. 537) and hence held subject to proceedings in involuntary bankruptcy. This case seems to have been overlooked, however, in the decision of the principal case. A like conclusion is reached in the cases of In re Barton Hotel Co., 12 Am. Bankr. Rep. 335, and In re San Gabriel Sanitorium Co., 95 Fed. 271; but in the for-

a private bank [38] and an unincorporated Lloyd's association of fire underwriters are subject to involuntary proceedings.[39] An irrigation company is not subject to involuntary proceedings.[40] It has been held that a quasi public corporation is not amendable to the bankruptcy law on the ground of public policy.[41] A corporation or association does not cease to exist so as to preclude bankruptcy proceedings by instituting proceedings to wind up its affairs.[42]

Who may petition. Voluntary proceedings.[43]—A "qualified person" of the statute is one, other than a corporation, who owes debts.[44]

Involuntary proceedings.[45]—Persons who procure or connive at the commission of an act of bankruptcy are incompetent to maintain proceedings in bankruptcy on account of such act.[46] The time of the adjudication is the time to test the sufficiency of the number of the petitioning creditors and of the amount of their claims to warrant the adjudication,[47] and the bankruptcy act does not sanction the splitting up of a single claim into several demands in order to create the requisite number of petitioning creditors.[48] The petition being dismissed for insufficiency of petitioning creditors it is too late for a nonparticipating creditor to intervene as a matter of right.[49]

§ 5. *Procedure for adjudication. A. In general.*[50]—The Federal district court has general and exclusive jurisdiction of bankruptcy proceedings,[51] which jurisdiction is defined by the bankruptcy act.[52] Proceedings in bankruptcy are in the nature of a suit [53] in equity,[54] and hence pleadings in bankruptcy follow the rules of equity pleading.[55] Proceedings may be instituted in a district court

mer the court laid stress on the fact that the receipts from a cafe and bar largely exceeded those from rental of rooms. In re Morton Boarding Stables, 108 Fed. 791, 5 Am. Bankr. Rep. 763, following In re Odell, 9 Ben. [U. S.] 209, 18 Fed. Cas. No. 10,426, 17 Nat. Bankr. Reg. 73, held that the owner of livery and boarding stables was engaged in trading or mercantile pursuits. See, also, Campbell v. Fink, 2 Duval [Ky.] 107; In re Sherwood, 9 Ben. [U. S.] 66, 17 N. B. R. 112, 21 Fed. Cas. No. 12,773, and Collier on Bankruptcy [5th ed.], p. 64. The following English and Canadian authorities support the decisions of the court in the principal case: Luton v. Biggs, Skinner, 267, 291; Willitt v. Thomas, 2 Chitty, 691; Harmon v. Clarkson, 22 U. C. Com. Pl. 291; Newton v. Trigg, 1 Showers, 96. See, also, In re Chesapeake Oyster and Fish Co., 112 F. 960.—3 Mich. L. R. 571.

38. An unincorporated association of individuals formed to carry on the business of a private bank under Laning's Rev. Laws Ohio, § 4891 et seq. Burkhart v. German-American Bank, 137 F. 958.

39. In re Seaboard Fire Underwriters, 137 F. 987.

40. In re Bay City Irr. Co., 135 F. 850.

41. Irrigation company. In re Bay City Irr. Co., 135 F. 850.

[In this case the report of the referee was adopted by the court, the company was held not to come within the purview of the act and the above point was not necessary to the decision.]

42. The election of liquidating trustees does not preclude the bankruptcy proceedings, the association being organized under a statute that upon giving notice the association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof. In re Hercules Atkin Co., 133 F. 813.

43. See 3 C. L. 439.

44. Act 1898, §§ 59 and 4a construed. In re Little [C. C. A.] 137 F. 521.

45. See 3 C. L. 439.

46. In re Marks Bros., 135 F. 448, citing In re Williams, 14 N. B. R. 132, Fed Cas. No. 17,706; Clark v. Heine, 11 A. B. R. 595, 127 F. 288, 62 C. C. A. 172; Simonson v. Sinsheimer, 95 F. 954, 37 C. C. A. 337. See, also, 3 C. L. 440, n. 63. 64. Where petitioners procured act of bankruptcy, and there was no proof that the defendant was insolvent and his property was in the hands of state receivers, who were acting faithfully, diligently and efficiently, petition was dismissed. Woolford v. Diamond State Steel Co., 138 F. 582.

47. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000. Creditors may join at any time before the adjudication and be counted to make up the number of creditors and the amount of claims required by the act. Id.

Contra: "The number of creditors necessary to the petition should be reckoned as of the date of the petition." See 3 C. L. 439, n. 52.

48, 49. In re Tribelhorn [C. C. A.] 137 F. 3.

50. See 3 C. L. 440.

51. In re Shoesmith [C. C. A.] 135 F. 684.

52. In re Tybo Mining & Reduction Co., 132 F. 697.

53. In re Herrman [C. C. A.] 134 F. 566.

54. Lockman v. Lang [C. C. A.] 132 F. 1; Dodge v. Norlin [C. C. A.] 133 F. 363. Except in certain specified particulars, proceedings in bankruptcy are of an equitable nature. In re Waugh [C. C. A.] 133 F. 281.

55. In re Urban & Suburban Realty Co.,

though there is a vacancy in the office of judge;[56] in such a case it is the duty of the clerk to receive and file the petition when offered[57] and it seems that he may also issue a subpoena thereon tested in his own name.[58]

Schedules.—The schedule should definitely describe the debt[59] and should give the address of the creditor or his attorney.[60] The schedule being sufficiently specific to notify the creditor that the debtor will claim his discharge as a release from liability on the claim it is generally sufficient.[61] A claim may be scheduled in the name of the equitable owner, thus a claim may be listed in the name of a creditor who is represented by a receiver,[62] and a note belonging to a bank may be scheduled as belonging to the bank though payable to its cashier.[63]

(§ 5) *B. Voluntary proceedings.*[64]—The bankruptcy law places no restriction upon one's right to file a second petition before the expiration of six years.[65] A voluntary petition which schedules no debt which would be barred by a discharge may be dismissed in the discretion of the court.[66]

(§ 5) *C. Involuntary proceedings.*[67]—The petition must be filed within four months of the commission of the act of bankruptcy.[68] Prior to the amendment of 1903, it was the transfer of property that was made the act of bankruptcy and not the recording of the instrument of transfer,[69] and the period of four months began to run from the time of such transfer.[70] The amendment of 1903 changing this rule is not retroactive.[71] The words "notorious, exclusive, or continuous possession" in section three as applied to intangible personal property means such possession as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership.[72]

Where bankruptcy proceedings are instituted in the courts of two different districts, each of which has jurisdiction, the one in which proceedings were last instituted will yield jurisdiction to the other[73] and will stay the proceedings.[74] A

132 F. 140. Time for demurring will not be extended as a matter of course, even where it is apparent that a demurrer would have been proper if filed in time. Id. Adjudication against a corporation will not be set aside because petition failed to show that it was of a class subject to involuntary proceedings. Id. See Equity, 3 C. L. 1210.

56, 57. In re Urban & Suburban Realty Co., 132 F. 140.

58. Rev. St. § 911. In re Urban & Suburban Realty Co., 132 F. 140.

59. A description, in the schedules, of the debt as follows: "Deficiency judgment on foreclosure of mortgage entered March 13, '02," held sufficient. In re David, 44 Misc. 516, 90 N. Y. S. 85.

60. Where creditor's residence was in fact unknown but certain attorneys had stated that all communications for such creditor should be sent to them, held an entry in the schedules, under the head of "Residence," "care D. & D., attys., 88 Nassau St., N. Y. C.," was sufficient. In re David, 44 Misc. 516, 90 N. Y. S. 85. Where creditor's address was unknown but bankrupt knew the address of his attorney and made no effort to ascertain the creditor's address, and no notice was sent him, held claim was not properly scheduled. Fieldmark v. Weinstein, 90 N. Y. S. 478.

61. Where the sole debt between the bankrupt and a creditor had been reduced to judgment, the fact that such debt was listed as the original contract debt does not except it from the discharge. Loomis v. Wallblom [Minn.] 102 N. W. 1114.

62. Where creditors of an insolvent corporation brought an action and obtained judgment against an insolvent corporation and its stockholders, and a receiver was appointed to enforce the stockholders' liability, a schedule by a stockholder naming the creditors and not the receiver, held correct. Longfield v. Minnesota Sav. Bank [Minn.] 103 N. W. 706.

63. Ross-Lewin v. Goold, 113 Ill. App. 499, afd. 211 Ill. 384, 71 N. E. 1028.

64. See 3 C. L. 441.

65. In re Little [C. C. A.] 137 F. 521.

66. In re Colaluca, 133 F. 255.

67. See 3 C. L. 441.

68. Rex Buggy Co. v. Hearick [C. C. A.] 132 F. 310. A petition filed more than four months after the recordation of a preferential transfer of notes secured by a chattel mortgage, held not filed in time and dismissed. In re Bogen, 134 F. 1019.

69. Murphy v. W. T. Murphy & Co. [Iowa] 101 N. W. 486. This is not affected by act 1898, § 3b. Id.

70, 71. Murphy v. W. T. Murphy & Co. [Iowa] 101 N. W. 486.

72. In re Bogen, 134 F. 1019.

73. In re Tybo Mining & Reduction Co., 132 F. 697.

74. Will not necessarily dismiss the proceedings, since the other court may transfer the case if it appears to be for the greatest convenience of the parties. In re Tybo Mining & Reduction Co., 132 F. 697.

corporation having its domicile in one judicial district and its principal place of business in another, the courts of both districts have concurrent jurisdiction.[75] In case two or more petitions are filed against the same debtor in different districts, the first hearing shall be had in the district where the debtor has his domicile,[76] and the proceedings in the other court will be stayed until such hearing is had [77] leaving it to the discretion [78] of such court to determine in which court the case can be proceeded with for the greatest convenience of the parties in interest,[79] and the burden is upon the petitioners for removal to show clearly and affirmatively that it is for the greatest convenience of such parties that the proceedings should be transferred.[80] This rule of jurisdiction is not absolute but must yield to the necessities of the case.[81] The phrase "parties in interest" as here used is not limited to unsecured creditors but includes all persons whose pecuniary interests are directly affected by the proceedings.[82] The word "individual" as used here and in general order No. 6 is equivalent to "person" and includes a corporation.[83] Proximity of the place of business of a bankrupt to the court entertaining the proceedings, and proximity of a majority of creditors in number or amount of claims, though persuasive, is not conclusive on the question of convenience.[84] An order directing the removal and consolidation of the proceedings with a cause pending in another jurisdiction is reviewable only by appeal from the order.[85]

An objection that the subpœna was improperly served can be raised only by motion or defense at the trial.[86] The answer alleging a larger number than twelve creditors the mode of service on such creditors is immaterial, the creditors named being actually served in time to intervene if they desired to do so.[87]

Any creditor may voluntarily appear and join in the petition or be heard in opposition thereto,[88] and those not appearing are, in contemplation of law, represented by the bankrupt to the extent of being concluded as to all matters directly in issue and determined by the order of adjudication.[89] The fact that directors and stockholders of the bankrupt corporation join in the petition is not evidence of bad faith or collusion, such petitioners being creditors.[90] An alleged bankrupt has a right to a reasonable time to answer petitions for his adjudication.[91] A single day is insufficient where the bankrupt is not within the district.[92]

75. In re United Button Co., 137 F. 668.

76. General orders No. 6. In re Globe Sec. Co., 132 F. 709. Where a petition is filed against an individual in the district of his domicile and is followed by a prompt adjudication before a hearing on petitions filed in the meantime in other districts, the court of the domicile acquires exclusive jurisdiction. In re United Button Co., 132 F. 378.

77. In re Globe Sec. Co., 132 F. 709.

78. In re Tybo Mining & Reduction Co., 132 F. 978.

79. In re Globe Sec. Co., 132 F. 709.

80. In re Tybo Mining & Reduction Co., 132 F. 978.

81. Where associated corporations of different states went into bankruptcy, held court first acquiring jurisdiction would retain it. In re Southwestern Bridge & Iron Co., 133 F. 568.

82. In re United Button Co., 137 F. 668.

83. In re United Button Co., 137 F. 668; In re Globe Sec. Co., 132 F. 709.

84. In re United Button Co., 137 F. 668. Evidence held insufficient to show that transfer would be for the greatest convenience of the parties in interest. Id. Where the petitioners are merely a minority of the creditors, representing only a small part of the indebtedness, a transfer is not warranted by the fact that the greater part of the bankrupt's property is in another district. In re Tybo Mining & Reduction Co., 132 F. 978. Where proceedings were started in New York and Colorado and most of the creditors, witnesses, etc., lived in the west, held case should be transferred to Colorado. In re General Metals Co., 133 F. 84.

85. Kyle Lumber Co. v. Bush [C. C. A.] 133 F. 688. Is not reviewable on a petition to review and revoke. Id.

86. Not by demurrer. In re Seaboard Fire Underwriters, 137 F. 987.

87. In re Tribelhorn [C. C. A.] 137 F. 3.

88, 89. Ayres v. Cone [C. C. A.] 138 F. 778.

90. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466.

91, 92. Lockman v. Lang [C. C. A.] 132 F. 1.

The petition being sufficient, the petitioners have the right to proceed to support it by evidence and, if successful, to have the defendant adjudged a bankrupt regardless of any delay, confusion or expense attending such a course.[93] Answer being filed and the petitioners moving for an adjudication on the pleadings they thereby admit all facts properly pleaded in the answer,[94] and if the motion is denied, defendants are entitled to a final decree dismissing the petition.[95] Where an answer is interposed in involuntary proceedings, the judge may refer the proceeding to a special commissioner to take the testimony and return it with his opinion,[96] and in such a case it is no objection to such reference that a former involuntary petition by other creditors had been determined by the judge in favor of the alleged bankrupt,[97] and the fact that the taking of testimony before the commissioner will be more extensive than is a hearing before the judge is insufficient to prevent such reference.[98]

The petition must state the nature of the petitioner's claims [99] though it need not allege all the elements thereof,[1] and must show either by express language or inference that the defendant is not of the excepted classes.[2] Allegations of acts of bankruptcy in the language of the act, without setting forth any other facts or circumstances, are insufficient,[3] the petitioning creditors being bound to make as full a disclosure as their information will permit,[4] and if such disclosure is incomplete it must be accompanied by an explanation.[5] A specification alleging that property was transferred with intent to hinder, delay, or defraud creditors, should state facts and circumstances from which such intent may be inferred.[6] An allegation that the bankrupt has his "principal place of residence" in the district is sufficient to confer jurisdiction on the court of such district.[7] Insufficiency in the allegation as to the number of creditors is not an incurable jurisdictional defect.[8] An attorney in fact for a petitioning creditor can make the necessary

93. Woolford v. Diamond State Steel Co., 128 F. 582.

94, 95. In re Waugh [C. C. A.] 133 F. 281.

96, 97, 98. In re Lacov [C. C. A.] 134 F. 237.

99. In re White, 135 F. 199.

1 The petition alleging that the claims are for goods sold and delivered to the bankrupt within one year from the date of the execution of the petition, it is not necessary to allege when the several amounts became due, nor to state the amount of the securities held nor the manner in which the value of such securities is fixed. In re Hark, 135 F. 603.

2. Either by a negative averment to that effect, or by a direct averment of his principal business. In re White, 135 F. 199.

3. In re Hark, 135 F. 603. A general averment of the payment of money with intent to prefer creditors is insufficient. In re Blumberg, 133 F. 845.

4. In re Blumberg, 133 F. 845. An averment that property was transferred for an "improper consideration" is insufficient. Id.

5. In re Blumberg, 133 F. 845.

6. In re White, 135 F. 199. An allegation that defendant, a retail merchant, transferred and removed goods from his store with intent to hinder, delay, or defraud creditors is insufficient. Id. A petition alleging that the bankrupt while insolvent conveyed certain described real estate to a designated person with intent to hinder, delay, and defraud his creditors, has been held sufficient. Id. [The facts here stated are very few, and this specification is barely over the line which divides it from those held to be insufficient, and probably cannot in all cases be regarded as a precedent. Id.] Petition alleging that defendants are insolvent and that on a certain date, within four months of filing the petition, they removed, transferred and concealed certain property from a designated place with intent to hinder, delay, and defraud their creditors, and stating the value of the goods on information and belief and that the petitioners have been unable to ascertain to what place said goods have been removed, is sufficient. In re Hark, 135 F. 603.

7. Especially as against a collateral attack. Ross-Lewin v. Goold, 113 Ill. App. 499, afd. 211 Ill. 384, 71 N. E. 1028.

8. In re Haff [C. C. A.] 136 F. 78. Failure of an involuntary petition filed by a single creditor to allege that the creditors were less than twelve in number does not deprive the court of jurisdiction, three creditors having probable claims having united in earlier proceedings, and the bankrupt not having denied the claims of such creditors, nor filed a list of all his creditors, with their addresses, under oath. Id. A single creditor filing the petition, the averment that all the creditors of the alleged bankrupt are less than twelve in number does not condition the jurisdic-

oath to the petition, where the facts are within his own knowledge.[9] A bankruptcy court has power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments.[10] Such power is discretionary [11] and will be exercised in the furtherance of justice the defect being properly excused.[12] The bankruptcy court having jurisdiction, it may permit the amendment of a petition, defective for want of equity, more than four months after the commission of the act of bankruptcy,[13] and such amendment relates to and takes effect as of the date of the filing of the original petition,[14] but an original petition cannot be amended by setting out therein acts of bankruptcy not referred to in the original petition, and occurring more than four months before the application for an order allowing the amendment.[15] That an involuntary petition contained a prayer that the petitioner might be permitted to intervene in earlier proceedings as a cautionary measure does not deprive it of its status as an original petition.[16] Defects may be waived by answer.[17]

It is incumbent upon the defendant to deny the allegation of insolvency in the petition,[18] and if he does so and appears in court on the hearing with his books, papers, and accounts, and submits to an examination, and gives testimony as to all matters relating to the question of insolvency, the burden of proving insolvency rests on the creditors; [19] but if the bankrupt fails to so do the burden of proving his solvency rests upon him.[20] The debtor seeking protection under the exemption of the statute should present tangible, reliable evidence to bring himself within the exemption.[21] As a general rule evidence of subsisting,[22] though unmatured,[23] liabilities of the bankrupt, are admissible on the issue of his solveney,[24] but evidence of concealed assets is inadmissible.[25] A creditor having ob-

tion of the court. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000.

9. Where verification alleged that petitioner was without district and that the attorney had full authority to institute and prosecute suit. Rogers v. De Soto Placer Min. Co. [C. C. A.] 136 F. 407.

10. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1,000. Petition may be amended by the insertion of averments that the alleged bankrupt is not a wage-earner or farmer, and that all his creditors are less than twelve in number. Id. Failing to state nature of petitioner's claim it may be amended. In re White, 135 F. 199. Failing to show that defendant is not of an excepted class it may be amended. Id.

11. Where petition was fatally defective. Woolford v. Diamond State Steel Co., 138 F. 582.

12. Amendment seeking to set up acts of bankruptcy occurring subsequently to those stated in the original petition, and which must have been known to some of the petitioners at the time the petition was filed, denied. Wilder v. Watts, 138 F. 426.

13, 14. In re Shoesmith [C. C. A.] 135 F. 684.

15, 16. In re Haff [C. C. A.] 136 F. 78.

17. The objection that the petitioner failed to file a duplicate of his petition is waived by an answer by the bankrupt within four months of the alleged acts of bankruptcy without presenting the objection. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1,000.

18. In re American Pub. Co. [Okl.] 79 P. 762. If he fails to do so the allegation is admitted. Id.

19. In re McGowan, 134 F. 498. See McGowan v. Knittel [C. C. A.] 137 F. 453, where the first case is reversed on other grounds, this one being reaffirmed. In re American Pub. Co. [Okl.] 79 P. 762. Where a respondent corporation appears at the hearing by its president, who with other witnesses is examined, and certain books are produced, but neither the testimony of the witnesses nor the matters shown by the books disclose the financial condition of the respondent, such acts are not a compliance with Act 1898, § 3, subd. d. Id.

20. In re Shoesmith [C. C. A.] 135 F. 684; In re American Pub. Co. [Okl.] 79 P. 762.

21. Bank of Dearborn v. Matney, 132 F. 75.

22. Evidence of a judgment which has been opened to permit a defense is inadmissible. McGowan v. Knittel [C. C. A.] 137 F. 453, rvg. 134 F. 498.

23. In the absence of denial. In re McGowan, 134 F. 498. But see McGowan v. Knittel [C. C. A.] 137 F. 453, where case is reversed on other grounds.

24. A judgment entered against the alleged bankrupt in a state court more than four months before the commission of the act of bankruptcy is admissible to show insolvency. In re McGowan, 134 F. 498. But see McGowan v. Knittel [C. C. A.] 137 F. 453, where case is reversed on other grounds.

25. Evidence that alleged bankrupt on deeding property had made a parol agree-

tained the appointment of a receiver on the ground of insolvency he is estopped to deny the debtor's insolvency when other creditors institute bankruptcy proceedings based on the appointment.[26] Cases dealing with the sufficiency of the evidence are shown in the notes.[27]

Notice to creditors of a proposed dismissal of the proceedings is generally essential,[28] but the creditors being informed of the pendency of the proceedings and not appearing and asking to intervene an order of dismissal for want of sufficient petitioners will not be withheld until the clerk can notify such creditors.[29]

The adjudication does not absolve the bankrupt from any agreement, contract, or liability,[30] but, as against a creditor acquiescing in it and proving his claim, it is res judicata on the question of the bankrupt's residence.[31] Creditors knowingly failing to plead they are not entitled to have the judgment set aside to permit them to plead unless they show satisfactory reasons for their delay.[32] A default judgment being rendered against the alleged bankrupt, an application to set it aside should be made to the district court.[33]

Costs will be allowed to an alleged bankrupt, on dismissal of an involuntary petition against him, only after the filing of his bill of costs with the clerk and notice to the petitioning creditors.[34]

Exemption of bankrupt from arrest.—The provision of the bankruptcy act which exempts a bankrupt from arrest upon civil process except in certain enumerated cases applies to the detention of a bankrupt taken into custody before bankruptcy,[35] and in such case he may be discharged on a writ of habeas corpus.[36] The bankruptcy court may issue an order restraining the arrest of the bankrupt even though a petition for review of an order refusing to revoke a discharge is pending.[37]

§ 6. *Protection and possession of the property pending the appointment of trustee; receivers.*[38]—From the filing of the petition until the adjudication, the property rights of the debtor are in abeyance,[39] and upon the adjudication, title to the bankrupt's property passes from him at once, and is conditionally vested in the court pending the appointment of a trustee, or until the estate is finally closed or abandoned by the creditors.[40] The court may, in its discretion,[41] when necessary to preserve the estate,[42] appoint a receiver. Such receiver is a mere custodian

ment that upon his paying certain judgments and claims, the property was to revert to him, and that such reversionary interest was an asset valued at $20,000, is inadmissible upon the issue of his insolvency. In re McGowan, 134 F. 498. But see McGowan v. Knittel [C. C. A.] 137 F. 453, where case is reversed on other grounds.

26. In re Spalding, 134 F. 507.

27. An adjudication of bankruptcy against a corporation held warranted by the evidence. In re Imperial Corporation, 133 F. 73.

28. In re Plymouth Cordage Co. [C. C. A.] 135 F. 1000.

29. In re Tribelhorn [C. C. A.] 137 F. 3.

30. Watson v. Merrill [C. C. A.] 136 F. 359. Where there was no rent due at the time of the filing of a petition against the lessee, the adjudication does not constitute a breach at that time of the covenant of the bankrupt to pay rents occurring thereafter. Id.

31. In re Hintze, 134 F. 141.

32. In re Urban & Suburban Realty Title Co., 132 F. 140.

33. In re Imperial Corporation, 133 F. 73.

34. In re Haeseler-Kohlhoff Carbon Co., 135 F. 867.

35. People v. Erlanger, 132 F. 883.
Contra: In re Claiborne, 109 F. 74.

36. People v. Erlanger, 132 F. 883.

37. In re Chandler, 135 F. 893.

38. See 3 C. L. 444.

39. In re Mertens, 134 F. 101.

40. Rand v. Sage [Minn.] 102 N. W. 864.

41. Such appointment is not reviewable by a writ of mandamus. Edinburg Coal Co. v. Humphreys [C. C. A.] 134 F. 839.

42. Where it was alleged that the indebtedness for which the alleged bankrupts were liable was created through fraud, that two of them had absconded, and that the other was in prison, the appointment of a receiver before adjudication without notice to such incarcerated defendant is not void as a taking of property without due process of law. In re Francis, 136 F. 912.

of the property [43] and cannot exercise the powers of a trustee, but he may take appropriate measures incident to the protection of the property in his custody, though he is not authorized, and the bankruptcy court cannot properly direct him, to take possession of property held and claimed adversely by third parties, or to institute actions for the recovery of property claimed to belong to the bankrupt's estate.[44] The order of appointment may confer power to borrow money.[45] The appointment of a receiver after a fire does not impair or destroy in any way the title or interest or possession of the bankrupt so as to render an insurance policy void under a provision prohibiting any change in the interest, title, or possession of the insured.[46] The order appointing a receiver should provide that he should not take possession of the property until the proper bond is filed,[47] and failing in this regard it should be vacated though another creditor has applied for a receiver and filed a bond conditioned to pay all expenses and damages if his petition be dismissed.[48]

§ 7. *Creditors' meetings; appointment of trustee; removals.*[49]—Neither the bankrupt nor his attorney should be permitted to have any influence in the election of the trustee,[50] but where the relation of attorney and client is limited to the filing of the petition, the attorney may accept claims, sent to him thereafter without his solicitation or the procurement of the bankrupt, and vote on such claims for the election of a trustee.[51] The requirement that the trustees shall be elected at the first meeting is directory only.[52] A "creditor" within the meaning of the bankruptcy act is one who "owns" a claim, and the owner of a beneficial interest in a claim does not own the claim itself,[53] hence a committee of creditors holding assigned claims in trust for the assignors is only entitled to one vote.[54] The choice of a trustee by the creditors is subject to the approval of the referee or judge, and a trustee chosen by the creditors is removable by the judge.[55] A trustee being selected by the vote of a majority in number and amount of those present at the creditors' meeting, the referee cannot appoint a different trustee merely because he does not approve of the creditors' selection,[56] nor is the fact that the trustee chosen is hostile to the bankrupt,[57] or had, as receiver, unreasonably delayed to account for the funds in his hands,[58] ground for the referee to refuse to confirm his selection. That the trustee affected a composition by means of fraudulent misrepresentations is ground for his removal.[59] The referee has no power to fill a vacancy in the office of trustee, unless the creditors, after a meeting has been called by the referee, fail to fill the same.[60] A bankruptcy court cannot aid the administration of the estate of person adjudicated a bankrupt in another district by ap-

43. In re Kolin [C. C. A.] 134 F. 557.

44. In re Kolin [C. C. A.] 134 F. 557. Evidence held sufficient to show that at the time the receiver took possession the claimant was not in possession nor was claiming possession. Id.

45. Edinburg Coal Co. v. Humphreys [C. C. A.] 134 F. 839.

46. Fire occurred after adjudication and after receiver was notified of appointment but before formal appointment. Fuller v. Jameson, 98 App. Div. 53, 90 N. Y. S. 456.

47. In re Haff [C. C. A.] 135 F. 742. Order failing to fix a time within which the bond should be filed and not requiring it to be filed before the receiver should take possession of the property. Id.

48. In re Haff [C. C. A.] 135 F. 742.

49. See 3 C. L. 445.

50, 51. In re Cooper, 135 F. 196.

52. In re William F. Fisher & Co., 135 F. 223. Where two trustees, appointed at first meeting, applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified and joined in petition of sale, the fact that the petition was presented by two trustees only in the first instance held no objection thereto. Id.

53, 54, 55. In re Kenney, 136 F. 451.

56. In re Mangan, 133 F. 1000.

57. So held where serious charges were made as to disposition of goods by the institution of the bankruptcy proceedings. In re Mangan, 133 F. 1000.

58. In re Mangan, 133 F. 1000.

59. In re Allen B. Wrisley Co. [C. C. A.] 133 F. 388.

60. In re William F. Fisher & Co., 135 F. 223.

pointing an ancillary trustee.[61] As a general rule a successor of a deceased trustee will only be appointed where necessary for the administration of the estate.[62]

§ 8. *Compositions.*[63]—The approval of a composition is discretionary,[64] and it will not be granted if the composition is detrimental to creditors[65] or if the bankrupt has been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge.[66] It is essential that a composition provide for the payment of all taxes legally due and owing.[67] The confirmation of a composition can only be set aside upon the application of parties in interest,[68] and leave to file a petition to set aside such confirmation should be refused only when the petition shows on its face that the petitioner is not entitled to relief.[69] That the composition was effected by the fraudulent statements of the trustee is ground for setting it aside.[70] A judgment confirming a composition is a judgment granting a discharge[71] and is reviewable only by appeal.[72] An order of confirmation may be proved by a certified copy under the seal of the clerk of the court.[73]

§ 9. *Property and rights passing to trustee. A. Particular kinds of property and rights.*[74]—Property in a stock exchange seat,[75] goods bought but not paid for, title having passed,[76] choses in action belonging to the bankrupt at the date of the adjudication,[77] a copyright held under an absolute assignment from the author to the bankrupt,[78] and the interest of a bankrupt mortgagor in the property mortgaged,[79] pass to the trustee. Remainders[80] and legacies[81] being vested at the time of the adjudication pass to the trustee of the remaindermen or legatees. The trustee is vested by operation of law with the title to all "documents relating to the bankrupt's property."[82] The word "document" includes all muniments of title, contracts, securities, bills of exchange, bills receivable, notes,

61. In re Tybo Mining & Reduction Co., 132 F. 697.

62. Where bankruptcy proceedings were instituted in 1868 and the assignee died in 1893, a successor to such assignee will not be appointed to enable the grantee of a deed executed by the bankrupt in 1860 to sue to reform the deed so as to include land alleged to have been omitted by mistake. In re Haskell's Estate, 134 F. 309.

63. See 3 C. L. 445.

64. In re Woodend, 133 F. 593.

65. Where bankrupt formed a corporation to carry on business and offered to issue stock for the payment of creditors, he retaining the control of the business, held the composition would not be ratified. In re Woodend, 133 F. 593.

66. Bankrupts failing to keep or withholding books for the purpose of concealing their true financial condition, confirmation will be refused. In re Olman, 134 F. 681. Where sole explanation of loss of $30,000 by tailoring firm was botch work and a tailor's strike, no books being offered in evidence except two bank books, held composition would be refused. Id. See, also, 3 C. L. 446, n. 74.

67. In re Flynn, 134 F. 145. Taxes assessed before, and payable after, the adjudication are "legally due and owing" on the day they are assessed. Id.

68. In re Allen B. Wrisley Co. [C. C. A.] 133 F. 388.

69. In re Allen B. Wrisley Co. [C. C. A.] 133 F. 388. A creditor who has assigned his claim and received value therefor is not a "party in interest" though the assignment was obtained through the fraud and misrepresentation of the trustee and bankrupt. Id.

70. In re Allen B. Wrisley Co. [C. C. A.] 133 F. 388.

71. In re Friend [C. C. A.] 134 F. 778; Mandell v. Levy, 93 N. Y. S. 545.

72. In re Friend [C. C. A.] 134 F. 778.

73. Mandell v. Levy, 93 N. Y. S. 545.

74. See 3 C. L. 446.

75. In re Hurlbutt, Hatch & Co. [C. C. A.] 135 F. 504.

76. Transaction under which goods were shipped to bankrupt held a sale and title passed to trustee. In re Martin-Vernon Music Co., 132 F. 983. The seller of goods under **a contract of sale and return** is not entitled to recover the goods unsold from the buyer's trustee in bankruptcy. In re Miller, 135 F. 868.

77. In re Grissler [C. C. A.] 136 F. 754.

78. In re Howley-Dresser Co., 132 F. 1002.

79. In re Jersey Island Packing Co. [C. C. A.] 138 F. 625.

80. Woods v. Little [C. C. A.] 134 F. 229.

81. In re McKenna, 137 F. 611. Legacy held to rest in legatee upon the death of the testator and that it might thereafter have been transferred or levied upon and sold under judicial process against him, hence upon his being adjudged a bankrupt, his interest vested in his trustee in bankruptcy. Watkins v. Bigelow, 93 Minn. 361, 101 N. W. 497.

82. Act 1898, § 70, cl. 1. In re Hess, 134 F. 109.

bankbooks, account books, and all papers and books relating to the bankrupt's business.[83] The right of a mortgagor to rents and profits accruing up to the time that the mortgagee enters passes to the former's trustee.[84] The interest of a bankrupt lessee in the demised premises being intact at the time of the adjudication the right of possession passes to the trustee.[85] The trustee takes title to insurance policies, on the life of the bankrupt, which have a cash [86] or collateral loan and paid-up insurance [87] value even though they have no cash surrender value, and this is especially true if the insurer voluntarily agrees to pay a certain sum for the policy, on condition that it receive a release signed by the insured and the beneficiary,[88] and in such case the trustee is entitled to sell the bankrupt's interest and to have the bankrupt assign the same.[89] But a policy which has no actual value as an asset does not pass to the trustee.[90] Property held by the bankrupt under a conditional sale, void for want of record, passes to the trustee.[91] In Texas community property passes to the trustee of the husband.[92] Trust funds, when kept separate from the bankrupt's general funds,[93] or money paid the bankrupt by mistake,[94] form no part of the bankrupt's estate. Salary of a public officer of a state earned but not payable at the time of his filing a petition in bankruptcy does not pass to his trustee.[95]

Property fraudulently conveyed.[96]—The trustee takes title to [97] property fraudulently [98] conveyed by the bankrupt,[99] unless the transferee is a bona fide [1]

83. In re Hess, 134 F. 109.

84. In re Chase, 133 F. 79.

85. So held where prior to the bankruptcy of the tenant the landlord took no step to regain possession of the premises for rent in arrears. In re Adams, 134 F. 149.

86. Gould v. New York Life Ins. Co., 132 F. 927.

87. In re Coleman [C. C. A.] 136 F. 818. Act 1898, § 70, subd. 5, does not change the above rule. Id.

88. Beneficiary was insured's wife. In re Coleman [C. C. A.] 136 F. 818.

89. In re Coleman [C. C. A.] 136 F. 818.

90. Gould v. New York Life Ins. Co., 132 F. 927. Where policy was of no actual value at time of adjudication but before discharge bankrupt died, held did not pass to the trustee as an asset. Id. Before a trustee can lay his hands on a policy of insurance, or the proceeds of it, if paid to another than the bankrupt, as being assets of the estate to be distributed among the bankrupt's creditors, he must be able to prove that the policy belonged to the bankrupt, having to him some value—either a cash surrender value payable to himself, his estate, or personal representatives, or an actual value of benefit to creditors. Carr v. Myers [Pa.] 60 A. 913.

91 In re Dunn Hardware & Furniture Co., 132 F. 719; In re Smith, 132 F. 301.

92. Collins v. Bryan [Tex. Civ. App.] 88 S. W. 432. May recover community funds used by the husband in the erection of improvements on the wife's separate property, to be paid out of the proceeds of the sale of the improvement. Id. And he is only entitled to interest on the amount the community contributed. Id.

93. In he Taft [C. C. A.] 133 F. 511.

94. Trustee cannot recover such funds from a third person. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

95. In re Doherty, 135 F. 432.

96. See 3 C. L. 448.

97. Shreck v. Hanlon [Neb.] 104 N. W. 193; Annis v. Butterfield, 99 Me. 181, 58 A. 898. See, also, Tucker v. Denico [R. I.] 59 A. 920.

Whether a trustee in bankruptcy can sell estate which had previously been conveyed by the bankrupt in fraud of his creditors, until he has obtained an adjudication of the fraud, and reduced the estate to possession, quaere. If the trustee cannot give title to the premises by the deed the deed conveyed only a mere right of action to attack the fraudulent conveyance and is not enforceable. Annis v. Butterfield, 99 Me. 181, 58 A. 898.

98. Fraud, actual or constructive, is a necessary element to give the trustee a right of action. Bush v. Export Storage Co., 136 F. 918. A bona fide sale for fair value or in the discharge of a valid lien made prior to the institution of bankruptcy proceedings cannot be annulled by the trustee, and the property sold is no part of the bankrupt's estate. Eason v. Garrison & Kelly [Tex. Civ. App.] 82 S. W. 800. Assignment by a wife, within four months prior to her bankruptcy, to her husband, for the purpose of securing money to pay a mortgage on her homestead, held fraudulent as against her creditors. Section 67e construed. Clarke v. Sherman [Iowa] 103 N. W. 982.

99. Trustee cannot have a fraudulent conveyance by a purchaser from the bankrupt set aside, the sale by the latter being valid. Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

1. Bush v. Export Storage Co., 136 F. 918. Sale of stock in bulk by bankrupt while insolvent, taking in exchange a farm and the payment of a debt to a bank in which the purchasers were stockholders, held void. In re Moody, 134 F. 628.

purchaser for value [2] prior to the date of the adjudication.[3] The trustee, to the exclusion of creditors,[4] may recover such property or its value [5] if the conveyance could have been avoided by any creditor of the bankrupt,[6] other than one whose right is in the nature of a mere lienor,[7] and it is not essential that the creditors be in position to attack the transfer.[8] The action being brought under act 1898, § 70e, it is immaterial that the transfer was made by the bankrupt more than four months before the filing of the petition,[9] though the contrary is true when § 67e is sought to be applied.[10] The term "fraudulent conveyances" as here used includes all conveyances which are fraudulent by the common law, by statute law and by any other recognized rule of law of the state.[11] The expression "with intent to hinder, delay, or defraud" creditors, is used in the bankruptcy act with the meaning given to it in statutes declaratory of the common law against fraudulent conveyances;[12] and the mere fact that an insolvent debtor pays one creditor in full is not of itself evidence of an intention on his part to hinder, delay, or defraud other creditors,[13] In order to set aside a sale by the insolvent the burden is on the trustee to show fraud.[14] Subsection 4 of section 70a and section 70e may be read in connection with section 1, subsections 23 and 25.[15]

2. Bush v. Export Storage Co., 136 F. 918. A mortgage given to secure antecedent debts is not given for "value" within the meaning of § 70, cl. e. Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co. [N. J. Err. & App.] 60 A. 940. Under § 67e, a transfer for a past consideration is void. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57. Gifts made by a bankrupt to his wife while he is insolvent and while he is contemplating going into bankruptcy which he does shortly afterwards are void and recoverable by his trustee. Wiley v. McBride [Ark.] 85 S. W. 84. One loaning money to the wife of a bankrupt to pay a mortgage on the bankrupt's homestead, and receiving a note made by the husband and payable to the wife, held a purchaser in good faith and for a present fair consideration within the meaning of Act 1898, § 67e. Clarke v. Sherman [Iowa] 103 N. W. 982. An issue in a suit by the trustee to recover property alleged to have been fraudulently conveyed failing to submit as an element of the purchaser's good faith that he paid a present fair consideration for the goods, was improper. Piedmont Sav. Bank v. Levy [N. C.] 50 S. E. 657.

3. Bush v. Export Storage Co., 136 F. 918.

4. Moore, Schafer Shoe Mfg. Co. v. Billings [Or.] 80 P. 422. A creditors' bill instituted subsequent to an adjudication in bankruptcy against the debtor to set aside a chattel mortgage and a sale of a stock of merchandise does not give rise to a lien, in favor of the creditor filing the same on the goods sought to be reached. Id.

5. Bush v. Export Storage Co., 136 F. 918.

6. Bush v. Export Storage Co., 136 F. 918. Trustee may avoid a mortgage made by a New Jersey corporation, which the creditors of the corporation might avoid under New Jersey corporation act, § 64. Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co. [N. J. Err. & App.] 60 A. 940. Trustee held entitled to recover community property conveyed by the bankrupt to his wife and by her conveyed to defendants pursuant to a conspiracy to defraud the bankrupt's creditors. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524.

7. Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. Cannot represent a creditor who has a lien by virtue of Burns' Ann. St. 1901, § 6637a et seq., providing that sales of a stock of merchandise in bulk are fraudulent as to certain creditors unless certain conditions are observed. Id.

8. Shreck v. Hanlon [Neb.] 104 N. W. 193. He may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance, without reducing the claims of the creditors to judment. Id.

9. Bush v. Export Storage Co., 136 F. 918; Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524.

10. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524; Murphy v. W. T. Murphy & Co. [Iowa] 101 N. W. 486. Under § 67e an assignment for the benefit of creditors made more than four months before the filing of the petition cannot be avoided by the trustee. McIntire v. Jennings [Wash.] 80 P. 278; Hoague v. Cumner, 187 Mass. 291, 72 N. E. 956.

11. Bush v. Export Storage Co., 136 F. 918. A conveyance fraudulent under the laws of the state is fraudulent under the bankruptcy act. Lavender v. Bowen [Iowa] 101 N. W. 760. Under act 1898, §§ 67a, 70e and Code, § 1254, the trustee may maintain an action to cancel, as a cloud on title, a deed made by the bankrupt, which was void for defective acknowledgment, probate and registration. Lance v. Tainter [N. C.] 49 S. E. 211.

12, 13. Kingsbury v. First Nat. Bank [Kan.] 81 P. 187.

14. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

15. Bush v. Export Storage Co., 136 F. 918.

(§ 9) *B. Nature of trustee's title in general.*[16]—The trustee is an officer of the court and stands in a fiduciary relation to creditors,[17] In all cases unaffected by fraud [18] or some positive provision of the bankruptcy act,[19] the trustee, upon his appointment and qualification,[20] is vested, by operation of law,[21] with the same, but no better title than the bankrupt had [22] at the date of the adjudication [23] to all nonexempt [24] property of the bankrupt, and the latter if he asserts a right to hold and possess such property against the trustee is in contempt of court.[25] The rights of the trustee to property are not enlarged by the fact that such property is listed and passed to the trustee as part of the bankrupt's assets.[26] The trustee has all the powers which the bankrupt might have exercised for his own benefit,[27] and may assume or renounce executory contracts of the bankrupt as he may deem for the best interest of the estate,[28] and may recover any of the bankrupt's property which a creditor might have recovered,[29] but in such an action he must recover on the strength of his own title.[30] But notwithstanding any provisions which are found in the bankruptcy act relative to the right of the trustee to avoid par-

16. See 3 C. L. 449.

17. In re Allen B. Wrisley Co. [C. C. A.] 133 F. 388.

18. See ante, § 9, a. Property fraudulently conveyed.

19. Thompson v. Fairbanks, 25 S. Ct. 306.

20. In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004; Bush v. Export Storage Co., 136 F. 918, and cases cited.

21. In re Hess, 134 F. 109; Bush v. Export Storage Co., 136 F. 918, and cases cited; In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004. No demand for the surrender and possession of the bankrupt's property is necessary. Id.

22. In re Bacon, 132 F. 157; Bush v. Export Storage Co., 136 F. 918, and cases cited. The trustee can enforce no greater rights than are held by the bankrupt and creditors the trustee represents. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800. Takes subject to all valid claims, liens and equities. In re MacDonald, 138 F. 463. Uncompleted vessels in shipyard owned by bankrupt held the property of the petitioners for whom they were being rebuilt and who had made all payments required, which payments exceeded in amount the value of the boats. Id. Trustee of lessee is bound by a valid assignment. Lamb v. Hall [Cal.] 81 P. 288. Trustee does not take title to goods held by the bankrupt as bailee. In re Miller, 135 F. 871. A trustee cannot sell a nonassignable contract held by the bankrupt without the assent of the other contracting party. In re D. H. McBride & Co., 132 F. 285. Trustee can assert no greater interest in estate of bankrupt's father than bankrupt himself could claim. Wick v. Hickey [Iowa] 103 N. W. 469. The trustee succeeds to the bankrupt's title to choses in action subject to any defense, abatement, or counterclaim to which they would have been liable in the hands of the latter. Nebraska Moline Plow Co. v. Blackburn [Neb.] 104 N. W. 178. A contractor's trustee stands in no better position with reference to a materialman's lien than would the contractor's general assignee for the benefit of creditors. In re Grissler [C. C. A.] 136 F. 754.

Evidence held insufficient to show that goods were obtained by bankrupt on a false statement made to a commercial agency. In re Rose, 135 F. 888.

23. In re MacDonald, 138 F. 463; In re Noel, 137 F. 694; Bush v. Export Storage Co., 136 F. 918, and cases cited. Adjudication operates as a seizure of the property by which it is taken in custodia legis. In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004. A debtor takes a bequest accruing after the adjudication free from the bankruptcy proceedings. In re Woods, 133 F. 82. The terms of the bequest providing that all indebtedness due by the legatee shall be deducted from the bequest, the legatee is entitled to the benefit of such bequest in full, so far as the legatee's general creditors are concerned, subject only to the contingency of his not obtaining a discharge. Id. Held error to refuse to instruct the jury that the bankrupt cannot recover on a claim earned prior to the date of the adjudication in bankruptcy. Id.; Rand v. Sage [Minn.] 102 N. W. 864.

Contra.—Takes title as of the date of the filing of the petition. Glidden v. Massacusetts Hospital Life Ins. Co. [Mass.] 73 N. E. 538.

24. See post, § 16.

25. In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004.

26. Lamb v. Hall [Cal.] 81 P. 288.

27. In re Bacon, 132 F. 157.

28. Lease. Watson v. Merrill [C. C. A.] 136 F. 359. See 3 C. L. 447, n. 8, 9. Vendor of land under a parol agreement to sell to the bankrupt, upon refusing to perform may be sued by the trustee to recover the purchase price. Durham v. Wick, 210 Pa. 128, 59 A. 824.

29. In a suit to foreclose a mortgage, it is competent for the mortgagor's trustee to question its validity. Carlsbad Water Co. v. New [Colo.] 81 P. 34. See ante, § 9, A. Property fraudulently conveyed.

30. Cannot recover on weakness of defendant's title. Lamb v. Hall [Cal.] 81 P. 288.

ticular transactions of the debtor, yet the whole act must be read in the light of the predominating purpose of congress with reference to the distribution of assets, namely, to prevent any inequality of payment among the unsecured creditors.[31] The trustee may pay off a mortgage on the property and have the mortgage assigned to himself or to a person designated by him, although it is not in process of foreclosure, where it is shown that so doing will result beneficially to the estate,[32] and the court of bankruptcy has jurisdiction on his petition to compel the mortgagee to accept payment and execute the assignment.[33] As to whether the trustee is a purchaser or not there is a conflict.[34]

(§ 9) *C. The trustee takes title free from liens*[35] acquired by legal proceedings[36] in a state or Federal court[37] within four months prior to the filing of the petition[38] in voluntary or involuntary proceedings;[39] as by garnishment,[40] by execution issued on judgment,[41] or by proceedings supplementary thereto,[42] upon property exempt as against the trustee,[43] and it being conceded that part and possibly all of the property attached is exempt from the bankruptcy proceedings it may be held under the lien until it is determined what part if any passed to the trustee.[44] A lien acquired within time, being otherwise valid, it will be protected if it is recorded within the statutory time although within four months of the filing of the petition[45] or after the adjudication.[46] Under the bankruptcy act, liens given or accepted in good faith, and not in contemplation, or in fraud, of the act,[47] and for a present consideration,[48] which have been recorded according to law, are valid. The requirement as to recordation under this provision is satisfied if the instrument be recorded before the commencement of the bankruptcy proceedings.[49] Liens and the rights of parties thereto will be construed in bankruptcy proceedings with reference to the laws of the state where the proceeding

31. Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

32, 33. In re Bacon, 132 F. 157.

34. That he is not. In re Ducker [C. C. A.] 134 F. 43, afg. 133 F. 771; In re Beede, 138 F. 441. For cases pro and con, see 3 C. L. 450, n. 41.

35. See 3 C. L. 450.

36. Subjecting the income of a trust fund to the payment of debts under N. Y. Code Civ. Proc. § 1391, as amended by Laws 1903, p. 1071, c. 46, is acquiring a lien through legal proceedings. In re Tiffany, 133 F. 799. A suit under Code W. Va. 1899, c. 74, § 2, brought within four months of the filing of the petition in bankruptcy is void as a proceeding for the imposition of a lien within Act 1898, § 67, cl. f. In re Porterfield, 138 F. 193.

37. See 3 C. L. 450, n. 57.

38. Liens acquired more than four months before the filing of the petition are valid. Attachment lien. American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 A. 515. Mortgage lien. In re Reynolds, 133 F. 585. Judgment lien. Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237. Title acquired by sale under attachment proceedings. Tucker v. Denico [R. I.] 59 A. 920.

39. Cavanaugh v. Fenley [Minn.] 103 N. W. 711; Gardiner v. Ross [S. D.] 104 N. W. 220; Smith v. Zachry, 121 Ga. 467, 49 S. E. 286, following McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433. Voluntary proceedings. Rothermel v. Moyer, 24 Pa. Super. Ct. 325.

40. Cavanaugh v. Fenley [Minn.] 103 N. W. 711. Though the bankrupt made no reference in his schedules to the fact that the indebtedness had been garnished. Id.

41. In re Burton Bros. Mfg. Co., 134 F. 157.

42. Gardiner v. Ross [S. D.] 104 N. W. 220.

43. The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor where the property attached is exempt as against the trustee in bankruptcy, but is not exempt from the attachment. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408.

44. Attachment proceedings. Jewett Bros. v. Huffman [N. D.] 103 N. W. 408. The fact that the warrant of attachment has been levied does not authorize the trustee to intervene in the action in which the attachment issued for the purpose of obtaining possession of the attached property. Id.

45. Mechanic's lien. In re Grissler [C. C. A.] 136 F. 754. **Contra:** See 3 C. L. 451, n. 70.

46. In re Lillington Lumber Co., 132 F. 886.

47. Crim v. Woodford [C. C. A.] 136 F. 34. That borrower, a man of excellent reputation and engaged in large contracts had overdrawn his bank account, does not charge lender with knowledge of his insolvency. Id.

48. Crim v. Woodford [C. C. A.] 136 F. 34.

49. In re Clifford, 136 F. 475.

is pending and the liens created.[50] The trustee takes subject to liens, legal or equitable, valid as to creditors,[51] but free from liens invalid as to creditors,[52] as for want of recordation.[53] Under the laws of most states the trustee takes free from unrecorded conditional sales.[54] Section 67, subds. "a" and "b" apply to judgments obtained by creditors of the bankrupt subsequent as well as prior to adjudication, in cases where the action to procure the judgment was commenced prior to the institution of bankruptcy proceedings.[55] A personal claim against a bankrupt's estate does not constitute a lien.[56] Creditors having a valid lien may enforce the same without regard to the bankruptcy proceedings,[57] but the property subject thereto not being in the actual custody of another court the lien must be enforced in the bankruptcy court.[58] The filing of the petition is a seizure for the benefit of the bankrupt's creditors; it is a caveat to all the world, and, in effect, an attachment and injunction.[59] The bankruptcy act only renders liens void as against the trustee and those claiming under him.[60] When beneficial to the estate, a lien voidable as against the trustee will not be dissolved but the trustee will be subrogated to the rights of the lienor and empowered to enforce the lien.[61] The court ordering attachment liens preserved for the benefit of the estate, it is proper for it to award the attaching creditors reasonable attorney's fees.[62] Under the bankruptcy act Congress may impair the obligation of contracts.[63]

50. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800. Section 67a refers only to the validity of lien claims under the law of the state wherein the bankruptcy proceedings are pending. Murphy v. W. T. Murphy & Co. [Iowa] 101 N. W. 486.

51. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800. A lien acquired without fraud for a valuable consideration, valid as against the bankrupt, and antedating by four months the bankruptcy proceedings, is good as against general creditors represented by the trustee whether recorded or not. Id. A vendor of goods, sold the bankrupt, having retained possession, the trustee takes subject to the vendor's lien. In re Manuel J. Portuondo Co., 135 F. 592. Drafts operating as an equitable assignment of certain rents pro tanto, they constitute a lien on the funds in the hands of the trustee. In re Oliver, 132 F. 588.

52. Receivers of Virginia Iron, Coal & Coke Co. v. Staake [C. C. A.] 133 F. 717; In re First Nat. Bank [C. C. A.] 135 F. 62.

53. The holder of an instrument who might have had a lien if he had recorded it before bankruptcy cannot acquire such lien by recording it thereafter. So held as regards a Pennsylvania mortgage. In re Lukens, 138 F. 188.

54. In re Smith, 132 F. 301; In re Dunn Hardware & Furniture Co., 132 F. 719; In re Press-Post Printing Co., 134 F. 998; In re Rasmussen's Estate, 136 F. 704. Under Ky. St. 1903, § 496; In re Ducker, 133 F. 771; In re Ducker [C. C. A.] 134 F. 43, afg. 133 F. 771. Under Rev. St. Ohio, § 4155-2. Dolle v. Cassell [C. C. A.] 135 F. 52.

55. In re Beebe, 138 F. 441.

56 Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

57. Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237.

58. In re Vastbinder, 132 F. 718. Trustee may sell the property to the exclusion of a sheriff who has a valid lien thereon by virtue of the levy of an execution more than four months prior to the filing of the petition. Id. In such case the sheriff having obtained the issuance of a rendition exponas, the latter must be stayed. Id.

59. In re First Nat. Bank [C. C. A.] 135 F. 62; In re Jersey Island Packing Co. [C. C. A.] 138 F. 625. Adjudication held to have this effect. In re Reynolds, 133 F. 585; In re Ducker, 133 F. 771. Adjudication and transfer of possession to trustee constitutes legal process and operates as a seizure of the property for all the creditors. In re Press-Post Printing Co., 134 F. 998. Seizure of the court of bankruptcy operates as an attachment, and an injunction for the benefit of all persons having interests in the bankrupt's estate. Dolle v. Cassell [C. C. A.] 135 F. 52.

60. Smith v. Zachry, 121 Ga. 467, 49 S. E. 286, following McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433.

61. Act 1898, § 67, c. 3. Attachment liens obtained within four months of filing the petition, and upon property previously transferred by the bankrupt by an unrecorded deed will be preserved for the benefit of the estate, although the property subject thereto did not belong to the bankrupt, except as to the attaching creditors, and could not have been reached by the trustee except for the attachments. Receivers of Virginia Iron, Coal & Coke Co. v. Staake [C. C. A.] 136 F. 717.

62. So held where the trustee could not have otherwise reached the property. Receivers of Virginia Iron, Coal & Coke Co. v. Staake [C. C. A.] 133 F. 717.

63. Rothermel v. Moyer, 24 Pa. Super. Ct. 325. Act 1898, § 67f, is valid as to an execution on a judgment by confession, although such confession contains a stipulation of "release of all errors and without stay of execution." Rothermel v. Moyer, 24 Pa. Super. Ct. 325.

(§ 9) *D. Whether chattel mortgages*[64] executed by the bankrupt are valid liens must be determined by the law of the state where they were executed.[65] The trustee has no greater right to attack a chattel mortgage executed by the bankrupt than the creditors represented by such trustee had at the time of the adjudication.[66]

(§ 9) *E. Preferential transfers*[67] *and payments.*[68]—In order to constitute a preference, there must have been a transfer[69] by the bankrupt[70] while insolvent,[71] within four months prior to the filing of the petition[72] to a creditor[73] or some one in his behalf,[74] the party so receiving it[75] or the one to be benefited thereby[76] having reasonable cause to believe that a preference was thereby intended.[77] He

64. See 3 C. L. 452.

65. In re First Nat. Bank [C. C. A.] 135 F. 62; In re Beede, 138 F. 441; Thompson v. Fairbanks, 25 S. Ct. 306. Massachusetts' rule considered. Humphrey v. Tatman, 25 S. Ct. 567.

66. Skilton v. Coddington, 93 N. Y. S. 460.

67. See 3 C. L. 453. See, also, Tiffany, Real Property, p. 1117.

68. See 3 C. L. 457.

69. Depositing money in a bank in the due course of business is not a transfer within the meaning of the bankruptcy act. Habegger v. First Nat. Bank [Minn.] 103 N. W. 216. The enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage, is not a conveyance or transfer within the meaning of the bankruptcy law. Thompson v. Fairbanks, 25 S. Ct. 306. The mortgage having been executed more than four months before the filing of the petition, the trustee's rights are not enlarged by the existence at the time the mortgagee took possession of an attachment and secured chattel mortgage which were both dissolved by the bankruptcy proceedings. Id.

70. Where a debtor transferred his property to a corporation formed to carry on the business for the benefit of creditors, and such corporation was thereafter declared a bankrupt, but no bankruptcy proceedings were instituted against the debtor, held not a conveyance in fraud of the bankruptcy law. In re A. L. Robertshaw Mfg. Co., 133 F. 556.

71. In re Clifford, 136 F. 475; Hastings v. Fithian [N. J. Err. & App.] 60 A. 350; Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247; Roney v. Conable, 125 Iowa, 664, 101 N. W. 505; Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46; Edwards v. Carondelet Mill. Co., 108 Mo. App. 275, 83 S. W. 764. On an issue as to whether a debtor was insolvent at the time he gave a certain transfer, the fact that late in the afternoon of the day he made the transfer he conveyed nearly all his property, thereby rendering himself insolvent, did not, on the theory that fractions of a day are not to be considered, render him insolvent at the time of the alleged transfer. Upson v. Mt. Morris Bank, 92 N. Y. S. 1101.

As to when one is insolvent within the meaning of the bankruptcy law of 1898, see ante, § 3a.

72. Hastings v. Fithian [N. J. Err. & App.] 60 A. 350; Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46. Order presented day before filing of petition held not to constitute an equitable assignment of the fund as of its date and hence to constitute a preference. Johnston v. Huff, Andrews & Moyler Co. [C. C. A.] 133 F. 704. A deed of trust executed more than four months before the filing of the petition held valid. In re Porterfield, 138 F. 193. A transfer made more than four months prior to the filing of the petition held valid. Little v. Holley-Brooks Hardware Co. [C. C. A.] 133 F. 874. Bankr. Act 1898, § 3b, applies only to acts of bankruptcy; it does not refer to preferences. Id.

73. Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46. A surety is a creditor. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286; Crandall v. Coats, 133 F. 965.

74. See 3 C. L. 453, n. 98.

75. In re Clifford, 136 F. 475. The statement of claim alleging that defendant's agent had reasonable cause to believe the debtor insolvent, an affidavit of defense alleging that defendant had no personal knowledge of the debtor's insolvency is insufficient. Plummer v. Myers, 137 F. 660.

76. In re Clifford, 136 F. 475.

77. Galveston Dry Goods Co. v. Frenkel [Tex. Civ. App.] 86 S. W. 949; Hastings v. Fithian [N. J. Err. & App.] 60 A. 350; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393; Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14.

What constitutes reasonable cause to believe that a preference was intended: This is a question of fact (Kaufman v. Tredway, 25 S. Ct. 33; Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98. Evidence held to require submission of question to jury. Wetstein v. Franciscus [C. C. A.] 133 F. 900; Upson v. Mt. Morris Bank, 92 N. Y. S. 1101). While actual knowledge is not essential (Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247), still the creditor is chargeable with notice of such facts as a reasonable inquiry, in view of the facts with respect to the debtor's condition, which were brought home to him, might reasonably be expected to foreclose (Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98), and it is not enough that the creditor suspected or had cause to suspect that a preference was intended (Johnston v. George D. Witt Shoe Co. [Va.] 50 S. E. 153). The creditor is bound only by the information he has at the time he receives payment and is not obliged to trace to the ultimate any suspicious circumstances that may exist within his knowledge to ascertain whether such payment would be void within the law. Blankenbaker v. Charleston State Bank, 111 Ill. App. 393. The principles of construction laid down by the

need not have actual knowledge of the debtor's insolvency,[78] though having reasonable ground to believe the debtor insolvent,[79] he is chargeable with notice of intent to prefer.[80] A preference must have actually resulted,[81] the effect thereof being to prefer one creditor over others of the same class.[82] Whether an intent to

courts in determining the force and effect to be given to the phrase "reasonable cause to believe," found in the act of 1867, apply equally in considering the meaning of this phrase in the act of 1898. Stevenson v. Milliken, Tomlinson Co., 99 Me. 320, 59 A. 472; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393.

Illustrations: A creditor knowing that money with which loan was repaid after frequent urging was obtained by the debtor by a sale of his stock of merchandise, and that such sale put him out of business had reasonable cause to believe the debtor insolvent. Thomas v. Adelman, 136 F. 973. A creditor receiving payment from a second transferee of property knowing that such payment was the consideration of the transfer and that the debtor was insolvent, held to have received a preference. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286. Where, at the time of the transfer, the creditor knew of the existence of judgments against the debtor, and that the latter had been unable to pay various notes and drafts, and was allowing sight drafts to be dishonored, and was failing to pay other obligations and accounts as they became due, held creditor had reasonable cause to believe that a preference was intended. Christopherson v. Oleson [S. D.] 102 N. W. 685. Evidence held insufficient to show that creditor had reasonable cause to believe that debtor intended a preference. Turner v. Fisher, 133 F. 594; Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247.

78. See 3 C. L. 453, n. 3.

79. What constitutes reasonable ground to believe debtor insolvent: This is ordinarily a question of fact (Kaufman v. Tredway, 25 S. Ct. 33; Turner v. Fisher, 133 F. 594; Christopherson v. Oleson [S. D.] 102 N. W. 685). Yet, where the facts as to the debtor's financial condition are clearly established by a special verdict, the court may, as a matter of law, hold that the creditor was charged with such knowledge (Christopherson v. Oleson [S. D.] 102 N. W. 685). It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. Turner v. Fisher, 133 F. 594; Stevenson v. Milliken, Tomlinson Co., 99 Me. 320, 59 A. 472. A creditor having knowledge of facts respecting his debtor's insolvency, sufficient to put an ordinary man on inquiry, is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247.

Illustrations: Grounds for reasonable belief in a present inability to pay debts in the course of business is not necessarily grounds for believing the debtor insolvent. In re Pettingill & Co., 136 F. 218. Where less than a year before bankruptcy the bankrupt owed the debtor $30,000 which he was unable to pay, but paid $8,000 on account, and the parties continued to deal with each other, the creditor relying on a mercantile agency's report, large credit being given and large payments being made, held, the creditor did not have reasonable cause to believe the debtor insolvent. Id. Where debtor claimed that his goods were more than sufficient to pay his debts and there was no rumor of his insolvency, held, the creditor did not have reasonable cause to believe him insolvent. Edwards v. Carondelet Mill. Co., 108 Mo. App. 275, 83 S. W. 764. Creditors receiving back goods bought and knowing that the debtor could not pay his debts, held to have reasonable cause to believe the debtor insolvent. In re Andrews, 135 F. 599. Evidence held sufficient to charge the preferred creditors with notice of the bankrupt's insolvency. Crandell v. Coats, 133 F. 965. Evidence held insufficient to show reasonable cause to believe debtor insolvent. Stevenson v. Milliken-Tomlinson Co., 99 Me. 320, 59 A. 472.

80. Creditor having knowledge of debtor's insolvency, a preference will be presumed. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57.

81. Unrecorded chattel mortgage being valid as against creditors, it does not constitute a preference, though recorded within the four-month period. Texas Rev. St. 1895, art. 3328, considered. Meyer Bros. Drug Co. v. Pipkin Drug Co. [C. C. A.] 136 F. 396. Where one agreed with an employer that the latter would deduct sums due the former for goods sold laborers, from the wages of the latter, and turn the same over to the seller of the goods, the retention of such sums by the employer within four months of the filing of the petition does not constitute a preference, though such seller was a debtor of the employer. Western Tie & Timber Co. v. Brown, 25 S. C. 334.

In those states where a chattel mortgagee by taking possession of after-acquired property brings it within the operation of the mortgage as of its date, and the mortgagee is entitled to possession at any time, the turning over of possession to the mortgagee within four months of the mortgagor's bankruptcy is not an unlawful preference, the mortgage having been executed more than four months before filing the petition. Vermont law considered. In re Rogers, 132 F. 560.

82. Hasting v. Tithian [N. J. Err. & App.] 60 A. 350; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119; Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46.

A creditor securing a transfer from an insolvent debtor within four months of the latter's bankruptcy in order to secure his claim to the exclusion of other creditors, the transfer may be set aside at the suit of the trustee. Ferguson v. Lederer, Strauss & Co. [Iowa] 103 N. W. 794.

Giving of chattel mortgages constitutes a preference, undue advantage over other

prefer on the part of the bankrupt is essential is the subject of conflicting decisions.[83] The trustee cannot avoid a transfer to a bona fide purchaser [84] for a present fair consideration.[85] The phrase "ground to believe" is synonymous with "cause to believe."[86] Whether a given transaction in the form of a recordable instrument constitutes a preference must be determined by the facts existing at its inception, and not at the time of its record,[87] if in fact a preference when executed it may be avoided by the filing of a petition in bankruptcy by or against the maker thereof within four months after its record; but if it was not originally a preference, a failure to record it until the maker became insolvent will not make it one.[88] The renewal of a prior valid mortgage within the four months period does not constitute a preference.[89] Where a creditor is given security more than four months before the filing of the petition, the subsequent execution of a more formal instrument within the four months period is not a preference,[90] providing that the giving of the first security is not void as to creditors.[91] It is not essential that the property actually passed into the hands of the defendant.[92] It is no defense that the property was applied to a guaranty of the indebtedness.[93] A preferential transfer is voidable, not void,[94] and the trustee has the exclusive right to take advantage of its invalidity;[95] it cannot be asserted by creditors whose debts were created after the bankrupt's discharge.[96] The four months period of limitation as against a preferential transfer which is neither fraudulent nor requires recordation begins to run from

creditors being thereby obtained. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

A creditor purchasing property with an understanding that the proceeds should be used to pay preferred claims, held not to constitute a preference. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

That a creditor is secured does not prevent the transfer from being preferential as to other creditors. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286.

83. That he must. Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14, following Peck v. Connell, 21 Pa. Super. Ct. 22; Little v. Holley-Brooks Hardware Co. [C. C. A.] 133 F. 874. For cases pro and con, see 3 C. L. 454, n. 8.

What constitutes such an intent: A transfer made more than a year before the passage of the bankruptcy act cannot be regarded as having been made in contemplation of bankruptcy. Gardner v. Haines [S. D.] 104 N. W. 244. Evidence held to show that certain mortgages were executed by the bankrupt with intent to prefer. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98. Evidence held to fail to disclose any desire or purpose on the part of the bankrupt to give the defendants any advantage over other creditors. Stevenson v. Milliken-Tomlinson Co., 99 Me. 320, 59 A. 472.

84. See 3 C. L. 455, n. 9.

85. In re Clifford, 136 F. 475. A present loan on security is not a preference. In re Noel, 137 F. 694. A sale of goods by a creditor to a bankrupt firm, to be paid for in ten or thirty days, cannot be regarded as a cash transaction so as to entitle the creditor to retain payment and prove the balance of his claim against the bankrupt's estate. In re John Morrow & Co., 134 F. 686.

A mortgage given within the four-months' period, in part to secure an antecedent debt and in part to secure a loan made at the time, is valid to the extent of the latter transaction. In re Dismal Swamp Contracting Co., 135 F. 415.

86. Edwards v. Carondelet Mill. Co., 108 Mo. App. 275, 83 S. W. 764.

87, 88. Seager v. Lamm [Minn.] 104 N. W. 1.

89. In re Noel, 137 F. 694.

90. Stewart v. Hoffman [Mont.] 81 P. 3, overruling former opinion, Id. [Mont.] 77 P. 689.

Testimony by the transferee that transfer was given in accordance with a former agreement between the parties and to pay for trust funds misappropriated by the bankrupt, held insufficient to render transfer valid. Lamb v. Hall [Cal.] 81 P. 286.

91. Mortgage executed within the four-months period is void, though it is given pursuant to a parol agreement made prior to the commencement of such period. In re Dismal Swamp Contracting Co., 135 F. 415.

92. In an action to recover the value of a preference, the fact that what defendant received was its mortgage interest under a chattel mortgage obtained from the bankrupt in fraud of the bankruptcy act, instead of the property itself, does not defeat the action. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

93. It is no defense where the goods were sold to the bankrupt on credit and part returned that the creditor's agent by a collateral agreement with him guarantied payment of part of the indebtedness and that the goods returned were applied on such part. Plummer v. Myers, 137 F. 660.

94. Dyer v. Kratzenstein, 92 N. Y. S. 1012.

95. Lewis v. First Nat. Bank [Or.] 78 P. 990. Trustee's assignee has no such right. Id.

96. Johnson v. Donahue [Tenn.] 83 S. W. 360.

the date of the transfer.[97] In an action to recover a preference, the only question involved is whether the property was obtained in fraud of the bankruptcy act.[98] An alleged preferred creditor is entitled to have the issue of the debtor's insolvency determined in an action to which he is a party, and is not bound by an adjudication of bankruptcy,[99] and the burden is on such transferee to show that the transfer was made before the bankrupt suspended payment and without knowledge of the latter's insolvency.[1] The preference being set aside, the preferred creditor is only required to return the property and the cash value of such of it as he has sold,[2] and is entitled to reimbursement for payments made in satisfying incumbrances.[3] New credits may be set off as against the amount recoverable from the creditor as a preference,[4] and it is not necessary that the property representing such credits should remain a part of the debtor's estate until his adjudication in bankruptcy, or that it should be used in payment of preferred debts.[5]

§ 10. *Collection, reduction to possession and protection of property. A. Discovery.*[6]

(§ 10) *B. Compelling surrender by bankrupt.*[7]—In the absence of satisfactory explanation, it is presumed that property traced into the hands of the bankrupt a short time prior to the suspension of business remains in his hands and the bankrupt must answer therefor.[8] The bankruptcy court has the power to require a bankrupt to execute the instruments necessary to effectuate the sale of a personal and exclusive right.[9] Upon an application to make the bankrupt surrender his books, he is entitled to plead the constitutional provision against forcing a man to give incriminating evidence against himself,[10] and in such case the books should be produced before the court or referee for determination of the question whether the plea is well founded in fact, and for the making of an order for the protection of the bankrupt from the discovery of such evidence, and, if possible, to enable the trustee to obtain other necessary information from such books.[11]

(§ 10) *C. Property in possession of officer appointed by state courts.*[12]—Before the adjudication the bankruptcy court has no jurisdiction over a receiver appointed in a state court, no relief being sought against him.[13]

(§ 10) *D. Summary proceedings against third persons; jurisdiction.*[14]—. A bankruptcy court has jurisdiction to summarily determine the right of a third party, not an adverse claimant, to or in property of the bankrupt;[15] but in the

97. Not from the date the transferee took possession or the bankrupt's creditors acquired notice. Act 1898, § 3h, is not intended to be read in connection with section 60, subdivisions a and b. Little v. Holley-Brooks Hardware Co. [C. C. A.] 133 F. 874.

98. The fact that there are one or more classes of creditors and the manner in which the property will be administered does not alter the plaintiff's rights. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

99. Edwards v. Carondelet Mill. Co., 108 Mo. App. 275, 83 S. W. 764

2. Russell v. Powell [Wash.] 80 P. 837. He is not required to pay the trustees the He is not required to pay the trustee the agreed value of the property at the time it was transferred. Id.

3. Crandell v. Coats, 133 F. 965.

4. Act 1898, § 60c. In re John Morrow & Co., 134 F. 686. Where indebtedness was settled by the giving of promissory notes and later goods were again sold the debtor on short credit, held indebtedness for such new goods was a new credit. Id.

5. Kaufman v. Tredway, 25 S. Ct. 33.

6. See 3 C. L. 458.

7. See 3 C. L. 459.

8. In re Royce Dry Goods Co., 133 F. 100. **Evidence** held sufficient to support finding that bankrupt had the sum of $2,425 under her control which she concealed and refused to surrender to her trustee. In re Cole, 135 F. 439.

9. Stock exchange seat. In re Hurlbutt, Hatch & Co. [C. C. A.] 135 F. 504. In such case title having vested in the trustee, it is no objection to the transfer that it was equivalent to resignation of the holder's personal membership in the exchange. Id.

10, 11. In re Hess, 134 F. 109.

12. See 3 C. L. 460.

13. In re Bay City Irr. Co., 135 F. 850.

14. See 3 C. L. 461.

15. So held as regards property of the bankrupt coming into the hands of a third party before the filing of the petition in bankruptcy to which he asserts no adverse claim. In re Wiesen Bros., 138 F. 164.

absence of consent,[16] it has no jurisdiction to so compel an adverse claimant to surrender property in his possession,[17] the remedy in such case being by an independent,[18] plenary [19] suit. But the bankruptcy court has jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant.[20] The failure of adverse claimants to abandon their claims after their objections to the jurisdiction of the court have been overruled does not amount to a consent to the jurisdiction.[21] If the bankruptcy court has either actual or constructive possession of the property, the matter may be heard upon petition and answer.[22] Property being surrendered to a claimant by the receiver, the trustee cannot recover the same in summary proceedings.[23] The mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant.[24] Sheriff seizing and holding property under an attachment issued out of the state court prior to the filing of the bankruptcy proceedings is an adverse claimant.[25] In a summary proceeding to recover property alleged to belong to the bankrupt, the questions of preference and of fraud cannot be considered.[26]

(§ 10) *E. Actions to collect or reduce the property to the trustee's possession.*[27]—The trustee may bring an action to recover property belonging to the estate, or to subject the income of trust funds to the payment of the bankrupt's debts [28] in the state [29] or Federal [30] courts without express leave or direction of the bankruptcy court.[31] Such an action is not criminal in its nature because the defendant may be punished for contempt in case he fails to comply with the court's order.[32] The trustee simply seeking the recovery of a money judgment, the action is legal in its nature; [33] but it being necessary to have a written instrument set aside, the suit is in equity.[34] There is a conflict as to whether a previous demand is necessary in order to maintain an action at law to recover a preference,[35] but

16. In re Andre [C. C. A.] 135 F. 736; In re Hadden-Rodee Co., 135 F. 886. Adverse claimant instituting a summary proceeding, the court of bankruptcy has jurisdiction to determine the rights of the claimant. In re D. H. McBride & Co., 132 F. 285. An injunction against the sale of mortgaged property being dissolved upon the mortgagee consenting to the payment of the proceeds of a sale of the property to a certain bank to be held subject to an order of court, the court can determine the validity of the mortgage in any appropriate form of proceeding. In re Noel, 137 F. 694.

17. In re Andre [C. C. A.] 135 F. 736; In re New York Car Wheel Works, 132 F. 203; First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693. A court of bankruptcy, after adjudging, in a proceeding begun by the receiver's petition for directions respecting a sale, that the receiver was not in possession of the property, has no jurisdiction to decree the sale, and determine the right of adverse claimants to the proceeds. Id.

18. In re Noel, 137 F. 694.

19. In re New York Car Wheel Works, 132 F. 203; In re Noel, 137 F. 694.

20. In re Andre [C. C. A.] 135 F. 736.

21. Objection was to jurisdiction of court of bankruptcy to act on receiver's petition for directions respecting a sale. First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693.

22. In re Noel, 137 F. 694. Property may be recovered in a summary proceeding from one taking the goods under a writ of replevin issued from a state court after the petition in bankruptcy had been filed. In re Briskman, 132 F. 201. This is not changed by a provision in an order consolidating with such involuntary proceedings the proceedings on a voluntary petition subsequently filed that it should be "without prejudice to interested parties." Id.

23. Hinds v. Moore [C. C. A.] 134 F. 221.

24, 25. In re Andre [C. C. A.] 135 F. 736.

26. Where money sought was claimed by defendant to have been applied by him in payment of his salary and in accordance with custom, held, trustee could not recover. In re Lebrecht, 135 F. 878.

27. See 3 C. L. 462.

28. N. Y. Code Civ. Proc. § 1391, as amended by Laws 1903, p. 1071, c. 46, considered. In re Tiffany, 133 F. 799.

29, 30. See next subdivision, Jurisdiction of Courts.

31. Callahan v. Israel, 186 Mass. 383, 71 N. E. 812.

32. In re Alphin & Lake Cotton Co., 134 F. 477.

33. Hodges v. People's Bank [S. C.] 50 S. E. 192.

34. Dyer v. Kratzenstein, 92 N. Y. S. 1012.

35. That it is not. Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707. Chattel mortgagee converting mortgaged property and applying the proceeds to the payment of the mortgage debt, no demand is necessary. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

That it is: Wright v. Skinner, 136 F. 694.

such demand is not necessary to the recovery of the preference in equity.[36] Where a mortgagee converts the property and applies the proceeds to his debts, the action to recover the value of the property, so converted, as a preference is one in trover.[37] An order of court providing that the bankrupt's attorney shall not act for any creditor or the trustee "in bankruptcy proceedings" has no application to a suit by the trustee on a claim.[38]

Jurisdiction.[39]—State and Federal courts have concurrent jurisdiction of actions to set aside preferential transfers.[40] An action to recover property fraudulently transferred may be brought in any court that would have had jurisdiction if bankruptcy had not intervened,[41] and the trustee may bring an action, to recover property taken by a lienor from the bankrupt after his adjudication, in a state court,[42] and having invoked the jurisdiction of such court, he is bound by its judgment rendered on the merits.[43] The bankruptcy court has jurisdiction of a plenary suit to determine rights in or liens upon property in its possession,[44] or to avoid an unlawful preference, or to recover property unlawfully transferred by the creditor,[45] and, in such a suit to establish rights in property within the district, a nonresident defendant, claiming adversely, may be brought in by an order and service, in accordance with Rev. St. § 783.[46] The trustee taking actual possession of property, although it be in another state, it is in the custody of the bankruptcy court administering the estate.[47] The district court of another district than that in which the bankruptcy proceedings are pending may entertain a suit to set aside a fraudulent transfer made by the bankrupt to parties residing in such district.[48] Prior to the amendment of 1903 the state courts had jurisdiction of an action by a trustee to recover the value of property transferred as a preference, and the action could not be maintained in a Federal court, in the absence of other jurisdictional grounds, without the defendant's consent.[49] An action by the trustee to enforce a chose in action in the nature of a statutory lien must be brought in the state courts, unless the adverse parties consent to be sued in the United States circuit court.[50] In what state court the action may be brought is governed by the state's statutes.[51]

Parties.[52]—In a suit by the trustee to set aside an alleged preferential transfer of the bankrupt's interest in a partnership to a third person, the bankrupt's partner is not a necessary party.[53] A trustee appointed after the institution of a suit to set aside a fraudulent conveyance made by the bankrupt may be added by amendment as a party defendant to the suit.[54]

Pleading.[55]—Pleadings in bankruptcy follow the rules of pleadings in equity.[56] The complaint in an action to recover a preference should allege all the essential

36. Wright v. Skinner, 136 F. 694.
37. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.
38. Callahan v. Israel, 186 Mass. 383, 71 N. E. 812.
39. See 3 C. L. 463.
40. Stern v. Mayer, 29 App. Div. 427, 91 N. Y. S. 292.
41. Breckons v. Snyder [Pa.] 60 A. 575. May be brought in court of common pleas. Id.
42, 43. In re Reynolds, 133 F. 585.
44. Whitney v. Wennran, 25 S. Ct. 778. The bankruptcy court has jurisdiction to determine the validity of an alleged equitable lien on nonexempt property of the bankrupt. Lucius v. Cawthon-Coleman Co., 25 S. Ct. 214.
45, 46. Horskins v. Sanderson, 132 F. 415.
47. In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004, for which case see 3 C. L. 463, n. 45.
48. Lawrence v. Lowrie, 133 F. 995.
49. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.
50. Mechanic's lien. In re Grissler [C. C. A.] 136 F. 754.
51. **New York:** An equitable action by a trustee to recover a preference is not within the jurisdiction of the city court of the City of New York as defined by Code Civ. Proc. § 315. Dyer v. Kratzenstein, 92 N. Y. S. 1012.
52. See 3 C. L. 463.
53. Lamb v. Hall [Cal.] 81 P. 286.
54. Davis v. W. F. Vandiver & Co. [Ala.] 38 So. 850.
55. See 3 C. L. 464.
56. In re Urban & Suburban Realty Title Co., 132 F. 140.

elements thereof,[57] but it need not allege that any creditor has filed a claim in the bankruptcy proceeding, or any fact showing the necessity of recovering the alleged preference,[58] and alleging a demand and refusal is sufficient, though it does not allege by whom it was made.[59] In a suit under § 70e, the petition should allege the amount of the claims of the creditors who were such at the time the fraudulent conveyances were made,[60] and that the assets of the bankrupt's estate in the hands of the trustee are insufficient to pay the same.[61] In a suit to recover the proceeds of insurance polices paid to a third person, it must be alleged that prior to the filing of the petition the bankrupt had a property right in the policies which he could have transferred or which might have been levied on and sold under judicial process.[62] A bill in equity to recover a payment made by the bankrupt alleging the same to be a preference or a fraudulent payment is not multifarious.[63]

Presumptions and burden of proof; evidence.[64]—In an action by the trustee to recover property of the bankrupt, the presumption is that the trustee has complied with all the requirements of the law and is qualified to sue,[65] and such fact can only be put in issue by a verified denial;[66] but being denied, the trustee must prove his appointment.[67] A trustee is not entitled to recover funds, alleged to belong to the bankrupt, from a third person, unless it is proved beyond a reasonable doubt that such person has the fund in his possession or control,[68] and the fund being traced into defendant's hands, the burden is upon him to account for it.[69] In a suit to recover a preference, the trustee must prove all essential facts[70] by a preponderance of evidence.[71] In proceedings by the trustee to set aside a conveyance as fraudulent, the burden is on defendants to show that they are purchasers for value.[72] Stenographer's notes of testimony given by the bankrupt at

57. Petition alleging that at the time of the transfer the bankrupt had no other property or estate available for the payment of his debts, and that neither he nor defendant made any provision for the payment of his other debts, that he was then owing defendant a specified sum, and with intent to collect his claim in full and in fraud of other creditors, defendant accepted the transfer, which was fraudulent, with intent on the part of all parties to give the defendant an illegal preference, and to hinder, delay and defraud all other creditors, held, in the absence of a request for a more specific statement, to sufficiently allege a preferential transfer. Ferguson v. Lederer, Strauss Co. [Iowa] 103 N. W. 794.

58. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

59. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247. This is especially true where the objection is first made on appeal under the Indiana practice. Id.

60. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524.

61. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524; Roney v. Conable, 125 Iowa, 664, 101 N. W. 505.

62. Carr v. Myers [Pa.] 60 A. 913.

63. Wright v. Skinner, 136 F. 694.

64. See 3 C. L. 464.

65. Breckons v. Snyder [Pa.] 60 A. 575.

66. Under Rev. Code 1892, § 1797, declaring that plaintiff need not prove the description of character, unless specially denied by verified plea, an allegation that one suing as trustee in bankruptcy was not legally appointed, verified only by an affidavit relating to the discovery given in the answer to interrogatories, is insufficient to require proof of the legality of plaintiff's appointment. Thompson v. First Nat. Bank [Miss.] 37 So. 645.

67. Van Houten v. Oliver, 91 N. Y. S. 36.

68. In re Feldser, 134 F. 307. Evidence held sufficient to show that the defendant had the property in his possession and control. Id. Must prove defendant's possession by evidence plain and convincing beyond reasonable controversy. In re Alphin & Lake Cotton Co., 134 F. 477. In a proceeding by the trustee of a bankrupt corporation, organized by defendant for the furtherance of fraudulent cotton transactions, to charge the latter with funds received by him and alleged to belong to the corporation, evidence held to require a finding in favor of the trustee. Id.

69. In re Alphin & Lake Cotton Co., 134 F. 477.

70. Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46. Must prove that payments were made while bankrupt was insolvent (Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247), and that payee had reasonable cause to believe that a preference was being obtained (Id.). As to what constitutes "reasonable cause to believe that a preference is being obtained," see ante, § 9, subd. e. The law presumes that payments made by the bankrupt were legal, and the burden of proof is on the trustee to overcome this presumption. Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14.

71. Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46. Instructions held fair and to cover entire case. Id.

72. Lawrence v. Lowrie, 133 F. 995.

the various stages in the proceedings are admissible against him,[73] but not as against third persons.[74] The testimony given by other persons in such proceedings is incompetent as against the bankrupt.[75] In a suit to recover property fraudulently conveyed, testimony is admissible that the bankrupt stated to witnesses that the property was his and that he made the transfer to defraud creditors.[76] Testimony of dealings between debtor and creditor some six or seven months prior to a transaction alleged to constitute a preference is admissible on the question of knowledge.[77] The certificate of appointment is admissible to prove the authority of the trustee.[78] Proof should be limited to matters in issue.[79]

In general, testimony of the trustee as to the extent of the liabilities and assets of the bankrupt [80] and evidence as to the value of the assets [81] is admissible on the question of insolvency. The adjudication is evidence of bankrupt's insolvency at its date.[82]

Trial and judgment.[83]—An action to set aside a preferential transfer, being brought in a state court, the trial and procedure in the action are to be governed by the laws of the state.[84] In a suit in equity by a trustee to establish rights in property, the court may issue a writ of sequestration to prevent the removal of the property from the district, where the showing is not such as to warrant the appointment of a receiver.[85] The requiring of an injunction bond in suits in the Federal courts by trustees or receivers in bankruptcy relating to the administration of the estate is a matter resting in the discretion of the court, to be exercised in view of the facts of each case.[86] An action by the trustee to recover the value of property fraudulently transferred by the bankrupt to defendant as an agent does not preclude the bringing of a similar action against the agent's principal.[87] Instructions must state the whole case [88] and must conform to the issues.[89] The prayer in the petition must authorize the judgment.[90] A judgment, in an action to

73. Testimony taken at creditor's meetings called for the general purpose of inquiring into the bankrupt's affairs. In re Wiesen Bros., 135 F. 442.

74. Notes of testimony given at preliminary hearing before the referee held inadmissible in an action by the trustee to recover property alleged to belong to the bankrupt. Breckons v. Snyder [Pa.] 60 A. 575.

75. In re Wiesen Bros., 135 F. 442.

76. Shelley v. Nolen [Tex. Civ. App.] 88 S. W. 524.

77. Kaufman v. Tredway, 25 S. Ct. 33.

78. Harrell v. State, 121 Ga. 607, 49 S. E. 703.

79. In an action by the trustee to recover moneys paid by the bankrupt prior to his adjudication in alleged satisfaction of a debt, the existence of the debt being the sole issue, it is not necessary to show that there were unsatisfied creditors at the time the payment was made, or the suit brought or at the time of trial. Breckons v. Snyder [Pa.] 60 A. 575.

80. In an action to recover a preference, testimony by the trustee as to the bankrupt's assets and liabilities at the time of the bankruptcy which was only a few days after the preference was given, during which no substantial change had taken place in the debtor's financial condition, is competent on the issue of insolvency, as well as to show the preferential effect of the payment. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247.

81. Evidence as to the value of the property that came into the hands of the trustee held admissible on the question of preference. Coolidge v. Ayers [Vt.] 61 A. 40.

82. Breckons v. Snyder [Pa.] 60 A. 575.

83. See 3 C. L. 466.

84. Stern v. Mayer, 99 App. Div. 427, 91 N. Y. S. 292. An action to recover the value of a preferential transfer of personal property, no equitable relief being asked, is within Code Civ. Proc. § 968, subd. 1, relating to jury trial. Id.

85. Horskins v. Sanderson, 132 F. 415.

86. In re Barrett, 132 F. 362. Is not governed by state statutes nor by rules of court applicable to ordinary suits at law or in equity. Id.

87. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

88. An instruction on the issue of notice and intent to prefer, stating only a part of the facts, held properly refused. Johnston v. George D. Witt Shoe Co. [Va.] 50 S. E. 153.

89. There being no allegation of fraud in a petition to recover a preferential transfer, a request to charge on fraud in the language of § 60e, act 1898, is properly refused. Johnston v. George D. White Shoe Co. [Va.] 50 S. E. 153.

90. The prayer of a petition of a trustee to enforce a claim against the separate estate of the bankrupt's wife for the amount of community funds expended in improving the wife's separate property, "for such

recover the value of a preferential transfer, including an amount sufficient to substantially offset an amount improperly deducted therefrom does substantial justice and will not be disturbed.[91]

Interest.—On the recovery of an unlawful preference, interest may be recovered from the date of demand.[92] The commencement of a suit to recover an alleged preference is a demand which starts the running of interest.[93]

Costs.[94]—The requiring of cost bonds in suits in the Federal courts, by trustees or receivers in bankruptcy, relating to the administration of the estate, is a matter resting in the discretion of the court, to be exercised in view of the facts in each case.[95] Such security will not be required unless it appears that the trustee is acting in bad faith, nor will it be required unless there are assets of the estate out of which costs are payable and then only when the circumstances are such as to render it equitable that the creditors should indemnify the adverse party by giving the security.[96]

Appeal and review.—In South Carolina, in a purely legal action by the trustee to recover the value of a preference, findings of fact cannot be reviewed on appeal.[97]

(§ 10) *F. Claims not reduced to possession by the trustee.*[98]—The trustee may, subject to the control of the bankruptcy court, refuse to take possession of properties that will be burdensome rather than profitable to the estate,[99] and he must elect within a reasonable time whether or not he will take any particular property of the estate.[1] Electing to reject, the title to the asset remains in the bankrupt,[2] and the trustee cannot object to the institution of suits by creditors to reduce to control assets which the trustee might intentionally or unintentionally permit to escape.[3] A bankrupt who omits to schedule and withholds from his trustee all knowledge of certain property cannot, after his estate in bankruptcy has been finally closed up, assert title to the property on the ground that the trustee had never taken any action in respect to it.[4]

§ 11. *Protection of trustee's title and possession;*[5] *actions pending by or against bankrupt.*[6]—Under act 1898, § 2, cl. 15, the court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith;[7] the court[8] but not the referee[9] may enjoin proceed-

other and further relief, general and special, legal and equitable, as to the court shall seem meet and just," authorized the court to decree a sale of the improvements to satisfy a judgment for the trustee. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432.

91. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

92. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247.

93. Kaufman v. Tredway, 25 S. Ct. 33.

94. See 3 C. L. 466.

95. In re Barrett, 132 F. 362. Is not governed by state statutes nor by rules of court applicable to ordinary suits at law or in equity. Id.

96. In re Barrett, 132 F. 362.

97. Hodges v. People's Bank [S. C.] 50 S. E. 192.

98. See 3 C. L. 467.

99. May refuse to take possession of mortgaged property, if its value, over and above the incumbrance, is not sufficient to justify an attempt to administer it. In re Jersey Island Packing Co. [C. C. A.]. See 3 C. L. 467, n. 7.

1. If the trustee desires to keep a contract of bankrupt alive, he must manifest his election within a reasonable time. In re Pettingill & Co., 137 F. 143.

2. See 3 C. L. 467, n. 11. Where, after a trial resulting in a verdict for defendant, plaintiff was adjudged a bankrupt, and his trustee substituted, plaintiff could nevertheless prosecute an appeal on the trustee's filing his written consent thereto, and the defendant had no ground of complaint. Christy v. Des Moines City R. Co. [Iowa] 102 N. W. 194.

3. Davis v. W. F. Vandiver & Co. [Ala.] 38 So. 850.

4. First Nat. Bank v. Lasater, 25 S. Ct. 206.

5. See 3 C. L. 467.

6. See C. L. 467; for rights of trustee therein, see next section.

7. In re Jersey Island Packing Co. [C. C. A.] 138 F. 625.

8. Where, after distress by a landlord,

ings against the bankrupt[10] upon a provable claim[11] in state courts, and the possession of the trustee cannot be disturbed by any form of adverse legal proceedings without the concurrent sanction of the court of bankruptcy.[12] The bankruptcy court has no jurisdiction in a summary proceeding to enjoin a suit in a state court, the plaintiff in such action asserting an adverse claim, and the court having acquired jurisdiction of the parties and subject-matter and taken possession of the property.[13] Upon an application to vacate an order staying proceedings in a state court, the burden of proof is on the petitioner.[14] The referee has power to enjoin an interference with the trustee's possession.[15] A state court having acquired jurisdiction of an action to enforce a lien, is not divested of jurisdiction by the defendant being adjudged a bankrupt pending the action, or by failure of the trustee to intervene.[16] The bankruptcy court will not enjoin a creditor who holds a written waiver of exemptions from prosecuting an attachment suit in a state court against exempt property,[17] and the validity of the waiver is immaterial so far as the bankruptcy court is concerned, the question being one for the state court to determine.[18] It lies in the discretion of a state court whether or not it will vacate a judgment rendered while the bankruptcy proceedings were pending, but before they were brought to the court's notice.[19] A claimant being adjudged a bankrupt and a trustee appointed, the fact that the cause of action has been transferred to the trustee is a matter of defense.[20] The bankruptcy court will not order the trustee to pay over money when in so doing it must pass upon the correctness of the decision of a state court in the matter.[21]

§ 12. *Rights of trustee in pending actions by or against bankrupt; jurisdiction of state courts.*[22]

§ 13. *Management of the property and reduction to money.*[23]—A trustee in bankruptcy is an officer of the court and as such is subject to its direction by order

the tenant is adjudged a bankrupt, the property comes under the control of the bankruptcy court which will stay further proceedings with the distress, and require the landlord to submit his rights to that court for adjudication. In re Lines, 133 F. 803. A sale under a valid lien may be enjoined, and the property sold by the trustee. In re Baughman, 138 F. 742; In re Vastbinder, 13 Am. Bankr. Rep. 148, 132 F. 718.

9. In re Siebert, 133 F. 781.

10. The trustee of a contractor cannot have an action in a state court to foreclose a materialman's lien, stayed pending the bankruptcy proceedings, to the injury of the owner and lienors. In re Grissler [C. C. A.] 136 F. 754.

11. Will not stay a suit based on a nonprovable claim. Mackel v. Rochester, 135 F. 904. So held, though suit was based upon the bankrupt's alleged fraud and plaintiff in his complaint waived the tort and sued upon an implied contract. Id.

12. In re Noel, 137 F. 694. Where, prior to a suit to correct the description in a deed of trust executed by a bankrupt grantor, and to foreclose it, plaintiff obtained an order of the Federal court permitting foreclosure, and the bankrupt's trustee disclaiming any interest in the property, it was immaterial that plaintiff had not obtained formal leave of the Federal court to file a bill to correct such description. Scott v. Gordon [Mo. App.] 83 S. W. 550.

13. Tennessee Producer Marble Co. v. Grant [C. C. A.] 135 F. 322.

14. Petition denied where petitioner failed to show that the order was made prematurely, or that the bankruptcy proceedings were invalid or that notwithstanding such proceedings the order should be vacated. Rothermel v. Moyer, 24 Pa. Super. Ct. 325.

15. So held where trustee of tenant was entitled to possession of leased premises. In re Adams, 134 F. 142.

16. Vance v. Lane's Trustee, 26 Ky. L. R. 619, 82 S. W. 297.

17. B. F. Roden Grocery Co. v. Bacon [C. C. A.] 133 F. 515. In any event it will not enjoin the proceeding after the property has been set aside by the trustee as exempt. Id.

18. B. F. Roden Grocery Co. v. Bacon [C. C. A.] 133 F. 515.

19. St. Louis World Pub. Co. v. Rialto Grain & Securities Co., 108 Mo. App. 479, 83 S. W. 781.

20. Plaintiff's failure to disclose such bankruptcy is not a fraud nor ground for a new trial. Coulson v. Ferree, 26 Ky. L. R. 959, 82 S. W. 1000.

21. An occupant of mortgaged premises alleged to belong to a bankrupt cannot recover from the bankrupt's trustee money which she paid under a final decree in a suit against her in a state court for an accounting of rents and profits. In re Chase, 133 F. 79.

22. See 3 C. L. 468.

23. See 3 C. L. 469.

made in summary proceedings in all matters concerning money or property which may have come into his possession by virtue of his office;[24] but the court of bankruptcy cannot summarily require him to pay a judgment for costs rendered against him in another jurisdiction, there being no funds of the estate in his hands.[25] The purpose of the appraisement prescribed by the bankruptcy act is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, and for which in the first instance he is accountable.[26] The particularity with which the appraisement is to be made depends upon circumstances. It should be general, rather than special, only such particularity being indulged in as will be sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value.[27] When necessary to preserve the estate the trustee may employ an attorney.[28]

Sale by trustee.[29]—The court making the adjudication has the exclusive right to order the sale of the bankrupt's property, whether within or without the district, on proper notice to the parties in interest.[30] It may appoint an official auctioneer to sell the property of bankrupts';[31] or it may order a sale of either real or personal property at private sale.[32] A purchaser being found, the sale of a speculative claim may be ordered.[33] It is the general practice after a case has been referred to a referee to present the petition for an order of sale to him and for him to grant or deny the order.[34] A bankrupt is not entitled to object to a private sale of his interest in an estate before appraisement for the first time before the judge, but should raise such objections on an application to the referee for a modification of the original judgment.[35] Where several months were allowed to elapse without making a deposit for the payment of preferred debts, the pendency of a petition for a composition is no defense to a petition for the sale of the bankrupt's assets.[36] To authorize an order for the sale of a bankrupt's property free of liens, the record should show affirmatively that every creditor whose lien will be discharged has received notice of the application therefor.[37] Such a sale will not generally be ordered if prejudicial to the lienors.[38] In the absence of such an order all the trustee is authorized to sell is the right of the bankrupt to the property,[39] the extent of which he cannot guaranty, nor the court pronounce upon prior to the sale.[40] The trustee selling property under an agreement that a lien thereon should be transferred to the fund, the fund is subject to such lien.[41]

24, 25. In re Howard [C. C. A.] 135 F. 721, afg. 130 F. 1004. See 3 C. L. 469, n. 56.

26, 27. In re Gordon Supply & Mfg. Co., 133 F. 798.

28. Where bankrupt inherited legacy before adjudication, trustee held justified in employing an attorney to represent him in the contest of the will and also in contesting an accounting by the administrator. In re McKenna, 137 F. 611.

29. See 3 C. L. 470.

30. In re Granite City Bank [C. C. A.] 137 F. 818, afg. 131 F. 1004.

31. In re Benjamin [C. C. A.] 136 F. 175.

32. 27 Stat. 751 does not apply. In re Edes, 135 F. 595.

33. A sale of the bankrupt's interest in the estate of his father will be ordered where a purchaser has been found and it does not plainly appear that the bankrupt had no right in the estate which passed to the trustee. In re Gutterson, 136 F. 698.

34. In re William F. Fisher & Co., 135 F. 223.

35. In re Gutterson, 136 F. 698.

36. In re William F. Fisher & Co., 135 F. 223.

37. In re Saxton Furnace Co., 136 F. 697. A general statement by the referee that such notice has been given is insufficient. Id.

38. Holders of the bonds of a bankrupt corporation, secured by a mortgage, which gives them the right to use such bonds in the purchase of the property if sold at judicial sale, should not be deprived of such right by an order authorizing the trustee to sell the property free from liens so long as their title to the bonds is unimpeached. In re Saxton Furnace Co., 136 F. 697.

39. In re Gorwood, 138 F. 844. A valid lien is not affected by the sale. Bassett v. Thackara [N. J. Law] 60 A. 39.

40. In re Gorwood, 138 F. 844. Held that the court could not determine whether certain improvements made by the bankrupt were fixtures or not in advance of the sale. Id.

41. In re Bourlier Cornice & Roofing Co., 133 F. 958.

§ 14. *Claims against the estate and proof and allowance. A. Claims provable.*[42]—The provability of a claim depends upon its status at the time the petition is filed.[43] A debt [44] founded upon an open account or upon a contract express or implied is provable,[45] though plaintiff elects to bring an action thereon for fraud.[46] The liability of the bankrupt as a maker [47] or indorser [48] of commercial paper is provable, though such liability does not become due or absolute until after the filing of the petition. A demand for damages for breach of marriage promise and seduction is provable, though the damages are unliquidated.[49] Equitable claims may be provable,[50] though an equitable, unliquidated demand is not.[51] A claim for money loaned for gambling purposes is provable in so far as the purpose has not been executed,[52] or if the loan was obtained by the fraud of the bankrupt.[53] If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating his obligation, can give the proving creditor the right to maintain at once a suit in which damages can be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation.[54] Contingent liabilities are not provable.[55] Neither a money decree for alimony,[56] a claim for alimony, not reduced to judgment,[57] nor a claim for arrears in alimony and allowance for the support of minor children, due under a decree in an action for divorce,[58] are provable. A claim for unliquidated damages arising ex delicto is not provable.[59]

(§ 14) *B. Proof of claims.*[60]—A claim must be proved in accordance with

42. See 3 C. L. 471.

43. In re Pettingill & Co., 137 F. 143. Rent which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy does not constitute a provable claim (Watson v. Merrill [C. C. A.] 136 F. 359), nor is a claim for damages for the breach of such a contract provable. (Id.).

44. A contract between **husband and wife** not creating a debt, the wife cannot prove a claim against the husband's bankrupt estate. Earnings of wife. In re Winkels, 132 F. 590. See topic, Husband and Wife, 3 C. L. 1669.

45. Mackel v. Rochester, 135 F. 904. A claim arising out of the conversion by stockholders of shares purchased and held by them on a customer's account, charging him with interest and crediting him with the amounts received as margins, is provable. Crawford v. Burke, 25 S. Ct. 9.

46. A creditor by electing to bring an action in trover, as for a fraudulent conversion, does not deprive such debt of its provable character. Crawford v. Burke, 25 S. Ct. 9.

47. Frank v. Mercantile Nat. Bank [N. Y.] 74 N. E. 841.

48. In re Philip Semmer Glass Co. [C. C. A.] 135 F. 77.

49. Biela v. Urbanczyk [Tex. Civ. App.] 85 S. W. 451.

50. In the absence of any authoritive state decision or statute governing the case, the holder of a recorded bond for a deed who has paid the purchase price is entitled to prove his claim as one secured by an equitable lien on the land. In re Peasley, 137 F. 190.

51. Where creditors assigned their claims, before the bankruptcy of the debtor, to a committee in trust to purchase the bankrupt's property and sell the same for the benefit of the assignors, the beneficial interest of the assignors prior to the settlement of the bankrupt's estate is not provable. In re E. T. Kenney Co., 136 F. 451. In such case the assignors have a complete and adequate remedy at law by proof of their claims in the bankruptcy proceedings by the committee. Id.

52. In re E. J. Arnold & Co., 133 F. 789.

53. This though lender had knowledge of purpose. In re E. J. Arnold & Co., 133 F. 789.

54. In re Pettingill & Co., 137 F. 143. Bankruptcy is such a breach of a contract to purchase stock at a stated price and time, which time was subsequent to bankruptcy, that a claim for damages for the breach is a provable debt. Id.

55. The liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition, is not a provable claim. In re Pettingill & Co., 137 F. 143.

56. Lemert v. Lemert [Ohio] 74 N. E. 194.

57. Arrington v. Arrington, 132 F. 200.

58. Such liability is not released by the discharge, though fixed by a decree which is beyond the power of the court to alter or amend. Wetmore v. Markoe, 25 S. Ct. 172.

59. A claim for damages against a lessee for abandoning the premises so that the house was wrongfully entered, burned and destroyed, is not a provable claim. Winfree v. Jones [Va.] 51 S. E. 153.

60. See 3 C. L. 473.

Scope. The question whether a particular contract, debt, or other liability exists

the provisions of the act and the forms prescribed thereunder,[61] and on presentation of claims the only pleadings authorized are the claim duly verified and such objections as the trustee or any creditor may interpose to the allowance thereof.[62] A claim is not proved until it has been filed,[63] and neither the court nor a referee has any discretionary power to permit the filing of proofs of claim after the expiration of a year from the adjudication, either nunc pro tunc or otherwise,[64] nor is their power in that respect enlarged by the fact that the proofs were delivered to the trustee within said year.[65] A creditor whose claim is secured by the individual undertaking of a third person failing to prove his claim, the third party is entitled to be subrogated to the creditor's rights, or in case the latter fails to prove the claim, to prove it in the creditor's name.[66] Failure to attach a written instrument which forms the basis of the claim to the proof of claim does not raise a presumption as to its nonexistence,[67] and in the absence of objection it will be presumed on appeal that such instrument was presented on trial and not attached, or that its presence was waived.[68] A usurious claim being disallowed, the creditor may amend and prove a claim for money fraudulently obtained by the bankrupt.[69] Attorneys for a trustee may make out and present formal proof of a claim of a creditor, no prejudice being shown.[70] A committee of creditors holding assigned claims as trustee of an express trust for the benefit of the assignors is only entitled to prove all of the claims so held as a single claim.[71] The burden is upon the claimant to prove the validity of his claim,[72] but the claim being presented in proper form and duly verified, it makes out a prima facie case in his favor,[73] and the burden of proof thereupon shifts to the objectors,[74] and can only be disproved by evidence, the probative force of which is equal to or greater than that offered by the claimant,[75]

(§ 14) *C. Contest of claims.*[76]—Creditors who desire to contest the allowance of a claim, which, as parties in interest, they may do,[77] must file objections in their own behalf.[78] Though no particular form is prescribed for objections, they should generally be in writing,[79] though the referee may in his discretion permit an oral objection,[80] and they should be sufficiently specific to indicate to the claimant their nature and character.[81] A creditor has no standing to contest a claim on an appeal taken from the decision of the district court by the trustee unless he joins therein.[82] A creditor who moves to expunge an allowance in favor of another creditor stands in the shoes of the bankrupt, and has no higher rights

is a question of proof of contract. See Contracts, 3 C. L. 805. See, also, Negotiable Instruments, 4 C. L. 787, and other specific topics.

61. In re Dunn Hardware & Furniture Co., 132 F. 719.

62. In re Carter, 138 F. 846.

63, 64, 65. In re Ingalls Bros. [C. C. A.] 137 F. 517.

66. Rule applied where a bankrupt's wife signed notes and executed a mortgage on her separate property to secure money borrowed for the bankrupt and used by him in his business. In re Carter, 138 F. 846.

67. In re Dresser [C. C. A.] 135 F. 495.

68. In re Carter, 138 F. 846.

69. In re Robinson, 136 F. 994.

70. In re McKenna, 137 F. 611.

71. In re E. T. Kenney, 136 F. 451.

72. Must show that all the partners consented to the giving of a firm note given for a partner's individual debt. In re McIntire, 132 F. 295.

73. In re Carter, 138 F. 846. In the absence of objection the proof of claim stands as sufficient warrant for the payment of a dividend based thereon. In re Dresser [C. C. A.] 135 F. 495.

74. In re Carter, 138 F. 846.

75. In re Dresser [C. C. A.] 135 F. 495.

76. See 3 C. L. 474.

77. Act 1898, § 57d. Ayers v. Cone [C. C. A.] 138 F. 778.

78. Cannot become parties to the issue merely by formally adopting objections filed by the bankrupt. Ayers v. Cone [C. C. A.] 138 F. 778.

79. In re Royce Dry Goods Co., 133 F. 100; In re Cannon, 133 F. 837.

80. In re Cannon, 133 F. 837.

81. In re Royce Dry Goods Co., 133 F. 100.

82. Ayers v. Cone [C. C. A.] 138 F. 778.

than he.[83] Upon the hearing of a contested claim, the referee should of his own motion consider the credibility of the witnesses and of their testimony; and he is not obliged to allow the claim, even if the testimony in its support is uncontradicted.[84] The validity of the petitioner's claim being put in issue and determined in the proceedings for adjudication, the matter is res judicata so long as the adjudication stands unrevoked.[85] The time within which a review of an order allowing a claim must be asked is not specified either by the bankruptcy act or by the general orders, and hence reasonable promptness must be used.[86] That a claim was indorsed "Disallowed as a preferred claim," without evidence taken or order made, does not bar a subsequent suit to establish or enforce the lien.[87] Defendant not denying his indebtedness, a new trial will not be granted, though the claims are not established with the same technical exactness as is required where the indebtedness is directly in issue.[88]

(§ 14) *D. Surrender of preferences and the effect thereof.*[89]—In order to prove his claim a preferred creditor must surrender his preference,[90] but such surrender need not be voluntary.[91]

(§ 14) *E. Secured creditors.*[92]—Under the bankruptcy law a creditor to be "secured" must either hold security against the property of the bankrupt or be secured by the individual obligation of another who holds such security.[93] The creditor holding such security cannot fix the value thereof by purchasing it at a sale held by himself after the filing of the petition and without notice to third persons;[94] but the court has power to direct that such security be sold at either a private or public sale after such notice as will guaranty to some extent that a fair valuation will be arrived at.[95] It appearing that insurance policies on the life of a member of a bankrupt firm were pledged by the firm, it will not be assumed that the firm had no interest in the policies.[96] Under the present bankruptcy law a creditor, unless guilty of fraud,[97] or unless he has secured a preference, may change his proof in form from an unsecured to a secured debt.[98] Such amendment may be permitted after the expiration of the year in which claims may be proved, and the prior receipt of dividends does not preclude the court from permitting such amendment.[99]

(§ 14) *F. Set-offs.*[1]—Mutual[2] debts and credits may be set off against each

83. In re E. J. Arnold & Co., 133 F. 789

84. In re Cannon, 133 F. 837.

85. Ayers v. Cone [C. C. A.] 138 F. 778. Cannot be contested, when filed for allowance before the referee, by creditors who failed to become parties to the proceedings for adjudication. Id.

86. In re Milgraum & Ost, 133 F. 802. Six months held an unreasonable delay. Id.

87. Skilton v. Coddington, 93 N. Y. S. 460.

88. So held where defendant merely raised technical objections to the manner of proof. In re McGowan, 134 F. 498.

89. See 3 C. L. 475.

90. In re Andrews, 135 F. 599; In re John Morrow & Co., 134 F. 686; In re Privett, 132 F. 592. If he retains the preference he is not entitled to a dividend. Id.

91. Claim may be proved where creditor accepted and defended preference in good faith. Keppel v. Tiffin Sav. Bank, 25 S. Ct. 443.

92. See 3 C. L. 476, n. 72, 73.

93. Gorman v. Wright [C. C. A.] 136 F. 164, rvg. 132 F. 274. A creditor who has been allowed to prove his claim as an unsecured creditor against a surety or indorser need not realize and credit the proceeds of collateral security held by him against the principal debitor before being allowed to participate in the distribution of the estate of the surety or indorser. Id.

94, 95, 96. In re Mertens, 134 F. 101.

97. Court's finding that creditor was not estopped from claiming security held equivalent to a finding that he was not guilty of fraud. Lewis v. First Nat. Bank [Or.] 78 P. 990.

98. Lewis v. First Nat. Bank [Or.] 78 P. 990. Pledgee of paper as security for claim, held not estopped from claiming pledged property as security when sued therefor, even though he proved his claim as unsecured, nothing having been realized, from the pledge at the time of filing the claim. Id.

99. Lewis v. First Nat. Bank [Or.] 78 P. 990, and cases cited.

1. See 3 C. L. 476-477.

2. A claim due from the bankrupt estate to a partner cannot be set-off against

other,[3] the debt against the bankrupt being provable,[4] even though the claim of the creditor was acquired after the bankrupt's insolvency, it being acquired before the creditor became liable to the bankrupt.[5] Credits which constitute voidable preferences cannot be set off against debts accruing prior to the time the preference was taken.[6] Provable, though unmatured claims, may properly be set off against a claim held by the trustee,[7] and this right extends to an assignee of the claim who also assumes the assignor's indebtedness to the insolvent.[8] A depositor in a bankrupt bank may set off the amount of his deposit against a note on which he is indebted to the bank.[9]

(§ 14) *G. Priorities.*[10]—In order to take advantage of priorities allowed by state laws, such laws must be complied with.[11] Wages due workmen, clerks or servants, which have been earned within three months before the date of the commencement of bankruptcy proceedings, not to exceed three hundred dollars to each claimant, are by the terms of the act given priority.[12] One advancing money or property for the purpose of paying laborers before the claims of the latter are proved is not entitled to be subrogated to their right of priority.[13] Expenditures for the sole benefit of general creditors in carrying out contracts of the bankrupt which were thought to be profitable are not "costs of administration" so as to be payable as preferred claims.[14] In such case lien creditors not consenting to the expenditures nor to the continuance of the business, their claims are payable from the fund derived from the contracts prior to the claim of the trustee for additional expenditures.[15] As to whether a creditor is entitled to a preference because his claim is based upon the bankrupt's misappropriation of a trust fund depends upon an equitable rule of preference as to which the Federal decisions and not those of the state where the contract was made govern,[16] and neither such creditor[17] nor the holder of a lien on specific property[18] is entitled to recover of the trustee unless he proves that such property came into the hands of the trustee. In determining whether a state imposition is a tax, the bankrupcy court is not bound by the state decisions.[19] A secured creditor is entitled to sums collected by the trustee in

the firm's debt to the bankrupt. In re Shults, 132 F. 573.

3. Under the law of **Missouri** the trustee may set off against a creditor's claim the deficiency arising from his payment of his stock subscription in the bankrupt corporation with overvalued property. In re Royce Dry Goods Co., 133 F. 100.

4. In re Phillip Semmer Glass Co. [C. C. A.] 135 F. 77.

5. Frank v. Mercantile Nat. Bank [N. Y.] 74 N. E. 841.

6. Western Fire & Timber Co. v. Brown, 25 S. Ct. 339. Where claim was acquired for the purpose of being used as a set-off. In re Shults, 132 F. 573. Referee's finding that certificate of deposit was taken by transferee with the knowledge of bankrupt's insolvency, held sustained by the evidence. Id.

7. Frank v. Mercantile Nat. Bank [N. Y.] 74 N. E. 841, afg. 100 App. Div. 449, 91 N. Y. S. 488. A debtor is entitled to set off his claim against the bankrupt, whether matured or unmatured at the date of adjudication. Id.

8. Frank v. Mercantile Nat. Bank, 100 App. Div. 449, 91 N. Y. S. 488; afd. 71 N. E. 841.

9. In re Shults, 132 F. 573.

10. See 3 C. L. 477.

11. Claim to priority disallowed where claimant did not file statement required by Code Iowa, 1897, § 4020. In re Burton Bros. Mfg. Co., 134 F. 157.

12. Act 1898, § 64b. (4). In re Burton Bros. Mfg. Co., 134 F. 157. Laborer's held entitled to liens for wages earned within three months prior to the bankruptcy. J. P. Browder & Co. v. Hill [C. C. A.] 136 F. 821.

13. One loaning employer money to pay such claims is not entitled to be so subrogated. In re General Automobile & Mfg. Co. [C. C. A.] 133 F. 525. Where laborers were paid in orders for goods on a certain store, held store was not entitled to be subrogated to the laborers' liens. J. P. Browder Co. v. Hill [C. C. A.] 136 F. 821.

14, 15. In re Bourlier Cornice & Roofing Co., 133 F. 958.

16. Does not depend upon the contract between the parties. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802.

17. John Deere Plow Co. v. McDavid [C. C. A.] 137 F. 802.

18. Mortgaged property being disposed of prior to the institution of bankruptcy proceedings, and neither the receiver nor trustee receiving any part of the proceeds, the mortgagee has no claim on the fund in the hands of the trustee. In re J. H. Alison Lumber Co., 137 F. 643.

19. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858.

preserving the assets of the estate and which reduce the value of the security.[20] The president of a corporation obtaining goods on false statements as to assets must account for the excess in such statements or be deferred until the other creditors are paid.[21] The present bankruptcy law expressly provides that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that only the surplus of each estate shall be added to the other.[22]

(§ 14) *H. Expenses of the proceedings.*[23]—A receiver is entitled to reasonable fees for his services,[24] but he is not entitled to an allowance for his particular services in conducting the bankrupt's business in addition to the compensation he receives for his services in general.[25] The word "disbursements," as used in section 48, as amended, should be construed, with reference to receivers, to include the value of property taken possession of by the receiver and delivered to others in specie.[26] Attorneys will be allowed reasonable compensation for services rendered which were beneficial to the estate,[27] the allowance of such fee lying in the discretion of the judge.[28] Though the trustee is a lawyer, he is under no obligation to perform legal services for the estate,[29] but if he does so he is not entitled to additional compensation therefor.[30] The statutory fees being sufficient to compensate a referee for his services, he is not entitled to extra compnsation for extra services rendered as special master in connection with a composition.[31] Clerks are only entitled to the actual expenses incurred in sending notices of the bankrupt's petition for a discharge to creditors,[32] and these expenses must be itemized by the clerk and charged as an expense.[33] All commissions are payable from the estate,[34] and hence the court cannot order them paid out of the proceeds of property subject to a valid lien.[35] Secured creditors making use of the bankruptcy court and officers to realize on their security may be required to contribute their proportion to the costs of the proceedings and for the preservation of the property during their

20. A brewery company prior to its bankruptcy, advancing money to pay the annual liquor licenses for several saloons, taking an assignment of the license certificates and later pledging them as security for a loan, the pledgee is entitled to collections made by the trustee on account of such advances, since they reduced the value of the certificates, and to allow the saloons to continue in existence was of advantage to the bankrupt estate. In re Elm Brewing Co., 132 F. 299.

21. In re Royce Dry Goods Co., 133 F. 100.

22. Act 1898, § 5f. In re Mueller [C. C. A.] 135 F. 711. Where partnership and members are insolvent, and there are no partnership assets, firm creditors are not entitled to share in the individual assets of one of the partners until all his individual debts are paid. In re Janes [C. C. A.] 133 F. 912.

23. See 3 C. L. 479.

24. Where receivers were men of ability and their services were of great benefit to the estate, a fee of 1¾ per cent. of the amount in their hands, as compensation for their services, was allowed. In re Sully, 133 F. 997.

25, 26. In re Cambridge Lumber Co., 136 F. 983.

27. In re Covington, 132 F. 884. An allowance of $50 to bankrupt's attorney and $200 to the attorney for creditors from an estate having $2,000 for distribution, approved. Id. Where attorney successfully defended will by which a legacy of $25,000 went to estate, and in so doing was engaged for a period of fifty days, $800 held not an excessive fee. In re McKenna, 137 F. 611. Voluntary bankruptcy proceedings being manifestly intended to be adverse to foreclosure proceedings instituted by a mortgagee, the bankrupt's attorney is not entitled to a first lien on the mortgaged property for his fees, on the ground that his services were beneficial in preserving the estate. Liddon Bro. v. Smith [C. C. A.] 135 F. 43.

28. Rule for allowance of attorney's fees laid down by the district court for E. D. N. Carolina. See 1 C. L. 331, n. 72, affirmed. In re Talton, 137 F. 178.

29. In re McKenna, 137 F. 611.

30. In re McKenna, 137 F. 611; In re George Halbert Co. [C. C. A.] 134 F. 236.

31. In re Talton, 137 F. 178.

32. In re Dunn Hardware & Furniture Co., 134 F. 997.

33. Not as a fee. In re Dunn Hardware & Furniture Co., 134 F. 997.

34, 35. In re Anders Push Button Telephone Co., 136 F. 995.

pendency, where there is sufficient unincumbered estate.[36] The petition to review an allowance of commissions to a trustee will not be set aside, though not filed within the time required by a rule of court, the trustee's account having been unanimously approved by the creditors at a meeting in which the petitioner was present by counsel.[37]

(§ 14) *I. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.*[38]—A state receiver appointed prior to the bankruptcy proceedings is not entitled to priority on account of his services rendered prior to the bankruptcy proceedings, or of expenses or advances made to the estate which did not contribute to the funds in the hands of the trustee.[39] Secured creditors, though they use the bankruptcy court to realize on their security, cannot be required to pay any part of the expenses of a prior receivership in a state court.[40]

§ 15. *Distribution of assets; dividends.*[41]—The assets must be distributed according to the provisions of the bankruptcy act,[42] and controversies collateral thereto will not be decided.[43] Exceptions to a proposed scheme of distribution must be filed before the final decree of confirmation is entered, and unless specially allowed cannot be considered thereafter.[44] A dividend being paid upon the full amount of a secured claim, it will be presumed that the security was found to be valueless,[45] and the creditor's right to such security is not thereby impaired.[46]

§ 16. *Exemptions.*[47]—The bankrupt's right to an exemption is governed by the state laws.[48] In most states the homestead exemption is limited to a certain sum and if the property claimed exceeds this sum, the bankrupt may have his exemption set aside from the proceeds of a sale of the property,[49] or he may retain the property upon payment of the excess.[50] An exemption being nonassignable, an attempted assignment operates as an abandonment.[51] A waiver in favor of one creditor does not inure to the benefit of all.[52] The bankruptcy proceedings will be stayed so as to enable a creditor to test his right to the bankrupt's exemption in the state courts.[53] Act 1898, § 70*a*, refering to insurance policies, in no way qualifies § 6 of the same act.[54] The trustee in bankruptcy acquires no title to exempt property duly claimed.[55] While in order to be entitled to his exemptions the bank-

36. In re J. H. Alison Lumber Co., 137 F. 643.

37. In re Scherr, 138 F. 695.

38. See 3 C. L. 480.

39, 40. In re J. H. Alison Lumber Co., 137 F. 643.

41. See 3 C. L. 481.

42. In re Porterfield, 138 F. 192.

43. Controversies between creditors not growing out of transactions connected with the bankruptcy proceedings cannot be litigated in such proceedings or adjusted in the distribution of dividends. In re Girard Glazed Kid Co., 136 F. 511.

44. In re Heebner, 132 F. 1003.

45, 46. Bassett v. Thackara [N. J. Law] 60 A. 39.

47. See 3 C. L. 481. See, also, Exemptions, 3 C. L. 1408.

48. Lipman v. Stein [C. C. A.] 134 F. 235; Burke v. Guarantee Title & Trust Co. [C. C. A.] 134 F. 562. Is entitled to the same exemption as if proceeded against as a debtor under the state law and to no other. In re Wunder, 133 F. 621.

See Exemptions, 3 C. L. 1408; Homesteads, 3 C. L. 1630.

49. In Colorado the bankrupt's homestead exemption antedating the bankruptcy proceedings carries with it the right of homestead occupancy, which, like the exemption itself, can be terminated only by a sale of the land for more than the prescribed amount and costs, when the exemption will be transferred to the proceeds of the sale. In re Nye [C. C. A.] 133 F. 33.

50. In re Manning, 123 F. 180.

51. In re Sloan, 135 F. 873.

52. The waiver of a homestead exemption in a mortgage, being in favor of the mortgage creditor alone, does not inure to the benefit of others. In re Nye [C. C. A.] 133 F. 33. If in other respects the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption, and the rights of other creditors are subordinated to both the mortgage lien and the payment of the bankrupt's exemption allowance. Id.

53. Where creditors held waiver of homestead exemption. In re W. C. Allen & Co., 134 F. 620. In Georgia the holder of a note containing a waiver of homestead has no remedy at law pending the bankruptcy proceedings, but must enforce his rights, arising from the waiver, in a court of equity. Hudson v. Lamar, Taylor & Riley Drug Co., 121 Ga. 835, 49 S. E. 735, following Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150.

54. Holden v. Stratton, 25 S. Ct. 656.

rupt must comply with the state laws, still such exemptions can be made available only in the manner prescribed by the bankruptcy act;[56] hence his claim of exemptions must be filed within the specified time,[57] and being so filed his right is not defeated by a prior sale.[58] The bankruptcy court has jurisdiction to determine what property is exempt,[59] but its jurisdiction ends there and the court has no authority to administer such property.[60] While a notice in general language, either in a voluntary or involuntary petition, of an intention to claim one's exemptions, may be amended if done in time,[61] yet, where the notice in either case is so general as not to indicate to the trustee what specific articles the bankrupt claims as his exemptions, and the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after the sale, he will be regarded as having waived his right of exemption;[62] but a notice that the bankrupt claims his exemptions out of certain property is sufficient,[63] it being the trustee's duty to set them apart and report the items and estimated value thereof to the court.[64] Where all the assets of the bankrupt's estate are claimed as exempt, the claim may be determined by the referee prior to the appointment of a trustee,[65] Both the bankrupt and his assignee of exemptions claiming an interest in a fund derived from the sale of certain assets, they are entitled to contest the allowance of a claim against it.[66] The question whether a bankrupt is entitled to a discharge cannot be tried on the hearing of his claim to exemptions.[67]

§ 17. *Death of bankrupt pending proceedings.*[68]—Proceedings in bankruptcy do not abate by the death of the alleged bankrupt after the petition is filed and before adjudication.[69] Where the bankrupt dies during the pendency of the bankruptcy proceedings, the widow's right to dower is governed entirely by the local law,[70] and in those states where dower is limited to property whereof the husband died seized and possessed, the widow of a bankrupt who dies after the adjudication, election of trustee, and the taking possession by the latter, is not entitled to dower in the property passing to the trustee.[71]

§ 18. *Referees, proceedings before them, and review thereof.*[72]—Referees are judicial officers clothed with judicial powers.[73] Their general authority extends to the consideration of an intervening petitioner's claim to specific property or proceeds in the hands of the trustee, alleged to be the property of the petitioner and

55. Smith v. Zachry, 121 Ga. 467, 49 S. E. 286, following McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Wright v. Horne [Ga.] 51 S. E. 30. Trustee is not entitled to bankrupt's exempt property as against a creditor who has attached the same by an attachment issued and served within four months prior to the bankruptcy, on a judgment waiving exemption. Sharp v. Woolslare, 25 Pa. Super. Ct. 251.

56. Lipman v. Stein [C. C. A.] 134 F. 235; Burke v. Guarantee Title & Trust Co. [C. C. A.] 134 F. 562; In re Wunder, 133 F. 821.

57. Act 1898, § 7, cl. 8. In re Wunder, 133 F. 821. Failing to claim them within the specified time, the right is waived, a sale having taken place as provided by a state law. Id.

Right held not saved by the bankrupt appearing and objecting to the order of sale on the ground that his exemption had not been allowed. Id.

58. Lipman v. Stein [C. C. A.] 134 F. 235. Having given notice of his claim, he cannot be deprived of his right by a sale before the filing of his schedule. In re Sloan, 135 F. 873.

59. A finding of the referee that "it appears that the schedule of the bankrupt discloses no assets except such as are claimed exempt and found by the court to be exempt" warrants a finding in a suit to quiet title that land held by the bankrupt is exempt. McKinley v. Morgan, 36 Wash. 561, 79 P. 45.

60. Smith v. Zachry, 121 Ga. 467, 49 S. E. 286, following McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Groves v. Osburn [Or.] 79 P. 500.

61, 62. In re Von Kerm, 135 F. 447.

63, 64. Burke v. Guarantee Title & Trust Co. [C. C. A.] 134 F. 562.

65. In re W. C. Allen & Co., 134 F. 620.

66. In re Sloan, 135 F. 873.

67. Question was whether certain conveyance was fraudulent. In re W. C. Allen & Co., 134 F. 620.

68. See 3 C. L. 483.

69. In re Spalding, 134 F. 507.

70. In re McKenzie, 132 F. 986.

71. So held as to personalty under Sand. & H. Dig. Arkansas, § 2541. In re McKenzie, 132 F. 986.

72. See 3 C. L. 484.

73. In re Romine, 138 F. 837.

not of the estate in bankruptcy.[74] That the referee is entitled to commissions on sums paid to creditors as dividends does not disqualify him as an interested party.[75] A witness cannot be compelled to leave the state where he resides in order to attend a hearing before a referee.[76] The subpoena not being sealed, the defect is waived by the witness appearing for examination without objection.[77] An order for the examination of a witness is not void because executed by the clerk and not by order of the court.[78] The case being referred generally to the referee, he has all the powers of the court relative to the examination of witnesses,[79] and his order in this regard is treated as that of the court.[80] He may order the examination of a witness on an oral application,[81] and may permit him to be represented by counsel.[82] General order No. 23, relating to the orders of a referee, has no application to a mere ruling by the referee that a witness be sworn.[83] Neither the provision of the bankruptcy act that testimony given by the bankrupt shall not be offered against him in any criminal proceeding,[84] nor the filing of a voluntary petition,[85] deprives a bankrupt of the right to claim his constitutional privilege of refusing to answer a question, where the answer might tend to incriminate him. The bankrupt claiming his constitutional privilege as a reason for not producing his books of account, he must bring such books before the court or referee for the determination of the question whether his plea is well founded in fact, and that the books may be used for such necessary and proper purpose as are not inconsistent with the protection of his rights.[86] That the bankrupt in refusing to testify acts under the advice of counsel palliates the offense but does not excuse it,[87] nor does a subsequent offer to testify purge the contempt, but acts rather as an admission that the defendant could have answered the questions without danger to himself.[88] A rule requiring a bankrupt to show cause why he should not be punished for contempt for refusing to answer sundry questions put to him by the referee is sufficient though it does not set out such questions, if it refers to the transcript where they fully appear.[89] In a case where a referee believes a witness to be in contempt for any reason it is his duty to set forth the contempt upon his record, certifying the facts to the district judge, who will then deal with the question as if the contempt had orginally arisen in his court.[90] The general rules as to discovery apply.[91] The referee, in taking testimony, is required to have it taken down, preferably in narrative form, and an objection being raised, to require the question, the objection and reason thereof to be clearly but briefly noted; then enter his ruling thereon, and then, though he rule the question to be improper, allow it to be answered.[92] Under general order No. 27 the referee is required to certify any order[93] made by him,

74. In re Drayton, 135 F. 883.

75. Act 1898, § 39b, construed. In re Abbey Press [C. C. A.] 134 F. 51.

76. Bankr. Act 1898, § 41a, construed. In re Cole, 133 F. 414.

77. In re Abbey Press [C. C. A.] 134 F. 51. Lack of seal held immaterial where witness was actually before the referee when ordered sworn. Id.

78, 79, 80, 81, 82, 83. In re Abbey Press [C. C. A.] 134 F. 51.

84, 85. United States v. Goldstein, 132 F. 789.

86. In re Hark, 136 F. 986; In re Hess, 134 F. 109. Order requiring bankrupt to produce books affirmed. In re Edward Hess & Co., 136 F. 988.

87. United States v. Goldstein, 132 F. 789.

88, 89. United States v. Goldstein, 132 F. 787 (Dicta).

90. In re Romine, 138 F. 837.

91. See Discovery and Inspection, 3 C. L. 1106.

92. In re Romine, 138 F. 837.

93. Where objections to evidence offered before a referee are sustained, the referee, at the request of the party offering the same, is not required to certify the objection made to the court for revision. In re Romine, 138 F. 837. Where a referee in bankruptcy, in taking the deposition of a witness, ruled that certain questions which the witness refused to answer and certain documentary evidence which he refused to produce were improper, immaterial and impertinent, he was not required to certify the objections made to the court for revision. Id.

upon the application of any party or witness,[94] but a referee has no jurisdiction of his own motion to certify a question not raised by the parties to a bankruptcy proceedings, which the referee foresees may arise and on which he desires to be advised.[95] Failure of the referee to summarize the evidence does not necessarily invalidate the appeal.[96] A referee's findings of fact will not be reversed upon appeal unless they are flagrantly against the weight of the evidence.[97] The court of bankruptcy giving the bankrupt a stated time to comply with an order of the referee, it is impliedly an affirmance of such order,[98] and the fact that the court in so affirming the order struck therefrom a provision for the commitment of the bankrupt in case of his default is not an adjudication that he should be so punished, but leaves that matter to be brought up anew by motion in case the bankrupt fails to obey the order within the time allowed.[99]

§ 19. *Modification and vacation of orders of bankruptcy court.*[1]

§ 20. *Appeal and review in bankruptcy cases.*[2]—A judgment or decree in a controversy at law or in equity arising in bankruptcy proceedings is reviewable by the Circuit Court of Appeals under its organic act and § 24*a*, of the act of 1898, by appeal or on writ of error as may be appropriate,[3] while a judgment or order in a proceeding in bankruptcy, if one of those specifically enumerated in § 25*a*, act of 1898, is reviewable only by appeal [4] sued out within ten days,[5] and, if not within such excepted cases, unless rendered on a jury trial,[6] can only be reviewed on an original petition as provided in § 24*b*, act of 1898.[7] "Proceedings in bankruptcy,"

94. A witness is entitled to have the proceedings, so far as they concern him, reviewed. In re Abbey Press [C. C. A.] 134 F. 51.

95. In re Reukauff, Sons & Co., 135 F. 251. Act 1898, § 39a, cl. 5, and General Order 27, contemplate that there shall be a contested matter, a finding or an order, and a party aggrieved. Id.

96. Where the referee has returned all the evidence taken and the matter has been determined by the judge without any motion having been made to require the evidence to be summarized a proceeding for review will not be invalidated, substantial matters being involved, for the failure of the referee to summarize the evidence. Crim v. Woodford, 136 F. 34.

97. In re Royce Dry Goods Co., 133 F. 100; In re Cole, 135 F. 439; In re Shults, 135 F. 623; In re Romine, 138 F. 837.

98. Is not again subject to review in subsequent proceedings. In re Hershkowitz, 136 F. 950.

99. In re Hershkowitz, 136 F. 950.

1, 2. See 3 C. L. 485.

3. In re Friend [C. C. A.] 134 F. 778. Has jurisdiction if it would have had jurisdiction if the controversy had arisen in the Federal courts in other cases outside of proceedings in bankruptcy. Dodge v. Norlin [C. C. A.] 133 F. 363. This appellate jurisdiction is not excluded or revoked by §§ 24b. and 25a. Id. A litigant has the option, in a proper case, to review a decision by appeal or by a petition for revision as a matter of law. Id. A judgment in an action at law brought by the trustee to recover property is reviewable on a writ of error. Delta Nat. Bank v. Easterbrook [C. C. A.] 133 F. 521. A petition to review does not lie to the circuit court of appeals from an interlocutory decree in a suit in equity brought in the district court by the trustee against an adverse claimant. Dorosbow v. Ott [C. C. A.] 134 F. 740.

4. In re Friend [C. C. A.] 134 F. 778; In re Mueller [C. C. A.] 135 F. 711. A judgment allowing a claim for over $500 is reviewable only by appeal. Act 1898, § 25a, cl. 3. Id. A judgment confirming a composition is a judgment granting a discharge and is reviewable only by appeal. In re Friend [C. C. A.] 134 F. 778. A judgment of a district court holding that certain property is not exempt and ordering that it be sold to satisfy a debt which it was mortgaged to secure, held appealable to the circuit court of appeals. Burrow v. Grand Lodge of Sons of Hermann of Texas [C. C. A.] 133 F. 708. No appeal lies from a decree of a court of bankruptcy in a proceeding begun by a receiver's petition for directions respecting a sale, by which the question of his possession of the property was decided, a sale decreed and the rights of adverse claimants determined. First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693.

5. In re Mueller [C. C. A.] 135 F. 711. A creditor claiming a lien under a trust deed, which the referee and district court held to be an invalid preference, prosecuting a petition for review does not occupy the position of a purchaser for value or an adverse claimant, within Act 1898, § 24, authorizing appeals within six months, but rather within § 25a, prescribing a ten-day limitation therefor. Kenova Loan & Trust Co. v. Graham [C. C. A.] 135 F. 717.

6. A judgment being upon the verdict of a jury, it cannot be revised under an appeal as in an equity case, but only by writ of error. In re Mueller [C. C. A.] 135 F. 711; Bower v. Holzworth [C. C. A.] 138 F. 28.

7. In re Friend [C. C. A.] 134 F. 778. A decree of a court of bankruptcy in a proceeding begun by a receiver's petition for

broadly speaking, include all questions between the bankrupt and his creditors as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally.[8] "Controversies at law and in equity arising in the course of bankruptcy proceedings," broadly speaking, involve questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, concerning property in the posssession of the trustee or the claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments but only the question of the extent of the estate.[9] The decisions under the prior bankruptcy law with respect to a proceeding in bankruptcy and an independent suit are applicable.[10] An appeal lies to the circuit court of appeals from a judgment allowing or rejecting a claim or debt of $500 or over.[11] This restriction has reference to the amount of the allowance or rejection and therefore to the amount which will be put in controversy by the appeal.[12] The revisory power granted by § 24*b* of the bankruptcy act does not include any orders or decrees which are appealable, the provisions for appeal for petition of review being mutually exclusive.[13] An order directing the removal and consolidation of the proceedings with a cause pending in another jurisdiction is reviewable only by appeal from the order.[14] An erroneous decision against an asserted right of exemption, and a consequently erroneous holding that the property forms assets of the estate in bankruptcy, while subject to correction in the mode appropriate for the correction of errors,[15] does not create a question of jurisdiction proper to be passed upon by the United States Supreme Court by a direct appeal under the provisions of the act of March 3, 1891.[16] The assertion of a right of set-off presents a claim of Federal right which will sustain an appeal from a decision of a Circuit Court of Appeals, rejecting the claim, to the Supreme Court of the United States.[17] The decision of a state court as to whether a conveyance by a bankrupt was made with intent to defraud creditors does not present a Federal question which can be considered by the Federal Supreme Court on writ of error to a state court.[18] Mandamus does not lie to review discretionary matters.[19]

directions respecting a sale, by which the question of his possession of the property was decided, a sale decreed and the rights of adverse claimant's determined, is reviewable under § 24b. First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693.

8. In re Friend, 134 F. 778.

9. In re Friend, 134 F. 778. The distinction above set out is quoted approvingly in In re Mueller [C. C. A.] 135 F. 711, where the following definition is given: "By controversies arising in bankruptcy proceedings is meant those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some rights or interest adverse to the bankrupt or his general creditors."

Illustrations: An order disallowing a mortgage lien on property of the bankrupt is appealable under § 24a. In re First Nat. Bank [C. C. A.] 135 F. 62. Proceedings on a petition filed in a bankruptcy court by a mortgagee of a bankrupt asserting a right to the proceeds of the mortgaged property which has been sold by the trustee, constitutes a controversy arising in bankruptcy proceedings. Liddon & Bro. v. Smith [C. C. A.] 135 F. 43. A judgment by a court of bankruptcy that chattel mortgage is voidable at the election of the trustee and creates no preference is a final decision of a controversy in bankruptcy proceedings. Dodge v. Norlin [C. C. A.] 133 F. 363. A receiver delivering goods to a claimant and the latter being thereafter ordered, in summary proceedings, to pay the value of the goods to the trustee, he may appeal from such order to the circuit court of appeals. Hinds v. Moore [C. C. A.] 134 F. 221.

10. First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 593.

11. Claim for taxes. Act 1898, § 25a (3) In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858.

12. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344.

13. In re Mueller [C. C. A.] 135 F. 711.

14. Kyle Lumber Co. v. Bush [C. C. A.] 133 F. 688. Is not reviewable on a petition to review and revoke. Id.

15. Lucius v. Cawthon-Coleman Co., 25 S. Ct. 214.

16. Lucius v. Cawthon-Coleman Co., 25 S. Ct. 214. [Act March 3, 1891 is 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.—Ed.].

17. Western Tie & Timber Co. v. Brown, 25 S. Ct. 339.

18. Thompson v. Fairbanks, 25 S. Ct. 306.

19. Validity of order appointing a re-

Where the bankruptcy court makes but a single order or judgment, claimants having separate interests may prosecute a joint appeal.[20] It is essential that the record should contain findings of fact or show that stated propositions of law were determinative of the case,[21] but the opinion of the court, while not taking the place of such findings, may, when made a matter of record, be looked to for the purpose of ascertaining what propositions of law governed the court in the decision of the case, or for the general purpose of determining whether the case went off on facts or law.[22] A bill of exceptions has no function and accomplishes no purpose in proceedings in bankruptcy.[23] In the absence of a rule of court on the subject, a petition of review need only be filed within a reasonable time.[24] Upon a petition of review, questions of law only can be considered and passed upon,[25] and hence the record should present simply, clearly, and unequivocally the issues of law to the like effect as bills of exceptions, proceedings without a jury, and proceedings in the Supreme Court on admiralty appeals,[26] and the Circuit Court of Appeals will ordinarily consider only such matters of law as are shown by the record, by findings of fact or their equivalent, to have been distinctly presented to the court below.[27] In the absence of prejudice or a violation of the rules of court, the fact that the petition to revise was not allowed by any judge of the appellate or trial court,[28] that no bond has been given,[29] that the transcript of the record filed is not certified by the clerk of the lower court,[30] and does not contain the pleadings upon which the issues were tried, nor show who are the proper parties to the appellate proceeding,[31] nor contain the evidence upon which the findings of the referee were based,[32] does not constitute ground for dismissal, nor is the fact that the petition was filed more than three months after the entry of judgment below,[33] or that no supersedeas has been granted,[34] ground for such action. A petition to revise in a matter of law the proceedings of the district court does not bring prior proceedings before the referee up for review.[35] An appeal makes the entire record available to the appellant and imposes the duty upon him and upon the clerk of the lower court to place the material parts of it in the transcript.[36] The Federal statutes as to what the transcript shall contain on appeal "in causes in equity" apply to bankruptcy proceedings.[37] The parties being unable to agree as to the contents of the record, the appellant should file a præcipe with the clerk, pointing out specifically what records, in his judgment, are necessary to be certified on appeal; if the appellee considers these insufficient he can suggest a diminution of the record and ask for a writ of certiorari.[38] The bankruptcy court has no jurisdiction to designate what records

ceiver cannot be so reviewed. Edinburg Coal Co. v. Humphrey [C. C. A.] 134 F. 839.

20. Crim v. Woodford [C. C. A.] 136 F. 34.

21. The record containing no findings of fact, and the opinion of the district court, although stating propositions of law, shows that they were not determinative of the matter at issue, which was decided as a question of fact on the evidence, there is nothing upon which the reviewing court can act. In re Pettingill & Co. [C. C. A.] 137 F. 840.

22. In re Pettingill & Co. [C. C. A.] 137 F. 840.

23. Dodge v. Norlin [C. C. A.] 133 F. 363.

24. Crim v. Woodford [C. C. A.] 136 F. 34. There is no provision in the bankruptcy act or general orders fixing the time within which such petition should be filed. Id.

25. Kenova Loan & T. Co. v. Graham [C. C. A.] 135 F. 717. As to whether or not a trust deed constituted a valid preference is not reviewable. Id.

26. A petition to revise. In re O'Connell [C. C. A.] 137 F. 838. Petition for review must set out matters of law upon which review is asked. In re Taft [C. C. A.] 133 F. 511. See topic, Equity.

27. In re O'Connell [C. C. A.] 137 F. 838.

28, 29, 30, 31, 32, 33, 34. Meyer Bros. Drug Co. v. Pipkin Drug Co. [C. C. A.] 136 F. 396.

35. In re Pettingill & Co. [C. C. A.] 137 F. 840.

36. Dodge v. Norlin [C. C. A.] 133 F. 363.

37. Act 1898, § 25a. Federal Statutes are Rev. St. §§ 698, 750. In re A. L. Robertshaw Mfg. Co., 135 F. 220.

38, 39. In re A. L. Robertshaw Mfg. Co., 135 F. 220.

shall be certified.[39] On an appeal by the trustee from a judgment allowing claims for expenses and costs of administration, no valid judgment can be rendered unless the claimants be given an opportunity to be heard.[40] On appeal from the disallowance of a claim the appellant is entitled to present any question concerning the security or rank of the debt, as an incident thereof.[41] A finding of trial court on conflicting evidence will not be disturbed unless clearly erroneous.[42]

§ 21. *Trustee's bonds; actions thereon.*[43]

§ 22. *Discharge of bankrupt; its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*[44]—Both the trustee, so long as the estate is unsettled,[45] and one who has a suit pending against a bankrupt for the discovery of a debt, which suit is contested, are parties in interest, though the latter's claim has not been proved in bankruptcy.[46] The bankrupt's petition for a discharge must be filed[47] within one year after the adjudication, unless it be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, in which case it may be filed within, but not after, the expiration of the next six months,[48] and failing to apply for his discharge within such time, the matter becomes res judicata, and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings.[49] The referee is not obliged to notify either the bankrupt or his attorney of the date the petition for discharge must be filed.[50] The bankrupt being insane, the petition for his discharge should be made by his guardian.[51] An objecting creditor has no right to enter an appearance after the return day, and should not be allowed to do so, except for good cause shown in excuse of the delay.[52] A bankrupt's petition for a discharge filed in due time cannot be dismissed because of delay in bringing the matter to a hearing after specifications of objection have been filed;[53] the remedy of the creditor is to move the court to set down the matter for hearing.[54] The bankrupt must attend the hearing of objections to his application for a discharge,[55] and though entitled to file papers in resistance of the specifications of objections, he is not bound to do so.[56] The application for a discharge being referred to a special master, to hear the facts and report his conclusions, and the specifications of objection are not sufficiently specific, the master should report back to the court that none of the objections filed require the taking of testimony.[57] The question of fraud in conveyances made prior to July 1, 1898, cannot be determined in a hearing on application for the bankrupt's discharge.[58]

40. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344.

41. In re Cosmopolitan Power Co. [C. C. A.] 137 F. 858.

42. Dodge v. Norlin [C. C. A.] 133 F. 363; Barton Bros. v. Texas Produce Co. [C. C. A.] 136 F. 355; In re Sullivan, 14 Okl. 400, 78 P. 85. Findings of referee approved by district court. In re Lawrence [C. C. A.] 134 F. 843.

43. See 3 C. L. 487.

44. See 3 C. L. 488.

45. In re Levey, 133 F. 572.

46. In re Conroy, 134 F. 764.

47. Petition for discharge filed a few days after the expiration of the year from the adjudication, but not presented to the judge until over two years after the date of filing, is not filed in time. In re Knauer, 133 F. 805.

48. Act 1898, § 4a. Where a bankrupt resided in a city where access to his attorneys was easy, the fact that he deferred making application until the latter part of the year when sickness in his family prevented him from filing his discharge in time, is no ground for an extension of time. In re Lewin, 135 F. 252. Affidavit by attorney that owing to extensive amount of practice due to his partners being out of town, he overlooked the filing of the petition for the discharge, held insufficient to excuse the failure. In re Anderson, 134 F. 319.

49. In re Weintraub, 133 F. 1000.

50. In re Knauer, 133 F. 805.

51. In re Miller, 133 F. 1017.

52. In re Grant, 35 F. 889.

53. In re Wolff, 132 F. 396.

54. In re Wolff, 132 F. 396, quoting from In re Sutherland, Deady, 573, Fed. Cas. No. 13,640.

55. Act 1898, § 7 construed. In re Shanker, 138 F. 862.

56, 57. In re Hendrick, 138 F. 473.

58. Shreck v. Hanlon [Neb.] 104 N. W. 193.

The specifications of objection [59] should show how the objecting party is interested.[60] The specifications being indefinite, the bankrupt is entitled to have them made so explicit and definite that he may have notice of the exact charge made and which he is to meet.[61] When based upon the ground of having committed an offense punishable by imprisonment, they should state the offense so committed with substantially the same particularity and exactness as would be required in an indictment for such an offense.[62] They must allege that the act was knowingly and fraudulently done.[63] In a specification of objection, alleging that the bankrupt has obtained property on credit for any purpose upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, not only must the false representations be set out, but the name or names of the person, or persons so alleged to have been defrauded must be given.[64] Specifications of objection on the ground that the bankrupt concealed property must allege such fact.[65] If defective in form they may be cured by amendments not changing the substantial nature of the objections.[66] There must be no variance between the specification and the proof.[67] An objection not set forth in the specifications filed cannot be considered.[68]

Evidence and burden of proof.[69]—The objecting creditor [70] must prove the commission of the offense alleged by a fair preponderance of evidence.[71]

(§ 22) *B. Grounds for refusal.*[72]—The grounds set forth in the bankruptcy act are exclusive,[73] hence insanity of the bankrupt, preventing his examination by creditors, is not a bar.[74] The bankrupt's transactions showing that his financial difficulties were the result of suspicious and fradulent dealings disentitle him to a discharge.[75] A bankrupt cannot procure a discharge either in voluntary or involuntary proceedings where, within six years, he has been granted a discharge in voluntary proceedings.[76] Such provision is not retroactive, but applies to cases begun after the amendment took effect.[77] The amendment applies to voluntary as well as involuntary proceedings, and hence a bankrupt having been discharged in voluntary proceedings within six years cannot receive a second discharge in involuntary proceedings.[78] That a proceeding under the act of 1867 is pending at the time the bankrupt applies for a discharge in new proceedings instituted under the act of

59. See 3 C. L. 494-496.

60. In re Levey, 133 F. 572. This is especially true where the objecting party is the trustee. Id.

61. In re Levey, 133 F. 572.

62, 63. In re Taplin, 135 F. 861; In re Levey, 133 F. 572.

64. In re Levey, 133 F. 572.

65. Specification of objection alleging that at the time of filing his petition in bankruptcy, the bankrupt was the owner of a stock of goods, no part of which was ever delivered to the trustee, and that the bankrupt now has possession of the same, is insufficient, it not alleging that he concealed the goods. In re Taplin, 135 F. 861.

66. In re Hendrick, 138 F. 473.

67. A specification of objection that certain books were so kept as to conceal the bankrupt's true financial condition will not warrant a refusal of a discharge on the ground that the bankrupt did not keep any books of account. In re Halsell, 132 F. 562.

68. In re Taplin, 135 F. 861.

69. See 3 C. L. 496, n. 17.

70. In re Levey, 133 F. 572; In re Hamilton, 133 F. 823; In re Isaac Prager & Son, 134 F. 1006. Fraudulent concealment of property or assets. In re Keefer, 135 F. 885.

71. In re Levey, 133 F. 572; In re Hamilton, 133 F. 823.

72. See 3 C. L. 489.

73. In re Wolff, 132 F. 396.

74. In re Miller, 133 F. 1017.

75. In re Miller, 135 F. 591. Equitable maxim, "He who comes into equity must come with clean hands." Id.

76. In re Seaholm [C. C. A.] 136 F. 144.

77. In re Neely, 134 F. 667; In re Seaholm [C. C. A.] 136 F. 144.

78. In re Neely, 134 F. 667.

NOTE. Interpretation of Statute: As the other clauses in § 14 apply to present proceedings, both voluntary and involuntary, the fact that the fifth clause begins with the words "In voluntary proceedings" would naturally indicate an intention that those words also should be construed to apply to present rather than to former proceedings. The court's decision seems douptful on principle. The recent tendency in America has been to give debtors a discharge whenever their creditors force them into bankruptcy. 18 U. S. Stat. at L.

1898, is no bar to a discharge from a debt proved in the former proceedings but kept alive by judgment.[79]

Commission of an offense.[80]—A bankrupt who has made a false oath or account in, or relation to, any proceeding in bankruptcy will be denied a discharge.[81]

Destruction of or failure to keep books of account.[82]—Prior to the amendment of 1903, failure to keep books must have been with fraudulent intent to conceal the bankrupt's true financial condition and in contemplation of bankruptcy.[83] Proof of such fraudulent intent must be clear,[84] though an intent to conceal one's financial condition may be presumed where an experienced business man fails to keep any books whatever.[85]

Obtaining property upon false statements.[86]—Since the amendment of 1903, the fact that the bankrupt obtained property on credit by means of false statements is ground for denying him a discharge,[87] and he may properly be called upon to explain the discrepancy between the extent of his property as given in these statements and as realized by his trustee, and his right to a discharge may be made to depend upon whether or not he has satisfactorily done so;[88] but such statements being made by him shortly before bankruptcy, they may be considered on the question as to whether he made a false oath to his schedules or fraudulently concealed property from his trustee.[89]

Concealment or transfer of property.[90]—One transferring his property within four months of the filing of the petition with intent to hinder, delay or defraud any of his creditors is not entitled to a discharge.[91] In order to bar the discharge

p. 3, 390, p. 180. If the creditor gets the benefit of an equal distribution of the assets, it seems just that the debtor should be freed from the handicap of debt, particularly when he took no part in instituting the present proceeding. The construction contended for would apparently fulfill the object of the amendment in preventing frequent voluntary proceedings quite as well as that adopted by the court. It would therefore seem that an interpretation contrary to the tendency of American legislation and to obvious justice to the debtor should not have been adopted unless warranted by less ambiguous language than that used.—XVIII Harv. L. R. 225.

79. In re Herrman [C. C. A.] 134 F. 566.

80. See 3 C. L. 489.

81. Where a bankrupt firm did not anticipate any reversion in certain lumber transferred to a creditor, and one of the partners testified that he was morally certain that there would be none, such partner's oath to the schedules omitting such reversionary interest, held insufficient to bar his discharge. In re Hamilton, 133 F. 823. False testimony given by a bankrupt on his examination in respect to his ownership of, or interest in, property conveyed to his wife some years before the bankruptcy proceedings constitutes the making of a false oath in relation to a proceeding in bankruptcy. In re Conroy, 134 F. 764. Bankrupt claiming to manage property for wife held to have an interest in the business and to be guilty of a false schedule stating that he had no such property. In re Herrman [C. C. A.] 136 F. 767. Evidence held to sustain finding that defendant was guilty of making a false oath in that he failed to schedule certain money claimed by him to have been stolen. Barton Bros. v. Texas Produce Co. [C. C. A.] 136 F. 355.

82. See 3 C. L. 489.

83. In re Mackenzie, 132 F. 114. Where pay was advanced employes and the money thus used was obtained by cashing customers' checks, failure to record such payments, as well as some made to the members of the firm for personal use, on the books, does not warrant denial of the discharge. Id. Misleading entries made by a bookkeeper held not to bar the discharge of a member of the firm who had no intent to falsify the books. In re Hamilton, 133 F. 823. Where bankrupt ceased to do business more than two years before the enactment of the bankruptcy act, failure to keep books will not bar discharge. In re Isaac Prager & Son, 134 F. 1006. Failure of school teacher, who was also agent for a small estate, to keep books of account, held not to bar discharge. In re Keefer, 135 F. 885.

84. In re Mackenzie, 132 F. 114.

85. In re Alvord, 135 F. 236.

86. See 3 C. L. 490.

87, 88, 89. In re Boyden, 132 F. 991.

90. See 3 C. L. 490.

91. In re Miller, 135 F. 591. A bankrupt knowingly and designedly omitting assets from his schedule, although the amount is small, he will be held to have done so with intent to defraud creditors, notwithstanding he acted under legal advice, unless it appears that he stated the facts fully to his counsel, and that the latter advised him to omit the asset, and that the advice was given and received in good faith. In re Breitling [C. C. A.] 133 F. 146. Unsupported testimony of bankrupt that attorney told him property was exempt, held

the property must have been such as would have passed to the trustee,[92] and it must have been concealed at the time the petition was filed.[93]

(§ 22) *C. Liabilities released, and use of discharge.*[94]—Only such claims as are provable [95] and have been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt,[96] are released unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.[97] The fact that the creditor's address is incorrectly given is not ground for excepting the debt from the discharge, even though as a result thereof the creditor has no knowledge of the proceeding, it not being shown that the mistake was due to any fault of the bankrupt.[98] The words "notice" and "actual knowledge" as used in the act of 1898, § 17, subd. 3, are convertible terms.[99] The actual knowledge of the proceedings here contemplated is a knowledge in time so that the creditor may have an equal opportunity with other creditors.[1] A judgment for costs in a criminal prosecution is satisfied by the discharge of the judgment debtor in bankruptcy.[2] An assignment of future earnings cannot be enforced against the debtor after his discharge, as to wages thereafter earned by him.[3] A judgment of a state court is rendered in "an action for fraud" so as to be exempt under act 1898, § 17, subd. 2, from a discharge in bankruptcy, where such judgment was based on actual, as distinguished from constructive, fraud of the bankrupt.[4] The discharge does not affect liens valid as against the trustee.[5] Prior to the amendment of 1903, only

insufficient to show that he acted in good faith. Id. Failure to schedule a piece of property of small and uncertain value, and under the advice of an attorney omitting from his schedules a debt which was a family matter and never intended to be enforced, held insufficient to justify a finding of fraudulent concealment. In re Neely, 134 F. 667. Where the bankrupt, acting under the advice of counsel, that his remainder interest was contingent, did not list same, held not to be bar discharge. Woods v. Little [C. C. A.] 134 F. 229.

92. Failure of a public officer to schedule salary earned but not payable does not constitute a concealment of property. In re Doherty, 135 F. 432.

93. Concealment of property two years before enactment of bankruptcy act held not to bar discharge. In re Isaac Prager & Son, 134 F. 1006.

94. See 3 C. L. 491.

95. A. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385; Lemert v. Lemert [Ohio] 74 N. E. 194; Groves v. Osburn [Or.] 79 P. 500; Young v. Stevenson [Ark.] 84 S. W. 623; Grosso v. Marx, 45 Misc. 500, 92 N. Y. S. 773. A nonprovable claim is not affected by the discharge. Arrington v. Arrington, 132 F. 200.

96. Longfield v. Minnesota Sav. Bank [Minn.] 103 N. W. 706; Feldmark v. Weinstein, 90 N. Y. S. 478. An unscheduled judgment cannot be discharged under Code Civ. Proc. § 1268. Id. Where neither judgment creditors' names, nor their judgments, nor the claim on which it was based was properly scheduled and they had no knowledge or notice of the proceedings, held claim not released by the discharge. Berheim v. Bloch, 91 N. Y. S. 40. Motion by discharged bankrupt to cancel judgment denied upon affidavit of creditor that his claim had not been included in the schedule. Woodward v. Schaefer, 91 N. Y. S. 104.

97. Longfield v. Minnesota Sav. Bank [Minn.] 103 N. W. 706; Delta County Bank v. McGranahan [Wash.] 79 P. 796; Westheimer v. Howard, 93 N. Y. S. 518. Questions, in a suit to enforce a claim, held competent as tending to show that the creditor neither received notices nor had actual knowledge of the bankruptcy proceedings. Id. That schedule did not state names and residences of creditor with exactness held immaterial, each creditor receiving notice or appearing in the proceeding. Grosso v. Marx, 45 Misc. 500, 92 N. Y. S. 773.

98. Schiller v. Weinstein, 94 N. Y. S. 763. A debt is not excepted because the schedule did not give the creditor's correct address, whereby he had no knowledge of the proceedings, it not appearing that the bankrupt knew the correct address, or that the failure to give it was intentional or fraudulent. Steele v. Thalheimer [Ark.] 86 S. W. 305.

99. Fields v. Rust [Tex. Civ. App.] 82 S. W. 331.

1. Birkett v. Columbia Bank, 25 S. Ct. 38. Knowledge of the proceedings acquired after the bankrupt's discharge, but at a time when the creditor could have had the discharge revoked is not such "actual knowledge." Id.

2. Olds v. Forrester [Iowa] 102 N. W. 419. It is not a debt "due as taxes" within the meaning of Act 1898, § 17; nor is it a debt based upon fraud. Id. Such release is not contrary to public policy, as an interference with the course of justice in the criminal prosecution. Id.

3. Leitch v. Northern Pac. R. Co. [Minn.] 103 N. W. 704.

4. Bullis v. O'Beirne, 25 S. Ct. 118. [This subdivision has been completely changed by the amendment of 1903. Ed.]

5. Held not to affect execution lien. Bassett v. Thackara [N. J. Law] 60 A. 39.

such debts as were created by the fraud of the bankrupt while he was acting in a fiduciary capacity were excepted from the operation of a discharge;[6] but since the amendment the bankrupt's[7] liability for obtaining property by false pretenses or false representations,[8] or for willful and malicious injuries to the person or property of another,[9] is not released. The liability of a co-debtor with, or guarantor or surety for, the bankrupt, is not altered by the latter's discharge.[10] This section refers to co-debtors, guarantors or sureties for the bankrupt on the same or original debt, the debt on which the release is given by the discharge.[11] The terms "officer" and "fiduciary capacity," as used in § 17, subd. 4, extends to all cases mentioned and are not confined to "defalcation."[12] The words "fiduciary capacity" are to be interpreted in a restricted sense, and include only technical trusts and not such as arise by implication of law.[13] A full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that one partner only.[14] That a firm creditor proved his claim against two of the partners in bankruptcy does not affect the liability of the other members.[15] The debt, being released, is absolutely canceled,[16] and no further proceedings to enforce it are permissible.[17] If the debt was evidenced by a judgment, the bankrupt is entitled to

Equitable lien of a judgment held not released. Wahlheimer v. Truslow, 94 N. Y. S. 137. Does not affect the lien of a judgment obtained, within four months prior to the adjudication, upon a note waiving the homestead exemption allowed by the laws of the state upon lands set aside by the bankruptcy court as exempt. Smith v. Zachry, 121 Ga. 467, 49 S. E. 286, following McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433. A discharge in bankruptcy does not preclude a creditor who levied an attachment upon property of the bankrupt more than four months before the bankruptcy proceedings, and who has taken a forthcoming bond for the property, from entering such a qualified judgment against the bankrupt as will enable such creditor to change the sureties on the forthcoming bond. C. D. Smith & Co. v. Lacey [Miss.] 38 So. 311.

6. Crawford v. Burke, 25 S. Ct. 9. [Quaere, does the amendment of § 17a, change the rule? Ed.].

7. An administrator misappropriating funds belonging to the estate before the filing of a voluntary petition in bankruptcy by a surety on his bond; a discharge in bankruptcy is a bar to an action against the surety on his bond. Harmon v. McDonald [Mass.] 73 N. E. 883.

8. The liability of a bankrupt for the value of property transferred to him in fraud of the transferror's creditors to the knowledge of the bankrupt held not released by the discharge. Mackel v. Rochester, 135 F. 904. In the absence of evidence to the contrary, a judgment for damages in an action of trover does not import an acquisition of property by false pretenses or false representations. Ex parte Peterson [Vt.] 59 A. 828.

9. In an action for an assault a judgment rendered by default on a recognizance constitutes a liability for a willful and malicious injury to the person and is not released by the discharge. In re Colaluca, 133 F. 255.

10. The liability of sureties on an appeal bond, becoming fixed prior to the principal's adjudication in bankruptcy, subsists even though the judgment becomes inoperative against the principal. St. Louis World Pub. Co. v. Riolto Grain & Securities Co., 108 Mo. App. 479, 83 S. W. 781.

11. A. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385. Does not apply to the liability of a bankrupt's surety on a bond given to discharge a garnishment in a suit against the bankrupt on a provable debt, pending at the time the bankruptcy proceedings were instituted. Id.

12. Crawford v. Burke, 25 S. Ct. 9; In re Harper, 133 F. 970. **Contra.** Ehrhart v. Rork, 114 Ill. App. 509.

13. Ehrhart v. Rork, 114 Ill. App. 509; Reeves v. McCracken [N. J. Eq.] 60 A. 332. A device to hinder creditors cannot be deemed a technical trust. Id. A debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed, no trust being expressly declared, is not excepted from the operation of a discharge. Id. Words "fiduciary capacity" do not embrace officers of private corporations. In re Harper, 133 F. 970. Word "officer" includes officers of private corporations. Id.

14. In re Kaufman, 136 F. 262; Loomis v. Wallblom [Minn.] 102 N. W. 1114. Such discharge held a good defense to an action brought against the two partners to renew a judgment on a partnership debt, when the discharged bankrupt alone was served, and the firm had years before made an assignment, to the knowledge of such creditor, and where it does not affirmatively appear that any firm assets now exist, it appearing that the claim was properly scheduled and due notice given. Id. **Contra.** Dodge v. Kaufman, 91 N. Y. S. 727.

15. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505.

16. Grosso v. Marx, 45 Misc. 500, 92 N. Y. S. 773. They do not render title to land unmarketable because not canceled as provided by Code Civ. Proc. § 1268. Id.

17. A. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385. Where a debt sued on in garnishment proceedings is re-

have the judgment canceled,[18] and the bankrupt has the absolute legal right, after obtaining his discharge, if he proceeds with reasonable diligence to have execution upon the same perpetually stayed.[19] This right to have the judgment canceled is not personal with the bankrupt but extends to the owner of the bond upon which the judgment is an apparent lien.[20] Neither a state court, municipal body, nor municipal ordinance, can inflict any penalty or punishment, directly or indirectly, upon the bankrupt for failing to pay the debts in full, from which the national bankruptcy law says he will be discharged,[21] and a court of bankruptcy has jurisdiction to enjoin a prosecution to inflict any such penalty or punishment.[22]

In order to revive a debt discharged by the discharge, the promise must be clear, distinct, and unequivocal.[23] A promise to pay "as soon as possible" is not a conditional promise and as such insufficient to support an action on the original demand.[24] While an oral promise, if definite and unambiguous, is sufficient to revive a debt under the bankruptcy law,[25] still a written promise being required by the law of the state where the action is brought to enforce the claim, such local law governs.[26] The discharge does not of itself affect the question of title to the bankrupt's property.[27]

Whether or not a particular debt has been released by the discharge is left to be determined by the court in which the action is brought to enforce the debt.[28] A plea of discharge failing to allege that the demand was scheduled or that plaintiff had knowledge of such proceedings is insufficient.[29] The discharge being pleaded as a defense, there is a conflict as to who has the burden of proving whether it is or is not applicable.[30] The bankrupt using his discharge as the basis of a

leased by the discharge of the debtor in bankruptcy and plaintiff cannot obtain a judgment thereon against the debtor. Id. Such judgment will not be rendered for the purpose of charging the sureties on his bond. Id. After a debtor has been discharged in bankruptcy, a provable debt cannot be enforced in equity by rendered for the purpose of charging the sureties on his bond. Id. After a debtor has been discharged in bankruptcy, a provable debt cannot be enforced in equity by a proceeding in rem against the homestead set apart in the proceedings to the bankrupt, though the debt was contracted prior to the adoption of the state homestead act. Groves v. Osburn [Or.] 79 P. 500. [If application had been made prior to the discharge, the Federal court would have withheld it until the purpose could have been accomplished].

18. Gardiner v. Ross [S. D.] 104 N. W. 220; Cavanaugh v. Fenley [Minn.] 103 N. W. 711.

19. Cavanaugh v. Fenley [Minn.] 103 N. W. 711.

20. Code Civ. Proc. § 1268 construed. Graber v. Gault, 93 N. Y. S. 76.

21. In re Hicks, 133 F. 739. Held, that a fireman going through bankruptcy could not be discharged under a municipal ordinance providing for dismissal on failure to pay debts. Id.

22. In re Hicks, 133 F. 739. Proceedings to obtain the discharge of a fireman going through bankruptcy because of failure to pay debts, enjoined until the expiration of 12 months from the date of adjudication, or until the question of the bankrupt's discharge, sooner applied for, should be determined. Id. In such case the bankrupt was held not to have an adequate remedy at law, the ordinance providing that the decision of the commissioner should be final. Id.

23. Letter written by debtor after discharge that addressee would have lien money even if it was but a little at a time held to constitute sufficient evidence of a new promise to support an action on the claim. Sundling v. Willey [S. D.] 103 N. W. 38. Under Personal Property Law, § 21, subd. 5 (Laws 1897, p. 510, c. 417), there must be a clear expression of intention on the part of the debtor to bind himself to the payment of the debt, and letters merely showing a recognition of a moral duty are insufficient. Mandell v. Levy, 93 N. Y. S. 445.

24. Sundling v. Willey [S. D.] 103 N. W. 38.

25, 26. Mandell v. Levy, 93 N. Y. S. 545.

27. Rand v. Sage [Minn.] 102 N. W. 864. Where no trustee was appointed by the creditors and the bankrupt was discharged, but it did not appear whether the court had subsequently exercised jurisdiction over the estate, nor whether the estate had been duly closed or abandoned by the creditors, such facts did not, as matter of law, operate to revest title in plaintiff. Id.

28. Young v. Stevenson [Ark.] 84 S. W. 623.

29. Biela v. Urbanczyk [Tex. Civ. App.] 85 S. W. 451.

30. Burden is on creditor to show that the debt is unaffected by the discharge. Ex parte Peterson [Vt.] 59 A. 828. In an action on a provable claim, the burden is on plaintiff to show that his debt was not

suit or motion, he must prove that the discharge affects the defendant's claim.[31] Where, pending a suit, defendant is discharged in bankruptcy, he may plead his discharge after answer filed, which plea is in the nature of a plea pius darrien continuance.[32] The bankrupt setting up his discharge as a defense to an action brought against him, his only remedy from an adverse judgment is by appeal.[33] The discharge cannot be collaterally attacked for any cause which would have prevented the granting of the discharge, or would have been sufficient ground for its annullment.[34] The holder of an unscheduled claim by showing that he had neither notice nor actual knowledge of the bankruptcy proceedings does not collaterally attack the judgment.[35]

§ 23. *Amendment, reopening, grounds and effect.*[36]—Either the discharge or the petition for it may be amended after the term at which the discharge was granted, when necessary to correctly set out the character of the debts scheduled and provable and upon which the discharge operated.[37] Under § 15 a discharge may be revoked upon the due application of "parties in interest," and in order to entitle creditors to come within the meaning of the phrase "parties in interest" the petition must show that they had provable debts which were affected by the discharge.[38] One having notice of the bankruptcy proceedings and failing to present his claim cannot have the discharge set aside to prove such claim.[39] A petition to reopen will be denied where there are no substantial assets remaining unadministered.[40] A petition for the vacation of a bankrupt's discharge not alleging the time when the alleged transaction took place it will be presumed to have occurred before the petition in bankruptcy was filed.[41] A petition alleging fraud, it must allege facts tending to prove the fraud.[42] A petition for the vacation of a bankrupt's discharge being defective, it may be amended.[43]

scheduled and that he had no notice of the bankruptcy proceedings. Lafoon v. Kerner [N. C.] 50 S. E. 654.

Burden is upon the bankrupt to prove that debt was scheduled in the true name of the creditor, or if not known, that he exercised reasonable diligence to ascertain such name. Fields v. Rust [Tex. Civ. App.] 82 S. W. 831. Evidence held to show that with reasonable diligence the true name and residence of the creditor could have been ascertained. Id.

31. Upon a motion to have a judgment canceled the burden is on the moving party to show that the debt had been scheduled or that the creditor had notice. Graber v. Gault, 93 N. Y. S. 76. The burden is on one who relies upon the discharge to overthrow a title to show that the claim upon which the title is based is not within one of the classes excepted from the operation of the discharge. Imhoff v. Whittle [Tex. Civ. App.] 82 S. W. 1056. Where a discharged bankrupt seeks to enjoin the collection of an unlisted claim he must allege and prove that the creditor had notice or knowledge of such proceedings in time for proof and allowance of same before he can succeed in the action. Armstrong v. Sweeney [Neb.] 103 N. W. 436. Evidence held insufficient to show that creditor had notice. Id.

32. Reeves v. McCracken [N. J. Eq.] 60 A. 332.

33. Howe v. Noyes, 93 N. Y. S. 476. Cannot have judgment canceled under Code Civ. Proc. § 1268. Id.

34. Young v. Stevenson [Ark.] 84 S. W. 623. In a collateral attack on the discharge it will be presumed in the absence of proof to the contrary that the court heard evidence establishing the residence of the petitioner as required by statute. Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028. The order of discharge is conclusive on collateral attack as to all provable debts of the bankrupt not specially excepted. Delta County Bank v. McGranahan [Wash.] 79 P. 796. See 3 C. L. 488, n. 88-92.

35. Fields v. Rust [Tex. Civ. App.] 82 S. W. 331. See 3 C. L. 488, n. 92.

36. See 3 C. L. 496.

37. In re Kaufman, 136 F. 262.

38. In re Chandler [C. C. A.] 138 F. 637.

Note: This was a petition to revoke a discharge, and the court in its opinion refers to section 141 as the one applying to the case, but as that section refers to the granting of the discharge, it would seem that section 15 as to the revocation of discharges, is the correct section. Ed.

39. Arrington v. Arrington, 132 F. 200.

40. In re O'Connell [C. C. A.] 137 F. 838.

41. In re Oliver, 133 F. 832.

42. A petition alleging that a claim was not paid as alleged by the bankrupt to the fraud of the petitioner, a partner of the bankrupt and not included in the schedules as a creditor, but that the money was delivered to an agent of the creditor who immediately returned it to the bankrupt who converted the same to his own use, held insufficient, as the money might have been used by the bankrupt to pay his just debts. In re Oliver, 133 F. 832.

43. A petition for the vacation of a bankrupt's discharge, being defective for failure

§ 24. *Crimes and offenses against the bankruptcy law.*—The concealment of property by a voluntary bankrupt after his adjudication, although before the appointment of a trustee, is a concealment from the trustee, which, if knowingly and fraudulently done, constitutes a criminal offense under the bankruptcy act.[44] The present or past bankruptcy of the person accused is an indispensable element of the offense of having knowingly and fradulently concealed property while a bankrupt.[45]

BASTARDS.

§ 1. *Legal elements and evidences of illegitimacy.*[1]—Children born out of wedlock are illegitimate.[2] A child of a married woman, begotten by one who is not the husband of the mother, is a bastard.[3] A child born after marriage and during wedlock, and within the usual period of gestation after the husband has had opportunity to have begotten it, is conclusively presumed to be legitimate.[4] Where the evidence shows beyond dispute that a child was conceived and born during marriage, and was not disavowed by the husband during his lifetime in the mode prescribed by law, the status of legitimacy is fixed and can be questioned by no one in any form of proceeding.[5]

§ 2. *Rights and duties of and in respect to bastards.*[6]—The right of a bastard to inherit real property is governed by the law of the situs.[7] In the absence of a

to show that petitioner acquired knowledge of the alleged facts since the granting of the discharge, may be amended, an affidavit alleging such fact being attached to the petition. In re Oliver, 133 F. 832.

44. Bankr. Act 1898, § 29b, cls. 1 and 2. United States v. Goldstein, 132 F. 789.

45. Field v. United States [C. C. A.] 137 F. 6. The officer of a bankrupt corporation who is not and has not been a bankrupt is not liable to punishment under § 29 of the act of 1898. Id.

1. See 3 C. L. 496.

2. Evidence held to show that parents were not married within Comp. St. Neb. 1903, c. 52, § 1, and that their children were therefore illegitimate. Brisbin v. Huntington [Iowa] 103 N. W. 144.

3. McLoud v. State [Ga.] 50 S. E. 145.

4. Buckner's Adm'rs v. Buckner [Ky.] 87 S. W. 776. See, also, 3 C. L. 497, notes 35, 36, 37, and authorities there cited.

5. Ezidore v. Cureau's Heirs, 113 La. 839, 37 So. 773.

6. See 3 C. L. 497.

7. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

NOTE. Conflict of laws as to legitimacy: It is the general rule that legitimacy, so far as it depends on the validity of the marriage, is to be referred to the law of the place where the marriage was celebrated. See In re Hall, 61 App. Div. 266, 70 N. Y. S. 400; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

When a child is born out of lawful wedlock and its legitimacy depends upon a law which presupposes the invalidity or nonexistence of a marriage before his birth, there is a conflict of authority whether the question of legitimacy for the purpose of determining the distribution of personal property or the descent of realty shall or shall not be referred to the lex domicilii decedentis or the lex rei sitae, as such, to the exclusion of all other laws. Thus it has been held that a child born out of wedlock cannot inherit real property unless legitimate according to the lex rei sitae, whatever his status elsewhere. Singer v. Singer, 45 Ala. 410; Williams v. Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238, 26 L. R. A. 764; Barnum v. Barnum, 42 Mo. 251; Smith v. Derr, 34 Pa. 126, 75 Am. Dec. 641. So it has been held, conversely, that if he is legitimate by the lex rei sitae, he may inherit, though illegitimate elsewhere. Sneed v. Ewing, 5 J. J. Marsh. [Ky.] 460, 22 Am. Dec. 41.

In the distribution of personalty, the legitimacy of a claimant is to be determined by the law of the domicile of the deceased. Thus, a child born out of wedlock cannot share in the personalty unless legitimate under the law of the domicile of the deceased. Singer v. Singer, 45 Ala. 410; Sneed v. Ewing, 5 J. J. Marsh. [Ky.] 460, 22 Am. Dec. 41; Jackson v. Jackson, 82 Md. 17, 33 A. 317, 34 L. R. A. 773. And conversely, if legitimate by the law of the deceased's domicile, he may take, though illegitimate elsewhere. Leonard v. Broswell, 99 Ky. 528, 36 S. W. 684, 36 L. R. A. 707.

As opposed to the doctrine announced and

statute a child born out of wedlock cannot inherit from its father.[8] The conditions under which such a child, acknowledged by the father, may inherit from him, are fixed by statute.[9] Acknowledgment prior to the adoption of a statute giving an acknowledged child the right to inherit, under certain conditions, entitles the child so acknowledged to the benefit of the statute.[10] A mother cannot inherit from her bastard child,[11] and cannot recover, as sole beneficiary, for his unlawful death, under the provisions of Lord Campbell's act.[12] In New York a mother who has renounced her illegitimate child by surrendering it to a foundling hospital cannot regain custody of the child by legal process after it has been indentured by the hospital authorities, nor can the indenture be canceled at her instance.[13] Hence an application by her for an extract from the hospital record should be denied, since no useful purpose would be served by granting it.[14] A deed by a father to his bastard child is valid.[15]

§ 3. *Procedure to ascertain paternity and compel support.*[16] *Nature of proceeding.*—A bastardy proceeding is neither a civil nor criminal action, strictly speaking, but is a statutory proceeding designed, primarily, to secure to the injured female compensation for her wrong.[17] Hence the Minnesota statute authorizing county commissioners to compromise the claim of a county against the putative father does not authorize them to settle and release the mother's interest without her consent,[18] and a settlement of the public claim does not oust the district

adhered to in the foregoing cases, the better reasoning and weight of authority establish the proposition that the status of a person, as legitimate or illegitimate, fixed by the proper law (see next paragraph), is to be accepted in other jurisdictions for the purpose of descent of real property and the distribution of personal property. In re Goodman, L. R. 17 Ch. Div. 266, 50 L. J. Ch. (N. S.) 425, 44 L. T. (N. S.) 527. This doctrine has been applied in the United States by recognizing the legitimacy, for the purpose of inheriting real property, of persons born out of wedlock, who, according to the proper law, had been legitimated by the intermarriage of their parents, notwithstanding that such intermarriage would not have that effect according to the lex rei sitae. Dayton v. Adkisson, 45 N. J. Eq. 603, 17 A. 964, 14 Am. St. Rep. 763, 4 L. R. A. 488; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669; Bates v. Virolet, 33 App. Div. 436, 53 N. Y. S. 893; De Wolf v. Middleton, 18 R. I. 814, 26 A. 44, 31 A. 271, 31 L. R. A. 146. See thorough examination of subject in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. Conversely it has been held that subsequent intermarriage of the parents did not make a child legitimate in Mississippi so that it could inherit realty and share in personalty, though such marriage would have that effect by the law of Mississippi (lex rei sitae and lex domicilii decedentis), when it did not have that effect in South Carolina, where the parties were domiciled at the time of the birth of the child and at the time of such subsequent marriage. Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87. See, also, Caballero's Succession, 24 La. Ann. 573. Of course the statute of another state or country which does not purport to affect the status of the child as legitimate or illegitimate, but merely prescribes the rights of illegitimate children, will not prevail over the lex rei sitae or the lex domicilii decedentis. See Pettit's Succession, 49 La. Ann. 625, 21 So. 717, 62 Am. St. Rep. 659.

Conceding that the lex domicilii decedentis and lex rei sitae may be eliminated, as is held in the foregoing cases, the question arises what is the proper law by which to determine the status of a person born out of wedlock? This question cannot be here discussed. A thorough discussion and numerous authorities will be found in the note to Irving v. Ford, 183 Mass. 448, 97 Am. St. Rep. 447, 65 L. R. A. 177, 182, from which the above is taken.

8. Lee v. Bolden [Tex. Civ. App.] 85 S. W. 1027.

9. Laws 1853, p. 78, c. 53, was repealed by Bunn's Ann. St. 1901, § 2630a, which is now the law relative to inheritance by illegitimate children. Townsend v. Meneley [Ind. App.] 74 N. E. 274.

10. Burn's Ann. St. 1901, § 2630a, applies where acknowledgment was before its adoption. Townsend v. Meneley [Ind. App.] 74 N. E. 274.

11, 12. McDonald v. Southern R. Co. [S. C.] 51 S. E. 138.

13. Under Laws 1872, c. 635. In re Shapiro, 92 N. Y. S. 1027.

14. In re Shapiro, 92 N. Y. S. 1027.

15. Hall v. Hall, 26 Ky. L. R. 610, 82 S. W. 300.

16. See 3 C. L. 498.

17. Meyer v. Meyer [Wis.] 102 N. W. 520. Thus the statutory provisions in Minnesota are said to be intended not merely to indemnify the public against expenses incurred in such cases, but for the protection and benefit of the mother, and the court may make a reasonable allowance for the support of the child to be paid to the mother, or for her use. State v. Hausewedell [Minn.] 102 N. W. 204.

18. Gen. St. 1894, c. 17, § 2053. State v. Hausewedell [Minn.] 102 N. W. 204.

court of jurisdiction to award judgment against the father for the support and maintenance of the child.[19] It is held in Michigan that the proceeding, though strictly neither civil nor criminal, is so far of a criminal nature that the defendant is not privileged from arrest while in the state for the sole purpose of furnishing special bail in a suit begun by capias.[20] On the other hand it is not a criminal proceeding within the meaning of the statute prohibiting in effect the employment of private counsel by the complainant.[21] In New York the proceeding is said to be a quasi-criminal one, and where defendant is granted a new trial on appeal, he is entitled to the costs of the appeal as a matter of right as soon as the appeal is determined, whether or not the new trial has been had.[22] In Kansas a bastardy proceeding is held to be an action of such a character that costs may properly be taxed against an unsuccessful defendant.[23] A bastardy proceeding is held in Illinois to be a civil proceeding, though criminal in form, and a jury trial may be waived by defendant.[24]

Jurisdiction.—What courts have jurisdiction, original [25] and appellate [26] in bastardy proceedings, and the manner in which jurisdiction is acquired,[27] are determined by the constitutions and statutes of the various states.

Abatement.—Bastardy proceedings begun against the father are not abated by his fraudulent marriage with the mother, not consummated by cohabitation, but followed by immediate abandonment.[28]

Trial procedure; pleading; indictment.—An issue is properly made up when plaintiff files an affidavit and declaration alleging that defendant is father of the child, and defendant files an affidavit denying this allegation.[29] Formal reading of the complaint and entering of a plea of not guilty on the record may be waived by the defendant.[30] In a proceeding under the Kansas statute to charge the putative father with support of the child, a defense based on a claim that a valid settlement had been made with the complaining witness prior to the commencement of the proceeding cannot be considered where it has not been pleaded.[31] An in-

19. State v. Hausewedell [Minn.] 102 N. W. 204.

20. Cady v. St. Clair Circuit Judge [Mich.] 102 N. W. 1025.

21. Comp. Laws, §§ 2556, 2561, 2569, construed. Harley v. Ionia Circuit Judge [Mich.] 12 Det. Leg. N. 269, 104 N. W. 21.

22. Code Cr. Proc. § 873. People v. Abrahams, 94 N. Y. S. 296.

23. Poole v. French [Kan.] 80 P. 997.

24. Kanorowski v. People, 113 Ill. App. 468.

25. In Indiana, mayors, being given the jurisdiction of justices of the peace, may hear the complaint of a prosecutrix in bastardy. Evans v. State [Ind.] 74 N. E. 244. In Florida a county judge has jurisdiction to entertain the complaint and inaugurate the proceedings in a bastardy case, and refer the same for trial to the circuit court. Edwards v. Edwards [Fla.] 37 So. 569. Within the territorial limits of New York jurisdiction of the county court to reduce or increase the amount directed to be paid under an order of affiliation in bastardy proceedings is conferred on the court of special sessions. Laws 1901, c. 466, § 1409, subd. 3. People v. Crispi, 94 N. Y. S. 372. In Mississippi a justice of the peace has authority to issue the warrant and jurisdiction to try a bastardy case, though the affidavit was made before the justice of another district, and defendant was a householder and resident in neither of their districts. Johnson v. Walker [Miss.] 39 So. 49.

26. An order of the court of special sessions in New York is reviewable by the appellate division. Laws 1901, c. 466, § 1414. People v. Crispi, 94 N. Y. S. 372.

27. The jurisdiction of the district court over the person of the defendant and the subject-matter in bastardy proceedings is complete, under the North Dakota statute, when the transcript of the proceedings before the justice and the jurisdictional papers filed with him are lodged with the clerk of the district court. State v. Carroll [N. D.] 101 N. W. 317. Where defendant in such proceedings furnishes bail, approved by the magistrate, the transcript need not show any formal order or judgment holding the defendant for trial. Construing Rev. Codes 1899, § 7842. Id.

28. Trayer v. Setzer [Neb.] 101 N. W. 989.

29. Under Code 1892, § 252, especially where defendant proceeds to trial without objection. Johnson v. Walker [Miss.] 39 So. 49.

30. Case being tried on theory of plea of not guilty, omission of entry on record was at most a harmless irregularity. McNeal v. Hunter [Neb.] 101 N. W. 236.

31. No pleading having been filed by de-

dictment for bastardy which follows the language of the statute and states the offense so plainly that the jury can understand it and with such particularity as to enable the accused to make his defense is sufficient.[32]

Judgment and bond.[33]—Under the Wisconsin statute one convicted of bastardy may be charged with the support of the child not only from the time of his conviction, but from the time of the child's birth.[34] Allowing the defendant twenty days in which to furnish a bond conditioned for performance of the judgment is a proper exercise of the court's discretion.[35] In Illinois a consent decree providing for payments for costs and maintenance of the child may be proper, though the statutory provisions as to the time and amount of payments are not literally followed.[36] The application for an increase of the amount allowed, provided for in New York, must conform to the statute.[37]

Evidence; presumptions; sufficiency of proof.[38]—In some jurisdictions, the child is admissible in evidence in proof of paternity to show a resemblance between it and defendant.[39] In others, it is held that a child under two years of age should not be exhibited to the jury for that purpose.[40] Mere presence of the child in the court room, in sight of the jury, does not, however, call for a reversal of the judgment, where the child was not exhibited to the jury, and no comparison was made between it and the defendant.[41] Testimony of a witness that the bastard child resembles accused is inadmissible.[42] Usually the relatrix is a competent witness and, while her testimony is sufficient without corroboration,[43] her declarations, during travail, are competent in corroboration of her testimony.[44] Where relatrix is a married woman she may testify to the non-access of her husband.[45] Defendant may prove intercourse with others upon or near the date of conception,[46] and the relatrix may be compelled to testify as to such fact and may be impeached by contradictory statements made by her upon that subject.[47] Evidence of promises of the accused at the time of the alleged intercourse, and of his nonperformance of such promises, is irrelevant.[48] Proof of birth of a child on a certain day warrants the inference that the child was born alive.[49] Where a person arrested on a charge

fendant, refusal to admit evidence of such claim was proper. Gunkle v. State [Kan.] 79 P. 1087.

32. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

33. See 3 C. L. 499.

34. Rev. St. 1898, § 1535. Sonnenberg v. State [Wis.] 102 N. W. 233.

35. Under Rev. St. 1898, § 1535. Sonnenberg v. State [Wis.] 102 N. W. 233.

36. Kanorowski v. People, 113 Ill. App. 468.

37. Application to increase the amount must be made by or under the authority of the commissioner of public charities (Code Cr. Proc. §§ 840, 859), and a notice of a motion for such increase which fails to show that the application is so made is fatally defective. People v. Crispi, 94 N. Y. S. 372.

38. See 3 C. L. 498.

39. Child ten months old. Shaller v. Bullock [Conn.] 61 A. 65. For conflict see Johnson v. Walker [Miss.] 39 So. 49.

40. Esch v. Graue [Neb.] 101 N. W. 978.

41. Child five months old was taken to witness stand by prosecutrix but was not introduced in evidence. Esch v. Graue [Neb.] 101 N. W. 978. Where child was in court room only two minutes and then removed, the attention of the jury not having been called to it in any way, there was no reversible error. Johnson v. Walker [Miss.] 39 So. 49.

42. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

43. Burns' Ann. St. 1901, §§ 504, 992. Evans v. State [Ind.] 74 N. E. 244.

44. There is a conflict on the proposition, but weight of authority is as above. Johnson v. Walker [Miss.] 39 So. 49. Code 1892, § 257, making such declarations competent as original evidence after her death, does not make them incompetent as corroborative evidence before her death. Id.

45. Testimony that husband was absent several months before conception complained of held competent. Evans v. State [Ind.] 74 N. E. 244.

46. Walker v. State [Ind.] 74 N. E. 614.

47. Letter of relatrix to defendant admitting intercourse with another prior to date of conception, and opportunity for further intercourse on that date, admissible to contradict relatrix. Walker v. State [Ind.] 74 N. E. 614.

48. Promise to marry if woman became pregnant. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

49. Evidence sufficient where prosecutrix testified to birth of child, and that defendant was the father, and took the child with her on the stand, though it was not

of bastardy marries the mother, it will not be presumed that the marriage was entered into merely to avoid the consequences of a prosecution, but it will rather be assumed that if the alleged father doubted his paternity of the child he would have resisted the proceeding.[50] Evidence of a trial of the accused on an indictment for seduction of the mother and a verdict therein finding him guilty of fornication is inadmissible, the verdict fixing no particular time when the offense was committed.[51] Entries on the warrant, made by the magistrate presiding at the preliminary hearing, requiring accused to give a bastardy bond, and in default thereof, recognizing him to the superior court, are admissible as original evidence on the subsequent trial on an indictment founded on such proceedings.[52]

Paternity of the defendant must be proved beyond a reasonable doubt in some jurisdictions;[53] a preponderance of evidence is sufficient in others.[54] The state is not bound to prove intercourse on any particular day or days,[55] but the jury must be satisfied that the defendant had intercourse with the mother during a time in which, in the ordinary course of nature, the child could be begotten.[56] It is not necessary for the jury to find that the mother was constant in her declarations that the defendant was the father of her child or that she made such declaration during her travail.[57]

Contracts and bonds for support.[58]—Contracts and undertakings of the father made in contemplation of a marriage with the mother, and for the purpose of having bastardy proceedings dismissed, are valid and enforceable.[59] The moral obligation of a father to support his illegitimate children is a sufficient consideration for his bond to do so.[60] The beneficial right in a bond given in bastardy proceedings is the separate property of the mother in regard to which she is authorized by statute to sue, although married.[61] Furthermore, her husband would in such suit be adverse to her, so that her marriage would not render her incompetent to sue.[62] Where such bond runs to the county judge as trustee of an express trust, he is the proper person to sue thereon as plaintiff without joining the beneficiary.[63] Where the bond provides for the determination of the amount to be paid, and the manner of its payment by the county judge, in the event that the parties cannot agree such determination is a condition precedent to the maintenance of any action on the bond.[64]

§ 4. *Legitimation, recognition, adoption.*[65]—Statutes providing that illegiti-

introduced in evidence. Esch v. Graue [Neb.] 101 N. W. 978.

50. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

51. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

52. Instruction of court that such entries were in substantial compliance with the statute was proper. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

53. Instruction approved. Sonnenberg v. State [Wis.] 102 N. W. 233. Evidence held sufficient to warrant finding of jury that defendant was guilty. Johnson v. Walker [Miss.] 39 So. 49.

54. Evidence sufficient to prove paternity of defendant. State v. Knutson [S. D.] 101 N. W. 33; McNeal v. Hunter [Neb.] 101 N. W. 236.

55. Hence alibi held not proven, when confined to only two days, no evidence as to accused's whereabouts on intervening days being given. Beck v. People, 115 Ill. App. 19.

56. Sonnenberg v. State [Wis.] 102 N. W. 233.

57. Shaller v. Bullock [Conn.] 61 A. 5.

58. See 3 C. L. 497, n. 45.

59. Bastardy proceedings dismissed where father promised marriage and gave mortgage conditioned that he would not desert wife and child; mortgage held valid and enforceable when husband deserted wife and child. Jangraw v. Perkins [Vt.] 60 A. 385. Bond for support of woman and child in consideration of discontinuance of bastardy proceedings is not against public policy (citing many authorities) Meyer v. Meyer [Wis.] 102 N. W. 52.

60. Trayer v. Setzer [Neb.] 101 N. W. 989.

61. Rev. St. 1898, § 2345. Meyer v. Meyer [Wis.] 102 N. W. 52.

62. Rev. St. 1898, § 2608. Meyer v. Meyer [Wis.] 102 N. W. 52.

63. Rev. St. 1898, § 2607. Meyer v. Meyer [Wis.] 102 N. W. 52.

64. Meyer v. Meyer [Wis.] 102 N. W. 52.

65. See 3 C. L. 499.

mate children whose parents have intermarried shall be considered as legitimate do not merely fix the status of such a child but are rules of descent by which he inherits the same as though legitimate.[66] But statutes providing that a bastard child shall inherit from the father when recognized by him in writing as his child are merely statutes of descent and do not affect the status of a bastard.[67] Hence a child so recognized cannot take under a will giving property to his father and his "lawful issue," these words being construed to include only legitimate children.[68] Statutes providing for legitimation by recognition of the child by the father, and subsequent marriage of the parents, do not apply where the father was the husband of another woman when the child was begotten.[69] Under a statute which does not define what shall constitute an acknowledgment, the burden is upon the child seeking partition of her father's real estate, to prove an acknowledgment that was clear and unambiguous, and such as would exclude all but one interpretation.[70] General or notorious recognition of the child is a sufficient acknowledgment in Iowa.[71] Under the Nebraska statute marriage of the parents of an illegitimate child does not legitimize the child unless other children are born after the marriage, and unless the father adopts the bastard child into his family, or acknowledges him in writing signed in the presence of competent witnesses.[72] The Missouri statute providing that the issues of all marriages decreed null in law, or dissolved by divorce shall be legitimate, does not make legitimate children of a white man and negro woman who lived together without any marriage of any kind.[73] Whether a natural child has been adopted as legal heir may be a question of fact.[74] A deed describing the grantee as the grantor's adopted daughter cannot be regarded as an adoption under a special act of the legislature authorizing the adoption.[75]

BENEFICIARIES; BENEFICIAL ASSOCIATIONS; BETTERMENTS, see latest topical index.

BETTING AND GAMING.

§ 1. *The offense and criminal prosecutions.*[76] *A. The offense.*[77]—Gambling is a generic term and includes every act, game, or contrivance by which one intentionally exposes money or other value to a risk or hazard,[78] in which pure chance has any place.[79] In general it is not essential that both parties should stand to lose but it is sufficient if one party stands to lose or to win by chance,[80] though in

66. Construing Hurd's Rev. St. 1903, c. 39, § 3. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.
67. Construing Code, § 3385. Brisbin v. Huntington [Iowa] 103 N. W. 144.
68. Brisbin v. Huntington [Iowa] 103 N. W. 144.
69. Hall v. Hall, 26 Ky. L. R. 610, 82 S. W. 300.
70. Evidence held sufficient to show acknowledgment. Townsend v. Meneley [Ind. App.] 74 N. E. 274.
71. Evidence held insufficient to show general or notorious recognition of a child by the father. Brisbin v. Huntington [Iowa] 103 N. W. 144.
72. Comp. St. 1901, c. 23, § 31, must be fully complied with. Trayer v. Setzer [Neb.] 101 N. W. 989.
73. Marriages between whites and blacks have always been unlawful in Missouri. Rev. St. 1899, § 2918, does not apply to case above. Keen v. Keen [Mo.] 83 S. W. 526.
74. Evidence held to warrant finding that there had been no adoption of an illegitimate child as heir under the Spanish law in force in Texas before 1840. Conrad v. Herring [Tex. Civ. App.] 83 S. W. 427.
75. Conrad v. Herring [Tex. Civ. App.] 83 S. W. 427.
76, 77. See 3 C. L. 500.
78. Bowen v. Lynn [Neb.] 102 N. W. 460.
79. Lang v. Merwin, 99 Me. 486, 59 A. 1021.
80. Rev. St. 1903, c. 139. Lang v. Merwin, 99 Me. 486, 59 A. 1021.

New York a scheme wherein the player stands to win only is not gambling.[81] A bet is a mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill or both combined.[82] Playing poker with a three cent limit is none the less gaming because of the small amount of money involved,[83] and the throwing of dice for money is within the Texas statute on betting.[84] Playing pool under an agreement whereby the losing player pays for the use of the table is within a statute forbidding betting at a pool table.[85] A lottery is a scheme for the distribution of valuable prizes by chance.[86] Buying on margins options for future delivery is not necessarily a gambling contract,[87] but such a purchase where delivery is not intended is illegal,[88] irrespective of statute, being contrary to public policy.[89] The general test is the intention not to actually deliver the goods contracted,[90] and in some states the purchase on margin for future delivery of commodities not needed in the ordinary course of the purchaser's business is prima facie evidence that the transaction is a wagering contract.[91] Each act of betting at a gaming table makes the keeper thereof guilty of a separate offense under the statutes of most of the states.[92] One making wagers by telegraph with persons in another state may be guilty of gambling though such other persons are not violating their local laws in accepting the wagers.[93]

Validity of regulations.[94]—Legislation prohibiting gambling or acts which may facilitate it will not be interfered with by the court unless such legislation be a clear, unmistakable infringement of rights.[95] The suppression of gambling is concededly within the police powers of a state,[96] and the regulation thereof may be delegated to the municipalities.[97] The state has unquestioned power to make the bucket shop business indictable,[98] and a statute prohibiting dealing in margins is not unconstitutional as violating the fourteenth amendment,[99] nor are such transactions matters of interstate commerce.[1] A statute which incidentally operates to prevent interstate wagers by telegraph is not, therefore, unconstitutional.[2]

Cards and other table games.[3]—By statute the playing of a game with cards, not at a private residence occupied by a family,[4] or the playing of a game with cards at a private residence commonly resorted to for the purpose of gaming, may

81. Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.
82. Mayo v. State [Tex. Cr. App.] 82 S. W. 515.
83. Ford v. State [Miss.] 38 So. 229.
84. Harnage v. State [Tex. Cr. App.] 82 S. W. 512.
85. Pen. Code, 1895, § 401. Hopkins v. State [Ga.] 50 S. E. 351; Mayo v. State [Tex. Cr. App.] 82 S. W. 515.
86. Bowen v. Lynn [Neb.] 102 N. W. 460.
87. State v. Clayton [N. C.] 50 S. E. 866; Kendall v Fries [N. J. Law] 58 A. 1090; State v. McGinnis [N. C.] 51 S. E. 50.
88. Paducah Commission Co. v. Boswell, 26 Ky. L. R. 1062, 83 S. W. 144; State v. Clayton [N. C.] 50 S. E. 866; State v. McGinnis [N. C.] 51 S. E. 50.
89. State v. Clayton [N. C.] 50 S. E. 866.
90. State v. Clayton [N. C.] 50 S. E. 866; State v. McGinnis [N. C.] 51 S. E. 50.
91. St. 1905, c. 538, § 5. State v. Clayton [N. C.] 50 S. E. 866; State v. McGinnis [N. C.] 51 S. E. 50.
92. Mayo v. State [Tex. Cr. App.] 82 S. W. 515.
93. Ames v. Kirby [N. J. Law] 59 A. 558.
94. See 3 C. L. 500.
95. Ah Sin v. Wittman, 25 S. Ct. 756.
96. Ah Sin v. Wittman, 25 S. Ct. 756; Town of Ruston v. Perkins [La.] 38 So. 583.
97. Town of Ruston v. Perkins [La.] 38 So. 583. A charter power to "prevent and suppress gaming and gambling pleas" does not authorize a city to make such places lawful by licensing them. State v. Nease [Or.] 80 P. 897. An ordinance making unlawful the visiting or resorting to a barricaded place where gambling implements are exposed to view is not unconstitutional. Ah Sin v. Wittman, 25 S. Ct. 756.
98. State v. McGinnis [N. C.] 51 S. E. 50.
99. Weare Commission Co. v. People, 111 Ill. App. 116.
1. State v. Clayton [N. C.] 50 S. E. 866.
2. P. L. 1898, p. 812. Ames v. Kirby [N. J. Law] 59 A. 558.
3. See 3 C. L. 501.
4. Mapes v. State [Tex. Cr. App.] 85 S. W. 797; Inman v. State [Tex. Cr. App.] 85 S. W. 796. Playing cards in a private room of a building not a private residence occupied by a family is within this statute. Fallwell v. State [Tex. Cr. App.] 85 S. W. 1069. Evidence that defendant, with others, "rounded up at a schoolhouse and had

be unlawful.[5] The characteristics of a gaming table are first, it is a game, second, it has a keeper, dealer, or exhibitor, third, it must be exhibited for the purpose of obtaining bettors.[6] The game of faro is a banking game.[7] One who participates in a game, and is dealer and manager thereof, may be convicted of exhibiting a gaming table,[8] but one who furnishes a table and participates in a game of craps thereon, without becoming banker, is not guilty of keeping and exhibiting a gaming table or bank.[9] The setting up of a poker table is not within a statute forbidding the setting up or keeping of any gambling device commonly called, A. B. C., faro bank, roulette, equality, keno, or any kind of gambling table or gambling device;[10] but otherwise of a crap table,[11] or the game of chuck-a-luck.[12]

Racing and race tracks.[13]—To maintain a telegraph and telephone office for collection of news as to horse races is not illegal in New York,[14] though by statute the receiving and recording of money bet on a horse race is prohibited.[15] Equity may restrain by injunction the maintenance of a pool room.[16]

Slot machines.[17]—In Maine a slot machine whereon the player is guaranteed in trade the equivalent of his deposit, but stands to win more, is a gaming device,[18] though the rule is otherwise in New York.[19] The illegal use of a slot machine is a nuisance and may be enjoined.[20]

Gaming at public place.[21]

Keeping a gaming place.[22]—Before any sort of gambling was prohibited or even considered to be against public policy, the keeping of a common gaming house was punishable at common law as a nuisance, because it tended to draw together disorderly persons.[23] To be indictable as a nuisance at common law, a place must be a "common" gaming house.[24] Keeping a gaming house may be punished under a statute forbidding the willful and wrongful commission of any act which grossly disturbs the public peace or which openly outrages public decency and is injurious to the public morals.[25] A turf exchange on the principal thoroughfare of a city where people daily congregate to bet upon horse races is a gaming house punishable as a nuisance at common law, whether the betting is a crime or not.[26] A resort where wagers upon horse races are made by telegraph has been held to be a gambling place,[27] and the maintenance of a pool room may be enjoined by a court of equity.[28] By statute in some states it is illegal to knowingly rent a place or room

a little game of poker," is sufficient to support an information charging the "unlawful playing of a game with cards" not at a private residence. Inman v. State [Tex. Cr. App.] 85 S. W. 796; Mapes v. State [Tex. Cr. App.] 85 S. W. 797. Evidence examined and held insufficient to support a conviction of gaming with cards at a place other than a private residence. Fallwell v. State [Tex. Cr. App.] 85 S. W. 1069.

5. A residence may be a private residence though not occupied by a family. Pen. Code 1895, art. 379; Acts 27th Leg. p. 26, c. 22. Williams v. State [Tex. Cr. App.] 87 S. W. 1155.

6. Mayo v. State [Tex. Cr. App.] 82 S. W. 515.

7. State v. Behan, 113 La. 754, 37 So. 714.

8. Coffee v. State [Tex. Cr. App.] 87 S. W. 820.

9. Coleman v. State [Tex. Cr. App.] 87 S. W. 152.

10. Rev. St. 1899, § 2194. State v. Etchman, 184 Mo. 193, 83 S. W. 978.

11. Rev. St. 1899, § 2194. State v. Locket [Mo.] 87 S. W. 470.

12. Rev. St. 1899, § 2194. State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975.

13. See 3 C. L. 501.

14. People v. Breen, 44 Misc. 375, 89 N. Y. S. 998.

15. Pen. Code, § 351. People v. Ebel, 98 App. Div. 270, 90 N. Y. S. 628.

16. Cella v. People, 112 Ill. App. 376.

17. See 3 C. L. 501.

18. Lang v. Merwin, 99 Me. 486, 59 A. 1021.

19. Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

20. Lang v. Merwin, 99 Me. 486, 59 A. 1021.

21, 22. See 3 C. L. 502.

23. State v. Nease [Or.] 80 P. 897.

24. State v. Carrick [Vt.] 61 A. 35.

25. B. & C. Comp., § 1930. State v. Nease [Or.] 80 P. 897.

26. State v. Nease [Or.] 80 P. 897.

27. P. L. 1898, p. 812. Ames v. Kirby [N. J. Law] 59 A. 558.

28. Cella v. People, 112 Ill. App. 376.

to be used for gaming purposes,[29] and one may be convicted therefor if the circumstances were such as to give a man of ordinary intelligence and caution good reason to expect that it would be put to the illegal use.[30]

(§ 1.) *B. Indictment or information and trial procedure.*[31]—In a prosecution for gaming, the state may rely on an offense committed any time within the limitation period,[32] but must prove an exact date within that period,[33] and there can be no conviction for keeping a gaming place on evidence relating only to a time subsequent to the issuing of the warrant.[34]

A conviction for dealing in margins contrary to statute may be had in the county where the orders were given and the money paid.[35] Under the New Jersey statute it is not necessary that both parties to the betting transaction be within that state.[36]

Indictments must allege all the statutory elements of the offense,[37] but an indictment for permitting games of chance in one's dwelling house, which informs the accused of the nature and cause of the accusation and so identifies the offense as to insure the accused against a subsequent prosecution therefore is sufficient.[38] In some states it is not necessary for the indictment to allege with whom the defendant played.[39] A count charging the keeping of a gaming house and aiding and assisting therein is not double.[40]

Circumstantial evidence may be sufficient to authorize a conviction for gaming.[41] Under an indictment charging conjuncturily that defendant played and bet at a game played with cards, dice, and balls, there may be a valid conviction upon proof that the game was played with either cards, dice, or balls.[42] The admissibility of certain matters in evidence is noted below.[43]

§ 2. *Penalties and seizure of implements.*[44]

29. Pen. Code 1895, § 398. Bashinski v. State [Ga.] 50 S. E. 54. Evidence held to show defendant to be lessee and occupant. Ford v. State [Miss.] 38 So. 229. U. S. § 5125. State v. Carrick [Vt.] 61 A. 35.

30. Pen. Code 1895, § 398. Bashinski v. State [Ga.] 50 S. E. 54.

31. See 3 C. L. 502.

32. Williams v. State [Tex. Cr. App.] 87 S. W. 1155.

33. Cox v. State [Tex. Cr. App.] 86 S. W. 1021.

34. State v. Harmon [Kan.] 78 P. 805.

35. Weare Commission Co. v. People, 111 Ill. App. 116.

36. P. L. 1898, p. 812. Ames v. Kirby [N. J. Law] 59 A. 558.

37. An indictment for keeping a gaming table is fatally defective if it fails to charge that defendant was in any manner interested in the loss or gain of the table, as required by the statute. Brazele v. State [Miss.] 38 So. 314. Under a statute making it a felony to set up a device, adapted, devised or designed for gaming, and indictment omitting the word "designed" is insufficient. Rev. St. 1899, § 2194. State v. Etchman, 184 Mo. 193, 83 S. W. 978. As is an indictment charging the setting up of a roulette wheel, where the statute prohibits the setting up of a roulette table. Id. An information under the Texas statute forbidding the keeping and exhibiting of a gaming table or bank must allege that it was a "gaming" table or bank. Trimble v. State [Tex. Cr. App.] 86 S. W. 1018. Under the Texas statute an indictment alleging that defendant "did unlawfully keep and exhibit for the purpose of gaming, a gaming table and bank" is sufficient. Pen. Code 1895, art. 1014. Kinney v. State [Tex. Cr. App.] 84 S. W. 590.

38. Brister v. State [Miss.] 38 So. 678.

39. Hubbard v. State [Ga.] 51 S. E. 11.

40. Act No. 12, p. 28, of 1870. State v. Behan, 113 La. 754, 37 So. 714.

41. Davis v. State [Ga.] 51 S. E. 501.

42. Pen. Code 1895, § 401. Hubbard v. State [Ga.] 51 S. E. 11.

43. In a prosecution for knowingly renting a room to be used for gaming purposes, anything tending to show the existence of such knowledge is admissible. Bashinski v. State [Ga.] 50 S. E. 54. In a prosecution for exhibiting a gaming table, evidence that defendant was running the house where the gaming was alleged to have accurred, is admissible. Porter v. State [Tex. Cr. App.] 86 S. W. 1018. In a trial for keeping a banking game, evidence is admissible to show the nature of the game of faro including the part of look-out assumed by the defendant. Act No. 12, p. 38, of 1870. State v. Behan, 113 La. 701, 37 So. 607. Likewise of evidence that defendant participated in the faro dealing at times previous to that charged as showing the character of the place and the guilty knowledge of defendant. Id. Racing placards taken from a pool room ten days after the offense complained of are not admissible on the trial for such offense without proper connecting proof. People v. Ebel, 98 App. Div. 270, 90 N. Y. S. 628.

§ 3. *Recovery back of money lost.*[45]—By statute, money lost at gambling [46] or in pursuance of a gaming contract [47] may be recovered by civil action against the winner [48] or the stakeholder.[49] In some states this right of recovery is given to the wife, children,[50] heirs, executors, administrators, and creditors of the looser if sued upon within a given time,[51] or by statute the state may sue for money lost at gambling, the wife being the beneficiary of any judgment recovered.[52] The law does not generally lend its aid to relieve any one of several parties who knowingly and intentionally embark in a gambling venture,[53] and when an illegal contract has been fully executed and the money arising therefrom deposited to the credit of one or more of the respective parties, such depository cannot, when sued therefor, successfully plead the illegality of the transaction,[54] but in so far as a gambling scheme has not been executed, the party advancing the money may sue therefor or establish his claim in bankruptcy.[55] Money lost in betting on horse races cannot be recovered.[56] At common law, to render a contract void as a wagering contract, it must appear that both parties understood and agreed, expressly or impliedly, the things which constituted it, as matter of law, a wagering contract.[57] To successfully defend on checks given in stock and cotton speculations, one must fairly prove that the transaction was a mere dealing difference.[58] The Nebraska statute on recovery applies to such kinds or descriptions of gambling only as are mentioned therein.[59] That a transaction grew from gambling contracts does not prevent the recovery of money paid by mistake.[60] A principal may recover funds misappropriated by its agent in the purchase on margin of produce whose actual delivery was not contemplated.[61] Pleadings in such actions are liberally construed.[62]

BIGAMY.

Most statutes provide an exception in case the first husband or wife has been absent for such time as to create a presumption of death,[63] and the statute in Texas excepts any person whose husband or wife shall remain absent from the state

44, 45. See 3 C. L. 505.

46. 1 Birdseye Rev. St. pp. 299, 300. Mendoza v. Rose, 92 N. Y. S. 791. Comp. Laws, § 3199-3212. Armstrong v. Aragon [N. M.] 79 P. 291. Includes election bet. Rev. St. 1899, §§ 3424, 3430. Crenshaw v. Columbian Min. Co. [Mo. App.] 86 S. W. 260. Cr. Code, § 214; Laws 1887, p. 665, c. 108. Bowen v. Lynn [Neb.] 102 N. W. 460.

47. Life insurance. Civ. Code 1895. § 3671. Quillan v. Johnson [Ga.] 49 S. E. 801. Purchase of stocks on margins. Ky. St. 1903, § 1955. Paducah Commission Co. v. Boswell, 26 Ky. L. R. 1062, 83 S. W. 144.

48. Crenshaw v. Columbian Min. Co. [Mo. App.] 86 S. W. 260; Armstrong v. Aragon [N. M.] 79 P. 291.

49, 50. Comp. Laws, § 3209. Armstrong v. Aragon [N. M.] 79 P. 291.

51. Comp. Laws, § 3200. Armstrong v. Aragon [N. M.] 79 P. 291. Rev. St. 1899, § 3425. Crenshaw v. Columbian Min. Co. [Mo. App.] 86 S. W. 260.

52. Judgment should not state recovery to be for benefit of wife. Burns' Ann. St. 1894, § 6678. Tyler v. Davis [Ind. App.] 75 N. E. 3.

53. In re E. J. Arnold & Co., 133 F. 789. Overholt v. Burbridge [Utah] 79 P. 561.

54. Overholt v. Burbridge [Utah] 79 P. 561.

55, 56. In re E. J. Arnold & Co., 133 F. 789.

57. Farnum v. Whitman [Mass.] 73 N. E. 473.

58. Kendall v. Fries [N. J. Law] 58 A. 1090.

59. Crim. Code, § 214; Laws 1887, p. 665, c. 108. Bowen v. Lynn [Neb.] 102 N. W. 460.

60. Adler v. C. J. Searles & Co. [Miss.] 38 So. 209.

61. Beidler & Robinson Lumber Co. v. Coe Commission Co. [N. D.] 102 N. W. 880.

62. Arstrong v. Aragon [N. M.] 79 P. 291. In New York the complaint in an action to recover money wagered on a horse race with a book-maker need not allege a demand for return of the money. 1 Birdseye Rev. St. pp. 299, 300. Mendoza v. Rose, 92 N. Y. S. 791. A complaint alleging that defendants were running and playing games of poker and that plaintiff played with them and lost and paid to them certain moneys is sufficient on which to base a recovery thereof. Parsons v. Wilson [Minn.] 103 N. W. 163.

63. Prosecution need not negative such exception. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

for five years,[64] or willfully remains absent in desertion for five years.[65] A valid first marriage must be shown.[66] It may be proved by the admissions of defendant [67] or by the record,[68] or in any other manner allowed in other proceedings.[69] Time and place thereof need not be alleged in the indictment.[70] An offense akin to bigamy is created by a statute in Arkansas prohibiting the willful marrying of the wife of another.[71] Under such statute the prosecution must prove scienter.[72]

BILL OF DISCOVERY; BILLS AND NOTES; BILLS IN EQUITY; BILLS OF LADING; BILLS OF SALE; BIRTH REGISTERS, see latest topical index.

BLACKMAIL.[73]

If the threat be to accuse of crime, it must be of a crime legally punishable.[74]

BLENDED PROPERTIES; BOARD OF HEALTH; BODY EXECUTED; BONA FIDES, see latest topical index.

BONDS.

Scope of title.—Questions relating to negotiable bonds and the like,[75] to indemnity,[76] and to suretyship, are treated elsewhere.[77] Matters relating to bonds in particular actions and proceedings,[78] and to the bonds of particular officers, will be found in the appropriate titles.[79]

§ 1. *The instrument; essentials and validity.*[80]—A bond is the acknowledgment under seal of a debt therein particularly specified.[81] In every good bond there must be an obligor and an obligee, and a sum in which the former is bound.[82] The insertion of the amount at or before the time of signing is essential unless it

64. This section does not apply to one who has not lived in Texas five years at the time of the second marriage. Poss v. State [Tex. Cr. App.] 83 S. W. 1109.

65. This section applies, though defendant was deserted by his wife in another state and has not lived five years in Texas. Poss v. State [Tex. Cr. App.] 83 N. W. 1109.

66. See note 68 L. R. A. 42. Proof of marriage to a girl of fourteen in a foreign country shows a presumptively valid first marriage. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

67. Murphy v. State [Ga.] 50 S. E. 48.

68. Record evidence of the marriage does not violate the constitutional guaranty of meeting the witness face to face. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

69. See Marriage, 4 C. L. 528. A witness should not be allowed to state the bare conclusion that defendant and his alleged first wife were married. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

70. Murphy v. State [Ga.] 50 S. E. 48.

71, 72. Brooks v. State [Ark.] 84 S. W. 1033. An instruction to convict unless defendant showed good faith is error. Id. Knowledge of facts which would lead to knowledge of marriage if diligently pursued is insufficient but knowledge of facts which would produce belief in a reasonable mind will suffice. Id.

73. Extortion by color of office, see Extortion, 3 C. L. 1414. Threats other than with intent to extort, see Threats, 4 C. L. 1679.

74. State v. Dailey [Iowa] 103 N. W. 1008. The offense of being a "disorderly person" not being defined or punished by any law, a threat to accuse thereof is not sufficient. Id.

75. See Corporations, 3 C. L. 880; Municipal Bonds, 4 C. L. 706; Non-negotiable Paper, 4 C. L. 827; Railroads, 4 C. L. 1181.

76. See Indemnity, 3 C. L. 1698.

77. See Suretyship, 4 C. L. 1595.

78. See Appeal and Review, 5 C. L. 121; Attachment, 3 C. L. 353; Replevin, 4 C. L. 1284; and like titles.

79. See Estates of Decedents, 3 C. L. 1238; Guardianship, 3 C. L. 1569; Officers and Public Employes, 4 C. L. 854; Receivers, 4 C. L. 1238; and other like titles.

80. See 3 C. L. 507.

81. Rollins v. Ebbs [N. C.] 49 S. E. 341. Since the abolition of private seals, any written instrument containing a clause binding the obligor to pay a sum affixed as a penalty, and conditioned that the penalty may be avoided by the performance of certain acts by one or more of the obligors. Walter Pratt & Co. v. S. J. Langston Mercantile Co. [Mo. App.] 85 S. W. 134.

82. Rollins v. Ebbs [N. C.] 49 S. E. 341.

is afterwards filled in by one duly authorized,[83] or unless the signers themselves afterwards duly ratify the insertion.[84] No surety is necessary.[85]

A statutory bond must conform substantially to the conditions prescribed by the statute,[86] but will be construed so as to carry into effect the intention of the parties if fairly ascertainable from the terms of the obligation.[87] Mere irregularities[88] or inaccuracies in its recitals do not affect its validity.[89] The insertion of an illegal or unauthorized provision does not affect the validity of the remaining portions, unless the conditions are so interwoven as not to be severable, or unless the statute expressly or by necessary implication so provides.[90] A surety on a city contractor's bond is not relieved from liability because its conditions are more comprehensive than are required by the ordinance under which it was given.[91]

An instrument void as a statutory bond may nevertheless be valid as a common-law obligation,[92] and will generally be so regarded where it has served the purpose for which it was given and enabled the obligors to secure the resulting advantage.[93] It must, however, be one which will stand as such without the aid of the statute by which it has been repudiated.[94] A bond which may or may not be

Bond of county treasurer, under Act April 15, 1834, § 33, which does not specify to whom such bonds shall run, is sufficient where it is given to the county commissioners by name and describes them as commissioners of a certain county. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406.

83. Authority must be under seal. Rollins v. Ebbs [N. C.] 49 S. E. 341. Rule applies to guardian's bond required by Code, § 1574, which must be in double the amount of the ward's personalty to be ascertained by the clerk. Id.

84. Held that there was nothing to show ratification. Rollins v. Ebbs [N. C.] 49 S. E. 341.

85. Instrument held to be bond. Walter Pratt & Co. v. S. J. Langston Mercantile Co. [Mo. App.] 85 S. W. 134.

86. State v. Harper [Tex.] 86 S. W. 920, rvg. 85 S. W. 294. The right of action arising from the breach of a liquor dealer's bond is purely statutory and is penal in character, and no recovery can be had unless the party suing brings himself strictly within the terms of the act. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818. A liquor dealer's bond having but one surety is not a valid statutory bond, and furnishes no basis for the recovery of the statutory penalties prescribed for the breach of the conditions of such bond against either the principal or the surety. Batts' Civ. St. art. 5060g. requires two or more sureties. Id.

87. A liquor dealer's bond reciting that two persons desire to engage in the business in which both are named as principals, and which is signed by both, is valid, though conditioned only that one of them shall perform the things required of them by statute. State v. Harper [Tex.] 86 S. W. 920; rvg. 85 S. W. 294. See, also, State v. Harper [Tex. Civ. App.] 87 S. W. 878.

88. Fact that name of additional party appeared in body of appeal bond as acknowledging himself bound as security, though he did not sign it, is mere irregularity, which may be cured by amendment. McDermid v. Judge [Ga.] 49 S. E. 800.

89. The validity of the bond required to be filed with a petition for a private road (Pol. Code, § 2692), is not affected by inaccurate recitals as to the petition, provided the identity of such petition remains sufficiently clear. Mariposa County v. Knowles [Cal.] 79 P. 525.

90. Executor's bond not rendered invalid as statutory bond to extent of remaining provisions because contained waiver of right to discharge any liability except in legal tender currency as provided by Acts 1884, pp. 24, 25, c. 22, instead of waiver of right to discharge liability with coupons of state bonds as required by Code, § 177. Yost v. Ramey [Va.] 48 S. E. 862. Surety authorizing attorney in fact to execute for him "the bond required by the court" not relieved from liability thereby. Id. The fact that an executor is required by the court to execute the statutory bond for the faithful performaance of his duties does not render it void because it contains a provision in excess of the statutory requirements on the theory that it is executed under legal duress. Id.

91. Given voluntarily for lawful purpose. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

92. Wall v. Mount, 121 Ga. 831, 49 S. E. 778.

93. Bond given to prevent sale under levy, in which claimant bound himself to return property in event it was found subject on trial of claim case, and which actually had effect of preventing sale, held valid common-law obligation, though invalid as statutory bond because made payable to the plaintiff in fi. fa. instead of to levying officer. Wall v. Mount, 121 Ga. 831, 49 S. E. 778. Obligors having secured advantage of having it treated as valid cannot secure additional advantage of having it treated as invalid. Id. Benefit secured sufficient consideration to support cause of action, irrespective of fact that instrument was under seal. Id.

94. Liquor dealer's bond cannot be upheld as common-law obligation, since there is no common-law action for the penalties sought to be recovered. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818.

required by the court in the exercise of his discretion is a common-law and not a statutory bond.[95] A bond given pursuant to an unconstitutional statute cannot be upheld as a valid common-law obligation.[96] An action to recover penalties purely statutory cannot be maintained on a bond good only as a common-law obligation.[97]

Consideration.—As in the case of other contracts a bond must be supported by a consideration.[98]

Execution.[99]—The omission of the date does not render the bond invalid.[1]

The fact that the name of a party appearing in the body of the bond as security is not signed to the instrument does not render it invalid as to the principal and the other security who have properly signed it,[2] nor does the fact that the corporate name of the principal is abbreviated in the body of the instrument, where it is capable of identification.[3] A bond purporting to be given by a corporation but signed only by an individual is defective.[4] Where the signatures of the sureties are forgeries the bond is void,[5] and it is not validated by the fact that the sureties were approved by the proper officer.[6]

Statutory bonds must be approved in the prescribed manner.[7]

Delivery.[8]—The conditional delivery of a bond under seal cannot be made to a party thereto without waiving the benefit of the condition, unless the condition appears on the face of the instrument.[9] Where a bond is delivered to the obligee showing on its face that one of the persons named as sureties in the body of the bond has not signed, such fact is sufficient to place the obligee upon inquiry, so as to permit the surety to set up the defense that his liability was conditioned on the signature of his co-surety.[10]

95. Supersedeas bond in common-law certiorari. Webb v. McPherson & Co. [Ala.] 38 So. 1009.

96. Pursuant to Code Civ. Proc. § 1203, requiring contracts in reference to the erection of buildings to be secured by bonds which shall inure to the benefit of materialmen. W. W. Montague & Co. v. Furness, 145 Cal. 205, 78 P. 640.

97. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818.

98. See 3 C. L. 509. A bond executed by defendant to secure payment to him of salary as clerk of board of education pending contest for that office, and conditioned to save city harmless in case defendant was defeated, held supported by consideration. McLaughlin v. Board of Education of Covington, 26 Ky. L. R. 1126, 83 S. W. 568. Bond and contract, the performance of which it was given to secure, held to have been executed as nearly contemporaneously as possible, the parties being in different states, and the mere fact that the former was dated two days later than the latter did not render the bond without consideration. Stauber v. Ellett [Mich.] 12 Det. Leg. N. 156, 103 N. W. 606. Consideration for bond given by private bank to treasurer of creamery association held to be the safe custody of the funds deposited with it by the association. Nelson & Albin Creamery & Cheese Mfg. Co. v. Armstrong, 93 Minn. 449, 101 N. W. 968.

99. See 3 C. L. 509.

1. Replevin bond. W. W. Kimball Co. v. Tasca [R. I.] 59 A. 919.

2. Appeal bond. McDermid v. Judge [Ga.] 49 S. E. 800.

3. Abbreviation of corporate name of appellant in body of appeal bond held not prejudicial, since meaning was shown by identification with different parts of the record. Eichorn v. New Orleans & C. R. Light & Power Co. [La.] 38 So. 526.

4. Replevin bond. W. W. Kimball Co. v. Tasca [R. I.] 59 A. 919.

5. Bond to dissolve mechanics' liens signed by sureties impersonating others, who gave false answers as to their property. Breed v. Gardner, 187 Mass. 300, 72 N. E. 983.

6. By fact that sureties on bond to dissolve mechanics' liens were approved by master in chancery. Only approves qualification and fitness of sureties, and does not pass on question of genuineness of signatures. Breed v. Gardner, 187 Mass. 300, 72 N. E. 983.

7. The indorsement on the bond of a school book publisher (Ky. St. 1903, § 4424) of the word "approved" followed by the signatures of the ex officio members of the state board of education is sufficient approval. Approval by board by entry on record book not necessary. American Book Co. v. Wells, 26 Ky. L. R. 1159, 83 S. W. 622.

8. See 3 C. L. 510.

9. Delivery of bond guarantying that obligee would realize certain sum from sale of certain property held waiver of condition that it should not apply in case sale was made under deed of trust. Bieber v. Gans, 24 App. D. C. 517.

10. City of Butte v. Cook, 29 Mont. 88, 74 P. 67.

§ 2. *Rights of parties and transferees.*[11]—The assignee of a replevin bond takes it subject to every defense which the maker had against the assignor.[12]

§ 3. *The terms and conditions in general; interpretation and legal effect.*[13]—Bonds are to be construed in accordance with the recognized rules for the interpretation of contracts.[14] The intention of the parties, to be ascertained from the words employed, the connection in which they are used, and the subject-matter in reference to which they are contracting, must control.[15] The language must receive a reasonable construction.[16] The entire instrument will be considered, and, if possible, a construction adopted which will render the whole contract operative,[17] and the courts cannot interpolate terms and conditions as to which the minds of the parties have not met.[18]

A bond of indemnity not stipulating how long it shall remain in force, but covenanting for the payment of an annual premium in advance to the obligor so long as it does so remain, leaves the obligee at liberty to terminate the contract in so far as the rights of third parties are not involved, by declining to make payment.[19] Recovery on a bond under seal, complete and unambiguous on its face, and containing an unconditional promise to pay the sum sued for on the happening of a certain event, which has admittedly occurred, cannot be defeated by showing a collateral oral agreement that it was to be conditional only.[20] A bond providing for the payment of interest and damages binds the obligor to the payment of interest as an element of damage, if not the payment of interest as such.[21] The construction of particular bonds will be found in the note.[22]

11. See 3 C. L. 510.

12. That agent giving it exceeded authority given him by power of attorney. Is non-negotiable. Stokes v. Dewees, 24 Pa. Super. Ct. 471.

13. See 3 C. L. 511.

14. See, also, Contracts, 3 C. L. 805. City of Oakland v. Snow, 145 Cal. 419, 78 P. 1060. The designation of the principal as "auditor and ex officio assessor" instead of "auditor and assessor," held a trivial and harmless misdescription not affecting the validity of the obligation. Id. Office of assessor held not distinct from that of auditor, since duties of both required to be performed by same person, and hence one bond conditioned on the faithful performance of his duties as auditor and ex officio assessor applied to duties of both offices. Id.

15. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4.

16. Provision in building contractor's bond that owner shall notify surety of any act of principal which may involve a loss for which surety would be liable does not require him to give notice of fact that contractor has become indebted for labor, but only of the institution of proceedings to enforce the lien. Ovington v. Aetna Indemnity Co., 36 Wash. 473, 78 P. 1021.

17, 18. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4.

19. Fidelity & Deposit Co. v. Libby [Neb.] 101 N. W. 994.

20. That bond guarantying that obligee would realize certain sum from sale of certain property should not apply to sale under deed of trust. Bieber v. Gans, 24 App. D. C. 517.

21. Bostrom v. Gibson, 111 Ill. App. 457.

22. **Liquor dealers bond** conditioned that he shall not permit any minor to enter and remain in his plaace of business is not breached by his permitting a minor to enter for a few moments on a matter of business. Douthit v. State [Tex.] 83 S. W. 795.

Bond of a vice consul conditioned that the principal should faithfully perform his duties, and should account for, pay over, and deliver up all moneys which should come into his hands, held not to require surety to respond for statutory penalty incurred by principal for charging excessive fees, where whole amount collected, including excess, was accounted for. United States v. Ballantine [C. C. A.] 138 F. 312.

Bond of school book publisher conditioned that it will sell books to patrons of common schools in counties adopting them at prices not greater than it sold them to patrons of schools in other states is broken, though it does not sell directly to pupils of any state, where it sells to dealers in Kentucky at 80 per cent. of list price and binds them to sell at list price, and agrees to furnish same books to boards of education in Ohio under statute requiring them to be furnished to such boards at 75 per cent. of list price, and requiring boards to sell them to pupils at a price not to exceed 10 per cent. in addition to that paid the publisher. American Book Co. v. Wells, 26 Ky. L. R. 1159, 83 S. W. 622. Bond executed by defendant **to secure payment** to him **of salary** as clerk of board of education pending contest for that office, and conditioned to save board harmless by reason of payment to him of "any salary now due him as clerk," held to cover amount of salary then due, and board having paid such amount to defendant, was entitled to recover it in action on bond on his defeat in contest. McLaughlin v. Board of Education of City of Covington, 26 Ky. L. R.

The statute in pursuance of which a bond is given is to be regarded as a part of it,[23] and the bond must, if possible, be so construed as to the scope of its obligation, as to cover the objects of the statute in requiring it.[24] So, too, where a bond is conditioned for compliance with certain covenants of a specified lease, such covenants are as much a part of the condition of the bond as if set fourth at large therein.[25]

1126, 83 S. W. 568. Defendant having had knowledge of all the facts, board was not estopped to recover on bond on ground that it had kept defendant in office, recognizing him as clerk, and that he had performed all duties as such clerk. Id. Provision in bond given **to secure payment of notes** that "said notes may be from time to time renewed during the said year," held to have been for purpose of enabling the obligee to take renewals without affecting the liability of the surety. Haney School Furniture Co. v. Medary [Wis.] 101 N. W. 929. Is a presumption that sum named in bond given by one selling out business **to secure performance of contract** not to engage in the business in the same town within a specified time is for a penalty and not for stipulated damages, and contrary must be made to appear. Dissosway v. Edwards [N. C.] 49 S. E. 957. Instruction erroneous in informing jury that sole question was whether bond was entered into when sale was made. Id. In bonds for immediate **collection of judgment,** full restitution includes interest on the amount of the judgment. Haunts v. Lanman Co., 2 Ohio N. P. (N. S.) 405.

Bond of county treasnry conditioned to "faithfully perform the duties of his office" is breached by failure to pay over to a city the proportion of proceeds from liquor licenses to which it is entitled. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. Questions relating to settlement of county treasurer's accounts respecting the proportion of liquor license taxes payable to cities must be determined by courts, and hence cannot set up an adjudication by the auditors against a claim by a city for its proportion. Id. General bond of **telephone company** held to cover damages to land of abutting owner by reason of additional servitude imposed by erection of poles on highway, and court in continuing injunction against it will limit it so as to prohibit their erection on plaintiff's private propperty only, though supervisors have not consented to use of roads. Pfoutz v. Pennsylvania Tel. Co., 24 Pa. Super. Ct. 105. Bond given by private bank to treasurer of creamery association for faithful performance of its duties as **custodian of** association's **funds** was to continue for one year. Within year agreement was indorsed thereon to the effect that bond should stand good until a successor to bank should be elected and qualified, which was signed by principal and sureties. Deposits were made for over nine years, when bank failed. Held, that bond continued indefinitely in force until successor was appointed and sureties were liable for amount due at time of failure. Nelson & Albin Creamery & Cheese Mfg. Co. v. Armstrong, 93 Minn. 449, 101 N. W. 968.

Building contractor's bonds: Bond by which obligors agree to erect buildings, or in default thereof, to pay a certain sum, while not technically an alternative contract, partakes of the nature of one. McCullough v. Moore, 111 Ill. App. 545. Held not too vague to be enforceable where no buildings were erected, though general in its terms and leaving much to the discretion of the obligors. Id. Bond executed by highway improvement contractors conditioned that they would promptly pay all debts incurred by them in the prosecution of the work, including labor and materials, held not to render them or their sureties liable for debts for labor and supplies incurred by subcontractor. Miller v. State [Ind. App.] 74 N. E. 260. Where a surety binds itself unconditionally for the faithful performance of alterations within the limits of a certain sum, it is bound, even though the regulations of the contract providing that changes shall only be made on the written order of the architect are not followed. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327. Under U. S. Comp. St. 1901, which provides that a surety upon a bond given by a building contractor to the government shall assume an obligation that the contractor pay all persons supplying labor and materials, a surety is not liable for the contract price of a lighter and crew furnished to transport materials. United States v. Fidelity & Deposit Co., 86 App. Div. 475, 83 N. Y. S. 752. Bond given by contractor to city conditioned to pay "any and all persons, any and all sums of money which may be due for labor and materials furnished and supplied or performed in and about the said work," embraces in the class of persons entitled to sue thereon one furnishing material to a subcontractor. Bowditch v. Gourley, 24 Pa. Super. Ct. 342. In action on contractor's bond to recover amount of mechanics' liens enforced against property, evidence that a change involving additional cost to the contractor was made, held inadmissible where contract provided that changes might be made. Ovington v. Aetna Indemnity Co., 36 Wash. 473, 78 P. 1021.

See, also, Building and Construction contracts, 3 C. L. 550.

23. State v. Wotring [W. Va.] 49 S. E. 365.

24. Bond of commissioner appointed to sell lands, conditioned that he shall "faithfull discharge his duties as such commissioner, and account for and pay over, as required by law, all money which may come to his hands by virtue of said office," covers money received by him in payment of notes given for part of purchase price. State v. Wotring [W. Va.] 49 S. E. 365.

25. McCullough v. Moore, 111 Ill. App. 545.

As between a bond and a collateral security, the bond is the principal debt in law, and must govern the rights of the parties between themselves.[26] It also governs as to the claims of volunteers, and they are affected by it without notice.[27]

Bonds given by assurance companies are in the nature of insurance contracts to be construed as contracts for compensation and the companies become identified with their principal and are bound by his acts.[28]

The question whether the sum named in the bond is to be regarded as liquidated damages or as a penalty is fully treated elsewhere.[29]

Conditions precedent to a right of recovery must be performed,[30] unless waived.[31]

§ 4. *Remedies and procedure.*[32]—All official bonds, whoever may be named as obligee, are given for the use of parties having a legal interest in their enforcement.[33] Where a bond in bastardy proceedings runs to the county judge as trustee of an express trust, he is the proper person to sue thereon without joining with him the beneficiary.[34] If the language of a contractor's bond and the proved circumstances of the case make plain the the intention of the parties to secure not only the owner of the building but the laborers and materialmen as well, then the latter may avail themselves of the security thus provided, though they are not specially named in the bond and no consideration passes directly from them to the surety.[35]

26. Godshalk's Estate, 24 Pa. Super. Ct. 410. Grantor in deed charged part of purchase money on land, the interest to be paid to grantor and his wife and the survivor during their lives, and upon death of survivor, fund was to go to legal heirs of grantor or to those legally entitled to same. Grantee executed bond conditioned for payment of fund, after death of grantor and his wife, to parties entitled to receive same by will. Held, bond governed and gift was but a provisional one to heirs, subject to implied power to vest title in others by will; and beneficiaries under will entitled to take to exclusion of heirs. Id.

27. Deed above referred to was recorded, but bond was not. Held immaterial that heirs had no notice of the bond. Godshalk's Estate, 24 Pa. Super. Ct. 410.

28. Deviation from the contract by the contractor and subcontractor upon whose bond defendant company was surety. Held not discharged from liability to principal contractor. Cannot invoke doctrine of strictissimi juris. Pacific Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772.

29. See Damages, 3 C. L. 997.

30. Where bond in bastardy proceedings provides that amount to be paid prosecutrix, if same cannot be agreed upon by the parties, shall be determined by the county judge and shall be paid in the manner designated by him, no action can be maintained thereon until such determination. Meyer v. Meyer [Wis.] 102 N. W. 52.

31. The obligee may show a waiver of stipulated conditions precedent in lieu of performance unless such waiver has the effect of making a new contract or obligation. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1. Statement of plaintiff's attorney that bond given by defendant in a capias, conditioned upon his presenting his petition for the benefit of the insolvent laws, and his surrender to jail in case he failed to obtain his discharge, had in his opinion already been forfeited and that there was no use in defendant's going to jail, held not to amount to an agreement to release defendant from obligation to surrender himself. Irwin v. Hudson, 24 Pa. Super. Ct. 72. Petition held not to allege facts constituting waiver of performance of terms of bond. Bieber v. Gans, 24 App. D. C. 517.

32. See 3 C. L. 514.

33. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406. A county treasurer's bond running to the county commissioners is given to secure performance of a public trust, and may be enforced without any authorization by the obligee in the manner provided in Act June 14, 1836, for enforcing bonds given to the commonwealth. Id. To the extent that money in the hands of a county treasurer is payable to a city, such city has a legal interest in the enforcement of the bond. Id. Six years' statute of limitations does not apply, since bond was under seal. Id. County court may sue on bond given by turnpike company to state, to secure construction of road, for any injury suffered by the district through which road runs, by reason of a breach thereof. State v. Sistersville, M. & M. Turnpike Co. [W. Va.] 49 S. E. 454. Though the bond of the clerk of the United States circuit court is given to the United States as sole obligee, it is available to any private suitor to indemnify him for any loss he has sustained by reason of the failure of the clerk to discharge any of the duties of his office. United States v. Bell [C. C. A.] 135 F. 336.

34. Rev. St. 1898, § 2607. To secure the support of the prosecutrix. Meyer v. Meyer [Wis.] 102 N. W. 52.

35. Where runs to owner and all per-

A bond binding the principal and each of the sureties in a specified sum is joint and several.[36] So also is one in which the obligors "bind ourselves, our heirs, executors, administrators, and each and every one of them."[37] By statute in many states joint bonds are made joint and several.[38] The surety on a joint and several bond may be sued alone.[39]

A condition of a contractor's bond that suit must be brought thereon within six months after breach of the contract is satisfied by suit within six months after the owner knew of a breach by failure to pay for labor and materials.[40]

In Texas the state may have successive recoveries on a liquor dealer's bond, either by suits in its own behalf or by parties aggrieved, until it is exhausted.[41]

Pleading and evidence.[42]—The breach of the bond by the principal must be pleaded in an action against the sureties.[43] The mere allegation that judgment has been recovered against him is insufficient.[44] The performance of conditions precedent must be alleged.[45]

In a suit on a penal bond, in which the county and district are both interested, the declaration should show whether it is for an injury or loss suffered by the county or the district,[46] and in what the injury consists.[47]

A defense that the bond sued on was extorted in proceedings which were void for want of jurisdiction is the subject of a plea in bar and not of a plea to the jurisdiction.[48]

sons who may be injured by any breach of its conditions, subcontractors may sue thereon for breach of condition to "well and truly pay all claims for labor and material furnished for the work," whereby they were injured. Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Subcontractor cannot be deprived of his rights by any act of the owner. Id. Laborers and materialmen may sue on a contractor's bond, conditioned on payment for labor and materials for a public building, as a contract made for their benefit. Buffalo Forge Co. v. Cullen & Stock Mfg. Co., 105 Mo. App. 484, 79 S. W. 1024. The fact that the bond contains a clause authorizing its assignment to laborers and materialmen, and stipulating that in such case it shall inure to the benefit of all of them, does not prevent a materialman from suing on it as a contract for his benefit, where he is the only creditor of the contractor. Id.

36. Bond filed with petition for private road. Mariposa County v. Knowles [Cal.] 79 P. 525.

37. When joint obligors bind each executor, the obligors are by implication severaly bound, since liability of executor arises from that of his testator, and both are necessarily bound to the same extent and in like manner. Lehigh Co. v. Gossler, 24 Pa. Super. Ct. 406.

38. Sureties may be proceeded against without first bringing action against the principals. Rev. St. 1899, § 889. Bond executed by a contractor and builder, with surety, to save owner harmless from liens. Manny v. Nationl Surety Co., 103 Mo. App. 716, 78 S. W. 69.

39. Where statute provides that persons severally liable upon same obligation may all or any of them be included in the same action at plaintiff's option. Pacific Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772.

40. Henry v. Aetna Indemnity Co., 36 Wash. 553, 79 P. 42.

41. Under Tex. Rev. St. 1895, § 5060g, the state may have successive recoveries on a liquor dealer's bond until it is exhausted, either by suits in its own behalf or by parties aggrieved. Douthit v. State [Tex.] 83 S. W. 795.

42. See 3 C. L. 516.

43. United States v. Meade [Ariz.] 80 P. 326. Allegation that at certain time within the life of the bond of a United States marshal there was a certain sum in his hands, being the balance which had come into his hands by reason of advances and payments" made to him as marshal, and that he afterwards refused to pay it over, held insufficient to show breach because not showing that such balance was improperly retained. Id.

44. Official bond of United States marshal. Recovery not the breach but only evidence thereof. United States v. Meade [Ariz.] 80 P. 326.

45. In an action on a bond, a contention that the complaint does not state a cause of action because the performance of conditions precedent is not alleged is untenable, where the bond and contract are pleaded according to their legal effect and no conditions precedent appear therein. Leghorn v. Mydell [Wash.] 80 P. 833.

46. Otherwise bad on demurrer. Bond given by turnpike company to secure construction of road. State v. Sistersville, M. M. Turnpike Co. [W. Va.] 49 S. E. 454.

47. State v. Sistersville, M. & M. Turnpike Co. [W. Va.] 49 S. E. 454.

48. Bond given to secure release of vessel seized by sheriff in proceedings under act for collection of demands against ships, etc. Birch v. King [N. J. Law] 59 A. 11.

If the conditions of the bond are merely to indemnify the obligee, a plea of non damnificatus is good;[49] but if the bond is an affirmative covenant to do a specific thing and not one of indemnity against damages, liability must be adjudged, though no loss results from nonperformance and the plea is bad.[50]

Recovery cannot be had on a bond as a common-law obligation in an action which is distinctly a suit thereon as a statutory bond, with allegations appropriate thereto,[51] but in such case plaintiff may be allowed to amend so as to set up facts entitling him to recover thereon as a valid common-law obligation.[52]

The ordinary rules of pleading[53] and evidence apply.[54]

A declaration alleging performance of conditions precedent is not supported by proof of facts constituting a waiver thereof.[55]

Judgment and damages.[56]—The judgment in an action on a bond given to secure the performance of a contract should be for the penalty of the bond and the amount of damages assessed, and should provide that the judgment shall stand as security for further breaches.[57] In an action on the official bond of a probate judge, it is proper to enter judgment for the penalty of the bond, with a direction to the master to advertise for claims and report them to the court.[58]

In a suit for a liquidated sum of money, due under the express terms of a bond under seal, it is proper, on sustaining a demurrer to a plea to the declaration, to refuse to permit the damages suffered by plaintiff to be assessed by a jury, and to enter up judgment for the amount claimed.[59]

In case a replevin bond does not comply with the statutory requirements and hence is not good as a statutory bond, the court is not authorized to enter summary judgment against the sureties, but the remedy thereon is by separate action.[60]

The debt for which the surety can be held liable is limited by the penalty named in the bond, but interest may be collected thereon from the time when it became the surety's duty to pay it, though the aggregate of principal and interest exceeds the penal sum.[61]

49. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4. Bond conditioned that lessee would remove improvements before expiration of lease, given in pursuance of an order of a court of chancery "to execute a penal bond," held not such an obligation as to preclude defendants from raising question whether or not it was intended merely as a contract of indemnity. Demurrer to pleas of non damnificatus properly overruled. Id.

50. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4. The controlling question in such case is whether the sum named is to be regarded as a penalty or as liquidated damages. Id.

See Damages, 3 C. L. 997.

51. Hillman v. Mayher [Tex. Civ. App.] 85 S. W. 818.

52. Wall v. Mount, 121 Ga. 831, 49 S. E. 778.

53. See 3 C. L. 516. See, also, Pleading, 4 C. L. 980.

Narr. in action on contractor's bond held demurrable for failure to assign breaches with sufficient particularity. United States v. Jacoby, 4 Pen. [Del.] 487, 60 A. 863. In an action against a surety on the bond of an administrator given for the sole purpose of securing proper distribution of the proceeds of the sale of realty for the payment of debts, a statement of claim failing to allege that an award made by the orphans' court and claimed by plaintiff was a portion of the proceeds of such sale is insufficient to support a summary judgment for want of a sufficient affidavit of defense. Commonwealth v. Magee, 24 Pa. Super. Ct. 329.

54. In an action on an indemnity bond to recover the value of personalty wrongfully taken on execution, evidence held to sufficiently show value so as to sustain judgment for plaintiff. State v. Zeb T. Steele & Co., 108 Mo. App. 363, 83 S. W. 1023. Evidence held to show that claimant's claim was bona fide. Id.

55. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1.

56. See 3 C. L. 518. For full discussion of the proper form of judgment on penal bonds see note, 62 L. R. A. 427.

57. Fidelity & Deposit Co. v. Schuchman [Mo.] 88 S. W. 626.

58. Williams v. Weeks [S. C.] 48 S. E. 619.

59. Bieber v. Gans, 24 App. D. C. 517.

60. Bond conditioned that, if defendant was condemned in the action, he or some other person would return the property or its value, to satisfy the judgment which might be rendered, together with interest. Mariany v. Lemaire [Tex. Civ. App.] 83 S. W. 215.

61. Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Where a bond to secure the performance of

Where an owner is obliged to pay a judgment on a mechanic's lien for which a surety is liable, he is entitled to recover the costs incurred in the proceedings against him, the amount of the lien plus interest to the date of the judgment, and interest on such judgment plus the amount of costs, from the date of its rendition.[62]

"Bottle" and "Can" Laws; Bottomry and Respondentia; Bought and Sold Notes, see latest topical index.

BOUNDARIES.

§ 1. *Rules for locating or identifying.*[63]—As a general rule, a line marked part of the way will be continued in the same direction for the full distance.[64] A line may be determined by reversing the calls from a located monument to the point of beginning.[65] The actual location of a boundary may be presumed,[66] and it may be a question of fact[67] even in a statutory proceeding.[68] If the name of a natural object called for is applicable to several objects it is a question of fact as to which was intended.[69] A boundary may be determined by circumstances surrounding the delivery of possession of land conveyed if the deed contains no definite description.[70] A call of the land of a third person as a boundary extends to the true line and is not a conventional one agreed upon by parol by the parties at the time the deed was executed.[71] A call for the width of a way controls for the entire length of the way.[72]

Monuments, courses and distances, and quantity.[73] Calls for the determina-

a building contract runs to the owner and all persons who may be injured by its breach, the only limit on the surety's liability is the penalty named in the bond. Not limited to contract price. Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550.

62. Manny v. National Surety Co., 103 Mo. App. 716, 78 S. W. 69.

63. See 3 C. L. 518.

64. Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545.

65. Where a deed calls to begin at a stake, thence to a monument which can be located, the line may be determined by reversing the calls and locating the lines from the monument to the point of beginning. Marshall v. Corbett [N. C.] 50 S. E. 210.

66. Where a dwelling house is situated in the midst of a comparatively large tract, the nearest fence or hedge may ordinarily be presumed to be the boundary unless the contrary appears. Okie v. Person, 23 App. D. C. 170.

67. Evidence held for the jury as to the location of the boundary line of certain lots. Gunkel v. Seiberth [Ky.] 85 S. W. 733. Conflicting evidence as to the location of a division line held to raise a question for the jury. Daley v. Wingert, 210 Pa. 160, 59 A. 982. Actual location of a boundary held a question for the jury. Neumeister v. Goddard [Wis.] 103 N. W. 241. Where testimony as to the location of a line is conflicting, and attempts to locate the line by measuring from monuments outside the property result differently when different monuments are selected. Richardson v. Morris, 26 Pa. Super. Ct. 192.

Where the calls are ambiguous in that they may be satisfied by either of two lines, the question as to the true line is one of fact. Cole v. Mueller [Mo.] 86 S. W. 193. A call for a corner as the point where the boundary line of a lane intersects a highway precludes the idea of a boundary joining on a curve. Rafferty v. Anderson, 94 N. Y. S. 927.

68. In a proceeding under Acts 1893, p. 44, c. 22, to have a disputed boundary settled, the question as to location was held to be one of fact. Smith v. Johnson [N. C.] 49 S. E. 62.

69. Call is for "Catskin Creek" and evidence tends to show that the term was used as descriptive of "Catskin Swamp." Rowe v. Cape Fear Lumber Co. [N. C.] 50 S. E. 848.

70. No description in a deed except a statement that it includes a certain house. Carney v. Hennessey [Conn.] 60 A. 129.

71. Hall v. Davis [Ga.] 50 S. E. 106.

72. Rafferty v. Anderson, 94 N. Y. S. 927.

73. See 3 C. L. 519.

tion of boundary lines which are inconsistent are to be given prevailing effect in the following order: Natural objects;[74] artifical marks;[75] courses and distances.[76] Courses and distances control quantity,[77] but a call for quantity may be considered where the calls for boundaries are ambiguous in that they can be satisfied by either of two lines,[78] or where it is evident that there is a mistake in the calls.[79]

Conflicts between plats, maps and monuments.[80]—A recorded plat of a survey is prima facie evidence of the correctness of the lines therein laid down and is not overcome by the absence of blazed lines or traces after many years.[81] Where lands are conveyed by reference to a plat, the notes and lines of the plat control the boundaries [82] irrespective of the field notes,[83] but such reference does not preclude the showing of where the line actually fell on the ground.[84] Where a boundary is to be located between adjoining lands, that method of constructing the line should be adopted which will present an arrangement of several surveys as nearly identical with that shown by the original map as possible, instead of an observance of courses and distances which would result in the destruction of the original configuration of the surveys.[85] If it does not appear that a boundary was established by any particular survey, resort may be had to the field notes of all the surveys of the land.[86] The general intent of a plan to exhibit a symmetrical plat prevails over a particular intent with reference to a certain line.[87] Maps are but slight evidence of the configuration of a beach line many years earlier where it is shown that changes are constantly taking place.[88] Calls in a patent may be corrected by resort to the surveyor's plat.[89]

74. Kleven v. Gunderson [Minn.] 104 N. W. 4.

Monuments: Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591. The actual monuments with reference to which a conveyance is made control the description. Dows Real Estate & Trust Co. v. Emerson, 125 Iowa, 86, 99 N. W. 724; Dunlap v. Reardon, 24 Pa. Super. Ct. 35. Where a **stream** is called as a boundary it controls courses and distances. The line described would not run in the creek at all. Stonestreet v. Jacobs, 26 Ky. L. R. 628, 82 S. W. 363.

A spreading hedge not trimmed every year is a poor monument of a boundary line. Bright v. New Orleans R. Co. [La.] 38 So. 494. Evidence held to show that parties to a deed understood that a certain fence was to be one of the boundaries of the land conveyed. Dows Real Estate & Trust Co. v. Emerson, 125 Iowa, 86, 99 N. W. 724.

Evidence insufficient to establish the existence of a monument. Chew v. Zweib [Tex. Civ. App.] 86 S. W. 925.

75. Kleven v. Gunderson [Minn.] 104 N. W. 4. In fixing the boundaries from deeds, the lines calling for ascertained corners must be run thereto though it requires a variation of course and distance. Mays v. Hinchman [W. Va.] 50 S. E. 823.

76. Kleven v. Gunderson [Minn.] 104 N. W. 4. Where a monument corner called for cannot be found or the place where it stood satisfactorily ascertained, the course and distance called for must control. Mays v. Hinchman [W. Va.] 50 S. E. 823.

77. Conveyance by metes and bounds stating that there was contained a certain number of acres. McIrwin v. Charlebois [Wash.] 80 P. 285.

78. Cole v. Mueller [Mo.] 86 S. W. 193.

79. McCoy v. Cassidy [Ky.] 86 S. W. 1130.

80. See 3 C. L. 520.

81. Adams v. Clapp, 99 Me. 169, 58 A. 1043.

82. Neumeister v. Goddard [Wis.] 103 N. W. 241.

83. Haley v. Martin [Miss.] 38 So. 99.

84. Neumeister v. Goddard [Wis.] 103 N. W. 241.

85. Lyon v. Waggoner [Tex. Civ. App.] 83 S. W. 46. Rule for establishing boundary line of surveys laid down. Wise v. Sayles [Tex. Civ. App.] 86 S. W. 775.

86. In a boundary dispute where it does not appear that the original field notes were embodied in the grant and there is no connection between such notes and the original grant, the calls in field notes of other surveys is admissible. Barrow v. Lyons [Tex. Civ. App.] 86 S. W. 773.

87. Where a tract is platted into lots and blocks, the general intent of the recorded plan to exhibit a symmetrical town plat with the dimensions of the lots and streets as there laid down prevails against a particular intent to place the terminus of a street at a point indicated on the plan. Nissley v. Moeslein, 23 Pa. Super. Ct. 119. Where a tract is platted into lots using a different scale for the interior streets and lots than the scale used for the exterior lines of the farm, the lines and measurements of the general plan prevail over the terminus of one of the streets as indicated at a particular point on the plan. Id.

88. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76.

89. Hogg v. Lusk [Ky.] 86 S. W. 1128.

Government surveys.[90]—The beginning corner of a survey is of no greater dignity than other calls.[91] Original corners as established by government surveyors, if they can be found, or the places where they were established, if they can be definitely determined, are conclusive whether they were located correctly or not.[92] An original survey upon the faith of which property rights have been based and acquired control surveys subsequently made which affect such rights.[93] Where some of the calls in the field notes of a surveyor must be treated as mistakes those which will produce the fewest possible conflicts should be selected.[94] Where there is ambiguity in the field notes as applied to the land upon which the survey was made, extrinsic evidence is admissible to locate the survey,[95] but the boundaries as shown by calls in a patent cannot be overthrown by parol evidence of the surveyor's statement before making the survey as to a monument he would take for a beginning corner.[96]

Highways, streets or ways as boundaries.[97]—A boundary on a way includes the fee to the center thereof unless the terms of the grant indicate the limitation of its intent to the exterior line of the way.[98]

§ 2. *Riparian or littoral boundaries.*[99]—It is presumed that the owner of the bank of a stream owns to the thread thereof,[1] and the fact that he conveys all the land on one side of the stream or up to the meander line is insufficient to rebut this presumption.[2] A call to an unnavigable stream[3] or other body of water[4] extends to the thread thereof, but one to a navigable stream ordinarily extends

90. See 3 C. L. 520.

Note: Lines run by government surveyors of public lands as boundaries. See Rowell v. Weinemann, 119 Iowa, 256, 93 N. W. 279, 97 Am. St. Rep. 310, and note.

91. Wilkins v. Clawson [Tex. Civ. App.] 83 S. W. 732.

92. Washington Rock Co. v. Young [Utah] 80 P. 382. Evidence held to sustain a finding as to the location of a government corner. Unzelmann v. Shelton [S. D.] 103 N. W. 646. The actual location of a government corner controls though it does not correspond fully with the calls in the field notes. Tyler v. Haggart [S. D.] 102 N. W. 682. The actual point of establishment of a government corner controls the field notes of the surveyors if such point is established by clear proof. Thayer v. Spokane County, 36 Wash. 63, 78 P. 200. The actual location on the ground of an original government corner controls the field notes. Unzelmann v. Shelton [S. D.] 103 N. W. 646.

93. Washington Rock Co. v. Young [Utah] 80 P. 382. Where there is a conflict of the boundaries between surveys, the elder title prevails. Vincent v. Blanton [Ky.] 85 S. W. 703.

94. Lyon v. Waggoner [Tex. Civ. App.] 83 S. W. 46.

95. Wilkins v. Clawson [Tex. Civ. App.] 83 S. W. 732.

96. Ratliff v. May [Ky.] 84 S. W. 731.

97. See 3 C. L. 521. A conveyance of lots abutting on a public way. Western Union Telegraph Co. v. Krueger [Ind. App.] 74 N. E. 25; Smith v. Beloit [Wis.] 100 N. W. 877; Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. A conveyance bounded by a road. Mitchell v. Einstein, 94 N. Y. S. 210.

Note: Prima facia the adjacent proprietor owns to the middle of the highway; or if the same person owns on both sides he owns the whole road, subject, in either case to the public easement. Town of Chatham, 11 Conn. 60; Rich v. Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Copp v. Neal, 7 N. H. 275; Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783; Western Union Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 8 L. R. A. 429. A grant of lands bounded on a highway is presumed to carry with it the fee to the center of the road. Hunt v. Rich, 38 Me. 195; McKenzie v. Gleason, 184 Mass. 452, 63 N. E. 1076 100 Am. St. Rep. 566; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678. This presumption does not prevail, however when the sovereign or public authorities are vested with the fee of the highway (Paige v. Schenectady R. Co., 77 N. Y. S. 889), and it is rebutted by the production of a deed from which the owner derives his title, granting the land to the side of the road only. Smith v. Slocumb, 77 Mass. [11 Gray] 280; Jackson v. Hathaway, 15 Johns. [N. Y.] 447; 8 Am. Dec. 263.—From note to Wright v. Austin, 143 Cal. 236, 101 Am. St. Rep. 104.

98. One bounded by an exterior line of a road carries title only to such line. Mitchell v. Einstein, 94 N. Y. S. 210. The boundaries in the town of Colfax, Louisiana, are the outer line of the streets. Calhoun v. Faraldo [La.] 38 So. 551.

99. See 3 C. L. 521.

1, 2. Walls v. Cunningham [Wis.] 101 N. W. 696.

3. Edwards v. Woodruff, 25 Pa. Super. Ct. 575. Where a stream is called, the thread thereof is the boundary. Stonestreet v. Jacobs, 26 Ky. L. R. A. 628, 82 S. W. 363.

4. Where a call is to a swamp it is for the jury to determine whether it stops at the edge or extends to the run. Rowe v. Cape Fear Lumber Co. [N. C.] 50 S. E. 848.

only to low-water mark [5] unless the grantor owns the fee of the bed of the stream.[6] Grants of government lands bounded on streams and other waters, without any reservation, are to be construed as to their effect according to the law of the state where the lands lie.[7] The sudden changing of the course of a boundary stream does not change the boundary.[8]

A meander line [9] is not a boundary, but one designed to point out the sinuosity of the bank or shore.[9a]

§ 3. *Establishment by agreement of adjoiners.*[10]—To make a valid oral agreement between contiguous owners there must be uncertainty as to the true line,[11] but if such uncertainty exists an oral agreement carried into execution is valid, without other consideration than the settlement of the dispute.[12] Such an agreement is not within the statute of frauds,[13] and need not have been recognized for a period necessary to give title by adverse possession [14] and is enforceable in equity.[15]

§ 4. *Establishment by acquiescence, estoppel, or adverse possession.*[16]—*A boundary may result from an estoppel,*[17] and if recognized for a long period of

5. Edwards v. Woodruff, 25 Pa. Super. Ct. 575. Where low water mark of a river is a state boundary it cannot confer a right to use a bridge beyond such mark. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973. Survey following shore line held to be the proper boundary. Kleven v. Gunderson [Minn.] 104 N. W. 4.

6. Where a grantor owns the land under a navigable stream, a conveyance with the stream as a boundary passes title to the thread. Smith v. Bartlett [N. Y.] 73 N. E. 63.

7. Whitaker v. McBride, 25 S. Ct. 530. Hence, a rule of local law that an owner of land bordering on a river owns to the center of the channel inures to the benefit of a patentee. Id.

8. Channel changing from one side of an island to the other did not change the boundary of the counties. Witt v. Willis [Ky.] 85 S. W. 223.

9. See 3 C. L. 522.

9a. See 3 C. L. 522. Whitaker v. McBride, 25 S. Ct. 530, and cases there cited.

10. See 3 C. L. 522.

Note: See Tiffany, Real Property, 581 et seq.

11. Le Comte v. Carson [W. Va.] 49 S. E. 238; Mays v. Hinchman [W. Va.] 50 S. E. 823.

12. Le Comte v. Carson [W. Va.] 49 S. E. 238; Mays v. Hinchman [W. Va.] 50 S. E. 823. Whether a line established by a fence was a consentable one held a question for the jury. Dunlap v. Reardon, 24 Pa. Super. Ct. 35.

Where adjoiners take conveyances from a common grantor with reference to a line he has located on the ground such line becomes the boundary irrespective of lapse of time. Herse v. Mazza, 100 App. Div. 59, 91 N. Y. S. 778.

13. Though portions of the land of each is left in the possession of the other. Frazier v. Mineral Development Co. [Ky.] 86 S. W. 983.

14. Frazier v. Mineral Development Co. [Ky.] 86 Ill. 983. Evidence held to show that a boundary fixed by oral agreement had been recognized for a period sufficient to give title by limitations. Id.

15. Frazier v. Mineral Development Co. [Ky.] 86 S. W. 983.

16. See 3 C. L. 522.

NOTE. Adjustments and settlements: Where the boundary between coterminous owners is in dispute and they agree upon a line and take possession accordingly, the agreement binds them, though not in writing. The effect of the agreement is not to pass title, but to define the line to which the deed of the respective parties extend. It is not within the statute of frauds for it does not operate to convey land, but merely as a contract with respect to what has already been conveyed. Sherman v. King, 71 Ark. 248, 72 S. W. 571; Dierssen v. Nelson, 138 Cal. 394, 71 P. 456. Lindsey v. Springer, 4 Har. [Del.] 547; Watrous v. Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139; Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230; Steinhilber v. Holmes [Kan.] 75 P. 1019; Higginson v. Schanebock, 23 Ky. L. R. 2230, 66 S. W. 1040; Jones v. Pashby, 67 Mich. 459, 34 N. W. 152, 11 Am. St. Rep. 589; McCaleb v. Pradat, 25 Miss. 257; Atkinson v. Pease, 96 Mo. 566; Hitchcock v. Libby, 70 N. H. 399; Wood v. Lafayette, 46 N. Y. 484; Bobo v. Richmond, 25 Ohio St. 115; Hagey v. Detwiler, 35 Pa. St. 409; Harn v. Smith, 79 Tex. 310, 23 Am. St. Rep. 340. But if the location of the true boundary is known and adjoiners attempt to convey land from one to the other, changing the location of the boundary, the statute of frauds applies. Miller v. McGlaun, 63 Ga. 435; Smith v. Dudley, 11 Ky. 66, 13 Am. Dec. 222; Turner v. Baker, 64 Mo. 218, 27 Am. Rep. 226; Vosburgh v. Feator, 32 N. Y. 561; Walker v. Devlin, 2 Ohio St. 593; Harris v. Crenshaw, 3 Rand. 14; Jenkins v. Frager, 136 U. S. 651, 34 Law. Ed. 557; Nichol v. Lytle, 12 Tenn. 456, 26 Am. Dec. 240; Pasley v. English, 5 Gratt. 141.—From note to McCoy v. McCoy, 102 Am. St. Rep. 246.

17. See 3 C. L. 523, n. 9. A grantor who points out certain line is estopped after his grantee has acted on the assumption that such is the true line, to assert that it is

years is established by acquiescence [18] unless such recognition was under an erroneous belief that the boundary was the true one.[19]

Occupancy under a claim of ownership up to a certain line for the period necessary to give title by limitations establishes a boundary by adverse possession,[20] but if there is a dispute as to the true line before the period has elapsed, the line is not fixed.[21]

§ 5. *Establishment by arbitration, action or statutory mode.*[22]—Equity has no jurisdiction of a suit where mere confusion of boundaries exist,[23] but will pass upon the question as incidental to other relief.[24] The method provided by the Federal land department for restoring lost meander lines has been adopted by some states.[25] The boundaries as established by a survey applied for as provided by law is binding on one who joined in the application and was present when his land was surveyed though no formal notice of the survey was served upon him [26] unless he appeals from the report of the surveyor within the statutory period after it is filed.[27] Processioners have no authority to run a boundary line between adjoining owners where no boundary had been previously located.[28]

All evidence tending to show the location of the line is admissible.[29] Where

not the boundary. Clark v. Hindman [Or.] 79 P. 56. An unrecorded sealed agreement executed by a grantor to his grantee purporting to fix the boundaries of a way mentioned in a previously executed deed is binding on subsequent holders under the grantee with notice. Wendall v. Fisher, 187 Mass. 81, 72 N. E. 322. The calls in a lease with an option to purchase erroneously made because of a mistake of the lessor are binding on him (Naughton v. Elliott [N. J. Eq.] 59 A. 869), and cannot be varied by parol evidence (Id.). Where valuable improvements are made relative to a division line agreement, and such line is acquiesced in for a long period the parties are estopped to dispute it. Diedrich v. Simmons [Ark.] 87 S. W. 649.

18. Holding by a grantee to a line recognized as the true line by both him and the grantor **for 10 years.** Dows' Real Estate & Trust Co. v. Emerson, 125 Iowa, 86, 99 N. W. 724. Fence recognized by adjoining owners as the line for 10 years. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851. Where a laid out highway has been used within certain marked boundaries **for 30 years** it cannot be overthrown by a new survey based on assumptions and uncertainty as to lines of the original survey. Town of Vernon v. Nicolai [Wis.] 103 N. W. 1111. Where lines are recognized and acquiesced in **for 40 years** they will control over a subsequent survey though the original survey was defective. Smith v. Beloit [Wis.] 100 N. W. 877. Where parties **purchase with reference to a certain line** and recognize it as the true line for many years it will be so regarded. Sullivan v. Michael [Tex. Civ. App.] 13 Tex. Ct. Rep. 198, 87 S. W. 1061.

Evidence Insufficient to show that a boundary had been established by acquiescence. Catoosa Spring Co. v. Webb [Ga.] 50 S. E. 942.

19. Boone v. Graham, 215 Ill. 511, 74 N. E. 559.

20. See Adverse Possession, 5 C. L. 45.

An oral agreement to have a survey made will not affect it. Lamb v. Lamb [Mich.] 102 N. W. 645; Off v. Heinrichs [Wis.] 102 N. W. 904. Whether a line had been established by adverse possession held a question for the jury. Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545.

21. Evidence held for the jury as to whether there was an agreement for a survey prior to the expiration of the limitation period. Lamb v. Lamb [Mich.] 102 N. W. 645.

22. See 3 C. L. 523.

23. See 3 C. L. 523, n. 13.

McCreery Land & Investment Co. v. Myers [S. C.] 49 S. E. 848. Interpleader held not the proper remedy to settle a boundary dispute. Stephenson & Coon v. Burdett [W. Va.] 48 S. E. 846.

24. Le Comte v. Carson [W. Va.] 49 S. E. 238. Equity will determine boundaries where coterminous owners have acquiesced in a line agreed on for a long period and valuable improvements have been made relative to it. Diedrich v. Simmons [Ark.] 87 S. W. 649.

25. Circular of the United States Land Office of March 14, 1901. Kleven v. Gunderson [Minn.] 104 N. W. 4.

26. Survey made under Gen. St. 1889, §§ 1836, 1838, replaced by Gen. St. 1901, §§ 1820, 1822. Shanline v. Wiltsie [Kan.] 78 P. 436.

27. The right of appeal is not extended if the surveying operations were continuous from the time they started until concluded. Shanline v. Wiltsie [Kan.] 78 P. 436.

28. Walker v. Boyer, 121 Ga. 300, 48 S. E. 916.

29. See 3 C. L. 523, n. 22. On an issue as to the location of the boundary of a city lot, evidence tending to show that a shortage was due to encroachment on the side opposite from defendant. Gunkel v. Seiberth [Ky.] 85 S. W. 733. Testimony of a chain bearer on a survey made a year before the execution of a deed showing what lines were run, is competent to locate the boundaries and calls of the deed. Marshall v. Corbett [N. C.] 50 S. E. 210.

adjoiners claim from a common source it is not necessary for one who is plaintiff in an action to determine the division line to show that he derived title from the state.[30]

BOUNTIES.

Bounties on enlistment in the army or navy [31] and bounties paid for capture or destruction of hostile ships [32] are elsewhere treated.

The Nebraska act to promote the growth of beet sugar and chicory is invalid as embracing two subjects,[33] and no obligation rests on the state to pay bounties on sugar whose culture was induced by the act.[34] The Massachusetts act providing for the payment of bounties to certain civil war veterans is unconstitutional.[35]

Coyote bounties.[36]—The California act of 1891 provided for the presentation of coyote bounty claims to the board of supervisors who issued a certificate,[37] and on the approval thereof by the board of examiners [38] the controller was authorized to draw a warrant for the claim provided a proper appropriation had been made.[39] Such act was held not to violate the constitutional limitation of indebtedness.[40] Many claims remaining unpaid because no appropriation was made, the legislature provided that suit might be brought against the state thereon,[41] and such statute is held not to be special legislation,[42] nor does the enlargement thereby of the period of limitations [43] violate the constitutional prohibition against the making of gifts by the legislature.[44] Perfected claims for coyote bounties are assignable [45] by parol,[46] and evidence of such parol assignment does not contradict a contemporaneous power of attorney to receive payment on the certificates,[47] and in a suit on such claims, approval of the certificate by the board of examiners need not be alleged.[48] The certificate of the board of supervisors is prima facie evidence of the validity of claims for coyote bounties in a suit against the state therefor.[49] The act of 1891 is now repealed, but such repeal did not destroy the evidentiary

30. Handshoe v. Conley [Ky.] 84 S. W. 1140.

31. Military and Naval Law, 4 C. L. 640.

32. See War, 4 C. L. 1818.

33. Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80. See 3 C. L. 525, n. 38.

34. Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80. See 3 C. L. 525, n. 40.

35. In re Bounties to Veterans [Mass.] 72 N. E. 95. It appropriates public money for private purposes, and such conclusion is not avoided by the fact that the bounty is made payable for moneys allowed the state by the Federal government as reimbursement for war expenses, for such moneys having been previously applied to payment of the state debt, the bounty act took from the state treasury money which could only be replaced by taxation. Id.

36. See 3 C. L. 525, n. 41.

37. A certificate signed by the clerk, reciting an order of the board of supervisors, is a sufficient compliance with the statutory requirement that the board shall give a certificate certified by its secretary. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

38. The board of examiners though authorized to hear other evidence may allow claims for coyote bounties on the certificate of the board of supervisors. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

39. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

40. Where a statute allowing bounties makes no appropriation therefor, claims for such bounties are not debts within the constitutional limitation of indebtedness. Bickerdike v. State, 144 Cal. 698, 78 P. 277. A bounty act is not void as increasing the state indebtedness above the constitutional limit because the bounties to be earned might exceed such limit, but only the excess is avoided. Id. Claims previously paid by state officers without a prior appropriation are not to be considered in determining whether bounty claims exceed the constitutional limitation of indebtedness. Id.

41. St. 1901, p. 646. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

42. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

43. Where a statute allows suit on certain claims against the state and provides a period of limitation, suits brought within such time are not affected by the fact that the general limitation of suits against the state had run before the passage of such statute. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

44, 45. Bickerdike v. State, 144 Cal. 698, 78 P. 277. Evidence of assignment of claims held sufficient. Bauer v. State, 144 Cal. 740, 78 P. 280.

46, 47, 48, 49, 50. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

effect of certificates previously issued thereunder.[50] Under the Idaho statute only ears need be presented unless the commissioners require more.[51]

Presenting false claims.[52]—The statute relating to the making of false affidavits in support of claims does not supersede the statute relating to the presentation of false claims.[53] It is not essential to the offense of presenting a false claim for coyote bounty that the same should have been allowed or paid,[54] nor is it a defense that the spurious coyote scalps presented were easy of detection.[55]

BOYCOTT; BRANDS, see latest topical index.

BREACH OF MARRIAGE PROMISE.[56]

The promise and breach thereof.[57]—The agreement to marry must be mutual.[58] A contract to marry a woman already married to another, made less than five years after the disappearance of her husband, is immoral and unenforceable, even though the marriage was not to take place until five years after her husband's disappearance, or until a divorce was obtained.[59] Whether the breach has been condoned, and defendant released from his promise, is a question determinable by reference to the facts of each case.[60] A petition which alleges the ability of the parties to contract marriage, the mutual promises to marry and their terms, and the defendant's breach, sufficiently states a cause of action for breach of promise of marriage.[61]

Damages.[62]—Damages may be recovered in full compensation for pain, mortification, and wounded feelings of the plaintiff, the amount being for the jury.[63] Seduction of the plaintiff by defendant after the promise to marry and pending the engagement may be alleged and proved in aggravation of damages,[64] and the allegation of seduction does not affect the character of the demand as one for breach

51. Act 1901, p. 205, not Rev. L. 1887, § 1760b, governs. State v. Adams [Idaho] 79 P. 398.

52. Evidence of presenting manufactured coyote scalps to obtain bounty held sufficient to sustain conviction. State v. Adams [Idaho] 79 P. 398.

53, 54, 55. State v. Adams [Idaho] 79 P. 398.

56. Seduction under promise of marriage, see Seduction, 4 C. L. 1418.

57. See 3 C. L. 525.

NOTE. What amounts to a breach of the promise: A positive refusal to perform the contract, even if made before the time fixed for its performance, constitutes such a breach as will authorize an immediate action therefor. Zatlin v. Davenport, 71 Ill. App. 292; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Halloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Lewis v. Tapman, 90 Md. 294, 45 A. 459; 47 L. R. A. 385; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516. But a postponement by one without the consent of the other does not amount to a breach, if based upon good and sufficient reason. Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Trammell v. Vaughan, 158 Mo. 214, 81 Am. St. Rep. 302, 59 S. W. 79, 51 L. R. A. 854. After a postponement, the law construes the obligation as one to be performed within a reasonable time if no specific time has been agreed upon. Clement v. Skinner, 72 Vt. 159, 47 A. 788. Clark v. Corey, 24 R. I. 137, 52 A. 811. Failure to appear at the appointed time to fulfill the contract, without good excuse or reason, constitutes a breach. Walters v. Schultz, 1 Misc. 196, 21 N. Y. S. 768; Lahey v. Knott, 8 Or. 198; Graham v. Martin, 64 Ind. 568; Lohner v. Caldwell, 15 Tex. Civ. App. 444, 39 S. W. 591; Waneck v. Kratky [Neb.] 96 N. W. 651, 66 L. R. A. 798, 3 C. L. 525.—From note to case last cited in 66 L. R. A. 798.

58. An allegation that plaintiff, at request of defendant, promised to marry defendant on such request, and that defendant promised plaintiff to so marry her "on his request" does not state a mutual promise. Smyth v. Greacen, 100 App. Div. 275, 91 N. Y. S. 450.

59. Johnson v. Iss [Tenn.] 85 S. W. 79.

60. Letter held to contain a distinct protest against defendant's refusal to marry, and not to condone his breach, or release him from the engagement. Mickens v. Phillips [Va.] 51 S. E. 354.

61. Graves v. Rivers [Ga.] 51 S. E. 318.

62. See 3 C. L. 526.

63. Graves v. Rivers [Ga.] 51 S. E. 318. Question of damages is one peculiarly for jury or trial judge, and a verdict or finding will not be disturbed unless manifestly excessive or insufficient. Kuck v. Johnson [La.] 38 So. 559.

64. Graves v. Rivers [Ga.] 51 S. E. 318.

of contract.[65] A demand for damages for breach of promise of marriage and seduction is provable in bankruptcy though the damages are unliquidated.[66] But a plea of discharge in bankruptcy, in such an action, is insufficient if it fails to allege that the demand was scheduled or that plaintiff had knowledge of the proceedings.[67]

Evidence; instructions.—Evidence of the social and financial condition of the plaintiff and defendant is admissible as affecting the question of damages.[68] Evidence of an offer to marry plaintiff after she had instituted the action is inadmissible.[69] Neither party to an action for breach of promise of marriage is a competent witness.[70] A charge to the effect that plaintiff may recover in proof of the contract of marriage and its breach by defendant is erroneous because excluding the defense of a justifiable refusal to carry out the promise.[71]

BREACH OF THE PEACE, see latest topical index.

BRIBERY.[72]

Nature and elements of offense.[73]—Neither at common law,[74] nor under the generally accepted modern definition of bribery,[75] is that offense confined to the giving and receiving of rewards by judicial officers, or other persons concerned in the administration of justice; but it may be committed by any officer,[76] including legislative officers[77] or any person with official duties in any way connected with the administration of the government.[78] The test is whether the matter is one that may be brought before the officer in his official capacity,[79] and if the bribe is given

65. Since no action is allowed the seduced party for seduction. Biela v. Urbanczyk [Tex. Civ. App.] 85 S. W. 451.

66, 67. Biela v. Urbanczyk [Tex. Civ. App.] 85 S. W. 451.

68. Evidence that plaintiff lived with mother and step-father, that the latter was a drunkard and abused her, that her home surroundings were not agreeable, and that defendant knew these facts, held admissible. Heasley v. Nichols [Wash.] 80 P. 769.

69. Heasley v. Nichols [Wash.] 80 P. 769.

70, 71. Graves v. Rivers [Ga.] 51 S. E. 318.

72. Bribery of jurors, see the forthcoming article on Embracery, 5 C. L. ----, corruptly procuring witnesses to absent themselves, see Obstructing Justice, 4 C. L. 853.

73. See 3 C. L. 527. Pen. Code, § 86, was not repealed by Const. art. 4, § 35. Ex parte Bunkers [Cal.] 81 P. 748.

74. State v. Sullivan [Mo. App.] 84 S. W. 105.

75. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

76. A chief of police engaged in assisting a sheriff to make an arrest is a peace officer within the meaning of the statutes defining the offense of attempting to bribe a peace officer. Lee v. State [Tex. Cr. App.] 85 S. W. 804. Bribery of an officer of the United States is an offense known to the law. Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680]. That is a proper designation of the offense denounced in this statute. United States v. Green, 136 F. 618.

77. State v. Sullivan [Mo. App.] 84 S. W. 105.

78. Though a school director in corruptly accepting money for his vote or influence in the appointment of teachers may not be technically guilty of bribery, yet for such an act he may be indicted at common law. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

79. See 3 C. L. 527, n. 76. The fact that a common council had no authority to make the contract in question did not prevent the payment of money to councilmen to influence their action in favor of the contract from constituting a violation of the statute defining bribery of a legislative officer. Comp. Laws, § 11,312. People v. Mol [Mich.] 100 N. W. 913; People v. Ellen [Mich.] 100 N. W. 1008. The question of whether the act of voting on the passage of an ordinance, by an alderman, is an act relating to his official capacity, cannot be tested by the validity or invalidity of the privilege sought to be granted, but depends upon the question of whether or not the ordinance was one dealing with a subject over which the common council had jurisdiction, and upon which the members had a right to vote, as the use and control of the public streets. Murphy v. State [Wis.] 102 N. W. 1087. It is no defense to a charge of bribery of an alderman that the proposed ordinance, on which his vote and action were corruptly influenced, would have been invalid if passed. Id. Nor can arbitration proceedings, irregularly instituted, be relied upon to show that an official had no power to act, so that he could not be guilty of receiving a bribe to influence his official action. As where the city ordinances authorized arbitration to persons aggrieved by the refusal of the building inspector, when vested with discretionary power, to grant a building permit, provided an application

and received by the accused with the understanding that it should influence him in his official action, it is immaterial whether he was or was not, or could or could not be so influenced.[80] Where the statute predicates criminality on the receipt of something of value, a mere promise or illegal undertaking is not sufficient to support a conviction.[81]

The offense of bribery embraces any attempt to bribe,[82] but the actual tender of a bribe is not necessary to perfect the offense of offering a bribe; any expression of an ability to produce a bribe is all that is necessary.[83]

Solicitation of a bribe is an offense in most states.[84] The power of expulsion of a member of the legislature for bribery is not affected by the constitutional provisions, disqualifying from holding any public office or trust any member convicted of bribery.[85]

Indictment.[86]—Immaterial variances as in other cases are diregarded.[86a] Several indictments are discussed as to form in the cases cited in the note.[87]

Evidence.[88]—Conversations subsequent to the abandonment of the conspiracy to bribe may be shown where their purpose was to prevent exposure.[89] Cases discussing the sufficiency of the evidence are cited below.[90]

therefor was made within 48 hours after notification of the refusal; but the application was not made until after the expiration of such time, and in a case where the inspector had no discretionary power. State v. Dunn [Wis.] 102 N. W. 935. Indian Agent held subject of bribery with respect to execution of leases of land. Sharp v. U. S., 138 F. 878. The legislative committee on commissions and retrenchment has power to investigate loan associations and the taking of a bribe by a member of the committee to influence his action in respect to such investigation is criminal. Ex parte Bunkers [Cal.] 81 P. 748.

80. State v. Dunn [Wis.] 102 N. W. 935.

81. See 3 C. L. 527, n. 83. A bank check is not an "obligation for the payment of money" within the meaning of the term as used in the statute for the punishment of bribery of United States officers. Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3676.] United States v. Green, 136 F. 618. Under the statute of Wisconsin relating to bribery, which probibits the receipt of any pecuniary or personal advantage, present or prospective, proof of the acceptance of a promise to pay money in the future will support a conviction. Rev. St. 1898, § 4475. Schultz v. State [Wis.] 104 N. W. 90. Where the statute makes a crime to agree to receive, as well as to receive, anything of value, proof of receiving a mere promise to give or do something in the future will not support a charge of receiving property or anything of value. Such promsie is made illegal by the statute and is therefore of no value. Id.

82. An indictment is not bad because in the accusing part it names the offense as bribery, but sets forth the offense, in the specific description of it, only as an attempt to bribe. Commonwealth v. Bailey, 26 Ky. L. R. A. 583, 82 S. W. 299.

83. Lee v. State [Tex. Cr. App.] 85 S. W. 804.

84. Under the statute of Missouri making it a felony to bribe a legislative officer, it is a misdemeanor for such officer to solicit a bribe (State v. Sullivan [Mo. App.] 84 S. W. 105); but in Kansas the solicitation of a bribe does not constitute an attempt to accept or receive a bribe, within the meaning of the statutes relative to attempts [Gen. St. 1901, § 2284.] (State v. Bowles [Kan.] 79 P. 726), and is not punishable as a crime.

85. Const. California, art. 4, § 35. French v. State Senate [Cal.] 80 P. 1031.

86. See 3 C. L. 527.

86a. Lee v. State [Tex. Cr. App.] 85 S. W. 804.

87. Forms of indictment held sufficient. Of United States officer, under Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680]. United States v. Green, 136 F. 618. Under the statutes of Wisconsin [Rev. St. 1898, § 4475], charging defendant with having, while acting in his official capacity as alderman, corruptly received money to influence his action, vote, and judgment in respect to an ordinance purporting to grant the privilege of laying a railroad track in a public street for private purposes, whereon he was required to act. Murphy v. State [Wis.] 102 N. W. 1087. Indictment of state senator for taking bribe to influence his action in respect to a committee investigation, held sufficient. Ex parte Bunkers [Cal.] 81 P. 748. Indictment of Indian agent for receiving bribe in respect to leases of land on reservation need not describe leases with particularity. Sharp v. U. S. [C. C. A.] 138 F. 878. For attempt to bribe a peace officer. Lee v. State [Tex. Cr. App.] 85 S. W. 804. For offering to bribe a witness. Commonwealth v. Bailey, 26 Ky. L. R. 583, 82 S. W. 299. Form held insufficient. For corrupting a juror. State v. Nunley, 185 Mo. 102, 83 S. W. 1074.

88. See 3 C. L. 528.

89. Conversation between conspirators concerning re-election of one of them as city attorney. People v. Mol [Mich.] 100 N. W. 913.

90. Evidence held sufficient: To support a conviction of a legislative officer for soliciting a bribe. State v. Sullivan [Mo.

Trial and instructions.[91]—Where several defendants are charged with bribery, growing out of the same transactions and the same evidence is relied upon to convict all of them, juror who have sat in the trial of part of the defendants are subject to challenge for cause in other cases.[92] In a prosecution for attempt to bribe, a charge defining a bribe in the terms of the statute is proper,[93] and a charge that the exact language, in which the offer was made, need not be proven, is harmless, even if erroneous, when the exact language is proved.[94] A charge in a prosecution for bribery was not objectionable as omitting the element of "corrupt intent," in defining the offense, when the court employed the term "corruptly" in stating the charge preferred in the indictment and defining the offense.[95] Nor does the statement that, if the check "was so (corruptly) given and received, it is immaterial whether or not it did or could, in fact, influence him in his official action," eliminate from the instructions the element of corrupt intent.[96]

BRIDGES.

§ 1. *Regulation and control.*[97]—The state has full power to control and regulate all bridges as parts of the public highways,[98] and a municipality has no control over a bridge which is located on land belonging to the state and was built with county funds though it is located within the municipal limits.[99] A statute of Indiana cannot give a right to use a bridge over the Ohio river, beyond low-water mark, which constitutes the boundary line of Indiana.[1]

§ 2. *Establishment and location by public agencies.*[2]—Under the New York act for the reconstruction of an approach to the Brooklyn bridge, it was not a condition precedent to the exercise of the right of eminent domain to make an effort first to purchase the necessary land.[3] The fact that the municipality was authorized by the legislature to construct a bridge does not relieve it from liability for a trespass committed in the administration of it.[4]

App.] 84 S. W. 105. To sustain a verdict that the money paid was received as a bribe. State v. Dunn [Wis.] 102 N. W. 935. The direct evidence of the promisor to the making of the promise and of the payment of the money suffices to carry both questions to the jury, notwithstanding defendant's direct denial and the testimony of other witnesses in refutation of the payment. Schutz v. State [Wis.] 104 N. W. 90.

91. See 3 C. L. 528.

92. People v. Mol [Mich.] 100 N. W. 913.

93. Pen. Code 1895, art. 144. Lee v. State [Tex. Cr. App.] 85 S. W. 804.

94. Lee v. State [Tex. Cr. App.] 85 S. W. 804.

95, 96. State v. Dunn [Wis.] 102 N. W. 935.

97. See 3 C. L. 529.

98. In re Opinion of the Justices [Me.] 60 A. 85. Under its constitutional authority to provide for bridges on the East river the legislature of New York has full power to regulate their construction and management and to delegate its powers in that respect [Const. art. 3, § 18], and a contract entered into by a commissioner in charge of such a bridge, owned by the city, for the operation of a railroad over the bridge, does not create a franchise beyond the power of such officer. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754.

99. Under Rev. St. § 860, the state making no claim to the structure, taxpayer cannot enjoin repairs by county. Ohio v. Carlisle, 2 Ohio N. P. (N. S.) 627.

1. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

2. See 3 C. L. 529.

3. Laws 1901, p. 1765, c. 712. But it was held necessary that such general plans and specifications be prepared as would show the court that the city was warranted in determining the necessity of taking the land. In re New York, 93 N. Y. S. 655.

4. Persons clearing the New York and Brooklyn bridge swept debris from the bridge so as to fall on the roof of plaintiff's house. Held, that the city was liable for matter so cast on plaintiff's house, but

§ 3. *Contracts and construction.*—Public officers have only such authority to make contracts for the building and repair of bridges as is specially conferred by law;[5] and authority conferred to rebuild or repair a bridge when damaged or rendered unsafe by the elements contemplates only damage by some extraordinary means and not by ordinary wear and tear.[6] Failure to complete a bridge within the time limited in the contract, caused by the service of an injunction upon both the city and the contractor, does not put him in default.[7] Neither unauthorized or collusive acts by a supervising engineer or a member of the board of supervisors, nor payments for the construction of a bridge, made without knowledge of the default of the contractors, nor the use of the bridge by the public, will estop a county, when sued for a balance due on a bridge contract, from setting up a counterclaim for damages for breach of contract by the substitution of inferior materials.[8] Nor will the fact that payment was voluntarily made on an unauthorized bridge contract constitute a defense to an action to recover moneys unlawfully drawn from the county treasury.[9] In Pennsylvania, upon the disapproval of a county bridge by the inspectors and their report of the amount to be deducted from the contract price, the court of quarter sessions cannot enter judgment against the contractors, after hearing evidence, but must approve, modify, or disapprove the report.[10]

§ 4. *Public liability for costs and maintenance.*[11]—The inherent power resides in the state to compel the maintenance and repair of bridges as parts of the legally located highways,[12] and their construction, support, and maintenance is a burden or duty,[13] which the legislature may impose on the municipal subdivisions of the state in such proportion as it may see fit.[14] The proceedings to enforce

not for water from rain and melting snow blown by the wind upon the house. Sadlier v. New York, 93 N. Y. S. 579.

5. See 3 C. L. 530. A commissioner of highways has no authority to make such contracts in behalf of the town unless specially authorized by statute. Livingston v. Stafford, 99 App. Div. 108, 91 N. Y. S. 172. An engineer employed by the board of supervisors to oversee the construction of a bridge has no authority to bind the county by consenting to a change in the specifications. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536. Under the statutes of Massachusetts the mayor and street commissioner of the city of Worcester, when "directed and authorized" by the city council to construct a bridge, may legally contract for the same; and a mere estimate, but not a determination, of the cost will not preclude them from contracting in good faith, with the lowest bidder, at a cost slightly in excess of the estimate. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639. In Maine, highway commissioners have power, by summary methods, to repair bridges, in case of neglect or refusal by the municipalities to do so. Rev. St. c. 23, §§ 56-59. In re Opinion of the Justices [Me.] 60 A. 85. In letting a contract for a new bridge, county commissioners may include therein an agreement whereby the material in the old bridge is given to the contractor for removing the same, the value of such material not exceeding the legal limit of $1,000. Huston v. County Com'rs, 2 Ohio N. P. (N. S.) 582.

6. Laws of 1890, p. 1179, c. 568, § 10, as amended by laws of 1895, p. 408, c. 606. Livingston v. Stafford, 99 App. Div. 108, 91 N. Y. S. 172.

7. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639.

8. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536.

9. Lan. R. L. 2655 (Rev. St. 1277). But where a bridge company performed its contract in good faith and has received the stipulated price, it cannot be forced to return the same without an offer of relinquishment of the property. Ohio v. Fronizer, 2 Ohio N. P. (N. S.) 373; 15 Ohio N. P. 613.

10. Mahoning Creek Bridge, 24 Pa. Super. Ct. 576.

11. See 3 C. L. 530.

12. In Maine, when two cities neglect to maintain, the legislature can enforce compliance by the establishment of a commission or any other agency, under its general constitutional powers to provide for the public interests. Const. art. 4, § 1. In re Opinion of the Justices [Me.] 60 A. 85.

13. County commissioners cannot ignore their statutory duties in the construction and repair of bridges, though required for the public safety, but unsafe bridges should be closed to travel until they can be legally repaired. State v. Fronizer, 2 Ohio N. P. (N. S.) 373, 15 Ohio N. P. 613.

14. In re Opinion of the Justices [Me.] 60 A. 85. Both at common law and by statute a county may be required to maintain and repair a bridge located mainly within the territorial limits of another county.

such liability, however, must pursue the statute strictly,[15] and such special statutory provisions must be construed in connection with the general laws on the same subject.[16] The New York and Brooklyn bridge, constructed under authority of the legislature, being a public highway, the obligations and liability of the city of New York with respect to its care, are to be determined with regard to its duties as to streets, modified by the fact that the bridge is not on the surface of the earth.[17]

§ 5. *Establishment, construction, and maintenance by private enterprise*[18] is more fully treated elsewhere.[19] The right to repair or alter, or to improve a bridge, for the safety of the public, is incident to the power to build it,[20] and a railroad company that has built a bridge across a navigable river, in compliance with an empowering act of Congress, has a vested right to maintain it, so long as used for railroad purposes.[21] Although a railroad company owes certain services to the public, it cannot, therefore, be compelled to allow a connecting railroad company to use its bridge, except by due process of law,[22] and a railroad company which has built, controls, and is required to maintain a bridge carrying a highway over its tracks, has a standing in equity, under the statute of Pennsylvania, to object to the construction of street car tracks over the bridge, although the municipality has consented.[23] Legislative authority given to a corporation to lease is canal and appurtenances does not absolve it from the duty to maintain good and sufficient bridges over its canal, imposed by its charter.[24] The statute of Penn-

Dodge County v. Saunders County [Neb.] 100 N. W. 934. The statutory obligation of joint repair of a bridge applies in case of a highway by user and working, without the regular steps having been taken to lay out a town-line road. Rev. St. 1898, § 1273. State v. Sexton [Wis.] 102 N. W. 24. An act which authorizes a township to contribute to the erection of a bridge, to be constructed under the supervision of the county commissioners, is not void because it authorizes an unequal burden of taxation on the township. McMillan v. Payne County Com'rs, 14 Okl. 659, 79 P. 898. The provisions in the general highway law of New York, for the joint construction of bridges on the boundaries of townships, applies as well when the stream crosses the line, as when it runs along the line. Gen. Highway Law, §§ 130, 136. In this case one town lay on both sides of the stream, which found the boundary line between the other two. In re Town of Madrid, 44 Misc. 431, 90 N. Y. S. 110.

15. A statute requiring the chairman of the county board to cause repairs to be made in a public bridge, in a town which refuses to make them, is not complied with by the rebuilding of a bridge under the supervision of the chairman of the county board, its committee and a town board. Rev. St. 1898, § 1311. State v. Sexton [Wis.] 102 N. E. 24. In Oklahoma, under the Act of March 11, 1903, authorizing bridges to be constructed, repaired and reconstructed, a bridge may be constructed within less than six miles of a bridge already existing, if within one mile of an incorporated town or city, and it may be built where one already exists, but which has become dangerous by decay or damage. McMillan v. Payne County Com'rs, 14 Okl. 659, 79 P. 898.

16. A special act of the legislature, declaring a section-line road a county road and authorizing the necessary gradings, bridges and culverts to make it a suitable highway, construed in connection with the general law and held to be directory and not mandatory. Sec. 2, c. 297, p. 549, Sess. Laws 1901. State v. Myers [Kan.] 80 P. 638. Rev. St. Mo. 1899, §§ 5193, 5194, relative to the joint construction of bridges by counties are to be construed with the rest of chapter 84, and vest a discretion in the county court, as to the building of a bridge, which will not be interfered with by mandamus. State v. Thomas, 183 Mo. 220, 82 S. W. 106.

17. The city is liable as a trespasser if debris is swept off the bridge on another's premises, but is not liable for the water resulting from rain and snow that may be blown on such premises. Sadlier v. New York, 93 N. Y. S. 579.

18. See 3 C. L. 531.

19. See Railroads, 4 C. L. 1181; Toll Roads and Bridges, 4 C. L. 1681.

20. The courts will not, at the suit of the United States, enjoin the replacing of the superstructure of a railroad bridge over a navigable river, constructed in compliance with an act of congress, so long as used for the purposes contemplated in the act. United States v. Parkersburg Branch R. Co., 134 F. 969.

21. It can be removed, as an obstruction to navigation, only by congress, and then only upon indemnification for its value. United States v. Parkersburg Branch R. Co., 134 F. 969.

22. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

23. Act of June 19, 1871, P. L. 1360. Pennsylvania R. Co. v. Parkesburg & C. St. R. Co., 26 Pa. Super. Ct. 159.

24. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 59 A. 29.

sylvania, providing for the taxation of bridge companies on their stock does not authorize the taxing of bridges as real estate.[25]

§ 6. *Injuries from defective bridges.*[26]—A municipality is liable for damages caused by its bridge-tender negligently running the end of a swing bridge against a vessel;[27] but, under the bridge act of New Jersey, an action for damages to a vessel passing through a draw, while the authorities were actually engaged in repairing the same, will not lie against the municipality.[28]

Municipalities having control of highways and bridges are generally required to keep them reasonably safe for ordinary travel;[29] the duty, however, is purely statutory in most states,[30] and in no event is the municipality held as an insurer;[31] nor is a county liable where the cause of the injury was the act of God, or the elements, in causing the bridge to collapse.[32] There can be no recovery where the officials having the care of the bridge had no notice of its defective condition and had used due diligence in its care and maintenance.[33] The wrongful neglect to repair a bridge must be continuing when the injury results, to support an action for

25. Gen. St. 1902, §§ 2331, 2332, provide for deducting the taxes paid on real estate, which is to be assessed and taxed in the town where located. Middletown & P. Bridge Co. v. Middletown [Conn.] 59 A. 34.

26. See 3 C. L. 531.

27. City of Chicago v. Hawgood & Avery Transit Co., 110 Ill. App. 34.

28. Gen. St. p. 307. Mattlage v. Chosen Freeholders of Hudson and Bergen Counties [N. J. Law] 60 A. 195.

29. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. An instruction that the defendant city was bound to use all reasonable care to keep its streets and bridges in a safe condition, and that, for failure to do so, was liable to one injured thereby, was approved as imposing no greater duty on the city than required by law. Benson v. Spokane [Wash.] 80 P. 1106. In an action for personal injuries received from the breaking of a bridge while driving an engine over it, this instruction was approved: "'Reasonable repair' and 'reasonably safe' mean what the terms imply—in other words, that the timbers of the bridge are reasonably sound and strong and in good condition to carry safely a load as heavy as bridges constructed in like manner, of equally as large timebrs, ought to carry when reasonably sound and in a reasonable state of repair." Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. In an action for damages from the collapse of a bridge, which had been repaired by the supervisors after notice of its unsafe condition, the fact that a supervisor and the foreman of the bridge crew had inspected the bridge after the repairs and thought it reasonably safe is no defense. Schlensig v. Monona County [Iowa] 102 N. W. 514.

30. In the absence of statutory provisions imposing liability, neither is a city liable for personal injuries caused by a defective bridge, which it has negligently failed to repair, nor are the members of the city council liable for damages for the improper exercise of their discretionary powers in failing to make such repairs. Gray v. Batesville [Ark.] 86 S. W. 295. Nor can a county be held liable for injuries caused by a defective bridge, which was built prior to the passage of an act making the county primarily liable in such cases. Act approved Dec. 29, 1888 (Acts of 1888, p. 39). Pool v. Warren County [Ga.] 51 S. E. 328.

31. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. Highway commissioner, under the circumstances, held not guilty of negligence in failing to place guard rails on a nine-foot bridge, so as to justify a recovery for injuries received by being driven off the side in a dark night. Mack v. Shawangunk, 98 App. Div. 577, 90 N. Y. S. 760.

32. The defense was that plaintiff drove on the bridge and remained there during a terrible and unusual storm for the purpose of shelter and that the storm caused the bridge to collapse. Verdict for defendant sustained. Culbertson v. Abbeville County [S. C.] 50 S. E. 33.

33. Notice to the commissioner of highways of the defective condition of a bridge is notice to the town; and it is not necessary that the notice should have been received by the commissioner in office at the time of the accident. It is the commissioner that receives the notice and not the individual. Kelly v. Verona, 97 App. Div. 488, 90 N. Y. S. 89. Under a statute rendering a county liable for damages resulting from a defective county bridge, where the chairman of the board of county commissioners has five days' notice of the defect, such notice must be actual personal notice, as distinguished from constructive or implied notice. No proof was offered to show that the chairman had personal knowledge of the rottenness of the sill which caused the bridge to fall. Parr v. Shawnee County Com'rs [Kan.] 78 P. 449. A general knowledge of the plan of the bridge as originally constructed, faulty in some respects, but which has stood and been in use for nine years, cannot be regarded as notice of some particular defect, as a rotten sill. Id. Evidence that the chairman of the county commissioners overheard a conversation, as to the bridge in question and others being in a defective condition, is not sufficient to show such notice. Scruggs v. Leavenworth County Com'rs [Kan.] 80 P. 595.

damages.[34] Assuming the care of a bridge and exercising acts of ownership and control over it are sufficient to render a city liable for its defective condition,[35] and a city which permits the use, and a street railway company which makes use of a bridge which is dangerous and unsafe for the use to which it is put, are both negligent.[36]

The officers charged with the care of bridges are not liable unless willfully or grossly negligent.[37]

A private corporation that is required to keep a bridge in good repair is liable for damages resulting from it failure to do so,[38] and this is so, whether the defect be latent or patent, unless the injured party was in default, or unless the defect arose from inevitable accident, tempest or lightning, or the wrongful act of some third person, unknown to the corporation.[39] A street railway company which uses a city bridge for its tracks thereby adopts such bridge as one of its appliances, and is liable for damages resulting from its defective condition, if it knowingly or negligently uses the same.[40]

Defective construction.[41]—While, under local laws, a county may not be liable for an accident due to a defect in a bridge caused by lack of repairs, of which it had no notice, it is nevertheless liable where the accident is due to defects in the original structure.[42]

Proximate cause of injury.[43]—In determining what is proximate cause, the true rule is that the injury must be the natural and probably consequence of the negligence, such a consequence as, under the circumstances of the case, might or ought to have been foreseen by the wongdoer as likely to follow from his act.[44]

34. Mattlage v. Chosen Freeholders of Hudson and Bergen Counties [N. J. Law] 60 A. 195.

35. As where the "bridge carpenter" for the city had laid the plank flooring; the street supervisor had covered the bridge with earth, and the city had on several occasions made repairs. Mackay v. Salt Lake City [Utah] 81 P. 81.

36. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691.

37. Gray v. Batesville [Ark.] 86 S. W. 295. The Kentucky statute, providing that a special commissioner appointed to let out and superintend the construction of any bridge shall be liable for any defect and requiring him to give bonds, is intended only for the protection of the county, and does not make him personally liable to a person injured by reason of a defective bridge. Hardwick v. Franklin [Ky.] 85 S. W. 709.

38. A canal company that is required to maintain good and sufficient bridges where the highways cross its canal, cannot relieve itself of that duty by leasing its canal, appurtenances and franchises to a railroad company. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 59 A. 29.

39. But an instruction that the company is liable, whether it had notice of the defect or not, is too broad, even under the Pennsylvania rule, where it makes no exception as to the cause of the defect; as where plaintiff was throw from his bicycle and injured, as he claimed, on account of defects in the carriageway of the bridge. Hellyer v. Trenton City Bridge Co., 133 F. 843.

40. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691.

41. See 3 C. L. 532.

42. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. A municipality is liable for an injury caused by an unsafe public structure, although the defect exists in the plan adopted for its construction, if there be no reasonable necessity for having the defect. Rule applied to the construction of the railing of a bridge. McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102. The placing in a bridge of alleged defective stringers, under the direct supervision of the road supervisor, is of itself actual notice of their condition. Howard v. Snohomish County [Wash.] 80 P. 293.

43. See 3 C. L. 533.

44. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. Where the complaint, in an action for injuries from a defect in a bridge, alleged that they resulted from plaintiff's horse stepping in a hole, it was not necessary that plaintiff should prove the exact facts, if the hole was the proximate cause in making the horse shy and throw plaintiff from the buggy. Benson v. Spokane [Wash.] 80 P. 1106. Where plaintiff, before driving an engine upon a bridge, was warned by the highway commissioner to use planks and did so, but the engine ran off of them and broke the bridge down, injuring plaintiff, the accident was but a casualty and defendant was not liable. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. The fact that plaintiff's house was twenty feet distant from the base of a vertical line, dropped from the edge of the New York and Brooklyn bridge, did not

Contributory negligence.[45]—Technically speaking the doctrine of assumption of risk is not applicable to an action for damages caused by the collapse of a bridge while plaintiff was driving a traction engine over it;[46] but one who knows, or has reason to believe, that a bridge will collapse under the load he is about to drive over it, and nevertheless voluntarily and knowingly takes the risk, cannot recover for injuries received from the breaking down of the bridge.[47] One approaching a bridge is not guilty of contributory negligence, as a matter of law, in stepping on the bridge where the planking is defective, while looking to one side observing a workman cutting down a tree.[48] A party who is injured by being driven off the edge of a bridge, while riding as the guest of another, is not chargeable with the negligence of the driver.[49]

Remedies.[50]—An action may be maintained against the county commissioners by an administrator of one whose death resulted from their negligence to keep a county bridge in repair.[51] A party bringing suit for damages resulting from a defective bridge is not restricted to the sum stated in the claim presented to the city, as required by law, but may recover his actual damages, though exceeding his claim presented.[52]

Pleading and evidence.[53]—It must be alleged and proven that the county, or its officers, had knowledge of the unsafe condition of the bridge, or might with reasonable diligence have known it, and that they neglected to repair it within a reasonable time;[54] but a general charge of negligence is sufficient to withstand a demurrer.[55] In an action for injuries resulting from the breaking of a bridge, witnesses cannot testify that the bridge was reasonably safe, that being a question for the jury.[56] The neglect of the highway commissioner may be shown to establish the neglect of the town;[57] and defendant's lack of care of the bridge and knowledge of its defective condition may be shown by evidence of the unsound condition of the planking when the bridge was redecked just before the accident.[58]

render the air currents, which carried the debris swept off the bridge on to plaintiff's premises, a superseding cause relieving the city from liability for the trespass. Sadller v. New York, 93 N. Y. S. 579.

45. See 3 C. L. 533.

46. But an answer containing facts raising the defense of contributory negligence, on account of the special danger from plaintiff's use of the bridge, was held not subject to a motion to strike because it alleged that plaintiff "assumed the risk." Howard v. Snohomish County [Wash.] 80 P. 293.

47. Evidence held to show, in contradiction of the verdict, that plaintiff's agent knew, before attempting to cross the bridge, that it was liable to collapse under the load he was about to drive upon it. Johnson v. Denning, 94 N. Y. S. 532. A street railway employe, who knows or should know of the defective condition of a bridge used by the company, and nevertheless operates or rides upon cars over the same assumes the risk of the bridge's falling. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691. Verdict of jury for defendant, on account of contributory negligence of plaintiff in driving a traction engine of extraordinary weight over a bridge, sustained. Howard v. Snohomish County [Wash.] 80 P. 293.

48. Brewster v. Elizabeth City [N. C.] 49 S. E. 885.

49. Mack v. Shawangunk, 98 App. Div. 577, 90 N. Y. S. 760.

50. See 3 C. L. 534.

51. Rev. St. §§ 845, 6134. Rahe v. Cuyahoga County Com'rs, 5 Ohio C. C. (N. S.) 97; 26 Ohio C. C. 489.

52. Rev. St. 1898, § 312. The claim was $1,520, and the verdict for $1,980, sustained. Mackay v. Salt Lake City [Utah] 81 P. 81.

53. See 3 C. L. 534.

54. Complaint held sufficient after verdict, and evidence sufficient to warrant the inference that defendant ought to have known of the defective condition of the bridge. Rice v. Wallowa County [Or.] 81 P. 358, citing Heilner v. Union County, 7 Or. 83, 33 Am. Rep. 703; Mack v. City of Salem, 6 Or. 275.

55. An allegation that a city negligently permitted a bridge to get out of repair and dangerous for travel, and, well knowing that fact, negligently suffered the same to remain out of repair and to be used by the public for travel, held sufficient. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691.

56. Competency of evidence as bearing on the questions of negligence and contributory negligence determined. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788.

57. Kelly v. Verona, 97 App. Div. 488, 90 N. Y. S. 89.

58. Rice v. Wallowa County [Or.] 81 P. 358.

Interrogatories.[59]

Questions for jury.[60]—The questions of defendant's negligence,[60a] plaintiff's contributory negligence,[61] the proximate cause of the injury,[62] and the condition of the bridge,[63] are all proper questions for the jury.

§ 7. *Injuries to bridges.*[64]—The provisions of the codes of South Carolina prohibiting anyone in charge of any carriage or animal from allowing it to stop on any bridge over 10 feet long, and making such person liable for all damages occasioned by so doing, apply to bridges built by the county under the general law.[65]

BROKERS.

§ 1. *Employment and relation in general.*[66] *Definition.*—A broker is an agent employed to make bargains.[67]

Creation of relation.—The relation of principal and agent is created by contract, the sufficiency of which is determined by the rules of law applicable to all other contracts.[68] There must be a meeting of the minds of the parties, and a consideration.[69] Its construction is for the court,[70] in the light of the facts and cir-

59, 60. See 3 C. L. 534.

60a. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. Verdict of jury for plaintiff for injuries, resulting from his horse stepping into a hole in the bridge and throwing plaintiff from the wagon, sustained. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234. A finding by a jury that the railing of the bridge, which broke and allowed plaintiff's infant daughter to fall over was unsafe, sustained. McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102.

61. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. Where there are conflicting statements and inconsistencies in the evidence as to the contributory negligence of the plaintiff, the question must be left to the jury. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234. Whether one approaching a bridge was guilty of negligence in stepping on it, where the planking was defective, while looking to one side observing a workman cutting down a tree, held a question for the jury. Brewster v. Elizabeth City [N. C.] 49 S. E. 885. Whether plaintiff, who, being near-sighted and wearing glasses, attempted to cross a bridge on a bicycle in the dark and rode off the approach into the stream, was guilty of negligence, was held a question for the jury. Spring v. Williamstown, 186 Mass. 479, 71 N. E. 949.

62. Where an elderly woman was injured by her horse becoming frightened and backing her buggy off of the end of a bridge, where there was no guard rail, the questions of negligence, contributory negligence and proximate cause of the injury were properly left to the jury. Russell v. Westmoreland Co., 26 Pa. Super. Ct. 425. Whether the act of plaintiff in stepping on a bridge where the planking was defective, while looking to one side at a workman cutting down a tree, was the proximate cause of his injury, was, under the evidence, a question for the jury. Brewster v. Elizabeth City [N. C.] 49 S. E. 885.

63. Witnesses cannot testify that the bridge was reasonably safe, as that is a question for the jury. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788.

64. See 3 C. L. 535.

65. Cr. Code, § 438; Civ. Code, § 1418. Culbertson v. Abbeville County [S. C.] 50 S. E. 33.

66. See 3 C. L. 535.

67. Alt v. Doscher, 102 App. Div. 344, 92 N. Y. S. 439.

68. Letter held to create agency to sell land. Weaver v. Snively [Neb.] 102 N. W. 77. Letters construed and held to constitute a contract of agency and not a sale. Sequatchie Handle Works v. Jennings [Ind. App.] 74 N. E. 578. Procuring a purchaser is an acceptance of an offer of a commission to do so. Brown v. Smith [Mo. App.] 87 S. W. 556. Undisclosed intention of purchaser to settle on difference in price does not make it a gambling contract as to the broker. Hocomb v. Kempner, 214 Ill. 458, 73 N. E. 740.

69. Contract for commissions on sales made by the landowner himself held without consideration. Wright v. Fulling, 93 N. Y. S. 228. Agreement by broker to divide commissions with a third person lest

cumstances surrounding the parties at the time it was made.[71] If ambiguous the construction adopted by the parties will be followed.[72] A material alteration in a written contract between a broker and his principal made by one without the consent of the other renders the whole contract void.[73]

Necessity of contract being in writing.[74]—In the absence of statute the contract between the broker and his principal need not be in writing. In some jurisdictions the statutes require that the broker's authority to sell land must be in writing,[75] and in such case he cannot recover commissions if the statute has not been complied with,[76] though a contrary rule prevails in the second judicial department in New York.[77] The New York statute does not apply to an agreement with the purchaser for commissions,[78] nor to an employment to sell a contract for the purchase of land.[79] A written authority from one of several owners in common is sufficient.[80] A writing signed by the owner and addressed to the broker, expressly or impliedly acknowledging authority to act as agent for the purposes of the sale, is a sufficient compliance.[81]

Termination of the relation.[82]—Violation by a broker of the terms of his employment is a justification for the termination of his agency.[83] A principal cannot terminate the broker's agency in the midst of negotiations and refuse to consummate a sale negotiated by the broker so as to deprive him of his compensation.[84] In the absence of a revocation of his agency or a time limit to his employment, the broker is entitled to a reasonable time within which to find a purchaser,[85] and the expiration of such time merely authorizes a termination of the agency and does not deprive the broker of his commission if he finds a purchaser before such termination.[86]

Scope of broker's authority.[87]—A real estate broker is a special agent and

the latter procure revocation of the agency is without consideration. Fox v. Seabury [Pa.] 60 A. 508.

70. Contract all embodied in letters and telegrams exchanged. Sullivant v. Jahren [Kan.] 79 P. 1071.

71. Contract with insurance broker construed and held not to obligate the insured to pay a commission on insurance procured by broker to take place of other insurance previously procured by him but canceled by insurance company. Tanenbaum v. Federal Match Co., 92 N. Y. S. 683.

72. Kinsey v. Meaney, 98 App. Div. 420, 90 N. Y. S. 327.

73. Harrison v. Lakenan [Mo.] 88 S. W. 53.

74. See 3 C. L. 536. The statute of frauds providing that no sale of land made by an agent shall be valid unless his authority is in writing, does not preclude an agent who was not authorized in writing, from recovering commission under an oral contract, when he has found a purchaser ready, willing and able to purchase on the terms which he was authorized to sell it for. Gwinnup v. Sibert, 106 Mo. App. 709, 80 S. W. 589. Where the owner with full knowledge of the terms on which the same has been sold by his broker ratifies the sale in writing, it is immaterial whether the agent's authority was in writing. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

75. Under Burn's Ann. St. 1901, § 6629a, a contract with a broker in writing agreeing to pay him for finding a purchaser of real estate, but not specifying the amount which he is to receive, is insufficient, since the amount of compensation can be shown only by parol, and the statute requires such contracts to be in writing. Zimmerman v. Zehender [Ind.] 73 N. E. 920.

76. Marshall v. Trerise [Mont.] 81 P. 400. N. Y. Pen. Code, § 640d. Adler v. Schaumberger, 84 N. Y. S. 235; Davis v. Kidansky, 86 N. Y. S. 6; Turner v. Lane, 93 N. Y. S. 1083.

77. Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899; Lopard v. Fritz, 91 N. Y. S. 5.

Constitutionality of statute: Penal Code, § 640d, as amended by Laws 1901, c. 128, is held constitutional in some judicial departments, while in the second judicial department it is held unconstitutional. Imperato v. Wasboe, 93 N. Y. S. 489; Cody v. Dempsey, 86 App. Div. 338, 13 Ann. Cas. 322, 83 N. Y. S. 899.

78. Friedman v. Bittker, 45 Misc. 178, 91 N. Y. S. 896.

79. Levy v. Timble, 94 N. Y. S. 3.

80. Flower v. Kassel, 93 N. Y. S. 563.

81. A letter describing the property addressed to a broker, as such, stating the minimum price which he will take and signed by the owner, held a compliance. Imperato v. Wasboe, 93 N. Y. S. 489.

82. See 3 C. L. 538, 540.

83. Macfarren v. Gallinger, 210 Pa. 74, 59 A. 435.

84, 85. Sallie v. McMurry [Mo. App.] 88 S. W. 157.

86. Donovan v. Weed [N. Y.] 74 N. E. 563; Moore v. Boehm, 91 N. Y. S. 125.

87. See 3 C. L. 539.

can only act within the scope of his limited authority.[88] He has no authority, unless specially authorized, to execute a contract of sale in his principal's name,[89] or to receive money to be applied on the purchase price.[90] Such powers as are usually exercised hy brokers under like circumstances of employment will, however, be implied.[91] The principal may ratify the unauthorized acts of one purporting to act for him so as to be bound thereby.[92] A local custom [93] or the rules and usages of a stock exchange may [94] be deemed a part of the contract if it appears that the parties knew thereof and contracted with reference to it.[95]

§ 2. *Mutual rights, duties and liabilities.*[96]—The relation between a broker and his principal is a fiduciary one,[97] calling for the exercise of the utmost good faith on the part of the broker.[98] The principal can recover any damages which are proximately the result of the broker's bad faith [99] or want of ordinary care and

88. Strong v. Ross, 33 Ind. App. 586, 71 N. E. 918; Sullivant v. Jahren [Kan.] 79 P. 1071.

89. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118; Robbins v. Maher [N. D.] 103 N. W. 755.

90. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118.

91. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. A broker held to have authority to accept merchandise purchased by him for shipment to his principal. John Schroeder Lumber Co. v. Stearns [Wis.] 100 N. W. 836. Generally speaking, possession of a policy by an insurance broker confers upon him implied authority to procure its cancellation, but if the insurance company has notice of the termination of the agent's authority, the implication arising from his possession of the policy is overcome. Fowler Cycle Works v. Western Ins. Co., 111 Ill. App. 631.

92. Where a seller, on a report by a broker of a sale which he purports to have made in behalf of the seller, retains the report setting forth the terms of the sale for an unreasonable time, he will be deemed to have ratified the sale even though the broker was not authorized to sell at the terms reported. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

93. A custom which gives a broker 5 per cent. of the purchase price of land for assisting in its sale, irrespective of the amount, value or character of the services rendered, is unreasonable and void and the broker can only recover the reasonable value of his services. Penland v. Ingle [N. C.] 50 S. E. 850. See, also, title Customs and Usages, 3 C. L. 988.

94. Persons dealing with members of the New York Stock Exchange are presumed to have contemplated that their transactions would be conducted in accordance with the reasonable rules and usages of the exchange. Ling v. Malcom [Conn.] 59 A. 698. A broker who sells stocks for another on the New York stock exchange is bound by the rules and customs of the exchange, and when he guaranties the signature of a corporation to an assignment, he is as between the transfer agent who transferred on a forged assignment and himself primarily liable to the person whose stocks are converted. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571.

95. A custom is no part of the contract between a broker and his principal unless it appears that they contracted with reference to it. Chambers v. Herring [Tex. Civ. App.] 13 Tex. Ct. Rep. 586, 88 S. W. 371; Rake v. Townsend [Iowa] 102 N. W. 499; Bacon Fruit Co. v. Blessing [Ga.] 50 S. E. 139; Robbins v. Maher [N. D.] 103 N. W. 755.

96. See 3 C. L. 538.

97. An action for an accounting will lie, wherein the burden of proof is on the broker to show that his trust duties have been performed and the manner of their performance, nor does the fact that intermediate accounts had been rendered deprive the customer of his right to a full and complete account. Haight v. Haight & Freese Co., 92 N. Y. S. 934.

98. Roome v. Robinson, 99 App. Div. 143, 90 N. Y. S. 1055. A broker authorized to sell land at a specified minimum sum is not entitled to commission where he sells for such minimum sum when he might have procured more. Lichtenstein v. Case, 99 App. Div. 570, 91 N. Y. S. 57; Harrison v. Lakeman [Mo.] 88 S. W. 53. Where a broker who has been employed to purchase land for another wrongfully taken title in his own name for the purpose of requiring his principal to pay an advance on the price paid by him, equity will decree him to hold it as trustee ex maleficio and decree a conveyance to the principal on payment to the broker of the price paid by the latter, nor is the broker in such case entitled to any compensation for his services. Harrison v. Craven [Mo.] 87 S. W. 962. A broker who procures another to take an option on certain property, under an agreement by the owner to pay him a commission in case the option is accepted, is not deprived of his right to commission by reason of the fact that he subsequently procures a purchaser for the holder of the option at a price in excess of that which the owner has contracted to accept. Davis v. Weber, 92 N. Y. S. 823.

99. Damages held too remote: Where a broker who has been employed to purchase certain land for his principal wrongfully taken title in his own name and refuses to convey to his principal except for a price in excess of what he paid, the principal cannot recover as damages the in-

skill in transacting the principal's business.[1] A broker authorized by his principal to purchase or sell stock is bound to actually sell or purchase the same.[2] If the transaction is not bona fide, the principal can recover margins paid to the broker.[3] The principal can recover damages occasioned by an unauthorized sale of his stocks by the broker,[4] or by the latter's failure to sell when directed.[5] In the former case it is not necessary that the customer should have actually repurchased the stocks wrongfully sold.[6] His measure of damages is the difference between the price for which the wrongful sale was made and what he would have to pay for a repurchase after notice, acting with reasonable promptness.[7] Such damages must be specially pleaded.[8] Where a customer directs a broker to sell certain stock at the market price, the broker is justified in selling at the best price obtainable, though the price had declined subsequent to the order to sell and before it could be executed.[9] The broker before selling stocks purchased on margins where the market price is declining, must give the customer reasonable notice of his intention to sell unless the purchaser keeps the margin good.[10] One of two persons hav-

crease in the cost of erecting a building over what he would have had to pay had the agent taken conveyance in the name of the principal, where it does not appear that at the time the broker took title the principal had any contract for the construction of the building, since such damages are too remote. Harrison v. Craven [Mo.] 87 S. W. 962.

1. Brokers who obtain insurance for others are bound to exercise reasonable care and skill in making inquiries and obtaining information concerning the responsibility of the insurer with whom they place the risk, and are liable for any loss occasioned by want of such care. Broker held liable for placing policy with company not authorized to do business in District of Columbia. Mallery v. Frye, 21 App. D. C. 105.

2. Hoogewerff v. Flack [Md.] 61 A. 184; Haight v. Haight & Freese Co., 92 N. Y. S. 934.

3. Holman v. Goslin, 93 N. Y. S. 126. Under St. Mass. 1890, c. 437, as amended St. 1901, c. 459, a customer of a broker can recover margins and securities deposited for margins unless the transactions were bona fide and the stocks ordered sold or purchased actually sold or purchased. In such an action it is competent for a witness to testify that such was the uniform practice of the broker firm. Allwright v. Skillings [Mass.] 74 N. E. 944. Where a broker does not obey his customer's orders in making actual sales and purchases, but reports to him fictitious transactions, the client may recover from the broker any money or securities deposited as margins or any payments made in settlement of such transactions. Hoogewerff v. Flack [Md.] 61 A. 184.

4. Evidence held to show that defendant's (brokers) wrongfully sold plaintiff's stock in violation of an agreement to give him a designated time within which to make his margins good. Blaine v. Thomas, 92 N. Y. S. 1036.

5. Zell v. Corkran [Del. Super.] 60 A. 699. The terms of pool agreements are not matters of common knowledge so that knowledge thereof can be imputed to purchasers of shares held in a pool so to justify the broker's refusal to sell the same on order of the purchaser. Ridgely v. Taylor, 94 N. Y. S. 1089.

6. To enable a customer to recover damages from his broker for the unauthorized sale of stocks, it is not necessary that the former should have actually repurchased them or have ordered them repurchased. The question is when in the exercise of reasonable diligence and judgment, ought he to have ordered a repurchase if he desired to obtain benefit of a possible future advance in price. In determining when the customer had the first reasonable opportunity to replace the stocks wrongfully sold, his financial inability to do so is not to be taken into consideration, although when he has sufficient means he is entitled to a reasonable time to convert his securities into money with which to repurchase. Ling v. Malcomb [Conn.] 59 A. 698.

7. Where a broker sells a customer's stocks without authority, the measure of damages recoverable by the latter is the excess, if any, over the price realized on the wrongful sale, for which the customer could have repurchased the stocks, after notice of the wrongful sale, had he given an order to that effect, with reasonable promptness, or for which, as the case may be, he did repurchase the same, acting with reasonable promptness, after such notice. In case of the fluctuations of the market price between the day of the conversion and the latest day to which it would have been reasonable to defer a repurchase or the date of a repurchase, if a repurchase be made prior to said last mentioned day, the measure is the excess, if any, over the price obtained where wrongfully sold and the highest market price attained during such intermediate period. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607; Ling v. Malcomb [Conn.] 59 A. 698.

8. Ling v. Malcomb [Conn.] 59 A. 698.

9. Fairbairn v. Rausch, 93 N. Y. S. 666.

10. In a suit by a customer against a broker for selling stocks because of the customer's failure to deposit margins on stock purchased on a margin, on a declin-

ing a joint account with stockbrokers cannot maintain an action against the broker for an accounting without joining such other person as a party.[11] In a suit by the owner of land against a broker whom he had authorized to sell the land to recover forfeit money deposited by a prospective purchaser with the broker and forfeited by the prospective purchaser because of his failure to consummate the purchase, the purchaser is not a necessary party.[12]

§ 3. *Rights and liabilities as to third persons.*[13]—The acceptance by the principal of an order for goods taken by a broker constitutes a contract beween the broker's principal and the purchaser.[14] Where a broker representing both parties enters no memorandum of the sale in his book, or such book is not produced, the bought and sold notes together, if they agree, establish the contract between the parties, but if they differ materially, they fail to establish a contract, but a material variance may be explained by a usage of trade.[15] Where a broker deposits money received by him from the sale of another's goods consigned to him, in a bank to the credit of his own account, the bank, if it has notice that such funds in fact belong to the consignor, cannot apply them in payment of a debt owing to it by the broker.[16] In some states the statutes require the payment of a license tax by brokers.[17] A broker who executes orders for another broker is not an agent of a customer of the latter.[18]

§ 4. *Compensation and lien.*[19] *Necessity of contract.*[20]—A broker is entitled to compensation only when there is an agreement therefor, either express or implied, and the burden is on him to show such agreement,[21] and by statutes in some states such employment must be in writing.[22] By accepting the services of a broker in effecting a sale, the principal may be bound by an implied contract to pay their reasonable value.[23] Substantial performance of his contract by the broker is a condition precedent to his right to recover compensation.[24] Thus where the

ing market, evidence held to show that the defendant gave plaintiff reasonable notice of its intention to sell unless margins were deposited. Foster v. Murphy & Co. [C. C. A.] 135 F. 47.

11. Levy v. Popper, 93 N. Y. S. 842.

12. Chambers & Co. v. Herring [Tex. Civ. App.] 13 Tex. Ct. Rep. 586, 88 S. W. 371.

13. See 3 C. L. 541.

14. Tuthill Spring Co. v. Holliday [Ind.] 72 N. E. 872.

15. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

Bought and sold notes have been defined to be written memoranda of a sale of goods delivered to the parties thereto by the broker employed to negotiate the sale. Generally, the memorandum delivered to the buyer is the bought note and that delivered to the seller is the sold note, but some authorities hold that the sold note is delivered to the buyer and the bought note to the seller. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

16. Boyle v. Northwestern Nat. Bank of Superior [Wis.] 103 N. W. 1123.

17. A trust company organized under Act 1874 (P. L. 73), and the supplemental act of May 9, 1899 (P. L. 159), and authorized to transact the business of buying and selling real estate is not liable for the license tax imposed on real estate brokers by Acts of May 27, 1841 (P. L. 396), April 10, 1849 (P. L. 570), May 15, 1850 (P. L. 772), and Act May 2, 1899 (P. L. 184), since such statutory provisions apply only to natural person or copartnerships. Commonwealth v. Real Estate Trust Co. [Pa.] 60 A. 551, afg. 26 Pa. Super. Ct. 149.

18. Evidence held that defendant who executed orders for another broker was an agent of a customer of the latter. Holman v. Goslin, 93 N. Y. S. 126.

19. See 3 C. L. 542.

20. See 3 C. L. 546.

21. Warwick v. North American Inv. Co. [Mo. App.] 87 S. W. 78; Kaake v. Griswold, 93 N. Y. S. 459; Elemendorf v. Golden [Wash.] 80 P. 264. Under Civ. Code La. art. 2991, an agent who has power of attorney to sell and convey land for another has not merely by reason of that fact a right to retain a commission out of the price received by him, in the absence of an agreement authorizing it. Knott v. Midkiff [La.] 38 So. 153.

22. See § 1, ante.

23. Stephens v. Tomlinson, Henderson & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 581, 88 S. W. 304.

24. Emérson v. Nash [Wis.] 102 N. W. 921; Stauff v. Bingenheimer [Minn.] 102 N. W. 694. Evidence held to show that real estate broker found a purchaser at a price satisfactory to the seller and hence entitled to commission. Storer v. Markley [Ind.] 73 N. E. 1081. An agreement to pay a broker a commission on all lands

time within which he is authorized to effect a sale is limited, he is not entitled to commission for finding a purchaser after the expiration of such time,[25] or for finding a purchaser willing to purchase on terms other than those offered by the principal,[26] unless such different terms are accepted by the principal.[27] If his right to compensation depends on the happening of certain contingencies, he must show that such contingencies have eventuated.[28] As a general rule, in the absence of a special agreement, a broker who has been employed to find a purchaser of land is entitled to his commission when he has produced a purchaser who is ready, willing and able to purchase on the terms authorized by the owner,[29] or satisfactory to him.[30] Where no price is fixed by the seller, but the broker under his employment produces a purchaser with whom the seller deals and agrees upon a price, the broker is entitled to his commission.[31]

Broker must be efficient producing cause of sale.[32]—A broker is entitled to his commission, if he was the procuring cause in bringing about the sale,[33] even

sold by defendant to customers sent by the broker, held to mean such persons as the defendant should sell on information received from the broker. Wineteer v. Jones, 113 Ill. App. 129. Where a contract with a broker provided that "commission or brokerage will be paid only to the one who actually makes and finally completes the sale and has the contract signed," the broker cannot recover where he does not show that a contract was actually signed and a sale consummated. Reichard v. Wallach, 91 N. Y. S. 347. A contract constituting plaintiff agent for the sale of defendants' goods within a certain territory, but not giving him the exclusive agency in such territory, construed and evidence held insufficient to show a right in plaintiff to commissions on sales made by defendant in such territory to which plaintiff's services in no way contributed. McCay Engineering Co. v. Crocker-Wheeler Elec. Co. [Md.] 60 A. 443. A contract construed and agent held entitled to a commision only in case it actually sold land listed before sale by owner or termination of agency. Iowa Land Co. v. Schoenewe [Iowa] 102 N. W. 817. Broker to receive percentage of the sale price is not entitled to percentage of the amount paid by a prospective purchaser for an option which is not accepted. Blakely v. Purssell, 90 N. Y. S. 337. A contract construed and held not to require the payment to the broker by the owner of commissions except on payments actually made by the purchaser. Murray v. Rickard [Va.] 48 S. E. 871. A broker employed to sell is not entitled to commissions for introducing a customer who merely took an option to purchase, which option he did not accept. Milstein v. Doring, 102 App. Div. 349, 92 N. Y. S. 417.

25. Beadle v. Sage Land & Improvement Co. [Mich.] 12 Det. Leg. N. 101, 103 N. W. 554; Satterthwaite v. Goodyear [N. C.] 49 S. E. 205.

26. Talcott v. Mastin [Colo. App.] 79 P. 973; Engle v. Johnson [Ind. App.] 73 N. E. 272. Where the contract provides for the payment of a fixed commission for procuring a purchaser of land at a fixed price, the broker is only entitled to compensation on his express contract where he has procured a purchaser who is ready, willing and able to purchase the property at the price and on the terms stated. It is not sufficient that he furnishes a purchaser who is willing to purchase at a less price, though the owner accepts such lower price. Ball v. Dolan [S. D.] 101 N. W. 719. An agent to whom the owner of land has agreed to pay a commission for making a sale of land "for cash" is not entitled to a commission for making a sale on credit, which the owner declines to accept. Rake v. Townsend [Iowa] 102 N. W. 499. A broker is not entitled to commissions for making sales of personal property, where the sales are not made in conformity with the terms on which the broker was authorized to sell. Schreiner v. Kissock, 91 N. Y. S. 28.

27. Ullmann v. Land [Tex. Civ. App.] 84 S. W. 294; Neely v. Lewis [Wash.] 80 P. 175; Reid v. McNerney [Iowa] 103 N. W. 1001.

28. Contract with broker construed and held not to entitle him to payment of commission until land sold was paid for by purchaser. Robertson v. Vasey, 125 Iowa, 526, 101 N. W. 271; Turner v. Lane, 93 N. Y. S. 1083. Where by the terms of his employment a broker's commissions were not to be paid until and unless title passed, the broker cannot recover if the purchaser produced by him failed to complete his purchase. Fittichauer v. Van Wyck, 92 N. Y. S. 241. Where by the terms of a sale effected through a broker the seller was to deliver the commodity provided the railroads were able to haul it, and the seller was to pay the broker a certain per cent. of the proceeds of the sale and the seller was unable to deliver because the railroads could not haul, the broker cannot recover. Hardloper v. Weaver Coal & Coke Co., 91 N. Y. S. 74.

29. Courter v. Lydecker [N. J. Law] 58 A. 1093. Purchaser held not ready, willing and able to purchase on terms offered by seller. Bunks v. Pierce [Colo.] 80 P. 1036.

30. Neely v. Schultz [Wash.] 80 P. 176; Hancock v. Dodge [Miss.] 37 So. 711.

31. Burdon v. Briquelet [Wis.] 104 N. W. 83.

32. See 3 C. L. 543.

33. Flower v. Kassel, 93 N. Y. S. 563.

though the owner at the time he entered into the contract of sale did not know that the broker was the producing cause of the sale.[34] After negotiations initiated by a broker have practically culminated in a sale, the principal cannot by terminating the agency of the broker deprive him of his commission.[35] If after the broker has abandoned his efforts to sell to a purchaser found by him the owner, or another broker, successfully negotiates a sale to such person, the first broker is not entitled to a commission,[36] unless fraud or bad faith on the part of the principal is shown.[37] Otherwise if the owner sells to one produced by the broker before the latter has discontinued negotiations.[38] A broker who is merely authorized to find a purchaser for another's land is not entitled to a commission for finding a purchaser where he did not notify his principal of the fact until after the principal had sold to another.[39]

Customer produced must be ready, willing and able to purchase.[40]—Under a general contract of employment, a broker who produces a purchaser who is ready, willing and able to purchase on the terms on which the broker was authorized to sell is entitled to his commission, though the owner refuse to consummate the sale [41] or cannot do so because of a defect in his title.[42] The foregoing rule may

Where the broker is not acquainted with the purchaser and did not introduce the latter to the seller, the effectiveness of the broker's instrumentality in bringing about the sale must affirmatively appear if he is to recover commissions. Halterman v. Leining, 90 N. Y. S. 397. Contract of agency construed and an agent held entitled to commission for a sale made in his "territory," though deal was closed by another agent of the seller, it appearing the negotiations were initiated by him. McGeehan v. Gaar, Scott & Co. [Wis.] 100 N. W. 1072. The agent is entitled to his commission if he is the procuring cause of the negotiations which resulted in the sale, even though the agent does nothing more than bring the parties together for the purpose of negotiating, and they are thereafter concluded by the principal person. Sallee v. McMurry [Mo. App.] 88 S. W. 157.

34. McCleary v. Willis, 35 Wash. 676, 77 P. 1073.

35. Hollyday v. Southern Farm Agency [Md.] 59 A. 646; New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550; Norris v. Byrne [Wash.] 80 P. 808; Harrison v. Augerson, 115 Ill. App. 226.

36. De Zalava v. Rogaliner, 90 N. Y. S. 563. Broker not entitled to commission where sale made through another broker, though the purchaser sold to one who had been introduced to the grantor by the plaintiff. Hollyday v. Southern Farm Agency [Md.] 59 A. 646. Where a broker has been allowed a reasonable time within which to procure a purchaser, and has failed so to do and the principal in good faith has terminated the agency and subsequently a sale is consummated, the fact that the purchaser is one whom the broker introduced and that the sale was in some degree aided by his previous efforts, does not entitle him to commissions. Donovan v. Weed [N. Y.] 74 N. E. 563. A person who puts property in the hands of an agent to sell does not bind himself perpetually against employing another agent to sell at a less price. Where a broker has sought to induce a purchaser to purchase but could not secure an offer of an amount for which he is authorized to sell, the fact that after his negotiations are broken off, another broker induces the owner to sell to the purchaser produced by the first broker for an amount which was offered through the first broker, does not entitle the latter to commissions. Gamble v. Grether, 108 Mo. App. 340, 83 S. W. 306.

37. Girardeau v. Gibson [Ga.] 50 S. E. 91; Elendorf v. Golden [Wash.] 80 P. 264. An owner cannot deprive a broker of his right to commission in making a sale of stock after a sale has been made, by agreeing with the purchasers to accept a less amount than the price agreed on or by neglecting to collect from him the price at which the stock was sold. Boland v. Ashurst Oil Land & Development Co., 145 Cal. 405, 78 P. 871.

38. Finkelstein v. Spurck, 115 Ill. App. 521.

39. Helling v. Darby [Kan.] 79 P. 1073.

40. See 3 C. L. 542, n. 13, 14.

41. Marcy v. Whallon, 115 Ill. App. 435; Scott v. Stuart, 115 Ill. App. 535; Guthrie v. Bright, 26 Ky. L. R. 1021, 82 S. W. 985; Gwinnup v. Sibert, 106 Mo. App. 709, 80 S. W. 589; Sallee v. McMurry [Mo. App.] 88 S. W. 157; Brown v. Smith [Mo. App.] 87 S. W. 556; Denton v. Howell [Tex. Civ. App.] 87 S. W. 221. A broker who produces a purchaser who is able, willing and ready to purchase on the terms on which the broker is authorized to sell is entitled to his commission, though no sale is consummated because of his refusal to change the terms of his contract as to compensation. Marks v. Elliot, 90 N. Y. S. 331.

42. Perrin v. Kimberlin [Mo. App.] 85 S. W. 630; Marlin v. Sipprell, 93 Minn. 271, 101 N. W. 169; Albritton v. First Nat. Bank [Tex. Civ. App.] 86 S. W. 646. Where the owner of a homestead agrees to pay a broker a commission for selling it and the broker procures a purchaser who is ready, willing and able to purchase on the terms the broker was authorized to sell for, the

be modified in a given case by the specific agreement of the parties.[43] The question of the financial ability of the proposed purchaser to carry out the contract negotiated by the broker arises only where the broker's principal rejects the purchaser, notwithstanding his readiness to enter into a contract of sale with the principal.[44] If the principal accepts the proposed purchaser produced by the broker and enters into a valid and enforceable contract with him, the broker is entitled to his commission, though the sale is not consummated through the fault of the purchaser,[45] or because of his financial inability to perform.[46] In Iowa, though the parties have entered into a valid contract, the broker must show that the financial condition of the purchaser is such that the contract is enforceable against him.[47] A contract of purchase signed by a proposed purchaser and tendered to the vendor for execution by him is prima facie evidence of the purchaser's readiness and willingness

broker is entitled to his commission, though the owner's wife refuses to join in the conveyance and for such reason the deal is not closed. Surry v. Whitmore [Mo. App.] 84 S. W. 1131.

43. Where a broker produces purchasers able, ready and willing to purchase on the terms agreed on, he is entitled to his commission, irrespective of whether the sale is consummated or not, provided his contract did not provide that a commission should be paid only in case a sale was consummated. Norman v. Hopper [Wash.] 80 P. 551. Where the owner agrees to pay a broker "for procuring a customer for her for the property" at a specified price, the complaint in an action by the broker need not allege that the customer was ready, able and willing to purchase, since the contrat was to furnish a customer and not to affect a sale. Lunsford v. Bailey [Ala.] 38 So. 362.

44. Russell v. Hurd, 113 Ill. App. 63. A broker who procures a purchaser for his client's land and with whom the client enters into a valid contract of sale is entitled to his commission, but if the seller rejects the proposed purchaser and the agent claims commission, then he is required to show before he can recover that the proposed purchaser was able and ready to perform his part of the contract. Id. To earn his commission for services rendered in finding a purchaser, when no sale is actually consummated, the agent must either procure a valid obligation to buy and tender it to the vendor, or bring the proposed vendor and purchaser together, so that a contract may be entered into if the owner so elects. If the owner does not accept the purchaser produced, the broker must show that the purchaser was ready, willing and able to purchase on the terms on which broker is authorized to sell. Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326. If the broker produces a purchaser ready and willing to purchase, and the principal refuses to enter into a contract, the broker must show that the customer is able, as well as ready and willing, not because he undertakes by his contract of employment to guarantee the financial ability of the purchaser, but because he must prove that the failure to make a contract was the fault of the principal and not his own. Alt v. Doscher, 102 App. Div. 344, 92 N. Y. S. 439.

45. Alt v. Doscher, 102 App. Div. 344, 92 N. Y. S. 439; Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899; Bingham v. Davidson [Ala.] 37 So. 738.

46. A broker under a general contract of employment for the sale of real property, who obtains a purchaser satisfactory to his principal, with whom the principal makes an enforceable contract of sale, without being induced so to do by any representations of the broker as to the ability of the proposed purchaser to perform his contract and without any bad faith on the part of the broker, can recover his commissions though without any fault of the principal, the vendee fails to perform solely because of his financial inability to pay for the land purchased at the time of entering into the contract. Alt v. Doscher, 102 App. Div. 344, 92 N. Y. S. 439.

47. Contract must be enforceable: In the absence of a special agreement a broker who has been employed to find a purchaser of real estate in order to be entitled to his commission must show that he found a purchaser who was ready, able and willing to purchase. If the purchaser has entered into a valid contract, the broker to recover must show that the purchaser is in such financial condition that the contract can be enforced against him. McGinn v. Garber, 125 Iowa, 533, 101 N. W. 279. If the owner of land and a proposed purchaser enter into an enforceable contract of purchase and sale, the broker is entitled to his commission, though the sale is never consummated. Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326.

Exchange of property: The undertaking of a broker to effect an exchange of property is not fully performed, so as to entitle him to his commission, by producing a customer with whom an executory contract was made, but never carried out, unless it is further made to appear that the failure to complete the deal was chargeable to the fault or neglect of the principal. The principal cannot arbitrarily refuse to perform and avoid paying the broker his commission. The contract effected must not only be a valid contract but one the enforcement of which will give him the property, money or other advantage he contracted for. If the purchaser cannot

to buy, but not of his ability to do so.[48] Where a broker produces a purchaser, the principal's absolute refusal to treat with him dispenses with the necessity of a tender on the part of the purchaser so as to give the broker a right to his commissions.[49]

Broker must act in good faith towards principal.[50]—To entitle him to compensation, the broker must act in good faith towards his principal,[51] at least as to matters within the scope of his employment.[52] He cannot represent both parties to the transaction without their mutual consent, and if he attempts to do so he forfeits all right to compensation or commission from either.[53] If, however, the principal knew of the broker's agency for another at the time he entered into the contract of employment with the broker, and the principal's interest was in no wise jeopardized thereby, the broker can recover his commissions.[54] A broker who gives a part of the commission he is to receive for making a sale of property to the purchaser does not thereby become the agent of both parties so as to preclude the recovery of his commission from the seller.[55] Where the owner of land employed a broker to sell it and agreed to give the broker all over a stipulated sum for which he might sell the land, the broker on securing a customer who was willing, ready and able to give the owner his price in cash and make a mortgage to the broker for a certain sum, is entitled to a performance by the owner, and on his refusal to convey can recover as damages the profits he would have made on the sale.[56] A broker entitled to compensation only in case a sale is consummated is not entitled to earnest money forfeited by a

give good title to the property to be given in exchange the broker cannot recover. Snyder v. Fidler, 125 Iowa, 378, 101 N. W. 130.

48. Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326.

49. Moore v. Boehm, 91 N. Y. S. 125.

50. See 3 C. L. 546.

51. Harrison v. Cravin [Mo.] 87 S. W. 962. See, also, supra, § 2. A broker to recover commissions for making a sale of real estate must prove an employment by defendant, the rendition of services at their request and that in connection with such employment he acted in good faith toward his principal. Roome v. Robinson, 99 App. Div. 143, 90 N. Y. S. 1055. See supra, § 2. A broker who has undertaken to sell property for the owner thereof is guilty of no misconduct in entering into an agreement with defendant whereby he agrees to pay defendant ½ of his commission if the latter will procure a buyer, nor is he precluded from recovering his share of commission from defendant because of any fraud of defendant in making the sale of which he did not know and did not participate in. Madler v. Pozorski [Wis.] 102 N. W. 892.

52. A broker employed to procure a purchaser, or exchange of property, owned by his principal earns his commission when he has procured and introduced a person who is able, willing and ready to purchase or exchange, and the fact that after introducing such purchaser he made false representations to his principal concerning the property the latter was to take in exchange, does not effect his right to compensation. Nichols v. Whitacre [Mo. App.] 87 S. W. 594.

53. Green v. Southern States Lumber Co. [Ala.] 37 So. 670. A real estate broker who is employed by the owner of land to sell it on commission cannot recover his commission for introducing a purchaser, where it appears that he had been employed by the purchaser to purchase the land for him from the owner, and he did not disclose such fact to the owner and the latter did not consent thereto and the broker is guilty of bad faith toward the seller pending the negotiations for the sale. Bunn v. Keach, 214 Ill. 259, 73 N. E. 419. Evidence held not to show such a dual agency as precluded a broker from recovering a commission for performing a contract with defendant. Burr v. Beacon Trust Co. [Mass.] 74 N. E. 300.

54. Mitchell v. Duke, 134 F. 999. Where a broker, with knowledge of his customers also acts as correspondent of another broker, who buys and sells stocks, etc., on orders of the former, under an arrangement with the latter by which the commissions are divided between them, he is not precluded from recovering commissions on the ground of an undisclosed dual agency, though the transactions are as between him and the custodian and as between him and the other broker conducted in his own name. Stripling v. Maguire, 108 Mo. App. 594, 84 S. W. 164.

55. Stephens v. Tomlinson, Henderson & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 581, 88 S. W. 304.

56. Canfield v. Orange [N. D.] 102 N. W. 313. Where principal requires a certain price for land, and agrees to "protect his agent in his commission," which is to be what he can obtain over that price, it is a breach of contract to sell directly to the prospective buyer obtained by the agent, at the net price. Baker v. Murphy, 105 Ill. App. 151.

prospective purchaser procured by him.[57] A broker may by his conduct estop himself from claiming his commission.[58]

Procuring loan.—A broker who has been employed to procure a loan for another is entitled to his commission when he has found a person ready to loan the specified amount on the property, secured by a trust deed or mortgage constituting a first lien on the property.[59] But not if the proposed lender refuses to consummate the loan because of a false description of the premises in the application, of which the broker had knowledge.[60] If the loan is not consummated, he must show it was through no fault of the person whom he had procured to make it.[61]

Necessity of broker's contract being in writing.[62]—The necessity of the contract between the broker and his principal being in writing, as bearing on his right to recover commissions, is discussed elsewhere in this title.[63]

Actions to recover commissions. Parties.—Where a broker agrees with another that if the latter will find a purchaser for the broker's customer's property, he will divide the commission with him, the broker is entitled to recover the full amount of the commission from his customer on effecting a sale through the intervention of the other broker, since such an arrangement is not an assignment of a part of his claim.[64]

Pleading.[65]—A real estate broker's commission, that has been fully earned under an express contract, may be recovered under the common counts and the contract itself admitted in proof of the particulars of the general right so set up.[66] Where a broker sues to recover commissions under an express contract, he cannot recover on a quantum meruit, though the proof might otherwise warrant a recovery on the latter theory.[67] Facts and not conclusions of law should be pleaded.[68]

Evidence and burden of proof [69]—In an action by a broker to recover commissions, the burden is on the broker to show that the purchaser introduced by

57. Chambers v. Herring [Tex. Civ. App.] 13 Tex. Ct. Rep. 586, 88 S. W. 371.

58. By accepting less than he is entitled to as compensation and subsequent acquiescence in the payment to another of compensation for procuring a purchaser, he may estop himself from claiming compensation. Evidence held not to show estoppel to claim compensation. Theobald v. Hopkins, 93 Minn. 253, 101 N. W. 170. Where a broker in reporting the sale of stocks to a customer erroneously and by a clerical mistake reported the sale at a price in excess of the price actually received, the broker in an action by the customer for a balance due pursuant to a sale is not estopped to show that he did not receive the price named in the report. Stewart v. Harris, 101 App. Div. 181, 91 N. Y. S. 438.

59. Brillow v. Oziemkowski, 112 Ill. App. 165.

60. A broker is not entitled to commissions for placing a mortgage loan on property where it appears that he as well as the defendant knew that the application which was accepted by a person procured by the broker incorrectly described the land as containing a greater area than it in fact did and the refusal to place the loan was based on such fact, since he is equally responsible with defendant for the rejection of the loan. Shropshire v. Frankel, 91 N. Y. S. 79.

61. A broker who has been employed to procure a mortgage loan on real estate is not entitled to commission where he procured a person to make a loan on the property, provided the title be found ultimately satisfactory, but no loan was consummated and it did not appear that the title was defective. Chambers v. Ackley, 91 N. Y. S. 78.

62. See 3 C. L. 536, 546.

63. See supra, § 1.

64. Bray v. Riggs [Mo. App.] 85 S. W. 116.

65. See 3 C. L. 547.

66. Risley v. Beaumont [N. J. Law] 59 A. 145.

67. Veatch v. Norman [Mo. App.] 84 S. W. 350; Lord v. Citizens' Steamboat Co., 94 N. Y. S. 98.

68. An allegation in an action by a broker to recover commissions that "because of the default of the defendant said premises were not conveyed," does not state the necessary facts to show to the court that the defendant did omit to do anything that she was under obligation to do, so as to entitle plaintiff to a commission where by his contract he was to be entitled to commission only in case a transfer was made. Davis v. Silverman, 98 App. Div. 305, 90 N. Y. S. 589. A complaint in an action for commission held to state a cause of action. McCleary v. Willis, 35 Wash. 676, 77 P. 1073.

69. See 3 C. L. 548.

70. Snyder v. Fidler, 125 Iowa, 378, 101 N. W. 130.

him was able as well as ready and willing to purchase on the prescribed terms.[70] Where a contract between the owner of land and a broker provided that the former would pay the latter a certain sum where a sale was consummated, a contract between the owner and a third person is admissible to show that the sale was consummated.[71] In an action to recover the reasonable value of his services where there was no specific contract as to what his compensation should be, evidence of what was usually paid by others for similar services is admissible.[72] A contract other than that sued on is inadmissible.[73] Cases discussing the sufficiency of the evidence in such actions are referred to in the subjoined notes.[74]

Questions for jury.—Various cases discussing what questions are proper for determination by a jury are referred to in the notes.[75]

Defenses.—An abandonment by the broker as well a termination of his employment by the principal before performance by the broker is matter of defense to an action by the broker for commission, and need not be negatived by broker as a condition precedent to his right of recovery.[76]

BUILDING AND CONSTRUCTION CONTRACTS.

71. Cutten v. Pearsall [Cal.] 81 P. 25.

72. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

73. In an action by a broker to recover commissions pursuant to an alleged oral contract for the sale to a certain person, a prior written contract between the parties wherein defendant agreed to pay plaintiff or making sales to other persons is not admissible. Abrams v. Manhattan Consumers' Brewing Co., 90 N. Y. S. 425.

74. Evidence held to show an agreement procuring a purchase so as to entitle plainton the part of defendant to pay plaintiff for iff to compensation. Teesdale v. Bennett [Wis.] 101 N. W. 688. Evidence held insufficient to show that plaintiffs were the producing cause of a sale so as to entitle them to commission. Dickinson v. Hahn [S. D.] 104 N. W. 247. Evidence held not to show that a broker procured a purchaser, so as to entitle him to commissions. Quinn v. Burton [Mass.] 74 N. E. 942. Evidence held insufficient to justify a verdict that plaintiff in an action to recover commissions, induced the owner to sell to the defendant so as to authorize a recovery in accordance with an agreement to pay if he induced a sale to defendant. Hawes v. Corporation Liquidation Co., 93 N. Y. S. 8. Evidence held sufficient to authorize the submission to a jury of the question of whether or not plaintiff had been employed by defendants to procure a purchaser of a patent right. Parr v. Abbott, 93 N. Y. S. 120. Evidence held to require submission to jury of question of whether broker had complied with his contract so as to be entitled to compensation. Gouge v. Hoyt [Iowa] 101 N. W. 463.

75. On conflicting evidence as to the terms of an oral contract of employment of a broker, the question of what such contract was is for the jury. Schultz v. Eberle [Wis.] 102 N. W. 1055. In an action to recover commission, the question of what the contract between the broker and his principal was and whether there has been a performance by the broker, where the evidence is conflicting, is for the jury. Carter v. Moss [Pa.] 60 A. 310. When the meaning of a contract is obscure and depends on facts aliunde, in connection with the written language, the determination of that meaning may be properly left to the jury. Meaning of clause in contract that broker should be entitled to commission "if title is taken" where plaintiff introduced evidence tending to show it referred to acquisition of title by defendant and not to taking of title by purchaser should have been submitted to jury. Thiel v. Schonzeit, 93 N. Y. S. 383. The question of whether plaintiff has produced a purchaser ready, able and willing to purchase on the terms offered by defendant should be submitted to the jury when the evidence is conflicting. Cox v. Hawke, 93 N. Y. S. 1117. The question of whether the defendant employed the plaintiff, in an action to recover commissions, is one for the jury. Cohn v. James McCreery Realty Co., 102 App. Div. 611, 92 N. Y. S. 143.

Questions for jury: It is for the jury to say, on all the evidence, whether the efforts of plaintiff were the efficient producing cause of the sale, so as to entitle the broker to commission. Burdon v. Briquelet [Wis.] 104 N. W. 83.

76. Moore v. Boehm, 91 N. Y. S. 125.

Matters common to all contracts,[1] or peculiar to contracts for public works,[2] are treated elsewhere.

§ 1. *The contract, sufficiency and interpretation.*[3]—The usual rules as to the requisites and validity of the contract apply.[4] As in the case of other contracts, illegality, in order to prevent recovery, must infect the contract on which suit is brought.[5]

A bond by which the obligors agree to erect a block of buildings is not strictly an alternative contract, but partakes of that nature.[6]

Interpretation.—As in the case of all other contracts, the intention of the parties, to be gathered from the whole instrument, must control.[7] The usual rules of construction apply.[8] Particular applications thereof will be found in the note.[9]

1. See Contracts, 3 C. L. 805.
2. See Public Contracts, 4 C. L. 1089.
3. See 3 C. L. 550.
4. Evidence held to justify submission to jury of question whether defendant had finally agreed to drawing of plans for building to cost in excess of his original limitation. Instructions approved. Hight v. Klingensmith [Ark.] 87 S. W. 138. Conversation between owner and contractor held not to constitute contract to complete work by a certain time. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858. Evidence insufficient to show any employment of plaintiff to prepare plans. Minuth v. Barnwell, 94 N. Y. S. 649. Where blds were invited for work complete, for work with railroad omitted, and for work with fireproofing omitted, and plaintiff submitted proposition to do work for a specified price, with a deduction if the railroad was omitted, and another deduction if the fireproofing was omitted, and the government accepted the proposition with the deduction on account of the railroad, taking no notice of the other proposed deduction, held that what was submitted with reference to fireproofing was ineffectual, and no contract was ever made in reference to it. Conners v. United States, 130 F. 609. Where plaintiffs based claim for amount withheld because of omission of fireproofing on theory that there was specific contract with reference to the amount which could be deducted on that account, held that complaint would be dismissed, but without prejudice to another suit. Id.

Contracts by agents: In action by architects to recover for services in drawing plans evidence held not to show any authority in rector to bind vestry by contracting with architects. Rector, etc., Church of Redeemer [Mo. App.] 85 S. W. 994. Agreement requiring plans to be drawn to the satisfaction of the vestrymen held to restrict authority of rector to bind church. Id. Though the contract was made by defendant as agent for another, a subsequent statement by him to the contractors that he himself was the owner and that he used another's name because he was in bankruptcy, and that he would pay for the work, constitutes an independent oral contract for the performance of the work for defendant according to the terms of the original contract, and having performed, the contractor can recover on it. Mogulewsky v. Rohrig, 93 N. Y. S. 590.

5. The fact that the tenant who furnished labor and materials for repairs uses the building for an unlawful purpose does not deprive him of the right to compensation therefor. Use is collateral to contract for repairs and independent of it. Doyle v. Franks [Kan.] 81 P. 211. Recovery not precluded for failure to file plans showing changes made after filing of originals where completed work is approved by the building department. Zwerdling v. Congregation Adas Le Israel, 92 N. Y. S. 360.

6. Description of buildings not too indefinite to prevent enforcement. McCullough v. Moore, 111 Ill. App. 545.

7. See 3 C. L. 550. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550.

8. Should receive a reasonable construction, and modifications which are provided for therein, or slight deviations from the plans and specifications, will not ordinarily avoid the contract or discharge the sureties on the contractor's bond. Schreiber v. Worm [Ind.] 72 N. E. 852. Repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550. Where clauses are repugnant, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other, which tends to defeat full performance. Building contract held to require contractor to do the plastering. Id. Contract requiring contractor to "erect and complete a municipal building," providing for the kind and quality of materials to be used, including those for plastering, and that the contractor shall "furnish and do everything required therefor except the plastering," held to require him to do the plastering. Id.

9. Owner held to have right to deduct

from contract price the amount of a lien filed against premises. Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054. Under a contract whereby plaintiff was to furnish labor in repairing defendant's house and was to be reimbursed and given a certain per cent. in addition, held that defendant was not liable for railroad fares of men living out of town, or for their board, or for increased wages arbitrarily paid to one of them over the amount for which he was hired. Westendorf v. Dininny, 92 N. Y. S. 858. Contract for installing water system in defendant's house and installing a hydraulic ram for the purpose, held to require building of dam to furnish water, such being the construction put upon it by the parties. Carolina Plumbing & Heating Co. v. Hall, 136 N. C. 530, 48 S. E. 810. Contract to deliver lime under which materialman "agrees to begin the delivery of said materials upon five days' notice, and thereupon to deliver the same as rapidly as the work upon said buildings shall require without further notice," requires him to ascertain how much will be required each day, and then to deliver it, and he is not excused from performance because he does not receive formal notice in each instance of the amount required. Merchants' Trust Co. v. Potter, 24 Pa. Super. Ct. 510. Provision in contract for clearing railroad right-of-way, cutting cord wood, two feet long, not to "exceed one thousand cords, ricked along roadbed, as required by chief engineer, $1.50," held not to require contractor to cut one thousand cords, but to give him option to cut not to exceed that amount. Eastham v. Western Const. Co., 36 Wash. 7, 77 P. 1051. Where contract for ties to be used in construction of railroad did not refer to any map or plat or designate any route which was to be followed, held that it was open to the construction company to make any reasonable selection of routes between the two termini, and the selection of one instead of another did not constitute such a change in the contract as to release the materialman's surety. American Surety Co. v. Choctaw Const. Co. [C. C. A.] 135 F. 487. Provision that granite was to be obtained from the quarries of G. & S. and G., "it being the intention of the writer to use both quarries," held to mean that granite could be taken from either "and" being construed to mean "or," and plaintiff's inability to obtain any from the G. quarry was not a breach of the contract, it appearing that sufficient could have been obtained from the other. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351. A contract specifying that the **"best quality of imported Portland cement"** shall be used is not satisfied by the use of any sound imported Portland cement satisfying the requirements as to tensile strength, fitness and weight. Drainage Com. v. National Contracting Co., 136 F. 780. Where plaintiff's proposal to furnish **"all the dimension granite required** in the construction of" certain bridge approaches, to be in accordance with the specifications and acceptable to the engineer, was accepted, he was entitled to furnish as much as it would take to complete the contract as approved by the bridge commission, and not only so much as defendant might choose to call for. United Engineering & Contracting Co. v. Broadaux [C. C. A.] 136 F. 351. A contract to complete a certain grading contract partly performed by the assignor, the assignee to have **"all compensation therefor hereafter accruing,"** held not to entitle assignee to ten per cent. of the amount earned at the time of assignment, which had been retained by the other party to the contract in accordance with its terms. Ercanbrack v. Faris [Idaho] 79 P. 817. Contract to furnish and erect all **iron work** according to plans and specifications prepared by the suppervising architect held not to require the contractor to do brick work and put in concrete called for by such plans. Hayes v. Wagner, 113 Ill. App. 299. In an action for materials furnished and services rendered in **designing a statue,** where plaintiff testified that he was employed by defendants to prepare models for them and looked to them for payment, and defendants that he merely undertook to submit a model to a committee, his employment by the committee depending upon the acceptance of the model and an agreement on the price, held that an instruction that there was no evidence entitling plaintiff to recover was properly refused. Hodges v. Pike [Md.] 59 A. 178. Instruction confining jury to single question whether plaintiff was to submit his models to the committee held properly refused, since defendants might be liable to pay for the models whether plaintiff secured the commission or not. Id. Where **contract to draw plans** for building provided "the architect's commission on which at 5 per cent. is not to exceed $350," immediately following which was a provision that equity in certain land to be conveyed to him was given as security for further payment of $250 which sum was to be in full for said plans, held that the last provision controlled the implied provision for compensation by commission. Perkins v. Hanks [Mass.] 74 N. E. 314. Contract further provided that payment was to be made within two years, and that, on its being made, defendant was to reconvey the land deeded to him as security, unless in the meantime he had sold it, as he was authorized to do, in which event the sale should release the defendant. Held that plaintiff, not having sold the land or been paid within two years, was entitled to recover $250. Id. A provision requiring the contractors to **cover and protect the work against injury** held not to require subcontractors to put in new pipes in different location to replace others which had been damaged after acceptance by reason of the default of other contractors. Cresswell v. Robertson [Mich.] 102 N. W. 963. Provision that a builder shall do all the plumbing work and furnish all the labor and materials **at a specified maximum cost,** means that he is entitled to that sum provided he does the work and does not lack mutuality because there is no absolute agreement to pay it. No necessity for reforming it. Flitcroft v. Allenhurst Club [N. J. Eq.] 61 A. 82. Evidence held to show that parties considered **ceilings** on eighth floor,

The contract, plans, and specifications are to be read together.[10] The intention governs as to whether work done by the same person under separate proposals shall be regarded as done under a single contract.[11] Conditions precedent to the taking effect of the contract which are specified therein will be presumed to be

which had been put up as sample, completed when estimate for ceilings for whole buildings was signed, and that plaintiff was not required by the contract to place a cornice on that floor. New York Metal Ceiling Co. v. City Homes Imp. Co., 88 N. Y. S. 233. In a contract to furnish steel work the phrase **"all detail drawings,"** which were to be furnished by the owner, held not to mean shop drawings and punching sheets, but that contract was complied with by plans furnished. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Contract to perform all the provision of a contract requiring one D. to furnish and place about 100,000 cubic yards of **riprapping** for a railroad, with a further provision that defendants might be required to furnish not to exceed 300,000 cubic yards if the amount required was increased by the railroad held only to require defendants to furnish the amount required by the railroad under the contract with D. and not to entitle D. to call on them for the balance of the 300,000 cubic yards for use on other contracts. Shanklin v. Brown, 92 N. Y. S. 860. In a contract for the construction of an arch over a driveway, the word **"ends"** will be construed to mean the faces of the arch as seen by one approaching along the driveway from either direction, or that part of the arch on either side of the driveway which comes nearest to the ground, as the evidence tends to show which was the meaning the parties had in mind when the contract was drawn, and the prices provided for therein for the work may properly be considered in determining in which sense the word was used in the contract. City of Cleveland v. Griffin, 5 Ohio C. C. (N. S.) 473. The phrase **"acceptable to the engineer"** in a contract to furnish granite for the construction of a bridge held unambiguous and hence not open to explanation by parol. United Engineering & Contracting Co. v. Broadway [C. C. A.] 136 F. 351.

Contracts for drilling wells: Contract for drilling well, to be paid for by the foot, held to require only payment of one-third of the price of the completed 100 feet, and not one-third of the whole contract price on completion of the first 100 feet. Ferguson Lumber Co. v. Little Rock Well & Pump Co. [Ark.] 84 S. W. 794. Contract for boring oil-well held to entitle plaintiff to compensation at the specified rate per foot for every foot sunk by him in good faith and with honest intention to carry out contract, notwithstanding work was finally abandoned with defendants consent because of breaking of drill. Cook v. Columbian Oil, Asphalt & Refining Co., 144 Cal. 670, 78 P. 287. Held that it was defendant's duty to furnish and deliver pipe before it could place plaintiff in default for failure to case oil well. Id. Contract for boring artesian well held to mean that contractor's obligation would be complied with whenever well would furnish continuous supply of 25 gallons per minute without regard to its depth. Moore v. Pritchett, 121 Ga. 439, 49 S. E. 292. Provision that company should set pump held not necessarily to imply that it was to transport pump to place where it was to be set up. Harris v. Louisiana Mach. & Wellworks Co., 112 La. 196, 36 So. 320. Contract held not to require plaintiff to insure a permanent supply of water, but it was complied with if there was a sufficient quantity, according to the prescribed test, when the work was completed. Nulton v. Croskey [Mo. App.] 85 S. W. 644. Held duty of plaintiff to case well, and instruction erroneous for failure to so inform the jury. Id. Contract held to guaranty that oil well would flow oil out of the opening above the ground. Cox & Co. v. Markham, Jr. & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 375, 87 S. W. 1163.

Contracts for excavating: Where proposals provided that all excavations were to extend at least four feet below the surface and to bed rock, and stated that levels of rock were shown approximately on the plans, but that the bidder must satisfy himself of their accuracy, held that contractor assumed the risk of the depth of excavation and could not recover extra compensation because such levels were inaccurate and it was necessary to go to a greater depth than four feet, in the absence of extraordinary circumstances entitling him to equitable relief. Conners v. United States, 130 F. 609. Contract held to give plaintiff right to charge for sloping in excess of 300 yards. Was not bound to procure defendant's consent to removal of excess, provided it was reasonably necessary to a complete and proper performance of the work, but he would have had no right to insist on its removal against defendant's protest. Dugan v. Kelly [Ark.] 86 S. W. 831. Also had right to remove sloping running back from and behind retaining wall, if necessary. Id. Contractors for sewer held bound to keep trenches free from water at their own expense, so that failure of city to allow extra compensation was not justification for abandonment of the contract. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368.

10. Contract for erection of house and stable held an entirety, where contract price included work as a whole, and payments were to be made on account of the whole work as it progressed. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

11. Separate proposals by subcontractor, which were accepted, held to constitute entire contract, particularly as between him and the owner. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

conclusive, and parol evidence is inadmissible to prove others.[12] A recital that persons are joint contractors does not necessarily control their relations.[13]

Fraud, misrepresentations, and mistake are fully treated elsewhere.[14]

§ 2. *Performance of contract.*[15]—A building contract, like any other, is to be fairly performed according to its terms, and any substantial change, unless authorized, is made at the risk of the contractor.[16] He has no right to substitute his own judgment for the stipulations of the contract, nor can he recover on the basis of full performance where he has willfully and intentionally used inferior and less expensive material.[17] Nor can recovery be had for partial performance where the contract is an entire one.[18] A literal compliance with the terms of the contract is not necessary,[19] but it is sufficient if there has been an honest and faithful performance in all its material and substantial particulars, and no willful departure or omission in essential points.[20] No recovery can, however, be had on the

12. United Engineering & Contracting Co. v. Broadway [C. C. A.] 136 F. 351.

13. A contract executed by a builder and a lumber company on the one part, which recites that they are joint contractors for the building of a house, and that the company, in consideration of the profit which it expects to make on the lumber which it is to furnish for the work, guaranties the completion of the contract, but which does not obligate the other parties to purchase lumber from it, is merely a contract of guaranty. Held invalid because ultra vires. In re Smith Lumber Co., 132 F. 620.

14, 15. See 3 C. L. 551.

16. Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21. Plaintiffs held entitled to agreed compensation for drilling oil well notwithstanding fact that water was not kept out, where contract did not require them to keep it out, and they fully complied with the provisions as to casing and pumping it. Vail v. Freeman, 144 Cal. 356, 77 P. 974. Evidence held insufficient to support contention that plaintiff did not fully perform contract to furnish steel work. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Evidence in action for contract price for drilling well held sufficient to support verdict for plaintiff. Council v. Teal [Ga.] 49 S. E. 806. In action on bond for breach of contract held error to instruct that there was no evidence to sustain a recovery though evidence tended to show that cost of completion would not exceed amount due on the contract, but there was also evidence that the material used did not comply with the requirements, that adjoining property was damaged, and that the work was not completed on time. Leppert v. Flaggs [Md.] 60 A. 450. Under contract for drilling well, held that where work was stopped, not on account of any act of defendant, but because casing had become fast so that work could not proceed, and flowing water had not been obtained, plaintiffs were entitled to no pay. Caruthers v. Cook [Tex. Civ. App.] 84 S. W. 690. Defendant was under no obligation to permit plaintiffs to dig a new well in a different place, there being no such provision in the contract. Id. Instruction that defendant admitted liability for one well held not such as to have misled jury into believing that he admitted liability as to other. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Exhibition by contractor to owner of vouchers and receipts for all labor and material, showing them all fully paid for, held sufficient compliance with requirement that he should satisfy owner that there were no outstanding claims which could be made the basis of a lien. Lavanway v. Cannon [Wash.] 79 P. 1117. Evidence in action for failure to furnish railroad ties held sufficient to require the submission to the jury of the question whether plaintiff violated the stipulation of the contract requiring it to transport other ties. American Surety Co. v. Choctaw Const. Co. [C. C. A.] 135 F. 487.

17. Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21. Expert evidence that certain pipes used in plumbing work were preferable to those required by the terms of the contract held properly excluded. Id.

18. Must be substantial performance. Contract to drill oil well through fourth sand for a certain sum per foot held an entire one, and contractor not entitled to recover where tools are lost in hole before the well is through the fourth sand and present an impenetrable barrier to further operations. Caughey v. Parker, 26 Pa. Super. Ct. 289. Evidence held not to show acceptance of well as a performance of the contract. Id. Evidence held to sustain finding that plaintiff failed to substantially perform, in that the plastering was deficient, imperfect and defective, to defendant's damage. Uldrickson v. Samdahl, 92 Minn. 297, 100 N. W. 5. Whether a contract is divisible depends upon the intention of the contracting parties to be ascertained from the contract itself. Contract to do all necessary excavating for a building at a certain rate per cubic yard of earth, and a certain rate per yard of rock held entire and not divisible. Toher v. Schaefer, 91 N. Y. S. 3.

19. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

20. Evans v. Howell, 211 Ill. 85, 71 N. E. 854. Mere technical and important omissions will not defeat a recovery of the contract price. Id. Dugue v. Levy [La.] 37 So. 995. Evidence held to show substantial completion within required time, and

theory of substantial performance until full compensation for deviations has been made.[21]

The contract must be performed in a good and workmanlike manner,[22] the question whether this has been done being for the jury.[23] If certain results are guaranteed, no recovery can be had unless they are obtained.[24]

Full performance of the contract may be waived by participation in acts done in disregard of its terms.[25]

The contractor is not responsible for breaches caused by the acts of the owner,[26]

that defects were remedied within reasonable time. Coen v. Birchard, 124 Iowa, 394, 100 N. W. 486. A contract to bore a well is not substantially performed if the diameter contracted for is not adhered to. Instructions erroneous. Connor v. Trapp [Iowa] 104 N. W. 333. Question whether contract for furnishing window screens was substantially performed held for jury, notwithstanding defect in one screen. Burrowes Co. v. Crittenden [Miss.] 37 So. 504. Held that there was some evidence on which to base a finding of substantial performance so as to render it conclusive on appeal. Isetts v. Bliwise [N. J. Law] 60 A. 200. Evidence held to show that there was not sufficient performance of an alleged contract to furnish working plans for the construction of a court house to entitle plaintiffs to recover thereon. Kinney v. Manitowoc County [C. C. A.] 135 F. 491.

21. Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Isetts v. Bliwise [N. J. Law] 60 A. 200; Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21. Contractors who failed to construct a free gravel road in accordance with the terms of their contract cannot complain of the action of the court in giving them the option of completing parts of the work according to contract or having part of the price deducted. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

22. A good and workmanlike job is one done as a skilled workman should do it. Provision in contract to install heating plant that all work should be done "in a good and workmanlike manner," held to require plaintiff not only to do a good job of pipe fitting, but to put in the apparatus in such manner that it would operate with reasonable success for the purpose intended, and, if necessary, to lower the boiler for that purpose, it was his duty to do so without extra charge. Ideal Heating Co. v. Kramer [Iowa] 102 N. W. 840. In an action for architect's services, evidence insufficient to sustain judgment for defendant, there being a conflict as to whether the plans furnished were workable. Repelye v. Lynch, 92 N. Y. S. 371. Fact that defendant submitted plans to building department and that they were disapproved not controlling, there being a question whether objections thereto were based upon plaintiff's errors and omissions, or could not have been easily obviated. Id.

23. Instructions held not to have taken question from jury. Shultz v. Seibel, 209 Pa. 27, 57 A. 1120.

24. Evidence held conclusive that well did not supply good, clear, pure water according to contract. Connor v. Trapp [Iowa] 104 N. W. 333. Held no excuse for failure of contractor, agreeing to change high temperature heating system to low temperature one, to comply with guaranty to heat the rooms, and effect a saving of fuel, that a flue in the building was too small, and that the building was difficult to heat by reason of its construction, particularly where he had installed the original plant. White v. Von Waffenstein, 94 N. Y. S. 257. One who guaranties that an oil well drilled by him shall be a flowing one cannot recover the contract price where it is not, though the well drilled can be profitably operated by the use of a pump. No evidence to sustain finding of substantial compliance. Cox & Co. v. Markham, Jr. & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 375, 87 S. W. 1163.

25. Defendant held to have waived right to complain that drilling of well was not stopped at his request when water was reached by deferring to opinion of plaintiff's superintendent, permitting him to continue boring, and furnishing additional casing. Council v. Teal [Ga.] 49 S. E. 806. Evidence that water was subsequently obtained at such depth in an adjoining well inadmissible under such circumstances, particularly when plaintiff did not offer to show that it came from same stream. Id. Provision in regard to joint supervision of construction of party wall held waived. Evans v. Howell, 211 Ill. 85, 71 N. E. 854. Where agreement for construction of party wall provided for use of hydraulic mortar, one of the parties cannot avoid paying his proportion of the cost because lime mortar was specified in the contract for its construction and used, where he had notice of the fact in ample time to remedy the mistake. Id.

26. Where failure of defendants to keep full insurance on building during its construction was due to the objection of the contractors, who were chargeable with the expense, and their representations that they had secured sufficient insurance, the contractors are estopped to maintain an action against defendants to recover their loss by fire on the ground of non-performance of the contract. Fransen v. Regents of Education of S. D. [C. C. A.] 133 F. 24. Civ. Code, S. D., § 1287, providing that written contract cannot be altered except by another written contract or an executed oral agreement, does not change the rule. Estoppel expressly recognized by Id., § 1173. Id. Architect employed by state board to superintend construction of building, and local secretary of board represent the board in such a sense that an estoppel in its favor may be created by statements made to them. Id.

and the owner is liable to the contractor for damages resulting from his improper interference with the work.[27]

Architects undertaking to superintend the construction of a building are bound to exercise reasonable care and diligence in supervising the work,[28] and are liable to the owner for damages resulting from their failure to do so.[29]

The owner is entitled to offset against the contract price reasonable damages sustained by him for necessary work and materials required to complete defective work,[30] or any damages resulting from the contractor's negligence.[31] So, too, contractors who participate in the engineer's breach of duty and bad faith are liable for the loss and expense reasonably incurred in completing the work in accordance with the contract.[32]

A contractor using cheaper materials than those called for by the contract is liable for the improper profit which he thereby makes.[33]

In the absence of a stipulation to the contrary, one undertaking a contract not involving personal trust or confidence is not bound to himself perform any of the work, or to give his personal attention thereto.[34]

A provision that the owner may reject plans contracted for unless they are satisfactory to him requires him to act in good faith, and he cannot escape liability by rejecting them arbitrarily.[35] A provision that the work shall be done to the satisfaction of the tenement house department means that it must satisfy that department when completed.[36]

Impossibility of performance.[37]—If a party contracts to perform a thing which is possible at the time when the contract is made, he is not excused from

27. The United States is liable for any improper interference with a contractor, the same as an individual would be. Houston Co.'s Case, 38 Ct. Cl. 724. It is not excused by reason of the fact that it suspends work on a bridge owing to the war with Spain in the expectation that it will consequently be needed for greatly increased traffic. Id.

28. Straus v. Buchman, 96 App. Div. 270, 89 N. Y. S. 226.

29. Straus v. Buchman, 96 App. Div. 270, 89 N. Y. S. 226.

See, also, Negligence, 4 C. L. 764.

30. Defects in work done by subcontractors. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295. Evidence in action to enforce mechanic's lien for balance due on contract held to sustain finding that owner was damaged by use of poor material and workmanship in excess of amount unpaid. Fletcher v. Sandusky, 26 Ky. L. R. 1232, 83 S. W. 644. Where subcontractor failed to replace foundations for division walls of reservoir blasted out with concrete, held that he was liable to contractor for actual cost of doing so, but not at price which contractor was to receive for other concrete work. Hely v. Fred Hoertz & Co., 26 Ky. L. R. 644, 82 S. W. 402. Jury may allow deductions. Shultz v. Seibel, 209 Pa. 27, 57 A. 1120.

31. An admitted liability by a contractor for injury to a steam heating system caused while at work in a public building in which the system is located is a valid set-off against a balance due him on account of the work. McClure v. Lorain County Com'rs, 4 Ohio C. C. (N. S.) 445.

32. Guild v. Andrews [C. C. A.] 137 F. 369.

33. Drainage Commission of New Orleans v. National Contracting Co., 136 F. 780. Contractor is estopped to say, when sued for the return of his resulting improper profit, that the material furnished was as good as the other. Portland cement used in public drainage work. Id. It is no defense that the contractor lost money (Id.), nor that the contract was executed (Id.).

34. Contract to bore well does not involve personal trust and may carry it out through workmen over whom he places a superintendent. Council v. Teal [Ga.] 49 S. E. 806.

35. Must be some substantial fault in the work itself rendering it unsatisfactory. Cann v. Rector, etc., Church of Redeemer [Mo. App.] 85 S. W. 994. Where plans were to be prepared under the direction of and to the satisfaction of the vestrymen, held that they had a right to reject them in good faith on the ground that they called for too expensive a building, where architects failed to ask any information as to the desired cost. Id. Could not reject them on ground that building prices were unreasonable, and that it would be expedient to postpone building. Id. Evidence held not to show bad faith, and hence presumption was that rejection was in good faith. Id.

36. Contract to put up fire escapes. A production of their certificate entitled plaintiff to recover, though escapes were not in accordance with the law when the contract was made, which had been changed pending the work. McManus v. Annett, 91 N. Y. S. 808.

37. See 3 C. L. 552.

performance because it is thereafter rendered impossible by act of God.[38] There can, however, be no recovery where performance is impossible within limits legally permissible to the parties.[39] In a verbal contract where there is no guaranty that a particular result will be accomplished, and from the nature of things such accomplishment may be impossible, the law implies a condition that both parties shall become excused from their obligations when it becomes reasonably certain that a continuance would be useless.[40]

A contractor who, through his own negligence, brings the work which he contracts to perform into such a condition that he is unable to complete it and abandons it, is liable for the loss thereby inflicted upon the owner, including the amount reasonably expended in the effort to minimize such loss.[41] So, too, the contractor is excused where further performance is rendered impossible by the acts of the owner.[42]

Destruction of subject-matter.[43]—There is an implied contract on the part of the owner of a building on which repair work is to be done that it will continue to exist until such work is completed.[44] Hence, if it is destroyed before that time, both parties are excused from further performance,[45] and the contractor is entitled to recover for the amount of contract work done which, at the time of the destruction, had become so far identified with the structure that, but for such destruction, it would have inured to the owner as contemplated by the contract.[46]

§ 3. *Modification of contract, and changes in plans and specifications.*[47]—A written contract may be modified by a subsequent parol agreement of the parties,[48] but unless specially authorized to do so, the architect or engineer in charge of the work has no authority to make such modifications.[49] Changes directed by the supervising architect, acting as the owner's agent, are binding on the latter.[50]

38. Not relieved from completion of bridge within specified time because of freshet. Phoenix Bridge Co.'s Case, 38 Ct. Cl. 492.

39. Where a contract for putting in wells and a system of waterworks contemplated a source of supply which the town had no legal authority to use, refusal to perform did not subject the town to damages, performance being impossible within legal limits. Smith v. Town of Stoughton, 185 Mass. 329, 70 N. E. 195.

40. Contract to drill well held subject to implied condition that performance should be excused in case its actual completion became impossible. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Evidence insufficient to show that plaintiff guarantied a certain quantity of water and was to have no pay unless it was obtained. Id.

41. Hammond Oil & Development Co. v. Feitel [La.] 38 So. 941.

42. A contract to remove stone stored on leased premises within a certain time contains an implied condition on the part of the owner that he will keep the lease in force during such period, and his failure to do so, resulting in dispossession proceedings, amounts to a breach of the contract, excusing further performance on the part of the contractor and releasing the surety on his bond. Fidelity & Deposit Co. of M. v. United States [C. C. A.] 137 F. 866.

43. See 3 C. L. 552.

44. Young v. Chicopee, 186 Mass. 518, 72 N. E. 63.

45. Young v. Chicopee, 186 Mass. 518, 72 N. E. 63; Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94.

46. Young v. City of Chicopee, 186 Mass. 518, 72 N. E. 63. Plaintiff agreed to repair bridge for defendant under contract that his compensation should be at a certain rate per thousand feet of lumber used and that no work should be begun until material for at least half the repairs should be upon the job. He distributed lumber along bridge and had used part of it when bridge and all the lumber was burned. Held that he could recover for the lumber which had been used but not for that which had not been. Id. Contractor may recover pay at the contract price for the proportion of the work already done. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94.

47. See 3 C. L. 553.

48. Changes as to manner of payment held to have been made for valuable consideration. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486. A provision in a contract with an architect that no charges for extra compensation shall be made unless previously agreed upon in writing does not prevent parties from modifying contract or making a further contract by parol. Ritchie v. State [Wash.] 81 P. 79. In determining whether this was done, jury may take into consideration the terms and provisions of the written contract between the parties. Id.

49. Is not the general agent of the owner and has no power to change the plans of the work, or the terms of the contract. Particularly when changes result to detriment of contractor. Fontano v.

Under a provision that no alteration shall be made except upon a written order of the engineer, who shall also compute its value, the production of such order is a condition precedent to recovery for alterations, in the absence of proof of a waiver or proof that plaintiff was fraudulently lured into proceeding without it.[51] Such provisions are for the benefit of the owner, and may be waived by him.[52]

In case of a substitution by agreement of materials of lesser value for those specified in the contract, the owner is entitled to a deduction of the actual difference of value in the absence of anything to the contrary in the contract.[53] In a country where marble is common, no allowance will be made for its use in the absence of a showing that its cost was in excess of the best quality of the stone specified in the contract.[54]

§ 4. *Extra work.*[55]—The contractor is ordinarily entitled to recover the reasonable value of extra work or material in excess of that required by the contract, and ordered or accepted by the owner or by his authorized agent.[56]

Extra compensation cannot be recovered for work required by the contract[57] or incidental thereto,[58] or for extra work made necessary by the acts of the contractor.[59]

Robbins, 22 App. D. C. 253. A provision that he will furnish materials under the direction and to the satisfaction of the architects and in accordance with the plans, does not authorize such changes. Id. Where contract provides that marble work is to commence when walls are up and roof on, architects held to have no power to require him to commence work sooner. Id. Engineer held to have no authority to make parol modifications of written contract by making allowances for loss or damage resulting from doing work for which the price was specifically fixed. Baltimore & O. R. Co. v. Jolly Bros. & Co. [Ohio] 72 N. E. 888.

50. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486.

51. Sheyer v. Pinkerton Const. Co. [N. J. Err. & App.] 59 A. 462. Held substantial compliance with contrct in regard to modifications. Schreiber v. Worm [Ind.] 72 N. E. 852.

52. A provision that alterations should be made on the written order of the architects, and the value of the work added or omitted computed by them and added to or deducted from the contract price. Waived by making changes by agreement without reference to architects. Hohn v. Shideler [Ind.] 72 N. E. 575.

53. Woarms & Lesser's Case, 39 Ct. Cl. 10.

54. McFerran's Case, 39 Ct. Cl. 441.

55. See 3 C. L. 553.

56. Subcontractor excavating for reservoir held only bound to excavate to required depth, and not to remove loose rock and level bottom of excavation (Hely v. Hoertz & Co., 26 Ky. L. R. 644, 82 S. W. 402), nor to construct or leave foundations for columns to support cover (Id.). Where a subcontractor rejected materials, but the principal contractor thereafter used them, they were outside the contract with the materialman, and the latter has a claim for unliquidated damages for their use. Wilson v. Dietrich [N. J. Eq.] 59 A. 251. Where the officer in charge of bridge construction advises or orders the contractor to put in a temporary "lift-span" to meet the exigency of the unexpected opening of navigation, his action is not obligatory on the contractor, who if he performs, cannot recover the extra expense to which he has been put. Officer had no authority. Phoenix Bridge Co.'s Case, 38 Ct. Cl. 492. Claimant allowed for certain extra work done by order of the officer in charge over his protest. Items in regard to which he made no protest disallowed. McFerran's Case, 39 Ct. Cl. 441.

57. Under contract to excavate for dam which required materials to be deposited in the manner and at the places designated by engineer, subcontractor held not entitled to extra compensation for depositing material on embankment in accordance with engineer's directions. Kearney v. Coleman, 94 N. Y. S. 206. Evidence held insufficient to entitle plaintiff to compensation for any extra work above contract price for excavating. Id. Held to be duty of subcontractor undertaking to excavate for reservoir to prevent caving of walls before completion of his work, and hence he was not entitled to extra compensation for removing earth which slid into excavation from the walls. Hely v. Hoertz & Co., 26 Ky. L. R. 644, 82 S. W. 402. Where the contract provides that the total cost of the work shall not exceed a specified sum, including cost of all changes and alterations required by the architect, no recovery can be had for extra work rendered necessary by such changes, where it does not appear that the architects had authority to make changes affecting the price, and the fact that the extra work imposed was unreasonable or unfair is not pleaded. Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242.

58. Although the specifications do not provide for it. As for pumping done in connection with excavation. Sentilhon v. New York, 92 N. Y. S. 897.

59. No allowance made for cost of tinting walls where it was made necessary by

Provisions that no claim shall be made for extra work unless the same shall have been furnished on the written order of the architect or other person in charge of the work,[60] and approved by the owner or his agent,[61] or unless the sum to be paid therefor shall first have been determined in a specified manner,[62] are valid and binding and will be enforced. They are ordinarily held not to apply to new work specifically contracted for, and not done under or in pursuance of the original contract.[63] In some states they are regarded as applying only to work concededly not within the contract, and not to changes and alternations intended to be covered by it.[64]

Such provisions may be waived,[65] but will not be deemed to have been in the absence of clear and satisfactory evidence showing such to have been the intention of the parties, or showing an estoppel in pais.[66]

§ 5. *Delay in performance.*[67]—The contractor is not liable for delays caused by the acts or omissions of the owner,[68] or where the latter consents to an extension

discoloration of plaster owing to improper manner in which it was put on. McFerran's Case, 39 Ct. Cl. 441.

60. Contractor held not entitled to recover for work not ordered by town board, though done under direction of engineer. People v. Snedeker, 94 N. Y. S. 319. Extra work as used in contract held to include all work necessitated by change of plans. Id.

61. Under provision that claims must be "authorized in writing by the supervising architect under the approval of the secretary of the treasury," there can be no recovery for extra work not approved by the secretary, though ordered by the government superintendent, with the knowledge of the supervising architect, and of benefit to defendants. Hyde's Case, 38 Ct. Cl. 649.

62. And indorsed on contract. Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351.

63. Provision that no allowance shall be made unless notice is served on the owner and his consent in writing obtained. Shultz v. Seibel, 209 Pa. 27, 57 A. 1120. Question whether work was new work and whether defendant agreed to have it done held for the jury. Id. Evidence held to clearly establish extent of time employed in extra work, and hence, if book of original entries in regard thereto was incompetent, its admission was harmless. Id. A provision that allowance shall be made only for such extra work as shall have been furnished under the written order of the chief of construction does not apply to work done under a new and different contract containing no such provision. Where plaintiff contracted to do exterior work only, does not apply to interior work thereafter done by direction of defendant or its duly authorized agent. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210.

64. Not necessary to allege demand and refusal of certificate. Langley v. Rouss, 94 N. Y. S. 108. The question whether the alleged extra work was within the terms of the contract is for the jury. Where contract is ambiguous. Id.

65. Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351. Provision requiring written order of engineer held for benefit of owner, and could not be waived by engineer. Baltimore & O. R. Co. v. Jolly Bros. & Co. [Ohio] 72 N. E. 888. A provision that compensation for extra work and materials shall be estimated at the rates prescribed in the contract for similar materials. Where plaintiff furnished items on defendant's oral request without such estimate, he was entitled to recover their reasonable value only. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. Requirement of written order waived by ratification of verbal order of architect. Cronin v. Still [Tex. Civ. App.] 79 S. W. 1074. Where plaintiff orally furnished certain items at defendants oral request, a part of which the latter admitted were extras, and some of which it paid. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. Where the work is performed on an oral order of a duly authorized subordinate and accepted by the owner. Acceptance equivalent to ratification of act of agent giving it. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210.

66. Performance of small amount of extra work without regard to provision held not a waiver. Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351.

67. See 3 C. L. 554.

68. Held not entitled to make deductions provided for in contract where architect admitted that delay was chargeable to owner. Curry v. Olmstead [R. I.] 59 A. 392. Allegation that work was delayed at plaintiff's request held to state good defense. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486. In action for breach of contract to do plastering, in which plaintiff alleged that he was prevented from performing by defendant, and defendant counterclaimed for damages for failure of plaintiff to do the work when ordered and without delay in accordance with his contract, and for damages resulting from his having to have others do the work, held that requested charge that plaintiff, to recover, must have performed the work so as not to delay the completion of the house was properly refused as a variance. Schergen v. Baerveldt Const. Co., 108 Mo.

of time.[69] So, too, he is excused where he is enjoined from proceeding with the work.[70]

Delay is not excused because of a failure of the railroad company to deliver material ordered, where the owner is not responsible therefor,[71] nor because there are not a sufficient number of days within the time fixed on which the temperature is sufficiently high to permit the work to be done under the terms of the contract,[72] nor does a provision authorizing an extension in case of a strike occurring through no fault of the contractor entitle him to an extension because of a strike for which he is himself to blame.[73] Where the duty to complete a building at a certain time is subject to several enumerated contingencies, a delay cannot be held to constitute a breach in the absence of a showing that none of such contingencies occurred.[74] So long as the contractor continues to endeavor to fulfill the contract and complete the building in good faith, the owner is under no obligation to take charge of it and complete it himself for the purpose of lessening the amount of damages he may claim for delay.[75] Whether the delay was excusable is a question of fact.[76]

Permitting a performance after the time fixed by the contract has expired is a waiver of the right to plead the delay as a defense in an action for the agreed price,[77] but is not a waiver of the right to counterclaim for any actual damage suffered by reason of such delay.[78]

A provision that no extra time shall be allowed on account of delays unless written notice thereof shall be given when they occur is valid and will be enforced,[79]

App. 262, 83 S. W. 281. Requested charge in general terms presenting the carelessness of plaintiff to the jury for consideration, and requiring it to find whether the prompt completion of the house was endangered held properly refused as foreign to the issues. Id. Charge that defendant had a right to expect from plaintiff a prompt and strict performance of his duty properly refused. Id. Instructions constituting mere delay, whether justified or inexcusable, and irrespective of its occasion, a ground of recovery by defendant, held properly refused as emphasizing matters not in evidence, and seeking to exclude elements properly to be considered in computing plaintiff's damages. Id.

69. Evidence held to show extension. Coen v. Birchard, 124 Iowa, 394, 100 N. W. 48. Plaintiff held to have consented to extension of time obtained by defendant by continuing work with knowledge thereof. United States v. Guerber, 124 F. 823.

70. Injunction against both city and contractor. Webb Granite & Const. Co. v. Worcester [Mass.] 73 N. E. 639. Contractor does not lose any rights against the city by failure to seek a modification of the injunction permitting him to proceed. Id.

71. Lawrence County v. Stewart Bros. [Ark.] 81 S. W. 1059.

72. A provision that no paving was to be done on any day when the temperature was below 35 degrees, and the fact that there were not 60 days when the temperature was above 35 degrees between the time of commencing the work and that specified for its completion. Barber Asphat Pav. Co. v. Munn, 185 Mo. App. 552, 83 S. W. 1062.

73. Miller v. Norcross, 92 App. Div. 352, 87 N. Y. S. 56.

74. Beebe v. Redward, 35 Wash. 615, 77 P. 1052.

75. Leghorn v. Nydell [Wash.] 80 P. 833.

76. Whether the contractor was guilty of inexcusable delay after dissolution of the injunction, whether delay was caused by the city, or whether the delay had made the expense of continuing the work too great and burdensome to require the parties to proceed under the contract, were questions of fact in an action to recover on the contract. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639.

77. Allowing contractor to put in elevator after agreed date. Crocker-Wheeler Co. v. Varick Realty Co., 43 Misc. 645, 88 N. Y. S. 412.

78. Allowing contractor to put in elevator after agreed date does not waive right to counterclaim for damages resulting from tenant's refusal, pursuant to terms of lease, to pay rent until elevator was installed where plaintiff had knowledge of lease. Crocker-Wheeler Co. v. Varick Realty Co., 43 Misc. 645, 88 N. Y. S. 412.

79. Unless written notice shall be given to the architect at the time when they occur, and that he shall then pass upon them and may make an allowance of additional time. Where contract provided for stipulated damages in case of delay if architect certified that work could have been completed on time, architect had no right, in certifying as to when it could have been completed to consider any delay for which no notice was given or allowance made. Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351. Subcontractor held not entitled to extension on account of strike where he failed to give required notice and make application

in the absence of fraud or wrong equivalent thereto, or mutual mistake in the execution, or a clear showing of waiver.[80]

The contractor is entitled to recover the increased cost of the work caused by delay on the part of the owners.[81] There seems to be a conflict of authority as to whether a provision authorizing an extension of time precludes a recovery by the contractor of damages for delay.[82] The question of liquidated damages is treated elsewhere.[83]

§ 6. *Termination or concellation of contract.*[84]—The contract may, of course, be terminated by mutual consent.[85] An agreement that an existing contract between the parties is abrogated and that all their rights thereunder shall cease includes all rights of action growing out of such contract and operates as a release.[86]

By statute in Louisiana the owner may cancel the contract at pleasure,[87] but in such case he must pay the contractor for all expenses incurred and all labor done, and, in addition thereto, all damages resulting to the contractor, such as his loss of profits.[88]

A provision authorizing the owner to terminate the contract at pleasure precludes a recovery of damages by the contractor for a refusal to allow him to perform.[89]

One who makes an excusable mistake in the amount of his bid may maintain a suit in equity for its rescission and the recovery of a deposit made by him as a guaranty that he would enter into the contract if his bid was accepted.[90]

therefor. Miller v. Norcross, 92 App. Div. 352, 87 N. Y. S. 56. Failure to give required notice held forfeiture of right to extension. Curry v. Olmstead [R. I.] 59 A. 392. The city engineer had no authority to suspend work until the weather was favorable, without specifying the number of days; nor could he grant a "reasonable time" in which to complete the work, when the weather became favorable, where the contract provided that no allowance would be made for additional time unless the contractor should be restrained from working by a written order of the city engineer, and then only for the number of days stated in the order. Barber Asphalt Pav. Co. v. Munn, 185 Mo. App. 552, 83 S. W. 1062.

80. Davis v. La Crosse Hospital Ass'n, 121 Wis. 579, 99 N. W. 351.

81. In furnishing plans, etc. Hyde's Case, 38 Ct. Cl. 649. Evidence in regard to damages held too uncertain and indefinite to permit recovery. Id. Where delayed by failure of owner to have building ready, may recover the increased cost of the work caused by an increase in wages. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210. In such case the contractor need not abandon the work, but may complete it and then sue for damages. Id.

82. A provision authorizing the chief of construction to extend the time for completing the work in case delays are caused by other contractors, and making his decision final and binding as to all controversies under the contract, does not give him authority to pass upon the question of the resulting damages to the contractor, or preclude the latter from recovering therefor. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210. Provision for an extension for delay due to the fault of the architects or owners precludes a recovery of damages by the contractor for such a delay. Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242.

83. See Damages, 3 C. L. 997.

84. See 3 C. L. 555.

85. Contract whereby plaintiff agreed to do certain brick work for defendant for 5 per cent. of the cost of the labor held rescinded by later contract, which was the result of mutual dissatisfaction with the original one, whereby it was agreed that defendant was to let the contract to the lowest responsible bidder. Plaintiff not entitled to return to original contract where defendant rejected all bids and completed the work himself, he not being the lowest bidder. Hughes v. Brennan Construction Co., 24 App. D. C. 90. Under a provision that the contract may be terminated by written notice on certification by the architect that the work has been abandoned, a written certificate from the architects is not necessary. Sureties not released. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556.

86. Installation of electric apparatus. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 77.

87. Civ. Code, art. 2765. Dugue v. Levy [La.] 37 So. 995.

88. Not liable for such consequential damages as loss of reputation and credit. Dugue v. Levy [La.] 37 So. 995.

89. Baltimore & O. R. Co. v. Jolly Bros. & Co. [Ohio] 72 N. E. 888.

90. Where omitted estimate on one part of work, held that acceptance of bid did not create contract for want of meeting of minds. Board of School Com'rs of Indianapolis v. Bender [Ind. App.] 72 N. E. 154.

§ 7. *Completion by owner or third person.*[91]—Building contracts generally provide for completion of the work by the owner in the event of its abandonment by the contractor,[92] or by the contractor in the event of abandonment by a subcontractor.[93] In such case he is entitled to deduct from the contract price the reasonable costs and expense necessarily incurred by him in so doing.[94] The price agreed to be paid for the completion of the work is not the reasonable cost thereof, where the agreement requires the satisfaction of all liens filed under the former contract.[95] The value of materials delivered but not used, and extra work done by the original contractor should also be deducted.[96] A provision in the contractor's bond giving the surety the right, in case of default, to assume the contract and sublet or complete the same, provided it is done in accordance with the contract, is valid, and the surety may elect to complete the contract, stand on the terms of the bond, or voluntarily pay any damages resulting from the principal's default.[97] In case it elects to complete the work, it assumes all defects of the principal's work, together with inferior materials used, and is entitled to the benefits of the contract from the time of default, together with any sum which may then be due the principal.[98]

§ 8. *Architect's and other certificates of performance, and arbitration of disputes.*[99]—Where the contract provides that payments shall be made only on the written certificate of the engineer or architect that the work has been performed, its production is a condition precedent to the right of recovery.[1] Such a provision will, however, be deemed and construed to embody the condition that the

Complaint alleging facts and that contractor promptly notified board having charge of the work of the mistake, and that contract was let to next highest bidder held to state cause of action. Id.

91. See 3 C. L. 556.

92. Where defendant agreed to retain from the contract price for painting her house an amount sufficient to pay plaintiff for materials sold to the contractor and used in the work, and to pay it to plaintiff when the work was completed, plaintiff was entitled to complete the work on the contractor failing, though his own fault, to do so. Bates v. Birmingham Paint & Glass Co. [Ala.] 38 So. 845. Defendant, having refused plaintiff's offer to do so is liable to it for the amount due it for materials, not exceeding the balance due the contractor, less the sum reasonably necessary to complete the work. Id. Where contractor who undertook to build levee was granted indefinite extension of time by chief engineer, and latter subsequently placed additional forces on work, not on account of contractor's negligence but because of unforseen contingency, the contract giving him no such right, and the contractor was induced to continue work by express statement that he would be paid for all work he might perform, held that levee board could not charge him more than the reasonable value of the work performed by the engineer, and not the entire cost of such work, if unreasonable. Board of Levee Com'rs for Yazoo & Mississippi Delta v. Short [Miss.] 38 So. 330. May adopt any methods and means reasonably necessary, and need not follow plans and specifications. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. Damages held sufficiently proven. Id.

93. Where, on default of the subcontractor, the contractor construes the contract as authorizing him to complete the work and deduct the cost of the work from the contract price, notifies the subcontractor of his intention to do so, and does so with the subcontractor's acquiescense, he cannot deny the right of the latter to the difference between the contract price and the cost of completion. Not on theory that, since contract was an entire one, there can be no recovery for a partial performance. Asbestos Mfg. Co. v. Burns, 24 Pa. Super. Ct. 84. Principal contractor held entitled to complete work on abandonment by subcontractor. Miller v. Norcross, 92 App. Div. 352, 87 N. Y. S. 56. Evidence insufficient to sustain finding as to value of work remaining uncompleted. Id.

94. The reasonable cost and expense necessarily incurred by a city held measure of its damages for breach of the contract, recoverable from the surety. Contract for sewers abandoned. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368.

95, 96. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

97, 98. American Bonding Co. v. Regents of University of Idaho [Idaho] 81 P. 604.

99. See 3 C. L. 556.

1. Sheyer v. Pinkerton Const. Co. [N. J. Err. & App.] 59 A. 462. Architect made primarily the judge of whether contract has been fulfilled or not, and his findings will not be lightly overruled. Dugue v. Levy [La.] 37 So. 995. His rulings are conclusive. Halsey v. W. Springs Sanitarium [Wis.] 104 N. W. 94.

2. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94.

architect shall exercise his function as arbitrator honestly and in good faith.[2] And the contractor, if he does his work, may recover without such certificate if he is prevented from obtaining it by the arbitrary, fraudulent, collusive, or unreasonable conduct of the architect in refusing it,[3] or if its issuance is prevented [4] or waived by the owner.[5]

Provisions that the report of the architect, engineer, or other person in charge of the work as to the amount and quality of the work done or material furnished shall be final,[6] that he shall determine the value of materials omitted or added,[7] or the increased or diminished compensation of the contractor incident to changes in the plans; [8] or the expense of completing the work in case it is abandoned by the owner,[9] or that he shall determine all questions arising during the performance of the contract are valid and binding,[10] and the action of the arbiter there-

3. Refusal held arbitrary and unjust though owner had withdrawn contract from architect. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94. If refusal dictated by caprice and prejudice, and contractor is evidently entitled to be paid, and owner is so advised. Dugue v. Levy [La.] 37 So. 995. If fraudulent. Sheyer v. Pinkerton Const. Co. [N. J. Err. & App.] 59 A. 462. Can recover where he produces the only certificate which he is able to obtain, though it is defective, particularly where such defect is due to some act or omission on the part of the owner. Defect in certificate of balance due in failing to state amount to which defendant was entitled for omitted work, where failure due to fact that owner failed to present claim. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

4. As where owner withdrew contract from architect. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94. Discharge of architect. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

5. Sheyer v. Pinkerton Const. Co. [N. J. Err. & App.] 59 A. 462. A provision requiring the certification of two architects showing completion of the work held waived where partnership between them was dissolved and owners refused to permit one of them to have anything further to do with the work, and accepted and made payments on certificate of other. Final certificate of latter sufficient. Lavanway v. Cannon [Wash.] 79 P. 1117.

6. Materials for construction of gun and mortar batteries. United States v. Venable Const. Co., 124 F. 267. Decision of chief engineer as to classification of material held binding, in absence of showing of fraud or mistake. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981. Contract of subcontractor held to make decision of chief engineer as to classification of material conclusive. Id. Contract binding, and there being no question of his good faith, question whether he was right or wrong, or whether others agreed with him not open for consideration. Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70. Admission of reports of others held error, but not prejudicial in view of the evidence. Id. Provision making him the arbiter of the amount and character of the work done, its conformity to the contract, and the compensation to be paid. Guild v. Andrews [C. C. A.] 137 F. 369. Provision held to refer to the final inspection and acceptance of the work. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295. Where the contract provides for the inspection of the materials before they are accepted, the judgment of the inspector is conclusive on both parties in the absence of fraud or a mistake so gross as to imply bad faith. Electric Fireproofing Co.'s Case, 39 Ct. Cl. 307. Where lumber is, pursuant to contract, inspected and accepted before being subject to a fireproofing process, defendant cannot require second inspection or reject it after contractor has paid for it and subjected it to such process. Id. A provision that certain lumber should be inspected by government officers before subjecting it to the fireproofing treatment held to imply that such inspection should be final and conclusive, and that the contractor might rely thereon. Id.

7. Owner cannot deduct amount due him for omitted work from contract price in absence of certificate. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115. Provision that architect's decision shall be final does not apply to a case where one material is substituted for another. Substitution of marbles. Woarms & Lesser's Case, 39 Ct. Cl. 10.

8. By board of naval officers. Conners v. United States, 130 F. 609.

9. In subcontract. White v. Abbott [Mass.] 74 N. E. 305.

10. Provisions that the architect is to determine questions arising during the performance of the contract, that payments are to be made on his certificate, and that his determination shall be binding, are valid, and such determination in the absence of fraud or mistake, is a condition precedent to the right of either party to recover on the contract. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115. Decision that contractor is not liable for extra expense of excavation made necessary by encountering quicksand in making excavations, held conclusive. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347. The interpretation of the drawings, specification, and contract may properly be left to the architects. Id.

under is generally held to be final and conclusive, in the absence of fraud, or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.[11] He is, however, only entitled to pass on claims within the class which he is appointed to consider.[12] It is the duty of the party who will benefit by the certificate to secure it.[13]

No notice or hearing need be given before making a decision,[14] nor is any particular form of certificate necessary,[15] though a certificate that the contractor

11. Gross mistakes imply bad faith only when, all the circumstances duly considered, they cannot be reconciled with good faith, and then they necessarily imply it. Guild v. Andrews [C. C. A.] 137 F. 369; Electric Fireproofing Co.'s Case, 39 Ct. Cl. 307. Instructions as to mistakes held proper, and requests as to inspection, etc., properly refused. Guild v. Andrews [C. C. A.] 137 F. 369. Evidence held to show mistakes so gross as to imply bad faith in supervision and acceptance of work under contract for construction of sewer. Id. There being a conflict in the evidence, defendant's request for directed verdict held properly refused. Id. Report can only be set aside for fraud, or for such gross mistakes as imply bad faith or a failure to exercise an honest judgment. United States v. Venable Const. Co., 124 F. 267. Certificate in pursuance thereof is binding upon the parties in the absence of fraud, or of such palpable mistake as prevents the architect from the exercise of his judgment on the matter submitted to him. White v. Abbott [Mass.] 74 N. E. 305. Award cannot be set aside for mere error of judgment as to the law or facts, in the absence of fraud or misconduct, or a palpable mistake of fact appearing on the face thereof. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115. Notwithstanding a provision that the decision of the engineer in charge as to quantity and quality shall be final, his measurements stopping at the perimiter of the brickwork of a tunnel are not final where it is necessary that the rock excavation be slightly larger, and the contractor is entitled to be paid for the amount of rock necessarily excavated. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295. Nor is his certificate of measurement of brickwork conclusive, where he arbitrarily assumes its thickness instead of measuring it. To be paid for by the foot. Id. The provision in a contract that the parties thereto shall be bound by the final estimate of the engineer does not, in Ohio, deprive a court of justice of jurisdiction in a suit involving the proper construction of the contract, or the correctness of the engineer's estimate thereunder. City of Cleveland v. Griffin, 2 Ohio N. P. (N. S.) 473.

12. White v. Abbott [Mass.] 74 N. E. 305. Claim of the contractor for services in making the arrangements and superintending the carrying on of the work after abandonment by the subcontractor held within architect's jurisdiction. Id. Provision that increased or decreased compensation resulting from changes in plans to the interest of the government should be determined by board of naval officers held not to refer to changes arising out of unseen necessities involving a mutual mistake of fact. Changes because lumber was not fit for fireproofing. Conners v. United States, 130 F. 609.

13. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

14. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347. A provision that the architects shall have the sole interpretation of their drawings and specifications and that their decision shall be final and binding on both the owner and the contractor authorizes them to adopt such legal principles as they honestly believe to be applicable, and to act on such evidence as they choose to receive. Id. Need not take testimony of witnesses in determining whether the contract has been completed. Fact that owner had not completed examination of bulding held no excuse for delay in furnishing certificate. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

15. Under a contract requiring an estimate to be given by the architects for 85 per cent. of work and material in place, and providing that payments shall be made on written certificates of the architects. Certificates stating that contractors are entitled to a payment according to the contract in a certain sum held sufficient. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Mere "O. K." indorsements on bills held sufficient. Id. The architect's determination of the amount to be added to or deducted from the contract price on account of changes may be made separately and embodied in a written certificate as to the amount, or it may be embodied in the certificate as to the balance due the contractor. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115. The same is true of a certificate as to the amount of damages suffered by either party from the delay of the other. Id. Contract by city for construction of sewers provided that city might, if it became dissatisfied therewith, proceed to complete the work, and the expense of so doing should be allowed to it by the contractors in accordance with the decision of the city engineer, which should be final. Contingency arose, and the city did some work and then relet contract for completion. Held that report of engineer showing amount of work done and materials furnished by persons to whom contract was relet, and showing on its face that it referred only to relations between city and them, was not a decision within the meaning of the contract, since it did not refer to work done by city. City of San Antonio v. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315. Certificate of engineer

is entitled to final payment should specify the amount due him.[16] The fact that part of the certificate is void does not invalidate the rest, where it is several, and is not so connected with the rest as to affect the justice of the case.[17]

The owner cannot revoke the authority granted by the contract unless authorized to revoke the contract as a whole.[18] A provision making payment for materials conditional on their approval by the architect is not waived by a further provision that payment may be made in advance of delivery.[19]

A provision for arbitration in case either party is dissatisfied with the decision of the architect as to any matter left to him cannot be relied on to defeat a recovery, where no demand for arbitration is made until the trial of the action.[20]

§ 9. *Acceptance.*[21]—The acceptance of the work by the owner may be a waiver of defects in performance,[22] provided it is such an acceptance as is contemplated by the contract,[23] and he has knowledge of all the facts and circumstances.[24]

The owner does not, by paying the contract price and going into possession, lose his right to recover damages for defective construction.[25] Part payment is not a waiver of delay in performance, where the owner retains enough of the consideration to cover the amount of liquidated damages claimed by it for such delay,[26] nor is the fact that the owner used the building before it was accepted a waiver of damages for delay already accrued.[27]

that he had accepted certain specified clearing work held, conclusive though it did not state in the language of the contract, that the work had been fully performed according to the provisions of the contract. Eastham v. Western Const. Co., 36 Wash. 7, 77 P. 1051.

16. Certificate held defective in leaving amount, to be deducted on account of omitted work, for future determination. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

17. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

18. Cannot be revoked after decision on a disputed point has been made and communicated. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

19. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734.

20. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115.

21. See 3 C. L. 557.

22. Held waiver. Burke v. Coyne [Mass.] 74 N. E. 942. Where window frames as constructed by a subcontractor have been approved by the owner and made a part of the building without objection either on the part of the owner or the architect, the owner cannot defend on the ground that they were not constructed according to plans which the subcontractor has never seen. Toan v. Russell, 111 Ill. App. 629. Plaintiff held entitled to recover for architect's services in preparing plans and specifications, where defendants admitted that they employed him to make an estimate, and that plaintiff furnished the plans which they kept until the commencement of the action without protest and never prior to that time contested his employment, and the only reason that the plans were not used was that defendants decided not to build for lack of funds. Adamo v. Blohm, 97 App. Div. 629, 89 N. Y. S. 644. Evidence insufficient to show that plaintiff copied defendants' plans. Id. Where the original plans were filed with the building department, the fact that no detailed specifications or plans showing changes afterwards made were filed does not defeat the contractor's right to recover the contract price, where the completed work is approved by the department, and the owner enjoys the benefits of the work and material furnished. Nothing to show that builder agreed to file them, and architect assumed duty of filing originals. Zwerdling v. Congregation Adas Le Israel, 92 N. Y. S. 360.

23. Acceptance of government work without final inspection held not such acceptance as contemplated by the contract, and hence did not relieve contractors from liability for defective work by subcontractors. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295.

24. Evidence held to justify submission to jury of question whether defendant had accepted certain plans knowing that they called for a building to cost in excess of his original limitation. Hight v. Klingensmith [Ark.] 87 S. W. 138. Retention of plans by rector and fact that picture of proposed building was framed by vestrymen and hung in vestry, held not an acceptance of plans, in absence of showing that they knew what the cost of such a building would be. Cann v. Rector, etc., Church of Redeemer [Mo. App.] 85 S. W. 994.

25. Ludlow Lumber Co. v. Kuhling, 26 Ky. L. R. 1185, 83 S. W. 634. If the defect must be discovered within a reasonable time, eight months is not unreasonable. Id.

26. 27. Lawrence County v. Stewart Bros. [Ark.] 81 S. W. 1059.

§ 10. *Payment.*[28]—Where an architect is to receive a percentage on the actual cost of the building, payments to be made from time to time as the work progresses with final payment at a stipulated time after the completion of the plans and specifications, he is not entitled to a lien until after the completion of the work, though the time fixed for final payment has elapsed.[29]

Where the contract provides for a payment when the work reaches a certain stage, and that the remainder of the contract price shall not be paid until the work is completed, there is, after the first payment and before the completion of the work, nothing due the contractor which can be reached by garnishment.[30]

The owner cannot take advantage of a provision that the last payment shall not be due until a permanent loan has been placed upon the building where he is solely at fault for not having obtained it.[31]

The usual rules as to compromise and settlement apply.[32] The acceptance of the contract price without protest does not preclude the recovery of compensation for extra work, where the items thereof were not the subject of discussion or contention in the settlement of the amount due.[33]

§ 11. *Subcontracts.*[34]—The owner cannot recover from a subcontractor for injuries resulting from his failure to perform his contract in accordance with the specifications, there being no privity of contract between them.[35]

A subcontractor who is prevented from completing his contract because of a default on the part of the principal contractor and the action of the owner in untaking the completion of the work, may recover against the owner on a quantum meruit, where he has substantially performed his contract.[36] Equities existing between the subcontractor and the principal contractor cannot, in such case, be availed of by the owner.[37]

The contractor and not the owner is responsible for defective work done by a subcontractor,[38] and a contractor paying subcontractors before the final acceptance of the work provided for by the contract does so at his own risk.[39]

Subcontracts generally provide that the work must be done in accordance with the terms of the principal contract.[40] A judgment in favor of a subcontractor in a suit by him against the principal contractor is not res adjudicata of the question

28. See 3 C. L. 557.

29. Since cost and hence amount of his compensation cannot be ascertained until that time. Richardson v. Central Lumber Co., 112 Ill. App. 160.

30. Simmons Hardware Co. v. Baker [Mich.] 12 Det. Leg. N. 132, 103 N. W. 529.

31. As where he permits premises to be sold under foreclosure. Mogulewsky v. Rohrig, 93 N. Y. S. 590.

32. See Accord and Satisfaction, 5 C. L. 14. Acceptance and retention of check by subcontractor held to estop him from claiming more, and he could not retain it on account and sue for a balance claimed by him. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981. Acceptance of payment in full, etc., held compromise conclusive on contractor. Phoenix Bridge Co.'s Case, 38 Ct. Cl. 492.

33. McFerran's Case, 39 Ct. Cl. 441. Held error to submit to the jury the question of final settlement between the parties, where undisputed evidence showed that no settlement was reached. Cronin v. Still [Tex. Civ. App.] 79 S. W. 1074.

34. See 3 C. L. 558.

35. Where plaintiff contracted with a company to install sprinkler system, and it contracted with defendant to build support therefor, held that plaintiff could not recover damages resulting from collapse of support owing to absence of tie member required by contract, particularly since subsequent intervening independent acts of others saved defendants' omission from being the proximate cause. Galbraith v. Illinois Steel Co. [C. C. A.] 133 F. 485.

36. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

37. No priority of contract. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

38. Latent defects unknown to either. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295.

39. Liable for latent defects discovered subsequently before final acceptance. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295.

40. "General stipulations" in construction contract held to constitute a portion of the "specifications" and hence to come within a provision of a subcontract that the specifications of the principal contract should be a part thereof and govern the same. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981.

whether the work was done in accordance with the principal contract, in a suit by the contractor against the owner.[41]

Orders drawn by the contractor upon the owner in favor of a subcontractor, and payable out of particular funds due on the contract constitute equitable assignments of such funds.[42] One taking such an unaccepted order takes his chances on there being a balance due to the contractor, and cannot assert a personal claim against the owner superior to those holding mechanics' liens against the property.[43]

A contractor who accepts an order of a subcontractor in favor of a materialman is not liable to the latter, where the only amount remaining unpaid was, by the terms of the order, to be paid out of the amount due on the last payment, and no last payment ever became due the subcontractors on account of their abandonment of the work and its complétion by the principal contractors.[44]

A promise by the contractor, on acceptance of a subcontractor's order, to pay to a third person a certain sum due the subcontractor "when said money is due him" is conditional on the completion of the contract by the subcontractor.[45]

§ 12. *Bonds.*[46]—A statute requiring building contracts to be secured by bonds which shall inure to the benefit of materialmen is unconstitutional as being an unreasonable restriction on the power to contract.[47]

A bond conditioned on the faithful performance of the contract renders the sureties liable for a failure of the contractor to perform any duties or obligations thereby imposed on him.[48] Where the contractor undertakes to furnish all labor and material, the owner may treat the filing of a mechanic's lien as a breach of a bond given to secure the faithful performance of the contract,[49] or he may waive

41. Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054.

42. If assignments not valid as against subsequent general assignee of contractor until filed (Laws 1885, p. 587, c. 342, § 5, as amended by Laws 1896, p. 981, c. 915), the prayee at least acquires inchoate rights, and the general assignee takes title subpect to the payee's right to file them and perfect his right to the fund. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299. Equitable assignment of so much of the contract price due and unpaid as is in the hands of the contractor, as against subsequent attachments. Lutter v. Grosse, 26 Ky. L. R. 585, 82 S. W. 278. The acceptance, by the subcontractor from the contractor, of an order on the owner for the amount of his claim, and the service on the owner of a notice of his holding it, works an equitable assignment of so much of the amount to become due the contractor as is represented thereby. Wheelock v. Hull, 124 Iowa, 752, 100 N. W. 863. Evidence held to show agreement by defendant owner and builder to pay materialman for material furnished contractor which materialman should furnish on order of contractor and charge to defendant. Order by contractor in favor of materialman held intended to limit amount for which owner should be liable, and latter was liable for value of material furnished, though it did not equal amount of order, and though contractor did not fully complete his contract. Statute of frauds not applicable. Potter v. Greenberg, 24 Pa. Super. Ct. 505.

43. Wheelock v. Hull, 124 Iowa, 752, 100 N. W. 863.

44. Miller v. Norcross, 92 App. Div. 352, 87 N. Y. S. 56.

45. Until performance, any question of payments by contractor to subcontractor is immaterial. Pohlman v. Wilcox [Cal.] 80 P. 625. In an action on the contract, testimony that the money advanced by plaintiff to the subcontractor was used in the work under the contract held immaterial. Id.

46. See 3 C. L. 558.

47. Code Civ. Proc. § 1203. Bond given pursuant thereto cannot be upheld as common-law obligation. Montague & Co. v. Furness, 145 Cal. 205, 78 P. 640.

48. Covers failure to complete work within specified time. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 50. The sureties on the contractor's bond to indemnify the owner from all personal loss resulting from a breach of the contract are responsible for damages to an adjoining building resulting from the performance of the contract, where the contract provided that the contractor would be personally responsible to adjoining owners for such damages. Leppert v. Flaggs [Md.] 60 A. 450. A stipulation in the contract that the last instalment due thereunder shall be paid when the building is surrendered free of all liens requires an indemnitor giving an undertaking that the principal shall faithfully comply with the terms of his contract to see that the building is free of liens when surrendered. McKinnon v. Higgins [Or.] 81 P. 581.

49. Beebe v. Redward, 35 Wash. 615, 77 P. 1052. Owner may sue for failure to pay materialmen without having first paid or suffered judgment for their claims. May

such apparent breach and insist that the covenant is broken only when the lien is made a fixed and determined charge against his property by the judgment of a court of competent jurisdiction.[50]

The extent of the surety's liability is governed by the terms of the bond and not those of the contract.[51]

In the absence of a provision in the bond to the contrary,[52] no notice to the surety of the contractor's failure to perform is necessary.[53]

Anything done or omitted by the owner to prejudice the position of the surety will discharge him either pro tanto or altogether.[54] The surety cannot, however,

treat it as breach of contract, and hence of the bond. Friend v. Ralston, 35 Wash. 422, 77 P. 794; Trinity Parish v. Aetna Indemnity Co. [Wash.] 79 P. 1097.

50. Provision in bond requiring suit to be brought within six months of breach complied with where brought within six months after lien was put into judgment. Beebe v. Redward, 35 Wash. 615, 77 P. 1052; Ovington v. Aetna Indemnity Co., 36 Wash. 473, 78 P. 1021.

51. Where a contractor's bond contains no provision for liquidated damages for delay in completing the work, called for by the contract for the work, such damages cannot be recovered from the surety. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. Under bond conditioned that contractors would promptly pay all debts incurred by them in the prosecution of the work, including labor, materials, etc., neither they nor their sureties were liable for debts incurred for labor and supplies by a subcontractor. Miller v. State [Ind. App.] 74 N. E. 260.

52. Where bond requires notice, owner cannot hold surety for liquidated damages fixed by contract for delay unless he gives it. American Bonding Co. v. Regents of University of Idaho [Idaho] 81 P. 604. A provision in the bond requiring the owner to notify the surety of any act of the principal which might involve a loss for which the surety would be liable does not require him to give notice of the fact that the contractor has become indebted for labor, but only of proceedings to enforce a lien for the debt. Ovington v. Aetna Indemnity Co., 36 Wash. 43, 78 P. 1021.

53. Admission of copy of notice harmless. Hohn v. Shideler [Ind.] 72 N. E. 575.

54. Hohn v. Shideler [Ind.] 72 N. E. 575.

Surety released: By the waiver by the owner of a stipulation requiring him to reserve a portion of the contract price, until after the completion of the work, without the surety's consent. Lawhon v. Toors [Ark.] 84 S. W. 636. Payment of first instalment before all the materials were delivered, contrary to terms of contract, releases sureties entirely, and not merely to extent of payment. Civ. Code, §§ 2819, 2840. Glenn County v. Jones [Cal.] 80 P. 695. By changes allowing payment to be made directly to the contractor instead of first paying claims for labor and material, when made upon sufficient consideration. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486. By violation of provision requiring final payment to be made on completion of the work and when receipts for all labor and material have been furnished. Are not liable for sums which the owner was required to pay for materials to outside parties, where he overpaid contractor before work was completed. Tinsley v. Kemery [Mo. App.] 84 S. W. 993. Fact that amounts were not specified in provision for payment of instalments as work progressed held immaterial. Id.

Surety not released: Because legal title is not in party spoken of in contract and bond as owner. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Building contract held not to require written audit or certificate of architects as to claims, and hence surety not released by fact that owner was allowed damages for delay without it, and the amount applicable to subcontractor's claims was thereby reduced. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556. Also held that paper in evidence was intended as such certificate and was sufficient. Id. Because of attempt to heat additional room from plant, where plan was failure, and change had no effect on amount of heat supplied to building as originally constructed. Board of Education of St. Louis v. National Surety Co., 183 Mo. 166, 82 S. W. 70. Particularly where arbiter excluded room from consideration in determining whether contract had been complied with. Id. Held that there was no such unreasonable delay in determining sufficiency of heating plant as to discharge surety. Id. Because two additional furnaces were put in. Id. By failure of owner to insure in manner provided by contract, where no loss occurred. Hohn v. Shideler [Ind.] 72 N. E. 575; Schreiber v. Worm [Ind.] 72 N. E. 852. By unimportant and trivial alterations made by agreement between parties without reference to architect in accordance with terms of contract, where contract contemplated alterations and changes. Hohn v. Shideler [Ind.] 72 N. E. 575. By alterations in contract before it or the bond was signed. Schreiber v. Worm [Ind.] 72 N. E. 852. By small alterations, where contract contemplates them. Id. Because of changes which contract gave right to make. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556. Ovington v. Aetna Indemnity Co., 36 Wash. 473, 78 P. 1021. Because of deviations from the contract by the contractor gratuitously and for the purpose of doing better work. Contractor put in a brick wall and certain additional supports not called for by the contract and made no

complain of any breach of the contract which the owner waives unless it results to his prejudice,[55] and this is particularly true in the case of compensated guaranty companies.[56] A contention that the surety is not liable until the owner has paid the full contract price, predicated on the fact that he has retained the amount of damages due him for delay in completion of the work, is untenable since he is not required to leave his own claim unpaid and apply the money for the benefit of the surety.[57]

It is no defense for the principal in an action on the bond that he was paid in installments other than those provided for in the contract, particularly where the payments were made at the contractor's own request and he accepted them, and where he was overpaid.[58]

The liability of a surety, released by a breach of the contract on the part of the owner, cannot be revived by a subsequent waiver of such breach by the contractor.[59]

The fact that, after a breach of the contract, the owner pays to the indemnitor the amounts due the contractor thereunder, in accordance with its terms, does not constitute a forfeiture of his right to the indemnity on the subsequent filing of liens against the property,[60] but the indemnity company, by accepting such payments and permitting the liens to be filed, waives its right to insist that the action to recover the damage sustained was not instituted within the time limited by the undertaking.[61]

Though a surety on a bond stipulating to protect the owner from liens, by reason of the contract and the work and material furnished under it, cannot himself acquire a lien for materials furnished the contractor, yet he may acquire from the contractor for that purpose an equitable assignment of such sums as are or may become due him under the contract.[62] It is not essential to the validity of the as-

claim for extra work. Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014. Because of irregularities of payments and approval of bills by surety's agent. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Estopped by conduct to object to payments. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556. By payments made not in accordance with contract but with surety's consent. Schrieber v. Worm [Ind.] 72 N. E. 852. By loan or advancement under contract without certificate of architect, where the money was used in the construction of the building, and was deducted from last certificate, since surety was benefited rather than injured thereby. Leghorn v. Mydell [Wash.] 80 P. 833. Because of failure to retain 15 per cent. of contract price until completion of building, where it was applied to payment of the cost of constructing the building which was in excess of the amount for which the contractor agreed to build it. First Presbyterian Church v. Housel, 115 Ill. App. 230. Because claims have been assigned to owner. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550.

55. Must show that failure to complete building on time resulted to his prejudice. Beebe v. Redward, 35 Wash. 615, 77 P. 1052. Surety cannot complain of advances made to principal outside of contract to enable latter to complete contract, where creditor makes no claim on account of them, and they have in no manner affected surety's rights. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734. Must show that he has sustained some damage by violation of contract (Schreiber v. Worm [Ind.] 72 N. E. 852), and then is only entitled to be discharged pro tanto (Id.).

56. Failure to notify surety of noncompletion of building on time held at most a waiver of claim for damages in that regard, but not a waiver of the entire contract. Trinity Parish v. Aetna Indemnity Co. [Wash.] 79 P. 1097. Notice of unpaid claims for materials subsequently discovered held sufficient to bind surety. Id. A compensated guaranty company cannot escape liability by reason of deviations from the exact terms of the contract, where such provisions were waived, and no damage is shown to have resulted to the surety by reason thereof. Not because of failure of owner to pay contractor's in full where they received full credit for balance due, which inured to benefit of surety. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

57. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550.

58. Tinsley v. Kemery [Mo. App.] 84 S. W. 993.

59. Government contract to remove stone from leased premises broken by failure to renew lease. Fidelity & Deposit Co. v. United States [C. C. A.] 137 F. 866.

60, 61. McKinnon v. Higgins [Or.] 81 P. 581.

62. Does not infringe on owner's rights or impair the obligations of the surety. Verbal assignment held valid. Campbell v.

signment that notice thereof be given to the owner, or that he consent thereto.[63]

The surety, in an action by the owner to recover on the contractor's bond, is estopped by a judgment obtained in good faith by the owner against the contractors for breach of the contract.[64]

§ 13. *Remedies and procedure.*[65]—A contractor signing the contract in his own name as an individual may properly sue thereon in his own name, though he may have been in partnership with a third person who performed the work under a private understanding between them that he was to share in the profits.[66] A stipulation as to speed in a ship-building contract is a collateral warranty and may be sued on after delivery and acceptance since it cannot be determined by inspection on delivery.[67] A subcontractor may prosecute a petition for a mechanic's lien simultaneously with a suit at common law to recover the same debt in which a part of the contract price still in the hands of the owner is attached.[68] An action cannot, of course, be maintained on the contract until after the time fixed for payment.[69]

Form of action.[70]—Performance upon the part of the contractor is a condition precedent to his right of payment, in the absence of anything in the contract to the contrary.[71] In case he is prevented from performing by the act of the owner or in case of any other breach of contract by the owner, he may either sue on a quantum meruit for the value of the services actually performed,[72] or he may recover damages for the breach.[73] Where substantial compliance is not found, the general rule that an express contract excludes an implied one covering the same

Grant Co. [Tex. Civ. App.] 82 S. W. 794. Where price was to be paid in instalments as the work progressed, held that the debt accruing under the contract, after the contract was made, had a sufficient potential existence to support a parol equitable assignment of a part thereof. Id. Answers held not to show that assignment was made before the execution of the contract. Id. Answer held to sufficiently show that assignment was supported by a valuable consideration, and that the fund sought to be assigned was definitely ascertained and expressed. Id.

63. Campbell v. Grant Co. [Tex. Civ. App.] 82 S. W. 794.

64. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

65. See 3 C. L. 559.

66. To bore well. Council v. Teal [Ga.] 49 S. E. 806.

67. Bull v. Bath Iron Works, 75 App. Div. 380, 78 N. Y. S. 181.

68. Hunt v. Darling [R. I.] 59 A. 398.

69. Where screens were to be paid for in six months after they were fitted, if satisfactory, and one screen was defective, action brought within six months after defect was remedied was premature, if defect was such that contract was not substantially performed; otherwise action brought more than six months after screens were originally furnished was not premature. Burrowes Co. v. Crittenden [Miss.] 37 So. 504.

70. See 3 C. L. 559.

71. Toher v. Schaefer, 91 N. Y. S. 3. Must be either substantial or complete performance. Where contract price was $110, and $30 was claimed for extras, and $20 had been paid on account, judgment for $50 was erroneous, since plaintiff was entitled to full amount claimed if he had substantially performed, and to nothing at all if he had not. Krombach v. Teilelbaum. 90 N. Y. S. 367.

72. Toher v. Schaefer, 91 N. Y. S. 3. Contract with architect for plans. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Action held one on quantum meruit rather than on contract. Id. A petition in an action by architects asking both the value of work done in making plans and also for the pay they would have received for superintendence had the building been erected cannot be construed as stating a cause of action on a quantum meruit. Id.; Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Held proper for jury to find that defendant's conduct and statements at the time of the request for a payment on account was a denial of the right of plaintiff to any remuneration for drilling a well unless water was obtained and amounted to a repudiation of the contract. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Where injured by owner's stoppage of work. Houston Co.'s Case, 38 Ct. Cl. 724.

73. On the refusal of the owner to perform his part of the contract the remedy of the contractor is to refuse to proceed and hold the owner for damages for its breach. Refusal to furnish plans. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. If prevented by owner. Toher v. Schaefer, 91 N. Y. S. 3. Including the amount which he has been induced to expend on the faith of the contract and anticipated profits, if any, subject to the right of the opposite

subject-matter applies.[74] Failure to fully perform is a bar to an action on the contract itself, unless such failure is waived.[75] But an unintentional failure to fully perform by reason of unimportant variations is no bar to a recovery under a count on an account annexed for the value of the labor and materials furnished in an amount not exceeding the contract price, and less any deductions necessary to complete the work.[76] A party may not, in one suit growing out of a single transaction, sue for damages for the alleged breach of contract and also for the value of services rendered regardless of the contract.[77]

A recovery may be had on the common counts for the value of labor and material furnished even though plaintiff has failed to perform the contract, where defendant accepted the work and it was of benefit to him.[78] The value of the use must, however, be shown[79]

If the contract is not performed according to its terms, and the owner refuses to accept the work, and the services are of such character and the materials furnished under such circumstances that the same can be rejected and the owner avoid receiving any benefit therefrom, the contractor cannot recover.[80] But where the services from their very nature must be regarded as accepted and the benefits thereof appropriated by the owner from day to day as the work progresses, he, though not liable upon the special contract, will be liable for the fair price and value of the benefits resulting from the partial performance, over and above the amount of damages sustained by the breach.[81]

Where the contract has been performed or terminated, and nothing remains to be done but to pay money, recovery may be had under the common counts,[82] and

party to show that such expenditures were extravagant or unnecessary. Government contractor held entitled to recover certain expenses. Houston Co.'s Case, 38 Ct. Cl. 724.

74, 75. Burke v. Coyne [Mass.] 74 N. E. 942.

76. Burke v. Coyne [Mass.] 74 N. E. 942. This principle also applies in proceedings to enforce mechanics' liens under similar conditions. Id. In such case the difference between the contract price and the outlay necessary to remedy the defects measures the value furnished by the contractor. Id.

77. Contract of employment as architect. Golucke v. Lowndes County [Ga.] 51 S. E. 406. Plaintiff, in suit for breach of contract for employment as architect held not to have alleged performance by him with sufficient definiteness, or to have alleged damages with legal certainty. Id.

78. Matthews v. Farrell, 140 Ala. 298, 37 So. 325.

79. Evidence insufficient to show that defendant accepted plans prepared by plaintiff, or used them, or that they were of any value to him. Minuth v. Barnwell, 94 N. Y. S. 649. In case plans for vessels submitted to the secretary of the navy are not adopted, the right to recover for their use depends upon whether they contain novel designs. If not, defendants were free to use them. Lundborg's Case, 39 Ct. Cl. 23. Where one submitting plans requests their return in case they are rejected, the officers of the department have no right to retain them, but the claimant cannot recover for such retention unless he proves damages. Id. Where the promise of the secretary of the navy to pay for plans depends on their adoption, their adoption or use must be shown in order to recover. Id. Where plaintiffs were not entitled to recover on a contract to furnish working plans and specifications for the construction of a court house, both on account of its invalidity and their failure to perform, they were not entitled to recover the value of the use of those furnished, which were only used to enable the county board to abandon the project, in the absence of proof of the value of such use. Kinney v. Manitowoc County [C. C. A.] 135 F. 491. The contract price was no evidence of the fair value of such use. Id.

80. Dame v. Woods [N. H.] 60 A. 744. Where plaintiff agrees to furnish all materials for, and install, a heating plant, for defendant for a sum to be paid on the completion of the work, and the building is destroyed before completion thereof, there being no insurance thereon, he cannot recover for the labor and materials already furnished on the theory of a quasi contract to pay for the benefits on the ground of a necessary acceptance from day to day, in the absence of a showing that the materials could not have been removed for a reasonable sum. Annexed to realty and destroyed without fault of either party, before defendant had made any use of them, and before he had had an opportunity to accept or reject them. Id.

81. Dame v. Woods [N. H.] 60 A. 744.

82. Where the contract has been performed and nothing remains to be done but to pay the amount due thereunder. Evans v. Howell, 211 Ill. 85, 71 N. E. 854. Where the contract has been terminated either by

the agreement may be read in evidence for the purpose of showing its terms and to measure the damages.[83]

An action conditio indebiti will lie to recover the improper profits made by a contractor by the substitution of a cheaper material than the one specified.[84]

Pleading.—The ordinary rules of pleading apply.[85] Recovery can only be had on the cause of action alleged.[86] Though not necessary to do so, it is not improper to make the plans a part of the complaint.[87] There is a conflict of authority as to the necessity of pleading waiver and estoppel.[88] In an action to recover a balance of the contract price for the erection of a building, no plea is necessary to present the defense of failure of performance.[89]

Evidence.[90]—The ordinary rules of evidence apply.[90a] On the issue as to the terms of an oral contract with an architect for the drawing of certain plans,

its original terms, by the consent of the parties, or by the unjustifiable act of the defendant, and nothing remains to be done but to pay money, indebitatus assumpsit will lie, though the debt accrued under a special contract. Contract to drill well. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795.

83. Evans v. Howell, 211 Ill. 85, 71 N. E. 854. Contract may be proper and necessary evidence (Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795), and the contract price is the reasonable measure of value, in the absence of evidence showing any loss or damage to defendant by reason of a failure to complete the work. (Id.).

84. Louisiana Civ. Code, arts. 2301 (2279), 2302 (2280), 2133 (2129). Not limited to action quanti minoris. Drainage Commission v. National Contracting Co., 136 F. 780.

85. See 3 C. L. 559. Complaint in action on contract to install plumbing work held to sufficiently aver performance and a resulting indebtedness. Matthews v. Farrell, 140 Ala. 298, 37 So. 325. Not open to the objection that the demand was for work performed under the contract other than installing the plumbing in the building mentioned. Id. In an action on a contractor's bond guarantying the construction of certain sewers, narr. held demurrable for not assigning the breaches with sufficient particularity. United States v. Jacoby, 4 Pen. [Del.] 487, 60 A. 863. Declaration held to sufficiently allege breach of contract to furnish materials in such manner as not to delay the material progress of the work, and to reimburse contractor for loss caused by failure to do so. Pinkerton Const. Co. v. Schweyer [N. J. Law] 58 A. 112. In an action for price of plans in which defendant counterclaimed for damages due to fact that plaintiff erroneously specified that property was certain distance from street and thereby necessitated making of new plans, held that plaintiff was entitled to bill of particulars stating in what papers mistake was made, etc. Price v. Ryan, 96 App. Div. 607, 88 N. Y. S. 984.

86. Where plaintiff refused to accept offer of compromise but sued for full amount claimed by him to be due under contract, without alleging any right to recover former amount, he could not, on failing to establish his claim, recover the sum offered by way of compromise. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981. Recovery cannot be had for damages due to changes in plans ater completion of the work, necessitating its being done over, under a complaint seeking recovery of damages incident to delay in furnishing plans only. Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242.

87. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486. Order requiring filing of plans with complaint is not reversible error since, at most, they are surplusage, and not prejudicial, because they would have to be submitted to jury in any event. Id.

88. Waiver of full performance must be pleaded. Of guaranty that oil well would be flowing one. Cox & Co. v. Markham, Jr. & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 375, 87 S. W. 1163.

Waiver or estoppel need not be pleaded. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

89. In district court. Isetts v. Bliwise [N. J. Law] 60 A. 200.

90. See 3 C. L. 560.

90a. In action on contract to install heating plant, where defendant claimed work was improperly done, evidence that mechanic who did most of the work got drunk and was confined in the calaboose held irrelevant. Matthews v. Farrell, 140 Ala. 298, 37 So. 325. Though contract for installing heating plant did not require boiler and mains to be covered with asbestos, where defendant introduced an expert who testified that loss of heat by radiation would thereby have been prevented, held proper for plaintiff to ask him if it was customary to do so when contract did not require it. Id. Defendant could not be questioned in regard to his construction of the contract. Id. Defendant's opinion as to work inadmissible, it appearing from his own testimony that he was incompetent to make the apparatus a proper instrumentality to serve the purpose for which it was intended. Id. Where contractor had agreed to keep plumbing in repair for a year, questions as to what the expense of doing so would or should be held properly disallowed where they failed to describe what was needed. Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21. In action on contract to drill wells, questions as to whether defendant had been able to use wells or any water there-

the declarations of defendant's wife in his presence and at the time the terms were being considered, coupled with his acquiescence in her wishes then expressed, are admissible.[91] Where the contractor agrees to protect and save the plaintiff harmless from all claims of any sort or description arising by reason of work done or omitted to be done under the contract, and to defend at his own expense all suits brought against the plaintiff on such claims the records of suits so brought in which recoveries were had against plaintiff, which he paid, are conclusive evidence against the contractor's surety provided they disclose with sufficient certainty that they were founded on the negligence or other improper conduct of the contractor.[92]

One suing for labor and material has the burden of proving that both were furnished in pursuance of a contract requiring defendant to pay for them.[93]

BUILDING AND LOAN ASSOCIATIONS.

§ 1. *Statutory regulation.*[94]—The business of building and loan associations is very generally regulated by statute, and compliance with such statutes is necessary to entitle an association to the privileges granted.[95] This rule applies equally to foreign and domestic corporations.[96] The law of the place of performance of the contract governs and is the law with which the association, seeking to enforce its contract, must comply.[97] In some states contracts of a foreign association which

from, and as to the value of wells to him held improper as calling for conclusions. Dubois v. Williamson, 93 App. Div. 361, 87 N. Y. S. 645. On an issue of plaintiff's failure to properly perform a contract to install a water system operated by a hydraulic ram, evidence of defects in the construction of a dam, which he built for the purpose of furnishing the water, was admissible. Carolina Plumbing & Heating Co. v. Hall, 136 N. C. 530, 48 S. E. 810. Admission of evidence to show condition of dam held harmless where nothing to show that its defective condition caused failure of water supply. Id. So too was evidence of a physician that the presence of odors, dampness, and mosquitoes in the house caused the sickness of persons living with defendant. Not on issue of damages, but as substantive evidence of defects in the system. Id. In action on contract for drilling well, permitting witness to illustrate to jury the character and appearance of the well by means of a paper cylinder held not erroneous. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Question asking defendant's president whether phrase was inserted in contract at his suggestion properly excluded. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

91. Hight v. Klingensmith [Ark.] 87 S. W. 138.

92. Contract for construction of canal. Lake Drummond Canal & Water Co. v. West End Trust & Safe-Deposit Co., 131 F. 147. Records properly excluded for indefiniteness, where they did not identify contractor as causing injury, and it affirmatively appeared that a part of the injuries occurred after the contractor had left the work, and there was no means of determining what occurred before and what after that time, and the records were offered as a whole. Id.

93. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550.

94. See 3 C. L. 561.

95. The powers and immunities granted to building and loan associations incorporated under Act April 29, 1874 (P. L. 73, § 37), and supplements thereto do not extend to corporations not chartered under that legislation and managed and controlled in accordance with its provisions. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

96. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256. A foreign association must comply with the statutes of the state wherein it seeks to do business. Miller v. Monumental Savings & Loan Ass'n [W. Va.] 50 S. E. 533.

97. Contract dated and to be performed in Missouri is governed by its laws, though real estate mortgaged is located in Arkansas. Hough v. Maupin [Ark.] 84 S. W. 717. Pennsylvania corporation, as trustee for New Jersey corporation, loaned money for the latter, secured by mortgage on Pennsylvania realty, and assignment of stock of New Jersey concern to it. Held, Pennsylvania contract. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

has not complied with the statute regulating foreign corporations are void.[98] In others, noncompliance with such statutes does not render the contract void, the statutory penalty imposed being deemed exclusive of other penalties.[99] The Missouri statute regulating building and loan associations, requiring them to make a deposit with the state treasurer to secure the holders of contracts, and to procure licenses from a supervisor, who is given ministerial powers, is held valid.[1] The act is not a regulation of interstate commerce, and is within the police powers of the state.[2] It does not confer legislative nor judicial powers upon the supervisor,[3] is not retrospective in operation,[4] and is not class legislation.[5] A building and loan association is liable to the organization tax imposed upon corporations by statute in Kentucky.[6]

The applicability of usury statutes to building and loan contracts is treated in a subsequent section.[7]

§ 2. *Membership and stock.*[8]—The membership usually consists of a borrowing and nonborrowing class, but all members, so far as stock and payments thereon are concerned, stand on an equal footing.[9]

Charters and by-laws.[10]—The articles of association and by-laws are a part of the contract with a member,[11] and stockholders are charged with notice thereof.[12] The fact that a certificate recites that the contract is subject to the articles, by-laws, terms, and conditions expressed on the back thereof, and that the articles and by-laws do not appear there, does not change this rule.[13]

Maturity of stock.[14]—In the absence of any special agreement, stock matures only when the dues paid and earnings apportioned to it amount to the face value.[15] There is a conflict of authority as to the legal effect of an agreement that stock shall mature after a specified number of payments or in a certain time, some courts holding such an agreement enforceable[16] and others that the association has no power to make such a contract,[17] and that it is therefore void.[18] But such an agreement does not render the entire contract void; payments must be made until the stock regularly matures.[19] Some courts hold that when a contract providing for the maturity of stock at the end of a fixed period is not prohibited by law when made,[20] and is fully performed, the association is estopped to set up that it is ultra vires and contrary to law.[21]

98. Loan and mortgage void if statute not complied with. Hanchey v. Southern Home Bldg. & Loan Ass'n, 140 Ala. 245, 37 So. 272.

99. The contract may be enforced, if it would be enforceable if made by a home association. Thompson v. National Mut. Bldg. & Loan Ass'n [W. Va.] 50 S. E. 756.

1. Acts 1903, p. 110. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075. Subject-matter is covered by title. Id.

2, 3, 4, 5. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075.

6. Ky. St. 1903, § 4225, applies. Commonwealth v. Licking Val. Bldg. Ass'n No. 3, 26 Ky. L. R. 730, 82 S. W. 435.

7. See § 3 B.

8. See 3 C. L. 562.

9. See 3 C. L. 563, for recent cases on rights of stockholders and the status of borrowing members. See, also, §§ 3 C. and 3 D.

10. See 3 C. L. 561.

11. Especially where the articles and by-laws so provide. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n, 93 N. Y. S. 916.

12. People's Bldg. & L. Ass'n v. Purdy [Colo. App.] 78 P. 465.

13. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n, 93 N. Y. S. 916.

14. See 3 C. L. 564.

15. See 3 C. L. 564, n. 96.

16. See 3 C. L. 564, nn. 97, 98.

17. That stock will mature in a specified time. People's Bldg. & L. Ass'n v. Purdy [Colo. App.] 78 P. 465.

18. Guaranty that 60 monthly payments would mature stock and satisfy loan held void, under Missouri law. Hough v. Maupin [Ark.] 84 S. W. 717.

19. In Missouri, the statute is read into the contract in place of the void agreement as to maturity. Hough v. Maupin [Ark.] 84 S. W. 717.

20. Amendment of 1897 to Act of 1879, prohibiting fixed maturity periods, is not applicable to a contract previously made and fully performed. Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56.

21. And cannot require payments to ma-

A mortgage executed by reason of false representations by an authorized agent that a certain number of payments would mature the stock is unenforceable.[22] But the fact that such representations were made is not a defense to a foreclosure action, when the by-laws, made a part of the contract, provide that stock should mature when the loan-fund portion of instalments, with accumulated profits, should bring the value of the stock to par.[23] Future profits not being determinable in advance, the representation is in such case merely an expression of opinion.[24] Such representations being true according to provisions of the contract, are not fraudulent because such provisions are subsequently held invalid by the court unless their invalidity was known to those who made the representations, and unknown to the borrower.[25]

Where the officers of an association erroneously declare stock of a certain series matured, such action does not release holders of that stock from further liability;[26] holders of such stock are liable for the amount necessary to fully mature the stock, with interest, but are not entitled to profits after the stock was declared mature, nor liable for burdens accruing thereafter.[27] A suit to cancel entry of satisfaction and enforce liability for a balance due is not barred by laches where demand for restitution is made on discovery of the mistake, and suit is brought within one year thereafter.[28]

§ 3. *Loans and mortgages. A. In general.*[29]—Unauthorized representations of an agent, through whom a loan is made, not brought to the notice of and acted on by the association, are not binding upon it.[30] A corporation borrower, which has received and used the borrowed money, cannot defeat enforcement on the ground that its contract is ultra vires, it having no power to hold stock in another corporation.[31] Where an association by a by-law designates an officer or committee to whom payments are to be made, and such designation is known to those making payments, payments to others than those designated are not payments to the association, unless actually received by it.[32] But such by-law may be waived by acquiescence for a number of years in a course of dealing under which payments are made to another.[33] A mortgage given a foreign association having been trans-

ture stock on mutual plan. Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56. See, also, 3 C. L. 564, n. 99.

22. Testimony of agent that he made the representations with authority, and of the mortgagors that the statements were made and were believed and relied on by them, sufficient to establish the defense in foreclosure action. Guaranty Sav. & L. Ass'n v. Simko [Ind. App.] 71 N. E. 906. (But see opinion on rehearing, Id., 74 N. E. 273.) Representations by secretary and advertising matter held to amount to assertion that stock would mature in 8 years, and not to mere opinion, and hence held good ground for setting aside foreclosure and for accounting. Stoddard v. Saginaw Bldg. & L. Ass'n [Mich.] 101 N. W. 50. Defense held not sufficiently sustained by evidence, and judgment for complainants held supported by evidence. Bush v. German-American Bldg. Ass'n, 33 Ind. App. 583, 71 N. E. 914.

23. Wayne International Bldg. & L. Ass'n v. Gilmore [Ind. App.] 72 N. E. 190. Such defense not available to one who had the contracts before him. Guaranty Sav. & L. Ass'n v. Simko [Ind. App.] 74 N. E. 273.

24. Wayne International Bldg. & L. Ass'n v. Gilmore [Ind. App.] 72 N. E. 190; Guaranty Sav. & L. Ass'n v. Simko [Ind. App.] 74 N. E. 273.

25. Hough v. Maupin [Ark.] 84 S. W. 717.

26. Such action is the action of agents of all the stockholders, and stockholders of that series cannot profit by the mistake at the expense of other stockholders. Pine Bluff Bldg. & L. Ass'n v. Thalheimer [Ark.] 84 S. W. 1032.

27, 28. Pine Bluff Bldg. & Loan Ass'n v. Thalheimer [Ark.] 84 S. W. 1032.

29. See 3 C. L. 565.

30. Alleged representations that one taking stock for the purpose of securing a loan would not thereby become a stockholder. Guarantee Sav., L. & Invest. Co. v. Mitchell [Tex. Civ. App.] 87 S. W. 184.

31. United States Sav. & L. Co. v. Convent of St. Rose [C. C. A.] 133 F. 354.

32. Louchheim v. Somerset Bldg. & L. Ass'n [Pa.] 60 A. 1054.

33. Payments made for 10 years to secretary, and directors knew of his methods of business; held, by-law waived, and association liable where secretary embezzled payments. Louchheim v. Somerset Bldg. & L. Ass'n [Pa.] 60 A. 1054.

ferred to a domestic concern, and the borrower's stock in the former canceled and an equal amount issued by the latter, the contract will be treated, in foreclosure, as though originally made between the mortgagor and the domestic association.[34] Where a borrower gives a bond conditioned upon the payment of the principal of a loan, and premiums, fines and charges, and a mortgage to better secure payment of the principal, with interest, the mortgage secures payment only of the principal and interest.[35] When a member is in default must be determined from the terms of the contract.[36]

(§ 3.) *B. Usury. Conflict of laws.*[37]—The law of the place of performance governs as to usury.[38] Where by-laws provide that payments shall be made at the home office, and that the contract shall be regarded as made at the home office, the state wherein the home office is located is deemed the place of performance.[39]

Exemption from usury laws.[40]—Statutes authorizing building and loan associations to assess and collect from borrowing members dues, fines, interest and premiums on loans, and such other assessments as may be provided for by the constitution and by-laws, and that such payments shall not be considered usury, though in excess of the legal rate of interest, are constitutional.[41] Such laws are uniform in operation,[42] and do not confer special privileges, or discriminate in favor of a certain class of corporations.[43] Statutes of this character exist in many states.[44]

34. Mercantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802.

35. Decree on foreclosure erroneous because including premiums, dues and fines. State Mut. Bldg. & L. Ass'n v. Batterson [N. J. Err. & App.] 59 A. 469.

36. Where right of re-entry was to accrue if rents remained unpaid 60 days, there could be no default until 60 days after date when first instalment was due. Bertin v. Fallon, 91 N. Y. S. 1037.

37. See 3 C. L. 565.

NOTE. Usury—Conflict of laws: As to what law shall govern in determining whether a building and loan contract is usurious, the authorities are in conflict. Some apply the law of the domicile of the association to the solution of the question on the ground that that is the place of payment and performance, and the law with reference to which the parties must be presumed to have contracted. See Bedford v. Eastern Bldg. & L. Ass'n, 181 U. S. 227, 45 Law. Ed. 834, 21 S. Ct. 597; Building & L. Ass'n v. Logan [C. C. A.] 66 F. 827; Pacific States Sav., L. & Bldg. Co. v. Green, 123 F. 43; Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 521, 30 So. 79; Farmers', Sav., Bldg. & L. Ass'n v. Kent, 131 Ala. 246, 30 So. 874; Home Sav. & L. Ass'n v. Mason, 127 Mich. 676, 87 N. W. 74; People's Bldg., L. & Sav. Ass'n v. Berlin, 201 Pa. 1, 50 A. 308, 88 Am. St. Rep. 764; Interstate Bldg. & L. Ass'n v. Powell, 55 S. C. 316, 33 S. E. 355; People's Bldg., L. & Sav. Ass'n v. Tinsley, 96 Va. 322, 31 S. E. 508.

The following are among the cases which have applied the local law to loans by a foreign association secured by mortgages on realty within the state, notwithstanding that the contract was by its terms payable in the state where the association was domiciled, and in some instances expressly stipulated that it was made with reference to the law of that state, and notwithstanding that by the local law the contract was usurious, whereas by the law of the domicile it was perfectly valid: Falls v. U. S. Sav., L. & Bldg. Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; Skinner v. Southern Home Bldg. & L. Ass'n [Fla.] 35 So. 67; Vermont Loan, etc. Co. v. Hoffman, 5 Idaho, 376, 49 P. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509; U. S. Sav. & L. Co. v. Scott, 98 Ky. 695, 34 S. W. 235; National Mut. Bldg. & L. Ass'n v. Burch, 124 Mich. 57, 82 N. W. 837, 83 Am. St. Rep. 311; Haskins v. Rochester Sav. & L. Ass'n, 133 Mich. 505, 95 N. W. 566; National Mut. Bldg. & L. Ass'n v. Brahan, 80 Miss. 407, 31 So. 840, 57 L. R. A. 793; Building & L. Ass'n v. Bilan, 59 Neb. 458, 81 N. W. 308; People's Bldg., L. & Sav. Ass'n v. Parish, 1 Neb. Unoff. 505, 96 N. W. 243; Meroney v. Atlanta Bldg. & L. Ass'n, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Hicinbothem v. Interstate Loan Ass'n, 40 Or. 511, 69 P. 1018; Southern Bldg. & L. Ass'n v. Atkinson, 20 Tex. Civ. App. 516, 50 S. W. 170.—For further discussion and many authorities, see note to U. S. Sav. & L. Co. v. Beckley, 137 Ala. 119, 33 So. 934, 62 L. R. A. 64, from which above cases are taken.

38. Allen v. Riddle [Ala.] 37 So. 680. Law of state where contract is made and is to be performed governs. Gunby v. Armstrong [C. C. A.] 133 F. 417.

39. Allen v. Riddle [Ala.] 37 So. 680.

40. See 3 C. L. 566.

41. Rev. St. (Bates Ann. St. p. 2130), §§ 3836-3, is valid. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200.

42. Ohio Const. art. 2, § 26, not violated. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200.

43. Ohio Const. art. 1, § 2, not violated. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200.

44. Building and loan contracts nonusurious in Georgia. Collins v. Citizens' Bank & Trust Co., 121 Ga. 513, 49 S. E. 594.

To entitle an association to the benefit of such laws, it must comply with the conditions imposed, otherwise its contracts will be regarded as ordinary loans and therefore usurious.[45] All payments of dues, premiums and fines are in such case to be applied on the loan,[46] and only the actual amount loaned with legal interest, can be recovered.[47] The validity of the contract and the bona fide character of the corporation as a building and loan association being put in issue, the association must show that it is in fact a building and loan association, and that its contracts are authorized by its charter.[48] The mere introduction of a certificate of incorporation in a foreign state, unaccompanied by a general statute showing its powers, is insufficient to carry the burden on such issue.[49]

Many statutes require competitive bidding on premiums for the privilege of priority of loan,[50] but the validity or invalidity of a statute exempting building and loan contracts from usury laws is not affected by the presence or absence of such a requirement.[51] Failure to comply with such a provision,[52] as by arbitrarily fixing [53] a minimum rate,[54] renders the loan usurious. A written bid may be sufficient.[55]

In the absence of fraud, duress or mistake, a loan, conforming to the charter of an association and the laws under which it was organized, will not be held usurious by virtue of the contract for stock, where the note given for the loan is lawful on its face.[56] It is immaterial that stock was taken for the sole purpose of obtaining a loan, providing it is not a mere device to cover usury.[57] The subscription for stock and the loan are to be considered as separate transactions.[58] Unless the stock is a mere device to cover usury, payments thereon should be applied thereto according to the contract;[59] and one who becomes a subscriber and borrower and makes payments according to the terms of his contract cannot thereafter attack the validity of the stock and claim that instalments on the stock were payments on the loan.[60] If a loan be free from usury and the stock valid as to the shareholder, they cannot be considered otherwise when attacked by one who is

Defense of usury held not sustained where contract was under New York law, and it was not claimed that under that law the agreement was usurious. Mercantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802.

45. Miller v. Monumental Sav. & L. Ass'n [W. Va.] 50 S. E. 533. Contract held within scheme of building and loan association and not usurious on its face. Collins v. Citizens' Bank & Trust Co., 121 Ga. 513, 49 S. E. 594.

46. Miller v. Monumental Sav. & L. Ass'n [W. Va.] 50 S. E. 533.

47. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

48, 49. National Bldg. Ass'n v. Quinn, 121 Ga. 307, 49 S. E. 312.

50. See 3 C. L. 567. Under the present Ohio statute the premium for a loan, if reasonable in amount, need not be ascertained by competitive bidding, but may be fixed at a uniform rate by the constitution and by-laws of the association. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200.

51. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200.

52. Evidence held to show that there was no competitive bidding as required by law. Stoddard v. Saginaw Bldg. & L. Ass'n [Mich.] 101 N. W. 50. Evidence sufficient to warrant finding that premium was fixed arbitrarily and not by competitive bidding, as required by Rev. Civ. Code, § 816. Clarke v. Conners [S. D.] 101 N. W. 883.

53. Where the premium is fixed arbitrarily, and not by competitive bidding as required by law, the excess of premium and interest over the legal rate is regarded as usurious and applicable upon the principal obligation. Clarke v. Conners [S. D.] 101 N. W. 883.

54. Fixing a minimum rate of premium, and exacting that rate from borrowers, is a violation of the provision requiring competitive bidding. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

55. So held under Tennessee statute requiring competitive bidding. Collins v. Citizens' Bank & Trust Co., 121 Ga. 513, 49 S. E. 594.

56. Loan contract under La. Sess. Acts 1888, p. 117, No. 115, held valid, it not appearing that the stock contract was a mere device to cover usury. Gunby v. Armstrong [C. C. A.] 133 F. 417.

57. Guarantee Sav., L. & Invest. Co. v. Mitchell [Tex. Civ. App.] 87 S. W. 184.

58. In this case the loan was a month after the subscription. Cooper v. Brazelton [C. C. A.] 135 F. 476.

59, 60. Gunby v. Armstrong [C. C. A.] 133 F. 417; Cooper v. Brazelton [C. C. A.] 135 F. 476.

a mere vendee of the property previously mortgaged to secure the loan.[61] In West Virginia it is held that when the time of the maturity of the stock is indefinite and uncertain, thereby rendering the amount of premiums to be paid uncertain and requiring payments to be made for an indefinite period, the contract is usurious.[62] But where the premium bid is fixed by the charter and by-laws and the bond and deed of trust, in monthly payments for a stated and definite number of years, or until maturity of the pledged shares, should they mature before expiration of the time stated, the amount of premium is sufficiently definite and certain.[63] If a contract is usurious in its inception, it cannot be purged of usury by subsequent by-laws reducing the amount of payments.[64]

In some states contracts calling for interest, premiums and dues are held usurious as to payments in excess of the stipulated interest, and such payments in excess are credited to the reduction of the principal.[65] But one who would bring himself within this doctrine and secure the benefit of payments of dues and premiums must show that he had contracted with a building and loan association having a plan or scheme different from that sanctioned by the statute,[66] and facts indicating that there was no corrupt intent between him and the other parties to receive and pay usurious interest.[67]

(§ 3.) *C. Accounting with borrower while solvent.*[68]—A borrowing member, upon settlement with the association while solvent, is chargeable only with his loan and legal interest, and all payments, whether as dues, premiums or interest, are regarded as payments on the debt.[69] But it has been held that payments of dues on stock is not ipso facto an application of money so paid to the mortgage debt; and that to have that effect there must be an act of appropriation by one or other of the parties.[70] Where a borrower acquiesces in the application of payments for a number of years, with knowledge of the terms of his contract, the court will not enforce another application on the mere ground that the borrower, at the time of making the contract, may have understood that such other application was to be made.[71] Where a mortgage provides that the actual surrender value of the stock should, on foreclosure, be applied on the debt, it cannot be urged as a defense, on foreclosure, that such value was less than it should have been, owing to mismanagement.[72] Under the Iowa statute, if a judgment is had against a borrower, the amount of recovery cannot exceed the actual amount of the principal, with interest

61. Especially when the shareholder is before the court claiming the transaction is valid. Gunby v. Armstrong [C. C. A.] 133 F. 417.

62. Miller v. Monumental Sav. & L. Ass'n [W. Va.] 50 S. E. 533.

63. Thompson v. National Mut. Bldg. & L. Ass'n [W. Va.] 50 S. E. 756.

64. National Bldg. Ass'n v. Quinn, 121 Ga. 307, 49 S. E. 312.

65, 66. Darr v. Guaranty Sav. & L. Ass'n [Or.] 81 P. 565.

67. Complaint held not to bring plaintiff within above doctrine. Darr v. Guaranty Sav. & L. Ass'n [Or.] 81 P. 565.

68. See 3 C. L. 568.

69. Kentucky Citizens' Bldg. & L. Ass'n Assignee v. Daugherty [Ky.] 84 S. W. 1178, afd. on rehearing, 86 S. W. 705. Where a contract provides that on final settlement the association is to retain as instalments on stock and interest no greater sum than that actually advanced, with interest at a certain rate, the borrowing stockholder may elect to be treated as a borrower simply, and all payments in excess of interest at the agreed rate may be applied on the debt. Interstate Bldg. & L. Ass'n v. Edgefield Hotel Co [C. C. A.] 134 F. 74. Where a borrower's contract requires him to take stock equal in amount to his actual loan and the amount of a prior mortgage assumed by the association, and requires him to pay premiums on the total amount of stock, and provides that the assumption of the prior mortgage should be void on default in payments, the borrower, on foreclosure for default, is entitled to credit for premiums paid on stock in excess of the actual amount loaned. Citizens' Mut. Banking & Bldg. Soc. v. Wyatt [N. J. Eq.] 59 A. 553.

70. Land, Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 260.

71. Premiums applied on shares and not on loan. United States Sav. & L. Co. v. Convent of St. Rose [C. C. A.] 133 F. 354.

72. Continental Bldg. & L. Ass'n v. Boggess, 145 Cal. 30, 78 P. 245.

at a rate not to exceed twelve per cent.[73] The method of computation under this statute [74] is to be applied to contracts made prior to its enactment.[75]

(§ 3) *D. Accounting after insolvency.*[76]—Where foreclosure proceedings are commenced by an association, practically insolvent at the time, and continued by the receiver of the association, the accounting will be treated as one after insolvency.[77] Insolvency of the association works a rescission of the contract,[78] and the sums borrowed become immediately due and payable, regardless of the terms of payment fixed by the contract.[79] The borrower is chargeable with the amount of his loan, with interest, and payments actually made, referable to the loan, are credited thereon.[80] Thus bonuses,[81] and interest and premium [82] payments, are usually credited in toto on the debt. But in the Federal courts it is held that no credit should be allowed on the debt for earned nonusurious premiums, nor for nonusurious premiums paid in monthly instalments prior to insolvency of the association.[83] Dues paid on the stock,[84] and fines paid for default in stock payments [85] cannot be treated as payments on the debt, but credit therefor can be given only upon final distribution of the net assets among all stockholders.[86] The same rule applies to dues upon stock pledged to secure premiums as to dues for stock pledged to secure the advancement.[87] Where an association consolidates with another, forming a new one, and a member of the old association takes stock from and gives a new note to the new association, dues paid the old association, while solvent, are to be credited on the debt, after insolvency of the new association.[88] If the assignee in insolvency

73. Code, § 1898. Iowa Deposit & Loan Co. v. Matthews [Iowa] 102 N. W. 817.

74. The amount recoverable is found by first ascertaining the amount actually received by the borrower and computing interest at 12 per cent. to judgment; the total amount of all payments made and all delinquencies charged is then found; if the latter amount equals or exceeds the former, judgment cannot exceed tne former; if the latter is less than the former, the difference may be recovered. Iowa Deposit & Loan Co. v. Matthews [Iowa] 102 N. W. 817. Payments by the borrower are not to be treated as partial payments on the loan in order to determine the rate of interest actually paid. Id.

75. By express provisions of Acts 27th Gen. Assem. p. 32, c. 48. Iowa Cent. Bldg. & L. Ass'n v. Klock [Iowa] 104 N. W. 352.

76. See 3 C. L. 569.

Note: As to the effect of insolvency on the borrower's contract, and the credits and charges to be made, see note in 3 C. L. 569. See, also, discussions and citations of authorities in the two recent cases of Mercantile Co-operative Bank of New Jersey v. Goodspeed [N. J. Eq.] 59 A. 802, and Harris v. Nevins [N. J. Eq.] 58 A. 1051; also note to Curtis v. Granite State Provident Ass'n [69 Conn. 6] in 61 Am. St. Rep. 24.

77. Mercantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802.

78. After insolvency, and sale of a borrowing member's property on foreclosure, so that the association cannot redeed the property, or otherwise perform its contract, the member is discharged from further performance. Bertin v. Fallon, 91 N. Y. S. 1037.

79. Harris v. Nevins [N. J. Eq.] 58 A. 1051. Upon institution of proceedings to wind up an association, borrowing stockholders may be required to pay at once, though they are not in default, and their contracts are not due by their terms. Gunby v. Armstrong [C. C. A.] 133 F. 417.

80. See 3 C. L. 570, nn. 58, 59, 60. People v. New York Bldg. Loan Banking Co., 45 Misc. 4, 90 N. Y. S. 809.

81. Bonuses will be credited in toto on the debt, since the consideration for the bonus wholly fails when the association becomes insolvent. Mercantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802.

82. People v. New York Bldg., Loan Banking Co., 45 Misc. 4, 90 N. Y. S. 809; Harris v. Nevins [N. J. Eq.] 58 A. 1051. Member cannot be charged with premium, nor any proportionate part thereof. Preston v. Lamano, 93 N. Y. S. 210. Weight of authority rejects enforcement of any part of the premiums. People v. New York Bldg. Loan Banking Co., 101 App. Div. 484, 92 N. Y. S. 62 (modifying decision of special term, 89 N. Y. S. 877, where it was held that earned premium should be allowed the association).

83. Gwinn v. Iron Belt Bldg. & L. Ass'n, 132 F. 710.

84. Harris v. Nevins [N. J. Eq.] 58 A. 1051; Mertantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802; Scaife v. Scammon Inv. & Sav. Ass'n [Kan.] 80 P. 957; Kentucky Citizens' Bldg. & L. Ass'n's Assignee v. Daugherty [Ky.] 84 S. W. 1178; afd. on rehearing, as to this point, 86 S. W. 705.

85. Mercantile Co-operative Bank v. Goodspeed [N. J. Eq.] 59 A. 802.

86. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee v. Daugherty [Ky.] 84 S. W. 1178, afd. on rehearing, 86 S. W. 705.

87. Neither can be credited on the loan, after insolvency. Taylor v. Clarke [Ark.] 85 S. W. 231.

88. Kentucky Bldg. & L. Ass'n's As-

has instituted foreclosure proceedings, the borrowing member should be remitted to the court administering the insolvent estate for his pro rata share of dividends on his stock;[89] the court before which foreclosure proceedings are pending will ascertain the value of the stock and apply it on payments only in case the right to participate in dividends has been barred by action of the court administering the estate.[90] In New York it is held that the rights and liabilities of borrowing members and the association should not be determined until the net assets of the association have been determined.[91] Hence payments by the member should not be credited to him, but become part of the assets of the association, a proportionate share of which will be awarded the member on final distribution.[92] But if liquidation has so far proceeded that the receiver knows that stockholders are to receive a dividend, and the approximate amount thereof, he should, as a matter of grace, credit the amount to the defendants in foreclosure, keeping within a safe margin.[93]

Fines for default in payment of dues and interest cannot be collected on foreclosure of the mortgage, unless the parties have so expressly agreed.[94] Attorney's fees, chargeable on default, cannot be enforced when the borrower has kept up all his payments to the time of insolvency.[95] A prior mortgage having been assumed by the association which paid interest thereon, but not the principal, such principal is to be deducted from the amount due from the member.[96] The difference between the interest on the assumed mortgage and the interest paid by the member on the entire loan is a part of the profits of the association, a share of which the member can obtain only on final distribution of assets.[97] Interest paid on such assumed mortgage by the receiver is to be charged to the member.[98]

A borrowing member who has voluntarily paid the receiver a sum in excess of his actual indebtedness may recover the excess but must bear the costs of the proceeding.[99] A suit for rescission of a stock contract on the ground of misrepresentations may be maintained against the receiver after insolvency if brought with due diligence and if the assets are sufficient to pay all creditors.[1]

A certificate of stock providing that the holder is entitled to interest on the amount paid, and may surrender the certificate on giving due notice, is in effect a promise to pay the amount indicated, with interest.[2] The holder of such certificate is entitled, after insolvecy of the association and payment of the general creditors, to treat it as a promise to pay, and to hold a mortgage assigned to her by the association as collateral,[3] even though she had also entered a sworn claim on the certificate in insolvency proceedings.[4]

Upon insolvency, mortgages of the association become immediately enforce-

signee v. Daugherty [Ky.] 86 S. W. 705, rvg. on rehearing, 84 S. W. 1178.

89, 90. Hough v. Maupin [Ark.] 84 S. W. 117.

91. People v. New York Bldg., L. Banking Co., 101 App. Div. 484, 92 N. Y. S. 62, modifying decision of special term in 44 Misc. 296, 89 N. Y. S. 877. Equities between the insolvent association and a borrowing member whose property has been sold on foreclosure before default cannot be adjusted until the assets of the association have been marshalled and liabilities ascertained. Hence evidence of improvements on property properly excluded in foreclosure proceedings. Bertin v. Fallon, 91 N. Y. S. 1037.

92. This is rule as to payments on premium, on principal, and dues. Preston v. Lamano, 93 N. Y. S. 210.

93. Preston v. Lamano, 93 N. Y. S. 210.

94. Including fines in judgment erroneous, when the mortgage and bond did not expressly mention them. Preston v. Brinley, 94 N. Y. S. 782.

95. Gunby v. Armstrong [C. C. A.] 133 F. 417.

96, 97, 98. Preston v. Lamano, 93 N. Y. S. 210.

99. People v. New York Bldg., L. Banking Co., 45 Misc. 4, 90 N. Y. S. 809.

1. Complaint to recover amount paid for stock held not demurrable for want of facts. Dunn v. Candee, 98 App. Div. 317, 90 N. Y. S. 674.

2. Stock issued for cash payment of $1,000, and mortgage assigned to certificate holder as security. Guild v. Baker [N. J. Eq.] 59 A. 299.

3, 4. Guild v. Baker [N. J. Eq.] 59 A. 299.

able by the receiver,[5] and a correlative right arises in each mortgagor to redeem his lands from the mortgage thereon.[6] This rule applies where a borrowing member has given a deed, accompanied by a defeasance stipulating for a reconveyance, upon performance of the borrower's agreements and the maturity of his stock, according to the scheme of the association.[7] In such case the receiver may enforce the association's rights immediately, upon insolvency, and the borrower may have a reconveyance upon payment of such amount as may be determined by the contract and the existing equities to be due.[8] Where such conveyance is made subject to a prior mortgage, which is assumed by the association, redemption will not be permitted unless the liability of the fund in the receiver's hands is wholly discharged either by payment of the prior mortgage or by a complete release from the holder thereof.[9] Premiums actually paid by the borrower are to be credited to him, in determining the amount to be paid for redemption.[10]

If the articles of association do not provide how funds shall be distributed in case of insolvency, no particular class of stockholders is entitled to a preference in such distribution of assets.[11] The withdrawal value of instalment stock at the time the action was commenced is the basis upon which a proportionate distribution of assets should be made.[12]

§ 4. *Termination and insolvency. Voluntary liquidation.*[13] *Insolvency.*[14]—Insolvency of a building and loan association is not inability to pay outside debts, but inability to carry out the purposes for which it was organized, and to satisfy the demands of its own members.[15]

Receiverships.[16]—A stockholder cannot in a single suit seek cancellation of a loan contract for fraud and usury, on the ground that the association is not authorized to do business in the state, and also seek, on behalf of himself and others, to have a receiver of the association appointed.[17]

§ 5. *Rights of withdrawing shareholders.*[18]—The by-laws constituting a part of a member's contract, the right of withdrawal must be exercised in accordance therewith.[19] Thus, by-laws providing that applications for withdrawal must be considered and paid in the order of presentation,[20] and that payments on withdrawals in any one month shall not exceed a certain proportion of the monthly income,[21] are binding on members. A nonborrowing stockholder who has given notice of withdrawal cannot maintain an action for the amount paid by him, when there are no funds legally applicable to his claim.[22] A defaulting stockholder has not the same right of withdrawal as a paid up stockholder, but is only entitled to the actual amount paid in for dues, less charges against him, including fines.[23] Fines are collectable, though not entered on the books.[24] If the association is in fact insolvent at the time notice of withdrawal is given, the withdrawing member

5, 6, 7, 8, 9, 10. Bettle v. Republic Sav. & L. Ass'n [N. J. Eq.] 58 A. 1053.

11, 12. People v. Metropolitan Mut. Sav. & L. Ass'n, 92 N. Y. S. 689.

13, 14. See 3 C. L. 571.

15. Gunby v. Armstrong [C. C. A.] 133 F. 417.

16. See 3 C. L. 571.

17. Bill held multifarious because capacities in which complainant seeks relief are antagonistic. Emmons v. National Mut. Bldg. & L. Ass'n [C. C. A.] 135 F. 689.

18. See 3 C. L. 571

19, 20. Domestic Bldg. Ass'n v. Jourdain, 110 Ill. App. 197.

21. Provisions of articles and by-laws that payments on maturity of stock should be made in the order in which applications for withdrawal are received, but that payments would not be made in any one month to exceed in amount one-half the amount received in dues and stock payments in that month are binding on the members. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n, 93 N. Y. S. 916.

22. As under statute that no more than one-half the funds on hand at any time shall be applicable to withdrawals. Domestic Bldg. Ass'n v. Jourdain, 110 Ill. App. 197.

23. Act April 10, 1879 (P. L. 16) construed. Folsom Bldg. & L. Ass'n v. Gogel, 24 Pa. Super. Ct. 539.

24. Folsom Bldg. & L. Ass'n v. Gogel, 24 Pa. Super. Ct. 539.

must be treated the same as other stockholders,[25] and the fact that notes are given for the amount to which such member is entitled on withdrawal does not make him a creditor.[26] Where a member withdraws, surrenders the pass book, and is paid the withdrawal value of stock, and thereafter the secretary, fraudulently and without authority, delivers the book to another and embezzles the amount received, the association is not liable to the person defrauded,[27] even though the latter holds a duly executed certificate of stock, nothing having been paid on the faith of such certificate.[28]

BUILDINGS AND BUILDING RESTRICTIONS.

§ 1. *Public regulations.*[30]—The construction or removal of wooden buildings [31] or the regulation of the disposal of sewage in tenement houses is a constitutional exercise of the police power,[32] and is not void because applicable only to cities of the first class,[33] nor is it a taking of private property for public use without compensation in so far as applied to existing buildings.[34] The right to erect buildings in cities,[35] or to interfere with electric wires in moving a building along a public way, is regulated by statute.[36] Building regulations are to be given a fair interpretation [37] and a literal construction,[38] and the terms of the statute must

25, 26. Ft. Smith Bldg. Ass'n v. Cohn [Ark.] 87 S. W. 1172.

NOTE. Withdrawal after insolvency: The writer of the opinion in the case above cited (Ft. Smith Bldg. Ass'n v. Cohn) says: "We are aware that there is conflict in the authorities upon this subject, but 'the true rule,' says Mr. Endlich in his excellent work on Building Associations, 'is undoubtedly that laid down by the Supreme Court of Pennsylvania as follows: 'When a building association has failed to fulfill the object of its creation, and has become hopelessly insolvent, after expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed pro rata among those whose claims are based upon stock of the association, whether they have withdrawn and hold orders for the withdrawal value thereof or not. Both classes are equally meritorious, and in marshalling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof.' End. on Building Ass'ns, §§ 514, 515; Appeal of Christian, 102 Pa. 184; Chapman v. Young, 66 Ill. App. 131; Walker v. Terry, 138 Ala. 428, 35 So. 466; Hohenshell v. Sav. & L. Ass'n, 140 Mo. 566, 41 S. W. 948; Rabbitt v. Wilcoxen, 103 Iowa, 35, 72 N. W. 306, 64 Am. St. Rep. 152, 38 L. R. A. 183; Heinbokel v. Nat. Sav. & L. Ass'n, 58 Minn. 340, 59 N. W. 1050, 49 Am. St. Rep. 519, 25 L. R. A. 215. But see Thornton and Blacklege, B. & L. Ass'n, § 329, where English cases are cited holding contrary doctrine." See, also, note in 3 C. L. 571.

27, 28. Louchheim v. Somerset Bldg. & L. Ass'n, 25 Pa. Super. Ct. 336.

29. The several tenements of a building constitute separate houses within a contract with a water company containing a schedule of rates based on the number of rooms in a house. Berends v. Bellevue Water & Fuel Gas Light Co., 26 Ky. L. R. 912, 82 S. W. 983.

30. See 3 C. L. 572.

31. Town council of village may regulate. Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761. The erection of a wooden building in a place where it would expose adjacent property to fire, increase the insurance rate and depreciate rental value. Id.

32. Requirement that school sinks be replaced by water closets. Tenement House Dept. of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231.

33, 34. Tenement House Dept. of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231.

35. That a building permit was issued to the husband of the applicant instead of to her cannot be complained of by one who has sustained no injury. Hutchings v. Munn, 22 App. D. C. 88. One not injured by a violation of building regulations cannot complain. Id.

36. The moving of a building along a highway is a use of the highway within Pub. St. 1882, c. 109, § 17, providing for the cutting, removal or disconnection of electric wires. This statute authorizes the cutting of electric light wires. Id. A. M. Richards Bldg. Moving Co. v. Boston Electric Light Co. [Mass.] 74 N. E. 350.

37. "Block" used in an ordinance prohibiting the erection of certain buildings

be definite.[39] Noncompliance therewith is prima facie evidence of negligence,[40] but in order to be made the basis of a recovery, it must have been the proximate cause of an injury [41] sustained by a person entitled to complain of such dereliction of duty.[42] Where the duties of a building inspector and board of public works is quasi-judicial, mandamus will not issue to review their judgment,[43] and in no event should it issue prior to action taken [44] or unless authorized by law.[45] A city cannot be held liable for failure of its board of aldermen to adopt a proper building code,[46] nor for default of duty of a building superintendent who is not its agent or representative,[47] nor is the superintendent liable in the absence of negligence.[48]

§ 2. *Private regulations.*[49] *Restrictive covenants.*[50]—The owner of an estate may bind it by restrictive covenant as against all except prior lienors.[51] A mutual covenant by adjacent owners creates a servitude on the land of each,[52] and a restriction for the benefit of certain property is appurenant to it and passes with a conveyance of it,[53] unless the general scheme of improvement has been abandoned.[54]

therein, held to mean the side fronting on a certain street and not the square surrounded by four streets. Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761.

38. A stable in which stall room is leased to persons who care for their own horses is not one "for taking horses and carriages for hire" within a statute prohibiting the erection of such a stable within 200 feet of a church. Congregation Beth Israel v. O'Connell, 187 Mass. 236, 72 N. E. 1011. The provision of the tenement house act that all stairways shall be provided with proper banisters and railings does not require the placing of a barrier across the entrance of tenement house cellarways. Construing Laws 1901, p. 889, c. 334; Tenement House Act, § 36. Rothlein v. Stajer, 88 N. Y. S. 921. Rev. St. 1899, § 9036, relative to fire escapes in hotel buildings, was repealed by Acts 1901, p. 219. Yall v. Gillham [Mo.] 86 S. W. 125. Building line restriction (Acts 1904, p. 1077, c. 616, § 1) is void as arbitrary classification. Storck v. Baltimore [Md.] 61 A. 330.

39. Acts 1904, p. 1077, c. 616, § 1, attempting to regulate the limits within which it shall be unlawful to construct steps for houses from the grade of the sidewalk, is void. Storck v. Baltimore [Md.] 61 A. 330.

40. Failure to comply with Building Code, § 102, p. 65, City of New York, requiring buildings exceeding 100 feet in height to be provided with stand pipes, is prima facie evidence of negligence in an action by one entitled to have the statute complied with. Acton v. Reed, 93 N. Y. S. 911.

41. That a stairway was not provided with railings and banisters as required by the Tenement House Act (Laws 1901, pp. 899, 900, c. 344, §§ 36, 41). Kuhnen v. White, 102 App. Div. 36, 92 N. Y. S. 104. Failure to provide a building with stand pipes as required by New York City Building Code, § 102, p. 65. Acton v. Reed, 93 N. Y. S. 911.

42. A statute relative to hoistways and elevators enacted exclusively for the benefit of employes cannot be made the basis of an action by a member of a fire department, Gen. St. p. 2345, § 5 imposes duties only for the protection of employes. Kelly v. Henry Muhs Co. [N. J. Law] 59 A. 23.

43. Hester v. Thomson, 35 Wash. 119, 76 P. 734. Under an ordinance providing that no building permit should be issued until objections had been adjusted, a determination not to issue a permit constitutes an adjustment. Id.

44. The office of a mandamus is not to compel action by the building department in advance of the preparation and adoption of plans, but only to compel action when plans have been arbitrarily or unreasonably condemned. Hartman v. Collins, 94 N. Y. S. 63.

45. Mandamus should not issue to compel the building inspector to approve plans not satisfactory to him under the Building Code, § 108, though without prejudice to his right to point out specifically lawful requirements and require them to be complied with. Hartman v. Collins, 94 N. Y. S. 63.

46, 47. McGuinness v. Allison Realty Co., 46 Misc. 8, 93 N. Y. S. 267.

48. Complaint against superintendent of buildings held not to allege facts constituting negligence on his part. McGuinness v. Allison Realty Co., 46 Misc. 8, 93 N. Y. S. 267.

49, 50. See 3 C. L. 574.

51. A mortgagor can, as against all except the mortgagee, make a valid contract with adjoining owners that intoxicating liquors shall never be manufactured on their premises. Scudder v. Watt, 98 App. Div. 228, 90 N. Y. S. 605. An agreement by several that liquors should never be manufactured or sold on their premises provided that if any one should refuse to agree to its provisions it should be void, held, that the fact that the premises of one were mortgaged did not constitute a refusal on his part to execute it. Id.

52. An agreement by several property owners that intoxicating liquors shall never be manufactured or sold on their premises imposes on the premises of each a servitude and an incumbrance enforceable by any one of them. Scudder v. Watt, 98 App. Div. 228, 90 N. Y. S. 605.

53. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455. Restrictive covenants in deed from one who has laid out his hand according to a general scheme of improvement may be enforced by one

A restriction cannot be enforced by one not in privity.[54a] Restrictive covenants are to be reasonably interpreted [55] and strictly construed,[56] and nothing is to be regarded as a violation that is not in disregard of express terms according to their meaning at the time the covenant was made.[57] They are enforceable against grantees who take with notice,[58] but not against those without notice.[59] Perpetual restrictions are not favored,[60] and whether one will be enforced is a question that cannot be raised on a petition under a statute to determine the

grantee against another. Morrow v. Hasselman [N. J. Eq.] 61 A. 369. Covenants against the manufacture or sale of intoxicating liquor run with the land, and are binding upon subsequent grantees, whether inserted in their deeds or not; and the fact that the original grantor owned only one-fourth interest in the land and was a tenant in common with his grantee is immaterial. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141.

54. A restrictive covenant which is a reiteration of one between adjacent owners is abrogated when the original ceases to operate. Halstead v. Atterbury, 94 N. Y. S. 1023. A deed by a corporation, which had laid out land relative to a general scheme of improvement, of all its remaining land, which contains blank spaces left for the distances left for the building line in the several streets, does not affect the restrictions on land conveyed by the former. Morrow v. Hasselman [N. J. Eq.] 61 A. 369. A deviation in a building line as to one block because of the prior location thereon of a house does not amount to a change in the general plan. Id.

54a. A restriction for the benefit of adjacent lots cannot be enforced as between grantees of a person who became the owner of several of such lots, subdivided and conveyed without restriction. Lewis v. Ely, 100 App. Div. 252, 92 N. Y. S. 705. See Tiffany, Real Prop. § 34 et seq.

Note: This decision is based on the ground that by conveyance of parts of the original tract in severalty the covenant was discharged as to such parts. The result thus achieved seems inconsistent with the theory by which the doctrine of covenants running with the land is sustained. It would probably not be contended that mere subdivision or rearrangement of boundaries could alter the quality or quantum of the estate.

55. In a covenant restricting the erection of a "tenement, apartment or community house," "apartment or community house" is not used as synonomous with "tenement." McClure v. Leaycraft, 97 App. Div. 518, 90 N. Y. S. 233. Restriction construed to mean that no building should be erected within limits prescribed without the consent of the grantor or her heirs. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455.

56. See 3 C. L. 575, n. 8.

Held not violated: A building line restriction is not violated by the extension beyond it of an awning, the roof of which was composed of transluctent glass. Olcott v. Sheppard, Knapp & Co., 96 App. Div. 281, 89 N. Y. S. 201. A restriction against coal yards, slaughter houses or tenement houses is not one against the erection of a modern apartment house. Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241. See, also, 3 C. L. 575, n. 10. A covenant fixing a building line except as to corners does not apply to corner lots when a new avenue is extended to intersect the street. Halstead v. Atterbury, 94 N. Y. S. 1023. An agreement that no house should be built except in the center of a certain lot held to mean the center of the lot at the time the building was erected, a part of the lot having in the meantime been taken for a street. Frost v. Havliand [Conn.] 61 A. 543.

Held violated: A bay window built up from a foundation is a house within a building restriction covenant. Righter v. Winters [N. J. Eq.] 59 A. 770. A restriction against the erection of a tenement house or any house except a private dwelling is violated by the erection of a building, the interior of which is divided into three floors each finished to accommodate a separate family (Levy v. Schreyer, 177 N. Y. 293, 69 N. E. 598), and one that a lot shall not be occupied except for one dwelling house is violated by a building designed for two families; one on each floor and having separate entrances (Harris v. Roraback [Mich.] 100 N. W. 391), and, also, the projection of bay windows on the upper stories of a building beyond a building line (Righter v. Winers [N. J. Eq.] 59 A. 770).

57. The meaning of "tenement house" at the time the covenant was made (it having at that time no well defined legal meaning) may be explained by witnesses familiar with the then conditions. As to whether it embraced an apartment house. Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241.

58. A purchaser who has notice of a restrictive covenant is charged with notice of the purpose for which it was made. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455. A recital in a deed that it is subject to the restriction in another deed is notice to the grantee of the restriction. Morrow v. Hasselman [N. J. Eq.] 61 A. 369.

59. Mutual covenants restricting the use of land will be enforced against purchasers from such covenantors only when such allenees take with notice. Atlantic City v. New Auditorium Pier Co. [N. J. Err. & App.] 59 A. 158. A contract between several that intoxicating liquor shall never be manufactured or sold on their premises is a bar to specific performance of a contract of sale of the property of one to a vendee without notice of such contract. Scudder v. Watt, 98 App. Div. 228, 90 N. Y. S. 605.

60. A restriction relative to a building line and material to be used is limited to the duration of life of the first building

nature of the covenant.[61] The doctrine of equitable restriction is for the benefit of other land owned by the grantor and originally forming, with the land conveyed, one parcel.[62] There is a conflict of authority as to whether land subsequently added by accretion is bound;[63] but one who has participated in a general scheme of improvement will not be permitted to violate it.[64]

The jurisdiction of equity to enforce restrictive covenants is discretionary,[65] but they will be enforced according to their terms,[66] regardless of special damage shown,[67] unless conditions of the property have so changed[68] or other circumstances render enforcement inequitable.[69] A restriction against the erection of a tenement house is not affected by a subsequent change in the character of the neighborhood.[70] That immaterial violations have been excused does not preclude enforcement against offensive violations,[71] but one who has violated such a covenant is estopped to complain of a similar violation by his neighbor.[72]

The law of another state relative to equitable restrictions is presumed to be the same as the common law of the forum.[73]

erected and is not a restriction in perpetuity. Welch v. Austin, 187 Mass. 256, 72 N. E. 972. Permanent restrictions being contrary to the policy of the law, equity in enforcing compliance will limit the decree by the duration of the conditions which form the basis of the equity calling for such enforcement. Robinson v. Edgell [W. Va.] 49 S. E. 1027.

61. Whether a perpetual restriction will be enforced in view of changed circumstances. Welch v. Austin, 187 Mass. 256, 72 N. E. 972.

62. He cannot as riparian owner impose an easement on the land of the state in front of his own. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191. A restriction against building within fifty feet of the front of a lot conveyed is ineffective after the grantor's death where he was the owner in common of adjoining land. Hazen v. Matthews, 184 Mass. 388, 68 N. E. 838. A restriction relative to a building line, front elevation and material to be used is to be taken as inserted for the benefit of adjoining land of the grantor enforceable as equitable restrictions and not mere personal covenants. Welch v. Austin, 187 Mass. 256, 72 N. E. 972.

63. In New York: Restrictive covenants relative to land bounded by a shore line, applies to land added by accretion. Levy v. Halcyon Casino Hotel Co., 45 Misc. 289, 92 N. Y. S. 231.

In New Jersey a restriction against the erection of a building within 27 feet of a street does not apply to lands subsequently added by accretion to that conveyed. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191.

64. Where several join in a deed of an easement to the public with a covenant that no buildings should be erected on the ocean side of the way, one cannot build on the ocean side on land subsequently acquired from the state. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191.

65. Is governed by the principles applicable to the enforcement of specific performance. Robinson v. Edgell [W. Va.] 49 S. E. 1027. A covenant against the sale of intoxicating liquor or its manufacture on the land sold may be enforced by injunction, unless the plaintiff has been deprived of his right by his own conduct or laches. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141.

66. Righter v. Winters [N. J. Eq.] 59 A. 770. Where one adjoiner gives notice to another that his building, in course of construction, would violate a covenant, but the building was completed after suit for injunction was brought, he is entitled to a mandatory injunction. Morrow v. Hasselman [N. J. Eq.] 61 A. 369.

67. One entitled to enforce a restrictive covenant need not prove special damage. Id.

68. If the purpose of the restriction will be defeated, it will not be enforced. Robinson v. Edgell [W. Va.] 49 S. E. 1027.

69. Equity will not require the removal of a building which violates where the violation was accidental, the injury inflicted small, and the loss resulting from removal large. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455. The violation of a covenant relative to a building line which has been violated without objection by other builders will not be enjoined, but where one owner objects he will be left to his remedy at law. Righter v. Winters [N. J. Eq.] 59 A. 770.

70. McClure v. Leaycraft, 97 App. Div. 518, 90 N. Y. S. 233.

71. Levy v. Halcyon Casino Hotel Co., 45 Misc. 289, 92 N. Y. S. 231. Slight projections on the second story held immaterial deviations from a building line. Morrow v. Hasselman [N. J. Eq.] 61 A. 369. An immaterial violation of a restriction which does not show an intention to abandon the general scheme of improvement is no defense to the enforcement of the covenant Id. The violation of a building line restriction on one street is no defense to its enforcement on another. Id.

72. Olcott v. Sheppard, Knapp & Co., 96 App. Div. 281, 89 N. Y. S. 201. Estoppel arises against one seeking to enforce a covenant against the sale or manufacture of intoxicating liquor on the land conveyed, where he has encouraged a breach of the covenant. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141.

§ 3. *Liability for unsafe condition of premises.*[74]—A municipal corporation is not liable for injuries caused by defects in buildings used for a public or governmental purpose,[75] but a private owner [76] or one in control of premises must exercise ordinary care [77] to keep them reasonably safe [78] for persons who enter thereon by invitation [79] or as a tenant [80] or by other lawful license; [81] but he owes no duty to trespassers [82] or bare licensees,[83] except to refrain from doing them affirmative injury; but circumstances may require him to keep the premises reasonably safe for persons who are neither licensees nor trespassers.[84] For injuries caused a third person because of negligence in caring for leased premises, the tenant and not the

73. As to whether a condition in a deed creates an equitable restriction. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838.

74. See 3 C. L. 576.

75. See Municipal Corporations, 4 C. L. 720.

School building. Clark v. Nicholasville [Ky.] 87 S. W. 300.

76. The maintenance of weak, warped and rotten eavetroughs 20 feet above a sidewalk and projecting over it is a public nuisance. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855. The owner of a leased building is liable to a pedestrian where because of the weak condition of an eavetrough above a sidewalk accumulated ice and snow fell upon him. Id. A resolution by a city board of health declaring a certain building to be a nuisance is not admissible in an action to recover damages for maintaining a nuisance. Holbrook v. Griffs [Iowa] 103 N. W. 479. Evidence that one was hurt by slipping on ice on the premises of another does not show negligence on the part of the owner. Vassin v. Butler, 94 N. Y. S. 14.

77. Evidence of previous accidents is admissible to show notice to the owner of the dangerous condition of his premises. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328. Evidence held for the jury as to whether the owner of an apartment house had exercised proper care in maintaining the porch railings in a reasonably safe condition. Widing v. Pennsylvania Mut. Life Ins. Co. [Minn.] 104 N. W. 239.

78. An abutting owner has no right to elevate his sidewalk above the natural grade so as to conform to a paper grade established by the borough. Where such walk constitutes a public nuisance it may be enjoined by the borough. Kittanning Borough v. Thompson [Pa.] 60 A. 584. Open and unlighted stairway on premises used as a public resort. Robinson v. Howard, 108 Mo. App. 368, 83 S. W. 1031. Where one in the exclusive control of an upper story allowed water pipes to break and injure those below, the question of his negligence was one for the jury. Levinson v. Myers, 24 Pa. Super. Ct. 481. Evidence insufficient to show negligence of contractors where a plumber was injured during the erection of a building. Hartman v. Clark, 93 N. Y. S. 314.

79. Seeker of employment. McDonough v. James Reilly Repair & Supply Co., 90 N. Y. S. 358. A sign of the office door of the superintendent of a building to "see the engineer" is an invitation to an intending tenant to go to the engine room in the basement. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328. As to whether a junk dealer was on premises by invitation of the owner held a question for the jury. Foley v. Y. M. C. A., 90 N. Y. S. 406. An owner of a building who by invitation leads a person to the basement must exercise reasonable care to have the premises safe. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328.

80. See Landlord and Tenant, 4 C. L. 389.

A tenant who has notice of defects in the premises which the landlord has promised to repair cannot recover from him damages for personal injuries. Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143. Premises are taken by a tenant subject to his own risk so far as their condition or subsequent repairs are concerned. Phelan v. Fitzpatrick [Mass.] 74 N. E. 326. A tenant in an apartment house walking down an unlighted common stairway knowing that the carpeting is defective is not, as a matter of law, guilty of contributory negligence. Lee v. Ingraham, 94 N. Y. S. 284.

81. One entering for the purpose of delivering goods to a subtenant of a portion of the premises enters lawfully. Wright v. Perry [Mass.] 74 N. E. 328. An electric company to whose cars United States mail boxes are attached is bound to provide for the carrier who collects the mail at the barns, safe access to the cars. Young v. People's Gas & Elec. Co. [Iowa] 103 N. W. 788. In visiting a public building in course of construction, a licensee does not assume a hidden risk known only to the contractor. Negligence of contractor's employes. De Haven v. Hennesey Bros. & Evans Co. [C. C. A.] 137 F. 472.

82. The owner of a building containing machinery in operation performs his duty toward trespassers of tender years when he warns them of danger and puts them out of the building, and is not liable if they return without his knowledge and are injured. North Texas Const. Co. v. Bostick [Tex.] 83 S. W. 12.

83. A licensee cannot recover for injuries caused by existing defects. Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. 280. Boys injured by falling walls while in the ruins of a burned building. Haack v. Brooklyn Lyceum Ass'n, 44 Misc. 273, 89 N. Y. S. 888.

84. The porches of an apartment house about which children of tenants play must be kept reasonably safe. Widing v. Pennsylvania Mut. Life Ins. Co. [Minn.] 104 N. W. 239.

landlord is liable,[85] unless the landlord has covenanted to repair;[86] but for injuries caused by continuance of premises in such bad condition as to constitute a public nuisance, both lessor and lessee are liable.[87]

§ 4. *Liability for negligent operation of elevators.*[88]—In some states the owner of a passenger elevator owes a duty to persons invited to ride therein analogous to a common carrier and must exercise the highest degree of care consistent with practical conditions,[89] and is liable for the slightest negligence,[90] and even where this analogy does not prevail, he is required to exercise a high degree of diligence.[91] The person who has control of an elevator is liable because of negligence relative to the elevator shaft,[92] and not one who uses it but is under no duty to repair or guard it.[93] As between master and servant the duty to inspect an elevator cannot be delegated.[94] There is no liability for an injury which is the result of an accident [95] or of the contributory negligence of the injured person.[96] At common law the owner of a store building owed no duty to a trespasser to maintain guards about an elevator shaft,[97] nor is such a duty imposed by a statute requiring shafts to be guarded.[98] To warrant a recovery for noncompliance with a law relative to elevators, such noncompliance must have been the proximate cause of the injury.[99] The question of what constitutes negligence may be one of law,[1] but ordinarily is one of fact.[2]

85. Failure to properly close a cellar door. Duffin v. Dawson [Pa.] 61 A. 76. Unless the landlord has covenanted to repair or the defect existed when the premises were let. Hirschfield v. Alsberg, 93 N. Y. S. 617.

86. A landlord is not liable to a tenant unless he agrees to repair and is negligent in doing so. Galvin v. Beals, 187 Mass. 250, 72 N. E. 969. A landlord who covenants to make repairs is liable if by his negligence persons lawfully on the premises are injured because of his failure to do so. Barron v. Lledloff [Minn.] 104 N. W. 289.

87. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855. Where a building is leased to several tenants and the tenants are each given the right to use the elevator in common with the others, one inviting a person on the premises is liable with the landlord for injuries sustained because of the dangerous condition of the elevator. Burner v. Higman & Skinner [Iowa] 103 N. W. 802.

88. See 3 C. L. 576.

89. See 3 C. L. 577, n. 38. Edwards v. Burke, 36 Wash. 107, 78 P. 610; Hensler v. Stix [Mo. App.] 88 S. W. 108.

90. Question of negligence held for the jury. Hensler v. Stix [Mo. App.] 88 S. W. 108. Instruction requiring no more than ordinary care on the part of the operator of the elevator held erroneous. Id.

91. Spring Val. Coal Co. v. Buzis, 115 Ill. App. 196.

92. Landlord who rents a building to several families. Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802. Evidence that owners of an apartment building procured indemnity insurance against liability for damages for injuries arising in operating the elevator is admissible to prove that they retained control of it. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323.

93. Not a tenant in an apartment who uses it. Burner v. Higman & Skinner Co. [Iowa] 103 N. W. 802.

94. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. A servant 14 years of age who is ordered to use an elevator which he knows does not work perfectly but which he does not know how nor is it his duty to repair it, does not assume the risk of injury. Moylon v. D. S. McDonald Co. [Mass.] 74 N. E. 929.

95. Where the building superintendent moved the operator's stool and he on attempting to sit down lost his balance, clutched the lever and involuntarily started the elevator, injuring a passenger. Gibson v. International Trust Co., 186 Mass. 454, 72 N. E. 70.

96. Passenger entered after the elevator had started to ascend when she knew the operator did not notice her. Cullen v. Higgins [Ill.] 74 N. E. 698. One who stands partly within and partly without an elevator of which there is no one in charge and is injured by its movement without apparent cause cannot recover. Green v. Urban Contracting & Heating Co., 94 N. Y. S. 743. Question of contributory negligence of a licensee who fell into an unguarded elevator well held for the jury. Wright v. Perry [Mass.] 74 N. E. 328.

97. Flanagan v. Sanders [Mich.] 101 N. W. 581.

98. Detroit City Charter 1893, p. 383, § 714. Flanagan v. Sanders [Mich.] 101 N. W. 581.

99. The noncompliance with a city ordinance respecting elevators, though negligence, was not the cause of the injury. Middendorf v. Schulze, 105 Ill. App. 221.

1. Permitting a movable stool to be in an elevator cage for the convenience of the operator is not negligence. Gibson v. International Trust Co., 186 Mass. 454, 72 N. E. 70. The operator of an elevator cannot be held negligent where after he has started to ascend a passenger whom he does not notice attempts to get into the elevator and is injured. Cullen v. Higgins [Ill.] 74 N. E. 698.

Evidence tending to show that defects in an elevator should have been discovered,[3] to account for the failure of certain devices to work,[4] and as to how the mechanism is affected by the manner of its operation, is admissible.[5]

BURDEN OF PROOF, see latest topical index.

BURGLARY.

§ 1. *What constitutes.*[6]—Burglary, at the common law, is the breaking and entering of the mansion house of another in the nighttime with intent to commit a felony therein.[7] Statutes have very generally added to the common-law definition.[8]

Breaking and entry.[9]—The breaking is an essential element of the offense.[10] The slightest force, however, such as the opening of a closed door,[11] the tearing away of a curtain to a transom,[12] or raising a window, that has been left partially open, sufficiently to effect an entrance,[13] is a sufficient breaking, if done with felonious intent.[14] An entry likewise is necessary but it need not be of the whole body,[15] though it must be without the consent of the owner.[16] The mere presence and assistance of a detective, in the burglary, if he did not instigate it and it was committed as to every ingredient of the offense by the accused, is not available as a defense.[17]

Intent.[18]—The felonious intent in entering is an essential ingredient of burglary,[19] and it must be shown;[20] but where a breaking has been committed, the law inclines to impute the intent to commit theft, if an intent is to be inferred.[21]

2. Evidence insufficient to show negligence in the operation of an elevator. Lyon v. Aronson, 140 Cal. 365, 73 P. 1063. Sufficiency of inspection held a question for the jury. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. Question of negligence in leaving an elevator well unguarded held for the jury. Wright v. Perry [Mass.] 74 N. E. 328. Question as to the liability of a contractor constructing a public building for injuries to a licensee because of the negligence of a servant of the contractor held for the jury. De Haven v. Hennessey Bros. & Evans Co., 137 F. 472.

3. See 3 C. L. 578, n. 53 et seq. That the wearing away of certain appliances was gradual. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821.

4. That blocks of wood and tools were lying beneath the slack cable device. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821.

5. Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821.

6. See 3 C. L. 578.

7. Clark & M. Crimes, § 400.

8. Under the statutes of Tennessee, the word "burglary" is treated as a generic term covering several offenses described in the code. Shannon's Code, §§ 6535-6538. Cronin v. State [Tenn.] 82 S. W. 477. An instruction that, if defendant entered the building in the nighttime, that is, between sunset of one day and sunrise of another, with the intent to commit larceny, he is to be found guilty of burglary in the first degree, is in strict compliance with the penal code of California. Pen. Code, §§ 460-463. People v. Perry, 144 Cal. 748, 78 P. 284.

9. See 3 C. L. 578.

10. Defendant not allowed proper cross-examination on this point. Adkinson v. State [Fla.] 37 So. 522.

11. State v. Brower [Iowa] 104 N. W. 284, citing State v. O'Brien, 81 Iowa, 93, 46 N. W. 861. Raising the latch to open the door. Abrams v. Commonwealth [Ky.] 85 S. W. 173.

12. Hofland v. State [Tex. Cr. App.] 85 S. W. 798.

13. Claiborne v. State [Tenn.] 83 S. W. 352.

14. Under Pen. Code 1895, art. 842. Jones v. State [Tex. Cr. App.] 87 S. W. 1157.

15. Pen. Code 1895, art. 841. Jones v. State [Tex. Cr. App.] 87 S. W. 1157.

16. Moore v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 701, 88 S. W. 230. But mere knowledge that a person's property is to be burglarized, and nonaction on his part to prevent it, is not such consent as can be urged by the accused as a defense. State v. Currie [N. D.] 102 N. W. 875.

17. State v. Curie [N. D.] 102 N. W. 875.

18. See 3 C. L. 579.

19. An instruction that, whether defendant entered through an open door or through a window he raised for the purpose, he would not be guilty, if he entered, as he claimed, to visit a woman, instead

The degree.[22]—The statutes of some states divide burglary into degrees as shown below.[23]

Accomplices.[24]

Nature and situation of building.[25]—Under the term "dwelling house" is included the other buildings that are occupied or used in connection therewith, as a chicken house on the premises,[26] a smoke house,[27] an outhouse,[28] or a shed.[29] And within the legal signification, the word "building" includes the cellar or basement as completely as it does the garret.[30] The felonious entrance of a private room in a hotel or boarding house,[31] or a "camphouse,"[32] is as much a burglary as the entrance of any other dwelling. The statutes of Texas make a distinction between a "house" and a "dwelling house;"[33] and the statutes of Ohio, between "inhabited" and "uninhabited" dwelling houses.[34]

§ 2. *Indictment and proof thereunder.*[35]—The indictment must sufficiently set forth the offense charged.[36] But it is not necessary, in an indictment for the burglary of a house other than a dwelling house, to allege that such house was not a dwelling house.[37] The ownership of the premises may be laid in the occupant, whose possession is rightful as against the burglar.[38] Special ownership of the

of to steal, as charged, approved. Carroll v. State [Tex. Cr. App.] 86 S. W. 1012.

20. Taylor v. State [Miss.] 37 So. 498. The mere breaking is not sufficient to constitute an attempt to commit burglary; the ulterior purpose to commit the crime charged in the indictment must be shown. Price v. State [Tex. Cr. App.] 83 S. W. 185; Russell v. State [Ala.] 38 So. 29.

21. Price v. State [Tex. Cr. App.] 83 S. W. 185. Where the articles intended to be stolen are less than $50 in value there is no burglary, as no felony is intended to be committed. Jones v. State [Tex. Cr. App.] 87 S. W. 1157.

22. See 3 C. L. 579.

23. First degree. Pen. Code, §§ 460, 463. People v. Perry, 144 Cal. 748, 78 P. 284.

24, 25. See 3 C. L. 579.

26. So held in a case where the charge was entering a house without consent of the occupant. Moore v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 701, 88 S. W. 230.

27. Under a statute making it a crime to feloniously break and enter a dwelling house or any house belonging to, or occupied with, any dwelling house. Ky St. 1903, § 1162. Dunn v. Commonwealth [Ky.] 84 S. W. 321.

28. 2 Ballinger's Ann. Codes & St. § 7104. State v. Randall, 36 Wash. 438, 78 P. 998; Abrams v. Commonwealth [Ky.] 85 S. W. 173.

29. Although it was entirely closed by planking, had no door and could not be entered without pulling off the planking. Crow v. State [Tex. Cr. App.] 85 S. W. 1057.

30. State v. Brower [Iowa] 104 N. W. 284, citing Mitchell v. Com., 88 Ky. 349, 11 S. W. 209.

31. Hofland v. State [Tex. Cr. App.] 85 S. W. 798.

32. Conviction of burglariously entering a "camphouse," not shown to be a mansion house, under Shannon's Code, §§ 6537, 6540. Cronin v. State [Tenn.] 82 S. W. 477.

33. A daytime burglary of a house, or the nighttime burglary of a house, is a distinct and separate offense from the nighttime burglary of a dwelling house. Martinus v. State [Tex. Cr. App.] 84 S. W. 831.

34. Where a family was absent in Europe and the servants left in charge of the dwelling were temporarily absent, the breaking and entering of the premises was held not to be burglary, as the premises were not an "inhabited" dwelling within the purview of Lan. R. L. 10,441 (R. S. 6835), which defines the crime of burglary. Mason v. State, 5 Ohio C. C. (N. S.) 647.

35. See 3 C. L. 579.

36. An indictment for attempting to break and enter a railroad car must contain a description of the overt act done in the attempt and a specification of the particular felony attempted to be committed. Indictment held insufficient. State v. Doran, 99 Me. 329, 59 A. 440. An indictment for having possession of burglar's tools with intent to commit the crime of burglary, must specifically describe the tools. Code, §§ 4790, 5280, 5282. State v. Erdlen [Iowa] 103 N. W. 984. In order to charge a burglary of an outhouse, it is necessary to allege that it was adjoining a dwelling house and occupied therewith. 2 Ballinger's Ann. Codes & St. § 7104. State v. Randall, 36 Wash. 438, 78 P. 998. An indictment charging defendant with breaking and entering a smokehouse, without alleging that it belonged to, or was used with any dwelling house is insufficient, under a statute making it a crime to feloniously break and enter a dwelling house or any house belonging to or used with any dwelling house. Ky. St. 1903, § 1162. Dunn v. Commonwealth [Ky.] 84 S. W. 321.

37. Pen. Code 1895, art. 838, and art. 839a. Gilford v. State [Tex. Cr. App.] 87 S. W. 698.

38. Flanagan v. People, 214 Ill. 170, 73 N. E. 347.

39. As where the indictment alleged ownership and occupancy by one who proved to be a renter. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 626, 88 S. W. 813.

premises or of the property stolen,[40] is sufficient to support an information for burglary. The misspelling of defendant's name, following the word "said," after it has once been correctly set forth, will not vitiate an indictment.[41]

Sufficiency of proof; variance.[42]—If the fact of the burglary is proved beyond all doubt, evidence connecting defendant therewith, beyond a reasonable doubt, is sufficient.[43] The intent charged in the indictment,[44] but not the actual commission of the intended felony,[45] must be proved; and where commission in the nighttime constitutes an essential element of the offense, affirmative proof thereof must be adduced;[46] and it must be proved, like any other fact, beyond a reasonable doubt.[47] It is unnecessary to prove the value of the property stolen,[48] unless a particular value is necessary to constitute a felony.[49] Proof that the occupant of the premises is a renter is not a variance from an allegation of ownership and occupancy;[50] nor evidence of the taking of a lodger's watch from his room, from an allegation of an intent to steal personal property belonging to the owner of the house.[51] A charge of breaking and entering a building is sustained by proof of breaking and entering the cellar.[52] And where the ownership of the property was laid in one "Neilson" and the proof showed the name to be "Nelson," the variance was held immaterial.[53] But proof that the house burglarized was a private dwelling house is a variance from an indictment for burglary of a house.[54]

§ 3. *Evidence. Sufficiency.*[55]—Where a larceny has been committed by an unlawful breaking and entering, the unexplained possession of stolen property is sufficient to sustain a conviction of burglary.[56] But the falsity of defendant's explanation of his possession of the property recently stolen, is not alone sufficient to warrant a conviction of burglary, where the state otherwise fails to make out a case.[57] And the receipt of property burglariously stolen by others is not sufficient to make one a principal in the crime of burglary.[58] Cases illustrating the sufficiency of evidence are grouped in the notes.[59]

40. A livery stable keeper's lien on horses, under Ballinger's Codes & St. §§ 5971, 5972, is sufficient, even when taken by their actual owner. State v. Nelson, 36 Wash. 126, 78 P. 790.

41. Bartley v. State [Tex. Cr. App.] 83 S. W. 190.

42. See 3 C. L. 580.

43. Evidence held sufficient. Keeler v. State [Neb.] 103 N. W. 64.

44. Evidence of intent. Russell v. State [Ala.] 38 So. 291; Taylor v. State [Miss.] 37 So. 498.

45. Under an indictment charging defendant with breaking and entering with intent to steal, it is sufficient to prove those facts, though nothing was actually stolen. Williams v. State [Fla.] 37 So. 521.

46. Such proof need not be direct, but may be circumstantial in character. State v. Richards [Utah] 81 P. 142.

47. Keeler v. State [Neb.] 103 N. W. 64.

48. Though the words "things of value" were used as descriptive of the property in the place burglarized, it was held immaterial that there was no evidence of the value of the watch found in defendant's possession. McCormick v. State [Ala.] 37 So. 377.

49. Jones v. State [Tex. Cr. App.] 87 S. W. 1157.

50, 51. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 626, 88 S. W. 813.

52. State v. Brower [Iowa] 104 N. W. 284, citing Mitchell v. Com., 88 Ky. 349, 11 S. W. 209.

53. Flanagan v. People, 214 Ill. 170, 73 N. E. 347.

54. Martinus v. State [Tex. Cr. App.] 84 S. W. 831.

55. See 3 C. L. 581.

56. State v. Brower [Iowa] 104 N. W. 284, citing State v. Brady, 121 Iowa, 561, 97 N. W. 62; State v. Donavan, 125 Iowa, 239, 101 N. W. 122; Smotherman v. State [Tex. Cr. App.] 83 S. W. 838; Jackson v. State [Fla.] 38 So. 599; Flanagan v. People, 214 Ill. 170, 73 N. E. 347; State v. Royce [Wash.] 80 P. 268. Possession of stolen property six weeks after the burglary in another state, taken in connection with attempted concealment and inconsistent statements. McCormick v. State [Ala.] 37 So. 377. Possession of stolen property as evidence, when defendant had not had exclusive possession of the room where found. People v. Barker, 144 Cal. 705, 78 P. 266.

57. A charge on this point disapproved as tending to mislead the jury. Hart v. State [Tex. Cr. App.] 82 S. W. 652.

58. Bird v. State [Tex. Cr. App.] 87 S. W. 146.

59. Evidence held sufficient to sustain a conviction of burglary. People v. Barker, 144 Cal. 705, 78 P. 266; Archibald v. State [Tex. Cr. App.] 83 S. W. 189; Bartley v. State [Tex. Cr. App.] 83 S. W. 190; Clark v. State [Tex. Cr. App.] 83 S. W. 695; McCoy v. State [Tex. Cr. App.] 85 S.

Admissibility.[60]—Statements made by defendant to police officers relative to his possession of stolen property, before he had been charged with any offense, and without any threats or inducements, are admissible as admissions.[61] Another breaking may be so connected with the one for which the defendant is being tried as to be admissible for the purpose of showing a corrupt combination and defendant's participation therein.[62] The condition of a safe on the morning after the burglary is a material circumstance to show the intent with which the store was entered.[63]

§ 4. *Instructions and verdict.*[64]—Several instructions which have been discussed by the courts are mentioned in the note.[65] A person cannot be convicted of both larceny and burglary, under an indictment charging both, but the conviction of burglary embraces the charge of larceny.[66] Where the indictment charges that the breaking and entering was with intent to commit larceny, particularly setting it out, there may be a conviction of larceny from the house.[67]

BURNT RECORDS; BY-LAWS, see latest topical index.

BY-LAWS—AMENDMENT AS AFFECTING EXISTING MEMBERSHIP CONTRACTS.*

[SPECIAL ARTICLE BY WALTER A. SHUMAKER.]

It being well settled that the by-laws form part of the contract of membership,[1] though not incorporated by reference in the membership certificate,[2] unless of course they are expressly excluded by the terms of the certificate,[3] the question how far the contract may be impaired by subsequent change of the by-laws is of frequent occurrence and great importance, and the decisions are in hopeless conflict.

W. 1072; Carroll v. State [Tex. Cr. App.] 86 S. W. 1012; Williams v. State [Fla.] 37 So. 521; Russell v. State [Ala.] 38 So. 291; Scott v. State [Ga.] 50 S. E. 49; State v. Richards [Utah] 81 P. 142; People v. Davis [Cal. App.] 81 P. 716; State v. McPherson [Iowa] 101 N. W. 738; Keeler v. State [Neb.] 103 N. W. 64. Where defendants were jointly tried. Lofton v. State, 121 Ga. 172, 48 S. E. 908. To warrant a finding that the burglary was committed in the nighttime. State v. Richard [Utah] 81 P. 142; Simon v. State [Wis.] 103 N. W. 1100; Keeler v. State [Neb.] 103 N. W. 64.

To show intent to steal: Williams v. State [Fla.] 37 So. 521. Testimony that the outer door of a building had been broken in and the cash drawers broken into. Brown v. State [Miss.] 37 So. 497. To sustain a conviction of breaking and entering an outhouse and stealing chickens. Abrams v. Commonwealth [Ky.] 85 S. W. 173. To warrant a finding that defendants were the owners of burglar's tools, in a prosecution for having them in possession. Rev. Laws, c. 208, § 41. Commonwealth v. Conlin [Mass.] 74 N. E. 351.

Evidence held insufficient to support a conviction of burglary. Reid v. State [Miss.] 38 So. 320; Bridges v. State [Miss.] 38 So. 679; Bird v. State [Tex. Cr. App.] 87 S. W. 146. To show intent to commit rape. Price v. State [Tex. Cr. App.] 83 S. W. 185; Mason v. State [Tex. Cr. App.] 83 S. W. 689; Taylor v. State [Miss.] 37 So. 498. To support a conviction of being an accomplice in burglary. Denson v. State [Tex. Cr. App.] 83 S. W. 820. To convict under Pen Code 1895, § 180, which declares that one who enters with intent to steal, but is prevented from so doing, shall be guilty of a misdemeanor. Coleman v. State [Ga.] 50 S. E. 56.

60. See 3 C. L. 581.

61. State v. Royce [Wash.] 80 P. 268.

62. State v. Donavan, 125 Iowa, 239, 101 N. W. 122.

63. Russell v. State [Ala.] 38 So. 291.

64. See 3 C. L. 582.

65. Instructions approved: Defining burglary, as in strict compliance with the penal code, §§ 460, 463. People v. Perry, 144 Cal. 748, 78 P. 284. Relative to the necessity of a felonious intent to constitute burglary. Carroll v. State [Tex. Cr. App.] 86 S. W. 1012.

Disapproved: Relative to the possession of property burglariously stolen. Gilford v. State [Tex. Cr. App.] 87 S. W. 698.

66. Cronin v. State [Tenn.] 82 S. W. 477.

67. Ray v. State, 121 Ga. 189, 48 S. E. 903.

1. Lake v. Minnesota Masonic Relief Ass'n, 61 Minn. 96; Conway v. Supreme Council, 131 Cal. 437; Supreme Lodge v. Knight, 117 Ind. 489; Sabin v. Senate of Nat. Union, 90 Mich. 177; Elbert v. Mutual Life Ass'n, 81 Minn. 116; Newton v. Northern Mut. Relief Ass'n, 21 R. I. 476.

2. Hass v. Mutual Relief Ass'n, 118 Cal. 6; Condon v. Mutual Life Ass'n, 89 Md. 99; Supreme Commandery v. Ainsworth, 71 Ala. 449. But see, Given v. Rettew, 162 Pa. 638.

3. Certificate provided that it and the application should be the "Complete and only contract." Covenant Mut. Life Ass'n v. Tuttle, 87 Ill. App. 309. And see Sinteff v. People's B. L. & S. Ass'n, 57 N. Y.

*FOR AN EXHAUSTIVE PRESENTATION OF THE ENTIRE SUBJECT OF ASYLUMS, see BOISOT ON BY-LAWS (2d edition).

Necessity of reserving power to amend.—A few states maintain the doctrine that the power to alter the by-laws and thereby affect the contract rights of members exists irrespective of any reservation;[4] but the weight of authority is that a member's contract rights are affected only by by-laws existing at the date of his certificate, unless the power of amendment is expressly reserved.[5]

Effect of reservation of power to amend in general.—Where the power of amendment is reserved in the by-laws, it is usually held that the member is charged with notice of this as well as of other by-laws, and it is as much a part of the contract.[6] "Time and experience will develop a necessity for changes in the by-laws, and if the consent was not required there would be a class of members bound by the changed laws and a class exempt from their operation."[7] "It may sometimes happen that the interests of a few individuals may be impaired, but it is the right and indeed the duty of the society to protect the interests of the many rather than of the few."[8]

In view, however, of the cases of individual injustice, most courts have endeavored to restrict as far as possible the power of amendment. A few decisions, for example, read into the reservation a limitation to changes not affecting the essential character of the contract.[9] But except as to extreme cases, the difficulty of judicially determining the importance of particular amendments is obvious.[10] Akin to this is a limitation declared by a number of decisions that the reservation contemplates only such changes as are consistent with the member's contract and nothing that tends to unpair its obligation[11] or affect the contract rights of the member as distinguished from his membership rights.[12] One of the most logical distinctions along this line is that drawn by the Pennsylvania court, viz., that so far as the contract consists of the by-laws, it may be amended if a power so to do is reserved, but that which is specially agreed outside the by-laws cannot be impaired.[13]

Another line of decisions limits the power of amendment to changes not impairing vested rights,[14] as where a member was ill at the time sick benefits were

Supp. 611; House v. Eastern B. & L. Ass'n, 66 N. Y. Supp. 109; Stohr v. San Francisco M. F. Soc., 82 Cal. 557.

4. Supreme Lodge v. Knight, 117 Ind. 489; Lawson v. Hewell, 118 Cal. 613.

5. Covenant Mut. Life Ass'n v. Kentner, 188 Ill. 431; Pokrefky v. Detroit Firemens' Fund Ass'n, 121 Mich. 456; Siewerts v. Nat. Ben. Ass'n, 95 Iowa, 710; Hughes v. Wisconsin O. F. Ass'n, 98 Wis. 292; Krakowski v. North New York B. & L. Ass'n, 27 N. Y. Supp. 314; Miller v. Tuttle [Kan.] 73 P. 88.

6. Wist v. Grand Lodge, 22 Or. 271; Poultney v. Bachman, 31 Hun, 52; Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; Hall v. Western Travelers' Acc. Ass'n [Neb.] 96 N. W. 170; Montgomery & C. Ins. Co. v. Milner, 90 Iowa, 685; Supreme Lodge v. La Malta, 95 Tenn. 157.

7. Supreme Commandery v. Ainsworth, 71 Ala. 449.

8. Supreme Lodge v. Knight, 117 Ind. 489.

9. Engelhardt v. S. & L. Ass'n, 148 N. Y. 281; Beardon v. People's B. L. & S. Ass'n [Tenn.] 49 S. W. 64; Supreme Lodge v. Knight, 117 Ind. 489; Supreme Commandery v. Ainsworth, 71 Ala. 445; Wist v. Grand Lodge, 22 Or. 271; Louisville, etc., Ass'n v. Wissing, 4 Ky. L. R. 443. "Except as to rights fixed by the terms of the original contract." Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83. Cannot create a new condition of forfeiture. Hobbs v. Iowa, etc., Ass'n, 82 Iowa, 107. Limitation of right to recover in case of injury held invalid. Sesson v. Supreme Court, 104 Mo. App. 54, 78 S. W. 297. A change from level assessment to assessment based on a classification does not affect the general plan and purpose of the organization. Messer v. Ancient Order of United Workmen, 180 Mass. 321.

10. Pope v. City, etc., Soc., 2 Ch. 311.

11. Smith v. Supreme Lodge, 83 Mo. App. 512; McNeil v. Southern Tier, etc., Ass'n, 58 N. Y. Supp. 119. And see Insurance Co. v. Connor, 17 Pa. 136; Covenant Mut. Life Ass'n v. Kentner, 188 Ill. 431; Wist v. Grand Lodge, 22 Or. 271.

12. Insurance Co. v. Connor, 17 Pa. 136; Knights Templars, etc., Ins. Co. v. Jarman, 104 F. 638; Pokrefky v. Detroit Firemens' Fund Ass'n, 121 Mich. 456; Revere v. Boston Copper Co., 15 Pick. [Mass.] 363; Campbell v. American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342; Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259; Denble v. Grand Lodge, 172 N. Y. 665.

13. Hale v. Equitable Aid Union, 168 Pa. 377. And see Supreme Council v. Getz, 112 F. 119.

14, 15. Becker v. Berlin Ben. Soc., 144 Pa. 322; and see Kent v. Quicksilver Min. Co., 78 N. Y. 159; Savage v. People's B. L.

reduced,[15] or before a by-law excluding from benefits diseases induced by certain causes.[16] Other courts hold that "the right of a sick member to future benefits is not a right to receive, so long as such disability continues, the future benefits provided by the by-law existing at the time the disability begins, but simply a right to receive them subject to such changes as may be made by the society."[17] In no cases is it doubted that after a present right to a certain benefit has accrued such right is vested beyond the power of recall.[18]

Amendments must be lawful and reasonable.—Whether or not a power of amendment is reserved, amendments are subject to the limitations governing original by-laws, that they shall not be contrary to law or in conflict with the charter,[19] and shall be reasonable in their character.[20]

Application of rules to particular amendments.—Though there is conflict on almost every specification, the weight of authority seems to be that as to existing contracts for membership there is no power to reduce benefits[21] or restrict the member to certain funds for their payment.[22] The right to increase dues is involved in more doubt, though the better opinion seems to sustain such power.[23] As to the making of new conditions of forfeiture, the weight of authority seems to sustain the validity of such changes, though the conflict of decisions is irreconcilable.[24] Rulings on other amendments of less frequent occurrence are summarized in the footnote.[25]

& S. Ass'n, 45 W. Va. 275; Enterprise B. L. & S. Soc. v. Bolln, 12 Colo. App. 304.

16. Lloyd v. Supreme Lodge, 98 F. 66.

17. Pain v. Societe St. Jean Baptiste, 172 Mass. 319. And see Stohr v. San Francisco M. F. Soc., 82 Cal. 557.

18. See Stohr v. San Francisco M. F. Soc., 82 Cal. 557.

19. Stilwell v. People's B. L. & S. Ass'n, 19 Utah, 257; Horn v. Mutual Assur. Soc., 6 Cranch [U. S.] 192.

20. Hibernia Fire Engine Co. v. Com., 93 Pa. 264; Thibert v. Supreme Lodge, 78 Minn. 448. Definition of hazardous employment held reasonable. Gilmore v. Knights of Columbus [Conn.] 58 A. 223. Increasing dues. Berg v. Badenser Understuetzungs & C. Verein Von Rochester, 90 App. Div. 474, 86 N. Y. S. 429.

21. Templars' & M. Life Ins. Co. v. Jarman [C. C. A] 104 F. 638; Stohr v San Francisco M. F. Soc., 82 Cal. 557, 22 P. 1125; Hale v. Equitable Aid Union, 168 Pa. 377, 31 A. 1066; Becker v. Berlin Ben. Soc., 144 Pa. 232, 22 A. 699; Graftstrom v. Frost Council, No. 21, O. of C. F. 19 Misc. 180, 43 N. Y. S. 266; Pellazzio v. German Catholic St. J. Soc., 16 Wkly. Law Bul. 27. And see opinion of the attorney general of Illinois in Re National Home B. & L. Ass'n, 11 Nat. Corp. Rep. 459; Berlin v. Eureka Lodge, 132 Cal. 294; Supreme Council v. Jordan, 117 Ga. 808, 45 S. E. 33; Russ v. Supreme Council, 110 La. 588, 34 So. 697; Langan v. Supreme Council, 174 N. Y. 266, 66 N. E. 932; Simon v. Supreme Council, 91 App. Div. 580, 86 N. Y. S. 866; Supreme Council v. Batte [Tex. Civ. App.] 79 S. W. 629; Newhall v. Supreme Council [Mass.] 63 N. E. 1; Gant v. Supreme Council, 107 Tenn. 603; Wuerfler v. Ancient Order of Druids, 116 Wis. 19; Weber v. Supreme Tent, 172 N. Y. 490, 65 N. E. 258; Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259; Supreme Council v. Getz, 112 F. 119.

Contra. Pain v. Societe St. Jean Baptiste, 172 Mass. 319; Fugure v. Mutual Soc., 46 Vt. 362; Supreme Lodge v. Knight, 117 Ind. 489; Bowie v. Grand Lodge, 99 Cal. 392.

22. St. Patrick's Male Beneficial Soc. v. McVey, 92 Pa. 510; Pokrefky v. Detroit Firemen's Fund Ass'n, 121 Mich. 456, 80 N. W. 240; Sinteff v. People's B. L. & S. Ass'n, 37 App. Div. 340, 57 N. Y. S. 611; Interstate B. & L. Ass'n v. Ouzts, 54 S. C. 214, 32 S. E. 303.

23. Fullenwider v. Supreme Council of R. L. 180 Ill. 621, 54 N. E. 485; Pioneer S. & L. Co. v. Brockett, 58 Ill. App. 204; Pioneer S. & L. Co. v. Miller, 58 Ill. App. 211; Berg v. Badenser, etc., Varein, 86 N. Y. S. 429; Ebert v. Mutual, etc., Ass'n, 81 Minn. 116, and see Messer v. A. O. U. W., 180 Mass. 32. Changing mode of assessment from level to classified rate, sustained. Messer v. Ancient Order of United Workmen, 180 Mass. 321. **Contra,** Strauss v. Mutual, etc., Ass'n, 128 N. C. 465; Hibernia Fire Engine Co. v. Com., 93 Pa. 268. In this case the association had entirely abandoned the purpose for which it was organized, and had apparently adopted no other, yet an increase of dues from fifteen cents to $2.50 per month was ordered.

24. Amendments sustained: Smith v. Galloway, 1 Q. B. Div. 71; MacDowell v. Ackley, 93 Pa. 277; Borgards v. Farmers' Mut. Ins. Co., 79 Mich. 440, 44 N. W. 856. Forfeiture for Suicide. Supreme Commandery v. Ainsworth, 71 Ala. 449; Supreme Lodge K. of P. v. Kutscher, 179 Ill. 340, 53 N. E. 620; Hughes v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 98 Wis. 292; Supreme Lodge, K. of P., v. La Malta, 95 Tenn. 157, 31 S. W. 493; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712. Extending the period within which suicide nullified the insurance. Chambers v. Supreme Tent, 200 Pa. 244; Supreme Tent v. Hammers, 81 Ill. App. 560. Forfeiture for engaging in certain busi-

Effect of invalid amendments.—If the amendment is invalid, the member may treat it as a repudiation of the contract and sue for damages or recover back the amount paid,[26] and a suit on such recission is not subject to a time limitation stipulated for actions on the contract.[27] He must, however, exercise his option within a reasonable time,[28] being bound by the amendment if he consents or acquiesces.[29]

CALENDARS, see latest topical index.

ness. Moerschbaecher v. Supreme Council of R. L., 188 Ill. 9; Ellerbe v. Faust, 119 Mo. 653, 25 S. W. 390; State v. Grand Lodge, A. O. U. W., 70 Mo. App. 456; People v. Grand Lodge, A. O. U. W., 32 Misc. 528, 67 N. Y. S. 330; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Schmidt v. Supreme Tent, K. of M., 97 Wis. 528, 73 N. W. 22. Forfeiture for joining certain organizations. Lawson v. Hewell, 118 Cal. 613, 50 P. 76.

Amendments invalid: Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610. Forfeiting for suicide. Northwestern B. & M. Aid Ass'n v. Wanner, 24 Ill. App. 358; Smith v. Supreme Lodge, K. of P., 83 Mo. App. 512; Shipman v. Protected Home Circle, 73 N. Y. S. 594. Forfeiting for arrears. Coyle v. Father Matthews T. A. B. Soc., 17 Wkly. Dig. [N. Y.] 17; McNeil v. Southern Tier M. R. Ass'n, 40 App. Div. 581, 58 N. Y. S. 119; Fire Ins. Co. v. Connor, 17 Pa. 136. Forfeiture for engaging in saloon business. Denble v. Grand Lodge, 172 N. Y. 665. Prohibiting certain employments without notice to members. Tebo v. Supreme Council, 89 Minn. 3, 93 N. W. 513.

25. Amendments sustained: Referring disputes to arbitration. Mackenzie v. Everton & W. D. Permanent Ben. Bldg. Soc., 61 Law T. (N. S.) 680. Imposing certain conditions of membership. Taylor v. Edson, 58 Mass. 522. Repealing provision for repayment of the amount paid in, in case of forfeiture. Schrick v. St. Louis Mut. House Bldg. Co., 34 Mo. 423. Changing rules regulating redemption. Wilson v. Miles Platting Bldg. Soc., 22 Q. B. Div. 381; Rosenberg v. Northumberland Bldg. Soc., 22 Q. B. Div. 373; Bradbury v. Wild, 1 Ch. 377. Limiting withdrawing members to a certain proportion of the receipts. House v. Eastern B. & L. Ass'n, 52 App. Div. 163, 66 N. Y. Supp. 109; Pawlick v. Homestead Loan Ass'n, 15 Misc. 427, 37 N. Y. Supp. 164; Bearden v. People's B. L. & S. Ass'n [Tenn. Ch. App.] 49 S. W. 64; Stilwell v. People's B. L. & S. Ass'n, 19 Utah, 257, 57 P. 14. Restricting designation of beneficiaries. Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Roberts v. Grand Lodge A. O. U. W., 33 Misc. 536, 68 N. Y. S. 949; Hysinger v. Supreme Lodge, K. & L. of H., 42 Mo. App. 627. Changing method of determining beneficiaries. Masonic Mut. Ben. Ass'n v. Severson, 71 Conn. 719; Supreme Council A. L. of H. v. Adams, 68 N. H. 236. Changing conditions upon which loans are made. Maynard v. Interstate B. & L. Ass'n, 112 Ga. 443. Repealing provision for payment of loans before maturity. Interstate B. & L. Ass'n v. Hafter, 76 Mass. 770, 24 So. 87. Regulating order of paying benefits. Engelhardt v. Fifth Ward P. D. S. & L. Ass'n, 148 N. Y. 281, 42 N. E. 710; Pepe v. City & S. P. Bldg. Soc., 2 Ch. 311; Eastern B. & L. Ass'n v. Snyder, 98 Va. 710, 37 S. E. 298. Requiring submission of claims. Robinson v. Templar Lodge, No. 17, I. O. O. F., 117 Cal. 370, 49 P. 170. Providing for periodical readjustment of insurance. Korn v. Mutual Assur. Soc., 6 Cranch [U. S.] 192.

Amendments held invalid: Restricting the designation of beneficiaries. Spencer v. Grand Lodge, A. O. U. W., 22 Misc. 147, 48 N. Y. Supp. 590; Wist v. Grand Lodge A. O. U. W., 22 Or. 271; Folmer's Appeal, 87 Pa. 133. Withdrawing right to designate beneficiary by will. Nelson v. Gibson, 92 Ill. App. 595. Changing widow's benefit from husband's death. Gundlach v. Germania Mechanics' Ass'n, 4 Hun [N. Y.] 339. Changing conditions of withdrawal. Savage v. People's B., L. & S. Ass'n, 45 W. Va. 275. Giving the corporation additional time to pay losses. Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 59 Wis. 162; Wheeler v. Supreme S. O. of I. N., 110 Mich. 437, 68 N. W. 229. Discontinuing assessment of nonborrowing members, and changing the maturity of the debts of borrowing members. International B. & L. Ass'n v. Braden [Tex. Civ. App.] 32 S. W. 704. Imposing conditions on reinstatement of delinquents. Sieverts v. National Benev. Ass'n, 95 Iowa, 710, 64 N. W. 671. Providing for submission of claims to the association. Brotherhood of Railroad Trainmen v. Newton, 79 Ill. App. 500. Diverting a fund to another purpose. Parish v. New York Produce Exch., 169 N. Y. 34. Arbitrarily retiring part of the stock. Bergman v. St. Paul Mut. Bldg. Ass'n, 29 Minn. 275. Giving preference to certain shares of stock. Kent v. Quicksilver Min. Co., 78 N. Y. 182. Making a member's application part of his contract. Grand Lodge A. O. U. W. v. State, 44 Mo. App. 445. Providing for the publication of notice of assessments in another state, and authorizing forfeiture without actual notice. Thibert v. Supreme Lodge, K. of H., 78 Minn. 448, 81 N. W. 220. Repealing a provision establishing a withdrawal value of shares. Louisville German B. & L. Ass'n v. Wissing, 4 Ky. L. R. 443. Repealing a provision for withdrawal upon notice, and for repayment of the amount actually paid in. Holyoke B. & L. Ass'n v. Lewis, 1 Colo. App. 127. Repealing a provision for benefit for total disability resulting from paralysis. Starling v. Supreme Council, R. T. of T., 108 Mich. 440.

26. O'Neil v. Supreme Council, 70 N. J. Law, 410, 57 A. 463; Lippincott v. Supreme Council, 130 F. 483; McAlarney v. Supreme Council [C. C. A.] 131 F. 538; Supreme Council v. Batte [Tex.] 79 S. W. 629; Black v. Supreme Council, 120 F. 580; Supreme Council v. Jordan, 117 Ga. 808, 45 S. E. 33; Makeley v. Supreme Council, 133 N. C. 367, 45 S. E. 649.

27. O'Neill v. Supreme Council, 70 N. J. Law, 410, 57 A. 463; Supreme Council v.

CANALS.

Land acquired by a canal company by the exercise of the right of eminent domain, for canal purposes, is not acquired in fee simple, but as an estate determinable upon the abandonment of the land for use as a canal.[68] A canal compay, required by its charter to erect good and sufficient bridges across its canal and to keep them in repair, cannot relieve itself of that duty by leasing its canal and appurtenant property and franchises.[69] A canal company is not an insurer against percolations and seepage of water through the ground through and on which it is constructed; such percolations and seepage must be shown to be due to gross negligence to render the company liable.[70] The landowner is under the duty of using reasonable care, skill and diligence to prevent injury through such seepage, but is not required to expend sums greater than that recoverable for the injuries caused.[71] In New York landowners may recover damages from the state for injuries to crops from overflows of the state canals, caused by negligence of employes.[72] The Washington statute providing for the excavation of public waterways by private contract, and for liens on tide lands for the compensation, is constitutional.[73] Since the state owned the tide lands affected at the time the act was passed, it could make any contract relative thereto which it chose, and purchasers from the state thereafter took with notice of the contract. Hence no question of due process or want of notice of the liens on the land could arise.[74] The statute in question did not give the credit of the state in aid of a private enterprise, nor did it create a debt for which the state is liable, so as to require submission of the act to the people at a general election;[75] nor is private property made liable, by the act, for a public debt.[76]

CANCELLATION OF INSTRUMENTS.

Scope of title.—Only the nature of the remedy of cancellation, the grounds therefor, and questions of procedure are here treated. The question, what consti-

Daix [C. C. A.] 130 F. 101; Supreme Council v. Jordan, 117 Ga. 808, 45 S. E. 33.

28. O'Neill v. Supreme Council, 70 N. J. Law, 410, 57 A. 463; Lippincott v. Supreme Council, 130 F. 483.

29. National Council v. Dillon, 212 Ill. 320, 72 N. E. 367; Allen v. Merrimack County Odd Fellows, 72 N. H. 525, 57 A. 922; Berg v. Badenser Understuetzungs Verein Von Rochester, 90 App. Div. 474, 86 N. Y. S. 429. Evans v. Northern Tier M. R. Ass'n, 76 App. Div. [N. Y.] 151; Pokrefky v. Detroit Firemans' Fund Ass'n, 131 Mich. 38, 96 N. W. 1057.

68. Sholl v. Stump, 24 Pa. Super. Ct. 48.

69. Morris Canal & Banking Co. not relieved from such duty by lease to Lehigh Valley Railroad Company. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 59 A. 29.

70. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79.

71. The value of the land being the limit of damages recoverable, landowner under no duty to build a ditch costing more than land was worth. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79.

72. Evidence held to show bank of Champlain Canal lower than general level at point of overflow, and that waste-weir tenders were negligent. Crowley v. State, 99 App. Div. 52, 90 N. Y. S. 496.

Note: A state cannot be held liable unless the demand is within statutory provisions. The following cases held claims against the state for injuries to property caused by construction or operation of canals valid: Shouer v. Eldred, 114 N. Y. 236; Canal Ford Com'rs v. Kempshall, 26 Wend. 404; Waller v. State, 144 N. Y. 579; Coleman v. State, 134 N. Y. 564. For claims held not valid, see Green v. Swift, 47 Cal. 536; Hoagland v. State (Cal.) 22 P. 142; Bower v. State, 134 N. Y. 429; Stone v. State, 138 N. Y. 124.—From note in 42 L. R. A. 65.

73. Laws 1893, p. 241, c. 99. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845.

74, 75, 76. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845.

tutes mistake, accident, fraud, duress, or undue influence, for which relief may be had in a court of equity, is elsewhere treated.[77] The law relating to conveyances in fraud of creditors is also given separate treatment.[78]

§ 1. *Nature of remedy.*[79]—Cancellation is a purely equitable remedy.[80] Revocatory actions can be sustained in Louisiana only under the provisions of the code relating to such actions.[81]

Adequacy of remedy at law.[82]—Equity will not take jurisdiction of a suit for cancellation, if complainant has an adequate remedy at law.[83] The legal remedy must be as complete, adequate and efficacious as that given by equity.[84] Where complainant has a defense to the enforcement of the obligation which is plain and palpable, and within his command at any time, equity will not decree cancellation.[85] So if an instrument is void on its face, equity has no jurisdiction to cancel.[86] But if evidence outside the deed is required to prove it void, equity has jurisdiction.[87] In the latter case it is immaterial whether the instrument was void ab initio or became void after its execution by reason of a condition subsequent.[88] A void instrument will be cancelled if it constitutes a cloud on title.[89] A prior action at law may bar the suit in equity;[90] but if it appears that a pending legal action cannot be maintained, the property concerned having gone into the hands of a receiver, equity may grant relief.[91]

Relief obtainable, and conditions precedent thereto.[92]—Having acquired jurisdiction of a suit for cancellation or rescission, the court will retain it in order to settle all the equities of the parties relating to the transaction in suit.[93] Where a bill asks for a reconveyance after an accounting, the rights of all parties can be protected, and proper reimbursements ordered.[94] Plaintiff is not entitled to have

77. See Duress, 3 C. L. 1147; Fraud and Undue Influence, 3 C. L. 1520; Mistake and Accident, 4 C. L. 674.

78. See Fraudulent Conveyances, 3 C. L. 1535.

79. See 3 C. L. 584.

80. Only equity has jurisdiction to set aside a sealed instrument, knowingly signed, on the ground of fraudulent misrepresentations as to collateral matters or as to nature and value of consideration. Fowler Cycle Works v. Fraser & Chalmers, 110 Ill. App. 126. State court of general jurisdiction at law and in equity has jurisdiction of suit to cancel mortgage. Ridge v. Manker [C. C. A.] 132 F. 599.

81. Calcasieu Nat. Bank v. Godfrey [La.] 38 So. 591.

82. See 3 C. L. 585.

83. Legal remedy held adequate: Equity will not ordinarily take jurisdiction of a suit to cancel a policy of insurance after the death of the insured, since the remedy at law is in such case usually adequate. Des Moines Life Ins. Co. v. Seifert, 112 Ill. App. 277. Equity will not take jurisdiction of a bill by an heir to compel reassignment of a mortgage by the decedent on the ground of fraud, when relief may be had by application to the orphans' court. Giekeson v. Thompson, 210 Pa. 355, 59 A. 1114.

Legal remedy held inadequate: Where a promissory note has been obtained by fraud, equity has jurisdiction of a suit for cancellation, the remedy at law not being plain, adequate, and complete. Manning v. Berdan, 135 F. 159. A deed may be set aside for breach of the contract to support the grantor, the remedy at law being in such case inadequate and involving a multiplicity of suits. Grant v. Bell [R. I.] 58 A. 951. A bill by a corporation to rescind a real estate purchase on the ground of fraud practiced by promoters and directors is not demurrable on the ground of an adequate legal remedy. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

84. Carney v. Barnes [W. Va.] 49 S. E. 423.

85. Chattel mortgage would not be canceled where defense of payment of notes secured was available. Reeves v. McCracken [N. J. Eq.] 60 A. 332.

86, 87, 88. Carney v. Barnes [W. Va.] 49 S. E. 423.

89. Sawyer v. Cook [Mass.] 74 N. E. 356. See § 2.

90. An action at law by a son to recover property deeded by him to his father is a bar to a later suit in equity to cancel the deed for undue influence and want of consideration. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106.

91. Where a lessee executes a trust deed of his interest, contrary to the terms of his lease, and the beneficiary commences foreclosure of the trust deed and has the property placed in the hands of a receiver, the lessor may intervene in the foreclosure suit and seek cancellation of the deed though he has already commenced a forceable entry and detainer action. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870.

92. See 3 C. L. 587.

93. Equities of parties relating to land adjusted where cancellation of conveyance was decreed. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872.

94. Reconveyance for failure to support grantor being ordered, grantees may be al-

a sale of the property in case of his failure to comply with the decree.[95] Where a conveyance of a one-third undivided interest in land is set aside, plaintiff is entitled to recover the value of one-third the whole parcel.[96] If reformation will protect the rights of the parties, and there are grounds for such remedy, an agreement, partly executed, should be reformed, and not canceled.[97] One party having shown a right to rescind, the other cannot have specific performance.[98]

To obtain the relief desired, plaintiff must do equity and will be required to restore to the defendant property with which he has parted,[99] unless defendant has been otherwise repaid, as by use of the property obtained under the contract.[1] A grantor seeking to have his deed canceled for fraud need not tender to a subsequent grantee, who had notice of the fraud, the price paid by him.[2] Where grantor seeks cancellation of a deed on the ground that his agent inserted the grantee's name in the deed without authority, restoration to the grantee of money paid by him cannot be required, when such money never came into the hands of the grantor.[3] Plaintiff cannot be required to restore to defendant money paid to one who was in fact acting for defendant, though he represented to plaintiff that he was also acting for her.[4] On cancellation of conveyance, defendant is entitled to credit only for the amount actually paid, and not for the face value of notes given in payment.[5] While a bill for rescission may be sustained, though no rescission or offer to rescind has previously been made or attempted,[6] yet if complainant has by his action, subsequent to notice of the alleged misrepresentations, elected not to rescind on that ground, equity will not grant relief.[7] One who has been induced to enter into a contract by false and fraudulent representations, upon which he has relied, has the right to bring an action to establish the fraud and to be released from its provisions, whether or not there be a threatened or attempted enforcement of it.[8]

Laches and limitations.[9]—Since equity aids only the vigilant, the suit must

lowed their expenditures. Grant v. Bell [R. I.] 58 A. 951.

95. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

96. Eighmy v. Brack [Iowa] 102 N. W. 444.

97. Reformation held proper where provision was omitted by fraud or mistake. Davy v. Davy, 98 App. Div. 630, 90 N. Y. S. 242.

98. Exchange of lands. Bales v. Roberts [Mo.] 87 S. W. 914.

99. A deed of trust debtor cannot have a provision of the deed providing for sale invalidated, without restoring the property parted with on faith of the deed. Sullivan v. Bailey, 21 App. D. C. 100. Where several years after execution of deed, grantor moved on land, claiming it, and grantee brought ejectment, when grantor claimed a mortgage was intended and an absolute deed was executed by duress, relief would be granted the grantor only on condition that he pay the debt. Bryan v. Hobbs [Ark.] 83 S. W. 341. On cancellation of a deed, and a judgment directing a reconveyance, it is proper to require plaintiff to repay to defendant sums paid on the contract, less damages sustained by plaintiff through defendant's failure to perform. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

1. Plaintiff will not be required to restore money received when defendant has received a greater amount in proceeds from the land. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872. Where deed of realty and personalty, based on consideration of support of grantors and a payment of money to their daughter, was set aside after a number of years, the payment to the daughter could not be made the basis of an equitable claim against the grantors, the grantees having had personalty, awarded to them, and having enjoyed use of the land meantime. Krause v. Krause [Wis.] 104 N. W. 76.

2. Grantee erased word "trustee" after name, and then transferred reversion after, giving two mortgages. Held, erasure being visible, no tender of reversion price necessary. Flitcraft v. Commonwealth Title Ins. & Trust Co. [Pa.] 60 A. 557.

3. Mitchell v. Squire [Iowa] 103 N. W. 783.

4. Willey v. Clements [Cal.] 79 P. 850.

5. Eighmy v. Brock [Iowa] 102 N. W. 444.

6. Du Bois v. Nugent [N. J. Eq.] 60 A. 339. An offer of restitution is not a condition precedent to the maintenance of a bill for cancellation of a conveyance procured by fraud, and such offer need not be made in the bill. Rule both in Massachusetts and New Hampshire. Thorpe v. Packard [N. H.] 60 A. 432.

7. Evidence held to show election not to rescind exchange of lands on account of certain alleged false representations. Du Bois v. Nugent [N. J. Eq.] 60 A. 339.

8. Pruyn v. Black, 93 N. Y. S. 995.

9. See 3 C. L. 588.

be brought within a reasonable time.[10] Where a deed or other conveyance has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death at the suit of those who succeed to his rights.[11] A cause of action for cancellation of a deed which had been returned to the grantor, and secretly obtained by the grantee and recorded, does not arise until the grantee so obtained possession of and recorded the deed.[12] The five-year limitation statute in California is applicable to a suit by a widow to cancel a deed procured from her husband through fraud and undue influence.[13]

Venue.—A suit to cancel a deed is one affecting title to realty, and in Missouri must be brought in the county where the land is situated, though summons may be served on defendant anywhere in the state.[14]

§ 2. *Cause of action and grounds for relief.*[15]—Relief will be granted where it appears that the instrument or contract sought to be canceled was procured by fraud,[16] duress,[17] or undue influence;[18] or that the grantor or party executing the

10. On ground of duress. Bryan v. Hobbs [Ark.] 83 S. W. 341. Suit to cancel deed for undue influence ten years after making it, nine years after discovery of grantee's claim, and two years after his death, barred by laches. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. Delay of seven years and receipt of four annual instalments on price held to bar suit for cancellation of deed on ground of duress. Horn v. Beatty [Miss.] 37 So. 833. Relief from assignment of stock procured by fraud denied where eight years had elapsed, the party charged with fraud and the attorney in charge of transaction having meantime died. Ripple v. Kuehne [Md.] 60 A. 464.

11. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

12. Father gave son a second deed taking back first, and son secretly took first and recorded it. Arnold's Heirs v. Arnold, 26 Ky. L. R. 884, 82 S. W. 606.

13. Code Civ. Proc. § 318. Page v. Garver [Cal.] 80 P. 860.

14. Rev. St. 1899, § 564. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

15. See 3 C. L. 585.

16. False representation in prospectus by corporation promoters as to value of property to be transferred to corporation held ground for cancellation of note given for stock. Manning v. Berdan, 135 F. 159. A deed from heirs to the administrator will be set aside when based on misrepresentations on faith of which the price was reduced, unless the administrator pays the full value. Cornish v. Johns [Ark.] 85 S. W. 764. Where promoters of corporation bought realty and sold it to the corporation, of which they became directors, at an advanced price, concealing facts, corporation could rescind real estate transfer for fraud. Old Dominion Copper Min. & Smelt. Co. v. Bigelow [Mass.] 74 N. E. 653. A bill seeking annulment of deed, and reconveyance, because part consideration was worthless stock which grantor was induced to take through fraud, held to state cause of action. Wagner v. Fehr [Pa.] 60 A. 1043. False representation that grantee intended to build on transferred property ground for cancellation. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

Equity has jurisdiction of suit to rescind contract for stock on ground of fraudulent misrepresentations, and to compel restitution of money paid. Hubbard v. International Mercantile Agency [N. J. Eq.] 59 A. 24. Where woman was induced by false representations as to value of certain building and loan stock to exchange what she held for a different kind, she being ignorant and having no opportunity to seek other advice, a decree restoring her to her former position was warranted. Tucker v. Osbourn [Md.] 61 A. 321. Deed declared void for fraud in erasing word "trustee" after grantee's name. Flitcraft v. Commonwealth Title Ins. & T. Co. [Pa.] 60 A. 557. Deeds cancelled and cash returned where evidence showed sale of shooting gallery void for fraud. Parker v. Anderson [Tex. Civ. App.] 85 S. W. 856. Where one of two joint purchasers obtained a deed of other property from the other, which was in fact without consideration, owing to false representations, such facts constituted cause of action for cancellation. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419. Evidence held to show deed procured by fraud and undue influence. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872. Evidence held not to show fraud or duress in execution of deed of mineral land. Horn v. Beatty [Miss.] 37 So. 833. Pleading held not to set out facts showing fraud or undue influence warranting cancellation of deed. Anderson v. Anderson [Wis.] 100 N. W. 829.

17. Evidence held to show mortgage executed to secure son's debt, induced by threats to prosecute son, constituting duress. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

18. Evidence held to warrant finding that deeds were procured by undue influence and never delivered, and decree of cancellation upheld. Douglass v. Longcor [Mich.] 100 N. W. 1004. Bill held to state cause of action for equitable relief on ground of undue influence, but not on ground of inadequacy of consideration, where husband induced wife to execute trust deed. Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449. Evidence held to sustain finding of fraud and undue influence in suit to set aside deed. Winn v. Itzel [Wis.] 103 N. W. 220. Evidence insufficient to prove assignment of stock was for insufficient

contract was incompetent.[19] It is no defense to a suit for cancellation for fraud that the person defrauded intended to defraud another.[20] If the false representations alleged are proved to have been made and to be false, it is immaterial whether or not their falsity was known to defendant.[21] A ratification of an exchange of property with knowledge of a false representation as to quantity but without knowledge of other material misrepresentations does not estop the party so ratifying from seeking to rescind the contract.[22] On discovery of the other misrepresentations, both the ratification and the original contract may be rescinded.[23] A bill which sets up fraud in several transactions between the parties and seeks the vacation of such transactions is not demurrable by reason of the fact that rescission of the final transaction between them is not asked for.[24] Fraud practiced by a wife on her husband is ground for cancellation of a deed from him to her induced thereby.[25] Where a conveyance is executed by a husband for an inadequate consideration, in fraud of his wife's rights in the homestead, at a time when he was non compos as to duties owed by him to her, equity has jurisdiction to enjoin ejectment by the purchaser, and to cancel the deed.[26] Equity will not set aside a transfer voluntarily and freely made as a part of a fraudulent[27] or illegal[28] transaction; but where the parties do not stand on equal terms, one being superior to and influencing the act of the other by reason of greater knowledge and experience, the fact that the transferor acted voluntarily is no defense to a suit to set the transfer aside.[29]

In case of mistake, either mutual or unilateral, equity will reform the contract, so as to make it express the real intention of the parties,[30] or rescind it if the minds of the parties have not in fact met upon the same terms.[31] A mistake

consideration or brought about by undue influence. Ripple v. Kuehne [Md.] 60 A. 464. A conveyance by one mentally competent, and under no undue influence, but made because of a fear of litigation, such fear being in fact groundless, will not be set aside. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

19. Finding that deed was void for want of mental capacity of grantor held supported by evidence. Parker v. Ballard [Ga.] 51 S. E. 465. Allegations of mental incompetency of grantor by reason of insanity held to state cause of action for cancellation. Logan v. Vanarsdall [Ky.] 86 S. W. 981. Evidence held to show grantor incompetent and a conveyance without adequate consideration. Sterling v. Sterling, 98 App. Div. 426, 90 N. Y. S. 306.

20. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872.

21. Such knowledge must be proved in action at law for deceit, but such proof is unnecessary in equitable action for rescission. Du Bois v. Nugent [N. J. Eq.] 60 A. 339. Where minor heirs relied on knowledge and experience of kinsman, and his attorney, who represented that they would be liable for debts, really barred by limitations, and gave a deed of their interests at a reduced price on account of such debts, the heirs were entitled to a rescission, unless the amount of such debts was paid them, even though the misrepresentations were unintentional, and in regard to law. Cornish v. Johns [Ark.] 85 S. W. 764.

22. Willey v. Clements [Cal.] 79 P. 850.

23. Under direct provisions of Civ. Code, § 2314. Willey v. Clements [Cal.] 79 P. 850.

24. Swinney v. Cockrell [Miss.] 38 So. 360.

25. Conveyance procured by threats not to live with husband; thereafter she lived with him 3 days and then left him. Conveyance set aside. Hursen v. Hursen, 212 Ill. 377, 72 N. E. 391.

26. Moseley v. Larson [Miss.] 38 So. 234.

27. Ingersoll v. Weld, 93 N. Y. S. 291.

28. Contract providing that husband would put in no defense in divorce action if brought on certain ground, and for certain other considerations, held illegal; hence it could not be canceled, wife having entered into it freely, and no fraud appearing. McAllen v. Hodge [Minn.] 102 N. W. 707. In absence of fraud, transfer of realty as part of agreement of separation of husband and wife, will not be canceled. Anderson v. Anderson [Wis.] 100 N. W. 829.

29. Ingersoll v. Weed, 93 N. Y. S. 291. Where grantees induced execution of deed without consideration, frightening grantor as to liability on bond, and promising to reconvey when the bond was settled, grantor could have deed canceled. Sanford v. Reed [Ky.] 85 S. W. 213.

30. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

31. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405. Facts held to show mutual mistake of fact. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757. Evidence held to show there was no mistake in giving check for taxes, and cancellation of check denied. In re Morgan's Estate, 125 Iowa, 247, 101 N. W. 127. Evidence insufficient to show omission of revocation clause in trust deed by mistake, or to show fraud or undue influence in procuring the deed. Dayton v. Stewart, 99 Md. 643, 59 A. 281.

of one party relative to the substance of the contract, such mistake being induced by false representations of the other party, or if not so induced, being participated in and made effective by the other, is ground for rescission.[32]

Contracts and conveyances made [33] or delivered [34] without authority may be set aside. A bill may be maintained for the cancellation of a void instrument, if it clouds the title of the real owner of property.[35] Where a deed deposited in escrow is delivered to the grantee without authority from the grantor, and the deed is recorded, equity will remove the resulting cloud on grantor's title by annulling the deed.[36] Willful and surreptitious breaches of immaterial parts of a contract constitute ground for rescission.[37] A breach of an agreement by a grantee to support the grantor is ground for cancellation of the deed.[38] Failure of the grantees to pay a debt of the grantor, which they verbally assumed, the debt being secured by deed of trust on the land, is not ground for cancellation of their deed.[39] A voluntary deed cannot be set aside on the ground of inadequacy of consideration;[40] but a total failure of consideration is ground for cancellation of notes.[41] An executed gift will not be revoked by equity unless wrongfully obtained.[42]

§ 3. *Procedure. Pleading.*[43]—A bill for annulment of a stock contract for fraud need not allege that complainant has suffered pecuniary loss.[44] General averments of fraud in a petition seeking the setting aside of a deed and other relief are sufficient against an objection to the introduction of evidence under the petition.[45] A petition to set aside a deed for fraud may be amended by setting up a mutual mistake of fact.[46] Where a bill alleged a fraudulent sale of real estate to complainant, a prayer for rescission and damages is not inconsistent.[47] A bill by

32. Schmitz v. Peterson [La.] 36 So. 915.

33. Where a contract made through agents was not the one they were authorized to make, nor the one the principal supposed had been made, the principal was entitled to have it canceled. Board of Trade of Grand Haven v. De Bruyn [Mich.] 101 N. W. 262. Lessor may have trust deed, executed by lessee contrary to terms of lease, canceled. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870.

34. Cancellation of deed may be decreed where it is delivered by a third person to the grantee named, contrary to the grantor's intention. Spacy v. Ritter, 214 Ill. 266, 73 N. E. 447. Deed, without consideration, delivered by third person to grantee without authority and recorded by grantee, may be canceled at suit of grantor's heirs. Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. Equity has jurisdiction of a suit to cancel a deed on the ground that it had been fraudulently taken from the grantor's safe and recorded, no delivery having been intended by the grantor. Cribbs v. Walker [Ark.] 85 S. W. 244. Petition held not to negative purposed delivery of deed to wife, and not to state cause of action for cancellation for nondelivery. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

35. Though a contract relating to land was no longer effective owing to lapse of time, yet as it constituted, on the record, an apparent cloud, suit to cancel it was held proper. Sawyer v. Cook [Mass.] 74 N. E. 356.

36. Bales v. Roberts [Mo.] 87 S. W. 914.

37. Bales v. Roberts [Mo.] 87 S. W. 914. A deed granting petroleum may be canceled for failure to perform its covenants where the deed provides for annulment in such case. Carney v. Barnes [W. Va.] 49 S. E. 423.

38. Evidence sufficient to support finding that grantee failed to maintain grantor as he agreed, and that deed should be canceled according to its terms. Caudill v. Lemaster, 26 Ky. L. R. 1010, 82 S. W. 1009. Where one under the stress of infirmity or age deeds property to another in return for an assurance of support, the transaction is treated as creating a trust, and not a mere contract, and on failure of the grantees to perform, equity will grant a reconveyance. Grant v. Bell [R. I.] 58 A. 951.

39. Thurmond v. Thurmond [Tex. Civ. App.] 13 Tex. Ct. Rep. 146, 87 S. W. 878.

40. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635. That a deed of trust containing no power of revocation was without consideration and voluntary is not ground for its rescission at the instance of the grantor. Dayton v. Stewart, 99 Md. 643, 59 A. 281.

41. Complaint held to state cause of action for cancellation where machine for which notes were given failed to work, was returned and accepted by the seller, who refused to return the notes. E. T. Kenney Co. v. Ruff [Ind. App.] 72 N. E. 622.

42. Fowler v. Fowler, 135 F. 405.

43. See 3 C. L. 590.

44. Stern v. Kirby Lumber Co., 134 F. 509.

45. Howard v. Carter [Kan.] 80 P. 61.

46. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

47. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

a wife whose husband has conveyed the homestead in fraud of her rights to enjoin ejectment by the purchasers, and to cancel the deed, is not multifarious.[48] A bill seeking the reassignment of a mortgage on the ground of fraud must properly allege knowledge of the fraud by the assignee.[49] Where a wife's amended complaint in divorce sets up facts showing a deed by her husband void, and makes his grantee defendant, the validity of such deed can be determined only on a cross petition by grantee against the wife, answer thereto, and proof on the issue thus made.[50]

Parties.[51]—All persons interested in the subject-matter and who will be affected by the decree are necessary parties.[52] Cancellation of a contract to convey land will not be decreed where one to whom plaintiffs have pledged the contract to secure a loan has not been made a party and has not consented to cancellation.[53] A suit by a corporation to rescind a real estate transfer on the ground of fraud practiced by directors who sold to the corporation, may be maintained without joining the representatives of a nonresident who held legal title and had a half interest in the contract of sale.[54] In revocatory actions in Louisiana parties to the acts attacked must be made parties to the suit.[55]

The widow of the grantor of realty is the real party in interest entitled to sue for the cancellation of a deed procured from the grantor through fraud and undue influence of the grantees.[56] A grantee of mortgaged land may sue for cancellation of the mortgage on the ground that it was executed by the mortgagor under duress.[57] If plaintiffs have only the equitable title to the land in question, they may maintain an action to cancel a deed thereto, though not in possession.[58]

Evidence and proof.[59]—Relief, if granted, must be upon proof of the grounds alleged.[60] Such proof must be clear, strong and convincing; a mere preponderance is not enough.[61] Ordinarily plaintiff has the burden of proof.[62] But if a fiduciary relation exists between parties to a conveyance, the burden is upon the grantee to show that the transaction was free from fraud and undue influence.[63] In a suit

48. Moseley v. Larson [Miss.] 38 So. 234.

49. Bill held demurrable. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114.

50. Zumbiel v. Zumbiel, 26 Ky. L. R. 1193, 83 S. W. 598.

51. See 3 C. L. 590.

52. Where in a suit for reassignment of a purchase-money mortgage, it is alleged that the original grantee of the land was a fictitious person who had transferred to others, such subsequent grantees were necessary parties. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114. In a proceeding against a resident defendant and a foreign corporation to cancel a conveyance of timber by the former to the latter, wherein title was warranted, and also to cancel an extension of a timber lease made by a third person to the resident defendant subsequent to said conveyance, the resident defendant is a necessary party. Paulk v. Ensign-Oskamp Co. [Ga.] 51 S. E. 344.

53. Specific performance, tendered by defendants, decreed. Shaw v. Benesh [Wash.] 79 P. 1007.

54. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

55. Calcasieu Nat. Bank v. Godfrey [La.] 38 So. 591.

56. Under Code Civ. Proc. § 367 as to parties. Page v. Garver [Cal.] 80 P. 860.

57. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

58. Persons claiming under will and as heirs, and that recorded deed from father had never been delivered to grantee. Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. Plaintiffs, though not in possession of the land, may maintain suit to have deed canceled on ground that grantee fraudulently took it from the deceased grantor's safe and recorded it, and to recover possession and have partition of the land. Cribbs v. Walker [Ark.] 85 S. W. 244.

59. See 3 C. L. 589.

60. Certain false representations being alleged as ground for rescission of exchange of land, relief not granted for other misrepresentations. Du Bois v. Nugent [N. J. Eq.] 60 A. 339.

61. Smith v. Rust, 112 Ill. App. 84. Evidence insufficient to show fraudulent representations inducing execution of deed. Fowler v. Fowler, 135 F. 405. Evidence held to warrant finding that written guaranty had been procured by misrepresentations as to its nature. First Nat. Bank v. Buetow [Wis.] 101 N. W. 927.

62. The burden of proving fraud is on plaintiff who must put in all his proof before defendant can be called on to assume the burden. Winn v. Itzel [Wis.] 103 N. W. 220.

63. Parent and child; evidence insufficient to show execution of deed by parent free from undue influence. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. Evidence sufficient to show gift of money by mother

commenced by the mortgagor and continued by his grantee to set aside the mortgage on the ground of duress, the date of the filing of the original petition by the mortgagor, and the deed from the mortgagor to the present plaintiff, are admissible in evidence.[64]

CANVASS OF VOTES; CAPIAS; CAPITAL; CARLISLE TABLES, see latest topical index.

CARRIERS.

PART I. GENERAL PRINCIPLES.

§ 1. *Definitions and distinctions.*[1]—A common carrier is one whose business it is to carry persons or chattels for all who may choose to employ and remunerate

to son free from undue influence. Id. Stepfather held not to have overcome presumption of fraud and inadequate consideration in taking a deed from stepdaughter, 18 years of age, while she was a member of his family. Eighmy v. Brock [Iowa] 102 N. W. 444. Evidence in suit to cancel deed from son to father held sufficient to rebut presumption of improper influence by father. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106.

64. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

1. See 3 C. L. 591.

him.[2] The term includes, besides the owners of shipping,[3] railroads,[4] street railroads, express, and the like, the owners of elevators,[5] telephones,[6] telegraphs,[7] sleeping cars [8] and ferries,[9] but not irrigation works,[10] draymen [11] or livery stable keepers.[12]

§ 2. *Public control and regulation. A. In general.*[13]—The Federal government under the commerce clause of the constitution is empowered to regulate commerce between the states, and this it has assumed to do by the interstate commerce act to the extent of preventing unlawful discrimination in charges and service by interstate carriers.[14] Rates are prescribed for government service by roads receiving aid from the government.[15] Except as limited by the commerce clause of the Federal constitution and those clauses designed for the security of persons and property, the several states and their municipal subdivisions have under their

2. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575.

3. Whether a towing company held itself out as a common carrier held a question for the jury. Bassett v. Aberdeen Coal & Min. Co. [Ky.] 88 S. W. 318.

4. A railroad company is not a common carrier of sleeping cars and employes performing duties therein. Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705. A contract by which a railroad operates, in its capacity as common carrier, a switch over private property, may be abrogated at will by the said road and the owner of the property, and the switch may be sold to the latter regardless of the motives actuating the parties. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441.

5. A merchant operating an elevator in his store to transport his customers is a carrier of passengers. Morgan v. Saks [Ala.] 38 So. 848.

6. Gwynn v. Citizens' Tel. Co., 69 S. C. 69 S. C. 434, 48 S. E. 460; State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390.

7. State v. Cumberland Tel. & Tel. Co. [Tenn.] 86 S. W. 390.

8. Mississippi Const. § 195. Pullman Co. v. Kelly [Miss.] 38 So. 317.

9. A city operating a ferry in part for profit may be considered a common carrier and held to the ordinary liabilities of one. Townsend v. Boston, 187 Mass. 283, 72 N. E. 991.

NOTE. Ferrymen as common carriers, see exhaustive note, 68 L. R. A. 153.

10. One who leases land and an accompanying water right from an irrigation company cannot claim damages beyond the limitation in his contract for failure to supply water on the others that the company is a common carrier, since it was under no duty apart from the contract to supply to him. Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 350.

11. Jaminet v. American Storage & Moving Co. [Mo. App.] 84 S. W. 128.

12. Livery stable keepers who let horses and carriages for hire either with or without drivers are not common carriers of passengers. Stanley v. Steele [Conn.] 60 A. 640. A livery stable keeper furnishing a conveyance and driver for a special trip is a private carrier for hire and held only to ordinary care. Not liable for negligence of driver. McGregor v. Gill [Tenn.] 86 S. W. 318.

13. See 3 C. L. 592. As to whether interurban car lines are railroads within the general railroad law, see note 67 L. R. A. 637.

14. Where the power of the court is invoked to compel obedience to an order of the interstate commerce commission, the court must enforce it as a whole or not at all, having no power to modify. Interstate Commerce Com. v. Lake Shore & M. S. R. Co., 134 F. 942. An order of the interstate commerce commission commanding a restoration of a commodity to the classification it bore previous to a recent change by a classification committee of the railroads is in effect an attempt to regulate rates and beyond the powers of the commission. Id. Mandamus to enforce the orders of the interstate commerce commission is authorized only in special cases. United States v. Lake Shore & M. S. R. Co., 197 U. S. 536, 49 Law. Ed. 870. An agreement between competing roads for a through rate conditioned on a reservation to the initial carrier of the power to route the shipments is an unlawful pool, and it is immaterial that the purpose in making it was to thwart a rebate system practiced by the connecting carriers. Interstate Commerce Com. v. Southern Pac. Co., 132 F. 829. The word "freights" as used in the interstate commerce act means as well the commodities carried as the compensation for such carriage. Id. A contract for the division of earnings between competing roads is prohibited by the interstate commerce act whether any division is in fact made or not. 24 Stat. 380, § 5. Id. Where a complaint for violation of the interstate commerce act makes a general allegation that the rule complained of is violative of the act, which the answer generally denies, the issue raised extends to every possible violation of the act, and in passing upon the issue the court is not confined to the grounds or reasons assigned by the commission for its conclusion. Id. In a suit to enforce its orders, the interstate commerce commission represents the public, and its right to relief is not affected by the fact that the complainants before it have themselves participated in unlawful practices. Id.

15. The Federal statutes requiring land-grant railroads to carry government freight at reduced rates do not apply to a road which received no land grant but runs its trains over a land-grant road for a short distance. United States v. Astoria & C. R. R. Co., 131 F. 1006.

police powers the right to control and regulate common carriers both as to the manner of conducting their business and the rates to be charged for their services.[16] Thus, street surface railroads in New York are required under penalty to give transfers on payment of a single fare to any line under the same management,[17] and similar control by terms of franchise is common.[18] A contract between a railroad and a sleeping car company for sleeping car service is neither a violation of the anti-trust law, nor a monopoly, nor does it tend to affect transportation or charges therefor.[19]

(§ 2) *B. Duty to undertake and provide carriage.*[20]—A common carrier is required to furnish reasonable facilities for transporting and to transport all persons and property legally offered for transportation,[21] and statutes declaring and

16. Though an express company is not organized as a corporation, it is subject to legislative control as a common carrier. United States Exp. Co. v. State [Ind.] 73 N. E. 101. Express companies may be compelled to deliver packages to the consignees at their residences or places of business. Burns' Ann. St. 1901, § 3312a does not clash with 14th amendment, nor interfere with interstate commerce. United States Exp. Co. v. State [Ind.] 73 N. E. 101. Statute is not complied with by delivery at the company's office to consignee in person. Id. The summons in New York in an action for the penalty for failure to sell tickets as required by statute must contain reference to the statute. Burdick v. Erie R. Co., 92 N. Y. S. 122. The corporate commission of North Carolina cannot in consideration of a low rate of freight limit the liability of a carrier for loss of goods through its negligence to less than their value. Everett v. Norfolk & S. R. Co., 138 N. C. 68, 50 S. E. 557. A city ordinance prohibiting hanging on the outside of a street car passed at a time when horse cars were universal has no application to passengers riding on the running board of open electric cars. Frank Bird Transfer Co. v. Morrow [Ind. App.] 72 N. E. 189. A statute prohibiting common carriers transporting intoxicating liquors for delivery in towns in which licenses are not granted will not support a prosecution of one not a common carrier. Commonwealth v. Beck, 187 Mass. 15, 72 N. E. 357. The railroad commission may require that specified trains must stop at a station in order that the community may be properly served. Proceedings held to constitute due process of law. Railroad Com'rs v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 641.

The tariffs that may be charged by railroad companies are within control of the state within reasonable limits. Matters to be considered in determining reasonableness. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 314. Particular rates may be prescribed lower than a general one. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 652. Rate held reasonable. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 657. Burden is on company to show unreasonableness. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 658. Lease construed to bring two roads under one management so as to constitute but one road within rules of railroad commissioners regulating freight rates. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 314. The state statutory classification of freights and the rulings of the state railroad commission are not applicable to interstate shipments. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722.

17. By lease or otherwise. McLaughlin v. New York City R. Co., 94 N. Y. S. 653; Griffin v. Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513. Only a single penalty can be recovered in a single suit. Id.; O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517; McLean v. Interurban St. R. Co., 102 App. Div. 18, 92 N. Y. S. 77. Held cumulative in Lux v. New York City R. Co., 45 Misc. 222, 92 N. Y. S. 109. Institution of action waives all previous penalties but does not prevent action for subsequent penalties. In re Transfer Penalty Cases, 92 N. Y. S. 322. Where three suits are begun in one day for three separate penalties, the last suit waives the others. McLaughlin v. New York City R. Co., 94 N. Y. S. 653. Refusal to accept a valid transfer when tendered for passage is equivalent to refusal to give one rendering the carrier liable to the penalty. Harris v. Interurban St. R. Co., 92 N. Y. S. 42. Where two lines operate on same street, it will not be presumed in the absence of evidence that the car on which transfer was refused was defendants'. Id. Answer pleading possible alternative route but not showing that transfers were issued over it is bad. Holmes v. Interurban St. R. Co., 92 N. Y. S. 57. Timely notice is necessary where carrier offers transfers over only one of two available routes. Freeman v. New York City R. Co., 92 N. Y. S. 47; Holmes v. Interurban St. R. Co., 92 N. Y. S. 57. Statute held not repealed. Lux v. New York City R. Co., 45 Misc. 222, 92 N. Y. S. 109. Court can take judicial notice of other cases in determining whether an erroneous judgment shall be reversed or modified and affirmed. In re Transfer Penalty Cases, 92 N. Y. S. 322. No excuse that to give transfers might cause undue crowding of cars. Moskowitz v. Brooklyn Heights R. Co., 93 N. Y. S. 385. A woman whose husband or escort pays her fare may recover. Carpenter v. New York City R. Co., 93 N. Y. S. 600; McLaughlin v. New York City R. Co., 94 N. Y. S. 653.

18. What are intersecting lines. Virginia Passenger & Power Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995.

19. Ft. Worth & D. C. R. Co. v. State [Tex.] 87 S. W. 336.

20. See 3 C. L. 592, § 2.

21. State v. Chicago, B. & Q. R. Co.

enforcing this duty are common.[22] Damages for failure to transport freight as agreed are recoverable,[23] and a connecting carrier is bound to receive a shipment when tendered it in the absence of any valid reason for declining.[24] Intersecting railroads are generally required to interchange business,[25] and may be required to build tracks,[26] and exercise the power of eminent domain where necessary to facilitate such exchange.[27] A statute prohibiting delay by carriers and providing a penalty for violation thereof is a proper exercise of the police power of the state.[28]

The duty to furnish cars [29] may be enjoined by statute,[30] under penalty,[31] and where so enjoined is properly enforceable by mandamus.[32] Cars may be appor-

[Neb.] 101 N. W. 23. Must furnish suitable cars. St. Louis, etc., R. Co. v. Marshall [Ark.] 86 S. W. 802. A connecting carrier is not obliged by a through bill of lading to furnish immediate transportation of cattle, but is only bound to forward them with reasonable diligence. Chicago, etc., R. Co. v. Kapp [Tex. Civ. App.] 83 S. W. 233. A common carrier cannot be required to receive freight on or along a private switch, but its duty in that regard is confined and limited to its own depots or shipping and receiving points. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441. That the enforcement of the duty will result in financial loss to the railroad is immaterial. Commonwealth v. Louisville & N. R. Co. [Ky.] 85 S. W. 712. Persons who have no property rights in a private switch over another's land cannot compel the latter to permit the railroad to receive and ship their freight over the switch to the railroad's own track. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441. A railroad company is under no legal duty to receive and transport passengers on a special train made up and used for the purpose of going to and returning from a wreck on the company's line. One who with full knowledge of the circumstances contracts with the conductor to be carried as a passenger on such train to and from the wreck, and who pays fare for his passage in going, has no right to an action ex delicto against the company for its breach of the contract to furnish him return transportation. Du Bose v. Louisville & N. R. Co., 121 Ga. 308, 48 S. E. 913. A telephone company as a common carrier may be liable for refusal to grant connections to all making proper application. Gwynn v. Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460. Contract to furnish cars held not shown by telephone conversation with person answering at railroad company's office. Gulf, etc., R. Co. v. Fromme [Tex. Civ. App.] 86 S. W. 651.

22. It is the duty of railroads to furnish cattle yards to restrain cattle offered for transportation prior to their being loaded. Pub. St. 1901, c. 160, § 1. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. The delivery of cars to shipper's private track scales is a public duty connected with carriage which may be regulated by the state. Norfolk & P. Belt Line R. Co. v. Commonwealth, 103 Va. 289, 49 S. E. 39. A petition founded on the statute of Indiana requiring railroad companies to keep stations open before the time of arrival of scheduled trains must aver that the train in question was scheduled. Burns' Ann. St. 1901, § 5188. Draper v. Evansville & T. H. R. Co. [Ind.] 74 N. E. 889. An order of the railroad commission requiring the operation of trains to and from two stations is proper and enforceable. It is not complied with by running a through train that does not stop at these stations. Traffic agreements between parties to lease cannot be effective to nullify a statute or order of the commission. Commonwealth v. Louisville & N. R. Co. [Ky.] 85 S. W. 712. Indictment for failure to provide waiting-room at station must charge that railroad commission ordered it. Commonwealth v. Illinois Cent. R. Co. [Ky.] 86 S. W. 542.

23. Authority of person assuming to contract for company held not shown. Texas & N. O. R. Co. v. Merchants' & Farmers' Cotton Oil Co. [Tex. Civ. App.] 86 S. W. 1042.

24. Sterling v. St. Louis, etc., R. Co. [Tex. Civ. App.] 86 S. W. 655. Liable for injuries resulting from delay in receiving. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530.

25. Roads must interchange car load freight. Hudson Val. R. Co. v. Boston & M. R. Co., 45 Misc. 520, 92 N. Y. S. 928. Remedy to secure right. Hudson Val. R. Co. v. Boston & M. R. Co., 45 Misc. 520, 92 N. Y. S. 928. Railroads may be required to rearrange their schedules so as to provide reasonable connections for passengers and freight offered to transfer at connecting points. North Carolina Corp. Commission v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191.

26. Crossing not at grade. International & G. N. R. Co. v. Railroad Commission [Tex. Civ. App.] 86 S. W. 16.

27. Hudson Val. R. Co. v. Boston & M. R. Co., 45 Misc. 520, 92 N. Y. S. 928.

28. Laws 1901, c. 634, § 868, held not repealed by Laws 1903, p. 999, c. 590, § 3. Lexington Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801. Burden of showing delay is on plaintiff. Walker Bros. v. Southern R. Co., 137 N. C. 163, 49 S. E. 84. Four days allowed means that transportation must be begun within four days. Id. Consignor may sue when he is the party aggrieved. Summers v. Southern R. Co., 138 N. C. 295, 50 S. E. 714. Powers of corporation commission with respect to delays. Id.

29. See 3 C. L. 596, § 6.

30. Application held sufficient. Houston & T. C. R. Co. v. Mayes [Tex. Civ. App.] 83 S. W. 53. Whether carrier could refuse to furnish for shipments out of state is not in issue in action for delay where no such claim was made when cars were furnished. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 84 S. W. 1073.

31. Houston & T. C. R. Co. v. Everett [Tex. Civ. App.] 86 S. W. 17.

32. Alternative writ may be amended

tioned in case of scarcity.[33] Damages for failure to furnish cars on demand or as contracted are recoverable.[34] It is not a discrimination to prefer shippers owning spurs over those who must load on the company's sidings which it needs for the conduct of its own business.[35]

(§ 2) *C. Charges.*[36]—The courts have no general supervisory jurisdiction over rates,[37] but the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation.[38] Charges may be regulated [39] but cannot be reduced below an amount sufficient to allow the carrier to earn an amount equal to the legal and usual rate of interest in the locality on the amount actually invested.[40] Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact,[41] and railroads have no right to graduate their charges in proportion to the prosperity which attends the industries whose products they transport,[42] nor can they advance an already reasonably remunerative rate on a particular commodity because they need more revenue.[43] Limitations in the franchises of corporate carriers are enforceable.[44] A shipper is entitled under the common law to relief in a state court from unreasonable freight rates though the shipment was interstate and the rate has been filed with the interstate commerce commission as required by the Federal statute.[45] An agreement between

as to percentage demanded, and may run against officer of railroad. West Virginia Northern R. Co. v. United States [C. C. A.] 134 F. 198. Mandamus will not lie to enforce a contract between the carrier and shippers prescribing the ratio of distribution of cargo. United States v. Norfolk & W. R. Co., 138 F. 849.

33. West Virginia N. R. Co. v. U. S. [C. C. A.] 134 F. 198; State v. Chicago, B. & Q. R. Co. [Neb.] 101 N. W. 23.

34. Contract held not shown with person authorized to represent railroad. Gulf, etc., R. Co. v. Fromme [Tex. Civ. App.] 86 S. W. 651. Complaint held demurrable for failure to show demand on person authorized to furnish cars. St. Louis, etc., R. Co. v. Moss [Ark.] 86 S. W. 828. Injury to cattle from delay is recoverable. Texas & P. R. Co. v. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065. Complaint held sufficient. Plaintiff held entitled to recover for expense of keeping teams used to load logs. Choctaw, O. & G. R. Co. v. Rolfe [Ark.] 88 S. W. 870.

35. Choctaw, O. & G. R. Co. v. State [Ark.] 84 S. W. 502.

36. See 3 C. L. 592.

37. Raritan River R. Co. v. Middlesex & S. Traction Co., 70 N. J. Law 732, 58 A. 332. In New Jersey the railroads have an uncontrolled discretion to establish such rates of freight and fare as their own interests demand, subject only to the maximum fixed by the legislature and the reserved right of repealer and modification. Id.

38. Tift v. Southern R. Co., 138 F. 753.

39. Louisville & N. R. Co. v. Brown, 123 F. 946. Street railroads may be required by the legislature to carry public school pupils at not more than half the regular rates. Commonwealth v. Interstate Consol. St. R. Co. [Mass.] 73 N. E. 530. A statute forbidding railroad companies to charge for transportation for any specific distance a greater sum than the charge for carriage over a greater distance is within legislative discretion and is valid. Chicago, B. & Q. R. Co. v. Anderson [Neb.] 101 N. W. 1019. In California a carrier once reducing a rate to compete with another cannot again raise it without the consent of the state. Const. art. 12, § 20. Restriction of privileges on limited ticket held no consideration for reduction. Edson v. Southern Pac. R. Co., 144 Cal. 182, 77 P. 894. An action for a penalty for an overcharge is not supported by proof of a declaration by defendant's agent that there was an overcharge on a shipment coming from another state where no tariff or statute fixing the rate is shown. Latta Martin Pump Co. v. Southern R. Co. [N. C.] 50 S. E. 686.

40. Louisville & N. R. Co. v. Brown, 123 F. 946. The general rule is that the greater the tonnage of the commodity transported the lower should be the rate of freight charges for such transportation. Tift v. Southern R. Co., 138 F. 753.

41, 42, 43. Tift v. Southern R. Co., 138 F. 753.

44. The granting of a franchise between specified points on condition that only one fare shall be charged on said road has no application to charges made on other portions of the system of roads operated by the same company. Byars v. Bennington & H. V. R. Co., 99 App. Div. 34, 90 N. Y. S. 736. Where suit is brought for a penalty for charging excessive fares and the fare charged is not contrary to the wording of the franchise, extrinsic evidence is not admissible to explain the franchise so as to give it a different meaning. Id. In Massachusetts the selectmen of towns have no authority to limit rates of fare on street railroads. Cunningham v. Boston & W. St. R. Co. [Mass.] 74 N. E. 355.

45. Abilene Cotton Oil Co. v. Texas & P. R. Co. [Tex. Civ. App.] 85 S. W. 1052. If the rate on a shipment to Mexico is not higher than that government allows, there can be no recovery. Concession construed. Ulmer v. National R. Co. [Tex. Civ. App.] 84 S. W. 838. Where the rate charged for two single deck cars of sheep is no more than the carrier was authorized to charge for

a railroad company and a competitor that for a limited time the railroad company will not reduce its rates of fare unless required to do so by law is not against public policy.[46]

(§ 2) *D. Discriminations and preferences.*[47]—Unjust and unreasonable discriminations by common carriers are unlawful alike by common and statute law,[48] and statutes providing for the enforcement of the carrier's duty in this respect are common.[49] A railroad company may lawfully contract to furnish a shipper solid trains for the transportation of his freight unmixed with other freight, to use one engine only for such transportation and to deliver the shipment at a certain time.[50] A union depot company may grant an individual the exclusive right to solicit cab passengers on its grounds.[51]

§ 3. *Connecting carriers, draymen, and transfermen.*[52]—In the absence of a special agreement, the initial carrier's responsibility ends[53] and the connecting

one double deck car, there is no extortion. Nynn v. Wabash R. Co. [Mo. App.] 86 S. W. 562.

46. Raritan River R. Co. v. Middlesex & S.Traction Co., 70 N. J. Law, 732, 58 A. 332.

47. See 3 C. L. 592.

48. A railroad cannot charge a higher rate for the carriage of raw materials to those who will not agree to reship their manufactured product by its line. Hilton Lumber Co. v. Atlantic Coast Line R. Co., 136 N. C. 479, 48 S. E. 813. A railroad company receiving and delivering freight in car lots from and to shippers along a switch track cannot refuse its service to some of such shippers while extending it to others. Agee & Co. v. Louisville & N. R. Co. [Ala.] 37 So. 680), except to enforce car service regulations (Id). Car service association is not a "trust." Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. Discrimination is none the less unlawful, though based on a socalled "rebilling rate." What constitutes true rebilling rate. Alabama & V. R. Co. v. Railroad Commission of Mississippi [Miss.] 38 So. 356. A voluntary rate made to favored shippers by a carrier so low as to be unremunerative is none the less a rate and must be granted to all alike. Alabama & V. Ry. Co. v. Railroad Commission [Miss.] 38 So. 356. Since exemplary damages are recoverable for a willful violation of the rule against discrimination, an averment in the petition showing willfullness should not be stricken. Augusta Brokerage Co. v. Central of Georgia R. Co., 121 Ga. 48, 48 S. E. 714. It is not discrimination to charge more for sheep than for cattle. Wynn v. Wabash R. Co. [Mo. App.] 86 S. W. 562.

Note: Exclusive patronage will not allow discriminations (Minacho v. Ward, 27 F. 529); nor is the fact that one individual gives heavier traffic to the railroad material (Hays v. Pennsylvania Co., 12 F. 309), unless the cost of transportation is less because of car-load lots (Brownell v. Railroad, 4 Interstate Com. Rep. 285). On the other hand, it has been held that differences between two towns in population and tonnage traffic justify different rates. Detroit, G. H. & M. R. Co. v. Interstate Com., 74 F. 803. The question seems to be one of economics rather than of legal theory. In passenger cases, the economic question does not arise, so that party-tickets are allowable. Interstate Com. Com. v. Baltimore & O. Railroad, 145 U. S. 263, 36 Law. Ed. 699.—5 Columbia L. R. 244.

49. The Georgia Railroad Commission has power to promulgate a rule requiring all railroad companies operating in the state "to afford to all persons equal facilities in the transportation and delivery of freight without unjust discrimination against any." Augusta Brokerage Co. v. Central of Georgia R. Co., 121 Ga. 48, 48 S. E. 714. Rule prohibits discrimination against persons but not against commodities. Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga.] 50 S. E. 473. The Federal courts have exclusive jurisdiction of actions for damages for unlawful preferences under the act of congress. Gulf, etc., Co. v. Moore [Tex.] 83 S. W. 362. Refusal to accept a shipment as shipper routes it, and compelling him to route differently, is actionable. San Antonio & A. P. R. Co. v. Stribling [Tex. Civ. App.] 86 S. W. 374. Cause of action is not defeated by acceptance under duress of shipping contract routing shipment as carrier desires. Id.

50. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47.

51. State v. Union Depot Co., 71 Ohio St. 379, 73 N. E. 633.

Note: Upon this point there is irreconcilable conflict of authority. The cases will be found exhaustively collated in the above case and in Donovan v. Pennsylvania Co., 120 F. 215.

52. See 3 C. L. 594, § 3; Id., 600, § 10; Id., 610, § 18.

53. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52. In the absence of special contract the initial carrier's liability ceases when he has delivered the property safely to the connecting carrier. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093; Chicago, I. & L. R. Co. v. Woodward [Ind.] 72 N. E. 558; Meredith v. Seaboard Air Line R. Co., 137 N. C. 478, 50 S. E. 1; Bishawaiti v. Pennsylvania R. Co., 92 N. Y. S. 783; Soviero v. Westcott Exp. Co., 94 N. Y. S. 375; Southern R. Co. v. Vaughn [Miss.] 38 So. 500. Kansas statute attempting to place burden of showing cause of loss on initial carrier held inapplicable. Laws 1893, p. 176, c. 100, § 7. Atchison, etc., R. Co. v. Canton Milling Co. [Kan.] 79 P. 656. Where there is delay in shipment and damage to the goods, the burden is on the initial carrier to show safe delivery to the connecting carrier. Statute raising presumption

carrier's begins,[54] on the safe delivery to it of the article carried. By agreement between the carriers,[55] or by the terms of the ticket,[56] or bill of lading,[57] creating a partnership or agency between them all carriers participating in a contract of carriage may become responsible for the acts of each,[58] and in some states the

that injury to freight in possession of carrier was caused by its negligence has no application to discharge initial carrier. Meredith v. Seaboard Air Line R. Co., 137 N. C. 478, 50 S. E. 1.

54. A connecting carrier is not liable for a loss occurring while the shipment is in the hands of the initial or an intermediate carrier, in the absence of agency or partnership. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161; Vincent v. Yazoo & M. V. R. Co. [La.] 38 So. 816. There is a presumption that goods lost from a package were lost by the connecting carrier where it appears that the package was in good order when delivered to the original carrier and also when delivered by it to the connecting carrier. Bullock v. Haverhill & B. Dispatch Co., 187 Mass. 91, 72 N. E. 256. Prima facie case against last carrier is shown by evidence of damage to goods at time of delivery and delivery to the initial carrier in good condition. Gulf, etc., R. Co. v. Pitts & Son [Tex. Civ. App.] 83 S. W. 727. Connecting carrier not liable for defects in car furnished by initial carrier. St. Louis S. W. R. Co. v. Myer [Ark.] 86 S. W. 999.

55. Carriers may issue through bills of lading and may make contracts for through shipments and for the interchange of business with each other. Graham v. Macon, D. & S. R. Co. [Ga.] 49 S. E. 75. A bill of lading guarantying a through rate to destination does not establish an agency or partnership relation. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161. Where acceptance is not specially enjoined upon a carrier by law, acceptance of freight from a connecting carrier involves assent to the terms of the bill of lading issued by the original carrier. Bank of Commerce v. Baltimore & O. R. Co., 15 Ohio Dec. (N. S.) 32, 2 Ohio N. P. (N. S.) 403. A connecting carrier is not liable for the default of another carrier in performing part of the transportation, where there was merely a traffic agreement for division of profits arising from the transportation. Wilson v. Louisville & N. R. Co., 92 N. Y. S. 1091.

Note: The theory of the action is that all and each of the corporations are liable by reason of some arrangement or agreement between them, and that they are to be bound by the undertaking of the initial carrier. This situation must result from some contract or agreement which would constitute the defendants liable for the default of any one of the carriers in performing the contract of transportation. Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583. In the absence of a special contract, the liability of the first carrier ceases when it has safely carried and delivered the shipment to the second without unreasonable delay. Chicago, etc. R. Co. v. Woodward, [Ind.] 72 N. E. 558. Where goods are delivered to a transportation company to be transported over its route, and over several railroads to the place of their destination, the companies having associated and formed a continuous line, an intermediate company is liable in the absence of a special contract for the loss of goods happening upon its part of the line. Barter & Co. v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Western & Atlantic R. Co. v. McDaniel & Strong, 42 Ga. 641; Bullock v. Haverhill & B. Dispatch Co., 187 Mass. 91, 72 N. E. 256; Montgomery & West Point Railroad Co. v. Moore, 51 Ala. 394; Lotspeich v. Central R. R. Co. of Georgia, 73 Ala. 306. Recovery may be had of the initial carrier for injury to perishable goods shipped over connecting lines, caused by negligent delay in transporting, though each carrier was guilty of delay, there being no evidence that the damages were caused solely by the delay of the subsequent carriers. St. Louis, I. M. R. Co. v. Coolidge [Ark.] 83 S. W. 333. But a mere traffic arrangement for a division of the profits of transportation among different corporations does not create a joint contract. Merrick v. Gordon, 20 N. Y. 96.—3 Mich. L. R. 662.

56. A railroad company selling a coupon ticket for transportation to a station beyond its own line may by special contract assume responsibility for safe carriage for the entire trip, but in the absence of evidence the presumption is that the initial carrier acts only as agent of the connecting carrier, and is responsible only for safe carriage on its own line. Pennsylvania Co. v. Loftis [Ohio] 74 N. E. 179; Id. [Ohio] 74 N. E. 182. Where ticket is bought and baggage checked to a certain station in a certain city and passenger and baggage are both delivered there, without intimation that the carriers line ends elsewhere, the contract will be deemed a through one to that place. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52. Instruction predicating recovery on showing of defendant's negligence held error where partnership is alleged. Woman died from exposure in cold cars. Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440.

57. Initial carrier may contract for safe delivery at destination, and in that event the connecting carrier becomes his agent. Chicago, I. & L. R. Co. v. Woodward [Ind.] 72 N. E. 558. A receipt for baggage which recites "to be delivered" to a place named is not a special contract for through transportation. Soviero v. Wescott Exp. Co., 94 N. Y. S. 375. Contract to deliver beyond its own line within time specified. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269. Where carrier is paid full freight to destination, it is a through contract. Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99. A carrier contracting to deliver a shipment at a certain place and time is liable for the default of a connecting carrier. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 88 S. W. 499.

58. Where live stock is shipped in Texas on a through contract, both roads are liable for damages occasioned by each and each is entitled to a judgment over for the damage inflicted by the other. Texas & P. R. Co. v. Andrews [Tex. Civ. App.] 80 S. W. 390. Recovery may be had of the initial

initial carrier is responsible for the entire trip in the absence of express contract to the contrary.[59] The initial carrier is responsible for the effects of its own negligence though they do not develop until in the hands of the connecting carrier,[60] and connecting carriers are not liable for delay arising from the misrouting of the shipment.[61] An initial carrier is not negligent in delivering freight to a connecting carrier to be transported to a station on the connecting carrier's line which it has officially stated to be open for business but which is not so in fact.[62] An intermediate carrier concurring in causing delay is not relieved by showing that the others by the exercise of reasonable diligence might have delivered the shipment in time.[63] Where several are sued in Texas the jury may apportion the damages among them.[64] The act of one carrier in accepting for transportation a ticket that has expired does not bind the succeeding carrier.[65] Nor is the carrier which sells a special return ticket responsible for the acts of the agent of the connecting carrier at destination in stamping and signing it ahead of time and assuring the passenger that it would be honored for passage.[66] A carrier to whom money is paid, for the passage of a person from another point from which another carrier must be the initial carrier, is not liable for the initial carrier's delay in delivering the the ticket in accordance with telegraphic instructions.[67]

Part II. Carriage of Goods.

§ 4. *Delivery to carrier and inception of liability.*[68]—The liability of a common carrier does not begin until there has been a complete delivery of the goods for immediate shipment with the knowledge and consent of the carrier.[69]

carrier for delay, though each carrier was guilty, there being no evidence that it was wholly caused by subsequent carriers. St. Louis, etc., R. Co. v. Coolidge [Ark.] 83 S. W. 333. Certificate of state inspector as to quality of corn shipped held not admissible as against a last carrier not a party thereto nor to the bill of lading. International & G. N. R. Co. v. Diamond Roller Mils [Tex. Civ. App.] 82 S. W. 660. Instructions as a whole held not objectionable as authorizing recovery against one for negligence of other. Houston & T. C. R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838.

59. Baggage. Kansas City, etc., R. Co. v. Washington [Ark.] 85 S. W. 406; Little Rock, etc., R. Co. v. Record [Ark.] 85 S. W. 421. Carrier may limit responsibility to injuries inflicted by himself on interstate shipments. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 1158.

60. Texas & P. R. Co. v. Stephens [Tex. Civ. App.] 86 S. W. 933. Failure to furnish proper cars. St. Louis, etc., R. Co. v. Marshall [Ark.] 86 S. W. 802. Furnishing passenger coach incapable of being warmed. Missouri, K. & T. R. Co. v. Foster [Tex. Civ. App.] 87 S. W. 879. Cars improperly bedded by the initial carrier do not become on acceptance a part of the connecting carrier's equipment so as to relieve initial carrier for damaging effect of improper bedding developing on connecting line. Texas Cent. R. Co. v. O'Loughlin [Tex. Civ. App.] 84 S. W. 1104.

61. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 84 S. W. 1073.

62. Texas & N. O. R. Co. v. Kolp, Jr. [Tex. Civ. App.] 88 S. W. 417.

63. Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085.

64. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Instruction held not erroneous in making one responsible for neglect of others. Houston & T. C. R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089. Plaintiff is not required to allege or prove the exact amount of damage done by each. Atchison, etc., R. Co. v. Williams [Tex. Civ. App.] 86 S. W. 38. If the negligence of several concurs and is not readily separable, judgment may go against defendant alone. Pecos River R. Co. v. Latham [Tex. Civ. App.] 13 Tex. Ct. Rep. 662, 88 S. W. 392.

65, 66. Boling v. St. Louis & S. F. R. Co. [Mo.] 88 S. W. 35.

67. Brezewitz v. St. Louis, etc., R. Co. [Ark.] 87 S. W. 127.

68. See 3 C. L. 594.

69. Goods loaded on carrier's car and by him placed in warehouse for want of shipping instructions raises liability only of warehouseman. Louisville & N. R. Co.'s Case, 39 Ct. Cl. 405. Delivery of cotton on platform at point where there is no agent is not a delivery to the carrier. Anderson v. Mobile & O. R. Co. [Miss.] 38 So. 661. The liability of a carrier does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier. Chicago, B. & O. R. Co. v. Powers [Neb.] 103 N. W. 678. A railroad is not liable as a common carrier for goods deposited in its warehouse awaiting shipping instructions from the owner. Louisville & N. R. Co.s Case, 39 Ct. Cl. 405. Mere marks on the goods do not impose the duty of immediate transportation where the custom is to require written bills of lading and shipping instructions. Id. As a general rule a railroad company is not obliged to receive

§ 5. *Bills of lading and other contracts of carriage.*[70]—Bills of lading and special contracts of affreightment in so far as they are not illegal or violative of law[71] are binding upon the parties to them as are other contracts.[72] Where a shipper contracts for the carriage of a certain number of cattle and within the knowledge of the carrier's agent includes with his own sufficient of another's to make up the number, the third person is a party to the contract and can sue on it.[73] A breach of contract to furnish cars is actionable,[74] and a carrier has authority to contract to furnish cars off its own line.[75]

Interpretation.[76]—The legal qualities of a bill of lading are governed by the law of the place where it is issued.[77] Where freight is accepted without any special agreement as to the charge for transporting it, the law implies an undertaking to pay the usual rate.[78] A bill of lading issued by a railroad company for cotton to be delivered "ship side" merely means that it will be delivered at a wharf accessable to the railroad and is not notice that carriage has been contracted for

freight except at stations, but it may as a result of custom or as a consequence of an express contract become obligated to receive freight at a point on its line where there is no station, depot, platform, cars or agent. Georgia, S. & F. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961. An agent who has authority to contract to place cars along a railway at points where there is no agent, freight house or other accommodation to receive freight has authority to agree on behalf of the company to receive such freight when deposited in such places to await the arrival of cars, though he may not have authority to make a contract of affreightment. Georgia, S. & F. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961. The carrier is not responsible as such for cattle awaiting shipment in its stock pens while the shipper has the right to remove them to feed and water before shipment. Chicago, etc., R. Co. v. Powers [Neb.] 103 N. W. 678. Held question of fact whether cattle in railroad stock yard were in possession of carrier or shipper. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. Cars loaded and attention of conductor called completes delivery, though no bill of lading delivered. Pine Bluff & A. R. Co. v. McKenzie [Ark.] 86 S. W. 834.

70. See 3 C. L. 595.

71. A contract made in a neutral state in time of war to transport articles that are contraband of war is not illegal. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269. A stipulation that no action shall be brought for damages after the expiration of sixty days is an attempt to vary the statute of limitations and invalid. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106.

72. Goods received by railroad company for transportation and the freight paid for under their classification, the company could not reclassify afterwards and charge a different rate. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89. The acceptance of freight from the initial carrier does not bind the connecting carrier to the terms of an oral contract of shipment. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093. The rule in bills of lading imposing demurrage for dilatoriness in unloading cars is binding upon consignees, even if they in fact be ignorant. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. A special written contract of affreightment is not affected by printed matter in a through bill of lading delivered after the shipment of the goods. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269. Contract with live stock agent of defendant held binding on it. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47. A rate quoted on lumber does not include railroad switch ties. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722. Rate made by agent in ignorance of rate promulgated by interstate commerce commission is binding on carrier. Chicago, etc., R. Co. v. Gardner [Tex. Civ. App.] 86 S. W. 793. Contract held binding, though not signed by shipper or his agent. Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99.

73. Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 86 S. W. 53; Gulf, etc., R. Co. v. Zimmerman [Tex Civ. App.] 86 S. W. 54.

74. Burden is on plaintiff to prove contract. Authority of agent to contract being denied, charge held confusing. Texas & P. R. Co. v. Ray Bros. [Tex. Civ. App.] 84 S. W. 691. Within contract releasing from liability under oral one must be recognized in absence of showing of invalidity. Ft. Worth & D. C. R. Co. v. Underwood [Tex. Civ. App.] 87 S. W. 713. Shipper is not bound to arrange with another carrier to ship partly over defendants line to reduce damages. Pecos River R. Co. v. Latham [Tex. Civ. App.] 13 Tex. Ct. Rep. 662, 88 S. W. 392. Acts of agent held admissible to show apthority to contract. Id. Contract held not established. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 88 S. W. 448.

75. Authority of live stock agent to so contract held shown. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 87 S. W. 389.

76. See 3 C. L. 596.

77. Cappel v. Weir, 92 N. Y. S. 365; Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52; National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134. An express company's shipping receipt is governed as a contract by the law of the state in which it is made and the carriage begins. Powers Mercantile Co. v. Wells-Fargo & Co., 93 Minn. 143, 100 N. W. 735.

78. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093.

on any particular ship.[79] An express company's local or general custom with regard to the delivery of packages is not admissible to contradict the express terms of the shipping receipt.[80]

Indorsement and transfer.[81]—Bills of lading and shipping receipts are not negotiable in an unrestricted sense,[82] and such negotiability as they ordinarily possess may be defeated by a restrictive statement.[83] But non-negotiable bills of lading like any other non-negotiable instrument may be transferred by assignment,[84] which will transfer title to the property subject only to the rights of the parties to it.[85]

§ 6. *The duty to furnish cars* [86] is discussed above.

§ 7. *Forwarding and transporting goods.*[87]—During transportation the goods are ordinarily under the exclusive control and protection of the carrier, who has a right to their custody until delivery at destination.[88] The shipper may, however, contract to care for them en route, and relieve the carrier from responsibility for resultant injuries.[89] Loss occurring by reason of carrier's failure to ice car as agreed may be recovered.[90]

79. Lee v. St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809.

80. Cappel v. Weir, 45 Misc. 419, 90 N. Y. S. 394.

81. See 3 C. L. 596.

82. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134. A bill of lading is not negotiable like a bill of exchange, and the rights arising out of a transfer correspond not to those arising out of the indorsement of a negotiable promise to pay money, but to those arising out of a delivery of the property itself under similar circumstances. Grayson County Nat. Bank v. Nashville, C. & St. L. R. Co. [Tex. Civ. App.] 79 S. W. 1094, citing cases.

83. Negotiability may be destroyed by writing or printing the words "non-negotiable" across its face. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134.

84. The assignee taking subject to the equities between the original parties. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134.

85. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134. A bill of lading represents the property, and a valid title to it obtained by pledge or otherwise is as valid a title to the goods as could be obtained to the goods themselves. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094, citing cases. A bank discounting a draft attached to a bill of lading is not a mere collector, but is entitled to the property as security for the money advanced. Mather v. Gordon Bros. [Conn.] 59 A. 424. Where the bill of lading is taken to the seller's order and his assigns, the mere fact that the buyer is named as consignee will not pass title to him. Grayson County Nat. Bank v. Nashville & C. R. Co. [Tex. Civ. App.] 79 S. W. 1094. Where a bank has discounted a draft with a bill of lading attached it owns the goods represented by the bill. Cannot be attached by creditor of shipper. Temple Nat. Bank v. Louisville Cotton Oil Co., 26 Ky. L. R. 518, 82 S. W. 253; Bank of New Roads v. Kentucky Refining Co. [Ky.] 85 S. W. 1103. When a bill of lading taken to the order of the seller is endorsed by him and attached to a draft upon the purchaser for the price, and the draft is then delivered to a bank for collection, or is discounted by the bank in reliance upon the security of the bill of lading, no title passes to the purchaser until by payment of the draft he has duly obtained possession of the bill of lading. Grayson County Nat. Bank v. Nashville & C. R. Co. [Tex. Civ. App.] 79 S. W. 1094, citing cases. Evidence held to show that bank discounted draft attached to bill of lading and not that it held as a mere collector. Temple Nat. Bank v. Louisville Cotton Oil Co., 26 Ky. L. R. 518, 82 S. W. 253. The bank to which such a draft is sent for collection and which delivers the bill of lading without payment is liable only for the actual value of the goods, where they are defective and refused for that reason. People's Nat. Bank v. Brogden [Tex. Civ. App.] 84 S. W. 601.

86. See 3 C. L. 596, nn. 21-26.

87. See 3 C. L. 596.

88. It is not incumbent upon a railroad company to deliver goods or live stock while in transitu to the shipper consigned to himself, at least unless the freight is paid. Olds v. New York, etc., R. Co., 94 N. Y. S. 924. A shipper has no right to have a car diverted en route from the destination provided in the bill of lading to another without paying a reasonable charge therefor. Carr v. Pennsylvania R. Co., 92 N. Y. S. 799.

89. A shipper who fails to care for the goods as per contract cannot hold the carrier for resultant loss. Where a shipper of live stock does not elect to take charge of them as he agrees under the contract, he cannot complain of failure of attention on the part of the carrier. Central of Georgia R. Co. v. James, 117 Ga. 832, 45 S. E. 223. Where plaintiff assumes the care of his own team while on a ferry boat, the ferryman is not responsible as a common carrier. Ferryman requested him to unhitch during passage. Frierson v. Frazier [Ala.] 37 So. 825. Where shippers undertake to supply a car with ice, the carrier has a right to assume in the absence of notice that enough was supplied to last until delivery could be made

Delay in transportation.[91]—The transportation must be accomplished with reasonable expedition,[92] the carrier being liable for all damages proximately caused by negligent delays,[93] and in some states for a destruction of the goods by act of God which they would have escaped but for the delay.[94] A statute authorizing special damages for detention does not apply to an action to recover the value of a shipment converted by the carrier.[95]

Delivery to succeeding carrier.[96]—In the absence of specific directions, the initial carrier has the right to route shipments beyond its own line,[97] but a contract of this sort may be changed or modified by subsequent oral agreement,[98] and for its breach by himself or a succeeding carrier, the initial carrier is held liable.[99]

in the ordinary course of business. Chicago, I. & L. R. Co. v. Reyman [Ind.] 73 N. E. 587. But if actual delivery is delayed beyond the usual time, there is an implication that the carrier will protect the shipment from heat. Id.

90. Damage incurred after leaving initial carrier may be recovered against it. Houston & T. C. R. Co. v. Wilkerson Bros. [Tex. Civ. App.] 82 S. W. 1069. See, also, Chicago, I. & L. R. Co. v. Reyman [Ind.] 73 N. E. 587.

91. See 3 C. L. 596.

92. Houston & T. C. R. Co. v. Foster [Tex. Civ. App.] 86 S. W. 44; Bibb Broom Corn Co. v. Atchison, etc., R. Co. [Minn.] 102 N. W. 709. In order that recovery may be had for delay in shipment, some evidence must be produced of the length of time ordinarily required. Johnston v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 479. Where no time is provided in the contract, the time must be reasonable. Sloop v. Wabash R. Co. [Mo. App.] 84 S. W. 111. Keeping live stock on track from 8 a. m. till 3 p. m., at destination before delivery is gross negligence not covered by limitation in contract. Smith v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 9. Where freight is accepted without notice that delivery will be delayed, the carrier is not absolved by a rush of business or an accumulation of freight. Texas & N. O. R. Co. v. Kolp, Jr. [Tex. Civ. App.] 88 S. W. 417.

93. The mismarking of three of four packages constituting a single shipment is no defense to an action for a penalty for failure to forward the one properly marked, where the three mismarked ones were forwarded to the place addressed. Lexington Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801. The statute of North Carolina subjecting to a penalty carriers who delay shipments more than four days does not relieve them of their common-law liability for delays less than that period. Laws 1903, p. 999, c. 590. Meredith v. Seaboard Air Line R. Co., 137 N. C. 478, 50 S. E. 1. Evidence that a defective engine delayed a shipment shows negligence, though the train crew worked faithfully to put the engine in order. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82. The mistaken act of a deputy collector of customs in refusing a clearance to a ship while the shipment in question is on board is no excuse to the carrier for failure to transport as agreed. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269.

Damages: Only interest on the amount invested in the commodity for the time of the delay is recoverable in the absence of notice of special loss. Lee v. St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809. Where a carrier has no notice that delay in shipping will result in any special damage, the measure of damages for delay is the difference in market value of the goods when delivered and when they should have been. Id. Traveling salesman working on commission held not entitled to recover for lost time for delay to samples. Seaboard Air Line R. Co. v. Harris, 121 Ga. 707, 49 S. E. 703. Whether plaintiff was bound by routing in contract of shipment occasioning delay complained of held question for jury. Houston & T. Cent. R. Co. [Tex. Civ. App.] 84 S. W. 1073. Complaint showing five days' delay in forwarding shipment held sufficient. St. Louis, etc., R. Co. v. Moss [Ark.] 86 S. W. 828. Carrier held not injured by admission of evidence of oral contract as to time of delivery, same having been suspended by written contract containing no such stipulation, the delay having been negligent. Ft. Worth & R. G. R. Co. v. Hadley [Tex. Civ. App.] 86 S. W. 932.

94. Whether the goods are perishable or non-perishable. Flood overtaking delayed shipment. Bibb Broom Corn Co. v. Atchison, etc., R. Co. [Minn.] 102 N. W. 709; Grier v. St. Louis Merchants' Bridge Terminal R. Co., 108 Mo. App. 565, 84 S. W. 158. Not liable on theory of breach of contract for loss not reasonably to be anticipated. Flood. Moffatt Commission Co. v. Union Pac. R. Co. [Mo. App.] 88 S. W. 117. Negligent delay in forwarding goods will not render the carrier liable for their destruction by fire for which the carrier was not responsible, though they would not have been destroyed but for the delay. General Fire Extinguisher Co. v. Carolina & N. W. R. Co., 137 N. C. 278, 49 S. E. 208. A carrier is not liable for a loss of property in shipment through an act of God which could not reasonably have been foreseen, although but for its previous negligence delaying the shipment the property would have escaped the danger and the loss would not have occurred. Empire State Cattle Co. v. Atchison, etc., R. Co., 135 F. 135.

95. Missouri, K. & T. R. Co. v. Rines & Co. [Tex. Civ. App.] 84 S. W. 1092.

96. See 3 C. L. 597.

97. Chicago, I. & L. R. Co. v. Woodward [Ind.] 72 N. E. 558; Steidl v. Minneapolis & St. L. R. Co. [Minn.] 102 N. W. 701.

98. Steidl v. Minneapolis & St. L. R. Co. [Minn.] 102 N. W. 701.

99. Potatoes might have been sold for a better price at point short of destination on

§ 8. *Loss of or injury to goods* [1] not traceable directly to the shipper's fault,[2] an act of God [3] or the public enemy,[4] renders the carrier liable, within the valid stipulations of the contract, for the value of lost goods,[5] or the amount of injury to goods not totally destroyed.[6] If negligence of the carrier co-operates with a natural catastrophe in bringing about the loss of a shipment, the carrier is liable.[7] A private carrier is liable only for negligence,[8] and not for an injury by a third person that could not have been foreseen.[9]

§ 9. *Delivery by carrier and storage at destination.*[10]—The responsibility of land carriers as such does not end with the arrival of the goods at their destination, but the contract includes in the case of express companies their delivery to the consignee,[11] and in the case of railroads, notice to the consignee and reasonable opportunity after notice to take them away.[12] The liability for goods left in

other line. Steidl v. Minneapolis & St. L. R. Co. [Minn.] 102 N. W. 701. The initial carrier is liable for increase of freight caused by deviation from shipping directions where communication with the shipper was feasible. Fisher v. Boston & M. R. Co., 99 Me. 338, 59 A. 532. The diversion of the shipment by an intermediate carrier to a line other than that designated by the initial carrier is not negligent where the next succeeding carrier designated could not take it on account of floods and no injury from the diversion was reasonably to be anticipated. Empire State Cattle Co. v. Atchison, etc., R. Co., 135 F. 135. If the initial carrier routes the shipment on the bill of lading and then delivers to another connecting carrier, it is liable. Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99.

1. See 3 C. L. 597.

2. Liable though shipper inspected car furnished. St. Louis, etc., R. Co. v. Marshall [Ark.] 86 S. W. 802. Where the shipper selects a car from among many in his yard available for the purpose, the carrier is not responsible for damages arising solely from defects in the car discoverable by inspection. Consignor is consingee's agent in making the selection. Edward Frohlich Glass Co. v. Pennsylvania Co. [Mich.] 101 N. W. 223.

3. Flood. Grier v. St. Louis Merchants' Bridge T. R. Co., 108 Mo. App. 565, 84 S. W. 158.

4. In case of interference by strikers, carrier is liable for delay only in case of negligence. Sterling v. St. Louis, etc., R. Co. [Tex. Civ. App.] 86 S. W. 655.

5. Where an express company pays for a lost shipment on an agreement for reimbursement in case the shipment is subsequently restored in the same condition as when shipped, it is entitled to recover on evidence that it tendered the goods in apparent good condition. Platt v. Gross, 92 N. Y. S. 249. Delivery of a lady's bonnet in good order in the customary paper box for transportation from New York to Newark and its delivery ten days later to the consignee with the appearance of having been trampled upon, the bonnet being ruined, makes a case. Jacoby v. Platt, 94 N. Y. S. 435. Where a transfer man deposited baggage on the station platform, he is responsible for it though the railroad company's servants knew it was his custom so to do. Alexander v. McNally [Mo. App.] 87 S. W. 1.

6. The consignor may refuse to receive a returned C. O. D. package offered in a damaged condition. Freeman v. Weir, 94 N. Y. S. 327. The owner cannot refuse to accept property injured in transportation and recover its full value but must accept it and sue for the injury. Gulf, etc., R. Co. v. Everett [Tex. Civ. App.] 83 S. W. 257. That the goods were unsaleable to plaintiff, a wholesaler, does not entitle him to refuse them because damaged and sue for their value. Gulf, etc., R. Co. v. Pitts & Son [Tex. Civ. App.] 83 S. W. 727.

7. Flood. Grier v. St. Louis Merchants' Bridge Terminal R. Co., 108 Mo. App. 565, 84 S. W. 158.

8. Bassett v. Aberdeen Coal & Min. Co. [Ky.] 88 S. W. 318.

9. Jaminet v. American Storage & Moving Co. [Mo. App.] 84 S. W. 128.

10. See 3 C. L. 598.

11. It is the duty of a carrier by express to reliver packages to the consignee at his residence or place of business. United States Exp. Co. v. State [Ind.] 73 N. E. 101. Citing many cases. An express company's duty where it receives a package addressed to a point at which there is no express service is to forward it to its nearest office and notify the consignee. Rogers v. Fargo, 93 N. Y. S. 550.

12. In Michigan the carriers' liability as such continues until the consignee has been notified of the arrival of the goods and he has had reasonable time in the common course of business to take them away after such notification. Immaterial that he knew probable date of shipment and probable time of arrival. Walters v. Detroit United R. Co. [Mich.] 102 N. W. 745. The liability of a carrier as such continues until the consignee has had a reasonable time to remove the goods. No notice required in South Carolina. Bristow v. Atlantic Coast Line R. [S. C.] 51 S. E. 529. Notice of arrival of ship and cargo at 3 o'clock one day destroyed at 5 the next, held not sufficient to relieve carrier. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. S. 86. The placing of a car of fruit at the usual point for unloading, according to the usages of the trade, relieves the carrier from further obligation than that of warehouseman without further notification to the consignee of its arrival. Chicago, I. & L. R. Co. v. Reyman [Ind.] 73 N. E. 587. Where the carrier has no warehouse and consignees are expected to unload freight di-

the carrier's possession after delivery and acceptance by the consignee,[13] and for goods remaining on hand after reasonable attempts to deliver, is that of warehousemen.[14] Where there is a refusal to deliver,[15] or a misdelivery,[16] the carrier is liable for the value of the goods; and being responsible for misdelivery he is entitled to take all necessary precautions to assure himself that the claimant of goods is entitled to them,[17] and to protect his possession of the goods by all lawful means.[18]

Liability for conversion.[19]—Unexplained refusal to deliver a shipment as agreed amounts to conversion.[20] A carrier cannot set up title in himself to defeat

rect from the cars, delivery is not complete until the car has been placed and the consignee notified. Bachant v. Boston & M. R. Co. [Mass.] 73 N. E. 642. Postal notice is sufficient. Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 P. 1087. Especially where the consignee is aware of a local custom to give such notices. Friedman v. Metropolitan S. S. Co., 45 Misc. 383, 90 N. Y. S. 401. Evidence held insufficient to show that notice of arrival of shipment was given. Rogers v. Fargo, 93 N. Y. S. 550. The mere setting out of a flat car on which freight is loaded at a flag station is not a delivery to the consignee. If the carrier does not put such a shipment in its warehouse and it is stolen it is liable. Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 P. 1087. Where a consignee noticed a shipment of freight on track and immediately took steps to ascertain if it was his and if so to have it unloaded, no notice of arrival by the carrier was necessary. Id. Where a car containing freight is set out on a side track at the destination, the consignee is not guilty of lâches in not being prepared to take it away until the day following notice of arrival. Id. Where there is no dispute as to the facts, the question what is a reasonable time for removal of goods is a question of law for the court. Id. Car load freight must he offered at the usual place. Loeb v. Wabash R. Co. [Mo. App.] 85 S. W. 118.

13. Verification and receipt by consignee for goods in car on track is a valid delivery and for subsequent theft the carrier is not liable in the absence of gross negligence. Kenny Co. v. Atlanta & W. P. R. Co. [Ga.] 50 S. E. 132.

14. After termination of the transit the carrier's liability is that of warehousemen only. Southern R. Co. v. Aldredge [Ala.] 38 So. 805.

15. Refusal to deliver based on failure to pay an unauthorized additional charge for freight cannot be justified on the ground of the absence of the shipping bill. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89. Carrier cannot refuse delivery for underrating due to fault of its clerks. Id.

16. An answer defending misdelivery on account of similarity of packages and their marks must show that plaintiff was responsible for the similarity. Ullman v. Southern R. Co., 93 N. Y. S. 480. Where goods have been transferred from one carrier to another, the last carrier is bound to deliver them to the holder of the bill of lading issued by the first carrier. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094. When the seller takes a bill of lading which expressly stipulates that the goods are to be delivered at the point of destination to himself, his order or assigns, there is the clearest evidence upon the face of the transaction that notwithstanding such an appropriation of the goods as might have been sufficient to transfer the title to the buyer the seller has determined to prevent this result by keeping the goods within his control. Id. Citing cases. Where an intermediate common carrier is required by statute to carry freights offered, it is bound to take notice of the fact that a bill of lading was issued, and is responsible for the delivery of the goods without the production of the bill of lading, but is not bound by its terms as to freight charges and like conditions. Bank of Commerce v. Baltimore & Ohio R. Co., 2 Ohio N. P. (N. S.) 403, 15 Ohio Dec. N. P. 32.

17. There is no delay in delivery where delivery was made to the consignee's employe as soon as his authority to receive was produced. Moore v. Baltimore & O. R. Co., 103 Va. 189, 48 S. E. 887. The carrier has a right to demand identification of a consignee unknown to it and to demand production of the bill of lading before making delivery. Sellers v. Savannah, F. & W. R. Co. [Ga.] 51 S. E. 398. The carrier, being bound to deliver the goods in accordance with the bill of lading, is under obligation to ascertain whether or not a bill of lading was delivered to the shipper, and if delivered, he must retain the property until it is demanded by one claiming under it. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094.

18. Where a seller ships goods consigned to himself and forwards the bill of lading with draft attached for collection and the buyer without authority takes possession and refuses to pay the draft, the carrier on paying for the goods can maintain trover against the buyer to recover their value Fordyce v. Dempsey [Ark.] 82 S. W. 493. A consignee procuring delivery of a shipment without the bill of lading on furnishing an indemnity bond cannot after paying the value of the shipment to the carrier recover the sum so paid from him as garnishee, the carrier having paid it to the consignor. Collins, Grayson & Co. v. Savannah, F. & W. R. Co. [Ga.] 50 S. E. 477.

19. See 3 C. L. 599.

20. On refusal by consignee, shipment was sent to another point to sell for charges but before sale consignee demanded it and offered to pay charges. Missouri, K. & T. R. Co. v. Rines & Co. [Tex. Civ. App.] 84 S. W. 1092. A cause of action for conversion is not made out by proof of failure to deliver a shipment and failure to return it because of loss (Gold-

an action for conversion,[21] but evidence of his ownership is admissible on the question of damages.[22] The damages for a conversion at the point of destination are the value of the property at that point less the unpaid freight charges.[23]

§ 10. *Liability of carrier or connecting carrier* [24] is discussed above.[25]

§ 11. *Limitation of liability.*[26]—In the absence of restrictions in the contract, a common carrier is liable as an insurer for the loss of goods intrusted to it for transportation unless caused by the act of God, a public enemy, some inherent defect in the goods, or by the shipper himself.[27] It is competent, however, in most states for the shipper and carrier to agree that the carrier's liability shall extend only to losses through its actual or "gross" negligence,[28] on its own line,[29] and that its liability shall be limited to a stated amount unless a greater amount or value is declared in the bill of lading and an increased rate paid therefor.[30] An agreement, in consideration of a reduced rate, that the carrier shall not be liable for failure to deliver at a particular time, is valid.[31] Such contracts being drawn by the carrier for his own benefit are construed liberally in favor of the shipper,[32] and strictly against the carrier,[33] and will not as a rule avail to relieve the carrier

bowitz v. Metropolitan Exp. Co., 91 N. Y. S. 318), or of delay in notifying the consignor of the consignee's refusal of the goods (Fishman v. Platt, 90 N. Y. S. 354). A mortgagor shipping cattle cannot recover against the carrier for commission where the carrier delivered them to a mortgagee entitled to possession. Johnston v. Cbicago, B. & Q. R. Co. [Neb.] 97 N. W. 479.

21, 22. Valentine v. Long Island R. Co., 102 App. Div. 419, 92 N. Y. S. 645.

23. Missouri, K. & T. R. Co. v. Rines & Co. [Tex. Civ. App.] 84 S. W. 1092.

24. See 3 C. L. 600, § 10.

25. See ante, § 3.

26. See 3 C. L. 601.

27. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479. In states where limitation is not allowed, it is error to charge that the carrier owes only ordinary care. Bibb v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 84 S. W. 663.

28. Cau v. Texas & P. R. Co., 194 U. S. 427, 48 Law. Ed. 1053; Russell v. Erie R. Co., 70 N. J. Law, 808, 59 A. 150. Except as to such gross negligence or misfeasance, as public policy forbids such stipulation. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54. A carrier cannot limit its liability for negligence by contract. Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781; San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302; Bibb v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 84 S. W. 663; Trace v. Penn. R., 26 Pa. Super. Ct. 466; Baltimore & O. S. W. R. Co. v. Fox, 113 Ill. App. 180. Where the contract of shipment stipulates against liability for loss by fire unless occurring through the carrier's negligence, no liability is shown by mere proof of loss by fire. Michaels v. Adams Exp. Co. [N. J. Law] 59 A. 142; Anderson v. Mobile & O. R. Co. [Miss.] 38 So. 661. Liability for negligence in supplying defective cars cannot be provided against. Nevius v. Chicago, etc., R. Co. [Wis.] 102 N. W. 489. Burden is on carrier to plead and prove special contract limiting liability. Chicago Great Western R. Co. v. Dunlap [Kan.] 80 P. 34. And that loss occurred without his negligence. Georgia So. & F. R. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807. Contract to ship "released" must be construed to mean that carrier is only relieved from losses occasioned without his negligence. Id.

29. Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99; Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 1158. A contract limiting the carrier's liability for damages to cattle to injuries occurring on its own line wil not relieve it from the consequences of failure to properly bed the cars, though the actual damage did not occur until the shipment had passed from its control. Texas Cent. R. Co. v. O'Loughlin [Tex. Civ. App.] 84 S. W. 1104.

30. A carrier may limit the amount of recovery to an agreed valuation in case of loss or damage as a result of its negligence or otherwise. Baltimore & O. R. Co. v. Hubbard [Ohio] 74 N. E. 214. An express company can limit its liability for loss by negligence to $50 unless a greater value is declared. Macfarlane v. Adams Exp. Co., 137 F. 982. In Minnesota and Illinois express companies cannot limit their common-law liability. Powers Mercantile Co. v. Wells, Fargo & Co., 93 Minn. 143, 100 N. W. 735. An arbitrary fixing of amount by carrier, by printed stipulation in the bill of lading, is invalid but a bona fide fixing of value by the shipper whereby he obtains a lower rate will be sustained. Georgia So. & F. R. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807. An arbitrary limitation without consideration will not be enforced. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Such limitation not permitted in Kentucky. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106. That damaged stock brought the full declared value does not absolve defendant; his liability in that case being such a proportion of the loss as the declared bears to the actual value. United States Exp. Co. v. Joyce [Ind.] 72 N. E. 865.

31. Does not cover a negligent delay. Smith v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 9.

32. Welsh v. Northern Pac. R. Co. [N. D.] 103 N. W. 396.

33. Holmes v. North German Lloyd S. S. Co., 100 App. Div. 36, 90 N. Y. S. 83.

of liability for the full value of goods lost through his negligence.[34] The contract containing the limitation must be shown to have been assented to by the shipper,[35] and founded on a sufficient,[36] though not necessarily an independent consideration.[37] Contracts of carriage are construed and enforced according to the law of the state where they are made,[38] except in the case of stipulations as to time to sue,[39] and the courts of the state in which the loss occurs will enforce a limitation of liability as the courts of the state where the contract was made would have done.[40] In states in which carriers are not allowed to limit their liability, they may make a special contract under which the shipper of live stock shall assume responsibility

34. A regulation of the state corporate commission fixing a rate on certain goods limited to $5 per hundred-weight and "released" does not relieve the carrier of liability for the full value of goods lost through his negligence. Everett v. Norfolk & S. R. Co., 138 N. C. 68, 50 S. E. 557.

35. Statement by agent "I don't suppose you wish to declare any excess" not replied to by shipper held no contract though limitation was printed on receipt. Colvin v. Fargo, 94 N. Y. S. 377. Limitation of liability cannot be invoked where package was delivered to carrier by servant not in plaintiff's employ and who stated she did not know its value. Woolsey v. Long Island R. Co., 94 N. Y. S. 56. Where a storage company sends a cartman with a package and shipping receipt, the carrier has no right to assume the carter has authority to consent to a modification or alteration of the shipping order. Russell v. Erie R. Co., 70 N. J. Law, 808, 59 A. 150. A contract limiting the carrier's liability is invalid where the shipper had no choice but accept it or not ship. Evansville & T. H. R. Co. v. McKinney [Ind. App.] 73 N. E. 148; St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Alternative contracts need not be presented to shipper. Cau v. Texas & P. R. Co., 194 U. S. 427, 48 Law. Ed. 1053. General words of exemption from liability for damage in the case of shipments of glass, and the words "Owner's risk" do not operate to relieve a carrier from the consequences of its negligence. Rieser v. Metropolitan Exp. Co., 45 Misc. 632, 91 N. Y. S. 170. Where the carrier attempts by a document that is both a receipt and a contract to limit its common-law liability, it is essential that the assent of the shipper to such limitation be shown. Baltimore & O. S. W. R. Co. v. Fox, 113 Ill. App. 180. The fact that a person is in charge of cattle at the time of delivery to the carrier and while in transit is not conclusive of his authority to contract on behalf of the owner where an oral contract had been previously made. Atchison, etc., R. Co. v. Watson [Kan.] 81 P. 499. Such a contract signed by the shipper, who did not know its provisions, after the stock was loaded and etarted on its way is invalid. McNeill v. Galveston, H. & N. R. Co. [Tex. Civ. App.] 86 S. W. 32; Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47; Olds v. New York Cent. & H. R. Co., 94 N. Y. S. 924; Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. [Mo. App.] 87 S. W. 553. Such contract held binding. Hoover v. St. Louis & S. F. R. Co. [Kan. App.] 88 S. W. 769. Whether contract was signed by plaintiff in ignorance of its contents held question for jury. Olds v. New York Cent. & H. R. Co., 94 N. Y. S. 924. Plaintiffs who had been shipping for years held bound by contract. Texas & P. R. Co. v. Byers Bros. [Tex. Civ. App.] 84 S. W. 1087. The use for personal transportation of an otherwise invalid live stock contract does not so ratify it as to render it binding on the shipper. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47. Delivery by carrier's agent unsigned to shipper's wife who was illiterate does not bind. Patrick v. Missouri, K. & T. R. Co. [Ind. T.] 88 S. W. 330.

36. Agreement that damages shall be value at point of shipment instead of destination held void for want of consideration. St. Louis, etc., R. Co. v. Coolidge [Ark.] 83 S. W. 333; St. Louis, etc., R. Co. v. Marshall [Ark.] 86 S. W. 802. Where live stock is shipped under a through contract, a new contract made by the shipper and a connecting carrier, merely limiting the latter's liability is without consideration and void. Barnes v. Long Island R. Co., 93 N. Y. S. 616. Lack of consideration renders limitation ineffective. Sloop v. Wabash R. Co. [Mo. App.] 84 S. W. 111. Mere recital in contract that shipment was carried at reduced rate is not binding. Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. [Mo. App.] 87 S. W. 553.

37. Cau v. Texas & P. R. Co., 194 U. S. 427, 48 Law. Ed. 1053. An express consideration is necessary. St. Louis, etc., R. Co. v. Marshall [Ark.] 86 S. W. 802.

38. Cappel v. Weir, 92 N. Y. S. 365; Powers Mercantile Co. v. Wells, Fargo Exp. Co., 93 Minn. 143, 100 N. W. 735; National Bank of Bristol v. Baltimore & O. R. Co., 99 Me. 661, 59 A. 134; Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52; Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. If an Ohio contract is relied on in Kentucky it must be shown to be valid in Ohio and that the loss occurred there. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106.

39. Missouri, etc., R. Co. of Texas v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871.

40. Pennsylvania only enforces them when the loss occurs in a state where such contracts are enforceable generally; hence the courts of New York will enforce a limitation in a contract made in Pennsylvania, the loss occurring in New York. Cappel v. Weir, 92 N. Y. S. 365, opinion on former appeal, see 90 N. Y. S. 394. A Kentucky contract being void as to the limitation it will not be enforced in New York. Barnes v. Long Island R. Co., 93 N. Y. S. 616.

for proper loading.[41] A provision that the shipper accepts the cars tendered and agrees that they are satisfactory does not relieve the carrier from liability for defects therein.[42] A special contract to haul a circus train limiting carrier's liability and providing for indemnity against injury to the circus company's officers, agents, etc., is not against public policy.[43]

Provisions for notice of injury and limitations on the time to present claims [44] are upheld [45] if reasonable [46] in states where limitation of common-law liability is allowed,[47] but such provisions may be waived.[48]

§ 12. *Public records of traffic.*[49]

§ 13. *Remedies and procedure. Timely notice of suit* [50] is necessary when properly stipulated for and not waived.[51]

Persons who may sue.[52]—Whoever holds the legal title to goods may recover for their loss,[53] but plaintiff cannot recover for the loss of goods where the evidence does not exclude the right of the consignor or consignee to recover also,[54] and consignors cannot recover in the absence of evidence to rebut the presumption of title in the consignee.[55]

Particular remedies available.[56]—A shipper may at his election bring either an action on the contract or in tort for injuries to goods shipped.[57] A suit for damages for breach of contract of affreightment is an action ex contractu.[58] An action under the Georgia "Tracing Act" is an action for a penalty which cannot be converted into an action on a contract by amendment of the declaration.[59]

41. Texas & P. R. Co. v. Edins [Tex. Civ. App.] 83 S. W. 253. Such a contract does not apply where the carrier himself does the loading. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. A contract which stipulates that the shipper shall assume all risks of feeding, watering, etc., of the stock while in the cars, yards, etc., does not relieve the carrier from liability for its own negligence. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286.

42. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

43. Wilson v. Atlantic Coast Line R. Co., 129 F. 774.

44. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54. Damages arising from delay of shipment of hogs. Smith v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 9.

45. Not in Texas, Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Evidence held insufficient to establish assent to provisions. Baltimore & O. R. Co. v. Hubbard [Ohio] 74 N. E. 214. Finding of jury held not sufficient to show that notice of injury was given before cattle were removed from place of delivery. Atchison, etc., R. Co. v. Means [Kan.] 80 P. 604.

46. Time one day longer than statutory minimum cannot be held unreasonable as matter of law. St. Louis & S. F. R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267. Burden of showing reasonableness is on carrier. Missouri, K. & T. R. Co. v. Godair Com. Co. [Tex. Civ. App.] 87 S. W. 871.

47. Not in Texas. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168.

48. Failure to object to notice on grounds raised at trial. Wabash R. Co. v. Johnson, 114 Ill. App. 545. Failure to object to sufficiency of notice waives it. Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781.

49. See 3 C. L. 603, § 12.

50. See 3 C. L. 603.

51. Baltimore & O. S. W. R. Co. v. Ross, 105 Ill. App. 54; Baltimore & O. R. Co. v. Hubbard [Ohio] 74 N. E. 214; Atchison, etc., R. Co. v. Means [Kan.] 80 P. 604; Wabash R. Co. v. Johnson, 114 Ill. App. 545; Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781. A provision for notice of damages relates to injuries to the property and not to damages arising from decline of market during wrongful delay in delivery. Loeb v. Wabash R. Co. [Mo. App.] 85 S. W. 118. A stipulation in a bill of lading for notice of claim within 90 days is restricted to claims against the initial carrier and cannot inure to the benefit of a connecting carrier. Grayson County Nat. Bank v. Nashville, etc., R. [Tex. Civ. App.] 79 S. W. 1094. The reasonableness of a rule of an express company requiring that the original receipt must be produced within thirty days attached to the notice of loss is a question for the jury. Adams Exp. Co. v. Gordon, 5 Ohio C. C. (N. S.) 563.

52. See 3 C. L. 603.

53. Plaintiff may recover value of goods in her trunk belonging to her daughter. Colvin v. Fargo, 94 N. Y. S. 377.

54. Lashinsky v. Russian Co., 91 N. Y. S. 175.

55. Dressner v. Manhattan Delivery Co., 92 N. Y. S. 800. Consignor may recover for goods shipped on approval and never delivered. Louisville & N. R. Co. v. Kauffman & Co. [Ala.] 37 So. 659.

56. See 3 C. L. 604.

57. Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781.

58. Plea in abatement held bad for being based on theory that action is in tort. Seaboard Air Line R. Co. v. Hubbard [Ala.] 38 So. 750.

59. Code Ga. 1895, §§ 2317, 2318. Ven-

Venue.[60]—Where two or more carriers, parties to an interstate shipment, operate their roads in Texas, all, any, or either of them are properly sued in any county into which the road of either extends.[61]

Pleading, proofs, and evidence.[62]—A declaration on a bill of lading or shipping contract [63] must be accompanied by the bill or a copy,[64] and where plaintiff founds his action on a shipping contract he cannot contend that he is not bound by its terms.[65] Gross or willful negligence, against which a common carrier may not stipulate, must be alleged in order to obtain a finding to that effect.[66] A contract limiting the liability of common carriers need not be specially pleaded, but is available under the general issue.[67] In Texas a plea of lack of notice of injury in accordance with the contract must be sworn to.[68] Specific acts of negligence alleged must be proved.[69] Immaterial variances are disregarded.[70]

The presumtion that title to goods passes to the consignee on delivery to the carrier is sufficient to support an action by the consignee against the carrier for their loss.[71] The doctrine of res ipso loquitur applies to goods,[72] and where goods received in good order by a carrier for transportation are lost [73] or delivered in a damaged condition,[74] the carrier is presumed, in the absence of evidence to the contrary, to have been negligent.[75] In trover, a prima facie case is made by show-

able Bros. v. Louisville & N. R. Co., 137 F. 981.

60. 3 C. L. 604.

61. Gen. Laws 26th Leg. p. 214, c. 125. Gulf, etc., R. Co. v. Pitts & Son [Tex. Civ. App.] 83 S. W. 727; San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Where the initial carrier is not sued and is not liable suit cannot be brought against others in a county through which neither of their roads, but only the initial carriers' runs. Missouri, K. & T. R. Co. v. Bumpas [Tex. Civ. App.] 85 S. W. 1046. Plea to jurisdiction on ground that a particular carrier not liable was fraudulently joined to confer jurisdiction held not sustained. Atchison, etc., R. Co. v. Williams [Tex. Civ. App.] 86 S. W. 38. See, also, Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 86 S. W. 655. Statute relates to venue rather than jurisdiction and the proper court of any county has jurisdiction unless attacked by plea of privilege. San Antonio & A. P. R. Co. v. Stribling [Tex. Civ. App.] 86 S. W. 374. Petition need not allege partnership joint contract, or the damages resulting from each separate carriers. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168. Where the bill of lading makes each carrier independent such a suit cannot be brought in a county where the carrier has no road. Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 647, 88 S. W. 390.

62. See 3 C. L. 604.

63. Requisites of declaration in assumpsit on contract of carriage. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161.

64. Omission is ground for demurrer. Leave after demurrer to attack a copy not availed of does not amount to an amendment. Chicago, I. & L. R. Co. v. Reyman [Ind.] 73 N. E. 587.

65. United States Exp. Co. v. Joyce [Ind.] 72 N. E. 865.

66, 67. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

68. St. Louis & S. F. R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267.

69. That defendant broke open car of furniture and threw it about and threw other freight on it. Galm v. Wabash R. Co. [Mo. App.] 87 S. W. 1015.

70. Where suit is brought on the common-law liability, a written contract not effective to vary that liability does not create a material variance. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

71. Bank of Irwin v. American Exp. Co. [Iowa] 102 N. W. 107.

72. Powers Mercantile Co. v. Wells, Fargo & Co., 93 Minn. 143, 100 N. W. 735.

73. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479; Everett v. Norfolk & S. R. Co., 138 N. C. 68, 50 S. E. 557. There must be evidence that the goods were in good order when the carrier received them. Not sufficient to show bill of lading stating that they were in apparent good order except as otherwise noted. Jean, Garrison & Co. v. Flagg, 45 Misc. 421, 90 N. Y. S. 289. In the absence of proof of the origin of a fire, the loss of goods thereby will be imputed to the negligence of the carrier. Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co. [La.] 38 So. 873. Where it appears that goods were destroyed by fire and the carrier offers no evidence to explain it, there is a presumption that the loss occurred from the carrier's negligence. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Evidence that money was delivered to a carrier and that when the package was delivered to the consignee it contained nothing but waste paper is sufficient to support a verdict for plaintiff. Bank of Irwin v. American Exp. Co. [Iowa] 102 N. W. 107.

74. Rieser v. Metropolitan Exp. Co., 45 Misc. 632, 91 N. Y. S. 170.

75. Fire in car of horses. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 85 S. W. 319. Fire in car is not excused by showing the use of the best spark arrester and em-

ing delivery to the carrier and his failure to redeliver.[76] After the carrier has shown that the loss occurred from a cause excepted in the bill of lading, the burden is on the plaintiff to show that it occurred by the carrier's own negligence from which it could not be exempted.[77] The last carrier when sued has the burden of proving that goods properly delivered to the initial carrier were not lost or damaged on the last carrier's line,[78] and when he has shown this, the burden falls on the next preceding carrier to show likewise as to his line.[79] The burden is on the carrier to show that notice of claim for injury was not given.[80]

Admissibility of evidence is governed by rules applicable in other cases.[81]

Cases in which the sufficiency of evidence is discussed are mentioned below.[82]

Trial and instructions [83] are governed by familiar rules.[84]

ployment of competent engineer. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479. In an action for injury to goods the burden is on plaintiff to show that defendant injured them or at least facts raising that presumption. Texas & P. R. Co. v. Capper [Tex. Civ. App.] 84 S. W. 694. Where goods are lost, the burden is on the carrier to account for it. Alexander v. McNally [Mo. App.] 87 S. W. 1.

76. Grier v. St. Louis Merchants' B. T. R. Co., 108 Mo. App. 565, 84 S. W. 158.

77. Fire in car of cotton. Cau v. Texas & P. R. Co., 194 U. S. 427, 48 Law. Ed. 1053. Where there is no limitation in the contract the burden is not on the shipper to show negligence. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479.

78. St. Louis S. W. R. Co. v. Birdwell [Ark.] 82 S. W. 835; Paterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621; Modern Match Co. v. Baltimore & O. R. Co. [Mich.] 104 N. W. 19. Presumption is one of fact merely which should not be changed where there is evidence tending to rebut it. Bibb v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 84 S. W. 663. Presumption does not apply where it is indisputably shown that no act of final carrier contributed to the damage. Missouri, K. & T. R. Co. v. Clayton [Tex. Civ. App.] 84 S. W. 1069.

79. Gulf, etc., R. Co. v. Pitts & Son [Tex. Civ. App.] 83 S. W. 727. A railroad delivering goods to a transfer company for delivery to the consignee cannot be held liable for injuries discovered after delivery to the consignee in the absence of evidence to show their condition at the time they left the railroad company's hands. Texas & P. R. Co. v. Capper [Tex. Civ. App.] 84 S. W. 694.

80. Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342.

81. Letters of a third party showing a shortage of freight cannot be introduced there being nothing to connect the writer with the carrier. Ragsdale v. Southern R. Co., 69 S. C. 429, 48 S. E. 466. Letters purporting to be written by defendants' freight claim agent held admissible without showing of authority. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Evidence of losses of other freight by other persons is incompetent. Ragsdale v. Southern R. Co., 69 S. C. 429, 48 S. E. 466. Evidence that according to the rules, usages, and customs of railway companies a particular bill of lading would authorize delivery of the freight without its production will not be admitted where contrary to the legal effect of the bill. Grayson County Nat. Bank v. Nashville, etc., R. [Tex. Civ. App.] 79 S. W. 1094. Evidence that a package undelivered was addressed differently than the receipt for it shows is admissible. Cappel v. Weir, 92 N. Y. S. 365, opinion on former appeal, see 90 N. Y. S. 394. Plaintiff's claim filed before suit brought is admissible to show that at that time he claimed less. Missouri, K. & T. R. Co. v. Clayton [Tex. Civ. App.] 84 S. W. 1069. Notification to carrier of a superintendent of terminals not to bring shipment to terminal because of strike is admissible on issue of negligent delay. Sterling v. St. Louis, etc., R. Co. [Tex. Civ. App.] 86 S. W. 655. Evidence of the usual time required between termini (Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342; Texas & P. R. Co. v. Ellerd [Tex. Civ. App.] 87 S. W. 362), and that connecting carriers did not require the shipment is admissible (Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342). Statements of conductor that he knew he could not get far with such an engine held admissible or at least not prejudicial. Missouri, K. & T. R. Co. v. Russell [Tex. Civ. App.] 13 Tex. Ct. Rep. 591, 88 S. W. 379.

Parol evidence of freight tariffs on file with interstate commerce commission is inadmissible. Sloop v. Wabash R. Co. [Mo. App.] 84 S. W. 111. Invalid written contract does not prevent shipper from showing terms of oral contract. McNeill v. Galveston, H. & N. R. Co. [Tex. Civ. App.] 86 S. W. 32. Plaintiff cannot show the contents of the bill of lading without evidence of its loss. Ragsdale v. Southern R. Co., 69 S. C. 429, 48 S. E. 466.

82. Loss by delay in transporting perishable freight and defendant's responsibility therefor held sufficiently shown to go to jury. Hanson v. Pennsylvania R. Co. [N. J. Law] 60 A. 1101. The weights specified in a bill of lading containing the clause, "Weight, measure and contents unknown" are not conclusive on the carrier. The Seefahrer, 133 F. 793. Evidence that four days after its arrival the address on a package was different from that on the shipping receipt is not conclusive proof that the two addresses were different at the time of shipment or excuse failure to deliver as agreed. Cappel v. Weir, 45 Misc. 419, 90 N. Y. S. 394; opinion on subsequent appeal, see 92 N. Y. S. 365.

83. See 3 C. L. 605.

84. Whether tender by a city delivery company on Monday, of goods received by

Damages.[85]—Only such damages as are reasonably in contemplation of the parties are recoverable. These generally extend only to the market value of the property at destination in case of loss,[86] and to the difference in value caused by the injury [87] or delay [88] in case there is not a total loss. Loss of profits,[89] time, and expenses, are not recoverable, nor can there be a recovery for the loss of property not carried, occasioned by failure to deliver that carried, in the absence of notice of special circumstances.[90] Notice of special circumstances after shipment was made

it on Saturday, is within a reasonable time is a question for the jury. Dressner v. Manhattan Delivery Co., 92 N. Y. S. 800. Instruction held erroneous as assuming that express company's driver had authority to contract for delivery of a shipment by a particular train. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22. Where plaintiff sues on an oral contract and defendant defends on a written contract and facts are shown which invalidate the written contract a charge that the oral contract was not in force is properly refused as on the weight of the evidence. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499.

85. See 3 C. L. 606.

86. Horses. Texas & P. R. Co. v. Snyder [Tex. Civ. App.] 86 S. W. 1041. The measure of damages for loss of goods is their value at destination with interest from the time they should have been delivered, less unpaid freight. Carrier not entitled to time to investigate. Chesapeake & O. R. Co. v. Stock & Sons [Va.] 51 S. E. 161. The damages for misdelivery of goods is their market value at the destination less freight charges if unpaid. Not the contract price. Grayson v. County Nat. Bank v. Nashville, etc., R. [Tex. Civ. App.] 79 S. W. 1094. Unless it is shown they have no market value, evidence of their intrinsic value, or of their market value at some other place, as the point of shipment, is immaterial. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479.

87. Where the connecting carrier refused to transport goods to their destination, but transported them to another place, the damages for injury must nevertheless be based on their market value at the contract destination. Texas & P. R. Co. v. Tracy [Tex. Civ. App.] 85 S. W. 833. Contract price at which cattle were to be sold is immaterial if the carrier had no notice of it. Gulf, etc., R. Co. v. Wright [Tex. Civ. App.] 87 S. W. 191. Market price at nearest place where there is a market may be shown. Atchison, etc., R. Co. v. A. S. Veale & Co. [Tex. Civ. App.] 87 S. W. 202. The carrier is entitled to the advantage of a compromise between the consignor and consignee settling the damage. St. Louis & S. F. R. Co. v. McDurmitt Grain Co. [Tex. Civ. App.] 87 S. W. 355; Atchison, etc, R. Co. v. Waddell Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 647, 88 S. W. 390.

88. Decline in price of commodity during delay. Wool. Butterick Pub. Co. v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 551, 88 S. W. 299. To be liable for special damages for delay the carrier must have had notice before or at the time the contract was made. Crutcher v. Choctaw, O. & G. R. Co. [Ark.] 85 S. W. 770. The difference in market value of cattle between the time they reached their destination and the time they would have reached it if the delays complained of had not occurred is the measure of damages for delay. International & G. N. R. Co. v. Startz [Tex. Civ. App.] 82 S. W. 1071; Gulf, etc., R. Co. v. Beattie [Tex. Civ. App.] 88 S. W. 367; Houston & T. C. R. Co. v. Foster [Tex. Civ. App.] 86 S. W. 44. So of grain. Chicago, etc., R. Co. v. C. C. Mill Elev. & L. Co. [Tex. Civ. App.] 87 S. W. 753. Shrinkage of cattle is to be considered. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 88 S. W. 499. Nominal damages and costs are recoverable in any case. Crutcher v. Choctaw, O. & G. R. Co. [Ark.] 85 S. W. 770. Rule where cattle are shipped to one point with privilege of changing destination to point further on at through rate. Texas & P. R. Co. v. Nelson [Tex. Civ. App.] 86 S. W. 616. Rule where reshipped. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938. Negligence resulting in missing two successive contracts of sale. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 86 S. W. 631. The measure of damages when a carrier through negligence or violation of duty delays the delivery of merchandise or baggage beyond a reasonable time is the difference between the value when delivery should have been made, and the value when delivery was made. Notice to the baggageman that a trunk contained samples does not justify the allowance of profits on sales that might have been made had the trunk been delivered. Katz v. Cleveland, etc., R. Co., 91 N. Y. S. 720. Evidence of notice of special circumstances is not admissible where special loss not pleaded. Stock shipped for entry at fair. Texas & P. R. Co. v. Ellerd [Tex. Civ. App.] 87 S. W. 362.

89. Profits lost by reason of the nondelivery of a machine cannot be recovered. Traywick v. Southern R. Co. [S. C.] 50 S. E. 549. Profits of crop not put in because of non-arrival of horses not recoverable. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168.

90. Delay in transporting feed for cattle occasioning injury to cattle. Daube v. Chicago, etc., R. Co. [Tex. Civ. App.] 86 S. W. 797; Choctaw, O. & G. R. Co v. Bourland [Tex. Civ. App.] 87 S. W. 173. Fish lost because of non-arrival of ice shipped cannot be recovered for in the absense of notice on the part of the carrier that the ice was necessary for that purpose. Lewark v. Norfolk & S. R. Co., 137 N. C. 383, 49 S. E. 882.

charges in the absence of evidence that any were paid,[92] and in an action for injuries, based on the value of the goods at destination, evidence of the amount of freight paid is immaterial.[93] Demurrage paid by the shipper and made necessary by the delay may be recovered.[94] For failure to adjust a claim within a stated time, a penalty is provided in several states to be recovered in addition to the amount of the claim.[95]

§ 14. *Freight and other charges.*[96]—The carrier has a lien on the goods carried for freight charges,[97] charges advanced,[98] demurrage,[99] charges for steerage,[1] and other extras,[2] unaffected by the default of the preceding carrier causing injury to the goods.[3] The lien, however, is lost by delivery,[4] and does not arise as to goods delivered to it by a wrongdoer.[5] A carrier is bound by the freight rates quoted by its agent and accepted by the shipper.[6] He may, however, reclassify freight, the character of which was misrepresented, and hold it for the higher rate,[7] but not in cases where there was no misrepresentation.[8]

Part III. Carriage of Live Stock.

§ 15. *Duty to carry and contract of carriage in general.*[9]—In nearly all the states railroads are common carriers of live stock and are required to furnish means for its care and transportation,[10] but are not required, as common carriers, to transport a circus train, part of which is loaded with wild animals, and may refuse to do so except under a special contract limiting its liability to that of a private carwill not bind.[91] In an action for failure to deliver, plaintiff cannot recover freight

91. Chicago, etc., R. Co v C. C. Mill Elevator & Light Co. [Tex. Civ. App.] 87 S. W. 753.

92. Johnson v. Alabama Great S. R. Co., 140 Ala. 412, 37 So. 226.

93. Missouri, K. & T. R. Co. v. Jarrell [Tex. Civ. App.] 86 S. W. 632. Receipts from connecting carrier showing freight paid are admissible. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 88 S. W. 499.

94. Consignee refused to accept because of delay and demurrage was charged for use of car. Texas & N. O. R. Co. v. Kolp, Jr. [Tex. Civ. App.] 13 Tex. Ct. Rep. 548, 88 S. W. 417.

95. Civ. Code 1902, § 1711, repealed by Laws 1903, p. 81. Mackorell v. Lancaster & C. R. Co. [S. C.] 51 S. E. 513. The penalty for failure to adjust a claim within ninety days after filing with the agent at destination is not incurred where the filing was with the general claim agent who sent it to the local agent. Brown v. Southern R. Co. [S. C.] 51 S. E. 151.

96. See 3 C. L. 606.

97. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093. Barges of lumber detained by low water. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575.

98. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093.

99. Southern R. Co. v. Lockwood Mfg. Co. [Ala.] 37 So. 667; Cleveland, etc., R. Co. v. Propst Lumber Co., 114 Ill. App. 659. Trover does not lie for refusal to deliver without payment of reasonable demurrage charges. Id.

1. Nicollette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575.

2. Railroads are entitled to charge and receive extra compensation for extra services rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage and the like. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

3. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093.

4. As against third persons without notice the lien of the carrier for freight is lost by delivery to the consignee, though he agrees to hold until the freight is paid. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59 A. 360. The placing of a car on the team track and its partial unloading by the consignee are not such a complete delivery of the whole car load as will deprive the carrier of his lien for subsequently accruing demurrage. Southern R. Co. v. Lockwood Mfg. Co. [Ala.] 37 So. 667.

5. Savannah, etc., R. Co. v. Tolbert [Ga.] 51 S. E. 401.

6. Texas & P. R. Co. v. Mugg [Tex.] 83 S. W. 800.

7, 8. Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585. The carrier must suffer from underrating of goods open to inspection. Carriers duty and not shipper's to see that rating is correct. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89.

9. See 3 C. L. 608.

10. Carrier may be required to furnish yards to restrain cattle offered for transportation prior to their being loaded. Pub. St. 1901, c. 160, § 1. Flint v. Boston, etc., R. Co. [N. H.] 59 A. 938. In providing cattle pens at a particular point a railroad company is only required to look to its own probable business, not that of all the roads entering that place. Casey v. St. Louis S. W. R. Co. [Tex. Civ. App.] 83 S. W. 20.

rier.[11] A station agent has implied authority to contract to furnish cattle cars for shipment from his station.[12]

§ 16. *Care required of carrier.*[13]—Common carriers of live stock are insurers to the same extent and degree that they are of goods, except as to losses arising from the nature or proper vices of the animals themselves,[14] and are charged with certain extraordinary duties arising from the requirements of live animals as distinguished from dead freight.[15] Reasonable diligence to transport stock within a reasonable time must be used.[16] Failure to transport without rough handling is not negligent per se.[17] An owner of live stock cannot recover for injuries to it caused by his own negligence in overloading.[18]

Rest and feeding[19] are duties imposed by statute,[20] for the neglect of which penalties are imposed in several states.[21]

§ 17. *Delivery.*[22]

§ 18. *Liability of carrier or connecting carrier.*[23]

§ 19. *Limitation of liability.*[24]

§ 20. *Procedure in actions relating to stock.*[25]—The shipper may at his election bring an action on the contract or in tort for injuries.[26] Pleadings are adjudged according to ordinary rules.[27]

11. Wilson v. Atlantic Coast Line R. Co., 129 F. 774.

12. Baltimore, etc., R. Co. v. Tison, 116 Ill. App. 48.

13. See 3 C. L. 608.

14. Texas & P. R. Co. v. Snyder [Tex. Civ. App.] 86 S. W. 1041; Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; Wabash R. Co. v. Johnson, 114 Ill. App. 545; Chicago, etc., R. Co. v. Woodward [Ind.] 72 N. E. 558. The carrier is an insurer as to such perils of transportation as it is his duty to provide against. Trace v. Pennsylvania R. Co., 26 Pa. Super. Ct. 466. Carrier held not responsible for loss of cattle from flood. Empire State Cattle Co. v. Atchison, etc., R. Co., 135 Tex. 135.

15. If the carrier negligently unloads cattle in infected stock yards thereby compelling the immediate slaughter of the cattle at a loss it is liable. Dorr Cattle Co. v. Chicago, etc., R. Co. [Iowa] 103 N. W. 1003. Where a railroad company accepts horses for transportation beyond its own line its duty is not only to carry them to its own terminus safely but also to deliver them to the connecting carrier in a car properly constructed and suitable for the purpose of carrying them to their final destination. Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781. It is prima facie negligent to give stock alkali water. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Must use ordinary care in handling and delivering to connecting carriers and afford reasonable opportunities for feeding and watering. Texas & P. R. Co. v. Byers Bros. [Tex. Civ. App.] 84 S. W. 1087.

16. Gulf, etc., R. Co. v. Beattie [Tex. Civ. App.] 13 Tex. Ct. Rep. 598, 88 S. W. 367.

17. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 87 S. W. 172; Ft. Worth, etc., R. Co. v. James [Tex. Civ. App.] 87 S. W. 730.

18. Texas & P. R. Co. v. Edins [Tex. Civ. App.] 83 S. W. 253.

19. See 3 C. L. 609.

20. A carrier receiving live stock for shipment is bound to properly care for it or afford the shipper an opportunity to do so. Olds v. New York Cent., etc., R. Co., 94 N. Y. S. 924. Negligence to give impure water. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Interstate shipments are governed by the Federal statute as to water, feed and rest and not by the state statute. International, etc., R. Co. v. Startz [Tex. Civ. App.] 82 S. W. 1071.

21. Sayles' Rev. Civ. St. 1897, art. 326. Houston, etc., R. Co. v. Brown [Tex. Civ. App.] 85 S. W. 44.

22. See 3 C. L. 610. See, also, ante, § 9.

23. See 3 C. L. 610. See, also, ante, § 3.

24. See 3 C. L. 610. See, also, ante, § 11.

25. See 3 C. L. 612.

26. Eckert v. Pennsylvania R. Co. [Pa.] 60 A. 781.

27. Plea held sufficient to raise issue of undertaking to load and overloading stock. Texas & P. R. Co. v. Edins [Tex. Civ. App.] 83 S. W. 253. Where the answer in an action for injuries is that plaintiff knew the condition of stock pens and facilities for unloading, and assumed the risk and was guilty of contributory negligence, a finding that he was not guilty of contributory negligence disposes of the issues raised. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Failure to furnish proper troughs for watering held not within issues of complaint for handling in rough and improper manner. Texas & P. R. Co. v. Stephens [Tex. Civ. App.] 86 S. W. 933. Negligence not pleaded cannot be recovered for improper bedding. Gulf, etc., R. Co. v. Wright [Tex. Civ. App.] 87 S. W. 191. Amendment as to unloading in improper pens held not to state new cause of action. Atchison, etc., R. Co. v. A. S. Veale & Co. [Tex. Civ. App.] 87 S. W. 202. Averments of damage held sufficiently specific. Texas & P. R. Co. v. Sherrod [Tex. Civ. App.] 87 S. W. 363.

The doctrine of res ipsa loquitur applies to the carriage of live stock,[28] and the burden is on the carrier to show that loss or death of live animals resulted from the nature or vice of themselves.[29] The burden, however, is on plaintiff to show that defendant's negligence was the proximate cause of injury to stock,[30] and in an action for negligent delay, the burden is on plaintiff to show that the delay was negligent, a mere showing of delay is insufficient.[31] In the absence of evidence to the contrary, it will be assumed that the servants of a railroad company did their duty with respect to watering stock.[32]

Evidence is admissible under ordinary rules.[33] Cases discussing its sufficiency are cited below.[34]

Instructions are governed by the ordinary rules.[35]

§ 21. *Damages*[36]—Where stock is injured the measure of damages is the difference between the market value of the stock at destination in an undamaged condition and the highest realizable value as actually delivered.[37] Additional expenses having effect to reduce the damages are recoverable.[38]

28. Fire in car bedded with straw. Trace v. Pennsylvania R. Co., 26 Pa. Super. Ct. 466; Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 85 S. W. 319. Where a carrier takes a crate containing three dogs and delivers it containing only two without explanation of the loss, it will be presumed to have occurred from the carrier's negligence. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106.

29. Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; Chicago, etc., R. Co. v. Woodward [Ind.] 72 N. E. 558.

30. Peterson v. Chicago, etc., R. Co., 102 N. W. 595.

31. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82.

32. Peterson v. Chicago, etc., R. Co. [S. D.] 12 N. W. 595.

33. Opinions of experts are admissible as to what is a reasonable time in which to transport cattle. Chicago, etc., R. Co. v. Kapp [Tex. Civ. App.] 83 S. W. 233. Experts may estimate ordinary loss of weight from shipment and increase of loss from undue delay. Atchison, etc., R. Co. v. Watson [Kan.] 81 P. 499. Time made on previous shipments admissible to show delay. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938.

34. Evidence held sufficient on which to find that a special contract for the carriage of cattle was made. Chicago, etc., R. Co. v. Woodward [Ind.] 73 N. E. 810. Evidence held to show that in making live stock contract joint agent was acting not for defendant but for another railroad company. Walter v. Missouri Pac. R. Co. [Kan.] 79 P. 1089. Evidence held sufficient to show carrier's negligence. Missouri, etc., R. Co. v. Russell [Tex. Civ. App.] 13 Tex. Ct. Rep. 591, 88 S. W. 379. Whether any damage occurred on defendant's line held question for jury. Texas Cent. R. Co. v. West [Tex. Civ. App.] 88 S. W. 426.

35. Several instructions where cattle were delayed, and arrived in damaged condition from getting down and trampled on, discussed. Houston, etc., R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838. Instruction held not objectionable as allowing recovery for injuries arising from bumping together of cars in switching, irrespective of negligence. Houston, etc., R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089. Where action is for negligent delay and not on the statute, it is error to instruct to ignore rush of business on road. Texas & P. R. Co. v. Nelson [Tex. Civ. App.] 86 S. W. 616.

36. See 3 C. L. 616.

37. Missouri, etc. R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168; San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302; Texas & P. R. Co. v. Stephens [Tex. Civ. App.] 86 S. W. 933. Evidence of value at shipping point held properly rejected. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 85 S. W. 319; Texas & P. R. Co. v. Sherrod [Tex. Civ. App.] 87 S. W. 363. Mingling of two shipments held not prejudicial. Gulf, etc., R. Co. v. McCampbell [Tex. Civ. App.] 85 S. W. 1158. Shipper may put stock on market at destination. Is not required to seek another market. St. Louis, etc., R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267. Testimony as to what cattle ought to have been worth instead of what they would have been worth is properly excluded. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 393. Instruction held not error as to liability of intermediate carrier. Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085. Value at other points is immaterial. Texas & P. R. Co. v. Stephens [Tex. Civ. App.] 86 S. W. 933. What testimony admissible on state of market, and value of cattle. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938; Texas & P. R. Co. v. W. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065. Where there is no market value actual value may be shown. Texas & P. R. Co. v. Ellerd [Tex. Civ. App.] 87 S. W. 362. Immaterial that cattle are intended for feeding. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 87 S. W. 389.

38. Expense of pasture before shipment made necessary by delay in providing cars. Texas & P. R. Co. v. W. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065. Expense of feeding at destination before sale is recoverable where its effect was to bring cattle up from an unsalable to a salable condition and was beneficial to defendant. Chicago, etc., R. Co. v. Woodward [Ind.] 72 N. E. 558. Extra expense of further shipment and feeding held recoverable. St. Louis, etc.,

Part IV. Carriage of Passengers.

§ 22. *Who are passengers.*[39]—A passenger is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier.[40] Payment of fare is not necessary,[41] but there must be an intent to become a passenger,[42] and an intent or a willingness to pay if requested.[43] A railway mail clerk is a passenger for hire.[44] But neither is an express messenger,[45] a sleeping car porter,[46] nor a servant employed by a railroad company and riding home after the day's work on a work train, a passenger.[47] Persons boarding a train to assist passengers to enter it are not entitled to the protection accorded passengers.[48]

Trains other than passenger trains.[49]—Ordinarily one is not a passenger who boards a train not designed for such traffic,[50] and no implied acceptance as passenger of one who rides on place not designed for use of passengers;[51] but a person of authority may permit one to so become a passenger.[52] Caretakers of live stock in transit are passengers for hire,[53] though they assume the risks and inconveniences

R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938. Time and medicine recoverable for. Missouri, etc., R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168. Where a shipper has cattle delivered to him relying on an agreement of the carrier to furnish cars on a certain day, he may recover all loss caused by failure to furnish them. Baltimore, etc., R. Co. v. Tison, 116 Ill. App. 48.

39. See 3 C. L. 617.

40. See 3 C. L. 617, § 22.

Note: The holding that one may become a passenger after the carrier has refused to enter such a relation (McNeill v. Durham & C. R. Co., 135 N. C. 682, 47 S. E. 765), is said to demonstrate that the "contract test" to determine when the relation begins is fallible. 5 Columbia L. R. 53, pointing out that the relation springs from duty not contract.

41. Reynolds v. St. Louis Transit Co. [Mo.] 88 S. W. 50. A carrier is liable for an injury to a child whom its servant has permitted to ride in excess of his authority. Denison & S. R. Co. v. Carter [Tex.] 82 S. W. 782.

42. A newsboy boarding a car merely to sell papers without intending to travel to any particular place or pay fare is not a passenger. Barry v. Union R. Co., 94 N. Y. S. 449.

43. Reynolds v. St. Louis Transit Co. [Mo.] 88 S. W. 50. Instruction assuming that boy who got on car on opposite side from conductor to ride short distance intending to pay fare if demanded was a passenger as a matter of law held error. Dallas Rapid Transit Co. v. Payne [Tex.] 82 S. W. 649.

44. Chesapeake & O. R. Co. v. Patton, 23 App. D. C. 113. A mail clerk is entitled to the same degree of care that a passenger for hire is. Cavin v. Southern Pac. Co., 136 F. 592; Southern Pac. Co. v. Schuyler, 135 F. 1015. Postal clerk going between cars with notice of liability to bump together, held negligent barring recovery. Rice v. New York Cent., etc., R. Co., 186 Mass. 521, 72 N. E. 79.

45. The liability of the railroad company to him is akin to that of one of its own employes. Chicago & N. W. R. Co. v. O'Brien [C. C. A.] 132 F. 593. No liability arises from failure to light depot and grounds in favor of employe of express company at a time when no express train is due, though company has been given permission to use baggage room. Texas Cent. R. Co. v. Harbison [Tex.] 85 S. W. 1138.

46. Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705.

47. Southern Indiana R. Co. v. Messick [Ind. App.] 74 N. E. 1097.

48. Flaherty v. Boston, etc., R. Co., 186 Mass. 567, 72 N. E. 66.

49. See 3 C. L. 618.

50. All persons are required to take notice that work trains are not intended for the transportation of passengers, and persons traveling on them if injured and seeking damages must show that they were rightfully there and that the company owed them the duty of carrying them safely. Pennsylvania Co. v. Coyer, 163 Ind. 631, 72 N. E. 875.

51. Street car step. Strong v. North Chicago St. R. Co., 116 Ill. App. 246.

52. One who boards a freight train under the erroneous information from a track superintendent that he can ride is not a passenger under an implied contract. But is not a willful trespasser. Alabama & V. R. Co. v. Livingston, 84 Miss. 1, 36 So. 256.

53. Carrier cannot stipulate as to negligence. Sprigg's Adm'r v. Rutland R. Co. [Vt.] 60 A. 143; Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014; Weaver v. Ann Arbor R. Co. [Mich.] 102 N. W. 1037. Entitled to protection while walking along the track at direction of the company's agent. Lake Shore R. Co. v. Hotchkiss, 24 Ohio C. C. 431, 4 Ohio C. C. (N. S.) 505; Elgin, etc., R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109; Chicago, etc., R. Co. v. Troyer [Neb.] 103 N. W. 680. A stipulation that only "bona fide employes will be allowed to ride on drovers' passes will not prevent liability to one who was actually in charge of stock, though he had never before been employed by the shipper and was to be given no other compensation for his services than his transportation. Weaver v. Ann Arbor R. Co. [Mich.] 102 N. W. 1037.

that necessarily attend upon the care of stock, and the means of transportation.[54] The servant of a shipper riding in the car for the mutual advantage of carrier and shipper is a passenger.

When relation begins.[56]—One may be a passenger who has neither paid fare, purchased a ticket,[57] or entered the conveyance, if he has properly indicated his intention,[58] and where one presents himself at a railway station a reasonable time before the scheduled departure of his train,[59] and purchases a ticket,[60] with intent to take passage,[61] he is a passenger and entitled to protection as such until his journey ends.[62]

When relation ceases or is interrupted.[63]—The relation continues until the passenger has had a resonably safe opportunity to alight from the train and make his way from the station by the ordinary course,[64] and while he is transferring from one car to another, he having been furnished a ticket enabling him to do so.[65] On alighting from a street car in the street, a passenger becomes at once an ordinary traveler on the highway.[66] One who has been ejected from a train notwithstanding his possession of a ticket entitling him to ride is not a trespasser on the track.[67]

54. Chicago, etc., R. Co. v. Troyee [Neb.] 103 N. W. 680; Young v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 175.

55. Holmes v. Birmingham So. R. Co., 140 Ala. 208, 37 So. 338.

56. See 3 C. L. 619.

57. The relation may exist, though the person claiming to be a passenger has neither paid his fare nor provided himself with a ticket, since it cannot be presumed he would not pay his fare on demand. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234.

58. Though one who has merely signaled a street car to stop is not before he actually reaches the car a passenger. Duchemin v. Boston El. R. Co., 186 Mass. 353, 71 N. E. 780. After reaching car and attempting to board he is a passenger. Lewis v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 659, 88 S. W. 489.

59. The relation of passenger and carrier begins on arrival at the station a reasonable time before the schedule time of departure of the intended conveyance, and continues for a reasonable time for departure after arrival at the destination. Abbott v. Oregon R. Co. [Or.] 80 P. 1012. One who enters the office of the railroad over an hour before train time to do some writing is not a passenger. Andrews v. Yazoo, etc., R. Co. [Miss.] 38 So. 773.

60. One on the way to the station and on the railroad company's property is not a passenger, though intending to become one. Eakins v. Chicago, etc., R. Co. [Iowa] 102 N. W. 104. One who enters a railroad station and purchases a ticket intending to board a passenger train soon to arrive is a passenger. Atchison, etc., R. Co. v. Holloway [Kan.] 80 P. 31.

61. Mere purchase of a ticket at the station does not make one a passenger. The purchase must be made with a purpose of taking passage on a train scheduled to depart within a reasonable time thereafter. Fremont, etc., R. Co. v. Hagblad [Neb.] 101 N. W. 1033. The mere possession of a ticket that one intends to use later does not make one a passenger. Vandegrift v. West Jersey & S. R. Co. [N. J. Err. & App.] 60 A. 184.

62. From the time a person places himself under the care of the carrier by presenting himself at its station for carriage until he has had a reasonable opportunity to depart from the station at his destination, he is a passenger. Fremont, etc., R. Co. v. Hagblad [Neb.] 101 N. W. 1033. One who has purchased a ticket and is crossing the station platform to board the train is a passenger. Maxfield v. Maine Cent. R. Co. [Me.] 60 A. 710. Where an ordinary car was engaged by excursionists to go to and from a certain place, plaintiff was not a passenger in going to the car during the day for his own purposes. Archer v. Union Pac. R. Co., 110 Mo. App. 349, 85 S. W. 934.

63. See 3 C. L. 620.

64. Ten or fifteen minutes' delay in station before starting for highway will not bar one from recovering for injury caused by falling over obstruction in path. Glenn v. Lake Erie & W. R. Co. [Ind. App.] 73 N. E. 861. It is immaterial what the passenger's purpose was in making his journey. Houston, etc., R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902. May alight at intermediate station without losing right to protection as passenger. Texas Midland R. Co. v. Ellison [Tex. Civ. App.] 87 S. W. 213.

65. Walger v. Jersey City, etc., R. Co. [N. J. Law] 59 A. 14; Clark v. Durham Traction Co., 138 N. C. 77, 50 S. E. 518.

66. Fry v. St. Louis Transit Co. [Mo. App.] 85 S. W. 960. One alighting from a street car and passing around its end and falling over a rail is not a passenger at the time of his injury, though the track is laid in a place from which ordinary traffic except pedestrians is excluded. Conroy v. Boston El. R. Co. [Mass.] 74 N. E. 672. He is still a passenger if the ground crumbles and lets him into a ditch before he takes a step. MacDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001.

67. Third rail accident. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013.

§ 23. *Duty to receive and carry passengers.*[68]—A railroad as a common carrier must accept as passengers all persons fit or entitled to travel,[69] who expose tickets valid on the train on which offered,[70] or pay or tender the regular fare, must sell tickets on demand at proper times,[71] and provide transportation at the time and to the place agreed upon.[72] A rule requiring passengers to purchase tickets before entering the cars is reasonable,[73] but in order that it may be enforced by ejection of the passenger or charging him an additional fare, reasonable opportunity to purchase tickets must be given.[74]

Through trains.[75]—A railroad company may adopt regulations under which certain of its trains shall stop only at the more important stations and the mere possession of a ticket reading to a certain station does not entitle the holder to passage on a train not scheduled to stop there.[76]

68. See 3 C. L. 620.

69. A carrier may exclude and deny transportation to any person who on account of physical or mental disability is unable to care for himself, but if the applicant is in fact able to travel alone to the knowledge of the carrier, his exclusion is actionable. Blind man. Illinois Cent. R. Co. v. Smith [Miss.] 37 So. 643. Not obliged to accept passenger too drunk to take care of himself. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575.

NOTE. Blindness as ground for rejection: The defendant's agent in accordance with the rules of the company refused to sell a railroad ticket to the plaintiff on the ground that he was blind and unaccompanied by an attendant. Held, that the defendant is not liable in the absence of proof that its agent knew, or had reasonable grounds to believe, that the plaintiff, though blind, was qualified to travel alone. Illinois Cent. R. Co. v. Smith [Miss.] 37 So. 643.

The prima facie duty of a carrier to accept all persons who present themselves for transportation must necessarily be subject to certain limitations made for the protection of the company. In view of the rule that a passenger who is affected with a disability of which the carrier knows, or has reason to know, is entitled to greater care and attention than an ordinary passenger, it seems but fair that the company should have the right of refusing to assume this added responsibility by requiring such persons to be accompanied by attendants. Cf. Croom v. Chicago, etc. R. Co., 52 Minn. 296, 38 Am. St. Rep. 557, 18 L. R. A. 602; Columbus, etc., R. Co. v. Powell, 40 Ind. 37. The cases which hold that a railroad may refuse to carry drunken and insane persons rest partly upon this principle of fairness to the company, as well as upon the policy of protecting passengers from annoyance and danger. Cf. Pittsburgh, etc. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Meyer v. St. Louis, etc. R. Co., 54 F. 116. Blindness alone would appear sufficient cause for rejection, unless the company's agent has reason to believe that the person is able to take care of himself. Cf. Zachery v. Mobile & O. R. Co., 75 Miss. 746, 65 Am. St. Rep. 617, 41 L. R. A. 385.—18 Harv. L. R. 540.

70. Two thousand five hundred not excessive for rude and insolent denial of admission to car for which plaintiff had a ticket and in which he was entitled to travel. Yazoo, etc., R. Co. v. Mattingly [Miss.] 37 So. 708.

71. A passenger may recover his damages from refusal of the carrier's agent to sell him a ticket for passage on a train soon to leave, though the refusal resulted from a mistake of the agent as to whether a through train or a local would be first to arrive. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

72. Action will lie for being put off a train at a station short of destination, where there was an express contract to carry the passenger on that train. Gulf, etc., R. Co. v. Moore [Tex.] 83 S. W. 362. Punitive damages may be awarded where a passenger with a ticket to a way station is put off a through train because it does not stop at his destination, where the agent selling the ticket and the trainman directing him to board it told him it would stop. Richardson v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 261. Railroad companies may be penalized for failure to carry passengers as agreed by their agents and according to their published schedules. Comp. Laws, § 6235. Countermand of schedule not brought to agent's attention held no defense. Van Camp v. Michigan Cent. R. Co. [Mich.] 100 N. W. 771. A passenger directed to the wrong car by the carrier's servants whereby he is left at a point other than his proper destination can recover for the resulting inconveniences and hardships. Robertson v. Louisville & N. R. Co. [Ala.] 37 So. 831. Where a passenger is carried to a place not called for by his ticket against his will, he is entitled to recover any damages suffered thereby. Latour v. Southern R. Co. [S. C.] 51 S. E. 265. Five hundred dollars held not excessive for young woman being put off in woods five miles from her station at night. Louisville, etc., R. Co. v. Covetts, 26 Ky. L. R. 934, 82 S. W. 975.

73. Ammons v. Southern R. Co. [N. C.] 51 S. E. 127.

74. Agent was out of tickets. Ammons v. Southern R. Co. [N. C.] 51 S. E. 127. Office not open. Rivers v. Kansas City, etc., R. Co. [Miss.] 38 So. 508.

75. See 3 C. L. 621.

76. Usher v. Chicago, etc., R. Co. [Kan.] 80 P. 956; Hancock v. Louisville & N. R. Co. [Ky.] 85 S. W. 210. Plaintiff held not misled into getting upon wrong train. Texas & P. R. Co. v. Bell [Tex. Civ. App.] 87 S. W. 730.

77. See 3 C. L. 621.

Ejection of passengers.[77]—A passenger failing to produce transportation valid on its face,[78] or pay fare,[79] though without his own fault,[80] may be expelled at a reasonably safe place and time,[81] the carrier using no more force than is necessary for the purpose, and for such an ejection the carrier is liable only for actual damages.[82] If the ejection is unauthorized,[83] or is malicious,[84] or unnecessarily violent,[85] or insulting and humiliating,[86] and the carrier participates or ratifies

78. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142 Where the ticket upon its face is one that does not entitle plaintiff to passage, he cannot recover for ejection. Mileage book made to "Mr." presented by woman. Parish v. Ulster & D. R. Co., 99 App. Div. 10, 90 N. Y. S. 1000. Ticket against which statute of limitations has run. Cassiano v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 806. A merely ambiguous ticket does not justify ejection, and where a ticket appears to have expired before it was sold, no invalidity appears. Jevons v. Union Pac. R. Co. [Kan.] 78 P. 817. An ejection is wrongful where the passenger tendered a transfer which the carrier was bound to and in fact did issue, though it claims that it did not at that time issue such transfers. Chiert v. Interurban St. R. Co., 92 N. Y. S. 781. Statement of ticket agent to one who has lost his ticket that conductor will let him ride is not binding on the carrier. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 84 S. W. 852. Refusal to stamp return ticket so as to validate it entitles passenger to ride on it unstamped. Texas & P. R. Co. v. Payne [Tex.] 87 S. W. 330. Return ticket stamped and signed too long before offered for passage. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35.

79. Conductor is not obliged to accept pawn of jewelry for passage, the company's rule requiring ticket or cash. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 84 S. W. 852.

80. A passenger who is in fact without transportation to his destination, though without fault on his part, and because of the mistake or wrong of some agent of the carrier, should pay his fare and take his remedy against the carrier for breach of contract. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142. Failing in this, he is liable to ejection. Id. Where plaintiff presented an order for a ticket to the agent and he told her she could travel on it and gave it back to her without a ticket, the carrier is liable for her ejection. Chase v. Atchison, etc., R. Co. [Kan.] 79 P. 153. Agent at destination told plaintiff ticket would be good. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35.

81. A passenger in a drunken condition who refuses to state his destination or pay fare may properly be ejected at a point where lighted houses are near. Korn v. Chesapeake & O. R. Co. [C. C. A.] 125 F. 897. The knowledge of a station agent of a passenger's stupor from the use of liquor or drugs is not necessarily imputable to the company, as it is not his duty to pass upon a passenger's fitness to travel or inform the conductor as to it. Id. It is a trespass to eject a passenger either when the train is in motion or with unnecessary force, though he is subject to ejection. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142. Where one takes passage upon a train which he knows does not stop at his destination, it is lawful for the company to eject him without unreasonable violence, at any reasonably safe place between stations, upon his refusing to pay fare to the next station at which the train stops. New York, etc., R. Co. v. Willing, 5 Ohio C. C. (N. S.) 137. Leaving a train in obedience to a command by the conductor to the porter to see that the passenger leaves at the next station, is an ejection. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35. For the passenger to leave the train against the conductor's advice that she remain and allow him to hold her baggage check as security for her fare is not an ejection, though the conductor refuses to honor her ticket. Id.

82. Transfer too old. Exemplary damages not recoverable. Little Rock Traction & Elec. Co. v. Winn. [Ark.] 87 S. W. 1025.

83. Passenger tendered good money which conductor refused to accept believing it counterfeit Breen v. St. Louis Transit Co., 108 Mo. App. 443, 83 S. W. 998. Recovery may be had for an injury received by one who was lawfully on a railway train, and was unlawfully ejected therefrom between stations in the nighttime, and was injured by falling into a cattle guard while making his way to the nearest highway crossing. New York, etc., R. Co. v. Willing, 5 Ohio C. C. (N. S.) 137. Where a worthless ticket is presented to and retained by the conductor, ejectment of the passenger on his refusal to pay fare or produce a good ticket is not rendered unlawful by the conductor's keeping the expired ticket. Elliott v. Southern Pac. Co., 145 Cal. 441, 79 P. 420. A transfer received in due course will be presumed in the absence of evidence to the contrary to be valid and to entitle plaintiff to continue his journey. Summerfield v. St. Louis Transit Co. [Mo. App.] 84 S. W. 172. Passenger buying ticket for freight train but not given written permit to ride on freight. Houston, etc., R. Co. v. Berry [Tex. Civ. App.] 84 S. W. 258. Where passenger lost his ticket en route, the fact that his baggage was checked through did not make his ejection unlawful. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 84 S. W. 852.

84. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170. Malice may be inferred from expulsion without explanation or excuse of passenger who presents proper transfer and refuses to pay fare. Summerfield v. St. Louis Transit Co. [Mo. App.] 84 S. W. 172.

85. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170.

86. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35.

the acts of its servant therein,[87] it is liable in substantial,[88] compensative and punitive damages,[89] though the passenger might have avoided ejection by paying another fare.[90] A carrier is not liable for an assault on an ejected passenger by the conductor after the ejection is complete.[91]

Delays.[92]—The passenger is entitled to be transported with reasonable expedition,[93] or be reimbursed in such actual damages as may reasonably be anticipated by the parties.[94]

§ 24. *Rates and fares, tickets and special contracts.*[95]—A ticket sold at full regular fare is generally regarded as a mere token or evidence of a contract which the law creates,[96] but a ticket sold at a reduced rate and purporting itself to be a special contract constitutes the contract, and lawful limitations expressed thereon are binding.[97] In the absence of fraud,[98] a contract of carriage of a passenger is binding alike on the passenger and the carrier,[99] and where the agent at destination refuses to stamp and sign a round trip ticket, the passenger has a right to ride on it without stamping and signing.[1] A carrier is liable for the injuries resulting from the act of its agent in improperly routing passengers.[2] The redemption

87. A street railroad company is not liable for the wrongful and unnecessarily violent ejection of a passenger by its conductor where it did not participate either by authorizing or approving it. Peterson v. Middlesex & S. Traction Co. [N. J. Err. & App.] 59 A. 456. Where an action against a street car company for wrongful and malicious ejection is founded on its approval by retaining the conductor in its employ, evidence that he had been prosecuted criminally and acquitted is admissible. Id. The motorman of a street car whose only duty is to operate the machinery is not within the scope of his authority in ejecting a boy trying to ride on the running board of the car. Drolshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344.

88. A passenger wrongfully ejected from a car after paying his fare is entitled to substantial damages. $200. Baltimore & O. R. Co. v. Kitchin [C. C. A.] 135 F. 520. $300 for ejection held excessive. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142. $400 reduced to $200 for being ejected. Gulf, etc., R. Co. v. Russell [Tex. Civ. App.] 85 S. W. 299. Insulting language is proper matter for aggravation of damages. Osteryoung v. St. Louis Transit Co., 108 Mo. App. 703, 84 S. W. 179. May recover for falling into cattle guard after ejection between stations. Houston, etc., R. Co. v. Berry [Tex. Civ. App.] 84 S. W. 255. A girl of 15 put off at the wrong station and invited to remain over night with family cannot recover for injuries received by immediately walking to destination in rain. Cain v. Louisville & N. R. Co. [Ky.] 84 S. W. 583.

89. Though no actual force was used. Summerfield v. St. Louis Transit Co. [Mo. App.] 84 S. W. 172. Refusal to change seat that screen separating races might be moved. Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629. If excessive force is inspired by malice or ill will, or plaintiff is recklessly or wantonly thrown from the car, punitive damages are recoverable. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170.

90. Breen v. St. Louis Transit Co., 108 Mo. App. 443, 83 S. W. 998; Summerfield v. St. Louis Transit Co. [Mo. App.] 84 S. W. 172. Agent at destination refused to stamp return ticket. Texas & P. R. Co. v. Payne [Tex.] 87 S. W. 330. Ability to pay fare may be shown on damages recoverable. Texas & P. R. Co. v. Lynch [Tex. Civ. App.] 87 S. W. 884.

91. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142.

92. See 3 C. L. 626.

93. The carrier must exercise such care and effort to avoid delay to a passenger as is due under the circumstances. Latour v. Southern R. Co. [S. C.] 51 S. E. 265.

94. Exemplary damages are not recoverable for malicious acts of servants unless the carrier ratifies. Townsend v. Texas & N. O. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 456, 88 S. W. 302. A complaint alleging special damages for delay in transportation arising from missing a business engagement and loss of a contract depending thereon must aver the names of the parties plaintiff expected to meet. Id.

95. See 3 C. L. 627.

96, 97. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35, citing cases.

98. There is no fraudulent concealment on the part of a railroad company selling a round trip ticket arising from the fact that a strike of its employes is imminent, and it may not be able to perform the return portion within the time limit. Elliott v. Southern Pac. Co., 145 Cal. 441, 79 P. 420.

99. Contract for shipment of cattle and for carriage of caretaker held to constitute a single contract based on one consideration. Sprigg's Adm'r v. Rutland R. Co. [Vt.] 60 A. 143; Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. A rate quoted too low by reason of error in transmitting a telegram from general to local agent is none the less binding if accepted and acted upon by the inquirer. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469.

1. Ft. Worth, etc., R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37; Texas & P. R. Co. v. Payne [Tex.] 87 S. W. 330.

2. Immaterial that agent did not know best route. St. Louis S. W. R. Co. v. White [Tex. Civ. App.] 86 S. W. 71.

of unused tickets is required by statute in some states.[3] Where a passenger is ejected by a connecting carrier because of a defect in his coupon ticket, his cause of action against the carrier selling him the ticket arises in the county where the ejection occurs and not where he bought the ticket.[4] For negligent failure to furnish transportation as agreed, the carrier is liable;[5] but in the absence of notice of the purpose of the trip is liable only for lost time and necessary expenses.[6]

Conditions and limits.[7]—The time within which a ticket sold at reduced rates may be used may be limited,[8] likewise its negotiability, and it may provide for identification of the holder by signature or otherwise.[9] A ticket containing no limitation on its face or under a regulation of the railroad company may ordinarily be used at any time within the statute of limitations;[10] but a condition as to the time of use plainly expressed on the ticket will be presumed to have been consented to by the purchaser in the acceptance and use of the ticket itself.[11]

Dealing in nontransferable special rate tickets has been restrained.[12]

§ 25. *General rules of liability for personal injuries. A. Nature and extent of liability generally.*[13]—A contract limiting the liability of a carrier of passengers is against public policy;[14] but a railroad company may lawfully exempt itself by

3. The statute of Texas containing such provision is void. Laws 1893, p. 97, c. 73. Texas & P. R. Co. v. Mahaffey [Tex.] 84 S. W. 646.

4. Georgia, etc., R. Co. v. Pearson, 120 Ga. 284, 47 S. E. 904.

5. Illinois Cent. R. Co. v. Head [Ky.] 84 S. W. 751; St. Louis S. W. R. Co. v. Culver [Tex. Civ. App.] 86 S. W. 628.

6. Damages for missing father's funeral are not recoverable. Illinois Cent. R. Co. v. Head [Ky.] 84 S. W. 751. Anxiety, distress and mental suffering of husband waiting for wife is recoverable. St. Louis S. W. R. Co. v. Culver [Tex. Civ. App.] 86 S. W. 628.

7. See 3 C. L. 628.

8. Elliott v. Southern Pac. Co., 145 Cal. 441, 79 P. 420. Where the carrier is not able to perform as to the return coupon of a round trip ticket within the time limit, the holder may return in any other manner and recover his damages; but he is not entitled to use the return coupon at any later period he may select. Id. Tickets may be limited as to time of use to a reasonable time. Limit of one day held reasonable. Freeman v. Atchison, etc., R. Co. [Kan.] 80 P. 592.

Note: "Time Limit for Presentation of Railroad Tickets," a critical note citing many cases. See 3 Mich. L. R. 230.

9. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35. A ticket sold to be used by one person going and another returning and which bears no signature is not void when presented by that other, though it states that it shall be used only by the original purchaser whose signature it bears. Jevons v. Union Pac. R. Co. [Kan.] 78 P. 817.

10. Freeman v. Atchison, etc., R. Co. [Kan.] 80 P. 592. A first class unlimited ticket is good only during the period of limitations which begins to run the date of its issue. Cassiano v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 806.

11. Freeman v. Atchison, etc., R. Co. [Kan.] 80 P. 592, citing Dangerfield v. Atchison, etc., R. Co., 62 Kan. 85, 61 Pac. 405; Railroad Co. v. Price, 62 Kan. 327, 62 P. 1001; Rolfs v. Atchison, etc., R. Co., 66 Kan. 272, 71 P. 526; Hanlon v. Illinois R. Co., 109 Iowa, 136, 80 N. W. 223; St. Clair v. Kansas City, etc., R. Co., 77 Miss. 789, 28 So. 957; Texas, etc. R. Co. v. Powell, 13 Tex. Civ. App. 212, 35 S. W. 841; Southern R. Co. v. Powell, 108 Ga. 791, 33 S. E. 951; Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; Lillis v. St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255; Boston & L. R. Co. v. Proctor, 1 Allen [Mass.] 267, 79 Am. Dec. 729; State v. Campbell, 32 N. J. Law, 309; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Boice v. Railroad Co., 61 Barb. 611; Rawitzky v. Louisville, etc. R. Co., 40 La. Ann. 47, 3 So. 387; Coburn v. Morgan's Louisiana R. Co. 105 La. 398, 29 So. 882, 83 Am. St. Rep. 242. Hutchinson, Carriers, §§ 576-581; 1 Fetter, Carriers, § 285; Thompson, Negligence, § 2599; 6 Cyc. 575. The fact that the purchaser knowing he was buying a special rate ticket did not read it does not relieve him of the limitations plainly expressed on it. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35.

12. See 3 C. L. 630. Pennsylvania Co. v. Bay, 138 F. 203.

13. See 3 C. L. 641.

14. The Oregon [C. C. A.] 133 F. 609; Yazoo, etc., R. Co. v. Grant [Miss.] 38 So. 502. Caretaker of live stock. Lake Shore, etc., R. Co. v. Teeters [Ind. App.] 74 N. E. 1014.

NOTE. Drover's Pass—Release from Liability: Weaver, the plaintiff's decedent, while being transported on one of defendant's freight trains in charge of a shipment of cattle, met his death through the negligence of the defendant's engineer. He was riding on a drover's pass in the form of a live stock transportation contract, which permitted the shipper or one of his employes to accompany the stock. The contract contained a release of liability for damages on account of negligence of the carrier and was signed by Weaver, who was not the owner of the stock but merely one of the shipper's friends who desired a free ride and incidentally undertook to look

contract with an express or sleeping car company from liability for negligent injuries to employes of the latter companies.[15] Though there may be risks which a railway postal clerk must assume different from those of an ordinary passenger, those risks do not include negligence of the railroad company in the operation of its trains.[16] A conductor who accepts an unattended passenger too drunk to take care of himself acts within his authority.[17]

The carrier which owns the road is liable for the negligence of another which runs trains over it with the owner's authority, regardless of the provisions of the contract between them,[18] and a consolidated railroad company of South Carolina is liable for an injury to a passenger committed by a constituent company prior to the consolidation.[19]

Degree of care required.[20]—A carrier of passengers is not an insurer of their safety,[21] but is bound to a very high degree of care which is variously defined.[22]

after the stock on the way. Held, that the plaintiff's decedent was a bona fide employe of the owner of the cattle; that he was a passenger for hire; and that the release of liability for damages on account of the carrier's negligence was invalid. Weaver v. Ann Arbor R. Co. [Mich.] 102 N. W. 1037.

This decision is interesting because of the Michigan holding that railroads are not common carriers of live stock. Railroad Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Heller v. R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; McKenzie v. R. Co. [Mich.] 100 N. W. 260. Many cases support the doctrine that a carrier may properly impose any condition it sees fit upon its granting a purely voluntary privilege. Chicago, etc., R. Co. v. Hawk, 36 Ill. App. 327; Quimby v. Boston, etc. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; 6 Cyc. 579, n. 53. Thus where a railroad company grants privileges to a sleeping car company, a contract by which it relieves itself from liability for injuries to employes of such a company is valid. Russell v. Pittsburgh, etc., R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 215, 55 L. R. A. 253. And a contract relieving a railroad company from liability for injuries to express messengers is held to be valid on the same grounds. Blank v. Illinois Cent. R. Co., 82 Ill. 332, 55 N. E. 332; Louisville, etc. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93; Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633. It has also been held that as a railroad company is under no obligation to carry passengers in freight trains it can limit its liability for personal injuries to one to whom this privilege is granted. Arnold v. I. C. R. Co., 83 Ill. 273, 25 Am. Rep. 383. The holding in the principal case is rather an extreme application of the rule followed by the majority of the American courts that a stipulation in a stock drover's pass exempting the railroad company from liability for negligence is void. N. Y. C. R. Co. v. Lockwood, 17 Wall [U. S.] 357, 21 Law Ed. 627. A contrary doctrine is well established in England, Ireland, Canada and some American states. McCawley v. Furness R. Co., L. R. 8 Q. B. 57, 4 Moak, Eng. Rep. 218, 42 L. J. Q. B. 4, 27 L. T. (N. S.) 485, 21 Week. Rep. 140; Hall v. N. E. R. Co., L. R. 10 Q. B. 437, 14 Moak, Eng. Rep. 261, 44 L. J. Q. B. 164, 33 L. T. (N. S.) 306, 23 Week Rep. 860; Duff v. Gr. N. R. Co., L. R. 4 Ir. 178, 41 L. T. (N. S.) 197; Bicknell v. Gr. Tr. R. Co., 26 Ont. App. 431; Poucher v. N. Y. Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Meuer v. Chicago, etc., R. Co. 5 S. D. 568, 49 Am. St. Rep. 898, 25 L. R. A. 81.—3 Mich. L. R. 659.

15. Kelly v. Malott [C. C. A.] 135 F. 74. A contract between a sleeping car porter and his employer releasing the railroads over which the car runs from liability to him for injuries is a defense to an action for injuries, whether founded on mere negligence or gross negligence. Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705.

16. Chesapeake & O. R. Co. v. Patton, 23 App. D. C. 113.

17. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575.

18. Chicago, etc., R. Co. v. Newell, 113 Ill. App. 263, afd. 212 Ill. 332, 72 N. E. 416. Where a railroad company has leased its ferry privileges to another by lease unauthorized by law, it is liable for injury to a purchaser as though it were operating the ferry itself. Brooker v. Maysville, etc., R. Co., 26 Ky. L. R. 1022, 83 S. W. 117. Ownership of station and tracks by defendant railroad company held sufficiently shown. Chicago, etc., R. Co. v. Newell, 113 Ill. App. 263, afd. 212 Ill. 332, 72 N. E. 416. Grantor in deed of trust held liable for injuries to person by operator of elevator in building. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

19. Pickett v. Southern R. Co., 69 S. C. 445, 48 S. E. 466.

20. See 3 C. L. 642.

21. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735; Maggioli v. St. Louis Transit Co., 108 Mo. App. 416, 83 S. W. 1026; Little Rock Trac. & Elec. Co. v. Kimbro [Ark.] 87 S. W. 121. A carrier of passengers is not, like a carrier of freight, an insurer, but is bound to the highest degree of care, prudence, and foresight. The Oregon [C. C. A.] 133 F. 609; McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108. Instruction that carrier must exercise that degree of care that will land the passenger at his destination is too strict. Crolly v. Union R. Co., 92 N. Y. S. 313. "Must carry safely" held too strict. Atkins v. New York City R. Co., 94 N. Y. S. 500. Instruction on duty in case of injury

Carriers of passengers are held to the exercise of the highest degree of care consistent with their undertaking,[23] irrespective of the means of conveyance,[24] the rule applying equally to street railroads,[25] elevators,[26] and the like, from the time passengers approach to board the car until they alight,[27] and to injuries in the production of which the passenger is a factor.[28] There must be some negligence on the part of the carrier or its servants,[29] and the negligence complained of must be the proximate cause of the injury,[30] though it is no defense that the negligence of an-

from cinder held too strict. Missouri, etc., R. Co. v. Mitchell [Tex. Civ. App.] 79 S. W. 94.

22. Carrier is liable for slight negligence. Hensler v. Stix [Mo. App.] 88 S. W. 108.

23. Topp v. United R. & Elec. Co., 99 Md. 630, 59 A. 52; Cavin v. Southern Pac. Co. [C. C. A.] 136 F. 592. Degree held properly submitted by instructions. Denham v. Washington Water Power Co. [Wash.] 80 P. 546. Instruction that it must carry safely as far as human care and skill will enable it to do so does not impose too high a degree of care. Williams v. Spokane Falls & N. R. Co. [Wash.] 80 P. 1100. Instruction held misleading. International & G. N. R. Co. v. Hubbs [Tex. Civ. App.] 82 S. W. 1062. It is no defense that the carrier did as others have customarily done. Williams v. Spokane Falls & N. R. Co. [Wash.] 80 P. 1100. In the actual carriage of passengers, carriers are required to do all that human care, vigilance, and foresight can do under the circumstances, considering the character and mode of conveyance to prevent accident to passengers. Maxfield v. Maine Cent. R. Co. [Me.] 60 A. 710. This, however, like the due care required in all other cases, is only ordinary care with respect to the particular case (Id.), and the duty owed to a passenger on the station platform while the same relatively is less actually (Id). Must use such a high degree of care and foresight in the protection of passengers and in guarding against possible dangers as would be used by very cautious and competent persons under like circumstances. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735. The utmost care that would be used by a very prudent person under like circumstances. Contreras v. San Antonio Traction Co. [Tex. Civ. App.] 83 S. W. 870.

24. Passenger, freight or mixed train. Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979; Young v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 175.

25. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735; Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. Klinger v. United Trac. Co., 92 App. Div. 100, 87 N. Y. S. 864; Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197; Lincoln Trac. Co. v. Webb [Neb.] 102 N. W. 258; Hutchels v. Celar Rapids & M. C. R. Co. [Iowa] 103 N. W. 779. Snider v. Chicago & A. R. Co., 108 Mo. App. 234, 83 S. W. 530; Mannon v. Camden Interstate R. Co. [W. Va.] 49 S. E. 450.

26. Hensler v. Stix [Mo. App.] 88 S. W. 108; Edwards v. Burke, 36 Wash. 107, 78 P. 610; Morgan v. Saks [Ala.] 38 So. 848; Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035; Phillips Co. v. Pruitt, 26 Ky. L. R. 1105, 83 S. W. 114.

27. Lehner v. Metropolitan St. R. Co., 110 Mo. App. 215, 85 S. W. 110; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939.

28. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108. Especially where the passenger's act was involuntary—fleeing from danger. Denison & S. R. Co. v. Freeman [Tex. Civ. App.] 85 S. W. 55.

29. Carrier held not liable for injury by falling car window where attachments were all in good order and there is nothing to show that carriers servants raised it. Faulkner v. Boston & M. R. Co., 187 Mass. 254, 72 N. E. 976. Where plaintiff left a place of safety and stood on the car step and was pushed off by reason of the crowd, notice to the carrier of his intention to alight was necessary to charge it with negligence. Buchter v. New York City R. Co., 90 N. Y. S. 335. There is no negligence in the mere act of allowing a child to board a street car, as distinguished from allowing him to ride in an essentially dangerous place on such car. Denison & S. R. Co. v. Carter [Tex.] 82 S. W. 782. Negligent handling of locomotive resulting in discharge of cinders held shown. Missouri, etc., R. Co. of Texas v. Mitchell [Tex. Civ. App.] 87 S. W. 841.

30. The superintendent of a building moved the elevator operators stool whereupon the operator attempting to sit down lost his balance and clutching the lever started the elevator and injured a passenger. Held that the act of clutching the lever and not that of moving the stool was the proximate cause. Gebson v. International Trust Co., 186 Mass. 454, 72 N. E. 70. Street railway held not guilty of negligence proximately contributing to injury of passenger by stepping into hole in street while attempting to board moving car which failed to stop though signaled. Block v. City of Worcester, 186 Mass. 526, 72 N. E. 77. Where plaintiff was negligently carried by his station and caused to alight in the dark in a strange, unsafe place and in making his way back to his destination fell through a bridge, the negligence in carrying him by and not the darkness of the night was the proximate cause of his injury. Indianapolis & E. R. Co. v. Barnes [Ind. App.] 74 N. E. 583. Neither a fire breaking out in the car or the conductor's stopping to let the passenger's alight is the proximate cause of injury to a passenger from stepping into an unguarded excavation in the street several steps from the car. Goldberg v. Interurban St. R. Co., 90 N. Y. S. 347. Proximate cause of child's injury held to be his jumping from moving car and not the motorman's negligence in allowing him to ride on front platform. Denison & S. R. Co. v. Carter [Tex.] 82 S. W. 782. Start of car throwing plaintiff under mule's feet causing him to be trampled on and run over held proximate cause.

other [31] or an act of God, concurred.[32] There is no liability for casualties which the exercise of reasonable foresight would not have anticipated or due care have avoided,[33] and carriers are not bound to so restrain their passengers that no act of their own can put them in unnecessary danger; [34] but a passenger too drunk to take care of himself is entitled to ordinary care.[35] Failure to perform a statutory duty is negligent,[36] but speed ordinances are not available to a passenger leaving a moving train.[37]

(§ 25) *B. Contributory negligence of passenger.*[38]—A carrier is not responsible for injuries proximately resulting from the passenger's negligent failure to use his natural senses for his own safety.[39] Passengers are required, however, to exercise only ordinary care,[40] having a right to assume that conveyances, stations and approaches are reasonably safe,[41] and if a passenger places him-

Parker v. St. Louis Transit Co., 108 Mo. App. 465, 83 S. W. 1016. Where, after a collision in which plaintiff was injured, someone stated in her hearing that another train was approaching and there would be another collision, whereupon she left the car and was poisoned by ivy along the track, the collision was the proximate cause of the poisoning. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627. Cold waiting room. Charge on proximate cause held necessary. St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 86 S. W. 1059. Proximate cause of injury to passenger in elevator. Hensler v. Stix [Mo. App.] 88 S. W. 108.

31. Where a railroad company places its dining car at the rear of a vestibule train and invites the passengers to go to it, it is bound to provide them safe passage from car to car and cannot escape responsibility because the cars are the property of a sleeping car company. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689. A railroad company sued jointly with a sleeping car company for the death of a passenger by reason of a defective vestibule on the sleeping car is not concerned in the direction of a verdict for the car company. Id. A street railroad passenger negligently injured by a railroad company at a crossing has an action against the railroad company. Snider v. Chicago & A. R. Co., 108 Mo. App. 234, 83 S. W. 530.

32. Flood. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682.

33. Kight v. Metropolitan R. Co., 21 App. D. C. 494. Charge on unprecedented rainfall causing flood discussed. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Passenger alighting from moving car. Little Rock Trac. & Elec. Co. v. Kimbro [Ark.] 87 S. W. 121.

34. Bridges v. Jackson Elec. R. L. P. Co. [Miss.] 38 So. 788; Little Rock Trac. & Elec. Co. [Ark.] 87 S. W. 121. Girl of 15 voluntarily leaving train in mistaken belief of arrival at destination is not entitled to rights of one ejected because not warned to return. Cain v. Louisville & N. R. Co. [Ky.] 84 S. W. 583. If car was moving so slowly that conductor by the exercise of reasonable foresight could not have anticipated injury from plaintiff's attempt to alight, he was not required to restrain him. Little Rock Traction & Elec. Co. v. Kimbro [Ark.] 87 S. W. 644.

35. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575.

36. But failure to stop at a railroad crossing cannot be availed of by one who jumps from a moving train. Mercher v. Texas Midland R. Co. [Tex. Civ. App.] 85 S. W. 468. Allowing passenger to leave car in motion. McHugh v. St. Louis Transit Co. [Mo.] 88 S. W. 853.

37. St. Louis S. W. R. Co. v. Highnote [Tex.] 86 S. W. 923.

38. See 3 C. L. 644.

39. Passenger standing on running board of street car struck by vehicle. Fraser v. California St. Cable R. Co. [Cal.] 81 P. 29. Passenger having hand injured on door joint when door closed held negligent. O'Rourke v. Interborough Rapid Transit Co., 92 N. Y. S. 317. A passenger in the caboose of a freight train who stands while switching is in progress and is knocked from his feet by a jolt cannot recover for consequent injuries, he being accustomed to riding on freight trains and having notice of its dangers. Shamblin v. New Orleans & N. W. R. Co. [La.] 38 So. 421. Where plaintiff while standing between tracks waiting for a car was run down by one going in the opposite direction, there being room to so stand in safety his negligence bars recovery. Chunn v. City & Suburban R., 23 App. D. C. 551. When a passenger on an interurban railway car was thrown therefrom and killed by the derailing of the car while running through the open country, the fact that he was standing on the platform at the time cannot be held to be the proximate cause of his death, when the evidence does not disclose that there was available or reasonably convenient room on the inside of the car; that the injury would not have happened had he been on the inside; that he had notice of a sign prohibiting passengers from standing on the platform; or that he was ordered inside the car by the company's servants, and refused to go. Cincinnati, L. & A. Elec. St. R. Co. v. Lohe, 6 Ohio C. C. (N. S.) 144, 27 Ohio C. C. 138. Where it appears that a passenger was thrown by lurch of train against stepladder in closet of passenger coach and against window breaking it and injuring himself, no issue of contributory negligence is raised. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 86 S. W. 943.

40. Topp v. United R. & Elec. Co., 99 Md. 630, 59 A. 52. Child held not negligent where window of car fell and cut off finger. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234.

41. A passenger stepping on an icy plat-

self in a position of danger while alighting in the exercise of ordinary care, he is not for that reason negligent.[4] Contributory negligence cannot arise where a passenger too drunk to take care of himself is knowingly accepted for transportation and injured.[43]

Acts due to impulse of sudden danger [44] are regarded with less strictness than others.[45]

Acts done at direction of employes.[46]—Directions of the carrier's employes [47] may prevent an imputation of negligence,[48] unless the danger is so apparent that no one of ordinary prudence would follow them.[49]

Boarding a moving train or car [50] is not generally negligence as a matter of law,[51] unless the fact of motion is the sole producing cause of the injury sued for,[52]

form in front of an approaching train is not negligent, he having a right to presume the carrier has made it reasonably safe. McGuire v. Interborough R. T. Co., 93 N. Y. S. 316. Passenger stepping into hole in platform is not negligent for not staying in waiting room until time of departure nor for deviating thirty feet from direct line from waiting room to conveyance. White v. Seattle, E. & T. Nav. Co., 36 Wash. 281, 78 P. 909. A passenger may leave the conveyance during the stop at an intermediate station for the purpose of transacting his private business and depend on the ordinary safety of the station premises without being responsible for injuries arising therefrom. Abbott v. Oregon R. Co. [Or.] 80 P. 1012. A passenger provided with a well lighted car in which to wait for his train on a dark night is guilty of contributory negligence where he leaves it to walk for exercise on the unlighted station platform. Id. Held not negligent for passenger to alight from long train in the night, part of train length from station platform and attempt to follow track to station. Chesapeake & O. R. Co. v. Harris, 103 Va. 635, 49 S. E. 997; Chesapeake & O. R. Co. v. Smith, 103 Va. 326, 49 S. E. 487. Contributory negligence of passenger walking into open elevator shaft held question for jury. Morgan v. Saks [Ala.] 38 So. 848; Phillips Co. v. Pruitt, 26 Ky. L. R. 831, 82 S. W. 628. It is not negligence to stand or walk in an ordinary passenger coach on a passenger train. St. Louis, etc., R. Co. v. Taylor [Ark.] 84 S. W. 1035.

42. Johnson v. Yonkers R. Co., 101 App. Div. 65, 91 N. Y. S. 508. The passenger under the circumstances of this case was charged with the duty of looking where she stepped in alighting from the car. Cincinnati Traction Co. v. McKee, 6 Ohio C. C. (N. S.) 426.

43. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575.

44. See 3 C. L. 645.

45. Whether passenger acted with ordinary prudence in leaping from moving car under apprehension of danger is a question for the jury. Mannon v. Camden Interstate R. Co. [W. Va.] 49 S. E. 450; Chretien v. New Orleans R. Co., 113 La. 761, 37 So. 716; Kight v. Metropolitan R. Co., 21 App. D. C. 494. Failure to let go of car starting before plaintiff had time to board. Guenther v. Metropolitan R. Co., 23 App. D. C. 433; Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Plaintiff's command to conductor to release him from moving car held not fatal to recovery. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Plaintiff ran against door in attempt to escape from car. Denison & S. R. Co. v. Freeman [Tex. Civ. App.] 85 S. W. 55.

46. See 3 C. L. 645.

47. A passenger told that the train is moving and that she must jump, who jumps and is injured is not barred from recovery though the train was in fact not moving. Staines v. Central R. of N. J. [N. J. Err. & App.] 61 A. 385. Authority of conductor to permit plaintiff to stand on running board of car held for jury. Ft. Wayne Tract. Co. v. Hardendorf [Ind.] 72 N. E. 593. Instruction predicating recovery on command of which there is no evidence is error. Griffin v. Atlantic Coast Line R. Co., 137 N. C. 247, 49 S. E. 212. That flagman said "This door" to a passenger going out does not amount to an invitation to alight from a moving train. Alabama & V. R. Co. v. Jones [Miss.] 38 So. 545.

48. Inviting plaintiff to pass along running board into car to find seat. Wheeler v. South Orange & M. Tract. Co., 70 N. J. Law, 725, 58 A. 927. Plaintiff may show that brakeman advised her to go to get a ticket and on her return told her to board the moving train, it appearing that conductor waited brakeman's signal before starting. Chicago & A. R. Co. v. Flaherty, 202 Ill. 151, 66 N. E. 1083. It is not negligent as a matter of law for a passenger to assume without looking that the running board of a street car has been placed in proper position after the conductor has cried "All out." La Clair v. New York City R. Co., 92 N. Y. S. 837. Protest by passenger at unsafe place to alight and taking hold of arm by conductor saying "jump this way" relieves passenger of negligence. Senf v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 887.

49. A passenger may rely upon the superior experience of the trainmen in determining whether the action he is advised to take is dangerous unless the danger is so glaring as to be apparent to anyone of ordinary prudence. Staines v. Central R. Co. of N. J. [N. J. Err. & App.] 61 A. 385. Invitation to woman to alight from moving train after assisting children aboard held not sufficient to relieve her of contributory negligence. Flaherty v. Boston & M. R. Co., 186 Mass. 567, 72 N. E. 66. Passing from car to car in search of seat. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819.

50. See 3 C. L. 645.

51. Chicago Union Tract. Co. v. Lundahl,

or the speed of the train and the difficulties in the way are so obviously dagnerous that a person of ordinary prudence would not attempt it.[53]

Riding in dangerous position[54] is generally negligent,[55] unless required or permitted under circumstances of necessity;[56] But a caretaker of live stock is not negligent per se in riding with the stock instead of in the caboose.[57]

Riding on platform or running board of street car[58] is not generally negligent as a matter of law,[59] the car being full,[60] and the carrier being accustomed to permit it,[61] but it may be negligent under special circumstances.[62]

Riding on platform of railroad train[63] is generally regarded as prima facie negligent, in the absence of excusing circumstances,[64] and statutes in many states provide against recovery in such cases.[65]

215 Ill. 289, 74 N. E. 155; McKee v. St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013; Lewis v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 378, 88 S. W. 489. It is in Pennsylvania. Boulfrois v. United Tract. Co., 210 Pa. 263, 59 A. 1007. And the federal courts. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 540. Plaintiff stepped on moving car but before reaching place of safety was struck by object near track. Tobin v. Pennsylvania R. Co. [Pa.] 60 A. 999. Depends on circumstances. Atchison, etc., R. Co. v. Holloway [Kan.] 80 P. 31. Held negligent. Meeks v. Atlantic & B. R. Co. [Ga.] 50 S. E. 99. Question for jury. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Whether plaintiff ought to have known speed had been checked not to take on passengers but to get past break in circuit and that speed was subject to sudden acceleration held for jury. Leu v. St. Louis Transit Co., 110 Mo. App. 458, 85 S. W. 137. Car going no faster than man's walk. Spencer v. St. Louis Transit Co. [Mo. App.] 86 S. W. 593.

52. Murphy v. North Jersey St. R. Co. [N. J. Law] 58 A. 1018; Texas Midland R. Co. v. Ellison [Tex. Civ. App.] 87 S. W. 213. Passenger attempting to board moving car in close proximity to barrier erected because of excavation in street cannot recover for injury from it. Berry v. Utica Belt Line St. R. Co. [N. Y.] 73 N. E. 970. One boarding a moving car at an unaccustomed place of obvious danger cannot recover for an injury there sustained. Evidence held to show that defendant was not a carrier of passengers while its car was in car barn. Kroeger v. Seattle Elec. Co. [Wash.] 79 P. 1115.

53. Atchison, etc., R. Co. v. Holloway [Kan.] 80 P. 31. Speed of eight or ten miles an hour makes it negligent per se. Id.

54. See 3 C. L. 646.

55. To attempt to ride on the bumper of an electric car is negligence and where injury results there can be a recovery only upon a showing of willful negligence on the part of employes of the company. Columbus R. Co. v. Muns, 56 Ohio C. C. (N. S.) 236.

56. When passengers are permitted and sometimes required to occupy dangerous places notwithstanding rules prohibiting it, they are entitled to due care. Augusta R. & Elec. Co. v. Smith, 121 Ga. 29, 48 S. E. 681. Especially if the train is so crowded that no other is available. Jackson v. Natchez & W. R. Co. [La.] 38 So. 701.

57. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014.

58. See 3 C. L. 646.

59. Halverson v. Seattle Elec. Co., 35 Wash. 600, 77 P. 1058; Cincinnati, etc., R. Co. v. Lohe, 6 Ohio C. C. (N. S.) 144, 27 Ohio C. C. 138; Frank Bird Transfer Co. v. Morrow [Ind. App.] 72 N. E. 189. Passing along running board to seat held not negligent per se. Wheeler v. South Orange & M. Tract. Co., 70 N. J. Law, 725, 58 A. 927. To stand on the platform of a moving electric car when there is room inside is negligent per se. Kirchner v. Oil City St. R. Co., 210 Pa. 45, 59 A. 270. Riding on front platform of ordinary horse car held negligent, it being unnecessary. Kleffman v. Dry Dock, etc., R. Co., 93 N. Y. S. 741. Passenger who gets down on step of back platform while car is in motion and is thrown off by a sudden jerk cannot recover. Gaffney v. Union Traction Co. [Pa.] 60 A. 488.

60. Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34. Question for jury where cars are crowded. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819. Passenger on crowded car struck by passing car. Ft. Wayne Tract. Co. v. Hardendorf [Ind.] 72 N. E. 593. Passenger injured by contact with barrier erected around excavation in street. Koontz v. District of Columbia, 24 App. D. C. 59. Where a common carrier accepts passengers upon the platform or running boards of overcrowded cars there is an implied assurance that such places are reasonably safe and a corresponding duty to so operate the cars as to maintain a condition of such safety. Sheeron v. Coney Island & B. R. Co., 89 App. Div. 338, 85 N. Y. S. 958, citing many cases.

61. Custom of car company to permit riding on running board. Stone v. Lewiston, etc., R. Co., 99 Me. 243, 59 A. 56.

62. Plaintiff struck by trolley post while on running board held negligent. Bridges v. Jackson Elec. R., L. & P. Co. [Miss.] 38 So. 788. To so ride without looking ahead is negligence though the car is crowded where other passengers avoided injury by standing close. Rosen v. Dry Dock, etc., R. Co., 91 N. Y. S. 333.

63. See 3 C. L. 647.

64. Instruction on contributory negligence held improper. Pittsburgh, etc., R. Co. v. Fitzpatrick, 112 Ill. App. 152. Whether it is negligence for a passenger to ride on the platform of a car when the train is traveling at a high rate of speed is a question of fact to be determined from all the circumstances in evidence. Crowded excursion train. Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263, afd. 212 Ill. 332, 72 N. E. 416;

Allowing body to project from car.[66]—A passenger who because of illness thrusts his head from a car window over a screen covering the lower half of the window and is injured by a pole in close proximity to the car is negligent.[67]

Acts preparatory to alighting,[68] such as arising from one's seat [69] and going to the platform,[70] are not necessarily negligent.[71]

Leaving moving train or car [72] is negligent or not, dependent on the circumstances,[73] and is generally a question for the jury,[74] unless the injury proximately

Jackson v. Natchez & W. R. Co. [La.] 38 So. 701; Morgan v. Lake Shore & M. S. R. Co. [Mich.] 101 N. W. 836. A passenger who leaves the car after the station is called but before the train stops and stands on the platform cannot recover for an injury caused by the steps striking a baggage truck along the track. Fletcher v. Boston & M. R. Co. [Mass.] 73 N. E. 552.

Note: Plaintiff was a passenger on defendant's excursion train. All seats and aisles were full and passengers were on the platforms. Plaintiff stood in the aisle of the smoker until he became faint, as a result of bad air. Not being able to get near a window, he went out on the platform, where he became unconscious and fell off. Held, he was not guilty of contributory negligence as matter of law. Morgan v. Lake Shore, etc. R. Co. [Mich.] 101 N. W. 836. The decisions are at variance as to whether riding upon the platform under such circumstances is contributory negligence as matter of law. It has been held not to be in Willis v. L. I. R. Co., 34 N. Y. 670, and Werle v. L. I. R. Co., 98 N. Y. 650. In Ward v. Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442, it is held to be a question for the jury. In Rolette v. G. N. R. Co., 91 Minn. 16, 97 N. W. 431, it is held negligence if there be standing room in the aisles. Defendant's contention that riding on the platform is prima facie negligent seems to be supported by the weight of authority and is based on the following cases: Cleveland, etc., R. Co. v. Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141; Worthington v. Central Vt. R. Co., 64 Vt. 107, 15 L. R. A. 326; Hickey v. B. & L. R. Co., 14 Allen [Mass.] 429; C. & A. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120, and Rolette v. G. N. R. Co., 91 Minn. 16, 97 N. W. 431. But the court held that all these cases recognize the rule that if the passenger is necessarily on the platform because of conditions created by the railroad company, he is not precluded from recovering damages. This tends to raise a question in each case as to what constitutes necessity. Two of the justices dissent on the ground that plaintiff was justified by no serious necessity.—3 Mich. L. R. 406.

65. Comp. Laws, § 6303. Morgan v. Lake Shore & M. S. R. Co. [Mich.] 101 N. W. 836.

66. See 3 C. L. 647.

67. Christensen v. Metropolitan St. R. Co. [C. C. A.] 137 F. 708.

68. See 3 C. L. 647. Notice to a motorman of intention to alight is not sufficient to relieve a passenger from contributory negligence. Notice should be to conductor. Wehrenberg v. Cincinnati Tract. Co., 2 Ohio N. P. (N. S.) 271, 15 Ohio Dec. N. P. 101. Failure to take hold of the rail or bar while riding on the platorm preparatory to alighting is not necessarily negligent. Chicago Union Tract. Co. v. Hauthorn, 211 Ill. 367, 71 N. E. 1022.

69. Plaintiff thrown by lurch of car when standing attempting to signal conductor. Question for jury. Strauss v. United R. & Elec. Co. [Md.] 61 A. 137. Negligence and contributory negligence where plaintiff prepared to alight before car came to full stop and was thrown by sudden forward movement are for jury. Murphy v. Union R. Co. [Sup.] 94 N. Y. S. 350. Plaintiff arose at end of seat of open street car, signaled stop in middle of block, and was thrown by sudden stop. Held negligent. Bendon v. Union Trac. Co., 26 Pa. Super. Ct. 539.

70. Crowded car. Pim v. St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155.

71. For a passenger on a freight train to do so is negligent. Young v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 175.

72. See 3 C. L. 648.

73. Chicago Union Trac. Co. v. Olsen, 211 Ill. 255, 71 N. E. 985; Gress v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 122; Bond v. Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124. Station announced and motion of car imperceptible. Elwood v. Connecticut R. Co. [Conn.] 58 A. 751. Plaintiff thought car was moving when it was not. Staines v. Central R. of N. J. [N. J. Err. & App.] 61 A. 385. City ordinance forbidding leaving moving car held admissible on question of contributory negligence. Denison & S. R. Co. v. Carter [Tex.] 82 S. W. 782. Instruction making it negligent irrespective of circumstances or speed of car properly refused. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 397. Instructions held not to sufficiently present issue. Galveston, etc., R. Co. v. De Castillo [Tex. Civ. App.] 83 S. W. 25. Instruction on that form of contributory negligence held necessary. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408. Agreement between passenger and conductor to slow up at point where passenger alighted. St. Louis S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 265, rvd. [Tex.] 86 S. W. 923.

Held negligent. Newlin v. Iowa Cent. R. Co. [Iowa] 103 N. W. 999; Fanning v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 354; Walker v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 121. Person boarding car as escort to passenger. Flaherty v. Boston & M. R. Co., 186 Mass. 567, 72 N. E. 66; Dunne v. New York, etc., R. Co., 99 App. Div. 571, 91 N. Y. S. 145. Holding to rail with wrong hand. Alabama & V. R. Co. v. Jones [Miss.] 38 So. 545. Stepping off with face to rear. Birmingham R., L. & P. Co. v. Glover [Ala.] 38 So. 836. Held that plaintiff had ample time to alight before train started and was negligent. Barringer v. St. Louis, etc., R. Co. [Ark.] 85 S. W. 94. Contributory negligence in alighting from rapidly moving car held

resulted from the act of alighting while the car was in motion and without invitation,[75] or the speed was such that no reasonably prudent person would attempt it.[76]

Alighting at unusual place[77] is not necessarily negligent,[78] and an invitation by one in charge of the train to alight at a place other than the station is sufficient authority for the passenger to do so.[79]

§ 26. *Condition and care of premises.*[80]—Reasonable care with respect to the safety of stations and grounds,[81] and light and heat therein, is required.[82]

question of law. East St. Louis R. Co. v. Hessling, 116 Ill. App. 125.

74. El Paso El. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735; Chicago Union Trac. Co. v. Olsen, 211 Ill. 255, 71 N. E. 985; Birmingham R., L. & P. Co. v. Willis [Ala.] 38 So. 1016; St. Louis S. W. R. Co. v. Ratley [Tex. Civ. App.] 87 S. W. 407. An instruction which may be construed as requiring a street car company to prevent a man 74 years old from walking off a rapidly moving car is objectionable. Indianapolis & G. Rapid Transit Co. v. Derry, 33 Ind. App. 499, 71 N. E. 912. Contributory negligence of one jumping off after concluding car was not going to stop held question for jury. Dallas Rapid Transit Co. v. Payne [Tex.] 82 S. W. 649. There being no statute making it negligent. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445.

75. Knoxville Tract. Co. v. Carroll, 113 Tenn. 514, 82 S. W. 313. Where a passenger attempts without the knowledge of the operatives to alight from a moving train, the facts that it was at a railroad crossing and that passengers frequently alighted there though there was no station do not relieve him from an imputation of negligence. Mercher v. Texas Midland R. Co. [Tex. Civ. App.] 85 S. W. 468.

76. Rule where speed is from three to five miles per hour. Gress v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 122. Though the train did not stop long enough for passengers to alight, a woman of 63, weighing two hundred pounds, who attempts to alight from a train moving five or six miles an hour cannot recover. Hecker v. Chicago & A. R. Co., 110 Mo. App. 162, 84 S. W. 126.

77. See 3 C. L. 648.

78. Contributory negligence of plaintiff alighting at stop made before crossing other tracks held for jury. Camden & S. R. Co. v. Rice [C. C. A.] 137 F. 326. Rules applicable to railroads do not apply to street railroads where it is presumably safe to alight anywhere. Selby v. Detroit R. Co. [Mich.] 12 Det. Leg. N. 382, 104 N. W. 376. Plaintiff falling over unplanked track in night after being set down at unusual place held not negligent. Hancock v. New York, etc., R. Co., 100 App. Div. 161, 91 N. Y. S. 601. Negligence of one alighting from street car and falling into ditch held for jury. McDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001.

79. Topp v. United R. & Elec. Co., 99 Md. 630, 59 A. 52. Where a pregnant woman is required to jump from a flat car causing a miscarriage she is not negligent in failing to inform the carrier's servant of her condition. West v. St. Louis S. W. R. Co. [Mo.] 86 S. W. 140.

80. See 3 C. L. 632.

81. Must exercise reasonable care in providing and keeping safe its depot and grounds. Glenn v. Lake Erie & W. R. Co. [Ind. App.] 73 N. E. 861. A railroad company is bound to exercise only such degree of care in the construction of its stations and platforms as is sufficient to protect passengers using ordinary care from injury. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 540. Its platforms for ingress and egress to and from stations. McCormick v. Detroit, etc., R. Co. [Mich.] 104 N. W. 390. Instruction stating degree of care required held not too strict. Hart v. Seattle, etc., R. Co. [Wash.] 79 P. 954. It is the carrier's duty to exercise ordinary care to maintain its station platform in such a reasonably safe and suitable condition that the passengers who are themselves in the exercise of ordinary care can walk over it in safety. Maxfield v. Maine Cent. R. Co. [Me.] 60 A. 710. A railroad owes no duty to keep access to its station free from obstruction by freight trains at times when no passenger train is scheduled to stop. Agent had agreed to flag fast train for passenger. Eakins v. Chicago, etc., R. Co. [Iowa] 102 N. W. 104. Where passenger stepped from an icy platform in front of an approaching train, negligence is for jury. McGuire v. Interborough Rapid Transit Co., 93 N. Y. S. 316. Unguarded hole in dock floor two feet long and four inches wide is negligent. White v. Seattle, etc., Nav. Co., 36 Wash. 281, 78 P. 909.

82. Must be kept properly lighted for a reasonable time before and after arrival and departure of night trains. What is reasonable held for jury. Abbott v. Oregon R. Co. [Or.] 80 P. 1012; Chesapeake & O. R. Co. v. Smith, 103 Va. 326, 49 S. E. 487. Instruction on comparative negligence held inapplicable where plaintiff fell from dark station platform at night. Missouri, etc., R. Co. v. Cannady [Tex. Civ. App.] 82 S. W. 1069. Character of lights required depends on character and extent of business transacted at station. St. Louis, etc., R. Co. v. Marshall [Kan.] 81 P. 169. A railroad company agreeing to stop its train at a station to take on a passenger agrees to keep open its waiting room for the accommodation of the passenger while waiting for the train. Draper v. Evansville, etc., R. Co. [Ind.] 74 N. E. 889. No duty to light depot for benefit of express company's employe at a time when no train is due, though express company has license to use baggage room. Texas Cent. R. Co. v. Harbison [Tex.] 85 S. W. 1138. Passenger falling from unlighted and unguarded platform in strange place at night may recover for injuries sustained. Instructions held not prejudicial to defendant. Gerhart v. Wabash R. Co., 110 Mo. App. 105, 84 S. W. 100.

Separate waiting rooms for white and colored passengers are required in some states.[83]

§ 27. *Means and facilities of transportation,*[84] such as tracks with their appliances,[85] engines or motive power,[86] cars,[87] with their platforms,[88] couplings,[89] and other accessories,[90] and passenger elevators,[91] must be maintained at the highest degree of efficiency that human care, vigilance, and foresight can achieve under the circumstances. Failing in this the carrier is responsible for every injury proximately resulting from the defect. Failure to equip a train with the tools usually carried for use in case of accident will render its owner liable for the additional suffering to which a passenger is subjected by reason of delay in releasing him from a wreck, irrespective of responsibility for the wreck or contributory negligence in being caught by it.[92]

Separate accommodations for white and colored passengers[93] are required by statute in many states,[94] and such statutes are enforceable by indictment,[95] to which unavoidable accident is a defense.[96]

§ 28. *Operation and management of trains and other vehicles.*[97]—That high degree of care which skillful and practical railroad operatives would exercise under similar circumstances,[98] including a reasonable degree of presence of mind

83. Accommodations need not be equally commodious. Indictment held bad for failure to specify inequality. Choctaw, etc., R. Co. v. State [Ark.] 87 S. W. 426.

84. See 3 C. L. 633.

85. That there was a stone on the track causing injury to a street car will not absolve its owner unless it had used due care to prevent injury from that source. Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201. That the trolley post which struck plaintiff was slightly nearer the track than others does not establish negligence. Bridges v. Jackson El. R., Light & Power Co. [Miss.] 38 So. 788.

86. Kelly v. Chicago & A. R. Co. [Mo. App.] 87 S. W. 583.

87. Screens of large mesh across the lower half of windows of a trolly car on the side near which the poles stand are a sufficient protection and warning to passengers not to allow any portion of their bodies to project from the car on that side. Christensen v. Metropolitan St. R. Co. [C. C. A.] 137 F. 708. Instruction on duty to keep fastenings of windows safe held bad as taking question from jury. International, etc., R. Co. v. Hubbs [Tex. Civ. App.] 82 S. W. 1062. That the guard rail was down on the side on which plaintiff was struck by a trolly post is not per se negligent. Bridges v. Jackson El. R., Light & Power Co. [Miss.] 38 So. 788. Whether open car with seats projecting beyond floor is negligent as to children held question for jury. Northern Texas Tract. Co. v. Roye [Tex. Civ. App.] 86 S. W. 621. Not absolutely bound to furnish safe seats. Boyles v. Texas & P. R. Co. [Tex. Civ. App.] 86 S. W. 936. Injury by defective door fastening allowing door to slam on passenger. Texas & P. R. Co. v. Leakey [Tex. Civ. App.] 13 Tex. Ct. Rep. 496, 87 S. W. 1168.

88. Leaving an open space between the platforms of cars made necessary by curves in the road, and allowing passengers to pass from car to car at stations without warning of the space is not negligent. Welch v. Boston El. R. Co., 187 Mass. 67, 72 N. E. 500; Falkins v. Boston El. R. Co. [Mass.] 74 N. E. 338.

89. Negligence held shown by fact that coupler had previously come apart and safety chains were thrown off to expedite business. Williams v. Spokane Falls & N. R. Co. [Wash.] 80 P. 1100.

90. Leaving a space of three inches between the door sill of an elevated railway car and the station platform is not negligent construction where the sway of the car in motion is from one to five inches. Willworth v. Boston El. R. Co. [Mass.] 74 N. E. 333. That a vestibule door intended to be closed was open because of a defect which inspection would have disclosed is negligence. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689. Negligence in the running of an interurban car at a high rate of speed; care required of company to avoid the use of cracked or imperfect wheels. Cleveland & S. W. Tract. Co. v. Ward, 6 Ohio C. C. (N. S.) 385.

91. Leaving the entrance to an elevator shaft unguarded is negligent. Morgan v. Saks [Ala.] 38 So. 848. It is not negligent for the owner of a passenger elevator to allow a movable stool to remain therein for the convenience of the operator. Gibson v. International Trust Co., 186 Mass. 454, 72 N. E. 70.

92. Jackson v. Natchez & W. R. Co. [La.] 38 So. 701.

93. See 3 C. L. 634.

94. Screen law held not complied with. Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629.

95. Chesapeake & O. R. Co. v. Com. [Ky.] 84 S. W. 566. Failure to provide sufficient accommodations so that white passengers were compelled to ride in compartment for colored passengers is not a violation of Ky. St. 1903, § 795. Commonwealth v. Louisville & N. R. Co. [Ky.] 87 S. W. 262.

96. Chesapeake & O. R. Co. v. Com. [Ky.] 84 S. W. 566.

97. See 3 C. L. 634.

98. The violation of any statutory or valid municipal regulations established for

in the presence of danger,[99] must be exercised. High speed, when accompanied by other dangerous conditions,[1] and unnecessary and unusual jerks and bumps,[2] on cars and trains other than freight and mixed trains,[3] are negligent. The overcrowding of cars [4] and station platforms [5] may of itself be negligence, and overcrowding always imposes on the carrier a higher degree of care in the operation of its trains.[6] Running a car or train past a station platform where passengers are waiting,[7] or past another car or train where passengers are alighting,[8] may be

the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain an action if the other elements of actionable negligence concur. Lincoln Tract. Co. v. Heller [Neb.] 100 N. W. 197. Injury to passenger by careless coupling of cars on another train. Kansas City, etc., R. Co. v. Nichols [Miss.] 38 So. 371. Where a street car approaches a crossing protected by a derailing switch, there is no negligence in the mere act of the conductor going ahead to operate the switch. Camden & S. R. Co. v. Rice [C. C. A.] 137 F. 326.

99. That the motorman was obliged to act quickly and without a chance for deliberation is to be considered. Tozier v. Haverhill & A. St. R. Co., 187 Mass. 179, 72 N. E. 953. To charge a motorman with negligence it must appear that he had notice of the agency which caused the injury, or contributed thereto, long enough to enable him to form an intelligent opinion as to how the injury might be avoided and apply the means. Team unexpectedly shying towards car. North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110.

1. A carrier must be held to know of the existence of a reverse curve which is a part of the permanent construction of its road and also of the violence of the lurch of a passenger coach caused by passing over it at a high speed. Chicago, etc., R. Co. v. Newell, 113 Ill. App. 263, afd. 212 Ill. 332, 72 N. E. 416. In order that a street car company be held responsible for injuries to a passenger on the ground that it was running its car at an unlawful speed, the speed must have contributed to the injury. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408.

2. Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536. Stopping a car so suddenly as to hurl a passenger from the car is plainly negligent. Glassberg v. Interurban St. R. Co., 92 N. Y. S. 731. Sudden stop throwing passenger from his seat is actionable. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. Jerk of car held to authorize submission to jury. Sheeron v. Coney Island & B. R. Co., 89 App. Div. 338, 85 N. Y. S. 958. That the car stopped on signal with a sudden jerk, throwing plaintiff who had left his seat and was standing on the running board, no negligence of the carrier is shown, there being nothing to show what caused the jerk. Conroy v. Detroit United R. Co. [Mich.] 102 N. W. 641, rehearing denied, 104 N. W. 319. Where an injury is referred to the sudden movement of a car, its actual management, not the resultant effects, should determine the question of the carrier's negligence. Faul v. North Jersey St. R. Co., 70 N. J. Law, 795, 59 A. 148. Fight on street car does not justify a stop so sudden as to disable motive power of car and injure passengers. Willis v. St. Joseph R. Light, Heat & Power Co. [Mo. App.] 86 S. W. 567.

3. One traveling on freight train assumes risk of jerks and jolts. Young v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 175.

4. Negligence where train is so crowded as to necessitate standing on platform is for jury. Kohm v. Interborough Rapid Transit Co., 93 N. Y. S. 671.

5. A common carrier engaged in a great city, in the transportation of a large number of passengers between stations from which it can control their admission to its trains, is bound to exercise care to so direct the movements and disposition of those whom it undertakes to transport as to preserve their safety. Kohm v. Interborough Rapid Transit Co., 93 N. Y. S. 671. Carriers are bound to exercise reasonable care so as to regulate the movements and disposition of those whom they undertake to transport as to preserve the safety of all. Allowing passenger to enter car through window to injury of another. Grogan v. Brooklyn Heights R. Co., 97 App. Div. 413, 89 N. Y. S. 1027.

6. Where the carrier knows of the overcrowded condition of its train before it leaves the station, it is its duty to exercise additional care commensurate with the dangers and perils caused by such overcrowded condition. Chicago, etc., R. Co. v. Newell, 113 Ill. App. 263, afd. 212 Ill. 332, 72 N. E. 416. Though it is not negligent per se for a street car company to fail to furnish seats for all its passengers, when it permits its cars to be crowded with standing passengers, it owes them the duty of greater care than when all are seated. Halverson v. Seattle Elec. Co., 35 Wash. 600, 77 P. 1058.

7. To run a freight train between a passenger train and the station is as to passengers awaiting to board the passenger train negligent. Atchison, etc., R. Co. v. Holloway [Kan.] 80 P. 31. Whether a railway company was negligent in running its car at a high speed past the point where passengers were waiting between parallel tracks to take a car bound in the opposite direction is a question for the jury. Chunn v. City & S. R. Co., 23 App. D. C. 551.

8. Negligence of street car company and plaintiff's contributory negligence held properly for jury where plaintiff was run down by car going in opposite direction after he had alighted to transfer to car on intersecting street. Craven v. International R. Co., 100 App. Div. 157, 91 N. Y. S. 625. An ordinance prohibiting a moving car from passing a standing one applies, though the standing car has stopped before crossing a street. Id.

negligent. Passengers are entitled to warning of dangers unknown to them but known to the carrier's servants.[9] Reasonable regulations of the conduct of passengers may be adopted.[10]

§ 29. *The duty to protect passengers*[11] *renders a carrier liable for an assault,*[12] an unintentional injury,[13] a malicious arrest,[14] or an injury to feelings because of insulting language[15] by a conductor,[16] other employe,[17] fellow-passengers,[18] and strangers;[19] but not for injury to reputation resulting therefrom,[20] and not if the assault was brought on by the passenger's own acts,[21] or was entirely beyond the

9. Failure to warn an intoxicated passenger of the danger of going out on the platform of a car when the servant of the carrier knows of his purpose is negligence, warranting a recovery for injuries from being thrown from the platform. Fox v. Michigan Cent. R. Co. [Mich.] 101 N. W. 624. Advice by the ticket agent to a belated passenger to get aboard a moving train is not an intentional wrong so as to entitle him to punitive damages for a resulting injury. Pickett v. Southern R. Co., 69 S. E. 445, 48 S. E. 466. Where passengers are invited either expressly or impliedly to get off a train at a place other than that at which they usually alight, and there is any special danger attending their approach to the station, it is the duty of the railway company to warn them of such danger and to aid them in reaching the station in safety; especially is this true in the night-time. Chesapeake & O. R. Co. v. Smith, 103 Va. 326, 49 S. E. 487; Chesapeake & O. R. Co. v. Harris, 103 Va. 326, 49 S. E. 997. Where the conductor tells a passenger to pass through the car to find a seat, it is his duty to warn the passenger as to the existence of a nearby curve or to so control the car as to obviate the danger. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819.

10. Where the seats are all occupied and a passenger is standing on the floor of the car in front of another passenger, the conductor has no right to compel him to take his place in front of some other passenger. Guariello v. Union R. Co., 94 N. Y. S. 538.

11. See 3 C. L. 636.

12. Houston, etc., R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902; Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560. Steamboat owner is liable for assault by captain and threats to arrest for attempting to defraud. Levidow v. Starin [Conn.] 60 A. 123. Evidence held insufficient to support verdict for plaintiff based on assault by conductor. Guariello v. Union R. Co., 94 N. Y. S. 538. Duty exists until passenger has safely alighted. Conductor followed passenger off car. O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939.

13. The carrier is responsible for an injury to a passenger caused by the conductor falling against him irrespective of the conductor's competency or the carrier's notice thereof. Spinney v. Boston El. R. Co. [Mass.] 73 N. E. 1021.

14. Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303. A carrier is not required to make active resistance to an officer who is attempting to arrest a passenger or to inquire into his authority, but must not voluntarily assist an unlawful arrest. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135.

15. Passenger asked for change. Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857. Threats to arrest. Levidow v. Starin [Conn.] 60 A. 123. Insulting language by conductor. Georgia R. & Elec. Co. v. Baker, 120 Ga. 991, 48 S. E. 355. Refusal to accept transfer and resistance to passenger's efforts to leave car. Five hundred dollars punitive and $25 compensatory damages held not excessive. Mueller v. St. Louis Transit Co., 108 Mo. App. 325, 83 S. W. 270. Whether carrier was negligent in expelling woman and children from sleeping car and exposing them to insults of drunken men on car platform held question for jury. Cincinnati, etc., R. Co. v. Taylor [Ky.] 85 S. W. 168.

16. The conductor of a palace car, though the servant of the company owning the car, is also the agent of the carrier in his relations to passengers. Blake v. Kansas City So. R. Co. [Tex. Civ. App.] 85 S. W. 430.

17. Brakeman. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175.

18. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175. Fellow-passenger. Stutsky v. Brooklyn Heights R. Co., 94 N. Y. S. 433. Immaterial that no physical injury appears. Plaintiff was insulted and driven from train at point of pistol. International, etc., R. Co. v. Henderson [Tex. Civ. App.] 82 S. W. 1065. Carrier is liable for allowing profane and indecent language by drunken passengers in presence of ladies. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 84 S. W. 270. Passengers shooting and exploding dynamite unrestrained by carrier. Nashville, etc., R. Co. v. Flake [Tenn.] 88 S. W. 326.

19. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175. A railroad company is not liable to one of its passengers for an injury received while waiting for his train, by the carelessness of an employe of another company using the same station. Miller v. West Jersey & S. R. Co. [N. J. Law] 59 A. 13. A carrier is not liable for injury to a passenger at the hands of a mob where it has no reason to expect injury from that source. Bosworth v. Union R. Co. [R. I.] 58 A. 982.

20. Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857.

21. Houston, etc., R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939. A passenger who voluntarily and without cause interferes between another passenger and the carrier's servant cannot recover from the carrier for injuries received at the hands of the servant. Gardner v. Interborough Rapid Transit Co., 45 Misc. 424, 90 N. Y. S. 373. Evidence held

scope of the employe inflicting it.[22] A carrier is not responsible for the act of a passenger which it had no opportunity to anticipate and prevent.[23] A passenger directed by the porter to ride in the smoker on entering the train and not requesting any other seat cannot recover for sickness caused thereby.[24]

§ 30. *Taking up or setting down passengers.*[25]—A carrier is bound to exercise the greatest care consistent with the operation of its cars towards its passengers, not only while they are on the cars but while they are in the act of boarding them.[26] Trains must stop a sufficient time to allow passengers to board with safety,[27] considering their age and physical infirmity,[28] including all who are reasonably supposed to be passengers;[29] but a carrier owes no duty to hold its train for a belated passenger,[30] and there is no negligence in starting after all are safely on except late comers and those as to whom there is no notice of intention to board.[31] Slowing a car in obedience to a signal may be an invitation to board.[32] Passengers must board the train within a reasonable time after it stops at the station.[33] Persons boarding a train to assist passengers are not entitled to the protection accorded passengers.[34] In New York it is provided that no train on an elevated rail-

to require submission to jury whether plaintiff or employe was aggressor. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175.

22. O'Brien v. St. Louis Transit Co. 185 Mo. 263, 84 S. W. 939. An assault on a passenger by a conductor after the relation has ceased to exist and while the conductor is not in the performance of his duty as such is not chargeable to the carrier. Plaintiff followed conductor to company's office in dispute over change. Reilly v. New York City R. Co., 91 N. Y. S. 319. Baggage agent assisting officer to make unlawful arrest of passenger as he was about to enter train renders the company liable, though not about the company's business. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135. Conductor following passenger off car during fight. Passenger held still entitled to protection. Flynn v. St. Louis Transit Co. [Mo. App.] 87 S. W. 560.

23. Drunken passenger cut off rear car and another was injured by concussion when parts of train came together. Texas & P. R. Co. v. Storey [Tex. Civ. App.] 83 S. W. 852.

24. Brezewitz v. St. Louis, etc., R. Co. [Ark.] 87 S. W. 127.

25. See 3 C. L. 637.

26. Motorman inviting passenger to board by front platform owes same degree of care otherwise due. Brake handle slipping and striking passenger. Thompson v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 465.

27. Maggioli v. St. Louis Transit Co., 108 Mo. App. 416, 83 S. W. 1026. If a passenger is thrown from the step or platform of a car by the starting of it before he is safely on, the carrier is liable for the injuries sustained. Hatch v. Philadelphia & R. R. Co. [Pa.] 61 A. 480. Instruction in effect taking negligence and contributory negligence from jury in case where plaintiff was attempting to board a car held erroneous. Ward v. Metropolitan St. R. Co., 99 App. Div. 126, 90 N. Y. S. 897. Starting car before passenger has reached place of safety is negligent. Lehner v. Metropolitan St. R. Co., 110 Mo. App. 215, 85 S. W. 110.

Elevator operator held negligent in starting while plaintiff was entering. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

28. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783.

29. When a street car has been stopped to take on passengers it is the duty of the conductor to see that all are safely on before giving the signal to start. Guenther v. Metropolitan R. Co., 23 App. D. C. 493. Conductor on single track road must look on both sides of the car to see if passengers are about to enter. Redington v. Harrisburg Traction Co. [Pa.] 60 A. 305. It is the duty of a street railway company when stopping its cars for the purpose of receiving passengers to use the highest degree of care to see that those who are intending to take passage thereon have safely boarded the cars before giving the signal to start. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030; Clark v. Durham Traction Co., 138 N. C. 77, 50 S. E. 518.

30. Pickett v. Southern R. Co., Carolina Division, 69 S. C. 445, 48 S. E. 466.

31. If every one reasonably supposed to be a passenger is safely on before a car starts, there is no negligence as to one stepping on the platform just as the train starts who is thrown off and injured. Hatch v. Philadelphia & R. Co. [Pa.] 61 A. 480.

32. Spencer v. St. Louis Transit Co. [Mo. App.] 86 S. W. 593. One injured by an increase of speed in an attempt to board a moving car at a point not the usual stopping place for passengers cannot recover, though the car had slowed up for him, where it does not appear that the motorman had actual notice of his attempt. Nathan v. New York City R. Co., 91 N. Y. S. 35.

33. Instruction held erroneous in repeatedly introducing qualification of plaintiff's condition and circumstances. Gulf, etc., R. Co. v. Condra [Tex. Civ. App.] 82 S. W. 528.

34. Flaherty v. Boston & M. R. Co., 186 Mass. 567, 72 N. E. 66; Georgia, etc., R. Co. v. Hutchins, 121 Ga. 317, 48 S. E. 939. There is no obligation on the part of a railroad to hold its train at a station until every

road shall be permitted to start until every passenger on the platform desiring to enter shall have done so unless due notice is given that the cars are filled.[35]

Setting down.[36]—The carrier's duty extends to setting down its passengers safely at the end of their journey,[37] and for this purpose they should be apprised of approach to their stations,[38] warned of any unexpected or unusual stops,[39] or other dangers in the vicinity of the place where the stop is made,[40] be provided with a safe place to alight,[41] and be given time to alight safely in the use of reasonable diligence and care under the circumstances.[42] Failure to slow down for passengers

person not a passenger leaves it irrespective of the length of the stop. Dunne v. New York, etc., R. Co., 99 App. Div. 571, 91 N. Y. S. 145.

35. Laws 1890, p. 1126, c. 565, § 138. Statute does not create presumption of negligence. Brown v. Manhattan R. Co., 94 N. Y. S. 190. A statute providing that no train on an elevated railroad shall be permitted to start until every passenger on the platform desiring to enter shall have done so unless due notice shall have been given that the cars are filled cannot be construed to require the opening of the gates after they have once been closed and the signal to start given, though persons come upon the platform desiring to board. N. Y. Laws 1890, p. 1126, c. 565, § 138. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 54.

36. See 3 C. L. 638.

37. O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939. Care imposed while passenger is alighting is of the same lofty degree as that imposed while he is in transit. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108. The conductor of a street car should know before starting whether all passengers alighting have safely done so. Union Traction Co. v. Siceloff [Ind. App.] 72 N. E. 266. The duty of a carrier to passengers alighting at terminal stations is the same as at intermediate stations. Farr v. Philadelphia & R. R. Co., 24 Pa. Super. Ct. 332. That the injuries would not have been sustained by a younger person or one of less weight does not absolve defendant. Staines v. Central R. Co. [N. J. Err. & App.] 61 A. 385. It is not negligence to ask passengers leaving an elevated railway car to move quickly. Willworth v. Boston El. R. Co. [Mass.] 74 N. E. 333. Failure to take measures to prevent crowding of passengers on leaving car held not negligent. Id. Failure to let down movable step causing plaintiff to fall is negligent. Hutchels v. Cedar Rapids & M. C. R. Co. [Iowa] 103 N. W. 779. Equal care is required in affording safe place to alight as in carriage. Harvey v. Chicago & A. R. Co., 116 Ill. App. 507.

38. Sleeping car company where a common carrier must notify passenger of arrival soon enough to afford sufficient time to alight. Pullman Co. v. Kelly [Miss.] 38 So. 317. It is not the duty of the carrier to awaken a sleeping passenger in order to advise him that the train has arrived at his destination. Fanning v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 354. Whether or not the station was announced is immaterial to him. Seaboard Air Line R. Co. v. Rainey [Ga.] 50 S. E. 88.

39. Passenger may get off at stop after station called in absence of notice. Davis v. Kansas City Southern R. Co. [Ark.] 86 S. W. 995.

40. Failure to stop at regular platform causing plaintiff to fall over unplanted rails at night held negligent. Hancock v. New York Cent., etc., R. Co., 100 App. Div. 161, 91 N. Y. S. 601. Should be warned of ditch so nearly covered by water as to be indistinguishable. MacDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001. Failure to warn passenger getting off caboose standing on bridge, negligence question for jury. Cruseturner v. International & G. N. R. Co. [Tex. Civ. App.] 86 S. W. 778.

41. Senf v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 887. A street railway company discharging passengers on its own private right of way is bound to the same degree of care in providing a safe place to alight that other railways are. Topp v. United R. & Elec. Co., 99 Md. 630, 59 A. 52. To require a woman to jump from a flat car is negligent. West v. St. Louis & S. W. R. Co. [Mo.] 86 S. W. 140. Stopping where pavement is rough is not necessarily negligent. Murnahan v. Cincinnati, etc., R. Co. [Ky.] 86 S. W. 688.

42. Where plaintiff was detained in water closet, question of liability is for jury. Farr v. Philadelphia & R. R. Co., 24 Pa. Super. Ct. 332. Insufficient time to alight. Elwood v. Connecticut R. & Lighting Co. [Conn.] 58 A. 751; San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445; Gress v. Missouri P. R. Co. [Mo. App.] 84 S. W. 122; Olson v. Chicago, etc., R. Co. [Minn.] 102 N. W. 449; Young v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 175; Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984. Plaintiff, an old woman, urged to hurry and to jump by conductor. Staines v. Central R. Co. [N. J. Err. & App.] 61 A. 385. When a street car is stopped under circumstances which justify a passenger in believing that he is invited to alight, the conductor must not start the car while the passengers are in the act of alighting. Selby v. Detroit R. Co. [Mich.] 12 Det. Leg. N. 382, 104 N. W. 376. Evidence held insufficient to justify recovery for failure to give infirm passenger time to alight at station and subsequent putting off between stations. Southern R. Co. v. Hobbs, 121 Ga. 428, 49 S. E. 294. Company failing to stop on signal of passenger wishing to alight held negligent. Dallas Rapid Transit Co. v. Payne [Tex.] 82 S. W. 649. A reasonable time is such as one of ordinary care under the circumstances should be allowed to take. Barringer v. St. Louis, etc., R. Co.

to alight as agreed may charge the carrier with liability for injuries in alighting from a train moving too rapidly.[43] Whether the acts and conduct of the carrier's servants amount to an invitation to alight is generally a question of fact rather than of law.[44] It is the passenger's duty to alight with reasonable promptness,[45] and to exercise ordinary care in so doing;[46] but failure to alight does not render him a trespasser.[47] An ordinance requiring street cars to stop on the far side of the crossing is not available to show negligence of a passenger who attempts to alight at a point where the car has customarily stopped to receive and discharge passengers.[48]

§ 31. *Duty to persons other than passengers.*[49]—These usually fall within the category of employes,[50] or licensees, trespassers, and strangers.[51] A person boarding a train to assist a passenger is not entitled to the protection due a passenger,[52] but if the carrier suffers such a person to enter a car it owes him ordinary care until he leaves it.[53] For such a person to attempt to leave the car while in motion is negligence which will prevent recovery if it contributed to his injury.[54] To a person allowed to ride on a construction train gratuitously,[55] and to persons not passengers on its station platform, a carrier owes only ordinary care,[56] but owes

[Ark.] 85 S. W. 94. Where conductor was on rear platform taking a drink with friends and gave signal to start when they left without regard to other passengers, carrier was negligent. St. Louis S. W. R. Co. v. Turner [Tex. Civ. App.] 84 S. W. 1094. Motorman operating car alone held not negligent in starting before plaintiff was safely off. Cramer v. Springfield Traction Co. [Mo. App.] 87 S. W. 24. Reasonable time to alight is not sufficient. Carrier must see that no passenger is in a dangerous position before starting. Little Rock Traction & Elec. Co. v. Kimbro [Ark.] 87 S. W. 121. Instruction held not objectionable as making carrier an insurer. St. Louis S. W. R. Co. v. Martin [Tex. Civ. App.] 87 S. W. 387. Unusual jerk of freight train resulting in injuries to passenger alighting on invitation held actionable. Young v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 767.

43. St. Louis & S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 265, rvd. 86 S. W. 923.

44. Car in motion. Elwood v. Connecticut R. & Lighting Co. [Conn.] 58 A. 751.

45. Fanning v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 354. Where plaintiff was the last passenger and all others had left the station platform, question is for jury. Philadelphia, B. & W. R. Co. v. Hand [Md.] 61 A. 285. A passenger thrown by the car stopping suddenly in response to a call for the emergency stop after a sufficient regular stop had been made cannot recover. St. Louis Transit Co. v. Thompson [C. C. A.] 137 F. 713. It is negligent to start a car while the conductor knows, or should know, that a passenger is alighting whether it has stopped long enough for him to alight in the exercise of reasonable diligence or not. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346. If train has stopped a reasonable time carrier is not negligent in starting unless he has notice of passenger's danger. St. Louis S. W. R. Co. v. Haynes [Tex. Civ. App.] 86 S. W. 934.

46. Johnson v. Yonkers R. Co., 101 App. Div. 65, 91 N. Y. S. 508.

47. Fanning v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 354.

48. Franklin v. St. Louis & M. R. Co. [Mo.] 87 S. W. 930.

49. See 3 C. L. 641.

50. See Master and Servant, 4 C. L. 533. Consult ante, § 322.

51. See Railroads, 4 C. L. 1181; Street Railways, 4 C. L. 1556.

52. Dunne v. New York, etc., R. Co., 99 App. Div. 571, 91 N. Y. S. 145; Flaherty v. Boston & M. R. Co., 186 Mass. 567, 72 N. E. 66. Carrier is not required to wait until he alights or give him notice of intention to start. Georgia, C. & N. R. Co. v. Hutchins, 121 Ga. 317, 48 S. E. 939.

53. Dunne v. New York, etc., R. Co., 91 App. Div. 571, 91 N. Y. S. 145.

54. Georgia, C. & N. R. Co. v. Hutchins, 121 Ga. 317, 48 S. E. 939; Flaherty v. Boston & M. R. Co., 181 Mass. 567, 72 N. E. 660. Failure of railroad employes to assist a mother in placing her children on the train if negligent was too remote to create liability on its part for injury to her from leaving the train while in motion. Flaherty v. Boston & M. R. Co., 186 Mass. 567, 72 N. E. 66. That a railroad's servant saw a passenger's escort walking towards the platform did not make it negligent for him to give the starting signal before the escort could alight. Dunne v. New York, etc., R. Co., 99 App. Div. 571, 91 N. Y. S. 145.

55. Pennsylvania Co. v. Coyer, 163 Ind. 631, 72 N. E. 875, citing many cases. Where an employe of a contractor has notice of a rule of a railroad company prohibiting the employes of his master from riding on its trains, the habitual disregard of such rule by the employes and the trainmen in charge of trains will not render the railroad company liable for an injury to the employe in the absence of proof of knowledge and acquiescence by the company of the disregard of its rule. Id.

56. Fremont, etc., R. Co. v. Hagblad [Neb.] 101 N. W. 1033. A railroad company station to receive a friend or guest upon arrival ordinary care for his safety while at the station and is liable for an inpany owes to one who comes to its passen-

no duty to a trespasser on one of its trains, except that of refraining from willful and wanton injury.[57] In removing a trespasser from a train the employes in charge thereof may use such force as is reasonably necessary to effect their purpose,[58] the company being liable for the conduct of its conductor in cursing and abusing him.[59]

§ 32. *Remedies and procedure.*[60]—The measure of damages differing in no respect from that in other personal injury cases is elsewhere treated.[61] The notice of injury required by the statutes of Wisconsin cannot be waived by acts of the claim agent of the railroad.[62]

Pleading.[63]—The plaintiff's statement of his case must show that he was a passenger,[64] that defendant was negligent,[65] and that that negligence was the proximate cause of his injury.[66] Matters going merely in aggravation or extenuation, and having effect to enhance or diminish the damages need not be pleaded.[67] If it appears therefrom that plaintiff's own negligence contributed to his injury, the pleading is bad.[68] Averment of inconsistent grounds of negligence presents an election.[69] That plaintiff was traveling on a pass under which he released defendant from responsibility for injuries must be specially pleaded.[70]

jury resulting from the negligence of an employe in the handling of baggage. Atlantic & B. R. Co. v. Owens [Ga.] 51 S. E. 404.

57. Chicago & G. T. R. Co. v. McDonough, 112 Ill. App. 315; Strong v. North Chicago St. R. Co., 116 Ill. App. 246.

58. Degree of force used in case of resistance should not be weighed with too much nicety. Clark v. Great Northern R. Co. [Wash.] 79 P. 1108.

59. Alabama & V. R. Co. v. Livingston, 84 Miss. 1, 36 So. 256.

60. See 3 C. L. 649.

61. See Damages, 3 C. L. 997.

62. Rev. St. 1898, § 4222, subd. 5. Smith v. Chicago, etc., R. Co. [Wis.] 102 N. W. 336.

63. See 3 C. L. 649.

64. An averment that plaintiff was "then and there invited to become a passenger" is a mere conclusion of the pleader from inadequate or undisclosed facts and is bad on demurrer. Kennedy v. North Jersey St. R. Co. [N. J. Law] 60 A. 40. It is not necessary to allege payment of fare by the passenger to the carrier in order to show the relation. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234. A mere averment that plaintiff was a passenger where that is in issue is to plead a conclusion. Fremont, etc., R. Co. v. Hagblad [Neb.] 101 N. W. 1033. Complaint claiming status of passenger by reason of transfer held subject to motion to make more specific Ruebsam v. St. Louis Transit Co., 108 Mo. App. 437, 83 S. W. 984. Where the petition alleges payment of fare, an amendment alleging the tender of a transfer does not set up a new case. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170.

65. Complaint charging negligence in causing plaintiff to fall from car while gence held sufficient. Birmingham R., Light & Power Co. v. Lindsey, 140 Ala. 312, 37 So. 289. Averment of defendant's negligence held sufficient. Birmingham R., Light Power Co. v. Glover [Ala.] 38 So. 836. Complaint stating injury from concussion of cars held good. Kansas City, etc., R. Co. v. Butler [Ala.] 38 So. 1024. Petition counting on negligence in starting while plaintiff was alighting held good. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108. General allegations as to negligence permitting collision are sufficient. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627. Petition for negligent starting of car held sufficient though failing to allege that plaintiff informed motorman of her purpose to alight. Cramer v. Springfield Trac. Co. [Mo. App.] 87 S. W. 24.

66. Allegation that defendant ran its car at a dangerously high rate of speed into a switch, off the track and against a pole throwing plaintiff down, etc., shows that defendant's negligence was the proximate cause of injury. Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201. Averment held sufficient to permit recovery on theory that speed of train caused plaintiff to fall from platform. Morgan v. Lake Shore & M. S. R. Co. [Mich.] 101 N. W. 836. Petition alleging injury from jolt, jar, or shock resulting in miscarriage, held good. Rapid Transit R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 788. Allegations in complaint for injury by fall of elevator held sufficient to show causal connection between negligence and injury. Alexander v. McGaffey [Tex. Civ. App.] 88 S. W. 462.

67. Insulting language of conductor calling forth similar language from passenger relied on as justification for assault. Houston & T. C. R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902.

68. A complaint is not demurrable merely because it states facts from which an inference of contributory negligence may be drawn, but only in case no other inference is possible. Cooper v. Atlantic Coast Line R. Co., 69 S. C. 479, 48 S. E. 458. Petition held not demurrable, though alleging that train was in motion when plaintiff attempted to alight. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445.

69. Starting without sufficient time to alight and allowing passenger to alight while car was in motion in violation of city ordinance. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346. Complaint alleging negligence in starting while plaintiff

Issues, proof and variance.[71]—As in other cases all substantial and necessary averments in the complaint must be proved,[72] in substantial conformity to the allegations, and evidence not so conforming is inadmissible,[73] though slight variances are disregarded.[74] Recovery cannot be had on a theory substantially different from that set up in the pleadings.[75]

Presumptions and burden of proof.[76]—Accident to the means of transportation,[77] resulting in injury to a passenger,[78] of itself raises a presumption of negligence on the part of the carrier[79] sufficient to warrant recovery of damages, unless refuted by evidence on behalf of the company showing that the accident was not

was alighting and allowing her to leave car while in motion contrary to ordinance is double. McHugh v. St. Louis Transit Co. [Mo.] 88 S. W. 853.

70. Yazoo & M. V. R. Co. v. Grant [Miss.] 38 So. 502.

71. See 3 C. L. 650.

72. An allegation that plaintiff's intestate, killed while riding in the private conveyance of another, was a passenger therein for hire, is an essential part of plaintiff's case and must be proved. Lydon v. Robert Smith Ale Brewing Co., 133 F. 830. A complaint charging that plaintiff was injured by the starting of defendant's street car while he was boarding it and before he had an opportunity to reach a place of safety thereon does not require proof that the car started with more than ordinary violence. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. S. 43.

73. An allegation of the duty of exercising due care to transport safely is broad enough to raise the issue whether sufficient care was exercised in giving passengers opportunity to alight. Camden & S. R. Co. v. Rice [C. C. A.] 137 F. 326.

74. A variance between petition and proof as to whether a street car had come to a full stop at the time an accident occurred, whereby plaintiff was injured in alighting from a car, or stopped three feet further on, is too slight to be prejudicial. Toledo R. & L. Co. v. Ketrow, 5 Ohio C. C. (N. S.) 254. Variance held immaterial. Cars colliding with wagons. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103. Whether car started with jerk as plaintiff was boarding. Lehner v. Metropolitan St. R. Co., 110 Mo. App. 215, 85 S. W. 110. Count charging failure of flagman to give proper signals to avoid collision is not variant from proof that he signaled both cars ahead at the same time causing the collision. Taylor v. Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873. Where the gravamen of the charge is stopping at unsafe place, an allegation that the ground was lower than the car and proof that it was higher than the car floor is immaterial. Senf v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 887.

75. A passenger injured by the car platform on which he was standing colliding with a baggage truck belonging to another carrier cannot recover against the owner of the truck on a mere allegation of duty on his carrier's part to carry him safely. Fletcher v. Boston & M. R. Co. [Mass.] 73 N. E. 552. Petition counting on sudden start while plaintiff was alighting will not support recovery on proof that plaintiff alighted from slowly moving train. Bond v. Chicago, B. & Q. R. Co. [Mo. App.] 84 S. W. 124.

76. See 3 C. L. 650.

77. Explosion in controller of car causing panic. Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410. Derailment of train. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609; St. Louis S. W. R. Co. v. Harkey [Tex. Civ. App.] 88 S. W. 506. Derailment of car. Cheetham v. Union R. Co. [R. I.] 58 A. 881. Derailment of car in passing over switch. Minahan v. Grand Trunk Western R. Co. [C. C. A.] 138 F. 37. Collision between street car and wagon. Rodman v. North Jersey St. R. Co. [N. J. Law] 58 A. 1095. Wagon slewing by getting into track of cross over. Walsh v. North Jersey St. R. Co. [N. J. Err. & App.] 60 A. 335. Displacement of switch. Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. S. 864. Falling of poles or wires on car. Stern v. Westchester Elec. R. Co., 90 N. Y. S. 870. Fire in car causing its sudden stoppage. Glassberg v. Interurban St. R. Co., 92 N. Y. S. 731. Collapse of bridge. Jackson v. Natchez & W. R. Co. [La.] 38 So. 701. Locomotive boiler explosion. Kelly v. Chicago & A. R. Co. [Mo. App.] 87 S. W. 583. Swinging open of gate on street car platform allowing plaintiff to fall through while car was in motion. Aston v. St. Louis Transit Co., 105 Mo. App. 226, 79 S. W. 999. Collision of trains. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627; Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671. Unexplained slipping of brake causing handle to strike passenger creates liability. Thompson v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 465. Evidence of explosion in car and injury to passenger thereby held to raise presumption of negligence. Chicago Union Traction Co. v. Newmiller, 116 Ill. App. 625.

78. An accident to a passenger being shown, negligence of the carrier is presumed. Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Williams v. Spokane Falls & N. R. Co. [Wash.] 80 P. 1100, citing cases. Passenger injured in attempt to escape in panic from explosion in controller. Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410.

79. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197; Id. [Neb.] 102 N. W. 262; Lincoln Traction Co. v. Webb [Neb.] 102 N. W. 258. Not so where runaway horse collides with car. Munzer v. Interurban St. R. Co., 45 Misc. 568, 91 N. Y. S. 21. Passenger receiving shock from controller box on electric car. South Covington & C. St. R. Co. v. Smith [Ky.] 86 S. W. 970.

caused by the negligence of itself or its employes.[80] This rule is applied with caution,[81] and never from the mere fact of injury.[82] Mere presence in a conveyance does not necessarily raise the presumption that the person present is a passenger,[83] and a caretaker of stock riding in the stock car rather than the caboose has the burden of showing that he was justified in riding where he did.[84] Contributory negligence may appear from plaintiff's case.[85]

Admissibility of evidence [86] is governed by the rules applicable to other cases.[87]

80. Proof that derailment was caused by cow on track does not absolve. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609. Interference of strikers with track held sufficiently shown to rebut presumption. Cheetham v. Union R. Co. [R. I.] 58 A. 881. Explanation of cause of explosions under electric car held to call for instructions on burden of proof. Lynch v. Metropolitan St. R. Co., 90 N. Y. S. 378. Presumption is rebutted by showing that derailment was caused by stones being thrown at car which got on rails. Swigelsky v. Interurban St. R. Co., 91 N. Y. S. 350. This presumption does not change the burden of proof which rests upon the plaintiff throughout. Maher v. Metropolitan St. R. Co., 102 App. Div. 517, 92 N. Y. S. 825; Patterson v. San Francisco, etc., R. Co. [Cal.] 81 P. 531. Statutes so providing are merely declaratory of common law. Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979. Where defendant admits the relation of carrier and passenger and the fact of collision, it assumes the burden of disproving negligence. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671. Where sudden stop was caused by a bolt or pin getting into the rail which was taken away by defendant's operatives, the burden is on it to show how the obstruction got there. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. An assault on the conductor by a passenger, if not the operation of a cause beyond the control of the carrier, does not excuse a stop so sudden as to throw passengers from their seats. Willis v. St. Joseph R., Light, Heat & Power Co. [Mo. App.] 86 S. W. 567.

81. And only where there is an absence of positive proof of any definite act of negligcnce, or want of skill, though the accident itself is of an unusual and extraordinary character and one not likely to occur without such cause. Kight v. Metropolitan R. Co., 21 App. D. C. 494.

82. Res ipsa loquitur does not apply where injury arises from attempt to alight from car. Blake v. Camden Interstate R. Co. [W. Va.] 50 S. E. 408. Applies to injury by conductor. Kohner v. Capital Traction Co., 22 App. D. C. 181. Does not arise where the accident might as plausibly have resulted from passenger's negligence; nor is it applicable to the death of a passenger from circumstances personal and peculiar to him and not by reason of any management of or accident to the train itself. Price v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 575. The mere fact that a passenger was injured does not of itself raise a presumption of negligence on the part of the carrier. Man standing on platform thrown off as car passed switch. State v. United R. & Elec. Co. [Md.] 60 A. 249. Passenger thrown in attempt to alight. Lincoln Traction Co. v. Webb [Neb.] 102 N. W. 258; Lincoln Traction Co. v. Heller [Neb.] 102 N. W. 262. It is not the injury but the manner and circumstances of it that justify the application of the doctrine. Kohner v. Capital Traction Co., 22 App. D. C. 181. Collision between street car and wagon. Fagan v. Rhode Island Co. [R. I.] 60 A. 672. Rule does not apply where horse ran into car from rear on its stopping. Grant v. Mearopolitan St. R. Co., 99 App. Div. 422, 91 N. Y. S. 202. In Arkansas proof of injury by a railroad train makes a prima facie case against the company operating the train. Barringer v. St. Louis, etc., R. Co. [Ark.] 85 S. W. 94. Where it appears that the proximate cause of the accident was in part the negligence of a third person, no presumption of carrier's negligence arises. Loehner v. North Chicago St. R. Co. & Chicago Union Traction Co., 116 Ill. App. 365.

83. Railroad train. Pennsylvania Co. v. Coyer, 163 Ind. 631, 72 N. E. 875. There is no presumption that a person riding in a private vehicle of another is a passenger for hire as would be the case were he in the public conveyance of a common carrier. Lydon v. Robert Smith Ale Brewing Co., 133 F. 830.

84. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014.

85. Philadelphia, B. & W. R. Co. v. Hand [Md.] 61 A. 285; Bridges v. Jackson Elec. R. L. & P. Co. [Miss.] 38 So. 788.

86. See 3 C. L. 652.

87. Where the injury was caused by collision of a street car with a vehicle, an ordinance giving the street car company the right of way is immaterial. Chicago City R. Co. v. Lannon, 212 Ill. 477, 72 N. E. 585. Where a boy was killed while attempting to board a slowly moving car and defendant claims he was trying to steal a ride, it may be shown he had money to pay his fare. Chicago Union Traction Co. v. Lundahl, 215 Ill. 289, 74 N. E. 155. The number of persons killed in a collision may be shown to show its severity where the claim is that plaintiff was not injured. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627. Plaintiff may state whether acts of brakeman in making room for plaintiff and stating to others that plaintiff wanted to get off influenced him in believing he had arrived at his destination. Long v. Red River T. & S. R. Co. [Tex. Civ. App.] 85 S. W. 1048. Witness cannot state that sometime after the accident he called someone's attention to a defective step, its defects being in issue. Texas Midland R. Co. v. Ellison [Tex. Civ. App.] 87 S. W. 213. Plaintiff having a right to transportation on a way bill cannot prove it by a letter

Sufficiency of evidence.[88]—The presence or absence of due care or other grounds of recovery [90] must be determined from all the facts and circumstances of the particular case and is usually for the jury. Cases in which the sufficiency of the evidence to establish particular grounds of recovery, or to authorize the submission of the question to the jury, has been considered, are grouped in the footnotes.[91] Plaintiff's evidence alone may be sufficient,[92] but not when uncorroborated

press copy. Texas & P. R. Co. v. Lynch [Tex. Civ. App.] 87 S. W. 884.

Subsequent statement of brakeman that he started to slap plaintiff and was sorry he did not do it, held not admissible. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175. Statement of conductor after accident as to what caused it is not admissible either as res gestae or as an admission. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 260. Conversations between plaintiff and defendant's motorman sometime after accident not admissible. Butler v. Detroit, etc., R. Co. [Mich.] 101 N. W. 232.

Opinion whether train stopped long enough to allow passengers to alight held inadmissible. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445. Opinion of roadmaster that running of train over submerged track was not dangerous held inadmissible, opinion not being limited to conditions in issue. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Plaintiff may state that he tried to get between the seats of a crowded car to escape being injured by poles, but could not because of its crowded condition, such statement not being a mere **conclusion.** Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34. Where the issue was whether the motorman and conductor knew or ought to have known car was off track, passengers may state that the noise and motion of the car was unusual. Beers v. West Side R. Co., 101 App. Div. 308, 91 N. Y. S. 957. Conductor may state whether it was duty of brakeman to caution and warn passengers. Long v. Red River T. & S. R. Co. [Tex. Civ. App.] 85 S. W. 1048.

Prior happening of similar accidents within rule of res ipsa loquitur may be shown. Cheetham v. Union R. Co. [R. I.] 58 A. 881.

A custom to allow passengers to ride on running boards may be shown, though there is no claim that the custom was known to the person injured. Stone v. Lewiston, etc., R. Co., 99 Me. 243, 59 A. 56. Where it is claimed that plaintiff attempted to board the car at a point where passengers were not received, he may show defendant's custom to receive passengers there. Gleason v. Metropolitan St. R. Co., 99 App. Div. 209, 90 N. Y. S. 1025.

The contract made between the carrier and passenger may be proved by **parol evidence** aside from the ticket sold. Pennsylvania Co. v. Loftis [Ohio] 74 N. E. 179. It is competent to prove by parol that one who lost his life in a railroad accident had upon his person at the time a ticket entitling him to passage on the train from which he received his injury, though the ticket is not produced. Elgin, J. & E. R. Co. v. Thomas, 115 Ill. App. 508, afd. 215 Ill. 158, 74 N. E. 109.

Reports made by conductors and motormen of accidents occurring along the line made to the claim agent of a street railway company are **not privileged** and must be produced under a duces tecum issued in an action growing out of such an accident. Ex parte J. H. Schoepf, 3 Ohio N. P. (N. S.) 93, 16 Ohio Dec. N. P. 17.

88. See 3 C. L. 653.

89. Evidence that the car was started as plaintiff was boarding and that he was thrown down justifies an inference of negligence. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. S. 43. Negligence of ferry hands in failing to block wheels of wagon going up drop held for jury. Townsend v. Boston, 187 Mass. 283, 72 N. E. 991.

90. Evidence held insufficient to show that plaintiff was kicked from defendant's train by a brakeman. Murphy v. New York, etc., R. Co., 101 App. Div. 610, 92 N. Y. S. 192. Where a train porter wrongfully took plaintiff's bag and took her money and ticket from it which was not returned, she was entitled to go to the jury, regardless of the sufficiency of proof as to other injuries. Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171. Whether a motorman claimed to have thrown a newsboy from a car was acting within the scope of his authority is a question for the jury. Barry v. Union R. of N. Y., 94 N. Y. S. 449.

91. Liability where decedent was run down by car on opposite track while alighting. Louisville R. Co. v. Hartman's Adm'r [Ky.] 83 S. W. 570. Evidence held to show that servant of carrier instigated unlawful arrest. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135.

Taking on passengers: Whether passenger transfering struck by another car could recover held for jury. Walger v. Jersey City, etc., R. Co. [N. J. Law] 59 A. 14. Evidence held not to establish that car was moving when plaintiff attempted to board. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351. Plaintiff stepped between platforms passing from one car to another standing at station. Held, no liability. Welch v. Boston El. R. Co., 187 Mass. 118, 72 N. E. 500; Falkins v. Boston El. R. Co. [Mass.] 74 N. E. 338. Recovery sustained where plaintiff on excursion was crowded through glass door. Madden v. New York, etc., R. Co., 98 App. Div. 406, 90 N. Y. S. 261. Weight of evidence held against finding that car was not in motion when plaintiff attempted to board. Koester v. Interurban St. R. Co., 90 N. Y. S. 375; Hanau v. Metropolitan St. R. Co., 92 N. Y. S. 1086. Sudden starting of car as plaintiff was boarding. Held for jury. McKee v. St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013.

Setting down passengers: Evidence held insufficient to support finding that car had stopped when plaintiff attempted to alight. Wager v. Interurban St. R. Co., 90 N. Y. S.

and contradicted by disinterested witness.[93] Physical facts may demonstrate falsity of oral testimony.[94] Positive evidence of the death of a passenger,[95] or its cause, is unnecessary.[96] Ownership by defendant must be proved.[97]

403; Adams v. Metropolitan St. R. Co., 99 App. Div. 621, 90 N. Y. S. 937; Gunther v. Metropolitan St. R. Co., 45 Misc. 117, 91 N. Y. S. 589. Negligence in starting while plaintiff was alighting held for jury. Gordon v. Nassau Elec. R. Co., 93 N. Y. S. 487. Negligence of street railway company using its own right-of-way in failing to provide safe place to alight held shown. Invitation of conductor to alight held shown. Contributory negligence of passenger held not shown. Topp v. United R. & Elec. Co., 99 Md. 630, 59 A. 52. Whether plaintiff was justified in believing he had arrived at his destination and was negligent in alighting from moving train held question for jury. Long v. Red River T. & S. R. Co. [Tex. Civ. App.] 85 S. W. 1048. Evidence held to sustain recovery on theory that plaintiff was thrown from train by jerk and was not injured by slipping on grass after alighting. St. Louis S. W. R. Co. v. Byrne [Ark.] 84 S. W. 469. Evidence held sufficient to show that plaintiff's ticket called for a stop at the station where he was injured in alighting. St. Louis S. W. R. Co. v. Turner [Tex. Civ. App.] 84 S. W. 1094.

Means of transportation: Where trolly wire and pole fell while car was at high speed, resulting in commotion and fright of passengers during which plaintiff either fell or was thrown from car, negligence was for jury. Stern v. Westchester Elec. R. Co., 90 N. Y. S. 870.

Care en route: Evidence held sufficient from which to infer that street car was being propelled at a dangerous speed at night Chicago City R. Co. v. Bennett, 214 Ill. 26, 73 N. E. 343. Evidence held sufficient to go to jury that plaintiff was injured by jolting of car. Murphy v. Interurban St. R. Co., 93 N. Y. S. 728. Evidence held insufficient to show that carrier was responsible for plaintiff's fall from moving train. Box v. Atlantic & B. R. Co., 120 Ga. 1050, 48 S. E. 427. Evidence held sufficient to support theory that car window was broken by collision with another car. Binsbacher v. St. Louis Transit Co., 108 Mo. App. 1, 82 S. W. 546. Evidence held sufficient to show negligence in running train over submerged track. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Negligence of elevator operator held question for jury. Hensler v. Stix [Mo. App.] 88 S. W. 108. Negligence of conductor allowing drunken passenger to go on platform and fall off held question for jury. Price v. St. Louis, I. M. & S. R. Co. [Ark.] 88 S. W. 575.

Contributory negligence: Evidence of admissions of plaintiff held sufficient to require charge on contributory negligence. South Covington & C. St. R. Co. v. Riegler's Adm'r, 26 Ky. L. R. 666, 82 S. W. 382.

Contra, plaintiff leaving moving train. St. Louis S. W. R. Co. v. Byrne [Ark.] 84 S. W. 469. Passenger slipping on incline. Charge on contributory negligence for going on place obviously dangerous held necessary. Missouri, K. & T. R. Co. v. Criswell [Tex. Civ. App.] 88 S. W. 373.

Proximate cause: Injuries held sufficiently shown to have been caused by the accident complained of. Johnson v. Yonkers R. Co., 101 App. Div. 65, 91 N. Y. S. 508. Evidence held sufficient to support verdict on theory that plaintiff's blindness resulted from injury. O'Neal v. Metropolitan St. R. Co., 93 N. Y. S. 145. That plaintiff's injuries were caused by sudden start of train as plaintiff was alighting. St. Louis S. W. R. Co. v. Turner [Tex. Civ. App.] 84 S. W. 1094.

92. An allegation that a ticket was from one to another of two stations is sufficiently proved by an uncontradicted statement of plaintiff to that effect, though there is no evidence as to how the ticket in fact read. Chicago & E. I. R. Co. v. Stratton, 111 Ill. App. 142. Evidence held insufficient to rebut plaintiff's testimony that the injury occurred, and sufficient to support theory that varicocele resulted from it. Bial v. Interurban St. R. Co., 90 N. Y. S. 434. Where plaintiff shows that he was injured in the face by being struck by the hand of the conductor of the car, testimony on the conductor's part that the act was purely involuntary and unintentional does not require the directing of a verdict, it being for the jury to say whether his explanation was true. Kohner v. Capital Tract. Co., 22 App. D. C. 181. Evidence by plaintiff that as she was about to take her seat another car bumped so hard as to throw her down requires denial of peremptory instruction. Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536.

93. Plaintiff's statement as to her injury held not sufficient to support a verdict in contradiction with all other witnesses. Heltzen v. Union R. Co. [R. I.] 59 A. 918.

94. Slippery condition of track from rain held not sufficiently shown to conclusively rebut plaintiff's case that car was started with a jerk. McNamara v. St. Louis Transit Co., 106 Mo. App. 349, 80 S. W. 303. Estimates that speed of car was not unlawful held insufficient to overcome presumption arising from physical fact that passengers were hurled from their seats by speed of car rounding curve. McEwen v. Atlanta R. & Power Co., 120 Ga. 1003, 48 S. E. 391. Injury to plaintiff's right hand on jamb of door closing from right to left held not a physical impossibility. Stein v. Manhattan R. Co., 90 N. Y. S. 437. Evidence held insufficient to rebut presumption that car window fell because not raised high enough for bolt to catch. Faulkner v. Boston & M. R. Co., 187 Mass. 254, 72 N. E. 976.

95. Evidence held sufficient to show that passenger not afterwards heard of was killed in railroad wreck, though body was never identified. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727.

96. Facts held not to leave death of passenger to mere conjecture, but to justify the inference that he was thrown out of defective vestibule by lurching of train. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689.

97. Defendant's ownership of car held not

Instructions[98] as in other cases must submit the issues fairly,[99] conform and be confined to the evidence,[1] and respect the province of the jury.[2]

Part V. Carriers of Baggage and Passengers' Effects.

§ 33. *Rights, duties and liabilities.*[3]—The contract of carriage of a passenger implies the carriage also of baggage, consisting of personal effects proper and nec-

shown. Bardack v. Brooklyn Heights R. Co., 91 N. Y. S. 10.

98. See 3 C. L. 656.

99. Instructions in case of injury to mail clerk by derailment of train by washout approved. Southern Pac. Co. v. Schuyler [C. C. A.] 135 F. 1015. Instructions in similar case disapproved. Cavin v. Southern Pac. Co. [C. C. A.] 136 F. 592. Instructions where passenger was thrown down by jolt from coupling cars approved. Columbia, N. & L. R. Co. v. Means [C. C. A.] 136 F. 83. Instructions on leaving moving car held not prejudicial. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 397. Instructions as to contributory negligence of mail clerk falling over pile of sacks by reason of jerk of train held proper. Graves v. Norfolk & S. R. Co., 136 N. C. 3, 48 S. E. 502. Question whether injury was caused by plaintiff's haste in leaving car held properly submitted. Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128. Instruction on care required of street railway held too general. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735. Specifications in starting a car before plaintiff was afforded a reasonable opportunity to safely get on and in not stopping subsequently to avert the peril impending in his jeopardous situation of being dragged and clinging to the car, are not inconsistent. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Assault on passenger by conductor. Insulting words by passenger. Houston & T. C. R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902. Complaint relying on wanton ejection does not authorize charge on use of unnecessary force and careless and wanton injury. Ruebsam v. St. Louis Transit Co., 108 Mo. App. 437, 83 S. W. 984. Instruction on starting while plaintiff was boarding, failing to take into consideration willfullness or negligence of defendant's servants is bad. Maggioli v. St. Louis Transit Co., 108 Mo. App. 416, 83 S. W. 1026. Charge authorizing jury to consider failure of defendant to provide employe to look after trolly pole held not justified by pleadings. Denison & S. R. Co. v. Freeman [Tex. Civ. App.] 85 S. W. 55. Instructions in case where passenger and conductor fought and conductor followed passenger to sidewalk and killed him, discussed. O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939. Instruction predicating defense of contributory negligence on finding of several unnecessary facts conjunctively held error. Boarding moving train. Texas Midland R. Co. v. Ellison [Tex. Civ. App.] 87 S. W. 213. Instructions submitting issue of passenger vel non as alleged in declaration cannot be complained of after verdict. Corum v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 143.

1. Instruction authorizing jury to draw inference from their own experience whether plaintiff ran after moving car. Hanan v. Metropolitan St. R. Co., 92 N. Y. S. 1086. Where the negligence claimed is improperly starting the car while plaintiff was alighting, an instruction submitting failure to stop should not be given. Chicago Union Tract. Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022. An instruction in effect authorizing substantial damages for insignificant injuries is erroneous. Rosenberg v. New York City R. Co., 94 N. Y. S. 1115. Where the negligence alleged is in the operation of a train, an instruction authorizing recovery for failure to use due care in keeping appliances in a safe condition is bad. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983. Where the negligence charged is the premature announcement of the station, it is proper for the jury to consider whether plaintiff knew when he went upon the step of the car that the proper point of alighting had not been reached, and an instruction on whether there was a light is proper. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791. Evidence that plaintiff alighted with extraordinary force warrants submission of issue whether he alighted before car stopped. San Antonio Tract. Co. v. Warren [Tex. Civ. App.] 85 S. W. 26. Instruction on proximate cause of injury held properly refused. St. Louis S. W. R. Co. v. Martin [Tex. Civ. App.] 87 S. W. 387. Where there is no evidence that car stopped for any purpose but to discharge passengers, instructions should not submit whether it stopped for another purpose. Corum v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 143.

2. An instruction characterizing as negligent an act of the motorman that is not so as a matter of law is erroneous. Ward v. Metropolitan St. R. Co., 99 App. Div. 126, 90 N. Y. S. 897. Requests in case where plaintiff attempted to board a car which started before he had time to get safely on and then failed to stop after he had been put in a precarious situation, held bad as comments on evidence. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Charge held not bad as assuming that defendant's employes violated rule requiring them to satisfy themselves of safety of road and bridges in time of flood. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Instructions where car stopped suddenly throwing plaintiff from seat held properly refused as argumentative. Willis v. St. Joseph R. Light, Heat & Power Co. [Mo. App.] 86 S. W. 567. Instructions on duty to provide reasonable time to board train held not to invade province of jury. Houston & T. C. R. Co. v. Copley [Tex. Civ. App.] 87 S. W. 219.

3. See 3 C. L. 661.

Note: See 99 Am. St. Rep. 343, for extensive monographic note; also 97 Am. St. Rep. 105, for note on liability of connecting carriers.

essary,[4] and in a reasonable amount considering the length and purpose of the journey, and the circumstances of the passenger,[5] and for such baggage, delivered to the carrier,[6] a reasonable time before departure of his conveyance,[7] the carrier is liable prima facie as a carrier of freight,[8] whether or not the passenger in fact traveled on his ticket.[9] The carrier's liability as warehouseman extends only to losses through negligence.[10]

§ 34. *Care of baggage and effects.*[11]—The general liability is that of an insurer.[12] A railroad company carrying a passenger and his baggage on a pass is a gratuitous bailee as to the baggage and responsible only for ordinary care.[13]

§ 35. *Limitation of liability.*[14]—The carrier may contract for a reasonable limitation of its common-law liability for loss or damage to baggage not resulting from its negligence,[15] but the passenger must consent to the limitation [16] and have notice in such a way as to afford an opportunity to accept or reject.[17]

4. Business papers, though carried in a trunk by a business man, are not baggage and cannot be recovered for if lost, nor can damages be allowed for delay in transporting them. Yazoo, etc., R. Co. v. Georgia Home Ins. Co. [Miss.] 37 So. 500. A railroad baggage master has authority to accept merchandise from a passenger and contract to carry it as baggage without extra compensation. Saleeby v. Central R. of N. J., 99 App. Div. 163, 90 N. Y. S. 1042. Where the carrier undertakes to transport as baggage without extra compensation a traveling case, knowing that it contains merchandise and samples, it is liable for the loss thereof. Id. Whether shot guns are baggage held properly submitted to jury. Little Rock, etc., R. Co. v. Record [Ark.] 85 S. W. 421. In the absence of special agreement, the carrier's liability extends only to such articles as are baggage in a technical sense; but jewelry, opera glasses, watches, bracelets, pins and rings may be baggage when carried in a woman's trunk for her personal use. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

5. The carrier is liable for money necessary for traveling expenses and jewelry for personal use carried in a trunk. Battle v. Columbia, etc., R. Co. [S. C.] 49 S. E. 849. That articles lost were not suited to plaintiff's station in life is matter of defense not inquirable into on appeal in the absence of evidence or requests for instructions on the issue. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

6. Deposit at place designated by only person at station and notice that owner will appear shortly is delivery to carrier. Battle v. Columbia, etc., R. Co. [S. C.] 49 S. E. 849. Delivery of baggage to a carrier is not accomplished by unloading it in the absence of station officials onto a truck standing out of doors, where a safe and readily accessable place is provided. Lennon v. Illinois Cent. R. Co. [Iowa] 103 N. W. 343.

7. A steamship company is responsible for the loss of baggage delivered several days in advance of sailing for the carrier's convenience and by it kept on the dock. North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426.

8. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

9. Adger v. Blue Ridge R. Co. [S. C.] 50 S. E. 783. See note on liability for baggage not accompanied by passenger in 3 C. L. 662, n. 29.

10. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52. The status of warehouseman begins when the passenger has had a reasonable time after arrival to take baggage away. Id.

11. See 3 C. L. 661.

12. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52. The unexplained loss of luggage checked as baggage makes out a prima facie case. Saleeby v. Central R. Co. of New Jersey, 99 App. Div. 163, 90 N. Y. S. 1042. The liability of a steamship company for property of a passenger stolen from a stateroom is that of an insurer in the absence of negligence on the part of the passenger. Leaving stateroom unlocked held not negligent. Hart v. North German Lloyd S. S. Co., 92 N. Y. S. 338.

13. Proof that officers attempting to arrest a fugitive shot into baggage does not convict the railroad of negligence. White v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 962.

14. See 3 C. L. 662.

15. Baggage limited to one hundred and fifty pounds at $1 per pound. Words printed on ticket. Mogill v. Central R. R. of N. J., 25 Pa. Super. Ct. 164. Under a statute authorizing carriers to limit their liability for baggage by stipulation in tickets liability for merchandise accepted for transportation as baggage is not limited by stipulation in the ticket. Saleeby v. Central R. of N. J., 99 App. Div. 163, 90 N. Y. S. 1042. Cannot limit liability in Texas. White v. St. Louis S. W. R. Co. [Tex. Civ. App.] 86 S. W. 962.

16. A contract limiting the carrier's liability for baggage to $100 unless an excess value is declared at the time of making the contract or of delivery to the ship is not applicable where baggage was lost on delivery to the ship's agents at the dock. Holmes v. North German Lloyd S. S. Co., 100 App. Div. 36, 90 N. Y. S. 834.

17. A passenger is not bound by conditions relative to the carrier's responsibility for baggage which are printed in fine print on the ticket, and to which his attention was not called and to which he in no way assented. Hutchins v. Pennsylvania R. Co. [N. Y.] 73 N. E. 972. Printing on back of ticket. Little Rock, etc., R. Co. v. Record [Ark.] 85 S. W. 421.

§ 36. *Damages.*[18]—Where defendant produces the baggage at the trial and tenders it to plaintiff, the damages are the reasonable loss and delay to plaintiff and the depreciation of value.[19]

§ 37. *Remedies and procedure.*[20]—Where there is a failure to deliver baggage arriving at the passenger's destination, the burden is on the carrier to account for the default.[21] The husband has title to wearing apparel of his wife and children,[22] and may testify to the value of the articles after the wife has enumerated them.[23] Cases in which some special questions of pleading,[24] evidence,[25] and new trial,[26] appear are cited in the notes.

Carrying Weapons; Car Trusts, see latest topical index.

CASE, ACTION ON.

An action on the case will not lie for breach of a contract to convey land, though the land be subsequently conveyed to another. The breach of the contract and not the conveyance to another is the proximate cause of injury.[65] A declaration alleging the letting of a team of horses and a promise to drive them to a certain place and no other, in a moderate and proper manner, and that the team was driven to another place and greatly injured by immoderate driving, states a cause of action in case.[66] In an action on the case counts upon the statutory liability under the Pennsylvania dram-shop act may be joined with a common-law count for conversion of property.[67]

Case Agreed; Case Certified; Case Settled; Cash; Catching Bargain. see latest topical index.

CAUSES OF ACTION AND DEFENSES.[68]

A cause of action consists in "a right possessed by one or more persons[69] and a violation thereof by another."[69a] The party plaintiff must derive such right

18. See 3 C. L. 663.

19. Wall v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 95.

20. See 3 C. L. 663.

21. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52; Southern R. Co. v. Edmundson [Ga.] 51 S. E. 388.

22, 23. Battle v. Columbia, etc., R. Co. [S. C.] 49 S. E. 849.

24. A petition for loss of baggage is not converted into a petition for negligence so as to require proof thereof by a mere allegation that the loss was occasioned by the negligence of defendants' employes. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

25. Evidence held sufficient to go to jury on whether plaintiff's satchel was purloined by sleeping car porter. Hatch v. Pullman Sleeping Car Co. [Tex. Civ. App.] 84 S. W. 246. Evidence that a passenger's trunk was received by a carrier in good condition and that articles packed in it by the passenger were gone when received at destination makes a prima facie case. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

26. New trial for newly discovered evidence—the discovery of the lost trunk—held properly denied for lack of showing of diligence. St. Louis S. W. R. Co. v. Goodwin [Ark.] 84 S. W. 728.

65. The reason is that a recovery in case would not bar a recovery in assumpsit. Morhouse v. Terrill, 111 Ill. App. 460.

66. Walker v. Mellish [Mich.] 98 N. W. 2.

67. All such counts are in principle counts in trespass on the case. Pisa v. Holy, 114 Ill. App. 6.

68. Scope of this title: None except cases defining or illustrating the most general and abstract principles are treated here. Most of the questions involving the terms "cause of action" or "defense" are referable to the identity or the joinder, severance or splitting of them. See Pleading, 4 C. L. 980; Abatement and Revival, 5 C. L. 1; Former Adjudication, 3 C. L. 1476.

Other topics dealing with kindred abstract principles are Actions, 5 C. L.—Forms of Action, 3 C. L. 1494.

69. This is called the "primary right." Emerson v. Nash [Wis.] 102 N. W. 921.

69a. Emerson v. Nash [Wis.] 102 N. W. 921. A "transaction" out of which several causes of action arise is not the same as the "primary right." It is the circumstance or circumstances out of which the primary rights arise because of the status of persons toward each other respecting

from, or it must be recognized by, the laws of the state or nation.[70] A right which is incident to another is not alone a cause of action.[71] It must be fully matured [72] by demand if necessary,[73] and all conditions precedent fulfilled.[74] The injury may be but slight,[75] though if nothing but a trifling amount be involved a cause may be disposed of as de minimus.[76] Damage ensuing because of statutory bar to relief is not an injury.[77] A party subject to be sued is essential.[78] An entire cause cannot be severed,[79] but in different aspects of a situation there may be one or several causes of action.[80] The fact that a transaction was criminal does not bar a civil action, at least where the crime, if any, was in another state.[81a] A private cause of action may co-exist with a public wrong,[81] and one may waive tort and sue in assumpsit.[82] A cause of action may be recognized, though created by foreign statute if consonant with domestic policy.[83] Whether a cause is equitable is to be determined in a code state by the prayer when the facts might be either legal or equitable.[84]

A defense must be that which if true furnishes a legal reason why the pleader should not be held in the action.[85] It is no defense that another was also in the wrong,[86] or that plaintiff has no right as against a third person,[87] or that a wrong

such circumstances. Id. The right of privacy has been recognized as such a primary right. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

70. Courts will not decide the sole question whether one is Catholic or recusant according to ecclesiastical canon. Bonacum v. Murphy [Neb.] 104 N. W. 180.

71. Right to attorneys' fees under stipulation is incident to main contract. Thrasher v. Moran [Cal.] 81 P. 32.

72. Suit on bonds before date specified for payment. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296. Distributive rights in an uncertain fund cannot be determined till it is ready for distribution. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

73. Demand is necessary to sue for money entrusted. Hitchcock v. Cosper [Ind.] 73 N. E. 264. If reformation of an instrument is sought and enforcement as reformed, no demand is necessary. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Want of demand must be pleaded if relied on. Harrison v. Lakenan [Mo.] 88 S. W. 53.

74. Leave to private person to sue on undertaking given to public officer for his benefit. Goldstein v. Michelson, 91 N. Y. S. 33.

75. Peterson v. Lacey [Iowa] 102 N. W. 153.

76. $1.04 held de minimus. Galm's Case, 39 Ct. Cl. 55.

77. Maxim "No wrong without a remedy" does not apply. Rowell v. Smith [Wis.] 102 N. W. 1; Pietsch v. Milbrath [Wis.] 102 N. W. 342.

78. Desha County v. State [Ark.] 84 S. W. 625.

79. Andreas v. School Dist. No. 4, Fractional Tp. of Leavitt [Mich.] 100 N. W. 1021. **Indivisible:** Right to accrued salary as officer. Hartmann v. New York, 44 Misc. 272, 89 N. Y. S. 912. **Divisible:** Assignee of part of claim may sue. Chase v. Deering, 93 N. Y. S. 434. Subscriptions to common object are several. Akins v. Hicks [Mo. App.] 83 S. W. 75.

80. Successive recoveries may be had under a contract of sale of personalty where independent causes of action are created by performance, but there can be only one recovery of damages for breach. Vendee's recovery of damages for nondelivery of instalment of bicycle pedals, past due when suit was commenced, bars him from recovering on same contract for failure to deliver remaining instalments. Pakas v. Hollingshead, 42 Misc. 287, 86 N. Y. S. 560. Mortgage note and a note for overdue interest may be sued as one cause of action. Kleis v. McGrath [Iowa] 1003 N. W. 371.

81. Obstruction of watercourse. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003.

81a. Where plaintiff indorsed a check to defendant without consideration on defendant's statement that the check had been made out to plaintiff by mistake, plaintiff could maintain assumpsit for money had and received without first instituting criminal proceedings (under Rhode Island statute), since the evidence showed at most deceit, or if a crime, that it was committed outside the state. Hazard v. Hazard [R. I.] 57 A. 1056.

82. Courter v. Pierson [N. J. Law] 61 A. 81.

83. Dennis v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 869.

84. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66.

85. Plea by surety that new collateral contract was made but not alleging extension of risk. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297. Neither under the general issue nor in abatement is a pending equity suit any defense to an action. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

86. Another was also negligent. Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 A. 953. It is no defense to a nuisance that like ones exist. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

87. Want of permit to cross necessary street no defense to condemnation proceed-

was done in an endeavor to rectify the wrong of a third person.[88] No action lies in aid of what is against the law or its policy.[89] Acts of plaintiff after suit may be pleaded as a defense.[90] Defenses are either a complete bar or an abatement of the action.[91] Prematurity of suit resting in the terms of an instrument declared on is a bar, but if it rests in a collateral agreement it is abatement.[92] Prematurity does not affect separable claims set up but fully matured,[93] but one can recover only the sum due when action brought.[95] Equitable defenses may now usually be made at law.[95]

CEMETERIES.[96]

Where the general public has acquired the right to use land as a burying ground, individuals cannot by staking off portions of the land into lots acquire any exclusive title therein.[97] The fact that numerous members of a church took part in improving the grounds, does not give the church any title or control over the land.[98] Generally, one receiving from a cemetery association a deed of a burial lot does not thereby take title to the soil itself.[99] The rights of burial are so far public that private interests in particular lots are subject to reasonable police regulations of the association having charge of the cemetery.[1] The association may be regarded as holding the fee in trust for the purposes for which the corporation was organized.[2] In the case of a city cemetery, the person in whose name a lot stands on the record is entitled to the use of it, no other special evidence of such right being required by the rules.[3] A lot owner, though not a member of a cemetery association, may maintain suit to enjoin a misappropriation of funds by

ings by railroad. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

88. Allen v. Stowell, 145 Cal. 666, 79 P. 371.

89. No action lies to compel installation of telephone in bawdy house. Godwin v. Carolina Tel. & Tel. Co., 136 N. C. 258, 48 S. E. 636.

90. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714.

91. Plea that bond was invalid because exacted in proceedings which were void is in bar. Birch v. King [N. J. Law] 59 A. 11. Improper person demandant against decedent's estate is matter of abatement only. In re Morgan's Estate [Or.] 78 P. 1029.

92. American Home Circle v. Schumm, 111 Ill. App. 316.

93. Anthony v. Smithson [Kan.] 78 P. 454.

94. City of Philadelphia v. Pierson [Pa.] 60 A. 999.

95. Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610; Highlands v. Philadelphia & R. R. Co., 209 Pa. 286, 58 A. 560. Equitable defenses may be interposed but the issue will be tried in chancery. American Soda Fountain Co. v. Futrall [Ark.] 84 S. W. 505. Recognition of equitable titles between vendor and purchaser does not extend to all actions between them. Martin v. Thomas [W. Va.] 49 S. E. 118.

96. See 3 C. L. 665.

97. So long as land remains unoccupied, the community at large has same right as those claiming to be owners. Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

98. Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

99. Deed subject to by-laws and regulations gave grantee only limited right to use lot for burial purposes, subject to association's regulations. State v. Scoville [Conn.] 61 A. 63.

NOTE. Character of estate or property of owner of burial lot: Many cases hold that the lot owner has an easement. Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769; Richards v. Northwest Prot. Dutch Church, 32 Barb. [N. Y.] 42; Hoak v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96; McWhirter v. Newell, 200 Ill. 583, 66 N. E. 345; Gardner v. Swan Point Cemetery, 20 R. I. 646, 40 A. 871, 78 Am. St. Rep. 897. Others hold that he has a mere license or privilege. Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Windt v. Ger. Ref. Ch., 4 Sandf. Ch. 4771; Richards v. Northwest Prot. Dutch Church, 32 Barb. (N. Y.) 42; Craig v. First Presby. Church, 88 Pa. 42, 32 Am. Rep. 417; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481.—The subject is discussed and the cases here cited considered in a note to Waldron's Petition [R. I.] 58 A. 453, in 67 L. R. A. 118.

1. By-law requiring consent and direction of association president or superintendent before a lot owner could cut or trim herbage or erect monuments, held reasonable; and statute authorizing such by-law reasonable. State v. Scoville [Conn.] 61 A. 63.

2. State v. Scoville [Conn.] 61 A. 63.

3. People v. Hogan, 91 N. Y. S. 715.

the company;[4] and where the object of a company, as declared in its certificate of incorporation, is to maintain and use its property for cemetery and burial purposes only, a bill alleging that cemetery grounds were uncared for and in need of attention, and that the association was without funds to pay its debts, sets out grounds for enjoining a gift to a church, some members of which were also members of the company.[5] In Connecticut, violation of by-laws of cemetery association providing for the care and management of burial lots is made a criminal offense.[6]

A cemetery is not necessarily a nuisance but may become so from location and the manner of its use.[7] The petition in a suit to enjoin location of a cemetery on certain lands must set out facts which show with reasonable certainty that injury will result to plaintiffs if the cemetery is located as proposed.[8] Mere depreciation in the value of adjoining or nearby property is not ground for such injunction.[9]

That a city cemetery superintendent caused an old grave to be disturbed in the digging of a new one is not alone ground for his discharge, where there was nothing to indicate the existence of the old grave.[10]

The tax exemption of cemeteries continues after abandonment for burial purposes until all the bodies have been removed.[11]

CENSUS AND STATISTICS.[12]

A statute authorizing supervisors to have the census of a township taken, and providing that when so taken it shall be the official census of the township, does not authorize the supervisors to declare by ordinance that the population is a certain number, no census having been taken.[13] The provision of the Greater New York charter, requiring filing of birth notices with the department of health, is sufficiently complied with by due mailing of the notice.[14] But when it appears that a notice has not been filed, the burden is upon the attending physician to prove the mailing of the notice, in order to escape the penalty for omission to file.[15] An undated, unsigned death certificate, the facts of which are not certified to by the health officer who certifies it to be a part of the records of his office, is not evidence of death of the person described therein.[16] Where a death certificate describes deceased as having lived in a certain county and gives only two initials, it cannot be presumed that such person is identical with one who lived in a city of the county, whose name was the same, except that he had a middle initial.[17]

4, 5. Clark v. Rahway Cemetery [N. J. Eq.] 61 A. 261.

6. State v. Scoville [Conn.] 61 A. 63. Pub. Acts 1903, p. 96, c. 134, amending Gen. St. § 4453, giving towns, cemetery associations, and ecclesiastical societies power to make such by-laws or regulations, and making violation thereof a crime, applies to joint stock cemetery associations as well as to non-stock associations. Id. This statute authorized a by-law, providing that no person should plant, cut or trim herbage of any kind, or erect any monument or memorial stone, except with the consent and direction of the association's president or superintendent. Id. A by-law regulating care of lots need not be passed by a two-thirds vote, not being one imposing a fine or laying an assessment; Gen. St. § 3938 does not apply. Id.

7. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

8. Allegations as to odors, etc., held mere conclusion, the mode of sepulture proposed not being set out. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

9. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

10. Evidence insufficient to warrant discharge on ground of misconduct. People v. Hogan, 91 N. Y. S. 715.

11. Watterson v. Halliday, 2 Ohio N. P. (N. S.) 693.

12. See 3 C. L. 666.

13. County Gov't Act, § 25, subd. 12 1-2, construed. Cothran v. Cook [Cal.] 80 P. 699.

14. Greater New York charter, §§ 1237, 1239; Laws 1901, pp. 522, 523, c. 466. Department of Health of New York v. Owen, 99 App. Div. 425, 88 N. Y. S. 184.

15. Evidence held sufficient to show mailing of notice within ten days. Department of Health of New York v. Owen, 94 App. Div. 425, 88 N. Y. S. 184.

16, 17. Lucas v. Current River Land & Cattle Co. [Mo.] 85 S. W. 359.

18. See 3 C. L. 667.

CERTIFICATE OF DOUBT; CERTIFICATES OF DEPOSIT, see latest topical index.

CERTIORARI.

§ 1. *Nature, occasion and propriety of the remedy.*[18]—The writ of certiorari,[19] sometimes denominated by statute the writ of review,[20] is one of the extraordinary remedies, and lies only when an inferior court,[21] tribunal,[22] board,[23] or officer,[24] exercising judicial functions,[25] has exceeded jurisdiction,[26] or acted illegally,[27] and there is no appeal,[28] nor in the judgment of the court any other plain, speedy and adequate remedy.[29] The writ in many states has been extended beyond what it was at common law, and is not now confined to reviewing the decisions of courts, properly so called,[30] but may also be used in certain instances to review the pro-

19. Being a common-law writ, it cannot be converted into a suit in equity to administer a public charity created by will. People v. Court of Appeals [Colo.] 79 P. 1028.

20. See 3 C. L. 667, n. 75. The statutory writ of review is substantially the same as the common-law writ of certiorari, and will lie when an inferior court or tribunal has exceeded its jurisdiction, or exercised its judicial functions illegally or contrary to the course of procedure applicable to the matters before it. Oregon R. & Nav. Co. v. Umatilla County [Or.] 81 P. 352.

21. Action of county court in calling a county seat removal election. Kinsloe v. Pogue, 213 Ill. 302, 72 N. E. 906. Conviction in a recorder's court on defendant's own confession. City of East Orange v. Richardson [N. J. Law] 59 A. 897. Certiorari to review action of circuit court in granting or denying writs of mandamus. City of Monroe v. Board of Sup'rs of Monroe County [Mich.] 100 N. W. 896. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851; Canal Const. Co. v. Schlickum [Mich.] 102 N. W. 737.

22. In New Jersey the proceedings of commissioners appointed by the court of common pleas under the act relating to newly created municipalities (P. L. 1898, pp. 28, 393) are subject to review by certiorari. Washington Tp. v. Etna [N. J. Law] 58 A. 1086.

23. Cancellation of liquor license by town board. Croot v. Board of Trustees of Manitou [Colo. App.] 78 P. 313. Reviewing refusal of supervisors to audit claim for services. People v. Board of Sup'rs of Orleans County, 98 App. Div. 390, 90 N. Y. S. 318. State board of railroad commissioners held to be an inferior body whose proceedings are subject to review on certiorari. Gulf, etc., R. Co. v. Adams [Miss.] 38 So. 348.

24. Reviewing action of commissioners of public safety in refusing adjournment of hearing on charges preferred against plaintiff in certiorari. People v. Webster, 98 App. Div. 581, 90 N. Y. S. 723.

25. See 3 C. L. 667, n. 77. It is not essential that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice. Kinsloe v. Pogue, 213 Ill. 302, 72 N. E. 906. But it has been held that the determination of civil service commissioners in a competitive examination cannot be reviewed on certiorari, on the ground that they were not judicial proceedings. People v. McCooey, 100 App. Div. 240, 91 N. Y. S. 436.

26. See 3 C. L. 668, n. 85. State v. Smith [Mo.] 86 S. W. 867; People v. Court of Appeals [Colo.] 79 P. 1021. Berry v. Robinson [Ga.] 50 S. E. 378. An affidavit which is made the basis of a proceeding to punish for contempt held insufficient to confer jurisdiction. Hutton v. Superior Court of San Francisco [Cal.] 81 P. 409. Dismissing appeal from justice court. Andrews v. Cook [Nev.] 81 P. 303. Cancellation of liquor license. Croot v. Board of Trustees of Manitou [Colo. App.] 78 P. 313. Action of police judge in summoning a jury in a misdemeanor case held not to be in excess of jurisdiction. Wittman v. Police Court of San Francisco, 145 Cal. 474, 78 P. 1052.

27. Berkey v. Thompson [Iowa] 102 N. W. 134. Removal of county seat. Reese v. Cannon [Ark.] 84 S. W. 793.

28. See 3 C. L. 668, n. 86. Staples v. Brown [Tenn.] 85 S. W. 254; Elliott v. Superior Ct. of San Diego County, 144 Cal. 501, 77 P. 1109; State v. District Court of Second Judicial Dist. [Mont.] 79 P. 410; People v. District Court of Pueblo County [Colo.] 79 P. 1013; State v. Justice Court of Tp. No. 1, Gallatin County [Mont.] 78 P. 498; Kinsloe v. Pogue, 213 Ill. 302, 72 N. E. 906; State v. Justice Ct. of Tp. No. 1, Gallatin County [Mont.] 78 P. 498. Personal property tax judgment. State v. District Court of Ramsey County, 93 Minn. 177, 100 N. W. 889. Order refusing leave to sue receiver. State v. Superior Court of Spokane County [Wash.] 80 P. 195. Probate order, held reviewable by appeal. In re Wilson's Estate [Minn.] 97 N. W. 647.

29. See 3 C. L. 669, n. 88. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945; People v. O'Brien, 91 N. Y. S. 649; De Lucca v. Price [Cal.] 79 P. 853. Whenever there is no direct remedy provided for review, the writ of certiorari lies, even though some other remedy can be conceived as possible in the future. County Court of De Kalb County v. Pogue, 115 Ill. App. 391.

30. See 3 C. L. 667, n. 74. Leppel v. District Court of Garfield County [Colo.] 78 P. 682.

ceedings of special tribunals, boards, commissions, and officers of municipal corporations.[31] In the latter class of cases, however, the office of the writ is confined to acts that are strictly judicial or quasi-judicial in their nature.[32] But certiorari will not lie to bring in question the legal existence of the court to which the writ is directed,[33] nor is it the appropriate remedy to try title to office;[34] neither will the writ lie where the relator must in any event fail.[35] The writ brings up nothing but the record of the tribunal to which it is directed, and whose proceedings it is sought to review.[36]

Ancillary certiorari.[37]—Frequently the writ issues as ancillary to another proceeding, as habeas corpus,[38] but it issues in aid of an appeal only when diminution of the record is suggested.[39] In cases over which the supreme court of the United States possesses neither original nor appellate jurisdiction, it cannot grant prohibition, mandamus, or certiorari as ancillary thereto.[40]

Prerogative writ.[41]

31. State v. Village of McIntosh [Minn.] 103 N. W. 1017.

Matters held reviewable on certiorari: Action of assessors in assessing damages on change of street grade. People v. Lawrence, 94 N. Y. S. 820. Refusal of justice of peace to fix amount of bond on appeal. Saxton v. Curley, 112 Ill. App. 450. Action of district court in quashing a jury panel Heitman v. Morgan [Idaho] 79 P. 225. Decision of a court adjudicating one guilty of contempt. Rogers v. Superior Court of San Francisco, 145 Cal. 88, 78 P. 344. Action of tax commissioners in fixing assessment. People v. Wells [N. Y.] 74 N. E. 878. Certiorari will issue to compel the incorporation of exceptions omitted from the case on appeal. Cameron-Barkley Co. v. Thornton Light & Power Co. [N. C.] 49 S. E. 76. Where there was no proof of the venue, it was error to refuse to sanction a petition for certiorari. Simpson v. Lumpkin, 121 Ga. 167, 48 S. E. 904. Orders making an allowance to an administrator from the funds of an estate for the services of himself and an attorney pending settlement of the estate, set aside on certiorari. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945. A proceeding in a county court to eject an intruder cannot be carried by appeal to the superior court. The remedy of the party dissatisfied with the judgment in such a case is by certiorari. Rigall v. Sirmans [Ga.] 51 S. E. 381.

Matters not reviewable on certiorari: A writ of certiorari is properly denied where it appears that the action in which the same is sought is a collusive proceeding. Sampson v. Commissioners of Highways, 115 Ill. App. 443. A location of a route filed by a railroad company under section 8 (P. L. 1903, p. 650), is not the proper subject of certiorari. Essen v. Dickinson [N. J. Law] 60 A. 1102. The erroneous discharge of a prisoner on habeas corpus by a court having jurisdiction to issue the writ and pass upon the application for a discharge cannot be reviewed on certiorari. State v. Simmons [Mo. App.] 87 S. W. 35. Certiorari does not lie to compel a county clerk to transmit to the district court a transcript of proceedings in connection with the opening of a road. McKinley v. Frio County [Tex. Civ. App.] 13 Tex. Ct. Rep. 571, 88 S. W. 447. Under the North Carolina Code providing that if the appellant's case is not returned in five days "with objections," it shall be deemed approved, and where appellee's attorney erroneously believed that he had ten days in which to serve a counter case, he was not entitled to certiorari to have appellant's case corrected. Barber v. Justice [N. C.] 50 S. E. 445.

32. Acts of judges of election held not to be such. State v. Village of McIntosh [Minn.] 103 N. W. 1017.

33. Bass v. Milledgeville [Ga.] 50 S. E. 59.

34. Anderson v. Morton, 21 App. D. C. 444; Murta v. Carr [Mich.] 12 Det. Leg. N. 289, 104 N. W. 27; Du Four v. State Superintendent of Public Instruction [N. J. Law] 61 A. 258. One not in possession of an office is not entitled to certiorari to amend the record of a vote of the city council by which his opponent was appointed as preliminary to an action by quo warranto to try title to the office. The correctness of the record can be tested in quo warranto itself. Daniels v. Newbold, 125 Iowa, 193, 100 N. W. 1119.

35. See 1 C. L. 500, n. 98. Certiorari to correct return of officer's service, which if done would still show jurisdiction in court. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

36. Sewickley Tp. Road, 23 Pa. Super. Ct. 170; State v. Patton, 108 Mo. App. 26, 82 S. W. 537. It does not bring up the evidence taken by it, nor can such evidence be considered, though included in the return. School Dist. No. 2, Tp. 24, R. 6 E., Butler County v. Pace [Mo. App.] 87 S. W. 580.

37. See 3 C. L. 670.

38. See 3 C. L. 670, n. 96. While the Federal circuit court may have power to issue a writ of certiorari auxiliary to the writ of habeas corpus, it is under no obligation to do so, and its refusal cannot be assigned as error. Hyde v. Shine, 25 S. Ct. 760; Dimond v. Same, Id. 766. The writ of certiorari may stay the execution of the sentence, but of itself does not discharge the prisoner from confinement. That privilege must be secured as in all other bailable cases. Dixon v. State, 121 Ga. 346, 49 S. E. 311.

39. See 3 C. L. 670, n. 97. State v. Mulvihill [Mo. App.] 88 S. W. 773.

40. In re Commonwealth of Massachusetts, 25 S. Ct. 512.

41. See 3 C. L. 670.

CERTIORARI—Cont'd.

§ 2. *Right to certiorari; parties.*[42]—At the common law the writ of certiorari was not a writ of right, but the granting or refusal thereof rested in the sound discretion of the court.[43] The parties to an application for certiorari cannot deprive the court of the exercise of its discretion by stipulating that the formal writ shall not issue and that no formal return need be made.[44] The writ will not issue at the suit of a stranger to the record;[45] on the contrary he must have been a party to the suit or matter in controversy,[46] or show some interest[47] or injury peculiar to himself.[48]

§ 3. *Procedure for writ; writ, service and return.*[49] *Application*[50] must be made seasonably,[50a] contain proper allegations,[51] specifically assign errors of law,[52] and affirmatively show necessary jurisdictional facts.[53] Facts alleged in the petition must be treated as admitted where the return is silent with regard thereto.[54] A motion to dismiss a petition is in the nature of a special demurrer.[55]

42. See 3 C. L. 670.

43. See 3 C. L. 670, n. 4. Leppel v. District Court of Garfield County [Colo.] 78 P. 682; Hyde v. Shine, 25 S. Ct. 760.

44. Sampson v. Commissioners of Highways, 115 Ill. App. 443.

45. Elliott v. Superior Ct. of San Diego County, 144 Cal. 501, 77 P. 1109.

46. See 3 C. L. 671, n. 5.

47. See 3 C. L. 671, n. 6. One appointed battalion chief without competitive examination has such interest as will entitle him to review on certiorari the placing of such position in a competitive list. People v. Whittet, 100 App. Div. 176, 91 N. Y. S. 675. Freeholders and taxpayers of a town have no such interest as will entitle them to apply for certiorari to review proceedings of highway commissioners in laying out a public road, unless they own land over which such highway is located. Sampson v. Com'rs of Highways, 115 Ill. App. 443.

48. See 3 C. L. 671, n. 7. People v. Wells, 101 App. Div. 600, 92 N. Y. S. 5; People v. O'Donnell, 92 N. Y. S. 577; People v. Wells, 92 N. Y. S. 769; People v. O'Donnell, 92 N. Y. S. 770.

49. See 3 C. L. 671.

50. See 3 C. L. 671, n. 16.

50a. Where the proceeding sought to be reviewed falls within the terms of N. Y. Code Civ. Proc. § 405, it is sufficient if the writ is issued within one year of the determination of such proceeding. People v. Snedeker, 94 N. Y. S. 319. Certiorari to a circuit court of appeals will not be granted upon dismissing, for lack of jurisdiction, a writ of error to that court, where the judgment sought to be reviewed was entered May 27, 1902, the writ of error was allowed May 22, 1903, the cause docketed June 1, 1903, and the petition for certiorari filed Feb. 17, 1905. Bonin v. Gulf Co., 25 S. Ct. 608. Delay of fifteen months without excuse to review proceedings removing prosecutor from police force is unreasonable. Glori v. Board of Police Com'rs of Newark [N. J. Law] 60 A. 47. Delay in applying for certiorari with knowledge by the prosecutor of a resolution and contract for reindexing public records until work is fully performed is such laches as requires dismissal of writ. Allen v. Board of Chosen Freeholdere of Hunterdon County [N. J. Law] 60 A. 36; Broadhead v. Board of Chosen Freeholders of Hunterdon County [N. J. Law] 60 A. 37.

51. See 3 C. L. 671, n. 17.

An affidavit for certiorari, stating that it contains substantially all the testimony taken at the trial, will not be taken as true, even though the return does not expressly contradict it, if there be some evidence set up in the return. Computing Scale Co. v. Tripp [Mich.] 101 N. W. 803. Points made in a petition for certiorari not verified by the answer of the trial judge present nothing for determination either by the superior or the supreme court. Little v. State [Ga.] 51 S. E. 501.

52. See 3 C. L. 671, n. 18. Where a petition for certiorari had attached thereto, as an exhibit, a copy of a plea filed in the trial court, and upon a refusal to sanction the petition a bill of exceptions was sued out, containing a copy of the petition, but omitting entirely the exhibit and contents of the plea, an assignment of error relating solely to such plea cannot be considered by the supreme court, though the plea be sent up as part of the transcript of the record, certified by the clerk of the superior court. Williams v. State, 121 Ga. 169, 48 S. E. 906. The answer of the justice of the peace to the writ of certiorari not verifying the allegations in the petition for the writ of certiorari that there was a final verdict and judgment, and no steps having been taken to traverse the answer or require the magistrate to answer over, neither the superior court nor this court can properly undertake to pass upon the merits of the assignments of error made in the petition for certiorari. Jessey v. Dean [Ga.] 50 S. E. 139.

53. See 3 C. L. 671, n. 19.

54. People v. Monroe, 97 App. Div. 283, 89 N. Y. S. 929.

55. Cedar Rapids & M. C. R. Co. v. Cummins, 125 Iowa, 430, 101 N. W. 176.

A petition for certiorari is such a suit as can be renewed under the provisions of the Georgia Civ. Code 1895.[56]

The statutory bond [57] must be given.[57a]—At common law a bond for the writ as a supersedeas was not necessary.[58] The bond required by the Georgia Act of 1902 (p. 105) is merely an appearance bond.[59]

The writ.[60]—Under the New York Code of Civil Procedure the writ must direct the return that is to be made.[60a] Where the clerk of the superior court, in issuing the writ of certiorari, made a clerical error in dating it, the judge of that court may pass an order authorizing the clerk to correct such error so as to make the writ bear the true date of its issuance.[61]

Notice of the writ.[62] must be given as required by the local statute or rule of court.[63]

Service of the writ [64] must be upon the officer whose decision is sought to be reviewed.[65] In some jurisdictions notice of the issuance of the writ must also be served upon opposing counsel.[66]

The return [67] should consist of a full transcript of the proceedings sought to be reviewed,[68] and, when responsive,[69] and covering the points of error appearing

56. Civ. Code 1895, § 3786. If, however, the petition be void for any reason, the suit cannot be renewed. Bass v. Milledgeville, 121 Ga. 151, 48 S. E. 919.

57. See 3 C. L. 672.

57a. Where a party has given a statutory bond with security for the payment of the eventual condemnation money, or to produce property sued for or levied on, or to pay damages in case he fails to recover, and a judgment adverse to the principal has been rendered, the security on such bond cannot be surety on a new bond required in proceedings seeking to secure a reversal. Woodliff v. Bloodworth, 121 Ga. 456, 49 S. E. 289. Where the only provision for certiorari proceedings, in an act creating a city court, indicates a legislative intent that the general provisions of the Georgia Civil Code of 1895, § 4637, relating to such proceedings from "inferior judicatories," should apply, no bond is required in criminal cases as a condition precedent to the issuance of the writ. Dixon v. State, 121 Ga. 346, 49 S. E. 311.

58. The court in the exercise of its discretion might however require it. Webb & Stagg v. McPherson & Co. [Ala.] 38 So. 1009. If a bond be required by law to be given on the allowance of a certiorari for the protection of the defendant in certiorari in case the proceedings below be affirmed, the court may, in its discretion, deny an application, presented on final hearing, for the dismissal of the writ because such bond was not given. City of Orange v. McConnell [N. J. Law] 59 A. 97.

59. On affirmance of the certiorari, it is not lawful to enter judgment against the sureties on such bond. Tucker v. Moultrie [Ga.] 50 S. E. 61.

60. See 3 C. L. 672.

60a. People v. Partridge, 99 App. Div. 410, 91 N. Y. S. 258.

61. Neal v. Neal [Ga.] 50 S. E. 929.

62. See 3 C. L. 672, n. 38.

63. Mansf. Dig. § 1273 (Ind. T. Ann. St. 1899, § 775), providing that where either party conceives that the copy of the record is imperfect the clerk of the supreme court shall on his application issue a certiorari to the clerk of the lower court, does not require notice to the opposite party of an application for the writ. Bracey-Welles Const. Co. v. Terry [Ind. T.] 82 S. W. 846. Even if it is essential, where a case is taken by certiorari to the superior court, that the record should contain a return of service of notice of the certiorari, either made by an officer authorized to make service or verified by the affidavit of a private person, it is error, upon the hearing of the certiorari, to refuse to allow the plaintiff in certiorari, who has made an unsworn return, to amend the same by verifying it under oath. Jones v. Gill, 121 Ga. 93, 48 S. E. 688.

64. See 3 C. L. 673.

65. Failure to do so is cause for dismissal. Bass v. Milledgeville, 121 Ga. 151, 48 S. E. 919.

66. Glenn v. State [Ga.] 50 S. E. 371.

67. See 3 C. L. 673.

68. If the prosecutor in certiorari obtains a rule on the lower court to certify the facts found, and then brings the cause to final hearing without procuring a return to the rule, he waives a complaint based on the insufficiency of the facts to support the judgment. Willett v. Morse [N. J. Err. & App.] 60 A. 362. Under the New York Code, § 2134, the person upon whom the writ is served must make and annex to the writ a return with the transcript annexed and certified by him of the record or proceedings and a statement of the other matters specified in and required by the writ. People v. Greene, 92 N. Y. S. 1112. The report or opinion of a referee in a proceeding to dismiss an officer from the police force is no proper part of the return. People v. Partridge, 99 App. Div. 410, 91 N. Y. S. 258. Affidavits heard by the court by consent of counsel on a motion for a rehearing are a part of the record on such rehearing and may be brought into the record for review by certiorari. Bracey-Welles Const. Co. v. Terry [Ind. T.] 82 S. W. 846. After a bill of exceptions has been certified, the defendant in error cannot have

in the affidavit for certiorari, is conclusive.[70] Under the Georgia practice the defendant in certiorari may at the first term, and before the hearing, traverse the truth of the answer or return.[71] It is only where the return is defective that a further return may be required.[72]

Objections and amendments.[73].—The court issuing the certiorari is not authorized to consider a paper as a part of the statement of facts unless it was properly made a part thereof by the trial court, nor has the court power to amend or add to the statement of facts as actually prepared.[74]

Quashal or dismissal.[75].—The failure of a judge whose decision is sought to be reviewed by the writ of certiorari to file his answer by the first day of the term to which the writ is returnable may subject him to punishment for contempt, but will not authorize a dismissal of the certiorari, when the answer is made during the first term, and before a motion to dismiss the certiorari is filed.[76] Where a writ of certiorari shows on its face that it is insufficient in law and that it does not lie to review the acts complained of, the court granting the writ has the power to quash it before the return.[77] Failure to deliver a writ of certiorari and a copy of the petition to the officer whose decision is sought to be reviewed is cause for dismissal but does not render the proceeding void.[78] Where an appeal is entered in a justice's court, and judgment rendered therein against the appellant, and a writ of certiorari sued out, the judge of the superior court should not dismiss the certiorari on the ground that the appeal is void, unless its invalidity affirmatively appears.[79] Certiorari to review the action of the district court in granting an injunction and appointing a receiver will be dismissed where pending its disposition the district court has dissolved the injunction and discharged the receiver, although its action in so doing was based on erroneous grounds, and it did not consider or determine the questions raised on certiorari.[80] Where a writ of certiorari has been quashed for defect or sufficiency in the petition or proceedings and liberty to amend has been denied, another writ may not be had.[81]

any additional evidence or other matter sent to the appellate court, except such as is part of the record, and of file in the office of the clerk. Jones v. Gill, 121 Ga. 93, 48 S. E. 688. Where the parties to an appeal to the circuit court of appeals in bankruptcy were unable to agree as to the contents of the appeal record, it was the duty of the appellant to file a praecipe with the clerk, pointing out specifically what records, in his judgment, should be certified, leaving appellee, if in his opinion the records certified are insufficient, to suggest a diminution of the record and ask for certiorari. In re A. L. Robertshaw Mfg. Co., 135 F. 220.

69. An allegation in a petition that certain affidavits were considered by respondent when the source of information and grounds of relief are not disclosed is not an allegation requiring a denial. People v. Greene, 91 N. Y. S. 803. Return held sufficient. Harris v. Daly, 121 Ga. 511, 49 S. E. 609.

70. Hinchman v. Spaulding [Mich.] 100 N. W. 901; Wetmore v. Dean [Mich.] 103 N. W. 166; People v. Greene, 97 App. Div. 502, 90 N. Y. S. 162. Facts relating to audit of claim. People v. Miller, 91 N. Y. S. 639. Denials and allegations of a return must be held true so far as they join issue with the material allegations of the petition. People v. Van Brunt, 99 App. Div. 564, 90 N. Y. S. 845.

71. Should it appear that the return was filed at such a time as not to give the plaintiff in certiorari an opportunity to prepare a traverse, the court should allow sufficient time to prepare the traverse. Folds v. State [Ga.] 51 S. E. 305. Where a certiorari has been sued out, taking a case from an inferior judicatory to the superior court, and a traverse is filed to the answer by the plaintiff in certiorari, such traverse may be verified by his attorney at law. Georgia, F. & A. R. Co. v. Sizer & Co., 121 Ga. 801, 49 S. E. 737.

72. People v. Greene, 92 N. Y. S. 1112.

73. See 3 C. L. 673.

74. Cox v. Thompson [Tex. Civ. App.] 82 S. W. 672.

75. See 3 C. L. 673.

76. Sutton v. State, 120 Ga. 865, 48 S. E. 342; Harrison v. May, 121 Ga. 816, 49 S. E. 728.

77. People v. McClellan, 94 N. Y. S. 1107.

78. Bass v. Milledgeville, 121 Ga. 151, 48 S. E. 919.

79. J. G. Puett & Co. v. McCall & Co., 121 Ga. 309, 48 S. E. 960.

80. Jumbo Min. Co. v. District Court of First Judicial Dist. of Esmeralda County [Nev.] 81 P. 153.

81. Brown v. Slater, 23 App. D. C. 51.

§ 4. *Hearing and questions which may be raised and settled.*[82]—Where the record of an inferior tribunal is brought before the appellate court by a common-law writ of certiorari, the only question before the court is the validity and sufficiency of the record certified to by that tribunal.[83] In some jurisdictions, however, errors of fact as well as law may be reviewed,[84] and in New York the hearing is in the nature of a new trial and evidence is admissible.[85] Where the court on certiorari is empowered to determine disputed questions of law and fact, the adjudication of the court on questions of fact is final and not open to review on writ of error, if there are any facts on which conclusion could be based.[86] Upon the hearing of a certiorari a superior court can decide such questions only as are raised by proper assignments of error in the petition and verified by the answer, or as are made by motion in reference to the certiorari proceeding itself.[87] The record as it existed at the time of the issue and service of the writ is all that can be considered by the court.[88] A general reason is sufficient when the error is apparent on the face of the proceedings,[89] and, on certiorari to review refusal of circuit judge to issue a writ of mandamus, the answer to the order to show cause will be taken as true.[90]

82. See 3 C. L. 674.

83. City of Rockford v. Henry Compton, 115 Ill. App. 406. Act of May 9, 1889 (Pennsylvania P. L. 158), does not enlarge scope of inquiry. Commonwealth v. Mills, 26 Pa. Super. Ct. 549. The court will not review facts stated in the return to a writ of certiorari in proceedings to widen a highway where they are founded on personal inspection and individual knowledge of the locality. People v. Van Brunt, 99 App. Div. 564, 90 N. Y. S. 845. Certiorari to set aside an order granting a liquor license is a direct attack thereon, and the court has power to review the question whether the petition on which the license was granted was sufficient to confer jurisdiction, notwithstanding the trial court's finding that it had jurisdiction. State v. Tulloch, 108 Mo. App. 32, 82 S. W. 645. On certiorari to a ruling of the board of review sustaining an assessment of property, the court cannot investigate the evidence and vacate the board's ruling on the ground that it is contrary thereto, but can only determine whether there is a reasonable basis, from the standpoint of the board, for its ruling, and, if there is such a basis, its determination must be sustained. State v. Fisher [Wis.] 102 N. W. 566. The decision of the court of appeals that defendant, who appealed to the county court from a justice's judgment, waived the right to charge grounds of objection to the justice's jurisdiction of the defendant's person, which were not presented to the justice, was, if incorrect, mere error, and not reviewable by the supreme court on certiorari. People v. Court of Appeals [Colo.] 79 P. 1017.

84. In **Tennessee** errors of fact and law may be reviewed on certiorari. Staples v. Brown [Tenn.] 85 S. W. 254.

Georgia: When the only error alleged in a petition for certiorari is that the verdict therein complained of is contrary to law and to the evidence, and it appears that the evidence demanded a verdict for the plaintiff in certiorari, the superior court should sustain the certiorari; but it is erroneous in such a case though there be no conflict in the evidence to render a final judgment in his favor. Atlantic Coast Line R. Co. v. Shuman, 121 Ga. 113, 48 S. E. 680. When the evidence is conflicting, the discretion of a judge of the superior court in granting, upon certiorari, a first new trial, will not be controlled. Casey v. Crane & Co. [Ga.] 50 S. E. 92. The supreme court will not disturb the first grant of a new trial upon certiorari from a city court when the verdict was not demanded by the evidence. Brantley v. Taylor, 121 Ga. 475, 49 S. E. 262. Where evidence was conflicting, court did not err in refusing to set aside verdict. Williams v. Mangum [Ga.] 50 S. E. 110. Evidence warranted verdict and it was not therefore error to overrule certiorari. Southern R. Co. v. Rollins, 121 Ga. 436, 49 S. E. 290.

85. People v. Wells [N. Y.] 73 N. E. 961; People v. Monroe, 94 N. Y. S. 366; People v. Hogan, 91 N. Y. S. 715.

86. Yellow Pine Co. v. State Board of Assessors [N. J. Err. & App.] 61 A. 436.

87. Casey v. Crane & Co. [Ga.] 50 S. E. 92. In reviewing the judgment of a superior court in ruling upon a certiorari, the supreme court must ascertain the facts from the answer to the writ. Allegations in the petition not verified by the answer cannot be considered. Akers v. J. M. High Co. [Ga.] 50 S. E. 105. It is upon the record alone that review by certiorari is had, not upon the averments in the petition for the writ. Leppel v. District Court of Garfield Co. [Colo.] 78 P. 682.

88. If the return shows subsequent proceedings nullifying the action complained of, the question is a mere moot one and will not be reviewed. In re Weeks, 97 App. Div. 131, 89 N. Y. S. 826. See 3 C. L. 675, n. 68.

89. Borough of Rutherford v. Maginnis [N. J. Law] 60 A. 1125.

90. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851.

§ 5. *Judgment.*[91]—In certiorari cases the judge of the superior court may make one of four orders: (1) If there is no error the writ should be quashed; (2) If there is no question of fact and an error of law which must finally govern the case, the judge of the superior court must himself make a final disposition of of the cause; (3) if there is other form of error, he may grant a new trial generally, returning the case to the court from which it came; or (4) if such error has been committed, he may return the case to the lower court with instructions.[92] Where such instructions are given, and not reversed on the application of the opposite party, they are to be treated as the law of the case, and must be given full effect on a second trial.[93] Where in justice court a defendant's answer is unsworn, but may in that respect be amended, it is error for the appellate court on certiorari to enter judgment for plaintiff.[94]

§ 6. *Costs.*[95]

§ 7. *Review of certiorari.*[96]—No appeal lies from the judgment of a court of common pleas on a certiorari to a justice of the peace, where the record shows that the justice had jurisdiction.[97] Where a case was carried to the superior court by certiorari, the answer of the justice of the peace traversed, verdict rendered against the traverse, and a motion for new trial made and overruled, a writ of error did not lie as the main case was still pending.[98] Where there is some evidence open which the finding of a superior court might have been based, the discretion of the court exercised in overruling the certiorari will not be reviewed.[99] The supreme court will not interfere with the order of the judge of the superior court refusing to sanction certiorari from a judgment of conviction in a county court, where the record fails to show that petitioner filed the affidavit required by the Penal Code of 1895, § 765.[1] Statements of fact contained in the brief of counsel and the attached affidavit of the justice, explaining what he meant by his answer, cannot be considered in reviewing the order of the judge of the superior court in sustaining the certiorari and in directing a new trial.[2] Michigan Circuit Court Rule 18, authorizing an extension of time to apply for new trial, includes the power to grant rehearing on certiorari.[3]

CHALLENGES; CHAMBERS AND VACATION, see latest topical index.

CHAMPERTY AND MAINTENANCE.[4]

An assignment by many to a few in order to facilitate the proceedings is not champertous, even though the assignees agree to take a certain percentage of the recovery in payment for their costs and expenses.[5]

Conveyances of land[6] by one ousted of possession are void, unless made to the disseisor.[7] This rule, if ever in force in the District of Columbia, is obsolete in that jurisdiction.[6]

91. See 3 C. L. 675.
92, 93. Wilensky v. Brady, 121 Ga. 90, 48 S. E. 687.
94. The case should be remanded for retrial. Stafford v. Wilson [Ga.] 49 S. E. 800.
95, 96. See 3 C. L. 676.
97. Phoenix Iron Works Co. v. Mullen, 25 Pa. Super. Ct. 547.
98. Du Vall v. Brogden [Ga.] 51 S. E. 404.
99. J. T. Copeland & Son v. Stephens [Ga.] 50 S. E. 976; Horton v. State [Ga.] 51 S. E. 287.
1. King v. State [Ga.] 50 S. E. 64.
2. Faulkner v. Snead [Ga.] 49 S. E. 747.
3. Hirsh v. Fisher [Mich.] 101 N. W. 48.
4. See 3 C. L. 677. See, also, Hammon on Contracts, § 239.
5. McEwen v. Harriman Land Co. [C. C. A.] 138 F. 797.
6. See 3 C. L. 677.
7. Gen. St. 1902, § 4042. Where married woman executed a lease without her husband joining, held a subsequent conveyance of the property by her and her husband would be regarded as a conveyance of the reversion, and not of a right of entry. Winestine v. Ziglatzki-Marks Co. [Conn.] 59

An agreement by an attorney to pay all or some portion of the court costs to accrue in a suit which he is employed to prosecute is champertous,[9] except where the consideration of such payment does not arise out of the claim in suit.[10] Where an attorney purchases a litigious right in the form of a judgment, the remedy of the defendant is to oppose its execution when the attorney attempts to enforce it.[11] An attorney at law is not entitled to recover any fees for services rendered in connection with the prosecution of a suit after he has made a champertous contract with respect thereto,[12] but he is entitled to recover upon a quantum meruit for all services rendered up to the time of the making of such contract.[13]

The defense of champerty[14] is an affirmative one,[15] and can only be interposed in an action between the parties to the champertous contract, and does not furnish any reason for refusing relief in the proceeding to which the champertous agreement relates.[16]

Maintenance.—In order to be guilty of maintenance, it is essential that the alleged maintainer have no real interest in the action.[17]

CHANGE OF VENUE; CHARACTER EVIDENCE; CHARITABLE AND CORRECTIONAL INSTITUTIONS, see latest topical index.

CHARITABLE GIFTS.[18]

§ 1. *Nature and essentials; Validity.*[19]—A charity is an undertaking which contemplates a public benefit, or the well being of a community or a class, as con-

A. 496. A deed of land held by a third person adversely to the grantor gives the grantee no right to recover the land from the possessor. Lowery v. Baker [Ala.] 37 So. 637.

8. Chesapeake Beach R. Co. v. Washington, P. & C. R. Co., 23 App. D. C. 587.

9. Comstock v. Flower [Mo. App.] 84 S. W. 207. Agreement between holder of a nonnegotiable chose in action and an attorney, whereby the latter in consideration of an assignment of the claim to him, agrees to enforce the collection thereof by suit, himself to pay all the expenses, and remit to the assignor one-half of the proceeds, held void. Slade v. Zeitfuss [Conn.] 59 A. 406. See. also, Attorneys and Counselors, 5 C. L. 319.

NOTE. Contingent fees: A contract by an attorney to prosecute an action at his own expense in behalf of his client, for a share of the proceeds of the suit, is the typical modern case. Such a contract, of course, falls exactly within the old definition of champerty; and the English courts, even though the attorney, in the utmost good faith, agrees to take the righteous cause of a penniless client for a contingent fee of ten per cent. of the recovery, refuse to enforce it. Strange v. Brennan, 15 Sim. 346. By American courts, on the other hand, all such contracts are usually enforced, but on various theories. Bayard v. McLane, 3 Harr. [Del.] 139, 216. Some courts, looking only at the old statutes and seeing that the danger of intimidation of the courts does not exist in the United States, reject the whole doctrine. Mathewson v. Fitch, 22 Cal. 86. Such a view was expressed in the recent case of Smits v. Hogan, 35 Wash. 290, 77 P. 390. Others recognize the illegality of champerty and maintenance at common law, but evade the logical result wherever possible by technical distinctions. For example, if the attorney agree to pay the costs of the suit, the contract is champertous; if he agree to prosecute the action at the client's expense, for a contingent fee, it is not champertous. West Chicago, etc., Com'rs v. Coleman, 108 Ill. 591, 601. And in Massachusetts, if the attorney stipulate for one-fouth of the proceeds, the contract is champertous; if he is to receive an amount equal to one-fourth of the proceeds, it is good. Blaisdell v. Ahern, 144 Mass. 393, 395, 59 Am. Rep. 99.—18 Harv. L. R. 223.

10. McCoy v. Griswold, 114 Ill. App. 556.

11. Kuck v. Johnson [La.] 38 So. 559. Held to have no interest in contesting title of the attorney on an appeal by the latter from the judgment. Id.

12, 13. Dreyfuss, Weil & Co. v. Jones, 116 Ill. App. 75.

14. See 3 C. L. 678.

15. Comstock v. Flower [Mo. App.] 84 S. W. 207. Defense of champerty not being pleaded is unavailable. Major v. Insurance Co. of North America [Mo. App.] 86 S. W. 883.

16. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091. In a suit to set aside a sale of certain real estate, the fact that the contract between plaintiff and his attorney is champertous is no defense. Id.

17. Insurance company indemnifying the insured for injuries to an employe is not

trasted with the beneficial use for a private purpose or individual.[20] In order that a gift may come within the rules relating to charitable gifts, some charitable utility must be derived from its execution.[21] A gift for the benefit of a particular Christian church or for the advancement of religion is charitable.[22]

Gifts in trust for charitable purposes must designate with reasonable certainty the property donated,[23] the objects and purposes to be accomplished,[24] and the manner in which the trust is to be executed.[25] It is sufficient if the founder describes the general nature of the charitable trust, and he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery.[26] Bequests in trust for, or made directly to, unincorporated societies are valid, though no purpose is mentioned to which the fund is to be applied, provided the testator has made plain the objects of his bounty so that the courts may enforce the application of the fund as he intended.[27]

guilty of maintenance in defending an action by the employe against the insured. Breeden v. Frankford Marine, Accident & Plate Glass Ins. Co., 110 Mo. App. 312, 85 S. W. 930. Complaint alleging that an insurance company unlawfully, maliciously, and willfully appealed a judgment in favor of plaintiff against a third party, and when on a new trial plaintiff again recovered judgment, the defendant was insolvent, held to state a cause of action for maintenance. Id.

18. See, also, Asylums and Hospitals, 5 C. L. 301; Schools and Education, 4 C. L. 1401. For interpretation of instruments creating charities, see Deeds of Conveyance, 3 C. L. 1056; Trusts, 4 C. L. 1727; Wills, 4 C. L. 1863.

19. See 3 C. L. 678.

20. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Objects of society, stated by certificate to be receipt of money contributed or devised, the investment of the same, and the application of the income to the relief of poverty and distress, and generally to act in respect to any property received for any charitable use or purpose, held benevolent and charitable within Laws 1848, p. 447, c. 319, § 1, providing for incorporation of such societies. Id. Laws 1871, p. 601, c. 301, for purpose of removing limit to amount of property which certain society might take, and containing recital of purposes of society as stated in its certificate of incorporation, rendered such incorporation valid if originally invalid, or else created a valid incorporation in the first instance. Id.

21. Bequest to college to be used for endowment to prosecute research in regard to colonial history held valid. Colbert v. Speer, 24 App. D. C. 187.

22. Bequest of fund to committee of certain church in trust to use income for benefit of church, and in their discretion for advancement of religion in the Baptist denomination. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279. A devise for the maintenance of a church. Biscoe v. Thweatt [Ark.] 86 S. W. 432. A bequest to the Rev. K., or his successor, of a certain church, for the purpose of saying masses for testator and certain other persons, is a religious use. In re O'Donnell's Estate, 209 Pa. 63, 58 A. 120.

23. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279. A provision directing the institution and maintenance of a scholarship from the income of an amount not to exceed $3,000 is not void for uncertainty in the amount directed to be expended. Colbert v. Speer, 24 App. D. C. 187. Alternative bequest of a sum not exceeding $5,000, to be equally divided between two orphan asylums, held valid, and each legatee should have half such sum. Id.

24. Colbert v. Speer, 24 App. D. C. 187. Bequest to college to be used as endowment to prosecute research in regard to certain colonial history not void for uncertainty or indefiniteness in nature or object of research. Id. A provision that all the balance of testator's property should go to an existing charitable institution and one which he wished to establish during his lifetime, but if he should not establish it, then the property to be divided between the existing institution and his wife is valid. Not invalid because disposition is at the absolute and unlimited discretion of the donee. Testator had power to select wife to make division, and heirs cannot object, particularly where institution does not. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Deed conveying property to certain persons "to be held by them in trust for Trinity Parish," held void for uncertainty as to purpose Weaver v. Spurr [W. Va.] 48 S. E. 852. Ambiguity is patent and hence cannot be helped by averment. Id.

25. Bequest to college to be used as endowment for prosecution of research in colonial history held valid. Colbert v. Speer, 24 App. D. C. 187. The power given the trustee must be definite and certain so that it can be ascertained in what manner the fund is to be used. In re Merchant's Estate, 143 Cal. 537, 77 P. 475. Bequest of fund to committee of certain church of which testator was a member, in trust to use income for benefit of said church and in their discretion for the advancement of religion in the Baptist denomination, held valid. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279.

26. Biscoe v. Thweatt [Ark.] 86 S. W. 432. A devise to the vestrymen of a church to be used as they may deem best for the interests of the church is not invalid because indefinite. Id.

27. Snider v. Snider [S. C.] 50 S. E. 504. Bequest to "Furman University" which took effect during time between expiration of its charter and its renewal held valid. Id. Bequests to "Southern Baptist Theological Seminary at Louisville, Kentucky," and the "For-

In many states it is regarded as inherent in public charities that the beneficiaries be somewhat uncertain;[28] but in others the ordinary rules as to private trusts apply and the beneficiaries must be certain or capable of being made certain.[29] Beneficent bequests will not, however, be defeated by mere misnomers,[30] but it is enough if the testator uses language sufficiently clear to enable courts by extrinsic evidence to identify the beneficiary and trustee,[31] and parol evidence is admissible for that purpose.[32]

Statutes often provide that no charitable trust shall be held invalid because of the indefiniteness of the beneficiary,[33] or by reason of the objects being uncertain,

eign Mission Board now at Richmond, Virginia," held valid, though it did not appear that they were incorporated. Id.

28. Charitable trusts must be for the benefit of an indefinite number of persons. Biscoe v. Thweatt [Ark.] 86 S. W. 432; In re Merchant's Estate, 143 Cal. 537, 77 P. 475. Bequest in trust for benefit and advancement of the Oakland Red Cross Society in California, to be used in equipping hospital if there was one in connection therewith and for benefit of soldiers coming from Pacific [illegible], held to indicate an intention that the entire residue might be used for purpose of equipping such a hospital. Id. Finding that society at all times had a certain ascertained membership should be construed as finding that it had an organization sufficiently formed to take and not that it was necessarily at all times composed of the same persons. Id. Bequest not for the benefit of persons composing society at time of testatrix's death, but for that of the society in its organized capacity, and through it for the charitable objects for which it was formed. Id. One of elements of a religious or charitable trust is its uncertainty. St. James' Parish v. Bagley [N. C.] 50 S. E. 841.

29. In the absence of statute, there must be a beneficiary capable of being designated, who can enforce the trust provision. Mount v. Tuttle, 99 App. Div. 433, 91 N. Y. S. 195. Beneficiary must be a definite, certain, ascertainable person, natural or corporate. Deed conveying property to certain persons "to be held by them in trust for Trinity Parish," in a certain town, county, and state, held void for uncertainty. Weaver v. Spurr [W. Va.] 48 S. E. 852. Beneficiaries and nature and quality of their interests. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279. Gift to one in trust for the worthy poor of a specified city is void. Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104. Laws 1903, p. 188, c. 132, relating to trusts, held void because subject-matter of act is not expressed in title. Id. Bequest of not to exceed certain sum to be expended under personal supervision of trustees for purchase of chimes, altar, or memorial window for some one Catholic church to be designated by testator's mother, and if she should fail to designate one, then said trust to be carried out by trustees as memorial to her, held void for uncertainty, no particular church having been named or described, and mother having died without naming any. Colbert v. Speer, 24 App. D. C. 187.

30. Cook v. Universalist General Convention [Mich.] 101 N. W. 217.

31. Bequest to "Universalist Japan Mission Fund" held to belong to the Universalist General Convention. Cook v. Universalist General Convention [Mich.] 101 N. W. 217. Bequests to St. Vincent's and St. Joseph's Catholic Orphan Asylums are good, though their correct corporate names are "St. Vincent's Orphan Asylum," and "The Trustees of St. Joseph's Male Orphan Asylum," respectively. Colbert v. Speer, 24 App. D. C. 187. Gift to "Georgetown University" held to have been intended for "The President and Directors of Georgetown College," particularly where act incorporating such institution provides that no misnomer of the corporation shall defeat or annul any bequest or devise made to it. Id.

32. Where testatrix made bequest to the "Universalist Japan Mission Fund" for the support of the "Universalist Mission in Japan," to show that she was a Universalist, that she had previously contributed to such fund, and that the Universalist General Convention was only society of that denomination having such a mission. Cook v. Universalist General Convention [Mich.] 101 N. W. 217.

See, also, Wills, 4 C. L. 1863; Deeds of Conveyance, 3 C. L. 1056.

33. N. Y. Acts 1893, p. 1748, c. 701. Mount v. Tuttle, 99 App. Div. 433, 91 N. Y. S. 195. Act applies only to trusts which are to be executed within that state. Gift in trust to T., missionary bishop of Utah and Idaho, his successors, etc., to erect church and rectory at such place in his jurisdiction as he should elect, held invalid. Id. Charitable trust providing that after death of testator's wife remainder of fund was to be devoted by trustees to the creation of some charitable or educational institution in New York, without restriction as to character, except that it should be nonsectarian, and that fund should not be divided between existing charities except for purpose of placing existing institution on sound foundation, held valid. Rothschild v. Wise, 92 N. Y. S. 1076. Where the property is to be distributed to charitable institutions by the trustees in the exercise of their discretion after the termination of a preceding life estate, the court cannot prior to that time determine to whom the money should be paid. Id. Evidence of the intention held by the trustees in regard to the distribution prior to the time when it can take place is incompetent in a proceeding to determine the construction and validity of the bequest. Before death of widow who is entitled to income for life. Id. Declarations of the testator made after the execution of the will are incompetent to show to what charity he desired the fund to go. Id.

indefinite, or dependent upon the discretion of a last trustee.[34] In such case the court is given control of the property for the purpose of carrying out the intention of the donor as nearly as possible.[35]

In many states charitable gifts made within a specified time before the death of the donor or the testator are void.[36]

In New York any person having a husband, wife, child, or parent is prohibited from devising or bequeathing more than half his estate after the payment of his debts to any charitable, scientific, religious or literary society, association, or corporation, in trust or otherwise.[37] The act applies to a disposition of property for a foreign trust.[38] As a general rule the value of the widow's dower must be deducted from the gross value of the estate in determining the amount which may lawfully be given to charities,[39] but this does not apply where she accepts a provision given her by will in lieu of dower.[40] The act applies only to testamentary dispositions of property.[41] It is for the benefit of those named therein and those of the next of kin who would take in connection with them under the intestacy laws,[42] and may be waived by them.[43] Any one who would take any interest in the estate if the instrument should be declared invalid may invoke its provisions.[44]

The rule against perpetuities does not ordinarily apply to charitable gifts.[45]

34. Act April 26, 1855 (P. L. 328). Gift to executors with discretionary power to distribute money among charitable institutions except missionary societies, and direction to distribute it among as large a number of institutions as they may think best calculated to secure greatest good not too indefinite to allow appointment of trustee. In re De Silver's Estate [Pa.] 60 A. 1048.

35. Acts 1893, p. 1748, c. 701. Supreme court. Mount v. Tuttle, 99 App. Div. 433, 91 N. Y. S. 195. Rothschild v. Wise, 92 N. Y. S. 1076. Act April 26, 1855 (P. L. 328.) In re De Silver's Estate [Pa.] 60 A. 1048.

36. In the District of Columbia gifts and devises for religious purposes are void unless made at least one month before death. Rev. St. § 457. Colbert v. Speer, 24 App. D. C. 187. The mere fact that a secular institution is controlled by a religious body or is conducted under the auspices of a particular church does not make it a religious institution within the meaning of the act, where it is open to all. Id. "President and Directors of Georgetown College" and certain orphan asylums incorporated under the laws of the district held not religious institutions, though under auspices of Catholic church. Id. In Pennsylvania are void if made within thirty days before death. Act April 26, 1855 (P. L. 328). In re O'Donnell's Estate, 209 Pa. 63, 58 A. 120.

37. N. Y. Laws 1860, p. 607, c. 360. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

38. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 920.

39. Is her property and not testator's. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

40. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

41. Not to declaration of trust. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Does not apply to declaration of trust in favor of college of more than half of settlor's estate, to take effect in praesenti, subject to a trust in favor of the settlor for a part of the income during his life, and on condition that after his death the college pay certain sums and annuities to specified persons, since it is not a testamentary disposition of property. Id. Where, during his lifetime, testator by deed of trust placed a certain sum in trust for his son with provision that on latter's death principal should revert to testator or to such persons as he should by will direct, held, that certain charities to whom he gave the remainder of the fund took as appointees under the deed and not as devisees under the will, and hence its value should not be considered in determining the amount given to charities. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

42. Does not apply to remote next of kin who would not take in such case. In re Beers' Will, 85 App. Div. 132, 83 N. Y. S. 67.

43. Release of husband of any interest in wife's estate contained in antenuptial agreement held waiver of statute and property distributed as directed to exclusion of next of kin where he would have been entitled to whole estate but for such agreement. In re Beers' Will, 85 App. Div. 132, 83 N. Y. S. 67.

44. Nephew of testator held entitled to attack declaration of trust where part of property would have descended under intestacy laws if it had been declared invalid, Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92.

45. Provision for accumulation of fund for twenty-five years, and its subsequent transfer to corporation to be organized held valid. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008; Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. Trusts for charitable purposes. Biscoe v. Thweatt [Ark.] 86 S. W. 432. Gifts or devises to a charitable corporation. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Where objects of society, for the benefit of which estate was given in trust are admittedly charitable, and it is plainly manifest that testatrix intended to create charitable trust for furtherance of such objects. In re Merchant's Estate, 143 Cal. 537, 77 P. 475.

§ 2. *Capacity of donee or trustee.*[46]— The power of a corporation to take gifts for charitable purposes generally depends on the terms of its charter.[47] It may hold and execute a trust for charitable objects which are in accord with, or tend to promote, the purposes of its creation, even though it would not have had authority to have established them or to have expended its funds therefor.[48]

Restrictions imposed by the charter of a corporation upon the amount of property it may hold can be taken advantage of only by the state in a direct proceeding, and not collaterally by individuals.[49] Hence where the state by special legislation enlarges its powers in that regard, its capacity cannot be questioned in any manner.[50] Where a testator devises his property to trustees to be held for a term of years and then to be transferred to a corporation to be organized for a charitable purpose, the fact that at the time of his death such a corporation is not permitted to hold property to the amount of the devise does not invalidate the gift as to the excess, since it is to a corporation only which is legally capable of taking,[51] and the legislature may, after his death, authorize the organization of such a corporation.[52]

A charitable devise to an unincorporated body is valid in Arkansas.[53] The burden is on the person attacking such gifts to prove that the organizations do not exist, or that their charitable purposes are too vague and uncertain to enable them to take.[54]

A charitable corporation cannot act as trustee in a matter in which it has no interest,[55] but where it has an interest either in the principal or the income, it may act as trustee for another or others having an interest in the whole or part of the income for life.[56]

§ 3. *Interpretation and construction.*[57]—Charitable donations are favored by the courts and will be carried into effect if it is possible to do so consistently with the rules of law.[58]

The ordinary rules of interpretation apply.[59]

46. See 3 C. L. 680.

47. Laws 1895, p. 343, c. 158, relating to the organization of corporations to administer and furnish relief and charity for the worthy poor of a designated locality, does not authorize such corporations to take property in trust for purposes not authorized by statute, but does authorize them to take property subject to such conditions and limitations as the donor may impose, if not inconsistent with their corporate purposes. Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104. The wardens and vestry of a parish are a body corporate with capacity to take and hold the legal title to land for purposes consistent with the creation and existence of the corporation. Code, § 3665. St. James Parish v. Bagley [N. C.] 50 S. E. 841.

48. Bequest to college to be held and used as endowment for the prosecution of research in certain colonial history, and in gathering and preserving archives in relation thereto, held germane to purposes of incorporation of college, even if not within the letter of its charter. Colbert v. Speer, 24 App. D. C. 187.

49, 50. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

51. Trusts will wait until one is organized which can take. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

52. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

53. To the vestrymen of a certain church and their successors. Biscoe v. Thweatt [Ark.] 86 S. W. 432. The individual members take as trustees. Snider v. Snider [S. C.] 50 S. E. 504.

54. Snider v. Snider [S. C.] 50 S. E. 504.

55, 56. Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Under endowment given by a declaration of trust for particular charitable use and irrevocably to a college having power to accept, and which did accept it on its creation, and subject to a trust in favor of the settlor for a part of his income during life, and to payment of specified sums and annuities after his death, college took corpus of estate as owner for particular charitable use, and not as trustee, even if trust to annuitants was invalid, though instrument was called declaration of trust, and settlor reserved right to substitute another beneficiary, and right to act as trustee for college and retain possession of principal during his lifetime. Id.

57. See 3 C. L. 680. See, also, Trusts, 4 C. L. 1727; Wills, 4 C. L. 1863.

58. In re Merchant's Estate, 143 Cal. 537, 77 P. 475; St. James' Parish v. Bagley [N. C.] 50 S. E. 841; Biscoe v. Thweatt [Ark.] 86 S. W. 432. The court will, if possible, so construe the instrument creating them as to accomplish the purpose of the donor. Bequest to church. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279.

59. See Deeds of Conveyance, 3 C. L. 1056; Wills, 4 C. L. 1863. Where testatrix be-

A gift of testator's residuary estate to his executors to be allowed to accumulate for a term of years and then to be transferred to a corporation to be formed for the purpose of maintaining a hospital for the care of the indigent sick in a certain county creates a charitable trust from the time of the probate of the will.[60] Both the legal and equitable estates vest immediately, the former in the executors as trustees, and the latter in that part of the public which is to be benefited.[61] Since the equitable interests vest from the death of the testator, a limitation over from one charity which speaks from his death to another is valid without regard to the technical character of succeeding changes in title, or the rule against perpetuities.[62] Nothing passes directly to the corporation under the will, but it takes through a conveyance from the trustees, made in the execution of their trust.[63] The income and accumulations of the property go with the corpus of the fund in so far as the title is concerned.[64]

A gift to an existing corporation or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift which are reasonably consistent with the corporate purposes of the donee, is not a gift in trust, but an absolute one to the corporation within the meaning of the statute of uses and trusts.[65]

§ 4. *Administration and enforcement.*[66]—A charitable or eleemosynary trust may only be created by grant or legislative act.[67] In the incorporation of a chari-

queathed residue of estate to charitable corporation, and thereafter by codicil changed same so as to give a specific sum therefrom to another charity, and such codicil was void, held, that the first named corporation was entitled to the entire residue, including the void bequest. Prison Ass'n of Virginia v. Russell's Adm'r [Va.] 49 S. E. 966. Where will provided for legacies to certain charitable institutions, but provided that, with one exception, they should not be paid until they had doubled by accumulation of interest, and thereafter directed that the income from royalties and the sale of certain land should be divided among the same charities, held, that the latter gift was not cumulative on the previous specific bequests, but merely directed the method in which they should be paid. In re Handley's Estate [Pa.] 61 A. 350.

60. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. Such provision is within rules applicable to public charities. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

61. Executors take as trustees, though not so designated. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008; Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. The provisions as to the accumulation and management of the fund and its transfer to the corporation are mere details of administration which do not affect the character of the gift or the nature of the title created. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008.

62. In equitable action court is concerned with equitable title only. Brigham v. Peter Bent Brigham Hospital [C. A. A.] 134 F. 513.

63. Hence cannot be said that gift is contingent or violates rule against perpetuities. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008.

64. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. Hence validity of gift not affected by provision therefor. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

65. Term absolute gift is used in contradistinction to a gift in trust. Not a trust where both the legal and beneficial ownership in the donee, though gift is a conditional one. Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104. Such a gift is not invalid as an attempt to evade the law relating to uses and trusts. Id. Gift to corporation to be organized in the future to furnish relief and charity to the worthy poor of a designated locality held valid. Id. The fact that certain trusts to be executed by the corporation are void does not affect the validity of the gift where the will provides that in that event the gift shall vest free from any invalid trust features. Id. A gift to a charitable corporation for its charitable purposes is not a trust or a gift to charitable uses, but an outright gift. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Evidence insufficient to show attempt to create secret trust. Id. Direction that the principal be kept invested and only the income used is not contrary to public policy or the rule against perpetuities. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Deed to wardens and vestry of a parish for the purpose of "aiding in the establishment of a home for indigent widows or orphans, or in the promotion of any other charitable or religious objects," held not to create trust but to pass absolute title which they could convey. St. James Parish v. Bagley [N. C.] 50 S. E. 841. The corporation on its organization does not hold the property in trust in the true sense of the word, but as its own to be devoted to the purposes for which it was created. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

66. See 3 C. L. 681.

67. Thompson v. Hale [Ga.] 51 S. E. 383.

table society, it is not necessary to minutely and precisely identify the ultimate recipients of the bounty.[68] A gift is for the "benefit" of the donee if the donee is of such character that it stands for all those who may be actual beneficiaries.[69]

The powers and duties of trustees for charitable purposes are generally fixed by the instrument creating the trust.[70] Where a valid gift for charitable purposes has been made by will, the heirs have no standing in equity to question the powers or title of the devisee or of intervening executors.[71] The mere fact that the society which is the beneficiary bestows its largess on other charitable institutions does not involve a delegation of its discretionary power to select beneficiaries.[72]

If, on account of a change in circumstances, it becomes impracticable to administer the trust in the precise manner provided by its creator, it will be administered as nearly as possible in accordance therewith.[73]

Courts of equity have an original and inherent jurisdiction over charities both under the statute of charitable uses and independent of it.[74] They may prevent any misappropriation of the trust fund or correct any abuse in its management by the trustees,[75] provided such jurisdiction is invoked by some one interested in the trust, or in the name of the attorney general, as the representative of the state, in an action or proper proceeding authorized by law for that purpose.[76] Unless such power is conferred by the instrument creating the trust, the court has no jurisdiction to act in the matter of his own volition and on his own motion without any information or action on the part of anyone.[77]

It can only be created by grant when property is thereby conveyed to it. Id.

68. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

69. Where will created trust for people of city and devised property to a church and school, a decree finding that the trusts were established for the benefit of the church and school instead of the city held not erroneous, since they were public charitable institutions which were to act as agencies in dispensing the charity. Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71.

70. Devise of realty in trust to religious society for erection of chapel, with direction that society should "suffer and permit" same to be under the "care, custody, and management of the deacons of the society as designated," held to give deacons control and management of the property independent of the trustee holding the title, and of which the latter could not deprive them. Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71. Deacons held to have been given similar powers in regard to legacies for support of industrial school and to defray expenses of maintaining minister, etc. Id. Bequest in trust held to require net income to be used in defraying expenses of maintaining minister and public worship, even if the trustees anticipate a loss to the principal, and should not be held back to make good such losses. Id. Provisions in regard to loans of trust fund for erection of chapel held binding on trustees and to be literally followed by them. Id.

71. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

72. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

73. Doctrine of cy pres does not apply where there is no doubt as to testator's intention, which is legal and possible of fulfillment, and only defect is a misnomer of the corporation named as trustee. Cook v. Universalist General Convention [Mich.] 101 N. W. 217. Where will provides for creation of corporation to which property is to be conveyed by trustees after a specified period, the gift will not fail if it becomes impossible to organize such a corporation, but doctrine of cy pres will be applied, and some other method of administration will be found to accomplish substantially the same result. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. Cy pres doctrine does not apply in Iowa. Filkins v. Severin [Iowa] 104 N. W. 346. Instruments creating trusts for public charitable purposes should be so construed as to carry out the general intention of the donor when clearly manifested, even if the particular form and manner pointed out by him cannot be followed. Biscoe v. Thweatt [Ark.] 86 S. W. 432.

74. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594. Statute of 43 Elizabeth, relating to powers of equity courts in regard to charitable gifts, is a part of the law of Kentucky. Id.

75. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594. Where a devise is given in trust for the benefit of a society existing solely for charitable purposes, it is presumed that the fund will be applied agreeably to the wishes of the testator, and resort may be had to the courts to compel such application. In re Merchant's Estate, 143 Cal. 537, 77 P. 475. Courts look with particular favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and to protect them from abuse. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594.

76. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594.

77. Will held not to give court any visi-

The removal of trustees rests in the sound discretion of the court;[78] but a trustee appointed by deed or will should not be removed in the absence of such misconduct as to show a want of capacity or fidelity, putting the trust property in jeopardy.[79]

The donor may, if he so desires, appoint trustees and confer the power of appointing their successors on them or on the beneficiaries.[80] The trustees of an unincorporated academy have, in the absence of power conferred by grant, no authority to perpetuate their succession by filling vacancies in the board.[81]

Equity will not allow an otherwise valid charitable trust to fail for want of a competent trustee, but will appoint one to take the trust property and carry out the charitable intent of the donor,[82] provided there is nothing to show that the donor reposed special personal trust and confidence in the persons whom he himself appointed.[83] Statutes in some states specifically provide to the same effect.[84]

On the dissolution of a charitable corporation supported by public moneys, it is competent for the legislature to direct that the proceeds of its property shall go to the county from whose treasury such moneys were in effect diverted.[85]

torial or other supervision over hospital or control over trustees in the manner of maintaining or conducting it. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594.

78. Haines v. Elliot [Conn.] 58 A. 718.

79. Refusal to remove trustees of a fund created for maintenance of school held proper, where they were appointed by donor, who acquiesced in their management until his death, as did his representatives after his decease. Haines v. Elliot [Conn.] 58 A. 718.

80, 81. Thompson v. Hale [Ga.] 51 S. E. 383.

82. Trustees of church appointed in place of unincorporated committee which was incompetent because of fluctuating membership. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279. A trust for a particular charitable purpose where the duties of the trustees are pointed out by the will so that there is certainty in the purposes and objects of the charity. In such case is no ground to suppose that discretion of any particular trustee has anything to do with essence of the gift. Colbert v. Speer, 24 App. D. C. 187. Where executors are directed to hold property for twenty-five years and then turn it over to a corporation to be organized, the trust in the executors is not a personal one, but on their death before that time may be executed by their successors appointed by the court. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

83. Where an estate is given by will to trustees to be applied to charity generally or to such charitable purposes and institutions as they, in their discretion, shall judge best, and they become incapacitated or decline to act, the question whether others can be appointed to take their places depends upon the intention of the testator, to be gathered from the whole instrument. Colbert v. Speer, 24 App. D. C. 187. If it appears that the testator reposed special personal trust and confidence in those named, the powers and discretion given them cannot be exercised by any one else (Id.); but if it be found that new trustees may reasonably perform such duties, they will be appointed by the court with direction to proceed in the execution of the will (Id.). Bequest for institution and maintenance of a scholarship, preferably in a named college, or else in some other medical college in the District of Columbia, held one which could be executed by trustees appointed by the court. Id.

84. Pub. Laws R. I. 1898-99, c. 680, § 1. Wood v. Trustees of Fourth Baptist Church [R. I.] 61 A. 279. In Pennsylvania no disposition of property for any religious, charitable, or scientific use shall fail for the want of a trustee. Act April 26, 1855 [P. L. 328]. Bequest to executors with discretionary power to distribute money among charitable institutions held not to fail by their death before distribution. In re De Silver's Estate [Pa.] 60 A. 1048. In Georgia the superior court exercising equitable jurisdiction has plenary power over trusts for educational purposes, and may fill vacancies in the trusteeship where no provision has been made therefor either by grant or legislative enactment. Civ. Code 1895, §§ 4008, 4009, Thompson v. Hale [Ga.] 51 S. E. 383. May be exercised by the chancellor on petition of the beneficiaries. Civ. Code 1895, §§ 3178, 3195. Id. The beneficiaries under a deed conveying property to the trustees of an academy to be used for educational purposes are not the trustees, but all persons living near the school who may avail themselves of its educational advantages and opportunities. Id.

85. Where inebriates' home was supported principally by excise money and liquor fines collected in county in which it was located, and its property was principally purchased with such money, held, that it was competent for the legislature, on dissolving such home, to direct that the proceeds of its property be returned to the treasury of the county from which it had, in effect, been diverted, there being no evidence of any creditor, or of any person claiming or entitled to claim any part of the property by way of reversion. Avila v. New York, 94 N. Y. S. 1132. Trustees of dissolved charitable corporation held not entitled to recover back proceeds of its property which they had voluntarily paid to the county treasurer in pursuance of an alleged unconstitutional statute, where all the debts of the corporation

CHARTER PARTY, see latest topical index.

CHATTEL MORTGAGES.

This topic deals exclusively with chattel mortgages,[86] and does not treat of general trust deeds upon the property of corporations,[87] such as railroads,[88] street railways,[89] and water companies.[90] The effect of the mortgage as a preference or fraudulent transfer is treated elsewhere,[91] as is the operation of limitations upon actions to enforce it.[92]

§ 1. *What constitutes a chattel mortgage.*[93]—The essential elements of a chattel mortgage are an indebtedness between the parties,[94] a transfer of property by the debtor to the creditor to insure the payment of the debt,[95] and a right in the debtor to have all that remains after the debt is paid.[96] The intention of the parties governs;[97] thus bills of sales,[98] and conditional sales,[99] have been held chattel mortgages. That an instrument absolute on its face is in fact a chattel mortgage may be shown by parol.[1]

had been paid and no one claimed any of its property by reversion. Id.

86. Real estate mortgages, see Mortgages, 4 C. L. 677, and Foreclosure of Mortgages on Land, 3 C. L. 1438.

87. See Corporations, 3 C. L. 880.

88. See Railroads, 4 C. L. 1181.

89. See Street Railways, 4 C. L. 1556.

90. See Waters and Water Supply, 4 C. L. 1824.

91. See Bankruptcy, 5 C. L. 367; Assignment for Benefit of Creditors, 5 C. L. 286; Fraudulent Conveyances, 3 C. L. 1535.

92. See Limitation of Actions, 4 C. L. 445.

93. See 3 C. L. 682. Chattel mortgages distinguished from other transactions. See Hammon, Chat. Mortg. § 1.

94. Hastings v. Fithian [N. J. Err. & App.] 60 A. 350. A chattel mortgage running to the mortgagee as "trustee" without naming a cestui que trust is void as to a third person, the mortgagor being in no wise indebted to the mortgagee. Martin v. Sexton, 112 Ill. App. 199.

95, 96. Hastings v. Fithian [N. J. Err. & App.] 60 A. 350.

97. Certain instrument construed and held to constitute an assignment of certain rents and profits and not a mortgage thereof to secure an indebtedness between the parties. Seymour v. Ryan [Minn.] 101 N. W. 958.

98. A bill of sale being simply intended to secure the buyers on their liability as surety for the seller, and the latter retaining and selling the goods, held to constitute a mortgage. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673.

99. A contract for the purchase of mill machinery, providing that the title thereto should remain in the seller until the purchase price was paid, and that failure to execute and pay notes as provided in the contract should entitle the seller to retake possession and resell the property, and retain any balance unpaid, together with interest, attorney's fees, etc., and pay the buyers any surplus and collect from them any deficiency, held, an equitable mortgage and not a conditional sale. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

Kentucky: A conditional sale of chattels by which the seller retains title until the purchase price is paid, and has power to retake possession if the price is not paid, is an absolute sale, with a mortgage back to secure the price. In re Ducker, 133 F. 771.

Texas: Where a seller delivers personal property to a buyer with the understanding and agreement that no title is to pass until the purchase price is paid, the transaction constitutes a sale within the meaning of Sayles' Ann. Civ. St. 1897, art. 3327, declaring that all reservations of title to or property in chattels as security for the purchase money thereof shall be deemed chattel mortgages. Eason v. De Long [Tex. Civ. App.] 86 S. W. 347.

1. Bill of sale. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673. This regardless of a statute prohibiting the admission of parol evidence to establish an express trust. Merritt-Allen Co. v. Torrence [Iowa] 102 N. W. 154.

§ 2. *Subject-matter. What may be mortgaged.*[2]—The mortgage may cover after-acquired property,[3] provided there is an interest in praesenti of which the future acquisition is the product, or in such wise incident to or connected with it, constituting a tangible and substantial predicate of a contract.[4] As to such property the lien attaches as between the parties upon the property coming into the possession of the mortgagor,[5] and, as between such parties, it relates back to the date of the mortgage.[6] Shares of stock in a corporation may be mortgaged.[7]

Title and interest of mortgagor.[8]—The mortgagor must have some title or interest in the property,[9] but this title need not be absolute, a contingent interest being sufficient to sustain the mortgage;[10] thus a purchaser under a conditional sale has a mortgagable interest in the property;[11] but he cannot by executing a mortgage affect the rights of the seller.[12] Partnership property cannot be mortgaged by one partner without the consent of the other partner, for the purpose of securing his individual debt, so as to defeat the claims of partnership creditors.[13] Statutory provisions as to the power of a husband to mortgage his wife's property govern.[14]

Description of property.[15]—The description must be such as, aided by the inquiries which the mortgage itself indicates and directs, will enable third persons to identify the property.[16] Location may make the description certain,[17] but failure to give the location,[18] or an error therein,[19] the description being ample in other re-

2. See 3 C. L. 683.

3. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

4. Fidelity & Deposit Co. of Maryland v. B. F. Sturtevant Co. [Miss.] 38 So. 783. See Hammon, Chat. Mortg. c. 2.

5. Crops to be grown. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

6. In re Rogers, 132 F. 560; declaring the law of Vermont as indicated by Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

7. Clark & M. Corp. § 624.

8. See 3 C. L. 683.

9. Richley v. Childs, 114 Ill. App. 173. Mortgage given, by the vendor of a chattel after its sale, upon the false representation that he was the owner, held not enforceable as against the vendee's creditors, the vendee having posted a sign with its name on in the shop where the chattel was used. Ott v. Sutcliffe [N. J. Eq.] 60 A. 965. Evidence held to show that such a sign was posted. Id. Where wife held executory contracts for the purchase of land, the fact that the husband devotes his time and labor to the cultivation of the land does not prove that he has any interest in the crop so that a mortgage given by him will create any lien thereon. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

Evidence held sufficient to show that the mortgagor had such title and interest in the property as owner, as authorized him to execute the mortgage and render it valid against the estate of his deceased partner. Chapman v. Greene [S. D.] 101 N. W. 351.

10. Hammon, Chat. Mortg. c. 2.

11. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

12. Seller under a conditional sale takes free from mortgage given by purchaser, the latter having defaulted. Freed Furniture & Carpet Co. v. Sorensen [Utah] 79 P. 564.

13. Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commission Co. [Mo. App.] 84 S. W. 142.

14. **Mississippi:** Under Code 1892, § 2293, a husband may subject cotton raised on his wife's planation to the payment of family and plantation supplies furnished and used on the place. Dean v. Boyd [Miss.] 38 So. 297.

15. See 3 C. L. 683.

16. Fair v. Citizens' State Bank [Kan.] 79 P. 144; Kaase v. Johnston [Ind. T.] 82 S. W. 680; Williamson v. Payne, 103 Va. 551, 49 S. E. 660. The recordation of a deed which furnishes a stranger with the obvious means of identifying the property gives constructive notice. Id. Description "One bay horse 12 year sold, named Mike, one hay mare, white star in forehead, named Mollie, 12 years old * * * purchased by G. from S. of O.," is sufficient. Colean Implement Co. v. Strong [Iowa] 102 N. W. 506. A mortgage of "one hundred two year old steers" branded in a certain way and "twenty-five head of yearling steers" branded in a certain way, "said cattle being held in the L. M. pasture ahout 18 miles south of D.," sufficienty describes the property. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. Error in classifying cattle as steers instead of stags does not invalidate the mortgage, where the breeds, ages, colors and location of the cattle are correctly given. Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commission Co. [Mo. App.] 84 S. W. 142.

17. So held where there were two mortgages given by the same mortgagor on two herds of cattle, all having the same brand and of the same description, except as to age and location. National Bank of Boyertown v. Schufelt [Ind. T.] 82 S. W. 927.

18. Mortgage giving residences and occupations of mortgagor and mortgagee and giving number and description of cattle mortgaged, held sufficient, though it did not state where the cattle were located, it be-

spects, does not invalidate the mortgage. The description being sufficiently definite to justify the admission of the mortgage in evidence, extrinsic evidence is admissible to identify the property.[20]

By statute in some states indefiniteness only impairs the title to the chattel while in the possession of the mortgagor.[20a]

The question of what is covered by the description is largely one of intent.[20b] In order that the mortgage may be extended to after-acquired property, the intention to have it so apply must be clearly expressed in the instrument.[20c] There is a conflict as to whether an after-acquired property clause extends to or covers the interest the mortgagor acquires in property as a purchaser under a conditional sale [20d] but in no case can it affect the rights of the seller in such sale.[20e]

§ 3. *Consideration.*[21]—Like other contracts a chattel mortgage must be based upon a lawful consideration.[22] The mortgage is wholly void if the consideration therefor is exaggerated with fraudulent intent.[23]

§ 4. *Fraudulent conveyances.*[24]—In the absence of circumstances raising a presumption of fraud, a chattel mortgage to be fraudulent must appear to have been given by the mortgagor and received by the mortgagee with a fraudulent intent,[25] and in this connection the fraud of an agent will be deemed that of his principal.[26] A mortgage permitting the mortgagor to retain and sell the mortgaged property in the ordinary course of trade [27] though valid as between the parties,[28] is in most [29] but not

ing recorded in the proper place. Kaase v. Johnston [Ind. T.] 82 S. W. 680.

19. Tootle v. Buckingham [Mo.] 88 S. W. 619.

20. Colean Implement Co. v. Strong [Iowa] 102 N. W. 506.

20a. Connecticut: Failure to observe the requirements of Gen. St. 1902, § 4132, in regard to definiteness of description by the terms of the statute only impairs the title to the chattel in the possession of the mortgagor, hence such defect is immaterial in trover and conversion against one taking the property from the possession of the mortgagee. Aldrich v. Higgins [Conn.] 59 A. 498.

20b. Furgerson v. Twisdale, 137 N. C. 414, 49 S. E. 914. A mortgage by two persons on crops to be raised by them on land of one, held not to include a crop raised by one of the mortgagors alone on another part of the same tract of land. Id. Evidence held to show that the cattle sold defendant were covered by the mortgage in question. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. A mortgage of land and of water rights held not to embrace certain stock in a water company. Bank of Visalia v. Smith [Cal.] 81 P. 542.

20c. Cunningham v. Alryan Woolen Mills [N. J. Eq.] 61 A. 372; Fidelity & Deposit Co. of Maryland v. B. F. Sturtevant Co. [Miss.] 38 So. 783. Mortgage covering all of the mortgagor's property of every nature and description including all franchises, machinery, etc., which he "now owns or may hereafter acquire" is insufficient. Id. A mortgage pledging the running gear, tools, implements and "working stock" of certain woolen mills, "now upon said premises and everything thereon, pertaining or in any way belonging to said mills, and in the business of the same," does not cover after-acquired property. Cunningham v. Alryan Woolen Mills [N. J. Eq.] 61 A. 372.

20d. That it does: Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

That it does not: Tilford v. Atlantic Match Co., 134 F. 924.

20e. Seller may receive from the proceeds of the foreclosure the amount still due on the price. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495.

21. See 3 C. L. 684.

22. Hammon, Chat. Mortg. c. 5.

23. Adams v. Pease, 113 Ill. App. 356.

24. See 3 C. L. 685.

25, 26. Adams v. Pease, 113 Ill. App. 356.

27. See 3 C. L. 685, n. 46. See, also, Dodge v. Norlin [C. C. A.] 133 F. 363. A mortgage given by a shipbuilding company on its plant, machinery, stock, etc., allowing the mortgagor to use the stock and replace the same, is void as to such stock and to a boat made therefrom. In re Marine Construction & Dry Dock Co., 135 F. 921.

28. Martin v. Sexton, 112 Ill. App. 199.

29. Adams v. Pease, 113 Ill. App. 356; Dodge v. Norlin [C. C. A.] 133 F. 363; In re Beede, 138 F. 441.

NOTE. Mortgagor in Possession: The authorities are conflicting as to whether or not a chattel mortgage will be good, as against the mortgagor's creditors and third parties, where the mortgagor is allowed to remain in possession of the goods with a power of sale. Many states have adopted the rule that such a mortgage is fraudulent per se. Stevens v. Curran, 28 Mont. 366, 72 P. 753; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Barchard v. Kohn, 157 Ill. 579, 29 L. R. A. 803; Standard Implement Co. v. Schultz, 45 Kan. 52, 25 P. 625. About an equal number of states take the view that such possession by the mortgagor, while presumptive evidence of fraud, does not constitute fraud per se. Blanchard v. Cooke, 144 Mass. 207, 226; Fink v. Ehrman Bros., 44 Ark. 310; Black Hills Mer. Co. v.

all [30] of the states held to be conclusively fraudulent as to creditors, unless, by the terms of the agreement, the proceeds of such sale are to be applied to the payment of the mortgage debt,[31] or unless the mortgage is recorded, or the mortgagee takes actual, open, notorious and unequivocal possession,[32] and in the latter case its validity dates from the date possession is so taken.[33] Statutory provisions govern.[34] A statutory presumption of fraud raised by the mortgagee failing to take immediate possession is not available to one attaching the property after the mortgagee has taken possession.[35] In the absence of insolvency in the mortgagor, or of any intent to hinder, delay or defraud creditors, the fact that the mortgage covers property worth much more than the debt secured does not invalidate the mortgage.[36] The mortgagee may, if he acts in good faith, by the terms of the mortgage appoint the mortgagor his agent in selling the mortgaged property.[37] A mortgage being void as to creditors, it is void as against the mortgagor's trustee in bankruptcy.[38]

§ 5. *The instrument. Form, execution and delivery.*[39]—Like other contracts, a chattel mortgage is invalidated by fraud entering into the execution of the contract.[40] A verbal chattel mortgage is binding on the parties and those having knowledge of its existence.[41] A mortgage not executed in the manner and form prescribed by law is good between the parties.[42] A signature by mark and the attestation thereof are not invalidated by the fact that the attesting witness was an agent or employe of the mortgagee.[43] An unsigned contract printed on the back of a mortgage, and not referred to therein, cannot in any way qualify the terms of the mortgage.[44]

Acknowledgment, affidavit and extension.[45]—Statutory requirements as to acknowledgement must be complied with in order to render the mortgage valid as to

Gardner, 5 S. D. 246, 58 N. W. 557.—From 3 Mich. L. R. 661.

30. Ward v. Parker [Iowa] 103 N. W. 104. Does not render mortgage fraudulent as a matter of law. Skilton v. Coddington, 93 N. Y. S. 460.

31. Dodge v. Norlin [C. C. A.] 133 F. 363. See 3 C. L. 686, n. 49.

32. Where mortgagee was introduced to clerks and the latter were told that the stock had been transferred to him as mortgagee, and a small typewritten notice to that effect was posted on the door, held not such possession as is required by Mills' Ann. St. § 2027. Hereford v. Benton [Colo. App.] 80 P. 499.

33. Ohio rule. In re First Nat. Bank [C. C. A.] 135 F. 62. Is valid after possession is taken except as to third persons having a valid lien. Martin v. Sexton, 112 Ill. App. 199.

34. **Montana:** Since there is no kind of personal property which may not be mortgaged, Civ. Code, § 4491, declaring that every transfer of personal property, other than a mortgage, when allowed by law, is conclusively presumed to be fraudulent, if not followed by change of possession, does not apply to any chattel mortgage. Stewart v. Hoffman [Mont.] 81 P. 3, rvg. former opinion, 77 P. 689. Under Civ. Code, § 3861, the mortgagor retaining possession, the mortgage is void as to attaching creditors unless it is accompanied by the affidavit of the mortgagee that the mortgage was made in good faith, without design to hinder, delay, or defraud creditors. First Nat. Bank v. Beley [Mont.] 80 P. 256.

35. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

36. Ward v. Parker [Iowa] 103 N. W. 104.

37. Such an arrangement is not void as to creditors. Kelly v. Tracy & Avery Co. [Ohio] 73 N. E. 455.

38. In re Marine Construction & Dry Dock Co., 135 F. 921.

39. See 3 C. L. 686.

40. Fraud entering into a contract of exchange will not avoid a mortgage given by one of the parties to secure payment of a balance in his favor. Sylvester v. Ammons [Iowa] 101 N. W. 782. An instruction that if either the seller or his employe changed the cost tickets on the goods, for the payment of a part of the purchase price of which the mortgage was given, so as to make them show a greater price than the cost price, the mortgage was void, held correct. Id.

41. See 3 C. L. 686, n. 60. Under Rev. St. 1895, art. 3327, on a sale of chattels, possession being given to the purchaser, a verbal reservation of title to secure the purchase money, constitutes a valid mortgage between the parties. Crews v. Harlan [Tex.] 87 S. W. 656; Id. [Tex. Civ. App.] 88 S. W. 411.

42. Stewart v. Hoffman [Mont.] 81 P. 3, rvg. former opinion, 77 P. 689.

43. Morris v. Bank of Attalla [Ala.] 38 So. 804.

44. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

45. See 3 C. L. 687.

third persons.[46] The signature of the affiant is not necessary, in the absence of a rule of court or statute requiring it.[47] An affidavit describing the affiant by name followed by the word "mortgagor" is a sufficient designation of him as the person who made the mortgage.[48]

Alteration and construction.—An intentional and fraudulent insertion of additional property in a chattel mortgage by the mortgagee renders the instrument void.[49] The mortgage being partly written and partly printed, the former controls the latter if the two are inconsistent.[50]

Proof of instrument.—A certified copy of a chattel mortgage is competent for the purpose of proving additions made to the original instrument, already in evidence, since its execution.[51]

Renewal affidavit.—An interested party may, as a notary public, administer the oath to a renewal affidavit.[52]

§ 6. *Filing or recording and notice of title or rights.*[53]—The recording of a chattel mortgage and the effect thereof are governed by the law of the state where the property is situated.[54] In some states a mortgage covering real and personal property is sufficient if recorded as a real estate mortgage.[55] In some states the mortgage must be recorded in the county where the mortgagor resides.[56] The index must be sufficient to give notice.[57] Failure of recording officer to discharge his duty in respect to mortgages duly filed with him does not affect the mortgagees' rights.[58] A mortgage is valid between the parties, though unrecorded,[59] but void as to third parties who, not having actual notice of the mortgage,[60] have acquired adverse rights or suffered prejudice during the interval between execution and recording or taking possession by the mortgagee.[61] To a certain extent recordation of the mortgage pro-

46. Illinois: Under Rev. St. c. 95, § 1, a chattel mortgage not acknowledged before a magistrate of the town where the mortgagor resided is void as against the rights and interests of third persons. Farson v. Gilbert, 114 Ill. App. 17.

Oregon: A bill of sale intended as a mortgage but not executed and acknowledged as required by B. & C. Comp. § 5630, is invalid. Culver v. Randle [Or.] 78 P. 394.

47. 15 Del. Laws, p. 616, c. 477, § 4, and Rev. Code 1852, amended in 1893, c. 112, § 9, construed. In re Shannahan-Wrightson Hardware Co. [Del.] 58 A. 1023. See Affidavits, 5 C. L. 60.

48. In re Shannahan-Wrightson Hardware Co. [Del. Super.] 58 A. 1023.

49. Bedgood-Howell Co. v. Moore [Ga.] 51 S. E. 420. See topic Alteration of Instruments, 5 C. L. 110.

50. Code, § 4616. Sylvester v. Ammons [Iowa] 101 N. W. 782. Printed clause permitting the mortgagee to take possession whenever he might choose held inconsistent with the written reservation of the right of the mortgagor to sell in the regular mercantile way. Id.

51. W. W. Kimball Co. v. Piper, 111 Ill. App. 82.

52. Such defect at most renders the affidavit voidable; it does not impair its effect as notice. Fair v. Citizens' State Bank [Kan.] 79 P. 144. So held where affidavit of a corporation was sworn to before an officer and stockholder in such corporation. Id.

53. See 3 C. L. 687. See, also, Notice and Record of Title, 4 C. L. 829.

54. Though mortgagor and mortgagee resided in another state. In re Greene, 134 F. 137.

55. See Notice and Record of Title, 4 C. L. 829, 833, n. 77, 78.

56. New York: Under Laws 1833, p. 402, c. 279, § 1, a mortgage given by two partners must be recorded in the county where each of the partners resides. Russell v. St. Mart, 180 N. Y. 355, 73 N. E. 31.

57. Where a chattel mortgage and agricultural lien for the amount of $100 was indexed under the head of "Character of Debt," "L. & M.," and under the head of "Amount," "$25," held sufficient to the amount of $25. Civ. Code 1902, vol. 1, § 950, construed. Bryant v. Thigpen [S. C.] 51 S. E. 535.

58. Scaling v. First Nat Bank [Tex. Civ. App.] 87 S. W. 715.

59 In re Ewald, 135 F. 168. Fishback v. Garrison Milling & Elevator Co. [Colo. App.] 79 P. 749; Martin v. Sexton, 112 Ill. App. 199; Skilton v. Coddington, 93 N. Y. S. 460. New York rule. Law v. Smith [N. J. Eq.] 59 A. 327.

60. What constitutes actual notice, see post, this section

61. One taking a mortgage to secure a present loan and recording the same takes free from a prior unrecorded mortgage of whose existence he had no knowledge. Patterson v. Irvin [Ala.] 38 So. 121. In an action for the conversion of a horse by the mortgagee, evidence held to justify a judgment for the defendant, his mortgage having been recorded and plaintiff being a subsequent purchaser. Smith v. Bean [Tex. Civ. App.] 82 S. W. 793.

Kentucky: Under Ky. St. 1903, § 496, the

tects the mortgagee from prior unrecorded claims of which he had no knowledge.[62] A chattel mortgage being executed on property in one state, and duly filed for record, it will be binding on the property after its removal to another state,[63] even as against an innocent purchaser for value from the mortgagor.[64] In New York an unfiled chattel mortgage is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith;[65] but only those who have obtained judgment and execution,[66] or placed the property in the custody of the court through the medium of a receiver,[67] can assert and take advantage of the invalidity. In New Jersey the chattel mortgage must be immediately recorded,[68] and knowledge of the existence of the mortgage does not preclude a creditor of the mortgagor from assailing the instrument for want of compliance with the statute.[69] Depositing with the clerk is a sufficient compliance, the mortgage being actually recorded.[70] In the absence of an agreement between the parties, a mere withholding of the mortgage from record is insufficient to render it fraudulent,[71] nor does such fact, no prejudice being shown, estop the mortgagee from relying on the mortgage.[72] In New York failure to refile the mortgage does not render it invalid as against, nor subordinate to, a subsequent mortgage executed after the first mortgage has been recorded and while such filing is in force.[73]

The word "creditor" as used in statutes, declaring unrecorded chattel mortgages to be void as against creditors and bona fide purchasers for value, means creditors

mortgagee under an unrecorded mortgage, though entitled to priority as against prior creditors of the mortgagor, is not entitled to priority as against subsequent creditors without notice. In re Ducker, 133 F. 771.

Michigan: Under Comp. Laws, § 9523, providing that chattel mortgages not filed or accompanied by immediate change of the possession of the property mortgaged shall be void as against subsequent mortgagees in good faith, a subsequent, unfiled mortgage has priority over a prior, unfiled mortgage. Lingle v. Owosso Sugar Co. [Mich.] 102 N. W. 639. Under such statute an unrecorded chattel mortgage, there being no change in the possession of the property, is void as against persons who in good faith extend credit to the mortgagor without notice of the existence of the mortgage. Sachs v. Norn [Mich.] 102 N. W. 983.

Texas: An unrecorded chattel mortgage is void only as against lien creditors of the mortgagor, or subsequent purchasers and mortgagees or lienholders in good faith. Meyer Bros. Drug Co. v. Pipkin Drug Co. [C. C. A.] 136 F. 396, following Grace v. Wade, 45 Tex. 527; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248.

62. Held to take free from claim that mortgagor procured mortgaged property by fraud. Heenan v. Forest City Paint & Varnish Co. [Mich.] 101 N. W. 806.

63. F. E. Creelman Lumber Co. v. J. A. Lesh Co. [Ark.] 83 S. W. 320. One buying chattels covered by a duly recorded mortgage is guilty of conversion, although he receives and sells such chattels in a state other than that in which the mortgage is recorded. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. See Conflict of Laws, 3 C. L. 720, also see note in 64 L. R. A. 353, 356.

64. F. E. Creelman Lumber Co. v. J. A. Lesh Co. [Ark.] 83 S. W. 320.

65. Russell v. St. Mart, 180 N. Y. 355, 73 N. E. 31; In re Beede, 138 F. 441.

66. In re Beede, 138 F. 441; Skilton v. Coddington, 93 N. Y. S. 460; Schwab Mfg. Co. v. Aizenman, 94 N. Y. S. 729.

67. Schwab Mfg. Co. v. Aizenman, 94 N. Y. S. 729.

68. Attaching creditor held prior to mortgagee who recorded mortgage five months after execution and a week before issuance of the attachment. Murray v. Zeller [N. J. Eq.] 59 A. 261.

69. Murray v. Zeller [N. J. Eq.] 59 A. 261.

70. Failure to record, held deposit insufficient. Murray v. Zeller [N. J. Eq.] 59 A. 261.

71. Ward v. Parker [Iowa] 103 N. W. 104.

NOTE. Delay in filing: As to the question of delay in recording a chattel mortgage, it is held by many courts that a mortgage is not rendered fraudulent, as to subsequent creditors, by mere failure to record, where there is no agreement between the mortgagor and mortgagee that the mortgage shall not be recorded. Mull v. Dooley, 89 Iowa, 312, 56 N. W. 513; Stewart v. Hopkins, 30 Ohio St. 502; Grimes Dry Goods Co. v. McKee, 51 Kan. 704, 33 P. 594. The court in Clark v. McDuffie, 21 N. Y. S. 174, held that the chattel mortgage, although filing was delayed, was good as against one who, with actual notice of the mortgage, had purchased the mortgaged property at sheriff's sale. Where, however, there has been delay in filing a chattel mortgage and the rights of creditors have intervened between the execution of the chattel mortgage and the filing thereof, such rights will not be affected by the subsequent filing of the mortgage. Willamette Casket Co. v. Cross, etc., Co., 12 Wash. 190, 40 P. 729; Cutler v. Steele, 85 Mich. 627; Maddox v. Wilson, 91 Ga. 39, 16 S. E. 213.—3 Mich. L. R. 661.

72. Ward v. Parker [Iowa] 103 N. W. 104.

73. Schwab Mfg. Co. v. Aizenman, 94 N. Y. S. 729.

having some sort of lien fixed by law or legal proceedings upon particular property, and does not include a mere general creditor.[74] The word "purchasers" includes mortgagees for value.[75] A "factor" is neither a creditor of the mortgagor nor a subsequent purchaser or mortgagee.[76] A mortgage debt being tainted with usury, the mortgagee is not a purchaser or creditor in good faith.[77] One having knowledge of the mortgage is not a bona fide purchaser.[78]

Notice of title or rights.[79]—The property[80] and parties[81] being correctly described in the mortgage, recording is equivalent to actual notice.[82] A mortgage, ineffective as notice to third parties for want of a sufficient description of the property when entered and recorded, cannot be made effective notice as to such third parties by thereafter writing into the original instrument the necessary descriptive words.[83] Actual, open and notorious possession by the mortgagee is just as efficacious as filing.[84] The mortgagee, asserting that the mortgagor's creditors had notice, must prove it.[85]

§ 7. *Title and ownership.*[86]—The general rule, following the common law, is that the mortgagee takes the legal title subject to be defeated on the performance of the conditions,[87] but the courts are not all in harmony with this rule.[88] Upon default of the mortgagor, the legal title to mortgaged chattels vests absolutely in the mortgagee,[89] and a subsequent tender of the amount due does not operate to revest the title in the mortgagor,[90] the latter's sole remedy being a bill to redeem,[91] and the mortgagor cannot, without proof of payment or other extinguishment of the mortgage, maintain an action against the mortgagee for a conversion of the property.[92] The alteration of the mortgage after execution and delivery does not divest the title of a purchaser acquired under the paper as made.[93]

§ 8. *Right of possession.*[94]—Upon default the mortgagee becomes entitled to

74, 75. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

76. Greer v. Newland [Kan.] 78 P. 835, rvg. former opinion, 77 P. 98.

77. Morris v. Bank of Attalla [Ala.] 38 So. 804. Exclusion of evidence on this point held error. Id.

78. Tootle v. Buckingham [Mo.] 88 S. W. 619.

79. See 3 C. L. 690.

80. W. W. Kimball Co. v. Piper, 111 Ill. App. 82.

81. Where the scrivener of a deed of trust, supposing a certain person was to execute it, inserted his name as grantor, but another signed and acknowledged it, the record of the deed is not notice to a subsequent grantee that it was the deed of the person who signed it. Marx v. Jordan, 84 Miss. 334, 36 So. 386.

82, 83. W. W. Kimball Co. v. Piper, 111 Ill. App. 82.

84. Brockway v. Abbott [Wash.] 79 P. 924. Where employe of mortgagor took possession of property and managed same, held sufficiently notorious so as to give notice. Martin v. Sexton, 112 Ill. App. 199. Where mortgagor makes a formal delivery of the chattels to the mortgagee, going around with him and pointing out the several articles, and then the mortgagee requests the mortgagor to take charge of the property and manage it as agent for a stipulated compensation, and the mortgagee does so, held not sufficient to warrant a jury in finding an actual change of possession. Act Mar. 24, 1864; P. L. p. 493, construed. Hastings v. Fithian [N. J. Err. & App.] 60 A. 350.

85. In re Ducker, 133 F. 771.

86. See 3 C. L. 690.

87. Brass v. Green, 113 Ill. App. 58. Retains title until payment. Stearns v. Oberle, 94 N. Y. S. 37. Mortgagee takes title subject to the right of the mortgagor to redeem before default. Fishback v. Garrison Milling & Elevator Co. [Colo. App.] 79 P. 749.

88. See 3 C. L. 691, n. 31.

89. Alexander v. Meyenberg, 112 Ill. App. 223; Fishback v. Garrison Milling & Elevator Co. [Colo. App.] 79 P. 749; Fidelity Loan Ass'n v. Connolly, 92 N. Y. S. 252; Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580. Where mortgagee took possession. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

90, 91. Alexander v. Meyenberg, 112 Ill. App. 223; John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. The possession of chattels by a mortgagee in possession does not become wrongful on condition broken, nor during the time the right of foreclosure exists, where the property remains intact, and the only remedy the mortgagor has is to redeem from the mortgage debt. Brockway v. Abbott [Wash.] 79 P. 924.

92. John O'Brien Lumber Co, v. Wilkinson [Wis.] 101 N. W. 1050. Hence such action cannot be maintained, even though the sale was not made in strict conformity with the statute. Rev. St. 1898, § 2616a, considered. Id.

93. Stearns v. Oberle, 94 N. Y. S. 37.

94. See 3 C. L. 691.

the immediate possession of the property,[95] and, except as against persons without interest,[96] this possession must be taken within a reasonable time after default,[97] a failure to so do destroying the lien of the mortgage as against subsequent purchasers and attachment or judgment creditors.[98] What is a reasonable time must be determined by the situation of the parties and the special circumstances of each case,[99] and the burden is upon the one claiming under such mortgage to establish a reduction to possession within the time required by law.[1] This possession the mortgagee is entitled to take from anyone who holds the property by a title subordinate to the mortgagor,[2] and for the purpose of assuming this possession, replevin is an appropriate form of action;[3] in such action no issue is involved except the question as to the plaintiff's right of possession;[4] hence it is not incumbent upon the plaintiff to join any person except the one who actually withholds possession.[5] The effect of statutory provisions upon the mortgagee's right to take possession is shown in the notes.[6] The mortgagee lawfully taking possession, a detention by him is not unlawful, no demand or tender being made.[7]

§ 9. *Liens and priorities; waiver. Duration of mortgage lien.*[8]—Upon what chattels the mortgage is a lien must be determined largely from the mortgage itself.[9] The lien of a mortgage upon after-acquired property attaches as soon as the property is acquired by the mortgagor,[10] and as between such parties it relates back to the date of the mortgage.[11] The lien of the mortgage cannot be defeated by the fraud of the mortgagor and a purchaser from him.[12]

Conflicting liens; waiver.[13]—In the absence of consent by the mortgagee,[14] a mortgage is generally paramount to liens created by the mortgagor, if the lienors are

95. Fishback v. Garrison Milling & Elevator Co. [Colo. App.] 79 P. 749; Fidelity Loan Ass'n v. Connolly, 92 N. Y. S. 252; Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580. Under B. & C. Comp. § 5636, a chattel mortgagee after breach of a condition can maintain claim and delivery under an allegation of absolute ownership. Culver v. Randle [Or.] 78 P. 394. An affidavit in an action of replevin by a mortgagee, alleging ownership in the plaintiff, is sufficient under Gen. St. 1901, § 4250, the mortgage containing no stipulation retaining title in the mortgagor. Bartlett v. Ridgley Nat. Bank [Kan.] 78 P. 414.

96. Fishback v. Garrison Milling & Elevator Co. [Colo. App.] 79 P. 749. That mortgagee allowed statutory period to elapse does not entitle a mere bailee of the property to retain it as against the mortgagee. Id.

97, 98, 99. Richley v. Childs, 114 Ill. App. 173. Where both parties resided in the same county, within a few miles of each other, and three days were suffered to pass after default without any effort being made to take possession, the delay is unreasonable as against the rights of third parties. Id.

1. Richley v. Childs, 114 Ill. App. 173.

2, 3. Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580; Fidelity Loan Ass'n v. Connolly, 92 N. Y. S. 252.

4, 5. Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. S. 580.

6. New York: Municipal Court Act, § 139, providing that no action can be maintained in that court on a chattel mortgage, except to foreclose a lien, does not preclude a chattel mortgagee from taking possession of chattels under the terms of the mortgage. Shelton v. Holzwasser, 91 N. Y. S. 328.

7. Shelton v. Holzwasser, 91 N. Y. S. 328.

8. See 3 C. L. 693.

9. A mortgage to secure vendor's lien notes covering crops grown on land "during the years 1897, 1898, 1899, 1900 and 1901," during which time the notes respectively matured, creates a lien on each year's crop to secure the note maturing that year, and not a running lien on all the crops produced during the term of years for the payment of each note without regard to the date of its maturity. O'Bryan Bros. v. Wilson [Miss.] 38 So. 609.

10. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

11. In re Rogers & Woodward, 132 F. 560, declaring the law of Vermont as indicated by Thompson v. Fairbanks, 76 Vt. 361, 66 A. 11.

12. Mortgagor of cattle cannot by mixing other cattle of like description with those mortgaged defeat the mortgages, either in his own favor, or in that of subsequent purchaser of certain of the cattle from him, on the ground that a portion of the cattle sold were not the cattle mortgaged. Tootle v. Buckingham [Mo.] 88 S. W. 619.

13. See 3 C. L. 693. See, also, ante, § 6, Recordation.

14. Citizens' State Bank v. Smith, 125 Iowa, 505, 101 N. W. 172. A mortgagor may with the mortgagee's consent make an absolute sale of the mortgaged property. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673. Having given such permission the mortgagee is bound thereby and is not entitled to the possession of the mortgaged property, especially after a sale. Id.

affected with notice of the mortgage.[15] A second mortgagee claiming priority by agreement, the burden is upon him to show such an agreement,[16] and in this connection a mortgagor is not the agent of the mortgagee so as to bind the latter by representations in obtaining a loan of another by mortgage on the same property.[17] The mortgagor owning the mortgaged property individually the mortgagee cannot be postponed in the collection of his debt to the adjustment of equities existing between the mortgagor and his partner.[18] The mortgagee takes subject to liens given priority by the law of the state where the parties to the mortgage reside and where the chattels are located, even though the property be removed to a state the law of which gives the mortgagee priority.[19] The mere taking of additional security does not necessarily waive the mortgage lien.[20]

§ 10. *Disposal and use of the property by the mortgagor.*[21]—In some states an unlawful disposition of mortgaged property is a crime.[22] In a criminal prosecution for so doing the general rules as to the sufficiency of the indictment apply,[23] and there must be evidence showing a sale and removal.[24]

§ 11. *Assignment of the mortgage.*[25]—An assignment of the debt carries the mortgage with it.[26] A mortgage securing a negotiable note so far partakes of its character as to pass free from equities between the original parties to a bona fide indorsee of the note.[27] The assignor of a mortgage has no right to take possession as against a junior mortgagee.[28] In Illinois the mortgagee cannot assign the legal title vested in him by virtue of the mortgage;[29] but after he assigns the debt secured by his mortgage, he becomes a mere naked trustee of the legal title, with no power to release or discharge the mortgage lien or otherwise to dispose thereof, and he has no right, of his own motion and for his own benefit, to institute and maintain an action for the recovery of the property or for a violation of a right secured by such mortgage, and this notwithstanding he may be liable as an indorser, and the defendants may have been guilty of wrongful conversion;[30] nor does the absolute reacquisition of the note and mortgage by the chattel mortgagee after the commencement of the suit alter his rights therein.[31]

§ 12. *Payment and discharge.*[32]—The mortgage fixing no time for payment becomes due immediately upon the execution of the mortgage, and the mortgagee may foreclose at any time.[33] A promise to forbear, or extend the time of payment of a debt actually due, based upon a promise of the debtor to pay the sum with in-

15. The lien of a livery stable keeper for the board of horses and care of a buggy after the execution of a mortgage thereon by the owner, of which the livery stable keeper has constructive notice, is inferior to the lien of the mortgage. Masterson v. Pelz [Tex. Civ. App.] 86 S. W. 56. Mortgage held to cover future indebtedness as against a subsequent mortgage taken subject to the first mortgage. Davis v. Carlisle [Ind. T.] 82 S. W. 682.

16, 17. Citizens' State Bank v. Smith, 125 Iowa, 505, 101 N. W. 172.

18. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

19. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

20. A creditor, furnishing a husband supplies for a plantation owned by the wife, by taking security upon property of the husband for his claim, does not waive the lien of a deed of trust taken on the cotton raised on the plantation. Dean v. Boyd [Miss.] 38 So. 297.

21. See 3 C. L. 694.

22. See 3 C. L. 694, n. 75.

23. Under Code 1896, p. 335, an indictment for selling mortgaged property alleging that defendant, for the purpose of defrauding prosecutor, who had a lawful mortgage thereon, sold personal property described, defendant having at the time knowledge of the existence of prosecutor's claim, is sufficient. Tallent v. State [Ala.] 38 So. 841.

24. In the absence of such evidence it is error to refuse a general charge requiring the jury to acquit. Tallent v. State [Ala.] 38 So. 841.

25. See 3 C. L. 695.

26. Brass v. Green, 113 Ill. App. 58.

27. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

28. If he does so he is guilty of conversion. Schwab Mfg. Co. v. Aizenman, 94 N. Y. S. 729.

29, 30, 31. Brass v. Green, 113 Ill. App. 58.

32. See 3 C. L. 695.

33. Stearns v. Oberle, 94 N. Y. S. 37.

terest on a later date, is without consideration and unenforceable.[34] Payment being tendered and refused, the mortgagee has no right to thereafter take possession of the mortgaged property.[35] The taking of a second note and mortgage does not of itself discharge the original security unless it is intended to so operate,[36] and this question of intent is generally one for the jury.[37] A surety upon a note secured by a mortgage, paying the same is entitled to be subrogated to the rights of the mortgagee.[38] A release to be valid must be supported by a consideration.[39] Damages suffered by the mortgagor by reason of the mortgagee's default may be deducted from the mortgage debt.[40] Though the mortgage provides for attorney's fees, such fees cannot be collected if the mortgagor has a meritorious defense to a part of the amount claimed.[41] Cases dealing with the sufficiency of the evidence are shown in the notes.[42]

One purchasing property months after the maturity of a mortgage appearing of record against it may rely upon the presumption that such mortgage has been discharged, and will be protected in his purchase, unless the mortgagee has since the maturity of the mortgage debt exercised reasonable diligence to locate and obtain possession of such property,[43] and the burden of proving such diligence rests upon the mortgagee.[44] No particular form of words is necessary to constitute a sufficient request to enter on the margin of the record of a mortgage a partial payment or payments on the mortgage.[45] All that is necessary in such notice is that the words used in the request are such as shall reasonably inform the mortgagee that entry of payment is desired.[46] In an action to recover the statutory penalty for failure of a mortgagee to record a partial payment, defendant cannot show that he recorded such entry after the expiration of the statutory time and after suit was commenced.[47]

Revival.—A dormant mortgage may be revived and made effectual by the acts of the parties, but an instrument which has ceased to be valid cannot be thus revived by any act of the parties to it.[48]

§ 13. *Redemption.*[49]—A second mortgagee is an "assignee of the mortgagor" within the meaning of statutes designating parties who may redeem.[50] As a general rule a tender of the redemption money to be effectual must be kept good.[51] In some states a notice of intention to redeem is required.[52] Cases dealing with the sufficiency of the evidence are shown in the notes.[53]

34. Repelow v. Walsh, 98 App. Div. 320, 90 N. Y. S. 651.

35. Hase v. Schotte [Mo. App.] 84 S. W. 1014.

36, 37. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

38. Can maintain an action to recover the value of the mortgaged property, to the extent of his lien, from one who had converted it. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

39. Lynn v. Bean [Ala.] 37 So. 515.

40, 41. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 137 F. 625.

42. Evidence held to show a certain amount due on the chattel mortgage. Dean v. Radford [Mich.] 101 N. W. 598.

43, 44. W. W. Kimball Co. v. Piper, 111 Ill. App. 82.

45. Code 1896, § 1065, construed. Lynn v. Bean [Ala.] 37 So. 515.

46. Code 1896, § 1065, construed. Lynn v. Bean [Ala.] 37 So. 515. Notice identifying particular mortgage by date and stating the amount paid held sufficient. Id. Such notice and the request for the recordation of partial payment held sufficiently set forth in the complaint. Id.

47. Lynn v. Bean [Ala.] 37 So. 515.

48. A valid affidavit of renewal does not validate a mortgage originally void as to attaching creditors because of want of the accompanying affidavit of good faith required by Civ. Code, § 3861. First Nat. Bank v. Beley [Mont.] 80 P. 256.

49. See 3 C. L. 696.

50. Rev. Codes 1899, § 5894, construed. Brown v. Smith [N. D.] 102 N. W. 171.

51. So held under Rev. Codes 1899, §§ 5894, 3814. Brown v. Smith [N. D.] 102 N. W. 171.

52. North Dakota: The notice of intention to redeem required by Rev. Codes 1899, § 5894, is served in time if served as soon after the sale as by reasonably prompt and vigorous exertion the service can be effected. Brown v. Smith [N. D.] 102 N. W. 171.

53. Evidence held insufficient to sustain a finding that the mortgagor had, by agreement, a year within which to redeem. Farrell v. Danbury [Mich.] 12 Det. Leg. N. 380, 104 N. W. 383.

§ 14. *Enforcement, foreclosure; sale.*[54]—In order to foreclose the mortgagor must be in default;[55] but the fact that the mortgagee is given the right to enter, take possession and sell upon default, does not bar the right to foreclose.[56] In order to foreclose under an insecurity clause, the circumstances must be such that a reasonable man thus situated might in good faith believe himself unsafe and insecure.[57] The parties may control the enforcement of the mortgage by a parol agreement, and an injunction may lie to enforce such parol agreement.[58]

A suit to foreclose is equitable in its nature,[59] and jurisdiction thereof is largely governed by statutes.[60] The bill to foreclose must show defendant's connection with the mortgage.[61] An answer alleging an agreement by the mortgagee to exchange the mortgage for other securities, constitutes no defense, it not being alleged that the agreement was carried out.[62] The proof must conform to the issues,[63] and there must be no material variance between the description of the property in the mortgage and that in the petition.[64] The judgment must be supported by findings.[65] In the absence of proof of the value of the property claimed, or of evidence to authorize the finding of a money decree against claimants to property sought to be foreclosed, such decree will be reversed as to the claimants.[66]

Prior to the judgment of foreclosure, the court's power with reference to the property is limited to the appointment of a receiver.[67] As a general rule a receiver will be appointed when the property in controversy is in danger of being lost or materially injured.[68]

A mortgagee, after due notice, may sell a sufficient amount of the mortgaged

54. See 3 C. L. 696.

55. A mortgagee under an unmatured, unfiled chattel mortgage foreclosing the same is a mere trespasser. Russell v. St. Mart, 180 N. Y. 355, 73 N. E. 31. Default being admitted the mortgagee's right to foreclose is established, all other matters of defense being unsupported by proof. Hanson v. Kassmayer, 91 N. Y. S. 755.

56. Mortgage need not allege that such power is not taken away. Harris Automatic Press Co. v. Demorest Pattern Co., 94 N. Y. S. 462.

57. Tanton v. Boomgaarden, 111 Ill. App. 37. Evidence held sufficient to warrant foreclosure under such clause. Id.

58. In a suit to restrain the enforcement of a note and mortgage, evidence held to establish a parol agreement at the time the mortgage was executed that defendant company would not enforce it so long as the complainant purchased his beer of it. O'Brien v. Paterson Brewing & Malting Co. [N. J. Eq.] 61 A. 437. In such case complainant on ceasing to purchase defendant's beer, was entitled to restrain the enforcement of the note and mortgage on tendering to defendant the reasonable value of the fixtures. Id.

59. Avery Mfg. Co. v. Smith [N. D.] 103 N. W. 410. Plaintiff is not entitled to a jury trial as a matter of right. Id.

60. County court has no jurisdiction of a suit to foreclose. Summers v. Robinson, 116 Ill. App. 489. Under Laws 1902, p. 1533, c. 580, § 139, forbidding actions in the municipal court in cases of a chattel mortgage to secure the purchase price of chattels, does not deprive the municipal court of jurisdiction in the case of a chattel mortgage to secure a loan. Fidelity Law Ass'n v. Connolly, 92 N. Y. S. 252.

61. Huff v. Clark, 33 Ind. App. 606, 71 N. E. 910. An allegation that certain named defendants were made parties to show what, if any, interest they had in the property, is insufficient to state a cause of action against them. Id.

62. Mahoney v. Crockett [Wash.] 79 P. 933.

63. Answer in an action to foreclose held not to allege a contract to exchange the mortgage for other securities, so as to render such contract admissible. Mahoney v. Crockett [Wash.] 79 P. 933.

64. There is no variance between a petition to foreclose "one 125 head of steers, some branded * * * and some * * *," and a mortgage describing the cattle as being "100 two year old steers branded * * * or * * *. Twenty-five head of yearling steers branded either * * * or * * *," or between the petition and a renewal mortgage describing the cattle as "branded * * * and * * *." Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

65. Martin v. Berry Bros. [Tex. Civ. App.] 87 S. W. 712. See Judgments, 4 C. L. 287.

66. Cato v. Easterlin [Fla.] 37 So. 562; Williams v. Hackett [Fla.] 37 So. 563.

67. Has no power to order a sale, especially where plaintiff has obtained no attachment. Tipton v. Harris [Ky.] 87 S. W. 1074.

68. Where security was inadequate, mortgagor insolvent, and security was endangered by the forfeiture of a leasehold interest through the mortgagor's failure to pay rent, and that the mortgagor had no defense to the merits, held a receiver would be appointed. Euphrat v. Morrison [Wash.] 81 P. 695.

property to satisfy the debt,[69] but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess.[70] A junior mortgagee or his assignee may sell the property subject to prior liens,[71] and free from the interference of everyone but the holder of such a claim.[72] A sale by agreement between the mortgagor and mortgagee is in effect a mortgage sale.[73] The sale being conducted in bad faith and the mortgagee bidding in the property for an inadequate price, the sale is void.[74] A mortgagee taking possession under a void sale is guilty of conversion, and is liable for the value of the property at the time of conversion,[75] and the action will lie, he having sold the property, thus rendering redemption inadequate.[76] The proper measure of actual damage in an action for the wrongful and premature foreclosure of a chattel mortgage is the loss of the use of the property during the time it was out of the possession of the mortgagor.[77] In such a case vindictive damages should not be allowed where no improper conduct attended the seizure, and no unnecessary damage was done.[78] A mortgage being void as to creditors, the mortgagee is liable to account in equity to creditors for the value of the property seized and sold by him,[79] and this suit for an accounting may properly be brought by a receiver in supplementary proceedings.[80] The mortgagor cannot maintain trover for an alleged wrongful foreclosure, where with full knowledge of all facts and without objection or protest, he has accepted the surplus arising from the alleged wrongful sale.[81]

§ 15. *Remedies as between the parties.*[82]—Plaintiff need not allege facts that

69, 70. Skow v. Locke [Neb.] 101 N. W. 340.

NOTE. Liability of mortgagee for selling more property than enough to satisfy debt: In arriving at the decision in the principal case, the court follows Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826. The same principles were adhered to in Griswold v. Morse, 59 N. H. 211, where the court held that a mortgagee is liable for conversion when he sells a part of the mortgaged chattels after having already sold sufficient to pay the debt and costs. To the same effect are Thompson v. Currier, 24 N. H. 237; Hutchins v. King, 1 Wall. [U. S.] 53; 17 Law. Ed. 544; Stromberg v. Lindberg, 25 Minn. 513. Contra, Ingalls v. Vance, 61 Vt. 582, 18 A. 452. However, the fact that more of the mortgaged property is sold than is sufficient to satisfy the debt will not make the sale void. Keating v. Hannenkamp, 100 Mo. 161, 13 S. W. 89. When upon the exercise of a power of sale, contained in a chattel mortgage, there remains unsold some of the mortgaged property over and above that which was sufficient to satisfy the mortgage debt, there is an implied agreement that the part so unsold shall be turned over to the mortgagor. Kohn v. Dravis, 94 F. 288. The mortgagee holds the unsold property for the mortgagor and is bound to surrender it to him on demand, but the mortgagee is not bound to return the unsold property to the premises of the mortgagor. Campbell v. Wheeler, 69 Iowa, 588, 29 N. W. 613. In case only a part of the mortgaged property is sold and the net amount realized from the sale is not sufficient to discharge the mortgage debt and costs, the chattels unsold are not released from the chattel mortgage, but there is still a lien on them for the sum remaining unpaid. First Nat. Bank of DeSmet v. Northwestern Elevator Co., 4 S. D. 409, 57 N. W. 77; Rose v. Page, 82 Mich. 105, 46 N. W. 227; Hopkins v. McCrillis, 158 Mass. 97, 32 N. E. 1026. In the foreclosure of a chattel mortgage, a sale of all the mortgaged goods is not necessary if the sale of part of the property will pay the debt and costs of the sale; for, in that case, there is a termination of the right of the mortgagee to possession and an extinguishment of his title. Moore v. Ryan, 31 Mo. App. 474; Bellamy v. Doud, 11 Iowa, 285; Charter v. Stevens, 3 Denio [N. Y.] 33, 45 Am. Dec. 444.—3 Mich. L. R. 316.

71, 72. Schwab Mfg. Co. v. Aizenman, 94 N. Y. S. 729.

73. J. F. Selberling & Co. v. Porter [Ind.] 74 N. E. 516.

Evidence held to sustain finding that chattels were sold by mortgagee to pay mortgage debt, and that the person conducting the sale was the mortgagee's special agent to receive and turn over to him the proceeds of the sale. J. F. Seiberling & Co. v. Porter [Ind.] 74 N. E. 516.

74. Sale held void where the mortgagee, against the request of the mortgagor and several bidders, had property sold in lots that no one but himself wished to purchase, and the price paid by him was inadequate. Kellogg v. Malick [Wis.] 103 N. W. 1116.

75. Kellogg v. Malick [Wis.] 103 N. W. 1116. Where property consisted of live stock the mortgagee is not entitled to credit for the expense of feeding them thereafter, nor for the value of animals dying after he took possession. Id.

76. Kellogg v. Malick [Wis.] 103 N. W. 1116.

77, 78. Tanton v. Boomgaarden, 111 Ill. App. 37.

79, 80. Brunnemer v. Cook & Bernheimer Co., 180 N. Y. 188, 73 N. E. 19.

81. Merritt v. Ward, 113 Ill. App. 208.

82. See 3 C. L. 698.

will be presumed.[83] In replevin by the mortgagor to recover property from the mortgagee, want of consideration may be set up as a basis of plaintiff's claim.[84] An injunction will not lie to restrain a default in the absence of a personal covenant on the part of the mortgagor.[85]

§ 16. *Remedies against third persons.*[86]—A mortgagee is entitled to an equitable lien on property substituted for the mortgaged property, the one exchanging property with the mortgagor having knowledge of the existence of the mortgage.[87] A mortgagee may maintain an action against one wrongfully converting the mortgaged property or a part thereof,[88] and it is immaterial whether or not the security remaining in his hands, if any, is exhausted or worthless, or has been converted by some one else,[89] and this is true, though the mortgagee is not entitled to the possession of the property.[90] A mortgagee having possession of the property may maintain conversion against one wrongfully attaching it.[91] In such case it is not necessary to set out in the petition the particulars of plaintiff's lien.[92] In trover by a mortgagee to recover the property from a creditor of the mortgagor, who had replevied the same, a draft which furnished the consideration of the mortgage is admissible.[93] A factor selling mortgaged goods on commission without notice or knowledge of the mortgage does not derive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action upon an implied contract.[94] Cases dealing with the sufficiency of evidence are shown in the notes.[95] In replevin the measure of damages for wrongful seizure, in case return of the goods cannot be had, is the value of the goods up to the amount of the indebtedness, with accrued interest.[96] In conversion the amount of the damages is the amount of the debt if that be less than the value of the property converted,[97] otherwise it is the value of such property at the time of the conversion.[98] A claim by a mortgagee for the conversion of a definite amount of property of a stated value to the consequent impairment of his lien is susceptible of pecuniary measurement, and does not sound in damages merely within the meaning of statutes relating to the right of set-off.[99]

CHATTELS; CHEATS; CHECKS; CHILDREN; CHINESE; CITATIONS, see latest topical index

CITIZENS.[1]

The political status of an alien is presumed to continue,[2] and long residence is insufficient to overcome this presumption.[3] Nothing which a state can do will

83. Where the mortgagor was allowed to remain in possession of a stock of goods and dispose of the same in the usual course of business, accounting monthly for the proceeds, the mortgagee in suing to take possession for failure of the mortgagor to account, need not allege that there were any sales during the months during which the mortgagor failed to account. Johnson v. Hillenbrand [S. D.] 101 N. W. 33.

84. Sylvester v. Ammons [Iowa] 101 N. W. 782.

85. Anheuser-Busch Brewing Ass'n v. Rahlf, 213 Ill. 549, 73 N. E. 414.

86. See 3 C. L. 699.

87. American Soda Fountain Co. v. Futrall [Ark.] 84 S. W. 505.

88, 89, 90. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

91. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329; Aldrich v. Higgins [Conn.] 59 A. 498.

92. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

93. Heenan v. Forest City Paint & Varnish Co. [Mich.] 101 N. W. 806.

94. Greer v. Newland [Kan.] 78 P. 835.

95. In replevin by mortgagees against purchaser of mortgagor, evidence held to support a finding for plaintiff as to the identity of the cattle in question with those covered by the mortgage. Schaff & Co. v. First Nat. Bank [Ind. T.] 82 S. W. 700.

96. Gallick v. Bordeaux [Mont.] 78 P. 583.

97. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

98. Aldrich v. Higgins [Conn.] 59 A. 498. See Conversion as Tort, 3 C. L. 866.

99. Debtor v. Henry [Ala.] 39 So. 72.

1. This topic deals only with the question of who are citizens. The naturalization of aliens (see Aliens, 5 C. L. 96), and the rights, privileges, and duties of citizens (see Constitutional Law, 3 C. L. 730, and vari-

invest a foreigner with the rights and privileges of a citizen of the United States.[4] An Indian tribe, having the characteristics of a distinct political community, has the power to admit to citizenship such persons as it may desire.[5] Children born of alien parents in this country are citizens.[6] The children of parents who have been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of naturalization of their parents shall, if dwelling within the United States, be considered citizens thereof.[7] Children at Ellis Island in the custody of the immigration authorities are not "dwelling in the United States."[8] Under act of Congress an Indian allottee, on the receipt of his first patent becomes a citizen of the United States.[9] An alien cannot be deemed a citizen of the United States because he resided in Colorado when the state was admitted to the Union, and has since exercised the rights of citizenship there.[10] In determining the jurisdiction of a Federal court the fact that a party is a member and officer of a corporation creates no legal presumption that he is a citizen of the same state as the corporation;[11] the presumption that the members of a corporation are citizens of the state in which it is incorporated being indulged in only for the purpose of fixing the status of the corporation as a litigant in such courts.[12]

CIVIL ARREST.

§ 1. *Privilege from arrest.*[13]—The provision of the bankruptcy act which exempts a bankrupt from arrest upon civil process except in certain enumerated

various specific subjects, such as Commerce, 3 C. L. 711; Intoxicating Liquors, 4 C. L. 252, etc.), being treated elsewhere.

2, 3. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

4. Mayer's Case, 38 Ct. Cl. 553.

5. Cherokee Nation has such power. Delaware Indians' Case, 38 Ct. Cl. 234.

6. Ehrlich v. Weber [Tenn.] 88 S. W. 188. See Aliens, 5 C. L. 96.

7. Rev. St. U. S. 2172 [U. S. Comp. St. 1901, p. 1334].

8. United States v. Williams, 132 F. 894.

9. 24 Stat. at L. 388, ch. 119, construed. In re Heff, 197 U. S. 488, 49 Law. Ed. 848. This is true though the act provides that the Indian's title shall not be alienated or incumbered for twenty-five years, and that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property. Id.

10. Mayer's Case, 38 Ct. Cl. 553.

NOTE. Naturalization by accession of territory: Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose domain they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided. [White persons or persons of European descent born or residing in Colonies before 1776. United States v. Ritchie, 17 How. [U. S.] 525, 15 Law. Ed. 236; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [U. S.] 99, 7 Law. Ed. 617; Shanks v. Dupont, 3 Pet. [U. S.] 242, 7 Law. Ed. 666; McIlvaine v. Coxe, 4 Cranch [U. S.] 209; 2 Law. Ed. 598. British subjects residing at Detroit before and at the time of the evacuation of the Territory of Michigan. Crane v. Reeder, 25 Mich. 303. Louisiana: Desbois' Case, 2 Mart. [La.] 185; United States v. Laverty, 3 Mart. [La.] 733. Texas: McKinney v. Saviego, 18 How. [U. S.] 235, 15 Law. Ed. 365; Cryer v. Andrews, 11 Tex. 170; Barrett v. Kelly, 31 Tex. 476; Carter v. Territory, 1 N. M. 317.] Congress having the power to deal with the people of the territories, in view of the future states to be formed from them, there can be no doubt that in the admission of a state a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission. Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are resognized as such in the formation of the new state with the consent of Congress. Boyd v. Thayer, 143 U. S. 135, 170, 36 Law. Ed. 103.—From Boyd v. Thayer, 143 U. S. 135, 36 Law. Ed. 103.

11, 12. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

13. See 3 C. L. 700.

cases applies to the detention of a bankrupt taken into custody before bankruptcy [14] and in such case he may be discharged on a writ of habeas corpus.[15] The bankruptcy court may issue an order restraining the arrest of the bankrupt even though a petition for review of an order refusing to revoke a discharge is pending.[16]

§ 2. *Arrest on mesne process. When allowable.*[17]—In some states one failing to pay his taxes may be arrested.[18] The term "debt" as employed in a constitutional provision prohibiting imprisonment therefor does not extend to or embrace any pecuniary obligation imposed by the state as punishment for crime, whether the money, the payment of which is demanded, be for fines or costs, or even, in certain quasi-criminal proceedings, other penalties of a money nature which may be lawfully inflicted by a court.[19]

Procedure to obtain order of arrest.[20]—In New York in an action of conversion, the affidavit must state facts showing the value of the articles alleged to have been converted.[21]

Validity and use of order.—An illegal and improper use of a writ of capias ad respondendum does not invalidate the writ or the act of the court issuing it,[22] but plaintiff may be responsible to defendant for the improper use.[23]

§ 3. *Execution against the body. Occasion and propriety. Procedure to obtain.*[24]—There is no imprisonment for debt in Illinois; but refusal to surrender non-exempt property to satisfy a judgment is regarded as a fraud, which after hearing and trial by jury may be punished by imprisonment for a limited time at the creditor's expense.[25] In New York a defendant may be arrested in an action for damages for an injury inflicted through the negligence of defendant's servant,[26] and wage-earners suing for wages earned are entitled to an execution against the person of their former employer [27] provided the action to recover such wages is commenced within one month after the accrual of the cause of action.[28] Also if the nature of the action is such that an execution against the person could be issued upon a judgment recovered by the plaintiff, such an execution may be issued against the plaintiff on a judgment against him for the costs,[29] and this is true though the defendant, owing to its corporate character, is not subject to arrest.[30]

What allegations are essential to the validity of the affidavit depends upon the local statutes.[31] Where the affidavit alleges fraud in general terms, and is such that the debtor might be entitled to have specifications filed, if seasonably requested, yet where no request is made for such specifications, or where the charge can be

14. People v. Erlanger, 132 F. 883.
Contra, In re Claiborne, 109 F. 74.
15. People v. Erlanger, 132 F. 883.
16. In re Chandler, 135 F. 893.
17. See 3 C. L. 700.
18. See Texas, 4 C. L. 1605.
19. Ex parte Diggs [Miss.] 38 So. 730.
20. See 3 C. L. 700.
21. Complaint and affidavit specifying the articles converted and stating in general terms that they were of the value of $2,500, and that plaintiff had sustained damage in a like sum, held insufficient. Barnes v. Goss, 98 App. Div. 1, 90 N. Y. S. 140.
22. Powell v. Perkins [Pa.] 60 A. 731. Where defendant instead of having writ against a minor served as a summons as required by P. L. 1901, 614, fixed amount of bail and notified the father of the infant of his action, and he, under fear of the child's arrest, entered the bail demanded, held writ would not be quashed. Id.
23. Powell v. Perkins [Pa.] 60 A. 731.
24. See 3 C. L. 701.
25. Rush v. Flood, 105 Ill. App. 182.
26. Code Civ. Proc. §§ 549, 3343, subd. 9, construed. Ossmann v. Crowley, 101 App. Div. 597, 92 N. Y. S. 29. A master is subject to arrest in an action against him for an assault committed by a servant in the course of his employment. Davids v. Brooklyn Heights R. Co., 93 N. Y. S. 285, rvg. 45 Misc. 208, 92 N. Y. S. 220.
27. See 3 C. L. p. 701, n. 91.
28. Laws 1902, p. 1569, c. 580, Municipal Court Act, § 274. Salsberg v. Tobias, 88 N. Y. S. 967.
29, 30. Davids v. Brooklyn Heights R. Co., 93 N. Y. S. 285, rvg. 45 Misc. 208, 92 N. Y. S. 220.
31. Wisconsin: An affidavit for a judgment debtor's arrest under Rev. St. 1898, § 3032, is not defective for failure to specify the property which it claimed the judgment debtor erroneously refused to apply to the satisfaction of the judgment. Enders v. Smtih, 122 Wis. 640, 100 N. W. 1061.

made specific by its reference to the action or otherwise, the debtor can be called upon to plead.[32]

The order and writ.[33]—An order correct in itself is not made erroneous because it follows upon a wrong conclusion or procedure of the court.[34] Upon appeal the order of the lower court will be sustained if possible.[35]

Arrest and return.[36]

§ 4. *Supersedeas bail or discharge from arrest. Final process.*[37]—Under a statute providing for the release of the detor where malice is not the gist of the action, the term "malice" implies a wrong inflicted on another with an evil intent or purpose.[38] The phrase "gist of the action" means the essential ground or object of a suit, and without which there is not a cause of action.[39] Under the Massachusetts statutes if the debtor voluntarily makes default he is not entitled to the benefit of proceedings for the relief of poor debtors.[40] In New Jersey the making of an assignment to the assignee appointed by the court of all the debtor's real and personal estate, except such property as is exempt, is necessary before the order of discharge can be made,[41] and an order of discharge will be set aside where it appears that the petition presented to the court was not filed with the clerk for more than two months afterwards.[42]

Costs.—The misconduct of the debtor rendering the proceeding necessary costs may be taxed against him.[43]

§ 5. *Liability for false imprisonment.*—In an action on plaintiff's bond, the general rules of pleading apply.[44]

CIVIL DAMAGE ACTS; CIVIL DEATH, see latest topical index.

CIVIL RIGHTS.[45]

Perfect equality in civil rights with the white race given by the 13th amendment is a right, privilege or immunity secured to members of the emancipated race by the Federal constitution.[46] A private citizen cannot, in a constitutional sense, prevent equal protection of the laws.[47] The right to have the state afford due pro-

32. Radovsky v. Sperling, 187 Mass. 202, 72 N. E. 949.

33. See 3 C. L. 701.

34. Defendant was found guilty of fraud in circuit court. Through error the question was again before the jury under the Insolvent Debtors' Act. He was again found guilty by the county court and remanded to the sheriff's custody. The proceedings in the latter court did not harm and may be regarded as superfluous. Penoyer v. People, 105 Ill. App. 481.

35. A magistrate refusing to issue a body execution on the ground "that the proof was insufficient to grant the same," without specifying any defect in which the proof was lacking, his decision in the matter will be upheld if there is any inadequacy in the proof. Salsberg v. Tobias, 88 N. Y. S. 967.

36, 37. See 3 C. L. 701.

38. Rev. St. c. 72, § 2. Penoyer v. People, 105 Ill. App. 481.

39. Penoyer v. People, 105 Ill. App. 481.

40. Rev. Laws, c. 168 § 55. The debtor defaulting and being refused the poor debtor's oath, another court, to which the debtor subsequently applied to be permitted to take the oath, held without jurisdiction to grant the relief sought. Radovsky v. Sperling, 187 Mass. 202, 72 N. E. 949.

41, 42. Stokes v. Hardy [N. J. Law] 58 A. 650.

43. Rev. St. 1898, § 3038, considered. Enders v. Smith, 122 Wis. 640, 100 N. W. 161.

44. In an action on an undertaking to procure an order of arrest an answer alleging that "prior thereto" plaintiff's attorney had commenced an action against defendant "claiming" that the claim had been assigned to them and that they had recovered a judgment from which an appeal is pending, held insufficient, it not alleging that the assignment was in fact made, nor that the action thereon was brought before the pending action. Cassidy v. Arnold, 100 App. Div. 412, 91 N. Y. S. 570.

45. See 3 C. L. 702. See, also, Constitutional Law, 3 C. L. 730; Carriers, 5 C. L. 507; Jury, 4 C. L. 358.

46. As prescribed by the Civil Rights Acts of April 9, 1868. Ex parte Riggins, 134 F. 404. The assailing of a negro by a white man, with intent to prevent his enjoyment, because of his race, of any civil right of a white citizen is an attack upon a right, privilege or immunity secured to him. Id.

47. Since the fourteenth amendment con-

cess when a citizen is taken into custody to punish him for a crime is secured by or dependent upon the Federal constitution,[48] and forcibly taking a prisoner from the custody of the state and murdering him destroys such right, privilege or immunity.[49] When a citizen is deprived of a right, privilege or immunity secured by the Federal constitution, though there is no dereliction of duty on the part of the state, congress has power to punish the act.[50] "Places of public accommodation" in Civil Rights Acts does not include a bootblacking stand,[51] and an apartment or family hotel where suites are rented on annual leases is not a hotel within a law requiring equal accommodations in hotels.[52]

Failure to comply with statutes requiring carriers to furnish separate coaches [53] or waiting rooms of equal and sufficient accommodation for the white and black races is a public offense,[54] unless it is the result of an accident.[55] The object of such statutes is to prevent discrimination.[56] A carrier who has violated the provisions of a law requiring the separation of the races cannot invoke minor provisions of it as a justification for ejecting a passenger.[57]

Civil Service; Clearing Houses, see latest topical index.

CLERKS OF COURT.

§ 1. *General powers and duties.*[58]—The clerk of a court of record is the custodian of its records and files and his certificate as to what is contained in the record must be looked to in preference to any other evidence.[59] A clerk has no judicial powers;[60] he has only such authority to satisfy judgments as is given him by statute,[61] hence the receipt of money by a clerk for the satisfaction of a judgment, except as provided by law, is not an official act of the clerk,[62] and he cannot be

fers only a right to a legal status which can be conferred in the first instance only by legislation, and when conferred can be impaired only by officials who wield state power. Ex parte Riggins, 134 F. 404.

48. Ex parte Riggins, 134 F. 404.

49. What constitutes due process in such case defined. Ex parte Riggins, 134 F. 404.

50. Ex parte Riggins, 134 F. 404.

51. A refusal to shine the shoes of a colored man does not subject the proprietor of a bootblack stand to punishment under the Civil Right Act (Laws 1895, p. 974, c. 1042). Burks v. Rosso, 180 N. Y. 341, 73 N. E. 58.

52. Under Laws 1895, p. 974, c. 1042, the proprietor of such an establishment need not accept a tenant whom he does not desire. Alsberg v. Lucerne Hotel Co., 92 N. Y. S. 851.

53. Indictment following the language of the statute held to charge the commission of a public offense. Chesapeake & O. R. Co. v. Commonwealth [Ky.] 84 S. W. 566. Signs inscribed "white" and "black" are not "adjustible screens," within a statute requiring the separation of white and colored races on street cars. Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629.

54. An indictment under Kirby's Dig. §§ 6622, 6634, 6636, requiring railroads to furnish separate waiting rooms of equal accommodations for the white and black races, must allege wherein the accommodations provided were not equal and sufficient. Choctaw, etc., R. Co. v. State [Ark.] 87 S. W. 426.

55. Failure to comply with a statute requiring a carrier to furnish separate coaches for the white and black races as the result of an accident is not a violation of the statute. Chesapeake & O. R. Co. v. Commonwealth [Ky.] 84 S. W. 566.

56. Rooms need not be of the same dimensions nor furnished in the same manner. Choctaw, O. & G. R. Co. v. State [Ark.] 87 S. W. 426.

57. Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629.

58. See 3 C. L. 702.

59. When there is a variance between the recitals in a bill of exceptions and the transcript of the record certified by the clerk, the latter controls. Georgia Southern & F. R. Co. v. Pritchard [Ga.] 51 S. E. 424.

60. Clerk of Illinois circuit court has no power to enter a decree dismissing a bill after demurrers thereto have been sustained by the court. Livingston County Bldg. & Loan Ass'n v. Keach, 213 Ill. 59, 72 N. E. 769.

61. Clerk of district court has no power to satisfy judgment on deposit with him of the full amount thereof. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

62. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

amerced for failure to pay over money so received.[63] A clerk in making up a transcript of a record for an appellate court has no discretion to omit anything which is directed by either party to be inserted, if it is a paper or proceeding in the cause having relation or leading up to the order or decree appealed from.[64] But he should omit all papers and proceedings in the same or another distinct cause which have no relation to, and which do not lead up to, the order or decree appealed from, even though such papers or proceedings have been directed to be inserted.[65] The clerk's certificate of the transcript should follow the rules prescribed therefor.[66] A clerk is not the agent of county commissioners to make contracts for services to be performed in his office, and cannot compel reimbursement where he has paid therefor.[67] A clerk of a Federal circuit court has authority to issue a subpœna duces tecum, when ordered to do so by the court, for production of documents on the taking of a deposition de bene esse before him.[68] The issuance by a clerk of a Florida circuit court of a commission to take the deposition of an absent witness, when all the preliminary steps prescribed by law and the rules of practice have been complied with, is a mere ministerial act, and ordinarily the clerk has no right to refuse its issuance because he is of the opinion that the deposition, when taken, will be incompetent in the proceeding in which it is to be used; he should issue the commission, leaving the competency of the deposition to the court when it should be tendered as evidence.[69] A clerk of the circuit court in Michigan may not object to an order of the court directing the filing with him of a certificate of deposit in lieu of a bond as security for costs.[70] Under the North Carolina statutes an appointee to fill a vacancy in the office of clerk of the superior court, occurring during the term, holds only until the next general election and not for the unexpired term,[71] though the order appointing him purports to make the appointment for such unexpired term.[72] Where a statement of claim shows on its face that plaintiff has no lawful demand or good cause of action, he is not injured by refusal of the clerk to file the papers and issue summons.[73]

§ 2. *Fees and compensation.*[74]—The allowance of fees is statutory,[75] and only such fees may be charged as are expressly provided for.[76] A clerk of a circuit

63. Rev. Codes 1899, §§ 5555, 5556, do not apply. Milburn-Stoddard Co. v. Stickney [N. D.] 103 N. W. 752.

64. It is immaterial that any paper is, in the judgment of the clerk, unnecessary to the proper presentation of questions raised. Andersen v. Long [Fla.] 37 So. 565; Ray v. Trice [Fla.] 37 So. 582.

65. Certain papers and proceedings held not a proper part of record; and the clerk should have omitted them. Ray v. Trice [Fla.] 37 So. 582.

66. Certificate improper where it showed omission of papers directed to be included in the transcript. Anderson v. Long [Fla.] 37 So. 565. Certificate showing omission of matters on demand of appellant held fatally defective. Ray v. Trice [Fla.] 37 So. 582.

67. Janitor's services in Indiana circuit court. Board of Com'rs of Harrison County v. Bline [Ind. App.] 72 N. E. 1034.

68. Rev. St. § 863. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

69. Mandamus issued to compel issuance of commission. State v. McRae [Fla.] 38 So. 605.

70. Smith v. Perkins [Mich.] 102 N. W. 971.

71, 72. Rodwell v. Rowland [N. C.] 50 S. E. 319.

73. United States v. Bell [C. C. A.] 135 F. 336.

74. See 3 C. L. 703.

75. Arkansas: The indexing of orders of the court relating to commissioners of accounts, petit jurors and grand jurors, is a part of the burden of the office of clerk of the circuit court. Kirby's Dig. § 3490, allowing ten cents for indexing each case, each item, has no reference thereto. Hempstead County v. Harkness [Ark.] 84 S. W. 799. Kirby's Dig. § 3490, allowing the clerk ten cents each for filing papers in a cause, does not include papers taken from a justice of the peace for presentation to the grand jury. Id. Since fifty cents is allowed by § 3491 for each indictment returned into court, the clerk is not entitled in addition to ten cents per one hundred words for recording indictments under section 3490, as "copies of bonds and papers." Id.

Florida: Under Rev. St. 1892, § 1394, the circuit clerk is entitled to charge fifteen cents for each search for unpaid taxes and tax certificates for each year for which search is made, whether or not a tax sale be found. Edwards v. Law [Fla.] 36 So. 569.

Missouri: Clerk of circuit court is entitled to ten cents per one hundred words of the copy of a petition for mandamus incorpo-

court who, under the statute, is also ex officio county recorder, fills but one office, and is entitled to but one salary, which must not exceed the limit fixed by law for the office of clerk of court.[77] Costs taxed for copies in favor of a clerk are a part of the emoluments of the clerk's office necessary to discharge office expenses, and the clerk cannot be deprived of such compensation by the fact that parties make and furnish such copies.[78] Where parties themselves, or by agents or assistants, inspect court records and make extracts therefrom, receiving no assistance from employes in the clerk's office, who merely watch and supervise as a part of their duty to keep the records safe, the clerk is not entitled to any fee or compensation.[79] A clerk who certifies to facts as well as to a paper containing a statement of such facts is entitled to reasonable compensation therefor in addition to the fee allowed by statute for certification of the paper.[80] Thus if a clerk makes a search of records to ascertain what liens, if any, exist against lands described in an abstract of title, and makes a statement of the result of his search on the abstract, he is entitled to reasonable compensation therefor.[81] But if the search of the records was a necessary part of another duty, to the performance of which a fee is attached, he cannot make an additional charge therefor.[82] A clerk extends credit at his peril and will be required to account for fees earned, whether the same are collected or not.[83] A clerk is not required to account for fees collected by him for services rendered by his predecessor before the enactment of a statute limiting salary, though the fees were collected after such statute went into effect.[84] He is chargeable with fees collected by him for compensating work left undone by his predecessor.[85] In Illinois the county clerk is not entitled to a fee for acknowledging a tax deed, but is entitled to one for recording it.[86] In Nebraska a clerk of the district court is required to account for fees earned by him as a member of the board of commissioners of insanity.[87] In Arkansas a clerk of a circuit court is entitled to his fees in cases in which a nolle prosequi has been entered.[88] A clerk of a circuit court in Wisconsin may recover of defendant his statutory fees, on dismissal for want of prosecution, though he has not required payment of fees in advance or by the prevailing party before entry of judgment.[89] The Indiana act of 1903 relating to salaries of clerks and sheriffs entitled such officers to unpaid salary from January 1, 1900.[90] Where, in an action to enforce a penalty for exacting illegal fees, it appears that services not required by law were performed, and a fee charged for their performance, it will not be presumed that the charge was more than the services were reasonably worth.[91]

rated in the alternative writ. State v. Board of Police Com'rs, 108 Mo. App. 98, 82 S. W. 960.

Tennessee: Under Acts 1901, p. 357, c. 174, § 57, a clerk of a circuit court can charge only one fee where several pieces of property sold for taxes are redeemed by one person at the same time, even though such parcels were assessed in the names of different persons and were located in different wards of a city, since he can issue only one receipt. Plyley v. Allison [Tenn.] 82 S. W. 475.

76. State v. Board of Police Com'rs, 108 Mo. App. 98, 82 S. W. 960.

77. Construing Arkansas statutes and constitution regarding the office of clerk of circuit court. Durden v. Greenwood Dist. of Sebastian County [Ark.] 83 S. W. 1048.

78. Copies of petition for mandamus. State v. Board of Police Com'rs, 108 Mo. App. 98, 82 S. W. 960.

79. State v. McMillan [Fla.] 38 So. 666.

80, 81, 82. Sheibley v. Hurley [Neb.] 103 N. W. 1082.

83, 84, 85. Boettcher v. Lancaster County [Neb.] 103 N. W. 1075.

86. Village of Morgan Park v. Knopf, 111 Ill. App. 571.

87. Boettcher v. Lancaster County [Neb.] 103 N. W. 1075.

88. Under Kirby's Dig. § 2470. Hempstead County v. Harkness [Ark.] 84 S. W. 799.

89. Rev. St. 1898, §§ 747, 748. Williams v. Willock [Wis.] 101 N. W. 927.

90. Hargis v. Perry County Com'rs [Ind.] 73 N. E. 915; Board of Com'rs of Perry County v. Lindemann [Ind.] 73 N. E. 912.

91. Construing Cobbey's Ann. St. 1903, § 9060, penalizing exaction of illegal fees. Sheibley v. Hurley [Neb.] 103 N. W. 1082.

United States courts.[92]—Under the statute entitling a clerk of a circuit court to a commission for receiving, keeping, and paying out money, such a clerk is not entitled to a commission on proceeds of mortgaged property paid by the master making the sale directly to the mortgagee,[93] nor on a fund paid by a master into a United States depositary, pursuant to an order of the court and subject to be withdrawn at its order, when the fund is so paid out,[94] nor on railroad bonds deposited in a circuit court as collateral security, and kept in a bank vault to which the clerk has the key.[95] A clerk of the circuit court may charge the statutory fees for copies of an injunctional order, though such orders were printed.[96] A clerk of the district court is not entitled to a fee for each notice sent to creditors of the filing of a petition for a discharge in bankruptcy, but is entitled only to the actual expense incurred.[97] Clerks are not entitled to fees for duplicates of their accounts to be retained in their offices as provided by law.[98]

§ 3. *Liability on bond.*[99]—A clerk who certifies to an acknowledgment of a deed taken before one of his deputies, the signature and acknowledgment being in fact forged, is liable to the purchaser for the price paid, he having relied on the certificate of acknowledgment.[100] Though a clerk's bond is given to the United States as sole obligee, any private suitor who has suffered loss by failure of the clerk to discharge his duties may sue thereon.[101] In Maryland, charges for work done in performance of duties of the office of clerk of the circuit court of Baltimore city, and the salaries of deputies, are in the nature of expenses of the office, payable before payment of the clerk's salary, and hence the clerk is liable therefor on his bond.[102] Under the statutory scheme for payment of such services, it is presumed, in the absence of contrary evidence, that the fees received were sufficient to pay for the maintenance of the office.[103]

CLOUD ON TITLE; CLUBS; CODICILS; COGNOVIT, see latest topical index.

COLLEGES AND ACADEMIES.[1]

An incorporated board of regents with power to sue and be sued is subject to suit for a claim which there is no legislative appropriation to meet, they being entitled to satisfy the judgment out of funds not otherwise specifically appropriated.[2] A board of regents having statutory power to increase or diminish the number of professors and regulate their salaries may employ a professor for a period exceeding their term of office.[3] A provision in a statute incorporating a board of regents which authorizes them to remove an instructor whenever the interests of the college require it, becomes a condition in a contract of employment for a specified time,[4] and a removal prior to the expiration of the contract period is not, in the absence of fraud or bad faith, subject to judicial investigation.[5] A ministerial board directed by law to issue certificates to practice to graduates of regular

92. See 3 C. L. 704.
93. Construing Rev. St. § 828. Michigan Cent. R. Co. v. Harsha [C. C. A.] 134 F. 217.
94, 95. Michigan Cent. R. Co. v. Harsha [C. C. A.] 134 F. 217.
96. Cudahy Packing Co. v. McGuire, 135 F. 891.
97. In re Dunn Hardware & Furniture Co., 134 F. 997.
98. Hart's Case, 38 Ct. Cl. 571.
99. See 3 C. L. 704.
100. Samuels v. Brand, 26 Ky. L. R. 943, 82 S. W. 977.
101. United States v. Bell [C. C. A.] 135 F. 336.
102, 103. State v. Turner [Md.] 61 A. 334.
1. See 3 C. L. 705.
2. Ward v. Board of Regents [C. C. A.] 138 F. 327.
3. A contract for two and one-half years is not void, though the personnel of the board changes from year to year. Ward v. Board of Regents [C. C. A.] 138 F. 372.
4, 5. Ward v. Board of Regents [C. C. A.] 138 F. 372.

schools has no power to determine whether a school is "regular" or to refuse a certificate to one having a diploma.[6]

The income of the lands granted by the Federal government for "university purposes" cannot be used for the erection or equipment of buildings,[7] but only for the support and maintenance of the university in payment of current expenses.[8]

COLLISION; COLOR OF TITLE, see latest topical index.

COMBINATIONS AND MONOPOLIES.

§ 1. *Combinations violative of the Federal anti-trust act.*[9]—The Sherman anti-trust act declares illegal any attempt at monopoly or restriction upon competition in interstate commerce,[10] and relative to carriers it applies only to interstate transportation companies.[11] A combination to secure less than lawful freight rates is a violation of the act;[12] but a contract giving an exclusive right to manufacture and sell certain articles[13] or a contract between a telegraph company and a board of trade, limiting the communication of quotations collected by the latter, is not;[14] and no monopoly or combination can arise from the fact that agents of the state only are allowed to perform duties devolving upon them by law.[15] The designation by city officials of a certain kind of asphalt to be used in paving a street is not a violation of the act.[16] The act makes a distinction between a contract, and a combination and conspiracy in restraint of trade.[17] A general allegation of intent colors and applies to specific charges in a bill seeking relief against violations of the act.[18] A declaration must describe with definiteness and certainty

6. The State Veterinary Board of Michigan cannot refuse a certificate to practice to a graduate of veterinary college existing under Comp. Laws 1897, c. 218. Wise v. State Veterinary Board]Mich.] 101 N. W. 562.

7, 8. Roach v. Gooding [Idaho] 81 P. 642.

9. See 3 C. L. 706.

Note: Effect and construction of Federal anti-trust law, see note to Whitwell v. Continental Tobacco Co. [U. S.] 64 L. R. A. 689.

10. Sherman Act held violated by combination of independent meat dealers. Swift & Co. v. United States, 25 S. Ct. 276. An agreement to refrain from purchasing salt within the state or abroad and to discourage importations by others is in violation of the Sherman law. Getz Bros. & Co. v. Federal Salt Co. [Cal.] 81 P. 416. A combination of the book publishers and sellers controlling ninety per cent. of the copyrighted books published, for the purpose of arbitrarily fixing the price of such books and operating a system to cripple persons not members of the combination is a violation of the Sherman Act. Bobbs-Merrill Co. v. Straus, 139 F. 155.

11. A Pennsylvania contract not to engage in the mining or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries is void as to the territory adjacent to the rivers outside of Pennsylvania, but valid as to that state. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088. A combination of independent dealers in a commodity to aid in an attempt to monopolize commerce in it among the several states violates the Sherman Act where the dealers are in different states than the producers. Combination of meat dealers. Swift & Co. v. United States, 25 S. Ct. 276.

12. Combination by independent meat dealers to monopolize commerce in that commodity. Swift & Co. v. United States, 25 S. Ct. 276.

13. 26 St. 209; U. S. Comp. St. 1901, p. 3200. Bancroft v. Union Embossing Co., 72 N. H. 402, 57 A. 97.

14. Board of Trade of Chicago v. Christie Grain & Stock Co., 25 S. Ct. 637.

15. State regulations restricting the right to pilot to persons duly appointed do not violate the Federal anti-trust laws. Olsen v. Smith, 25 S. Ct. 52.

16. Is not in restraint of interstate commerce nor does it tend to create a monopoly. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860.

17. A complaint alleging that defendant entered into a "contract, combination and conspiracy" is bad for duplicity. Rice v. Standard Oil Co., 134 F. 464.

18. Swift & Co. v. United States, 25 S. Ct. 276.

the combination and conspiracy complained of and the acts done under it which resulted in damage.[19] Parties who deliver their stock in competing lines to a holding corporation in violation of the act are in pari delicto and cannot recover their specific shares, but must be content with a ratable distribution of the corporate assets.[20]

§ 2. *Combinations violative of state anti-trust acts and of the common law.*[21]—A pool or trust is a combination having the intention, tendency and power to monopolize business or to control production, interfere with trade or regulate prices.[22] The form of an association will be disregarded and its actual operation examined to determine its legality;[23] but if the form and purpose of a combination is legal, it will not be denounced as illegal because it occasionally effectuates its purpose by exceptional rules,[24] and a contract not inimical to public welfare will be upheld unless so operated as to be oppressive to private rights, or works public detriment.[25] It is not necessary that any actual agreement to combine be entered into,[26] nor that the combination result in a complete monopoly,[27] or that prices be raised by virtue of it,[28] or that evil intent or actual injury to the public be shown;[29] but to render a combination to injure one in his business actionable, damage must result.[30] Such combinations are inimical to public welfare[31] and contrary to public policy, and are condemned by the common law[32] and by stat-

19. Complaint held bad for indefiniteness. Rice v. Standard Oil Co., 134 F. 464.

Complaint held sufficient: Allegations in a bill seeking relief against an attempt to monopolize commerce in fresh meat in violation of the Sherman Act held not defective as vague. Swift & Co. v. United States, 25 S. Ct. 276. A bill averring the existence of a combination of a dominant proportion of the dealers in a commodity to fix the prices, secure unlawful freight rates to the exclusion of competitors, and other facts tending to show a monopoly in violation of the Sherman Act, is good as against objections of want of equity, multifariousness and failure to allege specific facts. Id.

20. Harriman v. Northern Securities Co., 25 S. Ct. 493.

21. See 3 C. L. 708.

NOTE: Effect and construction of state anti-trust laws, see note to Whitwell v. Continental Tobacco Co. [U. S.] 64 L. R. A. 689. See Helliwell Stock and Stockholders, §§ 373-395.

22. Under the statutes of Illinois the number of persons implicated, extent of territory covered, or tendency to injure the public, is immaterial. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75. The test as to the illegality of a combination is its tendency to endanger the public by controlling prices, limiting production and suppressing competition so as to restrain trade and create a monopoly. Needles v. Bishop & Babcock Co., 2 Ohio N. P. (N. S.) 77. Acts 1898, p. 97, c. 82, placing car service corporations under the control of the railroad commission, held to show that they are not trusts prohibited by Code 1892, § 4437, and Acts 1900, p. 125, c. 88. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

23. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

24. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. Withdrawal of car service from a siding because the owner refused to pay demurrage charges held not to constitute the car service association an illegal trust or combine. Id.

25. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. When an order of car service is reasonable, whether it was rightfully invoked in a particular instance does not affect the question of whether the association is a trust. Id.

26. A tacit understanding is all that is essential. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75.

27. It is sufficient if it tends to that end. Hunt v. Riverside Co-op. Club [Mich.] 12 Det. Leg. N. 264, 104 N. W. 40.

28. Hunt v. Riverside Co-op. Club [Mich.] 12 Det. Leg. N. 264, 104 N. W. 40.

29. Needles v. Bishop & Babcock Co., 2 Ohio N. P. (N. S.) 77.

30. By inducing employes to leave his service or break their contracts with him. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353. Proof of excessive payment for car service is not conclusive proof of damage under anti-trust act (Acts 1900, p. 128, c. 88, § 7), in the absence of proof that such excessive payment is due to the existence of such trust or combine. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

31. Under the Mississippi statute, the test of a trust is whether the combination or contract is in its results obnoxious to public policy or inimical to public welfare. Under Const. 1890, § 198, Code 1892, § 4437, and Acts 1900, p. 125, c. 88. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

32. Contrary to public policy: An association of common carriers which has for its purpose the elimination of competition is illegal. Tift v. Southern R. Co., 138 F. 753. A combination, the object of which is to obtain sole control of a particular branch of business, is unlawful at common law and contrary to public policy. Charleston Natural Gas Co. v. Kanawha Natural Gas, Co. v. Kanawha Natural Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876. An agreement

ute,[33] and statutes prohibiting them are a valid exercise of the police power.[34] Contracts having for their purpose the creation of such combinations are void.[35] Agreements between public service corporations of a character to prevent competition in the interest of the public are condemned by the common law [36] and are contrary to public policy.[37] Contracts not to engage in a particular line of business

for the purpose of limiting the production of a commodity and regulating its price is illegal as in restraint of trade. Evans v. American Strawboard Co., 114 Ill. App. 450.

Not contrary to public policy: A contract between two mercantile houses engaged in the same line of business by which each acquires an interest in the gross profits of the other. Fechteler v. Plam Bros. & Co. [C. C. A.] 133 F. 462. A contract between a telegraph company and a board of trade limiting the communication of quotations by the latter. Board of Trade Chicago v. Christie Grain & Stock Co., 25 S. Ct. 637. Completion of the Gainesville road by the Georgia held not to defeat or lessen competition. Weed v. Gainesville, J. & S. R. Co., 119 Ga. 576, 46 S. E. 885.

33. Statutes violated: An agreement between an association of master plumbers and wholesalers, fixing the price of supplies to members and increased the price of supplies to members and increased price to non-members, the master plumbers agreeing not to sell supplies or labor below a fixed price and to make their estimates on contracts relative to such prices violates Pub. Acts 1899, p. 409, No. 255, § 1. Hunt v. Riverside Co-op. Club [Mich.] 12 Det. Leg. 264, 104 N. W. 40. Allegations of facts tending to show the creation of a monopoly in fertilizer business held to state a cause of action under Civ. Code 1902, § 2845, prohibiting trusts. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455. An agreement to refrain rom purchasing salt within the state or abroad and to discourage importations by others violaters Civ. Code, § 1673, forbidding contracts in restraint of trade. Getz Bros. & Co. v. Federal Salt Co. [Cal.] 81 P. 416. Admitted facts held to show an unlawful combination to fix the price of coal in violation of Anti-trust Act of 1891 (Hurd's Rev. St. 1903, c. 38, § 269a). Chicago, W. & V. Coal Co. v. People, 244 Ill. 421, 73 N. E. 770.

Statutes not violated: A car service association which is merely an agent of the railroads in enforcing payment for car service and demurrage charges but cannot control the railroads nor fix the charges is not a trust within Acts 1900, p. 125, c. 88, defining trusts as agreements whereby others than the contracting parties control their business. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. The condemnation of the right of way of one railroad company by another for the purpose of operating a double track does not violate a constitutional provision against owning a competing or parallel line. Chicago & M. Elec. R. Co. v. Chicago & N. W. R. Co., 211 Ill 352, 71 N. E. 1017. The operation of a railway by a lessee in connection with other lines owned by it is in no sense a combination of the lessor with such other lines in violation of the constitution of Ohio. Louisville & N. R. Co. v. Cincinnati, etc., R. Co. 3 Ohio N. P. (N. S.) 109. A stipulation in a contract granting a sleeping car company the exclusive right for 15 years to furnish sleeping cars for use on all the roads operated by a railroad company or thereafter acquired and operated does not violate a provision prohibiting combinations from restricting the free pursuit of any lawful business. Ft. Worth & D. C. R. Co. v. State [Tex.] 87 S. W. 336. An agreement by a railroad company to haul the cars of a sleeping car company held not a violation of the Anti-trust Act (Laws 1903, p. 119, c. 94), § 2, defining a monopoly as (2), where any corporation acquires the franchises or rights of another for the purposes of lessening competition, as the sleeping car company did not acquire any franchise of the railroad company. Id. A stipulation in a contract between a railroad and sleeping car company that the latter might charge passengers on its cars such fares as were customary on competing lines does not violate Anti-trust Act (Laws 1903, p. 119, c. 94), through interference with transportation of passengers. Id. Nor did the contract affect transportation or charges in that its provisions required the railroad company to pay the sleeping car company a certain mileage if the sale of berths did not amount to a certain sum. Id. Giving more favorable terms to one who would handle his goods exclusively is not a violation of an act forbidding a sale on condition that there shall be no dealing in the goods of others. Commonwealth v. Strauss [Mass.] 74 N. E. 308.

34. A statute which prohibits trusts and combinations which tend to lessen full and free competition is a valid exercise of the police power in regulating monopolies. Not a violation of U. S. Const. art. 14, § 1. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455.

35. One who leases his property to another as a step in the creation of a monopoly to control the production and price of a commodity cannot recover rent. Hartz v. Eddy [Mich.] 12 Det. Leg. N. 251, 103 N. W. 852. Whether a lease was made for the purpose of limiting or controlling the production of salt held a question for the jury. Id. Contracts which impose restraint upon business and tend to prevent competition will not be enforced by the courts. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876.

36. Agreement between gas companies tending to create a monopoly. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876.

37. Where the object is to limit production, regulate prices or kill competition. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876. Combination between carriers to prevent competition is prima facie illegal. Chicago,

in a certain place or district are generally held not to be in violation of anti-trust laws,[38] and contracts fixing and regulating the price of labor are not within such laws;[39] but such combinations cannot be specifically excepted.[40] An illegal combination may be enjoined from enforcing an illegal agreement to the injury of a person engaged in a competitive business,[41] and previous connection with an illegal combination will not deprive one who has been injured by it from being heard in equity.[42]

A combination by the producers of a necessary of life to control the output, price and sale of it is criminal,[43] notwithstanding the organization was voluntary and no articles of association were reduced to writing.[44] The fact that a combination does not have a complete monopoly,[45] or that the prices fixed may be reasonable and not have been advanced,[46] does not prevent it's being criminal. The criminal offense is complete as soon as the combination is formed,[47] and each member is bound by the acts of his fellows done in furtherance of the object sought to be accomplished.[48]

The common law relative to conspiracies to regulate and fix prices is not abrogated by a statute declaring certain acts to be conspiracies.[49]

etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843.

38. An agreement by one partner on dissolution of the firm not to engage in the same line of business in the town so long as the remaining partner was in business there does not violate the Anti-trust Act (Laws 1903, p. 119, c. 94). Crump v. Ligon [Tex. Civ. App.] 84 S. W. 250. A contract by the seller not to enter into the same line of business in a limited territory within a limited period is not a violation of Gen. Laws 1899, c. 359, prohibiting combinations in restraint of trade, to fix prices or control the production of a commodity. Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168. A contract not to engage in the mining or shipping of coal in the territory traversed by the Ohio, Monongahela, and Mississippi rivers and their tributaries, for 10 years, is not contrary to public policy, though the purchaser had similar contracts with several other operators. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088. A contract not to engage in the newspaper business in a certain town for five years is valid. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11.

NOTE: Agency in restraint of trade may be illegal. (See Hammon, Contracts, § 444a et seq.), In so far as it unnecessarily or unreasonably restrains the right of either principal or agent to exercise his trade or business, or to sell commodities which are the subject of trade and commerce. Althen v. Vreeland [N. J. Eq.] 36 A. 479; Cleaver v. Lenhart, 182 Pa. 285; Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 75 Am. St. Rep. 171; Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 37 L. R. A. 802. But this does not render reasonable restrictions unlawful, and as a general rule a stipulation in a contract of agency, although in partial restraint of trade, if there is a sufficient consideration, is held valid. Swanson v. Kirby, 98 Ga. 586; Up River Ice Co. v. Denler, 114 Mich. 296, 68 Am. St. Rep. 480; Kramer v. Old, 119 N. C. 1, 56 Am. St. Rep. 650, 34 L. R. A. 389; Tillinghast v. Boothby, 20 R. I. 59. See Clark & Skyles, Ag. § 39 (M.).

39. The fixing and regulation of the price of labor is not within Pub. Acts 1899, p. 409, No. 255, § 1. Hunt v. Riverside Co-op. Club [Mich.] 12 Det. Leg. N. 264, 104 N. W. 40.

40. An exemption from the provisions of an anti-trust act of combinations, the object of which is to regulate wages, is void. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75.

41, 42. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353.

43. Both at common law and under the statutes of Illinois. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75. An act prohibiting trusts under penalty authorizes the punishment by fine and imprisonment of a person who is an active member of and assists in carrying out the purpose of an association formed to prevent competition in the sale of an article of merchandise. 93 Ohio Laws, p. 143. State v. Gage [Ohio] 73 N. E. 1078.

44, 45. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

46. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75.

47. The acts of the different parties which thereafter tend to further the purposes of the combination are binding on all. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 77. A combination to prevent competition in the sale of an article which is a necessary of life amounts to a common-law conspiracy regardless of what is done in furtherance of it. Id.

48. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75; Id., 214 Ill. 431, 73 N. E. 770.

49. Hurd's Rev. St. 1903, c. 38, declaring it a conspiracy for two or more persons to conspire to do an illegal act injurious to public trade, and subjecting to fine one who attempts to corner the grain market or gives an option to buy grain at a future time. Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

A violation of the Illinois anti-trust law may be proscuted by indictment, though an action of debt also lies to recover the penalty.[50] An indictment in the language of the statute is suffcient.[51] The place of organization of a corporation defendant need not be alleged or proved in a prosecution for violation of the Illinois anti-trust act.[52]

Rights in an action brought under a particular statute must be determined from such statute alone;[53] but a ruling that a certain act is not a violation of a general statute which embraces within its terms a specific one is conclusive that it does not violate the latter.[54]

Declaring the forfeiture of the license to do business of a foreign corporation, for violation of an anti-trust law is not taking property without due process,[55] and a foreign corporation subject to forfeiture of its right to do business and to criminal prosecution is not denied equal protection of the laws, though by virtue of other statutes certain excepted classes are not subjected to criminal prosecution.[56]

Anti-trust statutes are not retroactive.[57] Acts relative to specific contracts are not repealed by acts general in their terms.[58]

§ 3. *Grants of privileges by statute, ordinance and contracts with municipalities tending to create monopolies.*[59]—A law securing to the successful bidder the exclusive right to supply books to the public schools does not create a monopoly.[60] Statutes putting obstacles in the way of new public service corporations are unconstitutional as tending to create a monopoly;[61] but authorizing a railroad company

50. Chicago Wilmington & V. Coal Co. v. People, 114 Ill. App. 75; Id., 214 Ill. 421, 73 N. E. 770.

51. Indictment for conspiracy held to charge that the combination was formed with fraudulent or malicious intent as required by Hurd's Rev. St. 1903, c. 38. Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. An indictment charging that a conspiracy was "unlawfully, maliciously, fraudulently and wickedly" entered into is sufficient, though the object of the combination was not unlawful until so declared by statute. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75.

52. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75. Where the object of the statute is to prevent combinations to fix prices, the fact that the statute reads "Corporations organized for the transaction of business within this state" does not require an indictment to so allege. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

53. Where an action is brought to recover penalties for violation of a state law, no rights can be predicated on the ground that the contract created a common-law monopoly or was in violation of the Federal Anti-trust Act. Ft. Worth & D. C. R. Co. v. State [Tex. Civ. App.] 88 S. W. 370. Agreements in violation of a statute specifically prohibiting them will be controlled by such statute and not by the general Anti-trust Act. State v. Wilson [Kan.] 80 P. 639. Gen. St. 1901, §§ 2439-2441 forbids agreements to maintain minimum rates of commission for services in the sale of live stock, but not relative to services in purchasing live stock. Id.

54. A ruling that a certain contract is not in violation of the Anti-trust Act of 1903 is conclusive that it does not violate the act of 1899, since the former is broader in its scope and effect than the latter. Ft. Worth & D. C. R. Co. v. State [Tex. Civ. App.] 88 S. W. 370.

55. National Cotton Oil Co. v. Texas, 25 S. Ct. 379. A foreign corporation accepting statutory conditions cannot complain of a law affecting its right to do business because it is a monopoly and in restraint of trade. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455.

56. National Cotton Oil Co. v. Texas, 25 S. Ct. 379; Southern Cotton Oil Co. v. Texas, 25 S. Ct. 383.

57. The Anti-trust Act (Laws 1903, p. 119, c. 94) does not apply to contracts entered into prior to its enactment. Crump v. Ligon [Tex. Civ. App.] 84 S. W. 250.

58. Gen. St. 19001, §§ 2439-2441, prohibiting combinations between cattle buyers and sellers, is not repealed by the general Anti-trust Law, §§ 7864, 7874. State v. Wilson [Kan.] 80 P. 639. Section 46 of the Illinois Criminal Code, relating to the crime of conspiracy, was not repealed by the Anti-trust Act of 1891. Chicago, Wilmington & V. Coal Co. v. People, 114 Ill. App. 75. Hurd's Rev. St. 1903, c. 38, declaring that if two or more persons conspire to do an illegal act injurious to public trade, they shall be guilty of conspiracy, is not repealed by Anti-trust Act (Hurd's Rev. St. 1903, c. 38, § 269a), providing that it is a conspiracy for a corporation to become a member of a pool to fix the price of a commodity. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

59. See 3 C. L. 710.

60. Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345.

61. Rev. St. §§ 3454, 3471-1, being limited in their application to overhead construction companies, having a switch-board in operation, are unconstitutional. Queen City

which has acquired more than three-fourths of the stock of another company and is unable to agree with the holders of outstanding stock for a purchase thereof, to condemn it, is not an exclusive privilege.[62]

COMMERCE.

§ 1. *Nature of commerce; domestic, interstate or foreign.*[63]—Commerce consists of intercourse between citizens and inhabitants, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.[64] Thus the soliciting of orders is commerce,[65] but insurance is not,[66] nor is issuing contracts to be fulfilled in the order of their issue by the accumulation of funds from contributions by the holders of such contracts,[67] nor the carrying of a pleasure party on a steamboat.[68] nor a contract made by a resident agent of a foreign corporation to furnish labor and material for construction work in pursuance of which laborers and material are sent into a state.[69]

Interstate commerce consists of intercourse and traffic between citizens and inhabitants of different states.[70] Thus, a sale in one state of goods manufactured in another;[71] goods shipped to an agent to fill orders previously taken;[72] but not goods shipped to be held in stock and offered for sale on the open market.[73] A foreign corporation selling goods to be shipped into a state upon orders to be approved by it, whether taken by a local or transient agent, is engaged in interstate commerce.[74] A C. O. D. shipment of intoxicating liquors from one state into another is interstate commerce;[75] but a shipment cannot be given an interstate character

Tel. Co. v. City of Cincinnati, 5 Ohio C. C. N. S. 411.

62. New York, etc., R. Co. v. Offield [Conn.] 59 A. 510.

63. See 3 C. L. 716, n. 7 et seq.

64. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

65. A foreign corporation engaged in interstate commerce may send its agents into a state to solicit orders without complying with state regulations requiring them to file their articles of incorporation with the secretary of state. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

66. Conditions may be imposed on foreign companies. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. A foreign corporation engaged in the insurance business may be excluded from a state. National Council Junior Order U. A. M. v. State Council Junior Order U. A. M. [Va.] 51 S. E. 166; Hooper v. California, 155 U. S. 648, 39 Law. Ed. 297; Greenwich Ins. Co. v. Carroll, 125 F. 121; In re Opinion of Justice, 97 Me. 590, 55 A. 828.

67. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075.

68. State v. Seagraves [Mo. App.] 85 S. W. 925.

69. It is business within a state subject to state regulation. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

70. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

71. In re Julius, 4 Ohio C. C. (N. S.) 604. A municipal ordinance imposing a license tax on the agent of a citizen of a foreign state for the privilege of selling goods is unconstitutional. Id. Where an order is taken by sample, the sale is at the place where the shipment is made. Sedgwick v. State [Tex. Cr. App.] 85 S. W. 813.

72. Smith v. Clark [Ga.] 50 S. E. 480.

73. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376; Smith v. Clark [Ga.] 50 S. E. 480. See 3 C. L. 716, n. 94 et seq. A foreign corporation may not ship its goods to agents to be held in stock and offered for sale in the open market without complying with state regulations. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

74. De Witt v. Berger Mfg. Co. [Tex. Civ. App.] 81 S. W. 334. Not required to file articles with the county recorder and secretary of state and appoint an agent on whom service of process can be made as a condition to enforcing its contracts. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58.

by a mere subterfuge to evade local option laws,[78] and it loses its interstate character when the carrier ceases to sustain the relation of carrier to it and holds it as a warehouseman or bailee.[77] Interstate freight retains its character as such until actual delivery to the consignee,[78] and an article of commerce though subject, on its arrivel within a state, to the police regulations thereof, is not divested of its interstate character so as to entitle the consignee to immediately remove inspection marks and labels.[79] Where the initial and terminal points of a telegram sent are within the same state, it is not interstate commerce, though the message is transmitted through another state.[80] A passenger traveling on an independent pass between two points within a state is a state passenger, notwithstanding he commenced his journey on a different pass at a point outside the state and his baggage was checked through from the initial point to destination.[81] It is not interstate commerce for an agent of a nonresident to solicit local business for a resident.[82]

Original packages.[83]—The original package exemption applies only when goods are imported in the form ordinarily used for the importation of that class of goods.[84] Goods do not lose their interstate character so long as they remain in original packages.[85] An importation may be divided into any number of original packages and still be subject to national control,[86] and the mere fact that goods are subject to be opened and inspected by the purchaser before delivery does not deprive them of their interstate character;[87] but their character is destroyed if the package is broken for the purpose of distributing its contents.[88]

75. Sedgwick v. State [Tex. Cr. App.] 85 S. W. 813. Is not subject to the laws of the latter while in the hands of the carrier. American Exp. Co. v. Iowa, 25 S. Ct. 182; Adams Express Co. v. Iowa, 25 S. Ct. 185.

See note on **Constitutionality of laws affecting commerce in interdicted articles,** 3 C. L. 710, n. 33.

76. Liquor manufactured in one state and sent to another to be reshipped to the first in retail quantities in violation of prohibition laws is not the subject of interstate commerce. Crigler v. Com. [Ky.] 87 S. W. 276.

77. A package of liquor was sent C. O. D. to one who had not ordered it but who told the carrier if he would hold the package a week he would take it. Held, the carrier was guilty of violation of the local option law. Adams Exp. Co. v. Com. [Ky.] 87 S. W. 1111.

78. An order of a state commission directing the carrier to place the cars on a certain siding for unloading is an interference with interstate commerce. Southern R. Co. v. Greensboro Ice & Coal Co., 134 F. 82.

79. Renovated butter: United States v. Green, 137 F. 179. The act imposing a penalty for destroying revenue and inspection stamps on interstate meat products is applicable to the stamp on interstate renovated butter under the Oleomargarine Act. Id.

80. Western Union Tel. Co. v. Hughes [Va.] 51 S. E. 225.

81. White v. St. Louis, S. W. R. Co. [Tex. Civ. App.] 86 S. W. 962.

82. Imposing a license tax on one who sells goods to merchants by selling trading stamps and also on the merchant who uses them is not as applied to a nonresident soliciting by an agent business for a resident business man, an interference with interstate commerce. Ollure Mfg. Co. v. Pidduck-Ross Co. [Wash.] 80 P. 276.

83. See 3 C. L. 717.

84. Packages of 10 cigarettes shoveled loose into a car and shipped are not original packages. Cook v. Marshall County, 25 S. Ct. 233.

85. Peddler selling original packages is not liable for a state peddler's license tax. Henderson v. Ortle [La.] 38 So. 440. Parts of a sewing machine packed together in one crate is an original package. Id. A contract by an agent in Michigan to sell whisky to be shipped from Ohio to the purchaser in the original package is interstate commerce. Sloman v. William D. C. Moebs Co. [Mich.] 102 N. W. 854.

86. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

87. Package of sponges broken and then retied. Greek-American Sponge Co. v. Richardson Drug Co. [Wis.] 102 N. W. 888. The removal of an outer covering does not necessarily change the character of an original package. The vital element is the retention of the identity of the package as a unit of transportation. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

88. Single brooms tagged with the name of the purchaser tied in bundles and shipped to an agent who unties and delivers them are not, after the bundle is broken, an original package. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384. Where one takes orders and sends them to a wholesale house without the state where the different articles are made up in packages and shipped to him where the bulk is broken and the packages for each customer segregated and delivered on receipt of the price the transaction is not interstate commerce. Town of Canton v. McDaniel [Mo.] 86 S. W. 1092.

§ 2. *Regulation of commerce. A. The "commerce clause" and its application to particular regulatory measures.*[89]—The commerce clause of the Federal constitution confers on congress the exclusive power to regulate interstate commerce,[90] and commerce with the Indian tribes,[91] and the eleventh amendment of the Federal constitution cannot be applied to nullify it.[92] The power extends to retail as well as wholesale trade,[93] and to commerce conducted by corporations as well as to that conducted by individuals;[94] but does not include the power to regulate the production of commodities to be used in such trade.[95] Therefore a state cannot place restrictions on interstate commerce,[96] and an attempt to regulate it cannot be sustained under the police power;[97] but if a matter is local and concerns the public policy of the state, though it incidentally affects interstate commerce, congressional inaction is an invitation to the state to regulate under its police power[98] but if a state law conflicts with a congressional regulation, the latter controls.[99] A state may, however, enact reasonable police regulations which incidentally affect interstate commerce,[1] but not unreasonable ones which directly affect it.[2] Requiring

89. See 3 C. L. 711.

90. The sole power to prescribe rules by which interstate commerce shall be regulated is in congress. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

91. The commerce clause does not give congress power to punish, under Act January 30, 1897, the sale of liquor within a state to an Indian citizen subject to the laws of the state. In re Heff, 25 S. Ct. 506.

92. Cannot prevent an action to restrain a state railroad commission from enforcing an order prejudicial to interstate commerce. Illinois Cent. R. Co. v. Mississippi Railroad Commission [C. C. A.] 138 F. 327.

93. Henderson v. Ortte [La.] 38 So. 440.

94. Greek-American Sponge Co. v. Richardson Drug Co. [Wis.] 102 N. W. 888.

95. State restriction of the right to take fish is not an interference with congressional powers. Ex parte Fritz [Miss.] 38 So. 722. The state under its police power has absolute control of the production of articles of commerce. Id.

96. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58. A state cannot impose conditions or limitations upon the right of a foreign corporation to make contracts in the state for carrying on interstate commerce. Id.

97. So much of Civ. Code 1902, § 2845, as prohibits importation with a view to lessen competition is void. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455.

98. Where congress has not acted relative to a river lying wholly within a state, the state has jurisdiction as to the world except future congresses. Corrigan Transit Co. v. Sanitary Dist. of Chicago [C. C. A.] 137 F. 851. Expenditure of money by the Federal government for the improvement of river does not evidence an intent to exclude the state from all dominion over that part of the waterway which lies wholly within it. Id.

NOTE. Rivers, improvements tolls: A state may authorize the improvement of a river within its borders by opening, widening, deepening or straightening it, or changing its course, and may authorize tolls to be charged all persons using it. Withers v. Buckley, 20 How. [U. S.] 84, 15 Law. Ed. 816; Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 Law. Ed. 149; Huse v. Glover, 119 U. S. 543, 30 Law. Ed. 487; McReynolds v. Smallhouse, 8 Bush [Ky.] 447; Thames Bank v. Lovell, 18 Conn. 500, 46 Am. Dec. 332; Wisconsin R., etc., Co. v. Manson, 43 Wis. 255, 28 Am. Rep. 542; Carondelet Canal Co. v. Parker, 29 La. Ann. 430, 29 Am. Rep. 339.—From note to People v. Wemple [N. Y.] 27 Am. St. Rep. 555.

99. State law in conflict with Interstate Commerce Act. Spratlin v. St. Louis S. W. R. Co. [Ark.] 88 S. W. 836.

1. P. L. 1898, p. 812, is not in conflict with the interstate commerce clause, though it may incidently operate to prevent interstate wagers by telegraph. Ames v. Kirby [N. J. Law] 59 A. 558. Laws 1899, p. 246, c. 225, § 2, requiring grain commission merchants to make a report to the consignor within 24 hours after the sale, is not an interference with interstate commerce. State v. Edwards [Minn.] 102 N. W. 697.

NOTE. Licenses: Any system of license taxes which discriminate between the products of different states. (Welton v. Missouri, 91 U. S. 275, 23 Law. Ed. 347; Firman v. Rinker, 102 U. S. 123, 26 Law. Ed. 103; Webber v. Virginia, 103 U. S. 344, 26 Law. Ed. 565; Walling v. Michigan, 116 U. S. 446, 29 Law. Ed. 691), or gives a citizen or resident of one state the right to carry on commerce on more favorable terms than are accorded citizens of another state, cannot be sustained (Ward v. Maryland, 12 Wall. [U. S.] 418, 20 Law. Ed. 449; State v. Wiggen, 64 N. H. 508, 1 L. R. A. 56). A statute imposing a license tax on peddlers of articles of foreign manufacture is invalid. State v. Pratt, 59 Vt. 590; Rodgers v. McCoy, 6 Dak. 238; Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L. R. A. 754; Marshalitown v. Blum, 58 Iowa, 184; Vines v. State, 67 Ala. 73; State v. Browning, 62 Mo. 591. But a license tax applicable to all peddlers is valid (State v. Emert, 103 Mo. 241, 23 Am. St. Rep. 874; Ex parte Butin, 28 Tex. 304), and it has been held that a state may prohibit all peddling within its limits (Commonwealth v. Gardner, 133 Pa. 284, 19 Am. St. Rep. 645, 7 L. R. A. 666).—From note to People v. Wemple [N. Y.] 27 Am. St. Rep. 563.

carcasses of calves shipped from any point within a state to be tagged is a proper exercise of the police power,[3] and not an interference with interstate commerce, though broad enough to apply to carcasses to be shipped into another state.[4] The designation of a specific material to be used in a public work is not an interference with interstate commerce.[5] The imposition of a property tax on an instrument of interstate commerce is not a regulation, though the value of property beyond the state be used in ascertaining the proper valuation.[6]

The selling of oleomargarine in unstamped or unmarked packages is made a crime by the Federal statutes.[7]

Regulation of foreign corporations in general.[8]—A state may prescribe the conditions on which a foreign corporation may do business therein except to regulate interstate commerce;[9] therefore a state tax on a resident agent of a nonresident corporation is not an interference with interstate commerce where the agent also does local business to some extent,[10] but when such regulations impose conditions which restrict them in their right to make contracts pertaining to interstate commerce, it invades their constitutional right.[11]

Regulation of telegraph and telephone companies.[12]—A state may impose a penalty on a telegraph company for failure to transmit an interstate message.[13] A

2. Acts 1904, p. 186, c. 109, requiring separate cars for the white and black races and making it an offense for a passenger to refuse to occupy a car to which he is assigned is invalid as to interstate passengers. Hart v. State [Md.] 60 A. 457. Act South Carolina, Feb. 16, 1904 (24 St. at Large) prohibiting the transportation of any shad fish beyond the limits of the state, is an interference with interstate commerce. McDonald v. Southern Exp. Co., 134 F. 282.

3. That the legitimate as well as the illegitimate article is required to be tagged, does not affect the reasonableness. People v. Bishopp, 94 N. Y. S. 773.

4. People v. Bishopp, 94 N. Y. S. 773. See 3 C. L 715, n. 88.

5. The designation by city officials of a certain kind of asphalt to be used in paving a street. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860. See Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142. A municipal ordinance requiring all contracts for public work involving the use of dressed stone to require the work of dressing the stone to be done within the state does not violate the interstate commerce clause. Allen v. Labsap [Mo.] 87 S. W. 926. Act March 4, 1903, p. 167, securing to the successful bidder the exclusive right to supply the public schools with books adopted by the state school board does not violate the interstate commerce clause. Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345.

6. Taking the entire valuation of the property of a railroad company without as well as within the state and dividing it upon the mileage basis for the purpose of fixing the value within one state. St. Louis, etc., R. Co. v. Davis, 132 F. 629.

7. Indictment held insufficient to allege a violation. United States v. Joyce, 138 F. 457.

8. See 3 C. L. 712.

9. Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467. A statute requiring a foreign corporation to file with the secretary of state a copy of its articles and comply with other requirements as a condition of doing business does not apply to its interstate commerce. De Witt v. Berger Mfg. Co. [Tex. Civ. App.] 81 S. W. 334. Rev. Civ. Code, §§ 833, 835, requiring foreign corporations to file their articles with the secretary of state and appoint a state agent on whom process may be served, as a condition to doing business does not apply to the interstate commerce of such corporations. Iowa Falls Mfg. Co. v. Farrar [S. D.] 104 N. W. 449. An answer to a complaint for the price of goods, setting forth that at the time of the sale plaintiff was a foreign corporation and had not filed its articles in the state as required does not show that the basis of the action was interstate commerce. Keystone Mfg. Co. v. Hampton [Ala.] 37 So. 552.

10. Agent of nonresident meat packing house who sold to customers as well as filling orders already taken. Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663; Id., 117 Ga. 969, 44 S. E. 854. A statute imposing certain duties on all foreign corporations applies to corporations engaged in interstate commerce, but which maintains a place of business for other purposes as well. Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467.

11. A foreign corporation may enforce such contracts, though it has failed to compiy with the requirements of a state law as to filing their articles of incorporation with the secretary of state. Greek-American Sponge Co. v. Richardson Drug Co. [Wis.] 102 N. W. 888. A foreign corporation engaged in interstate commerce cannot be required to file its articles of incorporation with the secretary of state as a condition to enforcing its contracts. Belle City Mfg. Co. v. Frizzeli [Idaho] 81 P. 58.

12. See 3 C. L. 713.

13. Postal Tel. Cable Co. v. Umstadter [Va.] 50 S. E. 529.

telegraph company transmitting a message from one point to another within the state is subject to state regulation, though the message is transmitted through another state.[14] A telephone company engaged in both interstate and intrastate commerce is not exempt from a license tax on its intrastate business.[15]

Regulation of traffic in intoxicating liquors.[16]—Under the Wilson Bill a state prohibition law does not attach until liquor shipped in from another state is delivered to the consignee.[17] State laws directly affecting interstate commerce in intoxicating liquor are void;[18] but laws which only incidentally affect it are valid.[19]

Inspection laws.—The state has power to pass inspection laws which incidentally affect interstate commerce,[20] though they are enacted for the sole purpose of detecting fraud or crime.[21] A valid inspection law is not rendered invalid because it operates to deter shipments into the state,[22] nor because it does not provide for an adequate inspection and imposes a burden beyond the cost of inspection.[23]

State burdens on foreign commerce.[24]—The Federal constitution prohibits a state from laying any duty on tonnage[25] or exports or imports.[26] A state may levy a property tax on an instrumentality of interstate commerce which has a situs within the state.[27] State pilotage regulations are not necessarily repugnant to the commerce clause in the absence of Federal regulation.[28] Compulsory pilot regulations authorized by Federal statutes do not violate the constitutional provision that the ports of one state shall not be given any preference over those of another.[29]

Regulation of railroads and other carriers.[30]—A state law requiring a carrier to observe a general duty is not an attempt to regulate interstate commerce,[31] nor is the imposition of a penalty for failure to furnish cars to a shipper on due application;[32] but the imposition upon the initial or any connecting carrier as a condi-

14. Western Union Tel. Co. v. Hughes [Va.] 51 S. E. 225. Cardwell, J., dissenting.

15. If there is nothing in the law to indicate an intention to tax interstate commerce, it will be upheld. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381.

16. See, ante, § 1. See 3 C. L. 714. See Intoxicating Liquors, 4 C. L. 252.

17. Crigler v. Commonwealth [Ky.] 87 S. W. 276.

18. A statute imposing a tax on persons who sell at wholesale, liquors to be shipped from one state into another is an interference with interstate commerce. Sloman v. William D. C. Moebs Co. [Mich.] 102 N. W. 854.

19. Rev. St. c. 29, § 64, prohibiting the maintenance of an action to recover for intoxicating liquor bought in another state with the intention to sell it in this state in violation of law is not in violation of the interstate commerce clause. Corbin v. Houlehan [Me.] 61 A. 131. Cr. Code, § 584, forbidding the transportation of intoxicating liquor under any other than the proper name does not apply to interstate shipments. State v. Moody [S. C.] 49 S. E. 8.

20. Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74

21. In the cattle industry. Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74.

22. Pabst Brewing Co. v. Crenshaw, 25 S. Ct. 552. State law imposing an inspection fee on intoxicating liquors held for sale held a valid exercise of the police power as to liquor shipped in from a foreign state where the state court had held it valid as to liquor of domestic manuacture. Id.

23. Pabst Brewing Co. v. Crenshaw, 25 S. Ct. 552; Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74.

24. See 3 C. L. 715.

25. Laws N. Y. 1897, p. 701, c. 592, § 63, requiring vessels entering the port of Albany to pay the harbor master a certain per cent. per ton for his services, is void. Way v. New Jersey Steamboat Co., 133 F. 188.

26. The provision of the Federal constitution prohibiting a state from laying duties on imports or exports is applicable to interstate commerce. Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74.

27. Vessels engaged in interstate commerce are subject to state taxation, though registered at a foreign port. Old Dominion S. S. Co. v. Commonwealth, 25 S. Ct. 686.

28. Olsen v. Smith, 25 S. Ct. 52.

29. Thompson v. Darden, 25 S. Ct. 660. See, also, Shipping & Water Traffic, 4 C. L. 1450.

30. See 3 C. L. 713.

31. Requiring express companies to deliver packages to the consignee at his residence or place of business. United States Exp. Co. v. State [Ind.] 73 N. E. 101.

32. Houston & T. C. R. Co. v. Mayes [Tex. Civ. App.] 83 S. W. 53; Houston & T. C. R. Co. v. Everett [Tex. Civ. App.] 86 S. W. 17,

tion of availing itself of a valid contract of exemption from liability beyond its own line, of the duty of tracing the goods and informing the shipper when, where and how lost or destroyed, is.[33] If adequate train service is furnished or if inadequate service can be otherwise remedied, a state commission cannot require through interstate trains to stop at particular stations.[34]

The Interstate Commerce Act forbids traffic pools,[35] and it is no justification for such a pool that it prevents unlawful rebates from connecting lines to shippers.[36] A contract for the division of earnings of competing lines of railroad violates the Interstate Commerce Act, whether or not actual division is made.[37] It is not a violation of the act for the carrier to pay a debt by carriage done at its legally established rates.[38] An interstate carrier may buy a commodity and sell the same to be transported over its lines at a less price than the cost, expense and its published rates, unless it is a mere device for covering a discriminatory rate;[39] but if the contract operates to give the purchaser an undue advantage to the prejudice of other dealers, it is a violation of the act,[40] and no action lies for breach of it.[41]

The Safety Appliance Act [42] embraces locomotives,[43] and applies to all cars used in moving interstate commerce,[44] though not actually running at the time.[45] Couplers which will both couple and can be uncoupled without the necessity of men going between the cars is what is meant by this act,[46] and cars with a defective appliance are not to be put in service.[47] Reasonable diligence to keep the apparatus in repair is no justification for a violation of the act,[48] and if it was, is not shown to have been exercised where several cars cut out for delivery to connecting carriers were found with defective appliances.[49]

Discrimination in rates.[50]—Reasonable compensation for the service actually rendered is all that a common carrier can be permitted to exact.[51] The reasonableness of a rate is a question of fact [52] for judicial investigation.[53] The general

following Houston & T. C. R. Co. v. Mayes [Tex. Civ. App.] 83 S. W. 53.

33. Central of Georgia R. Co. v. Murphey, 25 S. Ct. 218.

34. Code Miss. 1892, §§ 3550, 4302, empowering it to require all passenger trains to stop at county seats, does not give it such power. Illinois Cent. R. Co. v. Mississippi R. Commission [C. C. A.] 138 F. 327.

35. A rule between competing lines and their connections, reserving to the initial carrier power to route shipments beyond its line for the purpose of enabling such carrier to control and maintain the rate so fixed by preventing competition between their connecting carriers, is a traffic pool. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829. Pooling may be effected by concert of action in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines. Tift v. Southern R. Co., 138 F. 753.

36. Pooling and rebates are both prohibited and one cannot be lawfully employed to prevent the other. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

37. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

38. Interstate Commerce Commission v. Chesapeake & Ohio R. Co., 128 F. 59.

39. Not a violation of section 2 of the act. Interstate Commerce Commission v. Chesapeake & Ohio R. Co., 128 F. 59.

40. Coal contract held illegal. Interstate Commerce Commission v. Chesapeake & Ohio R. Co., 128 F. 59.

41. Interstate Commerce Commission v. Chesapeake & Ohio R. Co., 128 F. 59.

42. See 3 C. L. 713, n. 53.

43. "Any car" used in the Federal statute, requiring cars used in interstate commerce to be equipped with automatic couplers, embraces locomotives. Act March 2, 1893 (27 Stat. at L. 531). Johnson v. Southern Pac. Co., 25 S. Ct. 158.

44. A loaded car consigned to a point in another state is "used in moving interstate commerce," though the initial carrier only undertakes to deliver it to a connecting carrier within the state. United States v. Southern R. Co., 135 F. 122.

45. A dining car in constant use, while waiting for a train to be made up for the next interstate trip. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

46. Johnson v. Southern Pac. Co., 25 S. Ct. 158. The equipment of different cars with different types of automatic couplers which will not couple automatically does not satisfy the Federal statutes requiring interstate cars to be so equipped. Id.

47. United States v. Southern R. Co., 135 F. 122. Placing a "defect card" upon a car with a defective coupling apparatus is such a deliberate violation of the provision as to amount to a defiance of the law. Id.

48, 49. United States v. Southern R. Co., 135 F. 122.

50. See 3 C. L. 713.

51. Tift v. Southern Pac. Co., 138 F. 753.

rule is that the greater the tonnage of the commodity transported the lower should be the freight rate,[54] and railroads have no legal right to graduate their rates in proportion to the prosperity which attends industries whose product they transport.[55]

(§ 2) *B. Regulations of trade and commerce within a state.*[56]—The several states may regulate commerce within their borders.[57] They may regulate unincorporated carriers[58] and require a carrier to perform a general duty[59] within the terms of the law imposing it.[60] They may determine the reasonableness of interstate rates,[61] and regulate trade in an article which, because of its peculiarities, fraud with reference to transactions relative to it may be readily perpetrated.[62]

That which of itself is not a business in a commercial or legal sense cannot be regulated as a business.[63] The trading stamp business is not contrary to public policy,[64] and equity will enjoin the purchase and resale as an article of merchandise the trading stamps issued and redeemable by another.[65]

§ 3. *The Interstate Commerce Commission; its functions and proceedings before it.*[66]—The Interstate Commerce Commission, though clothed with quasi-judicial functions, is an administrative body and its orders are not self-executing.[67] It is an expert tribunal empowered to determine in the first instance the reasonableness of a rate;[68] but has no legislative powers;[69] hence no power to fix rates.[70]

52. Whether a rate is reasonable or excessive is a question for the jury, in an action to enforce an order for reparation. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

53, 54. Tift v. Southern R. Co., 138 F. 753.

55. Tift v. Southern R. Co., 138 F. 753. Where vast increase in an industry has resulted in large increase in net revenue to the carriers, an arbitrary increase of freight rates which practically destroy the industry, is unreasonable. The increased traffic did not require increased expenditures. Lumber industry. Id.

56. See 3 C. L. 717.

57. May require carriers to furnish separate cars for the white and colored races and require members of the races to occupy cars assigned to them. Hart v. State [Md.] 60 A. 457. Laws 1903, p. 999, c. 590, § 3, imposes a penalty for failure of a railway company to transport within a certain time goods received by it to be recovered by the party aggrieved. Summers v. Southern R. Co. [N. C.] 50 S. E. 714. Consignor held to be the party aggrieved. Id.

58. United States Exp. Co. v. State [Ind.] 73 N. E. 101.

59. Requiring an express company to deliver parcels to consignees at their residence or place of business is not deprivation of property without due process. United States Exp. Co. v. State [Ind.] 73 N. E. 101.

60. A statute requiring express companies to deliver parcels to consignees at their residence or place of business is not complied with by delivery at the local office of the company. United States Exp. Co. v. State [Ind.] 73 N. E. 101.

61. The interstate business of a carrier should be considered in determining the proportion of value of the property assignable to local business and other purposes, but no part of the earnings or losses from such business can be charged to or against the income account. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 314. In determining whether rates fixed by a state commission are reasonable, the cost of construction should not be deducted from the earnings, but the reasonable cost may be considered in determining the fair value of the property engaged. Id.

62. Cotton seed. Easily taken from the field and difficult to detect the thief. Bazemore v. State, 121 Ga. 619, 49 S. E. 701. Laws 1902, p. 1135, c. 482, § 29, prohibiting use or traffic in milk cans without the consent of the owner "irrespective of its condition or the use to which it may have been applied," does not apply to cans in such condition as to be insusceptible of further use for milk. Schmidt v. Justus, 92 N. Y. S. 362. In an action to recover the penalty for an alleged violation, it must appear in what condition the can was when it was taken for other use. Id.

63. Use of trading stamps. Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765. An ordinance imposing a license tax on the trading stamp business is a violation of the fourteenth amendment of the Federal constitution. Ex parte Hutchinson, 137 F. 950.

64. Sperry & Hutchinson Co. v. Temple, 137 F. 992.

65. Sperry & Hutchinson Co. v. Temple, 137 F. 992. One who has knowledge that the business of selling and redeeming trading stamps required that such stamps should not be dealt in by the public generally is not an innocent purchaser when he buys them for resale. Id.

66. See 3 C. L. 713.

67. Can be enforced only by a judicial proceeding. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

68. Tift v. Southern R. Co., 138 F. 753.

69. An order of the commission requiring railroads joining in a pooling contract to desist from enforcing it is not legislative in character. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

Words used in the act are given their customary meaning.[71] In enforcing its orders, it represents the people, and relief will not be denied it because complainants before it participated in unlawful practices.[72] Though an action to enforce an order of the commission is triable de novo, the cause of action must have been included in the order and have constituted the basis of it.[73] The Act gives a party claiming to be damaged by its violation a right to complain to the commissioner or bring action for damage, but he is confined to the proceeding he elects.[74] A bill by the commissioner alleging generally a violation of the Act, which is denied, raises the issue as to every possible violation of the Act.[75]

The Act does not confer on a Federal circuit court jurisdiction to issue writs of mandamus in an original proceeding.[76] A state court has no jurisdiction of an action for a violation of the Act,[77] but has jurisdiction, in a case of interstate carriage, to afford relief from unreasonable freight rates exacted, notwithstanding such rates have been promulgated under the provisions of the Act.[78]

The findings of fact set out in a report of the Commission are in all judicial proceedings deemed prima facie evidence of the facts found,[79] and except for controlling reasons, the national courts should not disparage or discredit them;[80] but the mere opinions of the Commission are not evidence.[81] The lawfulness of an order does not necessarily depend on the evidence adduced before it, but on the existence of facts warranting the reparation ordered.[82]

70. An order requiring a carrier to change an article of freight from one class to another is an attempt to fix rates. Interstate Commerce Commission v. Lake Shore & M. S. R. Co., 134 F. 942. See 3 C. L. 713, n. 56.

71. **"Freights"** as used in section 5 means commodities carried and not the compensation for such carriage. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

72. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

73, 74. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

75. In passing upon said issue the court is not confined to grounds assigned by the commission or its conclusion, but may reach a like conclusion on the same or other grounds. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

76. Such jurisdiction cannot be inferred from the grant of authority to the commission to enforce the act or from the direction to district attorneys to institute all necessary proceedings. United States v. Lake Shore & M. S. R. Co., 25 S. Ct. 538.

77. Gulf, etc., R. Co. v. Moore [Tex.] 83 S. W. 362.

78. The act does not abridge common-law remedies. Abilene Cotton Oil Co. v. Texas & P. R. Co. [Tex. Civ. App.] 85 S. W. 1052.

Note: Whether the interstate commerce regulations made by congress will permit a shipper to appeal to the common-law principles and to bring an action against a railroad company in a state court on account of unreasonable rates is a nice question. It was held in Swift v. Phil. R. Co., 58 F. 858, that interstate commerce is governed solely by the law of the United States, and that the United States as such has no common law; further, that the right to question the reasonableness of interstate rates is a matter of primary as well as of exclusive jurisdiction in the Federal courts. The contrary is held, however, in Murray v. C. & N. W. R. Co., 62 F. 24. In Van Patten v. Chicago, etc., R. Co., 81 F. 545, the court held that it was a good defense to an action for damages for alleged unreasonable freight charges to show that the defendant in obedience to the Interstate Commerce Act has adopted, printed and posted a properly proportioned schedule of rates and that the charges complained of are in accordance with those in the schedule. In W. U. Tel Co. v. Call Pub. Co., 181 U. S. 92, 45 Law Ed. 765, it was held that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment. See, also, Houston, etc., R. Co. v. Peters, 15 Tex. Civ. App. 515, 40 S. W. 429; St. Louis, etc., R. Co. v. Carden [Tex. Civ. App.] 34 S. W. 145; Gulf, etc., R. Co. v. Hefley, 158 U. S. 98, 39 Law. Ed. 910.—3 Mich. L. R. 660.

79. Tift v. Southern R. Co., 138 F. 753. The act creates a rule of presumption in favor of the report which upon its introduction casts the burden on the party against whom it is introduced. Id.

80. Tift v. Southern R. Co., 138 F. 753.

81. In a proceeding to enforce reparation of unjust rates. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343. The provision of the act that findings of the commission shall be prima facie evidence of the facts found in a subsequent proceeding to enforce the order means that they should be offered in evidence unaccompanied by opinions or other extraneous conclusions. Id.

82. Such facts may be established in an action to enforce the order. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

The orders of the Commission must be enforced, if at all, in toto; a court cannot separate an illegal part from the legal.[83] Only those who are parties to the hearing before the Commission are bound by its orders.[84] No appeal or writ of error lies from an order of the Commission.[85] The provision that an appeal from proceedings to enforce an order of the commission will not operate to supersede the order of the court appealed from does not affect the discretionary power of the court to grant a stay;[86] but a stay will not be granted where the damage resulting from enforcement will be less than that sustained by the other party if the order is suspended.[87]

Where carriers have stipulated that if a rate is held unreasonable they will repay the unlawful exactions, a reference will be had to ascertain the amount and a decree rendered therefor.[88]

§ 4. *State railroad and corporation commissions*[89] are not the state,[90] and though given quasi-judicial powers, are not courts.[91] A commission authorized to make reasonable rates cannot in consideration of a low rate limit the liability of the carrier for loss through its negligence to less than the value of the goods.[92] The North Carolina Corporation Commission has power to fix the time allowed as free time for intermediate points and make regulations as to time of transit, but not to change the time allowed as free time at the initial point.[93]

COMMITMENTS; COMMON AND PUBLIC SCHOOLS, see latest topical index.

COMMON LAW.

In general.[94]—From the time of their acquisition by the United States until 1868, the common law was prevalent over the separate portions of the region from which the state of Kansas was carved, under all civilized forms of governmental organization established for them;[95] and from 1855 until 1868 the common law, not inconsistent with the constitution of the United States, the Kansas-Nebraska act, or statute law, was the rule of action and decision, notwithstanding any law, custom or usage to the contrary.[96]

Presumption of prevalence of common law in a sister state and proof thereof.[97] In the absence of proof to the contrary, it is presumed that the common law prevails in a sister state.[98] The unwritten law of another state may be proved by parol evidence.[99]

83. Interstate Commerce Commission v. Lake Shore & M. S. R. Co., 134 F. 942.

84. A lessee operating part of a through route over which oil was transported at a discriminating rate. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

85. Order denying or awarding reparation for a violation of the act. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

86. As provided by equity rule 93. Interstate Commerce Commission v. Southern Pac. Co., 137 F. 606.

87. Interstate Commerce Commission v. Southern Pac. Co., 137 F. 606.

88. Tift v. Southern R. Co., 138 F. 753.

89. See 3 C. L. 713, n. 45 et seq.

90. A Federal court has jurisdiction of a suit against such a commission to enjoin it from enforcing an order which interferes with interstate commerce. Southern R. Co. v. Greensboro Ice & Coal Co., 134 F. 82. The North Carolina Corporation Commission, though a court of record, is in many respects an agent of the state and may be enjoined by a Federal court as to non-judicial acts. Id.

91. The Mississippi Railroad Commission being merely an administrative agency with quasi-judicial powers, and its findings only prima facie evidence that its decision is proper, it is not a court, and proceedings therein may be stayed by a Federal court. Illinois Cent. R. Co. v. Mississippi Railroad Commission [C. C. A.] 138 F. 327.

92. Regulation held not intended to fix the liability at less than the value. Everett v. Norfolk & S. R. Co. [N. C.] 50 S. E. 557.

93. Laws 1903, p. 999, c. 590, § 3, construed. Summers v. Southern R. Co. [N. C.] 50 S. E. 714.

94. See 3 C. L. 717.

95, 96. Clark v. Allaman [Kan.] 80 P. 571.

97. See 3 C. L. 718.

COMMUNITY PROPERTY; COMPARATIVE NEGLIGENCE; COMPLAINT FOR ARREST; COMPLAINT IN PLEADING, see latest topical index.

COMPOSITION WITH CREDITORS.

Any secret agreement between the debtor and any single creditor in contravention of equality is against the policy of the law, and, so long as it remains executory, it cannot be enforced,[1] and if fully executed at or before the composition, the excess may be recovered by the debtor;[2] but being made after the composition is effected, the excess payment cannot be recovered, though made pursuant to a prior agreement.[3] The other creditors have no lien or other right, in the proper sense of the terms, recognized either by the common law or by chancery, with reference to any amount received by a creditor who obtained such an advantage.[4]

COMPOUNDING OFFENSES.[5]

The commissioner of sea and shore fisheries in Maine has authority to settle prosecutions for having short lobsters in possession and may urge offenders to settle.[6]

CONCEALED WEAPONS, see latest topical index.

CONCEALING BIRTH OR DEATH.[7]

The Georgia statute covers the case of a child born dead, if it had ever been quick.[8] The child of a married women begotten by one not her husband is a bastard.[9]

CONDEMNATION PROCEEDINGS; CONDITIONAL SALES; CONFESSION AND AVOIDANCE, see latest topical index.

CONFESSION OF JUDGMENT.[10]

An attorney has power to confess judgment on behalf of his client[11] in an action of debt brought for a statutory penalty.[12] Authority to confess judgment is valid without a seal.[13] A judgment entered without authority cannot affect the rights of defendant.[14]

Authority to confess judgment without process must be clear and explicit,

98. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134; Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132; Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290; Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979.

99. Attorney practicing in such state allowed to testify. Rieck v. Griffen [Neb.] 103 N. W. 1061.

1, 2, 3, 4. Batchelder & Lincoln Co. v. Whitmore [C. C. A.] 122 F. 355.

5. See Hammon, Cont. § 236, as to contracts to compound. See, also, Contracts, 3 C. L. 805.

6. Prosecution of warden for extortion. State v. Hanna, 99 Me. 224, 58 A. 1061.

7. Violation of statutes requiring registry of births and deaths, see Census and Statistics, 5 C. L. 558.

8. Evidence held sufficient. McLoud v. State [Ga.] 50 S. E. 145.

9. McLoud v. State [Ga.] 50 S. E. 145.

10. See 3 C. L. 719.

11. In justice court as well as court of record. Town of Chalmers v. Tandy, 111 Ill. App. 252. An agreement by an attorney to confess judgment is in regard to a principal, and not a collateral matter, and is binding on the client. The Meriden Hydro-Carbon Arc Light Co. v. Anderson, 111 Ill. App. 449. In absence of fraud, collusion, surprise, or insolvency of attorney. Id.

12. Town of Chalmers v. Tandy, 111 Ill. App. 252.

13. Judgment note held valid. Hazelton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456.

14. Judgment against married woman on note not signed by her or for her by anyone with authority will be stricken from record. Gottlieb v. Middleberg, 23 Pa. Super. Ct. 525.

and must be strictly pursued;[15] and if there is no power to enter the appearance of the debtor and confess judgment, the judgment is a nullity and subject to collateral attack.[16] A judgment by confession can only be sustained by a warrant authorizing it at the time and in the manner and form in which it is entered.[17] Thus a power to confess judgment for rent due under a written lease cannot be construed as a power to confess judgment for rent due under an implied contract resulting from a holding over by the tenant, or for rent due under a subsequent agreement for renewal of the lease.[18] Under a joint warrant to confess judgment, a judgment can only be confessed against all the makers, and in case of the death of one, no judgment can be confessed against the survivors.[19] A warrant authorizing any attorney to appear and confess judgment does not give defendant the right to be heard before entry of judgemnt.[20] Where a warrant of attorney attached to a promissory note authorizes confession of judgment in favor of the holder, and judgment is confessed in favor of one not the legal or equitable owner of the note at the time of commencement of the suit, without service on or appearance of defendants, the judgment so entered is without due process of law,[21] and when suit is brought thereon in another state, it may be collaterally attacked, notwithstanding the full faith and credit clause of the constitution.[22] A surety on a judgment note who has paid the note on default of the principal may have judgment entered to his own use,[23] and such judgment cannot be attacked by the wife of the principal, without authority from the principal, and without interest in the note.[24] A provision in a promissory note authorizing confession of judgment before maturity makes the note nonnegotiable.[25] In Oregon an offer by defendant to allow judgment, served on plaintiff before trial, is deemed withdrawn if not accepted within three days, and cannot be used as evidence.[26]

Under the statute requiring affidavits for judgment on warrant of attorney to state the true consideration for the bond, and that the debt is justly due, judgment may be confessed on any actionable debt due at the time of confession, though not due at the date of giving the bond, provided such demand is supported by the same consideration as that which supports the bond.[27] Omission to state the consideration, or a false statement of it, in the affidavit, renders a judgment entered pursuant thereto a nullity;[28] but substantial truth in the statement of

15, 16. Weber v. Powers, 213 Ill. 370, 72 N. E. 1070.

17. Warrant to confess judgment to "The R. G. Eddy Marble and Granite Company of Meadville" will not sustain judgment confessed to R. G. Eddy individually. Eddy v. Smiley, 26 Pa. Super. Ct. 318.

NOTE. What judgment is authorized by warrant: Judgment for amount of note, where complaint claims larger amount and pleas admit larger amount is due is invalid. Tucker v. Gill, 61 Ill. 236. Judgment can be entered only for sum actually due, though warrant is for sum appearing to be due. Dilley v. Van Wie, 6 Wis. 209; Sloane v. Anderson, 57 Wis. 123. A judgment is not entirely void because entered on a warrant of attorney for an excessive amount. Davenport v. Wright, 51 Pa. 292. The debtor only can complain that the judgment is excessive. A creditor cannot raise the objection. Adam v. Arnold, 86 Ill. 185. Judgment on note must be on note of same date as that described in warrant. Chase v. Dana, 44 Ill. 262. Minor misdescriptions do not render judgment void. Osgood v. Blackmore, 59 Ill. 261; Adam v. Arnold, 86 Ill. 185.—From note, Teel v. Yost [N. Y.] 13 L. R. A. 799.

18. Weber v. Powers, 213 Ill. 370, 72 N. E. 1070.

19. Kloeckner v. Schafer, 110 Ill. App. 391.

20. Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

21. National Exch. Bank v. Wiley, 25 S. Ct. 70.

22. On the ground that person in whose favor judgment was confessed was not the "holder" because not the real owner of the note. National Exch. Bank v. Wiley, 25 S. Ct. 70.

23, 24. Lawrence Co. Nat. Bank v. Gray, 23 Pa. Super. Ct. 62.

25. Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494.

26. Under B. & C. Comp. § 532, an unaccepted offer cannot be used as an admission of the terms of a contract and a breach thereof, leaving only amount of damages to be litigated. Young v. Stickney [Or.] 79 P. 345.

27. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339.

the consideration is sufficient.[29] The fact that time of payment has been extended does not prevent entry of such judgment.[30] Provided the indebtedness is unpaid, it is immaterial whether a right of action thereon has accrued or not.[31] A judgment on bond and warrant of attorney, entered for the amount of the penalty and in pursuance of the express direction of the warrant, is not illegal, though a part of the real debt had been collected by foreclosure of a mortgage given for the same debt.[32]

A judgment by consent is binding only on parties to the record.[33] A consent decree entered between two terms of court is a nullity,[34] and is not cured by a subsequent order in term time purporting to correct only an error in the description of one of the parties.[35] Courts of law exercise after the term equitable control over judgments by confession.[36] The opening of such judgments is largely discretionary.[37] A judgment by confession may be opened by the court in the exercise of its equitable powers, on the application of any defendant having a meritorious defense, whether or not codefendants join in the application.[38] A motion to open a judgment by confession questions the right of plaintiff to recover on the merits, and is a waiver of irregularities in procedure.[39] Under the Rhode Island statute providing that on failure of defendants to plead to bills or petitions in equity within the proper time, judgment may, on motion of complainants, be taken as confessed, and that a decree so entered shall be conclusive unless motion to set it aside is made in five days, the court has the same power to vacate a decree so entered as in the case of default or mistake, or in the case of decrees in equity cases.[40] In Illinois there can be no appeal from a judgment entered by confession, and a motion to dismiss such an appeal may be made at any time.[41]

CONFESSIONS; CONFISCATION, see latest topical index.

CONFLICT OF LAWS.

§ 1. *Extraterritorial effect of laws in general.*—As a general rule statutes have no extraterritorial force, but, except as to penal laws,[42] rights arising under

28. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339. Judgment set aside for false statement of consideration in affidavit. Kleeman v. J. & P. Blatz Brewing Co. [N. J. Law] 60 A. 408.

29. Inartificiality or lack of technical precision is harmless. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339.

30, 31. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339.

32. Construing Gen. St. § 5, and Act of March 12, 1880. Earl v. Jenkins [N. J. Law] 58 A. 1086.

33. Raftery v. Easley, 111 Ill. App. 413.

34, 35. Boynton v. Ashabranner [Ark.] 88 S. W. 566.

36. Klaeckner v. Schafer, 110 Ill. App. 391.

37. Opening of consent judgment discretionary where defendant sets up good defense as to which he is corroborated by one or more witnesses or circumstances equivalent to another. Gottlieb v. Middleberg, 23 Pa. Super. Ct. 525. Chancellor justified in refusing to open judgment entered five years after date of note, no rule to open being taken until five years after entry, and evidence being conflicting. Fryberger v. Motter, 24 Pa. Super. Ct. 317. Partnership agreement held not to contemplate use of judgment notes by one partner to enforce claims against others; and judgment opened to permit a defendant to be heard on his denial of liability. Herman v. Potamkin, 24 Pa. Super. Ct. 11.

38. Custer v. Harmon, 105 Ill. App. 76.

39. Insufficiency of designation of plaintiff waived. Treasurer of Division No. 168 v. Keller, 23 Pa. Super. Ct. 135.

40. Construing Gen. Laws 1896, c. 240, § 10, as amended by Pub. Laws, p. 81, c. 671; and Gen. Laws, c. 246, § 2. Masterson v. Whipple [R. I.] 61 A. 446.

41. Appeal from judgment in justice

the statutes of foreign states will generally be enforced as a matter of comity.[43] The question of whether the statute is penal is to be determined by the court in which the action is brought,[44] and such court is not bound by the construction placed upon the statute by the courts of the place which enacted it.[45]

§ 2. *Contracts in general.*[46]—All matters bearing upon the execution, interpretation and existence of a contract,[47] and the measure of damages for the breach

court. Town of Chalmers v. Tandy, 111 Ill. App. 252.

42. No state will enforce the penal laws of another state. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618; Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69. Rev. St. Mo. 1899, § 2864, providing a penalty for the wrongful death of a person, held penal. Id. Illinois statute giving single damages by way of compensation for the killing of stock by a railroad may be sued on in Missouri. Stonebraker v. Chicago & A. R. Co., 110 Mo. App. 497, 85 S. W. 631. Code Ala. 1896, § 27, providing an action for wrongful death, is not a penal statute. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

NOTE. Extraterritorial effect of penal laws: It is a universally accepted rule of law that the courts of no country or state will execute the penal or criminal laws of another state or country. Such laws are strictly local, and affect nothing more than they can reach. Story's Conflict of Laws [8th ed.] § 620; The Antelope, 10 Wheat. [U. S.] 66, 123, 6 Law. Ed. 337; Flash v. Conn, 109 U. S. 371, 27 Law. Ed. 966; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239; Sherman v. Gassett, 4 Gilm. [Ill.] 521; Barnes v. Whitaker, 22 Ill. 606; Derrickson v. Smith, 27 N. J. Law, 166; Scoville v. Canfield, 14 Johns. [N. Y.] 338, 7 Am. Dec. 467; Teall v. Felton, 1 N. Y. 537, 49 Am. Dec. 352; Delafield v. State, 2 Hill [N. Y.] 159; Western T. & C. Co. v. Kilderhouse, 87 N. Y. 430; State v. John, 5 Ohio, 217; Rorer, Interstate Law, 148; Dickson v. Dickson's Heirs, 1 Yerg. [Tenn.] 110, 24 Am. Dec. 444. This rule is not confined to laws for the punishment of crimes, but extends as well to statutes which impose penalties for the neglect or failure to perform certain duties or obligations imposed by law. Louisiana v. City of New Orleans, 109 U. S. 285, 27 Law. Ed. 936; Flash v. Conn, 109 U. S. 371, 27 Law. Ed. 966; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239; Missouri River Tel. Co. v. First Nat. Bank of Sioux City, 74 Ill. 217; Carnahan v. Western U. Tel. Co., 89 Ind. 526, 46 Am. Rep. 175; State of Indiana v. Helmer, 21 Iowa, 370; Tanner v. Allen, Lit. Sel. Cas. [Ky.] 25; Lindsay v. Hill, 66 Me. 212, 22 Am. Rep. 564; Halsey v. McLean, 12 Allen [Mass.] 439, 90 Am. Dec. 157; O'Reilly v. New York, etc., R. Co., Sup. Ct. R. I., May, 1889; Pickering v. Fisk, 6 Vt. 102; Suffolk Bank v. Kidder, 12 Vt. 464, 36 Am. Dec. 354; Stack v. Gibbs, 14 Vt. 357; Graham v. Monsergh, 22 Vt. 543; Judge of Probate v. Hibbard, 44 Vt. 597, 8 Am. Rep. 396; Bowman v. Miller, 25 Grat. [Va.] 331, 18 Am. Rep. 686. The difficulty is in determining what liabilities are in their nature penalties. A liability imposed by statute upon a certain class of persons, as, for instance, the officers or stockholders of a corporation, which is made dependent upon the contingency of their failing to perform some duty required by the statute, is in the nature of a penalty, and cannot be enforced beyond the jurisdiction of the state. First National Bank of Plymouth v. Price, 33 Md. 487, 3 Am. Rep. 204; Halsey v. McLean, 12 Allen [Mass.] 439, 90 Am. Dec. 157; Derrickson v. Smith, 27 N. J. Law, 166; Garrison v. Howe, 17 N. Y. 458; Merchants' Bank v. Bliss, 35 N. Y. 412; Harrisburg Bank v. Commonwealth, 26 Pa. 451; Woods v. Wicks, 7 Lea [Tenn.] 40; Bingham v. Claflin, 7 Bank. Reg. 412, 419; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239. In determining the question whether or not a liability imposed by a statute is in its nature penal, the construction of the statute by the courts of the state in which it was enacted is generally considered to be conclusive. Flash v. Conn, 109 U. S. 371, 27 Law. Ed. 966; First National Bank of Plymouth v. Price, 33 Md. 487, 3 Am. Rep. 204; Halsey v. McLean, 12 Allen [Mass.] 439, 90 Am. Dec. 157.—From note to Attrill v. Huntington [Md.] 14 Am. St. Rep. 350.

43. See succeeding sections. For the extraterritorial effect of statutes imposing stockholders' liability, see Clark & M. Corp. § 825. The law of comity forbids the use of the courts of one state to perpetrate a fraud upon a citizen of another state. Baltimore & Ohio S. W. R. Co. v. McDonald, 112 Ill. App. 391.

44, 45. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

46. See 3 C. L. 720.

47. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26; Leonard v. State Mut. Life Assur. Co. [R. I.] 61 A. 52; Garrigue v. Keller [Ind.] 74 N. E. 523; Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 P. 40; Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952; Bailey v. Devine [Ga.] 51 S. E. 603; Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286; McCoy v. Griswold, 114 Ill. App. 556. Rights arising out of contract. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256. Execution, interpretation and validity of a promissory note, including the capacity of the parties to contract. Garrigue v. Keller (Ind.) 74 N. E. 523. Priority between lien of agister and chattel mortgagee. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165. As to whether a contract is a lease or a conditional sale, a court of bankruptcy will follow the state law. In re Sheets Printing & Mfg. Co., 136 F. 989. Code Civ. Proc. § 1761, forbidding the guilty party in divorce from marrying another during the life of the innocent party, does not affect the validity of his marriage to such other in another state. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979. Contract of suretyship made in New York by a married woman held enforceable in New Jersey. Law v.

thereof,[48] are determined by the law of the place where the contract is made; matters connected with its performance and legality of object are regulated by the law prevailing at the place of performance,[49] and matters respecting the remedy

Smith [N. J. Eq.] 59 A. 327. The liability of a retiring partner to a creditor of the firm is governed by the law of the place where the partnership was organized, though it carried on business in other counties. Easton v. Wastenholm & Son [C. C. A.] 137 F. 524. Where a life insurance policy was issued in Massachusetts by a Massachusetts company and was to be executed there, it was subject to Rev. Laws Mass. 1894, p. 679, c. 522, as amended. Leonard v. State Mut. Life Assur. Co. [R. I.] 61 A. 52. A note executed in Illinois by a married woman as surety, while domiciled in that state, is valid and enforceable in Indiana, although it is made payable at a bank in the latter state and the statute thereof prohibits a married woman from entering into a contract of suretyship. Garrigue v. Keller [Ind.] 74 N. E. 523. See Hammon, Cont. p. 497, § 260, p. 617, § 312.

48. Garrigue v. Keller [Ind.] 74 N. E. 523. Measure of damages for failure to deliver a telegram. Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952; Western Union Tel. Co. v. McNairy [Tex. Civ. App.] 78 S. W. 969.

49. Easton v. George Wostenholm & Son [C. C. A.] 137 F. 524; Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. S. 1062. All matters connected with the payment of a promissory note, including presentation, notice, demand, protest and damages for nonpayment (Garrigue v. Keller [Ind.] 74 N. E. 523), and the liability of the maker (Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290), are determined by the law of the place of payment. An indemity insurance policy being executed, countersigned and payable in New York, is governed as to interest by the law of New York, although the policy may have been delivered in another state. Cudahy Packing Co. v. New Amsterdam Casualty Co., 132 F. 623. As to whether or not contract is usurious is to be determined by the law of the place where it is to be performed. Allen v. Riddle [Ala.] 37 So. 680.

Where is contract to be performed? Where a firm doing business in California and Costa Rica purchased goods in England through complainant, as a purchasing agent, under an agreement that complainant in England should advance the money for the purchase, and to prepay freight, insurance and other charges for a commission, complainant's contract was to be performed in England. Easton v. Wostenholm & Son [C. C. A.] 137 F. 524. Where residents of New York executed a bond to a resident of New Jersey, secured by a mortgage upon property in the latter state, and the mortgage was foreclosed in that state, the rights of the parties held governed by the laws of New Jersey. Stumpf v. Hallaham, 101 App. Div. 383, 91 N. Y. S. 1062.

NOTE. What law governs as to usury: The general principles governing this and other questions involved in the conflict of laws are: 1. That if a note or obligation was valid where it was made, and did not there conflict with any usury law, it is equally valid in any other state in which an action is brought upon it, or whenever it is otherwise sought to be enforced, though its payment was secured by a mortgage or other security upon lands situate in a state other than of its execution. Conner v. Donnell, 55 Tex. 174; De Wolf v. Johnson, 10 Wheat. [U. S.] 367, 6 Law. Ed. 343; Andrews v. Pond, 13 Pet. [U. S.] 65, 10 Law. Ed. 61; Miller v. Tiffany, 1 Wall. [U. S.] 298, 17 Law. Ed. 540; Jewell v. Wright, 30 N. Y. 259, 86 Am. Dec. 372; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387. 2. That if it offended the statute against usury in the state wherein it was executed and was payable it is subject to the penalties imposed by that statute, though the action upon it is in another state, by whose laws it would not have been usurious if executed therein. Clague v. Creditors, 2 La. 114, 20 Am. Dec. 300; Jewell v. Wright, 30 N. Y. 264, 86 Am. Dec. 362. 3. That if the obligation was made in one state, but was to be performed in another, the parties were at liberty to regard it as a contract of either state, and to stipulate for any rate of interest allowable in either. Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Chapman v. Robertson, 6 Paige [N. Y.] 627, 31 Am. Dec. 264; Kennedy v. Knight, 21 Wis. 340, 94 Am. Dec. 543; Depau v. Humphreys, 8 Mart. N. S. [La.] 1; Cromwell v. County of Sac, 96 U. S. 51, 24 Law. Ed. 681; Dugan v. Lewis, 79 Tex. 246, 23 Am. St. Rep. 332, 12 L. R. A. 93; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306. And as a result of this rule the parties to a contract may make it payable, or otherwise stipulate for the performance of it, in a state other than that of its execution, and, when they do so, may agree to pay the highest rate of interest permissible in either state. Thornton v. Dean, 19 S. C. 583, 45 Am. Rep. 796; Wayne County Sav. Bank v. Low, 81 N. Y. 566, 37 Am. Rep. 533; Bigelow v. Burnham, 83 Iowa, 120, 32 Am. St. Rep. 294; Junction, etc., Co. v. Bank of Ashland, 12 Wall. [U. S.] 226, 20 Law. Ed. 385; Cockle v. Flack, 93 U. S. 344, 23 Law. Ed. 949; Cromwell v. County of Sac, 96 U. S. 51, 24 Law. Ed. 681; Tilden v. Blair, 21 Wall. [U. S.] 241, 22 Law. Ed. 632; Scott v. Perlee, 39 Ohio St. 63, 48 Am. Rep. 421. To this last proposition there is a vigorous dissent in some of the states, the courts of which maintain that their laws against usury will be constantly evaded and rendered ineffective if the parties to a contract are at liberty to designate the place of payment or performance and to stipulate for the highest rate of interest allowable at that place. Martin v. Johnson, 84 Ga. 481, 8 L. R. A. 170; Falls v. United States, etc., Co., 97 Ala. 417, 38 Am. St. Rep. 194, 24 L. R. A. 174. The proper answer to this argument is that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another state was to

depend upon the lex fori.[50] The rules being based upon the principal of comity,[51] the first two are inoperative when the law of such state is in conflict with that of the forum,[52] and a state legislature may by enactment so limit the rules.[53] These rules are not changed by the taking of foreign security.[54] The parties may by intent, expressed or implied, make the law of a place, other than that indicated by these rules, controlling.[55] A contract is made where one party unqualifiedly accepts the offer of the other.[56] The state where a promissory note is delivered is the place where it is made.[57] A bill of lading is governed by the laws of the state where issued.[58] As a general rule where an insurance policy must be countersigned by a local agent it is deemed to have been made in the state where it is so countersigned.[59] Goods being shipped to the purchaser, the sale occurs at the time and place of delivery to the carrier.[60] In North Carolina the place of delivery is the place of sale.[61] In considering statutes on this subject it should be remembered that the legislature has no power to arbitrarily fix the locus of a sale regardless of the rules of contract law.[62]

evade the law against usury of the state in which it was executed, it will be regarded as infected with usury. Pratt v. Adams, 7 Paige [N. Y.] 615; Railroad Co. v. Bank of Ashland, 12 Wall. [U. S.] 226, 20 Law. Ed. 385; Andrews v. Pond, 13 Pet. [U. S.] 65, 10 Law. Ed. 61.—From note to Bank of Newport v. Cook [Ark.] 46 Am. St. Rep. 178, 201.

See, also, extensive note on conflict of laws as to interest and usury, 62 L. R. A. 33.

50. See post, § 7. Application of remedies.

51. Corbin v. Houlehan [Me.] 61 A. 131.

52. See post, § 4. Effect of public policy.

53. Legislature has power to say that principle shall not be extended to a contract, the result of which is to give one of the parties thereto the means of violating the laws of the state and its established policy in relation to the sale therein of commodities believed to be prejudicial to the interests of its citizens. Rev. St. c. 29, § 64, relating to intoxicating liquors construed. Corbin v. Houlehan [Me.] 61 A. 131.

54. A bond is governed by the laws of the state where made, though secured by a mortgage on realty located in another state. Hough v. Maupin [Ark.] 84 S. W. 717.

55. Garrigue v. Keller [Ind.] 74 N. E. 523; Midland Sav. & Loan Co. v. Solomon [Kan.] 79 P. 1077. That bond given was secured by a mortgage on property located in a foreign state does not abrogate the stipulation. Id. Contract between building and loan association and member held governed by the law of the state where the home office of the association was located, it being so stipulated in the contract. Allen v. Riddle [Ala.] 37 So. 680. A statute of New York applying to insurance contracts made in New York with persons having a known postoffice address therein held not to apply where the insured lived in Texas, and the policy was delivered there, though the premiums and policy itself were payable in New York. Metropolitan Life Ins. Co. v. Bradley [Tex.] 82 S. W. 1031. In such a case held it could not be presumed that the parties intended such law to govern. Id.

56. Where offer was returned with a condition added, contract is made in the state where the amendment thus made was accepted by the original offerer. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Note and mortgage drawn up in California on land in Michigan and sent to the latter state and there accepted, held a Michigan contract and interest should be computed according to the Michigan rule. Palmer v. Hill [Mich.] 12 Det. Leg. N. 236, 103 N. W. 838. A contract of guaranty, not becoming effectual until accepted, will be construed according to the law of the place of acceptance. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345. A certificate of insurance issued in Illinois to a resident of New York, which, by its terms, was to take effect when accepted by the insured, held a New York contract. Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 49 Law. Ed. 1146. A Pennsylvania corporation loaning money for a foreign corporation to a citizen of Pennsylvania on a bond secured by a mortgage on land situated in Pennsylvania, and also secured by an assignment of shares of the stock of the foreign corporation, held a Pennsylvania contract. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

57. A promissory note received by the payee in the state where it is payable is a contract of such state. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456. Where, pursuant to an agreement between the parties, a note is signed in Illinois and there mailed to the payee in Indiana, the contract is completed in Illinois. Garrigue v. Keller [Ind.] 74 N. E. 523.

58. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134.

59. Policy of insurance in a Connecticut company on property in New York and countersigned by the company's agent in the latter state is made in New York, though the owner of the property resides in New Jersey. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

60. C. O. D. shipment. Keller v. State [Tex. Cr. App.] 87 S. W. 669. That express charges are paid by seller makes no difference. State v. Intoxicating Liquors, 98 Me. 464, 57 A. 798. Where principal filled order of agent and sent the liquor to him for delivery to the purchaser. James v. State

§ 3. *Effect of status or domicile.*[63]—The law of the domicile of a decedent governs the construction and legal effect of his will [64] and the distribution of his personal property.[65] The formalities to be followed by officials in taking acknowledgments are governed by the law of the state where the acknowledgments are taken.[66]

§ 4. *Matters relating to personal property.*[67]—The title to tangible chattels is determined by the law of the situs.[68] The validity of a chattel mortgage is governed by the law of the state in which it is made.[69] A contract affecting personal property, being made within the state within which the property is at the time situated, is governed by the laws of such state, though the property be subsequently moved elsewhere.[70]

§ 5. *Effect of public policy.*[71]—The courts of a state will not enforce a law of a foreign state which is contrary to the public policy of the state of the forum,[72] and this is true, though the contract sought to be enforced expressly stipulates that the law of the other state shall govern.[73]

§ 6. *Protection of citizens in state of forum.*[74]—The rights of a citizen of the forum should not be prejudiced.[75]

[Tex. Cr. App.] 78 S. W. 951. See **note:** "Where is contract made?" Intoxicating Liquors, 4 C. L. 270. See, also, Intoxicating Liquors, 4 C. L. 252, and Sales, 4 C. L. 1318.

61. Under Laws 1903, p. 472, c. 349, § 2. State v. Patterson, 134 N. C. 612, 47 S. E. 808.

62. Act 27th Leg. p. 262, providing that sale of intoxicating liquor shall be where order was solicted, held beyond power of legislature. James v. State [Tex. Cr. App.] 78 S. W. 951.

63. See 3 C. L. 722.

64. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75.

65. Hartley v. Hartley [Kan.] 81 P. 505. In proceedings in the Federal court for the establishment of a claim by a non-resident creditor against his debtor's estate, the law of the state of the debtor's residence will be applied. Alice E. Min. Co. v. Blanden, 136 F. 252.

66. Werner v. Marx, 113 La. 1002, 37 So. 905.

67. See 3 C. L. 722.

68. Lees v. Harding, Whitman & Co. [N. J. Err. & App.] 60 A. 352. The sufficiency of delivery of personal property is governed by the law of the state where the property was situated, was to be repaired and delivered. In re Pease Car & Locomotive Works, 134 F. 919. See, also, Sales, 4 C. L. 1318.

69. Bankruptcy proceedings. Dodge v. Norlin [C. C. A.] 133 F. 363; In re Beede, 138 F. 441. An unfiled chattel mortgage made in New York on property within the state, being valid as between the parties, will, as to them, be enforced in New Jersey. Law v. Smith [N. J. Eq.] 59 A. 327.

70. Lees v. Harding, Whitman & Co. [N. J. Err. & App.] 60 A. 352.

71. See 3 C. L. 723.

72. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992; Corbin v. Houlehan [Me.] 61 A. 131; Abbott v. Goodall [Me.] 60 A. 1030. See Hammon, Cont. p. 501, § 262.

ILLUSTRATIONS. Rights enforced: A New Jersey court of equity will enforce a contract of suretyship made by a married woman in New York. Law v. Smith [N. J. Eq.] 59 A. 327. Enforcement of a contract of suretyship by a married woman held not against the public policy of Indiana, though prohibited by the statutes of that state. Garrigue v. Keller [Ind.] 74 N. E. 523. Right of action for wrongful death held not contrary to public policy of Tennessee. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618. Will not decline to entertain such action because of the dissimilarity between the statutes of the two states on the subject. Id. The right acquired in Kansas where the rule obtains that an agister's lien, though subsequent, is superior to a chattel mortgage, will be enforced in Missouri, though such rule does not obtain there. Everett v. Borse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

Rights not enforced: A contract made in Minnesota held not enforceable in Montana, it containing a stipulation providing a sixty day limitation for an action thereon. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Contract relating to intoxicating liquors held not enforceable. Corbin v. Houlehan [Me.] 61 A. 131. Rev. St. Mo. 1899, § 2864, authorizing a recovery for wrongful death without proof of pecuniary loss, is against the public policy of Illinois as evidenced by Hurd's Rev. St. 1903, p. 1043, c. 70, § 2. Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69. Contract limiting time within which suit may be brought held not enforceable in Kentucky. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106. The courts of a state should not refuse, on the ground of a supposed public policy, to enforce collection of sums due on a lawful bond solvable by the laws of a foreign state, and not given in evasion of the lex fori, merely because, if construed by the laws of the forum the rate of interest would be higher than allowed. Midland Sav. & Loan Co. v. Solomon [Kan.] 79 P. 1077.

73. National Mut. B. & L. Ass'n v. Brahan, 193 U. S. 635, 48 Law. Ed. 823.

74. See 3 C. L. 723.

75. Abbott v. Goodall [Me.] 60 A. 1030. It is against the policy of the state of Maine to enforce a remedy against its citi-

§ 7. *Contracts respecting realty.*[76]—The law of the place where real property is situated governs as to all matters respecting such property.[77] The law of the situs governs all questions as to the title and possession of land held under a lease in another state,[78] and chattel interests therein.[79] Questions affecting the consideration of a mortgage are to be determined by the lex loci contractus.[80]

§ 8. *Application of remedies.*[81]—The lex fori governs as to all matters of procedure and practice,[82] as the bringing of suits and the service of process,[83] the burden of proof,[84] the admission of evidence,[85] and the quantum of evidence requisite to place the cause within the province of the jury.[86] It governs as to the time, mode and extent of the remedy,[87] including limitations [88] and exemptions.[89] Hence the validity of stipulations in a contract limiting the time within which an action may be brought thereon is governed by the lex fori.[90] Statutes authorizing the attachment of choses in action can have no extraterritorial force and effect.[91]

Presumptions and judicial notice regarding foreign laws.[92]—In the absence of statutory provisions,[93] a court will not take judicial notice of the laws of another state,[94] but such laws, whether written or unwritten,[95] must be pleaded and proved [96] as a matter of fact.[97] In an action involving the law of a sister state, the decisions

zens upon a liability created by a statute of Colorado which places them in a worse position than that occupied by citizens of that state whose liability under the same statute is sought to be enforced. Id.

76. See 3 C. L. 723.

77. The law of real property in the Cherokee country is to be found in the constitution and laws of the Cherokee nation. Delaware Indians' Case, 38 Ct. Cl. 234. A power of attorney being executed for the conveyance of land, the power to convey and the manner of conveyance depend on the law of the state where the land is located. Linton v. Moorhead, 209 Pa. 646, 59 A. 264.

78. Swearingen v. Barnsdall, 210 Pa. 84, 59 A. 477. The validity of deeds of estate in expectancy (Mort v. Jones [Va.] 51 S. E. 220), and the validity of a mortgage lien, though the mortgage be given to secure bonds issued and payable in another state (Bramblet v. Commonwealth Land & Lumber Co., 26 Ky. L. R. 1176, 83 S. W. 599). It governs in respect to the right of the parties and the modes of transfer and distribution. Broadwell v. Banks, 134 F. 470. Demised premises being located in Ohio, the right of a devisee and legatee of the lessor to sue an administrator of the lessee for rents is determinable by the law of Ohio. Id.

79. Ohio law considered. Broadwell v. Banks, 134 F. 470.

80. Conradt v. Lepper [Wyo.] 81 P. 307.

81. See 3 C. L. 724.

82. Abbott v. Goodall [Me.] 60 A. 1030.

83. Garrigue v. Keller [Ind.] 74 N. E. 523.

84. Chicago Terminal Transfer R. Co. v. Vandenberg [Ind.] 73 N. E. 990.

85. Garrigue v. Keller [Ind.] 74 N. E. 523; Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 49 Law. Ed. 1146. Competency of witness. Doll v. Equitable Life Assur. Soc. [C. C. A.] 138 F. 705.

86. Ferguson v. Cent. R. Co. [N. J. Err. & App.] 60 A. 382.

87. McCoy v. Griswold, 114 Ill. App. 556.

88. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106. A statutory requirement that an action for wrongful death shall be commenced within a certain time is not a statute of limitations. Dennis v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 869. See 3 C. L. 724, n. 28; Id. 725, n. 32.

89. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173; National Tube Co. v. Smith [W. Va.] 50 S. E. 717. Injunction does not lie against a garnishment of money owing by the garnishee to a non-resident debtor on the ground that such money is exempt by the law of the state of residence of such debtor. Id.

90. Missouri, etc., R. Co. v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871.

91. Shannon's Code, §§ 5260, 5267. Kimbrough v. Hornsby [Tenn.] 84 S. W. 613.

92. See 3 C. L. 725.

93. Under Acts 1901, p. 164, n. 98, judicial notice will be taken of the laws of a sister state. Creelman Lumber Co. v. Lesh & Co. [Ark.] 83 S. W. 320.

94. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345; First Nat. Bank v. Nordstrom [Kan.] 78 P. 804; Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106; Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1052; Moore v. Coler, 94 N. Y. S. 630; Baltimore & Ohio S. W. R. Co. v. McDonald, 112 Ill. App. 391; Gunning System v. La Pointe, 113 Ill. App. 405.

95. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642.

96. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167; National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368.

97. Mexican Cent. R. Co. v. Chantry [C. C. A.] 136 F. 316; America Alkali Co. v. Huhn, 209 Pa. 238, 58 A. 283; Linton v. Moorhead, 209 Pa. 646, 59 A. 264; Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345; Baltimore & O. S. W. R. Co. v. McDonald, 112 Ill. App. 391; Gunning System v. La Pointe, 113 Ill. App. 405.

Complaint alleging that prior to and at the time of the execution of the contract the law of the foreign state was so and so,

of the supreme court of such state may be read, considered and introduced in evidence when bearing upon questions of law involved in the case on trial.[98] Where it is sought in the trial court to prove the law of a sister state by the introduction of portions of the reports of the decisions of the courts of that state the opinions relied upon, or excerpts, therefrom, must be set forth in haec verba in the bill of exceptions in order that such proof may be before the appellate court.[99] Testimony of an attorney as to what he believed the law of another state to be is admissible.[1] In the absence of proof to the contrary, the law of a foreign state is presumed to be the same as the lex fori;[2] but this rule does not apply to positive statutory enactments.[3] In the absence of proof, it is presumed that the common-law rule exists in a sister state.[4] The common law of another state will be presumed to be the same as that of the state of the forum.[5]

§ 9. *Torts.*[6]—The right of action for a tort is governed by the law of the place where the cause of action arose.[7] The courts of a state have the power to enforce rights of action granted under foreign statutes.[8] But in such cases the right of action being unknown to the common law, the foreign statute must be pleaded, and the remedy prescribed by it must be pursued.[9] A right of action given by the statutes of another state will be enforced if the lex fori gives a similar right under the same state of facts.[10] It is not necessary that the statutes should be identical.[11]

held sufficient. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

Proof that a designated section of the statutes of another state declares that "every action, other than for the recovery of real testate for which no limitation is otherwise prescribed, shall be brought within four years," does not amount to proof that four years is the limitation on actions on a county board. Moore v. Coler, 94 N. Y. S. 630.

98. Blumle v. Kramer, 14 Okl. 366, 79 P. 215. Under a statute that the law of another state may be proved as a fact, such law may be shown by the decisions of the highest court of such state. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290. If he relies on a decision by one of the higher courts, he cannot rely on an averment of the existence of a decision that for aught that appears may have been rendered by a trial court. Penn. Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132.

99. Gunning System v. La Pointe, 113 Ill. App. 405.

1. Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952; Rieck v. Griffen [Neb.] 103 N. W. 1061.

2. Easton v. George Wostenholm & Son [C. C. A.] 137 F. 524; Linton v. Moorhead, 209 Pa. 646, 59 A. 264; Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642; First Nat. Bank v. Nordstrom [Kan.] 78 P. 804; In re Dunphy's Estate [Cal.] 81 P. 315; National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368; Gunning System v. La Pointe, 113 Ill. App. 405; News Pub. Co. v. Associated Press, 114 Ill. App. 241. Costs accruing in a foreign jurisdiction, as to the laws of which no proof is offered, must be taxed according to the domestic fee bill. Dignan v. Nelson, 26 Utah, 186, 72 P. 936. Law of England on question of interest presumed, the same as that of California. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053. So held as to laws referring to the forfeiture of property for taxes. Edleman v. Edleman [Wis.] 104 N. W. 56.

3. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456.

4. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134; Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132; Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456; Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979; Bailey v. Devine [Ga.] 51 S. E. 603. In the absence of evidence, it will not be presumed that the statutes of New Jersey contain any limitation as to the age of persons to whom insurance may be issued by fraternal benefit associations organized under the laws of that state. Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783.

5. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345.

6. See 3 C. L. 725.

7. Wrongful death: Hartley v. Hartley [Kan.] 81 P. 505; Benedict v. Chicago Great Western R. Co., 104 Mo. App. 218, 78 S. W. 60. Amendment to pleadings allowed. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. An action in admiralty for wrongful death, based on Civ. Code, La. art. 2315 is governed by the local law so far as defenses are concerned. Quinette v. Bisso [C. C. A.] 136 F. 825. Statute of that state prescribing time within which action must be brought governs. Dennis v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 869. Is not a statute of limitation. Id. See 3 C. L. 724, n. 23.

8, 9. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

10. Kansas statutes making railroads liable for injuries to their servants caused by the negligence of fellow-servants held

Confusion of Goods; Connecting Carriers; Consideration; Consolidation, see latest topical index.

CONSPIRACY.

§ 1. *Civil liability.*[12]—To constitute an actionable conspiracy there must be an agreement to do an unlawful act or to do a lawful act by unlawful means, and acts pursuant thereto causing damage,[13] and such as would have given a cause of action against the doer without regard to conspiracy.[14] If neither object nor means are unlawful, a malicious motive does not make the combination actionable.[15] Concerted refusal to sell to a particular person is not actionable, however wrongful the motive.[16] A statute punishing such conspiracies is valid.[17] A conspiracy to drive one from business is actionable if unlawful means are used,[18] as is a conspiracy to procure one's employes to leave him.[19] One entering a conspiracy after it is formed is liable for all acts from the inception of the conspiracy.[20] A corporation may become a party to a conspiracy.[21] Husband and wife cannot between themselves be guilty of conspiracy.[22] Several injurious acts pursuant to a conspiracy form but one cause of action.[23] After proof of conspiracy, acts and declarations of each conspirator in furtherance of the common purpose are admissible against all;[24] but not those accruing after the purpose of the conspiracy is completed.[25] Reception of separate acts of alleged conspirators before prima facie proof of conspiracy rests in discretion.[26] Admissibility[27] and sufficiency of evidence of particular conspiracies is shown in the footnote.[28] Proof of an assault and bat-

enforceable in Texas. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 87 S. W. 401.

11. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 87 S. W. 401.

12. See 3 C. L. 726.

13. No cause of action in conspiracy to procure sale of property on which plaintiff has a privilege if the proceeds of the sale are in court subject to plaintiff's claim. Levy v. Collins [La.] 38 So. 966.

14. Wills v. Central Ice & Cold Storage Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 512, 88 S. W. 265.

15. Where a fraternal benefit lodge has a right to dissolve, the fact that a dissolution was impelled by a desire to deprive a certain member of his membership gives no cause of action. Grand Lodge Order of Hermann's Sons v. Schuetze [Tex. Civ. App.] 83 S. W. 241. An agreement to boycott is unlawful, though the acts contemplated would be lawful for an individual. Loewe v. California State Federation of Labor, 139 F. 71.

16. Wills v. Central Ice and Cold Storage Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 512, 88 S. W. 265.

17. Aikens v. State of Wisconsin, 195 U. S. 194, 49 Law. Ed. 154.

18. Harassing salesmen, threatening customers, circulating false reports, institution of malicious prosecutions, and causing goods to be wrongfully condemned by public inspector. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271.

19. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353. See Master and Servant, 4 C. L. 533, for malicious interference with relation generally.

20. Patch Mfg. Co. v. Protection Lodge No. 215, International Ass'n of Machinists [Vt.] 60 A. 74.

21. Bank where stake money was deposited held a party to a conspiracy to defraud by means of a pretended foot race. Wright v. Stewart, 130 F. 905.

22. Merrill v. Marshall, 113 Ill. App. 447.

23. Green v. Davies, 100 App. Div. 359, 34 Civ. Proc. R. 1, 91 N. Y. S. 470.

24. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271.

25. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271. Conspiracy to steal and divide proceeds is not complete until the division is made. O'Brien v. State [Neb.] 96 N. W. 649; Lederer v. Adler, 92 N. Y. S. 827.

26. Wright v. Stewart, 130 F. 905.

27. Admissibility of evidence to show connection of various members of labor union with acts of intimidation. Patch Mfg. Co. v. Protection Lodge, No. 215, International Ass'n of Machinists [Vt.] 60 A. 74.

28. Evidence held to show conspiracy to procure sale of goods to irresponsible person. Lederer v. Adler, 92 N. Y. S. 827. Evidence of conspiracy to procure elopement of plaintiff's daughter with one conspirator held sufficient. Shoemaker v. Jackson [Iowa] 104 N. W. 503. Evidence held sufficient to sustain verdict for damages against labor union. Patch Mfg. Co. v. Protection Lodge No. 215, International Ass'n of Machinists [Vt.] 60 A. 74. Pretended transfers to give appearance of solvency to one who borrowed money on the faith thereof held to show conspiracy to defraud lender. Shields v. City Nat. Bank, 138 N.

tery by several entitles plaintiff to recover, without proof of an averment that it was pursuant to a conspiracy.[29]

§ 2. *Criminal liability.*[30]—The Illinois statute relating to conspiracy to do an act injurious to public trade did not abrogate the common law relating to conspiracy to fix prices.[31] A conspiracy to commit a crime is complete when the agreement is made and no overt act is essential.[32] Overt acts beyond the jurisdiction will sustain the charge.[33] Mere approval of an unlawful agreement without co-operation or agreement to co-operate does not constitute conspiracy.[34] Each member is liable for the acts of all after the combination is formed.[35] It is no defense to a charge of conspiracy to bribe a juror that the court had no jurisdiction of the case in which such juror was empanelled.[36] To constitute conspiracy to defraud the United States, the contemplated fraud need not be such as would itself be a violation of a penal statute,[37] nor is it necessary that the conspiracy should contemplate depriving the United States of money or property, but any fraudulent interference with its functions is within the statute.[38] Conspiracy for offering to the United States in exchange under act June 4, 1897, lands in which another had an equity is a conspiracy to defraud the United States under § 5440 Rev. St.[39] A conspiracy to induce one to bet and place property in the hands of a stakeholder is not a conspiracy to obtain title to the property.[40] A strike to compel an agreement for a closed shop is a conspiracy for an unlawful purpose.[41] A combination of producers to prevent competition in sale is unlawful irrespective of means.[42] A combination to control prices need not be formal or by written articles of association.[43] A tacit agreement without a formal contract is sufficient.[44] That a combination to fix prices did not result in a complete monopoly is no defense.[45]

Indictment.[46]—An indictment for conspiracy to defraud, setting out an un-

C. 185, 50 S. E. 591. Evidence of conspiracy between plaintiff's agent and a borrower from plaintiff by which insufficient security was taken, held for jury. Morrill v. Bosley [Tex. Civ. App.] 13 Tex. Ct. Rep. 529, 88 S. W. 519. Evidence of conspiracy to drive a rival out of business held for jury. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271.

29. Britton v. Young [Ind. App.] 74 N. E. 905.

30. See 3 C. L. 727.

31. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, afg. 114 Ill. App. 75.

32. O'Donnell v. People, 110 Ill. App. 250; Chicago, etc., Coal Co. v. People, 114 Ill. App. 75.

33. State v. Loser [Iowa] 104 N. W. 337.

34. O'Donnell v. People, 110 Ill. App. 250.

35. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

36. O'Donnell v. People, 110 Ill. App. 250.

37. United States v. Stone, 135 F. 392.

38. Conspiracy to procure approval by inspectors of life preservers which did not comply with law. United States v. Stone, 135 F. 392. Corrupting or impairing efficiency of governmental department. McGregor v. U. S. [C. C. A.] 134 F. 187. If the natural result of the acts agreed on was to defraud it is immaterial that the conspirators did not so intend. Id.

39. United States v. Hyde, 132 F. 545; Hyde v. Shine, 199 U. S. 62, 50 Law. Ed. ----; Dimond v. Shine, 199 U. S. 88, 50 Law. Ed. ----.

40. State v. Loser [Iowa] 104 N. W. 337.

41. Christensen v. People, 114 Ill. App. 40.

42, 43. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

44. Chicago, etc., Coal Co. v. People, 114 Ill. App. 75.

45. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

46. See 3 C. L. 729. Indictment for **conspiracy to procure approval of life preservers** not complying with law held to show defective character of the life preservers. United States v. Stone, 135 F. 392. Indictment for **conspiracy to procure the admission of certain Chinamen** held sufficient, though the names of defendant's co-conspirators, the names of the Chinamen, the vessel from which they were to be landed and the port from which they came were all alleged as unknown. Wong Din v. U. S. [C. C. A.] 135 F. 702. Indictment for **conspiracy to defraud the United States** by fraudulently obtaining lands from state forest reservations and exchanging them for public lands of the United States under Act June 4, 1897, is sufficient where the alleged representations by which the state lands were to be obtained would leave an equitable title in the state, since the Act of 1897 contemplates that the United States shall receive full title. United States v. Hyde, 132 F. 545. Indictment for conspiracy to defraud United States by paying to an officer commission on goods purchased by him for the United States, held sufficient. United States v. Green, 136 F. 618. Indictment in general terms for **conspiracy to boycott** held insufficient. State v. Van Pelt [N. C.] 49 S. E. 177.

lawful agreement which would result in fraud, need not allege intent to defraud.[47] An indictment for conspiracy to commit an offense against the United States must state as proposed all the legal elements of such offense.[48] An indictment for conspiracy to defraud the United States by causing a violation of a certain statute need not negative an exception in such statute.[49] An indictment is not double because it charges the commission of a felony pursuant to the conspiracy.[50] Where the statute forbids conspiracy to injure the business, property "or" rights of another an indictment in the conjunctive is good.[51] Overt acts need not be alleged with the same particularity as though they were the gist of the crime.[52] An averment that defendants fraudulently and maliciously conspired is sufficient under a statute prohibiting conspiracy "with fraudulent or malicious intent."[53] An indictment under the Anti-trust Act of 1891, relating to conspiracy by corporations need not allege that defendant corporation was organized to do business within the state.[54] Where the alleged object is unlawful, unlawful means need not be alleged.[55]

Variance.—The overt act is not conclusive as to the purpose of the conspiracy, and accordingly the fact that it varied from the purpose charged does not require an acquittal.[56] An indictment for conspiracy to cheat by false pretenses will not sustain a conspiracy to steal.[57]

Evidence.[58]—Conspiracy may be established by circumstantial evidence.[59] Where declarations are admitted on promise to supply proof of conspiracy, they should be stricken out if such proof is not made.[60]

CONSTABLES, see latest topical index.

CONSTITUTIONAL LAW.

[By HERCHEL B. LAZELL.]

47. United States v. Stone, 135 F. 392.
48. United States v. Green, 136 F. 618.
49. United States v. Stone, 135 F. 392.
50, 51, 52. State v. Loser [Iowa] 104 N. W. 337.
53, 54, 55. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; afg. 114 Ill. App. 75.
56. State v. Loser [Iowa] 104 N. W. 337.
57. Offense held larceny and not cheating because owner did not intend to part with his property. State v. Loser [Iowa] 104 N. W. 337.
58. See 3 C. L. 729. Evidence held to show unlawful combination to fix price of coal. Chicago, etc., Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.
59. Christensen v. People, 114 Ill. App. 40; O'Brien v. State [Neb.] 96 N. W. 649.
60. Brennan v. People, 113 Ill. App. 361.

This topic treats of the organic law of the nation and the states and of the distribution of power between them. Several of the clauses which relate to a specific and indivisible subject matter like "Commerce," "Jury" and "Rights of Persons Accused of Crime" are treated in topics which are specifically devoted to such subjects.[61]

§ 1. *Adoption and amendment of constitutions.*[62]—A court cannot inquire into the legality of a constitution to which it owes its own life and existence;[63] but the regularity of the adoption of amendments may be questioned,[64] and whether an amendment has been regularly proposed, adopted and ratified, is a question for the courts and not for the political department of the government.[65]

Amendments [66] are usually required to be passed upon by the legislature acting with certain formalities similar to those prescribed for the enactment of statutes,[67] and publication of the proposed amendment, and its submission to the electors under certain restrictions as to form and subject-matter, are generally provided for,[68] though popular adoption will generally cure any purely technical defect in the proceedings.[69] Proposed amendments to particular sections must be germane to the sections amended, though amendments to a constitution as a whole may embrace matters not mentioned in the original.[70] A majority of the electors voting upon the question is generally sufficient for its adoption.[71]

§ 2. *Operative force and effect.*[72]—Constitutions do not operate retrospectively,[73] or extra-territorially,[74] and laws in force at the time of adoption of a constitution and not in conflict therewith continue of force until expressly repealed.[75] Statutes in conflict are repealed by implication.[76] A treaty cannot supersede the Federal constitution.[77]

Self-executing provisions [78] are those which require no further legislation in order that the right given may be enjoyed and protected, or that the duty imposed may be enforced.[79] Provisions limiting the indebtedness of municipalities,[80] determining the tenure of officers appointed to fill vacancies,[81] and those contained in the thirteenth and fourteenth amendments to the Federal constitution,[82] have

61. See Commerce, 3 C. L. 711; Jury, 4 C. L. 358; Criminal Law, 3 C. L. 979; Indictment and Prosecution, 4 C. L. 1; Search and Seizure, 4 C. L. 1416; and the like.

62. See 3 C. L. 730.

63. See 3 C. L. 732, § 3.

64. In Federal court. Knight v. Shelton, 134 F. 423.

65. See 3 C. L. 730, n. 4. Declaration of canvassing officer is not conclusive. Knight v. Shelton, 134 F. 423.

66. See 3 C. L. 730.

67. A proposal to amend a constitution is not "legislation" that must be passed as statutes are passed. Need not be presented to the governor for his approval. Warfield v. Vandiver [Md.] 60 A. 538.

68. A requirement that where two amendments are submitted they must be submitted separately does not apply where the two amendments are dependant upon and connected with each other. Lobaugh v. Cook [Iowa] 102 N. W. 1121.

69. See 3 C. L. 731, n. 9.

70. See 3 C. L. 731, n. 15.

71. See 3 C. L. 731, n. 22. A majority of all voting at the election is necessary in Arkansas. Knight v. Shelton, 134 F. 423.

72. See 3 C. L. 732.

73. See 3 C. L. 732, n. 27. Arey v. Lindsey, 103 Va. 250, 48 S. E. 889; McCullough v. Graham [S. C.] 49 S. E. 1. A draining company organized under the constitution of 1851 is not affected as to its assessments by the constitution of 1891. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

74. See 3 C. L. 732, n. 38.

75. See 1 C. L. 570, n. 61. Exemption of territory from general stock law. McCullough v. Graham [S. C.] 49 S. E. 1. A special act providing for an election to determine a matter subsequently taken out of the domain of special legislation is valid, though the election is not held until after the change in the constitution. Arey v. Lindsey, 103 Va. 250, 48 S. E. 889.

76. See 1 C. L. 570, n. 62.

77. Citizen cannot be deprived by treaty of his constitutional right to invoke jurisdiction of Federal courts. The Neck, 138 F. 144.

78. See 3 C. L. 732.

79. See 3 C. L. 732, n. 30. Robertson v. Stanton [Va.] 51 S. E. 178; City of Newport News v. Woodward [Va.] 51 S. E. 193.

80. Halsey & Co. v. Belle Plaine [Iowa 104 N. W. 494; Robertson v. Stanton [Va.] 51 S. E. 178.

81. Rodwell v. Rowland [N. C.] 50 S. E. 319.

82. Ex parte Riggins, 134 F. 404; Clyatt

been construed as self-executing. The contrary is said of a provision authorizing the mayors of cities to suspend and remove police officers.[83]

§ 3. *Interpretation and exposition. A. When called for.*[84]—Courts refuse to pass on the constitutionality of a statute unless absolutely necessary to a decision of the case,[85] and cannot attempt, prior to an actual controversy, to pass upon the validity of provisions that may never be properly questioned.[86] Thus, the validity of a statute cannot be questioned by one to whom it has no application,[87] or who is not injured by it,[88] or who has voluntarily complied with it,[89] or invoked its provisions,[90] or who may avail himself of its provisions or not as he elects,[91] or who has waived his rights.[92] Whether a statute would be unconstitutional under a construction that has not been given it will not be decided.[93]

Objections to a statute must point out what provision of the constitution is violated,[94] the manner of its violation,[95] and the objector must show facts sufficient

v. United States, 197 U. S. 207, 49 Law. Ed. 726.

83. City of Newport News v. Woodward [Va.] 51 S. E. 193.

84. See 3 C. L. 732.

85. See 3 C. L. 732, n. 40. King v. Concordia Fire Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616; Blanchard v. Barre [Vt.] 60 A. 970; White v. Sun Pub. Co. [Ind.] 73 N. E. 890; People v. Wells, 99 App. Div. 364, 91 N. Y. S. 219; State v. Malheur County Court [Or.] 81 P. 368. Where an information, to which a demurrer was overruled, is fatally defective, the court will not pass on the constitutionality of the statute under which it was drawn. Oglesby v. State [Ga.] 51 S. E. 505.

86. See 3 C. L. 733, n. 41.

87. See 1 C. L. 571, n. 70; 3 C. L. 733, n. 42; John Woods v. Carl [Ark.] 87 S. W. 621. A plaintiff whose land has been damaged by a railroad company as a trespasser cannot raise the question of the validity of a statute under which the company condemned other lands on which to build its road. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991. In a proceeding by the state to oust a telephone company from its use of the public highway, the objection that the statute under which the company is acting is invalid because it does not provide for remuneration to abutting landowners, is personal to the landowners and will not be considered. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

88. See 3 C. L. 733, n. 43. Smiley v. Kansas, 196 U. S. 447, 49 Law. Ed. 546. A taxpayer whose assessment was reduced by a scaling act is in no position to contest the validity of the act. People v. Olsen, 215 Ill. 620, 74 N. E. 785. In litigation between two railroad companies concerning the installation of interlocking devices at their crossing, the constitutionality of a feature of the law requiring that such device when installed shall be approved by the state auditor cannot be assailed. Chicago, etc., R. Co. v. Indianapolis & N. W. Traction Co. [Ind.] 74 N. E. 513. In a prosecution under an amended statute that provides for a search, a contention that the search being unconstitutional the whole statute fails will not be considered where, if the whole statute should be regarded as invalid, the prosecution could be sustained under the statute as it stood before amendment. Uloth v. State [Tex. Cr. App.] 87 S. W. 822. The constitutionality of a liquor law exempting from its provisions native wines except when in the hands of liquor dealers for sale cannot be attacked by a retail liquor dealer. McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045.

89. See 3 C. L. 733, n. 44.

90. See 3 C. L. 733, n. 47. A corporation availing itself of the special privileges conferred by the law of eminent domain is estopped from questioning the constitutionality of such parts of the law as impose special burdens upon it. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206. Owner of swamp lands held estopped to contest validity of statute under which they were drained. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

91. See 3 C. L. 733, n. 45. An electric light company accepting an ordinance authorizing it to do business in and use the streets of a city is estopped to repudiate the reasonable regulations for safety therein. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

92. Right to compensation for property taken. Hellen v. Medford [Mass.] 73 N. E. 1070. By petitioning for or failure to object to local improvements, landowners may be estopped to question the constitutionality of assessments levied therefor. See 3 C. L. 734, n. 49, 50. One who waives trial by jury will not be heard to complain of the law prescribing the manner of selecting the jury, or urge the invalidity of the law creating the court because of the provision therein for a jury of six. Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977.

93. Mathis v. Gordy, 119 Ga. 817, 47 S. E. 171; Aikens v. Wisconsin, 195 U. S. 194, 49 Law. Ed. 154. The supreme court of the United States accepts the construction placed on a state statute by the state court on error from a state court. Smiley v. Kansas, 196 U. S. 447, 49 Law. Ed. 546; Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 Law. Ed. 689; Southern Cotton Oil Co. v. Texas, 197 U. S. 134, 49 Law. Ed. 696.

94. See 3 C. L. 734, n. 52. City of Excel-

to bring himself within the protection of the clause invoked.[93] In order that an appellate court may pass upon a constitutional question, it must generally have been properly raised below,[97] decided adversely to appellant,[98] and fully argued on appeal.[99] The constitutionality of the statute or ordinance under which a conviction was had cannot be tested by habeas corpus.[1]

(§ 3) *B. General rules of interpretation. Constitutions.*[2]—The words in constitutions must be regarded as being used in their natural sense[3] and to mean what they say,[4] and technical words are given their technical meaning unless clearly used otherwise,[5] though the intention of the framers must prevail, whatever the language used to express it.[6] All parts relating to the same subject must be construed together, and every part, if possible, rendered effective.[7] The position of an article in the instrument is not controlling.[8] Conditions, existing when the constitution was adopted,[9] debates of the members of the convention framing it,[10] and contemporaneous construction by co-ordinate branches of the government,[11] are resorted to in aid of doubtful provisions,[12] though where the language is plain there is no room for construction.[13] A provision adopted from a particular state brings its construction with it,[14] but not if the same provision is found in several constitutions and has received varying constructions.[15] That the validity of a constitutional amendment is not free from doubt is of itself a sufficient reason for sustaining it.[16]

Federal courts usually follow the state court's interpretation of the state constitution,[17] and the state courts are bound to follow the supreme court of the

sior Springs v. Ettenson [Mo.] 86 S. W. 255; State v. Cobb [Mo. App.] 87 S. W. 551.

95. See 3 C. L. 734, n. 53.

96. See 3 C. L. 734, n. 54. People v. Wells, 99 App. Div. 364, 91 N. Y. S. 219; Robertson v. Grant County Com'rs, 14 Okl. 407, 79 P. 97.

97. See 3 C. L. 734, n. 57. Motion for new trial is sufficient. Christy v. Elliott [Ill.] 74 N. E. 1035. General allegation not sufficient. City of Excelsior Springs v. Ettenson [Mo.] 86 S. W. 255.

98. See 3 C. L. 734, n. 58.

99. Iowa Cent. Bldg. & Loan Ass'n v. Klock [Iowa] 104 N. W. 352. See, also, Appeal and Review, 5 C. L. 140, 197 et seq., 211 et seq.

1. Must be by appeal or error. People v. District Court of Second Judicial Dist. [Colo.] 80 P. 888.

2. See 3 C. L. 734.

3. Keller v. State [Tex. Cr. App.] 87 S. W. 669; Halsey & Co. v. Belle Plaine [Iowa] 104 N. W. 494. In the sense in which they were used in previous constitutions. Alford v. Hicks [Ala.] 38 So. 752.

4. See 3 C. L. 734, n. 60. If the language used is plain and clear, then the usual and ordinary significance shall be given it. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

5. See 3 C. L. 735, n. 68.

6. See 3 C. L. 734, n. 61. Whether schedule was intended to be of temporary or permanent character must be determined from its provisions. State v. Galusha [Neb.] 104 N. W. 197.

7. See 3 C. L. 734, n. 62.

8. A limitation on the legislative power is none the less effective because not printed under that head. Sheehan v. Scott 145 Cal. 684, 79 P. 350.

9. And the evil sought to be remedied or guarded against. Halsey & Co. v. Belle Plaine [Iowa] 104 N. W. 494. It is especially important to look into it if the constitution is the successor of another and in the particular essential changes have apparently been made. City of Newport News v. Woodward [Va.] 51 S. E. 193.

10. See 3 C. L. 735, n. 63. State v. Kelly [Kan.] 81 P. 450.

11. See 3 C. L. 735, n. 64. Nye v. Foreman, 215 Ill. 285, 74 N. E. 140. In order that contemporaneous construction may be of force, the provision must be ambiguous, and the construction uniform and within a reasonable time after enactment of the provision. Knight v. Shelton, 134 F. 423. Practical construction by an inferior court is not controlling. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

12. See 3 C. L. 735, n. 65.

13. Keller v. State [Tex. Cr. App.] 87 S. R. 669. Legislative construction cannot prevail over plain language. State v. Galusha [Neb.] 104 N. W. 197.

14. See 3 C. L. 735, n. 66. Norfolk & W. R. Co. v. Cheatwood's Adm'x, 103 Va. 356, 49 S. E. 489. So of a provision adopted from a previous constitution of the same state. Alford v. Hicks [Ala.] 38 So. 752.

15. See 3 C. L. 735, n. 67.

16. See 3 C. L. 735, n. 69.

17. See 3 C. L. 735, n. 70; Stare Decisis, 4 C. L. 1512. Kane v. Erie R. Co. [C. C. A.] 133 F. 681; Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147. Decisions of the supreme court of a state construing and applying a constitutional amendment are not conclusive on the Federal courts on the question of its proper proposal and adoption. Knight v. Shelton, 134 F. 423. The Federal court is not bound to follow the local construction in respect to a right ac-

United States in interpreting the Federal constitution.[18] Limitations imposed for the protection of the people, or a minority of them are not to be regarded as penal, but as remedial, and are to be so construed as to afford the protection contemplated.[19]

Statutes violative of the constitution[20] in the least degree are unenforceable it being unquestionably the duty of the courts to give effect to the organic law as the supreme will of the people.[21] Enactments against the spirit of the constitution may be declared void, though not expressly prohibited in the instrument.[22] The courts are not at liberty, however, to set a statute aside on the ground of natural justice and right,[23] or public policy,[24] nor can they inquire into its wisdom,[25] the manner in which favorable consideration was obtained for it,[26] or the motives of the legislature in passing it,[27] the courts being bound to assume that the legislature acted in good faith and with a desire to promote the public good.[28] A statutory construction law is only applicable when not inconsistent with the general object of a subsequent statute, or the context of the language construed, or other provision of the repealing law indicating a different intent.[29]

Every presumption favors the validity of a statute,[30] a reasonable doubt as to its constitutionality being sufficient to sustain it.[31] Doubtful statutes are so construed if possible as to harmonize them with the constitution,[32] and both the statute

cruing prior to that construction. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977; City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 721.

18. State v. Scampini [Vt.] 59 A. 201. See, also, Stare Decisis, 4 C. L. 1512.

19. In re Opinion of Justices [Me.] 60 A. 85.

20. See 3 C. L. 735.

21. See 3 C. L. 735, n. 72. Keller v. State [Tex. Cr. App.] 87 S. W. 669.

22. See 1 C. L. 571, n. 83. 3 C. L. 735, n. 75. McDonald v. Doust [Idaho] 81 P. 60; National Council v. State Council [Va.] 51 S. E. 166. The spirit of the Federal constitution or its preamble, cannot be invoked, apart from the words of the instrument to invalidate a state statute. Jacobson v. Commonwealth, 197 U. S. 11, 49 Law. Ed. 643.

23. See 3 C. L. 736, n. 76. Kane v. Erie R. Co. [C. C. A.] 133 F. 681; National Council v. State Council [Va.] 51 S. E. 166.

24. See 1 C. L. 572, n. 91. Kane v. Erie R. Co. [C. C. A.] 133 F. 681. The public policy of a state can be found in, and is predicated solely on the constitution and laws of that state. Langmuir v. Landes, 113 Ill. App. 134.

25. See 3 C. L. 736, n. 77. Primary election law. Hopper v. Stack, 69 N. J. Law, 562, 56 A. 1. Cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power. Russ v. Commonwealth [Pa.] 60 A. 169; State v. Moore [Ark.] 88 S. W. 881. The judiciary cannot supplant the judgment of the legislature with its own. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544. Cannot review discretionary act of legislature in changing boundaries of judicial districts. People v. Rose, 203 Ill. 46, 67 N. E. 746.

26. See 3 C. L. 736, n. 78.

27. See 3 C. L. 736, n. 79. A division of the state by the legislature into legislative districts which complies with the constitutional requirements cannot be overturned by the courts simply because the apportionment might have been more nearly equal if slightly different. People v. Carlock, 198 Ill. 150, 65 N. E. 109.

28. See 3 C. L. 736, n. 80.

29. Davidson v. Wilthaus, 94 N. Y. S. 428.

30. See 3 C. L. 736, n. 82, 83. Ely v. Willard, 15 Ohio Dec. N. P. 318, 2 Ohio N. P. (N. S.) 571; Wright v. Hart, 103 App. Div. 218, 93 N. Y. S. 60; State v. Kelly [Kan.] 81 P. 450. Legislative enactments are presumed to be constitutional unless the contrary clearly appears. Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 P. 296; State v. Tingey, 24 Utah, 225, 67 P. 33; State v. Lewis, 26 Utah, 120, 72 P. 388. Where the question of the validity of a statute involves the consideration of many facts and a determination of a question of fact, nothing less than a certainty that the legislature was wrong, will suffice to overthrow the law. Commonwealth v. Interstate Consol. St. R. Co. [Mass.] 73 N. E. 530.

31. See 3 C. L. 736, n. 84, 85. People v. Rose, 203 Ill. 46, 67 N. E. 746; State v. Tower, 185 Mo. 79, 84 S. W. 10; State v. Moore [Ark.] 88 S. W. 881. Especially where a state statute is assailed in a Federal court on the ground of its repugnacy to the state constitution. Kane v. Erie R. Co. [C. C. A.] 133 F. 681.

32. See 3 C. L. 736, n. 86. Peope v. Wells [N. Y.] 73 N. E. 1025; Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467; Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3; State v. Kelly [Kan.] 81 P. 450; Standard Oil Co. v. Commonwealth, 26 Ky. L. R. 985, 82 S. W. 1020. A statute will not unnecessarily be given a retroactive effect where the result would be to invalidate it as impairing the obligation of contracts (Condon v. Eureka Springs, 135 F. 566), or interfering with vested rights (King v. Irving, 92 N. Y. S. 1094; Investment Co. v. Hambach, 37 Wash. 629, 80 P. 190). In Rev. St. § 2813, providing for the per diem of county commission-

and the constitution will be liberally construed in favor of the validity of legislative action;[33] but the court cannot give a statute for the purpose of sustaining it a construction which its language forbids.[34] A statute unobjectionable but for an unjust exemption or discrimination may be sustained by extending the exemption to all persons.[35] The validity of a statute is to be tested, not by what may possibly be attempted, but by what it authorizes to be done.[36]

A statute containing invalid provisions yields only to the extent of its repugnancy to the constitution,[37] and a part may be unconstitutional without rendering the whole statute bad,[38] if the invalid part is so independent of the remainder that it may be eliminated without rendering the whole ineffective,[39] unless the invalid portion was manifestly the inducement for the passage of the remainder.[40] The presumptions, however, favor the unconstitutionality of the remaining portions,[41] and where the unconstitutional portion is essentially and inseparably connected in substance with that which is constitutional, the whole must be rejected.[42]

Scope of Federal and state power.[43]—The government of the United States exercises only granted powers,[44] while the state legislatures exercise all powers not expressly prohibited by the Federal or state constitution.[45] A grant of power implies also the grant of all others necessary to make it effectual.[46]

ers, the word "such" before the word "county" should read "each" so as to make the law general and hence constitutional. The word "such" held to have crept in by error. State v. Carlisle, 2 Ohio N. P. (N. S.) 637, 15 Ohio Dec. 287. A statute making failure of corporations to make reports evidence of nonuser will be construed as relating merely to a prima facie case, since to hold that it was meant to be conclusive evidence would invalidate the statute. People v. Rose, 207 Ill. 352, 69 N. E. 762. A statute requiring the supreme court to weigh the evidence on appeal and give judgment according to the right of the matter will not be construed as conferring the right to trial de novo on appeals. Parkinson v. Thompson [Ind.] 73 N. E. 109.

33. State v. Kelly [Kan.] 81 P. 450.

34. City of Austin v. Cahill [Tex.] 88 S. W. 542. Plumber's act. Schnaier v. Navarre Hotel & Importation Co. [N. Y.] 74 N. E. 561. Peddlers' license law. Ex parte Deeds [Ark.] 87 S. W. 1030. Where the legislature distinctly refuses to limit an act prohibiting the shipment of "any shad fish" beyond the limits of the state to fish caught within the state, the court cannot do so for the purpose of sustaining the act. McDonald v. Southern Exp. Co., 134 F. 282.

35. Liquor law exempting sales of wine and cider by citizens of the state extended to all. State v. Scampini [Vt.] 50 A. 201.

36. City of Beatrice v. Wright [Neb.] 101 N. W. 1039. The essential validity of a law is to be tested not by what has been done under it but by what may by its authority be done. In re Grout, 34 Civ. Proc. R. 231, 93 N. Y. S. 711. Where the validity of a statute depends upon the power of the legislature to enact it, its validity must be tested by what might be done under its color and not by what has been done. State v. Stark County [N. D.] 103 N. W. 913. Statutes cannot be declared invalid on the ground that the officers acting under them fail to perform the duty which the statutes impose. Michigan Railroad Tax Cases, 138 F. 223.

37. See 3 C. L. 737, n. 89.

38. State v. Scampini [Vt.] 59 A. 201; State v. Robb [Me.] 60 A. 874; Sterling v. Bowling Green, 26 Ohio C. C. 581, 5 Ohio C. C. (N. S.) 217; St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786. Bucket shop act. State v. McGinnis [N. C.] 51 S. E. 50.

39. See 3 C. L. 737, n. 90. Wheelwright v. Boston [Mass.] 74 N. E. 937; Tite v. State [Tenn.] 88 S. W. 941. Liquor law. State v. Scampini [Vt.] 59 A. 201. If the objectionable feature be not so important to the legislative design as to warrant the opinion that the scheme would not have been authorized without it. Albright v. Sussex County Lake & Park Commission [N. J. Err. & App.] 59 A. 146.

40. See 3 C. L. 737, n. 91. McDonald v. Doust [Idaho] 81 P. 60. If a repealing act is itself invalid as to its principal purpose, the repeal will not be affective. McGonnell's License, 24 Pa. Super. Ct. 642.

41. See 3 C. L. 737, n. 92.

42. See 3 C. L. 737, n. 93. Statute changing time of holding judicial elections. State v. Galusha [Neb.] 104 N. W. 197. P. L. 1901, p. 333, to acquire rights of fishing, etc. Eminent domain provision vitiates whole act. Albright v. Sussex County Lake and Park Commission [N. J. Err. & App.] 59 A. 146. Ordinance restrictive of bill board advertising, held void. City of Chicago v. Gunning System, 114 Ill. App. 377. Garbage ordinance. Bauer v. Casey, 26 Ohio C. C. 598, 6 Ohio C. C. (N. S.) 69. Act abolishing county. McDonald v. Doust [Idaho] 81 P. 60. Scheme to prohibit ticket scalping held void in toto. Texas & P. R. Co. v. Mahaffey [Tex.] 84 S. W. 646.

43. See 3 C. L. 738.

44. See 3 C. L. 738, n. 98.

45. See 3 C. L. 738, n. 99. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544; McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. The compensation of judges may be increased during in-

The court cannot consider evidence aliunde,[47] but is confined to the consideration of the law itself, and the material facts of which the court can take judicial notice.[46]

Where the words of a statute are plain,[49] no construction is permissible.[50] Every word must be given its due force and effect,[51] and all parts construed together and harmonized,[52] with all other statutes in pari materia if possible.[53] A construction leading to an absurdity [54] or that would aid evasions of the statute is not favored.[55]

A statute copied from a similar statute of another state[56] is presumed to be adopted with reference to its prior construction, but the presumption is not conclusive,[57] and is never indulged where the same statute exists in several states and has been varyingly interpreted.[58]

A proviso[59] is considered strictly and takes no case out of the enacting clause not fairly within its terms.[60]

The title is ordinarily no part of a statute.[61]

The punctuation of an act [62] is not controlling.

A statute passed in contravention of the constitution is void,[63] and can be the basis of no rights,[64] legal or moral, against either an individual or the state,[65]

cumbency. Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961. Qualifications may be increased as to offices legislature is empowered to establish. Sheehan v. Scott, 145 Cal. 684, 79 P. 350. Exemption of railroads from taxation for a limited period is not an excess of legislative power where not expressly denied. Bennett v. Nichols [Ariz.] 80 P. 392. So far as the duties of county officers are not prescribed by the constitution, they may be by the legislature. Missouri River Power Co. v. Steele [Mont.] 80 P. 1093.

46. See 3 C. L. 738, n. 20.

47. See 3 C. L. 739.

48. State v. Kelly [Kan.] 81 P. 450; Tenement House Department of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231. Courts will take notice of whatever is generally known within the limits of their jurisdiction, and if the judges memory is at fault, he may refresh it by resorting to any means for that purpose which he deems safe and proper. This extends to such matters of science as are involved in the cases brought before him. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, citing cases. The history of the times, the country and its topography and general conditions, and the general state of opinion, public, judicial and legislative, may be considered. McDonald v. Doust [Idaho] 81 P. 60; State v. Kelly [Kan.] 81 P. 450. The proceedings of the legislature may be looked to when the legislative intent is in doubt. McDonald & Johnson v. Southern Exp. Co., 134 F. 282; McDonald v. Doust [Idaho] 81 P. 60; State v. Kelly [Kan.] 81 P. 450. Rejection of amendment that would have removed constitutional objection. McDonald v. Southern Exp. Co., 134 F. 282. Defeat of prior bill accomplishing all constitutional purposes in subsequently enacted bill. McDonald v. Doust [Idaho] 81 P. 60. Legislative policy may be looked to. City of Austin v. Cahill [Tex.] 88 S. W. 542.

49. See 3 C. L. 739.

50. See 3 C. L. 739, n. 7. State v. Kelly [Kan.] 81 P. 450. The rule that statutes are to be given a prospective rather than a retrospective operation is, like other rules of interpretation, resorted to for the purpose of giving effect to the presumed and reasonably probable intention of the legislature when the terms of the statute do not of themselves make the intention clear, and cannot be invoked to change or defeat the intention when it is made obvious or certain by the terms of the statute. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434; Schauble v. Schulz [C. C. A.] 137 F. 389.

51. See 3 C. L. 739 n. 8. City of Denver v. Campbell [Colo.] 80 P. 142.

52. See 3 C. L. 739 n. 9. City of Denver v. Campbell [Colo.] 80 P. 142; State v. Kelly [Kan.] 81 P. 450.

53. See 3 C. L. 739, n. 10. Russ v. Commonwealth [Pa.] 60 A. 169; Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74.

54. See 3 C. L. 759, n. 11-13. Parkinson v. Thompson [Ind.] 73 N. E. 109. An act relating to the salaries of judges of the supreme court will not be construed to give those commissioned after its passage a larger compensation than those commissioned before unless unavoidable. Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961. A law applying to cities of 100,000 inhabitants will be construed to mean over that number and not merely to cities containing exactly that number. State v. Tower, 185 Mo. 79, 84 S. W. 10.

55. State v. Hand [N. J. Law] 58 A. 641.

56. See 3 C. L. 739, n. 14.

57. See 3 C. L. 739, n. 15.

58. See 3 C. L. 739, n. 16.

59. See 3 C. L. 739, n. 17.

60. Towson v. Denson [Ark.] 86 S. W. 661.

61. See 3 C. L. 739, n. 18.

62. See 3 C. L. 740, n. 24.

63. See 3 C. L. 740.

64. Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961; Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

though a statute colorably valid may be color of authority for acts done under it until its unconstitutionality is esablished by direct attack.[66] A state officer may refuse to act under a law which he deems unconstitutional and thereby secure judicial interpretation of it.[67]

§ 4. *Executive, legislative and judicial functions.*[68]—Under the three phased form of government common to American constitutions, each branch is supreme in its particular division.[69]

(§ 4) *A. Executive functions.*[70]—The pardoning power is an executive function which may not be invaded by the legislature,[71] and neither legislative nor judicial powers may be conferred upon executive officers.[72]

(§ 4) *B. Legislative functions.*[73]—A legislature cannot fetter a subsequent one.[74] State legislatures have all the powers not expressly or by necessary implication withheld by the state or Federal constitution.[75] Congress has the right to delegate to state legislatures the right to make additional regulations concerning mining locations.[76] It being within the power of the legislature to prescribe the formalities necessary to the formation of a corporation, it can legalize one whose organization was defective through failure to comply with those requirements.[77] Legislative power cannot be delegated,[78] except that municipalities may

65. Invalid statute authorizing beet sugar bounty. Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80. A bond given by a contractor because required by an unconstitutional statute cannot be upheld as a valid common-law obligation. Montague & Co. v. Furness, 145 Cal. 205, 78 P. 640.

66. A statute colorably valid authorizing an extension of the boundaries of a municipal corporation cannot be attacked in a proceeding to punish an inhabitant for violating an ordinance. City of Topeka v. Dwyer [Kan.] 78 P. 417, citing many cases. In Ohio a statute commanding a duty of a public officer and providing for compensation therefor will be regarded as valid and operative until declared unconstitutional by a court of competent jurisdiction, and compensation paid him thereunder for services actually performed cannot be recovered back. State v. Carlisle, 2 Ohio N. P. (N. S.) 637, 15 Ohio Dec. 287. A contract entered into by a municipality under a statute subsequently declared unconstitutional but which is not otherwise ultra vires, illegal or malum prohibitum will be enforced on the principle of estoppel where an estoppel would be applied to a natural person in a similar case. City of Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515.

67. Salary law. Commonwealth v. Mathues, 210 Pa. 372. 59 A. 961.

68. See 3 C. L. 740.

69. Primarily elections belong to the political branch of the government and the judiciary have no control over them. McWhorter v. Door [W. Va.] 50 S. E. 838. The judiciary has no power to revise even the most arbitrary and unfair action of the state senate in expelling one of its members. French v. Senate of State, 146 Cal. 604, 80 P. 1031. The legislature having adjourned can be called together again only by the governor. Judiciary cannot do it, even to enforce an order. Id.

70. See 3 C. L. 740.

71. A law providing for commutation of sentences is not an invasion of the pardoning power. Fite v. State [Tenn.] 88 S. W. 941.

72. An act making the supervisor of building and loan associations ex officio supervisor of tontine contract associations, and giving him visitorial powers, confers neither legislative nor judicial powers upon him. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075. Factory inspection law held not to impose legislative or judicial duties on inspectors. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

73. See 3 C. L. 740.

74. See 3 C. L. 740, n. 36. Davidson v. Witthaus, 94 N. Y. S. 428.

75. May attend patriotic celebration at state expense. Russ v. Commonwealth [Pa.] 60 A. 169. Limitations upon the legislative power are to be sought for in the constitution, and if not found there they do not exist. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544. The legislature, subject only to the limitations of evidence expressly enshrined in the constitution, has entire control over the rules of evidence, and by statutory enactments may alter, change or create them anew. Tift v. Southern R. Co., 138 F. 753.

76. Butte City Water Co. v. Baker, 196 U. S. 119, 49 Law. Ed. 409.

77. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

78. Statute awarding a penalty cannot place it in the power of the plaintiff to determine the amount. Cigar Makers' International Union v. Goldberg [N. J. Err. & App.] 61 A. 457. Appropriation of money for "permanent street improvements" held not invalid as indefinite. Hett v. Portsmouth [N. H.] 61 A. 596. An ordinance providing that vehicles used for the sale of oil shall be provided with drip pans approved by the commissioner of public works does not confer legislative power on him. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Statute authorizing insurance commission to fix terms of standard insurance policy is void. King v. Concordia Fire

be given power over matters of purely local concern.[79] Local option laws are upheld.[80] The fixing of parish boundary lines is a legislative function,[81] and the public policy involved in apportioning representation in the state legislature, within the constitutional limits, is exclusive of legislative cognizance.[82]

(§ 4) *C. Judicial functions.*[83]—Judicial duties may not be imposed on nonjudicial officers,[84] nor nonjudicial duties on the judiciary.[85] Court will not sit merely to give advice,[86] and have no power to control the exercise of the judgment and discretion reposed by law in executive officers,[87] or the legislature.[88] The

Ins. Co. [Mich.] 12 Det. Leg. N. 160, 103 N. W. 616. The banking law providing that reports shall be made to the bank examiner as he may direct does not confer legislative power on him. State v. Struble [S. D.] 104 N. W. 465. Law regulating practice of dentistry held not invalid, as conferring legislative power on dental examining board. In re Thompson, 36 Wash. 377, 78 P. 899. A law delegating the power to the workhouse commissioners to commute sentences for good behavior in their discretion is invalid. Fite v. State [Tenn.] 88 S. W. 941. Power of congress to delegate to the board of medical supervisors of the District of Columbia authority to determine what shall constitute "unprofessional or dishonorable conduct" in a medical practitioner, **quaere.** Czarra v. Board of Medical Sup'rs, 24 App. D. C. 251.

79. Police regulations. Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648.

80. Liquor laws. State v. Scampini [Vt.] 59 A. 201; McGonnell's License, 24 Pa. Super. Ct. 642, holding otherwise rvd. 209 Pa. 327, 58 A. 615; State v. Barber [S. D.] 101 N. W. 1078. The provision of the Brannock Law (97 O. L. 87), whereby forty per cent. of the voters of a resident district may fix the boundaries of the district, is not an invasion of legislative power. Ely v. Willard, 15 Ohio N. P. 318, 2 Ohio N. P. (N. S.) 571.

Stock laws. Davis v. State [Ala.] 37 So. 154; Ormond v. White [Miss.] 37 So. 834.

81. But the courts have jurisdiction over a controversy as to which of two lines the statute was intended to adopt. Parish of Caddo v. De Soto [La.] 38 So. 273; Parish of Caddo v. Red River [La.] 38 So. 274.

82. Butler v. Stephens [Ky.] 84 S. W. 745.

83. See 3 C. L. 743.

84. A statute vesting in jury commissioners appointed by the governor, the power previously exercised by the sheriff of selecting jurors is not an encroachment on the judiciary. State v. McNay [Md.] 60 A. 273; State v. Aspara, 113 La. 940, 37 So. 883. Judicial power is not conferred on an auditor and chief of police by an ordinance which provides that if the former is not satisfied with the description of vehicles furnished by an applicant for a vehicle license, the matter shall be referred to the latter for examination and report. Sterling v. Bowling Green, 26 Ohio C. C. 581, 5 Ohio C. C. (N. S.) 217. A law requiring the assessing officers to levy a penalty against landowners failing to clean streams thereon is an invasion of the judiciary. Cleveland, etc., R. Co. v. People, 212 Ill. 551, 72 N. E. 725. A statute limiting the evidence of the capacity of a testator in the first instance to the witnesses of the will does not confer judicial power on them. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090. An ordinance providing that a license granted under it may be revoked by the mayor on proof of a violation of an ordinance does not confer judicial power on the mayor. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Statute regulating instalment investment companies held not to confer judicial powers on the state banking board. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. A statute providing for the cancellation of a lease of state lands procured by fraud, etc., does not confer judicial powers on the land commission. American Sulphur & Min. Co. v. Brennan [Colo. App.] 79 P. 750. Judicial duties are not conferred on a city council by an ordinance empowering it to assess omitted property on five days' notice. Muir's Adm'r v. Bardstown [Ky.] 87 S. W. 1096.

85. See 3 C. L. 743, n. 72. Statute empowering judges to fix salary of county surveyor. State v. Rogers, 71 Ohio St. 203, 73 N. E. 461. Statute empowering judges to fix salaries of county surveyors is void. Id. An act authorizing the court to detach unplatted farm lands from cities and villages does not confer legislative powers upon the judiciary. Village of Grover Hill v. McClure, 6 Ohio C. C. (N. S.) 197, 27 Ohio C. C. 376; Town of Ormond v. Shaw [Fla.] 39 So. 108. A statute giving boards of supervisors the right to regulate the taking of fish and game within their respective counties does not confer legislative functions on a judicial body, since the supervisors are not strictly speaking a judicial body. Ex parte Fritz [Miss.] 38 So. 722. The review of a special assessment is a matter of judicial procedure that may properly be imposed on the chancery court. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

86. Election matters. In re Election Court, 204 Pa. 92, 53 A. 784.

87. Cohn v. Townsend, 94 N. Y. S. 817.

88. A legislative determination that dense smoke is a nuisance does not invade the judiciary. State v. Tower, 185 Mo. 79, 84 S. W. 10. Where special acts are authorized when necessary, the necessity is a matter of legislative discretion uncontrollable by the courts. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Where the legislature with the consent of a city has provided for the erection of a monument in a public square, the court cannot interfere on the ground that the square is not a proper place for it. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550. A

constitutional jurisdiction of the constitutional courts cannot be interferred with by the legislature,[89] though rules of procedure, not interferring with the course of justice, may be prescribed.[90] The power to punish contempt summarily is incident to courts of record,[91] and is beyond the control of the legislature,[92] though the legislature may regulate it.[93] The legislature may declare in a statute the sense in which it used certain words therein contained.[94]

§ 5. *Relative powers of Federal and state or other subordinate governments.*[95]—Where there is a conflict between a state statute and a statute passed by the congress acting within its granted powers, the former must yield. Thus the Federal statutes respecting bankruptcy[96] and patents[97] supercede that state statutes on the same subject. These[98] and the regulation of commerce,[99] recognition of foreign judgments,[1] extradition,[2] treaties,[3] import duties,[4] and other matters of Federal administration and regulation, are discussed in separate topics.

§ 6. *Police power in general.*[5]—None of the provisions of the state and Federal constitutions protective of personal and property rights[6] are intended to interfere with the exercise of the police power by the states,[7] since all property and

provision that there shall be at least two terms of court in each county is only directory to the legislature and confers no power on the supreme court to declare void a statute organizing a court and not complying with the provision, nor is the judiciary empowered otherwise to enforce the provision. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786.

89. Cannot abridge or enlarge the original jurisdiction of the supreme court. Leppel v. Garfield County Dist. Ct. [Colo.] 78 P. 682. The legislature of Indiana cannot confer original jurisdiction on the supreme court in cases in which under the constitution it has only appellate jurisdiction. Parkinson v. Thompson [Ind.] 73 N. E. 109. The legislature can restrict the jurisdiction of the supreme court of Louisana but cannot enlarge it. State v. Judge of First Dist. Ct., 113 La. 654, 37 So. 546. Cannot take away any of the criminal jurisdiction of the district courts. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786. A statute providing for the confinement in the insane asylum of persons acquitted of capital felonies on the ground of insanity and prohibiting their release except by act of the legislature is unconstitutional as an interference with the power of the courts to inquire into the legality of restraint. In re Boyett, 136 N. C. 415, 48 S. E. 789.

90. The legislature may declare what shall be prima facie, but not what shall be conclusive evidence of a fact. Failure to report as evidence of non-user of a corporate franchise. People v. Rose, 207 Ill. 352, 69 N. E. 762. Legislature may limit evidence of capacity of testator in first instance to testimony of witnesses to the will. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090. Prima facie evidence of wagering contract. Margins. State v. McGinnis [N. C.] 51 S. E. 550. While the legislature may prescribe rules of procedure and pleading by which both courts and parties are bound, it cannot encroach on judicial domain by prescribing the manner and mode in which the courts shall discharge their judicial duties. Parkinson v. Thompson [Ind.] 73 N. E. 109. Statutes cannot take from the courts the right to hear preferred causes according to the circumstances of each particular case. Riglander v. Star Co., 98 App. Div. 101, 34 Civ. Proc. R. 92, 90 N. Y. S. 772.

91. O'Neil v. People, 113 Ill. App. 195; Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

92. O'Neil v. People, 113 Ill. App. 195. Courts have the inherent power to command respect for their processes, and the legislature cannot abridge, limit or take away such power, either directly or indirectly, by undertaking to regulate the procedure. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

93. Drady v. District Court of Polk County, 126 Iowa, 345, 102 N. W. 115.

94. Getz v. Brubaker, 25 Pa. Super. Ct. 303.

95. See 3 C. L. 746.

96. Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206.

97. A statute limiting the negotiability of notes given for patented articles and patent rights is not in conflict with the provision of the Federal constitution regarding patents. Woods v. Carl [Ark.] 87 S. W. 621.

98. See Bankruptcy, 3 C. L. 434; Patents, 4 C. L. 929.

99. See Commerce, 3 C. L. 711.

1. See Foreign Judgments, 3 C. L. 1466.

2. See Extradition, 3 C. L. 1414.

3. See Treaties, 4 C. L. 1697.

4. See Customs Laws, 3 C. L. 990.

5. See 3 C. L. 746. Definitions of police power. State v. Robb [Me.] 60 A. 874; State v. Brown, 37 Wash. 97, 79 P. 635; Sanders v. Williams [Or.] 80 P. 642.

6. The bills of rights in American constitution introduce nothing new into the law but merely secure old principles against abrogation or violation. State v. French, 71 Ohio St. 186, 73 N. E. 216.

7. See 3 C. L. 746, n. 19. State v. French, 71 Ohio St. 186, 73 N. E. 216; State v. Robb [Me.] 60 A. 874. Municipalities cannot contract away the right to exercise their police powers. City of Rochester v. Rochester R. Co. [N. Y.] 74 N. E. 953.

personal rights are held subject to that power,[8] and hence any statute or ordinance, the sole object and general tendency of which is to protect the public health,[9] safety,[10] or morals,[11] or promote the welfare of the community at large,[12] is valid

8. See 3 C. L. 746, n. 20. State v. Durein [Kan.] 80 P. 987. Tenement House Dep't v. Moeschen, 179 N. Y. 325, 72 N. E. 231. All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. State v. Robb [Me.] 60 A. 874.

9. See 3 C. L. 748, n. 44. A requirement that children shall be vaccinated as a condition of attending the public schools is proper. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97. See, also, Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643. See 3 C. L. 748, n. 58. Reasonable municipal regulations for the purpose of promoting the health of the citizens are clearly within the police power of the state. Regulations for collection of garbage. State v. Robb [Me.] 60 A. 874; City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265. Smoke nuisances may be prohibited. Glucose Refining Co. v. Chicago, 138 F. 209; State v. Tower, 185 Mo. 79, 84 S. W. 10. Statutes may prohibit treatment of disease for a fee except by duly authorized and licensed persons. State v. Marble [Ohio] 73 N. E. 1063; Territory v. Newman [N. M.] 79 P. 706. Statutes prohibiting sale of impure milk and fixing a standard are sustained. People v. Bowen [N. Y.] 74 N. E. 489. The practice of dentistry may be regulated. In re Thompson, 36 Wash. 377, 78 P. 899; State v. Brown, 37 Wash. 97, 79 P. 635; Wilson v. Com., 26 Ky. L. R. 685, 82 S. W. 427. Hours of labor in mines, smelters and reduction mills may be regulated. Ex parte Kair [Nev.] 80 P. 463. See 3 C. L. 748, n. 54. Vaccination may be required. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643. Drainage systems may be installed. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 Law. Ed. 831.

NOTE. Eight hour law. Health regulations: Application for habeas corpus to be discharged from imprisonment for violation of St. of 1903, p. 33, c. 10, making it a penal offense for any man to work more than eight hours a day in underground mines, smelters and all institutions for the reduction or refining of ores and metals. Petitioner contends that the law contravenes the constitutional provision guaranteeing the right to acquire and possess property and the fourteenth amendment of the United States constitution. Held, that the law was sustainable under the police power of the state. Ex parte Kair [Nev.] 80 P. 463.

A number of interesting cases have arisen lately in many of the states in regard to the constitutionality of the eight-hour laws, and the decisions are not harmonious. Eight-hour laws, applied indiscriminately to all trades, are seemingly unreasonable, and the numerous authorities holding them void are supported by strong arguments; but, when they are to apply to workmen in underground works or other obnoxious places or to women or children, another proposition confronts us. The state may within its police power look after the health, safety and comfort of its citizens. This has been recognized in many states by upholding the validity of statutes like the present. State v. Holden, 14 Utah, 71; Id., 96, 37 L. R. A. 108, afd. Holden v. Hardy, 169 U. S. 366, 42 Law. Ed. 780; State v. Cantwell, 179 Mo. 245; State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 59 L. R. A. 342; In re Boyce, 27 Nev. 299, 65 L. R. A. 47; Com. v. Hamilton Mfg. Co., 120 Mass. 383; Atkin v. Kansas, 191 U. S. 207, 48 Law. Ed. 148. The only state, perhaps, that holds the eight-hour law, as applied to miners, invalid, is Colorado. In re Eight-Hour Bill, 21 Colo. 29; In re Morgan, 26 Colo. 415, 77 Am. St. Rep. 269, 47 L. R. A. 52. This last case holds that the decision of the United States supreme court on the constitutionality of eight-hour laws is not binding upon the state courts.—3 Mich. L. R. 663.

10. See 3 C. L. 749, n. 59. A statute modifying the rule of fellow-servant as applied to the servants of the owners of railroads is within the police power of the state. Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147; Kane v. Erie R. Co. [C. C. A.] 133 F. 681; International & G. N. R. Co. v. Still [Tex. Civ. App.] 88 S. W. 257. See 3 C. L. 747, n. 32. It is a reasonable exercise of the police power to require a railroad company to keep a watchman at its own expense at a dangerous crossing. Not where the crossing is in open country and there is no evidence to show to what extent it is frequented. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 205. Automobile regulation is valid. Christy v. Elliott [Ill.] 74 N. E. 1035; State v. Cobb [Mo. App.] 87 S. W. 551. The speed of automobiles may be regulated, and reasonable safety appliances required; but a municipality cannot require a private user of the street to take out a license before he can use an automobile thereon. City of Chicago v. Banker, 112 Ill. App. 94. License ordinance for automobile sustained. People v. Schneider [Mich.] 103 N. W. 172. Ordinance restrictive of bill board advertising held oppressive. City of Chicago v. The Gunning System, 114 Ill. App. 377. An ordinance regulating the sale of oil from vehicles is valid. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Storage of oils may be licensed. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. Railroad crossings may be required to be reduced to grade. Houston & T. C. R. Co. v. Dallas [Tex.] 84 S. W. 648. The operation of street cars may be regulated. Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648.

11. See 3 C. L. 749. There is no question but the state in the exercise of its police powers may prohibit or regulate in any manner that seems to it proper the traffic in intoxicating liquors. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016; McLaury v. Watelsky, 13 Tex. Ct. Rep. 404, 87 S. W. 1045; State v. Durein [Kan.] 80 P. 987. See 3 C. L. 749, n. 71, 72. A statute regulating liquor traffic is not invalid because of the discretion vested in probate judges in the matter of granting permits

and enforceable, though it may incidentally interfere with liberty [13] or property,[14] but neither the legislature nor a municipality can under the guise of regulation

to sell for medical, mechanical and scientific purposes. State v. Durein [Kan.] 78 P. 152; Newman v. Lake [Kan.] 79 P. 675. Law empowering city to license places within four miles of its limits. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544. Females may be prohibited from entering saloons for immoral purposes or to buy or be treated or to wait upon customers. State v. Nelson [Idaho] 79 P. 79. An ordinance prohibiting the sale of liquors in any side room, etc., is valid. Sandys v. Williams [Or.] 80 P. 642. Common occupations which from their nature afford unusual opportunity for fraud may be regulated. Sale of seed cotton. Bazemore v. State, 121 Ga. 619, 49 S. E. 701. See 3 C. L. 750, n. 75. Law invalidating sales of merchandise in bulk unless certain formalities are complied with is valid. Wright v. Hart, 93 N. Y. S. 60. **Contra:** Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854. See 3 C. L. 750, n. 76. Hawking and peddling may be licensed. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384; Murphy v. Columbus, 2 Ohio N. P. (N. S.) 484, 15 Ohio N. P. 60. A statute prohibiting all hawking and peddling in a certain county (Warden's License, 24 Pa. Super. Ct. 75), or district is proper (Ex parte Camp [Wash.] 80 P. 547). Dealing in margins may be prohibited. Such a statute does not conflict with the fourteenth amendment. Weare Commission Co. v. People, 111 Ill. App. 116; State v. McGinniss [N. C.] 51 S. E. 50. A statute conferring jurisdiction on the court of quarter sessions to restrain the further selling of oleomargarine without a license is a proper exercise of the police power. Commonwealth v. Andrews, 24 Pa. Super. Ct. 571. An ordinance giving the marshal a right to enter any public resort and providing punishment for resistance is valid. People v. Croot [Colo. App.] 78 P. 310. Tontine and cumulative investment companies may be regulated. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075.

12. A statute authorizing a railroad company which has acquired more than three-fourths of the stock of a company owning a connecting line to condemn the remainder on a finding that it will be for the public interest is within the power of the legislature. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510. A statute prohibiting delay by carriers in the shipment of freight and providing a penalty for its violation is a proper exercise of the police power. Lexington Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801. A statute enforcing the duty of railroad companies to furnish cars is proper. Houston & T. C. R. Co. v. Mayes [Tex. Civ. App.] 83 S. W. 53. A municipality has authority under its general police power to impose an annual tax upon each street car run or operated on any street in the city. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77. Statutes for the protection of fish and game are sustained. State v. French, 71 Ohio St. 186, 73 N. E. 216; State v. Nergaard [Wis.] 102 N. W. 899; Ex parte Fritz [Miss.] 38 So. 722; State v. Mallory [Ark.] 83 S. W. 955. As a police regulation in the interests of education the law may require street railway companies to permit pupils of the public schools to ride to school on their cars without profit to the companies, provided it can be done without causing them loss. Commonwealth v. Interstate Consol. St. R. Co. [Mass.] 73 N. E. 530. The business of banking may be regulated. State v. Struble [S. D.] 104 N. W. 465. The keeping of live stock is under the police regulation of the state and such police regulation extends over the public lands of the United States within the state. Spencer v. Morgan [Idaho] 79 P. 459. Public meetings on streets may be regulated. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. Trusts and combinations in restraint of trade may be prohibited. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455; Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. The legislature may protect from waste the natural resources of the state which are the common heritage of all. Natural gas. Commonwealth v. Trent, 25 Ky. L. R. 1180, 77 S. W. 390. State factory inspection law held valid. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

Combinations to inflict malicious mischief may be prevented. Combinations to ruin business. Aikens v. Wisconsin, 195 U. S. 194, 49 Law. Ed. 154. A secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed without any merger of interests through partnership or incorporation, is one to which the police power extends. Smiley v. Kansas, 196 U. S. 447, 49 Law. Ed. 546. The due process clause does not deprive states of the right to administer on the estates of absentees. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125.

Validity of **regulations of domestic and foreign corporations,** see Clark and M. Corp. §§ 268-272, 845.

13. Law requiring vaccination as condition of attending public school. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97. Ordinance giving one person a monopoly of a certain business. Garbage monopoly. State v. Robb [Me.] 60 A. 874.

14. Where the sole object and general tendency of legislation is to promote the public health, there is no invasion of the constitution, even if the enforcement of the law interferes to some extent with liberty or property. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, citing Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 38 Am. St. Rep. 788, 25 L. R. A. 794; People v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 52 Am. St. Rep. 707, 31

arbitrarily invade personal or property rights,[15] and all regulations of this sort to be sustained must be reasonable,[16] and have a fair tendency to produce the result sought.[17] The power may be delegated to municipalities.[18]

§ 7. *Liberty of contract,*[19, 20] *and right of property* [21] *cannot be invaded, except as reasonably necessary for the public welfare.*

L. R. A. 689; People v. Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689; People v. Lochner, 177 N. Y. 145, 69 N. E. 373.

See 3 C. L. 747, n. 22. Garbage ordinance. State v. Robb [Me.] 60 A. 874. Law requiring removal of school sinks from tenement houses and substitution of water closets. Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231. Ordinance prohibiting storage of oils within corporate limits. City of Crowley v. Ellsworth [La.] 38 So. 199.

15. See 3 C. L. 747, n. 21. Lochner v. New York, 198 U. S. 45, 49 Law. Ed. 937. An ordinance prohibiting the trading stamp business has no just relation to the public welfare. Ex parte Hutchinson, 137 F. 949; Ex parte Hutchinson, 137 F. 950; People v. Zimmerman, 102 App. Div. 103, 92 N. Y. S. 497; City Council of Montgomery v. Kelly [Ala.] 38 So. 67. Ordinance restrictive of bill board advertising held oppressive. City of Chicago v. The Gunning System, 114 Ill. App. 377. A license cannot be required by a city of automobile users. City of Chicago v. Banker, 112 Ill. App. 94. Plumbers' act held invalid for requiring all members of a firm carrying on business to be registered. Schnaier v. Navarre Hotel & Importation Co. [N. Y.] 74 N. E. 561. A license may not be required of one who "may own, run or manage" a dental office. State v. Brown, 37 Wash. 97, 79 P. 635. The business of horse shoeing is not subject to regulation. In re Aubrey, 36 Wash. 308, 78 P. 900. An ordinance making it an offense for a female to enter or be permitted to enter a saloon for any purpose whatever is unreasonable. State v. Nelson [Idaho] 79 P. 79. An ordinance that deprives the owner of his property in a dead animal immediately on its death without reference to whether it is dangerous to public health is unreasonable. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265.

Interstate commerce cannot be interferred with under the guise of the police power. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455. Arbitrary extension of limits within which gas works are prohibited while works are in process of construction on property bought for that purpose evidently to perpetuate a monopoly. Dobbins v. Los Angeles, 195 U. S. 223, 49 Law. Ed. 169; Daly v. Elton, 195 U. S. 242, 49 Law. Ed. 177. It is not competent either for the legislature or for a municipality, under the guise of the exercise of the police power, to impose unequal burdens upon individual citizens. Act of congress requiring removal of snow and ice from the sidewalks of the District of Columbia by the **occupants** of improved property. McGuire v. District of Columbia, 24 App. D. C. 22. A legislative determination as to what is necessary to protect public health unless clearly oppressive and without relation to the mischief intended to be corrected is conclusive on the courts. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643.

16. State v. Robb [Me.] 60 A. 874; City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265. The only question that can be raised respecting a license fee imposed under the police power is whether it is reasonable. Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544. The burden is on the party assailing it to show that it is unreasonable. Kittanning Borough v. Kittanning Consolidated Nat. Gas Co., 26 Pa. Super. Ct. 355. The question is primarily for the legislature and ultimately for the courts. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016. It is not the hardship of the individual case that determines the reasonableness of a police regulation, but rather its general scope and effect in protecting the health and promoting the welfare of the community at large. Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231. A fine of not less than $25 nor more than $200, or imprisonment not less than ten nor more than sixty days for violating an ordinance prohibiting the entertainment of women in saloons is not unreasonable. State v. Nelson [Idaho] 79 P. 79. An ordinance prohibiting public meetings on the streets except as authorized by municipal authority is not unreasonable. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. Fee for factory inspection held reasonable. State v. Vickens, 186 Mo. 103, 84 S. W. 908.

17. The true purpose of the police power is the preservation of the health, morals and safety of the community, and a law or ordinance interfering with personal or property rights to be sustained must appear to have been enacted for one of these purposes. City of Chicago v. The Gunning System, 114 Ill. App. 377. Statute requiring all fiduciary agents to give surety company bonds held invalid as not promoted by considerations of public necessity or public welfare. State v. Robins, 71 Ohio St. 273, 73 N. E. 470.

18. See 1 C. L. 576, n. 61. Stone v. Paducah [Ky.] 86 S. W. 531; Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648. The use of automobiles may be regulated. People v. Schneider [Mich.] 103 N. W. 172. City may be authorized to license saloons beyond its boundaries. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544. The regulation and control of electric light companies in respect to their use of streets and the erection and construction of appliances is within the police power generally delegated by the state to municipal corporations. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

19. Tax on business of trading stamps held clearly intended to be prohibitory and therefore void as unduly restrictive of the right to engage in a lawful business. In re Hutchinson, 137 F. 949. Ordinance is void which makes it unlawful to sell merchandise by means of sale of trading stamps for

§ 8. *Freedom of speech and of the press*[22] *cannot be abridged;*[23] *neither can it be abused without liability.*[24]

§ 9. *Personal and religous liberty,*[25] *including the right to choose employment,*[26] *cannot be infringed.*

distribution by merchants with their sales. Id., 137 F. 950; City Council of Montgomery v. Kelly [Ala.] 38 So. 67; State v. Merchants' Trading Co. [La.] 38 So. 443. Prohibition of trading stamp business held an unwarranted interference with legitimate business. People v. Zimmerman, 102 App. Div. 103, 92 N. Y. S. 497. A statute requiring surety company bonds of all fiduciary agents is an undue restriction on the liberty of contract. State v. Robins, 71 Ohio St. 273, 73 N. E. 470. A statute requiring all who contract about erecting buildings to secure their contracts by bonds to enure to the benefit of all who furnish materials to be used in the building is unreasonable. Montague & Co. v. Furness, 145 Cal. 205, 78 P. 640. See 3 C. L. 752, n. 4. A statute prohibiting the payment of laborers by any order or evidence of indebtedness not redeemable in money is invalid as interfering with the right of contract. Leach v. Missouri Tie & Timber Co. [Mo. App.] 86 S. W. 579. An ordinance requiring that all dressed stone used in municipal work be dressed within the state does not interfere with the right to enjoy the gains of industry. Allen v. Labsap [Mo.] 87 S. W. 926. Malicious mischief is a familiar and proper subject for legislative repression as are also combinations for the purpose of inflicting it. And liberty to combine to inflict such mischief even upon such intangibles as business or reputation is not among the rights the fourteenth amendment was intended to protect. Aikens v. Wisconsin, 195 U. S. 194, 49 Law. Ed. 154. Combinations in restraint of trade may be controlled. Smiley v. Kansas, 196 U. S. 447, 49 Law. Ed. 546. The limitation of the hours bakers and confectioners shall work is unreasonable. Lochner v. New York, 198 U. S. 45, 49 Law. Ed. 937.

20. See 3 C. L. 750.

21. A municipal ordinance defining garbage as in this case, and forbidding its removal through the streets by others than the city contractor, or the placing of it upon private property, contravenes the fourteenth amendment of the Federal constitution. Bauer v. Casey, 26 Ohio C. C. 598, 6 Ohio C. C. (N. S.) 69. A statute requiring that a city to be liable for injuries from a defective sidewalk must have had written notice of the defect is bad as taking away the right of action altogether, and destroying a property right. Actual notice is sufficient. MacMullen v. Middletown, 92 N. Y. S. 410. A statute regulating the hours of labor in mines, smelters and ore mills does not interfere. Ex parte Kair [Nev.] 80 P. 463.

See 3 C. L. 750.

22. See 3 C. L. 753.

23. Free speech is not curtailed by an ordinance prohibiting public meetings on streets except as authorized by the municipal authorities. Fitts v. Atlanta, 121 Ga. 667, 49 S. E. 793. The power of a court to punish one for a contempt consisting of a libelous article published in a newspaper is no invasion of the liberty of the press. Burdett v. Com. [Va.] 48 S. E. 878. The law will not permit the right of privacy to be asserted in such a way as to curtail or restrain freedom of speech or of the press. The one may be used to keep the other within due bounds, but neither can lawfully be used to destroy the other. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

24. The publication of the picture of a person without his consent as a part of an advertisement for the purpose of exploiting the publisher's business is in no sense an exercise of the liberty of the press, but is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage. Dissenting opinion in Roberson v. Rochester Folding-Box Co., 171 N. Y. 540, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, approved. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

25. See 3 C. L. 753. A statute prohibiting the marriage of epileptics is not invalid as an interference with the right to life, liberty and the pursuit of happiness. Gould v. Gould [Conn.] 61 A. 604. The arrest of employes of a telephone and telegraph office where news of races is collected and the seizure of the instruments and books thereof without knowledge or information by the officers that any violation of law had been committed is an unwarranted invasion of personal rights. People v. Breen, 44 Misc. 375, 89 N. Y. S. 998. A statute prohibiting the giving of Christian Science treatment for a fee does not abridge rights of conscience and worship. State v. Marble [Ohio] 73 N. E. 1063. The Federal statute denouncing peonage is authorized by the thirteenth amendment. Clyatt v. U. S., 197 U. S. 207, 49 Law. Ed. 726.

Personal liberty includes not only freedom from physical restraint but also the right "to be let alone;" to determine one's mode of life, whether it shall be a life of publicity or privacy, and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68. Personal liberty is not infringed by a requirement of vaccination as a condition of remaining in a certain town. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643.

Personal security includes the right to exist, and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament and lawful desires of the individual. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

The right of privacy is embraced within

"Imprisonment for debt,"[27] *except in case of fraud, or other wrong,*[28] *is prohibited.*

§ 10. *Equal protection of the law,*[29] *as guaranteed by the state*[30] *and Federal constitutions,*[31] *merely requires that the law shall have equality of operation*[32] *on all persons of the same class.*[33] Within this rule statutes imposing inspection fees

the absolute rights of personal security and personal liberty. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68. The right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases. Id. Liberty of speech and of the press when exercised within the bounds of the constitutional guaranties are limitations upon the exercise of the right of privacy. Id.

26. See 3 C. L. 754. A plumber's law requiring all members of a partnership to be registered whether they have anything to do with the actual work or not is unduly restrictive. Schnaier v. Navarre Hotel & Importation Co. [N. Y.] 74 N. E. 561.

27. See 3 C. L. 754. A commitment for contempt for failing to comply with an order requiring the payment for money is not imprisonment for debt within the meaning of the constitution. Perry v. Pernet [Ind.] 74 N. E. 609.

28. Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977. Clothing furnished one during imprisonment and unpaid for may be used as a basis for further imprisonment. Ex parte Diggs [Miss.] 38 So. 730.

29. See 3 C. L. 755.

30. Probably all of the state constitutions guaranty equal protection in terms as broad as the fourteenth amendment. Ohio Bill of Rights, § 2, providing that all political power is inherent in the people and that government is instituted for their equal protection and benefit. Kane v. Erie R. Co. [C. C. A.] 133 F. 681; State v. Robins, 71 Ohio St. 273, 73 N. E. 470. Special privileges or immunities cannot be granted in Indiana. Board of Com'rs v. Lindemann [Ind.] 73 N. E. 912.

31. Equal protection of the laws is not denied by a statute requiring vaccination as a condition of attending the public schools. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97. See 3 C. L. 756, n. 61. The fourteenth amendment, which expressly declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. But it does not follow that congress in exercising its power of legislation within and for the District of Columbia may therefore deny to persons residing therein the equal protection of the laws. All of the guaranties of the constitution respecting life, liberty and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia as of those residing in the several states. Imposition of licenee tax on brokers. Lappin v. District of Columbia, 22 App. D. C. 68.

32. The fourteenth and fifteenth amendments of the Federal constitution have reference solely to acts of the state and have no reference to acts of individuals. Ex parte Riggins, 134 F. 404. See 3 C. L. 755, n. 52. The assessment by a state board of the property of a railroad company at a higher percentage of its actual value than other property assessed, in violation of the state constitution and without statutory authority and contrary to law as declared by the supreme court of the state, is not an act of the state within the equal protection clause. St. Louis, etc., R. Co. v. Davis, 132 F. 629. Law requiring surety company bonds held invalid or exempting officers giving bonds of less than $2,000. State v. Robins, 71 Ohio St. 273, 73 N. E. 470. A statute prohibiting the taking of fish and game by nonresidents is unequal in so far as it prevents nonresidents from using their own land as residents do. State v. Mallory [Ark.] 83 S. W. 955.

33. It is unnecessary that a statute passed in exercise of the police power shall apply equally and uniformly on all citizens; it need apply only to all of the same class. Wright v. Hart, 103 App. Div. 218, 93 N. Y. S. 60. A statute which contains inequalities in fact cannot be upheld on the theory of classification where the lines of division between persons or classes appear clearly to have no just relation to the subject-matter. Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. That a law prohibiting school sinks in tenement houses applies only to cities of the first class does not invalidate it. Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231. Railroads may be required to carry school children at half fare. Commonwealth v. Interstate Consol. St. R. Co. [Mass.] 73 N. E. 530. Salary law held operative on all of a certain class of sheriffs and for that reason unobjectionable. Board of Com'rs v. Lindemann [Ind.] 73 N. E. 912. A statute regulating the use of automobiles on the highway is not assailable as class legislation. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. A Jewish applicant for a public position is not discriminated against by holding the examination therefor on Saturday which is his Sabbath. Cohn v. Townsend, 94 N. Y. S. 817. An arbitrary discrimination is not made by an ordinance that prohibits public meetings on the streets except as authorized by municipal authority. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. An exception in a vaccination law in favor of children certified by physicians to be unfit for vaccination does not require a similar exception in favor of adults. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643. An ordinance requiring that all dressed stone used in municipal work be dressed in the state does not deny equal protection of the law. Allen v. Labsap [Mo.] 87 S. W. 926.

and licenses,[34] and providing for taxation,[35] local improvements,[36] regulations of business, trades and professions,[37] and the operation of railroads,[38] are sustained.

34. See 3 C. L. 756. Vehicle license ordinance held not unjustly discriminative between residents and nonresidents. Sterling v. Bowling Green, 5 Ohio C. C. (N. S.) 217, 26 Ohio C. C. 581. A statute regulating the practice of medicine and providing also for the licensing of practioners of osteopathy is not invalid because not also providing for Christian Scientists. State v. Marble [Ohio] 73 N. E. 1063. Horseshoers cannot be compelled to take out licenses. In in Aubrey, 36 Wash. 388, 78 P. 900. An exemption from a liquor law of wines produced from grapes grown in the state while in the hands of the producers or manufacturers is not unequal. Douthit v. State [Tex. Civ. App.] 82 S. W. 352; Id. [Tex.] 83 S. W. 795; McLaury v. Watelsky [Tex. Civ. App.] 13 Tex. Ct. Rep. 404, 87 S. W. 1045. A factory inspection law applying to all factories in the state is not assailable as discriminating between those in the city and those in the country. State v. Vickens, 186 Mo. 103, 84 S. W. 908. A license tax on occupations is not invalid because it excepts professional men called to the city to attend to some specific matter. Evers v. Mayfield [Ky.] 85 S. W. 697. A statute against peddling but exempting resident merchants is invalid. Ex parte Deeds [Ark.] 87 S. W. 1030. An exception from a cigarette license tax in favor of wholesale dealers doing an interstate business does not invalidate it. Cook v. Marshall County, 196 U. S. 261, 49 Law. Ed. 471.

35. See 3 C. L. 757. The fourteenth amendment was not designed to enforce uniformity of taxation (St. Louis, etc., R. Co. v. Davis, 132 F. 629), or compel the states to adopt an iron rule of uniformity (Michigan Railroad Tax Cases, 138 F. 223). There may be classification, and different rates may be imposed on different classes. It is enough that there is no discrimination in favor of one as against another of the same class and that the method for the assessment and collection of the tax is not inconsistent with natural justice. Id., citing many cases. That railroads are assessed by a state board as a whole and the assessment divided among the counties through which they run pro rata per mile, while other property is locally assessed, does not discriminate. Chicago, etc., R. Co. v. Richardson County [Neb.] 100 N. W. 950; State v. Back [Neb.] 100 N. W. 952. Foreign and domestic insurance companies may be separated and treated differently. Aachen & M. Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. The Federal constitution does not forbid the taxation of the franchise of a domestic corporation at a different rate than is levied upon the tangible property of the state. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615. A tax on the managing agent of a nonresident packing company does not deny him the equal protection of the laws where it is imposed alike on the agents of foreign and domestic companies. Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663; Smith v. Clark [Ga.] 50 S. E. 480. A street railroad is not denied the equal protection of the laws because taxed a fixed sum per mile of track for the privilege of doing business, and the use of the streets and steam railroads are not similarly taxed, though they do switching within the city limits and receive pay for it. Savannah, etc., R. Co. v. Savannah, 198 U. S. 392, 49 Law. Ed. 1097. Equal protection of the law is not denied by a law taxing public service franchises that exempts subsurface railroads, or that provides for a deduction of the amount annually paid by same holders for their franchises. People of State of New York v. State Board of Tax Com'rs, 199 U. S. 1, 50 Law. Ed.; Id., 199 U. S. 48, 50 Law. Ed. ----. There is nothing in the Federal constitution that prevents a state from granting exemptions from taxation. People of State of New York v. State Board of Tax Com'rs, 199 U. S. 1, 50 Law. Ed. ----.

36. See 3 C. L. 757. That a statute requires a petition of resident freeholders to initiate an improvement does not discriminate against nonresidents. Taylor v. Crawford [Ohio] 74 N. E. 1065. A drainage law extending to those who waive objections to the special assessments the privilege of paying in instalments does not deny equal protection. Sisson v. Board of Sup'rs [Iowa] 104 N. W. 454. Assessments for paving by the front foot rule are valid. Barber Asphalt Pav. Co. v. Munn, 185 Mo. 552, 83 S. W. 1062.

37. See 3 C. L. 757. Unequal operation of smoke ordinance as between owners of chimneys serving one and more than one fire box held not shown. Glucose Refining Co. v. Chicago, 138 F. 209. A statute invalidating as to creditors sales of goods otherwise than in due course of trade unless certain formalities are complied with is unduly restrictive (Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119), and unduly favors one class of creditors as against another (McKinster v. Sager, 163 Ind. 671, 72 N. E. 854). **Contra,** Wright v. Hart, 103 App. Div. 218, 93 N. Y. S. 60. Building and loan association law held valid. Cramer v. Southern Ohio Loan & Trust Co. [Ohio] 74 N. E. 200. A statute licensing peddlers is not bad for exempting manufacturers, farmers, mechanics, and nurserymen selling their own wares. People v. De Blaay [Mich.] 100 N. W. 598. A statute regulating instalment investment companies but exempting building and loan associations, savings banks, etc., as to which other statutes are effective, does not discriminate. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. Grazing on the public lands of the United States within the limits of the state may be regulated. Spencer v. Morgan [Idaho] 79 P. 459. Statute prohibiting sales of commodities on margins but exempting purchasers in the ordinary course of business does not discriminate unlawfully. State v. McGinnis [N. C.] 51 S. E. 50. A statute to regulate smoke nuisances is not unreasonable because it makes proof that no known device will prevent it a defense, nor because it exempts locomotives and steamboats. State v. Tower, 185 Mo. 79, 84 S. W. 10.

Criminal laws and procedure,[39] and civil remedies and proceedings,[40] are unassailable unless unequally oppressive as to particular persons.

§ 11. *Privileges and immunities of citizens.*[41]—Those sections and amendments of the Federal constitution, guaranteeing the civil rights of the citizens of the several states and the United States, operate only on discriminations by the states in their sovereign capacity, and not upon the acts of individuals,[42] and the rights, privileges and immunities which the fourteenth amendment and statutes for its enforcement were designed to protect are such as belong to citizens of the United States as such, and not as citizens of the state.[43] Congress has power to legislate for the protection of such rights.[44] The right to sell intoxicating liquors

38. See 3 C. L. 758. Railroads are recognized as proper subjects of classification and many statutes applicable only to them have been upheld. Tax law. Michigan Railroad Tax Cases, 138 F. 223; Chicago, B. & Q. R. Co. v. Richardson County [Neb.] 100 N. W. 950; State v. Back [Neb.] 100 N. W. 952; Savannah, etc., R. Co. v. Savannah, 198 U. S. 392, 49 Law. Ed. 1097. A statute modifying the rule of fellow-servants as to certain of the servants of railway companies does not deny railroads the equal protection of the laws because not applying to other employers. Kane v. Erie R. Co. [C. C. A.] 133 F. 681, rvg. 128 F. 474. A statute requiring all street railroads except one elevated railroad to carry school children at half fare does not violate. Commonwealth v. Interstate Consol. St. R. Co. [Mass.] 73 N. E. 530.

39. See 3 C. L. 759. To invalidate a municipal ordinance fair on its face because of inequality in its enforcement, there must be certainty to every intent as to the discrimination. Ah Sin v. Wittman, 198 U. S. 500, 49 Law. Ed. 1142.

40. See 3 C. L. 759. Equal protection is not denied by a law depriving all persons alike of the right to recover on a contract for the sale of intoxicating liquors. Corbin v. Houlehan [Me.] 61 A. 131. Section 6494, relating to appeal of motion to dissolve attachment, is not unconstitutional because it gives to defendant the right to appeal which is not given to plaintiff. Cecil v. Grant, 27 Ohio C. C. 442, 6 Ohio C. C. (N. S.) 65; Hare v. Cook, 26 Ohio C. C. 289, 6 Ohio C. C. (N. S.) 73. A statute authorizing the trial judge to reduce the witness fees and costs where cases are consolidated and tried together is valid because it applies to all of the class. Green v. Sklar [Mass.] 74 N. E. 595. A statute providing for an attorney's fee in actions against fire and life insurance companies is valid. L'Engle v. Scottish Union & National Fire Ins. Co. [Fla.] 37 So. 462.

41. See 3 C. L. 760. Compare title Civil Rights, 5 C. L. 589. An ordinance requiring that all cut stone used in municipal work be dressed within the state does not interfere with the privileges and immunities guarantied by the Federal constitution. Allen v. Labsap [Mo.] 87 S. W. 926. A statute against peddling exempting from its provisions resident merchants is invalid. Ex parte Deeds [Ark.] 87 S. W. 1030.

42. See 3 C. L. 760, n. 44. Where a mob of white men take a negro from the jail where he is waiting trial in defiance of the sheriff and lynch him because of his race, there is an invasion of his civil rights. Ex parte Riggins, 134 F. 404. Due process of law with reference to criminal proceedings is one of the privileges and immunities guarantied by the Federal constitution. Id.

43. The custody of infants is not so protected. Wadleigh v. Newhall, 136 F. 941.

44. NOTE. Interference With Civil Rights. Power of Congress to Enforce the Fourteenth Amendment: Petition for discharge on habeas corpus, on the ground that the indictment under which petitioner is held does not charge any offense against the United States. Petitioner is indicted under Rev. St., §§ 5508, 5509 (making it a penal offense for any person to interfere with the rights guaranteed by the constitution and laws of the United States), for conspiring to injure and for murdering in the prosecution of the conspiracy, a colored citizen, accused of a crime, in order to prevent his trial by the Alabama courts. Held, that it is within the powers of congress to make laws for the enforcement of the rights guaranteed by the 14th Amendment. Ex parte Riggins, 134 F. 404.

The question presented in this case is a most interesting one, and the decision of the court seemingly correct. There is no doubt that the rights guaranteed by the 14th amendment were intended to be enforceable in some way, and § 5 of that amendment as well as the implied powers clause, show that intention. In Boyd v. U. S., 116 U. S. 616, 29 Law. Ed. 746, the supreme court laid down the rule that constitutional provisions for the security of persons and property should be liberally construed. In the Slaughter-House Cases, 16 Wall. [U. S.] 36, 71, 21 Law. Ed. 394, 407, it is said, as to the last three amendments, "one prevading purpose is found in them all, and lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the rights of the newly made freeman and citizen from the oppression of those who had previously unlimited dominion over them." In United States v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897, afd. 92 U. S. 542, 23 Law. Ed. 588, it was held that congress had power to enforce the 14th amendment by making any violations of it a punishable offense, and the same doctrine has been supported by the following cases: Prigg v. Pennsylvania, 16 Pet. [U. S.] 539,

is not one of the privileges or immunities attaching to citizenship in the United States,[45] and a corporation is not a citizen within this section.[46] A state statute extending a certain special privilege to citizens of the state is not for that reason invalid, the constitution being effective to extend it also to the citizens of the several states.[47]

§ 12. *Grants of special privileges and immunities; class legislation.*[48] Whether or not classifications of municipalities are reasonable or unjust and arbitrary generally arises with reference to whether statutes infringe the provisions against local and special laws. This question is elsewhere treated.[49] The fourteenth amendment is satisfied if all persons similarly situated are treated alike,[50] and a law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it.[51]

Licenses, and privilege and occupation taxes[52] are unassailable unless raising invidious distinctions.[53]

Taxation.[54]—The subjects of taxation may be classified so long as the classification is reasonable.[55]

Regulations of business, trades and professions[56] are upheld unless unfairly oppressive of particular individuals or classes.[57]

Railroad companies[58] can properly be invested with special privileges,[50] and

10 Law. Ed. 1060; Logan v. U. S., 144 U. S. 288, 36 Law. Ed. 429; Ex parte Virginia, 100 U. S. 345, 25 Law. Ed. 676; Ex parte Siebold, 100 U. S. 372, 25 Law. Ed. 717; United States v. Waddell, 112 U. S. 80, 28 Law. Ed. 673; Robb v. Connolly, 111 U. S. 624, 28 Law. Ed. 542; Motes v. U. S., 178 U. S. 458, 44 Law. Ed. 1150.—3 Mich. L. R. 574.

45. Sandys v. Williams [Or.] 80 P. 642; State v. Durein [Kan.] 80 P. 987; Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544. A statute attempting to levy a tax on salesmen from other states selling liquors by sample is void. Sloman v. William D. C. Moebs Co. [Mich.] 102 N. W. 854.

46. U. S. Const. art. 4, § 2; 14th amendment. Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467; In re Speed's Estate [Ill.] 74 N. E. 809.

47. See 3 C. L. 760, n. 49. State v. Scampini [Vt.] 59 A. 201.

48. See 3 C. L. 761.

49. See Statutes, 4 C. L. 1522.

50. A statute authorizing suit against the state for certain bounties is not special legislation. Bickerdike v. State, 144 Cal. 681, 78 P. 270. A statute providing for the appointment of road overseers from "the qualified electors in each district" is not class legislation. State v. Newland, 37 Wash. 428, 79 P. 983.

51. See 3 C. L. 761, n. 63. Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56. Law empowering railroad company to condemn stock of another, majority of which it already owns. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510. A stock law applicable only to counties having a population of not less than 25,000 and not more than 25,100 is not class legislation in Tennessee. Murphy v. State [Tenn.] 86 S. W. 711.

52. See 3 C. L. 762.

53. The restriction of peddling of butter, eggs, vegetables, etc., to those who produce them, is unreasonable. Ex parte Camp [Wash.] 80 P. 547. A medical license law is not assailable as class legislation. Territory v. Newman [N. M.] 79 P. 706. An ordinance interdicting the sale of liquors in private rooms except in hotels does not confer special privileges. Sandys v. Williams [Or.] 80 P. 642. Dispensary act held invalid as conferring special privileges. Town of Elba v. Rhodes [Ala.] 38 So. 807. Act regulating tontine investment companies held unobjectionable. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075. It is not improper classification to distinguish between dealers who buy to sell again and manufacturers and producers who make to sell and sell only what they make. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

54. See 3 C. L. 763.

55. A succession tax levied on all successions opened and to be opened is a proper classification. Succession of Levy [La.] 39 So. 37. An exemption of railroads form taxation for a limited period after their construction is not a special privilege. Bennett v. Nichols [Ariz.] 80 P. 392.

56. See 3 C. L. 763.

57. A statute forbidding the sale of goods by warehousemen except such as obtain a license within thirty days after its passage is void. Webb v. Downes, 93 Minn. 457, 101 N. W. 966. A statute forbidding the use of trading stamps except where issued by a merchant redeemable in his own goods is arbitrary. People v. Zimmerman, 102 App. Div. 103, 92 N. W. 497. Peddling ordinance held invalid as class legislation in excepting farmers selling their own produce. Ex parte Camp [Wash.] 80 P. 547. An act regulative of foreign corporations and extending the privileges of residents to those which comply with its provisions does not confer special privileges to them prohibited by the constitution. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. Prohibition of smoke in cities of 100,000 inhabitants is not class legislation. State v. Tower, 185 Mo. 79, 84 S. W. 10.

58. See 3 C. L. 764.

burdened with special duties and liabilities [60] common to either persons or corporations.

Insurance [61] companies may be treated as a class.

Liquor traffic.[62]—Liquor laws must not discriminate.[63]

Relations of master and servant [64] are a proper subject of regulation.[65]

Criminal laws and procedure.[66]

Civil remedies and proceedings [67] may be regulated if arbitrary classes are not created.[68]

§ 13. *Laws impairing the obligations of contracts,*[69] *including state or municipal contracts,*[70] *corporate charters or franchises,*[71] *public service franchises,*[72] *and tax and assessment laws,*[73] *are void.*[74]

59. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

60. See 3 C. L. 764, n. 2. Statute abrogating rule of fellow-servant in part. Kane v. Erie R. Co. [C. C. A.] 133 F. 681. A law may apply to railroads only and to a particular class of railroad employes, without being unconstitutional for lack of uniformity or for denying equal protection of the laws to all. Ignatius Froelich v. Toledo & O. Cent. R. Co., 5 Ohio C. C. (N. S.) 6, 24 Ohio C. C. 359.

61. See 3 C. L. 764, n. 4-8.

62. See 3 C. L. 764.

63. Liquor law discriminating in favor of farmers and manufacturers of the state selling native cider and wine held invalid as to discrimination. State v. Scampini [Vt.] 59 A. 201.

64. See 3 C. L. 764, n. 14-16.

65. Classification of employes may be arbitrary without being unconstitutional where the classification is reasonable and is made with a proper purpose. Ignatius Froelich v. Toledo & O. Cent. R. Co., 5 Ohio C. C. (N. S.) 6, 24 Ohio C. C. 359.

66. See 3 C. L. 765, n. 17-21.

67. See 3 C. L. 765, n. 22-27.

68. Rev. St. § 6451, providing that in condemnation proceedings the jury fees shall be paid by the corporation as part of the costs, imposes no burden upon one suitor or class of suitors from which others similarly situated are exempt, and does not therefore violate Ohio Const. art. II., § 26. Cincinnati, etc., Traction Co. v. Felix, 5 Ohio C. C. (N. S.) 270, 25 Ohio C. C. 393. A statute merely bringing a previously exempted class of judgments under the general limitation law is not invalid as class legislation. Wooster v. Bateman, 126 Iowa, 552, 102 N. W. 521.

69. See 3 C. L. 765. The obligation of a contract is not impaired by a statute which authorizes the condemnation by one railroad company of shares of stock in another for the purpose of effecting a merger of connecting lines. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510. There is no impairment of contract in a law that provides for forfeiture of good time when a convict is again convicted of crime during the period of his first sentence. Ex parte Russell, 92 N. Y. S. 68. A law reducing the interest rate on redemption of land from sale on execution is valid. Welsh v. Cross [Cal.] 81 P. 229. A statute providing that all rules, by-laws, etc., meant to be part of insurance contracts, must be attached to the policy, applies to a by-law adopted after the policy is issued, and so construed the statute is not violative of the obligation of the contract. Supreme Lodge K. P. v. Hunziker [Ky.] 87 S. W. 1134.

What is a contract: The obligation of a contract is not terminated by the rendition of a judgment thereon, and a statute of limitations unduly restrictive of the right to enforce a judgment may impair. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. A contract between the state and a municipality that has expired for laches of 30 years cannot be impaired. Wheelwright v. Boston [Mass.] 74 N. E. 937. Where the state constitution provides against the annulling or impairing of any grant made by the King of Great Britain before the Revolution, such a grant is a contract the obligation of which cannot be impaired by the state. Trustees of Brookhaven v. Smith, 98 App. Div. 212, 90 N. Y. S. 646.

70. The power of a municipality corporation to levy taxes enters into its contracts and cannot be restricted to the injury of its existing creditors. Statute reducing assessments. City of Ft. Madison v. Ft. Madison Water Co. [C. C. A.] 134 F. 214. A withdrawal of the taxing power stipulated to be used in favor of municipal bonds is invalid. City of Austin v. Cahill [Tex.] 88 S. W. 542. A county officer's salary law which does not attempt to take away salaries already earned, or diminish or increase them, but merely changes the conditions for their payment in full, does not impair the obligation of contracts. Board of Com'rs v. Lindemann [Ind.] 73 N. E. 912. Limitation on taxing power held not to impair contracts of county bondholders. Desha County v. State [Ark.] 84 S. W. 625. See 3 C. L. 768.

71. The state cannot bargain away its right to exercise at all times its police power (Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77; Braddock Borough v. Allegheny County Tel. Co., 25 Pa. Super. Ct. 544; New Orleans Gaslight Co. v. New Orleans Drainage Commission, 197 U. S. 453, 49 Law. Ed. 831), nor can a municipality to which is delegated the state's police power over streets and highways enter into any contract by which the free exercise of the power granted can be abridged, limited or destroyed (Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77; Braddock Borough v. Allegheny County Tel. Co., 25 Pa. Super.

Regulations of remedies,[75] *merely, are enforceable,* provided they do not materially impair vested rights.[76]

§ 14. *Retroactive legislation; vested rights.*[77]—Save under those constitutions which forbid retroactive laws, they may be passed so long as other constitutional limitations are untouched.[78]

Ct. 544). An exemption of a railroad from taxation is a contract that cannot be abrogated by the state. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977; Bennett v. Nichols [Ariz.] 80 P. 392; Detroit, etc., R. Co. v. Powers, 138 F. 264. Reasonable regulations passed in pursuance of a reserved power of amendment do not impair. People v. Rose, 207 Ill. 352, 69 N. E. 762. Exemptions from taxation may be repealed under reserved powers of amendment. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87. Where there is no reserved power of amendment, there can be no change in rates without notice or hearing. City of Rushville v. Rushville Nat. Gas Co. [Ind.] 73 N. E. 87. Where a railroad's charter authorized it to condemn land under the general law which did not require notice to the landowner, an amendment to the law requiring notice did not impair the charter, being merely of the remedy. Chicago, B. & Q. R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412. A statute providing for the assessment of the value and purchase of dissenting minority stockholder's shares on a merger of railroads does not impair. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96; New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510. A statute conferring exclusive powers on a local corporation that have heretofore been exercised by a foreign corporation does not impair the obligation of contracts. National Council Junior Order U. A. M. v. State Council Junior Order U. A. M. [Va.] 51 S. E. 166. A city has no contract rights with respect to the burdens of street repairs which it imposes on street railroads as a condition of their occupancy of the streets which will interfere with the right of the legislature to relieve street railroads from such obligations. City of Worcester v. Worcester Consol. St. R. Co., 196 U. S. 539, 49 Law. Ed. 591.

Impairment of contracts with Corporations, see Clark & M. Corp. §§ 270, 271. See 3 C. L. 768.

72. Street railway franchise. Cleveland Elec. R. Co. v. Cleveland, 135 F. 368. A municipality has no power to contract away its taxing or police power. City of Rochester v. Rochester R. Co. [N. Y.] 74 N. E. 953. Immunity in street railway franchise from paying for pavement between tracks is not contractual and does not prevent city from requiring company to pay for its share of pavement subsequently laid. Id.; Marshalltown Light, Power & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005. The imposition on a gas company of the cost of changing the location of its pipes made necessary by the installation of an improved system of drainage does not impair its contract rights. New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U. S. 453, 49 Law. Ed. 831. No contract right is impaired by the levy of a franchise tax on the holders of public franchises who have paid either a lump sum for their franchises or who pay a stated sum annually therefor. People of State of New York v. State Board of Tax Com'rs, 199 U. S. 1, 50 Law. Ed. ----; Id., 199 U. S. 48, 50 Law. Ed. ----. See 3 C. L. 769.

73. A tax on the managing agent of a nonresident meat packer does not interfere with his contract of employment. Kehrer v. Stewart, 197 U. S. 60, 49 Law. Ed. 663. See 3 C. L. 769.

74. An existing law cannot be regarded as violating the obligation of a contract made while the law is effective. Corbin v. Houlehan [Me.] 61 A. 131. Bonds issued under a statute that had been at the time judicially construed as valid are not invalidated by a subsequent construction invalidating it. Rees v. Olmsted [C. C. A.] 135 F. 296. Change in plan of assessment of insurance company held not to violate. Iverson v. Minnesota Mut. Life Ins. Co., 137 F. 268; Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. A municipality has no power to contract away or limit its taxing powers. City of Rochester v. Rochester R. Co. [N. Y.] 74 N. E. 953. The provisions against impairment contained in the state and Federal constitutions are a part of the constitution and by-laws of benefit societies organized under state laws, and such societies cannot abrogate their contracts at will, Local society cannot withdraw from state association. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746.

75. See 3 C. L. 769.

76. Chicago, B. & O. R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412. Remedies which affect the interests and rights of the parties, and are made the subject of contract for the purpose of enforcing it, become an essential part of the obligation, and a right of the creditor which cannot be impaired by subsequent legislation. Right to execution without stay. Weist v. Wuller, 210 Pa. 143, 59 A. 820. Right to revive judgment. Howard v. Ross [Wash.] 80 P. 819; Fischer v. Kittinger [Wash.] 81 P. 551; Williams v. Packard [Wash.] 81 P. 710. Extention of period of redemption on execution sale is invalid. Welsh v. Cross [Cal.] 81 P. 229. Remedy for collection of tax to pay railroad aid bonds cannot be withdrawn unless one equally efficacious is provided. Folsom v. Greenwood County [C. C. A.] 137 F. 449. The right of a creditor to enforce individual liability of a stockholder cannot be infringed by substitution of a less efficacious remedy. Knickerbocker Trust Co. v. Myers, 133 F. 764; Myers v. Knickerbocker Trust Co. [C. C. A.] 139 F. 111.

77. See 3 C. L. 770. Ex post facto laws, see post, § 19 and Criminal Law, 3 C. L. 979.

78. See 3 C. L. 770, n. 77. Limitation of time to bring action against corporation for personal injury. Fitzgerald v. Scovil

Vested rights[79] *including contract rights,*[80] *interests in realty,*[81] *and in some instances defenses to actions,*[82] *cannot be diminished.*

Taxes, licenses and public rights.[83]—Taxes cannot be levied retrospectively,[84] but a healing act confined to matters which the legislature might previously have authorized or omitted is valid,[85] and reassessment[86] and regulations of procedure may be provided.[87] Licenses may be withdrawn,[88] and the conditions of obtaining them changed.[89]

Laws affecting corporations[90] are sustained if not retroactive on vested rights.[91]

Mfg. Co., 77 Conn. 528, 60 A. 132. Statutes of limitation may be retrospective provided contracts or vested rights are not impaired. Edelstein v. Carlile [Colo.] 78 P. 680.

79. See 3 C. L. 770. A city has no vested right in a statute authorizing it to call in outstanding warrants. Condon v. Eureka Springs, 135 F. 566. A statutory right of one county of the state to recover of another for the support of an indigent insane person is not a vested right, even as to support furnished before its repeal. Jefferson County v. County of Oswego, 102 App. Div. 232, 92 N. Y. S. 709. The objection of a land grant railroad that an act of congress interferes with its vested rights is waived by its acceptance of the act. Humbird v. Avery, 195 U. S. 480, 49 Law. Ed. 286.

80. See ante, § 13. Contract rights acquired under a prior interpretation of a statute cannot be divested by a subsequent reversal of that interpretation. Municipal bonds issued under a law first held valid and subsequently held invalid. Rees v. Olmsted [C. C. A.] 135 F. 296. Federal court is not bound to folow local construction of a statute with respect to a right accruing prior to that construction. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977. This distinction does not apply where rights arise solely by contract and not under any statute or constitution. City of Sioux Falls v. Farmers' Loan & Trust Co. [C. C. A.] 136 F. 721. A statute providing that where a conditional vendor retakes the property he must sell it at public auction within a time stated and if he does not he will be liable to the vendee for the amount he has paid on the contract, cannot operate to impair rights under contracts in existence at the time of its passage. Haefelein v. Jacob, 94 N. Y. S. 466.

81. Law authorizing court to permit wife to deed her lands without husband's consent is insufficient to destroy his life estate. Acts 1896, p. 42, No. 49. Hubbard v. Hubbard [Vt.] 58 A. 969. After title to land has passed to a city under condemnation proceedings and the owner is entitled to compensation, a statute which attempts to revest the title and deprive him of his right is void. Hellen v. Medford [Mass.] 73 N. E. 1070. A law extending the time of redemption on execution sale is void as to liens accruing prior to its enactment. Welsh v. Cross [Cal.] 81 P. 229. See 3 C. L. 771.

82. A vested right to existing defenses is under the protection of the law save only as to those defenses which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity or justice. Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703. The bar afforded by a statute that withdraws rights of actions from litigants who have not paid their privilege tax may be lifted by an amenesty act, even as to suits begun before its passage. North British & Mercantile Ins. Co. v. Edwards [Miss.] 37 So. 748. An acknowledgment of a mortgage to a corporation invalid only because the acknowledging officer was a stockholder in the corporation may be cured by legislative act. Maxwell v. Lincoln & Fifth Ward Bldg. & Loan Ass'n, 216 Ill. 85, 74 N. E. 804.

83. See 3 C. L. 771.

84. A tax on the exercise of a power of appointment under a will is valid and applies to a power created by a will made before the taxing law was passed. In re Delano's Estate, 176 N. Y. 486, 68 N. E. 871. But if the power is never exercised, there can be no tax. In re Lansing's Estate [N. Y.] 74 N. E. 882. A statute levying a succession tax on all successions opened and to be opened and not yet closed is not retroactive. Succession of Levy [La.] 39 So. 37.

85. Local improvement bonds. Chase v. Trout, 146 Cal. 350, 80 P. 81.

86. An ordinance providing for the assessment of omitted property, though retroactive, is not for that reason invalid, nor is it ex post facto. Muir's Adm's v. Bardstown [Ky.] 87 S. W. 1096.

87. It is within the power of the legislature after an assessment has been made and before sale to prescribe the conditions under which redemption may be had of the property taxed and sold. Rogers v. Nichols, 186 Mass. 440, 71 N. E. 950.

88. A permit to sell intoxicating liquors may be withdrawn. Newman v. Lake [Kan.] 79 P. 675; State v. Durein [Kan.] 80 P. 987.

89. A vested right is not conferred by a statute which merely prescribes a method by which such right may be obtained; and it is competent for the legislature to raise the conditions for obtaining such a right both as to those who were and those who were not therefore incompetent to acquire it. Ohio v. Board of Dental Examiners, 5 Ohio C. C. (N. S.) 55, 26 Ohio C. C. 369.

90. See 3 C. L. 771.

91. An act regulating tontine investment companies allowing all to comply with its provisions held not retroactive. State v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075. Laws 1897, p.

Regulations of procedure.[92]—There is no vested rights in a rule of evidence,[93] but an extinct right of appeal cannot be revived.[94]

Statutes of limitation[95] *affecting existing rights are not invalid if a reasonable time is given for the commencement of an action before the bar takes effect,*[96] but where the bar has once attached, the legislature cannot disturb it.[97]

§ 15. *Deprivation without due process of law, or contrary to law of the land.*[98]—The fifth amendment to the Federal constitution is merely restrictive of Federal powers,[99] and the fourteenth operates only against deprivation by a state or under its authority, and adds nothing to the rights of any citizen aginst another.[1] The Congress may penalize acts designed to frustrate one's enjoyment of this guaranty.[2]

Due process of law[3] does not necessarily require the exercise of the power of the courts,[4] but merely means the law of the land,[5] and is secured by laws operat-

313, c. 384, § 30, imposing a liability on directors of a corporation for failure to file an annual report, being an imposition of a penalty, did not create a vested right in a party entitled to recover thereon. Davidson v. Witthaus, 94 N. Y. S. 428.

92. See 3 C. L. 771.

93. That failure of a corporation to report to the secretary of state is made by statute evidence of nonuser, which it was not before, is no objection to the statute. People v. Rose, 207 Ill. 352, 69 N. E. 762.

94. A statute providing that appeals which have been dismissed for nonpayment of register's fee may be reinstated on terms on payment of the fee is as to appeals dismissed before its enactment an unconstitutional impairment of vested rights. Pub. Acts 1905, No. 15. Lohrstorfer v. Lohrstorfer [Mich.] 12 Det. Leg. N. 296, 104 N. W. 142.

95. See 3 C. L. 772.

96. July 1 to Jan. 11 following is sufficient. Fitzgerald v. Scovil Mfg. Co., 77 Conn. 528, 60 A. 132. One year to one who has permitted adverse possession of realty for nine years is reasonable. Schauble v. Schultz [C. C. A.] 137 F. 389. Six months is reasonable as to the liability of a director of a corporation failing to file its annual report. Davidson v. Witthaus, 94 N. Y. S. 428. The time intervening between the passage of the act and the time it takes effect is to be considered. Wooster v. Bateman [Iowa] 102 N. W. 521. Unreasonable restriction of time to sue on foreign judgment is void. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. A statute providing that constructive possession of unimproved lands shall be in the person who with color of title pays taxes thereon for a period of seven years, three of which must be subsequent to the passage of the act, is not void as interfering with vested rights. Towson v. Denson [Ark.] 86 S. W. 661.

97. Edelstein v. Carlile [Colo.] 78 P. 680.

98. See 3 C. L. 772.

99. Pratt Institute v. New York, 99 App. Div. 525, 91 N. Y. S. 136.

1. See 3 C. L. 772, n. 19. A municipal ordinance passed in contravention to the law of the state is invalid and not within the prohibition. City of Savannah v. Holst [C. C. A.] 132 F. 901.

2. Note: The defendants took a prisoner from the custody of state officers and lynched him. They were indicted under a Federal statute providing for the punishment of persons who should conspire to prevent or hinder the free exercise or enjoyment by any citizen of any right or privilege secured to him by the constitution or laws of the United States. Held, that the defendants may be convicted of a conspiracy to deprive the prisoner of his right under the Fourteenth Amendment to have the state afford him due process of law. Ex parte Riggins, 134 F. 404.

The Fourteenth Amendment operates as a guaranty only that the state shall not deprive any citizen of the United States of due process of law; and in the absence of state action, or such inaction as to amount to deprivation, it is difficult to see how any right of the citizen under the amendment can be infringed. The reasoning of the court, though ingenious, leads in effect to the conclusion that the amendment safeguards the citizen against the acts of individuals, a theory which has been expressly repudiated. Civil Rights Cases, 109 U. S. 3, 27 Law. Ed. 835. If the decision be sound, persons conspiring to prevent a negro from voting at state elections could be punished for a conspiracy to deprive him of the right not to have state officials discriminate against him in excluding him from voting. It has been held, however, that the Fifteenth Amendment gives no authority to punish such persons. Karem v. United States, 121 F. 250, 61 L. R. A. 437. The leading case upon which the court relies rests only upon the power of congress to regulate Federal elections. Ex parte Yarborough, 110 U. S. 651, 28 Law. Ed. 274; Lackey v. United States, 107 F. 114, 53 L. R. A. 660. If the decision be upheld, the generally accepted view that the constitutional amendments leave exclusively to the states the final protection of their citizens must be substantially modified; and the limits of Federal power of interference will be difficult to define. See United States v. Harris, 106 U. S. 629, 27 Law. Ed. 290.—18 Harv. L. R. 391.

3. See 3 C. L. 772. What constitutes in criminal proceedings. Ex parte Riggins, 134 F. 404.

4. See 3 C. L. 772, n. 20. Due process does not require a judicial determination of the right of a Chinese person to enter

ing on all alike without discrimination.[6] It is satisfied by notice and a right to be heard,[7] and a review by an appellate tribunal is not necessary.[8] Legitimate judicial discretion is due process of law.[9] One whose property is taken for a public use by condemnation proceedings[10] or who is interfered with in the reasonable exercise of the police power is not deprived without due process.[11]

Property[12] within this clause includes the right of acquirement and use of property as well as the property itself.[13] A public officer has no property right in his office.[14]

the United States, even when he claims the right on the ground of being a natural born citizen. United States v. Ju Toy, 198 U. S. 253, 49 Law. Ed. 1040. An order of the interior department that merchants doing business in an Indian nation and refusing to pay the license fee shall close business is due process of law. Zevely v. Weimer [Ind. T.] 82 S. W. 941. The appointment of a receiver in bankruptcy before adjudication without notice, where two of a firm had absconded and the remaining member was incarcerated, is not a deprivation without due process of law. In re Francis, 136 F. 912.

5. McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, citing cases. Means only that a man is to be tried as every other man is tried. Lamar v. Proser, 121 Ga. 153, 48 S. E. 977. Members of the legislature who have been expelled in the manner prescribed by the constitution are not deprived of their office without due process of law. French v. Senate of State, 146 Cal. 604, 80 P. 1031.

6. Lamar v. Proser, 121 Ga. 153, 48 S. E. 977.

7. Service on appointed agent of a foreign corporation is sufficient, irrespective of whether the corporation is doing business in state. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822. Notice too late to attend the hearing of a tax assessment is no notice. People v. Wells, 181 N. Y. 252, 73 N. E. 1025. No hearing need be provided before fixing a taxing rate when the legislature has left the taxing board a mere clerical function of calculating the rate which it has no power to change. Michigan Railroad Tax Cases, 138 F. 223. Right to be heard afterward in a suit to enjoin collection of tax is sufficient. Taylor v. Crawford [Ohio] 74 N. E. 1065. Where the statute names the time and place of meeting, personal notice is not necessary. Chicago, etc., R. Co. v. Richardson County [Neb.] 100 N. W. 950; State v. Back [Neb.] 100 N. W. 952; City of Beatrice v. Wright [Neb.] 101 N. W. 1039. Where the time and place of making the assessment is fixed and provision is made for a public hearing, there is due process of law. St. Louis, etc., R. Co. v. Davis, 132 F. 629. If there is a right to be heard at some stage before the proceeding becomes final, there is due process. Hacker v. Howe [Neb.] 101 N. W. 255. Iowa mulct law, making liquor tax a lien on premises where liquor is sold, provides sufficient notice. Newton v. McKay [Iowa] 102 N. W. 827. The law must provide notice. The fact that notice was in fact given in the particular case is immaterial. In re Grout, 34 Civ. Proc. R. 231, 93 N. Y. S. 711. Where a railroad company has appeared and contested before the state railroad commission a proceeding to compel it to provide reasonable service at certain stations, it cannot object that it has not been afforded due process of law. Railroad Com'rs v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 641. Indian appropriation act relating to proceedings to determine rights of citizenship held not invalid for failure to provide notice to all other Indians of the tribes. Dukes v. Goodall [Ind. T.] 82 S. W. 702. To assess a penalty in the guise of a drainage tax against a landowner for failure to clean out a stream is not due process. Cleveland, etc., R. Co. v. People, 212 Ill. 638, 72 N. E. 725. Due process of law requires that a confession of judgment under warrant of attorney should pursue the power strictly. National Exch. Bank v. Wiley, 195 U. S. 257, 49 Law. Ed. 184. Cannot be deprived for failure to comply with a court rule. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281.

8. McCue v. Com. [Va.] 49 S. E. 623. Hence it may be allowed subject to such limitations as deemed expedient. Town Council of Due West v. Fuller [S. C.] 51 S. E. 546.

9. What is a proper exercise of judicial discretion. Hubbard v. Hubbard [Vt.] 58 A. 969.

10. New York, etc., R. Co. v. Offield [Conn.] 59 A. 510. A statute authorizing condemnation by a corporation need not provide a tribunal to determine questions raised by landowners as to the right to condemn. If the condemnation be for a public purpose and provision is made for compensation, there is due process. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

11. Ordinance regulating use of automobiles on public roads held not a deprivation of liberty or property without due process of law. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035. Ordinance compelling automobile users to display number of license and regulating speed of machines and providing punishment for violation does not deprive of liberty or property without due process of law. People v. Schneider [Mich.] 103 N. W. 172. Statutes for the protection of fish and game do not take without due process. Ex parte Fritz [Miss.] 38 So. 722.

12. See 3 C. L. 773.

13. Is not taken by an ordinance limiting the hours constituting a day's work on municipal work. In re Broad, 36 Wash. 449, 78 P. 1004. A statute providing that conditional sales shall vest title in the vendee unless the contract is in writing and recorded does not deprive of property without due process of law. Pringle v. Canfield [S. D.] 104 N. W. 223. A statute requiring that vendors in conditional sales

Liberty [15] means not only freedom from actual servitude, but the right to use one's faculties in all lawful ways.[16] A statute authorizing the issuance of a subpœna to compel the attendance of a witness at a trial in another state is void.[17]

Reasonableness of regulations [18] is not measured by any individual case.[19]

Regulations of business and occupations [20] may be so restrictive of the right to contract and to choose employment as to amount to a denial.[21]

Statutes creating a liability may be valid.[22]

Eminent domain proceedings[23] which properly conserve the owners right to compensation are valid.[24]

on retaking the property shall sell it at public vendue with certain formalities, failing in which the purchaser may recover all purchase money paid, is not invalid as a deprivation without due process. Massillon Engine & Thresher Co. v. Wilkes [Tenn.] 82 S. W. 316. A statute extending to a foreign corporation the privilege of building its road in the state and conferring in general terms on it the powers granted by its foreign charter cannot be effective to transfer to it the title to land of an individual which it has not condemned or paid for. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677. An ordinance divesting one of his property in a dead animal immediately on its death and vesting it in a public contractor for the removal of garbage without reference to whether it is dangerous to public health is unreasonable. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265. An attempted mutualization of a life insurance company and consequent deprivation of stockholders of control therein, not done under the formalities required by its charter, deprives the minority stockholders of their rights without due process. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

14. A statute providing for removal of public officers by the appointing power does not deprive without due process. State v. Grant [Wyo.] 81 P. 795.

15. See 3 C. L. 774.

16. In re Aubrey, 36 Wash. 308, 78 P. 900. Law licensing horseshoers held invalid. Id. Stock-grazing on the public lands of the United States within the limits of the state may be regulated. Spencer v. Morgan [Idaho] 79 P. 459. The provision of a state constitution guarantying due process of law does not prevent a police officer from arresting a foreign seaman on the requisition of a consul according to treaty. Dallemagne v. Moisan, 197 U. S. 169, 49 Law. Ed. 709.

17. In re Commonwealth of Pa., 45 Misc. 46, 90 N. Y. S. 808.

18. See 3 C. L. 774.

19. Statute requiring removal of school sinks from tenement houses and substitution of water closets at an expense greater than defendant's interest in property. Tenement House Dept. of City of New York v Moeschen, 179 N. Y. 325, 72 N. E. 231. Statute regulating smoke nuisances. State v. Tower, 185 Mo. 79, 84 S. W. 10.

20. See 3 C. L. 774.

21. A law invalidating as to creditors' sales of stocks of goods otherwise than in due course of trade, unless certain formalities are complied with is void. See 3 C. L. 774, n. 49. Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854. **Contra,** Wright v. Hart, 103 App. Div. 218, 93 N. Y. S. 60. A law requiring express companies to deliver parcels to the consignees in cities having a specified population is not a deprivation without due process of law. United States Exp. Co. v. State [Ind.] 73 N. E. 101. A statute requiring foreign insurance companies to file with the insurance commissioner a stipulation that process against them may be served on him or an agent whom he shall designate does not deny due process. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. An ordinance prohibiting the storage of oils within the corporate limits, though it operates to destroy an individual's business, is not a deprivation without due process. City of Crowley v. Ellsworth [La.] 38 So. 199. An ordinance requiring railroads to reduce crossings to grade, being a proper exercise of the police power, is not a taking without due process. Houston, etc., R. Co. v. Dallas [Tex.] 84 S. W. 648. An ordinance requiring that all cut stone used in municipal work be dressed in the state does not deprive without due process. Allen v. Labsap [Mo.] 87 S. W. 926. The imposition of a mulct tax on the business of cigarette selling, making it a lien on the real property in which the business is carried on, does not violate the due process clause because no notice of the imposition of the tax is provided for. Hodge v. Muscatine County, 196 U. S. 276, 49 Law. Ed. 477. The revocation of the license of a foreign corporation for violation of a state anti-trust law does not deny it due process. National Cotton Oil Co. v. State of Tex., 197 U. S. 115, 49 Law. Ed. 689; Southern Cotton Oil Co. v. State of Tex., 197 U. S. 134, 49 Law. Ed. 696.

22. See 3 C. L. 775. A statute making cities liable for injuries to person or property from mob violence is valid. City of Iola v. Birnbaum [Kan.] 81 P. 198. Statutes providing for penalties are sustainable, but it is not due process to allow the plaintiff to arbitrarily determine the amount thereof. Law penalizing fraudulent user of union label for $200 to $500. Cigar Makers' International Union of America v. Goldberg [N. J. Err. & App.] 61 A. 457. A statute authorizing recovery by the United States against a land grant railroad for lands patented and sold by it to which it was not entitled does not deprive without due process. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 651. A statute imposing a penalty on railroads for allowing Johnson grass to go to seed on their right of way does not

Local assessments for improvements [25] require notice and opportunity to be heard.[26] Assessments by the front foot rule [27] and reassessments are allowable.[28]

Drainage acts [29] providing proper safeguards [30] are sustained.[31]

Taxation.[32]—Illegal taxation is a deprivation of property without due process of law.[33] Taxes properly assessed under authority of law,[34] after notice, actual or constructive, and opportunity to be heard,[35] and proceedings to enforce collection,[36] constitute due process, notwithstanding exemptions and inequalities.[37] The taxing of property proposed to be taken into a city by extension of its limits is not a taking or damaging of property without authority of law.[38]

Civil remedies and proceedings.[39]—Statutes of limitation may be within the due process clause if unreasonably restrictive.[40] Statutes providing remedies [41] and regulating procedure [42] are sustained unless violative of property rights.[43]

deprive them of their property without due process. Gulf, etc., R. Co. v. Henderson [Tex. Civ. App.] 86 S. W. 371.

23. See C. L. 593, n. 31.

24. Mining tunnel. Baillie v. Larson, 138 F. 177.

25. See 3 C. L. 775. A statute providing for an issue of bonds to pay for a local improvement and fixing the rate of interest thereon does not deprive an owner of his property without due process of law. Hulbert v. Chicago, 213 Ill. 452, 72 N. E. 1097.

26. Where notice and a hearing is provided, there is due process of law. City of Denver v. Kennedy [Colo.] 80 P. 122. A provision limiting the time to urge objections to special tax bills to sixty days is void. Barber Asphalt Pav. Co. v. Munn, 185 Mo. 552, 83 S. W. 1062; Schibel v. Merrill, 185 Mo. 534, 83 S. W. 1069.

27. Assessing by frontage the entire cost of a street extension including a charge for planking is not unfair as to an owner whose property extends beyond the planking. City of Seattle v. Kelleher, 195 U. S. 351, 49 Law. Ed. 232.

28. A statute providing for reassessment of levies invalidated by defective assessment does not deprive without due process. Haubner v. Milwaukee [Wis.] 101 N. W. 930. So where the reassessment is for work not assessable at the time it was done. City of Seattle v. Kelleher, 195 U. S. 351, 49 Law. Ed. 232.

29. See 3 C. L. 775.

30. Notice by publication of levy of levee taxes is sufficient. Ballard v. Hunter [Ark.] 85 S. W. 252.

31. Statute providing for cleaning out of ditches held unobjectionable. Taylor v. Crawford [Ohio] 74 N. E. 1065. It being the common-law duty of a railroad company to provide for the flow of water through streams which it crosses, though increased by artificial improvements, compelling it to do so by statute is not taking without due process. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

32. See 3 C. L. 776.

33. Bunkie Brick Works v. Police Jury of Avoyelles, 113 La. 1062, 37 So. 970.

34. A tax on the value of the capital stock of a corporation which includes the value of tangible property held by it beyond the limits of the state is to that extent a taking without due process. Coal mined in the state and shipped away to be sold. Delaware, L. & W. R. Co. v. Commonwealth of Pa., 198 U. S. 341, 49 Law. Ed. 1077. Due process is not denied by a law taxing public service franchises for which the owners paid the public at the time they were granted or for which they pay an annual sum. People of New York v. State Board of Tax Com'rs, 199 U. S. 1, 50 Law. Ed. —; Id., 199 U. S. 48, 50 Law. Ed. —.

35. A street railroad company cannot claim to have been denied due process of the law in the valuation of its franchise on the ground that it was ascertained by speculation and guesswork, when the valuation was made by a state board to whom the company was required to make a written report, and a notice and hearing provided and opportunity for review afforded. People of New York v. State Board of Tax Com'rs, 199 U. S. 48, 50 Law. Ed. —.

36. Article 13, § 3, of the constitution of West Virginia, providing for the transfer of title to lands to persons occupying under color of title and paying taxes, does not violate the fourteenth amendment. State v. Harman [W. Va.] 50 S. E. 828. A statute under which a lien for taxes assessed against a life estate attaches to the interest of the remainderman is valid. Hadley v. Hadley [Tenn.] 87 S. W. 250. Due process is not denied non-resident stockholders in corporations by a statute providing for a tax on shares to be paid by the corporation which is given a personal action against the shareholder to recover the amount so paid. Corry v. Baltimore, 196 U. S. 466, 49 Law. Ed. 556. Due process of law is not denied a foreign insurance company by distraining its personal property under authority of a statute to satisfy personal taxes lawfully levied. Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 49 Law Ed. 619.

37. Due process of law is not denied by a tax law that provides a different method of taxing railroad companies from other persons, even those which own railroads. Michigan Railroad Tax Cases, 138 F. 223; State v. Back [Neb.] 100 N. W. 952.

38. Forbes v. Meridian [Miss.] 38 So. 676.

39. See 3 C. L. 776.

40. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. One year is a reasonable time in which to assert title after adverse possession for nine years. Schauble v. Schulz [C. C. A.] 137 F. 389. Minority of claimants is not a fundamental ground of exemption from a statute of limitations. That ground exists only by favor of the

Criminal offenses and procedure.[44]—Statutes defining, and punishing crimes[45] and regulating criminal procedure,[46] unless violative of fundamental rights, are sustained.[47] A statute providing for a forfeiture of "good time" on conviction of a convict of another offense before expiration of his term is not objectionable.[48]

statute, and the statute may withdraw it. Id. A statute providing that constructive possession of unimproved lands shall be in him who under color of title pays taxes thereon for seven years, three of which must be subsequent to the passage of the act, is valid. Towson v. Denson [Ark.] 86 S. W. 661.

41. A statute empowering the insurance commissioner to proceed against insurance companies violating the laws for the purpose of winding them up and providing for receivers is not a deprivation without due process, the state having authority to say upon what terms corporations shall do business. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125. A statute providing that a judgment may be enforced or carried into execution after the lapse of five years from the date of its entry by leave of court, although no notice to the judgment debtor is required, affords due process. Harrier v. Bassford, 145 Cal. 529, 78 P. 1038. A statute authorizing apportionment of damages in cases of contributory negligence is valid. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. A statute providing administration on the estate of a person absent for so long a period as to raise a presumption of his death is valid, all his rights being safeguarded. See 3 C. L. 777, n. 99, 1. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125. A statute authorizing execution against the income of trust funds of a judgment debtor in favor of a judgment for necessaries, if applied to a trust created before the statute took effect, is unconstitutional. Sloane v. Tiffany, 34 Civ. Proc. R. 208, 93 N. Y. S. 149.

42. The rule that the sheriff's return of service is conclusive does not deny due process. Smoot v. Judd, 184 Mo. 508, 83 S. W. 481.

43. A judgment of ouster against a defendant in ejectment for failure to pay his half of the stenographer's fee is not due process. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281. A statute compelling the hearing of preferred causes on particular days on application of one party whether the other is able to go to trial or not is invalid. Riglander v. Star Co., 98 App. Div. 101, 34 Civ. Proc. R. 92, 90 N. Y. S. 772.

44. See 3 C. L. 777. See, also, ante, first part of this section.

45. A statute providing for the confiscation of fish nets as nuisances is not violative of any constitutional right. State v. French, 71 Ohio St. 186, 73 N. E. 216. A municipal ordinance prohibiting the visiting of gambling rooms does not deprive one of liberty without due process, though interpreted to make it criminal to visit such a room innocently. Ah Sin v. Wittman, 198 U. S. 500, 49 Law. Ed. 1142.

46. Indictment by a grand jury is not required either by the fourteenth amendment or by a similar clause in a state constitution. State v. Guglielmo [Or.] 79 P. 577; Id. [Or.] 80 P. 103. A judgment refusing a new trial but modifying the judgment below and remanding defendant for sentence for a lesser degree than the one of which he was convicted does not deny due process. Darden v. State [Ark.] 84 S. W. 507.

47. A fine cannot be imposed without judicial investigation. Poundage ordinance. Shook v. Sexton, 37 Wash. 509, 79 P. 1093. A statute authorizing a judge on proof by affidavit that a person subpoenaed and attending before a comptroller refuses to answer legal and pertinent questions by warrant to commit the offender to jail, there to remain until he submits to answer is unconstitutional. In re Grout, 34 Civ. Proc. R. 231, 93 N. Y. S. 711. A statute providing for the confinement in the insane asylum of one acquitted of homicide on the ground of insanity does not deprive him of liberty without due process of law. Ex parte Brown [Wash.] 81 P. 552. **Contra.** In re Boyett, 136 N. C. 415, 48 S. E. 789.

NOTE. Incarceration of insane persons accused of crime: Application for a writ of habeas corpus to be released from an asylum, where petitioner was kept by order of the judge of the superior court under L. 1899, c. 1, § 65, providing that persons convicted of crimes and acquitted on the ground of insanity are to be committed to asylums for the dangerous insane, at the discretion of the judge, and are to be discharged only by act of the general assembly. Held, that the act is unconstitutional because authorizing restraint without due process of law and attempting to interfere with the powers of the courts to inquire into the legality of the restraint. In re Boyett, 136 N. C. 415, 48 S. E. 789.

This is not the first time that a court has been called upon to pass on the validity of similar statutes, and the universal ruling holding them unconstitutional is based upon the fundamental principles of justice. During the last forty years, the absurd length to which the defense of insanity has been allowed to go, whereby so many criminals have escaped punishment, has led to the enactment of these statutes; but it must be conceded that the remedy is not to be sought by destroying the safeguards of private liberty. In Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633, where a statute almost identical with this was before the court, Campbell, J., said: "The state has an ultimate guardianship over noncompotes in cases where it is necessary. * * * Neither judge nor expert has any power under the constitution to select his own means and process of inquiry and pass ex parte upon the liberty of citizens." In the following cases similar decisions have been rendered: State v. Billings, 55 Minn. 467, 43 Am. St. Rep. 524, and note; In re Lambert, 134 Cal. 626, 86 Am. St. Rep. 296, 55 L. R. A. 856;

§ 16. *Compensation for taking property*[49] for public use is guaranteed by all constitutions,[50] and this guaranty is invariably construed to mean that private property shall be taken for private use under no circumstances.[51] A use is public when it will tend to promote the public interest.[52] A taking occurs when any injury for the benefit of the public is done or permitted,[53] though injuries resulting from mere police regulations need not be compensated.[54] The limitations on the power of eminent domain imposes no restriction on the legitimate exercise of the police power.[55] Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not taking property without due compensation.[56]

§ 17. *Right to justice and guaranty of remedies.*[57]—A certain remedy at law for every injury is a natural right, confirmed by probably every constitution,[58]

People v. St. Savior Sanitarium, 34 N. Y. App. Div. 363; In re Clayton, 59 Conn. 510, 21 Am. St. Rep. 128, 13 L. R. A. 66. The ruling as to the unconstitutionality of the provision in the statute, that the persons confined in the asylum are to be released only by act of the general assembly, is undoubtedly correct. The right to inquire into the legality of the restraint is exclusively within the province of the judiciary. Buswell, Insanity; Palmer v. Judge, 83 Mich. 528; Doyle, Petitioner, 16 R. I. 537. 27 Am. St. Rep. 759, and note.—From 3 Mich. L. R. 318.

48. Ex parte Russell, 92 N. Y. S. 68.

49. See 3 C. L. 773. See full treatment in Eminent Domain, 3 C. L. 1189.

Where property is taken by the public, compensation need not be first made if it is secured. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. An order of the Federal court requiring a suit to condemn a right-of-way over a railroad in the hands of its receiver to be brought in that court does not invade the state's right of eminent domain. Buckhannon & N. R. Co. v. Davis [C. C. A.] 135 F. 707.

50. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677. Where the Federal government takes property, including streets and alleys, belonging to a municipality, it should pay for the water and sewer pipes, curbing, and the like. Town of Nahant v. U. S. [C. C. A.] 136 F. 273. Statute providing for reassessment of defective assessments for local improvements held not to take private property for public use without just compensation. Haubner v. Milwaukee [Wis.] 101 N. W. 930. A statute protective of fish and game does not take without compensation. Ex parte Fritz [Miss.] 38 So. 722.

51. See 3 C. L. 779, n. 72. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031. An act granting aid in money to worthy infirm persons is not in violation of the provision of the Federal constitution against the taking of private property for private purposes. Davies v. State, 6 Ohio C. C. (N. S.) 417.

52. Taking shares of stock of connecting line by railroad already owning majority, for purpose of effecting a merger, is public. New York, etc., R. Co. v. Offield [Conn.] 59 A. 510; Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96. That condemnation by a railroad company of the few remaining shares of another company not already owned by it may be for a private use is precluded by the charter of the condemning company which provides that such condemnation will ipso facto work a merger of the two companies. New York, etc., R. Co. v. Offield [Conn.] 59 A. 510. A mining tunnel may be a public use. Baillie v. Larson, 138 F. 177. The construction and operation of roads and tramways for the development of mines is a public use. Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 P. 296. Agricultural drainage is a public use. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. A union depot is a public use. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

53. In an action for injury to plaintiff's property by a municipal contractor blasting a tunnel, it is proper to put before the jury by instruction the constitutional provision that private property shall not be taken for public use without just compensation. City of Chicago v. Murdoch, 113 Ill. App. 656.

54. A statute prohibiting the transportation of fish taken from the inland waters of the state except under conditions does not take property for public use without just compensation. State v. Nergaard [Wis.] 102 N. W. 899. It being the common-law duty of a railroad to make such changes in its bridges as may be necessary to provide drainage for all waters flowing in streams crossed by it, though increased by artificial improvements, compelling it to do so by statute is not a taking of its property without compensation. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219. A police regulation requiring tenement house owners to substitute water closets for school sinks at their own expense does not take their property without compensation. Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231. A statute which merely provides for the cleaning out of an established ditch need make no provision for compensation to owners. Taylor v. Crawford [Ohio] 74 N. E. 1065.

55. Reducing railroad crossings to grade. Houston & T. C. R. Co. v. Dallas [Tex.] 84 S. W. 648.

56. A gas company has no such property right in the location of its pipes in the city streets as will make the compulsory moving of them at its own expense a taking of property without compensation. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 Law. Ed. 831.

57. See 3 C. L. 779.

58. See 3 C. L. 779, n. 36. Local assess-

which right is not dependent on the frequency of its assertion.[59] Constitutional rights may exist without a remedy for their enforcement.[60] A statute forfeiting the license of a foreign insurance company that removes cases against it to the Federal court is not in conflict with the Federal constitution.[61]

§ 18. *Jury trials preserved.*[62]—This right of trial by jury as it existed at common law has been almost universally preserved. Some constitutions dispense with unanimity. In some states the constitutional right is supplemented by a statutory right in cases where it did not exist at common law.[63]

§ 19. *Crimes, prosecutions, punishments and penalties.*[64]—Under American constitutions persons accused of crime[65] are entitled to a speedy and public trial by an impartial jury,[66] to be informed of the nature of the accusation against them,[67] to confront the witnesses against them,[68] are protected from giving evidence against themselves,[69] from ex post facto laws,[70] and bills of attainder,[71] from being placed twice in jeopardy for the same offense,[72] and from excessive fines and cruel punishment.[73] Disbarment proceedings against an attorney are not

ment law providing for reassessment of defective levies held not violative. Haubner v. Milwaukee [Wis.] 101 N. W. 930. A statute limiting the period in which a landowner must act to invalidate a special assessment does not violate. City of Denver v. Campbell [Colo.] 80 P. 142.

59. That invasions of a particular right are rare, or that a right has not been asserted for a long time, is not conclusive of its absence. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68. Where a case is new in principle, the courts cannot give a remedy, but where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles. Id.

60. A provision that there shall be at least two terms of court in each county is unenforceable except by appeal to the legislature. St. Louis, S. W. R. Co. v. Hall [Tex.] 85 S. W. 786.

61. Prewitt v. Security Mut. Life Ins. Co., 26 Ky. L. R. 1239, 83 S. W. 611.

62. See 3 C. L. 780.

63. See a full treatment in Jury, 2 C. L. 633, 4 C. L. 358.

64. See 3 C. L. 780. See application of these guaranties fully discussed in Criminal Law, 3 C. L. 979; Indictment and Prosecution, 4 C. L. 1.

65. The term "crime" as used in the Federal and state constitutions forbidding involuntary servitude except as a punishment for crime includes misdemeanors and all offenses in violation of penal laws. Stone v. Paducah [Ky.] 86 S. W. 531.

66. The confinement in an insane asylum of one acquitted of homicide on the ground of insanity as required by law does not deprive him of jury trial, infringe his right of counsel, inflict cruel punishment, nor deprive him of his right to demand judicial investigation of his restoration to sanity. Ex parte Brown [Wash.] 81 P. 552.

67. A statute authorizing criminal prosecution by information and reserving to the circuit courts the right to convene grand juries when advisable is a proper exercise of legislative power under a provision authorizing the modification or abolition of the grand jury. State v. Gugliemo [Or.] 79 P. 577. Under a provision that no warrant shall issue but on probable cause supported by oath or affirmation, an information filed by the district attorney or his deputy need not be verified, since it is supported by his official oath. Id. Petty offenses may be tried without indictment. Assault. State v. Thornton, 136 N. C. 610, 48 S. E. 602. Liquor selling. State v. Lytle [N. C.] 51 S. E. 66. Violation of hack ordinance. Bray v. State, 140 Ala. 172, 37 So. 250.

68. The right of confrontation of witnesses is not impaired by allowing record proof of marriage in bigamy. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

69. Ordinance requiring automobile users to display number of license in large figures held not to compel giving of evidence against one's self. People v. Schneider [Mich.] 103 N. W. 172.

70. Any statute depriving a person accused of crime of a right which he possessed at the time the offense was committed is invalid as an ex post facto law. People v. Johnson, 44 Misc. 550, 90 N. Y. S. 134. The right of one convicted of crime to a diminution of sentence by good behavior is a substantial right which cannot be taken away by a law passed after the offense was committed. Id.; State v. Tyree [Kan.] 78 P. 525. A statute making a married woman a competent witness against her husband in certain cases is not ex post facto. Wester v. State [Ala.] 38 So. 1010. A change in the punishment not altering the situation to the material disadvantage of the convict does not render the law ex post facto. Changing place of execution and interim confinement from county jail to state penitentiary. Rooney v. North Dakota, 196 U. S. 319, 49 Law. Ed. 494.

71. A resolution of the state senate resulting in the expulsion of a member is not a bill of attainder. French v. Senate of State, 146 Cal. 604, 80 P. 1031.

72. A convict convicted a second time during the period of his first sentence and regarded as having forfeited his commutation for good behavior allowed on his prior sentence is not thereby placed in double jeopardy. Ex parte Russell, 92 N. Y. S. 68.

73. A statute providing for a fine of not less than $100 nor more than $500 or imprisonment in the county jail not exceed-

criminal, and the customary safeguards thrown around persons accused of crime are not applicable.[74] Involuntary servitude except as a punishment for crime is not permitted.[75]

§ 20. *Searches and seizures.*[76]—Unreasonable searches and seizures are prohibited.[77]

§ 21. *Suffrage and elections.*[78]—The provision that all elections shall be free and equal has no application to primary elections.[79] Primarily, elections belong to the political branch of the government and are beyond control of the judiciary.[80]

§ 22. *Frame and organization of government; courts; officers.*[81]—*The legislature* may impose the duty of rebuilding a bridge between two cities upon them in such proportion as it sees fit.[82]

The right to local self government,[83] is guarantied in terms in several constitutions,[84] and prohibitions on the imposing on the people of counties and municipal subdivisions of the state, new liabilities in respect of past transactions are met with.[85] But in the absence of such a provision a state can compel any of its political subdivisions to pay obligations not enforceable in the courts but which they in equity and good conscience ought to pay.[86]

Courts[87] and their jurisdiction are generally placed beyond control of the legislature except to a limited extent.[88]

ing six months or both for violation of a statute regulating the hours of labor in mines does not impose unreasonable fines or excessive punishment. Ex parte Kair [Nev.] 80 P. 463.

74. Information or indictment. Trial by jury. Confrontation of witnesses. State v. McRae [Fla.] 38 So. 605.

75. A statute compelling persons incarcerated in jail for want of sureties to keep the peace to labor to an extent sufficient to pay their board conflicts with the thirteenth amendment. Stone v. Paducah [Ky.] 86 S. W. 531. Compare the title Slaves, 4 C. L. 1494, for the law relating to peonage.

76. See 3 C. L. 783. See, also, Search and Seizure, 4 C. L. 1416.

77. Automobile ordinance requiring users to expose number of license in large figures held not to infringe provision against unreasonable searches. People v. Schneider [Mich.] 103 N. W. 172. An article taken from defendant's house under an invalid search warrant issued solely for the purpose of obtaining evidence against him is inadmissible in evidence against him. State v. Sheridan, 121 Iowa, 165, 96 N. W. 730. An order of the common council of a city made in the exercise of its charter powers commanding the production before it of the books and papers of a corporation in aid of investigations as to evasions of license taxes is not a violation of the provision. Ex parte Conrades [Mo. App.] 85 S. W. 150.

78. See 3 C. L. 784. Compare title Elections, 3 C. L. 1165.

79. Montgomery v. Chelf, 26 Ky. L. R. 638, 82 S. W. 388.

80. McWhorter v. Dorr [W. Va.] 50 S. E. 838.

81. See 3 C. L. 784.

82. In re Opinion of the Justices [Me.] 60 A. 85.

83. See 3 C. L. 785. As applied to municipalities, see, also, Municipal Corporations, 4 C. L. 720. Right of local self government fully discussed. Brown v. Galveston [Tex.] 75 S. W. 488, criticised, and Ex parte Lewis [Tex. Cr. App.] 73 S. W. 811, approved. Ex parte Anderson [Tex. Cr. App.] 81 S. W. 973.

84. Requirement that self imposed city charters shall conform to general law of state does not extend to purely local matters. Grant v. Berrisford [Minn.] 101 N. W. 940. The legislature has power merely to approve or reject charters proposed by inhabitants of certain cities in California. Sheehan v. Scott, 145 Cal. 684, 79 P. 350. The act of April 23, 1902 (95 O. L. 259), providing for detaching unplatted farm lands from cities and incorporated villages, and for attaching them to adjacent townships, does not conflict with the provision for local self government in the constitution of Ohio. Village of Grover Hill v. McClure, 6 Ohio C. C. (N. S.) 197, 27 Ohio C. C. 376. The legislature of Idaho cannot abolish an existing county. McDonald v. Doust [Idaho] 81 P. 60. Under a provision for the local election of local officers, an extension of the term of an existing officer is invalid. State v. Trewhitt, 113 Tenn. 561, 82 S. W. 480.

85. Not applicable to municipal corporations or governmental subdivisions of state. Apportionment and appraisement of property of divided school district sustained. School Dist. No. 1 of Denver v. School Dist. No. 7 in Arapahoe County [Colo.] 78 P. 690.

86. Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703.

87. See 3 C. L. 786. See, also, Courts, 3 C. L. 970; Judges, 4 C. L. 280; Jurisdiction, 4 C. L. 324; Officers and Public Employes, 4 C. L. 854.

88. The Texas act (26th Leg. p. 40, c. 33), giving corporation courts some of the jurisdiction of justices of the peace, is valid. Ex parte Freedman [Tex. Cr. App.] 83 S. W. 1125. The provision that at least two terms

No offices may be created[89] except as authorized by the constitution. Nor may tenure, terms, or compensation be altered beyond such authority.[90]

§ 23. *Taxation and fiscal affairs.*[91]—In the absence of constitutional restraint the legislature has absolute power with respect to taxation,[92] provided the power is exercised for a public purpose.[93] This right to redeem from tax sales is specifically granted by the constitution of Nebraska.[94]

Equality and uniformity.[95]—The limitation upon the taxing power as to equality and uniformity of taxation has its foundation in state constitutions,[96] though taxes must not be so nonuniform as to violate the fourteenth amendment.[97] Exact equality is not necessary,[98] and classification[99] and executions do not violate the provision.[1]

Double taxation.[2]

Exemption clauses[3] are strictly construed.[4]

of court shall be held in each county is enforceable only by appeal to the legislature. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786.

89. See 3 C. L. 786; 1 C. L. 602, n. 68. Also Officers and Public Employes, 4 C. L. 854.

90. Judicial officers are not public officers within meaning of prohibition to increase salary during incumbency. Commonwealth v. Mathues [Pa.] 59 A. 961. Change in size of district attorney's district thereby indirectly reducing the amount of his emoluments does not violate this provision. Butler v. Stephens [Ky.] 84 S. W. 745. Terms may not be extended. State v. Galusha [Neb.] 104 N. W. 197.

91. See 3 C. L. 786. See, also, Taxes, 4 C. L. 1605; Municipal Corporations, 4 C. L. 720; Municipal Bonds, 4 C. L. 706; Public Works, etc. (local assessments), 4 C. L. 1124.

92. See 3 C. L. 786, n. 38. If a tax is within the lawful power, the exercise of that power cannot be judicially restrained because of the result to arise from its exercise. Tax on employment agents procuring laborers for employment out of state. State v. Roberson, 136 N. C. 587, 48 S. E. 595. Inheritance tax. Succession of Levy [La.] 39 So. 37. Tax on trading stamp business. State v. Merchants' Trading Co., 38 So. 443.

93. Construction of road across flats to sea held to be of such public nature that the state may do it with public money. Wheelwright v. Boston [Mass.] 74 N. E. 937. The sprinkling of city streets is a public purpose for which a city can raise money by taxation. Maydwell v. Louisville, 25 Ky. L. R. 1062, 76 S. W. 1091. Liquor dispensaries established by municipalities to conduct the liquor traffic as authorized by law constitute a public purpose for which public money may be lawfully invested and expended. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016.

94. Decree on foreclosure of tax lien not providing for the constitutional redemption is erroneous. Logan County v. McKinley-Lanning Loan & Trust Co. [Neb.] 101 N. W. 991.

95. See 3 C. L. 787.

96. Given a reasonable and just classification of taxpayers, all that the fourteenth amendment requires is that all in the class shall be treated alike. Territory v. Denver & R. G. R. Co. [N. M.] 78 P. 74. Is not violated by a law reassessing the cost of a local improvement, but providing that those who have paid under a prior invalid assessment shall not be again assessed. Warren v. Boston Street Com'rs, 187 Mass. 290, 72 N. E. 1022. The equality and uniformity clause in Nebraska requires that the value of its property and franchises within the state be the basis of taxation of every corporation both foreign and domestic. Aachen & M. Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. Under a constitutional requirement of uniformity in proportion to value, a tax of a specific amount for a particular act cannot be upheld as a valid property tax. Ten dollars on oil depot where oil is stored in bulk or tank. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. A statute providing for redemption from tax sale for amount of bid examined and held in conflict with constitutional provision against commutation, release or discharge of taxes. City of Beatrice v. Wright [Neb.] 101 N. W. 1039.

97. Inequality in valuation must be systematic and intentional to be ground of Federal intervention where the assessment is not made on such a different scale of values from that adopted elsewhere as to amount to a violation of the fourteenth amendment. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 Law. Ed. 615.

98. Nonuniformity cannot arise from the necessarily different taxing rate employed in different taxing districts in which an owner's property lies or in which he does business. Aachen & M. Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3.

99. Is not violated by an act assessing railroad property differently from other property. State v. Back [Neb.] 100 N. W. 952.

1. An act exempting religious bequests from the transfer tax construed not to apply to a foreign corporation is not violative of uniformity. In re Speed's Estate [Ill.] 74 N. E. 809.

2. See 3 C. L. 788.

3. See 3 C. L. 789.

4. City of Rochester v. Rochester R. Co. [N. Y.] 74 N. E. 953. Land conveyed by the United States to a corporation for dry dock purposes is not entirely exempted from state taxation as an agency of the United States because of a reserved right of free use and a provision for forfeiture. Baltimore Ship-

Public improvements.[5]—Works of internal improvement by the state are prohibited by several state constitutions.[6]

Debt limit, and limit of levy.[7]—Provisions limiting the indebtedness that may be incurred by the legislature in behalf of the state,[8] or by the municipalities of the state,[9] and limitations on the tax levy,[10] are met with, and contracts and statutes having effect to increase indebtedness or levy beyond the limit are invalid.[11]

Submission of question of indebtedness.[12]

Provision for payment of debts.[13]

Public aid, donations and loans of credit.[14]—Donations of public funds to private individuals are invalid;[15] but it is within the general legislative power of the state to make provision for any legitimate class, recognized as such either by the constitution itself, or by a sense of justice and the common reason of the people of the state.[16]

§ 24. *Schools and education; school funds.*[17]—The constitutional provision for free schools is not violated by a law requiring children to be vaccinated as a condition of attendance.[18] Statutes applying school funds and property of various districts and imposing the burden of school support on them as the legislature sees fit are not assailable as interfering with property rights without compensation.[19]

§ 25. *The enactment of statutes* [20] is hedged about with various inhibitions, such as those against local and special laws, laws addressed to a plurality of subjects, and not reciting their subjects in their titles, and amendatory acts not setting out that amended. The powers of special sessions are limited, and there are also provisions regulating legislative procedure, and some relating to interpretation and effect of statutes.[21]

building & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 Law. Ed. 242. If a state unites in one undertaking an exercise of the police power with a commercial business, the national government cannot be compelled to aid the operation of the police power by foregoing its constitutional right to lay and collect an impost or exercise on the business part of the transaction (liquor dispensary system). State of South Carolina's Case, 39 Ct. Cl. 257.

5. See 3 C. L. 790.

6. The oil refinery act of Kansas is invalid under such a provision. State v. Kelly [Kan.] 81 P. 450.

7. See 3 C. L. 790.

8. Claims for a bounty on coyotes held not to constitute a debt within the limitation. Bickerdike v. State, 144 Cal. 681, 78 P. 270. Bonds authorized by a vote of the people are not an indebtedness to be considered in respect to the limit. Id. Claims of the same nature previously paid without authority are not to be considered. Id.

9. The legislature can neither authorize nor compel a municipality to increase its indebtedness beyond the constitutional limit. In re Opinion of the Justices [Me.] 60 A. 85; Robertson v. Staunton [Va.] 51 S. E. 178. And the constitutional provision will not be extended to include cases not fairly within it. N. W. Halsey & Co. v. Belle Plaine [Iowa] 104 N. W. 494.

10. Only one-half of one per cent. may be levied to pay railroad bonds in Arkansas. Desha County v. State [Ark.] 84 S. W. 625. The limitation in Texas does not interfere with a levy "for" a year previous in which the tax was less than the limit, though the year in which the levy is made the regular tax together with that for the previous year exceeds the limit. City of Austin v. Cahill [Tex.] 88 S. W. 542.

11. Robertson v. Staunton [Va.] 51 S. E. 178. An indebtedness that only may but does not necessarily increase the debt beyond the limit is not invalid. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

12, 13. See 3 C. L. 791.

14. See 3 C. L. 792.

15. A waiver by the state of the statute of limitations as to certain claims is not a donation. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

16. Davies v. State, 6 Ohio C. C. (N. S.) 417. The act (97 O. L. 392) providing for the payment to certain worthy blind persons of not more than $25 quarterly out of the county poor of the general expense fund, does not contravene the Ohio constitution. Id.

17. See 3 C. L. 792. See, also, Schools and Education, 4 C. L. 1401. The constitutional provision requiring notice of special local legislation is not applicable to the formation of school districts in Texas. Art. 11, § 10; art. 7, § 3. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

18. See 3 C. L. 792, n. 39. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97.

19. Board of Education of Kingfisher v. Kingfisher County Com'rs, 14 Okl. 322, 78 P. 455.

20. See 3 C. L. 793.

21. See Statutes, 4 C. L. 1522.

§ 26. *Miscellaneous provisions other than the foregoing,*[22] chiefly matters more properly belonging within the domain of legislation, are to be found in the more recent state constitutions. Among them are provisions respecting claims against the state,[23] public lands [24] and waters,[25] homesteads and other exemptions,[26] married women,[27] master and servant,[28] usury laws,[29] regulations of carriers,[30] corporations,[31] the liquor traffic,[32] and provisions respecting actions for wrongful death.[33]

Right to acquire information by compulsion.[34]—Production of papers cannot be compelled, where it is evident to the court that they must tend to subject the party to whom they belong to penalties and punishment.[35]

The right to bear arms [36] *is subject to such reasonable regulations and limitations as may be imposed by the legislature.*[37]

The full faith and credit clause is not violated by a state statute that prohibits suits between foreign corporations in the state courts, though construed to include foreign judgments.[38] This clause is oftenest invoked to protect foreign judgments.[39]

CONSULS, see latest topical index.

CONVICTS.[1]

22. See 3 C. L. 793.
23. See 3 C. L. 795, n. 81-83.
24. See 3 C. L. 795, n. 86.
25. See 3 C. L. 795, n. 87.
26. See 3 C. L. 794, n. 69-71. A statute providing for the setting aside of a homestead is not repugnant to a section of the constitution providing how it shall descend. Randolph v. White, 135 F. 875.
27. See 3 C. L. 795, n. 88.
28. See 3 C. L. 795, n. 84, 85. The provision that an employe's knowledge of defects shall not bar recovery does not do away with the defense of contributory negligence or make knowledge immaterial. Norfolk & W. R. Co. v. Cheatwood's Adm'x, 103 Va. 356, 49 S. E. 489.
29. See 3 C. L. 793, n. 61, 62.
30. See 3 C. L. 794, n. 72-74. Railroads in California lowering their rates for the purpose of competing with other carriers are not allowed to again raise them without permission of the government. Const. art. 12, § 20. Edson v. Southern Pac. R. Co., 144 Cal. 182, 77 P. 894.
31. See 3 C. L. 794, n. 75-79. Reserved power of amendment applies only to general and special laws under which corporations are organized and not to the charters themselves. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. Prohibition against issuance of stock except for actual value does not conflict with statute authorizing issuance of mining stock fully paid to purchase mines. Speer v. Bordeleau [Colo. App.] 79 P. 332.
32. See 3 C. L. 793, n. 63-68. The constitutional provision in Kansas does not affect the power of the legislature to further restrain or prohibit the traffic. State v. Durein [Kan.] 80 P. 987. A statute interdicting C. O. D. shipments of liquors is beyond the powers of the legislature as defined in the local option provision of the Texas constitution. Keller v. State [Tex. Cr. App.] 87 S. W. 669.
33. See 3 C. L. 795, n. 80.
34. See 3 C. L. 793, n. 59, 60.
35. Cleveland Elec. Illuminating Co. v. Hitchens, 27 Ohio C. C. 522, 3 Ohio N. P. (N. S.) 57.
36. See 3 C. L. 793, n. 57, 58.
37. The provision of 97 O. L. 436, which prohibits hunting or shooting or having in the open air for such purpose any implements for hunting or shooting on any Sunday, does not abridge the right to keep and bear arms, and is constitutional. Walter v. State, 15 Ohio N. P. 464, 3 Ohio N. P. (N. S.) 13.
38. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 48 Law. Ed. 225.
39. See Foreign Judgments, 3 C. L. 1466; Conflict of Laws, 3 C. L. 720.

§ 1. *Nature of contempt and what constitutes. A. Elements of contempt and nature of proceedings; civil or criminal.*[1]—Direct contempts are contempts in facie curiae. Constructive contempts are those committed outside the presence of the court, but tending by their operation to embarrass or prevent due administration of justice.[2] When brought for the purpose of vindicating the power and authority of the court and maintaining its dignity, contempt proceedings are criminal. When brought for the purpose of collecting an indemnity for the damages sustained by a party to an action because of the misconduct of other party, they are civil.[3]

(§ 1) *B. Disrespect to the court in general.*[4]—Disrespectful utterances to or concerning a judge in his official capacity, even respecting a case which has been terminated, are contempt;[5] but a proper assertion of legal rights,[6] or a truthful answer to a question by the judge,[7] cannot be considered as contempt.

(§ 1) *C. Acts in disobedience of court.*[8]—Failure to comply with an order of court is contempt[9] if the order is a valid one and within the jurisdiction;[10]

1. See 3 C. L. 795. Classification and distinctions discussed. State v. Bland [Mo.] 88 S. W. 28.

2. O'Neil v. People, 113 Ill. App. 195.

3. Davidson v. Munsey [Utah] 80 P. 743; Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774; Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277; Christensen v. People, 114 Ill. App. 40; Powers v. People, 114 Ill. App. 323. Contempt proceedings are quasi criminal in their nature. An intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense. Hutton v. Superior Court [Cal.] 81 P. 409. The willful violation of an injunction by a party to the cause is contempt of court, constituting a specific criminal offense. Marinan v. Baker [N. M.] 78 P. 531.

4. See 3 C. L. 796.

5. Burdett v. Commonwealth [Va.] 48 S. E. 878.

Note: Of this ruling the Columbia Law Review (V. 249) says: "As the origin of the offense of criminal contempt lay in the fiction that the king in the person of his judges presided over the courts of Westminister (Neel v. State, 9 Ark. 259, 264, 50 Am. Dec. 209), and that contemptuous conduct toward the judge was a mild form of treason (3 Columbia L. R. 45), in England scandalization of the court, not with reference to a pending cause, constitutes contempt. Queen v. Gray, 2 Q. B. 36. In the United States, however, the idea of offense to the sovereign was supplanted by the idea of interference with the administration of justice, to prevent which the court possesses the inherent power to punish for contempt. Ex parte Robinson, 19 Wall. [U. S.] 505, 22 Law. Ed. 205; Cartwright's Case, 114 Mass. 230; Watson v. Williams, 36 Miss. 331. Interference with the administration of justice, therefore, should be the test of criminal contempt, whether the interference be with a pending cause or with the future course of justice; 4 Bl. Com. 285. But the general rule in the United States is that a libelous attack on a court concerning a cause already terminated is not a criminal contempt. Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Cheadle v. State, 110 Ind. 301, 59 Am. Rep. 199; Rosewater v. State, 47 Neb. 630. From the effect of such act on the course of justice it is hard to see why the distinction exists. State v. Morril, 16 Ark. 384. See Com. v. Dandridge, Va. Cas. 408, 421. The principal case would seem to adopt the better rule."

The Michigan Law Review (3, 319) says: "There was no question as to the libel, but defendant contended that a publication with respect to an ended cause could not be punished as a contempt of court. A number of cases support this contention. Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Cheadle v. State, 110 Ind. 301, 59 Am. Rep. 199; State v. Anderson, 40 Ia. 207; Rosewater v. State, 47 Neb. 630; State v. Kaiser, 20 Ore. 50. But when the contempt consists in scandalizing and defaming the court itself, other courts hold that it need not relate to a pending suit. State v. Shepherd, 177 Mo. 205, 76 S. W. 79 (in which the subject is discussed at considerable length.) In re Chadwick, 109 Mich. 588, 67 N. W. 1071; State v. Morrill, 16 Ark. 384."

6. The filing of an affidavit of bias and prejudice against a judge in a contempt proceeding is not contempt per se, though the affidavit is insufficient. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

See Contra. Ohio v. Fronizer, 2 Ohio N. P. (N. S.) 476.

7. For one on contempt proceedings for saying out of court that the judge was corrupt to state in answer to a question of the court that he had given publicity to the statement that he heard the judge was corrupt, does not constitute a contempt committed within the presence of the court. Davis v. State [Ark.] 84 S. W. 633.

8. See 3 C. L. 796.

9. Failure of executor to comply with decree charging him with debt. In re David's Estate, 44 Misc. 337, 89 N. Y. S. 927. Failure of a divorced husband to comply with a decree for alimony. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447. Refusal to give a deposition. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

10. State v. Scarborough [S. C.] 49 S. E. 860; State v. Rice, 67 S. C. 236, 45 S. E. 153; Fenn v. Georgia R. & Elec. Co. [Ga.] 50 S.

and mere irregularities do not excuse disobedience.[11] It must be one binding on the party sought to be charged.[12] Injunctional orders, however, are generally held binding on all who have knowledge thereof,[13] but not on persons without such knowledge.[14]

(§ 1) *D. Official misconduct and obstruction or perversion of justice.*[15]—Interference with property in custodia legis,[16] tampering with jurors[17] or witnesses,[18] publications designed to affect the event of pending actions,[19] presenting false affi-

E. 103. A sheriff is not in contempt in declining to honor and execute a void order. Lindsay v. Allen [Tenn.] 82 S. W. 648.

Refusal to answer improper question: An attorney is not guilty of contempt from refusing to answer questions which would require him to divulge a privileged communication made to him by his client. Elliott v. United States, 23 App. D. C. 456. A witness cannot be adjudged guilty of contempt for a refusal to answer questions that are not legal and pertinent. Rogers v. Superior Court of San Francisco, 145 Cal. 88, 78 P. 344. Questions calling for hearsay testimony. Ex parte J. H. Schoepf, 3 Ohio N. P. (N. S.) 93.

11. Christensen v. People, 114 Ill. App. 40. Whether order increasing alimony was properly served on defendant and whether he was bound to comply with it, was not determinable on motion to vacate commitment for contempt. Keller v. Keller, 100 App. Div. 325, 91 N. Y. S. 528. A party who refused to obey an order of court directing him to deliver certain property to a receiver could not defeat contempt proceedings by contesting the right of the receiver to the possession of such property, which was adjudicated by the order from which he did not appeal. Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188. A party is not excused from obeying a valid injunction by showing that it was subsequently dissolved for an irregularity or for want of equity. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 83 S. W. 1100. Where a petition for an order to show cause why a party should not be punished for contempt of court in violating a decree was demurred to, the question whether decree was sustained by the evidence could not be considered on the demurrer, the court having jurisdiction of the parties and the subject-matter. State v. District Court of Third Judicial Dist. for Deer Lodge County [Mont.] 79 P. 319.

12. A person not a party to an action cannot be adjudged guilty of contempt for failure to comply with order of court made therein. American Mortg. Co. v. Sire, 92 N. Y. S. 1082. Where plaintiff procured an order from the probate court directing defendant, a warehouseman, who had certain property in storage the title to which was disputed by the plaintiff and the executors of her husband's estate, to deliver the property to plaintiff, and he delivered a warehouse receipt to her, but subsequently refused to deliver the property, held that defendant not being a party to any of the probate proceedings, he was not guilty of contempt. Drasdo v. Beck [Wash.] 79 P. 948.

13. Sloan v. People, 115 Ill. App. 84; Christensen v. People, 114 Ill. App. 40. Where injunction ran to parties and their employes, employe knowingly violating it is guilty of contempt. People v. Marr [N. Y.] 74 N. E. 431. Where injunction was addressed to association and "its each and every member," members violating it are in contempt. Id. One who, with knowledge that others have been enjoined from infringing a patent takes over their business in the sale of the infringing articles and continues it in collusion with them to invade the injunction, by which acts the profit is punishable for contempt, whether actually employed and paid by them or not. Diamond Drill & Mach. Co. v. Kelley Bros. 132 F. 978. A party may be punished for contempt for disobeying an injunction prohibiting them from "aiding and abetting" the defendant from doing certain acts notwithstanding the defendants themselves have been discharged. Sloan v. People, 115 Ill. App. 84.

14. Unintentional violation of order of court by defendant's agents, they having no knowledge of said order, held not to constitute contempt. Encyclopaedia Britannica Co. v. American Newspaper Ass'n, 130 F. 493. Where an order directing tenants in a building to attorn to a receiver appointed in a mortgage foreclosure proceeding affecting the property was not formally served on the tenant, he could not be adjudged guilty of contempt for refusing to comply with its provisions. American Mortg. Co. v. Sire, 92 N. Y. S. 1082.

15. See 3 C. L. 797.

16. The commencement of an action against a receiver without leave of court. Pruyn v. Black, 93 N. Y. S. 995. Interference with receiver's possession of property. Gunning v. Sorg, 113 Ill. App. 332.

17. Talking with jury during trial in manner designed to affect verdict. Drady v. District Court of Polk County [Iowa] 102 N. W. 115. A party to a cause may, without being guilty of contempt, interview person acquainted with jurors, to ascertain whether there is any room for challenging a particular juror. Wells v. District Court of Polk County [Iowa] 102 N. W. 106. A member of a general grand jury panel, who has not been sworn to try an issue in any particular case, is a juror within § 4461, Iowa Code, giving the court power to punish as contempt an attempt to influence a juror. Marvin v. District Court of Polk County [Iowa] 102 N. W. 119.

18. A person soliciting an attorney engaged in the trial of a case to bribe jurors through him by gifts of money is guilty of criminal contempt. Hurley v. Commonwealth [Mass.] 74 N. E. 677.

19. The publication of newspaper articles relating to a murder case, setting forth fac similes of a specimen of handwrit-

davits,[20] presenting false claims to the court for allowance,[21] putting in fictitious bail,[22] and similar acts tending to the obstruction of justice, are contempt.

§ 2. *Defense, excuse or purgation.*[23]—While intent to contemn has been sometimes deemed essential,[24] it is generally held that neither advice of counsel,[25] nor the fact that contemnor is animated only by zeal for a client[26] is an excuse. Even impossibility of complying with an order has been deemed no excuse for disobedience where it was not presented in opposition to the passing of the order,[27] but grounds of opposition which could not have been previously presented will be considered.[28] Official duty of a Federal officer has been held to justify disobedience of the order of a state court.[29]

§ 3. *Power to punish or redress; contempt or other remedy.*[30]—The power to punish contempt of their authority is inherent in courts[31] of general[32] but not of

ing of the person indicted for the crime, and of a paper found by the side of the body of the person murdered, followed by an analysis of the likeness and unlikeness in the handwriting, including interview with experts employed by the commonwealth, stating the methods of the prosecuting office in connection therewith, and discussing the interest of reading public in the specimens of handwriting constitutes contempt of court because interfering with the administration of justice. Globe Newspaper Co. v. Commonwealth [Mass.] 74 N. E. 682. The publication of a newspaper article which would constitute contempt of court if published during the trial or immediately before the trial of a cause cannot be justified on the ground that the trial to which it referred was not in progress or immediately to he begun, but would occur at a time to be afterwards fixed, though this fact should be taken into consideration in imposing sentence. Id.

20. An attempt to improperly influence the administration of justice by presenting false affidavits to the court constitutes contempt. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914.

21. Under chapter 301, Comp. Laws of Michigan, the presentation of a false claim to the court for allowance is contempt. Ex parte Toepel [Mich.] 102 N. W. 369.

22. Under N. Y. Code Civ. Proc. § 14, subd. 2, it is made contempt for a party to an action to put in fictitious bail whereby the remedy of the other party to enforce his judgment is defeated, impaired, impeded, or prejudiced. Hall v. Lanza, 97 App. Div. 490, 89 N. Y. S. 980.

23. See 3 C. L. 798. A publisher of a newspaper, charged with contempt of court in publishing an article relating to a cause pending in court, cannot justify by showing that the article was true and that it was published without an express intent to injure the parties or to interfere with the administration of justice, though the same may be material in considering the punishment. Globe Newspaper Co. v. Commonwealth [Mass.] 74 N. E. 682.

24. One acting in good faith and meaning no disrespect to the court should not be punished for contempt. Boone v. Riddle [Ky.] 86 S. W. 978; Powers v. People, 114 Ill. App. 323. A municipal corporation will not be adjudged guilty of contempt unless it clearly appears that it is acting in bad faith and seeking to evade the orders of the court. Sponenburg v. Gloversville, 94 N. Y. S. 264. Either an attorney or his client may by legal methods and in a respectful manner test the validity of a rule of court. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

25. United States v. Goldstein, 132 F. 789.

26. People v. Newburger, 98 App. Div. 92, 90 N. Y. S. 740.

27. One ordered to pay alimony, to protect himself from contempt proceedings for noncompliance therewith because of stress of circumstances, should apply for the revocation or modification of the order. State v. Second Judicial Dist. Court [Mont.] 79 P. 13. Where defendants contested an application to compel them to produce books and papers for inspection on the ground that plaintiff was not entitled to such examination, and made no claim that the books and papers desired were not under their control, proof in a subsequent proceeding to punish them for contempt in failing to comply with an order requiring such production, that the books and papers had been accidently or mistakenly lost or destroyed prior to the hearing of the application for production, was insufficient to purge their contempt. London Guarantee & Acc. Co. v. Doyle, 134 F. 125.

28. Where a motion for an order adjudging defendant guilty of contempt for failure to comply with an order previously made in supplemental proceedings, requiring him to pay certain money to plaintiff's attorney was denied without prejudice, defendant was entitled on a subsequent motion for an order to show cause why he should not be punished for contempt for the same reason to present a defense arising after the making of the order in the supplemental proceedings. Gardiner v. Ross [S. D.] 104 N. W. 220.

29. Where an assistant U. S. district attorney procured the production of the state court records before a Federal grand jury under an ordinary subpoena duces tecum and thereafter held possession of such records as such attorney, he was not subject to punishment for contempt of the state court for failure to return such records on demand. In re Leaken, 137 F. 680.

30. See 3 C. L. 798.

31. A judge at chambers has no author-

limited jurisdiction,[33] and as such is usually held to be beyond legislative impairment,[34] though there are contrary holdings.[35] An act may be punished as contempt, though it is also punishable as crime.[36] The power to punish contemptuous publications does not invade the freedom of the press,[37] nor is a commitment for contempt for disobedience of order for the payment of money imprisonment for debt.[38]

§ 4. *Pleadings and other proceedings before hearing.*[39]—Contempt in facie curiæ may in the absence of statute be summarily tried;[40] but in all other cases a reasonably specific,[41] verified[42] charge must be filed,[43] and notice or process

ity to punish for a contempt not committed in his presence, unless expressly authorized by statute. Mau v. Stoner [Wyo.] 76 P. 584; State v. Scarborough [S. C.] 49 S. E. 866. Under § 3610, Rev. St. Wyoming, which provides that all motions, demurrers and other matters not involving a trial or an issue of fact pending in any district court may be determined by the judge in vacation, held that one charged with contempt for interfering with a water distributer appointed by the court commissioner involved the trial of a question of fact and could not be punished for contempt by the judge in chambers or the commissioner. Mau v. Stoner [Wyo.] 76 P. 584.

32. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151. The court has power to enforce by punishment for contempt the complainer of any order which it had a right to make, notwithstanding the absence of statute giving it such authority. Ex parte Latham [Tex. Cr. App.] 82 S. W. 1046.

33. Inferior tribunals are without inherent power to punish for contempt. In absence of statute this power is confined to courts of record. Farnham v. Colman [S. D.] 103 N. W. 161. Under the charter of the city of Macon, Georgia, providing that the city recorder shall be to all intents and purposes a justice of the peace so far as to enable him to issue warrants for offenses committed within the corporate limits of said city, the recorder has power to punish for contempt without reference to whether he is suing for the trial of offenses against the municipal ordinances or as a court of inquiry for investigation of offenses committed against the state within the limits of the city. Faircloth v. Macon [Ga.] 50 S. E. 915.

34. Some courts hold, however, that the power of courts to command respect and enforce their decrees cannot be abridged, limited or taken away by the legislature either directly or indirectly by attempting to define the offense or undertaking to regulate procedure. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

35. The power of court to punish for contempt is inherent, but is subject to the limitations imposed by constitution and statute. O'Neil v. People, 113 Ill. App. 145.

36. Laws of 1891, North Carolina, p. 87, c. 87, making it a misdemeanor to intimidate or to attempt to intimidate any witness, is in addition to the power given by the code to punish for contempt, and not in repeal of that provision. In re Young, 137 N. C. 552, 50 S. E. 220. A court has power to punish an act which is a contempt, notwithstanding such act may, likewise, constitute a statutory crime, and notwithstanding further the guilty party may be indicted for the same offense. O'Neil v. People, 113 Ill. App. 195.

37. Burdett v. Commonwealth [Va.] 48 S. E. 878.

38. Perry v. Pernet [Ind.] 74 N. E. 609.

39. See 3 C. L. 799.

40. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151. A court may punish for contempt without issue or trial in any form. Burdett v. Commonwealth [Va.] 48 S. E. 878. Under a statute providing that, whenever any person shall be arraigned for a direct contempt, no affidavit or complaint shall be required to be filed against him, the word "arraigned" is held to have been used synonymously with the word "accused" or "charged," and not in the sense in which that term is used in criminal law. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151. A court of record may not punish, as for a criminal contempt, summarily, without formal accusation or complaint, and without affording the accused a reasonable time to prepare his defense, except in those cases in which the judge is, while in the exercise of his office, an actual witness of the alleged contemptuous conduct, or at least of a substantial part thereof, so that he is not compelled to inform himself concerning it, and of the circumstances of its commission, by the testimony of witnesses. Gordon v. State [Neb.] 102 N. W. 458. A prosecution for contempt of court is sui generis. If the contempt is committed in the presence of the judge, no complaint or process is necessary to give the court jurisdiction. If the contempt instead of being direct is indirect and constructive, and not committed in the presence of the court, knowledge of it should be first brought to the court in a way to justify formal action. Hurley v. Commonwealth [Mass.] 74 N. E. 677.

41. A rule requiring a bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him during his examination before the referee is sufficient, although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, from which they fully appear. United States v. Goldstein, 132 F. 789. Where a contempt is committed without the presence of the court, the affidavit of facts constitutes the complaint, and is insufficient to confer jurisdiction on the court to punish the defendant unless it shows a case of contempt on its face. Hutton v. Superior Court [Cal.] 81 P. 409; Rogers v. Superior Court of San Francisco, 145 Cal. 88, 78 P. 344. Where, on an application to punish defendant for contempt in

must be served,[44] unless the contemnor voluntarily appears.[45] Constructive contempts in equity are properly punishable in a proceeding in the original suit.[46]

§ 5. *Hearing; evidence; trial.*[47]—Contempt proceedings are said to be criminal in their nature, and this statement has been applied so far as to invoke the presumption of innocence [48] and require clear and convincing proof,[49] but has never been carried to the extent of importing into contempt proceedings the formalities of procedure guaranteed to persons accused of crime,[50] such as jury trial [51] and confrontation with witnesses,[52] nor does a rule to show cause violate the guaranty

violating an injunction restraining the infringement of a patent for an improvement in valves for air brakes, served on defendant's attorneys March 19, 1903, the affidavits allege that an examination of the cars in which the infringing valves were found showed that the cars were dated April, 1903, and that someone "informed" one of the affiants that the cars were "set up" between March 23 and 28, 1903, and that affiant "was also informed," without stating by whom, that all the braking equipments were delivered by defendant on August 28, 1902; such affidavits were insufficient to show a violation of the injunction. Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 F. 749.

42. A complaint by an assistant district attorney, signed by him as a public officer, charging one with a constructive criminal contempt is sufficiently verified to justify judicial action. Hurley v. Commonwealth [Mass.] 74 N. E. 677. The use of ex parte affidavits in procuring an order to show cause why respondents should not be adjudged guilty of contempt of court is proper where affiants are present at the hearing on the return, and are offered for cross-examination to the persons named in the order. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914.

43. Hunt v. State, 5 Ohio C. C. (N. S.) 621. The act of a county attorney in counseling the county auditor to violate an order of the superior court directing him not to issue certain warrants is, if contempt at all, a contempt without the presence of the court, and under Ballinger's Ann. Codes & St. Wash. § 5804, can only be prosecuted by affidavit. State v. Pendergast [Wash.] 81 P. 324.

44. In dealing with contempts not committed within the presence of the court, the defendant must be brought before the court by a rule or some sufficient process. Burdett v. Commonwealth [Va.] 48 S. E. 878. Where one is adjudged guilty of contempt committed both within and without the presence of the court and a judgment entered against him for both, he is not prejudiced by not having sufficient notice of the proceeding whereby he was punished for the contempt committed without the presence of the court when the punishment imposed therefore had been remitted. Davies v. State [Ark.] 84 S. W. 633. Under N. Y. Code Civ. Proc. § 2269, authorizing the court to issue a warrant of attachment for a person charged with contempt in certain cases or to make an order requiring him to show cause why he should not be punished for contempt, an order to show cause issued after the final judgment in an action for divorce requiring defendant to show cause why he should not be punished for failure to obey an order amending the judgment, the court cannot acquire jurisdiction of the defendant by service of said order on his attorney in the action, it appearing that such attorney has no authority to appear after final judgment. Keller v. Keller, 100 App. Div. 325, 91 N. Y. S. 528. Under N. Y. Code Civ. Proc. § 2269, a proceeding to punish judgment debtor for contempt in violating a restraining order in supplementary proceedings should be issued by attachment or order to show cause and not by a notice of motion. This objection is waived by failure to make the same at special term. Maigille v. Leonard, 102 App. Div. 367, 92 N. Y. S. 656.

45. It is not indispensable that the party proceeded against be actually served with notice of the application for attachment for contempt. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774. Parties who appear to contempt proceedings cannot complain of lack of process. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

46. The application to punish defendant for contempt was properly made in an equity case then pending, instead of proceeding by an independent action commenced in the name of the state. Ferguson v. Wheeler [Iowa] 101 N. W. 638.

47. See 3 C. L. 799.

48. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

49. Contempt proceedings are criminal in their nature, and to authorize a conviction, proof of guilt should be clear and convincing. Wells v. District Court of Polk County [Iowa] 102 N. W. 106; Hunt v. State, 5 Ohio C. C. (N. S.) 621.

50. Though a proceeding to punish for contempt is criminal in its nature, it is not a criminal case within section 3019, Iowa Code, requiring the county attorney to appear in criminal cases. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460.

51. In the absence of statutory provisions, the right to trial by jury does not exist in contempt proceedings. Drady v. District Court of Polk County [Iowa] 102 N. W. 115; O'Neil v. People, 113 Ill. App. 195.

52. A contempt proceeding is not a criminal case or proceeding within the meaning of the constitutions of various states, requiring a party accused of a crime to be confronted with the witnesses against him. O'Neil v. People, 113 Ill. App. 195.

Section 4513, Rev. St. Utah 1898, provides that in criminal prosecutions the defendant shall be confronted with witnesses against him, held that proceedings for contempt for violation of an injunction restraining the infringement of a trade mark were civil

against self crimination.[53] At common law a person accused of criminal contempt is entitled to an acquittal and discharge on his sworn denial of the facts charged; and in case of his failure to deny, his punishment may be assessed without the hearing of evidence.[54] This rule does not apply to civil contempts.[55] Contempt proceedings in equity should be determined by the chancellor, though the investigation of the facts may be referred to a vice chancellor or master.[56]

§ 6. *Finding and judgment.*[57]—To support a conviction of contempt there must be findings reciting the convictions and the facts on which it is based.[58] and if the recited facts do not constitute contempt, the conviction will be set aside.[59] The court may of its own motion remit part of the fine.[60]

and it was proper to admit a deposition in evidence. Davidson v. Munsey [Utah] 80 P. 743.

53. It is not in violation of the constitutional provisions requiring that no one shall be compelled to give evidence against himself in any criminal proceeding to enter a rule against a respondent to show cause why he should not be punished for criminal contempt. O'Neil v. People, 113 Ill. App. 195.

54. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277. Burn's Ann. St. Ind. 1901, § 1025. Under §§ 654, 656, Code of North Carolina, authorizing the punishment as for contempt of unlawful interference with the proceedings in an action, or acts tending to defeat or impair rights or remedies in an action, a person proceeded against as for contempt for attempting to induce a witness against him to leave the state cannot purge himself of the contempt by avowals of lack of intent. In re Young, 137 N. C. 552, 50 S. E. 220.

55. Christensen v. People, 114 Ill. App. 40; Sloan v. People, 115 Ill. App. 84. A statute regulating contempts of court, prescribing penalties and methods of procedure and authorizing, among other things, an aquittal on a sworn denial of the facts charged as a contempt, but which provides that nothing therein contained shall be construed as affecting proceedings against any party for contempt "for the enforcement of civil rights and remedies" has no application to contempt proceedings in chancery, brought for the violation of the injunctive process of the court, in which the rule has always been that the truth of defendant's answers to interrogatories may be controverted, and the whole matter inquired into and ascertained by the court. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277. Iowa Code 1897, tit. 21, c. 17, which prescribes the procedure for the punishment of constructive contempts, and contemplates a trial on the issues raised by accused's answer, instead of treating that answer as conclusive, is not unconstitutional as depriving the courts of their inherent powers, but merely regulates the exercise of such powers; nor does it take away an inherent right possessed by the accused or punish him without due process of law. Drady v. District Court of Polk County [Iowa] 102 N. W. 115. Where defendants were ordered to produce books and papers for inspection at a certain time and failed to properly comply with the order, the burden was on them to show facts excusing their default, in order to relieve them from punishment for contempt. London Guarantee & Acc. Co. v. Doyle, 134 F. 125.

Evidence held to sustain decree adjudging a person guilty of contempt for aiding others who had been enjoined from infringement of a patent in evading the injunction by taking over and conducting the business in his name with actual knowledge of the injunction. Hamilton v. Diamond Drill & Mach. Co. [C. C. A.] 137 F. 417. Where in proceeding for contempt, based on the charge that the accused had violated a decree enjoining him from selling liquor except in accordance with law, the accused admitted that his saloon was open on the 4th of July and did not deny sale of liquor therein. A denial of a change of venue was not prejudicial. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460. It is always within the discretion of the court to allow a party to disclaim contemptuous intent and submit to the order of the court. Citizens' Nat. Bank v. Alexander [Ind. App.] 73 N. E. 279.

56. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914.

57. See 3 C. L. 800.

58. When the court adjudges acts or conduct to be a contempt, its adjudication is a conviction. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151. An order punishing a judgment debtor for contempt in supplementary proceedings, describing the conduct constituting contempt as "willfully disobeying the order requiring him to appear June 14, 1904, for examination," was not objectionable on the ground that the words quoted were merely descriptive of the order, and did not set forth the act or omission of which the debtor was adjudged guilty. New Jersey Foundry & Mach. Co. v. Siebert, 45 Misc. 357, 90 N. Y. S. 468. Under Cal. Code Civ. Proc. § 1211, providing that when a contempt is committed in the immediate presence of the court, it may be punished summarily, and that an order must be made reciting the facts as occurring in such immediate presence, adjudging that the person proceeded against is thereby guilty of contempt and that he be punished as therein prescribed, it was held that the jurisdiction to punish for contempt is special and limited and the authority of the court to render judgment must be shown by the record of conviction. Ex parte Hoar [Cal.] 79 P. 853.

59. Under Ball. Ann. Codes & St. Wash. § 5800, requiring an order adjudging a party guilty of contempt in the presence of the

§ 7. *Punishment; fine and commitment; further proceedings.*[61]—Punishment to vindicate the dignity of the court lies in its discretion, but punishment to enforce an order for the benefit of the party is of private right and may be compelled by mandamus.[62] Contempt is usually punishable by fine or imprisonment,[63] and where the statute is in the alternative, both cannot be imposed.[64] Costs and attorney's fees are sometimes provided for.[65] Where the contempt results in injury to a party, the fine may take the form of a mulct for his benefit.[66] Payment of fine [67] or making of reparation is usually enforceable by imprisonment.[68] The pleadings of a party in contempt may be stricken out,[69] and in no event will he be heard until the contempt is purged,[70] though there are cases holding that denial of the right to make a defense because of alleged contempt is a taking of property without due

court to recite the facts on which it is based, an order or judgment reciting that defendant would be in contempt of court unless he apologized to the presiding judge, and that having failed to apologize he was adjudged guilty of contempt, is in excess of the court to make and the facts recited therein did not constitute a contempt. State v. Pendergast [Wash.] 81 P. 324.

60. Davies v. State [Ark.] 84 S. W. 633.

61. See 3 C. L. 800.

62. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

63. Under a statute requiring commitments for contempt to be for a definite term, but providing that nothing therein should be construed to limit or control any proceeding against any officer or person for contempt for the enforcement of civil rights, it was held that in a contempt proceeding against a husband for failure to comply with an order issued in an action by a wife against the husband for support, and requiring him to pay a certain sum weekly, the husband could be punished by imprisonment for an indefinite term. Perry v. Pernet [Ind.] 74 N. E. 609. A person guilty of criminal contempt may be committed to jail as authorized by Mass. Rev. Laws, c. 166, § 13, but cannot be imprisoned in the house of correction, as c. 220, Rev. Laws Mass. § 5, authorizing imprisonment in the workhouse of one convicted of a crime punishable by imprisonment in a jail does not apply to a case of contempt of court. Hurley v. Commonwealth [Mass.] 74 N. E. 677.

64. Under U. S. Rev. St. § 725, U. S. Comp. St. 1901, p. 583, limits the power of the United States courts to punish contempt to either fine or imprisonment, and they have no authority to punish by both fine and imprisonment. Moss v. United States, 23 App. D. C. 475.

65. Under section 3368, providing that if actual loss to a party in an action is caused by a contempt, the court, in addition to fine or imprisonment, may order payment to the party aggrieved of a sufficient sum "to indemnify him, and to satisfy his costs and expenses," it was held that in proceedings against one for contempt in violating an injunction restraining him from infringing a trade-mark, it was proper on finding for the plaintiff to award him a reasonable attorney's fee. Davidson v. Munsey [Utah] 80 P. 743. Where one is adjudged guilty of contempt in violating a decree enjoining him from selling liquor except in accordance with law, the judge is expressly authorized by Iowa Code, § 2429, to tax an attorney's fee as part of the costs in addition to ten per cent. of the fine. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460. Where the fees to which a sheriff was entitled in a proceeding to punish defendant for contempt in violating orders issued in supplementary proceedings were not fixed in the order nor made part of the fine, such order was erroneous in so far as it provided for defendant's commitment unless he paid the fine and fees. Maigille v. Leonard, 102 App. Div. 367, 92 N. Y. S. 656. Under New York statute in a proceeding to punish for a criminal contempt, costs are not allowable. People v. Marr [N. Y.] 74 N. E. 431.

66. A fine or contempt may be imposed equal to the applicant's actual loss, if the party obstructing the administration of justice caused the loss by his wrongful act. Lorick v. Motley, 69 S. C. 567, 48 S. E. 614. But there must be some evidence which tends to show the amount of such loss, and such loss or damage must be proved according to the rules of law which would govern in a civil action brought to recover damages for loss sustained. Davidson v. Munsey [Utah] 80 P. 743.

67. Section 4633, Rev. St. Wis. 1898, providing that when a fine is imposed as the whole or any part of the punishment for any offense that the defendant shall be committed to the county jail till such fine and costs are paid, but limiting the period of imprisonment does not apply to punishment for contempt, and in cases of commitment for contempt the defendant may be committed until the fine is paid. Jos. Schlitz Brewing Co. v. Washburn Brewing Co., 122 Wis. 515, 100 N. W. 832.

68. Where one willfully violates an order of the court of competent jurisdiction, he can be imprisoned until he makes such apology and reparation as lies within his power, and, until this is done, he cannot complain of any inaccuracies in the judgment. Ex parte Kruegel [Tex. Cr. App.] 86 S. W. 1020.

69. Code Civ. Proc. Cal. § 1991, authorizing the court to strike out the answer of a party for refusal to attend when required and give his deposition, is unconstitutional, as tending unduly to restrict the right to defend an action. Summerville v. Kelliher, 144 Cal. 155, 77 P. 889.

70. Where plaintiff in a suit in equity is in contempt of court, he has no absolute right to proceed with the trial. Campbell

process.[71] Excessive punishment for contempt does not render the judgment void, but only invalid, if at all, as to excess.[72]

§ 8. *Discharge or pardon.*[73]—When a person is committed for failure to comply with an order requiring him to pay money, the court has power to discharge him from custody on a showing that the failure to pay was due to actual inability to do so;[74] but where the imprisonment was to compel an act for the benefit of a party, the court can order a discharge without notice to such party.[75]

§ 9. *Review of proceedings.*[76]—Contempt proceedings were not appealable at common law, and in some states this rule obtains,[77] but in most jurisdictions, if the decision is final,[78] appeal or error lies.[79] Where there is no remedy by appeal or error, a more or less limited review on certiorari,[80] mandamus,[81] or habeas corpus,[82]

v. Justices of Superior Court [Mass.] 73 N. E. 659. Where a party to an action is in contempt of court, a court of chancery has power to refuse to allow him to plead further until he has purged himself of the contempt. Bennett v. Bennett [Okl.] 81 P. 632.

71. Harley v. Montana Co., 27 Mont. 388, 71 P. 407; Sibley v. Sibley, 76 App. Div. 132, 78 N. Y. S. 743. And see Hovey v. Elliott, 167 U. S. 409, 42 Law. Ed. 215.

72. Perry v. Pernet [Ind.] 74 N. E. 609. Where a judgment for contempt assessing a fine and imprisonment is in excess of the court's power so far as the imprisonment is concerned, the part imposing the fine is not affected thereby. Davies v. State [Ark.] 84 S. W. 633.

73. See 3 C. L. 800.

74. Perry v. Pernet [Ind.] 74 N. E. 609.

75. Under N. Y. Code Civ. Proc. § 2038, the court has no authority to discharge on habeas corpus proceedings a debtor imprisoned for contempt for failure to appear for further examination in supplementary proceedings, without notice to the creditors on whose application he was imprisoned. People v. Melody, 91 App. Div. 569, 86 N. Y. S. 837.

76. See 3 C. L. 800.

77. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 59 A. 914. An order of the circuit court refusing to punish an alleged violation of an injunction as for contempt is not reviewable on appeal. People v. Ann Arbor R. Co. [Mich.] 100 N. W. 892. Under Rev. St. Missouri 1899, § 2696, allowing an appeal from a final judgment rendered upon an indictment, a complaint informing the court of a violation of an injunction is not an indictment and judgment rendered thereon is not appealable. State v. Bland [Mo.] 88 S. W. 28.

78. An order punishing a witness for contempt for failure to answer questions in a proceeding under Code Civ. Proc. §§ 2707, 2709, for discovery as to property of a decedent's estate, is a final order and appealable to the court of appeals. King v. Ashley, 179 N. Y. 281, 72 N. E. 106. A motion to punish a third party for contempt for failing to appear and submit to an examination pursuant to an order of a justice. An order requiring such party to appear and submit to an examination, otherwise commitment to issue, was not a final order, and no appeal therefrom would lie. Siegel v. Solomon, 92 N. Y. S. 238; Field v. White, 102 App. Div. 365, 92 N. Y. S. 848. Under a statute providing for the review of convictions and judgments for contempt of court, an order of an orphan's court directing a writ of attachment to issue for an alleged contempt, made after hearing on an order to show cause, is not appealable. 2 Gen. N. J. St. p. 2600. In re Doland [N. J. Eq.] 59 A. 879. Where, in contempt proceeding, a part only of the fine as assessed against the defendant was awarded to the complainant, the proceeding was reviewable by appeal, though if the entire fine had been so awarded the order could have been reviewed only on writ of error. Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 135 F. 774.

79. State v. Bland [Mo.] 88 S. W. 28; Hurley v. Commonwealth [Mass.] 74 N. E. 677. Under section 3406 of the Compiled Laws of New Mexico 1897, which confers jurisdiction upon the supreme court to review by appeal final judgments rendered upon any indictment, an appeal will not lie from a judgment of the district court committing a person to jail for the willful violation of an injunction. Marinan v. Baker [N. M.] 78 P. 531. In Massachusetts under statutes (Rev. Laws, c. 193, § 9; c. 156, § 3) which provide that a judgment in a criminal case may be examined on writ of error and which declare that the supreme judicial court shall have general superintendence of all inferior courts to correct errors, etc., it has been held that a judgment adjudging one guilty of a criminal contempt may be reviewed on writ of error. Hurley v. Commonwealth [Mass.] 74 N. E. 677. Under Rev. St. Mo. 1899, § 806, providing that any party aggrieved by any judgment in any civil cause from which an appeal is not prohibited by the constitution may appeal from any final judgment in the case, an appeal lies from an order committing for contempt for violating an injunction. State v. Bland [Mo.] 88 S. W. 28.

80. Under Cal. Code Civ. Proc. § 2065, which provides that a witness need not answer questions, the answers to which would degrade the witness or his character, a judgment of contempt against a witness for refusing to answer certain questions is reviewable on certiorari on the question whether the answers would have a tendency to degrade the witness or his character. Rogers v. Superior Court, 145 Cal. 88, 78 P. 344. Under Cal. Code Civ. Proc. § 2066, providing that a witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue before a tribunal, a judgment of contempt against

is usually allowed, and remand on habeas corpus has been held not to be a bar to an application for certiorari.[83] The appellate court can look to the moving papers and the whole judgment in order to ascertain in what the adjudicated contempt consisted.[84] A statement filed by a judge and entered of record, relating to an alleged contempt in the presence of the court, imparts absolute verity,[85] and every intendment will be made in support of the decision;[86] but the reviewing court will not go outside of the record to determine whether there is matter other than that contained in the record which will support a charge of contempt of court.[87]

CONTINUANCE AND POSTPONEMENT.

Postponement of criminal prosecutions is elsewhere treated.[88]

§ 1. *Power and duty of court.*[89]—The granting or refusal of an application for a continuance is very largely discretionary, and a ruling of a trial court will not be disturbed unless an abuse of discretion clearly appears.[90] But where a legal and

a defendant for refusal to answer certain questions is reviewable on certiorari on the question whether the questions were legal and pertinent. Id. Under §§ 4154, 4466, 4468, Iowa Code, the supreme court on certiorari may review the facts in contempt proceeding. Wells v. District Court of Polk County [Iowa] 102 N. W. 106. A writ of mandamus or certiorari will not be granted to review a motion to quash contempt proceeding prior to the final determination thereof. Toepel v. Donovan [Mich.] 102 N. W. 369. The sufficiency of the affidavit which was the basis of a proceeding to punish a party for contempt may be reviewed on certiorari. Hutton v. Superior Court [Cal.] 81 P. 409.

81. The circuit court cannot review by mandamus the action of a committing magistrate in refusing to punish a witness for contempt. Farnham v. Colman [S. D.] 103 N. W. 161.

82. A party committed to jail for contempt by a court without jurisdiction, there being no legal authority for his commitment, is entitled to be discharged on a writ of habeas corpus. Elliott v. United States, 23 App. D. C. 456. Habeas corpus to procure discharge of one committed for contempt of court is a collateral attack upon the judgment of commitment and cannot succeed unless that judgment is absolutely void. Errors, if any, committed by the court in contempt proceeding, can be reviewed and corrected only on appeal. Perry v. Pernet [Ind.] 74 N. E. 609.

83. Under a California statute providing that a judgment on habeas corpus remanding a petitioner is not a bar to a subsequent application of the same kind, it was held that a decision of the supreme court, remanding a petitioner who had sought his discharge from a judgment fining him for contempt of court, was not available as res judicata on certiorari to review the judgment. Rogers v. Superior Court of San Francisco, 145 Cal. 88, 78 P. 344.

84. Ex parte Latham [Tex. Cr. App.] 82 S. W. 1046.

85. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151.

86. Where the record in a contempt proceeding does not affirmatively show that the accused was present, or that he was not present, the presumption that he was present will be indulged on appeal. Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151.

87. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

88. See Indictment and Prosecution, 4 C. L. 1.

89. See 3 C. L. 801.

90. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333; Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308; Richardson v. Ruddy [Idaho] 77 P. 972; Crouch v. Dakota, W. & M. R. Co. [S. D.] 101 N. W. 722. Especially where application is not statutory. Missouri, etc., R. Co. v. Henserlang [Tex. Civ. App.] 86 S. W. 948. Abuse of discretion must affirmatively appear to warrant interference with ruling. Banker Min. & Mill. Co. v. Allen [Colo. App.] 78 P. 1070. There must have been a palpable abuse of discretion, to the prejudice of the applicant, clearly and affirmatively shown on the record, to warrant reversal for refusal of continuance. Reynolds v. Smith [Fla.] 38 So. 903. Motion for continuance raises a question of fact for the trial term. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011. Permission to withdraw announcement of ready and verify a plea is discretionary, and refusal is not reviewable unless an abuse appears. Hamilton v. Bell [Tex. Civ. App.] 84 S. W. 289. Refusal of continuance in midst of trial to permit defense to procure and bring in written document not an abuse of dis-

valid excuse for a postponement exists, a party cannot be deprived of his right.[91] Terms to be imposed on granting a continuance are also largely discretionary.[92] If a motion for continuance be overruled for insufficiency, the court may require an election to proceed to trial or consent to a reference, and a consent to a reference so given cannot be said to have been given under duress.[93] A stipulation by attorneys for adjournment of the cause to a certain day will be enforced by the court[94] according to the reasonable construction of their agreement.[95]

The Wisconsin statute relative to loss of jurisdiction by justice courts by adjournment without sufficient cause does not apply to courts of record.[96]

§ 2. *Grounds for continuance or postponement. A. In general.*[97]—A continuance will not be granted unless it is made to appear that the moving party will be prejudiced by a denial of his motion.[98] Due diligence by the movant or his attorney in preparation of the case,[99] and in procuring the attendance of witnesses or counsel,[1] must also be made to appear. Distance of subject-matter from the place of trial is only one element to be considered in allowing time to prepare for trial, and is never alone conclusive.[2] Where plaintiff does not apply for a continuance, and does not show why he cannot at once proceed to trial, there is no error in overruling an objection to immediately proceeding.[3] Where a second motion for continuance is made on the same ground as the first and it is not claimed that any change of circumstances has occurred since the first was made, the denial of the first may be treated as an adjudication of the question and the second denied on that ground.[4] After a cause has been submitted and a final decree rendered in equity, a continuance will not be granted the defeated party merely to allow him to make further proof.[5] Submission of a cause in equity for hearing without a request for a continuance is a waiver of the right thereto.[6] A civil case for violation of a liquor law

cretion. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209. Refusal of continuance on ground that transcript filed was irregular was proper, where court offered to continue if affidavit setting up surprise was filed, and counsel stood upon his motion, without presenting such affidavit. Estate of Shields v. Michener, 113 Ill. App. 18.

91. As engagement of attorney in other court, under New York court rules. Robinson v. De Fere, 94 N. Y. S. 847.

92. No error shown in not taxing witness fees to plaintiff on granting continuance to defendant after amendments to complaint. Atchison, Topeka & Santa Fe R. Co. v. Jones, 110 Ill. App. 626.

93. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

94. Case dismissed on nonappearance of parties on day set but reset for day agreed on, since court did not lose jurisdiction by first dismissal. Johnson v. Monahan, 94 N. Y. S. 351.

95. Defendant's offer to submit to adjournment and to admit supplemental proof, after he had amended his answer, if plaintiff was surprised, held to render denial of adjournment, requested by plaintiff, improper. Hennion v. Harris Co., 94 N. Y. S. 425.

96. Rev. St. 1898, §§ 3630, 3631, does not apply to Rock county municipal court, which, under Laws 1881, c. 197, is a court of record. Snyder v. Malone [Wis.] 102 N. W. 354.

97. See 3 C. L. 801.

98. Thus a defendant asking for continuance must show he has a meritorious defense. City of Elgin v. Nofs, 113 Ill. App. 618; afd. 212 Ill. 20, 72 N. E. 43. Issue on which party was not ready being expressly reserved by the judge for later consideration, it was not error to refuse a continuance. Douglas v. Douglas, 24 Ky. L. R. 2398, 74 S. W. 233.

99. Denial proper where counsel set up lack of preparation, but had been absent from city one day and a part of another, and was present at trial. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569. Where motion for continuance was made the day on which the case was set, and the affidavit stated that attorneys had not had notice of the setting of the case until fifteen days previous, that they were elsewhere engaged, and could not get witnesses in time, but these statements were unsupported, and no showing was made why motion was not sooner made or attorneys on other side notified;—denial of continuance proper. Tiffin v. Cummings, 144 Cal. 612, 78 P. 23.

1. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

2. On motion to set a cause for trial, mere fact that land sought to be condemned was forty miles away is not cause for granting extension of time. Chelan County v. Navarre [Wash.] 80 P. 845.

3. Finlen v. Heinze [Mont.] 80 P. 918.

4. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

5, 6. Cross v. Cross [W. Va.] 49 S. E. 129.

will not be postponed until a criminal case based on the same violation has been disposed of.[7]

(§ 2) *B. Absence or disability of party or counsel.*[8]—Absence of a necessary [9] party is ground for a continuance.[10] Where several continuances have already been granted on account of illness of a party, it is not an abuse of discretion to deny a motion for a further continuance,[11] especially where at preceding term the court has announced that the case will not be again continued, and that interrogatories should be sued out if the party's testimony be desired.[12] While absence of counsel does not entitle a party to a continuance as a matter of absolute right,[13] it will usually be granted on that ground,[14] as where it appears that counsel is ill or engaged before another court,[15] unless it also appears that the movant is represented by other competent counsel and will not be prejudiced by a denial,[16] or that movant had not been duly diligent in procuring other counsel.[17]

(§ 2) *C. Absence of witness or inability to procure evidence.*[18]—Absence of a material witness for sufficient cause is ground for continuance.[19] But it must be made to appear that the expected evidence is competent [20] and material,[21] that

7. Cowdery v. State [Kan.] 80 P. 953.

8. See 3 C. L. 802.

9. It is not error, in an action by one legatee against the others to set aside a release of her share in the estate on the ground of fraud, to refuse a continuance on the ground that two of the defendants had died during the pendency of the action and that no administrators had been appointed for their estates, since under S. D. Comp. Laws 1887, § 4884, action may proceed without bringing in person who succeeds to rights of deceased party, and judgment does not affect him. Ward v. Du Pree, 16 S. D. 500, 94 N. W. 397.

10. Error to refuse a first continuance, where party was ill, and counsel stated in his place that he could not safely go to trial without his client. Martin v. Nichols, 121 Ga. 506, 49 S. E. 613.

11. Bomar v. Equitable Mortg. Co., 121 Ga. 466, 49 S. E. 267.

12. Camp v. Britt, 121 Ga. 466, 49 S. E. 286.

13. Court rule providing for continuance on ground of absence of counsel on account of sickness or other reason does not give an absolute right of continuance. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

14. Held error to deny continuance where party and counsel were delayed on the train and were diligent in seeking continuance by telegraph and telephone. Hoover v. Hoover [Neb.] 97 N. W. 620.

15. Motion before special term should be postponed where counsel is actually engaged in a case in the appellate division the same day. Dieter v. Title Guarantee & Trust Co., 96 App. Div. 168, 89 N. Y. S. 110. Attorney engaged to argue case in United States supreme court set for March 7, is entitled to postponement of case set in New York supreme court for March 6. Robinson v. De Fere, 94 N. Y. S. 847.

16. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333; Douglas v. Douglas, 24 Ky. L. R. 2398, 74 S. W. 233. Absence of attorney no ground where other competent counsel is present familiar with case. First Nat. Bank v. Dye [Neb.] 102 N. W. 614; Crouch v. Dakota, W. & M. R. Co. [S. D.] 101 N W. 722. Denial proper, where it did not appear that remaining counsel could not fairly present the case. City of Elgin v. Nofs, 212 Ill. 20, 72 N. E. 43. An affidavit for a continuance on the ground of illness of leading counsel is insufficient which does not show that applicant did not have other competent counsel. City of Elgin v. Nofs, 113 Ill. App. 618.

17. After two continuances had been granted for illness of an attorney, and party had been notified to procure other counsel, and case had been long pending and kept an estate tied up, refusal of third continuance on same ground held proper. In re Bollinger's Estate, 145 Cal. 751, 79 P. 427. Refusal of continuance for illness of counsel sustained where it did not appear how long the party had known of such illness. Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308.

18. See 3 C. L. 803.

19. Where material witness for defendant was beyond jurisdiction and was notified to respond but failed to do so, and a short adjournment was asked, held error to order inquest and enter judgment for plaintiff. Faist v. Metropolitan St. R. Co., 89 App. Div. 593, 85 N. Y. S. 646.

20. No continuance where testimony would have been incompetent over defendant's objection. Meyer v. Knott [Mich.] 100 N. W. 907.

21. It must be made to appear that the absent person is in fact a witness to some matter necessary to be shown. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791. Proper to deny continuance where only plea was to jurisdiction and absent witness' testimony, if given, would have been on merits. Fox v. Armour Packing Co., 121 Ga. 273, 48 S. E. 924. Testimony of absent witnesses that person on premises of liquor dealer had the appearance of one of legal age, immaterial in action on bond for permitting presence of minor. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858. Case called after 6 p. m., and witness had left. On request for adjournment, party was excused from

there are not other witnesses by whom the facts can be as well proved,[22] that it is not merely cumulative,[23] that due diligence has been exercised to obtain the presence of the desired witness,[24] and that it is reasonably certain that the witness will be present, competent to testfy, when the case is again called.[25] Where continuance for a stated time is asked, it must appear that attendance of the witnesses cannot be sooner procured.[26] Due diligence of the movant must also appear to warrant a continuance for the taking of a deposition,[27] or for non-return of interrogatories.[28] In Iowa a continuance should be granted to take depositions, a party having elected to take testimony in that form.[29]

Admission of testimony to avoid continuance.[30]—Where the adverse party consents that the affidavit for continuance may be read as the deposition of the absent witness, a continuance is properly denied.[31] The testimony of witnesses as contained in the affidavit should be accorded the same credit as would be given the oral testimony of such witnesses if personally present and testifying.[32] Where two defendants are hostile to each other, a continuance should not be denied on the motion of one, on account of the admission by plaintiff of facts to which an absent witness would testify, unless the other defendant also consents to the admission of such facts as testimony.[33]

(§ 2) *D. Surprise.*[34]—A continuance should be granted where an amendment to a pleading presents a new issue,[35] or where evidence is allowed to be intro-

making affidavit of materiality of testimony of absent witness, on ground that he had answered "ready" and adjournment would be refused. Held, party prejudiced, and new trial granted. Schwarzschild & Sulzberger Co. v. New York City R. Co., 90 N. Y. S. 374.

22. Conlan v. Murry, 92 N. Y. S. 58.

23. Where testimony of absent witness would not have affected result, since covered by other witnesses, refusal of continuance to procure his testimony is not ground for reversal of judgment. Houston, etc., R. Co. v. Oilis [Tex. Civ. App.] 83 S. W. 850.

24. Where subpoena was issued twelve days before trial, and was not served, and witness was not paid or tendered his fees, continuance to procure his presence denied. Hicks v. Porter [Tex. Civ. App.] 85 S. W. 437. Motion denied for want of diligence where it appeared that physician had ordered witness to leave county for his health ten days before, but it did not appear that the attorney did not then know of such fact, or that his deposition could not be procured, or that the witness was unable to be present. Banker Min. & Mill Co. v. Allen [Colo. App.] 78 P. 1070.

25. Where it appeared that insane person would not recover for months, and perhaps never, denial of postponement for his testimony proper. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866. Where two continuances had been granted to allow a party to procure a witness, and the sheriff, with bench warrant, could not find him, and it appeared to be doubtful if he could testify if obtained, owing to his mental condition, refusal of third continuance proper. Leghorn v. Nydell [Wash.] 80 P. 833.

26. Conlan v. Murry, 92 N. Y. S. 58.

27. When party was not diligent in retaking deposition, and did not show what additional testimony was expected in case the deposition was retaken, denial of continuance for the purpose was proper. Louisville Rock Co. v. Cain, 26 Ky. L. R. 849, 82 S. W. 619. Delay of three years in securing deposition of surveyor whose name could have been learned from examination of records in his office fatal to motion for continuance to secure such deposition. Hicks v. Porter [Tex. Civ. App.] 85 S. W. 437.

28. Civ. Code 1895, § 5136. Not due diligence where party depended on adverse party to pay expense of interrogatories. Thompson v. Hays [Ga.] 51 S. E. 33.

29. Since depositions cannot be taken during term, and party is entitled to a reasonable time for the purpose. Husted v. Williams [Iowa] 102 N. W. 519.

30. See 3 C. L. 804.

31. Manders' Committee v. Easter State Hospital [Ky.] 84 S. W. 761. Where testimoney of absent witness was cumulative only and affidavit of counsel as to what witness would testify to was read, denial held proper. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569. No adjournment where party admitted competent portion of absent witness' testimony. Meyer v. Knott [Mich.] 100 N. W. 907.

32. Held error to refuse to so instruct jury where affidavit was admitted to avoid continuance. Bloomington & Normal R. Co. v. Gabbert, 111 Ill. App. 147. See 3 C. L. 804, n. 14, 15, 16.

33. Doyle v. St. Louis Transit Co., 103 Mo. App. 19, 77 S. W. 471.

34. See 3 C. L. 804.

35. Where issues presented were simple negligence and contributory negligence, and amended complaint presented wanton negligence, it was an abuse of discretion to refuse continuance of at least twenty days in which defense could be prepared. Wright v. Northern Pac. R. Co. [Wash.] 80 P. 197. Amendment of complaint in personal in-

duced of facts not pleaded and of which the adverse party had no notice.[36] But the claim of surprise is untenable where the amendment merely conforms the pleadings to proof already in,[37] or merely amplifies and renders more specific matters already pleaded,[38] or where the proof, though constituting a variance from the complaint, conforms to the claim alleged and proved by defendant.[39] Failure of the adverse party to file a copy of an account is not ground for continuance where it does not appear that the moving party cannot prepare, and where he does not object to the evidence offered.[40] Unauthorized entries by the clerk, leading a defendant to believe a case had been discontinued, do not entitle him to a continuance at the ensuing term when the court subsequently struck out such entries and the case was regularly placed on the calendar.[41] An opposing party should not be forced to trial on the day a supplemental pleading is filed.[42] A demand for a bill of particulars is not alone equivalent to a request for a continuance.[43] A continuance will not ordinarily be granted on the ground of surprise following a ruling on a motion for a nonsuit.[44]

§ 3. *Sufficiency of affidavits or moving papers.*[45]—In deciding upon the sufficiency of an affidavit for continuance, no presumption favorable to the appellant will be indulged.[46] It is commonly required that the affidavit should allege that the application is not made for the purpose of delay,[47] and that the movant has been duly diligent,[48] and, if application is by the defendant, it must show that he has a meritorious defense.[49] The affidavit for continuance to procure attendance of absent witnesses should show what testimony was expected of the absent witness,[50] and should state that the expected testimony is true or that applicant believes it to be

jury action held to introduce new element, not in previous actions, and to warrant postponement. Denial ground for new trial. McDonald v. Holbrook, Cabot & Daly Contracting Co., 93 N. Y. S. 920.

36. Request to withdraw juror should have been granted where evidence was put in of injury not pleaded, and of which no notice was given. Brown v. Manhattan R. Co., 82 App. Div. 222, 81 N. Y. S. 755.

37. Claim of surprise untenable where counterclaim was amended so as to conform to proof, the variance having been called to the parties' attention in a former opinion in the same case. Finlen v. Heinze [Mont.] 80 P. 918. Continuance not granted where amendment, allowed after the parties had rested, merely conformed pleading to proofs already in, both parties having put in evidence on point covered by amendment. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505.

38. Denial of continuance proper where amended petition merely amplified and rendered more specific matters complained of in original petition. Missouri, etc., R. Co. v. Henserlang [Tex. Civ. App.] 86 S. W. 948. An amendment merely amplifying grounds of recovery already stated does not work surprise. Houston & T. C. R. Co. v. Cluck [Tex. Civ. App.] 84 S. W. 852 An amendment merely adding an evidentiary fact, the pleading being sufficient without it, does not work surprise entitling adverse party to continuance. Western Union Tel. Co. v. Hirsch [Tex. Civ. App.] 84 S. W. 394.

39. Where plaintiff alleges lease to commence April 1, and defendant sets up lease to commence May 1, which was proved to be the actual lease, contention by defendant of surprise untenable. Nieberg v. Greenberg, 91 N. Y. S. 83.

40. Banker Min. & Mill Co. v. Murnan [Colo. App.] 78 P. 1071.

41. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

42. Plaintiff, on objection, should be allowed time after filing of supplemental answer. Sparks v. Green [S. C.] 48 S. E. 61.

43. Especially where defendants did not ask for adjournment and had it specially entered on minutes that they did not. New York Lumber & Storage Co. v. Noone, 92 N. Y. S. 349.

44. Parties are bound to be prepared for such ruling, especially when it is in accordance with law. Vulcan Ironworks v. Burrell Const. Co. [Wash.] 81 P. 836.

45. See 3 C. L. 805.

46. Reynolds v. Smith [Fla.] 38 So. 903.

47. As in Georgia. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791.

48. Application must state that due diligence has been used to procure testimony of absent witnesses. Rev. St. 1895, art. 1277. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22.

49. City of Elgin v. Nofs, 113 Ill. App. 618. Denial of continuance for absence of counsel proper where defendant did not make such showing. City of Elgin v. Nofs, 212 Ill. 20, 72 N. E. 43.

50. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333. Affidavit for continuance in bastardy case, setting out that absent witness would testify that he saw a man other than defendant having intercourse with prosecutrix at or about the time of conception, held sufficient without stating the name of the man so seen. State v. Gordy [Del. Gen. Sess.] 60 A. 977.

true.[51] If the moving party does not personally know to what the absent witness will testify, he must present the affidavit of his informant upon that fact.[52] The affidavit for continuance because of the absence of a party to the cause should disclose fully the precise facts of the substance of the testimony expected to the proven by such party,[53] and that such facts cannot be sufficiently proven by other witnesses.[54] Where it appears that the absent witness is the only disinterested person by whom a material fact can be proved, the motion for continuance is not defective because of failure to allege that such material fact cannot be proved by any one else.[55] The verification of the application must comply with legal requirements.[56] That the motion is for a longer adjournment than the court has power to grant does not prevent a proper adjournment.[57]

§ 4. *Appellate procedure.*[58]—Where an affidavit for a continuance is read in evidence as the deposition of an absent witness, the continuance being denied, on appeal, the same effect will be given statements in such affidavits as though contained in depositions.[59]

CONTRACT LABOR LAW, see latest topical index.

CONTRACTS.

Scope of topic. This article treats only of the general principles applicable to all express contracts. Questions relating to implied contracts,[60] building contracts,[61] and public contracts, are treated in separate articles.[62]

51. Affidavit insufficient because failing to state that what applicant expects to prove by absent witness is true or that he believes it to be true. Metropolitan Life Ins. Co. v. Moravec, 116 Ill. App. 271.

52. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791.

53, 54. Reynolds v. Smith [Fla.] 38 So. 903.

55. Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791.

56. Verification by attorney insufficient which sets out that facts set forth in motion are to the best of his knowledge, information and belief true. St. Louis S. W. R. Co. v. Harkey [Tex. Civ. App.] 88 S. W. 506.

57. Conlan v. Murry, 92 N. Y. S. 58.

58. See 3 C. L. 805.

59. Ratliff v. May [Ky.] 84 S. W. 731.

60. See Implied Contracts, 3 C. L. 1690.

61. See Building and Construction Contracts, 5 C. L. 455.

62. See Public Contracts, 4 C. L. 1089.

§ 1. *Nature and formal requisites. A. Definition and kinds of contracts; parties.*[63]—A contract is an agreement by which at least one of the concurring parties acquires a right to an act or a forbearance upon the part of the other or others.[64] Anything not forbidden by law may legally become the subject or the motive of a contract.[65] The right is limited by the consideration that the contract must be an honest and legal one, and the right of the other party to expect such a contract must not be impaired.[66]

Contracts are either executed or executory. An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed, and an executory contract one in which something remains to be done by one or more of the parties.[67]

Contracts are also either written or oral. It has been held that they will be presumed to have been oral in the absence of a showing to the contrary;[68] but the general rule is that if writing is essential to the validity of a contract, it will be presumed.[69] A written contract is not legal evidence of an oral one.[70] It is not necessary in order to make a written contract that the terms thereof be reduced to writing in a formal way on one piece of paper, but it is sufficient if a written offer by or on behalf of one party is accepted by or on behalf of the other, and the language

63. See 3 C. L. 806.

64. Hammon on Contracts, p. 6. Bought and sold notes made by broker negotiating a sale of tomatoes, and sent to buyer and seller respectively, do not constitute contract of sale, but are mere memoranda which may be received as evidence of its terms, in the absence of any entry on the sales book of the broker; but if there is any material variance between such bought and sold notes, they are nullities and the contract is not proved thereby. Eau Claire Canning Co. v. Western Brokerage Co., 115 Ill. App. 71.

An instrument admitting an indebtedness, providing for its payment on the happening of certain contingencies, and stating the manner of payment, is a contract, whether based on transactions had between the parties at its date, or the result of an agreement relating to past transactions. Noyes v. Young [Mont.] 79 P. 1063. In the latter case it is an account stated, and as such a contract on which an action may be based. Id. See, also, Accounts Stated and Open Accounts, 5 C. L. 25. Grants of land covered by navigable water held contracts, the obligations of which could not be impaired by the state. Trustees of Town of Brookhaven v. Smith, 98 App. Div. 212, 90 N. Y. S. 646. Receipt of sheriff reciting that license tax was paid under protest held not a promise on his part to hold the money until the controversy as to liability was settled. Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701.

65. La. Code, art. 1764. Oil lease held not absolute nullity on its face. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

66. Acts 1903, p. 110, regulating business of persons making contracts to be redeemed in order of their issue by accumulation of funds arising from contributions of those holding contracts, held valid. State v. Preferred Tontine Merchantile Co., 184 Mo. 160, 82 S. W. 1075. Good faith, bona fides, is an element of every contract, though not expressed in terms. Campion v. Marston [Me.] 59 A. 548.

67. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. A contract between attorney and client whereby the former in consideration of services to be rendered by him in prosecuting certain actions is to have a part of the amount recovered, is executory merely, the cause of action remaining in the client and the attorney taking no interest therein, either by way of assignment or lien. Weller v. Jersey City, etc., R. Co. [N. J. Err. & App.] 61 A. 459. Where anything remains to be done by either or both parties to a contract of sale, before delivery, either to determine the identity, quantity, or price of the thing sold, the contract is executory, and title does not vest in the purchaser. Robinson v. Stricklin [Neb.] 102 N. W. 479. Mason v. Lievre, 145 Cal. 514, 78 P. 1040. A contract for the sale of a certain portion of crops yet to be planted, the portion sold to be identified by means of a certain standard set forth therein, is executory, and title does not pass until the part sold is separated and delivered to the buyer. Robinson v. Stricklin [Neb.] 102 N. W. 479. Where defendants paid full consideration at the time of the execution of a contract for the sale of timber to them, held, that the contract was an executed one, though it contained the words "agrees to sell." Brodack v. Morsbach [Wash.] 80 P. 275. Executory contracts of sale do not pass title, and executed ones do. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. See, also, Sales, § 6, 4 C. L. 1327.

68. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30. Agreement by landlord to repair premises, where there was no allegation that it was written and no written agreement filed. Altsheler v. Conrad, 26 Ky. L. R. 538, 82 S. W. 257.

69. See Frauds, Statute of, 3 C. L. 1534, n. 51.

70. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30.

used shows a meeting of the minds on some particular subject-matter.[71] The execution of one copy of a contract renders it effective and binding, even though a duplicate is afterwards executed.[72] If the original contract signed by defendant has not been changed, the fact that a purported duplicate offered in evidence is not the same as the original does not change or affect his liability.[73] A written contract need not necessarily be signed by both of the parties thereto.[74] An agreement to contract is, of course, not a final contract because something is left open.[75] Thus where the parties make the reduction of the contract to writing and its signature by them a condition precedent to its completion, it will not be a contract until it is reduced to writing and signed.[76] But where they assent to all of its terms, the mere reference to a future contract in writing will not negative the existence of a present and completed one.[77]

A quasi contract exists independently of the intention of the parties, and is founded upon the doctrine of unjust enrichment.[78] Its origin may be in the partial performance of a contract, as where a partial performance has resulted in benefit to the other party.[79] An express contract excludes an implied one covering the same subject.[80]

71. Report of creditors' committee advising compromise and agreement by creditor to accept compromise held to constitute written contract. Corbett v. Joannes [Wis.] 104 N. W. 69. Evidence held to show contract made by correspondence for employment of plaintiff at a reasonable compensation to be fixed in future. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 534. See, also, post, § 1, B.

72. Rule that written contract cannot be modified or altered by proof of what was said by the parties before or during the making of it does not prevent proof of an oral waiver of a provision made after the execution of one copy of the contract but before the execution of a duplicate. Morehouse v. Terrill, 111 Ill. App. 460. Each copy of a contract executed in duplicate is primary evidence, and one party, by proving that his copy is lost, has no right to prove its contents by parol, where he has taken no steps to cause the other party to produce the duplicate copy in his possession. Norris v. Billingsley [Fla.] 37 So. 564.

73. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137.

74. A contract for the sale of land need not be signed by the purchaser. Hyden v. Perkins, 26 Ky. L. R. 1099, 83 S. W. 128. The fact that the vendee in a contract to purchase land has not signed it does not render it any the less binding on him where he has paid a portion of the purchase price and gone into possession. Cannot by actual fraud made possible by reason of possession thus obtained, obtain title and hold it adversely to vendor. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345. Though the grantee in a deed containing an assumption clause does not sign it, yet, if he accepts the instrument and places it on record with knowledge of its contents, he is bound thereby as effectually as though he had done so. For a full discussion of the doctrine and the rights and liabilities of the parties thereunder, see Mortgages, 4 C. L. 677.

75. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917. Where contract obligated defendants to furnish lease to plaintiff with option to purchase, and plaintiff refused to accept lease because of certain litigation to which defendants were not parties and for which they were not responsible, plaintiff could not maintain action for specific performance or damages on such option. Livesley v. Muckle [Or.] 80 P. 901.

76. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30.

77. Where employer assented to terms of written draft of proposed contract of employment, and told employe to go to work and it would be fixed up later, held, that there was a completed contract though written contract was never signed, and employe could recover compensation provided for in proposed contract. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30. Principal making contract signed by one party and acted on by the other binding on both is not applicable so as to render such contract written instead of oral. Id. Defendant held estopped by its conduct to contend that the execution of formal written contract for oil was condition precedent to plaintiff's right to recover for failure to furnish oil. Vicksburg Waterworks Co. v. Guffy Petroleum Co. [Miss.] 38 So. 302. Agreement by defendant to enter into written contract with plaintiff and others to furnish them such quantities of fuel oil as they might require during one year at a specified price, held to be itself a binding and enforceable contract, though it did not state the amount of oil to be delivered to each party. Id. In suit on contract to employ plaintiff as attorney to recover claims against the government, held that defendant waived requirement that contract be reduced to writing. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917.

78. Dame v. Woods [N. H.] 60 A. 744. And see Implied Contracts, 3 C. L. 1690.

79. Benefit conferred on defendant and not detriment incurred by plaintiff is basis of the liability. Dame v. Woods [N. H.] 60 A. 744.

80. Applies to building contracts where substantial performance is not shown.

An alternative contract is one whereby a person promises to do one of several things specified.[81]

Parties.[82]—A person may become a party to a contract by entering into it himself, either directly [83] or through his duly authorized agent,[84] or by accepting a stipulation made in his favor by the contracting parties,[85] or by adopting as his own a contract entered into by third persons.[86] It has been held that one not a party to an offer may, by accepting it, become a joint contractor,[87] and of course if the offer is to the public generally, whosoever shall accept becomes a party.[88] One contracting on behalf of himself and another is estopped to deny the rights of the latter, though he made the contract in his own name alone.[89]

Everyone has the right to determine with whom he will contract and cannot have another person thrust upon him without his consent.[90] As a general rule only parties to the contract are bound thereby,[91] and they alone can enforce it; [92] but if

Burke v. Coyne [Mass.] 74 N. E. 942. An express contract as to the price to be paid for services controls, and where it exists there can be no implied contract to pay what they are reasonably worth. O'Connell v. King [R. I.] 59 A. 926. For a full discussion of this subject, see Implied Contracts, 3 C. L. 1690.

81. Hammon on Contracts, p. 886. Bond whereby obligors agree to erect buildings or, on default, to pay a certain sum of money, while not technically an alternative contract, partakes of that nature. McCullough v. Moore, 111 Ill. App. 545.

82. See 3 C. L. 847.

83. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

84. See Agency, 5 C. L. 64. City does not enter into contract for supplying water for fire department as agent of inhabitants so as to give them right of action for its breach. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

85. He remaining a stranger until he becomes a party by accepting it. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. These two methods are necessarily exclusive of each other. Id. A stipulation pour autrui on which the beneficiary may sue may result by implication. Id.

86. Instead of reducing their agreement to writing the parties may, by reference or otherwise, adopt the terms of an existing contract between others. Contract of railroad company to build spur track. Butler v. Tifton, T. & G. R. Co., 121 Ga. 817, 49 S. E. 763. In an action on an agreement between plaintiff and defendant made on the terms of a contract between defendant and a third person, held not necessary for plaintiff to show an assignment of the contract to him. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. Is bound thereby in the same manner as though he had originally made it himself. Where contract cancelling previous one for sale of land recited sales of timber by vendee to various parties and provided that latter might remove it within certain time, held, that vendor thereby adopted such contracts of sale. Watson v. Gross [Mo. App.] 87 S. W. 104. One purchasing the subject of a written contract and undertaking its performance thereby makes it his own. Oral adoption by railroad company purchasing another line, of contract whereby latter agreed to maintain its offices and shops in certain town held binding and not within statute of frauds. City of Tyler v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 238.

87. Plaintiff made an offer in writing to furnish machinery to "G. & Co.," such offer to be subject to the approval of the plaintiff's manager. The written acceptance was worded: "Your proposal as above is hereby accepted," signed "G. & Co. By S. S. G., W. B. G., T. H. G." W. B. G. was not an agent for G. & Co., but signed the acceptance individually. Held, that by joining in the acceptance of the offer the defendant became a joint contractor, although the offer was not addressed to him. Gill v. General Elec. Co. [C. C. A.] 129 F. 349.

Note: Several courts adopt the anomalous doctrine that where one not mentioned in the body of a simple contract signs his name thereto, he thereby makes himself a joint contractor; and this irrespective of whether the offer was made to him. Clark v. Rawson, 2 Denio [N. Y.] 135; Staples v. Wheeler, 38 Me. 372. There can be no meeting of the minds where the offeror has not the acceptor in mind in making the offer. Evans v. Conken, 24 N. Y. S. 1081; Lancaster v. Roberts, 144 Ill. 213. The better view would be to regard him as surety, but in that case the consideration must be recited in order to satisfy the Statute of Frauds. Gould v. Moring, 28 Barb. [N. Y.] 444.—4 Columbia L. R. 512.

88. See Rewards, 4 C. L. 1309.

89. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678.

90. Langdon v. Hughes, 113 Ill. App. 203. One cannot make himself the creditor of another without the latter's consent. Evidence sufficient to support finding that defendant borrowed money from plaintiff's deceased wife and not from him. Id. If defendant believed she was borrowing money from plaintiff's wife, though the money was in fact his, she was not liable therefor to him in action of assumpsit. Id. And see Novation, 4 C. L. 838.

91. In action on contract whereby defendant agreed to return certain bags to plaintiffs filled with grain, and to pay a certain price for all not returned or accounted for by certain date, but in which

defendant has also been guilty of a breach of duty to a third person as well as a breach of contract, he cannot escape liability to such third person by setting up such contract.[93]

The term privity denotes mutual or successive relationship to the same rights of property.[94] Privity has been called "a mode of becoming a party." [95]

There is a conflict of authority as to the right of a third person to enforce a contract made for his benefit, to which he is not a party, though as a general rule

twine was not mentioned, held error to render judgment for twine, where evidence, though showing contract by defendant with third person in regard to it, failed to show that plaintiffs had been substituted as the parties in interest. Curtin v. Ingle, 143 Cal. 354, 77 P. 74. Tenant's wife not bound to care for landlord's room under tenant's agreement to do so, but if her services are, with her consent, rendered by way of performance thereof, his liability is thereby extinguished. Kennedy v. Swisher [Ind. App.] 73 N. E. 724. A stipulation in a contract between the relief department of a railroad company and an employe that the bringing of a suit against the company by his representative or beneficiary or the payment by the company of any damages recovered against it by reason of his death or injury shall release the department from all claims by reason of the employe's membership, is not void as attempting to bind persons not parties to it. Rights of beneficiary are fixed by contract. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942. A contract signed by two persons as sureties for one about to enter an old men's home, but not by the latter, in which they covenant that he has no property and that he will convey any which he may acquire to the institution, is not the contract of the inmate and he cannot be held liable by virtue thereof. Baltimore Humane Impartial Soc. v. Pierce [Md.] 60 A. 277. Where plaintiff claimed proceeds of certain cattle deposited in bank to credit of R., agreement between plaintiff's agent and manager of company by which cattle were sold and money deposited that plaintiff should have time to investigate and bring suit to which neither the bank or R. were parties, was not binding on them. Drumm-Flato Com. Co. v. Gerlach Bank, 107 Mo. 426, 81 S. W. 503. Where purchasers of land took with notice of a prior sale of timber thereon, a promise by their grantor to secure or release of the timber contract was unavailing as against those claiming under it. Brodack v. Morsbach [Wash.] 80 P. 275. Where a contract is under seal, no one can sue or be sued to enforce the covenants therein contained, except those who are named as parties to the instrument, and who signed and sealed the same. If made by an attorney or agent, must be made in the name of the principal. Spencer v. Huntington, 100 App. Div. 463, 34 Civ. Proc. R. 30, 91 N. Y. S. 561. This is true though a seal is not essential to the validity of the contract. Persons not parties to contract under seal for purchase of stocks, alleged to have been made for their benefit, held not liable thereon. Id.

92. A mere stranger to a contract cannot maintain an action thereon. Contract between plaintiff's father and deceased, whereby plaintiff was to live with and work for deceased until he became of age in consideration of which deceased would provide by will or otherwise for him to have half his estate, held not to give plaintiff right of action against decedent's estate, though he performed the services and deceased failed to comply with his contract. Cooper v. Claxton [Ga.] 50 S. E. 399. One cannot recover damages for breach of a contract unless he is privy thereto, either from having been a party to it originally or from having accepted a provision therein in his favor, no matter how directly damages may result from the breach. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. The fact that defendants' title to a part of the machinery of their mill is defective is no defense to an action for breach of a contract whereby plaintiff agreed to enter into a joint enterprise with them for the manufacture of staves, there being no privity between plaintiff and the real owner of the machinery. Cannot be considered to reduce damages. Alderton v. Williams [Mich.] 102 N. W. 753. One not a party to a contract cannot, as a general rule, sue in respect of a reach of duty arising out of the contract. O'Donnell v. Rosenthal, 110 Ill. App. 225. Parties building piers, etc., not liable for injuries to scow belonging to third persons resulting from failure to remove piles in accordance with contract, where they were otherwise under no obligation to do so. Conklin v. Staats [N. J. Err. & App.] 59 A, 144.

93. Action by administrator of lessee's infant son for damages for death alleged to have been caused by failure of lessor to furnish steam in accordance with contract with lessee. O'Donnell v. Rosenthal, 110 Ill. App. 225.

94. Where lessee under gas lease mingles gas from demised premises with that of other persons so as to constitute a confusion of goods, and is compelled to pay and account to them for the whole mass of gas, the lessor is not entitled to collect from such persons the royalties on the gas taken from his land, there being no privity of contract or estate. Aiken v. Zahn, 23 Pa. Super. Ct. 411. There is no privity of contract between one furnishing provisions to a railroad contractor and an indemnity company giving a bond to the railroad conditioned for the payment of persons supplying provisions to the contractor, so as to enable him to recover on such bond as a common-law obligation. Armour & Co. v. Western Const. Co., 36 Wash. 329, 78 P. 1106.

95. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

he is permitted to do so.[96] The question whether a contract has been made for the

96. See Hammon on Contracts, p. 711, et seq., for full discussion of this question, with collection of authorities. See, also, Am. & Eng. Enc. Law [2nd Ed.] 104, et seq.

Georgia: Railroad company, though not party to agreement whereby its promoters agreed to render services in furthering the enterprise without compensation, held entitled, as matter of defense, to negative any implied promise to pay for such services by showing that they were rendered for its benefit in pursuance thereof. Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759.

In Illinois he may do so. Thus if part of the consideration for a conveyance is the assumption by the grantee of a mortgage on the premises, the mortgagee may enforce the agreement in an action at law for his benefit. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

In Indiana may do so, though he was not privy to it, and no consideration passed from him to the party bound. Agreement to place telephone in plaintiff's house in consideration of release of right of way by other persons held mutual. Foster v. Leininger [Ind. App.] 72 N. E. 164. Third person need not allege an acceptance thereof, since an acceptance is implied from bringing suit upon it. Id.

In Iowa, where one, for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity o the promise and may sue the promisor by direct action. Malanaphy v. Fuller & J. Mg. Co. [Iowa] 101 N. W. 640. In such case the rights of the creditor are to be measured by the terms of the agreement, and he takes subject to all the equities existing between the principal parties thereto. Where on sale of firm's business, purchaser assumed a debt of the firm as part of consideration therefor, and as between them the seller assumed the obligation of surety therefor, the creditor was bound to observe such relation and release of one of purchasing firm released seller. Acceptance by creditor of note signed by both firms did not change rule. Id. One who on a sufficient consideration, agrees with another to pay the future balance of the latter's open account to a third person, is liable to pay balance found due on investigation of its accuracy. Rule not changed because claim is on an account stated. Runkle v. Kettering [Iowa] 102 N. W. 142. In such case the defense of want of consideration is as available to defendant as though the suit had been brought by the other party to the contract. Id.

In Kansas third parties not privy to the contract or to the consideration thereof may sue thereon to enforce any stipulation made for their especial benefit or interest. A contract by one of the creditors of a decedent to pay all of the debts of the estate in consideration of the other acknowledging payment of a judgment against the estate, and of the heirs conveying certain tracts of land to them, may be enforced by the administrator after the heirs have ratified it by making the required conveyances, though neither he nor the heirs knew of the contract when it was made. Stewart v. Rogers [Kan.] 80 P. 58.

In Louisiana may sue on contract containing provision in his favor which he has accepted. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

In Missouri laborers and materialmen may sue on a bond given by a contractor for a public improvement, conditioned on his paying for labor and material furnished, as a contract made for their benefit. Buffalo Forge Co. v. Cullen & S. Mfg. Co., 105 Mo. App. 484, 79 S. W. 1024. Provision authorizing assignment of bond to laborers and materialmen and providing that in case of assignment it shall inure to benefit of all laborers and materialmen does not prevent a materialman who is the only creditor of the contractor from suing on it without an assignment as a contract for his benefit. Id.

In Montana a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. Evidence held to show sufficient privity of contract between plaintiff and abstract company to enable former to maintain suit against latter for damages resulting from failure of abstract to disclose judgment against owner of lands seeking loan thereon, where defendant knew that abstract was to be furnished for plaintiff's exclusive benefit and that it would rely thereon. Western Loan & Sav. Co. v. Silver Bow Abstract Co. [Mont.] 78 P. 774.

New Jersey: Evidence in action to recover for services rendered in assisting deputy marshal held not sufficient to justify court in finding as a matter of law a contract whereby a third person was to receive the entire compensation for such services, so as to require a nonsuit for lack of privity, though it may have shown that she had some beneficial interest therein. Murray v. Pfeiffer [N. J. Err. & App.] 59 A. 147.

New York: Where defendant agreed with one member of a firm that, if latter would sell his interest to defendant's brother for a certain price, he would pay the firm debts, but it did not appear that defendant received any of the firm assets, the promise was for the protection of the retiring partner only, and could not be enforced by firm creditors not parties thereto. Caeser v. Kulla, 92 N. Y. S. 798. An agreement between defendant and his son's wife whereby he was to make certain payments to trustees for the benefit of herself and her children, to which the trustees were not parties, held enforceable by her, and she was entitled to sue thereon in her own name. Recknagel v. Steinway, 94 N. Y. S. 119.

Pennsylvania: Bond given by contractor performing work under a municipal contract conditioned to pay claims for labor and material, held to embrace in the class of persons entitled to sue thereon a materialman furnishing material to a subcontractor. Bowditch v. Gourley, 24 Pa. Super. Ct. 342.

South Carolina: Under an agreement be-

benefit of a third person so as to entitle him to sue thereon is one of intention.[97] There is a strong presumption, however, that the contract was made solely for the benefit of the parties thereto.[98]

One with whom or in whose name a contract for the benefit of another is made may sue thereon in his own name as the trustee of an express trust.[99]

A party signing a contract in his own name as an individual may properly sue thereon to compel payment for the work done, notwithstanding a private understanding between himself and a third person whereby the latter becomes a partner in the enterprise.[1]

Execution.—To prove the execution of a chattel mortgage, where one of the subscribing witnesses is absent from the country, it is only necessary to call the other witness, and in case his recollection is at fault, the facts in regard to the execution may be proved by the mortgagor.[2]

Delivery.—The necessity for the delivery of the contract generally arises in connection with deeds [3] or promissory notes, and questions relating thereto are therefore treated in connection with those subjects.[4]

(§ 1) *B. Offer and acceptance.*[5]—Since no contract is complete without the mutual assent of the parties,[6] their minds must meet as to all its essential terms.[7]

tween two brothers to pay the proceeds of certain insurance policies to their sisters, the latter may sue thereon. Willoughby v. Willoughby [S. C.] 50 S. E. 208.

In Wisconsin one for whose benefit a contract is made between two other persons may enforce it at law without any prior acceptance thereof on his part. Gilbert Paper Co. v. Whiting Paper Co. [Wis.] 102 N. W. 20. Where one, for a valuable consideration moving from another, agrees to pay money to a third person, the latter may, at his election, sue to enforce such promise, and in the interval the original grantor of the property or payor of the consideration has no power of revocation. General creditor of promisee cannot, in such case maintain garnishment proceedings against promisor, since latter has no money or property belonging to him. Id.

97. Merely a matter of interpretation. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980.

98. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. Agreement by waterworks company to lease five hydrants to city and to furnish water for use of fire department, held engagement in favor of city and not of inhabitants individually. Not a stipulation pour autrui in their favor, and they had no right to sue thereon. Id. Rule not changed by fact that contract recited that it was entered into "in consideration of the public benefit and of the protection to property." Id.

99. Rev. St. 1899, § 541. Husband contracting for erection of buildings on wife's land. Simons v. Wittmann [Mo. App.] 88 S. W. 791. Agent making contract for undisclosed principal. Id.

1. Boring well. Council v. Teal [Ga.] 49 S. E. 806.

2. Makes out prima facie case and, if uncontradicted, constitutes sufficient proof of proper execution. Schouweiler v. McCaull [S. D.] 99 N. W. 95.

3. See Deeds, 3 C. L. 1056.

4. See Negotiable Instruments, 4 C. L. 787.

5. See 3 C. L. 806. As to acceptance by another than the person to whom the offer is made, see ante, § 1 A, Parties to Contract.

6. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. The unexpressed or uncommunicated intention of one party to a contract is not binding upon the other, but in order to be binding it must be common to both. As to delivery in sale of wheat. Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473.

7. Durgin v. Smith, 133 Mich. 331, 94 N. W. 1044. Must be an agreement of parties. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. One under no obligation to pay for medical services rendered to another cannot be held responsible therefor in the absence of a promise to pay relied on by the physician rendering them. Must appear that he said or did something showing an intent to pay for them. Evidence insufficient to show contract. Dorion v. Jacobson, 113 Ill. App. 563. Statute declaring that avails of life insurance policy are not subject to insured's debts in absence of a special contract (Code, § 3313) requires a meeting of the minds and all the essentials of a valid contract. In re Donaldson's Estate, 126 Iowa, 174, 101 N. W. 870. Minds held never to have met with reference to subject-matter of contract for removal of business from one town to another, and contract canceled. Board of Trade of Grand Haven v. De Bruyn [Mich.] 101 N. W. 262. Minds held not to have met as to time of payment. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. Evidence in action to recover money loaned held to have raised disputed question of fact as to whether loan was made to defendant and her husband jointly or to defendant alone, rendering the dismissal of the complaint erroneous. Boehringer v. Hirsch, 86 N. Y. S. 726. Do not meet if mistake of fact. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22; Benesh v.

Travelers' Ins. Co. [N. D.] 103 N. W. 405. If evidence justifies conclusion that there was a misunderstanding as to whether promise was that defendants should pay or that obligation should be that of a corporation to be formed, no contract has been proved. Durgin v. Smith, 133 Mich. 331, 10 Det. Leg. N. 215, 94 N. W. 1044. Mistake in amount of bid, not due to negligence, held to warrant its rescission. Board of School Com'rs of Indianapolis v. Bender [Ind. App.] 72 N. E. 154. See Mistake and Accident, 4 C. L. 674.

Evidence held to establish contract: To pay for training, feeding, and shoeing certain mares. Durfee v. Seale, 139 Cal. 603, 73 P. 435. To render services in promoting railroad without consideration. Powell v. Georgia, F. & A. R. Co., 121 Ga. 803, 49 S. E. 759. Instructions approved. Id. To pay notes in consideration of an agreement by plaintiff to pay certain others. Headley v. Leavitt [N. J. Err. & App.] 60 A. 963. To indemnify plaintiff against the payment of a certain note as a consideration for plaintiff's assignment of a mortgage given to secure it. Lost contract. Smith v. Nelson [Or.] 78 P. 740. To advance money to purchase land for plaintiff, to take deed in his own name, and to convey to plaintiff on repayment of amount advanced. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335. To prosecute joint adventure in dealing in certain stocks in partnership and to divide profits equally. Van Tine v. Hilands, 131 F. 124. By railroad company for transportation of lead to Japan by steamer leaving on certain day. Northern P. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269. In action to recover for services under an alleged contract to design and prepare models for statue, instruction that evidence was insufficient to entitle plaintiff to recover held properly refused as ignoring plaintiff's own evidence. Hodges v. Pike [Md.] 59 A. 178. In action on contract whereby defendant employed plaintiff to transport men to his camps, finding that defendant agreed to pay a certain sum for every man shipped to him rather than for every one received sustained on conflicting evidence. Idol v. San Francisco Const. Co. [Cal. App.] 81 P. 665.

Evidence insufficient to establish contract: Authorizing work of installing mining machinery to be done on defendant's account. Abner Doble Co. v. McDonald, 145 Cal. 641, 79 P. 369. Evidence in action for specific performance of contract to convey land held to support finding that there was no independent verbal agreement made at the time of the writing requiring defendant to construct a house on the land. Bird v. Potter, 146 Cal. 286, 79 P. 970. In regard to sale of land and water right. Talcott v. Mastin [Colo. App.] 79 P. 973. To complete work under building contract by a specified date. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858, afg. 112 Ill. App. 13. Held that correspondence did not make previous oral negotiations in regard to forming corporation and employing plaintiff into a contract. Ellis v. Block, 187 Mass. 408, 73 N. E. 475. By messenger company to transport and deliver package of money, but only one to furnish messenger to be used by plaintiff as he sought fit, at fixed rate per hour. Hirsch v. American District Tel. Co., 90 N. Y. S. 464. To sustain finding that plaintiff was employed to prepare plans for building, or that defendant's testator ever accepted or used such plans, or derived any benefit from them. Minuth v. Barnwell, 94 N. Y. S. 649. Agreement between plaintiff, defendant, and firm of brokers for employment of plaintiff and the firm to sell certain property and an apportionment of commissions between them superseding the original employment of plaintiff. Teesdale v. Bennett, 123 Wis. 355, 101 N. W. 688. To show agreement on basis of contemplated written building contract, which was never made on account of a final disagreement as to its terms, and which would have taken the place of the preliminary provisional agreement sued on. Building contract. Holland v. Ryan, 92 N. Y. S. 242. In an action to recover deposit made to secure the execution of a contract for the sale of realty evidence insufficient to support finding that prospective seller promised to insert stipulation that property was of a certain rental value. Rosenbloom v. Cohen, 91 N. Y. S. 382. Statement of attorney for plaintiff held not an agreement to release defendant in a capias from his obligation to surrender himself to jail in case he failed to secure his discharge as an insolvent, in accordance with the terms of a bond given by him. Irwin v. Hudson, 24 Pa. Super. Ct. 72. To show that plaintiff agreed to provision limiting carrier's liability. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346 To show express contract by employe to assign patents for inventions made by him during his employment to his employer, or to warrant a presumption that such contract existed. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403. Proposal submitted with reference to fireproofing of building held ineffectual, and there was no contract for a deduction of sum proposed therefor, upon change in plans by which it was omitted. Connors v. United States, 130 F. 609. Prima facie the custody of an infant is in the father, and a contract relinquishing this right must be established by clear and strong evidence. Evidence insufficient. Looney v. Martin [Ga.] 51 S. E. 304. Evidence to establish special contract required by Iowa Code, § 3313, to make proceeds of life insurance policy subject to insured's debts must be clear and satisfactory. In re Donaldson's Estate, 126 Iowa, 174, 101 N. W. 870. Evidence insufficient to show that policies were taken out in pursuance of contract with creditor. Id.

Contracts alleged to have been made with persons since deceased must be established by the clearest and most convincing evidence. If based on parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Promise by father of illegitimate child to settle certain sum on it. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916.

Evidence insufficient: To show contract to reimburse plaintiff for expenses incurred in certain trips which she took as decedent's companion. Apollonio v. Langley, 94 N. Y. S. 274. In any event insufficient to authorize her to charge up cost of clothes. Id. To support finding of parol agreement,

There must in every case be an offer by one party and an acceptance thereof by the other.[8] An offer of course imposes no obligation until it is accepted,[9] and may be withdrawn at any time before acceptance,[10] but not thereafter.[11] In order to convert it into a contract, the acceptance must be absolute and unconditional.[12] A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiations, unless the party making the orig-

partly performed, to will property to defendant. Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140. To show definite parol contract obligation to devise land. Lozier v. Hill [N. J. Eq.] 59 A. 234.

Evidence sufficient: To authorize submission of claim for services rendered deceased in discovering ore on mining claim, and for which it was alleged the latter agreed to pay a certain sum, to the jury, and directing of verdict for defendant, held error. Titus v. Bernard [Colo. App.] 77 P. 256. To show contract by decedent to convey land to plaintiff if he and his wife would live with decedent and attend to her business, and to show performance on his part. Turner v. Burr [Mich.] 101 N. W. 622. To show contract to compensate claimant for certain services by leaving him a portion of a stock of goods. Shane v. Shearsmith's Estate [Mich.] 100 N. W. 123. To show that deceased intended and agreed to pay plaintiff for services rendered during his last sickness. Birch v. Birch [Mo. App.] 86 S. W. 1106. See, also, Wills, 4 C. L. 1863.

Where claims for services are made against the estate of a decedent which were not presented to him during his lifetime, it must be clearly proved by disinterested witnesses that such services were accepted with an intent to pay therefor. Evidence held to show that services rendered by daughter-in-law, and for which no claim was made until after provisions of the will were known, were not under contract of employment. Rock v. Rock, 93 N. Y. S. 646. Claim for services, there being no opportunity for a demand, since the agreement was to pay therefor by will. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27. See, also, Estates of Decedent, 3 C. L. 1275.

8. Hammon on Contracts, p. 37, et seq. Letter offering to take 500 shares of stock, in response to previous letter of plaintiff's, and authorizing plaintiff to draw on him for the money, and reply of plaintiff that he had drawn on him, held to constitute an executed written contract, though stock did not accompany draft. Mason v. Lievre, 145 Cal. 514, 78 P. 1040. Correspondence held to have constituted written contract in regard to furnishing steel work for building. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Plaintiff's failure to reply to a letter proposing that defendants would continue to pay her hospital expenses provided that she would make no additional demand on account of her injury, and the fact that she remained at the hospital after its receipt, held not a tacit acceptance of such offer, particularly as plaintiff was an infant. Hensler v. Stix [Mo. App.] 88 S. W. 108. One who performs an act with the knowledge of the reward offered for it completes a contract thereby; his act constitute both acceptance and fulfillment. A broker's offer to share commissions with those who brought borrowers to whom loans are made is accepted and fulfilled by the bringing of a person with whom the broker completes negotiations, after notice that a share of the commission is expected. Van Vlissingen v. Manning, 105 Ill. App. 255. 255.

9. Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366; Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469; Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493; Powers v. Rude, 14 Okl. 381, 79 P. 89. The one may decline to accept, or the other may withdraw his offer. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. Letters held to constitute contract for purchase and sale of bananas, there being an offer and an unconditional acceptance thereof. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084, afg. 112 Ill. App. 281.

10. Offer to sell cement could be withdrawn at any time before acceptance, but if other party offered to take any definite quantity of cement to be delivered according to terms of proposal, the cement company would be bound to deliver. Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933. The fact that one has been regularly purchasing goods from another will not sustain an action for damages for failure of the seller to fulfill further orders. Penn Shovel Co. v. Phelps, 24 Pa. Super. Ct. 595.

11. One making subscription to induce railroad to extend its line to certain town cannot withdraw it or release himself after it has been accepted, and company has acted on same by commencing work. Instruction approved. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Not released because company did not notify him of acceptance, where it completed the work. Id.

12. Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366; Talcott v. Mastin [Colo. App.] 79 P. 973. Must correspond with offer in every respect. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P, 493. There must be a clear accession on both sides to the same set of terms. Proposition to donate certain property to railroad if it would extend its line. Powers v. Rude, 14 Okl. 381, 79 P. 89. Letter of acceptance of offer to sell yarn held unqualified and unconditional, notwithstanding expression of hope that it would be delivered within certain time. Cherokee Mills v. Gate City Cotton Mills [Ga.] 50 S. E. 82. Acceptance held not a departure. United Fruit Co. v. Louisiana Petroleum Co. [La.] 38 So. 958.

inal offer renews it, or assents to the modification suggested.[13] It is a new proposal[14] which must, in its turn, be accepted by the party making the original offer.[15] The acceptance of an offer as made is not rendered conditional because accompanied by a request for departure from its terms as to time and place of performance.[16] A party having once rejected the offer cannot afterwards revive it by tendering an acceptance of it.[17]

In the absence of a stipulation to the contrary, an oral acceptance is sufficient.[18]

Where the parties have adopted the mail as a means of communication in their negotiations, the mailing of a letter accepting an offer makes a complete and binding contract dating from the moment of the deposit of the letter in the postoffice unless the offer is so qualified as to require a receipt of the letter to constitute an acceptance.[19] It is immaterial in such case that the acceptance is delayed or lost and never received by the party making the offer.[20] The fact that the parties have previously used the mail as a means of communication in conducting their negotiations,[21] or that their situation is such as to make it highly probable that each contemplates its use, justifies its use in accepting an offer.[22] Proof that the letter was actually received, accompanied by proof of when it was written renders it unneces-

13. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. Order for "choice potatoes" is not an acceptance of proposal to sell "nice white potatoes (peerless stock)." Id. Proposal to sell ten cars of potatoes is not accepted by order requiring cars to average a certain number of pounds. Id. Proposal to sell ten cars of potatoes for winter use is not accepted by order of eight cars for winter storage. Id. Order for potatoes requiring seller to select the stock and send no small ones is not an acceptance of an offer to sell 10 cars of "nice white potatoes (peerless stock)." Id. In action on subscription contract, instruction that if, after it had been signed, plaintiff demanded an additional subscription as a condition of building the road, defendant had a right to treat the negotiations as at an end and withdraw his subscription, and that it could not be collected, held proper. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Proviso that demand and withdrawal must have been made before plaintiff had commenced construction held unnecessary and erroneous, but harmless. Id. Acceptance of offer to furnish feed, and pens and water to feed cattle, held to constitute modification of offer justifying defendant in withdrawing it altogether. Ingham v. Cisco Oil Mill [Tex. Civ. App.] 86 S. W. 630. Notification that coal "will be accepted" according to terms of option is a completed acceptance of option and not a mere promise to accept it in the future. Turner v. McCormick [W. Va.] 49 S. E. 28.

14. Civ. Code, § 1585. No contract where offer is to sell oil of guaranteed gravity of 15 degrees and acceptance requires it to be of that gravity at a temperature of 60 degrees. Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366. Conditional acceptance of proposition to sell ranch and water rights held not to constitute contract. Talcott v. Mastin [Colo. App.] 79 P. 973.

15. Letter held not an acceptance of requirement in qualified acceptance that deed should include certain stock. Talcott v. Mastin [Colo. App.] 79 P. 973. Where broker in accepting offer for sale of apples included a warranty of quality which seller refused to accept, and in turn proposed form of contract which broker refused to accept, and nothing further was done, held no contract. Wood v. Ellsworth, 45 Misc. 584, 91 N. Y. S. 24. Assent of dealer could not be inferred from his silence. Id.

16. Provided the request be not so worded as to limit or qualify the acceptance. Acceptance of option for sale of land "according to the terms of the option given me" to which there is added by the conjunction "and" a request for a departure from its terms as to time and place of performance, held absolute. Turner v. McCormick [W. Va.] 49 S. E. 28. Request relates to performance, and is not an element in the making of the contract. Id.

17. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493.

18. Option. Turner v. McCormick [W. Va.] 49 S. E. 628.

19. Sale of land. Campbell v. Beard [W. Va.] 50 S. E. 747. An offer must be considered as made every instant the letter is upon its journey. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

20. Mailing of notice that defendant had sent oil lease to third person to be delivered to plaintiff on his returning the rent received by him held to have precluded plaintiff from withdrawing his offer to rescind, though notice was never received. Carter v. Hibbard, 26 Ky. L. R. 1033, 83 S. W. 112.

21. Campbell v. Beard [W. Va.] 50 S. E. 747. Where parties live in different towns and offer is made by mail. Carter v. Hibbard, 26 Ky. L. R. 1033, 83 S. W. 112.

22. Campbell v. Beard [W. Va.] 50 S E. 747.

sary to show in detail that it was properly addressed, stamped, and deposited in the postoffice.[23]

Where it is expressly stipulated that acceptance must be made within a specified time, acceptance within such time is a condition precedent to the validity of the contract.[24] In case no time is fixed, the offer must be accepted within a reasonable time,[25] what is a reasonable time depending on the circumstances of each particular case.[26] When an offer is made by an agent having authority to sell, it may, if no time for acceptance is designated, be accepted at any time before the expiration of the agents authority.[27]

An offer made to a particular person can be accepted by him alone.[28] So, too, where the offer requires an acceptance by a particular officer of a corporation, it is not binding until so accepted.[29]

Where one of several parties to a contemplated contract, containing mutual covenants which are on each side the consideration for those of the other, refuses to become bound thereby or to perform, it is not binding on the others.[30]

An option is a mere continuing offer.[31] It cannot, however, be revoked if

23. Campbell v. Beard [W. Va.] 50 S. E. 747. Proof by a witness that he wrote a letter on a certain day, accompanied by proof of its receipt by the party to whom it was written on the day on which it would have arrived in due course of the mail, is sufficient to support a finding that it was mailed on the day on which it was written. Id.

24. Powers v. Rude, 14 Okl. 381, 79 P. 89 Proposal to donate property to railroad if it would extend its line. Id. The acceptance must be by return mail where the offer so provides or where the nature of the business is such as to give the offerer a right to expect that it will be. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199. The mere sending of a letter and telegram to a party accepting an option to purchase property is insufficient to constitute a contract unless received within the time limited for acceptance. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Where offer to sell was made on Sunday with understanding that it would expire on following day, Sunday is included in calculating time limit. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354. See, also, Time, 4 C. L. 1680.

Where party giving option to purchase certain land went to distant point before its expiration, thus preventing the vendee from making a tender within the specified time, held that letter left at vendor's residence constituted an acceptance, which together with his subsequent offer by mail and alleged continued readiness and willingness to perform prima facie entitled him to specific performance. Homes v. Myles [Ala.] 37 So. 588.

25. Offer by mail. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

26. Situation of the parties and the subject-matter of the negotiations. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199. Where the parties are dealing with regard to a mercantile commodity, the price of which in the market changes from day to day, and the party who receives the offer does not post his acceptance on the same business day, he cannot take advantage of a rise in the market price and accept upon some future day. Id.

27. Campbell v. Beard [W. Va.] 50 S. E. 747.

28. Option to purchase land not assignable, and assignee acquires no right to convert option into contract of sale by tender or payment of purchase money. Rease v. Kittle [W. Va.] 49 S. E. 150.

29. Where written order for threshing machine contains a condition that it shall not be binding until accepted by officers of selling corporation, the signer of such order is not bound thereby until it is so accepted. Robinson & Co. v. Ralph [Neb.] 103 N. W. 1044. By executive officer of company. Goldberger v. Morris, 94 N. Y. S. 359.

30. Where agreement to exchange realty was signed by husband for his wife without her authority, and she thereafter repudiated it and refused to perform. Griefen v. Hubbard, 112 Ill. App. 16.

31. Written contract whereby one party, for a valuable consideration, agrees to sell land to another for a specific price within a certain time thereafter, the purchase money to be paid in cash within such time, and, on failure to make such payment, the contract to be void. Rease v. Kittle [W. Va.] 49 S. E. 150. Contract whereby vendor agreed to sell land on stated terms, but only requiring vendee to pay small sum as deposit, which he did, and not binding him to purchase the property or to do anything else, held mere option not enforceable against vendee, and, never having been exercised, it did not entitle broker introducing parties to a commission as for sale, though vendor was willing to perform. Milstein v. Doring, 102 App. Div. 349, 92 N. Y. S. 417. An agreemnt by the owner of land to sell it and to make a deed on specified notice from the other party, but without any agreement on the part of the latter to buy it, is an option. Swank v. Fretts, 209 Pa. 625, 59 A. 264. Optional agreement for sale of minerals held to have expired by failure of vendee to pay purchase price and accept deed so that his assignee acquired no rights thereunder. Notley v. Shoemaker, 25 Pa. Super. Ct. 584. Agreement between

based on a valuable consideration.[32] An election to exercise it converts it into an executory contract, specific performance of which will be enforced.[33]

(§ 1) *C. Reality of consent.*[34]—Since the mutual assent of the parties is necessary,[35] there can be no valid agreement where the contract is the result of mistake or accident,[36] duress,[37] misrepresentation, fraud, or undue influence,[38] or where one or both of the parties are mentally incapacitated.[39]

§ 2. *Consideration.*[40]—A legal consideration is essential to the validity of every contract.[41]

At common law a contract under seal imports a consideration,[42] and in such case lack of consideration is an affirmative defense which must be pleaded and

insurance company and palace car company in consideration of one dollar and other valuable considerations that former would renew latter's policies at a specified rate, held a mere option, though signed by both parties, and not to bind latter to take insurance. Nothing to show different intent. Barker v. Pullman Co. [C. C. A.] 134 F. 70.

32. Rease v. Kittle [W. Va.] 49 S. E. 150.

33. Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. Verbal acceptance without tender of purchase money within time limited does not convert offer into contract of sale. Rease v. Kittle [W. Va.] 49 S. E. 150. Evidence held not to show payment of part of purchase price and acceptance by owner within time limited. Id. An election to exercise an option whereby plaintiff is entitled to have a telephone placed in his house is shown by a demand for performance. Foster v. Leininger [Ind. App.] 72 N. E. 164.

34. See 3 C. L. 809.

35. See ante, § 1 B.

36. See Mistake and Accident, 4 C. L. 674.

37. See Duress, 3 C. L. 1147.

38. See Fraud and Undue Influence, 3 C. L. 1520.

39. See Incompetency, 3 C. L. 1696; Insane Persons, 4 C. L. 126.

40. See 3 C. L. 809.

41. Forbs v. St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562; Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41; In re Brown's Estate [Pa.] 60 A. 147. Liability of the indorser of a promissory note. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006. Oral agreement by landlord during continuance of lease to repair premises. Altsheler v. Conrad, 26 Ky. L. R. 538, 82 S. W. 257. In action for specific performance of contract to convey land, a contention that there was no finding on the issue that defendant never received any adequate consideration for the alleged agreement held untenable where court found that the contract price was the reasonable value of the lot and evidence showed that defendant received $5 and refused to take balance when it was tendered. Bird v. Potter, 146 Cal. 286, 79 P. 970. Evidence insufficient to show that creditor for consideration agreed to release a note. Siewing v. Tacke [Mo. App.] 86 S. W. 1103. A mortgage may only be foreclosed or right under it enforced where it is given to secure debt, at least where it is not given to secure a note or bond intended as a gift. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. Evidence held to show both pecuniary consideration and detriment to one of the parties, so as to justify denial of motion for nonsuit. Willoughby v. Willoughby [S. C.] 50 S. E. 208. Held proper under the evidence to submit question to jury to determine whether any consideration was paid and accepted for permit to string telegraph line over plaintiff's land. Burnett v. Postal Tel. Cable Co. [S. C.] 50 S. E. 780. Evidence held insufficient to show that release of damages claimed in a libel in admiralty was without consideration, or that it was procured by collusion and fraud. Naretti v. Scully [C. C. A.] 139 F. 118.

Provision limiting carrier's common-law liability unenforceable in absence of a special consideration therefor. Evidence held to justify finding that there was none. Evansville, etc., R. Co. v. McKinney [Ind. App.] 73 N. E. 148. Instructions assuming a contract to be in force are properly refused, where there is evidence justifying a finding that it was without consideration. Id. Evidence insufficient to show agreement to release railroad from its common-law liability in transportation of stock in consideration that it would furnish him with free transportation. Rice v. Wabash R. Co., 106 Mo. App. 371, 80 S. W. 974. Where the freight rate on cattle was based on weights estimated by the carrier's agent, which were less than those estimated to him by the shipper, the carrier cannot claim that it carried them at a reduced rate by reason of their weight being underestimated, which entitled it to limit its common-law liability. Id. Evidence insufficient to show that cattle were undervalued by reason of which plaintiff secured lower freight rate than he would otherwise have had to pay. Rice v. Wabash R. Co., 106 Mo. App. 371, 80 S. W. 974. Contract for carriage of cattle and subsequent one for carriage of carctaker held a single contract, supported by the same consideration, viz., the price paid for carrying the cattle. Sprigg's Adm'r v. Rutland R. Co. [Vt.] 60 A. 143. Consideration expressed in bill of lading held sufficient to support entire contract including exemption of carrier from liability for loss of cotton by fire, notwithstanding the fact that no different rate was offered the shipper. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127. For a full discussion of this subject, see Carriers, 5 C. L. 507.

42. At common law no consideration is needed to pass the legal title to land. Deed by father to his bastard son, because latter would not inherit any of his land, held valid. Hall v. Hall, 26 Ky. L. R. 610, 82 S. W. 300. Is prima facie evidence and pre-

proved by the party desiring to take advantage of it.[43] This rule has been modified or abrogated by statute in many states.[44] In some states the presumption of a consideration exists in favor of all written contracts.[45] There is no call for any further proof in regard to the consideration for a deed which itself recites a consideration.[46]

Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter supports the former also.[47]

It is not necessary that the consideration move to the promisee,[48] but it must be furnished by one having a legal interest in the performance of the promise,[49] and at the instance of the promisor.[50] Thus where several agree to contribute proportionately, the promise of the others is a sufficient consideration for the promise of each,[51] contracts of subscription being the most common illustration.[52]

A consideration good as between the parties is good as to all the world.[53]

vents the contract from being attacked for want of consideration. Phillips v. American Tel. & T. Co. [S. C.] 51 S. E. 247. Rule does not apply when the question is as to the return of the consideration before repudiating the contract for fraud, and in such case it may be shown that no consideration was received and none can be returned. Id. Undertaking on appeal. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488.

43. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488. Where complaint does not allege that contract was under seal, defendant need not plead want of consideration in order to take advantage of it, but he still has burden of proof. Id.

44. Hammon on Contracts, § 272.

45. Promissory note. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054. The presumption of consideration for a note and mortgage arising from their execution and testimony that they were given to secure money borrowed from the estate is not overcome by the fact that they were not mentioned in the account of the executrix, it not appearing when she was executrix. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. Release of a mortgage. Court not bound to believe an interested witness to the contrary, if presumption satisfies his mind. Code Civ. Proc. § 2061, subsec. 2. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Note and mortgage. First Nat. Bank v. Bennett, 215 Ill. 398, 74 N. E. 405. No consideration need be proved as to one placing his name on the back of a promissory note before it is delivered to the maker. Is an original promisor or maker. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456. Civ. Code, § 2169. Instrument acknowledging debt and promising to pay it on happening of certain contingency. Noyes v. Young [Mont.] 79 P. 1063.

46. Allegations and proof in that regard held immaterial. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

47. Where guaranty was at foot of principal contract and was substantially contemporaneous therewith, though dated on next day. De Reszke v. Duss, 99 App. Div. 353, 91 N. Y. S. 221.

Where guaranty of payment was on same paper as contract and referred expressly thereto, held, that it should be regarded as part of contract and supported by the same consideration, even though signed subsequently. Klosterman v. United Electric L. & P. Co. [Md.] 60 A. 251.

48. Law v. Smith [N. J. Eq.] 59 A. 327. Agreement to purchase mortgage on its maturity supported by advancement of money to corporation on the strength thereof. Id. Extension of credit to principal binds sureties on bond. White Sew. Mach. Co. v. Fowler [Nev.] 78 P. 1034. The consideration for a mortgage need not move to the mortgagor, and the debt which it is given to secure may be that of another person. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser of a promissory note. First Nat. Bank v. Lang [Minn.] 102 N. W. 700. Consideration passing from payee of note to principal debtor. Chambers v. McLean, 24 Pa. Super. Ct. 567. Caretaker accompanying shipment of cattle held passenger, though consideration for carrying him, which was included in price paid for shipment, did not move from him. Sprigg's Adm'r v. Rutland R. Co. [Vt.] 60 A. 143.

49. The consideration for a promise for the benefit of a third person. Promise of mother to support illegitimate child and to keep him in particular place held consideration, if there was any, for agreement by father to give him a certain sum of money. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916. A note given by a third person to a wife to settle difficulties between her and the husband is without consideration. Kramer v. Kramer [N. Y.] 74 N. E. 474.

50. In order that a forbearance to sue may constitute a consideration for a promise of a third person to pay a debt, it must be given at the instance of the promisor. Gilman v. Ferguson, 116 Ill. App. 347. There must be an agreement to forbear, either express or implied, a mere voluntary forbearance being insufficient. Id.

51. The promise of each of the joint makers of accommodation paper to pay his share is on a sufficient consideration, but the secondary liability of each for the share of the other is not. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056.

52. See Subscriptions, 4 C. L. 1587.

53. Binding on representatives of deceased party. Sherman v. Matthieu, 94 N. Y. S. 565.

What constitutes in general.[54]—Any benefit accruing to one party or any loss, trouble, or disadvantage undergone by, or change imposed upon, the other, is a sufficient consideration to sustain a promise.[55] Thus the surrender of an existing

54. See 3 C. L. 810.

55. Building of railroad sufficient consideration for subscription. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. The test is whether the promisee has done, foreborne or undertaken to do anything real, or whether he has suffered any detriment, or has done something in return for the promise that he was not bound to do, or has promised to do some act, or has abstained from doing something. Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689. Anything by reason of which a party yields to the inducement to do differently than he otherwise would have done. Agreement to buy a piano to be paid for partly in cash and partly by advertising, by seller's furnishing advertising and availing himself of the resulting benefits. Mail & Times Pub. Co. v. Marks, 125 Iowa, 622, 101 N. W. 458. Consideration for stock subscriptions and for stock, see Helliwell on Stock and Stockholders, §§ 50, 51, 98-102.

Contracts held to be supported by a sufficient consideration: Parol agreement reducing rate of interest on mortgage, by agreement on part of mortgagor to pay all taxes. In re McDougald's Estate, 146 Cal. 196, 79 P. 875. Where defendant contended that paper sold was property of his wife, and hence agreement not to engage in newspaper business was without consideration, but he made all negotiations and nothing was said about her ownership and he signed bill of sale containing warranty of title, held that as between the parties, he was the owner. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, afg. 112 Ill. App. 518. Even if property belonged to wife, yet, if defendant was managing it for her as her agent, any agreement made by him to further the sale and as a part of the consideration therefor is binding on him. Id. Where evidence shows that agreement not to engage in newspaper business was left out of bill of sale of paper by mistake, and that subsequent agreement was executed to rectify it, the two will be regarded as parts of the same transaction and the latter is supported by the consideration for the sale. Id. Promise to pay certain debts, by executed agreement to turn over all the proceeds of a farm to the promisee. Runkle v. Kettering [Iowa] 102 N. W. 142. Where fences on lands leased for stock-raising were torn down and landlord refused to rebuild them or allow tenant to do so, landlord's promise to pay tenant all damages he might sustain from absence of fence. Ensign v. Park, 69 Kan. 870, 77 P. 583. A contract by a city for supplying its fire department with water finds its sanction in the right of the city to demand specific performance, or damages, or the revocation of the contract for nonperformance, and not in any right of the individual inhabitants to recover damages resulting from its breach. Allen & C. Mfg. Co. v. Shreveport Waterworks, 113 La. 1091, 37 So. 980. Bond given in order to secure employment, though executed two days later than contract of employment, where parties were in different states and the two instruments were executed as nearly contemporaneously as possible. Stauber v. Ellett [Mich.] 12 Det. Leg. N. 156, 103 N. W. 606. New agreement to carry out the terms of a contract rescinded by mutual consent. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307. A substituted agreement providing for the conveyance of land to defendant and his wife is sufficient consideration for plaintiff's promise to accept less than was due under the original agreement for the sale of the land which provided for its conveyance to defendant alone. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. Evidence insufficient to show such an agreement. Id. Appeal bond which, though insufficient under statute, operated to stay proceedings and to perfect appeal. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488. Contract whereby defendant hired plaintiff for fixed period at agreed wages, and plaintiff agreed not to strike and not to leave defendant's employment without his written consent. Silberman v. Schwarcz, 45 Misc. 352, 90 N. Y. S. 382. Where plaintiff agreed with a publishing company that it might publish his book within a certain time and that if it did not, his rights should revert to him on payment of a certain sum, contract with defendant, who had knowledge of such facts, that latter would pay him certain royalty in consideration of his permission to publish the work, since it disabled plaintiff from questioning defendant's right to publish it. Barry v. Smart Set Pub. Co., 45 Misc. 402, 90 N. Y. S. 455. Where sausages were purchased under agreement that they were to be dry enough for export and, on inspection, they were rejected as containing too much fat, agreement by seller to indemnify buyer if claim was made for too much fat, in reliance on which buyer accepted them. James v. Libby, 92 N. Y. S. 1047. Promise to pay certain sum to missionary society, by acceptance of obligation, receipt of payment on account, sending of missionaries, and refraining from making other collections. Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689. Agreement whereby defendant was to present claim against government for rent of and injury to his land by troops while in possession of plaintiff as lessee, and that plaintiff was to receive half of the amount paid as rent and a specific sum from the amount paid as damages. Bomgardner v. Swartz, 26 Pa. Super. Ct. 263. Note given by builder to materialman in part payment of order drawn by contractor, though order was not yet payable, where provision for payment after completion of contract was waived. Potter v. Greenberg, 24 Pa. Super. Ct. 502. Capital stock of corporation held good consideration for transfer of property to it by person organizing it, in absence of fraud. Gardner v. Haines [S. D.] 104 N. W. 244. Contract to advance money to purchase land for plaintiff, defendant to take deed in his own name and

obligation [56] or right,[57] the release of a mortgage [58] or judgment,[59] the extension

convey to plaintiff when amount advanced was repaid, held a mere loan as between plaintiff and defendant, and interest thereon, which in the absence of agreement was the legal rate, furnished a sufficient consideration therefor. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335. Agreement between author and publisher succeeding to rights of corporation owning copyrights of certain of her books, by agreement of author to enlarge the work and to perform revisory services in connection with its publication. In re McBride & Co., 132 F. 285. Agreement not to engage in competing business, by payment of sum in excess of that to which defendant was entitled under agreement in regard to certain stock. Knapp v. Jarvis-Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis-Adams Co. [C. C. A.] 135 F. 1015. Deed and lease executed by same parties on or about the same date and in relation to same subject-matter, held each to be a consideration for the other. Stadler v. Missouri River Power Co., 133 F. 314.

Contract held to be without consideration: If a conveyance is made purely as a mortgage for the purpose of securing an indebtedness, that fact alone does not furnish any consideration for a promise to pay a previous mortgage. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. Promise in letter accepting offer to purchase fruit to wire prices before shipping held not part of contract, but a mere voluntary gratuity. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084, afg. 112 Ill. App. 281. Subsequent agreement to complete building before certain date. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858, afg. 112 Ill. App. 13. If services of tenant's wife in caring for landlord's room were voluntarily rendered by way of performing labor for her husband and family, and not in pursuance of agreement between herself and landlord, they could not be a consideration for such latter agreement. Kennedy v. Swisher [Ind. App.] 73 N. E. 724. Agreement whereby defendant was to furnish money for purchase of certain land and divide the profits of its to meet payments provided for by contract sale with plaintiff. Forrest v. O'Bryan, 126 Iowa, 571, 102 N. W. 492. Subsequent agreement giving plaintiffs longer time in which for sale of land. Apking v. Hoffer [Neb.] 104 N. W. 177. Promise by one upon whom there rested no duty or obligation to do so, to go after certain horses which had strayed. Smith v. Corrigan [Neb.] 101 N. W. 331. Contract whereby husband placed deed of property in escrow to be delivered to wife in case he got drunk, and where at time of his death deed had not been delivered, he was owner of the property. Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41. Agreement by defendant to pay plaintiff a certain per cent. on sales of improved property made by defendant and in regard to which plaintiff, under his contract as defendant's manager and agent, had nothing to do. Wright v. Fulling, 93 N. Y. S. 228. Where plaintiff conveyed land to a bank and subscribed to stock therein, the bank agreeing that in consideration of a certain sum, payable in instalments, equaling the dues on plaintiff's stock, it would reconvey the land, and the bank at the same time gave plaintiff a certain sum which he loaned to its president on his personal bond to pay the instalments on the stock, held, that the bank having received no benefit from the loan, was not liable therefor or for a breach of the president's bond, and that its subsequent agreement to indemnify the president from loss on such bond was without consideration. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521. Services rendered gratuitously are not a sufficient consideration to support an executory promise. Strevell v. Jones' Estate, 94 N. Y. S. 627, afg. 92 N. Y. S. 719. Held, that no legal duty existed on plaintiff's part to set apart for son any share in his father's estate, and hence son's rights were not such as to furnish consideration for family settlement. Slater v. Slater, 94 N. Y. S. 900. Contract to divide commissions for sale of realty unenforceable where plaintiff rendered no services and sole inducement for making it was his threat that by the use of his personal influence as agent of owner he would procure cancellation of agreement between owner and defendant, and prevent latter from earning them. Fox v. Seabury, 211 Pa. 140, 60 A. 508. Agreement to pay nonexpert witnesses more than legal fees. Ramchasel's Estate, 24 Pa. Super. Ct. 262.

56. Discharge of attorney's obligation sufficient consideration for transfer to him of certain stock recovered by his client. Thaxter v. Thain, 100 App. Div. 488, 91 N. Y. S. 729. The surrender of a valid note for the execution of a new one. Garrigue v. Keller [Ind.] 74 N. E. 523. Note for amount of judgment supported by satisfaction of judgment. Snyder v. Knight, 23 Pa. Super. Ct. 309.

57. Agreement by association to pay retiring agent certain sum supported by surrender of his interest in funds arising from business procured by him. Rollins v. Co-operative Bldg. Bank, 98 App. Div. 606, 90 N. Y. S. 631. The abrogation of an antenuptial settlement held to constitute a sufficient consideration for postnuptial conveyance by husband to wife, as against his creditors. Clow v. Brown [Ind. App.] 72 N. E. 534.

58. Release by plaintiffs of certain property on which they had mortgage held to support promise by defendants to hold them harmless in sale of remainder of the property held under the mortgage. Cliff Foy & Bro. v. Dawkins, 138 Ala. 232, 35 So. 41.

59. Note given in consideration of release of valid subsisting judgment against the maker. Blythe v. Cordingly [Colo. App.] 80 P. 495. Contract whereby wife, desiring to obtain loan on land, the legal title to which was in her husband, obligated herself to pay amount due on a judgment against him to which his apparent interest in the land was subject, thereby securing the release of such apparent incumbrance, even though he had no real interest in the land. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124.

of the time for the payment of an existing debt,[60] and the rendition of services, have been held sufficient.[61]

The consideration need not exist at the time of making the promise, but it is sufficient if the person to whom it is made incurs any loss, expense, or liability in consequence of, and in reliance upon, such promise.[62]

Mutual promises[63] operate as a consideration each for the other.[64]

Forbearance[65] or a promise to forbear from doing what one has a right to do may constitute a sufficient consideration.[66] Thus forbearance to sue,[67] or the dis-

60. Will support mortgage. Creditor becomes bona fide purchaser within meaning of recording act, and mortgage takes priority over one previously given but not recorded until after second one. O'Brien v. Fleckenstein [N. Y.] 73 N. E. 30. Evidence sufficient to sustain finding that there was extension of time. Id.

61. Services to be rendered by plaintiffs in securing divorce for defendant held to support agreement by her to execute deed of trust on certain property to secure their payment, provided they succeeded in vesting title thereto in her. Enforceable when services fully performed. Patrick v. Morrow [Colo.] 81 P. 242. Satisfaction of mortgage supported by valuable services rendered by the mortgagor to the mortgagee. Sherman v. Matthieu, 94 N. Y. S. 565. Services performed under an express or implied promise to pay therefor, or in expectation of such payment, are a sufficient consideration for a promissory note. Strevell v. Jones' Estate, 94 N. Y. S. 627, afg. 92 N. Y. S. 719.

62. Agreement by railroad to construct sidetrack by plaintiff's building if he would move it and repair and remodel it so as to make it suitable for a warehouse, held supported by sufficient consideration where plaintiff thereafter incurred expense in so doing. Thomas v. South Haven & E. R. Co. [Mich.] 100 N. W. 1009. Services are sufficient consideration for note, though they were rendered without any specific request therefor or promise to pay for them, where they were for the benefit of the maker and were received and accepted by him. Yarwood v. Trust & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947. The mere fact that the services for which the note was given were rendered by infants, whose services presumably belonged to the family with whom they lived, does not defeat recovery thereon, where the persons entitled to such services were present when the note was given and acquiesced in payment to the infants. Id. A promise to sell certain stock, though gratuitous in its inception, will be enforced where a part of the purchase price has been paid. In re Brown's Estate [Pa.] 60 A. 147. Evidence held to support claim of half interest in certain stock held by decedent. Id.

63. See 3 C. L. 813.

64. Must be concurrent and obligatory on both. Smyth v. Greacen, 100 App. Div. 275, 91 N. Y. S. 450.

Contracts held supported by sufficient consideration: Promise by tenants to replace mill machinery destroyed by fire, and their performance thereof, held sufficient consideration for promise by landlord to rebuild kiln. Frey v. Vignier, 145 Cal. 251, 78 P. 733. Covenant of each of the parties sufficient to support promise of other In contract between railroad company and firm for exchange of freight business, whereby firm was to acquire and operate steamboat and railroad was to erect hoist for transfer of freight. Civ. Code, § 3361. Graham v. Macon, D. & S. R. Co. [Ga.] 49 S. E. 75. Lease of boat and firm's readiness to receive and deliver freight amounted to performance justifying their demand for corresponding performance of railroad's agreement to erect hoist and receive and deliver freight as stipulated. Id. Mutual promises of the promoters of a railroad to perform services in furtherance of the enterprise without consideration held a valid consideration for the obligations assumed by each under the agreement. Powell v. Georgia F. & A. R. Co., 121 Ga. 803, 49 S. E. 759. Promise by one party to publish and deliver books, and by other to pay for the same when delivered. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782. Contract between parties engaged in real estate and insurance business whereby plaintiff agreed to and did turn over to defendant the lands he had for sale, and not to engage in real estate business during continuation of contract, and defendant agreed to give plaintiff half his commissions and not to engage in insurance business. Roush v. Gesman Bros. & Grant, 126 Iowa, 493, 102 N. W. 495. Contract by which defendants agreed to change mill into a stave mill in consideration of plaintiff's agreement to advance money to carry on the business. Alderton v. Williams [Mich.] 102 N. W. 753. Promises of defendant to aid in effecting sale of certain land and of plaintiffs to pay him a certain part of their commissions for such sale held mutual promises. Barnett v. Block [Minn.] 102 N. W. 390. Subcontractors being under no obligation to finish work after abandonment by principal contractor, their promise to do so was sufficient consideration for agreement by owner to pay them for what they had done and what they would do. Reisler v. Silbermintz, 99 App. Div. 131, 90 N. Y. S. 967. A mutual promise between two brothers to pay the proceeds of an insurance policy to their sisters, especially when followed by performance on the part of one of them to his detriment. Instruction held not charge on facts. Willoughby v. Willoughby [S. C.] 50 S. E. 208.

65. See 3 C. L. 814.

66. Where seller of certain rock broke contract but plaintiff refrained from terminating contract, held that there was a consideration for seller's guaranty to thereafter furnish rock containing a higher per

missal of a suit, will support a contract,[68] irrespective of whether or not the suit would have been successful.[69]

The compromise of a doubtful right[70] is, in the absence of fraud, sufficient consideration to support a promise,[71] and this is true, though the claim could not have been supported in whole or in part either at law or in equity.[72]

Marriage[73] is a valuable consideration and will support an antenuptial settlement,[74] but not a subsequent contract by the parties thereto.[75]

Legal duty.[76]—A promise to do or the doing of that which one is legally

cent. of phosphate. Globe Fertilizer Co. v. Tennessee Phosphate Co. [Ky.] 85 S. W. 1177. Extension of forbearance to debtor held to support mortgage by third party to secure past due debt. Notes secured thereby payable at intervals in the future held to imply agreement to extend time of payment of original debt, though no express agreement to that effect. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167.

67. Noyes v. Young [Mont.] 79 P. 1063. Forbearance on part of creditor to prosecute claim against estate of decedent held to support promise on part of widow to assume and pay it as an original obligation. Franchi v. Tirelli, 92 N. Y. S. 784.

68. Mortgage conditioned that defendant in bastardy proceedings would support complainant and her child, by dismissal of proceedings and marriage of the parties. Jangraw v. Perkins [Vt.] 60 A. 385; Grand Lodge v. Ohnstein, 110 Ill. App. 312. There being an apparent shortage in accounts of plaintiff's deceased husband as executor of an estate, dismissal of proceedings against his co-executor and refraining from presenting claim against estate of deceased executor held sufficient consideration for plaintiff's note for amount of shortage. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054.

69. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054; Noyes v. Young [Mont.] 79 P. 1063. The renunciation or abandonment of a doubtful right is sufficient. Grand Lodge v. Ohnstein, 110 Ill. App. 312.

70. See 3 C. L. 815.

71. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Compromise of dispute as to performance of work under first contract held to support second contract. White v. Magirl, 113 Ill. App. 224. Evidence insufficient to show that compromise of disputed claim was consideration for agreement by creditor to accept less than amount due. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. Compromise of claim of retiring stockholder against corporation held good consideration for note of corporation for amount of the compromise. Warshawsky v. Grand Theatre Co., 94 N. Y. S. 522. Answer showing that there was difference between the parties as to the amount defendant owed plaintiff, and that it was settled by giving of the order sued on in consideration of the release of a lien by plaintiff, held to show sufficient consideration, and practically to admit liability. Creveling v. Saladino, 97 App. Div. 202, 89 N. Y. S. 834. An oral agreement fixing a disputed boundary line between two contiguous tracts of land is supported by a sufficient consideration when there is actual doubt and uncertainty as to its true location. Oral agreement not valid unless there is such uncertainty and unless it is executed by actual possession. Le Comte v. Carson [W. Va.] 49 S. E. 238. Where grantor in deed, given in consideration of support by grantee, sued to recover title on ground of grantee's failure to perform, a new deed given in settlement of the controversy in which grantor reserved life estate and grantee covenanted to pay taxes held supported by valuable consideration. Burgson v. Jacobson [Wis.] 102 N. W. 563. The rule that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such, for want of consideration, does not apply where there was a dispute between the parties as to the medium of payment when the agreement was made, and the subject-matter of such dispute is embraced in the agreement. Refusal of instruction that compromise would be binding held prejudicial. City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299. See, also, Accord and Satisfaction, 5 C. L. 14.

72. Where entered into in good faith, court will not consider merits of controversy. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. An agreement to settle a claim of infringement, made in good faith, even though it should appear that such claim was in fact wholly unfounded. License to use dredging machinery. Bowers Hydraulic Dredging Co. v. Hess [N. J. Err. & App.] 60 A. 362.

73. See 3 C. L. 813, n. 59.

74. Clow v. Brown [Ind. App.] 72 N. E. 534. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225. Where a marriage contract purports to release the wife's marital claims on payment to her by the husband of a specified sum, a further provision that "for the same consideration" she released, assigned, and conveyed any claim against his estate which she might have as his widow to his children by a former marriage, held without consideration, the first provision having exhausted the entire consideration expressed. Sawyer v. Churchill [Vt.] 59 A. 1014. A note given by a stranger to a husband in order that he might give it to his wife, to whom it was made payable, for the purpose of securing domestic peace between a newly married couple, is not a promise in consideration of marriage, and is without consideration and unenforceable by the wife. Fact that the two are brothers does not change rule. Kramer v. Kramer [N. Y.] 74 N. E. 474.

75. Is irrevocable. Postnuptial settlement void. Clow v. Brown [Ind. App.] 72 N. E. 534.

76. See 3 C. L. 814.

bound to do by contract or otherwise is no consideration for a contract;[77] but this does not prevent one from binding himself by merging an oral agreement into a written contract, nor enable him to escape the written contract merely because the consideration passed to him prior to its execution.[78] It has also been held that the duty of a husband to support his wife furnishes a sufficient consideration for his promise to support her after a contemplated separation.[79]

A promise to forbear, or extend the time of payment of a debt actually due, based upon a promise of the debtor to pay the sum with interest at a latter date, is without legal consideration and unenforceable.[80] The same is true of an agreement by a creditor to accept less than is due in full payment of a matured debt.[81]

77. Bailey v. Devine [Ga.] 51 S. E. 603; Tucker v. Dolan [Mo. App.] 84 S. W. 1126; Noyes v. Young [Mont.] 79 P. 1063.

Contracts held void for want of consideration: Where interest on mortgage was, on death of mortgagor leaving an insolvent estate, reduced from ten to seven per cent. by Code Civ. Proc. § 1494, in regard to rate of interest on claims against insolvent estates after publication of first notice to creditors, a prior parol agreement between mortgagor and mortgagee reducing rate of interest to seven per cent. on condition that the mortgagor pay all taxes, was unenforceable against the estate for want of consideration. In re McDougald's Estate, 146 Cal. 196, 79 P. 875. Assignment by widow of her right to certain interest money under will of her deceased husband in consideration of support for life, where assignees were bound to furnish such support under previous agreement. In re Castner's Estate [Cal. App.] 81 P. 991. Where attorney was employed at an agreed fee by defendant to defend her son who was in prison, a promise by her to pay him an additional sum for another attorney employed by persons held as witnesses for the state against the son to secure their release, is without consideration, since defendant acquired no benefit therefrom. Bailey v. Devine [Ga.] 51 S. E. 603. Promise of first attorney to bring on son's trial at once if additional sum was paid held no consideration, since he was bound to do so under his original contract. Id. A promise to release from an unlawful imprisonment which the promisor himself made unlawful does not afford any valid consideration for a contract to pay for such services. Id. Where payee of note, on failure of maker to pay it, surrendered it and accepted guarantor's note for same amount, indorsement of old note to him, since the guarantor was entitled to the old note on the execution of the new one, and created no liability against the guarantor as indorser. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006. Where one agrees for a consideration to give another a mortgage on certain property, a subsequent promise exacted from the mortgagee, as a condition to the execution of the mortgage, to pay certain debts of the mortgagor not included in the prior contract. Runkle v. Kettering [Iowa] 102 N. W. 142. Agreement to advance certain sum for purchase of grain and to grant extension of time for its delivery. Strange v. Carrington, Patton & Co., 116 Ill. App. 410. An agreement by the payee of a note to cancel the same by will at his death, upon the regular payment of interest. Trombly v. Klersy [Mich.] 12 Det. Leg. N. 349, 104 N. W. 419. Agreement of wife to live with and care for husband in consideration of agreement to deed her certain property in case he got drunk again. Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41. Agreement by plaintiff's intestate to cancel defendant's note provided defendant would pay or cause to be paid a certain note and condemnation bonds of a railroad on which both were liable, held without consideration where, prior to the making of such agreement, defendant was made receiver for such railroad and paid the note and bonds under order of the court. Utah Sav. & Trust Co. v. Bamberger [Utah] 81 P. 887. Fact that defendant was promoter of, and furnished the capital for, the corporation which purchased the property of the railroad at the receiver's sale, held not to have furnished consideration, since such corporation was organized prior to the execution of the agreement. Id. Family agreement held unenforceable where consideration therefor was son's signature to agreement which he was bound to sign as executor if it was advantageous to the estate, and if disadvantageous he could not derive any benefit therefrom personally. Slater v. Slater, 94 N. Y. S. 900.

78. Written contract acknowledging prior indebtedness and agreeing to pay it on happening of certain contingency. Noyes v. Young [Mont.] 79 P. 1063.

79. Duty of husband to support wife furnishes sufficient consideration to support contract for furnishing support after separation. Patterson v. Patterson, 111 Ill. App. 342.

80. Agreement to extend time of payment of mortgage debt held no bar to foreclosure of chattel mortgage. Repelow v. Walsh, 98 App. Div. 320, 90 N. Y. S. 651. A promise to extend the time of payment of a debt is void unless founded upon a good consideration. Hilderbrandt v. Fallot, 92 N. Y. S. 804.

81. May collect balance. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. Payment of the undisputed debt under insurance policy no consideration for release of further claim thereunder. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. Agreement to accept a sum admitted by both parties to be due under a bond in full satisfaction of all liability thereon, said amount being less than that claimed by one of the parties, is without consideration.

An agreement to pay a price greater than that fixed by the contract must rest on a new consideration.[82] So, too, an agreement to pay one liquidated debt will not support a release by the creditor of another liquidated or unliquidated debt.[83]

Natural love and affection [84] is not, as a general rule, a sufficient consideration to support a promise,[85] but it will support a deed of real property between husband and wife, or relatives within the degree of nephew or cousin.[86]

A mere moral obligation [87] is not ordinarily a sufficient consideration for a promise,[88] but the moral obligation of a father to support his illegitimate children is a sufficient consideration for his bond to do so.[89]

Mere gratitude is not by itself a sufficient consideration for a contract,[90] but the sufficiency of valuable services as a consideration is not affected by the fact that the obligor felt and declared a sense of gratitutde therefor, which was not at all intended to supplant or exclude a recognition of a legal obligation to pay for them.[91]

Past consideration.[92]—A promise by one to pay a past indebtedness of another cannot be enforced unless some new consideration moves to the promisor,[93] but if a surety is a party with his principal to a contract executed in consideration of some benefit to accrue to the latter, the consideration is sufficient as to him, and he is bound.[94] So, too, when one person is rendering services to another which he is under no legal obligation to perform and the party receiving the benefit expressly promises to pay therefor, upon the faith of which promise the services are continued, there is a sufficient consideration to support the promise to pay for all the services, past as well as future.[95]

Adequacy.[96]—A slight benefit to the promisor or a slight detriment to the

Bostrom v. Gibson, 111 Ill. App. 457. Courts are prone to uphold such agreements instead of defeating them and a very slight consideration will be held sufficient. Tucker v. Dolan [Mo. App.] 84 S. W. 1126.

82. Statement after partial performance "Finish it up and I will do what is right" insufficient. Combs v. Burt & B. Lumber Co. [Ky.] 85 S. W. 227.

83. Note. Siewing v. Tacke [Mo. App.] 86 S. W. 1103.

84. See 3 C. L. 816, n. 97 et seq.

85. An executory contract, the only consideration for which is natural love and affection, is unenforceable. Promissory note. Strevell v. Jones' Estate, 94 N. Y. S. 627, afg. 92 N. Y. S. 719.

86. Hammon on Contracts, p. 659. Deed from parent to child. Mullins v. Mullins [Ky.] 87 S. W. 764. A voluntary deed from a son to his father is valid. Hiles v. Hiles, 26 Ky. L. R. 824, 82 S. W. 580. The relationship of husband and wife is a sufficient consideration for the husband's contracting for the construction of buildings on the wife's land and then donating them to her. Simons v. Wittmann [Mo. App.] 88 S. W. 791. Evidence held not to show existence of sufficient love and affection between mother and son to support a family settlement. Slater v. Slater, 94 N. Y. S. 900.

87. See 3 C. L. 816.

88. At least unless it is an obligation of justice and not merely of benevolence or piety. Willoughby v. Willoughby [S. C.] 50 S. E. 208.

89. Trayer v. Setzer [Neb.] 101 N. W. 989.

90. Yarwood v. Trust & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947.

91. Note held to have been given in consideration of services and not out of mere gratitude, and to be supported by sufficient consideration. Yarwood v. Trust & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947.

92. See 3 C. L. 816.

93. Kephart v. Buddecke [Colo. App.] 80 P. 501. Agreement that the reasonable value of plaintiff's services shall be fixed by defendant, made after they have been performed in pursuance of a contract to pay their reasonable value. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334. Contract providing for payment for services rendered in procuring government contracts when they were procured held merely to put into written form what was previously orally agreed upon in regard to future contingent compensation, and hence was not open to objection that past services furnished no consideration for promise of future payment. Parke & Lacy Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 P. 1065.

94. Agreement of state treasurer to make future deposits in bank held to constitute new consideration and sufficient consideration for undertaking of sureties on bank's bond for payment of deposits previously made as well as those to be made. Kephart v. Buddecke [Colo. App.] 80 P. 501.

95. Held that court was bound to consider evidence as to promise. Currey's Estate, 26 Pa. Super. Ct. 479.

96. See 3 C. L. 816.

promisee is a sufficient consideration for any contract,[97] so that it is not essential that the consideration be adequate in value.[98] Courts of equity may, however, refuse to specifically enforce contracts for inadequacy of consideration when the inadequacy is so gross as to be evidence of fraud, or when accompanied by other circumstances tending to show fraud.[99]

Failure of consideration.[1]—If the consideration fails in whole or in part, plaintiff's right to recover must fail pro tanto.[2] So, too, money advanced on a consideration which subsequently fails may be recovered back.[3] The fact that one of several agreements constituting the consideration for a contract is unenforceable does not render the contract unenforceable.[4] In order to entitle one to rescind for failure of consideration, the evidence must show more than mere inadequacy.[5] The defense is premature where the failure is as yet merely anticipatory.[6]

97. Tucker v. Dolan [Mo. App.] 84 S. W. 1126.

98. Sufficient though small or even nominal, in absence of fraud. Forbs v. St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562. Gross inadequacy may become evidence of fraud. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Insufficiency of the consideration for a lease cannot be sustained in a suit exclusively for possession. Houssiere Latrille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Reemployment of injured employe, though vague and indefinite in duration, held to support release of defendant from liability for injury, though he was shortly discharged for other reasons. Forbs v. St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562. Will not inquire into the adequacy or inadequacy of the consideration for a compromise fairly and deliberately made. Bowers Hydraulic Dredging Co. v. Hess [N. J. Err. & App.] 60 A. 362. Mere inadequacy not a failure of consideration. Full payment of mortgage is not necessary to make a valid consideration for its satisfaction. Slight services sufficient. Sherman v. Matthieu, 94 N. Y. S. 565. Note for services. Yarwood v. Trust & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947. Smallest spark of benefit or accommodation sufficient Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689. Will presume adequacy to have been determined by the parties. Rease v. Kittle [W. Va.] 49 S. E. 150.

99. Rease v. Kitte [W. Va.] 49 S. E. 150. The recited consideration of $1 is insufficient to uphold an action for the specific performance of an oil and mining option contract otherwise unsupported by a consideration, it being so trifling as to shock the moral sense. Berrie v. Frisbie [Ky.] 86 S. W. 558. Rental in oil lease held not so inconsiderable as to be "vile" and a mere nothing. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Consideration for release of wife's interest in husband's property held so inadequate as to render its enforcement inequitable. In re Bell's Estate [Utah] 80 P. 615.

1. See 3 C. L. 817.

2. Fact that vendee of land could not acquire underlying coal to which he was entitled under his contract because vendor had previously sold it to another held to entitle him to a deduction from purchase price. Schoonover v. Ralston, 25 Pa. Super. Ct. 375. One giving note in payment for a horse cannot defend on ground of failure of consideration because horse has been taken from him by judgment in replevin, where it appears that he permitted such judgment to be entered against him by default, and it does not appear that the seller of the horse was notified to defend the action, or had knowledge of its pendency. Moul v. Pfeiffer, 23 Pa. Super. Ct. 280. The fact that whiskey was not such as to meet the demands of defendant's trade, as plaintiff's agent represented it would do, held not to amount to a failure of consideration for a note given for the purchase price thereof, it not being denied that the whiskey had value. Shiretzki v. Julius Kessler & Co. [Ala.] 37 So. 422. Failure of consideration for note held not established by proof that indorsement was made relying on promise of plaintiff to observe agreement whereby he was to manage business of certain corporation and a breach of such agreement. Evidence held to show different consideration. Batchford v. Harris, 115 Ill. App. 160. Promise to thresh certain wheat held consideration for a note. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074. Where defendant agreed to pay plaintiffs a certain sum in consideration of a loan of their credit for the purpose of raising funds for the construction of a street railway, but no one could be found to advance money on their indorsement in consequence of which the enterprise was abandoned without any notes having been executed or offered plaintiffs for their indorsement and they were not asked to lend their credit and did not assume any obligation, held, that the contract was at an end and plaintiffs were not entitled to recover the balance of the consideration remaining unpaid. Weed v. Centre & C. St. R. Co., 138 F. 474.

3. Tausig v. Drucker, 90 N. Y. S. 380.

4. Alderton v. Williams [Mich.] 102 N. W. 753.

5. Evidence held to show that parties seeking to rescind had enjoyed an income from the property received, and hence they were not entitled to rescind. Guss v. Nelson, 14 Okl. 296, 78 P. 170.

6. Northern Pac. R. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606.

§ 3. *Validity of contract. A. General principles.*[7]—Mere unreasonableness or absurdity does not render a contract unenforceable.[8]

Contracts between corporations and their officers and directors, or with third persons, including ultra vires contracts,[9] the effect on its contracts of the failure of a foreign corporation to comply with the statutory requirements for doing business within the state,[10] the contracts of aliens,[11] infants,[12] and married women,[13] usurious [14] and gambling contracts,[15] and contracts made on Sunday, are treated in separate articles.[16]

(§ 3) *B. Subject-matter or consideration.*[17]—If a statute directly prohibits the making of a certain class of contracts, or either enjoins or prohibits the doing of a certain class of acts, an agreement entered into in violation thereof, or which involves a violation thereof, is void.[18] There seems to be a conflict of authority as to whether the mere imposition of a penalty on any specific act or omission renders invalid a contract to do or omit to do such act. There is authority for the proposition that the imposition of such a penalty excludes all others, and that contracts in contravention thereof are not void unless it clearly appears that the legislature intended otherwise.[19] The generally accepted and more logical rule, however, appears to be that all such contracts are void unless the statute shows a contrary intent on the part of the legislature.[20] The presumption against their validity is particularly strong where the statute in question is one enacted for the public good.[21]

The mere fact that contracts are of a speculative character does not neces-

7. See 3 C. L. 817.

8. Contract by mutual loan association with agent held not unreasonable because it provided for payment for definite time of certain amount on business actually obtained by him, even after his employment should cease. Rollins v. Co-operative Bldg. Bank, 98 App. Div. 606, 90 N. Y. S. 631.

9. See Corporations, 3 C. L 880.

10. See Foreign Corporations, 3 C. L. 1455.

11. See Aliens, 5 C. L. 96.

12. See Infants, § 5, 4 C. L. 93.

13. See Husband and Wife, 3 C. L. 1669. The common-law rule that an executory contract is extinguished by the subsequent intermarriage of the parties is not applicable in equity in the case of antenuptial contracts made in consideration of marriage. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

14. See Usury, 4 C. L. 1764.

15. See Gambling Contracts, 3 C. L. 1546. Lotteries, 4 C. L. 469.

16. See Sunday, 4 C. L. 1589.

17. See 3 C. L. 817.

18. Hammon on Contracts, p. 338. Contracts violating positive law or contrary to public policy. Poling v. Board of Education. [W. Va.] 49 S. E. 148. All contracts requiring or tending to encourage, or arising out of, or connected with, the performance of an act forbidden by the terms of a statute, which is designed to forbid the performance of such act altogether and not merely to penalize it for revenue purposes. Note given in payment for pasturage of cattle on public land inclosed in violation of Federal statute making such inclosure a misdemeanor. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614. The fact that the amount of the note was arrived at by a common-law arbitration of the differences between the parties does not cure the invalidity. Id. Where a city charter provides that before anyone shall sell liquor he shall take out license, and makes it unlawful to sell it without such license, agreement between city and dealer, made pursuant to resolution of council, whereby dealer gave his note on understanding that he might carry on business without a license until its maturity when one was to be issued, held illegal, and note void. Meyer-Marx Co. v. Ensley [Ala.] 37 So. 639. Under the statute prohibiting the charging of usury, the promise to pay the usurious interest is void and cannot be enforced. Erwin v. Morris, 137 N. C. 48, 49 S. E. 53.

19. See 3 C. L. 818, n. 23.

20. Physician who has failed to register in compliance with Pol. Code 1895, §§ 1479, 1480, cannot recover for professional services rendered by him. Contract void. Murray v. Williams, 121 Ga. 63, 48 S. E. 686. One acting as real estate broker without written authority which is misdemeanor, cannot recover compensation. Davis v. Kidansky, 86 N. Y. S. 6. Are prima facie void, the question being one of legislative intent. Poling v. Board of Education [W. Va.] 49 S. E. 148.

21. Neither a court of law or of equity will enforce a contract in violation of laws enacted for the public good. Contract of sale to board of education of articles to be used in schools, made by member of the board in violation of Code 1899, c. 45, § 57, is void. Poling v. Board of Education [W. Va.] 49 S. E. 148. A plea setting up its illegality need not allege prejudice to the purchaser. Id.

sarily affect their validity.[22] One may lawfully agree to deliver in the future something that he has not got, provided it is a thing which he may get;[23] but may not sell or transfer that which has no potential existence.[24]

An assignment of wages to be earned in the future under an existing contract of employment to secure a present debt or future advances is valid as an agreement, and takes effect as an assignment as the wages are earned;[25] but an assignment of wages to be earned without limit as to amount or time is void.[26]

An agreement lawful in its character and purpose is not rendered unlawful because some of the parties thereto attempt to put it to an unlawful use.[27]

A void contract cannot be validated by subsequent acts of the parties recognizing its existence.[28]

Definiteness and certainty of terms.[29]—In order to be enforceable, the contract must be reasonably definite and certain in its terms,[30] or must at least be capable of being made certain.[31] It will be held too uncertain to be enforced only when

22. Stocks. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. See Gambling Contracts, 3 C. L. 1546.

23. In action for breach of contract for purchase and sale of stock, plaintiff need not allege that defendant owned it. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. A contract whereby a person gives to another an option to call for goods at a future time on tender of a certain price is lawful, though the person giving the option does not at the time own the goods. Stocks. Id.

24. Sale of all improvements in certain machines on which patents might thereafter be obtained held void at law. Wilson v. Maxon [W. Va.] 49 S. E. 123. Equity will regard the same as an executory contract, enforceable or not in the sound discretion of the court, if not contrary to public policy and the several rights of the parties as they appear. Id.

25. Such an assignment cannot be enforced as to wages earned by debtor after his discharge in bankruptcy. Leitch v. Northern Pac. R. Co. [Minn.] 103 N. W. 704. Assignment for period of six months to daughter in consideration of her caring for minor children, not made to hinder or defraud creditors, held valid. Quigley v. Welter [Minn.] 104 N. W. 236.

26. Leitch v. Northern Pac. R. Co. [Minn.] 103 N. W. 704.

27. Combination. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939.

28. Building contract void because executed on Sunday. Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095.

29. See 3 C. L. 818.

30. Parol contract to will property. Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140. Promise or agreement of the parties must be certain and explicit so that their full intention may be ascertained to a reasonable degree of certainty. Evidence held not to show contract for increased compensation. Nothing from which there could be inferred that what plaintiff was to receive would be based on a quantum meruit. Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132. In order that it may have the effect of depriving a father of the custody of his child. Looney v. Martin [Ga.] 51 S. E. 304.

Contracts held sufficiently definite: Stock option contract held not void for indefiniteness as to time when it should become operative. Cothran v. Witham [Ga.] 51 S. E. 285. Agreement by father that, on sale of certain land conveyed to him by his daughter, he would pay her a certain sum, held not unenforceable on ground that time of payment was uncertain. Schweitzer v. Schweitzer, 26 Ky. L. R. 888, 82 S. W. 625. Contract to engage in business of manufacturing staves to continue "so long as they could get sufficient timber for that purpose in the locality of the mill," not void for uncertainty as to its duration. Alderton v. Williams [Mich.] 102 N. W. 753. Guaranty of performance of certain contract, though ungrammatical. De Reszke v. Duss, 99 App. Div. 353, 91 N. Y. S. 221. Agreement whereby defendant was to advance money to pay for land for plaintiff and to convey to him on repayment held not void because there was no definite agreement as to the time and manner of repayment. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335; Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. Agreement whereby defendant was to be permitted to receive sheriff's certificate on mortgage foreclosure, sell the land, and account to plaintiff for proceeds, less a debt owing defendant. Chaffee v. Conway [Wis.] 103 N. W. 269. To warrant a decree for the specific performance of a parol contract, it must be clearly and unequivocally proved, and its terms as to consideration, subject-matter, and all other essentials must be clear and unambiguous. Pressed Steel Car Co. v. Hansen [C. C. A.] 137 F. 403. Informal oral agreement for purchase and sale of stock. Van Tine v. Hilands, 131 F. 124.

Contracts held void for uncertainty: Clause in contract for sale of land permitting the vendees to cut and remove "portions of the timber now standing on said premises" held too vague and uncertain for enforcement in a court of law, and to be binding on the parties only in so far as they mutually acted on it. Watson v. Gross [Mo. App.] 87 S. W. 104. Too indefinite to show any title in plaintiff. Id.

31. Contract for manufacture and sale of stoves held not too indefinite to be sus-

the court, after applying all the tests which the rules of law and of reason will permit, is unable to reasonably discover what the parties agreed to.[32] Mere indefiniteness of details does not render the contract void,[33] nor can it be called uncertain because based on a contingency where the contingency has occurred.[34]

(§ 3) *C. Mutuality.*[35]—As a general rule the obligations of a contract must be mutual; that is, it must be capable of enforcement by either party against the other.[36] The rule, however, does not apply to contracts which have been executed

ceptible of enforcement, but to require those supplied to be of the kinds and assortment supplied under previous contracts. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797.

32. Semon, Bache & Co. v. Copper, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Even the appearance of a contract has binding effect after execution. Oil lease held binding. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932.

33. Contract to engage in business of manufacturing staves held not void for uncertainty because it did not precisely specify what kind of machinery was to be bought or what kind of staves manufactured. Alderton v. Williams [Mich.] 102 N. W. 753; Schweitzer v. Schweitzer, 26 Ky. L. R. 888, 82 S. W. 625.

34. Contract providing for payment on sale of certain mining claim, where claim was sold before suit was brought. Noyes v. Young [Mont.] 79 P. 1063.

35. See 3 C. L. 818.

36. Baltimore Humane Impartial Soc. v. Pierce, 99 Md. 352, 58 A. 26. Equity will not enforce contract unless mutual. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. If the contract, either from personal incapacity, the nature of the agreement, or any other cause, is incapable of being enforced against one party, he cannot enforce it against the other, though he otherwise could do so. Baltimore Humane Impartial Soc. v. Pierce, 99 Md. 352, 58 A. 26. Because involving personal services and relation of trust and confidence. Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 P. 737. A unilateral executory contract is a nudum pactum. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity. Berry v. Frisbie [Ky.] 86 S. W. 558. A contract failing to impose any liability on one of the parties thereto is unenforceable. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Where the consideration for the promise of one party is the promise of the other, there must be absolute mutuality of engagement, so that each has the right to hold the other to a positive engagement. American Agricultural Chemical Co. v. Kennedy, 103 Va. 171, 48 S. E. 868. Both parties must be bound or neither will be. Id. Obligations must be reciprocal. Swindell & Co. v. First Nat. Bank, 121 Ga. 714, 49 S. E. 673. Performance by one party must confer on him the right to demand the corelative obligation from the other. Id. Where, in action on notes, the sole defense is a plea in recoupment for damages for breach of unilateral contract, verdict for plaintiff is demanded by the evidence. Id.

Contracts held mutual: Contract between railroad company and firm for exchange of freight, under which latter was to acquire and operate steamboat and former was to erect a hoist for handling freight transferred. Graham v. Macon, etc., R. Co. [Ga.] 49 S. E. 75. Subscription contract for books, since statement on back thereof amounted to agreement to publish and deliver them. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782. Contract stating that one party has bought certain stock and in consideration of the price paid and for value received he agrees not to sell any of it until he has first offered it to the other party in writing at its book value, giving him ample time to accept or refuse it. Cothran v. Witham [Ga.] 51 S. E. 285. Agreement to place telephone in plaintiff's house in consideration of release of right of way by others. Foster v. Leininger [Ind. App.] 72 N. E. 164. Contract to order goods from defendant providing that plaintiff would take same as specified on order between certain dates, subject to plaintiff's privilege to change sizes, and to cancel, in case of an emergency, such portions of the order as had not been taken in work by defendant. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Agreement to purchase piano and to pay therefor partly in cash and partly in advertising at an agreed rate, at least after seller had furnished advertising matter and availed himself of resulting benefits. Mail & Times Pub. Co. v. Marks, 125 Iowa, 622, 101 N. W. 458. Contract whereby telephone company agreed to place telephone in plaintiff's home in consideration of being allowed to place poles and wires on his farm. Anderson v. Mt. Sterling Tel. Co. [Ky.] 86 S. W. 1119. Oil lease requiring lessee to commence operations within specified time or pay quarterly rental until an oil well is completed, giving him right to cancel lease at any time on payment of certain sum, and providing for division of gross yield of oil and gas held not void on its face for want of mutuality or as containing a protestative condition. Houssiere Latrellle Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Provision in contract to furnish electricity that the electric company did not bind itself to furnish it at any particular time after the acceptance of the application held, when taken with other provisions, to have been inserted for purposes of protecting it against delays due to strikes, etc., and hence not to render contract void. Klosterman v. United States Elec. Light & Power Co. [Md.] 60 A. 251. Contract by which defendants agreed to change mill into stave mill in consideration of plaintiff's agreement to advance money to carry on busi-

in whole or in part.[37] Neither is it necessary that the contract be enforceable by both parties in the same manner,[38] nor, when time is not of the essence of the contract, does the fact that specific performance could not have been decreed on the day it was made invalidate it.[39] Mutuality may also be waived by the conduct of the party against whom the contract could not have originally been enforced.[40]

ness. Alderton v. Williams [Mich.] 102 N. W. 753. An agreement that a contracter will do all the plumbing work and furnish all the material for a building at a maximum specified cost entitles him to be paid that sum on performance, though there is no specific promise to pay it and hence is not void. Flitcroft v. Allenhurst Club [N. J. Eq.] 61 A. 82. Contract whereby defendant hired plaintiff for fixed period at fixed wages, and plaintiff agreed not to strike and not to leave defendant's employment without his written consent. Silberman v. Schwarcz, 45 Misc. 352, 90 N. Y. S. 382. Contract for transportation of freight with proposed railroad providing that it shall terminate without notice whenever such road and another railroad shall cease to compete for business, held not to authorize the road to terminate it at its option, and hence valid. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

Contracts held to lack mutuality: Contract to furnish cement, not containing any agreement on the part of the other party to purchase any in any stated or otherwise definite quantity, held mere offer to sell at stated prices during a given time. Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933. Contract whereby bank agreed to advance to manufacturer certain sum of money but not binding him to accept any of it unless he found it necessary in conducting his business. Swindell & Co. v. First Nat. Bank, 121 Ga. 714, 49 S. E. 673. Where there is no consideration for the promise of one party to furnish or sell to the other so much of a commodity as he may want except the promise of the latter to accept and pay for so much as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined whether he will want any, or how much he will want. Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010, afg. 112 Ill. App. 218. Agreement by one entering home for aged persons to execute contract to convey to it any property which he might acquire in the future. Baltimore Humane Impartial Soc., 99 Md. 352, 58 A. 26. An agreement to rent a telephone for three years at a stipulated rental, because not signed by plaintiff in consequence of which it could not be enforced against it. Co-operative Tel. Co. v. Katus [Mich.] 12 Det. Leg. N. 187, 103 N. W. 814. In action for damages for breach of contract to convey land, held that vendor was entitled to take advantage of provision that contract should be void in case title was not good and could not be made so. Schwab v. Baremore [Minn.] 104 N. W. 10. Contract whereby husband placed deed of property in escrow to be delivered to wife in case he got drunk again. Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41. Agreement whereby plaintiff promised to marry defendant at his request and defendant promised to marry plaintiff "on his request." Smyth v. Greacen, 100 App. Div. 275, 91 N. Y. S. 450. A mere naked agreement in a policy of fire insurance to arbitrate may be revoked at any time before the arbitrators have agreed upon an award. Lacks mutuality unless both parties bound to abide the event. Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154. Contract whereby plaintiff agreed to sell fertilizer and defendants agreed to buy, but providing that plaintiff might cancel it at any time, held void, and defendants could refuse to purchase though plaintiff manufactured it, put it in sacks marked for them, and made tender thereof. American Agricultural Chemical Co. v. Kennedy, 103 Va. 171, 48 S. E. 868.

37. The element of mutuality exists whenever anything passes from one party to the other or to the latter's nominee, which forms the consideration for it. Agreement to purchase mortgage at its maturity if plaintiff would advance money to corporation thereon which he did, held valid. Law v. Smith [N. J. Eq.] 59 A. 327. If lacking in mutuality, defect remedied by tender to defendant of assignment of mortgage. Id. A mere offer or promise to buy, though unilateral in its inception, becomes absolute and binding when the other party accepts and tenders performance. Agreement to pay certain sum on conveyance of land to third person, not obligating other party to sell, becomes binding on conveyance being made, and party conveying may recover contract price. Quinton v. Mulvane [Kan.] 81 P. 486. Option or offer to convey land for specified price, when other party pays or tenders purchase price before its withdrawal. Bird v. Petter, 146 Cal. 286, 79 P. 970. Though a contract to order manufactured goods is lacking in mutuality because not binding on the buyer, the manufacturer is bound to furnish goods to the extent that they are in fact ordered under the contract before its withdrawal. Simon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41.

38. Sufficient if enforceable by both in some manner. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

39. Though vendor of realty is not able to make good title at time of sale, equity may enforce specific performance if he can do so before final decree. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

40. Where contract for sale of land lacks mutuality for want of interest in vendor, purchaser who investigates title and makes requisitions or concurs in proceedings for remedying defects is thereafter precluded from setting it up. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

(§ 3) *D. Public policy in general.*[41]—Speaking generally, public policy is that principle which holds that no one can lawfully do that which tends to injury to the public or is contrary to the public good.[42] Contracts restricting the freedom of employment,[43] to pay witnesses more than the fees allowed by law,[44] a contract by a guardian to sell his wards realty made without any legal authority,[45] and agreements designed to defraud third persons,[46] or the public,[47] or to induce one to commit an unlawful act,[48] or which are unconscionable or extortionate,[49] have been held invalid as contrary to public policy.

A contract valid elsewhere will not be enforced if condemned by positive law, or inconsistent with the public policy of the state, the aid of whose tribunals is invoked for the purpose of giving it effect.[50] Neither will the courts of a state enforce a contract of sale made in another state and valid where made if the purpose of both parties was to violate the laws of the forum and the vendor has done some act in furtherance of such purpose.[51]

Contracts by corporations to repurchase their own stock,[52] or guaranteeing dividends thereon,[53] a provision in a contract for the sale of a majority of the stock

41. See 3 C. L. 820. As to what contracts of agency are illegal, see Clark & Skyles, Ag., pp. 82-96.

42. Baltimore Humane Impartial Soc. v. Pierce [Md.] 60 A. 277; Poling v. Board of Education [W. Va.] 49 S. E. 148. A contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society. Osgood v. Central Vermont R. Co. [Vt.] 60 A. 137.

43. Contract whereby an employer agrees not to employ any one not a member in good standing of a certain labor union, and to abide by the rules of such union. Note given to union as collateral security for performance held unenforceable. Jacobs v. Cohen, 97 App. Div. 481, 90 N. Y. S. 854.

44. Witness in charge of grade proceedings held not an expert. Ramschasel's Estate, 24 Pa. Super. Ct. 262.

45. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

46. A contract which has for its object the practice of deception or fraud upon a third party, or to take advantage of confidential relations with him for the purpose of drawing him into a bargain by which the party undertaking to so use his influence will secretly receive a benefit from the seller. Evidence in action for commissions by real estate agent held insufficient to show such a contract. Instructions approved. Torpey v. Murray, 93 Minn. 482, 101 N. W. 609. Creditors of a party thereto. Bryant v. Wilcox [Mich.] 100 N. W. 918.

47. Contention that arrangement whereby mortgage was executed was entered into for purpose of avoiding the payment of taxes on mortgage and hence was unenforceable because a fraud on the public, held untenable, since note which it was given to secure was taxable. Smith v. Nelson [Or.] 78 P. 740; Pape v. Standard Oil Co., 5 Ohio C. C. (N. S.) 252; Id., 2 Ohio N. P. (N. S.) 514.

48. Held, that contract for publication of book could not be reasonably construed as an attempt by plaintiff to induce defendant to commit an unlawful act by undertaking the publication of a story in violation of the property rights of others therein. Barry v. Smart Set Pub. Co., 45 Misc. 402, 90 N. Y. S. 455.

49. Loan contracts providing for payment of interest at the rate of 35 per cent. per week, irrespective of the usury laws. Woodson v. Hopkins [Miss.] 37 So. 1000; Id., 38 So. 298. Contract required to be executed by one about to become the inmate of an old men's home providing that any property which he may thereafter receive shall become the property of the institution. Baltimore Humane Impartial Soc. v. Pierce [Md.] 60 A. 277.

50. Where provision limiting time within which suit may be brought on a contract is void in state of performance and state where it is sought to be enforced, it will not be enforced on removal from state to Federal courts. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. If against the settled policy of the state where it is sought to be enforced. Unreasonable limitation of carrier's liability. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Statute prohibiting married woman from becoming surety does not render the enforcement of such a contract entered into in another state where it is valid, against public policy. Garrigue v. Keller [Ind.] 74 N. E. 523.

51. Vendor cannot recover purchase price of liquors in courts of state to which they were to be transported and sold in violation of its laws, where he knew of purpose of vendee, and did acts in furtherance thereof. Corbin v. Houlehan [Me.] 61 A. 131. See, also, Conflict of Laws, 5 C. L. 610.

52. Contract to repurchase held valid, though all stockholders were not given same rights, where no fraud was alleged or proved, and there was no averment that corporation was insolvent, or that stock was not worth amount agreed to be paid therefor. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

53. Contract giving free use of telephone lines as dividends on stock in telephone company. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

in a corporation that a certain person shall hold certain corporate offices for a designated period,[54] conditions in life insurance policies against the suicide of insured while insane,[55] a stipulation in a contract between the relief department of a railroad company and an employe that the payment by the company of any damages recovered against it by reason of his death or injury shall operate as a release to the department of all claims by reason of membership therein,[56] the business of issuing trading stamps to merchants,[57] and agreements to waive mechanics' liens have been held to be valid.[58] The fact that the lender of money causes the note and mortgage given therefor to be made payable to an alien for the purpose of avoiding local taxation thereon does not render the contract invalid or prevent the foreclosure of the mortgage.[59]

A stipulation in a contract that neither party may resort to the courts is void;[60] but a provision in the laws of a society conditionally prohibiting its members from resorting to the courts for the redress of membership grievances until they have exhausted the remedies provided by the laws and rules of the society is valid.[61]

There is a conflict of authority as to the validity of provisions limiting the time within which an action may be brought on the contract. They are prohibited by statute in some states.[62] Some courts hold them to be contrary to public policy as attempts to vary the statute of limitations.[63] Others hold them valid provided the limitation is reasonable.[64] Such a stipulation may be waived.[65]

By statute in Texas no stipulation in any contract requiring notice to be given

54. Even though it might be invalid as against subsequent stockholders and creditors, where all the stockholders joined. Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874, rvg. 112 Ill. App. 293.

55. Northwestern Mutual Ins. Co. v. Churchill, 105 Ill. App. 159; Id., 105 Ill. App. 164. See, also, Insurance, § 10, 4 C. L. 188.

56. Provision is reasonable and binding on one accepting contract knowing of it. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942.

57. When honestly conducted. Sperry & Hutchinson Co. v. Temple, 137 F. 992.

58. Building contractor. Gray v. Jones [Or.] 81 P. 813.

59. Unlawful purpose was collateral and incidental, and formed no part of consideration. McKinnon v. Waterbury, 136 F. 489.

60. Provision in compromise agreement that judgment entered in pursuance thereof shall not be appealed from. Hager v. Shuck [Ky.] 87 S. W. 300. An agreement in advance of the arising of a controversy to submit a question of law to a private person for his decision is invalid as an attempt to renounce one's right of appeal to the courts for the redress of his wrongs. Whether defendant was, under contract, charged with duty of providing right of way for canal. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510.

61. McGuiness v. Court Elm City, No. 1, Foresters of America [Conn.] 60 A. 1023. Member of beneficial association convicted, fined, and suspended under alleged invalid order not entitled to sue in civil courts to restrain enforcement of sentence until he had exercised his right to appeal to appellate tribunal of order as authorized by by-laws. Id. See, also, Associations and Societies, 5 C. L. 292; Fraternal Mutual Benefit Associations, § 4, 3 C. L. 1503.

62. Civ. Code Mont. § 2245; Rev. Codes N. D. 1899, § 3925. Limitation of time within which action could be brought for damages to live stock held void. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Civ. Code S. D. § 1276 Limitation on time within which action on fire policy may be commenced, though form of policy was prepared by state auditor under Laws 1893, c. 105, p. 174, since he had no authority to insert provisions in conflict with statutes. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074.

63. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106.

64. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. Limitation of six months in indemnity undertaking to secure performance of building contract held unreasonable and inoperative where amount of liens filed against building could not be determined until they were foreclosed, which was more than six months after breach. Id. Provision in bond held valid. Marshalltown Stone Co. v. Louis Drach Const. Co., 123 F. 746. Not available to a party to the contract in an action for its breach brought against him and the surety on the bond given to secure its performance. As to contractor the action is based on the contract to which the bond is merely an incident. Id.

65. Waived by indemnitor on building contract, who assumed performance thereof on its breach, and received money due thereon, but failed to promptly pay claims as required by the contract in consequence of which liens were filed against the building. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. Evidence held to show waiver of stipulation requiring suit to be brought on contract of shipment within ninety days. Missouri, K. & T. R. Co. v. Godair Com. Co. [Tel. Civ. App.] 87 S. W. 871.

of any claim for damages as a condition precedent to the right to sue thereon is valid unless it is reasonable, and any stipulation fixing the time within which such notice shall be given at a less period than ninety days is void.[66] The burden is on the party setting it up to show by proper pleading and proof that the limitation is reasonable.[67] It will also be presumed that the required notice has been given unless want of notice has been specially pleaded under oath.[68]

(§ 3) *E. Limitations of liability.*[69]—Contracts between master and servant relieving the former from liability for injuries caused by his negligence, or from statutory duties, are contrary to public policy and void.[70] So, too, common carriers cannot by contract relieve themselves from liability for their own negligence, though they may, for a valuable consideration, limit their common-law liability to passengers and shippers.[71]

Contracts breaking down common-law liability and relieving persons from just penalties for their negligent and improper conduct are not favored, and will not be given an enforcement beyond that demanded by their strict construction.[72]

(§ 3) *F. Relating to marriage or divorce.*[73]—No recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage.[74] Contracts and undertakings made with a view to procure a marriage between the defendant in bastardy proceedings and the complaining witness are valid and enforceable.[75]

A promise to marry a married women is contrary to public policy,[76] but an antenuptial agreement made in consideration of marriage is not invalid by reason of the fact that the man has a wife living, where the woman is ignorant of that fact.[77]

66. Rev. St. 1895, art. 3379. Stipulation allowing ninety-one days cannot be declared unreasonable and void as a matter of law, but question is one of fact. St. Louis & S. F. R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267. Provision requiring notification of injury to stock transported within one day after their receipt, held invalid. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Statute not a restriction on interstate commerce. Id. Stipulation relates only to the remedy, and hence law of forum governs as to its validity. Missouri, etc., R. Co. v. Godair Commission Co. [Tex. Civ. App.] 87 S. W. 871.

67. Missouri, etc., R. Co. v. Godair Com. Co. [Tex. Civ. App.] 87 S. W. 871.

68. Rev. St. 1895, art. 3379. Burden is on defendant and plea alleging failure to give notice raises no issue unless sworn to. St. Louis & S. F. R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267. Where plea in action on contract for shipment of cattle was not sworn to, erroneously sustaining demurrer thereto on ground that stipulation was unreasonable as a matter of law, held harmless. Id.

69. See 3 C. L. 821.

70. See Master and Servant, § 3a, 4 C. L. 545.

71. See Carriers, 5 C. L. 507. An agreement by one to whom a railroad company leases a part of its right of way for the erection of a coal and lumber shed that he will save the company harmless from all liability for damages to himself or his property resulting from the company's negligence or otherwise is valid as to injuries in which the public has no interest, such as those resulting from negligently running an engine against the shed. Osgood v. Central Vt. R. Co. [Vt.] 60 A. 137.

72. Johnston v. Fargo, 98 App. Div. 436, 90 N. Y. S. 725.

73. See 3 C. L. 822.

74. Promise to pay plaintiff if he would give woman such information concerning defendant as would induce her to marry him. In re Grobe's Estate [Iowa] 102 N. W. 804. The rule applies to advice or solicitations with reference to carrying out a marriage contract as well as to those with reference to its formation. Id.

75. Mortgage given by a relative of defendant in bastardy proceedings to father of complainant in order to procure dismissal of the proceedings and marriage of parties, and conditioned that defendant would support complainant and her child, held valid. Jangraw v. Perkins [Vt.] 60 A. 385.

76. Notwithstanding fact that marriage was not to take place until after the woman had procured a divorce, or until the husband should have been absent for five years, the statute providing that such absence shall be regarded as dissolution of former marriage, for purpose of remarriage. Shannon's Code, § 4188. Johnson v. Iss [Tenn.] 85 S. W. 79.

77. Agreement to substitute woman for his mother as beneficiary under a certificate in a beneficial association held enforceable by her as against the mother who was a mere volunteer. Broadwick v. Broadwick, 25 Pa. Super. Ct. 225.

Agreements between husband and wife whereby one may forfeit to the other any part of his or her property by reason of certain shortcomings on his part are invalid.[78] So, too, are agreements whereby they seek to change or avoid the obligations of their marriage, in so far as they contravene public policy or disregard duties imposed by law.[79] Agreements made in furtherance of divorce [80] or tending to procure a separation between husband and wife are void;[81] but a contract by the husband looking to the support of his wife after separation is valid.[82]

(§ 3) *G. Contracts tending to promote immorality.*[83]—Contracts tending to promote immorality are contrary to public policy.[84]

(§ 3) *H. Litigious agreements.*[85]—Agreements tending to promote litigation,[86] or to prevent the settlement of cases, are contrary to public policy.[87]

(§ 3) *I. Compounding offenses.*[88]—Contracts founded upon agreements to compound felonies, or to stifle public prosecutions of any kind are contrary to public policy.[89]

78. Deed placed in escrow to be delivered to wife if husband got drunk again. Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41.

79. Patterson v. Patterson, 111 Ill. App. 342. Agreement by husband to support wife who separates from him held no bar to her suit for separate maintenance. Id. Such suit held not waiver of right to instalments due under contract. Id.

80. Agreement whereby wife released statutory interest in husband's property for a sum of money on understanding that he should sue for divorce and that she would not depend on or demand alimony. In re Bell's Estate [Utah] 80 P. 615. Evidence held to show that agreement was made on understanding that husband should secure divorce, and was agreement for that purpose. Id. Contracts tending to stimulate divorces or to discourage defenses in divorce suits, or which in any way impose on the court. Silberschmidt v. Silberschmidt, 112 Ill. App. 58. Agreements as to alimony pending a suit for divorce without the sanction of the court. Agreement made antecedent to decree fixing alimony held not to affect power of chancellor to fix alimony and that he might entirely disregard it, particularly as it was unfair, unreasonable, and inequitable. Id. Courts do not favor such agreements but rather incline against them as tending to collusion between the parties and to facilitate divorces. Id. A contract intended to facilitate the procuring of a devorce by either of the parties thereto. Transfer of property to husband to induce him to allow wife to procure divorce. Davis v. Hinman [Neb.] 103 N. W. 668. Contract whereby plaintiff and her husband agreed that if she would dismiss pending action for divorce and would release all claims against third persons for alienating his affections, he would not defend an action for divorce on the ground of cruel and inhuman treatment and would pay her a certain sum, held illegal. McAllen v. Hodge [Minn.] 102 N. W. 707.

81. Courts of equity will not enforce contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things tending to bring it about. Marriage contract held void. Sawyer v. Churchill [Vt.] 59 A. 1014. Phrase "to wit" in a marriage contract used in referring to date of wedding as the date of the contract is immaterial in fixing the true date. Has not same force as in a pleading. Id.

82. Though made directly by the parties. Patterson v. Patterson, 111 Ill. App. 342. A separation agreement between husband and wife, through the intervention of a trustee, by which the wife, in consideration of certain payments made and to be made her by the husband, releases him from liability for her support and agrees not to institute suit for separate maintenance, is valid. Held bar to proceedings by her for support, which could be availed of by husband in probate court, and hence trustee not entitled to enjoin its violation. Bailey v. Dillon, 186 Mass. 244, 71 N. E. 538.

83. See 3 C. L. 822.

84. Hammon on Contracts, § 226, p. 389.

85. See 3 C. L. 822.

86. See, also, Champerty and Maintenance, 5 C. L. 565. An agreement whereby an attorney in consideration of the assignment to him of a nonnegotiable chose in action undertakes to enforce the same by suit, he to pay all the expenses, and to remit to the assignor half the proceeds and keep the balance for his services in said suit and other services theretofore rendered is void as against public policy. Slade v. Zeitfuss, 77 Conn. 457, 59 A. 406.

87. When the whole legal and equitable title to a cause of action rests in plaintiff and the sole responsibility to answer his claim rests upon defendant, an agreement by plaintiff with his attorney not to settle the case without the latter's consent is void, and cannot deprive defendant of his right to compromise, if he acts in good faith, even if it is enforceable as against plaintiff. Weller v. Jersey City, etc., R. Co. [N. J. Err. & App.] 61 A. 459.

88. See 3 C. L. 822.

89. Note and mortgage given to prevent prosecution of obigor's son for felony which obligee represented the son had committed, whether son had committed offense or not. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216. Evidence held to show that consideration for note and mortgage was compounding of felony. Id. Contract whereby parents agreed to convey land to plaintiff in payment of a debt due him from their son, on his agreement to forego his pur-

(§ 3) *J. Interfering with public service.*[90]—Contracts tending to do away with competition at public sales,[91] or to pay public officers extra compensation for services which they are required by law to perform,[92] or by which public officers assign their salaries,[93] and contracts by a city with a corporation in which a member of the city council is a stockholder, are contrary to public policy and void.[94] So, too, is a contract whereby an executor undertakes to sell his right to administer on the estate of his testator.[95] It is also contrary to public policy to procure the consent of property owners to the licensing of a dramshop by the payment to them of any valuable consideration.[96]

Agreements to use improper methods in obtaining public contracts,[97] or to improperly influence legislation, are void;[98] but if a contract contemplates only legitimate services, it is not illegal merely because an agent employed under it may use corrupt methods.[99] Contracts to procure legislation at a compensation contingent on success are generally regarded as contrary to public policy, without regard to whether improper means are contemplated or used in their consummation;[1] but there seems to be some conflict of authority in this regard.[2]

pose to prosecute son criminally for disposing of mortgaged property. Agreement also a penal offense under Pen. Code, art. 291. Medearis v. Granberry [Tex. Civ. App.] 84 S. W. 1070. An agreement by the county attorney to dismiss a criminal prosecution on payment of a certain sum. Johnson v. Owen [Neb.] 100 N. W. 945. Evidence held to establish that note was given by decedent for a valid consideration and was not part of a transaction for the compounding of a felony. Currie v. Michie, 123 Wis. 120, 101 N. W. 370. Contract for lease of building at stipulated rental and on condition that defendants would not prosecute plaintiff's husband for burglary. Graham v. Hiesel [Neb.] 102 N. W. 1010. One executing a deed of trust for the purpose and with the understanding that his son shall not be prosecuted by the beneficiary is not guilty of compounding a felony under Pen. Code 1895, art. 291. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. Agreement of third person to give property to procure discharge of one from arrest. Sellers v. Catron [Ind. T.] 82 S. W. 742.

90. See 3 C. L. 822.

91. Agreement between two persons, each desiring to purchase stock which had been put up as collateral and was to be sold at public sale, that one was to purchase for the benefit of both, the only inducement therefor being prevention of competition which was expressly agreed upon, will not be enforced in equity. Fletcher v. Johnson [Mich.] 102 N. W. 278. Acceptance of check by one party with intention to deliver stock held a mere carrying out the original contract and not to show a new one based on a different consideration. Id.

92. Pay court stenographer, appointed by judge for single case only, more than compensation fixed by statute for transcribing testimony. Dull v. Mammoth Min. Co. [Utah] 79 P. 1050.

93. Agreement of a city fireman assigning and selling his salary for the month then begun for a certain percentage thereof, and promising to collect the same when due and to turn over the whole amount thereof to plaintiff. Mercantile Finance Co. v. Welsh, 91 N. Y. S. 723.

94. Contract for city printing requiring payments to be made out of city treasury. Hardy v. City of Gainesvile, 121 Ga. 327, 48 S. E. 921. Not validated by the subsequent sale of such member's stock. Id.

95. Agreement by one of the executors to renounce right to administer in consideration of agreement by others to pay him a part of their fees. Oakeshott v. Smith, 93 N. Y. S. 659.

96. Frontage cannot be counted when so obtained. Theurer v. People, 211 Ill. 296, 71 N. E. 997. Where payment of rent to owner of property was conditioned on issuance of liquor license to lessee, held, that such rent was paid to him for his signature to an application for the issuance of a license. Id.

97. Kerr v. American Pneumatic Service Co. [Mass.] 73 N. E. 857. Evidence in action on contract for services in procuring government contract held to sustain finding that the exercise of improper or corrupt methods was not contemplated. Parks & Lacy Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 P. 1065, 79 P. 71.

98. Lobbying contract in regard to sale of water rights. Reynolds v. Britton, 102 App. Div. 609, 92 N. Y. S. 2.

99. Contract employing agent contemplating the procuring of government franchises for carrying mail by pneumatic tubes, and securing contracts for carrying mail, and providing for increase in agent's salary when amount of such contracts reaches a certain sum, does not necessarily call for corrupt practices on agent's part and is not void on its face, or contrary to public policy in absence of evidence showing that such services are contemplated. Kerr v. American Pneumatic Service Co. [Mass.] 73 N. E. 857.

1. To procure municipal franchise for operation of trolley line. Sussman v. Porter, 137 F. 161. Claims for credit by surviving partner under contract for division of attorney's fees for expenses paid to attorneys for procuring legislation by congress looking to reference and payment of certain claims held properly disallowed

Contracts made without the consent of the state, which disable public service corporations from performing their functions are contrary to public policy and void.[3] An agreement by a railroad company, in consideration of the conveyance to it of a right of way and certain other lands, to establish and perpetually maintain on the latter its machine shops and general offices, is valid.[4] The right of such a company to contract in regard to the construction of depots and the time and place of the stoppage of its trains is restricted by the rights of the public, and public policy must be considered in determining the validity of such contracts.[5] Though there is no such restriction on its right to contract with reference to the construction and maintenance of spur tracks to private enterprises,[6] a court of equity will refuse to decree specific performance of such a contract, since it would or might be detrimental to the public interests.[7]

(§ 3) *K. Restraint of trade.*[8]—A contract in total restraint of trade is contrary to public policy and void;[9] but a contract in partial restraint of trade which is reasonable in its provisions as to time and place and is supported by a valuable consideration is valid.[10] The test of reasonableness is whether the restraint is such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not such as to unreasonably restrict the other party, or to interfere with the interests of the public,[11] the legality of the contract depending

as not being the subject of a legal contract. Consaul v. Cummings, 24 App. D. C. 36.

2. A contract between an attorney and client for purely professional services is not necessarily invalid because a part of the services to be rendered thereunder is the procurement of legislative action, nor because it provides for a contingent fee (Stroemer v. Van Orsdel [Neb.] 103 N. W. 1053); but it will be enforced unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed in pursuance thereof and to attain the object for which it was made. Contract for such services as might be necessary in submitting to the Indians and the government claims of those who had purchased Indian land, which involved appearance before congressional committees in support of proposed bill, held valid. Stroemer v. Van Orsdel [Neb.] 103 N. W. 1053.

3. Contract between complainants and the receiver of a street railway company and a city by which company was permitted to permanently discontinue its railway on a certain street, held void. Thompson v. Schenectady R. Co. [C. C. A.] 131 F. 577. Contract between railroad company and a firm by which the latter was to acquire and operate a steamboat, and each party was to receive and deliver its freight to the other at the usual rates, in consideration of which the railroad agreed to erect a hoist for the handling of freight transferred, held valid. Graham v. Macon, D. & S. R. Co. [Ga.] 49 S. E. 75.

4. City of Tyler v. St. Louis S. W. R Co. [Tex. Civ. App.] 87 S. W. 238.

5, 6. Butler v. Tifton, T. & G. R. Co., 121 Ga. 817, 49 S. E. 763 See Railroads, 4 C. L. 1181, for a full discussion of this subject.

7. Existence of necessity for removal not an issue in the case, it being sufficient that general public might at some time be injured by depriving company of right to exercise its discretion in the matter. City of Tyler v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 238. Rev. St. 1895, art. 4367, requiring companies to keep and maintain their offices, etc., at the place where they have, for a valuable consideration, contracted to keep them, does not change the rule where the contract is made with a city or with individuals, its provisions being mandatory only in so far as they relate to contracts with counties made in consideration of bond issues. Id.

See, also, Specific Performance, 4 C. L. 1194.

8. See 3 C. L. 823. For a full discussion of this subject see Combinations and Monopolies, 5 C. L. 594.

9. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, afg. 112 Ill. App. 518.

10. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, afg. 112 Ill. App. 518. The mere fact that the contract is in partial restraint of trade raises no presumption that it is unlawful, but the party alleging its illegality has the burden of proving it. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis Adams Co. [C. C. A.] 135 F. 1015.

11. Roberts v. Lemont [Neb.] 102 N. W. 770; Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11; afg. 112 Ill. App. 518. The true test of the validity or invalidity at common law of a contract or combination to fix the price or control the supply of a commodity is whether it affords only a fair and just protection to the parties thereto and whether it is so broad as to interfere with the interests of the public Combination of corporations creating a virtual monopoly in crushed granite business, and preventing any competition therein, held illegal both at common law and under Sess. Acts 1889, p. 96; Sess. Acts 1891, p. 186. Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213. Contracts entered into in furtherance of combination held continuing ones, and though legal when made, become invalid

upon the facts of each case.[12] The restraining covenant must be ancillary to the main contract,[13] but the fact that a separate consideration is paid therefor does not necessarily render it void.[14]

on the subsequent passage of an act prohibiting them, and such act is not thereby given a retroactive effect. Id. The restriction may lawfully extend to all territory wherein plaintiff's trade is likely to go, having regard to the nature of the business. East of Denver held valid. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis Adams Co. [C. C. A.] 135 F. 1015. Ordinarily a contract prohibiting one of the parties from carrying on a specific trade or business without any limitation as to time or place is void. Total restraint of right to engage in insurance business. Evidence held not to justify its limitation to a particular city. Roberts v. Lemont [Neb.] 102 N. W. 770. Not enforceable where the business is of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876. Thus any agreement between competing public service corporations, the consequence of which is the controlling of prices, limiting of production, or suppressing of competition, so as to create a monopoly in things useful to the public, is contrary to public policy, and void. Agreement between two natural gas companies parceling out the territory between them, giving to each the exclusive right to sell gas in a given boundary, fixing prices and prohibiting their change except by mutual consent, binding one company to use for public consumption only gas supplied by the other, and prohibiting one from producing from other's territory. Id.

Contracts held legal: Agreement not to engage in newspaper business in a certain city for five years. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, afg. 112 Ill. App. 518. In suit to enjoin breach of contract, evidence that paper operated by defendant is not of same character as that sold to plaintiff and does not draw its patronage form same source is immaterial. Id. Agreement by one selling good will of business not to engage in same or similar business in same city for three years. Rugg v. Rohrback, 110 Ill. App. 532. Contract between plaintiff and defendant, both of whom were engaged in the real estate and insurance business whereby former agreed not to do any real estate business during continuation of contract, and to turn over to defendant the lands he had for sale, and latter agreed to give him half the commissions received from sale thereof and not to engage in insurance business. Roush v. Gesman Bros., 126 Iowa, 493, 102 N. W. 495. A municipal ordinance giving the exclusive privilege of removing garbage to a person or persons specially appointed, and prohibiting all others from doing so. State v. Robb [Me.] 60 A. 874. Agreement by seller of butcher business, as part of consideration for sale, not to engage in such business for five years within ten miles of certain town. Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168. Evidence held to conclusively show violation of agreement and to warrant direction of verdict for plaintiff for amount of stipulated damages provided for therein. Id. Contract whereby manufacturer of printing presses agreed to sell those adapted to printing of strip tickets only to a certain printing company where their adaptation to that use was joint work of both parties, and agreement was integral part of the thing sold. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 48. Agreement by one selling coal mines and boats not to engage in business of mining or shipping coal in territory traversed by three rivers and their tributaries for ten years. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088. Contracts with telegraph companies whereby a board of trade limits the communication of quotations of prices on sales of grain, etc., for future delivery, collected by it and which it might have refrained from communicating to any one. Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 49 Law. Ed. 1031. Agreement by sellers of fishing plants not to engage or become interested in business of catching certain fish or manufacturing their products along the Atlantic seaboard for 20 years. Fisheries Co. v. Lennan [C. C. A.] 130 F. 533. Agreement whereby stockholders of corporation, on sale of its business, agreed not to engage in similar business for 10 years in specified district. Davis v. Booth & Co. [C. C. A.] 131 F. 31. Agreement not to engage in business in territory dealt in by seller or operated in by its agents, or in its immediate vicinity, held to apply only to localities in which such company had establishments for doing business in their immediate vicinity and not to include all parts or every one of the United States in which a former customer resided, or into which the company's correspondence had extended, or through which its agents had traveled. Id. A contract between two mercantile houses engaged in the same line of business, whereby each acquires an interest in the gross profits of the other. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462. Agreement not to enter into or assist in any competing business for ten years Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis Adams Co. [C. C. A.] 135 F. 1015.

Held illegal: Agreement entered into for purpose of fixing and regulating price of strawboard and limiting its production in Illinois. Evans v. American Strawboard Co., 114 Ill. App. 450.

12, 13. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis Adams Co. [C. C. A.] 135 F. 1015.

14. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 48. Though consideration for sale of presses and agreement not to sell to others was divided, held, that contract should be treated as an entirety,

The mere loaning of money to a competitor is not a breach of an agreement not to engage in a business similar to that of another.[15]

Statutes in some states make all contracts restraining one from exercising a lawful business or profession void unless they accompany the sale of the good will of such business.[16]

A combination tending to prevent competition and create a monopoly is unlawful at common law as against public policy, and all contracts for the accomplishment of such purpose are void.[17]

(§ 3) *L. Effect of invalidity.*[18]—Neither a court of law nor of equity will lend its aid to the enforcement of contracts which are illegal or immoral or which are contrary to public policy.[19] If executed, either wholly or in part, it will leave the parties where it finds them.[20] Thus a party cannot recover money paid under an illegal contract or money due him as profits thereunder where he is obliged to make out his case by showing the illegal contract or transaction, or through its medium, or when it appears that he was privy to the original illegal contract or transaction.[21] The rule is not changed by the fact that the parties acted in good

and restrictive covenant regarded as in aid of and collateral to sale. Id.

15. Injunction restraining breach of agreement made by one member of a firm, on its dissolution, not to engage in a similar business within the state, held not erroneous in so far as it refused to restrain defendant from loaning money to his son for that purpose, or to restrain son from engaging in such business. Salzman v. Siegelman, 102 App. Div. 406, 92 N. Y. S. 844.

16. Civ. Code, §§ 1673, 1674. Contract by vendor of stock in corporation binding him not to engage in same business as corporation is void, since he cannot sell good will of latter's business. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. Agreement made in connection with purchase and sale of salt, not to purchase salt from anyone else for two years, not to import any or cause any to be imported, and to discourage importations by others, held void and no recovery can be had on checks given for consideration. Getz Bros. & Co. v. Federal Salt Co. [Cal.] 81 P. 416. Gen. Laws 1899, c. 359, relating to trusts and monopolies, does not apply to agreement by seller of business, as part of consideration for sale, not to engage in such business for five years within ten miles of certain town. Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168. Promise by partner on purchase of business by copartner not to engage in same business in that town so long as the latter remains in the business there is not void at common law or under Laws 1903, p. 119, c. 94. Crump v. Ligon [Tex. Civ. App.] 84 S. W. 250. Instruction in action for breach of such contract held to substantially present the issues. Id. 3 How. Ann. St. § 9354j does not invalidate contract whereby stockholders of corporation, on sale of its business, agree not to engage in similar business for ten years in specified district. Davis v. Booth & Co. [C. C. A.] 131 F. 31.

17. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876.

18. See 3 C. L. 825.

19. Corbin v. Houlehan [Me.] 61 A. 131; Woodson v. Hopkins [Miss.] 37 So. 1000; Id. [Miss.] 38 So. 298; Johnson v. Owen [Neb.] 100 N. W. 945; Overholt v. Burbridge, 28 Utah, 408, 79 P. 561. For prevention of competition at a public sale. Evidence held not to show new contract based on different consideration. Fletcher v. Johnson [Mich.] 102 N. W. 278. Question of agency, whether revocable or irrevocable, has no bearing in a suit under a contract which is invalid as against morality or public policy. Pape v. Standard Oil Co., 2 Ohio N. P. (N. S.) 514. For effect of illegality on contracts of agency, see Clark & Skyles on Agency, pp. 78-96.

20. Where both are equally culpable, court will not determine the right of the matter as between them. Contract to defraud creditors. Bryant v. Wilcox [Mich.] 100 N. W. 918. Though it has been performed by one party so that the other has received the benefits thereof without giving anything in return. To facilitate procuring of divorce. Davis v. Hinman [Neb.] 103 N. W. 668. Though the objectionable feature has been accomplished and there remains only the distribution of the proceeds among the contracting parties. Volney v. Nixon [N. J. Err. & App.] 60 A. 189. Contract between two persons that, in exchange for their joint property, one of them shall procure from a corporation an original issue of stock to an amount known by all parties to be in excess of the value of the property, and divide it with the other, will not be enforced, though stock is actually issued contrary to statute prohibiting issue of stock for purchase of property in excess of its value. Id.

21. Woodson v. Hopkins [Miss.] 37 So. 1000; Id. [Miss.] 38 So. 298. Plaintiff cannot recover money paid county attorney to procure dismissal of criminal prosecution, and his release from jail. Johnson v. Owen [Neb.] 100 N. W. 945. Where one loaning money at extortionate rates and by contracts contrary to public policy established an agency in charge of defendant, who subsequently claimed the business as his own and refused to account, his principal could

faith and under the mistaken belief that their agreement was legal, where they had knowledge of the facts and the law.[22] But when an illegal contract has been fully executed and the interests and differences of the parties agreed upon, and the proceeds deposited to the credit of one of the parties, the person with whom it is deposited cannot set up the illegality of the original contract in an action to recover the money brought by the party to whom it was due.[23] A contract valid on its face and which has been partially performed may not, in a court of equity, be shown to be invalid as against public policy in order that plaintiff may do that which he has contracted not to do, and thus take advantage of his own wrong.[24]

If the contract is executory, neither party can enforce it [25] or recover damages for its breach.[26]

The law lends itself to him who would destroy an unlawful contract and only refuses to have anything to do with the matter when both parties are equally guilty and an enforcement of the illegal contract is sought.[27] While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful and contravene none of its rules,

not maintain a bill to recover the money and for an injunction and receiver. Woodson v. Hopkins [Miss.] 37 So. 1000; Id. [Miss.] 38 So. 298. Cannot recover that with which he has parted in pursuance of contract in fraud of creditors. Rich v. Hayes, 99 Me. 51, 58 A. 62. See, also, Monahan v. Monahan [Vt.] 59 A. 169. Stockholders of two competing railroads cannot recover specific shares delivered to another corporation in return for its stock in pursuance of a combination subsequently declared illegal. Are only entitled to ratable porportion of assets on dissolution of such corporation. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739.

22. Because they believed that combination for consolidation of competing railroads did not violate Sherman anti-trust act. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739.

23. Bucket shop accepting margin to cover short sale of stock to third party, who thereafter paid to it for the seller the difference between the market price and sale price of the stock, acted only as seller's agent, and could not assert illegality of transaction when sued by seller for his profit. Overholt v. Burbridge, 28 Utah, 408, 79 P. 561.

24. On intervention of husband in action by wife for alienation of his affections he obtained an injunction restraining the prosecution of the action on the ground that she was precluded from prosecuting it by a contract of settlement between them. Held, that she could not set up the illegality of the contract without returning the consideration. McAllen v. Hodge [Minn.] 102 N. W. 707.

25. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216; Pape v. Standard Oil Co., 5 Ohio C. C. (N. S.) 252. Indorsement of certificate of deposit to partner in pool selling business for purpose of enabling indorser to engage in co-operative racing business held not to pass title thereto. Thomas v. First Nat. Bank of Belleville, 116 Ill. App. 20. Contract fraudulent as to creditors. Rich v. Hayes, 99 Me. 51, 58 A. 62. Pleadings in action to recover for work and labor held not to show conclusively that work was performed in pursuance of a contract in violation of the act of congress prohibiting the importation of foreign labor. Judgment for defendant on the pleadings erroneous. Simon v. Haut [Minn.] 104 N. W. 129. Fraudulent contracts. Somers v. Johnson, 70 N. J. Law, 695, 59 A. 224. Court will not enforce contract by guardian to sell ward's realty in advance of legal authority or award damages for its breach, but will leave the parties where it finds them. Leroy v. Jacobosky, 136 N. C. 443, 48 S. E. 796. Will not aid grantee in recovering possession of land under deed, the consideration for which was the compounding of a felony, where the grantor remained in possession. Medearis v. Granberry [Tex. Civ. App.] 84 S. W. 1070. Cannot recover agreed compensation for procuring franchise to operate trolley line. Sussman v. Porter, 137 F. 161.

26. Medearis v. Granberry [Tex. Civ. App.] 84 S. W. 1070; Poling v. Board of Education [W. Va.] 49 S. E. 148. Fraudulent contracts. Somers v. Johnson, 70 N. J. Law, 695, 59 A. 224. Of agreement to represent bank in another state in which he knows it is not entitled to do business. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521. Judgment against plaintiff in former suit against bank for damages suffered in prosecution for doing business in such other state without compliance with its laws by the bank, in which his knowledge of the illegality of the agreement must have been directly involved, held conclusive on that question in subsequent suit for breach of such contract. Id. For breach of a promise to marry a woman already married. Johnson v. Iss [Tenn.] 85 S. W. 79. Agreement to purchase farm and hay cut and cocked for a lump sum, plaintiff to take care of the hay, is wholly void under the statute of frauds, and damages cannot be recovered for failure to care for the hay. Schultz v. Kosbab [Wis.] 103 N. W. 237.

27. The fact that one gives a mortgage in consideration of the compounding of a felony does not prevent him from avoiding

and no contract should be held invalid or set at naught on a mere suspicion of illegality.[28]

If a contract is not severable, the illegality of a part of it renders the whole void.[29] If severable, the illegal portion may be rejected and the legal portion retained and enforced.[30] The rule is equally applicable whether there are two distinct promises, one to do a legal act and the other to do an illegal one, or one divisible promise, or whether the consideration for the two promises is entire or apportionable.[31] Public policy will not avoid a contract embracing an unlawful clause which was mutually disregarded.[32]

If the principal obligation is void for illegality, the infirmity will extend to and vitiate a contract guaranteeing it, and will constitute a defense open to the guarantor in an action on the guaranty itself.[33] Where the consideration for a

it on the ground of duress. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

28. Stromer v. Van Orsdel [Neb.] 103 N. W. 1053.

29. Osgood v. Central Vt. R. Co. [Vt.] 60 A 137. Where several parties join in an entire contract in which all the promises of each party form an entire consideration for the promises of each of the others, the entire contract is void if any part of the consideration is illegal. Bensinger v. Kantzler, 112 Ill. App. 293, revd. on other grounds. 214 Ill. 589, 73 N. E. 874. Contract for sale of salt and agreement not to import salt or cause it to be imported, and not to purchase from anyone else. Plaintiff could not recover on checks given pursuant thereto. Getz Bros. & Co. v. Federal Salt Co. [Cal.] 81 P. 416. Note and trust deed based on illegal combination agreement, in part at least. Evans v. American Strawboard Co., 114 Ill. App. 450. Subscription by defendant for one share of telephone stock and lease of telephone, the lease being void for want of mutuality, the whole contract is void. Co-operative Tel. Co. v. Katus [Mich.] 10 Det. Leg. N. 187, 103 N. W. 814 One entire consideration cannot be separated, though composed of distinct items, some of which are legal and some illegal. Note given for services of cowboys in caring for cattle in an unlawful inclosure on the public domain. Tandy v. Elmore-Cooper Live-Stock Commission Co. [Mo. App.] 87 S. W. 614. Agreement between public service corporations tending to create a monopoly. Charleston Nat. Gas Co. v. Kanawha Nat. Gas, Light & Fuel Co. [W. Va.] 50 S. E. 876. Agreement to procure consent of property owners for construction of trolley line in front of their property and to procure municipal franchise. Sussman v. Porter, 137 F. 161.

30. Whether rendered illegal by statute or common law. Osgood v. Central Vt. R. Co. [Vt.] 60 A. 137. Part of contract for digging drainage canal relating to collateral channel held severable and its invalidity did not affect validity of contract for digging main channel. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Void provision in contract between attorney and client that former shall prosecute suit on contingent fee and bear expenses and costs of litigation held not to render balance of contract invalid. Granat v. Kruse, 114 Ill. App. 488. Agreement of corporation to repurchase stock held severable from agreement to pay guarantied dividends, and enforceable irrespective of validity of the latter. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. Evidence held to support finding that mortgage was a separate transaction and not part of an illegal lobbying contract to influence legislation. Reynolds v. Britton, 102 App. Div. 609, 92 N. Y. S. 2. Agreement not to engage in business of mining or shipping coal in territory traversed by three rivers held void under Federal anti-trust act in so far as it affected business outside of the state, but valid in so far as it relates to business within it. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088. Mortgage executed by wife to raise money to pay husband's debts and to compromise a criminal prosecution against him held valid as to amount used for former purpose and invalid as to that used for latter. Pierson v. Green, 69 S. C. 559, 48 S. E. 624. Contract for carriage of cattle in company with caretaker exempting company from liability for injuries to cattle in excess of agreed amount and from any liability for injury to caretaker. Sprigg's Adm'r v. Rutland R. Co. [Vt.] 60 A. 143. Though contract by one erecting shed on railroad right of way to indemnify company for injuries resulting from its negligence or otherwise is invalid in so far as it relates to injuries in which the public has an interest, it is severable, and is valid in so far as it relates to injuries to plaintiff's property in which public has no interest. Osgood v. Central Vt. R. Co. [Vt.] 60 A. 137. Provision in contract for sale of stone that seller would pay buyer any rebate in the freight made by the carrier, if illegal, is separable. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. Where mortgage is last of series of three, and each of previous ones became merged in it, invalid only in so far as it was given as security for margins in illegal stock transaction. Conradt v. Lepper [Wyo.] 81 P. 307. Evidence held to sustain finding that part of consideration for second mortgage was advancement of margins. Id.

31. Osgood v. Central Vt. R. Co. [Vt.] 60 A. 137.

32. Alien labor clause in public contract. Doyle v. People, 207 Ill. 75, 69 N. E. 639.

33. Promissory note. Tandy v. Elomre-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614.

mortgage is legal, it is no defense to a suit by the assignee thereof to foreclose it that the consideration for the assignment was illegal.[34] It has, however, been held that a bank sued by the endorsee of a certificate of deposit may show that the indorsement was made in pursuance of an illegal contract.[35] If property is sold absolutely and unconditionally, mere knowledge on the part of the vendor that it will thereafter be illegally sold, or will be applied to some illegal or immoral use, will not bar an action for the purchase price, unless it is part of the contract that it shall be so sold or used, or unless the vendor aids or participates in the illegal objects otherwise than by the mere act of making the sale.[36] A member of a firm cannot preclude recovery by his innocent co-partner of his share of the partnership profits by showing that they were realized in an unlawful manner.[37]

The court should admit and consider legal evidence offered to show that the cause of action springs from an illegal or corrupt agreement,[38] even though the objection is not pleaded;[39] and whenever the evidence of either party, whether introduced for that purpose or not, shows illegality, should of its own motion direct a nonsuit.[40] So, too, the appellate court will not enforce such a contract, though the question was not raised in the lower court and is not urged on appeal.[41]

§ 4. *Interpretation. A. General rules.*[42]—The primary rule of construction is to give effect to the intention of the parties.[43]

34. Because assigned as consideration for illegal stock transactions. Conradt v. Lepper [Wyo.] 81 P. 307.

35. Held, the privilege and duty of a bank sued by endorsee of certificate of deposit to show that indorsement was made in pursuance of an illegal contract. Thomas v. First National Bank, 116 Ill. App. 20.

36. Rule applied to sale of liquor to keeper of house of ill-fame. As to whether it applies where unlawful use amounts to felony or crime involving great moral turpitude not decided. Washington Liquor Co. v. Shaw [Wash.] 80 P. 536.

37. Under partnership agreement to share profits in purchase and sale of certain stock, held no defense to defendant's liability to account for all such profits that he had made a part of them illegally by accepting commissions from both the purchaser and seller, where plaintiff did not participate in such improper conduct. Van Tine v. Hilands, 131 F. 124.

38. That agreement was signed by defendant for purpose of inducing public to believe that he had gone into enterprise, when he was only acting as agent of plaintiffs in perpetrating the fraud. Somers v. Johnson, 70 N. J. Law, 695, 59 A. 224.

39. Pape v. Standard Oil Co., 5 Ohio C. C. (N. S.) 252.

40. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. Agreement for purpose of deceiving public and making them believe that he had gone into certain enterprise, when his participation was only as agent of plaintiffs in perpetration of fraud. Somers v. Johnson, 70 N. J. Law, 695, 59 A. 224.

41. Davis v. Hinman [Neb.] 103 N. W. 668.

42. See 3 C. L. 827.

43. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; Wheaton v. Bartlett, 105 Ill. App. 326; Bennett v. Giles, 111 Ill. App. 428; Cochran v. County of Vermilion, 113 Ill. App. 140; Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797; Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. In determining whether a conveyance with agreement to reconvey constitutes a mortgage or a conveyance of the legal title. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268. So far as is ascertainable and lawful. Wilson's Rev. & Ann. St. 1903, § 787. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. As to whether it is entire or divisible. Pacific Mill Co. v. Inman Poulsen & Co. [Or.] 80 P. 424. As to whether sum contracted to be paid on breach of contract is liquidated damages or penalty. Santa Fe St. R. Co. v. Schultz [Tex. Civ. App.] 83 S. W. 39.

Particular contracts construed. Advertising contracts: Indorsement on order for publication of advertisement that it was given with understanding that publishers should "produce business to the amount of the cost of the advertisement or no pay," held to mean that orders for goods because of the advertisement should be treated as payment pro tanto of the bill, and that advertiser could not recover the balance. Snyder v. International Economist Co., 91 N. Y. S. 748. Evidence held to show contract that plaintiff was to receive commissions on continuing advertising contracts only while he remained in defendant's employ and was influential in securing their continuance. Hooke v. Financier Co., 99 App. Div. 186, 90 N. Y. S. 1012. In action to recover for advertising evidence held to support finding that plaintiff did not agree to submit proof to defendant before publication. Morning Journal Ass'n v. Harris, 92 N. Y. S. 316.

Building and construction contracts [See 5 C. L. 455]: Provision that payment was to be made for materials if they were satisfactory to the architect not waived by further provision that payment might be made in advance of delivery. Bateman Bros. v. Ma-

pel, 145 Cal. 241, 78 P. 734. Finding that contract did not call for monument similar in design and size to another one held proper. Braun v. Hothan, 87 App. Div. 611, 84 N. Y. S. 8. Contract held to render defendant liable to plaintiff only for such iron as was actually used in the building for which it was furnished. Weber v. Farrell, 84 N. Y. S. 272. Iron used in necessary temporary work held to be included in contract. Id. Assignment of contract to surety held absolute and not merely for security, though the instrument so recited. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. Contract held to entitle plaintiff to furnish as much granite as was necessary to make construction walls for bridge and approaches and not merely as much as defendant might call for. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351. Contractor held to have assumed risk of depth of excavation required, and could not recover extra compensation because levels on plans were inaccurate and it was necessary to go to a greater depth than indicated. Connors v. U. S., 130 F. 609. Agreement to install heating plant **"in a good and workmanlike manner,"** held to require installation in such a manner that it would operate with reasonable success in heating building. Ideal Heating Co. v. Kramer [Iowa] 102 N. W. 840. Provisions of contract for construction of **breakwater** held to require contractors to maintain stakelights in the proper positions, and to keep them properly trimmed and burning, and they were liable for injuries to vessel resulting from extinguishment of light. Harrison v. Hughes [C. C. A.] 125 F. 860. Contract held not to restrict contractors in placing lights to those prescribed therein or to those ordered by the officers in charge of the work. Id. Contract held to require construction of complete **dam** and not merely the furnishing of materials therefor. Montgomery Water Power Co. v. Chapman, 132 F. 138. Contract for **building wall and sloping bank** held to entitle plaintiff to $1 per yard for all sloping in excess of 300 yards necessarily removed, in absence of objection to his removing such excess, though defendant did not expressly consent to such removal, and though plaintiff began to slope at bottom of wall instead of at top. Necessity a question for jury. Dugan v. Kelly [Ark.] 86 S. W. 831. Contract for **railroad construction** work held not to give engineer authority to waive written orders for extra work, to make allowances for loss or damages for doing work for which price was fixed by contract, or to bind principal by parol modification. Baltimore & O. R. Co. v. Jolly Bros. & Co., 71 Ohio St. 92, 72 N. E. 888. Contract held to require only the construction of such **fire escapes** as would satisfy tenement house department when completed, and production of their certificate entitled plaintiff to recover, though escape as constructed would not have satisfied law when contract was made. McManus v. Annett, 101 App. Div. 6, 91 N. Y. S. 808. Contract for construction of **drainage canal** held to require defendant to furnish right of way. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Under contract providing for payment of $250 to plaintiff for **drawing plans,** as security for which defendant was to deed him the equity of redemption in certain lands, payment to be made within two years, and plaintiff to reconvey on payment, provided he had not previously sold the land, which he was authorized to do, in which event the price received was to release defendant, held, that plaintiff, not having sold the lot or been paid within two years, was entitled to recover contract price. Perkins v. Hanks [Mass.] 74 N. E. 314. In action for **architect's services,** there being a conflict as to whether the plans were workable, evidence held insufficient to sustain judgment for defendant. Repelye v. Lynch, 102 App. Div. 622, 92 N. Y. S. 371.

Contracts for drilling wells: Contract held to provide for payment at certain rate per foot for boring through earth until rock was struck, and after that different sum per foot, whatever the substance might be. Mansfield v. Morgan, 140 Ala. 567, 37 So. 393. There being no guaranty that water would be provided, where evidence showed that after boring a certain distance defendant advised plaintiff to bore elsewhere, which he did, and procured water, for which well defendant paid, held, that instruction that it made no difference as to plaintiff's right to recover for first well whether defendant obtained any benefit from it or not, if he consented to boring second one, was proper. Id. So also was instruction that where, in absence of express contract, services are rendered by one for another which are accepted by the latter, the law presumes an obligation to pay the reasonable value thereof. Id. Complaint held not demurrable for failure to allege that water was procured where there was no guaranty that water would be procured. Id. Contract held to mean that whenever well would furnish continuous supply of twenty-five gallons of water per minute, either by natural flow or by use of deep well pump, the contractor would be entitled to discontinue boring, provided he notified owner that use of deep well pump was necessary. Moore v. Pritchett, 121 Ga. 139, 49 S. E. 292. Contract held to require such a well as would be adapted to defendant's needs, the exact depth to be determined in the future according to the success achieved, and to require work to continue until sufficient amount of water was obtained or it became reasonably certain that further driling would be useless. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Plaintiffs held entitled to no pay where work was stopped before reaching water because casing became fast, nor was defendant bound to allow them to drill in a new place. Caruthers v. Cook [Tex. Civ. App.] 84 S. W. 690.

Contracts of employment: Resolution for appointment of county physician held to impose on him the duty of rendering medical aid to residents of a certain township who were not able to pay therefor, as well as to inmates of certain named institutions. Cochran v. County of Vermilion, 113 Ill. App. 140. Contract giving defendant exclusive right to sell goods in certain territory held not to give him right to fix prices at which goods sold by the manufacturer in such territory should be billed and sold for its own

profit. La Favorite Rubber Mfg. Co. v. H. Channon Co., 113 Ill. App. 491. Contract for payment of advances to agent to be repaid from commissions to be earned, and requiring defendant to remain in plaintiff's employment so long as he was in debt to him, held not to constitute such advances a debt which could be recovered by plaintiff on failure of the venture. Arbaugh v. Shockney, 34 Ind. App. 268, 72 N. E. 668, 71 N. E. 232. Use of word "debt" did not import personal liability. Id. Advancements provided for in contract which was supplemental to one employing plaintiff as insurance solicitor, held a part of and not in addition to commissions provided for in primary contract. Id. [Ind. App.] 71 N. E. 232, rehearing denied, 34 Ind. App. 268, 72 N. E. 668. Evidence held to show that use of farm was given plaintiff in return for services rendered in caring for his father and that he was not entitled to recover additional compensation for services rendered prior to subsequent agreement to pay him an additional sum. Durr v. Durr, 26 Ky. L. R. 855, 82 S. W. 581. Use of farm after father's death held to balance amount of additional compensation to which he was entitled under latter agreement. Id. Where defendant agreed to continue employment if trial for four months was satisfactory, he was not bound to notify him at the end of that period that it was unsatisfactory, on pain of being bound by continuance of the contract. Carter & Co. v. Weber [Mich.] 101 N. W. 818. Held that plaintiff should have inferred that it was unsatisfactory from defendant's conduct. Id. Defendant not estopped from claiming that it was unsatisfactory by failure to answer plaintiff's letters. Id. Minimum compensation provided for held to be $50 per week. Weik v. Williamson-Gunning Advertising Co. [Mo. App.] 84 S. W. 144. In action on contract to pay broker certain sum for selling land, instruction that defendant's proposition contained in a certain letter only required plaintiff to secure a purchaser for all the land if it contained an average quantity of timber, held erroneous where letter was silent in that regard. Veatch v. Norman [Mo. App.] 84 S. W. 350. Plaintiff held entitled to defendant's exclusive services. Seaburn v. Zachmann, 99 App. Div. 218, 90 N. Y. S. 1005. Contract allowing the employer to disregard orders sent in by a salesman, from persons of doubtful financial responsibility does not authorize him to disregard orders sent in at prices below those authorized. Highland Buggy Co. v. Parker, 5 Ohio C. C. (N. S.) 383. Evidence insufficient to support plaintiff's claim for extra compensation for nursing and caring for decedent. Services held to have been rendered in pursuance of contract between plaintiff's husband and decedent. Normile v. Osborne, 207 Pa. 367, 56 A. 937. Contract of theatrical employment held not to entitle defendant to make deduction from plaintiff's salary for performance omitted because of absence of other actors, for which neither plaintiff nor defendant was to blame. Wentworth v. Whitney, 25 Pa. Super. Ct. 100. In action for an accounting under agreement whereby defendant was to sell farm acquired under mortgage foreclosure and account to plaintiff for proceeds, less the amount of a debt owing defendant, held not to show that defendant was entitled to compensation for supervising farm before sale. Chaffee v. Conway [Wis.] 103 N. W. 269. Agreement by employe to assign to plaintiff a half interest in all inventions made by him relative to automatic organs in consideration of an increased salary, held to cover inventions equally applicable to automatic organs and pianos. Vocalion Organ Co. v. Wright, 137 F. 313.

Services of attorney held not contemplated by contract, and he was entitled to additional compensation therefor. Barcus v. Sherwood [C. C. A.] 136 F. 184, afg. 130 F. 364. Contract by attorney to procure payment of legacy to heirs for a contingent fee held to cover all necessary services, including those rendered in taking an appeal from an erroneous decision of the lower court. Cavanaugh v. Robinson [Mich.] 101 N. W. 824. Defendant's agent not bound to furnish appeal bond, and if no appeal was contemplated plaintiff had no authority to proceed therewith at defendant's expense. Id.

Franchises: Provision in franchise ordinance requiring company to reimburse property owners for **"cost of paving,"** held to cover expense of excavating, grading, etc., preparatory to laying pavement. Danville St. R. & Light Co. v. Mater, 116 Ill. App. 519. Agreement by street railroad company with property owner to operate the line for half the period of its charter, which was for fifty years, held to require continuous operation for twenty-five years from time of contract. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39.

Gas and oil leases: See, also, Mines and Minerals, 4 C. L. 649.

Lessee under gas lease not bound to furnish gas for use outside of house under contract requiring it to equip house of lessor for use of natural gas and furnish gas free. Gillespie v. Iseman, 210 Pa. 1, 59 A. 266. Under contract in regard to prospecting for gas and oil, held that the gas company could, on the development of gas in paying quantities while drilling for oil, and its election to pay the cost of drilling the well, take possession of it, and other party could not continue operations in effort to find oil in lower stratum. Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548.

Loans: Agreement held to require plaintiff to hold money in readiness to lend to defendant at any time between specified dates and obligate defendant absolutely to pay interest thereon during such time, even though he did not borrow it. Ehlen v. Selden, 99 Md. 699, 59 A. 120. Agreement whereby defendant was to furnish money to purchase certain land from third persons under no obligation to sell, and to divide the profits with plaintiff, held not to give the latter any right or interest in the land. Forrest v. O'Bryan, 126 Iowa, 571, 102 N. W. 492. Agreement to **furnish money** for prosecution of business of corporation, "and for paying up the outstanding accounts of said company, which are now due, less stockholders' notes," etc., held not to require payment of notes. Fairbairn v. Houghten [Mich.] 102 N. W. 284. Where defendant

promised that he would pay the expenses of procuring loan to pay third mortgage owned by him on property of plaintiffs, not to exceed a certain sum, he was only liable for the actual expense proved. Marks v. Appelbaum, 92 N. Y. S. 239.

Mail contract requiring contractor "to take the mail from and deliver it into the postoffices, mail stations, and cars," held to require him to carry it from his wagons up to the stations or cars of an elevated railroad. Utah Stage Co.'s Case, 39 Ct. Cl. 420.

Mining contracts: See, also, Mines and Minerals, 4 C. L. 649. Contract providing that money advanced for formation of mining company shall be repaid out of the proceeds of "ore sales, compromises, or otherwise," and that no other money shall be paid out, except for necessary operations, until after such repayment, held to mean that if net proceeds of ore sales and compromises does not amount to enough to liquidate such claim within a reasonable time, the obligation shall become absolute. McIntyre v. Ajax Min. Co., 28 Utah, 162, 77 P. 613; White v. Century Gold Min. & Mill. Co., 28 Utah, 331, 78 P. 868. Limitations do not begin to run against plaintiff's cause of action until expiration of reasonable time after creation of the obligation, and plea of limitations cannot avail on appeal where it does not appear from records or findings at what date reasonable time elapsed. Id.

Relating to mortgages: A contract by a mortgagee not to enforce his unsecured claims against the equity of redemption of the mortgagor does not preclude him from acquiring legitimate claims of other parties and enforcing them, unless at the time it was executed mortgagee entertained design of thereafter doing so for purpose of preventing mortgagor from obtaining benefit of the contract. Rich v. Hayes, 99 Me. 51, 58 A. 62. Release by mortgagor to mortgagee held broad enough to embrace equity of redemption. Leusenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268. Contract held to authorize retention of senior mortgage until advancements were paid and to prevent purchase of equity under junior mortgage by holder of both mortgages from operating as payment of senior mortgage. Continental Title & Trust Co. v. Devlin, 209 Pa. 380, 58 A. 843.

Payment: Contract authorizing defendant to pay out of sums due one with whom he had a contract for cutting certain timber "the actual labor claims incurred in cutting, removing, and logging said timber," and providing that balance remaining from month to month shall be paid to plaintiffs until their claims and any indebtedness thereafter incurred to them shall be settled, held to require payment of all labor claims incurred prior or subsequent to the making of the contract before making payments to plaintiffs. Esmond v. Gillies Logging & Mercantile Co., 36 Wash. 499, 78 P. 1016. Evidence as to amount of timber cut and amount of defendant's advancements, held admissible. Id. Evidence held to sustain finding that nothing applicable to plaintiffs' claims remained in defendant's hands. Id. Contract to accept specified monthly payments on certain note, given by one who received but did not pay over premiums on plaintiff's insurance policies, and that a certain per cent. of the premiums on all policies issued to plaintiff and certain of its officers should also be applied on the note, held not to bind plaintiff to take out any insurance, or at least that any obligation to do so was conditional on the prompt payment of the monthly instalments by defendant. Old Dominion Min. & Concentrating Co. v. Daggett & Co. [Wash.] 80 P. 839. Vendee of mortgaged land agreed with mortgagor to pay what was **"actually due"** on the mortgage debt. Mortgage called for usurious interest and vendee sued to restrain a foreclosure, alleging a tender of the amount actually due. Held, that injunction should have been continued to final hearing to determine whether words "actually due" meant the face of the note or the amount legally due. Erwin v. Morris, 137 N. C. 48, 49 S. E. 53. Defendants conveyed land to plaintiff by warranty deed. Later it appeared that there were outstanding tax claims against it. Defendant's grantor, recognizing his liability to pay them, agreed to do so, and conveyed to plaintiff as security a house subject to a mortgage, and at same time defendant executed a contract to plaintiff guaranteeing the **"payment** of the taxes" **in any event** and that they should suffer no loss. The house was sold under the mortgage and plaintiff never realized anything from it. Held, that a verdict was properly directed for defendant. Bigelow v. Stearns [Mich.] 100 N. W. 125.

A guaranty of "the payment of all bills payable by this contract" includes a balance of the total amount of the minimum contract price remaining unpaid. Klosterman v. United Elec. Light & Power Co. [Md.] 60 A. 251. Agreed consideration for contract whereby plaintiff was to receive money **on deposit** and pay it out to defendant's creditors held to have been the use by plaintiff of the deposit, which was not to be allowed to fall below a certain sum, and the opportunity for trade which the cashing of the orders would afford him, and he was not entitled to additional compensation for his services. Temple v. Schultz [Fla.] 36 So. 59.

Sales: See, also, Sales, 4 C. L. 1318. Contract held agreement for shipment of cotton, with liquidated damages for its breach, and not a mere usurious loan. Allen-West Commission Co. v. People's Bank [Ark.] 84 S. W. 1041. Contract to install complete printing press at a certain time requires installation of one fully equipped to do the work required of it at the time of delivery, and where plates were worn out plaintiff cannot recover contract price, less cost of new plates, though they were worn out in trials of its efficiency and it has been demonstrated that press will do the work according to contract. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Contract for rock held to require defendant to furnish the run of the mine, so long as the per cent. of bone phosphate of lime therein did not fall below that specified. Globe Fertilizer Co. v. Tennessee Phosphate Co. [Ky.] 85 S. W. 1177. Agreement to purchase "all" the srap iron which plaintiffs might receive at specified price held to have been made with reference to business in which they were engaged, and to include

only such iron as they would naturally and reasonably accumulate in such business as then conducted, and not iron purchased from wholesalers on drop in price. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. Contract for sale of ties held to bind neither party unless proposed new lines of railroad were actually built, and then only to the extent that they were needed for that purpose. Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. Demand for delivery of ties under contract held not to place defendant in default where neither it nor the evidence showed that they were needed for purpose specified. Id. Transfer of contract to construction company held not to have created new contract or changed rights of parties. Id. Contract held either a conditional sale of cattle or an absolute sale accompanied by a purchase-money mortgage, so that defendant could not contend that he was merely given possession of the cattle for purpose of taking care of them for plaintiff at specified compensation. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. Agreement to indemnify buyer of sausages for export in case claim was made for too much fat, held to render seller liable for damages resulting from refusal of authorities of country to which they were shipped to allow them to be landed. James v. Libby, 92 N. Y. S. 1047. Warranty "only against breakage caused by manifest defects in material for the year in which they are sold," held to exclude all other warranties of quality, express or implied. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. The fact that the word **"sell"** is used in the contract does not show as a matter of law that a present sale was intended rather than a contract to sell. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. Contract for manufacture and sale of stoves held to require the buyer to receive at least the specified number within the time limited. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Contract for sale of telephone line held not to have vested title thereto or exclusive control in the buyers before the expiration of five years. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678. Contract held to mean that title to lumber bought with money advanced by bank should remain in it until such money was repaid, when what remained was to be transferred to and become property of plaintiff. Dennis v. Montesano Nat. Bank [Wash.] 80 P. 764. Agreement by sellers of fishing plants not to engage or become interested in business of catching certain fish or manufacturing their products along the Atlantic coast for twenty years, held personal in its nature and to preclude them from engaging in such business on Chesapeake Bay. Fisheries Co. v. Lennen [C. C. A.] 130 F. 533. Evidence held not to show contemporaneous oral contract to furnish defendants with employment. Id. Provision in contract for purchase and sale of specified quantity of goods "deliveries to be made as wanted until further agreement" held not to give purchaser right to refuse to accept goods no matter when tendered, but he was bound to accept within a reasonable time. Dunn v. Mayo Mills [C. C. A.] 134 F. 804. Under contract to furnish government supplies in such quantities as might be ordered from time to time, held, that there could be no breach by failure to furnish supplies unless they were ordered, and fact that contractor became bankrupt and that contract was annuled did not create any liability on his part for failure to furnish supplies where none were ordered. Sparhawk v. U. S. [C. C. A.] 134 F. 720, rev. In re Stoever, 127 F. 394. Provision that vessel should be transferred "with her unexpired insurance fully paid," held to mean that to the extent to which the vessel was covered by insurance on Dec. 15th, the vendor was obliged to vest the vendee on Feb. 1st, with fully paid policies issued by underwriters as good at least as those which were underwriting her on Dec. 15th. Brauer v. Macbeth [C. C. A.] 138 F. 977.

Sales of realty: See, also, Vendors and Purchasers, 4 C. L. 1769. Where one agrees to convey land on the payment of money, the word "convey" means the making and delivery of a deed. Quinton v. Mulvane [Kan.] 81 P. 486. Contract held one for the sale of land to defendants and not to have merely constituted them plaintiff's agents to promote a sale. Harmon v. Thompson [Ky.] 84 S. W. 569. Held, that confirmation of land grant by court of private land claims was a "confirmation by the congress of the United States" within the meaning of a contract to pay a certain sum on such confirmation. Joseph v. Catron [N. M.] 81 P. 439. Also held that it was none the less a "confirmation" because only the allotments, and not the claim for the outlying pasture land, were confirmed. Id. Contract for sale of land held to be that of defendant individually and not as agent of the owner, though word "agent" was used in connection with his name and words "subject to the ratification of the owner of the land." Hardman v. Kelley [S. D.] 104 N. W. 272. Covenant in lease held to grant defendant right to raise its dam and to release it from liability for damages resulting to other lands owned by plaintiff in vicinity which would incidentally be flooded by the flooding of those described. Stadler v. Missouri River Power Co., 133 F. 314.

Miscellaneous contracts: Contract in regard to certain grain bags held not to render defendant absolutely liable to pay stipulated price for all bags not shipped to plaintiff by that date, but to give him the option to pay or account therefor. Curtin v. Ingle, 143 Cal. 354, 77 P. 74. Agreement held to constitute waiver by widow of her right to an award out of decedent's estate. Bennett v. Morris, 111 Ill. App. 150. Contract by real estate agent to turn over to defendant properties which he had for sale held merely agreement to turn them over for purpose of allowing defendant to make other arrangements for their sale with the owners, and hence not objectionable on ground that plaintiff could not transfer his authority. Roush v. Gesman Bros., 126 Iowa, 493, 102 N. W. 495. Contract held to be for the furnishing of a particular pasture, and not for furnishing sufficient pasturage for a certain number of cattle. Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37. Notes held not given in discharge of contract of purchase but were a part thereof and merely evidence of the debt thereby created, and failure to pay them

was breach. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Contract under which G. was to be permitted to use certain premises for piling granite to be furnished plaintiff, held to entitle him only to so much of the space thereon as he actually needed, and where he was furnished that much he was not excused from performance because he did not have it all. Degnon-McLean Const. Co. v. City Trust; Safe Deposit & Surety Co., 99 App. Div. 195, 90 N. Y. S. 1029. Contract whereby defendants agreed to be at the expense of all actions and legal proceedings necessary for obtaining or maintaining certain railroad franchises, held not to entitle plaintiffs to employ their own attorneys to take part in any litigation regardless of whether they were interested therein or not, and regardless of the necessity therefor, and defendants were not liable for fees of attorneys so employed. Johnson v. Atlas Imp. Co., 92 N. Y. S. 950. Mere fact that defendants consented to cooperation of attorneys so employed held not to make them liable. Id. Plaintiff held entitled to recover for cutting up of meadow by street railway company under oral agreement to compensate him therefor, though not entitled to do so under written agreement for use of a part of the land for a right-of-way. Quigley v. Montgomery & C. Elec. R. Co., 208 Pa. 238, 57 A. 512. Contract whereby each of two mercantile houses acquired interest in gross profits of the other held not to provide for such a sharing of profits as to create a partnership. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462.

Acceptance of order for payment of money held conditional only on the value of certain lumber on the switch between the date of the order and the time named therein for its payment. Fletcher v. Simms [Ark.] 86 S. W. 993. Evidence held to show that plaintiff had authority to sell a certain farm and hence he was entitled to part of commissions received by defendant for making sale, under agreement between them **to divide commissions** on business turned over to defendant by plaintiff. Roush v. Gesman Bros., 126 Iowa, 493, 102 N. W. 495. Contract **to furnish fuel oil** held to show intention that it should be modified to conform to new conditions in case certain wells should cease to gush, and parties not having been able to make new contract, court could not make one for them. United Fruit Co. v. Louisiana Petroleum Co. [La.] 38 So. 958. Money which a debtor on disclosure claimed as exempt was deposited with a third person and agreement in writing entered into to the effect that the creditor should commence suit against the debtor as principal and the third person as trustee, and reciting that said arrangement was made for the purpose of testing the creditor's right to the fund, and that it was agreed that all provisions of law should be available in defense as though the fund had remained in the debtor's hands. In suit commenced by trustee process, it was decided that the fund was not exempt. Held, that creditor was entitled to it under the agreement without further proceedings on his part. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057. Money became contingent property of plaintiff when placed in third person's hands, dependent upon decision of the court. Word **"right"** means ownership. Id. Money was not attached or put in the custody of the law by proceedings under trustee process. Id. Subsequent death of debtor and insolvency of his estate did not affect creditor's rights. Id. Contract between manufacturer of electric lamps and dealer, whereby latter was to carry a specified number of lamps in stock and to give a note to manufacturer which he was to be allowed to settle "by return of lamps * * * at any time at the option of either party, and by a sixty-day notice by either party," held to give dealer option to pay note by return of lamps, but not to give manufacturer right to elect to take them in payment, the words **"at the option of either party"** referring to time of payment merely. Union Trust Co. v. Michigan Elec. Co. [Mich.] 12 Det. Leg. N. 131, 103 N. W. 556. Contract **to furnish water power** held to require defendant, after expiration of ten years from date power was first used, to pay $5 per horse power for all power used. Great Falls Water Power & Town Site Co. v. Boston & M. C. Copper & Silver Min. Co. [Mont.] 81 P. 392. Instrument held to amount to **assignment of wages** to be earned and not mere power of attorney authorizing their collection. Quigley v. Welter [Minn.] 104 N. W. 236. Renewal of notes held not a **collection** thereof within meaning of contract whereby defendant agreed to pay plaintiff a certain sum on their collection. Dickinson v. Motley Co., 90 N. Y. S. 286. In action for an accounting under contract for sharing profits of **promoting a corporation,** evidence held to show that defendants were partners as between themselves, and finding that one of them had no interest in the contract was prejudicial to his rights. Boice v. McCormick, 94 N. Y. S. 892. Contract by owner **to transfer stock** to new corporation providing that old corporation should be free from all indebtedness maturing before certain date and that he would assume any not then paid, held to render him liable for costs of suit in which old company was engaged, which on an appeal being taken, had been paid by defendant therein to such company's solicitors under rules of English court where case was tried, and which such company had credited on solicitors' bill, and which new company had to repay on reversal of the judgment. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35, 72 N. E. 634.

Duration of option held to be for fifty days, that being the period within which the first payment was to be made. Swank v. Fretts, 209 Pa. 625, 59 A. 264. Where lease provided that expense of **keeping dam in repair** should be borne equally by the parties thereto and that it should be binding on the assigns, etc., of the parties, and the lessor sold the rental to one party and the land to another, held that the lessee was entitled to deduct half the cost of repairs from the annual rental before paying it to the person to whom the rental was sold. Hamaker v. Manheim Light, Heat & Power Co., 25 Pa. Super. Ct. 484. Contract with proposed railroad in regard to **transportation** of product of salt works held to entitle road to certain per centage of both the ingoing and outgoing tonnage incident

If the language of a written contract is clear and explicit, it alone must govern.[44]

Courts cannot interpolate terms as to which the minds of the parties have not given assent,[45] but stipulations which are necessary to make the contract reasonable and conformable to usage will be implied with respect to matters concerning which no contrary intention is manifested.[46]

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.[47] When two constructions are pos-

to the operation of the works. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. Contract in **settlement of will contest** providing that one party should have all property standing in name of deceased at time of his death "which said property is more particularly described in a quitclaim deed executed in conformity with this agreement," held to entitle him to realty which was discovered, after execution of instrument, to have been so owned by deceased, though not described in the deed. Lamona v. Cowley, 31 Wash. 297, 71 P. 1040. Provision giving author right to object to **assignment of copyrights** held valid and to prevent their sale by publisher's trustee in bankruptcy. In re McBride & Co., 132 F. 285.

Lease of lot "as a cattle feeding lot" held not to require lessee to divide lot into pens, or to put in cross-fences, or piping, or feeding troughs, but merely to give him permission to do so with privilege of removing them at end of lease. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Contract **to quarry marble** held to give plaintiff right to demand pay for all marble stripped by him which he should quarry before a specified date provided he fulfilled contract in all respects, and having failed to quarry amount required by contract, he could not recover damages for defendant's refusal to permit him to quarry marble so stripped. Freedley v. Wilson [C. C. A.] 136 F. 586. ,

44. Fletcher v. Simms [Ark.] 86 S. W. 993; Midland Sav. & Loan Co. v. Solomon [Kan.] 79 P. 1077; Dennis v. Montesano Nat. Bank [Wash.] 80 P. 764. Wilson's Rev. & Ann. St. 1903, §§ 789, 790. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. Whatever may be the result, and whether foolish or not. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. The fact that the profits under a contract are large does not prevent its enforcement. Where, in an action for loss of profits on a contract which defendant refused to permit plaintiff to fully perform, the contract is established and the cost of doing the work thereunder is found by the jury on sufficient evidence, the fact that the cost would have been much less than the contract price is immaterial, and does not render a verdict for the difference excessive. Norton v. Shields, 132 F. 873. Provision as to what laws shall govern. Midland Sav. & Loan Co. v. Solomon [Kan.] 79 P. 1077. Contracts are matters of fact to be decided by their terms and stipulations and the intent of the contracting parties. As to place of sale of intoxicating liquor. Keller v. State [Tex. Cr. App.] 87 S. W. 669. Intention must be sought from the language used. Kephart v. Buddecke [Colo. App.] 80 P. 501. If possible must be ascertained from the instrument itself without resort to extrinsic circumstances. Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. The purpose of the court is to arrive at the meaning of the parties as it may be gathered from their written agreement, and not necessarily what may have been in their minds. Harmon v. Thompson [Ky.] 84 S. W. 569. One writing a contract may not question the plain and obvious meaning of its terms. Boyd v. Liefer, 144 Cal. 336, 77 P. 953. The law presumes that a party meant what his language, under the circumstances in which it was used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something different, which he did not express, and which a person dealing with him neither understood or had reason to understand. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. Where the time for the completion of the work provided for in a written contract is left blank, the court cannot say that the parties intended to fill them, or what insertion they intended to make. Bolter v. Kozlowski, 112 Ill. App. 13, afd. 211 Ill. 79, 71 N. E. 858. Even if a party had authority to fill blanks in written instrument, it did not appear that he ever did so, and in any event original contract was not produced with such blanks filled, but only a copy. Id.

45. Courts are powerless to interpolate terms and conditions to which the minds of the parties have not given assent. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4.

46. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890. In a contract of employment for a limited time, the employe agreeing to promote the interests of the employer, there is an implied representation on the part of the employe that he has the experience and ability to promote the interests of the employer. Highland Buggy Co. v. Parker, 5 Ohio C. C. (N. S.) 383. Contract giving plaintiffs the right to represent defendant in the sale of cotton wadding held to contain an implied agreement on defendant's part to continue manufacturing during the entire year, and it was guilty of a breach in suspending manufacture and transferring its business. Horton v. Hall & C. Mfg. Co., 94 App. Div. 404, 88 N. Y. S. 73.

47. Wilson's Rev. & Ann. St. 1903, § 794. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. Certainty and not uncertainty should be sought for. Simon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41.

sible, that will be adopted which is most equitable, and which will not give an unconscionable advantage to one party over the other.[48] So, too, a reasonable construction will be preferred to an unreasonable one,[49] one rendering the contract binding and operative to one rendering it inoperative,[50] and one rendering it lawful to one which would make it unlawful.[51] Agreements waiving legal rights will not be construed or extended beyond the fair import of their terms.[52] Explicit provisions control those which may be implied.[53]

The entire contract must be considered together as a whole,[54] effect if pos-

48. Allemong v. Augusta Nat. Bank, 103 Va. 243, 48 S. E. 897. Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent when the necessity of the case and the ends of justice require it, notwithstanding the form. Id. Provision in compromise agreement in regard to alleged void conveyance of land, for satisfaction of an individual indebtedness released by one of the parties, and a pro rata division of the balance of the proceeds of a sale by a trustee, held not dependent upon provision for sale for particular sum, so as to require a pro rata deduction of the amount to be applied on the debt on forced sale for less amount. Id. Where sale was never made, held that action would be in equity to compel sale and distribution. Id.

49. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890; Allemong v. Augusta Nat. Bank, 103 Va. 243, 48 S. E. 897. Civ. Code, § 1643. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Contract for manufacture and sale of ice held not to require plaintiff to manufacture full quantity and place it on platform for defendant, but that latter was bound to pay for the amount called for by the contract which plaintiff was ready to manufacture. Citizens' Bank v. Taylor & Co. [Va.] 51 S. E. 159. Provision in contract for sale of land that it should be void in case title thereto was not good or could not be made good held to apply to defects arising subsequently, as where wife refused to join in deed to homestead, and to be available to either party. Schwab v. Baremore [Minn.] 104 N. W. 10.

50. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890; Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Option on oil and mineral rights, on its being accepted, held to bind plaintiffs to explore land within two years by sinking wells, and to operate same so as to yield defendant a royalty, and they were not in any event entitled to deed provided for by option until gas, oil, or minerals were found in paying quantities. Berry v. Frisbie [Ky.] 86 S. W. 558. Should be construed as to make the obligations imposed mutually binding unless such construction is wholly negatived by the language used. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. That construction will be adopted which makes performance possible or avoids a forfeiture, or is reasonable and just. Rankin v. Rankin, 111 Ill. App. 403. A construction upholding the contract should be preferred to one nullifying it, where it appears that the enforcement of the contract is reasonable and will not work injury to either party. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890.

51. Wilson's Rev. & Ann. St. 1903, § 794. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. Civ. Code, § 1643. Deed reserving lands "heretofore conveyed" held to reserve legal title to lands, the equitable title to which had been previously sold. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Contract to pay broker commission for sale of land held not to require purchase price to be paid solely in cash. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890. Provisions in contract for purchase of stock as to commissions will, on demurrer to the complaint in an action for breach of the contract, be treated as a proper mode of compensation rather than as a mode for concealing an illegal transaction. Hence not necessary to allege that an actual delivery was contemplated. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. No contract should be held as intended to be made in violation of the law whenever by any reasonable construction it can be made consistent with the law. Note executed by married woman as surety held Illinois contract and hence valid rather than Indiana contract which would render it invalid, notwithstanding fact that latter state is designated as place of payment. Garrigue v. Keller [Ind.] 74 N. E. 523. Particularly true in a criminal case. All presumptions in favor of accused. Contract for sale of liquor. Keller v. State [Tex. Cr. App.] 87 S. W. 669. In action on contract to pack fish, providing for stipulated damages in case plaintiff failed to pack specified number of cases per day, instruction that he could not be charged for any shortage occurring on Sunday and could not offset amount packed on Sunday against amount of shortage on other days held proper, there being no evidence that contract required him to work on Sunday. Go Fun v. Fidalgo Island Canning Co., 37 Wash. 238, 79 P. 797.

52. Waiver of "notice of protest" held not to waive demand of payment. Blatchford v. Harris, 115 Ill. App. 160.

53. Provision for specified sum in payment for services in preparing plans held to control implied provision for compensation by commission. Perkins v. Hanks [Mass.] 74 N. E. 314. Contract by defendant to make certain payments for support of his son's wife and children until youngest became of age held not to merely substitute defendant for his son and not to cease on son's death. Recknagel v. Steinway, 94 N. Y. S. 119.

54. Leslie v. Bell [Ark.] 84 S. W. 491; Cook v. Columbian Oil, Asphalt & Refining

sible being given to every word and clause.[55] Words which do not add to or take from a written contract in any legal sense may be rejected as surplusage,[56] but no provision should be ignored or expunged if it is possible to avoid it, nor unless it clearly appears that such provision is annulled intentionally by other provisions,[57] and no word regarded as superfluous if a meaning which is reasonable and in harmony with the other parts of the contract can be assigned to it.[58] Repugnant words may be rejected in favor of a construction which renders effectual the evident purpose of the entire instrument.[59] In case of a repugnancy between clauses, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than one tending to defeat a full performance.[60]

The most obvious and natural construction should be adopted,[61] technical rules being disregarded in favor of the meaning and intention as gathered from the whole instrument.[62]

Co., 144 Cal. 670, 78 P. 287; Kephart v. Buddecke [Colo. App.] 80 P. 501; Westfall v. Albert, 212 Ill. 68, 72 N. E. 4; Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550; Allemong v. Augusta Nat. Bank, 103 Va. 243, 48 S. E. 897; Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548; Vocalion Organ Co. v. Wright, 137 F. 313. The intention is to be ascertained by an examination of the whole instrument, and of its effect upon any proposed construction, and such a construction should be adopted as will carry that intention into effect, although single clause considered alone would lead to a different construction. Wathorn v. Robinson, 98 Me. 334, 56 A. 1057. Provision in contract to furnish electricity that company did not bind itself to furnish current at any particular time after contract was signed held to have been intended only to cover delays due to strikes, etc. Klosterman v. United Elec. Light & Power Co. [Md.] 60 A. 251. Word "sell" should be read in connection with all the other stipulations of the contract in determining whether a present sale or a contract to sell is intended. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

55. Kephart v. Buddecke [Colo. App.] 80 P. 501; Westfall v. Albert, 212 Ill. 68, 72 N. E. 4; Wheaton v. Bartlett, 105 Ill. App. 326; Cochran v. County of Vermilion, 113 Ill. App. 140; Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. Deed and contemporaneous contract. McCoy v. Griswold, 114 Ill. App. 556. Defendant held liable only for such delays in procuring right of way for drainage canal as it could not in the exercise of good faith and reasonable diligence prevent. Sanitary District of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. General words will not be restricted by previous particular ones when result would be to require their rejection as surplusage. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204, rvg. Cameron v. Sexton, 110 Ill. App. 381.

56. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. May be excluded or disregarded when necessary to effectuate intention. Cochran v. County of Vermilion, 113 Ill. App. 140. Word "such" preceding word "residents" in resolution employing county physician held to relate to some antecedent or consequent, evidently omitted by mistake, in the absence of which it failed to perform any office. Id.

57. Harmon v. Thompson [Ky.] 84 S. W. 569.

58. Kephart v. Buddecke [Colo. App.] 80 P. 501. Bond given by bank and sureties to state treasurer, reciting that treasurer would deposit certain money in the bank, and that bank should keep, etc., "all said sums so deposited or to be deposited as aforesaid," held to cover deposits made prior to its execution. Id.

59. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550.

60. Contract for erection of building held to require contractor to do plastering. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550.

61. Under deed conveying "one-tenth part thereof, less by 640 acres," the 640 acres is to be deducted from the tenth after division. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. A strained and unnatural construction, which would impose on one party a liability neither called for by the language used, nor the relations of the parties when it was made, should be rejected. Greason v. St. Louis, etc., S. R. Co. [Mo. App.] 86 S. W. 722. Plain, common-sense meaning. Cook v. Columbian Oil, Asphalt & Refining Co., 144 Cal. 670, 78 P. 287. Contract for drilling oil wells held to entitle plaintiff to be paid at specified price for each and every foot of hole sunk by him in good faith in an honest endeavor to carry out the contract, and he could recover contract price where work was abandoned because of breaking of drill in hole, rendering further drilling impossible. Id. A member of a limited partnership signing an agreement, on sale of the partnership business, providing that the parties thereto "will not, nor shall any member of said parties concerned engage in a similar business," and receiving a part of the consideration is estopped to claim that he did not know that he was individually bound thereby. Pittsburg Valve, Foundry & Construction Co. v. Klingelhofer [Pa.] 60 A. 161.

62. Allemong v. Augusta Nat. Bank, 103 Va. 243, 48 S. E. 897.

Words should be given their popular and accepted meaning in the absence of anything showing a different intention.[63] So, too, the contract should be given its natural, grammatical construction.[64] The spirit and intention, however, will control the literal meaning.[65] Technical words are to be construed as usually understood by persons in the profession or business to which they relate.[66]

For the purpose of interpreting an ambigious contract, it is the duty of the court to place itself as nearly as possible in the position of the parties when it was made,[67] taking into consideration the subject-matter and purpose of the contract, the situation and conduct of the parties, and all the surrounding circumstances,[68] and the mutual intention of the parties may be inquired into.[69]

63. Word "lumber" in contract for its transportation, where no evidence was introduced to show that it was employed in an unusual sense, held not to include ties. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722. Rather than their strict legal meaning. Civ. Code, § 1644. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Words and expressions in common use. Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. Under contract to clear land for certain price "per grub," the word "grub" should be given the meaning in which it is commonly understood by those entering into such contracts. Campbell v. Howerton [Tex. Civ. App.] 87 S. W. 370.

64. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903.

65. Equity looks to the spirit and intent of the parties rather than the words used, and in furtherance of justice will give such a construction to their writings as is consistent with their intent. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792. Plaintiffs held not entitled to benefit by trust agreement to secure certain creditors of a building contractor, they not having signed it or relied thereon, but having obtained other security. Bossert v. Zimmermann, 99 App. Div. 399, 91 N. Y. S. 255. Where father agreed that on sale of certain land conveyed to him by his daughter he would pay her a certain sum as an "advancement," held, that on sale she could recover such amount as a debt, and fact that he called debt an advancement did not make it such. Schweitzer v. Schweitzer, 26 Ky. L. R. 888, 82 S. W. 625. Contract must be construed according to its legal effect, mere names being ignored. Land contract held contract of sale and not a lease. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. Contract to furnish granite providing that it was to be taken from quarries of G. & S. **"and"** G. held not broken by plaintiff's inability to obtain any from one of them. "And" held to mean "or" and provision was not agreement to use both. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

66. Civ. Code, § 1645. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Breaking of the "shaft" of thigh bone in benefit certificate. Peterson v. Modern Brotherhood, 125 Iowa, 562, 101 N. W. 289. Rule applies only to words exclusively technical, or those shown to have been used in a technical sense. Not where question to be determined is whether words not exclusively technical were used in technical sense. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

67. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4; Vocalion Organ Co. v. Wright, 137 F. 313; Rider v. Rider, 114 Ill. App. 202.

68. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722; Hardwick v. American Can Co. [Tenn.] 88 S. W. 797; Carnegie Nat. Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. Written contract of compromise with creditor held separate and distinct from prior verbal contract giving security for debt. Corbett v. Joannes [Wis.] 104 N. W. 69. As to whether provision in contract for laying water pipe requiring contractor "to make all connections" required him to pay cost of having water shut off in old pipe. Norton v. Shields, 132 F. 873. Held, that if there was any ambiguity in contract for drilling well guaranteeing a certain "flow of oil," the circumstances surrounding the parties when it was made and construction placed upon it by them as evidenced by their acts, showed that the well was required to flow oil out of the opening above the ground. Cox & Co. v. Markham & Co. [Tex. Civ. App.] 87 S. W. 1163. Agreement held not to prevent defendant from raising his dam so as to overflow more of plaintiff's land. Carmichael v. Henry Wood's Sons Co., 184 Mass. 73, 67 N. E. 961. May also consider the previous relations and dealings between the parties. Hardwick v. American Can Co. [Tenn.] 88 S. W. 797. Language may be enlarged or limited by reference to the circumstances surrounding the parties and the objects they evidently had in view. Walker v. Johnson, 116 Ill. App. 145. Grant will be construed according to conditions existing when it was made lease. Slack v. Knox, 114 Ill. App. 435. The instrument may be read in the light of the surrounding circumstances. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057; Pittsburg Valve Foundry & Construction Co. v. Klingelhofer [Pa.] 60 A. 161. As to whether third person entitled to sue thereon. Allen & C. Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. Contract for manufacture of piston rod for engine. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382; Union Trust Co. v. Michigan Elec. Co. [Mich.] 12 Det. Leg. N. 131, 103 N. W. 556; Bennett v. Morris, 111 Ill. App. 150. May consider the situation of the parties, the acts to be performed under it, and the time, place, and manner of performance. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057. May be explained by reference to the circumstances under which it was made, and the matter to which it relates. Wilson's Rev. & Ann. St. 1903, § 798. American Soda Fountain

In case of ambiguity the practical interpretation put upon the contract by the parties themselves may be looked to to determine their intention.[70] Ambiguity calling for construction may appear from language clear in itself but leading to some absurd result when applied literally to the situation with which it deals.[71]

Written or typewritten provisions control printed ones.[72]

When an enumeration of specific things is followed by general words or phrases, the latter are usually held to refer only to things of the same kind or class as those specified.[73] The rule does not, however, apply unless the word "other" is used,[74] nor where its application would operate to defeat a larger intent as gathered from the whole instrument,[75] or to deprive the general words of all meaning.[76]

Laws existing at the time and place of making a contract and where it is to be performed enter into and form a part of it as though incorporated therein.[77]

If ambigious the contract will be construed most strongly against the party preparing it,[78] and in the sense in which the promisor believed at the time of making it that the promisee understood it.[79]

Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. The intention of the parties, to be ascertained from the words employed, the connection in which they are used, and the subject-matter in reference to which the parties are contracting, must control. In determining whether sum named in bond shall be regarded as penalty or liquidated damages. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4. As to admissibility of parol evidence for this purpose, see post, § 9e.

69. Provision in contract for sale of soda water apparatus that freight and setting up charges are to be paid by consignee, held to require their payment before absolute title would pass to purchaser. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115.

70. Fairbairn v. Houghton [Mich.] 102 N. W. 284; Cox v. Markham & Co. [Tex. Civ. App.] 87 S. W. 1163; Norton v. Shields, 132 F. 873; Vocalion Organ Co. v. Wright, 137 F. 313. Is strong evidence of their intention as to its meaning. Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. Their subsequent acts and declarations may be shown for that purpose. Contract to furnish ties. Id. Rule applies only in cases where the contract is uncertain, indefinite, or susceptible of different interpretations. Schwab v. Baremore [Minn.] 104 N. W. 10. Is entitled to great, if not controlling influence. As to whether one party was required to assist in prosecution of claims. Consaul v. Cummings, 24 App. D. C. 36. Will be adopted if possible. Construction of gas lease adopted by lessor and his successors cannot be changed by subsequent purchaser more than six years after date of lease. Gillespie v. Iseman, 210 Pa. 1, 59 A. 266. To determine whether an instrument was intended as mortgage. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. As to duty of lessor to furnish steam. Slack v. Knox, 114 Ill. App. 435. Coal used in plaintiff's engine held to be included in the term "labor and tools" rather than the term materials, and hence plaintiff was required to furnish the same under contract for excavating sewer trench, particularly as that was the practical construction adopted by the parties. Camardella v. Holmes, 97 App. Div. 120, 89 N. Y. S. 616. Agreement to install water system and hydraulic ram held to require construction of dam. Carolina Plumbing & Heating Co. v. Hall, 136 N. C. 530, 48 S. E. 810. Contract for setting crib for water pipes, as construed by parties, held to require city engineer to designate its location. O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W. 963.

71. Corbett v. Joannes [Wis.] 104 N. W. 69.

72. Option contract for repurchase of land held to contemplate the placing of an incumbrance on the property and its conveyance subject thereto on payment of the difference between the amount thereof and the specified consideration. Bennett v. Giles, 111 Ill. App. 428. Provisions of contract with reference to number of bales of cotton to be shipped thereunder being in conflict, held that latter provision, evidently inserted for the express purpose of showing the intention with reference thereto, should control previous provision which was part of blank form. Allen-West Commission Co. v. People's Bank [Ark.] 84 S. W. 1041.

73, 74, 75. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

76. As where the enumeration of particular things is so exhaustive as to leave nothing which can be called ejusdem generis, in which case maxim yields to rule requiring effect to be given to every part of contract. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. Rule held not to apply to clause in deed whereby grantee assumes "mortgages, liens, taxes, and claims of any and every description." Id.

77. Including those affecting its validity, construction, discharge, and enforcement. Trustees of Town of Brookhaven v. Smith, 98 App. Div. 212, 90 N. Y. S. 646. Laws relating to rights in subaqueous lands held part of land grants. Id. Will be presumed that the parties had them in mind. Employment by corporation. Wood v. Iowa Bldg. & Loan Ass'n, 126 Iowa, 464, 102 N. W. 410.

78. Rankin v. Rankin, 111 Ill. App. 403. Against the party causing such uncertainty

(§ 4) *B. What is part of contract.*[80]—Where a contract consists of several different instruments, each will be read and construed with reference to the others, and the contract will, if possible, be given effect as a whole.[81] So, too, several agreements between the same parties made at the same time and referring to the same subject-matter will be construed together as though constituting a single instrument.[82]

to exist. The promisor is presumed to be such party. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890. Contract for shipment of cotton. Allen-West Commission Co. v. People's Bank [Ark.] 84 S. W. 1041; Leslie v. Bell [Ark.] 84 S. W. 491. Contract held to require defendant to use every effort to set aside a sale of certain lands on a judgment, and, in the event that he succeeded in doing so, to reconvey 80 acres and retain the balance as his compensation. Id. Where defendant, failing to recover the land by suit, redeemed from the execution sale, held that he would be deemed to have acted under the contract and would be held to a reconveyance of the 80 acres, whether the contract contemplated a redemption or not. Id. Employment. Silberman v. Schwarcz, 45 Misc. 352, 90 N. Y. S. 382. Where the terms of a grant are ambiguous or self-contradictory, they are to be construed most favorably to the grantee. Lessee held to have had right to hold for two additional years beyond term, notwithstanding notice of termination by lessor, or to quit at end of first additional year. Henderson v. Schuylkill Val. Clay Mfg. Co., 24 Pa. Super. Ct. 422. Plaintiffs agreed to sell defendants a half interest in mining property, certain advances which were to be made by defendants for litigation and improvements to apply on purchase price. By subsequent contract such advances were to be repaid defendants, and by third contract a corporation, to which the property was conveyed, did "assume and agree to pay" the moneys advanced "as per" the first contract. Held, that words "as per" referred to the advancements and did not qualify the words "assume and agree to pay" and did not abrogate provisions of second contract providing for their repayment. Gibson v. Milner, 28 Utah, 438, 79 P. 556. Where the terms of the contract are plain and unambiguous and it is not claimed that plaintiff did not have ample opportunity to read and understand it before signing, it is immaterial who drew it. Evidence that building contract was drawn by contractor properly excluded. Novelty Mill Co. v. Heinzerling [Wash.] 81 P. 742.

79. Wilson's Rev. & Ann. St. 1903, § 800. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. When the terms have been intended in a different sense by the parties, that sense must prevail against either party in which he had reason to suppose the other understood it. Code, § 4617. Peterson v. Modern Brotherhood, 125 Iowa, 562, 101 N. W. 289. Rule applies only where the writing involved is fairly susceptible of different meanings, and cannot be used for the purpose of making it conform to the notions of one of the parties executing it. Benefit certificate. Id.

80. See 3 C. L. 831.

81. Constitution of benefit association and application for membership. Sterling v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 28 Utah, 526, 80 P. 1110. Contract for purchase of books and notes given pursuant thereto. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. A building contract and the plans and specifications. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231. Compromise agreement and "addendum" thereto. Benson v. Larson [Minn.] 104 N. W. 307. Each of several contracts for the purchase of stock on margins held to be independent of the others and the stock bought under one stood as security for the performance of it alone. Wiggin v. Federal Stock & Grain Co., 77 Conn. 607, 59 A. 607. Held that order drawn by subcontractor in favor of materialman and accepted by principal contractor should be construed in connection with the subcontract. Weber v. Farrell, 84 N. Y. S. 272.

82. Transfer of stock, and agreement in respect to it. Rider v. Rider, 114 Ill. App. 202. Power of attorney to vote shares of stock held irrevocable under agreements between the parties. Id. McCoy v. Griswold, 114 Ill. App. 556. Civ. Code, § 1642. Contract for purchase of salt. Contract not to purchase from any one else and to refrain from importing salt or causing it to be imported, and checks given in pursuance thereof held to form substantial parts of one transaction. Getz Bros. & Co. v. Federal Salt Co. [Cal.] 81 P. 416. Where, at time of execution of deed of conveyance, the grantees therein executed another deed to the grantors, reciting the first one, and stating that it was made in consideration of an agreement by grantees to pay grantor a certain sum, and purporting to reconvey the land to secure the same, both deeds should be construed as one, the former as a conveyance of title and the latter as a mortgage. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Contract whereby plaintiff was employed as insurance solicitor, supplemental contract as to advances to be made to him, and bond. Arbaugh v. Shockney, 34 Ind. App. 268, 71 N. E. 232, rehearing denied, 72 N. E. 668. Held that contract for commissions on sale of realty should be construed with contract of sale, in so far as latter related to purchase price, for purpose of ascertaining when commissions were payable. Robertson v. Vasey, 125 Iowa, 526, 101 N. W. 271. Notes and agreement as to their payment and not to transfer them held one contract and defendant had no right to negotiate them. Myrick v. Purcell [Minn.] 103 N. W. 902. Deed and lease. Stadler v. Missouri River Power Co., 133 F. 314. Contract in settlement of will contest construed in connection with stipulation of attorneys on which it was based. Lanlona v. Cowley, 31 Wash. 297, 71 P. 1040. Contract

(§ 4) *C. Character; joint and several, entire or divisible, etc.*[83]—Whether the contract is joint, several, or joint and several, generally depends upon the intention of the parties.[84]

The question whether the contract is entire or divisible is one of construction, the intention of the parties controlling.[85] A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other and not intended to be.[86]

(§ 4) *D. Custom and usage.*[87]—The general customs and usages of the trade in respect to which the contract is made form a part of it,[88] and proof thereof is admissible to annex a term, or to explain ambigious or technical terms, but not to vary or contradict the plain meaning of the language used.[89]

for sale of slop by distilling company and lease of land by purchaser to company to be used for feeding purposes held separate and distinct contracts, each complete in itself and requiring no reference to the other to be understood. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

83. See 3 C. L. 832. See, also, §9a, post, and § 31, ante.

84. See Hammon on Contracts, pp. 756-772. Evidence in suit against a corporation and its president jointly for services rendered held not to show that defendants, either expressly or impliedly recognized their joint liability, and judgment against both held erroneous. Stein v. Woodward Pub. Co., 45 Misc. 613, 91 N. Y. S. 17. Evidence held to show, irrespective of the question whether defendants were partners, that appellant had beneficial interest in work and materials furnished by plaintiff and knowingly accepted the benefits thereof, thereby ratifying the contract made by his co-defendant with plaintiff. Shubert v. Lincoln, 92 N. Y. S. 784.

85. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Cantwell v. Crowley [Mo.] 86 S. W. 257. Contract to install printing machines held entire, though some of them could be used separately. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Contract to do all necessary excavating for building at certain rate per cubic yard for rock and at different rate for earth held entire. Toher v. Schaefer, 45 Misc. 618, 91 N. Y. S. 3. Contract providing for erection of house and stable held an entirety, such being the evident intention. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231. Successive subcontracts made by one subcontractor under contract for the erection of a house and stable, held to be regarded as one contract as between the owner and the subcontractor who files mechanic's lien. Id. Where defendant contracted with plaintiff corporation to purchase certain amount of its capital stock, to be paid for in lumber, further agreement by plaintiff to increase stock and secure bona fide subscriptions for a certain amount thereof, to be paid in full within a certain time, held independent and separable, so that strict performance thereof was not condition precedent to suit against defendant. Pacific Mill Co. v. Inman, Poulson & Co. [Or.] 80 P. 424. It is no defense that plaintiff did not use proceeds of sale of such stock in accordance with the contract. Id. So as to enable purchaser of goods to keep part and return part because not according to sample. Barnett v. Becker, 25 Pa. Super. Ct. 22. Contract whereby complainant agreed to make and deliver to defendant for certain period all castings required by it, each delivery to be paid for within sixty days thereafter, held an entirety. Ross Meehan Foundry Co. v. Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167.

86. Contract reciting that one holds in trust for others certain undivided interests in two tracts of land held severable, and enforceable as to second tract, though not as to the first. Cantwell v. Crawley [Mo.] 86 S. W. 251. Contract for loan for which borrower was to give nine notes secured by trust deed held divisible. Less v. English [Ark.] 87 S. W. 447. Contract to furnish brick held severable. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787. Where there is a purchase at the same time of different articles at different prices, the contract is several as to each article, unless the accepting of the whole is rendered essential, either by the peculiar nature of the subject-matter or the terms of the contract. Contract for sale of pants held several, and retention of one lot did not prevent return of others as not corresponding to sample. Slayden-Kirksey Woolen Mills v. Spring, 116 Ill. App. 27. If the part to be performed by one party consists of several separate and distinct items and the price to be paid by the other is to be apportioned to each item to be performed or is left to be implied by law, the contract will generally be regarded as several. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. The same is true where the price to be paid is clearly and distinctly apportioned to the different parts of what is to be performed, though the latter is in its nature single and entire. Id. Covenant going only to part of consideration, breach of which may be paid for in damages, will be regarded as independent. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 80 P. 424.

87. See 3 C. L. 832.

88. To explain trade terms, abbreviations, etc. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607.

89. For a full discussion of this ques-

(§ 4) *E. As to place, time, and compensation.*[90]—Where a contract is by its terms to be performed on a day named, both parties have the whole of the business day in which to tender performance.[91]

A contract silent as to the time of performance must as a general rule be performed within a reasonable time.[92] So, too, performance according to the terms of the contract having been prevented by one of the parties, the other has a reasonble time after request in which to fulfill, if he so desires.[93]

At common law, time is always of the essence of the contract, and the same rule applies in equity if it appears from the contract that the parties so intended.[94] The modern rule, however, appears to be that time is never regarded as of the essence of the contract unless the parties expressly so stipulate, or the nature of the subject-matter or the surrounding circumstances renders it probable that they so intended.[95] One cannot enforce a forfeiture of a contract to convey

tion see Customs and Usages, 3 C. L. 988. See, also, Hammon on Contracts, § 394, p. 788.

90. See 3 C. L. 833; see, also, Time, 4 C. L. 1680, as to rules for Computation of time; and Payment and Tender, 4 C. L. 955, as to medium and manner of payment.

91. Brauer v. Macbeth [C. C. A.] 138 F. 977. Under option to purchase land to extend 20 days from February 3rd, vendee has whole of February 23rd in which to purchase. Holmes v. Myles [Ala.] 37 So. 588.

92. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792. Where a contract authorizing insertion of advertisements in newspaper on certain days during one year as per copy furnished by defendant fails to specify when publication is to begin, the law will imply an agreement to furnish copy within a reasonable time. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. For completion of work under building contract. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307. Instruction in action on contract for moving buildings on scows that if no time was fixed for performance the law would imply a reasonable time, taking into account the difficulties in securing scows, conditions of the weather, and all the surrounding circumstances, held not erroneous as assuming that there were difficulties and that weather was bad. Anderson v. Hilker [Wash.] 80 P. 848. Contract for exchange of land. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

93. Pitts v. Davey, 40 Misc. 96, 81 N. Y. S. 264. Where claimant's undertaking to complete repairs by a certain time was conditioned on the delivery of machinery at shop within specified time, which was not done, they were only bound to complete them within a reasonable time. Dutton v. Shaw [Miss.] 38 So. 638. Reasonable time depends on circumstances. Pitts v. Davey, 40 Misc. 96, 81 N. Y. S. 264.

94. Monarch v. Owensboro City R. Co. [Ky.] 85 S. W. 193. Time held to be of essence of agreement to convey right of way to defendant and to transfer to it all plaintiff's rights in a street railway franchise in consideration of which defendant agreed to construct certain line, and it was necessary for plaintiff to tender performance within the time specified in order to maintain an action at law for damages for breach of the contract. Id.

95. Evidence held to show that time was not of the essence of a contract whereby plaintiff furnished certain bags to defendant to be used in shipping grain, so as to render defendant's retention of them after a specified date an election to purchase them. Curtin v. Ingle, 143 Cal. 354, 77 P. 74. Where defendant agreed to pay agreed price or account for bags received by him for plaintiff to be used in shipping grain and not returned by a certain date, he cannot be required to pay for those retained after such date in the absence of a demand for an accounting, or embracing that in the alternative. Id. Provision in contract for sale of land for higher rate of interest if deferred payments were made after maturity and fact that plaintiff allowed them to remain unpaid when due without notice or demand for settlement, held to show that time was not of the essence of the contract, and it could be enforced in equity, though such payments were not made as provided by contract. Gumaer v. Draper [Colo.] 79 P. 1040. Not in contract for exchange of land where no time for performance is fixed. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Prima facie not of the essence of a contract of purchase and sale. Weaver v. Griffith, 210 Pa. 13, 59 A. 315. Liability of property owners on obligation whereby they promised to pay to a construction company a certain sum for the construction of a railorad, held conditioned on the work being completed within a specified time. Bes Line Const. Co. v. Wood [Tex. Civ. App.] 84 S. W. 378. Provision of letter accepting property owner's proposition agreeing to commence work within thirty days and push it with due diligence, held not to have extended time limit fixed by proposition, but to have referred to action within that time. Id. Time is of the essence of a contract for the purchase and sale of realty. If vendor not able to perform on day fixed by the contract, other party may elect to treat contract as at an end. Seibel v. Purchase, 134 F. 484; Henion v. Bacon, 100 App. Div. 99, 91 N. Y. S. 399. Time held to have been of essence of contract of sale of land, and failure to meet payment on specified date gave defendant option to forfeit it. Apking v. Hoffer [Neb.] 104 N. W. 177. Time held to be of essence of option contract.

land for the purchaser's failure to make payment in time, without the consent of one to whom he has conveyed it as collateral security.[96]

A contract to give one permanent employment for as long as he desires to retain his position and his services are satisfactory is not enforceable unless he fixes the period of his services at the time he presents himself for work.[97] Electing one an officer of a corporation does not ordinarily constitute a contract of employment with him for a stated time.[98]

Where the relations of the parties to a contract of employment are continued after the expiration of the year for which it was made without making any change or new agreement, the terms and conditions of the old contract are thereby continued.[99]

Payment.[1]—Parties may agree upon the commodity in which payment for services may be made, and having done so may not insist on some other measure of their value.[2] In the absence of a stipulation to the contrary, the character of money current at the time fixed for performance of the contract is the medium in which payments may be made.[3] Where the mode of measurement for ascertaining the amount to be paid is specified in the contract, that mode, and no other, must be followed.[4] In case such method is impossible, plaintiff may recover on a quantum meruit, resort being had to the best evidence obtainable to ascertain the amount due.[5] Where a contract of sale is silent as to the mode of payment, it is competent to prove a general custom among dealers in that regard.[6]

Where no time is fixed for payment for personalty sold [7] or services rendered,

Swank v. Fretts, 209 Pa. 625, 59 A. 264. See, also, Vendors and Purchasers, 4 C. L. 1769.

96. Under the circumstances held proper to refuse to cancel contract, and to decree specific performance. Shaw v. Benesh, 37 Wash. 457, 79 P. 1007. See, also, Vendors and Purchasers, 4 C. L. 1769.

97. Hickey v. Kiam [Tex. Civ. App.] 83 S. W. 716. Contract held not for definite term. Id. Where by the contract of employment the term of employment depends on the mere volition of the employer, he may discharge the employe without giving employe opportunity to exercise his right to fix the term. Id.

98. In absence of showing that plaintiff corporation agreed to continue its business during president's term of office, or to retain him as general manager after it ceased doing business, it was not liable for his salary after a sale of its business to defendant, and hence defendant was not bound to repay salary thereafter paid him, under agreement to hold plaintiff harmless from all claims, on account of contracts, debts, etc. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334.

99. Morgan v. McCaslin, 114 Ill. App. 427.

1. See 3 C. L. 834, n. 88; see, also, § 4a, ante.

2. Plaintiff agreed to purchase piano for part cash and balance in advertising. Held, that he could not repudiate his obligation to receive piano and recover payment for advertising in money because all the advertising contemplated had not been done, defendant having waived his right to the balance. Mail & Times Pub. Co. v. Marks, 125 Iowa, 622, 101 N. W. 458.

3. Error in instructing that time of making contract was to be alone considered in determining what was the foreign current money in which the contract provided for payment to be made, held harmless where it was conceded that United States money was within the contemplation of the parties when the contract was made, and that it was also current when performance was due. City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299. Contract for lighting streets in Porto Rico held to make current foreign money the medium of payment. Id.

4. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450. Where construction of contract for electric power was submitted to arbitration, held that, in an action to recover an overpayment found by the arbitrators to have been made, the award and decree were admissible to show what the contract was. Id. Complaint in action to recover amount of overpayment, found by arbitrators to have been made on a contract for electric power, held to state cause of action, particularly after verdict. Id.

5. Where it is impossible to measure electric power used by the kind of meter designated, evidence of other measurements and of the amount used by plaintiff under a subsequent contract with another company is admissible. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450. In such case plaintiff is not bound to pay for more power than he actually uses, but some other adequate appliance must be used to measure the amount actually used. Id.

6. Sale of cotton. Blalock & Co. v. Clark, 137 N. C. 140, 49 S. E. 88.

7. Delivery and payment will be regarded as concurrent acts in case of option for sale of personalty. Parol evidence inadmissible to show different agreement.

payment must be made on performance.[8] Where a contract for services provides for payment of a certain sum per month, payment is not due until the end of the month, in the absence of provision to the contrary.[9]

One voluntarily, and in variation or change of the contract, making a payment which the contract requires the other party to make cannot recover it from him on rescission of the contract.[10]

(§ 4) *F. What law governs.*[11]—As a general rule the lex loci contractus governs in determining the validity and effect of the contract, and the lex fori determines the course of procedure in giving redress thereon.[12]

§ 5. *Modification and merger.*[13]—The parties to a contract may at pleasure and by mutual assent, alter or modify it,[14] and cannot limit their right to do so.[15] An agreement to modify a previous one must be supported by a new consideration[16] and have all the essential elements of a contract.[17]

As a general rule the alteration must be made by an instrument of equal dignity with the original contract.[18] By statute in some states a contract in writing may be altered by a contract in writing or by an executed parol agreement, and

Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Payment for hides due when they were prepared as required in contract. Id.

8. Services under contract for drilling well. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795.

9. Plaintiff could not recover for month in the middle of which she rescinded it. Seymour v. Warren, 93 N. Y. S. 651.

10. Taxes. Seymour v. Warren, 93 N. Y. S. 651.

11. See 3 C. L. 834.

12. This subject is fully discussed under the title Conflict of Laws, 5 C. L. 610.

13. See 3 C. L. 834.

14. A prior contract may be rescinded by a subsequent one where the latter in terms purports to rescind or modify it. Berkey v. Lefebure & Sons, 125 Iowa, 76, 99 N. W. 710. Where one selling several invoices of goods to be paid for on specified dates afterwards entered into verbal agreement whereby the time of payment on invoices not yet due was accelerated, held, that he could, after the last date for payment mentioned in the original agreement, sue upon a part of the invoices based on his book account, and was not bound to sue on the verbal agreement, it not having operated to extinguish the original debt, but merely to modify and change the terms of sale. Weiss v. Marks, 23 Pa. Super. Ct. 602. Evidence held to show that agreement in regard to payment for certain fixtures was subsequently changed, and hence suit was not prematurely brought. Allum v. Nolle, 25 Pa. Super. Ct. 220. Evidence held not to show modification of contract between manufacturer of electric lamps and dealer by subsequent oral agreement. Union Trust Co. v. Michigan Elec. Co. [Mich.] 12 Det. Leg. N. 131, 103 N. W. 556. Evidence held not to show extension of time for payment of notes. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Where building contract provided that alterations and additions might be made during the progress of the work without affecting its validity, the value of the changes to be added to or deducted from the contract price, mutual agreement of the parties during progress of the work that plans shall be changed and part of contract waived does not work an abandonment of the old contract and the substitution of a new one therefor. Gray v. Jones [Or.] 81 P. 813. Acceptance of bill of lading by shipper held not to amount to assent to alteration of contract of shipment so as to relieve company from liability after delivery of lead to steamship. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269.

15. Provision in written contract with architect that no claims for extra compensation shall be made unless previously agreed upon in writing does not prevent modification of contract or making a further one by parol. Ritchie v. State [Wash.] 81 P. 79.

16. Promise to pay amount already due under first contract not a sufficient consideration to support supplemental agreement for daily forfeiture if work not completed at time fixed. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307.

17. A request for an alteration or modification of a fully accepted proposed contract does not effect such alteration unless assented to by the other party. Turner v. McCormick [W. Va.] 49 S. E. 28. Formal written agreement designed to embody contract evidenced by correspondence held never to have been accepted by one of the parties, and hence not to have superceded that made by such correspondence. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808.

18. The terms of a contract under seal cannot be varied except by an instrument of the same dignity, even though it would have been valid without a seal. Morehouse v. Terrill, 111 Ill. App. 460. But a mere waiver of a term or condition may be shown where it is in the nature of a release or discharge, and leaves the contract otherwise unchanged and introduces no new element into it. Release of provision in contract for sale of land requiring seller to furnish abstract. Id.

not otherwise.[19] Such a provision does not, however, preclude the application of the doctrine of equitable estoppel to defeat an action for nonperformance, where sufficient cause therefor exists.[20]

In order that a contract may be a renewal of a former one, it must be between the same parties.[21] An undertaking to be liable only in the event that another person fails to pay cannot in law be a renewal of an obligation to pay absolutely and at all events without regard to the liability of another.[22]

Merger.[23]—The taking by a creditor of the debtor's note for the existing indebtedness does not merge or extinguish the indebtedness.[24]

§ 6. *Discharge by performance or breach. A. General rules.*[25]—A contract is broken when either party wholly or partially refuses to perform the obligations imposed on him thereby.[26]

19. Civ. Code, § 1698. Parol agreement reducing rate of interest on mortgage provided mortgagor would pay all taxes, held valid as far as executed. In re McDougald's Estate, 145 Cal. 196, 79 P. 875. Rev. Codes, 1899, § 3936. Where, by mistake, land was erroneously described in contract of sale, held, that contract was modified by acceptance of deed for that intended to be covered in accordance with offer of defendant. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405. Plaintiff's conduct held such as to induce defendant to believe that he accepted his offer to modify contract, and hence he would not be heard to say that he did not intend to do so. Id. Executed parol agreement in effect a reformation of written contract, and complete satisfaction, which relieved defendant from liability for breach of contract. Id. Okl. St. 1893, c. 16, art. 5, § 7. Neverman v. Bank of Cass County, 14 Okl. 417, 78 P. 382. Wilson's Rev. & Ann. St. 1903, § 829. Unexecuted parol modification of contract to sell land unenforceable. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118.

20. Civ. Code S. D. § 1287. Plaintiffs estopped to maintain action for loss due to failure of defendant to keep buildings insured where such failure was due to their own objections. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24. Complaint held to set forth but two causes of action, one on a quantum meruit for services rendered to deceased, and the other for breach of a contract between plaintiff's father and deceased for plaintiff's benefit. Cooper v. Claxton [Ga.] 50 S. E. 399.

21. Contract between plaintiff and decedent made after the former became of age held not a renewal of a former contract between the latter and plaintiff's father providing that plaintiff should work for decedent until he became of age, since it was between different parties and the services under the first contract had been fully performed. Cooper v. Claxton [Ga.] 50 S. E. 399.

22. Indorsement of note signed by others held not a renewal of former note on which indorser was primarily liable. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396. Allegations that note sued on was given in renewal of existing indebtedness not sustained by proof of indorsement of note. Id.

23. See 3 C. L. 835.

24. Note merely evidence of debt, and when default is made in payment, creditor may sue upon the original demand and bring note into court to be delivered up on the trial. Hildebrant v. Fallot, 92 N. Y. S. 804. See Negotiable Instruments, 4 C. L. 787, for a full discussion of this question.

25. See 3 C. L. 836.

26. Arbaugh v. Shockney, 34 Ind. App. 268, 71 N. E. 232, rehearing denied 72 N. E. 668. One engaged in the commission business having a nonassignable contract with a telegraph company for the furnishing of board of trade quotations puts an end thereto by selling his business. Sullivan v. Chicago Board of Trade, 111 Ill. App. 492. Petition alleging that plaintiff's employe was injured by defect in premises, which defendant had failed to repair as he had agreed, and had recovered judgment against plaintiffs which they seek to recover against defendant, is not found on the personal injuries to the employe, but on the breach of the contract to which the five-year statute of limitation applies. Altsheler v. Conrad, 26 Ky. L. R. 538, 82 S. W. 257. Delays in offering to pay rental under an oil lease held not to render contract absolutely null. Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 38 So. 932. Held, that there was no breach of agreement to pay for services by will until promisor's death, so that limitations did not begin to run until that time. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27. Where plaintiff contracted to secure insurance for defendants at a less rate than he knew the company would issue policies for, of which fact defendants were ignorant, they were not guilty of a breach of contract in notifying him, on discovery of the fact before policies were issued, that they would not accept them. Wyeth v. Curtis, 91 N. Y. S. 20. Refusal of defendant to give plaintiff necessary data held breach of contract whereby he was employed as attorney to collect certain claims against the government. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917. Evidence in action for breach of contract to remove a building within a certain time held to sustain judgment for plaintiff. Hamburger v. Hellman, 92 N. Y. S. 1067. In action for breach of contract of employment, evidence held to show that plaintiff was discharged for sufficient cause. Anderson v. Block, 93 N. Y. S. 532.

Breach: Evidence held to show that but three carriages were furnished to defend-

Repudiation.[27]—If one party to a contract to be performed in the future announces his intention not to perform, the other may, if he so desires, elect to treat such announcement as a breach and sue at once therefor.[28] The repudiation must, however, be absolute and unequivocal, go to the whole of the contract, and be accepted and acted upon by the other party.[29] A party has no rights under a contract which he has repudiated.[30]

One may treat a contract as abandoned by the nonperforming party when failure or refusal to perform substantially deprives the innocent party of some benefit that he would have otherwise derived.[31]

(§ 6) *B. Acceptance and waiver.*[32]—Fraud in procuring a contract is waived by a party performing after knowledge thereof.[33] So, too, one who permits another to rely on a contract to his detriment cannot thereafter avoid it for indefiniteness.[34]

ant instead of six. Hummel v. Ackerman, 93 N. Y. S. 555. Fact that defendant, for whom plaintiff furnished carriages at a funeral, demanded and received from a relief committee money to pay for six, which number plaintiff claimed to have furnished, held not to defeat defense that but three were furnished, where he offered to return excess to committee. Id. Evidence in action to reciver money paid under contract in regard to sale of dredge alleged to have been breached by defendant and rescinded by plaintiff, held sufficient to go to jury, and motion for directed verdict properly denied. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. Evidence held to show breach of contract by street railway company to operate its line for twenty-five years. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. Plaintiff's evidence in action on contract requiring defendant to form a corporation and issue a certain number of shares of stock to plaintiff and others held sufficient, if uncontradicted, to show violation of contract, and hence it was error to grant nonsuit, though there was no proof to sustain allegation that defendant had issued the shares to himself. Grant v. Walsh, 36 Wash. 190, 78 P. 786. A mere request by one of the parties thereto for the alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a binding contract, is not a breach thereof, giving right of rescission thereof or action thereon. Turner v. McCormick [W. Va.] 49 S. E. 28. In action for damages by contractor for extra expenses incurred by him in repairing crib for water pipes, injuries to crib held due to breach of contract by city by failure of city engineer to properly designate place where it was to be sunk. O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W. 963.

27. See 3 C. L. 836.

28. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. Plaintiff's repudiation of contract held to release defendant from further performance. Arbaugh v. Shockney, 34 Ind. App. 268, 71 N. E. 232, rehearing denied 72 N. E. 668. May also elect to keep it still in force. Hence mere announcement not of itself a breach unless other party elects to treat it as such. Supreme Council A. L. H. v. Lippincott [C. C. A.] 134 F. 824. Payment of assessments after reduction of amount of plaintiff's benefit certificate held election not to rescind. Id.

29. A mere renunciation of an executory contract by one of the parties thereto, which is retracted within a few minutes thereafter, and before any declaration has been made or act performed by the other party in respect to such renunciation, and before any change in the situation of the parties or the subject-matter of the contract has taken place, does not ordinarily constitute a breach. Sale of stock of merchandise. Swiger v. Hayman [W. Va.] 48 S. E. 839.

30. Where vendee under executory contract for sale of land abandons contract and refuses to comply with its terms, vendor, after electing to sue for damages for breach and after time when conveyance was to have been made, may mortgage land without regard to the contract. Harmon v. Thompson [Ky.] 84 S. W. 569.

31. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307.

32. See 3 C. L. 839. See, also, Building and Construction Contracts, 5 C. L. 455. As to waiver of provisions in insurance policies, see Insurance, § 16c, 4 C. L. 200.

33. Party performing after knowledge that contract was procured by false representations, or who, without necessity, completes performance and accepts contract price, waives fraud. Baltimore & O. R. Co. v. Jolly Bros. & Co., 71 Ohio St. 92, 72 N. E. 888. Where the evidence shows that plaintiff after becoming fully informed in regard to the facts constituting the alleged fraud, continued to act with defendant in attempting to negotiate a sale of land in accordance with the contract, he is estopped to subsequently rescind on the ground of fraud. Carlock v. Sweeney [Tex. Civ. App.] 82 S. W. 469. The fact that there was fraud or illegality in the organization of a corporation cannot be set up to defeat its right to enforce a contract by one who receives and retains the benefits thereof. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008; Bossert v. Jarvis Adams Co. [C. C. A.] 135 F. 1015.

34. Where vendor permits vendee to remain in possession in reliance thereon, to make payments on purchase price, and to permanently improve land, he is estopped from thereafter claiming that contract is

The provisions of a written contract may be waived by participation in or assenting to acts done in disregard of it.[35] Thus, an absolute and unconditional acceptance with knowledge of all the facts is a waiver of any deficiency in the

invalid because indefinite as to time of payment. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792.

35. Evidence held to show waiver: Of provision for joint supervision of construction of party wall and of strict performance in other respects. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. Of provision in contract for shipment of horses requiring claims for injuries to be presented to the general freight agent of the carrier. Wabash R. Co. v. Johnson, 114 Ill. App. 545. Of written notice of termination of contract of employment. Arbaugh v. Shockney, 34 Ind. App. 268, 72 N. E. 668. See, also, Id., 71 N. E. 232. Of provision that continued use of threshing outfit after four days' trial should constitute an acceptance. Westinghouse Co. v. Meixel [Neb.] 101 N. W. 238. By defendant of right to performance of option to purchase property within time limited, so that he could not terminate the negotiations continued after the expiration of the option without previous notice. Henion v. Bacon, 100 App. Div. 99, 91 N. Y. S. 399. Of right to rescind contract for sale of land for failure to make payments when due. Kuhn v. Skelley, 25 Pa. Super. Ct. 185. Of provisions in building contract requiring extra work and materials to be ordered in writing, and that the compensation therefor should be estimated at the rates fixed by the contract for similar work, and each party held estopped by his acts from enforcing them against the other. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. One furnishing logs to another to be cut, knowing that they cannot be cut until after the performance of another contract, cannot recover damages caused by delay incident to the performance of the latter contract. Crawford v. Thomas [Ark.] 86 S. W. 285. The right to object that plaintiffs purchased tomatoes for others than defendants in violation of the contract is waived by failure to repudiate the contract until after purchases and shipments have been made by defendants, where plaintiffs had knowledge of the facts before that time. Massey v. Greenabaum Bros. [Del. Super.] 58 A. 804. Party for whom well was being bored cannot complain that work was not stopped at his request when water was reached, where he deferred to opinion of superintendent that supply was insufficient and allowed him to continue work without objection. Council v. Teal [Ga.] 49 S. E. 806. This is true though sufficient supply of water was subsequently obtained at same depth in another well near at hand. Id. A party cannot evade payment of his proportion of the cost of a party wall on account of an apparently inadvertent deviation from the contract of which he, through his representative, had knowledge in ample time to remedy the same. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. One accepting and retaining a report of a sale of goods by a broker without objection cannot thereafter repudiate the sale because report differs from its acceptance of offer. Must object within reasonable time. Eau Claire Canning Co. v. Western Brokerage Co., 115 Ill. App. 71. A seller of a machine receiving and acting upon a notice of defects therein thereby waives his right to insist on the "written notice by registered letter" required by the contract. Advance Thresher Co. v. Curd [Ky.] 85 S. W. 690. Held, that defendant, by permitting plaintiffs' timber to be deposited in certain gulch on his land, waived strict compliance with provision requiring its removal within certain time. Watson v. Gross [Mo. App.] 87 S. W. 104. Failure of contractor to complete building on time held waived by conduct of owner in thereafter urging him to hurry completion of work, and owner estopped to resist payment on ground that time was of the essence of the contract. Crocker-Wheeler v. Varick Realty Co., 94 N. Y. S. 23. Defendant agreed to give builder ten per cent. of profits on sale of certain building if he would superintend its construction, he not to receive any benefit from any other source, and in case of his death before the completion of the work, his compensation to be a certain sum per day. After death of builder before completion defendant agreed to pay such per centage to widow. On subsequent discovery that builder had received commissions, half of them were returned by widow, and it was then agreed that percentage was to be paid, less the rest of them. Held, that defendant, by his subsequent conduct, waived other misdoings of the builder thereafter discovered, and widow was entitled to accounting under her agreement. Komp v. Luria, 92 N. Y. S. 569. Though, at time of first agreement, defendant had agreed to pay builder's widow ten per cent. of the profits on a building only in case it was sold during the winter, the second agreement, containing no such limitation, re-established the contract on the same basis as that with her deceased husband, and without such limitation. Id. Where contract required plaintiff to increase its capital stock and obtain bona fide subscriptions to a part of it, failure of defendant to object to a certain subscription on receiving notice thereof held to be an admission of its genuineness. Pacific Mill Co. v. Inman Paulsen & Co. [Or.] 80 P. 424. Provision requiring defendant to start mill and demonstrate that it could be successfully run, held waived by plaintiff taking immediate possession and demonstrating that fact himself. Livesley v. Muckle [Or.] 80 P. 901. Vendor held to have waived right to terminate contract for sale of realty for nonpayment of instalment of purchase price and right to forfeit amounts already paid. Weaver v. Griffith, 210 Pa. 13, 59 A. 315. Where, on default in performance of a contract for work, the person for whom it is to be done construes the contract as authorizing him to complete the work and deduct the cost of so doing from the contract price, notifies the other party of his intention to

time or manner of performance.[36] A condition precedent is not necessarily

do so, and does so with his acquiescence, he cannot prevent recovery by the contractor of the difference between the contract price and the cost of completing the work by contending that the contract is an entire one and there can be no recovery for part performance. Asbestos Mfg. Co. v. Burns, 24 Pa. Super. Ct. 84. Where for over a year payments for ice have not been made weekly as provided by the contract, the seller cannot make a sudden, unconditional, and absolute recission on that ground, the seller being solvent and not having willfully refused to pay bills overdue, but notice of seller's intention to insist on strict compliance with contract in future must first be given. Portland Ice Co. v. Connor, 24 Pa. Super. Ct. 493. Action of builder in giving materialman a note on account of order drawn in latter's favor held waiver of provision of order that it should not be payable until after completion of work, where note became due before completion. Potter v. Greenberg, 24 Pa. Super. Ct. 502. Railroad cannot set up provision that shipper shall attend to loading and unloading at his own risk where it assumed control of such matters. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Author entitled to royalty on "wholesale" price of her books accepting as full payment checks based on a price twenty per cent. below the publisher's list price, held to have acquiesced in construction so placed on contract, and payment operates as an accord and satisfaction. In re D. H. McBride & Co., 132 F. 285.

Acts held not to constitute waiver: Where defendant agreed to return certain bags filled with grain to plaintiff by certain date, and to pay or account for any remaining in his possession on that date, statement of account sent to defendant a year later charging him with bags, to which defendant made no reply, held to amount to nothing in evidence, where suit was not based on account stated, and defendant had previously stated to plaintiff that he did not intend to acquiesce in his statements by failure to reply to them. Curtin v. Ingle, 143 Cal. 354, 77 P. 74. Assignment of void street railway franchise held to pass no rights so that its acceptance by assignee, and dismissal by assignor of action against assignee based thereon, did not preclude him from urging assignor's nonperformance of other portions of contract of which assignment was a part, in order to defeat an action on such contract. Monarch v. Owensboro City R. Co. [Ky.] 85 S. W. 193. Notification to plaintiffs to continue deliveries of iron under contract after discovering that they were purchasing it from others on drop in price in violation of their agreement, made after refusal to receive any more, held only a waiver of such refusal and not to constitute new contract waiving plaintiffs' departure from the old one. Helper v. Mackinnon Mfg. Co. [Mich.] 101 N. W. 804. Contract for sale of oil required shipments to be made monthly as ordered by buyer. Seller informed buyer that if he did not comply with contract in giving orders for shipment he would ship without notice, and thereafter shipped one car which was paid for. Buyer did not reply to letter. Held, that seller had not waived buyer's obligation to comply with contract, since buyer could not rely on variation in its terms in absence of acquiescence. Kellogg v. Frohlich [Mich.] 102 N. W. 1057. Plaintiff does not waive his right to damages resulting from a default by the other party by completing the contract at the latter's request after notifying him that he will claim such damages and that he does not thereby waive them. Where contractor placed crib for waterworks in wrong place through mistake of city engineer, and notified city that he would hold it liable for damages and board of public works required him to proceed to complete the contract, which he did by putting crib at right place and repairing damages caused by mislocation under protest of any waiver of extra expenses incurred in so doing, held, that he did not waive right to recover such expenses. O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W. 963. Evidence held to show that check was not accepted in full for plaintiff's services rendered under contract to pay their reasonable value. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

36. One who voluntarily accepts goods delivered to him in part performance of a contract of sale is bound to pay for them, and cannot set up a breach of the contract in bar of the suit, though he may recoup the damages suffered by him in consequence thereof. Gibboney v. Wayne & Co. [Ala.] 37 So. 436. Evidence held to have so far tended to show that the fruit was of the kind and quality contracted for and that it was accepted by the buyer, as to warrant submission of question of acceptance to the jury. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084, afg. 112 Ill. App. 281. Instructions as to proper course of buyer who has accepted goods and afterwards discovered that they are not of the quality contracted for, held not inapplicable under the evidence. Id. Where vendee of goods sold at specific price refuses to take them, vendor may sell them to best advantage and recover difference between amount so received and contract price. Id. The acceptance of plumbing done under a building contract is a waiver of any defects therein. Burke v. Coyne [Mass.] 74 N. E. 942. Though time is of the essence of the contract, one cannot, after allowing the time for payments to pass, rescind and declare the other parties' rights forfeited without reasonable notice of his intention to do so. Contract for sale of land. Kuhn v. Skelley, 25 Pa. Super. Ct. 185. Applies equally whether time is or is not of the essence of the contract, or where performance is to be made within a reasonable time. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792. Is especially true where the contract is renewed and extended from time to time by mutual consent of the parties. Contract for sale of land. Id.

Acts held not to constitute waiver: Where, during time plaintiff was installing machines for defendant, the latter loaned

waived by the promisor's voluntary performance of acts which he might have postponed.[37]

An agreement extending the time for completion of the contract is a waiver of previous difficulties interposed by the other party, and an acknowledgment that the contract is not then completed.[38] A payment under protest is not a waiver of the right to compensation for a breach of the contract.[39] Extending the time of payment after the time when it is due by the terms of the contract is a waiver of the right to enforce a forfeiture for default in prompt payment.[40] Permitting performance after the time does not extend the time, but waives a complete performance.[41] The right to forfeit a contract for failure to make payments due thereunder is not waived by the acceptance of past due payments.[42] In an action for a specific amount of damage for an agreed sum resulting from a breach of a contract of employment, plaintiff is not required to prove that he actually performed any work thereunder.[43]

One refusing to perform [44] or objecting to the performance by the other party on a particular ground thereby waives all other grounds.[45]

(§ 6) *C. Excuses for breach.*[46]—Obvious and absolute physical impossibility of performance, apparent on the face of the instrument, renders the contract void.[47]

him money and was to hold all the machines as security therefor, the use by defendant of a part of them after he has rejected the whole outfit does not amount to an acceptance. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Owner of land may recover damages for defective construction of house thereon, though he pays contract price, goes into possession, and lives in it for eight months before discovering defect. Ludlow Lumber Co. v. Kuhlin, 26 Ky. L. R. 1185, 83 S. W. 634. Even if law requires discovery to be made within reasonable time, eight months not unreasonable. Id. Fact that picture of proposed church was hung in vestry held not to have constituted an acceptance of plans so as to preclude their rejection on the ground that they called for too expensive a building, where it did not appear that the vestrymen knew what the cost would be. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Where purchaser of sausages, which were to be dry enough for export, accepted them under supplemental agreement that seller would indemnify him in case they were not, such acceptance did not constitute a waiver of such provision. James v. Libby, 92 N. Y. S. 1047.

37. Indemnity contract. O'Connell v. New York, etc., R. Co., 187 Mass. 272, 72 N. E. 979.

38. Hence plaintiff's letters complaining of such difficulties are incompetent. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

39. Rent paid under protest because of failure of lessor to comply with covenant of lease cannot be recovered back, but such payment is not a waiver of right to compensation for the lessor's breach. Oliver v. Bredl, 25 Pa. Super. Ct. 653.

40. Claudius v. West End Heights Amusement Co. [Mo. App.] 84 S. W. 354.

41. Pitts v. Davey, 40 Misc. 96, 81 N. Y. S. 264. The party not in default may, nevertheless, terminate the contract, or suffer it to go on and claim damages. Id. Where plaintiffs agreed to take certain cement from defendant in weekly quantities, and thereafter notified him not to deliver, but subsequently requested him to resume delivery, which he did, he was not liable, when ultimately he became unable to complete, for the extra cost of cement which plaintiffs had to buy elsewhere, but was entitled to recover, at contract price, for deliveries made after default. Id.

42. A forfeiture of a contract by failure to pay royalties due thereunder held not waived by defendant's acceptance of royalties in arrears at the time when he gave notice of termination. Weber v. Mapes, 98 App. Div. 165, 90 N. Y. S. 225.

43. Contract for employment of attorney to collect certain claims against the government for a percentage thereof, breached by employment of another attorney and refusal to furnish necessary data. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917.

44. Contract for exchange of realty. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Notice of election to resell stock to defendant in accordance with contract held sufficient, particularly as contract was repudiated by him solely on other grounds. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. Where purchaser refuses to pay for fruit solely on ground that it was frozen cannot afterwards defend on ground that quantity sent was in excess of that ordered. United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170.

45. Sale of bananas. Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281, afd. 211 Ill. 539, 71 N. E. 1084.

46. See 3 C. L. 840.

47. Contract made on April 28th to convey land on April 23d. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796. Signature by ward to contract on former date could not operate as ratification of guardian's promise to convey land on or before latter date. Id.

As a general rule, one who unqualifiedly undertakes to do a particular thing is not excused because performance is prevented by the act of God or a vis major,[48] or is rendered impossible by some unforseen contingency;[49] but this rule does not apply where the parties have expressly stipulated to the contrary,[50] nor where the contingency is of such a character that it cannot reasonably be supposed to have been in the contemplation of the parties, though the general words used are large enough to include it.[51]

Though the contract provides that a party shall not be liable if performance is prevented by hinderances beyond his control, he is nevertheless bound to use all reasonable and proper effort to overcome any hinderances which may arise,[52] and, of course, is not thereby relieved from performance by a hinderance of his own making.[53]

Where a party is prevented by the visitation of God, as by sickness or death, from performing in full, he or those in succession may recover the amount of the compensation promised, subject to the deduction of such loss or damage as is sustained by the other party.[54]

If the contract is of a continuing character, or to be performed at a future time and is dependent upon the continuing existence of a particular person or thing, or the continuing ability of the obligor to perform, subsequent death, de-

48. Extinguishment of stake light by wind, caused by its improper adjustment, not due to act of God so as to relieve contractors from liability for injuries to third parties. Harrison v. Hughes [C. C. A.] 125 F. 860.

49. Labaree & Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565. Where plaintiff absolutely guaranteed to install a heating plant which would heat a house to a certain temperature and effect a saving of fuel, held, that he was not excused for a failure to do so because a flue in the building was too small and that the building was difficult to heat by reason of its construction, particularly where he had knowledeg of those facts or could have acquired it. White v. Von Waffenstein, 94 N. Y. S. 257.

50. The failure to deliver goods sold within the time prescribed by contract is not excused by act of God by reason of the fact that the vessel in which they were shipped was prevented from sailing because storms rendered it impossible to cross the bar, where they could have been transported by land and there was nothing in the contract permitting transportation by water to exclusion of transportation by land. Action for damages. Fleishman v. Meyer [Or.] 80 P. 209. Revolution in port of vessels discharge rendering it practically impossible to receive cargo with dispatch contemplated, either because of intrinsic danger incident to unloading or inability to secure necessary men, held to constitute an unavoidable hindrance and to excuse performance and relieve charterers from liability under provision requiring them to pay demurrage for detention by default of themselves or their agents. Burrill v. Crossman [C. C. A.] 130 F. 763. Erroneous refusal of collector of port to grant clearance to vessel carrying lead on ground that it was contraband of war, held not to constitute a "restraint of prices, rulers, or people" within meaning of bill of lading so as to excuse nonperformance of agreement to ship it on that vessel. Northern P. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269.

51. As where board of health refused to allow coffee to be landed at certain port as required by the contract. Labaree & Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565. Where it becomes necessary to appoint an administrator for an estate, a previous agreement to settle it without administration becomes inoperative in so far as it is executory, and rights of parties are to be determined as though it had not been made. Bennett v. Morris, 111 Ill. App. 150. Refusal of deputy collector of port to permit vessel to sail with certain freight because it was contraband of war held no excuse for breach of contract to ship it by that vessel, where it was made with knowledge that difficulties might arise by reason of the character of the freight. Northern P. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269.

52. Under contract for delivery of coal, defendants held to be excused from performance if prevented by inability to obtain cars from only line of railroad reaching their colliery, provided they put forth all reasonable and proper exertion to obtain them even to the extent of paying any additional necessary expense, and made deliveries to all customers ratably. Jessup & Moore Paper Co. v. Piper, 133 F. 108. Not relieved from liability if made shortage an excuse for demanding an increased price, and gave preference to such customers as paid it. Id.

53. If made additional contracts to ship coal after discovering shortage of cars and thereby lessened their ability to ship to plaintiff, would be liable to that extent. Jessup & M. Paper Co. v. Piper, 133 F. 108.

54. Contract for division of crop raised by lessee. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

struction, or disability will excuse performance.[55] Thus, when complete performance of an entire contract to do work upon another's building or other structure is prevented by its total destruction, completion is excused and the contractor may recover pay at the contract price for the portion of the work done.[56] So, too, where a verbal contract contains no guaranty that the work to be done under it shall secure a particular result, and such result may become impossible from the nature of things, the law implies a condition that both parties may be excused from their obligations when it becomes reasonably certain that a continuance would be useless.[57]

Performance is excused when rendered impossible by act of law,[58] and the rule applies equally whether the law is in force when the contract was made[59] or is enacted thereafter.[60] In such case, however, the parties are bound to make a tender of the best possible performance under the circumstances.[61]

The mere fact that performance would render a party liable in damages to third persons is no excuse.[62]

(§ 6) *D. Sufficiency of performance.*[63]—A contract must be fairly performed according to its terms.[64] Ordinarily complete performance is necessary

55. Where person having right to use canal boats owned by canal company accepts note as collateral to agreement whereby he gives maker right to use boat, and maker agrees to pay certain sum after each trip, and canal is abandoned, maker is not liable for any further instalments. Wertz v. Klinger, 25 Pa. Super. Ct. 523.

56. Halsey v. Waukesha Springs Sanitarium [Wis.] 104 N. W. 94. Is an implied warranty that it will continue to exist. Young v. Chicopee, 186 Mass. 518, 72 N. E. 63. On destruction of building to be repaired, the contractor may recover for the amount of contract work done which had become so far identified with the structure that, but for its destruction, it would have inured to the owner as contemplated by the contract. Id. Thus, where contract for repair of bridge provided that compensation should be a certain sum per thousand feet of lumber used and that no work should be done until material for half the work should be upon the job, held that, on destruction of bridge by fire before completion, plaintiff was entitled to recover for lumber actually used but not for that which he had distributed along the bridge but not used. Id. See, also, Building and Construction Contracts, 5 C. L. 455.

57. Contract to drill well held not to guaranty results and it would be fully performed when sufficient amount of water had been obtained, or when it became reasonably certain that further drilling would be useless. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795.

58. Labaree Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565. Refusal of deputy collector of port to permit vessel to sail while carrying lead because it was contraband of war held no excuse for breach of contract to ship it by that vessel, when contract was not unlawful when made and was not rendered so by a subsequent legislation, and was made with knowledge that such difficulties might arise. Southern P. R. Co. v. American Trading Co., 195 U. S. 439, 49 Law. Ed. 269.

59. Defendants excused from performance of contract to deliver certain coffee sold to plaintiff at a specified port at a certain time, where the board of health refused to allow it to be landed because coming from infected port. Labaree & Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565.

60. Passage of law making it necessary for corporation to abolish expense fund from which plaintiff's compensation was to be paid, held to release defendant, particularly where contract provided that it should have right to change its method of doing business when required to do so by law. Wood v. Iowa Bldg. & Loan Ass'n, 126 Iowa, 464, 102 N. W. 410.

61. Defendants held to have made such tender where they offered to transport coffee, which board of health had refused to allow to be landed, to any point designated by plaintiff, on assumption and under bona fide belief that board would allow it to be landed elsewhere, though, as a matter of fact, they would not have done so. Labaree & Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565. Plaintiff could not contend that tender was insufficient because it could not have been performed where they did not refuse it on that account, but because they elected to stand on the liberal terms of the contract and insist on a strict performance. Id. Evidence held not to show that defendants should have made further efforts to induce board to change its attitude. Id.

62. Defendant is not entitled to refuse performance of a contract to manufacture and sell certain machinery on the ground that outstanding patents would be infringed thereby. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

63. See 3 C. L. 841.

64. Any deviation therefrom is at the risk of the party making it. Building contractor has no right to substitute earthen sewer pipes for iron ones of larger dimensions called for by the contract, and expert evidence that those used are preferable to those required is properly excluded.

to enable one to recover on the contract,[65] but in the case of building or construction contracts, a substantial performance is sufficient, provided the contractor acts in good faith.[66]

One who performs work in accordance with the terms of the contract is not liable for damages resulting from faults in the contract itself.[67]

In the absence of a stipulation to the contrary and where no element of special trust and confidence is involved, the promisor is not bound to perform the contract himself, but may do so through the medium of a third person.[68]

A stipulation in a contract that a party for whom work is to be done or to whom an article is to be furnished may reject the work or article unless it is satisfactory to him, gives him the right to reject it as unsatisfactory in any respect if he acts in good faith, but does not authorize him to reject it arbitrarily,[69] that is, he must find some substantial fault in the work or article itself, and not merely a reason for changing his mind regarding the project he had in view, and for which he ordered the work or the article.[70] The same is true where performance is to be to the satisfaction of a third party.[71]

If there has been a novation of parties promisor, the promisee cannot object that the original promisor failed to perform.[72]

Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21. Evidence in action on contract for recovery of commission on sale of defendant's realty held to show that contract was fully performed and commission fully earned. Storer v. Markley [Ind.] 73 N. E. 1081. Plaintiffs contracted to obtain options for defendants to purchase realty in case they should elect to do so upon examination, and entered into negotiations with third person to obtain such an option and brought matter to defendants' attention. Held, that on defendants' purchasing land before formal option was obtained, they they were liable to plaintiffs as upon a full performance. Emerson v. Nash [Wis.] 102 N. W. 921.

65. See post, § 9a.

66. See Building and Construction Contracts, 5 C. L. 455. Substantial compliance with the terms of a contract of subscription to a railroad, made for the purpose of procuring its extension, is sufficient to entitle the railroad to collect the subscription. Instructions approved. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

67. Contractor not liable for damages caused by tamping concrete as required by the contract, though contract was faulty in requiring such tamping to be done, unless he failed to do the tamping in the way it should have been done. Novelty Mill Co. v. Heinzerling [Wash.] 81 P. 742. Question whether piers were weakened by reason of default or neglect on contractor's part held for the jury under the evidence. Id.

68. Contract to bore well. Council v. Teal [Ga.] 49 S. E. 806. In action on contract for services in procuring reduction of fire insurance rates, where plaintiff showed that the reduction had been procured and that defendant had received the full benefit provided for in the agreement, held immaterial that he had procured the reduction through another. Prager v. Levy, 92 N. Y. S. 236. Evidence held to justify refusal to allow additional $100 to plaintiff. Id. Where a contract to pay plaintiff the reasonable value of his services in securing the sale of goods did not stipulate that he was to be the sole factor in accomplishing the sale, he was entitled to recover, though he did not do all that was done to promote the sale. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

69. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Any dissatisfaction whether reasonable or unreasonable, authorizes him to refuse to accept, provided only that he acts in good faith. Contract to manufacture printing presses. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Where contract provides that work is to be paid for when satisfactorily done, the contract price is not collectible until the person for whom the work is done is satisfied, provided he acts reasonably. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

70. Vestry of church held to have right to reject plans for church on the ground that they called for too expensive a building. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Evidence held not to show bad faith in rejection of plans. Id. Rejection of plans on ground that building prices were unreasonable, and that it would be expedient to postpone the work would not relieve owner from liability. Id.

71. Under a contract for a building loan providing for advancements as the work progressed, provided no liens existed having priority over the mortgage, as to which fact the opinion of an attorney should be conclusive, his adverse opinion, honestly entertained, relieves the defendant from the obligation to make such advances. Glidden v. Massachusetts Hospital Life Ins. Co. [Mass.] 73 N. E. 538. For interpretation and effect of provisions in building contracts requiring a certificate of performance by an architect or other person, see Building and Construction Contracts, 5 C. L. 455.

72. Agreement to support parent in consideration for conveyance. Brumback v. Chowning, 26 Ky. L. R. 917, 82 S. W. 974.

(§ 6) *E. Rights after default.*[73]—A party subjected to injury by breach of a contract is required to make reasonable exertions to render it as light as possible,[74] and if he negligently or willfully allows his damages to be unnecessarily enhanced, the increased loss falls on him.[75] The burden of proving that the damages could have been prevented rests upon the party guilty of the breach.[76]

§ 7. *Damages for breach.*[77]—The subject of damages is fully treated elsewhere.[78]

§ 8. *Rescission and abandonment. A. By agreement or under special provisons of the contract.*[79]—The parties to a contract may provide for its discharge or annulment and fix and limit the rights of each in the event of a failure to perform.[80] If a remedy is fixed by the contract itself it is exclusive.[81] Though a

73. See 3 C. L. 843.

74. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167; Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Where a buyer of goods, who has accepted them, refuses to remove them from the cars, the seller is not bound to exercise any further control over them or to receive the proceeds of their sale, but may recover the contract price. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084, afg. 112 Ill. App. 281. Where building contractor does not abandon work but in good faith endeavors to fulfill the contract, the owner is not bound to take charge and complete the work himself to lessen the amount of damage he may claim for delay. Leghorn v. Nydell [Wash.] 80 P. 833. Can charge the other party only with such damages as he could not, with reasonable expense and exertion, prevent. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Buyer of distillery slop for feeding purposes not precluded from recovering damages for breach of provision requiring seller to deliver it in suitable troughs and tubs because he did not himself erect proper appliances, when he relied on repeated promises of the seller to do so. Id. Fact that injured party relied on such promises unreasonably long and thereby suffered a greater loss than he reasonably should have does not prevent recovery of damages sustained before he was bound to take the necessary steps to save himself from loss. Id. Whether he did so a question to be determined on the evidence. Id.

75. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. Bidder for government supplies failing to execute contract cannot be held liable for difference between contract price and price paid government printer three months after default, where articles could have been purchased in open market for several weeks after default at less than the contract price, especially where it does not appear that the price subsequently paid was market price. United States v. Withers [C. C. A.] 130 F. 696.

See, also, Damages, 3 C. L. 997.

76. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

77. See 3 C. L. 844.

78. See Damages, 3 C. L. 997.

79. See 3 C. L. 844.

80. The right to cancel a contract in case of an "emergency" refers only to some unforeseen event or unexpected combination of circumstances, which, in view of the business to which it related, would furnish a reasonably substantial ground for cancellation, and not to a mere whim or wish. Does not render contract lacking in mutuality. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Provision giving defendant right to meet lower quotations if received, or to cancel such portions of order as had not been taken in work, and likewise the balance of the contract, held not to make right to cancel dependent on defendant's wish, but on decline of prices, evidenced by his receipt of lower quotations and an election on his part not to meet them. Id. Passage of act making it necessary for corporation to abolish expense fund held to release it from contract employing plaintiff for a compensation to be paid out of such fund, which provided that defendant should have the right to change its method of doing business when required to do so by law. Wood v. Iowa Bldg. & Loan Ass'n, 126 Iowa, 464, 102 N. W. 410. Either in original contract or by subsequent agreement. Schwab v. Baremore [Minn.] 104 N. W. 10. Contract for sale of realty held to have become void under its terms where defendant was unable to convey good title. Id. Defendant held to have right to rescind contract for purchase of threshing machine under provision authorizing rescission in case of breach of warranty. Robinson & Co. v. Ralph [Neb.] 103 N. W. 1044. Under contract for production of play providing that defendant could terminate it on plaintiff's failure to pay royalties, he was entitled to do so though plaintiffs had arranged with their agents to remit royalties, which the latter neglected to do. Weber v. Mapes, 98 App. Div. 165, 90 N. Y. S. 225. Plaintiffs held not entitled to recover on railroad contract because of provision that company might annul it without giving them any claim for damages. Baltimore & O. R. Co. v. Jolly Bros. Co., 71 Ohio, 92, 72 N. E. 888. Under contract to furnish supplies to government in such quantities as might be ordered from time to time, providing that on contractor's failure to furnish them they might be ordered in open market, and difference between price paid and contract price should be charged to contractor, and authorizing the postmaster general to annul contract for failure to perform and that exercise of such right should not impair right to recover damages for breach, held that such an annulment did not affect right to thereafter purchase supplies to fill orders previously given and not filled, and to re-

contract provides that a failure to make payments at a specfied time shall render it null and void, release both parties from further liability thereunder, and work a forfeiture of the amounts previously paid thereunder, it is generally held that a mere failure to make a payment does not terminate the contract in the absence of an election on the part of the innocent party to enforce the forfeiture.[82] In order that a party may take advantage of a provision giving him the option of rescinding before a specified date on return of all that he has received, he must notify the other party of his disaffirmance, and return or offer to return the property within the time limited by the contract.[83] A party cannot revoke authority conferred by one part of a contract which he is not entitled to revoke as a whole.[84]

The right given by a contract for services to revoke it at any time does not include a right to deprive the other party of compensation for services already rendered under it,[85] and in such case he may recover on quantum meruit a reasonable compensation therefor.[86]

A contract may be rescinded at any time by mutual consent of the parties [87]

cover difference between cost and contract price. Sparhawk v. United States [C. C. A.] 134 F. 720, rvg. In re Staever, 127 F. 394.

81. Schwab v. Baremore [Minn.] 104 N. W. 10. Under contract for sale of realty providing that it should become void in case the title was not good and could not be made so and that the part of the purchase price already paid should in that event be refunded, where vendor's wife refuses to join in conveyance vendee is not entitled to per- a conveyance of all land except homestead formance to extent of vendor's ability, viz., and subject to wife's one-third interest in remainder, nor to damages for failure to perform, in the absence of fraud. Id. Stockholder in corporation sold his stock to director on latter informing him that option had been given for sale of all the corporate property, and on understanding that if sale should not take place he could reassert his right to the stock. After expiration of option director offered to return stock, but offer was refused, and stockholder filed bill praying that director be required to pay him difference between selling price and actual value of stock, or that he be given option to be reinstated as stockholder, alleging that sale was induced by false representations. Held that complainant, having refused offer to return stock in accordance with the agreement, could not maintain the suit. A provision for the termination of a newspaper carrier route contract held not to prevent either party from terminating it as his election subject to liability to the other for such damages as he may have sustained by reason of the fact that it was not done in the manner provided. Provision for arbitration held not to apply to right to terminate contract but only to ascertainment of amount to be paid on its termination. Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 P. 737.

82. Will not be held to ipso facto terminate it unless the intent of both parties to that effect be made apparent by clear, precise, and unequivocal language. Weaver v. Griffith, 210 Pa. 13, 59 A. 315. The presumption is that such forfeiture clause is for the benefit of the vendor, and enforceable at his election, and in case he fails to enforce it and waives it by his conduct he thereby keeps alive his obligation to sell. Id.

83. Contract for purchase of certain mining stock, a certain part of the purchase price being paid down which payment is to be regarded as giving the parties an option on the property until a specified date, at which time they may either pay the balance or return all that they received. Guss v. Nelson, 14 Okl. 296, 78 P. 170. Rule applies though such other party resides in a different state. Evidence held to show that other party was not notified. Id.

84. Authority of architect to decide as to meaning of specifications given by building contract. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

85. New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550.

86. Cannot recover on contract as there has been no breach. New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550.

87. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Return of goods to agent authorized to receive them and a receipt thereof by him before suit, held not of itself to effect a rescission, there being nothing to show an agreement or a right or election of the purchaser to rescind. Keystone Mfg. Co. v. Hampton [Ala.] 37 So. 552. Contract whereby brick mason agreed to do brick work for per centage of cost of labor held rescinded by subsequent agreement. Hughes v. Brennan Construction Co., 24 App. D. C. 90. Where time is of the essence of a contract for the sale of land, the vendor may exercise the reserved right to rescind on default by the vendee. Civ. Code, 1895, § 3675. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. Evidence held to support finding that contract was rescinded by mutual consent of all the parties and plaintiffs entitled to recover money paid by them, they having returned what they had received. Williams v. Peterson [Minn.] 103 N. W. 722. Evidence sufficient to sustain finding that contract for bailment of mill had been canceled and that mill had been turned over to defendants as their property. Cox v. Burdett, 23 Pa. Super. Ct. 346. Letter written by plaintiffs to defendants held admissible on question whether original agreement of bailment of mill had been canceled

unless third persons have acquired vested rights thereunder, in which case their consent is also essential.[88]

An executory parol contract may be discharged by word of mouth.[89] An executory contract for the sale of land, whether written or oral, may, in equity, be waived or rescinded by parol, provided that possession be given up or the writing be destroyed.[90]

A contract may be discharged by the parties thereto or the beneficiaries therein by an entirely new contract entered into by them with reference to the same subject-matter, the terms of which are co-extensive with, but repugnant to, the original contract.[91] There must, however, be a meeting of the minds of the parties.[92]

(§ 8) *B. Occasion and right to rescind or abandon without consent.*[93]—A contract may be rescinded for fraud, misrepresentation, or undue influence,[94]

and mill had been turned over to defendants as their property. Id. An agreement that all rights of the parties under a former contract shall cease and determine releases a right of action thereunder. Swarts v. Narragansett Elec. Lighting Co., 26 R. I. 388, 59 A. 77. This is true though second contract stated that first was abrogated in consequence of a notice theretofore given, and such notice was of itself ineffectual to work such abrogation. Id., 26 R. I. 436, 59 A. 111. Defendant held to have been released from agreement to purchase all his beer from plaintiff on repaying money loaned him and releasing plaintiff from liability as his surety. Seattle Brewing & Malting Co. v. Jensen, 36 Wash. 462, 78 P. 1007. Consent must be mutual. Contract for transportation cannot be rescinded by one party merely notifying other of his intention to rescind. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Goods having been received by railroad company for transportation and the freight paid for under their classification, it could not reclassify afterwards and charge a different rate. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89.

88. Insured cannot surrender life policy for cancellation without beneficiary's consent, unless right to do so is specially reserved in the policy. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200. Proof of abandonment is sufficient evidence of the existence of such agreement unless the contrary is shown. Wilson v. Maxon [W. Va.] 49 S. E. 123. Any circumstance or course of conduct from which an agreement to put an end to the contract can be clearly deduced will amount to a rescission. Marsh v. Despard [W. Va.] 49 S. E. 24. The uncorroborated oral evidence of a party may be sufficient proof of the oral rescission of a written contract, but in such case the evidence must be clear, cogent, and convincing as against the party denying the rescission and seeking to sustain the writing. Evidence held to show rescission of written agreement as to division of profits and commissions from sale of realty, and the substitution of a different oral agreement therefor. Cooke v. Cain, 35 Wash. 353, 77 P. 682.

89. Wilson v. Maxon [W. Va.] 49 S. E. 123.

90. Must be something done by way of rescission or waiver. Marsh v. Despard [W. Va.] 49 S. E. 24.

91. Execution and acceptance of leases held to have put an end to contract of sale of land. Marsh v. Despard [W. Va.] 49 S. E. 24. Provision in contract authorizing agent to sell large tract of land, held to have become a part of contract, authorizing him to sell another tract by reference to former one, and the subsequent merger of both into one. Campbell v. Beard [W. Va.] 50 S. E. 747. Execution of new contract does not work abrogation of former one unless the latter covers the entire subject-matter of the former, or two are so inconsistent that both cannot stand. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710. Warranties in contract for sale of stallion that he was sound and a good foal getter held not abrogated by note subsequently given for part of purchase price reciting that it should be void if at end of two years he should not be in a "good serviceable condition as a stallion, and sound as he now is." Id.

92. Entire transaction must be looked to to determine the intention. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710. Taking of notes for balance and pinning them to contract with certain indorsements held not to abrogate the promise to pay made in contract. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130.

Contract to supply borough with water held not to have been rescinded or abandoned by company's offer to enter into a new one upon the same terms as the old, except as to the price, which offer was not accepted, nor was company thereby estopped to sue on old contract. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353.

93. See 3 C. L. 844.

94. See Fraud and Undue Influence, 3 C. L. 1520. The right to rescind for fraud is one accruing to the parties under the law and is separate and distinct from any right of rescission given by the contract. Guss v. Nelson, 14 Okl. 296, 78 P. 170. To rescind an executed contract in equity on the grounds of fraud, such fraud must be clearly alleged and fully sustained by proof if denied. Wilson v. Maxon [W. Va.] 49 S. E. 123. A party to a written contract cannot have it rescinded on account of representations made by the agent of the other party, a corporation, when there is a printed provision on the back of it that the company

accident or mistake,[95] duress,[96] or a failure of consideration in whole or in part through the fault of the other party.[97] On failure or refusal of one party to perform, the other may rescind the entire contract and demand to be restored to his former position,[98] but this rule does not apply where the party seeking to rescind has himself done some act justifying the other in refusing or delaying performance, or has failed to perform his part of the contract.[99] Where the contract is an entirety or there is but one consideration for a number of conditions, it must generally be rescinded as a whole if rescinded at all.[1]

will only be bound by representations and stipulations contained in the contract itself, and not by statements of any of its officers or agents. Butler v. Standard Guaranty & Trust Co. [Ga.] 50 S. E. 132.

95. See Mistake and Accident, 4 C. L. 674.

96. See Duress, 3 C. L. 1147.

97. Civ. Code, § 1689, subd. 2. Refusal of defendant to receive any more payments on debenture contract, and statement that it had decided to go out of business, held failure of consideration entitling plaintiff to rescind and recover what it had paid. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090.

98. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Where in ejectment plaintiffs proved that defendant went into possession under a written contract of purchase from plaintiff's grantors and had retained possession ever since, held that it was error to refuse to allow plaintiffs to prove a breach of such contract by defendant since it was essential for them to show a breach by him under such circumstances of negligence as showed an abandonment by him, after notice fixing a reasonable time for its performance, and since, if defendant had not lost his rights under the contract, it operated as an estoppel and a defense to the suit. Morris v. Billingsley [Fla.] 37 So. 564. Insubordination and disrespectful conduct on part of employe held to justify rescission of contract of employment. Parker v. Farlinger [Ga.] 50 S. E. 98. Evidence held to show that tender and demand for deed under contract for sale of realty were not in good faith so that purported rescission based thereon did not preclude decree for specific performance. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Mere fact that thereafter the owner of the hardware stock which was to be exchanged for the land sold part of it and added to it held not to prevent specific performance. Id. Evidence held to show rescission by plaintiff of contract for purchase of stallion on defendant's breach. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710. Evidence held to show willful and surreptitious breaches by defendant of contract for the exchange of land. Bales v. Roberts [Mo.] 87 S. W. 914. Evidence held insufficient to show intention on plaintiff's part to repudiate contract for exchange of land. Id. Orders for goods made at different times held not parts of same contract, so that failure of purchaser to pay for goods previously sold does not authorize seller to rescind. Southern Car Mfg. & Supply Co. v. Scullin-Gallagher Iron & Steel Co. [Tex. Civ. App.] 85 S. W. 845. Refusal of plaintiff to perform compromise agreement on his part held to have given defendant a right to rescind same, and he could not recover thereon for defendant's failure to perform. Benson v. Larson [Minn.] 104 N. W. 307. Contract whereby complainant agrees to make and deliver to defendant for certain period all castings required by it, each delivery to be paid for within sixty days thereafter, is an entirety, and entire contract may be terminated on defendant's failure to make one of such payments. Ross Meehan Foundry Co. v. Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167. Complaint held to allege cause of action for rescission of contract for raising alfalfa and feeding cattle. Hodges v. Price [Wash.] 80 P. 202.

99. Evidence held to show breach by failure to pay notes given pursuant to contract of sale law books. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Failure to pay installment due under building contract relieves contractor. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307. Defendant held entitled to terminate contract for performance of a particular "Comedy Act," where performance as given for him was materially different from that previously given and with respect to which defendant contracted. McLaughlin v. Hammerstein, 99 App. Div. 225, 90 N. Y. S. 943. Where defendant sold plaintiff a stallion under an agreement that another would be substituted for him in case the warranties in regard to him were untrue, held that on refusal of defendant to deliver such other stallion as agreed defendant was not confined to an action for damages, but might rescind and recover the amount paid and any damages which he had suffered. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710.

1. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Can be no partial rescission and a refunding of a part of the consideration, unless in an extreme case where there is no other possible remedy. Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910. Where one of the conditions of a settlement between plaintiff and defendant was broken, held that plaintiff was entitled to recover only the actual damages sustained by reason of such breach, and not that part of the whole consideration claimed to have been paid to secure the particular covenant broken. Id. Purchaser of oranges who sells a part of them and retains money received therefor has not effected a rescission. Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 P. 887.

As a general rule rescission is in toto and abrogates the contract completely, leaving the rights of the parties and the amount of damages, if any, to be determined by a court

(§ 8) *C. Time and mode of rescission or abandonment.*[2]—Since the remedy is largely equitable,[3] a party having a right to rescind must elect to do so within a reasonable time [4] and in some unequivocal manner.[5] He must restore [6] or offer to restore everything of value which he has received from the other party under the contract,[7] unless the latter is unable or positively refuses to do likewise,[8] or it seems probable that there will be nothing due him on final adjustment.[9] It is sufficient if one seeking to rescind for fraud tenders back the consideration in his petition.[10]

It is ordinarily sufficient if the other party is placed in substanitally the same position he occupied before the contract was made.[11] If it is impossible to restore

of equity rather than by the rescinded contract. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

2. See 3 C. L. 845.

3. For procedure in suits to rescind, see Cancellation of Instruments, 5 C. L. 500.

4. Guss v. Nelson, 14 Okl. 296, 78 P. 170; Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 P. 887; Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. The court having found that defendant fully performed his contract so that an action to rescind it would not lie, rejection of evidence to show that plaintiff was not dilatory in commencing the action is immaterial. Boyd v. Liefer, 144 Cal. 336, 77 P. 953. After recovery from intoxication. Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 A. 959. Where owner of lot agrees that owner of adjoining lot may insert beams in wall which he is about to build, with a provision that the covenant shall run with the land, he cannot declare the contract void ten years thereafter as against the grantee of the second lot unless he can show that the latter had notice of the invalidity of the agreement when he purchased. Immaterial that purchaser had no notice of agreement. Knappenberger v. Fairchild, 210 Pa. 173, 59 A. 986. Fraud. Rumsey v. Shaw, 25 Pa. Super. Ct. 386. Stockholders held prevented by laches and acquiescence from rescinding contract whereby they delivered stock to corporation, formed pursuant to unlawful combination, in return for its stock. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739.

5. Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 P. 887.

6. Civ. Code, § 1691. Green v. Duvergey, 146 Cal. 379, 80 P. 234. Original status must be restored, or an equivalent therefor must be provided in the contract or furnished by law. Civ. Code 1895, §§ 3710, 3711, 3712. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. Before vendor, on rescission of contract for sale of land, can recover the property sold, he must account for so much of the purchase money as has been paid and for any improvements made by the vendee which enhance the value of the land. Id. Illegality. McAllen v. Hodge [Minn.] 102 N. W. 707. Breach of warranty is no defense to an action for the price of a chattel sold, without a disaffirmance and an offer to return the chattel. Cluster Gaslight Co. v. Baker, 90 N. Y. S. 1034. Cannot rescind and retain any of the benefits. Guss v. Nelson, 14 Okl. 296, 78 P. 170; Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 A. 959. Where consideration for contract was a release from liability under former contract and surrender of bond to secure its performance, such release must be surrendered and bond restored. Id. See, also, Vendors and Purchasers, 4 C. L. 769.

7. Need only make a fair offer to return what he has received, and demand what he has parted with. If refused, it is sufficient if he proves such fact at the trial, and makes restoration in such manner as the court may direct. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. Evidence held to show offer to restore consideration and a demand that the other party return what it had received. Id. A party relying upon the rescission of a contract must tender a return of the property or security which was the subject-matter of the contract except in cases where it is entirely worthless or has ceased to exist. Fraud. Rumsey v. Shaw, 25 Pa. Super. Ct. 386. One cannot rescind sale for fraud without returning or offering to return what he has received. Affidavit of defense to note insufficient. Brian v. Merrill, 23 Pa. Super. Ct. 629. Evidence held to justify instruction that there was nothing for defendant to return. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

8. Civ. Code, § 1691, subd. 2. Where defendant positively refused to refund money received under debenture contract under any circumstances held that plaintiff was not bound to tender or offer to return contract prior to commencing action. Sufficient where produced them at trial and offered to cancel them or turn them over to defendant. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090.

9. Action to rescind contract of sale for nonpayment of purchase price. Succession of Delaneuville v. Duhe [La.] 38 So. 20.

10. Sufficient if he does so in his petition provided suit was not brought too late, the question of unreasonable delay being referred to the date of the suit. Tompkins v. Johnson [Tex. Civ. App.] 86 S. W. 953. Where the case is tried and submitted to the jury on the theory that plaintiff tendered back the consideration before suit, he is not entitled to a verdict on evidence showing a tender of only part of it. Id.

11. Civ. Code, §§ 3407, 3408. Green v. Duvergey, 146 Cal. 379, 80 P. 234. One from whom a conveyance was obtained by fraud gave notice of rescission immediately on discovering the fraud, and tendered back the certificate of deposit which he had received as the consideration. Held that rescission was completed by the tender and that he was not required to thereafter keep

the original conditions, the innocent party may, without a formal rescission have compensation in damages for the injury sustained, either as an equitable defense to an action on the contract, or to be recovered in a suit for that purpose.[12]

(§ 8) *D. Remedies.*[13]—On repudiation of a contract the innocent party may recover the consideration paid by him.[14] In such case resort should not be had to a court of equity, unless for some special reason the remedy at law is unavailing or inadequate.[15]

The statutes of California provide for rescission by complying with certain rules therein prescribed, and that if such rescission is not acceded to it may be enforced by action.[16]

The rescission of a contract necessarily constitutes a bar to its performance by either party,[17] and the rescinding party thereby loses his right of action for its breach.[18] Where the evidence shows plaintiff to be entitled to a rescission, defendant's claim for specific performance is necessarily eliminated from the case.[19] If the contract is to all intents and purposes wholly executory at the institution of the suit, any question of part performance as interfering with plaintiff's right to rescind is also eliminated.[20]

§ 9. *Remedies for breach. A. The right and its accrual.*[21]—On breach of a continuing agreement, the innocent party may sue at once for his entire damage without waiting for the expiration of the contract period.[22] The same is true where performance is prevented by the other party,[23] or where he intentionally

the certificate intact, but was sufficient if he was able to return the amount of money represented thereby. Id.

12. Rumsey v. Shaw, 25 Pa. Super. Ct. 386. In action to recover balance of purchase price of option on stock, where it appears that defendant secured new option before expiration of one purchased, and did not discover false representations until first option had expired, he may set up such representations as a defense though he had not rescinded the contract and tendered back the first option. Id.

13. See 3 C. L. 846.

14. On discovering fraud, if he elects to rescind, may sue in equity for a rescission and recover what he has parted with upon such conditions as the court may deem equitable, or rescind by his own act and sue at law for what he has parted with. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. On repudiation by a railroad company of a contract whereby it agreed to maintain its offices and shops in a city, the city and individuals may recover the land conveyed to it as a consideration therefor, together with any other consideration which passed. City of Tyler v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 238. A verbal contract for the exchange of personalty may be rescinded by either party thereto for good cause, and a suit at law maintained for the restitution of the property. Wilson v. Maxon [W. Va.] 49 S. E. 123. Vendee under executory contract for sale of realty may, on rescinding for non-performance, recover amount paid in action for money had and received. Seibel v. Purchase, 134 F. 484.

15. Wilson v. Maxon [W. Va.] 49 S. E. 123.

16. Civ. Code, § 1691. Green v. Duvergey, 146 Cal. 379, 80 P. 234.

17. Marsh v. Despard [W. Va.] 49 S. E. 24.

18. Plaintiff, by taking property into her own charge, held to have rescinded contract whereby defendant agreed to care for it and pay her a certain sum monthly, and to have lost her right of action for defendant's breach in refusing to longer pay more than a less sum. Seymour v. Warren, 93 N. Y. S. 651.

19. Exchange of land. Bales v. Roberts [Mo.] 87 S. W. 914.

20. Bales v. Roberts [Mo.] 87 S. W. 914.

21. See 3 C. L. 846.

22. May also elect to wait. Globe Fertilizer Co. v. Tennessee Phosphate Co. [Ky.] 85 S. W. 1177. Where case is not tried until expiration of term of employment, he may recover salary for whole time, less payments made, and such sums as he earned or might have earned by reasonable diligence after the breach. Morgan v. McCaslin, 114 Ill. App. 427.

23. Degnan v. Nowlin [Ind. T.] 82 S. W. 758. Though the purchase price of machines is not due for thirty days after they are installed and accepted, plaintiff may sue before the expiration of that period where defendant has absolutely rejected them. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Defendant held to have committed breach of contract, whereby plaintiffs were to publish an advertisement for him for a year, by notifying them at the end of the first quarter to discontinue publication, warranting plaintiffs, without doing more, in considering contract at an end, and in suing for loss of profits on the part they were not permitted to perform. Stumpf v. Merz, 92 N. Y. S. 789.

makes performance on his own part impossible,[24] or where he repudiates the contract before the time when performance is due.[25]

As a general rule in order to recover on an entire contract, plaintiff must show full performance,[26] or, in case the contract calls for concurrent acts, a readiness to perform on his part,[27] or that performance was prevented by the other

24. As where firm, which has agreed to pay balance of purchase price of mining property from the proceeds of its resale, conveys it, for a nominal consideration, to a corporation formed by them. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628.

25. See ante, § 6 A.

26. Massey v. Greenabaum Bros. [Del. Super.] 58 A. 804; Toher v. Schaefer, 45 Misc. 618, 91 N. Y. S. 3; Lassen v. Burt, 92 N. Y. S. 796; Pacific Mill Co. v. Inman Paulsen & Co. [Or.] 80 P. 424; Trumbower v. Woodley, 26 Pa. Super. Ct. 249. Civ. Code, § 1439. Plaintiff held not entitled to any interest in mine where he failed to make payments provided for in contract. Cameron v. Burnham, 146 Cal. 580, 80 P. 929. If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. Finding that plaintiff had delivered all the wire called for by defendant by contract held warranted by evidence that defendant had exercised option given him by making necessary payments. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. Cannot be enforced by one who has not performed conditions precedent. O'Connell v. New York, etc., R. Co., 187 Mass. 272, 72 N. E. 979. Strict performance is a condition precedent to recovery on a building contract itself, in the absence of a waiver. Burke v. Coyne [Mass.] 74 N. E. 942. Building contract. Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054. Where services and materials furnished under special contract are such that they can be rejected, and obligee can avoid receiving any benefit therefrom and refuses to accept same, there can be no recovery without complete performance. Dame v. Woods [N. H.] 60 A. 744. Right to compensation for services in consolidating corporations contingent on obtaining funds from underwriting syndicate, which plaintiffs failed to do. Fry v. Miles [N. J. Err. & App.] 59 A. 246. Refusal to receive 250 barrels of cement a week as required by contract held breach on plaintiff's part. Pitts v. Davey, 40 Misc. 96, 81 N. Y. S. 264. Failure to prove performance by plaintiff in matter of inspection of electrical installation and presentation of certificate held to justify judgment for defendant. Electrical Equipment Co. v. Feuerlicht, 90 N. Y. S. 467. Under contract authorizing plaintiff to insert defendants' advertisement in his publication for a period of 34 insertions, for which defendants agreed to pay a certain sum "in monthly payments as due," proof of 7 insertions between dates specified in complaint held to entitle plaintiff to recover therefor regardless of whether contract was entire or for a year. McKillop, Walker & Co. v. New York Preparatory School, 91 N. Y. S. 338. Where personalty is sold on time, the title to remain in the vendor until the purchase money is paid and delivery is made to purchaser subject to certain conditions to be performed by seller before possession or title can pass, latter cannot, before he has substantially performed such conditions, elect to treat property as that of purchaser, and sue for and recover contract price upon failure of purchaser to accept the property and pay the purchase money as agreed. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okl. 258, 78 P. 115. Where purchaser of eight cases of tobacco returns four as not according to sample, it is error to permit recovery for whole eight cases, plaintiff being only entitled to verdict for value of four retained and for damages for breach of contract as to four returned. Barnett v. Becker, 25 Pa. Super. Ct. 22. One contracting to drill oil well through fourth sand cannot recover where prevented from completing work by breaking of tools in well. Caughey v. Parker, 26 Pa. Super. Ct. 289. Common-law rule. Woodford v. Kelley [S. D.] 101 N. W. 1069. One guaranteeing that a well which he is to drill will be a flowing one cannot recover the contract price if it is not, though it can be profitably operated with a pump. Cox & Co. v. Markham, Jr. & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 375, 87 S. W. 1163. Where contract of sale provided for payment after delivery, seller was not entitled to recover purchase price without showing delivery or refusal to accept. Southern Car Mfg. & Supply Co. v. Scullin-Gallagher Iron & Steel Co. [Tex. Civ. App.] 85 S. W. 845. Where a contract of employment is an entire one, an employe rightfully discharged cannot, in an action on the contract, recover for partial performance. Parker v. Farlinger [Ga.] 50 S. E. 98. Must show performance on his part down to the time when instalment sued for became due. Seaburn v. Zachmann, 99 App. Div. 218, 90 N. Y. S. 1005. Where plaintiff was employed at a weekly salary and left without cause, he could not recover salary for any future time, nor for the week in which he left. Id. Where wages are payable monthly, cannot recover on contract for wages of month during which he was discharged. Parker v. Farlinger [Ga.] 50 S. E. 98.

27. Pacific Mill Co. v. Inman Paulsen & Co. [Or.] 80 P. 424. Tender in such case means offer accompanied by ability to perform if other party will concurrently do what is required of him. Tender of stock held sufficient. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. Where contract provided that defendant was to pay a certain sum on condition that plaintiff turned over to him by proper assignment a certain warehouse receipt, held, that plaintiff must show offer or ability to turn over receipt. Paddock v. Buchanan & Co., 110 Ill. App. 29. Where claimant repaired machinery under contract, requiring payment when work was completed, and shipped same with draft attached to bill of

party.[28] Ordinarily there must be an actual tender of performance,[29] but this does not apply where the other party has repudiated the contract,[30] or has put it beyond his power to perform.[31]

The rule requiring full performance has been relaxed in many states to the extent that, though it is still necessary in order to recover on the contract, yet if defendant has accepted and used what plaintiff has done in a partial compliance therewith, he will be held liable for the benefit he has received, on an implied promise to pay for the same.[32] One cannot, however, recover on a quantum

lading for more than the amount due, defendant was not entitled to recover possession of the machinery without tendering the amount actually due. Dutton v. Shaw [Miss.] 38 So. 638. Before plaintiff can recover in an action for the nondelivery of goods sold to him, he must show that when he demanded it he was able to pay for it in the manner fixed by custom. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88.

28. Foster v. Leininger, 33 Ind. App. 669, 72 N. E. 164; Fry v. Miles [N. J. Err. & App.] 59 A. 246; Trumbower v. Woodley, 26 Pa. Super. Ct. 249. Refusal of plaintiff to pay a monthly instalment when due under a contract for furnishing electric power is not a breach on his part, where the bill is for an amount in excess of that actually due, and defendant, at the time, owes him more than the amount of such instalment. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450. As where contract with amusement company provides that plaintiff shall install his apparatus only in localities assigned to him by defendant, and latter refused to assign space and incumbered ground so that it would have been impractical for plaintiff to construct and operate his concessions. Claudius v. West End Heights Amusement Co. [Mo. App.] 84 S. W. 354. Instructions approved. Id. Where defendant's lessee, after partially performing a contract to grub the land, was notified by him to do no more, defendant could not contend, in an action for plaintiff's resulting damages, that since the evidence showed that plaintiff was in possession and was not prevented from carrying out the contract, he could not recover. Campbell v. Howerton [Tex. Civ. App.] 87 S. W. 370. Letter of purchaser held not a refusal to accept so as to excuse delivery. Southern Car Mfg. & Supply Co. v. Scullin-Gallagher Iron & Steel Co. [Tex. Civ. App.] 85 S. W. 845.

29. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606.

30. But if before or at the time of performance one party declares his intention not to perform or refuses to do so, the other need not make an actual tender of performance, but it is sufficient for him to prove that he was ready and willing to perform. Evidence held to show repudiation of contract to repurchase certain stock. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. Where there was evidence that repudiation of joint contract was made to one of the parties who was acting for both, evidence of such repudiation was not objectionable as to the other on the ground that it was made to a stranger and had not been communicated to the person seeking to avail himself of it. Id. Refusal of seller to deliver cotton sold, because price has gone up, and on account of buyer's delay, renders tender of price by buyer before suing for nondelivery unnecessary. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88.

31. Where one party puts it beyond his power to perform, the other is thereby absolved from the duty of placing himself in readiness or ability to perform, and it is sufficient if he tenders performance in his pleading. By selling land to another. Morehouse v. Terrill, 111 Ill. App. 460. Where one party to an executory contract has placed it out of his power to perform, a tender of performance by the other party is not necessary to entitle him to rescind and recover a payment made thereon, when the time for performance by the other has expired. Seibel v. Purchase, 134 F. 484.

32. Where there has been an imperfect performance of a contract for irrigating crops which has been accepted, the water rent stipulated in the contract will be due up to the full amount thereof if the crop has been benefited that much, but the debt will be offset by any loss that may have resulted from the dereliction of the contractor. Hunter Canal Co. v. Robertson's Heirs, 113 La. 833, 37 So. 771. In such case only the excess of the rent can serve as a basis for sequestration. Id. For benefits such as improvement of the other's property, the sale and delivery of goods to him, or work done for him. Cann v. Rector, etc., of Church of the Redeemer [Mo. App.] 85 S. W. 994. One may receover on the theory of a quasi contract. Dame v. Woods [N. H.] 60 A. 744. Any liability to pay for a partial performance which does not result in such benefit must rest wholly on the special contract. Id. Plaintiffs held entitled to reasonable value of work and labor performed in pursuance of contract to cut, bale and deliver hay, less damages suffered by defendant on account of failure to fully perform. Woodford v. Kelley [S. D.] 101 N. W. 1069. Where no evidence of reasonable value of hauling part of hay to certain station, plaintiffs held not entitled to contract price therefor, but only proved value of cutting, stacking, and bailing. Id. An action in quantum meruit may be maintained to recover for labor and materials furnished under a building contract, subject to right of defendant to set up contract for purpose of limiting recovery to contract price, less damages for delay. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248. Where the services are from their very nature accepted from day to day as the work progresses and the benefits thereof must necessarily be regarded as appropriated and accepted, there is a liability to pay the fair value thereof over and above the damages sustained by the breach, though the contract is not fully

meruit for services rendered under a special agreement by the terms of which his compensation is contingent on performance.[33]

If the contract is divisible, either party, having fully performed any one of the several covenants therein contained, may maintain an action against the other party for a breach without pleading or proving performance of the entire contract on his own part.[34]

A material breach of the contract justifies the innocent party in refusing to be longer bound thereby, and entitles him to recover for what he has already done.[35]

One who has violated his obligations under a contract cannot compel performance by the other party or complain of his refusal to perform,[36] nor can one

performed. Dame v. Woods [N. H.] 60 A. 744. One contracting to furnish and install heating plant for a sum to be paid on completion is not entitled to recover on theory of quasi contract to pay for benefits on ground of necessary acceptance from day to day, where the work is destroyed by fire before completion, it not appearing that materials could not have been removed for reasonable sum had they not been destroyed. Id. One who himself breaches a contract has no interest in future profits thereunder, but is entitled only to the present value of his interest, in an action by the other party for a rescission because of such breach. Hodges v. Price [Wash.] 80 P. 202. Evidence held to sustain finding that defendant was the first party guilty of a breach. Id.

33. Where contract provided for compensation of plaintiffs for consolidating corporations on condition that they secured funds through an underwriting syndicate, could not recover where failed to secure them. Fry v. Miles [N. J. Err. & App.] 59 A. 246.

34. Pacific Mill Co. v. Inman Paulsen & Co. [Or.] 80 P. 424. Where, under a contract of sale, delivery, acceptance, and payment were to take place in instalments, the vendor may maintain an action to recover any instalment when it becomes due without pleading or proving full performance on his part. Sale of entire mill cut of timber for the season. Barnes v. Leidigh [Or.] 79 P. 51. Contract for loan for which borrower was to give nine notes secured by trust deed held not indisvisible so as to preclude lender, who did not advance the whole amount contemplated, from maintaining an action on the notes and deed for the amount actually advanced. Less v. English [Ark.] 87 S. W. 447. Contract to furnish brick required by contractor to construct walks for city, price to be paid monthly for those furnished during the month, as they were used, held severable, and failure of purchaser to pay one instalment did not release seller from contract. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787. A contract may be entire and the performance severable so that a part of the payment or performance on one side may be recovered before the whole consideration has been paid by the other. Subscription contract whereby set of books containing 51 volumes to be issued at the rate of two volumes per month is subscribed for, and subscriber agrees to pay on delivery at a specified rate per volume, held a promise to pay for the volumes as delivered, so that an action can be maintained for the price of any volumes delivered before delivery of the entire set. Barrie v. Jerome, 112 Ill. App. 329. As to what contracts are severable and what entire, see § 4 c, ante.

35. In suit on contract for drilling well, held that defendant's failure to furnish pipe constituted breach justifying plaintiff in abandoning work and entitling him to recover for what he had already done. Cook v. Columbian Oil, A. & R. Co., 144 Cal. 670, 78 P. 287. The value of the services rendered may be recovered where complete performance has been prevented by the act or default of the other party. By refusal to make payments on account. Poland v. Thomaston, F. & O. Brick Co. [Me.] 60 A. 795. Where purchaser of oil refused to take it within time provided by contract, seller was not obliged to accept his subsequent offer to take it on terms provided in contract. Kellogg v. Frohlich [Mich.] 102 N. W. 1057.

36. Where plaintiff refused to make advances to insurance solicitor as required by a contract supplemental to that by which the latter was employed, and refused to continue him in his service unless he entered into new contract, could not receover for failure of solicitor to further perform. Arbaugh v. Shockney, 34 Ind. App. 268, 71 N. E. 232, rehearing denied 72 N. E. 668. Claimants repaired machinery under contract requiring payment when work was completed, and shipped same to defendant with draft attached to bill of lading. Defendant replevied same from railroad without paying draft. Claimant did not have a part of the necessary material and intended to complete work after delivery to defendant. Held, that defendants, having themselves breached the contract, could not be heard to complain that complainants had not completed the work. Dutton v. Shaw [Miss.] 38 So. 638. Cannot recover damages for breach of a contract where the failure to comply therewith was his own. Plaintiff cannot recover damages where defendant exercises option to declare contract for sale of land at an end for plaintiff's failure to make payment on specified date. Apking v. Hoffer [Neb.] 104 N. W. 177. Cannot recover damages for neglect of duties devolving on his own agent. Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37.

who has directly or indirectly prevented performance by the other party recover for the breach primarily due to his own act or neglect.[37]

(§ 9) *B. Particular remedies and election between them.*[38]—Every material breach entitles the injured party to an action at law for his resulting damages.[39]

A party discovering facts entitling him to rescind may either do so and demand the return of what he has paid, or elect to affirm the contract and sue for his resulting damages.[40]

After a breach of the contract the party not in fault may either sue for damages, or rescind, and, after returning what he has received, recover the value of what he has paid or done.[41] In certain cases he may also sue in equity for specific performance.[42] If there has been no delivery of personal property sold, the vendor may either sell it and sue for the unpaid balance of the contract price, or he may treat it as the property of the vendee, notwithstanding a refusal to accept it, and sue on the contract for the whole contract price.[43]

37. Pitts v. Davey, 40 Misc. 96, 81 N. Y. S. 264. Where plaintiff frequently demanded copy for advertisement and finally published defendant's business card as he had a right to do under the contract, and otherwise fully performed, held, that defendant could not defend on the ground of a misunderstanding with plaintiff's solicitor as to the subject-matter of the advertisement. Keniston v. Flaherty, 101 App. Div. 605, 91 N. Y. S. 568. S. D. Rev. Civ. Code, § 1173. Plaintiffs estopped to maintain action for loss due to defendants failure to keep building insured as required by contract, where failure was due to their own objections. Fransen v. Regents of Education of S. D. [C. C. A.] 133 F. 24. Instructions as to necessity of showing that plaintiff had offered performance and that defendant had refused to perform, approved. Brauer v. Macbeth [C. C. A.] 138 F. 977. Cannot in such case avail himself of nonperormance within time limited. Lehman v. Webster & Co., 110 Ill. App. 298.

38. See 3 C. L. 846.

39. In the absence of a provision to the contrary, one who is prevented from performing his contract by the other party thereto is entitled to compensation therefor. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Where deceased agreed to compensate plaintiff for services by bequeathing him certain goods, but failed to do so, he was entitled to recover the value of such services from the estate. Evidence sufficient to justify finding that such agreement existed. Shane v. Shearsmith's Estate [Mich.] 100 N. W. 123. Where decedent promised to compensate claimant for services by a sufficient provision in her will, but failed to make any provision, she was entitled to compensation as a creditor of the estate for the value of the services, whether the omission was intentional or not. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27.

40. Fraud. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. Exchange of horses. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. Sale of land. Schoonover v. Ralston, 25 Pa. Super. Ct. 375.

41. Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 P. 887. Where the vendee under an executory contract for the sale of land takes possession, and the vendor's title fails or he is unable to make conveyance as stipulated, he may rescind, and, after restoring or offering to restore possession, recover what he has paid, or he may retain possession, pay the purchase price, and accept such title as the vendee can give, but he cannot retain both the land and the money until the vendor can give perfect title. Livesley v. Muckle [Or.] 80 P. 901. On failure of defendant to obtain conveyance on day named, time being of the essence of the contract, vendee may disaffirm contract for sale of realty. Seibel v. Purchase, 134 F. 484. On refusal of owner of building to furnish plans in accordance with contract for steelwork, the remedy of the other party was to refuse to proceed with the contract and to hold the owner for damages for its breach. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Where performance is prevented by the other party, plaintiff's remedy is an action for damages caused by defendant's breach, alleging his prevention of performance, or in an action on quantum meruit for so much of the work as he has done. Contract to do necessary excavating for building. Toher v. Schaefer, 45 Misc. 618, 91 N. Y. S. 3. May treat contract as abandoned and sue for what he has done. Cann v. Rector, etc., of Church of the Redeemer [Mo. App.] 85 S. W. 994. Refusal of employer to pay employe his share of net profits in accordance with contract entitles him to leave service and collect amount due him under contract for time of actual employment. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386.

42. On breach of a contract for the sale or exchange of property, may either treat the contract as rescinded and sue for damages, or he may sue for specific performance, but he cannot do both, the two remedies being inconsistent. Pyle v. Crebs, 112 Ill. App. 480. The only remedy for breach of a contract for personal services is an action for damages. Cannot be specifically enforced. Wood v. Iowa Bldg. & Loan Ass'n, 126 Iowa, 464, 102 N. W. 410. For discussion of what contracts will be specifically enforced, see Specific Performance, 4 C. L. 1494.

43. Osgood v. Skinner, 211 Ill. 229, 71 N.

An election of remedies once made is final ,and cannot thereafter be rescinded.[44] The actual commencement of a suit predicated on either theory is plenary, and complete proof of the exercise of such election.[45]

The remedy of the maker of a promissory note which has been sold by the payee to an innocent purchaser for value, in direct violation of the contract of the parties, is an action for damages for the amount of the note with interest.[46] The fact that the contract provides for the recovery of a partial payment thereunder on the happening of a certain contingency does not prevent its recovery on the happening of another contingency, not provided for, which prevents performance by the other party.[47]

Where the contract has been broken, the other party may fulfill it for himself, provided he does so in a reasonable manner and does not incur unnecessary expense in so doing.[48] He is not, however, bound to do so before suing for damages for the breach.[49]

Ejectment will not lie to enforce the performance of a contract which is the consideration for a deed of conveyance.[50]

One who maliciously interferes and induces one party to break a contract to the injury of the other is liable in damages to the latter.[51]

E. 869, afg. 111 Ill. App. 606. See Sales, 4 C. L. 1318, for a full discussion of this subject.

44. Where all grounds warranting rescission were in existence and complete when plaintiff elected not to rescind, he cannot, more than two years thereafter, make a second election reversing former one. Supreme Council A. L. H. v. Lippincott [C. C. A.] 134 F. 824. Defendant held to have elected to affirm contract for sale of realty. Schoonover v. Ralston, 25 Pa. Super. Ct. 375. Where he does some decisive act evidencing his choice of such remedies, he thereby adopts such position finally, and cannot ordinarily recede therefrom. Evidence held to show election to rescind contract for exchange of horses, and he could not thereafter sue for breach of warranty. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. In action for price of brick sold, held, that notices by defendant to plaintiff that brick were of inferior quality and that he would purchase brick elsewhere and charge difference to plaintiff, did not amount to an election of remedies so as to preclude defendant from recovering other damages for plaintiff's breach of contract, where plaintiff did not claim that he relied on the alleged election. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787. For a full discussion, see Election and Waiver, 3 C. L. 1177.

45. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. The fact that the terms of the contract are stated in the petition is not determinative of the question whether a plaintiff, who has been prevented from completely performing by the other party, is suing for damages for breach of contract, or has waived such damages and is suing on a quantum meruit for the value of the work actually performed. Cann v. Rector, etc., of Church of the Redeemer [Mo. App.] 85 S. W. 994. He may state a contract and its breach by defendant, and yet state a cause of action on quantum meruit, if he avers a waiver of damages for the breach and asks only for the reasonable value of what he has done toward performance before the other party stopped him. Petition in action by architects held not to state cause of action on quantum meruit. Id. Plaintiff by suing in indebitatus assumpsit on the unjustifiable refusal of defendant to perform thereby consents to the termination of the contract. Poland v. Thomaston F. & O. Brick Co. [Me.] 60 A. 795.

46. In violation of contemporaneous written contract not to sell them. Myrick v. Purcell [Minn.] 103 N. W. 902.

47. Failure to obtain conveyance from owner on day named. Seibel v. Purchase, 134 F. 484.

48. Simons v. Wittmann [Mo. App.] 88 S. W. 791.

49. Building contract. Simons v. Wittmann [Mo. App.] 88 S. W. 791.

50. To enforce contract by grantee to pay liens on land, where deed conveys title absolutely. Adams v. Barrell, 26 Pa. Super. Ct. 641.

51. Morehouse v. Terrill, 111 Ill. App. 460. Where claimants' undertaking to complete repairs by a certain time was conditioned on the delivery of the machinery at their shop within a specified time, which was not done, they were only bound to complete them within a reasonable time. Dutton v. Shaw [Miss.] 38 So. 638.

Note: As a general rule it may be stated that an action will lie against one who maliciously persuades another to break his contract with plaintiff to the injury of the latter. Perkins v. Pendleton, 90 Me. 166, 38 A. 96, 60 Am. St. Rep. 252; Walker v. Cronin, 107 Mass. 555; Morgan v. Andrews, 107 Mich. 33, 64 N. W. 867; Lally v. Cantwell, 30 Mo. App. 524; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Jones v. Stanby, 76 N. C. 355; West Va. Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895; Angle v. Chicago, etc., R. Co., 151 U. S. 1, 38 Law. Ed. 55; Rice v. Manly, 66 N. Y. 82, 23 Am. Rep. 30; Lucke v. Clothing Cutters, 77 Md. 396, 39 Am. St. Rep. 421, 26 A.

The disaffirmance of a contract which is merely voidable does not impair the right of the other party to recover money earned thereunder prior to such disaffirmance.[52]

If the contract is fully executed and nothing further remains to be done on the part of the plaintiff, he may sue and recover upon the common counts.[53]

Remedy by injunction.[54]—Equity may by injunction restrain conduct contrary to the terms of the contract where the remedy at law is inadequate, even though it is not a case where specific performance could be decreed.[55] Thus the court may, in proper cases and where irreparable injury is shown, enjoin a violation of negative covenants therein.[56] An injunction will not, however, issue to restrain the breach of a personal contract or one relating to personal property, or a mandatory injunction to compel specific performance thereof, where the recovery of damages at law would adequately redress the impending injury.[57] The breach of valid agreements in restraint of trade may be restrained by injunction provided they are established by clear and satisfactory proof,[58] even though plaintiff will not

505, 19 L. R. A. 408; Benton v. Pratt, 2 Wend. [N. Y.] 385, 20 Am. Dec. 623; Snow v. Judson, 38 Barb. [N. Y.] 210.

It has also been held that the person so induced to violate his contract may also recover. Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203.

There is, however, a line of cases holding that an action will not lie against one who from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself induces another to violate his contract with plaintiff, with whom he does not stand in any personal relation. Boysen v. Thom, 98 Cal. 578, 33 P. 492, 21 L. R. A. 233; Glencoe Land Co. v. Hudson Bros., etc., Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560. 36 L. R. A. 804; Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; Bourlier v. Macauley, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60, 11 L. R. A. 550. See, also, Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559.—From note Raymond v. Yarrington [Tex.] 97 Am. St. Rep. 923.

52. People v. Republic Sav. & Loan Ass'n, 97 App. Div. 31, 89 N. Y. S. 582.

53. Massey v. Greenabaum Bros. [Del. Super.] 58 A. 804. Where work has been performed and nothing remains to be done but to pay for it. Leach v. Alphons Custodis Chimney Construction Co., 110 Ill. App. 338; Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Party wall agreement. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. A real estate broker's commission that has been fully earned under an express contract may be recovered under the common counts, and the contract itself admitted in proof of the particulars of the general right so set up. Risley v. Beaumont [N. J. Law] 59 A. 145. This is true though the contract is one required by the statute of frauds to be in writing. Id. Where a contract of sale has been executed and nothing remains to be done but the payment of the purchase price, the seller may declare generally in indebitatus assumpsit. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084, afg. 112 Ill. App. 281. Where the contract is terminated by its terms, by mutual consent, or by the unjustifiable act of the defendant, and nothing remains to be done but to pay money, indebitatus assumpsit will lie. Contract price the reasonable measure of value in absence of showing of loss or damage to defendant by failure to complete the work. Poland v. Thomaston F. & O. Brick Co. [Me.] 60 A. 795. See, also, Assumpsit, 5 C. L. 297.

54. See Injunction, 4 C. L. 96.

55. Will do so if the case is one in which substantial justice will be thereby accomplished by obliging defendant to carry out contract or lose all benefit from its breach and no rule of public policy will be violated. American Electrical Works v. Varley Duplex Marget Co., 26 R. I. 295, 58 A. 977. Defendant restrained from removing patented machinery placed in plaintiff's factory to be used for their joint benefit, where plaintiff had expended money and entered into contracts to furnish products. Id. One contracting party who is about to be injured by the wrongful act of the other, and who has not a plain, adequate, and complete remedy at law, may resort to equity. Injunction issued to prevent landlord from cutting off steam which he agreed to furnish tenant. Slack v. Knox, 114 Ill. App. 435. Plaintiff, held entitled to maintain suit to enjoin telephone company from removing telephone from his home, placed there in consideration of the company being allowed to run its poles and wires across his farm. Anderson v. Mt. Sterling Tel. Co. [Ky.] 86 S. W. 1119.

56. Under contract appointing plaintiff exclusive selling agent for defendant's paper specialties, plaintiff, under showing made, held not entitled to injunction, particularly as there was no showing of irreparable injury, or that plaintiff had no adequate remedy at law. Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. S. 954. Under contract appointing plaintiff exclusive selling agent of defendant's paper specialties, affidavits showing sale of chop holders by defendant without plaintiff's consent does not show breach, where material from which chop holders were made is not shown. Id.

57. Harlow v. Oregonian Pub. Co., 45 Or. 520. 78 P. 737.

58. Must be no doubt as to their terms or the consideration on which they are founded. Roberts v. Lemont [Neb.] 102 N. W. 770. Injunction will issue to restrain the

suffer any substantial injury, or though he has an adequate remedy at law.[59] Third persons may be restrained from inducing the violation of the contract by those who are parties thereto.[60] Pending a suit for specific performance, equity may enjoin further violation of the contract for the purpose of maintaining the status quo.[61] Obedience to a final decree in a suit for specific performance may be

violation of a valid agreement not to engage in a particular business in a specified territory for a designated period. Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088. Because of the difficulty of estimating damages, and to prevent a multiplicity of suits. Davis v. Booth & Co. [C. C. A.] 131 F. 31.

59. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, afg. 112 Ill. App. 518.

60. Plaintiff sold proprietary medicines to wholesale and retail druggists under contract providing that they should only be sold at uniform prices and to dealers who became parties to the contract. Defendant who was not a party to the contract, obtained medicines from one who was, and after mutilating packages, or removing medicines therefrom, sold medicines at reduced prices. Held, plaintiff was entitled to preliminary injunction restraining defendant from inducing parties to contract to violate it, and from selling medicines as plaintiff's, in other than original packages and at less than contract price to the injury of plaintiff's business. Dr. Miles Medical Co. v. Goldthwaite, 133 F. 794. Use and distribution of quotations of prices on sales of grain, etc., for future delivery collected by board of trade, and which cannot be obtained without a known breach of the confidential terms on which they are communicated by the board to its customers, may be enjoined, even though such quotations relate to "pretended buying and selling" within Ill. Act June 6, 1887, prohibiting the keeping of places where such transactions are made. Board of Trade v. Christie Grain & Stock Co., 25 S. Ct. 637.

Trading stamps. New Jersey ruling: Trading stamps which, under the contract between the company issuing them and the merchants purchasing them, are redeemable when issued and collected in the regular way without limitation except as to the minimum number which can be presented at one time, are choses in action. Sperry & Hutchinson Co. v. Hertzberg [N. J. Eq.] 60 A. 368. When so issued and collected they are a property right, bought and paid for by the collector, and are assignable, in the absence of a provision to the contrary in the contract. Id. Where stamps are issued without any limitation on the right of holders to transfer them, the company cannot thereafter, by any change of its plan or its contracts with merchants, limit such right as to stamps previously issued and acquired by the holders in the regular way. Id. The retention by the company of the title to the stamp as a chattel after it has been issued does not interfere with its use as the token or evidence of the chose in action, and such title cannot, in a court of equity, be asserted adversely to the holder of the right of redemption. Id. When the transferable obligations represented by the stamps have been put upon the market subject to certain specified conditions in respect of their discharge, the company can exercise no further control over them. Id. When, under contract of company with merchant, a stamp is delivered to a customer of the latter, all three parties may be bound with reference to its transfer or use by any contract they may see fit to make. Id. But when stamp escapes from control of first party who took it under the contract, the contract cannot follow it, no condition created thereby can attach to it, and the only remedy of either of the three parties who may be injured by the violation of the contract is a suit on the contract against the party thereto who was guilty of such violation. Id. The company cannot prevent a merchant not one of its customers from acquiring such stamps from holders to whom they have been issued in the regular way and distributing them for advertising purposes, though its business may be injured thereby. Id. In any event complainant's right is a doubtful one and hence a preliminary injunction will not issue to prevent their use by such merchant, especially in the absence of a showing of defendant's insolvency. Id.

The Federal courts have held that when such stamps have once been issued by a merchant they have served the advertising purpose for which they were intended, and that they can thereafter be used for redemption purposes only. Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 F. 833. See, also, Id., 128 F. 800. And, while transferable for that purpose, a merchant having no contract with the company cannot acquire them from persons collecting them and reissue them to his customers for advertising purposes. Id. Such a use is an unlawful interference with the company's business and may be restrained by injunction. Law being clearly inadequate for that purpose, equity will see that the one who is served and the one who serves each gets what the contract calls for, and that neither shall appropriate more to the injury of the other. Id. The stamp book informs the collector what he is to have and what the merchant is to have and equity will not allow him to appropriate what he is told is the merchant's benefit in the transaction. Id. One who has been in the company's employment long enough to know that the necessities of its business require that such stamps shall not be dealt in by the public generally is not an innocent purchaser. Sperry & Hutchinson Co. v. Temple, 137 F. 992. And he will be restrained from selling as articles of merchandise stamps purchased by him from persons who have received them with purchases, and from advertising generally that he will purchase them as articles of merchandise. Cannot deal in them generally as articles of merchandise. Id. He cannot, however, be prohibited from purchasing them so far as he sees fit to do so. Id.

61. Contract in regard to prospecting for

enforced by prohibitory or mandatory injunction, or both, according to the exigencies of the case.[62]

(§ 9) *C. Defenses and counter rights.*[63]—Performance is of course a defense to an action for breach of contract.[64]

An agreement in a contract for arbitration is no defense to an action thereon, where no demand for arbitration was made until after the trial.[65]

Failure of one party to perform his contract entitling the other party to a modification or extinguishment thereof may be pleaded as a defense or counterclaim.[66]

In cases where recovery may be had for partial performance, defendant is entitled to counterclaim for any damages suffered by him because of plaintiff's breach.[67] So, too, negligent performance may be considered as a ground for recoupment of damages.[68]

(§ 9) *D. Procedure before trial.*[69]—The question of venue depends upon the statutes of the various states.[70]

(§ 9) *E. Parties, pleading, evidence, etc.*[71] *Time of commencing action.*—The action must, of course, be commenced within the time fixed by the statute of limitations,[72] and, in states where such provisions are valid, within the time fixed

gas and oil. Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548.

62. Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548.

63. See 3 C. L. 846.

64. Contract for construction of party wall held to have been let to lowest bidder as provided for therein. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. In creditor's bill seeking to reach indebtedness alleged to be due by defendants to the judgment debtors on certain contracts for merchandise, evidence held to show that defendants had fully performed such contracts, and had delivered to judgment debtors all merchandise which contracts required them to deliver. Chicago Daily News Co. v. Siegel, 212 Ill. 617, 72 N. E. 810. In action on contract to furnish information to enable defendants to locate timber and homestead claims held to justify submission of question of performance to jury. Cummings v. Weir, 37 Wash. 42, 79 P. 487.

65. Building contract. Heidlinger v. Onward Const. Co., 44 Misc. 555, 90 N. Y. S. 115. Under building contract providing for an arbitration in case of dissatisfaction with the architects's awards for extra work, etc., held that it was the duty of owner, if dissatisfied with awards, to demand arbitration within a reasonable time, and, if he failed to do so, could not set up absence of arbitration as bar to contractor's suit for extra work. Conrad v. Humphrey [Ky.] 84 S. W. 313.

66. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

67. See § 9a, ante. Employer entitled to counterclaim, in action for any unpaid instalment of wages for any damages suffered by him because of employe's breach. Seaburn v. Zachmann, 99 App. Div. 218, 90 N. Y. S. 1005.

68. In action on contract for work and labor in repairing electrical generator, negligence in not discovering condition of shaft and in putting on commutator in a way which rendered it liable to work loose, and in starting machinery while it was in an improper condition, may be considered as ground for recoupment of damages. Electric Supply & Maintenance Co. v. Conway Elec. Light & Power Co., 186 Mass. 449, 71 N. E. 983.

69. See 3 C. L. 847.

70. **In Iowa** suit should ordinarily be brought on a contract in the county in which defendant resides (Moyres v. Council Bluffs Nursery Co., 125 Iowa, 672, 101 N. W. 508), but suit on a written contract may be brought in the county in which by its terms it is to be performed. Code, § 3496. Held no written contract requiring defendant to replace dead trees sold to plaintiff in "B. county," and nothing to show that agreement in subsequent written contract obligating him to replace trees referred to in previous written contracts which were to be delivered in such county. Id.

In Montana actions on contracts may be tried in the county in which the contract was to be performed. Code Civ. Proc. § 613. Bond v. Hurd [Mont.] 78 P. 579. Where two causes of action upon open account for the reasonable value of services are properly triable in a different county from that in which the action is brought, plaintiff cannot deprive defendant of the right to a change of venue by joining therewith a cause of action on a contract to be performed within such county. Id.

New York: Change of venue should be granted to county of defendant's residence, in which contract was made and was to be performed, and where most of the witnesses reside. Church v. Swigert, 99 App. Div. 273, 90 N. Y. S. 939. See Venue and Place of Trial, 4 C. L. 1797.

71. See 3 C. L. 847. Consult also the general topics dealing with practice, such as Evidence, 3 C. L. 1334; Instructions, 4 C. L. 133; Parties, 4 C. L. 888; Pleading, 4 C. L. 980; Trial, 4 C. L. 1708, etc.

72. See Limitation of Actions, 4 C. L. 445. Count for value of services rendered by plaintiff to deceased, being based not upon an express contract which postponed the ma-

by the contract itself.[73] So, too, an action commenced prior to the time fixed by the contract for payment is premature.[74] Where the contract provides for payment on the happening of a contingency, limitations do not begin to run until it happens.[75]

Parties.[76]—Whether one of several parties to a contract may sue thereon without joining the others depends on the nature of the interests of the parties.[77] If that is several, separate actions may be maintained, even if the promise is joint.[78] But where the language used is joint, in order to enable one to sue alone he must allege and prove that the relations are several.[79]

Pleading.[80]—The ordinary rules of pleading apply to actions on contracts,[81] including those as to joinder of causes of action,[82] and amendments.[83]

The entire contract must be pleaded.[84] In the absence of a statute to the

turity of the debt beyond the termination of the services, but on an implied one to pay reasonable value of such services, held barred by lapse of four years after the termination of such services. Civ. Code 1895, § 3768. Cooper v. Claxton [Ga.] 50 S. E. 399. Instrument denominated a "real estate mortgage coupon bond" and bearing the name and seal of the maker held a sealed instrufent. Gibson v. Allen [S. D.] 104 N. W. 275. Rev. Code Civ. Proc. § 58, reating to limitation of actions on sealed instruments not affected by Id., § 1243, abolishing distinctions between sealed and unsealed instruments, and actions on such instruments may be brought within period limited thereby. Id.

73. For validity of such provisions, see § 3D, ante.

74. Where contract provided that screens were to be paid for in six months after they were fitted, if satisfactory and according to description, and one was defective, action brought within six months after defect was remedied was premature, if contract was not originally substantially performed; otherwise not premature if brought more than six months after screens were originally furnished. Question of substantial performance for the jury. Burrowes Co. v. Crittenden [Miss.] 37 So. 504. Where plaintiff loaned money to corporation under resolution providing that stockholders should advance to corporation a sum proportionate to the amount of their stock as a loan to become due in eight years, suit to recover loan before such date was premature. Sivin v. Mutual Match Co., 91 N. Y. S. 771.

75. Noyes v. Young [Mont.] 79 P. 1063.

76. See 3 C. L. 847. See, also, § 1A, ante, for matters depending on the doctrine of priority; and Parties, 4 C. L. 888, for general rules.

77, 78. Fisher Textile Co. v. Perkins, 100 App. Div. 19, 90 N. Y. S. 993.

79. One of three parties of the first part. Fisher Textile Co. v. Perkins, 100 App. Div. 19, 90 N. Y. S. 993. Where contract under seal provided for repurchase of certain stock transferred to the two plaintiffs in severalty and defendant refused to repurchase from one of them, an action at law on the contract was properly brought in the name of both, although the recovery was for the benefit of one only. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606.

80. See 3 C. L. 850.

81. See Pleading, 4 C. L. 980.

Complaint held to state cause of action: When action treated as one to recover on quantum meruit for services performed by real estate agents under an agreement alleged to have been fully performed by them. New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550. Declaration in action for damages for breach of contract to construct dam. Montgomery Water Power Co. v. Chapman, 132 F. 138.

82. See Pleading, § 2, 4 C. L. 998, for a full discussion of this question.

Causes held properly joined: Causes of action arising from violation of plaintiff's rights under contract to procure options for purchase of realty held to arise out of same transaction. Emerson v. Nash [Wis.] 102 N. W. 921. Complaint held to state cause of action. Id. A count for money had and received and one on a note thereafter given in settlement of the same claim. Schultz v. Kosbab [Wis.] 103 N. W. 237.

Causes improperly joined: For damages for alleged breach of written contract of employment, and also for the value of the services rendered, "regardless of the contract." Action treated as one on the contract. Golucke v. Lowndes County [Ga.] 51 S. E. 406. Obligations arising from an entire contract, to different persons, or to the same persons in different rights, without the consent of the parties bound. Executor cannot combine individual claim for rent as devisee with claim in representative character for rent accruing in lifetime of his devisor. Weil v. Townsend, 25 Pa. Super. Ct. 638. For breach of contract and for damages resulting from the falsity of prior oral representations in regard to its subject-matter. Swenson v. Colvin, 130 F. 626. Where a complaint contained a count for money lent and one on a bond given to secure its payment, an election to stand on the first is not a waiver of the right to use the bond in evidence if it becomes necessary or proper to do so. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

83. See Pleading, § 7, 4 C. L. 1016. A petition seeking to recover on a contract for services made by a decedent cannot be amended by seeking to recover on an express contract with the widow, made after her husband's death, to pay a given sum for the same services. Moore v. Smith, 121 Ga. 479, 49 S. E. 601.

84. Declaration. Carpenter & Co. v. Vulcanite Portland Cement Co. [Pa.] 61 A. 75. Answer attempting to set up breaches of

contrary,[85] it need not be set out in words and figures, but it is sufficient to definitely state its substance.[86] Where the contract is annexed to the complaint and made a part thereof, the rights of the parties are to be determined by it rather than by the general allegations of the complaint concerning its effect.[87] So, too, the contract prevails over inconsistent allegations of its effect.[88]

In the absence of a distinct averment, nothing will be presumed to defeat a contract valid on its face.[89] Fraud, accident, or mistake,[90] illegality based on matter not alleged in the complaint,[91] want or failure of consideration,[92] the laws

contract as defense insufficient for failure to fully set out contract. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903.

85. Procedure Act 1887, § 3, requiring copy of contract to be annexed to statement of claim is mandatory. White v. Sperling, 24 Pa. Super. Ct. 120. If defendant's affidavit clearly makes it appear that the very contract upon which the statement shows the action is founded is in writing, and statement is not accompanied by copy, defendant has shown a valid reason why summary judgment should not be entered against him, even though he does not set forth a perfectly valid defense upon the merits. Id. In action on book account, where defendant alleges written contract as basis of the action and relies on its breach for a defense, and plaintiff is ruled to produce it and denies its existence under oath and thereby obtains judgment, but its existence in plaintiff's possession is subsequently shown, the judgment should be opened. Id. Error to enter judgment on plaintiff's affidavit without giving defendant opportunity to show existence of contract by depositions. Id. In such case the fact that defendant did not give the exact date of the contract is immaterial, where he otherwise sufficiently designated it. Id.

86. Mansfield v. Morgan, 140 Ala. 567, 37 So. 393. Complaint setting out contract in haec verba is not demurrable because such contract is somewhat indefinite and obscure in its terms, where it is capable of being rendered certain by matter aliunde. Cliff Foy & Bro. v. Dawkins, 138 Ala. 232, 35 So. 41. A mere allegation of duty is insufficient, but there must be an allegation of facts sufficient to show such duty or obligation. Complaint in action for breach of contract to furnish water for irrigation purposes held insufficient in failing to show that said contract was binding upon the parties at the time of the alleged breach. Spencer v. Bessemer Waterworks Co. [Ala.] 39 So. 91. Complaint alleging that defendant had exclusive right to furnish water to the citizens of the city, but failing to allege that defendant was under any contractual obligation to the city to furnish water to plaintiff, or that there was a contract between plaintiff and defendant for the water, or what rate was to be paid for the water, or that either plaintiff or the city was under any obligation to pay for it at all, held bad. Id. Petition in action on alleged contract on the part of testator to give plaintiff half his estate by will in consideration of his services held too vague and indefinite to withstand demurrer on ground that it fails to set forth terms of the contract. Cooper v. Claxton [Ga.] 50 S. E. 399.

87. Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. S. 954. Where complaint alleges contract "ready to be produced when and where the court may direct," but only sets out a part of its provisions, a copy of the contract attached to the answer cannot be added to, and construed in connection with the complaint. Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179.

88. That a petition counting on a contract in writing alleges that the agreed amount to be paid for plaintiff's services is their reasonable value is immaterial. Contract to pay commissions for selling land. Jenkins v. Beachy [Kan.] 80 P. 947.

89. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. Contract by corporation to repurchase its stock on happening of certain contingencies held not contrary to public policy where no fraud is alleged or proved, and there is no averment that corporation is insolvent or that stock is not worth the amount agreed to be paid therefor. Id.

90. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. Answer, in action on contract whereby plaintiff was to secure release of defendant as surety on certain notes, alleging fraud held to state a good defense. Ryan v. Riddle [Mo. App.] 82 S. W. 1117. Affidavit of defense in action on note given for stock attempting to allege fraud and want of consideration held insufficient. Brian v. Merrill, 23 Pa. Super. Ct. 629.

91. In an action on a contract, a defense which expressly or impliedly admits the making of the contract and seeks to show that it is in contravention of public policy by reason of some fact outside of the statements in the complaint is based upon new matter which cannot be proved unless pleaded. Mills' Ann. Code. Colo. § 56. Rucker v. Bolles [C. C. A.] 133 F. 858. Pleadings held to sufficiently present issue on which jury determined case. Id. Evidence sufficient to sustain judgment for plaintiff. Id.

92. Answer in suit on contract whereby wife agreed to pay judgment of husband held to state defense. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124. In action on note given to plaintiff as substitute for judgment bond for same amount, where it appeared that bond was given at time of execution of deed to defendant, which deed acknowledged receipt of the consideration in full, specifying the amount, held that an affidavit of defense averring that the bond was given to secure annual payment of a dower interest in the land, and that the widow was dead, but not specifically stating that the bond was not a part of the consideration named in the deed, was insuffi-

of a foreign state,[93] the failure of a foreign corporation to comply with the laws of the state where the action is brought,[94] and a breach,[95] or rescission of the contract,[96] must be pleaded. There is a conflict of authority as to the necessity of pleading waiver and estoppel.[97]

A consideration must be alleged [98] unless the contract itself imports one or shows one on its face,[99] or unless the complaint shows a partial performance.[1]

One relying on performance [2] or nonperformance must ordinarily allege it,[3]

cient. Snyder v. Knight, 23 Pa. Super. Ct. 309.

93. In order that a contract may be declared invalid under the laws of a foreign state where it was made they must be pleaded. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. Lex loci contractus must be pleaded in order to control construction. Otherwise lex fori will control. Neverman v. Bank of Cass County, 14 Okl. 417, 78 P. 382. In order to protect itself under a contract made in another state, and void in the state in which the action is brought, a carrier must show that the contract was valid in that state and that the loss occurred there. Adams Exp. Co. v. Walker, 26 Ky. L. R. 1025, 83 S. W. 106. In action in Massachusetts on South Dakota contract there is no presumption that the statute law of the two states is the same, but it will be presumed that the common law is, in the absence of proof to the contrary. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456. Promissory note payable in South Dakota and sent to payee in that state is a South Dakota contract. Id. Averment that contract was executed in New York held denial of allegation that it was executed in Pennsylvania, and not new matter subject to demurrer under Code Civ. Proc. § 494. Onderdonk v. Peale, 93 N. Y. S. 505.

94. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. In an action by a foreign corporation on a contract alleged to have been executed and delivered in another state, held that its failure to secure the certificate required by statute could not be pleaded in bar of the action in the absence of an averment that it was doing business within the state. Onderdonk v. Peale, 93 N. Y. S. 505.

95. Complaint held to sufficiently allege breach of contract to save plaintiffs harmless in sale of certain property under a mortgage. Cliff Foy & Bro. v. Dawkins, 138 Ala. 232, 35 So. 41. Complaint in action on contract for purchase of stock on margins held to sufficiently allege breach of duty by defendant. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607.

Pleadings held insufficient: A declaration in assumpsit for breach of a mutual compact to make a donation, which recites no consideration and fixes no time for performance, where no breach other than a conveyance of the property which was to be donated is alleged, and there is no allegation of a demand and refusal of performance. Foulds v. Watson, 116 Ill. App. 130. Answer in action on contract whereby plaintiffs agreed to send defendants orders only from first class firms who would pay them commissions on wheat sold for them and would pay cable expenses. Duryee v. Parker, 94 N. Y. S. 981. In an action to recover money paid for threshing outfit and to rescind contract for breach of warranty, failure of plaintiff to comply with the terms of the warranty is new matter which must be pleaded by defendant, if relied on as a defense. Defendant held not entitled to prove such conditions under the pleadings. Westinghouse Co. v. Meixel [Neb.] 101 N. W. 238. Instructions held to properly state issues raised by pleadings. Id. Answer attempting to set up breaches of contract as a defense to promissory notes issued pursuant thereto failing to specifically assign the breaches. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903.

96. Storer v. Markley [Ind.] 73 N. E. 1081. Petition held to sufficiently plead rescission of contract for purchase of stallion. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710.

97. In Texas waiver must be pleaded. Of provision requiring oil well to be a flowing one. Cox & Co. v. Markham, Jr., & Co. [Tex. Civ. App.] 87 S. W. 1163.

In Illinois, waiver of a strict performance or estoppel to insist on it may be proved though not pleaded. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167. For a full discussion, see Estoppel, 3 C. L. 1327; Election and Waiver, 3 C. L. 1177.

98. Oral agreement by landlord to repair premises. Altsheler v. Conrad, 26 Ky. L. R. 538, 82 S. W. 257. For a nonnegotiable instrument not under seal and not reciting a consideration. Promise to pay money on confirmation of land grant. Joseph v. Catron [N. M.] 81 P. 439. Held no evidence in record to show consideration. Id. Complaint in action for damages for failure to furnish water according to contract held insufficient in failing to show consideration for alleged contract. Spencer v. Bessemer Waterworks Co. [Ala.] 39 So. 91. Complaint in action for breach of oral contract to furnish and put on a slate roof held insufficient. Taylor v. Lesson [Ind. App.] 74 N. E. 907. Failure to allege consideration is not cured by verdict. Id.

99. Taylor v. Lesson [Ind. App.] 74 N. E. 907. Need not be averred in action on written contract in states where such contracts import consideration. Noyes v. Young [Mont.] 79 P. 1063.

1. Spencer v. Bessemer Waterworks Co. [Ala.] 39 So. 91.

2. See, also, § 9A, ante. In action on contract employing plaintiffs as architects, petition held not to allege performance on plaintiffs' part with sufficient definiteness, or to show with legal certainty the amount of damages suffered by the alleged breach. Golucke v. Lowndes County [Ga.] 51 S. E. 406. Error in failing to allege in complaint that vendee under contract for sale of land was able, ready and willing to comply with his contract is cured where, after verdict and judgment, it affirmatively appears that

but performance or a readiness to perform need not be alleged where defendant has repudiated the contract, affirmatively refused to perform, or denied liability under it.[4]

A plea is subject to demurrer where the only damages alleged appear to have been suffered by one not a party to the suit.[5]

In order that extraneous evidence may be admitted to explain an ambiguous contract there must be a plea on which to base it.[6]

Anything showing that plaintiff is not entitled to recover is admissible under a plea of nonassumpsit.[7] The defense that no contract was in fact made,[8] that the contract has been satisfied,[9] or that plaintiff himself breached the contract is admissible under a general denial.[10] In an action on an oral contract, a defendant who pleads a general denial need not also plead want of consideration.[11] The illegality of a contract valid on its face,[12] fraud in the procurement of the contract,[13] or that it was so modified after its execution as to release defendant from his obligation thereunder, is inadmissible under the general issue.[14] Performance of conditions precedent may, in some states, be proved under the common counts.[15] If the obligation to pay depends on a contingency, its occurrance

he was. Harmon v. Thompson [Ky.] 84 S. W. 569. In action for monthly instalment of contract price of power furnished where plaintiff claims that defendant has rescinded the contract and is therefore liable for prospective profits, answer alleging excuse for nonperformance and that defendant has always been willing to perform and offers to proceed with performance, held to set up equitable defense. Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179. Counterclaim in action on contract for furnishing electrical energy alleging breach by plaintiff held insufficient in failing to allege performance by defendant. Id. Complaint in action on contract requiring payment of certain sums on specified contingencies held demurrable for failure to allege performance by plaintiff of covenant to surrender certain stock certificate. Fisk v. Black, 91 N. Y. S. 323.

3. In action for breach of contract for examination and insurance of title to certain premises, where special defense set forth different contract from that alleged in complaint without avoiding or barring latter, denial of performance held denial of one so alleged and not one sued on, and answer was demurrable. Barnard v. Lawyers' Title Ins. Co., 45 Misc. 577, 91 N. Y. S. 41. In an action to recover the contract price for the erection of a building, no plea is necessary in order to present the defense of nonperformance in the district court. Isetts v. Bliwise [N. J. Law] 60 A. 200.

4. In action for damages for breach of contract to construct telephone line, held unnecessary to allege that plaintiff had erected poles as required. Foster v. Leininger, 33 Ind. App. 669, 72 N. E. 164.

5. Plea of recoupment for damages for breach of contract sued on held subject to demurrer where such damages are alleged to have been suffered by defendant's alleged principals, who are strangers to the suit. Gibboney v. Wayne & Co. [Ala.] 37 So. 436.

6. To enable the court to put itself in the position of the parties when it was made. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4. When the existence of a contemporaneous oral agreement is alleged, the conditions which make proof thereof admissible must also be alleged. Affidavit of defense alleging that boiler was not delivered within time specified in contemporaneous oral agreement which varied terms of written contract held insufficient to prevent judgment, where there was no allegation of fraud or mistake and contract provided that it alone should govern rights of parties and that acceptance should constitute waiver of all claims for delay. Tranter Davison Mfg. Co. v. Pittsburg Trolley Pole Co., 23 Pa. Super. Ct. 46.

7. On issue framed after a judgment has been opened, where it is agreed that contract shall stand for a declaration and that defendant shall plead non assumpsit, and defendant so pleads, it is not error to refuse to permit additional plea of non est factum to be filed at trial, since she could prove anything showing that plaintiff was not entitled to recover. Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

8. Mail & Exp. Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864.

9. Defendant in an action on a quantum meruit for services rendered to be paid for by bequest held entitled to take advantage of the satisfaction of the contract under a general denial without a plea of estoppel. Burns' Rev. St. 1901, § 380. Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185.

10. In suit for salary for services, where defendant denied rendition of services, he was entitled to show that plaintiff violated contract by engaging in other employment, and that consequently salary sued for never become due. Seaburn v. Zachmann, 99 App. Div. 218, 90 N. Y. S. 1005.

11. Plaintiff must show consideration under such circumstances. Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724.

12. Must allege facts on which to rely as invalidating it. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607.

13, 14. Cir. Ct. Rule 7, subd. b. Carter & v. Weber [Mich.] 101 N. W. 818.

15. Performance of work, etc. Leach v.

must be alleged.[16] A denial that plaintiff has performed all the conditions precedent is not a negative pregnant.[17] In some states a denial of execution must be made under oath.[18]

Where recovery is sought on the theory of a contract performed, and the answer denies full performance, defendant is not required to give a bill of particulars showing in what particulars plaintiff has failed to perform.[19]

Where defendant denies performance and alleges by way of offset, without counterclaim, that he has expended money for labor and materials in completing the contract, plaintiff is entitled to a bill of particulars with reference thereto.[20]

Evidence.[21]—The burden is on plaintiff to establish by a preponderance of the evidence that a contract valid under the statute of frauds was entered into between the parties, its breach, and his damages.[22] The burden of proving consideration is ordinarily on plaintiff,[23] unless the contract itself imports one.[24] He also has the burden of showing performance.[25] The burden of proof is on defendant to show by a preponderance of the evidence that he did not sign the contract sued on.[26]

In the absence of proof of fraud, accident, or mistake, it is conclusively presumed that an unambiguous written contract, complete in itself, contains the final agreement of the parties and all prior or contemporaneous negotiations are deemed to have been merged therein.[27] Hence, as a general rule, parol evidence is inadmissible to vary, contradict, or add to it.[28]

Alphons Custodis Chimney Const. Co., 110 Ill. App. 338.

16. Briggs v. Rutherford [Minn.] 101 N. W. 954.

17. Electrical Equipment Co. v. Feuerlicht, 90 N. Y. S. 467.

18. Where the execution of a contract is not put in issue by a verified answer, it is error to allow defendant to attack its execution by plaintiff. Stark v. Hicklin [Mo. App.] 87 S. W. 106.

19, 20. Brandt v. New York, 99 App. Div. 260, 90 N. Y. S. 929.

21. See 3 C. L. 854.

22. Where defendant claims that his offer was not accepted. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. One suing for labor and material has the burden of proving that both were furnished under a contract requiring defendant to pay for them. Morrill & W. Const. Co. v. Boston, 186 Mass. 217, 71 N. E. 550. One who receives money from another either as a loan or for purposes of investment has the burden of showing either payment or investment. Burden on his representatives after his decease. In re Brown's Estate [Pa.] 60 A. 149.

23. In action or oral contract for services rendered decedent. Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724.

24. In states where written contracts import a consideration, the burden of proving want of consideration is on the party attacking the contract on that ground. Civ. Code, § 2170. Noyes v. Young [Mont.] 79 P. 1063.

25. In an action for refusal to accept goods tendered under a contract of sale, of showing that they complied with contract. McCall Co. v. Jacobson [Mich.] 102 N. W. 969. Instruction as to performance and burden of proof in action on contract to pay reasonable value of services, approved. Request properly denied. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

26. Evidence sufficient to support finding that contract for purchase of goods had been changed. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137.

27. Butler v. Standard Guaranty & Trust Co. [Ga.] 50 S. E. 132; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606; Fidelity Fire Ins. Co. v. Illinois Trust & Sav. Bank, 110 Ill. App. 92; Union Special Sew. Mach. Co. v. Lockwood, 110 Ill. App. 387; Smith v. Rust, 112 Ill. App. 84; Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37; Fairbairn v. Houghten [Mich.] 102 N. W. 284;Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531; Boggs v. Pacific Steam Laundry Co., 171 Mo. 282, 70 S. W. 818; Tucker v. Dolan [Mo. App.] 84 S. W. 1126; Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137. Apking v. Hoffer [Neb.] 104 N. W. 177; Spencer v. Huntington, 100 App. Div. 463, 34 Civ. Proc. R. 30, 91 N. Y. S. 561; Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957; Davis v. Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. Where a final letter in a correspondence shows that it was intended to embrace the whole agreement and finally conclude it, it is the only evidence of the contract. Grueber Engineering Co. v. Waldron [N. J. Err. & App.] 60 A. 386. All verbal promises made by either party to an engagement of marriage merged in the marriage. Kramer v. Kramer, 181 N. Y. 477, 74 N. E. 474. Arrangement in regard to leasing held merged in lease. Ranalli v. Zeppetelli, 94 N. Y. S. 561. Where it purports to be complete in itself. Rucker v. Bolles [C. C. A.] 133 F. 858. Prior oral representations as to machines. Swenson & Sons v. Colvin, 130 F. 626. While the contract may, in equity, be reformed or canceled for mistake or fraud, it may not be canceled on the ground that

The rule applies with the same force to exclude such proof for the purpose of varying an implication of law arising from the writing, or in other words, its legal

a previous oral promise has not been kept, nor reformed on the ground that such a promise was made and not included in the writing, unless it be shown that its omission therefrom was due to mistake, fraud, or accident. Smith v. Rust, 112 Ill. App. 84. A party signing a written contract cannot testify as to an understanding of its meaning different from the plain language of the writing. Bound to know its contents, and bound by contract, though he signs without reading it or on the representations of a stranger. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137. Cannot testify as to his undisclosed intention. Not to consider cost of coal in determining price to be charged for excavating trench, where contract required him to furnish "labor and tools." Camardella v. Holmes, 97 App. Div. 120, 89 N. Y. S. 616. Defendant cannot take advantage of a mistake on his part alone in failing to have contract express his intention. Harmon v. Thompson [Ky.] 84 S. W. 569. The test of the completeness of the writing proposed as a contract is the writing itself. Contract of employment as agent held complete and to show intent to leave the duration of the agency to be fixed by law. Union Special Sew. Mach. Co. v. Lockwood, 110 Ill. App. 387. That there was a misunderstanding between the parties could only be drawn from language used, and not from testimony of one party that his understanding of it was different from that of the other. Durgin v. Smith, 133 Mich. 331, 94 N. W. 1044.

28. Dugan v. Kelly [Ark.] 86 S. W. 831; Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; Wheaton v. Bartlett, 105 Ill. App. 326; Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37; Rucker v. Bolles [C. C. A.] 133 F. 858; Dunn v. Mayo Mills [C. C. A.] 134 F. 804; Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. Civ. Code 1895, § 5201. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. As to time of delivery of coal. Delaware & H. Canal Co. v. Mitchell, 113 Ill. App. 429. Evidence is admissible to show that a clause in a note limiting liability of three makers to one-third each was intended to avoid a liability as partners. Wheaton v. Bartlett, 105 Ill. App. 326. An incorporator signing and swearing to a certificate stating that he has subscribed for a certain number of shares of stock is estopped, in an action to recover the amount of his subscription, to set up a secret agreement that he was to take a smaller number of shares and that the balance was to be treasury stock. Greater Pittsburg Real Estate Co. v. Riley, 210 Pa. 283, 59 A. 1068. Where, pending suit by mortgagor of land to set aside mortgage on ground that it was obtained by duress, the mortgagor died, and his son, who had received deed of the land from his father, intervened as plaintiff, held, that evidence tending to show agreement between father and son whereby former was to prosecute suit and latter was to provide for father during life was not objectionable on ground that it attempted to show a contract to be performed in the future, or a different consideration from that recited in the deed or because it contradicted the recitals in the deed. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. Inadmissible against or beyond what is contained in the acts, or on what may have been said before or at the time of making them, or since. La. Civ. Code, art. 2276. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903.

Held inadmissible to show: Purpose for which defendant leased certain premises, with right to remove buildings erected by him at expiration of lease. Cox v. O'Neal [Ala.] 37 So. 674. Agreements and understandings concerning representations made by one party to another. Butler v. Standard Guaranty & Trust Co. [Ga.] 50 S. E. 132. That plaintiffs gave their word of honor not to engage in coal business for ten years, particularly where evidence showed that promise was intentionally omitted from contract. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, afg. 111 Ill. App. 606. That parties contemplated employment for definite period, where letter of appointment clearly expressed the intention that it was to be indefinite. Fidelity Fire Ins. Co. v. Ill. Trust & Sav. Bank, 110 Ill. App. 92. That stock subscriptions unconditional on their face were to be paid by transfer of franchise. Merrick v. Consumers Heat & Elec. Co., 111 Ill. App. 153. Negotiations leading up to agreement fixing alimony. Silberschmidt v. Silberschmidt, 112 Ill. App. 58. That lessor agreed to hold each party for his share only, where lease bound both tenants for full amount. Smith v. Rust, 112 Ill. App. 84. Where contract was for sale of all scrap iron received for sixty days, that real contract was a verbal one, and that it was agreed that the amount of iron to be furnished should not exceed the amount furnished during the preceding sixty days. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. That contract to pay certain sum for plaintiff's services was not to be operative unless it resulted in a saving to defendant of a specified amount. Carter & Co. v. Weber [Mich.] 101 N. W. 818. Time and manner of payment, where option to purchase personalty is silent in regard to them. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Parol agreement to employ plaintiff for life where release provided for employment for only so long as defendant saw fit. Boggs v. Pacific Steam Laundry Co., 171 Mo. 282, 70 S. W. 818. Antecedent and contemporaneous parol warranties and statements. Robinson & Co. v. Ralph [Neb.] 103 N. W. 1044. Agreement that plaintiffs might have longer time in which to meet payments under contract of sale. Apking v. Hoffer [Neb.] 104 N. W. 177. Warranty not expressed in a written contract to manufacture an article or implied from the terms used. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. That absolute conveyance of land was made on oral agreement of grantee to devise it to the grantor. Lozier v. Hill [N. J. Eq.] 59 A. 234. That agreement to purchase mortgage in consideration of plaintiff's advancing money thereon to a corporation was

effect, as it does to a charge of the written terms themselves;[29] nor is it changed by the fact that the contract contains a patent ambiguity,[30] nor because the contract is general in its terms.[31] Conditions precedent to its taking effect enumerated in a written contract will be presumed to be exclusive and others cannot be added by parol.[32] The fact that the contract contains an express warranty or representation does not exclude an implied warranty upon another matter concerning which it is silent.[33] An objection that parol evidence contradicts a written contract is untenable where the writing alleged to be contradicted is not in evidence.[34]

intended as a temporary security pending the removal of objections to the mortgaged premises. Law v. Smith [N. J. Eq.] 59 A. 327. What was said or done pending the negotiations. Grueber Engineering Co. v. Waldron [N. J. Err. & App.] 60 A. 386. That sale was conditioned on buyer's satisfaction, where agreement to pay was absolute. Cluster Gaslight Co. v. Baker, 90 N. Y. S. 1034. Negotiations wherein plaintiff at first objected to execution of sealed contract for purchase of stocks by P. in his individual capacity on ground that he was acting as agent for defendant, but later consented thereto. Spencer v. Huntington, 100 App. Div. 463, 34 Civ. Proc. R. 30, 91 N. Y. S. 561. Sale by sample where there is a written contract for the sale of machinery specifying terms and conditions. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. Other warranties where contract restricts warranty intended to be made. Id. Written warranty of quality cannot be enlarged by proof of prior parol warranties. Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516. Contemporaneous agreement that liability on note absolute in its terms was contingent. Neverman v. Bank of Cass County, 14 Okl. 417, 78 P. 382. Subsequent parol modification of written contract. Id. Buyer's understanding of price of goods, where price was plainly shown by letters constituting contract. Fletcher v. Underhill [Tex. Civ. App.] 83 S. W. 726. Where contract for sale of stone provided for payment of freight by purchasers, that seller agreed to pay any freight in excess of certain rate, where contract provided for its payment by purchasers. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. That a written contract is a mere part performance of a verbal one and to show the terms of the latter where the two are inconsistent or contradictory. Corbett v. Joannes [Wis.] 104 N. W. 69. Antecedent and contemporaneous conversations and negotiations. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903. Representations, promises, or agreements made, or opinion expressed in the previous conversations of the parties. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. Prior negotiations as to height of walls required by building contract. Id. Warranty that drill would bore holes as rapidly and economically as a diamond drill. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. To explain phrase "acceptable to the engineer," it being unambiguous. United Engineering & Contrcting Co. v. Broadnax [C. C. A] 136 F. 351. To give witnesses construction of unambiguous written contract, at variance with its terms. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903.

Contract in regard to sale of land held sufficiently clear and consistent, when properly construed, to prevent the admission of parol evidence to show that defendants were merely acting as plaintiff's agents to promote a sale. Harmon v. Thompson [Ky.] 84 S. W. 569. In action on oral agreement for purchase of wire based on written contract between defendant and third person, evidence of statements of latter's salesman as to number of pounds of wire in a mile, made before execution of written contract, held both incompetent and immaterial. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64.

Of custom: Parol evidence of a custom in construing contracts, which is inconsistent with the terms of the one in suit, is inadmissible to vary its terms. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. Of custom requiring real estate agent to render other services than those required by his contract in order to earn his commission. Torpey v. Murray, 93 Minn. 482, 101 N. W. 609. See, also, Customs and Usages, 3 C. L. 988.

29. Union Special Sew. Mach. Co. v. Lockwood, 110 Ill. App. 387. In such case the implication cannot be overcome or disputed by attempting to show a parol prior or contemporaneous agreement that a condition should exist at variance with the implication. Id. Where contract does not specify time during which defendant shall continue in plaintiff's employment, law supplies missing term by conclusively presuming that the relation shall last as long as both parties desire and terminate at the will of either on notice to the other to that effect, and extrinsic evidence is not admissible to show prior negotiations to the contrary. Id.

30. Fact that memorandum of sale of goods, otherwise constituting a complete contract, is signed only with the buyer's surname, necessitating the introduction of parol evidence to identify him as a partner in the defendant firm, and to show that he contracted on its behalf, does not authorize defendant to prove by parol a condition not therein expressed. Dunn v. Mayo Mills [C. C. A.] 134 F. 804.

31. If the terms employed are sufficient to create a contract susceptible of interpretation in itself. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804.

32. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

33. Implied warranty of fitness of steam heating apparatus for contemplated use. Ideal Heating Co. v. Kramer [Iowa] 102 N. W. 840. A provision that the contract shall

If the contract is ambiguous, the situation of the parties when it was made and all the surrounding circumstances may be shown for the purpose of arriving at their intention.[35] So, too, in such case, parol evidence is admissible to show the relation of the language to the subject-matter, or to identify any person or thing mentioned in the contract,[36] or to show the sense in which the parties used a word of vague meaning,[37] or the meaning of words peculiar to a particular business or trade, which are not in common use and have no settled judicial meaning,[38] or to supply omitted terms.[39]

fully express the agreement of the parties does not exclude an implied warranty where one would otherwise be found. Implied warranty of fitness of heating apparatus for contemplated use. Id.

34. Mason v. Postal Tel. Cable Co. [S. C.] 50 S. E. 781.

35. See, also, Interpretation, § 4A, ante. L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462; Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. Contract for excavating held not ambiguous. Dugan v. Kelly [Ark.] 86 S. W. 831. The acts, conduct, and declarations of the parties, to explain what the contract actually covers or to what conditions or subject-matter it applies, where its meaning in that regard is not obvious on inspection. Conduct and declarations of parties admissible on question whether contract, by its terms to be performed on consolidation of two corporations, was limited to consolidation resulting from negotiations then pending or applied to one resulting from future negotiations, where contract was silent on the subject. Donner v. Alford [C. C. A.] 136 F. 750. An ambiguous contract is open to explanation by parol. Evidence held to show contract to convey land to defendant on payment of purchase price. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792. Civ. Code 1895, § 5202. Where contract of sale of business was ambiguous as to method of paying part of purchase money, held competent to prove prior agreement that it was to be paid out of profits of a certain enterprise, and, if there were no profits, nothing further was to be paid. Morrison v. Dickey [Ga.] 50 S. E. 178.

Evidence held admissible: Where deed provides that grantee shall assume mortgages, taxes, and claims of any and every description, to show what claims were meant. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204, rvg. Cameron v. Sexton, 110 Ill. App. 381. To show condition of property which was subject of contract for sale of standing timber with view to arrive at intent of parties in terms used. Walker v. Johnson, 116 Ill. App. 145. Contemporaneous conversations in regard to when goods to be shipped would be wanted. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. To show the general character of the business of the parties. In suit on contract to purchase scrap iron, evidence that plaintiffs, on a drop in the price, purchased iron in unusual quantities and accumulated it in larger quantities that either party had a right to expect when contract was made, though contract provided for purchase of all the iron which plaintiff might receive. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. Evidence as to purpose for which ties were or would be needed, to show meaning of words "as needed" and similar expressions in offer to furnish them. Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. As to verbal understanding referred to in memorandum transferring tie contract from railroad to construction company, to show what contract was meant. Id. Oral and written statements of parties contemporaneous with making of contract between attorney and client, to show what services were to be performed and how payment was to be made. Barcus v. Gates, 130 F. 364, afd. Barcus v. Sherwood [C. C. A.] 136 F. 184.

36. To show what property was meant, where land sold is designated by a general name. Where it is described in contract of sale as farm consisting of about twenty acres, known as the "V. farm," Not admissible where question is which of two parcels was meant. Hyden v. Perkins, 26 Ky. L. R. 1099, 83 S. W. 128. To show who was meant by offer to furnish "you" ties as needed. Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. Evidence which is explanatory of the subject-matter of the written contract, consistent with its terms, and necessary for its interpretation. Cox v. Wilson, 25 Pa. Super. Ct. 635. Where, in the application of the contract to the subject-matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the instrument alone, parol evidence of the circumstances under which it was made and of statements made in the prior negotiations is admissible to resolve the ambiguity and prove the real intention. Admissible to explain indefinite provisions in building contract in regard to paving approaches to certain sheds. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. To explain the meaning of the language used or its relation to the facts. Where memorandum for sale of goods is signed only with buyer's surname, admissible to identify him as a partner in defendant firm, and to show that he contracted on its behalf. Dunn v. Mayo Mills [C. C. A.] 134 F. 804.

37. "Lumber" in contract to transport it. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722.

38. Words "merchantable lumber, mill run," in contract of sale. Barnes v. Leidigh [Or.] 79 P. 51.

39. When a letter claimed to contain the terms of the contract refers to prior correspondence, or negotiations, or understandings which are intended to be considered as a part of the immediate letter, or as em-

Parol evidence is also admissible to show the execution of the contract,[40] its actual date,[41] a subsequent modification thereof,[42] or an independent collateral agreement not inconsistent with it,[43] to show fraud,[44] accident or mistake,[45] illegal-

bracing a part of the contract, or as defining the obligation assumed, evidence in regard to them is admissible for the purpose of fully showing the terms of the contract. Letters admissible to show that agreement to pay drafts was not limited to acceptances for invoices mentioned in first letter, and to throw light on general course of dealing between the parties. James v. Lyons Co. [Cal.] 81 P. 275. Where one of the terms agreed upon has not been incorporated into the written contract, and the latter appears to be incomplete or uncertain as to the object or extent of the engagement. Union Special Sew. Mach. Co. v. Lockwood, 110 Ill. App. 387. Rule does not apply where the apparent omission is supplied by implication of law. Id. Contract to furnish advertising not so ambiguous as to justify admission of parol evidence to explain when publication was to begin. No time being specified, law will imply agreement to furnish copy within reasonable time. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. Where a contract for the transportation of live stock is silent as to the time and manner of performance, parol evidence is admissible to show that it was customary to transport stock amounting to ten cars or more in separate train when demanded. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992.

40. Where defendant denied that memorandum of sale of hops reciting consideration of $1 was ever executed or delivered as a contract, but claimed that it was signed as a part of the negotiations for the sale, which negotiations were never consummated, held, that evidence as to such negotiations and as to the amount to be paid for the hops was admissible for purpose of sustaining such contention and not incompetent as varying the terms of a written contract. Schwarz v. Lee Gon [Or.] 80 P. 110.

41. To show that building contract containing stipulation against liens, which was dated October 3d and filed October 19th, was not executed until October 18th. Cutter v. Pierson, 26 Pa. Super. Ct. 10.

42. Evidence as to conversations between the parties, had on same day but after contract to furnish information as to timber and homestead locations had been entered into and information had been given, in which defendants undertook to get plaintiffs to reduce the price, held admissible in action for contract price. Cummings v. Weir, 37 Wash. 42, 79 P. 487.

43. Where company's regulations provided for special charge for delivery of telegrams beyond free limits but did not require its prepayment, held possible for parties to contract with reference to custom of company to make such deliveries without prepayment without thereby contravening the terms of the written contract of which such regulations formed a part. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493. An independent oral agreement to make repairs prior to the beginning of the term, collateral to a subsequent lease under seal. Daly v. Piza, 45 Misc. 608, 90 N. Y. S. 1071. Agreement to pay it out of the first grain sold off the place. Saffer v. Lambert, 111 Ill. App. 410.

44. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. Where it is claimed that permit giving telegraph company permission to locate its line where it wishes over plaintiff's property was obtained by fraud, to show verbal agreement to locate it at particular place. Mason v. Postal Tel. Cable Co. [S. C.] 50 S. E. 781. No person can be precluded by any contract or writing that he has been induced to enter into through fraud or deceit. Acceptance of warranty deed to property held not to preclude inquiry into fraud in original contract in pursuance to which it was taken. Rule that previous and contemporary negotiations merge in conveyance does not apply. Kroll v. Coach, 45 Or. 459, 80 P. 900. A distinct verbal agreement may be set up as a defense in an action between the parties to prevent the use of the writing to effect a fraudulent or dishonest purpose. Debtor may show prior parol agreement as to collateral held by him in action to recover it on the ground that all liability was extinguished by payment under subsequent written compromise. Corbett v. Joannes [Wis.] 104 N. W. 69. The rule that a party to a written contract seeking to vary its terms on the ground of fraud, accident, or mistake, must prove his allegations by clear, precise, and indubitable evidence does not apply to a third person alleging that it was executed for the purpose of defrauding him, but he is only obliged to prove his case by a preponderance of testimony. To be determined by jury. Meyers v. Meyers, 24 Pa. Super. Ct. 603. A written agreement may be modified, explained, reformed, or set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. Wheatley v. Niedich, 24 Pa. Super. Ct. 198. In action on agreement in writing for sale of chattel to recover deferred instalments of purchase-money secured by chattel mortgage, affidavit of defense alleging that defendant was induced to execute agreement and mortgage on promise that he should thereby incur no personal liability, held sufficient. Id. On rule to open judgment entered on judgment note it appeared that note was given for lightning rods sold under written guarantee to pay a certain sum if rods did not protect building. Defendant proved parol contemporaneous agreement that guaranty was to be put in form of insurance policies which was inducement to execution of contract. Policies were never delivered and rods were negligently constructed. Held error not to open judgment. Keeler v. De Witt, 24 Pa. Super. Ct. 463. The law regards it as a fraud by

ity,[46] failure of consideration,[47] or the true consideration, even though it is different from that stated,[48] that a deed absolute in form was intended as a mortgage and that it was never delivered to the grantee or accepted by him,[49] that the delivery of a deed was conditional and that the condition essential to make it absolute never arrived,[50] or to show the true relation of the parties to a note where it appears that the payee knew that certain of them signed as sureties only.[51]

The contract itself is generally admissible.[52]

In order to support a plea of failure of consideration, it is competent to prove that the notes in suit were asked for and given as a mere matter of form,[53] and the alleged purpose of the parties in giving them.[54]

such means to secure an unfair advantage and subsequently to deny the parol qualification, upon the faith of which the contract was made. Wheatley v. Niedich, 24 Pa. Super. Ct. 198.

45. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. Where there has been a defective attempt to reduce to writing the terms of an agreement actually made, to show that fact, and to show what the true agreement was. Question whether there has been such a mistake held for jury on conflicting evidence. Contract for sale of patent medicines. Locke v. Lyon Medicine Co. [Ky.] 84 S. W. 307. Error in a written contract of sale in regard to the thing sold. Pharr v. Shadel [La.] 38 So. 914. To show that part of contract appearing below the signatures of the parties was a part of the original agreement, and that signatures had been placed above it because place for them had been arranged before that part had been added. Cox v. Burdett, 23 Pa. Super. Ct. 346.

46. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803. To show that the writing is but a cover for usury, or a penalty or forfeiture. May be shown to be void. Civ. Code 1895, § 5203. Thus, what is called "rent" in a contract for the sale of land may be shown to be usury, unreasonable liquidated damages, or purchase money, if as purchase money it could not be retained by the vendor on rescission. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

47. For promissory note. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074.

48. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. Consideration for indorsement of note as between indorsee and his immediate indorser. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006. Where the consideration is expressed in money only. Contract for release of claim to fund derived from sale of realty expressing consideration of $1. Anderman v. Meier, 91 Minn. 413, 98 N. W. 327. The consideration for any written agreement, under proper allegations in the pleadings. Noyes v. Young [Mont.] 79 P. 1063. To show the real consideration for a deed (Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986), regardless of the recitals therein (Tucker v. Dolan [Mo. App.] 84 S. W. 1126). Grantee agreed to pay the taxes in addition to the consideration named in the deed. Henderson v. Tobey, 105 Ill. App. 154. Mere fact that consideration named in deed was natural love and affection and $1 does not estop grantee from showing by parol, as against persons claiming through sheriff's deed under judgment against the insolvent grantor, that the real consideration was a money payment equal to the value of the land. Miles v. Waggoner, 23 Pa. Super. Ct. 432. Presumption is that claims assumed by grantee are part of consideration, and hence they may be identified. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204, rvg. Cameron v. Sexton, 110 Ill. App. 381. For sale of standing timber, even though different from that stated. Walker v. Johnson, 116 Ill. App. 145.

49. Hurd's Rev. St. 1903, c. 95, § 12. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

50. Voluntary conveyance held not to have passed title. Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. S. 911.

51. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459.

52. In action by broker to recover commissions for sale of land where it appears that defendant acquiesced in the terms of sale, held error to exclude contract of employment on ground that sale as made was not according to its terms. Broker must show written contract of employment to make the sale. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890. Where action is brought on common counts on contract fully performed. Evans v. Howell, 211 Ill. 85, 71 N. E. 854, afg. 111 Ill. App. 167; Risley v. Beaumont [N. J. Law] 59 A. 145. Where one sues on quantum meruit for services rendered under contract before its rescission under its terms, he must introduce contract in evidence. New Kanawha Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550. In indebitatus assumpsit on the termination of a special contract. Poland v. Thomaston F. & O. Brick Co. [Me.] 60 A. 795. In action by sisters on contract between brothers to pay them the proceeds of an insurance policy, agreement held properly admitted in evidence. Willoughby v. Willoughby [S. C.] 50 S. E. 208. In determining whether services were rendered under a written contract or under a subsequent parol modification thereof, the jury may consider the terms and provisions of the writing. Contract for architect's services. Ritchie v. State [Wash.] 81 P. 79.

53. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1.

54. May show that they were given by way of guaranty that certain saloon fixtures would not be sold or removed, and that appellant's beer only would be sold. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1. Does not vary or alter terms of

One's financial condition or possession of property is relevant to the question of whether he received the money or property alleged as the consideration.[55]

The performance of conditions precedent must be proved.[56]

The general rules as to the admissibility of evidence apply. Particular examples will be found in the note.[57]

note, but admissible in any event where failure of consideration is pleaded. Id. Evidence sufficient to support finding that conditions had been complied with, and hence there was a failure of consideration. Id.

55. Admissible that bank account showed no deposit corresponding to alleged loan. Wright v. Davis, 72 N. H. 448, 57 A. 335.

56. See, also, § 9A, ante. Provision that third person shall decide all questions relative to execution of contract and that his decision shall be final and binding held not condition precedent to maintenance of action on contract. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. Where plaintiff was only entitled to recover under order accepted by defendant for iron actually used in building, the burden was on him to show delivery and progress of the work to a point where payment became due. Weber v. Farrell, 84 N. Y. S. 272. Where the bond and contract sued on are pleaded according to their legal effect, and no conditions precedent appear therein, an objection to the introduction of evidence on the ground that performance of such conditions is not alleged is untenable, in the absence of a motion to make the complaint more definite and certain. Building contract. Leghorn v. Nydell [Wash.] 80 P. 833. Where promise of secretary of navy to pay persons submitting designs for vessels depends entirely upon subsequent adoption of plans, their adoption or use must be established in order to recover. Lundborg's Case, 39 Ct. Cl. 23.

57. See, also, Evidence, 3 C. L. 1334.

As to execution of contract: Evidence held admissible. In action to recover wages which it was alleged deceased had deposited in a bank and promised to hold subject to plaintiff's order, evidence as to the property and circumstances of deceased. Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361. And as to conduct of plaintiff in regard to claim after death of deceased. Id. Also declarations of testator made in his lifetime to defendant, or testator's sister, or contained in his will, under Rev. Laws, c. 175, § 67. Id. Where the plaintiff denies the existence of an express contract, evidence that the amount alleged by defendant to have been called for by the contract is the reasonable value of the work. Guglielino v. Cahill, 185 Mass. 375, 70 N. E. 435. In action on alleged oral contract by stockholder of one of two corporations, which had united to form the plaintiff company, to make good the loss resulting from the cancellation of a certain contract with it by transferring to plaintiff certain patents, evidence of defendant's representations as to the earning capacity of his company, made at the time of the consolidation. Anderson Carriage Co. v. Pungs[Mich.] 12 Det. Leg. N. 218, 103 N. W. 839. In action for rent under written lease, where sole issue was existence of subsequent oral agreement whereby lessee was to erect building on premises and was to be allowed to set off its value against rents for last two years of term, letters written by one of the lessors to the lessee tending to prove that building was erected under some such agreement. Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481. In action for nondelivery of cotton, option for the sale of which plaintiff had accepted by telegram, it was competent to prove the telegram by the operator at the sending office, though he was not the one who sent it, where he testified that he brought it from the office files. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88.

As to terms of the contract. Evidence held admissible: On issue as to terms of contract for drawing plans for defendant's house, declarations of defendant's wife in that regard, made in his presence when the terms were being considered, coupled with his acquiescence in her wishes. Hight v. Klingensmith [Ark.] 87 S. W. 138. Where written contract is uncertain, and evidence is offered showing market price, it is not reversible error to admit testimony in rebuttal showing what a fair price would be for the particular work. Schmidt v. Turner, 5 Ohio C. C. (N. S.) 492. Memorandum of contract dictated by one party in presence of manager of the other, a corporation, a copy of which was shown to have been delivered to the latter, held admissible as an admission by such corporation in suit involving an alleged breach by it, though unsigned. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. In action for breach of contract whereby plaintiff was to move buildings across water on scows, where each party claimed that it was the duty of the other to procure the scows, conversations by plaintiff with scow owners relative to securing them. Anderson v. Hilker [Wash.] 80 P. 848. Under a complaint alleging merely the advancement of money to defendant for its use and benefit, a bond executed by defendant to plaintiff reciting the defendant's need of the money and the advancement of the same by plaintiff to show the nature of the transaction between the parties. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

Evidence inadmissible: On the issue of the terms of a parol contract of employment, evidence of the terms of defendant's contracts with other employes is irrelevant. That none of them were paid commissions. Featherstone Foundry & Mach. Co. v. Criswell [Ind. App.] 75 N. E. 30. In action for services as bookkeeper, entries made by plaintiff in defendant's books containing statements of third person as to his understanding of a transaction whereby a certain note was assigned by defendant to plaintiff, held hearsay. Mattingly v. Shortell [Ky.] 85 S. W. 215. On claim against an estate for board of decedent, evidence as to payment of similar claims to others held incompetent, but its admission was harm-

Variance.[58]—As in other actions, a party can recover, if at all, only on the cause of action alleged in his pleadings, and hence pleading and proof must correspond.[59] One suing on an express contract cannot recover on an implied one,[60]

less. Tyndall v. Van Auken's Estate, 94 N. Y. S. 269.

Offers of compromise: Under B. & C. Comp. § 532, relating to offers to compromise, a tender by defendant which is not accepted is not an admission of the terms of the contract sued on and of the breach alleged. Young v. Stickney [Or.] 79 P. 345.

As to damages. Evidence held admissible: In action for breach of contract for sale of hides made in Detroit, trade paper showing their market value in Chicago, it having been shown that more were taken off in the latter city than in any other place in the country. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Evidence that plaintiff had to go on the market and buy cotton at an advance by reason of defendant's failure. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88. In any event it was harmless where no price was given and court subsequently ruled it out upon issue of damages. Id. Where there is a dispute as to whether the work was performed under a special contract or as defendant's agent, evidence as to the reasonable value thereof. Radel v. Lesher [C. C. A.] 137 F. 719. Where jury found that recovery should be for work, labor and materials, evidence as to amount actually expended for materials held properly admitted. Id. Where defendant agreed to pay plaintiff a reasonable sum for his services, evidence as to the usual amount paid for similar services held not objectionable because failing to show any fixed custom to pay any definite price. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

As to performance: Evidence admissible. In action on contract for transporting men to defendant's camp, original book in which plaintiff entered names of men shipped held admissible as book of original entries up to the time when such names were copied from the way bils. Idol v. San Francisco Const. Co. [Cal. App.] 81 P. 665. In any event its admission was harmless where plaintiff's evidence as to the number of men carried was uncontradicted. Id. In an action by a broker to recover commissions for the sale, evidence that the proposed purchaser is financially able to pay the price demanded. Czarnowski v. Holland, 5 Ariz. 119, 78 P. 890. Letters of plaintiff and his agents and evidence that other letters were written to refute defendant's evidence that plaintiff had done nothing in matter of procuring certain government contracts. Parke & Lacy Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 P. 1065. In action for breach of contract to convey land, deeds and correspondence from owner and third persons, to show defendant's ability to give title and disprove allegations of bad faith. Hardman v. Kelley [S. D.] 104 N. W. 272. In action for nondelivery of cotton, it is competent for plaintiff to testify that he was prepared to pay for it when he went to get it. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88.

Evidence inadmissible: Where subscription to extension of railroad merely required that it should be of standard gauge, and built of new material, and provided that it should be payable when road was completed to certain town and first train was run thereon, if done before a certain date, evidence as to whether railroad had any interest in said town (Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899), as to whether it put in ties after completion of the road, and as to the schedule and speed of trains (Id.), and as to whether it worked on the track after the specified date, held immaterial (Id.). Evidence as to acceptance of proposition and commencement of work after deposit of subscription, held admissible. Id. Evidence that first class steel was subsequently replaced properly stricken because not showing who made the change. Id. Letters complaining of difficulties interposed by defendant to the completion of the contract are incompetent in an action on the contract, because if the things complained of were prejudicial to plaintiff and were the acts of defendant, proving them is enough. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. They are also incompetent where previous difficulties have been waived by an extension of the time for completion. Id. In action to recover contract price for water furnished to a borough for a particular period, evidence as to the condition of the water company's reservoir and the sufficiency of its water supply at a time subsequent to such period. Ephiata Water Co. v. Ephiata Borough, 24 Pa. Super. Ct. 353.

As to payment: In action for services rendered deceased, deed executed by him to plaintiff long prior thereto and inferentially shown to have been based on a different consideration, held inadmissible. Birch v. Birch [Mo. App.] 86 S. W. 1106. Held no evidence to show payment for goods purchased for defendant by plaintiff which defendant admitted that he had received. Carter & Co. v. Weber [Mich.] 101 N. W. 818.

Miscellaneous evidence: In action for money paid under debenture contract, rescinded because of its breach by defendant, held proper to refuse to allow inquiry as to what had been done with monthly payments received by defendant thereunder. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090. In action on contract whereby wife agreed to pay judgment against her husband, evidence that execution was subsequently levied on certain land of husband held irrelevant. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124.

58. See 3 C. L. 853, n. 87-89.

59. See, also, Pleading, 4 C. L. 1050. One suing upon an alleged unconditional contract to pay a stated sum cannot recover upon proof of a contract to pay it on condition. Morrison v. Dickey [Ga.] 50 S. E. 178. Evidence in action to recover balance claimed to be due on sale of business held to justify verdict for defendant. Id. A petition alleging that a contract between three parties on one side and one on the

nor on a quantum meruit on proof of partial performance, though the proof may otherwise warrant it,[61] nor can one sue on a parol agreement and recover on proof of a written contract.[62]

(§ 9) *F. Procedure at trial; verdict and judgment. Questions of law and fact.*[63]—The construction of an unambiguous written contract is a question of law

other is invalid, and praying that the entire contract be set aside and canceled, is not supported by evidence that it was invalid as to only two of the three contracting parties. Barlow v. Strange, 120 Ga. 1015, 48 S. E. 344. Cannot set up forbearance to sue as consideration for agreement of third person not to sue, where different consideration is alleged. Gilman v. Ferguson, 116 Ill. App. 347. In action for contract price of brick, evidence that buyer was unable to pay for those furnished because of his financial condition held inadmissible, there being no such issue in the case. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787. There is no material variance between an allegation that a contract was entered into between two creditors and the heirs of a decedent and proof that it was entered into by the creditors and afterwards ratified by the heirs. Stewart v. Rogers [Kan.] 80 P. 58. No variance between an allegation of an unconditional promise to pay and proof of a promise to pay when able. Mattingly v. Shortell [Ky.] 85 S. W. 215. In action on notes guaranteed by defendant and given for fertilizer, plaintiff is not entitled to claim that the report of the analysis of the fertilizer by the agricultural experiment station is the only competent evidence of its quality, where it fails to allege that it has complied with the statute requiring such analysis, and under such circumstances testimony of persons who have purchased the fertilizer is admissible as to its quality. Hardy Packing Co. v. Sprigg [Ky.] 84 S. W. 532. Where defendant gives notice of recoupment based on breaches of the contract, evidence as to alleged fraudulent representations leading to its making is inadmissible. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. In action to recover overcharges on shipment of ties, where plaintiff counted on a contract for the transportation of "lumber," he was entitled to recover only for a breach of such contract, and a recovery could not be had on the ground that defendant embraced ties in the word "lumber" in its published tariff sheets and thereby expressly or impliedly agreed that they would be carried at lumber rates, though the classification might assist plaintiffs in showing that ties were among the articles called lumber, and hence that agreement to carry lumber at specified rate was agreement to carry ties. Instruction held erroneous. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722. Opinion of interstate commerce commission that ties should be put in same classification as lumber held irrelevant and prejudicial. Id. Where complaint alleged and evidence showed that defendant accepted deed under agreement that he should pay plaintiff any surplus remaining on sale of the property after deducting the amount of a debt owing him by plaintiff and any taxes he might pay, and that there was a surplus remaining after such sale, which plaintiff sought to recover, his action was at law, and it was error to allow him to recover on theory that defendant was a mortgagee in possession and liable to account for rents and profits. Johnson v. Stephens, 107 Mo. App. 629, 82 S. W. 192. One pleading performance of all the conditions of the contract on his part cannot recover on proof showing a waiver of some of them. Contract to haul logs. Young v. Stickney [Or.] 79 P. 345. Plaintiff must set out in his declaration the whole of his contract and his proof will be limited to his allegations. If evidence discloses fact that he has not done so, it will be stricken as being at variance with his allegations. Carpenter & Co. v. Vulcanite Portland Cement Co. [Pa.] 61 A. 75. It cannot be said that there is a variance because the writing offered in support of the contract declared on also contains words not pleaded, if they do not in themselves alter the meaning of the words pleaded. Id. Where plaintiff declares on contract based on telegram letter of same date containing copy of telegram which was the same as that set out in the declaration except that it contained the additional words "letter received" held admissible, since they did not alter effect of defendant's offer. Id. The fact that the contract declared on and established by plaintiffs is not the whole of the contract between the parties is a matter of defense. Defendant cannot complain as long as plaintiff's evidence tends to prove the contract pleaded and does not disclose any other. Id. In action of trespass on the case in assumpsit allegations in bill of particulars indicating contract between plaintiff and defendant and its breach, held not supported by evidence that defendant merely prevented a third person from performing a contract with plaintiff, to which defendant was not a party. Plaintiff's remedy is in action of trespass on the case. Feamster v. Feamster [W. Va.] 50 S. E. 238. Evidence held to show contract for plaintiff's services in securing other contracts which were made by correspondence in February as alleged, though consummation of scheme was postponed until September. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

60. For transportation of livestock. Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148.

61. For services. Hunt v. Tuttle, 125 Iowa, 676, 101 N. W. 509. Suit by broker to recover commissions under contract by defendant to pay certain price if he obtained purchaser for entire tract of timber. Veatch v. Norman [Mo. App.] 84 S. W. 350. Not without an amendment. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

62. For transportation of livestock. Evansville & T. H. R. Co. v. MvKinney, 34 Ind. App. 402, 73 N. E. 148.

63. See 3 C. L. 858.

for the court,[64] but when its language is indefinite or ambiguous, or it is averred that some provision was, by mistake, left out of it and parol evidence is admitted to explain what the parties intended, it is for the jury to determine its meaning from the evidence.[65] So, too, where its terms are definitely known, the interpretation of an oral contract is for the court,[66] but on conflicting evidence it is for the jury to determine both the existence of the agreement [67] and what its terms really were.[68] Where the contract consists both of oral negotiations and subsequent correspondence, it is for the court to instruct the jury as to the effect of the writing

64. Dugan v. Kelly [Ark.] 86 S. W. 831; Green v. Soule, 145 Cal. 96, 78 P. 337; Fletcher v. Simms [Ark.] 86 S. W. 993; Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; Higbie v. Rust, 112 Ill. App. 218, afd. 211 Ill. 333, 71 N. E. 1010; Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37; Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722; Young v. Van Natta [Mo. App.] 88 S. W. 123; Dunn v. Mayo Mills [C. C. A.] 134 F. 804; Dennis v. Montesano Nat. Bank [Wash.] 80 P. 764; Norton v. Shields, 132 F. 873; Donner v. Alford [C. C. A.] 136 F. 750. Where a written contract is so explicit in its terms as to be susceptible of but one construction, it is the duty of the court to advise the jury as to its meaning and effect. Locke v. Lyon Medicine Co. [Ky.] 84 S. W. 307. It is for the court to say what is meant by a word in a written contract used, as far as appears, in its ordinary, instead of a technical or trade sense, or a peculiar one adopted by the parties. Greason v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 722. Error to leave question to jury where meaning is free from doubt. Grueber Engineering Co. v. Waldron [N. J. Err. & App.] 60 A. 386. In assumpsit, where there is no substantial dispute as to the facts but the case turns on the construction of a written contract, it is proper for the court to enter judgment without the intervention of a jury. Continental Title & Trust Co. v. Devlin, 209 Pa. 380, 58 A. 843.

65. Locke v. Lyon Medicine Co. [Ky.] 84 S. W. 307. Held error for court to assume that contract for sale of patent medicine required seller's agent to go over territory but once, and then only to introduce goods. Id. Letters held not to so clearly express the terms of a contract employing plaintiff as salesman as to make it error for the court to refuse to treat them as embodying the whole contract or to charge the jury as to their purport and meaning. Cohn v. Sherman Refining Co. [Tex. Civ. App.] 87 S. W. 1170. Where contract for laying water pipe required contractor "to make all connections," question whether he was liable for expense of having water shut off in old pipe. Mixed question of law and fact. Norton v. Shields, 132 F. 873. Whether contract, by its terms to be performed on consolidation of two corporations, was limited to consolidation resulting from negotiations then pending or applied to one resulting from renewal of negotiations a year later. Donner v. Alford [C. C. A.] 136 F. 750.

66. Contract for sale of bull. Young v. Van Natta [Mo. App.] 88 S. W. 123. Whether it constitutes a contract. Higbie v. Rust, 112 Ill. App. 218, afd. 211 Ill. 333, 71 N. E. 1010.

67. Question of acceptance of offer in regard to transportation. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Subscription for extension of railroad. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Whether tenant's wife cared for room occupied by landlord under agreement between latter and tenant that it should be cared for in payment of the rent, or under an independent agreement between herself and the landlord. Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724. Whether a certain person was plaintiff's agent and accepted defendant's offer in regard to an advertising contract. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. Whether new contract was made between defendant and plaintiff, independent from that between plaintiff and the contractor, whereby plaintiff was to furnish defendant with material previously ordered by contractor. Spring Brook Lumber Co. v. Watkins, 26 Pa. Super. Ct. 199. Whether conversations over telephone in relation to purchase and sale of copper wire, supplemented by subsequent written order, constituted a contract, in view of the custom of the trade and the course of dealing between the parties, or whether acceptance of offer was not to be binding until submitted to main office, and whether agent had authority to make contract. Direction of verdict at close of plaintiff's evidence held error. Monarch Elec. & Wire Co. v. National Conduit & Cable Co. [C. C. A.] 138 F. 18. Question whether there was an oral contract between two railroads for the use of each other's tracks and what were its terms, and its validity held for court where there was no conflict. Looney v. Metropolitan R. Co., 24 App. D. C. 510.

68. Terms of oral contract for drawing plans for house. Hight v. Klingensmith [Ark.] 87 S. W. 138. Question whether, under contract of hiring, the work at which plaintiff was engaged when injured was within the scope of his employment. Annadall v. Union Cement & Lime Co. [Ind.] 74 N. E. 893. Where the contract is the result of several conferences and conversations, the question of what its terms were in its final conclusion. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. What the contract price was for the services rendered. O'Connell v. King, 26 R. I. 544, 59 A. 926. Whether plaintiff was bound to procure purchaser for property for cash, or whether he was entitled to commission for procuring an exchange. Teesdale v. Bennett, 123 Wis. 355, 101 N. W. 688.

leaving it to them to determine whether a contract, and if so what contract, was made by the negotiations and the writings taken together.[69]

What is a reasonable time for the acceptance of an offer,[70] except where the time is so reasonable or unreasonable as to leave no doubt in regard to the matter,[71] whether an offer was accepted before it expired,[72] whether work was done under an express contract or under the general authority of an agent,[73] whether the contract is severable or entire,[74] whether the contract was modified,[75] abandoned,[76] or rescinded,[77] whether the rescission was promptly made,[78] whether the contract has been performed,[79] whether performance was prevented by plaintiff,[80] whether performance has been accepted,[81] what is a reasonable time in which to perfom [82] or to accept performance,[83] and the reasonable value of services rendered,[84] are questions for the jury on conflicting evidence.

Judgment, verdict, and findings.[85]—A ruling on demurrer as to the validity of the contract in suit is not conclusive under the evidence introduced on the trial before another judge at a subsequent term.[86]

The court having found that defendant fully performed his contract so that an action to rescind it would not lie, a failure to find upon defendant's assurances that he was ready to carry out the contract is immaterial.[87]

69. Error to allow jury to determine effect of writing. Ellis v. Block [Mass.] 73 N. E. 475.

70. Where the answer to the question depends on many different circumstances, which do not continually recur in other cases of like character, and with respect to which no certain rule of law could be laid down. Question held for the jury. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

71. In such commercial transactions as happen in the same way, day after day, and present the question upon the same data in continually recurring instances, and where the time is so clearly reasonable or unreasonable that there can be no doubt in regard to the matter. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

72. The question whether a letter and telegram accepting an option were received before it expired. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531.

73. Whether the construction of an electric railroad was under an express contract, or under general authority given by defendant which virtually made plaintiffs his agents in the doing of the work. Radel v. Lesher, 137 F. 719.

74. Sale of eight cases of tobacco by separate sample for each case. Error to take case from jury. Barnett v. Becker, 25 Pa. Super. Ct. 22.

75. Contract to furnish heat. Shenandoah Steam, Ht. & Power Co. v. Beddall, 25 Pa. Super. Ct. 3. Whether services of architect were rendered under written contract or whether it was subsequently modified by parol. Ritchie v. State [Wash.] 81 P. 79.

76. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307. Whether contract for sawing timber had been abandoned by consent. Trumbower v. Woodley, 26 Pa. Super. Ct. 249.

77. By mutual consent. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Whether original agreement of bailment of a mill had been canceled and the mill delivered to defendants in pursuance of the cancellation. Cox v. Burdett, 23 Pa. Super. Ct. 346.

78. Evidence sufficient to sustain verdict. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

79. Subscription for extension of railroad. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. In action for breach of contract for sale of sausages evidence held to present question for jury as to whether they "were dry enough for export" within the meaning of the contract. James v. Libby, 92 N. Y. S. 1047.

80. Brauer v. Macbeth [C. C. A.] 138 F. 977. Verdict that performance of contract for sale of vessel was prevented by failure of plaintiff's agent to return at time indicated with definite statement as to whether he would or would not accept any of the old insurance thereon held conclusive. Id.

81. Whether there has been an acceptance of machines by a use of part of them. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. Whether defendant accepted certain plans knowing that they called for a building in excess of his original cost limitation. Instructions approved. Hight v. Klingensmith [Ark.] 87 S. W. 138.

82. For delivering cotton under a contract of sale which is silent as to the time. Blalock v. Clark, 137 N. C. 140, 49 S. E. 88.

83. Dunn v. Mayo Mills [C. C. A.] 134 F. 804.

84. In action on contract to pay reasonable value of plaintiff's services, it is no objection to a recovery that witnesses disagree as to price usually paid for similar services, since jury may exercise their own judgment in the matter. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334.

85. See 3 C. L. 861.

86. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607.

87. Boyd v. Liefer, 144 Cal. 336, 77 P. 953.

CONTRACTS OF AFFREIGHTMENT; CONTRACTS OF HIRE, see latest topical index.

CONTRIBUTION.

§ 1. *General principles.*[88]—Contribution is the right of a joint debtor paying more than his share to be reimbursed by his co-debtors thereby benefited.[89] It does not exist where the payor is secured by his principal,[90] or where he could not have been compelled to pay,[91] or where he pays only his proportionate share of the indebtedness.[92]

§ 2. *As between joint tort feasors and persons in particular relations.*[93]—No obligation in contribution arises in favor of one joint wrongdoer as against another where the former has been compelled to pay damages for the joint wrong,[94] except where the joint tort feasor agrees to bear equal proportions of the damages.[95] Accommodation indorsers may have contribution between themselves.[96] The devisees of a deceased person may be called upon for contribution by one of them paying the debts of the estate.[97] A tenant in common in possession paying off a recorded mortgage is entitled to bring an action for contribution against a bona fide purchaser of his co-tenant's interest at an execution sale,[98] and it would seem that where persons were engaged in a joint venture that the right of contribution existed between them.[99] No action lies where two persons at a judicial sale purchased two separate parcels both covered by a common incumbrance.[100]

88. See 3 C. L. 865.

89. One who with others executes a note is liable in contribution for an excess paid by his co-surety regardless of whether they are joint makers or co-sureties. Wilks v. Vaughan [Ark.] 83 S. W. 913. Where one surety pays the entire debt of both, the other is liable to him for his share thereof. Wash v. Sullivan & Co. [Tex. Civ. App.] 84 S. W. 368; Strickler v. Gitchel, 14 Okl. 523, 78 P. 94. A joint maker cannot compel another to contribute toward payment of any portion of a debt for which he was primarily liable. Saulsberry v. Saulsberry, 26 Ky. L. R. 735, 82 S. W. 415. Where one of the persons liable is insolvent, the loss is to be apportioned among the solvent sureties. Id.

90. In re Skiles' Estate [Pa.] 61 A. 245.

91. Surety paying debt barred by statute of limitations cannot recover in contribution. Saulsberry v. Saulsberry, 26 Ky. L. R. 735, 82 S. W. 415.

92. Where one surety pays the entire note and the other relying on the assurance of the creditor that nothing has been paid pays to him his proportionate part, he cannot recover it back from the creditor. Wash v. Sullivan & Co. [Tex. Civ. App.] 84 S. W. 368.

93. See 3 C. L. 866. Right of stock holders paying corporate debts, see Clark & M. Corp. § 830.

94. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258; Wanack v. Michels, 114 Ill. App. 631. A terminal company held jointly liable with a railroad for neglect to discover a defective brake, on payment of all the damages cannot compel the railroad to contribute any portion thereof. Union Stock Yards Co. v. Chicago, etc., R. Co., 196 U. S. 217, 49 Law. Ed. 453.

95. Southwest Missouri Elec. R. Co. v. Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966. Or where the party so paying had no notice to guard against the accident and the other was the last wrong-doer. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

96. Stockholders who endorsed for accommodation of the corporation held sureties entitled to contribution. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056.

97. Where a widow takes a devise in lieu of dower, she can be compelled to contribute to the heirs and devisees on account of debts of her deceased husband paid by them. Ohio Rev. St. § 5973. Allen v. Tressenrider [Ohio St.] 73 N. E. 1015. After closing an estate the executor cannot recover in contribution from other distributees of an estate money expended by him for counsel fees, for a matter purely between the executor in his representative capacity and the estate, and should have been included in his final account. Blair v. Blair, 97 App. Div. 507, 90 N. Y. S. 190. Where a decedent leaves three tracts of real estate of which two are mortgaged, the mortgaged debt should be apportioned against the two mortgaged estates. Hogg v. Rose, 94 N. Y. S. 914.

98. Rippe v. Badger, 125 Iowa, 725, 101 N. W. 642. Rights of co-tenants as to contribution, see Tenants in Common and Joint Tenants, 4 C. L. 1672; Tiffany, Real Property, p. 396.

99. Where parties engaged in the business of pooling corporations, they have a right to an accounting and distribution of

§ 3. *Proceedings to enforce.*[101]—The right as between co-obligors rests not on the contract which they assume but on a collateral contract implied between them.[102] Where sureties stand as such not only in equity but also in law, assumpsit lies,[103] but the paying surety cannot take an assignment and bring assumpsit on the original obligation[104] except to recover from a co-surety the proportion which he owes as his share primarily.[105] A court of equity can wind up the affairs of a partnership and decree contribution among the parties thereto,[106] but the right cannot be enforced by a decree or suit until after a final accounting.[107]

The burden of proving joint liability is upon the person seeking to recover,[108] and is a question for the jury.[109] In an action by one surety against another, the whole amount of principal and interest paid on behalf of the defendant may be recovered together with interest on the entire sum from the date of such payment.[110] While the holder of a note made out in blank may have authority to insert the name of the payee, this does not extend to one of the joint sureties in an action against another for contribution.[111] The statute of limitations runs from the time of payment by the party and not on the original obligation or judgment.[112]

earnings. Hart v. Sickles, 45 Misc. 174, 91 N. Y. S. 897.

100. Senft v. Vanek, 110 Ill. App. 117.

101. See 1 C. L. 705.

102. Sherling v. Long [Ga.] 50 S. E. 935.

103, 104, 105. Three stockholders made a note payable to one of their number and indorsed for accommodation of their corporation. The payee paid it and took an assignment. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056.

NOTE. Remedy at law or in equity: "The right to sue in equity for contribution was formerly an established head of chancery jurisdiction (Couch v. Terry, 12 Ala. 225); but courts of law have now adopted it (Jeffries v. Ferguson, 87 Mo. 244; Weidenmeyer v. Landon, 66 Mo. App. 520; Hanna v. Hyatt, 67 Mo. App. 308). And see Soule v. Frost, 76 Me. 119. Courts of equity have not, however, been ousted of their jurisdiction in matters of this kind on account of the assumption thereof by the law courts, but their jurisdiction is now considered concurrent. Thomas v. Hearn, 2 Port. [Ala.] 262; Chipman v. Morrill, 20 Cal. 130; Mitchell v. Sproul, 28 Ky. 264; Craig v. Ankeny, 4 Gill [Md.] 225; Owens v. Collinson, 3 Gill & J. [Md.] 25; McGunn v. Hanlin, 29 Mich. 476; Walker v. Cheever, 35 N. H. 339; Williams v. Craig, 2 Edw. Ch. [N. Y.] 297; Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475; Boyer v. Marshall, 8 N. Y. St. Rep. 233; Glasscock v. Hamilton, 62 Tex. 143; Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751.

The common remedy at law in an action for contribution is assumpsit. Taylor v. Reynolds, 53 Cal. 686; Bailey v. Bussing, 29 Conn. 1; Carroll v. Bowie, 7 Gill [Md.] 34; Van Petten v. Richardson, 68 Mo. 379; Oldham v. Broom, 28 Ohio St. 41."—From note to Stockwell v. Mutual Life Ins. Co. [Cal.] 98 Am. St. Rep. 48.

106. Bruns v. Heise [Md.] 60 A. 604.

107. Foss v. Dawes [Neb.] 101 N. W. 237. A bill for contribution brought by a surviving partner which fails to allege that there ever had been a settlement of partnership accounts or accompanied by a statement of such account, and does not ask for a final adjudication of the account, is demurrable. Bruns v. Heiss [Md.] 60 A. 604. Where all the partnership accounts are wound up except a few outstanding credits which are barred by statute of limitations, contribution may be enforced. Hill v. Fuller [Mass.] 74 N. E. 361.

108, 109. Strickler v. Gitchell, 14 Okl. 523, 78 P. 94.

110. Welmer v. Talbot [W. Va.] 49 S. E. 372.

111. Suit for contribution by one endorser against another. No payee named in the note. At trial the plaintiff filled up the blanks and was allowed to show the same to the jury. Held to be ground for granting a new trial. Keyser v. Warfield [Md.] 59 A. 189.

112. Welmer, Wright & Watkins v. Talbot [W. Va.] 49 S. E. 372; Sherling v. Long [Ga.] 50 S. E. 935.

NOTE. Nature of the Action: "It becomes necessary to determine the nature of the action in order to apply the appropriate statute thereto. Where one joint debtor pays a note, and then sues for contribution, the cause of action is based on an implied contract of the other to repay, and is governed accordingly by the statute of limitations: Sexton v. Sexton, 35 Ind. 88; Faires v. Cockerell, 88 Tex. 428, 31 S. W. 190, 28 L. R. A. 528, rvg. 29 S. W. 669. But see Murphy v. Gage [Tex. Civ. App.] 21 S. W. 396, holding that where one joint and several obligor paid off a note, he was subrogated to the rights of the payee as against his co-obligors, and his cause of action was founded on a written instrument. "Laches may bar the right of one co-obligor to contribution from another: Doughty v. Bacot, 2 Desaus. [S. C.] 546; but if the lapse of time has not worked a bar, mere passiveness in asserting his rights cannot prejudice him. Owen v. McGehee, 61 Ala. 440." —From note to Stockwell v. Mutual Life Ins. Co. [Cal.] 98 Am. St. Rep. 44.

CONTRIBUTORY NEGLIGENCE, see latest topical index.

CONVERSION AS TORT.

§ 1. *What constitutes.*[1]—Generally speaking, every act of dominion over personal property in violation of the owner's right is a conversion.[2] It has been said to be any unauthorized act which permanently deprives a man of his property.[3] There must be some unlawful act either of taking [4] or of detention,[5] and the detention must be wrongful [6] and unequivocal,[7] such as a wrongful disposition of goods by a bailee [8] or pledge;[9] but storing goods in a warehouse by a lessor when lessee refuses to take them away or receive them is not a conversion.[10] An unauthorized attachment [11] or sale [12] is conversion, and the purchaser is equally liable therefor.[13] The refusal of a corporation to transfer stock, asserting its right to

1. See 3 C. L. 866.

2. Custodian forbade owner to take his property. Lucas v. Sheridan [Wis.] 102 N. W. 1077. Refusal of agent to surrender "privileges" held for certain purpose, but used in violation of orders, held conversion. Vroom v. Sage, 100 App. Div. 285, 91 N. Y. S. 456.

Code of Montana makes a sale by one partner of all partnership property unlawful. Buyers under such circumstances are guilty of conversion. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. Melting metal owned by plaintiff held to be a conversion. Great Western Smelting & Refining Co. v. Evening News Ass'n [Mich.] 102 N. W. 286. But it is not conversion by a vendor if he sells property to which he is to retain a title until purchase price is paid if there is a default in payment. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

3. Phillipos v. Muhran [Wash.] 80 P. 527.

4. Fraternal Army of America v. Evans, 114 Ill. App. 578. Taking possession of a binder after exchanged it for a horse. Tillman v. International Harvester Co., 93 Minn. 197, 101 N. W. 71.

5. When property comes lawfully into possession of defendant, mere nonfeasance will not be sufficient to constitute conversion. Andrews v. Carl [Vt.] 59 A. 167. Simply detention of goods by mortgagor is not conversion of them. Shelton v. Holzwasser, 91 N. Y. S. 328. Refusal by a lessor or custodian to allow the removal of property. Miller v. Hennessy, 94 N. Y. S. 563; Lucas v. Sheridan [Wis.] 102 N. W. 1077.

6. But retention of property by a carrier for charges for storage after arrival. Cleveland, etc., R. Co. v. Propst Lumber Co., 114 Ill. App. 659.

7. Mere delay in sending a notice of consignee's refusal to accept the consigned goods is not. Fishman v. Platt, 90 N. Y. S. 354. But a shipment of goods by the carrier as unclaimed property for the purpose of selling the same within less than six months after their arrival is a tort. Georgia, So. & F. R. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807. Assertion by carrier that goods are lost, is not. Goldbowitz v. Metropolitan Exp. Co., 91 N. Y. S. 318. A sale by a vendee before he acquires title is conversion. Wesoloski v. Wysoski, 186 Mass. 495, 71 N. E. 982. After a trade of pianos has been agreed upon and one of them delivered, conversion cannot be brought for a refusal to redeliver the same although plaintiff does not deliver so as to consummate the agreement. Forbes v. Rogers [Ala.] 38 So. 843. Denial of possession of the owner's goods. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646. Mere assertion of title insufficient. Brown v. Leary, 100 App. Div. 421, 91 N. Y. S. 463.

8. Perlberger v. Grell, 77 App. Div. 128, 78 N. Y. S. 1038; Goodman v. Baumann, 43 Misc. 83, 86 N. Y. S. 287; Fordyce v. Dempsey [Ark.] 82 S. W. 493. Mortgagee of a bailee who has no right to mortgage is guilty of conversion when in possession of bailed property. Geneva Wagon Co. v. Smith [Mass.] 74 N. E. 299. Mortgagee and bailee are guilty of conversion if they attempt to dispose of the property. Sale of share of stock. Crawford v. Burke, 25 S. Ct. 9; Fordyce v. Dempsey [Ark.] 82 S. W. 493.

9. Scrivner v. Woodward, 139 Cal. 314, 73 P. 863.

10. Browder v. Phinney [Wash.] 79 P. 598.

11. Brown v. Bayer [Minn.] 104 N. W. 225. A creditor attaching property when he knows the same is in possession of a third party to whom it was mortgaged and subsequently delivered for the purpose of sale is guilty of conversion. Bledsoe v. Palmer [Tex. Civ. App.] 81 S. W. 97.

12. A sale of property under a void mortgage constitutes conversion. Fierro v. Schnurmacher, 94 N. Y. S. 365. Liability of mortgagee for selling more property than needed to satisfy the debt, see note, Chattel Mortgages, 5 C. L.

13. Purchaser of securities from guardian liable as for conversion where the sale was unauthorized. Merchants' & Clerks' Sav. Bank v. Schirk, 5 Ohio C. C. (N. S.) 569.

cancel the same,[14] or a wrongful change of registered bonds to bonds payable to bearer is a conversion.[15]

§ 2. *Property subject to conversion.*[16]—Realty is not subject to conversion,[17] but any personal property[18] of value[19] is.

§ 3. *Elements necessary to maintain the action.*[20]—As a general rule, to maintain trover the plaintiff must have legal title;[21] but a beneficiary of an insurance policy may sue,[22] and one having possession and claiming a lien on property may also bring an action for its conversion.[23] Some cases hold that bare possession is sufficient to enable the plaintiff to maintain replevin or trover against a mere stranger to the property.[24]

Immediate right of possession and ownership[25] of property at the time of the conversion are necessary in order to recover.[26] If plaintiff sues in conversion he must show that he is entitled to possession or is the owner of the property.[27]

Demand and refusal[28] are evidences of conversion.[29] If original taking is wrongful, plaintiff can maintain trover without demand;[30] if lawful, demand is necessary,[31] unless it in some way appears that a demand would have been futile.[32]

14. Humphreys v. Minnesota Clay Co. [Minn.] 103 N. W. 338. Refusal to make transfer on book of corporation. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685. See Clark & M. Corp. § 379.

15. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571.

16. See 3 C. L. 868.

17. But rails by being laid as a part of a railroad track do not lose their character of personalty where a railroad company has no easement or exclusive right of way over the property. Rails were used by a street railway company. Title was not to pass until rails were paid for. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646.

18. Insurance policy. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89. Corporate stock. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6. See Clark & M. Corp. § 379. Minerals separated from the earth but not the recovery of the value of minerals in deposit in the earth. Smoot v. Consolidated Coal Co., 114 Ill. App. 512. Natural gas taken from the earth and put into a pipe line. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15. Conversion of fixtures, see Bronson, Fixtures, § 109.

19. A written instrument which gives the holder the right to call for or deliver to the maker certain specified stock has such value. Vroom v. Sage, 100 App. Div. 285, 91 N. Y. S. 456. Plaintiff failed to show that certain cards were of any value. Rosen v. Voorhis, 45 Misc. 605, 91 N. Y. S. 126.

20. See 3 C. L. 869.

21. Alexander v. Meyenberg, 112 Ill. App. 223.

22. Harris v. Nelson, 113 Ill. App. 487; Fraternal Army of America v. Evans, 114 Ill. App. 578.

23. Mortgagee in possession. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

24. Property taken from one in possession. Stitt v. Namakan Lumber Co. [Minn.] 103 N. W. 707.

25. See 3 C. L. 869.

26. Trover for shares of stock. Title had passed to defendant. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6. Where a mortgagor has lost his right to possession on default of payment, and possession is in the mortgagee, the former cannot maintain the action of trover. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. In Texas a mortgagee may maintain an action against one who wrongfully converts the property, whether he is entitled to immediate possession or not. The tort feasor is charged with notice of plaintiff's right, although conversion takes place in another state. Sceebing v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. A trespasser who plants a crop cannot harvest it when another has rightful possession. The one in possession may maintain action of conversion if property is taken. Stebbins v. Demorest [Mich.] 101 N. W. 528. Redemption is necessary to deprive a pledgee of the right of possession. Pledgee cannot recover and own above loan. Brown v. Leary, 100 App. Div. 421, 91 N. Y. S. 463.

27. A partner suing his co-partners for conversion of partnership funds must show himself entitled to the possession of the same. Riddell v. Ramsey [Mont.] 78 P. 597.

28. See 3 C. L. 870.

29. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6.

30. Zorger v. Selicovitz, 115 Ill. App. 37; Morley v. Roach, 116 Ill. App. 534.

31. Mortgagee of property acquiring rightful possession can sell same without a tender for and own due or demand for return of property. Shelton v. Holzzwasser, 91 N. Y. S. 328. Landlord holding a part of crop for tenant's widow is liable after demand and refusal. Parker v. Brown, 136 N. C. 280, 48 S. E. 657. A pledgee of property is entitled to demand. Scrivner v. Woodward, 139 Cal. 314, 73 P. 863. Possession was rightful. Demand necessary. Hitchcock v. Wimpleberg, 92 N. Y. 997. Where goods are delivered or sale on approval, demand must be shown. Possession after demand justifies conclusion of refusal. Louisville & N. R. Co. v. Kauffman & Co. [Ala.] 37 So. 659.

32. Remark made by appellant in mag-

When demand is necessary it must sufficiently comply with the law.[33] The party who makes a demand must have authority to do so.[34]

Right to maintain and persons liable.[35]—A beneficiary of an insurance policy may maintain trover against an insurance company for conversion by the agent of the latter.[36] Action may be brought by a trustee in bankruptcy.[37] An attaching creditor of the morgtagor is liable in trover when he takes from the mortgagee property in the latter's possession.[38] Although a vendor owns a fourth of the property sold by him, the owner of the remainder can recover from the vendee.[39] An agister having a lien superior to a prior mortgager may recover from an innocent commission merchant who sells property for the mortgagor.[40] An owner of property may maintain an action of trover against a purchaser of property levied on, although he has failed to file a claim on the property.[41]

When a statute of a state provides that one partner cannot sell all of partnership property, a purchaser acquires no title regardless of good faith.[42] If timber cut is to be property of vendor if not removed by a certain date, after failure to remove, the vendor cannot sue the former for converting the same.[43] A crop planted by a trespasser cannot be harvested by him when another has lawful possession.[44]

One cannot sue in trover on theory that he is the owner and subsequently sue on contract as if title had passed.[45] A party cannot maintain both trespass and trover or replevin.[46] When goods have been sold the plaintiff may waive the tort and bring an action for money had and received.[47] Although plaintiff had elected to bring action for conversion, he may under Bankruptcy Act of July 1, 1898, prove a debt originating upon an open account or upon a contract express or implied.[48]

A principal is liable for a conversion by his agent.[49] A party ratifying or

istrates court showed fixed resolve not to return property. Turner v. Cedar, 91 N. Y. S. 758. Formal demand and refusal unnecessary when defendant claims purchase of goods from a third party. Great Western Smelting & Refining Co. v. Evening News Ass'n [Mich.] 102 N. W. 286. Under Fed. Bankruptcy Act of 1898, c. 514, § 60b, 30 Stat. 562, value of property transferred to a mortgagee as a preference can be recovered from him without a demand. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

33. Cousins v. O'Brien [Mass.] 74 N. E. 289.

34. No authority of agent was shown in. Jesse French Piano & Organ Co. v. Johnston [Ala.] 37 So. 924.

35. See 3 C. L. 870.

36. This is so although assured reserved right to change the beneficiary at any time. Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89.

37. Action against wife of bankrupt. Mowry v. Reed, 187 Mass. 174, 72 N. E. 936.

38. Aldrich v. Higgins [Conn.] 59 A. 498.

39. Property set apart for plaintiff as a year's support. Title in plaintiff. Neal v. Smith [Ga.] 50 S. E. 922.

40. Owner of cattle turns them over to mortgagee without the agister's consent. Everett v. Barse Live Stock Commission Co. [Mo. App.] 88 S. W. 165.

41. Lawless v. Orr [Ga.] 50 S. E. 85.

42. Action by one of two partners against a third person. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625.

43. Plaintiff cannot avail himself of equities when he brings an action purely at law for conversion. McNeil v. Hall, 94 N. Y. S. 920. Unless contract is construed to be a license and the timber is manufactured into ties before removal. Johnson v. Truitt [Ga.] 50 S. E. 135.

44. Stebbins v. Demorest [Mich.] 101 N. W. 528.

45. Trover may be brought against the agent of a mortgagee without barring the same kind of action against the mortgagee himself. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98.

46. Execution against a third party. Property recovered by replevin. Harris v. Nelson, 113 Ill. App. 487.

47. Otherwise when property has not been converted into money. Southern R. Co. v. Born Steel Range Co. [Ga.] 50 S. E. 488.

48. Construction of section 63a of Bankruptcy Act of July 1, 1898, permits proving of claim, although action was brought under § 17, subd. 4. Crawford v. Burke, 25 S. Ct. 9.

49. Railroad liable for wrongful transfer of stock by its agent. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571. A conversion by an agent in obedience to principal's orders renders the latter liable. Jury must find that principal ordered his servant to haul out the logs in question to hold him liable. Nieloon v. Read [N. H.] 59 A. 946. Question of whether marshal was acting under order of defendant or another in selling the property. Fierro v. Schnurmacher, 94 N. Y. S. 365.

adopting the issuance and execution of an illegal writ is liable to owner of property for wrongful seizure.[50]

§ 4. *Defenses.*[51]—Defendant may plead title in himself [52] or title in a third person unless he obtained possession under plaintiff.[53] Condemnation of property by board of health excuses a defendant from liability for conversion.[54] An offer to return the goods [55] or to substitute like property instead of that converted is not a defense but may be evidence to show mistake and disprove conversion.[56] A tender of property to constitute a defense must be made before a complaint demanding "money judgment or property" is amended so as to demand only a money judgment.[57] Consent to an alleged wrongful sale will prevent recovery; [58] but failure to object at the time of the wrongful appropriation will not preclude him from asserting his legal rights.[59] Whether an acceptance of part payment by a principal from his agent constitutes a waiver is a question of fact.[60] When a mortgagor has agreed to accept surplus arising from a sale, trover cannot be maintained by alleging the sale to be wrongful.[61] A plea of infancy is a good defense in an action in the form of conversion, if the fraud originated in a contract.[62]

§ 5. *Practice and procedure.*[63]—When defendant comes into possession lawfully, the statute of limitations runs from time of demand and refusal.[64]

Parties.[65]

The complaint.[66]—A complaint need not allege the particulars of a lien,[67] nor the value of the property,[68] but it must allege ownership or right to possession.[69] The complaint need not allege a tender of payment for repairs in addition to allegation of unlawful refusal to surrender the propery,[70] but such allegation of tender has been held necessary where property has been pledged.[71] An allegation of a conversion on a certain date will admit evidence of conversion several months

50. The writ was not signed by justice or by one with authority to sign, but defendants ratifying issuance were held liable. Sanger Bros. v. Brandon [Tex. Civ. App.] 88 S. W. 431.

51. See 3 C. L. 871.

52. One buying from an executor who has title can plead ownership of property. Curry v. Lanning, 94 N. Y. S. 535. A defendant who has become owner of timber which plaintiff has failed to remove by specified date can defend by showing title in himself. McNeil v. Hall, 94 N. Y. S. 920.

53. Vinson v. Knight [N. C.] 49 S. E. 891. When a bailee does not claim title at time property is bailed, he cannot defend on the ground of ownership to avoid recovery by bailor. Title may, however, be pleaded to lessen damage. Valentine v. Long Island R. Co., 102 App. Div. 419, 92 N. Y. S. 645.

54. Property condemned and taken from defendant. Willets v. Curth, 102 App. Div. 616, 92 N. Y. S. 174.

55. Lucas v. Sheridan [Wis.] 102 N. W. 1077.

56. Alleged conversion of notes. Brooke v. Lowe [Ga.] 50 S. E. 146.

57. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337.

58. Haynes v. Kettenbach Co. [Idaho] 81 P. 114. Where plaintiff attends an alleged wrongful sale and makes no objection to the manner in which property is sold, he cannot sue for conversion because articles were sold separately. Violin and carpenter's tools described as household goods. Webb v. Downes, 93 Minn. 457, 101 N. W. 966.

59. Refusal of defendant to allow plaintiff to remove timber from former's land held to be conversion. Watson v. Gross [Mo. App.] 87 S. W. 104.

60. Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950.

61. Merritt v. Ward, 113 Ill. App. 208.

62. Contract to return a watch unless sold. Stone v. Rabinowitz, 45 Misc. 405, 90 N. Y. S. 301.

63. See 3 C. L. 872.

64. Andrews v. Carl [Vt.] 59 A. 167.

65, 66. See 3 C. L. 872.

67. Mortgagee in possession brings conversion. Fred Krug Brewing Co. v. Healey [Neb.] 101 N. W. 329.

68. Value of the stock converted need not be alleged. Allegation of damage sufficient. Humphreys v. Minnesota Clay Co. [Minn.] 103 N. W. 338.

69. Suit brought by one of partners for conversion of partnership funds. No allegation of accounting was made. This too is necessary. Riddell v. Ramsey [Mont.] 78 P. 597. A complaint alleging ownership but failing to allege right to possession is not subject to an attack for the first time by an assignment of errors on appeal for such failure. Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind.] 74 N. E. 15. Plaintiff must allege title. Vinson v. Knight [N. C.] 49 S. E. 891.

70. Alling v. Weissman [Conn.] 59 A. 419.

71. Plaintiff is not entitled to recover amount that property is worth above loan

previous.[72] A conversion by demand and refusal can be shown under an allegation of conversion by sale.[73] If a complaint can be construed as a contract or tort, the latter will prevail.[74] In the note different constructions are referred to.[75]

The answer or plea.[76]—An answer alleging infancy is a sufficient defense if the fraud originated in a contract.[77] Under a general denial, defendant is permitted to show title in another.[78] A refusal to allow an amendment to an answer when defendant would still be liable is not error.[79] Where conversion is denied by answer, consent to an alleged wrongful sale may be shown.[80]

Proof.[81]—Burden to establish conversion,[82] to show the amount of loss,[83] and to prove ownership of property at time of conversion, is on the plaintiff.[84] Burden is on a carrier to establish that loss was without negligence.[85] When a statute provides that innocent purchaser for value acquires a good title unless a conditional sale is recorded, burden of proof is on plaintiff to show lack of good faith when the contract is not of record.[86] If defendant is permitted to lessen amount of damages by proof of unintentional conversion, burden of proof is on him.[87] Plaintiff must prove conversion [88] as well as ownership,[89] right to possession,[90] and value.[91] To prove conversion by mortgagee in possession, proof of payment or release of mortgage is necessary.[92] When there is failure of proof plaintiff cannot recover.[93] To show title something more than proof of a parol agreement to will real estate and personalty is necessary.[94] It is not necessary to prove that defendant was in possession at the time of filing the suit.[95]

Damages.[96]

made to him. Brown v. Seary, 100 App. Div. 421, 91 N. Y. S. 463.

72. Alling v. Weissman [Conn.] 59 A. 419.

73. Barker v. Lewis Storage & Transfer Co. [Conn.] 61 A. 363.

74. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727.

75. Complaint construed to be one for replevin and not conversion. Hitchcock v. Wimpleberg, 92 N. Y. S. 997. Complaint construed to be one for conversion and not replevin. Phillips v. Wihran [Wash.] 80 P. 527. Petition held not to be drafted on theory of conversion. Farmers' & Traders' Nat. Bank v. Allen-Holmes Co. [Ga.] 49 S. E. 816.

76. See 3 C. L. 873.

77. Stone v. Robinowitz, 45 Misc. 405, 90 N. Y. S. 301.

78. Pleading title in a stranger. Ten Eyck v. Denison, 99 App. Div. 106, 91 N. Y. S. 169.

79. Defendant wished to amend owner's denying the assumption of the liability of a certain company. Refusal to allow amendment was not error where latter had no right to property and defendant was still liable. Tebbetts v. Northern Commercial Co., 36 Wash. 599, 79 P. 203.

80. Haynes v. Kettenback Co. [Idaho] 81 P. 114.

81. See 3 C. L. 874.

82. Action for conversion of a piano Jesse French Piano & Organ Co. v. Johnston [Ala.] 37 So. 924.

83. Plaintiff must show the number of cattle in defendant's pasture. Uvalde Nat. Bank v. Dockery [Tex. Civ. App.] 83 S. W. 29.

84. Plaintiff must show that hay was cut by defendant after the former received title to the farm. Standlick v. Downing [Vt.] 60 A. 657.

85. Georgia, So. & F. R. Co. v. Johnson-King & Co., 121 Ga. 231, 48 S. E. 807.

86. Hogan v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 87, 103 N. W. 543.

87. Conversion of timber. Proof that there was no willful trespass is all the law requires. Negligence is no bar to lessening the damages. Trustees of Dartmouth College v. International Paper Co., 132 F. 92.

88. In trover to recover rails from defendant. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646. Conversion not proved. Minneapolis Threshing Mach. Co. v. Burton [Minn.] 103 N. W. 335; Bagwell v. Wroughton [Neb.] 102 N. W. 609. Defendant not shown to be in any way connected with the conversion. Martin v. Barry, 145 Cal. 540, 79 P. 66. It was not proven that defendant directed delivery of property to third persons. Neder v. Jennings [Utah] 78 P. 482.

89. Lustbader v. Fuller Co., 90 N. Y. S. 297.

90. Rosen v. Voorhis, 45 Misc. 605, 91 N. Y. S. 126.

91. Plaintiff must prove value of notes in question. Brooke v. Lowe [Ga.] 50 S. E. 146.

92. Mortgagee of chattels has taken possession after default. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

93. Horses taken from a mortgagee by a prior mortgagee whose mortgage is alleged to be void. No conversion shown. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685.

94. Under a statute (Rev. St. 1898, § 3824), allowing double damages for conversion of property before appointment of an administrator does not apply when spe-

CONVERSION IN EQUITY.

§ 1. *Definition and nature of doctrine.*[97]—Equitable conversion is a change of property from realty into personalty or from personalty into realty presumed by construction or intendment of equity to have taken place, though it has not in fact.[98] The basis of the doctrine is the maxim that equity regards that as done which ought to be done.[99]

§ 2. *How effected.*[1]—The doctrine is applicable to wills, conveyances to trustees, marriage settlements, contract for the sale of land, and to realty belonging to a partnership.[2]

By will.[3]—The most usual application of the rule is found in the case of a devise of realty to trustees with a direction to sell the same and distribute the proceeds among designated beneficiaries, or a bequest of personalty with directions to convert it into realty,[4] and where such direction is found, equity will regard the subject of the gift as that species of property into which it is directed to be converted.[5] The question whether a conversion takes place in such case is one of intention,[6] the doctrine being applicable only in furtherance of testator's intention, and never to defeat it.[7]

To constitute a conversion it must be the duty of the grantee of the power to sell in any event,[8] a mere unexecuted discretionary power,[9] or a power to sell if

cial administrator has been appointed. Dixon v. Sheridan [Wis.] 103 N. W. 239.

95. Proof of title in plaintiff possession in defendant, a demand for possession and a refusal prior to filing the suit are prima facie cases for recovery. Chambless v. Livingston [Ga.] 51 S. E. 314.

96. See 3 C. L. 874. See, also, Damages, 3 C. L. 997.

97. See 3 C. L. 876.

98. Duckworth v. Jordan [N. C.] 51 S. E. 109.

99. In equity, that is regarded as done which the testator intends shall be done. In re Severns' Estate [Pa.] 60 A. 492.

1. See 3 C. L. 877.

2. See Tiffany, Real Property, §§ 103, 111.

3. See 3 C. L. 877.

4. See, also, Wills, § 5b, 4 C. L. 1904.

5. Tiffany on Real Property, § 103. Jones v. Probate Court of East Greenwich, 25 R. I. 361, 55 A. 881. Direction to sell is, in effect, a conversion of land into personalty, and it will be treated as money in equity. Nelson v. Nelson [Ind. App.] 72 N. E. 482.

Directions held to constitute conversion: Express direction that land should be sold after death of testator's wife and proceeds divided in specified amounts. Lash v. Lash [Ill.] 70 N. E. 1049. To sell land after death of testator's wife and divide proceeds equally among his brother's children. Duckworth v. Jordan [N. C.] 51 S. E. 109. Devise of realty to executors with directions to sell. Jackson v. Gunton, 26 Pa. Super. Ct. 203. Direction held to have worked conversion and to have impressed upon property a trust in favor of beneficiaries so that rents collected from realty before sale belonged to them. Jones v. Probate Court of East Greenwich, 25 R. I. 361, 55 A. 881. Where will provided that trustees should sell all testator's real and personal property and invest same in realty in a certain city, such property will be considered in equity as real estate in the designated city. In re Dunphy's Estate [Cal.] 81 P. 315.

6. To be derived from whole will. Lash v. Lash [Ill.] 70 N. E. 1049. Whole theory of conversion rests upon the intention of the testator. Kennedy v. Dickey, 99 Md. 295, 57 A. 621. Whether it is the duty of the grantee of the power to sell in any event, and consequently whether a conversion takes place, is to be determined by the terms of the grant, or from the whole will. In re L'Hommedieu, 138 F. 606. Takes place only when the will discloses a clear intention that the nature of the property shall be changed. In re Severns' Estate [Pa.] 60 A. 492. Intention being to make gift to daughter in form of money, it should be treated as a bequest rather than a devise, though estate consists principally of realty. McCullough v. Lauman [Wash.] 80 P. 441.

7. Kennedy v. Dickey, 99 Md. 295, 57 A. 621. Though testatrix positively directs her realty to be sold, proceeds will not be merged with personalty, where her intent is to keep the two separate. In re Shedden's Estate, 210 Pa. 82, 59 A. 486.

8. In re L'Hommedieu, 138 F. 606.

9. Monjo v. Widmayer, 94 N. Y. S. 835. Provision in will empowering executor, in his own discretion, and at such time or times as he shall deem proper, to sell either at private or public sale any or all of testator's realty, does not work conversion. In re L'Hommedieu, 138 F. 606. Where will gave property to trustee after death of life tenant, "with power to sell and convey the same and divide the proceeds thereof"

necessary to pay testator's debts being insufficient.[10] There must either be a positive direction to sell,[11] or the will must disclose a clear intention that a sale shall take place.[12] An intention to convert will be implied where the executor or trustee is authorized to sell, and there is an absolute necessity for so doing in order to carry out the provisions of the will.[13]

The conversion takes place only for the purposes for which it is authorized, and, in so far as such purposes do not extend or do not take effect, the property is regarded as remaining in its original condition and passes accordingly.[14]

Neither the lapse of one of the legacies to be paid out of the proceeds of the sale,[15] nor the assignment by a legatee of his interest to the executor, prevents a conversion.[16]

As a general rule the conversion is to be considered as having been effected on the death of the testator,[17] even though the sale is postponed,[18] or the time of sale is made discretionary with the executor;[19] but a discretionary power of sale does not work a conversion until the sale takes place.[20]

§ 3. *Reconversion.*[21]—Before there has been any actual change in the property, there may be a reconversion, which takes place when the direction to convert is countermanded by the persons entitled to the property.[22] In order to work a reconversion, all the parties beneficially interested must, by some explicit and binding action, direct that no actual conversion shall take place, and elect to take the property in its original form.[23] Such an election, if properly made, extinguishes the power of sale under the will, and entitles the beneficiaries and their grantees to

among certain named legatees, the doctrine of equitable conversion at the time of testator's death will not be applied so as to entitle the legatees to interest from that time, there being no claim that the trustee refused to act or had not acted in good faith, but a reasonable time will be allowed for the performance of the trust. In re Schabacker, 94 N. Y. S. 80.

10. In re Raleigh's Estate, 206 Pa. 451, 55 A. 1119.

11. In re Severns' Estate [Pa.] 60 A. 492.

12. In re Severns' Estate [Pa.] 60 A. 492. There must be an implication of a direction to convert so strong as to leave no substantial doubt of such an intent. Monjo v. Widmayer, 94 N. Y. S. 835.

13. Where he is authorized to sell and to execute and deliver deeds in fee simple to purchaser, and it is clear that he intended that power should be exercised, it will be construed as a direction to sell, and operate as a conversion. In re Severns' Estate [Pa.] 60 A. 492. Where will empowers executrix to sell realty and divide proceeds among children, without making any alternative disposition of it. Sale imperative in order to make such disposition. Id. Unless the purpose of the testator will fail without a conversion, equity will not presume it. Monjo v. Widmayer, 94 N. Y. S. 835. Devise of realty to wife for life, with power to devise same to her children or grandchildren in such shares as she might deem best, held not to work conversion. Id.

14. Kennedy v. Dickey, 99 Md. 295, 57 A. 621.

15. Death of one of the children to whom proceeds of sale are to go, before testator and without issue, does not prevent conversion when it is necessary to the other purposes of the will, but lapsed bequest passes as intestate personalty or in form of money, no intention to the contrary appearing. Lash v. Lash [Ill.] 70 N. E. 1049.

16. Lash v. Lash [Ill.] 70 N. E. 1049.

17. Lash v. Lash [Ill.] 70 N. E. 1049. A positive direction to sell works an immediate conversion. Kennedy v. Dickey, 99 Md. 295, 57 A. 621.

18. Until after death of life tenant. Lash v. Lash [Ill.] 70 N. E. 1049. If the will discloses a clear intention that the sale shall be made. In re Severns' Estate [Pa.] 60 A. 492. Where will provided that realty was to be sold at death of testator's wife and proceeds divided among children, conversion held to have taken place at testator's death. Nelson v. Nelson [Ind. App.] 72 N. E. 482.

19. In re Severns' Estate [Pa.] 60 A. 492. Fact that time and terms of sale are discretionary does not give executrix authority to prevent it, or postpone it indefinitely. Id.

20. Kennedy v. Dickey, 99 Md. 295, 57 A. 621.

21. See Tiffany on Real Prop. § 107.

22. Duckworth v. Jordan [N. C.] 51 S. E. 109.

23. All must join in some action that will bind them. Duckworth v. Jordan [N. C.] 51 S. E. 109. The concurrent action of all the legatees is necessary. Lash v. Lash [Ill.] 70 N. E. 1049. Admission of deed of trust by which three of the beneficiaries and widow executed deed of trust to another beneficiary in which it was recited that trustee and remaining beneficiary had conveyed their shares to the widow, without proof that such beneficiary had so conveyed, held harmless. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

hold the property as it is.[24] In case the beneficiaries are all sui juris, the election may be made by deed in which all join, or by answer expressly stating that the parties desire to hold the land as it is, or partly by deed and partly by answer.[25] If some of them are infants, an election cannot be made either by or for them except by sanction and order of the court after due inquiry.[26]

§ 4. *Effect of conversion.*[27]—A direction in a will to change property from real to personal will have the effect, in equity, of changing the legal character at once, and the will should be construed as one of personalty only.[28] Gifts of the proceeds will be regarded as bequests of personalty,[29] and distribution should be made on the theory that the donation was made in money in the first instance.[30] The land will also be considered as personalty for the purpose of devolution and transfer,[31] and the beneficiaries have no interest in the realty as such, and cannot sell, convey, mortgage, or devise it.[32]

Where the proceeds of the sale are only partially disposed of in fulfillment of the purposes for which it was made, the surplus passes as money.[33]

CONVICTS.[1]

Only prisoners convicted of a violation of penal laws can be condemned to involuntary servitude.[2] One sentenced to hard labor cannot be detained an unreasonable length of time before commencing service of his sentence.[3] A convict cannot be deprived of substantial rights by an ex post facto law,[4] and in Kansas one under sentence of death is not rendered incapable of managing his estate.[5] A life convict is not disqualified as a witness.[6] A convict leased out by the state does not assume the risks of employment which a free man engaging therein would be charged with having assumed,[7] but he cannot voluntarily incur unnecessary risks,[8] Nor is there any liability if he sustains injury as the result of an accident.[9] An escaped convict is entitled to the benefit of his contracts up to the time of his re-

24. Duckworth v. Jordan [N. C.] 51 S. E. 109.

25. Are also other methods. Answer expressly stating that defendant desires reconversion held sufficient election. Duckworth v. Jordan [N. C.] 51 S. E. 109. Under a statute giving the husband the right to administer on his deceased wife's estate and making him sole distributee, he has, in the absence of any indebtedness, the sole beneficial interest in her share of property directed to be sold, and is alone required to make the election as to such share. Id.

26. Cannot elect by answer simply, though represented by guardian. Duckworth v. Jordan [N. C.] 51 S. E. 109.

27. See 3 C. L. 878.

28. Primm v. Primm, 111 Ill. App. 244.

29. Lash v. Lash [Ill.] 70 N. E. 1049. See, also, McCullough v. Lauman [Wash.] 80 P. 441.

30. Where conversion takes place at date of testator's death. Nelson v. Nelson [Ind. App.] 72 N. E. 482. Where will gave trustees power to manage and control estate with power to make sales as fully as testator himself had power and to reinvest proceeds, held, that proceeds which had been reinvested in securities should be distributed as personalty. Kennedy v. Dickey, 99 Md. 295, 57 A. 621.

31. Duckworth v. Jordan [N. C.] 51 S. E. 109.

32. Where conversion takes place at testator's death. Nelson v. Nelson [Ind. App.] 72 N. E. 482.

33. Kennedy v. Dickey, 99 Md. 295, 57 A. 621.

1. Management and discipline of penal institutions, see Prisons, Jails and Reformatories, 4 C. L. 1067.

2. Stone v. Paducah [Ky.] 86 S. W. 531.

3. Ex parte Bettis [Ala.] 37 So. 640.

4. Right to earn diminution of sentence. People v. Johnson, 44 Misc. 550, 90 N. Y. S. 134.

5. Sentence to be executed at a time appointed by the governor after the expiration of a year from date of conviction is not a sentence for life nor for a term less than life. Gray v. Stewart [Kan.] 78 P. 852.

6. One in a territorial prison may testify in a criminal case, but the fact of his conviction may be considered as affecting his credibility. Martin v. Territory, 14 Okl. 598, 78 P. 88.

7. Because he does not engage in the service of his own free will. Simonds v. Georgia Iron & Coal Co., 133 F. 776.

8. If he does he cannot recover for an injury sustained. Simonds v. Georgia Iron & Coal Co., 133 F. 776.

9. Evidence held to show that the question of accident was not in the case. Simonds v. Georgia Iron & Coal Co., 133 F. 776.

capture.[10] After recapture judicial proceedings are not necessary to his confinement for the unexpired term with the period of his absence added.[11] In Alabama convicts working beyond the limits of the county wherein they were convicted are under the control of the board of convict inspectors.[12] On convicted of a misdemeanor who fails to perform a contract of service with a surety who confessed judgment for him is subject to punishment, though the confession of judgment was for costs only.[13]

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Acquisition, extent and loss of copyright.[14]—A photograph contains such expression of idea, thought or conception as to be susceptible of copyright,[15] and a combination of separate pictures taken at different times and which connectedly tell a story likewise is.[16] Multicolored pictures impressed from plates of metal, each carrying one color, are prints and not "chromos or lithographs" [17] and are copyrightable, though not from plates made in this country.[18] The "Interim Copyright Act" for the protection of foreign publications exhibited at the Louisiana Purchase Exposition does not protect a foreign publication previously published in this country.[19] The notice prescribed by statute must at least in all substantial particulars be followed.[20]

10. Where he engages as a seaman but is injured and leaves the service before the expiration of the term of his shipment. McCarron v. Dominion Atlantic R. Co., 134 F. 762.

NOTE. The right of a convict to contract: A distinction was early made between the rights of one under attainder of treason or felony and one civilly dead. A person attainted was at times spoken of as "civiliter mortus" (Bullock v. Dodds, 2 B. & Al. 258), but the results of such attaint were not the same as the results of civil death. The latter term was synonymous to natural death and was strictly confined to cases of persons banished, or abjured the realm, or who had entered the church (Platner v. Sherwood, 6 Johns. Ch. [N. Y.] 118). Certain proprietary rights were preserved to a man attainted. He did not forfeit his freehold so long as he lived until office found or entry by the king. Doe v. Pritchard, 5 B. & A. 765; Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368, 1 L. R. A. 264. Until this entry was made, a grant by one under attainder bound all persons, but the king and the lord, of whom the lands were held. Sheppard's Touchstone, 231; Perkins' Profitable Book, 62. Likewise where the forfeiture of the estate was limited to the lifetime of the one attainted, the remainder of the estate could be devised by the felon. Rankin's Heirs v. Executors, 6 T. B. Mon. [Ky.] 531, 17 Am. Dec. 161.

It seems perfectly clear that the rights to personal safety of the one attainted were inviolated. He was not absolutely at the disposal of the crown, for until execution, the creditors had an interest in his person for securing their debts and after pardon granted, he could bring an action for personal injuries received during imprisonment. See Ramsay v. MacDonald, Foster's Crown Cas. 62, note. Whether his contract rights were preserved is not so clear. It is intimated that an attainted person could make a valid contract, although perhaps unable to enforce contracts at the time. Kynnaird v. Leslie, L. R. I. C. P. 389. This question has recently been passed upon by the Federal district court in Massachusetts as one of novel impression. A convict who had escaped was allowed to recover, after his subsequent recapture and service of sentence, upon his contract made during the period of his escape. McCarron v. Dominion Atlantic R. Co., 134 F. 762. In the eyes of the law, a convict's disqualifications attach the moment sentence is passed and continue wherever he may go by authority or by his own escape. Miller v. Finkle, 1 Park. Cr. R. 374; Ruggin's Case, 21 Grat. [Va.] 790. No distinction can, therefore, be drawn between the contractual rights of an escaped convict and one who is still incarcerated. In the light of the decision in the principal case, a convict's position today would seem to be analogous to that of one under attainder rather than one civilly dead. In the absence of a statute expressly making his contracts void, cf. 33 & 34 Vict., c. 23, his right to contract would seem to survive, although his remedy is temporarily suspended, and upon the ceasing of the disability, the remedy is itself restored.—5 Columbia L. R. 468.

11. In re McCauley [Wis.] 100 N. W. 1031.

12. Under Code 1896, § 4521, the board may order one to be removed to another county to be tried for a crime. Russell v. State [Ala.] 38 So. 291.

13. Under Code 1896, § 4751, McQueen v. State [Ala.] 37 So. 360.

14. See 3 C. L. 878.

15, 16. American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262.

17, 18. Hills & Co. v. Hoover, 136 F. 701.

19. Encyclopaedia Britannica Co. v. Werner Co., 135 F. 841.

20. "Copyright 1902. Published by H. & Co." is not misleading because of the in-

Publishers cannot by a printed notice (following copyright notice) restrict the dealer's license to sell below a fixed price books in which the publisher reserves no property or control.[21] A dealer purchasing such a book for resale is not a licensee or agent[22] and reselling below price was not within Rev. St. U. S. § 4964,[23] nor is the marketing of such books by the publisher, subject to such restriction, a mere license, but a sale.[24] A restrictive condition as to the retail price does not constitute a limitation of the retailer's title,[25] and where books were purchased at the full price demanded and were sold at a loss, there was no infringement, though the resale was at less than the price fixed by the publisher.[26]

At common law property in intellectual productions is lost by publication.[27] Exhibition of a painting in a gallery admission to which is limited and without permission to copy is not a free publication.[28] On the question of free publication, evidence that it was in a gallery and subject to certain restrictions is admissible.[29]

Assignments and royalty contracts.—An assignment to a publisher for publication on royalty with conditions against further transfer and for a reversion is a personal engagement of the publisher.[30] When assigned absolutely, a copyright is property transmutable to the assignee's trustee in bankruptcy.[31] A privilege of revoking a license for nonpayment of royalties may be exercised, even though tardiness of the licensee's agent was the only reason for delay in payment.[32] Acceptance of royalties in arrear does not reinstate a contract of license forfeited for nonpayment.[33]

Infringement.[34]—The use of a compiled work as a guide to original sources is not improper,[35] and one who has followed up such information and found it to be correct may publish it, though it is the same as that in a competing work.[36] He may work by taking memoranda from a copyrighted work and on investigation

terpolation of the word "published." Hills & Co. v. Hoover, 136 F. 701.

Note: This is decided on the authority of Hills & Co. v. Austrich, 120 F. 862, which held that this notice was "good within the rule" in Bolles v. Outing Co., 77 F. 966, 46 L. R. A. 712. But Bolles v. Outing Co., simply held that a notice was not bad which omitted the initials of the person obtaining the copyright and abbreviated the year to the two last numerals as commonly done. The notice held good read "Copyright 93 by Bolles Brooklyn." There was no interpolated word between the words "Copyright 93" and the name of the person obtaining it. Hence there was no question and consequently no rule in the Bolles Case as to interpolated words. The opinions in both the Hills & Co. cases and in the Bolles Case contain dicta intimating if not expressing the doctrine that the notice suffices if it does not mislead. Of that doctrine Mr. Justice Brown, speaking for the United States supreme court, in a very late case (Mifflin v. White, 190 U. S. 260, 47 Law. Ed. 1040), said: "It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue in substance at least the statutory method of securing it." The opinions in the Hills & Co. Cases (120 F. 862, 136 F. 701) are therefore not only unsupported by the precedents which they cite, but they lose part of their own force by following a doctrine repudiated by the supreme court. Since it is only by inference that a notice,—"Copyright 1902. Published by Hills & Co.," states who obtained the copyright, whether author or proprietor, and if the latter, whether he is also the publisher; it is difficult to see how it could be sustained under the rule laid down in Mifflin v. White, 190 U. S. 260, 47 Law. Ed. 1040.

NOTE. Accidental omission of notice: In 66 L. R. A. 444, under the report of American Press Ass'n v. Daily Story Pub. Co. [C. C. A.] (120 F. 766, 66 L. R. A. 444), the annotator with great reason criticizes the doctrine of the case and collates the authorities. There is a strong dissent by Grosscup, J., and it is doubtful if the case will ever become a precedent. See 1 C. L. 709, text 76.

21, 22, 23, 24. Bobbs-Merrill Co. v. Straus, 139 F. 155.

25, 26. Scribner v. Straus, 139 F. 193.

27. Plans. Wright v. Eisle, 86 App. Div. 356, 83 N. Y. S. 887.

28, 29. Werckmeister v. American Lithographic Co. [C. C. A.] 134 F. 321.

30. In re D. H. McBride & Co., 132 F. 285.

31. In re Howley-Dresser Co., 132 F. 1002, distinguishing In re McBride & Co., 132 F. 285, in which case the assignment was not absolute but partook of a trust.

32, 33. Weber v. Mapes, 98 App. Div. 165, 90 N. Y. S. 225.

34. See 3 C. L. 878.

35, 36. Sampson & Murdock Co. v. Seaver-Radford Co., 134 F. 890.

of the original sources may check his memorandum as correct and retain it, or may change it or reject what is erroneous, and publish the result.[37]

Laches[38] is not imputed until reasonable time to sue.[39]

Remedies and procedure.[40]—If matter has been copied from one compilation into another without resort to original sources, injunction may issue.[41] Proof of damages is not essential.[42] Infringement of copyright of cartoons and of a copyrighted dramatic composition based on them may for convenience be joined in one bill.[43] A demurrer to such a bill will not reach the question whether there was any dramatic possibility in such cartoons.[44] It seems that an assignee of dramatic rights is a mere licensee unable to sue in his own name.[45] If a copyrighted publication is attached to the bill and profert made, it will be examined as part of the bill.[46] The granting of a preliminary injunction is discretionary,[47] and will be denied if complainant's right is doubtful.[48] If complainants allege infringement of what was itself not original, that fact should first be challenged on hearing for the preliminary injunction.[49] Unless it appears that the infringeing matter cannot be expunged, the injunction will merely restrain sale whilst such infringing matter appears and will not be made general.[50] A bill should be dismissed where there is no equity and an immediate appeal thus facilitated rather than to enter an interlocutory order refusing an injunction.[51]

The penalties in case of piracy of a photograph are assessed according to the number of copies found, but not less than $100 nor exceeding $5,000.[52]

Coram Nobis and Coram Vobis, see latest topical index.

CORONERS.[53]

The record and finding of a coroner's jury are inadmissible in an action on an insurance policy on the issue of the cause of death.[54] In Michigan the presentation by a coroner of a false and fictitious claim to the circuit court for allowance against the state, the claim purporting to be for expenses of an inquest upon the

37. General directory. Sampson & Murdock Co. v. Seaver-Radford Co., 134 F. 890.

38. See 3 C. L. 879.

39. A year and a half held not laches. Werner Co. v. Encyclopaedia Brittannica Co. [C. C. A.] 134 F. 831.

40. See 3 C. L. 879.

41, 42. Sampson & Murdock Co. v. Seaver-Radford Co., 134 F. 890.

43, 44, 45. Empire City Amusement Co. v. Wilton, 134 F. 132.

46. American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262.

47. Werner Co. v. Encyclopoedia Britannica Co. [C. C. A.] 134 F. 831.

48. No injunction will be granted if there is a doubt whether a copyrighted moving picture film has been piratically republished or whether it has merely been approximated in theme by original photographs of the same general character. American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262. Injunction will not issue even in case of reproduction where a publication by the author or proprietor has at least partially freed the production and it is uncertain to what extent. Littleton v. Fischer, 137 F. 684.

49. Werner Co. v. Encyclopaedia Britannica Co. [C. C. A.] 134 F. 831.

50. Sampson & Murdock Co. v. Seaver-Radford Co., 134 F. 890. Accounting was ordered of all profits attributable to the incorporation of piratical matter. Id.

51. Encyclopaedia Brittannica Co. v. Werner Co., 135 F. 846.

52. Rev. St. U. S. § 4965, as amended 28 Stat. 965. Boston Traveler Co. v. Purdy [C. C. A.] 137 F. 717, following Bolles v. Outing Co., 175 U. S. 262, 44 Law. Ed. 156.

coroners

53. See 3 C. L. 879.

54. Held irrelevant in action on accident policy. Aetna Life Ins. Co. v. Milward, 26 Ky. L. R. 589, 82 S. W. 364. Finding of coroner's jury that insured committed suicide inadmissible in action on death benefit certificate. Boehme v. Sovereign Camp Woodmen of the World [Tex.] 84 S. W. 422. Where defense on benefit certificate was suicide, verdict of coroner's jury held inadmissible as hearsay. Kane v. Supreme Tent Knights of Maccabees of the World [Mo. App.] 87 S. W. 547.

Note: The three cases above cited recognize a conflict in the authorities on the point decided, and the opinions in the Kentucky and Texas cases contain discussions and citations of authorities. On this question, see the recent note in 68 L. R. A. 285.

body of a stranger, renders the coroner punishable for contempt.[55] Only the coroner of the county where one is found dead or the coroner of the county where his death is supposed to have been caused may hold an inquest on the body.[56]

CORPORATIONS.[57]

55. Under Comp. Laws, c. 301, § 1, and Comp. Laws, § 11, 828. Ex parte Toepel [Mich.] 102 N. W. 369.

56. Young v. Pulaski County [Ark.] 85 S. W. 229.

§ 1. *Definition and nature of corporation.*[58]—A corporation is usually deemed a "person" within the meaning of statutes,[59] but is not such a "person" as can be licensed to practice medicine,[60] or within the terms of some constitutional provisions[61] The fundamental idea of business corporation is the advantage coming from an aggregation of wisdom, knowledge and business foresight, resulting from bringing a large number of stockholders and directors into a common enterprise.[62] But courts of equity will sometimes disregard the corporate form, where justice requires it and where its retention is not needed to protect some interest requiring protection.[63]

§ 2. *Classification of corporations.*[64]—The objects and purpose of a corporation must be determined from the provisions of its charter and not from the declarations of its officers or agents.[65]

57. This article treats generally of domestic private corporations. Foreign corporations are made the subject of a later article (3 C. L. 1455). Taxation of Corporations is discussed in the article Taxes, 4 C. L. 1605. Consultations for questions peculiar to corporations for particular purposes, Banking and Finance, 5 C. L. 347, Building and Loan Associations, 5 C. L. 478; Exchanges and Boards of Trade, 3 C. L. 1397; Fraternal Mutual Benefit Associations, 3 C. L. 1499; Insurance, 4 C. L. 157; Railroads, 4 C. L. 1181; Religious Societies, 4 C. L. 1275; Street Railways, 4 C. L. 1556; Telegraphs and Telephones, 4 C. L. 1657; Warehousing and Deposits, 4 C. L. 1820; Waters and Water Supply, 4 C. L. 1824. Related articles are Associations and Societies, 5 C. L. 292; Franchises, 3 C. L. 1495.

The analysis here adopted is embraced in that of Clark & Marshall on Corporations. The searcher who so desires may find the earlier cases on a proposition by using this article and those at 1 C. L. 710, and 3 C. L. 880 in connection with Clark & Marshall.

58. See 3 C. L. 881.

59. The statute of limitations. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

60. Under c. 35, Comp. St. 1901. The qualification of a medical practitioner is personal to himself. State Electro-Medical Institute v. State [Neb.] 103 N. W. 1078.

61. Not a citizen within clause of 14th amendment forbidding abridgment of privileges or immunities of citizens. Aetna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348.

62. Audeuried v. East Coast Mill Co. [N. J. Eq.] 59 A. 577.

63. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167.

64. See 3 C. L. 881.

65. And the question of whether it was organized for an illegal purpose must be so determined. State v. New Orleans Water Supply Co. [La.] 36 So. 117. A corporation organized to manufacture and sell mineral and other waters held to be a manufacturing corporation, within Mills' Ann. St. Rev. Supp. § 481. Carlsbad Water Co. v. New [Colo.] 81 P. 34. A corporation organized to receive from each of its members a stated sum at stated intervals, until a specified sum is received, and to invest the money for the benefit of its members, is an instalment investment company within the meaning of the Nebraska statutes. Chapter 29, p. 269, Laws 1903; Comp. St. 1903, c. 16, §§ 216, 227, and Cobbey's Ann. St. §§ 6649, 6660. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. A corporation organized for the purpose of improving the breed of horses by promoting the interests of the American trotting turf, having no capital stock and acquiring no property other than membership fees and dues, held to come within the provisions of Pub. Acts 1903, p. 290, No. 171, for the incorporation of associations not for pecuniary profit. American Matinee Ass'n v. Secretary of State [Mich.] 12 Det. Leg. N. 262, 104 N. W. 141. A corporation organized to receive money or property contributed or devised, to invest the same and apply the income thereof to the relief of poverty and distress, as well as to act generally in respect to property received for any charitable use or purpose, held to be benevolent and charitable within Laws 1848, p. 447, c. 319, § 1. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. A corporation organized for the purpose of carrying on a wholesale and retail ice business, selling ice of its own cutting and large quantities purchased from others, is engaged chiefly in trading and mercantile pursuits within the meaning of the bankruptcy act. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466.

§ 3. *Creation, name and existence of corporations, and the amendment, extension and revival of charters.*[66]—Corporations can be created only by some sovereign authority,[67] the grant of corporate existence being a grant of special powers and privileges to the incoporators, to pursue the objects of the incorporation, and transact corporate business the same as an individual does.[68] In this country charters are generally granted either by special acts of the legislature or obtained under general statutes regulating the subject.[69] When a corporation is created by special act, that constitutes its charter;[70] but when formed by the adoption of articles of incorporation, in pursuance of general laws, such articles, in connection with the statutes, answer the same purpose as a special charter,[71] and the same rules of construction apply to them as to special charters.[72]

Unless there is a constitutional requirement, no particular forms are necessary to effect a grant of corporate franchises;[73] but where certain things are required in the organization of a corporation and a form of charter prescribed, they must be followed,[74] though a substantial compliance with the statute will be suf-

66. See 3 C. L. 882.

67. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

68. Booth & Co. v. Weigand [Utah] 79 P. 570.

69. Flerscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023; Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. They are creatures of statute—of local laws—and, except for such laws, would have no existence. Booth & Co. v. Weigand [Utah] 79 P. 570. There is no common-law rule in respect to the granting of charters to private business corporations. Hence no presumption can be indulged as to what the law of another state is in regard to granting them. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023. The general law provides and indicates the essentials of the charter of a corporation to be created thereunder. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. The constitution of New York is not mandatory that corporations shall be formed under general laws, but permission. Art. 8, § 1. Whether a special act is necessary or not rests entirely in the discretion of the legislature and is not reviewable by the courts. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

70. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

71. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735. All applicable provisions of the general law, not expressly set forth in the certificate or articles of incorporation, are to be read into, and taken to be a part of the charter. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. The very object of requiring the filing and recording of the articles is to give them the same publicity, as nearly as may be, as statutory charters. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735.

The articles of association are expressive of the relative obligations of the company and stockholders and where in the certificates of stock, in whosoever hands they may come. Dempster Mfg.. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735. They form the very basis of corporate existence. Everyone who deals with the corporation or its stock is charged with knowledge of their contents. Liens on stock, created by the articles, are binding as against third persons, although they have no actual notice thereof. Id.

72. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735. The charter of a stock corporation is, as between the corporation and its stockholders, and as to the stockholders, inter sese, an executed contract. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65, citing Long Island W. S. Co. v. Brooklyn, 166 U. S. 685, 694, 41 Law. Ed. 1165.

73. Any expression showing the legislative intent to confer the right to exercise corporate franchises is sufficient. The use of the word "incorporate" is not necessary. A corporation may be deemed to be created by implication. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

74. It is essential to name the termini of any proposed railroad under Shannon's Code, § 2412, prescribing the form of a railroad charter. But the route of a commercial railroad, as distinguished from a street railway, need not be definitely stated; and a railroad may be constructed entirely within one city, of circular or polygonal outline, having both termini at the same place, if the several connecting routes and their termini are named. Collier v. Union R. C., 113 Tenn. 96, 83 S. W. 155. In Ohio, in designating the route for a proposed railway in the articles of incorporation, the counties through which it is to pass must be named; but not the townships; where the latter are named, it is mere surplusage. Hayes v. Toledo R. & T. Co., 6 Ohio C. C. (N. S.) 281, 26 Ohio C. C. 395. Since stockholders in corporations organize under the law for sake of the special privileges given them and the special immunity from unlimited liability, their organizations must be in good faith, in obedience to the law. Greater Pittsburg Real Estate Co. v. Riley, 210 Pa. 283, 59 A. 1068. In the incorporation of a charitable society, the law does not require that the ultimate recipients of the county be minutely and precisely identified. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. In Illinois, the recording of the secretary of state's certificate of organization in the county where the principal office of the

ficient to show a corporation de facto,[75] and a defective organization may be legalized.[76]

For all purposes connected with the collection of subscriptions to its capital stock, the organization of corporation is complete when its entire capitalization has been unconditionally subscribed.[77]

A corporation has no legal existence without the limits of the jurisdiction which created it,[78] and unless it has both existence and some rights and powers in the state of its domicile, it cannot invoke the doctrine of comity to give it any in another state.[79]

In Indiana an act to continue the corporate existence for thirty years of private corporation created by special act of the legislature is unconstitutional.[80]

Cases involving the amendment of charters are collected in the note.[81]

company is located is an essential condition precedent to legal organization. Hurd's Rev. St. Ill. 1899, c. 32, § 4. Elgin Nat. Watch Co. v. Loveland, 132 F. 41. The acknowledgments required to certificates of incorporation cannot be taken before one of the signers of the certificate. Laws 1890, p. 1082, c. 565, § 2. People v. Board of Railroad Com'rs, 93 N. Y. S. 584. The validity of a corporate charter is not affected by the fact that one of the two affidavits required to be made upon application to the secretary of state contains matter not required by the statute. Laws of 1890, c. 154, § 5. So held in South Dakota. Thomas v. Wilcox [S. D.] 101 N. W. 1072.

75. In an action between the corporation and a private person. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 P. 295. A reasonable latitude is allowed as to what may be included in the certificate of incorporation. All matter required by the law must be inserted, and other provisions may be inserted, germane to the purposes of the corporation and not contrary to law or public policy. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. The officer whose duty it is to file or record articles of incorporation, while a ministerial, and not a judicial officer may exercise discretion in the premises, as to whether the articles are entitled under the law to be filed or recorded. The inclusion in a certificate of incorporation of powers not permitted held to justify the recording officer in refusing to accept it for record; also, informalities apparent on the face of the certificate in the matter of its execution. Dancy v. Clark, 24 App. D. C. 487.

76. It being within the power of the legislature to prescribe the necessary formalities. An act passed to remove the limit of the amount of property that a charitable society might take had the effect of validation the incorporation of a society which exceeded the limit in its original incorporation. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

77. It is immaterial that a part of its stock was issued without consideration. Merrick v. Consumers Heat & Elec. Co., 111 Ill. App. 153. An insurance company is organized, under the Illinois statute, for all purposes except issuing policies, when its charter has been filed as required by law and approved by the attorney general, its capital stock subscribed and its directors elected. Act of 1869. Blinn v. Riggs, 110 Ill. App. 37. Incorporators in Mississippi become a corporation upon the approval of their proposed charter by the governor, and the certification of such approval by the secretary of state, under the great seal. Notwithstanding certain conditions precedent to the commencement of business have not been complied with. Wells Co. v. Gastonia Cotton Mfg. Co.,198 U. S. 177, 49 Law. Ed. 1003.

78. Booth & Co. v. Weigand [Utah] 79 P. 570.

79. Myatt v. Ponca City Land & Improvement Co., 14 Okl. 189, 78 P. 185.

80. Act of April 2, 1885 (Acts 1885, p. 121, c. 30). Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083.

81. Where the certificate filed declares that the signers have adopted an "amendment" to the charter of a certain corporation, complying with the statutory requirements thereto, it cannot be considered the formation of a new corporation. Code Pub. Gen. Laws 1888, art. 23, § 47. Brown v. Maryland Tel. & T. Co. [Md.] 61 A. 338. But the change of name of a corporation, so as to include the word "trust" in the new name, is so far the organization of a new corporation as to violate a statute providing for the organization of trust companies and prohibiting the use of the word "trust" in the name of any corporation organized under any other act. Laws 1903, p. 367, c. 176. State v. Nichols [Wash.] 80 P. 462. Railroad corporations can extend their lines by amendment of their charter in the manner prescribed by law. Acts 1897, p. 271, c. 176, provides that corporations organized under Acts 1875, p. 232, c. 142, or acts amendatory thereof, may amend their charters as prescribed by § 19, p. 257, of the Acts of 1875. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155. The right of a corporation in New York to amend its charter, by inserting therein any matter which might have been originally inserted, contemplates only corporate action by the board of directors. Laws 1892, p. 1955, c. 690, § 52. An amendment merely assented to by owners of a majority of the shares of stock, without a corporate meeting held, is not binding on the minority stockholders. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. A constitution adopted by a membership corporation after

Corporate name.[82]—The corporate name is a necessary element of the corporation's existence,[83] and though it is an artificial and impersonal thing, selected arbitrarily by the corporators themselves,[84] it is a thing of value, when connected with a profitable business,[85] and any imitation of it, in such manner as to deceive the public, may be restrained.[86]

A mere change in the name of a corporation has no effect upon its legal status, or upon the rights of creditors.[87]

Purposes.[88]—In determining the purposes of a corporation, the charter will be strictly construed.[89]

its organization, not in conormity with its charter or certificate of incorporation, is invalid. A corporation organized and incorporated as a club for social and literary purposes could not be changed into a political club, by a change of constitution. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

82. See 3 C. L. 882.

83. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21.

84. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. A corporation may adopt the name of its president for the execution of commercial obligations, bills of exchange and promissory notes in the usual course of its business. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

85. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21. Where a stockholder confers upon a corporation the right to use his name in the corporation name, he cannot, upon selling his stock in the corporation, resume the use of his own name in carrying on the same business, during the life of the corporation, so as to mislead the public. Equity will give the corporation relief in such a case. McFell Elec. & Tel. Co. v. McFell Elec. Co., 110 Ill. App. 182. Nor can he, by becoming a stockholder in a new corporation, confer on it the right to adopt a name similar to that of the other corporation, to palm off the business of the new corporation as that of the old one. Dodge Stationery Co. v. the president of a corporation, whose individual name was included in the corporation name, continued to do business in the name of the corporation after its failure, such subsequent business will be regarded as his personal business and not a continuation of the corporation's business. Boyle v. Northwestern Nat. Bank of Su-Dodge, 145 Cal. 380, 78 P. 879. But where perior [Wis.] 103 N. W. 1123.

86. Exact simillitude is not a condition of relief; it is enough that the similitude is such as to be calculated to mislead the public. The use of the name "Landlords' Protective Department" was enjoined at the suit of plaintiff. Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21. In the absence of statutory provisions regulating the subject, parties organizing a corporation must choose a name at their peril, and the use of a name similar to one adopted by another corporation will be enjoined at the instance of the latter, if misleading and calculated to injure its business; and the fact that the name was assumed by the second corporation in good faith is immaterial, the probable and ordinary consequences of the act, regardless of the intent or motive, being the test. Nesne v. Sundet, 93 Minn. 299, 101 N. W. 490. The names "The Dodge Stationery Company," and the "J. S. Dodge Company," considering the fact that the business of the two is the same, held sufficiently similar to warrant an injunction restraining the latter. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. Where a word was evidently adopted by a corporation as part of the corporate name, for the purpose of availing itself of the trade reputation given to that word by another, the use of the word by the corporation in its business was enjoined. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561. Where the secretary of state permits the filing of a certificate of incorporation, in which the name adopted so nearly resembles that of another corporation as to be calculated to deceive, the action of the secretary of state is not conclusive, and the corporation aggrieved can have relief in equity. "The Columbian Chemical Company" held to resemble the name of relator, "Columbia Chemical Company," so nearly as to be calculated to deceive; but certiorari held not to lie to review the secretary of state's action in filing the certificate. People v. O'Brien, 101 App. Div. 296, 91 N. Y. S. 649.

87. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808. And an unauthorized change of name will not render the stockholders liable as partners for subsequent liabilities. Two stockholders of a mercantile corporation moved its stock from the state, opened a store and sold goods, having changed the name of the corporation. Judgment on a note for borrowed money, to pay former debts of the corporation and signed in the new name, reversed. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505.

88. See 3 C. L. 883.

89. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921. The "manufacturers' and miners'" act of Indiana, ch. 35, Rev. St. 1881, limits the business to be adopted by a corporation thereunder to a single class of the several classifications enumerated, and it is not competent to combine two or more of the purposes so classified in a single incorporation, as primary business. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. Under a statute for the organization of corporations for the transaction of any commercial business, a corporation may be formed for warehousing goods for shipment. Civ. Code, § 393 (25). Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

Fees[89] for filing articles[91] and for continuing in existence are imposed in most states.[92]

Proof of incorporation.[93]—The fact of incorporation may be inferred,[94] or established by admissions,[95] and proof may be waived;[96] but the denial of corporate existence in a suit by it puts the burden of proof upon the corporation.[97]

§ 4. *Effect of irregularities in organization, and of failure to incorporate. Stockholder as partner or agent.*[98]—The parties in an unsuccessful attempt to organize a corporation may be liable and held as partners.[99]

In the District of Columbia, a company cannot be incorporated to do all the classes of business for which corporations may be formed under the general law, but can be incorporated to engage in only one such business or enterprise. Sub. chap. 4, D. C. Code. And the provision that, upon certain conditions a company may extend its business to any other business authorized by law means extension by taking in something cognate to its original business. Dancy v. Clark, 24 App. D. C. 487. But a statute providing for the formation of corporations for mining manufacturing, mechanical, quarrying "and other industrial pursuits, and for any other lawful business," does not limit the formation of corporations to purposes similar to those enumerated. Ann. St. S. D. 1901, § 3812. Vokes v. Eaton [Ky.] 85 S. W. 174.

90. See 3 C. L. 883.

91. A reincorporation, after the expiration of a charter, held to be the creation of a new corporation and subject to the payment of the organization tax, under Ky. St. 1903, § 4225. Commonwealth v. Licking Valley Bldg. Ass'n, 26 Ky. L. R. 730, 82 S. W. 435.

92. The "yearly license fee or tax," imposed by the law of New Jersey, is imposed arbitrarily as a condition to the continued existence of the corporation. Act 1884 (P. L. 1884, p. 234, § 4). The state does not lose the right to enforce such fee against the property of an insolvent corporation, because, at the time of its assessment, it is in the hands of a Federal receiver. Duryea v. American Wood Working Mach. Co., 133 F. 329. Where instruments purporting to be certificates of preferred stock are ambiguous in their language, the corporation is estopped, by a declaration in its articles, that money represented by such certificates is a part of its capital stock, from asserting the contrary in a proceeding to fix its liability to the franchise tax. People v. Miller, 180 N. Y. 16, 72 N. E. 525. Corporation doing a wholesale and retail ice business is not liable for the mercantile license tax of Pennsylvania, under Act of May 2, 1899, P. L. 184, which is intended only to deal with mercantile pursuits. Commonwealth v. Pocono Mountain Ice Co., 23 Pa. Super. Ct. 267.

93. See 3 C. L. 883.

94. A certified copy of the designation, by a foreign insurance company, of a resident agent for the service of process, in accordance with law, is sufficient evidence of incorporation. So made by St. 1871-72, p 826, c. 566, § 1, as amended by St. 1899, p 111, c. 94, § 1. Anglo-California Bank v Field, 146 Cal. 644, 80 P. 1080.

95. A mortgage in the form of a deed, reciting that the deed is subject to the claim of the "Anglo-Californian Bank, Limited," imports that the bank is incorporated and is prima facie evidence of corporate character, and the acceptance of such an instrument is an admission that the bank mentioned at that time was a corporation, and that condition having been once shown to exist is presumed to continue until the contrary is shown. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. By the recital of the corporate existence of plaintiff corporation in a bond executed by defendant, on which such is brought. Campbell & Zell Co. v. American Surety Co., 129 F. 491.

96. Where a defendant is sued under a name that implies corporate existence, the fact of incorporation may be inferred from its having issued the obligation sued on under that name, by its president and secretary. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023. Where, in an indictment of a railroad company for a nuisance in maintaining an alleged illegal crossing over a highway, the company is alleged to be "an existing corporation, duly chartered," it may well be questioned whether the defendant corporation is bound to defend the validity of its incorporation. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

97. See 3 C. L. 883, n. 44. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906; Campbell & Zell Co. v. American Surety Co., 129 F. 491. Where the alleged incorporation of a company under the laws of a sister state is denied under oath, it devolves on the party alleging incorporation to affirmatively prove it. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023.

98. See 3 C. L. 884.

99. Mitchell v. Jensen [Utah] 81 P. 165. Where it is claimed that defendant is liable individually for goods ordered, because of the illegality of the organization of the corporation he represented, the declaration must be framed upon that theory in order to present the question. The declaration containing no such averment, the sole question was whether the contract was between plaintiff and defendant. Love v. Ramsey [Mich.] 102 N. W. 279. But where defendant contracted "for a bridge company to be organized and incorporated," the contract reciting that the party of the second part desire to build the bridge, and concluding, "In witness whereof we have hereunto set our hands and seals," but signed by plaintiff and defendant without a seal, defendant is personally liable. O'Rorke v. Geary, 207 Pa. 240, 56 A. 541. When an existing partnership becomes in-

De facto corporation. Collateral attack.[1]—Where the law authorizes a corporation and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, there exists a corporation de facto,[2] the legal existence of which cannot be questioned collaterally,[3] either by the state or by a private individual,[4] but only in a direct proceeding brought for that purpose.[5] There cannot be a corporation de facto, where there could not have been a corporation de jure,[6] as under an unconstitutional statute,[7] and the existence of such a corporation is subject to collateral attack.[8] So may the performance of acts, which are essential steps in the process of incorporation and prerequisite to corporate existence, also be challenged by private parties, unless estopped from doing so, whenever the question of corporate existence becomes material to them.[9]

Estoppel to deny incorporation.[10]—Whether or not a corporation exists, which may sue or be sued, is always open to challenge by a proper plea, in an action by or against it as such.[11] But one who deals with an association as a corporation is estopped from denying its corporate existence.[12]

corporated without formal dissolution and notice thereof, and continues dealing in the old way, the persons comprising such partnership are liable as partners, where the change of name does not convey information of the incorporation. Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647. An association of individuals, formed under the statutes of Ohio to carry on a private banking business, but not incorporated, is a partnership and subject to be adjudged a bankrupt, though it is entitled to exercise some of the attributes of a corporation. Lanning's Rev. Laws Ohio, § 4891 et seq. (Bates Ann. St. § 3170-1 et seq.). Burkhart v. German-American Bank, 137 F. 958.

1. See 3 C. L. 884.

2. Held, that a de facto corporation existed under the facts in this case. Lusk v. Riggs [Neb.] 102 N. W. 88; Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198. To constitute a corporation de facto, there must be (1) a valid charter or law under which a corporation of the kind in question might be formed; (2) a bona fide attempt to incorporate thereunder; (3) a colorable compliance with the charter or law; and (4) the exercise or user of corporate powers. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727, citing Doty v. Patterson, 155 Ind. 60; Clark & M. Corp. § 82. See, also, Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083. It is essential to the existence of a corporation de facto that there be a user of such corporate rights as could be authorized by law, and not merely such as might be exercised by individuals or unincorporated societies. Elgin Nat. Watch Co. v. Loveland, 132 F. 41.

3. Mitchell v. Jensen [Utah] 81 P. 165; Terry v. Chicago Packing & Prov'n Co., 105 Ill. App. 663; Lusk v. Riggs [Neb.] 102 N. W. 88. Under the statutes of California (St. 1862, p. 110, § 6) irregularities and defects will not defeat incorporation, where the questions are raised collaterally, as where the articles were filed with the county recorder instead of the county clerk. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 P. 295. Whether or not a corporation was properly organized to engage in a particular business cannot be determined collaterally, upon an objection to the admission in evidence of a deed made by it as a link in the chain of title. Thomas v. Wilcox [S. D.] 101 N. W. 1072.

4. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727.

5. Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083, citing Doty v. Patterson, 155 Ind. 60, 64, 56 N. E. 668.

6. Indiana Bond Co. v. Ogle, 22 Ind. App. 593-598, 54 N. E. 407, 72 Am. St. Rep. 326; Doty v. Patterson, 155 Ind. 60, 58 N. E. 668; Williams v. Citizens', etc., 25 Ind. App. 351, 57 N. E. 581; Farmers' Ins. Co. v. Borders, 26 Ind. App. 491-494, 60 N. E. 174; Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259.

7. Norton v. Shelby County, 118 U. S. 425, 30 Law Ed. 178; Walcott v. Wells, 21 Nev. 47, 24 P. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59-63; Clark & M. Corp. § 82c. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727; Id. [Ind.] 73 N. E. 1083.

8. Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083.

9. Elgin Nat. Watch Co. v. Loveland, 132 F. 41.

10. See 3 C. L. 884.

11. Elgin Nat. Watch Co. v. Loveland, 132 F. 41, citing Railway Co. v. Fifth Baptist Church, 137 U. S. 568, 34 Law. Ed. 784.

12. Civ. Code 1895, § 1862. Collins v. Citizens' Bank & Trust Co., 121 Ga. 513, 49 S. E. 594; Mitchell v. Jensen [Utah] 81 P. 165; Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727, citing Judah v. Amer. Live Stock Co., 4 Ind. 333, 339. One who contracts with a corporation cannot deny its corporate authority in order to defeat the enforcement of its contract. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. One who received pledged property from a corporation as such cannot deny the corporate character of the company for the purpose of holding the property. Blanc v. Germania Nat. Bank [La.] 38 So. 537. Parties who have given a bond to a corporation recognizing its corporate existence, cannot escape their liability on the bond by denying the capacity of the corporation to sue. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78

§ 5. *Promotion of corporations; acts prior to incorporation; incorporation of partnerships, etc.*[13]—Promoters,[14] including every person acting by whatever name in the forming and establishing of a company at any period prior thereto,[15] occupy a fiduciary relation toward the corporation they seek to promote,[16] and subscribers for stock of a proposed corporation, before they are incorporated, are partners in the business they have in hand.[17]

A corporation is not bound by contracts between its promoters unless it ratifies or adopts them.[18] The specific performance of a contract to incorporate will

P. 1073. One who sells a chose in action, even under false representations, to a purported corporation, is estopped to assert a want of legal corporate existence, as against a bona fide transferee. Green v. Grigg, 98 App. Div. 445, 90 N. Y. S. 565. Persons whose claims arise out of transactions with a company as a corporation cannot assert the invalidity of a trust deed given by it, on the ground that it was not legally incorporated. Hasbrouck v. Rich [Mo. App.] 88 S. W. 131. When one deals with a corporation, knowing that it is not in fact a de jure corporation, he, as well as the corporation, is estopped to deny its legality and cannot hold its manager liable individually or its stockholders liable as partners. Fairbairn v. Houghten [Mich.] 102 N. W. 284. The members of a corporation are not liable, where it is a corporation de facto, though not de jure, and the plaintiff has dealt with it as a corporation. Love v. Ramsey [Mich.] 102 N. W. 279. Where a corporation is acting within the general scope of its powers, it, as well as any person contracting with it, may be estopped to deny that it has complied with the legal formalities prerequisite to its existence or action, because they might have been complied with. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

13. See 3 C. L. 885.

14. A promoter is one who brings about the incorporation and organization of a company, who brings together the persons who become interested in the enterprise, who aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself. The Telegraph v. Loetscher [Iowa] 101 N. W. 773; Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio C. R. 198.

15. Defendant agreed with the owner of a patent to assist him in organizing a company to exploit the patent, receiving a cash consideration for his services. Defendant afterward became a director and assisted as such in the purchase of the patent. Held, that defendant was a promoter and liable to account to the corporation for the amount received from the patentee for his services. The Telegraph v. Loetscher [Iowa] 101 N. W. 773. Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. If they continue to act for the corporation by inducing persons to subscribe for stock, their relations as promoters continue. Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388.

16. The Telegraph v. Loetscher [Iowa] 101 N. W. 773; Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653; Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198; 24 Ohio C. C. 198. The fact that property was bought by promoters with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not entitle the corporation to the benefit of the purchase. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653. And where an undisclosed promoter of a corporation, formed to pool certain mills, was made a trustee of the corporation by the owners of the mills and not as a part of the contract of promoting, his claim against the corporation for services and disbursements as trustee was not inconsistent necessarily with his claim of a share in the promotion fees. Boice v. Jones, 94 N. Y. S. 896.

17. In such a partnership, where property is purchased before incorporation, the majority must have the right of control, so long as they act within the purview of the contract of subscription, and if they incorporate the property belongs to the corporation formed by them. Mt. Carmel Tel. Co. v. Mt. Carmel & Flemingsburg Tel. Co. [Ky.] 84 S. W. 515. Partnership relation of joint promoters of a corporation. Boice v. McCormick, 94 N. Y. S. 892. Assets of a dissolved firm, being appropriated and used in the business of a corporation, will be deemed to have entered into the business of the latter as capital, and any profits earned by the corporation should be distributed to such assets according to their value. Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473. But where a part of the profits was the result of the use of patented improvements not owned by the firm, a reasonable royalty for the use thereof should be deducted. Id.

18. Preliminary agreement by promoters of corporation that certain subscriptions to stock are to be paid by transfer of franchise not binding on corporation when organized. Merrick v. Consumers' Heat & Elec. Co., 111 Ill. App. 153. The weight of authority recognizes the power of a corporation, when formed to adopt or ratify such contracts. A survey made by promoters of a railroad, for its purposes, may be adopted as the location of the road, after incorporation. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890. Those undertaking to organize a corporation cannot be its agents before it comes into existence, for there can be no agent unless there is a principal. Jones v. Smith [Tex. Civ. App.] 87 S. W. 210. An agreement among promoters by which several of their number subscribe for stock upon condition that payment therefor shall be made by the transfer of a certain franchise, is not binding upon the corporation when

not be enforced by equity where a large proportion of the proposed incorporators are insolvent.[19]

Fraud of promoters.[20]—Promoters cannot secretly obtain profits from the corporation they cause to be organized,[21] and where a promoter fails to fulfill promises made to induce subscriptions to stock, the default vitiates the contract.[22] False and fraudulent representations in a prospectus issued by promoters, as to the value of property to be transferred by them to the corporation, afford ground for equitable relief against the corporation in behalf of one who relied on such representations in his suscription for stock.[23]

§ 6. *Citizenship and residence or domicile of corporation.*[24]—The national character of a corporation arises from the jurisdiction under whose laws it is organized,[25] and its domicile is that fixed by those laws.[26] A corporation is an inhabitant of the state and district in which its principal offices are, and its corporate business is transacted;[27] and for purposes of Federal jurisdiction, it is conclusively presumed that all the stockholders of a corporation are citizens of the state which by its laws, created the corporation;[28] but a corporation is not a citizen of a state within the meaning of the Federal constitution, securing to the citizens of

organized. Merrick v. Consumers' Heat & Elec. Co., 111 Ill. App. 153. Where the promoters of a railroad mutually agree to render without compensation their personal services in furthering the enterprise, one of them, who performs such services, cannot recover payment therefor from the railway company receiving the benefit of the same. Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759. A corporation that receives the fruits of advances made by a director before incorporation may assume the payment of the debt so created. Pitman v. Chicago-Joplin Lead & Zinc Co. [Mo. App.] 87 S. W. 10. Such adoption may take place by express corporate action or by any of the other modes by which corporations ratify or adopt the unauthorized or officious acts of others in their behalf. Where the promoter of a corporation requested an attorney to prepare a charter and certificate, to give advice in connection therewith and to rewrite by-laws, the corporation was not liable therefor, nor was the use of the charter and by-laws so prepared an adoption of the promoter's contract. Jones v. Smith [Tex. Civ. App.] 87 S. W. 210.

19. The Illinois incorporation act clearly contemplates that subscribers to capital stock should be persons of financial responsibility. Hernreich v. Lidberg, 105 Ill. App. 495.

20. See 3 C. L. 885.

21. Where promoters purchase property and afterward, as directors, sell it to the corporation at a price largely in excess of its value, without making a full disclosure of the circumstances, the corporation can rescind the contract for fraud. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653. But where there are no other stockholders but themselves, as when the corporation is organized with dummy directors, there is no one deceived and the corporation cannot afterward rescind the transaction. Old Dominion Copper Min. Co. v. Lewisohn, 136 F. 915. And where parties acquire property, intending to promote the organization of a corporation to purchase it from them at a profit, limiting the membership to interested parties until the deal is completed, and intending thereafter to cause the rest of the stock to be sold to outsiders ignorant of the nature of the transaction, they are guilty of actionable fraud upon the corporation and responsible to it for the gains made. Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388. Promoters will not be permitted to assert, either expressly or impliedly, that they will reap no benefit from the organization when in fact they will so do. Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198. An affidavit for an order of attachment, in an action against promoters for debt, held sufficient to charge actual fraud and the fraudulent contracting of the debt for which suit may be brought under Rev. St. § 5521, subd. 9. Id.

22. As where he promised, in consideration of stock to be retained by him as a part of the plan of organization, he would furnish certain subscriptions for the benefit of the subscribers. Audenried v. East Coast Mill Co. [N. J. Eq.] 59 A. 577. Promoters of a consolidation scheme held not entitled to compensation on account of nonfulfillment of conditions on which compensation depended. Fry v. Miles [N. J. Err. & App.] 59 A. 246.

23. Manning v. Berdan, 135 F. 159.

24. See, also, Foreign Corporations, 3 C. L. 1455; Domicile, 3 C. L. 1142; Process, 4 C. L. 1070.

25, 26. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225.

27. Wolff & Co. v. Choctaw, etc., R. Co., 133 F. 601. A corporation, created by the laws of another state, is deemed to be present in any state and entitled to the protection of the statute of limitations, where it has been regularly engaged in business, and has had its agent or agents, and been amenable to service of process. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

28. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225; Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

each state the privileges and immunities of the citizens of the several states.[29] An action against a corporation created by an act of congress can be maintained only in a Federal court of the district of which it is an inhabitant.[30]

§ 7. *Powers of corporations. A. In general.*[31]—A corporation is endowed with no natural attributes.[32] It possesses only such powers as are expressed or fairly implied in the statute by or under which it is created.[33] Its charter, however, is to be read in the light of any applicable general laws,[34] and its powers, in effecting its objects, are as broad and comprehensive as those of an individual, when not expressly prohibited.[35] Where the primary object and powers of a corporation are stated in its organization, the exclusion of all others not fairly incidental is strictly implied.[36]

Grants of corporate franchises are construed most strongly against the donee,[37] and any doubt respecting the possession of any particular power,[38] or whether or not a conflict exists between a company's special charter and a general law of the state, will be resolved against the corporation.[39]

Quasi public corporations.[40]—A quasi public corporation can exercise no power

29. Const. U. S. art. 4, § 2. Attorney General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467. A limited partnership, under the constitution and laws of Michigan, is not a corporation, so as to become a citizen of the state of its domicile for the purposes of Federal jurisdiction, independent of the individuals composing it. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. Where plaintiff sued two railroad companies jointly in tort, the question whether a separable controversy exists authorizing the sole nonresident corporation to remove the cause to the Federal court, will be determined by the cause of action set up in the declaration. Declaration held not to present a separable controversy. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225.

30. Under act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]. Wolff & Co. v. Choctaw, etc., R. Co., 133 F. 601.

31. See 3 C. L. 885.

32. Booth & Co. v. Weigand [Utah] 79 P. 570.

33. Anglo-American L. M. & A. Co. v. Lombard [C. C. A.] 132 F. 721; Bank of Montreal v. Waite, 105 Ill. App. 373; Myatt v. Ponca City Land & Imp. Co., 14 Okl. 189, 78 P. 185; Booth & Co. v. Weigand [Utah] 79 P. 570; Burnes v. Burnes [C. C. A.] 137 F. 781; New Albany Waterworks v. Louisville Banking Co. [C. C. C.] 122 F. 776. The production of the certificate of authority of a surety company, or a certified copy thereof, is sufficient authority for the approval of any bond or undertaking by the officers authorized to approve the same. Under sec. 880, Rev. Civ. Code of S. D. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304. The power of expulsion, given to a corporation, includes the lesser power of suspension. Board of Trade of Chicago v. Weare, 105 Ill. App. 289. While a peddler's license cannot issue to a corporation as such, it can take out a license in the name of a designated agent and such agent may lawfully peddle its goods. Crall v. Com. [Va.] 49 S. E. 638.

34. Bank of Montreal v. Waite, 105 Ill. App. 373.

35. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685, citing Thompson v. Lambert, 44 Iowa, 239. The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed. Cyclopedia of Law, vol. 10, p. 1097; 1 Cook on Corporations, § 3. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58; Burnes v. Burnes [C. C. A.] 137 F. 781. Where it is not otherwise provided, the implication in a grant of corporate power and life is that the corporation shall exercise its powers and carry on its business through its own officers and employes, and not indirectly through another corporation operated under its control. Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721.

36. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882; Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721. Where a corporation was authorized to do a certain business under an act, and its corporate powers were enlarged by a subsequent act, without any reference to the former act. Held not to show an abandonment of the privileges first conferred. Brown v. Maryland Tel. & T. Co. [Md.] 61 A. 338.

37. Myatt v. Ponca City Land & Imp. Co., 14 Okl. 189, 78 P. 185; South Western State Normal School, 26 Pa. Super. Ct. 99. The chartered privileges of a corporation as defined in its certificate of incorporation, which is invariably framed in the language of the incorporators, should be the index to its relations to the state. Relator, a New Jersey corporation, held to come within the provisions of the New York license and franchise tax law. Laws 1896, p. 856, c. 908, §§ 181, 182. People v. Miller, 181 N. Y. 328, 73 N. E. 1102.

38. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing State v. Lincoln Trust Co., 144 Mo. 562; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

39. Murphy v. Wheatley [Md.] 59 A. 704.

40. See 3 C. L. 886.

not expressly conferred or necessarily implied for the purpose of carrying out the powers expressly granted;[41] nor on the other hand can it avoid the public burdens imposed on it without legislative permission.[42]

(§ 7) *B. Power to take and hold property.*[43]—Though the capacity of a corporation to take and hold property is measured solely by the statute,[44] only the state, or a claimant of property claimed by the corporation, can raise the question of power.[45] If authorized generally, they may acquire title in any recognized mode,[46] and public and quasi public corporations can be vested with the power of eminent domain.[47] A stockholder has no property in any of the assets of a corpor-

41. A corporation organized to supply a municipality and its inhabitants with water. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. The special act incorporating the Chicago city railways, and the amendments thereto, constituted a grant directly to the companies named, over the streets designated or to be designated, and was not a mere grant to the city to grant, in turn, a franchise to the railways. Laws 1859, pp. 530-532; Laws 1861, p. 340; Laws 1865, p. 597. As to ordinances passed by the city prior to its coming under the general municipal act of 1872 (Act April 10, 1872; Laws 1871-72, p. 229, art. 5, § 1, subd. 24), giving cities a general control over the operations of street railway corporations, there exists, between the companies and the city, a contract relation; but as to those streets occupied under ordinances since then, the contract relation is to be looked for solely in the ordinances themselves. Govin v. Chicago, 132 F. 848.

42. Where a public duty is imposed upon a corporation by its charter, it cannot relieve itself of that duty by a lease of its property and franchises, under a general authority to lease. Defendant was not released from its obligation to maintain bridges over its canal, by a lease of the same with all its boats, etc., and franchises to a railroad company. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 59 A. 29. Legislative assent to such action must be unequivocally given, or necessarily implied, in the terms of the grant of powers. No such power is conferred upon companies, organized to supply municipalities and their inhabitants with water, by the laws of Indiana. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. A corporation, whose business is to gather and sell news reports to newspapers, such business being public in its nature and impressed with a public interest, is so far of a public character as to be required to render its service to its members without discrimination. News Pub. Co. v. Associated Press, 114 Ill. App. 241.

43. See 3 C. L. 886.

44. Lake Drummond Canal & Water Co. v. Com., 103 Va. 337, 49 S. E. 506. Railroad companies incorporated under the general law may acquire and operate steamboats in connection with their lines of road. So held under the general law of Georgia. Graham v. Macon, D. & S. R. Co. [Ga.] 49 S. E. 75.

A banking corporation may have a good will, which constitutes a species of property. Lindemann v. Rusk [Wis.] 104 N. W. 119. A trading corporation may acquire the good will of a business, as well as a private person (Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879), and it becomes the property of the corporation alone (Id.). The vendor of its stock cannot transfer any part of it. Id.

45. Myatt v. Ponca City L. & Imp. Co., 14 Okl. 189, 78 P. 185. The question of the necessity of real property, for the purposes of the corporation, cannot be raised as a defense to an action by it to recover possession; that is a question which concerns the state alone. Id.

46. Corporations can acquire title to land by prescription. So held under Civ. Code, § 354, subd. 4, construed with § 1007, although Civ. Code, §§ 286, 360, provides that a corporation may obtain title by purchase and condemnation. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113. The fact that a deed to a corporation was dated four days before the filing of its articles did not invalidate the conveyance, where the delivery and acceptance occurred after the incorporation. San Diego Gas Co. v. Frame, 137 Col. 441, 70 P. 295. The fact that a bequest to an institution took effect during the time between the expiration of its charter and its renewal, does not invalidate the bequest, where the name of the legatee clearly indicated the work in which it was engaged and the purpose in making the bequest. Bequests to "Furman University" and other organizations sustained, as there was no proof of the nonexistence of such institutions and the court could not assume such a state of facts against the assertion of the testator. Snider v. Snider [S. C.] 50 S. E. 504.

47. The legislature, in extending to certain corporations the right of eminent domain, can burden the privilege with a provision for taxing the corporation with attorneys' fees and expenses of the landowner, where the appropriation proceeding is abandoned after verdict. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206. When asking the aid of the courts in condemnation proceedings they are estopped to deny the constitutionality of the acts granting such privileges. Chap. 8, Probate Code, Lan. R. L. 9990-10,030 (Rev. St. 6414-6453). Id. In Tennessee, only such a railroad corporation, as is chartered under the General Incorporation Act, is authorized to condemn property under the exercise of the power of eminent domain. Act 1875, p. 238, c. 142, § 6 (Shannon's Code, §§ 2414-2425). Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155. Under the laws of Pennsylvania, a telephone company has not the right of eminent domain. Act of April 29, 1874, sec. 33, P. L. 73. It seems

ation, in the sense that he may control it, otherwise than as the charter directs.[48] The books and papers of a private corporation are not public, but private, records and documents.[49]

(§ 7) *C. Power to transfer or incumber property and franchises.*[50]—Corporations may, in the ordinary course of business, transfer their property with the same freedom accorded to individuals. A transfer of all the assets and franchises of a corporation, however, is unauthorized, except under express statutory authority, as to effect a consolidation,[51] unless it be for the purpose of closing up a losing venture,[52] and even in that case, such a transfer will not be effective to wipe out the corporation's liabilities.[53] They may lease [54] and encumber [55] their prop-

that a telephone company is a telegraph company within the meaning of that statute. Pennsylvania Tel. Co. v. Hoover, 24 Pa. Super. Ct. 96. Act of July 10, 1901, P. L. 632, held not to confer upon a state normal school power to condemn a public street on its own land, over which the public had had passage for more than twenty-one years. South Western State Normal School, 26 Pa. Super. Ct. 99, citing Pennsylvania R. Co.'s Appeal, 93 Pa. 150; Groff's Appeal, 128 Pa. 621. In Kentucky railroad corporations organized in other states are required to organize as corporations of that state before they can acquire the right to control and operate railways therein. Const. Ky. § 211; Ky. St. 1903, §§ 763, 765, 841. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

48. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846. Where a corporation, whose sole asset consisted of a lease of convicts, by agreement among its corporators and with the consent of the state authorities, apportioned the convicts among themselves individually, an individual corporator was estopped to deny that the corporation became a lessee of convicts, subject to all the provisions of law relative thereto. Acts 1876, p. 40. Dade Coal Co. v. Penitentiary Co. No. 2, 119 Ga. 824, 47 S. E. 338.

49. So held to be the case in West Virginia. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

50. See J C. L. 886.

51. Where the stockholders of two corporations, by resolutions, authorized the conveyance by one of all its property to the other, a claim that the contract was afterward modified could be substantiated only by showing that the modification was the act of all the stockholders. Pinchback v. Bessemer Min. & Mfg. Co., 137 N. C. 171, 49 S. E. 106.

52. Even in the absence of express statutory power, a private corporation doing a losing and unprofitable business may sell its entire assets, upon a vote of a majority of the stockholders. Hinds County v. Natchez, J. & C. R. Co. [Miss.] 38 So. 189.

53. A corporation cannot, any more than a natural person, by transfer of its assets and liabilities, discharge its liabilities or disturb suits already pending to enforce them. Wells v. Missouri-Edison Elec. Co., 108 Mo. App. 607, 84 S. W. 204. Where a corporation made an executory conveyance of real estate, taking lien notes for the price, the superior legal title remained in the corporation, and the land passed by a deed of its receiver of all the corporation's assets. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413. In the absence of any showing that the county did not pay full value or that the company did not have in its treasury the consideration received, available for its creditors, held that the transfer of a toll road to the county, under provisions of law therefor, passed the title to the same relieved from the claim of creditors of the company. Under the "free turnpike act" (Ky. St. 1903, §§ 4748b et seq.). Roush v. Vanceburg, etc., Turnpike Co. [Ky.] 85 S. W. 735.

54. A lease of the real estate used by a corporation to carry on its business does not constitite an abandonment of its purposes. A corporation organized to mine for oil and owning no property except lands, leased all its lands for twenty years, the lessee agreeing to bore for oil and pay the company a royalty. Held no abandonment. Starke v. Guffey Petroleum Co. [Tex.] 86 S. W. 1. A railroad company may lease its property for nine hundred and ninety-nine years. Under Railroad Law, § 78 (Laws 1890, p. 1106, c. 365) providing that any railroad company may contract with any other for the use of their respective roads. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714. Under statutes authorizing a railroad company to make contracts for building, completing and operating its road, it cannot divest itself of its franchises and exempt itself from any liability attaching to it, by a lease to a foreign railroad company. Acts 1865-66, p. 664, c. 755, confers no such authority. Brooker v. Maysville, etc., R. Co., 26 Ky. L. R. 1022, 83 S. W. 117.

55. A mortgage given by a corporation to secure its bonds, describing both real and personal property, is a lien on the personalty, although recorded only as a real estate mortgage. Under Laws 1897, p. 536, c. 418, § 91, such mortgages need not be refiled as chattel mortgages. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 94 N. Y. S. 495. A mortgage authorized by the board of directors of a manufacturing corporation, without being authorized by a majority of the stockholders, held invalid. Under Mills' Ann. St. Rev. Supp. § 481. Carlsbad Water Co. v. New [Colo.] 81 P. 34. A mortgage given merely to secure antecedent debts is not given for "a valuable consideration" within the meaning of the New Jersey corporation act. P. L. 1896, p. 298. Empire State Trust Co. v. Trustees of Fisher & Co. [N. J. Err. & App.] 60 A. 940. Whenever a corporation has

erty in pursuance of the purposes for which they are organized, and are generally authorized to pledge their credit, in pursuit of their other corporate business,[56] but not otherwise.[57]

(§ 7) *D. Power to contract and incur debts.*[58]—Business corporations are impliedly authorized to borrow money,[59] contract for the sale of their bonds,[60] guaranty dividends upon their stock,[61] and make all contracts necessary and proper to expedite the business for which they are formed.[62] In the absence of express statutory authority, however, a corporation cannot enter into a partnership.[63]

Mode of execution of contracts.[64]—A corporation in contracting can act only through its officers and agents,[65] pursuant to authority lawfully granted to them by the corporation,[66] though the presence of the corporate seal on a contract is prima facie evidence of its validity.[67]

power to mortgage its property generally, it can, in the absence of any restraining statute, mortgage after-acquired property. Cummings v. Consolidated Mineral Water Co. [R. I.] 61 A. 353; Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

56. A trust company has power to execute a note for the benefit of a railroad company which it was financing. So held under Rev. St. (Mo.) 1899, § 1427 authorizing such companies to act as agent or attorney in fact in the management of property, execute trusts, guaranty fidelity, loan money, buy and sell securities, etc. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109.

57. Accommodation notes given by a business corporation are invalid against creditors or dissenting stockholders. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. In the absence of express or necessarily implied power given in the charter, one corporation cannot indorse paper for the accommodation of another. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

58. See 3 C. L. 887.

59. The power to borrow money in furtherance of its corporate purpose is a necessary incident to the power conferred by the charter of a corporation. Peoria Star Co. v. Cutright, 115 Ill. App. 492; Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290. The borrowing of money by a corporation to repair its property, even from one of its directors, is a valid transaction, when the corporation is not imposed upon. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285. Loan made by officers of a corporation upon a pledge of its stock and bonds, each officer also obliging himself individually, if the loan was not paid, to purchase on demand his proportion of the collateral and to pay the lender the amount set opposite his name. Buffalo Loan, Trust & Safe Deposit Co. v. Carstensen, 94 N. Y. S. 907. Stockholders may become sureties for the corporation by making and indorsing a note for its accommodation. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056.

60. Construction of contract made with a syndicate formed to sell bonds for a construction company. Philadelphia Const. Co. v. Cramp [C. C. A.] 138 F. 999.

61. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

62. A corporation may be formed, by licensed physicians, and may make contracts for the services of its members and other legally authorized physicians. State Electro-Medical Institute v. Platner [Neb.] 103 N. W. 1079. In actions against a corporation upon a contract, it is presumed that the contract was within the powers of the corporation and that the officers executing it on behalf of the corporation acted within the law, unless the petition shows the contrary. Willow Springs Irr. Dist. v. Wilson [Neb.] 104 N. W. 165. A voidable contract cannot be rescinded by a minority of the stockholders of a corporation. Continental Ins. Co. v. New York & H. R. Co., 103 App. Div. 282, 93 N. Y. S. 27.

63. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462.

64. See 3 C. L. 887.

65. Crall v. Com. [Va.] 49 S. E. 638; Holder v. Cannon Mfg. Co., 138 N. C. 308, 50 S. E. 681; Russell v. Washington Sav. Bank, 23 App. D. C. 398; New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624.

66. To recover on a note purporting to have been executed by a corporation, by its president and treasurer, it must be shown that the officers were authorized to sign the corporate name, or that the corporation received the proceeds of the note, or that there was a course of business which justified the accepting of the note as the obligation of the corporation. National Bank v. Snyder Mfg. Co., 94 N. Y. S. 982. Where it appears on the face of a deed that the corporation caused it to be executed, such fact, after lapse of time, is sufficient to raise a presumption of the grantor's authority to execute. More than thirty years. Altschul v. Casey, 45 Or. 182, 76 P. 1083. The note of a corporation executed in the name of its president held to be the note of the corporation. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290. A note signed by a director in the corporate name only, when the corporation consisted of but three stockholders who were also its directors, two of whom were present and taking part in the transaction, is valid. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285. Where judgment and execution sale of a corporation's property has been had, proof of irregularity or absence of authority, in the execution of the note on which judgment was had, the note having been given in payment of actual indebt-

(§ 7) *E. Power to take and hold stock.*[68]—In the absence of constitutional, charter, or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock,[69] but one corporation cannot become a stockholder in another corporation unless authority therefor is clearly granted by statute.[70]

edness, is not proof of such fraud as will warrant the cancellation of the sheriff's deed. Relender v. Riggs [Colo. App.] 79 P. 328. See, also, post, § 15.

67. That the act of the corporation was executed by corporate authority. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 144. Is presumptive of the fact that it was affixed by the proper authority. Graham v. Partee, 139 Ala. 310, 35 So. 1016. Burden on objecting party to show contrary. Quackenboss v. Globe & R. Fire Ins. Co., 177 N. Y. 71, 69 N. E. 223. Where the execution of a contract by the president and secretary, in the name of the corporation and under its corporate seal is not denied, it must be taken as a conceded fact. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. The seal of a corporation affixed is evidence that a note is the obligation of such corporation. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667. A contract bearing the signatures of the president and secretary, as well as the corporate seal, is presumptively an obligation of the corporation. Quackenboss v. Globe & R. Fire Ins. Co., 94 N. Y. S. 723. Assignment of indebtedness secured by a deed of trust. Collier v. Alexander [Ala.] 38 So. 244. The name of the corporation need not be signed to a power of attorney bearing the corporate seal, purporting on its face to be the act of the corporation and signed by its chairman, secretary, and one other of its directors, it having no president. Graham v. Partee, 139 Ala. 310, 35 So. 1016. The seal of a corporation attached to a note prevents the word "president" following the signature from being regarded as mere personal description. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667. Where instruments introduced as evidence of the personal obligation of defendant appear on their face to be the obligations of a corporation it is not necessary for defendant to prove the corporate seal to relieve himself. Id. Where a corporation authorized impressions of its seal to be delivered to the disbursing officer of a city, to be used on papers executed in connection with its business, and its president knew that, in the execution of a release, the seal was required, but, instead of attaching it himself, left it to be attached by the disbursing officer, the corporation is bound by such release. Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

68. See 3 C. L. 888.

69. Burnes v. Burnes [C. C. A.] 137 F. 781. Unless the transaction renders it insolvent and operates as a fraud on its creditors. In re Smith Lumber Co., 132 F. 618. Notes given by it in part payment for such purchase are invalid. Id. An agreement by a corporation to repurchase stock in case of sale of its franchise is neither ultra vires, illegal, nor immoral. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. The transfer of its own stocks to a corporation, under an agreement on its part to pay annuity to the former owners, sustained. Burnes v. Burnes, 132 F. 485. The prohibition of ownership of stock in Rev. Laws, c. 112, § 26, refers to stock in other corporations. Leonard v. Draper [Mass.] 73 N. E. 644. Where the entire capital stock of a corporation was subscribed for by its promoters and issued to them as full-paid, though for a nominal consideration, and the secretary and treasurer donated a large number of shares to the company, the latter became the lawful owner of such stock and could sell or reissue it. Krisch v. Interstate Fisheries Co. [Wash.] 81 P. 855. Held in Louisiana that a corporation cannot purchase shares of its own stock. Bartlett v. Fourton [La.] 38 So. 882. Where a corporation has power to purchase its own stock and pay therefor with its bonds, the corporation cannot deny the validity of such bonds in the hands of innocent purchasers for value. Hoskins v. Seaside Ice Mfg. & Cold Storage Co. [N. J. Eq.] 59 A. 645. Stock repurchased by a corporation and resold by it cannot be considered unissued stock. Hartley v. Pioneer Iron Works, 181 N. Y. 73, 73 N. E. 576. The purchase by a corporation of shares of its own stock is not a reduction of its capital stock, within the meaning of the Massachusetts statute, where such shares are kept ready for sale to other parties. Rev. Laws, c. 112, § 26. Leonard v. Draper [Mass.] 73 N. E. 644.

70. Warren v. Pim, 66 N. J. Eq. 353, 59 A. 773. An agreement made in the purchase of stocks of one corporation by another construed to be not an ultra vires guaranty of dividends whether profits were earned or not, but a valid agreement to pay stated sums at stated periods as deferred payments on account of the purchase price of the stocks. Windmuller v. Standard Distilling & Distributing Co., 94 N. Y. S. 52. Although the right of one corporation to own and vote stock in another, in case of domestic corporations, and those of other states, has been granted, yet that right cannot be extended by comity to a corporation organized in a foreign country, as a "voting trust" to own and vote stock in a domestic corporation. Warren v. Pim, 66 N. J. Eq. 353, 59 A. 773. Even though a corporation is not authorized to purchase and hold stock in a bank, yet, having done so and having received dividends for a number of years, with knowledge of all its stockholders, it will be estopped from denying its liability as a stockholder. Under Laws 1899, p. 315, c. 272. Defendant held further estopped by participating in a scheme to reorganize the bank. Hunt v. Hauser Malting Co. [Minn.] 103 N. W. 1032.

§ 8. *Effect of ultra vires and illegal transactions.*[71]—An ultra vires contract, in the proper sense, is not voidable only, but wholly void [72] and incapable of ratification [73] or becoming effective by estoppel [74] by the acts of either party, though where such a contract has been fully performed on both sides, what has been done will not be undone at the suit of either.[75]

To determine whether the acts of a corporation are ultra vires or not, recourse must be had primarily to its charter,[76] and they must be shown to be neither within the scope of its charter, nor within its express or implied powers,[77]

71. See 3 C. L. 889.

72. Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101. Notes given in a transaction foreign to the purpose for which a corporation was created are ultra vires and void. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co. [C. C. A.] 126 F. 712.

When acts of corporations are spoken of as ultra vires, it is not intended that they are necessarily unlawful. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109. There is a well-defined distinction between acts mala in se, or mala prohibita, and those which are merely ultra vires; in the former the peace and good order of the state is involved and every contract is perforce such an act, or in consideration or furtherance of such performance, is absolutely void, while that which is merely ultra vires does not necessarily involve moral turpitude or illegality. A street railway company might, through its directors, make a subscription to build a church, or an orphans' home, or an asylum, and the contract would be ultra vires, but there is no illegality in such enterprises. Peoria Star Co. v. Cutright, 115 Ill. App. 492. Where a statute specifically prohibits the doing of an act by a corporation, neither the corporation nor the person dealing with it will be allowed to rely on such transaction, or assert any benefits that grow out of it. Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958. By the Missouri constitution, a corporation is both impliedly and expressly prohibited from exercising any power other than those granted in its charter or the law under which it is formed. Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721. Bonds held to be ultra vires under the New York statute, prohibiting the issue of bonds by a corporation, except for money, labor, or property actually received for its use and lawful purposes. Stock Corporation Law 1892, p. 1835, c. 688, § 42. In re Waterloo Organ Co. [C. C. A.] 134 F. 341. The business of defending physicians against civil suits for malpractice is a professional business, and within the inhibition of section 3225, forbidding the carrying on of a professional business by a corporation. State v. Laylin, 3 Ohio N. P. (N. S.) 185; 15 Ohio Dec. N. P. 360.

73. Because it could not have been authorized by either. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101.

74. Neither the corporation nor the other party can be estopped, by assenting to it, or acting upon it, to show that it was prohibited by law. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101. A creditor of a corporation is not estopped from asserting the ultra vires character of a contract, because he is capable of contracting. Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721. A contract between two corporations, which is ultra vires as to one, is as invalid as though beyond the powers of both. Id.

75. Anglo-American L., M. & A. Co. v. Lombard [C. C. A.] 132 F. 721, citing McIndoe v. St. Louis, 10 Mo. 575; Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243, 255; Ragan v. McElroy, 98 Mo. 349; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656. Where a contract with a city has been substantially performed, equity will not enjoin its further performance at the suit of a stockholder of the contracting (private) corporation on the ground that the contract is ultra vires. Fisher v. Georgia Vitrified Brick & Clay Co., 121 Ga. 621, 49 S. E. 679.

76. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58; Bank of Montreal v. Waite, 105 Ill. App. 373. Where a corporation is organized under a statute authorizing the formation of corporations for general mining purposes, donations by it for political purposes are ultra vires. McConnell v. Combination Min. & Mill Co., 35 Mont. 55, 76 P. 194; Id. [Mont.] 79 P. 248. So is the payment of money as the company's portion of the expense of lobbying a bill through the legislature. McConnell v. Combination Min. & Mill Co. [Mont.] 79 P. 248. Held that a corporation organized "to drill and mine for natural gas," etc., had no power to use its assets, after the supply of natural gas was exhausted, to manufacture artificial gas and furnish it to consumers. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. A contract of guaranty of the performance of a building contract, entered into by a company incorporated to buy and sell lumber and building materials is ultra vires and void. In re Smith Lumber Co., 132 F. 620.

77. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58; Bradbury v. Waukegan & W. Mln. & Smelting Co., 113 Ill. App. 600. The test seems to be, if the act is one which could be legally performed, when concurred in by the majority of the stockholders, then it is not ultra vires.

the conclusion being a legal one, to be drawn from the facts.[78] Several contracts assailed as ultra vires are discussed below.[79]

A corporation, having no authority under its charter to exercise certain pow-

Matters pertaining to the manner in which stock is issued, the price paid or to be paid therefor, the manner in which such stock is voted and the use which is made of the money arising from the sale of stock cannot be said to be acts ultra vires. Bradbury v. Waukegan & W. Min. & Smelting Co., 113 Ill. App. 600.

78. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

79. A corporation is incapable of being a director. O'Connor v. International Silver Co. [N. J. Eq.] 59 A. 321. Letters of administration on an estate cannot be granted to a corporation as a creditor of decedent. In re Rhoda, 93 N. Y. S. 973. The board of trade has not the power to pass upon the property rights of its members without their consent. Bank of Montreal v. Waite, 105 Ill. App. 373. A mutual building and loan association cannot contract that stock will mature in a definite time. People's Bldg. & Loan Ass'n v. Purdy [Colo. App.] 78 P. 465. In the absence of express authority, a corporation cannot acquire all the stock of another corporation for the purpose of controlling its affairs or exercising its powers through the use of its name, and such purchase is ultra vires and void. Rev. St. Mo. 1889, § 2839, subd. 9, does not confer such power to trust companies. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721. Nor can either a corporation or its stockholders, incidental to the sale of its property or otherwise, clothe another corporation with the right to maintain the corporate life or exercise the corporate powers. Id. The removal of the entire official business of a domestic corporation beyond the state and attempts of the directors to hold regular monthly meetings as directors in another state, are ultra vires. Comp. St. 1887, div. 5, § 449, provides that when a corporation is formed to carry on part of its business outside of the state, the certificate of incorporation shall so state. Action of directors held insufficient to ratify the ultra vires acts. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194. An application, by the New York Sabbath Committee, for a revocation of a theater license, was denied as it was not shown that the right to make such an application was within its corporate powers. In re New York Sabbath Committee, 44 Misc. 422, 89 N. Y. S. 992. A manufacturing corporation, which has otherwise no power to make accommodation indorsements, is not given such power by the Negotiable Instruments law. Laws 1897, p. 727, c. 612, § 41. Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. S. 355. A subscription by a railroad company to the stock of a land company is ultra vires, notwithstanding it was made in the name of trustees. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070. Where the note of a corporation was in fact accommodation paper and the holder knew that fact, proof of its execution by the president and treasurer is not sufficient to bind the corporation. National Bank v. Snyder Mfg. Co., 94 N. Y. S. 982. If a covenant by a tunnel company not to exercise the right of eminent domain over lands belonging to a railroad company, is valid, still it cannot be enforced in equity against the successor of the tunnel company. It is not a covenant running with the land and did not pass to defendant on foreclosure sale. Morris & E. R. Co. v. Hoboken & M. R. Co. [N. J. Eq.] 59 A. 332. The consent of a city to the transfer of its property and franchises, by a water company, will not authorize such a transaction, when the company is not authorized to do so by the laws of the state. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. Where the right to raise the water of a pond, by a dam at the outlet, was given, it was not ultra vires to erect the dam across the river outlet, below the pond, it being within the township in which the dam was authorized to be constructed and not appearing to be an unreasonable distance below the actual outlet and the fact that land overflowed was in another state did not make the construction of the dam ultra vires, where no law of such other state was violated. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. An agreement to pay in annual instalments, during the lives of the vendors, for property which a corporation has authority to buy, is not the granting of an annuity, such as is forbidden by the constitution and statutes of Missouri. Const. Mo. art. 12, § 7; Rev. St. Mo. 1899, §§ 1319, 7852, 7990. Those provisions merely prohibit corporations organized for pecuniary profit, and not for the purpose of granting and dealing in annuities, from doing so. Burnes v. Burnes [C. C. A.] 137 F. 781. A brewing corporation, organized to manufacture and sell intoxicating liquors, to erect, sell, lease, rent, exchange and otherwise handle suitable buildings and real estate for the prosecution of its business, may become surety on a liquor bond of a licensed dealer, where it appears that such undertaking is given with a view of renting its real estate and building, and to procure the sale of its products through such dealer. Horst v. Lewis [Neb.] 103 N. W. 460. And where it is necessary for a corporation to take and dispose of stock in other corporations, or property which it is not authorized to deal in, in order to secure itself against loss. Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958. Under statutes giving corporations, not authorized to hold land, a certain time to sell it, and providing, in case of forfeiture by the state, that the land shall be sold and the proceeds distributed to the stockholders, the acquirement of land by such a corporation is not unlawful. Rev. St. 1895, arts. 749c, 749e. The mere want of authority to hold real estate did not destroy the good faith of the transaction and prevent the corporation from defending itself as an innocent purchaser. Schneider v. Sellers [Tex.] 84 S. W. 417.

ers and franchises, cannot acquire such powers and franchises by the purchase of all the property of another corporation possessing them.[80]

Each state may determine what powers shall be possessed by corporations organized under its authority, and what effect shall attach to acts done by corporations beyond their powers.[81] And only the state,[82] or stockholders or creditors whose rights would otherwise be injuriously affected,[83] can take advantage of the want of power of a corporation to perform an act not clearly within the terms of its charter or the law. When the courts are appealed to to restrain the performance of an ultra vires act, the rule is applied with great stringency to the corporation.[84] Questions as to the powers of a national bank to buy or hold real estate can be raised by the Federal government only.[85]

Estoppel to assert ultra vires.[86]—A corporation cannot deny its power to make a contract fully executed by the other party,[87] and of which it has received the benefit,[88] unless it is illegal, immoral, fraudulent, or contrary to public policy.[89]

80. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

81. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

82. Whether a corporation has violated its charter or exceeded its powers in taking a conveyance of land will not be inquired into collaterally in an action between private parties contesting the title to the land. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7.

83. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167.

84. Peoria Star Co. v. Cutright, 115 Ill. App. 492.

85. Minneapolis Thresh. Mach. Co. v. Jones [Minn.] 103 N. W. 1017.

86. See 3 C. L. 889.

87. Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958. A contract of insurance, which the corporation had no power to make, but which was performed by the other party, could not be defended against as ultra vires. Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127. Where defendant corporation executed a note to enable the co-maker, a corporation it was financing, to obtain a loan and the contract was fully performed by the payee. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109. Where a corporation applied a portion of the money, borrowed for a purpose authorized by its charter, to a purpose not so authorized, the purchaser of its bonds could not control the use of the proceeds and the mortgage security was valid as to him and could not be defeated by the defense of ultra vires. Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co. [N. J. Eq.] 61 A. 529. Where a private corporation becomes a borrowing stockholder in a building and loan association and the contract has been executed by the association, such corporation cannot defeat the enforcement of the contract against it, on the ground that the contract was ultra vires, because of its want of power to become a stockholder. United States Sav. & Loan Co. v. Convent of St. Rose [C. C. A.] 133 F. 354. That the original note was given for an ultra vires purpose cannot be set up by the transferring corporation, as a defense to an action on its guaranty, given at the time of its transfer. Hunt v. Northwestern Mortg. Trust Co., 16 S. D. 241, 92 N. W. 23.

88. Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958, citing numerous authorities. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. In every case of an ultra vires engagement, entered into bona fide, a corporation must account for any benefit derived therefrom. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co. [C. C. A.] 126 F. 712. Where a corporation accepts the benefit of a contract executed on its behalf by its president, it is liable thereon, regardless of the question of the president's original authority to execute it. Hunt v. Northwestern Mortg. Trust Co., 16 S. D. 241, 92 N. W. 23, citing Dedrick v. Mortgage Co., 12 S. D. 59. Where a private corporation gives its notes for a legal and valid consideration and appropriates the proceeds, it is estopped from asserting its want of power to execute the same. Peoria Star Co. v. Cutright, 115 Ill. App. 492, citing Bissell v. M. S. R. Co., 22 N. Y. 258; Bradley v. Ballard, 55 Ill. 413; National Home Bldg. Ass'n v. Bank, 181 Ill. 35. Even if a corporation does in fact borrow money without any express or implied power to do so, it must repay the money borrowed. Peoria Star Co. v. Cutright, 115 Ill. App. 492, citing Humphrey v. Patrons' Mer. Ass'n, 50 Iowa, 607; Larwell v. Hanover Ass'n, 40 Ohio St. 274; Bradley v. Ballard, 55 Ill. 413; Dorst v. Gale, 83 Ill. 136. The use of the money borrowed for an ultra vires purpose, though known to the lender, is no defense. Peoria Star Co. v. Cutright, 115 Ill. App. 492, citing Wright v. Hughes, 119 Ind. 324. Where defendant corporation received the proceeds of a fraudulent sale of its own stock it could not defend a suit for damages resulting therefrom on the ground of ultra vires. Krisch v. Interstate Fisheries Co. [Wash.] 81 P. 855. A solvent corporation that has accepted a transfer of its own stocks, under an agreement to pay the former owners an annuity, and has held the same and received the dividends thereon, for a number of years, cannot avoid the contract as ultra vires. Burnes v. Burnes, 132 F. 485. The plea of ultra vires will not avail a corporation with respect to an act for

But where any part of the contract remains executory, its invalidity may be effectively asserted, notwithstanding its partial performance;[90] and courts will not only refuse to compel execution of such contracts, but will interfere upon proper application to restrain performance of them.[91]

Stockholders who authorize ultra vires acts cannot afterward avoid the same in equity,[92] and third parties may also be estopped to set up the defense of ultra vires, by their dealings with the corporation and recognition of its right to act.[93] To enable stockholders to set aside ultra vires acts which the corporation itself may not take advantage of, they must show that the conduct of the officers or directors works a substantial injury.[94] Stockholders cannot defeat the sale of the corporations's franchise by asserting the want of legislative or charter authority of the purchasing corporation to buy the same.[95]

The plea of ultra vires[96] is not looked upon with favor.[97] Where the petition

which it has received consideration, in any case where the status quo ante cannot be restored. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167, citing C. & A. R. Co. v. May's Landing, etc., R. Co., 48 N. J. Law, 530; Breslin v. Fries-Breslin Co., 70 N. J. Law, 274, 58 A. 313. In some cases a corporation which has received the benefit of an ultra vires contract may be sued on a quantum meruit, without reference to the attempted contract. Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101.

89. Peoria Star Co. v. Cutright, 115 Ill. App. 492; Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742; Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958; Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co. [N. J. Eq.] 61 A. 529.

90. Anglo-American Land. Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing Hoagland v. H. & S. J. R. R. Co., 39 Mo. 451, 459; St. Joseph v. Saville, 39 Mo. 460, 466; Pacific R. Co. v. Seely, 45 Mo. 212, 220, 221, 100 Am. Dec. 369; State v. Murphy, 134 Mo. 548, 567, 568, 56 Am. St. Rep. 515, 34 L. R. A. 369; Bertche v. Equitable, etc., Ass'n, 147 Mo. 343, 359-362, 71 Am. St. Rep. 571; Lovelace v. Pratt, 163 Mo. 70, 76; Newland Hotel Co. v. Furniture Co., 73 Mo. App. 135, 137; Kansas City v. O'Connor, 82 Mo. App. 655, 660-663; Caston v. Stafford, 92 Mo. App. 182, 188.

91. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co. [C. C. A.] 126 F. 712. When the public is concerned to restrain a corporation within the limit of its powers, an assent by the stockholders will be of no avail. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109.

92. Where no rights of the state or creditors intervene. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. Nor can the assignees of such stockholders avoid them, when consummated previous to the assignment or when their consummation is necessary to the protection of the interests of other persons. But such assignees may avoid ultra vires accommodation—indorsements for liabilities of the payor corporation arising since the assignment and after repudiation of such indorsements by the assignees. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

93. A person who has conveyed real estate to a corporation is estopped to deny its right to take and hold real estate. Myatt v. Ponca City Land & Imp. Co., 14 Okl. 189, 78 P. 185. The maker of a note cannot defend an action brought thereon by a corporation, or its privy, on the ground that the corporation had no power to take the note. Russell v. Cassidy, 108 Mo. App. 577, 84 S. W. 171. Defendant estopped, by failure to object to a list of subscribers to stock, to raise the question afterward that one of the subscriptions was made by a corporation and it did not appear that such corporation had power to purchase and hold corporate stock. Pacific Mill Co. v. Inman Poulsen & Co. [Or.] 80 P. 424. A judgment creditor of the president of a corporation cannot, by purchase on execution sale, defeat the corporation's title to property held by the president in trust, on the ground that the corporation was not authorized by its charter to hold such property. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7. One who subscribes to the building of a railroad in consideration of its line running to a certain point without the state, is estopped to deny his obligation after the road has been built, on the ground that the contract was ultra vires, such a contract being within the general scope of the powers conferred on the railroad company. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Persons dealing with a corporation are chargeable with notice of the purpose of its creation and its powers. Harris v. Vienna Ice Cream Co., 91 N. Y. S. 317. And persons purchasing bonds of a waterworks company are bound at their peril to ascertain the terms of the ordinance which is the contract between the company and the city. Illinois Trust & Sav. Bank v. Pontiac, 112 Ill. App. 545.

94. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

95. Hinds County v. Natchez, etc., R. Co. [Miss.] 38 So. 189.

96. See 3 C. L. 890.

97. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. And should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but would accomplish a legal wrong.

does not disclose the incapacity of a corporation to make the contract sued on, the defense of ultra vires cannot be made under a general denial, but must be specially pleaded.[98] Where a corporation in its answer sets up the plea of ultra vires, facts not inconsistent with the petition may be pleaded in the reply, in the nature of an estoppel, or to show that, under the circumstances, the corporation might enter into the contract in question.[99]

§ 9. *Torts, penalties and crimes.*[1]—A corporation is liable for the negligence of its officers or agents, who may be jointly sued with it;[2] but only when they are acting under the authority of the corporation,[3] and within the scope of their authority.[4] A corporation may be liable for an assault,[5] for maintaining a nuisance,[6] for neglect of a quasi public duty,[7] and, in some cases for acts connected with, or growing out of, an attempted ultra vires contract.[8] A corporation may be punished criminally for peddling through the medium of an unlicensed agent.[9]

§ 10. *Actions by and against corporations.*[10]—Corporations are ordinarily empowered to sue and be sued as natural persons.[11] Several matters of proced-

First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109.

98. Royal Fraternal Union v. Crosier [Kan.] 78 P. 162.

99. Horst v. Lewis [Neb.] 103 N. W. 460.

1. See 3 C. L. 890.

2. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898. Corporations, whether membership or stock corporations, are liable for the exercise of reasonable care in the selection of competent and skillful agents, employes and contractors. Ellsworth v. Franklin County Agricultural Soc., 99 App. Div. 119, 91 N. Y. S. 1040. An action for damages for personal injuries, by reason of the negligence of defendant, may be maintained against the receiver of a corporation. Where a judgment is rendered in a state court against a receiver appointed by a Federal court, it is proper to certify the judgment to the latter court, to be disposed of as that court may see fit (Reardon v. White [Tex. Civ. App.] 87 S. W. 365), but, in the absence of statutory provisions, stockholders of a dissolved corporation are not individually liable for damages resulting from an act of negligence committed by the corporation before dissolution. Damages to plaintiff's steamboat by running against a stake supporting defendant's gas pipe in the river. Mudson v. Limestone Natural Gas Co., 132 F. 410.

3. Haggerty v. Potter, 111 Ill. App. 433. The treasurer of a charitable society, who, under its by-laws, had charge of its securities, etc., was not authorized to procure the transfer of railway stocks, registered in the corporation's name, and to sell them. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571. A corporation cannot be held liable for death by wrongful act, without proof that the corporation committed, or participated in, the wrongful act, as distinguished from the wrongful act of its servant. Birmingham S. R. Co. v. Gunn [Ala.] 37 So. 329.

4. For trespass on plaintiff's land. Bright v. Bell, 113 La. 810, 37 So. 764. A corporation held not liable in damages for slander uttered by its agent after he had left plaintiff's presence and gone to another locality where he was not engaged in the performance of any duty under the terms of his employment. International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129. The mere fact that two corporations have the same officers does not make one liable for acts done by its officers in the performance of their duties to the other corporation, though they act upon information derived as officers of the first corporation. Holder v. Cannon Mfg. Co, 138 N. C. 308, 50 S. E. 681.

5. Before a corporation can be held for an assault, it must be shown that it owed some duty to the assaulted person and that the person committing it was acting under its authority. Haggerty v. Potter, 111 Ill. App. 433.

6. The fact that a corporation is quasi-public, and has erected a structure by virtue of the right of eminent domain, does not prevent an adjacent landowner's maintaining a second or third action against it for what, in case of a private person, would be a continuing nuisance. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

7. The Associated Press held to have committed a tort by refusing to furnish a news service to plaintiff except upon terms greatly in excess of those ordinarily imposed by the association. News Pub. Co. v. Associated Press, 114 Ill. App. 241. A court of equity, in Pennsylvania, cannot assess damages under the act of June 2, 1887 (P. L. 1887, p. 310), against a water company for failure to supply water to a private party during a breakdown. That act is for the protection of public interests and to insure performance of a public duty; it was not intended to abrogate the jurisdiction of the law courts to settle questions of damages between water companies and private individuals. Steck v. Bridgeport Water Co., 24 Pa. Super. Ct. 188; Brace v. Pennsylvania Water Co., 24 Pa. Super. Ct. 249.

8. Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101.

9. Crall v. Com. [Va.] 49 S. E. 638.

10. See 3 C. L. 891.

11. A corporation, that exists and is recognized by the courts and authorities of the state where it was organized, is en-

ure, including questions of name,[12] process,[13] pleading,[14] defenses,[15] evidence,[16] and judgments and the enforcement thereof[17] are discussed in the notes.

titled to the same recognition in other states, unless it was formed for purposes illegal, or was doing acts prohibited under the laws of such other states. MacGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. S. 591. A requested instruction that the defendant corporation was entitled to the same treatment in court as a private individual would be under the same circumstances, held correct, in itself, but properly refused because accompanied by improper and misleading language. Chicago & E. I. R. Co. v. Burridge, 211 Ill. 9, 71 N. E. 838. A corporation can sue in its own name, without designating its president or any other officer in its petition. (New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624), and until its charter has been forfeited by proper proceedings, the corporation is the only proper party to defend an action brought against it. Its directors have no right as trustees to intervene. Rippstein v. Haynes Medina Valley R. Co. [Tex. Civ. App.] 85 S. W. 314.

12. A private corporation having its principal office in a certain county cannot be sued in another county for a trespass committed therein, when it has no agent, agency or place of business in the latter county. Civ. Code 1895, § 1900. Tuggle v. Enterprise Lumber Co. [Ga.] 51 S. E. 433. The venue of a cause of action on a certificate of a fraternal benefit association is the county of the member's residence at the time of his death. Hildebrand v. United Artisans [Or.] 79 P. 347.

13. Service of process on the "last vice-president" of an insolvent corporation, the president being a nonresident, under Rev. St. 1899, § 995. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175. Return of service of summons by delivery of copy to the secretary at the company's business office in the county, he being in charge thereof and the president not being found in the county, held to give the circuit court jurisdiction. Under Rev. St. §§ 994-997. Taussig v. St. Louis & K. R. Co., 186 Mo. 269, 85 S. W. 378. Sheriff's return of service of process on a corporation held good, under clause e, § 2, Act of July 9, 1901, P. L. 614. Ben Franklin Coal Co. v. Penna. Water Co., 25 Pa. Super. Ct. 628. The service of summons upon an agent of a corporation whom its general counsel stated was authorized to accept service, cannot be questioned by the corporation. Taylor Provision Co. v. Adams Exp. Co. [N. J. Law] 59 A. 10.

Held insufficient: Service by leaving a copy of the writ with the secretary and treasurer of the corporation in another county, where it had no business office, the president not being found in the county. Rev. St. § 995. Eminence Land & Min. Co. v. Current River Land & Cattle Co., 187 Mo. 420, 86 S. W. 145. Service of process on a resident attorney, who had been retained simply as such by a foreign corporation which had never transacted business in the state, notwithstanding Acts 1887, p. 387, c. 226, § 3 (Shannon's Code, § 4546) provides that process may be served on any agent of a foreign corporation within the county where suit is brought whatever his character may be. Thach v. Continental Traveler's Mut. Acc. Ass'n [Tenn.] 87 S. W. 255. Under a statute providing for the service of summons on the president or other chief officer, service on a person who had been appointed a receiver, but whose appointment had been held invalid. Rev. St. 1899, § 995. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175. Service must be where the identical officer or agent prescribed in the statute. If the sheriff's return does not name the agent or officer whom service was made, it is not conclusive of his relation to the company. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. The secretary of a local assembly of a fraternal benefit association, whose duty it is to report deaths, receipts of money and membership, is a "clerk or agent" for the service of process in a county where none of the officers reside or keep an office. 1 B. & C. Comp. § 55. But the officer's return must show the reason for service on a local agent. Hildebrand v. United Artesans [Or.] 79 P. 347. In the absence of any showing as to his duties and to what extent he acted for the corporation, a member of its advisory committee is not an "agent," within the meaning of the statutory provisions for service of process upon corporations. Fahrig v. Milwaukee & Chicago Breweries, 113 Ill. App. 525. The service of summons against a corporation, on a stockholder who has been a director and trustee, after the corporation has ceased to do business, has no binding force on the other stockholders. Stanton v. Gilpin [Wash.] 80 P. 290. Valid service of process cannot ordinarily be made on an officer of a foreign corporation, who is temporarily within the state, although the foreign corporation may own lands and bring suits, within the state, to protect them from trespasses. Service on the president, while passing through on a train could not be made under N. M. Comp. Laws, 1897, § 450. Territory of New Mexico v. Baker, 196 U. S. 432, 49 Law Ed. 540. The secretary of a nonresident corporation, who was temporarily in the state, not having transacted "business for the corporation," did not come within the provisions of the statute which renders it possible to serve process on such persons. Southern Sawmill Co. v. American Hard Wood Lumber Co. [La.] 38 So. 977. But service of process on a general officer of a foreign corporation, who came into the state voluntarily to adjust differences between plaintiff and the corporation, relating to the subject-matter of the suit, was sufficient to confer jurisdiction of the corporation. Brush Creek Coal & Min. Co. v. Morgan-Gardner Elec. Co., 136 F. 505. It is not necessary that a summons against a corporation state facts showing that defendant is a corporation. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

14. The words "a corporation," appearing after plaintiff's name in the title of a

case, are merely descriptive and do not constitute an allegation of incorporation. Boyce v. Augusta Camp, No. 7,429, M. W. A., 14 Okl. 642, 78 P. 322. A petition which does not show whether plaintiff is a partnership or corporation may be amended, after demurrer, so as to state that it is a corporation. Lucile Min. Co. v. Fairbanks, Morse & Co. [Ky.] 87 S. W. 1121. The use of the name "The Georgia Co-Operative Fire Association," in a petition, together with allegations relative to the transaction of business, imported a corporation. It was not necessary, even, as against a special demurrer, to allege the corporate existence of the plaintiff. Georgia Co-op. Fire Ass'n v. Borchardt & Co. [Ga.] 51 S. E. 429. Under a statute prohibiting any corporation from setting up a want of legal organization as a defense to any action, the petition need not allege facts showing compliance with the statute in organization, but a simple allegation that defendant is a corporation is sufficient. Ky. St. 1903, § 566. A corporation cannot defend against an action by the state to recover its organization tax, on the ground that under Ky. St. 1903, § 4225, its organization was incomplete on account of nonpayment of the tax, and hence it was not liable. Commonwealth v. Licking Valley Bldg. Ass'n No. 3, 26 Ky. L. R. 730, 82 S. W. 435. Where the petition alleged that defendant was a corporation organized under the laws of Illinois, and, upon denial of organization under the laws of Illinois, an amended petition was filed, identical with the original but alleging organization under the laws of Iowa, held, that the contention that two separate corporations were described was not well taken. The place of incorporation was immaterial to the cause of action stated. Sands v. Marquardt [Mo. App.] 87 S. W. 1011. A corporation by appearing in an action admits its corporate existence. Herald Shoe Co. v. Oklahoma Pub. Co. [Okl.] 79 P. 111.

Verification of pleadings: When a corporation is a party to a suit, the verification of a pleading in its behalf may be made by a "managing or local agent thereof," as well as by an officer. Under Code, § 258, amended by Laws 1901, p. 854, c. 610. Godwin v. Carolina Tel. & T. Co., 136 N. C. 258, 48 S. E. 636. An affidavit of defense may be made by an agent of a corporation in its behalf and at its request, stating that he is the only party that has knowledge of the facts set forth in the plaintiff's statement, or the answers filed. Citizens' Natural Gas Co. v. Waynesburg Natural Gas Co., 210 Pa. 137, 59 A. 822.

Variance: A trifling variance in designating a corporation in a pleading is immaterial. "Underwriters' Fire Association at Dallas" held to be a harmless variance from "Underwriters' Fire Association of Dallas." Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. A variance as to the word "the" in the corporate name of defendant steamship company held insufficient to justify a reversal of the judgment for plaintiff. Carlson v. White Star S. S. Co. [Wash.] 81 P. 838. Where a railroad company was sued in its true corporate name, but the word "company" was omitted therefrom, the misnomer was an imperfection that could be cured by amendment in the appellate court, under Rev. St. 1899, § 672 (Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032); but where plaintiff sued defendant corporation as a partnership, the objection was fatal. (Welton v. Genesee Lumber Co. [La.] 38 So. 580).

15. In a suit against a corporation to remove the price of materials alleged to have been furnished on the order of certain of its directors, the corporation is entitled to defend by showing that such directors acted for themselves or other parties, and not as directors of the corporation sought to be held. Reisig v. Grand Theatre Co., 91 N. Y. S. 14. An action cannot be maintained against a corporation not for profit, upon a certificate of indebtedness issued to be paid out of a certain surplus, to be applied to such payment by annual drawings. The certificates were issued to raise a fund for building purposes, upon the distinct understanding that they were to be so paid. Schwerfeger v. Columbia Gesang Verein, 26 Pa. Super. Ct. 515. Where the name of a party in a complaint is stated in such words as to imply a corporation, such party will be presumed to be a corporation, until the fact is put in issue by a denial. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906, citing Smythe v. Scott, 124 Ind. 183; Adams Exp. Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214; Indianapolis Sun v. Hoerell, 53 Ind. 527; Harris v. Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372.

16. Where one corporation sold its property and assets to another and transferred to the latter its stock, books and records, which remained in the possession and control of the purchasing corporation thereafter, entries in such books relating to the transaction were held admissible against the latter corporation without further authentication. Dancel v. Goodyear Shoe Machinery Co., 137 F. 157. Where a corporation sues to terminate a voting trust of stock which it owns in another corporation, such trust being composed of parties having little personal interest in either corporation, slight evidence of bad faith will be sufficient to justify a finding of fraud in the execution of the trust agreement so as to authorize a temporary injunction. Such an action held not violative of Laws 1892, p. 1958, c. 690, § 56, requiring the intervention of the attorney general in certain proceedings against corporations. Knickerbocker Inv. Co. v. Voorhees, 100 App. Div. 414, 91 N. Y. S. 816. An application for the appointment of a referee to take the depositions of officers of a corporation, to be used on a motion, will be denied where it appears from the counter-affidavits that they have no knowledge of the facts sought to be established. Mercantile Trust Co. v. Calvet-Rogniat, 46 Misc. 16, 93 N. Y. S. 238.

17. The rule that no personal judgment can be rendered against a nonresident, who has neither been served with summons within the state nor made an appearance, applies as well to corporations as to individuals. Louisville & N. R. Co. v. Missouri, etc., R. Co. [Tex. Civ. App.] 88 S. W. 413. Under the statute of Wisconsin, allowing

§ 11. *Legislative control over corporations.*[18]—The legislative control over corporations of its own creation in the matter of publicity is complete,[19] and reasonable control of charter powers exercised pursuant to reserved powers,[20] or in the exercise of the police powers of the state,[21] is upheld. Where a corpora-

three years for the administration of corporate affairs after the termination of its charter existence. Rev. St. 1898, § 1764. Lindemann v. Rusk [Wis.] 104 N. W. 119. An action to wind up the corporation's affairs may be prosecuted to judgment more than three years after the termination of the life of the corporation. Id. In Arkansas, the property of plaintiff, acquired and held for the sole purpose of maintaining thereon a library, held not subject to sale under execution for tort, the corporation being a charitable trust, holding only a naked legal title, the beneficial interest being in the public. Sand. & H. Dig. § 3049, 3052-3055. Woman's Christian National Library Ass'n v. Fordyce [Ark.] 86 S. W. 417.

18. See 3 C. L. 893. See, also, Foreign Corporations, 3 C. L. 1455.

19. The public policy in regard to corporation affairs is absolute publicity of all corporate business. The object of the requirement of the receipt and record, by the county clerk, of semi-annual reports from the officers of corporations, showing their financial condition and who are shareholders, and the register of transfers of stock, is for the purposes of taxation and to show who has the control and management of corporations and who are liable in case of insolvency. Scott v. Houpt [Ark.] 83 S. W. 1057. Under the Indiana statute a manufacturing corporation has 20 days time within which to make and publish a statement of its assets and liabilities as of January 1. Burns' Ann. St. 1901, § 5071. Stafford v. St. John [Ind.] 73 N. E. 596. It is competent for the legislature to make provisions for the publicity of the business and condition of investment and similar corporations and to classify them for such purpose. State v. Northwestern Trust Co. [Neb.] 101 N. W. 14. Under Ky. St. 1903, § 573, repealing charter powers and privileges inconsistent therewith, and Act March 19, 1894 (§§ 725-743, Ky. St. 1903), providing for the incorporation of real estate title insurance companies, a company incorporated under special act before the adoption of the present constitution, is restricted to the exercise of powers specified in the latter act. Hager v. Kentucky Title Co. [Ky.] 85 S. W. 183. A corporation doing a poultry and game business in England, Canada and Germany, having an agency in England and dealing with firms in Canada and Germany, held to be a corporation doing business without the United States, and entitled to additional time to make its reports. Hoboken Beef Co. v. Hand, 93 N. Y. S. 834. A manufacturing corporation held not to be "doing business without the United States," so as to be entitled to a longer time for filing its annual report under Laws 1890, p. 1066, c. 564, § 30, as amended by Laws 1892, p. 3, c. 2, and Laws 1897, p. 313, c. 384. West v. Grosvenor, 102 App. Div. 266, 92 N. Y. S. 429.

20. The right of legislative control over the articles of incorporation, by-laws, rules and regulations of domestic corporations being reserved. Iowa Code, § 1619. Marshalltown Light, Power & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005. A statute regulating the pavement by street railway companies within and outside of the rails of their tracks, does not impair the obligation of a contract, although applied to a corporation granted a franchise, before its enactment, purporting to exempt it from liability for street paving. Iowa Code, § 834. Marshalltown Light, Power & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005. In New York the constitutional reservation of the right to amend or repeal charters applies to general laws and special acts only, while the statutory reservation has application to the charters of all corporations granted by the legislature, unless the statute creating it or authorizing its creation, expressly or impliedly provides otherwise. Const. § 1, art. 8; 1 Rev. St. p. 600, § 8. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. In the absence of language reserving the power to annul and repeal, or of language clearly inconsistent and in conflict with such reservation of power, general provisions of law, reserving such right, must be deemed a part of every statute creating a corporation or providing for their creation. The act for the incorporation of stock life insurance companies does not reserve the right of amendment or repeal (Laws 1853, p. 887, c. 463), but makes all such companies subject to the general corporation laws. Held, that their charters were amendable under 1 Rev. St. p. 600, § 8. Id.

21. The state, in the exercise of its police power, may restrict the power of corporations to contract within certain prescribed limits, so as not to infringe upon the rights of individuals or the general well being of the state. Const. 1890, § 198, requires the enactment of laws to prevent trusts, etc.; and Code 1892, § 4437, defines combinations between corporations. Yazoo & M. V. R. Co. v. Searles [Miss.] 37 So. 939. A combination of corporations, organized by a series of contracts between each individual corporation and a constituent corporation having a merely nominal capital, to create a monopoly and prevent competition, held to be illegal, both at common law and under Sess. Acts 1889, p. 96, as originally enacted and as repealed and re-enacted by Sess. Acts 1891, p. 186. Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213. The Kansas statute providing that any person, company or corporation violating any of the provisions of the "anti-trust law" shall be denied the right and prohibited from doing any business within the state, contemplates the prohibition only of continuing business in the state, in violation of the act. Section 5, c. 265, p. 482, Laws 1897. State v. Jack, 69 Kan. 387, 76 P. 911.

tion makes a contract of employment, subject to any change of method in doing business occasioned by a change in the state laws, an act of the legislature necessitating the abolishment of the "expense fund," from which the compensation was paid, terminates such contract.[22]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*[23]—A corporation is dissolved and ceases to exist when its charter expires,[24] unless there is some statutory provision to the contrary;[25] and it is then not even a de facto corporation.[26] But corporate existence is not affected by the pendency of a creditor's suit, or the appointment of a receiver, or a decree for the sale of its assets;[27] neither will failure to elect officers,[28] nor to transact business,[29] dissolve a corporation.

Dissolution by consent of stockholders or directors.[30]—The act of dissolution, like the act of association, is not a corporate act but an act of the members of the corporation.[31]

Forfeiture of charter in proceedings by the state.[32]—Forfeiture will be decreed only for serious or intentional violations of the law,[33] involving public rights,[34]

22. Code, § 1619, makes corporations for pecuniary profit subject to such legislative control as is deemed necessary for the public good. Wood v. Iowa Bldg. & Loan Ass'n, 126 Iowa, 464, 102 N. W. 410.

23. See 3 C. L. 893.

24. Clark v. American Cannel Coal Co. [Ind. App.] 73 N. E. 727, citing Brookville & G. Turnpike Co. v. McCarty, 8 Ind. 392, 393, 65 Am. Dec. 768; Ft. Wayne, etc., v. Deam, 10 Ind. 563-565; Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 506; Guaga Iron Co. v. Dawson, 4 Blackf. 262; Clark & M. Corp. § 82c, c. 247.

25. Under the direct provisions of Burns' Ann. St. 1901, § 3429, the existence of a corporation in Indiana is continued three years after the expiration of its charter, for the prosecution and defense of suits. Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083. And in Michigan, corporations whose charters have been annulled, by forfeiture or otherwise, do not at once cease to exist, but continue or three years for the prosecution or defense of suits by or against them, under Comp. Laws, § 8, c. 230, p. 2627. Held, that the receiver of such a corporation, under order of the Michigan court where the receivership proceedings were had, could sue out a writ of error in the Illinois supreme court in the name of the corporation. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. Proceedings on petition of the bank commissioner, under the statutes of New Hampshire, to wind up a banking corporation, do not at once dissolve the corporation, so as to preclude a judgment against it by a Federal court. Pub. St. N. H. 1901, c. 162. Cheshire Provident Inst. v. Anglo-American Land Mortg. & Ag. Co. [C. C. A.] 132 F. 968.

26. Clark v. American Cannel Coal Co. [Ind.] 73 N. E. 1083.

27. Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503; Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175. Such proceedings do not prevent the corporation from acting as such, nor from incurring indebtedness (Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503), nor from using its corporate name (Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175).

28. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

29. Its term of existence is fixed by law, and the state alone can question its existence meantime. This rule also applies to de facto corporations. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 P. 25.

30. See 3 C. L. 894.

31. Pottsvile Bank v. Minersville Water Co. [Pa.] 61 A. 119. Held competent for the stockholders of a loan association, for the purpose of winding up its business, to estimate the value of the shares and to ascertain the amount to be paid by each borrowing member, after deducting the value of his stock. Star Loan Ass'n v. Moore, 4 Pen. [Del.] 308, 55 A. 946. When the members of a corporation commit to their officers the matter of effecting a dissolution, the officers are rather trustees of the members than corporate functionaries. Pottsville Bank v. Minersville Water Co. [Pa.] 61 A. 119.

32. See 3 C. L. 894.

33. If a corporation is found guilty of an act, which is expressly declared to be a cause of forfeiture of its franchise, a court has no discretion to refuse such a judgment; neither mistake on the part of the corporation, nor its subsequent good behavior will disable the state from demanding such judgment. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390. In an action by the state to forfeit a charter for the issue of fictitious stock, where the question of value is in doubt and, in the nature of things, a sale of the plant and a liquidation of the corporation is necessary to ascertain the residuary interest of the stockholders, the state should be nonsuited. State v. New Orleans Water Supply Co. [La.] 36 So. 117. Compliance with the requirements of its act of incorporation, by a corporation, will be presumed, in the absence of evidence of failure to comply. Applied in case of a railroad company's alleged failure to construct its road within the time prescribed in its charter. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D. C. 587.

and then only at suit of the state, in direct proceedings for that purpose.[35] The state may, by acquiescence or recognition, be estopped from questioning the validity of an act of incorporation.[36]

Custody and sale of property.[37]—When a business corporation dissolves and loses legal capacity to preserve its estate, equity will, if necessary, lay hold of its assets to compel a final liquidation of its affairs and a distribution of the capital among stockholders as in partnership associations.[38]

Statutory proceedings[39] for dissolution are provided in most states.[40]

§ 13. *Succession of corporations; reorganization; consolidation.*[41]—Consolidations and mergers, not creative of monopolies,[42] and reorganizations safeguard-

In a proceeding by the state to revoke the charter of a corporation, great effect could be given the fact that the tendency of the business was to deceive investors into making an investment which must necessarily disappoint them. Vokes v. Eaton [Ky.] 85 S. W. 174. The making of an ultra vires lease of its plant by a corporation is not a ground of forfeiture of its franchise, years after the avoidance of the lease and the resumption by the corporation of its duties. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390. Nor does the failure to pay the franchise tax imposed authorize the secretary of state to declare a charter forfeited. Art. 5243i, Sayles' Ann. Civ. St. 1897. Rippstein v. Haynes Medina Valley R. Co. [Tex. Civ. App.] 85 S. W. 314.

34. In Louisiana insolvency of a corporation, evidenced by a return of no property found on execution, is ground for the forfeiture of its charter. Rev. St. § 688. Jones Co. v. Hoffman [La.] 38 So. 763. Courts have discretionary power as to declaring a forfeiture of a charter of a corporation for an act or omission which is not expressly made a ground of forfeiture by the charter, and will exercise such discretionary powers in favor of the corporation, where the violation of the charter appears doubtful and no public interest requires a forfeiture. State v. United States Endowment & Trust Co., 140 Ala. 610, 37 So. 442. A charter will not be declared forfeited for trifling omissions, where they do not appear to have been willful, or prejudicial to any one, and a judgment of ouster would cause loss to the stockholders. As failure to keep books at the place required by the charter for the maintenance of its principal office, for a limited time after organization; or the failure of its president to make the first annual report to the auditor of state. Id.

35. Such acts as may work a forfeiture of corporate rights, after the corporation has been brought into legal existence, can be taken advantage of only by the government in direct proceedings to forfeit the charter. Elgin Nat. Watch Co. v. Loveland, 132 F. 41. In Alabama, anyone who will give the required security for costs may institute quo warranto proceedings to annul the charter of a corporation. Code 1896, §§ 3417, 3418. State v. United States Endowment & Trust Co., 140 Ala. 610, 37 So. 442. On an indictment of a railroad company for a nuisance in maintaining an alleged illegal crossing over a highway, the question of forfeiture of its charter for nonuser of a part of its line cannot be raised. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235. An order of reference of a rejected claim against a banking corporation, in proceedings for dissolution, made without notice to the attorney general will be reversed. Laws 1883, p. 559, c. 378, § 8. Eustace v. New York Bldg. Loan Banking Co., 98 App. Div. 97, 90 N. Y. S. 784.

36. As where it has, with knowledge of the facts, encouraged the expenditure of large sums of money by the company, and the giving of credit by third persons, upon the faith of its grant, and by neglecting to assert its supposed right to repudiate the act of incorporation. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

37. See 3 C. L. 895.

38. Lindemann v. Rusk [Wis.] 104 N. W. 119.

39. See 3 C. L. 895.

40. The insurance commissioner of Maryland has power to institute suits to liquidate the affairs of insolvent or fraudulently conducted insurance companies. Code, art. 23, § 122, subsec. 7, as re-enacted by Acts 1902, p. 453, c. 338. This act is constitutional. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125. The vesting of title to the assets of a corporation in a trustee or assignee, in proceedings under a state statute to wind it up, does not deprive a foreign creditor of the right to obtain judgment against the corporation in a Federal court. Cheshire Provident Inst. v. Anglo-American Land Mortg. & Ag. Co. [C. C. A.] 132 F. 968.

41. See 3 C. L. 897.

42. Where a holding corporation was organized to control the patents and business of all the wire glass manufacturing companies, including defendant, it was held to be a "combination" within the terms of plaintiff's contract transferring to defendant the right to use his patent. Brownsville Glass Co. v. Appert Glass Co., 136 F. 240. The mere user of corporate powers which might have been lawfully acquired, without a bona fide attempt to acquire them by forming a consolidation, does not create a consolidated corporation de facto; nor does an attempt to organize without user have that effect. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259. The effect of consolidation is the extinguishment of the old and the creation of a new corporate life. Jones v. Missouri-Edison Elec. Co., 135 F.

ing the rights of lien holders, and others interested,[43] when authorized by law and conducted in accordance therewith, are sustained.[44] Transfer of corporate liabilities to a succeeding corporation depends upon whether the identity of the original corporation survives.[45]

153; New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776.

43. A reorganization committee appointed by the bondholders, pending foreclosure proceedings, upon whom almost unlimited powers were conferred, was bound to act in good faith so as to protect the interests of all the bondholders. A bondholder who was deprived of his right to withdraw his bonds, in accordance with the understanding among the bondholders, by the committee's failure to prepare its plan of reorganization before foreclosure, had a right of action against the committee for damages. Industrial & General Trust v. Tod, 180 N. Y. 215, 73 N. E. 70. Reorganization pending proceedings in insolvency to settle the affairs of a corporation, by the organization of a corporation and transfer of stock therein to creditors in exchange for their claims against the old corporation. McEwen v. Harriman Land Co. [C. C. A.] 138 F. 797. Transfer of indebtedness by creditors of an insolvent corporation for stock in a reorganized corporation held not to be a payment of the indebtedness, but a vesting in the new corporation of all the rights of such creditors as against the old one and its assets. Id.

44. The right of corporations to consolidate can exist only by virtue of positive legislative grant; such power cannot be implied. Jones v. Missouri-Edison Elec. Co., 135 F. 153. The corporate existence of a nominally consolidated corporation, formed in the absence of legislative authority, may be collaterally attacked, its acts and contracts are void, and it cannot be held liable for the debts of one of the corporations attempting to consolidate. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259. A consolidation of corporations made pursuant to an invalid statute is inoperative and void. The act of 1872, for the change of name and consolidation of corporations, not having been submitted to the people, was therefore void as to banking corporations, under Const. art. 11, § 5. Boor v. Tolman, 113 Ill. App. 322. Corporations cannot consolidate, unless the power to do so is expressly conferred upon both corporations. Priv. Laws 1901, p. 463, c. 168, authorized defendant corporation to consolidate with any railroad or transportation company in the United States, and authorized any such company incorporated in North Carolina to consolidate with defendant. Held to authorize the consolidation of defendant with the Raleigh & Gaston Railroad company. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96. Even where the right to amend a private charter has not been reserved, the legislature may pass an act authorizing the corporation to consolidate with another, for that is but an enabling act and imposes no duty or obligation on the corporation. Id. Statutes authorizing the consolidation of corporations of the same nature apply to a corporation which was itself created by a prior consolidation. In Missouri Rev. St. 1899, § 1334. Jones v. Missouri-Edison Elec. Co., 135 F. 153. In Alabama Code 1896, §§ 1202-1204. The rights of the parties in a suit against the original corporation for damages, pending at the time of a second consolidation, held not to be affected thereby. Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74. In conferring the power of consolidation upon a railroad corporation, the legislature cannot require a dissenting stockholder to surrender his stock and accept stock in the consolidated corporation in lieu thereof, but it may invoke the power of eminent domain and provide for the condemnation of such stock for a public use, by making compensation therefor. Priv. Laws 1901, p. 463, c. 168, is such an exercise of the power of eminent domain. A stockholder who waited more than two years before asking the court to declare the consolidation void was held guilty of laches and to be sufficiently protected by the offer of defendant to pay for the value of her stock. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96. Corporations created by different states can consolidate only under concurrent legislation in each state, in which case there exists a separate and distinct corporation in each state, the laws of each state having no extra-territorial effect. Where two such corporations attempted to consolidate without any statutory authority for such consolidation, the attempt was a nullity, and not even a de facto corporation was created by user. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259.

45. In the absence of a special agreement, or provision in the decree of sale, or statutory obligation, a separate and distinct corporation, which succeeds another by a valid purchase and sale of property and franchises, is not liable for the general debts and contracts of the selling corporation. Defendant held not liable on a contract with its predecessor, whose railroad, franchises, and property it had purchased on judicial sale. Hukle v. Atchison, etc., R. Co. [Kan.] 80 P. 603. A corporation cannot be held liable for services rendered to another corporation, it never having received or accepted the benefit of such services, merely because the books of the other corporation, containing a credit to plaintiff, came into its possession. Girbekian v. Cairo Cigarette Co., 94 N. Y. S. 345. A contract to furnish water to a town, made by the promoters of a corporation afterward organized for that purpose, held to be continuing and binding on a new corporation, to which the waterworks were transferred. Town of Boonton v. Boonton Water Co. [N. J. Eq.] 61 A. 390. A surety company, which is in all respects the successor of another, is liable on a bond executed by its predecessor. Manny v. National Surety Co., 103 Mo. App. 716, 78 S. W. 69. A corporation succeeding to the business and all the as-

§ 14. *Stock and membership.*—The scope of this section is limited to the relation of the corporation and its members inter se, rights of creditors being treated in a later section.[46]

(§ 14) *A. Membership in corporations in general.*[47]—Stockholders are members of the corporation,[48] and are the equitable owners of its property,[49] their rights being defined by the charter and the law.[50] A membership corporation cannot expel a member without notice of charges preferred and an opportunity to defend.[51] A church corporation issues no stock and is wholly without power or authority to levy assessments upon or enforce contributions from its members.[52]

(§ 14) *B. Capital stock and shares of stock.*[53]—The "capital stock" is the money or property paid in,[54] as distinguished from the shares of stock, and con-

sets of a former company and being practically identical in membership, is responsible for damages resulting from the negligence of the former corporation. McWilliams v. New York, 134 F. 1015. The members or some of the members of an insolvent or dormant corporation may organize a new corporation for the promotion of the same purposes as the old one, without becoming chargeable with its debts or obligations; but there must be no fraud accomplished, nor any taking over, absorbing or converting of the property or assets of the old corporation, to the prejudice of creditors. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808. The legal identity of the new corporation with the old will depend upon the intention of the incorporators. Id. Contract of sale and transfer of stock to a new corporation, organized to take over the stock of its predecessor and other corporations engaged in the same business, construed. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35, 72 N. E. 634. In case of a consolidation of corporations, the new company succeeds to the rights, duties, obligations and liabilities of each of the precedent companies, whether arising ex contractu or ex delicto. A consolidated corporation, under the provisions of Gen. St. 1901, § 5870, is held to assume all obligations and demands, arising out of tort as well as contract. Kansas City-Leavenworth R. Co. v. Langley [Kan.] 78 P. 858. One controlling the stock of a street railroad company purchased a large amount of its stock at fifty or sixty cents on the dollar, giving the other stockholders stock of another corporation after conveyance thereto of the property and franchises of the first company. Held, that the second corporation was responsible for the liabilities of the first. Camden Interstate R. Co. v. Lee [Ky.] 84 S. W. 332. Banking Law, § 37, as amended by ch. 382, p. 233, Laws of 1895. Plaintiff bank, in which was merged another bank to which defendant was liable on a guaranty, acquired the right to enforce the guaranty. Bank of Long Island v. Young, 101 App. Div. 88, 91 N. Y. S. 849. Under a statute providing for the consolidation of corporations and expressly reserving the rights of creditors unaffected, an action pending is not affected by the consolidation and no substitution of parties is necessary. Under Rev. St. 1899, § 1334. Wells v. Missouri-Edison Elec. Co., 108 Mo. App. 607, 84 S. W. 204.

46. See post, § 16.

47. See 3 C. L. 899.

48. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65; People v. New York Security Life Ins. Co., 18 N. Y. 117, 123, 34 Am. Rep. 522. A county which purchases railway stock does not hold it in its governmental capacity, but in the same way and subject to the same rights and obligations as private individuals and corporations. It is bound by the action of a majority of the stockholders, at a meeting where it was represented by a representative of its own choosing, in a sale of the corporate franchise and assets, and cannot repudiate such action. Hinds County v. Natchez, etc., R. Co. [Miss.] 38 So. 189.

49. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65, citing Matter, etc., of Argus Co., 138 N. Y. 557, 569; Martin v. Niagara Co., 122 N. Y. 165, 172. Whatever interest the shareholder has is in the custody and control of the corporation. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

50. Stockholder's rights are dependent upon the powers of the corporation derived from the state as set forth in its charter or certificate of incorporation, the by-laws adopted in conformity therewith and the statutes regulating such corporation. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921. By accepting stock, he assents to the terms and conditions found in the articles (Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735), becomes bound by the laws and rules of government which it is authorized to make (Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921), and creates, between himself and all other stockholders of the corporation, and between himself and the corporation, a contractual relation, which is affected and controlled, in some degree, by every proper act of the corporation, whether done by its board of directors, its officers, or its mere employes. He is bound by its past acts and has consented to be bound by its future acts (Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890).

51. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921. And where a member is illegally expelled, the remedy by an action at law, against individual members, is inadequate, justifying equitable relief. The expulsion may be declared void and such an administration of affairs compelled, as will prevent a diversion of assets to purposes other than those of the original incorporation. Id.

52. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808.

53. See 3 C. L. 899.

54. Capital, in the strict sense, signifies those resources whose dedication to the

stitutes, according to the holding of some courts, a trust fund for the benefit of the creditors.[55]

A share of stock is the interest or right the owner has in the corporation.[56] The shares are personal estate and a species of incorporeal property,[57] whose location is in the the state where the corporation is created,[58] and whose value is represented by the assets of a company.[59]

uses of the corporation is made the foundation for the issuance of certificates of capital stock. Smith v. Dana, 77 Conn. 543, 60 A. 117, citing State v. Norwich & W. R. Co., 30 Conn. 290; Bailey v. Clark, 21 Wall. [U. S.] 284, 22 Law. Ed. 651; Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429; Iron R. Co. v. Lawrence Furnace Co., 49 Ohio St. 102; Reid v. Eatonton Mfg. Co., 40 Ga. 103, 2 Am. Rep. 563; Commonwealth v. Charlottesville, etc., Co., 90 Va. 790, 44 Am. St. Rep. 950. Sometimes the term is used to designate that portion of the assets, regardless of their source, which are utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits. Iowa St. Sav. Bank v. Burlington, 98 Iowa, 739; People v. Feitner, 67 N. Y. Supp. 893; Hemmenway v. Hemmenway, 181 Mass. 406. And frequently the term is employed in a still wider sense, as descriptive of all the assets, gross or net, of a corporation, whatever their source, investment, or employment. Security Co. v. Hartford, 61 Conn. 89; Batterson's Appeal, 72 Conn. 374; People v. Coleman, 126 N. Y. 433, 12 L. R. A. 762; Ohio & M. R. Co. v. Weber, 96 Ill. 443; State v. Lewis, 118 Wis. 432. The capital stock of a corporation is one of its assets (Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816), and is the basis of its credit. It is a substitute for the individual liability of those who own its stock (Macbeth v. Banfield [Or.] 78 P. 693).

55. Allen v. Grant [Ga.] 50 S. E. 494; Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54; Smith v. Dana, 77 Conn. 543, 60 A. 117; Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816. This is commonly called the "American doctrine," and is somewhat criticised in this case. Macbeth v. Banfield [Or.] 78 P. 693. The distribution of the capital stock among stockholders, without making adequate provision for the payment of debts, or the issue of fictitious paid-up stock, is a fraud upon creditors contracting with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been paid up in full. Id. The creditors of a corporation have a lien upon its capital stock in equity. If diverted, they may follow it so far as it can be traced, and subject it to the payment of their claims, except as against bona fide holders for a valuable consideration and without notice. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54. The receiver of an insolvent bank can recover from stockholders dividends paid to them out of the capital stock of the bank. Corn v. Skillern [Ark.] 87 S. W. 142. In Michigan, if the capital stock of a corporation is withdrawn and refunded to the stockholders before the payment of all debts, the stockholders are liable to creditors to the amount so refunded, who can follow the assets of a corporation paid to stockholders as dividends, regardless of the good faith of the stockholders or of the corporation. Comp. Laws, § 7057. Under this section, one who subscribes to stock, acts as director, participates in the management of affairs, and receives the dividend, is deemed a stockholder, although he used the money of his sister, acting for her and paying over the dividend to her. American Steel & Wire Co. v. Eddy [Mich.] 101 N. W. 578.

56. In its surplus profits and, upon dissolution, in all assets remaining after the payment of debts. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392; Sweetsir v. Chandler, 98 Me. 145, 56 A. 584. The mere fact that a corporation has no capital stock does not necessarily deprive the members of their proportionate rights in the corporate property. Dade Coal Co. v. Penitentiary Co. No. 2, 119 Ga. 824, 47 S. E. 338.

57. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. In an incorporated canal or ditch company, Under § 2611, Rev. St. 1887. Watson v. Molden [Idaho] 79 P. 503. Under the statutes of Washington, the assessment of bank stock to the bank for taxation, whereby the shareholder was prevented from deducting his indebtedness from the gross amount of his credits, to determine the net amount of his assessment, was void. Pierce's Code, §§ 8613, 8614, 8615, 8593; Ballinger's Ann. Codes & St. §§ 1677, 1678, 1679, 1657. Jefferson County v. First Nat. Bank [Wash.] 80 P. 449.

58. But for purposes of taxation and some similar purposes, stock follows the domicile of its owner. Fahrig v. Milwaukee & Chicago Breweries, 113 Ill. App. 525. Capital stock in a domestic corporation can be attached, under the law of New Jersey, although the stock certificate is in possession of the debtor in another state. Cord v. Newlin [N. J. Law] 59 A. 22. The situs of the stock of a corporation is in the state in which the corporation was organized. Andrews v. Guayaquil & Q. R. Co. [N. J. Eq.] 60 A. 568.

59. Hubbard v. International Mercantile Ag. [N. J. Eq.] 59 A. 24. On an issue as to the value of corporate stock, the opinion of the treasurer as to its fair market value may be taken. Aldrich v. Bay State Const. Co., 186 Mass. 489, 72 N. E. 53. The failure of a corporation to pay a tax due the state on an increase of stock can be taken advantage of only by the state and does not affect the validity of its stock. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466. The value of preferred stock is not affected by the issue, large or small, of common stock, since the latter ranks below the preferred stock. Julia v. Critchfield, 137 F. 969.

Scrip, in corporation parlance, is the certificate or evidence of the right to obtain shares in a corporation.[60] A certificate of stock is not the stock itself, but is the evidence of its existence [61] and such ownership as is stipulated in the articles,[62] and of the holder's rights as a stockholder to the extent therein specified.[63] A certificate of stock is not essential to the existence of the property represented by it.[64]

At common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company, and the courts refuse to enforce them against stock, unless created by statute, charter, or by-law of the company.[65] Such lien may be incorporated in the articles of incorporation, as well as in special charters,[66] or in the by-laws,[67] and when so incorporated is good betwen the company and the stockholders, but it is not good against those who, at public or private sales, purchase without notice of its existence, nor against bona fide creditors who, without notice, advance money on the shares and thereby acquire the position of quasi purchasers. But the judgment creditor does not occupy so favorable a position and his lien is inferior to that created by the by-laws.[68]

In the absence of statutory provisions, shares of stock are not subject to execution or attachment.[69]

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock.*[70]—Unless prohibited by statute, payments for stock are governed by the contract as to time and manner of payment,[71] and so long as good faith is exer-

60. Corporation stock and scrip held not to be "money at interest." Sweetser v. Chandler, 98 Me. 145. 56 A. 584.

61. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

62. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735; Cord v. Newlin [N. J. Law] 59 A. 22; Williams v. Ashurst Oil, Land & Development Co., 144 Cal. 619, 78 P. 28.

63. Trover will lie for the conversion of stock, as well as for the conversion of the certificate which evidences it. Herrick v. Humphrey Hardware Co., [Neb.] 103 N. W. 685. Where certificates of stock were in possession of decedent at his death, under the evidence in the case the stock was held to belong to decedent's estate. In re Eslen's Estate, 211 Pa. 215, 60 A. 733. Certificate enables holder to obtain a transfer on the books. An actual delivery of certificates or acceptance of them is not necessary to the passing of title to stock. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. The statute declaring that corporations organized to supply water may, in their by-laws, provide that water shall be supplied only to owners of stock, that such stock shall be appurtenant to certain lands when described in the certificate issued therefor and that such shares shall be transferred only with the lands, had no invalidating effect upon shares of a corporation not organized in compliance with that statute, where they had become appurtenant to land before the statute was enacted. In re Tromas' Estate [Cal.] 81 P. 539.

64. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

65. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735. Shares of stock partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685, citing Keller v. Eureka B. Mach. Co., 43 Mo. App. 84, 11 L. R. A. 472.

66. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735.

67, 68. Civ. Code Ga. 1895, § 2825. If notice of the lien was given at the sheriff's sale, the purchaser could not compel a transfer without paying the amount due the company by the stockholder. Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379.

69. Code of 1899, § 9, c. 106, includes shares of stock in the terms "personal property, choses in action, and other securities," and they are almost universally held by courts to be property of that nature, and subject to attachment. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. When made subject to attachment a substantial compliance with the statute is all that is required in making the attachment levy. Scott v. Houpt [Ark.] 83 S. W. 1057.

70. See 3 C. L. 901.

71. In Mississippi a note cannot be received in payment for a subscription to capital stock. Code 1892, § 850. Where a note was given for stock and the stock was held for security, no title passed and the purchaser was not entitled to possession until the note was paid. Alford v. Laurel Imp. Co. [Miss.] 38 So. 548. Contract of employment and sale of stock by application of dividends, with a provision for the forfeiture of all right to the stock, if the employe should enter into a competing business, sustained. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008. Advances made

eised,[72] property as well as money may be received.[73] Subscriptions can be enforced only on compliance with the terms,[74] and may be avoided for fraud or false

by plaintiff to defendant held not to have been loans, but payments for his stock in the company. Hollins v. American Union Elec. Co., 66 N. J. Eq. 457, 60 A. 359. Where a contract for the purchase of stock provides for payment of instalments of the purchase price at fixed periods after the call of the directors, held that such instalments became due automatically and the statute of limitations ran against each instalment as it so became due. Williams v. Matthews, 103 Va. 180, 48 S. E. 861. Subscriptions for stock, under agreement that after payment of twenty per cent, subscribers should not be liable for any balance of subscriptions, except on such shares as should stand in their names on the books at the time of subsequent assessments. Bean v. American Alkali Co. [C. C. A.] 134 F. 57. Required subscriptions for stock in a telephone company must be paid in before the probate court can grant a decree vxing mode of use of the streets. City of Cincinnati v. Queen City Telephone Co., 2 Ohio N. P. (N. S.) 349, 15 Ohio Dec. N. P. 43.

72. A secret understanding for a subscription for a smaller number of shares cannot be set up as a defense against an action to recover the subscription price of the number of shares subscribed for, in a certificate for a charter signed and sworn to by an incorporator. Under Act April 29, 1874 (P. L. 73), incorporating a corporation of the second class. Greater Pittsburg Real Estate Co. v. Riley, 210 Pa. 283, 59 A. 1068; Macbeth v. Banfield [Or.] 78 P. 693. Where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. But if the nature of the property and the overvaluation are such that there may possibly have been an honest error of judgment in the valuation, there, to avoid the transaction, actual fraud must be shown. Macbeth v. Banfield [Or.] 78 P. 693. In such case, where actual fraud entered into the transaction, the remedy of the corporation is to rescind the agreement, tender the property back to the stockholder and ask that he be compelled to return the stock, or its market value, to the corporation. Orton v. Edson Reduction Mach. Co., 5 Ohio C. C. (N. S.) 540.

73. The directors of a corporation, in the absence of constitutional or statutory inhibition, may receive property in payment for stock, wherever they are authorized to purchase for the benefit of the corporation and to subserve the purposes of its organization. Macbeth v. Banfield [Or.] 78 P. 693. It is competent for all the stockholders, unanimously and in good faith, to agree that shares of the corporation shall be issued to themselves in exchange for property conveyed by them to the corporation, to acquire which in part the corporation was formed. Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 P. 838. The statute of Colorado authorizing the purchase of mines by a mining corporation and the issue of stock, in payment, to the value thereof, and providing that such stock shall be deemed full-paid, does not conflict with the constitutional prohibition of the sale of stocks, except for labor done, services performed, or money or property actually received. 1 Mills' Ann. St. §§ 490, 582; Const. art. 15, § 9 (1 Mills' Ann. St. p. 358). Speer v. Bordeleau [Colo. App.] 79 P. 332. The laws of Maryland, which authorize a corporation to take, in payment for its stock, such property as it is proper for the company to own for the advancement of its business, authorize the acceptance of the stock of another corporation in payment, where the organic act of the corporation authorizes it to purchase and hold the stock of other corporations. Code Md. 1888, art. 23, §§ 69, 70, amendatory of the general incorporation act of 1868. Southern Trust & Deposit Co. v. Yeatman [C. C. A.] 134 F. 810. A corporation having issued its stock as fully paid, in exchange for property transferred at an agreed valuation, cannot thereafter, without the consent of the stockholder, treat his stock as only partially paid and assess him for the difference between the market value of said property and the par value of the stock issued in exchange for it. Orton v. Edson Reduction Mach. Co., 5 Ohio C. C. (N. S.) 540.

74. A subscription payable partly in cash and partly in the stock of another corporation cannot be accepted as a cash subscription, the cash credited and the balance sued for as an unpaid subscription. Southern Trust & Deposit Co. v. Yeatman [C. C. A.] 134 F. 810. A subscriber to the stock of a corporation to be organized for a particular purpose cannot be held as a subscriber to the stock of a corporation materially different. The subscription was to the stock of a corporation to "deal" in automobiles, while the corporation formed was to "manuacture" and sell automobiles and other vehicles. Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, 73 N. E. 674. Substantial compliance with the terms of a conditional subscription to stock is sufficient to entitle the company to collect such subscription. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Where a stock subscription was conditional upon the sale of a certain amount of stock, the duty of determining the true amount of stock subscription was imposed on the original incorporators, and their decision, before applying for a charter, was final, in the absence of fraud, in an action on a subscription. Louisiana Purchase Exposition Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099. A railroad company, through a trust company, contracted for the purchase of stock of a ferry company, at a certain price, on condition that a majority of the stock could be secured. Held that the transaction was not rendered fraudulent by the act of the trust company in paying a higher price to other parties, without divulging that fact to the first parties. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6. A subscription for stock made

representations of fact.[75] A purchaser may, upon demand, obtain a certificate of shares, but, unless demanded, it need not be issued.[76]

Calls and assessments[77] may be made as provided in the contract and as authorized by law.[78]

The purchase of stock by a minor may be disaffirmed the same as other contracts.[79]

Restrictions may be created by a contract mutually agreed to by the stockholders,[80] and the owners of the entire stock of a corporation, upon selling a majority thereof, may impose conditions that will be binding upon the vendees.[81]

dependent upon a lease of a telephone, which lease contract was unenforceable for want of mutuality, was held invalid. Cooperative Tel. Co. v. Katus [Mich.] 12 Det. Leg. N. 187, 103 N. W. 814. A condition attached to a subscription for corporate stock can be waived by the subscriber. But such waiver must be made with full knowledge of the rights he intends to waive and it must clearly appear that he knew his rights and intended to waive them. Wright v. Agelasto [Va.] 51 S. E. 191.

75. Either as against the corporation itself or as against its assignee for the benefit of creditors, where there was no failure to exercise due care to discover the fraud. Kentucky Mut. Ins. Co.'s Assignee v. Schaefer [Ky.] 85 S. W. 1098. False statements by officers of a corporation that none of it had been sold for less than par, will warrant a rescission. Hubbard v. International Mercantile Ag. [N. J. Eq.] 59 A. 24. A sale of corporate stock, induced by fraudulent representations of the purchaser, is not void, but only voidable at the election of the seller. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445. Representations made by an officer of a corporation to induce the purchase of stock held insufficient to sustain the charge of fraud. German Nat. Bank's Receiver v. Nagel, 26 Ky. L. R. 748, 82 S. W. 433. False statement to plaintiff, as to the financial condition of a corporation, by its general manager, held not to warrant a rescission of the contract of sale of stock by defendant, a stockholder, and director, to plaintiff. Garrett Co. v. Appleton, 101 App. Div. 507, 92 N. Y. S. 136; Smith v. Bank of Lewisport [Ky.] 85 S. W. 219. A member of a building and loan association is presumed to know the by-laws and he cannot be heard to say that he was deceived by its agent in the purchase of stock, when the agent's representations, taken in connection with the by-laws, etc., are no more than mere expressions of opinions. Guaranty Sav. & Loan Ass'n v. Simko [Ind. App.] 74 N. E. 273.

76. So held under the laws of West Virginia. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. A provision in a contract for the sale of stock that a certificate therefor shall not be issued for five years is binding. Williams v. Ashurst Oil, Land & Development Co., 144 Cal. 619, 78 P. 28.

77. See 3 C. L. 902, n. 59 et seq.

78. The making of a call is but a step in the collection of stock subscriptions, and in making it the board of directors is not the representative of the stockholder, but of the corporation. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252. To assess stock is to assess the stockholder's proportionate right in the corporation itself, his right to have the corporate purposes carried out, his right to profits and to a proportionate division of the assets upon dissolution. Sweetsir v. Chandler, 98 Me. 145, 56 A. 584. An agent for the owners of stock of a corporation, having no interest himself therein, who caused the transfer of the same on the books to an employe of the company, who had no interest in the stock, the actual ownership not being changed, did not render himself liable for an assessment when no fraud or deception was practiced. American Alkali Co. v. Kurtz [C. C. A.] 138 F. 392. Under the Code of Iowa, the holder of corporation stock as collateral security is not liable for assessments thereon. Code, § 1626. A bank that paid assessments on stock, held as collateral security for a loan is not entitled to have the amount so paid made a superior lien on the stock. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459. Under the terms of the subscription contract, defendant held not liable for assessments on stock placed by him, as agent of an indisclosed principal, in the name of a dummy. American Alkali Co. v. Kurtz, 134 F. 663. An assessment to be held and treated as an "assessment loan" until met and paid by all the stockholders and then to become absolute. Steck v. Bridgeport Water Co., 24 Pa. Super. Ct. 188.

79. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 103 N. W. 961.

80. An agreement for the distribution of stock in a corporation to be formed interpreted and sustained. Hunter Smokeless Powder Co. v. Hunter, 100 App. Div. 191, 91 N. Y. S. 620. The substantial value of the patronage enjoyed by a corporation, due to its reputation for excellence in its business, or its "good will," recognized as a factor in determining the value of shares, in a stockholders' agreement for the purchase of the shares of a withdrawing, or a deceased member, by the other stockholders, at a price to be fixed by arbitration. In re Lindsay's Estate, 210 Pa. 224, 59 A. 1074. An agreement among stockholders that the stock held by them should be sold only by mutual consent; that on such sale the stock should be drawn equally from the shares held by them, and that, on a sale by either party, the others should have a prior right to purchase, did not create a partnership. Whittingham v. Darrin, 45 Misc. 478, 92 N. Y. S. 752.

81. A sale of the majority of the stock of a corporation, upon the condition that the vendors should retain the offices of president, secretary, and treasurer for five

Under the Civil Code of California an agreement, by the vendor of stock, not to engage in the line of business conducted by the corporation, is void.[82]

(§ 14) *D. Miscellaneous rights of stockholders.*[83]—Though a stockholder has vested rights as such, yet those rights are subject to the will of the majority of the stockholders, expressed in a lawful manner and for the general welfare of the corporation.[84] A stockholder has no primary or preemptive right to subscribe at par for increased stock, as against an outsider, when the same stock can be sold to other parties at a great advance on its par value.[85] Where a stockholding corporation was formed by the stockholders in two competing interstate railway companies, and afterward declared void, the stockholders can not reclaim specific shares of stock delivered by them to the unlawful organization, but must content themselves with a ratable distribution of the corporate assets resolved upon by the stockholding corporation.[86]

Injunction will not lie to interfere with the proceedings of a corporation acting regularly under valid by-laws.[87]

The right to dividends.[88]—In the absence of statutory provisions,[89] directors have a rightful discretionary power to determine at all times, within reasonable limits, the destiny of profits and of accumulated profits represented by surplus.[90]

years at a specified salary, is not void as contrary to public policy. Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874.

82. Civ. Code, §§ 1673, 1674. Contracts by which one is restrained from exercising a lawful profession or business are void, unless made by one who sells the good-will of a business. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

83. See 3 C. L. 903.

84. The issue of preferred stock, by consent of two-thirds of the stockholders, under an amendment of the law, although when the objecting stockholder purchased his stock the law required unanimous consent, was valid. Hinckley v. Schwarzschild & Sulzberger Co., 45 Misc. 176, 91 N. Y. S. 893. A purchaser of stock in a business corporation takes it subject to the reserved power of the legislature to amend the statute under which it is organized. A purchaser of stock, while corporations were prohibited from issuing preferred stock except by unanimous consent of its stockholders cannot complain of the issue of such stock by consent of two-thirds of the stockholders under a subsequent amendment of the law. Laws 1901, p. 969, c. 354. Id.

85. Where an increase of stock was regularly and in good faith voted by the officers, directors, and a majority of the stockholders, to be sold to a certain person at 4 and one-half times its par value, held that a dissenting stockholder could not recover damages for the refusal of the corporation to sell shares to him at par, proportionate to the number of shares already held by him. Stokes v. Continental Trust Co., 99 App. Div. 377, 91 N. Y. S. 239.

86. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739. Such distribution of stocks to its stockholders was an equitable arrangement and should not be enjoined. Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331.

87. Investigation by Board of Trade directors of charge against a member. Board of Trade of Chicago v. Weare, 105 Ill. App. 289.

88. See 3 C. L. 903.

89. Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905. In New Jersey, unless otherwise provided in the certificate of incorporation or in a by-law adopted by a majority of the stockholders, the directors of a corporation are required by statute (Corporation Law, § 47 [Laws 1896, p. 293] as amended by Laws 1901, p. 246), Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905. To declare annually a dividend of its accumulated profits above a certain reserve.

90. Smith v. Dana, 77 Conn. 543, 60 A. 117, citing Gibbons v. Mahon, 136 U. S. 549, 34 Law. Ed. 525; Knopp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008. Profits may be distributed as earned. They may be, in whole or in part, retained and utilized for the corporate advantage. They may be used for a time and later distributed, or they may be permanently used in the business. Smith v. Dana, 77 Conn. 543, 60 A. 117. Directors are not required to declare dividends on common, as well as preferred stock, even though there are profits enough, when it is not for the interest of the corporation to do so, although such profits may otherwise be absorbed in future dividends on preferred stock. Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905. A resolution of the directors of a bank to pay the taxes on the bank stock, held to be a declaration of a tax dividend, payable equally to all the stockholders. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796.

The power of the directors to declare dividends is not absolute and a court of equity will intervene on behalf of a stockholder who may complain, in case of abuse. Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905, citing Laurel Springs Land Co. v. Fougeray, 50 N. J. Eq. 756, 759, 760; Fougeray v. Cord, 50 N. J. Eq. 185, 197; Griffing v. Griffing Iron Co., 61 N. J. Eq. 269,

The stockholder has no title to the surplus earnings of the company, until his share is segregated by the board of directors,[91] but when a dividend has been declared, a debt at once becomes due from the corporation to each stockholder, recoverable by each in a separate action at law.[92] As a general rule, as between life tenants of corporate stock held in trust and remaindermen, a cash dividend is regarded as income and a stock dividend as capital.[93]

Right to inspect the books and papers of the corporation.[94]—A stockholder has a right to inspect the books of the corporation,[95] enforceable by mandamus,[96] which should not be granted for speculative purposes, but only to protect the in-

271; 2 Cook, Corp. [4th Ed.] § 545; Knopp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008. A stockholder, however, cannot compel the declaration of a dividend, by suit in equity, where it does not appear that he has made application therefor to the directors, or that such application would not be considered (Maeder v. Buffalo Bill's Wild West Co., 132 F. 280), and his right to invoke the aid of equity may be waived by acquiescence. Where a corporation adopted a by-law unanimously, giving the board of directors power to declare or withhold dividends, and the board, under such by-law, for a series of years used the profits for expanding the business, there was a waiver by the stockholders to invoke the aid of equity to compel the declaration of a dividend, especially in the absence of any showing that the expansion policy adopted by the directors was unreasonable. Raynolds v. Diamond Mills Paper Co. [N. J. Eq.] 60 A. 941. After a reduction of stock, assented to by plaintiff, held that she was entitled to dividends on the amount of stock held, but not on the amount of the reduction, for the time prior to the reduction, during which no dividends had been paid. Roberts v. Roberts-Wicks Co., 102 App. Div. 118, 92 N. Y. S. 387.

91. The law upon this subject is well and clearly stated in Wheeler v. Northwestern Sleigh Co., 39 F. 347. Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008. Until a dividend is declared, the entire assets of a corporation including accumulated profits, belong to the corporation, and the corporation owes no debt in respect thereto to the stockholders as individuals. 2 Cook, Corp. § 534. Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905

92. Stevens v. United States Steel Corp. [N. J. Eq.] 59 A. 905. But such indebtedness does not pass with the assignment of the stock. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796. A division of profits without the formality of declaring a dividend is the equivalent of declaring a dividend. Hartley v. Pioneer Ironworks, 181 N. Y. 73, 73 N. E. 576. Dividends payable at the pleasure of the corporation are payable within a reasonable time, and, some having been paid, all are payable. Billingham v. Gleason Mfg. Co., 101 App. Div. 476, 91 N. Y. S. 1046. Dividends, until paid, are held in trust for the stockholders and a demand is essential as a condition precedent to bringing suit, unless the corporation has refused to pay the dividend. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796.

93. The fact that undistributed profits or surplus have been invested in permanent work, improvements or extensions, does not render a cash dividend paid out of the proceeds of the sale of such improvements capital, instead of income. Smith v. Dana, 77 Conn. 543, 60 A. 117. The withdrawal of a corporation from certain incidental branches of business and the conversion of its investments therein into cash, which was distributed as a dividend, its capital remaining unchanged, is not a partial liquidation, so as to render such dividend capital rather than income, as between life tenants and remaindermen. Id.

94. See special article, post, p. 834, including cases to date of this topic.

95. Neubert v. Armstrong Water Co. [Pa.] 61 A. 123; Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232. The right of inspection of the general business books of a corporation by a stockholder is a common-law right. People v. Keeseville, etc., R. Co., 94 N. Y. S. 555. Stockholders have an absolute right to an inspection of the stockbook of the corporation, regardless of their motives in seeking such inspection, under § 29, Stock Corporation Law (Laws 1890, p. 1071, c. 564, as amended by Laws 1900, p. 218, c. 128, and Laws 1901, p. 965, c. 354). An important meeting having been called, relator had a right to inspect the stockbook to learn who were stockholders and entitled to vote. Id. A member of an incorporation political club has a right to inspect the list of members, when desired to promote the objects for which the club was organized. McClintock v. Young Republicans of Philadelphia, 210 Pa. 115, 59 A. 691. Where the shareholder himself was competent to conduct the examination, the court declined to order it done by a certified public accountant. Garcin v. Trenton Rubber Mfg. Co. [N. J. Law] 60 A. 1098

96. Maeder v. Buffalo Bill's Wild West Co., 132 F. 280; Garcin v. Trenton Rubber Mfg. Co. [N. J. Law] 60 A 1098; People v. Keeseville, etc., R. Co., 94 N. Y. S. 555; McClintock v. Young Republicans of Philadelpria, 210 Pa. 115, 59 A. 691; Neubert v. Armstrong Water Co. [Pa.] 61 A. 123. A director, being responsible to the stockholders for the faithful execution of his trust and alleging that the president and the other director were wasting the corporate assets, is entitled to a peremptory mandamus to enforce an examination of the books. The length of time allowed for the examination will be fixed by the court, subject to extension, if necessary, on application. People v. Columbia Paper Bag Co., 92 N. Y. S. 1084.

terests of the stockholder.[97] He cannot maintain a suit in equity to require the corporation to bring its books into the state, merely that he may have access to them.[98] The granting and the refusal of the right of inspection rests in the sound discretion of the court; and will not be ordered, unless the application therefor is made in good faith, and not for the purpose of injuring or annoying the corporation, and to learn something which the stockholder has a right to know for his protection.[99] The state in which a corporation is organized has alone authority to compel inspection of the books by a stockholder.[1] On an application to a Federal court for a mandamus, by a shareholder in a national bank, to compel the inspection by him of the list of shareholders, it must appear that the matter in dispute exceeds the value of $2,000, to confer jurisdiction.[2]

Remedies for injuries to stockholders or to the corporation.[3]—Courts of equity are prompt to redress the injuries of minority stockholders against the wrongdoing of majorities.[4] They are bound to seek relief through the corporation at a meeting of its shareholders or by application to those in charge of affairs;[5] but if relief cannot be had by either of these means, then they themselves can come into equity seeking it.[6] An action brought by a stockholder for relief from fraudulent transactions of its directors or officers is really an action by the corporation to redress a corporate wrong.[7] Where the officers and directors of one corporation are domi-

97. A stockholder induced by fraudulent representations to transfer valuable property to the corporation may compel inspection of the records to ascertain the condition of the corporation's affairs and the truth or falsity of the representations. State v. Pan-American Co. [Del. Super.] 61 A. 398.

98. Section 44 of the general corporation act of New Jersey (P. L. 1896, p. 292), providing for a summary order by the court of chancery for the production of books, applies only where the books are required for some judicial purpose. Maeder v. Buffalo Bill's Wild West Co., 132 F. 280.

99. People v. Keeseville, etc., R. Co., 94 N. Y. S. 555.

1. Motion for mandamus denied by a court of the state of New York, in the case of a New Jersey corporation. Mitchell v. Northern Security Oil & Transportation Co., 44 Misc. 514, 90 N. Y. S. 60.

2. Large v. Consolidated Nat. Bank, 137 F. 168.

3. See 3 C. L. 904.

4. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070. It is too late for interference by injunction, after directors, having power to sell, have consummated a sale of corporate stock. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846. Under the Code of Washington, barring an action for fraud in three years, a stockholders' action for relief against a fraudulent reorganization scheme, involving the sacrifice of mortgaged property on foreclosure, was held barred where the plaintiff had knowledge of the transaction. Ballinger's Ann. Codes & St. § 4800. Griffith v. Seattle Consol. St. R. Co., 36 Wash. 627, 79 P. 314.

5. But where the acts of one controlling a majority of the stock constituted a wrong toward the corporation, it was not necessary for a stockholder to apply at a stockholders' meeting for action to redress the wrongs, before commencing action for the appointment of a receiver. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198.

6. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

7. In order to obtain equitable relief in such cases, the corporation must do equity. Mosher v. Sinnott [Colo. App.] 79 P. 742. Where the entire capital stock was transferred to the directors, in purchase of patent rights at a price below par, in violation of law, an action to compel the directors to transfer the stock, at the instance of a minority stockholder who purchased a portion retransferred to be sold to raise a working capital, could not be maintained without offering to rescind the sale and reconvey the patent rights. Insurance Press v. Montauk Fire Detecting Wire Co., 103 App. Div. 472, 93 N. Y. S. 134. Where a corporation brought suit against an officer to compel him to convey to the corporation property purchased in his name with its funds, and he, having secured a controlling interest in the corporation, took steps to dismiss the suit, it was necessary for an intervening stockholder, seeking to prevent the dismissal of the suit, to show that the dismissal would result in loss or detriment to the corporation, or that some fraud was being perpetrated upon its rights. Intervener's complaint dismissed for insufficient showing of cause. Ainsworth v. Evans [Ariz.] 80 P. 344. Where stock has been issued in good faith and by unanimous consent of the stockholders, in payment for leases transferred to the corporation, the remedy of a subsequent stockholder, who has been misled by false representations of some of the stockholders, is personal to himself, and not in the name and for the benefit of the corporation. Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 P. 838.

nated by another, contracts between two will be set aside when they are not fair and reasonable.[8]

Stockholders suing for corporation.[9]—Stockholders may bring suit to enforce the rights of the corporation,[10] but the action must be predicated upon a demand

8. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371. Where directors common to two corporations enter into a contract between the two for the purpose of defrauding one of them for the benefit of the other, stockholders of the one sought to be defrauded have a common-law right of action to have the contract declared void. Jacobs v. Mexican Sugar Refining Co., 93 N. Y. S. 776. A contract between two corporations made by the directors, several of whom are common to both, and ratified by a majority of the stockholders of each corporation, will not be set aside at the suit of minority stockholders, in the absence of any showing of fraud. Continental Ins. Co. v. New York & H. R. Co., 103 App. Div. 282, 93 N. Y. S. 27. Minority stockholder held entitled to recover in equity, for the benefit of the corporation, a majority of its stocks, fraudulently obtained by financing contracts and transactions carried through the votes of dummy directors of both contracting corporations. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. A complaint setting forth that several distinct corporations, owning a majority of the stock of another company, have conspired to deprive plaintiff of his stock in the latter, and denied him an accounting, while proposing to conduct the business so as to deprive him of all benefits therefrom, states a cause of action for equitable relief. Anderson v. W. J. Dyer & Bro. [Minn.] 101 N. W. 1061.

9. See 3 C. L. 905.

10. Ownership of stock is an essential requirement to maintain a bill on behalf of the corporate interests. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. A minority stockholder who files a bill against the officers of a corporation for official misconduct in wrongfully appropriating its assets must show their failure to perform their duty, thus causing a breach of trust. Von Arnin v. American Tubeworks [Mass.] 74 N. E. 680. Complaint held not to show a cause of action on which plaintiff, a stockholder, could sue in his individual capacity. O'Connor v. Virginia Passenger & Power Co., 45 Misc. 228, 92 N. Y. S. 161.

Grounds of action, where contracts with a corporation have been fraudulently rescinded by the board of directors. Donald v. Manufacturers' Export Co. [Ala.] 38 So. 841. A breach of official duty on the part of directors is a fraud in law and entitles stockholders to relief, though fraud in fact is not shown. Coombs v. Barker [Mont.] 79 P. 1. Where the directors, in abuse of their trust, have paid unreasonable salaries to themselves as officers. Donald v. Manufacturers' Export Co. [Ala.] 38 So. 841. Use of corporate assets for alleged ultra vires business, affecting the interests of all the stockholders. Subject to the limitations of Equity Rule 94; although primarily the cause of action is in the corporation. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882. To prevent the destruction of a valuable asset by the fraudulent attempt to cancel a lease. Being an action in behalf of stockholders and not in behalf of the corporation, it is not such an action as is prohibited by § 1780 of the Code of Civil Procedure. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 180, 91 N. Y. S. 902. To enjoin violation of the corporate franchise. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776, citing Dodge v. Woolsey, 18 How. [U. S.] 331, 15 Law. Ed. 401; 5 Rose's Notes, U. S. Reports, 587. In case of loss of corporate funds resulting from the misconduct of the directors. The complaint, in such an action, must allege the cause of action and the refusal of the corporation to sue; and the corporation must be made a defendant. Kavanaugh v. Com. Trust Co., 181 N. Y. 121, 73 N. E. 562. Against the directors, who, by fraudulent management and conduct of affairs, depreciate, intentionally and wrongfully, the value of the stockholders' interest therein, and in effect deprive them of their property. Glover v. Manila Gold Min. & Mill. Co. [S. D.] 104 N. W. 261. A member of a benevolent society has an interest in its funds, and is entitled to the portection of the by-laws, and may maintain a bill to enjoin a violation thereof. Flaherty v. Portland Longshorsemen's Benev. Soc., 99 Me. 253, 59 A. 58. To set aside a decree of foreclosure, obtained by collusion between the corporation's president and the mortgagee. Whitney v. Hazzard [S. D.] 101 N. W. 346. In case of the unauthorized levy of an assessment, without the observance of the necessary formalities, and the threatened sale of stock as delinquent. McConnell v. Combination Min. & Mill Co. [Mont.] 79 P. 248. For the fraudulent diversion and misappropriation of funds, although the corporation is necessarily made defendant in such action, yet the action is in realty in behalf of the corporation. McConnell v. Combination Min. & Mill Co. [Mont.] 76 P. 194. To set aside an election of directors, who are personally ineligible. Under P. L. 1896, p. 291, § 42. In re Jersey City Paper Co. [N. J. Law] 59 A. 565. An election of directors will not be set aside on appication of a small minority of apparently defeated candidates, for mere irregularities, when no stockholder has been deprived of his vote or any substantial right, and there is no allegation of injury resulting to anyone from the irregularities protested against. Bartlett v. Fourton [La.] 38 So. 882. Where the directors of a creditor corporation were not only elected by the votes of the stockholders of a debtor corporation, but were also employes or officers of the latter, disqualifying them from properly acting for their company in the prosecution of a claim against the other. Louisville Bridge Co. v. Dodd [Ky.] 85 S. W. 683.

and refusal,[11] or unreasonable neglect [12] on the part of the proper officers to act, unless the circumstances are such that any application to them would be an idle ceremony.[13] In such actions the relief sought is for the benefit of all like interests,[14] and the money recovered goes to the corporation and not to the individual complainants.[15]

The corporation must be made a defendant in an action by stockholders for misappropriation or fraudulent diversion of its funds by its officers or directors;[16] also in a stockholders' suit for an accounting for moneys alleged to have been received and disbursed by defendant as president of a corporation, since any judgment against defendant must be rendered in favor of the corporation, and judgment cannot be rendered in favor of one not party to the action;[17] and in such an action against the corporation and some of its officers and stockholders, certain stockholders who took part in the alleged wrongful acts are proper parties defendant, although no specific relief is asked against them.[18]

Complaining stockholders must show that they have been diligent in seeking redress;[19] but they are not guilty of such laches as to lose their right of action,

11. Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; Whitney v. Hazzard [S. D.] 101 N. W. 346; Donald v. Manufacturers' Export Co. [Ala.] 38 So. 841; Van Arnin v. American Tubeworks [Mass.] 74 N. E. 680; Bowne v. Smith, 45 Misc. 575, 90 N. Y. S. 204. It is only under exceptional circumstances that a stockholder can maintain such an action; he must have exhausted all the means within his reach to obtain redress within the corporation. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198. Even where the officers' acts are ultra vires or otherwise illegal, a complaining stockholder must first seek his remedy with the corporation. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198, citing Dunphy v. Traveller Newspaper Association, 146 Mass. 495. A complaint by a stockholder on behalf of a corporation is demurrable, when it does not allege a request by plaintiff of the corporation to sue and the refusal of such request. O'Connor v. Virginia Passenger & Power Co., 45 Misc. 228, 92 N. Y. S. 161; Kavanaugh v. Commonwealth Trust Co., 45 Misc. 295, 92 N. Y. S. 233.

12. Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; Kavanaugh v. Wetmore, 92 N. Y. S. 543.

13. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 295, 92 N. Y. S. 233; McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070; Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198. Demand on the officials of a corporation to bring suit for fraud of officers and directors is not a condition precedent to an action by the minority stockholders. It would be idle to require plaintiffs to demand that the officers bring suit against themselves. McConnell v. Combination Min. & Mill Co. [Mont.] 76 P. 194. Where the stockholder relies upon the fact that a demand upon the board of directors would have been in vain if made, he must set forth the facts upon which his conclusion is based. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371. A demand and refusal were unnecessary in the following cases: Where a majority of the directors were themselves guilty of misconduct and fraud. Bowne v. Smith, 44 Misc. 575, 90 N. Y. S. 204. Or were the partisans of the wrongdoer. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371. Where the corporation management was under the control of the guilty parties. Kern v. Arbeiter Unterstuelzungs Verein [Mich.] 102 N. W. 746; Von Arnim v. American Tubeworks [Mass.] 74 N. E. 680. Where, had such request been made it would have been refused, or, if granted, the litigation would necessarily be subject to the control of the parties opposed to its success. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371; Barry v. Moeller [N. J. Eq.] 59 A. 97. In an action by a stockholder to compel a fraudulent trustee to account, and for the appointment of a receiver. Chanler Mortgage Co. v. Loring, 113 Ill. App. 423. Where the directors, who own a majority of the stock, issued to them without payment, are mismanaging affairs and diverting its funds and income to themseves. It is manifest that a demand under such circumstances would be unavailing. Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 F. 710. It is unnecessary for the complaining stockholders to allege any demand made upon the receiver of a corporation, in an action brought to call officers to account for misconduct in managing the affairs of a corporation, where he is one of the parties charged with misconduct. Weslosky v. Quarterman [Ga.] 51 S. E. 426.

14. Consumers' Gas Trust Co. v. Quinby [C. C. A.] 137 F. 882.

15. Barry v. Moeller [N. J. Eq.] 59 A. 97.

16. Kavanaugh v. Com. Trust Co., 181 N. Y. 121, 73 N. E. 562; McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

17. Peck v. Peck [Colo.] 80 P. 1063.

18. The bill prayed the refunding of unauthorized salaries drawn, the refunding of an unlawful dividend, the setting aside of irregular acts, and the winding up of the affairs of the corporation. Stone v. Pontiac, O. & N. R. Co. [Mich.] 102 N. W. 752.

19. Von Arnim v. American Tubeworks [Mass.] 74 N. E. 680, citing Hawes v. Contra

where they begin it as soon as they obtain the evidence of the fraudulent transaction.[20] Stockholders may in many cases be estopped from complaining, by express assent or tacit consent, to a corporate act,[21] even though it may be an ultra vires transaction;[22] but minority stockholders, who neither took part in, nor sanctioned the proceedings, are not bound thereby.[23]

Costs and allowances.[24]—After minority stockholders, suing in behalf of the corporation, have established the corporation's cause of action and the inability or unwillingness of the directors to sue, they are entitled to charge the necessary expenses and counsel fees to the corporation.[25]

Receivers and injunctions.[26]—At the suit of a stockholder to compel a fraudulent trustee to account, a court of equity, if necessary to the preservation of property for the benefit of the parties entitled thereto, will appoint a receiver;[27] and where the majority stockholders, as directors, are clearly violating the charter rights of the minority by diverting all the profits to themselves, either directly or indirectly, a court of equity will appoint a receiver although the corporation is solvent.[28] But where, in a suit against a corporation and its directors, it was shown that the business was not confined to the execution of contracts which had been fraudulently rescinded by the directors, nor that the directors had any adverse interest in the other business, nor that there was any mismanagement of the corporation in relation thereto, equity could not appoint a receiver.[29]

Contribution between stockholders.[30]—The right of a stockholder to compel contribution from his fellow stockholders is not conditioned on the insolvency of the corporation.[31] In an action by a stockholder to compel contribution for the payment of a corporate debt, the corporation is not a necessary party.[32]

(§ 14) *E. Transfer of shares.*[33]—Contracts for the purchase and sale of stocks between individuals are governed by the same rules as other contracts,[34] and

Costa Water Co., 104 U. S. 450, 26 Law. Ed. 827.

20. Whitney v. Hazzard [S. D.] 101 N. W. 346.

21. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. A stockholder suing to prevent the delivery of a lease executed by defendant to another corporation, having sold his right to subscribe for stock, the value of which depended upon the validity of the lease, held estopped to object to its validity. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714.

22. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167.

23. McConnell v. Combination Min. & Mill Co. [Mont.] 76 P. 194; Id. [Mont.] 79 P. 248.

24. See 3 C. L. 908.

25. Such counsel fees may be fixed by the court as an incident of the litigation, and to that end the court may hear evidence or may refer the matter to a commission to take evidence and report. Louisville Bridge Co. v. Dodd [Ky.] 85 S. W. 683.

26. See 3 C. L. 908.

27. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423.

28. On the ground that there is no complete, prompt and effective remedy at law. Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 F. 710.

29. Donald v. Manufacturers' Export Co. [Ala.] 38 So. 841.

30. See 3 C. L. 909.

31. Payment of a corporate note by one stockholder entitles him to contribution from the others. Hart v. Sickles, 45 Misc. 174, 91 N. Y. S. 897.

32. Hart v. Sickles, 45 Misc. 174, 91 N. Y. S. 897.

33. See 3 C. L. 909.

34. Contract declared on, held to be an agreement to buy stock in a commercial enterprise and not a mere option to buy. Edwards v. Capps [Ga.] 50 S. E. 943. Contract held to be an absolute purchase and sale of stocks. Northern Securities Co. v. Harriman [C. C. A.] 134 F. 331. Contract of purchase of stock, with agreement not to sell it without first giving vendor ample opportunity to purchase the same, held not void for indefiniteness and not unilateral. Cothran v. Witham [Ga.] 51 S. E. 285. Evidence held to warrant a finding that plaintiff was entitled to receive from defendant certain shares of stock in another company, in addition to his proportion of stock in one of the mining companies in controversy. Eno v. Sanders [Wash.] 81 P. 696. Plaintiff sold defendant corporate stock and the latter agreed to pay the corporate debts and did, and he also agreed, but failed, to change the corporate name. Held, that plaintiff could not rescind the sale, because of such failure, and recover the stock, without returning the price paid. Donovan v. McDermott, 108 Mo. App. 533, 84 S. W. 153. Optional contract for purchase and sale of stocks held not to have been rescinded in accordance with its terms. Guss v. Nelson,

are not to be strained for the purpose of bringing them within a criminal statute prohibiting gambling contracts in stock.[35] Title to certificates of stock passes by mere delivery, without the necessity of notice to the company,[36] and the assignment and delivery of the certificates constitute a symbolical delivery of the shares represented,[37] though a certificate is not necessary.[38]

Mode of transferring shares, registration, new certificates.[39]—Shares of stock are personal property, and, subject to statutory provisions, are transferable as such in the manner provided by the by-laws of the company.[40] Unless otherwise provided by statute or by-law,[41] a transfer may be good between parties without registration on the corporate books;[42] the law requiring the keeping of transfer books

14 Okl. 296, 78 P. 170. Antecedent indebtedness is a sufficient consideration for the transfer of stock. H. transferred stock to B. in compliance with a judgment therefor; B. transferred part of it to her attorney in compensation for services and the latter transferred it in payment of indebtedness, to defendant. Then the judgment was reversed. Held, that defendant was entitled to rely on the unreversed judgment and was a bona fide purchaser, entitled to hold the stocks. Thaxter v. Thain, 100 App. Div. 488, 91 N. Y. S. 729.

35. A contract to repurchase stock transferred in the purchase of other property, at a future time, at the option of the transferees, held not to be a gambling contract, under a statute prohibiting option contracts for the sale of stock for future delivery. 1 Starr & C. Ann. St. 1896, p. 1295, c. 38, par. 253. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. An agreement to pay at least $50 per share for four hundred shares of stock of a corporation, at the expiration of five years from date, is not a gambling contract within the meaning of the criminal code of Illinois, although the vendor reserves the option to retain his proportion of said four hundred shares. Hurd's Rev. St. 1903, p. 640. Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874.

36. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. But mere physical delivery of certificates of stock, indorsed by a blank power of attorney to transfer them, signed by the party to whom they were issued, will not pass title, even if value is paid, when the purchaser knows that the party assuming to dispose of them has not the right to do so. New Jersey Trust & Safe Deposit Co. v. Bodine [N. J. Eq.] 60 A. 387.

37. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. Evidence held not to show a joint ownership of stock between the party holding the certificates and another who assumed to act as his agent in the purchase. Leigh v. Laughlin, 211 Ill. 192, 71 N. E. 881.

38. The beneficial interest in them may be assigned by parol, the ownership passing by force of the contract of sale, as in the case of other choses in action. A sale of shares for which no certificate has been issued may be evidenced by an informal written instrument, which will entitle the vendee to have the shares transferred on the books of the company. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. It is not essential to a valid sale of stock that the certificates be delivered simultaneously with payment. In case of sale without specific requirement of immediate delivery of certificates, the buyer cannot defeat his liability for the price, by a revocation prior to a tender of the certificates, if made within a reasonable time. Mason v. Lievre, 145 Cal. 514, 78 P. 1040.

39. See 3 C. L. 910.

40. 1 Mills' Ann. St. § 480. Talcott v. Mastin [Colo. App.] 79 P. 973.

41. In Colorado, no transfer of stock is valid unless entered on the stock book of the company, within sixty days from the date of the transfer, by an entry showing to and from whom conveyed. 1 Mills' Ann. St. § 508. Talcott v. Mastin [Colo. App.] 79 P. 973, citing Conway v. John, 14 Colo. 30; Isbell v. Graybill, 19 Colo. App. 508, 76 P. 550. And in the absence of an entry of transfer of stock on the books, as provided by statute, the transferee must show, as against execution creditors of the transferor, that he has done all in his power to comply with the statute. Held, that plaintiff had not done all in his power to effect a transfer on the books. Isbell v. Graybill, 19 Colo. App. 508, 76 P. 550. Ownership simply of a certificate of stock does not constitute the owner a stockholder. There must be a transfer of the stock to him on the books. Boone v. Van Gorder [Ind.] 74 N. E. 4. A by-law providing that stock should be transferred only on the books, passed in pursuance of a statute declaring stocks personal property, and providing for their transfer in the manner prescribed by by-law, does not prevent the acquisition of title by assignment without transfer on the books. Rev. St. 1899, § 965. Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260. Where shares of stock were transferred in payment of a wager and no action was brought to recover the same, within the time limited by Rev. St. 1899, § 3432, the transferee, notwithstanding the illegality of the transaction, could maintain an action to compel a transfer on the books. Id. Under a statute providing that no transfer of stock shall be valid as against a creditor, until a certificate thereof shall have been deposited with the county clerk, a creditor will prevail over unregistered transfers, even when he has actual knowledge thereof. Sending a certificate of transfer of stock to the circuit clerk for record, in a county where the officers of circuit and county clerk are separate, is ineffectual to protect the transferee under this act. Scott v. Houpt [Ark.] 83 S. W. 1057.

42. The transferee by assignment and delivery to secure a valid debt has power to make transfer upon the books of the cor-

of stock, being intended for the protection and convenience of the corporation and shareholders,[43] and to give the company notice of who its stockholders are.[44] Ordinarily the officers of the company, in conducting the elections or distributing dividends, will not look behind the books to ascertain who are the real owners of the stock.[45] In the absence of equities between the corporation and the stockholder, the purchaser is entitled to registration and transfer.[46] When corporate stock is so far subject to the control of the corporation that its formal transfer cannot be perfected without the action of the corporation, garnishment process may be effectually served upon the corporation at its domicile.[47]

Courts should not order the issuance of a duplicate certificate, while the original is outstanding, without requiring an indemnity bond, unless it is reasonably certain that the original will not reappear in the hands of a bona fide holder.[48]

Pledge or mortgage of shares.[49]—The pledgee of stock takes only a special property in it, the general property remaining in the pledgor;[50] and the pledgee cannot foreclose and cut off the owner's rights by a mere notice to pay within a certain time.[51] The requirement of a record of transfers of stock with the county clerk does not apply to transfers by way of pledge,[52] and when a pledgee gives notice of the pledge, the corporation must respect his rights, though the transfer

poration. U. S. 3689. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. A party to whom a certificate of stock is delivered for a valuable consideration acquires, as between himself and the other party, a mere equitable right to have the legal right transferred to her on the books, subject to any paramount rights of the corporation and third parties. Boone v. Van Gorder [Ind.] 74 N. E. 4. The equitable owner of a stock certificate is not entitled to enjoin a levy and sale of the stock on execution by attaching creditors of the registered owner. Under Burns' Ann. St. 1901, § 735, the purchaser acquires only the title of the registered owner, subject to any valid title of an equitable owner, of which the purchaser has notice at the time of the sale. Id. An unregistered transfer of stock, for which no certificate has been issued, made for a valuable consideration and without fraud, vests a title superior to the claims of a subsequent attaching creditor of the transferror. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392. Where the purchaser of stock, under order of court, presented it for transfer, but was met with a refusal and a denial of his rights as a stockholder, he was entitled to attend a stockholders' meeting, although his stock was not transferred on the books, as provided by law. Comp. Laws § 7052. Noller v. Wright [Mich.] 101 N. W. 553.

43. Section 21, ch. 53, Code of 1899, so interpreted. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

44. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685. Any one having actual notice of the transaction stands in no better relation to it than one would, had it been completed of record. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

45. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685. The "stock and transfer book," required by law to be kept, is the criterion for determining the amount of stock held by any person, and for which he is entitled to cast a vote. Civ. Code, §§ 378, 312. But, in the absence of evidence from the stock and transfer book, the testimony of a stockholder as to the number of shares held by him will prevail over the unsupported recital of the secretary in his minutes of the meeting. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 P. 889.

46. The requirement by by-law of the payment of all indebtedness to the corporation, as a condition precedent to transfer of stock, does not authorize the refusal of the registration of a transfer reported before the owner became so indebted. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Without the production and surrender of the original certificates, or a showing of their loss or destruction, the secretary is justified in refusing to make an entry of transfer of stock. Under Mill's Ann. St. § 508. A mere order from the holder of the stock, reciting a sale of the same, is not sufficient. Isbell v. Graybill, 19 Colo. App. 508, 76 P. 550. Where the by-laws or a statute requires the transfer of stock to be made on the books the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock. Herrick v. Humphrey Hardware Co. [Neb.] 103 N. W. 685.

47. Cord v. Newlin [N. J. Law] 59 A. 22.

48. State v. New Orleans Cotton Exch. [La.] 38 So. 204.

49. See 3 C. L. 911.

50. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. The pledgee of stock, indorsed in blank with power of attorney to transfer on the books of the bank, should collect the dividends and account to the pledgor; but the assignee of the pledgee is not liable to the pledgor for the dividends collected by the pledgee after the assignment. Maxwell v. National Bank of Greenville [S. C.] 50 S. E. 195.

51. Groeltz v. Cole [Iowa] 103 N. W. 977.

52. Under Kirby's Dig. §§ 848, 849. Hud-

was not registered on its books.[53] In an action to foreclose a lien on stock, the corporation must be made a party.[54]

§ 15. *Management of corporations. A. Control of corporation by the stockholders or members. Power of the majority.*[55]—The stockholders do not own the corporate property; the corporation owns it, but, in a broad sense, the stockholders own the corporation,[56] and they are, therefore, the equitable owners of the corporate property,[57] or the actual and beneficial owners,[58] being, in a sense, partners, and holding a joint interest in the property of the company.[59]

Corporations are governed by the republican principle that the whole are bound by the acts of the majority.[60] The minority stockholders have no right, vested or otherwise, which is infringed by the action of the majority in amending the corporate by-laws in the manner provided therefor.[61]

(§ 15) *B. Dealings between a corporation and its stockholders,*[62]—A mere stockholder, unlike a director, is under no duty to serve his corporation, and he may deal with it or with its debts or property as any stranger.[63] Stockholders or directors may lawfully loan money to the corporation, and they may be lawfully preferred, by the transfer of enough of the corporate property to secure or pay them.[64]

A corporation, as an artificial entity, owes no fiduciary obligations to its shareholders, except to protect their legal title to shares owned by them by giving proper attention to transfers and reissues of shares.[65] And a corporation is not precluded from recovering for a fraud on it, because the party committing the fraud is a stockholder.[66] If a stockholder gives his note to the corporation in pay-

son v. Bank of Pine Bluff [Ark.] 87 S. W. 1177.

53. Notice by mail sufficient to put defendant on inquiry. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

54. Held, that the corporation was sufficiently made a party by the complaint. Hudson v. Bank of Pine Bluff [Ark.] 87 S. W. 1177.

55. See 3 C. L. 912. See ante, § 14d, rights of minority.

56. Sweetser v. Chandler, 98 Me. 145, 56 A. 584.

57. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109.

58. O'Connor v. International Silver Co. [N. J. Eq.] 59 A. 321. The business of a corporation is conducted primarily in the interest of the stockholders. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252.

59. Hubbard v. International Mercantile Agency [N. J. Eq.] 59 A. 24.

60. Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874. But the legislature may provide for cumulative voting, thereby securing minority representation on the board of directors of a private corporation, without interfering with any vested right of the majority to elect the members of the board. Renn v. United States Cement Co. [Ind. App.] 73 N. E. 269, citing Maynard v. Looker, 111 Mich. 498, 56 L. R. A. 947; Mower v. Staples, 32 Minn. 284. It is the public policy of the state that a majority of the shareholders should, through their directors, from year to year, control the management and policy of the corporation; and not that such majority, or even all the shareholders, should have the power, at any time, by a contract among themselves, for their advantage, to fix the status of the corporation for years to come. A provision in a contract by which the holders of the controlling interest in a corporation agree to elect certain stockholders as officers, for a certain period at a specified salary, held contrary to public policy and void. Bensinger v. Kantzler, 112 Ill. App. 293.

61. Renn v. United States Cement Co. [Ind. App.] 73 N. E. 269.

62. See 3 C. L. 912.

63. Bramblet v. Commonwealth Land & Lumber Co. [Ky.] 83 S. W. 599. A stockholder who buys, at a discount, a judgment against a corporation, part of which is founded on its indebtedness to the president, and does so at the instigation of the president on an agreement to share in the profits, can enforce that part of the judgment which is based on the president's indebtedness, but as to the rest is entitled only to reimbursement for his expenditures. Bramblet v. Commonwealth Land & Lumber Co. [Ky.] 84 S. W. 545.

64. Pitman v. Chicago-Joplin Lead & Zinc Co. [Mo. App.] 87 S. W. 10. The bona fides of the transaction is to be determined by the conditions existing and affecting the value of the property transferred. Evidence held to show bona fides. Heidbreder v. Superior Ice & Cold Storage Co., 184 Mo. 446, 83 S. W. 466.

65. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

66. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

ment of his stock, it is a debt due the corporation, which, until paid, is an asset.[67] It is not within the duty or power of a corporation to prevent a shareholder from selling his stock for any price he can obtain, and any rights of action accruing to the purchaser from representations made in so doing in no manner redound to the corporation.[68]

(§ 15) *C. By-laws.*[69]—By-laws are simply the rules of corporate government.[70] They are not in the nature of legislative enactments, so far as third parties are concerned, and are not usually intended for strangers, who do not subject themselves to their influence;[71] but they become upon adoption, written into the charter, and all persons who deal with the corporation are bound to take notice of the powers and duties of its officers as set forth therein,[72] and one who becomes a member of an association becomes chargeable with knowledge of the provisions of its charter and by-laws, and is bound by them.[73] While by-laws aid in the orderly transaction of corporate business, they also serve sometimes to protect the corporation itself, or minority members against ill-advised or illegal acts of the majority.[74]

By-laws may be adopted without the use of the corporate seal and without any entry in writing, as their existence may be established by custom or acquiescence in a course of conduct by those authorized to enact them and those dealing with it; if informally adopted, they may be subsequently ratified;[75] and they may be modified, limited or abrogated by the corporation.[76] They may be modified by unanimous consent of the stockholders to a regular course of action inconsistent therewith.[77]

A corporation has no power to adopt by-laws inconsistent with the laws of the state[78] or with its charter,[79] and the by-laws, rules and regulations of a member-

67. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846.

68. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

69. See 3 C. L. 912.

70. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58; Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735; Renn v. United States Cement Co. [Ind. App.] 73 N. E. 269; Indiana Trust Co. v. International Bldg. & Loan Ass'n [Ind. App.] 74 N. E. 633.

71. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735.

72. Loucheim v. Somerset Bldg. & Loan Ass'n, 25 Pa. Super. Ct. 325.

73. A shareholder in a building and loan association is so charged. People's Bldg. & Loan Ass'n v. Purdy [Colo. App.] 78 P. 465; Louchheim v. Somerset Bldg. & Loan Ass'n, 25 Pa. Super. Ct. 325.

74. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58.

75. Star Loan Ass'n v. Moore, 4 Pen. [Del.] 308, 55 A. 946.

76. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58. General power to make changes in the constitution and by-laws of a mutual benefit association will not authorize amendments that materially impair prior insurance contracts or change the scheme of insurance, for the constitutions of the general association and of the constituent local societies, as well as the benefit certificates, form part of the insurance contract of a mutual benefit association. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746.

77. Where the act of incorporation was silent as to the number of directors, but a by-law provided for five, and the corporation was afterward managed for a series of years by a board of three directors, it was held that the by-law had been changed by unanimous consent. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285.

78. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921. The state and Federal constitutions are "laws," within the meaning of a statute giving mutual benefit associations power to make regulations for their government not contrary to the laws of the United States or the state. Subd. 3, § 1, c. 164, How. Ann. St. By-laws cannot be adopted impairing the obligation of contracts or depriving members of rights without due process of law. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746. Civ. Code, § 301. A by-law providing for no calls for payments on capital stock, without a two-thirds vote of all the stock issued and outstanding, is inconsistent with the right of the directors to make an assessment in liquidation, under Civ. Code, § 331, and § 332, subd. 1. Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 P. 441. The statutory provision that the incorporators shall state the number of the directors who shall manage the affairs of the company "for the first year" has reference to the first only, and does not limit the right of the stockholders thereafter to change the number by a by-law changing the number of directors from seven to three, of a company organized in Indiana, whose statutes require not less than three nor more than eleven

ship corporation must be reasonable and adapted to the purposes of the corporation.[80]

When the power to make by-laws is vested in the stockholders or members and they have adopted them, they cannot be waived by the directors or other officers,[81] nor can a by-law be overridden or abrogated by a simple resolution, in favor of some object which is forbidden by the by-law.[82] But the stockholders may permit the directors or other officers to act in disregard of a by-law;[83] or they may ratify action taken in disregard of a by-law, and in such case there is a waiver of the by-law by the stockholders.[84]

Courts will not interfere with the internal government of either voluntary associations or membership corporations, where the action complained of has been fairly taken, in conformity with the reasonable by-laws and regulations of the association.[85] But no disciplinary action will be valid, unless taken as prescribed by their by-laws and the statutes governing their procedure.[86]

(§ 15) *D. Corporate meetings and elections. Notice.*[87]—Where due notice of a meeting was given the stockholders of a corporation, an individual stockholder is bound by the action of the majority, although he was not represented at the meeting.[88] If no form of notice of special meeting is prescribed, any form or manner of written notice, sufficient to inform the directors of the call and the exact time and place of the meeting is sufficient;[89] and, unless required by statute or by-law, such notice need not state the object or purpose of the meeting.[90]

The action of stockholders, where necessary, must be had at a stockholders' meeting, otherwise it is the act and expression of the individuals only;[91] but a meeting of the members of a membership corporation, not called or held as required by its by-laws, is not a meeting of the corporation, and a suspension of a member at such meeting is invalid.[92] The minutes of a stockholders' meeting, written on a sheet of paper, signed by the secretary and bearing the initials of the

directors. Burns' Gen. St. 1901, § 3425. Renn v. United States Cement Co. [Ind. App.] 73 N. E. 269. Under the laws of New Jersey, the stockholders can, by a majority vote, adopt by-laws regulating the distribution of dividends. Act of 1901. Prior to that amendment, by-laws were adopted unanimously. Raynolds v. Diamond Mills Paper Co. [N. J. Eq.] 60 A. 941. An irrigation company can make and enforce a by-law withholding water from a stockholder who fails to pay his assessments. Curtin v. Arroyo Ditch & Water Co. [Cal.] 81 P. 982.

79. Bank of Montreal v. Waite, 105 Ill. App. 373.

80. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

81. Indiana Trust Co. v. International Bldg. & Loan Ass'n [Ind. App.] 74 N. E. 633.

82. A benevolent society cannot vote to pay a salary to a physician, when the by-laws prohibit such use of its funds. Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58. A by-law which provides that resolutions adopted, at any general or special meeting, for any special purpose, shall be as binding as if embodied in the by-laws, can mean only that they have such effect only when not inconsistent with the by-laws, and do not have the effect of amending or repealing the by-laws. Id.

83. Variance by the secretary and treasurer from the mode prescribed by the by-laws, as to the receipt and paying over of moneys from day to day, and the payment of warrants, held to have been acquiesced in. Indiana Trust Co. v. International Bldg. & Loan Ass'n [Ind. App.] 74 N. E. 633.

84. Indiana Trust Co. v. International Bldg. & Loan Ass'n [Ind. App.] 74 N. E. 633.

85. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921, citing Baxter v. McDonnell, 155 N. Y. 83, 101, 40 L. R. A. 670; Matter of Haebler v. N. Y. Pro. Exch., 149 N. Y. 414, 427; Lewis v. Wilson, 121 N. Y. 284. Such associations will be left to enforce their rules and regulations by such means as they may adopt for their government. Board of Trade of Chicago v. Weare, 105 Ill. App. 289.

86. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921, citing People v. Musical M. P. Union, 118 N. Y. 101.

87. See 3 C. L. 913.

88. Hinds County v. Natchez, J. & C. R. Co. [Miss.] 38 So. 189.

89. Bell v. Standard Quicksilver Co. [Cal.] 81 P. 17.

90. But it must in some way be delivered to the person who is to receive it. Bell v. Standard Quicksilver Co. [Cal.] 81 P. 17.

91. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

92. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

president of the corporation, are competent evidence, where it does not appear that they were ever transcribed in a record book.[93] But minutes of a stockholders' meeting, on separate sheets of paper, pinned to the leaves of a record book, are not sufficient evidence of the proceedings.[94]

Elections.[95]—Where there is no requirement as to a quorum, the stockholders present at a meeting regularly called and held can transact business, and, although less than a majority, may hold a valid election of directors.[96]

(§ 15) *E. The right to vote.*[97]—In the election of directors, unless the charter otherwise provides, the share of stock is the voting unit.[98] Primarily the voting power of corporate stock is the personal privilege of the stockholder, not separable from ownership of the stock, except as sanctioned by legislation.[99] The charter of a business corporation may regulate the voting capacity of its stockholders;[1] and the right to vote may be qualified by statute.[2] Stockholders do not hold a fiduciary relation to each other,[3] but each stockholder represents himself and his own interests only,[4] and their right to vote is in no way affected by their having difference or adverse interests. But under a statute prohibiting a member of a corporate board from voting on a question in which he is personally interested otherwise than as a stockholder, the acts of three of the five members of such a board, in which one was personally interested, are void.[5] In New Jersey, the stock of a corporation belonging to the corporation cannot be voted on,[6] and a person owning stock can sue to prevent such illegal voting of stock.[7] A minority stockholder, in case of doubt as to the right to vote the majority stock, is entitled to an injunction to restrain illegal voting of such stock or the holding of an election until the right to vote the majority stock is settled.[8]

(§ 15) *F. Appointment, election and tenure of officers.*[9]—Failure to elect officers does not terminate the terms of the existing officers of a corporation.[10] A

93. Chott v. Tivoli Amusement Co., 114 Ill. App. 178.

94. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

95. See 3 C. L. 913.

96. Gilchrist v. Collopy, 26 Ky. L. R. 1003, 82 S. W. 1018.

97. See 3 C. L. 913.

98. Lord v. Equitabe Life Assur. Soc., 94 N. Y. S. 65.

99. Since 1841 the statutes of New Jersey have authorized voting by proxy, under certain conditions. Warren v. Pim, 66 N. J. Eq. 353, 59 A. 773. The right to vote corporate stock is prima facie in the person who has the legal title, as shown by the records of the corporation. Blinn v. Riggs, 110 Ill. App. 37. The right of a stockholder to participate in the election of the board of directors is an attribute to his shares of stock, which has been "defined as a right which its owner has in the management, profits and ultimate assets of the corporation." Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65, citing Lamkin v. Palmer, 24 App. Div. 255, 260, afd. 164 N. Y. 201. The right of a stockholder to vote upon his holdings of stock is a property right—"one of the essential rights of ownership." Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65, citing Sullivan v. Parkes, 69 App. Div. 221, 229, 74 N. Y. S. 787.

1. Where such capacity is determined by the number of shares held, coupled with a provision that no individual shall hold more than a certain number, that provision cannot be evaded by holding and voting stock through another person. Bastlett v. Fourton [La.] 38 So. 882.

2. The provision contained in section 3245 that a stockholder shall not vote any share of stock on which an instalment is due and unpaid, refers to the first election of directors as well as subsequent elections. Cincinnati v. Queen City Tel. Co., 2 Ohio N. P. (N. S.) 349.

3. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 P. 889.

4. Blinn v. Riggs, 110 Ill. App. 37.

5. Code 1887, § 1122. Triplett v. Fauver, 103 Va. 123, 48 S. E. 875.

6. Laws 1896, p. 290, c. 185, § 38. Held to include stock acquired by the purchase of all the capital stock of another corporation. O'Connor v. International Silver Co. [N. J. Eq.] 59 A. 321.

7. O'Connor v. International Silver Co. [N. J. Eq.] 59 A. 321.

8. The owner of the majority of the stock vested it by will in his widow and counsel as executors and trustees. By reason of controversy between them the counsel was enjoined from voting the stock. Held, that a minority stockholder was entitled to an injunction to prevent the widow's voting the stock alone and to stop the holding of an election pending the controversy. Villamil v. Hirsch, 138 F. 690.

9. See 3 C. L. 913.

stockholder who was elected director for one year and until his successor was elected, but who never accepted the office and was not re-elected, although he was present at a meeting many years afterward, was never in fact a director.[11]

(§ 15) *G. Salary or other compensation of officers.*[12]—Officers of a corporation are not, as of right, entitled to salaries,[13] nor, however valuable their services may be, can they appropriate corporate funds for such services, unless authorized by the corporation;[14] but where the treasurer of a corporation, at the expiration of his term of office, informed the directors that he could not again serve for the same compensation, and he was re-elected without any determination as to his salary, he could recover what his services were worth.[15]

Neither the president nor vice-president are prima facie entitled to collect for expenses in attending stockholders meetings or in visiting the directors,[16] nor can the president of a corporation charge the company with the amount he paid on a note, indorsed by him in the name of the corporation without authority.[17] But where the officers of a corporation manufacturing spokes and hubs were, for a long time and with the knowledge of everyone interested, in the habit of using culls for fuel, it would be regarded as additional compensation to the salaries received by the officers.[18] Where there is an express contract of employment before the services are rendered, an officer is entitled to compensation,[19] as in case of an officer employed to solicit business, outside of his duties as officer,[20] or of an officer who is an attorney and who renders professional services at the request of the board of directors.[21]

10. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

11. Bramblet v. Commonwealth Land & Lumber Co. [Ky.] 83 S. W. 599. Agreement as to election of directors of a bridge company, by two municipalities holding the entire stock. Gilchrist v. Collopy, 26 Ky. L. R. 1003, 82 S. W. 1018.

12. See 3 C. L. 914.

13. McConnell v. Combination Min. & Mill Co. [Mont.] 76 P. 194; Id. [Mont.] 79 P. 248; Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. When a corporation sells out its entire business, it is not liable for the president's salary as general manager, in the absence of any showing that it agreed to continue its business during his term or to retain him as manager for that time. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. But a corporation which discharges its manager before the expiration of the time for which he was employed, without grounds of complaint, of the most serious character, will be liable to such manager for his full salary. Under Civ. Code, art. 2749. Berlin v. Cusachs [La.] 38 So. 539. In Virginia, under Code 1887, § 1119, no president or director of a corporation can receive any compensation unless allowed by the stockholders. Triplett v. Fauver, 103 Va. 123, 48 S. E. 875. A contract to pay a director or officer of a corporation will not be implied as against the corporation; a manager held over after his term and, on notification that his position as manager had terminated, declined to be discharged. Held, that there was no implied contract to hire him for another year. Alston Mfg. Co. v. Squaw, 105 Ill. App. 238. A president cannot sue upon an implied contract to force a claim for services as an officer, when he is a stockholder or director; he must show an express contract for compensation as a basis for such a claim. Mere interviews with individual directors on the subject of compensation, and calling attention to his claim of compensation at a directors' meeting, without any action being taken, do not lay a sufficient foundation for an action for such compensation. Lowe v. Ring, 123 Wis. 370, 101 N. W. 698. Where the largest stockholder in a corporation performed services for it and wrote many letters, disclaiming any intention of charging therefor, he could not afterward recover compensation for such services, though beneficial to the corporation. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

14. Von Arnim v. American Tubeworks [Mass.] 74 N. E. 580.

15. Stacy v. Cherokee Foundry & Mach. Works [S. C.] 49 S. E. 223.

16. McConnell v. Combination Min. & Mill. Co. [Mont.] 79 P. 248.

17. Triplett v. Fauver, 103 Va. 123, 48 S. E. 875.

18. Jorndt v. Reuter Hub & Spoke Co. [Mo. App.] 87 S. W. 29.

19. Brophy v. American Brewing Co. [Pa.] 61 A. 123.

20. A trustee, employed by the president, who had authority to employ assistance, was credited with commissions by the responsible officers of the corporation. Held, that the corporation was estopped from repudiating its liability to pay for the services. Hooke v. Financier Co., 99 App. Div. 186, 90 N. Y. S. 1012.

21. Taussig v. St. Louis & K. R. Co., 183 Mo. 269, 85 S. W. 378.

The board of directors has not the inherent power to vote a salary to any director. The power to do so must emanate from the stockholders, from statute or from by-laws legally adopted;[22] nor can the directors, even under a by-law, vote a salary to one of their number, when the vote of such director is necessary to make up a quorum.[23]

(§ 15) *H. How directors must act; directors' meetings, records and stock books.*[24]—The board of directors occupies a dual relation in reference to the stockholder.[25] In the management of corporate affairs the board of directors must act together as a board; they cannot act separately,[26] or by the assent of the majority given singly, when not assembled as a board.[27] The acts of the first board of directors named in the articles of incorporation are as valid as those of the directors subsequently elected from among the stockholders.[28]

Evidence.[29]—The minutes of a meeting of a board of directors of a corporation are not conclusive evidence of the terms of the contract with its bookkeeper, as to employment, when he had no knowledge thereof.[30]

Penalties for refusal of inspection of stock book.[31]—Under the stock corporation law of New York the penalty imposed on the corporation and officer or agent for a refusal to allow the stock book to be inspected by a stockholder, is not cumulative, and a stockholder can recover only a single penalty in each case.[32]

(§ 15) *I. Powers of the directors or trustees.*[33]—The existence of directors is an essential part of the artificial creature known as a trading corporation.[34] The

22. A resolution passed by four directors giving three of their own number salaries and back pay, by virtue of by-laws previously passed by five directors, including the four first mentioned, held void under Civ. Code, §§ 2970-2976. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194; Id. [Mont.] 79 P. 248. In a suit by a receiver for an accounting by the directors, they are properly allowed credit for salaries due under an agreement with the corporation, and the fact that the salaries voted to them were excessive will not preclude their receiving such compensation as their services were reasonably worth. Miller v. Doyle, 211 Pa. 59, 60 A. 496. A director of a corporation, who rendered services in winding up its affairs, after its charter had expired, was properly allowed compensation equal to the salary he had received as an officer, while the corporation was a going concern. Lindemann v. Rusk [Wis.] 104 N. W. 119.

23. McConnell v. Combination Min. & Mill. Co. [Mont.] 79 P. 248.

24. See 3 C. L. 914.

25. It is both agent and adversary. It represents and it antagonizes. It protects and it assails. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252. In the conduct of the corporate enterprise, in choosing methods, in fixing policies and administering affairs, the board must be held to act on behalf of the stockholder and to represent him; but in a suit in the name of the corporation against a stockholder to compel payment of his subscription, the corporation and the stockholder are antagonists, and the board represents the corporation. Id.

26. A provision in a certificate of incorporation that any resolution in writing, signed by all the members of the board of directors, should constitute action by the board, the same as if passed at a duly called meeting of the board, held not to be authorized by the General Corporation Act (Laws 1898, p. 408, c. 172), § 8, subd. 7. Audenried v. East Coast Mill. Co. [N. J. Eq.] 59 A. 577. The acknowledgment of the justness of a claim against a corporation by three directors and an agreement that it should be paid, without any showing that they constituted a majority, or that they acted otherwise than in their individual capacity, does not fix an obligation upon the corporation. Farrell v. Gold Flint Min. Co. [Mont.] 80 P. 1027.

27. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. An agreement made by one or two of the trustees of a corporation is not binding on the corporation, in the absence of authority conferred to make such agreement, or ratification subsequently. And the burden is on the plaintiff to show such authority or ratification. Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054.

28. A mortgage executed by such a board was sustained, though Civ. Code, § 305, provides that corporate powers must be exercised by a board of directors "to be elected" from the stockholders. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 P. 889.

29. See 3 C. L. 915.

30. Gabriel v. Bank of Suisun, 145 Cal. 266, 78 P. 736.

31. See 3 C. L. 915.

32. Laws 1892, p. 1831, c. 688, § 29, as amended by Laws 1900, p. 218, c. 128, and Laws 1901, p. 965, c. 354. Walcott v. Little, 91 N. Y. S. 411.

33. See 3 C. L. 915.

34. O'Conner v. International Silver Co. [N. J. Eq.] 59 A. 321. Under the General Corporation Act of New Jersey, the board

affairs of a corporation are within the exclusive control of its directors,[35] who are chosen by and represent the stockholders, and derive their power wholly from them,[36] though they need not themselves be stockholders unless so required by by-law or charter.[37] They are not vested with the title to the property of the corporation, but are its agents, upon whom the duties of care and management devolve,[38] and a majority of the board of directors has power to bind the corporation in the tranasction of its ordinary business.[39] But a statute declaring that the corporate powers shall be exercised by a board of trustees does not exclusively lodge the powers of the corporation in such a board, so as to prevent ratification by the stockholders of a contract made on behalf of the corporation.[40] It is the duty of the directors to obtain money to pay current expenses, either by borrowing or by levying assessments upon the stockholders.[41] Courts have no power to review the findings of the board of directors of a corporation if within its charter rights.[42]

(15) *J. Powers of other officers and agents than the directors or trustees.*[43]—While a corporation is an entity which can hold property and be sued, yet it can act and speak only through its officers[44] who are trustees for the benefit of its stockholders, to whom has been committed the direction of the corporate affairs.[45] The act of the officers or agents of a corporation, unless shown to pertain

of directors is the governing body, whose aid, as a means of corporate action, cannot be dispensed with by the stockholders by waiver or otherwise. Audenried v. East Coast Mill. Co. [N. J. Eq.] 59 A. 577.

35. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544; West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252. All corporate contracts, as well original ones as modifications of them, are to be made by the directors. Mosher v. Sinnott [Colo. App.] 79 P. 742. Under their general powers, the directors of a corporation have authority to incur the expense of notifying the stockholders of a proposed scheme of consolidation or exchange of stock for that of another corporation, and the manner of giving such notice rests in their discretion. A contract made by them for the publication of notices to the stockholders in such a case is binding on the corporation. Rascovor v. American Linseed Co. [C. C. A.] 135 F. 341. It is within the power of the board of directors to employ a secretary and pay him a salary; also to incur the expense of an office and necessary help therein. McConnell v. Combination Min. & Mill Co. [Mont.] 79 P. 248. Directors have power to sell full-paid treasury stock for what they deem it worth, even though that be below par. Mosher v. Sinnott [Colo. App.] 79 P. 742. Where a contract is plain and unambiguous and a corporation's rights in a patent are clear, such rights cannot be affected by a resolution of its directors that the contract and all things connected with it are at an end. Church v. Anti-Kalsomine Co. [Mich.] 101 N. W. 230.

36. O'Connor v. International Silver Co. [N. J. Eq.] 59 A. 321; Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445.

37. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65.

38. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65. Though the directors and officers are the agents of the corporation and not subject to the stockholder's individual control, they are, in a substantial way, his agents and employes, and he, along with the corporation, is privy to their acts. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

39. Borrowing money to repair its property and giving its note therefor held to be an act in the transaction of its ordinary business of a corporation. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders, nor follow their wishes, even though the latter constitute the majority. The directors of a mining corporation have power to lease the mining property of the corporation, under their general authority to manage its affairs. Mosher v. Sinnott [Colo. App.] 79 P. 742.

40. Kirwin v. Washington Match Co., 37 Wash. 285, 79 P. 928.

41. The corporation's obligation to repay money borrowed by the directors for such purpose is not affected by the fraudulent diversion of part of it by the directors. McConnell v. Combination Min. & Mill Co. [Mont.] 79 P. 248.

42. Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, 105 Ill. App. 385.

43. See 3 C. L. 915.

44. Stickel v. Atwood, 25 R. I. 456, 56 A. 687.

45. Miller v. Kitchen [Neb.] 103 N. W. 297; Stewart v. Harris, 69 Kan. 498, 77 P. 277. Custom and usage, and the necessities of the social order, demand that the executive officers of a corporation should be regarded as entitled to bind the organization in all matters which such organization are accustomed to transact through such officers. Russell v. Washington Sav. Bank, 23 App. D. C. 398. In an action between two corporations it is not sufficient to allege transactions between the officers of the corporations, without naming them, as the

to their official duty or to be within the scope of their employment, is not binding upon the corporation,[46] but, while acting within the ordinary scope of their duties, in the absence of specific limitations brought to the knowledge of those who deal with them, or of which such persons are bound to take notice, they can bind the corporation to third parties.[47] Persons dealing with a corporation or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers[48] and of the powers and duties of its officers as defined in its by-laws.[49]

An agent is one who does business for the corporation upon its authority and for its account.[50] The appointment of an agent of a corporation is not required to be by resolution or formal vote of the directors or trustees, nor is it necessary that the power conferred upon him shall be so delegated. He may be appointed informally without vote or resolution, and clothed with authority in the same manner,[51] and the stockholders of a corporation, by permitting a person to act for the corporation in collecting debts, settling liabilities, and distributing proceeds, confer upon such, by acquiescence, the powers of a liquidating trustee.[52]

The president.[53]—The president, as such, has no power to contract for the corporation,[54] to execute a negotiable note which will bind the corporation,[55] to consent to the appointment of a receiver and to waive legal notices and delays,[56] to make a gift of the corporate property,[57] to sell machinery, which is a part of the manufacturing plant of the corporation;[58] and, unless his powers are enlarged by the charter or by-laws, his duties are confined to presiding and voting as a director.[59] His power is limited to that given by the by-laws,[60] or by express authority.[61] His authority may, in some cases, be presumed,[62] or implied from the course of dealing.[63]

defendant has a right to defend by showing that the persons named were not officers, or were not authorized to conduct the transactions. Cherokee Mills v. Gate City Cotton Mills [Ga.] 50 S. E. 82. The pastor of a church is not an officer of the corporation and he cannot bind it by his acts. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808.

46. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544.

47. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

48. Defendant held not liable for the services of a physician rendered to an employe at the request of the president and secretary. Harris v. Vienna Ice Cream Co., 91 N. Y. S. 317.

49. More especially is this the case where the party dealing with the corporation is himself a member. Louchheim v. Somerset Bldg. & Loan Ass'n, 25 Pa. Super. Ct. 325.

50. Fahrig v. Milwaukee & C. Breweries, 113 Ill. App. 525, citing Equitable Produce & Stock Exch. v. Kayes, 67 Ill. App. 460; Fairbank v. B. R. Co., 54 Fed. 420; R. R. Co. v. McDermid, 91 Ill. 270. A location of a railroad can be made only by act of the corporation through its board of directors, but acts done by agents, under the board's orders, are evidence of intent on the part of the board of directors to claim and hold such location. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

51. Cann v. Rector, Wardens, etc., of Church of the Redeemer [Mo. App.] 85 S. W. 994.

52. Under Act April 9, 1856 (P. L. 293). Pottsville Bank v. Minersville Water Co. [Pa.] 61 A. 119.

53. See 3 C. L. 916.

54. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783.

55. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Where the president had apparent, if not actual, authority to execute the note of the corporation, the latter is liable thereon to a bona fide indorser without notice, notwithstanding the proceeds were appropriated by the president and the corporation received no benefit therefrom. Schreyer v. Bailey & Co., 97 App. Div. 186, 89 N. Y. S. 870.

56. Saxon v Southwestern Brick & Tile Mfg. Co., 113 La. 637, 37 So. 540.

57. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. S. 443.

58. Giebler Mfg. Co. v. Kranenberg, 102 App. Div. 471, 92 N. Y. S. 843.

59. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783.

60. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247.

61. He cannot assign an account due the corporation without authority of the directors. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408. Authority given to the president by the board of directors to make a correction of some supposed defect in a lease to the corporation does not authorize

The vice-president.[64]—When the president cannot act, on account of absence, the vice-president can act in his stead,[65] and can bind the corporation in the transaction of business [66] and in the employment of counsel in pending, or prospective litigation.[67]

The secretary.—The secretary of a mining company, who is not a member of the board of directors, has no implied authority to bind the company beyond his authority as secretary.[68] Sureties on the bond of the secretary of a corporation assume their obligation with reference to the articles of association and by-laws, and cannot question the nature of the duties of their principal.[69]

The treasurer.[70]—The treasurer of a corporation, as such, has no powers of general management.[71] Ordinarily he is simply the custodian of the corporate funds and the disbursing officer.[72] Under a statute making every unqualified indorser a warrantor of the validity of a note and of the capacity of all prior parties to contract, the indorser of a note executed by the treasurer of a corporation cannot defend on the ground of the treasurer's lack of authority to execute the note.[73]

him to sign such petitions, with the knowl- one omitting the privilege of purchase. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247.

62. The public, in dealing with the president of a corporation, may, in the absence of notice to the contrary, presume that he has the same authority to do such acts as are customarily done by him, or by the presidents of similar corporations. But pastors of churches or presidents of church trustees have no implied power to control the building of church edifices or dictate their cost. Such duty must be performed by the governing body itself. Cann v. Rector, Wardens, etc., of Church of the Redeemer [Mo. App.] 85 S. W. 994. The general rule is that a corporation acts through its president and an act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporate body. Cozzens & B. Typesetting Co. v. Western Ranch & Irr. Co., 112 Ill. App. 309. The president being the principal executive officer of a corporation and charged with the management and operations of the company, his acts in purchasing supplies, employing men, etc., are clearly within the scope and extent of his authority. Albro Min. & Mill. Co. v. Chinn [Colo. App.] 77 P. 1097.

63. Berlin v. Cusacks [La.] 38 So. 539. While the board of directors is the governing body of all private corporations, yet the president and other officers are those who are usually brought into contact with third parties in the conduct of business. Russell v. Washington Sav. Bank, 23 App. D. C. 398. In the absence of by-laws, it will not be assumed that the president has authority to surrender a lease of lands and accept another omitting the privilege of purchase at the close of the term. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247. The signature of the president of a corporation, in behalf of the corporation, to a petition for repaving, was held valid, where it had been customary for him to surrender the lease and accept a new edge of the board of directors. Eddy v. Omaha [Neb.] 103 N. W. 692. The president of a corporation may employ an attorney for the company to conduct its litigation and bind the corporation for his reasonable compensation. Campbell v. Pittsburg Bridge Co., 23 Pa. Super. Ct. 138. Certificate of acknowledgment of the execution of a deed, by the president of a corporation, held sufficient under the requirement of the statute of South Dakota. Rev. Civ. Code, § 974. State v. Coughran [S. D.] 103 N. W. 31.

64. See 3 C. L. 916.

65. Held that the vice-president of defendant corporation was authorized, under the circumstances, to call a special meeting. Bell v. Standard Quicksilver Co. [Cal.] 81 P. 17. In the absence of any allegations of fraud, it will be presumed that the cause of the vice-president's assumption of the office of president was the absence of the latter. Held that it was not error for the court to refuse to compel the president to answer questions with reference to the corporation's ability to have obtained his presence to call the special meeting which was called by the vice-president and challenged as irregular. Bell v. Standard Quicksilver Co. [Cal.] 81 P. 17.

66. Vincent v. Soper Lumber Co., 113 Ill. App. 463.

67. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

68. Farrell v. Gold Flint Min. Co. [Mont.] 80 P. 1027.

69. Sureties held liable for shortages in accounts during the time the secretary held over the term for which he was elected, no successor having been elected, in accordance with provisions of the articles of incorporation. Danvers Farmers' Elevator Co. v. Johnson, 93 Mass. 323, 101 N. W. 492.

70. See 3 C. L. 916.

71. The treasurer of a charitable corporation, not engaged in commercial transactions, has no implied authority to transfer or sell securities standing in its name. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571.

72. Albro Min. & Mill. Co. v. Chinn [Colo. App.] 77 P. 1097.

73. Rev. Laws, c. 73, §§ 83, 84. Leonard v. Draper [Mass.] 73 N. E. 644.

Business managers, salesmen, etc.[74]—The president and general manager of a corporation has certain implied powers generally recognized by the courts.[75] A manager of a corporation cannot engage employes for a long future period without express authority,[76] but where the officer making the contract is the general manager and makes it in the ordinary course of business, it will be presumed he is acting within the scope of his powers,[77] and a stranger dealing with him in good faith, on the faith of his apparent powers and without notice of facts showing that his act was unauthorized, may hold the corporation liable.[78]

Evidence of authority.[79]—Agency for a corporation may be proved as for a natural person.[80] The presumption that a contract, bearing the signature of the president and secretary, as well as the corporate seal, is an obligation of the corporation may be overcome by the introduction of its charter and by-laws in evidence, to show want of authority on the part of its officers, and by parol evidence showing that the contract had never been acted on or ratified.[81] The fact that a contract was made by an agent for the benefit of a corporation may be shown by parol, though the contract has no such suggestion on its face.[82]

(§ 15) *K. Apparent authority of officers and agents and estoppel of the corporation and of others. Implied permission to act.*[83]—Authority conferred by a corporation may be implied as in other cases.[84] Where an officer or agent is entrusted with the general management of the business or a particular part of the business, he has apparent or implied authority to manage the same in the usual way and for such purpose to bind the corporation by his acts and contracts on its behalf.[85] An officer has no implied authority to act for his personal benefit.[86]

74. See 3 C. L. 916. Many rules as to authority do not rest on the corporate character of the principal. As to such, see Agency, 5 C. L. 64.

75. He may make such ordinary contracts as are required in the everyday business of the company, such as, arising in the routine of business, may be imposed by custom or necessity, without special authority, notwithstanding the statute provides that the corporate powers of a corporation shall be exercised by the board of directors, except when by-laws have been adopted. Rev. St. § 6, c. 32. Cozzens & B. Typesetting Co. v. Western Ranch & Irr. Co., 112 Ill. App. 309.

76. Contract of employment for one year held to have been made. Reupke v. Stuhr & Son Grain Co., 126 Iowa, 632, 102 N. W. 509.

77, 78. Cozzens & B. Typesetting Co. v. Western Ranch & Irr. Co., 112 Ill. App. 309.

79. See 3 C. L. 917.

80. Brown v. British American Mortg. Co. [Miss.] 38 So. 312. The question of whether a contract of employment was made by an authorized officer of defendant corporation, under the evidence, held to be a question for the jury. Julius Kessler & Co. v. Ellis [Ky.] 87 S. W. 798. The affiant in an affidavit for an order of attachment making oath that he is a director and agent of the plaintiff corporation it is not necessary to show that he was authorized to make the affidavit. Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198. Evidence held to show want of authority to find defendant corporation on the part of the party with whom plaintiff contracted. Texas & N. O. R. Co. v. Merchants' & Farmers' Cotton Oil Co. [Tex. Civ. App.] 86 S. W. 1042. Evidence held insufficient to show that plaintiff was employed in behalf of defendant. Negotiations resulting in plaintiff's services as an architect were had with the president and two directors, but were wholly unauthorized by the corporation defendant. Maynicke v. Central Realty Bond & Trust Co., 93 N. Y. S. 702. The delivery of notes and the mortgage security, by a mortgagee corporation, to the assignee thereof, held to tend to prove the authority of the treasurer to make the assignment, and to be a ratification of his action, if it was done without previous authority. Matthews v. Nefsy [Wyo.] 81 P. 305. The mere crediting of commissions on continuing business, by the bookkeeper of a corporation, after the employe had severed his connection with the corporation, without the knowledge of the officers of the corporation that such credit was made, imposed no liability upon the corporation. Hooke v. Financier Co., 99 App. Div. 186, 90 N. Y. S. 1012.

81. Quackenboss v. Globe & R. F. Ins. Co., 94 N. Y. S. 723.

82. So held where an oil lease was made by the treasurer of plaintiff in his own name. Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 77 P. 1040.

83. See 3 C. L. 917. For matters not affected by the corporate character of principal, see Agency, 5 C. L. 64.

84. Brown v. British American Mortg. Co. [Miss.] 38 So. 312.

85. Berlin v. Cusacks [La.] 38 So. 539. The superintendent of a waterworks company made a special contract with a party not knowing and not charging with knowl-

Acceptance of benefits.[87]—Having accepted the money on a contract for the sale of stock, a corporation cannot, while retaining the same, be heard to deny the authority of its officers to make the contract,[88] or to defend against an action thereon, on the ground that the provisions of its charter prescribing the form of the contract were not complied with, by the officer acting for the corporation in the execution of the contract.[89]

Acquiescence in similar acts.[90]—The authority of an officer of a corporation to do a particular act may be inferred from proof of his habitual doing of such acts, with the acquiescence of the directors.[91] Corporations may confer larger powers than usual upon their officers or agents, by habitually permitting them to exercise them and thus holding them out to the public as possessing them,[92] and the authority of the subordinate agents of a corporation often depends upon the course of dealing which the company or its directors have sanctioned.[93]

(§ 15) *L. Ratification of unauthorized acts.*[94]—A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf, which it is capable of making or doing in the first instance,[95] and ratifica-

edge of his lack of authority, for the supply of water at rates below those usually charged. Held to be within the apparent authority of the superintendent and binding on the company. Milledgeville Water Co. v. Edwards, 121 Ga. 555, 49 S. E. 621. The making of a contract, in behalf of a corporation chartered for the purpose of manufacturing lumber, for the hauling of logs to be sawn into lumber, is within the apparent scope of the authority of its superintendent or other managing official; and so is his notice to the plaintiffs that the company would no longer live up to the agreement, and they had a right to treat the declaration as a breach of the contract. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783. The secretary and treasurer of a hotel corporation, who signed a lease of the premises, was charged with putting the lessee in possession, superintended repairs, collected rent and negotiated for a surrender of the lease, had authority to effect such surrender. Commercial Hotel Co. v. Brill, 123 Wis. 638, 101 N. W. 1101. By conferring upon an officer the title "General manager," a railroad corporation holds him out to the world as authorized to make a contract to repair a sleeping car used on its line. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. The use of the funds of a corporation by its treasurer to pay the notes of a third person is not beyond the apparent scope of his authority, so as to warrant the recovery of the money, where it was received in good faith and without notice of want of authority. Manhattan Web Co. v. Aquidneck Nat. Bank, 133 F. 76. Evidence held insufficient to establish either the appointment of the treasurer of the company as its agent or his authority to purchase goods on its credit. Albro Min. & Mill Co. v. Chinn [Colo. App.] 77 P. 1097.

86. There is no presumption of authority by a treasurer of a corporation to use its funds to pay his own notes, arising from the mere fact that the funds are so used. Manhattan Web Co. v. Aquidneck Nat. Bank, 133 F. 76.

87. See 3 C. L. 917.

88. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

89. A note, signed by the secretary alone, instead of the president and secretary, as provided in the charter, will be valid if issued in due course of business, and especially if the corporation has been in the habit of disregarding that charter provision. Blane v. Germania Nat. Bank [La.] 38 So. 537.

90. See 3 C. L. 918.

91. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544; Peoria Star Co. v. Cutright, 115 Ill. App. 492. A public and long continued course of business as purchasing agent of a corporation is sufficient to create an apparent authority which may safely be relied upon by one dealing with the corporation upon the faith thereof. Batavian Bank v. Minneapolis, etc., R. Co., 123 Wis. 389, 101 N. W. 687. Where one who was virtually the owner of an amusement corporation, at a summer resort, treated the enterprise as his own without interference, conducting all its affairs, year after year, held that this was a sufficient ratification of the lease involved in this case. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419.

92. Carrington v. Turner [Md.] 61 A. 324.

93. Berlin v. Cusachs [La.] 38 So. 539.

94. See 3 C. L. 918.

95. Kirwin v. Washington Match Co., 37 Wash. 285, 79 P. 928; Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419; Carrington v. Turner [Md.] 61 A. 324; Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Evidence held not to show either an express or implied ratification of unauthorized acts of the president of a corporation. Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 P. 550. Transactions of the president of a bank in the purchase of railroad stocks held not to have been ratified by the bank. Dundon v. McDonald, 146 Cal. 585, 80 P. 1034.

tion by the board of directors, express or implied, gives to the officers of a corporation all the authority, for an act in its behalf, that could have been given by previous express authorization.[96] Acceptance of benefits by the corporation will operate as a ratification,[97] but ratification of an unauthorized act on behalf of the corporation must be with full knowledge of the act and intention to adopt it.[98]

Ratification may be presumed from the silence of the directors or their failure to act.[99]

If the officers or trustees do any unauthorized act, or incur indebtedness, the stockholders may subsequently ratify the acts and validate the original unauthorized transaction.[1] Even if the majority of the stockholders consent to ratify an illegal use of its funds, their assent will not bind a protesting minority, or prevent them from obtaining appropriate equitable relief.[2]

(§ 15) *M. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*[3]—Notice to an officer or agent of a corporation in the course of his employment and with respect to a matter within his apparent authority is notice to the corporation;[4] but a corporation, taking an assignment of a mortgage,

96. Where the president and secretary purchased bank stock and certificates of deposit in part payment of a claim for a deposit in an insolvent bank, and the directors, with full knowledge of the transaction treated the stock as assets and collected the certificates of deposit, the transaction was ratified. Fidelity Ins. Co. v. German Sav. Bank [Iowa] 103 N. W. 958. A resolution by the directors of a bank to indemnify a party for losses resulting from transactions with the president, from which the bank received no benefit, being without consideration, cannot operate as a ratification. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521.

97. Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 P. 550. Where the executive officers of a corporation, who are also its trustees, receive, retain, and use for benefit of the corporation money received from an unauthorized contract in its behalf, the contract is thereby ratified. Kirwin v. Washington Match Co., 37 Wash. 285, 79 P. 928. A corporation, after accepting a deed of land purchased by one of its officers cannot dispute the officer's authority to agree to pay a price additional to that recited as a consideration in the deed. Windsor v. St. Paul, etc., R. Co., 37 Wash. 156, 79 P. 613. Grants and proceedings beneficial to the corporation are presumed to be accepted and but slight acts on their part are admitted as presumptions of the fact. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419.

98. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Such knowledge must be possessed by some corporate agent, who had authority to act for the corporation in the matter, or whose function it was to report it, or unless knowledge would have been had by some such agent, had there not been neglect of duty on his part. Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 P. 550. The fact that the president of a corporation applied the proceeds of an unauthorized sale of property of a corporation in payment of corporate debts, without the knowledge and consent of the directors, did not effect a ratification of the sale. Giebler Mfg. Co. v. Kranenberg, 102 App. Div. 471, 92 N. Y. S. 843. Stockholders cannot be held to have ratified, by their silence, official misappropriation of funds of which they had no knowledge. Von Arnim v. American Tubeworks [Mass.] 74 N. E. 580.

99. Mere silence on the part of its directors after notification. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419. A board of directors, to whom the president communicates his action in making a contract, in the name of the corporation and within the scope of its powers, must disaffirm his action within a reasonable time, or ratification will be presumed. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247. Where the board of directors, with full knowledge of the act done, did not dissent within a reasonable time. Third Nat. Bank v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 49 S. E. 544. Ratification by failure to object, of acts of an attorney for a corporation in making a loan and clearing title to property on which security was given. Curtze v. Iron Dyke Copper Min. Co. [Or.] 81 P. 815.

1. First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109. Ratification of a mortgage, executed by the board of directors, by a resolution adopted by the stockholders at the annual meeting. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 P. 889.

2. Von Arnim v. American Tube Works [Mass.] 74 N. E. 580.

3. See 3 C. L. 919.

4. Notice to the local representative, adviser, and secretary and treasurer in the city where the loan was made, who had general supervision and advisory powers with reference to loans and the general policy of the association's business in his locality, was held notice to the association. Dennis v. Atlanta Nat. Bldg. & Loan Ass'n [C. C. A.] 136 F. 539. Knowledge of employes of a corporation, whose duty it was to shut off electric current from houses under repair, that persons were working in a

is not bound by the knowledge of its director, who procured the assignment, of a fraudulent prior assignment, where such knowledge was not acquired while he was acting for the corporation in procuring the assignment.[5] Where a corporation had but three stockholders, who were also its officers, knowledge by them affected the company with knowledge;[6] but where some of the directors conveyed land to a corporation, their knowledge, affecting the bona fides of the transaction, did not charge the corporation, the other directors being ignorant of such facts.[7]

(§ 15) *N. Admissions, declarations, and representations of officers and agents.*[8]—Admissions within the scope of authority and concerning matters entrusted to an officer or agent are binding on the corporation.[9]

False and fraudulent representations made by the president of a corporation as to its solvency, in the presence of the plaintiff who knew their falsity, were held to be a good defense to an action on a contract of suretyship entered into on the strength of such representations.[10]

(§ 15) *O. Delegation of authority by directors.*[11]

(§ 15) *P. Personal liability of officers and agents.*[12]—One concealing the fact that he is contracting for a corporation is bound personally.[13] Where an officer of a corporation enters into a contract which he is authorized to make, and which purports to be the contract of the corporation, he assumes n liability,[14] but he may by the language of the contract, pledge his own credit, while acting for the corporation, and mere words of description added to his signature will not alone relieve him from liability.[15] Directors may be held liable for publishing false reports, though they purport to be the statements of the company;[16] but officers of a cor-

house is notice to the corporation. Baries v. Louisville Elec. Light Co. [Ky.] 85 S. W. 1186. Notice to the promoter of a corporation who was its principal incorporator, manager, and resident, was such notice to the corporation as to prevent its claiming the protection of law to which an innocent purchaser is entitled. California Consol. Min. Co. v. Manley [Idaho] 81 P. 50. A corporation creditor of another corporation is chargeable with knowledge of facts known to its president as a director of the debtor corporation. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54. Evidence held admissible, of the knowledge of the president of a corporation, to show knowledge by the corporation plaintiff. California Elec. Light Co. v. California Safe Deposit & Trust Co., 145 Cal. 124, 78 P. 372.

5. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114.

6. City of Elberton v. Pearle Cotton Mills [Ga.] 50 S. E. 977.

7. Schneider v. Sellers [Tex.] 84 S. W. 417.

8. See 3 C. L. 920. See, also, Evidence, 3 C. L. 1334.

9. The statement of the manager of a telephone company that a broken wire, which was charged from the wires of an electric railway and which injured a boy who came in contact with it, was one of his company's wires, held admissible in evidence against the company. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148. The presence or absence of the plaintiff or of her representative at the time of the admission is immaterial. Vincent v. Soper Lumber Co., 113 Ill. App. 463.

10. First Nat. Bank v. Terry, 135 F. 621.

11, 12. See 3 C. L. 920.

13. Hamilton v. Davis, 90 N. Y. S. 370. An affidavit of defense that defendant was acting as an officer of a corporation in hiring plaintiff as salesman, held defective in not alleging that defendant made known his agency or that plaintiff knew of it. Paine v. Berg, 23 Pa. Super. Ct. 577. A note was executed upon a blank form of receipt bearing the name of a corporation, was signed by the president and secretary officially and bore the seal of the corporation, though no reference was made to it in the note. Held, under Laws 1899, p. 345, c. 140, § 20, providing that the mere addition of an official title to one's signature without disclosing his principal does not exempt him from personal liability, that the president and secretary were personally liable. Daniel v. Buttner [Wash.] 80 P. 811. Evidence held to justify the submission to the jury of the question whether the sale of goods was made to the corporation, or to the manager individually, and a finding against the corporation. Cockrum Co. v. Klein [Ind.] 74 N. E. 529.

14. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667.

15. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667. A contract signed by a person who adds "general manager" after his signature, is not the individual undertaking of the signer, if the contract shows on its face that it was made in behalf of another, or if that fact appears by extrinsic evidence in a suit for its breach. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008.

16. Stickel v. Atwood, 25 R. I. 456, 56 A. 687. A stockholder, who has been induced

poration cannot be held liable as for false representations for mere expression of opinion.[17] In some cases directors or officers of a corporation may make themselves liable in an attempt to fix upon the corporation a liability with which it cannot, under the law, be charged.[18] The true test as to the liability of a director is whether the transaction is such that the body of stockholders could not have sanctioned it.[19] In case of fraudulent transactions of directors, in misappropriating and diverting the corporate funds by the payment of unauthorized salaries, an officer who was in no way connected with the proceedings, although paid a salary thereunder, is not liable in a minority stockholders' action, but the officials who caused the money to be paid to him must account therefor.[20] Where the good will of a defunct corporation was wrongfully appropriated by one of its directors, who was administering its affairs, the appropriaton may be treated as a sale voidable at the option of those interested in the assets of the corportion. And where such appropriation was for the benefit of a new corporation, the latter may be compelled to account for the profits realized from the appropriation.[21] A corporation is not organized for an unlawful business, so as to make its officers liable for money invested in its bonds, merely because the business is bottomed on a scheme that will not finance out.[22]

The president of a corporation who participates in the sale of bonds, which falsely represent that they are secured by all the property of the corporation is personally liable for deceit, though ignorant of the particular sale in question.[23]

Where the business of a corporation itself involves a violation of law, all who participate in it are liable.[24]

Statutory liabilities.—The fact that the directors honestly believed in the competency of the president and so committed the entire management of the bank to him, did not relieve them from their statutory liability for neglect of duty.[25]

to subscribe for stock, to his financial injury, by the false and fraudulent representations of the directors may have relief against them. The law will compel them to make good whatever he may have lost by his investment; but if he asks to have them compelled to take his place as a stockholder, to assume his holding and return, not his actual damages, but his entire investment, then he must show that he was not merely the incidental victim, but the intentional victim of their fraud. Lyon v. James, 97 App. Div. 385, 90 N. Y. S. 28.

17. In selling bonds, the coupons of which were payable in numercial order, as money accumulated, the statement of the officers that the scheme would finance out, held to be but a mere expression of opinion. Vokes v. Eaton [Ky.] 85 S. W. 174.

18. Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101.

19. Steckel v. Atwood, 25 R. I. 456, 56 A. 687.

20. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

21. Lindemann v. Rusk [Wis.] 104 N. W. 119.

22. As where coupons are made payable as money accumulates, in numerical order on a scheme, which, under ordinary circumstances, will not result in all the coupons being paid. Vokes v. Eaton [Ky.] 85 S. W. 174.

23. Such a recital in a bond imports that the bonds are secured by some special lien. Stickel v. Atwood, 25 R. I. 456, 56 A. 687. Transactions of claimant with the president of the bank, from which the latter received no benefit, held to give claimant no claim against the bank, but that his remedy was against the president. People v. Mercantile Co-op. Bank, 93 N. Y. S. 521. But the implication of scienter arising from official connection with a company, and knowledge of its affairs, applies only to existent facts, and does not, as matter of law, reach and cover the question of good faith in the expression of opinion as to the worth of the company's securities. The president of a corporation therefore cannot be held liable in an action for deceit in the sale of corporate bonds, for expressions of mere matters of opinion as to their value. Kimber v. Young [C. C. A.] 137 F. 744.

24. The vice-president of a corporation, in general charge of its business in the state, may be convicted of peddling without a license, because of the corporation's servants having peddled its goods without license. Acts 1902-03-04, p. 484, c. 27 (Va. Code 1904, p. 2223). But the manager of a store cannot be held liable for such unlawful peddling done before he became manager. Crall v. Com. [Va.] 49 S. E. 638.

25. Kirby's Dig. § 863, makes directors who neglect their statutory duties liable for all debts of the corporation contracted during such neglect. Fletcher v. Eagle [Ark.] 86 S. W. 810.

The statute requiring annual reports by corporations and making directors personally liable for corporate debts, in case of failure to file a report, is penal in its nature and must be construed favorably to the directors.[26] They are not liable for debts contracted after the filing thereof.[27] And a director who resigns before the expiration of the time limited for filing the annual report cannot be subjected to the statutory liability.[28] This act being an imposition of a penalty did not create a vested right in the party entitled to recover.[29] In Indiana the mere failure of a manufacturing corporation to make its annual report does not render its officers liable for damages, unless creditors were deceived and misled thereby.[30] And where directors of a corporation sold their stock in good faith several months before a creditor's debt was created, they were not liable to him in damags for the failure of the corporation to file an annual report of its assets and liabilities.[31]

In Vermont the liability of a director who assents to the creation of indebtedness beyond the statutory limit is not an asset of the corporation to be collected and marshaled among creditors, but the assenting creditors are personally liable jointly and severally directly to creditors whose debts are beyond the limit.[32]

(§ 15) *Q. Liability of officers for mismanagement.*[33]—Unless the mismanagement is so gross as to amount to fraud, the president of a corporation is not personally liable for losses sustained through his mismanagement.[34] An officer of a corporation who unlawfully disposes of the moneys of the corporation is personally liable therefor.[35] An action against an officer of a corporation for a misappropriation of corporate funds, can be maintained only by the corporation, or by a stockholder in its behalf,[36] if the association refuses to bring the suit.[37]

Where the directors of a corporation vote themselves increases in salaries, while using the profits to expand the business, to the entire exclusion of dividends, a court of equity can compel the restoration of excessive amounts and adjust the salaries on a reasonable basis.[38] In a common-law action against directors of an insolvent corporation for damages for payment of dividends with knowledge of the impairment of the corporation's capital, it is necessary to show fraud and bad faith;[39] for, in the absence of any showing to the contrary, the officers of a corporation are presumed not to have impaired its capital in declaring a dividend.[40]

26. Laws 1897, c. 384, p. 313, § 30. Hoboken Beef Co. v. Hand, 93 N. Y. S. 834.

27. Kirby's Dig. §§ 848, 859. Beekman Lumber Co. v. Ahern [Ark.] 86 S. W. 842.

28. Hoboken Beef Co. v. Hand, 93 N. Y. S. 834.

29. Laws 1897, p. 313, c. 384, § 30, and Laws 1901, p. 966, c. 354, § 30, limiting the right of action to 6 months did not interfere with vested rights. Davidson v. Withaus, 94 N. Y. S. 428.

30, 31. Burns' Ann. St. 1901, §§ 5071, 5073. Stafford v. St. John [Ind.] 73 N. E. 596.

32. Hilliard v. Lyman, 138 F. 469.

33. See 3 C. L. 921.

34. Evidence held insufficient to show gross negligence or fraud on the part of the president of a building and loan association in accepting as security real estate subject to a lis pendens. David Reus Permanent Loan & Sav. Co. v. Conrad [Md.] 60 A. 737.

35. As where the treasurer distributes to himself and other stockholders corporation funds without authority from the directors and without a dividend having been declared. Cheat Valley R. Co. v. Humes, 211 Pa. 287, 60 A. 908. Treasurer of corporation held liable, under the evidence, for moneys not accounted for, in an action by the receiver to recover. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

36. Stoddard v. Bell & Co., 100 App. Div. 389, 91 N. Y. S. 477. The allowance of overdrafts by the officers of a bank, in the regular course of business, whereby losses occurred, held not to be such mismanagement as rendered the officers personally liable to stockholders. Cope v. Westbay [Mo.] 87 S. W. 504.

37. The real estate of a building association was sold for securities of doubtful value, and a bond and mortgage taken as a guaranty of the collection of the securities, which mortgage was canceled without the knowledge of the stockholders, and nothing was ever realized on the securities. Brinckerhoff v. Roosevelt, 131 F. 955.

38. Raynolds v. Diamond Mills Paper Co. [N. J. Eq.] 60 A. 941.

39. Davenport v. Lines, 77 Conn. 473, 59 A. 603.

Statutory actions against directors.—The right of action given by the New York Code, against directors or officers of a corporation to compel an accounting for money or property acquired or transferred, in violation of their duties, is not restricted to domestic corporations only,[41] and does not authorize an action against the corporation itself.[42] A claim against a director of a defunct corporation, in the administration of its affairs under the statutes of Wisconsin,[43] for wrongfully converting the good will of the corporation, is not for a tort, but for an injury to personal estate, or for an accounting, and survives the death of the director.[44] In Michigan only judgment creditors can invoke the aid of the circuit court to compel officers and directors of corporations to account for official misconduct, remove them from office, or to set aside or restrain unlawful alienations of property;[45] and the statute, authorizing a corporation creditor to charge its directors or superintending officers on account of any liability created by law, applies only to corporations having banking powers and not to corporations generally.[46]

(§ 15) *R. Dealings between a corporation and the directors or other officers and personal interest in transactions.*[47]—Directors are charged with the utmost good faith in their dealings with the corporation.[48] They stand in equity in a fiduciary capacity as to the corporation and stockholders,[49] being the trustees, while the stockholders are the cestuis que trustent.[50] Neither directors or officers can profit by virtue of their official position,[51] and they are forbidden to take part in

40. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796. To charge sale of treasury stock and appropriation of proceeds by directors it must be directly alleged that there was such stock and money so derived. An allegation that a prospectus advertised treasury stock is not an allegation that the corporation had any such stock, nor is an allegation that a corporation had no property except money received from the sale of its shares an allegation that it had money so received. Phillips v. Sonora Copper Co., 90 App. Div. 140, 86 N. Y. S. 200.

41. Code Civ. Proc. §§ 1781, 1782. Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116.

42. Jacobs v. Mexican Sugar Refining Co., 93 N. Y. S. 776.

43. Rev. St. 1898, § 1764.

44. Under section 4253. Lindemann v. Rusk [Wis.] 104 N. W. 119.

45. C. L. 1897, §§ 9757, 9759. McKee v. City Garbage Co. [Mich.] 12 Det. Leg. N. 227, 103 N. W. 906.

46. C. L. 1897, § 9769. McKee v. City Garbage Co. [Mich.] 12 Det. Leg. N. 227, 103 N. W. 906.

47. See 3 C. L. 922.

48. Coombs v. Barker [Mont.] 79 P. 1. Civ. Code Cal. § 2228. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9. Transactions disposing of certain stock, in which the directors were personally interested, held fraudulent as to the stockholders. Burnes v. Burnes, 132 F. 485.

49. Coombs v. Barker [Mont.] 79 P. 1. If a director purchases the stock of a stockholder, concealing the fact that a sale of the entire plant is contemplated which will materially increase the value of the stock, the stockholder may rescind the sale, for the fraud. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232. A director or managing officer, having a better knowledge of the condition of corporate affairs, on account of his position, before he can rightfully purchase the stock of a stockholder is bound to inform him of the true condition of the affairs of the corporation. Stewart v. Harris, 69 Kan. 498, 77 P. 277.

50. Lord v. Equitable Life Assur. Soc., 94 N. Y. S. 65; Mosher v. Sinnott [Colo. App.] 79 P. 742; McConnell v. Combination Min. & Mill. Co. [Mont.] 79 P. 248; Barry v. Moeller [N. J. Eq.] 59 A. 97. But a director does not sustain such a trust relation to an individual stockholder as to prevent his purchasing the stockholder's stock, in the absence of any fraud. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445.

51. Coombs v. Barker [Mont.] 79 P. 1; McConnell v. Combination Min. & Mill. Co. [Mont.] 79 P. 248. The president of a corporation cannot traffic in its property to his advantage and to its disadvantage. Bramblet v. Com. Land & Lumber Co., 26 Ky. L. R. 1176, 83 S. W. 599. Neither the executive officers nor the directors of a corporation have a right to convert its assets, give them away or make any self-serving disposition of them against the interest of the company. But where there are no stockholders but the directors and officers, the latter may make a valid gift of the assets, by unanimous consent, unless the rights of creditors are impaired. Jorndt v. Reuter Hub & Spoke Co. [Mo. App.] 87 S. W. 29. A corporation cannot sell, mortgage, or lease property only for the individual benefit of an officer or stockholder. Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017. The president of a corporation cannot acquire title for himself to the property of another corporation, at trustee's sale, when the sale was a scheme, entered into by both corporations, to clear the title of the corporation of which he was president. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7.

any transaction concerning the trust, in which they have an interest adverse to that of their beneficiary.[52] If they receive any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders,[53] and they will be compelled in equity to account for profits illegally made by them out of their dealings with the corporation.[54]

But officers and directors are not absolutely precluded from dealing directly with the corporation,[55] and when the contract is made with a director, he stands, as to the contract, in the relation of a stranger to the corporation.[56] Contracts whereby directors become creditors of their corporations will be subjected to the closest scrutiny and will be enforced only when fair and equitable,[57] and the burden

52. Civ. Code Cal. § 2230. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9. Directors cannot have any personal or pecuniary interest in conflict with their duties as such trustees. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445. The presumption that directors of a corporation will do their duty is overcome by the presence of causes sufficient to influence them to do otherwise. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371. The directors of a corporation have no authority to bind the company to any contract made with themselves personally. Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 P. 550. An officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer. The president cannot purchase notes payable to the corporation, and, as president, indorse them to himself individually. Id. A president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself, or certify a check for his own benefit. A by-law conferring such authority and making the president general manager does not empower him to purchase notes payable to the corporation and indorse them to himself. Id. Where bonds of a corporation intended to be secured by mortgage were withheld from sale by the secretary by resolution of the board of directors, to secure certain obligations of the company to the directors, such a pledge was void without the consent of all the stockholders. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7. A resolution passed at a stockholders' meeting, for the benefit of a stockholder who as trustee, owner, and proxy voted a majority of the stock, issuing to him certain treasury stock in consideration of services rendered, could not be sustained. United Gold & Platinum Mines Co. v. Smith, 44 Misc. 567, 90 N. Y. S. 199. But where a proposition to borrow money from certain directors was carried by votes enough without theirs, the fact that such directors were present and voting did not invalidate the transaction. Schnittger v. Old Home Consol. Min. Co. 144 Cal. 603, 78 P. 9. Nor does the fact that the directors loaning the money did not disclose their interest in the loan to the other directors and that the party in whose name the loan was made was a mere figurehead, unless it appears that they thereby gained an undue advantage over the corporation. Id.

53. Coombs v. Barker [Mont.] 79 P. 1. Property conveyed to the president and promoter of a street railway company, in consideration of the extension of the line to land owned by the grantor, was, in the absence of a valid agreement to the contrary between him and the company, presumed to have been taken by him as trustee of the company. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7. Where the president of a company, who was paid a salary, while prospecting on lands at the expense of the company, procuring certain leases of mining lands, took one of the leases in his own name, held that the rights secured thereby were held by him in trust for the company. De Bardeleben v. Bessemer Land & Imp. Co., 140 Ala. 621, 37 So. 511. Stock procured by defendant, while acting as trustee and agent of the bank of which he was the president, held to belong to the bank. Dundon v. McDonald, 146 Cal. 585, 80 P. 1034.

54. Barry v. Moeller [N. J. Eq.] 59 A. 97. A loan of money by a director from his bank, just before the termination of its corporate existence, to invest in the stock of another bank, held to be a simple loan and not an investment for the benefit of those interested in the old bank. Lindemann v. Rusk [Wis.] 104 N. W. 119.

55. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9. The president of a corporation, who is engaged in a private business similar to that of the corporation, is entitled to deal with the latter, on the same terms, as to rebates on the purchase price of goods, as other customers of the corporation, so long as he dealt openly and fairly and did nothing inconsistent with his duties as president. Action for an accounting between the corporation and its president for the property of the plaintiff disposed of by the defendant for his benefit and for his transactions as president. Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 N. Y. S. 128. The borrowing of money by a corporation, to repair its property, from one of its own directors who represented a third party in the transaction, is a valid transaction, when the corporation is not in any way imposed upon. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285.

56. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9.

57. Coombs v. Barker [Mont.] 79 P. 1.

is on the directors to show that transactions had by them with the corporation, from which they profit, are fair and bona fide.[58] Contracts awarded by the directors to themselves,[59] which are unfair and in which the directors secure any undue or unjust advantage,[60] or transactions had by a director with reference to the property of the company, while they may not be void per se,[61] are voidable at the option of the corporation, or its creditors or stockholders.

Purchase of corporate property.[62]—A director's purchase of property from a corporation is voidable at the option of the corporation, even though the director paid fully as much as, or more than, the property is worth,[63] and directors of a corporation who participate in sales of the company's property to themselves may be required, at the suit of the stockholders, to account to the corporation therefor.[64] In the absence of fraud, property of a corporation may be sold on execution to directors thereof, under a judgment obtained by them on claims against it, brought by them with own with their own funds.[65]

Purchase of corporate obligations.[66]—After a corporation has ceased to do business, a stockholder and trustee thereof may purchase its outstanding obligations and enforce them for his own benefit,[67] but the president of a corporation cannot buy in debts against it, at a heavy discount and then assert them at full value.[68]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors.*[69]—To a great extent the rights and remedies of creditors are not affected by the corporate charter of the debtor. For matters not so affected consult other titles, particularly those dealing with remedies[70] and insolvency proceedings.[71]

A note or other obligation given by a corporation to an officer is not necessarily void on that account; but a third person taking such a note knowing that the payee is an officer of the corporation maker is put upon his inquiry, and, if it is subject to any legal infirmity, he cannot avoid the effect of it, by claiming to be a bona fide holder without notice. Orr v. South Amboy Terra Cotta Co., 94 N. Y. S. 524.

58. Coombs v. Barker [Mont.] 79 P. 1.

59. Two out of three directors submitted a contract to the stockholders and then they as a majority of the stockholders, voted in favor of it, and as a majority of the directors, approved it. Booth v. Land Filling & Imp. Co. [N. J. Eq.] 59 A. 767. A loan of money to the corporation by its directors, while voidable at the instance of the beneficiary for any violation of duty by the directors, is not ipso facto void. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9.

60. A transfer of stock, in which the majority of the directors who passed the resolution were personally interested, was avoided. Burnes v. Burnes [C. C. A.] 137 F. 781.

61. Coombs v. Barker [Mont.] 79 P. 1.

62. See 3 C. L. 923.

63. A sale of corporate treasury stock by part of the directors to other directors is constructively fraudulent and voidable. Mosher v. Sinnott [Colo. App.] 79 P. 742.

64. A stockholders' suit for an accounting by directors who have sold company's property to themselves may be maintained after the appointment of a statutory receiver, if the latter is made a party. Barry v. Moeller [N. J. Eq.] 59 A. 97.

65. Such a sale is not prohibited by Civ. Code, § 2230, providing that a trustee or his agent may not take part in any transaction concerning the trust, in which he has an interest adverse to that of his beneficiary. Snediker v. Ayers, 146 Cal. 407, 80 P. 511. But a redemption by directors of corporate property from sale on execution, made under a judgment rendered in favor of one of them only two days before the redemption, which was obtained by default based upon the acceptance of service of the summons by another of their number, was held not to have been open, fair and equitable. Coombs v. Barker [Mont.] 79 P. 1.

66. See 3 C. L. 923.

67. Stanton v. Gilpin [Wash.] 80 P. 290.

68. Held that his illegal combination with another to traffic in the debts and share the profits, tainted the transaction with fraud so that the third party could derive no profit from it. Bramblett v. Com. Land & Lumber Co., 26 Ky. L. R. 1176, 83 S. W. 599. Where a director, at the instance of the president, renders an agreement to share the profits, bought judgments against the corporation and caused its lands to be sold on execution, which land he purchased, on a redemption of the land permitted because of the relationship of the parties to the corporation, the stockholder should not be required to contribute any of the money to be used by the corporation in redeeming. Bramblett v. Com. Land & Lumber Co. [Ky.] 86 S. W. 1114.

69. See 3 C. L. 924.

70. As Attachment, 5 C. L. 302.

71. As Bankruptcy, 5 C. L. 367; Receivers, 4 C. L. 1238, and the like.

The claims of domestic attaching creditors are preferred to those of foreign creditors, and will be upheld against indirect, as well as direct, attacks.[72] Creditors in a winding up suit may enforce liabilities, the legal title to which is in the receiver of the insolvent corporation.[73] The creditor of a church corporation is not the creditor of the members of the church, and has no right of action against them as such.[74]

The assets of an insolvent corporation are sometimes regarded as a trust fund for the benefit of creditors,[75] and no transfer or subterfuge will be countenanced, which prevents an equal distribution of such fund among creditors of the corporation.[76] In Michigan the doctrine that, when a corporation becomes insolvent and unable to carry on its business, each creditor is entitled to his pro rata share of its assets, that the creditors, under such circumstances, has an equitable lien on the assets [77] is not recognized, but has been deliberately repudiated; [78] and a creditor who has neither a judgment nor a lien upon the property of a corporation cannot complain of the distribution of that property, although the corporation is insolvent.[79]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[80]—A general creditor cannot file a bill in equity to enforce a claim against a going corporation, unless he has first obtained a lien on the property, or it is otherwise provided by statute.[81]

Voluntary preferences,[82] when illegal, may be impeached or repudiated by the receiver and, when so ordered by the court, he may sue to recover its diverted assets, even though the corporation itself might not have been allowed to do so.[83]

Priorities between claims.[84]—Courts of equity usually seek to put all the creditors of an insolvent corporation upon the same footing as to the payment of their claims, and in general allow no preferences; [85] yet justice often requires pref-

72. As against domestic creditors of an insolvent foreign corporation, an ancillary receiver will not be appointed to collect the funds and money, levied on by attachment and execution in favor of such creditors, and turn the same over to the foreign receiver. Clark v. Supreme Council of Order of Chosen Friends, 146 Cal. 598, 80 P. 931.

73. Spheres of action of creditors and receiver of insolvent corporation discussed. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

74. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808.

75. Mott v. Edwards, 98 App. Div. 511, 90 N. Y. S. 303. The capital and debts of banks and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders. Lindemann v. Rusk [Wis.] 104 N. W. 119.

76. A transfer by an insolvent corporation of its capital stock, assets and business to another corporation, no provision being made for the payment of debts, is fraudulent as against creditors, although the purchasing corporation did not know of the insolvency. Ball. Ann. Codes & St. § 4265. Tacoma Ledger Co. v. Western Home Bldg. Ass'n, 37 Wash. 467, 79 P. 992.

77. **Note:** See Doe v. Northwest Coal & Transp. Co., 64 F. 928; Nunnally v. Strauss, 94 Va. 255, 26 S. E. 580.

78. **Note:** See Bank of Montreal v. Potts Salt & Lumber Co., 90 Mich. 345, 51 N. W. 512.

79. McKee v. City Garbage Co. [Mich.] 12 Det. Leg. N. 227, 103 N. W. 906.

80. See 3 C. L. 924.

81. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198.

82. See 3 C. L. 924.

83. Contrary to Ky. St. 1903, §§ 1910, 1911. Industrial Mut. Deposit Co.'s Receiver v. Taylor, 26 Ky. L. R. 802, 82 S. W. 574. Knowledge of the president and treasurer of a corporation, of its insolvency, held to invalidate payments made to themselves within ten days of the appointment of a receiver because of insolvency. Jessup v. Thomason [N. J. Eq.] 59 A. 226.

84. See 3 C. L. 925.

85. Gilbert v. Washington Ben. Endowment Ass'n, 21 App. D. C. 344. Where a supposed debtor of an insolvent joint stock company, which afterward incorporated and then passed into the hands of a receiver, paid to the corporation's cashier, on account of the joint stock company, a certain sum, but it afterward appeared, in an action against him by the receiver, that the corporation owed him, held that the judgment had not a preferential character over other corporate debts. Lacy v. Clinton Loan Ass'n, 132 N. C. 131, 43 S. E. 586. Where a corporation assumed the debts of a firm as a part consideration for the conveyance to it of firm property, the corporate debts, in

erences, the equality to be sought being generally equality among members of a class, rather than among different classes of individuals,[86] In the distribution of the assets of an insolvent insurance company, whether it be joint stock, mutual or endowment, the claims of (1) ordinary creditors; (2) policy or certificate-holders, and (3) stockholders, should be preferred in the order enumerated.[87] The rights of creditors of a corporation are fixed as of the time of the appointment of a receiver, and those who have priorities then must be first paid and the others must be paid equally.[88] The state has no preference over other creditors of an insolvent corporation, in case of a simple contract claim, with no steps taken to enforce it before the appointment of a receiver.[89]

Assets for creditors.[90]—Every corporation impliedly agrees with every person becoming its creditor that it will observe the laws of its existence enacted to secure the certain payment of its debts, and will honestly apply its assets to that end.[91] Creditors of an insolvent corporation, who became such pending a creditors' suit, are entitled to intervene in the proceedings in the Federal court and to participate in the assets remaining after payment of the claims of creditors existing at the time the creditors' bill was filed.[92]

case of insolvency, were not entitled to preference in payment over those of the firm. And a part of such consideration being the assumption of debts of two individual partners secured by trust deed on the land conveyed and also on land owned by one of the partners, held, that the corporation was bound to release the individual land from the burden of the debt. London v. Bynum, 136 N. C. 411, 48 S. E. 764. An agreement by the officers of a corporation, in order to secure the extension of a loan, that the bank should be preferred if anything happened, gives the bank no preference on an assignment for the benefit of creditors. In re Kittanning Elec. Light, Heat & Power Co.'s Estate, 210 Pa. 6, 59 A. 266. Where a corporation made an equitable assignment of moneys, to be earned in the future under a manufacturing contract, and the corporation became insolvent and a receiver was appointed before the moneys were earned, the assignee was not entitled to preference. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408. A mortgagee who released her mortgage on the property of a corporation in consideration of certain bonds of the company to be issued her, but who took stock instead and held it two years without objection, on the insolvency of the company was held estopped from claiming priority over those who had extended credit to the corporation on the strength of her not being a bondholder. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 60 A. 955. Where a temporary receiver, under the New Jersey corporation act, presented a petition, and notified creditors, for leave to issue receiver's certificates to obtain funds to complete certain contracts and no one objected, the equitable assignee of money to be earned by the corporation on a contract, having failed to notify the receiver of a claim for preference, was estopped from doing so afterward. P. L. 1896, p. 277. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

86. Gilbert v. Washington Ben. Endowment Ass'n, 21 App. D. C. 344. Claims for labor performed for a corporation, just before its insolvency and the appointment of a receiver, which labor was necessary to continue its business and preserve its property, are entitled to preference over the claims of both ordinary and mortgage creditors. L'Hote v. Boyet [Miss.] 38 So. 1. Though the employes of an insolvent corporation have a first lien for wages, the assignee of an employe's claim, before the insolvency is decreed, has no such lien. P. L. 1896, p. 303. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

87. A claim on a certificate which matured several years before insolvency proceedings and was reduced to judgment, held entitled to priority over the claims of certificate holders and stockholders. Gilbert v. Washington Ben. Endowment Ass'n, 21 App. D. C. 344.

88. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

89. State v. Williams [Md.] 61 A. 297.

90. See 3 C. L. 926.

91. Industrial Mut. Deposit Co.'s Receiver v. Taylor, 26 Ky. L. R. 802, 82 S. W. 574.

92. Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503. Where a receiver was appointed on an express stipulation by certain creditors that, if the total amount realized by the receivership did not exceed a certain sum, they would waive any claims they held as stockholders or creditors, the sum realized having fallen short, they were held bound by their stipulation and their claims were excluded. Gibson v. Standard Automatic Gas Engine Co. [C. C. A.] 134 F. 799. In a proceeding to establish notes as a claim against the assets of an insolvent corporation, evidence held insufficient to show that they were given for a loan to a stockholder to purchase stock in another corporation for his own benefit, instead of for the corporation and that the claimant bank had knowledge of the fact. Cook v. Anderson Food Co. [N. J. Eq.] 61 A. 449.

Winding up proceedings, assignments, receivership.[93]—Any creditor or stockholder of an insolvent corporation may institute proceedings in chancery to wind it up.[94] A winding up action, commenced in simple form, may be broadened by amended and supplemental complaints, subject to the ordinary rules, so far as necessary to bring the entire subject-matter before the court for settlement.[95] Creditors in a winding up suit may enforce liabilities, the legal title to which is in the receiver of the insolvent corporation.[96]

A general assignee becomes the trustee for the benefit of the creditors of the corporation. His powers are superior to those of the stockholders or the corporation itself.[97]

In the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation, and, to that end, appoint a receiver for the sequestration of the corporate property.[98] Proceedings for the appointment of a receiver in a court of equity are usually ancillary in nature, and the appointment is granted only as an incident to the relief sought in the petition.[99] Where a court of equity can grant sufficient relief to a complaining minority stockholder for mismanagement of corporate affairs, a receiver will not be appointed.[1] A receiver

A bond executed by one corporation to another, upon the purchase of the property and assets of the latter, covenanting to pay all debts and to perform all contracts of the selling corporation, creates a direct and primary liability of the purchaser in equity, on a contract assigned as part of the assets. Dancel v. Goodycar Shoe Machinery Co., 137 F. 157. Where defendant sold his stock in the usual course of trade to the officer of a bank, not knowing that such officer was using the funds of the bank in the transaction, the sale was valid. Corn v. Skillern [Ark.] 87 S. W. 142. But where the stock was sold by them to the officer of the bank, when it was insolvent and in anticipation of its suspension, and the funds used belonged to the bank and were withdrawn to prevent their use for the payment of creditors, such moneys could be recovered from the stockholders by the receiver. Under Kirby's Dig. § 861. Id.

93. See 3 C. L. 926.

94. Under Kirby's Dig. § 950. Corn v. Shillern [Ark.] 87 S. W. 142. Where the stockholders and directors of an insolvent corporation sanctioned the sale of the assets, negotiated by its president, who submitted a list of its debts, including debts to himself and others for which he was surety, in excess of the selling price, and the proceeds were used to discharge those debts and some others, creditors not paid could not maintain a creditors' bill on the ground that the president was a trustee of the proceeds for the benefit of all creditors. Shipman Co. v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 281, 104 N. W. 24. A creditors' bill against a corporation cannot be based alone on unliquidated claims for torts alleged to have been committed by it. Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131.

95, 96. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

97. Mott v. Edwards, 98 App. Div. 511, 90 N. Y. S. 303.

98. Mills' Ann. St. § 497, in conferring upon a court of equity authority to decree the dissoution of a corporation at the suit of an individual and authorizing the taking charge of its property by a receiver for the purpose of closing up its affairs, merely gives a remedy in the nature of a creditors' bill. Nor does section 163 of the Code of Procedure confer the powers mentioned in the text. People v. District Court of Denver [Colo.] 80 P. 908. Statutes providing for creditors' suits for administering the affairs of an insolvent corporation for the benefit of creditors are merely confirmatory of previously existing law. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. The Delaware statute for the appointment of a receiver, on the application of stockholders or creditors of an insolvent corporation, creates a purely equitable right and remedy, which may be enforced in a circuit court of the United States by unsecured creditors who have not reduced their claims to judgment, as well as by stockholders or judgment creditors. Statute of March 25, 1891 (19 Laws Del. c. 181). Jones v. Mutual Fidelity Co., 123 F. 506.

99. Saxon v. Southwestern Brick & Tile Mfg. Co., 113 La. 637, 37 So. 540. In Colorado, courts of equity have no jurisdiction to appoint a receiver, except in an action pending in which the receiver is desired. People v. District Court of Denver [Colo.] 80 P. 908. A court of equity has no inherent power to appoint a receiver, except as an incident to, and in, a suit pending. Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131. Petition held not to state facts sufficient to authorize the court to appoint a receiver for defendant corporation. Smiley v. Sioux Beet Syrup Co. [Neb.] 101 N. W. 253; Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

1. A receiver will not readily be appointed in a stockholder's suit to remedy unauthorized or ultra vires acts of the directors or of the corporation, where neither the corporation nor its officers are insolvent, and the concern is profitably conducted.

may be appointed without notice, though generally such a thing should not be done.[2] It is no objection to the appointment of a particular person as receiver of a corporation that he is a stockholder and has an interest opposed to that of creditors.[3]

The law does not contemplate, on an application to appoint a receiver, two distinct judgments—the necessity for such appointment and the appointment—but the two orders must be read together as constituting one judgment.[4]

A solvent corporation will not be placed in the hands of a receiver to enable a stockholder, who has deposited his stock as collateral for a debt, to have an account of its assets.[5] A corporation, like an individual, is said to be insolvent when it is not able to pay its debts.[6] The mere refusal by a corporaton to pay its debts is not ground for the appointment of a receiver therefor, even with its consent;[7] but a receiver may well be appointed for a corporation, when the further conduct of its business would only make its condition more disastrous.[8] In case of an insolvent

Miller v. Kitchen [Neb.] 103 N. W. 297. A receivership can never be properly granted, at the instance of a general creditor of a corporation, until the point has been reached in its affairs, when the trust fund doctrine may be invoked by the creditors. Brenton v. Peck [Tex. Civ. App.] 87 S. W. 898. A court of equity will not appoint a receiver in behalf of a person suing a corporation in tort, solely to hold and manage its property awaiting the decision of other actions arising out of the same occurrence. Neither under Shannon's Code, §§ 4730, 4765, 5165, 5173, 5181, 5182, 5549, nor under the ordinary powers of courts of chancery. Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131. The fact that a board of directors of a corporation exceeded its powers in leasing its property and franchises does not warrant the appointment of a receiver, where no other violation of duty or mismanagement is shown. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. Judgment against defendant in an action to sequester its property and to appoint a receiver, rendered upon a frivolous answer. Defendant denied knowledge of a judgment and execution against itself, of which, being matter of public record, it was bound to take notice. Morgan & Co. v. Quo Vadis Amusement Co., 45 Misc. 130, 91 N. Y. S. 882.

2. Consolidated Barb Wire Co. v. Stevenson [Kan.] 79 P. 1085. The Code of Colorado contemplates that, when a receiver is asked for by a party to a pending action, his adversary should have notice and the right to make answer and be heard, before decision is made. Code, § 164. People v. District Court of Denver [Colo.] 80 P. 908. Notwithstanding an attempted sale of all the assets of an insolvent corporation to certain persons and an attempt to make them officers to manage the corporation, and a failure by the officers to administer the assets, the corporation still had such existence as to justify its being made a party to a suit by a creditor for the appointment of a receiver. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

3. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

4. Under Act No. 159, p. 312, of 1898. Oil City Ironworks v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

5. Huet v. Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846.

6. Brenton v. Peck [Tex. Civ. App.] 87 S. W. 898. Insolvency, under the New Jersey corporation act, denotes a general inability to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit. P. L. 1896, pp. 277, 298, § 64. Empire State Trust Co. v. Trustees of Fisher & Co. [N. J. Err. & App.] 60 A. 940, citing National Bank of Metropolis v. Sprague, 21 N. J. Eq. 530, 538; Skirm v. Eastern Rubber Mfg. Co., 55 N. J. Eq. 179, 184. The liability of stockholders for stock claimed to have been issued without payment, which claim is disputed, cannot be considered an asset in determining the corporation's solvency. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466.

7. Brenton v. Peck [Tex. Civ. App.] 87 S. W. 898.

8. Vokes v. Eaton [Ky.] 85 S. W. 174. Under a Kansas statute, now repealed, it was necessary that a corporation should be insolvent before a receiver could be appointed. Section 1302, Gen. St. 1901, under this section a judgment creditor of an insolvent corporation, after the return of an execution unsatisfied, was entitled to the appointment of a receiver, by application in the original action. Consolidated Barb Wire Co. v. Stevenson [Kan.] 79 P. 1085. Proceedings in Louisiana, under paragraph 8, section 1, Act No. 159, page 313, Acts 1898, for the appointment of receivers over corporations, contemplate proof of the financial inability of the corporation to meet its obligations, and of the necessity of the appointment of a receiver, by declaration of the board of directors, embodied in a resolution. Saxon v. Southwestern Brick & Tile Mfg. Co., 113 La. 637, 37 So. 540. The resolution of the board of directors referred to in the act of 1898 is made at least prima facie evidence of the necessity. Oil City Ironworks v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987. The statute of Louisiana (Act 159, p. 312 of 1898) does not require that the party asking for the appointment of a receiver be a "judgment" creditor of the corporation.

corporation, the courts of the state where it was organized are the proper tribunals to ascertain the deficiency of its assets, to determine the amounts due creditors and pass upon the rights and liabilities of its stockholders.[9] In the absence of any proceedings in the Federal courts, under the bankruptcy law,[10] proceedings may be had for the appointment of a receiver to take, hold and distribute the assets of an insolvent corporation under the insolvency statutes of a state.[11]

The principle object of a receivership is to afford prompt and efficient relief, and creditors of creditors are not permitted to intervene, to the hindrance and delay of such relief.[12] But where a creditor has assigned his interest in any dividends coming to him, or liens have been created upon his interest, those who succeed to his rights are generally allowed to appear as claimants and establish their claims to his share of the funds.[13] The very purpose of the appointment of a receiver is to bring into play rights hostile to the continued existence of the corporation,[14] although the mere fact that corporation has gone into the hands of a receiver does not affect its corporate existence.[15] But the appointment of a receiver operates as a suspension of its corporate functions and of all authority over its property and effects.[16] The title and right of possession of all its property, both real and personal, passes to the receiver, as the officer of the court appointing him, for the use and benefit of the creditors of the insolvent.[17] The effect of appointing a receiver being to take the property of a corporation out of the control of its officers, the courts should proceed with extreme caution and the statute authorizing such action should be strictly construed.[18]

The action of an inferior court in the appointment of a receiver for an insolvent corporation will not be interfered with, unless there is shown to be some overwhelming objection, point of propriety, or some fatal objection upon principle in the person named.[19] Any irregularity in the filing of the bond of a receiver in supplementary proceedings cannot be taken advantage of collaterally.[20]

Id. In the absence of statutory authority, unsecured creditors at law, who have not reduced their claims to judgment, cannot solely on the ground of insolvency maintain a bill to deprive a corporation of the possession of its assets and secure their administration and distribution. Jones v. Mutual Fidelity Co., 123 F. 506. Under the statute authorizing the appointment of a receiver for an insolvent corporation, or one in imminent danger of insolvency, the applicant must show that he has an actual interest in the property, or a lien thereon, or that it constitutes a fund out of which he is entitled to the satisfaction of his claim. Evidence held insufficient to show insolvency or imminent danger of it. Brenton v. Peck [Tex. Civ. App.] 87 S. W. 898.

9. Abbott v. Goodall [Me.] 60 A. 1030.

10. Act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). Proceedings under this act suspend the operation of state insolvency laws. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466.

11. Insolvent traders' act (Civ. Code 1895, §§ 2716-2722), Georgia. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466.

12. Williston Seminary v. Easthampton Spinning Co., 186 Mass. 484, 72 N. E. 67.

13. Williston Seminary v. Easthampton Spinning Co., 186 Mass. 484, 72 N. E. 67, citing Tuck v. Manning, 150 Mass. 211, 5 L. R. A. 666.

14. Industrial Mut. Deposit Co.'s Receiver v. Taylor, 26 Ky. L. R. 802, 82 S. W. 574.

15. Pinchback v. Bessemer Min. & Mfg. Co., 137 N. C. 171, 49 S. E. 106. The power of its officers to carry on its business is superseded, but the corporation can hold meetings and elect officers without leave of the court. Commonwealth v. Overholt, 23 Pa. Super. Ct. 199.

16. The officers can thereafter make no valid transfer of the corporate assets. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Commonwealth v. Overholt, 23 Pa. Super. Ct. 199.

17. Section 5406, Rev. Codes. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261.

18. Bartlett v. Fourton [La.] 38 So. 882. Where fraud and mismanagement by the officers of a corporation is charged, it is only where the ordinary remedies are inadequate; or where the assets of the corporation are liable to be squandered or dissipated, or the business of the corporation injured or destroyed, or for the purpose of winding up its affairs, that a court will be justified in taking from the owners the management and direction of the corporate affairs and assuming such management and direction itself through the hands of its

Where a corporation administering funds derived from various sources is placed in the hands of a receiver, who administers the whole, it appearing that the receivership was as necessary for the conservation of one fund as the other, the expense should be borne by the whole in proportion to the benefits received.[21]

A receiver is the officer of the court and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees.[22] He is a mere custodian, without title and without any power but that conferred upon him by the order appointing him.[23] He represents the state as well as the creditors and stockholders.[24]

A receiver has the right to do what the corporation might have done in collecting unpaid subscriptions and debts due the corporation and in paying taxes.[25] When a receiver is appointed and he finds contracts of the insolvent corporation, he has an election to carry out or not to carry out such contracts.[26] Ordinarily the receiver is the proper party to bring suit against offending officials, but when the receiver is one of the officials charged with the wrongdoing, an equitable proceeding may be maintained by the stockholders, the receiver and the corporation both being made parties.[27] A bill by a receiver against directors for negligence causing loss to the stockholders may be barred by laches.[28]

Corporate property in a receiver's hands sold by decree of a court passes free

receiver. Miller v. Kitchen [Neb.] 103 N. W. 297.

19. Showing held insufficient to warrant the setting aside of the appointment of receiver. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

20. Amendment nunc pro tunc of the order of appointment, relative to the place of filing bond allowed pending trial, under Code Civ. Proc. § 723. Boynton v. Sprague, 100 App. Div. 443, 91 N. Y. S. 839.

21. In re Immanuel Presbyterian Church, 113 La. 911, 37 So. 873.

22. In an action by one of the principal stockholders against the receiver, to wind up the affairs of the concern, held, that the delay of the receiver to settle the affairs of the concern, after repeated orders of the court, was a flagrant neglect of duty. Lyle v. Sarvey [Va.] 51 S. E. 228.

23. A receiver, under the corporation act of New Jersey, is a statutory receiver. He is the legislative agency to be named by the court, and has such powers as the legislature has vested in him. P. L. 1896, p. 277. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408. Receivers can act only by direction of the court, while liquidators hold no official position and act independently of judicial sanction. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

24. Industrial Mut. Deposit Co.'s Receiver v. Taylor, 26 Ky. L. R. 802, 72 S. W. 574.

25. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408. Upon the appointment of a receiver in a proceeding to marshal the assets, pay the debts and dissolve the corporation, all rights of action in the corporation to sue for and collect such assets pass to the receiver. Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816. Where a corporation purchased property on a conditional sale, which was retaken by the vendor upon default in payment by the vendee, and sold to another party, the receiver of the corporation could not recover the property, as the corporation was no longer entitled to its possession after forfeiture. The fact that the sale was made to the brother of the president of the corporation did not show fraud; and even if the transaction was fraudulent, the receiver could not recover without tendering the price paid by the president's brother. Kidder v. Wittler-Corbin Machinery Co. [Wash.] 80 P. 301. Where the property of a corporation has been divided among the stockholders, leaving its debts unpaid, any person receiving any part of such property is liable to contribute to the payment of such debts a sum equal to the value of the property received, which may be recovered by the receiver. Mitchell v. Jordan, 36 Wash. 645, 79 P. 311. Where capital of a corporation had been unlawfully paid to a stockholder and the corporation was found to be insolvent, the receiver was entitled to a judgment for the same, although there was no express finding that there were any allowable claims against the corporation. The capital stock was paid in violation of Ballinger's Ann. Codes & St. § 4265. Tait v. Pigott [Wash.] 80 P. 172. Right of debenture holders of a loan company to intervene and contest the petition of a receiver for an order permitting him to collect or sell securities in his hands and making the costs and expenses a charge against the fund realized. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 135 F. 180.

26. Cogan v. Conover Mfg. Co. [N. J. Eq.] 60 A. 408.

27. Weslosky v. Quarterman [Ga.] 51 S. E. 426.

28. Where a receiver of a building association delayed the prosecution of a suit against directors or losses to stockholders caused by negligence of directors, for ten years, during which time several of the directors had died, their estates had been settled and personal representatives discharged, held, a new receiver could not maintain the bill, but it would be dismissed for laches. Ex parte Baker, 67 S. C. 74, 45 S. E. 143.

of the claims of all parties to the proceedings except such claims as may be declared in the decree not to be prejudiced.[29]

A receiver collusively appointed to carry out the fraudulent designs of adversaries of the creditors may be regarded as the agent of such adversaries and made defendant in the main action or other action by the creditors.[30] The court may permit a receiver, charged with wasting or misappropriating a trust fund for creditors, to be made a defendant in a creditor's suit and his liabilty as a wrongful holder of trust funds determined and enforced.[31] A purchase of stock by a receiver at his own sale, through a third party, is irregular and voidable at the option of the original owners, and perhaps as to creditors, but it is not void or subject to collateral attack.[32]

(§ 16) *C. Rights of corporate mortgagees and bondholders.*[33]—A creditor who seeks the aid of a corporation mortgage must establish the corporation's authority to make it.[34] In Texas, an action for the appointment of a receiver to take charge of property embraced in a mortgage, pending foreclosure and enforcement of payment of the debt secured thereby, may be brought in the county whence any part of the mortgaged property is situated.[35] A corporation mortgage will not be construed to cover after-acquired property, unless the intent to do so is expressed.[36] The holder of bonds of a corporation, taken as collateral security for a pre-existing debt, is a bona fide holder for value.[37] Holders of bonds secured by a pledge of stock are entitled to have such stock continued in existence for their security, unless they consent that some other security may be substituted.[38] Where the income from certain water works companies paid to its fiscal agents was sufficient to pay interest and coupons on prior mortgage debts, but the agents misapplied such income by paying a subsequent lien, they could not afterward hold such coupons or interest instalments as outstanding debts under the mortgage lien, to the prejudice of bondholders.[39] The failure of a corporation to pay a tax due the state on an increase of stock can be taken advantage of only by the state and does not affect the value of its bonds.[40] Although an instrument is so executed as to become the bond of the corporation, it is not necessarily a sealed instrument as to the stockholders who indorsed it before delivery, to give credit thereto.[41] Coupon bonds issued by a water

29. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7.

30, 31. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

32. Groeltz v. Cole [Iowa] 103 N. W. 977.

33. See 3 C. L. 929.

34. Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co. [N. J. Eq.] 61 A. 529.

35. Under Rev. St. 1895, art. 1194, subd. 12, art. 1488, having no application to such cases. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

36. In re Adamant Plaster Co., 137 F. 251.

37. Hoskins v. Seaside Ice Mfg. & Cold Storage Co. [N. J. Eq.] 59 A. 645.

38. A clause in a mortgage of stock securing bonds that, upon request of the holders, of a majority of the bonds, the trustee should dispose of the stock so as to preserve the security or substitute new security, does not authorize the majority to use their power so as to injure the bondholders as a whole. Ikelheiner v. Consolidated Tobacco Co. [N. J. Eq.] 59 A. 363. Trustee in mortgage securing corporate bonds, under the facts in the case, held not personally liable to a bondholder as a guarantor of the truthfulness of the company's representations as to its obligations on the bonds. Tschetinian v. City Trust Co., 97 App. Div. 380, 89 N. Y. S. 1053. Where a railroad company was totally insolvent, a purchaser of its mortgaged assets, under a foreclosure decree for the benefit of the bondholders, could not, at the suit of a stockholder, be charged as a trustee of the property so purchased for the benefit of stockholders. MacArdell v. Olcott, 93 N. Y. S. 799.

39. Farmers' Loan & Trust Co. v. New England Water Works Co. [C. C. A.] 137 F. 729.

40. First Nat. Bank v. Wyoming Valley Ice Co., 136 F. 466.

41. Where an instrument in the form of a promissory note is executed by a corporation under seal and indorsed by stockholders, in a suit against the corporation and the indorsers, the minutes of the corporation and other surrounding facts and circumstances are admissible to show the

company under the general statutes are subject to prior equities in the hands of an assignee, though he took them in due course of business and without notice.[42] Interest coupons on corporate bonds, which are required to be presented for payment at the office of the corporation, bear interest from maturity, without presentation, unless it affirmatively appears that the corporation was prepared to make payment on presentation.[43] Immunity from taxation granted to a corporation does not pass to its successor, under sale of its property on the foreclosure of a mortgage or trust deed, as one of its franchise rights or privileges.[44]

(§ 16) *D. Officers and stockholders as creditors; preferences.*[45]—A corporation in a failing condition may prefer, in payment or security, the valid debt of any of its creditors, although a director, if done in good faith.[46] In the division of the profits of a corporation shareholders can participate only in proportion to the amount of stock they hold; so far as the money loaned by them to the corporation is concerned, they stand in the attitude of creditors and not of shareholders.[47]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions, and remedies.*[48]—The liability of shareholders to pay for the stock subscribed for by them is a common law, not a statutory, liability.[49] While a corporation is solvent, a stock subscription is due in accordance with its terms, and is payable when, and as called for, by the corporation; but when the corporation becomes insolvent, the contract between it and the subscriber is terminated, and his debt to it then is only for such part of his subscription as is required to pay the corporate debt, not to it in its own right, but in the right of its credtors.[50] It is not necessary for a stockholder to sign a subscription for stock, where the certificate is accepted, to render him liable to creditors for the full amount of unpaid subscriptions;[51] and his liability is not affected by the fact that the stock was to be paid for by the surrender of stock.[52]

The right to hold a stockholder for an unpaid subscription in the interest of creditors rests upon the doctrine that the capital stock is a trust fund for the pay-

true intent of the parties in executing the instrument. Somers v. Florida Pebble Phosphate Co. [Fla.] 39 So. 61.

42. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

43. Abraham v. New Orleans Brewing Ass'n, 110 La. 1012, 35 So. 268. In a suit by a trustee for bondholders to obtain a sale of securities pledged for their benefit, a court of equity is not required, at the instance of an intervening bondholder, to adjust, by way of set-off, in distributing the funds realized, unliquidated demands arising out of the promotion of the corporation, which can better be disposed of in independent suits. Land Title & Trust Co. v. Tatnall [C. C. A.] 132 F. 305.

44. Such an immunity is a personal privilege, not extending beyond the immediate grantee, unless so declared in express terms. Lake Drummond Canal & Water Co. v. Commonwealth, 103 Va. 337, 49 S. E. 506.

45. See 3 C. L. 933.

46. The burden is on the creditor, who attacks a preference made by the corporation, to show that one of the directors was not notified of the meeting at which the preference was authorized. Pitman v. Chicago-Joplin Lead & Zinc Co. [Mo. App.] 87 S. W. 10.

47. Donner v. Donner, 211 Pa. 409, 60 A. 1036.

48. See 3 C. L. 934.

49. Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816.

50. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252. When the receiver of an insolvent corporation applies for permission to make an assessment on unpaid stock subscriptions, to pay debts, the court must judicially determine what proportion of such subscriptions is needed, so as to confine the assessment to that amount. Kirkpatrick v. American Alkali Co., 135 F. 230. The liability of certificate holders in an endowment company to pay assessments terminates upon its insolvency, and, as creditors, they become entitled to an accounting as to the present value of their contracts on the basis of the surrender value of their certificates. Gilbert v. Washington Ben. Endownment Ass'n 21 App. D. C. 344.

51. Under Ky. St. 1903, § 547. Kentucky Mut. Inv. Co.'s Assignee v. Schaefer [Ky.] 85 S. W. 1098.

52. Under Ky. St. 1903, § 547. But they will be held liable for the difference between the amount they actually paid and the amount of stock they received at par value. Kentucky Mut. Ins. Co.'s Assignee v. Schaefer [Ky.] 85 S. W. 1098.

ment of the obligations of the corporations;[53] and neither the corporation nor the subscriber, nor both together can defeat the creditor's rights;[54] nor can the corporation remit the stockholder's debt to the creditor's injury.[55] A creditor of a corporation cannot compel the members thereof to pay what may be due him by the corporation. He can demand payment of the corporation only, and he can seize no other effects than such as belong to the corporation.[56] Transactions between a corporation and a stockholder, in the sale of stock for property conveyed, cannot be attached by a judgment creditor unless the corporation is made a party.[57] If stockholders do not pay their subscriptions to stock, their obligation is to the corporation, and the corporation only can enforce it.[58] It is the duty of the governing authorities of a corporation to require payment of stock subscriptions, and, on failure so to do, they may be required by the courts, at the suit of interested parties, to perform their duty.[59] But a creditor, who knew that stock issued as fully paid was not in fact fully paid and yet extended credit to the corporation, cannot require payment of the unpaid subscription, in case of the corporation's insolvency.[60] When a bill in equity is filed by the creditors of an insolvent corporation to subject the unpaid subscriptions to the payment of the corporate debts, it is necessary that all the delinquent subscribers be made parties defendant, unless some good reason for the contrary appears in the bill, such as death, insolvency or inability to reach a party with the process of the court.[61] The real owner of stock, which stands in the name of a dummy and has never been entered on the books in the name of the owner is nevertheless liable to be charged both for unpaid assessments and with the statutory liability for debts.[62]

In an action by stockholders against the corporation for a receiver and winding up, the court may order the receiver to determine the amount due from plaintiffs for unpaid subscriptions and render judgment against them therefore.[63] Where no effort has been made by a receiver to dispose of valuable assets of the insolvent corporation or to ascertain the real owners of stock held in the name of

53. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54; Allen v. Grant [Ga.] 50 S. E. 494; West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252; Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816. Where a corporation, without a legitimate basis for it, declares a stock dividend, the implied promise of a stockholder to pay for additional stock received arises only in favor of subsequent creditors. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721. An act amending a charter so as to provide that all stockholders paying fifty per cent. of the par value of their stock should not be liable for further assessments thereon for debts or liabilities, did not affect original contracts of subscription, so far as the claims of existing creditors were concerned. Act Jan. 9, 1892 (Acts 1891-92, p. 69, c. 38). Williams v. Matthews, 103 Va. 180, 48 S. E. 861.

54. A subscription to stock, made payable in specifics worth not more than ten per cent. of the face of the shares, is a fraud on subsequent creditors, and the trustee in bankruptcy could sue for the unpaid subscription. Allen v. Grant [Ga.] 50 S. E. 494.

55. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54.

56. Jones Co. v. Hoffman [La.] 38 So. 763.

57. Calcasieu Nat. Bank v. Godfrey [La.] 38 So. 591. Also when an attempt is made to hold stockholders liable on account of unpaid subscriptions. Jones Co. v. Hoffman [La.] 38 So. 763. In Louisiana stockholders are not direct personal debtors of the individual creditors. Civ. Code, art. 437. Id. But in Oregon a suit in equity is maintainable by a creditor, or one standing in his stead, to recover against a stockholder of an insolvent corporation an unpaid balance of his stock subscription, under Const. art. 11, § 3, making stockholders liable for the debts of a corporation to the amount of their unpaid stock subscriptions. The liability being not to the creditor, but for the indebtedness of the corporation, which is treated as an asset, to which the creditor is entitled in the adjustment of legal demands against the corporation. Macbeth v. Banfield [Or.] 78 P. 693.

58, 59. Jones Co. v. Hoffman [La.] 38 So. 763.

60. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54; Colonial Trust Co. v. McMillan [Mo.] 87 S. W. 933.

61. Fremont Package Mfg. Co. v. Storey, 2 Neb. Unoff. 325, 96 N. W. 416.

62. American Alkali Co. v. Kurtz, 134 F. 663.

63. Calef v. Wyandotte Realty Co. [Kan.] 78 P. 816.

dummies, so as to include them in the assessment, his application for permission to make an assessment to pay debts is premature.[64] In actions to enforce payment of unpaid subscriptions,, the stockholders are entitled to a jury trial of the issues raised by their denial of the ownership of, or subscription to, stock.[65] The payment of a judgment obtained by a creditor on the personal liability of a stockholder under the statute cannot be considered as payment on unpaid corporate stock.[66]

Purchasers of stock, apparently full-paid, in open market, are not liable for unpaid instalments thereon, under the statutes imposing such liability;[67] nor are holders of stock issued by a mining company for the purchase of mines, and taken as full-paid, under the Colorado statutes, where the transaction was bona fide,[68] and a bona fide transferee of stock, the certificate of which recites that it is full-paid, is not liable to make good the contract of the original subscriber, if such transferee did not know, actually or constructively, that the stock had not been fully paid for.[69] Where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account.[70]

Fictitiously paid up stock.[71]—A transferee of shares of stock, with knowledge that they had been fraudulently issued as fully paid-up, becomes liable for the unpaid subscription.[72]

Limitations.[73]—The statute of limitations does not begin to run against an action to enforce a stockholder's liability on unpaid stock, until levy of an assessment;[74] but an order of a bankrupt court to the trustee to bring suit for unpaid subscriptions is sufficiently in the nature of a call or assessment to perfect the cause of the action.[75] In Kansas the statute of limitations begins to run from the time when a private corporation becomes insolvent and suspends active business, leaving debts unpaid.[76]

(§ 16) *F. Personal liability of stockholder for debts of corporation, and remedies.*[77]—The exemption of the individual corporate member from personal liability upon a claim against the corporation is a fundamental principle in the general law of corporations.[78] The nature and extent of the stockholders' liability

64. Kirkpatrick v. American Alkali Co., 135 F. 230.

65. McFarland v. Martin [Tex. Civ. App.] 86 S. W. 639.

66. Civ. Code, § 322. Union Sav. Bank v. Leiter, 145 Cal. 696, 79 P. 441.

67. Ky. St. 1903, § 547. Hess v. Trumbo [Ky.] 84 S. W. 1153. The constitution of Missouri provides against liability of a stockholder, if the stock is fully paid up. Burnes v. Burnes, 132 F. 485.

68. 1 Mills' Ann. St. §§ 486, 490, 497, 582. Speer v. Bordeleau [Colo. App.] 79 P. 332.

69. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54.

70. Any device, by which the stock passes as fully paid, without such payment either in money or property, as an intentional overvaluation of property with the understanding that a part of the stock shall be returned for distribution among the directors voting for the purchase of the property, constitutes actual fraud against creditors of the corporation. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54. Under the corporation act of New Jersey, the issue of fully-paid stock, in exchange for property, constitutes a contract between the corporation and the stockholders, which, unless set aside as in fraud of creditors, will prevent an assessment of the stockholders. Rev. St. 1877, p. 174. Id.

71. See 3 C. L. 935.

72. Allen v. Grant [Ga.] 50 S. E. 494. In an action by a trustee in bankruptcy, to recover an assessment made on stockholders, defendant held not to be a bona fide holder without notice, he claiming to have purchased the stock as full-paid and nonassessable. Campbell v. McPhee, 36 Wash. 593, 79 P. 206.

73. See 3 C. L. 935.

74. Civ. Code, § 332, subd. 1. The levy and notice of an assessment on unpaid stock, which was afterward rescinded, did not commence the running of the limitation so as to prevent the enforcement of another assessment. Union Sav. Bank v. Leiter, 145 Cal. 696, 79 P. 441.

75. Allen v. Grant [Ga.] 50 S. E. 494.

76. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252.

77. See 3 C. L. 936.

78. Hudson v. Limestone Natural Gas Co., 132 F. 410.

is to be determined by the statute creating it,[79] and in force at the time his debt was incurred.[80] The liability is collateral to the principal obligation, which still rests upon the corporation.[81] It forms no part of the assets of the corporation, but constitutes a fund for the exclusive benefit and protection of all creditors.[82] Creditors are not required to await the collection of worthless or doubtful claims among the assets; shareholders must pay promptly and take upon themselves the onus and risk as to all such claims, looking to the assignee for whatever may be realized on assets.[83] A general law making stockholders of safe deposit, guaranty, loan and fidelity companies liable to depositors and creditors for double the amount of his stock, is applicable to a company incorporated by special charter.[84] Dissolution of a corporation does not extinguish the liability of the stockholders.[85]

79. Abbott v. Goodall [Me.] 60 A. 1030. Where a corporation created by special act was sought to be consolidated with another, the special liability of a stockholder of the original corporation cannot be enforced in an action against the attempted consolidated corporation, when the attempted consolidation is void. Boor v. Tolman, 113 Ill. App. 322. In Kansas, the constitutional and statutory liability of stockholders (in other than railway, charitable and religious corporations. Const. art. 12, § 2; Gen. St. 1868, c. 23, §§ 40, 44, 32), though statutory in its origin, is contractual in nature; it is several, and to the creditors individually and not to the corporation; and covers all contractual obligations of the corporation, whether it includes liabilities for torts, either before or after judgment is undetermined. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing Whitman v. Oxford Nat. Bank, 176 U. S. 559, 44 Law. Ed. 587; Howell v. Manglesdorf, 33 Kan. 194; Abbey v. Dry Goods Co., 44 Kan. 418; Pierce v. Security Co., 60 Kan. 164; Woodworth v. Bowles, 61 Kan. 569. It also includes unmatured and contingent obligations of the corporation, as well as those which are matured and absolute. Cottrell v. Manlove, 58 Kan. 405, 408; Brigham v. Nathan, 62 Kan. 243, 249; McHale v. Moore, 66 Kan. 267; Crissey v. Morrill [C. C. A.] 125 F. 878. And under the constitution of Kansas, a stockholder is liable for claims if they arise out of the exercise of powers "essential to the transaction of its ordinary affairs," ald within "the legitimate objects of its creation." Held to include indebtedness arising out of an accommodation indorsement by a corporation. First Nat. Bank of Pittsburg v. Darlington, 25 Pa. Super. Ct. 438. In Kansas, where for more than one year the usual and ordinary business which constitutes the active life of the corporation is suspended and the business done is only such as looks to a cessation of its affairs, dissolution is conclusively presumed for the purpose of enabling the creditor to enforce the stockholder's liability. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721. Under the statute of Maryland, making each stockholder liable for double the amount of his stock (Acts Md. 1892, p. 153, c. 109, § 851), the liability is absolute and direct to creditors and may be enforced by a creditor against a particular stockholder, and the stockholder being, as between them, a principal debtor, the creditor is not required first to exhaust his remedy against the corporation. Knickerbocker Trust Co. v. Myers, 133 F. 764. And the liability to creditors of a banking association, under the Maryland statutes, though statutory, is contractual in nature, each stockholder agreeing thereto; it is not an asset, but a debt directly by the stockholder to creditors who become such while the stockholder holds its stock. Myers v. Knickerbocker Trust Co. [C. C. A.] 139 F. 111.

80. Held that, where the debt was created in 1900, the creditor's right was governed by Stock Corporation Law 1892, p. 1841, c. 688, and was not affected by a later act, Laws N. Y. 1901, p. 971, c. 354. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24.

81. Abbott v. Goodall [Me.] 60 A. 1030; Clark v. Knowles, 187 Mass. 352, 72 N. E. 352.

82. Clark v. Knowles, 187 Mass. 35, 72 N. E. 352. An action against stockholders of a bank, to enforce liability for the payment of debts, is for the benefit of every creditor, though not named as a party. A nonparticipating creditor held entitled to prove his claim before the final distribution of the proceeds, but to be chargeable with a proportionate amount of the expenses of the litigation. In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681. Creditors of a corporation who have proved their claims in insolvency proceedings against a second corporation that received all the assets of the first corporation and assumed its liabilities, and have received dividends on such claims, are not estopped from enforcing the statutory liability of the stockholders of the first corporation for the balance due them. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721. The right to sue directors personally for corporate debts passes as an incident to the debt to an assignee thereof, during the lifetime of the creditor, or to a receiver appointed for the creditor. Under Laws 1897, p. 313, c. 384, § 30. Boynton v. Sprague, 100 App. Div. 443, 91 N. Y. S. 839.

83. Clark v. Knowles, 187 Mass. 35, 72 N. E. 352.

84. Code Pub. Gen. Laws, art. 23, § 85a (Laws 1892, p. 153, c. 109). The act is valid as to domestic corporations, even though invalid as to foreign corporations. Murphy v. Wheatley [Md.] 59 A. 704.

85. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

The special liability of a stockholder accrues when the cause of action arises against the corporation, and not when the judgment is rendered against it.[86]

The right of action, which the constitution and laws of Kansas give to a creditor against a stockholder, where a corporation suspends business for more than a year, without paying its debts, arises in that state and not in the state of the stockholder's residence.[87] A stockholder's liability in an Ohio corporation cannot be enforced outside of the jurisdiction of that state, on the theory that the constitutional provisions of that state are self-executing, the courts of that state having regarded the liability as statutory.[88]

As between creditors and stockholders, each stockholder is severally liable to all the creditors; but, as between themselves, each stockholder is to pay in proportion to his stock.[89]

Persons liable as stockholders.[90]—The statutory individual liability attached to corporate stock, as security for the payment of corporate debts, is that of the person who holds legal title to the stock as owner. This may be said to be part of the common law of corporations.[91] One who loans money to a corporation, but takes stock absolute upon its face, is liable as a stockholder;[92] but the beneficiary of the earnings of stock, where the bequest to him did not segregate such stock from the general estate of the deceased, is not liable as a stockholder;[93] nor is holding stock as collateral security.[94] And a person who agrees with another to subscribe for shares in a company, but fails to do so, while he may be liable for breach of

86. Boor v. Tolman, 113 Ill. App. 322. In Ohio, the liability of a stockholder attaches at the time the liability is incurred by the corporation. Act of the Gen. Assembly of April, 29, 1902, amending and repealing Rev. St. § 3258, held unconstitutional. Swift & Co. v. Youngstown Baking Co., 6 Ohio C. C. (N. S.) 89.

87. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

88. Const. Ohio (1851) art. 13, § 3; and Rev. St. 1880, § 3258, and § 3260, as amended in 1894, passed in pursuance of the constitutional provisions. Middletown Nat. Bank v. Toledo, etc., R. Co., 197 U. S. 394, 49 Law. Ed. 803.

89. The Colorado statute imposing a double liability upon stockholders in behalf of creditors contemplates a pro rata contribution by all the stockholders to satisfy creditors. Sess. Laws Colo. 1885, p. 204, § 1. Abbott v. Goodall [Me.] 60 A. 1030; Clark v. Knowles, 187 Mass. 35, 72 N. E. 352.

90. See 3 C. L. 936.

91. In re Noyes Bros., 136 F. 977. Under the statute of Rhode Island, defining the liability of members of a manufacturing company for its debts, it is immaterial whether the stockholders sought to be reached are original stockholders or subsequent purchasers. Gen. Laws 1896, p. 556, c. 180, § 1; § 13, as amended by Pub. Laws of 1900-01, p. 215, c. 839. Lazard Freres et Cie v. Phetteplace, 26 R. I. 568, 59 A. 931. A corporation that has held stock in a bank for a number of years, receiving dividends thereon, with knowledge of all its stockholders, even though not authorized to do so, will be estopped from denying its liability as a stockholder. Hunt v. Hauser Malting Co. [Minn.] 103 N. W. 1032. Under the statutes of Maine the pledgee for value, of a certificate of stock as security merely is not subject to the liabilities of a stockholder, unless he appears on the books as the absolute owner. Held, under the evidence, that claimant was not the absolute owner and not individually liable as a stockholder for corporate debts. In re Noyes Bros., 136 F. 977. In an action to enforce a stockholder's liability, the evidence was held sufficient to warrant a finding of defendant's ownership of the stock and his consequent liability. Hunt v. Reardon, 93 Minn. 375, 101 N. W. 606. Where a corporation organized under a special charter subsequently changed its name and came under the general (Act of June 16, 1887) a stockholder in such corporation was relieved of his special liability, inasmuch as the provisions of the later act were substituted for the special charter. Boor v. Tolman, 113 Ill. App. 322. The intention of the legislature of Ohio, as expressed in Rev. St. § 3258 and amended by Act April 29, 1902, was to restrict the liability of a stockholder to debts incurred while the stock was held by him and which were enforceable when due. Scofield v. Excelsior Oil Co., 6 Ohio C. C. (N. S.) 169. But the Act of 1902 was declared unconstitutional and the stockholder's liability attaches at the time of the incurring of the liability by the corporation. Swift & Co. v. Youngstown Banking Co., 6 Ohio C. C. (N. S.) 89.

92. American Steel & Wire Co. v. Eddy [Mich.] 101 N. W. 578.

93. Potter v. Mortimer, 114 Ill. App. 422.

94. Under the express provisions of Rev. St. 1899, § 1324. Defendant held to be a pledgee and not an owner, and not liable as a stockholder. Colonial Trust Co. v. McMillan [Mo.] 87 S. W. 933.

contract, does not become a stockholder and liable as such.[95] A transfer of stock not made in the ordinary course of business, nor at a time when the corporate business is being prosecuted and the corporate life maintained in the usual manner, will not relieve the stockholder from liability to creditors of the corporation;[96] nor can a stockholder avoid his liability on account of stock sold prior to the creation of the debt, if the stock was not transferred on the books as required by the rules.[97] A non-resident stockholder, who was not a party to, and did not appear in, any of the proceedings resulting in the appointment of a receiver and the levy of an assessment, cannot be held liable for such assessment, under the laws imposing and enforcing stockholders' liability.[98]

Before the books of a corporation can be put in evidence against a person charged with liability as one of its members his membership must be admitted or established by evidence aliunde.[99]

Ascertainment of corporate liability and exhaustion of remedy against it.[1]—In Rhode Island an action to enforce a stockholder's liability can be maintained only by a judgment creditor of the corporation.[2] But in North Dakota, a creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and other creditors to enforce stockholders' liabilities.[3] And in Kansas the remedy against the stockholder is available to the creditor immediately upon the dissolution, without first recovering a judgment against the corporation.[4] In an action by a creditor of an insolvent corporation against stockholders, it is not necessary to show a judgment against the corporation and an execution returned unsatisfied, where it was alleged that a judgment of dissolution had been rendered, restraining creditors from prosecuting actions against the corporation.[5] A judgment against the corporation is binding upon the stockholders as an adjudication of the liability of the corporation.[6]

Limitations.[7]—Where the law creating the liability of stockholders for the debts of the corporation does not fix the time when the cause of action accrues, it accrues immediately upon the insolvency or like default of the corporation;[8] but the liability is conditional and statutes of limitaton do not begin to run on it until an assessment has been made,[9] and must be enforced within six years.[10] But in

95. Held, under the evidence, that there was no consummated subscription for stock. Ecuadorian Ass'n v. Ecuador Co. [N. J. Eq.] 61 A. 481.

96. As a transfer of stock to a corporation not authorized to receive it or one fraudulent as to creditors. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

97. Knickerbocker Trust Co. v. Myers, 133 F. 764.

98. Const. art. 10, § 3; Laws Minn. 1899, p. 315, c. 272. In an action to enforce such liability, the corporation was an adverse party to the stockholders sued, and the court did not acquire jurisdiction of the stockholders by making the corporation a party. Converse v. Stewart, 94 N. Y. S. 310.

99. Entries in certain alleged record books of a corporation held insufficient evidence of defendant's being a stockholder of a defunct corporation, in an action to charge him as a stockholder. Girard Life Ins. Annuity & Trust Co. v. Loving [Kan.] 81 P. 200.

1. See 3 C. L. 937.

2. Gen. Laws 1896, c. 180, § 22. Legg & Co. v. Dewing [R. I.] 60 A. 1066.

3. Rev. Codes 1899, §§ 5767-5770. Marshall-Wells Hardware Co. v. New Era Coal Co. [N. D.] 100 N. W. 1084.

4. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing Cottrell v. Manlove, 58 Kan. 405; Sleeper v. Norris, 59 Kan. 555, 559; Brigham v. Nathan, 62 Kan. 243, 249.

5. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24.

6. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing Howell v. Manglesdorf, 33 Kan. 194, 197; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 Law. Ed. 619; Abbott v. Goodall [Me.] 60 A. 1030, citing Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 Law. Ed. 619; Scofield v. Excelsior Oil Co., 6 Ohio C. C. (U. S.) 169.

7. See 3 C. L. 937.

8. Bennett v. Thorne, 36 Wash. 253, 78 P. 936, citing numerous cases in the different states.

9. McClain v. Rankin, 197 U. S. 154, 49

Kansas the period of limitation for commencing proceedings to enforce a stockholder's liability is three years.[11] The personal liability of shareholders in a national bank, for the contracts, debts and engagements of the bank,[12] cannot be regarded as a contract liability, for the purpose of making applicable a limitation of an action on a contract not in writing and not arising out of any written instrument.[13]

Parties.[14]—In an action brought solely to enforce the liability of stockholders in an insolvent corporation, the receiver of the latter is not a necessary party.[15]

Defenses.[16]—Under the laws of Kansas the fact that a debt of a corporation has not become due, when the corporation is dissolved, does not prevent a creditor from pursuing a stockholder.[17] In such a proceeding the stockholder cannot interpose as a set-off a claim against the corporation, which does not constitute a legal defense against the plaintiff and can be made available only in a court of equity.[18] Under the Kansas statute defining the liability of stockholders, a proceeding by motion for execution against a stockholder, after recovery of judgment against the corporation and return of execution nulla bona, is a civil action within the meaning of the statute of limitations.[19]

Procedure.[20]—When a corporation ceases to do business, leaving debts unpaid, a suit in equity may be brought against it and the stockholders jointly;[21] and only a suit in equity by one or more creditors, in behalf of all, against the corporation and all the stockholders, is the proper proceedure in Colorado,[22] North Dakota,[23] and Maryland.[24] The receiver of a corporation can maintain a bill of discovery against stockholders, who bought shares of stock for parties unknown to the receiver, to discover the real owners of such stock, preliminary to a suit against them for an assessment to pay debts.[25]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*[26]—The statute of New Jersey, making directors jointly and severally liable to creditors to the full amount of stock withdrawn or in any way paid out to stockholders, is to a degree penal as respects the officer to whom it applies, and is governed by some of the principles applicable to strictly penal statutes.[27]

Law. Ed. 702, citing McDonald v. Thompson, 184 U. S. 71, 46 Law. Ed. 437.

10. Bennett v. Thorne, 36 Wash. 253, 78 P. 936.

11. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721, citing Cottrell v. Manlove, 58 Kan. 405, 408; First Nat. Bank v. King, 60 Kan. 733; Fox v. Bank, 9 Kan. App. 18, 21.

12. Under U. S. Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465). McClaine v. Rankin, 197 U. S. 154, 49 Law. Ed. 702.

13. Ball. Wash. Code, § 4800, subd. 3. McClaine v. Rankin, 197 U. S. 154, 49 Law. Ed. 702.

14. See 3 C. L. 937.

15. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24.

16. See 3 C. L. 938.

17. The debt is due, by force of the statute permitting it to be sued, so far as the stockholders are concerned, as soon as the corporation is dissolved, although not due as respects the corporation. Crissey v. Morrill [C. C. A.] 125 F. 878.

18, 19. Crissey v. Morrill [C. C. A.] 125 F. 878.

20. See 3 C. L. 938.

21. In section 25 of the corporation act, the words "after exhausting the assets of the corporation," are not a condition precedent to the liability of the stockholders. Parmelee v. Price, 105 Ill. App. 277.

22. A suit in equity by creditors of a Colorado corporation, on behalf of themselves and other creditors who may choose to come in, against a Massachusetts stockholder, cannot be maintained under Sess. Laws Colo. 1885, p. 264, § 1. The statute contemplates only a pro rata contribution by all the stockholders. Clark v. Knowles, 187 Mass. 35, 72 N. E. 352. Held, that a suit by creditors for themselves and such others as might choose to come in, against Maine stockholders alone, could not be sustained. Abbott v. Goodall [Me.] 60 A. 1030.

23. Rev. Codes 1899, §§ 5767-5770. Although he has not reduced his claim to judgment. Marshall-Wells Hardware Co. v. New Era Coal Co. [N. D.] 100 N. W. 1084.

24. Act 1904, p. 597, c. 337. Such bill may unite the claims of different creditors against numerous stockholders, some of whom are indebted to some of the creditors, and others to others. Murphy v. Wheatley [Md.] 59 A. 704.

25. Brown v. McDonald [C. C. A.] 133 F. 897.

RIGHT OF STOCKHOLDERS TO INSPECT BOOKS AND PAPERS.*

[SPECIAL ARTICLE.]

The right in general.—It is a well-established general rule of the common law, sometimes expressly declared with some modification or change by statute or by the constitution, or by provisions in charters, articles of association, or by-laws, that every stockholder of a private corporation has a right, by reason of his interest therein, to inspect and examine its books and papers,[28] if he asserts the same at a proper and reasonable time.[29] "There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books." [30] The right is the right of reasonable examination. It does not authorize such an appropriation of the records as will work serious detriment to the corporation, and on the other hand, mere inconvenience to the corporation is no ground for denying it.[31] A stockholder also has the right to make abstracts, memoranda, and copies.

26. See 3 C. L. 938.

27. Gen. Corporation Act (Laws 1896, p. 286, c. 185), § 30. Complainant held not to have made out a case thereunder. Audenried v. East Coast Mill Co. [N. J. Eq.] 59 A. 577.

28. England: Reg. v. Mariquita & New Granada Min. Co., 1 El. & El. 289; Rex v. Merchant Tailors' Co., 2 Barn. & Adol. 115; Foster v. Bank of England, 8 Q. B. 689; Rex v. Clear, 4 Barn. & C. 899; Nelson v. Anglo-American Land Mortg. Ag. Co. [1897] 1 Ch. 130.

United States: Ranger v. Champion Cotton-Press Co., 51 Fed. 61; Chable v. Nicararagua Canal Construction Co., 59 F. 846.

Alabama: Foster v. White, 86 Ala. 467; Winter v. Baldwin, 89 Ala. 483.

Delaware: Swift v. State, 7 Houst. 338, 40 Am. St. Rep. 127.

Florida: Alabama & Florida R. Co. v. Rowley, 9 Fla. 508.

Illinois: Stone v. Kellogg, 62 Ill. App. 444, 165 Ill. 192, 56 Am. St. Rep. 240; Meysenburg v. People, 88 Ill. App. 328.

Iowa: Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427.

Louisiana: Hatch v. City Bank of New Orleans, 1 Rob. 470; Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243; State v. Bienville Oil Works Co., 28 La. Ann. 204; Cockburn v. Union Bank of Louisiana, 13 La. Ann. 289; State v. New Orleans Gaslight Co., 49 La. Ann. 1556; State v. Citizens' Bank of Jennings, 51 La. Ann. 426.

Michigan: People v. Walker, 9 Mich. 328.

Missouri: State v. St. Louis & San Francisco R. Co., 29 Mo. App. 301; State v. Sportsman's Park & Club Ass'n, 29 Mo. App. 326; State v. Laughlin, 52 Mo. App. 542.

New Jersey: Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392; Mitchell v. Rubber Reclaiming Co. [N. J. Eq.] 24 A. 407.

New York: People v. Throop, 12 Wend. 183; People v. Mott, 1 How. Pr. 247; People v. Eadle, 63 Hun, 320, 133 N. Y. 573; In re Steinway, 31 App. Div. 70.

Ohio: Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189. 78 Am. St. Rep. 707.

Pennsylvania: Commonwealth v. Phoenix Iron Co., 105 Pa. 111, 51 Am. Rep. 184. 1 Smith's Cas. 248; Phoenix Iron Co. v. Com., 113 Pa. St. 563.

Rhode Island: Lyon v. American Screw Co., 16 R. I. 472.

Vermont: Lewis v. Brainerd, 53 Vt. 519.

Wisconsin: State v. Bergenthal, 72 Wis. 314.

The fact that the corporation is in the hands of a receiver does not necessarily deprive stockholders of this right. People v. Cataract Bank, 5 Misc. Rep. [N. Y.] 14. Compare Chable v. Nicaragua Canal Construction Co., 59 F. 846.

29. What is a reasonable time will be deduced from the circumstances. Commonwealth v. Phoenix Iron Co., 105 Pa. 111; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189; People v. Walker, 9 Mich. 328; Foster v. White, 86 Ala. 467. Demand at 3:15 p. m. when officer was at his office and stated that he was busy is during "usual hours for transacting business." Cox v. Island Min. Co., 73 N. Y. S. 69.

30. Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243. A stockholder may be granted the right to inspect by-laws and resolutions, having similar effect, of a corporation, no ulterior purpose being shown or prospect of abuse of the corporation's rights. In re Coats, 75 App. Div. [N. Y.] 567.

31. State v. St. Louis & S. F. R. Co., 29 Mo. App. 301.

*Adapted from Clark and Marshall on Corporations; with all cases since the publication of that work except those contained in the foregoing article (see ante, p. 795).

"The right to make copies, and to make abstracts and memoranda, of documents, books and papers, by a stockholder in an incorporated company, is as full and complete as the right of inspection thereof." [32]

Interest and motive.—The right is confined to stockholders [33] of record [34] and their personal representatives,[35] and to stockholders who are such at the time.[36] Some of the courts have held that stockholders have a right to inspect the books and papers of the corporation without first showing any mismanagement, where they wish to make the examination in good faith for the purpose of seeing whether its affairs are properly managed. "Such a right," said the New Jersey court, "is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny it in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant." [37] This, however, is not the doctrine at common law, as established by the decisions, and laid down in the text books. By the weight of authority, in the absence of a statute making the right of examination absolute, there must be something more than bare suspicion of mismanagement or fraud. There must be at least specific and reasonable grounds for suspicion. The right of a stockholder to examine the books and papers of the corporation is not unlimited, as is the right of a partner to examine the books and papers of the partnership. He can insist upon and enforce the right when he has a good and specific reason for making the examination, and where his purpose is a proper one, but not otherwise. He cannot do so from mere curiosity, or for merely speculative purposes, or for reasons not connected with his right as a stockholder, or vexatiously, but, at common law at least, he can do so only when he asserts the right "in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute involving and affecting seriously his rights as a stockholder." [38]

32. Swift v. State, 7 Houst. [Del.] 338, 40 Am. St. Rep. 127. See, also, Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707; Nelson v. Anglo-American Land Mortg. & Ag. Co. [1897] 1 Ch. 130. And see, under statutes giving a right of inspection generally. Martin v. Johnson Co., 62 Hun [N. Y.] 557; Clotheal v. Bronwer, 10 Barb. [N. Y.] 216.

33. State v. New Orleans Gas Light Co., 49 La. Ann. 1556.

34. Matter of Reiss, 30 Misc. [N. Y.] 234. Not pledgee: Matter of First Nat. Bank, 28 Misc. [N. Y.] 662.

35. State v. Citizens' Bank, 51 La. Ann. 426.

36. Where stockholders sold their stock under an agreement which provided that the certificates and the notes given in payment should be placed in the hands of a third person, to be by him delivered when the parties should fully comply with their obligations, and afterwards, while the stock and notes were thus held in escrow, the sellers made a demand on the corporation to be permitted to inspect its books, and, on its refusal, applied for a writ of mandamus, it was held that the transaction was not a mere agreement to sell, but a completed sale, passing the title to the stock, and the writ was therefore denied. State v. Whited & Wheless, 104 La. 125. Where petitioner sells his stock pendente lite, the proceeding will be dismissed. State v. New Orleans Maritime & Merchants' Exch. 112 La. 868, 36 So. 760. Under the New Jersey corporation act, one seeking mandamus for the examination of stock and transfer books must show that his right grows out of his position as a stockholder. Gen. Corp. Act § 33. State v. National Biscuit Co. [N. J. Law] 54 A. 241.

37. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392.

38. Phoenix Iron Co. v. Com., 113 Pa. 563; Commonwealth v. Phoenix Iron Co., 105 Pa. 111, 51 Am. Rep. 184, 1 Smith's Cas. 248; Com. v. Empire Passenger R. Co., 134 Pa. 237; Lyon v. American Screw Co., 16 R. I. 472; Rex v. Merchant Tailors' Co., 2 Barn. & Adol. 115; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427; Heminway v. Heminway, 58 Conn. 443; People v. Walker, 9 Mich. 328; People v. Lake Shore & Michigan Southern R. Co., 11 Hun [N. Y.] 1; Sage v. Lake Shore & Michigan Southern Ry. Co., 70 N. Y. 220; People v. Northern Pac. R. Co., 18 Jones & S. [N. Y.] 456; State v. Einstein, 46 N. J. Law, 479.

"There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit

A stockholder cannot make use of his relation as such to inspect the books of the corporation, where his purpose is merely to obtain information for use as a debtor of the corporation,[39] or for mere curiosity,[40] or for the purpose of injuring the corporation,[41] especially if he is acting in the interest of a rival corporation in which he is also a stockholder or otherwise interested.[42] A stockholder, however, cannot be denied the right to inspect the books and papers of the corporation on the ground of hostility to the management or officers, where he has a good reason for making the examination,[43] and the burden is not on the stockholder to disclose a lawful purpose or negative an improper one.[44]

Demand and refusal.—That the stockholder demands inspection of more than he is entitled to see does not authorize a general refusal.[45] The right is a present one when applied for at a reasonable time and an indefinite delay is equivalent to refusal.[46] Statement that the books could be inspected at the office of the president a short distance away is not a refusal,[47] and even if an offer to allow examination at the home of an officer is insufficient, if the stockholder agrees to call there and does not, he cannot claim that examination was refused.[48]

instituted; but it is necessary that there should be some particular matter in dispute, between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary." Rex v. Merchant Tailors' Co., 2 Barn. & Adol. 115.

On petition for a writ of mandamus by the holders of four shares of a large corporation, to allow them to inspect the stock ledger of the company, it was held that, to show a right to the writ, they must show some controversy pending, or some question at issue, as to which the contents of the book were of consequence, and that it was not enough to show an expectation of benefit from knowing the contents. Lyon v. American Screw Co., 16 R. I. 472.

39. Investment Co. of Philadelphia v. Eldridge, 2 Pa. Dist. R. 394.

40. Lyon v. American Screw Co., 16 R. I. 472; Phoenix Iron Co. v. Com., 113 Pa. 563; Foster v. White, 86 Ala. 467; Sage v. Lake Shore & M. S. R. Co., 70 N. Y. 220. The stockholder should not be granted a mandamus for the purpose of securing inspection of the books and papers except in emergency and for necessary purposes. Not granted in favor of a stockholder owning 6 per cent. of the capital stock, for the purpose of finding out if the corporation had been properly managed, where considerable loss would result from the examination, and transactions questioned by the stockholder were explained by the directors. In re Colwell, 76 App. Div. [N. Y.] 615. A stockholder is not entitled to mandamus compelling it to submit its books and papers to his inspection, merely that he may ascertain the names and residence of the stockholders to consult with them regarding the management of the company. In re Latimer, 75 App. Div. [N. Y.] 522, 12 Ann. Cas. 9. Must appear that application is in good faith for specific purpose. Bruning v. Hoboken Print. & Pub. Co., 67 N. J. Law, 119, 50 A. 906.

41. It should not be granted to compel the exhibition of corporate books to the executors of a stockholder where it is sought with the evident purpose of injuring the corporate business. In re Kennedy, 75 App. Div. [N. Y.] 188. The right of stockholders to examine corporate books extends to fire insurance companies, but an application by one seeking to gain control of a corporation for the purpose of wrecking it, or by a third person secretly acting for him, is properly denied. Application by a stenographer for an inspection of the books of an insurance company, alleging that he owned a fourth of the entire corporate stock, and that because of reports showing a decrease in surplus and an increase in losses, he had become alarmed as to the safety of his investments. In re Coats, 73 App. Div. [N. Y.] 178.

42. Heminway v. Heminway, 58 Conn. 443. Compare, however. Meysenburg v. People, 88 Ill. App. 328.

43. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427. And see Meysenburg v. People, 88 Ill. App. 328. That the stockholder is unfriendly to the officers and owns stock in a rival corporation is not ground for denying inspection. Cobb v. Legarde [Ala.] 30 So. 326.

44. Cobb v. Legarde [Ala.] 30 So. 326; Forster v. White, 86 Ala. 467; Mitchell v. Rubber Reclaiming Co. [N. J.] 24 A. 407; State v. Sportsman's Park & Club Ass'n, 29 Mo. App. 326. Averment of improper motives in answer held not to bar right to mandamus. Johnson v. Langdon, 135 Cal. 624, 67 P. 1050.

45. Ellsworth v. Dorwart, 95 Iowa, 108. Compare People v. Walker, 9 Mich. 328.

46. Cobb v. Legarde [Ala.] 30 So. 326. Reasonableness of requiring on applying on Saturday to wait till Monday held for jury. Kelsey v. Pfandler Process Fermentation Co., 51 Hun. [N. Y.] 636.

47. Lozier v. Saratoga Gas Elec. Light & Power Co., 69 N. Y. S. 247.

48. Kirkman v. Carlstadt Chemical Co., 74 N. Y. S. 865.

Express provisions in the charter, general law, articles of association, or by-laws.—In some jurisdictions, the right of stockholders to inspect and examine the books and papers of the corporation is not left to be determined by the common law, but is regulated by statute or by the constitution, and sometimes the right is given in express terms by the charter or articles of association of a corporation, or regulated by its by-laws. And when the right is so given or regulated, it is sometimes more absolute than it is at common law, according to the cases previously referred to, such statutes being ordinarily designed to enlarge the common-law right.[49] An act conferring a limited right of inspection incident to corporate elections does not by its re-enactment in a general corporation act extend an unqualified right of inspection to stockholders.[50] Under a general statute, as a statute providing that the stockholders of all private corporations shall "have the right of access to, inspection and examination of the books, records and papers of the corporation, at reasonable and proper times," it is to be implied that the inspection and examination shall not be from mere idle curiosity, or for speculative purposes, or for purposes hostile to the interests of the corporation, and by the express provisions of the statute the right must be asserted at "reasonable and proper times;" but these are the only limitations upon the right. It is not necessary to show any particular reason or occasion for making the inspection and examination.[51] In an Alabama case, involving a construction of a statute in the language above quoted, it was said: "The statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish and maintain their rights, and to intelligently perform their corporate duties. * * * The only express limitation is that the right shall be exercised at reasonable and proper times; the implied limitation is that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motive and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said, this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle, that the shareholders have a right to be fully informed as to the condition of the

49. Cobb v. Legarde [Ala.] 30 So. 326; Stone v. Kellogg, 165 Ill. 192.

50. A statute under the title "An act to prevent fraudulent elections in incorporated companies and to facilitate proceedings against them" remains subject to the limitation imposed by the title, though reenacted in a revision under the title "An act concerning corporations" and though general in language, does not entitle the stockholder to an absolute right to mandamus or confer on him a greater than his common-law right. State v. National Biscuit Co. [N. J. Law] 54 A. 241.

51. Foster v. White, 86 Ala. 467; Winter v. Baldwin, 89 Ala. 483; Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707; State v. Bergenthal, 72 Wis. 314; Cotheal v. Brouwer, 5 N. Y. Leg. Obs. 175, 10 Barb. 216, 5 N. Y. 562; People v. Pacific Mail Steamship Co., 50 Barb. [N. Y.] 280; People v. Paton, 5 N. Y. St. Rep. 313; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427; State v. St. Louis & San Francisco R. Co., 29 Mo. App. 301; State v. Sportsman's Park & Club Ass'n, 29 Mo. App. 326; State v. Laughlin, 53 Mo. Appp. 542.

corporation, the manner in which its affairs are conducted, and how the capital, to which they have contributed, is employed and managed." [52] The right being of common-law origin, additional remedies may be given as to existing corporations.[53] A statute giving a stockholder the right to inspect and examine books and papers of the corporation gives him the right to make abstracts, memoranda, or copies thereof.[54] Where a statute or by-law gives stockholders a right to examine books and papers of a corporation to a specified extent or at specified times only, they can only claim under the statute or by-law, such rights as it expressly confers[55] A statute, however, giving stockholders an absolute right to inspect certain books or papers, or to inspect them at a particular time, but containing no negative words, does not deprive a stockholder of his common-law right to inspect other books or papers, or to inspect them at other reasonable times.[56] And, of course, by-laws of a corporation to which a stockholder does not consent cannot deprive him of his common-law right.

A general statute giving stockholders in "all private corporations" the right to inspect and examine the books and papers of the corporation applies to national banks to the same extent as other corporations, at least in the absence of conflicting legislation by congress.[57]

Examination by attorney or agent.—When a stockholder has sufficient reason for making an examination of the books or papers of the corporation, he need not necessarily do so in person, but may do so through his attorney, or an expert accountant, or other agent.[58]

Remedies of stockholders on denial of right. Mandamus.—If the officers of a corporation wrongfully deny a stockholder the right to inspect its books or papers, he may enforce his right by writ of mandamus, unless this remedy is ex-

52. Foster v. White, 86 Ala. 467. And see, to the same effect, Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240.

On petition of a stockholder for a writ of mandamus to enforce his statutory right to inspect the books of a corporation, it was held that an answer setting forth that the relator cherished animosity towards the company's president, and had threatened to injure the business of the company by disclosing its business secrets to customers and business rivals, showed no ground for denying the writ. Meysenburg v. People, 88 Ill. App. 328.

53. Bay State Gas Co. v. State, 4 Pen. [Del.] 238, 56 A. 1114.

54. Cotheal v. Brouwer, 5 N. Y. Leg. Obs. 175, 10 Barb. 216, 5 N. Y. 562; Martin v. W. J. Johnston Co., 62 Hun, 557, 17 N. Y. S. 133; Nelson v. Anglo-American Land Mortg. Ag. Co. [1897] 1 Ch. 130.

Contra, Com. v. Empire Passenger R. Co., 134 Pa. 237.

55. See People v. Pacific Mail Steamship Co., 50 Barb. [N. Y.] 280; State v. Bergenthal, 72 Wis. 314; Lyon v. American Screw Co., 16 R. I. 472.

It has been held that a by-law of a corporation, providing that the treasurer shall keep full books of account of the business of the corporation, "which books shall at all times be open to the inspection of any of the stockholders," does not apply to the stock ledger. Lyon v. American Screw Co., 16 R. I. 472.

The power conferred by the general corporation act of New Jersey (P. L. 1896, p. 292, § 44) to summarily order books of a corporation to be brought within the state "on proper cause shown," can be exercised only when the judicial authority whose action is invoked can exercise control over the books after compliance with the order. Fuller v. Alex. Hollander & Co., 61 N. J. Eq. 548, 47 A. 646.

Where a statute requires a corporation to keep books showing certain matters for inspection of stockholders, a stockholder cannot be deprived of the right to inspect them because they are kept in a particular way, or because they contain, besides the information to which he is entitled, other information, which he has no right to demand. People v. Pacific Mail Steamship Co., 50 Barb [N. Y.] 280.

56. People v. Lake Shore & Michigan Southern R. Co., 11 Hun [N. Y.] 1; Sage v. Lake Shore & Michigan Southern R. Co., 70 N. Y. 220; People v. Eadie, 63 Hun [[N. Y.] 320, 133 N. Y. 573.

57. Winter v. Baldwin, 89 Ala. 483.

58. Foster v. White, 86 Ala. 467; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707; State v. Bienville Oil Works Co., 28 La. Ann. 204; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427; Mitchell v. Rubber Reclaiming Co. [N. J. Eq.] 24 A. 407; People v. Nassau Ferry Co., 86 Hun [N. Y.] 128.

Compare People v. United States Mercantile Reporting Co., 20 Abb. N. C. [N. Y.] 192.

cluded by statute.[59] The writ may issue against the corporation, or against both the corporation and the officer having the custody of the books or papers.[60] Or it may issue against the officer alone, without making the corporation a party.[61] If a statute gives a stockholder a particular remedy within the corporation, he must resort to that remedy before he can resort to mandamus.[62] A writ of mandamus may issue to enforce the right of a non-resident stockholder to inspect and take copies of documents of a foreign corporation, if they are in the custody of an agent within the state.[63] And the court may compel a domestic corporation to bring its books and papers into the state for an inspection, where they are kept in another state.[64]

In Ohio, and it may be in other states, the statutes are such that mandamus will not lie as at common law. In Ohio, where the statute declares that the writ of mandamus, "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law," it has been held that mandamus will not lie to compel a corporation or its officers to allow an inspection of its books and papers, as there is an adequate remedy by injunction,[65] and since by examination of the officers under a subpoena the value of corporate stock may be determined for the purpose of estimating a transfer tax, mandamus will not lie to compel an exhibition of the corporate books to the executors.[66]

In equity.—Stockholders may have generally enforced their right to inspect the books and papers of the corporation by mandamus, and there are very few reported cases in which it has been sought to enforce the right in equity by injunc-

59. Rex v. Merchants Tailors' Co., 2 Barn & Adol. 115; People v. Throop, 12 Wend. [N. Y.] 183; In re Steinway, 31 App. Div. [N. Y.] 70, 159 N. Y. 250; People v. Eadie, 63 Hun, 320, 133 N. Y. 573; Swift v. State, 7 Houst. [Del.] 338, 40 Am. St. Rep. 127; Stone v. Kellogg, 62 Ill. App. 444, 165 Ill. 192, 56 Am. St. Rep. 240; Commonwealth v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184, 1 Smith's Cas. 248; Phoenix Iron Co. v. Com., 113 Pa. 563; State v. Bienville Oil Works Co., 28 La. Ann. 204; Cockburn v. Union Bank, 13 La. Ann. 289; Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243; State v. New Orleans Gaslight Co., 49 La. Ann. 1556; State v. Bergenthal, 72 Wis. 314; Lyon v. American Screw Co., 16 R. I. 472; People v. Walker, 9 Mich. 328; Foster v. White, 86 Ala. 467; Winter v. Baldwin, 89 Ala. 483; Cobb v. Legarde [Ala.] 30 So. 326; Trimble v. American Can Sugar Refining Co., 61 N. J. Eq. 340, 48 A. 912; Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392; Fuller v. Alex. Hollander & Co., 61 N. J. Eq. 648, 47 A. 646; Trimble v. American Sugar-Refining Co., 61 N. J. Eq. 340, 48 A. 912; Meysenburg v. People, 88 Ill. App. 328; Nelson v. Anglo-American Land Mortg. Ag. Co. [1897] 1 Ch. 130.

To be entitled to the writ, the relator must be a stockholder at the time it is to be issued. It will not be issued if he has sold his stock (State v. Whited & Wheless, 104 La. 125), and if he sells pendente lite the proceeding will be dismissed (State v. New Orleans, etc., Exch., 112 La. 868, 36 So. 760).

60. Reg. v. Mariquita & New Granada Mining Co., 1 El. & El. 289; Rex v. Merchant Tailors' Co., 2 Barn. & Adol. 115; Commonwealth v. Phoenix Iron Co., 105 Pa. 111, 51 Am. Rep. 184, 1 Smith's Cas. 248; Phoenix Iron Co. v. Com., 113 Pa. 563; Cockburn v. Union Bank, 13 La. Ann. 289; Lyon v. American Screw Co., 16 R. I. 472; Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392. Under the Delaware Statute, the president is a proper respondent. Bay State Gas Co. v. State, 4 Pen. [Del.] 238, 56 A. 1114.

61. People v. Throop, 12 Wend. [N. Y.] 183; Swift v. State, 7 Houst. [Del.] 338, 40 Am. St. Rep. 127; Stone v. Kellogg, 62 Ill. App. 444, 165 Ill. 192, 56 Am. St. Rep. 240; Foster v. White, 86 Ala. 467; State v. Bergenthal, 72 Wis. 314.

In Louisiana, however, it has been held that, in mandamus proceedings to enforce the right to inspect the books of a corporation, the citation should be addressed to the corporation, and not to its manager. State v. North American Land & Timber Co., 105 La. 379.

62. People v. Nassau Ferry Co., 86 Hun [N. Y.] 128.

63. Swift v. State, 7 Houst. [Del.] 338, 40 Am. St. Rep. 127.

64. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392; Mitchell v. Rubber Reclaiming Co. [N. J. Eq.] 24 A. 407.

Compare Huylar v. Cragin Cattle Co., 42 N. J. Eq. 139, and Stetauer v. New York & S. Const. Co., 42 N. J. Eq. 46. The power conferred by the general corporation act to order books brought within the jurisdiction for examination can be exercised only when the court making such order would be able to control such books after compliance. Fuller v. Alex. Hollander & Co., 61 N. J. Eq. 648, 47 A. 646.

65. Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707.

66. Subpoena would issue from the public treasurer. In re Kennedy, 75 App. Div. [N. Y.] 188.

tion. It has been held, however, in some jurisdictions, that a suit for an injunction will lie,[67] and that a bill of discovery will not.[68] Of course, a court of equity has jurisdiction to enforce the right of inspection, if the circumstances are such that mandamus will not afford an adequate remedy, or if there are other grounds of equitable jurisdiction.[69]

Recovery of damages.—If an officer of a corporation, having the custody of its books and papers, wrongfully refuses to allow a stockholder to inspect the same, he is guilty of a wrong against the stockholder, and is liable in an action for damages[70] proximately resulting.[71] The corporation itself will undoubtedly be liable in damages for denial of a stockholder's right to inspect books and papers, if it can be regarded as in default in the matter, as where the inspection is refused by or by order of the board of directors or the majority stockholders as a body. It has been held, however, that a stockholder cannot hold his co-stockholders or the corporation liable in damages on account of the refusal by a subordinate officer of an informal request to be allowed to inspect books or papers of the corporation, although he would have ascertained that the affairs of the corporation were being improperly managed, and might have taken steps to avoid loss. Upon such a refusal, he should apply for a writ of mandamus, or else apply to the directors, so as to put the company in default. "If mandamus had issued immediately after the refusal," said the Louisiana court in such a case, "the action would have been maintained against the company only. It would have had the right to repudiate the refusal and permit the inspection. The act of the secretary is not absolutely binding upon the company in matter of inspection of the books. He cannot stand in judgment, nor can he as agent of the stockholders occasion damages by refusing the books, for which the company will be liable to one stockholder to the loss of the others, who are not parties and have not given the least sanction to the refusal. * * * An error of an officer in a subordinate position in refusing to permit books to be examined is not per se such an error as will expose the company to the payment of damages."[72]

Statutory penalty.—When the right of a stockholder to inspect the books and papers of the corporation is regulated by statute, a specific penalty is sometimes im-

67. Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707; Ranger v. Champion Cotton-Press Co., 51 F. 61; Nelson v. Anglo-American Land Mortg. Ag. Co. [1897] 1 Ch. 130; Holland v. Dickson, 37 Ch. Div. 669. But see Fuller v. Alex. Hollander & Co., 61 N. J. Eq. 648, 47 A. 646.

68. Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 A. 912.

69. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392; Ranger v. Champion Cotton-Press Co., 51 F. 61.

While a court of equity may, in its discretion, order the officers of a corporation to allow a stockholder to inspect its books at any stage of the proceedings, it will not do so upon the mere filing of the bill, or after service and before answer, "except under the most pressing necessity," since the defendants may deny that the complainant is a shareholder, or may set up that the charter or by-laws modify his right to such inspection. Ranger v. Champion Cotton-Press Co., 51 F. 61. A bill in equity by a stockholder, asking the aid of the court to enforce the right to inspect the books of the corporation, must show that there has been a denial of the right, or it will be demurrable. Coquard v. National Linseed Oil Co., 171 Ill. 480.

In New Jersey it is held that, where a stockholder wishes a discovery of the financial condition of the company, his remedy is not by a bill in equity for a discovery, but by mandamus to enforce the right to inspect its books, aided, if necessary, by a petition under the statute to compel the corporation to bring the books into the state for such purpose. Trimble v. American Sugar-Refining Co., 61 N. J. Eq. 340, 48 A. 912.

70. Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243.

71. Remote and speculative damages cannot be recovered for a refusal of the president to permit an inspection of the corporate books by a stockholder, if the president has not acted in bad faith. Bourdette v. Sieward, 107 La. 258.

72. Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243. See Fuller v. Alex. Hollander & Co., 61 N. J. Eq. 648, 47 A. 646.

posed upon the corporation, or upon the officer denying him the right, to be recovered in an action by the stockholder or by the state. And the penalty may be recovered without showing any actual pecuniary damage. All that is necessary is to show a wrongful denial of the right.[73] When the corpo ation or an officer has wrongfully denied to a stockholder the right to examine its books, his right to sue for the statutory penalty is fixed, and is not affected by the fact that he was allowed to make the examination upon a subsequent application.[74] The officer in charge of the records as well as the corporation is liable to penalty.[75] Where a statute imposes upon the custodian of the books and papers of a corporation the duty to allow stockholders to inspect the same, the duty is an incident of his office, and he cannot be relieved therefrom by a by-law of the corporation, or by any resolution or orders of the directors, so long as he continues in office, and has the legal custody of the books and papers.[76] But an officer is not liable to the penalty if the books and papers have been taken from his custody by the directors, so that it is not within his power to allow an inspection, provided, at least, he has not participated in putting them beyond his control for the very purpose of shirking his duty, and defeating a stockholder's right of inspection,[77] and provided he states the reason why he cannot allow an inspection,[78] If the books and papers come back into his custody after he has refused a request to be allowed to inspect them, it is his duty to notify the stockholder, and give him an opportunity to inspect them.[79] Reasonable or unavoidable delay in allowing an inspection, as because the books are locked up in a safe, and the only officer who knows the combination is absent, does not subject the corporation or its officers to a penalty,—but such an excuse cannot be made in bad faith, and for the purpose of defeating the stockholder's right.[80] A corporation does not incur three penalties for three refusals to permit inspection of the books, where the party seeking to recover desired to use the books for one occasion but repeated his request for two or three consecutive days, and made the demand three times, twice of the secretary and once of the president.[81]

CORPSES AND BURIAL.[1]

There is a quasi-property right in a dead body, subject to the necessity for proper disposition to prevent its becoming a nuisance and injurious to public health, which the courts will protect.[2] Thus a relative of a deceased, in whom exists

73. Kelsey v. Pfaudler Process Fermentation Co., 51 Hun [N. Y.] 636.

Under the New York stock corporation law (section 29) providing that every such corporation shall keep at its office a stock book containing the names of all stockholders, etc., which shall be open daily for inspection by its stockholders, and that for negligence or refusal to allow such inspection the corporation shall forfeit to the people fifty dollars for every day of such neglect or refusal, and that every officer or agent of the corporation who shall willfully neglect or refuse to exhibit such books shall be liable to the same penalty, the penalty is not incurred, either by the corporation or by its officers or agents, in the absence of such neglect or refusal. Where a stockholder, therefore, on three occasions, called at the general office of a corporation, and was informed by its agent that the stock books were at the office of the company's president, a short distance away, and that he could inspect them by calling there, and on one occasion he went there and took copies from the books, it was held that neither the company nor the agent was liable under the statute. Lozier v. Saratoga Gas, Elec. Light & Power Co., 59 App. Div. [N. Y.] 390.

74. Kelsey v. Pfaudler Process Fermentation Co., 51 Hun. [N. Y.] 636.

75. Cox v. Island Min. Co., 73 N. Y. S. 69.

76, 77, 78, 79. Lewis v. Brainerd, 53 Vt. 519.

80. Kelsey v. Pfaudler Process Fermentation Co., 41 Hun [N. Y.] 20, 51 Hun [N. Y.] 636, 3 N. Y. S. 723.

81. Action to recover penalty under Stock Corporation Law (Laws 1892, p. 1840, c. 688, § 53). Cox v. Paul, 175 N. Y. 328.

1. See 3 C. L. 939. See, also, Cemeteries, 5 C. L. 557.

2. Widow has such right in body of husband. Louisville & N. R. Co. v. Wilson [Ga.]

the right to preserve and bury the body,[3] may maintain an action for the unlawful mutilation of the body,[4] and recover damages for the mental suffering and sense of outrage directly resulting therefrom.[5] Negligence of a common carrier which receives a corpse for transportation, resulting in damage to the coffin and shroud, and mutilation of the body, is actionable.[6] Where mutilation of a body is intimately connected with and incidental to the act causing death, such mutilation cannot be regarded as a separate cause of action for which damages may be recovered independently of the wrongful death.[7] A consent to a post mortem examination is an implied permission to conduct such examination in the usual, approved manner, and to remove organs for microscopic examination when necessary to ascertain the cause of death, unless permission to do so is expressly withheld.[8] A direction that parts should not be taken away does not prohibit removal of organs for examination, if they are afterwards replaced for burial with the body.[9]

The right of sepulture cannot now be denied on the ground that deceased was a murderer and suicide.[10] The right to direct and control burial is ordinarily in persons related to deceased, when for any reason the surviving spouse does not exercise such right.[11] A surviving husband is liable for the expenses of the last sickness and burial of his wife, and the cost of a tombstone erected by him.[12]

•• Corpus Delicti; Corroborative Evidence, see latest topical index.

COSTS.

§ 1. *Scope, nature and definition.*[13]—As here used the term "costs" includes not only costs proper but also disbursements and allowances made to litigants as

51 S. E. 24. See, also, Koerber v. Patek [Wis.] 102 N. W. 40.

3. Son may maintain action for mutilation of widowed mother's body. Koerber v. Patek [Wis.] 102 N. W. 40.

4. Complaint held to state cause of action. Koerber v. Patek [Wis.] 102 N. W. 40.

5. More than nominal damages are recoverable. Koerber v. Patek [Wis.] 102 N. W. 40. [This being the first Wisconsin case on the subject, the opinion contains full discussion and cites many authorities.—Ed.]

6. Declaration alleging receipt of corpse, and damage resulting from leaving coffin and contents in the rain at a junction, held to show gross negligence, and to state a cause of action. Louisville & N. R. Co. v. Wilson [Ga.] 51 S. E. 24.

7. Where in action for wrongful death, it appeared that a brakeman shot a trespasser, and threw the body onto the track where it was mutilated by a passing train, the mutilation did not furnish a separate cause of action. Houston & T. C. R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80. Railway company not liable for the mutilation. Id.

8. Evidence held to warrant finding that consent was given. Winkler v. Hawkes [Iowa] 102 N. W. 418.

9. Winkler v. Hawkes [Iowa] 102 N. W. 418.

10. This implies only the right of decent burial, and not the right to burial with services of a religious organization. Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

11. Where deceased had lived separate from his wife, such right could be exercised by his sister. Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

part of or incident to the judgment by way of compensation to the successful party and against the other.[14] Costs are purely of statutory creation,[15] and being so, the statutes allowing them are to be strictly construed;[16] but not strained by denying compensation which the laws evidently intended.[17] Rules of court inconsistent with statute are void.[18]

§ 2. *Power to award costs.*[19]—The power to award compensation for judicial services to be paid from county funds excludes power to tax the same as costs.[20] A discretionary power to allow costs on a motion includes motions for new trial,[21] and though not customary, such an award will be upheld unless abusive of discretion.[22] Costs being incident to the judgment, the power to award them resides in the court which has control of the judgment[23] and while it is open.[24] Compensation to a receiver as costs of appeal must be allowed in the court below,[25] and so also costs cannot be founded on a void order or proceeding.[26]

§ 3. *Prepayment or security and suits in forma pauperis.*[27]—Prepayment[28] of fees is a right pertaining to the officer, and the adverse party cannot complain of its waiver.[29] In some jurisdictions a poor person may have a record for appeal[30] or other proceeding where one is required,[31] either without prepayment or by supplying affidavit of its contents.

Security.[32]—In civil cases[33] the grounds for exacting security, though not

12. Such expenses will not be allowed against her estate and credited to him on his administration account. Stonesifer v. Shriver [Md.] 59 A. 139. See Estates of Decedents, 3 C. L. 1238.

13, 14. See 3 C. L. 940.

15. McKenzie v. Coslett [Nev.[80 P. 1070. See, also, post, § 2. Patterson v. Ramsey, 136 N. C. 561, 48 S. E. 811.

16. State v. Board of Police Com'rs [Mo. App.] 82 S. W. 960; Veidt v. Missouri, K. & T. R. Co. [Mo. App.] 82 S. W. 1122.

17. A provision that referees' fees be taxed on the incoming of the report does not prevent allowance to a referee who died and therefore made no report. They should be taxed when his successor's report comes in. Winnebago County v. Dodge County [Wis.] 103 N. W. 255.

18. A rule requiring certain costs to be paid by the parties jointly is unauthorized where the statute provides that such costs shall be paid by the prevailing party in the first instance and taxed with the judgment. Reporter's per diem. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281.

19. See 3 C. L. 940.

20. Compensation of commissioners to take testimony. Gloucester Water Supply Co. v. Gloucester, 185 Mass. 535, 70 N. E. 1015.

21, 22. Kosloski v. Kelly, 122 Wis. 665, 100 N. W. 1037.

23. On dismissal of a removed cause for want of jurisdiction, no costs can be allowed in the Federal court. Parks Co. v. Decatur [C. C. A.] 138 F. 550. The trial court has no jurisdiction over costs in the reviewing court. Printing and clerk's fees. Berkey v. Thompson, 126 Iowa, 394, 102 N. W. 134. Nor while appeal is pending can it award or correct the award of its own costs or costs which the reviewing court might tax. Id.

On dismissing an appeal for failure to perfect the record, there is jurisdiction to allow costs. Hager v. Knapp, 45 Or. 512, 78 P. 671.

24. In equity cases costs cannot ordinarily be retaxed after appeal. Berkey v. Thompson, 126 Iowa, 394, 102 N. W. 134.

25. McKenzie v. Coslett [Nev.] 80 P. 1070.

26. An order of reference by the probate court of a complicated guardian's account is void where the estate objects thereto, and the estate cannot be amerced for costs therefor. Matter of Gorman, 2 Ohio N. P. (N. S.) 667. Code Civ. Proc. § 3075, providing that no costs shall be allowed where the judge is disqualified. A justice of the peace against whom affidavit of prejudice is filed has no jurisdiction to dismiss with costs. Truesdell v. Winne, 44 Misc. 451, 90 N. Y. S. 155.

27. See 3 C. L. 940.

28. Payment of costs as condition to further relief or proceedings, see post, § 9.

29. In a justice's court in Georgia, on appeal to a jury, the justice may demand payment of costs before appealing or he may waive it and the opposite party cannot complain. Refusing to dismiss appeal on opposite party's motion is a waiver. Stafford v. Wilson [Ga.] 49 S. E. 800.

30. A poor person is entitled of right to a transcript without paying fees, though the statute provides that the judge "may" direct the reporter to furnish. Smith v. Sisters of the Good Shepherd [Ky.] 87 S. W. 1076.

31. If one prosecuted for an act done under color of his Federal office seeks a removal to the Federal court and is unable to pay the clerk's fees below, he may supply the record by affidavit. Rev. St. U. S. § 645. State v. Felts, 133 F. 85.

32. See 3 C. L. 940.

33. Habeas corpus to determine custody of a child is civil within the statute requiring security on appeal. Stewart v. Paul [Ala.] 37 So. 691.

wholly derived from statute, are now generally so enumerated.[34] Some of the grounds are nonresidence,[35] the character of the action, or irresponsibility of the plaintiff.[36] Receivers are often absolved either absolutely or under certain circumstances,[37] unless they are nonresidents.[38] In New York security for costs cannot be required of an intervenor.[39] The ground must exist when the security is asked.[40] Where the costs are already secured by the terms of a bond necessary in the case, no additional bond is proper.[41] The defendant may by his conduct excuse the failure to give costs,[42] and he must move promptly to require it.[43] The authority of a court to exact security may be taken as conceded against one who sues in such a court a cause of action which without such authority it could not entertain.[44] In Michigan a certificate of deposit may be by order of court taken as "sufficient security" [45] and the clerk may not refuse such security.[46] An application for security must state all that constitutes the ground relied on.[47] Dismissal will be ordered only in favor of such parties as have not answered,[48] and does not constitute a decision on the merits.[49] Under the general power over judgments during term, a dismissal for want of security may be set aside [50] and it should be done where plaintiff has seasonably attempted to comply.[51]

In forma pauperis.[52]—Actual inability to pay costs is essential.[53] Whether a personal representative may so sue depends on the terms of the statute.[54] So, unless required, he need not show the poverty of those who will benefit if he is successful.[55] The right to appeal in forma pauperis depends wholly on statute.[56] The moving papers on application in New York to sue in forma pauperis must

34. See topic "Security for Costs," 19 Enc. Pl. & Pr. 337.

35. One temporarily absent to procure medical treatment held not a nonresident. Taylor v. Norris, 93 N. Y. S. 356. A resident administrator suing for the death of a nonresident need not give security. Richards v. Riverside Iron Works [W. Va.] 49 S. E. 437.

36. Chancellor may in suit for support exact from complainant a bond for costs. Divorce Act, § 21. Dithmar v. Dithmar [N. J. Eq.] 59 A. 644.

37. In New York, in the absence of bad faith or apparent lack of merits, a receiver will not be compelled to give security because the estate is insolvent. De La Fleur v. Barney, 45 Misc. 515, 92 N. Y. S. 926.

38. A nonresident receiver of a national bank must give security in Federal courts if the state laws would require it, unless he can absolve himself by filing the statutory certificate. Schofield v. Palmer, 134 F. 753.

39. Riley v. Ryan, 45 Misc. 151, 91 N. Y. S. 952.

40. Where a motion for security for costs on the ground that plaintiff was imprisoned for crime was not made until two years after suit and after plaintiff had been released, it is too late. Gibbons v. Bush Co., 98 App. Div. 283, 90 N. Y. S. 603.

41. The undertaking required in replevin secures costs, and accordingly a cost bond should not be required of a nonresident plaintiff in replevin. Vulcanite Portland Cement Co. v. Williams, 92 N. Y. S. 574.

42. A justice's judgment will not be reversed for failure of a nonresident to give security where it was verbally proffered to defendant but not insisted on and was furnished in the appeal from the justice. Hirsh v. Fisher [Mich.] 101 N. W. 48.

43. Application to require security for costs made on the day set for trial is too late. Brazell v. Cohn [Mont.] 81 P. 339.

44. Suit in name of United States to use on building contractor's bond, which suit could only be in court enabled to take such security. Act Cong. Aug. 13, 1895. Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513.

45, 46. A bond is not required. Smith v. Perkins [Mich.] 102 N. W. 971.

47. An affidavit of nonresidence of one suing in the city court of New York must state that he has no office either in the borough of the Bronx or the borough of Manhattan. Pelz v. Roth, 92 N. Y. S. 263.

48, 49, 50, 51. Randolph v. Cottage Hospital of Des Moines [Iowa] 103 N. W. 157.

52. See 3 C. L. 940.

53. Appeal. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194.

54. Under Acts 1903, c. 501, providing that when a nonresident becomes administrator of one leaving assets in the state he shall be regarded as a citizen, such an administrator is entitled to sue in forma pauperis, notwithstanding Acts 1901, c. 126, restricting to residents the right to so sue. Southern R. Co. v. Maxwell, 113 Tenn. 464, 82 S. W. 1137. "Any person" includes administrator. Christian v. Atlantic & N. C. R. Co., 136 N. C. 321, 48 S. E. 743.

55. Christian v. Atlantic & N. C. R. Co., 136 N. C. 321, 48 S. E. 743. The affidavit for leave should state that the administrator is himself unable to give bond. Id. Douglas, J., dissenting as to this.

56. Bradford v. Southern R. Co., 195 U. S. 243, 49 Law. Ed. 178. And the Act of July 20, 1892 applies only to suits, not to appeal. Id. Whether the statute relating to suit in forma pauperis applies to appeals to the court of appeals questioned but left

show that plaintiff has a good cause of action,[57] and must show an agreement of his attorney to serve without compensation.[58] The Federal statute allows application in forma pauperis either on beginning a suit or afterwards on motion for security.[59] In addition to the court rule requirements, all statutory requirements must be met;[60] hence in the Federal courts such applicant must not omit to show that he is a citizen of the United States, that he is unable to give security for costs and that he believes himself entitled to the redress he seeks. A sheriff cannot administer the oath in forma pauperis unless a statute so provides.[61] In Texas it must appear by an entry on the minutes that the application for leave to appeal without bond was to the court in session;[62] but not that it was made in open court,[63] and there need not be minute entry that sufficient proof was adduced.[64] A rule for security pending which defendant be not required to plead merely suspends a rule to plead, which becomes operative when the other rule is satisfied.[65] It is usually provided that dismissal shall follow if the showing of poverty be false or the cause of action is frivolous or malicious.[66] In a suit to expunge an order allowing appeal without cost bond, not actually made by the court, the ability of appellant to pay costs is not in issue.[67]

§ 4. *Parties entitled to or liable for costs in general.*[68]—Costs are not ordinarily assessed personally against one sued in an official capacity unless he has been in some respect delinquent.[69] When a state prosecution is removed because brought against one for an act done under color of his Federal office, the United States marshal may if he obtain special authority from the department of justice pay defendant's witnesses, but the state ought save in rare instances to pay her own.[70] The attorney is not liable for court fees.[71] An intervener who has dismissed is beyond the jurisdiction of the court to award costs on final judgment.[72] The state is not chargeable with costs in the absence of a statute consenting thereto.[73] The prosecuting witness is so far a party that costs may be taxed against him if the prosecution is malicious;[74] but there must be a hearing and a

open. Ferrara v. Auric Min. Co. [Colo. App.] 79 P. 302.

57. Traver v. Jackman, 98 App. Div. 287, 90 N. Y. S. 739. A certificate of his attorney to that effect is insufficient. Id.

58. Traver v. Jackman, 98 App. Div. 287, 90 N. Y. S. 739.

59, 60. Donavan v. Salem & P. Nav Co., 134 F. 316.

61. Heard v. State, 121 Ga. 138, 48 S. E. 905.

62. Smith v. Buffalo Oil Co. [Tex. Civ. App.] 85 S. W. 481.

63, 64. Smith v. Buffalo Oil Co. [Tex.] 87 S. W. 659.

65. American Mfg. Co. v. S. Morgan Smith Co., 25 Pa. Super. Ct. 176.

66. See Discontinuance, Dismissal and Nonsuit, 3 C. L. 1097; also 5 C. L. ——. An oath in forma pauperis is shown to be false by a subsequent affidavit of the party admitting recent receipt of a large sum of money. Texas Cent. R. Co. v. Pledger [Tex. Civ. App.] 85 S. W. 470.

67. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 87 S. W. 194.

68. See 3 C. L. 944.

Note. A party carrying on litigation for his own benefit in the name of another may be liable for costs either by virtue of statute or in actions to use or of ejectment. In other classes of cases this is denied. The precedents are collected in a note in 62 L. R. A. 618.

69. Costs of habeas corpus should not be assessed against an officer who held petitioner under process fair on its face. Magerstadt v. People, 105 Ill. App. 316. Mandamus costs will be taxed against officers respondent if relator is free from fault and they have been remiss, though it was in consequence of their obedience to a void injunction supposed to be valid. State v. Carlson [Neb.] 101 N. W. 1004.

70. State v. Felts, 133 F. 85.

71. Unless so by custom. Russell's Ex'x, v. Ferguson [Vt.] 60 A. 802.

72. Guinn v. Iowa & St. L. R. Co., 125 Iowa, 301, 101 N. W. 94.

73. State v. Williams [Md.] 61 A. 297. In Minnesota the state is liable in all civil actions brought by it. State v. Buckman [Minn.] 104 N. W. 289.

74. Leppel v. District Court of Garfield County [Colo.] 78 P. 682.

Note. Laws for the taxing of criminal costs against the prosecuting witness: In the recent case of Rickley v. State, 65 Neb. 841, 91 N. W. 867, 61 L. R. A. 489, such a law was held invalid as wanting due process of law. In that case it was said that Kansas and Wisconsin were the only states that had expressly upheld such a law, other states where one existed having assumed its validity. The editor of the note in 61

finding of want of probable cause.[75] Costs pertaining to the administration of a trust are not charged personally to the trustee, unless as a penalty for some maladministration or misdoing.[76] A notice of claim or demand before suing when prerequisite to costs suffices if it precede the suit in which judgment is had.[77] Allowance on such ground rests in discretion.[77a] An action continued in the name of devisees, legatees and executor may be at the cost of the estate up to the original complainant's death.[78] An executor is entitled to his costs in endeavoring to sustain a will, though the same is found to have been revoked.[79] This question usually arises in connection with the administration of decendant's estates and is more fully treated in connection therewith.[80]

§ 5. *Right dependent on event of action or proceeding. A. Prevailing party in general.*[81]—Except as affected by the qualified interest of a party,[82] or rules applicable to particular courts or proceedings,[83] the prevailing party is ordinarily entitled of right to recover costs. Though there are some decisions of contrary tendency,[84] he is ordinarily deemed the prevailing party who recovers generally in the action,[85] though his recovery be but partial,[86] or though it is diminished by the establishment of a set off,[87] the remedy of defendant in such case, if he desires

L. R. A. 489 states that Georgia and North Carolina have also sustained the validity of such a law. In that note are discussed all the cases on this point. Some of the leading ones are Lowe v. Kansas, 163 U. S. 81, 41 Law. Ed. 78; In re Ebenhack, 17 Kan. 618; State v. Smith, 65 Wis. 93; Green v. State, 112 Ga. 52, 37 S. E. 93; State v. Wallin, 89 N. C. 578; State v. Cannady, 78 N. C. 539.

75. Bailey v. Territory [Okl.] 79 P. 775.

76. Costs of audit made necessary by guardian's long delay in accounting and by the filing finally of an incorrect account. Miller's Estate, 24 Pa. Super. Ct. 32. Costs of audit charged for delay in collecting assets. Carr's Estate, 24 Pa. Super. Ct. 369.

77. Applies though a suit had been commenced before notice, it having been never entered but a new suit begun afterwards. Smallwood v. New York, etc., R. Co. [R. I.] 59 A. 314. Administrator charged for cost of litigating classification of claims bought in for heirs where he personaly was alone interested in their classification. Felsenthal v. Kline, 214 Ill. 121, 73 N. E. 428. Executor held for costs resulting from litigation of unfounded personal claims. Phillips v. Duckett, 112 Ill. App. 587.

77a. The allowance of costs against an administrator for unreasonable resistance or delay rests in the discretion of the referee. Domeyer v. Hoes, 99 App. Div. 294, 90 N. Y. S. 1074. Such discretion can only be reviewed by appeal from the judgment on the report, not by motion. Id.

78. Clemens v. Kaiser, 211 Ill. 460, 71 N. E. 1055.

79. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

80. See Estates of Decedents, 3 C. L. 1291, 1301.

81. See 3 C. L. 942.

82. See § 4, ante.

83. See § 7, post.

84. In a railway crossing suit in West Virginia the plaintiff should be taxed with costs if a substantially different crossing is allowed from what was demanded. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746. Plaintiff does not "recover" in a real property action where the title is adjudged to him but a parol trust which he denied was fastened on the property and a reference had to ascertain what defendant should pay to discharge the trust. Patterson v. Ramsey, 136 N. C. 561, 48 S. E. 811. In a suit to quiet title, no costs should be taxed against defendant where it had been previously adjudged that he had an easement, and it does not appear that he has exceeded his rights thereunder. Browning v. Wayland [Ky.] 85 S. W. 211.

85. Ordinary rule applies notwithstanding defendant was successful on all issues up to the time of an amendment at the trial, unless it is shown that if amended before trial the litigation would have been avoided. Kleimenhagen v. Dixon, 122 Wis. 526, 100 N. W. 826.

86. Though the recovery was but a trivial part of the claim, plaintiff is entitled to costs. Myer v. Abbett, 94 N. Y. S. 238. Plaintiff who recovers but part of the property sued for is the prevailing party and entitled to full costs of right. Freed Furniture & Carpet Co. v. Sorensen [Utah] 79 P. 564. One who sues for and recovers property should have costs, though he claimed and recovered only part, the other part being uncertain and indeterminate until adjudicated. Consolidated Cal. & Va. Min. Co. v. Baker, 131 F. 989. Costs both trial and appeal, were equally divided where plaintiff recovered on a contract, was defeated on a claim for extra work, and defendant recovered on a counterclaim. Palmer v. McGinness [Iowa] 102 N. W. 802.

87. When there is a counterclaim or set off in a money action, the judgment is for the difference in favor of the party entitled and the costs follow it. Gordon v. Steinmetz [Ohio] 73 N. E. 512. It is not an omission to set it up in the first instance which might deprive the counter claimant of costs where his claim was not due and he set it up on appeal de novo at the first opportunity. Construing Rev. St. §§ 5067, 5348, 6527. Gordon v. Steinmetz [Ohio] 73

to avoid costs, being to make a tender or offer of judgment.[88] A suit on a contract and for a quantum meruit for extra work is a suit on two claims within the Iowa Code as to apportioning costs in case of partial success.[89] Where some of the objections to an executor's account were sustained, costs should not be taxed against the objector.[90] Where plaintiff fails to recover, he is not entitled to costs because his failure was not due to lack of merits.[91] On a voluntary dismissal costs go against plaintiff unless the record shows an admission of the justice of his claim.[92] Where action and cross action both fail, each party should pay his own costs.[93] Where both parties appeal and each succeeds in part, neither should be allowed costs.[94] Where a judgment in ejectment is reversed with costs to abide the event, it is not the party prevailing on the retrial following the reversal but the party prevailing on a subsequent statutory new trial who is entitled to such costs.[95] Where on trial of an appeal by defendant from justice court, plaintiff recovered a less amount, neither party is "successful" and the costs are in the discretion of the court.[96] Where questions are reported to the full court, he prevails who recovers the general judgment and not whose contention on those questions is sustained.[97] The party in whose favor the judgment is in money actions has costs, even though some issues were decided adversely.[98] Disclaimer, if in full,[99] entitles defendant to subsequent costs.[1]

(§ 5) *B. Waiver of right and effect of tender or offer of judgment.*[2]—A statute providing that if a defendant does not use a claim as a set off he cannot recover costs in a subsequent suit thereon, applies only to claims which may be set off; hence not to an unliquidated claim.[3] Denial of costs to the successful

N. E. 512. Under statutes allowing costs to the successful party and providing that when a counterclaim is interposed the party for whom judgment is entered shall have costs, plaintiff is entitled to costs if he receives anything, though defendant succeeds in part on his counterclaim. Masterson v. Heitman & Co. [Tex. Civ. App.] 87 S. W. 227. Where defendant denies plaintiff's claim and pleads a set-off, and claim and set-off are both established, plaintiff is entitled to his costs. Milner v. Camden Lumber Co. [Ark.] 85 S. W. 234. But where the answer claimed only a part of the property and defendant was awarded all he claimed, plaintiff is not entitled to costs. Wilcox v. Smith [Wash.] 80 P. 803.

88. See post, § 5b.

89. Palmer v. McGinness [Iowa] 102 N. W. 802.

90. In re Corbin's Will, 101 App. Div. 25, 91 N. Y. S. 797.

91. Where an action for penalties abates because the legislature releases the penalties, the prosecutor cannot recover from defendant the accrued costs. Bray v. Williams, 137 N. C. 387, 49 S. E. 887. Where a contractor falls in a lien claim because the fund is exhausted by payment of subcontractor, he is not entitled to costs. Stimson v. Dunham, Carrigan. Hayden Co., 146 Cal. 281, 79 P. 968.

92. An additional plea by one tort feasor of release by reason of judgment and satisfaction does not waive defenses originally pleaded and admit the cause of action; hence it does not alter defendant's standing as the successful party. Western Coal & Min. Co. v. Petty [C. C. A.] 132 F. 603.

93. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470. Where there is a reconventional demand and both parties are cast, each is liable for the costs of the other, and the cost of such testimony as bears on both demands should be divided. Hunter Canal Co. v. Robertson's Heirs, 113 La. 833, 37 So. 771.

94. Sherman v. Matthieu, 94 N. Y. S. 565.

95. Barson v. Mulligan, 44 Misc. 26, 89 N. Y. S. 704.

96. Garrison v. Trotter [Tenn.] 86 S. W. 1078.

97. Costs on such report are awarded to him, though it was answered against him. Rev. Laws, c. 157, § 21. Smith v. Wenz [Mass.] 73 N. E. 651.

98. Gordon v. Steinmetz [Ohio] 73 N. E. 512; Smith v. Wenz [Mass.] 73 N. E. 651.

99. Disclaimer as to part only of the property involved does not entitle defendant to costs. Relender v. Riggs [Colo. App.] 79 P. 328. A partial disclaimer does not put a plaintiff who finally loses on all issues really in controversy in the attitude of a partially successful one. Defendant allowed full costs. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780. One who sets up a judgment as a bar of plaintiff's right and disclaims rights subsequently acquired is liable to costs if plaintiff recovers. Pease v. Buckley, 37 Wash. 182, 79 P. 627.

1. Where defendant disclaims before trial, he is entitled to costs subsequently incurred. Hamilton v. Saunders [Tex. Civ. App.] 84 S. W. 253. Under Code 1896, § 1533, where plaintiff does not take issue on a disclaimer by defendant, costs should be adjudged against him. Webb v. Reynolds, 139 Ala. 398, 36 So. 15.

2. See 3 C. L. 945.

3. Milner v. Camden Lumber Co. [Ark.] 85 S. W. 234.

party for failure to perfect and enter judgment will not be made if some subsequent determination of the court is necessary before judgment,[4] nor where he has once perfected judgment which was later amended on retaxation by adding other cost items.[5] Payment as a condition to relief in the suit may be waived or the time extended.[6] It is quite generally provided by statute that if defendant shall make a timely [7] and unconditional offer [8] of a certain sum or judgment therefor, with accrued costs,[9, 10] he is entitled to costs unless plaintiff recover a more favorable judgment.[11] The Missouri statute providing for the deposit of "the amount of the debt or damage" defendant admits to be due applies to suits for unliquidated damages,[12] and no notice of the deposit of the sum admitted to be due is required.[13]

§ 6. *Right dependent on minimum amount of demand or recovery.*[14]—In California where plaintiff recovers less than $300 in Superior court, he is not entitled to costs.[15]

§ 7. *Right affected by nature of action or proceeding or character of tribunal.*[16] *A. In general.*[17]—Proceedings under the bastardy act are so closely related to the ordinary civil action that costs are taxable therein under the statute relating to actions.[18] A proceeding by an occupying claimant to be reimbursed for his improvements is a "civil action" in which he is entitled to costs, though the judgment for such reimbursement is not absolute, but merely establishes a condition precedent to the recovery of possession.[19] To relieve a husband from costs in a divorce suit, it must appear not only that the wife was in fault but that she had property ample to pay the costs.[20] Costs in admiralty are wholly in discretion and are regulated as in equity.[21] Under statutes putting witness fees in criminal cases on the county when conviction results, the supervisors have no discretion to disallow such claims.[22] In cases of seizure of goods for violation of the customs laws, the proceeding is at common law, and the losing party is liable for court costs.[23]

4. Replevin where it was not yet ascertained whether judgment should be alternative or not. Dresser v. Lemma, 122 Wis. 387, 100 N. W. 844.

5. Hart v. Godkin, 122 Wis. 646, 100 N. W. 1057.

6. Crossman v. Griggs [Mass.] 74 N. E. 358.

7. An offer on appeal from justice to county court is good, though defendant has not yet appeared and though the time after filing return at the expiration of which the case is deemed at issue in county court had not elapsed. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. S. 658.

8. A tender is not conditional which exacts nothing from the other party, though it is accompanied by statements as to what it shall accomplish. Tender of taxes paid as "full payment," etc., and for "redemption." Glos v. Dyche, 214 Ill. 417, 73 N. E. 757.

9, 10. An offer of judgment which does not cover accrued interest and costs is insufficient. Dietz Co. v. Miller, Sears & Walling Co., 88 N. Y. S. 322. A tender to avoid costs must be of the full amount due and subsequently recovered. Hess v. Peck, 111 Ill. App. 111; Donaldson v. Severn River Glass Sand Co., 138 F. 691. In admiralty must be kept good or renewed after suit brought. Donaldson v. Severn River Glass Sand Co., 138 F. 691. An offer of judgment may be subscribed by attorney not being governed by the statute relating to tenders. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. S. 658.

11. A judgment for a certain sum with mechanic's lien on property is more favorable than an offer of judgment for a greater sum without lien. McNally v. Rowan, 101 App. Div. 342, 92 N. Y. S. 250. Failure to recover more than a rejected tender subjects the party to costs. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991.

12, 13. Atkins v. Ost [Mo. App.] 86 S. W. 903.

14. See 3 C. L. 946.

15. Boland v. Ashurst Oil, Land & Development Co., 145 Cal. 405, 78 P. 871.

16. See 3 C. L. 946.

Note: The law of costs in Feweral courts is exhaustively discussed in Gunckel on Federal Costs. See, also, Costs in C. C. A. (special article) 3 C. L. 954.

17. See 3 C. L. 946.

18. Poole v. French [Kan.] 80 P. 997.

19. Tice v. Hamilton [Mo.] 87 S. W. 497.

20. Steele v. Steele [Ky.] 84 S. W. 516.

21. The Oregon [C. C. A.] 133 F. 609. Denied in salvage suit excessive in amount claimed and long delayed, because of which delay defendant's proof's became difficult to obtain. Merritt & C. Derrick & Wrecking Co. v. Morris & C. Dredging Co. [C. C. A.] 137 F. 780.

22. Climie v. Appanoose County, 125 Iowa, 292, 101 N. W. 98.

23. United States v. 150 Head of Cattle and 52 Calves, 3 Ariz. 134, 77 P. 489.

(§ 7) *B. In equity and equitable code actions.*[24]—In equity it rests in the sound discretion of the court,[25] except as the power is affected by statute[26] to allow,[27] deny,[28] or apportion costs;[29] but the legal rule of awarding them to the successful party is ordinarily followed.[30] In Georgia the jury may recommend but cannot decide the taxation of costs in equity.[31] The defeated claimant must pay costs of interpleader.[32] Costs out of the fund may be awarded to the interpleading plaintiff and that defendant who is in the wrong should be taxed to reimburse the fund as well as for costs between them.[33]

(§ 7) *C. In inferior courts.*[34]—Garnishees entitled to costs in "courts of record" cannot have them in attachment proceedings by justices of the peace, aldermen or magistrates.[35] A probate order is "contested" within a statute making costs discretionary where it was appealed from the probate court and again appealed, which appeal was then voluntarily dismissed.[36] The discretion as to allowance of costs given to the county court on reversal of a justice for errors not going to the merits will not be disturbed except for abuse.[37] The filing of a writ-

24. See 3 C. L. 946.

25. Symms v. City of Chicago, 115 Ill. App. 169; Andrews v. Scott, 113 Ill. App. 581.

26. An action by heirs to vacate conveyances by decedent involves title or possession of realty so that costs are of right. Gibson v. Hammang, 145 Cal. 454, 78 P. 953.

27. Costs are properly allowed against a complainant on the dissolution of a preliminary injunction restraining a board of supervisors from moving the seat of justice. Hinton v. Perry County Sup'rs, 84 Miss. 536, 36 So. 565. Defendant held entitled on dismissal of bill for failure of proof, though complainant thereby was given an extended opportunity to protect his rights. Phelps v. O'Connor [Mich.] 100 N. W. 815. Fraudulent grantee held properly charged with costs occasioned by the participation in suit to set aside conveyances of creditors who were disentitled to relief because parties to the fraud. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112. Wife of fraudulent grantee properly charged where she opposed setting aside. Id. Costs on a bill to redeem go against the mortgagor unless he had made a tender of the debt. Liskey v. Snyder [W. Va.] 49 S. E. 515. Solicitor's fees allowed in partition where complainants' bill stated all interests correctly and no defense was made out. Jepersen v. Mech, 213 Ill. 488, 72 N. E. 1114. Costs given to defendant against whom specific performance was decreed (P. L. 1902, p. 538, § 84). Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. In partition where presentation of claims by one party caused practically all the expense. McMullin v. Doughty [N. J. Eq.] 61 A. 265. All costs on plaintiff where in suit for specific performance it appears that but for his side of a dispute conveyance to him would have been made. Kuhn v. Skelley, 25 Pa. Super. Ct. 185. Costs of audit of inheritance tax charged on heirs whose failure to procure proper appraisement made it necessary. Burkhart's Estate, 25 Pa. Super. Ct. 514.

28. A court of equity may in its discretion deny costs to both parties. Gutierrez v. Wege, 145 Cal. 730, 79 P. 449. Costs may be denied an equity suitor who though entitled to relief has been somewhat delinquent. Lowenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313. On quieting title a tax certificate holder will not be charged unless he has refused to do equity. Glos v. Collins, 110 Ill. App. 121. A defense may be substantial though not successful. McMullen v. Reynolds, 105 Ill. App. 386.

29. In partition cases the costs, including reasonable solicitor's fees, shall be apportioned so that each party pays his equitable portion thereof, except such party as may interpose a substantial defense. McMullen v. Reynolds, 105 Ill. App. 386. In a suit for trust funds wherein one sued as administrator and intervened as individual, being successful as individual as to all issues except one which caused no costs, he was allowed costs as individual, charged one-third as administrator and defendant charged two-thirds. Jacobs v. Jacobs [Iowa] 104 N. W. 489. On a bill to set aside a sale, the successful complainant should pay half costs where he opposed the terms on which relief was granted; or if he refuses them he should pay all costs on the dismissal of the bill. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

30. Consolidated California & V. Min. Co. v. Baker, 131 F. 989. One's good faith will not absolve him from liability in the event he is defeated on the entire cause of action. Pletsch v. Milbrath [Wis.] 102 N. W. 342.

31. Strickland v. Hutchinson [Ga.] 51 S. E. 348. Verdict construed as recommendatory rather than decisive. Id.

32. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

33. Swiger v. Hayman [W. Va.] 48 S. E. 839.

34. See 3 C. L. 948.

35. Statutes construed. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

36. Universalist General Convention v. Van Buren Circuit Judge [Mich.] 104 N. W. 384. Unsuccessful contestant of probate offering an alleged later will taxed for costs. Beebe v. McFaul, 125 Iowa, 514, 101 N. W. 267.

37. Flewellin v. Lent, 98 App. Div. 241, 90 N. Y. S. 417.

ten notice of appearance or a verified pleading is an absolute prerequisite to the right of a defendant to recover costs in municipal court.[38]

(§ 7) *D. In interlocutory or special proceedings.*[39]—The allowance of costs in special proceedings[40] on motions[41] or other interlocutory proceedings,[42] and the imposition of costs as a condition of relief therein, rests in discretion.[43] The discretion is not arbitrary but according to legal principles.[44]

(§ 7) *E. On appeal or error.*[45]—On affirmance or reversal costs are ordinarily allowed to the prevailing party;[46] but where appellant did not oppose the order below,[47] or apply below for correction of an error of inadvertence,[48] or failed to abstract the record,[49] or if he needlessly appealed,[50] or where the amount he was prejudiced is less than the amount necessary to give appellate jurisdiction,[51] or where he showed no interest,[52] he will not be allowed costs, though a reversal is ordered. In like manner, where a reargument was made necessary by failure to procure a substitution respondent was charged, even though there was affirmance in both hearings,[53] and waiver of appeal costs by respondent has been imposed as a condition of affirmance where appellant's recovery below was slightly inadequate.[54] On dismissal, respondent is ordinarily entitled to costs.[55] On substantial modi-

38. Laws 1902, p. 1585, c. 580. Rice v. Hogan, 45 Misc. 400, 90 N. Y. S. 395.

39. See 3 C. L. 943.

40. In eminent domain proceedings successfully litigated by a landowner, he should have costs, though no statute so provides, for to disallow them would diminish his "just compensation." Petersburg School Dist. of Nelson County v. Peterson [N. D.] 103 N. W. 756. Costs are not allowable in condemnation proceedings. In re Rapid Transit Com'rs, 93 N. Y. S. 262. A supplemental order after judgment giving directions to the receiver as to the collection of the judgment is not a "final order in a special proceeding" on which additional attorneys' fees can be allowed the reserve. Adams v. Elwood, 93 N. Y. S. 327. Costs of lunacy proceeding against lunatic's estate. Brooke's Lunacy, 24 Pa. Super. Ct. 430.

41. Motion costs charged against party where he confessed the motion by remedying the defect complained of. Matthews v. Nefsy [Wyo.] 78 P. 664. On denying an unopposed order, costs should not be imposed on the moving party. In re Collins Estate, 93 N. Y. S. 342.

42. Costs to the time of an amendment of the petition which does not change the issues should not be charged against a plaintiff who succeeds on the merits. Keas v. Gordy [Tex. Civ. App.] 78 S. W. 385. Counsel fee allowable to opposite attorney on overruling demurrer (Practice Rule 36) is not allowable of course, but only when demurrer was clearly frivolous. Mangnetto v. Crankshaw [R. I.] 59 A. 309. On granting a new trial because of falsity of the testimony of a principal witness, the costs of the motion should abide the event. Chapman v. Delaware, L. & W. R. Co., 102 App. Div. 176, 92 N. Y. S. 304 On allowing an amendment setting upon a new defense after a mistrial, costs to date should be imposed Bruns v. Brooklyn Citizen, 98 App. Div. 316, 90 N. Y. S. 701.

43. New trial on the weight of evidence being matter of favor, imposition of costs as condition is proper. Larsen v. United States Mortg. & Trust Co., 93 N. Y. S. 610. $10 costs as condition to renewal of motion to open default held proper. Liquari v. Abramson, 91 N. Y. S. 768.

44. In re Clapham's Estate [Neb.] 103 N. W. 61.

45. See 3 C. L. 947.

46. Erroneous determination by the lower court that action was stayed is error of law on reversal of which costs are of right. Smith v. Cayuga Lake Cement Co., 93 N. Y. S. 959. Full costs should be allowed on appeal from the grant or refusal of a new trial, the same as on appeal from a judgment. Benton v. Moss, 93 N. Y. S. 1113. On reversal for error duly saved appellant will be allowed appeal costs, though he can recover only nominal damages. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946.

47. Where appellant did not oppose the order below, costs on reversal should not be allowed. In re Collins' Estate, 93 N. Y. S. 342.

48. Where errors of inadvertence were not called to the attention of the lower court, no costs will be allowed on modification. In re Bell's Estate, 145 Cal. 646, 79 P. 358. A party who wholly fails to call attention to an error in computation is not entitled to costs of an appeal to have it corrected. Sweet v. Lyon [Tex. Civ. App.] 88 S. W. 384. But a general objection is sufficient. Missouri Pac. R. Co. v. Kansas City & I. Air Line Co. [Mo.] 88 S. W. 3.

49. Neal v. Brandon [Ark.] 85 S. W. 776.

50. Costs denied appellant on appeal from tax assessment after same had been abated. Penobscot Chemical Fibre Co. v. Inhabitants of Bradley, 99 Me. 263, 59 A. 83.

51. Wallace v. Leroy [W. Va.] 50 S. E. 243.

52. Appeal costs charged to appellant who showed no interest, notwithstanding the cause was remanded. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.

53. Jones v. Jones [S. D.] 104 N. W. 267.

54. Wappus v. Donelly, 91 N. Y. S. 381.

55. Costs to respondent on dismissal of appeal because order was nonappealable.

fication,[56] the appellant is usually deemed the prevailing party, but the allowance or apportionment of costs rests in discretion.[57] A party fails to bring an appeal to hearing within a statute depriving him of costs in such event where the appeal is dismissed for failure to file return unless he comply with a condition, and he fails to do so.[58] Appellant is entitled to tax his costs on appeal before the new trial is had.[59] Plaintiff should be taxed with the costs of an appeal by him where a reversal on such appeal resulted of course from a general reversal on defendant's appeal.[60]

§ 8. *Amount and items; after trial.*[61]—Where the right to costs is in discretion,[62] the items allowable are likewise discretionary.[63] Where not discretionary, the items taxable is governed by statute,[64] and some statutes make a judgment on the merits prerequisite to taxation of full costs.[65] Among the items usually allowed are jury fees,[66] fees and mileage of witnesses[67] actually called,[68] fees of referees,[69] expenses of reference,[70] and costs of depositions.[71] Allowance of an at-

Tracy v. Scott [N. D.] 101 N. W. 905. Appellant cannot withdraw an appeal from municipal court without costs, nor can the court permit him to do so. Mallery v. Interurban St. R. Co., 92 N. Y. S. 60. Dismissal of an appeal because the judgment below was void for disqualification of the judge will be without costs where the parties were ignorant of the disqualification at the time of trial. Elmira Realty Co. v. Gibson, 92 N. Y. S. 913.

56. Correction of decree for accounting so as to require defendants to account as partners instead of individually entitles appellant to costs. Boice v. Jones, 94 N. Y. S. 896. Modification of decree by reducing interest rate from 10 per cent. to 7 per cent, is too trivial to entitle appellant to costs. Thrasher v. Moran [Cal.] 81 P. 32.

57. Costs of appeal taxed to respondent on affirmance conditioned on remittitur of excess in verdict. City of Elgin v. Nofs, 212 Ill. 20, 72 N. E. 43. Costs taxed to plaintiff in error on partial reversal where respondents were a receiver and a party not served and plaintiff was dilatory. Day v. Davis, 213 Ill. 53, 72 N. E. 682. Appellee taxed on reversal where one part of judgment only was appealed and costs of new trial would be discretionary. Satterthwaite v. Goodyear, 137 N. C. 302, 49 S. E. 205. In case of partial reversal the court may award costs in its discretion. Day v. Davis, 213 Ill. 53, 72 N. E. 682.

58. Poggenberg v. Mestanlz, 91 N. Y. S. 342.

59. Bastardy proceeding. People v. Abrahams, 94 N. Y. S. 296.

60. Heidbreder v. Superior Ice & Cold Storage Co., 184 Mo. 456, 83 S. W. 469.

61. See 3 C. L. 948.

62. See ante, § 7.

63. Litigation on behalf of a trust estate. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31. In cases not specifically provided for, costs will be equitably distributed. Hite v. Rayburn [Tenn.] 85 S. W. 1105.

64. In a suit to substitute a trustee fees of petitioners' solicitor are not allowable. Wilson v. Clayburgh, 215 Ill. 506, 74 N. E. 799.

65. Judgment on failure to join issue on a plea of discharge in bankruptcy is on the merits entitling defendant to file costs. Peck & Bro. v. Karter [Ala.] 37 So. 920. Judgment for defendant held to be on the merits so as to carry costs based on the amount of plaintiff's demand. Ruegamer v. Cieslinskie, 93 N. Y. S. 599.

66. Jury fees in condemnation cases may be assessed against the corporation as part of the costs. Cincinnati, etc., Traction Co. v. Felix, 5 Ohio C. C. (N. S.) 270. Where plaintiff paid two jury fees because the case was postponed of the court's own motion, he may tax both. De Nigris v. Brill, 94 N. Y. S. 505. A jury fee deposited by plaintiff and which he cannot recall may be taxed, though a jury was waived. Lilly v. Lilly, Bogardus & Co. [Wash.] 81 P. 852.

67. It is within the discretion of the court to allow mileage to material witnesses coming a long distance or beyond the state. Perry v. Howe Co-op. Creamery Co., 125 Iowa, 415, 101 N. W. 150; Clinie v. Appanoose County, 125 Iowa, 292, 101 N. W. 98. Statutes limiting the number of witnesses of the same fact for whose attendance costs may be recovered by the prevailing party mean witnesses to the same evidentiary not the same ultimate fact. Burn's Ann. St. 1901, § 676, limiting witnesses of the same fact to three, has no application to lay witnesses testifying to different facts in a will case to show testamentary capacity. Westfall v. Wait [Ind.] 73 N. E. 1089. Mileage from beyond the jurisdiction should not be allowed where a deposition could have been taken. Whitehead v. Breckenridge [Ind. T.] 82 S. W. 698.

68. Witness fees cannot be taxed as costs to the losing party unless the witnesses were called or tendered for cross-examination. But the witnesses may tax their attendance against the party calling them. Id. Sitton v. Edward-Eversole Lumber Co., 135 N. C. 540, 47 S. E. 609. A settlement at the cost of one of the parties does not include fees of witnesses subpoenaed but not sworn or examined. Moore v. Navassa Guano Co., 136 N. C. 248, 48 S. E. 641. Fees of witnesses called to meet allegations of complaint were taxed against complainant, though theory of trial eliminated such issues. Merriam v. Johnson, 93 Minn. 316, 101 N. W. 308.

69. Referee's fees are in discretion. Cannot be reviewed by co-ordinate judge.

torney's fee is permitted by some statutes,[72] but such costs must be specially allowed.[73] A statute making each party liable for his own costs to "officers and witnesses" and fixing the liability for costs on the final outcome of the proceeding, does not exclude all costs which are not to officers and witnesses.[74] The Massachusetts law is valid which empowers the court to reduce costs where two or more cases are tried together.[75] Under it the aggregate of costs in all the cases is to be considered [76] but not reduced below the maximum recoverable in any one.[77] For being sued in the wrong county only such costs will be allowed as will compensate for the increased expense of defending.[78] Where defendant prevails on a plea of matter occurring after suit, he is only entitled to costs accruing after answer.[79] Costs will not be limited to those posterior to a new count if it merely pleaded a different right of recovery on the same wrong.[80] In condemnation proceedings if plaintiff succeeds on trial of issues raised by answer, he is entitled to trial costs, but not to costs of hearing before the commissioners unless he made an offer.[81]

Interlocutory proceedings.—Costs of motion may be taxed on allowing an amendment and full costs allowed to the amending party on the outcome of the judgment in his favor.[82] Where, after a reversal, a party is certain to lose on the record as it stands, all accrued costs should be imposed on allowing an amendment of pleadings.[83] Not more than $10 can be allowed in municipal court on permitting amendment.[84] On overruling demurrer, costs of the demurrer only, and not of the action, should be allowed.[85]

Extra allowances.[86]—An extra allowance of costs in difficult cases,[87] usually

Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161. Where the statute as in Wisconsin commits the allowance of referees' fees to the court, stating no criteria of their amount, the court has a wide discretion. Winnebago County v. Dodge County [Wis.] 103 N. W. 255. An increased per diem may be allowed to referees for sittings away from home if such sittings promote the efficiency of the reference. Id.

70. Extending and transcribing testimony before a referee may be necessary to advise the referee as the reference proceeds; hence should be allowed although never needed for a report. Winnebago County v. Dodge County [Wis.] 103 N. W. 255. Bailiff's fees on a reference may be allowed when the magnitude or difficulty of the reference or the care of exhibits is such that the reference is thereby expedited or facilitated. Id.

71. It is equivalent to not reading the examination of a party at the trial if the party taking it prevents a trial by standing on the ruling on a demurrer. Taxed to plaintiff under Burns' Ann. St. 1901, § 519, he refusing to plead over. Citizens' Nat. Bank v. Alexander [Ind. App.] 73 N. E. 279.

72. Averment that defendant "has so acted" as to necessitate suit is not equivalent to "stubbornly litigious" or "has caused * * unnecessary trouble and expense" warranting taxation of attorney's fee. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727. In a liquor injunction contempt case, an attorney's fee in addition to 10 per cent. of the fine may be taxed as costs. Brennan v. Roberts, 125 Iowa, 615, 101 N. W. 460. In admiralty only reasonable fees proportioned to the service rendered are allowable. $20 proctor's fee in each case reduced to $10 where many libelants appeared by one attorney and all causes of action were proved by the same witnesses. The Oregon [C. C. A.] 133 F. 609. Attorney's fees cannot be allowed as costs in the absence of agreement or statute. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296. Where a party prays in his pleading the allowance of a certain sum as attorneys' fees, a greater amount should not be allowed. Fields v. Rust [Tex. Civ. App.] 82 S. W. 331. See, also, Attorneys and Counsellors, 5 C. L. 319.

73. "Costs" decreed in a will contest mean taxable costs not counsel fees. Hamilton v. Trundle [Md.] 59 A. 719. An attorney's fee is no part of the taxed costs except the statutory appearance fee. Id.

74. Printing costs allowed in election contest appeal (P. L. 1898, p. 315, § 172). Darling v. Murphy [N. J. Law] 59 A. 225.

75. Rev. Laws, c. 203, § 9. Green v. Sklar [Mass.] 74 N. E. 595.

76, 77. Green v. Sklar [Mass.] 74 N. E. 595.

78. Not full costs and counsel fees. Prewitt v. Wilson [Iowa] 103 N. W. 365.

79. Tutty v. Ryan [Wyo.] 79 P. 920.

80. Amendment to ask simple instead of treble damages for same trespass. Hathaway v. Goslant [Vt.] 59 A. 835.

81. New York, O. & W. R. Co. v. McBride, 45 Misc. 516, 92 N. Y. S. 31.

82. Kleimenhagen v. Dixon, 122 Wis. 526, 100 N. W. 826.

83. Klinker v. Guggenheimer, 92 N. Y. S. 797.

84. Toher v. Schaefer, 92 N. Y. S. 795.

85. Gates v. Solomon [Ark.] 83 S. W. 348.

86. See 3 C. L. 950.

87. No extra allowance in ordinary per-

based on the amount claimed or recovered,[88] is authorized by some statutes to be made in the discretion of the trial court [89] to the prevailing party.[90] Where the cost judgment was left blank as to amount because costs as to some parties had not been taxed, an extra allowance to such parties may be made and inserted therein.[91]

On appeal or error.[92] The prevailing party is ordinarily entitled to tax cost of briefs,[93] and in some states "costs of argument," [94] and of printing the record,[95] but charges for unnecessary portions thereof will be disallowed.[96] Costs of an additional abstract may be taxed against a successful appellant if his abstract was materially deficient in doing justice to appellee,[97] but an unnecessary one will be at appellee's cost.[98] Costs of a "case," "abstract," or bill of exceptions are generally regarded as trial costs,[99] but are in Iowa regarded as appeal costs.[1] Where appellant orders a partial transcript, appellee may have the remainder copied and on

sonal injury case. Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116; Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84; Leonard v. Union R. Co., 98 App. Div. 204, 90 N. Y. S. 574. Extra allowance on recovery on foreign judgment defended against on ground that they were void for want of jurisdiction. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1048; Id. 93 N. Y. S. 1052. Extra allowance not objected to and sustained by equitable considerations will not be reversed, though the case is not a proper one for extra allowance. Schiff v. Tamor, 93 N. Y. S. 853. An allowance of $50 costs to an insurance company which deposits the amount of the policy in court is improper. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. S. 877.

88. Extra allowance of $4,000 in will contest reduced to $1,750. Rothschild v. Wise, 92 N. Y. S. 1076. An extra allowance will not be reduced because of the act of the opposite parties in stipulating away the difficulty in the case after preparation had been made for trial. People v. Bootman [N. Y.] 72 N. E. 505. When there is no "sum recovered or claimed" and no allegation as to the "value of the subject-matter involved," an allowance cannot be made under the New York Code. Code Civ. Proc. § 3253. Kitching v. Brown [N. Y.] 73 N. E. 241. Suit for partnership accounting held to present basis for computation of extra allowance. Slater v. Slater, 99 App. Div. 460, 91 N. Y. S. 269.

89. Johnston v. Mutual Reserve Life Ins. Co., 45 Misc. 316, 90 N. Y. S. 539.

90. That a party did not prevail as to some of his claims does not deprive him of his right to an extra allowance. Partnership accounting. Slater v. Slater, 99 App. Div. 460, 91 N. Y. S. 269. Where the difficulty was due principally to a counterclaim and defendant recovered in part thereon, plaintiff is not entitled to an extra allowance. Huber v. Clark, 93 N. Y. S. 1090.

91. Bowers v. Male, 1102 App. Div. 609, 92 N. Y. S. 183.

92. See 3 C. L. 951.

93. Appellant is not entitled on reversal to tax cost of a reply brief filed by him out of time. Stowe v. La Conner Trading & Transp. Co. [Wash.] 81 P. 97. A paper termed "argument" but brief and substantially only the "points and authorities" may be regarded as the latter and printing disbursements allowed under the South Carolina Code. Western Union Tel. Co. v. Winnsboro [S. C.] 51 S. E. 528.

94. Civ. Code 1902, § 3098 allows award of argument costs ($25) on appeal from order of a justice of the supreme court as well as in ordinary appeals. Western Union Tel. Co. v. Winnsboro [S. C.] 51 S. E. 528. "Costs for argument" cannot be taxed if the case is submitted on briefs in another case without argument. Nichols v. Smith [S. D.] 102 N. W. 606.

95. Where the court orders that the transcript shall be prepared at the equal cost of both parties, the prevailing party is entitled to tax the share paid by him. Bell v. Pleasant, 145 Cal. 410, 78 P. 957. Printing costs are a part of costs on appeal. Court Rule 38. Darling v. Murphy [N. J. Law] 59 A. 225.

96. Where a decision is affirmed as to one appellee and reversed as to the other, appellant can tax for only so much of the transcript as would have been necessary to the part of the case as to which there was reversal. Medearis v. Granberry [Tex. Civ. App.] 86 S. W. 790. One who took no measures to exclude inadmissible evidence cannot object to the cost of printing it. Taylor v. Marshall, 132 F. 407. Unnecessary matter in the statement of facts cannot be taxed for by a successful appellant. Sovereign Camp Woodmen of the World v. Hicks [Tex. Civ. App.] 84 S. W. 425. Cost of an unnecessarily voluminous record will be apportioned. Hoskins' Adm'x v. Morton [Ky.] 85 S. W. 742; Hite v. Rayburn [Tenn.] 85 S. W. 1105. Abstract setting out questions and answers contrary to rules of court taxed to successful party, though it would have withstood a motion to strike. Plagge v. Mensing [Iowa] 103 N. W. 152; Smith v. Fry [Iowa] 103 N. W. 1002.

97. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415. Appellee should have costs of an amended abstract which supplied material omissions. Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783. Costs will be denied respondent where he submitted no amendments, objections, or exceptions to appellant's proposed statement of facts, but waited several months and then moved for correction of trial judge's certificate so as to make it show that statement was incomplete. In re Holburte's Estate [Wash.] 80 P. 294.

98. Keeley Brewing Co. v. Mason, 116 Ill. App. 603.

99. In Nebraska cost of settling a bill of

affirmance tax the same.[2] Under the rule of costs to the time of the first error, all trial costs will be awarded appellant on reversal for lack of evidence to support the judgment.[3] After reversal with costs to abide the event, payment of such appeal costs may be imposed as a condition of allowing an amendment changing the cause of action.[4] Where a reversal does not affect the cost judgment, only costs subsequent to the reversal should be taxed after judgment on the retrial.[5] Costs or penalty for needless or frivolous appeals are generally authorized.[6]

§ 9. *Procedure to tax costs; correction and review.*[7]—Costs must be taxed in the suit in which they were recovered and cannot be liquidated and recovered by action.[8] Costs are usually taxed by motion or application on notice[9] entitled in the case,[10] and supported by affidavit as to facts not of record.[11] Fees to a

exceptions is trial cost and abides the event; hence a successful appellant cannot recover them as appeal costs. Pettis v. Green River Asphalt Co. [Neb.] 101 N. W. 333.

1. Berkey v. Thompson, 126 Iowa, 394, 102 N. W. 134.
2. Manion v. Manion [Ky.] 85 S. W. 197.
3. Westfall v. Walt [Ind.] 73 N. E. 1089.
4. Diehl v. Dreyer, 93 N. Y. S. 151.
5. Talcott v. Wabash R. Co., 99 App. Div. 239, 90 N. Y. S. 1037.
6. Ft. Worth & R. G. R. Co. v. Hadley [Tex. Civ. App.] 86 S. W. 932; Natzlavzick v. Oppenheimer [Tex. Civ. App.] 85 S. W. 855; St. Louis, etc., R. Co. v. Carroll [Ark.] 84 S. W. 475; Van Wormer v. Vaughan [Tex. Civ. App.] 84 S. W. 278; Kessler v. Hecht, 121 Ga. 274, 48 S. E. 922. Double attorney's fees taxed as a penalty for appealing from overruling of a frivolous demurrer. Rev. St. 1898, § 2951. Sprague v. Maxcy, 122 Wis. 509, 100 N. W. 832. A penalty for dilatory appeal will follow affirmance if there was a question fairly open to doubt. Times-Democrat Pub. Co. v. Mozee [C. C. A.] 136 F. 761. Costs by way of damage for an unjustifiable appeal will not be imposed on a school trustee. Chiles v. School Dist. of Buckner, Jackson County [Mo. App.] 85 S. W. 880. Allowance of 10 per cent. of the amount superseded will not be granted where the fund is in court. Hall v. Dineen [Ky.] 87 S. W. 275. 10 per cent. damages where judgment was superseded not allowed when fund in controversy was in court. Id. Eight months delay after taking appeal before motion to remit to court of intermediate appeal coupled with failure to assign error or prepare paper book. McFadden v. McFadden [Pa.] 61 A. 75. No paper book served and appeal nonproposed. Wilcox v. Merrill, 26 Pa. Super. Ct. 59.
7. See 3 C. L. 952.

NOTE. How costs are awarded in Equity: "Costs are to be awarded as a part of the decree, or they cannot be recovered, although they may be, and generally are, taxed after the decree." Coburn v. Schroeder, 8 F. 521. The amount of costs payable in a suit, whether given out of a fund, or payable by a party, is ascertained by taxation, which, if conducted by the strict rule of the court, is termed a taxation "as between party and party," which are the ordinary costs allowed by the court; but there is in some cases a more liberal allowance, called costs "as between solicitor and client," which are the costs allowed to parties filling those characters. 2 Barbour, Ch. Pr. 336; Adams, Eq. 391. In suits of a litigious class, the taxation is always "as between party and party," but in those of a protective or administrative kind, its adoption, though general, is subject to exceptions. The suits in which an exception is made are those for performance of trusts and administration of assets, in which the trustee or personal representative has always his costs as between solicitor and client, and, if payments have been made by him not coming strictly under the name of costs, he may obtain them also by a direction for "charges and expenses, not strictly costs in the cause." Adams, Eq. 391; 2 Smith Ch. Pr. 628. For costs as between solicitor and client, see 2 Barbour, Ch. Pr. 337, 338; 2 Smith, Ch. Pr. 636; 2 Daniell, Ch. Pl. & Pr. [4th Ed.] 1434; Edenborough v. Archbishop of Canterbury, 2 Russ. 93; Mohun v. Mohun, 1 Swanst. 201; Norway v. Norway, 2 Mylne & K. 278; Turner v. Turner, cited in 2 Russ. & M. 687; Tootal v. Spicer, 4 Sim. 510; Larkins v. Paxton, 2 Mylne & K. 320; Brodie v. Bolton, 3 Mylne & K. 168; Barker v. Wardle, 2 Mylne & K. 818; Attorney General v. Haberdashers' Co., 4 Brown, Ch. 178; Currie v. Pye, 17 Ves. 462; Moggridge v. Thackwell, 1 Ves. Jr. 464. When the court has once adopted the principle of taxation, as between solicitor and client, in favor of a particular individual, or of a particular class, it will in its future proceedings, whenever it becomes necessary to direct a further taxation of costs, direct them to be taxed on the footing of the former taxation. But it is to be observed that it is only where the former direction for taxation has been made at a hearing of the cause that the court will consider itself bound by it at the subsequent hearing, and that it will not do so when the former direction as to costs was made upon petition and by consent. 2 Barbour, Ch. Pr. 338." From Fletcher Eq. Pl. & Pr. § 745.

8. Casey v. H. Abraham & Son, 113 La. 581, 37 So. 484.
9. That costs were taxed without notice is not ground for reversing the judgment. Jennings v. Frazier [Or.] 80 P. 1011. On dismissing an involuntary petition, the alleged bankrupt must file his bill of costs with the clerk and give notice to petitioners. In re Haeselker-Kohlhoff Carbon Co., 135 F. 867.
10. Applied in consolidated action. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161.
11. To authorize allowance of costs for

referee who died should be taxed on the incoming of his successor's report.[12] The fixing and apportionment of referee's fees is in North Carolina regarded as a final judgment;[13] but a motion to fix them is not an action distinct from the cause.[14] Approval by the corporation attorney of cost bill of one acquitted of misdemeanor is required only on acquittal in police court, not on acquittal on appeal therefrom.[15] A judgment entry with the words "Costs taxed at $——" satisfies a requirement that the amount recovered or to be paid shall be set out in figures; the amount of costs being fixed by law, the subsequent filling of the blank space is sufficient.[16] Where a judgment is affirmed as amended and appeal costs are directed to be taxed against the prevailing party, the taxation should not be made in the judgment as made.[17] Adjudging costs to one defendant does not determine as between plaintiff and other defendants.[18]

The remedy to review a taxation by the clerk is by motion to retax.[19] One who moves to retax has the burden of showing error in the taxation.[20] Only the papers before the clerk on taxation can be used on a motion to retax.[21] On such motion the court may approve nunc pro tunc a charge taxed without approval.[22] Retaxation may be had pending an appeal from the judgment,[23] and inadvertence of the court in omitting an item of costs can be corrected after remand on affirmance.[24] Fees allowed on garnishment may be challenged by plaintiff in the main action after verdict and judgment in his favor.[25] A taxation will not be modified to charge a dilatory party on the tardy application of the losing party.[26]

Appeal or error ordinarily will not lie from a cost judgment alone.[27] The discretion of a chancellor will not be reviewed unless abused,[28] and it is presumed correct unless the evidence is certified in the record.[29] The record will not be searched on a general bill of exceptions to review a finding that unnecessary witnesses were called to the same fact.[30] Where the objection is that no costs should have been allowed, the question saves itself for review without a motion for retaxation.[31] Where the award follows judgment as an incident, an objection at trial is not essential to raise the right to costs when appealed.[32] A motion addressed to the taxation of two separate kinds of costs is separable[33] and as to the part respecting those costs which pertain to appeal and as to which there

attendance of witnesses in municipal court, affidavits must state actual number of days of attendance as required by municipal court act. Topken v. Cunard S. S. Co., 43 Misc. 675, 88 N. Y. S. 394.

12. Winnebago County v. Dodge County [Wis.] 103 N. W. 255.

13, 14. When causes are consolidated, the motion should be entitled in that cause where it was made. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161.

15. City of Spokane v. Smith, 37 Wash. 583, 79 P. 1125.

16. The lien of costs runs from entry of the judgment. Mathewson v. Fredrich [S. D.] 103 N. W. 656.

17. Rusk v. Hill, 121 Ga. 378, 49 S. E. 261.

18. Kennedy v. Maness, 138 N. C. 35, 50 S. E. 450.

19. Symms v. Chicago, 115 Ill. App. 169. The remedy for an excessive allowance of costs on motion is by motion to reargue the motion as to costs; appeal will not lie. Toher v. Schaefer, 92 N. Y. S. 795.

20. Worley v. Shelton [Tex. Civ. App.] 86 S. W. 794.

21. Crotty v. De Dion-Bouton Motorette Co., 102 App. Div. 405, 92 N. Y. S. 619.

22. Ross v. Anderson [Tex. Civ. App.] 85 S. W. 498.

23. McDermott v. Yvelin, 92 N. Y. S. 1088.

24. The statute allowing correction of party's inadvertence does not apply. State v. District Court of Second Judicial Dist. [Mont.] 79 P. 410.

25. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

26. Hill v. Fuller [Mass.] 74 N. E. 361.

27. See Appeal and Review, 5 C. L. 131, n. 98. Where costs are a positive right, the rule that the judgment for costs is not alone appealable does not apply. Eg., in actions at law in a Federal court. Western Coal & Min. Co. v. Petty [C. C. A.] 132 F. 603.

28, 29. Symms v. Chicago, 115 Ill. App. 169.

30. Westfall v. Walt [Ind.] 73 N. E. 1089.

31. Guinn v. Iowa & St. L. R. Co., 125 Iowa, 301, 101 N. W. 94.

32. Petersburg School Dist. v. Peterson [N. D.] 103 N. W. 756.

is a transcendence of jurisdiction, certiorari lies.[34] If an amendment of the record on which taxation is based is allowed after appeal from the taxation, the proper practice is to decide the appeal by reference back for a new taxation.[35]

§ 10. *Enforcement and payment.*[36]—Costs, being part of the judgment,[37] are enforceable by the regular process of execution, and the ordinary rules as to levy and sale[38] are applicable.[39] An execution should specifically command the making of appellate costs and not treat them as incident to the judgment.[40] Judgment for costs against plaintiff cannot be enforced by body execution unless a judgment for him could have been so enforced.[41] A statute authorizing the issuance of fee bills will not be extended to fees not enumerated in the statute.[42] An interlocutory judgment for costs is not collectible until final judgment.[43] If in partition no sale is necessary; the costs are a bare lien on the land to be enforced by bill; a sale for the satisfaction of costs only is invalid.[44] When final costs are taxed in partition, the case is closed and subsequent proceedings to charge one purpart do not affect interim purchasers.[45] The party may satisfy a cost judgment, as costs belong to him, not to his attorney.[46] Where a deed is set aside for incompetency of the grantor, costs before the decree should not be charged against the land.[47] Execution for costs should not go against an estate but be charged against it to be paid in due course.[48] Costs rightly taxed against an estate are an "expense of administration" and not a "claim,"[49] and they take priority accordingly.[50] A cost fi. fa. may be enjoined if defendant's liability rests on conflicting evidence and a hearing is necessary to determine it.[51] Limitations on costs runs as in a simple money demand or as on implied contract, not as on judgment.[52] Payment is often coerced by making it a condition on the right to proceed further.[53] Rendering judgment against a party for failure to comply with a court rule requiring the payment of certain costs before the examination of the witnesses is unconstitutional as depriving one of property without due process of law.[54]

33, 34. Berkey v. Thompson, 126 Iowa, 394, 702 N. W. 134.

35. Smith v. Wenz [Mass.] 73 N. E. 651.

36. See 3 C. L. 954.

37. Referee's fees become a part of the judgment and when allowed against an estate partake of the rank and priority of the judgment. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161.

38. See Executions, 3 C. L. 1397.

39. A levy should include several tracts either of which will amply suffice. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091. A sale at an inadequate price for costs will be invalid if the requisite demand before selling was not made. Thirty days demand wanting and sale for one-tenth value. 1 Starr & C. Ann. St. 1896, p. 1076, c. 33, § 28. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

40. If the judgment has been paid, it should command making of costs only. Hopper v. Smith [N. J. Law] 60 A. 63.

41. Not where the action was for personal injury by negligence of defendant's servant. Davids v. Brooklyn Heights R. Co., 45 Misc. 208, 92 N. Y. S. 220.

42. Fee bill for referee's fees unauthorized. Manewal v. Proctor [Mo. App.] 87 S. W. 30.

43. Cassavoy v. Pattison, 101 App. Div. 128, 91 N. Y. S. 876.

44, 45. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

46. Early v. Whitney, 94 N. Y. S. 728.

47. Combs v. Combs, 26 Ky. L. R. 617, 82 S. W. 298.

48. Clemens v. Kaiser, 211 Ill. 460, 71 N. E. 1055.

49, 50. Ferguson v. Woods [Wis.] 102 N. W. 1094.

51. McLeod v. Reid, 120 Ga. 785, 48 S. E. 315.

52. Fulton County v. Boyer, 116 Ill. App. 388.

53. The requirement that costs be paid before a nonsuited or discontinuing party may begin anew does not bar the state from estreating a recognizance whilst its action against the sureties is pending and costs unpaid. State v. Cornell [S. C.] 50 S. E. 22. Nonpayment of costs adjudged in a former action for the same cause is ground for stay. Lederer v. Krausz, 90 N. Y. S. 402. Proceedings had pending a stay for nonpayment of costs are not void, but only irregular and payment of the costs cures the irregularity. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824. Payment of costs on dismissal is prerequisite to another action for the same cause. Ingrosso v. Baltimore & O. R. Co., 94 N. Y. S. 177. A motion to stay proceedings until costs are paid is to be determined on the facts existing at the time the motion was made, and where defendant had no interest in such costs until later, the motion should be denied. Defendant took assignment of

COUNTERFEITING.

On a prosecution for uttering, possession of moulds for coins of a different denomination than those uttered may be shown to prove criminal intent,[55] and the dismissal on the trial of a count based on possession of such moulds does not withdraw such evidence.[56]

COUNTIES.

Scope of title.—Only those decisions which are peculiarly applicable to counties are here treated. Matters relating to public corporations generally,[57] to public securities,[58] contracts,[59] facilities,[60] and officers,[61] are given separate treatment. Taxation is also the subject of a separate article.[62]

§ 1. *Creation and organization.*[63]—Counties are territorial divisions of the state, organized for the convenience of the people, and as such are treated as governmental agencies of the state for the purpose of local government.[64] Within constitutional limits,[65] the legislature has full power to change county boundaries.[66] In making such changes the obligations of the people within the territory affected must not be interfered with.[67] Statutes making boundary changes usually appor-

cost judgment in favor of another defendant. Tanzsheim v. Brooklyn, Q. C. & S. R. Co., 94 N. Y. S. 534. Vexatious suits will be prevented by staying a new or successive suits until costs in former ones are paid. Davenport, Rock Island & N. W. R. Co. v. De Yaeger, 112 Ill. App. 537.

54. Court rule required one-half official reporter's per diem to be so paid. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281. Such judgment is also in conflict with Code Civ. Proc. § 274, as amended, providing that such fees shall be paid by the prevailing party and taxed as costs against the one against whom judgment is rendered. Id.

55, 56. Bryan v. United States [C. C. A.] 133 F. 495.

57. See Municipal Corporations, 4 C. L. 720.

58. See Municipal Bonds, 4 C. L. 706.

59. See Public Contracts, 4 C. L. 1089.

60. See Public Walks and Improvements, 4 C. L. 1124; Bridges, 3 C. L. 529; Highways and Streets, 3 C. L. 1593; Sewers and Drains, 4 C. L. 1429; Toll Roads and Bridges, 4 C. L. 1681.

61. See Officers and Public Employes, 4 C. L. 854.

62. See Taxes, 4 C. L. 1605.

63. See 3 C. L. 960.

64. Folsom v. Greenwood County [C. C. A.] 137 F. 449.

65. Mich. Const. art. 10, § 2, providing that no county shall ever be reduced by the organization of new counties to less than 16 townships, except on the decision of a majority of the electors residing in the county to be affected, applies to the taking of territory from one established county and adding it to another established county Board of Sup'rs of Bay County v. Edmunds [Mich.] 102 N. W. 998. North Dakota Const. § 168, relating to changes in the boundaries of organized counties, does not apply to unorganized counties, and propositions to change their boundaries need not be submitted to the electors of such unorganized counties. State v. Stark County [N. D.] 103 N. W. 913. Laws 1903, p. 78, c. 69, providing for the addition of two unorganized counties and certain unorganized territory to Stark county, is in conflict with § 168 of the constitution, because it provides for a majority vote in the entire territory affected and does not provide that a majority of the voters of Stark county must consent. Id. The statute is also void as special legislation in conflict with § 167 of the constitution. Id. The statute being void, proceedings thereunder are void, even though a majority of voters in Stark county actually voted for the change. Id. Act of Feb. 28, 1905, attempting to abolish Kootenai county and set up two new counties in its stead, and providing for the new county governments, held void, because the legislature has no power to abolish a county under the constitution. McDonald v. Doust [Idaho] 81 P. 60.

66. Folsom v. Greenwood Co. [C. C. A.] 137 F. 449.

67 Folsom v. Greenwood Co. [C. C. A.] 137 F. 449. Where a township is organized for the purpose of issuing bonds in aid of a railway, and the auditor and treasurer of the county in which the township is located are required to levy and collect taxes for the payment of the bonds, and thereafter the township is made a part of another county, the duty of levying and collecting such taxes devolves upon the officers of the latter county. Id.

tion the property and liabilities between the resulting divisions; but where an act changing boundary lines fails to apportion the indebtedness between the counties concerned, the legislature may provide for such apportionment by a subsequent act.[68] The division of property between two counties where a portion of one is annexed to the other depends chiefly upon the provisions of the statute making such change of boundaries.[69] The fixing of boundaries is a legislative function; but in case of a dispute as to the interpretation of a statute fixing boundary lines, the courts have jurisdiction of the controversy.[70] But where the legislature has prescribed a mode of proceeding for the fixing of uncertain lines, that mode must be followed and exhausted before recourse can be had to the courts.[71] The boundaries of two parishes being involved, the suit may be brought in either parish.[72] The incorporation of new boroughs is provided for by general statute in Pennsylvania, and while the court which is given jurisdiction of the proceeding has a large discretion therein,[73] jurisdictional facts must appear if such proceedings are to be upheld.[74] Where a borough in which the county seat is located is divided into two boroughs, the new borough in which the county buildings are situated may be given a new name.[75] The shifting of the channel of a river which is the dividing line between two counties does not change the boundary of the counties.[76]

The method of procuring the removal of a county seat is statutory, and the validity of such proceedings is dependent upon compliance with the terms of the statute.[77]

68. Desha County v. State [Ark.] 84 S. W. 625. Laws 1881, p. 102, and Laws 1899, p. 174, provide for the ascertainment and adjustment of the indebtedness of Chicat and Desha counties and the manner in which a settlement may be enforced, and are within the power of the legislature, the Act of 1879 changing boundaries not having adjusted finances. Id. Before the Act of 1899, Chicot county had no right of action against Desha county, since before the act the latter county was not capable of being sued. Id.

69. Sess. Laws 1903, p. 204, annexing a portion of Shoshone county to Nez Perce County, construed and proper division of property indicated. Shoshone County v. Thompson [Idaho] 81 P. 73.

70. Parish lines. Parish of Caddo v. Parish of De Soto [La.] 38 So. 273; Parish of Caddo v. Parish of Red River [La.] 38 So. 274. Statute defining boundary line between Hot Springs and Clark Counties construed. Crawford v. Brown [Ark.] 86 S. W. 425.

71, 72. Parish of Caddo v. Parish of De Soto [La.] 38 So. 273; Parish of Caddo v. Parish of Red River [La.] 38 So. 274.

73. Exercise of discretion by court of quarter sessions incorporating new borough not disturbed by appellate court, no abuse appearing. La Porte Borough, 26 Pa. Super. Ct. 333. A mistake in the filing of a petition for the incorporation of a new borough, which has misled or injured no one, may be corrected by the court of quarter sessions. Id.

74. Under Act 1871 (P. L. 283), signing of application of new incorporation of new borough within three months immediately preceding its presentation to the court is a jurisdictional fact which must be made to appear, either affirmatively in the petition, or in the course of the proceedings. La Porte Borough, 26 Pa. Super. Ct. 333. A petition for the incorporation of a new borough need not be concurred in by the grand jury of the county, since the portion of Acts 1889 (P. L. 393) which requires such concurrence, was repealed by Act 1895 (P. L. 389). Id.

75. La Porte borough divided, naming new borough containing county seat South La Porte held proper. La Porte Borough, 26 Pa. Super. Ct. 333.

76. Witt v. Willis [Ky.] 85 S. W. 223.

77. After several petitions for election on removal of county seat were circulated, the captions of all but one were removed and the signatures pasted together under a single caption. Held, in absence of any showing that a signature was not genuine, such petition was sufficient under Sand. & H. Dig. § 945. Williamson v. Russey [Ark.] 84 S. W. 229. The collector's list of paid poll taxes is the basis by which is to be determined whether the required one-third of the electors have signed a petition for an election to decide upon a county seat removal. Acts 1901, p. 76. Id. Publication of notice of intention to circulate a petition for removal of a county seat need be made in but one legal newspaper in the county. Foss v. Roseau County Com'rs [Minn.] 101 N. W. 71. It is not a jurisdictional prerequisite that affidavits attached to a petition for removal of a county seat should state that the parties executing the affidavits are signers of the petition. Gen. St. 1894, § 647. Id. Where, in an election for removal of a county seat under St. 1893, c. 23, it appears from the face of the returns that no one town received a majority of the votes cast and the county board orders a second election, such order in effect directs the county seat to remain unchanged, and the legality of the election may therefor be contested if the proper

§ 2. *Officers; personal rights and liabilities.*[78]—The appointment of county officers is provided for by constitutions[79] or statutes.[80] The legislature cannot abolish an office established by the constitution,[81] nor appoint officers by special laws.[82] It may prescribe the duties of county officers so far as such duties are not prescribed by the constitution,[83] and may provide for other county officers unless prohibited by the constitution.[84] Compensation of officers is entirely statutory.[85] County supervisors are not entitled to compensation in excess of that provided by statute, notwithstanding the reasonable value of their services or the custom

showing is made. Robertson v. Grant County Com'rs [Okl.] 79 P. 97. Allegations of petition held insufficient. Id. Signers of a petition for the calling of an election for the removal of the county seat may withdraw their names from the petition at any time before the county court has taken final action on the petition. Under Hurd's Rev. St. 1903, p. 553, c. 34, requiring names of two-fifths of voters of county on petition to give court jurisdiction. Kinsloe v. Pogue, 213 Ill. 302, 72 N. E. 906. Under Acts 1900-1901, p. 754, providing the method of procuring new county buildings upon removal of the county seat, the contribution of the county must be made out of the revenue of the county for one year without increasing the tax rate for that year. Hand v. Stapleton, 140 Ala. 555, 37 So. 362.

78. See 3 C. L. 961.

79. A county commissioner is a county officer within the meaning of Const. art. II., § 6, authorizing the filling of vacancies in counties by the county commissioners; hence Ball. Ann. Codes & St. § 327, providing for filling of vacancies in county board by other officers, is unconstitutional. State v. Fulton [Wash.] 79 P. 779. Road supervisors appointed by county commissioners and removable at will are not county officers, but employes, and are not within the terms of Const. art. 11, § 5, requiring general and uniform election laws to be passed for election of county officers. State v. Newland [Wash.] 79 P. 983.

80. Under Laws 1901, c. 2, § 1, providing for filling of vacancies in county offices caused by death, resignation "or otherwise" by appointment by the governor, vacancies other than those caused by death or resignation are to be so filled. Territory v. Gutierrez [N. M.] 78 P. 139.

81. Acts 1876, p. 322, consolidating offices of county treasurer and clerk of the superior court, making such clerk ex officio treasurer and fixing his fees, is unconstitutional because it abolishes the office of treasurer fixed by constitution. Morris v. Glover, 121 Ga. 751, 49 S. E. 786.

82. Under 24 Stat. 170, prohibiting territorial legislatures from passing local and special laws regulating township and county affairs, is law appointing certain persons as commissioners of a certain county established by a previous law is special and invalid. Territory v. Gutierrez [N. M.] 78 P. 139. An assessor appointed by the commissioners by such special law, according to its terms is not legally entitled to the office. Territory v. Albright [N. M.] 78 P. 204.

83. Missouri River Power Co. v. Steele [Mont.] 80 P. 1093.

84. Creation of county board of assessors and giving it power to fix valuation on realty in first instance held valid. Missouri River Power Co. v. Steele [Mont.] 80 P. 1093.

85. Kirby's Dig. § 7009 does not entitle county clerk to per diem compensation for attendance on board of equalization while in court pursuant to provisions of §§ 6998, 6999. Hempstead County v. Goodlett [Ark.] 84 S. W. 787. Kirby's Dig. § 3493 does not entitle the county clerk to a fee of 10 cents each for filing justice of the peace reports. Id. Ky. St. 1903, § 1845 fixes compensation of members of fiscal court and they cannot allow themselves any other compensation. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613. In Rev. St. § 2813, providing for the per diem of county commissioners, the word "such" before the word "county" should read "each" so as to make the law general, and hence constitutional. The word "such" held to have crept in by error. State v. Carlisle, 2 Ohio N. P. (N. S.) 637. Section 897 makes no provision for mileage for county commissioners when traveling either within or without their own county. The provision for "necessary traveling expenses when traveling outside of the county on official business" is a provision for official as distinguished from personal expenses—for the cost of going and coming, but not for board and personal expenses. Id. County treasurer's commissions, in Mississippi, are to be estimated on basis of political year, beginning and ending in January and not on basis of fiscal year. Adams v. Coker [Miss.] 37 So. 744. Schools in special districts are not under the official supervision of county superintendents and are not to be taken into account in computing their salary, under Rev. Codes 1899, § 652. Dickey County v. Hicks [N. D.] 103 N. W. 423; Dickey County v. Denning [N. D.] 103 N. W. 422. In California a district attorney is not entitled to extra compensation for services of a stenographer but such stenographer must be paid out of his salary. The cost of such services is not a "personal expense." County supervisors cannot therefore allow a claim for a salary of such a stenographer. Humiston v. Shaffer, 145 Cal. 195, 78 P. 651. Under Comp. St. 1901, c. 28, § 42, the treasurer and clerks and assistants in counties over 25,000 and less than 60,000 population can in no case receive more than the amount of fees actually earned in the office. Mauer v. Gage County [Neb.] 100 N. W. 1026. Laws 1898, p. 36, making county treasurer in counties of a certain class also supervisor of assessments, does not create a new office but adds new duties

of their predecessors.[86] Equity has jurisdiction to compel restoration of moneys illegally drawn by supervisors in excess of their salaries as allowed by law.[87] In such a suit by taxpayers defendant supervisors may plead limitations.[88] Overpayments made and received in good faith and applied to discharge claims against the county cannot be recovered from the officer receiving them.[89] In Tennessee the revenue agent may sue for the recovery of money illegally paid a county officer.[90]

For breaches of official duty[91] or for negligence resulting in loss to the county,[92] officers are liable on their bonds; and willful neglect or breach of duty may render them liable to penalties prescribed by statute.[93] A deputy county auditor duly appointed by the auditor at a previous term who continues to perform duties as such deputy during the subsequent term is a de facto officer.[94] But whether he was a de facto officer or not, the auditor, with whose permission and under whose supervision he performed such duties, would be liable on his bond for illegal acts of the deputy resulting in loss to the county.[95] Negligence of the treasurer in paying cash or checks on forged orders presented by the deputy auditor

to an old one; hence the salary of the county treasury is also compensation for his duties as supervisor of assessments. Parker v. Richland County, 214 Ill. 165, 73 N. E. 451. County auditor was justified in resisting payment of an excessive advertising bill and should be allowed his expenses in so doing. Kloeb v. Mercer County Com'rs, 4 Ohio C. C. (N. S.) 565.

86. Va. Code 1904, § 848, fixes compensation. Johnson v. Black, 103 Va. 477, 49 S. E. 633.

87. Bill by taxpayers held not multifarious, though against supervisors and predecessors, the defense being the same in every case. Johnson v. Black, 103 Va. 477, 49 S. E. 633. Equity jurisdiction not ousted by Va. Code 1904, § 836, providing for appeal from decision of board by commonwealth attorney when required by six freeholders. Id.

88. In suit against supervisors and their predecessors, only those could be held who had accepted money within 3 years before suit. Johnson v. Black, 103 Va. 477, 49 S. E. 633.

89. Where a county auditor in good faith but without legal authority paid a county superintendent of schools, besides the amount of his own salary, the salaries of his clerks, and the superintendent paid the clerks amounts in excess of those received from the county which they accepted in discharge of their claims, the county being thus relieved, the county could not recover from the superintendent the overpayment to him. Dickey County v. Hicks [N. D.] 103 N. W. 423.

90. Under Acts 1901, c. 174, a revenue agent may bring suit against a county judge to recover moneys illegally paid him. State v. Kelly, 111 Tenn. 583, 82 S. W. 311.

91. Under Burn's Ann. St. 1901, §§ 6521, 6530, fees collected by a county auditor belong to the county and failure to pay them over is a breach of his official bond. Workman v. State [Ind.] 73 N. E. 917. Common-law action may be brought against sureties on county treasurer's bond when he has turned his books over to his successor and a shortage appears, though county auditors have not fully adjusted his accounts. Lancaster County v. Landis, 209 Pa. 514, 58 A. 1068.

92. County trustee and surety liable for loss of funds deposited in unsafe bank, when though not intentionally dishonest in the matter he could have known of the bank's condition by the exercise of ordinary prudence and caution. State v. Ridley [Tenn.] 85 S. W. 891. Where a county treasurer recognizes an order on the treasury issued from the county auditor's office on a blank in every way regular on its face and issues a check on a county depositary payable to the person designated as payee, and gives the check to the pretended representative of the payee, in good faith and without negligence, neither the treasurer nor his sureties are liable for the forgery of the order or the indorsement thereon. Board of Com'rs of Ramsey County v. Elmund [Minn.] 102 N. W. 719.

93. Failure of a commissioner to require an account to be itemized and verified under Code, § 754 renders him liable to the penalty prescribed by Code, § 711, for neglect of duty. Turner v. McKee, 137 N. C. 251, 49 S. E. 330. County treasurer not liable for penalty imposed by Rev. Code 1892, § 902, for failure to report to supervisors, where such failure was not willful but was due to request of supervisors. Adams v. Caker [Miss.] 37 So. 744. A county commissioner who through ignorance and not through willfulness or with a corrupt motive disregards a statute regulating the exercise of his official duties, is not guillty of criminal misconduct in office, within meaning of Rev. St. § 6915, prescribing a fine and forfeiture of office as punishment for misconduct in office. State v. Bair, 71 Ohio St. 410, 73 N. E. 514.

94. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

95. Deputy forged orders and indorsements thereon and obtained money by presenting them to the treasurer as the representative of the payees named therein. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

would not relieve the auditor from liability for his concurrent negligence.[96] Approval and adoption of a report of a county trustee on funds received by him is not a settlement with and a release from liability of his predecessor.[97] Commissions earned by county trustee after failure of bank resulting in loss of county funds are properly applied in reduction of the trustee's liability.[98]

§ 3. *Public powers, duties, and liabilities.*[99]—Counties possess no powers and can incur no obligations not authorized by statute.[1] They cannot hold property for profit or take title to it for the purpose of revenue,[2] hence a judgment against a county is not a lien on land bought in by the county for taxes.[3] Counties are not bound by acts of officers or agents not authorized by law,[4] nor can they be estopped by such acts.[5] Counties which issue bonds for railway stock and are represented on the directorate of the road do not hold the stock in their governmental capacity, but as ordinary stockholders.[6] They are bound by acts of their representatives on the board of directors.[7] Mandamus lies to compel performance of ministerial duties of county officers which are clearly fixed by law.[8] The liability of a county for expenses incurred in caring for insane persons,[9] persons suffering from contagious diseases,[10] or others entitled to public aid,[11] is regulated by

96. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

97, 98. State v. Ridley [Tenn.] 85 S. W. 891.

99. See 3 C. L. 963.

1. Bucher v. Northumberland County, 209 Pa. 618, 59 A. 69.

2, 3. Buell v. Arnold [Wis.] 102 N. W. 338.

4. A county auditor has only such power as is conferred by statute, and acts in excess of such power do not bind the county. Assignment of certificate to forfeited lands without authority of state auditor of no effect. Patton v. Cass County [N. D.] 102 N. W. 174. County supervisors recommended a certain assessment of railroads by towns and agreed by resolution to bear expense of litigation resulting from such assessment. Held such resolution and agreement was ultra vires and not binding on county. People v. St. Lawrence County Sup'rs, 91 App. Div. 327, 91 N. Y. S. 948. County board has no power to create an office by employing an attorney for a year with salary payable quarterly; where an attorney is so employed the board may discharge him before the end of the year. Vincent v. Nassau County, 45 Misc. 247, 92 N. Y. S. 32.

5. County not estopped to assert invalidity of resolution of supervisors providing for payment of expenses incurred by towns in certain litigation, resolution being ultra vires. People v. St. Lawrence County Sup'rs, 101 App. Div. 327, 91 N. Y. S. 948.

6. Hinds County v. Natchez, J. & C. R. Co. [Miss.] 38 So. 189.

7. County board of action of directors at meetings at which its representative was present and could not question validity of stock in hands of one to whom it was sold by directors. Hinds County v. Natchez, J. & C. R. Co. [Miss.] 38 So. 189.

8. Mandamus lies to compel a county treasurer to deposit in a bank its pro rata share of the moneys of the county as provided by Cobbey's Ann. St. 1903, § 10,870. State v. Cronin [Neb.] 101 N. W. 325.

9. Under Laws 1896, p. 471, c. 545, § 65, and Code Cr. Proc. § 662, when a person pleads insanity to a charge of crime committed in another county and is committed to an insane asylum, there is no general liability on the county of his residence for the expense of keeping him in the state asylum. Jefferson County v. Oswego County, 102 App. Div. 232, 92 N. Y. S. 709. By-laws 1896, p. 508, c. 545, § 101, as amend by Laws 1899, p. 461, c. 260, the expense of caring for a lunatic transferred from a state hospital to that at Matteamar rests upon the county wherein the charge against him arose. Id. Under Code, § 2297, making estates of persons cared for by the county liable for the reasonable expense incurred, the estate of an insane person cannot be charged with the expense of the hearing on his sanity and transportation to the hospital. Westlake's Estate v. Scott County [Iowa] 101 N. W. 88.

10. Under Gen. St. 1894, § 7059, a county is not liable for expenses necessarily incurred by a village, town or city in caring for a person suffering from a contagious disease, if such person is solvent. Board of Com'rs of Marshall County v. Roseau County Com'rs [Minn.] 101 N. W. 164. A claim for services as quarantine watch is a proper claim for allowance by the county under How. Ann. St. § 1647. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 91, 103 N. W. 585.

11. County board has power to contract with physician to render, by the year, medical services to such persons as the county must supply with such aid. Cochran v. County of Vermillion, 113 Ill. App. 140. Primary duty to aid sick persons, who, though not paupers, are not able to help themselves, is on the county and not on a city. Hurd's Rev. St. 1903, c. 107, § 24. City of Spring Valley v. Bureau County, 115 Ill. App. 545. Value of medical services rendered a pauper may be recovered from county under common counts, when it appears that the county requested rendition of such services. County of De Witt v. Spaulding, 111 Ill. App. 364.

statute. Reasonable rules regarding the rendition of aid to persons with the care of whom the county is chargeable may be made;[12] but a county board cannot discriminate between classes of persons who come within the terms of the statute imposing the duty on the county.[13] Liability for witness's fees[14] and sheriff's costs[15] in criminal proceedings, and for the services of physicians at coroners' inquests[16] is also statutory.

The amount of indebtedness which may be incurred by a county is usually limited by the constitution, and this limit cannot of course be exceeded.[17] Obligations to be discharged by special assessments and not by general taxation are not usually considered in determining whether the constitutional limit has been exceeded.[18] A limitation upon a county's power to levy taxes is not necessarily a limitation upon its power to incur indebtedness.[19] Money collected and placed to the credit of a general county fund for a given year cannot be used to discharge debts of a previous year until those of the year for which the money was collected have been paid.[20] The laying of a special levy for bridge purposes by a county court does not limit its expenditures for such purposes to the amount raised by such special levy, if their are other available funds.[21]

The legislature has power to authorize an issue of bonds by a county to discharge an indebtedness incurred for necessary expenses,[22] and may even compel a county to make provision for the payment of such debts.[23]

12. City of Spring Valley v. Bureau County, 115 Ill. App. 545.

13. Rule that aid should be withheld from persons who engage in riots or lawlessness, or go out on strikes, or refuse or neglect to work when work is available, held invalid. City of Spring Valley v. Bureau County, 115 Ill. App. 545.

14. See, also, Witnesses, 4 C. L. 1943. Code, § 4661 provides that if a defendant in a criminal case be found not guilty, witness fees shall be paid by the county on certificate of the clerk. Held, supervisors have no power to disallow claims so presented. Climie v. Appanoose County [Iowa] 101 N. W. 98. Under Code, § 5492, witnesses for the defense, subpoenaed on order of the court, may be allowed mileage for the distance traveled outside as well as inside the state, being summoned from a point outside the state. Id. Where a nolle prosequi was entered on an indictment for homicide as to murder in the first degree, the trial was for murder in the second degree; hence, under Code, § 739, the county was liable only for half the witness fees, though witness came from without the county (Code, § 3756). Coward v. Jackson County Com'rs, 137 N. C. 299, 49 S. E. 207. But witness was entitled to full repayment of amount paid clerk for proving his ticket. Id.

15. A county is not liable to its sheriff for his costs, allowed by Pen. Code 1895, § 1107, for conducting prisoners before a judge or court to or from jail, but these costs must be collected by the sheriff from the prisoners after conviction. Hall County v. Gilmer [Ga.] 51 S. E. 307.

16. Physician may recover for services at coroner's inquest held according to the forms of law under Code, § 529. Finarty v. Marion County [Iowa] 103 N. W. 772.

17. Const. 1870, art. 9, § 12, limiting indebtedness of counties to 50 per cent. of value of taxable property, is only limitation of indebtedness by counties in Illinois. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. Laws 1899, p. 174, providing for levy to pay indebtedness of detached portion of county, held unconstitutional in so far as constitutional limit is authorized to be exceeded. Desha County v. State [Ark.] 84 S. W. 625. Where a county is already in debt beyond the constitutional limit, a law providing for an annual special tax for a number of years to pay for a proposed court house is invalid, even though it provides that the county as such shall not be liable except for the application of the special taxes so raised. Brix v. Clatsop County [Or.] 80 P. 650. Laws 1868, p. 312, providing for assessments to meet payments of interest on railroad bonds, limiting rate to five mills, did not provide any particular rate, and hence was not invalid as authorizing a rate above the constitutional limit. Desha County v. State [Ark.] 84 S. W. 625.

18. Drainage bonds which show on their face that they are to be paid by taxes on the lands in the drainage district do not constitute an obligation of the county. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. Ditch bonds, payable by assessment on lands benefited, are not to be considered in determining the county's debt limit. Johnson v. Norman County Com'rs [Minn.] 101 N. W. 180.

19. Const. 1870, art. 9, § 8, providing that county levies shall not exceed 75 cents per $100 of valuation, does not limit indebtedness. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

20. Construing Laws 1901, c. 36. Territory v. Bernalillo County Com'rs [N. M.] 79 P. 709.

21. Taylor v. Braxton County Ct. [W. Va.] 50 S. E. 720.

22. Chatham County Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862.

23. Laws 1903, c. 289, authorizing fund-

County boards of commissioners or supervisors, or county courts, are the general representatives of counties, and have only such jurisdiction as is expressly conferred by statute or necessarily implied to enable them to carry out powers expressly granted.[24] Powers granted must be exercised in the manner prescribed by law.[25] Such boards have the general management and control of the county property and business,[26] and where in such matters they are vested with discretionary power, their decisions will not be reviewed by the court in the absence of any abuse of power.[27] County boards have the right to compromise or settle claims,[28] and

ing of indebtedness and refunding of certain bonds, held mandatory and within power of legislature. Jones v. Madison County Com'rs, 137 N. C. 579, 50 S. E. 291, rvg. 135 N. C. 218, 47 S. E. 753.

24. Kemp v. Adams [Ind.] Sup. 73 N. E. 590. Under Rev. St. 1887, § 1759, subds. 2, 3, county commissioners have power to establish, abolish, and change justices' precincts in incorporated cities. Johnston v. Savidge [Idaho] 81 P. 616. The exercise of such power is not prohibited by Sess. Laws 1891, p. 60. Id. County commissioners have no power to offer a reward for the apprehension of offenders against the criminal laws of the state. Felker v. Elk County Com'rs [Kan.] 78 P. 167. County commissioners have power to repair a bridge situated within municipal limits but on ground which does not belong to the city. Sherman v. Carlisle, 2 Ohio N. P. (N. S.) 627. The power of county commissioners with reference to the elimination of dangerous railway crossings over highways is limited to existing crossings, and cannot be exercised with reference to a proposed crossing over a railway which has not yet been constructed. Grinnell v. Portage County Com'rs, 6 Ohio C. C. (N. S.) 180. Neither does the power to change or alter the course of a highway, and to vacate a portion thereof for the purpose of doing away with a crossing at grade, permit the commissioners to also change the course and vacate a portion of an adjacent highway intersected by the railway by a crossing not at grade. Id. Under Kentucky statutes, fiscal courts cannot make magistrates road supervisors in their respective districts. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613. Fiscal court has no authority to buy plats to aid assessor in making assessments. Construing Ky. St. 1903, §§ 1840, 1882, 1883, 4241. Jefferson County v. Young [Ky.] 86 S. W. 985. Where, in a contest over the selection of an official newspaper, one contestant failed to file the required statement regarding circulation, the board had no authority to adjourn to a subsequent date to allow the contestant time to file such statement. Sturges v. Vail [Iowa] 104 N. W. 366. Code 1899, c. 39, § 29, requiring an estimate to the mode and spread upon the records of the county court before making the annual levy, does not prevent the diversion of funds from the purposes mentioned in the estimate to other proper purposes. Taylor v. Broxton County Ct. [W. Va.] 50 S. E. 720. Collection of a fund levied by a county court will not be enjoined merely because it recites that the money is to be raised to pay indebtedness on account of a certain class of work and for the prosecution of other work of the same kind, though there are at the time unpaid orders for that class of work in existence. Id.

25. There are three statutory methods of raising revenue for and the construction of county buildings in Oklahoma. Giles v. Dennison [Okl.] 78 P. 174. In Indiana a county council cannot make an appropriation of money except by ordinance duly passed as required by statute. Attempted appropriation by mere motion and order pursuant thereto held invalid. State v. Newton County Com'rs [Ind.] 74 N. E. 1091. Lease of land by supervisors at a meeting held in a chancery clerk's office in a separate building and not in the court house, held void. Sexton v. Coahoma County Sup'rs [Miss.] 38 So. 636.

26. Kerby v. Clay County Com'rs [Kan.] 81 P. 503; Nelson v. Harrison County [Iowa] 102 N. W. 197.

27. Sale of extra bridge material by supervisors held free from fraud or abuse of power. Nelson v. Harrison County [Iowa] 102 N. W. 197. County commissioners have a large discretion in passing upon the necessity of erecting new county buildings and in deciding upon the location of such buildings. Discretion not abused in decision to erect new court house and in manner of securing bids. Anderson v. Newton [Ga.] 51 S. E. 508. Whether funds for a court house are to be raised by a tax for the current year or by affording the people an opportunity to vote for a bond issue rests with the county commissioners. Their decision cannot be reviewed by the superior court judge, who has no power to order an election or delay action until the voters have expressed themselves on the issue of bonds. Id. County board must determine necessity for repairs to court house, and whether finances of county will justify them, under Rev. St. c. 34, § 26, making it the county's duty to provide a suitable court house, when, etc. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. Appropriation of funds by county fiscal court of county of Magoffin held a proper exercise of court's discretion, under Ky. St. 1903, c. 52, § 1840. Magoffin County v. Owens, 26 Ky. L. R. 715, 82 S. W. 417.

28. Compromise of claims involving tax certificates held valid. Multnomah County v. Title Guarantee & Trust Co. [Or.] 80 P. 409. The fact that the county court is authorized to release debts or damages arising out of contract and due the county (B. & C. Comp. § 912, subd. 10), does not preclude the settlement of controversies arising in other ways. Id. The board of county commissioners has power to sell and assign a judgment for personal property taxes under the general revenue law

to determine whether actions shall be brought in the name of the county.[29] In West Virginia the county court is the legal representative of the various magisterial districts of the county, which can only sue and be sued in its name, as they have no legal existence for the purposes of suit.[30] But in a suit by the county court, the declaration should show whether the suit is for an injury or loss suffered by the county or district and in what such loss or injury consists.[31]

Torts.[32]—Neither a county nor its officers are liable to persons injured by defects in county highways, bridges or other structures which the county is by law required to maintain,[33] unless such liability is imposed by statute.[34]

Contracts.[35]—Counties may contract only in the manner,[36] by the persons,[37]

of 1890, and may accept less than the amount due if the transaction is free from fraud or other illegality. Hagler v. Kelly [N. D.] 103 N. W. 629.

29. County commissioners have right to determine whether actions shall be brought in the name of the county to recover moneys paid out without authority; county attorney may not institute and carry on such litigation without consent and concurrence of the board. Kerby v. Clay County Com'rs [Kan.] 81 P. 503.

30. State v. Sistersville, M. M. Turnpike Co. [W. Va.] 49 S. E. 454.

31. Suit on penal bond against turnpike company for failure to carry out contract. State v. Sistersville, M. M. Turnpike Co. [W. Va.] 49 S. E. 454.

32. See 3 C. L. 966.

33. Neither county, fiscal court, nor other county officer liable for injury resulting from defective elevator in court house. Simons v. Gregory [Ky.] 85 S. W. 751. In the absence of statute, county not liable for injury due to slipping on sidewalk in front of county court house. Bucher v. Northumberland Co., 209 Pa. 618, 59 A. 69.

34. Under Rev. St. §§ 845, 6134, an action may be maintained against county commissioners in their official capacity by the administrator of one whose death was caused by defective county bridge. Rahe v. Cuyahoya County Com'rs, 5 Ohio C. C. (N. S.) 97. The fact that a county supervisor and the foreman of the county bridge crew had inspected a repaired bridge and thought it reasonably safe for ordinary travel is no defense to an action against the county for damages for collapse of the bridge. Schlensig v. Monona County [Iowa] 102 N. W. 514.

35. See 3 C. L. 966.

36. A contract made with an ordinary in behalf of the county of which he is an official is not binding upon the county, unless it is in writing and entered on his minutes. Pol. Code 1895, § 343. Holliday v. Jackson County, 121 Ga. 310, 48 S. E. 947. Records of action of county board in making contract with experts to examine county books held a sufficient compliance with Burns' Ann. St. 1901, § 7853, and contract held complete. Board of Com'rs of Howard County v. Garrigus [Ind.] 73 N. E. 82. Contract for employment of attorney, not evidenced by any record, is void. Morrow v. Pike County [Mo.] 88 S. W. 99. Under Rev. St. 1899, §§ 6759, 6760, county contracts must be in writing subscribed by the parties or their authorized agents; must be executed in duplicate, and one copy filed with the clerk. Hence a contract must appear of record. Id. But a record identifying the subject-matter and general outlines of the contract is sufficient. Record of contract to employ attorney held sufficient. Id. Under Sayles' Rev. Civ. St. 1897, art. 797, authorizing county commissioners' court to appoint an agent to contract on behalf of the county for the erection and repair of county buildings, the authority to such agent must be express, and must be given by commissioners acting as a body. Jackson-Foxworth Lumber Co. v. Hutchinson County [Tex. Civ. App.] 13 Tex. Ct. Rep. 565, 88 S. W. 412. Hence failure of individual commissioners to object to his acts could not amount to ratification or implied authority. Id. Authority actually given may be shown by parol, no record of the appointment being required. Id. Purchasing of blank books, blanks and stationery for county officers is to be made by a committee consisting of the county treasurer, auditor and chairman of the county board, pursuant to Rev. Codes 1895, § 1906, as amended by Laws 1899, p. 69, c. 59, and need not be made under competitive bids under § 1925, Rev. Codes. Knight v. Cass County Com'rs [N. D.] 103 N. W. 940.

Preliminary steps: Advertisements for bids for court house held substantial compliance with Pol. Code 1895, § 345, and sufficient to notify prospective bidders and the public of the extent and character of the work and the terms and time of payment. Anderson v. Newton [Ga.] 51 S. E. 508. Act 1870 (P. L. 834), relating to contracts for erection of buildings, etc., held complied with by commissioners in advertising for bids for court house, since the act requires publication of advertisement during four weeks when specifications were on file before bids were opened, and does not require first publication to be 28 days before opening of bids. Commonwealth v. Brown, 25 Pa. Super. Ct. 269. Advertisement for sealed bids on county building held to have been published four weeks before contract was awarded as required by P. L. 834 (1870). Id., 210 Pa. 29, 59 A. 479. County must advertise for bids on bridges as required by statute, Rev. St. § 796. State v. Snyder, 2 Ohio N. P. (N. S.) 261.

37. Unless a contract with a county is made or sanctioned by commissioners' court, it is binding neither on the county nor on the other party. Presido County v. Clarke [Tex. Civ. App.] 85 S. W. 475. In

and for the purposes [38] expressly provided by law. A contract obligating the county beyond the constitutional limit is invalid.[39] There must have been a valid appropriation before a contract calling for expenditures can be legally made in some states.[40] A county cannot be estopped from asserting the invalidity of a contract made without authority,[41] nor can such a contract be ratified [42] by county officers [43] or by taxpayers.[44] A contract cannot be validated by a subsequent statute authorizing similar contracts but not expressly applicable to the one in question.[45]

County supervisors are ordinarily prohibited from becoming parties directly or indirectly to contracts to furnish supplies, materials or labor to the county,[46] and contracts participated in by supervisors contrary to law are to that extent fraudulent and void.[47] Warrants issued pursuant to such contracts will not be

Kentucky the fiscal affairs of the county are by law under control of the fiscal court, and the county judge has no authority to make contracts unless specifically authorized by statute. Scoville v. Baugh [Ky.] 84 S. W. 1146. Orders of county judge employing attorney to assist sheriff in collecting taxes and directing sheriff to pay a fee to attorney were void. Id.

38. Under North Dakota statutes a county board cannot make a contract with a person to collect a judgment owned by the county. Fox v. Jones [N. D.] 102 N. W. 161. County has no authority to contract to pay cost of publication of notice to nonresident taxpayers.. Baldwin v. Travis County [Tex. Civ. App.] 88 S. W. 480. County contract is void under Rev. St. 1899, § 6759, unless consideration is wholly to be performed subsequent to making of contract. Morrow v. Pike County [Mo.] 88 S. W. 99. A resolution of a county board to allow six per cent. per annum to fiscal agents of the county as compensation for cashing warrants held beyond power of board, being in effect an allowance of interest for which there is no express statutory authority. State v. Stewart [Fla.] 38 So. 600. Contract by county to pay experts one-half the money collected by means of mistakes discovered by them in the county's books is within Burns' Ann. St. 1901, § 7853, prescribing the procedure in making contracts wherein payment is to be by a commission or percentage. Board of Com'rs of Howard County v. Garrigus [Ind.] 74 N. E. 249.

39. Contract by county for court house repairs held not invalid, the limitation upon its indebtedness not being shown to have been exceeded. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. A contract for construction of a court house providing for an annual rental for 10 years at the end of which the court house is to become the property of the county does not create a present indebtedness equal to the aggregate of the rental to be paid. Giles v. Dennison [Okl.] 78 P. 174. Where a county board has contracted for a court house at a price exceeding the debt limit, and intends to issue warrants on the annual income, such procedure may be enjoined as an evasion of the debt limit. Johnson v. Board of Com'rs of Norman County [Minn.] 101 N. W. 180. Evidence held not to sustain finding that there was no intention to issue such warrants. Id.

40. A taxpayer may enjoin a county board from entering into a contract for a court house for which no valid appropriation has been made, since such contract, if executed, would result in an illegal tax. State v. Newton County Com'rs [Ind.] 74 N. E. 1091. The fact that a fund thought by county board applicable to payment of contract was misappropriated or paid out for other purposes does not affect question of power of board to make the contract. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. Kirby's Dig. §§ 1009-1025 empowers county court to authorize construction of new court house and approval of contract therefore, though levying court has made no appropriation previously. Bowman v. Frith [Ark.] 84 S. W. 709.

41. Baldwin v. Travis County [Tex. Civ. App.] 88 S. W. 480. County cannot be estopped from denying validity of order based on void contract. Phillips v. Butler County [Mo.] 86 S. W. 231.

42. Contract to publish notice to nonresident taxpayers made by county attorney without authority cannot be ratified. Baldwin v. Travis County [Tex. Civ. App.] 88 S. W. 480.

43. Where an attorney is appointed to assist in defense of a suit against the county by a void order, such employment could not be ratified by the fact that services were rendered with knowledge of the county officers. Phillips v. Butler County [Mo.] 86 S. W. 231.

44. Hence right of taxpayer to bring suit to restrain execution of such contract cannot be barred by laches. Fox v. Jones [N. D.] 102 N. W. 161.

45. Where order appointing an attorney to defend a suit against the county was void, a subsequent statute authorizing the employment of an attorney in such cases did not validate the prior order, it not being expressly applicable to prior orders. Phillips v. Butler County [Mo.] 86 S. W. 231.

46. Acts 27th Gen. Assem. c. 13, § 1. Nelson v. Harrison County [Iowa] 102 N. W. 197. Contracts for supplies made with firms in which county commissioners or purchasing agents are interested are unlawful, even though not denounced by statute. Lainhart v. Burr [Fla.] 38 So. 711.

47. Contract for repair of unimportant road at high price, most of the work being done by a county supervisor, held fraudulent. Nelson v. Harrison County [Iowa] 102 N. W. 197. Contract for filling ditch in highway held void because really per-

enforced,[48] and the officers concerned may be compelled to make proper restitution.[49]

The validity of a contract and warrant cannot be determined in a suit between the county and the county treasurer to which the person with whom the contract was made and to whom the warrant was issued is not a party.[50] Taxpayers may maintain a suit to enjoin a county board from accepting a public work which has not been constructed in accordance with the contract when it appears that the board is acting in collusion with the contractors,[51] and a demand upon the board for an action against the contractors is not in such case a prerequisite.[52]

Bonds.[53]—County bonds must be properly registered and certified.[54] A proposition to vote bonds in aid of a railway, otherwise valid, is not void by reason of a provision authorizing the county to receive capital stock of the company.[55] Where a proposition to vote railroad bonds provides for the future issue of such bonds, the assessed valuation of the county last preceding the actual issue of the bonds should be taken as the basis for determining whether the amount voted is allowed by law.[56] A county may be estopped to repudiate bonds, which are not absolutely void.[57]

Presentation, allowance, enforcement and payment of claims.[58]—Claims must be presented in the manner and form [59] and within the time [60] prescribed by law. In Michigan one who has performed services for a local health board may himself present a claim to the county.[61] Some statutes provide that a claim must be

formed by a supervisor who used another person as a cover for the fraud. Id. Contract for bridge material far in excess of county's needs, put through by a supervisor just before retiring from office, the price being exorbitant and large profits being realized by bridge company, held fraudulent and collusive. Id.

48. Nelson v. Harrison County [Iowa] 102 N. W. 197.

49. Rules under which accounting will be compelled laid down. Lainhart v. Burr [Fla.] 38 So. 711.

50. Nelson v. Harrison County [Iowa] 102 N. W. 197.

51. Acceptance of free gravel road enjoined. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

52. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

53. See 3 C. L. 968; also Municipal Bonds, 4 C. L. 706.

54. County bonds in aid of railroads held nonenforceable because not registered with and certified by state officers as required by law. Frank v. Butler County [C. C. A.] 139 F. 119.

55. Colburn v. McDonald [Neb.] 100 N. W. 961.

56. Bonds voted in 1871 but dated and actually issued in 1873. Held, assessed valuation as returned in 1872 governed as to validity of bonds. Colburn v. McDonald [Neb.] 100 N. W. 961.

57. A county will not be allowed to repudiate its bonds after a compromise of a suit thereon whereby a reduction in interest was obtained and after 30 years' interest and a part of the principal was paid, unless the bonds are absolutely void. Colburn v. McDonald [Neb.] 100 N. W. 961.

58. See 3 C. L. 968.

59. Code, § 754, that no account shall be audited by county board unless itemized and verified, is mandatory. Turner v. McKee, 137 N. C. 251, 49 S. E. 330. Claims against the county for fees of officers in actions before a justice, commissioner or county judge, must be certified to and allowed by the county board in the manner prescribed by Rev. St. 1898, § 680, and in no other way. Birdsall v. Kewaunee County [Wis.] 103 N. W. 1. Where local health board had an itemized account of expenses incurred in caring for a diseased person, and certified thereto, How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, No. 7, requiring itemized and separate accounts for each person to be rendered to the county board, was sufficiently complied with. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 91, 103 N. W. 585.

60. Under St. 1897, § 40, county boards cannot allow claims unless presented within a year after the last item therein accrued. Held, mandamus will not lie to compel auditor to draw warrant for claim allowed by the board, though not presented within a year. Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776. Salary of county judge need not be entered as claim on claim docket 30 days before meeting of county court to make an appropriation therefor valid. State v. Kelly, 111 Tenn. 583, 82 S. W. 311.

61. Under How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, No. 7, providing for the allowance of claims for services rendered in the care of a person suffering from a contagious disease, a claim may be presented to the county by the individual who has rendered services; it is not necessary for a town or village to first pay the claim and then present it to the county. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 91, 103 N. W. 585.

presented before an action can be maintained thereon.[62] In allowing claims for services rendered under statutes fixing the compensation therefor, county boards are in a merely ministerial capacity.[63] On failure or refusal to allow such claims, claimant may maintain an action at law against the county to recover the amount claimed.[64] On the other hand if a board allows greater compensation than that fixed by law, its action is void and the county may maintain an action to recover the excess, notwithstanding such settlement.[65] But in auditing and allowing claims not expressly provided for by statute, county boards are vested with a wide discretion, with the exercise of which courts will rarely interfere.[66] Claimants are entitled to a hearing in such cases, the decision of the board being final.[67] Where items of a claim have once been audited and rejected, mandamus will not lie to compel the board to audit such items when presented again.[68]

Recovery may be had against the county under the common counts where the work done for it has been accepted,[69] and the county board had authority to contract for it,[70] and such recovery is not precluded by the fact that orders issued in payment are void.[71] The county is in such case estopped to deny liability, having received the benefits of the work done.[72] But unless claim for service is founded upon a statute or on a contract entered into with the proper officer acting within the scope of his authority,[73] the mere beneficial nature of the service is not suffi-

62. Code, § 3528, providing that "no action shall be brought against any county on an unliquidated demand until the same shall be presented to such board [of supervisors], and payment demanded and refused or neglected," applies to claims for torts. Little v. Pottawattamie County [Iowa] 101 N. W. 752. Where claim for injuries due to defective bridge was filed August 24th and supervisors met September 7th, and rejected claim September 9th, a suit commenced September 1st was premature. Id.

Under Mill's Ann. St. § 801, providing for presentation of claims before suit thereon, a county treasurer must present a claim for a difference in salary as allowed by a former statute and a later law alleged by him to be unconstitutional. Gregg v. Lake County Com'rs, 32 Colo. 357, 76 P. 376. Attorney employed by county supervisors cannot maintain an action for disbursements, the amount of which is not fixed by law, until the amount has been presented to the board for allowance. Vincent v. Nassau County, 45 Misc. 247, 92 N. Y. S. 32.

Contra: Under Ky. St. 1903, §§ 4637-4645, notice need not be given the fiscal court of presentation to and allowance by the circuit court of claim of court stenographer. Polsgrove v. Walker, 26 Ky. L. R. 938, 82 S. W. 979.

63. In passing upon the accounts of county officers, county boards act in a ministerial capacity. Mauer v. Gage County [Neb.] 100 N. W. 1026. When an officer has performed services for which the law allows certain fees, the county court must audit and allow a claim for such fees. Wallowa County v. Oakes [Or.] 78 P. 892.

64. Wallowa County v. Oakes [Or.] 78 P. 892.

65. Excess allowed county treasurer recovered. Mauer v. Gage County [Neb.] 100 N. W. 1026.

66. County boards in passing on the validity of claims act largely from personal knowledge and experience and must be given wide latitude. People v. Orleans County Sup'rs, 98 App. Div. 390, 90 N. Y. S. 318. Where it appears that a claimant acted in bad faith and that there was a general scheme to defraud the county, it is proper for the board to reject an entire claim without special investigation of each item. Claims for fees rejected entirely where a fraudulent scheme appeared. Id.

67. Under Pub. Acts, p. 6, n. 7, giving supervisors power to examine and allow or reject claims against the county, their decision is final; hence no claim should be rejected without giving the claimant an opportunity to be heard. City of Monroe v. Monroe County Sup'rs [Mich.] 100 N. W. 896. Persons presenting claims for services as quarantine guards are entitled to a hearing before the county board under How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, n. 7. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 97, 103 N. W. 585. Error to reject a claim for services as "special policeman" in "smallpox cases" on the ground that it showed on its face it was for services rendered for policing a city. City of Monroe v. Monroe County Sup'rs [Mich.] 100 N. W. 896.

68. People v. Saratoga County Sup'rs, 94 N. Y. S. 1012.

69. Repairs on court house accepted; county liable and assumpsit lies. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

70. Contract for court house repairs held to have been authorized. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. County held liable for work and materials furnished in decorating court house, work being authorized by joint committee in charge of court house. Webber v. Ramsey County Com'rs [Minn.] 101 N. W. 296.

71, 72. Coles County v, Goehring, 209 Ill. 142, 70 N. E. 610.

73. Clerk of circuit court is not agent of county board authorized to contract for

cient to support the claim.[74] A county is not liable for interest on claims against it in the absence of an express agreement therefor.[75] A taxpayer may compel restoration of money paid on illegal bills allowed by a board.[76]

Warrants; issuance and enforcement.[77]—County warrants must be properly countersigned,[78] must sufficiently designate the funds on which they are drawn,[79] and can be issued only by and to the officers vested by law with such authority.[80] They can only be drawn and issued against and in anticipation of the collection of taxes already levied and must so show upon their face.[81] The record of settlements made by a sheriff which does not disclose the dates of orders paid by him is not sufficient evidence to show that certain unpaid orders were issued at a time when there were no funds available for their payment.[82] Failure to register a warrant drawn by the ordinary of a county may subordinate payment of it to others duly registered, but does not render it void.[83] The law presumes that all officers connected with the drawing of a warrant have performed their duties, and a petition for mandamus to compel payment by the treasurer need not allege such performance.[84] An order drawn by the ordinary is evidence of an adjudication by the ordinary that the amount stated is due, and the treasurer cannot go behind the order except for fraud or mistake in the amount.[85] A resolution of the supervisors directing the treasurer not to pay a warrant does not legally restrain him from making such payment, though served upon him, the validity of the transaction and warrant not having been judicially determined.[86] In Missouri, county warrants presented and not paid because of lack of funds bear interest at six per cent. after such presentment,[87] by one who is legally entitled to present the warrant.[88] Where the statute provides a form of assignment of warrant, this form

janitor's services in his office. Board of Com'rs of Harrison County v. Bline [Ind. App.] 72 N. E. 1034.

74. Board of Com'rs of Harrison Co. v. Bline [Ind. App.] 72 N. E. 1034.

75. Orders providing for interest being held void, and there being no other agreement for interest, claims represented by orders did not bear interest. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

76. A taxpayer may maintain an action against a county board and sheriff to compel restoration of money paid the sheriff on illegal bills audited by the board, although collusion by the board is not alleged. Laws 1892, c. 301, applied. Hicks v. Eggleston, 93 N. Y. S. 909.

77. See 3 C. L. 969.

NOTE. When county warrants are issued: After a claim against a county had been allowed, the auditor drew a warrant payable to the claimant in payment thereof and himself acquired the money from the treasury by a forged indorsement. Held, the warrant had not been issued to satisfy a statute requiring that the auditor should "issue" a warrant and not having been "issued" his successor might be compelled to do it by mandamus. American Bridge Co. v. Wheeler, 35 Wash. 40, 76 P. 534 (3 C. L. 969, n. 56). This case suggests the novel question as to when a warrant is issued. There is authority for the idea that a warrant is issued when it has actually been delivered or put into circulation, irrespective of whether the person to whom it comes be the one entitled to enforce it. State v. Pierce, 52 Kan. 521. The principal case is for the proposition that it must come into the hands of an authorized person before it is "issued." Nevertheless the original county auditor had been convicted of embezzlement of the funds on the theory of agency for the person to whom it was drawn. State v. Raby, 31 Wash. 111. Principle and justice seem to be subserved in holding the transaction no issuance until the warrant has come into authorized hands."—4 Columbia L. R. 603.

78. Warrants not countersigned by county treasurer as required by 1 Starr & C. Ann. St. (2d ed.) p. 1136, c. 35. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

79. Orders on county treasurer held to designate with sufficient particularity the fund on which they were drawn. Neal Loan & Banking Co. v. Chastain, 121 Ga. 500, 49 S. E. 618.

80. Court has no authority to make an order on county commissioners to pay a sum of money to enable defendants accused of murder to prepare their defense. Commonwealth v. Dillon [Pa.] 60 A. 263.

81. Warrants or orders held void because not showing on their face that there was money in the treasury or in course of collection for their payment, under Rev. St. c. 146a, § 2. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

82. Taylor v. Braxton County Ct. [W. Va.] 50 S. E. 720.

83, 84, 85. Neal Loan & Banking Co. v. Chastain, 121 Ga. 500, 49 S. E. 618.

86. Nelson v. Harrison County [Iowa] 102 N. W. 197.

87. Applying Rev. St. 1899, § 3705. Isenhour v. Barton County [Mo.] 88 S. W. 759.

88. But presentment by an assignee by blank indorsement does not cause interest

must be followed.[89] The burden is upon an assignee to show that the statute has been complied with.[90] One suing on an order must show that he is a bona fide holder and that it has not been paid.[91] Suit on a warrant may be barred by limitations.[92] When orders for the payment of money issued by a county court are attacked on the ground of illegality, the burden of proof is on plaintiff.[93]

Appeals from orders of county boards.—Where a board acts within its jurisdiction, its action can only be reviewed by appeal.[94] When such an appeal will lie,[95] who may or should prosecute it,[96] the necessity and sufficiency of a bond,[97] and procedure in general [98] in the case of such review, are matters regulated entirely by statute.

to commence, since his title is insufficient. Isenhour v. Barton County [Mo.] 88 S. W. 759.

89. Rev. St. 1899, § 6799, prescribes form and provides that blank indorsement is insufficient. Isenhour v. Barton County [Mo.] 88 S. W. 759.

90. Assignee by blank indorsement has no legal title. Isenhour v. Barton County [Mo.] 88 S. W. 759.

91. Evidence insufficient to show county orders had not been paid or that plaintiff was a bona fide holder in suit thereon. Board of Sup'rs of Issaquena County v. Anderson [Miss] 38 So. 47.

92. Where county warrants have been presented for payment, refused for want of funds, registered, numbered and indorsed as required by law, and thereafter the treasurer publishes a call for such warrants, a plea of the call and the statute of limitations is a good defense to an action on the warrants more than six years after publication of the call. Board of Com'rs of Seward County v. Shepherd [Kan.] 80 P. 36.

93. Taylor v. Braxton County Ct. [W. Va.] 50 S. E. 720.

94. Quo warranto proceeding improper to determine whether board could create justice's precincts in cities. Johnston v. Savidge [Idaho] 81 P. 616. The remedy for review of the action of county commissioners is by appeal from the order or act complained of under Rev. St. 1887, § 1776, amended Sess. Laws 1899, p. 248. School Dist. No. 25, Shoshone County, v. Rice [Idaho] 81 P. 155.

95. Value in controversy exclusive of interest and costs being more than $25, an appeal may be taken to circuit court from orders of fiscal court, under Ky. St. 1903, § 978. Jefferson County v. Young [Ky.] 86 S. W. 985.

96. County attorney may prosecute appeal from order of fiscal court when directed by county court. Jefferson County v. Young [Ky.] 86 S. W. 985. When so directed by county court, county attorney must prosecute appeals from orders of fiscal court. Ky. St. 1903, § 127. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613.

97. In Idaho, an appeal from an order of the county board, not taken to protect the interests of the people and the county, is ineffectual if the undertaking required by statute is not filed. Davis v. Elmore County [Idaho] 75 P. 910. An appeal from an order of a county board is perfected by serving on the clerk the notice required by Rev. St. 1887, § 1777, as amended by Sess. Laws 1899, p. 248; a bond is not necessary if not ordered by the district judge. Great Northern R. Co. v. Kootenai County [Idaho] 78 P. 1078. An appeal bond under Gen. St. 1901, §§ 1640, 1641, providing for appeals from county board decisions, must be approved by the clerk and filed with him; approval by and filing with the clerk of the district court will not answer. Board of Com'rs of Trego County v. Cross [Kan.] 79 P. 1084. On an appeal from an order of a county board disallowing a claim, the appeal bond was approved by the clerk of the county who was ex officio clerk of the district court as clerk of such court instead of as county clerk as required by law. Held, mere irregularity insufficient to defeat a meritorious appeal. Hitchcock County v. Brown [Neb.] 102 N. W. 456. Code, § 441, gives a publisher on appeal from an order of the county board selecting the official newspaper to the district court as in ordinary actions. Held, the appeal bond is to be approved by the county auditor. Sturges v. Vail [Iowa] 104 N. W. 366. Where a hearing on the selection of an official newspaper was on January 15th and the appellant's bond was filed in the district court February 6th, it will be presumed that such bond was approved within twenty days from the order as required by law. Id.

98. Under Ky. St. 1903, §§ 724-731, regulating appeals from fiscal to circuit courts, no bill of exceptions is necessary, cases being triable anew. Jefferson County v. Young [Ky.] 86 S. W. 985. Proper to take one appeal from two orders of the fiscal court made the same day and as a part of one plan, one appropriating money to be spent under direction of magistrates, and the other allowing per diem compensation to magistrates for supervising work on county roads. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613. Rev. St. 1887, § 1778, as amended by Sess. Laws 1899, p. 249, requiring clerk to transmit papers on appeal from county board to district court within five days, is not jurisdictional, and failure of the clerk to comply does not deprive an appellant of the benefits of his appeal. Humbird Lumber Co. v. Kootenai County [Idaho] 79 P. 396. In Nebraska appeals from the decisions of a county board should be entered, tried and determined in the district court, the same as appeals from justices of the peace. Loup County v. Wirsig [Neb.] 103 N. W. 56.

COUNTS AND PARAGRAPHS; COUNTY COMMISSIONERS OR SUPERVISORS; COUNTY SEAT; COUPLING CARS; COUPONS; COURT COMMISSIONERS, see latest topical index.

COURTS.

The jurisdiction of courts [1] and the effect of decisions as precedents [2] are elsewhere treated.

§ 1. *Creation, change, and alteration.*[3]—A court is a judicial tribunal [4] composed of one or more persons,[5] whose duty is primarily to adjudicate controversies,[6] though the duty to advise co-ordinate branches of the government has been imposed upon them in some states.[7] Unless prohibited by the constitution, courts,[8] espe-

1. See Jurisdiction, 4 C. L. 324; Appeal and Review, 5 C. L. 121.
2. See Stare Decisis, 4 C. L. 1512.
3. See 3 C. L. 970.
4. State v. Pope [Mo. App.] 85 S. W. 633. A city council vested with judicial powers is not a court within the Tennessee constitution, providing that all courts shall be open, and that every man having an injury done him shall have remedy by due course of law, and therefore its judgment is not conclusive of the rights of the parties. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254. The action of the council of a municipality in granting to street railway company a franchise in a street which crosses a steam railroad at grade is not the subject of judicial review, where it does not appear that in so doing council exceeded its power, or that its action was induced by fraud. Nor would a review be authorized by a showing to the effect that a safer crossing could be made on another street. C., C. C. & St. L. R. Co. v. Urbana B. & N. R. Co., 5 Ohio C. C. (N. S.) 583, 26 Ohio C. C. 180. Witnesses to a will in testifying to facts observed by them and in giving their opinion as to mental capacity based on such facts do not exercise judicial power. A statute of wills limiting evidence of capacity in the first instance to that of the attesting witnesses is not therefor violative of a constitutional provision vesting judicial powers in specified courts. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090. The probate court in Kansas by constitutional provision in that state is a judicial tribunal. In re Gassaway [Kan.] 79 P. 113.
5. Where a court consists of several judges, proceedings had before the several judges of such court are in the same court and jurisdiction, notwithstanding they are had in different court rooms and by different judges. Richcreek v. Russell [Ind. App.] 72 N. E. 617. Under the act creating the circuit court of appeals, such court is legally constituted where made up by three district judges of the circuit, regularly designated by particular assignments to attend as members for the term. Peters v. Hanger [C. C. A.] 136 F. 181. Where a majority of the judges of a court decline to sit because of personal interest in the result, the powers of the court devolve on the remaining judge or judges. Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961. The legislature may confer upon a single justice of the supreme court the power to hear and determine proceedings in certiorari, and authorize the entry of his order therein as the judgment of the full court. Brown v. Street Lighting Dist. No. 1, 69 N. J. Law. 485, 55 A. 1080. Mere absence of the justice from the court room or building in which a trial was had, or from the town, or from any portion less than the entire district, is insufficient to enable an assistant justice, in Rhode Island, to perform the duties of the justice. Opie v. Clancy [R. I.] 60 A. 635. Act providing for additional judge sustained. State v. Dabbs, 182 Mo. 359, 81 S. W. 1148.
6. Advice given to a guardian by a district judge while out of court and never entered in writing as an order cannot be regarded as justifying action of the guardian. In re Kimble [Iowa] 103 N. W. 1009. By establishing the court of claims, congress created a tribunal to determine the right of anyone to receive money due by the government. Officers of the treasury cannot arbitrarily select between contending claimants. People's Trust Co.'s Case, 38 Ct. Cl. 359.
7. Private rights, the title to an office, or the construction of an existing statute, will not be determined in an ex parte proceeding in answer to a question from the legislative or executive departments. But where actual litigants are before one of these departments, the proceeding is not ex parte. In re Senate Resolution No. 10 [Colo.] 79 P. 1009. Under the Massachusetts constitution requiring the supreme court to give opinions on legal questions propounded by the governor, it is the duty of the court to do so only so far as an opinion is desired as an aid in the performance of official duties in regard to a matter then pending. In re Bounties to Veterans [Mass.] 72 N. E. 95. Courts will not prescribe rules for the government of state institutions unless those in force are unreasonable or subversive of the purposes for which the institution was established. Doren v. Fleming, 6 Ohio C. C. (N. S.) 81.
8. Statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or

cially those of inferior jurisdiction,[9] may be created or abolished [10] by the legislature at will,[11] and legislative power over the districts of constitutional courts is subject to constitutional restraint.[12] Power to provide for the necessary incidents of a court is implied from the power to establish it.[13] Where several counties comprise a judicial circuit, the circuit court of each county is a separate and distinct entity.[14] The legal existence of a court cannot be questioned or tried out in a certiorari proceeding.[15]

§ 2. *Officers and instrumentalities of courts.*[16]—Judges and other attaches of courts are not public officers for all purposes.[17] An erroneous, as distinguished from a corrupt, decision is not ground for removal.[18] In North Carolina an appointee to fill a vacancy occurring during the time in the office of clerk of the superior court holds only until the next general election, and not for the unexpired term.[19] The salaries of county judges in Kentucky are fixed annually by the fiscal court.[20]

§ 3. *Places, terms, and sessions of courts.*[21]—Courts must be held at the place or places provided by law.[22]

special in their operation. Waterman v. Hawkins [Ark.] 86 S. W. 844.

9. Drain commissioners' courts in Indiana have limited powers, and only such jurisdiction as is expressly conferred by statute or necessarily implied to enable them to carry out the powers expressly granted. Kemp v. Adams [Ind.] 73 N. E. 590.

10. In California the power conferred upon framers of municipal charters to legislate concerning police courts as to the constitution, regulation, government and jurisdiction of such courts, and with reference to the clerks and attaches thereof is expressed under a constitutional provision of that state. Const. art. 11, § 8 1-2. Prior to the adoption of this amendment that power could only be exercised by the legislature. Elder v. McDougald, 145 Cal. 740, 79 P. 429. In Georgia the general assembly has no power to create a city court and provide for a direct writ of error therefrom to the supreme court in any municipality other than an incorporated city. White v. State, 121 Ga. 592, 49 S. E. 715. A recital in an act establishing a city court that the court is established in a named city when such municipality is in fact not a city is not binding upon the courts. Id. Act creating criminal court for Buchanan county, Missouri, sustained. State v. Etchman [Mo.] 88 S. W. 643.

11. See 3 C. L. 970, n. 67.

12. Legislative act creating a judicial district sustained as constitutional. Carter Brick Co. v. Clement [Tex. Civ. App.] 84 S. W. 434. Where, as in Kentucky, there is no provision for a state census, a constitutional requirement for the division of the state into judicial districts based upon population has reference to the Federal census. Butler v. Stephens [Ky.] 84 S. W. 745.

13. State v. Etchman [Mo.] 88 S. W. 643. Furnishing building wherein to hold court. City of Covington v. Kenton County, 26 Ky. L. R. 677, 82 S. W. 392.

14. State v. Pope [Mo. App.] 85 S. W. 633.

15. Bass v. Milledgeville [Ga.] 50 S. E. 59.

16. See 3 C. L. 970. And see Clerks of Court, 5 C. L. 590; Attorneys and Counsellors, 5 C. L. 319; Sheriffs and Constables, 4 C. L. 1442; Reference, 4 C. L. 1257; Masters and Commissioners, 4 C. L. 614; United States Marshals and Commissioners, 4 C. L. 1763.

17. Judges are not public officers within the provisions of the Pennsylvania constitution (Art. 3, § 13), that no law shall extend the term of a public officer, or change his salary, after his election or appointment. Commonwealth v. Mathues, 210 Pa. 372, 59 A. 961. But assistant district attorneys appointed by a United States district judge are officers of the United States courts for their respective districts. Not subject to punishment for contempt by state court for failure to return records on demand. In re Leaken, 137 F. 680. Stenographers are held to be mere attaches of the court, and not "public officers." Elder v. McDougald, 145 Cal. 740, 79 P. 429; Robertson v. Ellis County [Tex. Civ. App.] 84 S. W. 1097.

18. Under the New York constitution, art. 6, § 217, vesting in the appellate division authority to remove judges of inferior courts, a judicial officer may not be removed merely for making an erroneous decision, but he may be removed for wilfully making a wrong decision, for reckless exercise of judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of the other. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499.

19. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

20. Testimony admissible at hearing. Daniel v. Bulitt County, 25 Ky. L. R. 159, 115 Ky. 741, 74 S. W. 1057.

21. See 3 C. L. 971.

22. The purpose of a requirement that courts shall be held at the place provided by law is to give due stability and dignity to the administration of justice, and to protect the interests of litigants. State v. Richards [Iowa] 102 N. W. 439. Where a court was convened in the regular court room and an adjournment taken to another room on another floor of the same building to accommodate a defendant in a weak physical condition, the room being sufficiently large to accommodate the court, its

The terms of court are usually fixed by statute, or under statutory direction,[23] though this is sometimes provided for in the constitution of a state.[24] Two terms of court cannot be held simultaneously,[25] but where the legislature has made provision for calling in a judge from another circuit, there may be a session of the court in two or more counties of the same circuit at one and the same time.[26] Courts of

officers, the jury, attorneys, and a number of the general public, the holding of court in such room was not error. Id.

23. See 3 C. L. 971, n. 84. Under a provision in an act establishing a city court that one of its terms shall continue "until" the third Saturday in December excludes that day. Johnson v. State [Ala.] 37 So. 421. South Dakota Laws 1890, p. 174, fixing the regular terms of circuit courts, did not, by implication, repeal Comp. Laws 1887, § 426, authorizing circuit judges to appoint and hold special terms of court. In re Nelson [S. D.] 102 N. W. 885. Under a statute providing for special terms when the public good requires it, a special term may be convened when there are undisposed of matters concerning the whole county, though there are at the same time local matters before the court. Wilmans v. Bordwell [Ark.] 84 S. W. 474. Conviction at a special term sustained. White v. Commonwealth [Ky.] 85 S. W. 753; Jett v. Commonwealth [Ky.] 85 S. W. 1179.

24. Act No. 31, Michigan Pub. Acts 1903, providing for the drawing of a fresh panel of jurors once in each calendar month, does not offend the constitutional provision in that state relative to terms of court. Fornia v. Frazer [Mich.] 12 Det. Leg. N. 259, 104 N. W. 147.

25. October and May terms. Smith v. Kirg of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357.

26. State v. Pope [Mo. App.] 85 S. W. 633.

NOTE. Simultaneous "courts," "terms" or "sessions" in same district or county: The statutes and constitutions are usually construed as admitting of two or more courts sitting at the same time in the same district in different counties thereof (Harris v. Gest, 4 Ohio St. 469; Batten v. State, 80 Ind. 394; State v. Knight, 19 Iowa, 94, overruing earlier Iowa decisions, infra), provided there are several judges (Carroll v. Com., 84 Pa. 107; Cahill v. People, 106 Ill. 621), or there are competent judges who may legally be called in from other districts (Sippey v. State, 35 Neb. 368, 53 N. W. 208; Munzesheimer v. Fairbanks, 82 Tex. 351, and cases cited, 4 C. L. 282, n. 12).

It may even be allowable to hold in one county more than the usual number of "courts," i. e., terms or sessions. Carroll v. Com., 84 Pa. 107; Cahill v. People, 106 Ill. 621; Wadhams v. Hotchkiss, 80 Ill. 437. Thus in Courtney v. State, 5 Ind. App. 356, 32 N. E. 335, the regular judge having been displaced by a substitute for a particular case convened the regular term in a different room whilst the case in question was being tried, and his action was upheld.

Special terms concurrent with regular terms held elsewhere in the district are generally valid. Munzesheimer v. Fairbanks, 82 Tex. 351, 18 S. W. 697; Lewin v. Dille, 17 Mo. 64; People v. Shea, 147 N. Y. 78; National Bank of Greensboro v. Gilmer, 116 N. C. 684. But a judge cannot set a special term to be held by himself at a time when he will necessarily be engaged in another term. Bedell v. Powell, 3 Code Rep. [N. Y.] 61.

The adjournment of a term to a time within another regular term has been upheld in Indiana (Snurr v. State, 105 Ind. 125, 4 N. E. 445; Louisville N. A. & C. R. Co. v. Power, 119 Ind. 269, 21 N. E. 751), and denied in Kansas (Ex parte Millington, 24 Kan. 214). The extension of a term on the other hand cannot be beyond the first of the ensuing term (Blake v. Harlan, 75 Ala. 205; Cheek v. Merchants' Nat. Bank, 56 Tenn. [9 Heisk.] 489. In this case consent was curative of the error); but may run into a term for another county (State v. Leahy, 1 Wis. 258; Tippy v. State, 35 Neb. 368; State v. Knight, 19 Iowa, 94; King v. Sears, 91 Ga. 577. **Contra,** Cooper v. American Central Ins. Co., 3 Colo. 318; Gregg v. Cooke, 7 Tenn. 82). Statutes contradictory in that they authorize two terms at the same time have been construed as enabling the judge to elect in which place he would sit. Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356; Carland v. Custer Co. Com'rs, 5 Mont. 579, 6 P. 24. But in Arkansas a similar statute was held void. Ex parte Jones, 49 Ark. 110, 4 S. W. 639. Terms are not simultaneous if the later one is held during a time when the former one might have been but was not held, the business thereof having been completed earlier. Swails v. Coverdill, 21 Ind. 271, and see Mendum v. Com., 6 Rand [Va.] 704, where the judge had time within the same day to go from one court to the other.

In Colorado a statute (Mills' Ann. St. §§ 1038, 1039) authorizes the calling of a judge from another district to hold court in a different room when the accumulation of judicial business demands it. It was urged in Bigcraft v. People, 30 Colo. 298, 70 P. 417, that by so doing the power of increasing the number of judges for a particular judicial district was delegated to a judge, also that this statute transcended the constitutional provision (article 6, § 12) that the judges of the district courts "may hold court for each other," in that the constitution authorized substitution but not assistance. Both contentions were overruled, the court characterizing the latter one as a "narrow" construction. See 1 C. L. 825, n. 20.

In Iowa it was held that a judge might continue a term into the time set by law for holding another term in the same district. State v. Knight, 19 Iowa, 94, overruling Davis v. Fish, 1 G. Greene [Iowa] 408, 48 Am. Dec. 387; Grable v. State, 2 G. Greene [Iowa] 559. This accords with the principle stated in the text.

The Kansas courts have held that a special judge cannot sit in one county of a judicial district whilst the regular judge sits

record have inherent power to adjourn from time to time.[27] The setting apart of certain terms for the trial of particular kinds of cases is discretionary unless the statute otherwise provides.[28]

§ 4. *Conduct and regulation of business.*[29]—Subject to statutory restrictions,[30] courts may make reasonable rules governing the procedure before them,[31] and when made, they bind both courts and suitors,[32] and have the force of statutes.[33] The practice and procedure in the city [34] and county courts of Georgia are similar to those in the superior court of that state.[35] Rules of a trial court will not be regarded an appeal unless they are before the court in the particular record involved.[36] The transfer of a case from one department of a court to another is controlled by the rules adopted for the regulation of procedure in the several de-

in another (In re Millington, 24 Kan. 214); and they base this on the reasoning that the law establishing regular terms in the several counties is a command not only to hold a term at the prescribed place and time but also to hold none elsewhere. The court in State v. Pope, supra, calls attention to the fact that In re Millington was based wholly on the authority of Grable v. State, 2 G. Greene [Iowa] 559, and that case was overruled by State v. Knight, 19 Iowa, 94. The Kansas precedent is therefore greatly weakened.

The proposition stated in the text was substantially laid down in construing the Texas statute in Munzesheimer v. Fairbanks, 82 Tex. 351, 18 S. W. 697. A later line of decisions in that state holds that when a special term is to be held in a county of a judicial district and no regular judge is available from any of the adjoining districts, a special judge may be chosen to hold such special term. See 4 C. L. 282, n. 12, citing cases.

West Virginia also follows the general rule that two terms may concur in time, and in First Nat. Bank v. Parsons, 45 W. Va. 688, 32 S. E. 271, the court says: "Common sense, convenience, dispatch of the public business range themselves on the side of one [the affirmative] construction; mere idle technicality and inconvenience on the other."

27. See 3 C. L. 972, n. 90. The United States district judge in the Indian Territory in case of sickness or for other sufficient reason has under his general authority for fixing the terms of court in his particular district full authority to cause the marshal of his district to open and adjourn any regular term until such reasonable time as to the judge shall seem proper. Gardner v. United States [Ind. T.] 82 S. W. 704. Municipal courts in Wisconsin are courts of record and do not lose jurisdiction by failure of the docket to state the place to which an adjournment is taken. Tourville v. Seavey Co. [Wis.] 102 N. W. 352; Snyder v. Malone [Wis.] 102 N. W. 354. A county court does not lose jurisdiction in an action not within the jurisdiction of a justice of the peace because at the hour to which such action had been continued the county judge was not present in his office and did not appear for more than one hour thereafter. Bussing v. Taggart [Neb.] 103 N. W. 430. Under the Georgia Code 1895, § 4344, an order of adjournment of a regular term passed by a judge in vacation which fails to show on its face a sufficient cause for adjournment is void. Martin v. Scott, 118 Ga. 149, 44 S. E. 974. Death of prominent member of bar shortly before convening a term of court is not such cause as will authorize the judge in vacation to adjourn the term of the court. Frank & Co. v. Horkan [Ga.] 49 S. E. 800. In Florida a term was held not to have lapsed because of premature entry of adjournment under a statute providing for adjournment by the clerk in the absence of the judge. Webster v. State [Fla.] 38 So. 514.

28. Though a statute providing for a certain number of terms for the trial of criminal cases does not prohibit the trial of civil cases thereat, a rule so providing is good in the absence of objection at the time of assigning of case for trial. Hill's Adm'r v. Penn Mut. Life Ins. Co. [Ky.] 85 S. W. 759.

29. See 3 C. L. 972.

30. Under a legislative act that the court of appeals may adopt rules of procedure as nearly similar to those of supreme court as practicable, the determination of the question of similarity is confided to the legal discretion of the judges of the court of appeals. People v. Court of Appeals [Colo.] 79 P. 1021. A legislative act regulating the practice of circuit courts whereby the court is deprived of some of its jurisdiction cannot be upheld. Adcock v. State [Ala.] 37 So. 919.

31. Rule in respect to contents of notice of filing of plaintiff's statement sustained. Standard Underground Cable Co. v. Johnstown Tel. Co., 26 Pa. Super. Ct. 432. Rule that items of account and averments in statements of claims not denied by an affidavit shall be taken as admitted. Blair v. Ford China Co., 26 Pa. Super. Ct. 374.

32. See 3 C. L. 972, n. 97. State v. Donlan [Mont.] 80 P. 244. Under N. Y. Laws 1902, p. 1495, c. 580 (Municipal Court Act), providing that court shall be held at specified hours in every judicial day, or so often as the board of justices may direct, rules enacted by the board in this respect have the force of law and are binding on individual justices. In re Bolta, 97 App. Div. 551, 90 N. Y. S. 499.

33. See 3 C. L. 972, n. 1. Green v. Prince Metallic Paint Co., 25 Pa. Super. Ct. 415.

34. Clifton v. Fiveash [Ga.] 50 S. E. 134.

35. South Georgia R. Co. v. Ryals [Ga.] 51 S. E. 428.

36. Edwards v. Warner, 111 Ill. App. 32.

partments.[37] Cases relating to effect of failure to comply with particular rules are cited in the note.[38]

Every court has inherent power over its own records,[39] and may amend them so as to make them conform to the truth.[40] To justify an amendment nunc pro tunc there must be something to amend by. Where there is no record or memorandum of any kind to show that a former order existed, a court is without jurisdiction to enter a judgment or order nunc pro tunc as of a prior term.[41] The records of a court of record are not open to attack by oral testimony.[42] But where the record impeaches itself, that is, where it shows on its face that the court had no jurisdiction to make it, or that there was no court in session when the record was made, and it could not be made by the judge in vacation, it should be treated as a nullity.[43] Oral proceedings in a municipal court case are not scrutinized as keenly as proceedings in a court of record.[44] Cases illustrative of matters of practice, both in the Federal [45] and state courts, are gathered in the notes.[46]

37. Finlen v. Heinze [Mont.] 80 P. 918. In the absence of any rules, business having been distributed among various departments by an order of court concurred in by all the judges, such order should be held binding until revoked or modified by the same authority. State v. Donlan [Mont.] 80 P. 244. Where the district court of a given county is divided into three departments and by rule the criminal business is intrusted to one of such departments the supreme court will not issue its writ of supervisory control to compel the hearing of a grand jury indictment by the criminal department of the court. State v. Second Judicial District Court [Mont.] 76 P. 1005. Where, as in Rhode Island, the discretion to set aside a judgment and reinstate a case has been exercised by the division in which the judgment was rendered, such discretion is not subject to review in the other division. Cascia v. Gilbane [R. I.] 60 A. 237.

38. Failure of paper book to contain statement of question involved. Roush's Estate, 23 Pa. Super. Ct. 652. Assignment of error which does not set out evidence or exceptions. Pizzi v. Nardello, 23 Pa. Super. Ct. 535; Commonwealth v. Powell, 23 Pa. Super. Ct. 370; Moore v. Bischoff, 25 Pa. Super. Ct. 1; Wabash Ave., 26 Pa. Super. Ct. 305.

39. In re Jones [N. Y.] 74 N. E. 226. The provision of the Iowa Code, § 242, that the record of the proceedings of the district court "shall be signed by the judge," is directory only. Donnelly v. Smith [Iowa] 103 N. W. 776.

40. The purpose of the minutes is to preserve the judgments and proceedings of the court, and if a judgment has been actually rendered, it is not only the right, but the duty of the judge, during the term and without notice to any one, to see that the minutes represent the proceedings of the court just as they transpired. After the term has adjourned he has authority, after notice to parties interested, to make such order as may be necessary to make the record conform to the truth. Merritt v. State [Ga.] 50 S. E. 925. Amendment by a probate court. Smith v. Whaley [R. I.] 61 A. 173. District courts in Oklahoma have the power, while a case is pending and before final judgment, to correct and amend the record or any order or proceeding had in such case, to conform to the facts by a nunc pro tunc order, and is not confined to any one class of evidence, but may proceed upon satisfactory evidence. Clark v. Bank of Hennessey, 14 Okl. 572, 79 P. 217. Where a certificate of counsel provided by rule of court to the effect that a petition for appointment of viewers is sufficient in form and contents is omitted, the court may permit amendment to record in that respect nunc pro tunc. Dickinson Tp. Road, 26 Pa. Super. Ct. 34.

41. Entering decree of naturalization in 1897 as of 1863 entirely upon parol testimony. Gagnon's Case, 38 Ct. Cl. 10. An amendment of a record nunc pro tunc must be based upon some official or quasi-official note or memorandum or memorial paper remaining in the files of the case or upon the records of the court. Grand Lodge, Independent Order of Free Sons of Israel v. Ohnstein, 110 Ill. App. 312.

42, 43. Cook v. Penrod [Mo. App.] 85 S. W. 676.

44. Cossel v. Altschul, 91 N. Y. S. 1.

45. See 3 C. L. 973, n. 7. Revised St. § 918, authorizing the circuit courts to make rules and orders regulating their practice, should be construed in connection with section 914 (the conformity statute) requiring the practice and proceedings in circuit courts to conform as nearly as may be to the practice in the courts of record of the state, any rule of the court to the contrary notwithstanding. Importers' & Traders' Nat. Bank v. Lyons, 134 F. 510. But the conformity statute does not apply to equity causes, in which the Federal courts are governed by the rules of equity pleading, regardless of local practice (United Cigarette Mach. Co. v. Wright, 132 F. 195), nor does it require Federal judges to conform to state regulations in the submission of cases and the control of the deliberations of juries, such proceedings being governed by the common law. (Liverpool & L. & G. Ins. Co. v. Friedman Co. [C. C. A.] 133 F. 713), neither does it require the Federal court in the district of Connecticut, in an action against a town, to deviate from its long established practice in manner of making service of process (Elson v. Waterford, 135 F. 247), and the

COVENANT, ACTION OF.

At common law an action of covenant could not be maintained unless there existed a privity of contract between the parties.[47] Privity of estate alone would not sustain it.[48] But this rule is changed by a statute which authorizes suit by a party beneficially interested.[49] The action will not lie on the personal covenant of an ancestor in which the heirs are not named and there is no privity of estate between the parties,[50] and equitable considerations are not available in a court of common law as a foundation for the action.[51] The general issue is not a proper plea in the action.[52]

COVENANTS, see latest topical index.

COVENANTS FOR TITLE.

Scope of title.—This topic is designed to treat only the usual covenants contained in deeds of conveyance. Covenants in a lease,[53] restrictive covenants and agreements relative to the use of land,[54] and warranties in the sale of personal property,[55] are elsewhere treated.

act applies only to matters of practice and procedure, and does not appertain to jurisdiction or the mode of obtaining jurisdiction of the person in actions brought in Federal courts (Wells v. Clark, 136 F. 462). Service of monition in admiralty may be made under the provisions of a state statute regulating mode of service in actions at law or suits in equity. Insurance Co. of North America v. Frederick Leyland & Co., 139 F. 67. On the trial of a cause in a circuit court without a jury as provided in Rev. St. §§ 649, 700, the procedure is governed by such statutes; and the court may at its option make either general or special findings. It cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124. Act Cong. March 9, 1892, c. 14, 27 Stat. 7, providing that in addition to the mode of taking depositions in the Federal courts depositions may be taken in the mode prescribed by the laws of the state in which the courts are held merely relates to the manner of taking depositions, and neither enlarges nor restricts the grounds for taking them prescribed by Rev. St. §§ 863, 866. Magone v. Colorado Smelting & Min. Co., 135 F. 846. Practice as to transfer of cases in district court of appeal in California sustained. People v. Davis [Cal.] 81 P. 718.

46. Motions are always addressed to the discretion of the court, and it is therefore entirely within the province of the court to determine in what manner it will satisfy itself of the facts which appeal to its discretion. Importers' & Traders' Nat. Bank v. Lyons, 134 F. 510. It is within the power of the court to listen to the representations and to hear the evidence of those appearing in a cause as amici curiae, claiming that such cause is a collusive proceeding. Sampson v. Commissioners of Highways, 115 Ill. App. 443. Limiting time allowed to counsel for argument of case. Jones v. State [Ga.] 51 S. E. 312. Under Tennessee Code (Shannon, § 6336) the supreme court may in aid of its final process conduct an examination of a garnishee. Wyler, Ackerland & Co. v. Blevins [Tenn.] 82 S. W. 829. A trial judge has authority after the expiration of his term of office, and during the term of court at which trial was had, to make and file conclusions of fact and law. Storrie v. Shaw, 96 Tex. 618, 75 S. W. 20. Effect of a sylabus written by the court. Fidelity & Deposit Co. v. Buckl & Son Lumber Co., 189 U. S. 135, 47 Law. Ed. 744. It is within the power of a court within the term at which a judgment is entered against an administrator to strike therefrom an award of execution. McLaughlin v. Chicago, R. I. & P. R. Co., 115 Ill. App. 262. Conviction before jury of six in county court sustained. Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977.

47. Broadwell v. Banks, 134 F. 470.

48. Hence an assignee of a covenante could not maintain it. Broadwell v. Banks, 134 F. 470.

49. Ohio Code Civil Procedure. Broadwell v. Banks, 134 F. 470. A covenant of a lessee in a perpetual lease to pay rent is not a collateral one, but adheres to the enjoyment of the thing demised, and under Ohio Code Civ. Proc. a devisee of the lessor may sue thereon in his own name. Id.

50. Knowles v. Knowles [R. I.] 59 A. 854.

51. That defendants held the bare legal title in trust for plaintiff. Knowles v. Knowles [R. I.] 59 A. 854.

52. Lucente v. Davis [Md.] 61 A. 622.

53. See Landlord and Tenant, 4 C. L. 389.

54. See Buildings and Building Restrictions, 5 C. L. 487.

§ 1. *Making of covenants; persons and estate benefited or bound.*[56]—There is no implied warranty of title in a sale of real estate.[57] In some states, by statute, the use in deeds of conveyance of certain forms of expression imports the usual covenants.[58] Covenants are to be reasonably construed.[59] A general warranty of title includes in itself covenants of right to sell and covers defects in the title, though known to the purchaser at the time of taking the deed.[60] A warranty does not include an incumbrance which has been assumed by the grantee in a preceding clause.[61] The statutory warranty attached to the words "grants, bargains and sells" imports a covenant only against incumbrances suffered by the grantor.[62] The covenant of peaceable possession runs with the land,[63] and secures freedom from molestation by the covenantor.[64] Covenants which run with the land are obligatory on the assigns of the covenantor.[65] The covenant of warranty in a void deed does not estop the grantor from asserting title,[66] and a remote grantee is not estopped to sue for breach of covenant because the deed to the covenantor who was a mere conduit of title was void.[67] The holder of the mere legal title who conveys to the beneficial owner is not liable on the covenant against incumbrances.[68]

55. See Sales, 4 C. L. 1318.

56. See 3 C. L. 973.

Note: As to how far tide lands are within the protection of covenants in a deed, see West Coast Mfg. & I. Co. v. West Coast Imp. Co., 25 Wash. 627, 62 L. R. A. 763, and note.

57. Sale of standing timber. Van Doren v. Fenton [Wis.] 103 N. W. 228.

58. Under Conveyance Act, § 11 (1 Starr. & C. Ann. St. 1896, p. 924, c. 30), the use of "warrant" in a deed is to be construed as meaning all the usual covenants. King v. King, 215 Ill. 100, 74 N. E. 89. Under Code 1892, §§ 2479, 2480, declaring that the word **"warrant"** shall constitute a covenant that the grantor will forever warrant and defend the title, it constitutes a warranty of possession as well. Allen v. Caffee [Miss.] 38 So. 186. Under Sayle's Ann. Civ. St. 1897, art. 633, in a conveyance of a fee, there is an implied covenant **against incumbrances.** Bullitt v. Coryell [Tex. Civ. App.] 85 S. W. 482. Under Ball. Ann. Codes & St., § 4520, a bargain and sale deed, reciting **"bargain, sell and convey"** is construed to contain a covenant that the grantor had the fee. Blood v. Sielert [Wash.] 80 P. 799. Under Kirby's Dig., § 731, the words "grant, bargain and sell" in a deed amount to a covenant that the grantor is seised of a fee, free from incumbrances suffered by him. Seldon v. Dudley E. Jones Co. [Ark.] 85 S. W. 778.

59. An exception of taxes in the covenant against incumbrances is not abrogated by a subsequent recital "against lawful claims of all persons whatsoever, taxes." Newburn v. Lucas [Iowa] 101 N. W. 730.

60. Civ. Code 1895, §§ 3614, 3615. Allen v. Tayor, 121 Ga. 841, 49 S. E. 799, and cases cited.

61. Gaw v. Allen [Mo. App.] 87 S. W. 590.

62. Hood v. Cark [Ala.] 37 So. 550.

63. Patterson v. Cappon [Wis.] 102 N. W. 1083.

64. Under Real Property Law (Laws 1901, p. 594, c. 547), § 218, a covenant for quiet enjoyment should be construed as fully written out and as constituting a prospective agreement against molestation by the grantor. Cassada v. Stabel, 98 App. Div. 600, 90 N. Y. S. 533.

65. A covenant need not contain the words "assign or assigns" in order to make it obligatory of the heirs or administrator of the covenantor. Broadwell v. Banks, 134 F. 470. A devisee of land, subject to a perpetual lease is assignee in respect to a covenant to pay rent, and under the Ohio Code Civ. Proc. may sue the lessee for breach of such covenant. Id.

Note: If a covenant capable of running with the land relates to a thing in esse, the assigns of the covenantor are bound, though he has not named his heirs and assigns and has not covenanted on their part (Winfield v. Henning, 21 N. J. Eq. 188; Hartung v. Witti, 59 Wis. 285, 18 N. W. 175; Dinman v. Prince, 40 Barb. [N. Y.] 213; Kellog v. Robinson, 6 Vt. 276, 27 Am. Dec. 550); but a covenant which relates to a thing not in esse, but to be done upon the land, and therefore running with it, does not bind heirs and assigns unless they are named therein (Gulf, etc., R. Co. v. Smith, 72 Tex. 122, 9 S. W. 865; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Lynn v. Mount Savage, etc., R. Co., 34 Md. 603; Conover v. Smith, 17 N. J. Eq. 51), and a covenant in which the assignee is not specifically named, though it is for a thing not in esse at the time, will bind him if it affects the nature, quality or value of the thing demised, independently of collateral circumstances, or if it affects the mode of enjoying it. Mayor, etc., v. Pattison, 10 East. 130.—From note to Gusyler v. De Graaf [N. Y.] 82 Am. St. Rep. 667.

66. Deed of homestead not joined in by the wife of the grantor. Bollen v. Lilly & Son [Miss.] 37 So. 811.

67. Void because executed by a married woman in payment of her husband's debts. Allen v. Taylor, 121 Ga. 841, 49 S. E. 799.

68. An incumbrance assumed by the beneficial owner in the transaction by which he acquired the beneficial ownership. Deaver v. Deaver [N. C.] 49 S. E. 113. In an action for breach of such covenant, the statute of frauds does not preclude the investigation of the parol trust by which the legal title was held. Id.

§ 2. *Performance or breach.*[69] *Against incumbrances.*[70]—An incumbrance is any interest which may subsist in a third person to the diminution of the value of the land but consistent with the passing of the fee,[71] e. g., an outstanding lease for a term of years,[72] an outstanding dower interest,[73] whether inchoate or consummate,[74] or taxes for which the covenantor is liable;[75] but not those for which he is not liable.[76] The covenant to keep down incumbrances or pay taxes is broken by nonperformance, though the convenantee be not called on to pay.[77] Eviction is not essential to the maintenance of an action for breach of covenant against incumbrances if the land is wild.[78]

The covenants of seizin and right to convey are broken, if at all, when made,[79] and eviction or interference with possession is not necessary;[80] but such breach is a technical one only and the covenantor cannot be compelled to respond in damages until positive injury is suffered by virtue of a paramount title.[81]

The covenant of warranty [82] is not broken unless there is an eviction by virtue of a paramount title,[83] and though the covenant is not one against incumbrances, an incumbrance which eventuates in an eviction works a breach of it.[84]

The covenant for quiet enjoyment [85] is broken by an eviction,[86] but not by a trespass.[87] Literal and actual dispossession is not necessary to constitute an eviction,[88] but the mere assertion of a claim of dower in wild lands is insufficient.[89] Eviction is not essential where the paramount title is in the state.[90] The covenant

69. See 3 C. L. 974.

Note: See Tiffany, Real Property, p. 899 et seq.

70. See 3 C. L. 974.

71, 72. La Rue v. Parmele [Neb.] 103 N. W. 304.

73. Seldon v. Dudley E. Jones Co. [Ark.] 85 S. W. 778.

74. Raftery v. Easley, 111 Ill. App. 413.

75. Taxes become an incumbrance from the time the property should be listed, though the amount is not then ascertainable and they are not due. Carswell & Co. v. Haberzettle [Tex. Civ. App.] 87 S. W. 911.

Due taxes. Bullitt v. Coryell [Tex. Civ. App.] 85 S. W. 482. In Wisconsin taxes for 1893 assessed, levied and warranted to the collector, become an incumbrance prior to February 14, 1894. Patterson v. Cappon [Wis.] 102 N. W. 1083.

76. A tax lien suffered by a mortgagee, not required by the terms of the mortgage to pay taxes, is not a breach of his covenant against incumbrances. Hood v. Clark [Ala.] 37 So. 550.

77. It is not one of indemnity and suit will lie at once. Broadwell v. Banks, 134 F. 470. If a covenantor fails to pay current taxes on the date they are due as obligated by his warranty, the covenantee may immediately on default pay the same and recover from him. Swinney v. Cockrell [Miss.] 38 So. 353. Complaint in an action for breach of covenant to pay off an incumbrance held to state a cause of action. Lamkin v. Garwood [Ga.] 50 S. E. 171.

78. Seldon v. Dudley E. Jones Co. [Ark.] 85 S. W. 778.

79. Anderson v. Kyle [Iowa] 102 N. W. 527. The covenant for title is broken when made if at that time the covenantor had only a life estate. King v. King, 215 Ill. 100, 74 N. E. 89.

80. Reinhalter v. Hutchins [R. I.] 60 A. 234.

81. Anderson v. Kyle [Iowa] 102 N. W. 527.

82. See 3 C. L. 974.

83. Allegations that in an action against the covenantee it had been adjudged that the covenantor did not at the time of conveyance own the estate he conveyed, and that the covenantee was evicted from part of the land, shows that eviction was by paramount title. Chenault v. Thomas, 26 Ky. L. R. 1029, 83 S. W. 109.

84. Cain v. Fisher [W. Va.] 50 S. E. 752. A sale of land for nonpayment of taxes charged against it prior to the execution of the deed is a breach of the covenant of warranty. Id. A grantee may rely on a breach of covenant of warranty in an action to recover the amount of an incumbrance paid by him. Coleman v. Illinois Life Ins. Co. [Ky.] 82 S. W. 616.

85. See 3 C. L. 974.

86. Patterson v. Cappon [Wis.] 102 N. W. 1083.

87. In an action for trespass defendant cannot call in his vendor on his warranty. Bossier's Heirs v. Jackson [La.] 38 So. 525.

88. Where, after the showing of a paramount title, the covenantee purchases the same, it amounts to a breach of the covenant without an eviction by judgment at law. Morrow v. Baird [Tenn.] 86 S. W. 1079. A judgment establishing a paramount title is equivalent to an eviction. A satisfaction of such judgment perfects a cause of action on the covenant of warranty. McCrillis v. Thomas [Mo. App.] 85 S. W. 673.

89. Does not carry the right to possession. Seldon v. Dudley E. Jones Co. [Ark.] 85 S. W. 778.

90. Seldon v. Dudley E. Jones Co. [Ark.] 85 S. W. 778. Complaint held sufficient, to allege paramount title in the state under forfeiture proceedings for nonpayment of taxes, as against general demurrer. Id.

for quiet enjoyment precludes entry by the grantor,[91] and a breach of it by him is a defense against an action to foreclose the purchase-money mortgage,[92] and entitles the grantee to recover on his counterclaim the amount paid by him under the contract.[93] Danger of eviction justifies suspension of payment of the purchase price only until the seller has furnished bond,[94] and payment cannot be suspended because of a danger of eviction of which he was informed at the time of purchase.[95]

§ 3. *Enforcement of covenants.*[96]—An action for breach of covenant of title accrues at the time of eviction.[97] An action for breach of the covenant of seisin or right to convey is not one for the recovery of real property or an estate or interest therein or for injury thereto.[98] The question of title may be involved where breach of covenant for quiet enjoyment consists of an eviction under a paramount title.[99]

The covenants in a purchase-money mortgage deed will not estop the mortgagor, where the deed and mortgage are parts of the same transaction, from suing on the covenants in the deed.[1] And since the covenants of seisin in the two instruments are distinct, a breach of the one in the mortgage is not available by way of rebutter in an action for breach of the one in the deed.[2] A claim for money paid to satisfy an incumbrance may be set off in an action for the purchase price.[3] A covenantee who has not sustained loss because of breach of covenant against incumbrances can recover only nominal damages,[4] and his assignee acquires no greater rights,[5] and even if the covenant runs with the land, a remote grantee from whose deed an incumbrance is excepted cannot recover from the covenantor;[6] but an intermediate grantor who is held liable on his covenant of warranty by his vendee may recover reimbursement from his grantor on the similar covenant in his deed,[7] providing he has satisfied the claim of his grantee.[8]

91. The taking of possession by the grantor because of failure to pay interest on deferred payments is a breach of the covenant of quiet enjoyment. Cassada v. Stabel, 98 App. Div. 600, 90 N. Y. S. 533.

92. Cassada v. Stabel, 98 App. Div. 600, 90 N. Y. S. 533.

93. Cassada v. Stabel, 98 App. Div. 600, 90 N. Y. S. 533. A grantee in a warranty deed who retains a portion of the purchase price as security against a lien claimed in a pending suit and who purchases the land under execution of judgment rendered therein may in an action for the balance of the purchase price counterclaim for the damages for breach of covenant, though the judgment enforcing the lien is reversed. Talbott v. Donaldson [Kan.] 80 P. 981.

94. Where payment due is refused, the seller is entitled to judgment subject to stay of execution until danger of eviction has ceased or bond furnished. Jennings-Heywood Oil Syndicate v. Home Oil & Development Co., 113 La. 383, 37 So. 1. Where there is danger of eviction from part of the property only and the purchaser has disposed of a part and is gradually disposing of the remainder of the property, a bond should be required only as to that portion from which there is danger of eviction. It will be assumed that the purchaser has elected not to ask for a rescission of the sale. Id.

95. Jennings-Heywood Oil Syndicate v. Home Oil & Development Co., 113 La. 383, 37 So. 1.

96. See 3 C. L. 974.

97. Tract did not contain as many acres as estimated, but the action was not brought for deficiency of acreage. Chenault v. Thomas, 26 Ky. L. R. 1029, 83 S. W. 109.

98. Within Code, § 190, requiring such actions to be tried in the county where the land is located. Eames v. Armstrong, 136 N. C. 392, 48 S. E. 769.

99. Therefore a justice has no jurisdiction. Holmes v. Seaman [Neb.] 101 N. W. 1030, rvg. 100 N. W. 417. Cited 3 C. L. 975, n. 41.

1. Reinhalter v. Hutchins [R. I.] 60 A. 234. A second mortgagee may assail a first mortgage which he does not assume, though the prior one is exempted from the covenants of the latter. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012.

2. Reinhalter v. Hutchins [R. I.] 60 A. 234.

3. Action on vendor's lien note. Bullitt v. Coryell [Tex. Civ. App.] 85 S. W. 482.

4. Where he does not pay the incumbrance until after he conveys the land. Mandigo v. Conway, 90 N. Y. S. 324. A covenant against all incumbrances, except "surplus water" does not give the covenantee a right of action for damages unless he is deprived of water necessary to the enjoyment of his premises. Rollins v. Blackden, 99 Me. 21, 58 A. 69.

5. Where the original grantor paid the incumbrance after he had conveyed and assigned his right of action to his grantee. Mandigo v. Conway, 90 N. Y. S. 324.

6. Where the original grantor had paid the incumbrance and assigned to his grantee, the only right of action in the latter was on the assignment. Mandigo v. Conway, 90 N. Y. S. 324.

7. Morrow v. Baird [Tenn.] 86 S. W. 1079.

8. Complaint held to sufficiently allege that he had paid such claim. Morrow v. Baird [Tenn.] 86 S. W. 1079.

A complaint for breach of covenant of warranty need not allege eviction,[9] and one for breach of covenant of seisin need not aver eviction or special damage.[10] That an absolute deed outstanding is a mortgage,[11] or that an outstanding interest had been cut off by discharge in bankruptcy,[12] must be specially pleaded.

The amount of damage sustained must be proved.[13] An assignee of a cause of action must prove the assignment if denied.[14]

A covenant cannot be contradicted by parol evidence,[15] and notice in the covenantee at the time of execution of the deed of an outstanding paramount title,[16] or incumbrance[17] is not a defense. Failure of a grantee to prevent a sale by payment of taxes or redemption from delinquency neither bars his action on the covenant of warranty nor mitigates damages.[18]

Damages for breach.[19]—The measure of damages for breach of a covenant of warranty is the difference in value between the property as it was covenanted to be and its actual condition.[20] If title fails as to a portion of the land, the value of such portion is the measure.[21] A covenantor who has notice of the action in which his covenantee is evicted by virtue of a paramount title is liable for attorney's fees and costs therein[22] if properly pleaded;[23] but not for the expense of defending an unsuccessful attack in an improper proceeding.[24] In Texas, attorney's fees expended in defense of title cannot be recovered.[25] If no consideration was paid for the land, there can be no recovery;[26] but money paid out in defense of title may be

9. Coleman v. Illinois Life Ins. Co. [Ky.] 82 S. W. 616.

10. Reinhalter v. Hutchins [R. I.] 60 A. 234.

11, 12. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

13. In an action for breach of covenant, no recovery can be had unless the amount the covenantor is liable for is shown. Lampkin v. Garwood [Ga.] 50 S. E. 171.

14. Title Ins. Co. v. Bach, 90 N. Y. S. 350.

15. McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722. That a particular incumbrance was excluded. Patterson v. Cappon [Wis.] 102 N. W. 1083.

16. Outstanding paramount title to standing timber on the premises conveyed. McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722. Right of another to the growing crops. Newburn v. Lucas [Iowa] 101 N. W. 730.

17. No defense to an action for breach of covenant of warranty against incumbrances. De Long v. Spring Lake Beach Imp. Co. [N. J. Law] 59 A. 1034. The deed governs and the covenant cannot be defeated by parol evidence of the grantee's notice of an incumbrance. Newburn v. Lucas [Iowa] 101 N. W. 730; Brown v. Taylor [Tenn.] 88 S. W. 933. **Contra,** see Demars v. Koehler, 60 N. J. Law, 314, 38 A. 808.

18. Cain v. Fisher [W. Va.] 50 S. E. 752.

19. See 3 C. L. 975.

20. Where growing crops belonged to another, their value at the time of conveyance. Newburn v. Lucas [Iowa] 101 N. W. 730. Evidence of the value of the land is admissible in an action for breach of covenant of warranty. McCrillis v. Thomas [Mo. App.] 85 S. W. 673. Where the covenant of title of exchanged land is broken and there is no evidence of the value of the land introduced, the value of the land for which it was exchanged may be adopted as the measure. Chenault v. Thomas, 26 Ky. L. R. 1029, 83 S. W. 109. Where parties exchange lands and there is a breach of covenants of warranty in the deed of one, the other has a lien on the land he conveyed for the amount of the damage sustained. Newburn v. Lucas [Iowa] 101 N. W. 730.

21. McBride v. Burns [Tex. Civ. App.] 88 S. W. 394.

For **breach of covenant against incumbrances** consisting of an unexpired lease, the measure is the rental value of the premises during the currency of the lease. Brown v. Taylor [Tenn.] 88 S. W. 933.

22. Where he is made party to such action and is represented by attorney therein, he has notice. Chenault v. Thomas, 26 Ky. L. R. 1029, 83 S. W. 109. For breach of covenant against incumbrances, judgment including costs of action in which the incumbrance was adjudged to exist held not excessive. McCrillis v. Thomas [Mo. App.] 85 S. W. 673. Attorneys' fees expended in defending title may be recovered where the covenant of warranty is broken. Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545. The record of the proceedings in which an incumbrance was adjudged to exist is admissible, though the covenantor had no notice of such action. McCrillis v. Thomas [Mo. App.] 85 S. W. 673.

23. Claim for attorney's fees and other expenses held not allowable under Civ. Code 1895, § 3796, though the covenantor was charged with bad faith, in failing to comply with his covenant. Lampkin v. Garwood [Ga.] 50 S. E. 171.

24. A covenantor is not liable for the expense of defending an unsuccessful attack on the title in an equitable action; the action having been dismissed without prejudice to an action at law. Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545.

25. Not an element of damages for breach of covenant of warranty. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

26. It is competent to show in an action for breach of covenant for the purpose of

recovered, though the covenantee is entitled to nominal damages only for breach of covenant.[27] The covenant is one of indemnity and no more can be recovered than was expended in defense of the title.[28] Penalties and costs accruing on unpaid taxes is an element of damages for breach of covenant against incumbrances;[29] but counsel fees in a misdirected proceeding to evict a tenant in possession under a lease which constituted a breach of a covenant against incumbrances is not.[30] Special damages must be shown in order to warrant a recovery.[31]

COVERTURE; CREDIT INSURANCE, see latest topical index.

CREDITORS' SUIT.

§ 1. *Nature and grounds of remedy.*[32]—The purpose of a creditors' suit is to reach legal or equitable assets of a debtor not reachable by ordinary legal remedies.[33] A creditors' bill cannot ordinarily be maintained until a judgment at law has been obtained and execution thereon has issued and been returned unsatisfied.[34] But where the circumstances are such that it is impossible for the creditor to take these preliminary steps, equity will grant relief without them.[35] If it appears that exe-

mitigating damages that the portion of the land to which the grantor had no title was included in the deed by mistake, and no consideration was paid for it. Rook v. Rook, 111 Ill. App. 398.

27. Rook v. Rook, 111 Ill. App. 398.

28. Where a covenantee saves himself from total eviction by purchase of an outstanding claim for less than is recoverable by him in an action for total eviction, he can recover only what he was required to pay. Cannot recover as for total eviction Patterson v. Cappon [Wis.] 102 N. W. 1083.

29. A covenantor is liable for penalties and costs accruing on unpaid taxes which constitute a breach of his covenant against incumbrances. Carswell & Co. v. Habberzettle [Tex.] 86 S. W. 738; Id. [Tex. Civ. App.] 87 S. W. 911.

30. Brown v. Taylor [Tenn.] 88 S. W. 933.

31. Evidence held to show that no special damage was suffered. Brown v. Taylor [Tenn.] 88 S. W. 933.

32. See 3 C. L. 976.

NOTE. Creditors' suits against corporations: Independently of any statutory provision, a creditor of a corporation may maintain a creditors' bill in equity against it and other necessary or proper parties to obtain satisfaction of his debt, when he has exhausted his legal remedies, or when the circumstances are such that he has no legal remedy. The principles governing such a suit are the same, of course, as where suit is brought against a natural person. In accordance with those principles, when a creditor of a corporation has recovered a judgment against it, and an execution has been returned unsatisfied, or, under some circumstances, before the recovery of judgment, or without the issue and return of an execution, he may maintain a creditors' bill to reach equitable assets of the corporation, and have them applied to the satisfaction of his claim.

Such a bill may be maintained by a creditor, for example, to set aside a fraudulent conveyance, transfer or mortgage by the corporation, and to subject the property to the payment of its debts, or to hold the grantees or transferees liable for the value of the property; or to enforce claims in favor of the corporation against the directors or other officers for diversion of assets, mismanagement, or negligence; or to reach or hold stockholders liable for assets withdrawn by them, or distributed among them, in fraud of the rights of creditors; or to enforce a liability of stockholders for a balance due on their stock; or, under some statutes, to enforce the statutory liability of stockholders to creditors. After a corporation has been dissolved, creditors may maintain a bill in equity to subject its assets to the payment of their claims.

In many states, as in New York, special remedies are provided by statute for creditors of corporations unable to collect their demands by ordinary legal remedies.—See Clark & Marshall, Priv. Corp., § 775.

33. The essential purpose of a creditors' bill, as maintainable under the Georgia statute, is to administer, through the extraordinary powers of a court of equity, the assets of an insolvent debtor. Brannan v. Baxter & Co. [Ga.] 50 S. E. 45.

34. Suit to set aside one transfer and enjoin another, by holder of note, who had taken no legal steps to enforce or secure payment of note, held not maintainable. Matarese v. Caldarone [R. I.] 58 A. 976.

35. As where personal service of summons could not be made, debtor being in a foreign country, and service by publication would not enable plaintiffs to get a money judgment, there being no attachable property in the state. Bateman v. Hunt, 94 N. Y. S. 861.

NOTE. Nonresidence, insolvency or death of debtor as excuse for failure to exhaust

cution has been returned unsatisfied, the complaint need not allege that the judgment debtor is insolvent.[36] A general creditor cannot maintain a bill in equity to enforce a claim against a going concern unless he has first obtained a lien upon the property, except where otherwise provided by statute.[37] But a creditor who has filed a transcript of his judgment in the county where realty is situated, thus acquiring a lien, need not exhaust legal remedies before proceeding in equity.[38] Under modern uniform procedure statutes, creditors may in one suit proceed for judgment on their debts and to set aside fraudulent conveyances made by their common debtor.[39] But the existence of an adequate remedy at law will bar equitable relief.[40] After a trustee in bankruptcy has been appointed, only such trustee can sue to set aside a fraudulent transfer by the bankrupt,[41] and a creditor's bill by a creditor after the debtor has been adjudicated a bankrupt does not give such creditor a lien on the property sought to be reached.[42]

General creditors' suits.[43]—Whether suit be instituted by a plaintiff in his own name only or for himself and other creditors, the suit becomes, after a reference is made to convene creditors, a general creditors' suit;[44] and in Georgia, by virtue of statute, a creditors' suit is one for all the creditors ab initio, regardless of the number of plaintiffs.[45] After issuance of summons, which begins the suit,[46] a single

legal remedies: By weight of authority, where it is impossible to secure personal judgment against a debtor, by reason of nonresidence, or of the fact that he has absconded, there being no adequate remedy provided by statute whereby his property can be reached, a creditors' bill will lie in the first instance, if the debtor have property reachable thereby. Pope v. Solomons, 36 Ga. 541; Corn Exch. Bank v. Applegate, 91 Iowa, 411; Earle v. Circuit Judge, 92 Mich. 285; Overmire v. Haworth, 48 Minn. 372, 31 Am. St. Rep. 660; Pendleton v. Perkins, 49 Mo. 565; Merchants' Nat. Bank v. Paine, 13 R. I. 592. In Illinois, property of the nonresident in the state must be attached and a lien thereon thus created. Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 268; Dewey v. Eckert, 62 Ill. 218. In Alabama, a creditor's bill cannot be maintained on the ground that the debtor resides in another state. Smith v. Moore, 35 Ala. 76.

The insolvency of a judgment debtor, by the preponderance of authority, renders issuance of execution and a return thereof unnecessary as a condition precedent to the filing of a creditors' bill. The Halladay Case, 27 F. 830; Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440; O'Brien v. Stambach, 101 Iowa, 40, 63 Am. St. Rep. 368; Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438; Whitehouse v. Point Defiance, etc., R. Co., 9 Wash. 558; Case v. Beauregard, 101 U. S. 688, 25 Law. Ed. 1004. The contrary is held in New York. Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Adsit v. Butler, 87 N. Y. 585; McElwain v. Willis, 9 Wend. [N. Y.] 548. As to whether or not insolvency renders reduction of the claim to judgment necessary as a preliminary, the authorities are in conflict. That such reduction to judgment is necessary: Austin v. Bruner, 169 Ill. 178; Clark v. Raymond, 84 Iowa, 251; Adee v. Bigler, 81 N. Y. 349; Ginn v. Brown, 14 R. I. 524; McKeldin v. Gouldy, 91 Tenn. 677. That insolvency renders obtaining of judgment unnecessary: Austin v. Nichols, 23 S. C. 393; Alabama Iron, etc., Co. v. McKeever, 112 Ala. 134; Albany, etc., Iron Co. v. Ga. Agri, Works, 76 Ga. 169; Earle v. Grove, 92 Mich. 285.

It is held by a majority of courts that the death of the debtor enables the creditor to proceed in equity without exhausting legal remedies. Kennedy v. Creswell, 101 U. S. 641, 25 Law. Ed. 1075; Merchants' Nat. Bank v. McGee, 108 Ala. 304; Barber v. Peary, 31 Ark. 392; Bay v. Cook, 31 Ill. 336; Grosvenor v. Austin, 6 Ohio, 108, 25 Am. Dec. 743. For contrary doctrine, see Lichtenberg v. Herdtfelder, 67 How. Pr. [N. Y.] 196; Adsit v. Butler, 87 N. Y. 585; Estes v. Wilcox, 67 N. Y. 264.—For discussion of creditors' bills in general, see note to Ladd v. Judson [174 Ill. 344] in 66 Am. St. Rep. 271.

36. Suit to set aside conveyance tending to defeat collection of judgment. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

37. Virginia Passenger & Power Co. v. Fisher [Va.] 51 S. E. 198.

38. Such lien creditor may maintain suit to subject property without alleging a return of nulla bona, or insolvency of the debtor, where the complaint alleges that property was bought with the debtor's money and is held in trust for him, and that the purpose of the transaction was to hinder and delay the plaintiff in enforcing his judgment. Stephens v. Parvin [Colo.] 78 P. 688.

39. Under Civ. Code 1895, § 4937, such a bill is not demurrable. Booth & Co. v. Mohr & Sons [Ga.] 50 S. E. 173.

40. Prayer for injunction and receiver should be denied where plaintiffs may be adequately protected by common-law attachment. Booth & Co. v. Mohr & Sons [Ga.] 50 S. E. 173.

41. Construing Bankruptcy Act, c. 541, § 70. Moore, Schafer Shoe Mfg. Co. v. Billings [Or.] 80 P. 422.

42. Moore, Schafer Shoe Mfg. Co. v. Billings [Or.] 80 P. 422.

43. See 3 C. L. 978.

44. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434.

45. Code 1899, c. 74, § 2. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434.

46. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434.

plaintiff cannot dismiss except as to himself.[47] If he dismisses at rules, other creditors may have the case reinstated at the next term, though the summons has not been issued or the bill filed.[48] Failure of a judgment creditor to present and prove his lien in a creditors' suit against certain lands of the debtor does not bar him from participating in a second suit in which other lands are subjected to the satisfaction of debts.[49]

Intervention.—Owing to the peculiar nature of a creditors' suit, a petition to intervene may be filed without a previous order of the court, and when filed becomes a part of the pleadings and the record.[50] Where the allegations of the bill do not entitle plaintiffs to the extraordinary relief sought, other creditors cannot intervene and obtain judgment against the common debtor.[51] One who has parted with all his interest in the litigation cannot intervene.[52] A creditors' suit in a Federal court for the administration of assets of an insolvent corporation is constructive notice of lis pendens as to all property of the corporation in the district and division,[53] and one who becomes a creditor, taking a mortgage on corporation property, pending such suit, though he may intervene in the suit, his legal remedy in the state court having been enjoined, may share only in such assets as remain after claims existing at the time of filing the bill have been paid.[54] Where a receiver of a corporation has been appointed in a creditors' suit, one creditor cannot maintain a bill in intervention to subject the claim of another creditor to the satisfaction of a contract debt owing by such creditor to the intervener.[55]

Limitations.—In Virginia a suit may be brought in equity to enforce a judgment lien so long as the right to issue execution or bring scire facias or action thereon exists.[56] The limitation statute governing actions for the recovery of land does not apply to suits to enforce judgment liens.[57] A suit based on a fraudulent assignment must, in Nebraska, be brought within four years of the discovery of the fraud, or such facts and circumstances as would indicate fraud if investigated.[58]

The decree.—The court may award a personal judgment in lieu of setting aside a transfer where the facts establish such personal liability.[59] In a suit to set aside transfers of personalty, it is not necessary to set aside all transfers found to be fraudulent, where only one creditor is seeking relief; the setting aside of one transaction to satisfy his claim is proper.[60] Where, in a suit to set aside a transfer, no accounting is necessary, a money judgment is proper.[61]

§ 2. *Property which may be reached.*[62]—A judgment creditor, with the aid of equity, may reach any property or interest of his debtor,[63] not exempt from exe-

47. If dismissed as to him, other creditors may prosecute as substituted plaintiffs. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434.

48. Honesdale Shoe Co. v. Montgomery [W. Va.] 49 S. E. 434.

49. Gilbert Bros. & Co. v. Lawrence Bros. [W. Va.] 49 S. E. 155.

50. Hence, on appeal, error in refusing to allow intervention may be specified as a part of the record. Brannan v. Baxter & Co. [Ga.] 50 S. E. 45.

51. Dismissal of main bill and petition in intervention where main bill did not show fraud or lack of adequate legal remedy. Brannan v. Baxter & Co. [Ga.] 50 S. E. 45.

52. Intervenor assigned claim to a third person. Brannan v. Baxter & Co. [Ga.] 50 S. E. 45.

53, 54. Atlas R. Supply Co. v. Lake & River R. Co., 134 F. 503.

55. Such enforcement of a debt by a creditor of a creditor is not consistent with the objects of a receivership of the corporation. Williston Seminary v. Easthampton Spinning Co., 186 Mass. 484, 72 N. E. 67.

56. Code 1887, § 3573. Flanary v. Kane, 102 Va. 547, 46 S. E. 312.

57. Code 1887, § 2915. Flanary v. Kane, 102 Va. 547, 46 S. E. 312.

58. Weckerly v. Taylor [Neb.] 103 N. W. 1065.

59. Where debtor turned over money to mother and she mingled it with daughter's funds, a personal judgment against the mother was proper, in lieu of setting aside the transfer. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

60. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

61. Walheimer v. Truslow, 94 N. Y. S. 137. See Fraudulent Conveyances, 3 C. L. 1535.

62. See 3 C. L. 977.

63. Evidence held to show property belonged to debtor and that he did not hold it in trust. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832. Refusal to permit amendment of bill harmless where it was not proved

cution, which with such aid the debtor himself may reach.[64] Thus property to which the debtor has the equitable and beneficial title may be reached.[65] A wife's inchoate right of dower cannot be reached.[66] Since, under a policy of indemnity insuring an employer against loss or damage by reason of liability for injuries to servants, the amount of the insurance does not become available until the employer has given proper notice of an injury and paid the loss, the injured employe who has obtained a judgment against his employer cannot, before such notice and payment by the employer, subject such amount to payment of his judgment in a suit against the insurer.[67] Statutes providing for suits in equity to reach property of a debtor do not apply to property which can be attached at law.[68]

§ 3. *Pleading and procedure.*[69]—An assignment of a chose in action is not presumed fraudulent as to a subsequent creditor, and a pleading must set out circumstances from which fraud may be reasonably inferred.[70] Where a creditors' bill brought by a surety of a debtor who had paid the debt alleges facts entitling plaintiff to be subrogated, under the prayer for general relief, to the rights of the judgment creditor, the bill is not demurrable because not asking for this relief specifically.[71] In a suit between heirs for partition, a cross-bill seeking sale of another parcel of land to satisfy debts of the owner raises issues not germane to the original bill and cannot be maintained.[72] An answer setting up the fact that supplementary proceedings had been instituted, and setting out the report, order and decree in such proceedings, but which fails to show a sale or satisfaction of the debt with the proceeds, may be stricken.[73] In a suit by a judgment creditor against a debtor and a lien creditor of the debtor to subject incumbered property to the payment of a judgment held by the plaintiff, the debtor is a necessary party.[74] A prayer for relief against the lien creditor, he being a nonresident, incidental to the main purpose of the suit, does not make a separable controversy between plaintiff and such lien creditor, so as to make the proceeding removable from the state to the Federal court.[75]

CRIMINAL CONVERSION, see latest topical index.

CRIMINAL LAW.

This topic includes only the general rules of the substantive law of crimes;

that defendant had property, legal or equitable, in hand or due from others, or that he had title to property which he withheld from the record. Wilson v. Henry [Mich.] 100 N. W. 890. Evidence held to show that defendants were not indebted to judgment debtors, but had fully performed their contracts for the delivery of merchandise. Chicago Daily News Co. v. Siegel, 212 Ill. 617, 72 N. E. 810.

64. Weckerly v. Taylor [Neb.] 103 N. W. 1065.

65. Weckerly v. Taylor [Neb.] 103 N. W. 1065. Where the assets of an insolvent corporation are sold by its president, with the sanction of stockholders, and it is known that the price is insufficient to satisfy all claims, creditors not paid cannot maintain a bill for the distribution of such proceeds to all creditors on the theory that the president became a trustee of the proceeds for all. Shipman Co. v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 281, 104 N. W. 24.

66. Sherman v. Hayward, 98 App. Div. 254, 90 N. Y. S. 481.

67. Finley v. United States Casualty Co. [Tenn.] 83 S. W. 2.

68. Rev. Laws, c. 159, § 3, cl. 7. Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981.

69. See 3 C. L. 977.

70. Weckerly v. Taylor [Neb.] 103 N. W. 1065.

71. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

72. Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453.

73. Stephens v. Parvin [Colo.] 78 P. 688.

74, 75. Palmer v. Inman [Ga.] 50 S. E. 86.

criminal procedure[76] and matters peculiar to particular crimes[77] being elsewhere treated.

§ 1. *Elements of crime.*[78]—A crime is any violation of law which the state assumes to punish in its sovereign capacity through judicial proceedings;[79] a public, as distinguished from a mere private wrong.[80] Uniformity is not necessary to the criminal laws enforceable in the various courts established by the authority of the United States.[81]

Sources of the criminal law.[82]—The common law of crimes has been pretty generally abolished in this country.[83] That a penal statute in force for over 40 years has not been applied in a particular manner does not preclude its proper enforcement.[84] Municipalities may be authorized to punish petty offenses.[85] The statute forbidding peonage in any state or territory of the United States was authorized by the 13th amendment.[86] Estoppels are to a limited extent applied in criminal cases.[87]

76. See Arrest and Binding Over, 5 C. L. 264; Indictment and Prosecution, 4 C. L. 1.

77. See title dealing with the crime in question as Homicide, 3 C. L. 1643.

78. See 3 C. L. 979.

79. See Clark & M. Crimes, § 1. The word "crime" as used in the Federal and Kentucky constitutions includes all offenses in violation of the penal laws. Stone v. Paducah [Ky.] 86 S. W. 531. To constitute an offense under the statutes of Iowa, it is necessary that the act be one which falls within the definition of either a felony or a misdemeanor. Code, §§ 5093, 5094. State v. Dailey [Iowa] 103 N. W. 1008.

80. Clark & M. Crimes, § 2. A state cannot under the guise of a statute creating a criminal offense imprison one who has failed to pay a debt. (Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977), but if a fraud is perpetuated, the state may denounce such fraud as a crime and imprison the offender (Id.). No criminal action can he predicated upon a violation of a stock law which provides a civil remedy against all violators. Acts 1903, p. 1342, c. 499. Murphy v. State [Tenn.] 86 S. W. 711.

81. Whether within or without the restrictions of the constitution. Tyner v. United States, 23 App. D. C. 324.

82. See 3 C. L. 979.

83. There are no common-law offenses against the United States (Tyner v. United States, 23 App. D. C. 324), but all crimes and criminal procedure known to the common law are still in force in the District of Columbia except as otherwise provided by statute (Hill v. United States, 22 App. D. C. 395).

84. State v. Nease [Or.] 80 P. 897.

85. Whatever the legislature may punish as a misdemeanor, it may authorize a municipal corporation to punish as a misdemeanor. Denninger v. Recorder's Court of Pomona, 145 Cal. 629, 79 P. 360. Where an act is an offense both against the state and against the municipal government, the latter may be constitutionally authorized to punish it, although it be also an offense against the state (Bowles v. District of Columbia, 22 App. D. C. 321), and the state constitution declares that the legislature shall pass laws for the suppression of the vice [Act No. 136, p. 224 of 1898] (Town of Ruston v. Perkins [La.] 38 So. 583). Authority to enact ordinances punishing cruelty to animals may be conferred on municipal corporations in general terms (Porter v. Vinzant [Fla.] 38 So. 607), but in the absence of express legislative authority, a municipal court has no power to impose a fine for violation of an ordinance and enforce its collection by labor upon the public streets (Williams v. Sewell, 121 Ga. 579, 49 S. E. 732).

86. U. S. Rev. St. §§ 1990, 5526. Clyatt v. United States, 25 S. Ct. 429.

87. NOTE. Shall the doctrine of estoppel in pais apply in criminal law? In a recent case in Montana the defendant objected that the indictment under which he was arraigned had not been found by a grand jury legally constituted, since by the misfeasance of the defendant as county commissioner, the jury roll from which the grand jury had been drawn was wholly irregular. The court held that the defendant was estopped to deny the validity of the list and so set up his own wrongdoing as a defense. State v. Second Judicial Dist. Court [Mont.] 78 P. 769. The doctrine of estoppel in pais is equitable in its origin, though for a long time it has been as fully available in law as in equity. Freeman v. Cooke, 2 Exch. 653. An estoppel is defined as an agency of the law by which evidence to controvert the truth of certain admissions is excluded. Biglow, Estoppel, lix. It is therefore a branch of the law of evidence, and there would appear to be no inherent difficulty in its application to the criminal law. Estoppel in pais is to be distinguished at the outset from that estoppel most familiar to the criminal law, and which arises from the nature of an act committed, as where the act is of such a nature that the defendant is estopped to deny the intent to commit it. In such cases the presumption of an intent is so strong as to become in law conclusive. Such estoppel is therefore only that which denies the right to rebut a conclusive presumption. In some jurisdictions, however, an estoppel is allowed to be found in two classes of cases where no conclusive presumptions arise from the acts themselves. One is where, on an indictment for embezzlement of the property of his principal, the agent is estopped to

Criminal intent.[88]—The necessity of criminal intent is ordinarily maintained in statutory as well as common-law offenses;[89] but the legislature may dispense with it,[90] and inasmuch as every sane person is presumed to intend the natural consequences of his acts,[91] when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense.[92]

deny the agency he assumed and under color of which he received the property. Ex parte Hedley, 31 Cal. 109. The second, where one is estopped to deny the validity of a signature which he did not at once repudiate, when the signer of his name is on trial for the forgery. Reg. v. Smith, 3 Fost. & F. 504. The admissions, however, forming the ground for estoppel in pais, are only available to the party to whom they were made and who must be a party to the action. It is the fact of an otherwise possible prejudice to the other party which makes the admissions conclusive as to their truth. In both the classes of cases above the state was a party to the action, but in neither had the representations been made to it. An attempt has been made to justify the first class on the broad ground that one should not be allowed to take advantage of his own wrong (2 Bishop Crim. Law § 364), but the difficulty seems to be insuperable that, save for this technicality, the crime charged had not been committed; and the justification attempted is contrary to the principle, that, in criminal actions, the right of the state is to be strictly confined; and, to the tendency of the law to enlarge, in criminal actions, the rights of the defendant. In the principal case, however, there would seem to have existed no objection to an application of the doctrine. The representations of the defendant had been made directly to the state, and the state had acted on them to its disadvantage, to allow the defendant to deny the truth of his representations would have prejudiced the interest of a party to the action, and as against him therefore their truth should have been conclusive.—5 Columbia L. R. 318. There are several other cases holding that one who collects money for another on an assumption of being an officer, agent or employe of that other, cannot, on being prosecuted for its embezzlement, deny his agency. These cases do not all use the expression "estopped to deny his agency," but they are all clearly referable to the principle. See State v. Spaulding, 24 Kan. 1 (leading case); People v. Treadwell, 69 Cal. 235 (same); Ex parte Record, 11 Nev. 287; People v. Carter, 122 Mich. 668 (embezzlement from corporation de facto); People v. Sanders [Mich.] 102 N. W. 959 (deputy county treasurer de facto cannot on prosecution for embezzlement raise question of treasurer's authority to appoint a deputy); Bartley v. State, 53 Neb. 310 (conflicts with); Moore v. State, 53 Neb. 831; People v. Hawkins, 106 Mich. 477 (agent of foreign corporation not authorized to do business in state); State v. Pohlmeyer, 59 Ohio 491, citing cases; State v. Findley, 101 Mo. 223 (officer de facto cannot object that he was not an officer de jure); Fortenberry v. State, 56 Miss. 286 (same); People v. Cobler, 108 Cal. 538 (same); People v. Royce, 106 Cal. 187 (one who receives a draft and cashes it is estopped to deny that it was a valid draft); People v. Galagher, 100 Cal. 471 (if an agent obtains the money of his principal in the capacity of agent in a manner not authorized, it is received "in the course of his employment.") There are English cases supporting the theory of estoppel. Reg. v. Orman, 36 Eng. Law & Eq. 611; Rex v. Barrett, 6 Car. & P. 124; Rex v. Rees, 6 Car. & P. 606; Rex v. Beacall, 1 Car. & P. 454, 457. Closely allied is the case of the larceny or embezzlement of property kept and used in violation of law. Com. v. Cooper, 130 Mass. 285; Com. v. Smith, 129 Mass. 104, and the cases holding that perjury may be committed before a de facto judge. 1 Bishop, § 464 (6). State v. Williams, 61 Kan. 739; Izer v. State, 77 Md. 110; Greene v. People, 182 Ill. 278. There is a case that holds that where a bailee sells the property to a stranger, it is not larceny for him to steal it from the purchaser for the purpose of restoring it to the owner. Gooch v. State, 60 Ark. 5. In State v. Knowles [Mo. Sup.] 83 S. W. 1083, a prosecution for embezzlement, it was said that an officer of a benevolent society is estopped to question regulations under which he has received the money of the society. On principle it would seem that where an act depends for its criminality on the existence of a property right, that right may be established or proved in any manner recognized by the law applicable to civil cases, by an estoppel in pais as well as in any other manner.

88. See 3 C. L. 980.

89. People v. Jewell [Mich.] 101 N. W. 835. It is essential to a conviction for larceny that the property was taken "animo furandi." Bird v. State [Fla.] 37 So. 525.

90. People v. Jewell [Mich.] 101 N. W. 835.

91. Chelsey v. State, 121 Ga. 340, 49 S. E. 258. Though such act strike down an unintended victim (Id.), the original malice being transferred from the one against whom it was entertained to him who actually suffered the consequences of the felonious act (Id.). "Willful" has been held to imply an evil intent without justifiable excuse. People v. Jewell [Mich.] 101 N. W. 835.

92. State v. Lentz, 184 Mo. 223, 83 S. W. 970. Malice is an inference of fact and not of law (Andrews v. People [Colo.] 79 P. 1031), which may be drawn from the character of the assault, the want or use of a deadly weapon, and the presence or absence of excusing or palliating facts or circumstances (Brown v. State [Ala.] 38 So. 268). The buying or receiving of property, knowing it to have been stolen, necessarily implies a felonious intent. State v. Levich [Iowa] 104 N. W. 334. Statutes may provide that the means or instrument by which a homicide is committed shall be consid-

Attempts.[93]—To constitute an attempt there must be something more than mere intention or preparation,[94] but where the proofs conclusively showed the completion of a statutory offense, an instruction that the defendant could be found guilty of an attempt is not prejudicial.[95] It was an offense at common law to incite or solicit another to commit a misdemeanor;[96] but the solicitation of a bribe is not an attempt to accept or receive a bribe within the Kansas statutes.[97]

Felonies and misdemeanors.[98]—The measure of punishment and consequences growing out of the conviction and sentence must be looked to in determining the grade of a crime.[99] A felony is an offense for the conviction of which one is liable to be punished with death or imprisonment in the penitentiary,[1] while misdemeanors include only those crimes punishable by a fine or imprisonment in the county jail or both.[2] To solicit the commission of a felony was a misdemeanor at common law.[3] At common law one attainted of felony was liable to civil suits.[4]

§ 2. *Defenses.*[5]—An overpowering necessity may be a defense to a prosecution for a crime,[6] and acts apparently necessary for the defense of one's self, property, or another are justifiable.[7] A mistake of law, though based on an unconstitutional statute, is no defense.[8] Consent of the person injured is immaterial,[9] except as to

ered in judging the intent. Code Cr. Proc. 1895, art. 717. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153. Evidence held to show an intent to appropriate money to one's own use. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217. In a prosecution under a statute providing that all homicide committed in the perpetration of or attempt to perpetuate robbery shall be considered murder, the question of malice is immaterial. Andrews v. People [Colo.] 79 P. 1031.

93. See 3 C. L. 980.

94. State v. Doran, 99 Me. 329, 59 A. 440. There must be some act moving directly toward the commission of the offense after the preparations are made (Id.), which falls short of the thing intended. Attempted larceny. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490.

95. McLoud v. State [Ga.] 50 S. E. 145.

96. State v. Sullivan [Mo. App.] 84 S. W. 105.

97. Gen. St. 1901, § 2284. State v. Bowles [Kan.] 79 P. 726.

98. See 3 C. L. 981.

99. State v. Hicks, 113 La. 845, 37 So. 776; State v. Foster [Mo.] 86 S. W. 245.

1. Rev. St. 1899, § 2393. State v. Foster [Mo.] 86 S. W. 245. Under the Arkansas statute the receiving of the carcass of a stolen hog is not a felony where there was neither allegation nor proof of the value of such carcass. Sand. & H. Dig. § 1700 refers only to live animals. Hutchinson v. State [Ark.] 83 S. W. 331.

2. Rev. St. 1899, § 2395. State v. Foster [Mo.] 86 S. W. 245. A misdemeanor at common law may be described to be such exclusive trespass against good morals or public peace as tends to injure the public, either directly or consequently, but which does not amount to any higher degree of characterized crime. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490. The bribing of a witness is a misdemeanor under the Missouri statutes. Rev. St. 1899, § 2041. State v. Foster [Mo.] 86 S. W. 245. Disorderly conduct is not a misdemeanor unless made so by statute. People v. Keeper of New York Reformatory for Women at Bedford, 176 N. Y. 465, 68 N. E. 884. A violation of the Tennessee stock law is not a misdemeanor for the statute provides a civil remedy against all violators. Acts 1903, p. 1342, c. 499. Murphy v. State [Tenn.] 86 S. W. 711.

3. Soliciting a bribe. State v. Sullivan [Mo. App.] 84 S. W. 105.

4. Godfrey v. Wingert, 110 Ill. App. 563.

5. See 3 C. L. 981.

6. In a prosecution for obstructing a public road, the inability of defendant to remove the obstruction because of back water from a river is a matter of defense, and to be available must be specially pleaded. Commonwealth v. American Telegraph & Telephone Co. [Ky.] 84 S. W. 519.

7. One may use such means as are necessary to protect himself from danger or apparent danger (May v. State, 5 Ohio C. C. (N. S.) 437; O'Neal v. Commonwealth [Ky.] 85 S. W. 745); but before an assailant can claim the right of self-defense, he must abandon his criminal intent and so manifest his good faith as to remove all just apprehension in the mind of the party assailed (State v. Shockley [Utah] 80 P. 865). In considering the question of self-defense, the facts must be considered from defendant's stand point. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153. See, also, such topics as Assault and Battery, 5 C. L. 269; Homicide, 3 C. L. 1643.

8. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. Acts performed upon the faith of a statutory provision cannot be made the basis of a criminal charge because the statute was subsequently declared unconstitutional. Kueney v. Uhl [Iowa] 98 N. W. 602. Whether sanctioned or not by municipal or state law, the holding of another in a state of peonage is illegal. Clyatt v. United States, 197 U. S. 207, 49 Law. Ed. 726.

9. In a prosecution for incest, it is no defense for the accused that he also committed the crime of rape. Staub v. State of Ohio, 5 Ohio C. C. (N. S.) 529.

those crimes which involve a want of consent,[10] and neither condonation by the person injured,[11] nor repentance by the accused,[12] is of defensive effect; nor is it a defense that the person defrauded might by diligence have prevented the commission of the offense.[13] It is no defense to a crime involving acts in official capacity that defendant's authority in respect to such acts was improperly delegated to him by the officer charged by law with their performance.[14]

§ 3. *Capacity to commit crime.*[15]—The weight of authority makes knowledge of right and wrong as to the particular act the test of responsibility,[16] and rejects the theory of "irresistible impulse;"[17] but statutes may prescribe the circumstances under which mental weakness will excuse.[18] The presumptions favor sanity.[19]

Drunkenness is no defense except where a specific intent must be proved, and the drunkenness is sufficient to overcome the accused's capacity to form an intent.[20]

Corporations[21] are indictable for misdemeanors not involving personal violence or the element of malice or actual criminal intent.[22]

10. That one in anticipation of being robbed carried marked money is not such consent as will absolve from criminality one charged with robbery. Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217. See such titles as Rape, 4 C. L. 1231; Robbery, 4 C. L. 1317.

11. It is no defense in forgery that the fraudulent order was paid and the forgery therefore condoned and ratified. Wooldridge v. State [Fla.] 38 So. 3.

12. That one who intentionally embezzles money from his employer subsequently formed the intention of restoring the money and did restore it is not a defense in a prosecution therefor. State v. Lentz, 184 Mo. 223, 83 S. W. 970.

13. In a prosecution for presenting a fraudulent bill against county, it is no defense that the claim was not allowed or paid before conviction, or that the fraud was easily detected. Bounty on wild animals. State v. Adams [Idaho] 79 P. 398. And see False Pretenses and Cheats, 3 C. L. 1419.

14. Lorenz v. United States, 24 App. D. C. 337; Tyner v. United States, 23 App. D. C. 324.

15. See 3 C. L. 982. Evidence and instructions as to insanity, see Indictment and Prosecution, 4 C. L. 1.

16. One who both knows the nature and quality of his actions and that they are wrong is responsible therefor. People v. Silverman [N. Y.] 73 N. E. 980. In Arkansas a plea of insanity at the time of the alleged crime or at the time of conviction may be offered after trial and verdict. Kirby's Dig. § 244. Ince v. State [Ark.] 88 S. W. 818.

17. The doctrine of moral insanity which consists of irresistable impulse coexistent with mental sanity has been declared to have no support either in psychology or law. State v. Lyons, 113 La. 959, 37 So. 890. To render one guilty of a felony he must have been mentally capable of choosing whether to commit it or not and of governing his conduct according to such choice. Id.

18. Pen. Code, § 21. People v. Silverman [N. Y.] 73 N. E. 980.

19. Not conclusive. Hill v. United States, 22 App. D. C. 395.

20. See 3 C. L. 982, n. 45. To be a good defense in crimes involving an intent, drunkenness must be of such character as to render the accused incapable of consciousness that he is committing a crime, incapable of discriminating between right and wrong, and result in a stupification of the reasoning faculty. Brown v. State [Ala.] 38 So. 268. If an accused was so drunk as to be unable to form an intention, he would not be guilty of fraudulently appropriating money (Commonwealth v. McDonald [Mass.] 73 N. E. 852), but if liquor prompted the taking, he would be responsible for his actions, though had he been sober he would have acted otherwise (Id.). Drunkenness will not justify, excuse or mitigate the offense of robbery. State v. Stibbens [Mo.] 87 S. W. 460.

21. See Corporations, 3 C. L. 891.

22. Clark & M. Crimes [2d ed.] 167; Clark & M. Corporations, §§ 246 et seq.

NOTE. Liability of corporations to indictment: Corporations may be indicted and fined for offenses consisting of mere nonfeasance. Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; U. S. v. John Kelso Co., 86 F. 304; Louisville, etc., R. Co. v. Com., 13 Bush [Ky.] 388, 26 Am. Rep. 205; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Godwinsville, etc., Road Co., 49 N. J. Law, 266, 60 Am. Rep. 611; New York & G. L. R. Co. v. State, 50 N. J. Law, 303; 53 N. J. Law, 344; Susquehanna & B. Turnpike Road Co. v. People, 15 Wend. [N. Y.] 267; People v. Albany Corp., 11 Wend. [N. Y.] 539, 27 Am. Dec. 95; Delaware Div. Free Bridge Corp., 2 Gray [Mass.] 58; Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Louisville, etc., R. Co. v. State, 3 Head [Tenn.] 523, 75 Am. Dec. 778; State v. Monongahela River R. Co., 37 W. Va. 108; Com. v. Central Bridge Corp., 12 Cush. [Mass.] 242; Com. v. Proprietors of New Bedford Bridge, 2 Gray [Mass.] 339; State v. Morris Canal & B. Co., 22 N. J. Law, 537, Syracuse, etc., R. Co. v. People, 66 Barb. [N. Y.] 25; Waterford & W. Turnpike v. People, 9 Barb. [N. Y.] 161; White's Creek Turnpike Co. v. State, 16 Lea [Tenn.] 24; Nashville, etc., Turnpike Co. v. State, 96 Tenn. 249; State v. Concord R. Co., 59 N. H. 85; Texas & St. Louis R. Co. v. State, 41 Ark. 488; Memphis, etc., R. Co. v. State, 87 Tenn. 746;

§ 4. *Parties in crimes.*[23]—One who actually commits a crime is a principal in the first degree,[24] while one who is present, either actually or constructively, aiding and abetting in its commission, is a principal in the second degree.[25] To be an accomplice there must be some complicity or guilty acting together with the principal,[26] for mere knowledge or belief that an offense was to be or had been committed and the concealment of such fact does not render one an accomplice.[27] An accessory before the fact may, under modern statutes, be properly tried and convicted, though the principal is neither in custody nor on bail.[28] Each conspirator is liable for the acts of all,[29] and a man may be liable for the acts of his partner [30] or agent.[31]

Pittsburgh, etc., R. Co. v. Com., 101 Pa. 192; Nashville, etc., Turnpike Co. v. State, 96 Tenn. 249. Likewise misfeasance or malfeasance. Cincinnati R. Co. v. Com., 80 Ky. 137; Northern Cent. R. Co. v. Com., 90 Pa. 300; Reg. v. Great North of England R. Co., 9 Q. B. 315; State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 A. 680; Com. v. Proprietors of New Bedford Bridge, 2 Gray [Mass.] 339, Beale's Cas. 277; Palatka, etc., R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Atchison, 3 Lea [Tenn.] 729, 31 Am. Rep. 663; State v. Baltimore & O. R. Co., 15 W. Va. 362, 26 Am. Rep. 803; Com. v. Pulaski County Agr. & M. Ass'n, 92 Ky. 197, 17 S. W. 442; U. S. v. John Kelso Co., 86 F. 304, Mikell's Cas. 328; State v. Western N. C. R. Co., 95 N. C. 602; State v. Morris & E. R. Co., 23 N. J. Law, 360; State v. Vermont Cent. R. Co., 27 Vt. 103; Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; Clark & M. Priv. Corp. 662, and cases cited. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Northern Cent. R. Co. v. Com., 90 Pa. 300; Rex v. Medley, 6 Car. & P. 292. See, also, State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Sullivan County Agr. Soc., 14 Ind. App. 369, 42 N. E. 963; Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 32 N. W. 275, 60 Am. Rep. 786; State v. Security Bank of Clark, 2 S. D. 538, 51 N. W. 337; State v. Atchison, 3 Lea [Tenn.] 729, 31 Am. Rep. 663. And see Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803; Standard Oil Co. v. Com., 107 Ky. 606, 55 S. W. 8; U. S. v. Baltimore & O. R. Co., 7 Am. Law Reg. (N. S.) 757, Fed. Cas. No. 14,509; U. S. v. John Kelso Co., 86 F. 304, Mikell's Cas. 328; State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331. It is doubtful if a corporation can be responsible for a crime involving personal violence or evil intent. Com. v. Proprietors of New Bedford Bridge, 2 Gray [Mass.] 239; Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; Delaware Div. Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Car v. Bank of U. S. 1 Ohio, 36; Com. v. Punxsutawney St. Pass. R. Co., 24 Pa. Co. Ct. R. 25; Reg. v Great, etc., R. Co., 9 Q. B. 315. The tendency of late cases is to hold them liable. State v. Passaic County Ag. Soc., 54 N. J. Law, 260; State v. Atchison, 3 Lea [Tenn.] 729, 31 Am. Rep. 663; Telegram Newspaper Co. v. Com., 172 Mass. 274; 1 Whart. Cr. Law, § 87; Commonwealth v. Pulaski County, etc., Ass'n, 92 Ky. 197; State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803. A corporation cannot be liable for perjury, treason, or felony Com. v. Pulaski County, etc., Ass'n, 92 Ky. 197; U. S. v. John Kelso Co., 86 F. 304; Com. v. Proprietors of New Bedford Bridge, 2 Gray [Mass.] 339; Reg. v. Great North of England R. Co., 9 Q. B. 315; Delaware Div. Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. Adapted from Clark & M. Crimes [2d Ed.] pp. 167,-172, and Clark & M. Corp. pp. 648-657.

23. See 3 C. L. 982.

24. Clark & M. Crimes, § 166. Bodily presence on the ground when a robbery by assault is committed is essential to make the participants principals. Bollen v. State [Tex. Cr. App.] 86 S. W. 1025.

25. Clark & M. Crimes, § 170. Evidence held to sustain a conviction as principals in the second degree. Lofton v. State, 121 Ga. 172, 48 S. E. 908. All who aid and abet in the crime of murder are principals. Tuttle v. People [Colo.] 79 P. 1035. One who controls the motive power of an automobile may be convicted under a statute forbidding one to "ride or drive" at an excessive speed. Commonwealth v. Crowninshield, 187 Mass. 221, 72 N. E. 963.

26. Mahaney v. State [Tex. Cr. App.] 88 S. W. 223; Martin v. State [Tex. Cr. App.] 83 S. W. 390. Girl 14 years of age under influence of father is not an accomplice in the crime of incest. Straub v. State of Ohio, 5 Ohio C. C. (N. S.) 529. That one offers to pay a contemplated fine of another about to commit an assault, such offer being unknown to the principal, does not constitute the former an accomplice. Mahaney v. State [Tex. Cr. App.] 88 S. W. 223.

27. Martin v. State [Tex. Cr. App.] 83 S. W. 390.

28. Ky. St. 1903, § 1128. Begley v. Commonwealth, 26 Ky. L. R. 598, 82 S. W. 285.

29. Where the objects of an association are illegal and against public policy, the individual members thereof are liable for the combined acts of all. Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

30. That defendant was but one member of a partnership who sold liquors without payment of the tax thereon is no defense. Scott v. State [Tex. Cr. App.] 82 S. W. 656. See Robinson v. State, 38 Ark. 641; Waller v. State, 38 Ark. 656; Whitton v. State, 37 Miss. 379.

31. In a prosecution for knowingly allowing a minor to play billiards at one's

§ 5. *Former adjudication and second jeopardy.*[32]—American constitutions provide that no person shall be twice placed in jeopardy of life or liberty for the same offense.[33] Where one has been placed on trial on a valid indictment or information [34] before a court of competent jurisdiction,[35] has been arraigned, and has

place, it is a good defense that in the absence of defendant, his manager, in spite of instructions to the contrary, allowed such minor to play. State v. Meadows, 106 Mo. App. 604, 81 S. W. 463.

NOTE. Criminal liability of principal for agent's acts: As a general rule the principal is liable for the acts of his agent only where he has expressly or impliedly authorized them or has in some manner participated in or assented to them. Somerset v. Hart, 12 Q. B. Div. 360; Rex. v. Huggins, 2 Ld. Raym. 1574; Reg. v. Holbrook, 3 Q. B. Div. 60; Hardcastle v. Bielby, 1 Q. B. 709; U. S. v. Birch, 1 Cranch. C. C. 571, Fed. Cas. No. 14,595; U. S. v Beaty, Hempst. 487, Fed. Cas. No. 14,555; Patterson v. State, 21 Ala. 571; Seibert v. State, 40 Ala. 60; Nall v. State, 34 Ala. 262; Kinnebrew v. State, 80 Ga. 232; Hipp v. State, 5 Blackf. [Ind.] 149, 33 Am. Dec. 463; Com. v. Nichols, 10 Metc. [Mass.] 259, 43 Am. Dec. 432; People v. Parks, 49 Mich. 333; Anderson v. State, 22 Ohio St. 305; Com. v. Johnston, 2 Pa. Super. Ct. 317; Mitchell v. Mims, 8 Tex. 6; State v. Bacon, 40 Vt. 456; Com. v. Lewis, 4 Leigh [Va.] 664; Com. v. Morgan, 107 Mass. 199; Rex. v. Almon, 5 Burrow, 2686; Com. v. Stevens, 155 Mass. 291; Hately v. State, 15 Ga. 346; Stevens v. People, 67 Ill. 587; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Webster v. State, 110 Tenn. 491, 75 S. W. 1020; Atkins v. State, 95 Tenn. 474, 32 S. W. 391; Com. v. Gillespie, 7 Serg. & R. [Pa.] 469, 10 Am. Dec. 475; State v. Mueller, 38 Minn. 497, 38 N. W. 691; Britain v. State, 3 Humph. [Tenn.] 203; State v. Wiggin, 20 N. H. 449. For unauthorized and expressly prohibited acts there is no liability. Somerset v. Hart, 12 Q. B. Div. 360; Barnes v. State, 19 Conn. 398; Hipp v. State, 5 Blackf. [Ind.] 149, 33 Am. Dec. 463; Com. v. Stevens, 153 Mass. 421, 25 Am. St. Rep. 647, 11 L. R. A. 357; Com. v. Wachendorf, 141 Mass. 270; People v. Parks, 49 Mich. 333; Com. v. Junkin, 170 Pa. 195; State v. Smith, 10 R. I. 258; Rex. v. Huggins, 2 Ld. Raym. 1574; Hardcastle v. Bielby, 1 Q. B. 709; U. S. v. Beaty, Hempst. 487, Fed. Cas. No. 14,555; State v. Bacon, 40 Vt. 456; Com. v. Nichols, 10 Met. [Mass.] 29, 43 Am. Dec. 432; Com. v. Briant, 142 Mass. 463; Com. v. Stevens, 155 Mass. 291; State v. Dawson, 2 Bay [S. C.] 360; State v. Smith, 10 R. I. 258; Mitchell v. Mims, 8 Tex. 6; Nall v. State, 34 Ala. 262; Com. v. Lewis, 4 Leigh. [Va.] 664; Com. v. Putnam, 4 Gray [Mass.] 16; Com. v. Joslin, 158 Mass. 482, 21 L. R. A. 449; Com. v. Hayes, 145 Mass. 289; Lauer v. State, 24 Ind. 131; Hanson v. State, 43 Ind. 550; O'Leary v. State, 44 Ind. 91; Thompson v. State, 45 Ind. 495; Rosenbaum v. State, 24 Ind. App. 510; State v. Baker, 71 Mo. 475; State v. Heckler, 81 Mo. 417; State v. Shortell, 93 Mo. 123; State v. McCance, 110 Mo. 398; Anderson v. State, 22 Ohio St. 305; Com. v. Johnston, 2 Pa. Super. Ct. 317; Ellison v. Com., 24 Ky. L. R. 657; State v. Wentworth, 65 Me. 234; State v. Hayes, 67 Iowa, 27; State v. Gaiocchio, 9 Tex. App. 387; Pennybaker v. State, 2 Blackf. [Ind.] 484. But the prohibition must have been in good faith, and not merely colorable. Com. v. Nichols, 10 Met. [Mass.] 259, 43 Am. Dec. 432; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; Anderson v. State, 22 Ohio St. 305; Com. v. Johnston, 2 Pa. Super. Ct. 317; Com. v. Morgan, 107 Mass. 199; Reg. v. Holbrook, 3 Q. B. Div. 60; Rex v. Dixon, 3 Maule & S. 11, 4 Camp. 12; Redgate v. Haynes, 1 Q. B. Div. 89. A subsequent ratification will not make the principal responsible for his agent's unauthorized act. Morse v. State, 6 Conn. 9; Reg. v. Woodward, 9 Cox, C. C. 95. Statutes may render a principal liable for the unauthorized acts of his agent. Redgate v. Haynes, 1 Q. B. Div. 89; Rex v. Dixon, 4 Camp. 12, 3 Maule & S. 11; Brown v. Foot, 66 Law T. (N. S.) 649; Attorney-General v. Siddon, 1 Cromp. & J. 220; Police Com'rs v. Cartman, 1 Q. B. 655; State v. Baltimore & S. Steam Co., 13 Md. 181; Com. v. Kelley, 140 Mass. 441; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270; State v. Kettelle, 110 N. C. 560, 28 Am. St. Rep. 703, 15 L. R. A. 691; State v. McCance, 110 Mo. 398; People v. Waldvogel, 49 Mich. 337; People v. Blake, 52 Mich. 566; Banks v. Sullivan, 78 Ill. App. 298; Waller v. State, 38 Ark. 656; Edgar v. State, 45 Ark. 356; Mogler v. State, 47 Ark. 110; Loeb v. State, 75 Ga. 258; Snider v. State, 81 Ga. 753, 12 Am. St. Rep. 350; Noecker v. People, 91 Ill. 494; McCutcheon v. People, 69 Ill. 601; Whitton v. State, 37 Miss. 379; Riley v. State, 43 Miss. 397; State v. Dow, 21 Vt. 484; State v. Denoon, 31 W. Va. 122; George v. Gobey, 128 Mass. 289; Robinson v. State, 38 Ark. 641; Carroll v. State, 63 Md. 551; Lehman v. D. C., 19 App. D. C. 217; Snider v. State, 81 Ga. 753, 12 Am. St. Rep. 350.—Adapted from Clark & Skyles, Agency, pp. 1138 et seq., and Clark & M. Crimes [2d ed.] pp. 260 et seq.

32. See 3 C. L. 983.

33. Civ. Code 1895, § 5705. Save on his or her own motion for a new trial after conviction or in case of a mistrial. Lock v. State [Ga.] 50 S. E. 932.

34. People v. Hill [Cal.] 79 P. 845; State v. Foley [La.] 38 So. 402. Ball. Ann. Codes St., § 6532. State v. Riley, 36 Wash. 441, 78 P. 1001.

35. People v. Hill [Cal.] 79 P. 845. Jurisdiction is essential. Huffman v. State, 84 Miss. 479, 36 So. 395. Trial by a justice of the peace not having jurisdiction of the crime charged. Gibson v. State [Tex. Cr. App.] 83 S. W. 1119. Discharge by a mere examining magistrate. State v. Munroe [R. I.] 57 A. 1057. So also where a justice has jurisdiction to either try an accused person or examine him for binding over, and the latter jurisdiction only is exercised, the judgment cannot be pleaded in bar to a subsequent indictment for the same offense. Id.

Note: An acquittal so erroneously produced that it was clearly a loss of jurisdiction is no bar to a new trial. People v.

pleaded, and the jury has been impaneled and sworn, he is in jeopardy.[36] If the prosecution has proceeded so far as to place the accused in peril of conviction or punishment, there is jeopardy.[37] Jeopardy does not arise where a prosecution is dismissed without trial on defendant's own motion,[38] or the previous conviction is set aside on motion for new trial or in arrest of judgment on motion of the accused,[39] or a mistrial results from moral or physical necessity,[40] or a collusive conviction is procured at defendant's instance;[41] or one guily of a felony is convicted of a misdemeanor;[42] but the discharge of a jury for an erroneously declared mistrial,[43] or for inability to agree, not in accordance with the statute, is a good basis for the plea.[44] One again convicted before the expiration of his "good time" earned in prison is not placed in double jeopardy by being required to serve the balance of his first sentence in addition to the second.[45] Identity of offenses is necessary to sustain the plea,[46] and it is not enough that both arose out of the same occurrence and state of facts.[47] An action for violating an ordinance on fire limits is quasi

Stoll, 143 Cal. 689, 77 P. 818. Wherein acquittal was directed immediately after opening statement of the state. The case is likened to People v. Connor, 142 N. Y. 130, which denied the validity of an acquittal by a court having no jurisdiction.—4 Columbia L. R. 590.

36. See 3 C. L. 984, n. 62.

37. State v. Munroe [R. I.] 57 A. 1057.

38. Reese v. State [Ark.] 83 S. W. 918.

39. State v. Foley [La.] 38 So. 402.

40. Oliveros v. State, 120 Ga. 237, 47 S. E. 627.

41. State v. Moore, 136 N. C. 581, 48 S. E. 573.

42. A misdemeanor fine in a justice court will not bar a subsequent prosecution for a felony arising from the same transaction. Gibson v. State [Tex. Cr. App.] 83 S. W. 1119. And a conviction under a municipal ordinance is no bar to a prosecution for a common-law offense. Const., § 168, relates only to statutory crimes. Lucas v. Commonwealth, 26 Ky. L. R. 740, 82 S. W. 440.

43. Oliveros v. State, 120 Ga. 237, 47 S. E. 627.

44. State v. Klauer [Kan.] 78 P. 802.

45. Ex parte Russell, 92 N. Y. S. 68.

46. Huffman v. State, 84 Miss. 479, 36 So. 395; People v. Devlin, 143 Cal. 128, 76 P. 900. When one offense is a necessary element in and constitutes an essential part of another offense and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other. State v. Fink, 186 Mo. 50, 84 S. W. 921. The true test is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Charge of keeping a liquor nuisance on block 11 is distinct from that of keeping a liquor nuisance on block 12. State v. Virgo [N. D.] 103 N. W. 610. The test is whether both the indictments and the investigation that may be had thereunder relate to the same offense. Lock v. State [Ga.] 50 S. E. 932. Acquittal by a court of competent jurisdiction is a bar to a prosecution on a second indictment charging an offense which was or could have been made the subject of investigation under the first indictment. Acquittal of assault with intent to murder barred conviction for riot. Lock v. State [Ga.] 50 S. E. 932. If one may be convicted under the first complaint of the exact offense charged in the second, he is twice in jeopardy. Noland v. People [Colo.] 80 P. 887. A trial upon a charge of committing bigamy in one county is not a bar to a prosecution for the commission of bigamy in another county. Welty v. Ward [Ind.] 73 N. E. 889. Acquittal for grand larceny is not a bar to a prosecution for receiving stolen goods, knowing them to have been stolen. Rev. St. 1899, §§ 1898, 1960. State v. Fink, 186 Mo. 50, 84 S. W. 921. A conviction for keeping liquors for the purpose of unlawful sale is not a bar to a conviction for keeping the same liquors for that purpose on a subsequent day. Tucker v. Moultrie [Ga.] 50 S. E. 61. Indictment charging defendant with having sold, as a merchant, intoxicating liquors in less quantities than five gallons, and in a second count with having violated the dramshop act, acquittal on the second count does not operate as an acquittal on the first. State v. Wills, 106 Mo. App. 196, 80 S. W. 311. A conviction under the Kentucky statute for retailing oil from a wagon without a license is a bar to another prosecution for retailing from it during the same license year. St. 1903, § 4224. Commonwealth v. Standard Oil Co. [Ky.] 87 S. W. 1090. Where the offense as alleged is barred by prescription and the accused is therefore discharged, he cannot thereafter for the purpose of a plea of autre fois convict, identify the offense as being the same as that charged by information subsequently filed, to have been committed at a later date not so barred. State v. Foley [La.] 38 So. 402. The general rule is that an acquittal or conviction of a crime is no bar to a subsequent indictment for the same offense or the same species of offense, where the latter is alleged to have been committed at a different date from that previously tried, unless the offense is continuous. Id. A plea of former conviction is proper where the accusation upon which conviction was had was general in its terms and filed subsequent to the accusation upon which the defendant was last arraigned. McCoy v. State, 121 Ga. 359, 49 S. E. 294.

47. Huffman v. State, 84 Miss. 479, 36 So. 395. An acquittal on a charge of larceny is no bar to a subsequent prosecution for obtaining money under false pretenses based

criminal and a plea of former acquittal is to be determined by the rule applicable to criminal cases and not by the doctrine of res judicata of civil cases.[48] An acquittal in a criminal prosecution is no bar to a subsequent civil action to recover a penalty for the alleged violation of the ordinance.[49] The immunity from second jeopardy is personal and may be waived.[50] Ordinarily former jeopardy must be pleaded before plea to the merits,[51] whereupon accused has the burden of proof,[52] but if on the second trial the record discloses all the facts, they need not be pleaded anew or proved aliunde.[53]

§ 6. *Punishment of crime.*[54]—The provisions of the statute prescribing the penalty are exclusive,[55] but if a specific punishment is not provided for a misdemeanor, it is uniformly understood to be that annexed to common-law misdemeanor, viz: fine and imprisonment.[56] Upon the reversal of judgment the accused may by statute be subjected to a resentence.[57] Where one has been sentenced to hard labor for the county, an unreasonable detention thereafter in the county jail or elsewhere by the sheriff entitles the prisoner to his discharge on habeas corpus.[58] The constitutionality of several statutes authorizing punishment is considered in the note.[59]

Extent of punishment.[60]—The accused has a right to be sentenced under the law in existence at the time of his criminal act.[61] Excessive punishments cannot be

on the same facts. Rev. St. 1899, §§ 1898, 1927. State v. Anderson, 186 Mo. 25, 84 S. W. 946. A conviction for larceny committed during the same transaction and immediately after entering a building is not a bar to a prosecution for burglary in entering the building with intent to commit larceny. People v. Devlin, 143 Cal. 128, 76 P. 900. An acquittal of the crime of bribery is no bar to a subsequent prosecution for perjury, based on false swearing by defendant as a witness in his own behalf, in the bribery case. People v. Albers [Mich.] 100 N. W. 908. See 3 C. L. 985, n. 80. Conviction of an affray bars a prosecution for assault on the same facts. Thompson v. State [Tex. Cr. App.] 85 S. W. 1059. Incest and rape being offenses of the same nature and species, an acquittal of one is a bar to trial for the other. State v. Price [Iowa] 103 N. W. 195. (See an instructive dissenting opinion by Mr. Justice McClain in this case.)

48. Noland v. People [Colo.] 80 P. 887.

49. Town of Canton v. McDaniel [Mo.] 86 S. W. 1092.

50. State v. White [Kan.] 80 P. 589. And such waiver may be express or implied. Id. Failure to interpose an objection to entering upon a second trial constitutes a waiver. Id. The setting aside of a conviction, on motion for new trial or in arrest of judgment, at the instance of the accused, constitutes a waiver by him of any objection he might otherwise make to being tried again. State v. Foley [La.] 38 So. 402.

51. State v. White [Kan.] 80 P. 589; Clement v. State [Tex. Cr. App.] 86 S. W. 1017.

52. Clement v. State [Tex. Cr. App.] 86 S. W. 1017.

53. State v. White [Kan.] 80 P. 589.

54. See 3 C. L. 985.

55. And the courts have no right to impose any penalty save as provided by the legislature. Esquibel v. Chaves [N. M.] 78 P. 505. The sentence to be imposed is a matter of discretion for the trial judge, subject to the statutory limitations. Godwin v. State [Ga.] 51 S. E. 598. If the statute provides fine "or" imprisonment, both cannot be imposed. People v. Sloane, 98 App. Div. 450, 90 N. Y. S. 762.

56. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490.

57. Gen. St. 1901, § 57. State v. Tyree [Kan.] 78 P. 525.

58. Ex parte Bettis [Ala.] 37 So. 640.

59. The capital punishment act of Colorado (Andrews v. People [Colo.] 79 P. 1031); and the North Carolina statute providing for work on the highways as a part of the punishment for misdemeanors and crimes are constitutional [Laws 1887, p. 630, c. 355 § 1] (State v. Young [N. C.] 50 S. E. 213). A statute requiring persons committed for default of surety to keep the peace, to labor to defray the reasonable cost of their board, is a violation of the Federal and Kentucky constitutions prohibiting involuntary servitude except as a punishment for crime. Stone v. Paducah [Ky.] 86 S. W. 531. The North Carolina statute providing for the commitment to the hospital for the insane, of any person acquitted of murder on the ground of insanity, to there remain until released by the general assembly, is unconstitutional (In re Boyett, 136 N. C. 415, 48 S. E. 789); but the Washington statute providing for the commitment of such a person until the further order of the court is valid, and such a sentence is not void for uncertainty [Ball. Ann. Code & St., § 6959] (Ex parte Brown [Wash.] 81 P. 552).

60. See 3 C. L. 986.

61. "Confinement" and "close confinement" equally mean such custody and only such custody as will secure the production of the body of the prisoner on the day appointed for his execution. Rooney v. State of North Dakota, 196 U. S. 319, 49 Law. Ed. 494. The privilege of earning a commutation of sentence under a statute allowing for "good time" is a substantial right of which a convict cannot be deprived (People v. Deyo [N. Y.] 74 N. E. 430; Id., 103 App. Div. 126, 93 N. Y. S. 80; People v. Johnson, 44 Misc.

inflicted,[62] but no sentence is legally excessive which is not greater than the maximum fixed by law,[63] though the reviewing court considers it unnecessarily severe.[64] That a sentence is excessive is not a proper ground of a motion for new trial.[65] In some states the court is empowered to modify excessive sentences.[66] Cases involving indeterminate sentences,[67] and the right to commutation for good behavior,[68] are collected in the note. Attainder and corruption of blood are abolished by state and Federal constitutions.[69]

Place of imprisonment.[70]—A change in the place of confinement, except in the case of persons sentenced to death,[71] may render a statute ex post facto. A sentence to a prison other than that designated by the statute is void.[72]

550, 90 N. Y. S. 134), and an undeterminate sentence law containing no provision for the allowance of "good time" is ex post facto as to one sentenced thereunder for a crime committed while the statutes allowed for "good time" (State v. Tyree [Kan.] 78 P. 525). A statute allowing commutation for good behavior of those confined on definite sentence does not apply to a convict sentenced to serve not less than one year nor more than one year and nine months for an offense committed prior to the passage of the statute. Laws 1903, p. 315, c. 137. People v. Johnson, 44 Misc. 550, 90 N. Y. S. 134. A sentence to imprisonment for a minimum and maximum of five years, imposed after the taking effect of an indeterminate sentence law, for a crime committed before that time, is valid and does not deprive the prisoner of his rights to parole or good time allowances. Comp. Laws, § 11,556; Laws 1903, p. 168. In re Marion [Mich.] 12 Det. Leg. N. 55, 103 N. W. 512.

62. A fine of $300 for a first offense in violation of the Ohio liquor laws, being greater than the statute provides, is excessive. Dalrymple v. State of Ohio, 26 O. C. C. 562, 5 Ohio C. C. (N. S.) 185.

63. Godwin v. State [Ga.] 51 S. E. 598; Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. A fine of $100 for first violation of an ordinance prohibiting the storage or transportation of nitroglycerine within municipal limits is not excessive. Walter v. Bowling Green, 5 Ohio C. C. (N. S.) 516. Imprisonment not exceeding ten years and not less than one year is not excessive or unusual punishment for placing obstructions on a railroad track. Rev. St. 1898, § 4386. State v. Bisping [Wis.] 101 N. W. 359. A sentence of four months' imprisonment in the county jail is not excessive for violently resisting an officer in the service of a search warrant. State v. Moore, 125 Iowa, 749, 101 N. W. 732. In Georgia a sentence of twelve months in the chain gang for carrying concealed weapons is not excessive. Godwin v. State [Ga.] 51 S. E. 598. A sentence of two years in the penitentiary, being the statutory minimum, is not a cruel and unusual punishment for an assault with intent to kill with malice aforethought. State v. Lortz, 186 Mo. 122, 84 S. W. 906. That the sentence imposed upon defendant, though within the limits of the statute, was heavier than that imposed on others convicted at the same term of court, is not a ground for new trial. Seats v. State [Ga.] 50 S. E. 65. A sentence of four years in the penitentiary for receiving stolen property will not be disturbed as excessive where the appellate court is fully satisfied of defendant's guilt and his general lack of moral character. State v. Levich [Iowa] 104 N. W. 334.

64. State v. Van Waters, 36 Wash. 358, 78 P. 897.

65. Hill v. State [Ga.] 50 S. E. 57.

66. Rev. Codes 1899, § 8350. State v. Wisnewski [N. D.] 102 N. W. 883. A sentence of five years for the larceny of property valued at $40 is excessive and unjust. Junod v. State [Neb.] 102 N. W. 462.

67. The New York indeterminate sentence law providing for a minimum term "which shall not be less than one year" has been sustained. Laws 1902, p. 832, c. 282. People v. Deyo [N. Y.] 74 N. E. 430. The Michigan indeterminate sentence law is constitutional. Pub. Acts 1903, p. 168. In re Campbell [Mich.] 101 N. W. 826. The court thereunder is not required to fix the maximum sentence where the statute fixes the maximum term of imprisonment for the crime at a certain number of years. Id. Where commutation for good behavior is allowed on indeterminate sentences, the minimum term must not be greater than the maximum term less full commutation for that period. People v. Dayo, 103 App. Div. 126, 93 N. Y. S. 80.

68. An escaped convict will not be allowed time on his sentence while illegally at large upon unlawful escape. Ex parte Moebus, 137 F. 154. That a period of confinement is shortened for good behavior is a circumstance arising not from natural right but from the grace of the people, and the benefits thereof are subject to such limitations as the law which creates the benefits may impose. Ex parte Russell, 92 N. Y. S. 68. Statutes may take this privilege from persons confined on indeterminate sentences. Laws 1903, c. 137, p. 315. People v. Johnson, 44 Misc. 550, 90 N. Y. S. 134. By a law passed after the offense was committed. Id.; State v. Tyree [Kan.] 78 P. 525; In re Marion [Mich.] 12 Det. Leg. N. 55, 103 N. W. 512. One who has not earned his "good time" cannot complain that it may be withheld from him in the future. People v. Deyo [N. Y.] 74 N. E. 430.

69. A resolution of a state senate expelling a member thereof is not a bill of attainder. French v. State Senate [Cal.] 80 P. 1031.

70. See 3 C. L. 986.

71. Substitution, on conviction of murder, of close confinement after judgment and

Second offenses.[73]—An increase of punishment,[74] or a forfeiture of previous commutation for good behavior,[75] on a second or subsequent conviction, is valid. In order that the sentence may be that provided for a second offense, the prior conviction must be alleged.[76]

§ 7. *Rights in property the subject of crime.*[77]—Statutes may require that on conviction for larceny the property stolen shall be returned to the owner.[78]

CRIMINAL PROCEDURE; CROPS; CROSS BILLS AND COMPLAINTS; CROSSINGS; CRUEL AND UNUSUAL PUNISHMENTS; CRUELTY; CUMULATIVE EVIDENCE; CUMULATIVE PUNISHMENTS; CUMULATIVE VOTES; CURATIVE ACTS, see latest topical index.

CURTESY.

Curtesy attaches to any estate of inheritance of which the wife is seised during coverture.[79] Curtesy becomes initiate on birth of issue capable of inheriting.[80] At common law seisin must have been actual;[81] but the common law attributes have

awaiting execution in the penitentiary, in lieu of confinement in the county jail, is not ex post facto as applied to a person convicted before the passage of the statute on such substitution. N. D. Act March 9, 1903. Rooney v. State of North Dakota, 196 U. S. 319, 49 Law. Ed. 494. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is immaterial. Id.

72. In Pennsylvania, where the penalty is simple imprisonment for whatever period, the place of confinement is the county jail (Commonwealth v. Fetterman, 26 Pa. Super. Ct. 569); but when the penalty is imprisonment at labor by separate or solitary confinement, and the sentence is for one year or more, the place is either the penitentiary or a suitable county prison. (Id.). When the sentence is for less than a year, the place is a suitable county prison, or in the absence of such prison, simple imprisonment in the county jail is to be substituted. Id. Imprisonment in the penitentiary for eleven months is more than equivalent in severity to confinement in the county jail for ten years. Id. A prisoner will be released on habeas corpus where the record does not show that she was convicted of an offense enumerated in the statute under which she was convicted and sentenced to a particular institution. Certain persons guilty of certain offenses could be committed to a particular institution. The record did not show whether the prisoner was convicted for being a prostitute or for disorderly conduct. People v. Keeper of New York State Reformatory, 176 N. Y. 465, 68 N. E. 884. By statute in Rhode Island, one convicted of illegally selling liquor in one county may be imprisoned in the jail of another county. Gen. Laws 1896, § 39, c. 285. Dawley v. Wilcox, 25 R. I. 297, 55 A. 753. One convicted of lascivious cohabitation in Michigan may be sentenced to the branch prison but not to the state prison at Jackson. Ex parte Allen [Mich.] 103 N. W. 209.

73. See 3 C. L. 987.

74. The California statute providing additional punishment upon conviction for a second offense is not a violation of the state or Federal constitutions. Pen. Code, § 666. People v. Coleman, 145 Cal. 609, 79 P. 283. In Michigan where defendant had been twice convicted and was sentenced a third time to imprisonment for twenty years for larceny, it will be presumed that he was given the maximum punishment of five years for the larceny and that the remainder of the sentence was properly imposed under the statute. Comp. Laws 1897, § 11,786. In re Butler [Mich.] 101 N. W. 630.

75. A statute providing that upon second conviction within the committed period of a former sentence, that commutation will be forfeited and added to the second sentence is valid. Ex parte Russell, 92 N. Y. S. 68.

76. The indictment must show that defendant had previously been convicted of an offense of like character to that for which he is on trial. Pen. Code 1895, art. 1014. Kinney v. State [Tex. Cr. App.] 84 S. W. 590. An affidavit charging three separate violations of the liquor law will be treated as an entirety in that it charges a first offense. Dalrymple v. State of Ohio, 5 Ohio C. C. (N. S.) 185.

77. See 3 C. L. 987.

78. Rev. Laws, c. 208, § 39. Commonwealth v. McDonald [Mass.] 73 N. E. 852.

79. Estate held as tenant in common. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142. In Pennsylvania, curtesy attaches to any estate in fee **whether legal or equitable.** Morton's Estate, 24 Pa. Super. Ct. 246.

It is not a fraud on the husband for the wife to take title to lands in her daughter's name, though done to prevent any "dower" rights from attaching in his favor. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

80. Winestine v. Ziglatzke-Marks Co. [Conn.] 59 A. 496. By operation of law the husband becomes seised of a freehold estate, and the interest of the wife is merely a reversionary one. Id.

81. Where an estate descends to a daughter, a married woman, who dies in the life-

been abrogated by statute in most states, and birth of issue and actual seisin is rendered unnecessary.[82] Where married women are given absolute right to manage their separate property, the prospective right to curtesy does not entitle the husband to possession during coverture,[83] and where the right, though vested, cannot be asserted during the life of the wife, a purchase with her funds and title taken in the name of a third person for the purpose of defeating curtesy is not fraudulent as to him.[84] Curtesy may be released by accepting the provisions of a wife's will,[85] or by deed from husband to wife to her sole and separate use,[86] or by a deed of trust of her seperate property joined in by both for her sole and separate use;[87] but not by contract between husband and wife,[88] and the fact that such a contract is entered into does not estop the husband from asserting his right.[89] "Heirs" and "descendents" used in the creation of a separate estate will not bar curtesy except as to children.[90] The estate is merged where the tenant acquires the fee[91] The possession of a tenant by curtesy of property of which his wife was tenant in common is not adverse to her co-tenant.[92]

CUSTOMS AND USAGES.

§ 1. *Definition and elements.*[93]—A usage is general if generally recognized and observed by those engaged in the kind of transactions to which it applies within the region where it is claimed to exist,[94] and it is not essential that it be observed in every individual transacton.[95]

§ 2. *Application to contracts and other dealings.*[96]—Written or oral contracts, especially those relating to trade or mercantile agreements, are presumed to have been made with reference to the known and established customs and usages prevailing in respect to such agreements.[97] Hence proof of such a custom or usage is admissible

time of her mother to whom dower in the premises is subsequently assigned, the husband of the daughter is not entitled to curtesy in the part assigned as dower, even after the termination of the dower estate. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

82. Under Code 1860, art. 45, §§ 1, 2, giving the husband a life estate in her property, real and personal, if she died intestate, he takes curtesy in a remainder which is subject to an existing life estate. Snyder v. Jones, 99 Md. 693, 59 A. 118. Under the laws of descent in New York if a married woman dies intestate without issue, leaving a mother and brother but no father, her realty goes to her parent for life remainder to her brother subject to the curtesy of her husband. Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.

83. King v. Davis, 137 F. 222.

84. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

85. The form or name of the instrument containing consent to the provisions of the will is immaterial. Jack v. Hooker [Kan.] 81 P. 203.

86. Bingham v. Weller [Tenn.] 81 S. W. 843.

87. Deed executed pursuant to an antenuptial agreement. Wood v. Reamer, 26 Ky. L. R. 819, 82 S. W. 572.

88, 89. McCrary v. Biggers [Or.] 81 P. 356.

90. In order to prefer collateral kindred to the exclusion of curtesy, the intention to do so must be clear. Wood v. Reamer, 26 Ky. L. R. 819, 82 S. W. 572.

91. Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.

92. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142.

93. See 3 C. L. 988.

94. Evidence sufficient to show general usage of hardware dealers to carry small quantity of dynamite in stock, where custom was shown to exist in seven counties, but not in the whole state. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383.

95. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383.

96. See 3 C. L. 988.

97. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Well settled custom or usage as to meaning of word "noon" at place where contract of insurance was entered into governs in determining when policy expired, which by its

to explain what is ambiguous or uncertain in the contract,[98] to annex such incidents, not excluded by the words used, as the parties may be presumed to have tacitly adopted,[99] or to supply terms as to which the contract is silent.[1] By where the terms of a contract are full, clear and unambiguous, they cannot be varied or contradicted by proof of custom.[2] Evidence of general usage or custom has little, if any,

terms expired at noon on a certain day. Rochester German Ins. Co. v. Peaslee Gaulbert Co. [Ky.] 87 S. W. 1115. Insurance companies are bound to inform themselves of the usages of the particular business insured, and are presumed to know such usages. Thus, insurance policy construed in connection with established custom of retail hardware dealers to carry small amount of dynamite in stock, held to give insured right to carry it in stock. Traders' Ins. Co. v. Dobbins [Tenn.] 86 S. W. 383. Answer held to contain good averment that contracts were made with reference to recognized general custom, and not to allege a separate oral contract. Sillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

NOTE. Custom and usage as affecting contracts of agency: The general rule stated in the text is well illustrated in the case of agency contracts, as the following, from Clark & Skyles on Agency, § 69, will show: "Proof of the custom and usage in a particular business cannot be sufficient, without anything more, to show that the relation of principal and agent exists, but such proof may be material, when the fact of agency is otherwise proved, or admitted, to show what the contract of agency was, and to show the extent of the agent's authority. When the rights, duties, and liabilities as between an acknowledged agent and his principal are in question, or when the authority of an acknowledged agent to do a particular act or make a particular contract is in question, an established custom or usage in the particular business or place may be proved and taken into consideration, either for the purpose of construing the contract of agency as between the parties; or for the purpose of determining the extent of the agent's authority; for, unless expressly excluded, such a custom or usage enters into a contract of agency, as it does into other contracts, and also enters into the authority of the agent as respects persons dealing with him. Of course, as between the parties themselves, and as against persons with notice, the principal may, by his instructions to the agent, exclude customs and usages, however well established. But such secret instructions cannot be set up as against persons dealing with the agent without notice of them, for they have a right to assume, in the absence of notice to the contrary, that the agent's authority is in accordance with established customs and usages." See, also, §§ 194, 195, 196, 209c, 218, 772 of vol. I. of Clark & S. Agency.

98. Custom may be resorted to to make definite what is uncertain, clear up what is doubtful, or annex incidents. Moore v. U. S., 25 S. Ct. 202. Custom admissible to explain what is doubtful. Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 589, 72 N. E. 250. Uniform trade custom may explain ambiguous or indeterminate terms of contract. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. Evidence of custom in tobacco trade to accept checks in payment for large lots admissible, not to vary, but to interpret, contract. Hughes v. Knott [N. C.] 50 S. E. 586. Evidence of custom or usage of trade in delivering lumber held admissible in action on breach of contract for sale of lumber. Oriental Lumber Co. v. Blades Lumber Co. [Va.] 50 S. E. 270. Parol evidence admissible to show meaning of word "noon," used in insurance policy, was, by well known custom of place where contract was made, 12 o'clock midday standard time and not 12 o'clock sun time. Rochester German Ins. Co. v. Peaslee Gaulbert Co. [Ky.] 87 S. W. 1115. Proof of custom in respect to agreements for sale and delivery of distillery slop for feeding purposes held admissible to show what parties intended by "feeding lots." Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. The existence of a general custom and knowledge thereof by both parties may be proved, when the terms of a contract are in issue, as tending to show the existence and terms of the agreement alleged. Pawnbrokers' custom of selling articles after six months held admissible. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696.

99. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168; Moore v. U. S., 25 S. Ct. 202. A custom, known to both parties may add terms or tacitly implied incidents to those expressed. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

1. Evidence of custom to furnish independent stock train, on demand, when more than 10 cars were to be hauled, admissible when contract for transportation was silent as to manner and time of performance. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Contract for sale of cotton being silent as to mode of payment, evidence of a general custom among cotton dealers in regard to payment for cotton in large lots was admissible. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88.

2. Moore v. U. S., 25 S. Ct. 202. Custom inadmissible to vary or contradict express terms of contract. Torpey v. Murray, 93 Minn. 482, 101 N. W. 609. Proof of a special custom, inconsistent with the express terms of a contract, cannot be made. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607. Custom irrelevant when it tends to vary express terms of contract. Delaware & Hudson Canal Co. v. Mitchell, 113 Ill. App. 429. Requested instruction as to custom in coal trade held properly modified by excluding general custom if a special contract was found to exist. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026. Evidence of custom, local or general inadmissible to contradict terms of contract to ship by express. Cappel v. Weir, 90 N. Y. S. 394. Custom as to notice of fire and waiver of proof of loss inadmissible where

bearing in establishing a different contract which, if made, through mistake was never reduced to writing.[3]

A custom, to be controlling, so as to affect the rights and liabilities of persons arising from their dealings with each other, must be certain and uniform,[4] reasonable, as applied to the facts in issue,[5] and either known to the party sought to be charged thereby,[6] or so general and notorious that knowledge and adoption of it may be presumed.[7] The custom proved or sought to be proved must be applicable to the particular transaction involved.[8]

policy called for specific written statement under oath. Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 587, 72 N. E. 250. Proof of custom of insurance company of attaching copy of application and by-laws to policy cannot be made to prove that this was done in a particular instance. Custer v. Fidelity Mut. Aid Ass'n [Pa.] 60 A. 776. Where letters gave plain instructions to return empty beer kegs, and purchaser agreed to do so, evidence of a custom to return kegs was inadmissible. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43. Custom in San Francisco requiring consignees to designate berths for the discharge of cargoes cannot prevail over terms of contract for shipment to Honolulu, requiring discharge "on the wharf" and "on the wharf as customary," the custom at Honolulu being to discharge cargoes on the wharves. Moore v. U. S., 25 S. Ct. 202. Proof of custom held not to contradict terms of contract. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Where a regulation on a telegraph blank, made a part of the contract, did not expressly provide for prepayment of charges for delivering outside free delivery limits, the parties could contract with reference to a custom whereby messages were delivered outside such limits without prepayment without thereby contravening the terms of their contract. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493.

3. Finding that nothing was left out of contract by mistake held sustained by evidence. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

4. Evidence insufficient to show custom of this character regarding liability of counsel for fees of court. Russell's Ex'x v. Ferguson [Vt.] 60 A. 802. A custom on the part of a street railway company of permitting persons to ride on the bumper of cars cannot be proven by occasional instances. Columbus R. Co. v. Muns, 6 Ohio C. C. (N. S.) 236.

5. Custom of allowing brokers 5 per cent. on sales held unreasonable in a case where the broker performed practically no services. Penland v. Ingle [N. C.] 50 S. E. 850. A custom allowing brokers 5 per cent. commission irrespective of the amount, value, or character of services rendered, is unreasonable and void. Id.

6. Russell's Ex'x v. Ferguson [Vt.] 60 A. 802. A custom of a bank to pay proceeds of drafts drawn to the cashier to persons depositing them is not binding on a drawer of a draft who did not know of such custom. Kuder v. Greene [Ark.] 82 S. W. 836. Local custom of brokers of charging $10 per car on goods shipped them for sale is not binding on a nonresident shipper unless he knew of such custom and consented to it. Bacon Fruit Co. v. Blessing [Ga.] 50 S. E. 139. A party who has no knowledge of a customary meaning attached to "cash sale" of land in a particular locality is not bound by such meaning. Rake v. Townsend [Iowa] 102 N. W. 499. A particular custom as to collecting drafts in order to bind a customer sending a draft for collection must have been actually known to him when he sent it. Bank of Commerce v. Miller, 105 Ill. App. 224. The fact that it was customary for brokers at place of sale to negotiate sales in their own name, not disclosing the principal, and to assume personal liability for the completion of such sales, is insufficient to prove authority to sell in the broker's name, if it is not shown that the principal knew of the custom and contracted with reference to it. Robbins v. Maher [N. D.] 103 N. W. 755. That hotel corporation officers never knew of a single instance where a traveling salesman owned his samples, although their acquaintance was extensive is sufficient evidence that they knew of a general custom to the contrary; hence they were estopped to deny knowledge of such custom, so that their seizure of samples without inquiry as to ownership was not excusable. Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co. [Wash.] 80 P. 563.

7. Evidence insufficient to show notorious custom whereby attorneys in city courts become personally liable for court fees. Russell' Ex'x v. Ferguson [Vt.] 60 A. 802. Custom relied on as part of contract of employment must be shown as so certain, continuous, uniform, well-known, and of such long standing that the parties can be said to have contracted with reference thereto. American Ins. Co. v. France, 111 Ill. App. 310. Particular usages and customs of trade or business must be known by the party to be affected or so notorious and well established that his knowledge will be conclusively presumed. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. Custom must be shown to be uniform, long established, generally acquiesced in, and so well known as to induce belief that parties contracted with reference to it. Strange v. Carrington, Patton & Co., 116 Ill. App. 410.

8. Stock commission custom held not applicable to shipment in issue. In re Taft [C. C. A.] 133 F. 511. Contract required agent to find purchaser of land, but not to sell it; evidence of customary services to be performed by agent to close contract therefore inadmissible. Tarpey v. Murray, 93 Minn. 482, 101 N. W. 609.

CUSTOMS AND USAGES — Con't.

Proof of local customs is frequently admitted in actions based on negligence, as on the issue of contributory negligence in personal injury actions.[9] Proof of an individual custom is incompetent.[10] No custom, general or special, will excuse the want of reasonable diligence in protecting business customers from loss.[11]

A custom cannot vary the terms of, or operate to abrogate or repeal, a general statute;[12] nor will evidence of a local custom, contrary to established principles of law, be received.[13]

9. Local custom of railroad company requiring shippers to repair cars before they would be accepted for shipment is admissible to show that one injured while making repairs was not a trespasser or licensee. Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172. Where fact that railroad crossing gates were frequently left down unnecessarily became material on issue of contributory negligence in personal injury action, proof of such custom was competent, but only as to such instances as to which plaintiff had knowledge. Chicago & Eastern Ill. R. Co. v. Keegan, 112 Ill. App. 338.

10. In personal injury action, house mover could not testify to his own method of taking care of electric wires. Nagle v. Hake [Wis.] 101 N. W. 409.

11. The presenting of checks through the clearing house the day after receiving them, instead of having them certified on the same day, was claimed to be a usage, but held not to be reasonable diligence. Bank of Commerce v. Miller, 105 Ill. App. 224.

NOTE. Proof of custom on issue of negligence: A negligent act will not be excused on the ground that it is customary. Proof of custom, however, is evidence, but not conclusive, as to whether the act is negligent. Anderson v. Fielding, 92 Minn. 42, 99 N. W. 358; Craner v. Christian, 36 Minn. 413, 31 N. W. 457, 1 Am. St. Rep. 675; O'Mally v. Railway Co., 43 Minn. 289, 45 N. W. 440; Lamson v. Truesdale, 60 Minn. 410, 62 N. W. 546. What persons customarily do under certain circumstances is usually a test of ordinary care, but to this rule there is the familiar exception that where the doing of an act is so obviously dangerous as to constitute negligence as a matter of law, then it must be deemed inconsistent with ordinary care, regardless of custom. Douglas v. Chicago, etc., R. Co., 100 Wis. 405, 69 Am. St. Rep. 930. Proof of what is usually done under the same circumstances is admissible. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979. Custom of running train at high rate of speed at certain place admissible to show negligence. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. General custom of well regulated and prudently managed railroads as to time and manner of inspecting boilers held admissible. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. Proof of common and general use of a particular appliance is admissible on the issue of its reasonable safety, in an action by a servant against a master. Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357. See, also, as to admissibility of proof of custom, Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788; Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847; Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618.

12. Custom whereby purchaser of entire herd of cattle and brand becomes the owner of an undelivered remnant of herd cannot prevail against Civ. Code, § 4491, whereby sale of personalty is made fraudulent if delivery is not made. Ettien v. Drum [Mont.] 80 P. 369. Usage is without weight in the matter of allowance of fees to public officers. Millard v. Conradi, 5 Ohio C. C. (N. S.) 145.

13. Local custom in Kansas relating to distribution of water of running streams for irrigation cannot prevail against common-law principles, such custom not having been recognized by statute or judicial decisions. Clark v. Allaman [Kan.] 80 P. 571. Custom cannot prevail against or overcome a settled rule of law. Entwhistle v. Henke, 113 Ill. App. 572. The term "net receipts" as used in Laws 1869, p. 228, as amended by Laws 1879, p. 179 (Hurd's Rev. St. 1889, p. 801), providing for taxation of foreign insurance companies, cannot be explained by the testimony of insurance experts in Chicago, the meaning of the phase being a question of law, and being applicable throughout the state of Illinois. National Fire Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377.

Note: A custom should not be in conflict with the rules and principles of law. Turnbull v. Osborne, 12 Abb. Pr. [N. S., N. Y.] 203; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, 2 L. R. A. 836. A mere custom or usage is without force, in opposition to a positive law. Coleman v. M'Murdo, 5 Rand. [Va.] 51; Randall v. Smith, 64 Me. 105, 18 Am. Rep. 200; Cranwell v. The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; Winder v. Blake, 49 N. C. 332; Thompson v. Ashton, 14 Johns. [N. Y.] 316; Greene v. Tyler, 39 Pa. 361; Delaplane v. Crenshaw, 15 Grat. [Va.] 457; Piscataqua Exch. Bank v. Carter, 20 N. H. 246, 51 Am. Dec. 217; Joyes v. Shadburn, 11 Ky. L. R. 892; Baltimore First Nat. Bank v. Taliaferro, 72 Md. 164. No one can escape the punishment of the law by proving a custom contrary to law. Minaghan v. State, 77 Wis. 643. A custom making 2,240 pounds a ton of coal is not good when opposed to a statute (Act of April 15, 1834) making 2,000 pounds a legal ton. Godcharles v. Wigeman, 4 Cent. Rep. 887, 113 Pa. 431. A custom of railroads not to receive for transportation any live stock unless under certain conditions modifying their common-law liability would be contrary to law and public policy. Missouri Pac. R. Co. v. Fagen, 72 Tex. 127, 13 Am. St. Rep. 776, 2

§ 3. *Pleading and proof.*[14]—Proof of a custom must be clear, cogent and convincing as to the antiquity, duration and universality of the usage in the locality where it is claimed to exist.[15] If the evidence is uncertain and contradictory, the custom is not established, and the court should so instruct the jury.[16] Knowledge of a witness as to a general custom must be shown before he may testify in regard to such custom.[17] As to the necessity of pleading a custom, where relied on, there is a conflict.[18]

CUSTOMS LAWS.

§ 1. *Interpretation and operation of customs laws in general.*[19]—The treaty providing for a reduction of twenty per cent. of the duties on Cuban products became effective ten days after the exchange of ratifications.[20] The existence of the insurrection in the Philippines after the treaty with Spain was ratified did not justify the exaction of duties on imports from the United States into Manila after such ratification.[21] The president's order during the war, directing payment of duties as a military contribution on occupation of the country by the forces of the United States, had no application after the conclusion of the war.[22] The tariff act of 1897 applies to goods imported on the day it became effective,[23] and to merchandise previously imported for which no entry for consumption has been made.[24] Merchandise is being admitted for tariff purposes until the duties are finally liquidated.[25]

§ 2. *Dutiable articles and classification of the same.*[26]—Wherever, in the history of customs laws, it is found that a certain expression has received, in effect, a statutory construction, or a long and uniform use by congress or the departments, that construction is controlling, unless some other is necessary.[27] This rule of construction is superior to all others.[28] Every provision of a customs act classifying merchandise is presumed to have relation to some existing course of business.[29] The statutory provision, commonly known as the similitude clause, requiring unenumer-

L. R. A. 75. Usage will not control the legal interpretation of a statute. Dwight v. Boston, 12 Allen [Mass.] 316, 90 Am. Dec. 149. A custom contrary to morality, religion or the law of the land is void. Holmes v. Johnson, 42 Pa. 159. Nor can custom deprive a person of a legal right. See Attorney General v. Tarr, 148 Mass. 309, 2 L. R. A. 87; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, 2 L. R. A. 836. A usage must not be in restraint of trade, nor in conflict with public policy or the law of the land. Susquehanna Fertilizer Co. v. White, 6 Cent. Rep. 434, 66 Md. 444, 59 Am. Rep. 186.

14. See 3 C. L. 989.

15, 16. Penland v. Ingle [N. C.] 50 S. E. 850.

17. Nagle v. Hake [Wis.] 101 N. W. 409.

18. Courts take judicial notice of a general usage or custom, and it need not be pleaded. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. If a custom or usage is relied on, it must be pleaded. Orlental Lumber Co. v. Blades Lumber Co. [Va.] 50 S. E. 270.

19. See 3 C. L. 990.

20. Act of Congress of Dec. 17, 1903, providing that treaty should apply ten days after such exchange, which was on March 31, 1903, had a retroactive effect. American Sugar Refining Co. v. U. S., 136 F. 508.

21. Lincoln v. U. S., 25 S. Ct. 455.

22. The ratification of such order and action taken in accordance therewith by congress in 1902 could not therefore have the effect of ratification of an erroneous exaction of duties under the order. Lincoln v. U. S., 25 S. Ct. 455.

23. July 24th, 1897, at 4:06 p. m. John B. Ellison & Sons v. U. S., 136 F. 969.

24. John B. Ellison & Sons v. U. S., 136 F. 969.

25. Decision of appraisers as to Cuban products being after act of congress and proclamation of president regarding treaty with Cuba, goods were entitled to 20 per cent. reduction. American Sugar Refining Co. v. U. S., 136 F. 508.

26. See 3 C. L. 991.

27. Brennan v. U. S. [C. C. A.] 136 F. 743. Rule applied in determining classification of cold rolled steel strips. United States v. Crucible Steel Co. [C. C. A.] 137 F. 384.

28. Brennan v. U. S. [C. C. A.] 136 F. 743.

29. Loggie v. U. S., [C. C. A.] 137 F. 813,

ated articles to be classified with the enumerated article which they most resemble, does not require identity, but only substantial similitude in any one of the particulars mentioned—material, quality, texture or use.[30] Articles are not dutiable under general terms when a duty is imposed in specific language.[31] But though an article may be literally included by name in a certain paragraph, it may sometimes be more properly referred to another paragraph designating a class, on account of its relations to such class.[32] The titles of paragraphs of the customs laws are not intended to be perfectly accurate, but only to furnish general information of the articles enumerated.[33] The customs act provision that where two or more rates of duty are applicable to an article, the article shall pay the highest of such rates, does not apply where one paragraph lays an ad valorem duty and the other a specific duty.[34] Where merchandise in cases is dutiable under two different paragraphs, the value of the cases should be distributed between the two kinds of merchandise in determining ad valorem duties.[35] Where an article has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape for a particular use, it is deemed a manufacture.[36] In assessing duties on goods as to which countervailing duties are authorized, the collector should adopt such a basis of assessment as will compel the importer to pay as additional duty the net amount of the bounty paid by the exporting country.[37] In case of a commodity like sugar, which decreases while being imported, the additional duty should be based on the invoice weight, subject to deduction due to any cause warranting an allowance.[38] Countervailing duties on crude articles or their products should be based on the duty imposed by the country where the crude article is produced.[39] Rules as to the measurement of rugs,[40] and the ascertainment of the component material of chief value in woven fabrics,[41] are given in the notes. Other cases in which the classification of particular imports is decided or discussed are grouped in the footnotes.[42]

30. United States v. Roesseler & Hasslacher Chemical Co. [C. C. A.] 137 F. 770.

31. Brennan v. U. S. [C. C. A.] 136 F. 743. Paraffin more specific than products of crude petroleum. Schoellkopf, Hartford & Hanna Co. v. U. S., 139 F. 58.

32. Limes in juice not dutiable as limes. Brennan v. U. S. [C. C. A.] 136 F. 743. Figs preserved whole not dutiable as figs. United States v. Reiss [C. C. A.] 136 F. 741. "Glassware" in term "blown glassware" is not a term of general commercial designation. United States v. Durand [C. C. A.] 137 F. 382.

33. United States v. Brown [C. C. A.] 136 F. 550.

34. Loggie v. U. S. [C. C. A.] 137 F. 813.

35. Bottles and contents; fittings of bottles counted with bottles. Francis H. Leggett & Co. v. U. S., 138 F. 970.

36. Applied to flitters, manufactures of composition metal. United States v. George Meier & Co. [C. C. A.] 136 F. 764.

37. Act 1897, c. 11. Franklin Sugar Refining Co. v. U. S., 137 F. 655.

38. Franklin Sugar Refining Co. v. U. S. 137 F. 655.

39. Paraffin imported from Germany, but there made from petroleum produced in Russia, is dutiable according to the Russian duty. United States v. R. F. Downing & Co., 135 F. 250.

40. In measuring oriental rugs, entire area, including selvage, should be considered. Fritz & La Rue v. U. S., 135 F. 916.

41. As to woven fabrics, ascertainment of value of chief component should be at time of weaving, and cost of warping should be included in the value of the warp, and not distributed between warp and weft. United States v. Hoeninghaus [C. C. A.] 137 F. 478.

42. Agricultural and vegetable products and provisions: Frosted wheat. United States v. W. P. Devereux Co., 135 F. 428. "Oatmeal feed," by-product in manufacture of oatmeal, dutiable as oat hulls. United States v. McGettrick, 139 F. 304. Pineapples preserved in their own juice. United States v. Boden, 133 F. 839. Cherries in maraschino dutiable as unenumerated manufacture. Reiss & Brady v. U. S., 135 F. 248. Limes in brine are free. Brennan v. U. S. [C. C. A.] 136 F. 743. Mushrooms dried by evaporation. Kraut v. U. S., 139 F. 94. Frozen fish in packages containing less than one-half barrel. Loggie v. U. S. [C. C. A.] 137 F. 813. Fish prepared for preservation in packages of less than one-half barrel. Harvey v. U. S., 37 F. 186. Spent ginger. Lewis German & Co. v. U. S. [C. C. A.] 137 F. 817. Fish roe or caviar, in tin packages, dutiable by similitude as fish in tin packages. Menzel & Co. v. U. S., 135 F. 918.

Animals and animal products: Crude ostrich feathers. Brodie v. U. S., 135 F. 914. Crude eagle and condor quills. Spero v. U. S., 135 F. 915. Hides of mud buffalo of Straits settlements, killed in the chase, are free. United States v. Winter [C. C. A.] 134

§ 3. *Administration of customs laws. In general.*[43]—Duties are not exacted on goods which do not actually reach the port, and goods separable from the whole quantity, which by decay have lost all value, are considered a shortage, and duties are imposed only on those arriving in good condition.[44] The penalty of the "six months' bond" given by importers for the delivery of unexamined packages, not retained by the collector, is not to be considered as liquidated damages.[45] The object of the bond being to protect the government in assessment, valuation and collection of duties, and to facilitate the same, only actual damages suffered by nondelivery of packages called

F. 841. Evidence held to justify finding that importations were skins and not hides. Helmrath v. U. S., 135 F. 912.

Art goods, toys and ornaments: Folding pictures. Fuld & Co. v. U. S., 138 F. 973. Marble statues. United States v. Perry, 133 F. 841. "Cistern" in several pieces with figures sculptured thereon in almost full relief is statuary. United States v. American Exp. Co., 139 F. 89. Metal heads, temporarily strung. United States v. Buettner [C. C. A.] 133 F. 163. Wall mottoes dutiable as appliqued or embroidered articles. United States v. Miller, Sloan & Wright [C. C. A.] 135 F. 349.

Books and paper: Printed paper bags not dutiable as "printed matter." Kraut v. U. S., 134 F. 701. Paper cut for envelopes not dutiable as envelopes. Hunter v. U. S. [C. C. A.] 134 F. 361.

Beverages: "Sake" is dutiable as unenumerated manufacture, not as beer or wine under similitude clause. United States v. Nishimiya [C. C. A.] 137 F. 396.

Chemicals and medicines: Lentiscum or lentiscus used in tanning or dyeing is a crude article. Leber & Meyer v. U. S., 135 F. 243. Articles used in tanning or dyeing are not drugs. Leber & Meyer v. U. S., 135 F. 243. Gaduol dutiable as chemical compound. United States v. Merck & Co. [C. C. A.] 136 F. 817.

Minerals, metals and manufactures thereof: Ferro-chrome, ferro-molybdenum, ferro-tungsten, and ferro-vanadium classified, by similitude, as ferromanganese and not as unwrought metals. United States v. Roesseler v. Hasslacher Chemical Co. [C. C. A.] 137 F. 770. Alloy of metal-iron, tin, manganese—used to harden manganese bronze, dutiable as unwrought metal. William Cramp & Sons Ship & Engine Bldg. Co. v. U. S., 139 F. 303. Slides or buckles, made of metal, ornamented or colored, dutiable as manufactures of metals. E. H. Bailey & Co. v. U. S., 135 F. 917. Broken sterotype plates dutiable as type metal. Sapery v. U. S. [C. C. A.] 135 F. 332. Sheet steel in strips. Crucible Steel Co. v. U. S., 132 F. 269. Flitters dutiable as manufactures of metal. United States v. George Meier & Co. [C. C. A.] 136 F. 764. Cold rolled steel strips. United States v. Crucible Steel Co. of America [C. C. A.] 137 F. 384.

Miscellaneous manufactures: Ping pong balls not dutiable as toys but as articles of collodion. United States v. Strauss Bros. & Co. [C. C. A.] 136 F. 185. United States v. Wanamaker, 136 F. 266. Surgical needles. A. J. Woodruff & Co. v. U. S., 138 F. 946. Time detectors dutiable as watch movements. Hensel, Bruckmann & Lorbacher v. U. S., 135 F. 255. Ornamental rhinestones made of metal and paste dutiable as manufactures of paste. B. Blumenthal & Co. v. U. S., 135 F. 254. Hone stones used to polish stones and not to sharpen edged instruments are dutiable as unenumerated manufacture. R. J. Waddell & Co. v. U. S., 135 F. 211. Soap pencils. United States v. American Exp. Co. [C. C. A.] 136 F. 594. Imitation silk yarn. Von Bernuth v. U. S., 133 F. 800. Crude, incomplete articles of glass, known as "blanks." United States v. Durand [C. C. A.] 137 F. 382. Painted glass eyes for dolls. R. Hoehn Co. v. U. S., 139 F. 301. Square glass plates polished simply to determine character of article. Hensel, Bruckmann & Lorbacher v. U. S., 139 F. 95.

Textiles and manufactures thereof; wearing apparel: Cotton strips containing words woven in silk to be used on shoe tops. Herzog v. U. S., 135 F. 919. Raw silk on caps or tubes. United States v. Klotz, 133 F. 808. Raw tussah silk, rereeled from cocoons to smaller reels. United States v. Stewart, 133 F. 811. Silk goods woven on Jacquard looms. United States v. Johnson, 139 F. 55. Flax fabrics—doilies, table covers, etc.,—not dutiable as imitations of lace. United States v. B. Ulmann & Co. [C. C. A.] 139 F. 3. Embroidered woolen dress goods. Hall v. U. S. [C. C. A.] 136 F. 774. Figured cottons. United States v. George Riggs & Co. [C. C. A.] 136 F. 583. Cravenette cloths dutiable as waterproof cloth. United States v. Brown [C. C. A.] 136 F. 550. Dress shields. Darlington, Runk & Co. v. U. S., 136 F. 716. Pique and embroidered leather gloves. Douillet v. U. S., 133 F. 1007. Unfinished handkerchiefs. Meyer v. U. S., 138 F. 974. Straw lace sewed with thread. Kurtz, Stuboeck & Co. v. U. S., 136 F. 268. Embroidered, lace or open work half hose. Carter, Webster & Co. v. U. S., 137 F. 978.

Pearls and precious stones: Pearls arranged according to size but to be sold separately, dutiable by similitude as pearls in natural state not strung or set. Neresheimer & Co. v. U. S. [C. C. A.] 136 F. 86. Half pearls for jewelry settings. United States v. Hahn [C. C. A.] 35 F. 349. Imitations of precious stones less than one inch are measurable by any one dimension. Albert Lorsch & Co. v. U. S., 135 F. 214. Painted rock crystal intaglios. Benedict & Warner v. U. S., 135 F. 242. "Incrusted" precious stones, not ornamented or decorated. United States v. R. F. Downing & Co., 139 F. 155.

43. See 3 C. L. 992.

44. Principle applied to oranges, whether shipped in bulk or in barrels, and regardless of whether decayed portion was equal to 10 per cent. of importation Stone v. Shallus, 137 F. 674.

45. Dieckerhoff v. U. S. [C. C. A.] 136 F. 545.

for can be recovered,[46] and the district court has jurisdiction of an action for that purpose.[47] The phrase "entitled to debenture" in the statute refers to merchandise, the importer or owner of which is entitled to a certificate in due form, showing the amount of duties paid and that it has been duly entered for export back to a foreign country.[48] Until the duties have been paid and the merchandise entered for exportation, it is not entitled to debenture,[49] and the owner is not entitled to change the packages in which it is contained, on application to the collector.[50] A complaint against a surveyor of customs for damages for refusal to permit a change of packages, which alleges that merchandise is "entitled to debenture" without facts showing them to be so entitled, pleads a mere conclusion of law.[51] The government and not the importer should bear the expense of storing merchandise pending inspection and analysis by the department of agriculture, under the pure food law.[52] What vessels are required to report to customs officers must be determined by reference to the statute.[53]

Entry.[54]—An entry for consumption cannot be made in a given port until the goods are within the limits of that port when the duty is tendered to the collector.[55] A special act of congress is necessary to permit such an entry at any other port than the port of ultimate destination.[56] A custom house broker cannot deny his sworn declaration that he is the consignee of goods,[57] and under the statute declaring that for the purposes of the customs laws imported merchandise is deemed the property of the consignee,[58] he is liable as though he were the real owner, after making such a declaration.[59]

Liquidation.[60]—The secretary of the treasury has power to reliquidate an entry at the exchange value of the coins of the exporting country, where that value differs by more than ten per cent. from the metal value, as last proclaimed by him.[61] For the purpose of estimating the value of foreign merchandise exported to the United States, according to the currency of the country of exportation, as proclaimed each quarter by the secretary of the treasury, the consular certification of the invoice is conclusive proof of the date of exportation in determining which quarterly proclamation applies.[62] Local taxes of the country of exportation, remitted on exportation, not shown to be uniformly imposed throughout the country, nor uniform in amount where levied, cannot be considered by appraisers in determining market value.[63] Where a protest is sustained by the board of appraisers, it is the collector's duty to reliquidate the entry in accordance with the board's decision.[64]

46. Such as additional expense of learning contents without having goods; without proof of actual damage, there can be no recovery on such bond. Dieckerhoff v. U. S. [C. C. A.] 136 F. 545.

47. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455.

48. Rev. St. § 3030. W. H. Thomas & Son Co. v. Barnett, 135 F. 172.

49, 50, 51. W. H. Thomas & Son Co. v. Barnett, 135 F. 172.

52. United States v. Acker, Merrall & Condit, 133 F. 842.

53. Open, clinker-built gasoline launch, eighteen and one-half feet long, arriving from Victoria, B. C., at Seattle, not shown to be a foreign vessel or to contain merchandise, is not required to report to the customs officers. Rev. St., § 3097, applies to such a case, and not § 2774 or § 3109. United States v. One Gasoline Launch [C. C. A.] 133 F. 42.

54. See 3 C. L. 994.

55. Goods arrived in New York and entered for transportation to Philadelphia; no entry for consumption could be made at latter port until goods arrived there. John B. Ellison & Sons v. U. S., 136 F. 969.

56. John B. Ellison & Sons v. U. S., 136 F. 969.

57. United States v. Vandiver, 133 F. 252.

58. Rev. St. p. 744. United States v. Vandiver, 133 F. 252.

59. United States v. Vandiver, 133 F. 252.

60. See 3 C. L. 994.

61. Act Aug. 17, 1894, § 25. United States v. Whitridge, 25 S. Ct. 406, rvg. 129 F. 33. See 3 C. L. 994, n. 88, 89.

62. United States v. Lawrence, Son & Gerrish [C. C. A.] 137 F. 466.

63. "Drol de ville" and "octral" of France cannot be considered. United States v. Godillot & Co., 139 F. 1.

64. United States v. Dickson [C. C. A.] 139 F. 251.

Enforcement of duties.—Duties are not merely a charge on the goods, but are a personal debt or obligation of the importer;[65] hence the government is not limited to summary proceedings, in collection of duties, but may maintain an action of debt, when by accident, mistake, or fraud, no duties or short duties have been paid.[66] In an action by the govenment to recover unpaid duties, the importer may defend on the ground of illegality of the assessment, notwithstanding the statutory provision that the collector's decision shall be final and conclusive unless the duties are paid under protest.[67]

Refund for salvage.—Under the statute providing for the abatement or refund of duties paid or accruing on imported merchandise damaged or destroyed accidentally while in the custody of customs officers, the secretary of the treasury has no arbitrary power in regard to such refund, but should award it when the required facts are shown.[68] Where imported goods have been saved from accidental destruction, and the government has been saved duties which would otherwise have been refunded, the salvors are entitled to a salvage award against the government,[69] on the basis of the amount saved the government.[70]

Protests and appeals. Procedure.[71]—The statute requires protests to state the reasons for objections to decisions of the collector distinctly and specifically.[72] Reference to the wrong paragraph of the statute is fatal.[73] A protest citing the provision under which it is claimed the article is dutiable, because of resemblance to an enumerated article, need not refer in addition to the similitude clause of the statute.[74] If the protest fails to meet the statutory requirements, the action of the collector will be affirmed.[75] Omissions or mistakes in the protest, which may have misled the collector, will not be corrected on the review of his decision.[76] Where an importer mixes two kinds of goods so that it is impracticable or impossible to separate them, a protest covering the entire importation must be overruled, though some of the goods might be subject to the classification claimed in the protest.[77] An importer may file a protest against the action of a collector in failing to follow the decision of the board of appraisers in making a reliquidation.[78] Where a tentative liquidation is made pending a possible change of rates, and the final liquidation is made a year later, the importer may legally file a protest within ten days after such second liquidation,[79] and the fact that a protest was filed after the first is immaterial, whether or not the importer regarded the first liquidation as final.[80]

65. United States v. National Fibre Board Co., 133 F. 596.

66. Federal district court has jurisdiction of action of debt. United States v. Nat. Fibre Board Co., 133 F. 596.

67. United States v. Tiffany, 137 F. 971.

68. Rev. St. § 2984. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455.

69, 70. United States v. Cornell Steamboat Co. [C. C. A.] 137 F. 455.

71. See 3 C. L. 994, 995.

72. Adm. act, § 14. In re Solvay Process Co., 134 F. 678. Protest against payment of duty on 99 skins, classified as hides, "each of which weighs under 12 pounds," held sufficient, there being only one paragraph putting such skins on the free list. Helmrath v. U. S., 135 F. 912.

73. Protest referring to wrong paragraph, but naming correct duty, held insufficient. United States v. Fleitmann [C. C. A.] 137 F. 476.

74. United States v. Dearbergh Bros., 135 F. 245.

75. United States v. Fleitmann [C. C. A.] 137 F. 476. The board of appraisers and court will pass only on the allegations of the protests, rather than on the merits, even though it is apparent that an error has been made in classification. In re Solvay Process Co., 134 F. 678.

76. United States v. Fleitmann [C. C. A.] 137 F. 476. Correction of an apparent error cannot be made if the importer has made a mistake in pointing out the paragraph of the statute under which the duty ought to have been assessed. In re Solvay Process Co., 134 F. 678.

77. John B. Ellison & Sons v. U. S., 136 F. 969.

78. United States v. Dickson [C. C. A.] 139 F. 251.

79, 80. United States v. Franklin Sugar Refining Co., 137 F. 677.

81. United States v. Strauss Bros. & Co. [C. C. A.] 136 F. 185.

A decision of a collector based on no other evidence than the articles themselves may be reversed by the board of appraisers or the courts without further evidence.[81] On such review, the appraisers or courts may avail themselves of facts of which judicial notice may properly be taken.[82] Findings of fact by the board of appraisers are not as a rule reviewable by the court.[83] But the rule is otherwise where it appears that the appraisers signing the opinion did not in fact hear the testimony,[84] since a reappraisement by general appraisers, made without inspection of the merchandise or samples by themselves or any witnesses heard by them, is void.[85] The board of appraisers has jurisdiction to review the action of a collector of customs in assessing duty on the cost of repairs to vessels.[86]

A collector[87] who has followed directions of the department in making up a package of money for transmission to the treasurer, and has taken a receipt from the express company, is not liable for a loss occurring before the package reaches the treasurer.[88]

§ 4. *Violations of customs laws and consequences thereof.*[89]—A proceeding in rem lies under the statute for forfeiture of fraudulently imported goods,[90] but not under the statute providing for forfeiture of money arising from the sale of goods fraudulently imported.[91] Failure to enter imported goods renders the goods liable to forfeiture, whether or not they would be dutiable if entered, and whether or not the government is defrauded of any sum,[92] and whether or not there was any intent to defraud.[93] Proof of a knowing violation or evasion of a customs law is sufficient.[94] Rules and regulations of the treasury department may be continued in force under a new tariff law by simply adopting and continuing to enforce them.[95] Hence, in a proceeding to forfeit goods, it is no defense that regulations have not been promulgated.[96] An acquittal on a charge of importing goods with intent to defraud the United States of duty is a bar to a proceeding in rem,[97] but the fact that an indictment had been brought and a nolle entered does not bar a proceeding in rem.[98] A false declaration of ownership on entry of an importation is not ground for forfeiture unless the statement of ownership was willfully and knowingly false.[99]

82. Judicial notice taken of character of game of ping pong. United States v. Strauss Bros. & Co. [C. C. A.] 136 F. 185.

83. Neresheimer & Co. v. U. S. [C. C. A.] 136 F. 86.

84. Finding signed by three who did not hear testimony; one who heard it did not sign. Neresheimer & Co. v. U. S. [C. C. A.] 136 F. 86.

85. In such case the appraisement by the local appraiser should be followed. United States v. Murphy, 136 F. 811. Neither merchandise nor samples being before general appraisers, their reappraisement is void. Curnen & Stiner v. U. S., 136 F. 807. Where importers offered evidence equivalent to presence of actual samples, which was rejected by general appraisers, duty was assessed on importers' entered value, though local appraisement was valid. Id.

86. United States v. Geo. Hall Coal Co., 134 F. 1003.

87. See 3 C. L. 993.

88. United States v. Brendel [C. C. A.] 136 F. 737.

89. See 3 C. L. 995.

90. Rev. St., § 3082. United States v. A Lot of Precious Stones and Jewelry [C. C. A.] 134 F. 61.

91. United States v. A Lot of Precious Stones and Jewelry [C. C. A.] 134 F. 61.

92. Watches from Canada forfeited because not entered, though free of duty. United States v. Fifty Waltham Watch Movements, 139 F. 291.

93. Purpose of importer of watches who failed to enter them was to avoid being put on alleged black list. United States v. Fifty Waltham Watch Mvements, 139 F. 291.

94. United States v. Fifty Waltham Watch Movements, 139 F. 291.

95. Passage of act of 1897 did not render existing regulations inoperative, though power was given to make new regulations. United States v. Fifty Waltham Watch Movements, 139 F. 291.

96. United States v. Fifty Waltham Watch Movements, 139 F. 291.

97, 98. United States v. A Lot of Precious Stones and Jewelry [C. C. A.] 134 F. 61.

99. Held, that importer had full dominion over diamonds and could fairly be considered the owner; hence no forfeiture under Customs Adm. Act June 10, 1890, c. 407. United States v. Ninety-nine Diamonds, 132 F. 579.

DAMAGES.

§ 1. *Kinds of damages and their characteristics.*[1] *Damnum absque injuria.*—Damages are recoverable only where there has been an infraction of a legal right.[2]

Special damages[3] are such as result naturally but not necessarily from the wrong complained of,[4] and as to which there can be no recovery without special averment.[5] Special circumstances will justify their recovery when specifically sued for if they approximately flow from the breach and are such as might reasonably be within the contemplation of the parties.[6]

Nominal damages[7] are allowed for a wrong not shown to have resulted in pe-

1. See 3 C. L. 997.

2. Damages are only recoverable where it appears that defendant owed plaintiff some duty which he has violated or disregarded. Gage v. Springer, 112 Ill. App. 103. Where a man places great quantities of earth on his own land in grading it, without proper precautions to prevent its being carried down onto an adjoining proprietor, and it is so carried down to the injury of the adjoiner, he is liable. American Security & Trust Co. v. Lyon, 21 App. D. C. 122; Neumeister v. Goddard [Wis.] 103 N. W. 241. The manufacture of coke by a corporation on its own land from coal produced by it on land in the vicinity is not the natural and necessary use of its own property for the development of its own resources. Recovery may be had in such case for depreciation of nelghboring property from smoke, noxious gases, ashes, soot, etc. Campbell v. Bessemer Coke Co., 23 Pa. Super. Ct. 374. Where damage is the direct, immediate and unavoidable result of the execution of a plan of municipal improvement for which plaintiff has already been compensated in condemnation proceedings, there can be no recovery of damages. Beach v. Scranton, 25 Pa. Super. Ct. 430. No damages for taking water from a well can be recovered unless the plaintiff at the time of the taking had some interest in the water taken. Rollins v. Blackden, 99 Me. 21, 58 A. 69.

3. See 3 C. L. 997.

4. Thompson v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 465. General damages are such as the law implies and presumes from the breach complained of, while special damages are such as have proximately resulted but do not always immediately result from the breach, and will not therefore be implied by law. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

5. Rules of pleading special damages, see post, § 7.

6. Loss of profits and extra expense of feeding cattle may be recovered for failure

cuniary injury to plaintiff,[8] or where, since the action was instituted, the damages claimed have been duly released.[9] Recovery is sometimes limited to nominal damages where the special damages are insufficiently pleaded.[10]

Liquidated damages[11] are those the amount of which has been determined by anticipatory agreement between the parties.[12] When reasonable in amount and not disproportionate to the injury provided against the injured party will not be allowed to recover more than the sum fixed,[13] and will be regarded as having been injured to the extent of the sum stipulated,[14] especially where the damages are incapable of computation.[15] These principles have been applied to the amount stip-

to deliver distillery slops as agreed. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

7. See 3 C. L. 998.

8. See 3 C. L. 998, n. 38. Hopedale Elec. Co. v. Electric Storage Battery Co., 96 App. Div. 344, 89 N. Y. S. 325; Marquardt v. Hudson County Gas Co. [N. J. Law] 59 A. 1054; Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946. Incorrect transmission of telegram. Richmond Hosiery Mills v. Western Union Tel. Co. [Ga.] 51 S. E. 290. Death of person not shown to have left kin who are damaged by his loss. Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. Where goods belonging to a wife are without manual seizure wrongfully sold on execution against her husband, and the purchaser pays the price, taking a bill of sale from the constable, and no agreement is made between the purchaser and her or her husband for their disposition, the fact that her possession is not disturbed does not disentitle her to substantial damages. Mansfield v. Bell, 24 Pa. Super. Ct. 447. It is error to nonsuit merely for insufficient proof of substantial damages. Phillips v. Crosby, 70 N. J. Law, 785, 59 A. 142. Nominal damages only are allowed for a mere unlawful entry on land. Eldridge v. Gorman, 77 Conn. 699, 60 A. 643. Damages from exposure of hack used to transport small-pox patients held nominal in view of plaintiff's assent to the exposure. Nichols v. New Britain, 77 Conn. 695, 60 A. 655. Direction of verdict for nominal damages in false imprisonment case held error. Tidey v. Erie R. Co. [N. J. Err. & App.] 60 A. 954. Where plaintiff invites a verdict for defendant in case they think him entitled only to nominal damages, he cannot complain of a verdict for defendant if the evidence would support a verdict of nominal damages. Langdon v. Clarke [Neb.] 103 N. W. 62. An instruction awarding substantial damages for insignificant injury is error. Rosenberg v. New York City R. Co., 94 N. Y. S. 1115. Judgment will not be reversed for error in directing judgment for defendant instead of for plaintiff for nominal damages. Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910; Fulghum v. Beck Duplicator Co., 121 Ga. 273, 48 S. E. 901. May be allowed when contract has been violated in bad faith. Green v. Farmers' Consol. Dairy Co., 113 La. 869, 37 So. 858.

9. Mattoon Gas Light & Coke Co. v. Dolan, 111 Ill. App. 333.

10. See 3 C. L. 998, n. 41. Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436. Breach of contract not to sell bank stock. Cothran v. Witham [Ga.] 51 S. E. 285.

11. See 3 C. L. 998.

12. Phoenix Iron Co.'s Case, 39 Ct. Cl. 526; Lytle v. Scottish American Mortg Co. [Ga.] 50 S. E. 402.

13. Davis v. Alpha Portland Cement Co., 134 F. 274. Amount per case for failure to pack contract number of cases of fish per day. Go Fun v. Fidalgo Island Canning Co., 37 Wash. 238, 79 P. 797. Where a party does not execute his option to terminate a contract and seek to recover the amount specified therein by way of liquidated damages, he may keep the contract alive and claim damages irrespective of the amount fixed by the contract in an action for its breach. Wright v. Craig, 116 Ill. App. 493.

14. McCullough v. Moore, 111 Ill. App. 545; Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 51 S. E. 129; Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. No assessment by jury is necessary where breach is admitted. Bieber v. Gans, 24 App. D. C. 517. Suit on quantum meruit by contractor failing of entire performance. Defendant allowed stipulated amount as damages. Woodford v. Kelley [S. D.] 101 N. W. 1069. Initial payment on land contract held properly treated as liquidated. Pinkney v. Weaver, 216 Ill. 185, 74 N. E. 714.

15. McCullough v. Moore, 111 Ill. App. 545; Davis v. Alpha Portland Cement Co., 134 F. 274. A certified check deposited at the time of securing a franchise to secure the performance of its terms will be regarded as liquidated damages, when it is practically impossible to prove the damages, and will be forfeited absolutely to the municipality upon abandonment of the franchise by the company. Hattersly v. Village of Waterville, 4 Ohio C. C. (N. S.) 242, 26 Chio C. C. 226. Where, from the nature of the contract and its subject-matter, the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty by reference to any pecuniary standard, the sum named will be regarded as liquidated damages. Provision in bond to secure performance of resolution granting permission to company to build street railway, held to be for liquidated damages and not penalty. Springwells Tp. v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 164, 103 N. W. 700.

ulated for delay in completing a building,[16] for failure to furnish certain goods[17] and machinery,[18] for failure to complete exchange of property,[19] for delay in delivering chattels contracted for,[20] for failure to operate a street railroad as agreed,[21] a bond to secure the erection of buildings on demised premises,[22] a bond,[23] and a certified check deposited at the time of securing a franchise.[24] The stipulated amount must bear some reasonable relation to the injury,[25] especially where the amount of damage can be computed,[26] and if the sum stipulated increases as the contract draws near completion and the damages decrease, it will not be allowed.[27] Damages stipulated for delay in performance do not measure the recovery in case of a complete abandonment.[28] Courts incline to construe bonds as penal in character.[29] The fact that the sum to be paid is called liquidated damages in the contract will not always control, but the courts will look to the nature and purposes of the agreement.[30] The question whether the stipulated sum is for liquidated damages or a a penalty is for the court.[31] Statutory penalties are recoverable in amount, irrespective of the actual damages sustained.[32]

Exemplary damages.[33]—Certain sums in addition to the actual damages recoverable for a wrong, termed "exemplary," "punitive," "vindictive" damages, or "smart money" are allowed in cases of private tort or injury willfully or maliciously committed,[34] such as assault and battery,[35] libel or slander,[36] willful breach

16. Phoenix Iron Co.'s Case, 39 Ct. Cl. 526. $100 per day rejected as stipulation. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248.

17. Five cents per gallon for milk. Mondamin Meadows Dairy Co. v. Brudi, 163 Ind. 642, 72 N. E. 643.

18. $50 per day. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 51 S. E. 129.

19. Calbeck v. Ford [Mich.] 12 Det. Leg. N. 82, 103 N. W. 516.

20. Davis v. Alpha Portland Cement Co., 134 F. 274.

21. In deed to right of way. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39.

22. McCullough v. Moore, 111 Ill. App. 545.

23. Springwells Tp. v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 164, 103 N. W. 700.

24. Hattersly v. Village of Waterville, 26 Ohio C. C. 226, 4 Ohio C. C. (N. S.) 242.

25. $5,000 penalty for breach of contract to erect buildings not excessive. McCullough v. Moore, 111 Ill. App. 545.

26. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248; Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

27. See 3 C. L. 999, n. 53. Land contract stipulating for forfeiture of all payments on default. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. Forfeiture to buyer of all logs cut by seller but not delivered before a certain date. Daniel v. Day Bros. Lumber Co., 26 Ky. L. R. 940, 82 S. W. 981; Stillwell v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 483.

28. Murphy v. United States Fidelity & Guaranty Co., 100 App. Div. 93, 91 N. Y. S. 582.

29. Where the nature of the obligation is such that the damages cannot be computed with any degree of certainty, the penalty will be regarded as stipulated damages. McCullough v. Moore, 111 Ill. App. 545. If it appears to have been the purpose to secure the prompt performance of some act, it will generally be regarded as a penalty, and only the actual damages proved may be recovered. Westfall v. Albert, 212 Ill. 68, 72 N. E. 4.

30. McCullough v. Moore, 111 Ill. App. 545; Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402; Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39; Westfall v. Albert, 212 Ill. 68, 72 N. E. 4.

31. Mondamin Meadows Dairy Co. v. Brudi, 163 Ind. 642, 72 N. E. 643. Whether a bond is for stipulated damages or a penalty held for jury. Instruction invading their province disapproved. Disosway v. Edwards, 137 N. C. 489, 49 S. E. 957.

32. The penalty provided in the bond of a school book publisher required by Ky. St. 1903, § 4424, being one fixed by statute, is enforceable, and recovery is not limited to actual damages. American Book Co. v. Wells, 26 Ky. L. R. 1159, 83 S. W. 622.

33. See 3 C. L. 999.

34. Stevens v. Friedman [W. Va.] 51 S. E. 132; Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713. Where general reckless design or utter disregard of the rights of others is shown, no express malice towards plaintiff is necessary. Thomasson v. Southern R. Co. [S. C.] 51 S. E. 443.

35. Happy v. Prichard [Mo. App.] 85 S. W. 655; Stevens v. Friedman [W. Va.] 51 S. E. 132. Not necessary that there be previous malice or ill feeling. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. A street railroad is not liable in punitive damages for a wrongful ejection with unnecessary violence where it neither participated nor authorized or approved of the acts of its conductor. Peterson v. Middlesex & S. Traction Co. [N. J. Err. & App.] 59 A. 456. A passenger may recover punitive damages for a malicious assault. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162.

36. Dowie v. Priddle, 116 Ill. App. 184;

of duty to deliver telegrams without delay,[37] wrongful ejection of passenger,[38] willful trespass,[39] willful obstruction of highway,[40] malicious prosecution[41] and abuse of process,[42] and where a negligent act is committed under such circumstances as show that entire want of care which raises the presumption of a conscious indifference to consequences. Such damages are not allowed for breach of contract,[43] nor for private tort,[44] in the absence of willful misconduct, malice, fraud, wantonness, or oppression,[45] nor for mere negligence in the absence of that entire want of care characterized as gross negligence,[46] and they are never recoverable except where

Shockey v. McCauley [Md.] 61 A. 583; Post Pub. Co. v. Butler [C. C. A.] 137 F. 723. A telegraph company cannot be subjected to punitive damages for transmitting a libelous telegram where no malice or wrongful intent is shown other than appears from the acts themselves. Western Union Tel. Co. v. Cashman [C. C. A.] 132 F. 805.

37. Hellams v. Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12.

38. Richardson v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 261; Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629. Using unnecessary force. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162. Instruction based on actual malice held too favorable to defendant; plaintiff being entitled to punitive damages if act of conductor was reckless or wanton. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170.

39. A trespasser may be honest in his belief of right and yet so negligent in ascertaining facts as to subject him to punitive damages. Beaudrot v. Southern R. Co., 69 S. C. 160, 48 S. E. 106. Advice of counsel is immaterial where not shown to be based on facts. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490. Willful violation of right of view and drip. Bernos v. Canepa [La.] 38 So. 438. Evidence held to justify the recovery of exemplary damages where horses were driven from land included in defendant's pasture. Waggoner v. Snody [Tex. Civ. App.] 82 S. W. 355.

40. Tutwiler Coal, Coke & Iron Co. v. Nail [Ala.] 37 So. 634.

41. Wrongful attachment. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571. Act of agent ratified, Vandiver & Co. v. Waller [Ala.] 39 So. 136. Exemplary damages are allowed if a sequestration is maliciously sued out. Bledsoe v. Palmer [Tex. Civ. App.] 81 S. W. 97.

42. Plaintiff suing on a statute providing a penalty for wrongful levy of an execution can recover only the penalty and not a further sum as punitive damages. Johnson v. Larcade, 110 Ill. App. 611. Where the taking and detention in replevin is attended with circumstances of aggravation and defendant succeeds, he is entitled to exemplary damages. Cox v. Burdett, 23 Pa. Super. Ct. 346.

43. Are recoverable for fraudulent breach of contract to furnish coffin and burial robe, resulting in burial of relative in plain box without robe. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576. The court has no jurisdiction to award punitive damages in an action for breach of contract, though a petition alleging them is not demurred to at the proper time. Ford v. Fargason, 120 Ga. 606, 48 S. E. 180. Where land is conveyed to secure a debt with an agreement for reconveyance and the grantee fraudulently refuses to reconvey, punitive as well as compensatory damages may be recovered; but where he has conveyed away the land the grantor can sue only for the proceeds and not for punitive damages. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232. Punitive damages for unlawful arrest not recoverable on bond of police officer. Easton v. Com., 26 Ky. L. R. 960, 82 S. W. 996.

44. Libel by telegraph company in transmitting message. Western Union Tel. Co. v. Cashman [C. C. A.] 132 F. 805. Punitive damages cannot be imposed where a passenger is set down between stations after being carried past her destination in the absence of evidence of other than a negligent omission of duty. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23. Evidence held not to authorize submission of punitive damages when a passenger was carried by her station and exposed to cold and to acts of drunken passengers. Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000.

45. Delay of train. Macon R. & Light Co. v. Vining, 120 Ga. 511, 48 S. E. 232. Vindictive damages should not be allowed for wrongful foreclosure of a chattel mortgage where no improper conduct attended the seizure and no unnecessary damage was done. Tanton v. Boomgaarden, 111 Ill. App. 37. Force and detention to overcome a refusal to conform to a regulation requiring an extra charge for a peddler's pack is not ground for punitive damages, in the absence of a showing of malice and ill will. Northern Cent. R. Co. v. Newman, 98 Md. 507, 56 A. 973. Collision with street car. Lexington R. Co. v. Fain, 25 Ky. L. R. 2243, 80 S. W. 463. Levy on land. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797. Ejection of passenger. Little Rock Traction & Elec. Co. v. Winn [Ark.] 87 S. W. 1025. Not recoverable for malicious acts of servant or agent unless authorized or ratified. Townsend v. Texas & N. O. R. Co. [Tex. Civ. App.] 88 S. W. 302; Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 74 N. E. 738.

46. Atchison, etc., R. Co. v. Ringle [Kan.] 80 P. 43. A father cannot recover exemplary damages for the negligent injury of his child in the absence of a statute. Bube v. Birmingham R., Light & Power Co., 140 Ala. 276, 37 So. 285.

actual damages are recoverable.[47] Whether exemplary damages are recoverable is for the court,[48] but their amount is for the jury.

Statutory, double and treble damages,[49] are provided for certain injuries of a nature resembling those in which punitive damages are awarded.[50]

§ 2. *General principles for ascertaining.*[51]—The cardinal rule of damages is fair compensation;[52] general rules, however, cannot be formulated to govern all cases,[53] and whenever the rule ordinarily applied to similar cases fails to accomplish the cardinal result, it must yield to exception or modification.[54] Where damages may be estimated in a variety of ways, that method will be adopted which is most definite and certain.[55]

Rule of strictness as between contracts and torts.[56]—In actions for breach of contract the primary and immediate results are alone looked to,[57] but the damages recoverable for torts take wider range and all damages naturally and proximately though not necessarily resulting from the injury are recoverable.[58]

Limitation to natural and proximate consequences.[59]—In all cases only such damages as naturally and proximately result from the injury complained of are recoverable,[60] and those which result chiefly from some other or intervening cause,[61] or

47. Cole v. Gray [Kan.] 79 P. 654. Levy on land. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797.

48. Lexington R. Co. v. Fain, 25 Ky. L. R. 2243, 80 S. W. 463.

49. See 3 C. L. 1001.

50. A conversion after the appointment of a special administrator is not within a statute creating a liability for double damages for the conversion of property of a decedent before the granting of letters testamentary or of administration. Rev. St. 1898, § 3824. Dixon v. Sheridan [Wis.] 103 N. W. 239. A plaintiff in trespass is not entitled to treble damages for digging up gravel in which the trespasser had no interest or right unless the petition alleges the lack of such right. Rev. St. 1899, § 4572. O'Bannon v. St. Louis & G. R. Co. [Mo. App.] 85 S. W. 603. Railroad company held liable for treble value of sand taken away regardless of whether the land was injured. Good faith as defense. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989. The statute (Rev. St. 1899, § 1105) authorizing double damages for stock killed by railroad which has not fenced its track, contemplates an actual collision with stock by a train. Held no collision shown. Logan v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 565.

51. See 3 C. L. 1002.

52, 53. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74.

54. Barker v. Lewis Storage & Transfer Co. [Conn.] 61 A. 363.

55. Where a purchaser refuses without justification to accept an article manufactured for him, the manufacturer may hold the article for him and recover the contract price. Kinkead v. Lynch, 132 F. 692.

56. See 3 C. L. 1002.

57. Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183; Atchison, etc., R. Co. v. Thomas [Kan.] 78 P. 861; Lee v. St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809; Lewark v. Norfolk & S. R. Co., 137 N. C. 383, 49 S. E. 882. Actual damages only are allowed. La Favorite Rubber Mfg. Co. v. H. Channon Co., 113 Ill. App. 491. For breach of a contract of title insurance collateral to a mortgage, the mortgagee can recover only the value of the land where that is less than the amount secured by the mortgage. Whiteman v. Merion Title & Trust Co., 25 Pa. Super. Ct. 320. Where money belonging to a claimant was left in the treasury as security and is due, and an action for it is defended by a breach of the guaranty, the United States to succeed must prove that they suffered damages. Merely that there was a breach of the guaranty is not enough. Switzer & McHenry's Case, 38 Ct. Cl. 275. The damages for failure to complete gowns for plaintiff's bride cannot extend to recovery of all his other expenses incurred for his prospective wedding feast. Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436. Any necessary expense incurred in complying with the contract is recoverable, but expenses of litigation are not recoverable when it does not appear that the contract was entered into in bad faith or procured by fraud and deceit. McKenzie v. Mitchell [Ga.] 51 S. E. 34.

58. Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839. A woman suffering from a personal injury may recover for the postponement of her marriage made necessary thereby. Remey v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 368, 104 N. W. 420. For wrongfully destroying fodder intended for feed for cows at a time when similar fodder could not be obtained, the damages may include the direct and immediate loss caused by such act. Enlow v. Hawkins [Kan.] 81 P. 189. Where sawdust is blown on plaintiff's lot and into his house, he can recover for the discomfort suffered by himself and family as well as diminution in the value of his property. Mahan v. Doggett [Ky.] 84 S. W. 525.

59. See 3 C. L. 1002.

60. Breach of contract to sell and deliver goods. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255. Damages for the malicious suing out of an injunction bond cannot be recov-

which are not such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract,[62] are not recoverable. Negli-

ered in an action on the bond. Chicago Title & Trust Co. v. Chicago, 110 Ill. App. 395. Instruction limiting measure of damages to "outcome of the fire" is proper. Spink v. New York, etc., R. Co., 26 R. I. 115, 58 A. 499. The damages recoverable for an assault on a pregnant woman include only such mental suffering as is the direct result of the assault on her, apart from any alleged injury to the child. Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520. The obstruction of a navigable body of water is the natural cause of plaintiff's loss of the use of his logging engine, time of men and necessity of discharging employes and rehiring at advanced wages. Creech v. Humptulips Boom & River Imp. Co., 37 Wash. 172, 79 P. 633. In an action against a carrier for converting a shipment of goods, plaintiff cannot recover his expenses while waiting for them. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727. Loss of perishable goods due to wrongful attachment may be recovered. Vandiver & Co. v. Waller [Ala.] 39 So. 136. A minister cannot recover damages for hindrance in ministerial duties and loss of time from study and preparation for work caused by injury to his wife. Dallas, etc., Co. v. Ison [Tex. Civ. App.] 83 S. W. 408. Carrier held liable for injuries resulting from failure to receive cattle for transportation and keeping them in muddy pens after receipt. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530. Under the Civil Damage Act of Illinois, a saloon keeper is only responsible for the natural and probable results of the sale of intoxicating liquor. Schulte v. Menke, 111 Ill. App. 212. Breach of contract to sell a fisherman's catch, the loss of profits. Emerson v. Pacific Coast & N. Packing Co., 92 Minn. 523, 100 N. W. 365.

61. A child frightened by defendant's railroad train so she ran in front of the train of another company cannot recover. Illinois Central R. Co. v. Haecker, 110 Ill. App. 102. One injured by a defective sidewalk cannot recover for a subsequent injury caused by the slipping of the crutch the first injury compelled him to use. Vander Velde v. Leroy [Mich.] 12 Det. Leg. N. 183, 103 N. W. 812. A passenger injured in a railroad collision and subject to attacks of dizziness thereafter cannot recover for a broken wrist resulting from a fall occasioned by such an attack while she was standing in a sink to examine a leak in a water pipe. Snow v. New York, etc., R. Co., 185 Mass. 321, 70 N. E. 205. For breach of contract to store trucks in a stable, value of goods stolen therefrom while unguarded cannot be recovered. Peyser v. Lund, 89 App. Div. 195, 85 N. Y. S. 881. In a suit for injuries to cattle by flowing land, plaintiff cannot recover for loss occasioned by being obliged to sell his cattle because he had no hay to feed them after the flowing, and no money to buy it with. Berg v. Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528. Where an accident in June causes a miscarriage the following day, a subsequent miscarriage in November is not too remote. Rapid Transit R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 788. But its effect should be limited rather to showing the extent of the original injury than as a specific ground of recovery. Id. [Tex.] 86 S. W. 322. Railroad company building dump which sets water back on plaintiff's land is liable for consequent depreciation in its value, but not for fright and sickness of his family caused thereby. Denison, etc., R. Co. v. Barry [Tex.] 83 S. W. 5. Where an injured person suffers without negligence a second injury much greater than it would have been but for the prior injury, the tort feasor responsible for the original injury is responsible also for the increase of the second. Conner v. Nevada [Mo.] 86 S. W. 256. Discomforts suffered by reason of exposure to inclement weather are not proximately caused by failure to deliver a telegram. Western Union Tel. Co. v. Siddall [Tex. Civ. App.] 86 S. W. 343.

62. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510; Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183; Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436; Seaboard Air Line R. Co. v. Harris, 121 Ga. 707, 49 S. E. 703. Injuries to plaintiff from defective wagon cannot be recovered for breach of warranty. Rode v. Arney, 115 Ill. App. 629. Where a telegram bears no reference to plaintiff's wife and baby, he cannot recover for their discomfort or his own mental anguish caused thereby at not being met by a conveyance as directed in telegram. Jones v. Western Union Tel. Co. [S. C.] 50 S. E. 198. Where nondelivery of a telegram results in failure to ship whiskey ordered thereby, plaintiff cannot recover for remote consequences of refusal of his laborers to work without whiskey. Newsome v. Western Union Tel. Co., 137 N. C. 513, 50 S. E. 279. Vexation caused sender of telegram by failure to protect his check is not recoverable for nondelivery of a telegram. Capers v. Western Union Tel. Co. [S. C.] 50 S. E. 537. Other telegraph cases. Hilley v. Western Union Tel. Co. [Miss.] 37 So. 556. A shipper of fruit trees lost by the carrier's negligence may recover the expense of renotifying consignees and delivering goods to take their place, the carrier being informed of the result of delay at the time of accepting the shipment. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22. Where a carrier merely contracts to furnish transportation without being notified what the trip is for, the measure of damages for negligent delay is merely compensation for loss of time and for expenses incurred during the delay. Illinois Cent. R. Co. v. Head [Ky.] 84 S. W. 751. A reconvention where pasturage was not as represented is not too remote in claiming for money, time and labor expended in feeding the pastured cattle. Scovill v. Melton [Tex. Civ. App.] 85 S. W. 463. Anxiety of a husband caused by the nondelivery of a ticket to his wife on which she was to return home may be recovered for. St. Louis S. W. R. Co. v. Cul-

gence may be the proximate cause of an injury not reasonably to be anticipated,[63] and one guilty of deceit is liable for damages resulting, though causes operated which he did not foresee.[64] In an action for personal injuries plaintiff may recover in most states for an aggravation of a disease already existing.[65]

Speculative and prospective damages.[66]—Remote or speculative damages based solely on conjecture are not recoverable,[67] but future damages which are imminent and reasonably certain to occur may be taken into account.[68]

Loss of profits,[69] not too uncertain and speculative, may be recovered for,[70]

ver [Tex. Civ. App.] 86 S. W. 628. One who, being employed to repair the cylinder of an engine, delays returning it unduly, but has no notice that it belongs to a sawmill, is not liable for idleness of the mill. Pine Bluff Iron Works v. Boling [Ark.] 88 S. W. 306. Failure to complete wedding gowns as agreed cannot authorize recovery of all other expenses of wedding feast. Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436.

63. Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225; Denison, etc., R. Co. v. Barry [Tex.] 83 S. W. 5.

64. One fraudulently induced to hold stocks may recover for depreciation caused by embezzlement. Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040.

65. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71. Whether employer had knowledge of plaintiff's physical condition is immaterial. Basham v. Hammond Packing Co., 107 Mo. App. 542, 81 S. W. 1227. Instruction held erroneous as confining recovery to the effect of the accident as to permanent injuries and precluding recovery for suffering and impairment between date of injury and trial. Williams v. Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 489. That injuries were aggravated by an organic tendency to disease existing in the person injured, which was developed by the injury, or by the treatment applied to the injury by the physicians, does not preclude a recovery for the injuries. Chicago City R. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755. That injuries merely hastened death from a previously existing disease does not preclude recovery. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976.

66. See 3 C. L. 1003.

67. Chicago v. Lamb, 105 Ill. App. 204; Fleming v. Lobel [N. J. Law] 59 A. 28; Kellogg v. Malick [Wis.] 103 N. W. 1116; Atchison, etc., R. Co. v. Thomas [Kan.] 78 P. 861; Seaboard Air Line R. Co. v. Harris, 121 Ga. 707, 49 S. E. 703; Berg v. Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528; Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Humiliation, mortification and distress of mind from contemplation of one's crippled condition are too remote. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272. Likewise distress from being unable to care for one's family. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983. Recovery of expense of removing noxious weeds caused by seeds being blown over a boundary line cannot be had until the expense has been incurred and the amount definitely ascertained. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851. Plaintiff's damages held too speculative for nondelivery of a telegram affecting the settlement of a claim for which their compensation as attorneys depended on their success. Sweet v. Western Union Tel. Co. [Mich.] 102 N. W. 850. Testimony as to plaintiff's average weekly wages is not objectionable as speculative and remote. Tanzer v. New York City R. Co., 91 N. Y. S. 334. Damages for personal injury cannot extend to the loss of ability to bear children. Lennox v. Interurban St. R. Co., 93 N. Y. S. 230, **Contra.** Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030. Depreciation in market value of thoroughbred cows by being gotten with calf by common stock bulls is not too remote. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 746. The loss of trade and custom by reason of not being able to fill orders is too remote to recover for breach of contract to deliver labels. Vuccino & Co. v. Brown, 92 N. Y. S. 319.

68. It is not essential that all the injurious effects which arise from breach of a contract should have been manifested before suit, but both the actual effects down to the time of trial, and those which may ensue, if imminent and reasonably certain, may be considered in fixing damages. Hancock v. White Hall Tobacco Warehouse Co., 102 Va. 239, 46 S. E. 288.

69. See 3 C. L. 1003.

70. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 Fed. 168; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A. 1087. Where rate of profits for 16 months is shown, recovery can be had at such rate for eight remaining months of contract period. Lazier Gas Engine Co. v. Du Bois [C. C. A.] 130 F. 834. Profits recoverable in a personal injury case include only those earned by plaintiff's unaided labor. Jonas v. Interurban St. R. Co., 45 Misc. 579, 90 N. Y. S. 1070; Tanzer v. New York City R. Co., 91 N. Y. S. 334. Loss of profits of running a mill are not speculative. Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S. E. 725. For failure to manufacture and deliver patented motors, the purchaser may recover profits on sales which would have been consummated had they been delivered, including cash offers as well as binding contracts for future delivery which could not be filled. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667. As a basis for the recovery of damages for nondelivery of a telegram, plaintiff may show that the addressee would have filled the order it contained if he had received it. Elam v. Western Union Tel. Co. [Mo. App.] 88 S. W. 115. For breach of a contract to give plaintiff the exclusive sale of certain products, his business being established, he can recover the profit he would have made

but those merely possible,[71] or probable from accretion of the business,[72] and incapable of proof with any degree of certainty,[73] are not recoverable. Profits which would have resulted from the operation of a ship destroyed are not an element of damages for its destruction.[74] Where profits are recoverable the profits for a reasonable period preceding the injury may be taken as a basis of estimate,[75] and plaintiff is not obliged to prove with absolute certainty what they would have been, but only with such reasonable certainty as will satisfy a jury of the reasonableness of his demand and estimate.[76]

Difficulty of proof of amount as bar.[77]—Mere difficulty of proof of amount is never a bar to recovery either in contract[78] or tort,[79] it being sufficient to approximate the amount of damages by the best evidence obtainable.[80] The failure of the government to return plans submitted to it and rejected does not entitle the person submitting them to damages unless damages are proved.[81] Where the evidence to establish damages is general and unsatisfactory, there can be no recovery.[82]

Avoidable consequences.[83]—Ordinary care and diligence to lighten the conse-

on the goods sold in the exclusive territory by defendant. Corbin v. Taussig, 137 F. 151. Where defendant purchased certain machines under an agreement that the seller would furnish work for them and take his pay out of the profits, the measure of the damages for failure to furnish the work which may be set off in an action to recover the price of the machines is the profit which defendant might have made on the work plus the expense of maintaining the plant during the time it was idle. Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A. 1087. For breach by the seller of a machine of a contract to keep repairs therefor at a certain nearby place, the buyer may recover profits he would have made on work for which he had orders, but could not thereafter do because of the delay. Janney Mfg. Co. v. Banta, 26 Ky. L. R. 1089, 83 S. W. 130. For breach of a contract to give plaintiff the exclusive sale of its products in certain territory, plaintiff can recover no more than the profit he would have made on the goods defendant sold, had he sold them himself at the price at which defendant sold them. La Favorite Rubber Mfg. Co. v. H. Channon Co., 113 Ill. App. 491.

71. Benyakar v. Scherz, 92 N. Y. S. 1089; Atchison, etc., R. Co. v. Thomas [Kan.] 78 P. 861. Anticipated profits from operation of water pipe line held too speculative for recovery in action for breach of agreement to furnish money to construct it. Smith v. Curran, 138 F. 150. Hindrance in the execution of a contract or loss of profits on contracts by breach of a contract to sell and deliver materials cannot be recovered for. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255.

72. Kellogg v. Malick [Wis.] 103 N. W. 1116.

73. Emerson v. Pacific Coast & N. Packing Co., 92 Minn. 523, 100 N. W. 365; Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317; Atchison, etc., R. Co. v. Thomas [Kan.] 78 P. 861; Rumley Co. v. Jelsma, 2 Neb. Unoff. 330, 96 N. W. 147; Spring v. Markowitz, 98 App. Div. 324, 90 N. Y. S. 602.

74. Gossage v. Philadelphia, etc., R. Co. [Md.] 61 A. 692.

75. In estimating damages for breach of a contract for the purchase of the products of a distillery for 15 seasons, evidence of the average cost of manufacture and average price of grain used during a series of years was competent, the measure of damages being the difference between the contract price and cost of manufacture. Allen v. Field [C. C. A.] 130 F. 641.

76. See 3 C. L. 1004, n. 19.

77. See 3 C. L. 1004.

78. Rugg v. Rohrbach, 110 Ill. App. 532.

79. Where a husband has been deprived of the aid, society, and comfort of his wife by the act of another, he is entitled to compensation without proving the value thereof in dollars and cents. Reagan v. Harlan, 24 Pa. Super. Ct. 27. The mere fact that it is difficult to determine what part of the damage was occasioned by defendant is no objection to the relief asked. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

80. Courts and juries may act upon probable and inferential, as well as direct and positive proof. Rugg v. Rohrbach, 110 Ill. App. 532. Damage to mill and dwelling by pollution of stream. Dudley v. New Britain, 77 Conn. 322, 59 A. 89. Earning power of man suing for personal injury. Simpson v. Pennsylvania R. Co., 210 Pa. 101, 59 A. 693. Opinions as to weight of cattle at time of shipment and delivery may be shown where exact weights cannot be shown. Atchison, etc., R. Co. v. Watson [Kan.] 81 P. 499.

81. Lundborg's Case, 39 Ct. Cl. 23.

82. Though the claimant would be entitled to recover for some things if the evidence were not so general as to prevent segregation. Hyde's Case, 38 Ct. Cl. 649. Where the principles and ideas upon which alleged damages are claimed cannot be reduced to a money standard or where they do not form the subject of legal calculation in dollars and cents, there can be no recovery. Lundborg's Case, 39 Ct. Cl. 23.

83. See 3 C. L. 1004.

quential damages flowing from an injury must be shown[84] in cases both of contract[85] and tort,[86] and the rule extends to such an outlay of money as is reasonable under the circumstances.[87] Money reasonably expended for this purpose should be included as an element of recovery,[88] and where a reasonable outlay would have prevented the injury, the necessary amount may furnish the measure of damages.[89] There can be no recovery for damages preventable by reasonable effort on plaintiff's part,[90] and he can charge defendant only with such damages as he could not, with reasonable expense and exertion, prevent.[91]

84. Only reasonable diligence to avoid or reduce loss need be shown. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510; Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225. Aggravation of plaintiff's injuries by unskillfulness of attending surgeons will not relieve defendant unless there was negligence in employing them. Seeton v. Dunbarton [N. H.] 59 A. 944; Chicago City R. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755. A passenger can recover nothing for any aggravation of his injuries and disabilities occasioned by his own neglect of proper care after the accident. Injured by derailment of street car. Statement of physician that injury would be aggravated by riding on locomotive not harmful to defendant. Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201. Evidence of the best method of handling potatoes after they commenced to rot was admissible on the question of ordinary care. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. A passenger put off at the wrong station and invited by a respectable family living there to remain over night cannot recover for injuries received by immediately walking to her destination on a stormy night. Cain v. Louisville & N. R. Co. [Ky.] 84 S. W. 583. Loss of profits from nondelivery of telegram relative to machinery in mill. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289.

85. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168; Brown v. Weir, 95 App. Div. 78, 88 N. Y. S. 479. A seller of goods who failed to deliver the grade agreed on is not liable for any loss that the purchaser could have prevented by the exercise of ordinary care. Where lower quality of potatoes than called for by the contract was mixed with other potatoes and nothing was done after they commenced to rot. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Plaintiff wrongfully discharged should seek employment elsewhere. Jones v. Oppenheim, 91 N. Y. S. 343. Where defendant broke a contract to take all plaintiff's milk for five years, plaintiff was not required to change the character of his business and sell milk at retail to reduce the damages. Brazell v. Cohn [Mont.] 81 P. 339. An offer by the seller to supply motors at an advanced price cannot be considered on the doctrine of avoidable consequences where damages are claimed for lost profits for failure to deliver, and the damages have accrued prior to the offer. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667. Where a carrier breaches a contract to furnish cars for transportation, the shipper is not obliged to ship over another route to reduce the damages. Pecos River R. Co. v. Latham [Tex. Civ. App.] 13 Tex. Ct. Rep. 662, 88 S. W. 392.

86. It would be error, however, to charge that plaintiff in a personal injury case must have had surgical attendance. Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979.

87. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. In case of injury to land, the land-owner need not build works that would cost more than the value of the land because he could not recover more than that in any event. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79. On breach of a contract to take the entire output of a factory for a stated time, plaintiff is not obliged to operate it and endeavor to market the product in an effort to reduce defendant's damages, but may close it down and recover his profits for the entire period. Allen v. Field [C. C. A.] 130 F. 641. Promises on defendant's part to remedy defects causing damage may excuse plaintiff's failure to remedy them. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Plaintiff wrongfully deprived of water for irrigation for failure to pay assessments should pay them, and cannot recover for loss of crop. Mabb v. Stewart [Cal.] 81 P. 1073.

88. Hammond Oil & Development Co. v. Feitel [La.] 38 So. 941. Time and medicine devoted to care of stock injured in transit. Missouri, etc., R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168. When a contract is broken, it is the duty of the injured party to minimize the loss if possible by a reasonable outlay, and such outlay is to be allowed him as part of his damages. Griffith v. Blackwater Boom & Lumber Co., 55 W. Va. 604, 48 S. E. 442.

89. Irrigation assessments for nonpayment of which water was withdrawn destroying crop. Mabb v. Stewart [Cal.] 81 P. 1073. Where the purchaser of potatoes after placing them with others found them rotting, his damages were the expense of moving them. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

90. Kellogg v. Malick [Wis.] 103 N. W. 1116; Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626. Where bidder to furnish post-office supplies failed to execute his contract and for several months after his default the goods could have been purchased for less than contract price. United States v. Withers [C. C. A.] 130 F. 696. Evidence in personal injury case held not to present the issue of negligence after injury. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 87 S. W. 867.

91. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. That a passenger by paying his fare might have

Mitigation and aggravation of damages.[92]—All circumstances for which the defendant is responsible or of which he had knowledge effective to increase plaintiff's injuries, from the wrong complained of, and in case exemplary or punitive damages are recoverable, that illustrate defendant's susceptibility to punishment and the necessity therefor,[93] may be considered, in aggravation or enhancement of the damages, and on the other hand, circumstances that tend to palliate or excuse the wrong,[94] as well as subsequent acts and events tending to lessen the effect of the injury,[95] and that show that the damages were in fact less than would flow from a similar injury under other circumstances,[96] may be shown to mitigate or lessen the verdict. In Tennessee remote contributory negligence is effective to mitigate the damages recoverable for a negligent injury.[97] Evidence that defendant carries employers' liability insurance is inadmissible.[98] A trespasser cannot relieve himself from damages by showing that some advantage may have accrued to plaintiff therefrom.[99] In an action on a contract, where punitive damages are not recoverable, evidence that after suit brought defendant had plaintiff arrested on a baseless charge is improper.[1]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*[2]—Recovery is allowed only to the extent of plaintiff's proprietorship of the cause of action.[3] Applications of this rule to actions by minors,[4] married women,[5]

avoided ejection does not deprive him of the right to recover for the mortification of a public expulsion. Breen v. St. Louis Transit Co., 108 Mo. App. 443, 83 S. W. 998.

92. See 3 C. L. 1004.

93. Defendant's wealth may be shown in libel case. Dowie v. Priddle, 116 Ill. App. 184. Defendant's wealth is not material unless the case is one for exemplary damages. Western Union Tel. Co. v. Cashman [C. C. A.] 132 F. 805.

94. Birmingham R., Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701. Excitement or provocation not produced by plaintiff cannot avail to mitigate damages for slander. Shockey v. McCauley [Md.] 61 A. 583. In an action for libel, facts not known to the defendant when the publication was made cannot be shown in mitigation. Butler v. Barret, 130 F. 944; Post Pub. Co. v. Butler [C. C. A.] 137 F. 723. Provocation cannot mitigate damages for assault and battery in states where no punitive damages are allowed. Langdon v. Clarke [Neb.] 103 N. W. 62. Defendant cannot show provocation for an assault deliberately planned. Shoemaker v. Jackson [Iowa] 104 N. W. 503. Remote language recently repeated is not effective. Le Laurin v. Murray [Ark.] 87 S. W. 131. In an action for assault and battery, opprobrious words used by plaintiff are admissible in mitigation of punitive but not of actual damages. Mitchell v. Gambill, 140 Ala. 316, 37 So. 290; Le Laurin v. Murray [Ark.] 87 S. W. 131.

95. That plaintiff after breach of defendant's contract to take all the milk produced on his farm sold his dairy and thereby incapacitated himself for performance, is immaterial on the question of damages. Brazell v. Cohn [Mont.] 81 P. 339.

96. Defendant participating in arrest of woman on a charge imputing a want of chastity may show that she in fact kept a house of prostitution, and had been arrested on similar charges before. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135.

97. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.

98. Iverson v. McDonnell, 36 Wash. 73, 78 P. 202. Elevator insurance. Edwards v. Burke, 36 Wash. 107, 78 P. 610.

99. In an action against a town for tearing down a part of plaintiff's building, defendant cannot show that improvement in the appearance of the rest of the structure resulted from its acts. Town of Frostburg v. Hitchins, 99 Md. 617, 59 A. 49.

1. Jenkins v. Kirtley [Kan.] 79 P. 671.

2. See 3 C. L. 1005.

3. A joint owner of personalty injured can recover only to the extent of his interest (Waggoner v. Snody [Tex.] 85 S. W. 1134), but a bailee is entitled to recover to the whole extent of the injury (Id.). An owner can recover damages caused by fire in woodland, though he has given a license to another to cut and remove the timber. He can recover for damages to wood cut but not removed within the time of the license. Clarke v. New York, etc., R. Co., 26 R. I. 59, 58 A. 245. Plaintiff suing for the destruction of grass on leased land can recover only for the grass he would be entitled to during the life of his lease. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 746.

4. In a personal injury suit plaintiff cannot recover for the value of the services of his mother as nurse, in the absence of a special contract between them or proof of his emancipation. Bowe v. Bowe, 5 Ohio C. C. (N. S.) 233, 26 Ohio C. C. 409. In a suit for damages for personal injuries resulting from an employer's negligence, a charge which submits to the jury the consideration of the question of the length of time plaintiff had been earning wages, where it appears that plaintiff had not been emancipated, and that, therefore, his time belonged to his parents, is improper. Id. Where it appears that an unemancipated infant will recover from his injuries long before majority, he cannot recover for impairment of earning power or physician's or nurse's charges. Porter v.

parents,[6] and husbands,[7] are discussed in the notes. In Michigan, where a person injured by a wrongful act survives for an appreciable time, his cause of action for the injury passes to his personal representative, who can recover such damages as the injured person could have recovered had he survived to prosecute the action.[8]

§ 4. *Measure of damages for breach of contract. A. Miscellaneous contracts.*[9] —Recovery may be had for such damage as may be fairly and reasonably considered to arise naturally from the breach itself, and as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of a breach of it.[10] The presumption of damage arising from breach

Delaware, etc., R. Co., 134 F. 155. Error in allowing mother to testify in child's action that she had spent $7 for medicines held unprejudicial under rule of de minimis. Norfolk Ry. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502. A minor suing for a personal injury may recover the amount of necessary bills for physicians' services, they being necessaries for which he is liable. Berg v. United States Leather Co. [Wis.] 104 N. W. 60. A minor cannot recover for diminished earning capacity during minority. Gulf, etc., R. Co. v. Grisom [Tex. Civ. App.] 82 S. W. 671. Where a sole surviving parent appears as next friend for a minor and assists him to recover lost and future earnings on the theory of emancipation, such acts constitute an abandonment of the right to such earnings. Zongker v. People's Union Mercantile Co. [Mo. App.] 86 S. W. 486.

5. A wife may recover the value of her services lost by a personal injury where she has a separate business. Boarding house. Moran v. New York City R. Co., 94 N. Y. S. 302. Damages resulting from a personal injury to the wife are community property; the husband is a necessary party and the judgment is properly rendered in favor of both. Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 P. 659. A wife may recover for being prevented from performing and transacting her necessary affairs and business as a result of a personal injury. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030. A married woman running a boarding house with the assistance of her husband who is a cripple may recover for diminished ability to labor. Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30. Where the married women's acts make them liable for medical attendance to themselves, they may recover such expense as a part of the damages for personal injuries. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

6. The father of an infant may recover for injury to her clothing, the loss of her services, and for medical attention made necessary by plaintiff's acts. Shoemaker v. Jackson [Iowa] 104 N. W. 503. A parent cannot recover for his own mental anguish in an action for injuries to a minor child. Rube v. Birmingham R., Light & Power Co., 140 Ala. 276, 37 So. 285. Code 1896, § 26, providing that in an action for wrongful death of a minor child the parent may recover such damages as the jury may assess, has no application where death did not result. Id. A mother's right to recover for loss of a minor son's services is not impaired by the fact that the loss occurred pending a contract between him and the one who caused the loss to which she was a stranger. Scannell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021. Where plaintiff suing for an injury to his son shows the son's age, that he lived at home, and the nature and character of his injury, he is entitled to go to the jury on the amount of damage he has suffered. Son 10 years old. Brunke v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 84.

7. For injuries to his wife a husband may recover the money equivalent of the loss of services, assistance, companionship, and society that he is deprived of. His damages are not limited to the expense of hiring a domestic to attend to her household duties. Hutcheis v. Cedar Rapids & M. C. R. Co. [Iowa] 103 N. W. 779. The possible future earnings of a wife have no bearing on the amount of damages recoverable by her husband for injuries to her, the right to which he has assigned to her. Id. A husband cannot recover for injuries to the wearing apparel of his wife in a suit for damages for injury to apartments by gas explosion. Gilligan v. Consolidated Gas Co., 94 N. Y. S. 273. The married women's acts do not deprive the husband of his right to recover for personal injuries to the wife, including necessary expenses and loss of consortium. Code 1896, § 2521. Birmingham Southern R. Co. v. Lintner [Ala.] 38 So. 363. A husband is not entitled to recover for future loss of services of his wife. Id.

8. See 3 C. L. 1005, n. 49. Changed by Pub. Acts 1905, p. 120. Olivier v. Houghton County St. R. Co. [Mich.] 101 N. W. 530.

9. See 3 C. L. 1006.

10. Kellogg v. Malick [Wis.] 103 N. W. 1116; Atchison, etc., R. Co. v. Thomas [Kan.] 78 P. 861; Sanitary District of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510; Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183; McKenzie v. Mitchell [Ga.] 51 S. E. 34; Mudge v. Adams [Tex. Civ. App.] 83 S. W. 722. Failure to carry mail as agreed. Brown v. Cowles [Neb.] 101 N. W. 1020. Failure to furnish lumber for mill erected in pursuance of contract. Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S. E. 725. Plaintiff is entitled to more than nominal damages for wrongful dishonor of his check by a bank, though the dishonor arose from an error in bookkeeping and plaintiff is a corporation. Metropolitan Supply Co. v. Garden City Banking & Trust Co., 114 Ill. App. 318. Damages resulting from the loss of services of defendant's wife as a result of injuries

of a contract does not go to the extent of measuring the loss,[11] but in the absence of proof it is regarded as nominal, and if a further sum is demanded, proof must be given showing that the party claiming it has suffered loss.[12] An express contract should itself furnish the basis of estimating damages for its breach.[13] Recovery may be had for mental anguish caused by breach of contract.[14] Where a party to a con-

sustained by reason of a defective wagon cannot be recouped in an action for the price of the wagon. Rode v. Arney, 115 Ill. App. 629. Where the prosecution or defense of suits is rendered necessary, naturally and proximately, by a breach of contract or any wrongful act, the costs of that litigation, reasonably and judiciously conducted, incurred or paid, including reasonable counsel fees, are recoverable as part of the damages. Houser's Case, 39 Ct. Cl. 508. Where there is a breach of warranty of soundness of cattle, the loss sustained by the buyers of other cattle because of disease communicated to them by those bought may be recovered. Mitchell v. Pinckney [Iowa] 104 N. W. 286. Loss occasioned by the delivery of potatoes which soon rotted and ruined other potatoes is an element within this rule. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Where bridges are built of less weight than the contract calls for, it is not error for the court to add 15% for contractor's profits to the value of material necessary to bring them up to weight. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536. For the breach of a contract that involved the changing of the nature of the machinery in plaintiff's mill, he may recover the expenses reasonably incurred in making the change. Alderton v. Williams [Mich.] 102 N. W. 753. Special circumstances coming to the knowledge of the party after execution of the contract will not create an exception to the rule. Kellogg v. Malick [Wis.] 103 N. W. 1116. Notice of the object of the contract will not change the rule unless it forms the basis of the agreement. Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436. Counsel fees incurred in resisting an application for a preliminary injunction are not recoverable in an action on the bond. Quinn v. Silka [Colo. App.] 76 P. 555. In an action on an injunction bond in a suit where the injunction is only ancillary or in aid of another proceeding, the damages are only such as flow from the injunction itself and do not include attorney's fees in procuring its dissolution. Chicago, etc., R. Co. v. Sullivan, 25 Ky. L. R. 46, 80 S. W. 791. Where an injunction restrained the owner from leasing, transferring or bringing action to recover premises, his expenses in repairing waste done or permitted during the life of the injunction, the rental value of the property, and reasonable attorney's fees are recoverable in an action on the bond. McLennon v. Fenner [S. D.] 104 N. W. 218. Undisclosed principal in liquor bond held liable to surety only for expenses of trial at nisi prius, and not for expenses and costs of appeal. City Trust. Safe Deposit & Surety Co. v. American Brewing Co., 88 App. Div. 383, 84 N. Y. S. 771. Actress suing for nondelivery of trunk cannot recover for loss of engagements occasioned by nonpossession of trunk. Brown v. Weir, 95 App. Div. 78, 88 N. Y. S. 479. An action may be maintained by one partner against another for damages for defendant's failure to comply with an agreement made before the formation of the partnership, relating to the terms on which it was to be formed. Owen v. Meroney, 136 N. C. 475, 48 S. E. 821. The measure of damages for breach of a contract is the value of the rights of which one has been deprived whether more or less than stipulated for therein. Sale of electric cars, etc. Hopedale Elec. Co. v. Electric Storage Battery Co., 96 App. Div. 344, 89 N. Y. S. 325. For breach of a contract not to sue or permit suit on a certain contract, plaintiff can recover only actual damages. Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910. In action on a bond for failure to contest a claim of exemptions, expenses in attending court several terms, loss of time, hotel bills and attorney's fees are proper elements. Kirby v. Forbes [Ala.] 37 So. 411. Damages which are the natural and probable result of a breach of the contract and which may be reasonably anticipated therefrom, but which are so speculative and contingent that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered. Measure of damages for breach of contract between lessee of opera house and manager. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317. For breach of warranty of a refrigerator, in consequence of which meat placed therein spoiled, the buyer may recover the value of the spoiled meat. Evidence of value of meat held insufficient. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. For breach of a contract by an amusement company, whereby it was to assign plaintiff ground to operate certain concessions, plaintiff may recover moneys paid on the price of the concessions, and reasonable expenses incurred in preparing for the execution of the contract. Claudius v. West End Heights Amusement Co. [Mo. App.] 84 S. W. 354.

11. Hopedale Elec. Co. v. Electric Storage Battery Co., 96 App. Div. 344, 89 N. Y. S. 325.

12. No substantial damage shown. Hopedale Elec. Co. v. Electric Storage Battery Co., 96 App. Div. 344, 89 N. Y. S. 325.

13. Amount of royalties lost by defendant's failure to use construction required by its contract with plaintiff. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

14. Contract of sale of coffin and burial robe. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576.

tract obstructs or forbids its performance by the opposite party to a degree that is equivalent to a refusal of performance, the party interfered with may recover as if for full performance on his part.[15]

Interest as an element.[16]—Interest is recoverable on unliquidated damages if they are ascertainable for computation.[17] In actions against carriers, the interest allowed is allowed as damages and not as interest.[18]

Newspaper and advertising contracts.[19]—For breach by a hotel keeper of a contract to display plaintiff's advertising scheme, the damages are the amounts plaintiff would have received from advertisers for such advertising.[20]

Insurance contracts.[21]—For breach of a contract of insurance of title collateral to a mortgage, the mortgagee can recover only the actual value of the land and not the amount of the mortgage.[22] The measure of damages for failure to use a patented construction,[23] to give plaintiff the exclusive use of a machine,[24] and to renew an agreement for the sale of patented articles,[25] is discussed in the notes.

(§ 4) *B. Contracts for sale or purchase of land.*[26]—The damages for breach of a land contract are ordinarily the difference between the contract and market price,[27] interest, rental value and payments being considered in special cases.[28] For

15. Refusal to assign ground for concessions at amusement park. Claudius v. West End Heights Amusement Co. [Mo. App.] 84 S. W. 354.

16. See 3 C. L. 1006.

17. Degnon-McLean Const. Co. v. City Trust, Safe Deposit & Surety Co., 99 App. Div. 195, 90 N. Y. S. 1029. Interest is allowable in an action to recover unliquidated damages for breach of an executory contract of sale where the property has a market value. Reynolds v. Burr, 93 N. Y. S. 319. The measure of damages of a member of a co-operative association, entitled under its by-laws to withdraw stock to be paid by the directors, the par value of the stock is such par value with interest from time payment should be made, where the directors refuse to pay him. Lindsay v. Arlington Co-op. Ass'n, 186 Mass. 371, 71 N. E. 797.

18. Damages to shipment of cattle. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 393. In actions for nondelivery of telegrams, interest is allowed on plaintiff's demand not as interest eo nomine, but with a view to full compensation; the courts having adopted the rate of interest as fixed by law as the measure of damages suffered from the date of the original damage by reason of the loss of the use of the sum to which plaintiff was entitled. Western Union Tel. Co. v. Garner [Tex. Civ. App.] 83 S. W. 433.

19. See 3 C. L. 1007.

20. Mudge v. Adams [Tex. Civ. App.] 83 S. W. 722.

21. See 1 C. L. 840, n. 86, 87.

22. Whiteman v. Merion Title & Trust Co., 25 Pa. Super. Ct. 320.

23. For breach of a contract to use a patented construction, defendant agreeing to use no other, the damages are the royalties plaintiff would have received had his construction been used. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

24. For breach of a contract for the exclusive use of a patented machine, the measure of damages is the additional profit made by the users by use of the machine. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 48.

25. For breach of a contract to renew an agreement for the sale of patented articles, the plaintiff may recover the value to him of such renewal. Herman v. William B. Pierce Co., 93 N. Y. S. 413.

26. See 3 C. L. 1007.

27. Where suit for specific performance of a contract for the sale of land is brought by the administrator of the vendor and the purchaser has known for years that the coal underlying the land was granted to others before his purchase was made and there is no attempt to show that there was any coal thereunder or what it was worth, he is not entitled to any deduction of purchase price on account of the previous grant. Schoonover v. Ralston, 25 Pa. Super. Ct. 375.

For failure to convey land the damages are the excess of its market value at the time of the breach over the contract price. Nolde v. Gray [Neb.] 102 N. W. 759; Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028.

Where the purchaser breaches a contract for the sale of land and it and the title both remain with the vendor, his damages are the difference between the contract price and market value less any payment made on the purchase price. Prichard v. Mulhall [Iowa] 103 N. W. 774; Kuntz v. Schnugg, 99 App. Div. 191, 90 N. Y. S. 933. Interest is recoverable. Harmon v. Thompson [Ky.] 84 S. W. 569.

28. Where a decree for specific performance of a contract for the exchange of property provides for equalization of the rents, interest, taxes, etc., there is no ground for a judgment for damages for failure to perform. Ragette v. Zimmer, 98 App. Div. 619, 90 N. Y. S. 221. On rescission by the vendor for default by the purchaser, the purchaser is chargeable with the fair rental value of the land during the period of his posses-

default of purchaser at sheriff's sale, it is the difference between the bid and the price realized at a resale on equal terms.[29]

(§ 4) *C. Breach of covenant as to title.*[30]—For breach of covenant of title, recovery may extend to the value of the property lost,[31] or the amount paid to discharge the lien,[32] and interest,[33] costs and expenses in defending it.[34]

(§ 4) *D. Contracts to give lease and liabilities as between lessor and lessee.*[35]—For failure of a lessor to give possession of demised premises, the damages are the market value of the leasehold interest,[36] or the difference between the agreed rental and the rental value;[37] and the damages for breach of a covenant respecting the condition of the leased premises is the difference between the value of the use of the premises in the condition as contracted to be, and the rental value in their actual condition.[38] For an unauthorized eviction, the tenant can recover the value of the unexpired term less the rent reserved.[39] The damages for a breach by the lessee of a covenant to repair are ordinarily the cost of making the repairs,[40] though the lessee may recover for a similar breach the rental value of the premises for the purpose for which rented.[41]

(§ 4) *E. Contracts for sale or purchase of chattels.*[42]—For breach of a contract of sale of chattels, the damages ordinarily are the difference between the contract price and the market value,[43] and for breach of a warrant of quality, recovery

sion and damages for the breach, and is to be credited with all his payments and improvements. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

29. Pepper v. Deakyne [Pa.] 61 A. 805.

30. See 3 C. L. 1008.

31. Where warranty of title in a deed was broken as to part of the land, the measure of damages in the absence of fraud was such a proportion of the price as the part to which title failed bore to the entire tract, with interest. Dubay v. Kelly [Mich.] 100 N. W. 677.

32. In an action on a covenant against incumbrances, the breach being a recovery of dower by the widow of a former owner, a verdict for the amount of the judgment recovered by the widow, including costs, is not excessive. McCrillis v. Thomas [Mo. App.] 85 S. W. 673. For breach of the covenant against incumbrances, the vendor may recover not only the tax but the penalty he was obliged to pay. Carswell & Co. v. Haberzettle [Tex. Civ. App.] 87 S. W. 911.

33. The measure of damages for a breach of covenant is the amount necessarily paid in discharging the lien with interest from the date of payment. Lampkin v. Garwood [Ga.] 50 S. E. 171.

34. Attorney's fees in defense of the title are not recoverable for breach of warranty. Cates v. Field [Tex. Civ. App.] 85 S. W. 52. Where the grantee in a warranty deed is compelled to defend his title, he is entitled to recover the sum of money paid out in such defense, though the circumstances are such that in an action for breach of covenant he is entitled only to nominal damages. Rook v. Rook, 111 Ill. App. 398. Where plaintiff purchased a building at a public sale by the government under warranty, he may recover attorneys' fees necessarily incurred in defending his title. Houser's Case, 39 Ct. Cl. 508.

35. See 3 C. L. 1008.

36. Not how much a person might imagine he could make from enjoyment of the term. Birch v. Wood, 111 Ill. App. 336. Where the damages claimed are continuing and cannot be ascertained at commencement of the action, only such as have accrued can be recovered. Refusal of lessor to allow lessee to take possession. Albey v. Weingart [N. J. Law] 58 A. 87. For breach by the lessor of a contract to lease land, the recovery may include the value of crops that would probably have been raised. King v. Griffin [Tex. Civ. App.] 87 S. W. 844.

37. Andrews v. Minter [Ark.] 88 S. W. 822.

38. Kellogg v. Malick [Wis.] 103 N. W. 1116. If the contract be made for a particular use by the lessee, the rental value for that use will be the standard by which the damages will be awarded. Kellogg v. Malick [Wis.] 103 N. W. 1116. The fact that special circumstances came to the knowledge of the lessor after the execution of the lease will not take the case out of the general rule. Id. For breach of a covenant to furnish on the leased farm pasture for 100 head of cows, depreciation of cows, expense of feeding them, loss of profits on butter and milk are too remote. Id.

39. Campbell v. Howerton [Tex. Civ. App.] 87 S. W. 370; Goldstein v. Asen, 91 N. Y. S. 783. Humiliation and wounded feelings cannot be recovered for. Harris v. Cleghorn, 121 Ga. 314, 48 S. E. 959.

40. Lehmaier v. Jones, 100 App. Div. 495, 91 N. Y. S. 687.

41. For breach of covenant to repair premises rented for a boarding house, the tenant may recover the rental value of rooms of which he was deprived the use during the breach. Daly v. Piza, 45 Misc. 608, 90 N. Y. S. 1071.

42. See 3 C. L. 1008.

43. **Failure to deliver goods;** Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa.

may be had for the difference in market value between the article as it is and as it would have been had it been as represented,[44] notwithstanding the market value is greater than the purchase price.[45] Where a purchaser has to expend money to make

Super. Ct. 199; Nebraska Bridge Supply & Lumber Co. v. Owen Conway & Sons [Iowa] 103 N. W. 122; Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255; Caldwell Furnace Foundry Co. v. Peck-Williamson Heating, etc., Co., 6 Ohio C. C. (N. S.) 629; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. For failure to deliver coal under a contract, stipulatiog that each month's dealings shall be regarded as a separate contract, the measure of the buyer's damage is the excess over the contract price which he was compelled to pay on the last day of each month in the open market for coal to complete the contract. Haff v. Pilling, 134 F. 294. A surety on the contract of a materialman is liable, in case of default, for the difference between the contract price and the price paid for the material in the open market. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734. For failure of a materialman to furnish material to build a house, the owner can recover only the difference between the contract price and the market value, not the loss of rentals from the delay in completing the building. Woolf v. Schaefer, 93 N. Y. S. 184.

Refusal to receive goods: Blair v. Ford China Co., 26 Pa. Super. Ct. 374; Brazell v. Cohn [Mont.] 81 P. 339; Levis v. Royal Packing & Drying Co. [Cal. App.] 81 P. 1086; Mayberry v. Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401. For breach of a contract to take all the timber from certain land at a certain price, the damages are the excess of the contract price over the market value of the timber left on the land. Stillwell v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 483. Where a contract of sale, executed or executory is broken by the buyer, the general damages, if unliquidated, are the excess of the contract price over the market value (Hardwick v. American Can Co. [Tenn.] 88 S. W. 797); but if liquidated by a fair resale on proper notice, the excess of the contract price over the amount realized by the resale, plus interest and expenses, is the measure and is conclusive on both parties (Id.). Seller cannot sue for general damages and by resale after commencement of suit recover damages on basis of resale. Id. Where the property has been inspected and accepted, or delivered on cars as per contract, the damages are the contract price. Field v. Schuster, 26 Pa. Super. Ct. 82. For refusal to purchase stock as per agreement, the defendant is liable, not for the excess of contract price over market value, but for the contract price. Osgood v. Skinner, 111 Ill. App. 606. On rescission of a contract for the purchase of a stallion on the ground of breach of warranty, plaintiff cannot recover as damages expenses incident to keeping and returning him any greater sum than that claimed in his petition. Berkey v. Lefebure, 125 Iowa, 76, 99 N. W. 710. A statute prescribing a rule of damages on failure to accept and pay for personal property, the title to which is not vested in the vendee, is not applicable as a rule of damages where the property has been delivered to the vendee. N. D. Rev. Codes 1899, § 4988. In such case the vendor may waive the provision as to title and elect to sue for the purchase price. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903.

Special damages are recoverable only where the seller had notice of the purpose for which the goods were bought. Union Foundry Works v. Columbia Iron & Steel Co., 112 Ill. App. 183. If seller knew buyer had contracted to sell goods, he may recover on the basis of the selling price, though the seller did not know the price, unless it was exorbitant. Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224.

Prospective profits cannot be recovered in an action for breach of contract to make delivery, where there is no evidence tending to show that plaintiff bought the property to fill a particular contract already made by him and that defendants knew of the existence of such a contract or of the intended use of such property. Walker v. Johnson, 116 Ill. App. 145. Profits are recoverable when the article purchased cannot be had in the market when and where it should have been delivered. Armeny v. Madson & Buck Co., 111 Ill. App. 621. Loss of profits on contracts entered into on the strength of a contract to sell goods is too remote to be recoverable on breach of the contract of sale. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255; Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787.

44. Parker v. Fenwick, 138 N. C. 209, 50 S. E. 627. In an action for breach of contract to manufacture a safe and proper piston rod for an engine, an instruction that the proper measure of damages was the difference between the value of the rod before and after breaking is properly refused, since if the rod was defective in fact it was no more valuable before than after the defect was discovered. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. For breach of express warranty of a horse not returned to the seller, the measure of damages is the difference between the actual value of the horse and what his value would have been had he been sound. Collins v. Tigner [Del. Super.] 60 A. 978. Where defendants attempt to recoup on the ground that the articles furnished by plaintiff were not suitable for the purpose for which they were bought, they cannot recover the cost of tools bought for use upon the goods furnished, in the absence of proof that they could not be used for other purposes. Frederick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. Where inferior goods are delivered, the measure is the difference between the value of those actually delivered and those called for by the contract. Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066.

45. If the purchase price is greater than the market value of the perfect article, then the purchase price is the basis. Narr v. Nor-

the machine purchased conform to the contract of purchase, he may recover that sum and damages for its failure to work properly.[46] Where a purchaser refuses without legal justification to accept an article manufactured on his order, the vendor may retain it for his use and collect the contract price,[47] or if the breach occurs before the article is manufactured, he may recover the profit he would have made on it.[48]

(§ 4) *F. Liability of bailees, carriers, and telegraph companies.*[49]—For the loss of goods by a carrier, the shipper may recover their value,[50] and for injury[51] and delay,[52] the depreciation in value at destination,[53] less unpaid freight.[54] In case no de-

man [Mo. App.] 88 S. W. 122; Young v. Van Natta [Mo. App.] 88 S. W. 123.

46. Masterson v. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227.

47. Finkead v. Lynch, 132 F. 692.

48. Worrell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988. For breach of a contract to purchase dimension granite, the measure of damages is the difference between the contract price and the cost of performance of the contract. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

49. See 3 C. L. 1010.

50. American Exp. Co. v. Jennings [Miss.] 38 So. 374. For loss of goods by the carrier, the damages are their value at destination and interest on that value from the time they should have arrived, less the unpaid costs of transportation. Chesapeake & O. R. Co. v. Stock [Va.] 51 S. E. 161. Where live stock dies during transportation from the negligence of the carrier, the damages are the market value of the stock had it arrived at destination alive and uninjured. Texas & P. R. Co. v. Snyder [Tex. Civ. App.] 86 S. W. 1041.

51. For damage to stock the shipper may recover the difference between the market value of the stock as it actually arrived and what its value would have been had it arrived in an undamaged condition. Missouri, etc., R. Co. v. Allen [Tex. Civ. App.] 87 S. W. 168; San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. It is immaterial that the stock were intended not for market but for feeding. Missouri, etc., R. Co. v. Kyser & Sutherland [Tex. Civ. App.] 87 S. W. 389. The measure of damages for injury to fruit due to improper handling is the difference between its market value in the condition in which it arrived and what it would have been had it arrived in proper condition. When it arrived during the night, the market value on the next day should be used to fix damages. St. Louis, etc., R. Co. v. Henry [Tex. Civ. App.] 81 S. W. 334. For injury to an automobile in shipping, the damages are the depreciation in its value by the injury. Paterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621. Where horses are shipped under a declared value, the liability for injury to them is that proportion of the damage that the declared value bears to their actual value. That the horses on sale brought the full declared value and more does not entirely relieve the carrier of liability for injuries to them. United States Exp. Co. v. Joyce [Ind.] 72 N. E. 865. Where the shipper receives the whole contract price less a certain sum deducted for injuries in transit, that amount with interest is the measure of damages. Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 647, 88 S. W. 390.

52. For unreasonable delay in transporting cattle, the shipper may recover the consequent diminution of market value. Evidence held proper. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82; St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 393. Where stock was contracted for and the sale missed through the delay, the damages are the difference between the contract price and the market value on arrival. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 86 S. W. 631. Evidence of damage and the amount thereof held properly received. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530. The statutory special damages of five per cent per month on the value of a delayed shipment for the period of delay is not recoverable where the shipment was converted by the carrier and never delivered at all. Missouri, etc., R. Co. v. C. A. Rines & Co. [Tex. Civ. App.] 84 S. W. 1092.

When the carrier has no notice that delay in delivering goods will result in any special damages, recovery can only extend to the depreciation in market value caused by the delay. Lee v. St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809; Wesner & W. Mfg. Co. v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 789. Baggage. Wall v. Atlantic Coast Line R. R. [S. C.] 51 S. E. 95. Traveling salesman shipping sample trunks. Seaboard Air Line R. Co. v. Harris, 121 Ga. 707, 49 S. E. 703. A carrier losing a shipment of ice is not liable for loss of fish for the packing of which plaintiff expected to use the ice. Lewark v. Norfolk & S. R. Co. [N. C.] 49 S. E. 882. Carrier losing piston rod sent to be repaired is not liable for idleness of mill. American Express Co. v. Jennings [Miss.] 38 So. 374. Where an express company refused to deliver an actress her wardrobe trunk unless she paid an excessive charge, she could not recover as damages what she would have received from engagements during the wrongful detention. Brown v. Weir, 95 App. Div. 78, 88 N. Y. S. 479.

53. The market value of goods at destination and not where the damage occurred is the proper test. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 85 S. W. 319. Evidence of value at some other place as point of shipment is incompetent unless there is no market value at destination. Evidence as to value held sufficient. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479. In the absence of express consideration therefor, a provision in a contract of shipment fixing the market price at point of shipment in-

preciation is shown, recovery for delay extends only to interest on the value of the shipment during the delay.[55] For misdelivery of cattle by carrier, expenses of feeding paid to the person to whom they were delivered may be recovered,[56] but not expenses of a trip by consignee to have the mistake rectified.[57] Limitation of damages in bill of lading held to contemplate only damage for injury and not damage resulting from misdelivery.[58]

For wrongful ejection of a passenger, recovery may include actual reasonable expenses, and other actual compensatory damages,[59] as well as punitive damages,[60] and mortification and humiliation from public expulsion.[61] A warranted ejection gives rise to damages if wrongfully accomplished.[62] For being carried against his will to a place not called for by his ticket, a passenger may recover any damages suffered.[63] For nondelivery and erroneous delivery of business telegrams, recovery may extend to the natural and proximate consequences.[64] Mental anguish may be recovered for failure to deliver social telegrams in some states,[65] and if the breach of

stead of point of delivery as the measure of damages is void. St. Louis, etc., R. Co. v. Marshall. [Ark.] 86 S. W. 802. Where goods are carried to a place other than their destination, the value at such place is not the test. Texas & P. R. Co. v. Tracy [Tex. Civ. App.] 85 S. W. 833. For misdelivery of cattle by carrier, decreased weight and decreased market value by the day may be recovered. Southern R. Co. v. Webb [Ala.] 39 So. 262.

54. Where suit is brought for delay and injuries to goods by a carrier, and the damages claimed are the difference in value as they should have arrived and did arrive, the amount of freight paid on the shipment is admissible. Missouri, etc., R. Co. v. Jarrell [Tex. Civ. App.] 86 S. W. 632.

55. Lee v. St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809.

56, 57, 58. Southern R. Co. v. Webb [Ala.] 39 So. 262.

59. A passenger is not entitled to actual damages for delay of a train unless he shows some pecuniary or personal injury. Miller v. Southern R. Co., 69 Ala. 116, 48 S. E. 99. When a passenger's ticket was taken from him but he suffered no loss on account of delay thereby caused, he was entitled to recover only the price of the ticket. Stewart v. Baltimore & O. R. Co., 88 N. Y. S. 377.

60. Though no unnecessary force is used. Richardson v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 261; Southern Light & Traction Co. v. Compton [Miss.] 38 So. 629. So if assault accompanies ejection. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162.

61. Notwithstanding plaintiff might have avoided it by paying fare. Breen v. St. Louis Transit Co., 108 Mo. App. 443, 83 S. W. 998. One voluntarily leaving a train on finding that it did not stop at his station cannot recover damages for humiliation. St. Louis Southwestern R. Co. v. Knight [Ark.] 88 S. W. 1035. Insulting language by a conductor warrants recovery for injured feelings. When he refuses to return change and calls a passenger a dead beat and swindler and attracts attention of other passengers to her, her recovery is not limited to the change retained. Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 837.

62. Insulting language and unnecessary rudeness are. Boling v. St. Louis, etc., R. Co. [Mo.] 88 S. W. 35.

63. Latour v. Southern R. Co. [S. C.] 51 S. E. 265; Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713. Punitive damages cannot be given where a passenger was carried by his station when there was evidence that a stop was made and other passengers alighted. Yazoo, etc., R. Co. v. Smith, 82 Miss. 656, 35 So. 168.

64. Where two telegraphic bids for goods are sent on the same day, but through the negligence of the telegraph company the higher one is not delivered until the next day and after the market price has fallen below both bids, the measure of damages is not the difference between the highest bid and the market value, but the difference between the two bids. Western Union Tel. Co. v. Love-Banks Co. [Ark.] 83 S. W. 949. Where a telegram is changed in transmission so that plaintiff's offer of goods is made at a lower price than he intended and the offer is accepted and filled before discovery of the mistake, he can recover of the telegraph company the difference lost. Fisher v. Western Union Tel. Co. [Ky.] 84 S. W. 1179.

65. Willis v. Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538; Western Union Tel. Co. v. Porterfield [Tex. Civ. App.] 84 S. W. 850; Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165; Id. [N. C.] 49 S. E. 171. Mere "disappointment and regret" is not mental anguish for which damages may be recovered, and the mental anguish arising from the loss of a relative is no part of the mental anguish recoverable for on failure to deliver a telegram announcing it. Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952. Damages may extend only to results naturally to be anticipated. Jones v. Western Union Tel. Co., 70 S. C. 539, 50 S. E. 198; Capers v. Western Union Tel. Co. [S. C.] 50 S. E. 537. Where plaintiff was not prevented by non-delivery of a telegram from attending the funeral of a relative, she cannot recover for mental anguish endured before she obtained a postponement of the funeral. Western Union Tel. Co. v. Reed [Tex. Civ. App.] 84 S. W. 296. Daughter may recover for grief at not being able to see father's remains. Thomas

duty was willful, punitive damages may be awarded;[66] but recovery cannot extend beyond the natural and proximate results of the breach, either in business or personal matters.[67]

v. Western Union Tel. Co. [Ky.] 85 S. W. 760.

NOTE. Damages for mental anguish: "The following is the present status of the doctrine in the different states, as far as we have been able to ascertain: Its history in the state of Texas, where it was first specifically announced, may be briefly stated as follows: The first case in that court is the celebrated one of So Relle v. Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805. There it was held that there could be a recovery in such cases. The next cases were Railway Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269, and Id., 59 Tex. 563, 46 Am. Rep. 278. These cases were construed by the profession as in some respects modifying the doctrine in the first case. The question again arose in Stuart v. Western Union Telegraph Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623, and the rule announced in So Relle's Case was followed. That case was very thoroughly considered, and the decision then made has settled the law in that state upon the main question. Its reports show some 50 cases since in which the doctrine has been followed without question.

In Tennessee the doctrine was first announced in Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864, and has been reaffirmed in Telegraph Co. v. Mellon, 96 Tenn. 72, 33 S. W. 725, and Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

In Alabama the doctrine was expressly recognized in Telegraph Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148, but seems to have been somewhat modified in the more recent case of Telegraph Co. v. Crumpton, 138 Ala. 632, 36 So. 517, which appears to be the latest decision upon the subject.

In Kentucky the leading case in which such damages are allowed is Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880. The doctrine is affirmed in the later cases of Telegraph Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366, and Telegraph Co. v. Fisher, 107 Ky. 513, 54 S. W. 830.

In Iowa damages for mental anguish unaccompanied by physical pain are allowed. The leading case is Mentzer v. Telegraph Co., 93 Iowa, 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72, a carefully considered case, which has been widely cited. This case stood as the only expression of that court upon the subject until the recent case of Cowan v. Telegraph Co., 98 N. W. 281, 64 L. R. A. 545.

In Louisiana such damages are allowed. The leading and most recent case is Graham v. Telegraph Co., 34 So. 91.

In South Carolina they are also allowed. At first the doctrine was denied in Lewis v. Telegraph Co., 57 S. C. 325, 35 S. E. 556. This case was followed by an act of the legislature (23 St. at Large, 748; Civ. Code 1902, vol. 1, § 2223) permitting damages in such cases. This statute was held to be constitutional in Simmons v. Telegraph Co., 63 S. C. 429, 41 S. E. 521, 57 L. R. A. 607, which has subsequently been uniformly followed.

In Nevada the doctrine has been recently adopted in the case of Barnes v. Telegraph Co., 76 P. 931, 65 L. R. A. 666, in an able and learned opinion by Fitzgerald, J.

In Washington there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209, in which telegraph cases are cited with approval.

The doctrine is denied in the following states, as is shown by the most recent cases:

Florida: Telegraph Co. v. Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810, apparently the only case upon the subject in that state.

Georgia: Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 420; Giddens v. Telegraph Co., 111 Ga. 824, 35 S. E. 638.

Illinois: Telegraph Co. v. Haltom, 71 Ill. App. 63. The question does not appear to have come before the supreme court of that state.

Indiana: Telegraph Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

Kansas: West v. Telegraph Co., 39 Kan. 93, 17 P. 807, 7 Am. St. Rep. 530, appears to be the latest telegraph case in that state involving the question; but that case has been reaffirmed in Railway Company v. Dalton, 65 Kan. 661, 70 P. 645.

Minnesota: Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406, which is the only case in that state.

Mississippi: Telegraph Co. v. Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859. This case has apparently been doubted in one or two subsequent cases which, however, are not directly in point.

Ohio: Morton v. Telegraph Co., 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735, seems to be the only case in that state involving the question.

West Virginia: Davis v. Telegraph Co., 46 W. Va. 48, 32 S. E. 1026.

Wisconsin: Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.

Virginia: Connelly v. Telegraph Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663. In this state a statute was passed upon the subject, which apparently failed of its purpose.

In the following states **there have been no decisions** in telegraph cases upon the question, so far as we have been able to ascertain: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont and Wyoming." —Per Douglas, J., in Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165.

66. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12.

67. Newsome v. Western Union Tel. Co.

(§ 4) *G. Contracts for services.*[68]—For failure to perform services, the measure is generally the expense over the contract price made necessary by the breach;[69] and for incomplete performance,[70] the measure is generally the expense over the contract price made necessary by the default, while for delay in performance, recovery may extend to damages reasonably within contemplation of the parties.[71] Nonperformance of certain special services may involve damages not within the general rules.[72] Where the contractor fails of entire performance, he can recover only the reasonable value of that which he has performed less the hirer's damages for nonperformance.[73] For failure to accept services as agreed, the damages are the difference between the contract price and what it would cost plaintiff to perform,[74] or in case

[S. C.] 50 S. E. 279; Jones v. Western Union Tel. Co., 70 S. C. 539, 50 S. E. 198; Capers v. Western Union Tel. Co. [S C.] 50 S. E. 537; Western Union Tel. Co. v. Siddall [Tex.] 86 S. W. 343. Expense of railroad trip home to see about health of family made necessary by failure to forward telegrams is not recoverable. Hilley v. Western Union Tel. Co. [Miss.] 37 So. 556.

68. See 3 C. L. 1012.

69. Brown v. Cowles [Neb.] 101 N. W. 1020; Degnon-McLean Const. Co. v. City Trust, Safe Deposit & Surety Co., 99 App. Div. 195, 90 N. Y. S. 1029. For failure to put up cornice the hirer cannot recover the cost of putting it up, but only what it would cost him over the contract price. New York Metal Ceiling Co. v. City Homes Imp. Co., 88 N. Y. S. 233. The difference between the price to be paid by the owner to a contractor and that to be paid by him to a subcontractor, upon a contract wholly executory, is not an available measure of damages in an action on such executory contract. Levenson v. Bollowa, 85 N. Y. S. 386.

70. Where plaintiff has substantially performed and the contract provided for payment before beginning work, defendant's damages for defects in performance are the detriment suffered by him. Carpenter v. Ibbetson [Cal. App.] 81 P. 1114.

71. For delay in the completion of bridges to be used on extensions of plaintiff's railway system, which extensions could have been but were not completed at the appointed time because of the noncompletion of the bridges, plaintiff can recover interest on the amount expended in building the extensions from the time stipulated or the time thereafter when expenditures were made until the time of completion. American Bridge Co. v. Camden Interstate R. Co. [C. C. A.] 135 F. 323. For delay in obtaining right of way over which plaintiff agreed to construct a canal, plaintiff can recover the market rental value of equipment during the time it was necessarily idle. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510.

72. The measure for failure to erect a building is the excess of its reasonable value if erected over the contract price. Owner may recover the damages, though he does not erect it. Simons v. Wittmann [Mo. App.] 88 S. W. 791. For failure of a water company to supply a consumer, he can recover the fair value of the labor employed in procuring water from another source. Whitehouse v. Staten Island Water Supply Co., 101 App. Div. 112, 91 N. Y. S. 544. For breach of a contract to supply funds to construct a pipe line, plaintiffs may recover all expenses incurred subsequent to the execution of the contract and before breach, but not those incurred after. Smith v. Curran & Hussey, 138 F. 150. Where a contractor through his own negligence brings the work he has undertaken to perform into such a condition that he is unable to complete it, and thereupon abandons it, he is liable for the loss resulting to the contracting party, including the amount reasonably expended in minimizing the loss. Hammond Oil & Development Co. v. Feitel [La.] 38 So. 941. For failure of an agent to purchase chattels at a foreclosure sale unless more than a certain sum is bid, the measure of damages is the difference between the fair cash market value and the amount for which they sold. Dazey v. Roleau, 111 Ill. App. 367. Where a dyer does his work so badly that the material is rendered valueless to the owner, he cannot recover the full value unless he also shows that it is absolutely valueless. Emmerich v. Chegnay, 92 N. Y. S. 336.

73. Woodford v. Kelley [S. D.] 101 N. W. 1069.

74. Withers v. New York, 92 App. Div. 147, 86 N. Y. S. 1105; Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562. That from plaintiff's situation the cost to him would be unusually small is immaterial. Campbell v. Howerton [Tex. Civ. App.] 87 S. W. 370. Where plaintiff has partly performed, he can recover the value of the services rendered and the profit on the balance. Anderson v. Hilker [Wash.] 80 P. 848; Chase v. Smith, 35 Wash. 631, 77 P. 1069. When a party who has entered upon the performance of a contract and incurred expense therein is prevented from completing it by the other party, without fault of his own, his damage consists of the amount of such expenses and the profits he would have made. May recover expenses on quantum meruit, where timber contract abrogated by dissolution of corporation with which it was made. Griffith v. Blackwater Boom & Lumber Co., 55 W. Va. 604, 48 S. E. 442. Where a contractor, by reason of the termination of a partly executed contract, is entitled to compensation for services and outlay, part of which have been expended in permanent improvements, such services and expenditures are not apportioned between the executed and executory portions of the con-

of personal services the excess of the contract price over what plaintiff was able to earn elsewhere during the period.[75] For breach of a contract to employ plaintiff to collect certain claims, plaintiff can recover the agreed compensation without proof of services performed or of their reasonable value.[76]

(§ 4) *H. Promise of marriage.*[77]

§ 5. *Measure and elements of damages for torts. A. Miscellaneous torts.*[78]—Under allegation and proof of a willful tort, actual as well as punitive damages are recoverable, and actual damages may be recovered on proper proof, though there is no proof of willfulness.[79] Interest is recoverable in a proper case.[80] No recovery can be had for mere mental suffering unaccompanied by any physical injury,[81] or other actual damage;[82] but fright may be considered an element of damage when accompanied by a severe physical shock.[83]

Injuries to animals.[84]—For injury to horses, the damages are their reasonable hire during incapacity to work, permanent depreciation in value, and cost of treatment, not exceeding in all their reasonable value before injury.[85]

Alienation of affections.[86]

tract. Id. The fact that by means of such improvements the contractor also does work for others is immaterial. Id. Where defendant agreed to pay a contractor a certain amount for painting his house and also to retain from the contract price the price of materials furnished by plaintiff and the contractor defaulted, plaintiff was entitled to complete the job, and on defendant's refusal was entitled to recover the amount due for materials not exceeding the balance due the contractor, less the reasonable cost of completion. Bates v. Birmingham Paint & Glass Co. [Ala.] 38 So. 845.

75. Jones v. Oppenheim, 91 N. Y. S. 343; Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334.

76. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917.

77. See 3 C. L. 1013.

78. See 3 C. L. 1013. Damages for death by wrongful act, see Death by Wrongful Act, post, p. 945.

79. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

80. Interest is not recoverable on damages in actions ex delicto where no pecuniary benefit can accrue by reason of the injury. Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34. In estimating the damages for injury to an oil well by negligent shooting, the jury may properly take into consideration the facts that the well was run as one of a system of small wells and also that the ordinary and usual result of shooting was to improve them. Donnan v. Pennsylvania Torpedo Co., 26 Pa. Super. Ct. 324. In an action of tort for unliquidated damages, the question of awarding interest is in the discretion of the jury (Nichols v. Coleman, 96 App. Div. 353, 89 N. Y. S. 234; Feller v. McKillip [Mo. App.] 81 S. W. 641), unless by stipulation it is left to the court (Nichols v. Coleman, 96 App. Div. 353, 89 N. Y. S. 234). Under Rev. St. 1899, § 2869, providing that on a trial for damages the jury may award interest, such an allowance is discretionary with them and an instruction to allow interest is erroneous. Feller v. McKillip [Mo. App.] 81 S. W. 641.

81. Cole v. Gray [Kan.] 79 P. 654; Newton v. New York, etc., R. Co., 94 N. Y. S. 825; Pullman Co. v. Kelly [Miss.] 38 So. 317. No recovery can be had for fright alone unaccompanied by any physical injury. Night terrors to child caused by burning of sister in his sight. Fleming v. Lobel [N. J. Law] 59 A. 28. May be included in assault and battery. Happy v. Prichard [Mo. App.] 85 S. W. 655.

82. The sense of outrage and mental suffering resulting directly from the willful mutilation by defendant of the body of plaintiff's deceased parent are proper independent elements of compensatory damages. Koerber v. Patek [Wis.] 102 N. W. 40, reviewing many cases involving injury to feelings. Mental anguish may be recovered for in some states when caused by nondelivery of a telegram. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538; Western Union Tel. Co. v. Porterfield [Tex. Civ. App.] 84 S. W. 850; Thomas v. Western Union Tel. Co. [Ky.] 85 S. W. 760; Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952. Plaintiff driven from train at point of pistol by intoxicated passengers and compelled to walk home held not precluded from recovery on ground that his damages consisted of mental anguish only. International & G. N. R. Co. v. Henderson [Tex. Civ. App.] 82 S. W. 1065.

83. Lofink v. Interborough Rapid Transit Co., 102 App. Div. 275, 92 N. Y. S. 386.

84. See 3 C. L. 1013.

85. Instruction held erroneous for failure to limit recovery to value before injury. Georgia R. & Elec. Co. v. Wallace & Co. [Ga.] 50 S. E. 478. For injury to animals from which they partly recovered, the measure is the difference in value, the expense of effecting the cure, and the loss of use. Southern R. Co. v. Gilmer [Ala.] 39 So. 265.

86, 87. See 3 C. L. 1014.

False imprisonment.[87]—Substantial damages are recoverable for false imprisonment.[88]

Malicious prosecution.[89]—For wrongful attachment, both actual and exemplary damages are recoverable,[90] and where property was seized under a writ of replevin wrongfully and maliciously sued out for the purpose of extorting money, damages for injuries to the feelings of the owner are recoverable;[91] but plaintiff cannot recover for the expense of storing the goods after they were returned to him by virtue of the judgment in the replevin suit.[92] Attorney's fees and the expense of attending court in the suit maliciously brought are recoverable.[93]

Infringements of patents and trade-marks and unfair competition.[94]

Interference with water rights.[95]

Expulsion from association.[96]

Fraud and deceit.—The true measure of damages suffered by one who has been fraudulently induced to purchase or exchange property in some jurisdictions is the difference in actual value between what he gives and what he receives;[97] in others it is the difference in value between the property received and what it would have been had it been as represented.[98] The measure of damages for fraud and deceit is unaffected by the relation of principal and agent between the parties.[99]

(§ 5) *B. Loss of, or injuries to, property.*[1]—For permanent injury to land, the measure of damages is the difference between the fair cash market value immediately before and immediately after the injury,[2] or the expense of remedying the injury,[3]

88. Direction of verdict for nominal damages where plaintiff was arrested by railroad conductor held error. Tidey v. Erie R. Co. [N. J. Err. & App.] 60 A. 954.

89. See 3 C. L. 1014.

90. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

91, 92. Harris v. Thomas [Mich.] 12 Det. Leg. N. 239, 103 N. W. 863.

93. Harr v. Ward [Ark.] 84 S. W. 496.

94, 95, 96. See 3 C. L. 1014.

97. Where a corporation exchanges its stock for defendant's property, a mine, and it has no assets except the mine, there is no damage to the corporation if the mine is not as represented. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

98. Beare v. Wright [N. D.] 103 N. W. 632; Pritchard v. McCrary [Ga.] 50 S. E. 366.

99. Miller v. John, 111 Ill. App. 56.

1. See 3 C. L. 1014.

2. Railroad embankment, and operation of road. Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75. Where land is overflowed. Sanitary District of Chicago v. Pearce, 110 Ill. App. 592; Osborn v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879. Poisoning waters of stream. Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14. Change of grade. Whitehead v. Manor Borough, 23 Pa. Super. Ct. 314. Operation of foundry and iron works. Farver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. Negligent fire burning over meadow and timber lot. Toledo, etc., R. Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561. Pollution of stream, killing fish, etc. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Deposit of barren earth on land causing permanent injury. Baltimore, etc., R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661. Where the operation of a railroad results in a direct physical injury to neighboring property, a right of action exists and the damage therefor may include all other elements of injury, such as noise naturally arising from the operation of the road. Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75; Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488, rvd. 212 Ill. 406, 72 N. E. 39; Kuhn v. Illinois Central R. Co., 111 Ill. App. 323. Does not include danger that adults or children may be killed while upon tracks. Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75. In an action for injury to real property arising from the construction of a railroad, special damages are allowable on account of any special value of the property for a particular purpose. Illinois Cent. R. Co. v. Trustees of Schools, 112 Ill. App. 488. In an action for injuries to land by flooding, the fact that it has never been platted for building lots does not render evidence of its probable use for that purpose as a criterion of damages inadmissible. McGroarty v. Lehigh Valley Coal Co. [Pa.] 61 A. 570. For deprivation of lateral support the damages are limited to the injury to the land without regard to the buildings thereon. Jones v. Greenfield, 25 Pa. Super. Ct. 315; Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613. Where the wrong is the cutting of timber specially valuable to the land as shade trees, the damages are the diminution in the value of the land. Eldridge v. Gorman, 77 Conn. 699, 60 A. 643. Increase in value of land since the injuries from other causes should not be included. Missouri, etc., R. Co. v. Dennis [Tex. Civ. App.] 84 S. W. 860. Permanent depreciation of a building may be recovered for where an excavation is made by

and for nonpermanent injuries resulting in the loss of crops or use of land, the damages are the value of the crops,[4] or of the use[5] respectively.[6] Where the building of a railroad embankment changes the course of a stream and overflows plaintiff's land and compels him to build new roads and bridges, the cost of such improvements may be recovered.[7] For negligent destruction of a vessel, the damages are the value of the vessel at the time it was destroyed, with interest to the time of the trial. Prospective profits on its earnings cannot be considered.[8] For injuries to personal property, the measure of damages is the difference in value before or at the time of injury and after.[9]

(§ 5) *C. Maintaining nuisance.*[10]—For a continuing nuisance as distinguished from a permanent injury, the measure of damages is the depreciation in rental value;[11] but if the injury be permanent the damages are the depreciation in the value of the property.[12] Where a nuisance is temporary in character, recovery cannot be

an adjoining owner so close as to injure it. Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34.

3. Davelaar v. Milwaukee [Wis.] 101 N. W. 361. If defendant desires an instruction presenting this theory, he must request it. Osborne v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879. Damages may be limited to the cost of remedying the injury unless that would be more than the value of the land, in which case the value of the land becomes the measure of damages. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79; Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226. The cost of restoring land to its former condition is the measure of damages when such cost is less than the diminution in value, if such cost would exceed the diminution, then the latter is the correct measure. Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96; City of Covington v. Berry [Ky.] 87 S. W. 317. For injuring a gas well by negligent shooting, the damages are either the cost of repair, the value of the well, or the expense of drilling a new one, whichever would be the least expensive. Donnan v. Pennsylvania Torpedo Co., 26 Pa. Super. Ct. 324. Where defendant claims that a body of water it has obstructed is not navigable or a public highway, plaintiff's damages are not limited to the cost of removing the obstruction and the increased expense of his business made necessary by the delay for such time as was necessary for the removal, but he may recover for all the cost made necessary by the delay during the whole period of actual obstruction. Creech v. Humptulips, etc., Co., 37 Wash. 172, 79 P. 633.

4. Rule for estimating value of crop, annual and perennial. Candler v. Washoe Lake Reservoir & G. C. Ditch Co. [Nev.] 80 P. 751. The measure of damages in the case of destruction of growing crops is their value at the time of such destruction; the value being estimated upon what was reasonably probable as to their maturity and their value at that time. City of Chicago v. Dickman, 105 Ill. App. 209. For overflowing willow land with salt water, the crop being perennial, defendant is liable only for the crop destroyed, not for four successive crops. Black v. Highland Solar Salt Co., 98 App. Div. 409, 90 N. Y. S. 338.

5. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626; Sanitary Dist. of Chicago v. Alderman, 113 Ill. App. 23. The diminution in rental value. Baltimore & O. S. W. R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661. For injury to property by the overflowing of a sewer, the damages are the depreciation in rental value. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744. The value of plaintiff's property and the expense of moving, not the amount paid for other premises, would control. Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226. Depreciation of flow of water to mill. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

6. Partial obstruction of stream causing overflow at flood time does not authorize recovery on basis of permanent injury. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 86 S. W. 1052.

7. San Antonio & A. P. R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842.

8. Gossage v. Philadelphia, etc., R. Co. [Md.] 61 A. 692.

9. Injury to cattle by fire. Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225. For damage to goods by overflow of a sewer, the recovery may extend to the lessening of value of the goods. City of Houston v. Reichardt [Tex. Civ. App.] 86 S. W. 74.

10. See 3 C. L. 1016.

11. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882; Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 873; Gerow v. Liberty, 94 N. Y. S. 949; Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744; Baltimore & O. S. W. R. Co. v. Quillen [Ind. App.] 72 N. E. 661. The collection and discharge of water on the land is temporary. Is abatable, and its continuance will not be presumed. Id. Plaintiff cannot recover permanent or fee damages for a continuance of the nuisance. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956. The damages to the lessee of a hotel for the maintenance of a nuisance in the vicinity are measured by the injury to its usable value. The diminution of rental value is only one element of damages. Pritchard v. Edison Elec. Illuminating Co., 179 N. Y. 364, 72 N. E. 243; afd. 92 App. Div. 178, 87 N. Y. S. 225. See 3 C. L. 1016, n. 15-17.

12. Denison, etc., R. Co. v. Barry [Tex.]

had for injuries sustained after suit begun,[13] and where a life tenant sues for injury resulting from the maintenance of a continuing nuisance, the damages, notwithstanding defendant's election to have the tort treated as a permanent one, cannot include the permanent injury to the property, but can only be assessed to the time of the trial.[14]

(§ 5) *D. Trespass on lands.*[15]—For cutting timber, in the absence of special injury to the land, the measure of damages is the value of the trees for timber or fuel.[16] For wrongfully and without consent using plaintiff's roof to string telephone wires on, he can recover the reasonable rental value of the roof for that purpose.[17]

(§ 5) *E. Conversion.*[18]—The measure of damages in an action of trover is the market value of the property at the time and place of the conversion, with interest to the day of trial.[19] For conversion of household goods the damages are not restricted to the price which could be obtained by a sale in market, but the owner

83 S. W. 5. Instructions erroneous. Baltimore, etc., R. Co. v. Quillen [Ind. App.] 72 N. E. 661. Instructions approved. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Where count asking for damages for permanent injuries was dismissed, held error to give instruction authorizing recovery for such injuries. Measure of damages. Long v. Kansas City, 107 Mo. App. 533, 81 S. W. 909. The deposit of barren earth on plaintiff's land by flooding it with water from defendant's ditches is permanent. Id.

13. Fairbank Co. v. Bahre, 213 Ill. 636, 73 N. E. 322; Neumeister v. Goddard [Wis.] 103 N. W. 241. Recovery should be for all damages up to time of bringing suit. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744.

14. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

15. See 3 C. L. 1016.

16. If of value as a summer home, injury as to shade trees is recoverable. Eldridge v. Gorman, 77 Conn. 699, 60 A. 643; Ferguson v. Buckell, 101 App. Div. 213, 91 N. Y. S. 724.

17. Bunke v. New York Tel Co., 34 Civ. Proc. R. 170, 91 N. Y. S. 390.

18. See 3 C. L. 1017.

19. Morley v. Roach, 116 Ill. App. 534; Meloon v. Read [N. H.] 59 A. 946; American Soda Fountain Co. v. Futrall [Ark.] 84 S. W. 505; Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646. Stock. Hagar v. Norton [Mass.] 73 N. E. 1073. Where a chattel in possession of a mortgagee is wrongfully taken in attachment by a creditor of the mortgagor, the mortgagee may recover the value of the chattel at the time of the taking. Aldrich v. Higgins, 77 Conn. 370, 59 A. 498. For an invalid attempt at foreclosure of a chattel morgage on live stock amounting to a conversion, defendant is liable for its value at the time of seizure unreduced by expenses of keeping between seizure and sale, or the value of stock dying in the interim. Kellogg v. Malick [Wis.] 103 N. W. 1116. A defendant selling securities belonging to his wife is liable for the currency price in the state where sold at the time of sale. Gittings v. Winter [Md.] 60 A. 630. Where a broker who has purchased and is holding stocks at the option of a buyer makes an unauthorized sale of them, he is liable for the excess, if any, over the price realized of the lowest sum for which the client could have purchased the stocks after notice of the sale had he given an order to that effect with reasonable promptness, or for which he did repurchase acting with reasonable promptness after notice. In case of fluctuations in the market price between the day of the conversion and the latest day to which it would have been reasonable to defer a repurchase, the damages would be the excess over the price obtained of the highest price attained during such interval. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. The measure of damages for the conversion of a life insurance policy when there is no evidence to the contrary is the face value of the policy with interest from date of conversion. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200. In Montana the damages are presumed to be the value of the property at the time of conversion with interest, or the highest value between time of conversion and date of verdict without interest. Civ. Code Mont. § 4333. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. For conversion of property by a carrier at destination, the damages are the value of the property there less the unpaid freight charges. Missouri, etc., R. Co. v. C. H. Rines & Co. [Tex. Civ. App.] 84 S. W. 1092. Conversion of corn. Hanaway v. Wiseman [Tex. Civ. App.] 13 Tex. Ct. Rep. 681, 88 S. W. 437. If a landlord has gathered a crop, measure of damages for conversion by him is value of crop less cost of fertilizer and the cost of taking care of the same. Parker v. Brown, 136 N. C. 280, 48 S. E. 657. If conversion of timber is not willful, the general rule applies. If the trespass was intentional, the value at the time the suit is brought determines the amount of damages. Trustees of Dartmouth College v. International Paper Co., 132 F. 92. Defendant under a grant from plaintiff necessarily in removing coal removes iron pyrites. Measure of damage is value of property at mouth of pit less the cost of the digging of the iron pyrites and of separating it from merchantable coal. Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

should recover their actual value to him not including sentimental or fanciful value.[20] For the conversion of railroad bonds which have no market value, the measure is their proportionate part of the intrinsic value of the property on which they were a first lien.[21] The measure of a mortgagee's damages for the conversion of the mortgaged property by a stranger is the amount of his debt if that is less than the value of the property.[22]

(§ 5) *F. Wrongful taking or detention of property.*[23]—For wrongful seizure of property on execution,[24] or wrongful attachment, defendant may recover all accruing damages,[25] including the value of property unreturned.[26] For detention of property, interest on its value and damages for depreciation are ordinarily the measure, but where the use of the property is valuable, the value of the use with deterioration may be the measure.[27]

(§ 5) *G. Libel or slander.*[28]—Punitive as well as compensatory damages,[29] including mental suffering,[30] are recoverable for malicious libel or slander.

(§ 5) *H. Personal Injuries.*[31]—For an assault one may recover for injuries to his person, his medical bill, his loss of time, and mental suffering, and, if the as-

20. Barker v. Lewis Storage & Transfer Co. [Conn.] 61 A. 363. Recovery is not confined to what clothing and household goods would sell for as second-hand goods, but plaintiff may recover their actual value to him. Head v. Becklenberg, 116 Ill. App. 576.

21. Industrial & General Trust v. Tod, 180 N. Y. 215, 73 N. E. 7.

22. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715.

23. See 3 C. L. 1018. Compensation in eminent domain proceedings, see Eminent Domain, 3 C. L. 1189.

24. One unlawfully conducting a saloon without a license cannot recover for the wrongful levy of an execution thereon the wages paid his bartender and porter, but may recover the value of beer spoiled during the time the place was withheld from him and also the use of his house in which the business was conducted. Young v. Stevenson [Ark.] 86 S. W. 1000.

25. Perishable goods lost. W. F. Vandiver & Co. v. Waller [Ala.] 39 So. 136. Where an attachment is wrongfully sued out, time spent by defendant in employing and advising with counsel for the defense of the suit, time and money spent in procuring a delivery bond, and the value of the necessary use of defendant's team in making trips to consult counsel are proper elements of damage. Tullis v. McClary [Iowa] 104 N. W. 505.

26. For wrongful seizure of property on execution, a mortgagee may recover the value of the property up to the amount of his debt with interest. Gallick v. Bordeaux [Mont.] 78 P. 583. For wrongful attachment of a stock of goods, the damages are their actual value at the time and place of seizure. Rule where stock includes old and shelf worn goods (State v. Parsons [Mo. App.] 84 S. W. 1019), and the expense of dissolving the attachment, but not the expense of trying the main case thereafter (Id.).

27. If use would wear it out, as a machine, and it was not used, the deterioration naturally arising from use during the period of detention should be deducted. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51; Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. For the wrongful and premature foreclosure of a chattel mortgage, plaintiff may recover the value of the use of the property during the time it was out of his possession. Tanton v. Boomgaarden, 111 Ill. App. 37. In replevin for a heifer, defendant on recovering damages is entitled to the value of her use during the period of detention under the writ, without deduction for her increase in value during that time. McGrath v. Wilder [Vt.] 60 A. 801. Where defendant in replevin succeeds and has judgment for return of the property, he is also entitled to his damages which include the decrease in the value of the goods during their detention, and interest on their value. Cox v. Burdett, 23 Pa. Super. Ct. 346. Where there is a judgment for return in replevin and some of the goods are not returned and others are returned in a damaged condition, defendant's damages are the value of the goods not returned and the deterioration of those returned with interest. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. Where butter and eggs are wrongfully levied on, the damages are the difference between their value when seized and when returned to the owner. Barber v. Dewes, 101 App. Div. 432, 91 N. Y. S. 1059. The measure in replevin for a cow that plaintiff intended to use in his business is her usable value. Smith v. Stevens [Colo.] 81 P. 35.

28. See 3 C. L. 1018.

29. Post Pub. Co. v. Butler [C. C. A.] 137 F. 723; Shockey v. McCauley [Md.] 61 A. 583. Instruction on propriety of punitive damages held not prejudicial to defendant in view of verdict. Butler v. Barrett, 130 F. 944. Punitive damages not recoverable against telegraph company for transmitting a libelous telegram where no express malice is shown. Western Union Tel. Co. v. Cashman [C. C. A.] 132 F. 805.

30. Finger v. Pollack [Mass.] 74 N. E. 317; Butler v. Barrett, 130 F. 944.

31. See 3 C. L. 1018.

sault was malicious, exemplary damages.[32] The damages for negligent personal injury must be compensatory,[33] excluding exemplary or punitive damages,[34] and including remuneration for necessary expenditures,[35] loss of time,[36] mental and physical pain and suffering,[37] and the effects of permanent disability, such as loss of earn-

32. Happy v. Prichard [Mo. App.] 85 S. W. 655. Damages can never be mitigated below adequate compensation. Le Laurin v. Murray [Ark.] 87 S. W. 131.

33. Peterson v. Roessler & H. Chemical Co., 131 F. 156; Porter v. Delaware. etc., R. Co., 134 F. 155; Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422; Waechter v. St. Louis & M. R. Co. [Mo. App.] 88 S. W. 147. Instruction detailing elements of damage approved. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383; Clark v. Durham Traction Co. [N. C.] 50 S. E. 518; Western & A. R. Co. v. Burnham [Ga.] 50 S. E. 984. A woman may recover for necessary postponement of her marriage. Remey v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 368, 104 N. W. 420. A disease caused by an accident may be recovered for, though not noticed until some time after the injury. Wood v. New York. etc., R. Co. 83 App. Div. 604, 82 N. Y. S. 160.

34. Denver & R. G. R. Co. v. Scott [Colo.] 81 P. 763.

35. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383; Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422. That expenses have not been paid does not preclude recovery. Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 781; Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34; Wilbur v. Southwest Missouri Elec. R. Co., 110 Mo. App. 689, 85 S. W. 671. Physician's charges should not be included in damages for personal injuries, defendant having paid the same. Bowe v. Bowe, 5 Ohio C. C. (N. S.) 233, 26 Ohio C. C. 409. Where an injury webbed plaintiff's fingers, the cost of a surgical operation to separate them may be considered. Busch v. Robinson [Or.] 81 P. 237. Recovery for expenses made necessary by a personal injury cannot be had unless they are shown to be reasonable. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408. Evidence of the value of treatment furnished by a physician is not sufficient to authorize recovery of the value of medicine. Knight v. Kansas City [Mo. App.] 87 S. W. 1192. The recovery extends to reasonable value of physician's services unless the charge made is less than the reasonable value, in which case it cannot exceed the charge made. Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 781. An injured person may recover the reasonable value of nursing given him by a widowed daughter who lived with him, though there was no express contract between them that she should be compensated. Kaiser v. St. Louis Transit Co., 108 Mo. App. 708, 84 S. W. 199. Recovery by minor, see ante, § 3.

36. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383. Loss of earning power may be considered where plaintiff shows she has been employed as a nurse at certain wages, that she gave up that occupation to keep house for her son, and that since her injury it has become necessary to employ another person at stated wages to take her place as housekeeper. Olin v. Bradford, 24 Pa. Super. Ct. 7. Damages for an injury due to the fault of another cannot be reduced by the amount of sick benefits paid to the one injured; nor where sick benefits are waived in order to receive full wages; but the equivalent of such wages cannot be again awarded by the jury, as a special item of compensatory damages. Pittsburgh, etc., R. Co. v. Fagin, 3 Ohio N. P. (N. S.) 30, 15 Ohio N. P. 605. Loss of earning power cannot be ignored because plaintiff's employer continues to pay him his wages as a gratuity. Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 A. 958. Plaintiff may testify as to his occupation, his compensation, and that he could not follow his occupation because of the accident. McCarthy v. Philadelphia & R. Co. [Pa.] 60 A. 778. Plaintiff may not recover loss of profits from his business where the earnings do not proceed entirely from his labor, but involved the use of his store, a truck, capital and the labor of hired men. Jonas v. Interurban St. R. Co., 45 Misc. 579, 90 N. Y. S. 1070; Tanzer v. New York City R. Co., 91 N. Y. S. 334. Plaintiff cannot recover for loss of time where he has suffered no pecuniary loss from it. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Evidence held sufficient to justify verdict for lost time. Texas & P. R. Co. v. McDowell [Tex. Civ. App.] 88 S. W. 415.

37. City of Chicago v. Davies, 110 Ill. App. 427; Peterson v. Roessler & Hasslacher Chemical Co., 131 F. 156; Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383; Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422; Waechter v. St. Louis & M. R. Co. [Mo. App.] 88 S. W. 147; Fuchs v. St. Louis Transit Co. [Mo. App.] 86 S. W. 458. One suffering from injuries to the person may recover for mental distress and anguish resulting from the same cause. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983. There is no fixed rule for the measure of damages for mental anguish, apart from physical suffering, and much must be left to the jury under proper instructions. Powell v. Nevada, etc., R. Co. [Nev.] 78 P. 978. Mortification and distress of mind from contemplation of the crippled condition is too remote. Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272; Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983. See 3 C. L. 1019, n. 59. May include mental anguish, the sense of loss and burden. the inconvenience and the embarrassment. Rice v. Council Bluffs, 124 Iowa, 639, 100 N. W. 506. Mental pain may be inferred from physical suffering. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856.

ing power,[38] permanent impairment of mental and physical powers,[39] and future pain and suffering,[40] which the evidence shows are reasonably certain to result from the injury;[41] but possible or even probable future effects are too remote and speculative to form any basis of legal injury.[42]

§ 6. *Inadequate and excessive damages.*[43]—Verdicts showing willful disregard of the testimony will not be permitted to stand, whether excessive[44] or inade-

38. Northern Commercial Co. v. Nestor [C. C. A.] 138 F. 383; Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422; Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. The age of the person, his situation in life, his condition of health and habits of industry, and profits derived from the management of a business resulting from the personal attention and labor of the owner, as distinguished from profits arising from invested capital, may, in proper cases, be considered in determining earning power. Simpson v. Pennsylvania R. Co., 210 Pa. 101, 59 A. 693. Where there is a complete destruction of earning power, the pecuniary loss is theoretically estimated by the capital which, at a fair rate of interest, will produce a yearly sum equal to the average wages likely to be earned during plaintiff's expectancy of life, less such a sum as at compound interest for the same period will equal and offset such sum. Peterson v. Roessler & Hasslacher Co., 131 F. 156; Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569. The earnings of plaintiff for several years past may be shown as to his earning capacity, though at the time of the injury he had not been employed for two months. West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586. Such earnings for remote years not admissible. Chicago & J. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796. There must be evidence showing with reasonable certainty that the permanent injury was in fact sustained. Goken v. Dallugge [Neb.] 103 N. W. 287. Instruction held not bad as allowing recovery without proof. McCarthy v. St. Louis Transit Co., 108 Mo. App. 317, 83 S. W. 298. Plaintiff is not limited to recovery on basis of occupation he was pursuing at time of injury. Dallas Consol. Elec. R. Co. v. Hardy [Tex. Civ. App.] 86 S. W. 1053.

39. Pumorlo v. Merrill [Wis.] 103 N. W. 464. Loss of memory and impairment of mental power are proper elements. Nichols v. Oregon Short Line R. Co. [Utah] 78 P. 866.

40. City of Chicago v. Davies, 110 Ill. App. 427; West Chicago St. R. Co. v. Dougherty, 110 Ill. App. 204; Chicago & M. Elec. R. Co. v. Ullrich, 213 Ill. 170, 72 N. E. 815; Fishburn v. Burlington & N. W. R. Co. [Iowa] 103 N. W. 481. Instruction held proper as authorizing recovery for future suffering and not permanent injury. Achey v. Marion [Iowa] 101 N. W. 435. Where injuries are such that they are necessarily certain to continue to cause pain and suffering, the fact that they are not shown to be permanent does not preclude consideration of future pain and anguish. Haxton v. Kansas City [Mo.] 88 S. W. 714. The issue of probable future suffering is presented where plaintiff has lost one leg nearly to the knee, the great toe of the other foot and sustained a deep scalp wound, though at the time of the trial the wounds are entirely healed. Missouri, etc., R. Co. v. Nesbit [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891. Physical disfigurement is not an element. Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698.

41. City of Chicago v. Davies, 110 Ill. App. 427; Shaw v. Seattle [Wash.] 81 P. 1057; Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304; San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401; Pentoney v. St. Louis Transit Co., 108 Mo. 681, 84 S. W. 140; Houston & T. C. R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902; Newport L. & A. Turnpike Co. v. Pirmann, 26 Ky. L. R. 933, 82 S. W. 976. Recovery must be limited to reasonably certain results; and not extend to speculative, contingent or probable effects. Waddell v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 765. Instruction enumerating elements recoverable for held to state them properly. West Chicago St. R. Co. v. Dougherty, 110 Ill. App. 204; Olson v. Chicago, etc., R. Co. [Minn.] 102 N. W. 449; City of Chicago v. Davies, 110 Ill. App. 427. Evidence of likelihood of climacteric of woman 40 years old occurring before recovery held sufficient to go to jury. Keefe v. Norfolk Suburban St. R. Co., 185 Mass. 247, 70 N. E. 46. Instruction held not bad as ignoring boundary of reasonable certainty. Central Texas & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. Use of word "likely" and "probably" in instructions held not bad. Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133; Pentoney v. St. Louis Transit Co., 108 Mo. App. 681, 84 S. W. 140.

42. Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304. Experts cannot state what "might" result. Briggs v. New York, etc., R. Co., 177 N. Y. 59, 69 N. E. 223. Evidence as to possible future conditions as the result of an accident is inadmissible as too remote and speculative. Damages due to hernia caused by an accident must be based upon actual condition, and not upon the possibility of the hernia becoming strangulated and causing death. City of Chicago v. Lamb, 105 Ill. App. 204. $6,000 to child 10 years old based on testimony of specialist that as puberty approached he would develop insanity or epilepsy held obviously speculative. Fleming v. Lobel [N. J. Law] 59 A. 28. Evidence must show such a degree of probability of their occurring as amounts to reasonable certainty. MacGregor v. Rhode Island Co. [R. I.] 60 A. 761. Inability to bear children cannot be recovered for. Lennox v. Interurban St. R. Co., 93 N. Y. S. 230. Instruction held erroneous as not properly limiting. Walker v. St. Louis & S. R. Co., 106 Mo. App. 321, 80 S. W. 282.

43. See 3 C. L. 1020.

44. Mills v. Larrance, 111 Ill. App. 140;

quate;[45] but the court will not interfere unless the amount is so out of proportion to the injury as to indicate passion or prejudice on the part of the jury, and cannot be accounted for in any other manner.[46] Unless grossly excessive, an excessive verdict may be cured by a remittitur.[47] Where plaintiff submits to the verdict, defend-

Finlay Brewing Co. v. People, 111 Ill. App. 200; Shaw v. Seattle [Wash.] 81 P. 1057. Trifling excess will not cause reversal. Roesch v. Young, 111 Ill. App. 34. Whether a verdict should be set aside because of excessiveness of damages is a question of fact. Meloon v. Read [N. H.] 59 A. 946. In the Federal appellate courts, where no error of law appears, the verdict is conclusive on the amount of damages. Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171. An assessment in a personal injury case approved by the trial court and affirmed by the appellate court is conclusive on the supreme court in Illinois. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787. No reversal for excessiveness in South Carolina. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

45. See 3 C. L. 1020, n. 75. Fischer v. St. Louis [Mo.] 88 S. W. 82; Lovenhart v. Lindell R. Co. [Mo.] 88 S. W. 757. That the court would have awarded a larger sum is not sufficient to set the verdict aside. Hellyer v. Trenton City Bridge Co., 133 F. 843. Under a statute providing against awarding new trials for inadequacy of damages in personal injury cases, a verdict for nominal damages should not be set aside, though the court thinks it inadequate. Neb. Ann. Code 1901, § 315. Langdon v. Clarke [Neb.] 103 N. W. 62. Where there is a verdict for $1.00 in an action by a father for the death of a son of 17, a new trial is rightly granted on the ground of the inadequacy of the damages. Rawitzer v. St. Paul City R. Co. [Minn.] 103 N. W. 499.

46. Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422; Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Normile v. Wheeling Tract Co. [W. Va.] 49 S. E. 1030; Deland v. Cameron [Mo. App.] 87 S. W. 597; Waechter v. St. Louis & M. R. Co. [Mo. App.] 88 S. W. 147; United States Brewing Co v. Stoltenberg, 113 Ill. App. 435; Kozlowski v. Chicago, 113 Ill. App. 513; Houston & T. C. R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902. Must shock the sense of right or justice. Village of Wilmette v. Brachle, 110 Ill. App. 356; Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 A. 958. That the amount is larger than the appellate court would have awarded is not sufficient to set it aside. N. K. Fairbank Co. v. Bahre, 112 Ill. App. 290. A verdict is not excessive merely because its amount invested at five per cent would produce a larger annual income than plaintiff was able to earn prior to his injury. Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37. Merely that the verdict is for the highest amount assessable under the evidence does not make it excessive. Jennings v. Ingram, 111 Ill. App. 261. That remittitur from $5,000 to $3,000 was ordered below is not conclusive of passion and prejudice. American Contracting Co. v. Sammon, 6 Ohio C. C. (N. S.) 121, 27 Ohio C. C. 337. Neither is $5,000 reduced to $2,500. Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116. Damages for personal injuries based on conflicting expert testimony as to seriousness and permanence cannot be interfered with. Zelley v. West Jersey & S. R. Co. [N. J. Law] 59 A. 9. Where the verdict on plaintiff's claim of loss of profits from defendant's failure to carry out a contract is within the range of the testimony it cannot be considered excessive. Norton v. Shields, 132 F. 873. In personal injury cases the amount of damages is peculiarly within the province of the jury. Rice v. Council Bluffs, 124 Iowa, 639, 100 N. W. 506. If the verdict is fairly within the credible testimony and within the amount demanded, it is not excessive merely because it exceeds plaintiff's own estimate. Einolf v. Thompson [Minn.] 103 N. W. 1026. Judge not required to grant a new trial, though he would have returned a smaller verdict; the verdict was of $1,016.66 for removing a fence when the actual injury was not over $2.50. Beaudrot v. Southern R. Co., 69 S. C. 160, 48 S. E. 106. Where exemplary damages are recoverable, the case must be clear to set aside for excessiveness. Stevens v. Friedman [W. Va.] 51 S. E. 132. For conspiracy to injure one in his business as a merchant, $2,300.00 against a corporation and $300.00 against one individual and nothing against another was not the result of passion or prejudice. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271. The amount of damages for personal injuries is for the jury, subject to review by the trial judge, and the verdict will not be set aside on appeal unless induced by passion and prejudice. Gorham v. St. Louis, etc., R. Co. [Mo. App.] 86 S. W. 574.

47. City of Chicago v. Hawgood & Avery Transit Co., 110 Ill. App. 34; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; Shaw v. Seattle [Wash.] 81 P. 1057; Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727; McDonald v. Rhode Island Co., 26 R. I. 467, 59 A. 391; Lynch v. M. T. Stevens & Sons Co. [Mass.] 73 N. E. 478; McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722; Haas v. New Orleans R. Co., 112 La. 747, 36 So. 670; St. Louis, etc., R. Co. v. Adams [Ark.] 86 S. W. 287. Not in Arizona. Southern Pac. Co. v. Fitchett [Ariz.] 80 P. 359. Where the damages awarded evinces passion or prejudice, the court on appeal may require a remittitur as a condition of affirming. Alabama Great Southern R. Co. v. Roberts [Tenn.] 82 S. W. 314, citing many cases. Remittitur of allowance as to which proof was insufficient. Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126; Gerst v. St. Louis [Mo.] 84 S. W. 34; Howard v. Terminal R. Ass'n, 110 Mo. App. 574, 85 S. W. 608; Polacci v. Interurban St. R. Co., 90 N. Y. S. 341; St. Louis S. W. R. Co. v. Haynes [Tex. Civ. App.] 86 S. W. 934. Remittiturs are allowable in Illinois in actions ex delicto, both at the trial and appellate courts, and the action of the appellate court is conclusive on the supreme

ant cannot be heard to insist that it should be set aside for inadequacy.[48] Under a conflict of evidence as to the extent of personal injuries, an allowance of damages fairly within the limits of plaintiff's evidence is conclusive on appeal,[49] and under the constitution of Utah the amount of damages recoverable is a question of fact.[50] Holdings on the excessiveness and inadequacy of recovery are collected and classified in the footnote.[51]

court. Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43. An error in the admission of evidence that could merely have affected the amount of the verdict may be cured by remittitur. Chicago City R. Co. v. Miller, 111 Ill. App. 446. Where the damages assessed are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court in the exercise of a sound discretion may make the remittitur of the excess the condition for refusing to grant a new trial. American Contracting Co. v. Sammon, 6 Ohio C. C. (N. S.) 121, 27 Ohio C. C. 337. Verdict reduced the amount allowed by the jury as costs. Toal v. North Jersey St. R. Co. [N. J. Law] 58 A. 172. Defendant should not be allowed on a counterclaim a smaller sum than plaintiff concedes to be due him. Farry v. Shea [N. J. Law] 59 A. 21. Remittitur of award to married woman for expenses ordered. Achey v. Marion, 126 Iowa, 47, 101 N. W. 435. A court has power to order a remittitur as a condition of overruling a motion for a new trial. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 P. 377. And on appeal such order will be presumed to have been based on insufficiency of evidence and not on a conviction that the verdict was the result of passion or prejudice. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78. Attorney's fees not recoverable under the law. Pritchard v. McCrary [Ga.] 50 S. E. 366. Where the evidence is too indefinite to form a basis for it, a remittitur cannot cure. Texas & P. R. Co. v. Frank [Tex. Civ. App.] 88 S. W. 383. Error in allowing exemplary damages is not curable by remittitur. Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 74 N. E. 738.

48. Rockefeller v. Lamora, 94 N. Y. S. 549.

49. Hitt v. Kansas City [Mo. App.] 85 S. W. 669; International & G. N. R. Co. v. Goswick [Tex.] 85 S. W. 785.

50. Whether damages are excessive is a question exclusively for the trial court and jury. Nichols v. Oregon Short Line R. Co., 28 Utah, 319, 78 P. 866.

51. Recoveries held not excessive. Breach of contract: $800 for death of dog during shipment. Oldham v. United States Exp. Co., 25 Pa. Super. Ct. 549. $75,000 for failure to deliver 1000 shares of 6% preferred stock in asphalt mining company. Julia v. Critchfield, 137 F. 969. $300 for breach of warranty as to foal getting power of jack bought for $400. Wingate v. Johnson [Iowa] 101 N. W. 751. $10,529.46 for breach of contract for term of three years, the profits of the preceding two years being $10,000. Herman v. William B. Pierce Co., 93 N. Y. S. 413. 10% statutory damages and $200 attorney's fee for unreasonable contest of life insurance policy. Williams v. St. Louis Life Ins. Co. [Mo.] 87 S. W. 499.

Torts in general: $1,200 for injury to mill and dwelling by pollution of stream. Dudley v. New Britain, 77 Conn. 322, 59 A. 89. $2,000 to family for permanent paralysis of husband and father induced by intoxication contributed to by defendant. Felsch v. Babb [Neb.] 101 N. W. 1011. $200 for horse killed by railroad where plaintiff's verified claim for $100 is explained by saying he thought he might get that much without suit. Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208. $3,000.00 for being bitten by a dog; blood poison having set in and the injured person having been confined to his bed for seven weeks. Grissom v. Hofius [Wash.] 80 P. 1002. $250 for willful obstruction of highway two hours at night entailing exposure and suffering. Tutwiler Coal, Coke & Iron Co. v. Nail [Ala.] 37 So. 634. $2,500 exemplary damages for insulting refusal to permit entry into train. Yazoo & M. V. R. Co. v. Mattingly [Miss.] 37 So. 708. $1,000 to passenger driven from train at point of pistol by other intoxicated passengers. International & G. N. R. Co. v. Henderson [Tex. Civ. App.] 82 S. W. 1065. $25 compensatory, $500 punitive damages for refusing to accept transfer on street car and detaining passenger. Mueller v. St. Louis Transit Co., 108 Mo. App. 325, 83 S. W. 270. $1,500 for malpractice resulting in loss of use of ankle. Miller v. Minturn [Ark.] 83 S. W. 918. $17 for killing horse and destroying harness, shown to be worth from $5 to $40. Roberts v. Wabash R. Co. [Mo. App.] 87 S. W. 601. $500 for overflow of cotton land. Gulf, etc., R. Co. v. Harbison [Tex Civ. App.] 88 S. W. 452.

Wrongful ejection of passenger: $900 for woman and two children being ejected from sleeping car, riding on platform of train and being frightened by drunken passengers. Cincinnati, etc., R. Co. v. Taylor [Ky.] 85 S. W. 168.

Assault: $1,000 for assault, entailing disgrace, humiliation, and loss of three teeth. O'Donnel v. St. Louis Transit Co., 107 Mo. App. 34, 80 S. W. 315. $7,000 to stenographer for vicious assault entailing loss of eye and other injuries. St. Louis, etc., R. Co. v. Grant [Ark.] 88 S. W. 580.

Nondelivery of telegram: $500 to grandmother for nondelivery of telegram announcing death of granddaughter. Western Union Tel. Co. v. Porterfield [Tex. Civ. App.] 84 S. W. 850.

Libel and slander: $2,000 where no proof of special damage was made. Dowie v. Priddle, 116 Ill. App. 184. $7,000 to district judge. Lauder v. Jones [N. D.] 101 N. W. 907. $300 actual, $500 punitive damages for charge of theft. Carpenter v. Hamilton, 185 Mo. 603, 84 S. W. 863.

§ 7. *Pleading, evidence and procedure. A. Pleading.*[52]—All damages that necessarily flow from the injury complained of may be recovered without special

Personal injuries: $2,000 for injury to head, wound in thigh, aneurism of hip, and ear torn off. Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154. $8,500 for injury resulting in paralysis of left side of housewife. Village of Wilmette v. Brachle, 110 Ill. App. 356. $3,000 to woman for injuries causing confinement to bed for nine months and resulting in bad hernia and incapacity to work. City of Chicago v. Harris, 113 Ill. App. 633. $1,750 to coal miner earning $2.00 per day for permanent and serious injury incapacitating him for following occupation. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49. $1,500 for lacerated wound on leg, permanent impairment and likelihood of permanent injury to sciatic nerve. Chicago & A. R. Co. v. Pulliam, 111 Ill. App. 305. $7,500 to woman for permanent injuries resulting in paralysis of right side. City of Chicago v. Bush, 111 Ill. App. 638. $14,000 to man of 53 earning $1,500 per year for severe permanent injuries incapacitating him from all participation in affairs of life. Chicago & Joliet Elec. R. Co. v. Spence, 115 Ill. App. 465. $4,000 to laboring man of fifty-six permanently injured. Cleveland & Southwestern Traction Co. v. Ward, 6 Ohio C. C. (N. S.) 385. $9,250 to man of thirty-five earning $2.65 per day for mashed ankle and arm and disordered kidneys. Lorain Steel Co. v. Hayes, 6 Ohio C. C. (N. S.) 353, 27 Ohio C. C. 407. $5,000 for serious permanent injuries. Vail v. Middlesex & S. Traction Co. [N. J. Law] 60 A. 42. $9,000 to steel worker for fall of five stories, causing several fractures resulting in loss of sight of one eye and permanent deformity of both wrists and one leg. Welk v. Jackson Architectural Iron Works, 98 App. Div. 247, 90 N. Y. S. 541. $10,000 to merchant for broken ribs and arm, dislocated shoulder, cuts and bruises. Yazoo & M. V. R. Co. v. Grant [Miss.] 38 So. 502. $1,500 for permanent injury of son 19 yrs. 3 mos. old, earning $11 per week. Scamell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021. $1,500 to man 61 for injury to leg and head. Louisville R. Co. v. Meglemery, 25 Ky. L. R. 1587, 78 S. W. 217. $10,500 to man earning $100 per mo. for injuries totally disabling him. Galveston, etc., R. Co. v. Roth [Tex. Civ. App.] 84 S. W. 1112. $25,000 to locomotive engineer of 38 earning $140 to $160 per mo. for serious permanent injuries to sight, spine, kidneys, bladder and heart. International & G. N. R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847. $1,999.99 to man of 56 earning $75 per mo. for injury entailing great suffering and ultimately resulting in death. Stuber v. Louisville & N. R. Co. [Tenn.] 87 S. W. 411. $2,100 to woman of 55 for severe permanent injury incapacitating for housework. Deland v. Cameron [Mo. App.] 87 S. W. 597. $6,375 to husband for injuries to healthy wife 39 years old, producing traumatic neurosis. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 88 S. W. 445. $5,000 to washwoman for injury to ankle and back necessitating abandonment of work. Haxton v. Kansas City [Mo.] 88 S. W. 714. $10,000 to locomotive engineer for permanent injuries, incapacitating for occupation, including fracture of leg, loss of teeth, one arm disabled, and permanent loss of speech. Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898.

Injuries to head: $8,000 to guard on elevated railroad for injury to head resulting in loss of hearing in one ear and pain and loss of power to work or study. South Side El. R. Co. & Cosmopolitan Elec. Co. v. Nesvig, 114 Ill. App. 355. $900 for lip cut through to teeth, two teeth loosened, and other injuries. Chicago & Joliet Elec. R. Co. v. Herbert, 115 Ill. App. 248. $6,000 for fall, causing concussion of brain, atrophy of right arm, and impairment of mental faculties. Powell v. Nevada, etc., R. Co. [Nev.] 78 P. 978.

Sight and hearing: $9,000 for impairment of hearing and sight and other serious injuries. Graham v. Joseph H. Bauland & Co., 97 App. Div. 141, 89 N. Y. S. 595. $5,000 for loss of one eye and consequent injuries. Georgia, etc., R. Co. v. Lasseter [Ga.] 51 S. E. 15. $3,000 for loss of hearing in one ear and injury to other, impaired sight and reduction of strong man to physical wreck. Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133. $500 for loss of sight and hearing in one eye and ear, there being some evidence of permanence. Palmer Transfer Co. v. Eaves [Ky.] 85 S. W. 750.

Spinal and nervous injuries: $2,000 for injuries resulting in curvature of spine and floating kidney. Olson v. Chicago, etc., R. Co. [Minn.] 102 N. W. 449. $500 for spinal injuries resulting in uterine and other sickness. Lofink v. Interborough Rapid Transit Co., 94 N. Y. S. 150. $2,000 to woman for nervous injury. Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127. $2,500 to man for injury resulting in curvature of spine. Robinson v. St. Louis & S. R. Co., 103 Mo. App. 110, 77 S. W. 493. $13,200 to railroad fireman of 25 earning $100 per mo. for permanent spinal injury incapacitating for manual labor. San Antonio & A. P. R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27.

Internal injuries: $2,000 for dragging woman passenger attempting to board. Batten v. St. Louis Transit Co., 102 Mo. App. 285, 76 S. W. 727. $6,000 for permanent serious injuries to hip, heart, and circulation. Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664. $750 for fracture of rib, pain in side, heart and back and impaired use of hand. San Antonio Traction Co. v. Sanchez [Tex. Civ. App.] 84 S. W. 849. $3,000 for dislocation of ribs, and injury to heart, spine, and bowels. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. $1,250 to farm laborer for injury to foot, hip, and fracture of ribs. Texas & P. R. Co. v. Leakey [Tex. Civ. App.] 13 Tex. Ct. Rep. 496, 87 S. W. 1168. $2,500 for fracture of rib and collar bone, arms and back bruised. Waechter v. St. Louis & M. R. Co. [Mo. App.] 88 S. W. 147.

Injuries peculiar to women: $1,500 to woman and $200 to her husband for injuries resulting in miscarriage and resultant ill-

averment;[53] but such as are merely the natural or proximate but not the necessary

ness for several weeks. McCaughey v. Jencke Spinning Co. [R. I.] 59 A. 110. $5,000 for injury producing miscarriage, traumatic neurasthenia and other injuries. Berger v. St. Paul City R. Co. [Minn.] 103 N. W. 724. $5,000 injuries resulting in lacerated cervix. Small v. Kansas City, 185 Mo. 291, 84 S. W. 901.

Burns and scalds: $5,000 for severe burns on face, hands and hips. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294. $1,500 for severe burns of face and hands. Riverton Coal Co. v. Shepherd, 111 Ill. App. 294.

Fractures, dislocations and injuries to and loss of limbs: $8,000 to laboring man of 60 earning $1.10 to $1.25 per day for loss of leg and permanent injury to shoulder and arm. Indiana, etc., R. Co. v. Otstat, 118 Ill. App. 37. $9,450 for loss of leg at knee. Sorenson v. Oregon Power Co. [Or.] 82 P. 10. $1,250 for loss of fingers. Chicago & Alton R. Co. v. Bell, 111 Ill. App. 280. $3,500 for transverse fracture of knee cap, producing permanent injury. Town of Cicero v. Bartelme, 114 Ill. App. 9. $8,000 to structural iron worker of 35 earning from $4 to $9 per day for loss of use of left arm and permanent incapacity to follow his trade. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209. $1,819 to infant of 22 months for loss of both legs. Cleveland, etc., R. Co. v. Ricker, 116 Ill. App. 428. $1,158.35 to canvasser earning $350 a year for severe sprain incapacitating for work for year or more, pain, suffering and expense. Maxfield v. Maine Cent. R. Co. [Me.] 60 A. 710. $2,000 for dislocation of shoulder and fracture of arm, causing permanent loss of power to lift arm above shoulder. Rice v. Council Bluffs, 124 Iowa, 639, 100 N. W. 506. $2,000 for injury to son 4½ years old for severe scalp wound and injury resulting in shortened leg. Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208. $1,683 for serious crushing of hand. Shalgren v. Red Cliff Lumber Co. [Minn.] 104 N. W. 531. $3,000 to switchman earning $3 per day for compound comminuted fracture of right leg incapacitating for labor for a year. Campbell v. Railway Transfer Co. [Minn.] 104 N. W. 547. $15,000 to railway mail clerk of 32 earning $1,100 for fracture of several bones, resulting in serious permanent injury and loss of earning power. Jones v. New York, etc., R. Co., 99 App. Div. 1, 90 N. Y. S. 422. $2,000 including $205 of actual expenditure for fracture of neck of femur causing shortening of leg. Leonard v. Union R. Co., 98 App. Div. 204, 90 N. Y. S. 574. $200 for dislocation of shoulder and bruises on head, knee and ankle incapacitating for labor three weeks and causing expense of $40 for medical services. Tanzer v. New York City R. Co., 91 N. Y. S. 334. $2,500 for fracture of ankle. Miller v. New York, 93 N. Y. S. 227. $1,350 to carpenter for troublesome injury to foot, materially decreasing his earnings. Young v. O'Brien, 36 Wash. 570, 79 P. 211. $2,500 to girl 9 years old for dislocated hip. Lorenz v. New Orleans [La.] 38 So. 566. $2,500 for injury to shoulder. Chicago, etc., R. Co. v. Barrett [Tex. Civ. App.] 80 S. W. 660. $8,500 for permanent injury of the foot and limb. Goldsmith v. Holland Bldg. Co., 182 Mo. 597, 81 S. W. 1112. $10,000 to child of 4½ for loss of one arm and total disability of other. South Covington & C. St. R. Co. v. Weber, 26 Ky. L. R. 922, 82 S. W. 986. $20,000 to man of 21 for loss of both legs and wound in back. Scullin v. Wabash R. Co., 184 Mo. 695, 83 S. W. 760. $8,800 to woman for fracture of both bones of leg resulting in permanent impairment. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. $4,000 to woman for permanent injuries to leg and hip and other injuries. Louisville R. Co. v. De Gore [Ky.] 84 S. W. 326. $19,500 to foreman of switching crew earning from $90 to $140 per mo. for loss of leg in peculiarly distressing accident. Texarkana, etc., R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375. $12,000 to boy of 19 earning $60 a month for loss of leg and injury to eyes. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. $2,000 to boy of 10 for loss of thumb and other injuries. Vanesler v. Moser Cigar & Paper Box Co., 108 Mo. App. 621, 84 S. W. 201. $15,000 to freight brakeman for injuries resulting in club foot and inability to labor. International & G. N. R. Co. v. Brandon [Tex. Civ. App.] 84 S. W. 272. $4,200 to woman for injury to hip, knee and ankle necessitating use of crutches. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445. $3,000 to married woman for oblique fracture of leg, injury to ankle and bedridden for 10 months. Conner v. Nevada [Mo.] 86 S. W. 256. $3,000 to carpenter for fractured hip shortening leg. Neves v. Green [Mo. App.] 86 S. W. 508. $1,500 to child of 12 for fracture and dislocation of elbow. Willis v. St. Joseph R., Light, Heat & Power Co. [Mo. App.] 86 S. W. 567. $2,500 to man of 25 earning $2.50 per day for loss of two fingers. Texarkana Table & Furniture Co. v. Webb [Tex. Civ. App.] 86 S. W. 782. $500 to boy of 15 for bruise and sprain of ankle. St. Louis S. W. R. Co. v. Underwood [Ark.] 86 S. W. 804. $2,500 for badly broken left arm. Dutro v. Metropolitan St. R. Co. [Mo. App.] 86 S. W. 915. $4,000 for electric shock paralyzing right arm. South Covington & C. St. R. Co. v. Smith [Ky.] 86 S. W. 970. $2,000 to woman of 60 for severe injury to elbow. Louisville Gas Co. v. Page [Ky.] 86 S. W. 1112. $7,500 to strong man of 26 for injury involving loss of use of left arm. Smith v. Fordyce [Mo.] 88 S. W. 679. $7,500 to woman for oblique fracture of knee, it being doubtful whether she would ever walk. Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509.

Bruises and shock: $900 for three ribs broken, bruises and shock impairing health. Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367. $200 for being thrown from seat in street car by collision. Cincinnati, L. & A. Elec. St. R. Co. v. Leonard [Ind. App.] 73 N. E. 932. $2,000 to passenger injured while alighting. Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689. $750 to woman for hurt in back and hip. Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536. $2,200 to railway mail clerk for bruises in back and sides, broken ribs and wrench of

result, must be specially averred.[54] General averments of personal injury are sufficient.[55]

spinal cord resulting in nervous disorders. Missouri, etc., R. Co. v. Hay [Tex. Civ. App.] 86 S. W. 954. $2,000 to able-bodied man of 32 earning $1,000 to $1,500 yearly for bruised side, back and leg, impairing earning power one-half. St. Louis S. W. R. Co. v. Harkey [Tex. Civ. App.] 88 S. W. 506. $6,000 for serious bruises and injuries necessitating amputation of toes. Rapp v. St. Louis Transit Co. [Mo.] 88 S. W. 865.

Recoveries held excessive. Breach of contract: $249.50 for carrying passenger by station, merely causing delay of few hours and loss of dinner. Central of Georgia R. Co. v. Wood, 118 Ga. 172, 44 S. E. 1001. $400 for wrongful ejection of passenger reduced to $200, no force or special expense above $2 being shown. Gulf, etc., R. Co. v. Russell [Tex. Civ. App.] 85 S. W. 299.

Torts in general: $1,000 for conversion reduced to $58.00 on vague evidence of value of property. Lawrence v. Wilson, 95 N. Y. S. 147. $3,000 for excessive levy. Mills v. Larrance, 111 Ill. App. 140. $300 against carrier for assault by conductor. Chicago & E. I. R. Co. v. Stratton, 111 Ill. App. 142. $8,000 against foreign corporation for doing business in state without obtaining permit. Finlay Brewing Co. v. People, 111 Ill. App. 200. $1,916 for injury to feelings by unfounded charge of insanity. Wait v. Robertson Mortg. Co. [Wash.] 79 P. 926.

Personal injuries: $3,500 to girl nearly recovered within a year and not entitled to exemplary damages, nurses' or physicians' charges, nor damages for loss of time. Reduced to $1,750. Porter v. Delaware, etc., R. Co., 134 F. 155. $9,000 for shrinking up of the flesh of one leg and insomnia. Watson v. Brightwell [Ky.] 82 S. W. 454. $23,400 to man of 42 for injury resulting in diabetes and paralysis of both legs. Reynolds v. St. Louis Transit Co. [Mo.] 88 S. W. 50.

Injuries to head: $10,000 to child of 3½ for scalping reduced to $7,000. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 937. $49,850 to locomotive fireman for injuries to head and spine. Denver & R. G. R. Co. v. Scott [Colo.] 81 P. 763.

Sight and hearing: $9,500.00 reduced to $8,000.00 (loss of sight of laborer earning $1.50 per day. $6,000.00 for pecuniary loss and $2,000.00 for suffering). Peterson v. Roessler & Hasslocher Chemical Co., 131 F. 156. $10,000 for injury to head by blast slightly impairing hearing and vision, but not materially diminishing earning power, reduced to $3,000. Smith v. Day, 136 F. 964.

Fractures, dislocations, and injuries to and loss of limbs: $3,000 for fracture of fibula and lameness not permanent. West Chicago St. R. Co. v. Dean, 112 Ill. App. 10. $20,000 to locomotive fireman of 38 earning $85 per mo. for loss of leg and other injuries scaled to $10,000. Ricker v. Central R. Co. of New Jersey [N. J. Law] 61 A. 89. $9,500 to man of 45 doing office work for fracture of leg, leaving slight permanent defect. Reduced to $5,000 maximum, $2,500 minimum. Rueping v. Chicago & N. W. R. Co. [Wis.] 101 N. W. 710. $12,000 to brakeman of 27 earning $60 to $75 per mo. for loss of left arm. Reduced to $7,500. Struble v. Burlington, etc., R. Co. [Iowa] 103 N. W. 142. $5,000 for mere broken leg without more. Ross v. Metropolitan St. R. Co., 93 N. Y. S. 679. $6,000.00 reduced to $4,000.00 for fracture and permanent injury to forearm. Bailey v. Cascade Timber Co., 35 Wash. 295, 77 P. 377. $5,000 to logger earning $3.00 per day for fracture of both thighs followed by complete recovery, reduced to $3,500. Hart v. Cascade Timber Co. [Wash.] 81 P. 738. $5,000 reduced to $4,000 for injury to two fingers. San Antonio & A. P. R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256. $20,000.00 reduced to $10,000.00 where a man 62 years old had the bones of one leg crushed below the knee so as to require amputation. Newcomb v. New York Cent. & H. R. R. Co., 182 Mo. 687, 81 S. W. 1069. $7,225.00 for injury to ankle which did not wholly destroy power to use it. Phillips Co. v. Pruitt, 26 Ky. L. R. 831, 82 S. W. 628. $35,000 to locomotive engineer of 45 for loss of both legs, reduced to $20,000. Markey v. Louisiana & M. R. Co., 185 Mo. 348, 84 S. W. 61. $15,000 to barber of 18 earning $3 a week, for compound fracture of both legs. Stolze v. St. Louis Transit Co. [Mo.] 87 S. W. 517.

Injuries to women: $2,500.00 for injuries resulting in miscarriage. Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676.

Bruises and shock: $6,000.00 to woman for severe shock or jolt breaking no bones and causing no loss of limb or organ, but producing injuries which might last for 18 months to permanency. MacGregor v. Rhode Island Co. [R. I.] 60 A. 761. $5,000 to locomotive fireman for fracture of ribs and probable traumatic neurosis reduced to $3,500. Fry v. Great Northern R. Co. [Minn.] 103 N. W. 733. $8,000 to woman of 43 earning $60 to $90 per mo. as boarding house keeper reduced to $4,000. Shaw v. Seattle [Wash.] 81 P. 1057. $5,500 for bruises and shock; it being doubtful if permanent injury claimed resulted from the accident. Taylor v. Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873.

Adequacy of recovery. Torts: $1,750 allowed a longshoreman 56 years of age for fracture of thigh incapacitating for usual avocation. The City of San Antonio, 135 F. 879. $10,000 allowed for serious spinal injury. Oberg v. Northern Pac. R. Co., 136 F. 981. $1,500 awarded to seaman of 43 for crippling of right hand. The Sarnia, 137 F. 952. $500.00 held not inadequate for badly crushed hand and injury to muscles of forearm, where plaintiff was a worthless fellow and it was doubtful whether earning capacity had been impaired. He had paid $100 doctors' bill. Palmer v. Cedar Rapids & M. C. R. Co., 124 Iowa, 424, 100 N. W. 336. $24 held inadequate for injury to leasehold shown by undisputed evidence to have been injured $350. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135. $50 for ejection of passenger held not so inadequate as to require setting aside. Meyer v. St. Louis & S. R. Co., 108 Mo. App. 220, 83 S. W. 267. $300 to fireman earning $120 a month for scalp wound causing three months confinement held not so inadequate as to require reversal. Gorham v. St. Louis, etc., R. Co.

ficient in the absence of exception,[55] and under an averment of a particular injury, all natural effects of that injury may be shown.[56] Thus if an injury from its de-

[Mo. App.] 86 S. W. 574. $1.00 for broken ankle held so inadequate as to require reversal. Fischer v. St. Louis [Mo.] 88 S. W. 82. $1 for being struck on head by street car controller held so inadequate as to justify setting aside. Loevenhart v. Lindell R. Co. [Mo.] 88 S. W. 757.

52. See 3 C. L. 1022.

53. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. In an action on the case against a bank for wrongful refusal to pay a check, it is competent for plaintiff to show conversations by him with representatives of business houses with which he had been doing business and from which he sought to obtain credit after dishonor of the check, though the declaration did not aver special damages. Metropolitan Supply Co. v. Garden City Banking & Trust Co., 114 Ill. App. 318. Evidence under the true rule as to the measure of damages for breach of contract is admissible, though not set up in the petition. Ford v. Fargason, 120 Ga. 606, 48 S. E. 180.

54. Wells, Fargo & Co. Express v. Boyle [Tex. Civ. App.] 87 S. W. 164. Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126, holding otherwise, is of doubtful authority. Damages not the natural and usual consequences of a detention of personal property must be specially pleaded. Train engine in use by logging camp. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51. Pleading held sufficient. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. Damages to land as a building spot caused by cutting timber thereon valuable as shade trees, held not recoverable because not specially pleaded. Eldridge v. Gorman, 77 Conn. 699, 60 A. 643. Averments of cross petition as to guaranties good for the purpose of letting in proof as to special damages sustained. Cleveland, etc., Co. v. Consumers' Carbon Co., 5 Ohio C. C. (N. S.) 258, 25 Ohio C. C. 307. In an action for delay in furnishing cars in which to ship cattle, there can be no recovery for horse hire made necessary in holding the cattle during the delay where such item was not pleaded. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 13 Tex. Ct. Rep. 547, 88 S. W. 448. Where a distinct disease has developed from the injury which may, but does not always, result from like injuries, it must be pleaded. Allegation of shock to nervous system will not admit proof of resulting locomotor ataxia unless that always results. Wilkins v. Nassau Newspaper Delivery Exp. Co., 98 App. Div. 130, 30 N. Y. S. 678. Miscarriage must be specially pleaded. Town of Florence v. Snook [Colo. App.] 78 P. 994. Loss of earnings must be specially pleaded and proved. Zongker v. People's Union Mercantile Co. [Mo. App.] 86 S. W. 486. Expenses incurred in nursing, doctors' bills, etc., must be specially pleaded. Complaint held not sufficient to admit value of wife's services as nurse. Stowe v. La Conner Trading & Transportation Co. [Wash.] 80 P. 856. A functional trouble which does not manifest itself in a woman until 70 days after injury by a blow in the face, and is caused by the nervous shock produced by the blow, must be specially pleaded. Thompson v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 465. Mental suffering and time lost from injuries not of such character that such damages necessarily flow. Lodwick Lumber Co. v. Taylor [Tex. Civ. App.] 87 S. W. 358. In action of contract for exchange of freight, held error to dismiss petition whether special damage was pleaded or not, since plaintiff was in any event entitled to nominal damages for the breach. Graham v. Macon, D. & S. R. Co. [Ga.] 49 S. E. 75.

55. Averments as to injury and its permanence and impairment of earning power held obnoxious to special exception as being too general. Dallas Consol. Elec. St. R. Co. v. Hardy [Tex. Civ. App.] 86 S. W. 1053. An allegation that plaintiff "was seriously and permanently bruised and injured" is broad enough to admit proof of any bodily injury which resulted. Impairment of hearing and sight. Graham v. Joseph H. Bauland Co., 97 App. Div. 141, 89 N. Y. S. 595. An averment that plaintiff suffered serious bodily injury and pain and will continue to suffer pain and permanent bodily injury is sufficient as against a general demurrer. Casey v. American Bridge Co. [Minn.] 103 N. W. 623. An allegation of "injuries to the head" is broad enough to admit evidence that the injury received caused pressure on and injury to the brain. Fleming v. Tuttle, 98 App. Div. 222, 90 N. Y. S. 661. Proof of uterine trouble is admissible under an averment that plaintiff became "sick, sore and disabled," notwithstanding subsequent specific allegations. Lofink v. Interborough Rapid Transit Co., 94 N. Y. S. 150. **Contra.** Farnham v. Interurban St. R. Co., 94 N. Y. S. 364. Heart trouble and neuralgia may be shown under averment of "serious and lasting internal injury." Rice v. Wallowa County [Or.] 81 P. 358. Averment of internal injury unobjected to is sufficient to admit proof of injury to kidneys. Fuchs v. St. Louis Transit Co. [Mo. App.] 86 S. W. 458. A general averment of bodily injury is sufficient to admit proof of particular injuries, the objection being first made at the trial. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671. An allegation of "bodily injuries" is sustained by proof of injury to hands and wrists. City of Eureka v. Neville [Kan.] 79 P. 162. Where a petition alleges serious and permanent injury to the head, hips, limbs and ankles, it should also state the nature and character of the injuries or state why they cannot be stated. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408.

56. Description of injuries in complaint held sufficient to admit evidence of their seriousness and painful effect. Currelli v. Jackson [Conn.] 58 A. 762; Hillyer v. Winsted [Conn.] 59 A. 40; Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 A. 958. Where a fracture is pleaded, a necessary rebreaking and resetting may be shown (a doubtful case). Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126. Under a declaration alleging injury to an arm, the effect of such injury on the use of the hand may be shown,

scription appears to be necessarily permanent, permanency need not be specifically alleged,[57] though it is otherwise if permanency is not the inevitable result.[58] Where particular injuries are described, there can be no recovery for others not described.[59] Evidence of injuries not pleaded is admissible for purposes other than to enhance damages.[60] Recovery cannot be had for a mere aggravation of a previously received injury without an allegation of such aggravation.[61] Punitive damages need not be claimed eo nomine.[62] The damages can never exceed the sum claimed in the pleadings,[63] and special averments will not authorize recovery of damages not the natural and proximate result of the injury sued for.[64] Personal injury[65] and other cases,[66] involving the sufficiency of allegations to support recovery of special damages, are col-

and under averment of injury to the head and face, inability to use the mouth and affectation of speech and ability to eat may be shown. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. Under a declaration alleging physical injuries, recovery may be had for rheumatism ascribable to the accident, but not for mere aggravation of rheumatism not alluded to in the complaint. Id. Averment of injury to head and back causing great pain and mental anguish and permanent injury to back authorizes proof of fainting and dizzy spells. Hollingworth v. Ft. Dodge, 126 Iowa, 627, 101 N. W. 455. Where injury to lungs is alleged, plaintiff may show consequent susceptibility to lung disease. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Impairment of memory resulting naturally may be shown under allegation of being injured and disabled physically, mentally, internally, and permanently. Nichols v. Oregon Short Line R. Co. [Utah] 78 P. 866. Under a general averment of disqualification to labor, plaintiff may show his occupation and loss of time and earnings. Wilbur v. Southwest Mo. Elec. R. Co., 110 Mo. App. 689, 85 S. W. 671.

57. See 3 C. L. 1025, n. 98. Fuchs v. St. Louis Transit Co. [Mo. App.] 86 S. W. 458. If the injury be alleged, recovery may be had for the whole extent thereof, though not averred in the declaration. Barnett & Record Co. v. Schlapka, 110 Ill. App. 672.

58. Wallace v. New York City R. Co., 92 N. Y. S. 766. Where the description of injuries does not show that they are necessarily permanent, permanency must be alleged. MacGregor v. Rhode Island Co. [R. I.] 60 A. 761.

59. Fracture of femur and shortening of limb held not included. Southern Pac. Co. v. Martin [Tex.] 83 S. W. 675. Pleading injury to thigh and nervous system will not admit proof of gastritis. Brown v. Manhattan R. Co., 94 N. Y. S. 190. Under an allegation of a physical injury, damages resulting from fright or nervous shock cannot be recovered. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78. Averment of injury to head, spine and nerves is insufficient to warrant admission of evidence of injuries to eyes and sight. Wells, Fargo & Co. Express v. Boyle [Tex. Civ. App.] 87 S. W. 164. Though a general charge of injuries without specifying details is good, if particular injuries resulting from the principal one are specified, all that are designed to be proved should be stated. Cancer of foot resulting from injury specified held not provable. Arnold v. Maryville [Mo. App.] 85 S. W. 107. Injury to an eye is not provable under allegation of nervous affection. Union Pac. R. Co. v. Hammerlund [Kan.] 79 P. 152.

60. Where the issue is as to whether plaintiff had sustained any injury at all and experts base their opinions in part on the condition of his eyes, he may show that he suffered pain in them, though no injury to them is alleged. San Antonio & A. P. R. Co. v. Callihan [Tex. Civ. App.] 86 S. W. 929. Where plaintiff did not claim damages for injuries to his nervous system, evidence that he had been nervous since the injury was not objectionable as relating to an element of damages not claimed. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78.

61. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983.

62. Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569.

63. Texas & P. R. Co. v. Frank [Tex. Civ. App.] 88 S. W. 383; Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51. Recovery for loss of time should be limited to the amount claimed in the petition. If the evidence shows more, there should be an amendment of the petition. Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119.

64. W. F. Vandever & Co. v. Waller [Ala.] 39 So. 136.

65. Averments of injury held sufficiently specific. Union Traction Co. v. Siceloff [Ind. App.] 72 N. E. 266; El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457. Internal injuries to woman. Alexander v. McGaffey [Tex. Civ. App.] 88 S. W. 462. Plaintiff cannot recover medical expenses where there is no averment that they are reasonable. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. Defendant held not entitled to have petition made more definite as to portions of body mangled. International & G. N. R. Co. v. Gready [Tex. Civ. App.] 82 S. W. 1061.

66. Where damages for diminution of rental and market value of lands by pollution of a stream are claimed, there may be a recovery for temporary loss of the use of the land. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882. A petition alleging that water damaged a large amount of merchandise is sufficient to authorize recovery for the property destroyed. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493. Declaration held sufficient to recover stipulated damages but not actual damages. Calbeck v. Ford [Mich.] 12 Det. Leg. N. 82, 103 N. W.

lected in the note. Payment or obligation to pay for medical services should be averred according to the fact.[67] Defendant cannot complain of allegations of facts in aggravation of damages.[68] Where no evidence is introduced as to an alleged item of damage, recovery thereon is waived.[69] In an action by a husband for injuries to the wife, it is not necessary to allege or prove the value of her services.[70] Plaintiff in an action for injuries is not obliged to prove all the elements of damage alleged, to entitle him to recover, nor do the other items necessarily fall with failure to prove the largest alleged item.[71] Matters of defense involving the measure of damages need not be specially pleaded.[72] Averment that goods could not be bought in vicinity to replace those agreed to be delivered is insufficient to change measure of damages.[73]

(§ 7) *B. Evidence as to damages. In general.*[74]—Plaintiff must show that the injuries complained of are the result of the wrongful act complained of.[75] Damages cannot be assessed where there is no proof of their amount,[76] the burden of establishing which is on plaintiff,[77] and evidence of expenses or the cost to plaintiff

516. Complaint for injunction against disclosure of plaintiff's patentable ideas held insufficient to found recovery of damages. Griffith v. Dodgson, 93 N. Y. S. 155. Complaint for obstruction of navigable stream held sufficient to found recovery for loss of time of logging engine, time of men and the necessity of discharging employes and rehiring at advanced wages. Creech v. Humptulips Boom & River Imp. Co. [Wash.] 79 P. 633. Where a shipper sues for the price for which goods had been sold rather than for their market value, no description of them is necessary. It being alleged that the carrier had full notice of their price, that is the measure of plaintiff's damages. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22. Where plaintiff claims damages against a carrier for delay in transporting him by reason of failure to consummate a contract he lost by not arriving in time, he should name the parties with whom he was about contracting. Townsend v. Texas & N. O. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 88 S. W. 302.

67. An allegation of expenditure of money for medical attention will not support recovery on proof of incurred expenses not paid. Stanley v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 112; Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 781. Evidence that plaintiff has obligated himself for medical attendance, unobjected to, will authorize recovery under an averment that he has paid it, since if objection had been made the pleading might have been amended. Spengler v. St. Louis Transit Co., 108 Mo. App. 329, 83 S. W. 312.

68. Gadsden v. Catawba Water Power Co. [S. C.] 51 S. E. 121.

69. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

70. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445; St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 85 S. W. 476.

71. Williams v Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 1160.

72. Where plaintiff's physical condition before the injury becomes material, evidence that he was drawing a Federal pension for disability is admissible without being pleaded. Hawkins v. Missouri, etc., R. Co. [Tex. Civ. App.] 83 S. W. 52. A contract limiting a common carrier's liability may be introduced in defense under the general issue and need not be specially pleaded. Baltimore & O. S. W. R. Co. v. Ross, 105 Ill. App. 54. In an action for overflowing land, the damages alleged being diminution of rental value, defendant may show that the loss was attributable to other causes under a plea of the general issue. San Antonio, etc., R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842.

73. Alabama Chemical Co. v. Geiss [Ala.] 39 So. 255.

74. See 3 C. L. 1027.

75. Not error to strike out testimony as to injuries to horse not shown to have been result of accident sued for. Fisher v. New York City R. Co., 90 N. Y. S. 341.

76. The damages for injury to a vessel should not include demurrage in the absence of proof of her market value or proof that she had no market value. City of Chicago v. Hawgood & A. Transit Co., 110 Ill. App. 34. Where the measure of damages is the difference between the price to have been paid for an article and that at which it was resold proof must be made both of such purchase price and of such price of resale. Armeny v. Madson & Buck Co., 111 Ill. App. 621. Recovery of wages cannot be supported where there is no evidence of their amount. People v. Woodbury, 102 App. Div. 462, 92 N. Y. S. 442. No recovery for physician's services without proof of their value. Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 781. Where three animals were killed and three injured, evidence merely of the value of all of them is insufficient to found recovery. Carman v. Montana Cent. R. Co. [Mont.] 79 P. 690.

77. Where a sheriff fails to execute or return final process, there is a presumption that he has been damaged the amount of the execution, and the burden is upon him to mitigate the damages (Beck & G. Hardware Co. v. Knight, 121 Ga. 287, 48 S. E. 930); but where he fails to execute an attachment or other mesne process, the presumption is the other way and plaintiff must allege and prove actual damages to found recovery (Id.).

is not sufficient in the absence of evidence of reasonableness.[78] The burden of proving that the damages sustained might have been prevented rests upon the party causing them.[79] Testimony as to value is peculiarly within the province of experts.[80] Generally, testimony as to the amount of damages sustained by plaintiff in a lump sum is inadmissible,[81] but all facts material to show the extent of plaintiff's damage,[82] or the value of the matter in dispute, may be shown.[83] Defendant's wealth may be shown in libel as basis for exemplary damages.[84]

78. Plaintiff suing for injury to his wagon cannot testify to the amount of repairs without showing their necessity and reasonable value. Reid v. New York City R. Co., 93 N. Y. S. 533. What plaintiff was offered for his dog two years before is not evidence of its value. Southern R. Co. v. Parnell [Ala.] 37 So. 925. The price paid by defendant for land is admissible on the question of value if not too remote in point of time. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521. Proof of what was paid for goods is not always proof of their value. Peyser v. Lund, 89 App. Div. 195, 85 N. Y. S. 881. Evidence of the amount expended in seeking to be cured of the effects of a personal injury is not competent unless accompanied by proof of what services were actually rendered and that such amount is reasonable, customary and usual. Chicago City R. Co. v. Miller, 111 Ill. App. 446; Polacci v. Interurban St. R. Co., 90 N. Y. S. 341; Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126; Goodson v. New York City R. Co., 94 N. Y. S. 10; Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601; Polacci v. Interurban St. R. Co., 90 N. Y. S. 341. Mere cost is insufficient without more to found recovery for lost baggage. Brooke v. Cunard S. S. Co., 93 N. Y. S. 369; Walsh v. New York City R. Co., 93 N. Y. S. 552. In the absence of better evidence, proof of the cost of articles of furniture and the amount they have been used is sufficient in an action for their destruction. Behm v. Damm, 91 N. Y. S. 735. Evidence that plaintiff was compelled to employ another man to take his place at certain wages is evidence as to plaintiff's loss of time and its value. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. Evidence that plaintiff employed a man at a certain wage to attend to his business while incapacitated by a personal injury is incompetent, it not being shown that such help was necessary or what its reasonable value was. Costello v. New York City R. Co., 91 N. Y. S. 23. In an action of trover, a wrongdoer cannot lessen his liability by invoking an agreed valuation made for the purpose of obtaining reduced freight rates. Georgia, So. & F. R. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807. The amount paid for property by defendant does not control unless it is shown to be the fair reasonable value. Error to instruct jury that plaintiff is entitled to recover reasonable value of ice if it exceeds amount paid by defendant. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. When no market value exists, opinion of witnesses as to value of property is properly admitted. Market value at time of conversion. Vroom v. Sage, 100 App. Div. 285, 91 N. Y. S. 456. Where identity of goods has been lost and value can be proved in no other way, the price agreed upon by the parties is evidence of the value. Goodman v. Baumann, 43 Misc. 83, 86 N. Y. S. 287. Amount that a witness paid for shelving is some evidence of its value. Perlberger v. Grell, 77 App. Div. 128, 78 N. Y. S. 1038. Evidence of what property sold for when it has no market value is relevant. Humphreys v. Minnesota Clay Co. [Minn.] 103 N. W. 338.

79. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168.

80. Evidence of the value of property must be the individual opinion of witnesses, not a quotation from memoranda. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89. The opinions of experts as to the value of lands flooded and the extent of injury may be taken. McGroarty v. Lehigh Valley Coal Co. [Pa.] 61 A. 570. The owner of buildings destroyed may testify to the value of the land before and after their destruction though not an expert. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374.

81. Berg & Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528. The owner of a stock of goods burned with its inventory by a negligent fire may testify to their value in a lump sum, though he cannot itemize them. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374. Plaintiff cannot state without facts that after the accident sued for his horse could not be used as before, nor can a witness not an expert state that before the accident the horse was worth $200 and after it he would not give $50 for it. Reid v. New York City R. Co., 93 N. Y. S. 533. Testimony of plaintiff, a farmer, that he went through his field and estimated the damage done by defendant's hogs to his crop of matured corn, giving the amount, is competent and sufficient to sustain a verdict. Auckland v. Lawrence [Colo. App.] 78 P. 1035.

82. In an action under the dramshop act for death of a husband and father, his habits and the effect thereof are proper subjects of inquiry as bearing on the loss his family sustained. Kelley v. Malhoit, 115 Ill. App. 23. In an action for negligent fire, evidence of the value of timber burned if "put to its best use" is proper as showing an element of damage, the distinction between wood as cordwood and that suitable for better purposes. Spink v. New York, etc., R. Co., 26 R. I. 115, 58 A. 499. In an action for burning trees, evidence that trees which subsequently became useless could soon after the fire have been sold is admissible. Id. Plaintiff to prove special damages from libel may show what the income from his business had been up to the time of the libel and how it had fallen off immediately thereafter. Morse v. Times-Republican Printing Co., 124

Evidence in action for personal injuries.[85]—In an action in Texas for injuries sustained in Kansas, a Kansas statute limiting recovery in case of wrongful death is inadmissible.[86] The testimony of physicians as to the extent and character of plaintiff's injuries,[87] and facts having a like tendency, are material.[88] Where damages for medical bills are recoverable, plaintiff's request that witness telephone for a doctor is admissible.[89] Exclamations indicating present pain may be shown;[90] but statements made by plaintiff subsequent to his injury descriptive thereof as distinguished from mere exclamations indicating present pain cannot be shown.[91] Recent[92] but not remote[93] earnings of plaintiff, and the value of such labor as he can

Iowa, 707, 100 N. W. 867. In an action for converting logs, plaintiff may show how many he put into the water, how many were accounted for, the percentage to be deducted for sunken logs, and the loss in towing and otherwise, in order to show approximately the number converted. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613. In an action for damages for failure to receive a telegram, plaintiff may not testify to his own fears, apprehensions and conclusions from his failure to receive it. Willis v. Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538.

83. Where the property in question has no market value, proof may be made of such facts as tend to show value or which aid the jury in estimating it. The cost of manufacturing a new article and transporting it to market may be inquired into. Farson v. Gilbert, 114 Ill. App. 17. The amount of insurance carried on buildings and contents is immaterial on their value in an action for their negligent burning. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374. The rental value of property three years prior to the injury complained of is not too remote. Peabody v. New York, etc., R. Co. [Mass.] 73 N. E. 649. What one earns in his ordinary occupation is evidence of the value of his time. Fullis v. McClary [Iowa] 104 N. W. 505. Where a train engine is detained, the rental value of a railroad locomotive is not material on the value of the use of the engine detained. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 51. Where a horse killed had no market value, evidence that he had been trained to be used in roping contests and had a peculiar value on that account is admissible, though a law against roping contests has been passed subsequent to his use for that purpose. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. Rep. 570, 88 S. W. 301. The value of the services of a trained nurse is no criterion of the value of the services of plaintiff's daughter as nurse who was untrained. Her services are measured by those of an ordinary person doing like work. MacDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001.

84. Dowie v. Priddle, 116 Ill. App. 184.

85. See 3 C. L. 1029.

86. Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 87 S. W. 401.

87. Physicians may testify to probable future effect of injuries. Norfolk R. & Light Co. v. Spratley [Va.] 49 S. E. 502. Plaintiff's attending physicians, who are familiar with his condition and the nature of his injury may testify as to how long it will affect him. Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601. Evidence of a physician who attended injured plaintiff that when he saw plaintiff blood poisoning had set in, without showing any connection between the injury and such blood poisoning, was irrelevant. Costello v. New York City R. Co., 91 N. Y. S. 23. Where a surgical operation is necessary as a result of personal injuries, plaintiff may show that it is a difficult and dangerous operation which few surgeons will perform. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030. Expert opinion evidence based on subsequent diagnosis held admissible as to permanency of injury by fracture of skull. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 13 Tex. Ct. Rep. 589, 88 S. W. 857. See, also, Evidence, 3 C. L. 1334, for a full treatment of the subject of expert evidence.

88. In an action for injuries received in street car collision resulting in fainting fits and nervous troubles, evidence that plaintiff was subject to fainting fits before the accident was competent. Mullin v. Boston El. R. Co., 185 Mass. 522, 70 N. E. 1021. Not error to allow question as to whether plaintiff's physician had gotten any of her family history in regard to nervous disorders. Id.

89. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21.

90. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755; Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21; Fishburn v. Burlington & N. W. R. Co. [Iowa] 103 N. W. 481; Stevens v. Friedman [W. Va.] 51 S. E. 132. Wife may state that husband appeared to suffer from headache. Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569. In an action for the conscious suffering of plaintiff's intestate between injury and death, evidence tending to prove such suffering is admissible. Dickinson v. Boston [Mass.] 75 N. E. 68.

91. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818; Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601; Howe v. Chicago, etc., R. Co. [Mich.] 103 N. W. 185. A dream of plaintiff that his hand would have to be amputated is not admissible to show pain. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755.

92. Though plaintiff is no longer employed at the work. West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586. A physician suing may testify as to the amount of his earnings the previous year. Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648. Plaintiff who was conducting a blacksmith shop in which others were employed may show that the value of his work there

perform,[94] are admissible on the question of his earning power. The family of a plaintiff suing for a personal injury,[95] and his pecuniary condition[96] and habits, are immaterial.[97]

Expectancy life tables[98] are properly admitted in actions for death,[99] and in actions for personal injury, where the injuries are permanent,[1] as persuasive, though not conclusive,[2] evidence of the continuance of life.[3] They are not necessary as a basis for recovery based on expectancy.[4] Mortality tables are not admissible to show how long plaintiff will be inconvenienced by a change in street grade.[5]

Physical examination.[6]—The court has no power to compel a party to submit to a physical examination by physicians. Failure to submit on request is simply a matter for the consideration of the jury;[7] but where plaintiff exhibits his injured member and his experts point out the injury thereto, defendant is entitled to have it also exhibited so that its experts may show there is no injury.[8] A dramatic exhibition of plaintiff's injuries may be ground for reversal.[9]

Sufficiency of evidence[10] is discussed in cases cited below.[11]

"would average five dollars per day." City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431.

93. Chicago & J. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796.

94. Plaintiff may testify to what his services in the profession for which he has prepared himself are worth. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. In an action by a farmer boy for damages for injuries, evidence of the present price of farm labor was held admissible on the issue of damages, though the boy would not be of age for eleven years North Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109. The rate of wages in the mill where plaintiff, an employe, worked and was hurt is immaterial where it is not claimed that he received that wage. Davis v. Kornman [Ala.] 37 So. 789. Testimony as to plaintiff's profession, capacity and efficiency is relevant. Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569. An averment in the petition of plaintiff's earning capacity does not limit him to proof of that particular amount. He may show his ability to earn more as tending to show capacity to earn the amount alleged. City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724.

95. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983; Union Pac. R. Co. v. Hammerlund [Kan.] 79 P. 152; Atchison, etc., R. Co. v. Ringle [Kan.] 80 P. 43; St. Louis, etc., R. Co. v. Adams [Ark.] 85 S. W. 768. Held otherwise where plaintiff, a minor, was shown to have contributed to the support of his parents and family. Morrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573.

96. Plaintiff's habits of industry and pecuniary condition are immaterial. Davis v. Kornman [Ala.] 37 So. 789. Plaintiff cannot testify that she depended upon herself for support. Such a rule would create a shifting scale of compensation for personal injuries depending on plaintiff's pecuniary condition. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6.

97. Davis v. Kornman [Ala.] 37 So. 789.

98. See 3 C. L. 1030.

99. Horst v. Lewis [Neb.] 103 N. W. 460; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908.

1. Virginia & S. W. R. Co. v. Bailey [Va.] 49 S. E. 33; Hyland v. Southern Bell Tel. & T. Co. [S. C.] 49 S. E. 879; International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. Where the evidence does not establish permanency with any reasonable certainty, it is not admissible. MacGregor v. Rhode Island Co. [R. I.] 60 A. 761; Atlanta, K. & N. R. Co. v. Gardner [Ga.] 49 S. E. 818. Permanency held sufficiently shown to authorize admission of tables. Northern Tex. Const. Co. v. Crawford [Tex. Civ. App.] 87 S. W. 223.

2. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Instruction as to effect of Carlisle tables held proper. Iseminger v. York Haven Water & Power Co., 209 Pa. 615, 59 A. 64.

3. It is immaterial that the life tables do not take into consideration the hazardous character of plaintiff's occupation. International & G. N. R. Co. v. Brandon [Tex. Civ. App.] 84 S. W. 272.

4. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997.

5. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

6. See 3 C. L. 1030.

7. International & G. N. R. Co. v. Butcher [Tex. Civ. App.] 81 S. W. 819; International & G. N. R. Co. v. Gready [Tex. Civ. App.] 82 S. W. 1061. Exhibition at one trial does not require it at the next. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 86 S. W. 785. After defendant has had plaintiff examined twice by physicians of whose testimony it does not avail itself, it is no abuse of discretion to require any further examination to be in the presence of the jury. Helbig v. Grays Harbor Elec. Co. [Wash.] 79 P. 612. An application to have the trial suspended for the purpose of having an injured passenger examined by a physician to determine the extent of his injuries is addressed to the discretion of the court. Macon R. & Light Co. v. Vining, 120 Ga. 511, 48 S. E. 232.

8. St. Louis S. W. R Co. v. Smith [Tex. Civ. App.] 86 S. W. 943,

9. Felsch v. Babb [Neb.] 101 N. W. 1011. Allowing plaintiff to walk in presence of jury held not prejudicial. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84.

(§ 7) *C. Instructions.*[12]—Instructions should clearly define the measure of plaintiff's damages,[13] limit them to the amount pleaded[14] and proved,[15] respect the

10. See 3 C. L. 1030.

11. In an action of debt on a replevin bond, the statement contained in the affidavit for replevin as to the value of the property sought to be replevied is prima facie evidence of such value. Farson v. Gilbert, 114 Ill. App. 17. Evidence that prior to an accident a wagon was worth $200, that it would cost $200 to repair it, is sufficient basis for a verdict of $125. Reisenberg v. New York City R. Co., 91 N. Y. S. 4. Evidence held not sufficient to base special recovery for cutting timber useful for shade trees. Ferguson v. Buckell, 101 App. Div. 213, 91 N. Y. S. 724. Evidence of market value of certain peas held sufficient. Kiley v. Lee Canning Co., 93 N. Y. S. 986.

Personal injuries: Mental anguish held sufficiently shown to authorize allowance of damages therefor. Baier v. Selke, 112 Ill. App. 568. Evidence that a mangled hand will cause future pain and suffering is not necessary to justify recovery therefor. Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869. Evidence in action for personal injury to woman 40 years old held sufficient to go to jury on likelihood of her climacteric occurring before her recovery so as to be an element of damages. Keefe v. Norfolk Suburban St. R. Co., 185 Mass. 247, 70 N. E. 46. Held insufficient to show that injuries were imaginary or hysterical, Patterson v. New Orleans & C. R. Light & Power Co., 110 La. 797, 34 So. 782. Where one injured in a collision testified that her head was affected and her brain confused, evidence was sufficient to justify the jury in considering whether her brain was affected. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189. Evidence that a boy of 14 suffers severe pain in head, that before injury he was a "bright boy," that he is now "dull," is sufficient to justify instruction on future injury to mind. El Paso Elec. R. Co. v. Kendall [Tex. Civ. App.] 85 S. W. 61. Evidence held sufficient to justify instruction on injury to nervous system. Howard v. Terminal R. Ass'n [Mo. App.] 85 S. W. 608. Evidence of injury to arm and leg held sufficient to go to jury. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

Loss of earnings: Loss of earning power of woman housekeeper held sufficiently shown to warrant recovery. Olin v. Bradford, 24 Pa. Super. Ct. 7. Testimony as to plaintiff's earnings per day prior to his injury held insufficient to found recovery. Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. Evidence held sufficient to found recovery for lost earnings. Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486. Plaintiff alleging injury to eye held not entitled to recover for alleged diminished earning capacity. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 86 S. W. 943.

Permanency: Proof of the existence of an injury not necessarily permanent does not authorize submission of the question of permanent injuries. McNeill v. Interurban St. R. Co., 92 N. Y. S. 767. Evidence held insufficient to show any permanent injury. Robinson v. Metropolitan St. R. Co., 92 N. Y. S. 1010; Wilbur v. Southwest Mo. Elec. Co., 110 Mo. App. 689, 85 S. W. 671. Evidence held sufficient to raise issue of permanency of injury by broken collar bone. Ballard v. Kansas City [Mo. App.] 86 S. W. 479.

Causal connection between injury and accident: Evidence held sufficient to go to jury on whether plaintiff's injuries resulted from the accident complained of or were due to antecedent rupture. Young v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 767. Evidence held to show that injuries to a woman (miscarriage) resulted from a jolting of a railroad train, and fright occasioned thereby. Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676. Evidence held insufficient that impairment of hearing of man over 80 years was caused by accident. Lamm v. Metropolitan St. R. Co., 94 N. Y. S. 584. Evidence held insufficient to show that varicose veins resulted from injury sued for. McGinness v. Third Ave. R. Co., 93 N. Y. S. 787. Evidence held sufficient to support finding that accident caused curvature of spine. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84. Evidence held sufficient that injuries caused appendicitis. Sullivan v. Boston El. R. Co., 185 Mass. 602, 71 N. E. 90. Evidence held sufficient to support recovery on theory that plaintiff's varicocele was of traumatic origin. Bial v. Interurban St. R. Co., 90 N. Y. S. 434.

12. See 3 C. L. 1031.

13. Failure to instruct as to the measure of damages is not error where no request was made. Central R. Co. v. Ankiewicz, 213 Ill. 631, 73 N. E. 382. Instructions must inform the jury as to the elements to be considered and limit them thereto. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108; Ballard v. Kansas City, 110 Mo. App. 397, 86 S. W. 479. Where the evidence shows that plaintiff's injuries might have been caused by something else than the accident complained of, that feature of the evidence should be commented on. Clark v. Union Traction Co. [Pa.] 60 A. 302. Instruction held not objectionable as permitting recovery for loss of earnings during plaintiff's minority. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Error to instruct to use own discretion in assessing amount. Elements of damage open to consideration should be enumerated and methods and criteria for their estimation pointed out. Jenkins v. Kirtley [Kan.] 79 P. 671. Where the damages are unliquidated, failure to give a measure is reversible error. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 84 S. W. 1073.

14. Instructions authorizing recovery according to a different standard of damages than that pleaded and proved are erroneous. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. Refusal to caution the jury not to go beyond the amount claimed and proved in awarding expenses for medical services is not error. San Antonio Traction Co. v. Menk [Tex. Civ. App.] 13 Tex. Ct. Rep. 578, 88 S. W. 290. Inclusion of expenses for medicines in recovery is error where there is neither pleading nor proof of

province of the jury,[16] and avoid authorizing speculative,[17] sympathetic,[18] capricious,[19] and double[20] damages. Correct general instructions are sufficient in the ab-

them. Northern Texas Traction Co. v. Jamison [Tex. Civ. App.] 85 S. W. 305. Failure to limit recovery for medical expenses to amount alleged in petition is not error where there is no evidence of any other amount. South Covington, etc., R. Co. v. Smith [Ky.] 86 S. W. 970.

15. It is error to instruct that the jury are to give such damages as in their "judgment" would fairly compensate. Their judgment must be limited by the evidence. Consolidated Coal Co. of St. Louis v. Shepherd, 112 Ill. App. 458; Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253; Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829. Instruction that plaintiff "can recover all damages suffered by him by reason of the default of the other party" held misleading in not limiting recovery to actual damages. La Favorite Rubber Mf'g Co. v. H. Channon Co., 113 Ill. App. 491. Instruction authorizing consideration of "all the facts and circumstances in evidence" approved. Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43. An instruction to assess damages in such amount as the jury may believe, from the preponderance of evidence, was sustained, is proper. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. Instruction to jury to take plaintiff's present physical condition into account held error where the evidence left it in doubt whether his condition was the result of the injury. Chicago Union Traction Co. v. Miller, 212 Ill. 49, 72 N. E. 25. An instruction on the effect of provocative words to mitigate damages for assault and battery is error where there is no evidence of provocation. Langdon v. Clarke [Neb.] 103 N. W. 62. An instruction authorizing punitive damages in a tort case where the evidence does not justify it is prejudicial. Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569. Where the only evidence was that medical expenses were "five or six hundred dollars" and were reasonable, the instructions should confine the recovery to such as were reasonable. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343. Instruction authorizing recovery for medical attendance in absence of evidence that plaintiff had paid or obligated himself for any is erroneous. Kimble v. St. Louis & S. R. Co., 108 Mo. App. 78, 82 S. W. 1096. Instruction allowing future medical expenses held not improper under the evidence. Parker v. St. Louis Transit Co., 108 Mo. App. 465, 83 S. W. 1016. Hypothesis of severe abrasions should not be submitted in the absence of evidence of them, though charged in the petition. St. Louis v. Kansas City [Mo. App.] 85 S. W. 630. Instruction following language of petition which alleged injuries not proven held not bad as authorizing recovery for injuries pleaded but not proved. Missouri, etc., R. Co. v. Hay [Tex. Civ. App.] 86 S. W. 954.

16. Where the evidence is conclusive that plaintiff has not recovered from his injuries, an instruction on future pain and suffering is proper. Chicago & M. Elec. R. Co. v. Ullrich, 213 Ill. 170, 72 N. E. 815. Held proper in the particular case to omit from a general instruction on the measure of damages any reference to the social standing of the mother of an infant owing for personal injury. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Instruction using term "destruction" of nervous system held not erroneous where nerve force was impaired. Fishburn v. Burlington & N. W. R. Co. [Iowa] 103 N. W. 481. Where personal injuries are such that permanence may be inferred, it is not error to charge on the subject. Macon R. & Light Co. v. Streyer [Ga.] 51 S. E. 342. Instruction held not bad as assuming that plaintiff will experience future pain and suffering. Missouri, etc., R. Co. v. Nesbitt [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891.

17. A charge that the measure is such an amount as is dictated by the enlightened consciences of impartial jurors is erroneous. Macon R. & Light Co. v. Vining, 120 Ga. 511, 48 S. E. 232. Instruction held not bad as allowing speculative and uncertain damages for personal injury. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Permission to assess what they think just and right after full consideration of all the evidence is error. Toledo, St. L. & W. R. Co. v. Smart, 116 Ill. App. 523. Instruction as to future pain and suffering held not bad as allowing speculative recovery. Chicago & M. Elec. R. Co. v. Ullrich, 213 Ill. 170, 72 N. E. 815. An instruction merely giving the jury a form of verdict cannot be objected to as giving them unlimited power in respect to assessment of damages. Central R. Co. v. Ankiewicz, 213 Ill. 631, 73 N. E. 382. Instruction held not bad as allowing speculation on value of injury to feelings. Howe v. Chicago, etc., R. Co. [Mich.] 103 N. W. 185. Charges using words "probably" and "likely" in stating basis of recovery of future damages held not erroneous. Pentoney v. St. Louis Transit Co., 108 Mo. App. 681, 84 S. W. 140; Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133.

18. An instruction that the amount of damages to be assessed must be "such as is dictated by the consciences of enlightened jurors" was error where pain, loss of time and diminished capacity to earn were elements. Macon R. & Light Co. v. Vining, 120 Ga. 511, 48 S. E. 232. Instructions where plaintiff suffered miscarriage held not objectionable as a "roving commission" to assess damages. West v. St. Louis S. W. R. Co. [Mo.] 86 S. W. 140.

19. Instructions that allow the assessment of damages from mere caprice are erroneous. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

20. Instruction in personal injury case held bad as allowing double damages for loss of future earning power. Missouri, etc., R. Co. v. Nesbitt [Tex. Civ. App.] 13 Tex. Ct. Rep. 656, 88 S. W. 891. Instruction in action for injuries to minor son held bad as authorizing double recovery for lost time. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 86 S. W. 785. Instructions should not be so framed as to authorize recovery of particular elements of damage included in

sence of special requests.[21] Instructions should be considered as a whole.[22] Erroneous instructions are frequently cured by verdict.[23] A party cannot complain of an instruction on the subject of nominal damages when he himself requested a similar charge.[24] Holdings on various instructions complained of are collected below.[25]

(§ 7) *D. Trial.*[26]—Where it has been previously determined that defendant is liable, the question cannot be again raised at the hearing before an assessor appointed to assess damages, or by a request for a ruling by the court on a motion for a new trial.[27] In an action for breach of contract of sale where the evidence as to the market value of the goods was oral and conflicting, it is error to withdraw from the jury the question of the amount of damages.[28] In Iowa the apportionment of the damages among the owners of sheep-killing dogs is for the jury.[29] The time of admitting testimony on the question of damages is within the discretion of the court.[30] An extra allowance cannot be made in a negligence case of a very common type.[31]

the general measure. Damages to cattle in shipment. International & G. N. R. Co. v. Startz [Tex. Civ. App.] 82 S. W. 1071; International & G. N. R. Co. v. Butcher [Tex.] 84 S. W. 1052. Instruction to consider impairment of health, physical injuries, physical and mental suffering, expenses of medical treatment and impairment of ability to earn, erroneously allowed double damages. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343. Instruction in personal injury case held good as against objection that it allowed double damages. San Antonio Traction Co. v. Sanchez [Tex. Civ. App.] 84 S. W. 849; Reynolds v. St. Louis Transit Co. [Mo.] 88 S. W. 50; Red River, etc., R. Co. v. Reynolds [Tex. Civ. App.] 85 S. W. 1169; International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 87 S. W. 1063; Northern Tex. Traction Co. v. Yates [Tex. Civ. App.] 88 S. W. 283.

21. Red River, etc., R. Co. v. Reynolds [Tex. Civ. App.] 85 S. W. 1169; Crown Cotton Mills v. McNally [Ga.] 51 S. E. 13. Failure to exclude effect of prior injuries in charging on expenses and lost time held not error in absence of special request on that subject. Missouri, etc., R. Co. v. Hay [Tex. Civ. App.] 86 S. W. 954. In the absence of a request, it is not error to fail to instruct that the present worth rather than the aggregate of future damage for a personal injury may be recovered. Hutcheis v. Cedar Rapids & M. C. R. Co. [Iowa] 103 N. W. 779.

22. Defendant's instructions given held curative of others not confining recovery to proximate results. Chicago Union Traction Co. v. Miller. 212 Ill. 49, 72 N. E. 25. Misleading instruction held not reversible. Personal injury. City of Chicago v. Bush, 111 Ill. App. 638.

23. An instruction in a personal injury case authorizing recovery for "direct expenses incurred" held not prejudicial in view of the verdict, though there was no proof of the value of the physician's services. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234. Where the jury found for defendant the plaintiff could not have been prejudiced by any error in instructions as to the measure of damages. Conant v. Jones, 120 Ga. 568, 48 S. E. 234. A recovery which is only fair in view of plaintiff's injuries and is not assailed as excessive will be sustained, notwithstanding error in instructions on the measure of damages. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108.

24. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

25. Instruction enumerating items recoverable for in personal injury cases approved. West Chicago St. R. Co. v. Dougherty, 110 Ill. 204; Kirkham v. Wheeler-Osgood Co. [Wash.] 81 P. 869; Smith v. Fordyce [Mo.] 88 S. W. 679; Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957; Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509; Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856; St. Louis S. W. R. Co. v. Highnote [Tex. Civ. App.] 84 S. W. 365; Lackland v. Lexington Coal Min. Co. [Mo. App.] 85 S. W. 397; Wright v. Kansas City [Mo.] 86 S. W. 452. Instruction enumerating elements held vague and obscure. Maggioli v. St. Louis Transit Co., 108 Mo. App. 416, 83 S. W. 1026. Instructions in action involving burning of tract of timber reviewed. Spink v. New York, etc., R. Co., 26 R. I. 115, 58 A. 499. Instructions approved as to plaintiff's loss of time. Collision of street cars. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. An instruction in a malicious prosecution case to award damages for "shame, mortification, mental anguish and pain, and injury to feelings" does not authorize recovery for physical pain. Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303. Instruction not to allow damages to husband for loss of aid, society and comfort of wife because of no proof of value held error. Reagan v. Harlan, 24 Pa. Super. Ct. 27. An instruction on exemplary damages is faulty that may be construed to mean that if they are recoverable against one defendant they are recoverable against all. Corkings v. Meier, 112 Ill. App. 655.

26. See 3 C. L. 1033.

27. National Mach. & Tool Co. v. Standard Shoe Machinery Co., 186 Mass. 44, 70 N. E. 1038.

28. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

29. Anderson v. Halverson [Iowa] 101 N. W. 781.

(§ 7) *E. Verdicts.*[32]—A single verdict or finding may include damages for elements of damage recoverable.[33]

DAMNUM ABSQUE INJURIA; DAMS; DATE; DAYS; DEAD BODIES, see latest topical index.

DEAF MUTES.

Deaf mutes may by reason of their weaknesses be more susceptible to fraudulent arts than other persons.[1]

DEATH AND SURVIVORSHIP.

The presumption of death arises on a person's absence from home continuously for seven years unheard of;[2] but it may be rebutted.[3] It is proper to charge that all the circumstances of the absence shall be considered.[4] The necessity of inquiry and search is sufficiently presented by a charge that impliedly draws in from the declaration such elements.[5] The refusal to charge that the absentee must have intended to return, if error,[6] was harmless where the only evidence was that he did.[7] The

30. Spink v. New York, etc., R. Co., 26 R. I. 115, 58 A. 499.

31. Starting of street car while plaintiff was alighting. Leonard v. Union R. Co., 98 App. Div. 204, 90 N. Y. S. 574. Collision on public highway between bicycle and wagon. Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116. Where only question is extent and character of injuries. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84.

32. See 3 C. L. 1033.

33. A finding enumerating several elements of damage and collecting them in a single amount is not objectionable as allowing double recovery. Haistead v. Sigler [Ind. App.] 74 N. E. 257. A single verdict for assault and battery may include damages for the personal injury, the medical bill, and loss of time. Happy v. Prichard [Mo. App.] 85 S. W. 655.

1. Culley v. Jones [Ind.] 73 N. E. 94.

2, 3. Policemen's Benev. Ass'n v. Ryce, 115 Ill. App. 95. Evidence considered. Id. Instruction held not to tell jury that presumption was conclusive. Policemen's Benev. Ass'n v. Ryce, 213 Ill. 9, 72 N. E. 764. Lapse of more time makes it stronger. In re Truman [R. I.] 61 A. 598. Presumed from 26 to 27 years' absence without being heard of. In re Morris, 91 N. Y. S. 706. From disappearance and absence for over 15 years with no explanation save indicia of a suicidal purpose. In re Losee's Estate, 94 N. Y. S. 1082. From unexplained absence for 43 years. McNulty v. Mitchell, 84 N. Y. S. 89.

Note: Appended to the report of Policemen's Benev. Ass'n v. Ryce in 104 Am. St. Rep. 190, 198 is an exhaustive monograph on the "Presumption of Death."

4. Policemen's Benev. Ass'n v. Ryce, 213 Ill. 9, 72 N. E. 764. Not presumed from 16 years' absence where he left to go to another place and was subsequently known to have been living in adultery. Donovan v. Twist, 93 N. Y. S. 990.

NOTE. Presumption of Death After Seven Years as Foundation for Declarations Against Interest: Held, that an absconding solicitor, although he may have remained absent to avoid the ordeal of public bankruptcy, is presumed to be dead when he has not been heard of for seven years, and his entries of collections are admissible in evidence as declarations against interest. Wills v. Palmer, 53 W. R. 169 (Eng. Ch. D.). By the common law, in the absence of proof of death, life is presumed to continue. From ancient statutes relating to bigamy and life estates has been adopted the counter-presumption of death after seven years' absence without intelligence. Burr v. Sim, 4 Whart. [Pa.] 150, 170, 33 Am. Dec. 50. But the rule is practically uniform that such presumption arises only when no news has been received by persons likely to hear from the absentee; and is rebutted by circumstances fairly explaining his silence consistently with life. Bowden v. Henderson, 2 Sm. & G. 360. In the light of these authorities this decision seems ill-considered, but cases are infrequent which apply the presumption merely to render evidence admissible, and that situation may require a less exacting rule than where property interests are directly involved. Manby v. Curtis, 1 Price, 225, 229. The court thus circumvents the prevailing doctrine that declarations against interest are admissible only after the declarant's death. Stephen v. Gwenap, 1 Moo. & R. 120; see contra Shearman v. Atkins, 4 Pick. [Mass.] 283, 293. It would seem more logical to apply the presumption of death uniformly, and either reject the evidence entirely, or, on analogy with similar cases, extend the doctrine admitting such declarations to include those of absentees. North Bank v. Abbot, 13 Pick. [Mass.] 465, 471.—From 18 Harv. L. R. 471.

5. Policemen's Benev. Ass'n v. Ryce, 213 Ill. 9, 72 N. E. 764.

6, 7. A specific intent might weaken or strengthen the presumption, but would not

presumption is against suicide as a cause of death,[8] but the accompanying circumstances may overcome it.[9] A statutory presumption of the death of residents who do not return to the state has no application to the case of one who was never a resident.[10] Death may be inferred from one's disappearance at the time and place of a disaster whither he was bound,[11] or where he must have been.[12] It is said that a grant of administration is very weak evidence of decedent's death.[13] To be probative of one's death a death certificate and burial record should be referred to him by such clear evidence of identity as to overcome the contrary presumptions.[14] Such a certificate is inadmissible if unsigned and undated.[15] If there is no specific finding when the death occurred, it will be regarded as having been on the date of the decree.[16]

The presumption that a young man who absconded and whose occupation was dangerous was living after two years is not strong enough to clear all doubt from a title depending on his surviving.[17]

DEATH BY WRONGFUL ACT.

The scope of this topic is limited to the nature and elements of the liability, including damages for causing another's death. It excludes the general law of negligence or tort on which such liability is predicated and also all questions of practice, evidence and pleading in negligence or tort cases except such as are peculiar to this action.[18]

be conclusive. Policemen's Benev. Ass'n v. Ryce, 213 Ill. 9, 72 N. E. 764.

8, 9. Note in deceased's handwriting with directions for burial admitted. Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

10. Ironton Fire Brick Co. v. Tucker, 26 Ky. L. R. 532, 82 S. W. 241. Evidence held insufficient. Id.

11. Collision at sea of boat which he was about to board. Hall v. North Pac. Coast Co., 134 F. 309.

12. Passenger on wreck of train wherein bodies of victims were burned. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727.

13. Phillips v. Heraty [Mich.] 100 N. W. 186.

Note: The claim has been made that letters of administration are prima facie evidence of death and it was so held in Tisdale v. Connecticut Mut. Ben. Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; Id., 28 Iowa, 12; but that such evidence is very weak and may be rebutted by slight evidence. On the same state of facts with the same plaintiff the United States supreme court held in Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 Law. Ed. 314, that the granting of letters of administration afforded no legal evidence of death. The latter holding seems to be the correct one, for if otherwise, it would open up an avenue of fraud in connection with life insurance policies that would be startling in its possible consequences. It would be easy to procure a policy for a large sum. In a year or two the person insured could disappear. Then letters of administration can be procured and the case is made. Similar unfortunate consequences will result in holding that granting letters of administration is conclusive evidence of widowhood. It might defeat the rights of heirs and the lawful widow and would be an easy way to forestall a prosecution for bigamy. Counsel for plaintiff in Phillips v. Heraty [Mich.] 100 N. W. 186, relies on James v. Emmet Min. Co., 55 Mich. 347, as sustaining his position; the facts were similar to the principal case but the point decided was that the letters of administration were conclusive evidence of plaintiff's right to appear as plaintiff. But in the principal case counsel contended that said letters were conclusive also as to the fact of plaintiff being the lawful widow of the deceased at the time of his death and hence entitled to pecuniary compensation under the statute. Carpenter and Moore, JJ., dissent.—3 Mich. L. R. 159.

14. Certificate of death of T. A. of St. Louis County held not proof of death of T. J. A. of St. Louis City in St. Louis County. Lucas v. Current River Land & Cattle Co., 186 Mo. 448, 85 S. W. 359.

15. Lucas v. Current River Land & Cattle Co., 186 Mo. 448, 85 S. W. 359.

16. In re Losee's Estate, 94 N. Y. S. 1082.

17. Van Williams v. Elias, 94 N. Y. S. 611.

18. See Carriers, 5 C. L. 507; Master and

§ 1. *Nature and elements of liability and release or bar thereof.*[19]—A cause of action for wrongful death does not exist at common law.[20] It is of statutory creation and arises only within the strict terms of the statute.[21] Statutes relative to the cause of action are to be construed in connection with each other.[22] In Massachusetts if death was caused by a defendant's servant the negligence must have been gross.[23] The injuries negligently inflicted need not be the sole cause of death.[24] The cause of action does not accrue until death.[25] In North Carolina a cause of action for injuries abates at the death of the injured party and merges in the cause of action for death.[26] Under Lord Campbell's Act the right of action survives to the administrator of the party in whose favor it accrues.[27]

A release by an injured party does not deprive those dependent on him of their right of action if death results.[28]

§ 2. *Who may bring action.*[29]—The action must be brought by the person designated by the statute, and cannot be brought by another, though he be sole beneficiary.[30] Thus if the right of action is given to the administrator, he alone may sue,[31] and the beneficiaries have no right to be parties or to compromise or control the action;[32] but where the action is given to the personal representative for the benefit of the widow and next of kin and he conspires with the one responsible for the death to prevent suit, the widow and next of kin may maintain the action, making the administrator a party.[33] If the right of action be given to several in the alternative, the parties named should not be joined.[34] If the personal representative is

Servant, 4 C. L. 533; Negligence, 4 C. L. 764; Railroads, 4 C. L. 1181, and like titles.

19. See 3 C. L. 1034.

20. Swift & Co. v. Johnson [C. C. A.] 138 F. 867; Harshman v. Northern Pac. R. Co. [N. D.] 103 N. W. 412. A father cannot maintain an action in his own right for the negligent killing of his child. Shaw v. Charleston [W. Va.] 50 S. E. 527.

21. Bowen v. Illinois Cent. R. Co. [C. C. A.] 136 F. 306; Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. Under a statute which gives a cause of action for death caused by negligence, carelessness or unskillfulness of the agents, servants and employes of a railroad company, no recovery can be had where a servant wantonly shot a person. Bowen v. Illinois Cent. R. Co. [C. C. A.] 136 F. 306. "Driver" as used in Rev. St. 1899, § 2864, giving an action for death caused by the negligence of any driver of a stage coach or other public conveyance, does not include the motorman of a street car. Drolshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344.

22. The provisions of the North Carolina Employers' Liability Act is in pari materia with the provisions of Lord Campbell's Act, in force in that state, and must be construed in connection with it. Dennis v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 869.

23. Evidence insufficient to show gross negligence. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

24. Death resulting from disease caused by the injury inflicted gives a cause of action. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207. And if death by a disease with which a person is already afflicted is hastened by injuries occasioned by a wrongful act, a cause of action exists. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976.

25. Could not be set up by amendment to an action for injuries commenced by deceased. Bolick v. Southern R. Co., 138 N. C. 370, 50 S. E. 689.

26. Bolick v. Southern R. Co., 138 N. C. 370, 50 S. E. 689.

27. Rev. St. 1899, § 2864. Behen v. St. Louis Transit Co., 186 Mo. 430. 85 S. W. 346.

28. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976.

29. See 3 C. L. 1036.

30. Rev. Codes 1899, § 5976 designates persons who may bring action but does not include parents. Held, a complaint by a father does not state a cause of action. Harshman v. Northern Pac. R. Co. [N. D.] 103 N. W. 412.

31. Though the decedent was a minor. Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345. Where the action is given to the personal representative, a father may not maintain it. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115.

32. Where the action is given to the personal representative in his capacity as such, for the benefit of the widow or next of kin, the widow or next of kin have no right to be parties or to compromise or control the action. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 73 N. E. 285.

33. McLemore v. Sebree Coal & Min. Co. [Ky.] 88 S. W. 1062.

34. Under a statute giving a right of action to the husband, widow, children or parents, where a husband is killed leaving a widow and children, the action must be brought by the widow alone, the damages recovered to be shared by the children. Un-

given the right of action, a foreign personal representative may sue under the statute of the state where the death occurred, in the state of his appointment if he has such right in that state, and the legal machinery of that state is adequate to the enforcement of the rights given.[35] A personal representative may maintain an action for the wrongful death of a servant caused by the master's negligence.[36] In Illinois the action may be maintained by a foreign administrator.[37]

§ 3. *Beneficiaries of the right of action.*[38]—The action can be maintained only for the benefit of the persons named in the statute,[39] and there can be no recovery for the benefit of persons not dependent on deceased and who have no expectancy of benefit in his continuance of life;[40] but it is not necessary that the beneficiary have a legal claim on the services of the deceased,[41] and that a beneficiary is married,[42] or is supported after the death by other members of the family, does not preclude a recovery.[43] Under Lord Campbell's Act a mother cannot recover for the death of her illegitimate child.[44] "Next of kin" includes a husband,[45] but "heirs" does not.[46] Under a statute giving an action for the benefit of the widow, if any, or the next of kin, if the deceased leaves a widow, no cause of action exists for the benefit of the next of kin.[47] Nonresident alien next of kin may recover under a statute giving a right of action to the next of kin,[48] and an alien widow residing in another state is entitled to the benefits of the statute for the death of her husband, a resident alien.[49] Under the Indiana statute recovery may be had for the benefit of a nonresident alien if he would be entitled to a similar recovery under the laws of his own country.[50] When the recovery is for the benefit of the estate of the decedent, a local administrator may recover for the death of an alien, though decedent's sole relative is a nonresident alien.[51]

Contributory negligence of the beneficiary of the right of action will defeat a recovery for the death of a child non sui juris.[52]

der P. L. 309. Haughey v. Pittsburg R. Co. 210 Pa. 367, 59 A. 1112. Where the action should be brought by the widow alone and a nonsuit is entered in an action by the widow and children, the children cannot appeal separately in their own names. Id.

35. Williams v. Camden Interstate R. Co., 138 F. 571.

36. Under Code 1896, § 27, permitting personal representatives to maintain actions for wrongful death. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

37. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

38. See 3 C. L. 1037.

39. Swift & Co. v. Johnson [C. C. A.] 138 F. 867.

40. Diller v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 271.

41. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115. Two brothers and a nephew with whom decedent lived and did housework are entitled to recover for her death, though there was no legal obligation resting on her to render such services. Smith v. Michigan Cent. R. Co. [Ind. App.] 73 N. E. 928.

42. In this case a daughter for whose benefit the action was brought was married but received nothing from her husband except his name. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 85 S. W. 1163.

43. Under a statute giving a right of action to one dependent on decedent for support, one dependent may recover, though after the death of the deceased her other children supported her. Rev. St. 1899, § 8820, McDaniels v. Royle Min. Co., 110 Mo. App. 706, 85 S. W. 679.

44. McDonald v. Southern R. Co. [S. C.] 51 S. E. 138.

45. A husband is "next of kin" of his wife under a statute giving a cause of action for the benefit of the next of kin. Atchison, etc., R. Co. v. Townsend [Kan.] 81 P. 205.

46. Under Ball. Ann. Codes & St. § 4828, giving a cause of action to "heirs or personal representative," "heirs" is restricted to widow and children and a surviving husband has no cause of action for the death of his wife. Johnson v. Seattle Elec. Co. [Wash.] 81 P. 705.

47. Diller v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 271.

48. Hirschkovitz v. Pennsylvania R. Co., 138 F. 438.

49. Under Va. Code 1904, § 2902, making the person guilty of the wrongful act liable to an action for damages. Pocahontas Collieries Co. v. Rukas' Adm'r [Va.] 51 S. E. 449.

50. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 178 N. E. 285, rvg. 70 N. E. 839, cited 3 C. L. 1038, n. 69.

51. Romano v. Capital City Brick & Pipe Co., 125 Iowa, 591, 101 N. W. 437.

52. See note, Imputed negligence in actions for wrongful death, 4 C. L. 778.

§ 4. *Damages.*[53]—The damages recoverable are strictly compensatory and limited to the pecuniary loss sustained,[54] or the relief contemplated by the statute.[55] Punitive elements, loss of society, wounded feelings and sufferings of the deceased cannot be considered.[56] Some courts lay down a mathematical rule by which to ascertain the measure of damages;[57] but others hold that this is a question of fact and is not to be ascertained by means of any particular mathematical calculation.[58]

A minor can recover for the death of a parent the reasonable value of such nurture, care, and education as he would have received,[59] unless the action is given for the benefit of the estate of the decedent.[60] For the death of a child the parent may recover the value of the child's services during minority,[61] less the cost of his support.[62] In Illinois, however, it is held that the measure in such case is the pecuniary benefit which would have been derived at any period of his life.[63] The fact that a child is absent from home without his parent's consent does not necessarily preclude a recovery.[64]

The remarriage of a widow pending the action is not to be considered in fixing the damages;[65] and damages recoverable by a husband for the death of his wife are not mitigated by the fact that he remarries;[66] and that a parent receives aid from

53. See 3 C. L. 1038.

54. Fair and just compensation for the pecuniary loss sustained. Toledo, St. L. & W. R. Co. v. Smart, 116 Ill. App. 523; Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62; Elgin, J. & E. R. Co. v. Thomas, 115 Ill. App. 508; United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115; Smith v. Cissel, 22 App. D. C. 318; McCabe v. Narragansett Elec. Lighting Co., 26 R. I. 427, 59 A. 112. A husband can recover only his pecuniary loss for the death of his wife. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727. Pecuniary loss must be shown in order to sustain a judgment for more than nominal damages. Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. Expenses incurred in the treatment of decedent prior to death is a proper element of damages. Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440.

55. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Where the action is for the benefit of minors, the measure is what they would have received until their majority. Eichorn v. New Orleans & C. R. Light & Power Co. [La.] 38 So. 526. Under Pub. St. 1901, c. 191, § 12, providing for the recovery of damages for mental and physical pain, a recovery may be had for fright or mental suffering caused by the negligence of the defendant, but not if caused by the decedent's own act whether careless or prudent. Yeaton v. Boston & M. R. Co. [N. H.] 61 A. 522.

56. But see 3 C. L. 1038, n. 84, stating that there is a conflict of authority. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Sorrow or loss of society. International & G. N. R. Co. v. McVey [Tex.] 87 S. W. 328.

57. To be ascertained by finding the gross amount of the prospective income, deducting therefrom what deceased would have had to lay out for personal expenses, and as a producer, and reducing the result to its present value. McCabe v. Narragansett Elec. Lighting Co., 26 R. I. 427, 59 A. 112; Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. Under the Michigan survival act, the measure of recovery is the amount decedent would have earned during his probable lifetime without any deduction for personal expenses. Oliver v. Houghton County St. R. Co. [Mich.] 101 N. W. 530. The measure is the probable earnings of deceased, considering his age, business capacity, experience, health, habits, energy and perseverance. Norfolk & W. R. Co. v. Cheatwood's Adm'x, 103 Va. 356, 49 S. E. 489.

58. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695.

59. International & G. N. R. Co. v. McVey [Tex.] 87 S. W. 328.

60. Where the action is given for the benefit of the estate of the deceased, loss to a surviving infant of parental care is not an element of damages. Under Gen. Laws 1896, c. 233, § 14. McCabe v. Narragansett Elec. Lighting Co. [R. I.] 61 A. 667.

61. Southern I. R. Co. v. Moore, 34 Ind. App. 154, 72 N. E. 479.

62. Evidence of the value of board and clothing in the neighborhood in which decedent lived is admissible in an action by a parent for the death of his minor child. Southern I. R. Co. v. Moore, 34 Ind. App. 154, 72 N. E. 479.

63. United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081. That decedent 48 years of age contributed to his father's support, and the amount of such contributions, are admissible. Prendergast v. Chicago City R. Co., 114 Ill. App. 156.

64. It may be shown that he was capable of earning wages and had manifested an intention to give some of his earnings to his parents. Dean v. Oregon R. & Nav. Co. [Wash.] 80 P. 842. The fact that the boy had left home without his parent's consent and did not send them any of his earnings does not authorize a presumption that they never would have received pecuniary assistance from him. Dean v. Oregon R. & Nav. Co. [Wash.] 80 P. 842.

65. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995.

66. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 85 S. W. 1163.

another source does not mitigate damages recoverable for the death of a child.[67] Under the Michigan survival act the damages recoverable are those sustained by the deceased, and the fact that he left no family is not to be considered.[68]

The probable continuance of contributions during life may be considered.[69] Earning capacity of the deceased[70] and expectancy of life as shown by mortality tables may be considered[71] if relevant.[72]

Exemplary damages[73] cannot be recovered where the action is purely compensatory.[73a]

The amount of recovery[74] is a question of fact,[75] but the jury may not fix the amount arbitrarily.[76] Pecuniary loss must be shown by the evidence,[77] and cannot be merely conjectured.[78] The jury may apply their own observation, experience, and

67. Where a mother seeks to recover for the death of her son, evidence that she received contributions from another son is inadmissible without proof that such son was a minor to whose earnings she was entitled. Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 86 S. W. 34.

68. Oliver v. Houghton County St. R. Co. [Mich.] 101 N. W. 530.

69. Evidence as to the age, health and poverty of the dependent is admissible to show that contributions would probably have continued during his life. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115.

70. United Elec. Light & Power Co. v. State [Md.] 60 A. 248. In an action by a husband for the death of his wife. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727. Allegations of prospective earning capacity of deceased held not too remote or contingent. Central of Georgia R. Co. v. Henson, 121 Ga. 462, 49 S. E. 278. Evidence of what the deceased spent on his family is admissible on the question of earning capacity in the absence of better evidence, but this may be rebutted by showing that he derived it otherwise than from his earnings. Memphis Consol. Gas & Elec. Co. v. Letson [C. C. A.] 135 F. 969. Proof of earning capacity may be properly sought by a question, "You may state what Mr. Edmond's earning ability was, not what he told you himself, but what you know." And an answer, "For the last three years $75 to $100 per month." Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8. Instruction as to elements to be considered in ascertaining the amount of damages held proper under the Tennessee statute. Memphis Consol. Gas & Elec. Co. v. Letson [C. C. A.] 135 F. 969. On issue of damages for death the union scale of wages may be used as the ground of an opinion as to probable wages of deceased, though there is no evidence that he belonged to a union. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69.

71. The standard life and annuity tables are admissible. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. Expectancy of life as shown by mortality tables may be shown by the testimony of a life insurance agent. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908.

72. Where the father is sole next of kin, evidence of the mother's expectancy of life cannot be considered as an element. Swift & Co. v. Johnson [C. C. A.] 138 F. 867.

73. See 3 C. L. 1041.

73a. Atchison, etc., R. Co. v. Townsend [Kan.] 81 P. 205.

74. See 3 C. L. 1041.

75. Evidence that the father of a child two years old was a farmer and her mother a housekeeper and that wages of school teachers in the vicinity ranged from $25 to $35 per month, held sufficient to take the question of the value of the child's life to her estate to the jury. Gregory v. Wabash R. Co., 126 Iowa, 230, 101 N. W. 761. The court should not instruct for nominal damages in an action by the parent for the death of an adult child. Predmore v. Consumers' Light & Power Co., 99 App. Div. 551, 91 N. Y. S. 118. The proof need not establish the amount of damages in dollars and cents. Prendergast v. Chicago City R. Co., 114 Ill. App. 156.

76. There must be some evidence to sustain the verdict. Hirschkovitz v. Pennsylvania R. Co., 138 F. 438. Where the measure of damages is the pecuniary injury, the verdict should not exceed the amount the jury believe the next of kin would have received had decedent lived. Id.

77. Pecuniary loss is not established by evidence that decedent left a dwarf brother to whom he had sent money. Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. Where deceased's father abandoned him seven years prior to his death and contributed nothing to his support during such period, the father was held not entitled to recover anything for his death. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Under Code 1895, § 3828, proof by a parent in an action for the death of his minor child need only show that he was partially dependent on her for support and that she made a substantial contribution to his maintenance. Central of Georgia R. Co. v. Henson, 121 Ga. 462, 49 S. E. 278. Where minor children sue for the death of their father, their mother (guardian) may testify as to deceased's contribution to the support of the children at the time of his death. Powley v. Swensen [Cal.] 80 P. 722.

78. Swift & Co. v. Johnson [C. C. A.] 138 F. 867. Evidence that a child abandoned by his father had said that if the father was ever in need of assistance he would help him is too conjectural to be used as basis of recovery by the father for the son's death. Id.

Held Reasonable. Children: $5,000 for a boy 18 years. Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345.

knowledge to the circumstances of the case.[79] Interest on the amount recovered may be allowed from date of death to date of recovery.[80]

§ 5. *Remedies and procedure.*[81]—The action is transitory.[82] Where the death occurs on the high seas within the jurisdiction of a state, the laws of that state governing such actions apply.[83] The cause of action is property,[84] and is a sufficient basis for appointing an administrator for a decedent nonresident killed while temporarily in the state.[85]

Where an action is given to a widow for instantaneous death and one to the legal representative for lingering death, a person cannot maintain one action as widow and another as administratrix.[86] If a plaintiff dies pending an action for injuries, the action cannot be revived in the name of the administrator.[87] Where the action is given to several in the alternative, and one dies pending his action, it abates and the cause is extinguished,[88] though a contrary rule seems to prevail in South Carolina.[89]

Adults: $13,190 for a tradesman earning over $2,000 per year. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995. $5,000 for a mason 51 years of age, temperate and of first class ability, leaving a wife, and five children whose ages range from 12 to 16 years. McCarthy v. Claflin, 99 Me. 290, 59 A. 293. $5,000 for man supporting his family. Hall v. North Pac. Coast R. Co., 134 F. 309. $2,700 for man 26 years of age leaving a mother dependent on him. Swanson v. Oakes, 93 Minn. 404, 101 N. W. 949. $2,000 for a man 21 years of age, unmarried, earning $10 per week, leaving a father who was in comfortable circumstances. Predmore v. Consumers' Light & Power Co., 99 App. Div. 551, 91 N. Y. S. 118. $4,000 for wife 23 years of age earning since marriage $400 per year. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727. $5,000 for man 35 years of age earning $40 per month. Young v. Waters-Pierce Oil Co., 185 Mo. 634, 84 S. W. 929. $15,000 for man 54 years old earning $100 per month. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62. $17,500 for man 45 years old earning $200 per month, apportioned $10,000 to the wife, $5.500 to the daughter, and $2,000 to the mother, held not excessive as to amount or apportionment. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 87 S. W. 395. $16,000 for a man 33 years old earning $100 per month. Missouri, K. & T. R. Co. v. Nelson [Tex. Civ. App.] 87 S. W. 706. $10,000 not excessive. Less by $1,054 than the present value of his income. St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 908.

Held excessive. Children: $2,000 held excessive by $1,000 for a girl five years and eight months old, it not appearing that the father had any reasonable expectation of receiving benefit, had she lived. Fleming v. Lobel [N. J. Law] 59 A. 27. $7,487 for a boy 14 years of age earning 75c. per day. Reduced to $2,500. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829.

Adults: $18,500 for a tradesman 51 years of age. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. $3,500 for a common laborer earning $1.50 per day. Reduced to $2,500. Hirschkovitz v. Pennsylvania R. Co., 138 F. 438. $22,500 for a man who contributed $20 to $25 per week to the support of his family, wife, and four children ranging from four and one-half years to three and one-half months of age. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078. $10,000 reduced to $5,000. Durfield v. New York, 101 App. Div. 581, 92 N. Y. S. 204. $5,000 for a young man with no trade and earning only nine dollars per week. Chicago Elec. Transit Co. v. Kinnare, 115 Ill. App. 115.

Inadequate: $1 for boy 17 years of age said to be reproach on the administration of justice. Rawitzer v. St. Paul City R. Co. [Minn.] 103 N. W. 499.

79. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727.

80. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995.

81. See 3 C. L. 1042.

82. Kansas City Southern R. Co. v. McGinty [Ark.] 88 S. W. 1001.

83. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

84. Administrator may be appointed to collect it. Richards v. Riverside Ironworks [W. Va.] 49 S. E. 437.

85. Under Code, § 1374, forbidding the appointment of an administrator for a nonresident unless the deceased left assets in the state or assets have since come into the state. Vance v. Southern R. Co., 138 N. C. 460, 50 S. E. 860.

86. Massachusetts Employer's Liability Act construed. Smith v. Thomson-Houston Elec. Co. [Mass.] 74 N. E. 664; Hyde v. Booth [Mass.] 74 N. E. 337.

87. The remedy is in action for death. Gallagher v. River Furnace & Dock Co., 2 Ohio N. P. (N. S.) 661.

88. Where the right of action is for the benefit of the widow, if any, or the next of kin if there is none and the widow dies pending an action. Diller v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 271.

89. An action for the benefit of a father who is sole beneficiary at the time action is commenced does not abate if he dies pending the action but may be prosecuted for the benefit of whoever may be entitled to participate in the recovery. Morris v. Spartanburg R. Gas & Elec. Co. [S. C.] 49 S. E. 854.

The action must be brought within the time limited by the statute.[90] The venue of the action is the place contemplated by the statute.[91]

Irregularity in granting letters of administration may be attacked in an action by the administrator for the death of his intestate.[92] An administrator is a merely nominal party to a suit for wrongful death, and a general denial does not traverse his representative capacity,[93] but a misnomer of the deceased is a defect which may be raised by general demurrer.[94] A misnomer of the decedent in an action by an administrator is fatal to the right to maintain the action.[95]

An action may be maintained against county commissioners in their official capacity for wrongful death due to failure to keep a county bridge in repair.[96]

Rights under a statute of one state may be enforced in another[97] unless the statute is penal[98] or contrary to the public policy of the state in which enforcement is sought.[99] The character of the statute will be determined by the court in which the action is brought.[1] The courts of one state will not refuse to entertain an action under the statute of another because of the dissimilarity of the provision relative to damages in the statutes of the respective states.[2] The extent of the remedy in an action in one state under the statute of another is governed by the limitations of the foreign statute.[3]

The pleadings are governed by the law of the forum.[4] Where the action is given for the benefit of certain persons, an action by one as representative will be construed as one for the benefit of the persons named.[5] Two causes of action accruing

90. A cause of action under Code 1896, § 25, for the death of a minor child, is not barred until two years. Louisville & N. R. Co. v. Robinson [Ala.] 37 So. 431.

91. Under a statute providing that the action shall be prosecuted by the personal representative and that the action may be brought in the county where the plaintiff resides, the venue is the county of the residence of the personal representative, not the decedent. Illinois Cent. R. Co. v. Stith's Adm'x [Ky.] 85 S. W. 1173.

92. Zeimer v. Crucible Steel Co., 99 App. Div. 669, 90 N. Y. S. 962.

93. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. Objection to an administrator bringing suit for wrongful death of the intestate must be taken by demurrer as for want of legal capacity to sue or by special denial. Id.

94. Where an administratrix of the estate of one person sues for the death of another her right to maintain the action may be raised by general demurrer. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604.

95. One suing as administratrix of the estate of Ferdinand N. A. cannot maintain an action for the death of Fernando W. A. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604.

96. Rahe v. Board of Com'rs of Cuyahoga County, 5 Ohio C. C. (N. S.) 97.

97. Whitlow v. Nashville, etc., R. Co. [Tenn] 84 S W. 618.

98. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618. Rev. St. Mo. 1899, § 2864, is penal, and an action under it cannot be maintained in Illinois. Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69. Code Ala. 1896, § 27 (Code 1886, § 2589) is not penal. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

99. Right of action given to the personal representative by Code Ala. 1896, § 27, is not repugnant to the public policy of Tennessee. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618. The Illinois statute provides that there must be pecuniary injury; the Missouri statute does not so require. Held there can be no recovery in Illinois under the Missouri statute without proof of damage. Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69.

1, 2. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

3. Dennis v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 869. The provisions of Code N. C. § 1498, that the action must be brought within one year applies to an action under the statute brought in South Carolina. Id.

4. In a suit in a Federal court in Vermont for a death in Connecticut based on the statute of that state which requires the complaint to allege notice to defendant of the claim, but the statute of Vermont does not require such allegation, no such allegation is necessary. Brown v. New York, etc., R. Co., 136 F. 700. A complaint setting forth in the caption, plaintiff's name, followed by "administratrix of" decedent, and in some of the counts alleging that plaintiff "as administratrix" sues, and in others "the plaintiff as aforesaid claims," shows that plaintiff sued as administratrix. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207. An additional count, when read in connection with the others, held to show that plaintiff sued in her capacity as administratrix. Id.

5. Under a statute which provides that the recovery shall be for the benefit of the widow and children, where a widow sues as administratrix for the benefit of the children, it will be construed as an action for the benefit of the widow and children. Balti-

to a personal representative in different capacities cannot be joined[6] nor can a count at common law and one under a statute.[7] It must be alleged that the deceased left next of kin.[8] The complaint need not show that the plaintiff had a pecuniary interest in the life of the deceased.[9] A complaint by a parent for the death of a child need not allege that the child lived at home.[10] If death was caused through the negligence of a servant of the defendant, it must be alleged that the act causing death was in the line of his duty.[11] An allegation at the close of a complaint for the benefit of the widow that decedent's estate was damaged in a certain sum does not change the action from one under the statute to one for the benefit of his estate.[12] The usual rules as to amendments apply.[13]

The ordinary rules of negligence are applicable in matters not specially prescribed.[14] The death of the person for whose death the action is brought must be shown.[15] The facts essential to recovery need not be proven by direct evidence of persons who saw the occurrence.[16] Proof of date of death need not be confined to the date alleged in the petition.[17] When death is caused by the act of a servant, the burden is on the plaintiff to show that the act was in the scope of the servant's employment.[18] Where the action is for the death of a young child, the plaintiff must show no contributory negligence on his part or on the part of those who had him in charge.[19]

The instructions as to the measure of damages should be certain[20] and not misleading,[21] and the jury should not be instructed to consider elements not supported by evidence,[22] nor required to itemize the elements of damage.[23]

more & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942.

6. A count under the statute and a count at common law for injuries to the intestate cannot be joined in the same action. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

7. The husband's action for funeral expenses paid on the wrongful death of his wife cannot be joined with an action on behalf of the minor children for the death of their mother (Johnson v. Seattle Elec. Co. [Wash.] 81 P. 705), and where so joined and the children decline to amend so as to state their cause of action separately, judgment is properly entered for the defendant (Id.).

8. Chicago & G. T. R. Co. v. Kinnare, 115 Ill. App. 132.

9. Burns' Ann. St. 1901, § 285. Pennsylvania Co. v. Coyer, 163 Ind. 631, 72 N. E. 875.

10. Complaint by a parent for death of a child alleging that he was capable of earning a certain sum per week and that he had been damaged in a certain sum held sufficient to sustain a verdict. Kansas City v. Siese [Kan.] 80 P. 626.

11. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. Complaint held sufficient under employer's liability act. Pierce v. Seaboard Air Line R. Co. [Ga.] 50 S. E. 468.

12. Lounsbury v. David [Wis.] 102 N. W. 941.

13. A complaint by a father for the death of his minor daughter under Civ. Code 1895, § 3828, which alleges "that he is unable to support his family without her assistance" may be amended by substituting "himself" for "his family." Central of Georgia R. Co. v. Henson, 121 Ga. 462, 49 S. E. 278.

14. See Carriers, 5 C. L. 507; Master and Servant, 4 C. L. 533; Negligence, 4 C. L. 764; Railroads, 4 C. L. 1181; Shipping and Water Traffic, 4 C. L. 1450; Street Railways, 4 C. L. 1556; Electricity, 3 C. L. 1181 A complaint which shows that the decedent might have avoided the results of the defendant's negligence is demurrable. Dorsey v. Columbus R. Co., 121 Ga. 697, 49 S. E. 698. The action cannot be maintained without proof of negligence; the mere fact of an accident is insufficient. United Elec. Light & Power Co. v. State [Md.] 60 A. 248.

15. Evidence held to show the death of one for whose death the action was brought. Denver & R. G. R. Co. v. Gunning [Colo.] 80 P. 727. Evidence held to show that deceased was a passenger on a boat and lost his life in a collision. Hall v. North Pacific Coast R. Co., 134 F. 309.

16. May be established by circumstances giving rise to a reasonable inference of the truth of the facts alleged. United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081.

17. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515.

18. Drolshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344.

19. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

20. Instruction measuring the amount by what decedent would probably have contributed to the support of his family out of his probable earnings during his probable lifetime disapproved. Consolidated Stone Co. v. Staggs [Ind.] 73 N. E. 695.

21. An instruction which expressly excludes one improper element of damages is misleading if it does not also exclude other improper elements. International & G. N. R.

§ 6. *Distributive rights in the amount recovered.*[24]—The damages are to be disposed of according to the statute of the state where the wrongful act was committed,[25] and where recovered for the benefit of the estate are to be distributed according to the law of the domicile of the decedent[26] to the persons entitled.[27] Where the recovery is for the benefit of minors during minority, the recovery should be apportioned according to the length of their respective minorities.[28]

DEATH CERTIFICATES; DEBENTURES; DEBT, see latest topical index.

DEBT, ACTION OF.[29]

In debt on a penal bond the debt and damages should be found separately and judgment should be for the debt to be discharged on payment of the damages.[30]

DEBTS OF DECEDENTS, see latest topical index.

DECEIT.

Scope of topic.—This topic embraces fraud as a ground of action for damages, whether the action be in common-law form for deceit or an equivalent action under the Code. Fraud as a ground for relief other than damages is elsewhere treated.[31]

§ 1. *Nature and elements.*[32]—The essential elements of an action for deceit are representation, falsity, scienter, deception, and damage.[33]

Co. v. McVey [Tex.] 87 S. W. 328; International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515.

22. No evidence was introduced as to decedent's prospects for the future or as to his expectancy of life. Alabama & V. R. Co. v. Overstreet [Miss.] 37 So. 819.

23. Southern I. R. Co. v. Moore, 34 Ind. App. 154, 72 N. E. 479.

24. See 3 C. L. 1045.

25. Wrongful act in Iowa resulting in death of a resident of Kansas. Damages are to be disposed of according to the Iowa statute. Hartley v. Hartley [Kan.] 81 P. 505.

26. Damages recovered by a citizen of one state under the statute of another. Hartley v. Hartley [Kan.] 81 P. 505.

27. Where the recovery is for the benefit of the estate of the deceased, a widow who is sole legatee is entitled to the damages recovered to the exclusion of the children. In re Cook's Estate, 126 Iowa, 158, 101 N. W. 747.

28. Elchorn v. New Orleans & C. R. Light & Power Co. [La.] 38 So. 526.

29. NOTE. When debt is proper remedy: Debt in the debet, which is the only form of the action of debt now in use, and which is the one ordinarily understood when the action of debt is mentioned, is not in any case sustainable, unless the demand be for a sum certain or for a pecuniary demand which can readily be reduced to a certainty; that is, a liquidated demand. 1 Chit. Pl. 127; 1 Abbott Michigan Prac., § 166. In Michigan the importance of this action is somewhat diminished in the present condition of the practice on account of the statute (2 How. St. § 778; Comp. Laws 1897, § 10417), which authorizes the bringing of an action of assumpsit in all cases arising upon contracts under seal or upon judgments, as well as upon contracts not under seal. The action however still lies as at common law (Goodrich v. Leland, 18 Mich. 110; Stewart v. Sprague, 71 Mich. 50; McDonald v. Butler, 3 Mich. 558), and for reasons connected with the statute of limitations it must in some cases be employed in preference to the action of assumpsit [2 How St. subd. 1, §§ 8714, 8719] (Christy v. Farlin, 49 Mich. 319; Goodrich v. Leland, 18 Mich. 118). Assumpsit on instruments sealed or otherwise must be brought within six years. But an action of debt may be brought on an instrument under seal, or upon the judgment or decree of a court of record of the United States or of this state or of any other of the United States at any time within ten years. Sigler v. Platt, 16 Mich. 206; Goodrich v. Leland, 18 Mich. 110. Assumpsit also may be brought upon any such judgment or decree at any time within ten years. Snyder v. Hitchcock, 94 Mich. 313.—From 1 Abbott Michigan Prac., §§ 166, 167.

30. Pickett v. People, 114 Ill. App. 188. Failure to do this is, however, a technical error and will not reverse. Id.; Weber v. Powers, 114 Ill. App. 411.

31. See Fraud and Undue Influence, 3 C. L. 1520; Reformation of Instruments, 4 C. L. 1264; Wills, 4 C. L. 1863; Cancellation of Instruments, 5 C. L. 500.

32. See 3 C. L. 1046.

33. Miller v. John, 111 Ill. App. 56.

There must be some representation,[34] but it may be read from recitals in the written evidence of the transaction.[35]

The representation must be of a fact,[36] material and existing,[37] and not mere matter of opinion[38] or of law.[39] Ordinarily a statement as to value is a mere expression of opinion,[40] but may amount to a representation of fact under certain circumstances.[41] A representation of a matter of intention may amount to one of fact.[42] A false representation may be read from a promise.[43]

The representation must be false.[44] *The maker must know it to be false*[45] or

34. See 3 C. L. 1046. Where a conveyance of corporate stock amounts to a conveyance of land, misrepresentations as to quantity of land are as actionable as if conveyance was by deed. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447. Evidence sufficient to show that false representations relative to the quantity of land in a parcel conveyed, were made. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447. **Evidence insufficient** to show that false representations were made in a sale of bonds. O'Day v. Bennett, 26 Ky. L. R. 702, 82 S. W. 442.

35. A recital in a contract for the sale of goods that the cost marks on them should govern the prices is a representation that the cost marks truly noted the prices the vendor paid for the goods. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048. Where a principal and customer changed the terms of the contract so as to defeat a **broker's right to commissions.** Corder v. O'Neill, 176 Mo. 401, 75 S. W. 764. Under Rev. Laws, c. 74, § 4, certain representations must be in writing. Walker v. Russell, 186 Mass. 69, 71 N. E. 86.

36. See 3 C. L. 1046.

Representations of fact. That a trust deed is a first mortgage. Kehl v. Abram, 112 Ill. App. 77. Where two persons agree to purchase property jointly, false representations by one as to the lowest **price** it can be obtained for. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419. As to **fertility of soil.** Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. Representation by a vendor as to the **quantity of land in a tract.** Stearns v. Kennedy [Minn.] 103 N. W. 212. That a **worthless medicine is a sure cure** for hog cholera. McDonald v. Smith [Mich.] 102 N. W. 668. False representation in sale of land that it was unincumbered. Hahl v. Brooks, 114 Ill. App. 644. A statement by a seller of corporate stock that he **had investigated** it enough to know that he wanted some of it is more than a mere expression of opinion. McDonald v. Smith [Mich.] 102 N. W. 668.

37. Representations to a married woman that her husband would receive part of the purchase price of land, made to induce her to release her dower right is a statement as to existing conditions. Garry v. Garry, 187 Mass. 62, 72 N. E. 335. Misrepresentations of what will occur in the future are insufficient. Boulden v. Stilwell [Md.] 60 A. 609.

38. Statement of one procured to find vacant land for an entryman that evidence of mining claims on the land were those of claims long since abandoned. David v. Moore [Or.] 79 P. 415. Representation as to population and extent of business of a certain town, knowledge of which was derived from journals and other estimates. Donnelly v. Baltimore Trust & Guarantee Co. [Md.] 61 A. 301. Statements that bonds sold were good and would be paid, principal and interest at maturity though stated as a fact were mere matters of opinion. Kimber v. Young [C. C. A.] 137 F. 744. Where a vendor knowingly permits a vendee to rely on his false representations, he is liable in damages. Watson v. Molden [Idaho] 79 P. 503.

39. Representations of persons as school committee, the scope of whose authority plaintiff was bound to know. Dube v. Dixon [R. I.] 60 A. 834.

40. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

41. Coulter v. Minion [Mich.] 102 N. W. 660.

42. A statement to the mortgagor, that the mortgagee would foreclose, made for the purpose of inducing the mortgagor to sell the property for less than its value, is actionable though relied on without investigation or verification. Fox v. Duffy, 95 App. Div. 202, 88 N. Y. S. 401.

43. Sprigg v. Commonwealth Title Ins. & Trust Co. [C. C. A.] 131 F. 5. One obtained money on a promise to deliver certain goods he then sold to another. Held fraud. Bernstein v. Lester, 84 N. Y. S. 496.

44. See 3 C. L. 1046. Eckman v. Webb, 116 Ill. App. 467. Representation of Christian Science healer that he would cure plaintiff. Spead v. Tomlinson [N. H.] 59 A. 376. A statement of the milage of a road is not false because each mile of double track is counted as two miles, according to custom. Donnelly v. Baltimore Trust & Guarantee Co. [Md.] 61 A. 301. A statement made on the advice of attorneys that a certain charter was perpetual and had so been held by a state court is not shown to be false by the fact that the Supreme Court subsequently held the consolidation of the corporation holding the charter to be void without holding that the franchise was not perpetual. Id.

45. See 3 C. L. 1047, n. 5 et seq. The fact that a statement not susceptible of personal knowledge is untrue is insufficient. Spead v. Tomlinson [N. H.] 59 A. 376; Eckman v. Webb, 116 Ill. App. 467. Knowledge of the falsity or what is equivalent thereto must be alleged and proved. Kimber v. Young [C. C. A.] 137 F. 744.

NOTE. Necessity of scienter: The ceiling in an apartment house leased by the defendant to the plaintiff became unsafe. The defendant asserted as of his own knowledge that the ceiling was safe, honestly believ-

make it with such reckless indifference as is equivalent to knowledge;[46] therefore, proof of a breach of warranty does not establish fraud.[47] A representation believed to be true though induced by ignorance or negligence will not sustain the action,[48] but it is held that representing as a fact that which the maker does not know to be true is actionable though made through an honest mistake.[49] Knowledge of facts may be proved by circumstantial evidence.[50]

The falsity must be willful[51] *and have been made with intent to deceive,*[52] but where known to be false, an intent to deceive will be presumed.[53]

The representation must be material[54] such as that without it the transaction

ing his assertion. Later, the ceiling fell and injured plaintiff's wife. Held, there could be no recovery in an action of deceit, a scienter not having been alleged. Kushes v. Ginsburg, 32 N. Y. L. J. 1183, cited 5 Columbia L. R. 250. Belief in the truth of a statement is not a defense when it is made as of the defendant's knowledge. Hadsack v. Osmer, 153 N. Y. 604; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Litchfield v. Hutchinson, 117 Mass. 195. The court in the principal case seems to have been misled by the case of Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651, 29 L. R. A. 360, in which the expression was one of belief, not of knowledge. In such cases belief in the truth of the assertion is usually a defense. Hawley v. Smith, 46 N. J. Law, 380, 50 Am. Rep. 432, 5 Colum. L. R. 251.

In England it is settled that deceit will not lie for a false representation if made in the honest belief that it is true even though belief may not have been founded on such grounds as would produce belief in the mind of a prudent and competent man (Pollock, Torts [Webb's Ed.] 362, 363; Derry v. Peek, 14 App. Cas. 337; Taylor v. Ashton, 11 Mees. & W. 401; Le Lievre v. Gould [1893] 1 Q. B. 491), and some of the courts of this country have adopted the same doctrine (Cowley v. Smith, 46 N. J. Law 380, 5 Am. Rep. 432; Townsend v. Felthousen, 156 N. Y. 618; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651, 29 L. R. A. 360; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878; Boddy v. Henry, 113 Iowa, 462; Allison v. Jack, 76 Iowa, 205; Pieratt v. Young, 20 Ky. L. R. 1815, 49 S. W. 964). Others, however, consider the moral wrong sufficient to support the action, and belief in the truth of the statement is not considered a defense. Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Braley v. Powers, 92 Me. 203; Bird v. Kleiner, 41 Wis. 134; Davis v. Nuzum, 72 Wis. 439, 1 L. R. A. 774; West v. Wright, 98 Ind. 335, 18 Am. St. Rep. 485; Bullitt v. Farrer, 42 Minn. 8, 6 L. R. A. 149; Holcomb v. Noble, 69 Mich. 396. See monograph on Deceit, 1 C. L. 890.

46. Boulden v. Stilwell [Md.] 60 A. 609. The maker must have known the representations to be false or intend to convey the impression that he knew they were true when he had no such knowledge. Booth v. Englert, 94 N. Y. S. 700. An agent who makes a statement as of his own knowledge when he has no such knowledge is liable to his principal if injury thereby results. Miller v. John, 111 Ill. App. 56. Representation must contain a statement of fact with respect to which the maker could have had personal knowledge. Spead v. Tomlinson [N. H.] 59 A. 376.

47. Did not appear that the warrantor had knowledge of the falsity of his statements as he had never seen the goods. Clover Farms Co. v. Schubert, 92 N. Y. S. 260.

48. Boulden v. Stilwell [Md.] 60 A. 609.

49. Real estate agents pointing out the wrong lots as those to be sold at auction when they could with reasonable circumspection have ascertained the true location of the lots. Dunham v. Smith [Okl.] 81 P. 427.

50. A vendor's knowledge of the actual quantity in a parcel misrepresented may be shown by his tax receipts reciting the number of acres. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447.

51. See 3 C. L. 1046. Connelly v. Brown [N. H.] 60 A. 750. False representations as to acreage of land sold. Leicher v. Keeney, 110 Mo. App. 292, 85 S. W. 920. Representation of Christian Science healer that he would cure plaintiff. Spead v. Tomlinson [N. H.] 59 A. 376. Statements in a prospectus with reference to earning capacity, value of plants, etc., made on the opinion of experts sent to examine the property, held not ground for an action of deceit. Donnelly v. Baltimore Trust & Guarantee Co. [Md.] 61 A. 301.

52. Instruction omitting this element is erroneous. Louisiana Molasses Co. v. Ft. Smith Grocery Co. [Ark.] 84 S. W. 1047. The representations must have been known to be false and fraudulently made. Woods v. Letton [Mo. App.] 85 S. W. 919. Must be fraudulently made. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048; Kushes v. Ginsberg, 91 N. Y. S. 216.

53. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447.

54. See 3 C. L. 1047. Eckman v. Webb, 116 Ill. App. 467; Connelly v. Brown [N. H.] 60 A. 750.

Held material: That certain bonds sold were preferred over certain others. Kimber v. Young [C. C. A.] 137 F. 744. False representations by a vendor as to the price he paid for the goods, if made with intent to deceive, are actionable. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048. False representations to a married woman that her husband would receive a part of the purchase price of land, made to induce her to release her dower right, is actionable though she did not expect to receive any of the money herself. Garry v. Garry, 187 Mass. 62, 72 N. E. 335. A representation that a parcel of

would not have been entered into[55] or contributing as an inducement to the transaction.[56]

The representations must be relied[57] and acted upon,[58] and must actually deceive the person who seeks to recover therefor.[59] That one makes an affidavit does not preclude him from maintaining an action against the person whose false representations he relied upon in making it.[60]

They must be such as he is entitled to rely upon,[61] and such as to mislead a reasonably prudent man,[62] unless the parties occupy fiduciary relations toward each other.[63] Therefore, plaintiff must have been ignorant of their falsity.[64] One may rely on representations as to quantity of land after view[65] but not those as to quality,[66] and a refusal by a vendor to warrant the quantity is not inconsistent with his liability for false representations as to it.[67] The rule of caveat emptor does not apply where the buyer has no knowledge nor means at hand of obtaining it,[68] and state-

land contains "about 17,000 acres" is materially false when it contains only 15,000 acres. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447.

Not material: Representations that certain bonds were legal obligations held not to be material. Kimber v. Young [C. C. A.] 137 F. 744. Fraudulent representations as to ownership of adjacent land by a lessor are not actionable if the lessee is not disturbed in the possession of the parcel he leased. Robinson v. Syracuse Rapid Transit R. Co., 100 App. Div. 214, 91 N. Y. S. 909.

55. Boulden v. Stilwell [Md.] 60 A. 609. Evidence held insufficient to show that the defendant made the representations which induced the transactions. Warner v. Thompson, 93 N. Y. S. 830 [Advance sheets only]. A representation inducing one to invest in more stock of a certain corporation is actionable though the party had previously invested in some of the stock. McDonald v. Smith [Mich.] 102 N. W. 668.

56. The representation must be as to a fact forming the basis of or contributing an inducement. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

57. See 3 C. L. 1047. Connelly v. Brown [N. H.] 60 A. 750; Boulden v. Stilwell [Md.] 60 A. 609; Kushes v. Ginsberg, 99 App. Div. 417, 91 N. Y. S. 216; Eckman v. Webb, 116 Ill. App. 467. Evidence of false representations should be excluded where it is admitted that they were not relied on. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. A subscriber to stock may not sue the soliciting agent for false representations unless he believed and relied upon them to his damage. Eames v. Brunswick Const. Co., 94 N. Y. S. 24. Where a vendor **falsely read a deed to a purchaser,** evidence held to show that the purchaser relied on his representation and was deceived by it. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727.

58. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

59. That misrepresentations were made to a broker who sold goods for the maker will not entitle a purchaser from the broker to recover unless the representations were repeated to him. Chemical Bank v. Lyons, 137 F. 976.

60. An entryman who makes a non-mineral affidavit. David v. Moore [Or.] 79 P. 415.

61. See 3 C. L. 1047. Moore v. Giddings, 77 Conn. 291, 59 A. 36. Evidence of false representations should not be admitted where the party was not justified in relying upon them. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. In the absence of special circumstances, a false statement as to what the vendor or others paid for an article is not actionable. Beare v. Wright [N. D.] 103 N. W. 632.

62. A representation that if money was invested in a certain project large profits could be realized is insufficient if the parties are dealing with each other at arm's length. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195. One of ordinary business prudence. Boulden v. Stilwell [Md.] 60 A. 609.

63. One partner is entitled to presume that another will not conceal any material fact concerning transactions relative to the partnership property. Burgess v. Deierling [Mo. App.] 88 S. W. 770. Where two persons agree to purchase property jointly, one is entitled to rely on representations by the other as to the lowest price the property can be obtained for. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419.

64. Connelly v. Brown [N. H.] 60 A. 750. Sending assessment notices to an administrator who paid them does not amount to a misrepresentation that the decedent owned shares of corporate stock and was liable for assessments when the administrator knew that the deceased was not liable. Miles v. Pike Min. Co. [Wis.] 102 N. W. 555. The representations must have been relied upon without notice of their falsity. Woods v. Letton [Mo. App.] 85 S. W. 919.

65. A vendee is entitled to rely on representations of a vendor and his agent as to the quantity of land in a parcel although he views it before purchasing. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447.

66. Zilke v. Woodley, 36 Wash. 84, 78 P. 299.

67. Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447.

68. Where one employed to find vacant land for an entryman represented that evidences of mining claims on the land were of claims long since abandoned and would be no obstacle. David v. Moore [Or.] 79 P. 415.

ments of fact peculiarly within the knowledge of the maker may be relied on without investigation when means are not easily ascertainable.[69]

The representations need not be made personally by the maker to the person relying on them,[70] and if made for the purpose of, and do induce a transaction it is immaterial that the maker was not a party to the transaction.[71] It would seem to be deceit when one connives at the sale of impure food and then causes the arrest of the purchaser when he resells it.[72]

It is essential that damage result[73] as a direct consequence of the deceit,[74] but the pecuniary loss need not be sustained immediately.[75]

§ 2. *Actions and procedure.*[76]—A principal is liable for the misrepresentations of his agent.[77] Officers of a corporation who obtain a loan by means of false representations as to the financial condition of the corporation are personally liable though the evidence of the transaction is made in the name of the corporation.[78] The action sounds in tort and cannot be predicated on a matter ex contractu.[79] The action must be brought within the time limited by statute.[80]

That a person might have accomplished what he did without deceiving any one is no defense.[81] That a purchaser of land does not elect to rescind the sale does not preclude his recovery for deceit inducing it,[82] but he can maintain the action only when his evidence makes a clear case.[83] The action may be maintained by an interested though silent party to the transaction.[84]

69. Representations of officers of a corporation as to its financial condition made for the purpose of procuring a loan. Daniel v. Buttner [Wash.] 80 P. 811. Where one makes false representations peculiarly within his own knowledge, he is liable though their falsity could have been ascertained by the exercise of reasonable diligence. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048.

70. It is sufficient where they are made to a commercial agency and by it given out. Mills v. Brill, 94 N. Y. S. 163.

71. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

72. The court does not expressly hold that this is deceit. McKenzie v. Royal Dairy, 35 Wash. 390, 77 P. 680.

73. See 3 C. L. 1048. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048. A technically false statement as to the ownership of stock by trustees who offered it for sale does not damage purchasers who get all they bargain for. Donnelly v. Baltimore Trust & Guarantee Co. [Md.] 61 A. 301. A complaint which shows no damage because of the act of the defendant is demurrable. Mauger v. Shedaker [N. J. Law] 58 A. 1091. Damage must be proven. Bellettiere v. Lawlor, 93 N. Y. S. 471. Where a seller of mines receives in exchange all the stock of a corporation organized to purchase it, he suffers no damage. Stratton's Independence v. Dines [C. C. A.] 135 F. 449.

74. Representation as to future contingent profits is immaterial. Boulden v. Stillwell [Md.] 60 A. 609. Misrepresentation as to value of stock in September is not proved by the value of the stock the following April. Id.

75. Deceit in inducing a married woman to release her dower right damages her. Garry v. Garry, 187 Mass. 62, 72 N. E. 335. Where one is deceived relative to an incumbrance on land, he may recover though he has not paid it and his title has not been swept away (Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727), and a vendee in an executory contract may sue for deceit as to quantity though he has not paid the entire purchase price and is not entitled to his deed (Stearns v. Kennedy [Minn.] 103 N. W. 212).

76. See 3 C. L. 1048.

77. Briggs v. Foster [C. C. A.] 137 F. 773. Where a vendor refers a prospective purchaser to a third person for information relative to the subject-matter of the sale, he is bound by representations made. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727.

78. Daniel v. Buttner [Wash.] 80 P. 811.

79. Eckman v. Webb, 116 Ill. App. 467. Mere failure to perform a promise or make good subsequent conditions which have been assured will not sustain an action. Urwan v. Northwestern Nat. Life Ins. Co. [Wis.] 103 N. W. 1102. Comp. Laws, 1897, § 10421, providing that assumpsit will lie where deceit might be brought is constitutional. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005.

80. See Limitation of Actions, 4 C. L. 445. In Alaska the action for deceit is governed by the two year statute. Tudor v. Ebner, 93 N. Y. S. 1067.

81. Mills v. Brill, 94 N. Y. S. 163.

82. Fraudulent representations as to the location of the land. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232.

83. Evidence held insufficient where a vendee brought action because of a deficiency in the acreage after the purchase price had been paid and the deed recorded. Schmitz v. Roberts, 26 Pa. Super. Ct. 472.

84. A party on whose behalf a conveyance is made may recover for fraud relative to it though the property stood in the name of and was conveyed by another. McDonald v. Smith [Mich.] 102 N. W. 668.

Pleading.[85]—An action for deceit and breach of warranty[86] and a count charging fraud and one charging conspiracy to commit fraud may be joined,[87] and under a statute providing that assumpsit will lie where case for deceit might be brought, a count for deceit may be joined with the common counts.[88]

All of the essential elements of the tort must be alleged[89] and the facts relied upon set forth specifically[90] with definiteness and certainty.[91] The scienter must be alleged,[92] but excuse for failure to investigate need not be.[93] If the complaint is not specific, a bill of particulars may be demanded,[94] if the fraud as alleged has been denied.[95]

Matters of defense must be specially pleaded,[96] and objections going to the right to maintain the action must be raised by special demurrer.[97]

Evidence.[98]—The burden is on the party alleging deceit to prove it clearly and satisfactorily[99] as alleged,[1] but every allegation of false representation need not be proved,[2] and where a complaint alleges a conspiracy to defraud, it is immaterial that the proof does not show conspiracy.[3] One asserting deceit through an agent has the burden of proving the agency.[4] If set up as a defense in an action for the price of goods, the vendor has the burden to prove a ratification and waiver of it.[5]

Evidence as to questions not in issue is inadmissible,[6] but specific acts relevant to the issue are admissible though not pleaded.[7]

Instructions.[8]—An instruction in which the element of belief is implied is not objectionable because not making special reference to it,[9] and a charge that a representation must be intended and calculated to deceive sufficiently charges that it must be material.[10]

The measure of damages for deceit in a contract of sale is the difference between

85. See 3 C. L. 1048.

86. Kimber v. Young [C. C. A.] 137 F. 744.

87. Miller v. John, 111 Ill. App. 56.

88. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

89. Complaint held sufficient. David v. Moore [Or.] 79 P. 415. Complaint held to sufficiently allege the fraud. Smith v. McDonald [Mich.] 102 N. W. 738. A complaint showing want of deceit in the transaction complained of is demurrable. Mauger v. Shedaker [N. J. Law] 58 A. 1091. A complaint must allege damage. Robinson v. Syracuse Rapid Transit R. Co., 100 App. Div. 214, 91 N. Y. S. 909. A complaint for damages for deceit states a cause of action ex delicto and under Code 1896, § 4205, may be brought where the tort was committed or where defendant resides. Hoge v. Herzberg [Ala.] 37 So. 591.

90. Warner v. James, 94 App. Div. 257, 87 N. Y. S. 976.

91. Warner v. James, 94 App. Div. 257, 87 N. Y. S. 976. The specific facts constituting the deceit must be distinctly and definitely alleged. Jones v. Rogers [Miss.] 38 So. 742.

92. Kimber v. Young [C. C. A.] 137 F. 744.

93. Kehl v. Abram, 112 Ill. App. 77.

94, 95. Newman v. West, 91 N. Y. S. 740.

96. Word v. Marrs [Tex. Civ. App.] 83 S. W. 17.

97. That the complaint contains no precise averment that the fraud induced plaintiff to part with his property. McDonald v. Smith [Mich.] 102 N. W. 668. That the complaint does not specifically describe the property parted with in reliance on the fraud. Id.

98. See 3 C. L. 1049.

99. Miles v. Pike Min. Co. [Wis.] 102 N. W. 555. A case should not be dismissed because of failure of proof as to an immaterial issue. Hengen v. Lewis, 91 N. Y. S. 77.

1. An action for constructive fraud cannot be sustained by proof of actual fraud. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

2. It is sufficient if the proof shows a right of action. Kehl v. Abram, 112 Ill. App. 77. Repetition of false representations need not be proved, though alleged. Id.

3. The gravamen is fraud and damage, not conspiracy. Lefler v. Fox, 92 N. Y. S. 227.

4. O'Day v. Bennett, 26 Ky. L. R. 702, 82 S. W. 442.

5. Land. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232.

6. Title. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

7. McDonald v. Smith [Mich.] 102 N. W. 668. Where deceit has been accomplished partly by misrepresentations and partly by false promises, evidence of the promises is admissible though not in themselves actionable. Id. Proceedings in a suit for the appointment of a receiver are admissible in an action based on false representations as to the company's financial condition. Walker v. Russell, 186 Mass. 69, 71 N. E. 86.

8. See 3 C. L. 1049.

9. David v. Moore [Or.] 79 P. 415.

10. McDonald v. Smith [Mich.] 102 N. W. 668.

the value of what the buyer parts with and the value of what he receives.[11] For deceit relative to an incumbrance on land, the measure is the amount of the incumbrance,[12] and if title to a portion of land purchased is misrepresented, it is the value of such portion.[13] One induced to purchase bonds cannot recover the difference between what he paid for them and what he sold them for long before they were due.[14]

DECLARATIONS; DECOY LETTERS, see latest topical index.

DEDICATION.

§ 1. *What is dedication.*[15]—Dedication is an appropriation of land to some public use, made by the owner and accepted for such use by or on behalf of the public.[16]

§ 2. *The right to dedicate.*[17]—The dedicator must have some estate in the premises dedicated.[18] A railroad has power to dedicate.[19]

§ 3. *The purposes of dedication.*[20]—Lands are dedicated for the purpose of establishing public use in and control over the premises dedicated[21] for the purposes only for which they are dedicated.[22]

§ 4. *Mode of dedication.*[23] *In general.*[24]—Dedication is either statutory[25] or common law.[26] To constitute a common-law dedication, an intention to dedicate and

11. Not the difference between the price and the market value of the property if it had been as represented. Stratton's Independence v. Dines [C. C. A.] 135 F. 449. Where one is induced to exchange land for corporate stock and ratifies the transaction after the deceit is discovered, he may recover the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with had the representations been true. Beare v. Wright [N. D.] 103 N. W. 632.

12. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727.

13. Walker & Co. v. Walbridge [C. C. A.] 136 F. 19.

14. O'Day v. Bennett, 26 Ky. L. R. 702, 82 S. W. 442.

15. See 3 C. L. 1050.

16. See Cyc. Law Dict. "Dedication."

17. See 3 C. L. 1050.

18. A verbal agreement by a person to dedicate as a street, land of which he is not the owner is void. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19. Dedicators of a city did not own tide lands beyond the meander line. Sheridan v. Empire City, 45 Or. 296, 77 P. 393.

19. An intention to dedicate, however, will not be inferred from the use of land by the public, necessary to or consistent with the public use for which the company holds the property claimed to have been dedicated. Loomis v. Connecticut R. & Lighting Co. [Conn.] 61 A. 539.

20. See 3 C. L. 1050.

21. Dedication is necessary to establish in the public a right of control over the premises of another. Pitcairn v. Chester, 135 F. 587.

22. The laying of telephone conduits in the street is not one of the purposes of the original dedication and imposes an additional servitude. Burns v. Telephone Co., 3 Ohio N. P. (N. S.) 257.

NOTE. Purposes of dedication: A dedication may be made subject to reservations or restrictions upon the use of the land by the public. Thus a highway may be dedicated to be used only during certain seasons (Hughes v. Bingham, 135 N. Y. 347) or subject to the right of the dedicator or other to use the land for certain purposes or at certain times (City of Noblesville v. Lake Erie & W. R. Co., 130 Ind. 1; City of Dubuque v. Benson, 23 Iowa, 248; Ayres v. Pennsylvania R. Co., 52 N. J. Law 405); and a highway may be dedicated not for general highway purposes, but for the use of pedestrians or a certain class of vehicles (Trustees of Methodist Episcopal Church v. Hoboken, 33 N. J. Law 405). See Tiffany, Real Prop., p. 973.

23. See 3 C. L. 1050.

Note: See Tiffany, Real Prop., p. 971.

24. See 3 C. L. 1050.

25. In Iowa, by statute, the acknowledgment and recording of a plat is equivalent to a dedication in fee of the streets indicated thereon. Code 1873, § 561. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

26. The doing of an act by an owner which clearly shows an intention to dedicate, and the doing of an act by the public which shows an intention to accept, as im-

an acceptance by the public must be clearly established.[27] No specific length of possession by the public or particular form of ceremony, however, is necessary.[28] A dedication may be implied from acts of the fee owner,[29] or may result from a ratification of acts done by one who had no authority to dedicate,[30] or from long continued user by the public,[31] especially if acquiesced in by the owner,[32] although where user is adverse and has continued for a period necessary to give title by adverse possession, prescription would seem the more accurate term.[33] A dedication will not be implied where a municipality lays out streets over the land of a private owner.[34] A reservation in a deed of a strip "appropriated for a public highway" amounts to an offer to dedicate,[35] and such act may result in dedication, though it is

proving and using the premises as a street, constitutes a common law dedication. McGrath v. Nevada [Mo.] 86 S. W. 236.

27. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. There must be an intention to dedicate and an acceptance. Wilson v. Lakeview Land Co. [Ala.] 39 So. 303. It being a voluntary donation, there are no presumptions in its favor. Id. The grading of a strip reserved by owners who made a plat, and the putting up of street sign posts at the corners, held insufficient to show a common-law dedication. Mitchell v. Denver [Colo.] 78 P. 686.

28. It is only necessary that the owner should definitely give the land by written declaration or by acts. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111. Evidence held to show dedication. Calhoun v. Faraldo [La.] 38 So. 551.

29. Where a division superintendent of a railroad constructed a street crossing and the town was built up with reference thereto and was used by the public for four years, there was held to be a dedication, though the superintendent had no power to dedicate. His conduct having been acquiesced in by the managing agents. Larson v. Chicago, etc., R. Co. [S. D.] 103 N. W. 35. An intent to dedicate and an acceptance may be implied where a way has been used for a considerable period with the consent of the owner, and it is beneficial to and has been treated by the public as a highway, and material injury would ensue if it was closed. McClaskey v. McDaniel [Ind. App.] 74 N. E. 1023. Where an owner opens a strip of land as an approach to his place of business and tells the street commissioner that the space is open to the public and always would be and that the city ought to macadamize it, this constitutes a dedication. Loomis v. Connecticut R. & Lighting Co. [Conn.] 61 A. 539. Opening of a passageway by an owner as a convenient means of access to his store for himself and customers **does not amount to a dedication,** though the passway may be used by the public generally. Id.

30. A ratification of a dedication made by a vendee by one holding a vendor's lien on the premises is as effective as if originally made by such lienor. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826. The payment of taxes assessed according to a plat does not constitute a ratification of it with reference to streets noted thereon as dedicated. Sheridan v. Empire City, 45 Or. 296, 77 P. 393.

31. User by the public, in order to constitute dedication, must exclude the owner's private rights. Wilson v. Lakeview Land Co. [Ala.] 39 So. 303. A dedication may be conclusively presumed from long continued public use and municipal control over contiguous streets, and all of the street in question except a small portion in controversy. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470. Where a strip of land has been recognized as a street; was so designated on the plat of the town and timber thereon had been cut and used for school purposes, a finding of dedication was justified, though a portion of the strip was inclosed. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. Evidence that city authorities laid sidewalks on each side of a strip claimed to have been dedicated by common-law dedication, established a grade and otherwise improved it is admissible on the question of dedication. Raymond v. Wichita [Kan.] 79 P. 323.

32. User by the public and acquiescence therein by the owner may constitute both dedication and acceptance. Raymond v. Wichita [Kan.] 79 P. 323. Evidence of adverse user to the knowledge of the owner is admissible on the question of dedication. Id.

33. To establish a highway by prescription there must be user by the public under a claim of right, adverse to the occupancy of the owner, of a defined track, for a period necessary to bar an action to recover the land. Bleck v. Keller [Neb.] 103 N. W. 674. Long user by a city gives a highway by prescription. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826. To acquire a highway by user it must have continued under a claim of right for a period necessary to acquire title by adverse possession. Southern Ind. R. Co. v. Norman [Ind.] 74 N. E. 896. An unexplained user for 20 years will be presumed to have been under a claim of right. Id. The occasional driving by the public over a way is not a sufficient use to acquire an easement by prescription. Aikens' Adm'x v. New York, etc., R. Co. [Mass.] 74 N. E. 929.

34. In such case there is no implication of a covenant on the part of the owner to give his lands to the public without compensation. Fitzell v. Philadelphia, 211 Pa. 1, 60 A. 323.

35. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33.

not expressly stated that the reservation is for the benefit of the public.[36] A mere offer to dedicate may be withdrawn at any time prior to acceptance.[37]

An intention[38] to dedicate is essential,[39] but it may be inferred from acts of the owners.[40] Hence a dedication may result, though there is a secret intent not to dedicate.[41] Long continued user by the public may indicate an intent to dedicate, but it is by no means conclusive.[42] An alleged dedicator may testify that he never intended to dedicate,[43] and that he never gave any express consent to the public use of the premises,[44] but he may be contradicted by his conduct, acts and declarations.[45]

Acceptance[46] within a reasonable time after the dedication[47] by or on behalf of the public is essential,[48] but may result from user by the public,[49] or be made in any

36. Dougan v. Greenwich, 77 Conn. 444, 59 A. 505. Where a deed excepted from its terms of grant a landing place and way and the land had been used by the public for the entire period within the memory of elderly men, evidence held to show a dedication. Id.

37. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. The deeding of the strip away amounts to a withdrawal of the offer. Id. Acts of the owner who had dedicated streets and alleys, in selling the land and permitting the same to be used and cultivated without reference to such streets for 30 years before the dedication was accepted constitute a revocation. City of Venice v. Madison County Ferry Co. [Ill.] 75 N. E. 105.

38. See 3 C. L. 1051.

39. Raymond v. Wichita [Kan.] 79 P. 323. Evidence insufficient to show an intention to dedicate a park. Wilson v. Lakeview Land Co. [Ala.] 39 So. 303. Unless an intent to dedicate appears, the public can acquire no right by user unless it extends for the period necessary to acquire title by adverse possession. Coward v. Llewellyn, 209 Pa. 582, 58 A. 1066. The laying out of a highway on a section line by residents along such line, the user of such road by the public and its improvement by township officers is not a dedication of the strip marked out, used and improved, where it departs from the true section line. Shanline v. Wiltsie [Kan.] 78 P. 436. Where plattors reserve a strip without intention to dedicate it, the fact that subsequent owners treat it as dedicated, which acts are not known or acquiesced in by the original owners, does not constitute a dedication. Mitchell v. Denver [Colo.] 78 P. 686. A space in an outlying town addition for a street was marked on the plat "closed," and the owner asserted his ownership over it whenever occasion required. It was never improved and was used by the public only as outlying property connected with the town. Held, there was no dedication. Pitcairn v. Chester, 135 F. 587. Where one co-owner gave the city a right to discharge sewage into a sinkhole on the premises, but he and the other co-owners refused to execute a deed giving the city a right to do so, there was held to be no dedication but a mere revocable license. Sherman Line Co. v. Glens Falls, 101 App. Div. 269, 91 N. Y. S. 994.

40. The public have a right to rely on conduct as indicative of intent. Raymond v. Wichita [Kan.] 79 P. 323. An exception of a landing place and way from the terms of a grant indicates an intention to dedicate. Dougan v. Greenwich, 77 Conn. 444, 59 A. 505.

41. Raymond v. Wichita [Kan.] 79 P. 323. An intent not to dedicate will not prevail against unequivocal acts on the part of the owner inconsistent with such intent. Larson v. Chicago, etc., R. Co. [S. D.] 103 N. W. 35.

42. Coward v. Llewellyn, 209 Pa. 582, 58 A. 1066.

43, 44, 45. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

46. See 3 C. L. 1052. An agreement by the road commissioners with the alleged dedicator that they would not work a certain strip is admissible on the question of acceptance. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

47. Acceptance must be made within a reasonable time after proffer of dedication or the owner may revoke. City of Venice v. Madison County Ferry Co. [Ill.] 75 N. E. 105.

48. There must be an acceptance by public authorities. Pitcairn v. Chester, 135 F. 587. No rights are acquired by a municipality in streets and public grounds shown on a plat until acceptance. City of Venice v. Madison County Ferry Co. [Ill.] 75 N. E. 105.

Acceptance not shown: Proof of **very little work done** on a highway and not altogether clear that it was done by the proper authorities does not show an acceptance. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111. A finding that a street closed at one end had been used by the public by passing through a gate, that the owner had at times used the strip for a garden and as an approach to her premises and had dug a well thereon held insufficient to show acceptance. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. By the **public working** of the strip as a highway or by user. Id. The **building of a pest house** on a public square shown by a plat is not an acceptance where done by consent of the proprietor of the platted tract and not because of the dedication. City of Venice v. Madison County Ferry Co. [Ill.] 75 N. E. 105. A **survey of streets** and alleys shown on a plat, made 50 years after the execution of the plat, and long after the dedication was revoked, is not an acceptance. Id.

Taking sand and dirt from streets and alleys shown on a plat for the purpose of

manuer provided by statute,[50] and need not be made until the convenience of the public demands it,[51] providing it is prior to revocation of the offer to dedicate.[52] Land dedicated for a street is presumed to have been accepted in its entirety.[53] Acceptance may be made by the municipality for whose benefit the land is dedicated.[54] An acceptance by the public authorities is not necessary to entitle one who has purchased a lot with reference to a dedicated street to have it kept open.[55]

A sale of lots with reference to a plat[56] ordinarily constitutes a dedication of the streets and alleys therein described,[57] unless otherwise provided by statute. By statute in Minnesota it is necessary that such plat be approved by the village council.[58] This rule applies to parks and other public places designated,[59] and especially as to lots sold which abut on the plot designated.[60] A formal written dedication need not accompany the map.[61] Where a plat is ambiguous as to the amount of land dedicated, it will be construed as a whole and most strongly against the dedicator,[62] and the fact that a park noted on the plat is not mentioned in the dedicatory state-

building up other streets is not an acceptance of such streets where such sand was paid for by the village or taken with the consent of the proprietor of the platted territory. City of Venice v. Madison County Ferry Co. [Ill.] 75 N. E. 105. The inclusion within the limits of a municipality of territory covered by a plat is not an acceptance of the streets and alleys shown thereon. Id. Whether acts of city officials relative to taxing dedicated lands amounted to a repudiation of the dedication held a question for the jury. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

49. Raymond v. Wichita [Kan.] 79 P. 323. A street dedicated to and **used by the public for 25 years** is a public street within Code 1899, c. 54, § 61, though not accepted by order of the town council. Ray v. Chesapeake & O. R. Co., 121 W. Va. 189, 50 S. E. 413.

Open use and improvement of the streets manifest an acceptance. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826. A user by the public constitutes an acceptance of the grant made by the Act of Congress (Rev. St. U. S. § 2477) for highways over public lands. No resolution of the board of county commissioners is necessary. Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262.

50. Under Code 1897, § 751, providing that acceptance may be made by ordinance or resolution, an acceptance by resolution is proper. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

51. Where land was platted and lots sold, the fact that a street is not opened to its full width for 10 years does not deprive the public of the right to use the entire width when it becomes necessary for the convenience of the public. Indianola Light, Ice & Coal Co. v. Montgomery [Miss.] 37 So. 958. An acceptance 10 years subsequent to the filing of a plat is in time. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

52. Evidence held insufficient to show an acceptance during the continuance of an offer of dedication. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

53. It is not at once required to improve the street to its full width. Vorhes v. Ackley [Iowa] 103 N. W. 998.

54. A dedication of land partly within the city limits and partly without may be accepted by the city as to the portion within its limits and by the adjacent township as to the remainder. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

55. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. A sale of lots with reference to a plat entitles the purchasers to the use of the streets and alleys designated thereon, although the dedication has not been accepted by the public authorities. Edwards v. Moundsville Land Co. [W. Va.] 48 S. E. 754. Though a plat is not accepted by the authorities purchasers of lots with reference to designated dedications have a right to have such tracts kept open for the uses specified. Parks. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618. Complaint by a purchaser of a lot alleging that a dedicated street had been closed up, inconveniencing access to and egress from his premises and causing them to depreciate in value, states a cause of action. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. A reservation for a private way of a strip parallel to a dedicated street on a plat so that the dedicators could recover compensation in case the street was widened by condemnation reserves to the dedicators the fee with an easement in the lot owners. Lever v. Grant [Mich.] 102 N. W. 848.

56. See 3 C. L. 1053.

57. Conveyance of **urban property** in accordance with an unrecorded plat. Nagel v. Dean [Minn.] 101 N. W. 954. The recording of the plat of a city addition and the sale of lots therein by the proprietors constitutes a dedication. Schooling v. Harrisburg, 42 Or. 494, 71 P. 605.

58. Laws 1899, c. 168, p. 174. Nagel v. Dean [Minn.] 101 N. W. 954.

59. The noting of a "park" on a plat constitutes a dedication of the tract so specified as a public park. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

60, 61. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

62. Where there is nothing to indicate that a park was reserved as a private one, it will not be so construed. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618. A reservation of riparian rights to a lot

ment will not operate to withdraw it from the lands dedicated.[63] Where lots are sold under a written contract, parol evidence is not admissible to show an oral agreement to dedicate certain adjacent land.[64]

Plats and maps.[65]—Recording a plat as provided by statute constitutes a dedication of plots designated as reserved for public use.[66]

Evidence of dedication and questions of law and fact.[67]—Dedication, if denied, is a question of fact,[68] and one asserting it has the burden of proving it.[69] Prima facie evidence that the land is subject to taxation is prima facie evidence that it has not been dedicated.[70]

§ 5. *Effect of dedication.*[71]—Dedication divests the original owner of any private ownership rights in the premises.[72] After acceptance the property becomes subject to the exclusive control of the public,[73] and its improper use cannot be enjoined by a citizen and taxpayer, as such,[74] and the owner cannot by any act of his deprive the public of the use of it.[75] A dedication becomes irrevocable after third persons have acquired rights which would be impaired by revocation.[76] Dedicated premises may be abandoned,[77] and where abandonment works a forfeiture, a subsequent user without the consent of the owner does not work a revival of the rights granted.[78] As a general rule the power to change[79] or vacate dedicated premises rests in the municipality[80] or legislature;[81] but in Illinois, by statute, a plat in which

designated on a plat as a park, construed. Id.

63. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

64. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19.

65. See 3 C. L. 1053. An original map may be proved by a lithograph copy of great age and long use where its accuracy is made to appear and there is some doubt as to whether it is not itself the original. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

66. A dedication may be effected by making and recording a plat as provided by statute, in which case no acceptance is necessary. McKenzie v. Haines, 123 Wis. 553, 102 N. W. 33.

67. See 3 C. L. 1054.

68. Gerhard v. Johnson, 105 Ill. App. 65. Whether the conduct of an owner is such as to induce a belief of his intent to dedicate. Raymond v. Wichita [Kan.] 79 P. 323.

69. In an action by an owner to recover a strip claimed by the city to have been dedicated, the city has the burden of proving dedication and acceptance. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

70. Under a statute providing that a tax deed is prima facie evidence that the land is subject to taxation. Mitchell v. Denver [Colo.] 78 P. 686.

71. See 3 C. L. 1054.

72. After dedication of a strip of land, a subsequent owner cannot recover damages for the use of such strip where the city establishes a building line so as to include it. Forsythe v. Philadelphia, 211 Pa. 147, 60 A. 578. A deed of dedication and release of damages caused by grading the street, by the owner of the legal title, precludes conditional purchasers at the date of dedication from recovering damages because of such grading. Tabor Street, 26 Pa. Super. Ct. 167; Id., 26 Pa. Super. Ct. 175.

73. Where land is conveyed for a park subject to the restriction that a way through it shall forever remain open as a public way unless closed with the consent of certain persons, the way on acceptance becomes a public way subject to use and occupation by street railways. Bancroft v. Bancroft [Del.] 61 A. 689.

74. Bancroft v. Bancroft [Del.] 61 A. 689.

75. Where, after dedicating a way, the owner granted the use of it as a private way. Gayle v. Rigg [Ky.] 85 S. W. 1172.

76. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

77. **Held abandoned:** The allowing of dedicated streets to be enclosed and used as private property for a long period of years constitutes an abandonment and estops the public from asserting its rights. Schooling v. Harrisburg, 42 Or. 494, 71 P. 605. As to a grant of a right of way for access to a dock on condition of reverter on failure to maintain or abandonment of the dock, evidence that boys occasionally fished from the dock does not show a user within the contemplation of the parties. Ellis v. Pelham, 94 N. Y. S. 103. Query: Whether after a dedication and acceptance the permission of mere encroachments will constitute an abandonment. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

Not abandoned: Nonuser for 14 years where no one has changed his legal position in reliance on an abandonment. Arnold v. Volkman, 123 Wis. 54, 101 N. W. 158.

78. Ellis v. Pelham, 94 N. Y. S. 103.

79. The location of highways dedicated over public lands by act of congress may be changed in the same manner as other public highways are. Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262.

80. See Highways and Streets, 3 C. L. 1593.

81. City of Columbus v. Union Pac. R. Co. [C. C. A.] 137 F. 869.

no lots have been sold may be vacated by the owner,[82] and where lots have been sold the power to vacate rests in all the owners of the platted premises.[83] Streets may not be vacated to the special injury of one who has purchased with reference thereto.[84]

§ 6. *Remedies.*[85]—The maker of a plat is not an indispensable party to an action to determine the rights of persons who purchased lots relative to it, in places designated thereon as dedicated.[86]

DEEDS OF CONVEYANCE.

§ 1. *Nature, form and requisites. Deeds distinguished from other instruments.*[87]—A deed cannot be executed as a testamentary disposition to take effect after the grantor's death.[88] Whether an instrument is a deed or a testamentary disposition is to be determined from the intention of the maker;[89] if such intention

82. Laws 1847, pp. 166, 167. Saunders v. Chicago, 212 Ill. 206, 72 N. E. 13.

83. Saunders v. Chicago, 212 Ill. 206, 72 N. E. 13.

84. See Highways and Streets, 3 C. L. 1593. Highbarger v. Milford [Kan.] 80 P. 633. The vacation of a street will not divest one who has purchased a lot with reference to a plat of his right to have the space left open as a street. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. One who purchases with reference to dedicated streets becomes vested for all time with the right to use such streets as are reasonably necessary to the enjoyment of the premises purchased. Ordinarily such streets as bound the block in which his lot is situated. Highbarger v. Milford [Kan.] 80 P. 633.

85. See 3 C. L. 1056.

86. Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618.

87. See 3 C. L. 1056.

88. Hayden v. Collins [Cal. App.] 81 P. 1120.

89. **Note:** Whether an instrument specifically providing that it is not to take effect until the grantor's death is a deed or a testamentary disposition is a question upon which there is an irreconcilable conflict of authority. Thus in Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986, the deed contained these words: "This deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." It was held a good deed, reserving a life estate in the grantor. So in Wilson v. Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213, the words of the deed were: "To be of no effect until after death of grantor, and then to be in full force." The instrument was held valid as a deed. The same ruling was made in Shackelton v. Sebree, 86 Ill. 616, where the words were: "This deed is not to take effect until after my decease—not to be recorded until after my decease." So in Wyman v. Brown, 50 Me. 139, where the words were: "Not to take effect during my lifetime, and to take effect and be in force after my death." So in West v. Wright, 115 Ga. 277, 41 S. E. 602, where the words were: "This deed is to take effect at my death." So in Abney v. Moore, 106 Ala. 131, 18 So. 60, where the words were: "This conveyance is not to take effect until after my death, and after my death the title to the foregoing lands is to vest immediately in my said children." So in Bunch v. Nicks, 50 Ark. 367, 7 S. W. 563, where the words were: "And the deed shall go into full force and effect at my death." See, also, Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548; Abbott v. Holway, 72 Me. 298; Owen v. Williams, 114 Ind. 179, 15 N. E. 678; Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378; Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843. In these states the rule followed rests on the ground that as the instrument contains words of present grant, covenant of warranty, and the like, and is authenticated or acknowledged as a deed, some force must be given all the parts of the instrument, and such a construction must be given to it as will make the instrument effective, rather than one that would deny it any operation; and therefore the words that the instrument is not to take effect until the death of the grantor must be construed as a clumsy way of expressing that the deed is not to take effect in possession or in the enjoyment of the property until the grantor's death. On the other hand, in Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411, the deed contained these words: "This deed is to take effect and be in full force from and after my death," and it was held that no present interest passed by the grant. The same ruling was made in Turner v. Scott, 51 Pa. 126, where the words were: "This conveyance is

was to convey a present interest, though possession be postponed until after his death, it is a deed.[90]

A conveyance may be read into a contract to convey,[91] or a decree of court,[92] or an agreement as to their interests, between heirs;[93] but a release by the beneficiary in a trust deed is not a deed.[94] By statute in Iowa the acknowledgment and recording of a plat is equivalent to a deed in fee of a street indicated thereon.[95]

A deed absolute on its face may be a mortgage[96] if it is intended as such at the time of its inception,[97] and there is a subsisting debt after execution,[98] but a mortgage will not be read into a conditional sale,[99] or absolute sale,[1] and contract to reconvey.[2] That an absolute deed was intended as a mortgage may be established by parol evidence.[3] The burden is on one asserting it to prove it[4] by evidence

in no way to take effect until after the decease of the grantor." So In Armstrong v. Armstrong, 4 Baxt. [Tenn.] 357, where the words were: "This conveyance to have effect from and after my death." So in Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522, where the words were: "To commence after the death of both the said grantors." Also the following: "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the said grantors, or either of them, shall live, and that after the death of both the said grantors, the grantee shall have and hold the premises by fee simple title." So in Murphy v. Gabbert, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733, where the words were: "The intention of this instrument of writing is such that if Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." To same effect, see Coulter v. Shelmadine, 204 Pa. 120, 53 A. 638; Horn v. Broyles [Tenn. Ch. App.] 62 S. W. 297; Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677; Hazleton v. Reed, 46 Kan. 73, 26 P. 450, 26 Am. St. Rep. 86; Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98; Carlton v. Cameron, 54 Tex. 72, 38 Am. Rep. 620. See Hunt v. Hunt, 26 Ky. L. R. 973, 82 S. W. 998.

90. A deed of trust from husband to wife, containing apt words of conveyance but reserving a right to revoke, is a deed. Cribbs v. Walker [Ark.] 85 S. W. 244. The fact that the time of enjoyment is postponed is insufficient to show that the instrument is testamentary in character. Webb v. Webb [Iowa] 104 N. W. 438.

91. An agreement by a purchaser of a concession from the state of Coahuila before the land was selected to sell his concession amounts to an act of sale and not an executory contract to sell, since he had power to alienate his concession at once. Surghenor v. Ranger [C. C. A.] 133 F. 453.

92. A decree in specific performance adjudging one to be the equitable owner is not a conveyance within Acts 1885, p. 233, c. 147, providing that no conveyance shall be valid as against creditors or bona fide purchasers until after registration. Skinner v. Terry, 134 N. C. 305, 46 S. E. 517.

93. An agreement between the heirs of an intestate providing that the widow was entitled to one-third of the income of the premises, and that the heirs stand seised of certain individual interests operates as a conveyance between the parties. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

94. Where the grantor in a trust deed conveyed by warranty deed and the beneficiary of the trust deed appended a release thereto. Stevens Lumber Co. v. Hughes [Miss.] 38 So. 769. The release operated to the benefit of the grantor and the grantee was not subrogated to the rights of the beneficiary. Id.

95. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

96. Schnelder v. Reed, 123 Wis. 483, 101 N. W. 682. A deed executed as security, the grantee executing a written defeasance, is a mortgage. Wells v. Scanlan [Wis.] 102 N. W. 571. A deed, though absolute on its face if given to secure a debt, is a mortgage. Meeker v. Warren, 66 N. J. Eq. 146, 57 A. 421. Where set up as a defense to an action for breach of warranty, it must be specially pleaded. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

97. The intent of the parties at the inception of the transaction determines its character. Hursey v. Hursey [W. Va.] 49 S. E. 367. The intention of the parties as gathered from all the surrounding circumstances is the test. Miller v. Miller [Md.] 61 A. 210.

98. Rankin v. Rankin, 111 Ill. App. 403; Holmes v. Warren, 145 Cal. 457, 78 P. 954.

99. Conveyance is absolute, notwithstanding a separate written contract to reconvey within a certain time upon certain terms. Bates v. Sherwood, 5 Ohio C. C. (N. S.) 63.

1. A deed was delivered under an agreement that the grantee might within one year pay the balance of the purchase price and retain title but if he concluded not to purchase, the amount paid was to be treated as a loan. Held a deed. Reich v. Dyer, 180 N. Y. 107, 72 N. E. 922.

2. An agreement for an immediate resale to the grantor does not constitute an absolute deed a mortgage. Hays v. Emerson [Ark.] 87 S. W. 1027. An absolute conveyance and an agreement to reconvey upon condition held not to constitute an equitable mortgage. Bailey v. St. Louis Union Trust Co. [Mo.] 87 S. W. 1003.

3. Welborn v. Dixon [S. C.] 49 S. E. 232; Miller v. Miller [Md.] 61 A. 210. Though the debt is due to a third person and not to the grantee. Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813. Civ. Code, § 2922, providing the requisites of a mortgage does not preclude

satisfactory as to credibility, unequivocal as to terms and meaning, clear and convincing.[5] As to whether the fact must be established beyond a reasonable doubt there is a conflict of authority.[6]

Requisites.[7]—The grantor must have some estate in the premises,[8] but a deed by an entryman who has the equitable title passes it to his grantee in whom the legal title vests by way of relation when the patent issues.[9] It must contain apt words of conveyance,[10] a definite description of the premises conveyed,[11] or a description

the declaring of an absolute deed to be a mortgage. Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077.

4. Hays v. Emerson [Ark.] 87 S. W. 1027; Rankin v. Rankin [Ill.] 74 N. E. 763.

5. Gerhardt v. Tucker, 187 Mo. 46, 85 S. W. 552; Holmes v. Warren, 145 Cal. 457, 78 P. 954; Way v. Mayhugh [W. Va.] 50 S. E. 724; Rankin v. Rankin, 111 Ill. App. 403.

Evidence sufficient to show a deed was intended as a mortgage. McGill v. Thorne [S. C.] 48 S. E. 994; Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633; Huntington v. Kneeland, 93 N. Y. S. 845; Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Falkner v. Powell [Neb.] 100 N. W. 937.

Evidence insufficient to show a deed to be a mortgage. Northwestern Fire & Marine Ins. Co. v. Lough [N. D.] 102 N. W. 160. To impress a trust upon the land conveyed. Sheldon v. Carr [Mich.] 103 N. W. 181; Steele v. Steele, 112 Ill. App. 409.

Question whether a deed was given as security held **one of fact.** Tappen v. Eshelman [Ind.] 73 N. E. 688.

Evidence held admissible: Declarations made by the grantor at the time of and subsequent to the execution of the instrument. Bell v. Pleasant, 145 Cal. 410, 78 P. 957. A **receipt** given by the grantor to the grantee stating that it was received in final payment of the purchase price as per the deed in question. Holmes v. Warren, 145 Cal. 457, 78 P. 954. A **contract** whereby the grantor agreed to sell to the grantee on a certain date at a certain price. Id.

6. In **Missouri** this quantum of evidence is required (Gerhardt v. Tucker, 187 Mo. 46, 85 S. W. 552); but in **Minnesota** it is not (Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017).

7. See 3 C. L. 1057.

8. Conkey v. Rex, 212 Ill. 444, 72 N. E. 370; Wade v. Brown [Ark.] 87 S. W. 639; Gayle v. Rigg [Ky.] 85 S. W. 1172. The **interest** in land **that a child will inherit in case his parent dies intestate** is not subject to conveyance (Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734); but a **contingent remainder** may be conveyed (Cheek v. Walker, 138 N. C. 446, 50 S. E. 863). A contingent interest may be created by a valid deed of trust. Carroll v. Smith, 99 Md. 653, 59 A. 131. A recitation of an intention to convey whatever title the grantor acquired at a certain tax sale is no evidence of the title acquired at such sale. McKee v. Ellis [Tex. Civ. App.] 83 S. W. 880. Where the owner had conveyed the fee and by a subsequent deed reciting that it was given to correct the prior one, sought to convey to the original grantee and another, the latter got nothing. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622. A deed by one having no interest in the land and no authority to execute a deed conveys nothing. Bullin v. Hancock, 138 N. C. 198, 50 S. E. 621. Where two deeds were executed the same date, one from the grantor to the grantee and one back, it could be reasonably inferred from the evidence that either was executed first. Chadbourne v. Hartz, 93 Minn. 233, 101 N. W. 68. Title is conveyed by a deed executed after the vesting of an indeterminate estate as against the lien of an execution levied prior to the vesting. Swerer v. Trustees of the Ohio Wesleyan University, 2 Ohio N. P. (N. S.) 333.

9. Entryman who has paid his money and obtained the registrar's certificate of purchase. Smith v. Beloit, 122 Wis. 396, 100 N. W. 877.

10. A deed after conveying a life estate recited that after the death of the life tenant it was the "purpose" of the grantor that the land "shall become the property of R." conveys nothing to R. McGarrigle v. Roman Catholic Orphan Asylum of San Francisco, 145 Cal. 694, 79 P. 447. A written agreement that a child should have the income of certain land after the deduction of running expenses, taxes, etc., if the father did not need the same, is not a deed. Brettman v. Fischer [Ill.] 74 N. E. 777. A fee cannot be reduced to a life estate by a separate instrument concurrently executed unless the latter contain appropriate operative words of conveyance of the remainder or reversion. Lee v. Scott, 5 Ohio C. C. (N. S.) 369.

11. The description must be sufficient to identify the property. Holley's Ex'r v. Curry [W. Va.] 51 S. E. 135. If the description is so indefinite as to afford no means of identifying any land, the deed is inoperative. Pitts v. Whitehead, 121 Ga. 704, 49 S. E. 693.

DESCRIPTION HELD INSUFFICIENT. By metes and bounds: Little Rock & Ft. S. R. Co. v. Evans [Ark.] 88 S. W. 992. A conveyance of "coal banks reserved by the grantor in a prior deed made by him to a certain other person" is a certain description. Jones v. American Ass'n [Ky.] 86 S. W. 1111. A reference to the land by **lot number,** describing it. Lieberman v. Clark [Tenn.] 85 S. W. 258. "My entire undivided one-tenth interest in about 265 acres of land of R., deceased, of H. County, Kentucky." Fields v. Fish & Co., 26 Ky. L. R. 659, 82 S. W. 376. A description in a conveyance of an undivided interest in certain lands as "belonging to the separate estate of P." does not qualify the conveyance nor prevent its taking effect from delivery. Garner v. Boyle, 97 Tex. 460, 79 S. W. 1066. Description of a lot "90 by 450" on a certain street is sufficient where the grantor owns only one lot of those dimensions on that street. Burton v. Mullenary [Cal.] 81 P.

capable of being made certain,[12] be signed[13] by one competent to execute a deed,[14] or with authority to convey,[15] and must run to a grantee capable of taking.[16] In order to cut off a wife's dower right, a deed by a married man must be joined in by his wife.[17] Statutory requirements must be complied with.[18] Unless otherwise provided by statute, the deed must have been executed at a time when the grantor was seised of the premises,[19] and in some states attested, if a grant of a freehold

544. Description of a deed of a right of way as "land lying within fifty feet of the main track of the railroad." Abercrombie v. Simmons [Kan.] 81 P. 208. Description of land conveyed for a public road held not void for indefiniteness. Mitchell v. Einstein, 94 N. Y. S. 210. "One-fourth interest" in a definitely described lot is not so vague and indefinite as to be void, but is an accurate description of a fractional interest in the land. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Deed of **water right** held not void for uncertainty as to the amount of water to be diverted. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617. Grant of **right of way for a pipe line** not specifying the exact boundaries held not void for uncertainty as to location. Id.

Description held void for indefiniteness. Kennedy v. Maness, 138 N. C. 35, 50 S. E. 450. If the description in a tax deed is insufficient to identify the property, no title passes. Levy v. Gause, 112 La. 789, 36 So. 684.

12. A description is certain which can be made certain. Welborn v. Dixon [S. C.] 49 S. E. 232. A description is not insufficient when one of the corners called can be established by a simple mathematical calculation. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 88 S. W. 534. It is not essential, however, that it be such as without the aid of extrinsic evidence the property may be ascertained. Description held sufficient. Halley's Ex'r v. Curry [W. Va.] 51 S. E. 135. The description must be such that the property can be located by the aid of extrinsic evidence which does not add to or enlarge the description. Archer v. Beihl [C. C. A.] 136 F. 113. A deed of all of one's interest in certain land as heir of a certain person may be explained by showing what his interest was. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

13. A recital in a deed that it is executed as a duplicate of a former one is an admission of the execution of the former one. City of Hickory v. Southern R. Co., 137 N. C. 189, 49 S. E. 202. Evidence held to show that a deed executed by mark was executed by the grantee, though the name accompanying the mark was spelled differently from hers. Timber v. Desparois [S. D.] 101 N. W. 879. The acknowledgment of a signature is a sufficient signing. Godsey v. Virginia Iron, Coal & Coke Co., 26 Ky. L. R. 657, 82 S. W. 386; Loyd v. Oates [Ala.] 38 So. 1022. Evidence held to show that a deed was executed. Brooks v. Hunt, 26 Ky. L. R. 608, 82 S. W. 296. Deed held not invalid because not joined in by certain trustees. Koch v. Robinson, 26 Ky. L. R. 969, 83 S. W. 111. Where a deed is lost, execution may be proved by a series of concomitant acts which would not tend to any other purpose than the execution of the deed. Garrett v. Spradling [Tex. Civ. App.] 88 S. W. 293.

14. A deed by an infant is voidable not void. Hiles v. Hiles, 26 Ky. L. R. 824, 82 S. W. 580. It is presumed that female grantors in ancient deeds were unmarried. Dunn v. Stowers [Va.] 51 S. E. 366. Under Real Property Law (Laws 1896, p. 592, c. 547), § 207, deeds can be executed only by the grantor. Thistle v. Jones, 45 Misc. 215, 92 N. Y. S. 113.

15. An administrator grantor must have power from the court. Hall v. Davis [Ga.] 50 S. E. 106. A power of attorney authorizing the donee to sell the donor's lands does not authorize a sale in consideration of the donee's debts or a joint debt of the donee and donor. Hunter v. Eastham [Tex. Civ. App.] 81 S. W. 336. Where an administrator advertised to sell at public outcry certain land "except the minerals therein," but in the deed no reference was made to the exception, it will be presumed that he did not intend to exceed his authority and pass title to the minerals. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Evidence held insufficient to show that a deed was executed by an agent without authority. Brown v. Orange County [Tex. Civ. App.] 13 Tex. Ct. Rep. 138, 88 S. W. 247. A deed by the cashier of a state bank from the bank to himself as an individual is void in the absence of proof of his authority to execute it. Northwestern Fire & Marine Ins. Co. v. Lough [N. D.] 102 N. W. 160. An act of sale signed by one partner for himself and the others, construed to have passed the interest of both, since at the time it was executed a verbal sale of land was valid where it was executed. Surghenor v. Ranger, 133 F. 453.

16. A corporation may not deed property for the benefit of an officer or stockholder. Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017.

17. A conveyance signed by a married man alone does not pass his wife's dower right. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. A deed executed in 1862, reciting that the grantor is a bachelor, is presumptive evidence that he was single when he executed a deed in 1858. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

18. Signing, sealing and delivery in the presence of two subscribing witnesses of the grantor. Parken v. Safford [Fla.] 37 So. 567. In Illinois a deed is valid though the Federal statute requiring **revenue stamps** to be placed thereon and canceled is not complied with. Thompson v. Calhoun [Ill.] 74 N. E. 775.

19. Joyce v. Dyer [Mass.] 75 N. E. 81.

estate and not acknowledged.[20] If its genuineness is questioned, it must be established.[21] A deed to become operative in the future is valid.[22]

Delivery[23] by authority of the grantor[24] with the intention of passing title[25] and

20. A grant of a right to lay pipes over land so long as the grantee occupies certain lands is a grant of a freehold interest. Clark v. Strong, 93 N. Y. S. 514.

21. Other signatures made by the grantor in the deed cannot be compared with the signature to the deed for the purpose of disproving its genuineness. Campbell v. Bates [Ala.] 39 So. 144. Where execution is denied, it must be proven by a preponderance of evidence. Parken v. Safford [Fla.] 37 So. 567. The transcribing of instruments not entitled to record on the records does not make such records sufficient evidence of the execution of the instruments. Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353. An instrument appearing on the records in the handwriting of a clerk who was grantor therein is evidence of execution, though the instrument was not entitled to record. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

22. At grantor's death. Lewis v. Tisdale [Ark.] 88 S. W. 579.

23. See 3 C. L. 1058, n. 76 et seq. Schnurer v. Birheck Sav. & Loan Co., 91 N. Y. S. 742; Parken v. Safford [Fla.] 37 So. 567; Erler v. Erler, 124 Iowa, 726, 100 N. W. 856; Powers v. Rude, 14 Okl. 381, 79 P. 89. Delivery is complete when the grantor parts with control over the instrument with intention that title shall pass. Biggins v. Lambert, 115 Ill. App. 576.

Evidence held to show delivery: Lewis v. Tisdale [Ark.] 88 S. W. 579; Doan v. Hostetler, 215 Ill. 635, 74 N. E. 767. Instruction as to what constitutes delivery, approved. Lancaster v. Lee [S. C.] 51 S. E. 139.

Held a sufficient delivery: A manual delivery of a deed of gift to the grantee who takes it and hands it to her brother to be kept for her and he puts it away without recording it constitutes a valid delivery. Fischer v. Union Trust Co. [Mich.] 101 N. W. 852. Where a husband in delivering a deed of trust to his wife acted on the **advice of counsel** as to delivery and handed her the deed, but it was agreed that he should keep possession of it until his death, delivery was shown. Cribbs v. Walker [Ark.] 85 S. W. 244. Where one shortly before death executed a deed and placed it in an envelope with her will with **directions to deliver it to the grantee at her death** if not recalled. Prior to her death, she recalled the envelope but without opening it directed that it be delivered after her death. Held, a good delivery. Wilcox v. First M. E. Church and Soc. of Henderson, 93 N. Y. S. 423. **A delivery to a third person to be delivered to the grantee after the grantor's death** is a good delivery, though the grantor retains control of the premises (Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427), and the grantor cannot change his purpose and revoke the conveyance (Tompkins v. Thompson, 93 N. Y. S. 1070). No title passes until final delivery. Id. But the title is then deemed to relate back to the time of delivery to the third person. Id. Where a deed is delivered after a certain proportion of the price has been paid, the delivery relates back to the date of the contract of sale. Krakow v. Wille [Wis.] 103 N. W. 1121.

Delivery to the husband of the grantee is a delivery to the grantee (Newman v. Newman [Tex. Civ. App.] 86 S. W. 635), and a delivery **to one of several grantees** to hold for all, with the knowledge of the others, is a delivery to all (Webb v. Webb [Iowa] 104 N. W. 438), and a delivery **to a third person with directions to deliver to the grantee** is a good delivery (Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747).

No delivery where the grantor delivers a voluntary deed to a third person without instructions to deliver it to the grantee and after the death of the grantor the grantee procures possession and has it recorded. Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. A deed executed by several grantors was delivered to a common agent on the understanding that it was not to be delivered to the grantee until executed by another grantor. Held, a delivery by the agent to the grantee without such signature was no delivery. Wisconsin & M. R. Co. v. McKenna [Mich.] 102 N. W. 281. Where an agent for both parties receives the deed to be delivered on payment of the purchase price, and places the deed on record after being notified that the sale has been rescinded, there is no delivery. Mason v. Strickland [Neb.] 103 N. W. 458.

NOTE. Presumptions as to Delivery of Deeds: It goes without saying that the intent is the vital thing in connection with the matter of delivery. But the presence in the mind of the grantor of an intent to deliver is ineffectual unless he has evidenced that intent by some act or acts that the law recognizes as sufficient to indicate that he has parted with the legal control of the instrument. It follows, then, that in every case involving the question of delivery, the facts assume a controlling importance, and that, in a way, each case must stand by itself, and be decided by the application of a few general principles to its particular facts. But there are certain facts and circumstances which, though not in themselves controlling upon the question of delivery, give rise to presumptions of importance in connection with that question. For example, where a duly executed deed is in the hands of the grantee named therein, a strong presumption arises that the deed has been delivered, and this presumption will be overcome only by clear and convincing evidence. Inman v. Swearingen, 198 Ill. 437, 440, 64 N. E. 1112. (See, also, Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563; Hathaway v. Cass, 84 Minn. 192, 87 N. W. 610; McGee v. Allison, 94 Iowa, 527, 531, 63 N. W. 322.) And in the absence of proof of an understanding that a deed is to be delivered at a particular time or some other evidence as to the intention of the parties as to the time of the delivery, a presumption arises of a delivery on the day of its date. Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644, 667.

in such manner as to terminate the grantor's control over the instrument is essential.[26] Actual manual delivery is not essential.[27] Such a delivery, however, raises

So if a deed is recorded by a grantor, a presumption of delivery is raised. Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461; see, also, Hilderhrand v. Willig, 64 N. J. Eq. 249, 255. But this is a presumption of fact simply that may be overcome by other evidence showing as a matter of fact that there was no delivery. Thus, where the evidence tended strongly to show that no consideration was paid, that the grantor placed the deed on record himself, the grantee having no knowledge of its execution or recording at the time, and never having had possession of the deed, it was held that the presumption of delivery arising from the recording was overcome. Smith v. Smith, 116 Wis. 570. No presumption of delivery arises from the acknowledgment of a deed. Tarlton v. Griggs 131 N. C. 216, 223, 224.

A valid delivery of a deed may be made through the instrumentality of a third person. The courts very generally hold that if a grantor has placed his deed in the hands of a third person with directions to him to deliver to the grantee named therein upon his (the grantor's) death, intending thereby to release all legal control over the instrument and to make the act and directions a delivery, he has thus made a valid and effective delivery. The following are some of the most recent cases that so hold: Bogan v. Swearingen, 199 Ill. 451, 65 N. E. 426; Oliver v. Wilhite, 201 Ill. 552, 66 N. E. 837; Marshall v. Hartzfelt, 98 Mo. App. 178, 71 S. W. 1061; Diefendorf v. Diefendorf, 132 N. Y. 100, 30 N. E. 375; Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 532, and note; Ruiz v. Dow, 113 Cal. 490, 45 P. 867; Stout v. Rayl, 146 Ind. 379, 45 N. E. 515; Dettmer v. Behrens, 106 Iowa 585, 76 N. W. 853, 68 Am. St. Rep. 326; Meech v. Wilder, 130 Mich. 29, 89 N. W. 556; Martin v. Flaharty, 13 Mont. 96, 32 P. 287, 40 Am. St. Rep. 415, 19 L. R. A. 242. But if the right to recall the deed is retained by the grantor who has placed it in the hands of a third person with directions to deliver it to the grantee, the delivery is not good. See Johnson v. Johnson, 24 R. I. 571; Tarlton v. Griggs, 131 N. C. 216. And in a very recent case the supreme court of Michigan, following the supreme court of Iowa and of Ohio, while recognizing the doctrine that if a deed is delivered by the grantor to the grantee the presumption arises that it is for the grantee's use, holds that if the deed is given to an intermediary for the grantee, no such presumption will arise. Thomas v. Sullivan [Mich.] 101 N. W. 528. "The rule is well settled," says the court, "that if a deed is delivered by the grantor to the grantee, the presumption arises that it is for his use, but if it is handed to a stranger, there is no such presumption, for the delivering to the stranger may have been by mistake or for safe-keeping simply, or for some other purpose wholly independent of an intent to transfer the estate." Where the delivery is made through the instrumentality of a third person, then there is no presumption to which the grantee can appeal, but the facts and circumstances attending the transaction must be shown, and if the delivery is to be sustained, they must be such as to indicate a release of legal control over the instrument by the grantor and an intention on his part that the deed should be delivered by the custodian to the grantee and that the passing of title should be consummated thereby.—3 Mich. L. R. 224.

24. Delivery by the executor of a grantor and recording by the grantee is no delivery in the absence of authority in the executor to deliver. Berkemeier v. Peters [Mo. App.] 86 S. W. 598. Evidence insufficient to show a waiver of a provision that the deed was not to be delivered until the grantor's death. Griffin v. Miller [Mo.] 87 S. W. 455. The death of a grantor in a deed delivered to a third person to be delivered to the grantee after the grantor's death does not revoke the authority of such third person to deliver. Thompson v. Calhoun [Ill.] 74 N. E. 775.

25. A valid delivery is not shown where it appears that the grantor intended the delivery to relate to the date of his death. Schlicher v. Keeler [N. J. Err. & App.] 61 A. 434. Where one to whom a deed was delivered, to be delivered to the grantee on the performance of a condition, did not understand that it was delivered to him beyond the grantor's power of control, but he surrendered the deed to the grantee, there was no delivery. Hayden v. Collins [Cal. App.] 81 P. 1120. A manual delivery without intention to surrender control over the instrument is insufficient. Gatt v. Shive [Tex. Civ. App.] 82 S. W. 303. There must be something more than a physical change of possession; there must be an intent to part with title. Commins v. Perry, 44 Misc. 458, 90 N. Y. S. 92. Merely handing the deed to the grantee does not constitute delivery. Johnson v. Cameron, 136 N. C. 243, 48 S. E. 640. If it is apparent that a physical delivery was not intended to pass title, there is no delivery. Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. S. 911. A delivery to a third person for the grantee raises no presumption that it is for the benefit of the grantee. Thomas v. Sullivan [Mich.] 101 N. W. 528. It must appear that the grantor intended to part with his title. Id.

26. Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. A delivery subject to the grantor's control, revocation or alteration is no delivery, though given into the possession of one of the grantees who was the grantor's man of business, the other grantees not having knowledge of the deed until after the death of the grantor. Joslin v. Goddard, 187 Mass. 165, 72 N. E. 948.

NOTE. Delivery to a Third Person—Requisites: A, the owner of a tract of land, made eleven deeds thereof to his children, in one of which appellant, X, was grantee of a specific part. The consideration for this was shown to be appellant's care of A during his old age, together with certain book accounts due appellant's husband, from which it was agreed there should be no more trouble. The eleven deeds of which that in suit was one, were given to B, a stranger, with written instructions from A "at his

a presumption of legal delivery.[28] A delivery may result from an estoppel[29] or from the ratification of a wrongful taking.[30] A presumption of delivery arises from possession of the instrument by the grantee,[31] and one of nondelivery arises from the grantor's retention of possession of the premises[32] or from the finding of the instrument among the grantor's effects after his death,[33] unless he has reserved an interest in the premises.[34] A presumption of delivery also arises from the fact of recordation;[35] but whether the deposit for record of a deed delivered to a father in which his son is grantee amounts to delivery is a question of intention.[36] A deed is presumed to have been delivered the day of its date.[37] Parol evidence is admissible to show delivery[38] or to show that a physical delivery was not made

death to deliver them to each one of the heirs." Subsequently at A's request, B returned the deeds, together with the paper accompanying them, and after their destruction a deed of the eighty acres was made to appellee, C, of all of which C had prior notice. After A's death, appellant, X, sued to quiet title. Held, that appellant was entitled to judgment. Emmons v. Harding, 162 Ind. 154, 70 N. E. 142.

The court considered the appellant as a grantee not without equity, the consideration for the deed to her being in the nature of a family settlement. The subsequent acceptance by X referred back, by relation, to the date of the deed's delivery to B, giving appellant a prior title. The decision is in accord with the weight of authority. Assuming that there had been a delivery of the deed, its destruction by the grantor could not divest the grantee (appellant) of title. Spangler v. Dukes, 39 Ohio St. 642; Albright v. Albright, 70 Wis. 528, 537, 36 N. W. 254; Hyne v. Osborn, 62 Mich. 235, 28 N. W. 821. And it is clear that a delivery is sufficient, based upon grantor's declaration in the presence of a witness that he delivers the deed as his, yet keeps it in his possession. Garnons v. Knight, 5 Barn. & C. 671; Clavering v. Clavering, 2 Vern. 473. And a delivery of a deed to a stranger to be redelivered to the grantee upon the grantor's death is generally sustained as a sufficient delivery. Owen v. Williams, 114 Ind. 179; Goodpaster v. Leathers, 123 Ind. 121; Stout v. Rayl, 146 Ind. 379; Ranken v. Donovan, 46 App. Div. 225, 61 N. Y. S. 542, affirmed 166 N. Y. 626, 60 N. E. 1119.—3 Mich. L. R. 74.

27. A legal delivery may result though the deed remain in possession of the grantor. Chastek v. Souba, 93 Minn. 418, 101 N. W. 618.

28. Manual delivery to and acceptance by the grantee in the presence of the grantor, nothing being said or done at the time to qualify the act, raises an inference of legal delivery. Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583. This inference is not affected by the mere bodily illness of the grantor at the time. Id.

29. Where a wife executes a voluntary deed to her husband but does not deliver it, and he steals it and conveys to another who makes improvements, the wife having notice thereof, she is estopped to deny delivery. Baillarge v. Clark, 145 Cal. 589, 79 P. 268. Evidence held insufficient to show that an alleged grantor was estopped to deny delivery. Gatt v. Shive [Tex. Civ. App.] 82 S. W. 308. In case the grantor is negligent relative to an unauthorized delivery out of escrow to the prejudice of bona fide purchasers. Houston Land & Trust Co. v. Hubbard [Tex. Civ. App.] 85 S. W. 474.

30. Even though a valid delivery has not been made, the grantor may thereafter ratify the wrongful taking of the deed by the grantee after he has acquired complete knowledge of the transaction. Whitney v. Dewey [Idaho] 80 P. 1117.

31. Wilbur v. Grover [Mich.] 10 Det. Leg. N. 99, 103 N. W. 583. A presumption of delivery on the day of its date. Leonard v. Fleming [N. D.] 102 N. W. 308. When the presumption of delivery from possession by the grantee of a deed is rebutted by positive testimony that there was no delivery until after the grantor's death, there is no conflict such as to require a submission to the jury. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857.

32. That the grantor remains in possession, and insures the property in his own name is not conclusive against delivery. Webb v. Webb [Iowa] 104 N. W. 438.

33. This presumption is rebuttable. Cribbs v. Walker [Ark.] 85 S. W. 244.

34. Cribbs v. Walker [Ark.] 85 S. W. 244.

35. Evidence held to show that a deed duly attested, acknowledged and filed for record was delivered. Chancellor v. Teel [Ala.] 37 So. 665. The burden is on one claiming against it to show otherwise by a clear preponderance of evidence. Drees v. Drees [Iowa] 104 N. W. 479. Prima facie evidence. Clark v. Harper, 215 Ill. 24, 74 N. E. 61. A deed properly acknowledged and recorded. McCrum v. McCrum [Iowa] 103 N. W. 771. Deeds duly signed, acknowledged and recorded. Webb v. Webb [Iowa] 104 N. W. 438. Recordation by the grantor is not necessarily a delivery, but a circumstance which may be looked to on that question. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

36. Where a father took title in the name of his son for the purpose of defeating seizure under condemnation proceedings, and at no time intended to give the property to his son, it does not constitute delivery. Erler v. Erler, 124 Iowa, 726, 100 N. W. 856.

37. McBrayer v. Walker [Ga.] 50 S. E. 95; Tabor St., 26 Pa. Super. Ct. 167. Notwithstanding it was not acknowledged until later. Ewers v. Smith, 98 App. Div. 289, 90 N. Y. S. 575.

38. Since the deed does not show evi-

with intent to pass title;[39] but not to show a secret intention that a delivery should be ineffectual,[40] or to show that a deed delivered to the grantee was subject to conditions.[41] Evidence of the circumstances surrounding the transaction is admissible when the question of delivery is doubtful.[42] Much more is presumed in favor of the delivery of a deed creating a settlement than in ordinary cases of deeds of bargain and sale,[43] because of the presumed confidential relation of the parties.[44] The delivery in escrow is elsewhere treated.[45]

Acceptance[46] by a competent grantee is essential,[47] but where a deed is unconditional and beneficial to the grantee, acceptance is presumed.[48] Parol evidence is admissible to show that a deed was never accepted.[49]

A consideration[50] is imported by the seal.[51] A valuable consideration[52] is not essential to the validity of the instrument,[53] and inadequacy of consideration will

dence of it on its face. Whitney v. Dewey [Idaho] 80 P. 1117.

39. Where both grantor and grantee so understood the nature of the delivery. Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. S. 911.

40. Where a deed is manually delivered in such manner as to raise an inference of legal delivery, a secret intention that the deed should be ineffectual cannot be shown to vary its effect. Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583. An unconditional delivery of a deed of a married woman purporting to convey land to her husband cannot be contradicted by testimony of the husband that he intended to assert title only in the event that he survived his wife. Id.

41. Whitney v. Dewey [Idaho] 80 P. 1117.

42. Merki v. Merki, 113 Ill. App. 518.

43. Baker v. Hall, 214 Ill. 364, 73 N. E. 351, and cases cited therein; Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775. A delivery by a father of a deed running to his son, to a third person, to have recorded after the father's death is in the nature of a voluntary settlement. Id. Where parents executed a deed for a nominal consideration to their child and it was recorded, held that, though the child was not fully capable of accepting the deed and it was provided that the parents should have the right to possession for life, there was a valid delivery. Baker v. Hall, 214 Ill. 364, 73 N. E. 351. Presumption of delivery of a voluntary deed where soon after its execution the grantee took possession is not rebutted by the fact that the deed was found in the grantor's private box after her death. Henry v. Henry, 215 Ill. 205, 74 N. E. 126. A deed to an infant grantee is presumptively delivered, when delivered to his father and by him recorded. Coleman v. Coleman [Ill.] 74 N. E. 701. And this presumption is not overcome by the fact that the father procured the deed to be made to the infant in order to keep the land from his second wife. Id. Nor by the fact that he retains possession of the deed. Id. The execution by infant grantees of a deed to their father does not rebut the presumption of delivery of a deed to them delivered to their father and by him recorded. Id. The execution and recording of a deed from mother to daughter authorizes a presumption of delivery and acceptance. Morrison v. Fletcher [Ky.] 84 S. W. 548.

44. Henry v. Henry, 215 Ill. 205, 74 N. E. 126. Where the delivery of such a deed is questioned, the burden of proof is on the person claiming adversely to the donee. Baker v. Hall, 214 Ill. 364, 73 N. E. 351.

45. See Escrows, 3 C. L. 1238, and post, 5 C. L.—.

46. See 3 C. L. 1060. Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. S. 911. Commins v. Perry, 44 Misc. 458, 90 N. Y. S. 92; Parken v. Safford [Fla.] 37 So. 567; Santee v. Day, 111 Ill. App. 495. A grantee is not bound by a mortgage assumption clause in a deed he never accepted (Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986), but a deed accepted and recorded with knowledge of its contents is binding on the grantee, though execution took place through his agent (Gage v. Cameron, 212 Ill. 146, 72 N. E. 204).

Recordation is not conclusive evidence of acceptance. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. Delivery and acceptance are presumed from the recording by the grantor of a deed beneficial to the grantee. Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. Where a deed was made to an **infant grantee** his refusal after attaining majority to convey to his father amounts to an acceptance. Coleman v. Coleman [Ill.] 74 N. E. 701. The placing of a deed in a sealed envelope and handing it to the grantee and telling him to keep it until called for is no delivery when the grantee did not know the contents of the envelope. Sutton v. Gibson [Ky.] 84 S. W. 335.

47. Delivery of a deed does not immediately pass title unless the grantee is in a position to legally accept the deed at the time it came into his manual possession. Goodhue v. Goodhue, 3 Ohio N. P. (N. S.) 225.

48. Coleman v. Coleman [Ill.] 74 N. E. 701. The validity of a deed from father to son, delivered to a third person to be delivered to the son after the father's death, is not affected by the fact that the son was unaware of the deed until the father's death. Thompson v. Calhoun [Ill.] 74 N. E. 775.

49. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

50. See 3 C. L. 1061. See, also, Contracts, 5 C. L. 664.

51. Phillips v. American Tel. & T. Co. [S. C.] 51 S. E. 247; Livingston v. Murphy, 187 Mass. 315, 72 N. E. 1012.

52. A deed reserving a life estate after

not invalidate it in the absence of fraud.[54] A consideration of love and affection is good as between the parties,[55] but fraudulent per se as to creditors of the grantor.[56] A deed based on an illegal consideration will not sustain ejectment,[57] and will not be set aside in equity.[58] A grantor in a voluntary deed cannot be compelled to assume obligations relative to the premises conveyed.[59] The enforcement of a contract which is the consideration of a deed cannot be had in ejectment.[60] A recited consideration is prima facie the consideration passed,[61] and an assumption of liens against the premises is presumed to be part of the consideration.[62] Parol evidence is admissible to show the real consideration,[63] but not to contradict the acknowledgment of a consideration paid in order to affect the validity of a deed.[64]

Validity of assent.[65]—A deed may be invalid because of fraud or undue influence of one party upon the other,[66] or of mutual mistake or accident,[67] or incapacity of the parties,[68] which prevents any real assent.

the grantor had sought to recover title conveyed by a deed, based on love and affection, because of breach of conditions, is based on a valuable consideration. Burgson v. Jacobson [Wis.] 102 N. W. 563.

53. A deed in nature an executed gift will not be set aside unless fraudulently obtained. Fowler v. Fowler, 135 F. 405. That a deed from mother to son was unwise and improvident on her part is no ground for avoiding it. Powers v. Powers [Or.] 80 P. 1058. A voluntary deed from son to father is valid as between them. Hiles v. Hiles, 26 Ky. L. R. 824, 82 S. W. 580.

54. Inadequacy of consideration is not of itself ground for avoiding a deed. Powers v. Powers [Or.] 80 P. 1058. A considerable disparity between the consideration and the value of land conveyed will not avoid the deed in the absence of fraud. Rixey v. Rixey, 103 Va. 414, 49 S. E. 586. Inadequacy of consideration is no ground for avoiding a voluntary deed. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

55. McKee v. West [Ala.] 37 So. 740.

Love and affection and faithful service shown to have been the consideration for a deed. Doan v. Hostetler, 215 Ill. 635, 74 N. E. 767.

56. McKee v. West [Ala.] 37 So. 740.

57. Compounding a felony: Medearis v. Granberry [Tex. Civ. App.] 84 S. W. 1070.

58. Consideration of an **agreement between a husband and wife to live apart:** Anderson v. Anderson, 122 Wis. 480, 100 N. W. 829.

59. Cannot be obliged to **pay off incumbrances** on the property, though provided in the deed that he would do so. Fischer v. Union Trust Co. [Mich.] 101 N. W. 852.

60. Adams v. Barrell, 26 Pa. Super. Ct. 641.

61. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. When assailed for fraud. Thompson v. Williams [Md.] 60 A. 26. A recited consideration which does not include the amount of a mortgage the grantee holds on the premises accurately sets forth the consideration. Id.

62. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

63. Where the expressed consideration is one dollar and the payment of certain debts due from the grantor. Medical College Laboratory v. New York University, 178 N. Y. 153, 70 N. E. 467; Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113. To show the true consideration when the presumption that the payment of assumed liens was part of the consideration has not been overthrown. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. A recital of the acreage does not exclude **proof of the true acreage** for the purpose of ascertaining the consideration if it is not manifest that such recital was intended to control metes and bounds. See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557. The **statement of the consideration in the form of a recital** and not as an element of the contract itself may be contradicted by parol. Id. Recitals as to consideration are not conclusive. Rook v. Rook, 111 Ill. App. 398. In an action for breach of covenant of warranty, it is competent to show that land as to which the covenant was broken was included in the deed by mistake, and that no consideration was paid for it. Id. The recital of love and affection does not preclude the showing of a valuable consideration. Miles v. Waggoner, 23 Pa. Super. Ct. 432. Where rescission for fraud is sought, the grantor may show that there was no consideration. Phillips v. American Tel. & T. Co. [S. C.] 51 S. E. 247.

64. Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113.

65. See 3 C. L. 1061.

66. See Fraud and Undue Influence, 3 C. L. 1520. A conveyance of a remainder in consideration of support of the grantor during life will not be set aside because children of the grantee of tender age failed to support the grantee after their parent's death; does not show fraud in the inception. Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673.

67. See Mistake and Accident, 4 C. L. 674. One asserting that a provision suspending delivery until the grantor's death was inserted by mistake has the burden of proving it. Griffin v. Miller [Mo.] 87 S. W. 455.

68. See Incompetency, 3 C. L. 1696. Mental capacity sufficient to execute a deed is such a degree that the person understands the effect of the instrument as a conveyance. It is not necessary that he understand the legal effect of the words used. Moorhead v. Scovel [Pa.] 60 A. 13. In the absence of fraud or undue influence, mere mental weakness from sickness and old age is not ground for avoiding a deed. Id. A deed executed

§ 2. *Recordation*[69] is not essential as between the parties.[70]

§ 3. *Interpretation and effect. General rules.*[71]—The deed should be construed as a whole[72] for the purpose of ascertaining the intention of the grantor[73] as expressed by the terms employed.[74] Where executed contemporaneously with other instruments, they will be construed together.[75] The practical construction by the parties is to be considered.[76] The date of a deed is presumed to be the date of its execution.[77] If terms used are ambiguous, resort may be had to parol evidence of the surrounding circumstances.[78] A void provision may be looked to to ascertain the nature of the estate intended to be granted.[79] The first part of a deed controls the last.[80] The instrument will be given effect if possible,[81] and if necessary to that end will be construed as a deed,[82] and so as to vest the estate

by a person of unsound mind is voidable only. Logan v. Vanarsdall [Ky.] 86 S. W. 981.

69. See 3 C. L. 1062. See, also, Notice and Record of Title, 4 C. L. 829. A deed granting an easement in fee is entitled to record. Sweetland v. Grants Pass News Water Light & Power Co. [Or.] 79 P. 337.

70. McCrum v. McCrum [Iowa] 103 N. W. 771; Licata v. De Corte [Fla.] 39 So. 58.

71. See 3 C. L. 1062.

72. Lamb v. Medsker [Ind. App.] 74 N. E. 1012. All its parts must be considered. Hunt v. Hunt, 26 Ky. L. R. 973, 82 S. W. 998. The intent is to be ascertained from the entire instrument. Hubbird v. Goin [C. C. A.] 137 F. 822. A deed should be construed so that no part shall be rejected. Hads v. Tiernan, 25 Pa. Super. Ct. 14. Deed construed to convey an estate to a wife during her life or widowhood, remainder in fee to her children. Stiles v. Cummings [Ga.] 50 S. E. 484. Deed construed and held to pass a life estate to the grantee, remainder to his children born and unborn. Hall v. Wright [Ky.] 87 S. W. 1129. An estate in trust for A and her children during the life or widowhood of A and then to the children living at her death creates a joint life estate in A and her children during her life, remainder in fee to her surviving children. Lnquire v. Lee, 121 Ga. 624, 49 S. E. 834.

73. The intent of the grantor is the guiding star. Hubbird v. Goin [C. C. A.] 137 F. 822. The intention of the parties as it appears from the whole instrument controls inconsistent technical rules of construction. Hall v. Wright [Ky.] 87 S. W. 1129. Whether provisions in a deed are covenants or conditions is to be ascertained by finding the intention of the parties from a construction of the entire instrument regardless of the technical meaning of terms employed. Minard v. Delaware, etc., R. Co., 139 F. 60. "Accepted" construed "excepted" where that is the apparent sense in which the word was used. Dougan v. Greenwich, 77 Conn. 444, 59 A. 505.

74. The intention in the minds of the parties is not what is sought but the intention as expressed by the language used. Mortgage assumption clause construed. Cameron v. Sexton, 110 Ill. App. 381.

75. A **deed and contract** relative to the same subject-matter. McCoy v. Griswold, 114 Ill. App. 556. Where a **will, lease and deed** are made about the same time and appear to be parts of one transaction, they may be construed together to ascertain the purpose the deed was intended to accomplish. Jack v. Hooker [Kan.] 81 P. 203. An **earnest money receipt** given by the agent of the grantor, the grantor not being aware of its contents, is not admissible in aid of the construction of a deed subsequently executed and accepted by the grantee. Kruse v. Koelzer [Wis.] 102 N. W. 1072.

76. A joint grantee's failure to question another's right to possession held not such a practical construction of the deed as to enlarge her estate. Fullagar v. Stockdale [Mich.] 101 N. W. 576.

77. Leonard v. Fleming [N. D.] 102 N. W. 308.

78. Cameron v. Sexton, 110 Ill. App. 381. To show what liens were intended to be assumed. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. If doubt exists as to the intention of the grantor, the situation of the parties, the subject-matter at the time of contracting, and the attendant circumstances leading up to the execution of the instrument, are to be considered. Walsh v. Abbott, 145 Cal. 285, 78 P. 715. The intention is to be ascertained by a consideration of all the provisions of the deed as well as the situation of the parties. Shepherd Co. v. Shibles [Me.] 61 A. 700. Where a deed recites that it is given to replace one lost, parol evidence of the situation and previous dealings of the parties is not objectionable as varying the terms of the deed. Scapien v. Blanchard, 187 Mass. 73, 72 N. E. 346.

79. Hubbird v. Goin [C. C. A.] 137 F. 822.

80. A discretionary power to dispose of the land free from trust controls a subsequent clause imposing a trust. Mee v. Mee, 113 Tenn. 453, 82 S. W. 830. A grant in consideration of an annual payment held to pass an exclusive right of way. Alderman & Sons' Co. v. Wilson [S. C.] 50 S. E. 643. A subsequent clause giving the grantee an option to retain possession after the expiration of the period held not to affect the grant. Id.

81. Hunt v. Hunt, 26 Ky. L. R. 973, 82 S. W. 998; Nuckols v. Stone [Ky.] 87 S. W. 799. A deed is to be construed if possible so as to give all the operative words effect. Walsh v. Abbott, 145 Cal. 285, 78 P. 715.

82. An instrument in apt words conveying a present estate but also providing that it was not to take effect until the death of the grantor. Hunt v. Hunt, 26 Ky. L. R. 973, 82 S. W. 998.

granted at the earliest possible moment.[83] All doubts are to be resolved in favor of the grantee.[84] The maxim "ejusdem generis" does not apply unless the word "other" is used.[85] General words are not restrained by restrictive ones if they do not clearly indicate the intention and designate the grant.[86] Terms will not be given effect to create an estate the grantor did not show it was his intention to create.[87] The habendum may be used to explain the intention of the granting clause expressed in general terms,[88] or qualify the estate apparently granted,[89] but cannot be used to contradict or cut down the estate granted,[90] and if in conflict must yield.[91] A conveyance to one legally incapable of holding realty naming a person to act as agent for the grantee in and about said land creates the person, named as agent, a trustee for the grantee.[92] A quitclaim deed conveys title free from any equitable right of which the grantee has no notice.[93]

Covenants[94] of special warranty are limited to the estate conveyed.[95] A covenant will not be read into a mere representation.[96] A grantee cannot be held liable on an exception to a covenant for a mere personal liability of the grantor.[97] The covenants cannot be contradicted by parol.[98]

Alterations and interlineations[99] are presumed to have been made prior to execution.[1] Immaterial interlineations will not be considered.[2]

Designation of parties.[3]—Mere descriptive words after the name of the gran-

83. Deed of trust held to vest the property as of the date of the death of the initial beneficiary. Thom v. Thom [Md.] 61 A. 193.

84. Most strongly against the grantor. Rankin v. Rankin, 111 Ill. App. 403; Shepherd Co. v. Shibles [Me.] 61 A. 700; Hunt v. Hunt, 26 Ky. L. R. 973, 82 S. W. 998. Instrument in the form of a deed conveying a right of way for a pipe line held to constitute a grant and not a mere license. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617. A grant of a way will be construed as a way for all purposes. Gayle v. Rigg [Ky.] 85 S. W. 1172.

85. A provision that the grantee assumes mortgages, liens, taxes, and claims of any and every description, does not restrict "claims of any and every description" to the species of claims mentioned. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

86. Shepherd Co. v. Shibles [Me.] 61 A. 700.

87. Where the granting clause and habendum create an estate in entirety they will not yield to a clause in the premises specifying that the conveyance to the husband is of an undivided half. Wilson v. Frost, 186 Mo. 311, 85 S. W. 375.

88. See 1 C. L. 912, n. 47. Lamb v. Medsker [Ind. App.] 74 N. E. 1012.

89. Deed to A and her children apparently creating them co-tenants qualified by the habendum so as to make A a life tenant and also to open and let in after-born children as remaindermen. Hubbird v. Goin [C. C. A.] 137 F. 822. Where the habendum clause is to the grantee and remainder to her bodily heirs, the first taker acquires only a life estate though the granting clause is unlimited to the grantee. Miller v. Dunn, 184 Mo. 318, 83 S. W. 436.

90. Lamb v. Medsker [Ind. App.] 74 N. E. 1012.

91. Lamb v. Medsker [Ind. App.] 74 N. E. 1012. The granting clause prevails over the habendum in case of conflict. Hall v. Wright [Ky.] 87 S. W. 1129. The habendum cannot bring within the operation of the conveyance after-acquired property which the granting clause does not purport to pass. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476. Where the premises described the property as a lot and one-half the double house thereon, and the habendum described it as a lot and one-half the double house thereon, the grantee took the land and one-half the house. Hads v. Tiernan, 25 Pa. Super. Ct. 14. An exception in the habendum which is not mentioned in the granting clause is not repugnant if it otherwise appears that it was the intention of the parties to make this exception. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

92. Johnson v. Cook [Ga.] 50 S. E. 367. Such trustee holds the legal title, the grantee the equitable. Id.

93. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012.

94. See 3 C. L. 1063. See, also, Covenants for Title, 5 C. L. 875.

95. Covenant of special warranty in a deed conveying only "right, title and interest" cannot be enlarged, but is limited to the estate granted; unpaid taxes not a breach of such warranty. Fountain Square Theatre Co. v. Pendery, 3 Ohio N. P. (N. S.) 41. Covenant against the acts of the grantor is limited to the estate granted. Unpaid taxes which were a lien at the time of the purchase cannot be recovered on the ground of breach of such a covenant. Id.

96. A recital that the tract conveyed contains a certain number of acres is a mere representation. Corrough v. Hamill, 110 Mo. App. 53, 84 S. W. 96.

97. A provision that the conveyance is subject to any existing lien for street work does not render the grantee liable to the holder of a lien for street improvements. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

tee will not operate to diminish the estate conveyed to him,[4] nor affect the conveyance to the person named as one to him as an individual.[5] As a general rule, children designated by name or otherwise definitely described as individuals take as individuals and not as a class,[6] and the fact that real estate can be conveyed in trust so as to let in after-born children does not alter the general rule of construction where there is no such provision,[7] but if it appears that though named the persons were in the mind of the grantor as a class, the intention will prevail.[8] In order that "heirs" may be construed "children," it must clearly and positively appear that it was so used,[9] but if the intention to so use it is apparent it will be given that construction.[10] Extrinsic evidence is not admissible to show that the term was used in that sense.[11] Persons manifestly not intended to be grantees acquire no interest.[12] "Heirs at law" construed to mean those in being at the death of the ancestor and not those surviving at the date of the distribution of a trust estate, postponed because of certain beneficiaries.[13] A deed to "the estate of E., deceased, his heirs and assigns," is a deed to E's estate,[14] and is not void for want of a grantee.[15] A deed to a husband and wife conveys the property to them as a community.[16] A deed intended as a joint gift to husband and wife invests each with an undivided half.[17] A deed from husband to wife makes the land her separate property whether or not the deed so specifically declares.[18] A deed from husband to wife for life, remainder to her children, inures to the benefit of children by a subsequent marriage.[19] Conveyances under an assumed name are valid,[20] and the mere fact that a purchaser uses the name of another person as grantee does not work a forfeiture of his title

98. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

99. See 3 C. L. 1063. See Alteration of Instruments, 5 C. L. 110.

1. In order that evidence of an alteration be admissible it must appear to have been made prior to execution. Gunkel v. Seiberth [Ky.] 85 S. W. 733. There is no presumption that after delivery the grantor has access to a deed, so as to make indorsements thereon. McBrayer v. Walker [Ga.] 50 S. E. 95.

2. The word "fourth" over the word "quarter." Campbell v. Bates [Ala.] 39 So. 144.

3. See 3 C. L. 1064.

4. To "A, trustee," gives him a fee. Title Guarantee & Trust Co. v. Fallon, 101 App. Div. 187, 91 N. Y. S. 497.

5. To "E. H. P., vice-president of the National Bank of the Republic.". Greenfield v. Stout [Ga.] 50 S. E. 111.

6. Stiles v. Cummings [Ga.] 50 S. E. 484, and cases cited. A deed in trust for a wife and children conveys nothing to after-born children. Plant v. Plant [Ga.] 50 S. E. 961.

7. Plant v. Plant [Ga.] 50 S. E. 961. Deed of trust construed and held not to operate to let in after-born children. Id. Unborn children not parties to a deed may take under it. Hall v. Wright [Ky.] 87 S. W. 1129.

8. Mere designation by name is not conclusive that they were dealt with as individuals. Stiles v. Cummings [Ga.] 50 S. E. 484. Deed to a wife and children construed to include after-born children. Id.

9. Lamb v. Medsker [Ind. App.] 74 N. E. 1012. "Children" does not mean "heirs" within the rule in Shelley's Case unless such was clearly the intention. Hubbird v. Goin [C. C. A.] 137 F. 822. A deed to H. and W. for a home for them and the heirs of their body with power to sell and reinvest is a deed to H. and W., and their children need not join in the deed. Louisville & A. R. Co. v. Horn, 26 Ky. L. R. 829, 82 S. W. 567.

10. "To A and heirs of her body which she has or may have by B" conveys to A and her children as co-tenants. Reeves v. Cook [S. C.] 51 S. E. 93. A deed to A, a widow, her husband and her heirs and to the heirs of the party of the second part gives the widow and her second husband an estate by the entirety in a portion of the premises, the other portion to the children of the wife by her first husband. Fullagar v. Stockdale [Mich.] 101 N. W. 576.

11. Edins v. Murphree [Ala.] 38 So. 639.

12. Where the estate is limited to the children of a life tenant living at her death, heirs of a child of the life tenant who died prior to her, acquire no interest. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

13. Merrill v. Preston, 187 Mass. 197, 72 N. E. 941.

14, 15. McKee v. Ellis [Tex. Civ. App.] 83 S. W. 880.

16, 17. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

18. Jones v. Humphreys [Tex. Civ. App.] 88 S. W. 403.

19. Pettit v. Norman's Committee, 26 Ky. L. R. 860, 82 S. W. 622.

20. Where a father uses his infant son's name, by which he is known, in purchasing and selling land, the fact that persons dealing with him know the son, who is but four years old, does not affect their title. Chapman v. Tyson [Wash.] 81 P. 1066.

nor create an estate in the person named,[21] and the fact that he uses such name in conveying the property does not constitute forgery.[22] Where father and son have the same name, a deed not designating which is intended is presumed to run to the father.[23] The construction of an ambiguous name is for the court.[24]

Description of property conveyed.[25]—Lines of a survey named in a deed stand as the boundaries despite irregularities and inequalities produced.[26] The construction placed on the description by the parties is the one to be given effect.[27] In construing a doubtful description the position of the contracting parties and the circumstances under which they acted will be considered,[28] but acts of the parties cannot be received in aid of construction of an ambiguous or indefinite deed.[29] Where there are two inconsistent descriptions, the grantee may select the one most favorable to him.[30] A description of a definite quantity of land in the corner of a tract will ordinarily be held to mean a parcel containing that quantity according to square measure,[31] but not where other parts of the description show that a particular tract or lot rather than a certain quantity or acreage was intended.[32] Where land is conveyed with reference to a plat, the plat, its notes and lines, are controlling as to description.[33] But such reference does not preclude evidence of where the lines actually fell on the ground.[34] The boundaries of lots conveyed by reference to a plat are as a general rule limited to those designated by the plat;[35] but the general rule will yield to the clearly shown intention of the parties at variance therewith,[36] and the intent which is most certain will prevail over one which is indefinite or left to speculation or conjecture.[37] Parol evidence is admissible to fit the description to the premises[38] or to explain a latent ambiguity in the description,[39]

21. Where a father took title in the name of his son. Chapman v. Tyson [Wash.] 81 P. 1066.

22, 23. Chapman v. Tyson [Wash.] 81 P. 1066.

24. Where it is possible to read the name of a grantee as either "Mack" or "Mock" it is for the court to say which was intended. Fenderson v. Missouri Tie & Timber Co., 104 Mo. App. 290, 78 S. W. 819. Evidence insufficient to show that the name of a corporate grantee was a misnomer only and that another corporation was intended. Cobb v. Bryan [Tex. Civ. App.] 83 S. W. 387.

25. See 3 C. L. 1064.

26. Adams v. Clapp, 99 Me. 169, 58 A. 1043. A description referring to a strip of land 26 feet wide to be used for a right of way controls the entire length of the way. Rafferty v. Anderson, 94 N. Y. S. 927.

27. Webb v. Walters [Tex. Civ. App.] 13 Tex. Ct. Rep. 376, 87 S. W. 1051. Where a deed contains no description by which to determine the real location of the land conveyed except that it includes a certain house, resort must be had to the acts and conduct of the parties at the time of and following the transaction to determine whether a certain tract adjoining was included. Carney v. Hennessey, 77 Conn. 577, 60 A. 129.

28. Abercrombie v. Simmons [Kan.] 81 P. 208.

29. Kruse v. Koelzer [Wis.] 102 N. W. 1072. "A beach lying on the south side of the island at a place called Rockaway" indicates a description of a small tract and not the whole of Hempstead Bay on Long Island. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76.

30. McBride v. Burns [Tex. Civ. App.] 13 Tex. Ct. Rep. 72, 88 S. W. 394. Description held to embrace a certain tract. Off v. Heinrichs [Wis.] 102 N. W. 904.

31. Mayberry v. Beck [Kan.] 81 P. 191.

32. "Acre" held to refer to a parcel containing three-fifths of an acre, usually referred to as an acre. Mayberry v. Beck [Kan.] 81 P. 191.

33. Neumeister v. Goddard [Wis.] 103 N. W. 241; Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545.

34. Neumeister v. Goddard [Wis.] 103 N. W. 241.

35, 36, 37. Owsley v. Johnson [Minn.] 103 N. W. 903.

38. Ward v. Gay, 137 N. C. 397, 49 S. E. 884. To fit the description to the land. Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591. Where parol evidence is required to fit the description to the premises, the question as to what was conveyed is for the jury. Ward v. Gay, 137 N. C. 397, 49 S. E. 884.

39. Evidence of the situation and condition of the land and the circumstances under which the conveyance was made. Mayberry v. Beck [Kan.] 81 P. 191. An ambiguous description apparently including an adjacent tract is not conclusive as against an adjacent owner who also claims it but it casts the burden on the latter to prove that the description in his deed includes it. Carney v. Hennessey, 77 Conn. 577, 60 A. 129.

40. Kruse v. Koelzer [Wis.] 102 N. W. 1072.

but not to vary or explain the terms.[40] Uncertainty in the description of an exception does not affect the validity of the deed.[41]

Quantum of estate conveyed.[42]—A deed is presumed to pass the greatest estate consistent with the terms employed,[43] and, unless a contrary intention appears,[44] all of the estate of the grantor is presumed to pass,[45] and a recital that the grantor has a certain interest does not limit the conveyance to such interest if he has a greater one;[46] but a subsequently acquired interest does not pass[47] if the deed purports to convey only the interest the grantor then has.[48] A repugnant clause will not limit the estate granted.[49] At common law the word "heirs" is necessary to the creation of an estate in fee.[50] A confirmatory deed passes no estate not included in the original.[51] If a vested remainder be limited on a particular estate

41. Loyd v. Oates [Ala.] 38 So. 1022. "Eighty acres heretofore sold to W" is a sufficient description of an exception; it can be made certain by parol. Id.

42. See 3 C. L. 1065.

43. A deed containing apt words of conveyance and full covenants and purporting to convey all the interest of the grantor with directions to convey the land in fee and apply the proceeds to the payment of certain debts, the balance to be returned to the grantor, conveys the fee. Thompson v. Price, 37 Wash. 394, 79 P. 951. Deed construed and held to convey a fee. Kirkman v. Wadsworth, 137 N. C. 453, 49 S. E. 962. Deed held to convey an estate in fee free from trusts or conditions. Langford v. Searcy College [Ark.] 83 S. W. 944. A deed of minerals passes an estate in fee. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622. A deed reserving a life estate and power in the grantor to recall and destroy it delivered to a third person to be delivered to the grantee at the grantor's death passes a present interest subject to be defeated. Nuckols v. Stone [Ky.] 87 S. W. 799. A description as "90 acres more or less, being the north half of a certain lot" conveys one-half the lot though it contains over 200 acres. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. A description "The property known as the J. J. Martin plantation embracing," etc., conveys a portion of such plantation not specifically described. Martin v. Urquhart [Ark.] 82 S. W. 835.

44. A conveyance of a contingent remainder to revert to the grantor in case the contingency does not happen does not divest the grantor of the fee of such remainder. Pinkney v. Weaver, 216 Ill. 185, 74 N. E. 714. Conveyance of use of income of land and right to use principal for comfort or pleasure, but not to devise it, so that land should descend at her death as under will of testator who was grantor's source of title, gave life estate and power, not fee to grantee. Hinn v. Gersten, 122 Wis. 222, 99 N. W. 338. Deed construed and held to pass only such land as the grantor was in possession of at the time it was executed. Person v. Chambliss' Adm'r [Miss.] 38 So. 286. A deed to a city for street purposes does not preclude the grantor from maintaining an action for damages to his abutting property which he had no reason to apprehend from the improvement of the street. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323. Ky. St. 1903, § 2342, providing that a deed without words of inheritance is deemed to pass such estate as the grantor has unless a different intent appears does not apply where the deed indicates how the property is to pass. Hall v. Wright [Ky.] 87 S. W. 1129. A lease renewable forever, containing a covenant to pay rent, is not converted into a conveyance of a life estate by the death of the lessee. Broadwell v. Banks, 184 F. 470. Description in a deed of one's interest in an estate held not to include the family allowance pending administration. De Leonis v. Walsh, 145 Cal. 199, 78 P. 637.

45. Deed for a valuable and presumptively commensurable consideration though granting the land for certain purposes and no other shows that the grantor was not the donor of a charity and in the absence of a reservation there is no reverter. Murphy v. Metz [Ky.] 85 S. W. 1097. A life tenant who pays off a mortgage and then executes a warranty deed of the premises conveys her life estate and lien acquired by virtue of such payment. Keller v. Fenske, 123 Wis. 435, 101 N. W. 1055. The grantee of land over which a right of way has been previously granted acquires the fee of the way on termination of the easement. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

46. A statement that the grantor's interest is a one-half interest. Costello v. Graham [Ariz.] 80 P. 336.

47. A deed of all the grantor's property does not pass property subsequently acquired. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476.

48. Though a deed passes an after-acquired title where a deed conveyed one's interest under a lode mining location, it did not pass the interest under a placer location acquired after abandonment of the lode location. Wells v. Chase [Ark.] 88 S. W. 1030.

49. A grant in fee simple followed by a repugnant clause that the grantee shall not mortgage or dispose of the property creates an estate in fee. Kessner v. Phillips [Mo.] 88 S. W. 66.

50. In Ohio. Lee v. Scott, 5 Ohio C. C. (N. S.) 369.

51. Does not pass title to a parcel of land acquired after the original deed was lost and before the execution of the confirmatory one. Scaplen v. Blanchard, 187 Mass. 73, 72 N. E. 346.

with a condition that if the remainderman dies without heirs his estate to vest in a third person, such remainderman takes a defeasible fee conditioned on his dying without heirs during the continuance of the particular estate.[52] A grantor in an executory conveyance retains the legal title.[53] A conveyance for a certain purpose does not carry the right to use the premises for any other purpose,[54] but does pass a right of use consistent with the use granted,[55] and a conveyance of a certain interest does not pass any other estate[56] but is presumed to carry everything essential to the enjoyment of the thing granted.[57] A grant of standing timber to be removed within a specified time creates a license.[58] The grant of a right of way ordinarily passes only an easement.[59] A quitclaim deed passes such interest as the grantor has,[60] together with a subsequently acquired interest included in the estate he purported to convey.[61] A conveyance bounded by a road takes the fee to the center thereof,[62] but if by one line of the road, the grantor retains the fee.[63] The grantee, however, acquires a right to have the street remain open[64] but not an easement in an unopened portion of the street upon which adjoining land of the

52. Gibson v. Thompson, 26 Ky. L. R. 1085, 83 S. W. 138. An estate to one for life, remainder to another if alive at the death of the life tenant, otherwise over, gives the latter a defeasible fee in remainder conditional on his outliving the life tenant. Colburn v. Gividen [Ky.] 85 S. W. 168.

53. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413.

54. Provision in a deed for a home for the life tenant's children construed to mean an abode merely and not support. Stiles v. Cummings [Ga.] 50 S. E. 484; Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638.

55. A grant of timber to be used in constructing a railroad authorizes the use of timber to construct a tramway and chute where a railway is impracticable. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124.

56. A deed of "bridge and masonry" does not pass title to land on which the abutments rest. Nicolai v. Baltimore [Md.] 60 A. 627. Where a grant of a right of way excepts a certain kind of timber from what might be used in the construction of the railroad such timber cut on the right of way cannot be used. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124.

57. A grant of a right of way. Atchison, Topeka & Santa Fe R. Co. v. Jones, 110 Ill. App. 626. A conveyance of mineral rights with authority to use timber authorizes the cutting of timber to build a platform for a crusher and a millhouse. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124.

58. An instrument conveying all the timber and logs suitable to be manufactured into cross ties, the right to remove such timber to expire in 12 months, conveys only a license. Johnson v. Truitt [Ga.] 50 S. E. 135. Where an instrument conveying standing timber and a license to remove it also provided for a reverter of such timber as was not removed within the period prescribed, "timber" does not mean that cut. Id.

59. Only the interest for which the land is to be used with a reverter to the abutting owner. Abercrombie v. Simmons [Kan.] 81 P. 208. Where a grantor "relinquishes" a right of way only an easement passes. Not the fee. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16. A grant of a right to a corporation and its successors to go on land and construct an abutment for a dam and to keep the same in repair is the grant of an **easement in fee.** Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. Only the **perpetual use.** Walker v. Illinois Cent. R. Co., 215 Ill. 610, 74 N. E. 812.

60. A grantee in a quitclaim deed from a life tenant who also has a quitclaim from a part of the remaindermen acquires an estate for life and the interest of the remaindermen. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747. Quitclaim deed covering all the interest of an heir in the real estate of his ancestor carries such additional interest as the grantor may have by reason of advancements to other heirs. Dow v. Dow, 3 Ohio N. P. (N. S.) 125.

61. If a grantor in a quitclaim deed subsequently acquires an instrument which evidences the title he purported to convey, it inures to the benefit of his grantee. Ford v. Axelson [Neb.] 103 N. W. 1039. Where quitclaim deeds are given for the sole purpose of effecting a partition, an exception is made to the general rule as to after-acquired title in real estate, and such deeds will be treated as containing an implied covenant that the grantor owns the premises conveyed. Chambers v. Wilcox, 3 Ohio N. P. (N. S.) 269.

62. Mitchell v. Einstein, 94 N. Y. S. 210. Deed from abutting owners for a road held to convey the fee. Id. In the absence of a reservation a deed of land abutting on a public way passes the fee to the center of it, though not included in the description. Hess v. Kenney [N. J. Eq.] 61 A. 464.

63. Mitchell v. Einstein, 94 N. Y. S. 210. Evidence held to show that a deed of a lot according to a plat did not include the street on which it abutted. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

64. A grantee who purchases with reference to a plat acquires the **right to have a street remain open,** which is not divested by the vacation of the street by the municipal

grantor abuts.[65] A deed will pass all the estate which the granting clause purports to convey and not merely what the grantor meant to convey,[66] also including all appurtenant rights,[67] fixtures,[68] and unmatured crops,[69] but not a mere chose in action due the grantor.[70] Under the rule in Shelley's case, a deed to one for life, remainder to his heirs, creates a fee in the first taker,[71] otherwise, however, where the rule has been abolished.[72] In order to warrant the application of this rule, the word "heirs" must be used.[73] It is generally provided by statute that deeds creating estates tail pass a fee to the first taker.[74] An assumption of liens creates a charge on the land.[75] Parol evidence is admissible to identify the subject-matter of an assumption clause.[76] Parol evidence is admissible to show a holding in trust under a deed in fee simple.[77]

A reservation[78] is limited to some part of the estate which would otherwise pass,[79] and an exception is a part excepted from the general terms of that which is granted.[80] The terms are often used interchangeably,[81] and the mere fact that what is excepted is mentioned as reserved will not defeat its operation as an exception.[82] A reservation contained in the habendum is as enforceable as if set out in the granting clause.[83] Both are construed strictly[84] and most strongly against the

authorities. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. It is an appurtenant distinct from the public right of passage. Id.

65. A deed of land abutting on a street opened fifty feet wide but plotted sixty gives the grantee a fee to the ten feet but no easement in the corresponding ten feet of adjoining land of the grantor. Fitzell v. Philadelphia, 211 Pa. 1, 60 A. 323.

66. A deed of land with all the privileges and appurtenances "meaning to convey only a right of way to take lime from the premises" conveys a fee with a reserved right to take lime. Shepherd Co. v. Shibles [Me.] 61 A. 700.

67. **Drain** leading across adjoining land owned by the grantor. Hess v. Kenney [N. J. Eq.] 61 A. 464. A **reservation of a heritable interest** is an appurtenant to the land and passes by a conveyance of it. Restrictive covenant for the benefit of heirs. Hemsley v. Marlborough House Co. [N. J. Err. & App.] 61 A. 455. An **easement** appurtenant to a water power plant passes with a grant of the dominant estate without special mention. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337.

68. **Building material** for a partially constructed building, lying on the lot conveyed and an adjoining one, passes with a conveyance of the lot on which the building is being erected. Byrne v. Werner [Mich.] 101 N. W. 555. Moore, J. dissenting.

69. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730. Crops raised on the land by the grantor after executing a voluntary deed belong to the grantee. Chancellor v. Teel [Ala.] 37 So. 665.

70. Demand against a traction company for the proportionate cost of paving a street which by franchise it was required to pay abutting property owners. Danville St. R. & Light Co. v. Mater, 116 Ill. App. 519.

71. Doyle v. Andis [Iowa] 102 N. W. 177. The rule in Shelley's Case is part of the common law of Iowa. Id. Sherwin and Weaver dissenting. A deed to A for life then to her heirs creates a fee in A under the rule in Shelley's Case. Wilson v. Rusk [Iowa] 103 N. W. 204. A deed to one and her bodily heirs gives a fee to the first taker unless it appears from the deed that the term "bodily heirs" was used as "children." Edins v. Murphree [Ala.] 38 So. 639. Estate to "A" and her heirs for life, then to her bodily heirs, creates a fee in A under the rule in Shelley's Case. Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735.

72. Comp. Laws, § 8810, abrogates the rule in Shelley's Case. Fullagar v. Stockdale [Mich.] 101 N. W. 576. Code § 1329, providing that a limitation to the heirs of a living person shall be construed to be to his children, does not apply when a precedent estate is given to such living person. Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735.

73. If "children" is used it is deemed a word of purchase. Brown v. Brown, 125 Iowa, 218, 101 N. W. 81.

74. A deed to A and B and the survivor of them and to their legitimate heirs is an estate tail converted by statute into a fee. Lamb v. Medsker [Ind App.] 74 N. E. 1012. A deed to the wife of one living and her heirs by him specially entails the land. Schrecongost v. West, 210 Pa. 7, 59 A. 269. By statute this amounts to a fee. Id.

75, 76. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

77. Mee v. Mee, 113 Tenn. 453, 82 S. W. 830.

78. See 3 C. L. 1067.

79. Stadler v. Missouri River Power Co., [C. C. A.] 139 F. 305. Oil and gas are a part of the real estate and may be reserved. Preston v. White [W. Va.] 50 S. E. 236.

80, 81. Elsea v. Adkins [Ind.] 74 N. E. 242.

82. "The grantor reserves the well on or near the east end of the lot" is an exception. Elsea v. Adkins [Ind.] 74 N. E. 242. A reservation of oil and gas has the same effect as an exception of those properties. Preston v. White [W. Va.] 50 S. E. 236.

83. Jones v. American Ass'n [Ky.] 86 S. W. 1111.

84. A reservation of a right to maintain

grantor,[85] but if valid include, as an incident, whatever is necessary to enable the grantor to enjoy it.[86] In construing a reservation, the surrounding circumstances will be considered.[87] Parol evidence is admissible to identify the thing excepted or reserved.[88] In order to render exceptions a dedication to public use, it is not necessary that they should be expressly excepted for such purpose.[89]

Conditions and restrictions.[90]—Conditions subsequent[91] are not favored and must be created by express terms,[92] and if it is doubtful whether terms used im-

a two-story building over an alleyway cannot be extended to include a right to construct a third story on the building. Gilbert v. White, 23 Pa. Super. Ct. 187. An intention to reserve a right of way out of land conveyed cannot establish a way inconsistent with the deed by a reservation over land which has no existence in fact. Attempted reservation of a way over land occupied by a building. O'Neil v. Potter [Mich.] 12 Det. Leg. N. 337, 104 N. W. 396. A reservation of all mines and minerals and the right to dig and carry the same away does not reserve a right of open quarrying and blasting. Brady v. Smith, 181 N. Y. 178, 73 N. E. 963.

85. Stadfer v. Missouri River Power Co. [C. C. A.] 139 F. 305. An exception in the covenant against incumbrances cannot be construed as a reservation from the grant. Wendall v. Fisher, 187 Mass. 81, 72 N. E. 322. On the face of a deed of all the property of a corporation held that the grantor had no beneficial interest in a reservation. Pinchback v. Bessemer Min. & Mfg. Co., 137 N. C. 171, 49 S. E. 106.

86. Where a well is excepted. Elsea v. Adkins [Ind.] 74 N. E. 242. An exception of all of the granite on the land reserves not only that which is exposed at the time the deed is made but all that mineral, regardless of the right to disturb the surface to obtain it, and when from washing away or other causes it becomes exposed, the owner has a right to remove it. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. But only exposed granite can be recovered at the time action is brought. Id.

87. A reservation of "coal banks" made at a time when the country was sparsely settled and no mercantile development of coal mines, reserves veins of coal in the ground and not merely banks which had been opened. Jones v. American Ass'n [Ky.] 86 S. W. 1111.

88. "The well on or near the east end of the lot" held not void. Elsea v. Adkins [Ind.] 74 N. E. 242.

89. The question of dedication being one of fact is to be determined not only from the deeds but from the acts of the parties. Dougan v. Greenwich, 77 Conn. 444, 59 A. 505. An exception for a landing place and highway indicates that the landing place was for public use. Id.

90. See 3 C. L. 1068.

NOTE: Where the performance of the condition constitutes the consideration for the grant or devise, the condition will ordinarily be held to be precedent. Markham v. Hufford, 123 Mich. 505, 82 N. W. 222, 81 Am. St. Rep. 222, 48 L. R. A. 580. Hence, a devise to A on condition that his mother releases the testator's estate from a specified liability (Howard v. Wheatley, 15 Lea [Tenn.] 607, or to B on condition that he assist the testator in certain pending litigation (Cannon v. Apperson, 14 Lea [Tenn.] 553), or a bequest to C to be paid him in two years providing he be a reformed man (Markham v. Hufford, 123 Mich. 505, 82 N. W. 222, 81 Am. St. Rep. 222, 48 L. R. A. 580.), is upon condition precedent. In some instances, as in the conveyance of property expressed to be on condition of the payment of the balance of the purchase price, the instrument may be considered as in the nature of a mortgage or as an attempt to reserve and give notice of a vendor's lien, and hence as operating as a conveyance from the moment of execution. Sheppard v. Thomas, 26 Ark. 617; Creswell v. Lawson, 7 Gill & J. & J. [Md.] 227. A like result follows where the condition is for the doing of certain acts after the instrument becomes operative, as where a testator makes a devise conditional on the support of certain persons after his death. Woods v. Woods, 44 N. C. (Busb.) 290; Whithead v. Thompson, 79 N. C. 450; Misenheimer v. Sifford, 94 N. C. 592.—From note to Brennan v. Brennan [Mass.] 102 Am. St. Rep. 368.

91. A provision in a deed granting land to a corporation, reserving to the grantor the right to reacquire the land if the corporation became insolvent, gives the grantor such right if the insolvency occurs. Smith v. Ellis [Tex. Civ. App.] 87 S. W. 856. A provision that the grantee shall erect and maintain a fence around the granted premises (Randall v. Wentworth [Me.] 60 A. 871), or a provision that if the grantee fails to support the grantor the deed shall be void, creates a condition subsequent (Helms v. Helms, 137 N. C. 206, 49 S. E. 110); but a grantee's covenant to pay taxes (Burgson v. Jacobson [Wis.] 102 N. W. 563), or an agreement by the grantee of a right of way to furnish the grantor an annual pass does not (Hasbrouck v. New Paltz, H. & P. Traction Co., 98 App. Div. 563, 90 N. Y. S. 977). An oral agreement by the grantee to pay off a mortgage does not entitle the grantor to cancellation on the grantee's failure to pay. Thurmond v. Thurmond [Tex. Civ. App.] 87 S. W. 878. Failure of grantees in a voluntary conveyance, to pay one-half the cost of erecting a building on the premises as they agreed to do, does not invalidate the deed. Clark v. Hindman [Or.] 79 P. 56.

92. Burgson v. Jacobson [Wis.] 102 N. W. 563. The words "to be used as a church location" held merely declaratory and not to create a condition subsequent. Downen v. Rayburn, 214 Ill. 342, 73 N. E. 864.

port a covenant or condition they will be construed as creating a covenant.[93] Where a clause of reverter is found, undertakings of the grantee will be construed as conditions,[94] otherwise as covenants.[95] A condition against alienation without the grantor's consent and for the payment to the grantor of a monthly stipend during his life[96] or against the sale of intoxicants on the premises[97] is valid. The obligation in a deed on condition may be assignable.[98] Conditions are deemed broken only when the terms are substantially violated.[99] An entry by the grantor on breach of a condition subsequent is necessary in order to defeat the estate of the grantee.[1] Only the grantor or those in privity of blood with him can enter for breach of condition subsequent,[2] unless the estate limited is an easement.[3] A right to enforce forfeiture may be waived,[4] but after a reverter because of a breach, title cannot be revived by subsequent compliance with the conditions.[5]

Restrictions[6] are strictly construed[7] and all presumptions resolved in favor of a free use of the property.[8]

Extinguishment of rights.[9]—Title is not divested by the return[10] or loss or failure to record a deed,[11] nor will the surrender or destruction of it operate to reinvest title in the grantor.[12]

93. So as to avoid forfeiture. Minard v. Delaware, L. & W. R. Co., 139 F. 60.

94, 95. Minard v. Delaware, L. & W. R. Co., 139 F. 60.

96. Polzin v. Polzin, 110 Ill. App. 187.

97. A condition against the sale or manufacture on the premises of intoxicating liquor is valid. Fanning's License, 23 Pa. Super. Ct. 622.

98. The obligation in a conveyance in consideration of future support may be assignable where such construction is placed on it by the parties and it does not involve personal services. Hurley v. McCallister [S. D.] 103 N. W. 644.

99. The person for whose benefit it is created has the burden of proving a violation. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638. Even if the words in a deed "for the use of a school and no other use" constitute a condition subsequent, forfeiture is not worked by mere nonuser of the premises for two and one-half years. Buck v. Macon [Miss.] 37 So. 460. The making of a free road out of an easement acquired for a toll road does not constitute a relinquishment of rights in the easement. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16. A grantee has no right to declare a forfeiture of a leasehold for breach of conditions occurring prior to the conveyance to him. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622. Evidence held to show a breach of condition to maintain the grantor. Caudill v. Lemaster, 26 Ky. L. R. 1010, 82 S. W. 1009. Where a father conveys to his son in consideration of future support and leaves the premises after a quarrel provoked by himself, he is entitled to recover only reasonable expenditures made and reasonable provision for the future. Woolcott v. Woolcott [Mich.] 101 N. W. 218. Evidence that boys occasionally fished from a dock is not a compliance with a condition within the contemplation of the parties that a dock should be maintained for the use of the town. Ellis v. Pelham, 94 N. Y. S. 103.

1. Randall v. Wentworth [Me.] 60 A. 871. Failure to perform a condition subsequent entitles the grantor to re-enter for the purpose of revesting himself with title. Id.

2. Helms v. Helms, 137 N. C. 206, 49 S. E. 110; Mitchell v. Einstein, 94 N. Y. S. 210.

3. Where the estate limited is an easement, the right of entry on breach is assignable and passes with a conveyance of the land. Ellis v. Pelham, 94 N. Y. S. 103.

4. Where a voluntary conveyance bound the grantee to pay off incumbrances and pay an annuity to the grantor, an acceptance of the annuity by the grantor after he was entitled to enforce forfeiture for breach of the other condition, amounts to a waiver of rights arising therefrom. Hurley v. McCallister [S. D.] 103 N. W. 644.

5. Ellis v. Pelham, 94 N. Y. S. 103.

6. See 3 C. L. 1069. See, also, Buildings and Building Restrictions, 5 C. L. 455.

7. A reference to a statute establishing a building line will not impose a restriction if the land is without the district to which the statute is applicable. Title Guarantee & Trust Co. v. Fallon, 101 App. Div. 187, 91 N. Y. S. 497. A restriction against the erection of more than one building on a lot to cost not less than $2,500 does not limit the kind of building that may be erected. Peck v. Hartshorn [Mass.] 75 N. E. 133.

8. The words "as above described" held to refer to the description only and not to a clause "to be used as a church location" and, therefore, did not limit the use. Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364.

9. See 3 C. L. 1069.

10. Clark v. Harper, 215 Ill. 24, 74 N. E. 61; McCrum v. McCrum [Iowa] 103 N. W. 771. Redelivered so the grantor could have it recorded. Blackford v. Olmstead [Mich.] 12 Det. Leg. N. 287, 104 N. W. 47.

11. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

12. Clark v. Harper, 215 Ill. 24, 74 N. E. 61. The destruction of a deed will not operate to divest title acquired by it. Voiers v. Atkins Bros. [La.] 36 So. 974.

DEFAULTS.[13]

§ 1. *Elements and indicia of defaults.*[14]—Strictly speaking, a default only lies where the defendant has failed to enter an appearance in the case;[15] but the phrase is now often used, generally as a result of statutory enactments, as including failure to plead[16] or failure to appear at the trial.[17] There must be valid process, served[18] and returned[19] in a legal manner; but the return being irregular or incorrect, it may, in certain cases, be amended[20] or contradicted.[21] The process must designate the defendant in such manner that he may have notice that the action is against him;[22] but the service being personal, the weight of American authority is to the effect that a defendant sued in the wrong name is bound by a default judgment;[23] but a defect in this regard may be waived.[24] It is essential that plaintiff's pleadings be filed in time[25] and authorize a right of recovery.[26] No answer

13. See Confession of Judgment, 5 C. L. 608, and Judgments, 4 C. L. 287. Taking bills as confesed in equity, see Fletcher Eq. Pl. & Pr. §§ 140-165.

14. See 3 C. L. 1069.

15. Defendant having appeared and filed an answer, a default cannot be entered, though he fails to appear and take part in the trial. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498.

NOTE. What constitutes a default: Except where the nomenclature of the common law has been altered by statute, a default, strictly speaking, can only be rendered where the defendant has failed to enter an appearance in the action. 6 Enc. Pl. & Pr. 59. Defendant having entered a general appearance but failed to plead, the technical form of the judgment is by nihil dicit and not by default. 6 Enc. Pl. & Pr. 59. As said by one court: "There is a plain difference in meaning between default and absence, default signifying that there has not been an appearance at any stage of the action by the party in default, while absence means that the party was not present at a particular time, naming it." Covart v. Haskins, 39 Kan. 574. "There is, however, no material distinction between a judgment by nihil dicit and a judgment by default in their effect, operation and the principles applicable thereto. * * * While the rendition of a judgment by default is technically error after the appearance of the defendant, it will not suffice to authorize a reversal of the judgment." 6 Enc. Pl. & Pr. 60.

16. See post, this section.

17. A case being retired from the docket, judgment cannot be entered in the absence of notice and an opportunity to be heard. King v. Davis, 137 F. 222.

18. Cooke v. Haungs, 113 Ill. App. 501.

New York: Must be personal. Code Civ. Proc. § 426, subd. 4. O'Connell v. Gallagher, 93 N. Y. S. 643. Affidavits held to show no personal service. Id. The discovery of a summons and its delivery to defendant by his employe is not such personal service. Id.

19. King v. Davis, 137 F. 198; Pennsylvania Casualty Co. v. Thompson [Ga.] 51 S. E. 314. Under Code 1887, § 5, cl. 8, a notice of judgment served on the 21st and returned on the 26th of the month is not returned within five days as required by § 3211, and judgment by default based thereon is invalid. Swift & Co. v. Wood, 103 Va. 494, 49 S. E. 643. Sunday is to be included in such five days. Id.

20. King v. Davis, 137 F. 198.

21. In Illinois, while an officer's return cannot be contradicted so as to defeat jurisdiction, yet it may be done to excuse a default. Cooke v. Haungs, 113 Ill. App. 501.

22. Naming plaintiff by a name other than his own, and which was not a customary designation of him, a default judgment rendered thereon is a nullity. Durst v. Ernst, 45 Misc. 627, 91 N. Y. S. 13.

23. King v. Davis, 137 F. 198. But see Durst v. Ernst, 45 Misc. 627, 91 N. Y. S. 13, supra.

24. Where word "company" was omitted from corporate name in process but default judgment was entered against it in its true name, whereupon it sued out a writ of error in the name under which the process was served, it could not attach the judgment on the theory of a misnomer. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032. By permitting default to stand and judgment to be entered, an entire lack of identity between the name of the plaintiff as contained in the process, default and judgment, and as contained in the declaration, will be cured. Edwards v. Warner, 111 Ill. App. 32.

25. Where petition was not filed within the time limited by the court, a default for failure to answer is improperly granted. Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518.

26. Must allege a right of recovery. Chicago v. M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. Pennsylvania procedure act of May 25, 1887 (P. L. 271), authorizing a default for failure to file an affidavit of defense, does not authorize a default where . plain-

being filed, a default may be entered,[27] but the full time to plead,[28] including extensions,[29] must have expired. When necessary,[30] failure to file a pleading after appearance may authorize what is sometimes termed a default,[31] but a defect in this regard may be waived by going to trial.[32] In Illinois so long as defendant's answer is on file, he cannot be deemed in default.[33]

§ 2. *Procedure on default; taking judgment.*[34]—Before a case can be considered in default the appearance docket must be called, and the entry "in default" made.[35] Where on the day such entry was made the judge defaced it by passing his pen through the entry, it, in the absence of proof to the contrary, will be treated as the correction of an inadvertence, and not as an "in default" judgment.[36] Under the statutes of some states it is unnecessary for plaintiff to make out his case by proof;[37] but in equity he is not entitled to judgment for default of answer, unless he establish his right to the relief sought to the satisfaction of the chancellor.[38] Under the present Virginia statutes no rule to plead is required in ejectment before a default judgment can be entered.[39] The relief granted by the judgment must not exceed that demanded in the complaint,[40] and in some states must not include relief not specified in or clearly contemplated by the notice contained in the summons.[41] The judgment is not rendered void by failure to file a paper not a part of the judg-

tiff's statement of claim is insufficient on its face. United States v. Bell [C. C. A.] 135 F. 336.

27. Under Code, §§ 385, 386, in an action under Laws 1893, p. 37, c. 6, to determine conflicting claims to real estate, failure of defendant to answer at the return term entitles plaintiff to a final judgment by default in accordance with the facts stated in the complaint, without injury or proof of such facts. Junge v. McKnight, 137 N. C. 285, 49 S. E. 474, rvg. 47 S. E. 452.

28. Garnishee having until first day of second term to answer, a default should not be entered before such date. Averback v. Spivey [Ga.] 49 S. E. 748.

29. Where answer was served before order vacating extension was signed and entered, held, no default should be taken. De Pallandt v. Flynn, 93 N. Y. S. 678.

30. Where, after the overruling of a demurrer to the complaint, there is no reason for entering a default other than that defendant did not file an answer as provided by the statute of 1872, such an order is unnecessary and improper. Hourigan v. Norwich, 77 Conn. 358, 59 A. 487.

31. Under court rule 8 (71 N. H. 676), held that, where defendant failed to file a plea up to the day of trial, more than 90 days after the entry of the action, its failure to plead specially did not amount to a plea of the general issue, at least until the trial had actually begun, and hence defendant's attorney having withdrawn on the court's denial of a continuance, a default was properly entered. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011. An interpleader voluntarily appearing and accepting service of a copy of the supplemental complaint, but failing to plead thereto within six days, and failing to obtain an extension of time to plead, a default may be entered against him. Greenblatt v. Mendelsohn, 92 N. Y. S. 963. Under Mansf. Dig. § 5043, the answer failing to set up a set-off or counterclaim, judgment cannot be entered against plaintiff on refusal to plead further. Madden v. Anderson [Ind. T.] 82 S. W. 904. [This is not strictly a "default"; see note, ante, this section. Ed.]

32. Held to waive failure to file an answer. Gregory v. Bowlsby, 126 Iowa, 589, 102 N. W. 517.

33. Knopf v. Corcoran, 112 Ill. App. 320.

34. See 3 C. L. 1070.

35. Albany Pine Products Co. v. Hercules Mfg. Co. [Ga.] 51 S. E. 297. No entry of default being made, the court may in its discretion, at a subsequent term, permit a plea to be filed at any time before such entry has been made. Chambless v. Livingston [Ga.] 51 S. E. 314.

36. Albany Pine Products Co. v. Hercules Mfg. Co. [Ga.] 51 S. E. 297.

37. So held in a suit upon an accounting. Civ. Code 1895, § 5078, considered. Norman v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782.

38. Code Civ. Proc. § 267. Cannady v. Martin [S. C.] 51 S. E. 549.

39. King v. Davis, 137 F. 198.

40. Complaint in a suit to foreclose a mortgage alleging that the mortgage provided for counsel fees and praying judgment therefor, a default judgment allowing an "attorney's fee" is not objectionable. Thrasher v. Moran [Cal.] 81 P. 32. A complaint praying for a divorce and that defendant be awarded custody of the children and for such other and further relief as may seem just and equitable does not authorize an award of the custody of the children to plaintiff, and payments by defendant for support of plaintiff and the children. Mitchell v. Mitchell [Nev.] 79 P. 50.

41. Under Justice Code, § 13, a statement in a summons that plaintiff claims to recover on account for services will not warrant a default judgment for laborer's wages. Phillips v. Norton [S. D.] 101 N. W. 727.

ment roll.[42] In most states the contents of the judgment roll is declared by statute.[43] The amount of damages being certain, the plaintiff is entitled to a final judgment,[44] and in such case a judgment by default and inquiry being entered, the mistake may be corrected by the court at the next term.[45]

In Virginia an office judgment on default does not become final until there is either a judgment of the court at the following term confirming it, or until the term, or possibly the 15th day thereof, has passed without an order setting it aside;[46] but an office judgment in ejectment cannot become final without intervention of the court or jury.[47] There being no statement of damages in ejectment, the court may at any term following the entry of the office judgment render final judgment without setting the cause for inquiry.[48] In West Virginia an office judgment in an action on contract, where there is no order for inquiry of damages, becomes final on the last day of the next term of a circuit court after the entry of such office judgment.[49]

§ 3. *Opening defaults. Grounds.*[50]—The court has the inherent power,[51] in the exercise of a judicial discretion,[52] to set aside a default and allow a defense, and this power exists though a transcript be filed in a higher court for the purpose of creating a lien,[53] and though an appellate court has remanded the case with permission to plaintiff to move for judgment.[54] Statutes conferring the power must

42. Arizona: A default judgment is not void because of failure to comply with Rev. St. 1901, § 1435, providing that a **statement of the evidence** shall be filed as part of the record, § 1443, not enumerating such paper as among those constituting the judgment roll. Steinfield v. Montijo [Ariz.] 80 P. 325.

43. California: Under Code Civ. Proc. § 670, a certificate of the secretary of state as to service on him for a corporation does not constitute part of the judgment roll. Willey v. Benedict Co., 145 Cal. 601, 79 P. 270.

44. In an action to recover premiums paid on a policy wrongfully canceled, the complaint being verified and the amount plaintiff is entitled to recover fixed, he may, under Code, § 385, subd. 1, have a final judgment by default. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221.

45. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221.

46. King v. Davis, 137 F. 198.

47. Virginia practice. King v. Davis, 137 F. 198. Where, in ejectment, there was no necessity of an inquiry, and the court entered an order after the case was ripe for final judgment, reciting that defendant's time to plead having expired, the cause was set down for inquiry, such recital was equivalent to an order making the office judgment final. Id.

48. Va. Code 1904, p. 1412, considered. King v. Davis, 137 F. 198. In such a case the entry of an order setting the case for inquiry held a mere irregularity. Id.

49. Code 1899, c. 125, § 46. Bradley v. Long [W. Va.] 50 S. E. 746. The fact that defendant at such term appears and suggests the nonresidence of the plaintiff and takes a rule against him for security for costs, but does not demur, plead or otherwise make defense to the action, does not prevent such judgment from becoming final. Id.

50. See 3 C. L. 1071.

NOTE. Scope of section: The opening of judgments for fraud, accident, mistake, etc., should be consulted. See Judgments, 4 C. L. 287. The fact that a judgment was taken on default may be of persuasive force in applying these equitable grounds after judgment has become final, so that the default cannot as such be opened. In some states the distinction between relief from a default and relief from the judgment is almost or wholly lost because of the nature of the procedure and the similarity of the grounds on which both reliefs must rest; because of this some cases in which the "judgment," as distinguished from the "default," has been opened have been retained in this article as being valuable for illustrative purposes. The note at the beginning of this article on what, strictly speaking, constitutes a default, should be consulted.

51. See 3 C. L. 1071, n. 56.

52. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231; McClure v. Clark [Minn.] 101 N. W. 951; Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515; Meade County Bank v. Decker [S. D.] 102 N. W. 597; Moody v. Reichow [Wash.] 80 P. 461; Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190; Hartman v. Viera, 113 Ill. App. 216. Code Civ. Proc. § 195. Cannady v. Martin [S. C.] 51 S. E. 549. Default for failure to file pleas. Considine v. Lee, 105 Ill. App. 246. A trial court has the power to set aside a default granted for want of an affidavit of defense, and to allow such affidavit to be filed. O'Connell v. King, 26 R. I. 544, 59 A. 926.

53. Filing a transcript of a default judgment, rendered in superior court, in the district court so as to create a lien on land, does not deprive the superior court of power to set it aside. Code §§ 260, 263, 273, 3790 and 4537 considered. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515.

54. The affirmance of an order discharging rule for judgment for want of a sufficient affidavit of defense with permission to plaintiff to move the court below for judgment for so much of his claim as to which the affidavit is insufficient does not abridge discretionary power of court below to permit the filing of a sufficient affidavit of defense,

be liberally construed,[55] and the exercise of the discretion of the court ought to tend in a reasonable degree to secure determination of rights of parties upon a trial.[56] Defendant must show a clear case of diligence,[57] and, unless the complaint be defective,[58] a meritorious defense[59] unknown or unavailable at the time of the trial,[60] and that he was prevented from making such defense by fraud, accident,[61] surprise,[62] mistake of fact, as distinguished from one of law,[63] or the acts of the opposite party,[64] wholly unmixed with any unexcusable[65] fault or negligence,[66] or laches[67] on his

the defect being merely in the mode of statement. Kyler v. Christman, 25 Pa. Super. Ct. 74.

55. Meade County Bank v. Decker [S. D.] 102 N. W. 597.

56. Walsh v. Boyle [Minn.] 103 N. W. 506. See 3 C. L. 1071, n. 58.

57. Foster v. Weber, 110 Ill. App. 5; Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190. There being want of diligence, the fact that there is a good defense on the merits is insufficient. Considine v. Lee, 105 Ill. App. 246. Where cross complaint and answer were forwarded to local counsel by registered mail, and attorney sending same failed to receive return receipt, but took no action, held not to show sufficient diligence to justify setting aside default. Carr v. First Nat. Bank [Ind. App.] 73 N. E. 947.

58. Cooke v. Haungs, 113 Ill. App. 501. Where petition was not filed in time limited by the court. Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518.

59. Tschohl v. Machinery Mut. Ins. Ass'n, 126 Iowa, 211, 101 N. W. 740; Foster v. Weber, 110 Ill. App. 5; Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190. A denial based on want of information of plaintiff's ownership of note sued on, unaccompanied by any claim that she was not the owner, held insufficient. Tullis v. McClary [Iowa] 104 N. W. 505. Affidavit of attorney stating that from his investigations he believed that the accident for which the plaintiff sought to recover was not caused by the negligence of defendant, held sufficient without setting forth the facts on which the attorney's belief rested. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515.

60. Where defendant answered but failed to appear at the trial, a "meritorious defense" is not one that was available under the answer. Peterson v. Crosier [Utah] 81 P. 860. Where defendant had a good defense available under the answer filed, the fact that he had an additional defense which was known to him at the time he filed the answer, is insufficient to authorize a setting aside of the default. Id.

61. That petitioner's principal attorney was in ill health and that he relied on agreement of opposing counsel to notify him when cause was set for trial, held insufficient to authorize opening of default, it not being alleged that the expected notice was not in fact given. Tschohl v. Machinery Mut. Ins. Ass'n, 126 Iowa, 211, 101 N. W. 740.

62. Where, on adjournment, court stated that case would be held open the next morning until defendant's counsel could fill an engagement in another court, a default judgment entered while defendant's counsel was so absent will be set aside. Rabinowitz v. Haimowitz, 91 N. Y. S. 11. Where plaintiff was given until the 7th of April to plead and defendants on examination on April 6th found no petition on file, held, default would be set aside. Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518. Defendant in ejectment receiving a copy of the declaration, he cannot have a default judgment, based upon an amended declaration, set aside on the ground that the description of the property in the original declaration was defective. King v. Davis, 137 F. 198.

63. A legatee, though cited, failing to appear at the accounting of an executor because she did not then know of her interest as heir, may have her default opened. In re St. John, 93 N. Y. S. 840. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for answering, is not ground for setting aside the default. Mantle v. Casey [Mont.] 78 P. 591.

64. See 3 C. L. 1072, n. 65.

65. Default opened where failure to appear was due to an oversight due to the papers in the case being misplaced. Klepfer v. Keokuk, 126 Iowa, 592, 102 N. W. 515. Default opened where defendant in attempting to serve answer by mail, failed to serve properly and in time. Cannady v. Martin [S. C.] 51 S. E. 549. That summons was served by leaving a copy at a place other than defendant's residence, and the latter had no actual notice of the action until after judgment was rendered, and had a meritorious defense, constitutes a case of excusable neglect. Knowlton v. Smith, 163 Ind. 294, 71 N. E. 895. Where answer was served one day after expiration of statutory time, and the application for leave to answer showed a defense on the merits, reasonable excuse, an attachment of sufficient of defendant's land to protect plaintiff, and no delay in trial, the defendant should be permitted to interpose his defense. Walsh v. Boyle [Minn.] 103 N. W. 506, citing 1 C. L. § 4, p. 915; 3 C. L. § 3, p. 1071.

Business interests: The fact that defendant would have lost his position as an employe of a corporation if he had attended the trial is not ground for vacating judgment and setting aside default. Peterson v. Crosier [Utah] 81 P. 860.

66. Where defendants had been in default for more than 14 months, and were twice notified that the motion for default would be called for hearing and were actually represented at such hearing, held, the default would not be vacated, the only excuse offered being that one of the defendants understood imperfectly the English language, and had difficulty in explaining his defense to his counsel. Moody v. Reichow [Wash.] 80 P. 461. Where petitioner failed to employ an attorney until two years after de-

own part. A motion for leave to open a default, so far as grounded on accident, mistake or misfortune, presents a question of fact for the decision of the trial court.[68] Negligence of an attorney is the negligence of his client,[69] and defendant is not entitled to rely on the clerk of court or any one else to inform him when the case was coming on for determination.[70]

Procedure.[71]—A motion to open a default is interlocutory in its nature[72] and can never result in a decision of the issues involved in the controversy.[73] Statutory requirements must be complied with.[74] In New York the affidavit on which an order to show cause why a default should not be opened is granted need not state the time appointed for holding the next trial term.[75] Cases dealing with the sufficiency of affidavits are shown in the notes.[76] An answer filed after default has been entered will be stricken from the files,[77] the proper practice being to move to set aside the default, tendering the answer with the motion;[78] but one is not in default for failing to file an answer while the motion is under consideration by the judge.[79] It is sufficient if filed immediately upon the grant of the order of vacation.[80] An order opening a default ordering that an answer filed with the motion papers on a previous date stand as duly served on said date, operates, in the absence of a showing of prejudice or exception to the order, to make the service of the answer effective, as of the date on which it was made.[81] As a condition of opening a default and vacating a

fault judgment was entered, held, judgment would not be opened. McClure v. Clark [Minn.] 101 N. W. 951. Where, after postponement on account of illness of counsel, defendant abandoned his case, held a default would not be set aside in the absence of any excuse. Brown v. Huber, 92 N. Y. S. 940. Where both defendant and his attorney knew date of trial, but intentionally abandoned defense, held, default would not be opened. Peterson v. Crosier [Utah] 81 P. 860. Plaintiff is not entitled as a matter of right to have a default opened, where, after the case has been twice passed on the plea that counsel who was to try the case had other engagements, further adjournment was asked on the ground that the guardian ad litem was to try the case and had a conflicting engagement, which request was refused. Cohen v. Meryash, 93 N. Y. S. 529.

67. The mere fact that a defendant not personally served with summons knows of the action and takes no steps to prevent proceedings therein does not constitute laches, barring his right to have a default judgment set aside. O'Connell v. Gallagher, 93 N. Y. S. 643. In New York personal service is essential, see ante, § 1.

68. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

69. Carr v. First Nat. Bank [Ind. App.] 73 N. E. 947; Peterson v. Crosier [Utah] 81 P. 860; Burrell v. Anchor Fire Ins. Co., 3 Ohio N. P. (N. S.) 321. The negligent failure of an attorney to interpose a defense is imputed to his client. Foster v. Weber, 110 Ill. App. 5.

70. Burrell v. Anchor Fire Ins. Co., 3 Ohio N. P. (N. S.) 321.

71. See 3 C. L. 1072.

72. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231.

73. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231. Denial of motion to open held not a bar to an action to have the judgment set aside for fraud. Id.

74. Indian Territory: Under Mansf. Dig. §§ 4957, 3909, 3911, 3914, a default judgment being rendered against an infant, personally served, without the appointment of a guardian ad litem, the record being silent as to his nonage, the infant is not entitled to restrain the levy of an execution without taking steps to vacate and modify the judgment. Cook v. Edson, Keith & Co. [Ind. T.] 82 S. W. 918.

75. Rule 37 of the general rules of practice considered. Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. S. 806.

76. An affidavit on motion to set aside a default that defendant employed an attorney, without stating when, is insufficient. Foster v. Weber, 110 Ill. App. 5. Where the only witnesses to an accident other than plaintiff are nonresidents and absent from the state, and their affidavits are not obtainable, defendant, on moving to open a default judgment, may, by its agent, make affidavit of facts narrated to the agent by the absent witnesses. El Paso & S. W. R. Co. v. Kelley [Tex.] 87 S. W. 660, rvg. 83 S. W. 855. Where an affidavit to have the default vacated under 2 Ball. Ann. Codes & St. §§ 4880, 5091, failed to allege that defendant had no actual knowledge of the action in time to defend, and a counter affidavit alleged correspondence between defendant and his attorneys concerning the case at least 13 days before the entry of default, held, default would not be vacated. Jordan v. Hutchinson [Wash.] 81 P. 867.

77. Mantle v. Casey [Mont.] 78 P. 591.

78. Mantle v. Casey [Mont.] 78 P. 591. See, also, Carver v. Seevers, 126 Iowa, 506, 102 N. W. 518.

79. Averback v. Spivey [Ga.] 49 S. E. 748.

80. Averback v. Spivey [Ga.] 49 S. E. 748; Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518.

judgment, defendant should be required to pay all costs of the action up to the date of granting the order, including a trial fee,[82] and an order opening a default without condition will be considered as made on the theory that the party was entitled to it as a matter of right.[83]

Appeal.[84]—A default judgment is ordinarily not appealable,[85] unless it has been attacked in such manner as to relieve defendant from the imputation of consent.[86] Appeal lies from an order refusing to vacate such judgment,[87] but not from a refusal to vacate a mere order of default.[88] Appellate court will not interfere with ruling of trial court unless an abuse of discretion be clearly shown.[89] In the absence of proof all things will be presumed in favor of the trial court's action.[90] Where an answer in support of a motion to set aside a default is in fact filed before the action of the court upon the motion, it will be presumed that the court in granting the motion examined the answer and found it sufficient.[91]

§ 4. *Operation and effect of default and proof of damages.*[92]—A default only admits the facts stated in the declaration to be true; it does not admit that the facts, in law, entitle the plaintiff to recover.[93] The right to an inquest for damages[94] and the procedure thereon[95] are governed by the statutes of the various states. The object of a writ of inquiry is primarily to aid the court in the assessment of damages.[96] The writ is issued by the court, and it appoints the sheriff as its represent-

81. Moody v. Lambert [S. D.] 101 N. W. 717.

82. Marcus v. Pomeranz, 98 App. Div. 619. 90 N. Y. S. 139. An order denying defendant's motion to open a second default properly made defendant's permission to renew the application conditional on payment of $10 costs, where the order to show cause was founded on affidavits verified two days after the date of the order. Liquari v. Abramson, 91 N. Y. S. 768. Where defendant failed to appear upon the call of the calendar and an inquest was ordered, upon opening the default, defendant should be required to pay the $10 motion costs, a trial fee of $30 and plaintiff's disbursements. Siegel v. Frankel, 93 N. Y. S. 533.

83. Cohen v. Meryash, 93 N. Y. S. 529.

84. See 3 C. L. 1073.

85. See Appeal and Review, 5 C. L. 131.

86. As by motion to set aside order of default. Jordan v. Hutchinson [Wash.] 81 P. 867.

87. See Appeal and Review, 5 C. L. 138. Defendant's motion to have the default opened being denied he may, if aggrieved, allege exceptions thereto in writing and have the cause transferred to the supreme court. Laws 1901, p. 563, c. 78, § 5, considered. Hutchinson v. Manchester St. R. Co. [N. H.] 60 A. 1011.

88. Jordan v. Hutchinson [Wash.] 81 P. 867.

89. See Appeal and Review, 5 C. L. 222.

90. Where an offer to file an answer is refused on the ground that the case is in default, the record being silent, the court will presume in favor of the ruling of the court below that the case had been marked in default on the docket. Norman v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782.

91. Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518.

92. See 3 C. L. 1074.

93. Chicago & M. El. R. Co. v. Krempel, 116 Ill. App. 253.

94. Illinois: A defaulted defendant is entitled on asking it, to have his damages assessed by a jury. The statute is imperative and not open to construction. Blizzard v. Epkens, 105 Ill. App. 117.

New York: Defendant making default in an action for injury to property, the damages must be ascertained by writ of inquiry. Code Civ. Proc. § 1215. Fullerton v. Young, 94 N. Y. S. 511. A conversion to defendant's own use of money collected by him as agent is an injury to property. Id.

95. Connecticut: Under Gen. St. 1902, § 742, in an action against a city for wrongful death, defendant cannot invoke the fellow-servant rule as a defense, it not having given the notice required by the statute. Hourigan v. Norwich, 77 Conn. 358, 59 A. 487.

Rhode Island: Defendant having defaulted after answer made, he is not entitled to have the damages assessed by the judge of the common-pleas division in chambers under Gen. Laws 1896, c. 238, § 8, but it is within the discretion of the trial judge to then assess the damages with or without a jury, or continue the case, or cause the case to be placed on the motion calendar to be there disposed of as authorized by chapter 224, § 4. King v. Rhode Island Co. [R. I.] 60 A. 837.

Virginia: Under Virginia Code 1904, p. 1412, it is proper for the clerk in entering confirmation of the common order on default to award a writ of inquiry, though no statement of damages has been filed. King v. Davis, 137 F. 198.

West Virginia: A clerk entering an office judgment has no authority to add thereto an order for inquiry of damages. Such order is void, and knowledge of its invalidity is imputed to the defendant. Bradley v. Long [W. Va.] 50 S. E. 746.

ative or alter ego to execute its mandate and to preside if the judge does not act himself; the execution of the writ may, however, be had in court before a jury drawn from the regular panel, and with the judge presiding instead of the sheriff.[97] Defendant having entered an appearance, he is entitled to notice of an application for assessment of damages.[98] Upon an inquest for damages the jury should be instructed solely with respect to the assessment of plaintiff's damages.[99] In Rhode Island the excessiveness of damages in a default case cannot be reviewed by the appellate division.[100]

DEFINITE PLEADING; DEL CREDERE AGENCY; DEMAND; DEMURRAGE; DEMURRERS; DEMURRER TO EVIDENCE; DEPARTURE, see latest topical index.

DEPOSITIONS.[1]

§ 1. *Occasion or necessity; right to take.*[2]—The right to take testimony by deposition is purely of statutory origin,[3] and the Federal conformity act[4] merely adopts the state procedure and does not enlarge the grounds for taking depositions provided by the Federal statutes.[5] It is ordinarily allowed where a document[6] or the testimony of a witness beyond the jurisdiction, or who is about to leave the jurisdiction,[7] or under some statutes, a witness who resides at a great distance from the place of trial or is aged and infirm,[8] is necessary.[9] While examination of the adverse party before suit by way of discovery is allowed in some states,[10] depositions proper can be

96. Elsey v. International R. Co., 93 App. Div. 115, 87 N. Y. S. 28.

97. Action for personal injuries. Elsey v. International R. Co., 93 App. Div. 115, 87 N. Y. S. 28.

98. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253.

99. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. It is improper to instruct them to return a verdict of guilty, and a verdict of guilty may be disregarded as surplusage. Id.

100. King v. Rhode Island Co. [R. I.] 60 A. 837.

1. **This topic includes** the various proceedings by which evidence of witnesses is taken before trial to be used in the determination of issues thereat. It excludes the equitable remedy of discovery and the various statutory proceedings designed to force disclosure from an opponent or unwilling person of facts in his knowledge or to procure an inspection of his books, papers or person. See Discovery and Inspection, 3 C. L. 1106, and post, 5 C. L.

2, 3. See 3 C. L. 1074.

4. An act of March 9th, 1892, providing that depositions in the Federal courts may be taken in the mode prescribed by the laws of the state in which the courts convene. Comp. St. of 1901, p. 664. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465; Carrara Paint Agency Co. v. Carrara Paint Co., 137 F. 319. A rule of the circuit court for the eastern district of Pennsylvania provides that the testimony of witnesses on rules to show cause shall be taken by deposition. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

5. Magone v. Colorado Smelting & Min. Co., 135 F. 846.

6. Kelly v. Moore, 22 App. D. C. 9.

7. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163.

8. In the Federal courts depositions may be taken and read at the trial "when witnesses reside more than a hundred miles from place of trial or bound on a voyage to sea, or about to go out of the U. S. or out of the district in which the case is to be tried and to a greater distance than a hundred miles from the place of trial before the time of trial, or when the witness is aged or infirm." Importers' & Traders' Nat. Bank v. Lyons, 134 F. 510; Magone v. Colorado Smelting & Min. Co., 135 F. 846.

9. If plaintiff seeks a dedimus under section 866, Rev. St. U. S., he must show that the taking of the deposition is necessary "to prevent the failure or delay of justice." but no such showing is essential to a deposition de bene esse on the grounds provided by section 863. Magone v. Colorado Smelting & Min. Co., 135 F. 846. Sec. 880 of N. Y. Code of Civil Procedure makes it a prerequisite to granting order that the affidavit show that depositions are necessary. Calvet-Rogniat v. Mercantile Trust Co., 46 Misc. 20, 93 N. Y. S. 241.

10. See Discovery and Inspection, 5 C. L.

taken only after suit.[11] Contrary to the general rule, they are allowed in some states before issue[12] and after the trial is begun.[13]

Where applicant has been guilty of laches, the court may deny leave to take depositions,[14] or may refuse to delay the trial until they are returned.[15] Whether depositions may be taken in probate,[16] or for use on motions,[17] or in special proceedings,[18] depends on the terms of the statute.

§ 2. *Procedure to obtain deposition.*[19]—Except where the practice of taking depositions on notice prevails,[20] and in some cases under such a practice,[21] there must be an authorizing order[22] or a commission, which in some states is issued by the clerk without an order of court.[23] Such commission or order must be applied for on notice[24] by affidavit[25] of the party[26] complying with the statutory requirements,[27] which

11. When a plaintiff seeks an order for the perpetuation of testimony merely for the purpose of enabling him to frame his complaint, the granting of the same is improper. In re Tweedie Trading Co., 94 N. Y. S. 167.

12. Under Code of Civil Procedure, §§ 871-876, the court may grant an order for the examination of a witness after the complaint is served but before issues are joined. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824.

Contra: In an equity suit a deposition cannot be taken until the cause is at issue between the parties. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

13. The court has power under the New York Code to issue a commission at any time before the final decision of the case. Especially where case is tried before a referee and the only objection is a delay of trial for a few weeks. Mercantile Nat. Bank v. Sire, 100 App. Div. 459, 91 N. Y. S. 418.

Contra: Under a statute providing that depositions be "returned before the hearing of the cause and before final decree," there is no authority for taking depositions after the cause has been actually submitted for decision. Fulmer Coal Co. v. Morgantown & K. R. Co. [W. Va.] 50 S. E. 606.

14. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. S. 429. Action at issue for more than two years, then continued from Feb. term to June 16, 1904, and afterwards it was stipulated that case be tried on first Monday, October 7, 1904. Motion to have deposition taken, returnable Sept. 7th, was denied. Valentine v. Rose, 45 Misc. 342, 90 N. Y. S. 389.

15. There is no error in refusing to delay trial when applicant for taking of deposition has had sufficient time in which to examine his witness, but neglected to do so before trial. Testimony taken on May 22, a year and a half after joining of issues. A retaking permitted on 19th of June. Trial began on 7th of July, but depositions not yet retaken. Held no error to refuse to delay trial to again take deposition. Louisville Rock Co. v. Cain, 26 Ky. L. R. 849, 82 S. W. 619. But if a party knows of the infirmity of his witness before trial, the taking of depositions should not be allowed after the trial has commenced. Hebron v. Work, 101 App. Div. 463, 34 Civ. Proc. R. 134, 92 N. Y. S. 149.

16. In Missouri depositions may be taken in a proceeding in probate court, such a proceeding being a suit pending within the meaning of the statute. See § 2877, Rev. St. Mo. 1899. Ex parte Gfeller, 178 Mo. 635, 77 S. W. 552.

17. A court may refuse to grant order for a deposition to be used at a hearing for a new trial when the motion must be decided before the expiration of the term, and the length of time is therefore insufficient for the requisite notice. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 86 S. W. 943.

18. A statute providing for the use of depositions in a civil action or other civil proceeding is held to authorize depositions in disbarment proceedings against an attorney. State v. Mosher [Iowa] 103 N. W. 105; State v. McRae [Fla.] 38 So. 605.

19, 20. See 3 C. L. 1075.

21. Where a statute provides that "no party shall be required to take depositions on notice during a term of court in which the action is pending unless such court in furtherance of justice shall so order," the order of the court is the only notice required. Sec. 4688 of Iowa Code. State v. Mosher [Iowa] 103 N. W. 105.

22. Must be order in writing. Hebron v. Work, 101 App. Div. 463, 34 Civ. Proc. R. 134, 92 N. Y. S. 149.

23. It is generally the duty of the clerk to issue commission when applicant has complied with the statutes without any order from the court to do so. St. Louis S. W. R. Co. v. Harkey [Tex. Civ. App.] 13 Tex. Ct. Rep. 51, 88 S. W. 506. In Florida, a clerk of the circuit court can be compelled by mandamus to issue a commission if the law leading up to the issuance has been complied with, unless it appears that the issuance would be of no avail. The issuance by the clerk is merely a ministerial act. State v. McRae [Fla.] 38 So. 605.

24. Pergoli v. Lyman, 92 N. Y. S. 788, Hurd's Rev. St. Ill. 1903, p. 938, provides for a notice of ten days (together with a copy of the interrogation) of "an intention of suing out a commission." Carrara Paint Agency Co. v. Carrara Paint Co., 137 F. 319.

25. Hebron v. Work, 101 App. Div. 463, 34 Civ. Proc. R. 134, 92 N. Y. S. 149.

26. Under the New York Code of Civil Procedure the affidavit made for the purpose of taking depositions must be made by the party not his attorney, and statements in the affidavit made on information and belief are not sufficient. A statement that witnesses are not residents of the state does not

usually involve a statement of the witness' evidence,[28] and averment of facts showing that the deposition is necessary,[29] that the proposed evidence is relevant and material,[30] and within the knowledge of the proposed witness,[31] and that applicant intends to use the testimony so obtained on the trial.[32] In some states, where a deposition is taken on interrogatories, the proposed interrogatories, which must be properly addressed to the witness,[33] are served with the application for commission,[34] and at the hearing on such application the interrogatories are settled. In other jurisdictions the practice is to serve interrogatories with the notice of hearing.[35] On a showing of distinct necessity, oral examination by a commissioner[36] or the privilege of oral cross-examination[37] may be allowed.

The party applying for the deposition may be required to deposit a sufficient sum to cover the expenses and allowance to the opposing attorney in attending the examination by open commission.[38] Unless the number of depositions appears unreasonable and unnecessary, it will not be limited in advance.[39]

§ 3. *Taking the testimony or evidence adduced. Officers authorized to take.*[40] —Under most statutes a notary public is authorized to take depositions,[41] but at common law he had no such authority.[42] When a commission is issued to two commissioners to take the depositions severally, either one may act without the other.[43]

Notice of hearing and attendance of witness.[44]—Notice of hearing as prescribed by statute[45] with a copy of the interrogatories, if any,[46] must be given, and the notice

satisfy the statute. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. S. 137.

27. The affidavit containing all that the statute requires is sufficient. Doll v. Smith, 43 Misc. 417, 89 N. Y. S. 331.

28. Chan. Pr. Rule 60, Ala. Code 1896, p. 1213. Edwards v. Edwards [Ala.] 39 So. 82.

29. Statement of conclusion insufficient. Pergoli v. Lyman, 92 N. Y. S. 788.

30. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163.

31. When it appears from counter affidavits that the officers of the corporation whose depositions are sought are ignorant of the facts attempted to be proved, an application for their deposition will be denied. Mercantile Trust Co. v. Calvet-Rogniat, 46 Misc. 16, 93 N. Y. S. 238. If it appears under Code Civ. Proc. § 872, subd. 7, that the officer had no personal knowledge of what was done and had no connection with the corporation, he cannot be examined. In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4; Calvet-Rogniat v. Mercantile Trust Co., 46 Misc. 20, 93 N. Y. S. 241.

32. In order to obtain an order for the examination of a witness before trial, the moving papers must show that it is intended to use the evidence upon the trial. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. S. 429. The application need not expressly state that deposition will be read on the trial. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824. The statement that the examination "is desired for the purpose of using the testimony upon the said trial" was held to satisfy the statute. McCormick v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

33. Edwards v. Edwards [Ala.] 39 So. 82.

34. Under Hurd's Rev. St. Ill. 1903, § 938. Carrara Paint Agency Co. v. Carrara Paint Co., 137 F. 319. Interrogatories were presumed to have been filed before the date fixed in the notice for issuing the commission. Haish v. Dreyfus, 111 Ill. App. 44.

35. See § 3, post.

36. A special examiner will not be appointed to examine experts orally outside of the district merely because it is advantageous to do so. Magone v. Colorado Smelting & Min. Co., 135 F. 846.

37. An order for a commission permitting oral cross-examination should not be granted except on a showing of special circumstances. Woodward v. Skinner, 92 N. Y. S. 259.

38. But a party may choose to examine by written interrogatories annexed to commission. Gowans v. Jobbins, 91 N. Y. S. 842.

39. Carrara Paint Agency Co. v. Carrara Paint Co., 137 F. 319.

40. See 3 C. L. 1075.

41. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

42. Statute of Ind., Burns' Ann. St. 1901, § 8039, grants to notary this power. The fact that a notary of a foreign state is not authorized by laws of his own state will not disqualify him to take depositions to be used in Indiana. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

43. If a commission is joint and the adverse party appears, cross-examines, and does not object to the absence of one of them, the deposition will not be surpressed on that account. New v. Young [Ala.] 39 So. 201.

44. See 3 C. L. 1076.

45. Honor Co. v. Stevedores' & Longshoresmen's Benev. Ass'n [La.] 38 So. 271. In Michigan, a notice of four days is sufficient when a party can arrive at the place of tak-

is bad if it misstate the time[47] or place[48] of hearing, but there is no necessity of giving notice of the nature of the evidence that is to be taken.[49] Failure to give notice cannot be availed of by one who voluntarily appears,[50] or by a co-party not affected.[51] Subpoena[52] and subpoena duces tecum[53] are usually allowed to compel attendance and production of documents.

Proceedings at hearing.[54]—The applicant is under no obligation to examine the witness, and without examination by him the opposing counsel has no right to proceed to cross-examination.[55] If the deposition is taken on interrogatories, oral examination cannot be had.[56] If it is oral, the parties propound such questions as they choose and it is generally provided that questions and answers be taken down by a disinterested person.[57] Witnesses must answer all questions which are material and do not come in conflict with their constitutional privileges,[58] but not impertinent and illegal questions,[59] or those calling for disclosure of trade secrets.[60] A notary public has the authority to require a witness to answer all legal questions properly asked.[61]

§ 4. *Returning and filing.*[62]—It is usually required that the officer taking the deposition return it properly sealed and indorsed,[63] by mail or other authorized conveyance,[64] within a specified time,[65] and the deposition must be received, opened, and filed by the clerk without passing into the hands of private persons.[66]

ing the deposition in twenty-four hours. Sec. 10,136, Comp. Laws of Mich. 1897. McCall Co. v. Jacobson [Mich.] 102 N. W. 969. Under a statute requiring the service of a copy of the order not more than twenty nor less than six days before examination unless the affidavit shows circumstances making a different time necessary, four days are not sufficient. Sec. 873 of Code of Civil Procedure. Osborn v. Barber, 93 N. Y. S. 833.

46. Ala. Code 1896, §§ 3181, 732, 733. Edwards v. Edwards [Ala.] 39 So. 82. In Texas the clerk of the district court who takes the deposition need not certify the copy of the notice and interrogatories served on the adverse party. Texas Rev. St. 1895, Art. 2274. El Paso & S. W. R. Co. v. Vizard [Tex. Civ. App.] 13 Tex. Ct. Rep. 443, 88 S. W. 457.

47. Bauer v. State, 144 Cal. 740, 78 P. 280.

48. Indiana Baptist Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

49. Conn. Statutes, § 679, provides for reasonable notice to adverse party. McPhelemy v. McPhelemy [Conn.] 61 A. 477.

50. Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869. Sec. 28, art. 36, of the Code of Public Gen. Laws of 1888 dispenses with notice under such circumstances. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228.

51. When testimony affects only the party who is served with notice, failure to serve other parties to the action is not error. Standard Oil Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271. When one defendant is subpoenaed to give his deposition in an action pending in another state, he cannot have the subpoena set aside because the other defendants were not notified. In re Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. S. 1059.

52. See 3 C. L. 1076.

53. A clerk of the U. S. circuit court when directed by the court to issue a subpoena duces tecum on the taking of a deposition de bene esse before him, has authority to issue such subpoena. Rev. St. § 863, U. S. Comp. St. p. 661. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

54. See 3 C. L. 1076.

55. Plaintiff failed to attend at the hearing. If defendant desires to examine witness he must proceed to give plaintiff notice of the intention as required by statute. Hosch Lumber Co. v. Weeks [Ga.] 51 S. E. 439.

56. Oral questions propounded to a witness aside from those in writing at a hearing before a notary taking the witness' deposition are improper. Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740.

57. A stenographer in the employ of one of the parties cannot be considered a disinterested person. Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869.

58. Rule where depositions are being taken under U. S. Rev. St. § 863. Perry v. Rubber Tire Wheel Co., 138 F. 836.

59. Fenn v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 103.

60. His claim of privilege may be determined by the court in the district where deposition is taken. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

61. Ex parte Gfeller, 178 Mo. 635, 77 S. W. 552. See, also, 3 C. L. 1077, n. 40-43.

62. See 3 C. L. 1077.

63. A deposition returned without a sealing or indorsement and appearing to be nothing more than an ordinary letter cannot be admitted as evidence. Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683.

64. Under the Ky. Civil Code, it is required that "the officer taking the depositions shall deliver them to the clerk of the court in which the action is pending or send them by mail or private conveyance. If sent by private conveyance, the person by whom

§ 5. *Suppression and objections before trial.*[67]—An objection or motion to suppress before trial as ordinarily allowed by statute is the remedy for defects of procedure in taking the deposition, and is usually required to be made within a limited time after the filing of the deposition,[68] objections not going to the admissibility of the testimony itself being deemed waived unless so made;[69] the purpose of the statutes being to allow whenever possible a recommitment[70] or retaking of the deposition.[71] In a few states a deposition will be suppressed for inadmissibility of contents,[72] objection to its admission at the trial[73] being the usual remedy in such case. A deposition will be suppressed if taken at a time[74] or place[75] other than that stated in the notice, or without notice to a party;[76] and defects in the address of the interrogatories,[77] failure to sign and certify the deposition,[78] failure to properly seal and address it,[79] and improper interference with a deposition by a party's attorney while it is in course

sent must make oath that they were not opened by him or anyone else during transit." Ky. Code, § 583. Depositions were transmitted by Adams Exp. Co. Affidavits were made by officer taking deposition that it was delivered to a certain agent of the express company, and by this agent and all others through whom it passed that envelope had not been opened and also by the clerk that he received the sealed package. Held to satisfy the above section. Standard Oil Co. v. Doyle, 36 Ky. L. R. 544, 82 S. W. 271.

65. The Iowa Code provides that a deposition must be returned to the clerk of the proper court within thirty days. Section 4705. Iowa Code. But when it appeared that a deposition had not been filed at time of trial, court ordered it filed, the opposing counsel having examined it a year previous and was not prejudiced by failure to return the same. Court can do this under § 4708. Ferguson v. Lederer, Strauss & Co. [Iowa] 103 N. W. 794.

66. Where plaintiff's attorney asked clerk of court to send to the former the depositions and where the attorney, upon their receipt, discovered that they were not properly signed and sealed and sent them to the postmaster for correction, it was held that depositions must be suppressed. White v. Southern R. Co., [Ga.] 51 S. E. 411.

67. See 3 C. L. 1078.

68. Section 10139 of Mich. Compiled Laws of 1897 provides that objections to notice, manner of taking deposition, or its certification or return, shall be waived unless they are made "in writing within three days after knowledge or return thereof." McCall Co. v. Jacobson [Mich.] 102 N. W. 969. Ga. Civil Code 1895, § 5314, provides that "all exceptions to the execution and return of commission must be made in writing and notice thereof given to opposite party." White v. Southern R. Co. [Ga.] 51 S. E. 411. Under a statute which provides that objections to depositions shall be determined at the first term of court after their filing, a motion made to suppress them cannot be entertained after the making of an announcement of ready for trial. Sayles' Rev. Civ. St. 1897, art. 2289. St. Louis S. W. R. Co. v. Harkey [Tex. Civ. App.] 13 Tex. Ct. Rep. 51, 88 S. W. 506.

69. When statute provides for the filing of objections, those otherwise made are properly excluded. Iowa Code, § 4712. Ostenson v. Severson, 126 Iowa, 197, 101 N. W. 789. When the only variance from the strict terms of a stipulation is the taking of a deposition by a justice of the peace instead of a notary public and the deposition is on file for six days, an objection after the beginning of the trial is too late. Seamster v. State [Ark.] 86 S. W. 434.

70. When a commissioner fails to make a sufficient return as to facts which he is sent to ascertain, the recommitment of the cause to a commissioner is within the court's discretion and a party who does not object to such order or to the return when made cannot do so later. Commissioner was sent abroad to take testimony as to decedent's next of kin and failed to make a return concerning relatives of the mother of the decedent. A recommitment for this purpose held proper under the circumstances. In re Flanagan's Estate, 207 Pa. 490, 56 A. 1062.

71. But objection to deposition taken should be made before trial if possible, in order to allow sufficient time to take the deposition properly. Abbott v. Marion Min. Co. [Mo. App.] 87 S. W. 110.

72. When portions of a deposition are admissible it is not error to refuse to suppress it. Griggs v. Carson [Kan.] 81 P. 471. It is not reversible error to suppress a deposition whose contents have no bearing on the issues of the case. Gilman v. Ferguson, 116 Ill. App. 347.

73. See § 6, post.

74. Bauer v. State, 144 Cal. 740, 78 P. 280.

75. Indiana Baptist Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

76. In re Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. S. 1059.

77. If interrogatories are not addressed to the party who signs the deposition there is error in refusing to suppress the testimony thus taken. Edwards v. Edwards [Ala.] 39 So. 82.

78. Certificate did not show that deposition had been read to witness. Parties lived in same place and had eighteen days in which to correct it before trial. Louisville Rock Co. v. Cain, 26 Ky. L. R. 849, 82 S. W. 619.

79. U. S. Comp. St. p. 63. The Saranac, 132 F. 936.

of transmission,[80] have been held ground for suppression. Trivial defects, working no prejudice[81] or affecting only a co-party,[82] or those which have been waived,[83] are not ground for suppression.

§ 6. *Use as evidence.*[84]—The deposition being a substitute for the production of the witness, it cannot be used if his attendance can be procured,[85] though such exclusion has been held discretionary[86] and is waived by failure to make timely objection.[87] In some states it must be made to appear that the grounds for taking the deposition exist at the time of trial,[88] while in others their continuance is presumed.[89] In Michigan the court may, in its discretion, to prevent abuses, order the retaking of testimony or the production of the witness.[90] The competency of the witness is determined as of the time of offering the deposition.[91]

A deposition is not evidence until read in evidence.[92] Either party to the action may, in South Carolina, call for the reading of the deposition,[93] but isolated portions of a deposition cannot be introduced,[94] nor will answers to cross-examination be admitted if direct examination is excluded,[95] and one may object to the reading of his own cross-examination on the ground that the questions are incompetent and irrele-

80. White v. Southern R. Co. [Ga.] 51 S. E. 411.

81. If adverse party is not prejudiced by failure to apply for an order or give a longer notice than twenty-four hours, the order granting deposition should not be vacated if the testimony is material to the party applying. In re Tweedie Trading Co., 94 N. Y. S. 167. A failure to state in the certificate that witnesses were sworn is not a sufficient error to exclude the deposition when that fact is stated in the caption. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761. That a dedimus was issued at a later date than that mentioned in the notice is not a sufficient ground for the suppression of a deposition. Haish v. Dreyfus, 111 Ill. App. 44. In some states, statutes provide "that unimportant deviations shall not be sufficient to exclude the deposition when no prejudice to opposite party results." Iowa Code, § 4708. Ferguson v. Lederer, Strauss & Co. [Iowa] 103 N. W. 794. The irregularity of permitting an order for examination of a witness when proceedings are stayed because of a failure to pay costs on a previous motion is cured by the payment of costs before return day. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824.

82. Failure to give notice to co-party. Standard Oil Co. v. Doyle [Ky.] 82 S. W. 271; In re Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. S. 1059.

83. By the appearance of the attorney and the cross-examination of the witness at the hearing, a party does not waive the right to suppress the deposition on the ground that it was not written by a disinterested person. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228; Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869.

84. See 3 C. L. 1078.

85. If the witness is in court ready and willing to take the witness stand, the deposition is properly excluded. Handy & Co. v. Smith, 77 Conn. 165, 58 A. 694.

86. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49.

87. Not made until other witnesses had testified, plaintiff rested and a motion for nonsuit made by defendant, the court will not under § 52 of the act of March 23, 1900, exclude it. Flannery v. Central Brew. Co., 70 N. J. Law, 715, 59 A. 157.

88. In New York it is error to allow a deposition to be read without showing that the witness was unable to attend the trial. Code Civ. Proc. § 882. Meres v. Emmons, 92 N. Y. S. 1099. Consenting to the admission of a type-written copy of the testimony of the witness who was unable to attend did not waive proof of infirmity at the time of trial. Carter v. Wakeman, 45 Or. 427, 78 P. 362.

89. It cannot be presumed when there is no objection that the cause for taking the deposition does not exist at the time of the trial when the deposition states that the age of the witness is eighty and that he is unable to travel. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Under the laws of Michigan, a deposition of a witness shown by an affidavit of an attorney to be living in another state may be admitted although the reason for issuing the deposition was not shown to exist at the time of the trial. Mich. Comp. Laws, § 10142. Talcott v. Freedman [Mich.] 12 Det. Leg. N. 128, 103 N. W. 535.

90. Comp. Laws 1894, §§ 10136-10143. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832.

91. Deposition of party as to transaction with adversary who died after taking of deposition. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379.

92. Under a statute where either the wife or husband may testify, the taking of the wife's deposition when it is not read at the trial will not prevent the husband from testifying. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

93. Providence Mach. Co. v. Browning [S. C.] 49 S. E. 325.

94. Gussner v. Hawks [N. D.] 101 N. W. 898.

95. If direct examination is read, then cross examination should also be read. Bentley v. Bentley's Estate [Neb.] 101 N. W. 976,

vant.[96] In Michigan, a plaintiff may by a rule of the circuit court of that state read his cross-examination of defendant's witnesses whose testimony was taken by depositions.[97] Depositions may be again used at a retrial of the case[98] if the cause for the original taking thereof continues,[99] and the parties remain the same;[1] but a deposition whose admissibility at the first trial depended on a stipulation cannot be used again without a renewal of the stipulation.[2] The fact that a case is consolidated with another after a deposition has been taken for use in the original case will not render its admission improper.[3]

Objections[4] going to the procedure are usually required to be made before trial, and those objections which might have been made on the taking of the deposition are usually deemed waived if not so made.[5] Objections not included in either of these classes are properly made on the trial,[6] and must be then made to save them for review.[7] Depositions as evidence are the equivalent of the testimony of the witness in open court,[8] and are subject to the same considerations respecting credibility.[9]

96. N. Y. Code Civ. Proc. § 911, provides that either party may read a deposition taken and returned. Cudlip v. New York Evening Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925.

97. Circuit Court Rule 41a. The depositions should not be read on the theory that the answers and questions were those of cross-examination but the fact that they were so read is not sufficient reason for reversal unless results prejudicial to objecting party are shown to have occurred. McDonald v. Smith [Mich.] 102 N. W. 668.

98. At common law, depositions taken in a former trial de bene esse can be used in a case between the same parties if the witness is proved to be dead, unable to attend court by reason of sickness, out of the court's jurisdiction or otherwise not amenable to its process. U. S. Rev. St. p. 666, § 861, does not change above rule of evidence. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. A deposition was offered against six of the heirs only, one of whom was a party to the action in which deposition was taken. Held that this testimony was properly excluded. Roberts v. Powell [Pa.] 60 A. 258. The adverse party may introduce at the second trial a deposition de bene esse used at a former trial. This can be done although the witness is present at the trial. Providence Mach. Co. v. Browning [S. C.] 49 S. E. 325.

99. When a witness lives within the distance of the court house in which depositions are not allowed except for other reasons than length of distance from place of trial, a deposition used in a former case cannot be read unless some reason is shown making it admissible at the subsequent trial. Smith v. Park's Adm'r [Ky.] 84 S. W. 1167. The testimony of a witness at a former trial cannot be introduced without proof of attempts to procure attendance of witness or of the impracticability of taking depositions de bene esse or otherwise as provided by Rev. St. §§ 863-867. Diamond Coal & Coke Co. v. Allen [C. C. A.] 137 F. 705.

1. Depositions taken in a former case are not admissible in evidence in a subsequent trial if the parties to the action are not the same. Such a deposition is but hearsay. Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407. Although plaintiffs adopt the allegations of a petition filed in their names without their authority, depositions taken before they became parties cannot be used at the trial. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. Depositions taken ten years previously in a case in which the parties were not identical. Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620.

2. Armeny v. Madson & Buck Co., 111 Ill. App. 621.

3. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390.

4. See § 5, ante.

5. The fact that a deposition is taken in a narrative form is not a ground for objection after the trial of the case has commenced. Defendant was present at the taking of the deposition, cross-examined the witness but did not at that time object to its form. Patterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621. Testimony to which no objection was advanced at the time of taking the deposition on the ground that it was too remote or any motion to strike out subsequently made is properly admitted at the trial over a general objection made by the adverse party. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465. A party proceeding to cross-examination after objecting to questions at the time of taking the deposition does not waive the objection to incompetency at the time of the trial. Bentley v. Bentley's Estate [Neb.] 101 N. W. 976. When a party has opportunity to cross-examine a witness and is not surprised by his answer to the general question, whether "the witness could state anything else pertinent to the issues between the parties," appended to the conclusion of the commission, there is no ground for objection. Witness answered the general question by making a statement relative to the sanity of his father. Kelly v. Moore, 22 App. D. C. 9.

6. When questions in a deposition are leading, the trial court may properly exclude them and the answers. State v. Taylor [W. Va.] 50 S. E. 247. Answers to other questions than those attached to the deposition may be excluded at the trial. Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740. A question objected to as hearsay and appearing by an admission in a subsequent part of the deposition as hearsay should, when read in

DEPOSITS; DEPUTY, see latest topical index.

DESCENT AND DISTRIBUTION.

Scope of topic.—This topic deals only with the rules governing the disposition of the property of those dying intestate. The construction and effect of wills,[10] and the administration and management of estates of decedents, are treated elsewhere.[11]

§ 1. *Law governing descent.*[12]—Where the owner of property dies without making any disposition of it, it descends as provided by the statute of descent.[13] The law in force at decedent's death controls the distribution of his personalty.[14]

The descent of realty is governed by the law of its situs,[15] and the succession to movables by the law of the actual domicile of the owner at the time of his death.[16]

§ 2. *Persons entitled to share or inherit.*[17]—The legal presumption is that every decedent has heirs, but this presumption may be rebutted either by lapse of time accompanied by the nonappearance of heirs, or by proof of the fact.[18] One becomes an heir only on the death of the ancestor,[19] and his capacity to take by descent must be determined as of that time.[20]

court, be excluded. Norman Printer's Supply Co. v. Ford, 77 Conn. 461, 59 A. 499.

7. Objections that depositions were not signed, when not made in the lower court and none of them filed but made for the first time on appeal, will be of no avail to the appellant. Dearlove v. Hayward, 113 Ill. App. 326. An objection may be made on appeal when section 250 of art. 93 of the Maryland Code, which provides that depositions shall be taken in writing and recorded when used in plenary proceedings, has not been followed. When no evidence appears on record on an appeal from such a case, the decision of lower court cannot be sustained. Stonesifer v. Shriver [Md.] 59 A. 139.

8. Under a provision of Hurd's Rev. St. 1903, court may so instruct. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

9. If the statements of a witness in different depositions conflict, the statement against his interest is not conclusive against him. It is for the jury to determine which one they believe to be true. One statement is that plaintiff was thrown off the car by a sudden jerk and the other that the train was moving at a certain rate at the time. Bond v. Chicago, B. & Q. R. Co., 110 Mo. App. 131, 84 S. W. 124. Statements in a deposition made against the interest of the party taking it is not conclusive against him. When the adverse party introduces it, the deposition is made his own. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

10. See Wills, 4 C. L. 1863.

11. See Estates of Decedents, 3 C. L. 1238.

12. See 3 C. L. 1081. See, also, Conflict of Laws, 5 C. L. 610.

13. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

14. In re New York Security & Trust Co., 94 N. Y. S. 93.

15. Whether bastard whose parents have subsequently intermarried can inherit father's realty. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806. The right of aliens to take by descent, in the absence of treaty provisions to the contrary. Ehrlich v. Weber [Tenn.] 88 S. W. 188. Descent of permanent leaseholds, perpetually renewable. Broadwell v. Banks, 134 F. 470. As to advancements. Mort v. Jones [Va.] 51 S. E. 220.

16. As to validity of contract whereby wife releases all her interest in her husband's property. Caruth v. Caruth [Iowa] 103 N. W. 103. Disposition, distribution of, and succession to personalty, wherever situated, is governed by the laws of the state where the owner had his domicile at the time of his death. Appeal of Hopkins, 77 Conn. 644, 60 A. 657.

17. See 3 C. L. 1082. See, also, Tiffany on Real Property, p. 981.

18. Mere allegation of petition that left no heirs or kindred of any kind or degree and that property descended to her husband held insufficient to require purchaser under mortgage foreclosure sale to take title where there was no proof thereof, defendant having defaulted, and no proceedings against unknown heirs. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569. Such allegation is not a conclusion of law, nor is it necessary to state specifically that left neither paternal nor maternal kindred. Id.

19. The mere fact that a child will inherit the realty of his father in the event of the latter's death intestate does not in-

Heirship, except that based upon consanguinity, can be created only by a constitutional law.[21]

The common law did not authorize the adoption of heirs,[22] but this rule has been generally changed by statute.[23] Adopted parents do not inherit from the adopted child.[24]

In many states an illegitimate child whose parents have subsequently intermarried inherits in the same manner as though legitimate.[25] In Indiana if the father, during his lifetime, acknowledges such child as his own, he inherits as though legitimate, provided there are no legitimate children or descendants of legitimate children.[26]

The heirs of an Indian, who has selected lands for allotment and whose right to their allotment to him has attached, succeed to his interests.[27]

At common law an alien cannot transmit land by hereditary descent, and no

vest the child with an interest therein which can be made the subject of sale or conveyance by him during the life of the father. Where husband and wife owned land jointly, deed by children after husband's death purporting to convey their "expectancy" in the half of the land to which the wife held title held void. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. Since there can be no heir of the living, one who adopts a minor as his child and heir has the same unlimited power of disposition of his property that a natural father has. Burnes v. Burnes [C. C. A.] 137 F. 781.

20. Conditions then existing determine who is entitled to take. Only those who at that time come within the description of those entitled by law to inherit. Theobald v. Smith, 92 N. Y. S. 1019. One adopted under law expressly providing that adopted children shall not inherit (Laws 1873, c. 830, p. 1243) may inherit where parent died after adoption of amendment allowing such children to inherit (Laws 1887, c. 703, p. 909). Id.

21. Mere agreement to adopt and to take necessary steps to that end, which was never executed, held not to take place of adoption so as to entitle complainant to inherit. Bowins v. English [Mich.] 101 N. W. 204. An agreement to treat a child as a person would treat his own child confers upon the child no rights whatever to the property of the person making it. Hanly v. Hanly, 93 N. Y. S. 864.

22. Evidence insufficient to show adoption of natural child under the Spanish law or under a special act of the legislature authorizing it. Conrad v. Herring [Tex. Civ. App.] 83 S. W. 427.

23. **In Missouri** an adopted child has the rights of a natural child, and no greater or less rights. Burnes v. Burnes, 132 F. 485. The father, natural or adopting, may disinherit the child, allow him to take a full share, or give him his entire estate, subject to the rights of the wife, to the exclusion of his natural children. May limit amount which he shall take by adoption paper. Id. An adopted child cannot inherit from one person's estate in the dual capacity of adopted child and blood relation. Id. He can inherit from both his natural and his adopting father. Id.

New York: See Theobald v. Smith, 92 N. Y. S. 1019.

Texas: Sayles' Ann. St. 1897, arts. 1, 2, providing for the adoption of legal heirs, places them in the same position as and gives them only the rights of natural children. Logan v. Lennix [Tex. Civ. App.] 88 S. W. 364. Hence such an adopted child may be disinherited by his adopting father, in the absence of a valid agreement to the contrary. Id. Instrument of adoption reciting that it was executed in consideration of love and affection for the child and of the relinquishment of his possession and control by the parents, and that the child should be entitled to all the privileges of a legal heir, does not give him any greater rights than those fixed by statute, and hence does not prevent execution of will disinheriting him. Id.

Washington: Ballinger's Ann. Codes & St. § 6483, gives adopted child all the rights and privileges of a child born in lawful wedlock. Van Brocklin v. Wood [Wash.] 80 P. 530.

24. Fact that one makes a gift to another under mistaken belief that latter is her adopted daughter makes no difference in devolution of property to child's next of kin. White v. Dotter [Ark.] 83 S. W. 1052. See, also, Adoption of Children, 5 C. L. 41.

25. Under Hurd's Rev. St. 1903, c. 39, § 3, providing that an illegitimate child whose parents have intermarried and whose father has acknowledged him or her as his child, shall be considered legitimate, held, that such child inherits the same as though born in lawful wedlock, the statute being a rule of descent. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

26. Under Burns' Ann. St. 1901. § 2630a. Testimony of the mother cannot be received to establish such acknowledgment. Townsend v. Meneley [Ind. App.] 74 N. E. 274. It is immaterial that the acknowledgment was made prior to the date when the statute took effect. Id. Evidence held to show recognition. Id. See, also, Bastards, 5 C. L. 412.

27. Under Act Cong. March 3, 1885, 23 St. 341, providing for allotment of lands of Umatilla Indian Reservation. Act of commissioners in wrongfully allotting them to another does not cut off heirs. Smith v. Bonifer, 132 F. 889. See, also, Indians, 3 C. L. 1706.

one can take by inheritance when he must deduce his title through an alien.[28] This rule has been changed or abrogated by various treaties with foreign nations,[29] and by statute in many of the states.[30] Treaty provisions control state statutes in this regard.[31]

By statute in some states no person may inherit from one whose life he feloniously takes or causes to be taken.[32]

In some states afterborn[33] or pretermitted children are entitled to the shares they would have taken had the parent died intestate.[34]

As a general rule one may make a voluntary conveyance of all or any of his

28. McCormack v. Coddington, 95 N. Y. S. 46. If he takes at all it must be by virtue of the statutes of the state where the property is situated or the provisions of treaties. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

29. Under art. 2 of the treaty of May 4, 1845, ratified Aug. 12, 1846, with Saxony (9 St. 830, 831), aliens protected thereby are given the same right to inherit realty as citizens, with the qualification that they must sell the land within two years, which term may be reasonably prolonged according to circumstances. Ehrlich v. Weber [Tenn.] 88 S. W. 188. Under art. 3 of the same treaty, such aliens inherit personalty in the same manner as realty. Id. Such provisions are not changed by the subsequent treaty with Germany. 17 St. 921, 923. Id. State may give aliens greater rights than treaty does. Thus Shannon's Code, §§ 3659, 3660, gives them equal rights with citizens. Id.

30. **Kansas:** Gen. St. 1899, p. 268, § 1194, providing that heirs of aliens may take their lands by devise or descent, and may hold the same for period of three years and no longer, was repealed in 1901, without any saving clause in the repealing act. Held, in action to recover realty of deceased brought by sisters and nephews of deceased less than three years after his death, in which the state intervened, claiming title by escheat on the ground that decedent's parents died aliens before the time of his death, that the rights of the parties were to be determined as of the date when the action was commenced, and that as the state had at that time no interest in the lands under facts alleged in the answer, a demurrer thereto was properly sustained. State v. Ellis [Kan.] 79 P. 1066.

In New York a citizen of a foreign nation, which, by its laws, confers similar privileges on citizens of that state, may transmit by inheritance and descent his interest in lands to his heirs. Laws 1896, c. 547, p. 561, as amended by Laws 1897, c. 593, p. 706, §§ 5, 5a, 7, construed. Power "to take, acquire, hold, and convey" includes right to transmit by inheritance. Citizen of Great Britain may. Haley v. Sheridan, 94 N. Y. S. 864, overruling 95 N. Y. S. 42. Under Laws 1845, p. 95, c. 115, § 4, as amended by Laws 1875, c. 38, p. 32, requiring aliens to declare their intention of becoming citizens in order to hold as against the state property acquired by inheritance from alien residents or from citizens who have purchased lands within the state, title to realty acquired by a nonresident alien, who had not declared his intention of becoming a citizen, from a resident, escheats to the state, there being no statute authorizing the transmission of title from a nonresident alien who had himself acquired it by descent and not by purchase. McCormack v. Coddington, 95 N. Y. S. 46. A female alien is not required to declare her intention of becoming a citizen under such act. Id. Grantee of citizen who acquires title through nonresident alien takes good title under Laws 1877, p. 117, c. 111, § 1. Id.

Tennessee: Shannon's Code, §§ 3659, 3660, places aliens in all respects, as to the succession of property, in the same situation as citizens. Ehrlich v. Weber [Tenn.] 88 S. W. 188. Acts 1883, p. 330, c. 250, §§ 1, 2, providing for the descent of property when the heirs are aliens, applies only in case all are aliens, and not where one is a citizen and one an alien. Id.

31. Ehrlich v. Weber [Tenn.] 88 S. W. 188. See, also, Aliens, 5 C. L. 96.

32. Code, § 3386. In re Kuhn's Estate, 125 Iowa, 449, 101 N. W. 151. Does not apply to distributive share in husband's estate given to wife by § 3366, which she takes as a matter of right and contract and not by inheritance. Id. Rule since changed so as to include such share by Acts 29th Gen. Assem. c. 135, p. 102. Id.

33. See, also, Wills, § 1, 4 C. L. 1865. Where will provides that afterborn children shall share in personalty not bequeathed to wife, they are not pretermitted within meaning of St. 1903, § 4848, though testator left little or no personal property. Porter v. Porter's Ex'r [Ky.] 86 S. W. 546. If one dies leaving a child, or one is born after his death, and he leaves a will made when he had no child, which does not provide for or mention any that may be born, the will, except in so far as it provides for the payment of debts, is to be construed as if the devises and bequests had been limited to take effect in the event that the child should die under the age of twenty-one and without issue. St. 1903, § 4847. Logan v. Bean's Adm'r [Ky.] 87 S. W. 1110. Where will provided that it should remain unchanged if testator's wife had any children at his death, held, that children born after the will was made were "mentioned" in it. Id.

34. Ball. Ann. Codes & St. § 4601. Van Brocklin v. Wood [Wash.] 80 P. 530. Act applies to adopted children under Ball. Ann. Codes & St. § 6483, giving such children all the rights and privileges of a child born in lawful wedlock. Id. Will not rendered invalid in other particulars by reason of omission of child. Id. See, also, Logan v. Bean's Adm'r [Ky.] 87 S. W. 1110.

property without regard to his children, they being neither purchasers nor creditors.[35] In some states, however, children are entitled absolutely to a certain share in their parent's estate.[36]

§ 3. *Inheritable and distributable property.*[37]—Upon the death of the ancestor intestate, the descent is cast by operation of law on his heirs,[38] and his personalty passes in accordance with the statute of distribution.[39] The legal rights of the heirs or distributees to the property cannot be defeated except by a valid devise thereof to some other person,[40] and they take whatever is undisposed of by will, whether the ancestor so intended or not.[41]

The title to lands or any interest therein vests in the heirs immediately on the death of the ancestor,[42] subject to all liens and charges existing against it,[43] and subject to the payment of the ancestor's debts.[44] Vested remainders, though the land never comes into the remainderman's possession,[45] the legal title remaining in the

35. Jones v. Jones, 213 Ill. 228, 72 N. E. 695.

36. Transfer of shares of stock in building association, together with his contingent right thereunder to certain realty, made by father to his son, held not a donation, but an onerous contract, of character such as would not entitle plaintiffs to a share in the profits therefrom, or to a joint ownership in the property. Nereaux v. Nereaux [La.] 38 So. 11. A donation to one's mother will not be presumed fictitious in order to let children of a subsequent marriage into their legitime simply from the fact that the donee mortgaged the property for the donor's debt. Griffith v. Alcocke, 113 La. 514, 37 So. 47.

37. See 3 C. L. 1085.

38, 39. Mort v. Jones [Va.] 51 S. E. 220.

40. Pomroy v. Hincks, 180 N. Y. 73, 72 N. E. 628.

41. See Wills, § 5 D, 4 C. L. 1936. Land owned by testator and not described in the will passes to the heirs at law as intestate estate, though it is alleged that there was a mere misdescription of the land intended to be devised. Godfrey v. Wingert, 110 Ill. App. 563. It is not sufficient to deprive him of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention in the will that he should not inherit any part of the estate. Pomroy v. Hincks, 180 N. Y. 73, 72 N. E. 628.

42. For a full discussion of what fixtures go to the heir and what to the personal representative, see Bronson, Fixtures, §§ 71, 79. Animals ferae naturae belong to the heir rather than to the personal representatives. Bronson, Fixtures, § 79.

Smith v. Courtnay's Ex'rs [Ky.] 85 S. W. 1101. Code 1895, § 3353. Doris v. Story [Ga.] 50 S. E. 348. Where A contracted with B for purchase of land and paid first installment, and C, at A's request, paid balance of purchase money, and B, by A's direction, made C the absolute fee-simple deed, C's title descended to his heirs. Id. May maintain an action for its recovery, if there is no administrator, or with his consent, if there is one. Id. Administrator cannot appeal from bill to set aside cloud on title. Strong v. Peters, 212 Ill. 282, 72 N. E. 369. In proceedings under Indiana drainage laws to charge realty belonging to defendants with cost of constructing ditch, where one of the defendants died after judgment and before appeal, held, that his heirs should have been made appellants and served with notice of appeal instead of his administrator, they being his successors in interest. Burns' Ann. St. 1901, §§ 268, 271. Rich Grove Tp. v. Emmett, 163 Ind. 560, 72 N. E. 543. The administrator takes the right to rescind and recover land under a contract of sale, the price whereof has not been paid. Succession of Delanenville v. Duhe [La.] 38 So. 20. Is no inconsistency in an act executed by several heirs in a succession in which they acknowledge that they have received payment in full from one of their co-heirs of everything falling to them in that succession, and yet appoint that co-heir as their agent to sell certain realty described in the inventory of the succession, since that portion of the act was necessary in order to take out of those executing the power of attorney all apparent interest in the legal title to the immovables. Werner v. Marx, 113 La. 1002, 37 So. 905. Forms no part of the estate in the hands of the administrator for distribution. Stark v Kirchgraber, 186 Mo. 633, 85 S. W. 868. In a contest between rival claimants seeking to establish heirship for the purpose of making distribution of the estate, the administrator has no official interest, and is not an adverse party to any of the claimants. Sorensen v. Sorensen [Neb.] 100 N. W. 930. Sess. Laws 1895, c. 105, p. 197. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945. Consequently he is entitled thenceforth to be heard as to the disposition of the estate, even though his claim of heirship is contested. May appeal from orders allowing administrator's and attorney's fees. Id. Not assets. Herron v. Comstock [C. C. A.] 139 F. 370.

43. Lippincott v. Smith [N. J. Eq.] 60 A. 330.

44. Lippincott v. Smith [N. J. Eq.] 60 A. 330. A creditor of the heir cannot, by the entry of judgment and the levy of an execution, acquire a right to payment from the ancestor's lands in priority to the ancestor's debts. Lien of judgment against ancestor superior to that of judgment against heir. Id. For a full discussion of this question, see Estates of Decedents, §§ 7 and 8, 3 C. L. 1278, et seq.

45. Where one having a vested remainder died before the happening of the contingency

vendor of realty, when a lien to secure the purchase money is reserved in his deed,[46] and the interest of the grantor under a trust deed, descend to the heir.[47] By statute in Indiana where a conveyance is made solely in consideration of love and affection and the grantee dies intestate without leaving a widow or children, the land reverts to the grantor.[48] In the absence of a statutory or testamentary provision to the contrary, rents of realty accruing after the death of the owner go to the heirs,[49] and those which accrued during his lifetime go to his personal representatives as assets of the estate.[50] All contingent and executory interests, where the person to take is certain, descend to his heirs or pass to his personal representatives, according to whether the property is real or personal.[51]

Personal property,[52] including choses in action, goes to the executor or administrator and not to the heirs or beneficiaries under the will.[53] At common law an estate for years in lands is personal property and on the death of the tenant goes to his representatives;[54] but this rule has been changed by statute in some states.[55]

§ 4. *Course of descent and distribution.*[56]—The realty of one dying unmarried and without issue goes in equal shares to his brothers and sisters.[57] That of a widow goes to her children in equal shares.[58] In Texas, realty descends in equal shares to

on which he was entitled to possession, his interest passed through his estate to his heirs, and they took subject to the lien of a judgment against his estate. Melton v. Camp, 121 Ga. 693, 49 S. E. 690.

46. Have same rights to enforce lien as ancestor had. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504.

47. Where one gave a trust deed in favor of his wife to his father, on the latter's death without other heirs his estate descended to the grantor in the deed, together with all the powers, duties and trusts declared in the deed. Kirkman v. Wadsworth [N. C.] 49 S. E. 962.

48. Burns' Ann. St 1901, § 2628. Held error, under the evidence, to direct verdict on ground that consideration for deed from father to son was solely "love and affection." Wagner v. Weyhe [Ind.] 73 N. E. 89.

49. Hollahan v. Sowers, 111 Ill. App. 263. Are not assets in the hands of the personal representatives. Broadwell v. Banks, 134 F. 470. Where purchaser of realty at sale for purpose of paying mortgage and other debts of deceased took possession before expiration of time for redemption, he was liable for rents to decedent's husband and heirs at law and not to estate, since they were not assets. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

50. Are personal property. Broadwell v. Banks, 134 F. 470. Do not inure to the benefit of his heirs by descent cast. Coberly v. Coberly [Mo.] 87 S. W. 957.

51. Where happening of contingency is, not necessary to the determination of who is to take. Personalty. Hall v. Brownlee [Ind.] 72 N. E. 131.

52. Burnes v. Burnes [C. C. A.] 137 F. 781; Carpenter v. U. S. Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404; Huyler v. Dolson, 101 App. Div. 83, 91 N. Y. S. 794; Perkins v. Goddin [Mo. App.] 85 S. W. 936; Irwin v. Sample, 213 Ill. 160, 72 N. E. 687. Legatees cannot take title to personalty except through the administrator or executor, and on his appointment all rights in any of decedent's personalty, including the right to recover his interest in a partnership of which he was a member, vest in him and must be sued for by him. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

53. Rents accruing before lessor's decease. Broadwell v. Banks, 134 F. 470. If no time for redemption is fixed by a contract of pledge and the pledgor does not redeem during his lifetime, the right of redemption descends to his personal representatives. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Right of surety to recover from principal the amount paid by him by reason of his secondary liability. Coffinberry v. McClellan [Ind.] 73 N. E. 97. Legal title to a note bequeathed to a particular individual. Jacques v. Ballard, 111 Ill. App. 567.

54. Applies to terms for a longer period than tenant's life. Broadwell v. Banks, 134 F. 470.

55. Under Swan's St. Ohio 1841, p. 289, § 1, permanent leasehold estates, renewable forever, are subject to same law of descents and distributions as estates in fee. Broadwell v. Banks, 134 F. 470.

56. See 3 C. L. 1089. See, also, § 6, post; Tiffany, Real Prop., 981. For the construction and effect of agreements between the heirs and distributees affecting the distribution of the estate, see Estates of Decedents, § 17, 3 C. L. 1323.

57. Of the whole and half blood, born before or after his death. Shannon's Code, § 4163, subsec. 2. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

58. Plaintiffs purchased land with their own money and had it conveyed to their mother under an agreement that she should convey it to them by deed or will whenever they might desire. Held that on her death intestate leaving four children, plaintiffs and two others, plaintiffs took the legal title in fee to half the property and the equitable title to the rest, so that it could not, in an action on an insurance policy, be said as a matter of law that the property belonged

the children, subject to the widow's one-third life estate therein.[59] In New York in case the intestate leaves no descendants his realty goes to his mother for life, with remainder to his brothers and sisters in equal shares.[60] In Texas the homestead of one who leaves no wife goes to his children, free from liability for his debts.[61]

In many states ancestral realty can go only to those of the blood of the ancestor from whom the intestate acquired it, provided there are any such.[62] On death, without issue, of a daughter, who has inherited land from her father, leaving a husband and brothers and sisters, the husband inherits half the property and the brothers and sisters the other half.[63] An ancestral estate derived from decedent's mother does not ascend to the father.[64] If the estate is a new acquisition, derived from a stranger to the blood, and decedent leaves no issue, his father takes a life estate, with remainder to the next of kin.[65]

Undisposed-of personalty passes to the surviving husband or wife and the surviving children in equal shares.[66] If intestate leaves neither a husband or wife nor any children, it goes to his father, or to his mother if his father is dead.[67] If he leaves no father or mother, it goes in equal shares to his brothers and sisters.[68]

In New York, in the distribution of personalty, representation is admitted among collaterals in the same manner as is allowed in reference to realty.[69] Thus, where the intestate leaves only nephews and grandnephews, they take his personalty by right of representation.[70] So too, where he leaves only first cousins and repre-

to the four children in equal parts. Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83.

59. On death of one of the children without issue his share goes to his brothers and sisters. Broom v. Pearson [Tex.] 85 S. W. 790.

60. Under 3 Rev. St. [7th Ed.] 2211, pt. 2, c. 2, § 6. McCormack v. Coddington, 95 N. Y. S. 46. Realty held by a married woman dying intestate and leaving her surviving a husband, mother, and one brother, but no children or descendants of deceased children and no father, descends to the mother during life, and the reversion to the brother in fee, subject to the husband's curtesy, if any. Rev. St. pt. 2, p. 752, c. 2, § 6. Where mother conveyed to husband, subject to curtesy, and brother and his wife quitclaimed to him, the curtesy was merged in the higher title. Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.

61. Under Tex. Rev. St. 1895, art. 2046, and Const. art. 16, § 52. Randolph v. White, 135 F. 875. Statute and constitution are not in conflict. Id.

62. In Connecticut ancestral real estate of an intestate is to be distributed to his brothers and sisters and those who legally represent them, of the blood of the ancestor from whom the estate came; or, if there are none such, then to the children of the ancestor, and those who legally represent them; or if there are none such, then to the brothers and sisters of the ancestor, and those who legally represent them; and if there are none such, then it is to be divided in the same manner as other realty. Gen. St. 1902, § 398. In re Tuttle's Estate [Conn.] 59 A. 44. The words "legal representatives" as used in the act are used to describe those who inherit property per stirpes as the representative of a deceased ancestor, or, in other words, lineal descendants, and do not include parents. Id. Ancestral estate inherited by a son as sole issue of his father will not, on son's death without issue, pass to his surviving mother as his representative, and hence, on death of mother, father's brothers and sisters are entitled to property as against son's nearest of kin on his mother's side. Id.

63. Keith v Keith [Tex. Civ. App.] 87 S. W. 384.

64. Wheelock v. Simons [Ark.] 86 S. W. 830.

65. Where will devised land to daughter with provision that in case of her death without legal heirs of her body, or in case of death of herself and her heirs leaving no legal heirs of their bodies, the property should revert to testator's estate, and daughter survived testator and was herself survived by a son and a daughter, and son died leaving his father surviving, the father took life estate in son's half with remainder to son's sister, since children took by purchase under the will and not by inheritance from their mother. Wheelock v. Simons [Ark.] 86 S. W. 830.

66. Pomroy v. Hincks, 180 N. Y. 73, 72 N. E. 628.

67. Undisposed of remainder in trust fund after death of widow passes to daughter and widow, and on death of daughter, unmarried and without issue, her share goes to widow as her mother under Code Civ. Proc. § 2732, subd. 8. Pomroy v. Hincks, 180 N. Y. 73, 72 N. E. 628.

68. Of one dying intestate unmarried and without issue and leaving no parents. Ehrlich v. Weber [Tenn.] 88 S. W. 188.

69. Laws 1898, c. 319, p. 941, amending Code Civ. Proc. § 2732. In re De Voe, 94 N. Y. S. 1129; In re New York Security & Trust Co., 94 N. Y. S. 93.

70. In re De Voe, 94 N. Y. S. 1129.

sentatives of deceased cousins, the second cousins take a distributive share by representation.[71] In such case the question of the scources from which the property came to the decedent is immaterial.[72]

In New Jersey in the distribution of personalty among collaterals, representation is limited to the descendants of the stock represented by the surviving next of kin.[73] The stock entitled to representation are the descendants of the first ancestor in the ascending line common to the intestate and all the surviving next of kin; the next of kin of equal degree taking per capita, and the descendants of deceased members of the class as representing their stock.[74] If some first cousins are living, being the only next of kin, they constitute the stock entitled to representation, and, there being no great-uncles or great-aunts living, first cousins and the representatives of deceased persons of that class take to the exclusion of the descendants of the deceased great-uncles or great-aunts.[75]

§ 5. *Quantity of estate or share acquired.*[76]—The shares of the heirs or next of kin may be increased or decreased by transfers of property made between them and the ancestor during the latter's lifetime, depending upon whether such transactions are gifts[77] or advancements.[78]

§ 6. *Husband or wife as heir.*[79]—Property held by the entireties goes to the survivor.[80]

Community property descends one-half to the surviving spouse and the other half to the children.[81] In Kentucky the half interest of the husband in property owned by his wife and himself jointly goes to his children, subject to his wife's right of dower therein.[82]

In New Jersey the widow takes a third of the personalty.[83]

In some states the widow of an intestate who leaves no child or children or descendants thereof takes half his realty and all his personalty.[84] In other states this applies only in case the property is not ancestral.[85] In still others, under such circumstances, she is his sole heir, and may, upon payment of his debts, take possession

71. In re New York Security & Trust Co., 94 N. Y. S. 93.

72. In the distribution of personalty among first and second cousins on both the father's and mother's side. In re New York Security & Trust Co., 94 N. Y. S. 93.

73, 74. Smith v. McDonald [N. J. Err. & App.] 61 A. 453.

75. P. L. 1898, p. 778, and P. L. 1899, p. 203, construed. Smith v. McDonald [N. J. Err. & App.] 61 A. 453.

76. See 3 C. L. 1091.

77. See Gifts, 3 C. L. 1560.

78. See Estates of Decedents, § 17 B, 3 C. L. 1324.

79. See 3 C. L. 1091. See, also, § 4, ante. See Husband and Wife, 3 C. L. 1669; Dower, 5 C. L.; Tiffany, Real Prop. § 427.

80. Real Estate. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. Deposit in a bank made in the joint names of a husband and wife. Same is true though it is in the names of the husband "or" the wife. In re Klenke's Estate [Pa.] 60 A. 166.

81. Deed of widow to land conveyed to herself and her husband held not to have conveyed undivided half interest of the children. Summerville v. King [Tex.] 83 S. W. 680. On death of wife, husband and children hold it as tenants in common. Rev. St. 1895, art. 1696. Wiess v. Goodhue [Tex.] 83 S. W. 178. The husband, in such case, without administration or qualification as survivor, has no power over the interest of the children except such as would arise by reason of the analogy to a partnership estate, or as tenant in common. Id.

82. Where three of nine children conveyed their interest to a fourth, and he thereafter conveyed his entire interest to his mother, and she subsequently reconveyed her interest to him, he thereby became the owner in fee of her half, and four-ninths of the other half, together with her dower interest therein. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734.

83. Where will provided that income of child's share should be paid to him for life, and on his death his share was to go to his heirs, held that, the property being personalty, one-third thereof will pass to the son's widow on son's death intestate. Throp v. Throp [N. J. Eq.] 61 A. 377.

84. Butman v. Butman, 213 Ill. 104, 72 N. E. 821. Fact that widow instituted suit for specific performance of contract for sale of decedent's land that she might obtain whole of proceeds as personalty, where, if it was preserved as realty, she would only have half of it, does not affect her right to specific performance as against the heirs. Id.

85. See, also, ante, § 4. Kirby's Dig. § 2709. Terry v. Logue [Ark.] 87 S. W. 119.

of his estate without administration.[86] In New York the widow is entitled to the whole of the personal estate of a decedent who leaves no descendant, parent, brother, sister, nephew, or niece.[87] In Kentucky the husband is the sole heir of his wife only in case she does not leave surviving her any kindred in either the paternal or maternal line, however remote.[88]

The widow is generally given the homestead for life for the benefit of herself and her minor children, if there are any.[89] Where a husband makes a homestead entry during his wife's life, but she dies prior to the making of final proof and the issuance of a patent, the children take the title which their mother would have had as a member of the community on the subsequent acquisition of the legal title by the father.[90] The right of the survivor of a community to occupy the community homestead is a personal one, and not an estate in the land which can be assigned or conveyed so as to vest the right to such use and occupancy in the assignee.[91] A provision that the homestead shall descend free from all judgments and claims against the deceased owners abrogates the right to a vendor's lien thereon.[92]

In some states the widow is entitled to occupy the dwelling house of her husband for a specified time after his death, or until dower is assigned to her.[93]

In some states the widow may, under specified circumstances, elect to take a child's part of the estate in fee in lieu of dower.[94] In Missouri, if the husband leaves no descendants, she may, at her election, take one-half of the land of which her

86. Civ. Code 1895, § 3355 (1). Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Where widow takes possession under this statute without notice of existing debt, creditor may sue her directly. Civ. Code 1895, § 3422. Id.

87. Code Civ. Proc. § 2732, subd. 3. In re Hardin's Estate, 97 App. Div. 493, 89 N. Y. S. 978, afg. 44 Misc. 441, 90 N. Y. S. 95. Such provision is not affected by Laws 1898, c. 319, p. 941, providing that representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate. Id.

88. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569.

89. Provided husband was resident of state at time of his death. Const. 1874, art. 9, §§ 3-6. Answer in ejectment claiming such right held to state a good defense. Gates v. Solomon [Ark.] 83 S. W. 348. Answer alleging that one of the defendants was holding land as a homestead, but failing to show that she had a right to do so, held demurrable. Id. In case there is a widow and a child or children, the homestead inures to the widow as widow and to the heirs, unless the wife consents to its alienation during the husband's lifetime. Const. 1885, art. 10, § 4. Palmer v. Palmer [Fla.] 35 So. 983. In case no such alienation takes place the homestead cannot be disposed of by will. It cannot, in such case, be dealt with or affected in any way by will, either directly or indirectly, and intestacy is compelled in so far as it is concerned. Id. In cases where the will is void in so far as it attempts to dispose of the homestead, the widow is not deprived of her right of dower in such homestead by her failure to dissent from the will, nor by accepting the valid provisions of the will in her favor, where the will is not so framed as to render it inequitable for her to claim her right in the homestead and at the same time insist upon such provisions. Id. There being no minor children, the widow is entitled to the exclusive possession of the homestead, with all the rents, issues, and products thereof. Takes crop of wheat growing thereon at time of husband's death. Mahoney v. Nevins [Mo.] 88 S. W. 731.

90. Cox v. Tompkinson [Wash.] 80 P. 1005.

91. Homestead right terminates on wife's sale of her interest and heirs of deceased husband are entitled to possession of their interest in the property. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

92. Rev. St. 1898, § 2271. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678. See, also, Homesteads, 3 C. L. 1630.

93. May retain full possession of the dwelling house in which her husband most usually dwelt next before his death, free from molestation or rent, until her dower is assigned to her. Rev. St. 1892, § 1834. Palmer v. Palmer [Fla.] 35 So. 983. May tarry in the mansion or chief dwelling house of her husband for two months after his death, and if her dower is not assigned within that time, may continue in possession thereof, together with the farm thereto attached, free of all rent, until it is assigned. Answer in ejectment attempting to set up such right held fatally defective. Gates v. Solomon [Ark.] 83 S. W. 348.

94. Civ. Code 1895, § 4689 (3). Election must be made within one year, and law makes no exception because of widow's insanity. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300. May elect to take a child's part of the land in fee, if she has a child or children living. Rev. St. 1899, § 2944. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757. Is not, by so doing, deprived of her homestead interest by Rev. St. 1899, § 3621, providing that no dower shall be assigned to widow where her interest in the homestead equals or exceeds a third interest for her life in

husband died seised.[95] The right of election is a personal one and not a property right which will survive to her representatives or heirs.[96] The surviving spouse may also generally elect to take his or her statutory share of the estate in lieu of taking under the will.[97] A husband electing to take under the statute instead of under his wife's will, there being no children or lawful issue of any deceased child, takes only an equal undivided one-third of all lands other than the homestead of which she died seised, though, had there been no will, he would have taken the whole estate.[98]

The distributive share of the widow in her husband's estate goes to her as a matter of right and of contract and not by inheritance.[99]

The husband surviving to the wife's choses in action takes no title until he reduces them to possession by suit.[100]

A plural wife cannot inherit any interest in lands acquired by her husband either before or after marriage.[101]

In Iowa the widow cannot, by contract with him, release her interest in her husband's property.[102]

In construing a statute providing for the descent of property received by the surviving spouse from his or her husband or wife who died intestate, the rights of the parties are to be determined by the legal title and their legal status.[103]

DETECTIVES; DETERMINATION OF CONFLICTING CLAIMS TO REALTY, see latest topical index.

DETINUE.

To sustain an action of detinue, plaintiff must allege and prove title to the property,[1] but having possession at the time of the alleged wrongful taking, title is presumptively in him,[2] and defendant has the burden of disproving plaintiff's title.[3] If defendant denies plaintiff's title, he may set up title in a third person.[4]

DEVIATION; DILATORY PLEAS, see latest topical index.

all realty of which her husband died seised. Section applies only to dower proper. McFadin v. Board [Mo.] 87 S. W. 948.

95. Rev. St. 1899, § 2939. Wash v. Wash [Mo.] 87 S. W. 993. Is only entitled to common-law dower in land which he has previously disposed of by gift. Coberly v. Coberly [Mo.] 87 S. W. 957. Recognition by heir of widow's right to make such election held an admission that decedent owned the land at the time of his death. Id.

96. Election cannot be made by anyone in her name or otherwise after her death. Wash v. Wash [Mo.] 87 S. W. 993. See, also, Election and Waiver, 3 C. L. 1177.

97. See Election and Waiver, 3 C. L. 1177.

98. Gen. St. 1894, §§ 4469-4471, construed. Kelly v. Slack, 93 Minn. 489, 101 N. W. 797.

99. Share given her by Code, § 3366. Hence § 3386 providing that no one shall inherit from one whose life he feloniously takes or procures another to take does not apply to prevent widow murdering her husband from taking such share. In re Kuhn's Estate, 125 Iowa, 449, 101 N. W. 151.

100. Until then are not garnishable by his creditor. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454. Entitled to administer and to surplus after paying her debts. Gen. Laws 1896, c. 212, § 9. Id.

101. Has no dower interest. Raleigh v. Wells [Utah] 81 P. 908.

102. Code, § 3154, providing that when property is owned by the husband or wife the other has no interest therein which can be the subject of contract between them, is to be construed as a statute regulating the descent and distribution of property, and renders void an agreement by the wife purporting to release all her interest in her husband's property. Caruth v. Caruth [Iowa] 103 N. W. 103.

103. Rev. St. § 4162. Digby v. Digby, 5 Ohio C. C. (N. S.) 130. The surviving husband or wife in such case does not take as trustee, but with an absolute right to dispose of the estate and to change its character so as to prevent its descent being controlled by Rev. St. § 4162. Id. Money received by a widow for the sale of oil from land derived by her from her deceased husband is not identical with the land, and upon distribution after her death is not to be controlled by Rev. St. § 4162. Id.

1. Vinson v. Knight, 137 N. C. 408, 49 S. E. 891. Where the summons stated the cause of action to be "for the recovery of the possession of one steer" this day forcibly taken by defendant from plaintiff's servants, etc., and an oral complaint alleging practically the same facts, a cause of action in detinue is stated. Id.

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

Insufficiency of evidence, while the most frequent ground for directed verdict or demurrer to evidence, is frequently raised in other ways. Accordingly reference must be had to topics dealing with the specific subject-matter for a full treatment of sufficiency of evidence on particular questions.[5]

§ 1. *Directing verdict.*[6] *Grounds and occasions.*[7]—It is the duty of the court to direct a verdict where there is no evidence to support the cause of action;[8] or where the evidence on material points[9] is undisputed,[10] so that the only issue is one of law,[11] or is such that all reasonable men[12] or ordinary minds could draw but one conclusion therefrom,[13] or of such a conclusive character as would compel the court in the exercise of sound legal discretion to set aside a verdict returned in opposition thereto,[14] or where as a matter of law there can be no recovery had upon any view that can properly be taken of the facts which the evidence tends to establish;[15] but if there is any substantial evidence bearing upon the issue to which the jury might in the proper exercise of its function give credit, the court cannot

2, 3. Vinson v. Knight, 137 N. C. 408, 49 S. E. 891.

4. Vinson v. Knight, 137 N. C. 408, 49 S. E. 891. An answer denying plaintiff's title and his right to recover the chattel is sufficient to put plaintiff on notice that the real issue on the trial would be one of title, and not the trespass in taking possession. Id.

5. See such topics as Master and Servant, 4 C. L. 533. See, also, Appeal and Review, 5 C. L. 224, for extent of appellate review of verdicts.

6, 7. See 3 C. L. 1093.

8. Jennings v. Ingle [Ind. App.] 73 N. E. 945; Armstrong v. Aragon [N. M.] 79 P. 291. An issue cannot be submitted to the jury where there is no evidence to support it. Frank v. Berry [Iowa] 103 N. W. 358. Plaintiff fails to sustain the cause of action pleaded. Peckinpaugh v. Lamb [Kan.] 79 P. 673. If after all the evidence is received, plaintiff has established no cause of action, a directed verdict for defendant, and not a dismissal, is proper. Harris v. Buchanan, 100 App. Div. 403, 91 N. Y. S. 484; Niagara Fire Ins. Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. S. 208.

9. Green v. Stewart, 23 App. D. C. 570; Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590.

10. Patillo v. Allen-West Commission Co. [C. C. A.] 131 F. 680; Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469; Tyrus v. Kansas City, etc., R. Co. [Tenn.] 86 S. W. 1074; York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895; International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129; Chicago Great Western R. Co. v. Roddy [C. C. A.] 131 F. 712; Fielding v. Chicago, etc., R. Co. [Neb.] 101 N. W. 1022.

11. Babb v. Oxford Paper Co., 99 Me. 298, 59 A. 290; Sachs v. Norn [Mich.] 102 N. W. 983; Posten v. Denver Consol. Tramway Co. [Colo. App.] 78 P. 1067; Bridges v. Jackson Elec. R., Light & Power Co. [Miss.] 38 So. 728; Kiesewetter v. Supreme Tent of the Knights of the Maccabees of the World, 112 Ill. App. 48; Jennings v. Ingle [Ind. App.] 73 N. E. 945; Tyrus v. Kansas City, etc., R. Co. [Tenn.] 86 S. W. 1074.

12. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808.

13. Gilbreath v. State [Tex. Civ. App.] 82 S. W. 807. Where the evidence is all one way and such that there can be but one answer, the question is for the courts. Holmes v. Missouri Pac. R. Co. [Mo.] 88 S. W. 623.

14. Chicago Great Western R. Co. v. Roddy [C. C. A.] 131 F. 712; Anderson v. Cumberland Tel. & T. Co. [Miss.] 38 So. 786; Armstrong v. Aragon [N. M.] 79 P. 291; Mauer v. Gould [N. J. Law] 59 A. 28; Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005; Patillo v. Allen-West Com. Co. [C. C. A.] 131 F. 680; Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636; International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129; Riley v. Louisville & N. R. Co. [C. C. A.] 133 F. 904; Westfall v. Wait [Ind.] 73 N. E. 1089. Where it is plain that no verdict for defendant could have been supported if rendered, it becomes the duty of the court to control the action of the jury and direct a verdict for plaintiff. Loper v. Somers [N. J. Err. & App.] 61 A. 85. The Federal supreme court has held that a case may be withdrawn from a jury not only where the plaintiff's evidence is plainly insufficient to support a verdict, but also where the whole evidence is of such conclusive character that the court in the exercise of sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. Guenther v. Metropolitan R. Co., 23 App. D. C. 493.

15. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808. The court may direct a verdict where there is no conflict in the evidence and where that introduced, with all reasonable deductions and inferences therefrom, demands a particular verdict. Civ. Code 1895, § 5331. Central of Georgia R. Co. v. Gortatowsky [Ga.] 51 S. E. 469. Where the plaintiff in a personal in-

rightfully direct the jury to find in opposition to such evidence,[16] on some of plaintiff's material and essential allegations,[17] nor determine whether the plaintiff has a preponderance of the evidence.[18] Where the evidence on a material issue[19] only enables the jury to guess at which one of several causes produced a certain result in issue,[20] or is conflicting,[21] so that reasonable men may fairly differ upon the question,[22] or different minds might reasonably draw different conclusions or inferences therefrom,[23] and authorize a finding either for or against the defendant,[24] or there is any evidence which alone justifies an inference of a disputed fact,[25] or where the weight of evidence,[26] or the credibility of the witnesses is involved, the case should be submitted to the jury,[27] though the weight of evidence be sufficient to justify the judge in setting aside the verdict.[28] A mere preponderance of con-

jury case was guilty of contributory negligence, a verdict directed for defendant was proper. Gallagher v. Northern Pac. R. Co. [Minn.] 101 N. W. 942.

16. Minahan v. Grand Trunk Western R. Co. [C. C. A.] 138 F. 37; Central Union Bldg. Co. v. Kolander, 113 Ill. App. 305. On a motion to direct a verdict for the defendant, the test is whether there is any evidence fairly tending to support the cause of action. Chicago Union Traction Co. v. Lundahl, 215 Ill. 289, 74 N. E. 155; Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751; Illinois Central R. Co. v. Smith, 111 Ill. App. 177; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Scott v. Stuart, 115 Ill. App. 535.

17. Alabama & V. R. Co. v. Boyles [Miss.] 37 So. 498; East St. Louis R. Co. v. Hessling, 116 Ill. App. 125; Fox v. Michigan Cent. R. Co. [Mich.] 101 N. W. 624.

18. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Illinois Cent. R. Co. v. Smith, 111 Ill. App. 177. A case need not be submitted to a jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it. Kielbeck v. Chicago, etc., R. Co. [Neb.] 97 N. W. 750. A verdict can be directed at the close of evidence only where all the evidence with the inferences which a jury might justifiably draw therefrom is not sufficient to support a verdict for the adverse party. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229.

19. Weller v. Hilderbrandt [S. D.] 101 N. W. 1108. Where material points of evidence are contested, it is error for the court to assume the existence of facts and take away from the jury the finding of them. Calvert Bank v. Katz & Co. [Md.] 61 A. 411.

20. Fuller v. Ann Arbor R. Co. [Mich.] 12 Det. Leg. N. 348, 104 N. W. 414.

21. Prouty v. McCormick Harvesting Mach. Co. [Iowa] 103 N. W. 155; Posten v. Denver Consol. Tramway Co. [Colo. App.] 78 P. 1067; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108; Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Yezner v. Roberts, J. & R. Shoe Co., 116 Ill. App. 40; Parker v. Stroud [Tex. Civ. App.] 87 S. W. 734; Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076; Louisville R. Co. v. Hartman's Adm'r [Ky.] 83 S. W. 570; Illinois Central R. Co. v. Keegan, 112 Ill. App. 28; Louisville & N. R. Co. v. Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Brand v. Learned [Miss.] 38 So. 43; Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105; Robinson v. Lamoureaux [Kan.] 80 P. 595; Powley v. Swensen, 146 Cal. 471, 80 P. 722; Unlon Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374; McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55; Boyett v. Payne [Ala.] 37 So. 585; Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427; Dobbs v. Woodstock Iron Works [Ga.] 50 S. E. 914; Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644; North Carolina Corp. Commission v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191; Bartholomew v. Kemmerer, 211 Pa. 277, 60 A. 908; Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Affirmative instructions are properly refused where the evidence affords adverse inferences upon every issue of fact presented by the pleadings. Garrison v. Glass, 139 Ala. 512, 36 So. 725. Questions of facts depending on the interpretations of disputed facts and inferences are for the jury. Molloy v. United States Exp. Co., 22 Pa. Super. Ct. 173.

22. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115.

23. Lockhart v. Hewitt [S. D.] 101 N. W. 355; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108; Ferguson v. Central R. Co. [N. J. Err. & App.] 60 A. 382; Beall Bros v. Johnstone, 140 Ala. 339, 37 So. 297; Chicago Great Western R. Co. v. Roddy [C. C. A.] 131 F. 712; Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133; Houts v. St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Blakeslee's Express & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135.

24. Brunelle v. Ruell [Mich.] 12 Det. Leg. N. 167, 103 N. W. 602.

25. Omaha Packing Co. v. Murray, 112 Ill. App. 233; Kelton v. Fifer, 26 Pa. Super. Ct. 603.

26. Craft v. Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 519; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108. The question of preponderance of evidence is for the jury. Wacker v. St. Louis Transit Co., 108 Mo. App. 645, 84 S. W. 138.

27. Eastham v. Hunter [Tex.] 86 S. W. 323; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108; Farley v. Thalhimer, 103 Va. 504. 49 S. E. 644; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536.

28. Dinan v. Supreme Council of Catholic Mut. Ben. Ass'n [Pa.] 60 A. 10. The mere fact that a new trial is ordered because the evidence is insufficient to sustain the verdict does not entitle the party in whose favor the order is given to a directed verdict on the second trial if the evidence therein

flicting evidence will not justify a directed verdict,[29] but where the evidence for one party is a mere scintilla and that for the other is so overwhelming that no real controversy is raised,[30] or the evidence in support of a given fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential and improbable, should carry the case to the jury.[31] But in some jurisdictions it has been held that a verdict can be directed only where there is no evidence to sustain the cause of action or defense,[32] or there is no evidence which if believed by the jury might have supported a different verdict,[33] or where as a matter of law the testimony is undisputed, even by indirection,[34] or where, after a consideration of all the evidence most favorable to a party, together with all the reasonable and legitimate inferences which a jury might have drawn therefrom, it can be said that the evidence is clearly insufficient to establish one or more facts essential to that party's cause.[35] A party introducing sufficient evidence to support a verdict is entitled to go to the jury;[36] this applies to a plaintiff who makes out a prima facie case, though defendant's evidence apparently overcomes such prima facie case;[37] but there may be exceptional cases where the evidence introduced by the defendant is of such conclusive and unimpeachable nature as to justify binding instructions in his favor, though plaintiff's evidence standing alone would justify the inferences necessary to support his claim.[38]

Plaintiff is entitled to a directed verdict where he makes out a prima facie case,[39] or proves his case as laid,[40] or where the evidence tending to establish his cause of action is undisputed and ample,[41] making a case that has no matter of fact left open,[42] defendant introducing no evidence,[43] or where defendant's evidence and all reasonable inferences therefrom show no defense.[44] Where a prima facie case is made out by plaintiff,[45] or the evi-

is substantially the same as on the first trial. McKenzie v. Banks [Minn.] 103 N. W. 497.

29. Bond v. Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124.

30. Cromley v. Pennsylvania R. Co., 211 Pa. 429, 60 A. 1007. The old scintilla doctrine has been severely criticised. Kelton v. Fifer, 26 Pa. Super. Ct. 603. Though there be slight evidence, yet if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, it is the duty of the court to instruct a verdict. Wills v. Central Ice & Cold Storage Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 512, 88 S. W. 265.

31. Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557.

32. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Chicago & E. I. R. Co. v. Stratton, 111 Ill. App. 142; County of DeWitt v. Spaulding, 111 Ill. App. 364; Smith v. Park's Adm'r [Ky.] 84 S. W. 1167; Randall v. Detroit & N. W. R. Co. [Mich.] 102 N. W. 988; Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635.

33. Wheeler v. Seamans, 123 Wis. 573, 102 N. W. 28.

34. Wilson v. Royal Neighbors of America [Mich.] 102 N. W. 957.

35. Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899; McCaughn v. Young [Miss.] 37 So. 839; Farmer v. Cumberland Tel. & T. Co. [Miss.], 38 So. 775.

36. Eastham v. Hunter [Tex.] 86 S. W. 323; Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863; Farrell v. Interurban St. R. Co., 90 N. Y. S. 345. Where the evidence tends to prove the cause of action laid in the declaration, the case should go to the jury. Chicago Junction R. Co. v. McGrath, 203 Ill. 511, 68 N. E. 69.

37. Kohner v. Capital Traction Co., 22 App. D. C. 181.

38. Kelton v. Fifer, 26 Pa. Super. Ct. 603. There may possibly be an exception to this rule where there is not a scintilla of evidence and nothing substantial on the part of the plaintiff, and a verdict if rendered in his favor would not be permitted to stand. Kohner v. Capital Traction Co., 22 App. D. C. 181.

39. Mitterwallner v. Supreme Lodge of Knights & Ladies of Golden Star, 90 N. Y. S. 1076.

40. United States Fidelity & Guaranty Co. v. Donnelly [N. J. Err. & App.] 61 A. 445; Murphy v. Davis [Ga.] 50 S. E. 99. Where defendant offers no evidence and that of plaintiff sustains his claim, a verdict may be directed. Uzzell v. Horn [S. C.] 51 S. E. 253.

41. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

42. People v. Cole [Mich.] 102 N. W. 856.

43. Uzzell v. Horn [S. C.] 51 S. E. 253; Mitterwallner v. Supreme Lodge of Knights & Ladies of Golden Star, 90 N. Y. S. 1076; United States Fidelity & Guaranty Co. v. Donnelly [N. J. Err. & App.] 61 A. 445; Murphy v. Davis [Ga.] 50 S. E. 99.

44. Poindexter v. McDowell, 110 Mo. App. 233, 84 S. W. 1133.

dence fairly[46] tends to show plaintiff's right to recover,[47] or to support his cause of action,[48] or is such that with the inferences that the jury may justifiably draw therefrom, is sufficient to support a verdict for plaintiff, it is proper to refuse to direct a verdict for defendant.[49] Verdict should not be directed in favor of a plaintiff who fails to make out a prima facie case,[50] or when the evidence is such as to afford reasonable inference of the existence of any facts unfavorable to a right of recovery by the party asking it,[51] and a directed verdict for plaintiff on one count is improper where a complete defense thereon was shown by the evidence on another count reciting the same cause of action.[52] Where there is evidence to support a counterclaim,[53] or one of defendant's pleas, it is improper to direct a verdict adverse thereto.[54] When issue is joined on an immaterial plea and its averments are proved, the defendant is entitled to the general charge.[55] Though plaintiff's evidence offered no basis for recovery of any certain amount, a verdict should be directed for the indebtedness admitted in defendant's answer.[56] A defendant setting up a cross action in his answer is not entitled to have the facts confessed in the supplemental petition, denying such cross action, treated as evidence in his favor as a basis for directed verdict.[57] Oral evidence in support of an affirmative defense, even if not contradicted, will not authorize a trial court to direct peremptorily a verdict for defendant.[58] It is only when the facts are such that all reasonable men must draw the same conclusions that the question of negligence is ever considered as one of law for the court.[59] A motion for a directed verdict based upon a part only of the issues involved should be refused.[60] A verdict may be directed upon certain of the counts of a declaration,[61] but the court is not required to direct upon a count against which a demurrer has been sustained.[62] The rule that where there is nothing for a jury to determine except the amount of principal and interest due on a note, the verdict may be directed, does not obtain in Missouri,[63] and it is an invasion of the province of the jury for the court to direct them that they must accept as true and act upon the evidence of witnesses, though such evidence be all one way.[64] In Illinois, a verdict may be directed for defendant, after he has pleaded to the declaration, where each count is so defective that it could not after verdict support a judgment.[65] Where a question is res adjudicata, the court should direct a verdict and not refuse to proceed with the trial.[66] Where

45. Humboldt Bldg. Ass'n v. Ducker's Ex'r, 26 Ky. L. R. 931, 82 S. W. 969. Where there is evidence tending to prove all that is required to warrant a recovery, the case should be submitted to the jury. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8.

46. Shickle, Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444; News Pub. Co. v. Associated Press, 114 Ill. App. 241; Nicholls v. Colwell, 113 Ill. App. 219.

47. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415; Belt R. Co. v. Confrey, 111 Ill. App. 473; Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50.

48. Hahl v. Brooks, 114 Ill. App. 644; Luttrell v. East Tennessee Tel. Co. [Ky.] 86 S. W. 1124.

49. Chicago City R. Co. v. Bennett, 214 Ill. 26, 73 N. E. 343.

50. Moultrie Lumber Co. v. Driver Lumber Co. [Ga.] 49 S. E. 729.

51. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

52. Evidence properly received for any reason during a trial must be considered. Wollman v. Loewen, 96 Mo. App. 299, 70 S. W. 253.

53. Campbell v. Park [Iowa] 101 N. W. 861.

54. Henry v. Leet [Ga.] 50 S. E. 929.

55. Rasco v. Jefferson [Ala.] 38 So. 246.

56. McCormick v. Gubner, 90 N. Y. S. 1073.

57. Banderer v. Gunther Foundry Mach. & Supply Co. [Tex. Civ. App.] 87 S. W. 851.

58. Jevons v. Union Pac. R. Co. [Kan.] 78 P. 817.

59. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115.

60. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285.

61. Reynolds v. Cavanagh [Mich.] 102 N. W. 986.

62. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005.

63. Dawson v. Wombles [Mo. App.] 86 S. W. 271.

64. Rev. St. 1899, §§ 721, 726. Dawson v. Wombles [Mo. App.] 86 S. W. 271.

65. Practice Act, § 51. Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142.

66. Hatch v. Frazer [Mich.] 101 N. W. 228.

the court of last resort has held that plaintiff's petition states a cause of action and his evidence makes a case for the jury, it is not error on a second trial on the same pleadings and evidence to refuse to direct a verdict for defendant.[67] Judgment should not be rendered for defendant on the merits at the close of the opening statement for plaintiff, when such statement, though deficient as to facts necessary to warrant a recovery for plaintiff, does not disclose a complete defense or affirmatively show there was no cause of action.[68] Verdict should not be directed because of defects in an affidavit where such defects have been waived.[69] A directed verdict is of course improper where jurisdiction is lacking; the proceeding should be dismissed.[70] After answer filed joining issue on the facts, a verdict cannot be directed for defendant because of insufficiency of the petition unless so defective that no judgment could properly be entered on a verdict for plaintiff.[71] To direct a verdict for defendant because of plaintiff's failure to produce papers not shown to be relevant to the issue is error.[72]

The motion; its effect.[73]—A motion to direct a verdict admits for the purpose of the motion the truth of the testimony which supports the opponent's case,[74] together with all inferences which may be drawn therefrom,[75] and the untruth of his own allegations which have been denied by the opposing party;[76] the court is bound to assume the facts as testified to by the adverse party,[77] giving his evidence a most favorable construction.[78] A motion for verdict being overruled, the court cannot instruct for the adverse party upon the ground that the motion admitted the truth of the evidence adduced.[79] Where both parties move for a directed verdict, and neither requests a submission to the jury, those facts become undisputed[80] which could operate to deflect or control the question of law,[81] and the trial court may draw all the inferences therefrom that a jury might have drawn.[82] Such a motion constitutes an election that the trial judge decide any questions of fact in the case;[83] and the verdict directed is in effect that of the jury;[84] this rule does not obtain where the party whose request is denied asks to go to the jury upon questions of facts which he specifies.[85] After the court has announced its decision, a party cannot demand submission to the jury;[86] but a request to go to the jury,

67. Taussig v. St. Louis & K. R. Co., 186 Mo. 269, 85 S. W. 378.

68. Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 P. 308.

69. Sachs v. Norn [Mich.] 102 N. W. 983.

70. Walker v. Boyer, 121 Ga. 300, 48 S. E. 916.

71. Harold v. Baltimore & O. R. Co. [C. C. A.] 133 F. 384.

72. Randall v. Detroit & N. W. R. Co. [Mich.] 102 N. W. 988.

73. See 3 C. L. 1095.

74. Blakeslee's Exp. & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135; Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

75. Veach v. Champaign, 113 Ill. App. 151; McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 103 N. W. 285.

76. Walling v. Bown [Idaho] 72 P. 960.

77. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026.

78. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. In directing a verdict the trial judge is bound to consider the evidence in the aspect most favorable to the unsuccessful party. Hirsch v. American District Tel. Co., 90 N. Y. S. 464.

79. Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224. For such a motion does not involve a concession that there does not exist on the evidence a question of fact necessary to be settled in favor of the other party before he would be entitled to recover, and in such case an exception by the movant in the direction of a verdict for his adversary sufficiently shows that he did not intend to concede his opponents' right to recover as matter of law or waive the submission of questions of fact. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326.

80. Sundling v. Willey [S. D.] 103 N. W. 38.

81. West v. Roberts [C. C. A.] 135 F. 350.

82. Sundling v. Willey [S. D.] 103 N. W. 38; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. S. 836; Insurance Co. of North America v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794.

83. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. S. 86; Griffin v. Interurban St. R. Co., 94 N. Y. S. 854.

84. Kennedy v. New York, 99 App. Div. 588, 91 N. Y. S. 252. But see Stauff v. Bingenheimer [Minn.] 102 N. W. 694.

85. German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. S. 836.

86. Insurance Co. of North America v.

before a verdict is directed or recorded, is seasonably made.[87] Direction of verdict must be applied for by the party seeking it.[88] In Illinois a request for a directed verdict must be in writing,[89] and it is essential that a motion to instruct be made at the close of all the evidence, in order to preserve for review the question of the sufficiency of the evidence, as a matter of law, to sustain the verdict.[90]

Effect of ruling; appeal; waiver.[91]—Upon the direction of a verdict for plaintiff, the defendant is entitled to have his counterclaim deducted as pleaded or to be allowed to prove his claim, and if established to have it deducted from any amount found due.[92] A motion for a directed verdict presents a question of law only,[93] and is therefore reviewable[94] if an exception be taken,[95] a motion for a new trial not being necessary;[96] but under the Georgia statutes it is not error in any case for the trial judge to refuse to direct a verdict.[97] While the usual and better practice is that a formal verdict in writing be returned by the jury, the absence thereof is not fatal to the validity of the proceedings.[98] The sufficiency of the declaration cannot be raised by request for peremptory charge by a defendant who failed to demur and met the issue in respect to which the pleading failed.[99] The propriety of directing a verdict must be determined in view of the entire evidence,[1] and the facts will be regarded as having been so decided as to sustain the disposition made by the trial judge;[2] he should only determine whether or not there is evidence legally tending to prove the fact affirmed,[3] and is not authorized nor required to weigh the evidence or to determine where the preponderance of evidence lies.[4] On appeal from verdict directed for defendant at close of plaintiff's evidence, the question is whether the court would set aside a verdict for plaintiff on the evidence.[5] When both parties move for a directed verdict, the only questions on review are whether there was any proper evidence to sustain the court's findings and whether the law was correctly applied thereto.[6] In reviewing the propriety of a directed verdict, the ap-

Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794. The courts are not agreed as to whether requests for a directed verdict by both parties constitute a waiver by plaintiff of his right to have any question of fact submitted to the jury. Stauff v. Bingenheimer [Minn.] 102 N. W. 694.

87. Hermann v. Koref, 93 N. Y. S. 488.

88. A refusal to give the "general charge" will not be reviewed on appeal where the language of the charge is not copied in the bill of exceptions (Lunsford v. Bailey [Ala.] 38 So. 362), but in Indiana a record properly disclosing any order of the court directing a verdict is sufficient to present such ruling on appeal (Davis v. Mercer Lumber Co. [Ind.] 73 N. E. 899). A party cannot complain of failure to instruct the jury to return a verdict for him, where no such instruction was requested. Cook Bros. Carriage Co. v. National Bank of Cleburne [Tex. Civ. App.] 85 S. W. 1169.

89. Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322.

90. Rautert v. Carlson, for use of Carlson Construction Co., 116 Ill. App. 260.

91. See 3 C. L. 1096.

92. Crane Co. v. Collins, 103 App. Div. 480, 93 N. Y. S. 174.

93. Stauff v. Bingenheimer [Minn.] 102 N. W. 694; Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737.

94. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099. A motion for peremptory instruction presents a pure question of law, and in the event of an adverse ruling an exception preserves that question of law for the consideration of an appellate tribunal. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. And see Appeal and Review. 5 C. L. 121.

95. Wheeler v. Seamans, 123 Wis. 573, 102 N. W. 28; Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. And see Saving Questions for Review, 4 C. L. 1368.

96. Wheeler v. Seamans, 123 Wis. 573, 102 N. W. 28.

97. Sikes v. Norman [Ga.] 50 S. E. 134.

98. Moore v. Petty [C. C. A.] 135 F. 668.

99. Savage v. Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531.

1. Watson v. Dilts, 124 Iowa, 344, 100 N. W. 50; Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648.

2. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326; Reed v. Spear, 94 N. Y. S. 1007.

3. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099.

4. Nicholls v. Colwell, 113 Ill. App. 219; Central Union Bldg. Co. v. Kolander, 113 Ill. App. 305.

5. Rhymes v. Jackson Elec. R., Light & Power Co. [Miss.] 37 So. 708.

6. Insurance Co. of North America v. Wisconsin Cent. R. Co. [C. C. A.] 134 F. 794. But if the one whose motion is overruled merely excepts thereto, the verdict should

pellant is entitled to the benefit of all disputed questions of fact.[7] Where evidence has been actually received and then erroneously stricken out, the court should consider such evidence as should have been allowed to go to the jury in passing upon the correctness of a directed verdict.[8] One may so waive a jury that he cannot complain whether the judge directs a verdict or makes findings and a decision,[9] and it is a general rule that the introduction of evidence by a party after the overruling of his motion for a directed verdict waives any error in such refusal,[10] if the motion is not renewed;[11] but where the strict application of this rule would work injustice, it may be disregarded by an appellate court;[12] waiver does not result from one's subsequently requested instructions which in effect conceded that there was evidence tending to establish the opposite side of the case on the issues presented,[13] and a party may assist the court in the proper submission of the cause without estopping himself from afterward objecting to a verdict against him as unsupported by the evidence.[14] An exception to a refusal of a motion for directed verdict is not waived by the subsequent reopening of the case and the receiving of testimony not material to the determination of the motion for verdict.[15] One cannot complain of a refusal to direct a verdict where by his subsequent instructions the jury was given the determination as issues of fact of all the issues made by the pleadings.[16] An affirmative charge for one party on certain counts of his complaint eliminates from consideration on his appeal all questions arising on the pleadings and on the trial on those counts.[17] Where the appellate court believes that defendant failed to introduce proof of his cross action because of erroneously directed verdict in his favor, the cause will be simply reversed and remanded.[18]

§ 2. *Demurrers to evidence.*[19]—A motion to exclude all of plaintiff's evidence should be treated as a demurrer to the evidence,[20] and hence is properly overruled where there is substantial evidence tending to establish the allegations of the petition,[21] and to support plaintiff's theory of the case.[22] A demurrer to the evidence

not be set aside unless clearly against the weight of the evidence. Gilligan v. Supreme Council of Royal Arcanum, 5 Ohio C. C. (N. S.) 471, 26 Ohio C. C. 42.

7. Dill v. Marmon [Ind.] 73 N. E. 67; Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. S. 836; McCaughn v. Young [Miss.] 37 So. 839; Eastham v. Hunter [Tex.] 86 S. W. 323; Farmer v. Cumberland Tel. & T. Co. [Miss.] 38 So. 775; LaFayette & Bro. v. Merchants' Bank [Ark.] 84 S. W. 700; Merrill v. Oregon Short Line R. Co. [Utah] 81 P. 85.

8. Campbell v. Park [Iowa] 101 N. W. 861.

9. Bernheim v. Bloch, 45 Misc. 581, 91 N. Y. S. 40.

10. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; Western Maryland R. Co. v. State, 95 Md. 637, 53 A. 969; Vonderhorst Brewing Co. v. Amrhine, 98 Md. 406, 56 A. 833. Where a defendant, after the overruling of his motion to dismiss the action, elects not to reply upon the claim that the plaintiff had failed to prove his case, and proceeds with his own evidence, he cannot thereafter raise the question of error in overruling said motion. Doren v. Fleming, 6 Ohio C. C. (N. S.) 81.

11. Columbia, etc., R. Co. v. Means [C. C. A.] 136 F. 83.

12. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326.

13. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737.

14. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

15. Weizinger v. Erie R. Co., 94 N. Y. S. 869.

16. Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322; Gunning System v. LaPointe, 113 Ill. App. 405. Where a party has caused the court to submit to the jury a particular proposition as one fact, he cannot thereafter urge such proposition as a reason why the court erred in refusing his motion for directed verdict. Belt R. Co. v. Confrey, 111 Ill. App. 473.

17. Louisville & N. R. Co. v. Sullivan Timber Co., 138 Ala. 379, 35 So. 327.

18. Banderer v. Gunther Foundry Machine & Supply Co. [Tex. Civ. App.] 87 S. W. 851.

19. See 3 C. L. 1096. Record held to show that a case was submitted for a finding of the facts and not on demurrer to the evidence. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921.

20. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005.

21. Fields v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 134.

22. Harrison v. Lakenan [Mo.] 88 S. W. 53.

of defendant should be overruled where it would sustain even a partial defense to the cause of action.[23]

Effect.[24]—The object of a demurrer to the evidence is to refer to the court the law arising from an admitted fact,[25] and not to bring before the court an investigation of the facts in dispute,[26] for joining issue on a demurrer to the evidence withdraws a case from the jury.[27] A demurrer to the evidence allows full credit to the evidence of the demurree,[28] and admits all the facts directly proved by or that a jury might fairly infer from the evidence,[29] and also that if there be evidence to support it, the finding of the jury would be against him.[30] Inferences most favorable to the demurree will be made in cases in which there is a grave doubt which of two or more inferences shall be deduced.[31]

Waiver.[32]—After an adverse ruling upon a demurrer to an item of evidence, one does not waive his rights by asking instructions which conformed with the view of the court,[33] but a demurrer to a complaint having been waived, the sufficiency of the complaint cannot again be called in question by the objection to the introduction of any testimony.[34]

Effect of ruling.[35]—Sustaining a demurrer to the evidence at law or in equity means that there is some evidence to be weighed, but that as a matter of law, when weighed by the trier of fact, it is not satisfactory.[36]

DISCLAIMERS, see latest topical index.

DISCONTINUANCE, DISMISSAL AND NONSUIT.

§ 1. *Voluntary nonsuit or discontinuance.*[37]—Plaintiffs are generally allowed to discontinue on payment of costs,[38] at any time before decision of the case[39] if no

23. Marion Mfg. Co. v. Bowers [Kan.] 80 P. 565.

24. See 3 C. L. 1096.

25, 26. Mugge v. Jackson [Fla.] 39 So. 157.

27. Nashville, etc., R. Co. v. Sansom, 113 Tenn. 683, 84 S. W. 615. A demurrer to evidence being overruled, defendant may not introduce further evidence; but the overruling of a motion to direct a verdict for defendant does not have that effect. As a result of the distinction above stated, demurrers to evidence have been practically eliminated from Texas practice. Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224.

28. Des Moines Life Ass'n v. Crim [C. C. A.] 134 F. 348; Mugge v. Jackson [Fla.] 39 So. 157.

29. Des Moines Life Ass'n v. Crim [C. C. A.] 134 F. 348; Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140; Mugge v. Jackson [Fla.] 39 So. 157. Upon demurrer to the evidence the court must take as true not only every fact which there is evidence tending to establish, but must consider all such fair and reasonable inferences of fact as the jury might properly have drawn. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816.

30. Mannon v. Camden Interstate R. Co. [W. Va.] 49 S. E. 450.

31. Des Moines Life Ass'n v. Crim [C. C. A.] 134 F. 348; Mugge v. Jackson [Fla.] 39 So. 157.

32. See 3 C. L. 1097.

33. Warwick v. North American Inv. Co. of United States [Mo. App.] 87 S. W. 78.

34. Healy v. King County, 37 Wash. 184, 79 P. 624.

35. See 3 C. L. 1097.

36. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921.

37. See 3 C. L. 1097.

38. One who voluntarily intervenes, without being substituted as defendant or notified to defend the action may voluntarily dismiss his petition of intervention, and withdrawing it is equivalent to a dismissal. Guinn v. Iowa & St. L. R. Co., 125 Iowa, 301, 101 N. W. 94. Where suit is brought against defendants who are only jointly liable, the plaintiff cannot dismiss as to one and proceed against the other except as provided by statute (Charles Lippincott & Co. v. Behre

affirmative relief has been demanded by defendant or an intervener.[40] Allowance, however, is discretionary,[41] and is generally regulated by statute.[42] A suit by relators, in the name of the state and the attorney general, may be dismissed on the petition of the attorney general without the consent of the relators.[43] A "dismissal without prejudice" is a practice not proper at law.[44]

If affirmative relief is demanded[45] against plaintiff, he may not dismiss the entire cause,[46] and the taking of nonsuit by plaintiff does not prevent a defendant from obtaining judgment upon his cross complaint.[47]

When right to voluntary nonsuit is lost.[48]—After the case has been finally submitted,[49] or the court announces its decision, the plaintiff cannot dismiss his action to prevent a judgment;[50] but a case is so in the control of the trial judge pending the term that a motion of discontinuance as to one defendant, made at the hearing of a motion for new trial, is timely, though verdict and judgment have been entered,[51] and in Illinois one may on appeal from justice to circuit court abandon his proceeding

[Ga.] 50 S. E. 467), but where the defendants are sued jointly but the proofs or pleadings show there is no joint liability, the plaintiff may dismiss as to those who are not proper parties to the action (Id.). Proper to allow voluntary nonsuit where co-plaintiff was improperly joined. Pritchard v. Mitchell [N. C.] 51 S. E. 783.

39. A plaintiff has the right to dismiss his action at any time [Code Civ. Proc. § 581] (Alpers v. Bliss, 145 Cal. 565, 79 P. 171), before trial [Code Civ. Proc. § 1004] (State v. District Court of Eighth Judicial Dist. [Mont.] 79 P. 546), or if the case be tried by the judge, at any time before his decision is announced (Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357), or filed (Paltzer v. Johnston, 114 Ill. App. 493), though reduced to writing (Halstead v. Sigler [Ind. App.] 74 N. E. 257). Dismissal may be at any time before the jury retire. Shannon's Code, §§ 4689-4691. Nashville, etc., R. Co. v. Sansom, 113 Tenn. 683, 84 S. W. 615; Halstead v. Sigler [Ind. App.] 74 N. E. 257; Lay v. Collins [Ark.] 86 S. W. 281; Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357. In a case tried without a jury, dismissal may be at any time before final submission to the court. Shannon's Code, §§ 4689-4691. Nashville, etc., R. Co. v. Sansom, 113 Tenn. 683, 84 S. W. 615.

40. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357; Alpers v. Bliss, 145 Cal. 565, 79 P. 171. If counterclaim is not made. Code Civ. Proc. § 581. Alpers v. Bliss, 145 Cal. 565, 79 P. 171. An action may be dismissed notwithstanding the filing of a cross complaint, where at the time of dismissal the cross complaint had been stricken from the files, within the authority of the court. Id. It is a general rule of equity practice that where no cross bill has been filed, complainant has the right at any time before final decree to dismiss his bill upon payment of costs (Wilcoxon v. Wilcoxon, 111 Ill. App. 90), but in Florida, after a cause has been set for final hearing, the complainant has no absolute right to a dismissal without prejudice, that resting in the discretion of the court (Lykes v. Beauchamp [Fla.] 38 So. 603).

41. The rule that a chancellor may at his discretion refuse to allow complainant to dismiss when such action is likely to work a hardship to defendant is not followed in Illinois except as to accountings. Wilcoxon v. Wilcoxon, 111 Ill. App. 90. Refusal to allow withdrawal of juror for surprise on exclusion of important documents for failure to prove foreign law held abuse of discretion. Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n, 93 N. Y. S. 575.

42. Under the New York statute providing that where a party has an attorney in an action, he cannot appear to act in person where the attorney may appear or act, a stipulation of discontinuance signed by the party can be effectual only by an application to the court on notice to the attorney or when the party would have a right to the discontinuance regardless of stipulation. Code Civ. Proc. § 55. Kuehn v. Syracuse Rapid Transit R. Co., 93 N. Y. S. 883.

43. Shannon's Code, §§ 1565, 5169. State v. Red River Turnpike Co. [Tenn.] 79 S. W. 798.

44. Durham v. Stubbings, 111 Ill. App. 10.

45. See 3 C. L. 1098, n. 71.

46. After a valid plea of set-off has been filed, a plaintiff is not entitled to dismiss so as to interfere with the rights of the defendant, except upon sufficient cause shown. Wilson v. Exchange Bank [Ga.] 50 S. E. 357. It is a general rule that a demand for affirmative relief against a plaintiff, when properly pleaded, will protect the rights of defendant as against a voluntary dismissal by plaintiff. Lay v. Collins [Ark.] 86 S. W. 281.

47. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357.

48. See 3 C. L. 1099.

49. Argument on a demurrer to the evidence is such a final submission to the court as deprives a plaintiff of his right to voluntary dismissal in Tennessee. Shannon's Code, §§ 4689-4691. Nashville, etc., R. Co. v. Sansom, 113 Tenn. 683, 84 S. W. 615.

50. Grim v. Griffith, 34 Ind. App. 559, 73 N. E. 197. In Illinois a chancellor, after directing the preparation of a decree dismissing a cross bill for want of equity, may allow the cross complainant to dismiss without prejudice. Paltzer v. Johnston, 213 Ill. 338, 72 N. E. 702.

51. Texas & P. R. Co. v. Sheftall [C. C. A.] 133 F. 722.

for an account and prove any indebtedness of defendant to him.[52] In Montana a plaintiff cannot dismiss after a motion for judgment on the pleadings on plaintiff's failure to reply to an answer alleging new matter has been signed and submitted.[53]

Discontinuance by operation of law.[54]—If a plaintiff demurs or replies over to a proper plea answering a part only of the plaintiff's cause of action, without "signing judgment," an hiatus and consequent discontinuance take place.[55]

Effect of discontinuance.[56]—Voluntary dismissal by an attorney acting beyond his authority does not necessarily bind his client, who may, within a reasonable time, have the cause reinstated according to the sound discretion of the court,[57] and a discontinuance obtained by fraud may be set aside on motion and proper showing.[58] Dismissal as to one of two joint tort feasors as an improper or unnecessary party does not discharge plaintiff's claim against the other defendant, if he is otherwise liable,[59] but under the Alabama statute the striking out of a party defendant who has been served with process can only be done after a misjoinder is shown,[60] and a discontinuance as to one defendant in such a case without a showing of misjoinder amounts to a discontinuance of the action unless waived by the defendant.[61] An agreement by the parties to an action, waiving a jury and consenting to an assessment of damages on one count, constitutes an abandonment as to the other count.[62] Every dismissal of a bill in equity upon final hearing is not necessarily an adjudication upon the merits,[63] but if the cause is at issue and on final hearing, a dismissal even on complainant's motion is deemed to be upon the merits,[64] unless the order shows it to have been upon other grounds, or without prejudice.[65] The withdrawal of one who voluntarily intervened and afterward dismissed his petition of intervention terminates the jurisdiction of the court, and no costs can be taxed against him,[66] but one discontinuing his action of garnishment before the filing of the answer may in Texas be taxed with the costs of preparing such answer if the discontinuance is made with actual knowledge that the answer is ready for filing.[67]

Retraxit.[68]

§ 2. *Involuntary dismissal or nonsuit.*[69]—Nonsuit is a name given to a judgment against a plaintiff when he is unable to prove his case or refuses or neglects to proceed to trial after the case has been put at issue.[70] In Georgia, a justice of the peace having on the trial before him rendered a judgment for the plaintiff, has not the power, on the trial before a jury, to grant a nonsuit.[71]

Grounds in general.[72]—A motion for nonsuit is in the nature of a demurrer to the evidence,[73] and cannot be based on the ground that the complaint fails to state a cause of action.[74] Dismissal may be granted in a proper case for failure to comply with an order for security for costs,[75] or where plaintiff's opening statement shows

52. Dickinson v. Morgenstern. 111 Ill. App. 543.

53. Code Civ. Proc. § 722; Laws 1899, p. 142. State v. District Court of Eighth Judicial Dist. [Mont.] 79 P. 546.

54. See 3 C. L. 1100.

55. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

56. See 3 C. L. 1100.

57. Schaefer v. Schoenborn [Minn.] 103 N. W. 501.

58. Thompson v. Bay Circuit Judge [Mich.] 101 N. W. 61.

59. Texas & P. R. Co. v. Sheftall [C. C. A.] 133 F. 722.

60, 61. Code 1896, § 2331. Evans Marble Co. v. D. J. McDonald & Co. [Ala.] 37 So. 830.

62. Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065.

63, 64, 65. Sykes v. Beauchamp [Fla.] 38 So. 603.

66. Guinn v. Iowa & St. L. R. Co., 125 Iowa, 301, 101 N. W. 94.

67. Hamburg-Bremen Fire Ins. Co. v. Bailey [Tex Civ. App.] 77 S. W. 294.

68, 69. See 3 C. L. 1100.

70. Spring Valley Coal Co. v. Patting, 112 Ill. App. 4.

71. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124.

72. See 3 C. L. 1100.

73, 74. Messenger v. Woge [Colo. App.] 78 P. 314.

75. Failure to file security for costs is no ground for dismissal as against defend-

no ground for relief.[76] By statute in Montana an action may be dismissed by the court when after verdict or final submission the party entitled to judgment neglects to demand and have the same entered for six months.[77]

Want of jurisdiction.[78]—Proceedings will be dismissed where there is an entire want of jurisdiction over the subject-matter,[79] but a suit improperly brought in equity should not, on that account, be dismissed, but should be transferred to the law court.[80] When a preliminary injunction is dissolved before final hearing, a motion to dismiss the bill should be allowed where there is no cross bill on file and the answer asks no affirmative relief.[81]

Defect in pleadings; parties.[82]—A motion to dismiss is the equivalent of a general demurrer and may be made at the trial term if the petition is fatally defective,[83] but it cannot reach mere defects in pleadings, such as may be cured by appropriate amendment.[84] A petition which sets forth in substance a good cause of action is not subject to such a motion,[85] but dismissal is proper where the cause of action relied on at the close of the evidence is not set forth in the complaint,[86] though in Washington a complaint which shows a cause of action in any form will not be dismissed, even if failing to state facts to warrant the equitable relief prayed.[87] A motion to dismiss, in the nature of a special demurrer, must be filed at the appearance term.[88] A court of general jurisdiction has power on its own motion to dismiss an action as frivolous where the pleadings present no cause of action recognized by the law;[89] but is not authorized to dismiss a case because the complaint is lengthy and cannot be understood without an adjournment to read it.[90] The court may refuse to dismiss for failure to serve defendant with a copy of an amended petition when the court's order in regard thereto was fully complied with.[91] Where there is no denial of substantial rights, an order granting leave to discontinue an action prematurely brought will be affirmed.[92] A motion to dismiss for want of a demand before suit brought was properly overruled where not made until after the filing of a general demurrer to the petition.[93] In actions where a substitution of plaintiffs is not allow-

ants who had answered. Randolph v. Cottage Hospital of Des Moines [Iowa] 103 N. W. 157. Failure to pay the costs of a former suit brought upon the same cause of action is not ground for dismissing one subsequently brought. Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537. The Texas statute providing for dismissal for failure to give security for costs is not mandatory so that the court must of its own motion dismiss if security be not furnished. Gilmer v. Beauchamp [Tex. Civ. App.] 87 S. W. 907.

76. Shows affirmatively that there is no cause of action (Brooks v. McCabe [Wash.] 80 P. 1004; Miner v. Hopkinton [N. H.] 60 A. 433), or that there is a complete defense thereto (Brooks v. McCabe [Wash.] 80 P. 1004), or insufficient facts being stated, it is expressly admitted that these are the only facts plaintiff expects or intends to prove (Id.). A court is not authorized to take the case from the jury, or render judgment, upon the opening statement for plaintiff, unless some fact is clearly stated, or some admission clearly made which cannot be cured by evidence and hence necessarily and absolutely precludes recovery. Brashear v. Rabenstein [Kan.] 80 P. 950. Where a complaint states a good cause of action, a motion to dismiss on the opening of counsel will not be granted unless it appear that the averments of the complaint were limited to particular matter upon which no recovery could be had. Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. S. 473.

77. Code Civ. Proc. § 1004, subsec. 6. Franzman v. Davies [Mont.] 80 P. 251.

78. See 3 C. L. 1101.

79. Walker v. Boyer, 121 Ga. 300, 48 S. E. 916.

80. Cribbs v. Walker [Ark.] 85 S. W. 244.

81. Thompson v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 131.

82. See 3 C. L. 1101.

83, 84. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783.

85. Mullins v. Matthews [Ga.] 50 S. E. 101.

86. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66.

87. McKay v. Calderwood, 37 Wash. 194, 79 P. 629.

88. Mullins v. Matthews [Ga.] 50 S. E. 101.

89. O'Connell v. Mason [C. C. A.] 132 F. 245.

90. Daniel v. Manhattan Life Ins. Co., 94 N. Y. S. 49.

91. Norman v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782.

92. Goreth v. Shipherd, 86 N. Y. S. 849.

93. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

ed, a nonsuit is proper if there is no proof of damage to the original plaintiffs.[94] Want of necessary parties must be pleaded in abatement to be a good ground for dismissal.[95] A defendant whose interests are not injuriously affected thereby cannot complain of the dismissal as to a co-defendant who has died since the institution of the suit.[96]

Failure of prosecution.[97]—Abandonment,[98] laches,[99] failure to prosecute,[1] and to comply with conditional orders,[2] are recognized grounds for dismissal.

Nonsuit for failure of proof.[3]—A nonsuit is proper where the evidence is wholly insufficient to sustain the cause of action,[4] or the plaintiff has discontinued as to the only one of several defendants against whom he in fact had a cause of action,[5] or when a plaintiff suing for a money recovery fails to show the value of the property involved,[6] or the damages sustained.[7] When plaintiff makes out a prima facie case,[8] or the evi-

94. McEarchern & Co. v. Edmondson [Ga.] 49 S. E. 798.

95. Donovan v. Twist, 93 N. Y. S. 990.

96. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226.

97. See 3 C. L. 1102.

98. In New York the court may dismiss the complaint when the plaintiff unreasonably neglects to proceed, and the defendant may move for dismissal at any time after younger issues have been tried. Code Civ. Proc. § 822; Gen. Rules Prac. 36. People v. York, 94 N. Y. S. 812. By statute in Louisiana a suit is considered abandoned and may be stricken from the docket or dismissed at the suggestion of any party in interest when at any time before obtaining final judgment the plaintiff allows five years to elapse without taking any steps in its prosecution. Act 107, p. 155, of 1898. Lockhart v. Lockhart, 113 La. 872, 37 So. 860.

99. To dismiss a case for laches is an abuse of discretion where defendant had no defense on the merits and never asked for a trial. Merced Bank v. Price, 145 Cal. 436, 78 P. 949. The dismissal of a case as barred by the statute of limitations, without prejudice to parties petitioning for its revival, is not an abuse of the chancellor's discretion in Mississippi. Farmer v. Allen [Miss.] 38 So. 38.

1. It is a general rule that an action must be dismissed upon the failure of plaintiff to appear upon the return or adjourned day (Consumers' Park Brewing Co. v. Greenberger, 94 N. Y. S. 38; Elfenbein v. Rosenthal, 94 N. Y. S. 40; Clement v. Breaux [La.] 38 So. 900), and judgment rendered as in case of nonsuit (Spring Valley Coal Co. v. Patting, 112 Ill. App. 4). It is the duty of a plaintiff to be present when his case is called, and in the absence of his attorney to ask for postponement. Harrison v. Oak Cliff Land Co. [Tex. Civ. App.] 85 S. W. 821. Under the New York practice, until the justice has indorsed the dismissal upon the summons, the cause may be heard if the plaintiff appears. Elfenbein v. Rosenthal, 94 N. Y. S. 40. Inexcusable delay and gross negligence in the prosecution of a cause are good grounds for dismissal. Peddecord v. Vennigerholz, 212 Ill. 612, 72 N. E. 819. Facts held to show such a failure to prosecute as justified a dismissal. Harrison v. Oak Cliff Land Co. [Tex. Civ. App.] 85 S. W. 821. An appellate court having no jurisdiction of the appellee has no authority to dismiss the suit for want of prosecution. Hecht v. Franklin, 113 Ill. App. 467. Twenty years delay in prosecuting suit and resumption of prosecution only when certain speculative interests obtained control held ground for dismissal. Hoffmeister v. Renton Co-op. Coal Co. [Wash.] 82 P. 127.

2. Refusal to comply with an order requiring the causes of action to be separately stated and numbered. Burdick v. Carbondale Inv. Co. [Kan.] 80 P. 40. Failure to amend a petition upon order of the court. Rev. St. § 5313-4. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482, 26 Ohio C. C. 616. Failure to amend within the time granted after the sustaining of a formal demurrer. Haskins v. Providence Washington Ins. Co. [R. I.] 61 A. 51. Neglect to amend for 30 days after the sustaining of a demurrer. Saddlemire v. Stockton Sav. & Loan Soc., 144 Cal. 650, 79 P. 381. Failure of an appellant to print his abstract and brief while a motion to dismiss is pending does not show a failure to prosecute with reasonable diligence. Cooke v. McQuarters [S. D.] 103 N. W. 385. It is error to dismiss a bill merely because complainant failed to pay the master's fees taxed upon a reference regarding a preliminary injunction. Symms v. Chicago, 115 Ill. App. 169.

3. See 3 C. L. 1103.

4. Kirk v. Kirk [Ga.] 50 S. E. 928; Hood v. Hendrickson [Ga.] 50 S. E. 994; Butler v. Carillo, 88 N. Y. S. 941. Where defendant offers no evidence, a nonsuit rather than a directed verdict for defendant is the proper practice. Hobbs v. Bowie, 121 Ga. 421, 49 S. E. 285. Where the allegations of the petition are not supported, a judgment of nonsuit will not be reversed. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396.

5. Pearsall v. Mining & Developing Co., 90 N. Y. S. 380.

6. Brooke v. Lowe [Ga.] 50 S. E. 146.

7. Kuntz v. Schnugg, 99 App. Div. 191, 90 N. Y. S. 933.

8. Grant v. Walsh, 36 Wash. 190, 78 P. 786; Westbrook v. Baldwin County, 121 Ga. 442, 49 S. E. 286; Wood v. Earls [Wash.] 80 P. 837; Sheppard v. Lang [Ga.] 50 S. E. 371. Or he carries every burden placed upon him by the law (Atlanta & B. Air Line R. Co. v. Weaver, 121 Ga. 466, 49 S. E. 291), or establishes the material allegations of the petition (Tifton, etc., R. Co. v. Chastain [Ga.] 50 S. E. 105), or proves his case exactly (Ogburn v. Dublin Wagon & Mach. Co., 121 Ga. 437, 49 S. E. 263; Jesup v. Atlantic & B. R. Co. [Ga.]

dence is conflicting,[9] it is for the jury,[10] though the court might deem it its duty to set aside a verdict for plaintiff as against the weight of evidence.[11] Judgment of nonsuit cannot be based on extrinsic facts, such as judgment in another case not in the record.[12] Incompetent evidence admitted without objection cannot be disregarded on a motion for nonsuit, but must be left to the jury.[13] In a joint action against several defendants, some of whom successfully pleaded the statute of limitations, a judgment dismissing the action as to all will not be disturbed.[14]

Motion for nonsuit; effect.[15]—Under a statute requiring a judge, on the trial of a question of fact before the court, to state in writing his conclusions of law and of fact separately, a motion for nonsuit at the conclusion of plaintiff's testimony and a judgment dismissing the complaint is not proper practice.[16] A motion to dismiss on the ground that there was no evidence to establish damages under the rule of law applicable to the facts is not sufficient to raise the question that there was no sufficient proof on which prospective profits could be estimated.[17] The motion should be timely made,[18] and by failing to move for a nonsuit one concedes that there is a question for the court or jury to decide as between the parties.[19] As to whether a motion for

51 S. E. 315), or there is some competent evidence (In re Morgan's Estate [Or.] 78 P. 1029), or material points (Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573), so with a dismissal before plaintiff has rested, having presented evidence as to all essential facts but one (Tiger v. Interurban St. R. Co., 94 N. Y. S. 395). In proceedings to determine a disputed boundary, held, that plaintiff having testified that he was in possession of "land on plat blue, 1-2-3-4 to 1," it would be presumed, in the absence of any map, that he referred to the land described in the complaint, and hence that it was error to grant a nonsuit on the ground that plaintiff had not shown ownership. Smith v. Johnson, 137 N. C. 43, 49 S. E. 62.

9. Lewis v. Erie R. Co., 94 N. Y. S. 765. That the testimony of plaintiff's witness is conflicting does not justify a nonsuit, there being some evidence to support the cause of action sued upon. Hopper v. Smith, 70 N. J. 403, 57 A. 389.

10. In Kentucky a scintilla of evidence supporting plaintiff's claims requires a submission to the jury. McFarland's Adm'r v. Harbison & Walker Co., 26 Ky. L. R. 746, 82 S. W. 430. It has been held that an order of nonsuit is proper only when plaintiff's evidence, giving it the most favorable inference reasonably possible in his favor, does not tend to establish his cause of action (Hupfer v. National Distilling Co., 119 Wis. 417, 96 N. W. 809; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816), and whether trial be with or without a jury, the court cannot dismiss an action without verdict or findings of fact, because of failure to establish a cause of action, unless the evidence is such as to require a verdict or finding as a matter of law, against the plaintiff (Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017; Ness v. March [Minn.] 104 N. W. 242). A motion for nonsuit should be denied unless the evidence wholly fails to establish a right of recovery. Small v. Harrington [Idaho] 79 P. 461. By statute in Colorado an action may be dismissed on motion of defendant for a nonsuit when the plaintiff fails to prove a sufficient case for the jury. Mills' Ann. Code, § 166. Messenger v. Woge [Colo. App.] 78 P. 314. Though plaintiff's evidence establish his own noncompliance with certain conditions, a nonsuit is improper, for he might show a waiver by defendant. Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4. In an action for damages from negligence and willful misconduct, it is proper to refuse a nonsuit on the whole case, if there is evidence of negligence, though none of willfulness. Machen v. Western Union Telegraph Co. [S. C.] 51 S. E. 697. Upon disputed facts there should be a judgment on the merits and a nonsuit is improper. Globe Lithographing Co. v. Bimberg, 92 N. Y. S. 768.

11. Lewis v. Erie R. Co., 94 N. Y. S. 765.

12. Wood v. Earls [Wash.] 80 P. 837.

13. Blowers v. Southern R. Co., 70 S. C. 377, 50 S. E. 19.

14. Somers v. Florida Pebble Phosphate Co. [Fla.] 39 So. 61.

15. See 3 C. L. 1104.

16. Rev. St. 1898, § 2863. Sliter v. Carpenter, 123 Wis. 578, 102 N. W. 27.

17. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

18. A motion to dismiss a suit after filing of a **praecipe**, but before service of summons or a general appearance on the part of defendant, is premature (Collier v. Gray, 105 Ill. App. 485); but a motion to dismiss a case on appeal, after the dismissal of the appeal, is too late (Blair v. Coakley, 136 N. C. 405, 48 S. E. 804). In the absence of a statute limiting the time, it is within the sound discretion of the court to entertain a motion to dismiss a complaint in intervention, though made several months after leave to file and at a subsequent term of court. Ainsworth v. Evans [Ariz.] 80 P. 344. Where the judgment on a motion to dismiss was an interlocutory order, the court is not thereby precluded from entertaining a like motion at a subsequent term. Hilton v. Consumers' Can. Co., 103 Va. 255, 48 S. E. 899.

19. McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. S. 148.

nonsuit is waived by the moving party putting in evidence after the overruling of such motion, the courts are divided in opinion.[20] An exception to an order overruling a motion to dismiss on the ground of failure of proof, taken at the close of plaintiff's evidence, is waived by failure to renew the motion at the close of the case, or to request the court to direct a verdict, or to except to the charge.[21] A motion for nonsuit admits the truth of plaintiff's evidence,[22] and every legitimate inference of fact which may be drawn from it;[23] but raises a question of law as to its sufficiency,[24] and a motion for nonsuit upon the opening statement and admission of plaintiff concedes the truth of all plaintiff's averments.[25]

Effect of dismissal or nonsuit.[26]—The dismissal of an action at law does not bar another suit for the same cause of action,[27] unless rendered on the merits;[28] but an order that an action be dismissed is an order for final judgment,[29] and is reviewable.[30] A defendant cannot complain that plaintiff did not formally dismiss as to a co-defendant where there is an abandonment of the suit as to such co-defendant by leave of the court.[31] One in whose behalf an action was not commenced has no standing in court to object to an order of dismissal.[32] Motions for reinstatement are addressed

20. Cain v. Gold Mountain Min. Co., 27 Mont. 529, 71 P. 1004. Defendant assumes the risk of supplying the deficiency in plaintiff's testimony, thereby curing any error in overruling the motion for nonsuit. Id. Prayers to take a case from the jury at the close of plaintiff's evidence are not reviewable on appeal where the defendant proceeded with his testimony after an adverse ruling. Keyser v. Warfield [Md.] 59 A. 189. An exception for refusal to nonsuit at the close of plaintiff's evidence is waived by the introduction of evidence by defendant without renewing the motion at the close of all the evidence. Earnhardt v. Clement, 137 N. C. 91, 49 S. E. 49; Blalock v. Clark, 137 N. C. 140, 49 S. E. 88; McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. S. 148.

21. Faulkner v. Cornell, 80 App. Div. 161, 80 N. Y. S. 526.

22. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493; Levin v. Habicht, 45 Misc. 381, 90 N. Y. S. 349.

23. In re Morgan's Estate [Or.] 78 P. 1029. The evidence of the plaintiff must be taken as true and construed in the light most favorable to him (Craft v. Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 519; Cox v. Hawke, 93 N. Y. S. 1117), and when so considered, if there is a scintilla of evidence tending to prove his contentions, the case should go to the jury (Craft v. Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 519).

24. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. While the rule of law is the same, the practical restrictions upon the court are even greater in the face of a motion for nonsuit than they are upon a motion to direct a verdict. Hupfer v. National Distilling Co., 119 Wis. 417, 96 N. W. 809.

25. Green v. Duvergey, 146 Cal. 379, 80 P. 234.

26. See 3 C. L. 1105.

27. Durham v. Stubbings, 111 Ill. App. 10. Dismissal for failure to file security for costs and rendition of judgment against such party for costs is not a judgment on the merits nor a final adjudication on plaintiff's right to maintain an action. Randolph v. Cottage Hospital of Des Moines [Iowa] 103 N. W. 157. Dismissal for failure to furnish additional security for costs is a nonsuit under the Missouri statute permitting a nonsuited party to commence a new action within a year. Rev. St. 1899, § 4285. Wetmore v. Crouch [Mo.] 87 S. W. 954. By statute in Arkansas one who suffers a nonsuit on an insurance policy may begin a new action within a year, notwithstanding a provision in the policy to the contrary. Kirby's Dig. § 4381. American Cent. Ins. Co. v. Noe [Ark.] 88 S. W. 572.

28. In New York a final judgment of dismissal either before or after trial may prevent a new action on the same cause of action if it expressly appears by the judgment roll that it is rendered on the merits. Code Civ. Proc. § 1209. Niagara Fire Ins. Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. S. 208. In New York a dismissal after all the evidence is received is equivalent to a nonsuit. Id. Where a decision is in effect a nonsult only for failure of proof, a judgment of dismissal on the merits is unauthorized. Weeks v. Van Ness, 93 N. Y. S. 337; Hedeberg v. Manhattan R. Co., 91 N. Y. S. 68. Though a verdict may be directed for defendant at the close of all the evidence. Harris v. Buchanan, 100 App. Div. 403, 91 N. Y. S. 484; Niagara Fire Ins. Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. S. 208.

29. Davis v. National Life Ins. Co. [Mass.] 73 N. E. 658. A decree in a divorce suit recited an order that "the complaint herein be dismissed, and that the defendant have judgment against the plaintiff for the sum of $5,000 for alimony." It was held that this could not be construed as a final determination of the controversy and future rights of the parties. Fred v. Fred [N. J. Eq.] 58 A. 611.

30. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482, 26 Ohio C. C. 616.

31. Chicago, etc., R. Co. v. Kuck, 112 Ill. App. 620.

32. Mayer v. Flammer, 81 N. Y. S. 1062.

to the sound discretion of the trial judge;[33] on a motion for dismissal, a direction to return a "verdict of nonsuit" is erroneous in form only.[34]

Practice on appeal.[35]—Refusal to dismiss,[36] or nonsuit,[37] or to set aside a dismissal,[38] being discretionary, is not ordinarily reviewable;[39] but orders granting such motions, since they have effect to determine the action, are generally reviewable either separately, or on appeal from final judgment,[40] proper exceptions having been saved, and the question properly presented in the reviewing court.[41] In Montana an order sustaining a motion to dismiss an appeal from a justice is not appealable to the supreme court.[42] On review of an order of dismissal or nonsuit, plaintiff is entitled to the view most favorable to his statement and evidence.[43] On review of a dismissal for the nonappearance of plaintiff, the only questions to be considered are the

33. Harrison v. Oak Cliff Land Co. [Tex. Civ. App.] 85 S. W. 821. It is not error to refuse to reinstate where the plaintiff's absence was due to his own carelessness. Kline v. Higday [Okl.] 79 P. 774. A wise discretion should be exercised in allowing the reinstatement of a case dismissed for want of prosecution, where it appears that plaintiff's absence was due to an unavoidable casualty. Lateness of train. Aultman-Taylor Machinery Co. v. Caldwell, 14 Okl. 472, 78 P. 319. A cause dismissed on the nonappearance of the parties at the call of the calendar on a day before that fixed by stipulation may be restored to the calendar. Johnson v. Monahan, 94 N. Y. S. 351. After both parties have appeared and submitted themselves to the jurisdiction of the court, either party's excusable default may be opened. Elfenbein v. Rosenthal, 94 N. Y. S. 40. Where both parties appeared but a dismissal was had because plaintiff was not prepared to go on, he may move to be relieved of his default. Rothenberg v. Herman, 94 N. Y. S. 6. In Georgia where a petition has been dismissed on demurrer, the plaintiff may during the same term move to reinstate the case. Van Dyke v. Van Dyke, 120 Ga. 984, 48 S. E. 380. A case dismissed upon a general call which reserves to the court jurisdiction to reinstate within a specified period cannot after the lapse of such period be reinstated, notwithstanding the order of dismissal was erroneous. State Bank of Chicago v. Thweatt, 111 Ill. App. 599.

34. Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. S. 1062.

35. See 3 C. L. 1106.

36. Steward v. Parsons, 112 Ill. App. 611. Mere written requests for dismissal filed with the clerk. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

37. Storms & Co. v. Horton [Conn.] 59 A. 421; Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125. A refusal to grant a compulsory nonsuit is not reviewable on appeal. Cox v. Wilson, 25 Pa. Super. Ct. 635. Refusal of the presiding justice at the close of the evidence to order a nonsuit for any cause is not exceptionable, the exercise of such power being discretionary. Snowman v. Mason, 99 Me. 490, 59 A. 1019.

38. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

39. An exception permits a review of an order denying a nonsuit, notwithstanding the absence of an exception to the judgment. Burlington & M. R. Co. v. Campbell [Colo. App.] 78 P. 1072.

40. The granting of a nonsuit upon the opening statement of counsel is reviewable on appeal from an order denying a motion for new trial. Green v. Duvergey, 146 Cal. 379, 80 P. 234.

41. A judgment dismissing a complaint on the merits, which is supported by credible evidence on one ground, cannot be attacked as erroneous on some other ground. Laws 1902, p. 1561, c. 580. Mashkowitz v. O'Connell, 91 N. Y. S. 115. Under some circumstances the propriety of a dismissal may be reviewed, though the printed case contains no certificate that it embraces all the evidence and no exception to the dismissal or request to go to the jury. Plaintiff immediately moved for a new trial on the minutes, and excepted to a denial thereof and entered a formal order of denial from which he appeals as well as from the judgment. Boehringer v. Hirsch, 86 N. Y. S. 726. Where a motion for nonsuit was decided after conclusion of the trial, and was evidenced by a formal entry at a time when there was no opportunity to take an exception, the appellate court will review the judgment as though there had been formal exception. Sutherland v. St. Lawrence County, 93 N. Y. S. 958. There can be no appeal by one on whose motion a cause is dismissed. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125.

42. Code Civ. Proc. § 1772; Sess. Laws 1899, p. 146. Franzman v. Davies.[Mont.] 80 P. 251.

43. Robinson v. New York City R. Co., 90 N. Y. S. 368; Smith v. Johnson, 137 N. C. 43, 49 S. E. 62; Dorff v. Brooklyn Heights R. Co., 95 App. Div. 82, 88 N. Y. S. 463; Coleman v. Robert Graves Co., 97 App. Div. 411, 89 N. Y. S. 1040. And to the benefit of every fact which the jury could have found from the evidence (McConnell v. Morse Iron Works & Dry Dock Co., 102 App. Div. 324, 92 N. Y. S. 477; Walsh v. Metropolitan Life Ins. Co., 93 N. Y. S. 445), and all inferences that may be drawn from it (Walsh v. Metropolitan Life Ins. Co., 93 N. Y. S. 445; Robinson v. New York City R. Co., 90 N. Y. S. 368). On appeal the court will only search the record to ascertain if any material testimony exists to sustain the plaintiff's cause (Lassiter v. Okeetee Club, 70 S. C. 102, 49 S. E. 224), or taken as a whole was sufficient for submission to the jury (Burlington & M. R. Co. v. Campbell [Colo. App.]

regularity of the appeal and whether plaintiff was in default.[44] Where a motion to dismiss a complaint was based on several grounds, and the order of dismissal does not disclose the ground on which it was made, it will be sustained if any ground of the motion was good.[45]

DISCOVERY AND INSPECTION.

This article does not deal with the taking of depositions for use as evidence at the trial,[1] nor with examinations of parties during the trial,[2] nor during proceedings supplementary to execution,[3] nor with the power of a court to compel a contumacious witness to answer.[4]

§ 1. *Discovery in equity.*[5]—Equity permits a suit for discovery and relief,[6] and this practice exists in the Federal courts.[7] A bill cannot be maintained for the sole purpose of a discovery,[8] nor to fish for information,[9] except to ascertain the proper persons to make defendants in a proposed suit at law.[10] A bill by simple contract creditors for the discovery of assets need not allege that the alleged concealed assets are not exempt.[11]

§ 2. *Production and inspection of books and papers or survey of property.*

78 P. 1072). A judgment of dismissal at the close of plaintiff's case requires the court on appeal to find the most favorable inferences in favor of the plaintiff. Edwards v. Fireman's Ins. Co., 43 Misc. 354, 87 N. Y. S. 507. On appeal from a dismissal on the complaint and plaintiff's opening the facts alleged in the complaint and opening together with every inference that can be fairly drawn from them must be assumed to be true. Oakeshott v. Smith, 93 N. Y. S. 659. On defendant's appeal from an order setting aside a nonsuit, plaintiff is entitled to the most favorable inferences deducible from the evidence, and every disputed fact must be treated as established in his favor. Lewis v. Erie R. Co., 94 N. Y. S. 765.

44. Clement v. Breaux [La.] 38 So. 900.

45. Holm v. Empire Hardware Co., 102 App. Div. 505, 92 N. Y. S. 914.

1. See Depositions, 5 C. L. 988.

2. See Trial, 4 C. L. 1708. Physical examination during trial, see Damages, 5 C. L. 904.

3. See Supplementary Proceedings, 4 C. L. 1591.

4. See Contempt, 5 C. L. 650; Witnesses, 4 C. L. 1943.

5. See 3 C. L. 1106.

6. Bowdish v. Metzger [Kan.] 81 P. 484. In a suit to remove a cloud and quiet title to realty, a petition stating that the nature, character, or extent of defendants' title is unknown, and praying that defendants be required to disclose such title in their answer, held to state a good cause of action for discovery and relief. Id. Where a vendor of goods renders the vendee's agent subservient to his will by the use of intoxicating liquors, held a bill of discovery and relief would lie. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

7. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295. State statutes authorizing the examination de bene esse of the defendant, and the compulsory production of books and papers in his possession or under his control, are aids to the methods of procedure in the Federal courts in actions at law, but are not entire substitutes for bills of discovery and relief in equity in Federal practice. Id.

8. See 3 C. L. 1106, n. 81.

NOTE. Distinction between bill of discovery and bill for discovery and relief: There is a distinction between a bill filed for discovery merely and a bill filed for discovery and relief. The former is auxiliary to a trial at law or in equity. The latter, although a bill of discovery, withdraws the case from the legal forum, and brings it for a decision before a court of equity. Bell v. Pomeroy, McLean, 57, Fed. Cas. No. 1263.—Fletcher Eq. Pl. & Pr. § 805. See this work for a full discussion of the law and procedure relative to both bills, including forms.

9. Where a creditor objecting to a bankrupt's discharge files an amended specification, alleging on oath, as positive facts, different acts of the bankrupt, any one of which, if true, would prevent his discharge, such creditor is not entitled to a discovery of certain books belonging to a partnership existing between a witness and the bankrupt's son to prove such acts prior to the giving of evidence by the creditor himself. In re Romine, 138 F. 837.

10. Bill granted to ascertain for whom corporate stock was purchased so that suit could be brought to enforce the stockholders' liability. Brown v. McDonald [C. C. A.] 133 F. 897.

11. Held not demurrable for failure to

Nature of remedy and right thereto.[12]—The Federal courts have authority in actions at law to require the production of the books and writings of the adverse party, so that the cause may be prepared for trial.[13] The production of books and papers will not be ordered unless their production is indispensably necessary,[14] or is provided for by contract between the parties;[15] hence, in the absence of any fiduciary relations between the parties, such production will not be ordered where the books and papers can be obtained by subpoena duces tecum.[16] A corporation ought not to be required to produce its books upon the examination of one of its officers before trial, to enable him to refresh his memory therefrom while on the stand, unless he requires their assistance in order to testify concerning the matters in regard to which he is to be examined.[17] Where the rights of plaintiff will be preserved by authorizing an inspection of the books and papers at the place of business of defendant in ordinary course during business hours, the order should so provide.[18]

Proceedings.[19]—The notice to defendant must specifically designate the books and papers desired to be examined,[20] and the order must authorize such examination.[21] In New York an order to produce documents for inspection must be made on petition,[22] and a justice in one district has no authority to grant ex parte an application for the exhibition of books and papers in an action in another district.[23] Statutory requirements must be complied with.[24] Laches may defeat an application for the modification of the order.[25] An order granting or refusing an order for inspection is not appealable.[26]

§ 3. *Examination or interrogation of party before trial.*[27]—The examination of a party before trial is discretionary, to be determined upon the necessities of each

so do. Code 1896, § 819, construed. Kinney v. Reeves & Co. [Ala.] 39 So. 29.

12. See 3 C. L. 1107. For the law and procedure, including forms, relative to the production and inspection of documents, see Fletcher Eq. Pl. & Pr. ch. 20, §§ 370-377.

13. Rev. St. § 724 construed. Cameron Lumber Co. v. Droney, 132 F. 304.

14. Ashley v. Calhoun Circuit Judge [Mich.] 100 N. W. 1005.

Examination awarded where it was necessary in order that plaintiff might find out amount due on contract, secret payments being alleged. In re Sands, 98 App. Div. 148, 90 N. Y. S. 749. In an action for injuries examination of lease under which defendant acquired right to use premises, and reports made to it of cause of the accident, allowed. Boyle v. Consolidated Gas Co., 94 N. Y. S. 27.

15. Ballenberg v. Wahn, 92 N. Y. S. 830.

16. Ashley v. Calhoun Circuit Judge [Mich.] 100 N. W. 1005. In a suit to recover money paid a limited partnership on the ground that its president and secretary had no authority to make the contract, inspection of the firm's articles, by-laws and records, in order to ascertain the authority of such officers, denied. Id.

17. Bruen v. Whitman Co., 94 N. Y. S. 304.

18. Ballenberg v. Wahn, 92 N. Y. S. 830.

19. See 3 C. L. 1107.

20. In an action on an insurance policy, a notice to defendant to produce the proofs of loss, all letters written by defendant's agent to defendant concerning the loss, and all letters written to the agent by plaintiff concerning his application and his loss, described the papers with sufficient certainty. Home Ins. Co. of New York v. Overturf [Ind. App.] 74 N. E. 47.

21. An inspection of accounts rendered by defendant's firm to plaintiff is not authorized by an order for the examination before trial. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. S. 429.

22. Code Civ. Proc. § 805. An order based on an affidavit is erroneous. Lee v. Winens, 99 App. Div. 297, 90 N. Y. S. 960.

23. Municipal Court Act, § 165 and Municipal Court Rule 15 considered. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499.

24. In New York one cannot procure an inspection of books by proceeding under Code Civ. Proc. § 872, subd. 7, but must proceed under Code Civ. Proc. §§ 803-809, relative to discovery. In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4; In re Sands, 98 App. Div. 148, 90 N. Y. S. 749.

25. Under Code Civ. Proc. § 870, providing that the examination may be had at any time before or during the trial, plaintiff is not chargeable with laches, delay in an application for a modification of the order being caused by defendant's appeal from an order denying a motion to vacate the order. Boyle v. Consolidated Gas Co., 94 N. Y. S. 27.

26. An appeal does not lie from an order of the probate court to produce for examination certain books and papers, to be used in a pending controversy over the removal of an executor and the settlement of his account. Comp. Laws, § 669, considered. Erwin v. Ottawa Circuit Judge [Mich.] 101 N. W. 537. See, also, 3 C. L. 1108, n. 20.

27. See 3 C. L. 1108.

case,[28] the test being the pertinency of the particular interrogatory to the issue in hand.[29] A party may be examined not only in regard to the facts necessary to establish an affirmative cause of action, but as to all matters material to the issues.[30] One cannot be examined for the purpose of enabling a plaintiff to frame a complaint in an action not yet commenced,[31] nor to enable him to examine into the defense it is proposed to make.[32] An examination will not lie to ascertain what is a matter of public record.[33] Interrogatories directed to corporations will be allowed to stand where to treat them otherwise would be to encourage technical pitfalls.[34] In a suit for an accounting, the fact that a trial of the issues prior to the interlocutory judgment will result in disclosing to the court all the facts necessary for a final judgment is no ground for refusing to allow an examination of defendant before trial.[35] Where interrogatories are submitted to a corporation, it is the latter's duty to select an agent familiar with the facts to answer the questions.[36] Interrogatories must be answered without evasion,[37] and an answer not being explicit, the remedy is by motion for a more explicit answer.[38] The giving of evasive answers to ex parte interrogatories is not ground for taking the interrogatories as confessed, there being no deliberate refusal to answer.[39] In most states statutes prescribe matters that cannot be inquired into.[40] In Massachusetts defendant refusing to answer, plaintiff is entitled to the oath of the party interrogated that the matters inquired

28. Nonresident heirs held entitled to examine opposite party as to ownership of real estate by intestate. McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218. In an action for breach of a contract of employment, examination of plaintiff allowed in order to show what efforts he had made to obtain employment after his discharge, and if he did obtain employment, what was the compensation. Edelstein v. Goldfield, 92 N. Y. S. 243. In an action for breach of a contract, whereby defendant corporation agreed to give plaintiff a preference in executing its printing in competition with other printers, an order for examination of an officer of defendant held to properly require him to disclose the names of persons to whom the corporation wrongfully gave work, the quantity of work given each, but not the price paid. Bruen v. Whitman Co., 94 N. Y. S. 304. In an action against a railroad company for wrongful death, an examination of an officer of the company lies to ascertain whether the train that killed deceased was owned and operated by defendant, or by another company which, under contract with defendant, had the right to use the tracks, and in the latter case what company, and under what contracts it used the tracks. Muldoon v. New York, etc., R. Co., 98 App. Div. 169, 91 N. Y. S. 65. A complaint stating a cause of action in equity for an accounting, plaintiff is not entitled to examine defendant before trial to ascertain the condition of the account. Louda v. Revillon, 99 App. Div. 431, 91 N. Y. S. 194.

29. The fact that the information may expose defendant's case is not ground for demurrer. Graham v. Ohio Tel. & T. Co., 2 Ohio N. P. (N. S.) 612.

30. Griffen v. Davis, 99 App. Div. 65, 90 N. Y. S. 491. In an action for an accounting brought against the confidential friend and advisor of plaintiff's assignor, the defendant may be examined as to the fairness of an accounting and settlement between him and plaintiff's assignor. Id.

31. Code Civ. Proc. § 870 et seq., construed. In re Schlotterer, 93 N. Y. S. 895.

32. McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

33. In an action against a railroad for wrongful death, an examination of an officer of the company is not permissible to ascertain by what authority defendant operated a railroad on a certain street. Muldoon v. New York, etc., R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

34. Graham v. Ohio Tel. & T. Co., 2 Ohio N. P. (N. S.) 612.

35. Griffen v. Davis, 99 App. Div. 65, 90 N. Y. S. 491.

36, 37. Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509.

38. Not by a motion to dismiss. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209.

39. So held where notary insisted upon immediate answers and the party interrogated explained that he desired time to consult his attorney, who was then otherwise busily engaged. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 746. Code, § 3610, authorizing the entry of judgment for failure to answer interrogatories sworn to by the interrogator to be within the personal knowledge of the opposite party, does not authorize the summary entry of judgment because of an indefinite or unsatisfactory answer to interrogatories so sworn to; especially in the case of a county as a party, which could only answer by its officers and agents, who might not be able to respond from personal knowledge. Modern Steel Structural Co. v. Van Buren County, 126 Iowa, 606, 102 N. W. 536.

40. Under Rev. Laws, c. 173, § 63, providing a party shall not be obliged to disclose the names of the witnesses by whom, or the manner in which he proposes to prove his own case, in a personal injury suit

of are within the protection of the statute, and this must be fully stated in the answers.[41] Defendant refusing to answer, it is within the power of the court to direct him to appear again for examination,[42] and if such order is erroneous, it is not prejudicial to plaintiff.[43] Orders allowing the party interrogated leave to file further answers or further time in which to answer are within the discretion of the court.[44] The liability for the costs of the proceeding is largely determined by statute.[45] In New York a judicial order for the examination of certain persons may be vacated on application to the special term.[46]

The examination of a defendant, taken before trial, is not to be taken as part of his answer for the purpose of passing on a demurrer.[47]

§ 4. *Physical examination to prepare for trial.*[48]—There is a conflict as to whether a trial court can compel a plaintiff to submit to a physical examination by physicians appointed by the court.[49] In New York the subject is regulated by statute.[50]

DISCRETION; DISFRANCHISEMENT; DISMISSAL AND NONSUIT, see latest topical index.

against a street railway company, the latter need not disclose the conductor's report containing the names of witnesses and the manner in which the accident happened. Spinney v. Boston Elevated R. Co. [Mass.] 73 N. E. 1021.

41. Spinney v. Boston El. R. Co. [Mass.] 73 N. E. 1021.

42, 43. Citizens' Nat. Bank v. Alexander, 34 Ind. App. 596, 73 N. E. 279.

44. Spinney v. Boston El. R. Co. [Mass.] 73 N. E. 1021.

45. Under Burns' Ann. St. 1901, § 519, providing that if an examination of a party is not read on trial the party causing the same to be taken shall pay the costs thereof, where plaintiff refuses to plead after the court has sustained a demurrer to the complaint, the costs of the examination of defendant are properly taxed against plaintiff. Citizens' Nat. Bank v. Alexander, 34 Ind. App. 596, 73 N. E. 279.

46. Code Civ. Proc. § 772. In re Schlotterer, 93 N. Y. S. 895.

47. Examination taken under Code, § 581. Whitaker v. Jenkins [N. C.] 51 S. E. 104.

48. See 3 C. L. 1111. Physical examinations during trial when for the purpose of informing the jury as to the extent of the injury or for use as evidence are treated in Damages, 5 C. L. 904, and Evidence, 3 C. L. 1334; but when used for the purpose of enabling experts to testify, the same rules apply as to an examination before trial and the cases are here treated.

49. Trial court has no such authority May v. Northern Pac. R. Co. [Mont.] 81 P. 328.

NOTE. Compulsory physical examination in personal injury cases (Supplementing the note on the same subject in 1 C. L. p. 936): The first reported case in which the power of the court to compel such examination is asserted is Walsh v. Sayre, 52 How. Prac. [N. Y.] 334, decided by the New York superior court in 1868. This was an action for damages for malpractice, and upon the analogy to cases of mayhem, divorce on the ground of impotency and cases of controversies between a widow, claiming to be pregnant by the decedent, and other heirs of the estate, wherein such examinations had been ordered, it was held that a court of law could compel the plaintiff to submit to a physical examination. A leading case on the subject is Schroeder v. R. Co., 47 Iowa, 375, decided in 1877. Mention is not made of the New York case cited above, the opinion stating that there were no precedents at the time of rendition. The court held that the trial court had the power to compel the plaintiff to submit to such an examination. These cases were followed in the cases of Turnpike Co. v. Baily, 37 Ohio St. 104; Railroad Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; White v. Railroad Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808 (In this case Georgia Code, § 206 is referred to, but the power is asserted upon the authority of the cases herein considered above); Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; Graves v. Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641; Belt E. L. Co. v. Allen, 102 Ky. 551, 44 S. W. 89, 80 Am. St. Rep. 374; Lane v. Railroad Co., 21 Wash. 119, 57 P. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; Brown v. Railroad Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564; Hatfield v. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14 (dicta); the same rule has been acquiesced in by the lower courts of Pennsylvania (see former note, 1 C. L. 936) and the case of Bryant v. Stilwell, 24 Pa. 317, is cited in Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584, as holding the same view. The first case to deny the right was Loyd v. Railroad Co., 53 Mo. 509, decided in 1873; the same view was upheld by other courts in the following cases: Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Kern v. Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409. In 1891 the question came before the supreme court of the United States in Railroad Co. v. Botsford, 141 U. S. 250, 35 Law. Ed. 734, and it was there held by a

divided court—seven to two—that the power does not reside in the Federal trial courts. As shown in a former note, 1 C. L. 396, this decision was influenced by a Federal statute. These cases have been followed in City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107; Austin & N. W. Railway Co. v. Cluck [Tex. Civ. App.] 73 S. W. 569; Stack v. Railroad Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328; and May v. Northern Pac. R. Co. [Mont.] 81 P. 328.

The foregoing review shows the decisions of courts upon the first presentation of this question to them. The case of Walsh v. Sayre was followed in Shaw v. Van Rensselaer, 60 How. Prac. [N. Y.] 143; but in 1891 the question came before the court of appeals of New York in McQuigan v. Railway Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466, and Walsh v. Sayre, 52 How. Prac. [N. Y.] 334, and Shaw v. Van Rensselaer, 60 How. Prac. [N. Y.] 143 were overruled. The McQuigan Case was followed in Cole v. Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670, decided in 1899. The legislature of New York, however, circumvented the effect of these last decisions by enacting a statute directly conferring upon trial courts the power to make and enforce such an order. In Shepard v. Railway Co., 85 Mo. 629, 55 Am. Rep. 390, decided in 1885, a view contrary to that expressed in Lloyd's Case is intimated by the supreme court of Missouri, and in Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549, a decision was rendered which had the effect of directly reversing the Lloyd Case; and the Sidekum Case was followed in Owens v. Ry. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. The Schroeder Case was followed by the supreme court of Iowa in Hall v. Manson, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; and Railway Co. v. Thul was approved and followed in Ottawa v. Gilliland, 63 Kan. 165, 65 P. 252, 88 Am. St. Rep. 232, and again in Railway Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90. White v. Milwaukee R. Co. was followed by the Supreme Court of Wisconsin in O'Brien v. La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831. Sibley v. Smith, above, was followed in Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147. The supreme court of Indiana has been most uncertain in its treatment of the question. Kern v. Bridwell, above, was decided in May 1889; but in November of the same year, in Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90, a contrary doctrine is announced. In 1891, in Railroad Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860, the announcement in Hess v. Lowrey is pronounced dictum, and the authority is again distinctly denied. But the Newmeyer Case is distinctly reversed in South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396, and, so far as we are aware, the last decision from that court asserts the power. Belt E. L. Co. v. Allen is affirmed in Distilling Co. v. Riggs, 104 Ky. 1, 45 S. W. 99, and in Railroad Co. v. Simpson, 111 Ky. 754, 64 S. W. 733. In Wanek v. Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448, decided in 1899, the dictum in the Hatfield Case is declared to be the law in Minnesota. Parker v. Enslow is followed in Railway Co. v. Rice, 144 Ill. 227, 33 N. E. 951, and in Railway Co. v. Story, 104 Ill. App. 132. In Railway Co. v. Underwood, 64 Tex. 463, and Railway Co. v. Johnson, 72 Tex. 95, 10 S. W. 325, the court, without deciding, intimated that the trial courts in Texas had the power to compel such examination; but in Railway Co. v. Cluck [Tex. Civ. App.] 73 S. W. 569, decided in 1903, the question is squarely met and decided, and the authority denied. This last case is affirmed and the doctrine reannounced upon appeal to the supreme court of Texas, in Austin & N. W. R. Co. v. Cluck, [Tex.] 77 S. W. 403, 64 L. R. A. 494. The question has been before the supreme court of Nebraska, but not decided, in Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724, in Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336, and Chadron v. Glover, 43 Neb. 732, 62 N. W. 62. The syllabus to the decision in Mills v. Railway Co. [Del.] 40 A. 1114, announces that the superior court of Delaware denies the power, but there is nothing in the body of the opinion with reference to the question. The case of Carrico v. Railroad Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, is frequently cited in these opinions, but the question is not decided by the West Virginia court at all. The Federal and territorial courts have followed the decision in the Botsford Case, in Railway Co. v. Griffin [C. C. A.] 80 F. 278, and in the Oklahoma case cited.

If the last announcements of these several courts may be taken to indicate the law in their respective states, a review of the decisions discloses that the power of trial courts to compel such examination is asserted in Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Ohio, Pennsylvania, Washington and Wisconsin, and denied in the Federal and territorial courts and in Illinois, Massachusetts, and Texas, and was denied in New York until specifically granted by direct legislative enactment.

The bare assertion that trial courts possess this power, in the absence of any legislation, and without common-law precedents, has led to the greatest possible confusion among the decisions of the very courts asserting it. (1) What is the source of the power? (2) To what extent may it be carried? (3) May the defendant demand the order as a matter of right? And (4) how will the court enforce obedience to its order? Singularly enough, the first of these questions appears to have received little or no consideration.

(1) In Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808, the section of the Georgia Code above is quoted; but further reference is not made to this provision of the law and it can hardly be presumed that the decision proceeds upon the assumption that the source of the power is the statute quoted. That section adds nothing to the powers already possessed by courts of general jurisdiction, for it is merely declaratory of the common law. In some of the opinions it is said that the power is one inherent in the trial courts. In Graves v. Battle Creek, decided in 1893,

DISORDERLY CONDUCT.[51]

Disorderly conduct as defined by the statutes of various states includes not only the common-law offense of breach of the peace,[52] but a number of specifically prohibited disorderly acts, such as drunkenness in public places,[53] shooting on a public street,[54] or use of language calculated to provoke a breach of the peace.[55] It is sometimes required that some person be in fact disturbed.[56]

it is said, "It is true that the rule is one of modern growth." Most of the courts content themselves with the bare assertion of the power, without any discussion of its origin.

(2) If the plaintiff may be compelled to submit to a physical examination, is the authority to order it an absolute or only a qualified one? May the plaintiff be compelled to submit to the administration to him of anaesthetics or drugs by which he loses consciousness altogether, or, if the injury is an internal one, may he be compelled to submit to the use of such surgical instruments as the physicians appointed to make the examination may see fit to use? May he be compelled to exhibit his injury to the jury in open court, and, if the plaintiff be a woman, is there any protection whatever against violence to her feelings? By some of these courts it has been held that anaesthetics and drugs should not be used (Schroeder v. Railway Co., 47 Iowa, 375; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616), and that plaintiff should not be compelled to submit to the use of surgical instruments (O'Brien v. La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831; but in Railway Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90, it was held that the plaintiff could be compelled to submit to the examination, and to an injection of a drug into his injured eye to dilate the pupil; and in Hall v. Manson, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207, it was held that the plaintiff, a woman, could be compelled to remove her shoe and stocking, that an examination might be had and measurements taken of her injured ankle in the presence of the jury. In Railway Co. v. Hill, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442, above, the Supreme Court of Alabama said: "When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice on the other, the law cannot hesitate. Justice must be done." This is quoted with approval in Lane v. Railway Co., 21 Wash. 119, 57 P. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153. However, in Graves v. Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641, it is said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court under proper restrictions, the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination * * * where the sense of delicacy of the plaintiff may be offended by the exhibition." To the same effect is the decision in Ottawa v. Gilliland, 63 Kan. 165, 65 P. 252, 88 Am. St. Rep. 232.

(3) In Sibley v. Smith and in Railway Co. v. Thul it is held that the defendant may demand the order as a matter of right, but that in granting it the court may exercise its discretion. We are unable to understand this contradiction of terms, and observe that in most of the cases it is held that the application is one addressed to the sound discretion of the trial court, subject to review for manifest abuse only.

(4) In the Schroeder Case, and in Sibley v. Smith it is said that refusal of the plaintiff to comply with the order would constitute contempt of court, and subject the plaintiff to the punishment of a recusant witness; while in Turnpike v. Baily, Lane v. Railroad Co., Wanek v. Winona, Brown v. Railroad Co., and in the dissenting opinion in the Botsford Case, it is said that it is not a question of contempt; that the court cannot compel the plaintiff to comply with the order which it has made, but, if he refuses, the court may dismiss his action or refuse to permit him to testify.

From the assertion of the power arising from the apparent necessities of extraordinary cases, as disclosed by the decision in the Schroeder Case, we observe the almost limitless extent to which the power has been carried; and, not content with applying the rule to civil actions for personal injuries, it has been extended to apply to the prosecuting witness in a criminal case (King v. State, 100 Ala. 85, 14 So. 878), and for the same reasons advanced for the exercise of the power in civil actions by the courts asserting its existence, the doctrine has been applied to a criminal case, and the defendant compelled to bare to the view of the jury part of the unexposed portions of his body upon which were certain tatoo marks, in order to enable the state to complete the case against him, with the result that the defendant was convicted of a capital offense. State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530.—From opinion of Holloway, J., in May v. Northern Pac. R. Co. [Mont.] 81 P. 328.

50. Under Code Civ. Proc. § 873, an order for the physical examination of plaintiff before trial must contain provision for his oral examination, although the scope of such examination may be confined by the court to questions touching the nature and extent of his injuries. Landau v. Citron, 93 N. Y. S. 1111.

51. For related crimes, see Assault and Battery, 5 C. L. 269; Indecency, Lewdness and Obscenity, 3 C. L. 1697; Profanity and Blasphemy, 4 C. L. 1084.

52. The offense of **being a disorderly person** is not recognized by the statutes of Iowa. State v. Dailey [Iowa] 103 N. W. 1008.

53. Town of Dewitt v. La Cotts [Ark.] 88 S. W. 877, and see Murrey v. State [Tex. Cr. App.] 87 S. W. 349.

54. Establishment of the street by pre-

Indictment in the language of the statute is sufficient,[57] and slight variances from the statute may be disregarded.[58] An indictment is not double because it alleges several disorderly acts.[59] An averment of drunkenness at a certain building near a public road does not allege drunkenness in a public place,[60] nor can evidence of drunkenness at a place other than the building specified be received.[61] The New Jersey statute excludes disorderly conduct by a drunken person, and the complaint must show that defendant was not at the time of the offense under the influence of liquor.[62] Where defendant testified that he never used profanity, he may be contradicted as to occasions other than that on trial.[63]

DISORDERLY HOUSES.

Includes only the criminal offense of keeping or frequenting a bawdy house,[64] the keeping of gaming houses[65] and the remedies against bawdy houses as nuisances[66] being elsewhere treated.

Any house kept for resort[67] for purposes injurious to the public morals or safety is a disorderly house,[68] and keepers[69] and frequenters[70] of such houses as well as persons leasing property for such purpose[71] or allowing it to be so used[72] are liable. A count for frequenting a bawdy house may be joined with one for keeping such a house.[73]

DISSOLUTION; DISTRESS; DISTRICT ATTORNEYS; DISTRICT OF COLUMBIA, see latest topical index.

DISTURBANCE OF PUBLIC ASSEMBLAGES.

Disturbance of public assemblies was a misdeameanor at common law,[74] but is generally prohibited by statute; such statutes being given a liberal construction to prevent all unwarrantable disturbances.[75] The assemblage need not at the time of

scription is sufficient. Commonwealth v. Terry [Ky.] 86 S. W. 519.

55. Intent to cause a breach of the peace is unnecessary if the language used naturally would produce that effect, but otherwise such intent is essential. State v. Shelby [Minn.] 103 N. W. 725.

56. The fact that a peace officer was disturbed is insufficient. Village of Salem v. Coffey [Mo. App.] 88 S. W. 772.

57. Stancliff v. United States [Ind. T.] 82 S. W. 882.

58. Abuse "in a manner calculated" instead of "under circumstances calculated" to produce breach of peace, held sufficient. Trezevant v. State [Tex. Cr. App.] 84 S. W. 828.

59. Stancliff v. U. S. [Ind. T.] 82 S. W. 882.

60, 61. Murrey v. State [Tex. Cr. App.] 87 S. W. 349.

62. State v. Sims [N. J. Law] 59 A. 32.

63. Lampkin v. State [Tex. Cr. App.] 85 S. W. 803.

64. See Indecency, Lewdness and Obscenity, 3 C. L. 1697, as to prostitution.

65. See Betting and Gaming, 5 C. L. 417.

66. See Nuisance, 4 C. L. 839. See, also, Injunction, 4 C. L. 96.

67. Evidence held not to require a charge that a single instance of illicit intercourse was not sufficient. Stone v. State [Tex. Cr. App.] 85 S. W. 808.

68. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211. And see Clark & M. Crimes [2d Ed.] 713, 715.

69. Proof of actual possession and control will sustain an indictment for keeping a disorderly house. Stone v. State [Tex. Cr. App.] 85 S. W. 807.

70. A woman notoriously frequenting a bawdy house and publicly soliciting persons to go there with her is guilty of a misdemeanor at common law. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

71. A contract for sale may be shown to be a sham not precluding the existence of a tenancy. State v. Emblem [W. Va.] 49 S. E. 554. And such showing may be made by circumstantial evidence. Id.

72. A statute forbidding property owners to allow their buildings to be "kept" as a place of resort for unlawful sexual intercourse prohibits allowing them to be used for such purpose. Sess. Laws 1903, c. 12, art. 3, § 7. Oligschlager v. Territory [Okl.] 79 P. 913.

73. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

74. See Clark & M. Crimes (2d Ed.) 644.

75. The words "indecently acting" in Pen. Code 1895, § 418, include all improper conduct calculated to disturb. Folds v. State [Ga.] 51 S. E. 305. Shooting near religious meeting held within statute. Id.

the disturbance be actually engaged in religious services.[76] A slight variance as to the name of the organization whose services were disturbed is not fatal.[77]

DIVIDENDS; DIVISION OF OPINION, see latest topical index.

DIVORCE.

Scope of article.—Suits for annulment[78] and for support or separate maintenance,[79] are elsewhere treated, as is the subject of alimony.[80]

§ 1. *Jurisdiction and domicile of parties.*[81]—Jurisdiction of the subject-matter[82] and parties[83] in divorce proceedings is statutory. Jurisdiction of the parties may be obtained by appearance by attorney,[84] but a decree granted upon a forged entry of appearance is a nullity and binds no one.[85] Where defendant appears and moves to set such judgment aside, but subsequently consents to dismiss the motion, such dismissal does not validate the decree of divorce nor affect the marriage relation.[86] The principle of estoppel cannot be invoked to confer jurisdiction on a foreign tribunal.[87] Where one court has acquired jurisdiction of a divorce action by the filing of a bill in good faith, and the issuance of process thereon, another court of co-ordinate jurisdiction in the same state has no power to take jurisdiction of an action by the defendant in the suit already commenced.[88] In such case prohibition is the proper remedy to settle the conflict in jurisdiction.[89]

Domicile of complainant.[90]—Bona fide residence of complainant in the state for the period required by law[91] is a jurisdictional prerequisite,[92] and must be established by the complainant by the quantum of proof prescribed by the statute.[93] If

76. Disturbance while dinner was being served on the church grounds after morning services and before afternoon services. Folds v. State [Ga.] 51 S. E. 305.

77. Averment of New Hope Methodist Church (Colored) not variant from proof of New Hope African Methodist Episcopal Church. Edwards v. State, 121 Ga. 590, 49 S. E. 674.

78. See Marriage, 4 C. L. 528.

79. See Husband and Wife, 3 C. L. 1669.

80. See 5 C. L. 101.

81. See 3 C. L. 1127.

82. Under Pub. Laws 1899, c. 649, § 3, a single justice of the supreme court assigned to the appellate division is a quorum to try petitions for divorce; hence such single justice has final jurisdiction as to incidental questions arising on a trial, as the competency of testimony by a physician. Banigan v. Banigan, 26 R. I. 454, 59 A. 313.

83. Record and evidence held to show that court had jurisdiction of subject-matter and parties. Given v. Given, 25 Pa. Super. Ct. 467.

84. Court acquires jurisdiction of a defendant by the appearance of an attorney under written authority signed by defendant. Dodge v. Dodge, 98 App. Div. 85, 90 N. Y. S. 438.

85, 86. Brown v. Dann [Kan.] 81 P. 471.

87. Where husband used New Jersey divorce decree in evidence in suit to bar dower rights of wife, and testified that she was not his wife, he was not estopped thereafter to question the validity of the New Jersey decree. Percival v. Percival, 94 N. Y. S. 909.

88, 89. Wells v. Montcalm Circuit Judge [Mich.] 104 N. W. 318.

90. See 3 C. L. 1127.

91. A wife began an action for separate support but later added a paragraph asking for divorce, and to the amended complaint the husband appeared. Plaintiff had been a resident for the required period when the amended complaint was filed. Held, complaint for divorce not premature. Burns' Ann. St. 1901, §§ 6977, 6978. Roshniakorski v. Roshniakorski [Ind. App.] 72 N. E. 485.

92. Complainant, husband, held not to have shown himself a bona fide resident of the district as required by D. C. Code, § 971. Downs v. Downs, 23 App. D. C. 381.

93. Burns' Ann. St. 1901, § 1043 requires plaintiff in divorce to prove bona fide residence by at least two witnesses who are

there is a serious doubt as to the good faith of petitioner's residence in the state, jurisdiction should not be exercised.[94] In some states, if the offense relied on was committed in the state, the complainant need not show residence for a certain period.[95] Every person is presumed to retain the domicile of his nativity until another is acquired.[96] To constitute a change of domicile there must be a concurrence of actual change of residence with an intention to abandon the old and acquire a new domicile.[97] An intention to return to the domicile of nativity, after a change of residence, is ineffective when it is conditional upon inclination or the happening of future events.[98] In the absence of contrary proof, the law presumes that a husband and wife are living together and that the wife's domicile is that of the husband.[99] To overcome this presumption proof of willful desertion by the husband is necessary.[1] Where there is a valid decree of separation from bed and board, the presumption that the wife's domicile follows that of the husband does not obtain.[2]

Service of process on nonresident defendant.[3]—Personal service outside the state is authorized by some statutes.[4] Whether service is personal[5] or constructive,[6] statutory requirements must be strictly complied with. Divorce and separation from bed and board being distinct and separate, a statute authorizing substituted service in actions for separation cannot be extended to suits for divorce.[7] The court of the domicile of marriage may, at the suit of the wife, render a decree of divorce

resident freeholders and householders. Two witnesses held properly qualified under statute. Roshniakorski v. Roshniakorski [Ind. App.] 72 N. E. 485.

94. Petitioner had position in New York, and spent her Sundays and holidays there with her mother, but spent nights in New Jersey for two years prior to bringing suit for divorce on ground of desertion. Held, bona fide residence not shown. Mason v. Mason [N. J. Eq.] 60 A. 337.

95. While parties were living in Delaware, husband committed adultery in Maryland. Wife acquired legal residence in Maryland, living on a farm which she bought. Held, she could bring a bill for divorce in the county where she lived, without having resided in the state for two years. Adams v. Adams [Md.] 61 A. 628.

96. Sparks v. Sparks [Tenn.] 88 S. W. 173.

97. Sparks v. Sparks [Tenn.] 88 S. W. 173. Residence of a few months in New York held not to have changed domicile from New Jersey. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931. One who owned a farm in Vermont, lived there five years, was a town official one year, which required a year's residence, was domiciled in Vermont, though he worked in New York. Hammond v. Hammond, 103 App. Div. 437, 93 N. Y. S. 1.

98. Civil service employe lived in Washington, D. C., with family 22 years, and only returned to Tennessee three times to vote. Held, not a resident of Tennessee, so as to maintain suit for divorce there, even though he intended to return there to live in case he lost his position. Sparks v. Sparks [Tenn.] 88 S. W. 173.

99. Smith v. Smith [Ind. App.] 74 N. E. 1008.

1. In suit by wife attacking a Texas decree of divorce on the ground of want of jurisdiction, the wife must prove that she acquired a separate domicile by proving that her husband willfully deserted her; otherwise her domicile will be held to have been that of her husband. Kendrick v. Kendrick [Mass.] 75 N. E. 151. Evidence held insufficient to prove desertion by husband and acquisition of separate domicile by wife. Id.

2. After legal separation, no presumption that wife's domicile was in New York at time decree of divorce was granted her in New Jersey. Percival v. Percival, 94 N. Y. S. 909.

3. See 3 C. L. 1127, 1128.

4. Personal service of complaint and summons in divorce outside the state is sufficiently authorized by Gen. St. 1894, §§ 4796, 4797. Sodini v. Sodini [Minn.] 102 N. W. 861.

5. A return showing proper personal service is not insufficient by reason of reciting that the name by which defendant is described is not his true name but an alias. Sodini v. Sodini [Minn.] 102 N. W. 861. If the language of the return of service of summons and complaint in a default divorce judgment fairly admits of an interpretation which will make the return legal and sufficient, it should be so construed on collateral attack. Id. Affidavit of complainant's solicitor only showing inquiry of complainant does not show such "diligent inquiry" as to defendant for purposes of identification, before delivery of citation to the sheriff as is required by Chancery Rules 53 and 59. Challender v. Challender, 65 N. J. Eq. 9, 59 A. 643.

6. Order of court for service of summons by publication held sufficient compliance with Wisconsin statute. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960. Proof that summons was published for "six successive weeks" in a weekly newspaper sufficiently shows publication "once a week" for six successive weeks as required by Wisconsin statute. Id.

7. Civ. Code, art. 142, does not apply to divorce. Connella v. Connella [La.] 38 So. 690.

against the nonresident husband on statutory constructive service, but is without jurisdiction to render a decree for alimony or costs against the husband.[8]

§ 2. *Causes for divorce.*[9]—Grounds of divorce are statutory, and a complainant must allege and prove each element of the statutory cause relied on in order to obtain relief.

Desertion[10] or abandonment[11] is a cause of divorce only when willful[12] and obstinate, and continued for the statutory period.[13] A husband is not entitled to a divorce on the ground of a desertion by the wife unless he has made reasonable[14] efforts to induce her to return, when the original separation was not intended as a desertion,[15] or when the wife has indicated repentance and a desire for a reconciliation.[16] If the husband refuses to meet the wife's advances,[17] or if his offers to resume matrimonial relations are not made in good faith,[18] the wife cannot be held a willful deserter. Separate living by mutual consent cannot become willful desertion except

8. Husband not being served with process and not appearing. Baker v. Jewell [La.] 38 So. 532.

9. See 3 C. L. 1128.

10. See 3 C. L. 1129.

11. Evidence held to justify decree of divorce to wife on ground of abandonment by husband. Clemans v. Western [Wash.] 81 P. 824. Evidence held to support finding that defendant's abandonment of plaintiff was not justified. Long v. Long [Wash.] 80 P. 432. Where husband had been put out of the house for drunkenness and failure to support wife, and subsequently wrote his wife, and she promised to see him, regarding his return, held no abandonment. Wheeler v. Wheeler [Md.] 61 A. 216.

12. Willful and malicious desertion by husband not established by evidence. Carey v. Carey, 25 Pa. Super. Ct. 223. Violence and threats of a husband, made when he was not living with his wife and was not able to provide her a home, do not make a separation, originally voluntary, a willful one. Corson v. Corson [N. J. Eq.] 61 A. 157. Letter from wife to husband saying "I never intend to live with you again" is proof of a willful desertion. Edwards v. Edwards [N. J. Eq.] 61 A. 531. Where a husband leaves his wife, avowedly to obtain work, and thereafter fails to assist in her support owing to his weakness of will and dissipated habits, he becomes a willful deserter, even though he continues to write affectionate letters promising to reform. Coe v. Coe [N. J. Eq.] 59 A. 1059. Under such circumstances the wife, who is without fault, is not bound to seek the deserter and ask a reunion. Id. Husband openly and notoriously lived with and supported another woman and failed to communicate with or support his wife and children, for more than the statutory period of desertion. Held, finding of willful, continued and obstinate desertion by husband proper. Carroll v. Carroll [N. J. Err. & App.] 61 A. 383. The fact that a wife is maintaining a divorce action against her husband will not prevent her absence from him from amounting to desertion unless it affirmatively appears that her action was brought in good faith. Kusel v. Kusel [Cal.] 81 P. 297.

13. Desertion must be for statutory period. Edwards v. Edwards [N. J. Eq.] 61 A. 581. Desertion for two years not clearly proved. Trimmer v. Trimmer, 215 Ill. 121, 74 N. E. 96.

14. Evidence held not to show such diligence as circumstances required to induce wife to return where separation was not intended as desertion. Briggs v. Briggs [N. J. Eq.] 59 A. 878.

15. Briggs v. Briggs [N. J. Eq.] 59 A. 878.

16. Where wife left after a quarrel, but in a letter held out a hope of reconciliation, it was husband's duty to seek such reconciliation. Edwards v. Edwards [N. J. Eq.] 61 A. 531. Where wife left against husband's will and express command, but subsequent letters indicated repentance, and husband did not reply thereto, he was not entitled to divorce, since though desertion was willful, he made no effort to obtain resumption of marital relation. Meier v. Meier [N. J. Eq.] 59 A. 234.

17. Husband not entitled to divorce for desertion where wife left him because of dissatisfaction with surroundings, but after birth of child showed desire to return and that he should provide support, and he gave her no opportunity to return, though able to support her and the child. Brand v. Brand [N. J. Eq.] 59 A. 570. When a husband refuses to invite his wife, who has left him, to return, and does not try to induce her to resume her duties, but rebuffs her attempts at reconciliation, he is presumed to have consented to the separation, and cannot obtain a divorce on the ground of desertion. McElhaney v. McElhaney, 125 Iowa, 333, 101 N. W. 93.

18. Where ground alleged was desertion, held, facts were such that the case should have gone to jury to establish whether defendant's expressed desire to return and resume relations was bona fide. Gordon v. Gordon, 23 Pa. Super. Ct. 261. Husband executed bond and mortgage for payment of alimony and maintenance to wife, and thereafter invited her to return in order to induce her to consent to cancellation of the mortgage. Held, her refusal to return in such case was not a willful desertion. Spille v. Spille [N. J. Err. & App.] 61 A. 742. Where husband's unfounded suspicions and charges made life with him unbearable by wife, the fact that he wished her to return was no defense to an action for divorce where it appeared that his conduct would

by a withdrawal of the consent and a demand for marital duty.[19] Such a demand on the husband, and a refusal by him, do not make him a deserter unless he is able to support the wife.[20] To establish a constructive desertion, petitioner's separation must have been necessary, and defendant must have had the intention to cause such separation.[21] It is only such misconduct by the husband as will entitle the wife to a divorce that justifies desertion by the wife.[22] The fact that one spouse does not object to the other's procuring a divorce is not alone evidence of willful desertion.[23] The fact that a wife lived alone after a separation is evidence of the continuance of the separation but not that the original separation was desertion.[24] The domicile of the husband is that of the wife only when the husband provides a domicile where the wife has a right to stay.[25] Hence, where the husband fails to provide a domicile and leaves the wife for an indefinite period, she is entitled to a decree of separation from bed and board on the ground of abandonment.[26] A husband cannot secure a divorce in New Jersey for a desertion occurring in New York unless the desertion is shown to have continued two years after the husband's residence in New Jersey began.[27]

Cruel and inhuman treatment[28] is usually a ground of divorce, but the mere fact that the parties can no longer live together is not.[29] Personal violence is not required to constitute cruel and inhuman treatment.[30]

Adultery, where sufficiently shown by the evidence,[31] is a cause for divorce in most states. Commission of the act need not be proved by eyewitnesses, if the disposition and opportunity to commit it are sufficiently shown.[32]

remain the same. Thompson v. Thompson [Ky.] 85 S. W. 730.

19. Evidence insufficient to corroborate husband as to desertion by wife, where they were actors playing in different parts of the country and separate living began with mutual consent. Currier v. Currier [N. J. Eq.] 59 A. 4.

20. Where parties married without means or expectation of establishing a home, went to a hotel for a few days and then separated to their former homes, and only met at the hotel a few times thereafter, the husband's subsequent refusal to support the wife was not evidence of willful desertion, in the absence of a showing as to his ability to support her. Carson v. Carson [N. J. Eq.] 61 A. 157.

21. No divorce on ground of constructive desertion by husband where wife left him on account of his habitual drunkenness and because he could not support her properly, evidence not showing intention by defendant to cause such separation. Foote v. Foote [N. J. Eq.] 61 A. 90.

22. Walton v. Walton, 114 Ill. App. 116. Husband entitled to divorce where wife left him and refused to return on his request, her reasons not being such as would entitle her to a divorce. Id.

23. Currier v. Currier [N. J. Eq.] 59 A. 4.

24. Corder v. Corder [N. J. Eq.] 59 A. 309.

25. Wilcox v. Nixon [La.] 38 So. 890.

26. Husband took wife to her parents' home, and then left the state for an indefinite period without notice to her. Wilcox v. Nixon [La.] 38 So. 890.

27. Brand v. Brand [N. J. Eq.] 59 A. 570.

28. See 3 C. L. 1128. Evidence sufficient to warrant decree for cruel and inhuman treatment by husband. Crabtree v. Crabtree [Ky.] 85 S. W. 211; Malone v. Malone [Ark.] 88 S. W. 840. Evidence insufficient to show cruel and inhuman treatment by husband. McMakin v. McMakin [Ky.] 87 S. W. 1140. Evidence insufficient to prove cruelty and other charges in action by husband. Loomer v. Loomer [Neb.] 102 N. W. 759. Decree for permanent separation advised where husband had conceived hatred for wife, had abandoned her, and had been guilty of cruel treatment. Costell v. Costell [N. J. Eq.] 60 A. 49. In suit for legal separation from bed and board for cruelty, under D. C. Code, § 966, held that that statute is enforceable, though the time and extent of drunkenness, cruelty and desertion, named as causes for separation, are not definitely stated. Maschaur v. Maschaur, 23 App. D. C. 87.

29. 2 Ball. Ann. Codes & St. § 5716, subd. 7 construed. Where cruel treatment was alleged but not proved, court could not grant divorce because of inability of parties to live together. Wheeler v. Wheeler [Wash.] 80 P. 762.

30. Habitual ill treatment held ground for divorce. Pierce v. Pierce [Miss.] 38 So. 46. Pederasty is extreme cruelty within the meaning of the divorce statute. Crutcher v. Crutcher [Miss.] 38 So. 337.

31. Evidence insufficient to prove adultery by wife. Farrow v. Farrow [N. J. Eq.] 60 A. 1103. In suit by wife for separation, evidence held insufficient to sustain recriminatory charge of adultery by the wife. Costell v. Costell [N. J. Eq.] 60 A. 49. Evidence held to show adultery by wife. Feinberg v. Feinberg [N. J. Eq.] 59 A. 880. Evidence sufficient to prove adultery by wife. Shoemaker v. Shoemaker, 25 Pa. Super. Ct. 183.

32. Feinberg v. Feinberg [N. J. Eq.] 59 A. 880.

Drunkenness,[33] when shown to be habitual,[34] is a sufficient cause in some states,[35] but not in others.[36]

Imprisonment.[37]—A sentence of imprisonment is a ground of divorce in some jurisdictions.[38]

Insanity[39] subsequent to the marriage is not a ground of divorce. Thus, under the Kentucky statute, making separate living without any cohabitation for five years a cause of divorce, a divorce will not be granted if the living apart was caused by the permanent lunacy of one of the spouses.[40] But if the parties lived apart for five years before the afflicted spouse became insane, the other will be granted a divorce.[41]

Fraud is a ground of divorce in some states,[42] but usually this is a ground for annulment.[43]

§ 3. *Defenses and excuses; facts constituting a bar.*[44] *Collusion.*[45]—If it appears that a defense has been suppressed by collusion,[46] or that the acts charged were committed by procurement or with connivance of the other spouse,[47] a divorce will be denied.

Condonation[48] is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.[49] There must be reconciliation and remission of the offense

33. See 3 C. L. 1130.

34. Evidence sufficient to show only occasional instances of drunkenness and not habitual drunkenness. Acker v. Acker, 22 App. D. C. 353.

35. Habitual drunkenness must have existed during three years immediately preceding bill for divorce, or for separation, followed within a reasonable time by suit for divorce. Acker v. Acker, 22 App. D. C. 353.

36. Drunkenness and consequent inability to support the wife is not a cause for divorce. Wheeler v. Wheeler [Md.] 61 A. 216. Habitual drunkenness is not a cause for absolute divorce in New Jersey, even when the effect is to justify the wife in separating herself from her husband, and to render the husband incapable of supporting the wife. Foote v. Foote [N. J. Eq.] 61 A. 90.

37. See 3 C. L. 1130.

38. Under V. S. 2674, making a sentence of three years or more to prison ground of divorce, the length of the sentence by the court controls regardless of the shortening of the actual term of confinement by good behavior of the prisoner. Sargood v. Sargood [Vt.] 61 A. 472. The Pennsylvania statute making conviction of a felony and sentence of imprisonment for a term exceeding two years a ground of divorce refers only to conviction of a single felony followed by a single term, and not to conviction for several offenses the sentences for which combined exceed two years. Under Act May 8, 1854 (P. L. 644), amended by Act June 1, 1891 (P. L. 142), conviction of larceny and receiving stolen goods and sentence of one year and six months for each is not ground for divorce by wife. Kauffman v. Kauffman, 24 Pa. Super. Ct. 437.

39. Insanity is not a ground of divorce under Civ. Code, c. 37. The court did not decide whether insanity at the time of the marriage was ground for annulment in equity, since the evidence was found insufficient to establish the existence of insanity at that time. Smith v. Smith [Ala.] 37 So. 638.

40. Construing Ky. St. 1903, § 2117. Andrews v. Andrews' Committee [Ky.] 87 S. W. 1080.

41. Parties lived apart five years before wife became insane, and continued to live apart thereafter. Held, husband's cause of action was not lost by his not bringing suit at once. Andrews v. Andrews' Committee [Ky.] 87 S. W. 1080.

42. One who has been fraudulently induced to marry an epileptic is entitled to a divorce on the ground of a fraudulent contract, since Pub. Acts 1895, c. 325 prohibits an epileptic from marrying. Gould v. Gould [Conn.] 61 A. 604. Husband is entitled to divorce on proof that wife was pregnant by another at time of marriage, and that he was ignorant of her condition. May v. May [Kan.] 80 P. 567.

43. As to annulment of marriages, see Marriage, 4 C. L. 528.

44, 45. See 3 C. L. 1131.

46. Petition dismissed where wife brought suit after negotiations with husband resulting in agreement to pay her a lump sum if she obtained a decree on the ground of desertion; and where it appeared that part of their agreement was suppressed, so as not to disclose a defense. Griffiths v. Griffiths [N. J. Eq.] 60 A. 1090.

47. Where adultery by wife was committed by procurement or with connivance of the husband within the meaning of Code Civ. Proc. § 1758, husband was denied divorce, and wife granted separation. Armstrong v. Armstrong, 45 Misc. 260, 92 N. Y. S. 165. Only collusion which would invalidate decree held to be collusion in procuring or conniving at acts of adultery which were basis of suit, divorced wife having remarried. Dodge v. Dodge, 98 App. Div. 85, 90 N. Y. S. 438.

48. See 3 C. L. 1131.

49. Civ. Code, § 115. Kusel v. Kusel [Cal.] 81 P. 297.

by the injured party.[50] Voluntary resumption of marital relations constitutes a condonation,[51] provided the forgiving party had full knowledge of the other's misconduct.[52] Subsequent misconduct of the forgiven spouse makes the condonation ineffective as a defense.[53] To cure a desertion under the California statute the party deserting must not only return and offer in good faith to fulfill the marital obligation, but must also solicit condonation,[54] and such action must be taken by the deserting party before the expiration of the statutory period of desertion.[55] Condonation should be pleaded;[56] but even if not pleaded, where evidence of it is admitted without objection, and the defense established, a divorce will be denied,[57] since the defendant would in such case have the right to amend so as to raise the issue.[58]

Recrimination.[59]—A plaintiff who has himself broken the marriage contract cannot be relieved from its obligations because the other spouse may also have broken it,[60] since divorce is a remedy for the innocent and injured.[61] Hence an action for divorce on any one of the statutory grounds may be defeated by proof of existence of another statutory ground,[62] without regard to the nature or gravity of the several causes.[63] Sufficient recriminatory charges being alleged in the answer, the plaintiff will be denied relief, though defendant does not pray for a divorce.[64]

§ 4. *Practice and procedure. In general.*[65]—If the statute denominates the annulment of a void marriage a "divorce" proceeding, the incidents of a divorce proceeding attach thereto.[66] Where a petition alleges that defendant has conveyed property to a third person for the purpose of defeating the collection of any alimony

50. Civ. Code, § 116. Kusel v. Kusel [Cal.] 81 P. 297.

51. Cruelty condoned by voluntary resumption of matrimonial relations. Fullhart v. Fullhart [Mo. App.] 83 S. W. 541. Resumption of marital intercourse after a known cause for divorce is a condonation thereof. Womack v. Womack [Ark.] 83 S. W. 937.

52. Husband held not to have had such knowledge of wife's improper conduct as to have condoned it. Apgar v. Apgar [N. J. Eq.] 59 A. 230. Evidence insufficient to prove that wife condoned husband's act, she not having adequate knowledge of the cause of his condition. Andros v. Andros [Cal. App.] 82 P. 90. Husband held to have had knowledge of wife's infidelity and to have condoned it by cohabiting with her thereafter. Day v. Day [Kan.] 80 P. 974.

53. Condonation or forgiveness to be effective requires the subsequent good conduct of the one forgiven. Apgar v. Apgar [N. J. Eq.] 59 A. 230. Civ. Code, § 117. Kusel v. Kusel [Cal.] 81 P. 297. Condonation of adultery no defense where husband's relations to paramour were improper thereafter. Totten v. Totten [N. J. Eq.] 60 A. 1095. Condonation of drunkenness and acts of cruel and inhuman treatment held abrogated by subsequent misconduct. Edleman v. Edleman [Wis.] 104 N. W 56. If husband condoned wife's impropriety by cohabiting with her, her subsequent misconduct caused the forgiveness to be forfeited. Apgar v. Apgar [N. J. Eq.] 59 A. 230. Evidence held to show illicit relations resumed after having been condoned, the opportunity and inclination for such resumption being shown, but no specific act proven. Totten v. Totten [N. J. Eq.] 60 A. 1095.

54. Civ. Code, § 102. Finding held not to show solicitation of condonement. Kusel v. Kusel [Cal.] 81 P. 297.

55. Finding held not to show return in time. Kusel v. Kusel [Cal.] 81 P. 297.

56. Bordeaux v. Bordeaux [Mont.] 80 P. 6; Apgar v. Apgar [N. J. Eq.] 59 A. 230; Delaney v. Delaney [N. J. Eq.] 61 A. 266.

57. Bordeaux v. Bordeaux [Mont.] 80 P. 6.

58. Apgar v. Apgar [N. J. Eq.] 59 A. 230.

59. See 3 C. L. 1131.

60. Day v. Day [Kan.] 80 P. 974. When it appears that both parties have violated the marriage obligation, a divorce will not be granted. Cupples v. Cupples [Colo.] 80 P. 1039. No relief will be afforded either party if both are equally at fault. Womack v. Womack [Ark.] 83 S. W. 937. Complaint alleged cruelty and cross complaint desertion; both parties held to be at fault and divorce denied. Malone v. Malone [Ark.] 88 S. W. 840.

61, 62. Day v. Day [Kan.] 80 P. 974.

63. Cruelty and gross neglect of duty a good defense to an action based on adultery. Day v. Day [Kan.] 80 P. 974.

64. Husband brought suit for divorce on ground of adultery, and wife, by amended answer, set up similar charges against the husband, but did not ask for divorce. Held, evidence supporting her charges, divorce would be denied. Domingeau v. Darby [La.] 38 So. 815. Under the Colorado statute a defendant may defeat the action by pleading and proving any act or conduct by plaintiff which would be ground for divorce, though the answer does not seek a divorce. Under 3 Mills' Ann. St. § 1566a, evidence of cruelty by plaintiff admissible, though defendant did not ask for a divorce. Cupples v. Cupples [Colo.] 80 P. 1039.

65. See 3 C. L. 1132.

66. Temporary allmony allowable in proceeding for annulment under Gen. Laws 1896,

that may be allowed, and the grantee is served with summons, such grantee cannot be heard on the question of divorce, but his defense is limited to the question of alimony and the validity of his conveyance.[67]

Pleading.[68]—The petition must show jurisdictional facts, such as residence of petitioner in the state for the required period.[69] A petition for divorce on the ground of constructive desertion must set out facts showing the necessity of petitioner's separation from defendant.[70] A petition alleging abusive language by defendant, reflecting on plaintiff's character, need not allege that the language was used in the presence of a third party.[71] Where a cross complaint is stricken and defendant, instead of answering, brings an independent action for divorce, the plea of another action pending is not available in the latter suit.[72] The general rules regarding the filing of a supplemental complaint[73] or cross bill,[74] and the raising of objections to pleadings,[75] control. The New York statute authorizing a defense by way of counterclaim in actions for divorce or separation does not authorize a counterclaim on facts warranting annulment of the marriage.[76] But if the facts alleged are sufficient to constitute a counterclaim, the allegations will not be stricken, though the pleading is not denominated a counterclaim.[77]

Framing and trial of issues.—Even though a defendant has failed to move to have a complaint made more definite or certain regarding charges made, he is entitled to have the issues framed with such a degree of definiteness as will avoid surprise on trial and enable him to prepare his defense.[78] Whether adultery charged was committed with the consent, connivance, or procurement of the plaintiff, are is-

c. 195, § 1. Leckney v. Leckney, 26 R. I. 441, 59 A. 311.

67. Bennett v. Bennett [Okl.] 81 P. 632.

68. See 3 C. L. 1132. Petition held to state grounds for divorce and evidence held sufficient to support charges. Conner v. Pozo [La.] 38 So. 454.

69. As that petitioner has lived in state for two years next preceding desertion charged. Blauvelt v. Blauvelt [N. J. Eq.] 59 A. 567. Where petition did not state that petitioner had resided in state for two years, and defendant was brought in by publication, and notice of an amended petition was not given defendant, no process being taken out, but there was a reference and a report by the master, held a decree could not be advised. Id. In such case two courses are open: (1) If petitioner can get personal service on defendant, he may take an order to show cause at a future date why a decree should not be granted on the report. (2) He may issue new citation, and on its return unserved, take an order of publication. Id. Where a petition alleges that "both plaintiff and defendant are bona fide resident citizens of the city and county of El Paso and state of Texas, where they have resided for more than one year next preceding the filing of this petition," it was not objectionable because not alleging that she was a "bona fide inhabitant" of the state. Longwell v. Longwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 600, 88 S. W. 416.

70. Petition held insufficient. Foote v. Foote [N. J. Eq.] 61 A. 90.

71. Schweikert v. Schweikert, 108 Mo. App. 477, 83 S. W. 1095.

72. Cupples v. Cupples [Colo.] 80 P. 1039.

73. In action for separation under Code Civ. Proc., § 1762, on ground of cruel and inhuman treatment rendering it unsafe and improper for plaintiff to live with defendant, plaintiff is entitled to file a supplemental complaint setting up additional acts of cruelty since the original complaint was filed. Construing § 544 and § 1764. Smith v. Smith, 99 App. Div. 283, 90 N. Y. S. 927.

74. Motion for leave to file crossbill setting up adultery and asking for divorce denied in action for permanent separation when made six months after issue joined, and after complainant had sworn a witness, no excuse for such delay being shown. Costell v. Costell [N. J. Eq.] 60 A. 49.

75. Where bill contained statement of acts constituting habitual ill treatment and alleged that defendant by inhuman treatment caused plaintiff to leave him, being thus guilty of desertion, and defendant did not demur, he could not, after answering, object to bill as vague and uncertain and insufficient. Pierce v. Pierce [Miss.] 38 So. 46.

76. Code Civ. Proc. § 1770, construed. Durham v. Durham, 99 App. Div. 450, 34 Civ. Proc. R. 141, 91 N. Y. S. 295.

77. Allegations of cruel and inhuman treatment and failure to support, accompanied by a denial of the allegations of the complaint, constitute a counterclaim within Code Civ. Proc. § 1770, and will not be stricken from the answer as irrelevant, even though not expressly defined in the pleading as a counterclaim. Mason v. Mason, 94 N. Y. S. 868.

78. Order framing issues as to charges of adultery held not sufficiently definite as to time or place. Bush v. Bush, 93 N. Y. S. 159.

sues to be tried by the court, if necessary, after the rendition of a verdict on the issue of adultery.[79]

Evidence and proof.[80]—Full proof of a sufficient cause for divorce is required,[81] and a careful examination of all the evidence not only by trial but also by appellate courts.[82] A divorce will not be granted on the uncorroborated evidence of the party seeking it.[83] A divorce should not be granted upon a confession of misconduct unless all suspicion of collusion has been removed.[84] A husband in a suit by him for divorce may testify to admissions by the wife as to her condition at the time of the marriage and her concealment of it,[85] but such testimony should be cautiously received and carefully weighed.[86] While the testimony of a co-respondent is to be regarded with caution it cannot be entirely disregarded merely because he is an accomplice.[87] Misconduct not alleged cannot be proved.[88] A default must be proved by competent evidence.[89]

Reference.[90]—The opinion of a master in a divorce proceeding is merely advisory.[91]

Interlocutory and final decrees.—The right to a divorce is subject to the legislative will and exists only by legislative grant.[92] Hence, the legislature may prescribe the terms and conditions on which a divorce may be granted and has power to regulate procedure within reasonable limits.[93] Thus, in California, a final decree can be entered only upon expiration of a year from entry of an interlocutory decree, and after an appeal therefrom, if taken, has been finally disposed of.[94] Under this statute, a decree purporting to grant an immediate divorce when no interlocutory decree has been entered is void.[95] But, though void in so far as it grants an immediate divorce, such a decree may constitute a valid interlocutory judgment declaring a party entitled to a divorce,[96] and an order vacating such judgment as an entirety is ineffective to destroy it as such preliminary decree.[97] The year which must elapse

79. Bush v. Bush, 93 N. Y. S. 189.

80. See 3 C. L. 1133.

81. Rishel v. Rishel, 24 Pa. Super. Ct. 303.

82. Part of evidence taken by master was lost, but court decreed divorce on what evidence was left in the report made. Held improper, and decree reversed. Rishel v. Rishel, 24 Pa. Super. Ct. 303.

83. Corder v. Corder [N. J. Eq.] 59 A. 309. A divorce will not be granted upon the uncorroborated testimony of either of the parties. By express provisions of Civ. Code, § 130. Berry v. Berry, 145 Cal. 784, 79 P. 531. Evidence insufficient to support charge of failure to support wife to best of husband's ability. Id. No divorce where complainant's evidence was uncorroborated either as to his residence in the state sufficient to give jurisdiction, or as to the wilful desertion charged. Sabin v. Sabin [N. J. Eq.] 59 A. 627. Where complainant was not corroborated as to desertion charged except as to fact that parties were living apart, no divorce was warranted. Hunt v. Hunt [N. J. Eq.] 59 A. 642. Petitioner's testimony as to husband's habitual drunkenness as a cause for her separation held not sufficiently corroborated. Foote v. Foote [N. J. Eq.] 61 A. 90.

84. Adultery. Diederichs v. Diederichs, 44 Misc. 591, 90 N. Y. S. 131.

85, 86. May v. May [Kan.] 80 P. 567.

87. Delaney v. Delaney [N. J. Eq.] 61 A. 266.

88. Evidence that defendant had embezzled funds inadmissible where ground for divorce alleged was abandonment. Wheeler v. Wheeler [Md.] 61 A. 216.

89. Default of defendant held not sufficiently proven by entry in attorney's register. Diederichs v. Diederichs, 44 Misc. 591, 90 N. Y. S. 131.

90. See 3 C. L. 1134.

91. Under P. L. 1899, 8, providing for a reference in divorce. Edgar v. Edgar, 23 Pa. Super. Ct. 220.

92, 93. Grannis v. Superior Court of San Francisco, 146 Cal. 245, 79 P. 891.

94. St. 1903, pp. 75, 76, 77, is constitutional. Grannis v. Superior Court of San Francisco, 146 Cal. 245, 79 P. 891. There is a right of appeal for six months after entry of interlocutory judgment, by Civ. Code, § 132. Smith v. Superior Court of San Francisco [Cal.] 82 P. 79.

95. Construing Civ. Code, § 61, as amended by Laws 1897, c. 36, and by Laws 1903, cc. 67, 158. Grannis v. Superior Court of San Francisco, 146 Cal. 245, 79 P. 891.

96. Claudius v. Melvin, 146 Cal. 257, 79 P. 897. The superior court has power to vacate a decree so entered in so far as it grants an immediate and absolute divorce, the decision that a party is entitled to divorce being left unaffected by such order. Grannis v. Superior Court of San Francisco, 146 Cal. 245, 79 P. 891.

97, 98. Claudius v. Melvin, 146 Cal. 257, 79 P. 897.

before a final decree can be entered is a year from actual entry of the interlocutory judgment, not from a theoretical nunc pro tunc order.[98] If an interlocutory decree has been in fact entered,[99] and the required year has elapsed, mandamus lies to compel entry of final judgment.[1]

In New York, final judgment can be had only upon expiration of three months after the filing of the interlocutory decree that a party is entitled to a divorce. The entry of the interlocutory decree does not dissolve the marriage.[2] When the interlocutory decree so directs,[3] the clerk may enter final judgment as of course, upon expiration of the three months, unless the judge meantime directs otherwise.[4] Where application is made for entry of final judgment, either by special direction of the judge, or by the clerk under directions contained in the interlocutory judgment, proof of necessary facts must be made to the judge.[5]

Under the Louisiana statute authorizing application for a divorce at the expiration of one year from the time a judgment of separation from bed and board has become final, the year begins to run from the finality of the judgment of the appellate court, in case there is an appeal.[6]

Decree, vacation, and modification.[7]—The decree must be supported by sufficient findings of facts.[8] A final decree dismissing a bill for divorce may include an allowance of attorney's fees to the successful defendant.[9] A prayer for general relief does not warrant a default decree giving relief inconsistent with the theory and allegations of the complaint.[10] Under a statute authorizing a divorce from bed and board in cases where absolute divorce is prayed for, if the facts authorize such decree, the court will not grant such decree of its own motion.[11] A refusal to revoke a final decree of divorce being discretionary, will be reversed by the appellate court only for an abuse of discretion.[12] A default judgment for divorce is protected against collateral attack by the same conclusive presumptions of validity and the same favorable intendments which surround any other judgments.[13] A mere informality does not render a decree subject to collateral attack.[14] A judgment obtained by fraud[15] will

99. Where court ordered entry of interlocutory decree but it was not in fact entered, mandamus would not issue to compel entry of final judgment. Civ. Code, § 131. Smith v. Superior Court of San Francisco [Cal.] 82 P. 79.

1. Claudius v. Melvin, 146 Cal. 257, 79 P. 897.

2. Code Civ. Proc. § 1774. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979. Hence a marriage of a party to the divorce suit in a foreign state after the entry of the interlocutory judgment and before entry of final decree is void. Pettit v. Pettit, 93 N. Y. S. 1001.

3. When interlocutory judgment contains directions provided for by court rule No. 76, this is sufficient authority for final entry as of course by the clerk. Phillips v. Phillips, 45 Misc. 232, 92 N. Y. S. 78.

4. Code Civ. Proc. § 1774. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979. Code Civ. Proc. § 1774, providing for such entry of final judgment, is not inconsistent with Court Rule No. 76 providing that no judgment shall be entered except on special direction of the judge. Phillips v. Phillips, 45 Misc. 232, 92 N. Y. S. 78.

5. As that decision was filed and interlocutory judgment entered three months previously. Phillips v. Phillips, 45 Misc. 232, 92 N. Y. S. 78.

6. Construing Civ. Code, art. 138, and Act No. 25 of 1898. Hill v. Hill [La.] 38 So. 77.

7. See 3 C. L. 1134.

8. Specific finding that defendant's cruelty made life burdensome to plaintiff unnecessary when facts found irresistibly led to that conclusion. Mitchell v. Mitchell [Wash.] 81 P. 913.

9. Jones v. Jones, 111 Ill. App. 396.

10. Where prayer was for divorce and that custody of children be given defendant, and for general relief, it was improper to decree custody of children to plaintiff and order defendant to make payments to plaintiff for support of herself and children. Mitchell v. Mitchell [Nev.] 79 P. 50.

11. Wheeler v. Wheeler [Md.] 61 A. 216

12. Given v. Given, 25 Pa. Super. Ct. 467.

13. Sodini v. Sodini [Minn.] 102 N. W. 861.

14. Divorce decree having every appearance of a final judgment is not subject to collateral attack because it was entered before costs were paid in violation of a rule of court. Baker v. Baker, 26 Pa. Super. Ct. 553.

15. Where husband induced wife to believe he had dropped a divorce suit and she relied on his assurance and put in no defense he was guilty of fraud in obtaining the judgment within the meaning of Sand. & H. Dig. § 4197. Womack v. Womack [Ark.] 83 S. W. 937.

be set aside provided a good defense to the action existed,[16] and the suit to set the decree aside is not barred by laches.[17] A divorce decree will not be set aside when the party in whose favor it was granted is dead, the rights of minors have intervened, and the complainant seeking review has been guilty of laches.[18]

New trial.[19]—A somewhat liberal rule prevails in regard to granting new trials in divorce actions, since public policy demands that there should be a full hearing in such cases.[20]

Review.[21]—Condonation of the offense on which the decree of divorce was based will not justify granting of leave to file a bill of review.[22] The disposition of a divorce case being a matter of public concern, an appellate court will examine considerations supporting a judgment of dismissal even though no argument is submitted for defendant.[23] Acceptance of money under a decree for maintenance does not prevent a defendant in a subsequent suit for divorce from attacking the decree on motion for a new trial.[24] In Kentucky no appeal lies to the court of appeals from a judgment granting a divorce.[25]

Costs and attorney's fees.[26]—In Kentucky, the husband is liable for costs and a reasonable attorney's fee though he secures a divorce for fault of his wife, when it is not shown that she is able to pay.[27]

§ 5. *Custody and support of children.*[28]—In awarding custody of the children, their welfare is the prime and almost the only consideration,[29] and custody will be awarded to the party best suited by character and situation to properly care for and maintain them.[30] The judgment in a habeas corpus proceeding to determine the

16. Wife held to have had a good defense to suit by husband wherein he obtained judgment by fraud. Womack v. Womack [Ark.] 83 S. W. 937.

17. Husband knew of institution of suit and of decree but waited 2½ years until wife was dead and rights of others had intervened before assailing decree. Held suit barred by laches. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

18. Evans v. Woodsworth, 115 Ill. App. 202.

Note: For an exhaustive treatment of the right to contest the validity of a divorce decree after the death of one or both of the parties, see note appended to Lawrence v. Nelson [113 Iowa 277] in 57 L. R. A. 583.

19. See 3 C. L. 1134.

20. Sickness of one party held ground for new trial, sufficient diligence in trying to get a postponement being shown. Smith v. Smith, 145 Cal. 615, 79 P. 275.

21. See 3 C. L. 1136.

22. Condonation of adultery should have been pleaded and proved in original suit. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

23. Gould v. Gould [Conn.] 61 A. 604.

24. Smith v. Smith, 145 Cal. 615, 79 P. 275.

25. Steele v. Steele [Ky.] 84 S. W. 516. Action of circuit judge in granting divorce not revisable by court of appeals. Thompson v. Thompson [Ky.] 85 S. W. 730.

26. See 3 C. L. 1136.

27. Ky. St. § 900. Steele v. Steele [Ky.] 84 S. W. 516. Husband liable for wife's attorney's fees if she is unable to pay, even though she is at fault. Ky. St. 1903, § 900. McMakin v. McMakin [Ky.] 87 S. W. 1140.

28. See 3 C. L. 1137. See also, Alimony, 5 C. L. 101, for allowances for support of children; Parent and Child, 4 C. L. 873, for general rules relating to custody; and Habeas Corpus, 3 C. L. 1576, for general procedure.

29. Brown v. Brown [Kan.] 81 P. 199.

30. Dawson v. Dawson [W. Va.] 50 S. E. 613. Immoral life of mother being shown, custody of children was properly awarded to father. Brown v. Brown [Kan.] 81 P. 199. Upon application for an order changing the custody of children, evidence of the mother's reputation for chastity is admissible. Id. Older children awarded to father and younger to mother, where latter was guilty of adultery and former of abuse and neglect responsible for wife's fault, no other disposition of children being possible. Richardson v. Richardson, 36 Wash. 272, 78 P. 920. Order awarding custody of infant children to mother proper where father had and was maintaining a paramour. Crabtree v. Crabtree [Ky.] 85 S. W. 211. Custody of 3 minor children was awarded to mother who obtained divorce on ground of drunkenness and cruelty. On application for modification of decree it appeared that father had reformed, and wished custody of children to place them in a convent. Mother was able to care for and educate them, at home of her parents. Held, custody unchanged, but father given right to visit, and custody of older boy one week a month. De Reitmatter v. De Reitmatter [Ark.] 87 S. W. 118. Husband's demand for separation was not supported by evidence, but he had had children two years, was able to care for them, and wife had not asked for custody of them. Held, children given husband with right in wife to visit them: Knoll v. Knoll [La.] 38 So. 523.

custody of a child is res judicata in a subsequent action for divorce and custody of children, as to all facts known and existing at the time of the hearing.[31]

Custody being awarded to one, the right of visitation is usually given the other, or the decree may be subsequently modified to make such provision,[32] but residence at a particular place to facilitate such visitation will not be required.[33] Complaint that a decree does not make such provision cannot be raised on application for modification of the decree as to the allowance of alimony.[34]

Custody of the children being awarded the wife, provision for their support is usually made by setting aside a portion of the father's property for the purpose,[35] or by requiring him to make periodical payments for that purpose.[36] In some states if the decree does not contain a provision for the maintenance of the children, such a provision will not be added subsequently.[37] Failure of a decree to provide for maintenance of children, custody of whom was awarded the wife, does not relieve the husband from his liability therefor, and such liability may be enforced against his estate after his death.[38] But a decree will not be modified so as to provide for reimbursement by the father where the mother voluntarily took and maintained the children for a number of years.[39] In a suit for divorce, alimony, and custody of minor children, custody of the children and alimony for their support may be awarded, even though a divorce has been denied.[40]

§ 6. *Adjustment of property rights.*[41]—A court which has jurisdiction of a proceeding for divorce has power to settle the property rights of the parties.[42] The

31. No new facts appearing, habeas corpus decree giving child to wife held res judicata in action by husband for divorce. Dawson v. Dawson [W. Va.] 50 S. E. 613.

32. Decree awarding custody of children to mother not reversible because not providing for visitation by the father, since it was subject to modification in that regard on application. Baker v. Baker [Ky.] 85 S. W. 729.

33. Where judgment gave wife custody of child but provided for visitation by the defendant husband, and the parties later removed to a distant state, leave to the husband to apply for a modification of the judgment so as to provide that the child should reside at a place where he could visit and care for her, was properly denied, under Code Civ. Proc. § 1771. Newman v. Newman, 93 N. Y. S. 847.

34. Griswold v. Griswold, 111 Ill. App. 269.

35. Custody of two children aged 11 and 8 properly awarded the mother, in suit for divorce by father, and $6,500 a proper sum to be awarded for their support, the father's property being worth $7,500; such appropriation made a lien on his property. Taylor v. Taylor [Or.] 81 P. 367.

Contra: While a divorce does not cancel a husband's obligations as a parent, there is no legal right in the child or divorced wife to compel him to set aside a portion of his estate for the child's future needs. Foote v. De Poy, 126 Iowa, 366, 102 N. W. 112.

36. Code, § 3180 authorizes a court which has granted a wife a divorce and custody of children to require the father to pay a further weekly sum in aid of the support of the children, though alimony has already been allowed. Ostheimer v. Ostheimer, 125 Iowa, 523, 101 N. W. 275. Where a divorce and custody of children was granted a wife, the fact that the husband after remarrying offered to take the children and give them a home is no defense to an application to compel him to contribute to the support of the children. Id.

37. Where final decree of divorce contains no provision for maintenance of children awarded to wife and no reservation of power to modify the decree, the court has no power to insert such provision subsequently, under Code Civ. Proc. § 1771. Salomon v. Salomon, 101 App. Div. 588, 34 Civ. Proc. R. 113, 92 N. Y. S. 184. Application for modification of divorce decree by providing for maintenance of children awarded wife held properly denied in view of wife's situation. Id.

38. Construing Rev. St. 1899, §§ 2926, 2832. Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274.

39. Where a divorce decree made no provision for custody and care of children but complainant voluntarily took charge of them, she could not ten years later have the decree modified and obtain an order requiring defendant to reimburse her for the expense incurred. Demonet v. Burkart, 23 App. D. C. 308.

40. [Conflict pointed out.] Horton v. Horton [Ark.] 86 S. W. 824.

41. See 3 C. L. 1138.

42. Court has jurisdiction to settle property rights of parties in divorce proceeding. Andrews v. Scott, 113 Ill. App. 581. Under Ill. R. S. c. 40, § 17, providing that, when a divorce is granted, if it appears that one spouse holds property equitably belonging to the other, the court may compel a conveyance thereof, upon equitable terms, the chancellor is invested with full power to settle and adjust the property rights of the parties. Heyman v. Heyman, 110 Ill. App. 87.

disposition and division of the property rests largely in the discretion of the trial judge,[43] guided by the respective merits of the parties and the condition in which they will be left by the divorce,[44] and the facts relating to the acquisition of the property.[45] An allowance of one-third to the wife is ordinarily considered liberal, in the absence of special circumstances.[46] It is proper for a divorce decree to make such provision with reference to the use of the homestead as will protect the rights of the mother and minor children.[47] Where a community homestead has been set aside to a divorced wife, who has been given custody of minor children, it is not subject to sale on execution against the divorced husband.[48]

A division of community property out of court will be set aside and a redivision made if the division was obtained by fraud and duress.[49]

§ 7. *Effect of divorce.*[50]—A divorce severs an estate held by the entirety and makes the former husband and wife tenants in common.[51] In Massachusetts the person against whom a divorce is granted may not marry again within two years after entry of the final decree, and a marriage by such person within that time is invalid.[52] The New York statute forbidding the guilty party in a divorce action from marrying another during the life of the innocent party cannot affect the validity of a marriage in another state.[53] An Indian whose wife has obtained a divorce from him cannot thereafter recover from her in equity land originally allotted to him by virtue of his status as a married man, such land having been subsequently allotted to her as a single woman.[54]

§ 8. *Foreign divorces.*[55]—A foreign judgment for divorce may be collaterally

43. 2 Ball. Ann. Codes & St. § 5723. Mitchell v. Mitchell [Wash.] 81 P. 913. Property, title to which has been lost by nonpayment of taxes, cannot be considered in making a division between the spouses. Edlemann v. Edlemann [Wis.] 104 N. W. 56.

44. Where wife was without fault and in poor health, and was given custody of children, and husband was strong and able-bodied, it was proper to award all the real property to the wife. Mitchell v. Mitchell [Wash.] 81 P. 913.

45. Mother was granted custody and care of 4 minor children. She had assisted in accumulating property. Held, life estate in half the realty and half the personalty absolutely, not excessive allowance. Ky. St. 1903, § 2123. Crabtree v. Crabtree [Ky.] 83 S. W. 211. Where husband abandoned wife, leaving her all his property, worth $10,000, but subject to indebtedness of $7,500, and wife during abandonment saved property from foreclosure and reduced debts to $4,200, held proper to award all children to wife and give her all the property. Clemans v. Western [Wash.] 81 P. 824.

46. Allowance to wife held excessive in view of condition of parties. Edlemann v. Edlemann [Wis.] 104 N. W. 56.

47, 48. Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36.

49. Division properly set aside where wife was threatened and deceived. Richardson v. Richardson, 36 Wash. 272, 78 P. 920.

50. See 3 C. L. 1139.

51. Hayes v. Horton [Or.] 81 P. 386.

52. Rev. Laws, c. 152, § 21. Tozier v. Haverhill & A. St. R. Co., 187 Mass. 179, 72 N. E. 953.

53. Construing Code Civ. Proc § 1761. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979.

54. Plaintiff claimed land on ground of fraud of wife in claiming she was single, though in fact his wife. Morrisett v. United States, 132 F. 891.

55. See 3 C. L. 1139.

NOTE. Extraterritorial effect of divorce decrees: Where the courts of a state are not resorted to in good faith by a complainant, as where he or she has acquired a temporary domicile therein merely for the purpose of procuring a divorce, any judgment rendered by them against a nonresident defendant not served with process within the state, and who has not appeared and submitted to the jurisdiction of the court, is not entitled to respect in other states. Bell v. Bell, 181 U. S. 175, 45 Law. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 181, 45 Law. Ed. 807; Sewall v. Sewall, 122 Mass. 162, 23 Am. Rep. 299, Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Watkins v. Watkins, 125 Ind. 163, 21 Am. St. Rep. 217.

On the other hand, a bona fide resident of a state may there prosecute a suit for divorce against a nonresident spouse, and obtain a decree which will dissolve the marriage tie, though the defendant does not appear in the proceeding, and the service of process is constructive, or is made outside of the state. Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70; Smith v. Smith, 43 La. Ann. 1140; Franklin v. Franklin, 154 Mass. 515, 26 Am. St. Rep. 266, 13 L. R. A. 843; Loker v. Gerald, 157 Mass. 42, 34 Am. St. Rep. 252, 16 L. R. A. 497; Jones v. Jones, 67 Miss. 195, 19 Am. St. Rep. 299. This view does not meet with the concurrence of all the courts. Some of them deny the power of the courts of any state or country to call before them any married person not a resident thereof for the purpose of answering a bill for di-

impeached for want of jurisdiction appearing upon the face of the record.[56] But such a judgment imports absolute verity, and want of jurisdiction must be made to appear affirmatively to justify a court in declaring it invalid.[57] Fraud having been practiced on the foreign court, its decree will be set aside,[58] if the suit for that purpose is not barred by laches.[59] It is the rule in New York that if one spouse abandons the matrimonial domicile in that state and becomes domiciled in another and obtains a decree of divorce in an action in which defendant was not served with process in that state and did not personally appear, such decree has no extraterritorial force.[60] One who seeks to take advantage of this rule in an attack on a foreign decree must show that he was a bona fide resident of New York at the time the foreign court took jurisdiction.[61] But where the spouse against whom the suit is brought had previously abandoned the matrimonial domicile, and the abandoned spouse acquires a bona fide residence and legal domicile in another state, a decree obtained in the latter state is entitled to recognition in New York,[62] since courts of the state of the matrimonial domicile have jurisdiction of the status, and may acquire jurisdiction of the defendant by constructive service.[63]

vorce, though brought by a resident of the state in which it is pending, and declare that a judgment rendered therein, unless based upon a voluntary appearance of the defendant is void as against him (People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Jones v. Jones, 108 N. Y. 415, 2 Am. St. Rep. 447; Williams v. Williams, 130 N. Y. 193, 27 Am. St. Rep. 517, 14 L. R. A 220; Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471; Green v. Green, L. R. Prob. Div. 89); especially if the cause of divorce is not recognized by the laws of the state in which he lives or in which the marriage was contracted (McCreery v. Davis, 44 S. C. 195, 51 Am. St. Rep. 794, 28 L. R. A. 655). For a full discussion of the position of the New York courts on the question, see Rigney v. Rigney, 127 N. Y. 408, 24 Am. St. Rep. 462; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274.

But the question has been settled by a decision of the Federal supreme court (Atherton v. Atherton, 181 U. S. 155, 45 Law. Ed. 796. See also 83 Am. St. Rep. 616) in which it was in effect held that where jurisdiction rests solely on the domicile of the complainant, and the defendant, being a nonresident, is brought into court by publication and the service of notice outside the jurisdiction, the decree rendered is conclusive against such nonresident in the courts of other states, including that of which he or she was a resident when the suit was instituted and the publication made and notice served. See, also, Felt v. Felt, 59 N. J. Eq. 606, 45 A. 105, 49 A. 1071, 83 Am. St. Rep. 612.

For further discussion see notes in 94 Am. St. Rep. 553, and 103 Am. St. Rep. 328, and the recent cases of Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366; Winston v. Winston, 189 U. S. 507, 47 Law. Ed. 922, and German Sav. & Loan Soc. v. Dormitzer, 192 U. S. 125, 48 Law. Ed. 373.

56. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960.

57. Under Wisconsin statutes, where a proper showing is made that a defendant cannot be found, and the court issues an order for service by publication, a judgment pursuant to such service cannot be collaterally attacked by showing that defendant was in fact in the state. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960.

58. After an unsuccessful attempt to secure a divorce in Illinois, a husband went to Nebraska, and though he knew his wife's address in Chicago, concealed it, representing that her residence was unknown. Held, fraud was practiced on Nebraska court, and Illinois court could set Nebraska decree of divorce aside. Field v. Field, 215 Ill. 496, 74 N. E. 443.

59. In 1875 an unsuccessful attempt was made to obtain a divorce in Illinois. In 1878, a divorce was secretly and fraudulently obtained in Nebraska, but wife had no notice of it until 1894, when husband died. Held, attack on decree for purpose of getting widow's allowance was not barred by laches. Field v. Field, 215 Ill. 496, 74 N. E. 443.

60. Is a nullity in New York. North v. North, 93 N. Y. S. 512. See, also, discussion of this rule in Percival v. Percival, 94 N. Y. S. 909.

61. Plaintiff held not to have sustained burden on him in attacking a New Jersey decree in action by him for divorce in New York. Percival v. Percival, 94 N. Y. S. 909.

62. Wife abandoned husband in New York, and husband went to California to live and there obtained a divorce after service as required by law. Held, such decree is good defense to action for support in New York, after husband had returned there to live. North v. North, 93 N. Y. S. 512.

63. Legal domicile of husband was in Vermont. Wife left and took up residence in New York, not intending to return. Held, matrimonial domicile was in Vermont and decree of Vermont court after service on wife by publication was entitled to recognition by New York courts. Hammond v. Hammond, 103 App. Div. 437, 93 N. Y. S. 1.

DOCKETS, CALENDARS AND TRIAL LISTS.[64]

Right to go on calendar.[65]—A cause cannot be placed on the calendar until issue is joined,[66] and this rule cannot be evaded by stipulation between the parties.[67] An unauthorized demurrer does not prevent the placing of the cause on the trial calendar.[68] The right may be lost by laches.[69]

Note of issue and notice of trial.[70]—Plaintiff appealing from an order overruling demurrers to an answer without a stay of proceedings, the defendant can file a note of issue and serve notice of trial pending the appeal;[71] but the issue and date being changed by the due service of replies pursuant to leave of court, the right of the defendant to retain the case on the calendar, or to move for trial pursuant to his original notice, is terminated,[72] and the issues can only be brought to trial upon the service of a new notice and the filing of a new note of issue.[73]

Placing cause on calendar.[74]—A reasonable time should be allowed to prepare for trial, and the cause placed upon the calendar for the following term of court.[75] Distance of the subject-matter of the trial from the place of trial, when urged as a reason for granting time to prepare for trial, is an element to be considered but is never alone conclusive.[76]

Posting of trial list.—The trial court may suspend a rule requiring the posting of the trial list within a designated time if such suspension results in no material injury to the party complaining.[77]

Passing or advancing cause.[78]—The advancement of causes is discretionary with the court.[79] A statute providing that when a cause is advanced the court must des-

64. Calendars and dockets of appellate courts, see Appeal and Review, 5 C. L. 121. Rules for determining when issues are joined, also time to plead, see Pleading, 4 C. L. 980. Terms of court, see Courts, 5 C. L. 97. See, also, Removal of Causes, 4 C. L. 1277, and Trial, 4 C. L. 1708.

65. See 3 C. L 1140.

66. Where plaintiff served a notice of trial and filed a note of issue 17 days before the original answer was served, held, case was improperly on calendar. Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. S. 216.

67. A stipulation entered into as a condition of an extension of time to answer that the issue should be as of the date the summons and complaint were served, held not to authorize placing the cause on the trial calendar before it was at issue. Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. S. 216.

68. Demurrer in an suit to foreclose held not authorized by Code Civ. Proc. § 493, and hence it raised no issue of law and did not prevent the placing of the case on the trial calendar. Armstrong v. Loveland, 99 App. Div. 28, 90 N. Y. S. 711.

69. Failure to make application to have cause placed on docket for trial by jury, for 2½ years after the filing of issues, is such laches as to defeat the application. Chenault v. Eastern Kentucky Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552.

70. See 3 C. L. 1141, n. 53, 56.

71. Ward v. Smith, 45 Misc. 169, 91 N. Y. S. 905, this point afd. 92 N. Y. S. 1107.

72, 73. Ward v. Smith, 92 N. Y. S. 1107, rvg. 45 Misc. 169, 91 N. Y. S. 905.

74. See 3 C. L. 1140.

75. An application by one co-tenant against another for partition of land by sale may be tried at the term to which the application is made, if the party defendant has time, in the judgment of the court, to prepare and file his objections; otherwise it should be tried at the next term thereafter. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372. Where the proceedings at rules did not operate as a discontinuance of the action, the clerk properly placed the case on the docket for the ensuing term of court. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

76. Chelan County v. Navarre [Wash.] 80 P. 845. Where, in condemnation proceedings, the land was 40 miles from the place of trial, held, that setting the cause for trial on the third day after the arguing of the motion to set the cause for trial and nine days after overruling demurrer to petition allowed sufficient time. Id.

77. Suspension of rule requiring trial lists to be posted six weeks before the trial term held proper, 37 days having elapsed between the framing of the issue and the trial. Stamey v. Barkley, 211 Pa. 313, 60 A. 991.

78. See 3 C. L. 1141.

79. Attachment issue. Dickinson v. Morgenstern, 111 Ill. App. 543.

ignate a day during that term, on which day the cause shall be heard, is unconstitutional.[80] In New York suits against a corporation being founded on a note or other evidence of debt for the absolute payment of money,[81] and suits against administrators,[82] are entitled to a preference. In said state, in the absence of special facts calling for the exercise of the court's judicial discretion, a preference should only be allowed over nonpreferred cases noticed for the same term.[83]

Transfer, correction or striking off.[84]—The transfer of a case from one department to another of a district court is controlled by the rules adopted by such departments,[85] and in the absence of a showing of prejudice, one cannot complain of irregularity in such transfer.[86] A suit being improperly brought in equity, it should not be dismissed but should be transferred to the law docket.[87] and vice versa.[88] Either party may make application to have the case transferred,[89] but neither making application, the court may try the case,[90] or, on its own motion, have it transferred.[91] Where the grounds of a motion to transfer are not established on the face of the pleadings, proof must be taken and presented to the court upon the question.[92] The right to have the transfer made is lost by laches,[93] or failure to make the motion.[94] One failing to except to the transfer but acquiescing therein cannot complain thereof for first time on appeal.[95] The remedy for refusal of a court to transfer a cause from the law to the equity docket is by appeal, and not by mandamus.[96] One seeking the transfer of a cause from the law to the equity docket cannot complain of the exercise of jurisdiction by the chancellor.[97] Defects in the form of a paper furnished for the guidance of the clerk furnish no ground for striking from the calender a cause correctly entered thereon.[98] A cause being retired from the docket, judgment cannot be entered upon it.[99]

80. Laws 1904, p. 311, c. 173, held unconstitutional. Riglander v. Star Co., 98 App. Div. 101, 34 Civ. Proc. R. 92, 90 N. Y. S. 772.

81. Code Civ. Proc. § 791, subd. 8, giving a preference to an action "against a corporation founded on a note or other evidence of debt for the absolute payment of money," applies to both domestic and foreign corporations. Martin's Bank v. Amazonas Co., 98 App. Div. 146, 90 N. Y. S. 734.

82. Where defendant's attorney had a copy of the pleadings, which copy was handed up to the court on the motion, held, there was unquestionable proof before the court that an administratrix was the sole party defendant, and plaintiff was entitled to the preference given by Code Civ. Proc. § 791, subd. 5. Jackson v. Jackson, 44 Misc. 44, 89 N. Y. S. 715. The statutory preference given in an action against an administratrix by Code Civ. Proc. § 791, subd. 5 will not be denied because the action is for an amount within the jurisdiction of the municipal court. Id. The rule of the trial term that such preference shall not be granted without some additional reason does not apply to the special term calendar. Id.

83. Martin's Bank v. Amazonas Co., 98 App. Div. 146, 90 N. Y. S. 734. This is under Code Civ. Proc. § 793, the amendment thereof, Laws 1904, p. 312, c. 173, being unconstitutional. Id. The preference of an action for libel should prevail only as to other causes noticed for the same term and not as to all causes then on the court calendar. Woerner v. Star Co., 94 N. Y. S. 1117.

84. See 3 C. L. 1142.

85, 86. Finlen v. Heinze [Mont.] 80 P. 918.

87. Cribbs v. Walker [Ark.] 85 S. W. 244. Civ. Code Proc. § 12. Tucker v. Russell, 26 Ky. L. R. 1086, 83 S. W. 555.

88. Manion v. Manion [Ky.] 85 S. W. 197.

89. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673.

90. Harmon v. Thompson [Ky.] 84 S. W. 569. In such a case, in an action for breach of a contract, the evidence showing conclusively that the defendant had abandoned the contract, held not an abuse of discretion for the trial court to decide the question. Id.

91. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673; Harmon v. Thompson [Ky.] 84 S. W. 569. Where a case has, under the rules of the district court, been placed upon the jury calendar by counsel, the court is not concluded by this designation, but may, before the beginning of the trial, order the same tried to the court, if its character requires that disposition. Shipley v. Bolduc, 93 Minn. 414, 101 N. W. 952.

92. Haggart v. Ranney [Ark.] 84 S. W. 703.

93. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

94. Cribbs v. Walker [Ark.] 85 S. W. 244; Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044.

95. Kessner v. Phillips [Mo.] 88 S. W. 66.

96. Horton v. Gill [Ind. T.] 82 S. W. 718.

97. Deidrich v. Simmons [Ark.] 87 S. W. 649.

98. Note of issue required by Rev. Code Civ. Proc. § 246 held such a paper. Moody v. Lambert [S. D.] 101 N. W. 717.

99. King v. Davis, 137 F. 222.

Short-cause calendars.[1]—A motion to place a cause upon the short-cause calendar being denied by one justice, it cannot be renewed before another without leave of court.[2] An objection to the affidavit or notice should be called to the attention of the court before the cause is reached for trial.[3] The affidavit and notice pursuant to which a case has been placed on the short-cause calendar are not parts of the common-law record, and to be subject to appellate review must be preserved by bill of exceptions.[4] In the absence of proof to the contrary, a court is presumed to have complied with its own rules respecting the calling of the short-cause calendar.[5]

Reinstatement and restoration.[6]—The redocketing of the case is largely discretionary with the court.[7] Before a case can be reinstated upon the docket by either party, notice should have been served upon the opposite party of the intention to have an order made to that effect.[8] A cause being dismissed for failure of plaintiff to appear, it cannot be redocketed in the absence of the express consent of defendant or of his voluntary appearance,[9] hence it may be redocketed where the attorneys of the parties have stipulated for an adjournment of the cause to a day subsequent to the date of dismissal.[10] Where the issue between the plaintiff in an attachment suit and the garnishee therein has been determined, an appeal taken from such determination and a reversal had thereof, the same should, upon a redocketing, be entitled according to the names of the respective parties to the attachment proceeding.[11]

DOCUMENTS IN EVIDENCE, see latest topical index.

DOMICILE.

Definition and elements.[12]—A man's residence is his home or habitation fixed at any place without a present intention of removing therefrom.[13] In law every person has a domicile.[14] It may be different from his place of abode;[15] thus temporary absence does not work a change of domicile if the intention to return is fixed, absolute and unconditional.[16] It is not disturbed by absence on naval service.[17] A

1. See 3 C. L. 1142.
2. Garner v. Hellman, 93 N. Y. S. 431.
3, 4. Kaestner v. Farmers' & Merchants' State Bank, 112 Ill. App. 158.
5. Union Book Co. v. Robinson, 105 Ill. App. 236.
6. See 3 C. L. 1142.
7. Where after filing of petition and issuance of summons, no further steps were taken for over three years and the case was ordered filed away, it is within the discretion of the court to redocket it. City of Dayton v. Hirth [Ky.] 87 S. W. 1136.
8. Asher v. Louisville & N. R. Co., 26 Ky. L. R. 364, 81 S. W. 678. Where, several years after reversal of a judgment in condemnation proceedings, a notice by the appellant was filed that it would on a certain day of the term move to file the mandate of the court of appeals and redocket the case, but no motion was in fact made to redocket, and the mandate was not filed, the case stood as if no notice had been made. Id.
9. Eichner v. Cohen, 91 N. Y. S. 357.
10. Johnson v. Monahan, 94 N. Y. S. 351.
11. State Bank of Chicago v. Thweatt, 111 Ill. App. 599.
12. See 3 C. L. 1142.
13. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

NOTE. Definition and distinctions: There is no doubt a marked distinction between the terms "residence" and "domicile;" residence having a more limited and local application than domicile. But although the distinction undoubtedly exists, the courts, in construing constitutional provisions and statutory enactments, have quite generally, in America, held the statutory residence to mean domicile and the words to be convertible terms. Jacobs, Domicile, § 75; People v. Connell, 28 Ill. App. 285. Under attachment statutes, however, residence is construed to mean actual rather than legal residence. Burt v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29, 50 L. R. A. 284; Long v. Ryan, 30 Grat. [Va.] 718; Stickney v. Chapman, 115 Ga. 759. Domicile has been defined "In a strictly legal sense" to be that place "where one has his true fixed permanent house and principal establishment, and to which whenever he is absent he has the intention of returning." Story, Conflict of Laws, § 41; approved in Dicey, Conflict of Laws, p. 729.—3 Mich. L. Rev. 483. See, also, 3 C. L. 1142, n. 86.

14, 15. Erwin v. Benton [Ky.] 87 S. W. 291.
16. Sparks v. Sparks [Tenn.] 88 S. W. 173. Where one left the state of his domicile to take a civil service position, held to work a change of domicile, though he intended to return if ever discharged. Id. Temporary absence does not destroy one's domicile. Erwin v. Benton [Ky.] 87 S. W. 291; Watkin-

domicile having once been acquired, it continues until a new one is acquired animo et facto.[18] To bring about a change of domicile, it is necessary that a bona fide[19] intention to so do exists,[20] coupled with an actual abandonment of the old, and location in the new, place of residence,[21] and it is essential that these two acts concur.[22] The motive or purpose of a change of domicile or residence is not material.[23] A man's domicile is determined by his actual residence coupled with his intention to remain, irrespective of the residence of his family;[24] that his residence is in a hotel does not affect the question.[25] So long as the marital relations exist,[26] the domicile of the husband is presumed to be the domicile of the wife;[27] but the wife may for certain

son v. Watkinson [N. J. Err. & App.] 60 A. 931.

17. Radford v. Radford, 26 Ky. L. R. 652, 82 S. W. 391.

18. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931; Erwin v. Benton [Ky.] 87 S. W. 291; Sparks v. Sparks [Tenn.] 88 S. W. 173.

19. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

20. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113; Barron v. Boston, 187 Mass. 168, 72 N. E. 951.

NOTE. Elements and change of domicile: A domicile once acquired is retained until it is changed. Desmare v. U. S., 93 U. S. 605, 23 Law. Ed. 959; Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311. Every independent person can acquire a domicile of choice by the combination of residence (factum), and intention of permanent or indefinite residence (animus manendi), but not otherwise. Dicey, Conflict of Laws, p. 104; Udny v. Udny, L. R. 1 H. L. Sc. 441; Bell v. Kennedy, L. R. 1 H. L. Sc. 307. And any restraint upon such person's choice would be an abridgment of his rights. Tanner v. King, 11 La. 175, 179. Domicile is largely a question of intention, but that alone will not control. Talmadge, Admr, v. Talmadge, 66 Ala. 199; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134; Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952. Declarations of intention are primarily valuable as expressions of intention, but they are not controlling and are subject to being overcome by other and more reliable indications of the true intention. They often serve to turn the scale when they are not inconsistent with acts; but it is otherwise if they are contradicted by the acts and general conduct of the person making them. Plant v. Harrison, 74 N. Y. Supp. 411; Long v. Ryan, 30 Grat. [Va.] 718; Jacobs, Domicile, § 455. The requisite fact is the transfer of the person himself from the old place of abode to the new; and this factum must be commensurate with the intention. Therefore it is that a new domicile cannot be acquired in itinere, except in cases of reverter. It is now the settled rule, both in this country and in England, that to constitute a new domicile both residence in the new locality and intention to remove there are indispensable. Guier v. O'Daniel, 1 Binn. [Pa.] 349, note; Price v. Price, 156 Pa. 617; Plant v. Harrison, 74 N. Y. Supp. 411; In re Moir's Estate, 207 Ill. 180, 99 Am. St. Rep. 205; Marks v. Germania Bank, 110 La. 659; Wicker v. Hume, 7 H. L. Cas. 124, 167; 9 Eng. Ruling Cases, p. 689.—3 Mich. L. R. 483.

21. Sheehan v. Scott, 145 Cal. 684, 79 P. 350; Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113; Barron v. Boston, 187 Mass. 168, 72 N. E. 951. Where one owned houses in two cities and lived in each part of the year, his declared intention to become a resident of one of the cities while actually residing there held to render such place his domicile. Id. Where defendant, an unmarried man, resided in one place and his mother and sister in another, held, he was domiciled in the former, though he intended that his domicile should be in the latter. Redfearn v. Hines [Ga.] 51 S. E. 407. Where defendant intended to take up his abode in another city, the mere placing of his wife in the home of her father in such city, and defendant's occasional visits to her is insufficient to establish his residence in such city. Sheehan v. Scott, 145 Cal. 684, 79 P. 350.

Note: Opposed to the rule laid down in the last case is Bangs v. Brewster, 111 Mass. 382, wherein it was held that a man, by sending his wife to Orleans with intent to make it his home, thereby changed his domicile; that the fact of removal and intent concurred, and that although he was not personally present he established his home there from the time of his wife's arrival. But the weight of authority is against this case. Cf. Casey's Case, 1 Ashm. [Pa.] 126; Penfield v. Chesapeake R. Co., 29 F. 494; Hart v. Horn, 4 Kan. 232.—3 Mich. L. R. 483.

22. Sparks v. Sparks [Tenn.] 88 S. W. 173. A change of domicile is consummated when one leaves the state where he has hitherto resided, avowing his intention not to return, and enters another state intending to permanently settle there. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. One whose domicile was undetermined, owing to a change of occupation, coming into a state to take out letters of administration, held to become a resident, he having declared his intention of so doing, engaged board and lodging and opened a bank account. Id.

23. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

24. McCord v. Rosene [Wash.] 80 P. 793.

25. Ball. Ann. Codes & St. § 1322 considered. McCord v. Rosene [Wash.] 80 P. 793.

26. Where there is a valid decree of separation from bed and board, the presumption that the wife's domicile follows that of her husband does not obtain. Percival v. Percival, 94 N. Y. S. 909.

27. Smith v. Smith [Ind. App.] 74 N. E. 1008. That wife resides elsewhere does not change rule. Thompson v. Stalmann, 139 F. 93.

purposes acquire a separate domicile.[28] As a general rule the domicile of a child follows that of the father,[29] but this rule does not hold when the parents are judicially separated, and the custody of the child has been awarded to the mother; but in such case the child's domicile is determined by the mother's so long as he remains with her and in her care.[30] Upon the death of the father the domicile of the child follows that of the mother,[31] unless she is dead, in which case the domicile of the father continues to be the child's domicile until legally changed,[32] and it has been held that the first part of the above rule is not altered by the appointment of a guardian.[33] The general rule is that an infant is incapable of changing its own domicile,[34] but in some states this rule has been changed by statute.[35]

Evidence and establishment.[36]—One may become estopped to deny that his domicile is in a certain place.[37]

DOWER.[38]

§ 1. *Nature of right; persons entitled; election.*[39]—The right to dower is only an inchoate one during the life of the husband,[40] but on his death it becomes consummate, and a vested right without any act on the part of the dowress.[41] The inchoate right is not an interest or title subject to conveyance,[42] nor a chose in action or estate in lands which can be reached by creditor's bill.[43] Nor is dower consummate but unassigned an estate in lands.[44] The right to take a statutory share in lieu of dower depends on an election,[45] as does the right, in Massachusetts, to take dower in lieu of the provision made for her by the will of her husband.[46] The right

28. So held where she acquired a domicile for the purpose of securing a divorce. Adams v. Adams [Md.] 61 A. 628; Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. Wife may acquire separate domicile after divorce. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Compare Divorce, ante, 5 C. L. 1026.

29, 30. See Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

31. Garth v. City Sav. Bank [Ky.] 86 S. W. 520.

32. Hayslip v. Gillis [Ga.] 51 S. E. 325.

33. This is so though the custody of the ward's person as well as his estate is awarded to his guardian. Garth v. City Sav. Bank [Ky.] 86 S. W. 520.

34. Hayslip v. Gillis [Ga.] 51 S. E. 325.

35. Civ. Code 1895, § 1827 so changes the rule. Evidence held insufficient to show that infant had exercised the privilege. Hayslip v. Gillis [Ga.] 51 S. E. 325.

36. See 3 C. L. 1143.

37. Alleged bankrupt denying under oath that his residence was in the state where the petition was filed and alleging his domicile to be in another state, his administrator is estopped to deny in a subsequent proceeding in the latter state that decedent was not domiciled there. Long v. Lockman, 135 F. 197.

38. See general law discussed. Tiffany Real Property, p. 420.

39. See 3 C. L. 1144.

40. See Cyc. Law. Dict. "Dower" defining the three stages; inchoate, consummate, and assigned.

41. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

42. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673.

43. Sherman v. Hayward, 98 App. Div. 254, 90 N. Y. S. 481.

44. See 3 C. L. 1144, n. 7. So as to entitle a dowress to maintain partition under Rev. St. 1898, § 3101. Ullrich v. Ullrich, 123 Wis. 176, 101 N. W. 376. Owner of unassigned dower cannot bind the property by her signature for a street improvement. Herman v. Columbus, 3 Ohio N. P. (N. S.) 216.

Note: An unassigned right of dower is a chose in action assignable in equity and may be reached by a creditor's suit. McMahon v. Gray, 150 Mass. 289; Petefish v. Buck, 56 Ill. App. 149; Stewart v. McMartin, 5 Barb. [N. Y.] 438; Tompkins v. Fonda, 4 Paige [N. Y.] 448; Thompson v. Marsh, 61 Ill. App. 269; Boltz v. Stoltz, 41 Ohio St. 540. **But see** Harper v. Clayton, 84 Md. 346, 35 A. 1083; Maxon v. Gray, 14 R. I. 641.—See note to Hall v. Henderson [Ala.] 63 L. R. A. 697.

45. In Georgia the right of a widow to take a child's share in lieu of dower depends upon an election which must be made within one year from the date of administration on her husband's estate. Le Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

46. Under Pub. St. 1882, c. 127, § 18, a widow for whom no provision is made by the will of her husband must file her claim for dower within six months, or it is barred (Shelton v. Sears [Mass.] 73 N. E. 666), and

to dower may be accelerated by contract between husband and wife[47] or by a judicial sale of his lands.[48] A plural wife acquires no dower rights.[49] The right of dower in Indians in allotted lands is governed by the Federal statutes.[50] Under the National Bankruptcy Law the right of a widow of a deceased bankrupt to dower is dependent entirely upon local law.[51]

§ 2. *In what dower may be had.*[52]—As a general rule dower may be had in all lands of which the husband was seised of an estate of inheritance during coverture in which the dowress has not relinquished her right,[53] but in some states the husband must have had seisin thereof at the date of his death.[54] The seisin in the husband must have been actual.[55] Hence, dower cannot be had upon dower.[56] She is entitled to dower in an equitable estate where the husband is entitled to immediate seisin,[57] but not in property held by him in trust,[58] nor in property taken from him under foreclosure of a purchase-money mortgage,[59] except as to the residue after the mortgage is satisfied,[60] nor as against a mortgagee in a mortgage executed by the husband prior to marriage.[61] Statutes providing for dower in equitable estates have

ignorance of the law will not avail her if she so fails to file her claim where no fraud, accident, or mistake appears (Id.). Pub. St. 1882, c. 24, § 15, does not entitle a widow deprived of the provisions made for her by the will of her husband in lieu of dower to be endowed anew where no provision is made. Id.

47. A contract for the resumption of marriage relations providing that if the husband shall desert or fail to support the wife she shall immediately become entitled to dower is not contrary to public policy. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444.

48. Where land belonging to several is sold at judicial sale, the wife of a married co-owner should be made a party and the value of her inchoate right determined and paid to her out of her husband's share of the proceeds. Sale under Civ. Code Proc. § 490. Wise v. Wolfe [Ky.] 85 S. W. 1191.

49. Raleigh v. Wells [Utah] 81 P. 908.

50. The Federal circuit court has jurisdiction of an action involving Indian lands where they are withheld under a claim of dower. Patawa v. United States, 132 F. 893.

51. In re McKenzie, 132 F. 986.

52. See 3 C. L. 1144.

53. She is entitled to dower in lands conveyed by her husband by deed in which she did not join. Harris v. Langford, 26 Ky. L. R. 1096, 83 S. W. 566; Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. A purchaser must protect himself against the dower interest of the vendor's wife, in his contract. Rankin v. Rankin, 111 Ill. App. 403. Under Rev. St. 1899, § 2939, giving the widow one-half the lands of her husband if he die without descendants entitles her to only common-law dower in lands which he has disposed of. Coberly v. Coberly [Mo.] 87 S. W. 957. A dower right cannot be affected by a contract by the husband to give a son the home farm in consideration of services, where the wife was not a party to such contract. Eastwood v. Crane, 125 Iowa, 707, 101 N. W. 481. A widow who does not elect to take under the will is entitled to dower in all the lands of which her husband died seised, and where there is a direction that certain lands be sold and the proceeds distributed to certain persons, such persons do not acquire title by electing to take the land, and the widow's right to her share of the proceeds from the land cannot be defeated by such election. Bullock v. Bullock, 3 Ohio N. P. (N. S.) 190.

54. A bankrupt who dies after the trustee in bankruptcy under the National Bankruptcy Act has taken possession does not die "seised" so as to entitle his wife to dower under Sand. & H. Dig. Ark. § 2541. In re McKenzie, 132 F. 986.

55. Johnson v. Johnson, 93 N. Y. S. 197. Seisin in a corporation of which a husband owns all the stock is not seisin in him so as to entitle the wife to dower. Poillon v. Poillon, 90 App. Div. 71, 85 N. Y. S. 689.

56. The widow of an heir who dies while his mother is living is entitled to dower only in the heir's two-thirds of the estate. Johnson v. Johnson, 93 N. Y. S. 197.

57. In the equitable estate her husband has in land for which he has paid the entire purchase price and has been put into possession. Howell v. Parker, 136 N. C. 373, 48 S. E. 762.

58. Where a mortgagee purchased the property to protect his security. Ross v. McGrath's Adm'r [Ky.] 86 S. W. 555; Allard v. Allard [Ky.] 86 S. W. 679.

59. After 46 years it is presumed that a mortgage executed by a vendee on the same day the deed was executed was a purchase-money mortgage. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

60. Where real estate is sold by the personal representative of a decedent, to pay the debts of decedent, which real estate is incumbered by a purchase-money mortgage given by the decedent in his lifetime, and by a purchase-money mortgage assumed by the decedent as a part of the purchase price of the land, and such land is sold for a sum more than the amount of both of said mortgages, the widow is entitled to have her dower interest in said land computed from and based on the entire proceeds of the sale, payable out of the residue of the proceeds, after satisfying said mortgages. Hickey v. Conine, 6 Ohio C. C. (N. S.) 321; Id., 3 Ohio N. P. (N. S.) 209.

61. A widow not entitled to dower as against a mortgagee in a mortgage given

no retroactive operation.[62] Where entitled to dower in lands sold, she is entitled to dower in the proceeds of the sale.[63]

§ 3. *Extinguishment, release, or bar, and revival of dower.*[64]—Dower may be relinquished by deed[65] or by an antenuptial[66] or postnuptial agreement,[67] providing it is fair and reasonable,[68] legal,[69] and in writing,[70] but it need not be acknowledged as is required of her deeds of release.[71] Dower cannot be barred by laches in attempting to assert an inchoate right,[72] nor by marital misconduct alone though it constitutes ground for divorce,[73] nor by the concealment of their marriage by her husband,[74] nor is she estopped by having unsuccessfully asserted title as equitable owner.[75] Her acts during coverture to operate as a bar must in effect amount to one of the modes pointed out by common law or statute.[76] There may be an extinguishment by a merger in a greater estate.[77]

A voluntary conveyance by a prospective bridegroom on the eve of his marriage is not fraudulent as to his prospective bride's inchoate right if he retains sufficient property so that her right will not be prejudiced.[78]

prior to marriage is not entitled to dower where a mortgage is given after marriage to take up a void one given prior thereto, the mortgagee having been subrogated to rights under the prior mortgage. Hall v. Marshall [Mich.] 102 N. W. 658.

62. Under Code Pub. Gen. Laws art. 45, § 6, wives of cestuis que trustent have no dower in the trust estate where the marriage had taken place and the property sought to be affected had been acquired prior to the date the act took effect. Slingluff v. Hubner [Md.] 61 A. 326.

63. In re Cadmus [N. J. Eq.] 59 A. 245. She is entitled to dower in the proceeds of a sale of a life estate under Gen. St. p. 1195. Id.

64. See 3 C. L. 1145.

65. Under Gen. St. 1901, § 7972, dower may be relinquished by giving written consent to a conveyance by the husband executed in the presence of two witnesses Jack v. Hooker [Kan.] 81 P. 203. The form of the writing is immaterial if it shows that the wife agrees to accept the provision otherwise made for her. Id.

66. An ante-nuptial contract or marriage agreement in order to bar a widow from dower must be shown to have been fair, reasonable and just to the wife under all the circumstances existing at the time the agreement was entered into. Binkley v. Binkley, 3 Ohio N. P. (N. S.) 33.

67. Dower may be barred by an agreement between husband and wife that he should put a certain sum in trust for her in lieu of all interest in his estate. Merki v. Merki, 212 Ill. 121, 72 N. E. 9. Statutes removing the common-law disabilities of married women enable a wife to contract with her husband for a release of dower. Carling v. Peebles, 215 Ill. 96, 74 N. E. 87.

68. A relinquishment of dower for a grossly inadequate consideration, the wife being ignorant of the amount of property her husband owned, is unenforceable. In re Bell's Estate [Utah] 80 P. 615. An agreement based on no consideration does not preclude the wife from claiming dower. In re Taylor's Estate [Ind. T.] 82 S. W. 727.

69. Released for a certain sum on the understanding that the wife would make no defense to an action for divorce. In re Bell's Estate [Utah] 80 P. 615.

70. The inchoate right cannot be barred by an oral contract between husband and wife. Shemwell v. Carper's Adm'r [Ky.] 87 S. W. 771.

71. Carling v. Peebles, 215 Ill. 96, 74 N. E. 87.

72. The right is inchoate until the death of the husband, so that the wife cannot be guilty of laches for failing to attempt to assert it during his lifetime. Lohmeyer v. Durbin, 213 Ill. 498, 72 N. E. 1118.

73. Adultery of the wife not followed by divorce is not a bar of dower under a statute providing that a wife divorced because of her misconduct shall not be endowed. In re Taylor's Estate [Ind. T.] 82 S. W. 727.

74. The concealment of a mortgagor's marriage is not necessarily a fraud on the mortgagee so as to deprive the wife who does not join in the mortgage of her dower right. Hall v. Marshall [Mich.] 102 N. W. 658.

75. A widow who files a bill claiming title as equitable owner, to which a demurrer was sustained, is not estopped to claim dower. Lohmeyer v. Durbin, 213 Ill. 498, 72 N. E. 1118.

76. Under Code 1904, p. 1272, providing that a deed by a husband and wife bars dower, a deed signed by a wife, in which the husband does not join, does not. Lewis v. Apperson, 103 Va. 624, 49 S. E. 978.

77. See note to Forthman v. Deters [Ill.] 99 Am. St. Rep. 145, at p. 156.

78. Jones v. Jones, 213 Ill. 228, 72 N. E. 695. The prospective bride has the burden of proving that her right is prejudiced. Id.

Note: A conveyance by a man in contemplation of marriage, with intent to defeat his intended wife of her dower, is void as to her (Babcock v. Babcock, 53 How. Pr. [N. Y.] 97; Poston v. Gillespie, 5 Jones Eq. [N. C.] 258, 75 Am. Dec. 437), but it must appear that it was made with intent to defraud her (Beere v. Beere, 79 Iowa, 555, 44 N. W. 809; Smith v. Smith, 6 N. J. Eq. 515; Youngs v. Carter, 50 How. Pr. 410), and it is not necessarily fraudulent because not disclosed to the wife (Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602), and it is held that it is not

A release operates as an estoppel and not as an extinguishment except in favor of the person to whom it is given and those who claim under him.[79]

§ 4. *Liens and charges on dower.*[80]

§ 5. *Assignment of dower and money awards.*[81]—An agreement between heirs giving the widow a certain proportion of the rents and profits for life and that the property should not be sold without her consent constitutes an assignment of dower.[82] A dowress is entitled only to an allotment of a life estate,[83] but may be allotted a share of the rents and profits where the property is indivisible in specie.[84] A dowress subject to mortgage may require moneys payable to her husband's estate to be applied in exoneration of her dower.[85] The allotment must include property specially designated by statute,[86] and be made in the method prescribed by law.[87] No formal order of court is necessary where it is admeasured by commissioners appointed for that purpose and the dowress has been in possession with the acquiescence of all persons concerned.[88] The description of land assigned must be sufficiently certain to locate the premises.[89] A dower claim superior to the claim of general creditors is subrogated to the rights of a lien creditor who refuses to file his claim against an insolvent estate, and sells the property under foreclosure of his lien.[90] A statute providing that if a homestead exceeds a one-third interest in the estate no dower shall be assigned does not apply where a widow elects to take a child's share in lieu of dower.[91]

§ 6. *Remedies and procedure.*[92]—In Nebraska the district court has jurisdiction of proceedings to assign dower,[93] and the county court may assign it if there be no contest.[94] A claimant for dower in lands conveyed by the husband during his life must make out a clear case,[95] and if it appears that she is in possession of lands worth more than her claim, it will be dismissed to avoid circuity.[96] Limitations do not run against the right until the husband's death,[97] and not then if the dowress is under legal disability.[98] In New York there is a special statute of limitations relative to actions to recover dower.[99]

DRAINS; DRUGS, DRUGGISTS; DRUNKENNESS, see latest topical index.

fraudulent unless made without the knowledge or consent of the intended wife (Murray v. Murray, 90 Ky. 1, 13 S. W. 244) and it is not fraudulent if she has notice of it (Clark v. Clark, 183 Ill. 448). That the conveyance is to the children of the grantor by a former marriage does not render it less fraudulent (Rice v. Waddill, 168 Mo. 99, 67 S. W. 605), and it may be declared void during the lifetime of the husband (Leach v. Duvall, 8 Bush [Ky.] 201. See note to Collins v. Collins [Md.] 103 Am. St. Rep. 418).

79. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673.

80. See 3 C. L. 1146, and ante § 2.

81. See 3 C. L. 1146.

82. Not merged in the superior estate by a deed between the widow and heirs conveying the interests inter se. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

83. She cannot on her petition have a sale of the lands in order to secure absolutely a certain part of the proceeds. Shemwell v. Carper's Adm'r [Ky.] 87 S. W. 771.

84. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

85. Life insurance moneys. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

86. Under Code § 2103, the dwelling house in which the husband usually resided must be included in the allotment of dower regardless of the wishes of the widow. Howell v. Parker, 136 N. C. 373, 48 S. E. 762.

87. Under Laws 1893, p. 313, c. 314, requiring dower to be allotted in one proceeding, and Code § 2103, providing that the dwelling house of the husband shall be included in the allotment, dower in the whole estate must be allotted in the county in which the dwelling is located. Howell v. Parker, 136 N. C. 373, 48 S. E. 762.

88. Callaway v. Irvin [Ga.] 51 S. E. 477.

89. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

90. Whitmore v. Rascoe, 112 Tenn. 621, 85 S. W. 860.

91. Rev. St. 1899, § 3621. McFadin v. Board [Mo.] 87 S. W. 948.

92. See 3 C. L. 1147.

93. See 3 C. L. 1147, n. 60. Swobe v. Marsh [Neb.] 102 N. W. 619.

94. Swobe v. Marsh [Neb.] 102 N. W. 619.

95, 96. Saunders v. Hamilton, 26 Ky. L. R. 851, 82 S. W. 630.

97. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673.

98. In Georgia if the wife is insane at the date of her husband's death, her right of

DUELING.[1]

DUE PROCESS; DUPLICITY, see latest topical index.

DURESS.

To be duress the act must be physical violence, threats of violence or harm, or imprisonment or threats of imprisonment,[2] made to a person or a member of his family,[3] and the constraint which destroys the power of withholding assent must be one which is imminent and without immediate means of prevention and be such as to influence a person of ordinary firmness.[4] Duress of imprisonment must be actual or threatened, unlawful imprisonment,[5] but an imprisonment may be originally lawful and become unlawful.[6] Duress of property which will avoid a contract is its restraint under circumstances of peculiar hardship.[7] There seems to be a tendency on the part of the courts to extend this doctrine.[8] There is also a modified form of duress recognized by the courts which renders void a contract illegally exacted.[9] A . . .

dower is not barred until seven years after removal of the disability. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

99. Code Civ. Proc. § 1596, prescribes the only conditions which will suspend the operation of the statute. Wetyen v. Fick, 90 App. Div. 43, 85 N. Y. S. 592.

1. No cases have been found for this subject since the last article. See 3 C. L. 1147.

2. Burnes v. Burnes, 132 F. 485.

Evidence sufficient to show that a mortgage was procured by threats to prosecute the mortgagor's son for a penitentiary offense. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. To show that a deed and contract of separation between husband and wife were executed under duress. Ice v. Ice, 26 Ky. L. R. 1065, 83 S. W. 135. Deeds, notes and mortgages held to have been executed under threats of imprisonment, warranting their cancellation. McClelland v. Bullis [Colo.] 81 P. 771. Statements made to members of a mortgagor's family are admissible in an action to cancel a mortgage for duress. Similar statements to the mortgagor being the duress relied on. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

3. A parent may avoid a contract given under duress of imprisonment of a child. Bailey v. Devine [Ga.] 51 S. E. 603. Threats to prosecute a child for a penitentiary offense. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

4. That a landlord said to a tenant, "If you don't come down and pay the rent, I'll bring a force of hands and tumble the building upside down." Mineral R. & Min. Co. v. Flaherty, 24 Pa. Super. Ct. 236.

5. Bailey v. Devine [Ga.] 51 S. E. 603.

6. As where one is in prison under charge of murder and another threatens to detain him in prison for an indefinite period and prevent his trial from taking place. Balley v. Devine [Ga.] 51 S. E. 603.

7. Where an agister who had no lien on animals in his possession refused to deliver them until a mortgagee guaranteed the note of the mortgagor for pasturage. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614. Mere threats to injure property without power to carry them out do not constitute duress. Mineral R. R. & Min. Co. v. Flaherty, 24 Pa. Super. Ct. 236.

Note: A contract made to prevent a threatened destruction of property where no ready and adequate remedy lies open may be avoided for duress. United States v. Huckabee, 16 Wall. [U. S.] 414, 432, 21 Law. Ed. 457; Foshay v. Ferguson, 5 Hill [N. Y.] 154; Waller v. Parker, 5 Cold. [Tenn.] 476; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10. Some courts go further and hold that duress of goods may exist whenever their owner is compelled to submit to an illegal exaction in order to obtain them from one who has them in his possession. Adams v. Schiffer, 11 Colo. 15, 7 Am. St. Rep. 202; Fuller v. Roberts, 35 Fla. 110; Crawford v. Cato, 22 Ga. 594; Bennett v. Ford, 47 Ind. 264; Lightfoot v. Wallis 12 Bush [Ky.] 498; Hackley v. Headley, 45 Mich. 569; Wilkerson v. Hood, 65 Mo. App. 491; McPherson v. Cox, 86 N. Y. 472; Miller v. Miller, 68 Pa. 486; Oliphant v. Markham, 79 Tex. 543, 23 Am. St. Rep. 363. It will generally be found, however, that there was some peculiar and pressing necessity for the coerced party to have the particular property. Dustin v. Farrelly, 81 Mo. App. 380; Collins v. Westbury, 2 Bay [S. C.] 211, 1 Am. Dec. 643; Williams v. Phelps, 16 Wis. 80. See Hammon, Contracts, § 136.

8. The payment by a newspaper publisher to the Associated Press of a sum in excess of that ordinarily imposed as a condition of obtaining their service which was indispensable to his business is deemed to have been made under duress. News Pub. Co. v. Associated Press, 114 Ill. App. 241.

9. Where a divorced wife instituted proceedings against her former husband, claiming he was wasting his estate, and procured the appointment of a guardian and the proceeding was dismissed on his conveying property for the benefit of a child of which the wife had custody. Another circumstance was that the husband was old and enfeebled and was very anxious to procure the dismissal of the guardian. Foote v. De Poy, 126 Iowa, 366, 102 N. W. 112. A threat by officers of a musician's union that unless a member paid an illegal fine, he would be expelled and deprived of means of earning a living

mere threat of litigation does not constitute duress,[10] and money paid a creditor for forbearance of a lawful act is not paid under duress.[11] The doctrine of legal duress applies only to contracts which the law does not require.[12] Duress which will avoid a contract must have been instrumental in procuring its execution.[13] That one in executing a contract was guilty of compounding a felony will not preclude him from seeking to set it aside for duress.[14] The right of a mortgagor to cancellation of a mortgage for duress passes to a purchaser of the land.[15] One may be estopped from asserting duress as a defense.[16] A contract set aside for duress absolves both parties from liability under it, and one who has partly performed its conditions before notice that steps would be taken to rescind is entitled to be placed in statu quo.[17]

In pleading duress, the facts constituting it must be alleged.[18]

DYING DECLARATIONS, see latest topical index.

EASEMENTS.

§ 1. *Nature and creation.*[19]—An easement is a right in the owner of one parcel of land to the use of the land of another for a special purpose not inconsistent with the general property of the owner.[20] An easement is distinguished from a license in that it is an interest in land.[21] An easement is a species of incorporeal hereditament[22] lying in grant,[23] and can be acquired only by grant[24] or condemnation,[25] or

is duress. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155.

10. A threat of litigation to induce a family settlement is not such duress as will avoid the settlement. Burnes v. Burnes, 132 F. 485.

11. To postpone a sale under a decree of court. Foster v. Central Nat. Bank, 93 N. Y. S. 603.

12. A bond executed by an executor as a condition precedent to exercising the functions of his office is not void because in excess of statutory requirements. Yost v. Ramey, 103 Va. 117, 48 S. E. 862.

13. That a redelivery of a deed of which the grantor had recovered possession was induced by duress, does not invalidate it. McCrum v. McCrum [Iowa] 103 N. W. 771.

14, 15. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

16. Where, in a suit to foreclose, a mortgagor did not contradict plaintiff's evidence that he took an assignment of the mortgage at the mortgagor's solicitation, the mortgagor could not assert that the mortgage was procured by duress. Langley v. Andrews [Ala.] 38 So. 238.

17. Ice v. Ice, 26 Ky. L. R. 1065, 83 S. W. 135.

18. A general charge of duress in a bill in equity is insufficient. McPeck's Heirs v. Graham's Heirs [W. Va.] 49 S. E. 125.

19. See 3 C. L. 1148.

20. See 3 C. L. 1148. Tiffany, Real Property, § 304. A right to a private way acquired by adverse use is a vested right and not a mere license. Power v. Dean [Mo. App.] 86 S. W. 1100.

21. An oral agreement between adjoining owners that one will build a stairway to be used in common in consideration of a right to erect a porch on vacant land of the other, held to give only a license to use such stairway. Howes v. Barmon [Idaho] 81 P. 48. Instrument in the form of a deed conveying right of way for a pipe line and right to divert water held to create an easement and not a mere license. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617.

22. The surrender of a way of necessity is within the registry laws. Dahlberg v. Haeberle [N. J. Law] 59 A. 92. The grant of an easement in fee is entitled to record. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337.

23. A release by abutting owners to a city of so much of the lands as is necessary to make a road "for the sole and only use of a public road forever" conveys an easement only. Mitchell v. Einstein, 42 Misc. 358, 86 N. Y. S. 759.

24. Evidence held insufficient to show that a grant had ever been made. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921. An easement of light and air is an interest in land and lies only in grant or estoppel. Hutchins v. Munn, 22 App. D. C. 88. An owner conveyed a portion of a lot without reserving a right of way over it; he subsequently conveyed the remainder with a

by prescription which presupposes a grant.[26] A parol contract for an easement is within the statute of frauds,[27] yet part performance may in equity take a parol grant from the operation of the statute.[28] Such contracts are presumed to have been made with knowledge of the statute of frauds and have been intended to create a license only.[29] Easements resting in local custom are not generally recognized in this country.[30] It is only over public highways that an abutter's easement of view, light and air are recognized.[31] Easements may be either appurtenant[32] or in gross. An easement may be appurtenant, though the servient and dominant tenement be separated by other lands.[33]

A grant[34] of an easement will be construed in the light of surrounding circumstances,[35] and no presumption that it is in gross will be entertained if it can be fairly inferred that it was intended as an appurtenant.[36] No particular form of words is necessary to constitute a grant.[37] The owner of real estate can establish in that portion which he sells and in that portion which he retains such servitudes as he deems proper;[38] but one who has no estate cannot grant an easement,[39] nor enlarge an existing one.[40]

right of way over the part first conveyed. Held, the grantee acquired no way. Morin v. Lefebvre [N. H.] 61 A. 675.

25. Under P. L. 226, incorporating the Union Canal Company, land acquired by condemnation under section 13 of the act is not acquired in fee, but only as an estate determinable upon the abandonment of the land for use as a canal. Sholl v. Stump, 24 Pa. Super. Ct. 48.

26. See post, Creation by prescription. In legal contemplation an easement lies only in grant, but a grant is presumed from long continued adverse user. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921.

27. Belser v. Moore [Ark.] 84 S. W. 219. An easement is an estate, and a grant of one is within the statute of frauds. Howes v. Barmon [Idaho] 81 P. 48.

28. Part performance held insufficient. Hutchins v. Munn, 22 App. D. C. 88.

29. Howes v. Barmon [Idaho] 81 P. 48.

30. In Connecticut personal rights of way or other easements resting in local custom are not recognized. Graham v. Walker [Conn.] 61 A. 98.

31. A right of way belonging to a railroad company is private property as to an adjoining owner. Osburn v. Chicago, 105 Ill. App. 217.

32. Held to be appurtenant: A reservation in a conveyance of one-half of a house, of a right to use a stair and hallway in the part conveyed. Teachout v. Capitol Lodge, I. O. O. F. [Iowa] 104 N. W. 440. A reservation of a way to cross a certain strip to other lands of the grantor construed as an exception of an existing way which became an easement appurtenant to such lands. Dee v. King [Vt.] 59 A. 839. **A sale of lots with reference to a plat** carries as appurtenant the right to the use of an easement in streets and alleys necessary to the enjoyment of such lots. Edwards v. Moundsville Land Co. [W. Va.] 48 S. E. 754. The landowner may be compelled to open such streets and alleys, though the dedication thereof has not been accepted. Id.

33. Graham v. Walker [Conn.] 61 A. 98.

34. See 3 C. L. 1149.

35. A conveyance of a right and privilege to use a stairway is the conveyance of an easement, though the deed contains words appropriate to pass the fee, and general warranty. Bale v. Todd [Ga.] 50 S. E. 990. A deed of an easement for a pipe line to a grantee, his heirs and assigns forever, will be construed as unlimited as to time. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617.

36. Grant of a right to construct an abutment for a dam and keep it in repair, held to be appurtenant in view of the fact that at the time it was made the grantee was constructing on the opposite side of the river a plant to be operated by water power. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. A reservation of an easement in premises conveyed need not be to the "grantor, his heirs and assigns" in order to create an easement appurtenant. Teachout v. Capitol Lodge, I. O. O. F. [Iowa] 104 N. W. 440.

37. A grant with **appropriate words of conveyance** for an annual consideration of a right of way when the railroad is located, becomes irrevocable at execution. Alderman & Sons' Co. v. Wilson [S. C.] 50 S. E. 643. Where a landowner for a consideration **allows a strip to be used as a road** without restriction as to time, it constitutes a grant of an easement. Power v. Dean [Mo. App.] 86 S. W. 1100. A **right of way voucher** signed by the fee owner and reciting a consideration received from a telephone company for the right to string and maintain wires over certain premises, is sufficient to secure the easement it purports to grant. Barber v. Hudson River Tel. Co., 93 N. Y. S. 993. A **reservation in a plat** of streets for private use of the owners and their assigns vests in them an easement in such streets. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

38. Bernos v. Canepa [La.] 38 So. 438. An owner of two adjacent lots who erects a building on one may add to the security of

A way of necessity[41] is implied from the grant of a parcel surrounded by other lands of the grantor,[42] or where bounded on three sides by lands of other owners;[43] but an easement will not be implied merely because it is a matter of convenience.[44]

Creation by prescription.[45]—Adverse user under a claim of right with the knowledge of the fee owner gives an easement by prescription.[46] The user[47] must have been hostile,[48] continuous[49] and under a claim of right[50] over a uniform route,[51] and

a mortgage given on the lot and building an easement for light and air over the other so long as mortgagees of the latter are not prejudiced. Wood v. Grayson, 22 App. D. C. 432.

29. Ditch rights cannot be granted by the United States over land withrawn from the public domain. Campbell v. Flannery [Mont.] 79 P. 702.

40. Where public lands burdened with ditch rights under Act Cong. July 26, 1866, such burdens cannot be added to under the act after the land has been withdrawn from the public domain. Campbell v. Flannery [Mont.] 79 P. 702.

41. See 3 C. L. 1150. The grant of a right of way across a meadow for the purpose of constructing a street railway carries an implied right of way to reach the strip. Quigley v. Montgomery & C. Elec. R. Co., 208 Pa. 238, 57 A. 512.

42. An execution sale of a portion of a tract carries a way of necessity over the remaining portion. Damron v. Damron [Ky.] 84 S. W. 747.

43. A sale of land surrounded on three sides by the land of other individuals carries by presumption a way to the public highway over remaining land of the grantor. Brown v. Kemp [Or.] 81 P. 236.

44. Where the owner of a saloon is also part owner of a hotel which was constructed with doors leading from the rotunda to the saloon, there is no implied easement that such doors shall remain open. Belser v. Moore [Ark.] 84 S. W. 219. A way of necessity is not acquired by a purchaser whose land is not surrounded by other lands of his grantor and he has means of ingress and egress over a public highway, though the way claimed would be of great convenience and advantage. Wills v. Reid [Miss.] 38 So. 793.

45. See 3 C. L. 1150. The doctrine of prescriptive easements is discussed fully in Tiffany, Real Property, p. 1020.

46. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Wasmund v. Harm, 36 Wash. 170, 78 P. 777. User of an easement without asking permission and without objection is adverse. Godino v. Kane, 26 Pa. Super. Ct. 596.

Easement by prescription: Uninterrupted use of an alley for 22 years. Godino v. Kane, 26 Pa. Super. Ct. 596. 10 years adverse use of either a public or private way. Power v. Dean [Mo. App.] 86 S. W. 1100. User of a passway for 15 years. McKinney v. Thompson [Ky.] 86 S. W. 543. Adverse use of a way for 20 years. Van De Vanter v. Flaherty, 37 Wash. 218, 79 P. 794. The maintenance of a dam and bridge in a particular manner for 50 years. Illinois Cent. R. Co. v. Dennison, 116 Ill. App. 1. The maintenance of a ditch across the land of another for from 30 to 35 years. Board of Regents of State Agricultural College v. Hutchinson [Or.] 78 P. 1028. An uninterrupted use for 15 years **raises a presumption** that such use is adverse. Warth v. Baldwin [Ky.] 84 S. W. 1148. After use of an easement for 25 years, the use is presumed to have been adverse and not permissive. Wathen v. Howard [Ky.] 84 S. W. 303. The burden is on the fee owner to show that an uninterrupted use of an easement was by virtue of permission or contract. Godino v. Kane, 26 Pa. Super. Ct. 596. One claiming that use of a passway for 15 years was not adverse has the burden of proving that it was permissive. Chenault v. Gravitt [Ky.] 85 S. W. 184.

Evidence insufficient to show a way by prescription. Brown v. Peck, 125 Iowa, 624, 101 N. W. 443. Evidence held to show that premises were never in public use and were not subject to public servitude. Calhoun v. Faraldo [La.] 38 So. 551; Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921. Under Code, § 3004, providing that use of an easement is not admissible as evidence of an adverse claim, an easement by prescription must be established by evidence of adverse claim as of right for the statutory period with express notice to the fee owner. Brown v. Peck, 125 Iowa, 624, 101 N. W. 443.

Evidence sufficient to show adverse user for the statutory period. Franz v. Mendonca [Cal.] 80 P. 1078. Where a drain had been constructed to carry water from a lake to a mill pond but was abandoned, the successors of the person who constructed it acquired no prescriptive right to reconstruct and use it for drainage purposes. Flynn v. Service [Mich.] 12 Det. Leg. N. 113, 103 N. W. 541.

47. A prescriptive right to flood land is not acquired by maintaining a dam and certain head of water for the prescriptive period. Such right depends on the reach and elevation of the back water during such period. Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970.

48. Prescriptive rights in a neighborhood road are not acquired by the public by user for a considerable period where no hostile rights therein are asserted, and it is never under supervision of the public authorities. Wills v. Reid [Miss.] 38 So. 793. An abutting proprietor cannot claim a prescriptive easement in a neighborhood road where he has asserted no hostile claim and changed the route from time to time, though he has made repairs for his own convenience but has given no notice of his claim. Id.

49. That way is permissively used by adjoining owners as a pasture does not break the continuity. Power v. Dean [Mo. App.] 86 S. W. 1100. The purchase of one of two tracts over which a way is being used does not toll the prescriptive period as to the tract not purchased. Bullock v. Phelps [R. I.] 61 A. 589.

50. To create a presumption of grant the

not permissive;[52] but in Georgia a private way may originate in permission and yet ripen by prescription,[53] and users of it may acquire an inchoate right before they acquire a prescriptive one.[54] A prescriptive right cannot be obtained unless during the period an action could have been maintained by the servient party.[55] At common law, to acquire an easement by adverse user, the use must have continued from a time when the memory of man runneth not to the contrary;[56] but it is now the prevailing rule that the prescriptive period corresponds with the local period for quieting title to lands.[57] A light and air easement cannot be acquired by prescription in this country,[58] nor can police regulations be prescribed against.[59] After the public has acquired a prescriptive easement, a private way over such land cannot be acquired by adverse user.[60]

Creation by estoppel.[61]—An easement may be created by estoppel,[62] as where lots are sold which abut on a road of which the grantor owns the fee,[63] or with reference to a plat.[64] An easement so created is not one of necessity,[65] and extends,

circumstances attending user must make it appear that it was established for the use of the claimant, or that use was accompanied by a claim of right. Warth v. Baldwin [Ky.] 84 S. W. 1148.

51. Wasmund v. Harm, 36 Wash. 170, 78 P. 777. Those who use a private way must repair it, and they cannot take advantage of their default in turning out to avoid obstructions. Kirkland v. Pitman [Ga.] 50 S. E. 117. The existence of wide places in a way will not defeat rights acquired by prescription. Id. A prescriptive right cannot be acquired to pass over land generally, but only on a definite, certain and precise line. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

52. Wasmund v. Harm, 36 Wash. 170, 78 P. 777. Permissive use will not ripen into an easement by prescription. Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52. No prescriptive way is acquired where users used gates at each end erected and maintained by the fee-owner of the land crossed. Warth v. Baldwin [Ky.] 84 S. W. 1148. A permissive license will not ripen into an easement. Belser v. Moore [Ark.] 84 S. W. 219. Use under a parol gift is not permissive. Franz v. Mendonca [Cal.] 80 P. 1078. Evidence as to the acquisition of an easement in a passageway by prescription, held for the jury. Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545.

53. Kirkland v. Pitman [Ga.] 50 S. E. 117.

54. In Georgia after a private way has been used for 12 months, the fee owner cannot obstruct it without giving 30 days notice of his intention. Kirkland v. Pitman [Ga.] 50 S. E. 117; Neal v. Neal [Ga.] 50 S. E. 929.

55. Chessman v. Hale [Mont.] 79 P. 254.

56. Wasmund v. Harm, 36 Wash. 170, 78 P. 777.

57. Adverse use from the middle of the year of 1887 to the end of 1902 is sufficient. Wasmund v. Harm, 36 Wash. 170, 78 P. 777. That one alleges an easement by prescription by 20 years adverse use does not estop him from claiming that adverse use for any lesser period would establish the right. Id. An easement by prescription is established by proof of adverse user for a period necessary to give title to land. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921.

58. Hutchins v. Munn, 22 App. D. C. 88.

59. Where market men and hucksters claim an easement to use the street and sidewalks. Taylor v. District of Columbia, 24 App. D. C. 392.

60. Providence, F. R. & N. Steamboat Co. v. Fall River, 187 Mass. 45, 72 N. E. 338

61. See 3 C. L. 1151.

62. The grantor of an easement to locate a dam abutment on certain land is estopped to question the right to maintain it at a different location where he allowed the grantee to change the original location and maintain it on a different one for six years. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. A fee owner who consents in writing to give a railroad right of way over his land, and the company with his knowledge constructs a roadbed and operates the line for several years, the owner is estopped to question the right to continue such use. Robertson Mortg. Co. v. Seattle, R. & S. R. Co., 37 Wash. 137, 79 P. 610. The owner of land subject to an easement for the operation of a wooden tramway who stands by and permits the construction of a steam railroad thereon, is estopped to maintain ejectment to recover the land. Warren & O. V. R. Co. v. Garrison [Ark.] 85 S. W. 81. Where one adjoining owner consented to his neighbor's building a house over a disputed strip, whether he was thereafter estopped to maintain ejectment was a question for the jury. Daley v. Wingert, 210 Pa. 169, 59 A. 982.

63. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. A conveyance of a lot bounded by the middle line of a street, instead of the outer line, carries an easement in the street. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85.

64. Where land is platted and lots sold with reference to streets noted on the plat as 60 feet wide but opened only 50 feet wide, the grantee does not acquire an easement in the additional 10 feet in front of adjoining land of the grantor. Fitzell v. Philadelphia, 211 Pa. 1, 60 A. 323. Where one sells lots with reference to a plat which notes a street as 60 feet wide but which has been opened only 50 feet wide, there is no implied grant of a public easement in an additional 10 feet in front of lots not sold. Id. Where dedicators reserve on

not only to the part of the street on which the lot abuts, but so far as the grantor had power to create such right.[66] Representations by one without authority to make them will not create an easement by estoppel.[67]

The condemnation of private lands for private ways[68] is unconstitutional,[69] and a private way of necessity can be established only by the legal proceeding prescribed.[70] In Georgia a private way of necessity may be acquired by compulsory sale and purchase in a manner prescribed by law.[71]

Natural easements[72] of drainage,[73] of lateral[74] and subjacent support,[75] exist in favor of adjacent and surface owners.

Negative easements[76] may be created by restrictive covenants as to the use of land.[77]

§ 2. *Location, maintenance and extent of right.*[78]—The width[79] or acreage of land subject to the easement is to be determined from the terms of the grant,[80] and circumstances under which it was made.[81] The owner of a prescriptive easement not definitely defined is entitled to a way bounded by the line of reasonable enjoyment,[82] limited by the character and extent of use during the prescriptive

the plat as a private way a strip parallel with a street, it is a reservation of the fee with an easement in lot purchasers to cross the strip to the street. Lever v. Grant [Mich.] 102 N. W. 848. And if purchasers with reference to the plat acquired an easement in the entire strip, purchasers subsequent to the conveyance of a portion of such strip to another have no easement in the portion conveyed. Id.

65. It is created by estoppel, and exists, though there are other ways leading to the lot. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85.

66. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85.

67. An easement cannot be established by representations of one who has no interest in and does not represent the fee owner. Campbell v. Flannery [Mont.] 79 P. 702.

68. See 3 C. L. 1152.

69. Code Pub. Gen. Laws, art. 25, §§ 100-121, providing that any land owner shall have a right to a road from his lands to places of worship, mills, market, towns and public ferries, is void. Arnsperger v. Crawford [Md.] 61 A. 413. But see 1 C. L. 1006, n. 37, to the effect that "private" roads for a public use may be taken.

70. Wills v. Reid [Miss.] 38 So. 793.

71. Neal v. Neal [Ga.] 50 S. E. 929.

72. See 3 C. L. 1152; also Adjoining Owners, 5 C. L. 33.

73. The owner of the dominant heritage may drain his premises into natural channels, even if the quantity of water thrown onto the land of an adjoiner is increased. Bickel v. Martin, 115 Ill. App. 367.

74. Adjoining owners have an easement in the land of each other for the support of their own in its natural state. Jones v. Greenfield, 25 Pa. Super. Ct. 315. Where a railroad company removed lateral support from the land of an abutting owner, when excavating a cut. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613.

75. Where the surface and underlying minerals are owned by different parties, the minerals cannot be removed without leaving the surface supported as it was in its natural state. Allshouse's Estate, 23 Pa. Super. Ct. 146. Where the surface subsides because of removal of the underlying minerals, the owner of the surface need not affirmatively show that the subsidence was not caused by the weight of structures on the surface. Western Indiana Coal Co. v. Brown [Ind. App.] 74 N. E. 1027. Where the surface is owned by one and the underlying minerals by another, the owner of the minerals cannot remove them without leaving sufficient support to sustain the surface. Id.

76. See 3 C. L. 1153. See Buildings and Building Restrictions, 5 C. L. 487.

77. An agreement between adjacent owners that intoxicants shall never be manufactured or sold on their premises imposes a servitude on the land of each. Scudder v. Watt, 98 App. Div. 228, 90 N. Y. S. 605.

78. See 3 C. L. 1153.

79. A grant of a strip 26 feet wide for a way controls the width throughout the length of the way and not merely at the point of beginning. Rafferty v. Anderson, 94 N. Y. S. 927.

80. A grant of a right to construct a dam and to overflow lands as a result of such construction is sufficiently broad in its terms to build the dam to any height deemed proper. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. Covenant for easement of light and air construed. Jackson v. Eli, 23 App. D. C. 122. An easement to flood lands to whatever height a dam might be raised held to be a release of damages for injuries to all the lands flooded. Stadler v. Missouri River Power Co., 133 F. 314.

81. Where one in use of a way purchases from the fee owner a tract of land and is granted the way as an appurtenant to his land, a right to use such way passes as an appurtenant to the land originally owned as well as to that purchased. Bullock v. Phelps [R. I.] 61 A. 589. A deed of a railroad right of way is presumed to carry such rights as the company could have acquired under its power of eminent domain. Harman v. Southern R. Co. [S. C.] 51 S. E. 689.

82. Van De Vanter v. Flaherty, 37 Wash. 218, 79 P. 794.

period.[83] The grant of an easement to string and maintain telephone wires is in its nature continuous and includes the right to string as many wires as is necessary.[84] In Louisiana the servitudes of view and drip when established merely by the destination du pere de famille do not include the prohibition of building on the adjoining property.[85]

Extent of use.[86]—A way appurtenant to land attaches to every part of it, though it may go into the possession of different persons;[87] but an easement for the benefit of a particular tenement cannot be used for the benefit of others owned by the owner of the easement,[88] unless an enlarged right is acquired,[89] nor can the owner of the dominant tenement use an easement in such manner as to render it a nuisance or unnecessarily damage the servient tenement.[90] A right of ingress and egress does not entitle the owner to the use of facilities constructed by the owner of the servient estate for his own convenience,[91] even though they could be used without inconvenience to him.[92] An easement for the operation of a wooden tramway does not authorize use for a steam railway.[93] A right to maintain a two story building does not give a right to construct a third story.[94] A right to maintain a ditch does not justify an entry for the purpose of enlarging the capacity of the ditch.[95] The use by the public of a private way is presumed to be permissive.[96] An agreement between the dominant and servient owners relative to the use of the easement is binding on them.[97]

§ 3. *Transfer and assignment.*[98]—Easements appurtenant pass with the conveyance of the dominant tenement[99] without special mention,[1] and a purchaser of the servient estate with notice of the servitude takes subject to it.[2] An easement in gross where the grant is to the grantee, his successors and assigns, is capable of assignment and is therefore in perpetuity, though not technically in fee.[3]

83. Chessman v. Hale [Mont.] 79 P. 254.

84. Barber v. Hudson River Telephone Co., 93 N. Y. S. 993.

85. Bernos v. Canepa [La.] 38 So. 438.

86. See 3 C. L. 1153.

87. Dee v. King [Vt.] 59 A. 839.

88. Schmoele v. Bety [Pa.] 61 A. 525. Cannot haul coal over the alley for a heating plant located on the dominant estate which transmits heat to other premises. McCullough v. Broad Exchange Co., 101 App. Div. 566, 92 N. Y. S. 533.

89. The owner of a way appurtenant to one tract may by prescription acquire an enlarged right to use it for the benefit of another tract. Bullock v. Phelps [R. I.] 61 A. 589.

90. Cannot negligently permit a ditch to fill up and cause the water to overflow, nor can the ditch be enlarged so as to increase the flow of water to the injury of the servient tenement. Board of Regents of State Agricultural College v. Hutchinson [Or.] 78 P. 1028. An easement to string and maintain telephone wires and trim trees is not a right to destroy or unnecessarily injure the trees. Barber v. Hudson River Tel. Co., 93 N. Y. S. 993.

91, 92. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441.

93. Warren & O. V. R. Co. v. Garrison [Ark.] 85 S. W. 81.

94. A right to maintain a two-story building over an alley does not give a right to construct a third story on such building. Gilbert v. White, 23 Pa. Super. Ct. 187.

95. City of Owensboro v. Brocking [Ky.] 87 S. W. 1086.

96. Weldon v. Prescott [Mass.] 73 N. E. 536.

97. Board of Regents of State Agricultural College v. Hutchinson [Or.] 78 P. 1028.

98. See 3 C. L. 1154.

99. See Deeds of Conveyance, 5 C. L. 964. Hess v. Kenney [N. J. Eq.] 61 A. 464; Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. An apparent quasi easement may be reserved by implication where it will pass by conveyance as an appurtenant. Hess v. Kenney [N. J. Eq.] 61 A. 464. An easement for light and air specially attached to a lot passes by a conveyance of it as appurtenant. Wood v. Grayson, 22 App. D. C. 432.

1. Right to maintain an abutment for a dam as appurtenant to a water power plant. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337.

2. That the way is open at the time of purchase constitutes sufficient notice. Brown v. Kemp [Or.] 81 P. 236. An easement by prescription as against a mortgagor is valid as against the mortgagee and purchaser at foreclosure sale. Van De Vanter v. Flaherty, 37 Wash. 218, 79 P. 794.

3. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. Under a statute providing that the extent of a servitude is determined by the terms of the grant, no question arises as to whether a covenant runs with the land where a perpetual easement is granted. Los Robles

§ 4. *Extinguishment and revival.*[4]—An easement may be lost by adverse possession,[5] but cannot be discharged by legislative action,[6] nor destroyed without compensation.[7] An easement acquired by deed is not extinguished by nonuser,[8] and one in a private way is not lost by mere neglect to repair.[9] An easement of way is not lost by a temporary change in it with the consent of the user; he having used it as changed during such period.[10] Where the owner of a way consents to the closing of it in consideration of a grant of a substitute way, the right to the use of the new way at once attaches,[11] and the new way cannot be closed without restoring the old one, though the grant of the new was oral.[12] An unlawful or excessive use of an easement does not work a forfeiture of it,[13] but where the authorized and unauthorized use are so intermingled that they cannot be designated, all use may be enjoined until circumstances have so changed as to permit the valid use without affording opportunity for the unlawful one.[14]

The discharge of an easement of way must be recorded as against a bona fide purchaser of the dominant tenement.[15]

Abandonment.[16]—An easement may be lost by abandonment and nonuser.[17] Abandonment is a question of intention,[18] and mere nonuser without intent to abandon does not constitute abandonment,[19] nor does a mere intention to abandon without an actual yielding up of possession or cessation of user.[20] That tenants of the dominant estate do not make actual use of an easement appurtenant does not indicate an abandonment by the owner.[21] Abandonment of an old dilapidated flume is not an abandonment of the right to divert water conveyed through it.[22]

§ 5. *Interference with easements and remedies and procedure in respect thereto.*[23]—A statute giving county courts jurisdiction to open a private way of

Water Co. v. Stoneman, 146 Cal. 203, 79 P. 880.

4. See 3 C. L. 1154.

5. Possession of part of a railroad right of way not in use by the company and not needed for railroad purposes is permissive only. Smith v. P. C. C. & St. L. R. Co., 5 Ohio C. C. (N. S.) 194. A railroad company's easement in a right of way may be lost by adverse possession. Harman v. Southern R. Co. [S. C.] 51 S. E. 689.

6. The easement of one who purchases land abutting on a road. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

7. The easement an abutting owner has in a private street cannot be destroyed without compensation. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

8. McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N. Y. S. 533. One acquired by grant cannot be lost by nonuser. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85. Nonuser of a water right for any period short of the period of limitations will not defeat the rights of the grantee. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617.

9. Kirkland v. Pitman [Ga.] 50 S. E. 117.

10. Chenault v. Gravitt [Ky.] 85 S. W. 184.

11. He is not required to use it for the prescriptive period. Thompson v. Madsen [Utah] 81 P. 160.

12. Thompson v. Madsen [Utah] 81 P. 160.

13. McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N. Y. S. 533.

14. Where other property was so included in the dominant estate that the parts of each were interdependent and contained a common opening onto the alley. McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N. Y. S. 533.

15. Dahlberg v. Haeberle [N. J. Law] 59 A. 92.

16. See 3 C. L. 1155.

17. An easement in a private way. Kirkland v. Pitman [Ga.] 50 S. E. 117.

18. Mere encroachment on a common right of way does not necessarily show an intention to abandon. New England Structural Co. v. Everett Distilling Co. [Mass.] 75 N. E. 85. The obstruction of that portion of a street of which the abutting owner owns the fee does not show an intention to abandon his easement in the remaining portion. Id. The erection of a building in a street closing half of it held not to show an intention to abandon the unobstructed portion which continued to be used. Id.

19. Wood v. Etiwanda Water Co. [Cal.] 81 P. 512.

20. Right to divert and use water. Wood v. Etiwanda Water Co. [Cal.] 81 P. 512.

21. Teachout v. Capital Lodge I. O. O. F. [Iowa] 104 N. W. 440. It is not necessary to the continued existence of an easement appurtenant that the owner's tenants should have no oher means of access to their tenements. Id.

22. Wood v. Etiwanda Water Co. [Cal.] 81 P. 512.

23. See 3 C. L. 1155, n. 24 et seq.

necessity does not affect the jurisdiction of the district court to enjoin the obstruction of an existing way.[24]

Form of remedy.[25]—One asserting a right to an easement must seek his remedy at law.[26] The appropriate remedy for the disturbance of an easement is an action on the case,[27] or an equitable proceeding to enjoin interference.[28]

Parties.[29]—Lands cannot be adjudged subject to an easement in an action to which the fee owner is not a party,[30] but a tenant for years may enjoin a trespass on an easement appurtenant,[31] and the owner of an easement may enjoin a trespass relative to it, though his rights are not materially impaired.[32] By statute in California, the owner or occupant of a dominant tenement may maintain an action to enforce an easement appurtenant.[33]

Pleading and evidence.[34]—A complaint for obstructing an easement need not describe the premises as definitely as would be required in a proceeding to establish a new way.[35] A complaint for the obstruction of a highway which has been in existence for 30 years need not allege how it came into existence as such,[36] nor how user began.[37]

Where an easement is claimed by adverse use, the question of necessity is immaterial.[38]

A decree must definitely locate an easement adjudged to exist.[39]

Damages.[40]—The obstruction of an easement appurtenant entitles the owner to damages on the theory of permanent depreciation in the value of his land.[41] The measure of damages for obstructing an easement of way is the diminution in the value of the premises during the time of the obstruction,[42] and where the violation of rights is flagrant, exemplary damages may be recovered.[43]

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24. Damron v. Damron [Ky.] 84 S. W. 747.

25. See 3 C. L. 1157.

26. One asserting an easement by adverse user must seek his remedy at law; equity has no jurisdiction. Godino v. Kane, 26 Pa. Super. Ct. 596.

27. Not an action of trespass. Bale v. Todd [Ga.] 50 S. E. 990.

28. One entitled to an easement in outbuildings may enjoin an alteration of them if there is no apparent necessity for the change. Piro v. Shipley, 211 Pa. 36, 60 A. 325. The **wrongful obstruction** of one's means of egress to and ingress from a private road may be enjoined. Downing v. Corcoran [Mo. App.] 87 S. W. 114. The **construction of gates across a way** held an obstruction that equity would enjoin. Preston v. Siebert, 21 App. D. C. 405. A threatened interference with an easement of water rights may be enjoined. Everett Water Co. v. Powers, 37 Wash. 143, 79 P. 617. Injunction held not the proper remedy for interference with an easement. Morris & E. R. Co. v. Hoboken & M. R. Co. [N. J. Eq.] 59 A. 332.

NOTE: Obstructing light and air by one adjoining owner from his neighbor's windows, whatever the motive or means used, gives no right of action. Levy v. Brothers, 4 Misc. 48, 23 N. Y. S. 825; Knabe v. Levelle, 23 N. Y. S. 818; Dawson v. Kemper, 32 Ohio L. J. 15, disagreeing with the decision of a sister circuit, Kessler v. Letts, 7 Ohio C. C. 108, which was sustained in the supreme court. Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765. In many states, however, statutes have been enacted declaring it unlawful to erect a fence or other obstruction solely with a malicious purpose. See Harbison v. White, 46 Conn. 106; Lord v. Langdon, 91 Me. 221; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81; Hunt v. Coggin, 66 N. H. 140, 20 A. 250.—See note to Passaic Print Works v. Ely & Walker Dry-Goods Co. [U. S.] 62 L. R. A. 683.

29. See 3 C. L. 1156.

30. Campbell v. Flannery [Mont.] 79 P. 702.

31, 32. Schmoele v. Betz [Pa.] 61 A. 525.

33. Civ. Code, § 809. Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 P. 880.

34. See 3 C. L. 1157.

35. Kirkland v. Pitman [Ga.] 50 S. E. 117.

36. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827. An allegation that a way existed as an appurtenant to the owner's land is an allegation of fact. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

37. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

38. Chenault v. Gravitt [Ky.] 85 S. W. 184.

39. Van De Vanter v. Flaherty, 37 Wash. 218, 79 P. 794.

40. See 3 C. L. 1156.

41. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

42. Louisville & N. R. Co. v. Carter [Ky.] 86 S. W. 685. Evidence of the rental value

EJECTMENT (AND WRIT OF ENTRY).

§ 1. *Cause of action and nature of remedy.*[44]*—Disseisin is the basis of the action* which is possessory and lies only when the defendant is in possession,[45] and where corporeal rights are involved,[46] but persons unlawfully using an easement may be ousted where such relief is incidental.[47] It will lie to recover a mineral interest in lands,[48] but not to enforce the performance of a contract which is the consider-

of property, the passway to which is obstructed, is admissible on the question of damages. Id.

43. Bernos v. Canepa [La.] 38 So. 438.

44. See 3 C. L. 1157.

45. As a general rule it cannot be maintained for land of which the plaintiff is in possession. Zerres v. Vanina, 134 F. 610. P. L. 256 and 612 require that a defendant not residing in the county in which the land is situate be ruled to appear and plead and that such rule be published. Such statute must be complied with in order to raise a presumption that he is in possession. Kreamer v. Voneida, 24 Pa. Super. Ct. 347. The plaintiff in one ejectment suit must be in possession before the defendant can be required to bring a second action for the same premises. Bloomer v. Meade, 26 Pa. Super. Ct. 292.

46. The erection of a bridge abutment under a license does not convert such license into a corporeal right which can be made the basis of ejectment under a statute authorizing this action "to recover land." Nicolai v. Baltimore [Md.] 60 A. 627.

NOTE. Action by railroad company for right of way: Plaintiff brought ejectment against defendant to recover possession of land condemned for right of way, depot and terminal facilities. Defendant claimed the land by right of possession under a tax deed regular on its face, the erection of lasting improvements, and nonuser of the lots by plaintiff for railway purposes. There had never in fact been any delinquency in the payment of taxes by the plaintiff. Held, ejectment could be maintained. Kansas & C. P. R. Co. v. Burns [Kan.] 79 P. 238.

The decision seems to be based on defendant's unavailing defense rather than upon the strength of plaintiff's own title, and a minority dissent is placed on this ground, as it is fundamental that the plaintiff in ejectment must recover, if at all, on the strength of his own title. Had the plaintiff such a title? In the absence of explicit statutory provisions, the decisions are not harmonious. The railway company's interest is frequently broadly stated to be a mere easement. 14 Cyc. 1162; Missouri, K. & N. W. R. Co. v. Schmuck, 69 Kan. 272, 76 P. 836; Taylor v. Railroad Co., 38 N. J. Law, 28; Railway & Nav. Co. v. Real Estate Co., 10 Or. 444; Shields v. Railroad Co., 129 N. C. 1; Lyon v. McDonald, 78 Tex. 71; Jones, Easements, § 211; Lewis, Em. Dom. 278. But ejectment does not lie for an easement. Fritsche v. Fritsche, 77 Wis. 270; Northern Transp. Co. v. Smith, 15 Barb. [N. Y.] 355. After holding such an interest to be a "mere easement," many courts further declare it will revert to the original owner if the purpose for which it was taken is abandoned. Noll v. D. B. & M. R. Co., 32 La. 66; Kellogg v. Malin, 50 Mo. 496; Railway Co. v. Telford, 89 Tenn. 293; Chouteau v. Missouri Pac. R. Co. 122 Mo. 375. But this is evidently an improper use of terms. Lewis, Em. Dom. § 596. That more than an easement is obtained and that ejectment will lie, see Currie v. New York Transit Co., 66 N. J. Eq. 313, 58 A. 308; Aden v. District No. 3, 97 Ill. App. 347; Railway Co. v. Holton, 32 Vt. 43; Chaplin v. Commissioner, 126 Ill. 264 (Overruling earlier decisions); T. & C. R. Co. v. Alabama R. Co., 75 Ala. 516; Gurney v. Elevator Co., 63 Minn. 70; Railway Co. v. Peet, 152 Pa. 488. In some states a fee is given by statute where the circumstances require such an estate. State v. Griftner, 61 Ohio St. 201; Sou. Pac. R. Co. v. Burr, 86 Cal. 279; Northern Pac. R. Co. v. Lannon, 46 F. 224.—3 Mich. L. R. 484.

Note: Ejectment will not lie to recover a mere easement (Racine v. Crotsenberg, 61 Wis. 481, 21 N. W. 520, 50 Am. Rep. 149), but will lie to recover the interest a railroad company has in a right of way (New York, S. & W. R. Co. v. Trimmer, 53 N. J. Law, 1, 20 A. 761; Southern P. Co. v. Burr, 86 Cal. 279, 24 P. 1032; McLucas v. St. Joseph & G. I. R. Co. [Neb.] 93 N. W. 928), or for the interest a municipality has in public streets (San Francisco v. Grote, 120 Cal. 59, 52 P. 127, 65 Am. St. Rep. 155, 41 L. R. A. 335), In California a street railway company with a franchise to operate its cars on the street cannot maintain ejectment against a railroad company using part of a street as a right of way. Fresno St. R. Co. v. Southern P. Co., 135 Cal. 202, 67 P. 773. The action will lie to oust a railway company that has appropriated a highway. South Amboy v. New York & L. B. R. Co., 66 N. J. Law, 623, 50 A. 368; Bork v. United New Jersey R. & Canal Co., 70 N. J. Law, 268, 57 A. 412, 64 L. R. A. 836.—See note to Webster Lumber Co. v. Keystone L. & M. Co. [W. Va.] 66 L. R. A. 40.

47. Though the action does not lie for an easement, persons unlawfully using a way over the premises under purchase from defendants may be ousted under a writ of possession. King v. Davis, 137 F. 222.

48. Moragne v. Moragne [Ala.] 39 So. 161.

ation of a deed of conveyance,[49] nor to enforce the payment of a lien existing on land at the time it is conveyed,[50] nor against a public corporation occupying a street within the limits of the public right.[51] Federal statutes require notice by the plaintiff to the defendant to vacate where the action is brought against an intruder on Indian lands.[52]

Title in plaintiff.[53]—The plaintiff must recover on the strength of his own title,[54] and not on the weakness of the title of his adversary,[55] except where he can show that the title under which defendant claims has an intermediate common source with his own,[56] or that while in quiet and undisturbed possession, the defendant, a mere trespasser, entered and ousted him.[57] An equitable title will not sustain the action,[58] except as against a trespasser.[59] The purchaser of an equity of redemption may maintain it against the mortgagor,[60] but not against the mortgagee.[61]

The possessory action known in Louisiana may be maintained by a lessee against his lessor.[62]

Prior possession[63] is sufficient as against a trespasser or one claiming only under a later possession;[64] but where one seeks to recover on the prior possession of his predecessor in title, he must show the prior possession of his predecessor and a deed from him or from one claiming under him executed while the grantor was in actual possession.[65]

Nature of the remedy.—The proceeding is legal[66] and is not converted into

49, 50. Adams v. Barrell, 26 Pa. Super. Ct. 641.

51. Budd v. Camden Horse R. Co., 70 N. J. Law, 782, 59 A. 229.

52. The notice to leave the premises required by 30 Stat. 496, is sufficient where given by any person bringing the action, though an Indian nation is subsequently joined as party plaintiff. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893.

53. See 3 C. L. 1158.

54. Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617; Terhune v. Porter, 212 Ill. 595, 72 N. E. 820; Smith v. Curtice [Neb.] 102 N. W. 241; Harrison v. Gallegos [N. M.] 79 P. 300; Crist v. Boust, 26 Pa. Super. Ct. 543; Carpenter v. Jones [Ark.] 88 S. W. 871. A purchaser from an Indian who has no power to sell has no title on which to maintain the action. Denton v. Capital Townsite Co. [Ind. T.] 82 S. W. 852. Laches of a defendant in taking possession of land under a patent issued to his ancestor by virtue of an Indian treaty held no ground for recovery by one who had no title nor prior possession. Dunbar v. Green, 198 U. S. 166, 49 Law. Ed. 998.

Evidence insufficient to show title in plaintiff. Gwinner v. Michael, 103 Va. 268, 48 S. E. 895. Evidence insufficient to show that the deed to plaintiff from the common source was executed prior to the one to the defendant. Skidmore v. Smith [Ky.] 84 S. W. 1163.

Evidence sufficient to show that plaintiff was entitled to possession. Gould v. Alton, 93 Minn. 448, 101 N. W. 965. A showing of title from the record owner by deed executed after he was ousted by the defendant will sustain the action. Chesapeake Beach R. Co. v. Washington, P. & C. R. Co., 23 App. D. C. 587. Proof of title as purchaser at an execution sale against one to whom land was awarded in partition will sustain a verdict, though no part of the purchase price has been paid. Richardson v. Wymer [Va.] 51 S. E. 219.

55. On failure to establish the title by adverse possession relied on, recovery cannot be had on defects in the paper title of defendant. George v. Columbia & P. S. R. Co. [Wash.] 80 P. 767.

56, 57. Chesapeake Beach R. Co. v. Washington, P. & C. R. Co., 23 App. D. C. 587.

58. Ables v. Webb, 186 Mo. 233, 85 S. W. 383.

59. The holder of an equitable title can recover as against a mere trespasser. Hinton v. Moore [N. C.] 51 S. E. 787.

60. The mortgagor will not be allowed to set off the outstanding title of the mortgagee. Carter v. Smith [Ala.] 38 So. 184.

61. Defendant may show that he is in as mortgagee notwithstanding an assignment of the mortgage subsequent to the institution of the suit. Carter v. Smith [Ala.] 38 So. 184.

62. A lessee in possession has the same right to maintain his possession against his lessor as he has against any other person. State v. De Baillon, 113 La. 572, 37 So. 481.

63. See 3 C. L. 1160.

64. Penrose v. Cooper [Kan.] 81 P. 489. Proof of peaceable possession under a claim of title prior to the time defendant took possession under a voidable tax deed will sustain a recovery, though a good paper title is not established. Id. Where possession has once been taken and acts of ownership exercised thereunder, a continuing constructive possession up to within a reasonable time before bringing the action is sufficient as against a trespasser. Chesapeake Beach R. Co. v. Washington P. & C. R. Co., 23 App. D. C. 587.

65. Priester v. Melton [Ga.] 51 S. E. 330.

one in equity by setting up an equitable defense where no affirmative relief is asked,[67] but by the filing of amendments praying equitable relief, it may become so.[68] It is analogous to an action to quiet title in that the plaintiff must recover on the strength of his own title, but differs from it in that it is legal,[69] and from forcible entry and unlawful detainer in that title is involved.[70] In an action to recover land purchased at foreclosure sale, an irregularity occurring at such sale cannot be inquired into.[71] The Georgia statutory action for the recovery of real property is a mixed action; partly ex delicto but mainly possessory.[72] It is in no sense an action ex contractu and cannot be joined with such an action.[73]

§ 2. *Defenses.*[74]—Title in the defendant[75] or that he is in possession under a contract to purchase,[76] or by virtue of homestead rights,[77] is a good defense. A ground of defense repudiated by the plea and evidence cannot be asserted.[78] There is a conflict of authority as to whether an equitable title is a good defense.[79]

A judgment in ejectment is not a bar to another action between the same parties for the same land,[80] unless such judgment is more than a mere ejectment judgment and accords the defendant full equitable relief.[81] It is not barred by bringing an inappropriate remedy for use and occupation under a license,[82] nor by the dismissal of a bill to set aside a judgment recovered against a tenant where such bill did not ask the determination of the landlord's title.[83] A judgment against a tenant is not, so far as title to the land is concerned, conclusive against the landlord who is not made a party,[84] and especially where the judgment is by default and neither tenant nor landlord appeared.[85] The action may be barred by limitations.[86]

66, 67. Kessner v. Phillips [Mo.] 88 S. W. 66.

68. So that when the same is referred to an auditor, exceptions of fact to his report need not be submitted to the jury. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

69. See Quieting Title, 4 C. L. 1167.

70. See Forcible Entry and Unlawful Detainer, 3 C. L. 1435. The pendency of an action in ejectment will not bar forcible entry and uniawful detainer. Merki v. Merki, 113 Ill. App. 518.

71. The terre tenant against whom the judgment in scire facias was rendered cannot complain that no service thereof was made on the mortgagor. Taylor v. Beckley, [Pa.] 61 A. 79. See, also, Foreclosure of Mortgages on Land, 3 C. L. 1438; Judicial Sales, 4 C. L. 321.

72. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

73. A grantee in a security deed cannot join an action against the widow of the deceased grantor to recover the land, and a suit against the grantor's estate on the debt secured by the deed. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

74. See 3 C. L. 1160.

75. An owner may defend ejectment on any title which he has acquired for the purpose of fortifying his possession. Richardson v. Morris, 26 Pa. Super. Ct. 192.

76. Unless it is shown to have been broken or abandoned. Norris v. Billingsley [Fla.] 37 So. 564. A vendor in a contract of which time is not the essence and which does not stipulate for forfeiture in case of failure to pay the purchase price, cannot maintain ejectment on failure of the purchaser to pay a balance due without showing an abandonment of the contract. Brixen v. Jorgensen, 12 Utah, 290, 78 P. 674.

77. An answer setting forth that the defendant is the widow of one who died seised of the premises in controversy who at the time of his death was occupying them as a homestead and that the defendant so occupies them, states a defense. Gates v. Solomon [Ark.] 83 S. W. 348.

78. A life lease. Rausch v. Briefer [Mich.] 101 N. W. 523.

79. That it is: Leggett v. Peterson [Ga.] 50 S. E. 51. The plea upon equitable grounds provided for by Rev. St. 1892, § 1047, though not entitling the pleader to the same full relief as would be given him in equity, entitles the defendant to a verdict when it is sustained by proof. Smith v. Love [Fla.] 38 So. 376.

That it is not: Rausch v. Briefer [Mich.] 101 N. W. 523.

80. See Jamison v. Martin, 184 Mo. 422, 83 S. W. 750.

81. Defendant was given a lien for the value of improvements and for sums paid at the tax sale and for subsequent taxes. Jamison v. Martin, 184 Mo. 422, 83 S. W. 750.

82. Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815.

83. Not a bar to an action by the heirs of the landlord. Eldred v. Johnson [Ark.] 86 S. W. 670.

84, 85. Eidred v. Johnson [Ark.] 86 S. W. 670.

86. An action to determine whether land is subject to a trust is not one for the recovery of land so as to bar a subsequent action under Code Civ. Proc. 1902, § 98, requiring a second action to be brought within two years after the dismissal of the former. Martin v. Ragsdale [S. C.] 50 S. E. 671.

§ 3. *Parties.*[87]—One co-tenant may maintain the action alone as against one who is not a co-tenant.[88] It may be maintained by an administrator alone,[89] or by the heirs of an owner,[90] but not by a temporary administrator,[91] and if joined as a party plaintiff, his name may be stricken.[92] A tenant who disclaims and surrenders possession is properly retained as a party to determine his liability for rent while in possession.[93] The wife of the holder of the record title properly made a party and charged with a personal liability for withholding the premises is required to answer.[94]

§ 4. *Process and pleading.*[95] *Process.*—In New Jersey, in ejectment against a corporation, the declaration may be annexed to the summons and served therewith.[96] This rule applies where it is necessary to obtain the judge's order directing the manner of service.[97]

The complaint[98] must contain a description of the property sufficient to identify it,[99] allege title and a right to possession,[1] and clearly state that defendant is in possession,[2] an allegation of possession being one of fact.[3] By statute in Arkansas, muniments of title may be attached to the complaint as exhibits.[4]

NOTE. Impairment of contract obligation: Ejectment by L. claiming under a quitclaim deed from P. B., defendant below, showed title through a sheriff's certificate issued upon foreclosure sale to her as mortgagee and purchaser. B. had been in possession since breach of condition by the mortgagor to pay taxes. The statute existing when the mortgage was executed did not limit the period within which the sheriff's deed was to be made. Subsequently a statute limiting such time to five years after the period of redemption had expired was passed. B. neglected to comply with the provision, and secured no deed within the prescribed time. Held, ejectment would not lie. Bradley v. Lightcap, 195 U. S. 1, 49 Law. Ed. 65.

The decision is based upon the impairment of the contract obligation wrought by the latter enactment, which the court (per Chief Justice Fuller) refuses to read into the terms of the mortgage previously made. This cause was twice before the Illinois supreme court (188 Ill. 510, 201 Ill. 511): judgment for defendant B. being first reversed, and the case remanded, and on a second appeal, judgment for plaintiff L. affirmed. The United States circuit court for the Northern District of Illinois refused to take jurisdiction of a bill to quiet title, maintaining that no Federal question was involved, the statute in question neither forfeiting B.'s title to the mortgagor, nor interfering with her title acquired by possession. This decree was affirmed on appeal. The question of impairment of contract obligations has arisen, in this connection, in numerous ways. Without impairing such obligations, it is held, the remedy afforded by law may be changed. Sturges v. Croninshield, 4 Wheaton 122. But a law creating or extending the period of redemption in favor of the mortgagor and his judgment creditors passed subsequently to the execution of the mortgage is void. Barnitz v. Beverly, 163 U. S. 118; Cargill v. Powers, 1 Mich. 369. And a law extending the period of redemption from tax sale passed after the sale, but before the redemption period is expired, is void. Robinson v. Howe, 13 Wis. 380. But as to a stranger purchasing at foreclosure sale, a change in the law subsequent to the execution of the mortgage, does not work an impairment of the contract. Hooker v. Burr, 194 U. S. 415, 48 Law. Ed. 1046. See 36 American L. Rev. 70, as to the protection afforded contracts by the Federal Constitution.—From 3 Mich. L. R. 157.

87. See 3 C. L. 1161.

88. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382.

89. Under Sand. & H. Dig. § 2573, providing that the action may be maintained by one entitled to possession, an administrator may maintain it without joining the heirs when the land is needed for the payment of debts of the estate. Cook v. Franklin [Ark.] 83 S. W. 325. May be maintained by an administrator, regardless of whether it is for payment of debts or distribution. Moragne v. Moragne [Ala.] 39 So. 161.

90. Doris v. Story [Ga.] 50 S. E. 348.

91. He has no title. Doris v. Story [Ga.] 50 S. E. 348.

92. Doris v. Story [Ga.] 50 S. E. 348.

93. Crane v. Cameron [Kan.] 81 P. 480.

94. In order to avoid liability for costs. Stephenson v. Doolittle, 123 Wis. 36, 100 N. W. 1041.

95. See 3 C. L. 1161.

96, 97. Kane v. Trustees of Fillmore Ave. Baptist Church [N. J. Law] 60 A. 1099.

98. See 3 C. L. 1161, n. 57.

99. Bossier's Heirs v. Jackson [La.] 38 So. 525. The description is sufficient if by the aid of a survey and persons knowing the monuments and boundaries mentioned, the land can be found. Off v. Heinrichs [Wis.] 102 N. W. 904.

1. An allegation of facts showing possession in the defendant and that he denies plaintiff's title and right to possession states a cause of action for possession. Love v. Turner [S. C.] 51 S. E. 101. A declaration that plaintiff owns and is entitled to possession of an undivided one-half of the premises is sufficient. Brosnan v. White, 136 F. 74. Complaint by a Cherokee Indian against a United States citizen held to state a cause of action. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893.

2. An allegation that at the commencement of the action plaintiff was the owner

An answer[5] must be definite in its traverse of plaintiff's title,[6] and set forth particularly the nature of the title claimed by the defendant.[7] One alleging title by adverse possession must allege that the statutory period expired prior to the commencement of the action;[8] and where title is claimed under a short-period statute, it must show that the terms of that statute have been complied with.[9] Pleading in avoidance of the title alleged is an admission of it.[10] An answer setting up a special right to possession must allege in what manner such right exists.[11] A general denial to a complaint specifically setting forth the title claimed raises no issue.[12] Under the plea of a general issue to a writ of entry, only the question of title is in issue.[13]

Amendments are allowable in ejectment as well as in other actions.[14]

§ 5. *Evidence.*[15]—The burden is on the plaintiff to establish his title[16] or right

and in possession of the entire premises and that for about one year prior thereto defendant "had been and now is" unlawfully in possession of a described portion, is demurrable. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281.

3. An allegation that plaintiff's predecessor in title died seised and possessed of the land in controversy is an allegation of fact, not a conclusion. Pace v. Crandall [Ark.] 86 S. W. 812.

4. A plat, not being a deed or written evidence of title, is not a proper exhibit to be attached to a complaint under Kirby's Dig. § 2742. Pace v. Crandall [Ark.] 86 S. W. 812. And not being a proper exhibit was not a subject of exception under Kirby's Dig. § 2743. Id.

5. Under the Federal statute relative to the power of townsite commissioners in regard to property in the Creek Nation, answer held to state a defense and to require the investigation of the question as to whether prior possession of the plaintiff entitled him to recover and whether the action of the board was legal. Madden v. Anderson [Ind. T.] 82 S. W. 904.

6. An answer setting up that persons under whom plaintiff claimed had no title and that a deed to plaintiff was void and setting up limitations without reasons is not demurrable, but is subject to a motion to make more definite. Gates v. Solomon [Ark.] 83 S. W. 348.

7. Under the Alaskan Code the particularity required is complied with if he allege his estate. That he is sole or part owner of the fee or upon condition or for life or years, Brosnan v. White [C. C. A.] 136 F. 74.

8. Gates v. Solomon [Ark.] 83 S. W. 348.

9. Sand. & H. Dig. § 4819 (2 year statute) contemplates possession under a tax deed, and an allegation of possession under a purchase is insufficient. Harvey v. Douglass [Ark.] 83 S. W. 946.

10. Setting up title by tax deed and adverse possession. Harvey v. Douglass [Ark.] 83 S. W. 946.

11. That defendant holds the premises as a homestead. Gates v. Solomon [Ark.] 83 S. W. 348. Where a widow is entitled to possession of the mansion house until dower is assigned, an answer claiming to hold under a right of dower is not good unless it shows that the premises in question constituted the mansion farm. Id.

12. Harvey v. Douglass [Ark.] 83 S. W. 946. An allegation in an answer that "defendants deny that plaintiff now has or ever has had title" is ineffective. Pace v. Crandall [Ark.] 86 S. W. 812.

13. Plea of nul disseisin amounts to a plea of the general issue. Hastings v. Lawson, 187 Mass. 72, 72 N. E. 252.

14. A complaint, the description in which does not cover the land when laid down upon the ground, may be amended before defendant's appearance under Va. Code 1904, p. 1712. King v. Davis, 137 F. 198. A complaint which does not describe the land to which plaintiff appears to be entitled should be amended after verdict to conform to the evidence. New York, etc., R. Co. v. Horgan, 26 R. I. 448, 59 A. 310. The abstract of title attached to the petition may be amended by any supplementary matter in aid thereof. Brice v. Sheffield, 121 Ga. 216, 48 S. E. 925. An answer denying the material allegations of the complaint and alleging that defendant is in possession under a good and perfect title may be amended by setting up an equitable title. Leggett v. Peterson [Ga.] 50 S. E. 51.

15. See 3 C. L. 1162.

16. Title and right to possession held established. Collier v. Alexander [Ala.] 38 So. 244. Where defendants claim under a parol gift from plaintiff's ancestor, a finding that no gift was made and that plaintiff is the owner of the premises is sufficient to support the judgment. Eva v. Symons, 145 Cal. 202, 78 P. 648.

Homestead entryman whose entry was contested held entitled to judgment as against persons claiming under his contestants. White v. Johnson [Idaho] 79 P. 455. Plaintiff must show title to the particular land in dispute. Harrison v. Gallegos [N. M.] 79 P. 300. Where **defendant is in actual possession** claiming title by a series of deeds, plaintiff must show good title from some unimpeachable source in order to overcome the presumption of ownership arising from occupation. Baxter v. Brown, 26 R. I. 381, 59 A. 73. Recovery against one in possession under a paper title cannot be had on proof of paper title without proof of occupancy by plaintiff or his predecessors. Id. To prove title by **sale on execution**, the

to possession,[17] as alleged in his complaint,[18] and proof of legal title in him precludes the granting of a nonsuit.[19] He must prove title as against the world or from a common source,[20] at the commencement of the action and at the time of trial.[21] If he claims title by adverse possession, he must prove every element necessary to constitute title under the statute of limitations.[22] But after he has established a prima facie title,[23] the burden is on the defendant to prove facts negativing the case so made.[24] Where title is claimed from a common source, neither party is required to prove another title or pursue the chain further than to the common grantor;[25] but plaintiff must show a better title than that of defendant or an actual prior possession in order to put the defendant to the necessity

purchaser must show a valid judgment, an execution or order of sale and deed. Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617. A claim of title through a **tax deed** can be sustained only by proof that the law has been complied with. Id. To authorize a recovery on **a sheriff's deed** there must be a valid judgment, execution, levy, sale and deed; and it must also appear that the defendant in judgment had an estate subject to levy and sale. Carter v. Smith [Ala.] 38 So. 184.

Evidence held for the jury where the premises in controversy were near the boundary. Richardson v. Morris, 26 Pa. Super. Ct. 192; Daley v. Wingert, 210 Pa. 169, 59 A. 982. Conflicting evidence as to the identity and acreage of the tract sued for raises a question for the jury. Error to direct a verdict for plaintiff. Brand v. Learned [Miss.] 38 So. 43.

17. A mortgagee entitled to possession may maintain a real action whether there has been a breach of the condition of the mortgage or not. Davis v. Poland, 99 Me. 345, 59 A. 520.

18. Burns' Ann. St. 1901, § 1066. On an allegation of legal title, proof of an equitable one does not entitle him to recover. Coppock v. Austin, 34 Ind. App. 319, 72 N. E. 657.

Evidence insufficient to establish the title alleged. George v. Columbia & P. S. R. Co. [Wash.] 80 P. 767; Coppock v. Austin, 34 Ind. App. 319, 72 N. E. 657. A deed offered in evidence which describes the land mentioned in the complaint except that it is not clear whether the number of feet stated by figures is the same as that stated in the complaint is not subject to the objection "that it describes a different piece of land than that described in the complaint." Marsh v. Bennett [Fla.] 38 So. 237. Where the complaint described the land according to an unauthorized plat, the proof must show that such description was identical with the true description by metes and bounds as alleged. Pace v. Crandall [Ark.] 86 S. W. 812.

19. Where defendants admit legal title in plaintiff but aver that they are in possession under a contract to purchase with the greater portion of the purchase money paid and pray specific performance. Du Bignon v. Finch [Ga.] 51 S. E. 574.

20. Love v. Turner [S. C.] 51 S. E. 101. **If the land is wild and unoccupied** he must establish a superior paper title. Skidmore v. Smith [Ky.] 84 S. W. 1163. Where defendants do not claim from the same source as plaintiff, and make no admissions concerning title, plaintiffs must show prior possession or a holding in privity with some one who had prior possession or title. Leech v. Karthaus [Ala.] 37 So. 696. Proof of common source is not established by showing that defendant claims title to a part of a subdivision of which the land in controversy is a part but is distinct from the part claimed by defendant. Butt v. Mastin [Ala.] 39 So. 217.

21. A deed from plaintiff to defendant followed by no evidence of a reconveyance, precludes judgment for plaintiff. Rottenberry v. Brown [Ala.] 38 So. 804.

22. Crist v. Boust, 26 Pa. Super. Ct. 543. A nonsuit is properly refused where plaintiff proves possession under color of title for twenty years. Lassiter v. Okeetee Club [S. C.] 49 S. E. 224. Adverse possession for 20 years enables the possessor to maintain ejectment. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142.

23. Claim under unrecorded deeds and proof of possession by their grantors establishes a prima facie case. Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815. Though a plaintiff claiming under mortgage foreclosure and sale should introduce the mortgage, the decree and deed to plaintiff make out a prima facie case. Chesapeake Beach R. Co. v. Washington P. & C. R. Co., 23 App. D. C. 587. A bond for title from the common source and a deed to plaintiff from the holder of the bond to plaintiff's grantor establish a prima facie case. Skidmore v. Smith [Ky.] 84 S. W. 1163.

24. A judgment of nonsuit cannot be based on extrinsic facts such as a judgment in another case. Wood v. Earls [Wash.] 80 P. 837; Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815. Possession in defendant under a contract of sale with plaintiff's grantor after he had parted with title is not sufficient to overcome a prima facie title established by plaintiff. Id. Fraud set up as a defense not sustained by the evidence. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775. Where a deed in plaintiff's chain is signed by acknowledgment only, the defendant has the burden to overcome the legal effect of the acknowledgment as a signing. Loyd v. Oates [Ala.] 38 So. 1022. The presumption of possession within the statutory period where plaintiff shows legal title must be rebutted by proof of adverse possession within such period. Love v. Turner [S. C.] 51 S. E. 101. Evidence held to show that the land in controversy was covered by a patent under which defendant claimed. Speer v. Duff [Ky.] 84 S. W. 1140.

25. Brosnan v. White, 136 F. 74.

of supporting his possession by a title superior to one of naked possession,[26] and neither can assail the title of the common source.[27] A conveyance by one in possession is prima facie evidence of title,[28] but a conveyance by one not in possession nor connected with the legal title is not.[29] The evidence admissible[30] is confined to the title pleaded.[31] Evidence of any defense legal or equitable may be given under a general denial.[32] Possession cannot be established by family repute,[33] and an administrator's application for leave to sell land is not evidence of title or possession in his intestate.[34] A deed, the description in which is so uncertain as to afford no means of identification of the premises, is no evidence of title[35] unless explained by parol,[36] and will not sustain a recovery.[37] An intermediate deed between the conveyance from the commonwealth and plaintiff's title is not admissible without evidence of a line of paper title from the grantee of the commonwealth to the grantor in the deed offered in evidence.[38] Such a deed is admissible, however, on a claim of title by adverse possession, or where it is connected with the grant of the commonwealth by recitals.[39] Where plaintiff relies on a deed coming from his own possession, defendant may rely on an indorsement thereon showing it to be void without proof of execution.[40]

26. Harrison v. Gallegos [N. M.] 79 P. 300.

27. Where the common source was an Indian and neither the United States nor the nation of which the common source was a citizen, was a party. Wilhite v. Coombs [Ind. T.] 82 S. W. 772.

28. Terhune v. Porter, 212 Ill. 595, 72 N. E. 820.

29. Conveyance of wild land by one not connected with the legal title does not draw to the grantee constructive possession available in ejectment. Terhune v. Porter, 212 Ill. 595, 72 N. E. 820.

30. Where it is sought to recover a portion of lands partitioned by commissioners selected by co-tenants, title being traced through partition deeds, a commissioner may testify as to partition and who the commissioners were. Senterfeit v. Shealy [S. C.] 51 S. E. 142. And a witness who testifies that he knows the land in question may be asked if he knows the land described in the deed in evidence, the description being read as part of the question. Senterfeit v. Shealy [S. C.] 51 S. E. 142. Statements by a grantor that he had delivered a deed are admissible against him or those claiming under him adversely to the deed. Cribbs v. Walker [Ark.] 85 S. W. 244. Where plaintiff shows title from the state, defendant may show an older grant. Love v. Turner [S. C.] 51 S. E. 101. Where it is admitted that a judgment under the execution of which plaintiff claimed was final, it was not competent for defendant to assail it. Kessner v. Phillips [Mo.] 88 S. W. 66. A receiver's deed in plaintiff's chain of title is admissible, though the defendant was not a party to the action which resulted in the decree under which the receiver sold the property. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Nor would the fact that the receiver was not in possession of all the property at the time the deed was executed. Id. Evidence of a lost deed never recorded is not admissible, Laws 1885, p. 233, c. 147 providing that a deed is only valid from registration as against bona fide purchasers. Hinton v. Moore [N. C.] 51 S. E. 787. In an action by a guardian, evidence of his motives, belief or desires is immaterial. Hayden v. Collins [Cal. App.] 81 P. 1120.

31. Where defendant claimed as mortgagee in possession and evidence of an assignment of his mortgage was introduced, evidence of a reassignment is not admissible in rebuttal. Barson v. Mulligan, 94 N. Y. S. 688. Under a court rule providing that parties shall file abstracts of title and evidence shall be confined to the facts denied, a defendant who has set out a written agreement as the basis of his title cannot show a verbal sale followed by possession and improvements. Westcott v. Crawford, 210 Pa. 256, 59 A. 1085. Evidence of equitable defenses not pleaded as required by law is not admissible in writ of entry. Hastings v. Lawson, 187 Mass. 72, 72 N. E. 252.

32. The defendant may attack a judgment by virtue of which a sheriff's sale was made. Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617.

33. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

34. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691; Pitts v. Whitehead, 121 Ga. 704, 49 S. E. 693.

35. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691; Crawford v. Verner [Ga.] 50 S. E. 958. A writing purporting to convey land but in which the description is so indefinite that the land cannot be identified is no evidence of title without extrinsic evidence showing the description applicable to a particular parcel. Priester v. Melton [Ga.] 51 S. E. 330.

36. An ambiguous deed, explained by parol, is admissible as foundation for a recovery. Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591. Deed held admissible as tending to prove the title alleged. Pace v. Crandall [Ark.] 86 S. W. 812.

37. Crawford v. Verner [Ga.] 50 S. E. 958.

38, 39. Crist v. Boust, 26 Pa. Super. Ct. 543.

40. The burden is on the plaintiff to explain the indorsement. McBrayer v. Walker [Ga.] 50 S. E. 95.

§ 6. *Trial and judgment.*[41]—The United States courts in the Indian Territory have jurisdiction of an action by a Cherokee Indian or the Cherokee Nation to recover land from an intruder.[42]

In North Carolina the defendant is required to file a bond for costs and damages,[43] and in Arkansas, in an action to recover land held under tax title, the plaintiff must make affidavit of a tender of the amount paid if the sale is void for irregularities of officers.[44]

If a complaint states a cause of action in ejectment,[45] it will be tried as such, though erroneously styled.[46] A different cause of action and source of title cannot be introduced into the case after issue joined.[47]

Instructions must meet the usual requirements[48] and should not deny a party the benefit of the presumptions arising from prior possession.[49]

In determining what judgment shall be entered on a special verdict, only the pleadings and postea can be looked to; evidence cannot be considered.[50] The holder of the legal title is bound by a judgment against the tenant where he is notified of the action and conducted the defense;[51] but under a statute providing that a judgment shall be conclusive as to title and right to possession as to the party against whom it is rendered and those claiming under him after commencement of the action, a judgment against a tenant who removes prior to execution is not binding on the landlord or a subsequent tenant.[52] A Virginia office judgment in ejectment cannot become final without the intervention of a court or jury,[53] but may be made final without inquiry at a subsequent term where no claim for damages is filed.[54] A judgment must be enforced within a year and a day after rendition both at common law and by the statute of Virginia.[55] It will not be reversed on plaintiff's appeal for error in allowing all instead of only one defendant to recover for im-

41. See 3 C. L. 1163.

42. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893.

43. That defendants not in possession fail to file the bond for costs and damages including rents and profits required of defendants in possession by Clark's Code, § 390, is no ground for judgment against them. Carraway v. Stancill, 137 N. C. 472, 49 S. E. 957. The bond for costs and damages, including rents and profits required of defendant by Clark's Code, § 390 may be increased if the defendant shows a disposition to delay the suit. Id. If defendant in possession files the bond for costs and damages including rents and profits required by Clark's Code, § 390, plaintiff properly asks no judgment against him. Id.

44. The statute does not apply where it is void because made in the wrong county. Harvey v. Douglass [Ark.] 83 S. W. 946.

45. A complaint against a tenant at will alleging that he refused to surrender the premises after notice to quit, and demanding restitution of the premises and triple damages and costs states a cause of action in ejectment. Hayden v. Collins [Cal. App.] 81 P. 1120.

46. Evidence of title is admissible under a complaint stating a cause of action in ejectment, though the action is erroneously styled one in forcible entry. Hayden v. Collins [Cal. App.] 81 P. 1120.

47. Where plaintiff bases his right of recovery solely on the location of a mining claim and the sole issue raised was whether he had forfeited his rights, he cannot after the case is before the jury rely on adverse possession. White River Min. & Nav. Co. v. Langston [Ark.] 88 S. W. 971.

48. Not make the case depend on a single issue if there are others to be considered. Campbell v. Bates [Ala.] 39 So. 144. Not specifically call attention to a particular item of evidence. Id.

49. Where both parties claim by adverse possession, an instruction denying one the presumed rights arising from prior possession of which the other had notice is erroneous. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382. And if neither show a muniment of title better than the other, an instruction placing one party in the attitude of a trespasser is erroneous. Id.

50. In an action by borough authorities to recover a portion of a street, the plaintiff is entitled to judgment where the pleadings and postea show that the locus in quo was part of a street and application was made by both parties to enter judgment on a special verdict. Borough of Seabright v. New Jersey Cent. R. Co. [N. J. Law] 60 A. 64.

51. Crane v. Cameron [Kan.] 81 P. 480.

52. They cannot be considered as claiming through or under the tenant against whom judgment was rendered. King v. Davis, 137 F. 198.

53, 54. King v. Davis, 137 F. 198.

55. A judgment not enforced by writ of possession within a year and a day after entry thereof will not support a writ of

provements;[56] but where judgment by default is irregularly taken and plaintiff put into possession under a writ, the court in striking the judgment should award restitution if the property has not been sold.[57]

A writ of possession[58] is not exhausted by one dispossession.[59] One in possession who was not a party to the action cannot be disturbed by virtue of it;[60] but the holder of an independent title, not a party to the action, who acquires the defendant's title pendente lite, may be ousted, though his independent title has not been litigated.[61]

Costs.—In Wisconsin a disclaimer by a defendant holder of the record title does not entitle him to a judgment for costs,[62] but a disclaimer by one charged with a personal liability for withholding the premises constitutes a complete defense.[63]

§ 7. *New trial.*[64]

§ 8. *Mesne profits and damages.*[65]—In many states it is provided by statute that damages for detention of the premises may be recovered[66] if properly pleaded.[67] A prayer for mesne profits and damages may be set up by amendment to the original complaint.[68]

§ 9. *Allowance for improvements and expenditures.*[69]—As a general rule, only improvements made in good faith and without notice of adverse claims to the premises can be recovered for.[70] Hence one who makes improvements with actual or constructive notice of superior rights of another cannot recover for them,[71] though through mistake of law he regards his title as superior.[72] Statutes allowing

entry subsequently issued. King v. Davis, 137 F. 198.

56. Where one defendant is entitled to recover for improvements but others are not, a judgment erroneous in that it allows a recovery for all is not ground for reversal on plaintiff's exception. Boucher v. Tremhley [Mich.] 12 Det. Leg. N. 184, 103 N. W. 819.

57. Hoffman v. Hafner, 211 Pa. 10, 60 A. 314.

58. See 3 C. L. 1164, n. 3. See Possession, Writ of, 4 C. L. 1060.

59. Second execution was lawful. Smith v. State [Tex. Cr. App.] 81 S. W. 936.

60. Where one in possession was not a party to the action and would be disturbed by execution of the writ of possession, an order will issue to the officer executing the writ to leave his possession undisturbed. King v. Davis, 137 F. 222.

61. King v. Davis, 137 F. 222.

62. Laws 1901, c. 152, p. 186, providing that a judgment against the holder of the record title shall be binding on him and all who claim under him. Stephenson v. Doolittle, 123 Wis. 36, 100 N. W. 1041.

63. Not having a record title, Laws 1901, c. 152, p. 186 does not apply. Stephenson v. Doolittle, 123 Wis. 36, 100 N. W. 1041.

64. See 3 C. L. 1164, and New Trial and Arrest of Judgment, 4 C. L. 810.

65. See 3 C. L. 1164.

66. Under Mansf. Dig. § 2637 (Ind. T. Ann. St. 1899, § 1921), a successful plaintiff is entitled to recover rents and profits as damages for detention. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893. In an action for mineral rights where the defendant has leased the premises, the royalties received by him and due to him are the proper damages recoverable as mesne profits. Moragne v. Moragne [Ala.] 39 So. 161.

67. An allegation that defendant while in possession cut and sold a large number of trees, and demanding damages, sufficiently pleads damages for withholding possession. Lassiter v. Okeetee Club [S. C.] 49 S. E. 224.

68. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

69. See 3 C. L. 1165.

70. A purchaser with notice of his grantor's violation of a condition subsequent in his deed is not entitled to recover for improvements. Van Tassell v. Wakefield, 214 Ill. 205, 73 N. E. 340. In order to claim for improvements under Comp. Laws 1897, § 10,995, defendants must have occupied under color of title and have been in possession six years. Boucher v. Trembley [Mich.] 12 Det. Leg. N. 184, 103 N. W. 819. Under Comp. Laws 1897, § 10,995, where a husband and wife occupied premises as a homestead but he died before the expiration of six years and his widow continued the occupancy and made improvements, held, she was entitled to recover for improvements. Id.

71. Yock v. Mann [W. Va.] 49 S. E. 1019; Wood v. Tinsley [N. C.] 51 S. E. 59. Under Acts 1883, p. 106, § 1, occupancy under color of title and in good faith is necessary to entitle an occupant to recover for improvements. Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224. A bond for title is not color within this statute. Id.

72. One with notice of facts rendering his title inferior to another's, who by mistake of law regards his title good, cannot claim for improvements. Yock v. Mann [W. Va.] 49 S. E. 1019.

a defendant to recover for improvements are not retroactive as to occupancy.[73] The statutes of some states give the plaintiff an election to pay the value of the improvements or sell the land to the defendant.[74] A defendant desiring reimbursement for improvements must make his claim by proper averments in his answer;[75] but the striking of an answer as frivolous does not preclude a recovery.[76] Where there is a prayer for damages for detention, a tender of money for improvements need not be brought into court.[77] In some states a claim for improvements must be made by petition after judgment,[78] and that a claim is not set up in the action does not preclude the defendant from thereafter while still in possession maintaining a suit in equity therefor.[79]

ELECTIONS.[80]

§ 1. *Legal authorization, time, place and notice.*[81]—Authority always comes from the constitution and statutes under it prescribing occasions which befall either periodically or are created at irregular times by petition of electors, legislative submission or the like.[82] A petition must be signed by such electors in such number as the law fixes.[83] It may, if the statute shows no contrary policy, be withdrawn and refiled.[84] Where a certain local policy is submitted, a petition which is legally insufficient does not have precedence over a legal petition, covering overlapping

73. To give them such effect would invalidate them as affecting vested rights. Investment Co. v. Hambach, 37 Wash. 629, 80 P. 190.

74. Under the Kansas occupying claimants' law if the defendants are entitled to the value of improvements and the plaintiff elects to sell to them and they refuse a deed, the value of the land specially found in the action should be adjudged a first lien. Bruner v. Hunt [Kan.] 81 P. 194.

75. Evidence of improvements is not admissible unless claim therefor is made in the answer. Carraway v. Moore [Ark.] 86 S. W. 993.

76. Does not preclude the defendant from making proof of equitable claims for tax certificates, fees, recording, etc. Stephenson v. Doolittle, 123 Wis. 36, 100 N. W. 1041.

77. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893.

78. Cannot be set up at the trial of the action. Wood v. Tinsley [N. C.] 51 S. E. 59.

79. Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010. Under Rev. St. 1899, §§ 3075, 3076, nothing but the value of improvements can be adjudicated, therefore an action for a portion of the purchase price paid is not brought under such statute. Id.

80. Scope of topic. The law of elections is not regarded as including that of offices and officers or their remedial rights (see Officers and Public Employes, 4 C. L. 854; Mandamus, 4 C. L. 506; Quo Warranto, 4 C. L. 1177) nor does it include appointive votes whereby public bodies like "boards" or "councils" chose officers (see Officers and Public Employes, 4 C. L. 854). Many questions pertinent to elections, whereby voters act on matters of law or local policy submitted to them are not susceptible of any generalization. Therefore in addition to this topic the topics Animals (stock law elections) 5 C. L. 113; Constitutional Law (adoption and amendment) 5 C. L. 620; Intoxicating Liquors (local option elections) 4 C. L. 252; Municipal Bonds, 4 C. L. 706; Municipal Corporations, 4 C. L. 720; Public Works and Improvements, 4 C. L. 1124; Schools and Education, 4 C. L. 1401, should be consulted as to elections specially relating to such matters.

81. See 3 C. L. 1165.

82. See 10 Am. & Eng. Enc. Law [2d Ed.] 562.

83. A petition for referendum in a municipal election under the Wisconsin statute requires the signature of 20 per cent. of the very names appearing on the last poll list. State v. Russell [Wis.] 102 N. W. 1052.

84. A petition for an election under the Brannock Law may be withdrawn, and the boundaries of the proposed district changed, and the petition refiled; and it is immaterial if in refiling the old sheets are used, without having the signers rewrite their

territory, which is properly filed before the insufficient petition is made sufficient.[85] Matters of local policy referred to voters must be described with certainty in the petition,[86] and the order calling the election must conform.[87]

Time.[88]—A fixed and authoritative time for holding an election is indispensable to a full and effectual exercise of the right to vote;[89] but a substantial observance is sufficient, and a slight variance will not invalidate,[90] except where the time is mandatory.[91]

Place.[92]—It is also imperative that the place of holding an election shall be fixed. An election held at any other than the designated place is void;[93] but where result could not have been affected, an election held on the precinct boundary but outside was sustained.[94]

Precincts[95] may be created or changed by statute or under statutory authority as public convenience may require,[96] and their boundaries may become fixed by long public recognition.[97]

Notice[98] of some kind is essential to the validity of an election.[99] But the time and place of holding general elections is usually fixed by public laws of which all are bound to take notice.[1] Provisions, therefore, for giving notice, are to be

names, provided only that the signers assent to the change in the boundaries, and constitute forty per cent. of the electors of the district so changed. City of Columbus v. Glackin, 3 Ohio N. P. (N. S.) 356.

85. Under Brannock Law. Fulton v. Columbus, 3 Ohio N. P. (N. S.) 358.

86. Stock law. Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382.

87. Petition and order for stock law election must state what animals are to be kept up. Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382.

88. See 3 C. L. 1166.

89. The provision of the Nebraska constitution (Section 13, art. 18), that "the general election of this state shall be held on Tuesday succeeding the first Monday of November of each year," is not of itself an imperative command that general elections shall be held annually. State v. Galusha [Neb.] 104 N. W. 197.

90. See 3 C. L. 1166, n. 22. Under a statute that a local option election shall not be held within two years of a former election, that the result of the former election was published within the two years does not invalidate a subsequent election. Ex parte Smith [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 245.

91. The provision of the Brannock Law that an election shall be held not less than twenty or more than thirty days after the filing of the petition is mandatory, and compliance therewith is essential to the validity of the election. City of Columbus v. Cole, 3 Ohio N. P. (N. S.) 353.

92. See 3 C. L. 1166.

93. See 3 C. L. 1166, n. 27. But though the polling place is in a room not opening on a public thoroughfare, it having been established by the proper authorities, and been the authorized and usual voting place for years, its location does not render the election void. Choisser v. York, 211 Ill. 56, 71 N. E. 940.

94. The designation, in an order for an election and the proclamation giving notice thereof under the Brannock Law, of a voting place on the opposite side of a street forming one of the boundaries of the proposed district and fifteen feet beyond the center of the street where the boundary line runs, is not a sufficient ground for setting aside the will of the voters as expressed by a decided majority, in the absence of any showing of fraud, or that any electors were misled thereby or deprived of an opportunity to vote, or that the result would have been different had the voting place and booth been properly located within the district. In re Petition of John F. Ammer, 3 Ohio N. P. (N. S.) 329.

95. See 3 C. L. 1166, n. 27.

96. In New Hampshire it is within the general power of the legislature to divide towns into voting precincts, and have elections of all officers by precinct meetings instead of town meetings. In re Opinion of the Justices [N. H.] 60 A. 847. A statutory provision that precincts should not be changed within 90 days preceding an election has no reference to a special election upon question of creating a school district. Rader v. Board of Education of Beaver Dist. [W. Va.] 50 S. E. 240.

97. Where for many years certain lines have been recognized by election judges as the true lines of a township, votes cast in reliance thereon will not be excluded, though cast in wrong township. Lovewell v. Bowen [Ark.] 88 S. W. 570.

98. See 3 C. L. 1166.

99. Where notice of vacancy in an office and of an election to fill the vacancy is required by law, **it will be presumed that such notice was given,** and the burden rests upon one who assails the validity of the election to show the want of notice. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

1. Where a statute authorized the submission, at an annual election of borough officers, of the question of the issuance of bonds, failure of the notice of submission of this question to state place of election was not fatal. Fletcher v. Collingswood [N. J. Law] 59 A. 90.

regarded as merely directory.[2] The manner of notice prescribed in an act specially relating to one kind of elections respecting the public policy of a region is not abrogated by a law relating to general elections.[3] An irregularity in the publication of a proclamation by the mayor will not be considered, where it appears that notice to voters of the pendency of the election was so general that more votes were cast that at the last preceding election,[4] and a misnomer of the office by virtue of which the election was called has been disregarded.[5]

§ 2. *Eligibility and registration of electors.*[6]—These are matters of state concern to be fixed by their organic law or legislation within limitations of the Federal or state constitution.[7] The right to vote is usually limited to citizens[8] or freemen[9] who have attained their majority,[10] who are sane in mind,[11] and sometimes depends upon the payment of taxes.[12]

Residence.[13]—One of the more common requirements is that the person offering to vote shall for a given period have been a resident[14] of the district within which the election is held. It is competent for a state to require a stated residence and a prior registration of intent to become a voter.[15] Persons in the public service,[16] students in attendance at a college or university,[17] neither gain nor lose a residence.[18]

Registration.[19]—As a means of determining who possess the qualifications of voters, and of regulating the exercise of the right,[20] statutes have been passed in nearly all the states requiring the names of those entitled to vote to be previously recorded by officers designated for that purpose,[21] though as to some elections[22]

2. See 1 C. L. 982, n. 13; 3 C. L. 1166, n. 29. Failure of election notice to contain a description of territory proposed to be incorporated did not vitiate election. People v. New, 214 Ill. 287, 73 N. E. 362.

3. Stock law election requires 30 days notice (Stock Law, § 5), notwithstanding Acts 28th Leg. 1903, p. 133, c. 101. Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382. The requirement of 12 days notice of a local option election under the Texas statutes is not repealed by a general act requiring 20 days notice of an election. McHam v. Love [Tex. Civ. App.] 87 S. W. 875.

4. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

5. The fact that registration commissioners styled themselves "commissioners of election" in the public notice calling a special election was a mere clerical error and insufficient to invalidate election. Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

6. See 3 C. L. 1167.

7. See 3 C. L. 1167, n. 38, 39; 1 C. L. 982, n. 19, 20.

8. See 3 C. L. 1167, n. 40.

9. See 3 C. L. 1167, n. 41.

10. As the law notes no fraction of a day, a man attains his majority on the day preceding his 21st birthday; hence a man born on June 9, 1883, is eligible to vote on June 8, 1904. Erwin v. Benton [Ky.] 87 S. W. 291.

11. One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum or in appointing a guardian for him were proper application made, comes well within the class of persons who under the term "idiot" or "insane" are prohibited from voting by the constitution. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

12. See 3 C. L. 1167, n. 42. The payment by another of a poll tax will not disqualify the person whose tax is thus paid from voting. Schuman v. Sanderson [Ark.] 83 S. W. 940.

13. See 3 C. L. 1167.

14. As to what constitutes residence in the general sense, see Domicile, 5 C. L. 1041.

15. A law requiring a year's residence and notice is neither unreasonable nor does it add to the constitutional qualifications of Maryland; and it in no wise abridges the privileges and immunities of citizens or denies equal protection of laws contrary to the Federal constitution. Pope v. Williams, 98 Md. 59, 56 A. 543, 103 Am. St. Rep. 379; Pope v. Williams, 193 U. S. 621, 48 Law. Ed. 818.

16. Soldier in U. S. army. In re Cunningham, 45 Misc. 206, 91 N. Y. S. 974.

17. In re Jacobs, 45 Misc. 113, 91 N. Y. S. 596.

18. See 3 C. L. 1167, n. 45. An inmate of a Soldiers' Home does not lose his former residence, and hence cannot vote on local option where the home is situate. In re Smith, 44 Misc. 384, 89 N. Y. S. 1006.

19. See 3 C. L. 1168.

20. **Registration lists are only prima facie** evidence that persons whose names appear thereon are legally qualified to vote. People v. District Court of Third Judicial Dist. [Colo.] 78 P. 679.

21. Yates v. Collins, 26 Ky. L. R. 930, 82 S. W. 973.

22. While the charter of the city of Thomasville declares that no person who is not duly registered shall be allowed to vote in any election, there is no provision for

or localities it is not made necessary. A registration taken without legal warrant has no force in determining who or how many are qualified.[23] Registration laws must be just, reasonable, uniform and impartial,[24] not impairing constitutional rights of suffrage,[25] and statutory requirements as to time, place and manner of registration must be substantially complied with.[26] The name of a voter properly qualified may not at a subsequent meeting of the registration board be arbitrarily stricken from the lists.[27]

§ 3. *Nominations by convention or petition.*[28] *Conventions and nominations.*[29]—Conventions can only make such nominations as are specified in the call,[30] but the convention may delegate to a committee such authority as it itself possesses.[31]

Petitions.[32]—A provision that the elector shall "subscribe" excludes a signing by another.[33] An elector may sign but one petition in Rhode Island.[34] Where, as in Rhode Island, the petition is to be examined to determine which of the signers are qualified as shown by the voting list, no initials or abbreviations can be recognized except what are shown by the voting list.[35]

Certificates and declination and vacancies.[36]—The certificate must comply substantially with the statute,[37] naming the candidates and the offices,[38] and be filed at the proper time.[39] Under the Nebraska statute, a candidate declining a nomination must do so at least 12 days before the election.[40] A failure to properly certify nominations may result in a vacancy which a committee may fill.[41]

Contests and disputes.[42]—The decisions of statutory tribunals to whom have been submitted disputes as to rival nominations are final.[43]

registration for any other election than the annual election for municipal officers. City of Thomasville v. Thomasville Elec. Light & Gas Co. [Ga.] 50 S. E. 169.

23. The last tally list determines how many there were. City of Thomasville v. Thomasville Elec. Light & Gas Co. [Ga.] 50 S. E. 169.

24. People v. District Court of Third Judicial Dist. [Colo.] 78 P. 679.

25. See 1 C. L. 983, n. 28.

26. In Rhode Island it is the duty of the board of canvassers to hear evidence offered at a canvass meeting upon the qualifications of persons whose names are sought to be added or removed from the voting lists. Williams v. Champlin, 26 R. I. 416, 59 A. 75.

27. People v. District Court of Third Judicial Dist. [Colo.] 78 P. 684.

28. See 3 C. L. 1168.

29. See 3 C. L. 1169.

30. To entitle the nominees of a mass convention to a place upon the official ballot, the call must state that the convention is to assemble for the purpose of nominating candidates. State v. Hays [Mont.] 78 P. 486.

31. Where owing to a deadlock a party convention fails to make a nomination for state senator and thereafter a joint meeting of the proper committees makes a nomination, the nominee's name should be placed upon the official ballot. In re Kehoe, 45 Misc. 132, 91 N. Y. S. 889. If a mass convention of electors could not make nominations for public office because the call of the convention did not set forth such purpose, a committee appointed by such convention could not make such nominations. State v. Hays [Mont.] 78 P. 486.

32. See 3 C. L. 1168.

33. Gen. Laws 1896, c. 11, § 13. Attorney General v. Clarke, 26 R. I. 470, 59 A. 395.

34. Each elector may sign but one nomination. Gen. Laws 1896, c. 11, § 13. Attorney General v. Clarke, 26 R. I. 470, 59 A. 395.

35. Attorney General v. Clarke, 26 R. I. 470, 59 A. 395.

36. See 3 C. L. 1170.

37. See 3 C. L. 1170, n. 67. In Montana all convention nominations of one party must be contained in a single certificate. A separate certificate for each nominee cannot be filed. State v. Hays [Mont.] 78 P. 301.

38. State v. Hays [Mont.] 78 P. 301.

39. See 3 C. L. 1170, n. 68. State v. Dewey [Neb.] 102 N. W. 1015. A requirement that certificates of nomination for city offices shall be filed a certain length of time before the election will not be assumed merely because this is required in case of nominations for county offices. City of Annapolis v. Gadd, 97 Md. 734, 57 A. 941. The Montana statute that certificates of nomination must be filed with the secretary of state not more than 60 nor less than 30 days before the election is mandatory. State v. Hays [Mont.] 78 P. 301.

40. State v. Dewey [Neb.] 102 N. W. 1015.

41. In Montana an inadvertent failure to include the name of a convention nominee for a certain office in the certificate renders the certificate insufficient as to that office, and entitles the proper committee to fill the vacancy. State v. Hays [Mont.] 78 P. 301.

42. See 3 C. L. 1169. See, also, post, § 10.

43. See 3 C. L. 1169. People v. Rose, 211 Ill. 259, 71 N. E. 1125; State v. Stewart, 71 Ohio St. 55, 72 N. E. 307; State v. Larson [N. D.] 101 N. W. 315.

§ 4. *Official ballot.*[44]—The official ballot must be in substantial compliance with the form prescribed by statute.[45] A form which provides for a means of voting a "party" ticket has been held not offensive to the guaranty of freedom of elections.[46] Questions submitted must not be so couched as to render the vote ambiguous.[47] Statutes designed to protect the secrecy of the ballot usually forbid the use of other than white paper for the ballots.[48] A party emblem may be legally displayed, though not all the names of candidates who adopted it appear beneath.[49] Statutes which probibit the printing of a candidate's name in more than one column are constitutional.[50]

Use of party name.[51]—A substantial number of persons having an organization with the distinct views and policies is a political party,[52] and entitled to the benefit and exclusive use of a party name.[53] In Montana only one ticket may appear on a ballot under a particular party designation.[54]

§ 5. *Primary elections.*[55]—The legislatures of many states have brought nominating elections, called "primary elections," by which the nominees of a party or delegates to its nominating conventions are chosen, under the surveillance and protection of the law.[56] Proceedings under such statutes must conform substantially to the law as to time[57] and notice.[58] The provision of the Michigan primary statute, which requires that before the name of any candidate shall be placed on the ballot at a primary election such candidate shall on oath declare his purpose to become such, is unconstitutional.[59]

44. See 3 C. L. 1170.

45. See 3 C. L. 1170, n. 70. Under the general rule that a mere irregularity in form, which does not mislead the electors, will not invalidate an election, the court holds that the form of ballot used in this case, although not the form laid down in the statute, is not a sufficient reason for invalidating the election, and especially in view of the fact that the contestors by participating in the election sanctioned the form of ballot used. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

46. Provisions that there shall be printed at the left of ballots a list of the names of all the political parties, with squares at the right of each party named, and instructions as to method of voting party ticket, are not unconstitutional as interfering with freedom of elections. Oughton v. Black [Pa.] 61 A. 346.

47. Ballot in the alternative, "for or against the proposition of construction or purchase of waterworks," held to have rendered election nugatory. Marcellus v. Garfield [N. J. Law] 58 A. 1099.

48. Where paper of prescribed quality had become exhausted and a paper somewhat lighter in weight and color was used, no fraud appearing, election sustained. People v. Voorhis, 45 Misc. 104, 91 N. Y. S. 595.

49. The mere fact that a printed ballot contains at the head thereof the emblem legally adopted by a political party, but does not contain all of the names of the candidates adopting it, does not render the ballot void. Esquibel v. Chaves [N. M.] 78 P. 505.

50. State v. Porter [N. D.] 100 N. W. 1080; State v. Hanson, 93 Minn. 178, 102 N. W. 209.

51. See 3 C. L. 1170.

52. See 1 C. L. 985, n. 57. State v. Hays [Mont.] 78 P. 486. If a political party casts the requisite number of votes in a general state election, it is entitled by virtue of that fact to have its nominees for local and district offices placed upon the ballot, even if it did not cast the requisite percentage of votes in the particular county or district for which the nomination was made. Gaylord v. Curry, 145 Cal. 154, 78 P. 548.

53. "Social Democratic Party" is not an infringement on the right of a party bearing the name of "Democratic Party." In re Social Democratic Party, 45 Misc. 194, 91 N. Y. S. 941; Id., 93 N. Y. S. 1023.

54. Amending an election law to the extent of removing the circle from the head of the ticket, thereby preventing a voter from voting a straight ticket by marking in the circle does not change this rule. State v. Weston [Mont.] 78 P. 487.

55. See 3 C. L. 1170.

56. Commonwealth v. Combs [Ky.] 86 S. W. 697. See, also, Ellis v. Wheatly [Cal.] 81 P. 1105.

57. Nominees of a primary convention held entitled to have names printed on ballot, though petition was filed but 27 instead of 30 days before date of election. Ellis v. Wheatly [Cal.] 81 P. 1105.

58. A petition which alleges a call by the party central committee for primaries to elect delegates to city convention, but which fails to allege notice given of the primary election, is defective. State v. McCaffery [Mo. App.] 82 S. W. 1104.

59. Dapper v. Smith [Mich.] 101 N. W. 60.

Note: Article XVIII, § 1, of the State Constitution provides the oath which shall be required for qualification to an office, and further provides that no other oath shall be required. Where the constitution states the qualifications of an officeholder, the state legislatures can neither add to nor other-

Control by party committees.[60]—Primary elections are usually under the control of the party governing committee,[61] subject, however, to provisions of law governing their mode of action.[62]

Ballots for primaries. Review and contest of primary.[63]—In case of contest or dispute over a party nomination, the governing authorities of that party are usually given exclusive jurisdiction to determine it,[64] in which event their action is final.[65] A member of a party committee who is a brother of a contestee in a contest of a nomination for office pending before the committee is disqualified to sit in the proceeding.[66] The grounds of contest should be filed before such committee and notice given the contestee.[67] Where the time within which a contest must be begun is fixed by statute, the resolution of a committee fixing a different time is void.[68]

§ 6. *Officers of election.*[69]—If the tribunal required by law to appoint election commissioners fails to appoint such commissioners, the qualified voters present on election day may elect them in the manner prescribed[70] by statutes in nearly all the states. Where it is provided that officers shall be appointed from lists submitted as "provided by law," but the provision is one for convenience only, the appointment may be made, though no list is submitted and no law provides for one.[71] One cannot officiate at his own election,[72] but that one of the judges of an election for the incorporation of a school district was at the time a candidate for the office of trustee of the district did not render the incorporation election void.[73]

The duties of members of a canvassing board being ministerial, they are liable for the salary of a county officer who is kept out of office by the wrongful refusal of the board to recognize the certificate of precinct officers.[74]

An assignee of an election inspector's claim for compensation cannot maintain an action for conversion of certain cards bearing the inspector's signature, and which cards had been filed in the office of the board of elections.[75]

§ 7. *Polling the vote.*[76]—The state may make such reasonable regulations for the holding of elections and the voting thereat as shall protect and preserve the right of the elector to exercise the franchise;[77] but the votes of innocent electors

wise change them. Thomas v. Owens, 4 Md. 189, 223; Page v. Hardin, 8 B. Mon. [Ky.] 648, 661. If the above provision (Loc. Acts 1903, p. 142, No. 326), of the Kent County Primary Laws were valid then the franchise rights of the voters would be limited, for they would be unable to vote for any person who would not declare his candidacy. No man who was not seeking an office could be elected to it. In the case of Attorney General v. Common Council, 58 Mich. 213, 55 Am. Rep. 675, the doctrine is announced that the election franchise is the same in all parts of the state and cannot be essentially changed in any locality by legislation to regulate its exercise.—From 3 Mich. L. R. 237.

60. See 3 C. L. 1171.

61. See 1 C. L. 985, n. 66; 3 C. L. 1171. The officers of a primary election are officers of the state, though appointed by the party authorities. Commonwealth v. Combs [Ky.] 86 S. W. 697.

62. See 1 C. L. 985, n. 67; 3 C. L. 1171, n. 86.

63. See 3 C. L. 1171.

64. Commonwealth v. Combs [Ky.] 86 S. W. 697.

65. Harris v. Bruce [Ky.] 87 S. W. 1078. Such organization is not an inferior court so that certiorari will lie on refusal to hear contest. Taylor v. Democratic Committee of Franklin County [Ky.] 87 S. W. 787.

66. Taylor v. Democratic Committee of Franklin County [Ky.] 87 S. W. 786.

67. Hill v. Holdam [Ky.] 87 S. W. 805.

68. Taylor v. Democratic Committee of Franklin Co. [Ky.] 87 S. W. 786.

69. See 3 C. L. 1171.

70. Rader v. Board of Education of Beaver District [W. Va.] 50 S. E. 240.

71. A law providing for the submission of nominations of supervisors has no application where wardens and clerks are to be chosen. Pub. Laws 1900, c. 798, § 4 and Gen. Laws 1896, c. 11, § 32. Ney v. Whitley. 26 R. I. 464, 59 A. 400.

72, 73. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

74. Steadley v. Stuckey [Mo. App.] 87 S. W. 1014.

75. Rosen v. Voorhis, 45 Misc. 605, 91 N. Y. S. 126.

76. See 3 C. L. 1171.

77. A statute closing polls in cities of 300,000 inhabitants or over at four o'clock P. M. at November elections held to be a

are not to be rendered invalid by mere irregularities on the part of election officials;[78] though where it is plain that the irregularities have changed or rendered doubtful the result,[79] or where mandatory provisions have been dispensed with, the election is vitiated.[80] Provisions of law in regard to the preparation and distribution of ballots by designated officers are mandatory, and must be strictly construed.[81] An election is void in which one precinct of the county is deprived of an opportunity to vote by not having ballots furnished it,[82] nor can there be a subsequent election in such precinct to supply the deficiency.[83] The voter must appear and prepare his ballot in person,[84] and until a voter either qualifies by showing his right to vote or offers to do so by making affidavit, he is not a rejected voter.[85] Where, on an application to strike a name from registered list, there is any dispute as to facts, the judges should not interfere but permit voter to swear in his vote at his peril.[86]

Voting by machine.—Constitutional provisions declaring that all votes shall be by ballot do not render invalid statutory enactments providing for the use of voting machines.[87]

Curative legislation will not validate a corrupt and fraudulent election.[88]

§ 8. *Irregularity and ambiguity in ballot.*[89]—While the intent of the voter is material in determining the validity and effect of a ballot,[90] and he should not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot,[91] yet

reasonable and impartial regulation. Gentsch v. State, 71 Ohio St. 151, 72 N. E. 900.

78. See 3 C. L. 1171. That polls were open at only two of three polling places, that the election was called by resolution of the common council instead of ordinance (See 3 C. L. 1167, n. 32. O'Laughlin v. Kirkwood, 107 Mo. 302, 81 S. W. 512), that certain ballots cast were rejected without a reason being given, were irregularities cured by a validating statute. Election for subscribing stock in railroad enterprise. Red River Furnace Co. v. Tennessee Cent. R. Co. [Tenn.] 87 S. W. 1016. Failure to use the register of voters will not avoid the election, it not appearing that any illegal votes were cast in consequence thereof. Choisser v. York, 211 Ill. 56, 71 N. E. 940. Minor irregularities by members of an election board, voters, and bystanders at a polling place, unaccompanied by fraud or conduct affecting the integrity of the ballot, will not operate to quash the election. Bingham v. Broadwell [Neb.] 103 N. W. 323. The fact that one vote was cast after the time fixed by law for the closing of the polls is no ground for excluding the entire vote of a precinct, but when, even if the vote of the precinct were counted as cast, the result of the election would not be changed, mandamus will not issue to require the superintendents to reconsolidate the vote of the county so as to include the votes of the precinct. Gilliam v. Green [Ga.] 50 S. E. 137.

79. In re Smith, 44 Misc. 384, 89 N. Y. S. 1006. An election is void where enough persons were deprived of an opportunity to vote or legal votes were thrown out, destroyed or miscounted to change the result of the election if all were counted for contestant. Maloney v. Collier, 112 Tenn. 78, 83 S. W. 667.

80. To avoid the result of an election because of irregularities in conducting it, it must be shown that some mandatory statute was violated, or that the election was conducted in such illegal manner that the true sentiment of the electors was not expressed by it, or that it is impossible to know whether it was expressed. O'Laughlin v. Kirkwood, 107 Mo. App. 302, 81 S. W. 512. Use of rubber stamp in placing initials of an election official on ballot is mandatory. Choisser v. York, 211 Ill. 56, 71 N. E. 940.

81. Current v. Luther [Ind.] 72 N. E. 556.

82, 83. Commonwealth v. Combs [Ky] 86 S. W. 697.

84. See 3 C. L. 1172, n. 98. Under the California Pol. Code, § 1208, the question whether an elector cannot read or cannot mark his ballot because of physical disability is to be ascertained from the entry on the great register. Huston v. Anderson, 145 Cal. 320, 78 P. 626. It is competent for judges of election, upon being informed that a qualified voter, who is unable to leave his carriage, has been driven up to the curbstone, to go out to the carriage and receive his ballot and deposit it in the ballot box; and were such not the case the irregularity is one which should be charged to the election officers rather than to the voter, and is not of a character which would interfere with a free expression of the people's choice. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

85. Erwin v. Benton [Ky.] 87 S. W. 291.

86. In re Jacobs, 45 Misc. 113, 91 N. Y. S. 596.

87. Lynch v. Malley, 215 Ill. 574, 74 N. E. 723; City of Detroit v. Board of Inspectors of Election for Fourth Election Dist. [Mich.] 102 N. W. 1029; People v. Board of Canvassers of Essex County, 94 N. Y. S. 996.

88. Red River Furnace Co. v. Tennessee Cent. R. Co. [Tenn.] 87 S. W. 1016.

89. See 3 C. L. 1172.

90. See 3 C. L. 1172, n. 5.

91. Choisser v. York, 211 Ill. 56, 71 N. E. 940. Irregular and defective or unauthoriz-

such intent, to become effectual, must be expressed comformably to the imperative requirements of law.[92] The penalty of losing his ballot will not, in the absence of a statute so declaring, be imposed upon a voter because of informalities in his ballot due to a violation of law by others and for which he is in no sense responsible.[93]

The marks.[94]—Where the voter indicates his choice by writing the name upon, or by pasting a printed sticker containing the name upon the official ballot, a cross mark after the name so written or pasted is not necessary to entitle it to be counted.[95] Ballots marked with a cross in the square under the party name at the head of a party column, and a cross extending over the whole column, of such party, thereby crossing out other candidates named in that column are void,[96] and in California ballots containing a stamp or cross in the blank opposite "no nomination" are thereby rendered illegal,[97] although there may be a large number of such ballots.[98]

The writing in of names.[99]—Official ballots upon which the elector has placed printed stickers or written in name in the manner provided by statute are not rendered unofficial by that fact, and must be received and counted.[1]

§ 9. *Distinguishing marks on ballot.*[2]—An illegal mark upon a ballot, or a legal mark illegally placed, which may serve as a distinguishing mark, will invalidate the ballot, and necessitate its exclusion from the count.[3] The intent of a voter in making a distinguishing mark on his ballot cannot be shown other than by what appears upon the face of the ballot.[4]

§ 10. *Count, canvass and return,*[5] *custody of ballots and recount.*[6]—The casting of a ballot which is not properly marked is not the casting of a vote, and in determining the number of votes cast, only those should be counted upon which the expression of a choice is indicated.[7] The record of a popular election is made up and finally completed at the polls.[8] The duty of determining in the first instance the choice of the electors is usually imposed upon the board or officers whose duty it is to count the ballots,[9] and the election of the person chosen should be certified pursuant to the result.[10] A provision that after the votes are counted

ed markings of a ballot, apparently the result of innocent awkwardness, inattention, or ignorance, and apparently not intended or made use of for the purpose of subsequent identification, will not justify the rejection of such ballots, if the intent of the voter can be ascertained therefrom. Bingham v. Broadwell [Neb.] 103 N. W. 323; Griffith v. Bonawitz [Neb.] 103 N. W. 327.

92. Placing cross otherwise than at right of and opposite the candidate's name. In re Wilcox [R. I.] 60 A. 838.

93. Esquibel v. Chaves [N. M.] 78 P. 505.

94. See 3 C. L. 1172.

95. Roberts v. Bope [N. D.] 103 N. W. 935.

96. Turner v. Hamilton [Wyo.] 80 P. 664.

97. McCardle v. Barstow, 145 Cal. 135, 78 P. 371.

98. Treanor v. Williams, 145 Cal. 315, 78 P. 884.

99. See 3 C. L. 1172.

1. The fact that the voter has attached a combination of stickers, covering the names of several candidates, and substituting the names of those upon the stickers, without severing the stickers and attaching them separately, does not render the ballot invalid. Roberts v. Bope [N. D.] 103 N. W. 935. Writing contestant's name with blue pencil instead of black held not to invalidate ballot, under law making intention of voter test of validity of ballot. State v. Conser, 5 Ohio C. C. (N. S.) 119.

2. See 3 C. L. 1172.

3. See 3 C. L. 1172. Ballots having pieces of colored paper folded within them held to be properly excluded as containing distinguishing marks. Choisser v. York, 211 Ill. 56, 71 N. E. 940. Placing a cross on the parallelogram containing the candidate's name after the name, but not in the square, is not a distinguishing mark in the absence of a statutory provision that the cross must be placed within the square. Huston v. Anderson, 145 Cal. 320, 78 P. 626.

4. Treanor v. Williams, 145 Cal. 315, 78 P. 884.

5. See 3 C. L. 1173.

6. See 3 C. L. 1176.

7. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

8. Nothing can afterwards be taken therefrom or added thereto, and a trial judge cannot exclude any part of it from evidence in the trial of an election contest. Griffith v. Bonawitz [Neb.] 103 N. W. 327. See, also, ante, § 7, "Curative Acts."

9. See 3 C. L. 1173. Whether a legislative act may authorize a court to intervene and control the action of officers in ascertaining the result of an election during the process of ascertaining that result, quaere. In re Blake [Conn.] 60 A. 265 [Advance sheets only].

10. Where one has been lawfully elected to fill a vacancy in a borough council, the

the judges shall proclaim the number of votes received by each person is directory merely.[11]

Return.[12]—The certificate of a canvassing board carries a presumption of the proper discharge of duties,[13] and is prima facie evidence of the right of the holder to the office.[14] Official returns are quasi records and stand until overcome by affirmative evidence against their integrity.[15] Failure of election officers to sign and return a certificate on the stub book as required by statute was held not sufficient to throw out vote of the precinct.[16]

Recount of ballots.[17]—On a recount the regular custodian or in case of his refusal an appointee of the canvassing board should receive and keep in custody the ballots and ballot boxes during recesses.[18] If one who has been declared elected is present at a recount to guard his interests, he is not estopped thereby from setting up the illegality of the recount.[19] Where the correctness of a canvass was not assailed, a private citizen was not entitled to mandamus to compel a second count on ground that original count was not made by the officers authorized by law.[20]

§ 11. *Judicial control and supervision.*[21]—In respect to party contentions peculiar to the province of party tribunals, the courts have no power.[22] Ordinarily the courts cannot review or correct the decision of the governing or central committee,[23] but the courts may require the committee to act or it may restrain them from acting when they have no jurisdiction.[24] Primary contests are usually settled before party committees or tribunals.[25] How the vote shall be canvassed or how certain ballots shall be counted will not be controlled by the courts.[26] Courts will

fact that he did not receive a certificate of election is immaterial in mandamus proceedings to procure his installment in the office. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

11. Choisser v. York, 211 Ill. 56, 71 N. E. 940.

12. See 3 C. L. 1174.

13. Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013.

14. The only remedy for setting aside or cancelling is that provided by statute for contests. Gibson v. Twaddle [Cal. App.] 81 P. 727.

15. The frauds of individual voters and the casting of illegal votes do not vitiate the returns unless the officers are parties thereto. In such cases the returns are accepted and purged of the illegal votes. Schuman v. Sanderson [Ark.] 83 S. W. 940.

16. Preston v. Price [Ky.] 85 S. W. 1183.

17. See 3 C. L. 1176.

18. When the clerk of a county court has laid before the board of canvassers of the county, for the purpose of a recount, the ballots, pollbooks, and other returns of the election, and without just cause, has refused to receive back into his custody the ballots and care for them during the recesses of the board, while engaged in the recount, such board may lawfully commit the care and custody of the ballots to the sheriff of the county. Stafford v. Mingo County Canvassers, 56 W. Va. 670, 49 S. E. 364. Retention of one or both of the keys to the ballot boxes, although the ballots are in the boxes, by the board of canvassers or a member thereof, does not justify the refusal of the clerk to preserve and be responsible for the ballots. Id.

19. Election of chief engineer of fire district. Fritz v. Cream, 182 Mass. 433, 65 N. E. 832.

20. In re Scofield, 102 App. Div. 358, 92 N. Y. S. 672.

21. See 3 C. L. 1167, n. 33-36.

22. See ante, § 3.

23. Hill v. Holdam [Ky.] 87 S. W. 805.

24. Hill v. Holdam [Ky.] 87 S. W. 805. Mandatory injunction is a proper remedy to compel the members of a political committee to meet and canvass votes for the purpose of ascertaining the party nominee and issuing to him a certificate. Mason v. Byrley [Ky.] 84 S. W. 767. Under section 10 of the Illinois Australian ballot act of 1891 (Laws 1891, p. 110), requiring the secretary of state to refer objections to certificates of nomination to the county judges of the counties comprising the district in which the nominations are made, and providing that the decision of such judges shall be final, the supreme court cannot, in a proceeding by mandamus, review the action of the county judges, nor can it ignore that action and take original cognizance of the matter, although the decision of the county judges is contrary to law. People v. Rose, 211 Ill. 249, 71 N. E. 1123.

25. See ante, § 5. The court of common pleas in Ohio is without jurisdiction to restrain the deputy state supervisors of the county from considering certificates of nomination issued to rival candidates of the same party and the controversy arising thereon. State v. Thompson, 71 Ohio St. 76, 72 N. E. 296.

26. People v. Hanes, 44 Misc. 475, 90 N. Y. S. 61. But see In re Blake [Conn.] 60 A. 265 [Advance sheets only]. The duty of an election board to canvass the votes cast at an election is a political duty prescribed by

expedite the decision of questions involving the holding of an impending election.[27]

Mandamus[28] will not issue in anticipation of an omission of duty, or to compel the performance of a discretionary one,[29] nor unless the relator shows a clear legal right to the relief sought;[30] but where a duty respecting the holding of an election is clearly obligatory, mandamus will lie.[31] It has been held that mandatory injunction is the proper remedy to require election judges to correct their returns by adding votes omitted by mistake or oversight, the duties of such officers being ministerial,[32] and where a board of canvassers has dissolved before properly performing its func-

statute and cannot be enjoined by the courts, State v. Carlson [Neb.] 101 N. W. 1004. Common council acting as a canvassing board held not to have power to determine that one receiving a majority of votes for alderman is ineligible because not a taxpayer. People v. Burns, 94 N. Y. S. 196.

27. Ney v. Whitley, 26 R. I. 464, 59 A. 400.

28. See 3 C. L. 1167, n. 34.

29. See 3 C. L. 1167, n. 35. Where a canvassing board has performed its duty, well or otherwise, and its official existence is at an end, mandamus will not lie to compel modification of a certificate of election. People v. Mattinger, 212 Ill. 530, 72 N. E. 906.

30. Insufficient showing of legality of convention. People v. Rose, 211 Ill. 252, 71 N. E. 1124. Rival nominations. State v. Stewart, 71 Ohio St. 55, 72 N. E. 307. It is not error to refuse to grant a mandamus to require the clerk of the superior court to deliver certain ballots and voters' lists to named persons, when it affirmatively appears that these ballots and lists are not in his possession. Gilliam v. Green [Ga.] 50 S. E. 137.

31. See 1 C. L. 982, n. 15.

NOTE. Mandamus against Canvassing Boards: In Ex parte Mackey, 15 S. C. 322, the court quoted with approval from McCrary on Elections, 106, 107, where it is said: "That the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial powers, is settled in nearly or quite all the states. * * * There are statutes in some of the states which expressly confer upon a board of canvassing officers the power to revise the returns of an election, to take proof, and in their discretion to reject such votes as they deem illegal. Such a statute exists in Texas, and in Alabama, and in Louisiana and Florida." See, also, People v. County Com'rs, 6 Colo. 202, as to such officers having no judicial power.

In State v. Deane, 23 Fla. 121, 1 So. 698, 11 Am. St. Rep. 343, it was held that where such officers were called upon to exercise their discretion in determining whether a ballot was "scratched," and they decided that it was, mandamus would not lie to control that discretion.

If the canvassing board improperly performed its duty, mandamus lies; but not if it did so properly, according to the returns before it, in which case a contest should be brought. Steele v. Meade, 98 Ky. 614, 33 S. W. 944. If a contest be allowed for errors during elections, that remedy must be pursued (State v. Stewart, 26 Ohio St. 216), and if an appeal lies, mandamus does not; but the power of congress to judge of the election returns of its members does not constitute another remedy within the meaning of the rule, and in such a case mandamus is the proper remedy (Ex parte Mackey, 15 S. C. 322).

It is the duty of the election officers to canvass all the votes cast, and mandamus will issue to compel its performance. State v. Stearns, 11 Neb. 104, 7 N. W. 743; State v. Barber, 4 Wyo. 56, 32 P. 14. So the legislative canvass of votes by the speaker is ministerial, and the writ will issue to enforce it. State v. Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796.

The writ is the proper remedy, according to several decisions, to compel the board to reconvene and recanvass the vote, and it makes no difference that they had adjourned. Belknap v. Canvasser of Ionia County, 94 Mich. 516, 54 N. W. 376; State v. Peacock, 15 Neb. 442, 19 N. W. 685; State v. Hill, 20 Neb. 119, 29 N. W. 258; People v. Schiellein, 95 N. Y. 124. Speaking in this connection, the court in State v. McFadden, 46 Neb. 668, 65 N. W. 800, said: "The law imposes upon the canvassers the duty of canvassing the returns exactly as filed with the county clerk by the election boards, and, until the canvassers have so compiled the vote, their task is uncompleted. They have no right to adjourn without, until they have finished their work. It has been repeatedly decided that after they have made one canvass, declared the result, and adjourned, they may be compelled by mandamus to reassemble and make a correct canvass of all the returns, where it appears that upon the first canvass they neglected or refused to fully perform their duty."

There is, however, another view, which holds that when a canvassing board has concluded its labors and finally adjourned, it is functus officio, and the court cannot by mandamus compel it to reconvene and recount the votes. Rosenthal v. State Canvassers, 50 Kan. 129, 32 P. 129, 19 L. R. A. 157.

Mandamus will not lie to compel a recanvass of votes where there is a mode of contesting election provided by statute. State v. Hamil, 97 Ala. 107, 11 So. 892; Houston v. Steele, 98 Ky. 596, 28 S. W. 662.

The writ will issue to compel election officers to make further returns and to correct errors, where the returns are defective (People v. City of Syracuse, 88 Hun [N. Y.] 203, 34 N. Y. S. 661), and to convene and declare the result of an election (Morgan v. County Court, 53 W. Va. 372, 44 S. E. 182).—From note State v. Gardner [Wash.] 98 Am. St. Rep. 888.

32. Bennett v. Richards [Ky.] 83 S. W. 154.

tions, its members may, by mandamus, be compelled to reconvene and recanvass the votes in accordance with the direction of a court having jurisdiction of the subject-matter.[33] A mandamus to compel common council to grant a certificate of election should be directed to persons who were members of the council at the time of the election and not to their successors.[34] An original action does not lie to require the board of registry to strike from the registry the name of a person alleged to be disqualified to vote.[35]

Injunction.[36]—The jurisdiction of courts of chancery is confined to questions arising relative to property or civil rights, and the mere right to office, or the nomination to an office, cannot be regulated or controlled by writ of injunction.[37]

§ 12. *Judicial proceedings to contest or review.*[38] *Rights and remedies.*[39]—Certiorari may lie to review the action of a board passing in the first instance on election questions or contests.[40] Under the system which obtains in some states whereby the supreme court is required to give its opinion on important questions when requested by a co-ordinate branch of the government, the supreme court may give an opinion on request of the senate as to whether, on a contest over the office of governor, the general assembly may adopt a report to the effect that it is impossible to separate legal from illegal votes, and that no person was elected governor, and declare a vacancy in that office.[41]

Jurisdiction.[42]—Courts of original jurisdiction may hear issues arising out of a contest,[43] and the original jurisdiction of courts of latter resort may in proper cases be invoked.[44] Statutory proceedings to contest must conform closely to the statute in respect to time[45] and notice,[46] else jurisdiction may not attach.[47] Orders made by judges for elections which are merely ministerial and not judgments of the court,[48] may be reviewed by an associate judge, notwithstanding a rule against the review of the judgments of associate judges.[49]

Pleadings and issues.[50]—A suit to contest an election is a civil suit brought to recover and enforce a civil right, and the rules of pleading in civil actions are applicable thereto except where otherwise provided by statute.[51] The contestant

33. People v. Burns, 94 N. Y. S. 196; Morris v. Glover, 121 Ga. 751, 49 S. E. 786.

34. People v. Burns, 94 N. Y. S. 196.

35. Collier v. Carter [Md.] 60 A. 104.

36. See 1 C. L. 982.

37. People v. Rose, 211 Ill. 252, 71 N. E. 1124. An injunction does not lie to restrain the commissioners' court from canvassing the returns and publishing notice of the result of a local option election as required by statute, since the performance of such duties does not constitute a legal invasion of the property rights of licensed liquor dealers in the districts. Robinson v. Wingate [Tex.] 83 S. W. 182.

38. See 3 C. L. 1174-1177.

39. See 3 C. L. 1174.

40. Where hearing of a contest is lodged in a common council, the unsuccessful candidate may have certiorari to remove proceedings to circuit court. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254. Certiorari to determine correctness of count in village license election. State v. McIntosh [Minn.] 103 N. W. 1017.

41. In re Senate Resolution No. 10 [Colo.] 79 P. 1009.

42. See 3 C. L. 1174.

43. The district court in Louisiana held to have original jurisdiction to hear issues arising in a contest for office. McClenny v. Webb [La.] 38 So. 558.

44. See 3 C. L. 1174, n. 38.

45. Must be instituted within the time prescribed. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786; Cusker v. Berryman [Wash.] 81 P. 686. The provision of the West Virginia Code that notice of a contest must be presented to the first term of the county court means the first regular term. Stafford v. Mingo County Court [W. Va.] 51 S. E. 2.

46. Provisions of a statute that candidates who desire to contest an election shall within 20 days after the election present a sworn statement of the grounds of contest to the chancellor, and for the service of process and a trial, constitute a special tribunal, and such provisions are jurisdictional and must be complied with. Harmon v. Tyler, 112 Tenn. 8, 83 S. W. 1041. A notice of an election contest which, while it states a defective case, states a case, gives the circuit court jurisdiction, and prohibition will not lie merely to correct an erroneous ruling of that court on a demurrer to the notice. State v. Evans, 184 Mo. 632, 83 S. W. 447.

47. See preceding note.

48, 49. Election under Brannock Law. Fulton v. Columbus, 3 Ohio N. P. (N. S.) 358.

50. See 3 C. L. 1175.

51. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786.

must exhibit a sufficient petition,[52] properly verified,[53] as particular as can practicably and reasonably be made,[54] showing that the election was valid and that he received a majority of the votes cast by the qualified electors,[55] that he is one who has a right to institute the contest,[56] and since a candidate who has received a certificate of election has a prima facie title thereto, a contestant should show on the face of his pleading a clear right to the office.[57] Where anything occurs after the commencement of a contest and after the time of pleadings which is a relevant and necessary fact in aid of the original grounds, it may be asserted as an amendment of the petition.[58] Amendments corrective of defective allegations must be timely.[59] On appeal under the Nebraska law from the decision of a county court in a contested election case, it is not necessary to file new pleadings in the district court.[60]

Dismissal.[61]

Preservation and production of ballots.[62]—The ballots are the best evidence of the result of an election, if they have been properly preserved, and have not been exposed to the reach of unauthorized persons.[63] Whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition is a question largely in the discretion of the trial court.[64]

Evidence.[65]—Certificates of the result of an election made by the commissioners at the precincts are prima facie evidence of the result of the election. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots as controlling evidence, it must appear that they have been pre-

52. Johnson v. Brice, 112 Tenn. 59, 83 S. W. 791.

53. McCardle v. Barstow, 145 Cal. 135, 78 P. 371.

54. Election returns cannot be purged of illegal votes on general charges of fraud and misconduct of the officers of the election and others. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786. The general allegation in a petition to contest the validity of an election under the Beal Law that the election was illegal is not sufficient for the admission of testimony as to irregularities other than those specified in the petition. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373. A contestant is not required to allege the facts as to each separate ballot unless the particular facts will apply to a specific ballot only. If there are a number of ballots to which the same allegations will apply, the pleader may adopt them. Robertson v. Grant County Com'rs, 14 Okl. 407, 79 P. 97. The allegation in a petition for an election contest that "many legal votes" cast for petitioner were unlawfully thrown out, destroyed or miscounted without stating the number, is too indefinite. Maloney v. Collier, 112 Tenn. 78, 83 S. W. 667.

55. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786.

56. Where the right to contest an election is limited to an elector of the county, a petition which fails to allege that petitioner is an elector is demurrable. Adams v. McCormick, 216 Ill. 76, 74 N. E. 774.

57. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786.

58. Adams v. Roberts, 26 Ky. L. R. 1271, 83 S. W. 1035. But an amended bill setting forth additional grounds of contest cannot be permitted where contestant fails to state any reason for not having incorporated the new matter in his original bill. Harmon v. Tyler, 112 Tenn. 8, 83 S. W. 1041. New and separate causes of contest set forth in an amended petition in an election contest are barred where the amendment was not filed within the time required by statute for instituting election contests. Turner v. Hamilton [Wyo.] 80 P. 664.

59. Cannot amend later than 20 days after election. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

60. Griffith v. Bonawitz [Neb.] 103 N. W. 327.

61, 62. See 3 C. L. 1175.

63. Choisser v. York, 211 Ill. 56, 71 N. E. 940; Lovewell v. Bowen [Ark.] 88 S. W. 570. A holding on an election contest that the ballots will not overcome the returns is proper where the ballots were accessible to unauthorized persons, and the seals on the packages containing them were broken, and they were removed from the wires on which they were strung, and many of them changed or disfigured. Choisser v. York, 211 Ill. 56, 71 N. E. 940. When all the ballots cast at all the precincts in an election held in the county have been kept in proper custody, and the packages of ballots voted at one of the precincts nevertheless bear evidence of having been tampered with, that fact does not vitiate the ballots cast at the other precincts. Stafford v. Mingo County Canvassers, 56 W. Va. 670, 49 S. E. 364.

64. See 3 C. L. 1176, n. 60. Huston v. Anderson, 145 Cal. 320, 78 P. 626; McCardle v. Barstow, 145 Cal. 135, 78 P. 371; Choisser v. York, 211 Ill. 56, 71 N. E. 940.

65. See 3 C. L. 1176.

served in the manner and by the officers prescribed by the statute, and while in such custody they have not been changed or tampered with.[66] Testimony of election commissioners that a majority of votes cast were in the negative is incompetent, in the absence of a showing that the original returns had been destroyed or could not be procured.[67] The rejection and destruction of ballots by the judges of election is not final or conclusive, but the contents thus rejected and destroyed may be shown by parol.[68] Under statutes requiring evidence in election contests to be taken by deposition, oral testimony may not be taken.[69] Where one has been declared elected by the board of canvassers and holds office under such determination, the presumption arises that he received the number of votes stated in the certificate;[70] but no presumption arises from statutory authority to use voting machines that such machines and the registers of the votes which they disclose remain unchanged between the close of an election and a subsequent contest.[71] Questions relative to the propriety of counting or rejecting particular ballots are discussed in the note.[72] Where an election turned upon the vote of an insane person, and there is no way of determining which way the one thus afflicted voted, a court will deduct one vote from the proposition receiving the greatest number of votes, and the result being thus made a tie, the court will declare that there was no majority either way and no election under the statute.[73]

Decision and review thereof.[74]—When authority to hear an election contest is conferred upon a judicial officer, and there is no provision of law for a review of his decision, it is final.[75] A certificate submitting to the supreme court for decision a question as to the rejection of a ballot at the state election, to be communicated to the secretary of state, is not such a reservation as is contemplated by the statute authorizing reservation of questions of law.[76] Findings as to the number of illegal votes and for whom they were cast being made on conflicting evidence heard in open court will not be disturbed unless manifestly wrong.[77] Where an appealing contestee in an election contest did not bring up any of the ballots, the counting or

66. Stafford v. Mingo County Canvassers [W. Va.] 49 S. E. 641. The court may receive evidence that the ballots have been tampered with, although the time for taking evidence has passed. Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013. The record of a popular election is made up and finally completed at the polls, and nothing can afterwards be taken therefrom or added thereto, and a trial judge cannot exclude any part of it from evidence in the trial of an election contest. Griffith v. Bonawitz [Neb.] 103 N. W. 327.

67. State v. Songer [Ark.] 88 S. W. 903.

68. State v. Conser, 5 Ohio C. C. (N. S.) 119.

69. Kirby's Dig. § 2861. Lovewell v. Bowen [Ark.] 88 S. W. 570.

70. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

71. Trumbull v. Jackson Canvassers [Mich.] 12 Det. Leg. N. 255, 103 N. W. 993.

72. See 3 C. L. 1176, n. 64. The court being unable to determine for whom certain illegal votes were cast, they are properly apportioned between the candidates in the proportion of the total votes received by them. Choisser v. York, 211 Ill. 56, 71 N. E. 940. The political parties to which persons casting illegal votes belonged being shown, and there being no other evidence as to how they voted, the ballots are properly deducted on the theory that the persons voted their party ticket. Id. Where it appeared that 109 ballots were in box and but 107 persons had voted, and where 2 ballots were found folded together, it was duty of the board under the statute to throw out 3 ballots so as to make number of ballots conform to number of persons voting. In re Village of Webster, 102 App. Div. 202, 92 N. Y. S. 658. An election precinct cannot be thrown out and the contest decided on the returns from the other precincts simply because in the precinct in question there were more ballots found in the box than there were election voters who in fact voted at the election. Motley v. Wilson, 26 Ky. L. R. 1011, 82 S. W. 1023. Frank Bierse and Frank Bersche are idem sonans. So also George Lang and George Long. See 3 C. L. 1173, n. 19. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

73. In re South Charleston Election Contest, 3 Ohio N. P. (N. S.) 373.

74. See 3 C. L. 1177.

75. Ogburn v. Elmore [Ga.] 51 S. E. 641.

76. In re Blake, 77 Conn. 595, 60 A. 292.

77. Choisser v. York, 211 Ill. 56, 71 N. E. 940.

rejection of which was complained of by him, the supreme court could not reverse the judgment on any point arising out of the rulings on particular ballots.[78]

Security for appeal; costs.[79]—An appeal bond in an election contest conditioned that appellant will perform the judgment if affirmed does not make the surety responsible for anything more than the surrender of the office if the judgment is affirmed.[80] When the supreme court on appeal reverses the judgment of the circuit court in an election contest, and orders the petition filed to be dismissed, the appellant is entitled to costs in that court.[81]

§ 13. *Offenses against election laws.*[82]—The authority conferred by New Jersey election law of 1898 upon county boards of election to appoint district boards of registry and election is valid to the extent that persons so appointed become de facto members, indictable for misdemeanors.[83] An officer at a primary election indicted for fraudulently counting and returning ballots will not be heard to set up as a defense his own neglect to cause ballots to be numbered as required by the rules of the party.[84] Where defendant was indicted for willfully and knowingly refusing to perform his duty as an election officer, he was not entitled to a writ of prohibition to restrain prosecution of such indictment, on the ground that he had appeared before the grand jury and testified concerning such offense as a state's witness.[85]

The indictment[86] is sufficient in the language of the statute,[87] and need not state the name of a person incidentally referred to by it, unless the name is one of the matters that must be proved at the trial or that are required in order to inform the accused of the nature and cause of the accusation.[88]

ELECTION AND WAIVER.

Only a general treatment of the doctrines of election and waiver is here attempted. For application of the principles involved to particular facts, reference must be had to the topic dealing with the subject-matter concerned. Election between counts[1] and the waiver of objections in judicial proceedings[2] are specifically treated elsewhere, as are the doctrines of estoppel[3] and laches.[4]

§ 1. *Election in general. Definition.*[5]—An election is a choice between two or more available, inconsistent rights or remedies.[6] The doctrine of election rests upon the principle that one who has knowledge of the facts or means of knowing

78. Treanor v. Williams, 145 Cal. 315, 78 P. 884.
79. See 3 C. L. 1177.
80. Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013.
81. Darling v. Murphy [N. J. Law] 59 A. 225.
82. See 3 C. L. 1177.
83. State v. Corrigan [N. J. Law] 60 A. 515.
84. Commonwealth v. Tucker, 23 Pa. Super. Ct. 632.
85. Rebstock v. Superior Court of San Francisco, 146 Cal. 308, 80 P. 65.
86. See 3 C. L. 1177.
87. Personation of voter. Brennan v. People, 113 Ill. App. 361.
88. State v. Cooney [N. J. Law] 60 A. 60.
1. See Pleading, 4 C. L. 980.
2. See Saving Questions for Review, 4 C. L. 1368; Appeal and Review, 5 C. L. 121.
3. See Estoppel, 3 C. L. 1327.
4. See Equity, 3 C. L. 1210.
5. See 3 C. L. 1178.
6. See Zimmerman v. Robinson & Co. [Iowa] 102 N. W. 814; Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa, 410, 102 N. W. 144; Rowell v. Smith [Wis.] 102 N. W. 1.

them may not assume two contradictory positions so inconsistent that the assertion of one necessarily repudiates the other.[7]

§ 2. *Occasions for elections. A. Of remedies.*[8]—Where more than one remedy is open to a party, he may select that which will give him the relief he seeks;[9] but if such remedies are coexistent[10] and inconsistent,[11] he cannot pursue both; in such case an election may be required. Thus one cannot at the same time stand upon a contract and recover for its breach, or irrespective of its terms as upon a quantum meruit;[12] or repudiate a contract and recover according to its terms.[13] A principal cannot treat a contract with a third person as subsisting, with knowledge of the fraud inducing it, and yet recover from the agent, who participated in the fraud, for the loss suffered.[14] The doctrine of election has no application where available remedies are consistent,[15] or where a party having a rightful remedy erroneously adopts one which is not in fact available to him.[16] A purchaser may

7. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787.

8. See 3 C. L. 1178.

9. Wrongfully discharged servant may treat his contract as rescinded and sue upon quantum meruit; or may treat contract as existing and recover under its terms and damages for its breach. James v. Parsons, Rich & Co. [Kan.] 78 P. 438. The owner of goods wrongfully taken from his possession may sue in conversion, replevin or assumpsit. Harter v. Pearson, 5 Ohio C. C. (N. S.) 304. This right of election is in the owner and cannot be exercised by the wrongdoer. Id. A person who is induced by fraud to sell personal property may disaffirm the sale and retake the goods, or affirm the sale and sue for the agreed price, when due. Fisher v. Brown, 111 Ill. App. 486. One who has been induced to enter into a contract by fraudulent misrepresentations may elect either to stand upon the contract and recover damages for the fraud, or to rescind the contract, and upon returning what he has received, recover that with which he parted, or its value. Applied to exchange of horses, where false warranty induced the contract. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. Where plaintiff alleged unlawful occupancy of a pier, it could either claim rental value of the pier for general purposes or demand damages growing out of the particular use to which the pier was put by defendant. City of New York v. Brown, 179 N. Y. 303, 72 N. E. 114. Where facts will support an action in assumpsit or in tort, the tort may be waived and action in assumpsit brought. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98; May v. Disconto Gesellschaft, 113 Ill. App. 415. A commission merchant who receives and sells mortgaged cattle without the mortgagee's knowledge or consent, in violation of the terms of the mortgage, and who remits proceeds, less his commission, to the consignor, without notice of the mortgage, does not derive such benefit from the contract as to authorize the mortgagee to waive the tort and sue in assumpsit. Greer v. Newland [Kan.] 78 P. 835. Unpaid accrued instalments under a contract may be recovered in an action at law, notwithstanding a provision that in case of default, proceedings for separate maintenance may be brought. Patterson v. Patterson, 111 Ill. App. 342.

10. To compel election between inconsistent remedies, both must exist at the time of resort to one of them. Forcible detainer and action for rent under lease. Mark v. Schumann Piano Co., 105 Ill. App. 490.

11. An election can exist only where two or more inconsistent remedies are open to a party. Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa, 410, 102 N. W. 144. Right to stand on a contract and sue for damages for fraud inducing it, or to rescind and recover back consideration, placing other party in statu quo, are inconsistent remedies. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. Persons who made contract with a patentee could not hold him to the contract and at the same time involve him in what would practically be an action ex delicto. Harvey Steel Co.'s Case, 38 Ct. Cl. 662.

12. Missouri Pac. R. Co. v. Kansas City & Air Line Co. [Mo.] 88 S. W. 3.

13. Agent for sale of patent rights cannot repudiate his contract and at the same time claim profits. Civ. Code, §§ 3711, 3712. Fulghum v. Beck Duplicator Co., 121 Ga. 273, 48 S. E. 901. One cannot maintain an action at law for damages for breach of a contract and at the same time sue in equity for specific performance of the contract. Pyle v. Crebs, 112 Ill. App. 480.

14. Doctrine of election has no application where a life insurance company is induced by fraud in which its agent participates to issue a policy so as to permit the company after knowledge of the fraud to continue the policy in force and then recover from the agent for the loss suffered. New York Life Ins. Co. v. Hord, 25 Ky. L. R. 1531, 78 S. W. 207.

15. No election between consistent and concurrent remedies. Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa, 410, 102 N. W. 144. A claim to recover the full contract price as for a completed sale is not inconsistent with a claim for damages for refusal to accept the property. Id. Though in an action of replevin, plaintiff elects to take a money judgment for the value of the property, he may recover also for the wrongful detention of the property, where the conversion is treated as taking place at the time of trial. Newberry v. Gibson, 125 Iowa, 575, 101 N. W. 428.

16. Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa, 410, 102 N. W. 144.

accept and retain goods and yet rely upon a breach of warranty in diminution of the price.[17] A creditor holding collateral security is not put to an election of remedies but may prosecute simultaneously whatever actions at law or in equity are warranted by the principal and collateral contracts.[18] A creditor who collects a portion of his claim from a third person, who after the debt is contracted agrees with the debtor to pay it, does not waive his claim against the debtor, since there is in this no election between inconsistent claims or remedies.[19]

(§ 2) *B. Of rights and estates.*[20]—The doctrine of election, as applied to instruments of donation, rests upon the equitable principle that one who accepts a benefit under the instrument must accept the whole, conforming to its provisions and renouncing all rights inconsistent with it.[21] Thus a grantee of certain land to whom the grantor afterwards devises the land conveyed, and other property, for

17. Acceptance of warranted goods does not waive the right to rely on the breach of warranty in an action for the price. Daily v. Smith-Hippen Co., 111 Ill. App. 319. One who accepts goods with knowledge that they are not as impliedly warranted and retains them may not rescind the contract, but may rely upon the breach of warranty in diminution of the price. Alabama Steel & Wire Co. v. Symons, 110 Mo. App. 41, 83 S. W. 78. A purchaser upon whom fraud has been practiced may in some cases retain the property and yet recover damages for deceit. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232.

18. Pyle v. Crebs, 112 Ill. App. 480.

19. Creditors who prove claims in insolvency proceedings against a corporation which has obtained the assets and assumed the liabilities of the original debtor corporation, and received dividends, may nevertheless assert their claims against the first corporation and its stockholders. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

20. See 3 C. L. 1179.

21. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. A will devised a life estate to testator's daughter, the remainder, share and share alike, to her heirs. Before her death, she and her children entered into a settlement dividing the property, and thereafter one of the children died, and his heirs continued to use the land as his heirs. Held, such conduct was not inconsistent with an intention to claim under the will of the testator, upon death of their grandmother. Parrott v. Barrett [S. C.] 49 S. E. 563. One who contracted to bequeath certain stock absolutely, bequeathed it in trust. The beneficiary accepted dividends paid by the trustee. Held, she had not elected to take under the will, since she accepted only what she was entitled to; hence she could maintain a suit for specific performance of the contract. Earnhardt v. Clement, 137 N. C. 91, 49 S. E. 49.

NOTE. Election by beneficiary under will: Commenting on Tripp v. Nobles, 136 N. C. 99, 48 S. E. 675 (3 C. L. 1179, n. 97), a writer in the Michigan Law Review says: "A distinction is to be noted between those cases where the election is against being bound by the provisions of the will, and those in favor of it. The modern view in the former case is that the principle of compensation, rather than that of forfeiture, applies; that is, that just compensation be made to the disappointed donees, and the surplus, if any, remaining, be given to the donee exercising the right of election, rather than that the entire gift to him be forfeited. 2 Underhill on Wills, § 729; 11 Am. & Eng. Enc. Law [2nd Ed.] p. 115; Carper v. Crowl, 149 Ill. 465. On the other hand, it appears that there is no authority for applying the principle of compensation to cases where the election is in favor of the will. The donee so electing relinquishes every inconsistent right and assumes the burdens attached to the devise. In re Lord Chesham, L. R. 31 Ch. Div. 466; Eaton, Equity, 182. Hence, if the principal case be admitted to involve an election, there would seem to be no escape from the conclusion reached in the majority opinion. Election, however, is defined to be a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property, already his own, which is attempted to be disposed of by the same instrument (Bispham's Equity [5th Ed.] p. 295); and since nothing was given by the will which would not have been the widow's without one, there seems to be force in the contention of the dissenting opinion that this is not a proper case to involve an election. It would seem just to require that the benefit conferred should be a substantial one in order to put the donee to an election. Tyler v. Wheeler, 160 Mass. 206.—3 Mich. L. R. 336.

A writer in the Columbia Law Review comments on the same case as follows: "Whether a devisee, by probating a will and qualifying as executor is estopped to claim adversely to it is in conflict. Gardner, Wills, p. 602 and cases cited. However, as it is a question of implied intention, the fact that the executrix in the principal case set forth the land as part of her husband's estate, and did not mention it in her own will, would seem to be strong evidence of her election. The dissenting opinion proceeded on the ground that she had received no alternative benefit under the will, since she was already entitled to more than $100 as her year's support. Godman v. Converse, 38 Neb. 657. The better view is that the doctrine of election is based on the equitable notion of compensation. Underhill, Law of Wills, § 729; Pomeroy, Eq. Jur. 468; Young v. Young, 51 N. J. Eq. 491. A donee who elects to take under a will does not forfeit all his own property

life, must elect to take under the deed or will.[22] A party taking the benefit of a provision in his favor under a will cannot assert the invalidity of the instrument.[23] A widow is put to an election between benefits conferred on her by her husband's will, and her statutory rights in his property;[24] but a widow who acquires no beneficial interest under a will is not required to make such election in order to prevent her being bound by the provisions of the will.[25] The right to dower may, however, be lost, if a claim therefor is not filed as required by the statute, even though a will makes no provision for the widow.[26] A widow who is called upon to make an election is entitled to be judicially informed as to her legal rights.[27] An election must be made in the statutory manner.[28] The right of election is personal to the widow and does not pass to her representatives or heirs,[29] but where the widow fails to take any action, the right to a legacy survives to her personal representative, the widow being presumed to have consented to the will.[30] False representations regarding the validity of a will, by virtue of which a widow elected to take against it, are not ground for setting the election aside, unless a will contest was begun or threatened.[31]

A widow who has received money for joining in a deed by her husband cannot retain the same and at the same time recover a distributive share of the property conveyed.[32] A widow cannot have both dower and homestead rights in lands of her deceased husband.[33] In some states a widow may elect between a child's part and her dower rights,[34] but such election can only be made in the manner[35] and within the time[36] prescribed by law.

which the testator has attempted to give to another, but must compensate the disappointed donee. Brown v. Brown, 42 Minn. 270; Underhill, Law of Wills, § 729. In the principal case the widow was entitled to claim adversely to the will and yet receive $100 as her year's support. Compher v. Compher, 25 Pa. 31; Stone v. Vandermark, 146 Ill. 312. Unless, after the lapse of time, the rights of third parties had intervened, the dissenting opinion seems preferable."—5 Columbia L. R. 67.

22. Where a mother conveys certain land to her daughter reserving a life estate for herself, and thereafter devises all her property to the daughter for life, the daughter is put to an election to take under the deed or will. Morrison v. Fletcher [Ky.] 84 S. W. 548.

23. Utermehle v. Norment, 25 S. Ct. 291, 197 U. S. 40, 49 Law. Ed. 655; Id., 22 App. D. C. 31. A beneficiary of a will who accepts a provision for his benefit cannot dispute the validity of one to his prejudice. Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321.

24. See Tiffany, Real Prop., p. 453.

25. Will held to confer no benefit on widow; hence her legal interest not subject to terms of will. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

26. Construing Pub. St. 1882, c. 127, § 18, and other statutes requiring a claim to be filed within six months after probate of will. Shelton v. Sears [Mass.] 73 N. E. 666.

27. When a widow is called upon to elect whether she will take under or against the will, and property specifically devised must be taken to pay debts, she is entitled to be judicially informed whether, if she elects to take against the will, she will be compelled to contribute to the devisee whose property is taken for the debts. Rev. St. § 5963. Allen v. Tressenrider [Ohio] 73 N. E. 1015.

28. Under Real Property Law, § 181, bringing suit to revoke probate of a will, is not a rejection of the will. Flynn v. McDermott, 43 Misc. 513, 89 N. Y. S. 506. Deputy clerk of probate court is without authority to receive the election of a widow, under Rev. St. § 8964. Election so made may be canceled. Mellinger v. Mellinger, 5 Ohio C. C. (N. S.) 435.

29. Bowers v. McGavock [Tenn.] 85 S. W. 893. This is especially true when the widow has made her election to take under the will, and declined and refused to take under the statute. Id.

30. Real Property Law, § 181, requires a widow to elect between a legacy and dower within one year after the husband's death. Held, if the widow dies within the year without any rejection, the right to the legacy survives to her personal representative. Flynn v. McDermott, 43 Misc. 513, 89 N. Y. S. 506.

31. Whitesell v. Strickler [Ind. App.] 73 N. E. 153.

32. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

33. Election to take homestead interest bars dower. Jones v. Green, 26 Ky. L. R. 1191, 83 S. W. 582.

34. Under Rev. St. 1899, § 2944, a widow who has a child or children living by her deceased husband may elect to take a child's part of his land in fee in lieu of dower. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

35. Under Rev. St. 1899, § 2945, an election by a widow to take a child's part in lieu of dower must be by declaration in writing,

Where a will directs land to be sold and the proceeds distributed, the beneficiaries may elect to take the property in its original form and thus effect an equitable reconversion.[37] To constitute a valid election in such case all beneficiaries must concur and must be bound.[38] The election may be by deed, or by answer, or partly by deed and partly by answer.[39]

§ 3. *Waiver in general; definition.*[40]—A waiver is usually defined as an intentional relinquishment of a known right,[41] and must be supported either by a consideration or by an estoppel.[42] Statutory provisions for the benefit of private or personal rights, and not affecting public rights or policy, may, in general, be waived,[43] and this is especially true as to statutory provisions regarding formal procedure.[44] But an express waiver contrary to public policy is void.[45] Waiver must be pleaded.[46]

§ 4. *Acts and indicia of election and waiver.*[47]—An election is usually evinced by the doing of some decisive act of an unambiguous nature showing a choice.[48] Such act or acts must have been done with full knowledge of legal rights and the

acknowledged before an officer authorized to take acknowledgment of deeds, and filed in the office of the recorder of the county where letters testamentary were granted, within 15 months after the grant of the same. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757. Under this statute, the filing of the declaration by the widow herself or her authorized agent, in her lifetime, is an essential part of the election. Id.

36. Under Civ. Code 1895, § 4689 (3) the right of a widow to take a child's share in her husband's estate depends upon her election so to do within one year after administration is granted, and the law makes no exception in favor of a widow who is insane or under other disability. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

37, 38. Duckworth v. Jordan [N. C.] 51 S. E. 109.

39. Where certain beneficiaries conveyed to others, and another expressed in answer desire for reconversion, it was held that an election was shown, if allegations of answer were established. Duckworth v. Jordan [N. C.] 51 S. E. 109.

40. See 3 C. L. 1179.

41. See 3 C. L. 1179, n. 2.

42. Bieber v. Gans, 24 App. D. C. 517.

43. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

44. Statute requiring claims against an estate to be under oath may be waived by an executor or administrator, who may allow claims not under oath if proved just. This waiver is allowed by P. L. 1898, p. 739, § 68. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

45. Rev. Laws, c. 198, § 13, giving the vendee in a conditional sale the right to redeem after default in payments, cannot be waived. Desseau v. Holmes [Mass.] 73 N. E. 656.

46. Fraud being set up by a defendant in a suit on a contract for the sale of land, a ratification and waiver of the fraud must be pleaded by the plaintiff if relied on by him. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232.

47. See 3 C. L. 1179.

48. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. That there may be an election, three things are necessary: (1) there must be in fact two or more concurrent remedies between which the party has the right to elect; (2) these remedies must be inconsistent; and (3) the party must by bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice. Zimmerman v. Robinson & Co. [Iowa] 102 N. W. 814. Demanding performance of a contract shows an election to exercise an option granted by the contract. Foster v. Leininger, 33 Ind. App. 669, 72 N. E. 164. Where party to horse trade attempted to institute replevin suit, demanded return of his horse, tendered back the one he received and refused to exercise any act of ownership over it, he was held to have elected to rescind the contract. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. Though a mechanic or artisan retains possession of the chattel, he is not thereby precluded from filing a bill in equity to enforce his lien; and by filing such bill within three months, he shows an election to proceed under Rev. St. 1892, § 1744, rather than under § 1745. Ocala Foundry & Machine Works v. Lester [Fla.] 38 So. 56. One who brings an action of attachment against a party accused of fraud in obtaining goods, affirms the sale to him and waives the tort. Ermling v. Gibson Canning Co., 105 Ill. App. 196. The levy of a writ of attachment upon property transferred to defraud creditors is deemed an election by the creditor to treat the conveyance as void. Salemonson v. Thompson [N. D.] 101 N. W. 320. Son who had deeded land to father, after father's death sued to recover as heir; held, that he could not thereafter maintain a suit to cancel his deed for undue influence and want of consideration. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. Where plaintiff obtains a reference by virtue of a formal statement that the action is on contract, he has made a binding election to so proceed. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. A statement in an affidavit to support a motion for change of venue that the action was in tort, which had no effect on the decision of the motion, is not a binding election to proceed in tort. Id. The rendering of an account to an agent for rent due or the charging of the account against the agent does not amount to an election by the landlord to hold the agent rather than the principal. Smart v. Masters & Wardens,

facts.[49] Failure to make an election within a reasonable time is a waiver of the right where the other party will be prejudiced.[50] In the case of an express contract giving an option to purchase property, notice of an election to rescind according to the terms of the contract must be given.[51]

Acts done with knowledge of the legal rights intended to be waived,[52] and clearly evincing an intention to abandon such rights,[53] or inconsistent with an intention to insist upon them,[54] constitute a waiver. Failure to assert rights within

etc., Lodge No. 2, 6 Ohio C. C. (N. S.) 15. The appropriation, otherwise than by attachment or execution, of furniture or other property found on demised premises, does not amount to an election by the landlord to hold the agent rather than the principal for the balance of unpaid rent. Id. Where mother deeded certain land to daughter, reserving a life estate, and later devised all her property to the daughter, and the daughter, upon her mother's death, entered into possession of the land conveyed, but showed no intention to treat it differently from other property devised, and paid no attention to the deed, held, she had elected to take under the will and not under the deed. Morrison v. Fletcher [Ky.] 84 S. W. 548. A notice served on one who contracted to furnish brick of a certain quality, that those delivered were not of the required quality, and that brick would be purchased elsewhere and the difference in price charged to the contractor, is not an election of the measure of damages and does not prevent the defendant, when sued for the price, to set up the ordinary measure of damages—loss of profits. Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721, 102 N. W. 787.

49. To be binding an election must be made with knowledge of legal rights or at least after a reasonable opportunity to learn such rights. Woman induced by fraud to buy house and lot held not to have elected to stand by contract, because at time she demanded possession of tenant, she did not know her legal rights. Annis v. Ferguson [Ky.] 84 S. W. 553. In order that acts of a widow shall be regarded as an election to take under a will, such acts must be plain and unequivocal, indicating an intention to so take, and must be made with full knowledge of the facts and of her rights. White's Estate, 23 Pa. Super. Ct. 552.

50. Chenault v. Eastern Kentucky Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552.

51. Held, where contract gave option on mining stock, no proper notice of election to rescind was given, and attempted rescission was not in accordance with terms of contract. Guss v. Nelson, 14 Okl. 296, 78 P. 170.

52. A waiver is not binding unless made distinctly and with full knowledge of the rights intended to be waived. Garrett v. Simpson, 115 Ill. App. 62. The fact that a widow joins with heirs in an agreement to settle an estate without administration in the common belief that the personalty would be sufficient to pay debts does not establish a waiver of the widow's portion in the real estate where it appears that the personalty was insufficient to pay debts. Bennett v. Morris, 111 Ill. App. 150.

53. An agreement to arbitrate a fire loss is a waiver of want of due proofs of loss. Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889. Whether insurance company had waived more complete proofs of loss held for jury. Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. Time limit within which plaintiff was to bring parties together and effect a sale held waived and plaintiff held entitled to his commission. Mitchell v. Duke, 134 F. 999. A property owner who has taken advantage of the Indiana statute and agreed to waive irregularities in assessments for street improvements in consideration of the privilege of paying an assessment in instalments cannot, in an action on bonds issued to a contractor, set up a defective description in the report of the engineer on which the assessment is based. Dunkirk Land Co. v. Zehner [Ind. App.] 74 N. E. 1099. Where there is a recovery on a counterclaim by a defendant, and after a reversal of plaintiff's judgment, defendant again pleads the counterclaim, he is not entitled to have judgment on the verdict in his favor in the first action. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

54. Waiver of defaults or contract provisions: Provisions of contracts for construction of building held unenforceable, having been disregarded and waived by acts of the parties. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing [C. C. A.] 132 F. 957. One who accepts seven instalments after a default as to one cannot thereafter declare a forfeiture for the first default, his acts having been inconsistent with an intention to rescind. Kuhn v. Skelley, 25 Pa. Super. Ct. 185. Letters by an insurance company holding out reasonable inference that claims will be adjusted constitute a waiver of provisions of policy requiring suit to be brought thereon within a certain time. Peters v. Empire Life Ins. Co., 90 N. Y. S. 296. Strict performance of a contract for leasing a farm with option to purchase within two years, upon certain conditions, held to have been waived by parties entering into negotiations; hence owner could not arbitrarily and without notice end the negotiations and refuse to convey. Henion v. Bacon, 100 App. Div. 99, 91 N. Y. S. 399. Father conveyed property to son and son agreed to support father, to pay off incumbrances, and to pay father an annuity. Father served notice of a demand for reconveyance, but thereafter accepted payments of the annuity. Held, default consisting in nonpayment of incumbrances was waived. Hurley v. McCallister [S. D.] 103 N. W. 644. Written provisions of contract for construction of building providing that orders for extra material must be in writing waived when oral order was made by one and performed by the other. Kilby Mfg. Co.

a reasonable time,[55] or to raise a proper objection at the proper time,[56] may also constitute a waiver.

An infant may, on reaching his majority, waive rights accruing during his minority.[57]

§ 5. *Consequences of an election or waiver.*[58]—When an election between

v. Hinchman-Renton Fire Proofing [C. C. A.] 132 F. 957.

Waiver of grounds of non-liability: When a party places his refusal to perform a contract upon certain grounds, he thereby waives other grounds and cannot assert them in litigation. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Where a carrier's refusal to deliver goods was upon the sole ground that an additional charge was not paid, it could not upon suit for conversion set up that the bill of lading was not presented by the proper person. Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585. Fruit refused on ground that it was frozen; buyer could not in action set up that refusal was on ground that shipment was in excess of order. United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170. Where liability for insurance was denied on the ground of nonpayment of assessments, the company cannot, after suit brought, deny liability on the ground that the policy was canceled by the board of directors as authorized by an article of association. Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co. [Iowa] 103 N. W. 207.

Waiver of irregularities of procedure: Predecessor in title by paying one-third of an assessment estopped those claiming under him from denying validity of assessment. Gilfeather v. Grout, 101 App. Div. 150, 91 N. Y. S. 533. Executor who induced a claimant to delay filing claims for more than a year cannot set up failure to file the claims in time as a ground of forfeiture of interest thereon. Hamilton's Ex'r v. Wright [Ky.] 87 S. W. 1093.

Held not to constitute waiver: Execution of leases of property involved by a constructive mortgagor does not indicate intention to abandon rights as such mortgagor. Conkey v. Rex, 111 Ill. App. 121. A provision in a life insurance policy releasing the insurer from liability upon failure to pay premiums when due cannot be considered waived by the company unless some authorized officer has done some act which may reasonably have led the insured to believe the condition would not be insisted upon. Sydnor v. Metropolitan Life Ins. Co., 26 Pa. Super. Ct. 521. Acceptance of the second premium, after it was due, when insured was in good health, is not a waiver of the condition as to payment of future premiums regardless of the health of the insured at the time of such future defaults. Id. Where complaint contains two counts, one for money lent and one on a bond given to secure payment, an election to stand upon the first count is not a waiver of the right to use the bond as evidence if it becomes necessary or proper to use it. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636. Receipt of rents and profits from land of which a co-tenant was in possession, having purchased at a mortgage sale, held not a waiver of the right to take a sheriff's deed at the end of the redemption period, there being no agreement to apply rents and profits on the sheriff's certificate. Ryason v. Dunten [Ind.] 73 N. E. 74.

55. Salt bags were ordered subject to cancellation of order unless a certain machine was furnished. The bags were received and retained five months without notice of cancellation of order. Held, condition waived. Root & McBride Co. v. Walton Salt Ass'n [Mich.] 12 Det. Leg. N. 193, 103 N. W. 844. Where a beneficiary acquiesces in the wrongful application of a trust fund, he releases the administrator or trustee and his bondsmen from liability to him therefor. Estate of Koehnken, 6 Ohio C. C. (N. S.) 359. Purchasers of lumber to be delivered in carload lots as sawed, received and paid for all shipments except the last without objection. Held, they were estopped to claim damages on account of the manner in which the lumber was handled and piled. Skidmore v. Scobee [Ky.] 85 S. W. 1088.

56. See, also, Saving Questions for Review, 4 C. L. 1368. Where a case is heard upon the merits, an objection to the remedy pursued not being properly raised and not insisted on, such objection is waived. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865. Persons who fail to object to finding of commissioners in partition at the time cannot object thereto on appeal. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115. A party who appears and files a brief to oppose a motion cannot complain that the rules as to notice of motion were not followed. Bruce v. Myers, 34 Ind. App. 664, 73 N. E. 710. Lack of verification of a claim presented against an estate held to have been waived by failure to make any objection thereto, in the course of negotiations and correspondence concerning the claim. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. An administratrix who voluntarily enters to defend a suit begun against the decedent cannot thereafter complain of the regularity of the proceeding or of the form of the judgment as "against the defendant." Cole v. Jerman, 77 Conn. 374, 59 A. 425. One who acted as attorney and business agent of an executrix in the administration of an estate held to have had authority to waive, by failure to object thereto, lack of verification of a claim. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. An admission in an answer is waived where plaintiff does not request judgment on the pleadings or object to the introduction of evidence on the issue, but treats the issue as one properly raised. Caldwell v. Drummond [Iowa] 102 N. W. 842.

57. An infant co-tenant, during whose minority another co-tenant purchased a sheriff's deed to the property, may, on reaching his majority, waive the right to sue for his share of the claim against the land. Ryason v. Dunten [Ind.] 73 N. E. 74.

58. See 3 C. L. 1180.

available inconsistent remedies has been made, with knowledge of the facts, the right to the other is forever gone;[59] but if several existing remedies are not inconsistent, nothing short of full satisfaction of plaintiff's claim waives any of such remedies.[60] All may be pursued concurrently, even to judgment, but satisfaction in one reaching the whole claim is a satisfaction in all.[61] Where only one remedy exists, but plaintiff asserts one which he does not in fact possess, the proper remedy is not waived.[62] One who adopts a remedy without full knowledge of the facts, may resort to a different remedy upon learning all the facts;[63] but one who has deliberately chosen his remedy will not be heard to say he was ignorant of the law, when he attempts to set his election aside.[64] One who has elected to treat a contract as continuing in force, and has waived a breach by the other party, is not entitled to a second election to rescind.[65] A creditor who elects to bring an action in trover as for a fraudulent conversion does not deprive his debt of its provable character under the bankruptcy act.[66]

59. An election once made is final. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. When more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one the others to all intents and purposes no longer exist. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. An election of one of two inconsistent remedies is final and bars pursuit of the other, in the absence of ignorance of material facts or mistake. Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363. An election of one remedy with full knowledge of the facts is binding unless the party can show that he never had a right to the remedy he attempted to pursue. Fisher v. Brown, 111 Ill. App. 486. A party who has recovered a portion of goods sold by replevin cannot thereafter maintain assumpsit to recover price of goods not recovered in replevin suit. Id. Election to proceed in assumpsit precludes subsequent proceeding in tort. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. One shipping goods to bankrupt claiming that transaction was a sale cannot after the buyer's bankruptcy claim that it was a bailment. In re Martin-Vernon Music Co., 132 F. 983. A party who recovers in replevin and gets a return of the property from one party cannot bring trespass for the wrongful taking against such party and another. Palmer v. People, 111 Ill. App. 381. Servant who recovered for three days of service before same was due under contract treated contract as rescinded and hence could not recover under its terms. James v. Parsons Rich & Co. [Kan.] 78 P. 438. A policy holder who after a change of plan by the insurance company elects in writing to cancel his policy, and demands his payments, is bound to pursue that remedy and cannot thereafter maintain a bill to compel the company to continue business under its original plan. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268. A suit against an ex-agent of an insurance company for failure to keep property insured, and recovery of judgment against him, is an election to treat the agent as personally liable, and a second suit cannot be brought against an insurance company formerly represented by the agent as an undisclosed principal. Rounsaville v. North Carolina Home Fire Ins. Co., 138 N. C. 191, 50 S. E. 619. Under Comp. Laws 1897, c. 308, providing that if a plaintiff obtains restitution of premises he may sue on the bond given by defendant on appeal to the circuit court (§ 25) or may recover treble damages for unlawful detainer, and other damages suffered in an action of trespass (§ 24), an election to sue on the bond under § 25 bars a subsequent action under § 24 to recover treble or other damages. Schellenberg v. Frank [Mich.] 102 N. W. 644.

60. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

61. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. Recovery of a judgment in an action against a sheriff for damages for a false return of service of summons bars a suit to set aside a default judgment based on the return. Smoot v. Judd, 184 Mo. 508, 83 S. W. 481.

62. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. Unsuccessful action to recover price on mistaken theory that there was a rescission of sale does not bar action for breach of warranty. Zimmerman v. Robinson & Co. [Iowa] 102 N. W. 814. An attack by general creditors of a corporation on the legality of an assignment, fraud such as would have vitiated an assignment not being charged, was not such an election of remedies as to preclude participation in distribution of assets, since the attempted attack on the assignment was not an available remedy, if stockholders and directors consented. Duncan v. State Nat. Bank [Miss.] 38 So. 45.

63. Delta Bag Co. v. Kearns, 112 Ill. App. 269.

64. Mortgagee bought in property at sale at a low price but could not get a deficiency decree. Mortgagor redeemed and then transferred to his brother. Held, mortgagee could not have mortgage sale set aside on the ground that he did not know mortgagor could redeem. Mallar v. Mallarian [Mich.] 101 N. W. 548.

65. Insurance society issued policy for $5,000, but later, by by-law, reduced policy to $2,000. Holder protested, but for over 2 years paid assessments on $2,000. He then demanded repayment, notifying society that he desired insurance canceled. Held, he could not rescind. Supreme Council A. L. H. v. Lippincott [C. C. A] 134 F. 824.

66. Construing Bankr. Act, §§ 17, 63a.

An election to take under a will waives and bars statutory rights.[67] Such election by a widow is binding on her representatives.[68] One electing to take against a will is entitled only to the statutory allowance.[69] Renunciation of provisions in a will frees from the operation of the will only such property as is affected by the provisions renounced.[70] An election by a widow to take her homestead rights in lands of her deceased husband bars her dower rights therein.[71] The waiver of a homestead exemption in a mortgage is in favor of the mortgage creditor alone, and does not inure to the benefit of others.[72] Where a remainderman after the sale of the corpus of a life estate approves the sale, the approval applies only to the sale of the life estate and not to a sale of the remainder.[73] Legacies to be distributed after the death of the testator's widow are accelerated in possession by the widow's election not to take under the will.[74] The abatement of unequal legacies resulting from a widow's election not to take under the will must be proportionate.[75]

§ 6. *Pleading.*[76]

ELECTRICITY.

This topic deals with the law relative to the rights and duties which persons furnishing or using electricity have or owe to third persons not in their employ,[77] except in so far as such rights and duties are peculiar to a specific application of electricity, as its use in propelling street cars,[78] or in transmitting messages between parties.[79] The general principles as to what constitutes negligence,[80] and the rules for measuring damages,[81] are treated elsewhere.

Electric franchise and right to use streets.[82]—The regulation and control of electric light companies in respect to their use of streets and the erection and construction of appliances is within the police power generally delegated by the state to its political subdivisions.[83] An ordinance must be definite.[84] An electric com-

Crawford v. Burke, 195 U. S. 176, 49 Law. Ed. 147.

67. Where a will devised an absolute life estate in the homestead, and the statute (Rev. St. 1899, § 3620) only gave the widow a determinable life estate, an election to take under the will bars dower in other realty under Rev. St. 1899, § 2948. McKee v. Stuckey, 181 Mo. 719, 81 S. W. 160. Where a widow accepts a legacy paid out of the proceeds of realty sold by the executor, her claim of dower in the realty sold is barred. Id.

68. Bowers v. McGavock [Tenn.] 85 S. W. 893.

69. A widow who elects not to take under a will is entitled only to one-third the value of her husband's estate. Wright v. Breckenridge, 125 Iowa, 197, 101 N. W. 111.

70. Where a will gave the widow one-half the estate for life, remainder to her children, and the other half to a daughter for life, the widow's renunciation of the will could free only one-half the estate and the remaining half would go to the daughter under the will. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

71. Jones v. Green, 26 Ky. L. R. 1191, 83 S. W. 582.

72. In re Nye [C. C. A.] 133 F. 33.

73. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

74. In re Klenke's Estate [Pa.] 60 A. 167.

75. Legacies were 80 and 117 shares of stock. By widow's election, total number of shares available was reduced from 197 to 131⅓. Held, legatees took proportionate shares of 131⅓ shares of stock. In re Klenke's Estate [Pa.] 60 A. 167.

76. See 3 C. L. 1181.

77. Duty as to employes, see Master and Servant, 4 C. L. 533.

78. See Street Railways, 4 C. L. 1556.

79. See Telegraphs and Telephones, 4 C. L. 1657.

80. See Negligence, 4 C. L. 764.

81. See Damages, 5 C. L. 904.

82. See 3 C. L. 1181; see, also, Franchises, 3 C. L. 1495.

83. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780; 10 Am. & Eng. Enc. Law [2d Ed.] p. 863. Under 1 Starr & C. Ann. St. 1896 [2d Ed.] p. 694, c. 24, par. 63, the city of Chicago may enact an ordinance requiring electric wires on its streets to be insulated and overhead wires to be protected by guard wires. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. A corporation organized under Code Pub. Gen. Laws 1888, art. 23, class 11, § 24, and Acts 1892, p. 662, c. 469, having obtained the city's consent, may conduct the electric lighting business in Baltimore. Brown v. Maryland Tel. & T. Co. [Md.] 61 A. 338. Cities of the fourth class have power to grant franchises to erect and maintain electric light and power plants therein. State v. Taylor, 36 Wash. 607, 79 P. 286. Mayor of such city cannot refuse to sign an ordinance granting such a franchise on the ground that a prior franchise has been granted, the latter not being

pany by unqualifiedly accepting an ordinance and availing itself of the benefits thereof is estopped to repudiate conditions imposed thereby.[85] The constructions placed upon different ordinances are shown in the notes.[86] Manufacturing, generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes is not a public use for which private property may be taken against the will of the owner,[87] though the rule seems to be otherwise if the purpose is to supply the public, or such part of the public as wishes it, with electric lights.[88] A corporation being invested with the power of eminent domain for the purpose of establishing its plant, the word "plant" includes its pole and wire lines.[89] An electric light company cannot extend its conduits through private walks solely by reason of its employment by lessees of private places of amusement abutting on the walk, though the public have used the walk for access to the places of amusement.[90] In most states overhead wires may be cut when necessary for the removal of buildings.[91]

Contracts.[92]—The general contract rules as to mutuality,[93] consideration, etc., govern. Payments being made after tests, they may constitute an acceptance.[94] It being impossible to apply the method of measurement provided by the contract, the method best adapted to show the actual power used should be used.[95] Failure on the part of a consumer to pay a monthly instalment when due is not a breach of contract on his part where the seller is at the time owing him more than the amount of such instalment.[96]

exclusive. Id. A township may require an electric lighting company, authorized by statute and ordinance to erect poles in streets and highways, to obtain a permit from the township committee before tearing up the street and deposit $10 as security for the restoration of the street or highway to its natural condition. Cook v. North Bergen Tp. [N. J. Law] 59 A. 1035.

84. An ordinance requiring an electric company to insulate its wires and to protect overhead conductors by guard wires "or other suitable mechanical device or devices" is not rendered indefinite by the use of the quoted phrase, nor does such phrase improperly delegate power to a city representative to determine what are suitable mechanical devices. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780. See Municipal Corporations, 4 C. L. 720.

85. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

86. Section 1 of ordinance numbered 4363 of the city of Omaha held to impose no duty on the defendant light company, except to furnish a competent lineman to act under the city authorities' direction in disconnecting wires. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W. 89.

87. Brown v. Gerald [Me.] 61 A. 785. A corporation empowered to generate and transmit electric power for lease or sale and having granted to it the power of eminent domain is not a quasi-public corporation, and hence is not invested with the right of exercising the power of eminent domain for the purpose of supplying electric power for manufacturing purposes. Id. See Eminent Domain, 3 C. L. 1189.

88, 89. Brown v. Gerald [Me.] 61 A. 785.

90. Lent v. Tilyou, 94 N. Y. S. 479. A lease of such abutting places does not include a lease of the walks for all street purposes, entitling an electric light company to lay its conduits therein for the purpose of applying light to the lessees. Id.

91. The statutes of Massachusetts permit the wires of an electric light company to be cut for such purpose. Richards Bldg. Moving Co. v. Boston Elec. Light Co. [Mass.] 74 N. E. 350.

92. See 3 C. L. 1182.

93. Contract to furnish electricity, binding the applicant to take and pay therefor a stipulated price, but providing, in effect, that the company should not be liable for failure to furnish the electricity if prevented by strikes, etc., is not unenforceable for lack of mutuality. Klosterman v. United Elec. Light & Power Co. [Md.] 60 A. 251. See Contracts, 5 C. L. 764.

94. In an action for compensation for street lighting, held that, as payments had been made after the tests relied on by the defense to prove nonfulfillment of the contract had been taken, recovery could be had under the common counts in assumpsit. Central Elec. Co. v. Street Lighting Dist. No. 1 of Woodbridge Tp. [N. J. Law] 58 A. 1080.

95. The contract providing that the power is to be measured by hour meters, the fact that those meters are incapable of measuring the power does not require plaintiff to pay for more power than is used, but some adequate appliance, other than that provided for in the contract, must be used to measure the power. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450. Where the meter designated in a contract for measuring electric power furnished under the contract is inadequate for that purpose, evidence is admissible as to the operation of another meter, and of the results obtained. Id.

96. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450.

Degree of care.[97]—While one furnishing electricity is not an insurer,[98] yet as to persons not in his employ he is obliged to use the utmost human care, vigilance and foresight, reasonably consistent with the practical operation of his plant, to provide against all reasonably probable contingencies,[99] the care required in any particular case being proportional to the danger.[1] This includes the use of such safeguards as are best known and most extensively used,[2] the best mechanical contrivances and inventions in practical use,[3] perfect insulation at all places where persons may reasonably be expected to go for work, pleasure or business,[4] the consideration of climatic conditions, such as storms,[5] and the maintenance of such a system of inspection as will insure reasonable promptness in the detection of de-

97. See 3 C. L. 1182.

98. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W. 89; Norfolk Ry. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. In an action for injuries from a leakage of electricity from defendant's wires into a street where plaintiff was driving, an instruction that there was no contractual relations between the parties, and that defendant was not an insurer of plaintiff's safety, held correct. Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061.

99. Alexander v. Nanticoke Light Co., 209 Pa. 571, 58 A. 1068; Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502. Street railway must use such care to prevent injury to persons using the street. Metropolitan St. R. Co. v. Gilbert [Kan.] 78 P. 807. There can be no liability for an accident that could not have been reasonably anticipated. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143; Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. Instruction that defendant would not be liable if injury was the result of falling on the wires held properly refused, it omitting the necessary qualification that such result would not follow if defendant knew or ought to have known that plaintiff was liable to fall on the wires. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. If an instruction that defendant was obliged to use all possible means to insure the safety of people lawfully near to and likely to be exposed to the wires, was too broad, there was no reversible error, the court having instructed that defendant was bound to take at least reasonable precautions to protect persons near the wires, and to so guard the wires as to make the place safe. Id.

1. Barto v. Iowa Telephone Co., 126 Iowa, 241, 101 N. W. 876; Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711, afg. 114 Ill. App. 535; Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361; Citizens Elec. R., etc., Co. v. Bell, 5 Ohio C. C. (N. S.) 321.

What constitutes ordinary care: Instruction that ordinary care is that "degree of care which an ordinarily prudent person, with deceased's knowledge or means of knowledge of electrical affairs, and situated as deceased was, before and at the time of the accident, would exercise for his own safety," held not erroneous. Commonwealth Elec. Co. v. Rose, 114 Ill. App. 181. Where the court had instructed that ordinary care is that care exercised by the majority under similar circumstances, an instruction that defendant in breaking and uncoiling an uncharged wire, was presumed to know that it was an electric wire, and that a higher degree of care was necessary, is not objectionable as requiring the exercise of more than ordinary care. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Facts held to constitute negligence: Where transformer was burned out and a current of 2,000 volts was sent into a wire designed to carry 104 volts, evidence held to show negligence on the part of defendant. McCabe v. Narragansett Elec. Lighting Co., 26 R. I. 427, 59 A. 112. A telephone company permitting its wire to become broken and lie across a highly charged electric light wire is guilty of want of ordinary care. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. Failure of street railway company to put up a guard wire so as to prevent its wire from coming in contact with electric light wires held to constitute actionable negligence. Mahan v. Newton & B. St. R. Co. [Mass.] 75 N. E. 59. Where a house mover allowed a live wire to hang down after it was cut, held guilty of actionable negligence. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. Allowing broken wire to so remain for over five months held sufficient to charge company with notice. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. Complaint alleging such fact held to sufficiently allege notice. Id.

2. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361.

3. Instruction that company was only bound to have such appliances as were in common use at the time and not the most modern and recent ones, held erroneous. Crowe v. Nanticoke Light Co., 209 Pa. 580, 58 A. 1071.

4. While the duty of an electric company to maintain perfect insulation does not extend to its entire system, it extends to wires strung 25 feet above ground in a street where telephone employes are likely to come in contact therewith while attending to their duties. Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711, afg. 114 Ill. App. 535.

5. Construction must be sufficient to withstand storms of ordinary or normal severity (Smith v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 71), but not storms of unusual severity, which could not have been reasonably foreseen and its consequences guarded against (Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361). Evidence held sufficient to justify a verdict in favor of defendant. Id.

fects.[6] The duty to maintain the wires in a safe condition extends to one rightfully on private property over which the wires extend.[7] An electric company cannot evade these duties by employing some one else to fulfill them,[8] and if it employs an independent contractor, it must make a reasonable inspection to see that the work is skillfully and carefully done.[9] One furnishing electricity for interior lighting has the right to assume that the interior wiring is properly done,[10] and, in the absence of negligence on its part, is not liable for injuries resulting from defects in such wiring.[11] The installer of such interior system need not anticipate and prepare for the access of dangerous or deadly currents of electricity through the wires.[12] The contract between the parties providing that plaintiff should keep all inside wires and apparatus in proper condition, the defendant is under no duty to inspect such wires and apparatus, though under the contract he has the right to so do.[13] An electric railway using a live rail is bound to use ordinary care and prudence to prevent persons from coming in contact therewith;[14] such railway being an elevated one, it is not negligence for the company to fail to place signs on the structure warning the public of the danger from such rail.[15] The violation of an ordinance is prima facie evidence of negligence.[16] The prevalence of a general strike suspending the operation of street cars and the lawlessness attending such situations does not excuse or justify a fallen wire.[17] To be liable, defendant must have owed

6. Memphis Consol. Gas & Elec. Co. v. Letson [C. C. A.] 135 F. 969; Bube v. Weatherly Borough, 25 Pa. Super. Ct. 88. Must use utmost degree of care in keeping wires properly insulated. Winkelman v. Kansas City Elec. Light Co., 110 Mo. App. 184, 85 S. W. 99.

7. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143.

8. Hoboken Land & Improvement Co. v. United Elec. Co. of New Jersey [N. J. Law] 58 A. 1082.

9. Where independent contractor was employed to install electrical apparatus in building. Hoboken Land & Improvement Co. v. United Elec. Co. of New Jersey [N. J. Law] 58 A. 1082.

10. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393.

11. Where death was caused by transmitting an excessive voltage into the lighting system of a building, the defendant is not responsible for any accident occurring from defects in the interior wiring, if it was not done by defendant and it had no control over it, unless it was negligent in the outside wiring, or in its connection with the inside wiring. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. Where injury resulted from the admission of an excessive current into a lighting system, a requested instruction that it would not be negligence for defendant to omit the grounding of the secondary wires, if it was not permitted to do so, was properly refused, as being too broad. Id. Where inside wiring was not the property of defendant, a defect in the insulation thereof held not to render defendant liable. Bube v. Weatherly Borough, 25 Pa. Super. Ct. 88. Where the insulation on an interior electric light wire is sufficient to prevent accident when a current of the required voltage is flowing over the wire, it is error to charge that a verdict should be returned in favor of the electric company, should the jury find that had the wire been perfectly insulated the accident would not have occurred. Wheeler v. Northern Ohio Traction Co., 6 Ohio C. C. (N. S.) 406.

12. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. Is not an insurer against accidents caused by the imposition upon it of burdens beyond its control and far in excess of its normal capacity, Id.

13. Brunelle v. Lowell Elec. Light Co. [Mass.] 74 N. E. 676.

14. Where a passenger on a street railway car was ejected therefrom and started to walk back to a station, held, he was entitled to reasonable protection from hidden and unknown dangers arising from the fact that one of the rails forming the track was charged with electricity. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013. A company erecting and maintaining an elevated railroad structure upon which a live rail is used is obliged to only use and exercise ordinary care and prudence to so erect and maintain the same as to preclude children of tender years from getting thereon. McAllister v. Jung, 112 Ill. App. 138. Is not guilty of want of ordinary care in failing to construct means to prevent persons from climbing upon such structure at a point where there was no temptation so to climb thereon, notwithstanding such company did, at and near stations, construct means to prevent persons climbing upon such structure. Id. Held not guilty of negligence. Id.

15. McAllister v. Jung, 112 Ill. App. 138.

16. Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780, afg. 114 Ill. App. 181. Plaintiff extended his electric light system without securing the permission required by a city ordinance, which act contributed to his injury; held to constitute evidence of negligence on his part. Brunelle v. Lowell Elec. Light Co. [Mass.] 74 N. E. 676.

17. Instead it aggravates it, and lends force to the charge of negligence in permit-

plaintiff a duty, and this duty must have been violated.[18] Plaintiff must establish his case by the same degree of proof as in cases where the cause of injury is more certain and easily explained,[19] and the negligence of defendant must have been the proximate and efficient cause of the injury.[20] A wire being allowed to remain broken, the company is not relieved from liability by the fact that a storm, not unprecedented in violence, caused the wire to come in contact with an electric light wire, causing the injury complained of.[21] In order to recover the injured party must have been free from contributory negligence,[22] and must not have assumed the risk;[23] a child is held to only such care and prudence as are usual

ting electricity to be conducted through the wire at such a period. Cleary v. St. Louis Transit Co., 108 Mo. App. 433, 83 S. W. 1029.

18. Mahan v. Newton & B. St. R. Co. [Mass.] 75 N. E. 59. A **fireman** who assists to hoist a ladder with metalic corners against an electric light wire cannot, in the absence of invitation or permission of the owner, complain that the wires were not properly insulated, and that he was injured because of such lack of insulation. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W. 89. Electric light company held not liable to a **trespasser** on a train for an injury due to the fact that the **poles of the company** were within 9¾ inches of the ladder on the cars. Powell v. New Omaha Thomson-Houston Elec. Light Co. [Neb.] 104 N. W. 162. The defense that plaintiff, a boy eight years old, was a trespasser, because while on a street he reached through a fence, and so came in contact with a charged wire of defendant telephone company, which had been broken for three days, to its knowledge, and was hanging down through a tree, is not available. Lynchburg Tel. Co. v. Booken, 103 Va. 594, 50 S. E. 148. Where the wires of two companies were close together and it was the **custom** of one of the companies **to blow** its **whistle** before turning on the current to warn its employes, it is not liable for an injury received by the employe of the other company through its failure to blow the whistle, there being no agreement between the companies as to signals or any knowledge on the part of the one that the men of the other relied thereon. Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711.

19. Bube v. Weatherly Borough, 25 Pa. Super. Ct. 88.

20. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. Negligence in setting guy pole held proximate cause of injury. Smith v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 71. Where through defendant's negligence the wire broke and fell, the fact that some other person negligently wrapped the ends of the broken wire around the pole, and thereby facilitated the forming of a short circuit on the pole on which plaintiff was working, held not to relieve defendant from liability. Id. Testimony of a witness that two women were struck in the face by the wire, but not injured, and that the child grasped it at a point where it was not insulated, and that he thought he, the witness, took hold of it at a place where it was insulated without being hurt, is insufficient to show that a lack of insulation, and not the falling of the wire, was the proximate cause of the injury. Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502.

21. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143.

22. Winkelman v. Kansas City Elec. Light Co., 110 Mo. App. 184, 85 S. W. 99.

Facts held to constitute contributory negligence and vice versa: Failure to use safety strap held not to constitute contributory negligence. Rowe v. Taylorville Elec. Co., 114 Ill. App. 535, afd. 213 Ill. 318, 72 N. E. 711. Held not necessarily contributory negligence for lineman to fail to wear rubber gloves or a safety belt and to stand upon a grounded steel cable instead of upon a wooden cross-arm. Commonwealth Elec. Co. v. Rose, 114 Ill. App. 181. Where contact with wire was caused by the plaintiff's foot slipping, held, he was not guilty of contributory negligence in failing to test the wire or in failing to wear rubber gloves. Smith v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 71. Where one took hold of an electric light wire, into which 104 volts were ordinarily sent, and received a current of 2,000 volts due to the transformer being burned out, held not guilty of contributory negligence. McCabe v. Narragansett Elec. Lighting Co., 26 R. I. 427, 59 A. 112. The fact that deceased, an electrician, saw another attempt to turn out the lights and draw back on account of the shock received, which, however, was not serious, did not render him guilty of contributory negligence, as a matter of law, in endeavoring to turn out the lights. Predmore v. Consumers' Light & Power Co., 99 App. Div. 551, 91 N. Y. S. 118. A violation by a lineman of a rule of the electric light company employing him that linemen are to treat every wire as a live wire is not conclusive evidence of negligence, but only a circumstance to be considered with others. Mahan v. Newton & B. St. R. Co. [Mass.] 75 N. E. 59. In an action for death due to trolley wire coming in contact with electric light wire, evidence held to show no contributory neglect. Id. The question of what kind of a cord was connected with the electric light in the house, held immaterial on the question of contributory negligence where no kind of a cord could have prevented the accident. Company negligently allowed dangerous current to enter. Memphis Consol. Gas & Elec. Co. v. Letson [C. C. A.] 135 F. 969. Whether deceased had knowledge that wire was charged held a fact to be considered by the jury in determining the question of contributory negligence. Central Union Tel. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143.

23. Where plaintiff in falling from a stag-

among children of his age and capacity.[24] Direct affirmative evidence that plaintiff was exercising due care is not necessary;[25] it may be inferred from all the circumstances attending the accident, and from the lack of evidence indicating carelessness on his part.[26] An electric lighting company cannot be charged with negligence in maintaining a pole for its wires not upon or overhanging the right of way of a railroad, yet so near such right of way as to endanger the employes of the railroad company while engaged in the performance of their duties, it being shown that the pole was in place for two years prior to the time of the injury complained of.[27] An employer is liable for the negligence of his servants.[28]

Actions.[29]

Pleading.[30]—Though the plaintiff may not be able to allege the particular negligent act or omission causing the injury, the ultimate facts relied on should be stated in as direct and specific a manner as the circumstances of the case permit.[31] The petition alleging a sufficient cause of action at common law independent of a city ordinance pleaded, it is sufficient to support the action as developed by the evidence regardless of the ordinance.[32]

Evidence and presumptious.[33]—If the circumstances are such that the accident could not have happened if the required care had been exercised by the company, the doctrine res ipsa loquitur applies;[34] thus the maxim has been held to apply where a live wire falls into the street,[35] and this presumption is not overcome by testimony of defendant's employes that the wire was properly constructed and put up,[36] and that it was in good condition when inspected on the morning of the day of the accident.[37] Also the breaking of an electrical apparatus under the control of defendant,[38] and the sending of an excessive current into a building for lighting purposes,[39] constitute a prima facie case of negligence. The injury resulting from the breaking of a transformer, the presumption of negligence is not met by proof that it was made by a reputable manufacturer without a showing as to who had purchased it, when it was purchased, how long it had been in service, its condition at installation and when it was inspected.[40] Injury being due to imperfect insulation, it is conclusively presumed that the owner was negligent.[41] In the absence of evi-

ing came in contact with a live wire, evidence held sufficient to warrant a finding that plaintiff had not assumed the risk. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848.

24. Citizens Elec. R., etc., Co. v. Bell, 5 Ohio C. C. (N. S.) 321.

25, 26. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848.

27. South Side Elevated R. Co. v. Nesvig, 214 Ill. 463, 73 N. E. 749.

28. Defendant agreed to wire and install a new motor for plaintiff's printing press. After it was installed and connected defendant's electrician, who was a nonprofessional pressman, started it up in the absence of plaintiff or his representatives, and in so doing broke the press; held, defendant was liable. American Colortype Co. v. James Reilly's Sons Co., 94 N. Y. S. 493.

29. See 3 C. L. 1185.

30. See 3 C. L. 1185. See, also, Pleading, 4 C. L. 930.

31. Whitten v. Nevada Power, Light & Water Co., 132 F. 782. Complaint held demurrable as being too general in its averment of defendant's duty and its breach. Id.

32. Winkelman v. Kansas City Elec. Light Co., 110 Mo. App. 184, 85 S. W. 99.

33. See 3 C. L. 1185.

34. Alexander v. Nanticoke Light Co., 209 Pa. 571, 58 A. 1068.

35. Citizens Elec. R., etc., Co. v. Bell, 5 Ohio C. C. (N. S.) 321; Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Cleary v. St. Louis Transit Co., 108 Mo. App. 433, 83 S. W. 1029.

36. Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502.

37. Wire had been down about two hours. Norfolk R. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502.

38. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393.

39. Crowe v. Nanticoke Light Co., 209 Pa. 580, 58 A. 1071; Alexander v. Nanticoke Light Co., 209 Pa. 571, 58 A. 1068; Memphis Consol. Gas & Elec. Co. v. Letson [C. C. A.] 135 F. 969; Wheeler v. Northern Ohio Traction Co., 6 Ohio C. C. (N. S.) 406.

40. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393.

41. Winkelman v. Kansas City Elec. Light Co., 110 Mo. App. 184, 85 S. W. 99.

dence it is presumed that a wire is fastened to an insulator in the usual manner.[42] Evidence relating to the condition of the wires shortly after the accident,[43] and to the condition of a pole at a time subsequent to the accident, it being shown to be the same as at the date of the accident,[44] is admissible, as is evidence that guard wires were in common use in similar cases.[45] Expert testimony is admissible,[46] and negligent construction being alleged, it is competent to put to an electrical expert a hypothetical question embodying the facts of the case and asking him if it constituted good construction.[47] Evidence that defendant's wires were defective at other times and places is inadmissible.[48] Unverified certificates showing that the work complained of was in compliance with the regulations of the various city departments and of the board of fire underwriters are inadmissible.[49] In order to admit evidence of a custom, it must be shown to be a general one,[50] and the witness must be shown to have knowledge thereof.[51] The relevancy and admissibility of particular questions[52] and cases dealing with the sufficiency of evidence[53] are shown in the notes. The general rules as to the extent to which cross-examination may be carried apply.[54] There must be no variance between the pleading and proof.[55]

Instructions.—The general rules as to the sufficiency of instructions apply.[56]

Questions for the jury.[57]—As a general rule the questions of negligence[58] and

42. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

43, 44. Smith v. Missouri & K. Tel. Co. [Mo. App.] 87 S. W. 71.

45. Mahan v. Newton & B. St. R. Co. [Mass.] 75 N. E. 59.

46. Where injury was occasioned by a crossing of an electric light and a trolley wire, testimony of an electrical engineer as to voltage carried by each wire, effect of contact, insulation and absence of guard wires, held admissible. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

47. German-American Ins. Co. v. New York Gas & Elec. Light, Heat & Power Co., 103 App. Div. 310, 93 N. Y. S. 46.

48. United Light & Power Co. v. State [Md.] 60 A. 248.

49. German-American Ins. Co. v. New York Gas & Elec. Light, Heat & Power Co., 103 App. Div. 310, 93 N. Y. S. 46.

50. Question in such case as to witness' custom of handling such wires held objectionable as calling for the witness' individual custom. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

51. Question asked defendant, a house mover, as to the custom of handling live wires cut in order to allow the house to pass held inadmissible, it not being shown that the witness had any knowledge of such custom. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

52. Where it appeared that plaintiff's father and mother knew that wire was hanging where it was, held not error to sustain an objection to a question asking the mother if she made no objection to the wire being so left. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. Where plaintiff's parents knew that wire was left hanging on house, evidence that no one had told them that wire was dangerous held admissible on question of negligence. Id.

53. A claim for injury by an electric shock cannot be sustained by a mere hypothetical claim that such shock was only rendered possible by a current negligently permitted at some other point in the circuit by defendant; it not appearing that any usual precautions to prevent such grounding had been omitted, or that defendant had, or, under the circumstances, ought to have had, knowledge of it. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W 89. Held, that there was neither allegation nor proof that defendant, after knowledge of the dangerous position of the deceased, negligently omitted to turn off its electric current. Id.

54. A witness being called to testify that the wire was covered with "waterproof insulation," he may be asked on cross-examination as to whether additional insulation would not be safer, and whether, under the circumstances of the case, it was not customary to use guard wires. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. See Examination of Witnesses, 3 C. L. 1383.

55. There is no variance between a declaration alleging that a part of one of defendant's wires became detached, was charged from the wires of an electric railway and came in contact with plaintiff who was on the street, and evidence that plaintiff, while on the street, was injured by reaching through a fence and coming in contact with the wire hanging down on the inside of the fence. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148.

56. An instruction that if deceased's negligence contributed at all, it would defeat the action, was not erroneous in emphasizing the word "contributed." Predmore v. Consumers' Light & Power Co., 99 App. Div. 551, 91 N. Y. S. 118.

57. See 3 C. L. 1185.

58. Linton v. Weymouth Light & Power Co. [Mass.] 74 N. E. 321. So held in an action against an electric railway company for injuries to one coming in contact with an electrically charged rail while walking on the track after he had been wrongfully ejected from a car. Anderson v. Seattle-Ta-

of contributory negligence[59] are for the jury, as are all other disputed questions of fact.[60]

EMBEZZLEMENT.

This topic includes not only the offense of embezzlement proper but equivalent statutory offenses denominated larceny, larceny by bailee, larceny after trust, etc.

§ 1. *Nature and elements of offense.*[61]—One who having received as bailee,[62] trustee,[63] agent or servant, officer of a corporation or association,[64] or as a public officer,[65] any money or property,[66] converts the same to his own use[67] with fraudulent intent[68] entertained at the time of conversion,[69] is guilty of embezzlement. The of-

coma Interurban R. Co., 36 Wash. 387, 78 P. 1013. Whether the method used to guard the wires was negligent or not is a question for the jury. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. Evidence held to require submission to jury of questions whether fire was communicated by defendant's wires, and whether defendant was guilty of negligence in wiring the building. German-American Ins. Co. v. New York Gas & Elec. Light, Heat & Power Co., 103 App. Div. 310, 93 N. Y. S. 46. Where street railway wire was knocked down by derrick and remained down for a couple of hours, held question of negligence for the jury. Sorrell v. Titusville Elec. Trac. Co., 23 Pa. Super. Ct. 425. Where electric light company removed fixtures from building but left service wires in the building, held a question for the jury whether under the circumstances failure to cut off the current from such wires constituted negligence. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115.

59. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848; Linton v. Weymouth Light & Power Co. [Mass.] 74 N. E. 321; Cleary v. St. Louis Transit Co., 108 Mo. App. 433, 83 S. W. 1029. So held in an action against an electric railway company for injuries to one coming in contact with an electrically charged rail while walking on the track after he had been wrongfully ejected from a car. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013. Held a question for the jury whether plaintiff lost his balance and fell on the wire, or whether he came in contact with it while he had entire control of his person. Stevens v. United Gas & Elec. Co. [N. H.] 60 A. 848. Where another person had been killed by coming in contact with wire held question of decedent's contributory negligence in passing same was for the jury. United States Elec. Lighting Co. v. Sullivan, 22 App. D. C. 115. Whether the child uses required care in a particular case is a question for the jury. Citizens Elec. R., etc., Co. v. Bell, 5 Ohio C. C. (N. S.) 321.

60. Where defendant had leased its plant, by an unrecorded lease, prior to the accident, but had sent bills and received payment therefor subsequent to such time, held question of defendant's liability was for the jury. Crowe v. Nanticoke Light Co., 209 Pa. 580, 58 A. 1071.

61. See 3 C. L. 1186. Elements stated. State v. Blackley, 138 N. C. 620, 50 S. E. 310.

62. A servant riding the master's horse on the master's errand is a bailee of such horse. Wilson v. State [Tex. Cr. App.] 82 S. W. 651.

63. Placing of money in bank subject to defendant's order for certain purposes does not complete a trust, but the drawing out of such money by him does. De Leon v. Territory [Ariz.] 80 P. 348.

64. Officer of benevolent organization. State v. Knowles, 185 Mo. 141, 83 S. W. 1083; State v. Wise, 186 Mo. 42, 84 S. W. 954.

65. If defendant was a de facto deputy, it is immaterial that there was no authority for his appointment. People v. Sanders [Mich.] 102 N. W. 959. Where a county officer on suit against him by the county for certain fees admits that he holds them subject to judicial determination, he is guilty of embezzlement if he fails to pay them over to the proper officer after judgment requiring him to do so. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Nor can he urge in defense of a prosecution the questions determined in such suit. Id. Words "any person" in statute enumerating various officials held to make it apply to private persons. Territory v. Hale [N. M.] 81 P. 583.

66. A horse cart is a subject of larceny and accordingly subject of embezzlement. State v. Seeney [Del.] 59 A. 48; State v. Bogardus, 36 Wash. 297, 78 P. 942.

67. Deposit of money received for the principal to his account to cover a previous defalcation accompanied by a suppression of all account of its receipt constitutes an embezzlement. Crime of embezzlement is not complete until the agent or servant who has lawfully received different sums at different times finally refuses or is unable to account for the aggregate amount. Young v. State, 6 Ohio C. C. (N. S.) 53. Where there has been an actual conversion, no demand is necessary. State v. Knowles, 185 Mo. 141, 83 S. W. 1083. Demand not necessary unless made so by statute. State v. Blackley, 138 N. C. 620, 50 S. E. 310. Evidence of demand held dispensed with in any event by declaration of defendant. Id.

68. State v. Seeney [Del.] 59 A. 48; Ehrhart v. Rork, 114 Ill. App. 509; State v. Dunn, 138 N. C. 672, 50 S. E. 772. That a corporation president was responsible for a course of business which while not designed to produce defalcation did so operate without his complicity does not render him liable. State v. Carmean, 126 Iowa, 291, 102 N. W. 97. If defendant used the money openly, in

fense being completed, no subsequent restoration[70] or agreement to restore[71] will avoid the criminality of the act. The distinction between embezzlement and larceny where the taking is fraudulent, consists in whether the intent to convert was formed after or before possession was obtained.[72] Criminal intent may be presumed from intentional and unlawful conversion.[73] At common law one who held as part owner was not guilty of embezzlement on converting the whole to his own use,[74] but statutes in most states have changed this rule in whole or in part.[75]

§ 2. *Prosecution and punishment.—Indictment*[76] in the language of the statute is usually sufficient.[77] There must be averment of receipt of the money or property[78] in a fiduciary capacity,[79] subsequent conversion with fraudulent intent to defendant's own use,[80] and ownership of the money or property in the alleged principal at the time of the receipt and of the conversion.[81] Where sums were received for the principal from various persons at different times and embezzled, embezzlement of the aggregate may be charged.[82] The venue is properly laid where defendant's pos-

good faith, under mistake of right, he is not guilty. Eatman v. State [Fla.] 37 So. 576.

69. A depositary who uses the fund with the consent of the owner is not guilty of embezzlement in fraudulently failing to repay it on demand. State v. Dunn, 138 N. C. 672, 50 S. E. 772.

70. State v. Lentz, 184 Mo. 223, 83 S. W. 970.

71. A subsequent arrangement for refundment does not avoid criminality. State v. Merkel [Mo.] 87 S. W. 1186; State v. Dunn, 138 N. C. 672, 50 N. E. 772.

72. Flohr v. Territory, 14 Okl. 477, 78 P. 565. Borrowing property in good faith and converting it pursuant to subsequently formed intent is not larceny. Abrams v. State, 121 Ga. 170, 48 S. E. 965. If the fraudulent intent existed at the time possession was obtained, the offense is larceny, though an indictment under Pen. Code, art. 877, for conversion by bailee might also lie. Lewis v. State [Tex. Cr. App.] 87 S. W. 831.

73. State v. Lentz, 184 Mo. 223, 83 S. W. 970; State v. Merkel [Mo.] 87 S. W. 1186. From retention of money collected for employer without accounting. Zuckerman v. People, 213 Ill. 114, 72 N. E. 741. A knowledge by a corporation officer that the company's course of business would result in money being misapplied is not sufficient; there must be an intent that such result should follow in the particular case on which the prosecution is based. State v. Carmean, 126 Iowa, 291, 102 N. W. 97.

74. One of the crew of a fishing vessel selected by the captain to make sales of fish and turn the proceeds over to the captain for division between the owner and crew is an agent, not a part owner. Commonwealth v. McDonald [Mass.] 73 N. E. 852. Thus a partner cannot embezzle partnership funds. But if the partnership contract is in any way executory, one prospective partner may be guilty of embezzling funds received pursuant thereto. Ray v. State [Tex. Cr. App.] 86 S. W. 761.

75. Rev. St. 1899, § 1918, relating to embezzlement by officers of benevolent societies, was designed to obviate the common-law rule by which a part owner is not guilty of embezzlement, and the statute covers unincorporated as well as incorporated societies. State v. Knowles, 185 Mo. 141, 83 S. W. 1083; State v. Wise, 186 Mo. 42, 84 S. W. 954.

76. See 3 C. L. 1186.

77. An indictment stating a fiduciary capacity, receipt of money on behalf of the principal and fraudulent conversion thereof is sufficient. State v. Bogardus, 36 Wash. 297, 78 P. 942.

78. A stated sum in money a better description of which is unknown is sufficient. Territory v. Hale [N .M.] 81 P. 583.

79. The particular purpose for which the money was entrusted to defendant need not be alleged. De Leon v. Territory [Ariz.] 80 P. 348. A charge that defendant was "entrusted" with money is sufficient under a statute relating to persons "entrusted with the care" of money. State v. Meeker [N. J. Err. & App.] 61 A. 381. An indictment alleging fiduciary capacity and receipt of money on a certain day and conversion on a later day is defective for failing to allege that the fiduciary capacity continued to such day. Thomas v. Territory [Ariz.] 80 P. 320.

80. An indictment charging that defendant converted property to the use of himself and of the owner is bad. State v. Twining [N. J. Law] 58 A. 1098.

81. An averment of receipt and conversion of a certain sum "of the money of" the principal sufficiently alleges ownership. Eatman v. State [Fla.] 37 So. 576. Where a local lodge collects at stated intervals a sum from its members to be sent to the grand lodge, and it is embezzled by an officer of the local lodge to whom it is entrusted for transmission, the property is properly laid in the local lodge. State v. Knowles, 185 Mo. 141, 83 S. W. 1083. An averment of receipt of the money of the principal followed by an averment that defendant did "then and there" convert it, sufficiently alleges the property at the time of the conversion. Eatman v. State [Fla.] 37 So. 576.

82. State v. Wise, 186 Mo. 42, 84 S. W. 954; State v. Meeker [N. J. Err. & App.] 61 A. 381.

session became adverse.[83] An indictment under the Missouri statute, relating to embezzlement by officers of a benevolent organization, is sufficient if it alleges that the society was such an organization and need not state whether it was incorporated.[84] An averment that defendant at a time and place stated then and there received certain money and then and there embezzled the same is sufficient as to time and place.[85] A Massachusetts statute defines larceny as including embezzlement, and provides for a single form of indictment; under it embezzlement may be prosecuted by an indictment in common law form for larceny.[86]

Variance between indictment and proof is not fatal unless material.[87]

Admissibility of particular items of evidence is shown in the footnote.[88] On the issue of intent, other embezzlements are admissible,[89] but not other similar transactions which do not distinctly manifest criminal intent,[90] nor can forgery of other receipts be shown to negative a defense of repayment.[91] Defendant may testify directly to his honest intent,[92] and where he claims that he retained money under claim of right on account of indebtedness of the employer to him, he may show the existence of such an indebtedness.[93] The rules and by-laws of an association may be shown by a pamphlet copy verified by members, and proof that the members including defendant acted under them,[94] or by officers of the grand lodge.[95]

Sufficiency of evidence[96] in particular cases is noted below.[97] Proof of a general

83. Territory v. Hale [N. M.] 81 P. 583; State v. Blackley, 138 N. C. 620, 50 S. E. 310.

84, 85. State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

86. Commonwealth v. Kelley, 184 Mass. 320, 68 N. E. 346; Commonwealth v. McDonald [Mass.] 73 N. E. 852.

As to the form and sufficiency of such Indictments, see Larceny, 4 C. L. 410.

87. There is no variance between an averment of receipt and conversion of money and proof that the money was deposited in bank and afterward drawn out and misappropriated. Territory v. Hale [N. M.] 81 P. 583. An averment that defendant converted cattle while he had them under a bailment to take them to pasture is not sustained by proof that he sold them after they had been put in the pasture. Czernecki v. State [Tex. Cr. App.] 85 S. W. 796. Under Revised Statutes 1899, § 1821, proof of the embezzlement of the sum charged or any part thereof within 3 years before the time stated is good. State v. Wissing, 187 Mo. 96, 85 S. W. 557.

88. Book entries by clerks made without defendant's knowledge are inadmissible on trial of corporation officer. State v. Carmean, 126 Iowa, 291, 102 N. W. 97. The check by which defendant drew the money from the bank is admissible. De Leon v. Territory [Ariz.] 80 P. 348. A statute permitting proof of embezzlement at any time within six months "after" the date alleged in the indictment does not exclude evidence of receipt of the money by defendant before such date. Eatman v. State [Fla.] 37 So. 576. On prosecution for embezzling the proceeds of a check, the history of the check may be known, where it is claimed the proceeds were accounted for. People v. Peck [Mich.] 103 N. W. 178. On trial of one indicted for embezzlement as township officer, it may be shown that he was short in his accounts as a village officer and used township money to cover the shortage. People v. Sanders [Mich.] 102 N. W. 959.

89. Eatman v. State [Fla.] 37 So. 576.

90. Where it was sought to hold a corporation officer on the theory that he was responsible for a course of business which operated to produce defalcation, evidence of other transactions not in themselves unlawful are inadmissible to prove criminal intent. State v. Carmean, 126 Iowa, 291, 102 N. W. 97.

91. On an issue whether a receipt to defendant for the money alleged to be embezzled was a forgery, proof that other receipts held by defendant in transactions between the same parties were forged is error. People v. Peck, [Mich.] 103 N. W. 178.

92, 93. Eatman v. State [Fla.] 37 So. 576.

94. State v. Knowles, 185 Mo. 141, 83 N. W. 1083.

95. State v. Wise, 186 Mo. 42, 84 S. W. 954.

96. See 3 C. L. 1187.

97. Evidence of embezzlement of money deposited to defendant's order for certain purposes held sufficient. De Leon v. Territory [Ariz.] 80 P. 348. Evidence of sale of property by borrower held too vague to support a conviction. Marshall v. State [Tex. Cr. App.] 82 S. W. 1044. Defendant being authorized to purchase cattle with prosecutor's money paid a third person more for cattle than the latter had just given for them. Held, that the evidence was insufficient that the third person was a mere go-between or that defendant received any part of the additional price. Ray v. State [Tex. Cr. App.] 86 S. W. 761. Evidence of embezzlement by collector held sufficient. Zuckerman v. People, 213 Ill. 114, 72 N. E. 741; State v. Merkel [Mo.] 87 S. W. 1186. Evidence of larceny after trust by contractor of money delivered to him to pay claims held sufficient as against defense that claims were against defendant and that the money was paid to him on account. Smith v. State, 121 Ga. 618, 49 S. E. 677. Servant riding the master's horse on an errand was found at a place other than that to which he was sent endeavoring to sell the horse. Held sufficient to show a con-

deficiency in defendant's account without showing when or in what amounts the items thereof were received is sufficient.[98]

Instructions[99] should be confined to the case made by the evidence,[100] and present all elements of the offense,[101] and all defenses of which there is evidence.[102]

The verdict must find the value of the property as in larceny.[103]

A sentence on conviction of a county officer that he pay to the county the amount embezzled is erroneous.[104]

EMBLEMENTS AND NATURAL PRODUCTS.[1]

Crops form a part of the real estate to which they are attached.[2] Hence a cropper has no interest in them,[3] but a tenant has.[4] Standing timber is real estate,[5] but a sale of it converts it into personalty,[6] and it is held that annual crops, (fractus industriales) are personal property.[7] Crops, whether matured[8] or unmatured,[9] pass with a conveyance of the land, and where the grantee is deprived of them, he may recover their value at the time of conveyance.[10]

A trespasser who sows a crop on land in the possession of another[11] or a tenant who plants a crop on mortgaged premises under lease from the mortgagor at a time when the equity of redemption must expire before the crop will mature[12] is not entitled to harvest it. A life tenant is entitled only to interest on the proceeds of minerals taken from the land; the principal goes to the remainderman.[13]

version. Wilson v. State [Tex. Cr. App.] 82 S. W. 651.

98. State v. Meeker [N. J. Err. & App.] 61 A. 381. Shortage in accounts held to show embezzlement by administrator. Commonwealth v. Kelley, 184 Mass. 320, 68 N. E. 346.

99. See 3 C. L. 1187.

100. Instruction held to require that property belong to alleged principal at time of conversion. Eatman v. State [Fla.] 37 So. 576. Evidence held not to require instruction on implication of consent from previous use of employer's money by defendant without objection. Id.

101. An instruction as to fraudulent intent should be given. State v. Dunn, 138 N. C. 672, 50 S. E. 772.

102. Instruction held to sufficiently present a defense that defendant innocently received the property from a third person. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159.

103. State v. Carmean, 126 Iowa, 291, 102 N. W. 97.

104. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526.

1. NOTE. Right to estovers in a tenant—see note to Anderson v. Cowan [Iowa] 68 L. R. A. 641.

2. Crops raised by a grantor after execution of a deed belong to the grantee. Chancellor v. Teel [Ala.] 37 So. 665.

3. A cropper has no ownership in growing crops. Taylor v. Donahue [Wis.] 103 N. W. 1099.

4. A tenant may mortgage his share of crops before division. Denison v. Sawyer [Minn.] 104 N. W. 305.

5. No implied warranty of title in a sale of it. Van Doren v. Fenton [Wis.] 103 N. W. 228.

6. Brodack v. Morsbach [Wash.] 80 P. 275.

7. Growing strawberry plants are the subject of replevin. Cannon v. Mathews [Ark.] 87 S. W. 428.

8. Matured crops, not severed, pass with a conveyance of the land unless reserved. Firebaugh v. Divan, 111 Ill. App. 137.

9. Unmatured crops receiving nourishment from the soil. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730. A deed to be delivered at the grantor's death passes growing crops to which the grantor is entitled at the date of his death. Wilhoit v. Salmon [Cal.] 80 P. 705.

NOTE: Reservation of growing crops may, according to many authorities, be made by parol. Heavilon v. Heavilon, 29 Ind. 509; Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Baker v. Jordon, 3 Ohio St. 438; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Kerr v. Hill, 27 W. Va. 576. **But see** Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Powell v. Rich, 41 Ill. 476; Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438; Kammroth v. Kidd, 80 Minn. 380; Kirkeby v. Erickson, 90 Minn. 299, 96 N. W. 705, 101 Am. St. Rep. 411; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.—From note to McCoy v. McCoy [Ind. App.] 102 Am. St. Rep. 233.

10. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

11. Stebbins v. Domorest [Mich.] 101 N. W. 528.

12. Rev. St. 1899, § 4355, providing that foreclosure shall not affect the rights of a tenant in growing crops, does not apply. Nichols v. Lappin, 105 Mo. App. 401, 79 S. W. 995.

13. Swayne v. Lone Acre Oil Co. [Tex.] 86 S. W. 740.

EMBRACERY.[14]

To sustain a conviction of improperly influencing "any juror," it must appear that the juror had been impanelled in a pending case,[15] and even under a statute forbidding the influencing of one "summoned as a juror," it must be shown that there was a cause pending for service in which the juror had been summoned.[16] Something must be done which reasonably tends to exert an improper influence on the juror.[17] An indictment for corrupting a juror must contain the name of the juror.[18]

EMINENT DOMAIN.

§ 1. *The power of the state and delegations of it. A. Definition and nature of power.*[19]—The right of eminent domain is the right to take private property for a public use.[20] It is an inherent,[21] inalienable[22] attribute of sovereignty, derived from the ancient "jus publicum,"[23] and hence existed independent of and before con-

14. See Clark & M. Crimes [2d Ed.] 670; also note, 103 Am. St. Rep. 669.

15, 16. State v. Williford [Mo. App.] 86 S. W. 570.

17. To say to a juror in a criminal case that the defendant therein is a good fellow is insufficient. State v. Davis [Mo. App.] 87 S. W. 33.

18. Rev. St. 1899, § 2043; Const. "Bill of Rights," art. 2, § 22. State v. Nunley, 185 Mo. 102, 83 S. W. 1074.

19. See 3 C. L. 1189. See 2 Tiffany, Real Property, p. 1068, § 471.

20. Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. [Ohio] 74 N. E. 209.

21. Town of Nahant v. United States [C. C. A.] 136 F. 273; Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

22. Legislature cannot divest itself of the power. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

23. Brown v. Gerald [Me.] 61 A. 785.

stitutions.[24] Strictly speaking, the power is a right and not a defense.[25] In the United States the exercise of the power is limited by consitutional provisions; these provisions, while not uniform in all their details, generally provide that private property can only be taken[26] and used[27] for a public use,[28] and then only upon the payment of just compensation;[29] unless such compensation is waived;[30] but such a waiver is binding only by way of estoppel,[31] hence may be withdrawn at any time before it is acted on.[32] An obligation to pay is implied from the taking and use by the public.[33] One whose property is taken by condemnation proceedings is not deprived thereof without due process of law,[34] nor is a statute authorizing the majority stockholders of consolidating railroads to condemn the stock of dissenting stockholders unconstitutional as impairing the obligation of a contract,[35] nor as granting exclusive

24. Brown v. Gerald [Me.] 61 A. 785; Lazurus v. Morris [Pa.] 61 A. 815.

25. That property might have been condemned is no excuse for an unlawful taking. City of Clinton v. Franklin, 26 Ky. L. R. 1056, 83 S. W. 140.

26. What constitutes a taking, see post, § 4.

27. Property cannot be taken under a public use and immediately or ultimately converted and appropriated to private uses. Brown v. Gerald [Me.] 61 A. 785.

28. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684; New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624; Brown v. Gerald [Me.] 61 A. 785. A grant of the power for a use other than a public one is void, and a corporation can acquire no rights by accepting it. Id. Const. art. 1, § 18, providing that "Private property shall not be taken for a public use * * * without just compensation," impliedly prohibits the taking of private property for a private use, though just compensation be made therefor. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031.

What is a public use, see post, § 2.

29. Leffmann v. Long Island R. Co., 93 N. Y. S. 647. That portion of St. 1903, p. 350, c. 381 which provides that no compensation shall be paid for certain lands, held unconstitutional. Wheelwright v. Boston [Mass.] 74 N. E. 937. Sections 55 and 56 of the drainage and levee act (Hurd's Rev. St. 1899, p. 682) are void in so far as they require a railroad to construct a bridge or culvert on its right of way whenever required by drainage commissioners, and in so far as they give such commissioners the right to remove railroad bridges or culverts for drainage purposes. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684. A railroad having acquired title to its right of way in fee, a city cannot construct a street across it without the payment of compensation. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657. A municipal ordinance compelling the removal of a fence erected on private property not subject to a public easement is illegal as a taking of private property without compensation. Riley v. Greenwood [S. C.] 51 S. E. 532. Laws 1854-55, p. 264, c. 228, §§ 27, 29, does not give to the railroad any land not belonging to the state, but contemplates that land in excess of 100 feet on either side of the road belonging to the state, and all land belonging to private owners and not freely given, should be paid for in full. City of Hickory v. Southern R. Co., 137 N. C. 189, 49 S. E. 202. The heirs of one who, in surrendering a right of way through his land, reserved the right to erect gates across the same, cannot be deprived of such right by proceedings under Ky. St. 1903, § 4297, but are entitled to be compensated for their loss under § 4292. Allen v. Hopson, 26 Ky. L. R. 1148, 83 S. W. 575.

Measure and sufficiency of compensation, see post, § 6.

Note: A similar provision is found in the Constitution of **Washington,** art. 11, § 15, **inhibiting the taking of private property for the debt of a public** or municipal corporation. Under this provision, Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on state tide lands for the compensation, was held valid, there being no debt until the purchase of the tide lands from the state, when the purchasers agree to pay for the improvements the state has been permitted to place upon them. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845.

30. The owner of land consenting to the construction of a railroad in the street and granting the company the right to so use the street, neither he nor his grantee can recover damages for the proper use of the street by the railroad. Cane Belt R. Co. v. Ridgeway [Tex. Civ. App.] 85 S. W. 496. A fee being taken the landowner may waive his right to damages for the taking by agreeing to an abandonment. Hellen v. Medford [Mass.] 73 N. E. 1070.

31, 32. Ashley v. Burt County [Neb.] 102 N. W. 272.

33. Where the government appropriates to its use private property, an implied agreement for compensation arises. Brook's Case, 39 Ct. Cl. 494. Occupation of land for military camp. Alexander's Case, 39 Ct. Cl. 383.

34. New York, etc., R. v. Offield, 77 Conn. 417, 59 A. 510, 23 St. at Large, p. 1168, granting a corporation the right of eminent domain, held not to violate the 14th amendment to the Federal Constitution. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

35. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96. Gen. St. 1902, § 3694, construed. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

privileges.[36] The right to appropriate private property to public uses lies dormant in the state until legislative action is had, pointing out the occasions, the modes, conditions and agencies, for its appropriation,[37] and such power must be exercised in the manner, by the tribunal, and with the limitations provided by law.[38] The property owner may always raise the question as to whether the purpose is public in its nature.[39]

(§ 1) *B. Who may exercise the right; delegation of power.*[40]—The power of the state may be exercised through the agency of a private corporation formed for private gain so long as its purpose is public.[41] An enabling act need not be limited to that portion of the state wherein the use contemplated will be a public one,[42] but, like all other statutes, it must comply with constitutional requirements as to title, etc.[43] When the enabling act fails to provide for the payment of compensation, the general law of the state is by implication a part of the act and may be looked to to supply its deficiencies.[44] An objection that a statute is unconstitutional for failing to provide compensation to abutting owners can only be made by such owners.[45] The statute should also designate who is liable for the compensation;[46] but it is not necessary to designate a tribunal for the proceedings; the regular courts may hear them.[47] A statute authorizing a city to condemn certain land for a public purpose is not unconstitutional because it provides that the cost of the land shall not exceed a specific sum.[48] The corporation asserting the power must come within the provisions of the enabling act,[49] and must comply with all the requirements

36. Gen. St. 1902, § 3694, construed. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

37. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811; Lazurus v. Morris [Pa.] 61 A. 815.

38. Lazurus v. Morris [Pa.] 61 A. 815. A city street commissioner has no power to appropriate and take charge of land for a sidewalk for a city. Cannady v. Durham, 137 N. C. 72, 49 S. E. 50.

39. New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624.

40. See 3 C. L. 1189.

41. Brown v. Gerald [Me.] 61 A. 785. A corporation including a purpose of purely private business among the purposes of its organization cannot exercise the power of eminent domain. Louisiana Navigation & Fisheries Co. v. Doullut [La.] 38 So. 613. It makes no difference that such corporation was organized prior to the passage of Act 120 of 1904, which legalizes all corporations theretofore formed on the multifarious plan. Id.

42. Irrigation works. Borden v. Trespalcios Rice & Irrigation Co. [Tex.] 86 S. W. 11. Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2), construed. Id.

43. Section 23 of the revised railroad act of 1903 (P. L. p. 657) is not unconstitutional, in that it does not indicate by its title that it is intended to extend the eminent domain act to tunnels. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130. Laws 1896, p. 887, c. 727, § 2, held not repugnant to Const. art. 3, § 17, providing that no act shall enact that any existing law or part thereof shall be applicable except by inserting it in such act. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6. The use of the words "one-third" in the latter part of § 4 of such act held an inadvertence, and should read "one-fourth." Id.

44. Acts 1899, pp. 250-252, c. 142, §§ 1-7, authorizing the condemnation of land for park purposes "in the manner now provided," held not invalid for failing to provide for the payment of compensation, the general law providing therefor. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609. An act need not provide for the payment of compensation, there being a general law of the state providing a method for ascertaining the compensation to be paid in all such cases. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

45. Cannot be considered in a proceeding by the state to oust a telephone company from the use of certain highways. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

46. St. 1903, p. 124, c. 163, authorizing a certain railroad to erect a trestle, any damages caused thereby to be assessed, held not objectionable on the ground that the person who is to pay the damages is not ascertained, it being sufficiently apparent that the damage was to be paid by the railway company. Lentell v. Boston & W. St. R. Co. [Mass.] 73 N. E. 542.

47. 23 St. at Large, p. 1168 is not unconstitutional. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

48. The only effect of the limitation is to prevent the city from acquiring the land in case its value exceeds that sum. Laws 1903, p. 705, c. 354, so construed. In re City of Rochester, 102 App. Div. 181, 92 N. Y. S. 405.

49. It is only such a railroad corporation as is chartered under Acts 1875, p. 238, c. 142, § 6 (Shannon's Code, §§ 2414-2425) as is authorized to exercise the power of eminent

of the statutes as to organization,[50] though it has been held that a de facto corporation may maintain condemnation proceedings.[51] A domesticated foreign corporation is generally authorized to exercise the power.[52] The patent of incorporation is proof of petitioner's incorporation,[53] and, an affidavit of good faith being a prerequisite to incorporation, the patent of incorporation being produced the question of good faith is not in issue, though the statute requires good faith to be alleged in the petition.[54] In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied,[55] and there can be no implication in favor of the right of eminent domain unless it arises from a necessity so absolute that without it the grant itself will be defeated.[56] Under such rules it has been held that a telephone company comes within the term "telegraph company."[57]

Extent of power granted.—The extent of the power granted is largely a question of statutory construction, both as to property which may be taken[58] and as to the purposes of the delegation,[59] limited always to what is necessary.[60] The power being undoubtedly conferred, the statute will be liberally and reasonably construed so as to make its purpose effective.[61] In construing a grant of power to an electric power company, the word "plant" includes its pole and wire lines.[62] A corporation

domain. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

50. Queen City Tel. Co. v. Cincinnati, 5 Ohio C. C. (N. S.) 411.

51. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

52. Alaska: A domesticated foreign corporation may exercise the right of eminent domain for a public pipe line to supply water for mining. Miocene Ditch Co. v. Lyng [C. C. A.] 138 F. 544.

Kentucky: A foreign railroad corporation merely complying with the provisions of Ky. St. 1903, § 841, by filing its articles and hence acquiring the right to "possess, control, maintain and operate" a railroad in the state, has no right to exercise the power of eminent domain. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

South Carolina: Under Code Laws 1902, § 2211, an undomesticated foreign telegraph company is not entitled to the benefit of the condemnation laws. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

53. Under Rev. St. 1898, § 4181. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401.

54. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401.

55. Lewis on Eminent Domain [2d Ed.] § 255. Lazurus v. Morris [Pa.] 61 A. 815. Both as regards the right to take private and state property. State v. Superior Court for Chelan County, 36 Wash. 381, 78 P. 1011. Under Act April 29, 1874, neither a telegraph nor a telephone company has the power of eminent domain to take private lands of individual owners. Act Apr. 29, 1874. Pennsylvania Tel. Co. v. Hoover, 24 Pa. Super. Ct. 96; Pfoutz v. Pennsylvania Tel. Co., 24 Pa. Super. Ct. 105.

56. Snee v. West Side B. R. Co. [Pa.] 60 A. 94. Act Feb. 19. 1849, § 10 (P. L. 83), giving a railroad the right to enter on land to erect its depots, sidings, etc., and giving it power to condemn a right of way 60 feet in width, does not give it the right to condemn land in excess of such 60 feet in width for the purpose of relocating a stream so that the company may be relieved from the necessity of constructing two bridges over the stream in question. Id.

57. Pennsylvania Tel. Co. v. Hoover, 24 Pa. Super. Ct. 96.

58. Rev. St. § 5263, giving telegraph companies power to build lines over the public domain and upon military and post roads, gives no power to occupy a railroad right of way. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540. 49 Law. Ed. 312. And such power is not conferred as to a particular railroad by the fact that its charter declares its line to be a public highway. Id. A general power of condemnation which authorizes the crossing of the tracks of a railway company by a highway, or of a highway by the tracks of a railway company, is insufficient to authorize the condemnation of property purchased and used by a railroad company for depots, stations and railroad yards. Code 1887, §§ 1095, 1096, considered. Richmond, etc., R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496.

59. Laws 1901, p. 24, c. 12, authorizing certain counties and cities to construct sea walls, authorizes such a county to construct a sea wall within the limits of a city within the county. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511. A city is not authorized to condemn land for the purpose of improving and enlarging a harbor on navigable water. Pub. Acts 1899, p. 191, No. 136, c. 25, § 1 and Comp. Laws 1897, §§ 3143, 3155, considered. City of South Haven v. Van Buren Probate Judge [Mich.] 12 Det. Leg. N. 71, 103 N. W. 521.

60. The question of necessity as an element of public use, see post, § 2; as an element of the interest allowed to be taken, see post, §§ 3 and 21.

61. Petersburg School Dist. v. Peterson [N. D.] 103 N. W. 756.

62. Brown v. Gerald [Me.] 61 A. 785.

may exercise the power only to carry out its corporate objects; and its charter is controlling as to what they are.[63]

Rights of transferees, agents or receivers of delegates.—The lessee of a corporation does not take the power of eminent domain possessed by such corporation,[64] but the corporate identity of the lessor company being maintained, its statutory powers continue, although the exercise of them inure to the benefit of the lessee.[65] The lessee should condemn in the name of the lessor,[66] and a railroad company may authorize an individual to condemn lands in the name of the railroad whenever necessary in constructing its proposed right of way.[67] A receiver not being vested with title to the corporation's property, his appointment does not divest the corporation of its power of eminent domain so far as the exercise thereof does not interfere with the control of the receiver, or transgress any order of the court appointing him.[68]

Exhaustion of the power does not result from a single exercise.[69]

§ 2. *Purposes and uses of a public character.*[70]—As has been shown, the purpose or use for which the property is taken must be public.[71] The term "public use" is a flexible one, depending somewhat upon the nature and wants of the community at the time, and hence has necessarily been of constant growth.[72] While public benefit is one of the essential characteristics of a public use,[73] still the weight of authority seems to be against the doctrine that a public use may rest solely upon public benefit, a public interest or great public utility.[74] There must be a public exigency.[75] It is not essential that the entire community or people of the state or any political subdivision thereof should be benefited or share in the use or enjoyment of

63. Hurd's Rev. St. Ill. 1899, c. 114, § 49, providing that a railroad operating water craft for the carriage of passengers shall not have the power of eminent domain to acquire a landing for such vessels, does not deprive a railroad company of the right to condemn land for terminal purposes because its line terminates on a river and its engineer states that the purpose of the line is to there construct an incline and operate a ferry, there being nothing in the charter to show any corporate purpose to operate under said § 49, nor any evidence to show such an intention. Taussig v. St. Louis Valley Transfer R. Co. [C. C. A.] 133 F. 220. See, also, Corporations, 5 C. L. 764.

64. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 594, 49 Law. Ed. 332.

65. Snyder v. Baltimore & O. R. Co. [Pa.] 60 A. 151. The right acquired by a railroad company to condemn a dwelling house to widen its tracks, under Act Mar. 17, 1869 (P. L. 12), operates for the benefit of a lessee to whom a company was authorized to lease its road. Id.

66. 10 Am. & Eng. Enc. of Law [2d Ed.] p. 1060, and cases cited.

67. So held where contract provided that the individual was to defray the expenses and be compensated in an agreed sum. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

68. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

69. Under Acts 1869 (P. L. 12), giving railroads power to widen and straighten or otherwise improve their roadways, a single taking does not exhaust the power. Sutton v. Pennsylvania R. Co., 211 Pa. 554, 60 A. 1090. A railroad company after having acquired a 25 foot right of way may condemn land for an additional right of way up to the statutory limit of 100 feet. Chicago & M. Elec. R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017.

70. See 3 C. L. 1190, also, same page, subd. "Who may exercise the power."

71. See ante, § 1.

72. Brown v. Gerald [Me.] 61 A. 785.

73. Brown v. Gerald [Me.] 61 A. 785. A public use means public usefulness, utility, advantage or benefit. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684.

74. Brown v. Gerald [Me.] 61 A. 785. Public benefit or interest is not synonymous with public use. Id.

75. Brown v. Gerald [Me.] 61 A. 785. In the absence of public necessity, the taking of land by a corporation empowered to erect and operate plants for furnishing electric light and power to individuals and corporations, held not for a public use. State v. White River Power Co. [Wash.] 82 P. 150. An electric light company cannot under the power of eminent domain cut down trees on the edge of the sidewalk for mere convenience in erecting poles and wires, it not being necessary therefor. Brown v. Asheville Elec. Light Co. [N. C.] 51 S. E. 62. Where a city ordinance granting a steam railroad a right of way on city streets is permissive only and it is shown that the interests not only of the railroad company but of the general public will be subserved by not having the railroad tracks laid in the streets, held, the ordinance did not deprive the railroad company of the right to

the improvement.[76] The use may be local or limited. It may be confined to a particular district and still be public,[77] but in such case the use must be directly beneficial to a considerable number of the inhabitants of such section and the property to be taken must be controlled by law, for the advantage of the particular portion of the community to be benefited.[78] The use must inure to the benefit of the parties concerned, considered as members of the community or of the state, and not solely as individuals.[79] It is necessary that every one, if he has occasion, shall have the right to share in the use,[80] and this must not be a mere theoretical right.[81] A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded is in no sense public.[82] It is not material that each user will not be affected in precisely the same manner or in the same degree.[83] Controlling effect cannot be given the fact that the construction of a particular improvement will result incidentally in benefit to private rights and interests.[84] The question of the necessity, propriety or expediency of exercising the power is purely a legislative question.[85] While a legislative declaration that a use is a public one is entitled to great weight,[86] the question as to what is a public use is purely a judicial question,[87] and a private use cannot be converted into a public one by statute,[88] or, in some states, by constitutional provisions.[89] The legislature has power to delegate the authority to decide upon the necessity or expediency for the taking without submitting the matter to a court or jury,[90] and, hence, the power being absolute, the courts have no jurisdiction to review the exercise of such discretion.[91] In most states, however, the courts are given revisory powers and will interfere to prevent an abuse of discretion.[92] A corporation seeking to expropriate

condemn private property because of want of necessity. Louisiana Ry. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

76. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684; Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454; Brown v. Gerald [Me.] 61 A. 785.

77, 78. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684.

79. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. The use must be for the general public, or some portion of it, and not a use by or for particular individuals. Brown v. Gerald [Me.] 61 A. 785.

80, 81. Brown v. Gerald [Me.] 61 A. 785.

82. Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894. 14 L. R. A. 114, quoted with approval in Brown v. Gerald [Me.] 61 A. 785. Supplying electricity for manufacturing purposes is not a public use. Id.

83, 84. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

85. Brown v. Gerald [Me.] 61 A. 785; Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. [Ohio] 74 N. E. 209; Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811; Speck v. Kenoyer [Ind.] 73 N. E. 896.

86. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

87. Brown v. Gerald [Me.] 61 A. 785; Arnsperger v. Crawford [Md.] 61 A. 413; Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. [Ohio] 74 N. E. 209.

88. Brown v. Gerald [Me.] 61 A. 785; Borden v. Trespalacios Rice & Irrigation Co. [Tex.] 86 S. W. 11; State v. White River Power Co. [Wash.] 82 P. 150. Statute declaring that trestle shall not be an additional servitude held unconstitutional if the trestle did in fact interfere with property rights. St. 1903, p. 124, c. 163, construed. Lentell v. Boston & W. St. R. Co. [Mass.] 73 N. E. 542. Acts 30th Gen. Assem. p. 61, c. 68, § 1, declaring that the drainage of surface water from agricultural lands shall be considered a public benefit, held not to invade the province of the courts, the act merely marking out a general field within which the drainage of lands shall be deemed a public benefit. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

89. State v. White River Power Co. [Wash.] 82 P. 150.

Note: See 10 Am. & Eng. Enc. of Law, [2d Ed.] p. 1071, for authorities on this point.

90. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811. Power conferred on township trustee by Burns' Ann. St. 1901, § 6006, is absolute. Id. As Laws 1901, p. 405, c. 466, § 970, authorizing the city of New York to acquire title to land for streets, etc., and empowering the board of estimate and appointment to direct the same to be done where it shall deem it for the public interest, vests an absolute discretion in the board. People v. McClellan, 94 N. Y. S. 1107.

91. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811. Burns' Ann. St. 1901, § 6006, leaving the necessity for the condemnation of land for school purposes to the discretion of the township trustee, the fact that the trustee would be benefited in his private business beyond the general benefits resulting to the public, or that he was prejudiced against the landowner, is not a proper matter to go to the jury. Id.

92. While a corporation, to whom the power of eminent domain has been delegat-

property assumes the burden of proving the necessity in the particular case.[93] Such issue is one of fact,[94] and the fact that other property had been temporarily used does not estop petitioners.[95] Whether a corporation will serve a public purpose depends not alone on its articles of incorporation but also on evidence showing the actual business proposed to be conducted.[96] When a grant of the right embraces several purposes, some of them constitutional and others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, the grantee must use that discretion in good faith, and the taking must actually be for the constitutional purpose,[97] and the actual purpose is open to judicial inquiry.[98]

Particular purposes and uses.[99]—The construction of drainage[1] and irrigation[2] ditches and mining tunnels[3] have been held public purposes. So, also, the improvement of a railroad,[4] the building of a union passenger depot,[5] and a terminal or transfer railroad,[6] are public uses. A park is a public use,[7] though not located in,

ed, has primary discretion in determining what land is necessary for the purpose, yet the probate judge has, under Rev. St. § 6429, power to prevent abuse in the exercise of such discretion. Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. [Ohio] 74 N. E. 209. The decision of a municipal corporation, to whom the power of eminent domain has been delegated, that a street is necessary at a given point, will not be interfered with in the absence of a palpable abuse of discretion. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657. Where the right of viewers to lay out highways is limited to such as will in their judgment be of public utility, and declaring a want of public utility a ground of remonstrance, the question of public utility becomes a judicial one. Speck v. Kenoyer [Ind.] 73 N. E. 896.

93. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

94. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1. The necessity for use of the route selected is a question of fact. Pennsylvania Min. Co. v. Naomi Coal Co., 26 Pa. Super. Ct. 39.

Sufficiency of proof: Where a crossing over a railroad right of way was necessary to connect a street, held, the necessity sufficiently appeared. St. Louis, etc., R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

95. That a more devious route was used temporarily pending the condemnation proceedings does not estop petitioners to claim that the route asked for was necessary. Pennsylvania Min. Co. v. Naomi Coal Co., 26 Pa. Super. Ct. 39.

96. In re Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429, approved in Brown v. Gerald [Me.] 61 A. 785.

97, 98. Brown v. Gerald [Me.] 61 A. 785.

99. See 3 C. L. 1190.

1. The use of lands for the purpose of constructing thereon a ditch of a drainage district organized under the drainage and levee act (Hurd's Rev. St. 1899, c. 42), is a public use, hence such district may avail itself of the eminent domain act. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684. The taking of private property for the drainage of agricultural lands is for a public use. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454.

2. The construction of reservoirs and ditches for irrigation, etc., is a public use. Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2) construed. Borden v. Trespalacios Rice & Irrigation Co. [Tex.] 86 S. W. 11. Under Rev. St. 1895, art. 642, subd. 23, art. 704, subds. 4 and 6, and Acts 1895, c. 21, §§ 11, 12, a corporation organized for the purpose of constructing, maintaining and operating dams, reservoirs, lakes, wells, canals, flumes, laterals and other necessary appurtenances for the purposes of irrigation and milling, navigation and stock raising has the power to condemn private property for a right of way for its works. Id.

Individual irrigation ditch: Clark v. Nash, 198 U. S. 361, 49 Law. Ed. 1085.

3. Rev. St. Idaho 1887, § 5210, as amended by Act March 3, 1903 (7 Sess. Laws, p. 203) and Act March 15, 1899 (5 Sess. Laws, p. 442), are not unconstitutional. Baillie v. Larson, 138 F. 177.

4. It is for the public interest that a railroad company condemn the few shares of stock of another railroad company, which it does not own, where extensive improvements of the latter company's connecting road are necessary and such company does not, but the condemning company does, possess the means and credit to make such improvements. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

5. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

6. A terminal or transfer railroad which by its charter is obligated to do a general railroad business both as to freight and passengers is a public necessity, and, as such, entitled to exercise the power of eminent domain, although its most important business is to transfer loaded and empty cars from one point to another, and passengers may rarely, if ever, pass over its line. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

7. See Parks and Public Grounds, 4 C. L. 876. Hence Code Civ. Proc. tit. 1, c. 23, does not repeal the provisions of Laws 1888, p. 256, c. 193. In re City of Rochester, 102 App. Div. 181, 92 N. Y. S. 405.

but near, a city or town.[8] While the taking of land for a public highway is for a public use,[9] there is considerable conflict as to whether or not private property may be taken for the construction of a private road.[10] The legislature may empower a majority of the stockholders of railroads to consolidate the same upon their paying the value of dissenting stock.[11] Manufacturing, generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes, is not a public use.[12] Structures necessary to facilitate industrial development of a region are for a public use.[12a]

§ 3. *Property liable to appropriation and estate therein which may be acquired.*[13]—Except where exempt or used for another public purpose, any kind of property may be taken; for instance, corporate shares of stock,[14] private roads,[15] an es-

8. Acts 1899, pp. 250-252, c. 142, §§ 1-7, construed. City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609. Acts 1899, pp. 250-252, c. 142, §§ 1-7, authorizing taxing districts to condemn land for parks not more than 10 miles from the nearest point in the limits of such taxing districts or cities, held valid. Id.

9. Speck v. Kenoyer [Ind.] 73 N. E. 896. The construction of Northern avenue and a bridge across Fort Point Channel in accordance with St. 1903, p. 350, c. 381, held a public benefit. Wheelwright v. Boston [Mass.] 74 N. E. 937.

10. Laws for the taking of land for "private" roads are valid. Dickinson Tp. Road, 23 Pa. Super. Ct. 34, citing Pocopson Road, 16 Pa. 15, and Palairet's Appeal, 67 Pa. 479, wherein reasons are stated by Sharswood, J. Under the constitution, in order to authorize the compulsory purchase of a private way, such way must be one of necessity. Neal v. Neal [Ga.] 50 S. E. 929. Such fact must be stated in the application to the ordinary. Id.

The taking of property for such purpose is for a private use. Code Pub. Gen. Laws, art. 25, §§ 100-121 is unconstitutional. Arnsperger v. Crawford [Md.] 61 A. 413.

NOTE. Private highways: It is very often difficult to determine what is a private use, and the decisions of the courts, passing upon the constitutionality of statutes similar to this, are by no means uniform. To obviate this difficulty some states have provided by their constitutions that private property may be condemned for that purpose. For example, Colorado, art. 2, § 14; Missouri, art. 2, § 20; Washington, art. 1, § 16; Wyoming, art. 1, § 32. The following states hold that a taking for a private highway is for a private use. Illinois (40 Ill. 175); Indiana, (123 Ind. 372, 8 L. R. A. 58); Missouri (73 Mo. 651); Nebraska (38 Neb. 767, 41 Am. St. Rep. 771, 22 L. R. A. 496); New York (6 Hill 47, 40 Am. Dec. 387); Oregon (4 Or. 318, 18 Am. Rep. 287); Tennessee (2 Swan, 540); Wisconsin (24 Wis. 89, 1 Am. Rep. 161); West Virginia (21 W. Va. 534). The following states uphold the constitutionality of such statutes on the ground that the opening of private roads is beneficial to the public: Alabama (83 Ala. 204, overruling 34 Ala. 311); Arkansas (15 Ark. 43); California (64 Cal. 110); Connecticut (15 Conn. 83); Delaware (4 Harr. 580); Idaho (2 Idaho, 1118, 16 L. R. A. 81); Kentucky (4 Metc. 337); Maine (73 Me. 56); Massachusetts (108 Mass. 202); New Hampshire (36 N. H. 404); New Jersey (29 N. J. Law, 226); North Carolina (107 N. C. 64); Georgia (71 Ga. 250); Pennsylvania (112 Pa. 183); Iowa (63 Iowa 28).—3 Mich. L. R. 153.

11. Priv. Laws 1901, p. 463, c. 168, considered. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96. That condemnation of a railroad company of the few shares of another company which it does not already own may be for a private use is precluded by the charter of the condemning company, by the terms of which such acquisition will ipso facto work a merger of the stock and franchises of the other company in those of its own. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510.

12. Brown v. Gerald [Me.] 61 A. 785.

12a. Aerial tramway for a mine, mining being by statute a public use. Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 P. 296.

Note: This case is another example of the difficulty of formulating a test for a public use. 4 Columbia L. R. 133. It is not justified in the idea that the people may to some extent be entitled to use the property (Gaylord v. Sanitary Dist. 203 Ill. 576), or that its use would directly benefit the public (Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221). As has been pointed out, "Every lawful business in a sense confers a public benefit." Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564. The case is one differing from those where the power of eminent domain is invoked in behalf of public service companies, and is one that illustrates a desire to further the economic interests of a section in the development of natural resources such as water power, mines, oil wells, etc. Mining Co. v. Parker, 59 Ga. 417.—From 5 Columbia L. R. 162. A late case akin to this subject is Brown v. Gerald [Me.] 61 A. 785, preceding note, where the object, a water power to generate electricity for sale to manufacturers, was held not public. The reasoning by which some courts uphold the taking of land for a private road is of the same kind as that in the principal case cited. See a note elsewhere in this section.

13. See 3 C. L. 1191. See 2 Tiffany, Real Property, p. 1069, § 472.

14. New York, etc., R. Co. v. Offield, 77 Conn. 417, 59 A. 510. Laws 1895, c. 232 (Gen. St. 1902, § 3694), authorizing a railroad company which has acquired more than three-fourths of the stock of another rail-

tablished business,[16] and the interest of a grantee or lessee of tide lands.[17] Railroads are not highways within a provision in the charter of a telegraph company giving it the right to occupy streets and highways.[18] A conflicting public use to be superior must antedate the beginning of the condemnation proceedings.[19]

Property exempt by law.[20]—In Pennsylvania a railroad company cannot condemn a dwelling house for an original right of way,[21] though it may condemn such property for the purpose of widening its right of way, such widening being rendered necessary by increase in traffic.[22] The Louisiana statute prohibiting the taking of residence property unless there is no other feasible way applies to expropriations for railroad and canal, but not for street purposes.[23] In Washington a corporation formed for the purpose of procuring water for domestic purposes has no authority to condemn state school lands.[24]

Property in actual and necessary use for a public purpose.[25]—While property condemned for a particular public use or purpose cannot, unless the fee has been taken, be devoted to a public use or purpose different from that for which the property was originally taken,[26] still it may be used for purposes incidental to the original use.[27] Property devoted to a public use may when necessary be taken for a more public use.[28] The right to exercise the power to take property already subjected to a public use must rest on express legislative grant,[29] or it must arise by necessary implication, either from the powers and privileges granted, or it must appear

road company, and cannot agree with the holders of the outstanding stock for purchase thereof, to condemn it on a finding that it will be for the public interest, is within the power of the legislature. Id.

15. Wagon road. Charleston & W. C. R. Co. v. Fleming, 118 Ga. 699, 45 S. E. 664.

16. A farmer selling his farm products in a village has an "established business," though he has no regular route for customers, within the meaning of St. 1895, p. 573, c. 488, § 14, providing for damages done to one having an established business. Village was destroyed by construction of a reservoir. Allen v. Commonwealth [Mass.] 74 N. E. 287.

17. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44. P. L. 1903, p. 653, § 13, providing that no railroad shall have power to condemn property of the state, does not affect the case. Shamberg v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 46.

18. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 594, 49 Law. Ed. 332.

19. Rights of location date from filing of petition to take for railway and platting of a town thereafter is subject thereto. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

20. See 3 C. L. 1192.

21. See 3 C. L. 1192, n. 46.

22. Under Act March 17, 1869 (P. L. 12) a railroad company in widening its roadbed for additional tracks may condemn a dwelling house. Snyder v. Baltimore & O. R. Co. [Pa.] 60 A. 151. Where a railroad company had, by purchase, acquired for terminal facilities all the property of a city block, except two lots on one of which was a dwelling house, and before any train had been run on the road the directors adopted a resolution to condemn the dwelling house to widen the terminal site, there was no such increase of business as authorized the condemnation of the dwelling house, under the acts of 1849 (P. L. 79) and 1869 (P. L. 12), authorizing the condemnation of a dwelling house when necessary, for the purpose of widening its right of way, rendered necessary by increase in traffic. O'Leary v. Wabash Pittsburg Terminal R. Co. [Pa.] 60 A. 164. In the absence of evidence that the widening is not required, or that any less ground would answer for the safe operation of the railroad, injunction will not lie to restrain a railroad company from taking land for widening its road from the curtilage of a dwelling house. Sutton v. Pennsylvania R. Co., 211 Pa. 554, 60 A. 1090.

23. Civ. Code art. 2637; Rev. St. 1870, § 1486. City of Shreveport v. Noel [La.] 38 So. 137.

24. State v. Superior Court for Chelan County, 36 Wash. 381, 78 P. 1011.

25. See 3 C. L. 1192.

26. 10 Am. & Eng. Enc. of Law, 1093. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811.

27. Brown v. Gerald [Me.] 61 A. 785.

28. Under Code Civ. Proc. §§ 1237, 1240, the land of a private person subject to an easement for a public highway may be taken by a water company for a dam and reservoir as for a more public use. Marin County Water Co. v. Marin County, 145 Cal. 586, 79 P. 282.

29. In re Milwaukee Southern R. Co. Wis.] 102 N. W. 401. Public service corporation is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment or by due process of law thereunder. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973. Act April 29, 1874 (P. L. 73, § 34, cl. 2), as amended by Act May 16, 1889 (P. L. 226), gives water companies the power to condemn property held

that the rights granted, when applied to the conditions and circumstances covered by it, cannot be beneficially exercised without the taking of such property.[30] It follows that a general grant, although it contains no express words of exception, does not give the power to condemn property devoted to a public use.[31] A city having authority to lay off, condemn and establish streets may condemn a right of way over the tracks of a railroad.[32] The question whether the property is in actual and necessary use for a public purpose is one of fact.[33] The public use of the property being abandoned, the property is open to appropriation to other public uses.[34] Structural properties created or acquired through the exercise of municipal functions in connection with a franchise or easement granted by the state will not be taken for a distinct and different public use, without compensation.[35] Speaking generally, the authorities sustaining the doctrine of a dedication to a second public use without compensation have reference to the rights of the original landowner, who has once been paid full compensation for the land taken.[36]

Statutory authority to petitioner to choose his own location.[37]—That another suggested location is better adapted to the purpose,[38] even though such property

for public use, and does not limit such power to private property only. Independent Natural Gas Co. v. Butler Water Co., 210 Pa. 177, 59 A. 984. The charter of the City of Paterson does not authorize it to lay out a street across the freight yard of a railroad company, and hence an ordinance purporting to do so is void. Paterson & R. R. Co. v. Paterson [N. J. Law] 60 A. 47. Where there was evidence that at the point where the proposed street crossed the railroad's tracks, there were side tracks, that cars were loaded and unloaded there, and that the point is used as a storing yard, held to sufficiently show that such place was used as a freight yard. Id.

30. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401. Where in condemnation proceedings by a railroad company it appeared that it could efficiently locate its road between the termini without invading a certain public park, held, there was no necessity warranting the taking of a portion of the park. Id. A water company may condemn land for a dam, the latter being required by the increase of population in the territory the company serves, although a natural gas company has, by agreement with the landowner, laid its pipes under the land condemned, the pipes being removable to other land at small expense. Independent Natural Gas Co. v. Butler Water Co., 210 Pa. 177, 59 A. 984. A railroad cannot condemn longitudinally the right of way of another railroad company of the width of 100 feet, authorized by the statute, but may condemn a strip adjoining the statutory right of way. Chicago & M. Elec. R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017.

31. A street is a public franchise and cannot be condemned under a general power of eminent domain. South Western State Normal School, 26 Pa. Super. Ct. 99.

32. St. Louis & S. F. R. Co. v. Fayetteville [Ark.] 87 S. W. 1174. A general authority to a municipality to lay out, widen, straighten or change streets includes the power to construct a street crossing across a railroad track in the city; this power cannot, however, be exercised against the consent of the railroad company, unless the further power is given the municipality to condemn so much of the property of the company as may be necessary for such use. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657. Under the general authority to establish streets, a city or village may establish streets across lands which are subject to the franchises of a railroad, provided the second use is reasonably consistent with the former. Cincinnati, etc., R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583. A street crossing held not so inconsistent with the use of the property for railroad purposes as to authorize a court of equity to enjoin the municipal authorities from instituting condemnation proceedings. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657.

33. In proceedings by a railroad company to condemn land belonging to another railroad company, the question whether the strip sought to be taken is necessary for the present or immediate future uses of the railroad company owning it, in connection with the business of operating its railroad, so as not to be subject to condemnation, is a question of fact. Chicago & M. Elec. R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017. Evidence examined and held land could be condemned. Id.

34. Crescent Tp. v. Pittsburg & L. E. R. Co., 210 Pa. 334, 59 A. 1103. Where a petition for viewers prayed the court to lay out a road in great part upon an abandoned railway right of way and the viewers reported that they had followed the old abandoned roadbed and that legal notice of the view was given, held to show an adjudication of the abandonment of the roadbed. Id.

35. Town of Nahant v. United States [C. C. A.] 136 F. 273. Structural properties include water or sewer pipes, curbing and the like. Id.

36. Town of Nahant v. United States [C. C. A.] 136 F. 273.

37. See 3 C. L. 1193.

38. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811.

be owned by those interested in the proceeding,[39] or that a less quantity of land than that described will suffice,[40] or that in order to effect the purposes of the condemnation it will be necessary to take lands not subject to condemnation,[41] or which the corporation has, at the time, no power to take,[42] or that the corporation has it within its power to do all that it proposes to do by means as advantageous to the public as it will have if it acquires the property,[43] are not available as defenses to the proceeding. If there appears to be no bad faith on the part of the delegate of the power, his discretion will not be interfered with.[44]

§ 4. *What is a "taking," "injuring" or "damaging" of property.*[45]—Any direct injury to[46] or substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed,[47] is a taking, though the title remains undisturbed and the occupation of the land is only temporary.[48] The injury must be actual, susceptible of proof, and capable of being approximately measured.[49] It must not be merely speculative, remote, prospective or contingent.[50] It must be a physical[51] damage to property, and not a mere personal inconvenience or injury,[52] and the owner must sustain a special damage in excess of that sustained by the public generally.[53] It is immaterial that such damage be small,[54] or that it

39. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

40. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811.

41. Shamberg v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 46. The fact that a railroad seeking to condemn property through a city has no license to cross or traverse the street of the city is no defense to the property owner. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

42. Want of license to cross adjacent streets is no defense to the taking of private property. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

43. That a railroad has, under its charter, power to do all that it proposes to do by means as advantageous to the public as it would have, should it acquire stock owned by defendant in another railroad, is no defense in an action by the railroad to condemn such stock. New York, etc., R. Co. v. Offield [Conn.] 60 A. 740.

44. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

45. See 3 C. L. 1193.

46. Leffmann v. Long Island R. Co., 93 N. Y. S. 647; Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491. The owner of a building is entitled to recover from a city for damage done the building by the construction of a sewer so close to the foundations of the building as to cause it to settle. Johnson v. City of St. Louis, 137 F. 439. Excavation in private street is a taking. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

47. Oregon Short Line R. Co. v. Jones [Utah] 80 P. 732; Town of Nahant v. United States [C. C. A.] 136 F. 273. Obstruction of a private way affording ingress to and egress from property entitles owner to damages. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

48. Litchfield v. Bond, 93 N. Y. S. 1016. Where, in making a public survey, the public officers entered on land and cut down trees, held a taking of private property for public use. Id.

49. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39. In an action by school trustees for damages resulting from the operation of a railroad near a schoolhouse, there can be no recovery for the vibration of the ground caused by passing trains, without evidence of actual damages. Id.

50. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

51. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39. In an action by school trustees for damages resulting from the operation of a railroad near a schoolhouse, refusal to strike out evidence as to improper elements of damages, such as obstruction to view, danger of children being injured on the track, attracting attention of children to passing trains, held error. Id. In such case, an instruction that there could be no recovery for obstruction of view, or danger of children going on the track, did not cure the erroneous admission of such evidence. Id. A direct physical disturbance of property by casting cinders and smoke upon it has been considered a taking. Id., and cases cited. A statute providing damages for "property taken, injured or destroyed" means the actual and physical appropriation of and injury to the property of persons injured, and cannot be held to cover indirect and consequential damages that may result to a sewer company, with which a city has no contract, by the construction of a municipal sewerage system. Olyphant Sewage Drainage Co. v. Olyphant Borough [Pa.] 61 A. 72.

52. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

53. Little Rock, etc., R. Co. v. Newman [Ark.] 83 S. W. 653; Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

54. Little Rock, etc., R. Co. v. Newman [Ark.] 83 S. W. 653.

affects a considerable number of people in the same way.[55] It follows from this that damages cannot be recovered for an injury occasioned by the obstruction of a public and common right, even though the injury and inconvenience to the plaintiff be greater in degree than to other members of the public.[56] The general public means the people of the whole neighborhood.[57] Under a constitutional provision providing that private property shall not be "damaged" for a public use without compensation, the damages must be such as physically affect the property,[58] and a recovery cannot be had for injuries consequentially resulting from the devotion of neighboring property to a public use.[59] Compensation must be made for the use by the government of a patented article.[60]

Exercises of police or taxing power.—The requirement of adequate compensation does not impose any restriction upon the proper employment of the police power upon any subject lying within its sphere of operation.[61] Such regulations must

55. Little Rock, etc., R. Co. v. Newman [Ark.] 83 S. W. 653; Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

56. Little Rock, etc., R. Co. v. Newman [Ark.] 83 S. W. 653; Herzog v. P. C. C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 527. A property owner cannot recover damages for an obstruction in a street near but not adjacent to his property and which he uses in common with the general public, although to a greater extent than other members of the public. Smith v. St. Paul, etc., R. Co. [Wash.] 81 P. 840. Where a railroad is constructed on streets near, but not abutting on plaintiff's property and intersects other streets leading to the property and it is not shown that travel is diverted from the property, and access thereto is not obstructed, the injury is a general one. Little Rock, etc., R. Co. v. Newman [Ark.] 83 S. W. 653. Injury caused to a country place by the fact that the railroad runs between it and a city is general. Id. In proceedings to condemn land for a railroad right of way, the landowner is not entitled to recover damages because a bridge to be erected over a highway will interfere with his access to town and will render the highway dangerous. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. The erroneous admission of evidence on this point held not cured by an instruction that plaintiff could not recover for inconveniences caused by such bridge. Id.

57. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39.

58. The property owner may recover damages for injuries resulting from the operation of a railroad and which physically affect the property, such as jarring of earth, casting of soot and cinders on the property and the emission of smoke (Smith v. St. Paul, etc., R. Co. [Wash.] 81 P. 840), but he cannot recover damages for the ringing of bells, sounding of whistles, rumbling of trains and other usual noises, and the emission of smoke, gases, fumes and odors which are necessarily incident to the proper operation of the road (Id.).

59. Smith v. St. Paul, etc., R. Co. [Wash.] 81 P. 840.

60. Brook's Case, 39 Ct. Cl. 494.

61. Houston & T. C. R. Co. v. Dallas [Tex.] 84 S. W. 648. The exercise of the police power simply regulates the use and enjoyment of the property by the owner but does not appropriate. State v. Robb [Me.] 60 A. 874; Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

Animals ferae naturae: Statutes restricting and regulating the capture of animals ferae naturae, not reduced to actual possession, are not violative of constitutional provisions declaring that private property shall not be taken without just compensation. Ex parte Fritz [Miss.] 38 So. 722. Laws 1901, p. 518, c. 358, § 22, as amended by Laws 1903, p. 720, c. 437, § 20, prohibiting the transportation of fish taken from inland waters of the state, does not violate the constitutional inhibition against the taking of private property for public use without compensation. State v. Nergaard [Wis.] 102 N. W. 899.

Bridges: A statute requiring a railroad to perform its common-law duty to build its bridges over natural water courses, with a view of the future as well as the present contingencies and requirements of such water course, though the flow be increased by artificial improvements, does not constitute a taking of private property without just compensation. Farm drainage act (Hurd's Rev. St. 1901, p. 687) construed. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

Grade crossings: An ordinance, as authorized by Dallas City Charter, § 113, requiring railroad companies at their own expense to reduce their tracks at crossings to grade is in the exercise of the police power, and not of the power of eminent domain. Houston, etc., R. Co. v. Dallas [Tex.] 84 S. W. 648.

Health regulations: The provision of Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, requiring all school sinks in existing tenement houses in cities of the first class to be removed, does not constitute a taking of private property for public use without just compensation. Tenement House Department of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231. 95 Ohio Laws, p. 155, § 3, being an act to provide for the cleaning out of public ditches and drains, is not violative of art. 1, § 19 of the constitution. Taylor v. Crawford [Ohio] 74 N. E. 1065.

Licenses: Burns' Ann. St. 1901, § 3927, giving a city the power to require a license

be reasonable,[62] but where a city is authorized to maintain a pesthouse, it is liable in damages for its act in seizing private property without the consent of the owner and without compensation, for the purpose of a temporary pesthouse.[63] The apportionment of the entire cost of a sidewalk improvement upon the abutting lots according to their frontage is not a taking as the term is here used.[64]

Changing uses of streams and highways.—The lowering of the waters of a navigable stream,[65] or the interference with the natural and usual flow of a nonnavigable stream,[66] may constitute a taking; but compelling the depression of tunnels so as to remove obstruction to navigation of the stream above them,[67] or requiring a gas company to change the location of its mains in streets, is not a taking,[68] though the removal of telegraph poles and lines from a post road may be.[69]

Establishment or vacation of streets.[70]—A railroad company required to con-

to sell intoxicating liquors within four miles of its corporate limits, is constitutional. Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544.

62. State v. Robb [Me.] 60 A. 874. A rule of a park commission forbidding the erection or display of **advertising signs** within a certain distance of a park held a taking of private property for public use without compensation. Commonwealth v. Boston Advertising Co. [Mass.] 74 N. E. 601.

63. Where guest at hotel was discovered to have smallpox and hotel was quarantined, city held liable in damages. Barton v. Odessa [Mo. App.] 82 S. W. 1119.

64. There was no judicial inquiry as to the value of the various lots or the benefits resulting from the improvement. Wilzinski v. Greenville [Miss.] 37 So. 807.

65. Improvements under the drainage act of March 29, 1889 (Starr & C. Ann. St. 1896, c. 42) having lowered the waters of a navigable stream, requiring abutting owners to excavate and deepen such stream, such lowering is a taking or damaging private property. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

66. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779.

67. Under Horse and Dummy Act 1874 (Hurd's Rev. St. 1903, p. 1833, c. 131a), a city ordinance requiring the lowering of a street railway tunnel under the bed of a river, such tunnel constituting an obstruction to navigation, does not constitute a taking. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

68. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 Law. Ed. 831.

69. The state cannot, without the payment of compensation, compel the removal of telegraph poles and lines from a public highway, which is a post road, such lines having been erected with the consent of the local authorities and the owner thereof having filed its acceptance of the provisions of Rev. St. § 5263, though such poles and wires have become an inconvenience to the public. Ohio Postal Tel. Cable Co. v. Sandusky County Com'rs, 137 F. 947.

70. See 3 C. L. 1195.

NOTE: Is the vacating of a street a taking? It has been held that the vacating of a street is neither a taking nor a damaging of private property in such a sense as to authorize the adjacent landowner or others who have been accustomed to use the street to claim compensation for the deprivation of this right; that any loss resulting from the exercise of the power to vacate a street is damnum absque injuria. Paul v. Carver, 24 Pa. 207, 64 Am. Dec. 649; Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 P. 569, 23 L. R. A. 388; Coster v. Albany, 43 N. Y. 399; Gray v. Land Co., 26 Iowa, 387. But there is also authority for the proposition that when the vacating of the street occasions to the adjacent owner or others who had been accustomed to use the street such peculiar loss as is not of the same character as that inflicted upon the general public, equity will interfere in behalf of such owner to restrain the attempted abandonment of the street, and such person has a right of action against a municipal corporation exercising a power to vacate delegated to it by the state. Heller v. Railroad Co., 28 Kan. 625; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; Brady v. Skinkle, 40 Iowa, 576. It has also been said that, if the vacating of the street has the effect to entirely destroy or seriously impair the right of ingress and egress of a person owning property approached from the street, the loss thus sustained is not one suffered in common with the general public, and that such a person is entitled to compensation. Chicago v. Building Ass'n, 102 Ill. 379, 40 Am. Rep. 598; Mills, Em. Dom. [2d Ed.] § 318; Chicago v. Burcky, 158 Ill. 103, 42 N. E. 179, 49 Am. St. Rep. 142, 29 L. R. A. 568. On the other hand, it has been held that the destruction of one means of access when another is left unimpaired will not give a right of action against a city which had proceeded to vacate a street in the manner authorized by law. Smith v. Boston, 7 Cush. [Mass.] 254; Fearing v. Irwin, 55 N. Y. 486; Kings Co. Fire Ins. Co. v. Stevens, 101 N. Y. 411, 5 N. E. 353. Other courts hold that the owners of property abutting upon a street have such a property in the use of the street that the same cannot be destroyed by vacating the street without compensation being made for the loss thus sustained. Van Witsen v. Gutman, 79 Md. 405, 29 A. 608, 24 L. R. A. 403; Webster v. Lowell, 142 Mass. 326, 8 N. E. 54; Haynes v. Thomas, 7 Ind. 38; Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490; Bannon v. Roh-

struct grade crossings is entitled to compensation for the construction of the highway over its right of way.[71]

Establishment or change of street grade.[72]—In the absence of negligence,[73] a municipality changing a street grade is not liable for injuries resulting to abutting property.[74] In some states, however, this rule has been changed by constitutional or statutory provisions.[75] Though a railroad is obliged by its charter to maintain safe passages for the public over or under its tracks, it is liable for injuries to property resulting from a change in the grade of a highway made by it for its own convenience.[76]

Railroads or other ways or structures on city streets.[77]—The construction of an ordinary passenger and freight railroad upon the streets of a city constitutes an additional servitude, and abutting property owners are entitled to compensation for the damages resulting to their property.[78] The reverse is ordinarily true of an ordinary street passenger railway.[79] Except where the fee of the street is in the city,[80]

meiser, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Pearsall v. Supervisors, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193. See, also, 27 Am. & Eng. Enc. Law [2d Ed.] 115.—From Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 315.

71. St. Louis S. W. R. Co. v. Royall [Ark.] 88 S. W. 555.

72. See 3 C. L. 1195. See, also, Highways and Streets, 3 C. L. 1593.

73. Rule is subject to qualification that no unnecessary damage to an adjoining landowner, resulting from a want of ordinary care in making the improvement, or from a physical invasion of such owner's property, thereby depriving him of it and devoting it to a public use. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706. Where a city in grading a street removed the lateral support of soil of premises near the highway, causing such soil to fall, held a taking of private property for public uses. Id.

74. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1. The revised eminent domain act (P. L. 1900, p. 79) does not apply to injuries arising from a change of a street grade. Id. Mere fact that access to property is rendered more difficult is immaterial. McCullough v. Campbellsport, 123 Wis. 334, 101 N. W. 709; Smith v. Boston & A. R. Co., 181 N. Y. 132, 73 N. E. 679, afg. 99 App. Div. 94, 91 N. Y. S. 412. Railroad Law 1897, p. 797, c. 754, § 63, providing that a municipal corporation may acquire or condemn land necessary to abolish grade crossings, does not abolish the rule. Id. Complaint alleging that an order was made by the railroad commissioners authorizing a town and a railroad to purchase lands described therein, and that the town destroyed the highway in front of plaintiff's premises, held insufficient to render the town liable. Id.

75. Laws 1903, p. 1396, c. 610, providing for the recovery of damages caused by the change of grade of highways, is constitutional. Laws 1892, p. 1761, c. 686, § 69, construed. In re Borup [N. Y.] 74 N. E. 838, afg. 102 App. Div. 262, 92 N. Y. S. 624. Laws 1903, p. 1396, c. 610, providing for the recovery of damages caused by the change of grade of highways, construed as permitting an award of damages less than the diminution in the market value of the property, but in no case a greater sum. Id. Under Const. § 242, a property owner is entitled to recover damages for an injury to his property by the grading of a street adjoining the same, though there was no actual invasion of his property lines. Board of Councilmen v. Edelin, 26 Ky. L. R. 601, 82 S. W. 279. Change of grading obstructing right of egress and ingress to private property is a damaging for public use. Village of Grant Park v. Trah, 115 Ill. App. 291. Change of grade held to constitute mercly ordinary repairs and property owner was entitled to maintain an action for damages against the town. Garvey v. Revere [Mass.] 73 N. E. 664.

76. Perrine v. Pennsylvania R. Co. [N. J. Law] 61 A. 87; Central R. Co. v. State, 32 N. J. Law 229, distinguished.

77. See 3 C. L. 1195, also, see p. 1196, n. 98, 99.

78. Kentucky & K. Bridge & R. Co. v. Clemmons [Ky.] 86 S. W. 1125. Damages may be recovered whether they result from direct invasion or from consequential injuries. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Though the rails are flush with the surface of the street, and the construction works no change of grade. Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 P. 868. A railroad company authorized by a city council to construct and operate a track on a way within the city limits is liable for interference with property owner's right of ingress and egress. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

79. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711. A street surface passenger railway constructed at grade does not constitute an additional servitude so long as its use of the street does not unnecessarily interfere with the ordinary modes of travel, though the street in which the tracks are laid is so narrow as to render it difficult for the passage of street cars and vehicles. Morris v. Montgomery Traction Co. [Ala.] 38 So. 834. A double-track street railway was constructed in

the construction of an elevated railway is an injury to abutting property for which the property owner,[81] and in some states a mortgagee,[82] is entitled to compensation, which compensation should include damages for depreciation of value owing to the obstruction of ingress or egress,[83] and also, the owner having a vested right in the easements of light and air, for the interference therewith.[84] A steam surface railway acquiring a right of way in fee is not liable for damages caused by the construction of a viaduct to connect its trains with an elevated railroad, to a subsequent grantee of its grantor.[85] A property owner is entitled to compensation for the obstruction of means of access caused by the construction of a retaining wall,[86] or a railroad embankment.[87] Where property is damaged beyond a mere incidental inconvenience which unavoidably follows the exercise of charter powers by the construction of tunnels and the operation of railroad trains through them, property owners affected thereby are entitled to recover damages without proof of negligence on the part of the railroad.[88] Every approach to a railroad crossing forms a part of the crossing.[89]

Use of rural highways for purposes other than general public travel.[90]—The weight of authority seems to be that the placing of telephone poles and wires[91] upon a rural highway does not constitute an additional servitude, and the same has been held of an electric railway.[92] Where, in the improvement of its road, a railroad company occupies a public highway and supplies another, a common-law action may be maintained by a party injured thereby, whose lands have not been taken in chang-

the northerly half of a road 33 feet in width, pursuant to a city ordinance. The poles were placed close to the outer line of the street and the ties extended to within two or three feet of that line.. No sidewalk had been built. Held not to constitute an additional servitude. Budd v. Camden Horse R. Co., 70 N. J. Law, 782, 59 A. 229.

80. In such case damages are damnum absque injuria. Sauer v. New York, 180 N. Y. 27, 72 N. E. 579, afg. 90 App. Div. 36, 85 N. Y. S. 636.

81. Leffmann v. Long Island R. Co., 93 N. Y. S. 647.

82. St. 1894, p. 764, c. 548, § 8 does not extend the rights given mortgagees by St. 1855, p. 666, c. 247 and St. 1881, p. 426, c. 110, but merely puts beyond question the right of mortgagees to compensation for the construction of an elevated railway in the street on which the mortgaged premises abut. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

83. So held where a railroad viaduct 10 or 12 feet high was erected in a street leaving a space of only 21 feet between the viaduct and the property line of an abutting owner and 11 feet between the viaduct and the sidewalk. Camden Interstate R. Co. v. Smiley [Ky.] 84 S. W. 523.

84. One who acquired land at a time when it was held by the highest court of the state that an abutter was entitled to compensation for impairment of his easements of light, air and access by the construction of elevated railroads in the street acquires a vested right in easements so protected and a subsequent overruling by the state court of its holding does not impair his right to compensation for the subsequent construction of an elevated railroad in the street. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872.

85. Bennett v. Long Island R. Co., 181 N. Y. 431, 74 N. E. 418, afg. 89 App. Div. 379, 85 N. Y. S. 938.

86. City built retaining wall, thereby converting a street into a cul de sac. Walsh v. Scranton, 23 Pa. Super. Ct. 276; Haggerty v. Scranton, 23 Pa. Super. Ct. 279.

87. Harrington v. Iowa Cent. R. Co., 126 Iowa, 388, 102 N. W. 139; Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827. One purchasing land in reliance on the fact that the street affording him access to his property was platted is entitled to recover damages from a railroad company obstructing such street by an embankment. Hyman v. Ann Arbor R. Co. [Mich.] 12 Det. Leg. N. 392, 104 N. W. 375.

88. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Code Pub. Gen. Laws 1889, art. 23, § 198, providing that a railroad shall be liable in suits for injury to cattle or injuries occasioned by fire from its engines, unless it proves that the injury occurred without negligence on its part, does not change the rule but merely shifts the burden of proof. Id.

89. Code, § 767, providing that no railroad track can be laid in a street until abutting owners have been compensated for injuries, applies to owners whose property abuts on streets excavated to make an approach to the railroad crossing. Middleton v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 364.

90. See 3 C. L. 1196.

91. Cumberland Tel. & T. Co. v. Avritt [Ky.] 85 S. W. 204; Lowther v. Bridgeman [W. Va.] 50 S. E. 410.

92. Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148.

ing the site of the original highway, and whose injuries are peculiar to himself and different in kind and degree from those sustained by the general public.[93]

Additional servitudes on railways.—The acquisition of a crossing by one railroad over another involves a taking of private property.[94] The fact that a railroad track is changed from narrow to standard gauge and that heavier trains are run over the same does not entitle the landowner to damages.[95]

§ 5. *Conditions precedent to the exercise of the power; location of route.*[96]—Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued.[97] In delegating the power the legislature has the authority to render the right to exercise it conditional; thus it may require that before proceedings can be commenced to condemn land for a highway[98] or a railroad,[99] a map of the proposed road shall be made and filed and, in some cases, approved. A location under such a requirement amounts to an appropriation of the place selected as against all persons except the owner of the land and a person who may have perfected a prior location thereon;[1] and, as to the landowner, it gives a right to acquire his title, by purchase or the further exercise of the power of eminent domain, paramount to that of a person claiming under a subsequent location.[2] As to whether or not an offer to purchase is a necessary condition precedent to condemnation is purely a statutory question.[3] In Louisiana the

93. Foust v. Pennsylvania R. Co. [Pa.] 61 A. 829. Railroad company appropriating public highway held liable to owner or mill for rendering access so inconvenient and dangerous as to drive away customers. Id.

94. Wellsburg, & S. L. R. Co. v. Pan Handle Traction Co., 56 W. Va. 18, 48 S. E. 746.

95. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

96. See 3 C. L. 1196. See, also, § 22, for conditions precedent to the taking of possession.

97. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031.

Oregon; ditch rights: Under B. & C. Comp. §§ 5022-5030, an action to condemn land for a ditch can be maintained before the right to divert the surplus water of a stream has been secured. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031.

98. Under Laws 1901, p. 1765, c. 712, § 1, such general plans and specifications for the improvement must be prepared by the commissioner and approved by the board of estimate as will show the court that the land is necessary for carrying out the improvement, before the city can proceed to condemn the land. In re City of New York, 93 N. Y. S. 655, rvg. Id., 45 Misc. 184, 91 N. Y. S. 987. A resolution of the board of estimate held not to constitute a sufficient approval by it of the general plans and specifications for the improvement authorized by Laws 1901, p. 1765, c. 712, § 1, so as to authorize condemnation proceedings, but to merely approve the recommendation of the commissioner as to the selection of lands to be acquired for the improvement. Id. All matters relating to the location of a highway are treated in Highways and Streets, 3 C. L. 1593.

99. The map referred to in Comp. Laws, § 6232 need not be a map of the right of way to be acquired; it is sufficient if it is a map of the route. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856. The filing with the secretary of state of the certificate required by Rev. St. 1897, § 3280, is a condition precedent to the right to appropriate property for the construction of a branch railroad. Pittsburg, etc., R. Co. v. Tod [Ohio] 74 N. E. 172. Rev. St. 1898, § 1846, requiring a railroad to have surveyed and staked out its route, has reference to a survey of that portion of the main line covering the land in question. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401. See, also, Railroads, 4 C. L. 1181.

1. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890. Land covered by a location for the purposes of its road, made by a railroad company, and acquired by it by purchase from the landowner, may be taken, under the power of eminent domain, by another railroad company which has made an earlier location of its road on the same land, but the company owning its land by purchase may defeat the condemnation proceeding by showing that its location upon the same was first made. Id. See, also, Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

2. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

3. **Arkansas:** A city is not required to first attempt to secure a street crossing over a railroad right of way by agreement with the company, before beginning condemnation proceedings. St. Louis & S. F. R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

Georgia: Under Civ. Code 1895, §§ 4658, 4659, it is essential that the condemnor first try to buy land. City of Elberton v. Hobbs, 121 Ga. 750, 49 S. E. 780.

New York: It is not a condition precedent to the exercise of the power of eminent domain under Laws 1901, p. 1765, c. 712, that the city make an effort to purchase the land by agreement with the owner. In re City of New York, 93 N. Y. S. 655, rvg. 45 Misc. 184, 91 N. Y. S. 987. Under Laws 1901, p. 1769, c. 712, § 6, requiring the consent of

only penalty incurred by failure to tender the value of the property before suit is the obligation to pay costs.[4]

§ 6. *Measure and sufficiency of compensation.*[5]—As a general rule the proper measure of damages as to property actually taken is the fair cash market value of such property at the time of taking.[6] As to property not taken, the injury being permanent, it is the difference between such value immediately before and after the injury.[7] This includes the cost of such improvements as are necessary to the reasonable enjoyment of the land not taken,[8] but the sum awarded for the land taken and not taken must not exceed the difference between the actual value of the entire tract immediately before and after taking.[9] The injury being temporary, the owner's measure of damages is the diminution in the value of the use of the premises for the purpose for which it was being used during the period of injury.[10] The property being used for business purposes, the court should consider the actual loss of trade and profits caused by the interruption and the reasonably necessary additional labor and expense required to prevent further loss, and which could not have been avoided by the use of reasonable care and foresight.[11] If the premises were used as a place of residence, or for the purpose of renting, the measure of dam-

property owners to the construction of any railroad track along a street in reconstructing an approach to Brooklyn Bridge, the obtaining of such consent is not a condition precedent to the condemnation of land under the act, when it is not made to appear that any railroad track is to be laid. Id.

North Carolina: Under Laws 1854-55, p. 264, c. 228, § 29, an effort to purchase the land should be made before condemnation. City of Hickory v. Southern R. Co., 137 N. C. 189, 49 S. E. 202.

Texas: Although Rev. St. 1895, art. 4370 is not expressly referred to in Acts 1884, p. 63, c. 29, § 3, it is to be implied therefrom that the written consent of the owner is to be applied for, and if not obtained, that commissioners should be appointed to assess damages. Morgan v. Oliver [Tex.] 82 S. W. 1028.

4. City of Shreveport v. Noel [La.] 38 So. 137.

5. See 3 C. L. 1197.

6. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122; Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1; Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310. Change of grade of street. Garvey v. Revere [Mass.] 73 N. E. 664. A railroad taking the whole of a tract of land, the compensation to be allowed the owner is, ordinarily, its market value at the time of its appropriation, without any deduction for benefits or appreciation in value, general and common to the community in which the land is, shared by all property along the line of the road, and due to the prospect of its construction. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521. See, also, on this point. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1. In proceedings to condemn land for a railroad, an instruction that, in assessing damages for land taken, it would not be reasonable to fix the price of one acre or less at the general rate of the whole tract, as "this would be selling at retail, and ought to be at a higher price for the quantity taken," is erroneous, because it does not follow that the sale of a small strip would in all cases be higher than the average of the land as an entire tract, and, where a small portion of the land is taken, it ought to be valued at such a price for the quantity taken as the jury deem it to be worth at the place and in that form. Union R. Co. v. Raine [Tenn.] 86 S. W. 857.

7. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491; Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996; Illinois, I. & M. R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116; Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118; Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122; Pichon v. Martin [Ind. App.] 73 N. E. 1009; Settegast v. Houston, etc., R. Co. [Tex. Civ. App.] 87 S. W. 197; Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310. Damages resulting to the part of the property not taken, consequent on the use of the land taken, must be considered. In re Board of Public Improvements of New York, 99 App. Div. 576, 91 N. Y. S. 161. Where railroad was constructed across the mouth of a cove in such manner as not to materially impair plaintiff's right of access to her land from the river through the cove, the navigability of which was slight because of the shallowness of the water, held, plaintiff was only entitled to nominal damages. Richards v. New York, etc., R. Co., 77 Conn. 501, 60 A. 295.

As to elevated railroads in streets, see ante, § 4.

8, 9. Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310.

10. Opening of street and consequent temporary interruption of right of access. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491.

11. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491. Where plaintiffs were engaged in a wholesale grocery, grain and meat business, held error to allow items of damage for money paid for extra team and help and the extra price paid for meat to an amount exceeding the value of the plaintiff's premises. Id.

ages would probably be fairly measured by the market rental value, or the diminution in such rental value, during the period of interruption.[12] The damages must be confined to the property directly involved in the proceeding,[13] and as a general rule where part of a tract is taken, they must be confined to such tract and cannot include separate and segregated tracts unless all are used together and the owner has, as a matter of right, means of communication between them.[14] The time of the actual opening of a street is the time the law fixes for estimating the damages.[15] The market value is the price for which the property could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind.[16] Such value is to be determined by the same considerations that enter into a sale between private parties, namely, the availability of the land for all valuable uses to which it is adapted, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[17] Rental value is to be considered,[18] but it may be shown that the lease was taken as a speculation on the allowance to be made in the condemnation proceedings.[19] In proceedings to condemn a right of way over oil-bearing lands, it is permissible to show a progressive decrease in the productiveness of the field within which the land in question is situated.[20] Where part of a leased tract is taken, the lessee is entitled to the difference between the value of the annual use of the premises before the taking and what it was worth afterward.[21]

The value of intangible property of a public service system cannot be determined by capitalizing its actual income,[22] but should be determined by capitalizing an income based on reasonable rates.[23] In applying the rule that the basis of all calculations as to the reasonableness of rates is the fair value of the property used for the service of the public, franchise values are not to be disregarded,[24] the element of going concern value is not to be considered only as in-

12. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491.

13. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

14. Kansas City, etc., R. Co. v. Littler [Kan.] 79 P. 114. Where deed under which the landowner sought to establish his title showed that land was crossed by another railroad, held, he was not entitled to introduce evidence as to the consequential damages occasioned to the entire tract. Id.

15. Fitzell v. Philadelphia, 211 Pa. 1, 60 A. 323. Where street was platted as of the width of 60 feet but was only opened to the width of 50 feet, the owner is entitled to damages for the extra 10 feet when the same are actually taken. Id.

16. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521.

17. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521; Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1; Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491; Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122. The market value of land is generally based upon its extent, the character of its improvements, its productive qualities, and upon sales of property in the vicinity. Reed v. Pittsburg, etc., R. Co., 210 Pa. 211, 59 A. 1067. An instruction that the jury might consider the property's value for the purpose for which it was shown by the evidence to be most available was no ground for reversal. Chicago, & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. Where the land was only a quarter of a mile from the limits of a thriving city and property adjoining had been platted and the lots were in the market for building purposes, it is competent for defendants to show the adaptability of their land for such use, as well as for farming or gardening purposes. Chicago, etc., R. Co. v. Rottgering, 26 Ky. L. R. 1167, 83 S. W. 584. Instructions on the question of what facts may be considered by the jury in determining the value of the property involved, considered and held not erroneous. Petersburg School Dist. v. Peterson [N. D.] 103 N. W. 756.

18, 19. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182.

20. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

21. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135.

22, 23. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537.

24. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537. A statutory direction to appraisers to fix the valuation of the plant and of the franchises is, in substance, a direction to fix the valuation of the plant as affected by the franchise. Id.

volved in structure value,[25] and property value in this connection is not merely structure value.[26] Profits which, in the aggregate, exceed a fair return on the owner's property and franchises, involve unreasonable rates, and furnish no criterion of either franchise values or going concern value. What would be a fair return must depend upon the circumstances of each particular case.[27] When the rates which furnish a basis for estimating value are earned in part by property taken and in part by property not taken, the appraisers must discriminate and, so far as value may depend upon rates, they should charge the property taken for only its fair proportion of the earnings.[28] In determining structure value on a certain day, the market prices of materials and labor on that day or during a period long enough before that time for construction are the standards, rather than former prices,[29] and interest upon the money invested in the plant during construction and before completion should be allowed as a part of the cost of construction;[30] hence while actual cost bears upon the present value of the structure, it is not the only criterion. If, by the rise in prices, the present value of the structure is greater than the cost, the owner is entitled to the benefit of it; if less than the cost the owner must lose it.[31] The fact that the structure is in use and the further fact that it may lawfully be used where it is may enhance its value.[32] Where, in widening a street, a building is partly demolished, the jury should either consider the remainder of the building worthless and allow its value, or consider what could be done with the remainder of the building and the cost of doing it in accordance with the ordinances of the city.[33] Land being condemned for general railroad purposes, it is the duty of the jury to estimate the damages with reference to the right of the company to devote the entire tract[34] to any of the uses to which it may lawfully apply it,[35] and with reference to any motive power that the company may use under its charter.[36] In the absence of evidence to the contrary, a street being widened, it will be presumed that the grade will not be changed.[37] In proceedings to recover damages for the taking of a water power, the measure of damages is not, as a matter of law, the cost that might result from the substitution of steam power for the water power.[38] In such a case in making an estimate of the cost of production of power as a foundation for an assessment of damages, the best test is the cost under the most favorable conditions,[39] and the average daily yield, including times of the highest water and of the lowest, does not fairly represent the usual available power.[40] In the absence of consent by the

25, 26, 27, 28, 29, 30, 31. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537.

32. Waterworks. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537.

33. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159. A verdict allowing only a portion of the value of the building held sustainable only on the theory that the remaining portion of the building would be of value, by reconstructing the building. Id.

34. Union R. Co. v. Raine [Tenn.] 86 S. W. 857.

35. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. In condemnation proceedings by a railroad, an instruction that the company would have the right to haul both freight and passenger cars, and as many of them as it desired, and to perform all the duties pertaining to a railroad as a common carrier, held proper. Id.

36. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. So held where company refused to frame its pleadings so as to show that it did not intend to use steam power. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. So held where company refused to stipulate that it would operate its road by electricity. Id. Where a judgment for plaintiff would give it the right to operate its road by steam, held proper to instruct that the damages should not be assessed nor the benefits offset upon the idea that the road would be operated by electricity. Id.

37. Tenney v. Cincinnati, 5 Ohio C. C. (N. S.) 459.

38, 39. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

40. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. In proceedings to recover damages for the taking of a water power, a witness testifying as to the manner of handling high water, held petitioner could not complain of the exclusion of a question put to him as to the average daily

parties, these rules cannot be changed by legislative enactment.[41] The United States in the exercise of the right of eminent domain is under its own limitation and injunction in respect to questions relating to just compensation for property taken in its own right.[42] In any case the amount to be awarded is a question of fact for the jury,[43] upon consideration of all the evidence in the case, including the knowledge of the property which they have acquired by their view of it.[44] Their award should not be based on mere caprice,[45] nor influenced by passion or prejudice.[46] The person damaged is entitled to interest on the value of the property taken from the time that title vests in the taker;[47] but care should be taken in awarding such interest that interest is not given on interest.[48]

Benefits.[49]—While benefits resulting from the improvement cannot be set off against the value of land taken,[50] still the value of such benefits as are direct and peculiar to the landowner, as distinguished from those shared by him in common with other citizens,[51] and are not speculative, contingent or remote,[52] should be set

yield of water from the watershed, including the reservoirs above the mill. Id.

41. Where the charter of a political subdivision of the state provided rule for damages for condemning waterworks, held, rule became effective by the approval of the charter by the inhabitants of the political subdivision. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 A. 537.

42. Town of Nahant v. United States [C. C. A.] 136 F. 273. Measure of damages may be different from that which would have been awarded in a proceeding under the state laws. Id. An act of a state legislature authorizing the United States to condemn property operates merely as a formal assent to the exercise by the general government of its own right of eminent domain, and does not entitle the United States to stand upon the state law as to the rule of damages where property taken for a second and different public use is connected with a prior public use authorized by the state. Id.

43. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122; Swope v. Seattle, 36 Wash. 113, 78 P. 607. Hence, in an action against a city for lowering the grade of a street, plaintiff held not prejudiced by a ruling that defendant was simply damaging plaintiff's property, and that its acts did not constitute a taking of property entitling plaintiff to recover the actual value of the earth taken and damage to the land not taken. Id.

44. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521.

45. In proceedings for condemnation of land to widen a street, evidence held insufficient to sustain a verdict arbitrarily allowing a certain sum for the land taken, assessing an equal amount for benefits to land not taken, and allowing a part only of the value of the building for the taking of the front portion thereof. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159. An instruction that it was proper for the jury to consider every element of annoyance and disadvantage resulting from the construction of the railroad which would influence an intending purchaser in making an estimate of the market value of plaintiff's property, held erroneous as permitting the jury to award damages on mere caprice. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

46. Evidence held insufficient to show that the damages awarded were so excessive as to indicate passion and prejudice on the part of the jury. Chicago, etc., R. Co. v. Rottgering, 26 Ky. L. R. 1167, 83 S. W. 584. Evidence considered and held to warrant the damages awarded. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. In proceedings to condemn land for a railroad right of way, facts held insufficient to show that the damages awarded were grossly inadequate. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122.

47. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6. Under Laws 1896, p. 888, c. 727, § 4, interest should be included in the assessment. Id.

48. An award in which interest from the date title vested to the date of the report of commissioners was added to the amount of the value of the land, as damages, and interest was allowed on this sum; held erroneous, as awarding interest on interest. Laws 1897, p. 907, c. 665 considered. In re City of New York, 179 N. Y. 496, 72 N. E. 522; modifying In re Dorsett, 92 App. Div. 523, 87 N. Y. S. 308.

49. See 3 C. L. 1198.

50. Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310.

51. Bennett v. Hall, 184 Mo. 407, 83 S. W. 439. Benefits which the landowner enjoys only in common with the community are not to be deducted. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281. In laying out of a highway, jury should consider benefits and damages as specially applied to the specific real estate over which the road is laid out. Pichon v. Martin [Ind. App.] 73 N. E. 1009.

52. Illinois Cent. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39; Swenson v. Hallock Sup'rs [Minn.] 103 N. W. 895. Proof of a local custom of a town to improve roads as rapidly as possible, and judicial notice of a general custom to construct roads so as to afford some drainage, is not sufficient evidence to establish such a benefit. Swenson v. Hallock Sup'rs [Minn.] 103 N. W. 895.

off against the damages to land not taken.[53] So doing does not violate a constitutional provision requiring just compensation,[54] even though it results in an award of no damages.[55] Benefits made possible by the improvement cannot be considered if the cost of making them must be borne by the property owner.[56] In some states the benefits allowed are only such as inure to or directly affect the land adjacent to the land taken;[57] in others any benefit to a single tract of land used by the owner for a common purpose is allowed.[58] The determination of benefits from a street improvement is to be based on the increase in the market value of the property, and is not limited by the benefit conferred for the particular use to which the property is then put.[59] Where damages are assessed according to frontage, benefits may be assessed in the same way.[60] Benefits accruing from the construction of a railroad may be set off against damages for consequential inconvenience or injury resulting from the prudent construction and operation of the railroad.[61]

Particular elements of damage.[62]—In general all damages reducing the salability of the property should be considered.[63] Thus that rights of drain and access are taken,[64] and the fact that surface water will be thrown back on the premises,[65] are proper elements of damage. Where land bordering on a river is taken, allowance

Illustrations. What benefits may be set off: Drainage of land not taken. Swenson v. Hallock Sup'rs [Minn.] 103 N. W. 895. Increasing value of property for a factory site. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122. In such case the fact that an electric railroad is in operation over the land is a fact to be taken into consideration. Id. Probable increase in value from a railroad depot then in construction near by is to be considered. City of El Paso v. Coffin [Tex. Civ. App.] 13 Tex. Ct. Rep. 601, 88 S. W. 502. Where the owner of land abutting on a street held under a deed restricting him for a period of 30 years from building nearer than 20 feet to the traveled portion of the street, the condemnation of a strip 20 feet wide along the entire distance of the street for the purpose of beautifying the same, held a benefit to the property. In re City of New York, 94 N. Y. S. 146. In proceedings to condemn land for railroad right of way, it appearing that the land not taken is valuable for manufacturing sites, the fact that under the law other railroads would have the right to cross the plaintiff's tracks and vice versa should be considered. Union R. Co. v. Raine [Tenn.] 86 S. W. 857.

53. Instructions that defendants should be allowed the fair value of the land taken and such other damages as directly resulted to the remainder of the tract and improvements, if any, not exceeding the difference in value before and after the taking, and authorizing the jury to find for defendants such incidental damages as resulted to the remainder of their land, by the building and operating of the railroad in a prudent manner, less whatever sum the value of the advantage accruing from the building of the road, held correct. Chicago, etc., R. Co. v. Rottgering, 26 Ky. L. R. 1167, 83 S. W. 584.

54. Heath v. Sheetz [Ind.] 74 N. E. 505.

55. Bennett v. Hall, 184 Mo. 407, 83 S. W. 439.

56. Where the grade of a highway is changed, benefits, such as sidewalks, drains and sewers, rendered possible by the improvement, cannot be set off against the property owner's damages, it being possible that the owner will have to pay for such improvements. Garvey v. Revere [Mass.] 73 N. E. 664. Where street grade was changed, held proper to subtract from the benefits which may appear to have accrued to the property, the sum charged against the property as a special tax for the making of the sidewalks accompanying such change of grade. Village of Grant Park v. Trah, 115 Ill. App. 291. Where street was widened, and a witness testified that the improvement would benefit defendant's property by bringing business to the street, defendant is entitled on cross-examination to ascertain whether witness considered that defendant would be compelled to pay for repaving the street and a new sidewalk. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159.

57. Rev. St. 1898, § 3598. Railroad constructing new roadway cannot compel owner to offset against damages the benefits to be derived from the abandonment of the old right of way, the two rights of way being nearly a mile apart. Oregon Short Line R. Co. v. Fox, 28 Utah, 311, 78 P. 800.

58. So held where land lay in one body except for an intervening highway, and this though a remonstrance filed by the owner was arbitrarily confined to a part of such land. Speck v. Kenoyer [Ind.] 73 N. E. 896.

59. Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849.

60. In re City of New York, 94 N. Y. S. 146.

61. Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310.

62. See 3 C. L. 1199.

63. Erection of elevated railroad. Logan v. Boston El. R. Co. [Mass.] 74 N. E. 663. Expert may testify in regard thereto. Id.

64. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

65. Johnson v. Charleston & W. C. R. Co. [S. C.] 50 S. E. 775.

should be made for the riparian rights.[66] The fact that the property is situated in a religious settlement does not enhance its value.[67] Damages accruing from the improper construction of a railroad[68] or other public improvement[69] cannot be considered; but all damages occasioned by the proper use of the improvement[70] or operation of the railroad,[71] including the fact that the company is not obliged to fence its right of way,[72] should be considered. In proceedings to condemn a highway across a railroad's right of way, the railroad is entitled to compensation for necessary structural changes and for any direct expense incurred;[73] but it is not entitled to compensation for the observance of public regulations,[74] nor for the fact that it may be compelled to construct an overhead crossing.[75] A mere personal right or privilege in the taker cannot be considered in diminution of damages.[76] The fact that nearby landowners maintain works beneficial to the use to which plaintiff is putting the land cannot be considered.[77] The property being sold pending the proceedings, it will be presumed that the grantor sustained a loss in diminution of the purchase price.[78] Neither remote, speculative or fanciful damages,[79] nor those common to the general public,[80] can be considered.

Taking rights in public way.[81]—On a railroad's condemning the whole of a dedi-

66. Waterford Elec. Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

67. The fact that the owner of property has formulated a great plan for the salvation of mankind, and believes, with his followers, that by the intervention of Devine Providence the property is rendered unusually valuable as a place of residence for the elect, does not impress the property with a value proportionate to his and his followers' estimate thereof, but the value of the property is to be measured as other property owned by other people in the same vicinity and similarly situated. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

68. Baltimore, etc., R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661. Not for overflow of land from construction of embankment, since railroad is required to build culverts. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281.

69, 70. Sanitary Dist. of Chicago v. Alderman, 113 Ill. App. 23.

71. After the compensation has been paid, damages cannot be recovered for injuries occasioned by smoke and noise, no negligence being alleged. Johnson v. Charleston & W. C. R. Co. [S. C.] 50 S. E. 775. Noise caused by the running of cars upon an elevated structure or by an increase and aggravation of the sound of the cars running underneath the elevated structure, on the tracks of a surface railway, are proper elements of damage in determining injury to property by erection of elevated railway. Logan v. Boston El. R. Co. [Mass.] 74 N. E. 663. Testimony of expert is admissible. Id. Danger from fire arising from the operation of the road, to buildings, fences, timber, etc., on the remaining portion of the land is, to the extent the property is thereby depreciated, a proper element of damages. Hayes v. Toledo R. & T. Co., 6 Ohio C. C. (N. S.) 281. But future crops, or other property, which may be placed upon the land, cannot be considered in arriving at an award. Id.

72. So held where the company was not obliged to fence its right of way until six months after the completion of the road. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

73, 74. Village of Plymouth v. Pere Marquette R. Co. [Mich.] 102 N. W. 947.

75. St. Louis, etc., R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

76. Where a railroad condemned a right of way through a farm, dividing it into two parts and making access from one to the other inconvenient, the fact that the company had for its own use constructed a viaduct under its tracks by which access from one part to another was rendered more convenient cannot be considered on the question of damages. Shepp v. Reading Belt R. Co., 211 Pa. 425, 60 A. 985.

77. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, it appearing that the petitioner had not acquired prescriptive rights in certain reservoirs, held, the value of the power must be determined without reference to the reservoirs. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

78. Code Civ. Proc. § 3381, construed. Waterford Elec. Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

79. In a proceeding to condemn land for a railroad right of way, the fact that the owners of the land intended at some future time to use it for an amusement park held too speculative, conjectural and remote to be considered as an element of damage. Richmond & P. Elec. R. Co. v. Seaboard Air Line R., 103 Va. 399, 49 S. E. 512. See 3 C. L. 1197, n. 24; Id. 1198, n. 25.

80. The fact that the operation of an elevated railway frightens horses is not an element of damage, where it is an inconvenience of a general character, and is not confined to the horses of those having occasion to trade with the tenants of petitioner's property. Swain v. Boston El. R. Co. [Mass.] 74 N. E. 672. An instruction that this circumstance did not diminish the commercial value of the petitioner's property, held correct, and refusal of a similar instruction held nonprejudicial. Id.

81. See 3 C. L. 1200.

cated street, the abutting owner is entitled to compensation for the full value of the land taken.[82]

Amount of damages as dependent on estate or interest appropriated.[83]—Where there is no substantial difference between the value of the fee and the value of the easement to be taken by condemnation proceedings, the value of the fee may be proven and assessed as damages;[84] but where it can be shown that the fee burdened with the easement is of some value to the owner, this value is reserved to the owner and must be considered in assessing damages.[85]

Extent and sufficiency of damages.[86]—A highway being extended over a railroad right of way, the award covers all ordinary street uses, but not new servitudes.[87] Cases dealing with the sufficiency of damages in particular cases are shown in the notes.[88]

§ 7. *Who is liable for compensation.*[89]—A corporation for whose quasi-public purposes damage is caused is liable, though ostensibly the work done was to improve a public street.[90] In the case of an entry and damage necessary to survey a public boundary, the surveying officers are liable only for misconduct, neglect or unskilfulness,[91] the remedy is against the public,[92] even though no provision is made for compensation.[93]

§ 8. *Condemnation proceedings in general.*[94]—The statutory procedure in effect when the proceedings are commenced[95] must be strictly followed,[96] and no meth-

82. Suffolk & C. R. Co. v. West End Land & Improvement Co., 137 N. C. 330, 49 S. E. 350.

83. See 3 C. L. 1200.

84. Rule applied where an easement was condemned over oil lands. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

85. Rule applied where an easement was condemned over oil lands. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

86. See 3 C. L. 1200; see, also, ante, this section, Particular elements of damage.

87. Cleveland, etc., R. Co. v. Urbana B. & N. Ry. Co., 5 Ohio C. C. (N. S.) 583.

88. Where a steam railway by condemning a right of way necessitated the removal of a house and the destruction of a large number of fruit and ornamental trees, held, an award $2,000 was not excessive. St. Louis & S. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063. In an action for damages for the obstruction of ingress and egress by the erection of a railroad viaduct in a street, plaintiff's evidence showing the difference in the value of the property before and after the erection of the obstruction to be $625, a verdict for $425 held not excessive. Camden Interstate R. Co. v. Smiley [Ky.] 84 S. W. 523. Proofs on one side showing the property to be worth $9,000, and on the other a value between $4,500 and $5,500, a judgment based on a verdict of $9,000 will not be reversed as excessive. Reed v. Pittsburg, etc., R. Co., 210 Pa. 211, 59 A. 1067.

89. See 1 C. L. 1018. Rules as to assessing the cost of public works and improvements, see Public Works and Improvements, 4 C. L. 1124.

90. Certain ways on a plat reserved from dedication to complete public use were graded so as to destroy access to abutters' lots. **Evidence** held sufficient to show that defendant did the excavating complained of. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

91, 92, 93. Officers held not liable for entry made on private property in making a survey, the method of surveying used being proper, though there were other methods by which such entry would have been rendered unnecessary. Litchfield v. Bond, 93 N. Y. S. 1016.

94. See 3 C. L. 1200.

95. That board of public improvements of New York authorized the city to open a street prior to the date when the charter of 1897 took effect had no effect on proceedings for such openings begun by appointment of commissioners, after the taking effect of the charter, so as to make the provisions of the consolidation act, in force prior to the charter, applicable. In re Opening 178th St., 94 N. Y. S. 838.

96. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. The fact that a city constructing a sidewalk on private property without compensation passed an ordinance declaring the improvement necessary and directing that it be done, held not to confer any authority on the city's agents to construct the sidewalk. City of Clinton v. Franklin, 26 Ky. L. R. 1056, 83 S. W. 140.

Statutes construed. New York: The method of procedure referred to in Laws 1903, p. 705, c. 354, § 1, authorizing the park commissioners of the city of Rochester to acquire certain land **for a public park,** is that prescribed in Laws 1888, p. 256, c. 193. In re City of Rochester, 102 App. Div. 181, 92 N. Y. S. 405.

Ohio: 95 Ohio Laws, p. 530, an act to provide for one steam **railroad crossing another** steam railroad does not exempt pending actions or proceedings from its operation. Wheeling & L. E. R. Co. v. Toledo Ry. & T. Co. [Ohio] 74 N. E. 209.

od of procedure being stated in the enabling act, general rules apply.[97] In extending to a foreign corporation the privileges granted by its charter, modes of procedure and periods of limitation found in the charter will not be read into the enabling act unless its terms clearly import such an intent.[98] It is essential that the defendant be entitled to a judicial hearing.[99] A suit does not lie to condemn property in the hands of a Federal receiver without leave of court,[1] and leave to sue may be made dependent upon suit being brought in the Federal court.[2] The right to combine or consolidate proceedings[3] or to effect a severance or splitting thereof,[4] or hear counterclaims,[5] is all statutory. The fact that a railroad is improperly occupying a public highway is immaterial in condemnation proceedings directed against the land of private proprietors.[6] A special procedure for highways, streets and railways and other special uses respectively is usually prescribed.[7] In Texas the commissioners in certain counties must proceed under the railroad law to condemn for roads.[8] In some mode indicated by statute, the decision that the contemplated taking is a necessity must be made. This is sometimes by order of court or board,[9]

97. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312. Applied to limitations. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677.

98. Charter allowed the "taking" and required owners to sue in five years; this was held not to have been adopted. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677.

99. Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576. Inasmuch as the provisions of the condemnation law (Code Civ. Proc. c. 23) are not inconsistent with Laws 1901, p. 680, c. 240, as amended by Laws 1902, p. 1221, c. 510, the proceedings pointed out by the condemnation law are applicable to proceedings under the act of 1901, as amended, and hence such act is not unconstitutional on the ground that there is no provision for denying or controverting the petition, or making any pleading or defense, and no opportunity to litigate the right of the plaintiff to maintain the proceedings. Id.

1. 24 Stat. 554 and 25 Stat. 436 (U. S. Comp. St. 1901, p. 582) do not alter the rule. Buckhannon & N. R. Co. v. Davis [C. C. A.] 135 F. 707, afg. Coster v. Parkersburg Branch R. Co., 131 F. 115. Refusal by the receiver of a railroad to agree on a crossing at a point and in a manner insisted upon by another railroad does not constitute "an act or transaction" by the receiver within such act. Id.

2. Buckhannon & N. R. Co. v. Davis [C. C. A.] 135 F. 707, afg. Coster v. Parkersburg Branch R. Co., 131 F. 115.

3. Under Code Civ. Proc. § 1244, subd. 5, it is within the discretion of the court whether suits to condemn separate tracts of land in the same county and required for the same public use shall be consolidated or tried separately. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. Under Rev. St. 1898, §§ 2647, 2844, it is discretionary with the court to permit the joinder of an action to recover damages for change of grade of a street with one against the city, its treasurer and another to annul an assessment certificate and for an injunction. Held not error for it to refuse to consolidate the actions. Haubner v. Milwaukee [Wis.] 101 N. W. 930. Under B. & C. Comp. §§ 5022-5030, a corporation having acquired the right to appropriate water is entitled to maintain an action either to condemn land for a ditch, or to condemn the right to have the water flow in the channel of the stream through the premises of a riparian proprietor, or to join both such rights in one action when they are both vested in the same defendant. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031.

4. There is nothing in the Wisconsin statutes indicating that only a part of the main line of a proposed railroad can be included in a proceeding to condemn a right of way. In condemnation proceedings by a railroad company, notice to some of the landowners being insufficient, the proceedings may be dismissed as to them and continued as to those sufficiently notified. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401.

5. In Louisiana plaintiff and defendant residing in different parishes, damages to land not taken are recoverable by reconvention in the condemnation proceedings, even though wholly disconnected with the main demand. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

6. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

7. See more particularly Highways and Streets, 3 C. L. 1593; Railroads, 4 C. L. 1181; Sewers and Drains, 4 C. L. 1429; Waters and Water Supply, 4 C. L. 1824.

8. As to such counties the statute repeals the general road law. Plowman v. Dallas County [Tex. Civ. App.] 13 Tex. Ct. Rep. 487, 88 S. W. 252.

9. An order of court as to the necessity of the improvement is necessary but, as a general rule, any order showing that the court had reached such a determination is sufficient. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511. In proceedings by a county to condemn land for a sea wall, it appearing that the issuance of bonds had been authorized and the court ordered that the county was authorized to issue the bonds, that they were issued and a tax levied and collected as prescribed by law, and the order defined and described the

sometimes by ordinance or the like.[10] In Mississippi a justice of the peace, in eminent domain proceedings, acts ministerially only.[11]

Discontinuance or abandonment.[12]—In the absence of statutory provisions to the contrary, the condemning party may abandon the proceedings at any time before the rights of the parties have become vested,[13] leaving the landowner without grievance which will authorize an appeal from the assessment,[14] and such an abandonment will be presumed from continued inaction after the report of the viewers.[15] Upon damages being fixed by the judgment, it is the petitioner's duty to determine within a reasonable time whether it will pay the damages and enter upon the land, or abandon the proceeding;[16] and, if it takes the latter course, its purpose should be promptly and unequivocally made a matter of record by the vacation of the judgment and the dismissal of the petition.[17] The proceedings should be prosecuted with diligence,[18] and if plaintiff wrongfully delays the trial of the cause and omits to make its election to take the land or abandon the proceeding within a reasonable time after the amount of the judgment has been fixed, and then elects to discontinue, it is liable to the owner of the land for damages occasioned by such wrongful acts.[19] If the acts be not both wrongful and injurious, there is no liability, but where they are both wrongful and injurious, the landowner is entitled to recover.[20] The measure of damages to which the landowner is entitled is the difference between the value of the land at the time he could have sold it, but for the pendency of the suit, and its value at the time the suit was dismissed.[21] The owner of the land at the time of the delay may recover damages for the wrongful delay of the petitioner in bringing the case to trial.[22] Though approval by the municipal assembly of petitions by the city for condemnation is required before proceeding to assessment, disapproval by it does not of itself dismiss the petition, though it might possibly be ground for dismissal.[23] There is a conflict as to whether the property owner is entitled to recover all costs and expenses, including attorney's fees, upon the abandonment of the proceedings.[24] It is, however, competent for the legislature to impose such a burden in delegating the right of eminent domain.[25]

lands needed for the location and construction of the sea wall, held, the order sufficiently showed that it was necessary for the county to construct the sea wall. Id.

10. In Missouri an ordinance is the proper initial step where the purpose of the proceeding is to extend a street. Not a resolution. Rev. St. 1899, §§ 5979, 5990, construed. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. Under Rev. St. 1899, § 5993, the mayor has no jurisdiction to appoint a jury to assess damages before an ordinance is passed defining the benefit district. Id. In the case of a street extension petition by citizens is not necessary. Under Rev. St. 1899, §§ 5979, 5990 and 5993. Id.

11. His actions may be controlled by mandamus. Sullivan v. Yazoo & M. V. R. Co. [Miss.] 38 So. 33.

12. See 3 C. L. 1201.

13. 7 Enc. Pl. & Pr. 674. A municipality may abandon at any time before award. In re Seventeenth St. [Mo.] 88 S. W. 45. May abandon at any time before a decree of appropriation passing title is entered. Ballinger's Ann. Codes & St. §§ 5640-5642, considered. Port Angeles Pac. R. Co. v. Cooke [Wash.] 80 P. 305.

14, 15. In re Seventeenth St. [Mo.] 88 S. W. 45.

16. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

17. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066. A delay of 15 months between the entry of judgment in condemnation proceedings and the election of the city to abandon the proceedings is prima facie unreasonable. Id.

18, 19, 20, 21. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

22. May be recovered by one buying the land after the institution of the proceedings but before the delay. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

23. City of St. Louis v. Lawton [Mo.] 88 S. W. 80.

24. That he is. Sterrett v. Delmar Ave. & Clayton R. Co., 108 Mo. App. 650, 84 S. W. 150; Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206. Where proceedings were dismissed after award was made. Nauman v. Big Tarkio Drainage Dist. No. 2 [Mo. App.] 87 S. W. 1195.

He is not entitled to them, the right to abandon being absolute and there being no statutory provisions in regard to the matter. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

25. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206.

Parties.[26]—It is not necessary to the jurisdiction of the court that all persons interested in the property be made parties, but damages may be assessed to the persons made parties, and they cannot complain of the failure to bring in other interested parties.[27] A lessee of the land to be condemned is a necessary party.[28] The liability of a city for "damaging" property for a public use is not tortwise, and the statutes authorizing joinder of him against whom a city might recover over do not apply.[29] Where between the impaneling of the jury to assess damages and the rendition of their verdict, the owner conveys the land in several parcels and the grantees do not intervene, they cannot object to an assessment of damages and benefits to the tract as a whole.[30]

Bonds.[31]—The necessity of a bond is statutory.[32] The validity of the bond is not affected by inaccurate recitals as to the petition if the latter is sufficiently identified.[33]

§ 9. *Jurisdiction.*[34]—While equity has no jurisdiction of condemnation proceedings,[35] it may, in the absence of a statutory remedy, restrain a corporation from taking property for a private use.[36] The jurisdiction of particular courts is statutory.[37] A statute failing to provide a special tribunal to determine the petitioner's right to condemn, the regular machinery of the courts is available.[38]

§ 10. *Applications; petitions; pleadings.*[39]—The complaint or petition must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use,[40] though a defect in this regard is amendable.[41] It should describe the property so that the landowner may,

26. See 3 C. L. 1201.

27. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

28. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182.

29. Sess. Laws Missouri 1901, p. 78, authorizing city when sued for damages to make any person whose negligence caused the damage a party, does not apply to an action against a city to recover for damages to property resulting from the performance by the city of a public duty without negligence on the part of the contractor. Johnson v. St. Louis, 137 F. 439.

30. Wilkinson v. District of Columbia, 22 App. D. C. 289.

31. See 1 C. L. 1021.

32. In proceedings to condemn land for highway purposes, no bond is required as a prerequisite to a final order of condemnation except in the cases specified in Code Civ. Proc. § 1248, subd. 5. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

33. Bond, required by Pol. Code, § 2692 to be filed with a petition for a private road, construed. Mariposa County v. Knowles, 146 Cal. 1, 79 P. 525.

34. See 3 C. L. 1202.

35. Code 1899, ch. 52, § 11 does not confer such jurisdiction. Wellsburg & S. L. R. Co. v. Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

36. Mountain Park Terminal R. Co. v. Field [Ark.] 88 S. W. 897. The proceedings provided in the circuit court in petition to condemn being merely for assessment of damages and assuming the right to condemn, on an answer disputing petitioner's power to take by eminent domain, the issues should be transferred to chancery. Id. See, also, post, § 19 B.

37. The circuit courts have jurisdiction at law in proceedings for the condemnation of crossing by one railroad company over the real estate and line of another railroad company. Grafton & B. R. Co. v. Buckhannon & N. R. Co., 56 W. Va. 458, 49 S. E. 532. The board of county commissioners having no jurisdiction to establish a proposed road, the superior court has no power to condemn land for that purpose. Chelan County v. Navarre [Wash.] 80 P. 845. Probate court is without jurisdiction in a proceeding by a municipality to appropriate land to determine whether the preliminary resolution was passed. Erie R. Co. v. Youngstown, 5 Ohio C. C. (N. S.) 332.

38. St. at Large, p. 1168, granting the power of eminent domain to a corporation, is not unconstitutional in that it does not provide a special tribunal to determine any question made by the landowners as to the right of the corporation to condemn, the regular machinery of the courts being available. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

39. See 3 C. L. 1202.

40. Miocene Ditch Co. v. Lyng [C. C. A.] 138 F. 544. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized by law, and supported by a statement of facts from which the court can see that the property is intended to be used for that purpose. Id. The application to the ordinary to establish a private way must allege that it is a way of necessity. Neal v. Neal [Ga.] 50 S. E. 929.

41. Complaint failed to allege a public use. Miocene Ditch Co. v. Lyng [C. C. A.] 138 F. 544.

from reading the same, and a comparison thereof with monuments or other landmarks upon the ground, and therein referred to, tell the location of the land which it is proposed to take.[42] A defective description may generally be amended,[43] and the proceeding will not be set aside for this reason until the party applying for the condemnation has had an opportunity to apply for leave to amend.[44] Where the petition is required to state "the property sought to be condemned," property not to be taken but which might be injured by the appropriation of other property need not be stated.[45] The petitioner is required at its peril to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title.[46] The petition is sufficient if it conform to statutory requirements.[47] An allegation, in substance in the language of the statute, that all preliminary steps required by law have been taken, is sufficient.[48] As a general rule an ambiguous recital not required by statute will not be construed so as to contradict necessary averments.[49] In Wisconsin a petition by a railroad must state the terminal and length of the road.[50] A declaration which states a good cause of action is not subject to a general demurrer because it claims an incorrect measure of damages.[51] Amendments in an appellate court cannot cure the omission of necessary jurisdictional allegations.[52] A landowner, who has united in a petition for the establishment of a public road, expressly waiving compensation for damages arising therefrom, may withdraw such waiver by filing a claim for compensation before the establishment of the road.[53]

In some states a claim for damages must be filed by the property owner.[54] A

42. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44. He should not be required to seek other maps and data to be able to ascertain and locate the land proposed to be condemned. Id. The record must show with certainty what land is to be taken. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

43. May be amended in New Jersey. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44.

44. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44.

45. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281.

46. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

47. Under Code Civ. Proc. § 1244, a complaint is not demurrable for failing to specify the manner in which it was proposed to establish a highway. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. Under § 2 of the eminent domain act of 1900 (P. L. p. 80), it is not necessary, in a petition for the condemnation of tunnel rights, to allege that the proposed tunnel will be so built or kept in such condition as to make the surface of the ground above the same firm and safe for buildings and other erections thereon, or that it will be at such depth beneath the land as not to interfere with the use thereof. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130. Under Laws 1901, p. 24, c. 12, § 3 and Rev. St. 1895, § 4447, a petition by a county to condemn land for a sea wall is not defective for failing to allege that the voters of the county have voted for the issuance of bonds and the levy of the necessary tax to afford means to enable the county to construct the improvement. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

48. Where the petition so recited, in proceedings under Laws 1901, p. 680, c. 240, as amended, an objection that the petition failed to state that the proceeding was authorized by the board of supervisors was one that could have been raised by answer, but was not tenable as a preliminary objection. Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576.

49. A petition under Laws 1901, p. 680, c. 240, as amended, reciting that all preliminary steps required by law had been taken, an ambiguous recital not required by statute, which might be construed to contradict the averment as to preliminary steps having been taken, held not available to defeat a confirmation of the report of the commissioners. Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576.

50. Rev. St. 1898, § 1846. Is not limited to termini within the state. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401. The requirement that the length of the proposed railroad be given refers to the length of the road between termini and is not limited to the portion of the road within the boundaries of the state. Id. It is sufficient if the portion of the proposed road within the state be designated by naming each county, in the state, through or into which it is designed to be located and built. Id.

51. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

52. So held where petition was amended in county court. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

53. Ashley v. Burt County [Neb.] 102 N. W. 272.

54. Under Pub. St. 1882, c. 52, § 15, a

cross-petitioner who pays for an award for damages accruing to land which is not "taken" must allege in the petition that he is the owner of the property alleged to be "damaged."[55] If the original petitioner desires to contest the allegation, he must, by appropriate pleadings, raise that issue.[56] Where papers are handed to clerk with statement that the attorney would remit the fee, which the clerk did not then demand of the messenger, and the clerk delayed filing the papers, the filing will be held to relate back to the date when the papers were given to the clerk.[57]

§ 11. *Process, notice, citation, publication.*[58]—As a general rule, unless waived,[59] notice to the landowner is essential.[60] This is especially true of the notice of the proceedings to assess damages, for while the state has the power to provide for the designation of property to be taken for its own use, through its own agencies, without notice to the owners,[61] the latter have a constitutional right to be heard on the question of the assessment of compensation.[62] Notice being jurisdictional, the fact that it was given or waived must appear on the face of the proceedings.[63] When given under legislative authority, notice by publication is sufficient.[64] A three days notice of a meeting is a notice given three days before the meeting is to be held.[65] If the legislative grant of power specifically describes the property, the notice need not contain a description of it.[66] The notice to some of the landowners along a proposed railway being insufficient, the proceedings may in Wisconsin be dismissed as to them and continued as to those sufficiently notified.[67] A corporation's charter authorizing it to condemn land under a statute not requiring notice to landowners, a subsequent amendment of such statute requiring notice does not violate the charter contract.[68]

§ 12. *Hearing and determination of right to condemn.*[69]—The issue of ownership, if any, is preliminary to the submission of the question of damages to the jury, and is to be litigated and determined before the jury is impaneled to assess the

claim handed a member of the board of selectmen, when the board was not in session, in the presence of all the members of the board, is sufficient, though the selectmen fail to record the filing. Garvey v. Revere [Mass.] 73 N. E. 664.

55, 56. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

57. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

58. See 1 C. L. 1022.

59. General appearance waives notice. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. Waives defect in notice. Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576. Where the attorney general appears in condemnation proceedings instituted against the state, the jurisdiction of the court attaches to the same extent as if the state had been regularly summoned and the proceedings were authorized by law, although instituted prior to the enactment of St. 1901, p. 307, c. 144, adding subd. 7 to Code Civ. Proc. § 1240. California & N. R. Co. v. State [Cal. App.] 81 P. 971.

60. Condemnation proceedings begun in 1870 by a railroad company whose charter authorized it to condemn land under Rev. St. 1845, c. 92, are void unless notice is given to landowners. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412. A municipal corporation attempting to exercise the power of eminent domain, the council must pass the preliminary resolution and give notice to the property owners as required by § 1536-105. Erie R. Co. v. Youngstown, 5 Ohio C. C. (N. S.) 332. Failing to do so the only remedy of the property owners is an action to restrain the municipality from proceeding to assess compensation, and from taking possession of the property. Id. The notice required by Laws 1903, p. 223, c. 122, § 160, to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley, is a substitute for the notice required by § 161a of the same act to be given by the appraisers appointed to assess damages in condemnation proceedings generally. Harrison v. Newman [Kan.] 80 P. 599.

61, 62. Morgan v. Oliver [Tex.] 82 S. W. 1028.

63. So held as regards the notice required by Rev. St. 1899, § 5993. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

64. Notice required by Laws 1888, p. 256, c. 193, construed. In re City of Rochester, 102 App. Div. 181, 92 N. Y. S. 405.

65. Harrison v. Newman [Kan.] 80 P. 599. Requirement is satisfied by publication of a notice nine days before the time set. Id.

66. Penobscot Log Driving Co. v. West Branch Driving & Reservoir Dam Co., 99 Me. 452, 59 A. 593.

67. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401.

68. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412.

69. See 3 C. L. 1202.

amount to be paid the owner.[70] In Mississippi the circuit court has no jurisdiction to fix the time and place of meeting of the eminent domain court.[71] The trial court allowing the corporation counsel to assume control of the trial calendar, the city is estopped to claim that the property owner should have applied to the court to have the cause placed on the trial calendar.[72] Distance of the subject-matter from the place of trial, while an element in allowing time to prepare for trial, is not conclusive.[73] The questions of the existence or nonexistence of a corporation seeking to condemn property and its power or want of power to do so are questions of law.[74] The court being required to take judicial notice of the private acts of the state, a defense that petitioner under its charter has power to do all it proposes to do by means as advantageous to the public as it would have should it take defendant's property presents a mere question of law.[75] The court having jurisdiction, the fact that it hears without determining or determines without hearing is merely error.[76] Where the only fact necessary to be established is conceded, the entry of an order for condemnation without a hearing is harmless.[77]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[78]—Where the legislature provides for a commission to determine the compensation, it is evidently its intention to provide a speedy method of procedure, and a construction which admits of divided and protracted litigation is not to be favored;[79] hence the appointment and action of the commission is not to be kept in abeyance while the question of the plaintiff's title to certain property of the kinds enumerated is tried out in court.[80] A commission being clothed with the power and duty to determine the value of the property taken, it has authority to decide what property is taken.[81] In some states commissioners chosen by the property owner are given a preference.[82] In Illinois the report of commissioners appointed under a petition for the organization of a drainage district is not conclusive.[83] In many states the parties have a constitutional right to a jury trial,[84] but this right may be waived, in some states, by failure to demand such a trial,[85] and the law in force at the time the proceedings are

70. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

71. Sullivan v. Yazoo & M. V. R. Co. [Miss.] 38 So. 33.

72. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

73. Where land was 40 miles from place of trial, held not erroneous to place trial on the third day after the motion to set the cause for trial is heard. Chelan County v. Navarre [Wash.] 80 P. 845.

74. Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549.

75. Gen. St. 1902, § 697, considered. New York, etc., R. Co. v. Offield [Conn.] 60 A. 740.

76. Is not ground for collateral attack. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

77. Conceded by bill of exceptions. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

78. See 3 C. L. 1202.

79, 80, 81. Penobscot Log Driving Co. v. West Branch Driving & Reservoir Dam Co., 99 Me. 452, 59 A. 593.

82. Where owner was allowed to name one commissioner and he acquiesced in the appointment of two others, held, Rev. St. 1895, art. 4448, requiring the county judge to give a preference to those that may be agreed upon between the owner and the corporation, was complied with. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

83. Their report that none of the lands described would be injured by the proposed improvement is not conclusive on the question of damages, though no objection was made to the report, and it was approved by the court. Starr & C. Ann. St. 1896, p. 1503, c. 42, § 5, construed. Michigan Cent. R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696.

84. Under Const. art. 12, § 4, an incorporated railroad company is entitled to a jury trial to assess its damages for the taking of its lands for a city street. City of St. Louis v. Roe, 184 Mo. 324, 83 S. W. 435. Under Const. art. 2, § 21, the owner is entitled to have his damages ascertained by a jury or board of commissioners of not less than three freeholders, hence it is error for the county court to assess the damages. Grossman v. Patton, 186 Mo. 661, 85 S. W. 548. Under Const. art. 2, § 13, the only legal method by which a property owner can be deprived of his property for public use is by having his damages assessed by a jury duly selected, impaneled, and sworn, and acting under the direction of a court of competent jurisdiction. Michigan Cent. R. Co. v. Spring Creek Drainage Dist., 215 Ill. 501, 74 N. E. 696.

85. So held under Laws 1903, p. 50, c. 43. Chelan County v. Navarre [Wash.] 80 P. 845.

instituted is to be resorted to in determining whether or not there is a waiver.[86] Changes by the court in the report of appraisers, on hearing exceptions thereto, do not infringe the constitutional right to have damages assessed by a jury of freeholders.[87] It is quite generally provided that the members of the commission[88] or jury[89] must be freeholders, and the record must so recite. "Householders" is not synonymous with "freeholders."[90] On appeal from the commissioners and trial de novo, the report of the commissioners is of no force or effect,[91] and an instruction that the commissioner's award has been paid should tell the jury what to do in case their award is less or more than that of the commissioners.[92] Michigan statutes contemplate that one jury shall determine in one proceeding the questions relating to condemnation by a railroad company of lands of different persons in a locality.[93] In Mississippi, the clerk of the circuit court should summon the jurors.[94] As a general rule a challenge to the array being sustained, the judge should issue a new venire.[95] On appeal, appellant's counsel, in examining jurors on their voir dire, may state the amount of the award below for the purpose of identifying the case,[96] and in such a case it is not an abuse of discretion for the court to permit counsel to ask the jurors if such finding would have any weight with them.[97] In California several parcels of land lying in the same county being sought for the same purpose, the owners must all join in their peremptory challenges.[98] It is error for counsel, witnesses and jurors to mingle freely together, dine together, and for meals, cigars and drinks to be furnished by petitioner's representatives.[99] The fact that the commissioners were not sworn is no defense to the payment, no appeal having been taken by the landowner.[1]

Where the parties by agreement submit the question of damages to referees, the agreement governs.[2]

86. Chelan County v. Navarre [Wash.] 80 P. 845.

87. City of St. Louis v. Lawton [Mo.] 88 S. W. 80.

88. Record must show that commissioners are freeholders. Report of the commissioners that they are freeholders is insufficient. Grossman v. Patton, 186 Mo. 661, 85 S. W. 548.

89. Proceedings to condemn land for a street extension are invalid unless the record recites that the jury appointed to award compensation were disinterested freeholders. Rev. St. 1899, § 5993. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

90. Grossman v. Patton, 186 Mo. 661, 85 S. W. 548.

91. Where, in proceedings to establish a highway, exceptions are taken to the report of the commissioners and a jury trial had, the fact that the record does not show that the commissioners were not of kin to any of the parties is immaterial. Bennett v. Hall, 184 Mo. 407, 83 S. W. 439.

92. An instruction that if they awarded damages in excess thereof, the amount of the commissioners' award should be deducted therefrom, held erroneous as not telling the jury what to do if the amount awarded by them was less than the commissioners' award. Missouri Pac. R. Co. v. Roberts, 187 Mo. 309, 86 S. W. 91.

93. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

94. The circuit court has no jurisdiction to so do. Sullivan v. Yazoo & M. V. R. Co. [Miss.] 38 So. 33.

95. Under Hurd's Rev. St. 1903, p. 909, c. 47, §§ 3, 6 and 7, whether condemnation proceedings are instituted in vacation or in term time, where the judge before whom the petition was first presented is unable to preside at the trial, and a challenge to the array is sustained, it is the duty of the judge to issue a new venire in the same manner as the first one had been issued. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122. Where judge erroneously designated 12 persons by name to serve as jurors, but defendant did not claim, after a challenge to the array had been denied, that the jury was prejudiced or not qualified, held, the error was harmless. Id.

96. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

97. Such question was asked for the purpose of enabling appellant to intelligently exercise his peremptory challenges. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

98. Code Civ. Proc. § 601. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

99. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

1. State v. Moniteau County Ct. [Mo. App.] 87 S. W. 1193.

2. Where the waters of a brook were taken under St. 1905, p. 427, c. 384, and the parties by agreement submitted to referees the question of damages except such as were "incidental to the use and value of the water for purposes of power," held, it was intended that the assessment for each part should be at its fair value as a part of the whole,

§ 14. *The trial, or inquest, and hearings on the question of damages.*[3]—The weight of authority seems to be that the burden is on the owner to prove the amount of his damages,[4] and in states so holding, he is entitled to open and close.[5] The jury is the judge of the credibility of the witnesses, and may determine as to the value of the testimony given by such witnesses respectively,[6] and in Louisiana it may take into consideration the information of its members outside of the testimony of the case, and also their own opinions, but in so doing they must not disregard the testimony of witnesses.[7]

Admissibility of evidence.[8]—The price brought on the sale of neighboring land similarly situated,[9] within a reasonable time prior to the condemnation proceedings,[10] may be shown.[11] Evidence to show the value of the land by its location and surroundings is admissible;[12] but evidence as to the value of the same property in a different location is inadmissible.[13] The price paid for the land by the defendant is admissible on the question of value, provided the purchase was not remote from the appropriation in point of time,[14] also the owner is bound by declarations as to value or offers to sell at a specified price, made at or about the time of the taking;[15] but offers made in the course of negotiations for the compromise of a claim for damages

and the decrease in value in the parts of the property which had been procured or constructed in order to make the right to use the water available, was not a damage incidental to the taking of the right to use the water, such parts of the property having been also taken, and to be paid for. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. In proceedings to determine the amount of petitioner's damages under the exception in the agreement, flowage rights and the dam and the right to maintain it held elements not to be considered. Id.

3. See 3 C. L. 1203.

4. Indianapolis & C. Traction Co. v. Shepherd [Ind. App.] 74 N. E. 904. Under Ky. St. 1903, § 838 and Code Civ. Proc. § 526, a property owner excepting to the commissioners' report has the burden of proof. Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549; Chicago, etc., R. Co. v. Rottering, 26 Ky. L. R. 1167, 83 S. W. 584.

5. Indianapolis & C. Traction Co. v. Shepherd [Ind. App.] 74 N. E. 904; Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549.

6. City of Shreveport v. Noel [La.] 38 So. 137. The jury is not bound to accept the opinions of witnesses as to the value of the land, etc. Heath v. Sheetz [Ind.] 74 N. E. 505. Jury is not bound by testimony of experts. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. In an instruction that opinions of experts "and others" are not binding, the words "and others" held superfluous and nonprejudicial. Id.

7. City of Shreveport v. Youree [La.] 38 So. 135. A verdict which entirely ignores the evidence, and rests exclusively upon the opinions of the members of the jury, will, if manifestly erroneous, as judged by the evidence, be set aside. City of Shreveport v. Noel [La.] 38 So. 137.

8. See 3 C. L. 1203. See, also, Evidence, 3 C. L. 1334, and Damages, 5 C. L. 904.

9. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281. Evidence as to what the taker had paid to others per acre for rights of way over their land not similarly situated is inadmissible. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

10. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182. Sales of property in the neighborhood made a year and a half and two years before the institution of suit and before a radical change in the physical character of the land itself by the completion of a drainage system held inadmissible. Louisiana, R. & N. Co. v. Xavier Realty [La.] 39 So. 1.

11. Chicago, etc., R. Co. v. Rottgering, 26 Ky. L. R. 1167, 83 S. W. 584. Instructions as to estimation of value and consideration of neighboring values held correct. City of El Paso v. Coffin [Tex. Civ. App.] 13 Tex. Ct. Rep. 601, 88 S. W. 502.

12. Suffolk & C. R. Co. v. West End Land & Improvement Co., 137 N. C. 330, 49 S. E. 350. In proceedings to condemn a right of way over oil lands, an expert may testify as to matters which would influence him from the standpoint of a contemplating buyer in determining the market value of the land in an oil-bearing territory, the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom, and the general relation of outlay to income; and such testimony is not objectionable as conjectural and speculative. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P 961. In proceedings to condemn land for levee purposes, evidence as to the value of the land for a steamboat landing is admissible. Board of Levee Com'rs v. Lee [Miss.] 37 So. 747.

13. Value of water power in a city is inadmissible where power taken is located in a small town. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. In such a case held proper to exclude an award made by certain engineers determining the amount of water in a reservoir below petitioner's mill which received part of its water from a watershed which did not flow into petitioner's pond. Id.

14. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521.

15. Kaufman v. Pittsburg, C. & W. R. Co. [Pa.] 60 A. 2. Letter written by landowner

cannot be shown,[16] nor is a tax list admissible on the issue of value.[17] The value of the property for speculative purposes is inadmissible.[18] In proceedings to recover damages for the taking of a water power, evidence as to the rate of interest paid by savings banks is properly excluded.[19] In an action against a city for lowering the grade of a street, mortality tables showing the expectancy of plaintiff's life are inadmissible,[20] as is the testimony of a physician as to the injurious effect which would or might be caused upon the health of a woman by climbing the stairs rendered necessary by the improvement.[21] A photograph of real estate showing how it existed prior to the change in the grade of the street upon which it is situated is competent.[22] Evidence that the property was to be applied to a different use from that for which it was appropriated is incompetent.[23] Evidence as to all matters reducing the damage is admissible.[24] On appeal from the commissioners and trial de novo, the report appealed from is not evidence as to the amount of damages.[25] Speculative,[26] hearsay,[27] and immaterial[28] evidence is of course not admissible; but evidence being clearly disregarded, its erroneous admission is harmless.[29]

to representative of railroad offering to sell his land for a certain price held admissible as a declaration against interest. Id.

16. Kaufman v. Pittsburg, C. & W. R. Co. [Pa.] 60 A. 2. Statement in offer that if it was not accepted he would sell to a rival company held to show that offer was not one to compromise a claim for damages. Id.

17. Suffolk & C. R. Co. v. West End Land & Improvement Co., 137 N. C. 330, 49 S. E. 350.

18. In proceedings to condemn a right of way over oil fields, testimony of a witness that he would take into consideration what "he could pay for it and have sufficient margin for speculation during at least five years," is incompetent on the issue of market value. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961.

19. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

20. Was sought to be introduced for the purpose of showing the length of time during which the extra burden placed on him in the use of his home would obtain, and the extra steps he would be obliged to climb. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

21. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

22. Village of Grant Park v. Trah, 115 Ill. App. 291.

23. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811.

24. Where, on the day condemnation proceedings were started, the owner of the land platted the property, showing the railroad track, and the lots could only be bought and sold with the expectancy that they would be along the track, held, plat was admissible, it having been recorded. Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122. Where it was claimed that the establishment of the proposed railroad would destroy the owner's right to a switch connection with another railroad, evidence that the establishment of the road would not interfere with the construction of a switch similar to one that had previously been in operation, held admissible. Id. In an action for the destruction of the means of ingress to and egress from land by the construction of a railroad track, evidence as to the owner's putting in crossings held admissible. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.

25. Lewis, Eminent Domain [2nd Ed.] § 449. Missouri Pac. R. Co. v. Roberts, 187 Mo. 309, 86 S. W. 91. It is error to permit the reading of such report to the jury. Id. Such error is not cured by an instruction that the jury should not consider such report and that the award had been paid and if damages in excess thereof were awarded the amount of the commissioners' award should be deducted therefrom. Id.

26. In an action for damages caused by grading street, it being admitted that the street had only been opened for a few blocks between two termini, held proper to exclude evidence as to what would have been the difference in value of plaintiff's property if the street had been opened up all the way between such termini. Board of Councilmen v. Edelin, 26 Ky. L. R. 601, 82 S. W. 279.

27. In an action against a city for lowering the grade of a street, hearsay statements made by defendant's contractor, when he commenced to grade the street and slope plaintiff's premises, in regard to plaintiff's being entitled to damages, is inadmissible as res gestae. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

28. In an action against a railroad company for damages to plaintiff's property, caused by the excavation of streets to form a crossing with defendant's track, evidence that the track when completed would be about a foot above the existing level, held properly excluded, there being no claim that any change in the character of the excavation was contemplated. Middleton v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 364. In condemning a crossing across the tracks of a street railway, evidence as to the cost of grading is inadmissible, proceedings for condemnation and for grading being entirely distinct under the city charter. In re Topping Ave., 187 Mo. 146, 86 S. W. 190. Where grade of street was changed, evidence of the reasons which induced the municipal authorities to make the change is immaterial. Garvey v. Revere [Mass.] 73 N. E. 664.

29. Verdict held so low as to show

Witnesses and examination thereof.[30]—The question of the competency of a witness is a preliminary question, and the trial court should see that the witness discloses his competency by a proper examination before he is permitted to testify generally.[31] In an action against a city for lowering the grade of a street, the refusal to permit the respective parties to examine more than three real estate experts as to the value of plaintiff's premises is not an abuse of discretion.[32] To render a witness competent to testify to the damages sustained in a particular case, he should have such knowledge as will enable him to estimate the market value of the entire tract of land both before and after the taking,[33] and if he has a knowledge of the requisite facts to enable him to give the total amount of the difference, his inability to give the elements of damage does not render him incompetent.[34] Hence the witness should disclose some knowledge of the location of the land, its area, quality, and productiveness, the extent and condition of the improvements, the manner of the taking, and of the value of other lands in the neighborhood at or about the time of the appropriation.[35] The extent of his knowledge in regard to these facts affects the weight of his testimony and not his competency;[36] and any person familiar with values may qualify.[37] The same general rules apply where property other than realty is being condemned.[38] The general rules as to the cross-examination of witnesses apply.[39] The right to

that the jury disregarded evidence of market value, and accordingly petitioner could not complain of such evidence. Little Rock, etc., R. Co. v. Evans [Ark.] 88 S. W. 992.

30. See 3 C. L. 1204. See, also, Witnesses, 4 C. L. 1943, and Examination of Witnesses, 3 C. L. 1383.

31. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996.

32. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

33, 34. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996.

35. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996. In proceedings to recover damages for the taking of a water power where a witness was called to testify generally as to the damages, and he based his opinion wholly on the value of his own plant, and that he arrived at that value from an offer made him for it, he was held not qualified to testify. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. Held not error to refuse to permit one who had never lived in the vicinity of the property, or bought or sold property there, though he was engaged in the real estate business in a neighboring city, to testify as an expert, though a part of the property, a mill, was excepted from the taking and the witness had had experience as a builder, and operator of mills. He also testified that, in his opinion, the park commissioners might restrict the use of the water, which it was held by the court, as a matter of law, they could not do. Klaus v. Commonwealth [Mass.] 74 N. E. 330.

36. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996.

37. A witness need not be a real estate expert to qualify him to testify to the market value of property injured by the construction of a railroad through it, but all persons familiar with the property who have formed an opinion are competent to testify to its value. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996. Residents of the vicinity who have knowledge of the property, its uses and the general selling price in the neighborhood, are competent witnesses as to value. Reed v. Pittsburg, etc., R. Co., 210 Pa. 211, 59 A. 1067; Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521.

38. In proceedings to recover damages for the taking of water power, a mechanical engineer testified but as he did not appear to have any knowledge of values in that neighborhood, held proper to exclude a question asking him to state from his knowledge what was the value of power there per horse power, though it is proper to permit him to give the cost of producing it. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. In proceedings to recover damages for the taking of a water power, held discretionary with the judge whether he would or would not permit experts in hydraulic engineering to give an opinion as to the value of the waters, and as to the damage caused by the taking of the same. Id.

39. See Examination of Witnesses, 3 C. L. 1383. Witness testifying as to the value of land, counsel should be permitted, on cross-examination, to ask him the value of the land after the proposed improvement is made. Heath v. Sheetz [Ind.] 74 N. E. 505. The property owner testifying as to the value of his land, the taker should be permitted to prove by him on cross-examination how much he paid for the land and how much he received for parcels thereof which he had sold. Indianapolis & C. Traction Co. v. Shepard [Ind. App.] 74 N. E. 904. Under Laws 1897, pp. 346-349, c. 378, §§ 979-981, 983, 984, relative to proceedings to open streets and the duties of commissioners of estimate, an objector to the preliminary abstract is entitled to produce evidence to sustain his objection, but is not, as a matter of right, entitled to further cross-examine witnesses who had testified on behalf of the city at the original hearing, and whom the objector had then cross-examined. In re Cromwell Ave., 95 App. Div. 514, 88 N. Y. S. 947.

have an expert's testimony stricken out and allow him to retestify is largely discretionary with the judge.[40]

Instructions.[41]—The instructions must be construed as a whole.[42] An instruction should not assume the disputed existence of injury.[43] Instructions upon a part[44] or upon the weight[45] of the evidence are erroneous. It is improper to call the jury's attention to the fact that the land is being taken against the will of the owners.[46] An instruction is not prejudicial because not applicable to all the defendants.[47]

§ 15. *View of appropriated premises.*[48]—Where no formal request was made to have the judge accompany the jury on a view, an absent co-owner of certain of the property, who was represented by his co-owner, will be held to have acquiesced in the action of the court.[49]

§ 16. *Verdict, report or award; judgment thereon and lien or enforcement of judgment.*[50]—The viewers' report in Pennsylvania must affirmatively show that legal notice was given.[51] The amounts awarded for the value of the land taken and for the damages to the remainder should be stated separately, though a joint judg-

40. In proceedings to recover damages for the taking of a water power, a witness testified as to what it would cost to produce steam power and that under the most favorable conditions it would be somewhat less than a previous estimate based on existing conditions; held discretionary with the judge to strike out such testimony and give the witness an opportunity to present another estimate. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

41. See 3 C. L. 1204.

42. Instruction that jury must confine damages to the market value of the land held not erroneous in view of another instruction that measure of damages was "fair cash market value" and the proof was restricted to the fair cash market value. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. An instruction that in estimating the compensation for land actually taken no deductions could be made because of any benefits which would accrue to land not taken held not erroneous, other instructions clearly showing that benefits to land not taken were properly to be considered on the question of damages to land not taken. Id. Where, in an action for damages for the obstruction of ingress and egress, the court in three instructions told the jury that they could give damages only for the obstruction of ingress and egress, an instruction that the damages should be the difference in the value of the property before and after the obstruction held not erroneous. Camden Interstate R. Co. v. Smiley [Ky.] 84 S. W. 523. An erroneous instruction that the jury should award compensation for all injury to lands not taken which they might believe from the evidence, or from their own observation, would actually affect its value for use or its market value, is not cured by other instructions limiting the recovery to the difference in value of the land before and after the construction of the road. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116.

43. Where injury to land not taken is denied, an instruction that the jury should allow full compensation for such injuries to land not taken as they might believe defendant was entitled to, held objectionable as assuming that there was damage to the land not taken. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116. But both litigants proceeding to charge the jury on the theory that such fact has been proved, neither can complain of the instruction. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

44. In proceedings to recover damages for the taking of water power, a requested instruction that it was competent for the jury "to ascertain what amount of money invested at a reasonable rate of interest would produce an annual income amounting to the annual cost of replacing the amount of water power taken away by substituting steam or other power for the water power so taken," held properly refused as being a request to instruct upon a part of the evidence, and to say that there are possible views of the evidence which would warrant a jury in coming to a certain result. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

45. Instruction as to weight to be given testimony of engineer testifying in proceedings to condemn a right of way for a ditch across a railroad right of way, held erroneous. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684. Where nearly all the witnesses were farmers, an instruction authorizing the jury to consider whether witnesses engaged in farming in the neighborhod of the land in dispute have a better opportunity of estimating the injury to plaintiff's farm than men engaged in other occupations was erroneous as on the weight of the evidence. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

46. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116.

47. Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

48. See 1 C. L. 1029.

49. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

50. See 3 C. L. 1204.

51. Crescent Tp. v. Pittsburg & L. E. R. Co., 210 Pa. 334, 59 A. 1103.

ment for both may be rendered.[52] The judgment should simply adjudicate that the amount found due and assessed is a just compensation to be paid for the property taken.[53] A personal judgment against the taker should not be entered.[54] The owner being represented by an agent, it is immaterial whether the damages awarded for such land are allowed to the agent or owner.[55]

Sufficiency.[56]—The report should be certain and unambiguous.[57] An appellate court in passing upon this question may look into the entire record, and, if from other portions of the record any uncertainty as to amount in the verdict is rendered certain and specific, the judgment should be sustained.[58]

Effect or conclusiveness.[59]—The verdict is subject to review by the trial judge, and if he believes that it does not do justice to the parties, he should set it aside.[60] The judgment is not subject to collateral attack for irregularities in the proceedings.[61] A void decree may be set aside after the expiration of the term of court at which it was made.[62] In the District of Columbia when the property owner excepts to an order confirming the verdict of a jury of seven, the verdict is rendered void.[63]

In the absence of evidence to the contrary, after the lapse of a long period of time, facts will be presumed rendering the proceeding valid.[64] By dismissing his appeal and accepting compensation, one may become estopped to claim that the proceedings were irregular or void.[65]

Enforcement of judgment.—A statute requiring the payment of awards within a certain period stays the enforcement of the lien of a judgment upon an award for such period.[66]

52. Union R. Co. v. Raine [Tenn.] 86 S. W. 857.

53, 54. McCall v. Marion County, 43 Or. 536, 75 P. 140.

55. Dunman v. Nall [Tex. Civ. App.] 87 S. W. 177. Where the damages were awarded to the agent and the landowner obstructed the road and sued to enjoin the removal of the obstruction, and the award was then changed so as to read in the owner's favor, held, on dissolution of the injunction, defendants were not chargeable with the costs incurred up to the date of the order correcting the award. Id.

56. See 3 C. L. 1204.

57. Use of phrase "consequential damages" in report held ambiguous. In re Board of Public Improvements of New York, 99 App. Div. 576, 91 N. Y. S. 161.

58. Illinois, etc., R. Co. v. Powers, 213 Ill. 67, 72 N. E. 723. A verdict fixing the damages to land not taken at "the sum of ($2,600.00) twenty-six and no-100 dollars," held rendered certain by the jury's affirmative answer to the judge's question if their verdict was "Damages to the land not taken, $2,600." Id.

59. See 3 C. L. 1205.

60. Werthman v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 135. In a suit by a lessee for damages, there being uncontradicted evidence that the difference between the value of the leasehold before and after the taking was $350, a verdict for $24 held properly set aside. Id.

61. Choate v. Southern R. Co. [Ala.] 39 So. 218. The petition being sufficient as against a general demurrer, a judgment is valid and binding unless set aside on appeal therefrom. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501. Error in refusing to admit testimony in a condemnation suit as to resulting damages to property does not authorize a subsequent action for recovery of such damages. Tenney v. Cincinnati, 5 Ohio C. C. (N. S.) 459. Under Greater **New York** Charter of 1901, §§ 980, 981, 984, 986, 1001, 1004, 1005, 1017, the final **order of confirmation** of the report of commissioners of estimate and assessment in the matter of opening a street has the force of an adjudication from its entry so that it can be attacked only by an appeal, or by an application to set it aside for fraud, error or mistake. In re Whitlock Ave., 101 App. Div. 539, 92 N. Y. S. 18. A railroad company having notice of an application to lay out a highway over its abandoned roadbed, and making no objection at the time, it cannot attack the adjudication in a collateral proceeding. Crescent Tp. v. Pittsburgh & L. E. R. Co., 210 Pa. 334, 59 A. 1103.

62. Decree confirming verdict of a jury of seven over the objection of the property owner may be vacated at any time. MacFarland v. Saunders, 25 App. D. C. 438.

63. Under act of Congress of Mar. 3, 1899, § 5 and D. C. Rev. St. ch. 11, another jury of twelve must be summoned. MacFarland v. Saunders, 25 App. D. C. 438.

64. So held where there was 30 years delay and both parties had treated the proceedings as valid. Roberts v. Sioux City & P. R. Co. [Neb.] 102 N. W. 60.

65. Roberts v. Sioux City & P. R. Co. [Neb.] 102 N. W. 60.

66. Laws 1887, p. 396, c. 820, § 4 stays the enforcement of a lien of such a judgment within the meaning of Code Civ. Proc. § 1255, providing that the time during which a judgment creditor is stayed by express provision of law is not a part of the period of

§ 17. *Costs and expenses.*[67]—The right to costs is purely statutory.[68] The word "costs" as used in statutes on this subject includes the fees and mileage of jurors.[69] A statute making jury fees a part of the costs is constitutional.[70] As a general rule, one whose property is taken against his will in condemnation proceedings is entitled to recover his court costs if he prevails in the action,[71] otherwise not.[72] In some states by failing to tender the true value of the property before bringing suit, the taker incurs a liability for costs.[73] In New York, in condemnation proceedings under the rapid transit act, costs are not allowable to a property owner.[74]

§ 18. *Review of condemnation proceedings.*[75] *Right to review.*[76]—A statute conferring the right of review whenever an "appeal" would formerly have been given uses appeal in the broad sense of review,[77] and this is the sense in which the word is often used in eminent domain.[78] The court will not review questions which have become moot by abandonment of the proceedings.[79] Payment of amount assessed and taking possession of premises does not estop petitioner from prosecuting an appeal from the award of damages.[80] A claimant by receiving that part of the award

limitations. Van Loan v. New York, 94 N. Y. S. 221, afg. 45 Misc. 482, 92 N. Y. S. 734.

67. See 3 C. L. 1205. Liability for costs on abandonment or dismissal of proceedings, see ante, § 8, par. Discontinuance or abandonment.

68. New York: Where, under the authority of Laws 1898, p. 395, c. 182, § 149, as amended by Laws 1899, p. 1282, c. 581, § 16, and the charter of the city of Rochester, property was taken in the manner prescribed by Code Civ. Proc. §§ 3357-3384, a landowner whose property had been condemned, and who accepted the award, and conveyed the land to the city on payment thereof, reserving all rights to costs and allowances, is entitled to recover from the city, under Code Civ. Proc. § 3372, the costs of the proceeding to be taxed as provided by such section. In re City of Rochester, 181 N. Y. 322, 73 N. E. 1106.

69. Rev. St. § 6451, so construed. Detroit Southern R. Co. v. Lawrence County Com'rs, 71 Ohio St. 454, 73 N. E. 510. Said provision is a valid exercise of legislative power. Id.

70. Rev. St. § 6451 imposes no burden upon one suitor or class of suitors from which others similarly situated are exempt. Cincinnati, etc., Traction Co. v. Felix, 5 Ohio C. C. (N. S.) 270.

71. Petersburg School Dist. v. Peterson [N. D.] 103 N. W. 756. To hold otherwise would have the effect of partially nullifying a constitutional provision prohibiting the taking or damaging of private property for public use without just compensation being first made or paid into court for the owner. Id.

72. Code Civ. Proc. §§ 3365, 3372, considered. New York, etc., R. Co. v. McBride, 45 Misc. 516, 92 N. Y. S. 31.

73. City of Shreveport v. Noel [La.] 38 So. 137. Incurs a liability for costs of hearing before commissioner, defendant recovering any damages whatever. New York, etc., R. Co. v. McBride, 45 Misc. 516, 92 N. Y. S. 31.

74. Code Civ. Proc. § 3240 has no reference to condemnation proceedings. In re Rapid Transit Com'rs, 93 N. Y. S. 262. The counsel fees and expenses referred to in Laws 1894, p. 1873, c. 752, as amended by Laws 1895, p. 887, c. 519, are such as may be incurred by the city or corporation counsel, and the statute gives no authority for allowance of counsel fees for property owners. Id.

75. See 3 C. L. 1205. See generally Appeal and Review, 5 C. L. 121 and the titles Harmless and Prejudicial Error, 3 C. L. 1579; Saving Questions for Review, 4 C. L. 1368; New Trial and Arrest of Judgment, 4 C. L. 810.

76. See 3 C. L. 1205.

77. The word "appeal" in the eminent domain acts of New Jersey includes any statutory proceeding by which an award made for property taken by condemnation may be reviewed by a different tribunal for the purpose of confirmation or alteration. Van Emburgh v. Paterson & State Line Traction Co., 70 N. J. Law, 668, 59 A. 461, overruling Paterson & S. L. Traction Co. v. De Gray, 70 N. J. Law, 59, 56 A. 250. The review, before a justice of the supreme court, of the award made by commissioners under the provisions of the Traction Companies Act of 1893 (Gen. St. p. 3235) is "an appeal" within the meaning of § 9 of the eminent domain act of 1900 (P. L. p. 79). Id.

78. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

79. Where the motion of the taker to have the landowner's appeal dismissed for want of prosecution is denied and such appeal is consolidated with that of the taker, and the latter, without objection from the landowner, dismisses its appeal, held, it was not thereafter entitled to a review of the order refusing to dismiss the landowner's appeal. McKinnon v. Cedar Rapids & I. C. R. & L. Co., 126 Iowa, 426, 102 N. W. 138. Defendant cannot appeal from a judgment dismissing the petition, though such dismissal is had on petitioner's motion and for unsound reasons, and after a refusal of the court to act on defendant's motion to dismiss. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125.

80. Union Traction Co. v. Basey [Ind.] 73 N. E. 263; Cleveland, etc., R. Co. v. Hayes

which it is conceded he is entitled to does not forfeit his right to appeal from a judgment awarding the balance to another claimant.[81]

Saving questions for review.[82]—Errors not fundamental cannot be first raised on appeal.[83] Thus that the award is erroneous will not be considered in the absence of exceptions,[84] and the party prosecuting the proceeding must abide by his assumption that it was necessary.[85] Error in that petitioner's representatives treated the jury to drinks and cigars is seasonably taken advantage of by objection to confirmation.[86] The sufficiency of particular objections[87] and exceptions[88] is shown in the notes.

Mode of review.[89]—In proceedings under eminent domain acts, there is no right to a writ of error unless expressly given by statute.[90] The validity of an order allowing an appeal from the award must be tried on certiorari or other direct proceedings.[91] In New York the act of the board of estimate and apportionment in directing the taking of land is not reviewable by certiorari,[92] though the contrary is true where the board of assessors holds that there has not been a former recovery by the claimant for the same damages.[93] One opposing the issuance of a writ of certiorari cannot assert the entire invalidity of the proceeding assailed, he having procured it.[94]

Parties appellant and respondent.[95]—The legal successor of an incorporate taker may prosecute the appeal[96] on showing that it is such.[97] That one of joint defendants may appeal who was allowed no damages, though the other recovered.[98]

[Ind. App.] 74 N. E. 531. Burns' Ann. St. 1901, § 5160, Horner's Ann. St. 1901, § 3907, and Rev. St. 1881, § 3907, construed. Cleveland, etc., R. Co. v. Nowlin, 163 Ind. 497, 72 N. E. 257.

81. City of St. Louis v. Nelson, 108 Mo. App. 210, 83 S. W. 271.

82. See 3 C. L. 1205. See, also, Saving Questions for Review, 4 C. L. 1368.

83. Alleged defect in showing made by plaintiff cannot be taken advantage of for the first time on appeal. New York, etc., R. Co. v. Offield [Conn.] 60 A. 740. Where apparent owner appeared at hearing and agent of real owner also appeared, though not as agent, held, objection that notice of intention of common council to acquire the premises by condemnation proceedings was prematurely given cannot be made for the first time on appeal. In re City of Rochester, 102 App. Div. 181, 92 N. Y. S. 405.

84. That no allowance for certain damages was not made will not be considered on appeal in the absence of an exception to the verdict on that ground. Village of Royal Oak v. Detroit, etc., R. Co. [Mich.] 101 N. W. 535. The taker failing to make any objections or save any exceptions to the instructions and not filing a motion for a new trial, it cannot claim on appeal that the damages were excessive. St. Louis & S. F. R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

85. After a county board has established a highway by ordinary condemnation proceedings, in which the landowner has been allowed damages, it cannot upon the landowner's appealing from the award defeat recovery by showing a previous congressional grant of a highway over the same route, and an acceptance of such grant by the state legislature. Howard v. Hooker [Kan.] 78 P. 847.

86. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

87. Where the only objection relating to the apportionment of the cost of street widening proceedings was that the improvement was a public one and a public benefit, such objection is insufficient to raise the question that the statute prohibiting a review on error or appeal applies only to special assessments proper and not to condemnation proceedings. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159.

88. An exception to an appraisement to the effect that the award was erroneous, in that the valuation fixed was too small, and should have been a specified sum, instead of the sum awarded, held sufficient. Richland School Tp. v. Overmyer [Ind.] 73 N. E. 811.

89. See 1 C. L. 1034.

90. Sweeney v. Chicago Tel. Co., 212 Ill. 475, 72 N. E. 677. Under Hurd's Rev. St. 1899, p. 837, c. 47, proceedings can only be reviewed by appeal. Id.

91. Cannot be questioned on a rule to show cause after trial on the appeal. Murray v. Newark [N. J. Law] 60 A. 38.

92. Laws 1901, p. 405, c. 466, § 970 and Code Civ. Proc. § 2120, construed. People v. McClellan, 94 N. Y. S. 1107.

93. Board of assessors, in assessing damages for change in the grade of a street under Laws 1896, p. 865, c. 716. People v. Lawrence, 94 N. Y. S. 820.

94. A claimant who is awarded a hearing for the assessment of damages cannot assert that the statute did not provide for the hearing. Laws 1896, pp. 867, 868, c. 716, §§ 4, 5, considered. People v. Lawrence, 94 N. Y. S. 820. See Estoppel, 3 C. L. 1327; Saving Questions for Review, 4 C. L. 1368.

95. See 3 C. L. 1205.

96, 97. Where the petitioning company is

Decisions reviewable.[99]—The determination of preliminary questions[1] and an order of partial confirmation[2] are reviewable by statute in some states. The necessity for a motion for a new trial in order to secure an appeal is largely statutory.[3]

Jurisdiction of appeal.—All proceedings which are appellate must rest on a jurisdiction perfected below.[4] For the purpose of conferring jurisdiction on appeal, condemnation proceedings in which it is sought to take real estate involve the title to land.[5]

Taking and perfecting an appeal.[6]—The appeal must be taken within the statutory time, and in Ohio, on an appeal from the determination of the probate judge on the preliminary questions, the time within which the bill of exceptions must be filed should be computed from the day on which the questions are determined, no motion for a new trial being filed, or, if such a motion is filed, from the day it is overruled,[7] and the time within which a petition in error must be filed is to be computed from the date of the final judgment either dismissing the petition or confirming the verdict of the jury.[8] In Iowa jurisdiction of an appeal from an award of a sheriff's jury is conferred by service of notice on the adverse party and the sheriff; and the filing of the transcript and payment of docket fees is not necessary to this end.[9] The affidavit of a landowner must show his interest in the proceeding.[10] In Indiana the filing of exceptions will be treated as an appeal from the award.[11]

In order to have a joint appeal, the award must be joint.[12] The interests of a landowner and his tenant are not joint.[13]

Defective or tardy proceedings; dismissals; amendments.—Where the transcript is necessary only for the purpose of furnishing the data for the docketing of the case,

pending the proceedings consolidated with another company, which succeeds to all petitioner's rights, titles and estates in and to the subject of the litigation, the consolidated concern is entitled, on averring such facts, to prosecute an appeal from the award of damages in its own name. Union Traction Co. v. Basey [Ind.] 73 N. E. 263.

98. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

99. See 3 C. L. 1205.

1. In proceedings for the appropriation of property by a private corporation, the determination of the preliminary questions by the probate judge, as required by Rev. St. 1897, § 6420, may be reviewed on error. Pittsburg, etc., R. Co. v. Tod [Ohio] 74 N. E. 172.

2. Under Laws 1901, pp. 416-418, c. 466, §§ 986, 988, 989, the appellate division of the supreme court has jurisdiction to review an order of partial confirmation made by the special term, and appeal lies to the court of appeals from the order of the appellate division finally determining the same. In re City of New York [N. Y.] 74 N. E. 840, afg. 92 N. Y. S. 8, 101 App. Div. 527.

3. **Ohio:** A motion for a new trial is not necessary to the review of the determination of the preliminary questions by the probate judge. Pittsburg, C. & T. R. Co. v. Tod [Ohio] 74 N. E. 172. Although it may not be necessary to file a motion for a new trial at the time of the hearing of the preliminary questions, yet if the errors are included in the causes set forth in Rev. St. 1892, § 5305, the aggrieved party may include the same in a motion for a new trial, to be filed within 10 days after the verdict is rendered in the appropriation proceeding as provided in Rev. St. 1892, § 6432. Dayton & U. R. Co. v. Dayton & M. Traction Co. [Ohio] 74 N. E. 195.

4. County court in reviewing award of commissioners is exercising an appellate jurisdiction. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511. Unless petition is sufficient, county court acquires no jurisdiction. Id.

5. Supreme court has jurisdiction. In re Topping Ave., 187 Mo. 146, 86 S. W. 190; City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

6. See 3 C. L. 1206.

7. Pittsburg, etc., R. Co. v. Tod [Ohio] 74 N. E. 172; Dayton & U. R. Co. v. Dayton & M. T. Co. [Ohio] 74 N. E. 195.

8. Pittsburg, etc., R. Co. v. Tod [Ohio] 74 N. E. 172.

9. Code, § 2009, construed with §§ 3660, 4559. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

10. Street opening proceedings. Affidavit held insufficient. In re Seventeenth St. [Mo.] 88 S. W. 45.

11. Under Burns' Ann. St. 1901, § 5160, providing that an award may be reviewed on written exceptions. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 531.

12. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Where landowner and his tenant are made partles and the jury assessed damages which the owner had suffered, held not joint award. Id.

13. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Where separate appeals were taken by a landowner and his tenant, held not error for the court to refuse to consolidate them on the taker's re-

or to show the trial court what is in issue, appellant's failure to file the same until the case is reached for trial is not a fatal defect,[14] nor is the failure of appellant to pay the docket fee ground for dismissal.[15] Such defects cannot be raised by answer.[16] In New York the notice of a motion to quash a writ of certiorari to review the act of the board of estimate and apportionment in directing the taking of land may be signed by the corporation as such.[17]

Record.[18]—Interlocutory motions become a part of the record only by being preserved in the bill of exceptions.[19] In some states an appeal bond and partial transcript being filed within the statutory time, it is proper for the court to allow appellant to perfect his appeal after the expiration of such time.[20]

Hearing and scope of review.[21]—Review proper is confined to the questions raised below,[22] and properly saved.[23] Errors not complained of may be disregarded.[24] Questions raised over the introduction of evidence cannot ordinarily be considered on appeal,[25] though evidence clearly improper may cause a reversal of confirmation, should it appear that it caused a substantial error on the part of the jury.[26] The award being fully sustained by the evidence, it will not be disturbed because of the incompetency of one witness.[27] The report of the commissioners is presumptively correct.[28] It may be set aside for an insufficient award,[29] or for errors occurring in the examination of witnesses;[30] but it will not be disturbed as excessive, where it is less than half what it might have been under the evidence.[31] The appellate court will not review findings of fact further than to see that the finding is supported by the evidence,[32] and an award on conflicting evidence,[33] especially where the premises

fusal to agree to the rendition of separate verdicts and findings in each case. Id.

14. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Under Code, §§ 3660, 4559, the district court has discretion to refuse to grant a motion to dismiss and affirm an appeal from an award for appellant's failure to promptly file transcript and pay the docket fee, on a proper showing of an excuse, which discretion will not be interfered with on appeal. Id. Where notice of appeal had been served on the adverse party and the sheriff, and the case was properly put on the docket, the appeal will not be dismissed or judgment affirmed for appellant's failure to file a transcript before trial or to pay the docket fee. Id. A motion to dismiss the appeal will be denied where appellee failed to make the motion until three days after the first day of the second term after the appeal was taken, and appellant paid the docket fee and filed a transcript before the motions were ruled on. Code, §§ 3660, 4559, considered. Id.

15. Appeal from the award. Code, § 4559 considered. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129.

16. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Striking of answer held not prejudicial. Id.

17. People v. McClellan, 94 N. Y. S. 1107.

18. See 3 C. L. 1206.

19. So held as regards a motion to quash the proceedings. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

20. Under Ky. St. 1903, §§ 839, 840, and Civ. Code Proc. § 134, where an appeal bond and partial transcript were filed within the 30 days, it was proper for the circuit court to permit appellant to file a full statement of the parties and a full transcript of the orders of the county court. Big Sandy R. Co. v. Dils [Ky.] 87 S. W. 310.

21. See 3 C. L. 1206.

22. Where there was no hearing or any evidence on the question of apportionment, held, the question could not be reviewed on appeal. West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159.

23. See ante, this section, Saving Questions.

24. Where, on appeal, the appellant does not complain of the rule followed by the county court in ascertaining the damages, an error by the commissioners in estimating the damages is harmless. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

25, 26. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

27. Board of Levee Com'rs v. Lee [Miss.] 37 So. 747.

28. Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549. Code 1887, § 1079, considered. Richmond & P. Elec. R. Co. v. Seaboard Air Line R. Co., 103 Va. 399, 49 S. E. 512.

29. Code Civ. Proc. § 3371. Waterford Electric Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

30. Where questions asked witnesses were intended to create an erroneous idea in the latter's mind as to the estate to be taken, it constitutes error of law for which the report may be set aside under Code Civ. Proc. § 3371. Waterford Elec. Light, Heat & Power Co. v. Reed, 94 N. Y. S. 551.

31. Board of Levee Com'rs v. Lee [Miss.] 37 So. 747.

32. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

33. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

were viewed,[34] will not be disturbed unless it clearly appears that, by proceeding on an erroneous principle, injustice has been done.[35]

Decision and determination.[36]—The condemnor entering into possession pending the proceedings, the appellate court, on ascertaining that the action cannot be maintained, will order restitution to the landowner of the possession of the premises, and remand the case, with leave to owner to sue out a writ of possession, and a direction to dismiss the action with costs, after the effectuation of such restitution.[37] The taker only appealing from one award, the appellate court on dismissing the appeal and affirming the judgment should not direct the entry of judgment against the petitioner and the surety upon its appeal bond, in favor of the other defendants.[38] Where the appellant has only given an appeal bond, the appellate court on entering a judgment of affirmance should only enter judgment for the costs of the appeal.[39] The report being ambiguous, it may be remanded for explanation;[40] and the words "consequential damages" are ambiguous within this rule. The proceedings being regular except that the jurors were not freeholders, the cause will be remanded.[41] In New York there being an irregularity or error of law, the report should be set aside and not remanded to the commissioners for correction.[42] In Ohio if the court of common pleas reverses the judgment of the probate court for error in the determination of either of the preliminary questions, it should retain the case and hear and determine such questions de novo; and it is clearly error for it to determine them upon the evidence in the record of the hearing before the probate judge, unless the parties see proper so to submit them.[43] If the taker appeals it is not necessary under the Iowa code for the landowner to appeal in order that he may procure larger damages.[44] Upon remanding the proceedings it is proper for the appellate court to tax the costs of that court only, and allow the lower court to tax the costs therein after a final disposition of the proceedings.[45]

34. Hall v. State, 93 N. Y. S. 956; In re City of New York, 94 N. Y. S. 146.

35. In re Board of Public Improvements, 99 App. Div. 576, 91 N. Y. S. 161; In re City of New York, 94 N. Y. S. 146. In order to refuse confirmation it must appear that the property owners have been deprived of a substantial right or that it would be inequitable or unjust to confirm the report. In re Cromwell Ave., 95 App. Div. 514, 88 N. Y. S. 947.

36. See 3 C. L. 1206.

37. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

NOTE. Right to restitution: There is some authority for the position that restitution lies in the discretion of the court and is not demandable of right, but like specific performance and rescission of contracts, it may be discretionary, but it will go as a matter of course when a proper case is made. Brown v. Cunningham, 23 W. Va. 109; McCormick v. Short, 49 W. Va. 1, 37 S. E. 769; Keck v. Allender, 42 W. Va. 420, 26 S. E. 437; Stanard v. Browlow, 3 Munf. [Va.] 229; Branch v. Burnley, 1 Call. [Va.] 147; Haebler v. Myers, 132 N. Y. 366, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589.—From Chesapeake, etc., R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

38. Port Angeles Pac. R. Co. v. Cooke [Wash.] 80 P. 305.

39. It should not order a judgment, for the damages awarded, against petitioner and its surety. A bond given under Ballinger's Ann. Codes & St. §§ 5645, 5646 serves only the purpose of an appeal bond. Port Angeles Pac. R. Co. v. Cooke [Wash.] 80 P. 305.

40. In re Board of Public Improvements, 99 App. Div. 576, 91 N. Y. S. 161.

41. Will not be dismissed. Rev. St. 1899, §§ 1674, 10,352, considered. Grossman v. Patton, 186 Mo. 661, 85 S. W. 548. Rule held in harmony with views expressed in Seafield v. Bohne, 169 Mo. 537, 69 S. W. 1051 and Turlow v. Ross, 144 Mo. 239, 45 S. W. 1125.

42. Code Civ. Proc. § 3371, construed. Waterford Elec. Light, Heat & Power Co. v. Reed, 92 N. Y. S. 960. Code Civ. Proc. § 3382, providing that where the mode of conducting the proceedings is not expressly provided by law, the court may make all necessary orders and give necessary directions to carry into effect the object and intent of the eminent domain acts, does not alter the above rule. Id.

43. Pittsburgh, etc., R. Co. v. Tod [Ohio] 74 N. E. 172.

44. Code, §§ 2009, 2011. McKinnon v. Cedar Rapids & I. C. R. & L. Co., 126 Iowa, 426, 102 N. W. 138.

45. Grossman v. Patton, 186 Mo. 661, 85 S. W. 548.

[To be concluded.]

EMINENT DOMAIN—Con't.

§ 19. *Remedy of owner by action or suit. A. Actions for tort, damages or trespass; recovery of property.*[46]—A possessory action does not ordinarily lie where the owner has acquiesced in the construction of a railroad or other works over his land;[47] but may lie where the effect of the judgment is so limited as to allow the making of compensation before being executed.[48] The possessory action not being allowed, the owner's remedy is limited to an action for damages,[49] and this right of action belongs to him personally and does not run with the land.[50] The right of action for damages for the appropriation of land by a railroad accrues when the railroad is located.[51] The act of location of a railroad is the selection and adoption of a line by the board of directors of the company.[52] Only a person showing an interest in the abutting property has a right to sue for damages thereto, by reason of unwarranted servitudes imposed upon the way contiguous thereto.[53] Where the property is in the hands of a tenant, the reversioner may recover his damages.[54] All damages present and prospective must be sued for in one action and additional damages cannot be made the subject of a subsequent suit.[55] The fact that the property might have been condemned is no excuse for an unlawful taking,[56] and the payment of a judgment in an action for trespass is not a payment for appropriation so as to bar subsequent actions for the continuance of the nuisance.[57] That the taker defaults does not deprive him of his right to have his damages assessed according to the rule applicable to condemnation proceedings rather than according to trespass.[58]

Prohibition is not the proper remedy for relief from an ordinance attempting to take private property for a public use without compensation.[59]

Pleading.[60]—A complaint in an action for the obstruction of a public highway which became such more than 30 years before the alleged obstruction need not allege how the highway came into existence as such,[61] and the same is true in an action for the obstruction of a private way, the complaint alleging that for more than 30 years plaintiff has been in the continuous and uninterrupted enjoyment of the way.[62]

Appeal.[63]—In determining the question of appellate jurisdiction, an action for damages for delay in bringing a condemnation proceeding to trial and for delay in

46. See 3 C. L. 1206.

47. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

NOTE. Right to maintain possessory action: There is no doubt about the proposition that private property being taken for a public use without the knowledge, consent or acquiescence of the owner, the latter may maintain an action for the recovery thereof. Green v. Tacoma, 51 F. 622; Jacksonville, etc., R. Co. v. Adams, 27 Fla. 443, 9 So. 2; Graham v, Columbus & I. C. R. Co., 27 Ind. 260, 89 Am. Dec. 498. The courts are divided upon the proposition as to whether or not an owner of land who stands by and without protest sees a public improvement constructed thereon is estopped to thereafter maintain an action in ejectment or a suit in equity. The following cases hold that he is: Trenton Banking Co. v. McKelway, 8 N. J. Eq. (4 Halst.) 84; Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 206, citing Roberts v, Northern Pac. R. Co., 158 U. S. 1, 39 Law. Ed. 873; McAulay v. Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627; Provolt v. Chicago, etc., R. Co., 57 Mo. 256; Dodd v. St. Louis & H. R. Co., 108 Mo. 581, 18 S. W. 1117. Other cases hold that the proceeding will lie but that the judgment will be stayed to allow the taker to proceed under the statute to condemn the land and ascertain and pay the damages. (Injunction) New York v. Pine, 185 U. S. 93, 46 Law. Ed. 820. (Ejectment) Pittsburg, V. & C. R. Co. v. Oliver, 131 Pa. 408, 19 A. 47, 17 Am. St. Rep. 814, 25 Wkly. Notes Cas. 226. The damages will be assessed as of the date of entry. Pittsburg, V. & C. R. Co. v. Oliver, supra. Such damages constitute a personal claim in favor of the owner at the time the injury occurred, and they do not run with the land. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205; Roberts v. N. P. R. Co., 158 U. S. 1, 39 Law. Ed. 873; McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681; Chicago, B. & Q. R. Co. v. Englehart. 57 Neb. 444, 77 N. W. 1092; Maffet v. Quine, 93 F. 347; N. P. R. R. Co. v. Murray [C. C. A.] 87 F. 648.

48. Slaght v. Northern Pac. R. Co. [Wash.] 81 P. 1062.

49. A subsequent grantee takes subject to the burden. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

50. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

51, 52. Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2.

53. Taylor v. Larchmont Water Co., 86 App. Div. 631, 83 N. Y. S. 712.

dismissing it after judgment is one involving the taking of private property for a public use.[64]

(§ 19) *B. Suits in equity; injunction*[65]—While, as before stated, equity has no jurisdiction of condemnation proceedings,[66] it has jurisdiction to prevent the construction of a work of internal improvement, where it would work such injury to private property, not actually taken, as virtually destroys its value, until compensation for the injury is paid or secured to be paid,[67] and in such case an issue out of chancery will be directed to ascertain the amount of compensation.[68] In the absence of a statutory remedy, equity may restrain a corporation from taking property for a private use,[69] or under invalid condemnation proceedings.[70] An injunction will not issue where there is an adequate remedy at law,[71] nor will the condemnation proceedings be enjoined pending the settlement of a controversy respecting the title to the property.[72] In the absence of damage, an injunction pendente lite will not be continued.[73] In a suit to enjoin condemnation proceedings, the fact that the party whose land it is proposed to take is not given personal notice of the bill authorizing such condemnation is immaterial.[74] An injunction suit against trespass is no impediment or bar to subsequent expropriation proceedings or to the exercise of rights of property acquired thereunder.[75]

Parties.[76]—A county which has condemned property is the real party in interest in a suit to enjoin a contractor under it from entering upon and making use of the property in the construction of a public work, and is entitled to defend such suit.[77]

Pleadings.[78]—It appearing that plaintiff is entitled to damages if the allegations in the petition are true, the court, after the dissolution of the preliminary injunction, may permit the amendment of the petition so as to pay for damages.[79]

Decree, judgment or order.[80]—The court having jurisdiction of the suit, it will do complete justice by awarding an issue of damages.[81]

§ 20. *Payment and distribution of sum awarded; title or interest requiring compensation.*[82]—An award made for lands is personal property.[83] Receipt of the compensation allowed estops the landowner to claim the land appropriated,[84] and he cannot without the consent of the taker return the money and avoid the estoppel.[85] The taker is discharged from liability upon making compensation, in good faith and pursuant to a judgment of the court, to the person in possession, and who is the

54. Alexander's Case, 39 Ct. Cl. 383.
55. Settegast v. Houston, etc., R. Co. [Tex. Civ. App.] 87 S. W. 197.
56. City of Clinton v. Franklin, 26 Ky. L. R. 1056, 83 S. W. 140.
57. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.
58. Suit was in trespass. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491.
59. Riley v. Greenwood [S. C.] 51 S. E. 532.
60. See 3 C. L. 1207.
61, 62. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827.
63. See 1 C. L. 1041.
64. Supreme court has appellate jurisdiction in the first instance. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.
65. See 3 C. L. 1207.
66. Wellsburg & S. L. R. Co. v. Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746. See ante § 9, Jurisdiction.
67, 68. Wellsburg & S. L. R. Co. v. Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.
69. Mountain Park Terminal R. Co. v. Field [Ark.] 88 S. W. 897.
70. Injunction by a landowner lies to prevent the opening of a proposed road over his land where the condemnation was invalid. Plowman v. Dallas County [Tex. Civ. App.] 13 Tex. Ct. Rep. 487, 88 S. W. 252. A municipal council failing to pass the preliminary resolution and give notice to the property owner as required by Rev. St. § 1536-105, the owner's only remedy is a suit to restrain the assessment of damages and the taking of possession. Erie R. Co. v Youngstown, 5 Ohio C. C. (N. S.) 332.
71. Grafton & B. R. Co. v. Buckhannon & N. R. Co., 56 W. Va. 458, 49 S. E. 532. Where the probate judge, under the power vested in him by Rev. St. § 6420, determines that a proposed appropriation by a corporation will be an abuse of corporate power, or destructive of the public use to which the land is already devoted, and dismisses the petition, an injunction does not lie to prevent a prosecution of proceedings in appropriation. Wheeling & L. E. R. Co. v. Toledo R. & T. Co. [Ohio] 74 N. E. 209.
72. Code 1887, §§ 1075, 1076, 1079, 1081, construed. Richmond & P. Elec. R. Co. v. Seaboard Air Line R. Co., 103 Va. 399, 49 S. E. 512.
73. Turl v. New York Contracting Co., 46 Misc. 164, 93 N. Y. S. 1103.

apparent sole owner of the land.[86] In Ohio payment of costs and damages arising from the establishment of a county road should be made to the county treasurer.[87] Statutory requirements must be followed.[88] The landowner, retaining possession, is not entitled to interest on the award from the date of the service of the summons to verdict, less rents and other benefits of possession received by him during that period.[89] An incumbrancer is entitled to interest on his debt pending an appeal.[90]

Sufficiency of payment.[91]—The owner is entitled to payment in money and cannot be compelled to accept any other kind of property in lieu thereof.[92]

Distribution.[93]—The rights of various parties to compensation is fixed at the date of the taking,[94] though in some states as to subsequent purchasers the proceedings operate as lis pendens.[95] The courts are not agreed as to the distribution of the award when mortgaged premises are taken. Some hold that the mortgagee is entitled to the fund;[96] others that the mortgagor has the right thereto.[97] The matter is now largely regulated by statute. A mortgagee is an "owner" within the meaning of statutes on this subject,[98] and a third mortgagee is a "mortgagee," as that word is here used.[99] In those states where it is held that the award belongs to the mortgagor, the mortgagee can in equity follow the land taken, and subject the fund to a lien for the payment of the mortgage debt due him.[1] Where part of a tract of mortgaged land is taken, nothing remains subject to the mortgage except the land not taken, and that only can be sold on a foreclosure of the mortgage;[2] and the right of the mortgagee to reach the compensation fund is an equitable right distinct from his rights

74. Riley v. Charleston Union Station Co. [S. C.] 51 S. E. 485.

75. Xavier Realty v. Louisiana R. & Nav. Co. [La.] 38 So. 427.

76. See 1 C. L. 1043.

77. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501.

78. See 1 C. L. 1043.

79. Camden Interstate R. Co. v. Smiley [Ky.] 84 S. W. 523.

80. See 3 C. L. 1208.

81. In an action to restrain a city from grading a street, plaintiff being granted a jury trial, the jury may render a verdict for plaintiff's damages. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

82. See 3 C. L. 1208.

83. Van Loan v. New York, 94 N. Y. S. 221, afg. 45 Misc. 482, 92 N. Y. S. 734.

84. 85. Brooks, Neely & Co. v. Yell County [Ark.] 88 S. W. 590.

86. Where land was taken by county, held county authorities need not ascertain the construction or validity of a will. Cedar County v. Lammers [Neb.] 103 N. W. 433.

87. And not directly to the claimants. Cincinnati, etc., R. Co. v. Brossia, 5 Ohio C. C. (N. S.) 505.

88. California: Pol. Code, § 4145, providing that the county treasurer shall not receive money into the treasury unless accompanied by a certificate of the auditor, has no application to money paid in, under § 2689, as damages for laying out a private road. Mariposa County v. Knowles, 146 Cal. 1, 79 P. 525.

89. Rev. St. Utah 1898, §§ 3599, 3601, 3603, 3604, considered. Oregon Short Line R. Co. v. Jones [Utah] 80 P. 732.

90. Kansas City Charter, art. 10, § 18, providing that in case of appeal the judgment shall stand suspended and no interest shall be allowed until the appeal is disposed of, does not affect the rule. Kansas City v. North America Trust Co., 110 Mo. App. 647, 85 S. W. 681.

91. See 1 C. L. 1045.

92. Oregon Short Line R. Co. v. Fox, 28 Utah, 311, 78 P. 800. Railroad establishing new right of way cannot compel owner to take old right of way in even part payment. Id.

93. See 3 C. L. 1209.

94. A prior grantee has the right thereto. Ashley v. Burt County [Neb.] 102 N. W. 272. Under St. 1894, p. 761, c. 548, as amended by St. 1897, p. 498, c. 500, the date of the beginning of the physical construction of the railway upon or in front of the premises in respect to which compensation is claimed is the date to be taken in determining what persons are entitled to compensation. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017. See, also, Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205, where it is held that a subsequent grantee has no right to damages accruing to a landowner by the wrongful taking of his property. See ante, § 19a.

95. As to purchasers pending the proceedings, a general lien attaches to the land on the filing of petition for condemnation and service of notice on the then owners, which becomes special on the confirmation of the assessment of damages and benefits. Wilkinson v. District of Columbia, 22 App. D. C. 289.

96. Where mortgage security is impaired by the proceedings, the mortgagee is entitled to such part of the award as is required to repair the impairment. Bolton v. Seamen's Bank for Savings, 99 App. Div. 581, 91 N. Y. S. 122.

97. Where mortgaged property is taken, the compensation, in the absence of any statute on the matter, is at law the property of the mortgagor. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

98. A mortgagee is within the protection of a provision requiring commissioners to ascertain the damages for which any occupant or owner of "any right or interest claimed

under the mortgage on the remaining land.[3] A mortgagee being entitled to the money may establish his claim by a bill in equity[4] and to such a suit the mortgagor is a necessary party.[5] Where mortgaged property is damaged, the payment of the mortgage should be apportioned between the land and the compensation fund.[6] Equity has jurisdiction to adjust the equitable rights existing between the various mortgages where the mortgage debts are secured by liens on other funds.[7] A sum paid the owner and mortgagor in consideration of his withdrawing his opposition to the condemnation proceedings is no part of the award.[8] The award being paid into court, it stands in the place of the land condemned, and the lien or incumbrances on the land are transferred to the fund thus held in the order of priority that they were held on the land before it was taken.[9] In New York an award made for realty takes the place of the land and remains subject to judgment liens to which the land was subject,[10] and hence is payable to a receiver appointed in supplementary proceedings on a judgment against the owner of the land.[11] Where a part of a lot subject to an irredeemable ground rent under a lease renewable forever is condemned, the fact that the portion not taken is sufficient security for the rent charge does not deprive the owner of the ground rent of the right to compensation,[12] and the rent may be apportioned when necessary to do full justice to all the parties.[13] A lessor becoming the owner of improvements is entitled to a fund awarded for damages thereto.[14] The eminent domain court has jurisdiction to determine the amount of attorney's fees to be allowed an executrix who is a party to the proceeding.[15]

Lien and enforcement.[16]—A claim for damages caused by the location of railroad tracks in a street is a lien upon the corpus of the railroad, superior either to a prior or subsequent mortgage, and cannot be defeated by a sale of the road, unless the lienholder is made a party to the foreclosure proceeding.[17]

§ 21. *Ownership or interest acquired.*[18]—The quantity of land[19] and the interest therein[20] which can be taken, are limited by the necessities of the public use, and

in the ground or improvements ought to be compensated." City of Hagerstown v. Groh [Md.] 61 A. 467.

99. Within St. 1894, p. 764, c. 548, § 8, providing for the compensation of mortgagees having an estate in premises abutting on property taken for or injured by an elevated railway. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

1, 2. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

3. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017. In such a case where there were three mortgages on the land, held, that a foreclosure sale under the second mortgage did not affect the third mortgagee's rights in the compensation fund, the right to reclaim which was entirely distinct from the right to redeem the land itself. Id.

4. City of Hagerstown v. Groh [Md.] 61 A. 467.

5. City of Hagerstown v. Groh [Md.] 61 A. 467. Especially where the state of the mortgagee's claim depends upon the state of accounts between him and the mortgagor. Id.

6. Where land subject to first, second and third mortgages was damaged by the construction of an elevated railway, and, the second mortgage being foreclosed and satisfied by a sale of the property, compensation was obtained for the damage done, the burden of satisfying the first mortgages should be apportioned between the land and the compensation fund, proportionally to the value of the land, subject to the injury done by the elevated railway, free of incumbrances and the amount of compensation found due for the injury. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

7. Under Rev. Laws, c. 48, § 114, and c. 111, §§ 112, 113, a court of law has such jurisdiction. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

8. Where in consideration of one owner withdrawing his opposition to the condemnation of land, the other property owners guaranteed that his award should equal $4,000, exclusive of benefits, held, that the fund arising thereunder belonged to him rather than to a mortgagee of the land. Bolton v. Seamen's Bank for Sav., 99 App. Div. 581, 91 N. Y. S. 122.

9. Kansas City v. North American Trust Co., 110 Mo. App. 647, 85 S. W. 681.

10, 11. Van Loan v. New York, 94 N. Y. S. 221, afg. 45 Misc. 482, 92 N. Y. S. 734.

12. City of Baltimore v. Latrobe [Md.] 61 A. 203.

13. City of Baltimore v. Latrobe [Md.] 61 A. 203. Where a part of a lot subject to an irredeemable ground rent under a lease renewable forever was condemned, held, that the ground rent was apportionable, and the owners of the rent charge were entitled to the capitalized proportionate value of the land taken. Id.

14. City of St. Louis v. Nelson, 108 Mo. App. 210, 83 S. W. 271.

15. Does not conflict with the jurisdiction of the surrogate court. In re East Seventh St., 95 N. Y. S. 140.

16. See 3 C. L. 1209.

by the terms of the enabling act.[21] As a general rule, under a general power of condemnation, corporations are authorized to take only such rights as are necessary.[22] What amount of land is necessary is a question for the jury.[23] The property or interest acquired may also be limited by the instrument of taking[24] or by the terms of the award.[25] The mortgage lien of one not a party to the proceedings is not affected thereby.[26] Former trespasses are not merged in the expropriation proceedings.[27] The judgment in the proceedings and not the petition determines the amount that can be taken;[28] but the rights and interests of parties date from the time of the filing of the petition and subsequent dedications are subject to it.[29] The record of the condemnation proceedings as to what the assessment was intended to cover cannot be altered or varied by parol.[30]

17. Kentucky & K. Bridge & R. Co. v. Clemmons [Ky.] 86 S. W. 1125.

18. See 3 C. L. 1193, 1209.

19. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961; Hellen v. Medford [Mass.] 73 N. E. 1070.

20. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961; Newton v. Newton [Mass.] 74 N. E. 346; Hellen v. Medford [Mass.] 73 N. E. 1070; Mott v. Eno, 181 N. Y. 346, 74 N. E. 229, rvg. 97 App. Div. 580, 90 N. Y. S. 608; Brown v. Asheville Elec. Light Co. [N. C.] 51 S. E. 62. An electric light or street railway company appropriating any of the reserved rights of abutting owners must compensate them therefor. Id. Trees standing on the edge of a sidewalk and not interfering with the use thereof cannot be cut down without compensating the abutting owners. Id. An easement being all that is necessary to carry out the provisions of St. 1898, p. 37, c. 63, it will be presumed that an easement only was intended to be taken. Newton v. Newton [Mass.] 74 N. E. 346. A railroad company is only entitled to acquire an easement. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961. A city condemning a street across railroad tracks acquires a mere right of way. St. Louis & S. F. R. Co. v. Fayetteville [Ark.] 87 S. W. 1174.

21. Mott v. Eno, 181 N. Y. 346, 74 N. E. 229, rvg. 97 App. Div. 580, 90 N. Y. S. 608. Laws 1847, p. 196, c. 203 was imperative in appropriating the lands it describes for the city streets, and, necessarily, vested the city with the fee, leaving those persons, who had title to the same or interests therein, to recover compensation therefor from the city in ways provided by law. Id. Under Act April 9, 1867 (P. L. 51), authorizing school directors to occupy sufficient ground for the erection of school buildings, the title acquired by the school district is merely a right to use and occupy the land condemned. Lazarus v. Morris [Pa.] 61 A. 815. Park commissioners taking land under St. 1882, p. 111, c. 154, § 3, the city becomes vested with the fee. Hellen v. Medford [Mass.] 73 N. E. 1070. A city cannot, by encroaching on abutting property in improving a street under an ordinance authorizing such improvement by grading, and not authorizing the widening of the street, acquire any title to such property. Davis v. Silverton [Or.] 82 P. 16.

22. In the absence of express language to that effect, a statute does not authorize the taking of a fee, but only the right to use and occupy the land for the purpose for which it is taken. Lazarus v. Morris [Pa.] 61 A. 815. Section 1 of Acts of 1902 (P. L. p. 214), now § 23 of the Revised Railroad Act of 1903 (P. L. p. 657), authorizes railroad corporations to carve out from the title of the general owner of land and to acquire by condemnation such rights and easements for the construction of tunnels as may be necessary for the accomplishment of their purposes. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130. The Eminent Domain Act of 1900 (P. L. p. 79) is applicable to the condemnation of rights and easements under the section above mentioned. Id.

NOTE. New Jersey rule: The principle stated in the text is not wholly abrogated by the judgment in the case of Currie v. New York Transit Co., 66 N. J. Eq. 313, 58 A. 308, but was merely limited so far as to give effect to the will of the legislature clearly expressed in the statute delegating the power. If the statute be ambiguous, it should still be construed in accordance with that principle. McEwan v. Pennsylvania, etc., R. Co. [N. J. Law] 60 A. 1130.

23. Where the order appointing the jury directed it, in assessing the damages, to give the cash value of the ground and set apart by metes and bounds a sufficient quantity of land for the purposes intended, not exceeding the amount prayed for in the petition, and the jury set aside the amount prayed for, it could not be contended that the court did not leave to the jury the determination of the amount of land to be taken. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

24. An instrument of taking, excepting from its operation all lawful rights to take or use the waters of a river, or the power derived therefrom, for mechanical or manufacturing purposes, also the lawful rights of flowage, as well as the right to keep up, maintain, reconstruct, alter and use any water mill, mill privilege, etc., now lawfully existing or used—secures to the owners the water rights belonging to the property, and does not limit the right to use the water to methods previously adopted. Klous v. Com. [Mass.] 74 N. E. 330. A general release of damages for taking of land for railway purposes includes all damages for the construction of the road and such extensions of the original plan as may be necessary, provided they do not encroach beyond the right of way (Davis v. Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364), but does not cover damages from negligence in the construction or operation of the road (Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626).

25. A commissioner's report awarding damages for the taking and allowing for the use of a railroad company a strip 100 feet wide, held not to include land outside of such strip, though included in a subsequent

§ 22. *Transfer of possession and passing of title.*[31]—In most states, except where the land is taken by the state,[32] the payment or tender of the award[33] or the giving of security for such payment[34] is made a condition precedent to the taking of possession by the taker, unless the use is temporary and of uncertain duration and the extent and character of the injuries which may result are consequently uncertain.[35] In some states the rule is limited to property actually taken.[36] This requirement may be waived by the owner,[37] but such waiver does not deprive him of his right to compensation.[38] In construing statutes on this subject a county is a "municipal corporation,"[39] and the condemnation of land for a county road is a condemnation by the state.[40] A requirement for adequate security will be satisfied if the security which it is proposed to give makes it reasonably certain that compensation will in due time be made.[41] The property owner refusing the award, it is usually provided by statute that upon the payment into court of a certain sum, usually the amount of the award and costs, possession may be awarded the petitioner,[42] even though an appeal be pending;[43] but such statutory provisions must be strictly complied with.[44] If the proceeding is removed from a state to a Federal court and a writ of error is prosecuted, any supersedeas should be modified so that the petitioner shall have the same rights which he would have had if the proceedings had remained in the state court.[45] A decree of condemnation vesting title to the land on payment of the award, it is im-

entry in the report. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412.

26. Land is subject to lien thereof. Rieck v. Omaha [Neb.] 103 N. W. 283.

27. An injunction restraining trespass held not to abate, as to the issue of prior trespass, by the subsequent expropriation of the property. Xavier Realty v. Louisiana Ry. & Nav. Co. [La.] 38 So. 427.

28. Where plaintiff only sought to condemn easements of light, air and access, but the judgment provided for the taking also of any other right, title or interest, which might be the subject of injury or inconvenience, from the structure erected by plaintiff, defendant was entitled to damages resulting from the erection of pillars extending into vaults under the sidewalk. In re Brooklyn Union El. R. Co., 93 N. Y. S. 924.

29. Streets platted after railroad location. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

30. Plaintiff cannot show by parol that the award was for his crop and not for his land; the petition describing the land, and it, after verdict of the jury, being adjudged to be condemned. Choate v. Southern R. Co. [Ala.] 39 So. 218.

31. See 3 C. L. 1209. For conditions precedent to the right to take possession, see 3 C. L. 1196, § 5. See also 2 Tiffany, Real Prop. p. 1072, § 474.

32. Const. art. 1, § 7 does not apply. Litchfield v. Bond, 93 N. Y. S. 1016. The faith of the state is ample security, and it is sufficient if provision is made by law by which the party injured can obtain compensation, and that an impartial tribunal is provided for assessing it. Id.

33. Under Laws 1895, p. 367, c. 27, § 5 and Pub. St. 1901, c. 67, §§ 17, 18 and chap. 71. § 4, an assessment and payment or tender of the damages are conditions precedent to the right of a street railway to occupy the highway for the construction and operation of its railroad; and a failure to comply with these prerequisites, in the absence of a waiver by the abutters, renders its occupancy of the highway unlawful. Strickford v. Boston & M. R. Co. [N. H.] 59 A. 367. Payment immediately prior to the time order is made for the establishment and opening of road is sufficient. Cincinnati, etc., R. Co. v. Brossia, 5 Ohio C. C. (N. S.) 505.

34. Const. art. 1, § 18, providing that private property shall not be taken for public use without "compensation first being made or secured to be made" to the owner, authorizes a taking of private property without payment of compensation in advance, on the compensation being secured and future payment made certain in the manner prescribed by the legislature. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. Acts 30th Gen. Assem. p. 63, c. 68, § 7, providing that the amount of damages shall be paid "or secured to be paid upon such terms as the county auditor may deem just," held to meet the constitutional requirements. Id.

35. Vincent Bros. v. New York, etc., R. Co., 77 Conn. 431, 59 A. 491. The fact that there is no such preappraisal and payment does not increase defendant's liability. Id.

36. Const. art. 1, § 17 does not apply to damages caused abutting property by the construction of a railroad in a street. Settegast v. Houston, etc., R. Co. [Tex. Civ. App.] 87 S. W. 197.

37. Where he stood by until long after the railway was in operation, held to have waived his rights and, the railway being properly constructed, he could not sue for the damages. Strickford v. Boston & M. R. Co. [N. H.] 59 A. 367. Owner of property, by allowing street to be closed without instituting proceedings to prevent it, waives his right to demand compensation as a condition precedent to the closing of the street, and is remitted to his action at law for damages. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

38. Strickford v. Boston & M. R. Co. [N. H.] 59 A. 367.

39. Within the meaning of Const. art. 1, § 16, providing that no right of way shall be appropriated for the use of any corporation other than municipal, until full compensation shall have been made irrespective of bene-

material that a quitclaim deed also given is void.[46] A railroad company is not entitled to compensation for improvements made by it on property upon which it has entered, pending the condemnation proceedings, upon reversal of the final judgment in its favor, subsequently obtained in the action and adjudicating against its right to condemn the land.[47] The court failing to award writs of possession at the term at which the decree was entered, it can issue such writs at a subsequent term,[48] and the lower court having lost the power by lapse of time, the appellate court will issue such writs, or remand the cause to the court below for that purpose.[49]

§ 23. *Relinquishment or abandonment of rights acquired.*[50]—Except where the appropriator has a fee, property taken for a public use reverts to the owner on abandonment.[51] The fee to land being taken, a statute providing that abandonment shall revest title in the person from whom the land was taken is unconstitutional as depriving one of a vested right.[52] An abandonment of land cannot be established by proof merely of a failure for the time to use it, or of a temporary use of it not inconsistent with an intention to use it for the purpose for which it was taken, or another public purpose.[53] An averment of an actual abandonment of any intent to use the land for any public purpose is a sufficiently well pleaded abandonment.[54]

EMPLOYEE'S LIABILITY; ENTRY, WRIT OF; EQUITABLE ASSIGNMENTS; EQUITABLE ATTACHMENT; EQUITABLE DEFENSES, see latest topical index.

fits. Lincoln County v. Brock, 37 Wash. 14, 79 P. 477.

40. Morgan v. Oliver [Tex.] 82 S. W. 1028.

41. Sisson v. Buena Vista County Sup'rs [Iowa] 104 N. W. 454. A bond amply secured, for the benefit of the persons whose property is taken, conditioned on its being void on the payment of the damages out of the funds created by the levy of a special drainage tax, authorized by Acts 30th Gen. Assem. p. 61, c. 68, is sufficient to secure the payment of damages within Const. art. 1, § 18. Id.

42. The corporation depositing the sum in court, an order of court giving it possession is authorized. Const. § 242 and Ky. St. 1903, § 839, considered. Hamilton v. Maysville & B. S. R. Co [Ky.] 84 S. W. 778.

43. Broadmoor Land Co. v. Curr [C. C. A.] 133 F. 37. Colorado Statutes give the right. 1 Mills' Ann. St. § 1728. Such statute is applicable to proceedings to condemn an easement through an existing ditch for irrigation purposes, brought under the statute of 1881 (Sess. Laws 1881, p. 164). Id. Under Code Civ. Proc. §§ 1254, 941, the condemnor is entitled to possession upon payment of the amount of the award into court, even though the property owner has taken an appeal. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. Burns' Ann. St. 1901, § 5160 authorizes a railroad to take possession of property involved on payment or tender of the award, notwithstanding an appeal. Cleveland, etc., R. Co. v. Hayes [Ind. App.] 74 N. E. 531. Under Supp. Sayles' Ann. Civ. St. art. 4471, providing that plaintiff may take possession upon payment of award and depositing in court a further sum to secure additional damages, and that if on the final decision of the case, it is determined that the right to condemn the property does not exist, possession shall be surrendered to defendant and damages awarded him. Defendant has an adequate remedy at law and cannot enjoin plaintiff from taking possession pending an appeal. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501.

Quaere: When one internal improvement company has been erroneously adjudged to have the right to condemn and take land belonging to another such company, may the plaintiff be stayed from taking possession thereof by an order of supersedeas or other process? Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

44. Under Sayles' Supp. Rev. St. 1897-1904, art. 4471, providing that before taking possession of the land condemned the owner shall be paid the value assessed, or that double the award shall be deposited in court, and a bond for costs be executed, failure to execute the bond entitles the landowner to an injunction restraining the taker from taking possession pending an appeal. Hausmann v. Trinity & B. V. R. Co. [Tex. Civ. App.] 82 S. W. 1052.

45. Broadmoor Land Co. v. Curr [C. C. A.] 133 F. 37.

Note: A different case might be presented if upon the motion to modify the supersedeas it was made to appear that the property or easement proposed to be taken was already devoted to an inconsistent public use, or was of a character which the law would not permit to be taken. Broadmoor Land Co. v. Curr [C. C. A.] 133 F. 37.

46. Choate v. Southern R. Co. [Ala.] 39 So. 218.

47. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

48, 49. Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

50. See 3 C. L. 1210.

51. Applied to title acquired by school directors under Act April 9, 1867 (P. L. 51). Lazarus v. Morris [Pa.] 61 A. 815. Under Act April 2, 1811, the Union Canal Company did not acquire the fee or condemnation but only an estate determinable on abandonment of use of the land for canal purpose. Sholl v. Stump, 24 Pa. Super. Ct. 48.

52. St. 1900, p. 138, c. 196 is unconstitutional. Hellen v. Medford [Mass.] 73 N. E. 1070.

53, 54. Corr v. Philadelphia [Pa.] 61 A. 808.

EQUITY.

This topic treats of the general rules of equity and of the procedure in equity in those states where the adoption of a code has not changed equitable forms and procedure, and also of such matters of procedure as remain under the codes. The jurisdiction of equity over particular subject-matters is retained, but the law relative to such subjects [1] and to purely equitable remedies [2] and the equitable jurisdiction of particular courts [3] are treated elsewhere. The question of the legal or equitable character of a controversy sometimes arises in determining the right to a jury,[4] or in determining upon what calendar the cause shall be placed for trial,[5] and in many other matters of procedure especially under the codes.[6] The saving of questions for review [7] and appellate procedure [8] are treated elsewhere.

§ 1. *Nature of, and general principles controlling, equity.*[9]—Equity supplements and aids the law, but does not invade its domain, and never works for the destruction of a legal right nor in opposition thereto.[10]

§ 2. *Equity jurisdiction and occasions for relief. A. In general.*[11]—Jurisdiction of the subject-matter cannot be conferred by consent,[12] but one voluntarily seeking the aid of equity cannot question its jurisdiction.[13] Jurisdiction is to be

1. See specific topics, such as Trusts, 4 C. L. 1727.
2. Specific equitable remedies are treated under appropriate titles, such as Cancellation of Instruments, 5 C. L. 500; Injunction, 4 C. L. 96; Receivers, 4 C. L. 1238; Reformation of Instruments, 4 C. L. 1264; Specific Performance, 4 C. L. 1494, etc.
3. See Jurisdiction, 4 C. L. 324, also Bankruptcy, 5 C. L. 367, and Patents, 4 C. L. 929.
4. See Jury, 4 C. L. 358.
5. See Dockets, Calendars and Trial Lists, 5 C. L. 1039.
6. See Pleading, 4 C. L. 980; Parties, 4 C. L. 888, and like topics.
7. See Saving Questions for Review, 4 C. L. 1368.
8. See Appeal and Review, 5 C. L. 121.
9. See 3 C. L. 1210.
10. Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620. There is no equitable remedy for the perpetuation of the testimony of a dead witness. Id.
11. See 3 C. L. 1210.
12. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303; Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865. So held with reference to a city court. Ragan v. Standard Scale Co. [Ga.] 50 S. E. 951.
13. Cribbs v. Walker [Ark.] 85 S. W. 244.

determined from the allegations of the bill.[14] Service out of the state by copy of the bill and notice gives the court jurisdiction so far as property within the state is sought to be effected.[15]

A law action may be converted into an equitable one by amending the complaint so as to ask for equitable relief,[16] or by interpleading proceedings.[17] In states and courts retaining the distinction between equity and law courts, an equitable defense cannot be interposed in an action brought on the law side of the court;[18] but this is not the rule where the mixed system of jurisprudence prevails.[19] A bill showing want of equity, the defect may be cured by the filing of a cross bill.[20]

The court may, on its own motion, dismiss for want of jurisdiction,[21] or the defendant may raise the question by answer[22] or plea,[23] and in the latter case the merits cannot be gone into further than is necessary to determine the question of jurisdiction.[24] Where courts of equity have concurrent jurisdiction with law courts, it is in the sound discretion of the chancellor whether he will assume jurisdiction in a particular case.[25] Courts of equity, having once acquired jurisdiction, never lose it because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words.[26]

Effect of code or statutory provisions.[27] In those states where the distinction between actions at law and suits in equity has been abolished, the distinction between

One having a cause transferred from the law to the equity docket cannot complain of the exercise of jurisdiction by the chancery court. Deidrich v. Simmons [Ark.] 87 S. W. 649. Where defendant acquiesced in transfer of cause to equity docket held could not object on appeal. Kessner v. Phillips [Mo.] 88 S. W. 66.

14. Where the bill contained a general prayer, held jurisdiction was not to be determined therefrom but from the allegations in the bill. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423. Where a complaint for the pollution of the water of a stream alleges the destruction of timber, diminution in value of realty, sets forth the interference with the use and enjoyment of the premises, and alleges damages specifically, it does not state a case of equitable cognizance, though it states that defendant intends to and will continue to pollute the stream and asks for equitable relief. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882. But see 3 C. L. 1211, n. 74, 75, also see post, § 6B.

15. Fahrig v. Milwaukee & Chicago Breweries, 113 Ill. App. 525. Where notice is so served upon an English corporation organized solely for the purpose of holding the legal title to the stock of an American corporation, equity may, where the legal situs of the stock in the American corporation is within the jurisdiction of the court, enter a decree against such American corporation and its officers, requiring it and them to issue to the stockholders of such English corporation certificates of stock representing their several rights and interests in such domestic corporation. Id. See Process, 4 C. L. 1070.

16. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

17. Couch v. State [N. D.] 103 N. W. 942. An action to recover a reward is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under Rev. Codes 1899, § 5239, and assert their claims to the same reward. The rule is otherwise when a defendant against whom there are other claimants for the same debt interpleads such claimants, and secures his own discharge, and pays the money into court, pursuant to Rev. Codes 1899, § 5240. Id.

18. American Soda Fountain Co. v. Futrall [Ark.] 84 S. W. 505. Federal courts. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. The allowance of a claim, against a decedent's estate, for good cause shown out of the time limited, or the extension of such time for such a cause, cannot be obtained in an action at law. Id.

19. See infra, Effect of code and statutory provisions.

20. Pending proceedings in the courts of administration to sell decedent's lands for debts, a bill was filed, by the purchaser, for relief, and the administrator filed a cross-bill for specific performance. Podesta v. Binns [N. J. Eq.] 60 A. 815.

21. McConnell v. Hampton [Ind.] 73 N. E. 1092.

22. Adequate remedy at law. Henion v. Pohl, 113 Ill. App. 100.

23. Insufficient service of process. Groel v. United Elect. Co. [N. J. Eq.] 60 A. 822.

24. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

25. Des Moines Life Ins. Co. v. Seifert, 112 Ill. App. 277.

26. Johnson v. Block, 103 Va. 477, 49 S. E. 633. Equity is not without jurisdiction to entertain a suit by a number of taxpayers against a county board of supervisors and a number of their predecessors to compel them to restore to the county moneys paid them in excess of their salaries, on the ground that there is an adequate remedy at law under Code 1904, p. 398, § 836. Id.

27. See 3 C. L. 1211.

The New Jersey legislature has no power to force a jury trial upon the court of chancery, or to compel the court of chancery to submit those controversies of which it has original jurisdiction to the determination of

legal and equitable principles is still retained,[28] and the question whether an action is legal or equitable raises only a question of practice,[29] and equitable defenses and counterclaims may be interposed in an action at law.[30] In some states the use of such a defense is not permitted for the purpose of obtaining affirmative relief.[31]

(§ 2) *B. Maxims and principles controlling the application of equitable relief. General maxims.*[32]—He who comes into equity must come with clean hands;[33] but this maxim requires only that the plaintiff be not guilty of reprehensible conduct with respect to the subject-matter of his suit.[34] It has been applied to the right to interpose a defense.[35]

Equity aids the vigilant and not those who sleep upon their rights,[36] and this applies not only to the operation of statutes, but to the action of suitors in the conduct of their causes.[37]

He who seeks the aid of equity must do equity.[38] This maxim only applies

a jury in a court of law. Van Houten v. Van Houten [N. J. Eq.] 59 A. 555.

28. Thompson v. Hardy [S. D.] 102 N. W. 299.

29. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

30. Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610. In such cases the legal issues are triable by a jury, the equitable ones by the court, and the order of the trial is a matter of discretion with the court, to be determined by the exigencies. Id. Where equity is administered through the medium of legal forms, any defense to an action on a specialty, which would be good in a court of equity, may be shown. Atherholt v. Hughes, 209 Pa. 156, 58 A. 269.

31. The answer setting up an equitable defense but asking no affirmative relief, the case is at law. So held in an action of ejectment where the land involved, which plaintiff claimed under an execution sale, was the corpus of a spendthrift trust in which the judgment debtor had been the beneficiary. Kessner v. Phillips [Mo.] 88 S. W. 66.

32. See 3 C. L. 1212.

33. Where purchaser made false representations, held, contract of sale would not be specifically enforced. Miller v. Fulmer, 25 Pa. Super. Ct. 106. Where one has, contrary to the statute, tapped telegraph wires, he cannot come into equity and obtain relief with respect to telegraph service previously furnished by means of such wires. Sullivan v. Chicago Board of Trade, 111 Ill. App. 492. One who has been guilty of unfair competition or has made false statements on the label on his goods is not entitled to have the use of his trade-mark by another restrained. Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511. Where plaintiff ejected defendant from the latter's position in line at a public sale, held, he could not bring the action to establish his prior right, defendant having procured the filing of his application prior to plaintiff. Cobb v. Gooch [Tex. Civ. App.] 13 Tex. Ct. Rep. 682, 88 S. W. 401. Equity will not entertain a suit by either party to an illegal agreement against the other, where the contract is one against public policy, whether executed or executory. So held where agent refused to account to principal, both being engaged in loaning money at usurious rates. Woodson v. Hopkins [Miss.] 37 So. 1000. Where a business man conveyed land worth $2,500 to another person, who sustained no fiduciary relation to the vendor, without consideration, and merely to avoid the payment of a possible liability, held, equity would not decree a reconveyance. Massi v. Lavine [Mich.] 102 N. W. 665. Equity will only grant a new trial in a law action where complainant is without fault. Zweibel v. Caldwell [Neb.] 102 N. W. 84. See New Trial and Arrest of Judgment, 4 C. L. 810.

34. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353; Block Light Co. v. Tappehorn, 2 Ohio N. P. (N. S.) 553; Knapp v. Jarvis Adams Co. [C. C. A.] 135 F. 1008. The fact that there was fraud or illegality in the organization of a corporation cannot be set up to defeat its right to maintain a suit for the enforcement of a contract made by it, and of which the defendant receives and retains the benefit. Id. A former member of an illegal combination, whose connection with it was severed before the filing of the suit, will not be denied the protection of a court of equity against an illegal act of such combination because of his previous connection therewith. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353. In suit to enforce its orders the Interstate Commerce Commission represents the public, and its right to relief is not affected by the fact that the complainants before it may themselves have participated in unlawful practices. Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829.

35. Equity will not enforce a defense of fraud to set aside a written instrument when the party making such defense is shown to be the principal party in perpetrating the fraud, and where the proof is doubtful as to the other party having knowledge of the fraud. Price v. Winnebago Nat. Bank, 14 Okl. 268, 79 P. 105.

36. See post, § 3. Laches and acquiescence.

37. Lyle v. Sarvey [Va.] 51 S. E. 228.

Depositions: Under Va. Code 1904, § 3362, providing that a deposition may be read if returned before the hearing in the cause, a receiver who negligently failed to settle his accounts held not entitled to have his deposition read for the purpose of extenuating his conduct and to reduce his liability as ascertained by the commissioners' report. Lyle v. Sarvey [Va.] 51 S. E. 228. See Depositions, 5 C. L. 988.

38. Where community property has been sold at a judicial sale to pay the purchase

where the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction,[39] and it is essential that the equity which the plaintiff is required to perform be pointed out.[40] From the maxim it follows that a court of equity may condition its grant of relief to those who seek its aid by requiring that they shall do equity to their opponents, although the latter have been barred by limitation or by laches from successfully seeking that equity by an independent suit.[41]

Equity looks to the intent of the parties rather than to the form of their transactions.[42]

Where equities are equal in other respects the first in order of time shall prevail.[43]

Where equities are equal the law must prevail.[44]

An injury which the written law renders a nonactionable wrong, or not a wrong at all, is not within the maxim that equity will not suffer a wrong without a remedy.[45]

Equity acts in personam and not in rem, hence a court of equity having acquired jurisdiction over the person of the defendant, it has jurisdiction to enter any decree which may concern or affect lands situated in a foreign state to the same extent and as fully as though these were situated within the state of the forum.[46] This maxim has been limited in some states by statutes requiring the suit to be brought in the county where the land is situated.[47]

In equity there is a group of principles which, while not included in the maxims, may, because of their long usage, be said to have the force of maxims;

price, the heirs of the wife should not be permitted to recover without first offering to make restitution to the purchaser or his assigns. Luria v. Cote Blanche Co. [La.] 38 So. 279. Maker of a deed of trust cannot enjoin a sale thereunder on the ground that the property sought to be sold was not covered thereby, he having disposed of the property mortgaged, unless he offers to make good the amount disposed of by him. Sullivan v. Bailey, 21 App. D. C. 100. The partner of a judgment debtor holding money belonging to the execution creditors must pay interest thereon. Weber v. Zacharias, 105 Ill. App. 640. A contract made without fraud or mistake may not be modified by a court of equity, to give either party a better bargain, while he retains all the benefits of the original trade. Rule applied to a family settlement. Burnes v. Burnes [C. C. A.] 137 F. 781. Held error to dismiss for want of equity a bill to cancel a bond and mortgage given to a foreign building and loan association doing business in the state without having complied with Code 1896, § 1316. Hanchey v. Southern Home Bldg. & Loan Ass'n, 140 Ala. 245, 37 So. 272. In a suit by a city to enjoin a judgment on warrants, one of the warrants being confessedly valid and the payee in another being entitled fo a warrant, the failure of the city to tender the just amounts due or the warrant to which defendant was confessedly entitled, violates the maxim that he who seeks equity must do equity. City of Ft. Pierre v. Hall [S. D.] 104 N. W. 470.

39. Does not apply where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action. Mercantile Trust Co. v. Hensey, 21 App. D. C. 38.

40. Henry v. Henry [Neb.] 103 N. W. 441.

41. Burnes v. Burnes [C. C. A.] 137 F. 781.

42. Maxim applied to an agreement whereby certain daughters agreed to pay their father one-half of the cost of erecting a house on certain land, in consideration of his agreement to convey the premises to them. Clark v. Hindman [Or.] 79 P. 56. Deed absolute on its face declared a mortgage. Hursey v. Hursey [W. Va.] 49 S. E. 367. See Deeds of Conveyance, 5 C. L. 964; Mortgages, 4 C. L. 677.

43. Maxim applied in a contest between rival claimants under equitable titles to real estate. Johnson v. Hayward [Neb.] 103 N. W. 1058.

44. Equity will not enforce against an innocent purchaser, who has paid the purchase money and taken legal title to land, without notice, a prior executory contract for the purchase of the land. Martin v. Thomas [W. Va.] 49 S. E. 118.

45. Pietsch v. Milbrath, 123 Wis. 647, 102 N. W. 342; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

46. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345.

47. Illinois: Where nothing but the title to land is concerned, and the court is called upon to act upon the person of the defendant only, a court of chancery may administer relief in any county where the defendant is found; but when the court is called upon to act directly upon the property, it is essential to its power that the property to be effected be within the territorial jurisdiction of the court. Munger v. Crowe, 115 Ill. App. 189. A bill to restrain a county from tearing down a public building in order that it may erect a new one in its stead can only be maintained in the county in which such real estate is located. Id.

thus equity will never do a vain or useless thing;[48] it will not aid a party in taking advantage of his own wrong;[49] and, akin to this, where one of two innocent parties must lose, the loss should fall upon the one whose action or conduct has induced or made possible the loss.[50] When the parties are not in pari delicto, the one that is comparatively the more innocent of the two may obtain relief by doing full equity to those parties, if any, who have sustained injury by his partial wrong.[51] A harsh and unconscionable contract of employment will not be enforced by a court of equity.[52] That a creditor has been persistent and determined in his efforts to collect his debt and has resorted to unnecessarily expensive and vexatious means to that end affords no just ground for denying him equitable relief in the enforcement of his debt.[53]

Existence of an adequate remedy at law.[54]—Except where changed by constitutions or statutes,[55] equity has no jurisdiction where there is an adequate remedy at law.[56] To deprive equity of jurisdiction, the legal remedy must be as practical and as efficient to the ends of justice and its prompt administration as any that equity can afford;[57] but it is not the mission of a court of equity to simplify or make easier the enforcement of a legal right,[58] and to be complete and adequate the remedy must not leave open for future litigation matters really and substantially involved.[59] The circumstances of each case must determine the application of the rule.[60] As-

48. Where cause was properly adjudicated it will not grant a bill of revivor. Prouty v. Moss, 111 Ill. App. 536.

49. A debtor being in default, he cannot have a sale by a trustee under a chattel deed of trust enjoined on the ground that he advertised the property before taking possession. Sullivan v. Bailey, 21 App. D. C. 100.

50. Pennypacker v. Latimer [Idaho] 81 P. 55. If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss. Humphrey Hardware Co. v. Herrick [Neb.] 101 N. W. 1016. Where one of two innocent parties must lose, the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. Louchheim v. Somerset Bldg. & Loan Ass'n, 25 Pa. Super. Ct. 325.

51. Sanford v. Reed [Ky.] 85 S. W. 213. Where one conveys land to get it out of the way in case recovery be had on a bond on which she was surety, yet, the grantees having taken advantage of her weakness to induce her to make the conveyance without consideration by frightening her as to her liability on the bond and promising to recover, held, the deed would be canceled at her suit. Id.

52. Contract whereby the employe is bound for two years and the employer for only one week, and which gives the employe no redress against discharge at any time without cause, but prohibits him from entering the same line of business for 18 months thereafter, whether the employer continues in the same business or not, will not be enforced. Jennings v. Bethel, 6 Ohio C. C. (N. S.) 245.

53. Anthes v. Schroeder [Neb.] 103 N. W. 1072.

54. See 3 C. L. 1213.

55. Under Const. § 147, providing that no decree in chancery in a civil cause shall be reversed for want of jurisdiction arising from any error as to whether the cause was of equity or common-law jurisdiction, a decree in chancery will not be reversed merely because there was an adequate remedy at law. Hancock v. Dodge [Miss.] 37 So. 711.

56. Presley v. Dean [Idaho] 79 P. 71; School Dist. No. 25, Shoshone County v. Rice [Idaho] 81 P. 155; Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484; United States Min. Co. v. Lawson [C. C. A.] 134 F. 769; Henion v. Pohl, 113 Ill. App. 100. Action at law cannot be maintained in equity. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. Demurrer reciting "that the statement of facts" in the bill "show that the complainant had an adequate remedy at law" is substantial. Opie v. Clancy [R. I.] 60 A. 635.

57. United States v. Bitter Root Development Co. [C. C. A.] 133 F. 274; Southern Pac. R. Co. v. United States [C. C. A.] 133 F. 651; Williams v. Neely [C. C. A.] 134 F. 1; McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295; Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100; Carney v. Barnes [W. Va.] 49 S. E. 423.

58. Yellow Pine Export Co. v. Sutherland-Innes Co. [Ala.] 37 So. 922. The fact that evidence may be obtained and presented with greater convenience in an equity suit is not sufficient. United States v. Bitter Root Development Co. [C. C. A.] 133 F. 274.

59. Peterson v. Hall [W. Va.] 50 S. E. 603.

60. Southern Pac. R. Co. v. United States [C. C. A.] 133 F. 651.

ILLUSTRATIONS. Cases in which the legal remedy is held to be adequate: [Only general illustrations have been retained, the application of the doctrine to specific equitable remedies being treated in the topics dealing with such remedies; see Injunction, 4 C. L. 96; Specific Performance, 4 C. L. 1494; Trusts, 4 C. L. 1727, etc.].

Accounting [See 3 C. L. 1213]: Where partnership accounts have been settled and a balance determined, the fact that one or two items of account were omitted does not

give equity jurisdiction. Jackson v. Powell, 110 Mo. App. 249, 84 S. W. 1132.

Boundary disputes: A mere confusion of boundaries of land is not sufficient to give a court of equity jurisdiction. McCreery Land & Investment Co. v. Myers [S. C.] 49 S. E. 848; Deidrich v. Simmons [Ark.] 87 S. W. 649. Equity held to have jurisdiction where tract had been held by one party and his predecessors in interest for over 13 years, during which time valuable improvements had been made and their rights acquiesced in by the other party and his predecessors in interest. Id.

Damages [See 3 C. L. 1213]: The inadequacy of the legal remedy because of defendants' inability to respond in damages is not presented in such manner as to sustain the jurisdiction of a court of equity, where of two defendants, only one is alleged to be financially responsible. Williams v. Mathewson [N. H.] 60 A. 687. An action for damages for breach of contract is not equitable. Akins v. Hicks [Mo. App.] 83 S. W. 75.

Easements: Equity has no jurisdiction where a person claims title to an easement by adverse user, the owner of the land denying the title and alleging that the use was merely permissive. Godino v. Kane, 26 Pa. Super. Ct. 596.

Estates of decedents [See 3 C. L. 1213]: Where complainant has no lien on the personal property of a decedent, he cannot maintain a suit in equity against the distributees of such estate to subject it or lands purchased therewith to the payment of a bond on which deceased was liable. Acton v. Shultz [N. J. Eq.] 59 A. 876.

Highways (See Riparian Lands, infra).

Insurance [See 3 C. L. 1213]: Equity has no jurisdiction of a bill by an insurance company to cancel an insurance policy for fraud. Des Moines Life Ins. Co. v. Seifert, 112 Ill. App. 277.

Liens: If a decree erroneously awards a lien priority, the mortgagee has a speedy and adequate remedy by appeal or error, and equity will not intervene. Nebraska Loan & Trust Co. v. Crook [Neb.] 103 N. W. 57.

Mortgages: A bill to compel the satisfaction of a mortgage, and to restrain proceedings thereon will be dismissed, if the pleadings and proofs leave the question of payment in substantial doubt. To sustain such a bill the evidence of payment must be clear and precise; if it is not, the parties will be left to their remedy at law. Dinner v. Van Dyke, 25 Pa. Super. Ct. 433.

Remedies against corporations, officers, or stockholders [See 3 C. L. 1214]: Where there was a breach of an agreement to deliver certain corporate stock, held, plaintiff's remedy was at law and not a bill for specific performance, though defendant owned 92 per cent. of the stock of such corporation, which stock was not listed or purchasable in open market. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113. A court of chancery has no jurisdiction to try title to a corporate office upon a bill filed purely or that purpose, the proper remedy being by quo warranto. Blinn v. Riggs, 110 Ill. App. 37.

Right to property or possession [See 3 C. L. 1214]: Equity has no jurisdiction of a suit of claimants to land, though it is alleged that the debt secured by a deed of trust has been paid, though no formal release can be proven. Peck v. Haley, 21 App. D. C. 224. Has no jurisdiction of a petition which merely seeks to recover possession of demised premises after a declaration of forfeiture by the lessor. Gunning v. Sorg, 113 Ill. App. 332. Chattel mortgagees have an adequate remedy at law by replevin to recover possession of the mortgaged property when the same is attached under Kirby's Dig. § 5011. Johnson v. Gillenwater [Ark.] 87 S. W. 439. Has no jurisdiction to enforce a forfeiture and recover possession of real estate on the strength of an alleged legal title thereto. Land v. May [Ark.] 84 S. W. 489. Equity has no jurisdiction of a suit to recover property in the possession and control of one who refuses to permit the owner to remove it. Yellow Pine Export Co. v. Sutherland-Innes Co. [Ala.] 37 So. 922. A bill alleging that the defendant is in various ways wrongfully interfering with cattle legally under the control of the complainant and that defendant claims title to some of such cattle, held not to state a case for equity cognizance. Williams v. Peeples [Fla.] 37 So. 572. A tenant who has been dispossessed by his landlord, under a claim by the latter that the lease has been violated and that he has a right to retake the possession, is not entitled to the aid of a court of equity. Williams v. Mathewson [N. H.] 60 A. 687.

Riparian lands: Whether a grant by the riparian commissioners under the riparian acts (Gen. St. p. 2791, par. 26) operates to terminate the existence of a highway over the lands included in the grant below the line of the original highwater mark is a question of law. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348. Whether a grant of tide lands by the riparian owners was ultra vires held a legal question. Id. The question as to the existence of a highway on the shore of navigable water prior to a grant of the locus in quo by the riparian owners held a legal one. Id.

Cases in which the legal remedy is held to be inadequate: [Only general illustrations have been retained, the application of the doctrine to specific equitable remedies being treated in the topics dealing with such remedies. See Injunction, 4 C. L. 96; Specific Performance, 4 C. L. 1494; Trusts, 4 C. L. 1727, etc.].

Contracts [See 3 C. L. 1213, 1214, 1215]: That vendor of personal property may sue at law to recover the whole purchase price does not prevent suit in equity to enforce the contract of sale. Law v. Smith [N. J. Eq.] 59 A. 327. In the absence of special reason rendering the remedy at law inadequate a suit in equity cannot be maintained to rescind a verbal contract for the exchange of personal property. Wilson v. Maxon [W. Va.] 49 S. E. 123. The vendee of property assuming a mortgage thereon, the vendor may bring a suit in equity to compel him to pay it. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. See Contracts, 5 C. L. 664.

Estates of decedents [See 3 C. L. 1213]: A court of equity can entertain jurisdiction of a suit against a legal representative and the sureties on his bond in the first instance, where there is no remedy at law, or where the remedy at law is for any reason inadequate. Bailey v. McAlpin [Ga.] 50 S. E. 388.

Fiduciary relations [See, also, 3 C. L.

senting to reference does not admit inadequacy of legal remedy.[61] The court of equity may decide whether the legal remedy is adequate or inadequate.[62] The court having jurisdiction of the subject-matter, the objection that there is an adequate remedy at law must be taken at the earliest opportunity and before the defendants enter upon full defense;[63] in other words, it should be made within a reasonable time after the bill is filed[64] and before the filing of an answer.[65] The objection may be raised by demurrer[66] or by answer,[67] as by a denial of plaintiff's allegation that he has no adequate remedy at law.[68] Although the objection is not made by demurrer, plea or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize it of its own motion and to give it effect,[69] and the defect appearing upon the face of the bill, and no ground for equitable intervention being shown, an appellate court may notice the defect, although it has been ignored in the pleadings, assignments of error and argument, and may remand the cause with directions to dismiss the bill.[70]

1214]: There is a remedy in equity to compel restitution of money taken in violation of the duty owed by a fiduciary. Rule applied as between corporation and a promoter thereof. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

Highways: Where there are several distinct parties necessary to the litigation, whose rights and duties are not clearly defined, a bill to regulate the crossing of a highway over a railroad will not be dismissed on the ground of an adequate remedy at law by petition under Act June 7, 1901 (P. L. 531). Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100.

Landlord and tenant: A bill by a landlord to cancel a mining lease as a cloud on his title, to establish his right of possession in the premises, and to enjoin the lessee from mining ore on the leased premises, because of its breach of the lease in operating the mine in an unworkmanlike manner, so as to cause the surface of the ground to cave, etc., held maintainable. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279.

Matters relating to corporations [See 3 C. L. 1215]: In a bill to have certain unauthorized acts by corporate officers set aside and a receiver appointed, the fact that a violation of a contract with one of the complainants is alleged is insufficient to show that complainants have an adequate remedy at law. Stone v. Pontiac, O. & N. R. Co. [Mich.] 102 N. W. 752.

Public lands: Equity held to have jurisdiction of a suit by the United States under 24 Stat. 556 and 29 Stat. 42, to recover the price of land erroneously patented under a railroad grant. Southern Pac. R. Co. v. United States [C. C. A.] 133 F. 651.

Quieting title [See Quieting Title, 4 C. L. 1167]. The enlarged remedy given by Rev. St. Utah, 1898, §§ 2915, 3511, may be enforced in a Federal court of equity sitting in that state when the complainant is in possession, and the defendant is out of possession, or when both parties are out of possession. United States Min. Co. v. Lawson [C. C. A.] 134 F. 769. A bill to quiet title will lie where the owner of a mining claim is in possession of its surface claiming title to the entire claim, though the bill further alleges that defendant has, through underground workings, wrongfully entered upon and removed ore bodies beneath the surface of the claim, and threatens to extend his workings therein. Id.

Rights between lessees: Chancery has jurisdiction to decide between conflicting claims to rent or royalty oil under conflicting oil leases to the same lessee, both as to that already produced and that to be produced in future by the lessee under the leases, which royalty oil is by the leases to be delivered to the credit of the lessors. Peterson v. Hall [W. Va.] 50 S. E. 603, overruling Zinn v. Zinn, 54 W. Va. 483, 46 S. E. 202.

Taxes: Sand. & H. Dig. § 3778, authorizing an injunction against all unauthorized taxes or assessments by counties, cities, etc., gives a substantive right enforceable on the equity side of a Federal court. Humes v. Little Rock, 138 F. 929.

61. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113.

62. Penn Iron Co. v. Lancaster, 25 Pa. Super. Ct. 478; Penn R. Co. v. Parkesburg & C. St. R. Co., 26 Pa. Super. Ct. 159.

63. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 651; Id., 133 F. 662; Martin v. Sexton, 112 Ill. App. 199. Defendant failing to raise the objection until after testimony on the merits has been taken, the court may, in its discretion, retain the cause. Mertens v. Schlemme [N. J. Eq.] 59 A. 808.

64. Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100.

65. Martin v. Sexton, 112 Ill. App. 199. Is waived by going to a hearing before a master for assessment of damages on an answer which did not set up the objection. United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056.

66. Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100; Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129.

67. Henion v. Pohl, 113 Ill. App. 100.

68. No affirmative allegation by defendant that plaintiff had a remedy at law is necessary. Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113.

69. Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484.

70. Williams v. Peeples [Fla.] 37 So. 572.

Doing complete justice.[71]—A court of equity having jurisdiction of a case for any cause may, to avoid circuity of action, proceed to try all the questions in it, whether legal or equitable;[72] but where the sole ground of equity jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded—for example, to hold matters in statu quo until the lawsuit can be ended—then a chancellor may with propriety give the aid of his court to that exent, and leave the parties otherwise untrammeled in their lawsuits.[73]

Multiplicity of suits.[74]—Equity will take jurisdiction to prevent a multiplicity of suits.[75]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*[76] Trusts,[77] the settlement of mutual accounts,[78] the regulation of conflicting easements,[79] removing clouds from titles,[80] the enforcement of liens,[81] probate proceedings,[82] the protection

71. See 3 C. L. 1216.

72. Crenshaw v. Looker, 185 Mo. 375, 84 S. W. 885; Southern Pac. R. Co. v. United States [C. C. A.] 133 F. 651; United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715; McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295; Coberly v. Coberly [Mo.] 87 S. W. 957; Rugg v. Rohrbach, 110 Ill. App. 532; King v. Arney, 114 Ill. App. 141; Trustees of Schools v. Board of School Inspectors, 115 Ill. App. 479; Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. In a suit for an accounting, a release or an assignment which has been obtained by fraud may be set aside. Id. There being an independent ground of equitable jurisdiction, the court may settle the boundary and title to the land involved. Le Comte v. Carson [W. Va.] 49 S. E. 238. Court having jurisdiction to enjoin interference with plaintiff's use of water rights, it may decide all questions involved and grant appropriate relief, such as the quieting of title. Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053. Jurisdiction having once attached it may be retained for all purposes, including partition which is as yet premature. Steinman v. Steinman, 5 Ohio C. C. (N. S.) 600. In cancelling deed may quiet title. Cribbs v. Walker [Ark.] 85 S. W. 244. Where a bill is maintainable to enjoin the lessee of a mine from committing waste and destroying the property as a mine, the court may cancel the lease as a cloud on title, quiet the title, and determine the right of possession. Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279. Equity may determine the title to a corporate office by way of affording incidental relief, it having jurisdiction upon other grounds. Blinn v. Riggs, 110 Ill. App. 37. In partition proceedings, it appearing that the relations of plaintiff and defendant are not harmonious, that defendant is in possession of a part of the land, and that plaintiff's bid for the whole land is accepted, the court will fix a time within which the defendant's share shall be paid to him by the plaintiff, leaving the plaintiff to his legal remedy to secure possession. Monroe v. Monroe, 26 Pa. Super. Ct. 47.

73. Crenshaw v. Looker, 185 Mo. 375, 84 S. W. 885.

74. See 3 C. L. 1216.

75. North American Ins. Co. v. Yates, 116 Ill. App. 217. A bill is maintainable against several foreign insurance companies maintaining an agency in Illinois, where they transacted all forms of business with reference to insurance except the insurance of property in Illinois without having complied with the state laws. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423, afg. 116 Ill. App. 217. Chancery has jurisdiction to decide between conflicting claims to rent or royalty oil under conflicting oil leases to the same lessee, both as to that already produced and that to be produced in the future by the lessee under the leases, which royalty oil is by the leases to be delivered to the credit of the lessors. Peterson v. Hall [W. Va.] 50 S. E. 603, overruling Zinn v. Zinn, 54 W. Va. 483, 46 S. E. 202. The fact that a landlord has dispossessed a tenant under a claim of right does not create the danger of a multiplicity of suits. Williams v. Mathewson [N. H.] 60 A. 687.

76. See 3 C. L. 1217.

77. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594. County and probate courts have no jurisdiction. Dingman v. Beal, 213 Ill. 238, 72 N. E. 729. Plaintiff conveyed certain land to secure a debt under a contract with the grantee to reconvey on payment thereof, the grantee thereafter sold the land; held, that on tender of debt and refusal to reconvey, the grantor may sue in equity for the proceeds, but cannot recover punitive damages. Welborn v. Dixon [S. C.] 49 S. E. 232. A suit for the enforcement and administration of a trust is one peculiarly of equitable cognizance, and may be maintained by a contract creditor whose demand has not been reduced to judgment. George v. Wallace [C. C. A.] 135 F. 286. A court of equity may, at the instance of a stockholder of a corporation, entertain a proceeding against it and its officers and compel it to account for a fraudulent conversion of its funds, and such court may, if necessary for the preservation of the res, appoint a receiver. Chandler Mortg. Co. v. Loring, 113 Ill. App. 423. See Trusts, 4 C. L. 1727.

78. Manion v. Manion [Ky.] 85 S. W. 197. A bill alleging fraud in accounts rendered held to state a cause of action in equity. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921. See Accounting, Action for, 5 C. L. 22.

79. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303.

80. Ky. St. 1903, § 11. Chenault v. Eastern Kentucky Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552. See Quieting Title, 4 C. L. 1167.

81. George v. Wallace [C. C. A.] 135 F.

of all persons under disability,[83] the appointment of receivers,[84] the cancellation [85] and restoration [86] of instruments, and the reformation of the written evidence of an agreement so as to make it correspond to the understanding of the parties,[87] are subjects of equitable jurisdiction. As to fraud [88] and mistake,[89] the jurisdiction of equity and law is concurrent. Hence equity will grant relief from fraud,[90] and if the fraud consists in fraudulent representations as to collateral facts, or as to the nature or value of the consideration of the instrument, equity must be resorted to to reform or set aside the instrument.[91] It also has jurisdiction to prevent the consummation of a fraud.[92] In order that equity may grant relief, the mistake must have been mutual or brought on by the conduct of the other party.[93] A mistake of law may, in some circumstances, be remedied.[94] In some states by statutes

286. Where plaintiff alleged that he improved defendant's land under a contract whereby the defendant was to convey a portion of the land to him in consideration therefor, and he sought to recover their value and to enforce a lien therefor, and defendant denied the contract, held, the claim was an equitable one. Robards v. Robards [Ky.] 85 S. W. 718.

82. Any person entitled to share in the distribution of an estate has the right to have the estate administered in a court of equity without assigning any special equity for transferring the estate to such court. Greenhood v. Greenhood [Ala.] 39 So. 299.

83. Rhea v. Shields, 103 Va. 305, 49 S. E. 70. Has jurisdiction in matters of guardianship. Matthews v. Mauldin [Ala.] 38 So. 849. For the exercise of this power see the topic relating to the person affected, such as Infants, 4 C. L. 92, Insane persons, 4 C. L. 126, etc., also see Guardians Ad Litem and Next Friends, 3 C. L. 1567.

84. Garrett v. London & L. Fire Ins. Co. [Okl.] 81 P. 421. See Receivers, 4 C. L. 1238.

85. Carney v. Barnes [W. Va.] 49 S. E. 423; Cribbs v. Walker [Ark.] 85 S. W. 244. See Cancellation of Instruments, 5 C. L. 500.

86. Under Comp. Laws 1897, § 448, equity has jurisdiction of a bill seeking to have a lost or destroyed deed restored. Blackford v. Olmstead [Mich.] 12 Det. Leg. N. 287, 104 N. W. 47. See Restoring Instruments and Records, 4 C. L. 1294.

87. Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589; Van Houten v. Van Houten [N. J. Eq.] 59 A. 555. May include mistakes of law. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. See Reformation of Instruments, 4 C. L. 1264.

88. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139; McCreery Land & Investment Co. v. Myers [S. C.] 49 S. E. 848. Especially where the remedy at law is not fully adequate. Bank of Montreal v. Waite, 105 Ill. App. 373.

89. McCreery Land & Investment Co. v. Myers [S. C.] 49 S. E. 848.

90. Equity may afford relief where a written instrument is impaired by fraud, accident or mistake. Smith v. Rust, 112 Ill. App. 84. Rescission or cancellation of an instrument. Thompson v. Hardy [S. D.] 102 N. W. 299. Will give relief against fraudulent and unfair competition. Use of corporate name. McFell Elec. & Tel. Co. v. McFell Elec. Co., 110 Ill. App. 182. Equity will grant a new trial in a law action where a party has by fraud or accident been deprived of his constitutional right to be heard thereon in the court of last resort. Zweibel v. Caldwell [Neb.] 102 N. W. 84. Equity has jurisdiction of a suit by a judgment creditor to impress a lien on property bought by the judgment debtor's wife with money transferred to her by her husband previous to the recovery of the judgment. Mertens v. Schlemme [N. J. Eq.] 59 A. 808.

91. Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481; Fowler Cycle Works v. Fraser, 110 Ill. App. 126. Fraudulent representations as to collateral matters held not available to have instrument set aside in equity. Id. See Cancellation of Instruments, 5 C. L. 500; Fraud and Undue Influence, 3 C. L. 1520; Reformation of Instruments, 4 C. L. 1264.

92. Lynch v. Herrig [Mont.] 80 P. 240.

93. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463. Must be mutual. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757; Gray v. Merchants Ins. Co., 113 Ill. App. 537; Boyce v. Hamburg-Bremen Fire Ins. Co., 24 Pa. Super. Ct. 589. Equity will rarely relieve a party from the performance of his contract on the ground that it was entered into on his part through mistake, the mistake not being mutual, and especially where the alleged mistake was the result of negligence. Vallentyne v. Immigration Land Co. [Minn.] 103 N. W. 1028. Equity will not interfere against a grantor, in favor of a volunteer, to correct a mistake or to reform a defective conveyance. Clark v. Hindman [Or.] 79 P. 56. Where there was a mutual mistake in escrow agreement, held, equity had jurisdiction to compel the redelivery of the deed to the grantor and the surrender of the escrow paper. Beach v. Bellwood [Va.] 51 S. E. 184. Equity will afford relief where a written instrument is impaired by fraud, mistake or accident. Smith v. Rust, 112 Ill. App. 84. Rescission or cancellation of an instrument. Thompson v. Hardy [S. D.] 102 N. W. 299. Relief refused where plaintiff executed notes and paid money under the mistaken belief that he was indebted to defendant. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463.

94. Mistake of law in reducing contract to writing. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. If a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the lan-

guage employed in the writing. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436. Equity will grant relief from a **mistake of fact resulting from a misconception of the law.** Ahlers v. Estherville [Iowa] 104 N. W. 453. Will not allow the recovery of a tax voluntarily paid under a mistake of law. Id.

NOTE. Mistake of law as ground for relief in equity: The maxim that ignorance of the law does not excuse prevails in a court of equity, as it does in a court of law. Hardigree v. Mitchum, 51 Ala. 151, 154; State v. Paup, 13 Ark. 129, 56 Am. Dec. 303; Upton v. Tribilcock, 91 U. S. 45, 50, 23 Law. Ed. 203. Professor Pomeroy in § 849 of the second edition of his work on Equity Jurisprudence attempts to make a distinction whereby one may be charged with a knowledge of the law and yet not chargeable with a knowledge of his legal rights. This rule has been applied and approved in a few cases. See Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458; Toland v. Corey, 6 Utah, 392, but the great weight of the authorities is that ignorance or mistake of law alone does not, as a rule, excuse, and that it is no ground for either defensive or affirmative relief in equity, and such ignorance or mistake includes misconception of the law, erroneous deductions, and misapprehension of legal rights. Emerson v. Navarro, 31 Tex. 334, 98 Am. Dec. 534; Pierson v. Armstrong, 1 Iowa, 282, 63 Am. Dec. 440; Iverson v. Wilburn, 65 Ga. 103; Fisher v. May, 2 Bibb [Ky.] 448, 5 Am. Dec. 626; Smith v. McDougal, 2 Cal. 586; Shafer v. Davis, 13 Ill. 396; Wood v. Price, 46 Ill. 439; Wintermute v. Snyder, 3 N. J. Eq. 489; Good v. Herr, 7 Watts & S. [Pa.] 253, 42 Am. Dec. 236; Shotwell v. Murray, 1 Johns. Ch. [N. Y.] 512; Arthur v. Arthur, 10 Barb. [N. Y.] 9; Lyon v. Sanders, 23 Miss. 530; Nabours v. Cocke, 24 Miss. 44; People v. O'Brien, 96 Cal. 171; State v. Paup, 13 Ark. 129, 56 Am. Dec. 303; McAninch v. Laughlin, 13 Pa. 371; McMurray v. St. Louis Oil Mfg. Co., 33 Mo. 377; Hunt v. Rousmaniere's Adm'rs, 1 Pet. [U. S.] 1, 7 Law. Ed. 27; Id., 8 Wheat. [U. S.] 174, 5 Law. Ed. 589; United States Bank v. Daniel, 12 Pet. [U. S.] 32, 9 Law. Ed. 989; Upton v. Tribilcock, 91 U. S. 45, 50, 23 Law. Ed. 203; State v. Williams, 36 S. C. 493; Snell v. Insurance Co., 98 U. S. 85, 25 Law. Ed. 52; Weed v. Weed, 94 N. Y. 243; Mowatt v. Wright, 1 Wend. [N. Y.] 355, 19 Am. Dec. 508; Ruffner v. McConnell, 17 Ill. 212, 63 Am. Dec. 362; Lawrence v. Beaubien, 2 Bail. [S. C.] 623, 23 Am. Dec. 155, and note; Allen v. Elder, 76 Ga. 674, 2 Am. St. Rep. 63, and note; Lane v. Holmes, 55 Minn. 379, 43 Am. St. Rep. 508; Moe v. Northern Pac. R. Co., 2 N. D. 287; Ohlander v. Dexter, 97 Ala. 476; Conyne v. Jones, 51 Ill. App. 17. Equity will not relieve against a pure mistake of law, if there is no fraud, imposition, misrepresentation, undue influence, imbecility of mind, misplaced confidence, or other special circumstances of a similar character, inferable from the transaction. And there is no distinction, in this respect, between mistake and ignorance of law. Gwynn v. Hamilton, 29 Ala. 233; Champlin v. Laytin, 18 Wend. [N. Y.] 407, 31 Am. Dec. 382; Thurmond v. Clark, 47 Ga. 500; State v. Reigart, 1 Gill [Md.] 1, 39 Am. Dec. 628; Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561; Kenyon v. Wetty, 20 Cal. 637, 81 Am. Dec. 137; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613. As every person is bound to know the law, both civil and criminal, it has been held that no one can complain of the misrepresentations of another respecting it. Platt v. Scott, 6 Blackf. [Ind.] 389, 39 Am. Dec. 436; Burkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740.

Firmly settled as is the foregoing general rule, that ignorance or mistake of the law does not excuse, it is equally well settled that there are particular instances in which equity will grant defensive or affirmative relief from mistakes of law, pure and simple as well as from those accompanied by other inequitable incidents. These instances are exceptions to the general rule, or rather cases in which the maxim is not rigidly enforced; but it is difficult to draw any sharply defined lines by which all these instances may be accurately determined. It is said that the maxim, "ignorantia legis neminem excusat," is not universally applicable, but only when damages have been inflicted or crimes committed. Brock v. Weiss, 44 N. J. Law, 241. It has been held that any departure from the maxim, under any circumstances, should be distinctly marked and so guarded as to leave the general rule unimpaired. Yet some courts, in trying to uphold the maxim, have in cases of peculiar hardship, distinguished between ignorance of the existence of a law and of its legal effect. State v. Paup, 13 Ark. 129, 56 Am. Dec. 303. The rule that equity will not grant relief where the mistake is one of law is, at best, a harsh one, and applies only where the mistake is simply one of law, and the party had full knowledge of all the material facts and circumstances. A mistake of law, therefore, which is caused by fraud, imposition or misrepresentation, etc., may be relieved against in equity. Kyle v. Fehley, 81 Wis. 67, 29 Am. St. Rep. 866; Rankin v. Mortimere, 7 Watts [Pa.] 372; Haviland v. Willets, 141 N. Y. 35, 50; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Benson v. Markoe, 37 Minn. 30, 5 Am. St. Rep. 816; Hardigree v. Mitchum, 51 Ala. 151; Moreland v. Atchison, 19 Tex. 303; Haden v. Ware, 15 Ala. 149; State v. Paup, 13 Ark. 129, 56 Am. Dec. 303; Trigg v. Read, 5 Humph. [Tenn.] 529, 42 Am. Dec. 447; Lane v. Holmes, 55 Minn. 379, 43 Am. St. Rep. 508; Dill v. Shahan, 25 Ala. 694, 60 Am. Dec. 540. The power to relieve against a mistake in equity must, however, be exercised with caution. To justify it the evidence must be clear, unequivocal, and decisive as to the mistake. It must arise from ignorance, surprise, imposition, or misplaced confidence, and be unmixed with negligence. Iverson v. Wilburn, 65 Ga. 103. Equity will not, as a rule, relieve from an act done under a mistake of law and advice of counsel, unless there is some additional ground for equitable relief. McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406. For a mistake of law, pure and simple, there is generally no remedy, but relief may be afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and is attempting to enforce an unconscionable advantage without consideration, provided the other party is not blamable. Lane v. Holmes, 55 Minn. 379, 43 Am. St. Rep. 508, and note; Benson v. Markoe, 37 Minn. 30, 5 Am. St. Rep. 816. The four principal excep-

chancery is divested of its jurisdiction to quiet title.[95] It is the duty of a court of equity to see that the interests of infants are protected in suits before it whether the claim or defense be properly pleaded or not; and for this purpose the chancellor should look to the record in all its parts, and of its own motion give to the infants the benefit of all objections and exceptions appearing thereon, as if specifically interposed;[96] but equity will not lend its affirmative aid to enable infants to take advantage of the mistakes and misfortunes of their adversaries.[97] Equity will not entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent or uncertain.[98] It has no jurisdiction to construe a will unless a trust is involved.[99] Equity will not enforce a penalty,[1] and will relieve from forfeitures;[2] it will not permit its jurisdiction to be used as a mere cover for a collateral attack.[3] It will not ascertain and decree compensation for damages to property,[4] though it may enjoin the infliction of such damages until compensation is paid, and in such case an issue out of chancery will be directed to ascertain the amount of compensation.[5] Equity will not review the exercise of a discretionary power vested in an official,[6] nor will it invade the functions confided by law to other departments of the government,[7] though equitable jurisdiction over executive officers is, in some states, conferred by statute.[8] It has jurisdiction to determine whether certain territory has been properly annexed.[9] Equity will not interfere in the internal management

tions to the rule that no relief can be obtained against a mistake of law may be summed up as follows: (1). Where there is a marked disparity in the position and intelligence of the two parties, with the result that on the one side undue influence is exercised, while on the other, undue confidence is reposed; (2) Where one, through mistake as to his legal rights, acknowledges himself under an obligation which the law will not impose; (3) Where it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights and obligations of the parties; (4) Where there is a mistake of law on both sides, owing to which the objects of the parties cannot be attained. Note to Renard v. Clink [Mich.] 30 Am. St. Rep. 461.

As said above, ignorance of law, pure and simple, is sometimes relieved against in equity. In other words, mistakes of law may, in some cases, afford good cause for relief in equity. Wilson v. Ott, 173 Pa. 253, 51 Am. St. Rep. 767; Lowndes v. Chisholm, 2 McCord Eq. [S. C.] 455, 16 Am. Dec. 667; Hunt v. Rousmanier, 8 Wheat. [U. S.] 174, 5 Law. Ed. 589; Evants v. Strode, 11 Ohio, 480, 35 Am. Dec. 744; McNaughten v. Partridge, 11 Ohio, 223, 38 Am. Dec. 731. The relief granted, however, seems to be based upon the hardship of peculiar cases, and the facilities for proving them rather than upon any well-defined and established principle of equity jurisprudence.—From note to Alabama, etc., R. Co. v. Jones [Miss.] 55 Am. St. Rep. 488, 497 et seq. See, also, note, 4 C. L. 676, n. 36.

95. Kirby's Dig. § 6518. Brown v. Norvell [Ark.] 86 S. W. 306. See Quieting Title, 4 C. L. 1167.

96. Parken v. Safford [Fla.] 37 So. 567.

97. Tindall v. Peterson [Neb.] 99 N. W. 659.

98. Carroll v. Smith, 99 Md. 653, 59 A. 131. A bill cannot be maintained by the grantor in a deed creating a trust to ascertain whether the deed prevents a testamentary disposition of the property by the grantor. Id.

99. Primm v. Primm, 111 Ill. App. 244.

1. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341. See Penalties and Forfeitures, 4 C. L. 963.

2. Where the payment of taxes by the lessee is made a part of the rental consideration of a lease, equity will relieve from forfeiture for the non-payment of taxes equally with forfeiture for the non-payment of rent as such. Webb v. King, 21 App. D. C. 141. See Penalties and Forfeitures, 4 C. L. 963.

3. Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489.

4. Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. [W. Va.] 48 S. E. 746. For a full discussion of the law relative to penalties and forfeitures, see topic Penalties and Forfeitures, 4 C. L. 963.

5. Internal improvement. Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. [W. Va.] 48 S. E. 746.

6. Will not review act of clerk in refusing to issue license under Code Pub. Loc. Laws, art. 24, as amended by Acts 1896, p. 717, c. 411. Fooks v. Purnell [Md.] 61 A. 582.

7. Will not determine in advance of the final action of the land department the respective rights of grantees from the Northern Pacific Ry. of land claimed to be within the indemnity limits of the land grant of July 2, 1864, and settlers and purchasers from the United States or their grantees, whether holding patents or not, who claim the protection of the act of July 1, 1898. Humbird v. Avery, 195 U. S. 480, 49 Law. Ed. 286.

8. **Ohio:** Courts of equity have full authority to review the decision of the auditor where the foundation of the right to tax is challenged. Considering Rev. St. § 5848. Kraay v. Gibson, 2 Ohio N. P. (N. S.) 537.

9. Trustees of Schools v. Board of School Inspectors, 115 Ill. App. 479. City school in-

of a foreign corporation where no question of public policy is involved and the corporation has no property in the state of the forum.[10] Where rent is to be determined by designated appraisers and one of the latter dies before the determination is made, equity has jurisdiction to make the determination.[11] A court of equity may intervene and grant relief by way of permitting the record of a common-law court to be impeached,[12] may set aside a judgment rendered upon perjured testimony,[13] and a fraudulent judicial sale.[14] Property rights within the protection of a court of equity may arise under corporate charters.[15] In Illinois, equity will enforce a contract at the suit of one having a beneficial interest in it.[16] Equity has no jurisdiction in matters merely criminal or immoral, and will not interfere merely to prevent violations of law;[17] but it may enjoin the violation of state laws where the acts complained of are injurious to the public, and it is immaterial that such acts are punishable under the criminal statutes, or that there is an adequate remedy at law, or that the complainant has suffered no injury.[18] Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled.[19] Equity has no jurisdiction in condemnation proceedings.[20]

§ 3. *Laches and acquiescence.*[21]—Laches will bar equitable relief.[22] Laches is inexcusable delay in enforcing a right[23] by reason of which the condition or relation of the property or persons has become so changed as to render the enforcement of plaintiff's claim inequitable.[24] Thus it will be seen that while lapse of time is one of the chief elements, yet there are others of equal importance, such as change in the value of the property,[25] complainant's knowledge or ignorance,[26] or the

spectors may bring a suit to recover school taxes raised upon territory annexed to the city, and to determine the legal effect of the annexation, so far as concerns the public schools in such territory. Phelps v. Board of School Inspectors of Peoria [Ill.] 73 N. E. 412.

10. Bradbury v. Waukegan & Washington Min. & Smelting Co., 113 Ill. App. 600.

Equitable remedies against corporations, see Clark & M. Corp. § 771.

11. Weir v. Barker, 93 N. Y. S. 732.

12. Opie v. Clancy [R. I.] 60 A. 635.

13. Avocato v. Dell Ara [Tex. Civ. App.] 84 S. W. 443.

14. Has jurisdiction to set aside a judicial sale as against one chargeable with notice, it appearing that the sale was for an inadequate price, was made without notice to the judgment debtor and was accompanied with irregularities. King v. Arney, 114 Ill. App. 141.

15. A charter authorizing a corporation to organize subordinate councils of a beneficial association to raise funds for the relief of members and their families, and to defray funeral expenses and to give relief in other cases of distress, gives rise to possible rights of property which are within the protection of a court of equity. National Council Junior Order United American Mechanics v. State Council Junior Order United American Mechanics [Va.] 51 S. E. 166.

16. The vendee of property assuming a mortgage thereon, the vendor may bring a suit in equity to compel him to pay it. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. See Contracts, 5 C. L. 664.

17. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61. See Injunction, 4 C. L. 96.

18. North American Ins. Co. v. Yates, 116 Ill. App. 217.

19. Dobbins v. Los Angeles, 195 U. S. 223, 49 Law. Ed. 169; Daly v. Elton, 195 U. S. 242 49 Law. Ed. 177.

20. Code 1899, c. 52, § 11, does not confer upon courts of equity jurisdiction to condemn the property of one railroad, turnpike or canal company for the purpose of a crossing by another railroad, turnpike or canal company. Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. [W. Va.] 48 S. E. 746.

21. See 3 C. L. 1218.

22. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404. Laches may deprive a plaintiff of the right to enforce a covenant against the manufacture or sale of intoxicating liquor on the land conveyed. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141. One who fails, through culpable inertness, to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake. Farrell v. Bouck [Neb.] 101 N. W. 1018. A court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, which by his own negligence he has not availed himself of. Presley v. Dean [Idaho] 79 P. 71.

23. See infra, Excusable Delay.

24. Stevens v. Grand Central Min. Co. [C. C. A.] 133 F. 28. Delay in enforcing demand does not constitute laches, unless debtor is prejudiced thereby. Farr v. Hauenstein [N. J. Eq.] 61 A. 147. A complainant, with full knowledge of his rights, having been guilty of long delay without legal excuse, and another having materially altered his position to his prejudice, relief will be denied. Ryason v. Dunten [Ind.] 73 N. E. 74.

25. Patterson v. Hewitt, 195 U. S. 309, 49

possession of the means of knowledge[27] of the facts, defendant's own diligence,[28] and the death of witnesses and parties.[29] As a general rule, delay short of the period fixed by analogous statutes of limitation will not constitute a bar,[30] but if such delay render the enforcement of the right inequitable, equity will not entertain the suit,[31] even though the statutes of limitation are made applicable, in general terms, to suits in equity, but not to the particular defense.[32] Laches is an equitable doctrine, resting on the ground of public policy,[33] and depends upon the facts and circumstances of each case.[34] In other words, the question is ad-

Law. Ed. 214; Ripple v. Kuehne [Md.] 60 A. 464.

26. Patterson v. Hewitt, 195 U. S. 309, 49 Law. Ed. 214. See, infra, Excusable Delay.

27. Possession of the means of knowledge is equivalent to knowledge. Williamson v. Beardsley [C. C. A.] 137 F. 467.

28. One cannot complain who is himself guilty of laches. Randolph v. Nichol [Ark.] 84 S. W. 1037. Where both parties were guilty of delay, held defendant was not entitled to have an adverse decree, modified as to costs because of plaintiff's delay. Hill v. Fuller [Mass.] 74 N. E. 361.

29. It is a material circumstance that the claim is not made until after the death of those who could have explained the transaction. Ripple v. Kuehne [Md.] 60 A. 464. Eight years' delay, together with the intervening death of the party charged with the fraud, and the attorney who conducted the transaction, is such laches as to bar relief from the fraudulent transaction. Id. Stale demands, withheld from prosecution until after the death of the alleged debtor and all the parties interested in and cognizant of the transaction, are regarded with disfavor, and, where no hindrance was in the way, must be established with more than reasonable certainty. Kuhn v. Bercher [La.] 38 So. 468. A bill by one claiming an interest in a mining claim held barred by laches where there was twenty-eight years' delay after the consummation of the alleged fraud, and where defendants or their predecessors at that time expressly repudiated the claims of plaintiff, and many of the parties whose acts are complained of are dead. Socrates Quicksilver Mines v. Carr Realty Co. [C. C. A.] 130 F. 293.

30. Delay short of period of limitations does not bar right in the absence of circumstances rendering the late assertion of the right inequitable. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. See infra, Application of analogous statutes of limitation.

31. Ryason v. Dunten [Ind.] 73 N. E. 74; Kleinclaus v. Dutard [Cal.] 81 P. 516. See infra, Application of analogous statutes of limitation.

32. Patterson v. Hewitt, 195 U. S. 309, 49 Law. Ed. 214. Rule applied to a suit to enforce rights in a mining location. N. M. Comp. Laws, § 2938, considered. Id.

33. Ryason v. Dunten [Ind.] 73 N. E. 74.

34. Patterson v. Hewitt, 195 N. S. 309, 49 Law. Ed. 214; Stevens v. Grand Central Min. Co. [C. C. A.] 133 F. 28; Ryason v. Dunten [Ind.] 73 N. E. 74; Stevenson v. Smith [Mo.] 88 S. W. 86; Darlington v. Turner, 24 App. D. C. 573.

ILLUSTRATIONS. Conduct amounting to laches: [Only general illustrations have been kept. What constitutes laches in regard to specific equitable rights and remedies is treated in the specific topics relating to such rights and remedies. See Injunction, 4 C. L. 96; Specific Performance, 4 C. L. 1494; Trusts, 4 C. L. 1727, etc. Laches in opening and vacating a judgment is treated in Judgments, 4 C. L. 287.]

Deeds: Thirty years' delay in enforcing an agreement, by grantee of a deed, to build a bridge, held to bar right, though such agreement was part consideration for the deed. Bright v. Louisville & N. R. Co. [Ky.] 87 S. W. 780. Where complainant delayed for seven years in suing to set aside a conveyance for alleged duress, and during such time received four annual payments of the price, held barred by laches. Horn v. Beatty [Miss.] 37 So. 833.

Depositions: Defendant in a dower action having known for ten years, and before the death of the deponent, of the latter's wife's claim, and of the suit in which such testimony was taken, held not entitled to maintain a bill to establish and perpetuate the testimony contained in the deposition. Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620. [Such a bill would not lie in any event because it is for the perpetuation of the testimony of a dead witness. Id.]

Estates of decedents: A suit by non-residents to set aside conveyances by an executor, the grounds of attachment consisting of errors apparent on the record, held barred by a delay of 18 years after the admission of the will, six and a half years from the entry of the orders on which the orders of sale were in part based and between 4 and 5 years' delay after the rendition of the order of sale. Williamson v. Beardsley [C. C. A.] 137 F. 467.

Fraud: Long acquiescence in binding effect of a written instrument will defeat a claim that the execution thereof was obtained by fraud. McConnell v. Pierce, 116 Ill. App. 103.

Gifts: Twenty years' delay in enforcing gift, during eight of which the donor, was in exclusive possession of the property, and suit not being commenced until after donor's death, held to bar right. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404.

Highways: Where an individual to whom a city had granted lands for use as a roadway ceased to use the same for several years and then declared to the mayor of the city that he was done with it, and when the city took possession he brought suit and abandoned it, and 16 years thereafter he brought suit to enjoin the city's using the same, held case was affected by laches. Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626.

Mandamus: Where the secretary of state refused to register and validate certain

bonds, and a remedy by mandamus was recognized by the state statute for reviewing such action, which remedy was barred in four years, a suit after the lapse of twenty years is barred by laches. Frank v. Butler County [C. C. A.] 139 F. 119.

Mortgages; foreclosure: Delay of 10 years by a mortgagor and heirs in instituting suit to set aside a foreclosure for fraud held to constitute laches. Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351. Where a mother and son held land as co-tenants and the mother purchased it at a mortgage sale, and the son, after reaching his majority, asserted no right against his mother, held, he would not be allowed to assert his claim against a remote grantee who had parted with value. Ryason v. Dunten [Ind.] 73 N. E. 74.

Motions: Two years and a half delay held to bar right to have cause transferred from equity to jury docket. Chenault v. Eastern Kentucky Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552.

Mutual benefit insurance company: Where mutual benefit insurance company passed a by-law which amounted to a renunciation of its contracts and entitled a member to rescind his contract, failure to so do for 3 years and 7 months held to bar right, a large number of members having died in the meantime. Supreme Council A. L. H. v. McAlarney [C. C. A.] 135 F. 72.

Public lands: Two months' delay on the part of settler on state lands after his application to purchase was returned to him by the surveyor general with notice of other claims, held to bar rights. Smith v. Roberts [Cal. App.] 81 P. 1026.

Real property: Delay of eight years held to bar right to enforce right to mining interest, complainant having contributed nothing to the development of the mine and the consequent discovery of a rich ore deposit. Patterson v. Hewitt, 195 U. S. 309, 49 Law. Ed. 214.

Conduct not amounting to laches: [Only general illustrations have been kept. What constitutes laches in regard to specific equitable rights and remedies is treated in the specific topics relating to such rights and remedies. See Injunction, 4 C. L. 96; Specific Performance, 4 C. L. 1494; Trusts, 4 C. L. 1727, etc. Laches in opening and vacating a judgment is treated in Judgments, 4 C. L. 287]. The defense of laches applies only when a party has delayed so long, after his right attaches, in asserting his claim that he is presumed to have abandoned his rights. Dickinson v. Griggsville Nat. Bank, 111 Ill. App. 183.

Copyrights: A year and a half delay after knowledge of infringement of copyright held not to bar suit. Werner Co. v. Encyclopoedia Britannica Co. [C. C. A.] 134 F. 831.

Deeds: A suit seeking to have a deed declared a mortgage, brought within 10 years after the execution of the deed, is not barred by laches. Gerson v. Davis [Ala.] 39 So. 198.

Estates of decedents: Where a legatee to whom testator's interest in the firm had been bequeathed was appointed administrator with the will annexed a few months after obtaining his majority, and immediately sued the surviving partner for an accounting, held not guilty of laches. Stehn v. Hayssen [Wis.] 102 N. W. 1074. Administrator held not guilty of laches in failing to collect debt which had never been established. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170. In Illinois, in the absence of circumstances excusing a greater delay, a petition for the sale of the realty of a decedent for the payment of his debts must be made within seven years. Graham v. Brock, 212 Ill. 579, 72 N. E. 825.

Guardianship: Where a ward, whose signature to a paper consenting to her guardian's discharge was fraudulently obtained, repeatedly sought to have a statement of her account within a reasonable time, which he refused and thereafter, and within three years after the guardian's discharge, she filed a bill to set the same aside and for an accounting, she was not barred from maintaining the same. Willis v. Rice [Ala.] 37 So. 507.

Liens: Where no prejudice was shown and defendant's lien on stock previously pledged to complainant did not attach until within less than 3 years and seven months after defendant received notice of the pledge, held, complainant was not barred by laches from enforcing the pledge. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Facts held insufficient to show that plaintiff had been guilty of such laches as to deprive him of his right to be subrogated to a superior lien. Anthes v. Schroeder [Neb.] 103 N. W. 1072.

Mortgages; foreclosure: A plaintiff in a foreclosure suit being as diligent as the law will permit in endeavoring to subject the mortgaged property to the payment of the debt and procure a deficiency judgment, cannot be said to be guilty of laches. Phelps v. Wolff [Neb.] 103 N. W. 1062. Where, after a decree for the sale of mortgaged premises, unless the mortgagor paid within a certain time, the mortgagor remained in undisturbed possession for more than 12 years, held not guilty of laches in failing to have proceedings dismissed. Eakle v. Hagan [Md.] 60 A. 615. Corporate stockholders, residing in a distant state, held not guilty of laches defeating the right to maintain an action to have a mortgage foreclosure decree set aside, such decree having been brought about by the fraud of the mortgagee and the president of the corporation, such stockholders having had no notice of the decree for three years, when they made a motion to set it aside, which motion was defeated by fraud, of which they had no evidence to disprove until two years later, when the present action was commenced. Whitney v. Hazzard [S. D.] 101 N. W. 346.

Public officials: The fact that a suit by taxpayers, to recover moneys paid members of board of supervisors in excess of their salaries, embraced money paid during a period of 11 years, held not to render it barred by laches, though the books of the board had been open to the public. Johnson v. Black, 103 Va. 477, 49 S. E. 633.

Real property: A grantee commencing suit to quiet title as against a cloud prior to his deed, within five months after he received his deed, is not guilty of laches. Bland v. Windsor, 187 Mo. 108, 86 S. W. 162. Four years' delay held not to bar suit to establish title, defendant not having been misled or injured, and having made but few improvements, the value of which were far

dressed to the sound discretion of the chancellor,[35] and unless that discretion is abused, it will not be interfered with.[36] The question of relationship is entitled to great weight.[37] Laches can have no effect upon a void transaction.[38] The true owner of land having the legal title may bring suit at any time.[39] Laches is not ordinarily imputable to the holders of estates in remainders.[40] A married woman, as to her separate estate or right, is subject to laches.[41] The equitable rules relating to the effect of laches and acquiescence are enforced against the state when it is a suitor for equitable relief as well as against private suitors.[42]

While it has been held that it is necessary to plead laches, in order to invoke it as a defense,[43] yet the better doctrine seems to be that the defense of laches is not one which it is necessary to take advantage of by pleadings; and, if the case at the hearing is liable to such objections, the court may, and usually will, remain passive and refuse relief.[44] The defense of laches may be made by plea or answer or demurrer, if the facts appear on the face of the bill.[45] The defense of laches cannot be raised for the first time on appeal.[46]

exceeded by the rents he had received. Black v. Baskins [Ark.] 87 S. W. 647. Widow failing to pay taxes because advised that sale was invalid, held not guilty of laches. Webb v. King, 21 App. D. C. 141.

Unfair competition: Where defendant did not know of use of trade-mark by another until 1899 and such use did not come into competition with him until 1902, a suit in February, 1903, to restrain such use is not barred by laches. Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511.

35. Ryason v. Dunten [Ind.] 73 N. E. 74; Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082; Kleinclaus v. Dutard [Cal.] 81 P. 516.

36. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

37. One who conveyed land to her brother on his oral agreement to devise it to her, held barred by laches from enforcing such agreement ten years after death of the brother and after the death of his devisee, even though complainant was poor, relied on her brother's promise and herself promised him to make it right in the end. Lozier v. Hill [N. J. Eq.] 59 A. 234. The doctrine of laches will not be applied to dealings of an old mother with her son, who was her confidential business manager and with whom she resided, except in a pronounced case; and hence such defense is not available against her heirs suing timely after her demise. Stevenson v. Smith [Mo.] 88 S. W. 86. Where plaintiffs loaned money to their brother without security and subsequently forgave him one half the debt, and accepted securities for the other half, under an agreement that if paid they should constitute full satisfaction, the brother died shortly thereafter and plaintiffs took no step until the death of the brother's wife, held not guilty of laches. Davis' Adm'x v. Davis [Va.] 51 S. E. 216.

38. The question of laches is immaterial in a suit by a taxpayer to set aside an ultra vires and void contract made by the county commissioner. Fox v. Jones [N. D.] 102 N. W. 161. A direct attack on a void judgment is not barred by laches. Bailey v. Hood [Wash.] 80 P. 559. A delay of three years by a pledgor held not to bar a suit to set aside a void sale by the pledgee. Perkins v. Applegate [Ky.] 85 S. W. 723.

39. Doris v. Story [Ga.] 50 S. E. 348.

40. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091. Five years' delay in bringing suit to have judicial sale of remainder set aside held not to constitute laches, there having been no change of possession. Id.

41. McPeck v. Graham, 56 W. Va. 200, 49 S. E. 125.

42. Attorney General v. Central R. Co. of New Jersey [N. J. Eq.] 59 A. 348. While the delay of the state in filing an information to test the validity of a grant of tide land, until all the officers who executed it are dead, will not be sufficient of itself to deprive the state of equitable relief, it is sufficient to prevent it from insisting on the application of a rule of evidence relating to the burden of proof as the basis for deciding that, in the absence of proof to the contrary, it must be conclusively presumed that the grant was in fact induced by false representations. Id.

43. Bliss v. Prichard, 67 Mo. loc. cit. 191; Smith v. Russell [Colo. App.] 80 P. 474.

44. Stevenson v. Smith [Mo.] 88 S. W. 86. In the Federal courts it is not necessary, in order to let in the defense of laches, that a foundation should be laid by any averment in the answer Moore v. Nickey [C. C. A.] 133 F. 289.

45. May be taken advantage of by demurrer. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404; Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351; Holzer v. Thomas [N. J. Eq.] 61 A. 154; Kleinclaus v. Dutard [Cal.] 81 P. 516. Laches being apparent on the face of the bill, it need not be set up by answer. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082. While as a general rule the defense of laches must be made by plea or answer, yet such rule does not apply when the bill already states the causes of and excuses for delay. Wieczorek v. Adamski, 114 Ill. App. 161.

Note: See Exchange National Bank v. Darrow, 177 Ill. 362, where the supreme court seems to have gone a step further and to have held that the question of laches may be raised by demurrer, even where the excuses for the delay are not stated in the bill.—From Wieczorek v. Adamski, 114 Ill. App. 161.

Excusable delay.[47]—Lack of knowledge, the circumstances not demanding inquiry, excuses delay.[48] Each case depends upon its own facts and circumstances.[49] It is incumbent on plaintiff to specifically[50] allege facts showing an excuse.[51] General allegations of an excuse are insufficient to put the burden on defendant.[52]

Application of analogous statutes of limitation.[53]—In cases of concurrent jurisdiction courts of equity will hold themselves bound by the statute of limitation that would govern an action at law upon the same demand,[54] and where the subject-matter of the demand is one ordinarily cognizable at law, but, by reason of special conditions, the remedy for its enforcement in the particular case is obtainable solely in equity, the bar of limitation will be applied, either in obedience to the statute or by analogy.[55] In the application of the doctrine of laches, courts of equity are not bound by, but usually act or refuse to act in analogy to the statutes relating to actions of law of like character.[56] If unusual conditions or extraordinary circumstances make it inequitable to permit the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the analogous statute, the chancellor will not follow the statute, but will determine the case in accordance with the equities which arise from its own conditions or circumstances,[57]

46. Vollenweider v. Vollenweider, 216 Ill. 197, 74 N. E. 795.

47. See 3 C. L. 1220.

48. Barry v. Moeller [N. J. Eq.] 59 A. 97. Where a remainderman was induced to assign his interest for an inadequate price by misrepresentations as to the health of the life tenant, the fact that the remalnderman was old and weak, and lived a long distance from the residence of the defendant, and that he did not learn of the physical condition of the life tenant until after her death held to excuse delay. Obney v. Obney, 26 Pa. Super. Ct. 116. In a bill by a corporation against brokers alleging that the latter falsified the accounts between the parties, allegations of fraud, collusion and conspiracy on the part of the managing officer of plaintiff corporation, who controlled the other officers, were important to excuse plaintiff's delay. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921.

49. A delay of 19 years in filing a petition for the sale of realty, subject to dower, of a decedent, for the payment of his debts, is not excused by merely showing that the land was practically worthless for many years and had recently increased in value. Graham v. Brock, 212 Ill. 579, 72 N. E. 825. In the absence of fraud, fiduciary relations or lack of knowledge the fact that the heirs of a record owner of land had became widely scattered is not sufficient to excuse a delay of 16 years in bringing suit to establish title to land, the value of which had increased enormously during an adverse possession of 70 years. Peck v. Haley, 21 App. D. C. 224. Allegations that plaintiffs have been delayed in instituting suit by the negligence and misconduct of attorneys employed by them, held too general to constitute a sufficient excuse for ten years' delay. Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351. Such allegations, in view of the dates set forth, also held insufficient in that they did not cover the entire 10 years. Id.

50. Peck v. Haley, 21 App. D. C. 224.

51. 52. Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351.

53. See 3 C. L. 1220.

54. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132; Holzer v. Thomas [N. J. Eq.] 61 A. 154.

55. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132.

56. Stevens v. Grand Central Min. Co. [C. C. A.] 133 F. 28; Williams v. Neely [C. C. A.] 134 F. 1. Equity will ordinarily refuse to apply the bar of laches on a delay of less duration than the statute of limitations. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. A demurrer will lie to a bill in equity which states a case within the statute of limitations at law. Parmelee v. Price, 105 Ill. App. 271. Defense of laches held not available where action was brought in time allowed by the statute. Barrett v. Mutual Life Ins. Co. [Ky.] 85 S. W. 749. Recovery allowed for a period coinciding with the period for which recovery might be had in an action at law. Barry v. Moeller [N. J. Eq.] 59 A. 97. Where plaintiff was engaged with defendant in developing a mine and stood to lose more than the latter and defendant knew of plaintiff's claim all the time, held, plaintiff would not be barred by any time short of the period of limitations. Eno v. Sanders [Wash.] 81 P. 696.

57. Stevens v. Grand Cent. Min. Co. [C. C. A.] 133 F. 28; Williams v. Neely [C. C. A.] 134 F. 1. Ryason v. Dunten [Ind.] 73 N. E. 74; Kleinclaus v. Dutard [Cal.] 81 P. 516. Suit on contract of sale of mining stock held barred by period of limitations, the only excuses for delay being that complainant lived 300 miles from the office of the company, that during a part of the time the company had ceased working its mine, and that for about four years the contract was lost, it having been recovered more than a year before suit was instituted. Moore v. Nickey [C. C. A.] 133 F. 289. Mere delay in commencing suit to redeem from a void sale does not bar the suit provided it does not extend beyond the period of limitations sufficient to give title by adverse possession. Moore v. Dick, 187 Mass. 207, 72 N. E. 967.

even though the statues of limitation are made applicable in general terms, to suits in equity, but not to the particular defense.[58] These rules apply as regards a Federal court of equity and a state statute of limitations.[59] When the suit is brought within the time limited by the analogous statute, the burden is upon the defendant to show, either from the face of the bill or by his answer, that unusual conditions or extraordinary circumstances exist which require the application of the doctrine of laches;[60] and when such suit is brought after the statutory time has elapsed, the burden is on the complainant to show by suitable allegations in his bill that it would be inequitable to apply it to this case.[61]

§ 4. *Practice and procedure in general.*[62]—The court will, to a large extent, disregard technical errors.[63] A court of equity should not intervene in an action in a law court involving an equitable right, and by injunction transfer the cause to itself on the ground that it alone can recognize and enforce such right.[64] The legal nature of the action is not ground for dismissal, but the cause should be transferred, and failure to make a motion to this effect waives the defect.[65]

§ 5. *Parties.*[66]—All parties who are legally or equitably interested in the subject-matter of the suit are necessary parties to a chancery proceeding;[67] but the interest must be a present, substantial one as distinguished from a mere expectancy or future contingent interest.[68] It is sufficient if all such parties are before the court either as complainants or defendants.[69] To the rule which, in general, prohibits the joinder of parties having no interest in the suit, there is an exception, which in a suit attacking a transaction as fraudulent renders permissible the joinder as defendant of a party to the fraud.[70] Several parties being injured by the same act, they may join in bringing suit.[71] The court cannot properly adjudicate the

58. Patterson v. Hewitt, 195 U. S. 309, 49 Law. Ed. 214. Rule applied to a suit to enforce rights in a mining location. N. M. Comp. Laws, § 2938, considered. Id.

59. Stevens v. Grand Cent. Min. Co. [C. C. A.] 133 F. 28. Where one of two joint owners of mining claims fraudulently relocated the property and applied for a patent, and the excluded owner upon learning of the action brought suit, pending which he died and the suit was dismissed, then his administrator commenced another suit which was subsequently dismissed without prejudice and decedent's interest transferred to complainants who commenced suit; held, relief would be granted in equity, though action at law would have been barred by limitations. Id.

60, 61. Stevens v. Grand Cent. Min. Co. [C. C. A.] 133 F. 28.

62. See 3 C. L. 1220.

63. The fact that in ancillary probate proceedings the will of a testator was admitted to probate without any expressed reference to a compromise decree entered in the state of original jurisdiction by which contesting heirs not named in the will were given a certain share in the estate, so that the record in the ancillary proceedings does not show any interest in such heirs, will not preclude a court of equity from fastening a lien upon their interest in the assets within the ancillary jurisdiction; the objection being one of form only which such court will disregard. Ingersoll v. Coram, 136 F. 689.

64. Kronson v. Lipschitz [N. J. Eq.] 60 A. 819.

65. Cribbs v. Walker [Ark.] 85 S. W. 244. See post, § 9, Dismissal.

66. See 3 C. L. 1221.

67. Indian River Mfg. Co. v. Wooten [Fla.] 37 So. 731; Pinkney v. Weaver, 115 Ill. App. 582.

Illustrations: In a suit to annul a contract, all parties to such contract whose interests will be substantially affected by its cancellation are indispensable parties. United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715. In an action by corporate stockholders against the corporation and other stockholders, stockholders who participated in the wrong but against whom no relief is asked are proper parties. Stone v. Pontiac, etc., R. Co. [Mich.] 102 N. W. 752. In a suit to wind up the affairs of a joint stock association, every person interested as a stockholder or creditor is a proper party. Randolph v. Nichol [Ark.] 84 S. W. 1037. One secondarily liable on the contract held not an indispensable party. Dancel v. Goodyear Shoe Machinery Co., 137 F. 157. See, also, the various specific topics such as, Accounting, Action for, 5 C. L. 22; Injunction, 4 C. L. 96; Trusts, 4 C. L. 1727, etc.

68. Pinkney v. Weaver, 115 Ill. App. 582.

69. Davis v. Vandiver & Co. [Ala.] 38 So. 850.

70. Johnston v. Little [Ala.] 37 So. 592.

71. Several parties being oppressed by the unjust and unlawful use of the machinery of the courts, they may, where the wrongs suffered by them are joint, proceed in one action for relief at the hands of a court of equity. Herzberger v. Barrow, 115 Ill. App 79.

matters involved when it appears that necessary parties to the proceeding are not actually or constructively before the court.[72]

Bringing in new parties, intervention.[73]—New, necessary parties, complainant or defendant, may be added at any time before the final decree is entered.[74] Defendant having consented to the making of other persons defendants, he cannot, after the conclusion of the taking of evidence before a master, object that they cannot be held jointly.[75] One having an interest in the subject-matter of the suit may by intervention become a party.[76] Intervention may be allowed at any time while the cause is under the control of the court.[77]

§ 6. *Pleading.*[78] *A. General rules.*[79]—A pleading will be construed most strongly against the pleader,[80] hence where there are contradictory or inconsistent allegations in a bill, its equity will be tested by the weaker, rather than by the stronger allegations.[81] But all pleadings must be construed reasonably, and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleading.[82] It is not good pleading to encumber the record with allegations of more matter, and especially mere matter of evidence, than is necessary to raise the question that may be actually involved for decision.[83] A party is entitled to a definite statement in the pleading of the nature of the charge intended to be made against him, but not of the particulars or circumstances of time and place, unless they are material parts of the cause of action or defense.[84] A pleader need make no formal averment of a conclusion if he distinctly avers facts from which it must follow.[85] Facts constituting fraud must be specifically stated.[86] An irrelevant allegation is one which has no substantial relation to the controversy between the parties to the suit.[87] Scandal consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners or anything unbecoming the dignity of the court to hear.[88] Scandalous matter cannot be stricken out if relevant to the issue.[89] Where no answer is

72. Indian River Mfg. Co. v. Wooten [Fla.] 37 So. 731.

73. See 3 C. L. 1222.

74. Chancellor has power to allow such proceeding. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722. A party has the right to add such parties. Sullivan v. Chicago Board of Trade, 111 Ill. App. 492. In a cross bill seeking affirmative relief, new parties may be added, whose presence is essential to a complete determination of the matter. Indian River Mfg. Co. v. Wooten [Fla.] 37 So. 731.

75. Equitable replevin. United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056.

76. See 3 C. L. 1222, n. 3. All persons whose claims were within clause of deed assuming to pay existing mortgage, held entitled to intervene in a suit by the grantor to compel such payment. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. The privilege of coming into an equity suit under Laws 1904, p. 597, c. 337 applies to an existing equity suit. Murphy v. Wheatley [Md.] 59 A. 704.

77. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

78. The article on Pleading, 4 C. L. 980, should also be consulted.

79. See 3 C. L. 1222.

80. Kleinclaus v. Dutard [Cal.] 81 P. 516; Durham v. Edwards [Fla.] 38 So. 926.

81. Barco v. Doyle [Fla.] 39 So. 103.

82. Lockhart v. Leeds, 195 U. S. 427, 49 Law. Ed. 263.

83. Wagenhurst v. Wineland, 22 App. D. C. 356.

84. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. Parties must state the case upon which they predicate their right to recover in their pleadings, and conclude with a prayer for appropriate relief. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786.

85. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114.

86. Peck v. Haley, 21 App. D. C. 224. Must state facts showing the nature of the offense and in what way it was committed. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. See Fraud and Undue Influence, 3 C. L. 1520.

87. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411. In a suit to restrain defendant from holding herself out as plaintiff's wife, an allegation as to the original meretricious relations between the parties held relevant. Id. Also an allegation that plaintiff was married to another woman at the time the relations between the parties began held relevant. Id.

88. McNulty v. Wieson, 130 F. 1012.

89. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411.

filed to a bill and no denial made of any of its averments, the facts as stated, so far as they are well pleaded, must be assumed to be correct.[90]

(§ 6) *B. Original bill, petition or complaint.*[91]—The facts constituting the cause of action must be distinctly alleged, so that the defendant may know what he has to meet, and so that he may, if he choose, put them in issue.[92] This rule must receive a reasonable interpretation, and must be enforced so as to further, and not obstruct, the administration of justice.[93] The bill should state not only the ultimate facts but also such collateral facts as are necessary in order that the court may understand the extent and manner of relief to be granted.[94] The extent to which facts must be set out depends upon the nature of the principal facts to be established. When a general term used has a double meaning, and, standing alone, may either import a mere fact or a conclusion of law, it must be accompanied by a statement of such additional facts as to constitute ground for the legal conclusion which plaintiff undertakes to establish; else the rule that pleadings must be certain to a common intent is violated.[95] The pleader is not confined with the same degree of strictness to alleging material facts only as in an action at law.[96] Thus allegations of inducement are permissible,[97] and unless the moving party is prejudiced thereby, they should not be stricken out.[98] Complainant must clearly and definitely allege every material fact,[99] and the facts set forth must constitute a cause of action.[1] When it is fairly doubtful whether the complaint states more than one cause of action, and plaintiff intends to state but one, a motion to separately state and number should not be granted, but the defendants should be left to their remedy by demurrer.[2] In the Federal courts an allegation of the residence of the parties is not necessary to impart jurisdiction,[3] nor is an allegation of citizenship jurisdictional, except in cases in which the jurisdiction depends on diverse citizenship.[4] An omission to comply with the provision of Federal Equity Rule 20, requiring the place of abode of the parties to be stated, is properly corrected by motion.[5]

Complainant being absent from the state, the bill may generally be verified by agent or attorney.[6] An attorney swearing positively that the statements contained in the bill are true, it will be presumed in the absence of anything to the contrary that the attorney had knowledge of the facts to which he deposed.[7]

Sufficiency of allegations.[8]—The allegations must not be vague or indefinite.[9]

90. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61.

91. See 3 C. L. 1222.

92. Lockhart v. Leeds, 195 U. S. 427, 49 Law. Ed. 263. A bill is sufficient if it so states plaintiff's case as to inform the defendant of what he is called upon to meet. Rule applied to bills filed under Code 1899, c. 52, § 11, relating to railway crossings. Wellsburg & S. L. R. Co. v. Pan Handle Traction Co., 56 W. Va. 18, 48 S. E. 746.

93. Lockhart v. Leeds, 195 U. S. 427, 49 Law. Ed. 263.

94. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411.

95. Wellsburg & S. L. R. Co. v. Pan Handle Traction Co., 56 W. Va. 18, 48 S. E. 746.

96, 97, 98. McGarahan v. Sheridan, 94 N. Y. S. 708.

99. Durham v. Edwards [Fla.] 38 So. 926.

1. Nelson v. Sneed, 112 Tenn. 36, 83 S. W. 786. A court of equity cannot grant relief when the complainant's own showing in his bill demonstrates a want of equity in his prayer. Durham v. Edwards [Fla.] 38 So. 926. See 3 C. L. 1223, n. 20.

2. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

3, 4. Wright v. Skinner, 136 F. 694.

5. Not by demurrer. Wright v. Skinner, 136 F. 694.

6. An affidavit stating that complainants are absent from the state is sufficient to support a verification by complainant's attorney. Code 1896, p. 1205, considered. Kinney v. Reeves & Co. [Ala.] 39 So. 29. See, also, Verification, 4 C. L. 1816.

7. Kinney v. Reeves & Co. [Ala.] 39 So. 29.

8. See 3 C. L. 1223.

9. Durham v. Edwards [Fla.] 38 So. 926; Reeves v. McCracken [N. J. Eq.] 60 A. 332. A bill to recover, for the use of the school fund, damages for cutting timber on school lands, alleging that defendant was the assignee of a lease of such land, held too vague, there being no averment showing when, by whom, or to whom the lease was made, nor of its terms, nor whether it was in force or had expired at the time of the acts complained of. Adams v. Griffin [Miss.] 37 So. 457.

Where the complaint refers to "other persons," and there is no averment that their names are not known, defendant is entitled to have the names of such persons definitely stated, where they are necessary parties to the action.[10]

Multifariousness.[11]—Multifariousness is the improper joining in one bill of distinct and independent matters.[12] Although there may be several causes of action, if they grow out of the same transaction, and all the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained.[13] The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to hear and adjudicate in a single suit.[14] Where it is as practical and convenient for court and parties to deal with the claims and parties joined by a petition in one suit as in many, there is no multifariousness.[15] Hence the union of two or more causes of action for the same demand or relief does not render the bill or petition which presents them multifarious.[16] The question of when a bill is multifarious is largely one of judicial discretion and depends upon the circumstances of each case.[17] The fact that all the defendants are not affected to the same extent

10. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

11. See 3 C. L. 1223.

12. Fletcher, Eq. Pl. & Prac. p. 141. If the bill contains several matters of a distinct and independent nature against several defendants, it is multifarious; otherwise not. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423.

13. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423. Multifariousness is avoided if each of the parties is concerned in matters material, provided they are related to or connected with the others. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

14, 15. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26.

16. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26. The union of a cause of action upon a mechanic's lien and a cause of action upon an equitable preference in a bill to enforce the same demand against the same property does not render the pleading multifarious. Id.

17. Johnson v. Black, 103 Va. 477, 49 S. E. 633. Doctrine rests largely in the discretion of the court; thus considerations of convenience, the avoidance of a multiplicity of suits, and of unreasonable hardship to the several parties joined are to be taken into account. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423.

ILLUSTRATIONS. Bills held multifarious: A bill by a borrowing stockholder in a building and loan association against the association seeking to have his contract canceled for fraud and usury and also seeking to have a receiver appointed for the association is multifarious. Emmons v. National Mut. Bldg. & Loan Ass'n [C. C. A.] 135 F. 689. A bill against two defendants which joins a cause of action at law against one defendant with one in equity against both defendants is multifarious. Motley Co. v. Detroit Steel & Spring Co., 130 F. 396.

Bills held not multifarious: A bill by a trustee in bankruptcy to recover a payment either as a preference or as a fraudulent payment is not multifarious. Wright v. Skinner, 136 F. 694. Two causes of action for infringement of a copyright, one with reference to certain cartoons and the other with reference to a play based thereon, may be joined in the same bill. Empire City Amusement Co. v. Wilton, 134 F. 132. A bill by a ward against his guardian and several sets of sureties on his official bonds is not objectionable for misjoinder or multifariousness. Matthews v. Mauldin [Ala.] 38 So. 849. Where a husband conveys the homestead in fraud of his wife, a bill by her to enjoin an action of ejectment by the purchasers and to cancel the deed for fraud is not multifarious. Moseley v. Larson [Miss.] 38 So. 234. Complaint uniting causes of action for the reformation of an instrument, the violation thereof and for the enforcement of an implied trust, held not demurrable. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219. Under Laws 1904, p. 597, c. 337, a bill reciting claims of different creditors against numerous stockholders, some of whom are indebted to one portion of the creditors and others of whom are indebted to a different portion of them, is not multifarious, though without the statute it would be. Murphy v. Wheatley [Md.] 59 A. 704. A bill by a number of taxpayers against the members of a county board of supervisors and a number of their predecessors in office to compel defendants to restore to the county moneys paid them in excess of their salaries, to which the same defense was made by each defendant, held not multifarious. Johnson v. Black, 103 Va. 477, 49 S. E. 533. A bill against brokers to surcharge and falsify a large number of monthly statements of account of plaintiff's dealings through a series of years and praying for a correction of errors in the accounts is not multifarious. Bay State Gas Co. v. Lawson [Mass.] 74 N. E. 921. Where the charge is conspiracy and combination to commit one or many acts, a bill is not multifarious that includes all the conspirators and relates to all the acts within the general scheme. North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423. A creditors' bill to wind up the affairs of an insolvent national bank, and to obtain a complete judicial administration of its affairs, involv-

or in the same way will not deprive the court of jurisdiction.[18] A bill is not multifarious because it prays impossible or improper relief.[19] The joinder of cases of action at law and in equity is not permissible,[20] though some courts hold that such joinder does not render the bill multifarious inasmuch as the allegations respecting the legal demand may be treated as surplusage.[21] The mere recital of the facts of another transaction does not render the bill multifarious, no relief being asked in reference thereto.[22] Multifariousness can be taken advantage of by demurrer, plea or answer;[23] and where it is manifest upon the face of the bill that two causes of action are presented, the defense can be interposed by general, as well as by special, demurrer.[24]

Prayer.[25]—Where there is more than one prayer for relief, the prayers must be consistent.[26]

ing an ascertainment of claims against it, the enforcement of trusts in respect to assets and capital stock, and for the distribution of the proceeds, is not multifarious. George v. Wallace [C. C. A.] 135 F. 286. Id.; McCague Inv. Co. v. Same, Id. Bill by a state official against a great number of defendants, to prevent their several violations of state laws, the facts in each case being similar and there being an identity of interest, is not multifarious. North American Ins. Co. v. Yates, 116 Ill. App. 217. A bill by corporate stockholders against the corporation, its officers and some of its stockholders, alleging violation of a contract with one of the complainants, and praying that a certain officer be required to account and that certain salaries and dividends be refunded and that certain acts of the directors be set aside and that a receiver be appointed, is not multifarious because some of the complainants had acquired their interests after the making of the contract whose breach was alleged. Stone v. Pontiac O. & N. R. Co. [Mich.] 102 N. W. 752. In a suit to relieve a lessee from forfeiture for nonpayment of taxes, held, the bill was not multifarious in view of an allegation that there was an arrangement between the parties by which the tax titles should be procured for the purpose of ousting the complainant and putting the holder of the tax deed in possession. Webb v. King, 21 App. D. C. 141. A bill by a joint vendee, who was fraudulently induced to pay the entire purchase price on the representation that such sum was but one-half the price; to establish a trust in the land or its proceeds, is not multifarious, though containing a prayer that the complainant be invested with title, or that an intermediary be held to account to him for the purchase money received by her, or that the defendants be held to account to him for the amount of which he was defrauded. Johnston v. Little [Ala.] 37 So. 592. A bill by a beneficiary under a foreign will against the executrix, seeking an accounting and also alleging that the same defendant was executrix and trustee under a will of a resident of the state, in which complainant was interested, and seeking an accounting thereof, held not multifarious. Holzer v. Thomas [N. J. Eq.] 61 A. 154. In an action for damages for injury to dwelling houses caused by a stone quarry, and to enjoin the further maintenance of the same, allegations alleging facts which showed that the existence of the quarry endangered the lives of plaintiff, his family and tenants, held not to render the complaint demurrable for improperly uniting causes of action for injuries to the person and for injuries to property. Rooney v. Gray, 145 Cal. 753, 79 P. 523. A petition by the transferee of a debt secured by a deed, making persons, who are asserting title against him and colluding for the purpose of delaying and hindering him in the pursuit of the remedies which equity will afford him to obtain satisfaction of his debt, parties held not multifarious. Clark v. Havard [Ga.] 50 S. E. 108. A bill is not multifarious which seeks to have an accounting on contracts with one of the defendants, where another defendant is joined under allegations that the two have fraudulently sought to cover them up by investing them in lands, taking the legal title thereto in themselves, and the bill seeks to fasten a trust thereon for the use of the complainant. McMullen Lumber Co. v. Strother [C. C. A.] 136 F. 295.

18. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219.

19. Stone v. Pontiac, etc., R. Co. [Mich.] 102 N. W. 752; Blackford v. Olmsted [Mich.] 12 Det. Leg. N. 287, 104 N. W. 47. A bill seeking the re-establishment of a deed to complainant and the setting aside of a codicil to a will under which the representatives of a legatee would take except for complainant's prior title held not multifarious. Id.

20. Schurmier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

21. Dellsburg & S. L. R. Co. v. Pan Handle Traction Co., 56 W. Va. 18, 48 S. E. 746; Johnston v. Little [Ala.] 37 So. 592.

22. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

23, 24. Emmons v. National Mut. Bldg. & Loan Ass'n [C. C. A.] 135 F. 689.

25. For measure of relief grantable under a prayer, see post, § 13.

General prayer held sufficient if the allegations were. Martin v. Sexton, 112 Ill. App. 199.

26. Where a bill by a corporation alleged a fraudulent sale of certain real estate to it by defendant and another, who were its promoters and directors, a prayer for rescission and damages held not inconsistent. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

(§ 6) *C. Amended and supplemental bills, complaints, or petition.*[27]—Amendments may be allowed at almost any stage of the proceedings, the right resting largely in the discretion of the court,[28] and the exercise of such discretion will not be reversed on appeal unless clearly abusive.[29] Except where changed by statute,[30] the amendment must be germane [31] and must not set up a new cause of action.[32] An amendment is permissible which does not change the cause of action, but merely sets forth a new assignment or breach springing from the original cause.[33] A petition may be amended so as to conform to the proofs.[34] In Massachusetts a fact, occurring after the filing of the bill, which makes good the plaintiff's cause of action, may be pleaded by amendment.[35] Ordinarily, amendments to a sworn bill should be verified; [36] but the rule is not rigid and unbending, unverified amendments being allowed.[37] Under Federal Equity Rule 28, entitling plaintiff to amend the bill, as a matter of course, before answer, plea or demurrer filed, the amendment need not be supported by affidavit.[38] An offered amendment being ineffectual to remedy the defect, its disallowance is not ground for reversal.[39] On an appeal in equity, the cause being tried de novo, an amended petition may be filed in conformity with the facts proven in the record; [40] but an amendment presenting a radically different case than that presented to the trial court cannot be permitted.[41]

27. See 3 C. L. 1225.

28. Small v. Harrington [Idaho] 79 P. 461; Kinney v. Craig, 103 Va. 158, 48 S. E. 864. Where a bill showed that a conveyance was fraudulent in law and a demurrer was sustained because it was not shown that the conveyance was made for the purpose of hindering, delaying and defrauding creditors, an amendment setting forth such facts held properly allowed. Id. Where complainant, after filing an original bill, an amended bill, an amendment to an amended bill and a second amended bill, fails to state a case, further amendment is not as of course, but in reversing the case the bill will be ordered dismissed without prejudice. Barco v. Doyle [Fla.] 39 So. 103.

29. Kinney v. Craig, 103 Va. 158, 48 S. E. 864. See Appeal and Review, 5 C. L. 121.

30. Illinois: Under Chancery Act, § 37, the court has discretion to permit a complainant to amend his bill, even to the extent of filing an amended bill based upon new grounds, repugnant to and inconsistent with the grounds for relief relied upon in the original bill. Patterson v. Johnson, 114 Ill. App. 329.

31. In an action to set aside a sale by a trustee, an amendment that the trustee conveyed land which he stated, at the sale, was reserved, held germane. Dingman v. Beal, 213 Ill. 238, 72 N. E. 729.

32. Kinney v. Craig, 103 Va. 158, 48 S. E. 864. Where a bill showed that a conveyance was fraudulent in law and a demurrer was sustained because it was not shown that the conveyance was made for the purpose of hindering, delaying and defrauding creditors, an amendment setting forth such facts held not objectionable. Id. In a suit to set aside a deed for fraud, held proper to amend so as to allege that deed was executed by mutual mistake. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757. Where bill for an injunction restraining the removing of a building on the ground that it violated a certain section of an ordinance which the answer denied, the bill may be amended so as to set up other sections of the ordinance which the removal would violate. Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761.

33. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57.

34. So held where amendment was filed after the taking of testimony, and while the case is under consideration. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. Amendment was made after hearing before an auditor was concluded but before he had made his report. First State Bank v. Avera [Ga.] 51 S. E. 665.

35. Chancery rule 25. Hill v. Fuller [Mass.] 74 N. E. 361.

36. Patterson v. Johnson, 114 Ill. App. 329. Where an injunction issues upon a bill and it becomes necessary to amend the same, the injunction will not be continued in force unless the chancellor can see from a sworn amendment that it should be allowed without prejudice to the injunction. Id.

37. Patterson v. Johnson, 114 Ill. App. 329; Id., 214 Ill. 481, 73 N. E. 761. An inconsequential amendment to a sworn bill does not require that the bill be resworn. Change of Christian name of one of the parties. Davis v. Miller Signal Co., 105 Ill. App. 657.

38. Chase Elec. Const. Co. v. Columbia Const. Co., 136 F. 699.

39. Where, after demurrers going to the merits have been sustained, plaintiff files an amendment containing a more specific prayer for relief, but which does not avoid the substantial grounds on which the demurrer was sustained, the amendment being filed without a motion for leave, agreement of parties, or offer to pay costs, its disallowance is not ground for reversal. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853.

40. Raley v. Raymond Bros. Clarke Co. [Neb.] 103 N. W. 57.

41. Levandowski v. Althouse [Mich.] 99 N. W. 786.

A supplemental bill must be germane to the original and amended bills.[42] Where no new facts have arisen since the filing of the bill, except that the defendant afterwards continued to do what the bill alleged he was doing and about to do, a supplemental bill is unnecessary.[43]

(§ 6) *D. Cross bill or petition.*[44]—Except in a few cases, an action for an accounting being one,[45] a defendant seeking affirmative relief in a suit in chancery must do so by cross bill.[46] The cross bill must state the grounds relied on for affirmative relief with the same strictness required of plaintiff in the original bill;[47] it is auxiliary to the original suit, and a dependency upon it, and should not introduce any new or distinct matter not embraced in the original bill,[48] nor should it introduce new controversies between the co-defendants to the original bill, the decision of which is in no way necessary to the complete determination of the controversy between the complainant and the defendants over the subject-matter of the original bill.[49] A cross bill in an answer is unknown in the practice of Federal courts,[50] and a charge in an answer which is denominated a "cross bill" may be accepted as a statement of defendant's case, notwithstanding the misnomer.[51] A cross bill simply seeking affirmative relief may be retained and the relief granted,

42. Supplemental bill held not germane to the original and amended bills where the object of the former was to remove obstacles in the way of the enforcement of judgments in personam, and that of the latter to enforce a tax lien by a proceeding in rem. Langlois v. People, 212 Ill. 75, 72 N. E. 28.

43. Martin v. Sexton, 112 Ill. App. 199.

44. See 3 C. L. 1226.

45. In an action for an accounting the right of the defendant to affirmative relief is as broad and ample as that of the complainant, although no cross bill has been interposed. Wilcoxon v. Wilcoxon, 111 Ill. App. 90.

NOTE. Necessity for a cross bill in order to obtain affirmative relief: As a general rule a cross bill is essential in order that defendant may obtain affirmative relief. McPherson v. Cox, 96 U. S. 404; Tallman v. Wallack, 54 N. J. Eq. 655, 33 A. 1059; Fletcher Eq. Pl. & Pr. § 891 and cases cited. "There are some well-recognized exceptions to this rule, where a defendant may have a decree in his favor without a cross bill, as on a bill for specific performance, where the defendant sets up in the answer and proves an agreement different from the one sought to be enforced; on a bill for accounting, if a balance is found due the defendant; and on a bill for partition, where the defendant claims the same relief as is sought by the original bill." Freeland v. South Penn Oil Co., 189 Pa. 54, 41 A. 1000; McClaskey v. Barr, 48 F. 130; Story, Eq. Pl. § 394; Coxe v. Smith, 4 Johns. Ch. [N. Y.] 271. A cross bill is not necessary to enable the defendant to avail himself of a set-off in a foreclosure suit. McClaskey v. Barr, 48 Fed. 130; Jennings v. Webster, 8 Paige [N. Y.] 503. The defendant must proceed by cross bill if, in addition to a denial of the decree for partition, and the admission of the bill, he seeks further and affirmative relief on his part, by a decree for the transfer to him of the legal title to the whole premises, or if a discovery is necessary to establish his equitable defense. German v. Machin, 6 Paige [N. Y.] 288; McClaskey v. Barr, 48 F. 130. It is held in McClaskey v. Barr, 48 F. 130, that when, in a partition suit in the Federal court, title to an interest in the rents is established by persons not in possession, and the defendants wish to claim compensation for improvements, such claim must be set up by cross bill. See, for consideration of this question, Griffith v. Security Home Building & Loan Ass'n, 100 Tenn. 410, 45 S. W. 670, citing many authorities.—From Fletcher Eq. Pl. & Pr. p. 951, § 888, n. 5.

46. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56; Bessmer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053. In a divorce suit, held, defendant could only have a deed canceled by filing a cross bill. Zumbiel v. Zumbiel, 26 Ky. L. R. 1193, 83 S. W. 598. Where, in a suit to set aside a conveyance from a husband to his wife as in fraud of creditors, defendants did not plead a set-off against complainant's claim by a cross bill, evidence to prove such set-off was properly excluded. Noble v. Gilliam, 136 Ala. 618, 33 So. 861.

47. Bessmer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053.

48. Gilmore v. Bort, 134 F. 658. In a suit to compel the restoration of trust property to the trust, the defendant, on allegation that he has by purchase become the sole cestui que trust, is entitled to file a cross bill to enable him to present the question of his right to control the trustee. Riley v. Fithian [N. J. Eq.] 59 A. 302.

49. Gilmore v. Bort, 134 F. 658. In a suit against a corporation and its treasurer to cancel a bond, given defendants, on the ground of fraud, a cross bill by the defendant treasurer against complainant and his co-defendant, alleging the validity of the bond and asking a recovery thereon, and also alleging that if it was void that he be released from liability on his own bond, held improper. Id. Where original bill was for the partition of certain realty belonging to the estate of a decedent, a cross bill for the sale of realty belonging to the estate of another for the payment of the latter's debts is unsustainable. Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453.

50, 51. Hoge v. Eaton, 135 F. 411.

though the original bill be dismissed.[52] A cross bill must be promptly filed.[53] Where the issues raised by the cross bill depend upon the issues under the original bill, the hearing of the former should be stayed until the latter have been decided.[54] The failure of a cross complaint to require an answer is a waiver thereof.[55] A reply will generally prevent a decree pro confesso on the cross bill.[56]

(§ 6) *E. Demurrer. Grounds.*[57]—Except in the "code states" a demurrer does not lie to a plea or answer.[58] As to whether the questions of laches or adequate remedy at law can be raised by demurrer, there is a conflict.[59] In equity the statute of limitations may be availed of on demurrer to a bill where the bar appears on its face, unless equitable excuse is alleged in the bill to avoid the bar.[60] A general demurrer will be overruled if the bill contains any ground of equitable relief.[61] When some allegations in a bill show a case entitling a complainant to some relief, but are contradicted by other allegations in the same bill, and it is impossible for the court to determine the true nature of the case sought to be made by the bill, a demurrer thereto should be sustained.[62] A demurrer will not be sustained because the allegations do not entitle complainant to all the relief demanded in the prayer.[63] Where the bill alleges a state of facts entitling plaintiff to relief under the general prayer, the failure to ask specifically for such relief is not ground for dismissing the bill on demurrer.[64]

Form.[65]—The demurrer must point out specifically what sentences or paragraphs of the bill are demurred to.[66] A demurrant may present, ore tenus, an additional ground of demurrer.[67]

Effect of, and procedure on, demurrer.[68]—A general demurrer goes to the merits of the case.[69] The complaint being insufficient, a demurrer to the answer will be overruled.[70] In passing upon a demurrer to a bill, every presumption is against the bill.[71] A demurrer to a nonexisting part of a bill should be treated

52. Callahan v. Mercantile Trust Co. [Mass.] 74 N. E. 666.

53. Application in a divorce suit, to file a cross bill alleging adultery on the part of plaintiff, being made more than six months after issue joined, and no excuse for the delay offered, will be denied. Costell v. Costell [N. J. Eq.] 60 A. 49.

54. Where, in a suit to set aside a judicial sale of a remainder, defendant filed a cross bill praying that a mortgage executed on the land by the remainderman be removed as a cloud on defendant's title, the proceedings under the cross bill should be stayed until the issues under the original bill have been determined. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

55. Cribbs v. Walker [Ark.] 85 S. W. 244.

56. Where a cross bill is blended with matter pleaded as an affirmative defense, a reply denying the new matter is sufficient to deprive defendant of the right to a judgment pro confesso on the cross bill, though the code requires a separate answer to a cross bill and a reply to new matter, where the answer contains new matter and a cross bill. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

57. See 3 C. L. 1227.

Demurrers to the evidence, see post, § 12. Also see topic Directing Verdict and Demurrer to Evidence, 5 C. L. 1004.

58. Pennsylvania Co. v. Bay, 138 F. 203.

59. See ante, § 3, Laches and acquiescence and § 2B, Existence of an adequate remedy at law.

60. Wieczorek v. Adamski, 114 Ill. App. 161.

61. Cole v. Cole [N. J. Eq.] 59 A. 895; Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658. A demurrer held not to lie to a bill to have the administration of an estate removed from the probate to the chancery court, and to require the executor to give a bond, though the bill was insufficient in its allegations for removal. Cronk v. Cronk [Ala.] 37 So. 828. That bill failed to sufficiently allege facts relied on as fraudulent held insufficient to authorize sustaining a demurrer, the bill sufficiently setting forth an estoppel against defendants. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

62. Derham v. Edwards [Fla.] 38 So. 926.

63. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. S. 219.

64. Hawpe v. Bumgartner, 103 Va. 91, 48 S. E. 554.

65. See 3 C. L. 1228.

66. Empire City Amusement Co. v. Wilton, 134 F. 132. A demurrer for "defect of parties" is insufficient under Rev. St. 1898, § 2651, requiring that the demurrer set forth a particular statement of the defects. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

67. Acton v. Shultz [N. J. Eq.] 59 A. 876.

68. See 3 C. L. 1228.

69. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761.

70. Mitchell v. Peru, 163 Ind. 17, 71 N. E. 132.

71. Durham v. Edwards [Fla.] 38 So. 926.

as a demurrer to the whole bill.[72] A demurrer admits all material statements of facts which are well pleaded;[73] but it does not admit inferences or conclusions of law.[74] Where a bill combines prayers for proper and improper relief, and a demurrer to the part of the bill seeking improper relief is sustained, the bill will be retained for the administration of the relief properly sought.[75] A demurrer waives the fact that an amendment is not verified,[76] and also any error in a previous ruling on a motion to dismiss.[77] A general demurrer waives want of demand before the suit is brought.[78] By answering after a general demurrer is overruled, the right to assign error in overruling the demurrer is waived.[79] The proper order on sustaining a demurrer is "Demurrer sustained with leave to amend," and on failure to amend, "Bill dismissed;"[80] but an order omitting the words "Demurrer sustained," and dismissing the bill absolutely, will not be reversed where the bill was properly dismissed for want of jurisdiction.[81]

(§ 6) *F. Plea.*[82]—Unlike a demurrer, one of the main objects of a plea is to bring upon the record such new matter as has not been shown or relied on by the plaintiff, as will preclude him from the relief sought in the bill;[83] hence, whatever shows that there is no right which can be made the foundation of a suit or decree therein for the plaintiff may constitute the subject of a plea.[84] A plea must present some single definite point on the maintenance of which the bill will be disposed of.[85] It must not be uncertain or evasive,[86] and must not tender an issue on an immaterial allegation in the bill.[87] In some states a plea must be supported by an affidavit that it is not interposed for delay.[88] Under Federal Equity Rule 31, a joint plea should ordinarily be verified by all of the defendants in whose behalf it is filed.[89] Setting pleas down for hearing upon their sufficiency is an admission of the facts, but not the conclusions averred in them;[90] likewise the defendant admits to be true the facts alleged in the bill which are not denied by the plea,[91] and setting a plea down for argument is a waiver of objections for want of proper verification.[92] When a replication has been filed to a plea, it is incumbent upon the defendant to prove the

72. Where no part of a bill sought to rescind a sale, a demurrer to such a "part" should be treated as a demurrer to the whole bill. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

73. Williams v. Mathewson [N. H.] 60 A. 687; Bradbury v. Waukegan & Washington Min. & Smelting Co., 113 Ill. App. 600.

74. Williams v. Mathewson [N. H.] 60 A. 687; Carroll v. Smith, 99 Md. 653, 59 A. 131; Bradbury v. Waukegan & Washington Min. & Smelting Co., 113 Ill. App. 600. Does not admit argumentative conclusions in the bill. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114. Does not admit an allegation that defendant's acts are "without right," and that plaintiff will suffer "irreparable injury." Williams v. Mathewson [N. H.] 60 A. 687. Allegations that a defendant has no vested interest in property, and is incapable, under its charter, of receiving certain property, are not admitted by demurrer. Carroll v. Smith, 99 Md. 653, 59 A. 131.

75. Cole v. Cole [N. J. Eq.] 59 A. 895.

76. City of Chicago v. Banker, 112 Ill. App. 94. See 3 C. L. 1230.

77. Where, after an amended bill was filed, defendants moved to dismiss because it persented a new case, and the court denied the motion on condition that complainant pay defendants a specified amount, which he did, whereupon defendants filed demurrers, they waived their right to object to the bill on that ground. Paine v. Sackett [R. I.] 61 A. 753. See 3 C. L. 1230.

78. Manders' Committee v. Eastern State Hospital [Ky.] 84 S. W. 761. See 3 C. L. 1230.

79. Glos v. Hanford, 212 Ill. 261, 72 N. E. 439; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

80, 81. Fooks v. Purnell [Md.] 61 A. 582.

82. See 3 C. L. 1228.

83. Wagenhurst v. Wineland, 22 App. D. C. 356. Pleas introducing no matter dehors, the record will be overruled. Dekle v. Barkley [Fla.] 37 So. 581.

84. Wagenhurst v. Wineland, 22 App. D. C. 356. The defense of former adjudication is properly made by plea. Id.

85. Western Elect. Co. v. North Elect. Co. [C. C. A.] 135 F. 79.

86, 87. Computing Scale Co. v. Moore, 139 F. 197.

88. A plea wil be held a nullity unless the certificate and affidavit required by Chancery Act, § 22 (P. L. 1902, P. 518) is attached thereto. Resnick v. Campbell [N. J. Eq.] 59 A. 452.

89. Computing Scale Co. v. Moore, 139 F. 197.

90. McKee v. West [Ala.] 37 So. 740; General Elect. Co. v. Bullock Elect. Mfg. Co., 138 F. 412.

91. General Elect. Co. v. Bullock Elect. Mfg. Co., 138 F. 412.

facts which the pleas suggest.[93] If the plaintiff conceives the plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency; and so may the defendant interposing the plea, and thus have its sufficiency determined before proceeding further with the defense.[94] If plea is defective it may be amended.[95] A plea and an answer strictly and wholly in support of the plea form one pleading, and such an answer cannot be regarded as a defense independent of the plea;[96] but when an answer contains more than is strictly applicable to the support of the plea, it will have the effect of overruling the plea.[97]

(§ 6) *G. Answer.*[98]—The answer should fairly meet the allegations of the bill,[99] and, while it need not set forth in detail all the circumstances connected with the facts alleged in the answer,[1] yet it must apprise complainant of the nature of the defense,[2] and defendant cannot avail himself of matters of defense appearing in the evidence but not set up in the answer,[3] unless he amends his answer.[4] When an answer in chancery concludes with the usual general denial found in such a pleading, it is sufficient to make an issue on material allegations in the bill, not admitted in the answer, and to which no especial response is made.[5] Such allegations cannot be taken as admitted to be true, but must be proved by at least a preponderance of the testimony.[6] While the same defense cannot be made by both plea and answer to a bill, yet after the plea has been adjudged insufficient, the same matter of defense set up by the plea may be advanced and relied upon in the answer.[7] In order that the answer of one co-defendant may re-dound to the benefit of another, their interests must not be separate and distinct.[8] An assignment of certain money sued for cannot be set aside for fraud under an answer containing a general denial only.[9] Where the defense is former adjudication, the answer should be supported by a verified copy of the record and decree in the former suit, exhibited as part of the answer.[10] A rule requiring an answer to be divided into paragraphs should not be applied where it would work an unnecessary hardship.[11] It is proper to file supplemental answers setting up facts occurring since the filing of the original answer.[12]

92. Computing Scale Co. v. Moore, 139 F. 197.

93. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56.

94, 95. Wagenhurst v. Wineland, 22 App. D. C. 356.

96, 97. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56.

98. See 3 C. L. 1229.

99. McNulty v. Wieson, 130 F. 1012. The answer should be perfect in itself, so that if the case is set down for argument on bill and answer all matters of defense may be properly before the court in one record. Wagenhurst v. Wineland, 22 App. D. C. 356.

1. McNulty v. Wieson, 130 F. 1012.

2. Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763.

3. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763. Where defendant alleged that he refused to accept a tender because the money was not derived from a certain source, he thereby waived any claim that the tender was not good because conditional. Id.

4. Alfred Richards Brick Co. v. Trott, 23 App. D. C. 284.

5, 6. Parken v. Safford [Fla.] 37 So. 567.

7. Wagenhurst v. Wineland, 22 App. D. C. 356.

8. In a suit brought to enforce the specific performance of a contract, where the party with whom the contract is alleged to have been made, and against whose heirs the contract is sought to be enforced, is dead, and where the administrator and heirs of the decedent are made parties defendant, an answer filed by the administrator contesting the right of plaintiff to have specific performance, and denying the allegations of the bill, does not inure to the benefit of his co-defendants. Ferrell v. Camden [W. Va.] 50 S. E. 733.

9. Midler v. Lese, 45 Misc. 637, 91 N. Y. S. 148.

10. Wagenhurst v. Wineland, 22 App. D. C. 356. An answer, taking the place of a plea, setting up former adjudication, it need set forth no other matter than the record and decree which it is alleged constitutes a bar. Supreme Court rule 34 considered. Id.

11. Where the answer to a narrative and discursive bill of 40 separate paragraphs, some of them long and complex, simply sets up by way of defense a decree of dismissal in a former suit for the same subject-matter and between the same parties, exceptions to the answer on the ground that it is not divided into paragraphs as required by rule 54 of the supreme court, cannot be sustained. Wagenhurst v. Wineland, 22 App. D. C. 356.

12. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. S. 153.

On a final hearing of a cause upon bill, answer and replication, after the time for taking testimony has expired, every averment in the answer responsive to the bill is taken as true.[13]

Verification.[14]—Unverified answers which neither deny the substantial allegations of the bill nor allege any sufficient ground of defense are insufficient.[15]

Effect of answer; as evidence; admissions.[16]—By answering, defendant may waive errors in the petition,[17] and in the ruling of a court denying a motion to strike out an amended petition.[18]

Unless the verification be waived,[19] a responsive, sworn answer in equity can only be overcome by the testimony of two witnesses, or of one witness and corroborating circumstances,[20] though in some states, to have this effect, discovery must be expressly prayed for.[21] Oath to the answer being waived, complainant must prove the material allegations in the bill by a preponderance of evidence.[22] An answer admitting the truth of certain allegations in the bill, the facts so alleged and admitted, are not in issue; consequently the complainant is entitled to a decree upon such allegations, though he produces no other proof, even though defendant has produced evidence tending to show that the allegations are untrue.[23] Pleadings can only be used as evidence by way of admission against the parties whose pleadings they are,[24] hence admissions in the answer of adult defendants do not bind infant co-defendants.[25] Where an answer is used in support of a bill, the whole of the answer must be taken together, and explanations given must be used in connection with the admissions made.[26] Plaintiff setting down the case for hearing upon bill and answer, he admits the truth of every fact set forth in the answer,[27] and this is true as well of averments in avoidance of, as of those responsive to, the allegations of the bill.[28]

(§ 6) *H. Replication, exceptions and motions.*[29]—When a general replication is filed to an answer in chancery, it thereby puts in issue all the matters alleged in the bill and not admitted in the answer,[30] as well as those matters contained in the

13. Lykes v. Beauchamp [Fla.] 38 So. 603.
14. See 3 C. L. 1229.
15. Raub v. Hurt, 24 App. D. C. 211.
16. See 3 C. L. 1229.
17. Jackson v. Powell, 110 Mo. App. 249, 84 S. W. 1132. An action being tried on a second amended complaint, to which an answer was interposed, any error in the rulings sustaining the original and first amended complaints is immaterial. Rooney v. Gray, 145 Cal. 753, 79 P. 523. See, also, 3 C. L. 1230.
18. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.
19. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56; Parken v. Safford [Ala.] 37 So. 567. So held where an allegation of the execution of certain deeds was denied by an unverified answer. Id. Answers when not called for under oath by the bill are not evidence of the facts alleged therein, but may be referred to as showing the grounds of defense. Mankey v. Willoughby, 21 App. D. C. 314.
20. Evans v. Evans [N. J. Eq.] 59 A. 564; Ocala Foundry Mach. Works v. Lester [Fla.] 38 So. 56. Where one witness on behalf of the complaints testifies positively as to the material allegations of the bill, and the testimony of the defendant does not support his answer, being evasive, or in conflict therewith, this is to be taken into consideration by the court, and, in connection with all the circumstances as shown by the pleading and the evidence, may prove sufficient to overcome the probative force of the sworn answer. Id. Where both an answer and a plea are filed, it is incumbent upon the complainant to prove the allegations in his bill as to the matters contained in the answer, which were not in support of the plea, but which were responsive to the bill. Id. Complaints requiring an answer under oath make the same evidence so far as it is responsive to the charges contained in the complaint and to the interrogatories propounded. Evans v. Evans [N. J. Eq.] 59 A. 564. In a suit to set aside an alleged fraudulent conveyance, evidence held insufficient to overcome answer. Id. Is open to explanation and rebuttal, unless sworn to with knowledge of the facts. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430.
21. Toomer v. Warren [Ga.] 51 S. E. 393.
22. Parken v. Safford [Fla.] 37 So. 567; Lykes v. Beauchamp [Fla.] 38 So. 603.
23. Lainhart v. Burr [Fla.] 38 So. 711.
24. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430.
25. Holderby v. Hagan [W. Va.] 50 S. E. 437.
26. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170.
27. Read v. Reynolds [Md.] 59 A. 669; Bowers v. McGavock [Tenn.] 85 S. W. 893.
28. Read v. Reynolds [Md.] 59 A. 669.
29. See 3 C. L. 1230.

answer which are not responsive to the bill,[31] and it is incumbent upon the complainant to prove all such matters by at least a preponderance of the evidence, the oath to the answer being waived.[32] The replication cannot be made to perform the office of a bill of exceptions.[33] Exceptions to an answer will lie for scandalous or impertinent matter contained therein,[34] but not as to matters admissible under the issues formed.[35] An exception to an answer for insufficiency does not raise the question of the sufficiency of the answer in point of law,[36] but raises the question as to whether a sufficient discovery has been made by the defendant, or the averments fully answered.[37] If such complete answer has been made, exceptions to new matter therein will not lie for insufficiency.[38] Exceptions for insufficiency will lie to the answer of a corporation.[39]

(§ 6) *I. Issues, proof and variance.*[40]—An allegation in a bill of material matter and a direct denial of that allegation in the answer frames an issue of fact.[41] The allegation and proof must agree. A recovery will not be allowed in a case, although proved, which differs essentially from that alleged in the bill.[42]

(§ 6) *J. Objections and waiver thereof.*[43]—It is a general rule that certain objections must be taken by demurrer,[44] plea,[45] or answer,[46] according to the nature of the defect, and also that by proceeding to plead defects may be waived. By going to trial on the merits, defendant waives all objections to the sufficiency of plaintiff's pleadings.[47] Appearance without objection waives defects in notice indorsed on bill.[48]

§ 7. *Taking bill as confessed or on default.*[49]—It is proper to take a bill for confessed as to all defendants thereto who have been personally served with process, or who have appeared in the cause and have failed to answer or make an issue therein.[50] When a plea in equity is not properly verified, complainant should disregard the plea and take a decree pro confesso.[51] A decree pro confesso cannot be entered if there is an answer on file, even though exceptions to it have been sustained.[52] A bill cannot be taken for confessed as to infants.[53] If the allegations of

30. Parken v. Safford [Fla.] 37 So. 567; Lykes v. Beauchamp [Fla.] 38 So. 603.
31. Parken v. Safford [Fla.] 37 So. 567.
32. Lykes v. Beauchamp [Fla.] 38 So. 603; Parken v. Safford [Fla.] 37 So. 567.
33. Robins v. American Car & Foundry Co. [C. C. A.] 135 F. 693.
34, 35, 36, 37, 38. Pennsylvania Co. v. Bay, 138 F. 203.
39. Flitcroft v. Allenhurst Club [N. J. Eq.] 59 A. 878.
40. See 3 C. L. 1230.
41. Pierce v. Woodbury [Me.] 60 A. 424.
42. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170. Bill should be dismissed. Caton v. Raber, 56 W. Va. 244, 49 S. E. 147. An allegation that the grantor in a certain deed failed to retain a certain reservation authorized by the contract between the parties is not sustained by proof that such reservation was omitted by reason of an agreement between the parties that the grantee should make a separate deed for such reservation. Id. In a suit against an administrator, the bill alleging that borrowed money was repaid to the administrator and the proof showing that it was handed to a third party, held, plaintiff could not recover. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170. Where a bill sought to charge with a trust a fund in the hands of the executors of a deceased trustee and the proof showed that a portion of the trust fund did not continue in the possession of the decedent up to the time of his death, held not a fatal variance. Darlington v. Turner, 24 App. D. C. 573.
43. See 3 C. L. 1230.
44. See ante this section, subd. E.
45. See ante this section, subd. F.
46. See ante this section, subd. G.
47. Boglino v. Giorgetta [Colo. App.] 78 P. 612. In a suit in equity to set aside a judgment at law and for a new trial, held to waive defect in petition in that it did not allege that a motion for a new trial was properly filed, the evidence showing that such motion was in fact filed. Parker v. Parker [Neb.] 102 N. W. 85. Failure to incorporate amendment in complaint is waived by proceeding to trial upon the issues formed by the amended complaint and answer. Christiansen v. Aldrich [Mont.] 76 P. 1007. Defendant failing to object to a supplemental bill waives the fact that it is not germane to the original bill. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.
48. Hughes v. Antill, 23 Pa. Super. Ct. 290.
49. See 3 C. L. 1231.
50. Ferrell v. Camden [W. Va.] 50 S. E. 733.
51. Computing Scale Co. v. Moore, 139 F. 197.
52. Wagenhurst v. Wineland, 22 App. D. C. 356.
53. Holderby v. Hagan [W. Va.] 50 S. E. 437.

a bill are distinct and positive, they may be taken as true without proof, if the defendant makes no defense; but if they are indefinite, or if the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof.[54] A decree pro confesso admits the facts charged in the bill, but not the conclusions drawn therefrom, nor the conclusions of law.[55] Statutes largely regulate the time within which application may be made to open a decree pro confesso.[56] In the Federal courts a decree pro confesso on a cross bill may be vacated on motion after the adjournment of the term.[57] The court will generally open the decree if the applicant shows a meritorious defense[58] and an excuse for his default.[59] If a partial defense is shown it will modify the decree pro tanto.[60] A consent decree will not be set aside because, through accident and mistake, one of the consenting parties failed to introduce evidence which was in his possession, and which might, if submitted on a trial, have resulted in the rendition of a decree different from the one which was taken by consent.[61] In some states, reversible error being shown, the trial court should reverse the decree and render a correct one.[62]

§ 8. *Abatement and revival.*[63]—Upon a bill of revivor the merits of the proceeding sought to be reviewed will be inquired into, and if the cause was properly adjudicated the relief sought by the bill of revivor will be denied.[64] A bill of revival is not the proper remedy where a decree has become final by failure to appeal.[65]

§ 9. *Dismissal.*[66] *Voluntary dismissal.*[67]—As a general rule, there being no cross bill on file and the answer not seeking affirmative relief, the complainant has the right, upon the payment of costs, to dismiss his bill at any time before final decree;[68] an exception to the above rule exists where a proceeding to account has

54. Perkins v. Tyrer, 24 App. D. C. 447. Under Code Civ. Proc. § 267, plaintiff is not entitled to judgment by default of answer, but is bound to establish his right to the relief sought to the satisfaction o the chancellor. Cannady v. Martin [S. C.] 51 S. E. 549.

55. Perkins v. Tyrer, 24 App. D. C. 447.

56. Florida: A final decree rendered in pursuance of a previous decree pro confesso may be set aside after the lapse of 20 days from its entry, whereby it has become absolute under Rev. St. 1892, § 1446, but an application to set aside such a final decree after the expiration of 20 days from its entry should never be entertained from a mere desire to let in a defense on the merits, but only where strong and unavoidable circumstances exist excusing failure to answer at the proper time. Macfarlane v. Dorsey [Fla.] 38 So. 512.

Rhode Island: Under Gen. Laws 1896, c. 240, § 10, as amended by Pub. Laws, p. 81, c. 671, providing that a decree pro confesso shall be "conclusive," such a decree has the same effect as a decree entered after appearance and hearing, and may, under Gen. Laws, c. 246, § 2, be opened within six months after its entry. Masterson v. Whipple [R. I.] 61 A. 446.

57. Is within Federal Equity Rule 1, but not within Rule 19. Blythe Co. v. Bankers' Ins. Co. [Cal.] 81 P. 286.

58. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413. A decree pro confesso on a bill for an account will not be vacated, it being clear that defendant is under a duty to account. Tull v. Brooke, 24 Pa. Super. Ct. 426.

59. Where parties did not demur or answer, though represented by counsel, and shortly after an amended bill had been filed on an application to open a decree pro confesso, their counsel notified them that he could no longer represent them, and they took no steps to employ other counsel, held, they were not entitled to have the decree opened as a matter of right. Verstine v. Yeaney, 210 Pa. 109, 59 A. 689. Under Code Civ. Proc. § 195, it is within the discretion of the court to excuse default in serving answer in time by mail. Cannady v. Martin [S. C.] 51 S. E. 549.

60. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413.

61. Gray v. Wright [Ga.] 51 S. E. 373.

62. Under Code 1899, c. 134, § 5, the trial court should upon motion made reverse the decree for an error for which the appellate court might reverse it, and should give such decree as ought to be given upon the record as it exists at the time the motion is made. Ferrell v. Camden [W. Va.] 50 S. E. 733. Upon reversal of such decree the defendants are not entitled to file their answers and make defense to the bill. Id.

63. See 3 C. L. 1232, n. 61, 62. See, also, Abatement and Revival, 5 C. L. 1.

64. Prouty v. Moss, 111 Ill. App. 536.

65. Where no appeal was taken from a partition decree within the time allowed by law, held, the case was not a pending one so as to entitle a party to a revival of the suit 18 years later. Farmer v. Allen [Miss.] 38 So. 38. A dismissal of the case at such time, without prejudice to parties petitioning for its revival to file a bill on their own behalf, was not an abuse of the chancellor's discretion. Id.

66. See 3 C. L. 1232. See, also, Discontinuance, Dismissal and Nonsuit, 5 C. L. 1011.

67. See 3 C. L. 1232.

68. Gilmore v. Bort, 134 F. 658; Thompson

reached the stage where the parties have been ordered to account to each other,[69] and in some states this right to dismiss is not an absolute one after the cause has been set down for final hearing.[70] The general rule is, moreover, subject to the exception that where such dismissal would be manifestly prejudicial to the defendant it will not be permitted.[71] The suit must have progressed so far that defendant, upon answer or cross bill, is either entitled to a decree, or the injury or prejudice to him because of the dismissal is of a character that deprives him of some substantial rights concerning the matter of the original bill which would not be available to him in a second suit;[72] and it is uniformly held that mere liability to or the inconvenience of future litigation against him regarding the subject-matter of the suit is not of that character.[73]

Involuntary dismissal.[74]—In a strictly equitable action there is no such thing as a technical nonsuit.[75] Defendant may, if he chooses, submit the cause to the court for decision,[76] or may, where the bill shows want of equity[77] or is unsupported by evidence,[78] or the suit has been abandoned,[79] move for the dismissal of the bill. In some states the legal nature of the action is not ground for dismissal, but the cause should be transferred on motion being made.[80] The dismissal of a bill for want of equity is a matter of discretion, and cannot be controlled by mandamus.[81] A motion to dismiss for want of equity is not the equivalent of a demurrer, nor is it sufficient to reach mere defects or insufficiencies of pleading curable by amendment;[82] but the possibility that a bill showing no equity can be amended so as to give it equity is no ground for its retention against a motion to dismiss.[83] Where a suit is improperly brought in equity, it should not on that account be dismissed, but should be transferred to the law court, and, if no motion is made to transfer the cause, the objection is waived.[84]

Effect.[85]—A general decree of dismissal of a suit in equity, without more, renders all the issues in the case res adjudicata, and constitutes a bar to an action at law for the same cause.[86] Hence, when the court has no jurisdiction of the suit, the decree of dismissal must expressly adjudge that it is for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may have sustained.[87] The dismissal of the original bill before the final hearing carries with it the cross bill, in so far as that bill alleges matters that are defensive to the original bill.[88]

v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 131; Wilcoxen v. Wilcoxen, 111 Ill. App. 90. The rule prevailing in some jurisdictions, which recognizes a discretionary power in the chancellor to restrict the exercise of this right, does not exist in Illinois. Id.

69. In such a case a cross bill is not necessary. Wilcoxen v. Wilcoxen, 111 Ill. App. 90.

70. After a cause in equity has been set down for a final hearing after issue and expiration of the time for taking testimony, in accordance with the provisions of Equity Rules Nos. 85 and 86, the complainant has no absolute right to a dismissal of his bill without prejudice, this being a matter resting within the sound judicial discretion of the court below. Lykes v. Beauchamp [Fla.] 38 So. 603.

71, 72, 73. Gilmore v. Bort, 134 F. 658.

74. See 3 C. L. 1232.

75, 76. Morrison v. Jones [Mont.] 77 P. 507.

77. Hendry v. Whidden [Fla.] 37 So. 571.

78. Finch v. Finch, 111 Ill. App. 481.

79. Under Act No. 107, p. 155, of 1898, amending and reenacting article 3519, Civ. Code 1870, five years' delay in prosecuting a suit will be considered an abandonment, and suit will be dismissed at the suggestion of any party in interest. Lockhart v. Lockhart, 113 La. 872, 37 So. 860.

80. Cribbs v. Walker [Ark.] 85 S. W. 244. Failure to make the motion waives the defect. Id.

81. Ex parte Merritt [Ala.] 38 So. 183.

82. Johnston v. Little [Ala.] 37 So. 692.

83. Edins v. Murphree [Ala.] 38 So. 639.

84. Cribbs v. Walker [Ark.] 85 S. W. 244. See Dockets, Calendars and Trial Lists, 5 C. L. 1039.

85. See 3 C. L. 1232.

86. Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484; Wagenhurst v. Wineland, 22 App. D. C. 356. Where order is not made, "without prejudice," it is presumed that dismissal was on the merits. Lykes v. Beauchamp [Fla.] 38 So. 603.

87. Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F. 484.

88. Gilmore v. Bort, 134 F. 658.

Vacation of order.[89]—A motion to open an order of dismissal must be promptly made.[90]

§ 10. *Trial by jury or master,*[91] *their verdicts and findings.*[92]—While juries are not appropriate tribunals to determine purely equitable controversies,[93] still the chancellor may, in his discretion,[94] call a jury to try any issue of fact, either legal or equitable.[95] By the statutes of some states trial by jury in equity is made a matter of right.[96] The verdict of the jury is merely advisory.[97] A party by permitting the impaneling of a jury without objection does not thereby render its verdict binding.[98] It has been held that a verdict upon a legal issue is conclusive until set aside by competent authority.[99] In Minnesota the verdict of a jury upon specific questions of fact is as binding on the court as a general verdict in a legal action, and is subject to the same rules as to setting it aside for insufficiency of evidence.[1]

§ 11. *Evidence.*[2]—In general it may be said that the rules of evidence are the same in law and in equity,[3] though the court is not confined to the strict rules prescribed for the admission of evidence in law cases.[4] The matter of enlarging the time for taking testimony rests in the sound judicial discretion of the trial court,[5] and an exercise of such discretion will not be reversed on appeal unless the discretion is shown to have been abused.[6] Application not being made within the time fixed by the rules of the court, the circumstances, to excuse the delay, must have been controlling and unavoidable.[7] One failing to make an application to have the case referred to a commissioner cannot object that the service of plaintiff's notice of his intention to take testimony in open court is premature.[8] Every remedy having for its object the perpetuation of testimony is confined to the testimony of witnesses in being.[9]

§ 12. *Hearing or trial.*[10]—The parties are entitled to a hearing before the issues can be adjudicated.[11] The conduct of the trial is in the sound discretion of the

89. See 3 C. L. 1232.

90. Where case was dismissed for lack of prosecution two years and nine months after parties had appeared and defendants demurred, held, a motion to vacate the order made 44 days after the making of the order and two days before the end of the term would be denied. Peddecord v. Vannigerholz, 212 Ill. 612, 72 N. E. 819.

91. See 3 C. L. 1231-1283. See Masters and Commissioners, 4 C. L. 614.

92. Findings of the court, see post, § 13.

93. Van Houten v. Van Houten [N. J. Eq.] 59 A. 555.

94. Proceeding for separate maintenance. Pike v. Pike, 112 Ill. App. 243. The various issues being referred to an auditor, to whose report exceptions were filed the judge has authority to pass on the exceptions without submitting the issues made thereby to a jury. Hogan v. Walsh [Ga.] 50 S. E. 84. Exceptions of fact to auditor's report need not be referred to a jury unless the judge approves them. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382.

95. McClelland v. Bullis [Colo.] 81 P. 771. Issue at law. Gunning v. Sorg, 112 Ill. App. 332.

96. A petition being filed under Code 1899, c. 106, § 23, the issue must be tried by jury unless the right thereto is waived. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392. Waiver of such right must be by consent entered of record; it cannot be inferred from the fact that the court tried the cause without objection. Id.

97. McClelland v. Bullis [Colo.] 81 P. 771; Thompson v. Hardy [S. D.] 102 N. W. 299; Lauman v. Hoofer, 37 Wash. 382, 79 P. 953. Held no merit in assignment that court erred in calling jury and in submitting questions to them. Id. Rule applies in suit for separate maintenance. Kozacek v. Kozacek, 105 Ill. App. 180.

98. McClelland v. Bullis [Colo.] 81 P. 771.

99. Lancaster v. Lee [S. C.] 51 S. E. 139.

1. Reider v. Walz, 93 Minn. 399, 101 N. W. 601.

2. See 3 C. L. 1233. See, also, Evidence, 3 C. L. 1334.

3. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139. See Evidence, 3 C. L. 1334.

4. Small v. Harrington [Idaho] 79 P. 461.

5, 6, 7. Lykes v. Beauchamp [Fla.] 38 So. 603.

8. So held where case was not at issue as to one defendant, and objection was that notice was premature, no pro confesso order having been entered against such defendant. Chancery Rule 15a considered. Letts v. Trevallick [Mich.] 102 N. W. 661.

9. Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620.

10. See 3 C. L. 1232.

11. It is improper to sustain exceptions to an answer and cross bill and adjudicate the issues thereby raised without permitting the defendant and cross complainant to be heard touching such issues, where such issues are necessary and proper to be determined in order to adjudicate the rights and

chancellor,[12] hence it is discretionary with him whether certain matters shall be passed by for the time being,[13] whether legal or equitable issues shall be first tried,[14] and whether, after the cause has been closed, it shall be opened to allow the introduction of more evidence.[15] In Pennsylvania the trial of the cause is regulated by rules promulgated by the supreme court;[16] these rules of court have the force of a statute,[17] and cannot be suspended by the court of common pleas, nor can that court adopt others inconsistent therewith;[18] but the rules are subject to the discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship.[19] A plaintiff being in contempt of court, he has no absolute right to proceed with the trial.[20] A feigned issue does not admit of any other defenses than are included in such issue.[21] Where an equitable action is tried on oral evidence, the effect of a demurrer to the evidence by defendant is the same as in a law action.[22] The taxation of costs is a matter of discretion with the trial court, and, in the absence of abuse, the exercise of such discretion will not be interfered with on appeal.[23]

§ 13. *Findings by court*[24] *and decree, judgment or order.*[25]—The usage and practice of courts of equity do not require any findings of fact as preliminary to the validity of a decree in equity,[26] and while it is the growing practice in some states to file a finding of facts with the decree, yet the propriety of doing so rests wholly within the discretion of the sitting justice,[27] and if the justice does make a finding of facts, and therein declares none inconsistent with the allegations of the bill, the omission to find other facts that might have been found will in no way affect the validity of the decree.[28] Findings appearing in the decree, it is not necessary that they should appear in findings separate therefrom.[29] As before shown, the court may disregard the verdict of the jury,[30] and, neither party offering proof, the court may make its own findings without hearing additional evidence.[31] Findings of chancellor as to matters of fact will not be reversed on appeal, unless they are clearly and manifestly against the weight of the evidence.[32]

The decree[33] must be entered by the court.[34] Where a bill in equity is filed in connection with an information, separate decrees may be rendered on the bill and information.[35] The decree must be supported either by a certificate of the oral evidence heard, or by recitals in the decree of the facts found by the court to be established by the evidence.[36] An objection to parties is not the proper subject of de-

interest of the parties to the litigation, including the rights and interests of such defendant and cross complainant. Getzelman v. Blazier, 112 Ill. App. 648.

12. Winn v. Itzel [Wis.] 103 N. W. 220.

13. Randolph v. Nichol [Ark.] 84 S. W. 1037.

14. McCreery Land & Investment Co. v. Myers, 70 S. C. 282, 49 S. E. 848.

15. Winn v. Itzel [Wis.] 103 N. W. 220.

16, 17, 18, 19. Green v. Prince Metallic Paint Co., 25 Pa. Super. Ct. 415.

20. Campbell v. Justices of Superior Court [Mass.] 73 N. E. 659.

21. Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

22. Anthony v. Kennard Bldg. Co. [Mo.] 87 S. W. 921. See Directing Verdict and Demurrer to the Evidence, 5 C. L. 1004, for discussion of subject.

23. Andrews v. Scott, 113 Ill. App. 581.

24. Verdict and findings of jury or master, see ante, § 10.

25. See 3 C. L. 1234, 1235.

26, 27, 28. Pierce v. Woodbury [Me.] 60 A. 424.

29. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517.

30. See ante, § 10.

31. McClelland v. Bullis [Colo.] 81 P. 771.

32. Schoop v. Schoop, 115 Ill. App. 343; Entwhistle v. Henke, 113 Ill. App. 572; Obney v. Obney, 26 Pa. Super. Ct. 116; Id., 26 Pa. Super. Ct. 122. Findings of court were in accordance with verdict. Thompson v. Hardy [S. D.] 102 N. W. 299. While an equity case involving the issue of reformation is triable de novo in the appellate court, that court will be reluctant to disturb the findings of the trial judge. Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502. See Appeal and Review, 5 C. L. 121.

33. See 3 C. L. 1232.

34. The clerk cannot enter a decree dismissing a bill after the court has sustained a demurrer thereto. Livingston County Bldg. & Loan Ass'n v. Keach, 213 Ill. 59, 72 N. E. 769.

35. Attorney General v. Cent. R. Co. of New Jersey [N. J. Eq.] 59 A. 348.

36. Decree on a rule to show why a bid for property in the hands of a receiver

cree, but a statement in the preliminary part of a decree that all proper parties have been joined is not an irregularity calling for a reversal.[37] A decree is improper which in effect asserts the adequacy of the legal remedy by providing security against damages.[38]

Effect and construction.[39]—A decree rendered upon a cross bill is interlocutory.[40] A decree finding that the allegations of a bill are not true, and denying complainant the relief asked, is a final disposition of the bill, though it does not explicitly dismiss it.[41] A decree to which all parties in interest who were in esse at the time the proceedings became lis pendens is binding upon parties in interest subsequently coming into being.[42]

Measure of relief.[43]—A court of equity obtaining jurisdiction of the suit, it has power to grant full relief, legal as well as equitable;[44] such relief must, however, be warranted by the facts and be within the issues made by the pleadings;[45] that the pleader is mistaken in the relief which he asks is immaterial.[46] It has been held that a party is entitled to such relief as the nature of the case, and the facts as they exist at the close of the litigation, demand.[47] Under a prayer for general relief, whatever relief is justified by the allegations of the bill and the proof may be awarded,[48] and, where all the facts are stated, it is no reason for denying relief under a general prayer, because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based on the same facts, clearly set forth in the bill.[49] On the trial of a feeigned issue to determine the ownership of a fund paid into court it is error to permit a verdict and judgment to be entered against the defendant for a stated sum. The verdict and judgment should be for the plaintiff generally.[50] The decree may provide for further contingencies,[51] and the defendants being liable for different periods, the decree may regulate and provide the periods for which each defendant shall be held responsible.[52] The court may condition its grant of relief, by re-

should not be accepted. Day v. Davis, 213 Ill. 53, 72 N. E. 682.

37. Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71.

38. Western Union Tel. Co. v. Elec. Light & Power Co., 178 N. Y. 325, 70 N. E. 866.

39. See 3 C. L. 1234.

40. Blythe Co. v. Bankers' Inv. Co. [Cal.] 81 P. 281.

41. Kozacek v. Kozacek, 105 Ill. App. 180.

42. Pinkney v. Weaver, 115 Ill. App. 582.

43. See 3 C. L. 1234.

44. See ante, § 2 B, subd. Doing complete justice.

45. See 3 C. L. 1234, N. 98. A bill alleging that the deed was procured by fraud and undue influence at a certain place, a decree that the deed was obtained by fraud and undue influence, without reference to the place, does not vary from the allegations of the bill. Vollenweider v. Vollenweider, 216 Ill. 197, 74 N. E. 795. Under the Code of Practice relief may be granted according to the facts alleged and proved, though they are insufficient to constitute a cross complaint, and the pleading by which they are set forth is so designated. Randolph v. Nichol [Ark.] 84 S. W. 1037.

46. Hunt v. Fronizer, 3 Ohio N. P. (N. S.) 303. Equitable rights will not be denied to a defendant who has failed to pray for the equitable protection of the court in a suit for recovery of money paid out of the county treasury under an illegal contract for the construction of bridges. Id.

47. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. S. 153.

48. Thompson v. American Percheron Horse Breeders' & Importers' Ass'n, 144 Ill. App. 131; Langlois v. People, 212 Ill. 75, 72 N. E. 28; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763; Mobile Land Imp. Co. v. Gass [Ala.] 39 So. 229. Though a bill seeks to have deeds declared void ab initio, yet a right to have them canceled, because voidable, being shown by the averments of facts, such relief may be had under the prayer for general relief. Id. In a suit against a guardian for an accounting, it being shown that the guardian's decree of discharge was procured by fraud, the court may set aside such discharge under the prayer or general relief. Willis v. Rice [Ala.] 37 So. 507.

49. Lockhart v. Leeds, 159 U. S. 247, 49 Law. Ed. 263.

50. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

51. A decree in equity, giving judgment on a contract by which the defendant is obligated to pay monthly instalments, not all of which are due, may provide, also, for future instalments, and that judgment may be entered for the same as they fall due, on application of the court and notice to defendant's attorney. Dancel v. Goodyear Shoe Machinery Co., 137 F. 157.

52. Suit for an accounting by corporate

quiring that complainants do equity to their opponents, although the latter have been barred by limitation or by laches from successfully seeking that equity by an independent suit.[53] Immaterial errors will be disregarded.[54]

Modifications and amendment; vacation and setting aside; collateral attack.[55]—The court has power, after announcing a judgment, to amend the order before it is signed, to conform to the facts.[56] After the expiration of the term of court at which a decree was rendered, the court has no power over it, except to correct it in matters of form,[57] and it may, after directing the preparation of a decree dismissing a cross bill for want of equity, allow the cross complainant to dismiss without prejudice.[58] The application being made within a reasonable time,[59] the decree will be opened or set aside when to do so will result in doing equity.[60] Courts of equity will not set aside a decree upon the ground that it was obtained by false evidence, but only for fraud which gives the court a colorable jurisdiction.[61] As in other cases, the proof of the fraud must be clear and satisfactory.[62] A bill to impeach a decree by fraud, though not within the terms of the statute which bars a bill of review, must, by analogy, be governed by the same limitations.[63] Statutory methods of procedure govern.[64]

§ 14. *Rehearing,*[65]—A rehearing will not be ordered unless some special reason other than the desire of the defeated party to try the cause over again, be shown;[66] the chancellor may, however, grant a new trial if he is satisfied that the verdict or finding is against the weight of the evidence.[67] If the application is also for leave to present additional testimony, it must be shown that such testimony is newly discovered evidence, not accessible to the petitioner at the time of hearing, and that it will probably change the result.[68] A motion for a new trial being sustained, the cause is at issue for trial again, and the court has no authority to enter a judgment without another trial.[69]

§ 15. *Bill of review.*[70]—The object of a bill of review, or a bill in the nature

stockholders against directors. Barry v. Moeller [N. J. Eq.] 59 A. 97.

53. Burnes v. Burnes [C. C. A.] 137 F. 781.

54. Where, in an action on a vendor's lien note, defendant prayed for specific performance of a contract with plaintiff's decedent, whereby the note had been paid, held that, while the pleadings did not authorize the rendition of a general judgment for defendant on a finding that the note had been paid, yet being but a short way of accomplishing the right result, the judgment was not erroneous. Hasenbeck v. Hasenbeck [Mo. App.] 85 S. W. 916.

55. See 3 C. L. 1235.

56. Harmon v. Thompson [Ky.] 84 S. W. 569.

57. Finch v. Finch, 111 Ill. App. 481.

58. Paltzer v. Johnston, 213 Ill. 338, 72 N. E. 702.

59. A divorce decree will not be set aside where the party in whose favor it was rendered is dead, the rights of infants have intervened and the complainant has been guilty of laches. Evans v. Woodworth, 115 Ill. App. 202. Where a judgment note is not entered up until five years after its date, and no rule is taken to open it until four years after its entry, and the testimony on the rule to open is contradictory in character, the court is justified in refusing to open the judgment. Fryberger v. Motter, 24 Pa. Super. Ct. 317.

60. Where purchaser for value applied to have decree in favor of a volunteer opened, held, application would be granted. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865.

61. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

62. Evans v. Woodworth, 213 Ill. 404, 72 N. E. 1082. Two and a half years delay held to bar right to have divorce decree vacated for fraud, complainant having acquiesced in the proceedings to obtain such decree and the other party thereto being dead and the rights of third parties having intervened. Id. See Fraud and Undue Influence, 3 C. L. 1520.

63. Willis v. Rice [Ala.] 37 So. 507.

64. **Michigan:** Under Comp. Laws 1897, § 496, where a decree is entered on substituted service, the right of defendant to appear is conditional only on the payment of costs or securing thereof, and the appearing defendant is not required to give any notice to the opposite party. Coffin v. Ontonagon Circuit Judge [Mich.] 12 Det. Leg. N. 219, 103 N. W. 835. Notice or subsequent steps must of course be given. Id.

65. See 3 C. L. 1232. See New Trial and Arrest of Judgment, 4 C. L. 810.

66. Richardson v. Hatch [N. J. Eq.] 60 A. 52.

67. Hurley v. Kennally, 186 Mo. 225, 85 S. W. 357.

68. Richardson v. Hatch [N. J. Eq.] 60 A. 52.

69. Hurley v. Kennally, 186 Mo. 225, 85 S. W. 357.

70. See 3 C. L. 1235.

of a bill of review, is to procure the reversal, alteration, or explanation of a decree in a former suit.[71] If the decree has been signed and enrolled, the practice is to file a bill of review, if not, a bill in the nature of a bill of review.[72] When it is sought to review errors of law apparent on the face of the record, a bill of review may be filed without leave first had and obtained;[73] but where it is to review the findings by reason of newly discovered evidence, leave must first be had,[74] and the granting of such leave rests in the sound discretion of the court.[75] While ordinarily before a bill of review can be filed the decree sought to be reviewed must be first obeyed and performed, prior obedience or performance may be excused by poverty, want of assets, and other inability to perform the decree,[76] and the court may, in the exercise of its judicial discretion, grant leave to file the bill without such previous performance.[77] An order overruling a motion to strike the bill from the files, which motion is based upon complainant's failure to perform, is equivalent to the granting of such special leave.[78] A bill of review does not lie to vacate or review a consent decree unless the consent of the parties was obtained by fraud or mistake.[79] All persons or the legal representatives of persons who are necessary parties to the judgment sought to be reviewed must be made parties to the bill of review.[80] The term "legal representatives" means the executor or administrator if the subject-matter is personalty, and heirs or devisees if it is realty.[81]

Time for bill; laches.[82]—Except where the review sought is founded on matters discovered since the decree,[83] in the absence of express statutory enactment a bill of review must ordinarily be filed within the time limited by statute for the taking of an appeal [84] or the suing out of a writ of error.[85] Laches will bar the right.[86]

Grounds.[87]—A bill of review must rest on error in law apparent from the face of the record,[88] fraud in procuring the decree,[89] or newly discovered evidence not of

71. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

72. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

NOTE. Present importance of this distinction: "As stated by Judge Story in Dexter v. Arnold, 5 Mason, 310, Fed. Cas. No. 3,856. 'The distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the courts of the United States, and perhaps rarely in any of the state courts of equity in the Union. I take it to be clear that in the courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the term in which they are passed, so that the appropriate remedy is by a bill of review.' See, also, Wiser v. Blackly, 2 Johns. Ch. [N. Y.] 489."—From Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

73. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87.

74. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87. So held where grounds were fraud and newly discovered evidence. Rowan v. First Nat. Bank, 112 Ill. App. 434.

75. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87.

76, 77, 78. Perkins v. Tyrer, 24 App. D. C. 447.

79. Rowan v. First Nat. Bank, 112 Ill. App. 434.

80. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87. Where a party represented by a guardian died, held a notice served on the guardian was insufficient. Id.

81. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87.

82. See 3 C. L. 1236.

83. Jorgenson v. Young [C. C. A.] 136 F. 378.

84. Jorgenson v. Young [C. C. A.] 136 F. 378; Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931. A bill of review cannot be filed after the lapse of three years from the final decree, except in case of new or newly discovered evidence. Id.

85. Wieczorek v. Adamski, 114 Ill. App. 161.

86. Ten years of unexplained inaction in failing to interpose a bill of review constitutes laches. Wieczorek v. Adamski, 114 Ill. App. 161.

87. See 3 C. L. 1236.

88. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931. It is error, apparent on the face of a decree, if, taking the whole previous record into consideration, exclusive of the evidence, it is plain that no cause of action has been stated sufficient to justify the decree. Perkins v. Tyrer, 24 App. D. C. 447. A personal pro confesso decree entered against several defendants without proof in support of the bill held reviewable by a bill of review, the original bill erroneously stating that the contract on which it was based was one of a loan with collateral security. Id. Where a petition to file a bill of review shows a decree authorizing a sale of petitioner's lands for the nonpayment of taxes, which decree petitioner claims is invalid, and the answer, in effect, admits that no taxes were due against the land, petitioner should be allowed to file such bill to

a cumulative or impeaching character, but such as will produce a different result on the merits on another trial,[90] and which could not, by the exercise of reasonable diligence, have been discovered before the entry of the original decree.[91] If it appears that the complainant was heard as to matters complained of, or had opportunity to be heard in the original proceedings, the decree will not be disturbed.[92]

Application and proceedings.[93]—An application to review a decree upon a claim of newly discovered evidence must be supported by affidavit that the evidence is new and could not have been discovered by reasonable diligence before the hearing.[94] To maintain a bill of review and open a decree for fraud, the allegation must be so specific in fact and circumstances that the court may determine on demurrer whether there is sufficient ground for the relief prayed for,[95] and the particular facts relied upon must be supported by the affidavit of witnesses by whom such proof can be made.[96] An order overruling a demurrer to a bill of review is not erroneous because it fails to allow the defendants to plead over to such bill, where the bill was filed solely upon the ground of error of law apparent on the face of the decree, and the demurrer raised the only question that could be raised.[97] Such order should direct a dismissal of the original bill, unless the same be amended, it being fatally defective.[98]

§ 16. *Other equitable remedies for which no specific title is provided. Bill quia timet.*[99]—Fear that future recoveries on unliquidated claims will render a corporation insolvent will not sustain a bill quia timet by the holder of an unliquidated claim for damages,[100] nor in such case will fear that all the assets of the corporation will be distributed to the stockholders in the form of dividends before complainant can recover a judgment sustain such a bill.[101] It would seem that a bill quia timet will lie to prevent a woman from unwarrantably holding herself out as plaintiff's wife.[102]

ERROR CORAM NOBIS; ERROR, WRIT OF, see latest topical index.

ESCAPE AND RESCUE.

In both escape [1] and rescue [2] there must have been a detention based on lawful custody. It is immaterial that the arrested person passively submitted to arrest.[3] After a liberation of one unlawfully detained is complete, no criminality can be

set aside the decree. Rumsey v. Auditor General [Mich.] 101 N. W. 623.

89. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

90. Wieczorek v. Adamski, 114 Ill. App. 161; Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

91. Wieczorek v. Adamski, 114 Ill. App. 161; Jorgenson v. Young [C. C. A.] 136 F. 378. Where defendant testified that his brother was not his authorized agent or attorney in fact, a bill of review by plaintiff, alleging that such testimony was false, and was surmised by him so to be at the time it was given; and the falsity could be shown by powers of attorney of record, held, such records were not newly discovered evidence. Id.

92. Rowan v. First Nat. Bank, 112 Ill. App. 434.

93. See 3 C. L. 1236.

94. Watkinson v. Watkinson [N. J. Err. & App.] 60 A. 931.

95. Rowan v. First Nat. Bank, 112 Ill. App. 434. The charge must be coupled with a tender of proof sufficient to sustain it, and this must be alleged under specification that the court may determine its value. Id.

96. Rowan v. First Nat. Bank, 112 Ill. App. 434.

97, 98. Perkins v. Tyrer, 24 App. D. C. 447.

99. See 3 C. L. 1236.

100, 101. Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131.

102. Bell v. Clark, 45 Misc. 275, 92 N. Y. S. 411.

1. Complaint against Richard Roe; on learning his name it was entered and warrant issued against his real name and he was thus arrested. Held, lawful custody. State v. King [Kan.] 80 P. 606.

2. If the arrest must of necessity have been on warrant, either the arresting officer or one near by and acting in concert must have had the warrant. If it was in his house, the arrest was unlawful. Adams v. State, 121 Ga. 163, 48 S. E. 910.

3, 4. Adams v. State, 121 Ga. 163, 48 S. E. 910.

fastened on the liberator by procuring a lawful warrant and exhibiting it to him.[4] In Georgia it is an escape if a "trusty" voluntarily leaves a lawful chain gang, even if his sentence was alternative and he afterwards paid his fine,[6] and even though he left to avoid unmerited punishment.[7] A conspiracy to escape may subsist between prisoners, though one of them being sentenced for life is not with the statute defining escapes.[8] Under the law of Arkansas, one who aids a prisoner or does that which might aid him is guilty of a crime, though the prisoner does not assent.[9] It is irrelevant whether the prisoner is guilty,[10] The release of a prisoner under a mistake as to the authority of the officer ordering his release is equivalent to a negligent escape, and a prisoner so released may be taken and returned to custody.[11]

ESCHEAT.

Escheat must rest on the want of any person lawfully entitled to property.[12] If by any means a decedent had effectually disposed of property, it cannot escheat.[13] A devise of property "as the law directs" results in escheat if there are no relatives.[14] Ordinarily the title is in the state from the time of decedent's death, and not from decree,[15] but under statutes permitting aliens to hold inherited lands for a time certain, the public has no interest or any right of escheat initiate until the time has fully elapsed.[16] In Michigan the common-law doctrine that personalty of a dissolved corporation escheats is repudiated, at least where the members held a pecuniary interest in it,[17] and it is said that the doctrine should be obsolete.[18] In Kentucky the escheator may sue only in respect to decedent's property,[19] and though lands needlessly held by a corporation are forfeitable, he cannot sue.[20] In California, distributive shares of an estate falling to aliens who fail to claim them for five years escheat and do not fall back for distribution.[21]

Escheat can be claimed only by the state [22] and must be declared by a suit by the state.[23] Accordingly the grantor to an alien with covenants of warranty is estopped, and his heirs as well, to deny the title.[24] But where it is made the duty of the court in adjudging an escheat at suit of the state to ascertain and hold for the true owner the proceeds of the lands, the right of parties in respect to it may be adjudicated, though as between themselves relief has been denied for want of a litigable right.[25] Proof of want of relatives must naturally be negative and less certain than the contrary fact.[26]

5, 6, 7. Johnson v. State [Ga.] 50 S. E. 65.

8. People v. Wood, 145 Cal. 659, 79 P. 367.

9. Maxey v. State [Ark.] 88 S. W. 1009.

10. But proof that he was acquitted is harmless. Maxey v. State [Ark.] 88 S. W. 1009.

11. Jiha v. Barry, 3 Ohio N. P. (N. S.) 65.

12. Cannot take place where an incorporated fire company is dissolved and there are members or their legal representatives or other objects of the trust for which it held its funds still in being. Hopkins v. Crossley [Mich.] 101 N. W. 822. The common law and the modern doctrines of escheat and of forfeiture and confiscation are discussed in 2 Tiffany, Real Prop. p. 1049 et seq.

13. Evidence showed a completed gift in view of death. Phinney v. State, 36 Wash. 236, 78 P. 927.

14, 15. State v. Goldberg's Unknown Heirs [Tenn.] 86 S. W. 717.

16. Such a statute having been repealed, an action prematurely begun to declare the escheat has no basis in right to bring it within a saving clause. State v. Ellis [Kan.] 79 P. 1066.

17, 18. Hopkins v. Crossley [Mich.] 101 N. W. 822.

19, 20. Ky. St. 1903, §§ 567, 1606-1623 and Const. § 192. Commonwealth v. Wisconsin Chair Co. [Ky.] 84 S. W. 535; Commonwealth v. Farmers' Bank [Ky.] 84 S. W. 732.

21. Civ. Code, §§ 672, 1404; In re Pendergast's Estate, 143 Cal. 135, 76 P. 962.

22. Hopkins v. Crossley [Mich.] 101 N. W. 822.

23. Under Laws 1891, p. 7, c. 3, a nonresident alien may take title to land—subject to immediate forfeiture in some circumstances and with a right to hold it for a fixed time under other conditions—and until the state sues, the title cannot be questioned. Madden v. State, 68 Kan. 658, 75 P. 1023.

24, 25. Madden v. State, 68 Kan. 658, 75 P. 1023.

26. State v. Goldberg's Unknown Heirs [Tenn.] 86 S. W. 717.

Administration of a decedent's estate should precede escheat proceedings,[27] or else the latter should be stayed to abide the determination of the question whether there will be any property after debts are paid.[28] The judgment of escheat must be supported by findings that there is such property.[29] Whilst a petition to escheat does not invoke power to subject the property to payment of debts due to traversers who come in,[30] yet it will not invalidate the judgment where all parties participated without objection.[31] The state appealing from a decree of distribution on the ground that some of the shares have escheated must, in order to try that question, give notice of appeal to the distributees claiming such shares.[32] Failing such notice the appeal may proceed as to other parties and issues, and the shares which on the record appear to be escheated may be withheld pending suit to so declare them.[33]

The statutory right to sue to establish heirship and recover escheated property or its proceeds [34] is limited to such heirs and such conditions as are prescribed, and if not retroactive has no application to property fully escheated when the law was passed,[35] and under the laws of Montana the prescription of a time within which to sue excludes other limitations.[36]

ESCROWS.

An escrow is an instrument deposited with a stranger to be delivered to the obligee on the performance of a condition [37] and beyond power of revocation in the obligor.[38] The depositary must be a stranger to the escrow.[39] The escrow is inchoate,[40] and constitutes a mere scroll until the performance of the conditions.[41] A

27, 28. State v. Simmons [Or.] 79 P. 498.

29. State v. Simmons [Or.] 79 P. 498. Under the present law of Oregon (Gen. Laws 1903, p. 127, § 9), a proceeding to escheat property ousts the probate court of jurisdiction to determine heirship, but does not impair its power to settle the estate. Hence where there has been no such finding as that mentioned in the text, a premature judgment of escheat cannot be modified and as thus affirmed. Id.

30, 31. In re Bugg's Estate [S. C.] 51 S. E. 263.

32. In re Pendergast's Estate, 143 Cal. 135, 76 P. 962. The notice in such case must be to them, not merely to the attorneys who represented them. Id.

33. In re Pendergast's Estate, 143 Cal. 135, 76 P. 962.

34. In re Pomeroy's Petition [Mont.] 81 P. 629. Statute enabling nonresident alien to so sue does not enable citizens to do so. Id.

35. Code Civ. Proc. § 2253, is prospective. In re Pomeroy's Petition [Mont.] 81 P. 629.

36. Construing Code Proc. § 2253 and Pol. Code, § 5162. In re Pomeroy's Petition [Mont.] 81 P. 629.

37. A deed deposited with a third person to be delivered to the grantee on the performance of a condition is an escrow. Guild v. Althouse [Kan.] 81 P. 172. Receipt construed and held to constitute a mere escrow agreement creating no fiduciary relations between the parties. Havana City R. Co. v. Ceballos [C. C. A.] 139 F. 538.

38. Deed. Hayden v. Collins [Cal. App.] 81 P. 1120; Tompkins v. Thompson, 93 N. Y. S. 1070.

39. A delivery in escrow cannot be made to the grantee (Clark v. Harper, 215 Ill. 24, 74 N. E. 61) and if a delivery purports to be such, it will operate as an absolute delivery free from all parol conditions. Whitney v. Dewey [Idaho] 80 P. 1117.

40. Instructions held erroneous. Blair v. Security Bank, 103 Va. 762, 50 S. E. 262; Davis v. True, 89 App. Div. 319, 85 N. Y. S. 843.

41. If the grantee obtains possession of it he acquires no title. Powers v. Rude, 14 Okl. 381, 79 P. 89. That an escrow is delivered before the performance of the conditions constitutes a complete defense to it. Blair v. Security Bank, 103 Va. 762, 50 S. E. 262. The recordation of a deed delivered out of escrow without performance of the conditions constitutes a cloud on the grantor's title. Bales v. Roberts [Mo.] 87 S. W. 914. Evidence held to show that a grantor never authorized the delivery of a deed deposited in escrow except on the happening of the condition. Skinner v. Kelley [Mich.] 101 N. W. 205.

NOTE. Purchase from the grantor of a deed in escrow: Delivery of the deed is necessary to pass the title to land and escrow is a method of delivery. Under the general rule, this delivery does not avail to pass the title until the performance of the conditions or the happening of the contingency upon which the deed is held in escrow (Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179); but if for any reason, such as insanity, coverture, or death, the grantor becomes incapacitated from passing title before the delivery out of escrow, this second delivery is by the fiction of relation carried back to the time of the delivery into escrow so as to make the title pass as of that time (Webster v. Kings County Trust Co., 145 N. Y. 275). Since then, in the or-

delivery out of escrow without performance of the conditions is not binding on the obligor,[42] unless by virtue of estoppel, based on his negligence relative to such unauthorized delivery.[43] And while delivery must be with his consent,[44] which is deemed withheld until the performance of the conditions,[45] such performance renders the escrow effective, notwithstanding the death of the obligor in the meantime,[46] providing the instrument is an escrow,[47] no manual delivery out of escrow being essential.[48] If the depositary delivers the deed to the grantee without informing him of the conditions, they are not binding upon him;[49] but if he is informed of the conditions, he acquires no rights without performing them.[50] The holder of the escrow has no authority to accept performance of the conditions after the time within which they were to be performed has transpired.[51] It is held by some courts that a deposit of a deed in escrow passes title immediately,[52] while others hold that title does not pass until delivery out of escrow,[53] the grantor in the meantime being powerless to

dinary case it is not the grantor's deed until the second delivery, the question arises whether a subsequent grantee getting a conveyance before the performance of the conditions of the escrow would get a title indefeasible at law. It is the policy of the law to favor the grant in escrow. At least it is not regarded as just that one charged with notice of the grant in escrow should nevertheless take a complete legal title; and all jurisdictions agree that he cannot, though there may be an exception where the original grantee is a volunteer. Since, however, the cases reach this result on different grounds, a conflict arises as to whether an innocent purchaser will take a complete legal title. Some jurisdictions cut off the intervening grant to a purchaser with notice by extending the use of the fiction of relation (McDonald v. Huff, 77 Cal. 279). But as it is a general doctrine that a fiction invoked to do justice should not be used against innocent third parties (Viner's Abdg. tit. "Relation"), in these jurisdictions a bona fide purchaser from the grantor of a deed in escrow takes an indefeasible title (Wolcott v. Johns, 7 Colo. App. 360), and this doctrine has been recently followed (Emmons v. Harding, 162 Ind. 154, 70 N. E. 142).

Other jurisdictions do not allow an innocent purchaser to defeat the grantee in escrow. Hall v. Harris, 5 Ired. Eq. [N. C.] 303. These jurisdictions hold that after the deed is placed in escrow the grantor no longer has full legal tilte. The grant in escrow puts the land out of his power and makes it possible for the grantee to get something analogous to specific performance at law. All the grantor has is a title subject to a defeasance, and a title subject to a defeasance is all that a purchaser from him, whether mala fide or bona fide, can buy. Hooper. v. Ramsbottom, 6 Taunt, 12; Fort v. Beekman, 1 Johns. Ch. [N. Y.] 288. Therefore, notwithstanding the intervention of third parties, the grantee in escrow gets a full legal title upon performance of the conditions. Leither v. Pike, 127 Ill. 287. The latter decisions invoke no fiction in reaching this result, and seem to support the better rule.—18 Harv. L. R. 138.

42, 43 Houston Land & Trust Co. v. Hubbard [Tex. Civ. App.] 85 S. W. 474.

44, 45. Powers v. Rude, 14 Okl. 381, 79 P. 89.

46. A deed deposited in escrow becomes effective on performance of the conditions, and the death of the grantor does not abrogate the contract of deposit. Guild v. Alahouse [Kan.] 81 P. 172. After delivery in escrow to be delivered to the grantee on the grantor's death, of a deed of the land, rents, issues and profits thereof, the grantor died, while crops were growing. Held, the grantee was entitled to the amount agreed as rent. Wilhoit v. Salmon, 146 Cal. 444, 80 P. 705.

47. A husband executed a deed to his wife and deposited it with a third person, to be delivered in case the grantor again became intoxicated. At the time of his death the deed had not been delivered, though the condition had been satisfied. Held, since there was no contract pursuant to which the deposit had been made, the depositary was only the agent of the grantor and his authority was terminated by the death of the grantor. Bosea v. Lent, 44 Misc. 437, 90 N. Y. S. 41.

Note: The depositary of an escrow is usually called the agent of both parties to the instrument (Davis v. Clark, 58 Kan. 100; Olmstead v. Smith, 87 Mo. 602); but neither the death of the grantor or of the depositary will defeat the escrow (Ruggles v. Lawson, 13 Johns. [N. Y.] 285, 7 Am. Dec. 375), and since it is essential that neither party shall have acquired the instrument (Cook v. Brown, 34 N. H. 460; Cocks v. Barker, 49 N. Y. 107), it would seem more accurate to regard him an impersonal or an automaton. The court in the principal case having found that the grantor had never released control of the deed, no escrow was created.—5 Columbia L. R. 163.

48. A delivery in escrow is deemed consummate from the performance of the condition if the obligor dies prior to such performance. Gaudy v. Bissell's Estate [Neb.] 100 N. W. 803.

49, 50. Virginia Passenger & Power Co. v. Patterson [Va.] 51 S. E. 157.

51. Brinton v. Lewiston Nat. Bank [Idaho] 81 P. 112.

52. A delivery in escrow to be delivered at the grantor's death vests title in the grantee immediately, qualified by the life estate. Wilhoit v. Salmon, 146 Cal. 444, 80 P. 705.

53. Delivery is there deemed however to relate back. Tompkins v. Thompson, 93 N. Y. S. 1070. And see Bither v. Christensen [Cal. App.] 81 P. 670.

revoke it.[54] An escrow will be given effect from the date of deposit if such is the intention of the parties.[55]

ESTATES OF DECEDENTS.

54. Tompkins v. Thompson, 93 N. Y. S. 1070. And see Hayden v. Collins [Cal. App.] 81 P. 1120.

55. Where it is the intention of the parties that a note delivered in escrow shall draw interest from the date of deposit, it will be so computed and not merely from the date of consummation of the transaction. Bither v. Christensen [Cal. App.] 81 P. 670. And see Tompkins v. Thompson, 93 N. Y. S. 107.

Scope of title.—Matters relating to the descent of property under the interstate laws,[1] the validity, probate, and interpretation of wills,[2] testamentary trusts,[3] and inheritance and succession taxes, are treated elsewhere.[4]

§ 1. *Necessity or occasion for administration and kinds thereof.*[5] An administrator may be appointed for the sole purpose of collecting and receiving the proceeds of property or funds, or rights of action which cannot otherwise be made available, even though such proceeds will not become general assets of the estate, or liable for decedent's debts, but will belong to particular persons entitled thereto by law or by contract with deceased.[6] In such case it is for the probate court to determine whether there is an apparent claim, a bona fide intention to pursue it, and whether administration is necessary to its pursuit.[7]

Statutes in some states authorize the appointment of administrators for persons who have been absent and unheard of for a specified period, on the theory that they are presumed to be dead.[8]

No administration is necessary where there are no debts, and no suits to be brought,[9] nor to render a homestead exemption effectual.[10] As a general rule the estate may be settled without administration by agreement of all parties interested therein,[11] but if administration in the usual way thereafter becomes necessary, such an agreement becomes inoperative, except in so far as it has been executed, and the rights of the parties are to be determined as if it had never been made.[12]

In some states the conservator of a lunatic, idiot, drunkard, or spendthrift, if a resident, may, under his letters as such and without further letters of administration, make final settlement and distribution of his ward's estate.[13]

1. See Descent and Distribution, 5 C. L. 995.

2. See Wills, 4 C. L. 1863.

3. See Trusts, 4 C. L. 1727.

4. See Taxes, 4 C. L. 1605.

5. See 3 C. L. 1239.

6. Richards v. Riverside Ironworks, 56 W. Va. 510, 49 S. E. 437. Right of action for wrongful death being given solely to the representatives of deceased (Code 1899, c. 103, §§ 5, 6), refusal to appoint administrator would render it nugatory, though amount recovered is not assets. Id. Deceased died in Ohio by reason of injuries received while working for defendant in West Virginia. He left no property in the latter state. Held, that the claim against defendant for wrongful death must be regarded as personal property of decedent in the county where deceased was injured, and that the probate court of that county was therefore (Code 1899, c. 85, § 4, and c. 77, § 22) authorized to appoint an administrator to collect it. Id. The cause of action for wrongful death given by Code, § 1498 is a sufficient basis for the grant of letters of administration on the estate of a nonresident in the county where the injury and death occurred, though it is not assets in the sense that it must be distributed according to the law of the domicile, and though deceased left no other assets in the state. Vance v. Southern R. Co., 138 N. C. 460, 50 S. E. 860. A cause of action for death by wrongful act is sufficient upon which to base the appointment of an administrator for a nonresident leaving no resident next of kin, though a foreign administrator might have maintained the action. Western Union Tel. Co. v. Lipscomb, 22 App. D. C. 104.

7. Richards v. Riverside Ironworks, 56 W. Va. 510, 49 S. E. 437.

8. Code Pub. Gen. Laws, art. 93, § 230, authorizes administration of estates of those who have been uninterruptedly absent and unheard of for more than seven years. Lee v. Allen [Md.] 59 A. 184. Due process clause of 14th amendment to Federal constitution does not deprive state of power to confer jurisdiction on its courts to administer on estates of absentees. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125. Pa. Laws 1885, p. 155, providing for the administration of estates of absentees, does not violate such clause either as to the publication of notice of the proceeding or as to the remedy afforded the absentee in case of his return. Id. Fixing period of absence at seven years held not so unreasonable as to render statute repugnant to such clause. Id.

9. Where father left no debts and no estate, and his son, who predeceased him, left no debts, the next of kin of both, being the same persons, could distribute the son's estate without administration on the father's estate. In re Losee's Estate, 94 N. Y. S. 1082. If no debts. Distributees or legatees may sue for property. Patton v. Pinkston [Miss.] 38 So. 500.

10. Exemption from forced sale to satisfy ancestor's debts. Randolph v. White, 135 F. 875.

11, 12. Bennett v. Morris, 111 Ill. App. 150.

13. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2665. Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329. Amendment whereby this provision was incorporated into the statute (Sess. Laws 1895, p. 244) held not unconstitutional as embracing more than one subject not expressed in the title. Id.

Community property may generally be administered by the surviving husband or wife without the supervision of the probate court.[14] In some states, upon the death of her husband without lineal descendants, the widow is his sole heir, and may, upon the payment of his debts, take possession of his property without administration.[15] This rule applies only in cases of intestacy,[16] and a legacy is not a debt as the term is therein used.[17]

In Louisiana, dative letters will be refused where the widow holds as usufructuary, the only debts are costs which are assumed by the attorney, and the only legatee is willing to await the widow's death before payment.[18]

A temporary administrator [19] may be appointed pending the appointment of one entitled to permanent letters.[20]

An ancillary administrator [21] is one appointed in a state other than that of decedent's domicile for the purpose of representing the estate therein.[22]

An administrator de bonis non [23] may be appointed after the death, resignation, discharge, or removal of the original representative, where the estate has not been fully administered.[24]

An administrator pendente lite [25] may in some states always be appointed where the appointment of a general administrator is delayed for any reason, or the validity of the will is contested, or pending an appeal of proceedings on removal of an executor or administrator.[26]

§ 2. *Jurisdiction and courts controlling administration.*[27]—The jurisdiction and powers of courts in administering upon the estates of decedents are fixed by the statutes of the various states.[28] Courts to which such matters are intrusted are,

14. Husband may administer it for payment of debts. Levy v. W. L. Moody & Co. [Tex. Civ. App.] 87 S. W. 205.

15. Civ. Code 1895, § 3355, subd. 1. Moore v. Smith, 121 Ga. 479, 49 S. E. 601; Harrell v. Harrell [Ga.] 51 S. E. 283. Cannot sue on a debt owing decedent until after she has paid all his debts. Jackson v. Green [Ga.] 51 S. E. 284.

16. Widow cannot recover on chose in action of decedent where there is in existence a paper apparently executed in due form of law as the will of the deceased, until there has been a judgment of the court of ordinary that it is not his will. Harrell v. Harrell [Ga.] 51 S. E. 283.

17. Harrell v. Harrell [Ga.] 51 S. E. 283.

18. Succession of Glancey [La.] 38 So. 554.

19. See 3 C. L. 1240.

20. An appeal from the order admitting will to probate taken after the issuance of letters to, and the qualification of executors named therein, operates to suspend their functions pending its determination, and in such case it is proper for surrogate to grant them limited powers necessary for the preservation of the estate. Code Civ. Proc. § 2582. In re Choate's Will, 94 N. Y. S. 176. Where a resident of one county dies in another with property or business matters in the latter requiring immediate attention, the superior court of the latter may appoint a special administrator to conserve such property until an executor or general administrator is appointed in the former county. In re Long's Estate [Wash.] 81 P. 1007.

21. See 3 C. L. 1240.

22. Every administration, either on testate or intestate estates, granted in another state, not based on the adjudicated fact of decedent's domicile therein, but solely on the accidental situation of some personalty which may require the aid of its laws for its reduction to possession, is an administration ancillary in its nature to that of the domicile, whether granted before or after the grant of domiciliary administration. Appeal of Hopkins, 77 Conn. 644, 60 A. 657. In Missouri, nonresident executors cannot act, either in the collection of debts due the estate, or in disposing of its property for the payment of debts or legacies. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. In case one dying testate leaves property in a state other than that of his domicile, letters testamentary with the will annexed should be issued in the latter state to some one qualified to administer by its laws. Rev. St. 1899, § 254. Such administration is in the nature of ancillary administration. Id. It is no objection to the grant of letters in the latter state that the estate is in process of administration in the state of testator's domicile. Id. Issuance of ancillary letters is necessary to enable a foreign executor to recover assets of the estate. Downey v. Owen, 98 App. Div. 411, 90 N. Y. S. 280. Ancillary letters are based on the existence of personalty. Spratt v. Syms, 93 N. Y. S. 728.

23. See 3 C. L. 1241.

24. After final settlement and discharge, there is neither a "death," "resignation" or "removal" to warrant letters de bonis non. Hickey v. Stallworth [Ala.] 39 So. 267. Grant of letters de bonis non when there is no vacancy is void. Id.

25. See 3 C. L. 1240.

26. Power exists where contest is being carried on in another court. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379.

27. See 3 C. L. 1241.

28. See, also, Jurisdiction, 4 C. L. 324.

in most states, courts of record, possessed of special, superior and original jurisdiction to administer any relief pertinent to probate and administration,[29] and of appropriate equitable powers.[30]

29. As to jurisdiction of the various courts to hear and allow claims, see § 6B, post. As to whether such courts are courts of general jurisdiction so as to render their judgments immune from collateral attack, see § 15, post. As to jurisdiction of appellate courts, see § 16, post.

In Illinois the probate court is not a constitutional court but a creature of statute, and possesses only such powers as are conferred upon it by the laws passed in pursuance of the constitutional provision authorizing its creation. Upson v. Davis, 110 Ill. App. 375.

In Montana, probate courts or district courts sitting in probate have but a special, limited jurisdiction, and only such powers as are expressly granted to them by statute, or necessarily implied to give effect to those granted. Statute giving them power to enforce written contracts of the decedent to convey land does not give them power to enforce executory oral ones. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334.

Montana. The assignment of dower is not the settlement of the estate, or any part of the settlement of the estate of a deceased person, nor a matter of probate, and the county court has jurisdiction to assign it only when the right thereto is not disputed by the heirs and devisees, or any person claiming under them or either of them. Cobbey's Ann. St. 1903, § 4908. Swobe v. Marsh [Neb.] 102 N. W. 619. The district court has original jurisdiction to assign both dower and homestead. Not curtailed by statute last cited. Id.

In New Jersey the orphans' court is a statutory tribunal with no powers beyond those conferred by law. Cannot, in absence of statute, allow counsel fees to next of kin defending fund from distribution to those held not entitled thereto. Smith v. McDonald [N. J. Err. & App.] 61 A. 453. Has no jurisdiction to determine whether executors were negligent in failing to make provision for the payment of legacies at the proper time, the appropriate remedy being by bill in equity. In re Woolsey's Estate [N. J. Eq.] 59 A. 463.

In New York the eminent domain court has jurisdiction to determine the amount of attorney's fees to be allowed an executrix who is a party to the proceeding. Does not interfere with the jurisdiction of the surrogate court. In re East Seventh St., 95 N. Y. S. 140.

In Pennsylvania the direction and control of executors and administrators in the performance of their duties is an essential attribute of the jurisdiction of the orphans' court. They are officers of that court and should not be compelled to take orders from two courts. Moore v. Fidelity Trust Co. [C. C. A.] 138 F. 1, afg. 134 F. 489.

Tennessee: Under Shannon's Code, § 3934, providing that letters of administration shall be granted by the county court, and § 3940, authorizing appeals to the circuit court from orders appointing administrators, the circuit court has no jurisdiction to make an appointment on appeal to it, or to revoke letters improvidently granted, but should, on determining the appeal in favor of appellant, remand the cause for the issuance of letters by the county court. In re Wooten's Estate [Tenn.] 85 S. W. 1105. Circuit court has no power to consider the application of any one not a party to the proceedings in the county court. Id.

In Texas, in probate matters, the county court is one of general jurisdiction. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839. A proceeding to compel an administrator to include in his inventory certain notes and credits held by him for decedent is not an action for debt ousting probate jurisdiction, but the county court has jurisdiction thereof under Const. art. 5, § 16, and Rev. St. 1895, art. 1840, giving it general probate jurisdiction, and under the express provisions of Batt's Ann. Civ. St. §§ 1973-1975. Moore v. Mertz [Tex. Civ. App.] 85 S. W. 312.

In Washington the superior court of the county of which deceased was a resident or in which he had his abode at the time of his death has exclusive original jurisdiction to administer his estate, and to issue general letters of administration thereon. 2 Ball. Ann. Codes & St. § 6087. In re Long's Estate [Wash.] 81 P. 1007.

In West Virginia, county courts and the clerks thereof in vacation have exclusive original jurisdiction in all probate matters involving the probate of wills and the ordinary administrative proceedings involved in the settlement of estates. Stone v. Simmons, 56 W. Va. 88, 48 S. E. 841. Acts 1872-73, c. 136, p. 456, giving the circuit court concurrent jurisdiction with the county courts in probate matters, held repealed by the repealing clauses of Acts 1882, cc. 68, 84, pp. 137, 194. Id.

In Wisconsin the county court has no jurisdiction to compel an accounting by a surviving partner. Circuit court has jurisdiction of bill by administrator of deceased partner to compel an accounting of the partnership affairs by the surviving partner and the representatives of another deceased partner, notwithstanding that the estate of the latter is in process of settlement by the county court, since county court has no jurisdiction to bring before it or enter judgment against the surviving partner. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

30. Illinois: A court having jurisdiction over estates of decedents, though having no general chancery powers, may administer equity principles in the exercise of its jurisdiction. Wheeler v. Wheeler, 105 Ill. App. 48. Claimant recovered judgments on two notes against the maker and the surety jointly, and on the subsequent death of the latter, filed claims against his estate based thereon. The administratrix paid the claims in full with money contributed by herself and the heirs, and then sued the maker, who claimed that the judgments were joint and consequently could not be enforced against decedent's estate, and claim could not have been allowed had plaintiff interposed such a

The general rules controlling precedence and conflict in jurisdiction,[31] and the jurisdiction of various courts over testamentary trusts, are treated elsewhere.[32]

The residence of decedent and the situs of the property fix the jurisdiction of the probate courts of particular counties,[33] and the existence of property within the state is generally held to be a condition precedent to the administration of the estates of nonresidents.[34] Whether decedents were residents of the state at the time of their deaths so as to give the public administrator a legal right to administer on their estates is a question of fact for the trial court.[35]

It has been held that probate courts have no jurisdiction to determine the respective rights of individuals in property the title to which it is claimed that decedent parted with prior to his death,[36] or rights under ordinary contracts not testa-

defense. Held, that the county court, in the exercise of its equitable powers had the right to look beyond the judgments to the notes, and allow the claim as an equitable money demand. The equitable jurisdiction of the county and probate courts does not give them power to declare a deed absolute on its face to be a mortgage. Rook v. Rook, 111 Ill. App. 398.

Missouri: Though the probate court has not general jurisdiction in equity, it may allow claims which are equitable as distinguished from legal, and entertain equitable defenses to claims and demands against the estate. Has jurisdiction to entertain defense to application for widow's allowance based on a separation agreement whereby she released all her rights in her husband's property, though such contract can be affirmatively enforced only in equity. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

In Pennsylvania the orphans' court is a court of equity and may compel an accounting by a surviving partner, who is one of the executors, of the assets of the partnership estate. Moore v. Fidelity Trust Co. [C. C. A.] 138 F. 1, afg. 134 F. 489.

In Texas both the county court sitting in probate, and the district court on appeal, in classifying claims against the estate and for the purpose of determining their privity, have jurisdiction to hear evidence of a mistake in the terms of a written contract in order to determine the status of a claim growing out of it, and to grant appropriate relief. Held, that there was no intention to release vendor's lien, and that it was done through a mistake, so that lien was superior to widow's allowance. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

Wisconsin: Where probate courts are given jurisdiction over all matters relating to the settlement of the estates of decedents, they necessarily have by implication all the judicial authority of courts of equity in the administration of trusts necessary to the proper administration of the particular class of trusts in question. Under Rev. St. 1898, § 2443, county court has jurisdiction to determine the expense incurred by administrator for legal services, and on his defalcation without having paid for them, to make the amount thereof a lien on the assets of the estate in their favor. Carpenter v. United States Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404.

31. See Jurisdiction, 4 C. L. 324.

32. See Trusts, 4 C. L. 1727.

33. Where the resident of one county dies in another with property or business matters in the latter requiring immediate attention, the superior court of the latter may appoint a special administrator to conserve such property until an executor or general administrator is appointed in the former county (In re Long's Estate [Wash.] 81 P. 1007; but the appointment of such a special administrator does not give such court jurisdiction to issue letters of general administration, nor in any way to interfere with the exercise of general jurisdiction by the court of the county where deceased resided or had his abode (Id.). On an application for the grant of letters of administration, the proceedings of the superior court of another county granting special letters are immaterial. Certified copy thereof held properly excluded. Id.

34. New York: Under Code Civ. Proc. § 2476, subd. 4, the surrogate has no authority to grant original letters of administration with the will annexed on the estate of one who was not a resident of the state at the time of his death, but who left property in the county, unless the will of the testator is produced and proven before him. Spratt v. Syms, 93 N. Y. S. 728. The rule is not changed by the fact that the will is filed and remains in another state. Id. Has no jurisdiction to administer on the estate of a nonresident who has no property in the state. McCarthy v. Supreme Court I. O. F. 94 N. Y. S. 876.

Missouri: The granting of letters of administration on the estate of one dying testate in a foreign state is proper, where deceased leaves personalty, consisting of debts due him, in the county where the letters are granted, and also owes debts in such county. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. Even if court in which suit for partition of realty of one dying in another state was instituted had exclusive jurisdiction to the exclusion of that subsequently exercised by the probate court in directing administrator to take charge of the realty, the granting of letters by the latter court as to personalty was in no way affected thereby. Id. The fact that an order authorizing such administrator to take charge of the realty is invalid in no way affects the validity of the letters. Order and letters are separate, and overthrow of former in no way invalidates latter. Id.

35. Preponderance of evidence held to be in favor of finding that they were. Sommer v. Franklin Bank, 108 Mo. App. 490, 83 S. W. 1025.

36. The surrogate has no jurisdiction to pass upon the issue of title to property be-

mentary in character, even though made in contemplation of death,[37] or the validity of assignments by the heirs or beneficiaries of their interest in the estate.[38]

A probate court in a statutory partition cannot decide questions of jurisdiction.[39]

A state court has jurisdiction to order the transfer of national bank shares by an executrix to one for whom decedent held them in trust.[40]

The right of the probate court to exercise supervisory control over the estate does not give it jurisdiction to appoint a "superintendent" thereof,[41] and such appointment being void, a writ of prohibition will issue against the appointee to prevent him from acting as such.[42]

Jurisdiction of Federal courts.[43]—The Federal courts have no original jurisdiction in respect to the administration of the estate of a decedent and cannot take any action or make any decree looking to the mere administration of such an estate.[44] They have, however, in cases where the requisite jurisdictional amount is involved, and where there is diversity of citizenship, concurrent jurisdiction with the courts of the various states to hear and allow claims against such estates, and this is true even though the state statutes confer exclusive jurisdiction to hear and adjudge such claims on certain state courts.[45] In the exercise of such jurisdiction they administer the laws of the state of decedent's domicile, in the enforcement of which they uniformly follow the rules and decisions governing the state tribunals in so far as they violate no right secured by the Federal constitution or statutes.[46] The action may be at law in case it is commenced within the time limited for the presentation of claims, and no equitable relief is necessary to the allowance of the claim.[47] In case, however, the allowance of the claim for good cause shown after the expiration of the time limited, or the extension of such time, or other relief which can be secured by the exercise of the judgment of the chancellor alone, is indispensable, resort must be had to a suit in equity.[48]

tween an administrator as an individual and third parties, where both parties claim that deceased parted with the title thereto prior to his death. In re Finn's Estate, 44 Misc. 622, 90 N. Y. S. 159. Code D. C. § 122, providing a prompt remedy in the probate court for the discovery and reduction to possession of concealed assets of an estate gives that court no jurisdiction to determine ownership of property in the hands of persons claiming adversely to the estate, they having made full disclosure of assets in their possession. Richardson v. Daggett, 24 App. D. C. 440.

37. Cannot determine rights arising under contract between husband and wife made after marriage, where it was not executed with the formalities essential to a will. McWhorter v. Oneal, 121 Ga. 539, 49 S. E. 592.

38. See post, § 12.

39. Penn v. Case [Tex. Civ. App.] 81 S. W. 349. See, also, special article, 3 C. L. 1489.

40. In re Fisher's Estate [Iowa] 102 N. W. 797.

41. Right of court to exercise a supervisory control over the estate does mean control by means of a personal and irresponsible agent. Court has no agent or representative except the administrator. Such an appointment not authorized by Laws 1901, c. 81, § 8. Koury v. Castillo [N. M.] 79 P. 293.

42. Koury v. Castillo [N. M.] 79 P. 293.

43. See 3 C. L. 1244.

44. Where surviving partner of firm was one of the executors of the estate of his deceased partner, the settlement of which was pending in the probate court of the state, which had full equitable jurisdiction to compel an accounting between the executor and by the surviving partner of his deceased partner's interest in the firm, bill cannot be maintained in Federal court by distributee under will to compel accounting by such surviving partner and a payment of the amount found due to the executors for distribution, particularly when both parties are citizens of the same state. Moore v. Fidelity Trust Co. [C. C. A.] 138 F. 1, afg. 134 F. 489.

45. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. Jurisdiction of Federal courts cannot be limited by state statutes. Alice E. Min. Co. v. Blanden, 136 F. 252.

46. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42; Alice E. Min. Co. v. Blanden, 136 F. 252.

47. Action to secure allowance of claim and its certification to proper state court for allowance in its class. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

48. Federal court cannot determine such questions in an action at law. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42.

A Federal court has jurisdiction equally with state courts to enforce liens on the interests of defendants in funds belonging to the estate of a decedent in the hands of an ancillary administrator.[49] Whatever action it may take, however, is subject to that of the probate court within its proper jurisdiction.[50] It will not enjoin the local probate court from directing that the funds within its control be remitted to the court of probate of the domicile,[51] but will, on a proper showing, enjoin those whose interests are sought to be reached from receiving any portion of the estate under any order of distribution by either the local probate court or that of the domicile.[52] Its decree in such case is necessarily confined to the property localized within its jurisdiction, though personal judgments may be entered against the defendants, to which the liens are incidental.[53]

Short of intermeddling with the possession of a state court, or controlling the administration, the Federal court may, where the requisite diversity of citizenship exists, grant full relief to one suing to obtain the share of the estate to which he is entitled.[54] If the requisite diversity of citizenship exists, and the jurisdictional amount is in controversy, such courts may direct the disposition of trust property over which the probate court has no jurisdiction,[55] and may entertain suits to set aside as fraudulently obtained judgments of a probate court which are liens on decedent's realty situated in the district and inherited by complainants.[56]

Jurisdiction of courts of equity.[57]—When probate jurisdiction is exclusively vested in probate courts, county courts, or the like, equity has no jurisdiction to interfere in matters of probate,[58] unless in exceptional cases, where the jurisdiction of the probate court is inadequate or has been found inefficient.[59] Its determination that such an exceptional case exists will not be reversed unless clearly erroneous.[60]

49. Ingersoll v. Coram, 127 F. 418.

50. Ingersoll v. Coram, 127 F. 418; Id., 132 F. 168. Decree should declare that nothing therein is intended to or shall contravene any action of any probate tribunal in the state of the domicile with reference to distribution, or to any order or judgment remitting to the courts of the domicile. Ingersoll v. Coram, 136 F. 689.

51, 52. Ingersoll v. Coram, 136 F. 689, Id., 132 F. 168.

53. In suit in Federal court under Rev. St. § 738 to establish a lien on the interest of defendants in property in the hands of an ancillary administrator in the state in which the suit is brought, the decree is necessarily confined to the property localized within the jurisdiction, though personal judgments may be entered against the defendants, to which the liens are incidental. Ingersoll v. Coram, 136 F. 689.

54. Herron v. Comstock [C. C. A.] 139 F. 370.

55. Where the powers and duties of executors and trustees under a will are severable, and, prior to the filing of a bill in the Federal court by a beneficiary under the trust, the admininstration of the personalty by the executors has been completed, and nothing remains but the management and disposition of the trust realty remaining unsold for the completion of the trust, such court has jurisdiction to decree an accounting by the trustees and direct final distribution and settlement of the trust, the probate court having no jurisdiction in that regard. Herron v. Comstock [C. C. A.] 139 F. 370.

56. Circuit court has jurisdiction under Act March 3, 1875, § 8, 18 St. at L. 472, c. 137, Comp. St. 1901, p. 513, empowering circuit court to remove cloud on title to realty or personalty within the district as against nonresident defendants. McDaniel v. Traylor, 196 U. S. 415, 49 Law. Ed. 533. The value of the matter in dispute in a suit to set aside judgments establishing claims is the aggregate amount of the claims the allowance of which was procured. The judgments were obtained by several who conspired together. Id.

57. See 3 C. L. 1244.

58. Stone v. Simmons, 56 W. Va. 88, 48 S. E. 841. Executrix named in the will being insane, county court appointed an administrator with the will annexed. Executrix thereafter recovered and served notice on administrator of an application to the county court for the revocation of his letters and for her appointment as executrix. Held, that circuit court, in which he had commenced an action to construe the will and for directions in regard to the distribution of funds in his hands, had no jurisdiction to restrain the executrix from further prosecuting her action. Id. Could not be contended that such injunction was merely ancillary, since court had no jurisdiction. Id. Contention that appointment of executrix in county court would interfere with action of circuit court in its proceedings in main case held without foundation, since change would only apply to that part of the estate already administered. Id.

59. Though the ordinary jurisdiction of courts of equity over administrations has been taken away and conferred on probate courts, or has become obsolete, yet there still remains an auxiliary or supplemental juris-

Courts of equity in some states have jurisdiction to entertain administration suits at the instance of creditors, devisees, legatees, or others interested in the proper administration of an estate,[61] and to appoint a receiver for the estate on a proper showing.[62] An order in an administrator's suit authorizing the issuance of a receiver's certificate does not bind creditors not parties to the suit when it is made.[63] When one person is both domiciliary and ancillary administrator, the chancery court of the domicile may assume entire administration, though it covers foreign assets brought thither without settlement by the administrator under his ancillary letters.[64]

Creditors of a decedent's estate may resort to equity for the ascertainment and preservation of the property and assets of the estate, and the subjection of the same to the payment of the debts against it, when the personal representative refuses to perform his duty in the premises.[65] If necessary to full relief in such case, a receiver may be appointed to take charge of the premises.[66]

Equity has jurisdiction of a suit to enforce a pledge of or lien upon the undivided shares of heirs or devisees in the hands of an ancillary administrator,[67] and to appoint a new trustee where the administrator de bonis non, who is also trustee, denies the right of the beneficiaries to the trust fund.[68] It may also grant relief to the

diction, to be exercised in such cases. Under Rev. St. 1898, § 3845, as amended by Laws 1899, c. 5, p. 7, providing that actions may be prosecuted against executors and administrators in the circuit court when the county court cannot afford as adequate, complete, prompt, or efficient remedy, the circuit court has jurisdiction of a suit by the executor of a deceased director to wind up a corporation, in which a cross bill is filed against the executor to recover, as a corporate asset, a sum alleged to be due the corporation because of the wrongful conversion of its good will by decedent. Lindemann v. Rusk [Wis.] 104 N. W. 119.

60. Where the court of equity has determined that an exceptional case exists and has taken jurisdiction. Lindemann v. Rusk [Wis.] 104 N. W. 119.

61. Under Code, § 1511, authorizing original actions to be brought in the superior court against executors or administrators and empowering the court to order an account to be taken, and to adjudge the application or distribution of funds, or grant other relief as the case may require. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 50 S. E. 592. Facts set out in petition held to entitle parties to the aid of the court in protecting the property by the appointment of a receiver, and the adjustment of conflicting claims, to the end that it might be sold so as to pass an unincumbered title and under such circumstances and conditions as would pay the debts and leave the largest possible surplus to the devisees. Id. Where it appeared from the pleadings that the decedent had, prior to his death, entered into a contract for the sale of a part of the realty, under which certain vested rights were claimed, held, that it was proper for the court to dispose of the question so presented in order to clear the way for the sale of the property. Id. A distributee's right to remove administration to chancery in Alabama does not rest on any special equity such as the right to surcharge or falsify a partial settlement. Greenhood v. Greenhood [Ala.] 39 So. 299. A bill to remove administration to chancery and to require a bond of the executor may on general demurrer be sustained if defective as to the latter relief only; the attack should be to the defective part specifically. Cronk v. Cronk [Ala.] 37 So. 828.

62, 63. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 50 S. E. 592.

64. Greenhood v. Greenhood [Ala.] 39 So. 299.

65. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

66. May be appointed at the instance of creditors to take charge of, care for, put in marketable condition, and sell timber belonging to the estate, but subject to the purchase-money lien of a stranger on whose land it is lying, when representative has refused to do so. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Creditors do not represent estate and hence cannot take charge of timber or maintain any action at law for it or its proceeds. Id.

67. Lien to secure payment for services of lawyer in contesting will. Ingersoll v. Coram, 127 F. 418, Id., 132 F. 168. The fact that in ancillary probate proceedings the will was admitted to probate without any expressed reference to a compromise decree entered in the state of original jurisdiction whereby contesting heirs not named in the will were given a certain share in the estate, so that the record in the ancillary proceedings does not show any interest in such heirs, will not preclude a court of equity from fastening a lien upon their interest in the assets within the ancillary jurisdiction, such objection being one of form only, which will be disregarded. Ingersoll v. Coram, 136 F. 689.

68. Notwithstanding that administration is pending in the probate court. Morrow v. Morrow [Mo. App.] 87 S. W. 590. Where an administrator de bonis non is removed from his office as trustee, the fact that the time for proving demands against the estate had expired and that distribution had been made

beneficiaries on failure of the executor to properly perform the duty imposed on him by the will to select from the stock and bonds of the estate a sufficient amount to make up deficiencies in funds bequeathed in trust.[69]

A Federal court of equity has no jurisdiction of a suit against an executor or administrator to recover unliquidated damages for a tort alleged to have been committed by his decedent, where he is not charged as trustee, but is made a party solely as personal representative.[70]

As in other cases, a court of chancery having rightfully assumed jurisdiction of a matter involved in the administration of an estate, will grant complete relief, without remitting the parties to an action at law.[71]

§ 3. *The persons who administer and their letters. A. Selection and nomination.*[72] *The right to administer*[73] is a valuable right and those upon whom it has been conferred by statute should not be deprived of it except as provided by the statute.[74] One cannot sell his right to act as executor, and any agreement whereby he attempts to do so for a consideration is void as against public policy.[75] The legislature has a right to determine who may and who may not act as executor.[76]

Except as permitted by statute, only natural persons may be appointed.[77]

The executors named in the will have the right to the appointment unless they are within the class of persons declared by the statute to be incompetent,[78] or unless they have renounced their right,[79] which under certain statutes is presumed from delay to claim the right.[80] Such statutes apply to foreign as well as domestic

shows that no legal impediment obstructs the administrator's obligation to pay a trust fund to a new trustee. Id.

69. Blair v. Scribner [N. J. Err. & App.] 60 A. 211.

70. United States v. Bitter Root Development Co. [C. C. A.] 133 F. 274.

71. Plaintiff having sued to enjoin administrator from selling property to pay a fraudulent claim and alleging title in herself as evidence of her right to sue, court may quiet title in parties admitted to the suit as defendants and allowed to file answer and cross complaint in which they claimed the equitable title to the property. Norman v. Pugh [Ark.] 86 S. W. 833. See, also, Equity, 5 C. L. 1144.

72, 73. See 3 C. L. 1245.

74. Wiliams v. Williams, 24 App. D. C. 214.

75. Agreement whereby one of the executors renounced his right, in consideration of which, among other things, he was to share equally in the fees received by the other executors. Oakeshott v. Smith, 93 N. Y. S. 659.

76. Does not thereby interfere with testator's right to dispose of his property. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

77. In New York a foreign corporation cannot act as executor. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974. Corporations are not persons within meaning of code provisions relating to qualification of executors. Id. If they are, then foreign corporation is expressly prohibited from acting as such by § 2612, declaring incompetent aliens not inhabitants of the state. Id. As it is policy of the laws of the state not to permit the property of an estate to be taken out of the jurisdiction of its courts, there is an implied prohibition against foreign corporations acting as executors. Id. Banking Law, art. 4 (Laws 1892, c. 689, p. 1906), authorizing trust companies to act, applies only to domestic corporations. Id.

78. Are given preference by Rev. St. 1899, § 4574. Rice v. Tilton [Wyo.] 80 P. 828. Only objections authorized by Rev. St. 1899, § 4629, to the appointment of the executor named in the will are those specified by Id., § 4628. Id. Evidence held not to show incompetency. Id. The testator may appoint anyone and the court is bound to issue letters to the person so appointed unless he falls within a class specifically declared to be incompetent. Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, afg. 114 Ill. App. 312. Administration Act, c. 3, § 1 (1 Starr & C. Ann. St. 1896, p. 269), providing that when a will has been duly proved the county court "shall" issue letters testamentary to the executor named in the will, if he is legally competent, accepts the trust, and gives the required bond, is mandatory. Id. Under 1 Starr. & C. Ann. St. 1896, p. 270, c. 3, § 3, the only qualifications are that the person must be 17 years old, of sound mind and memory, and not under conviction of a crime rendering him infamous, and under Id. § 18, he must be a resident. Id. Administration Act, c. 3, § 5 (1 Starr & C. Ann. St. 1896, p. 270), providing that where two or more executors are named in the will and one of them dies, refuses to act, or is otherwise disqualified, letters shall be granted to the other person or persons so named and not renouncing and not disqualified, does not authorize the court to prescribe grounds of disqualification in addition to those prescribed by Id. §§ 3, 18. Id.

79. Rice v. Tilton [Wyo.] 80 P. 828.

80. By statute in some states an executor who fails to petition for probate and the grant of letters within a specified time after he has knowledge of the death of the tes-

wills.[81] The delay does not render the executors incompetent, but merely deprives them of their preferential right, and makes their appointment a matter for the exercise of the sound discretion of the court.[82] In the absence of a statutory provision to the contrary, mere moral delinquencies,[83] alleged indebtedness to the estate, even when liability is denied,[84] or allegations that there are reasons warranting the belief that he will subsequently incur disabilities or be guilty of conduct justifying his removal,[85] do not justify the court in refusing to issue letters to the person named as executor in the will.

In case the person named in the will dies,[86] or refuses to act, or is disqualified, letters of administration may be granted to those who would have been entitled thereto had there been no will.[87] One is not rendered incompetent to act as administrator with the will annexed by reason of the fact that he is hostile to the will and claims adversely to it.[88]

The right to administer on the estate of one dying intestate is generally given first to the surviving husband or wife,[89] then to the next of kin [90] or the heirs,[91] and

tator and of the fact that he has been named as executor may be held to have renounced his right to letters, and the court may appoint any competent person, unless good cause for delay is shown. Rev. St. 1899, § 4582, requires him to petition within thirty days. Rice v. Tilton [Wyo.] 80 P. 828. Evidence held to show no good cause for delay in applying for letters under foreign will. Id.

81. Rice v. Tilton [Wyo.] 80 P. 828.

82. Exercise of such discretion will not be disturbed on appeal unless abused. Rice v. Tilton [Wyo.] 80 P. 828.

83. Cannot refuse to appoint executrix because she maintained illicit relations with testator, and had alienated his affections from his family, and because by reason thereof her appointment would outrage the feelings of testator's family, work serious disadvantage to the beneficiaries, and prevent her co-executors from working in harmony with her. Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, afg. 114 Ill. App. 312.

84. Particularly in view of the statutory provision (3 Starr & C. Ann. St. 1896, p. 4045, c. 148, § 19) that the appointment of a debtor as executor does not release his debt. Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, afg. 114 Ill. App. 312. Thus letters should not be refused because executrix had received property from testator during the existence of illicit relations between them, and that it was necessary for his executors to contest her right to retain it. Id. In any event allegations in regard to the receipt of such property, etc., held too indefinite to warrant refusal of letters. Id.

85. 1 Starr & C. Ann. St. 1896, p. 282, c. 3, §§ 29, 30, authorizing removals in certain cases, the court has the right to remove executors only when one or more of such statutory grounds are properly brought before it for judicial action, and hence an objection to the appointment of an executrix on the ground that the court would be immediately obliged to remove her is untenable where no statutory grounds for removal are set out therein. Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, afg. 114 Ill. App. 312. Such sections authorize removals only for disabilities occurring after appointment. Id.

86. Under 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 269, § 1, the court is required, in such case, to commit the administration to the widow, surviving husband, next of kin, or creditor, the same as if deceased had died intestate. Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329. Act June 7, 1895, Sess. Laws 1895, p. 244, 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2665, providing for the settlement of a deceased lunatic's estate by his conservator repeals the last named statute pro tanto, or engrafts an exception thereon, so that, on the death of a lunatic's executor, his next of kin have no right to appoint an administrator as against his conservator's right to distribute his estate. Id.

87. Rev. St. 1899, § 11. Executors and widow of one dying in foreign state being disqualified by non-residence, letters held properly granted to brother of decedent who moved into state and acquired a residence therein. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

88. His bond affords sufficient protection to those interested. Rice v. Tilton [Wyo.] 80 P. 828.

89. Under Code D. C., §§ 276-280, 287, if the decedent leaves a widow and minor children, the widow, if a fit person, and qualified to act, is entitled to sole administration of the estate, and the probate court cannot against her consent appoint a co-administrator who is a stranger to the estate. Williams v. Williams, 24 App. D. C. 214. Under Code D. C., § 276, an adult child of decedent who is otherwise qualified may in the discretion of the probate court be appointed as co-administrator with the widow. Id. But if either is unwilling to act as joint administrator with the other, one of them should be appointed. Williams v. Williams, 25 App. D. C. 32. One cannot be appointed co-administrator against the protest of the other. Id.

90. Under Rev. St. 1899, § 7, providing that letters of administration shall be granted first to the husband or wife, and second to those entitled to distribution of the estate, or one or more of them, where deceased died in a foreign state and made his wife executrix, one of the next of kin is entitled to ancillary letters. State v. Guinotte [Mo. App.] 86 S. W. 884. Decedent's half-sisters are entitled to letters as against his maternal uncle. In re

then to the creditors, provided they are legally competent to act.[92] If none of these apply or will accept letters, then they may be granted to the first legally competent person applying therefor.[93] In New York a renunciation of the right to administer must be in writing, acknowledged or proved and certified as a deed, or otherwise proved to the satisfaction of the surrogate, and filed in his office.[94] An oral renunciation, which has not been acted upon by the parties, may be withdrawn with the consent of the surrogate.[95]

In case there are more than one next of kin of the same degree, the court may decide between them.[96] Where a stranger is appointed co-administrator with the next of kin, the latter is the only person entitled to object.[97]

In case the next of kin do not desire to act,[98] or in some states if they are nonresidents, they are entitled to nominate some other person who should be appointed if legally competent and a fit and suitable person for the office,[99] his fitness being tested by the same rules and tests as if the next of kin were applying personally.[1] The right of choice is not exhausted by reason of the fact that the first nominee is declared ineligible,[2] and, in such case, the probate court cannot, on its own motion, appoint another person, but should notify the next of kin and give them, and, after them, the creditors, an opportunity to name another appointee.[3]

An erroneous conclusion of the court in determining who is entitled to administer does not render the appointment of one not entitled to the office absolutely void,[4] but he is entitled to act until the order is revoked.[5]

The only grounds rendering one incompetent to act as administrator are those

Morris, 91 N. Y. S. 706. Under Ky. St. 1903, § 3896, a sole distributee is absolutely entitled to be appointed. Buckner's Adm'rs v. Buckner [Ky.] 87 S. W. 776.

91. The tutor of minor legatees under a universal title is not an "heir" present or represented in the state and so entitled by preference over the public administrator to dative letters. Succession of Bossu [La.] 38 So. 878.

92. In New York a corporation creditor is not entitled to administer on the estate of its deceased debtor. In re Rhoda, 93 N. Y. S. 973. An attorney to whom the executor owes fees for services rendered in a will contest is a creditor in the sense of statute giving creditors a preferential, though deferred, right to administer, and as such is entitled to be heard before one having no interest in the estate is appointed. In re Wooten's Estate [Tenn.] 85 S. W. 1105.

93. Under Code Civ. Proc., § 2660, where deceased left no relative or next of kin within the state, and no creditors except a corporation, and neither the next of kin or the creditor applied for letters, they were properly issued to the first legally competent person applying therefor. In re Rhoda, 93 N. Y. S. 973.

94. Code Civ. Proc., § 2663. In re Morris, 91 N. Y. S. 706.

95. In re Morris, 91 N. Y. S. 706.

96. Shannon's Code, § 3939, applies only where there are more than one next of kin of the same degree applying for administration. In re Wooten's Estate [Tenn.] 85 S. W. 1105.

97. Buckner's Adm'rs v. Louisville & N. R. Co. [Ky.] 87 S. W. 777.

98. In re Wooten's Estate [Tenn.] 85 S. W. 1105. If no executor is named and none of a class entitled to administer are competent or desire to act, a person nominated by the heirs entitled to administer should be appointed. Act of March 15, 1832, P. L. 135, gives the right in such case where there is a general residue to those having the right to such residue. Hence, a stranger cannot be appointed nor can one against whom a suit by the testator was pending at the date of his death. Job's Estate, 23 Pa. Super. Ct. 611.

99. In Montana if a person otherwise entitled to serve as administrator is not a resident of the state and either the husband, wife, parent, child, brother or sister of the deceased, he may request the appointment of a resident of the state, and such person may be appointed. Code Civ. Proc. § 2434, as amended by Sess. Laws 1899, p. 137. Held that nominee of brothers and sisters, who were non-resident foreigners, should have been appointed rather than the public administrator. In re Watson's Estate [Mont.] 78 P. 702.

1, 2. In re Wooten's Estate [Tenn.] 85 S. W. 1105.

3. Appointment of outsider without giving next of kin or creditors an opportunity to be heard, held invalid. In re Wooten's Estate [Tenn.] 85 S. W. 1105. The next of kin do not, by appealing from an order refusing to appoint their nominee and wherein the court appoints another of his own motion, waive their right to make another nomination in the event that the reviewing court declares him ineligible. Id.

4. Buckner's Adm'rs v. Louisville & N. R. Co. [Ky.] 87 S. W. 777.

5. A co-administrator appointed by an erroneous but not totally void order. Buckner's Adm'rs v. Louisville & N. R. Co. [Ky.] 87 S. W. 777.

prescribed by statute,[6] or which disqualify or disable him as a trustee.[7] In some states, it is the duty of the probate court in the appointment of an administrator to ascertain and determine whether the applicant is a suitable person to administer,[8] and, if there is substantial evidence to support a finding that he is not, an order refusing to appoint him will not be disturbed on appeal.[9] As a general rule, and in the absence of a statute to the contrary, nonresidence does not disqualify one from acting as representative.[10] The rule has, however, been changed by statute in many states.[11]

Administrators pendente lite[12] are appointed to take the place of the court in temporarily caring for the estate, and consequently statutory provisions as to who are entitled to administer do not apply to them.[13] The court should ordinarily appoint disinterested persons rather than the nominee of either party, though in certain cases executors may be appointed.[14]

Temporary administrators.—A provision for the appointment of a temporary administrator other than one of the parties precludes the appointment of the executor named in the will.[15]

Public administrators.[16]—A county administrator does not, by virtue of his appointment, become the legal representative of any estate, but by giving the bond required by law he assumes a position where he may be appointed legal representative of such estates as the ordinary is authorized to place in his hands.[17] The right of the public administrator to take charge of the estate cannot be raised on exceptions to his accounts going only to the proper settlement of his administration.[18]

(§ 3) *B. Procedure to obtain administration and grant of letters.*[19]—General administration of the estate of one dying testate cannot be granted until his will has been proven.[20] In Louisiana the record of appointment of a dative testamentary executor must show that either the will or a copy was produced or registered in the district court for the parish where it was then sitting.[21]

Application for letters must be made within the time prescribed by law.[22]

6. Those prescribed by Rev. St. 1899, § 4637. Rice v. Tilton [Wyo.] 80 P. 828.

7. An attorney representing the bulk of the estate, but having no other interest therein, and who is obligated, as such attorney, to carry into effect agreements between those interested in the estate which will divert large amounts of its funds into channels different from the ordinary channels of distribution, is not eligible to appointment as administrator on nomination by the next of kin. In re Wooten's Estate [Tenn.] 85 S. W. 1105.

8. Gen. St. 1901, § 2817, provides that next of kin shall not be appointed if evidently unsuitable for the discharge of the trust. Brown v. Dunlap [Kan.] 79 P. 145.

9. Brown v. Dunlap [Kan.] 79 P. 145.

10. As a general rule, and in the absence of a statute to the contrary, a nonresident may qualify and act as executor. Hecht v. Carey [Wyo.] 78 P. 705. Non-residence does not disqualify one to act as executor provided he comes into the state, submits himself to the jurisdiction of the court, and personally conducts the affairs of the estate. Rice v. Tilton [Wyo.] 80 P. 828. Rev. St. 1899, § 4570, authorizes appointment of nonresident executor provided he is a citizen and resident of the United States, though non-residents are incompetent to act as administrators under section 4637. Statute detailing who cannot act omits non-residents. Section 4628. Hecht v. Carey [Wyo.] 78 P. 705.

11. Rev. St. 1899, § 10, disqualifies nonresident from acting as administrator. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. An administrator is not a public officer within the meaning of Const. art. 8, § 12, providing that no one shall be elected or appointed to any office who has not resided in the state for a year. Id. Under Ky. St. 1903, § 3846, which contemplates the residence within the state of personal representatives, an administratrix appointed under the laws of the state cannot while exercising the office set up non-residence to avoid service of process in the courts of the state. Linn v. Hagan's Adm'x [Ky.] 87 S. W. 763.

12. See 3 C. L. 1247, n. 30.

13, 14. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379.

15. Bal. Ann. Codes & St. § 6172. Hartley v. Lord [Wash.] 80 P. 554.

16. See 3 C. L. 1247, n. 33.

17. Bailey v. McAlpin [Ga.] 50 S. E. 388.

18. Browning v. Richardson, 186 Mo. 361, 85 S. W. 518.

19. See 3 C. L. 1247.

20. Iowa Code, §§ 3278, 3297. Alice E. Min. Co. v. Blanden, 136 F. 252.

21. Order vacated for want of it. Succession of Henry, 113 La. 787, 37 So. 756.

22. Rev. St. 1895, §§ 1880, 1881, providing that no letters testamentary or of adminis-

The petition must be in accordance with the statutory requirements,[23] and the required notice must be given.[24] In some states, persons in the preferred classes are entitled to appointment on application without citation, subject only to the approval of the court, or the judge or clerk in vacation.[25]

An opposition that administration is needless, or, if proper, that opponent should be preferred, should be tried with and determined on the decision of the original application for letters.[26] In Missouri the determination of the qualifications of an applicant for letters to properly manage the estate is wholly discretionary with the probate court, and no trial or hearing in regard to the matter is necessary.[27] Objection that the time to claim a preferential right has not elapsed can only be made by one who is entitled to such preference.[28] Persons recognizing the authority of the representative cannot thereafter question the validity of his appointment.[29]

On a petition for the granting of letters of administration, the court has no jurisdiction to direct decedent's widow to turn over to the petitioner property alleged to have been held in trust for the latter by decedent, and to have been fraudulently transferred by him to his wife.[30]

Any party in interest may apply for the appointment of an administrator pendente lite, or the court may appoint one on his own motion.[31]

(§ 3) *C. Security or bond.*[32]—The giving of the bond required by statute is

tration shall be issued where application therefor is made more than four years after decedent's death, and that in no case shall letters testamentary be issued where a will is admitted to probate more than four years after testator's death, apply to ancillary proceedings to procure letters of administration c. t. a. and for the probate of a certified copy of a will admitted in a foreign state, and such proceedings cannot be maintained more than four years after testator's death. The granting of such letters after the lapse of that period is not, however, wholly beyond the jurisdiction of the court, so as to render the proceedings subject to collateral attack. Id.

23. Code Pub. Gen. Laws, art. 93, § 230, authorizes the appointment of an administrator for one who, by reason of his uninterrupted absence, unheard of, for more than seven years is presumed to be dead, on a petition setting forth when the absentee was last heard of, that diligent inquiry has been made among the family, that advertisement and inquiry has been made at the most likely place of his last residence without results, and that the applicant really believes him to be dead. Lee v. Allen [Md.] 59 A. 184. Petition held insufficient. Id. Under Code Civ. Proc. § 2698, the failure of the petition to allege indebtedness of decedent to creditors within the state is fatal to the granting of ancillary letters. Spratt v. Syms, 93 N. Y. S. 728. No authority to issue ancillary letters is conferred on the surrogate by section 2703, relating to the recording of the will of a non-resident testator which disposes of realty within the state. Id. A petition for letters of administration need not set forth that there is no other application for letters pending. In re Long's Estate [Wash.] 81 P. 1007. The application will, on appeal, be deemed to have been amended to correspond to the proofs, where the evidence was sufficient to, and did, establish all the necessary facts, in the absence of any showing of prejudice to the rights of others. Id.

24. Code Pub. Gen. Laws, art. 93, § 230, authorizing administration on the estates of absentees in certain cases, requires notice of the petition therefor to be published not less than once a week for four successive weeks, fifteen days before the time fixed by the order for the appearance of the absentee. Lee v. Allen [Md.] 59 A. 184. Letters held void where it did not appear that any notice was given, and it did appear that letters were granted seventeen days after the petition therefor. Id.

25. No notice required by Rev. St. 1899, § 7. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

26. Separate disallowance of opposition is error. Miguez v. Delcambre [La.] 38 So. 820.

27. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

28. An objection to the grant of letters because the time during which a preferential right thereto is given to certain heirs and next of kin had not elapsed when they were issued is not available to one who does not belong to any of the classes to whom such preference is given except that of "principal creditors" to which the administrator appointed also belongs. In re Long's Estate [Wash.] 81 P. 1007.

29. A claimant who files his claim with the widow after her appointment as administratrix with the will annexed, and appeals from its classification, cannot question the validity of the court's action in canceling a clause of the will appointing her independent executrix and appointing her such administratrix. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

30. Petition held one for letters of administration only. Leach v. Misters [Wyo.] 79 P. 28.

31. Creditor may apply. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379.

32. See 3 C. L. 1248.

a necessary prerequisite to the right of the representative to act as such.[33] The insertion of an illegal or unauthorized provision in it does not affect the validity of the remaining portions, unless the conditions are not severable, or unless the statute expressly or by necessary implication so provides.[34]

The court may, either on his own motion,[35] or on petition of the heirs, require the administrator to furnish additional security.[36] In the absence of any words to the contrary therein, a new bond will be regarded as cumulative.[37] The amount of security to be given by an administrator pendente lite is discretionary with the court.[38] The Ohio statute requiring any administrator's or executor's bond in excess of two thousand dollars to be executed and guarantied by a surety company is unconstitutional as restricting the liberty to contract, and because it discriminates between different classes of estates.[39]

(§ 3) *D. Removals and revocation of letters.*[40]—Letters testamentary or of administration, will be revoked where the person appointed was, or has since become, incompetent or disqualified to act,[41] or has been guilty of misconduct or mismanagement of the estate,[42] or where the letters were obtained by a false suggestion of a

33. Where declaration, in action against city for damages for death of plaintiff's intestate, alleged plaintiff's appointment as administratrix, and that she presented the claim to the city as such, and it appeared that her bond was approved and filed not later than the date of such presentation, and defendant pleaded merely the general issue, held that her letters and evidence of the presentation of her claim were admissible as against the objections that her letters were issued before the filing of her bond, and that she was not administratrix when she presented her claim. Warn v. Flint [Mich.] 12 Det. Leg. N. 294, 104 N. W. 37. Failure of administrator to give bond renders appointment invalid and action for wrongful death brought by him nugatory. Archdeacon v. Cincinnati Gas & Elec. Co., 3 Ohio N. P. (N. S.) 45.

34. Fact that executor's bond contained waiver of right to discharge any liability except in legal tender currency, as required by Acts 1884, c. 22, pp. 24, 25, instead of waiver of any right to discharge any liability to the state with coupons detached from state bonds, as required by Code, § 177 (1 Code 1904, p. 99), held not to render it invalid as a statutory bond, but it binds obligees to extent of remaining valid provisions. Yost v. Ramey, 103 Va. 117, 48 S. E. 862. Where surety authorized his attorney in fact to execute "the bond required by the court," surety was not relieved from liability because bond contained such invalid provision. Id. Such invalid provision did not render bond void on ground that it was executed under legal duress. Id.

35. Whenever it comes to his knowledge that the bond is insufficient. Code Civ. Proc. § 1402. Elizalde v. Murphy, 146 Cal. 168, 79 P. 866. Where executors had accounted for all sums received by them and had disbursed all the assets, except the payment of a part of the legacies, the balance due on which, after applying funds admitted to be in their hands, could only be determined by an accounting, decree of orphans' court requiring bond for faithful performance of their duties held unjustified, the amount thereof being excessive even, if it was proper to require any bond. In re Woolsey's Estate [N. J. Eq.] 59 A. 463.

36. Code Civ. Proc. § 1397. Elizalde v. Murphy, 146 Cal. 168, 79 P. 866.

37. New bond, in view of the wording thereof and the order accepting it, held not a substitute for the original bond so as to terminate the liability of the sureties on the latter. Elizalde v. Murphy, 146 Cal. 168, 79 P. 866.

38. Not reviewable unless discretion is abused. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379.

39. Act April 20, 1904, § 97, Ohio Laws, 182, violates Const. art. 1, §§ 1, 2. State v. Robins, 71 Ohio St. 273, 73 N. E. 470.

40. See 3 C. L. 1248.

41. If the grounds of objection did not exist, or the objection was not taken by the petitioner or the person whom he represents, upon the hearing of the application for letters. Code Civ. Proc. § 2685. Foreign corporation. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974. Letters issued to a non-resident. Brother of deceased held to have become a resident. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. Under Mont. Code Civ. Proc. § 2434, the court may revoke letters issued to one who is found to be incompetent to execute the duties of the trust by reason of his improvidence or want of understanding. In re Courtney's Estate [Mont.] 79 P. 317. Evidence held to warrant removal of executor. Id. The fact that one consents to the issuance of letters testamentary to a person not legally qualified to act does not estop him to apply for their revocation, since the defect is jurisdictional. Foreign corporations. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

42. The institution of a suit for partition of lands of one dying testate is in no sense a contest of the will and hence is no ground for the removal of the administrator with the will annexed. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. Letters testamentary of foreign corporation revoked for making investments in securities not authorized by statute. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974. Action of ad-

material fact, provided the result was affected thereby.[43] Letters of administration will be revoked on the subsequent discovery of a will.[44]

As a general rule when letters of administration are issued to any person other than those entitled to preference, any one of the latter may procure their revocation and his own appointment in his place.[45] So, too, letters issued to the nominee of a creditor may, on payment of all the debts by a devisee, be revoked and new letters be issued to such devisee in his stead.[46]

The fact that the petition on which letters were issued stated all the facts on information and belief merely, and failed to aver that decedent was a resident of the county or state, is no ground for revocation of the letters,[47] particularly where all the material facts necessary to authorize the issuance of letters are shown, on the hearing of the petition for revocation, to have existed.[48] The fact that the executor gave his testator unsound advice as to the management of trust property during the latter's lifetime,[49] or that he for a long time knowingly concealed the will of testator's wife, and all knowledge of the same, does not necessarily afford ground for his removal.[50] Neither should an administrator be removed merely because he has a hostile or unfriendly feeling toward persons interested in the estate, unless it is of such a character as to prevent him from managing the estate in such a manner as prudence, sound policy, and the interests of the heirs, devisees, and creditors require.[51]

The statutes of Montana provide for the suspension of the power of an executor when the judge has reason to believe that he has permanently removed from the state, and for the revocation of his letters, if, on the hearing, the court is satisfied that cause for his removal exists.[52] Since nonresidents may serve as executors in

ministratrix in refusing to pay over accruing rents to committee of an incompetent, held, under the circumstances, not to be ground for her removal. In re Coiven, 94 N. Y. S. 303. Removal of administrator held justified where evidence showed that he had neither filed an inventory of the property, nor caused it to be appraised, nor given notice to creditors, and had failed to require verified vouchers for money paid out by him, had temporarily removed from the state, and did not then have a residence therein. In re Dietrich's Estate [Wash.] 81 P. 1061.

43. Code Civ. Proc. § 2685, subd. 4, § 2687, subd. 2. In re Rhoda, 93 N. Y. S. 973. False suggestion that there were no creditors not ground for revocation where only creditor was a corporation, and hence not entitled to letters. Id.

44. Existence of valid will and its probate determine conclusively that letters were improvidently granted. In re Kern's Estate [Pa.] 61 A. 573.

45. Under Code Civ. Proc. § 1383, when issued to any person other than the surviving husband or wife, child, father, mother, brother or sister of the deceased. In re Aldrich's Estate [Cal.] 81 P. 1011. Section deals only with classes of persons given statutory priority in their rights to letters, and refers only to cases where letters have been issued to one not claiming to be or not adjudicated to be one of the persons enumerated, and does not entitle one claiming to be decedent's widow to the revocation of letters granted on the nomination of one alleged and, after due notice and hearing, found to be decedent's widow. Id. Court has power to re-examine the facts upon which an administrator has been appointed, and to remove him if he is not entitled thereto. May remove administratrix on ground that she is not in fact the widow of the deceased and hence is not entitled to preference in the right to administer. Koury v. Castilla [N. M.] 79 P. 293. Power to remove administrators is vested in probate courts by Comp. Laws 1897, § 928. Laws 1901, c. 81, §§ 6, 8, pp. 151, 152, authorizing removals by the probate court for certain specified causes does not take away the right of removal for other causes. Id. Evidence held to show that petitioners were next of kin to decedent, and hence letters of administration issued to others revoked. In re Kelly's Estate, 95 N. Y. S. 57.

46. Adamson v. Parker [Ark.] 85 S. W. 239. The clerk of the probate court is not prejudiced by the revocation of letters while his fees remain unpaid where a new administrator is appointed. Has remedy against new administrator, and hence fact that fees are unpaid is no bar to revocation. Id.

47. Under Code Civ. Proc. § 2685, In re Rhoda, 93 N. Y. S. 973.

48. In re Rhoda, 93 N. Y. S. 973.

49. Not where he is not a lawyer and it is not claimed that he acted in bad faith, or did not exercise his best skill and judgment. McGuinness v. Hughes [Mass.] 74 N. E. 317.

50. Does not follow as a matter of law that he was unsuitable, where evidence tended to show that he did not produce it because it left everything in the same manner as if there had been no will. McGuinness v. Hughes [Mass.] 74 N. E. 317.

51. Evidence held not to show grounds for removal. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

52. Rev. St. 1899, §§ 4622, 4623. Hecht v. Carey [Wyo.] 78 P. 705.

that state, this statute does not authorize the removal of an executor who was a nonresident when appointed merely on account of his continued nonresidence.[53] The fact that an administrator with the will annexed, appointed by a court of a state other than that of the testator's domicile, is improperly authorized to take possession of the realty and to collect the rents and profits thereof, is no ground for his removal.[54]

Creditors may petition for the revocation of letters of administration,[55] but only when they were such when the letters were issued.[56]

Administrators pendente lite are removable at the pleasure of the court appointing them.[57] So is a collector of an estate to whom letters ad colligendum have been issued.[58]

On petition for removal of the representative, a notice or citation must ordinarily be served on him.[59] In case he tenders his resignation and files his account and the heirs object thereto, he cannot thereafter, by withdrawing his resignation, withdraw the issue tendered by him as to whether his letters should be revoked, but the heirs have the right, on the hearing, to insist on the revocation of his letters for cause, without serving a notice or citation on him.[60] The burden is on one alleging grounds for removal to prove them.[61] The question of the unsuitableness of the representative is to be determined as of the date of the petition.[62] Trial by jury is not generally allowed.[63]

Testamentary trust powers conferred on an executor as such are his by virtue of his appointment, and the revocation of his appointment as executor also revokes his power to act as trustee unless the will provides to the contrary.[64] If he is specifically named as trustee by the will, the rule is otherwise.[65] The fact that an executor is removed by the court of the domicile does not, as a matter of law, require his removal as ancillary executor in another state.[66]

An appeal from the order admitting the will to probate, taken after the issuance of letters to, and the qualification of the executors named therein, operates to suspend their functions pending its determination.[67] On the issuance of letters testamentary to the executors named in the will, a temporary administrator appointed to

53. Hecht v. Carey [Wyo.] 78 P. 705. In such case the phrase "has permanently removed from the state" means a permanent withdrawal and remaining away from the state after receiving letters. Must come to the state within a reasonable time, personally submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate. Id.

54. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

55. Code Civ. Proc. § 2685. In re Rhoda, 93 N. Y. S. 973.

56. Not when they subsequently acquire claims by assignment. In re Rhoda, 93 N. Y. S. 973.

57. Since they are officers of the court. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379.

58. Only an abuse of such discretion will be reviewed on appeal. Guthrie v. Welch, 21 App. D. C. 562. Removal of a collector appointed in a will contest because he is interested in the litigation is not an abuse of discretion. Id.

59. Pierce's Code, §§ 2329-2331, Bal. Ann. Codes & St. §§ 6081-6083. In re Dietrich's Estate [Wash.] 81 P. 1061.

60. In re Dietrich's Estate [Wash.] 81 P. 1061.

61. Evidence held not to show that administrator willfully or negligently delayed the settlement of the estate. In re Sylvar's Estate [Cal. App.] 81 P. 663.

62. McGuinness v. Hughes [Mass.] 74 N. E. 317.

63. A proceeding under Rev. St. 1899, § 42, providing for the removal of administrators is a statutory proceeding, equitable in its nature, the matter resting primarily in the discretion of the probate court, and hence is not within Const. art. 2, § 28, guarantying the right to trial by jury "as heretofore enjoyed." No jury may be demanded either in probate court or on appeal to circuit court. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

64, 65. Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385, afg. 113 Ill. App. 457.

66. Ancillary administration is independent, and not affected by orders of foreign court. American Missionary Ass'n v. Hall [Mich.] 101 N. W. 535.

67. In re Choate's Will, 94 N. Y. S. 176. In such case it is proper for the surrogate to grant them limited powers necessary for the preservation of the estate until the appeal is determined. Code Civ. Proc. § 2582. Id.

preserve the estate pending the probate of the will becomes functus officio.[68] The repeal of a statute authorizing the appointment of an agent to take charge of lands belonging to an estate puts an end to the authority of such an agent.[69]

Resignations.—A county administrator on resigning his office does not thereby cease to be administrator of any estate of which he has been legally appointed as administrator, but remains as such until he has been removed, or his resignation has been accepted as to such estate.[70]

In Louisiana, an administrator may not resign after he has begun his administration [71] and he may be superseded only when some cause exists which disables him to perform his trust.[72] Press of private business is not such a cause [73] nor is illness not shown to be disabling, permanent, or protracted.

§ 4. *The authority, title, interest, and relationship of personal representatives. A. In general.*[74]—The administrative authority cannot be exercised to the full even in the case of an executor until letters issue,[75] but after probate, his power continues pending contests.[76] Letters to an executor relate back and validate his acts; [77] but it has been held that the authority of an administrator does not relate back in the matter of a claim for wrongful death, but begins with his appointment.[78] Where duties other than the mere settlement of the estate are imposed upon an executor by the terms of the will appointing him, he becomes a trustee.[79] A judgment for or against one in his representative capacity is not conclusive on him in a subsequent action in which he appears personally, and vice versa.[80] An ancillary administrator in one jurisdiction is not in privity with an ancillary administrator of the same

68. On appeal from the order admitting the will being taken after the qualification of the executors, it is not necessary that the care of the estate pending the appeal be again confided to him, but a new appointment is necessary. In re Choate's Will, 94 N. Y. S. 176.

69. Rev. St. 1889, § 257, authorizing the probate court to appoint an agent to take charge of lands belonging to estates, was repealed by Laws 1899, p. 41 (Act May 11, 1899), and hence an agent previously appointed had no authority, after such repeal, to sue for rent of lands of decedent leased by him. His office ceased on such repeal. Wendleton v. Kingery, 110 Mo. App. 67, 84 S. W. 102.

70. Bailey v. McAlpin [Ga.] 50 S. E. 388.

71, 72, 73. Succession of Broadway [La.] 38 So. 430.

74. See 3 C. L. 1249.

75. An executor cannot act as such until after the will has been properly probated and letters of administration have been issued to him. Mere taking of affidavits of subscribing witnesses by deputy register of wills does not constitute probate, and executrix named in will did not defend subsequent caveat in her official capacity so as to be entitled to attorney's fees from the estate. Tilingham v. France, 99 Md. 611, 59 A. 277.

76. In a will contest plaintiff cannot by any process that can be issued to enforce the judgment, obtain possession of the property, regardless of the right of the executor to duly and legally administer the estate. Burgess v. Sullivant, 2 Ohio N. P. (N. S.) 327. Executor cannot be interfered with by the appointment of a receiver in a suit to contest a will. Id.

77. Nance v. Gray [Ala.] 38 So. 916.

Note: Accords and satisfactions by persons assuming to represent an estate are held binding on them when they later receive letters. Rattoon v. Overacker, 8 Johns. [N. Y.] 126; Priest v. Watkins, 2 Hill [N. Y.] 225, 38 Am. Dec. 584; Vroom v. Van Horne, 10 Paige [N. Y.] 549, 42 Am. Dec. 94; Beck v. Snyder, 167 Pa. 234. The rule has been held inapplicable to a claim under the statutes respecting death by wrongful act, such rights of action not being general assets of the estate. Stuber v. McEntee, 142 N. Y. 200.—From note to Harrison v. Henderson [Kan.] 100 Am. St. Rep. 405.

78. Archdeacon v. Cincinnati Gas & Elec. Co., 3 Ohio N. P. (N. S.) 45. Where appointment is not completed until after action has been brought, and two years have elapsed since the accident occurred, the action cannot be maintained and the cause is abated. Id.

79. Nangle v. Mullanny, 113 Ill. App. 457. Where the will does not recognize any distinction between the offices of executors and trustees, but devises realty in trust to the executors, the trust vests in them as executors, and attaches to that office, and they accept such trust by accepting and qualifying as executors. Rowe v. Rowe, 92 N. Y. S. 491. An executor authorized to sell or release realty at discretion is vested with the fee in trust for the beneficiaries. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. See, also, Trusts, 4 C. L. 1727; Wills, 4 C. L. 1863.

80. Decree in partition suit dividing rents of which deceased was entitled to a part, to which suit representative was not a party, was not res judicata of his right to recover same, on his subsequent appointment as administrator, though he represented his wife in the partition suit, and had full knowledge of the terms of the decree. Perkins v. Goddin [Mo. App.] 85 S. W. 936.

estate in another so as to render a judgment against one of them a bar to an action against the other on the same cause of action.[81]

It is for the court and not the jury to determine the powers of a representative.[82]

Though in the ordinary acts of administration of an estate, the act of one executor is the act of all, and is binding upon the estate, where several have qualified the joint act of all of them is necessary to execute a special trust created by the will.[82a]

It is the duty of a special administrator to preserve the estate merely.[83] The administrator de bonis non has the same powers possessed by the original administrator, and is governed by the laws for the settlement of decedents' estates.[84] His authority, however, is limited to the administration of such assets as have not been converted into money and not distributed and delivered or retained by the executor or former administrator, under the direction of the orphans' court.[85] Moneys received by the executor or former administrator and mingled with his own, or other assets sold, wasted, misapplied, or converted to his own use, are regarded as already administered within the meaning of this rule, and hence the administrator de bonis non acquires no title thereto, and cannot sue anyone for their recovery.[86] Thus he cannot in such case sue on his predecessor's bond, but the remedy is for the beneficiaries to apply to a court of equity for the appointment of a trustee for that purpose.[87]

The public administrator is generally a county officer, and acts by virtue of his office and not merely by virtue of the letters issued to him on particular estates.[88] When duly appointed administrator of any estate he occupies the same position as to duties and liabilities as any other administrator.[89]

Acts merely ministerial may be delegated; hence it is proper to employ another to conduct a sale in the representative's presence.[90]

(§ 4) *B. Contracts, conveyances, charges and investments.*[91] *Contracts.*—The executor or administrator personally, and not the estate, is liable on his contracts for the benefit of the estate,[92] and persons performing services thereunder are generally

81. Ingersoll v. Coram, 127 F. 418.

82. Held duty of court to determine powers of executor and temporary administrator to carry on business belonging to decedent, and not error to refuse to submit the question of their authority to the jury. Altgelt v. Oliver Bros. [Tex. Civ. App.] 86 S. W. 28.

82a. Hosch Lumber Co. v. Weeks [Ga.] 51 S. E. 439. Heirs will not be held to have acquiesced in the unauthorized act of one of several co-executors in executing a deed requiring the signature of all, where there is no evidence that actual notice of its execution was ever brought home to them, and deed was not recorded until after execution and record of a later deed by an administrator de bonis non of the estate. Id.

83. In re Bell's Estate, 145 Cal. 646, 79 P. 358. An administrator pro tem appointed in a contest of a claim represents the entire estate and is bound to follow an appeal if another appointment is not made as authorized by administration act, section 72. Mayer v. Schneider, 112 Ill. App. 628.

84. Burns' Ann. St. 1901, § 2395. As to payment of taxes. Cullop v. Vincennes, 34 Ind. App. 667, 72 N. E. 166.

85. Code Pub. Gen. Laws 1899, art. 93, §§ 70, 72, construed. State v. Fidelity & Deposit Co. [Md.] 59 A. 735.

86. Cannot sue for a devastavit by his predecessor in office. State v. Fidelity & Deposit Co. [Md.] 59 A. 735.

87. State v. Fidelity & Deposit Co. [Md.] 59 A. 735.

88. Is a county officer under Pol. Code, § 4103, and St. 1897, p. 492, c. 277, and acts by virtue of his office when acting under Code Civ. Proc. § 1726, subd. 4, requiring him to take charge of the estates upon which letters of administration have been issued to him by the court. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P. 861.

89. Bailey v. McAlpin [Ga.] 50 S. E. 388.

90. Does not delegate power of sale. Landry v. Lapios, 113 La. 697, 37 So. 606.

91. See 3 C. L. 1251.

92. Judgment, in action on executor's contract for drilling well on land belonging to decedent, directing that the amount found to be due be paid out of the funds of the estate, held erroneous. Renwick v. Garland [Cal. App.] 82 P. 89. Debt is his own and he is personally liable to the party employed, and hence his promise to pay balance of an attorney's claim provided the latter will release his lien on funds of the estate in his hands is not a promise to pay the debt of another within the statute of frauds. Burleigh v. Palmer [Neb.] 103 N. W. 1068. In the absence of a provision therein to the contrary, is liable thereon in his personal

required to look to him alone for their compensation,[93] though disbursements by reason thereof, when reasonable in amount and for necessary purposes, will constitute a charge against the estate in favor of the representative.[94] An attorney is not, however, deprived of his lien for compensation for professional services and for disbursements upon moneys received by him on his client's behalf in the course of his employment, by reason of the fact that the client is an executor, and that the services were rendered and the money received on behalf of the estate.[95] Agreements by the representative to pay his attorney a certain part of the amount recovered by him have been held to be valid.[96]

Since an administrator is not an agent of his intestate, but derives his authority solely from the statute, and is, with respect thereto, a public officer,[97] he is not personally liable on his official contracts, though in excess of his powers, provided he acts in good faith, and the persons with whom he contracts have equal means of knowing the extent of his authority, or the latter depends upon a public statute.[98] Executors making a contract in their official capacity have at least a prima facie right to enforce it.[99] One cannot be sued as executor on a contract made by him personally.[1]

capacity to the same extent as though they were to be rendered for his personal benefit. Reynolds-McGinness Co. v. Green [Vt.] 61 A. 556. Is not relieved from personal liability on a contract to pay a commission to brokers for selling realty belonging to the estate because, at the time when he made it, he did not have a license from the probate court to make the sale. Particularly where the parties interested in the estate had authorized the sale, there was nothing to prevent his securing such a license, and he actually did secure one before the broker procured a customer. Id. Such a promise is an original one, and so not within the statute of frauds (V. S. 1224), requiring special promises of an executor or administrator to answer damages out of his own estate to be in writing. Id.

93. An attorney cannot maintain a suit in the probate court against the estate for legal services rendered by him to the estate under a contract with the executor. Parker v. Mayo [Ark.] 83 S. W. 324. Not a charge against the estate until it has been allowed in his account as executor. Plaintiff as executor procured the probate of decedent's will, but the probate was thereafter annulled and he was then appointed administrator. On settlement of his account as administrator the surrogate disallowed an amount paid by him for attorney's fees in the probate proceedings, and he appealed. Pending the appeal the estate was distributed by final order, but under an agreement with the distributees sufficient securities were retained to pay the claim if the court should so order. Court affirmed surrogate's decree on ground that claim must be credited to him in his account as executor and not as administrator, and that he might apply for the opening of the executor's account. Held that, on plaintiff's failure to secure the opening of his account as executor because of final distribution, he had no right of action against the distributees for contribution. Blair v. Blair, 97 App. Div. 507, 90 N. Y. S. 190. There is no relation between the administrator's attorney and the estate. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945.

94. See § 9D, post.

95. Burleigh v. Palmer [Neb.] 103 N. W. 1068.

96. Agreement to pay attorney half the proceeds of realty recovered by him for the estate is valid and enforceable against the estate. In re Shoenberger's Estate, 211 Pa. 99, 60 A. 502. Where decedent left valuable papers, relative to French spolation claims, and under a contract between his administrator and an attorney the administrator was to receive 25 per cent. of the fees realized after deducting certain expenses, including office rent, a charge against such contract of four-fifths of the rent of a certain office used almost exclusively in the prosecution of such claims was not unreasonable. Wagaman v. Earle, 25 App. D. C. 582. Allowance of clerk hire held not unreasonable. Id. But a claim for lobbying services should not be allowed. Id.

97. Henry v. Henry [Neb.] 103 N. W. 441.

98. Persons contracting with him are supposed to know the extent and limitation of his powers. Henry v. Henry [Neb.] 103 N. W. 441. Mortgages on realty executed by widow as administratrix, which are void because executed without authority of law, are not liens on her dower or homestead interests. Id. Same result is reached even if she is regarded as the agent of the estate, since her interests are separate and distinct from those of the estate, and hence a mortgage on the latter cannot create a lien on the former; that is, one who without authority executes a mortgage on the land of another, though he thereby renders himself liable for damages, does not create a lien on his own land. Id.

99. Contract for the purchase of land. Complaint in action to declare a forfeiture held not demurrable for failure to show by what court, if any, plaintiffs were appointed executors. Stein v. Waddell, 37 Wash. 634, 80 P. 184.

1. Chambers v. Greenwald, 94 N. Y. S. 504.

In the absence of express authority in the will, the executors have no power to carry on testator's business.[2] By statute in some states an independent executor may do so.[3]

In the absence of a statute, a direction in the will, or an agreement between the partners to the contrary, the executor of a deceased partner has no authority to continue the partnership business.[4]

Investments.[5]—The representative in making investments should employ such diligence and prudence as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs.[6] Investments beyond the jurisdiction of the court are not necessarily illegal, but should not be sustained except under exceptional circumstances.[7] Statutes in some states provide in what securities the funds of the estate may be invested.[8] Where the security taken is unauthorized, the representative must convert it into cash at his own charges, and make good any deficiency;[9] but this is not necessarily the case where security, though authorized, is insufficient.[10] An administrator with the will annexed cannot justify the investment of trust funds in a manner not within the authority of trustees on the ground that the trustees appointed by the will were given discretionary power to make them, such discretion being purely personal.[11]

Conveyances.[12]—The deed of a commissioner who, acting as such, sells land belonging to decedent, is evidence of the facts therein recited.[13]

One whose interest in property depends upon the terms of a will does not, by a deed from the executor purporting to be executed pursuant to the requirements of the will, but which the executor is not required to execute either by the will or the law, acquire any greater interest than would pass under the will;[14] nor can such

2. In re Corbin, 101 App. Div. 25, 91 N. Y. S. 797.

3. Sayles' Ann. Civ. St. 1897, art. 1894. Altgelt v. Oliver Bros. [Tex. Civ. App.] 86 S. W. 28. The estate is liable for the salary of an agent employed by an independent executor carrying on a business belonging to the estate under Sayles' Ann. Civ. St. 1897, art. 1894, whose employment was continued by a temporary administrator, expressly authorized by order of court to continue the business, and by the permanent administrator. Altgelt v. Oliver Bros. [Tex. Civ. App.] 86 S. W. 28. In action against administrator for indebtedness incurred and services rendered by plaintiffs as purchasing agents of the estate while it was engaged in a mercantile business, allegations held sufficient to charge estate with indebtedness incurred in carrying on its business. Id.

4. Under Rev. St. 1895, art. 1867, providing that the rights, powers, and duties of representatives shall be governed by the principles of common law where the same do not conflict with any provisions of the statute. Altgelt v. Alamo Nat. Bank [Tex.] 83 S. W. 6. Cannot interfere with right of surviving partner to close up business, nor can survivor consent to his participation in the business. Id. Rev. St. 1895, art. 1984, providing that the representative may carry on decedent's business in certain cases, applies only to his individual business and does not repeal Id., art. 1867, or change the rule above stated. See, also, Partnership, 4 C. L. 908.

5. See 3 C. L. 1254.

6. Loans on realty should be such as a reasonable and prudent investor, dealing with his own funds under like circumstances, would require. P. L. 1902, p. 700, c. 240. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

7. Investment in mortgages on realty outside of the state held not breach of trust under the circumstances. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586. Investments in mortgages on property outside of state held improper. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

8. Under Laws 1902, c. 295, p. 1253, value of the property on which loans are taken must be 50 per cent. more than the amount of the loan. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

9. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

10. Where trustee entitled to receive the fund claims that securities are insufficient, court should investigate question before directing them to be turned over to him. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

11. Plaintiff held not to have ratified investments. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737.

12. See 3 C. L. 1253.

13. Though he styles himself receiver and commissioner, and receiver's deed is not evidence of facts so recited, is evidence of fact that sale was ordered by decree of circuit court. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

14. Will itself a muniment of title, and deed was merely a recognition by the executor of whatever interest the grantee took under the will. Sanders v. Thompson [Ga.] 50 S. E. 976.

deed be used as color to lay the foundation of a prescriptive title against the claims of those whom the grantee was bound to recognize as the owners under the terms of the will.[15]

Where an administrator's deed recites the authority given by the ordinary of the county to sell certain land with the exception of all the granite thereon, but in the granting clause fails to refer to the granite, it will be presumed that the administrator did not undertake to exceed his authority, and that there was no intention to pass title to the granite.[16]

(§ 4) *C. Title, interest, or right in decedent's property.*[17]—The administrator cannot exercise any right which was personal to the decedent.[18] The legal title to personalty goes to the executor or administrator,[19] and the legatees or distributees cannot take title thereto except through him.[20] He holds the same in trust, however, for the creditors and distributees, and is accountable to the court appointing him after the manner of trustees generally.[21]

An executor named in a valid will has a right to the custody of the title papers belonging to his testator, but has no right to refuse to allow the parties in interest to see and examine them.[22]

By statute in Georgia, no devise or legacy passes title until the executor assents thereto;[23] such assent perfects the inchoate title of the devisee.[24] When once given it is irrevocable,[25] and the property cannot thereafter be recovered by the executor or his successor,[26] even for the purpose of selling the same to pay debts.[27] Assent may

15. Sanders v. Thompson [Ga.] 50 S. E. 976.

16. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. The exception in the habendum clause is not void for repugnancy, since the whole instrument, when construed together, clearly shows the intention of the parties to make the exception. Id.

17. See 3 C. L. 1254.

18. Order in bankbook for payment of deposit to depositor's husband held personal to him and not to authorize payment to his administrator. Cole v. Bates, 186 Mass. 584, 72 N. E. 333.

19. See, also, Descent and Distribution, 5 C. L. 995. Huyler v. Dolson, 101 App. Div. 83, 91 N. Y. S. 794; Carpenter v. United States Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404; Stehn v. Hayssen [Wis.] 102 N. W. 1074. Unless the probate court, by order, dispenses with administration under Rev. St. 1899, § 2. Perkins v. Goddin [Mo. App.] 85 S. W. 936. On setting aside a conveyance by complainant of his interest in his deceased wife's realty, in which he also transferred his interest in her personalty to the same persons, held error to require her administrator to surrender her personalty, of which he had taken possession prior to the commencement of the suit, since he was required to account for the personalty only in the course of administration. Irwin v. Sample, 213 Ill. 160, 72 N. E. 687. The legal title of a promissory note bequeathed to a particular individual. Jaques v. Ballard, 111 Ill. App. 567. Title to timber severed from realty before owner's death goes to executor, and purchaser from him acquires good title. Instructions held misleading. Curry v. Lanning, 94 N. Y. S. 535. Title vests in the administrators and not in distributees, and in a controversy between them over its title or possession the former must prevail. Burnes v. Burnes [C. C. A.] 137 F. 781.

20. Stehn v. Hayssen [Wis.] 102 N. W. 1074. Under Utah Rev. St. 1898, § 2810, in a specific devise or legacy, the title passes by will, but possession may only be obtained from the personal representative, and he may be ordered to sell the property devised or bequeathed in certain cases. Williamson v. Beardsley [C. C. A.] 137 F. 467. An executor to whom a promissory note payable to the order of his testator has been bequeathed and which was not indorsed by the testator nor by the executor as such prior to his final discharge cannot be sued thereon by such executor as an individual. Jaques v. Ballard, 111 Ill. App. 567. Under Probate Code, §§ 147, 242, making it the duty of the representative to take possession of all the property, the heir of the deceased indorsee of a note cannot sue thereon without proof by the probate records that all the debts of the decedent had been paid and that he became the owner by an order of distribution made by such court. Mears v. Smith [S. D.] 102 N. W. 295. In case the indorsee died in a foreign state, probate proceedings therein can be shown only by an attested copy thereof, and not by parol. Code Civ. Proc. § 529. Id.

21. Huyler v. Dolson, 101 App. Div. 83, 91 N. Y. S. 794; Carpenter v. United States Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404.

22. Neece v. Neece [Va.] 51 S. E. 739.

23. Civ. Code 1895, §§ 3319, 3320. Phillips v. Smith, 119 Ga. 556, 46 S. E. 640. Assent perfects inchoate title of devisee. Watkins v. Gilmore, 121 Ga. 488, 49 S. E. 598.

24, 25. Watkins v. Gilmore, 121 Ga. 488, 49 S. E. 598.

26. Administrator with the will annexed cannot recover devised land in ejectment. Phillips v. Smith, 119 Ga. 556, 46 S. E. 640.

27. Even though assets are insufficient.

be presumed from lapse of time,[28] the burden being on the party denying it to overcome the presumption.[29] Assent to a devise to the life tenant inures to the benefit of the remainderman, and, at the termination of the life estate, the latter may take immediate possession, unless the will shows a different intention.[30]

§ 5. *The property; its collection, management, and disposal by personal representatives. A. Assets.*[31]—Ordinarily realty passes to the heirs or devisees, subject only to the right of the probate court to order a sale thereof for the purposes fixed by statute, and the representative has no interest therein,[32] and is not entitled to the rents and profits thereof accruing after decedent's death.[33] By statute in some states, however, the representative is entitled to the possession of the realty and to the rents and profits thereof until the estate is settled and delivered by order of the court to the heirs or devisees.[34] In others where there is no heir or devisee present and competent to take possession of the realty, the administrator may do so, and demand and receive all rents and profits for the benefit of the persons entitled thereto.[35] The law of the place where realty is situated governs in respect to the rights of the parties and the modes of its transfer and distribution.[36] An administrator, being

Watkins v. Gilmore, 121 Ga. 488, 49 S. E. 598.

28. After lapse of 30 years. Phillips v. Smith, 119 Ga. 556, 46 S. E. 640.

29. Burden held not sustained. Phillips v. Smith, 119 Ga. 556, 46 S. E. 640.

30. Civ. Code 1895, § 3105. If will provides for sale or other act to be done for the purpose of, or prior to, a division, the executor may recover possession for the purpose of division. Watkins v. Gilmore, 121 Ga. 488, 49 S. E. 598. Fact that division is necessary on the death of the life tenant does not authorize executor to recover possession, where will does not provide that such division shall be made by the executor, but merely that the remaindermen shall take in equal shares. They become tenants in common and as such may have a division under Code 1895, § 4786, without any interference from the executor. Id.

31. See 3 C. L. 1255.

32. See, also, Descent and Distribution, 5 C. L. 995. Doris v. Story [Ga.] 50 S. E. 348; Rich Grove Tp. v. Emmett, 163 Ind. 560, 72 N. E. 543; Smith v. Courtnay's Ex'rs [Ky.] 85 S. W. 1101. Administrator cannot sue to quiet title or appeal from a decree in such a suit. Strong v. Peters, 212 Ill. 282, 72 N. E. 369. In proceedings to charge realty with cost of constructing ditch, where one of defendants died after judgment, his heirs and not his administrator should have been made co-appellants. Rich Grove Tp. v. Emmett, 163 Ind. 560, 72 N. E. 543. Forms no part of the estate in the hands of the administrator for distribution. Has nothing to do with it except in so far as it may be subjected to his control under the provisions of law authorizing its subjection to the payment of debts. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868. Where the same parties are named as executors and trustees they take and hold the personalty until the debts and legacies not included in the trust are paid, and balance then goes to them as trustees, but they take title to the realty as trustees under a devise to them in fee in that capacity. Herron v. Comstock [C. C. A.] 139 F. 370.

33. Broadwell v. Banks, 134 F. 470. Executrix has no interest in rent. Hollahan v. Sowers, 111 Ill. App. 263. Where purchaser of realty sold to pay mortgage and other debts took possession before the expiration of the time for redemption from the mortgage sale, he is liable for rents to the deceased owner's spouse and heirs at law and not to the estate. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98. Proceeds of cotton raised on the homestead after the owner's death are not assets. Where a part of the purchase price of the homestead secured by vendor's lien notes was unpaid at vendee's death, his administrator, who was also the holder of the notes, had no right to treat proceeds of cotton, turned over to him by widow, as assets, but was bound to apply it on the notes, and, as against a donee of the notes after maturity, the widow was entitled to a credit on the notes of the amount realized. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504. Evidence held not to show that widow consented to use of proceeds of cotton as assets of estate. Id.

34. Under Bal. Ann. Codes & St. §§ 6200, 6201, 6296, 6309, the executor or administrator is entitled to the possession of the realty. Noble v. Whitten [Wash.] 80 P. 451. Where the statute authorizes an administrator to take charge of all of the realty of the deceased, it is his duty to take charge of realty belonging to the estate under a resulting trust, and hence items of his account relating to expenses incurred in its management and rents received therefrom should have been allowed. Lufkin v. Jakeman [Mass.] 74 N. E. 933. Under the Mississippi law rents accruing during the year of testator's death and crops remaining in whatever stage or condition on the lands at the time of his death are assets. Baled cotton. Gordon v. James [Miss.] 39 So. 18.

35. Code § 3333. Nonresident heirs held not parties to proceeding by administrator to recover rent notes and lease alleged to belong to estate, notwithstanding this section, where order of probate court directed administrator to treat notes as part of the estate, but did not refer to the interest of such nonresident. Milburn v. East [Iowa] 102 N. W. 1116.

36. As to whether chattel interests go to

legally entitled to the possession of the lands of the estate when they are needed for the payment of debts, may, when the complaint shows that they are so needed, bring ejectment for their recovery without joining the heirs, provided that no affirmative relief is asked against the heirs and no relief which will affect their title.[37] In states where the administrator is entitled to the possession of the realty, the heirs may maintain an action for its recovery if there is no administrator, or, if there is one, provided he consents to their doing so.[38] A temporary administrator, as such, has no title or interest in the land of his intestate, and cannot maintain an action for its recovery, nor is his consent necessary to enable the heirs to do so.[39]

It must, of course, appear that decedent actually had title to the property at the time of his death.[40] The fact that the representative deals with property as assets is not conclusive upon the question whether or not it is such,[41] nor is an application for leave to sell land by an administrator evidence of possession or title in his intestate.[42]

Property deeded to the estate,[43] a contract of the grantee to pay the debts of the estate in consideration of the heirs conveying to him a portion of the lands of the deceased,[44] rents of realty accruing during decedent's lifetime,[45] and the right to redeem from a pledge, where no time for redemption is fixed by the contract, and the

executor or administrator. Broadwell v. Banks, 134 F. 470.

37. Under Sand. & H. Dig. § 2573, providing that ejectment may be maintained in all cases where plaintiff is legally entitled to the possession of the premises. Cook v. Franklin [Ark.] 83 S. W. 325.

38. Doris v. Story [Ga.] 50 S. E. 348.

39. In suit by heirs to recover realty in possession of another, naming him as a coplaintiff amounts to a misjoinder, and the other plaintiffs may have his name stricken on motion. Doris v. Story [Ga.] 50 S. E. 348.

40. See, also, Gifts, 3 C. L. 1560; Trusts, 4 C. L. 1727. Where written contract for sale of personalty, to be paid for in instalments, provides for retention of title in the vendor and that, on failure to pay any instalment, he may take possession of the property without any legal process and apply all previous payments as rent and for depreciation, and the vendee defaults and dies, the vendor is not guilty of trespass if he seizes and removes the property while in the hands of the vendee's administrator. Administrator has no more title than the vendee. Wilmerding v. Rhodes-Haverty Furniture Co. [Ga.] 50 S. E. 100. Money on deposit in the wife's name at the time of her death presumably belongs to her and the burden is on the husband, or, in case of his death, on his representative, to show that it belongs to him. Where husband took out letters of administration and died within year, and executors filed his account as administrator, including such deposit in assets, but at the audit claimed that it belonged to the husband, evidence held to sustain finding that it belonged to wife. In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081. Evidence held sufficient to show that stock belonged to the estate, though issued in the name of decedent's son, particularly where son transferred it to estate with knowledge that executors intended to sell it, and made no claim for it or its proceeds, until the executors' accounts were audited. In Moore's Estate, 211 Pa. 338, 60 A. 987. Finding that stock of corporation had been sold to decedent by bankrupt, whose trustee claimed it, held sustained by the evidence. In re Esten's Estate, 211 Pa. 215, 60 A. 733. In the absence of allegations or proof of insolvency of the donor's estate, his administrator is not entitled to a savings bank deposit standing in decedent's name which the latter had transferred during his lifetime by a valid gift. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367.

41. Cannot deprive next of kin of their interest by any act of his. In re Warren, 94 N. Y. S. 286. Fact that he receipts for funds in his official capacity conclusive evidence that he was dealing with them as belonging to the estate. Fact that he so indorsed certificates of deposit and receipted for a savings bank deposit because the banks required him to do so for their own protection, held not to render him responsible for the money received, where the evidence showed that they were the subjects of a gift causa mortis. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548.

42. Application of former administrator inadmissible in action of ejectment between administrator of an intestate and one not privy in estate. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

43. A deed to "the estate of E., deceased, his heirs and assigns," makes the land assets of E.'s estate. McKee v. Ellis [Tex. Civ. App.] 83 S. W. 880. Such deed is not void for want of a grantee, but conveys title to those entitled to take the estate. Id.

44. Stewart v. Rogers [Kan.] 80 P. 58.

45. Broadwell v. Banks, 134 F. 470. The court, in a partition suit to which the estate is not a party, has no jurisdiction to divide rents accruing before decedent's death, even though the heirs consent thereto, and the fact that it decrees their division does not preclude the administrator from recovering them for the purpose of paying the debts. Creditors have first right in the estate, and administrator represents them. Perkins v. Goddin [Mo. App.] 85 S. W. 936.

creditor has not in the meantime called upon him to redeem,[46] have been held to be assets of the estate.

Where the grantor in a security deed dies after its execution, in exercising the power of sale therein the property should be sold as that of his estate.[47]

The proceeds of insurance policies payable to the estate are assets,[48] but the proceeds of those payable to the widow and children as individuals are not.[49] At common law an estate for years in land is personalty, and goes to the representative;[50] but this rule has been changed by statute in some states.[51] One with whom decedent, during his lifetime, deposited money or property with directions to use it for a specific purpose, is not liable to the decedent's representative as for assets in his hands, provided he has complied with such directions, even though he did not do so until after decedent's death.[52]

A note evidencing an advancement by an ancestor to an heir is not a part of the estate of the ancestor, but the heir must account to the estate.[53] The administrator should, however, inventory a note against a son of the decedent, where the will directs that, if the note is not paid at the death of the testator, the amount thereof shall be charged against the son and taken out of his distributive share.[54]

Since the legal title and the right to possession of personalty is in the representative,[55] suits for its recovery must ordinarily be brought by him;[56] but this rule does not apply where there is no administration and no necessity therefor.[57]

46. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

47. Greenfield v. Stout [Ga.] 50 S. E. 111.

48. Where death benefits accruing to decedent from a beneficial association are payable to his estate, his administrator and not a minor son for whose support he was partially liable, is entitled to it. Compton's Estate, 25 Pa. Super. Ct. 28. Widow, as administratrix of deceased husband, took out policy of fire insurance on a house which it was supposed belonged to him under the will of his first wife. Later it was held that the latter will was invalid and that the husband had no interest in the property. Held that the proceeds of policy belonged to the estate and passed as intestate property, and did not go to the widow under her husband's will. Bloom v. Strauss [Ark.] 84 S. W. 511.

49. Widow not bound to account therefor in her capacity as administratrix. Bramlett v. Mathis [S. C.] 50 S. E. 644.

50. Though for a longer period than the tenant's life. Broadwell v. Banks, 134 F. 470.

51. Under Swan's St. Ohio 1841, p. 289, § 1, personal leasehold estates, renewable forever, descend in the same manner as realty. Broadwell v. Banks, 134 F. 470. Lessor may pursue estate of deceased lessee for recovery of accruing rentals so long as there can be found assets of the estate subject thereto. Id.

52. Doctrine held not to apply where conditions of trust were not performed. Pierce v. Woodbury [Me.] 60 A. 424.

53. Tobias v. Richardson, 5 Ohio C. C. (N. S.) 74.

54. Bullock v. Bullock, 3 Ohio N. P. (N. S.) 190.

55. See § 4C, ante; also Descent and Distribution, 5 C. L. 995.

56. To recover part of crop due decedent as rental for lands owned by him and others in common. Perkins v. Goddin [Mo. App.] 85 S. W. 936. Right to recover on chose in action payable to decedent. Harrell v. Harrell [Ga.] 51 S. E. 283. Including right to recover decedent's interest in partnership of which he was a member. Stehn v. Hayssen [Wis.] 102 N. W. 1074. Where the complaint, in an action by an administrator of a deceased partner for an accounting did not suggest that the parties in interest, some of whom were minors without guardians, had settled the estate without administration, held that it was not demurrable as raising a presumption that such settlement must have taken place. Id. Where a beneficiary was appointed administrator with the will annexed shortly after reaching his majority, held that the complaint, in an action by him to compel an accounting by the surviving partner and the representatives of a deceased partner in a firm of which his testator was a member, which expressly alleged that all of the beneficiaries under the will were ignorant of their rights thereunder was not demurrable as showing laches on its face. Id. Where testator bequeathed his interest in partnership to his wife for life with remainder to his children, she was not a necessary party to a suit by his representative for an accounting of his interest in the firm, though she participated in carrying on the business after his death. Id. The order of the county court appointing plaintiff temporary administratrix with power to bring the suit, and an order continuing her administration held to authorize the institution and prosecution by her of a suit to recover personalty alleged to have belonged to decedent. Young v. Meredith [Tex. Civ. App.] 85 S. W. 32.

57. Not where the widow of one dying intestate and without lineal descendants takes possession of his property under a statute authorizing her to do so without administration on payment of his debts (Harrell v. Harrell [Ga.] 51 S. E. 283), but she cannot

It is only under special circumstances that distributee may maintain a suit against the personal representative and another who is a debtor of the estate.[58]

It is not incumbent on an administrator suing to recover rents belonging to the estate to prove that decedent left debts unpaid and that creditors are interested in the estate.[59]

Assets of the estate cannot be said to be in custody of the law where distrained for rent long after the final account of the executor has been confirmed.[60]

(§ 5) *B. Collection and reduction to possession.*[61]—The administrator is the agent of the creditors in marshaling the assets and accumulating funds for the payment of their claims, and is also the representative of the estate,[62] and may maintain an action on a contract made by the creditors for the benefit of the estate.[63] In Louisiana, it is his duty to recover the assets and reduce them to cash if the succession owes debts, unless the heirs pay such debts.[64] He may in that state sue a purchaser of land for the price or may recover the land pursuant to the contract in the event of nonpayment[65] and for that purpose the right is indivisible so that the assent or objection of heirs is immaterial.[66]

Statutes in some states provide for a proceeding by the representative in the probate court to recover money or other personal property belonging to the decedent, to the possession of which the representative claims to be entitled.[67] In the absence

sue in such case until she has actually paid all his debts (Jackson v. Green [Ga.] 51 S. E. 284). Nonsuit properly granted in action by widow on open account for salary due decedent, where it appeared from her evidence that she had paid some of his debts before bringing the suit and some afterwards. Her status when suit is brought governs. Id. A specific legatee of a chose in action may sue when there are no debts and no administration (Patton v. Pinkston [Miss.] 38 So. 500), and the possibility that funeral expenses and administration costs are unpaid is no defense (Id.). The fact that a distributee is a defendant in such an action is no obstacle in equity. Id.

58. Held allowable to do so in suit against representative and two others, all of whom were debtors, the object of which was to have a further settlement of the accounts of the representative, to require debtor defendants to account for what they owed the estate, and for a distribution thereof between those entitled, where all defendants were necessary parties to a suit for settlement and distribution, and bill in effect charges collusion between the representatives and the other defendants, shows confidential relations between them and deceased, and that representative did not charge himself with his indebtedness or attempt to collect that of the other defendants. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170. Allegation that representative had been requested to sue other debtors and had refused to do so held not necessary under the circumstances. Id. In action by a distributee against administrator and debtor of estate where petition alleged that a third person had borrowed money from the decedent and repaid it to the administrator, there could be no recovery on proof that the money was repaid to the decedent through the medium of the debtor. Id.

59. Where court in partition suit divided realty and also certain rents accruing before decedent's death among the heirs, held that it could not be presumed in support of the decree, and as against the administrator of a deceased tenant in common, suing to recover decedent's share of the rents, that deceased left no debts and hence that administration on her estate was unnecessary. Perkins v. Goddin [Mo. App.] 85 S. W. 936.

60. Where furniture had been bequeathed to a child who after the death of the decedent lived in the house with an aunt who was to pay the rent from income derived from the shares of the children. The rent for which furniture was distrained accrued more than a year after decedent's death. Fidelity Trust Co. v. Cook, 25 Pa. Super. Ct. 142.

61. See 3 C. L. 1258.

62. Stewart v. Rogers [Kan.] 80 P. 58.

63. On contract between two creditors of the estate, made after the death of the deceased, whereby one of them agrees to pay all the debts and expenses of administration in consideration of the other satisfying a judgment against the estate, and of the heirs agreeing to convey certain tracts of land to each of them, after the same has been ratified by the heirs, and this is true though neither he nor the heirs knew of the contract when it was made. Stewart v. Rogers [Kan.] 80 P. 58. After its ratification, the contract becomes an asset of the estate. Id. The term expenses as used is such contract includes attorney's fees incurred by the administrator in enforcing it. Id.

64. Right to rescind sale of land for nonpayment may be exercised by him for that purpose. Succession of Delaneuville v. Duhe [La.] 38 So. 20.

65, 66. Succession of Delaneuville v. Duhe [La.] 38 So. 20. It cannot be said that such suit attacks the act of his intestate. Id.

67. Code Civ. Proc. § 2707. Proceeding before the surrogate. In re McGuire's Estate, 94 N. Y. S. 97. Irregularities in failing to comply with § 2708 relating to surrogate's order, and the service thereof and of the citations, are waived by a general appear-

of statute, only the heir may recover intestate and the devisee testate realty or interests therein.[68] By statute in Arkansas the representative of a fraudulent grantor may, on application to a court of chancery, have any deed or grant made by decedent with intent to delay and defraud his creditors, set aside for the use and benefit of the grantor's heirs at law, saving the rights of creditors and purchasers without notice.[69] In case the representative refuses to take advantage of the act, the heirs at law may bring such a suit.[70] The sale of the subject of a fraudulent conveyance made by a decedent during his lifetime to one with notice of the fraud may be enjoined, where the estate is insolvent, particularly where the creditor has a lien upon the land.[71] This rule, however, has no application when a person seeking to enjoin partition proceedings has no present claim against the decedent's estate.[72]

A conditional gift of personalty by an intestate can be recovered by his administrator.[73]

An executor who is made trustee of certain legacies has sole power to maintain actions with respect to their preservation and recovery.[74]

An administrator with the will annexed to whom the testamentary trustee has, on his discharge, transferred the trust estate, may sue to recover property belonging to it.[75] The executor of the wife may enforce a trust resulting in her favor in property purchased by her husband in his own name with money belonging to her.[76]

In the absence of a statute to the contrary, the executor or administrator may assign, sell, and transfer the choses in action of the estate held by him,[77] but this

ance and the filing of an answer to the merits. Id. If the control of the property is admitted, but the petitioner's right thereto is disputed, the surrogate is required to dismiss the proceedings, unless the parties consent to have him determine their rights. Id. § 2710. Id. Duty of surrogate to dismiss proceedings where witness claimed an attorney's lien on papers sought to be recovered. Id.

68. The heir at law and next of kin of decedent cannot maintain a bill to secure the reassignment of a mortgage alleged to have been secured from the decedent by fraud, where he alleges that the decedent died testate, and that his will has been admitted to probate, even though he further avers that he has appealed from such probate, it not appearing that he would have any interest if the will should be allowed to stand. Particularly in view of Act May 19, 1874 (P. L. 206) § 7, providing that the orphans' courts shall have power to prevent, by order in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they have jurisdiction. Gilkeson v. Thompson, 210 Pa. 355, 59 A. 1114.

69. Act April 19, 1895, Laws 1895, p. 165. Moore v. Waldstein [Ark.] 85 S. W. 416. Act is a remedial one and applies to deeds executed before its enactment. Id. Act does not vest grantor with any additional right to control or dispose of the land, or to make a will valid as to it, but when the deed is set aside the title goes to the heirs, saving the rights of the creditors and purchasers without notice. Devisees cannot, as such, take advantage of cancellation of deed. Id.

70. Moore v. Waldstein [Ark.] 85 S. W. 416.

71, 72. Monroe v. Monroe, 26 Pa. Super. Ct. 51.

73. An intestate shortly before his death gave an acquaintance a promissory note stating that if he did not come back she could have it. Hafer v. McKelvey, 23 Pa. Super. Ct. 202.

74. The guardian or curator of the legatee cannot. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

75. Where testamentary trustee filed his final account, transferred the trust estate and any rights of action in regard to it or pertaining to him as trustee to the administrator with the will annexed, and was discharged, the administrator had title to pledged securities formerly held by the trustee for a beneficiary since deceased and was entitled to recover the balance in the hands of the pledgee after the satisfaction of the claim secured thereby. Bristol Sav. Bank v. Holley, 77 Conn. 225, 58 A. 691.

76. Property purchased with proceeds of her securities. Gittings v. Winter [Md.] 60 A. 630. Evidence insufficient to show gift of securities by husband to his wife. Id. In action to recover proceeds of such securities memorandum of them written and signed by testatrix, and copy thereof which defendant examined after her death and from which he identified the securities, held admissible. Id. Where property purchased with proceeds of securities could not be easily identified, and husband failed to state in what they were actually invested and at what price, he was chargeable with the currency price of the securities in gold at the place where they were sold. Id.

77. Broadwell v. Banks, 134 F. 470. Has full legal title and may release, transfer,

right has been taken away in some states.[78] The representative of a deceased surety may recover from the estate of the principal the amount which the surety has been compelled to pay by reason of his secondary liability, and may enforce such claim against property fraudulently conveyed by the principal where his estate is insolvent.[79] He may also compel the obligee to resort to the property so conveyed for the satisfaction of the balance of his claim.[80]

A surviving partner has a right to the possession and control of partnership property superior to that of the administrator of a deceased partner, and the latter can claim only such of it as remains after the payment of the partnership debts.[81] On a proper showing the administrator may compel the survivor to account,[82] but he cannot enforce partnership demands or maintain actions to reduce partnership assets to possession.[83]

The conservator of a nonresident alien whose property upon his death will escheat to the state is not precluded by that fact from removing it to the state of his residence.[84]

The heir ab intestato under the laws of Porto Rico may discharge debts owing the estate and release the debtor from further liability.[85] The validity of a payment by a mortgagor to one decreed the sole heir ab intestato of the deceased mortgagee is a question of fact where made before maturity and at a time when the debtor had notice of a well-founded assertion of another claiming a right to the property.[86] A mortgagor who, pending proceedings to have a petitioner declared sole heir ab intestato of the mortgagee, under order of the court pays his indebtedness into court, is thereby discharged from liability to one declared a co-heir in proceedings commenced subsequent to the payment.[87]

(§ 5) *C. Inventory and appraisal.*[88]—The inventory is an admission by the administrator, though not a conclusive one, of possession of such assets of his intestate as are therein described.[89] He may explain any mistake or error therein, or

and compound them. Nance v. Gray [Ala.] 38 So. 916.

78. Broadwell v. Banks, 134 F. 470. Under Ohio Rev. St. § 6074, right to sell notes, claims, demands, rights of action, etc., is taken away except as to desperate claims, and bonds and stocks necessary to be sold to pay debts as provided by Id. §§ 6077, 6080. Id. Sale of claim for rents accruing before decedent's death held to confer no right of action on purchaser. Id.

79. Right of action of surety goes to representative and not to heir. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

80. Has equitable right to have property of principal exhausted before resort is had to estate of surety which he represents. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

81. Realty. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

82. Where an administrator of a deceased partner brings action for a partnership accounting against a surviving partner who asserts that he purchased the interest of the decedent, the surviving partner has the burden to show by clear and satisfactory evidence the truth of his assertion. Consaul v. Cummings, 24 App. D. C. 36.

83. For a full discussion of these questions see Partnership, 4 C. L. 908.

84. Langmuir v. Landes, 113 Ill. App. 134.

85. Payments by a mortgagor to one decreed the heir ab intestato of the deceased mortgagee, in proceedings under Porto Rico Code §§ 976-980 are not made at the risk of being required to respond to others who may subsequently be found to be co-heirs because the decree reserved the rights of third persons. Sixto v. Sarria, 196 U. S. 175, 49 Law. Ed. 436. The effect of proceedings under Porto Rico Code, §§ 1000, 1001, to designate the heirs ab intestato, is to permit them after final decision to collect the estate; hence payment of debts due an intestate to them is not made at the risk of being required to respond to others who establish a right thereto within five years because the Porto Rico mortgage laws declare that property acquired by inheritance cannot be cleared until five years from date of recording. Id.

86. Sixto v. Sarria, 196 U. S. 175, 49 Law. Ed. 436.

87. Sixto v. Harria, 196 U. S. 175, 49 Law. Ed. 436. After reinstatement by an appellate court of an order of a lower court directing a debtor to pay into court the amount of his debt, the debtor cannot discharge his liability by obtaining from the lower court an order permitting the withdrawal of a payment and paying it to an assignee of the claim. Id.

88. See 3 C. L. 1261. Necessity of inventory for purpose of levying succession tax, see Taxes, 4 C. L. 1605.

89. Wood v. Brown, 121 Ga. 471, 49 S. E. 295. Where inventory was introduced, evidence in suit on administrator's bond to col-

may show that deceased had no title to the property inventoried, but the burden of doing so is on him.[90]

In Texas any executor may, on petition of any person interested in the estate pointing out property alleged to have been omitted from the inventory, be cited to show cause why he should not correct such inventory so as to include the same,[91] and upon proof, on the hearing, that property has been so omitted, the county court may require him to make such correction.[92]

(§ 5) *D. Property allowed widow or children.*[93]—In some states the widow is allowed to retain the mansion or chief dwelling house of her husband, free from molestation or rent, until dower is assigned to her.[94]

The widow and children generally have an extended estate of homestead in land occupied by decedent,[95] free from liability for debts except such as he charged thereon. The widow's right in the homestead is one of occupancy only, which she cannot convey, and may abandon at pleasure.[96] When she abandons it,[97] or sells her interest, the homestead right terminates, and the heirs of the deceased husband are entitled to possession of their interest in the property.[98] She cannot have both dower and homestead in the same land, and therefore by electing to take the former she waives her right to the latter.[99] By statute in some states it is made the duty of the probate court or judge, on the coming in of the inventory, to set aside to the surviving husband or wife, or minor children, the homestead selected and recorded during decedent's lifetime, or, if none has been so selected and recorded, then to select and set apart one from the estate and have it recorded.[1] The court may act either on petition or on its own motion.[2] The wife is not deprived of her right to

lect amount of widow's allowance held to require submission of case to jury. Id.

90. Wood v. Brown, 121 Ga. 471. 49 S. E. 295. Has the burden of proving that property included in the inventory did not belong to decedent at the time of his death. In re Bayley [N. J. Eq.] 59 A. 215. Evidence insufficient to show gift of stock by decedent to her children, but merely showed an attempted testamentary disposition, ineffective because not made by will. Id. Husband of decedent not estopped from claiming accounting for stock by his silence, where he did not have knowledge of all the facts. Id.

91. Batts' Ann. Civ. St. art. 1974. Allegation that particular description of notes and credits which legatees and devisees sought to have included could not be given because executor had suppressed and destroyed all evidence in regard to them held to state a sufficient excuse for failure to specifically describe property. Moore v. Mertz [Tex. Civ. App.] 85 S. W. 312.

92. Batt's Ann. Civ. St. arts. 1973, 1975. Moore v. Mertz [Tex. Civ. App.] 85 S. W. 312. Such a proceeding to compel him to include notes and credits held by him for decedent is not an action for debt so as to oust the county court of jurisdiction. Has jurisdiction under Const. art. 5, § 16, and Rev. St. 1895, art. 1840, giving such court general probate jurisdiction and under express provisions of Batts' Ann. Civ. St. §§ 1973-1975. Id.

93. See 3 C. L. 1261.

94. Under statute authorizing widow to occupy the mansion or chief dwelling house of her husband for two months or until her dower is assigned, an answer in ejectment in which defendant claims right to hold land under her dower right, and alleging that defendant's dower has not been assigned, but failing to allege anything as to the premises being the mansion or farm attached thereto is fatally defective. Gates v. Solomon [Ark.] 83 S. W. 348. See, also, Descent and Distribution, § 6, 5 C. L. 1001.

95. See, also, Homesteads, 3 C. L. 1630. Under Const. art. 9, §§ 3-6, entitling the widow of a deceased resident to a homestead during her natural life, answer in ejectment alleging that defendant was widow of one who occupied land as a homestead and that she had continued to occupy it as such since his death, held to state a good defense. Gates v. Solomon [Ark.] 83 S. W. 348.

96. Jones v. Green, 25 Ky. L. R. 1191, 83 S. W. 582. The right of the survivor of a community to occupy the community homestead is a personal right, and not an estate in land. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

97. Terminates an unexpired lease previously made by her. Jones v. Green, 25 Ky. L. R. 1191, 83 S. W. 582.

98. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

99. Having conveyed and abandoned land after electing to take homestead, her grantee does not acquire her dower interest. Jones v. Green, 25 Ky. L. R. 1191, 83 S. W. 582.

1. Code Civ. Proc. § 1465. In re Firth's Estate, 145 Cal. 236, 78 P. 643; In re Shively's Estate, 145 Cal. 400, 78 P. 869. Comp. St. 1887, Div. 2, § 134. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334.

2. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334.

such homestead by the fact that she has other property fitted for occupancy.[3] In a proceeding merely to set apart a homestead to the surviving wife, the probate court has no jurisdiction to determine in whom the remainder in fee vests.[4] Where the administrator has previously, and under order of the court, mortgaged property belonging to the estate, including that subsequently set apart as a homestead, the administrator is entitled to pay out of the assets of the estate a sum necessary to secure the release of such homestead.[5]

The surviving husband or wife is also generally entitled to certain of decedent's personalty free from liability for his debts, or a money equivalent in lieu thereof.[6] Desertion of her husband by the wife may operate to deprive her of this right.[7]

In most states the widow is also given an allowance for the support of herself and her family during the period of administration.[8] It is for the benefit of herself and her family, and, if it may be reached by her creditors after it has been allowed, she cannot be compelled to assert it for their benefit, nor can they assert it for her.[9] It is not a claim against the decedent within the statute relating to the filing of claims.[10] The widow and minor children of a deceased partner are entitled to a statutory year's support only in what remains of his interest in the partnership property after payment of the partnership debts.[11]

The right may be lost by delay in asserting it.[12] The wife is not necessarily de-

3. Not because she has another residence. In re Firth's Estate, 145 Cal. 236, 78 P. 643. Court held not to have abused his discretion, where homestead awarded is much less in value than her interest would have been under the dower law. Id.

4. In re Firth's Estate, 145 Cal. 236, 78 P. 643.

5. Even though it was a greater sum than the homestead tract was liable for in proportion to its value. In re Shively's Estate, 145 Cal. 400, 78 P. 869.

6. Under Burns' Ann. St. 1901, § 2424, she may select articles named in the appraisement not exceeding $500 in value, and if she fails to select any part of them the amount of the deficiency shall be paid to her in cash. If the personalty is insufficient to pay that amount, it is made a lien on the realty, to be enforced by sale upon petition of the administrator. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130. Where administrator knows that the amount selected by her is less than $500, and that there is not sufficient personalty to pay the balance, it is his duty to petition for a sale of the realty before seeking final settlement of the estate. Id. Where a husband deserts his wife and family in England and after becoming domiciled in Pennsylvania dies, leaving an estate, the widow is entitled to the exemption allowed by the act of April 14, 1851 (P. L. 612), though she knew during his lifetime of his residence in Pennsylvania. Balmforth's Estate, 26 Pa. Super. Ct. 491. Tex. Rev. St. 1895, art. 2046, authorizing probate court to set aside property exempt from forced sale to the widow, minor children, and unmarried daughters remaining with the family of the deceased, held not repugnant to Const. art. 16, § 52, providing for the descent of the homestead. Randolph v. White, 135 F. 875.

7. Where a wife without reasonable cause leaves her husband and renounces all conjugal relations a considerable time before his death, she is not such a widow as entitles her to appropriate $300 of his estate to her own use. Myer's Estate, 24 Pa. Super. Ct. 142.

8. Widow's and minor's allowance given by Rev. St. 1895, arts. 2037, 2038, 2044, 2093, is a claim on the estate next in priority to those of the first class, and is superior and prior to all other claims except that of a vendor who expressly reserves a lien on land to secure the payment of the purchase money. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436. Has right in proceeds of sale of land prior to that of one holding a trust deed thereon to secure his claim. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

Allowance as lien on realty, see Tiffany, Real Prop. p. 1323.

9. She being barred by laches from obtaining it, creditors cannot do so. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

10. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130.

11. Wood v. Brown, 121 Ga. 471, 49 S. E. 295.

12. A widow who makes no effort to administer on her husband's estate for ten years after his death is barred by laches from doing so thereafter for the sole purpose of having her widow's award set off and the homestead sold for that purpose. Barred after seven years. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114. Where the clause in the will appointing the widow as independent executrix was canceled and she was then appointed administratrix with the will annexed, held that, under the circumstances, the order making an allowance to the widow and minor children was not void because not made within a year after decedent's death. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

prived of her right by her misconduct,[13] but a separation agreement between herself and her husband may have that effect.[14] The acknowledgment by a married woman of a deed of trust given by her husband does not deprive her or her minor children, after her husband's death, of the right to have the proceeds of a sale of the land covered thereby applied to the payment of her allowance, where the estate is insolvent.[15] Neither does the fact that she joins the grantee in an application for the sale of the land.[16] She does not, by joining in an agreement with other heirs to settle the estate without administration and agreeing to take a life estate in the realty for her share, waive her right to an award when administration becomes necessary because of a deficiency of personalty to pay the debts.[17] The allowance of a claim by an independent executrix in her official capacity does not estop her, on her subsequent removal and her appointment as administratrix with the will annexed, from claiming priority over the same for her widow's allowance.[18]

The allowance may, in some states, be made before the return of the inventory and appraisement.[19] Any person interested in the estate may ordinarily oppose the application therefor.[20]

In determining the amount thereof the court may take into consideration the character and amount of the estate, and the provision the deceased sought to make for the widow as well as her actual necessities.[21] Evidence showing the financial condition of the estate when the application is made is admissible.[22]

The widow may recover property set apart to her for a year's support and in the possession of a third person.[23] She is not entitled to interest on the amount thereof from the date when it is set off by the commissioners.[24] It is the duty of the administrator to pay the allowance, and a final settlement made before doing so is illegal and may be set aside, though she made no demand for such payment.[25] The judgment of the ordinary allowing a year's support is conclusive only that she is entitled to the amount of the judgment, if there are assets to pay it, and is no

13. Misconduct held, under the circumstance, not to be such as to deprive her of her right to an allowance, even if misconduct ever would be. In re Drasdo's Estate, 36 Wash. 478, 78 P. 1022.

14. Though she does not therein expressly renounce all interest in her husband's property. Sufficient if it appears that there was an intent to do so. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

15. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

16. Where there is no other property from which it can be paid. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

17. Bennett v. Morris, 111 Ill. App. 150.

18. Evidence held to show that she made allowance in her official capacity without any intention of waiving her individual rights. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839. Even if approval could be construed as having been made in her individual capacity, it was not binding because there was no consideration therefor. Id. Evidence as to her intention and as to lack of consideration held admissible, without pleas of non est factum or want of consideration. Id. Hence, if it was error to allow filing of such pleas by administratrix after testimony was concluded, it was harmless. Id.

19. Under Gen. St. 1894, § 4477, as amended by Laws 1903, c. 334, p. 581, and § 4493. In re Strauch's Estate [Minn.] 104 N. W. 535.

20. Including the executor of a co-surety of the decedent on a bond on which suit has been brought, may interpose a caveat to an application of the widow for a year's support. Civ. Code 1895, § 3467, requires citation to be issued to all persons interested. Mathews v. Rountree [Ga.] 51 S. E. 423.

21. Allowance held not excessive under the circumstances. In re Drasdo's Estate, 36 Wash. 478, 78 P. 1022. The extent should be determined primarily by the value of the estate and the amount of claims against it, though some regard should be had to the situation in life and the previous manner of living of the surviving family. In re Strauch's Estate [Minn.] 104 N. W. 535.

22. Evidence as to the amount of claims admissible on appeal, though they have not yet been passed upon by the probate court. In re Strauch's Estate [Minn.] 104 N. W. 535.

23. Where portion of crop owned by tenant at time of his death was set apart to his widow as a year's support, she could recover the same in trover from one to whom the landlord, without authority, had delivered it as payment of a debt which deceased owed such person, though the tenant owed the landlord one-fourth of the crop for rent, and such conversion was made before the year's support was set apart. Neal v. Smi [Ga.] 50 S. E. 922.

24. Field v. Field, 215 Ill. 496, 74 N. E. 443.

25. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130.

evidence of the fact that the administrator has sufficient assets out of which to pay it.[26]

(§ 5) *E. Management, custody, control, and disposition of estate.*[27]—The management and disposal of property under testamentary trusts, though the same persons act as executors and trustees, is treated in the article on trusts.[28]

Where there is a will the executor is governed by its directions, if legal, as to administration.[29]

The executor or administrator represents the creditors as well as the heirs in the collection of debts, and in the prosecution and defense of claims,[30] and it is his duty to conserve the interests of all the creditors, and not to so administer the estate as to work a preference to any one of them.[31] He may assert any right commensurate with his title; hence an executor who, under the will, has the right to keep the estate intact until the youngest child becomes of age, may sue for an injury to the property resulting from a negligent tort.[32] For any acts contrary to good trusteeship, he may be held liable according to the usual equitable principles.[33]

An independent executor in Texas may do, without an order of court, everything which an executor administering the estate under the control of the court may do with such order.[34] He may, without an order of court, convey land belonging to the estate in payment for services rendered to him as executor.[35] He may sell personalty, especially when so licensed, but cannot without license mortgage it.[36] Executory sales of personalty whereby title remained in decedent at his death leave the personal representative free to dispose of it.[37]

Control by courts.—The exercise of a legal discretion vested in the executor may be compelled.[38] In Georgia, when for any reason it becomes impossible to carry out the will in whole or in part, the judges of the superior court are given power at chambers, in vacation, to render any decree that may be necessary and legal in the premises, provided all parties in interest consent thereto in writing.[39] In some states the court may order a sale of securities which are in danger of depreciation.[40]

26. Administrator is not required to object to setting aside of allowance, and cannot show lack of assets with which to pay it. Wood v. Brown, 121 Ga. 471, 49 S. E. 295.

27. See 3 C. L. 1263.

28. See Trusts, 4 C. L. 1727.

29. The question usually arises as to what the will intends. See Wills, § 5E, 4 C. L. 1937.

30. Perkins v. Goddin [Mo. App.] 85 S. W. 936.

31. Schermerhorn v. Gardenier, 94 N. Y. S. 253.

32. For loss due to fire set by locomotive. Hendricks v. Southern R. Co. [Ga.] 51 S. E. 415.

33. See post, § 9.

34. Altgelt v. Mernitz [Tex. Civ. App.] 83 S W. 891.

35. Where will authorizes him to gather and collect all decedent's property, collect all debts due the estate, and to sell and convey any of the property. Baker v. Hamblen [Tex. Civ. App.] 85 S. W. 467.

36. A purchaser from an administrator under a sale authorized by the court acquires title as against a purchaser under foreclosure of a chattel mortgage given by the administrator without authority. Richley v. Childs, 114 Ill. App. 173.

37. Sale of chattels by the executor was regarded as in pursuance of a new contract rather than one made by decedent, the contrary not having been proven, and hence a right of satisfaction out of proceeds reserved by decedent's agreement was not binding on executor. Schermerhorn v. Gardenier, 94 N. Y. S. 253.

38. Where will imperatively requires sale of realty and executrix has discretion only as to terms and time of sale, she will be compelled to sell after occupying property for three years without attempting to do so, unless she shows some satisfactory reason to the contrary. In re Severns' Estate, 211 Pa. 68, 60 A. 494. Burden on her to show such reason is not met by simple declaration by herself and her sister that time was not suitable for sale, where there was no showing that they knew anything about the matter. Id.

39. Civ. Code 1895, § 4855. Jurisdiction of the subject-matter depends upon such written consent of all persons sui juris. Callaway v. Irvin [Ga.] 51 S. E. 477. If a feme covert be a beneficiary under a will probated prior to the married woman's act of 1866, and her husband has taken no steps to enforce his marital rights with respect to the devise or bequest made to her by the testator, her written consent is necessary to the validity of an order passed in vacation authorizing the executor to sell the property of the estate. Id.

Contracts for sale or conveyance of land by or to decedent.—The administrator may maintain a suit in equity to compel the heirs at law to specifically perform a contract made by the decedent for the sale of land.[41] His right to do so is not dependent on the fact that the funds to be derived from the sale are necessary for the payment of decedent's debts.[42] The fact that such suit is instituted by the widow, who is also administratrix, and that she will, under the statute of distributions, take the whole of the proceeds of the sale as personalty whereas she would only take half the realty, does not affect her right to specific performance as against the heirs.[43] By statute in some states, where one bound by a contract in writing to convey realty dies before doing so, and where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.[44] An executor or administrator of an estate has the same right to present a petition for conveyance of real estate to him under these circumstances as any other person, and need not first resign his position in order to enforce it.[45] Such a statute does not give jurisdiction to compel performance of an executory oral contract to convey,[46] and hence the petition must show that the contract was in writing.[47]

Right to sell realty.[48]—In the absence of a provision to the contrary in the will, an executor has no authority to sell realty except when necessary for the payment of debts and legacies, and then only after obtaining an order of sale from the probate court,[49] nor has he authority to deliver a deed executed by testator.[50] He cannot

40. In Ohio the probate court has power to order the sale of securities of an estate which are in danger of depreciation. Guthrie v. Cincinnati Gas & Elec. Co., 2 Ohio N. P. (N. S.) 117.

41. Where purchaser was ready and willing to perform and had deposited the money in escrow. Has no adequate remedy at law. Butman v. Butman, 213 Ill. 104, 72 N. E. 821. Hurd's Rev. St. 1903, c. 29, § 4, providing that the representative of a decedent who has contracted to sell land may, when the consideration has been paid, or a conveyance ought to be made, obtain an order for a conveyance on notice to the vendee, does not require such notice to be given to the heirs when they refuse to convey, and the vendee is ready and willing to perform. Id.

42, 43. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

44. Comp. St. 1887, div. 2, § 236. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334. Provision in decree setting aside certain water for use of such homestead held invalid, the petition being one merely for setting aside homestead and not asking for or contemplating any other relief. Id. Code Civ. Proc. §§ 1597-1602, held within the power of the legislature to enact. In re Garnier's Estate [Cal.] 82 P. 68. Rev. Prob. Code, § 259, authorizes the circuit court to take jurisdiction of a suit to compel an executor to specifically perform a contract to convey land entered into by his testator, where the latter died before making the conveyance, and requires the county court to dismiss the petition whenever the rights of the petitioner to specific performance is doubtful. Right held so doubtful as to render dismissal of petition by county court proper. Id. Sayle's Ann. Civ. St. 1897, arts. 2152, 2153, authorizes the county court to direct the administrator to convey land in accordance with a bond for a deed executed by decedent, and provides that a conveyance made in accordance with such statute shall be prima facie evidence that all laws have been complied with in obtaining the same. Such a deed to a trustee is prima facie evidence of title in the latter. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025. Court records being burned, bond for title offered in evidence and purporting to have been executed by decedent, but differing essentially from the recitals in regard to the bond in the judgment authorizing the conveyance, held insufficient to show that it was the bond on which the court acted, or to rebut the presumption that court had sufficient evidence before it on which such judgment was rendered. Id.

45. In re Garnier's Estate [Cal.] 82 P. 68.

46. Cannot direct specific performance of contract whereby decedent, in his lifetime, agreed to convey certain water rights to his wife. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334.

47. Court is without power to proceed unless it does so, and order made on petition which does not is ineffective for any purpose. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334. Court being one of limited jurisdiction, it cannot be presumed that the contract was in writing, and that the court therefore had jurisdiction to enforce it. Id. Decree being void for want of jurisdiction, it was not validated by curative act (Sess. Laws 1899, p. 145) subsequently passed to validate judicial sales by executors, administrators, etc. Id.

48. See 3 C. L. 1265 n. 28 et seq. For matters relating to sale to pay debts, see § 7, post.

49. Deed without such order is absolutely void. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441. The realty of one dying testate passes immediately to the devisees, and the executor has no authority over or title to it by virtue of his appointment merely, and no

exercise a power of sale of realty given him by the will until the will has been probated and he has qualified under his appointment.[51] A power of sale coupled with a trust,[52] or a mandatory power, without discretion, may be exercised by an administrator with the will annexed.[53]

The power of an administrator to sell land belonging to the estate is in all cases limited by the order granting him license to sell, and is confined to the lands therein described.[54] Though the estate owns only an equity of redemption in land, the administrator may, with the public consent of the owner of the legal title, sell the fee.[55]

A notice of sale must be given where the statute or order of license requires it.[56] Mere irregularities will not avoid the sale,[57] or render the proceedings subject to collateral attack,[58] nor will fraud be presumed on a sale in regular form to the executor,[59] for confirmation is an adjudication that the sale was under order of the court, and cures all irregularities.[60]

The rule of caveat emptor applies, and the purchaser takes only such title as the decedent had at the date of his death.[61] He is also charged with absolute notice of any want of power on the part of the representative to make the sale,[62] and must

right to sell it unless the will, either expressly or by necessary implication, authorizes him to do so. Where will directs property to be sold and proceeds to be divided, executor is by implication vested with power to make the sale though not named as the donee of the power. Smith v. Courtnay's Ex'rs [Ky.] 85 S. W. 1101. A deed by an executrix who by the terms of the will of a decedent has power to convey in as full a manner as the testator could had he been alive passes a good title, though she was not empowered to pay debts of the estate. Kerr v. Long's Ex'r [Ky.] 88 S. W. 1068.

50. Delivery of a deed to the grantee by the executor of the grantor and recording the same by the grantee, held not to pass title to the latter, in the absence of a showing that the executor was authorized by the grantor to make the delivery. Berkmeier v. Peters [Mo. App.] 86 S. W. 598.

51. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

52. May v. Brewster [Mass.] 73 N. E. 546.

53. Ayers v. Courvoisier, 101 App. Div. 97, 91 N. Y. S. 549.

54. Hall v. Davis [Ga.] 50 S. E. 106. One claiming title to land under an administrator's deed must in all cases show the order of the court of ordinary granting the administrator license to sell the land in question. Must affirmatively appear that the land described in the order is the same as that described in the deed and for which the action is brought. Id.

NOTE. Right to postpone sale: An executor or administrator may lawfully postpone the sale if in so doing he exercises a sound discretion and acts with a view to the best interests of the parties. Norris v. Howe, 15 Mass. 175; Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; Gillespie's Estate, 10 Watts [Pa.] 300; Lamb v. Lamb, 1 Spears Eq. [S. C.] 289.—From 40 Am. Dec. 618.

55. Mallard v. Curran [Ga.] 51 S. E. 712. Borrower of money executed deed of trust to secure it, and thereafter died. His administrator, having been granted authority by the ordinary to sell the land, sold the fee with the consent of the grantee in the deed, which was publicly announced by the auctioneer at the sale. Held, that the purchaser could maintain an action to compel the administrator to make a deed, and the holder of the trust deed to cancel the same. Id.

56. In Minnesota notice of sale must be given where the order of license requires it. Gen. St. 1894, §§ 4600, 4612. Cater v. Steeves [Minn.] 103 N. W. 885. Order of license held to require notice of sale to be given. Fact that it only required a notice of the terms under which the sale was to be made did not render it void, as an effective notice could not be given without stating when and where the sale was to take place. Id.

57. Under Gen. St. 1894, § 4612, if it appears that license was issued by court having jurisdiction, that representative gave bond and took prescribed oath, that he gave required notice, and that sale was made in manner required by license, and was confirmed, and that land is held by bona fide purchaser. Cater v. Steeves [Minn.] 103 N. W. 885. That a sale and adjudication of the property of a succession was not made at the court house or an authorized place is a mere irregularity prescribed in five years. Landry v. Laplos, 113 La. 697, 37 So. 606.

58. See post, § 15.

59. Where the will and the probate records show that the executors were authorized to sell the land to one of their number and that they did so and that the sale was approved, mortgagees of the purchasing executor are entitled to rely thereon, and are not bound to inquire into his disposition of the purchase price. Their rights are superior to those of legatees. Curtis v. Brewer [Mich.] 12 Det. Leg. N. 105, 103 N. W. 579.

60. Altgelt v. Mernitz [Tex. Civ. App.] 83 S. W. 891.

61. Court only attempts to order sale of what deceased owned and not to determine what he owned, and representative sells without any warranty or guaranty. Altgelt v. Mernitz [Tex. Civ. App.] 83 S. W. 891.

62. By records of necessary proceedings in probate court. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

see that the order of sale is regularly obtained and properly complied with.[63] As a general rule the representative is not bound to make known defects of title within his knowledge, and where there is neither fraud nor misrepresentation by the administrator in selling, and the sale is regular, the purchaser is bound to pay the amount bid, though there be a defect in the title.[64] He will, however, be protected from the consequences of having been misled by the fraud or mistake of the representative in so far as he had a right to rely on his representations.[65]

An executor will not be compelled to execute a deed to a purchaser guilty of fraud.[66] An administrator's sale is effective without any deed where the record shows that he received the purchase money.[67]

Neither the estate nor its administrator can be held to be a constructive trustee of property sold without authority by the executor named in the will,[68] but, if necessary, the purchaser may be held as trustee in invitum for the estate.[69]

An administrator may recover land belonging to the estate sold by a former executor without authority,[70] notwithstanding the fact that the will is not executed according to the laws of the state where the realty in dispute is situated and hence cannot be admitted to probate therein.[71] The estate and administrator are not estopped to set aside such deed in a transaction to which they were not parties and in which they did not profit or participate.[72]

Right to mortgage realty.—Lands belonging to a decedent's estate can only be incumbered for the purposes and in the manner prescribed by law.[73] Statutes in some states authorize the mortgage of realty on order of the court, when it appears to him to be for the best interests of the estate.[74]

The estate is bound in equity to repay with interest the amount advanced by the

63. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

64. Altgelt v. Mernitz [Tex. Civ. App.] 83 S. W. 891.

65. Conceding that the rule of caveat emptor applies in all its strictness to sales by independent executors made without any order of the court, yet the purchaser will be protected against the consequences of having been misled by the fraud or mistake of such executor in so far as he had a right to rely on his representations. Altgelt v. Mernitz [Tex. Civ. App.] 83 S. W. 891. Thus, where the executor knows, or may reasonably be supposed to know, material facts concerning the title which are unknown to the vendee, and which cannot otherwise be ascertained by him at the time and place of sale, and the vendee informs the vendor that he relies solely on the truth of his statements and representations concerning the title, and the vendor makes such statements relative thereto, which if true, would constitute a good title, and the vendee buys relying thereon, and the representations prove to be false and the title bad, the vendee may, to the extent of the failure of the title, surrender the property and defend against an action for the purchase money, irrespective of whether the vendor knew such representations to be false or did not know whether they were true or false. Id.

66. Not where it appears that prior to the sale the devisees had agreed among themselves that the property should not be struck off under a certain price and the crier in disregard of his instructions sold at a lower price to some of the parties to the agreement. Cobleigh's Estate, 23 Pa. Super. Ct. 271.

67. Where approval of sale contains evidence that he received it, sale was effective, though deed was dated and acknowledged before the date of the sale and before sale was approved. Sale for purpose of dividing estate and closing administration. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

68. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

69. Sale by executor to carry out compromise agreement with parties contesting will. Coy v. Gaye [Tex. Civ App.] 84 S. W. 441.

70. Sale to carry into effect compromise with persons contesting will. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441. Purchasers held not to have purchased in good faith so as to be entitled to return of purchase-money. Id.

71. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

72. Land sold without authority by a former executor to carry out a compromise agreement between the executor and those contesting the will, to which neither the creditors nor the legatees were parties, where none of the proceeds were paid into court, or accounted for, or expended for the benefit of the estate, or of any one having an interest in or a claim against it. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

73. No lien or right of subrogation created on account of money derived from mortgage, which was expended for farm machinery and general uses. Henry v. Henry [Neb.] 103 N. W. 441.

74. Code Civ. Proc. §§ 1577, 1578. In re Shievly's Estate, 145 Cal. 400, 78 P. 869. Under Gen. St. § 253, real estate held in trust. Townsend v. Wilson, 77 Conn. 411, 59 A. 417.

mortgagee under an unauthorized mortgage, where the proceeds have been applied to the payment of debts and legacies.[75]

§ 6. *Debts and liabilities of estate; their establishment and satisfaction. A. Claims provable*[76] embrace those arising out of contracts, express or implied, valid against decedent in his lifetime and not extinguished by his death,[77] and also torts which survive.[78] They must subsist in law and be enforceable as against a plea of limitations or of the statute of frauds or like defense.[79] These matters are the subjects of separate topics in Current Law. An implied contract may arise on the death of decedent leaving his part of a contract unperformed.[80] The decedent rather than his heir, partner, principal or other person must have stood as debtor. Thus, taxes which become a lien on decedent's realty prior to his death should be paid by his representative out of the personalty.[81] So also the estate is liable for money loaned decedent to be used in a business in which he was interested, whether he owned the entire business or was only a partner;[82] but the estate of one partner is not liable for money loaned to another partner as an individual.[83] Where the husband, as head of the community, manages a business and treats it as his own, he and the community and not the wife or her paraphernal property invested in the business is liable for its debts.[84]

The estate is not liable for the torts of the representative, even though persons interested therein have benefited thereby.[84a] An administrator who obtains and converts property belonging to another under the mistaken belief that it belongs to the estate which he represents is liable to the owner for the value thereof both in his representative and his individual capacity.[84b] An executor who borrows money from an heir for the use of the estate may be personally bound if it is not used as agreed at the time of the loan.[84c]

(§ 6) *B. Exhibition, establishment, allowance, and enforcement of claims.*[85] *Jurisdiction.*[86]—As a general rule the courts having jurisdiction of probate

75. Thomas v. Provident Life & Trust Co. [C. C. A.] 138 F. 348. Executors borrowed money and executed mortgage to secure its repayment without specific authority to do so, and used the proceeds to pay debts and a legacy charged on a portion of the land. Later, in consideration of their obligation to repay the money, they quitclaimed to the mortgagee. Held, neither the legatee whose legacy was charged on the land nor a judgment creditor of the residuary devisees could attack the mortgage or deed in the absence of fraud. Id.

76. See 3 C. L. 1267.

77. See Contracts, 5 C. L. 664; Implied Contracts, 3 C. L. 1690.

78. See Abatement and Revival, 5 C. L. 6.

79. See Limitation of Actions, 4 C. L. 445; Frauds, Statute of, 3 C. L. 1527; Fraud and Undue Influence, 3 C. L. 1520; Duress, 5 C. L. 1047.

80. See full treatment in Implied Contracts, 3 C. L. 1690. One rendering services to deceased for which the latter agrees to compensate him out of his estate has, in case he fails to do so, a claim against his estate on a quantum meruit. Properly construed, petition held to be one for recovery on quantum meruit. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. One authorized to improve and sell lands and reimburse himself for his expenses out of the proceeds of the sale is entitled, after the termination of his authority by the death of party conferring it, to be repaid and compensated from the proceeds of the property when sold, for expenses incurred and services rendered in reliance thereon. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 50 S. E. 592.

81. Not by testamentary trustee who takes the realty. Rev. St. § 2838. Loomis v. Von Phul, 2 Ohio N. P. (N. S.) 423. Where it is the duty of a life tenant to pay the taxes, his estate is liable for taxes which became a lien prior to his death. Penn's Ex'r v. Penn's Ex'r [Ky.] 87 S. W. 306.

82. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412. Money deposited in decedent's business after her death and before the qualification of her independent executor may be collected from the latter, where he ratifies such deposit after his qualification. Id.

83. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412.

84. Succession of Sangpiel [La.] 38 So. 554.

84a. Not for his misapplication of the proceeds of an insurance policy which were not assets of the estate but belonged to the widow. Nickals v. Stanley [Cal.] 81 P. 117. The estate should not he mulcted in damages for his failure to deed property sold. Mallard v. Curran [Ga.] 51 S. E. 712.

84b. Bank deposit. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367

84c. Frick v. Shimer, 26 Pa. Super. Ct. 563. Parol evidence is admissible to show the terms of the loan, if denied by the executor. Id.

85. See 3 C. L. 1269.

86. See 3 C. L. 1267.

matters are given authority to hear and determine claims against the estate.[87] Accordingly creditors must enforce their claims in the probate court and cannot, during the time allowed by law for the issuance of letters of administration, sue the heirs or devisees.[88] But this rule does not apply where there is no administration and no necessity therefor.[89]

Occasion and necessity of proving claims.[90]—The widow's allowance,[91] claims arising under contracts with the representative,[92] and costs incurred by the representative in suits to recover assets alleged to belong to the estate, are not claims against the decedent within the statutes relating to the filing and adjustment of such claims.[93] The widow is not a creditor to the extent of the amount necessary to augment her separate estate to the share she is entitled to take under the statute by electing against the will, under the Mississippi statute.[94]

The presentation of a claim against the estate is not necessary to enable one to sue the representative for property or money which can be identified in specie as that of the plaintiff,[95] nor is the presentation of a claim against the estate of the maker

87. See, also, § 2, ante.

In New York the surrogate has no authority to determine disputed claims, but where a claim is questioned by the representative, he must dismiss the proceeding and remit the creditor to the common-law courts for the establishment of his claim. Code Civ. Proc. §§ 2722, 2743. In re Gall [N. Y.] 74 N. E. 875.

In Oregon the county court has jurisdiction to hear and determine claims which have been presented to and rejected by the administrator, under Laws 1854-55, p. 339, giving such jurisdiction to the judge of probate, and Const. art. 7, § 12, conferring on the county court the jurisdiction pertaining to probate courts. In re Morgan's Estate [Or.] 78 P. 1029.

88. On the death of the defendant pending an appeal from a judgment against him in the superior court, the power of the latter court to enforce the judgment terminates, and, in case said judgment is affirmed, plaintiff is remitted for its collection to the probate jurisdiction of the court having charge of the administration of his estate, to which court any objection to its payment out of the assets of the estate must be presented. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029. Appellate court will not, on substitution of defendant's executors, refuse to consider the case on the ground that the judgment appealed from was unenforceable because not presented to defendant's executors. Id. A vendor's lien when established in the district court as against an estate must be collected through the probate court. A failure to pursue such remedy results in a loss of the claim. Wall v. Club Land & Cattle Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 677, 88 S. W. 534. Until a claim has been established in a pending suit at law, equity cannot make any declaration or decree against the executrix in regard to it. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. Until the creditor has exhausted his remedy against the estate in the hands of the executor, equity cannot grant any relief against a legatee, or a trust fund alleged to be held by the executor for the payment of debts. Id.

89. Where the widow takes possession of the estate of her husband as sole heir, a creditor of the husband may maintain an action directly against her, upon proof that he is sole heir and in possession, that there has been no administration on the estate, that his claim was the only debt due by the estate, and that the widow took possession without notice of any debt due by the estate. This by implication and analogy to Civ. Code 1895, § 3422, authorizing creditors to compel distributees without notice to contribute pro rata to payment of their debts. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Failure of petition to allege that widow took possession without notice of any existing debt can be taken advantage of only by a special demurrer, and does not render petition subject to general demurrer. Id. Amendment to show that there were no other debts, and no necessity for administration, and that the widow was in possession held properly allowed. Id.

90. See 3 C. L. 1267 et seq.

91. Widow's allowance under Burns' Ann. St. 1901, § 2424, is not a claim against the estate within the meaning of Id. § 2465, providing for the filing of claims. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130.

92. A claim arising under a contract with the widow while acting as independent executrix in accordance with the terms of which claimant paid certain indebtedness of the estate, including funeral expenses, etc., need not be presented to her for allowance on a change in the form of the administration and her appointment as administratrix with the will annexed. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

93. Not within Rev. St. 1898, § 3838. Ferguson v. Woods [Wis.] 102 N. W. 1094.

94. Rev. Code 1892, §§ 4496, 4499. Gordon v. James [Miss.] 39 So. 18.

95. Right arises from the fact that the thing sued for is not part of the estate. Sprague v. Walton, 145 Cal. 228, 78 P. 645. One claiming that property left by deceedent was held by him in trust for claimant and others, and claiming a definite and identified portion thereof under the trust is not a creditor in such sense as to be required to present a claim, or to be entitled to object to the distribution of the estate. In re Dutard's Estate [Cal.] 81 P. 519. The fact that the claimant asks for the value of the property in the alternative (Id.), or that he adds a claim for an accounting and settlement of

of a promissory note a necessary prerequisite to a suit against a surety thereon.[96] A creditor of the community after the death of the wife may sue the husband and, upon establishing his debt, subject the community property to its payment, notwithstanding administration may be pending.[97] The claim of one partner against the estate of his deceased co-partner cannot be passed upon by the probate court until the accounts of the partnership have been settled by a bill in equity.[98] The administrator of a deceased partner may maintain a suit for a partnership accounting against the administrator of the surviving partner, who dies before the partnership affairs are settled, without presenting a claim against the latter's estate.[99]

A claim for taxes need not be filed against the estate, but it is the duty of the representative to take notice thereof and pay it before final settlement.[1] Statutes in some states, however, provide for the presentation of such claims.[2]

As a general rule mortgages and other liens on land owned by decedent may be foreclosed without presenting a claim for the debt secured thereby to the representative.[3] In California a mortgage upon the homestead cannot be enforced unless a claim for the mortgage debt is first duly presented to the representative;[4] but this rule applies exclusively to the property described in the mortgage which is impressed with the character of the homestead, and a failure to present the claim does not deprive the mortgagee of his right to foreclose the same against property covered by it in excess of that set off as a homestead by the superior court to those entitled thereto.[5] In the same state on foreclosure of a mortgage on land

the account of decedent as administrator of an estate of which claimant was afterward made administrator does not change the character of the claim so as to make him a creditor (Id.).

96. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643. Rev. St. 1895, art. 3814, providing that, when a principal and surety are sued together, the surety may have the property of the principal first sold for the satisfaction of the debt, cannot be enforced where the principal is dead, with a preservation to the creditor of his right to proceed against the surety, since the principal must be proceeded against in the probate court, and hence does not apply to such a case. Id. Hence in an action on certain notes secured by trust deeds, one of which was given by the deceased maker alone and the other by him and certain other parties who were liable as sureties on the notes, and to foreclose such deeds, held, that foreclosure should have been authorized against the interests of the sureties alone as in ordinary cases, without making a sale dependent on proceedings in the probate court to enforce the claim against the decedent's estate. Id. Where a trust deed was given to secure payment of notes executed by one of the grantors since deceased, his administrator was properly joined as defendant in an action to foreclose the deed against the other grantors, he having rejected a claim on the notes against the estate, though the mortgaged property of the estate could not be sold therein. Id.

97. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205.

98. Cannot be passed upon by the orphans' court until the accounts of the partnership have been settled by bill in equity in the court of common pleas. Claim cannot be considered where accounting has previously been had upon a bill filed against claimant and decedent, in which proceeding a decree pro confesso was taken against claimant and his interest sold and a certain sum was paid in full settlement. In re De Coursey's Estate, 211 Pa. 92, 60 A. 490.

99. Surviving partner and his administrator holds partnership property in trust, and the claim is not one against his estate. Franklin v. Trickey [Ariz.] 80 P. 352. The fact that no claim is presented by the estate of a deceased partner against the estate of a partner dying subsequently cannot operate to bar the right of the administrator of the first estate to a partnership accounting and to reach the partnership property, though it prevents a money recovery against the estate of the second decedent. Stehn v. Hayssen [Wis.] 102 N. W. 1074.

1. Must list for taxation property in his possession. Burns' Ann. St. 1901, §§ 8420, 8421, 8459, 8460. Cullop v. Vincennes, 34 Ind. App. 667, 72 N. E. 166.

2. Burns' Ann. St. 1901, § 8587. Cullop v. Vincennes, 34 Ind. App. 667, 72 N. E. 166. See, also, Taxes, 4 C. L. 1605.

3. Where grantor in deed of trust subsequently conveyed land to a third person, held, that a foreclosure sale less than four years after the grantor's death, and after his estate was closed was valid, though the claim secured by the trust deed was never presented. Miles v. Coleman Nat. Bank [Tex. Civ. App.] 84 S. W. 284.

4. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

5. Under Code Civ. Proc. § 1475, the rule applies only to cases where the homestead does not exceed $5,000 in value, or in which the mortgagee seeks to foreclose against the property eventually set off as a homestead under that section where the premises described in the homestead declaration exceed $5,000. Bank of Woodland v. Stephens [Cal.] 79 P. 379. Thus, where the in-

belonging to the estate, the petition must either allege that the mortgage debt has been presented to the administrator for allowance as a claim against the estate, or must expressly waive all recourse against the other property of the estate.[6]

Statutes in some states provide for the presentation and allowance of contingent claims and for their payment, less interest.[7] In California if there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, to be paid to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed as the circumstances of the case require.[8] A matured mortgage indebtedness against the estate is not contingent within the meaning of this statute.[9]

Time for presentation; limitations.[10]—It is the policy of the law to insure the speedy administration and distribution of estates.[11] As a general rule all claims must be filed or presented to the executor or administrator within the time fixed by statute or they will be barred.[12] The time may usually be extended, however, or claims may be allowed after its expiration in cases where justice and equity require

ventory shows the value of the community homestead to be $15,000, and, in proceedings under Code Civ. Proc. §§ 1476-1486, 100 acres are set off to the surviving widow, a failure to present the mortgage debt as a claim does not bar foreclosure as against the remaining 220 acres. Id.

6. Code Civ. Proc. § 1500. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. Held an abuse of discretion to refuse to allow amendment setting up such waiver. Id. Error cured by allowing plaintiffs to file a statement making such waiver, since it was in substance a part of the complaint. Id.

7. Administration Act, § 67, Rev. St. 1903, p. 116, providing for the presentation and allowance of claims not yet due, and their payment, less interest, applies only to unmatured debts which will become due on a specified date, capable of ascertainment by the court at the time of their presentation and allowance. Brown v. Rouse, 116 Ill. App. 513.

8. Code Civ. Proc. § 1648. In re McDougald's Estate, 146 Cal. 196, 79 P. 875.

9. Not on the theory that balance which will remain due after a sale of the mortgaged premises and an application of the proceeds thereto is uncertain and indeterminable, and the court is not authorized to take testimony to ascertain the probable deficiency which will arise on foreclosure, and to direct the retention of a sufficient sum to pay it. In re McDougald's Estate, 146 Cal. 196, 79 P. 875.

10. See 3 C. L. 1270.

11. Holway v. Ames [Me.] 60 A. 897.

12. **In California** the time allowed for presenting claims depends on the value of the estate. Ten months after first publication of notice if estate exceeds $10,000 in value, and four months if it does not. Code Civ. Proc. § 1491. In re Wilson's Estate [Cal.] 81 P. 313.

In Iowa claims must be filed in the probate court, and notice thereof served on the representative within one year after publication by the latter of notice of his appointment. Code 1897, § 3278 et seq. Alice E. Min. Co. v. Blanden, 136 F. 252. The preferred claim of a physician for services rendered deceased in his last sickness is not barred by failure to file and prove it within the time limited by statute for the presentation of ordinary claims, provided it is presented before final settlement and the estate is solvent. Code, § 3349, barring claims not presented within twelve months, is expressly limited to those of the fourth class as designated by Id., § 3348, and does not apply to claims made preferred by § 3347. Wolfe v. Knapp [Iowa] 103 N. W. 369.

Michigan. Comp. Laws 1897, § 9380. Rankin v. Big Rapids [C. C. A.] 133 F. 670.

In Minnesota claims must be presented within the time limited by the order of the probate court, except that, for good cause shown, the court may in its discretion consider claims presented thereafter, and within one year and six months from the time when notice of the order limiting the time for presenting claims is given. Gen. St. 1894, § 4509. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. Actions upon claims which are susceptible of ascertainment and proof within the time fixed by the order of the probate court are barred unless presented within that time. Gen. St. 1894, § 4511. Id.

In West Virginia if a creditor fails to present his claim before a decree upon a report of debts, allowing debts and subjecting the lands of the estate to their payment, such decree bars him from claiming participation in the proceeds of such lands until such decreed debts are satisfied. Code 1899, c. 86, § 9. Statute requiring decree of distribution among creditors is mandatory, though word "may" is used. Trail v. Trail, 56 W. Va. 594, 49 S. E. 431. A creditor named in a bill by an executor to administer the assets of his testator, and who is made a formal party but fails to appear or prove his claim, is concluded by a decree allowing certain debts, but not his, both under the statute and by the principle of res judicata. Id. Rule not changed by Id., § 3, making realty of deceased liable for his debts, nor by Code 1899, c. 87, § 26, which applies only to ex parte settlements in probate court, and not to creditor's suits in circuit court. Id

it.[13] A decree barring all claims not presented within the time limited operates in a court of law to prevent plaintiff from showing facts estopping the executrix from setting it up, or that the presentation of plaintiff's claim under oath was waived.[14] Equity however, may enjoin the executor from proving such decree in the action at law, where it appears that verification was waived when the claim was presented before such decree.[15]

Such limitations do not apply to the remedy provided by the Federal statutes for the enforcement against an estate of its liability on national bank stock owned by it, but the estate is liable so long as its assets may be reached.[16] Unless the statute makes an exception in favor of creditors laboring under disability, it is generally held that none exists.[17]

Claims which are so contingent and uncertain as not to be susceptible of ascertainment and proof are not ordinarily barred by failure to present them within the time prescribed.[18] Provision is generally made for their presentation and payment where they do not become absolute until after such time has expired.[19] The

13. In Maine if the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been presented within the time limited is of the opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not presenting his claim on time, it may give him judgment thereon against the estate, but such judgment does not affect any payment or distribution made before the filing of the bill. Rev. St. 1883, c. 87, § 19. Holway v. Ames [Me.] 60 A. 897. "Culpable neglect" means a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of creditors who slumber on their rights. It is less than gross carelessness, but more than failure to use ordinary care. Id. In order to take advantage of this act the creditor must show the existence of a claim due him and enforceable by an action at law except for the special statute bar of limitations; that there are undistributed assets of the estate; that justice and equity require it; and that he is not chargeable with culpable negligence. Id. Evidence held to show that claimant was guilty of culpable neglect, there being nothing to show fraud, or that there was any agreement that its claim could be corrected. Id.

In Minnesota claims must be presented within the time fixed by the order of the probate court limiting the time for the presentation of claims, except that the court may thereafter, and within 18 months from the time when notice of the order limiting the time is given, allow claims for good cause shown and in the exercise of its discretion. Minn. Gen. St. 1894, § 4509. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. Federal court may entertain a suit in equity to permit presentation of and to allow such claims for good cause shown after the time limited by order of the probate court and within the 18 months. Id.

Nebraska: Even if the county court has authority to permit the filing of claim after the time limited in its order, it should not do so in the absence of a showing of diligence and of unavoidable mistake or accident, or of fraud of a nature analogous to that which warrants the interposition of a court of equity to grant a new trial in ordinary cases. Even if the rule previously laid down by the court that the county court has no jurisdiction to enlarge the time for filing claims under any circumstances is not adhered to, the most that could be held would be that the matter is one for the exercise of judicial discretion, which will not be interfered with except in cases of manifest error or abuse. Nebraska Wesleyan University v. Bowen [Neb.] 103 N. W. 275.

14. Decree made under Rev. 1898, p. 764, § 62, P. L. 1898, p. 740, § 70. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

15. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

16. Estate liable under U. S. Rev. St. § 5152, Comp. St. 1901, p. 3465. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817, afg. 114 Ill. App. 482.

17. Code, § 3349, requiring claims to be filed within twelve months after notice of the administrator's appointment, applies to minors, nor will minority be regarded as a peculiar circumstance entitling the creditor to equitable relief. Boyle v. Boyle, 126 Iowa, 167, 101 N. W. 748.

18. Under Minn. Gen. St. 1894, § 4509, actions upon claims that are so contingent and uncertain that they are not susceptible of ascertainment and proof within 18 months are not barred. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 137 F. 42. In case the claim becomes absolute and provable a sufficient length of time before the expiration of the 18 months to give the creditor a reasonable time in which to present it and show cause within the 18 months, the rule is otherwise. Id.

19. Comp. Laws Mich. §§ 9411-9414, providing for the retention of funds to pay contingent claims which are presented to the commissioners, authorize retention for two years only, at the end of which time, if the claims have not become absolute, such funds will be distributed. Rankin v. City of Big Rapids [C. C. A.] 133 F. 670. Sections 9415, 9416, authorizing the presentation and payment of claims which do not become absolute until after the time for presenting claims has passed, provided they are presented within one year after they become due, applies only to claims becoming absolute before the estate has been closed. Id. For right to re-

Alabama act requiring the filing of claims against insolvent estates within six months has no application to judgments rendered not against the intestate but against the administrator.[20]

In the absence of a special statute of limitations, claims not barred by the general statute of limitations may be proved and presented at any time before final settlement, and therefore no claim not within the bar of the special statute can be excluded.[21] The death of the debtor arrests the running of the general statute of limitations until an administrator or executor has been or can be appointed.[22] Any claim that might have been enforced against decedent at the time of his death may be enforced against his representatives within the time prescribed by law therefor in any court having jurisdiction thereof.[23] The time prescribed within which claims may be enforced against the representative is a period of limitations as to debts owing by the decedent at the time of his death, distinct and separate from that prescribed by the general statute of limitations.[24] It is not operative until the death of the debtor, but it then supersedes the general statute, and stops the running thereof as to such debts.[25] Such time may shorten or extend the period fixed by the general statute as to such debts, and all thereof that are not barred at the time of the debtor's death may be proven against his representative within the time fixed therefor, and will not be barred until the expiration of such time.[26] Statutes providing short limitations for actions on rejected claims, and for barring claims not duly presented, are generally regarded as penal, and cannot be invoked by the representative to bar suit on the claim where his action toward the creditor in relation to its preservation or rejection has been ambiguous or equivocal.[27]

It is the duty of the representative to plead the general statute of limitations against a demand which is barred,[28] at least if the bar attached during decedent's

cover from distributees in case claim does not become absolute until after estate is closed, see § 8, post.

20. Woodall v. Wright [Ala.] 37 So. 846.

21. Wolfe v. Knapp [Iowa] 103 N. W. 369. Conceding that preferred creditor may lose his right to priority by laches, the administrator cannot object to payment because of delay, where the estate is solvent and no other creditor is in any way prejudiced thereby. Id.

22, 23. Alice E. Min. Co. v. Blanden, 136 F. 252.

24. Alice E. Min. Co. v. Blanden, 136 F. 252. Proviso to Code 1887, § 2920, barring rights of action within five years from the qualification of the representative in terms applies only to cases in which the person whose estate is to be affected died after it took effect and where the right of action had accrued at the time of his death, and concurrence of both of these circumstances is essential. Davis' Adm'x v. Davis [Va.] 51 S. E. 216. Where creditors accepted securities under agreement that when and if paid they should be in full settlement of the debt, right of action was suspended during the currency of the securities, and where some of them did not mature until after death of decedent, right of action had not then accrued. Id. In any event case is controlled by Code 1887, § 2938, providing that when action was not pending when code took effect, it may be prosecuted within such time as it might have been had not the change been made. Limitation before code was enacted was 20 years. Id. Where trust fund, as such, did not come into the hands of the executors of the trustee, and the beneficiaries brought an action against the executors on the trustee's bond conditioned to pay over the trust fund to his successors and did not seek to follow a specific trust fund, held that, as to the defendants, the claim was a mere personal obligation of the testator to be enforced as any other obligation, and the two years' statute of limitations applicable to actions against executors applies. Downer v. Squire, 186 Mass. 189, 71 N. E. 534. Such bond not having been breached until a demand was made to pay over the fund in accordance with its terms, and the statute of limitations did not begin to run until such demand. Id.

25. Alice E. Mining Co. v. Blanden, 136 F. 252. On the death of the maker of a note, the statute limitations ceases to run against the note, and is succeeded by the two years' statute of nonclaim which runs from the grant of letters of administration. Ross v. Frick Co. [Ark.] 83 S. W. 343.

26. Alice E. Min. Co. v. Blanden, 136 F. 252. Where claim on promissory note was filed in the probate court and notice thereof served on the executor within one year after notice of his appointment, in accordance with Iowa Code 1897, § 3278 et seq., and action thereon was commenced within such year, the claim was not barred, though the ten years allowed by the general statute for commencing suit thereon (Code 1897, §§ 3447, 3451) expired before the appointment of the executor but after decedent's death. Id.

27. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

28. Brantley v. Bittle [S. C.] 51 S. E. 561.

lifetime.[29] If he allows judgment to be rendered against him in either case, both he and the heirs, who are his privies, are bound hereby, and cannot thereafter set up that the claim is barred.[30] A dormant judgment is a debt of record and these rules apply to a proceeding instituted thereon, whether an ordinary suit on the judgment or a scire facias to revive the same.[31] Devisees may rely on the defense of limitations,[32] or show such laches on the part of plaintiff as to deprive him of the right to invoke the equity powers of the court, even though the representative fails to do so.[33]

Where it affirmatively appears on the face of the petition that the statutory period for bringing an action on a claim had elapsed before the action was brought, the objection may be raised by demurrer on the general ground that it fails to state facts sufficient to constitute a cause of action.[34] In case the bar does not so affirmatively appear, the objection must be taken by answer.[35]

It is held in South Carolina that an administrator may, by his promise in writing, renew a note of his intestate so as to prevent the running of general limitations against the right to collect it from the personalty of the maker's estate,[36] but the promise of the heir is necessary in order to prevent limitations from running against the right to collect it from the realty.[37] The representative may also, by his conduct, estop himself from setting up limitations.[38]

An express waiver of the statute of limitations in the will and a direction to pay claims without reference thereto inures to the benefit of creditors and is binding on the executors.[39]

Where the representative has collected the assets and, by filing a petition for the settlement of his accounts, has brought the surplus into court for distribution among the creditors and next of kin, the fund becomes a trust fund for the benefit of creditors whose claims were presented in due time, and such claims do not afterwards become barred by lapse of time.[40]

To assert defense when claim is presented. In re Goss, 98 App. Div. 489, 90 N. Y. S. 769.

29. If the bar attached during decedent's lifetime, but not otherwise. Civ. Code 1895, § 3433. Helms v. Marshall, 121 Ga. 769, 49 S. E. 733.

30. Helms v. Marshall, 121 Ga. 769, 49 S. E. 733.

31. Judgment against administrator, purporting to revive a dormant judgment which so far as the record discloses was barred, there being no entry on the execution within ten years after its issuance, is not void, and cannot be collaterally attacked by heirs in trial of claim interposed by them to levy of an execution issued on the revived judgment. Helms v. Marshall, 121 Ga. 769, 49 S. E. 733.

32. Brantley v. Bittle [S. C.] 51 S. E. 561. A judgment cannot be renewed against the administrator of the judgment debtor, so as to again become a lien on the lands of the estate, by his acquiescence after the expiration of the 20 years' limitation prescribed by Code of Laws of 1902, § 2449. Id. Though he allows renewal after that time by default, devisees may prevent its enforcement against the realty. Id.

33. In action for partition and to enjoin defendants from enforcing judgment rendered against testator and revived more than 20 years thereafter against his administrator, the latter permitting such revival by default, held that the judgment creditor was barred by laches. Brantley v. Bittle [S. C.] 51 S. E. 561.

34. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

35. Objection not raised by general demurrer where petition shows the date of the accrual of the cause of action but not the date when the action was commenced. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

36. Divine v. Miller, 70 S. C. 225, 49 S. E. 479.

37. Promise of administrator held to bind him to extent of his interest in realty as heir. Divine v. Miller, 70 S. C. 225, 49 S. E. 479.

Note: There is a conflict on the question whether the personal representative has any power to waive or toll the statute, see 3 C. L. 1270, n. 89, 90; p. 1271, n. 98; 1 C. L. 1106, n. 86-90; 2 C. L. 759, n. 46-49.

38. An executor who assures a claimant of full payment of his claim and requests him not to sue and induces him to delay filing his claim for more than a year from the qualification of the executor is estopped to assert a forfeiture of his rights because of such failure to file. Hamilton's Ex'r v. Wright [Ky.] 87 S. W. 1093. An executor of a surety who induces a creditor not to file his claims cannot set up the limitations prescribed for sureties to defeat the clause. The statute does not apply to a period during which a surety obstructs or hinders suit. Id.

39. Glassell v. Glassell [Cal.] 82 P. 42.

40. No presumption of payment arises. In re Hannon's Estate, 93 N. Y. S. 207.

The enforcement of claims may also be barred by laches.[41]

Notice.[42]—Publication of a notice to creditors directing them to present their claims within a specified time is commonly required.[43] In California, after notice has been given, the court may, on proof of due publication filed, make an order or decree of due notice given.[44] In case the value of the estate is doubtful and the court is, therefore, unable to determine whether the notice allows sufficient time for the presentation of the claims, he may postpone the making of the decree of due notice until final settlement and distribution.[45]

The claim; its form and substance.[46]—Claims should so specify and identify the transactions out of which they arise as to appraise all concerned of their general nature, character and amount, so that they can be properly investigated and defended against if desired.[47] As a general rule it is not necessary to present the agreement on which the claim is founded;[48] but in some states, if it is founded on a bond, bill, note, or other instrument, a copy thereof must accompany it.[49] If a claim is secured by a recorded mortgage, it is sufficient to describe the mortgage or lien, and to refer to the date, volume, and page of its record.[50]

In some states claims must be supported by an affidavit of the claimant that they are justly due, and that no payments have been made thereon and that there are no offsets thereto.[51] In others the representative may require such an affidavit if in doubt as to the validity of a claim.[52]

In Ohio any person whose property is or may be affected by the recovery of a judgment on a claim may file a written requisition on the representative to disallow and reject it.[53]

Informalities in the manner of presenting claims may be waived.[54] The objection that a claim was not presented by the proper party is a matter in abatement

41. Plaintiffs loaned money to their brother and subsequently forgave him half the debt and accepted securities for balance under agreement that, if paid, they should constitute full settlement. Brother died leaving his estate to his wife for life. Plaintiffs took no steps to interfere with her possession, but commenced action against brother's representatives within two years after wife's death to recover the unpaid balance. Held that they were not guilty of laches. Davis' Adm'x v. Davis [Va.] 51 S. E. 216.

42. See 3 C. L. 1272.

43. Code Civ. Proc. § 1490. In re Wilson's Estate [Cal.] 81 P. 313.

44. Code Civ. Proc. § 1492. In re Wilson's Estate [Cal.] 81 P. 313.

45. Held that a decree vacating a decree of due notice, after publication of notice requiring claims to be presented within four months, and stating that the court found the estate to be greater in value than $10,000 (in consequence of which notice should have allowed ten months) is not res adjudicata as to the value of the estate, and does not preclude the court from determining, on an application for settlement and distribution, that the estate never exceeded $10,000 in value, and that the notice was sufficient, and again making a decree of due notice. In re Wilson's Estate [Cal.] 81 P. 313.

46. See 3 C. L. 1272.

47. Carter v. Pierce, 114 Ill. App. 589.

48. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41.

49. Code Civ. Proc. § 1497. Filing of note is sufficient, without filing the assignment by which it was transferred to claimant. In re McDougald's Estate, 146 Cal. 191, 79 P. 878.

50. Code Civ. Proc. § 1497. Description of mortgage held sufficient. In re McDougald's Estate, 146 Cal. 191, 79 P. 878.

51. Affidavit to claim presented held in conformity with Rev. St. 1895, § 2072. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41.

52. Code Civ. Proc. § 2718. In re Goss, 98 App. Div. 489, 90 N. Y. S. 769. The affidavit is not admissible to prove the existence of the claim on the judicial settlement of the administrator's accounts. Id.

53. Rev. St. § 6098. Word "heir" as there used includes devisees and legatees. Todd v. Todd, 6 Ohio C. C. (N. S.) 105.

54. Where claim was presented in form of a letter, but parties adopted it as the basis of the issue, referred the same by consent, and litigated, without objection, every question upon which it was based, plaintiff was entitled to recover, if, on any theory presented by the evidence, he established a valid legal demand against the estate. Merino v. Munoz, 99 App. Div. 201, 90 N. Y. S. 985. Statutory provisions requiring the presentation of claims under oath are intended primarily for the benefit of the executor or administrator and may be waived by him, provided the estate is solvent. Right recognized by P. L. 1898, p. 739, § 68, providing for allowance to representative for payment of claims not so presented, if proved to be just. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. Verification held to have been waived by attorney of executrix. Id.

only, and is waived by joining issue on the merits without raising it in the county court.[55]

Allowance and rejection.—In some states, the executor or administrator is required to indorse on all claims presented to him his allowance or rejection with the date thereof.[56] If he allows it, it must then be presented to the county judge, who must in the same manner indorse upon it his allowance or rejection.[57] The failure or refusal of the representative or the judge to indorse such allowance or rejection within a specified time amounts to a constructive rejection.[58] The judge may, in his discretion, set aside a previous rejection and allow a claim, provided he does so before it is barred by either the general or special statute of limitations.[59] If rejected, suit must be brought on the claim in the proper court within a specified time.[60] The allowance of a claim at less than the full amount thereof is a rejection of the balance.[61] The rejection of the claim in such states is a condition precedent to the right to sue thereon.[62] Notice of the rejection is generally necessary in order to start the running of limitations.[63]

Contests and actions on claims.[64]—All interested parties must be cited to appear.[65] In Ohio any person whose property may be affected by the recovery of a judgment may file a requisition on the representative to disallow any claim presented, and is a proper party to an action on a claim so rejected, and may defend

55. That it was presented by assignee instead of the original claimant, even if presentation by assignee is insufficient. In re Morgan's Estate [Or.] 78 P. 1029.

56. Rev. Code 1899, § 6405. In re Smith's Estate [N. D.] 101 N. W. 890. Indorsement of words "allowed and approved," with the amount thereof and the date, on a claim purporting on its face to be a secured one, must be construed to refer to the claim on which they are indorsed, and constitute a sufficient allowance thereof as a secured claim. Is not a rejection of the claim as a secured one. In re McDougald's Estate, 146 Cal. 191, 79 P. 878.

57. Rev. Code 1899, § 6405. In re Smith's Estate [N. D.] 101 N. W. 890. May be conclusively rejected by either the administrator or the judge, and the statute commences to run on a rejection by either. Jones v. Walden, 145 Cal. 523, 78 P. 1046. In case the claim is disallowed by the executor, it need not be presented to the judge, but if the administrator allows it, the rule is otherwise. Id.

58. Within ten days under Rev. Code 1899, § 6405. Purpose of this section is to fix time when claimants secure the right to sue, and when they become barred by the special limitation fixed by Id. § 6407, and for these purposes a rejection by nonaction is equivalent to an actual rejection by written indorsement. In re Smith's Estate [N. D.] 101 N. W. 890.

59. Whether rejected by nonaction or written indorsement. Thus allowance after ten days operates as revocation of constructive rejection. In re Smith's Estate [N. D.] 101 N. W. 890.

60. Code Civ. Proc. § 1822. Heinrich v. Heidt, 94 N. Y. S. 423. In California when a claim is rejected either by the administrator or a judge of the superior court, suit thereon must be commenced within three months from the date of its rejection, if it is then due, or within two months after it becomes due. Code Civ. Proc. § 1498. Jones v. Walden, 145 Cal. 525, 78 P. 1046. The rejection by an executor of an unauthenticated claim did not, under ch. 101, § 18, subch. 18, Act of Maryland 1798, have the effect to bring any part of it under the operation of the limitations prescribed by that act. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132. Under Rev. Code 1899, § 6407, must be brought in justice or district court, according to its amount, within three months after the date of its rejection, or it will be forever barred. In re Smith's Estate [N. D.] 101 N. W. 890. Under Rev. St. 1899, § 4753, an action on a claim must be commenced within three months after its rejection. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

61. Jones v. Walden, 145 Cal. 523, 78 P. 1046.

62. Hence rejection is no defense to action on claim, but only operates to set the special statute of limitations in motion. In re Smith's Estate [N. D.] 101 N. W. 890.

63. Code Civ. Proc. § 1822. Dockwood v. Dillenbeck, 93 N. Y. S. 321. Under Code Civ. Proc. § 1822, an action against executors or administrators on a claim against the estate must be commenced within six months after notice of its rejection. Heinrich v. Heidt, 94 N. Y. S. 423. Notice may be served on the claimant's duly authorized agent. Notice addressed to claimant and served on attorneys who prepared claim held sufficient, though their actual employment had been limited to its preparation where the executor had no notice of that fact, where claim was indorsed by them. Lockwood v. Dillenbeck, 93 N. Y. S. 321. Where attorney employed to present claim sent it to executors by mail, a notice to him by mail of its rejection was notice to the claimant and started the running of limitations. Heinrich v. Heidt, 94 N. Y. S. 423.

64. See 3 C. L. 1274.

65. Judgment on a disputed claim rendered in the absence of necessary parties, as the next of kin, is not binding on them.

against it.[66] In New York a legatee cannot intervene in a proceeding to collect a disputed claim, which by reference has assumed the status of an action in the supreme court, on the ground of collusion between the administrator and the claimant, and consequent danger to his legacy.[67]

The ordinary rules of pleading apply to actions on claims,[68] though in states where the contest is in the probate court, technical rules governing suits at law may be disregarded and the substantial rights of the parties considered.[69] In some states it is not necessary for defendant to plead any matter by way of answer except a set-off or counterclaim.[70] A plea of plene administravit which fails to allege that the estate has been fully administered without notice of plaintiff's claim is defective, and is properly stricken on demurrer.[71]

Evidence and proof.[72]—The claimant, of course, has the burden of proving his claim.[73] On presentation of a claim for money received by decedent as a loan or for purposes of investment, his representatives have the burden of showing either payment or an accounting.[74]

It is competent to show by parol that a promissory note is not a valid claim.[75] Evidence of the payment by the executors of other similar claims is inadmissible.[76] Proof that a note presented as a claim was executed by mistake and did not express the intention of the parties is only admissible when such facts are alleged by way of an equitable counterclaim.[77]

Recovery can be had only on the claim as presented to and rejected by the administrator,[78] but a variance is mere error and not an avoidance of the judgment.[79]

Riley v. Ryan, 103 App. Div. 176, 93 N. Y. S. 386, rvg. 45 Misc. 151, 91 N. Y. S. 952.

66. Rev. St. § 6098. Word "heir" in such section may be construed to include legatees and devisees. Todd v. Todd, 6 Ohio C. C. (N. S.) 105.

67. Code Civ. Proc. § 452, subd. 2, authorizing intervention in certain cases, does not apply where no specific or tangible property is involved, and a mere money judgment is sought. Honigbaum v. Jackson, 97 App. Div. 527, 90 N. Y. S. 182.

68. Petition held to state good cause of action. Altgelt v. Elmendorf [Tex. Civ. App.] 86 S. W. 41. In an action on a claim against decedent's estate held not necessary to set out the will, but plaintiff was entitled to prove its terms under allegation that it did not specifically direct how the executor was to dispose of the property. Id.

69. Carter v. Pierce, 114 Ill. App. 589. Thus where a claim filed was insufficient, and an amended claim was filed after limitations had run, it will be deemed to relate back though a different cause of action is set up where it appears by extraneous evidence that the original and amended claims pertain to the same transaction. Id.

70. Burns' Ann. St. 1901, § 2479. Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724.

71. Allegations that plaintiff did not file his claim within twelve months from the date of administration is insufficient where it is not also alleged that defendant did not know of existence of claim when he administered the estate. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782.

72. See 3 C. L. 1275, n. 31 et seq.

73. Evidence sufficient to support claim for half interest in certain stock. In re Brown's Estate [Pa.] 60 A. 147. Under Burns' Ann. St. 1901, § 2479, regulating the trial of claims against estates, one claiming on a note made by his agent and found in the latter's possession at his decease, has the burden of establishing its execution. Indiana Trust Co. v. Byram [Ind. App.] 72 N. E. 670. Evidence held to show that decedent held note as claimant's agent and hence claimant was entitled to recover thereon. Id.

74. Representatives held to have failed to meet burden. In re Brown's Estate [Pa.] 60 A. 149.

75. That the holder (a child of the decedent) held it under an agreement to return it when demanded and that when demand was made she said it was lost and would be returned when found. Carskaddon v. Miller, 25 Pa. Super. Ct. 47.

76. Admission held harmless. Tyndall v. Van Auken's Estate, 94 N. Y. S. 269.

77. For purpose of showing that it was intended as an advancement. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678.

78. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708; In re Dutard's Estate [Cal.] 81 P. 519. Claimant is not, on appeal, entitled to enlarge the written claim filed in the probate court. Form of claim for services held not to cover demands for property destroyed or for loss of profits of claimant's business, and evidence thereof properly excluded. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103 N. W. 574.

79. The fact that a referee appointed to pass on a disputed claim allows an amendment and that a judgment materially differing from that asked for in the claim filed is rendered on the amended claim is no ground for vacating such judgment at a subsequent term. Though it may be ground for reversing it on appeal. Riley v. Ryan, 103

Claims against estates of decedents must be established by very satisfactory evidence,[80] and this is particularly true of claims for services and the like, which were never presented to decedent during his lifetime,[81] and claims or contracts alleged to have been made by him.[82] By statute in Massachusetts if a cause of action brought against an executor is supported by oral testimony of a promise by the testator, evidence of written or oral statements made by him and of his habits of dealing tending to disprove or show the improbability of making such a promise, are admissible.[83]

Set off.[84]—In an action by the assignee of a claim, the administrator cannot offset a claim which plaintiff owes him personally, though the heirs have assigned their interests in the estate to defendant in his personal capacity.[85]

(§ 6) *C. Classification, preferences, and priorities.*[86]—Claims are generally classified by statute and provision made for their payment in the order of such classification.[87] No creditor of any one class is entitled to receive any payment on

App. Div. 176, 93 N. Y. S. 386, rvg. 45 Misc. 151, 91 N. Y. S. 952.

80. Evidence insufficient to sustain verdict against the estate for the value of certain securities alleged to have been delivered to deceased during his lifetime to be sold by him. Linden v. Thieriot, 94 N. Y. S. 246. Rule that a fact testified to by disinterested witness, who is not discredited, and whose evidence does not conflict with other evidence offered at the trial, is to be taken as established, does not apply. Walbaum v. Heaney, 93 N. Y. S. 640. Question whether loan sought to be recovered was made, held for the jury. Id. The unsupported testimony of claimant is insufficient to establish a claim for personal services rendered decedent during his lifetime. Evidence insufficient to support claim for caring for premises, nursing decedent, etc. Mulhern v. Carrard, 94 N. Y. S. 741. Allowance of claim for board and clothes furnished decedent's daughter by her half-brother, held excessive. Goetz v. Walters [N. J. Law] 59 A. 19; Id., 59 A. 20. In proceedings to establish claim on open account, evidence held insufficient to support judgment for plaintiff. Stickley v. Hanson [Iowa] 102 N. W. 514.

81. In action for services alleged to have been rendered testator, evidence as to the property and circumstances of deceased (Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361), and as to plaintiff's conduct after testator's decease in failing to make any claim, held admissible (Id.). It being shown that decedent was amply able to pay his debts, it will be presumed that he did so, and such presumption can only be overcome by clear and convincing proof on the part of the claimant. Evidence insufficient to establish claim for board and lodging alleged to have been furnished deceased. Schultz v. Carrard, 94 N. Y. S. 740. Can only be allowed on clear proof of their validity. Evidence insufficient to establish promise by deceased to pay any more for services, consisting of shaving him, etc., than was paid when the services were rendered. Maisenhelder v. Crispell, 94 N. Y. S. 707. Claims for board and care of decedent should be carefully examined and only allowed upon the most satisfactory proof, particularly when in favor of near relatives. In re Goss, 98 App. Div. 489, 90 N. Y. S. 769. Clear proof from disinterested witnesses that the services were accepted with intent to pay therefor is required. Evidence insufficient, where no claim was made until after provisions of will were known. Rock v. Rock, 93 N. Y. S. 646. Are looked upon with great disfavor and every intendment will be made against them. Claim by partner against estate of deceased co-partner on due bills given by firm thirty-five years before decedent's death held stale and unenforceable, though bills were payable on demand, there being no evidence to rebut the presumption of payment. In re De Coursey's Estate, 211 Pa. 92, 60 A. 490. Where one renders personal services to a relative during his last illness and does not present a claim until after his relative's death, the evidence of a promise to pay for such services must be considered. Currey's Estate, 26 Pa. Super. Ct. 479.

82. Contracts must be established by the clearest and most convincing evidence. Oral contract whereby he promised mother of his illegitimate child to settle certain sum on it provided she would support it for certain time cannot be established by parol evidence of an interested witness. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916. In action on claim for services, where claimant claimed that testatrix had agreed to leave her her property in consideration of such services, and where it appeared that she had accepted the provisions made for her by the will, and she testified that she was claiming the property given her thereby, held that she was not entitled to recover anything further. Finn v. Sowders' Estate [Mich.] 103 N. W. 177.

83. Rev. Laws, c. 175, § 67. Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361. In action to recover for services rendered testator, his declarations made in his lifetime or contained in his will held admissible. Id.

84. See 3 C. L. 1275, n. 37. See, also, Set-off and Counterclaim, 4 C. L. 1421.

85. Under Pub. St. 1901, c. 223, § 7, authorizing set-off of mutual debts or demands only. McCaffrey v. Kennett [N. H.] 60 A. 96.

86. See 3 C. L. 1276.

87. **California:** Code Civ. Proc. § 1643, divides debts into five classes to be paid in the order there given. In re McDougald's Estate, 146 Cal. 196, 79 P. 875. The fourth class includes judgments and mortgages in the order of their date, and the fifth class all other demands not included in the preceding classes. Id. Section 1644 provides that the preference given to mortgages in the preceding section only extends to the proceeds of the property mortgaged, and that if

his claim until all those of the preceding class are fully paid.[88] If the estate is insufficient to pay all the debts of any one class, each creditor is entitled to a dividend in proportion to the amount of his claim.[89] Classification is primarily for the benefit and protection of creditors, and when they will not be prejudiced thereby, the representative cannot object to the belated payment of a preferred claim not filed and presented within the time limited for the presentation of ordinary claims.[90]

Claims for proper and necessary attorneys fees and other expenses of administration which are payable out of the assets of the estate are usually given priority over the general debts of the decedent.[91] The right of the widow to dower and homestead is superior to the rights of the general creditors.[92]

The liens, incumbrances, and order of payment of the indebtedness are fixed either by contract or by statute, and cannot be disturbed by the court in an administration suit.[93]

Secured debts and liens.[94]—The lien of a judgment obtained during the life of a decedent continues indefinitely as against his heirs and devisees.[95] One proving his claim as unsecured and failing to enforce his security thereby places himself in the list of general creditors.[96]

The priority called a "privilege" and given in Louisiana to the claim of a

they are insufficient to pay the debt, the part remaining must be classed with other demands against the estate. Id. "Proceeds" as there used does not include the rents of the mortgaged property accruing before the sale, at least where they are not included in the mortgage, and hence such rents are general assets of the estate on which the mortgage is not a lien, and in which it is entitled to no preference. Preference given by section 1643 is clearly limited to proceeds arising from the mortgaged property, either on a foreclosure sale, or a sale by the administrator under section 1659. Id. Where there are no proceeds before the court, as where there has been no sale of the mortgaged premises, the mortgage debt should be classed as a claim of the fifth class, and allowed a dividend estimated on the full amount thereof, without any deduction for the probable proceeds of a future sale. Id.

Georgia: Under Civ. Code 1895, § 3424, debts due for rent take priority over liquidated demands. Wade v. Peacock, 121 Ga. 816, 49 S. E. 826.

Illinois: Hurd's Rev. St. 1903, c. 3. § 70, places claims for money received by deceased in trust for any purpose in the sixth class, and all debts and demands, not included in the other six classes, in the seventh class. Felsenthal v. Kline, 214 Ill. 121, 73 N. E. 428. The word "trust" is used in its restrictive sense and applies only to technical trusts and not to those implied by law as growing out of contracts. Hence, claims for repayment of money deposited by customers in hands of broker and loan agent for investment belong in the seventh class rather than in the sixth. Id. Indebtedness of trustee for moneys received under an express trust for the use of the beneficiaries of the trust belongs to sixth class. Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756, afg. 116 Ill. App. 592.

Iowa: Money deposited with decedent in tr for a particular purpose is a preferred claim. Money deposited with firm, of which decedent was a member, for purpose of securing it for advances to be made in the future. Officer v. Officer [Iowa] 101 N. W. 484.

North Carolina: Referee's fees, in a suit in which judgment is recovered against the administrator, are not a preferred claim against the estate, but are simply a part of the costs, and, when not paid in advance, take no greater pro rata than the judgment of which they are a part. Not preferred by Code, § 1416. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161. The fact that funds derived from the sale of realty to make assets in another proceeding are in the hands of the clerk does not authorize the court to order the payment of such fees therefrom as a preferred debt. Id.

88, 89. Code Civ. Proc. § 1645. In re McDougald's Estate, 146 Cal. 196, 79 P. 875.

90. Physician's claim for services preferred under Code, § 3347, and not barred by failure to present it within time limited for presentation of ordinary claims. Wolfe v. Knapp [Iowa] 103 N. W. 369.

91. Under Rev. St. 1898, § 3852. Costs of suit to recover assets alleged to belong to the estate, which he was authorized by county court to bring, and in which he was unsuccessful. Ferguson v. Woods [Wis.] 102 N. W. 1094. Action cannot be regarded as one pending at death of decedent within Id. §§ 3846, 3847. Id.

92. Whitmore v. Rascoe, 112 Tenn. 621, 85 S. W. 860.

93. Not by authorizing the issuance of a receiver's certificate to pay expenses incurred by the administratrix in discharging mortgages, funeral expenses, attorney's fees, and expenses of support of the widow and family. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 50 S. E. 592.

94. See 3 C. L. 1277, n. 62.

95. Even though after five years and between two revivals, its priority is lost as to other judgments against decedent or as to mortgagees or judgment creditors of devisees by failure to notify them of its revival. Ziegler v. Schall, 209 Pa. 526, 58 A. 912.

96. Defendant died pending a suit at law in which his land was attached, and the suit

widow and minors in necessitous circumstances does not disturb the relative rank of inferior claims or cause them to prorate in what may be left.[97]

(§ 6) *D. Funds, assets, and securities for payment.*[98]—The usual way in which charges against an estate are satisfied is for the administrator to collect the debts owed to the deceased, and to sell personalty not specifically bequeathed, and use the proceeds for that purpose.[99] The personalty is the primary fund for the payment of debts,[1] with the realty secondarily liable if there is a deficiency.[2] The testator may, however, if he so desires, designate what portion of the estate shall be appropriated for that purpose and the expenses of administration, and such a provision controls.[3] In case he fails to do so, or the estate appropriated for that purpose is insufficient, resort should be had to that portion of the estate not devised or disposed of.[4]

Legatees and devisees must contribute ratably in case there is not sufficient undisposed-of property.[5] A widow electing to take under the will in lieu of dower must also contribute.[6] Her election against the will does not make what she takes under the statute intestate in the sense that it is primarily liable; but her portion and that devised are equally liable.[7]

Subsequently collected assets are available to creditors unless their claims have become statute barred.[8]

Under the doctrine of marshaling assets, general creditors may, ordinarily, compel the holder of a claim secured by a lien on realty to look to the land alone for the satisfaction of his debt, or, failing in that, are entitled to be subrogated or substituted to his rights against the land to the extent that the personalty is used in paying his debt.[9] This rule does not, however, apply to a case where the widow is asserting her right of dower and homestead against the general creditors, to whose rights hers is superior.[10] If the holder of the lien debt resorts to the realty instead of the personalty for its payment, the widow is entitled to be subrogated and substituted to the rights which he would have had in the personalty, had he filed a claim against the estate, for the satisfaction of her claim to dower and homestead, which is superior to the rights of the general creditors.[11]

was revived against his administrator. Judgment was entered by plaintiff and execution was issued and a levy made on the land. Held that, by releasing and returning the levy, and by proving his claim against the estate as an absolute and unsecured one, without anything to indicate an intention to retain his lien, and a continuance of that condition for over a year, plaintiff abandoned his levy and placed himself in the list of general creditors. Lafferty v. Lafferty [Mich.] 102 N. Y. 626.

97. Succession of Peters [La.] 38 So. 690.

98. See 3 C. L. 1277.

99. In absence of evidence to the contrary, it will be presumed that testator intended his estate to be administered in the ordinary way. Walker v. Hill [N. H.] 60 A. 1017.

1. Whitmore v. Rascoe, 112 Tenn. 621, 85 S. W. 860. Including a vendor's lien debt created by decedent. Id.

2. See post, §§ 7, 8.

3. Code Civ. Proc. § 1560. In re Traver's Estate, 145 Cal. 508, 78 P. 1058. Where a testator designates a fund, items of indebtedness paid should not be charged by the executor to the general estate. Phillips v. Duckett, 112 Ill. App. 587.

4. Code Civ. Proc. § 1562. Where no provision is made, there is an "insufficient" provision within the meaning of this section. In re Traver's Estate, 145 Cal. 508, 78 P. 1058. Where half of testator's property is undisposed of, debts and expenses should be paid from it. Id.

5. In Ohio whenever any estate, real or personal, that is devised is taken from the devisee for the payment of testator's debts, all other devisees and legatees are required to contribute their respective proportions of the loss to the person from whom such estate is taken. Rev. St. § 5973. Allen v. Tressenrider [Ohio] 73 N. E. 1015.

6. Allen v. Tressenrider [Ohio] 73 N. E. 1015.

7. Gordon v. James [Miss.] 39 So. 18.

8. From Code 1857 to the year 1880, creditors might have sued the administrator though the estate was insolvent, the earlier law not having been re-enacted; hence, limitations ran and claims not prosecuted in 1867 cannnot be enforced as to assets first available in 1902. Nutt v. Brandon [Miss.] 38 So. 104. Errors pointed out in Hendricks v. Pugh, 57 Miss. 162, 163, and in Pool v. Ellis, 64 Miss. 555, 1 So. 725. Id.

9, 10. Whitmore v. Rascoe, 112 Tenn. 621, 85 S. W. 860.

11. Is entitled to allowance of dower and

Assets should not be applied to discharge liens on land which when thus cleared will not come into the estate but will go to the administrator as an individual holding under the foreclosure of a junior lien.[12] Moneys arising from one year's crops and constituting nearly the entire assets should not be ordered paid to satisfy crop liens partly on other crops.[13]

(§ 6) *E. Payment and satisfaction;*[14] *refund; interest.*—Interest on a claim for board can only be allowed from the date of its presentation.[15]

In California, if the estate is insolvent, no greater rate of interest can be allowed on any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court.[16] In case of payment of a lien to clear land later adjudged to a stranger, the executor may be subrogated to the lien.[17]

§ 7. *Subjection of realty to payment of debts under orders of court. A. Right to resort to realty.*[18]—The personalty being insufficient for that purpose, so much of decedent's land as may be necessary may be sold under order of the court for the payment of his debts,[19] unless the same is exempt by law from sale on execution.[20] Such exemptions will be deemed waived unless asserted when the application for sale is made.[21] The land may also as a general rule be sold for the payment of funeral and administration expenses,[22] but in some states the rule is otherwise.[23]

homestead from surplus arising on the sale of the realty, and from the pro rata share of the personalty to which the lien creditor would have been entitled, the estate being insolvent. Whitmore v. Rascoe, 112 Tenn. 621, 85 S. W. 860.

12, 13. O'Bryan Bros. v. Wilson [Miss.] 38 So. 509.

14. See 3 C. L. 1278.

15. Where date not shown, will be allowed from date of rejection of claim. Tyndall v. Van Auken's Estate, 94 N. Y. S. 269.

16. Code Civ. Proc. § 1494. Where the estate is insolvent, this statute operates to reduce the rate of interest on a mortgage given by decedent from ten to seven per cent., so that a parol agreement by the mortgagor to pay taxes on both his own and the mortgagee's interest in the premises in consideration of the reduction of the rate of interest to seven per cent. is unenforceable as against the mortgagor's estate for want of consideration. In re McDougald's Estate, 146 Cal. 196, 79 P. 875.

17. See, also, Subrogation, 4 C. L. 1583; Implied Contracts (payments by mistake), 3 C. L. 1690. Realty was conveyed subject to a mortgage, and two actions were brought against the grantee to set aside the conveyance as in fraud of creditors. The appellate division reversed a judgment in one of the actions setting aside the conveyance. Pending an appeal to the court of appeals the grantee died, and his executors were served with notice of appeal. They only had constructive notice of the other action through filing of lis pendens. Mortgage, which was a prior lien to the claims of the creditors seeking to set aside the conveyance, became due before the appeal was heard, and the executors paid it from the assets of the estate, after which the judgment was reversed. Held that executors were not volunteers and were entitled to be subrogated to the rights of the mortgagee as against judgment creditors. Lilianthal v. Lesser, 102 App. Div. 500, 92 N. Y. S. 619.

18. See 3 C. L. 1278.

19. Stewart v. Rogers [Kan.] 80 P. 58. Code Civ. Proc. § 2479. Smith v. Blood, 94 N. Y. S. 667. Is in the hands of the representative for the payment of the debts as far as needed for that purpose after the personalty has been exhausted. James v. Gibson [Ark.] 84 S. W. 485. See, also, Tiffany, Real Prop. p. 1321. An allowance of claims and a full accounting of personalty leaving them unpaid makes a prima facie case in most states. The burden is on opponents to show that claims are not properly allowable. Milburn v. East [Iowa] 102 N. W. 1116; 2 Woerner, Adm. 466, and see cases cited from other states.

20. See Exemptions, 3 C. L. 1408; Homesteads, 3 C. L. 1630. Except where it is devised expressly charged with the payment of his debts or funeral expenses, or is exempt from levy and sale by virtue of an execution. Code Civ. Proc. § 2749. Smith v. Blood, 94 N. Y. S. 667. Decedent's homestead is not subject to administration, and any attempt on the part of the county court to sell it for the payment of debts is void. Dignowity v. Baumblatt [Tex. Civ. App.] 85 S. W. 834.

21. See Exemptions, 3 C. L. 1408; Homesteads, 3 C. L. 1630. If the property purchased with pension money is exempt from sale for payment of decedent's debts, the widow and heirs cannot assert such an exemption in a collateral proceeding as against an innocent purchaser, where they did not assert it before the surrogate. Smith v. Blood, 94 N. Y. S. 667.

22. Sale ordered for payment of funeral and administration expenses. In re Koppikus' Estate [Cal. App.] 81 P. 732. Funeral expenses. Code Civ. Proc. § 2749. Smith v. Blood, 94 N. Y. S. 667.

23. In Arkansas, where there are no debts there can be no sale for the purpose of paying the expenses of administration. Under Kirby's Dig. § 186, providing that lands shall be assets in the hands of the representative for the payment of debts. Collins v. Paepcke-

The application for a sale must be made within the time limited by statute,[24] or, in case no time is fixed, within a reasonable time.[25] Only those persons can complain of the delay who have been injured thereby,[26] and it is not a ground of collateral attack where the rights of innocent third parties have intervened.[27] Equity having assumed jurisdiction of a suit to set aside a sale of lands to pay a claim may, where the right to resort to the land has been lost by delay, enjoin any further proceedings to sell it for that purpose.[28]

It is the policy of the law not to permit the sale of lands of a decedent by the representative for any purpose for which other funds and property are available and sufficient.[29]

Realty which is specifically devised should not be sold until the rest of the estate has been exhausted,[30] and it is the duty of the devisee to see that this is done.[31]

Leicht Lumber Co. [Ark.] 84 S. W. 1044. In case application is made to sell lands solely for the purpose of paying the expenses of administration, it must be made to appear that such expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. Id.

24. Where plaintiff was both the committee of a lunatic and administrator of his estate after his death, held, that limitations had not run against an action by him against the heirs to settle his accounts, and to have the lands of decedent sold to pay the indebtedness he held against the estate, and the balance partitioned among the heirs and next of kin, where he had never been discharged from either office, especially as defendants required him to retain both offices when he was about to file his suit for an accounting before the statute could have been a bar. Cauthen v. Cauthen, 70 S. C. 167, 49 S. E. 321. In Pennsylvania no debts except those secured by mortgage or judgment are a lien on decedent's realty longer than five years after his decease unless an action is brought thereon within such time, or unless a copy or particular written statement of any bond, covenant, debt, or demand not payable within such period is filed in the office of the prothonotary, in which case it is a lien for five years after it becomes due. Act Feb. 24, 1834, P. L. 70. Sleeper v. Hickey, 26 Pa. Super. Ct. 59. A judgment note of a decedent entered in the office of the prothonotary is equivalent to the filing of a copy or written statement of the debt within the act, and will continue the lien of the debt for five years from the date of filing. Id.

25. Seven years has been adopted in Illinois as the time within which the application must be made. Graham v. Brock, 212 Ill. 579, 72 N. E. 825. Mere lapse of time will not bar the proceeding if sufficient excuse is given for the delay. Delay of nineteen years, where land was subject to widow's dower, held not excused by merely showing that land was practically worthless for many years, and had recently increased in value. Id. The rights of the creditors to enforce payment out of the lands must be exercised within a reasonable time, and will be barred by unreasonable delay. Unexplained delay of fourteen years held a bar. James v. Gibson [Ark.] 84 S. W. 485. On setting aside sale for fraud, held error for chancellor to declare debt a lien on the land and to order a resale. Id. Rule is not, strictly speaking, an application of the equitable doctrine of laches, or of the statute of limitations, but is, sui generis, rather an application of the statutory period of limitation to the equitable doctrine, so as to prevent creditors from abusing their rights. Id. Fact that land was in possession of executor during delay does not change the rule. Id. In the absence of peculiar circumstances excusing delay, application should be made within the time allowed for the filing and allowance of claims. Milburn v. East [Iowa] 102 N. W. 1116. Application of administrator made three and one-half years after his appointment held not too late, where, by reason of the fact that the conveyances to her were not recorded, he had no knowledge that she owned the property. Id.

26. Heir not injured cannot complain. Robbins v. Boulware [Mo.] 88 S. W. 674.

27. See, also, § 15, post. Such delay is a matter of defense which may be set up to prevent the sale, but cannot be made available in a collateral proceeding after the sale where the rights of innocent parties have intervened. Delay of fourteen years. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

28. James v. Gibson [Ark.] 84 S. W. 485.

29. Where all the debts had been paid by a devisee, and only a small part of the expense of administration remained unpaid, and there was no showing that funds could not be realized from the rents of the property to pay it, held, that no necessity for a sale had been shown, conceding that a sale could be had to pay the cost of administration. Adamson v. Parker [Ark.] 85 S. W. 239.

30. Lot in which will gave devisee an interest. In re Bryant's Estate [Wash.] 80 P. 555. Where order provided that administrator should not sell certain lots until the balance of the estate had been exhausted and all the rest of the realty had been sold or offered for sale and it should become necessary to sell them in order to raise the required amount, held, that he was entitled to sell such lots where he was unable to sell enough of the other property to raise the required sum, though he offered it for sale for more than six months, the statute requiring the sale to be made within six months from the date fixed by him when he will commence receiving bids. Id. In a collateral action it will be presumed that land specifically devised was not sold until the

In some states the whole of the realty may be sold, when such a course is deemed to be for the best interests of the estate, though the sale of only a part thereof is necessary.[32]

In Georgia, on the executor assenting to a devise of realty, the land is no longer assets of the estate, and is not subject to sale for the payment of its debt and the ordinary has no jurisdiction to order it sold as part of the estate.[33]

(§ 7) *B. Procedure to obtain order.*[34]—An application under the statute to a court of general equity powers for license to sell realty is not an action in equity, but a special statutory proceeding.[35] It is purely a proceeding in rem, and the only questions to be determined are the amount of the indebtedness, the amount of personalty available for its payment, the necessity for selling the land, and the character of the estate sought to be charged.[36] The allowance of claims against the estate by the administrator, though not binding on the heirs, is prima facie sufficient to authorize the sale of realty for their payment, and the administrator need not, in the first instance, prove them on the hearing of the application to sell.[37] The heirs may, on the hearing of the application, contest the validity of claims already allowed in proceedings to which they were not parties, but if they do so, must introduce some evidence to overcome the prima facie case made by proof of their allowance.[38]

Creditors or others interested in the estate are generally given the right to petition for a sale,[39] or to oppose an application to sell.[40]

rest of decedent's land was exhausted. Gwinner v. Michael, 103 Va. 268, 48 S. E. 895.

31. If he is party to suit in which land is sold, and makes no objection, he cannot, in a collateral action, have his loss made good out of other lands of decedent. Gwinner v. Michael, 103 Va. 268, 48 S. E. 895.

32. Whether it will be for the advantage, benefit, and best interests of the estate or those interested therein to order a sale of all the realty, when it is only necessary to sell one tract to pay the expenses of administration, is a question of fact to be determined by the trial court upon the evidence before it in reference thereto. In re Steward's Estate [Cal. App.] 81 P. 728. And to the extent that its decision depends upon inferences to be drawn from the situation of the property, or of the parties interested therein, is not open to review. Court held to have exercised a wise discretion in refusing to sell both tracts, though one of them was so small as to render its division among the heirs impractical, where title thereto was in dispute. Id.

33. Such order is void for want of jurisdiction. Watkins v. Gilmore, 121 Ga. 488, 49 S. E. 598. Though the ordinary has granted an order of sale, the executor cannot recover the land from the remainderman or from a third party, whether the latter has good title or not. Id. Unpaid creditors may follow the land in the hands of the devisees, or have their remedy against the executors personally for assenting to the devises before paying the debts. Id.

34. See 3 C. L. 1280.

35. Bixby v. Jewell [Neb.] 101 N. W. 1026.

36. When it is made to appear that the property is the homestead, court has no authority to proceed further until homestead right has been admeasured and its value determined. Bixby v. Jewell [Neb.] 101 N. W. 1026.

37. Fact of existence of valid claims not it so appears from the fact set forth in the required to be affirmatively established by Code, § 3323. Milburn v. East [Iowa] 102 N. W. 1116.

38. Milburn v. East [Iowa] 102 N. W. 1116.

39. On creditor's bill for sale of realty for payment of debts, evidence held to establish that wife was creditor of estate for money paid in construction of building, which husband had promised to repay. Ruliman v. Winterling [Md.] 60 A. 468. Evidence insufficient to support her claim for money advanced for repairs of building, or for rents and profits. Id. The purchaser of the interest of an heir in decedent's land is not entitled to apply for a sale under Rev. St. 1899, § 150, providing for a sale on application of a "creditor or other person interested in the estate," and a sale made on his application is void. Realty is no part of the estate which goes to the administrator for distribution, and persons interested are those entitled to a distributive share. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868.

40. Any person interested in the estate including the grantee of one of the heirs. Code Civ. Proc. § 1540. Is entitled on distribution to the share of the heir so conveyed to him. Code Civ. Proc. § 1678. In re Steward's Estate [Cal. App.] 81 P. 728. Objection to introduction of deed conveying heir's interest on the ground that it did not appear that the latter had any interest in the estate, held overcome by averment in administrator's petition that grantor was the husband of the deceased. Id. Its introduction did involve any adverse claim to the property, but was proper for purpose of establishing grantee's right to object to sale of all the property. Id.

Among other things the petition should set forth a description of the real estate of the deceased liable to be made assets for the payment of his debts, and his title therein at his death.[41] The sufficiency of the petition may be tested by a demurrer for want of facts.[42]

The required notice of the proceedings must be given,[43] and a failure to give it is not waived by a voluntary petition.[44]

A mortgagee of a portion of the lands of the estate has a right, when application is made for authority to sell all the lands, to require that the sale of land which his mortgage does not cover shall be proper and regular.[45]

Mere irregularities in the proceedings do not affect the title of the purchaser [46] or render them subject to collateral attack.[47]

(§ 7) *C. The order.*[48]—An order authorizing a sale of the land does not give the representative power to exchange it,[49] but though the order authorizes a sale of all the land, where the representative sells a part of it for a sum sufficient to pay all the debts, and his return to that effect is approved, accepted and recorded, and his final account showing the receipt and application of the proceeds is also accepted, he has no authority to thereafter sell the balance.[50] Recitals in the order that the statutory notice was given is evidence of such fact only on a collateral attack on the order.[51]

A license purporting to authorize the sale of a homestead for the payment of debts, in states where it is exempted from liability therefor, is absolutely void.[52]

(§ 7) *D. The sale.*[53]—The rules of fairness, etc., applicable generally to judicial and trustees' sales apply here.[54] Where the general bond does not include it or where the statute requires it, a special bond must be given before making the

41. Burns' Ann. St. 1901, § 2491. Taylor v. Stephens [Ind. App.] 72 N. E. 609. If by his death decedent's title was defeated, and it so appears from the facts set forth in the petition, it will be held insufficient on demurrer. Id.

42. For failure to show title in decedent. Taylor v. Stephens [Ind. App.] 72 N. E. 609.

43. Rev. St. 1879, § 149, requiring notice of proceeding to be published four weeks before the term of court, does not require that the period should be the four weeks immediately preceding the term. Robbins v. Boulware [Mo.] 88 S. W. 674.

44. Where notice of an application for an order authorizing the sale of realty to pay debts is required by statute to be publicly given. Texas Land & Loan Co. v. Dunovant's Estate [Tex. Civ. App.] 87 S. W. 208.

45. Texas Land & Loan Co. v. Dunovant's Estate [Tex. Civ. App.] 87 S. W. 208.

46. Under Rev. Probate Code, § 202, the failure to set forth facts showing a sale to be necessary in the order to show cause will not invalidate the subsequent proceedings if the defect is supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree. Blackman v. Mulhall [S. D.] 104 N. W. 250. The petition was not verified by affidavit as required by statute. Robbins v. Boulware [Mo.] 88 S. W. 674. Failure to comply with Rev. St. 1895, art. 2123, requiring application to show the estimated expense of administration, etc., can be taken advantage of only by exceptions made at the proper time, and does not render the application insufficient to support an order of sale. Texas Land & Loan Co. v. Dunovant's Estate [Tex. Civ. App.] 87 S. W. 208. Title of bona fide purchaser at sale made pursuant to a decree of the surrogate is not affected, where petition was presented, the parties were duly cited, and a decree was made as prescribed by statute, by any omission, defect, irregularity, or error, occurring between the return of the citation and the making of the decree, except so far as the same would affect the title of a purchaser at a sale pursuant to a judgment of the supreme court. Code Civ. Proc. § 2763, as amended by Laws 1904, c. 750, p. 1911. Smith v. Blood, 94 N. Y. S. 667. Not by omission to appoint guardian ad litem for minor heirs, where decree recites that order had been made appointing special guardian. Id.

47. See § 15, post.

48. See 3 C. L. 1281.

49. Order to sell land held not to authorize its exchange. Cole v. Jerman, 77 Conn. 374, 59 A. 425.

50. Cole v. Jerman, 77 Conn. 374, 59 A. 425.

51. Texas Land & Loan Co. v. Dunovant's Estate [Tex. Civ. App.] 87 S. W. 208.

52. Homestead of less value than $2,000. Bixby v. Jewell [Neb.] 101 N. W. 1026. Pleadings insufficient to sustain judgment for sale, where they fail to set out that the sale is sought for purpose of paying claims from liability for which the homestead is not exempted. Id.

53. See 3 C. L. 1282.

54. See Judicial Sales, 4 C. L. 321; Trusts, 4 C. L. 1727; Compare Foreclosure, etc., 3 C. L. 1438.

sale.[55] In Mississippi the land sold must be divided into tracts of not to exceed one hundred and sixty acres.[56]

A sale of realty to pay decedent's debts, made under order of the proper court, is a judicial sale,[57] to which the rule of caveat emptor applies.[58] The court in dealing with the purchaser, however, will do so upon the equitable principles governing all cases of specific performance, and will grant him relief if he can legally claim that he was misled or deceived by some apparent adjudication by the court, and that it would be inequitable to enforce his contract against him under the circumstances.[59]

The purchaser ordinarily takes all the right, title, and estate which the deceased had in the premises at the time of his death,[60] and hence his title is superior to that of a mortgagee of an heir.[61] The mortgagee, however, has a lien on the funds of the mortgagor in the hands of the administrator, and is, therefore, entitled to recover from him, payable out of the mortgagor's share, the amount due him, with costs.[62]

The purchaser takes decedent's title cum onere.[63] Thus, the purchaser at a sale of a deceased partner's interest in land, the title to which stands in the partnership name, takes only the interest of the deceased partner in the land after a settlement of the partnership affairs, and the surviving partner may, in a proper proceeding against him, subject the land to the payment of partnership debts.[64] The proceeds of the sale, in such case, belong to the estate of the deceased partner, and are no part of the partnership assets.[65] But where title to the land stands in the name of the individual partners, an innocent purchaser takes the interest of the deceased partner unincumbered by the secret equity of the partnership, and the proceeds of the sale can be recovered from the administrator by the surviving partner, if necessary to pay partnership debts.[66]

55. Parol evidence of the giving of the statutory bond must rest on proof of loss of original or failure to find it where it should be. Shannon v. Summers [Miss.] 38 So. 345.

56. A sale is void as one of more than 160 acres if a half section be sold entire, reserving an unascertained homestead and dower. Const. 1869, art. 12, § 18. Shannon v. Summers [Miss.] 38 So. 345. All subsequent purchasers must take notice of this. Id.

57. Podesta v. Binns [N. J. Eq.] 60 A. 815; Pierce v. Vansell [Ind. App.] 74 N. E. 554.

58. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276. Purchaser is bound to examine for himself beforehand to see what title he will get, and to take such title as an examination of the proceedings will show that he will get. Podesta v. Binns [N. J. Eq.] 60 A. 815. Orphans' court not called upon and does not pass upon question of how much or what kind of a title sale made in pursuance of its order will vest, but purchaser takes as prescribed by P. L. 1898, p. 749, § 94, and assumes risk of what he will get. Id.

NOTE. Subrogation of purchaser at void sale to rights of creditors: A purchaser at an invalid sale is entitled to be subrogated to the rights of creditors to the extent that the money paid by him has been applied to the payment of their claims, and may retain the property as security for the repayment of the sums to which he is entitled. Duncan v. Gainey, 108 Ind. 579, 9 N. E. 470; Pool v. Ellis, 64 Miss. 555, 1 So. 725; Valle v. Fleming, 29 Mo. 152, 77 Am. Dec. 657; Scott v. Dunn, 21 N. C. 425, 30 Am. Dec. 174; Perry v. Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Hunter v. Hunter, 58 S. C. 382, 79 Am. St. Rep. 845; Hunter v. Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663; Hudgin v. Hudgin, 6 Grat. [Va.] 320, 52 Am. Dec. 124; Blodgett v. Hitt, 29 Wis. 169. The right of subrogation has been denied to a purchaser whose title fails for want of a proper description. Borders v. Hodges, 154 Ill. 498, 39 N. E. 597.—From note to American Bonding Co. v. National Mechanic's Bank [Md.] 99 Am. St. Rep. 530.

59. Podesta v. Binns [N. J. Eq.] 60 A. 815.

60. Code Civ. Proc. § 1555. Gutter v. Dallamore, 144 Cal. 665, 79 P. 383.

61. Purchaser's title relates back to the time of the death of the deceased and he takes freed from the mortgage. Land cannot be ordered sold on foreclosure of mortgage. Gutter v. Dallamore, 144 Cal. 665, 79 P. 383. Finding in foreclosure suit construed as finding that property was sold by the administrator under order of the court. Id.

62. Gutter v. Dallamore, 144 Cal. 665, 79 P. 383. In such case the supreme court will not inquire into the propriety of the action of the probate court in ordering a sale of an entire city lot, instead of a part of it only. Id.

63, 64, 65. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

66. Rule of caveat emptor does not extend to secret equities, and purchase money would be substituted for the land. Hartnett v.

The sale is subject to the widow's right of dower unless she consents to the disposal of her interest, in which case her rights attach to the proceeds.[67] In case she has only a life interest in the homestead, the fee may be sold subject to her rights.[68] Where the lien of a first mortgage is set up, it must be preserved in the fund realized from the sale; but if the mortgage is not set up, the lien is cut off, and the mortgagee becomes a general creditor.[69]

Statutes in some states require the deed to refer to the record wherein the order or judgment of the court authorizing its execution is entered,[70] and in case this is done the grantee and all those claiming under him take with notice of the character, extent, and contents of the order and judgment.[71] One is not deprived of his character as bona fide purchaser because the administrator's deed to him is a quitclaim.[72] Where land of a nonresident decedent is sold, a copy of the will probated in the state is not within the chain of title of a subsequent purchaser so as to charge him with notice of outstanding equities.[73]

Mere inadequacy of price is no ground for setting aside the sale,[74] but by statute in some states it may be be set aside if a sum greater by ten per cent. than the amount bid, together with the expenses of resale, is offered for the property before confirmation.[75] In such case the intrinsic value of the property and the motive of the person making the increased bid are immaterial.[76]

Payment or tender of part of the indebtedness before the sale does not affect its validity,[77] nor does a tender of the whole indebtedness before the sale affect the title of one purchasing without notice thereof.[78]

The confirmation cures all irregularities in the sale or order, but not jurisdictional defects.[79] The sale cannot be set aside except on grounds authorizing the vacation or modification of a judgment after the expiration of the term.[80] The

Stillwell, 121 Ga. 386, 49 S. E. 276. If the surviving partner himself purchases the land, he is charged with knowledge of the nature of the title and is estopped from claiming the proceeds of the partnership property. Id. See, also, Partnership, 4 C. L. 908.

67. May be sold free and clear of her interest where she consents thereto and such course appears to be for the best interests of the estate. Widow in such case takes her interest in cash. Decree directing sale of reversionary interest only, reversed and remanded for that purpose. Rullman v. Winterling [Md.] 60 A. 468.

68. Robbins v. Boulware [Mo.] 88 S. W. 674.

69. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

70. Burns' Ann. St. 1901, § 2518, requires the deed to describe the kind of record, the number of the volume, and the page wherein the order or judgment of the court is entered, by virtue of which the administrator is authorized to execute the particular deed. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

71. Where the deed contains all such entries, the grantee and all persons claiming under him take with notice of the character, extent, and contents of the order and judgment, and in a suit to reform the deed on the ground that, through a mistake, it describes more property than was intended to be sold, one claiming under the grantee cannot defend on the ground that he is an innocent purchaser. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

72, 73. Nelson v. Bridge [Tex. Civ. App.] 87 S. W. 885.

74. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

75. Purchaser takes subject to this contingency. Rohlff v. Snyder's Estate [Neb.] 103 N. W. 49.

76. Rohlff v. Snyder's Estate [Neb.] 103 N. W. 49.

77, 78. Green v. Cannady [S. C.] 51 S. E. 92.

79. Does not render sale valid where order shows on its face that it was made to pay expenses of administration only and not to pay debts, and statute only authorizes sale for latter purpose. Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044. Where evidence demanded finding that administrators of common grantor of plaintiffs and defendant sold property in dispute at public outcry as that of their decedent, to pay debts and for distribution; that defendant had a complete chain of title from the purchaser; that sale was had by order of the court of ordinary, and after compliance with the usual procedure, and that plaintiffs or their predecessors received the benefits of the proceeds, and never attempted to repudiate the sale or refund the money received, held that defendant showed a perfect equitable title as against plaintiff, regardless of any defects or irregularities in the sale, and that it was not error to direct a verdict in his favor. Leggett v. Peterson [Ga.] 50 S. E. 51.

80. Grounds stated in Civ. Code Prac. § 518. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

rule is not changed by the fact that one claiming to be a creditor, but who has not proved his claim, is not made a party.[81]

The representative may make the deed as the purchaser directs.[82] Equity may correct mistakes in the deed,[83] and fraudulent sales may be set aside.[84] If bidders abstain on the general understanding and belief that the purchase is for the heirs, the purchaser holding out such facts may be held as their trustee.[85]

An invalid sale may be cured by subsequent ratification.[86]

Owners of decedent's realty sold for the payment of a mortgage thereon are entitled to possession until a receiver is appointed or until the expiration of the time for redemption.[87] Where land is sold merely for enough to pay a mortgage thereon, the fact that the equity of redemption is not also sold in accordance with the order of the court does not prevent the termination of the right to redeem at the expiration of a year from the date of the sale.[88]

If the sale is subsequently declared void, a purchaser who has entered and made improvements in good faith cannot be ejected until the purchase money has been repaid and he has been paid for such improvements,[89] and as against a purchaser who rescinds an assignment of his bid for fraud, the fraudulent assignee may be subrogated to liens he has discharged.[90] Various statutes limit the time within which sales open to objections and irregularities may be challenged,[91] but sales not in good faith are not within them.[92]

Actions to recover realty sold by an executor or administrator must be brought within the time fixed by the statute of limitations.[93] Laches will bar such a suit in a court of equity.[94]

81. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

82. Sale is not rendered void because deed is made to the husband of the successful bidder even though the bidder paid the purchase price. West v. Burgie [Ark.] 88 S. W. 557.

83. Whereby more land was described than was intended to be sold. Pierce v. Vansell [Ind. App.] 74 N. E. 554. Estate not estopped from prosecuting action to correct deed and recover possession of excess by reason of the fact that the purchase money notes and mortgage were assigned to a third person who foreclosed the mortgage, it not appearing that the administrator knew of the mistake when he assigned it. Id.

84. Fact that sales were irregular or even void does not establish that executor was guilty of fraud, where he applied for permission to sell and truthfully stated in detail the condition of the estate and the previous conduct of its affairs. Williamson v. Beardsley [C. C. A.] 137 F. 467. Mere allegations that sales sought to be set aside were fraudulently conducted, without an averment of substantive facts justifying the charge of fraud, are insufficient. Id. Evidence insufficient to show fraud in an executor's sale of realty. West v. Burgie [Ark.] 88 S. W. 557.

85. See 15 Am. & Eng. Enc. Law [2d ed.] 1191. But on suit to hold persons, in whose name land was purchased, as trustees for all the devisees, it being claimed that the person who bid it off had agreed with his mother to buy it for the benefit of both plaintiffs and defendants, and that this agreement being known, no one else bid at the sale, evidence that it was understood that the mother was to buy the land for the children, and that people did not want to bid against her, held hearsay. King v. Bynum, 137 N. C. 491, 49 S. E. 955.

86. Podesta v. Binns [N. J. Eq.] 60 A. 815. Purchaser cannot maintain bill in chancery to relieve him from his bid on the ground that he was entitled to a deed in fee, clear of all incumbrances, where he was tendered a deed, and an offer was made to pay off mortgages, which would give him a fee. Id.

87, 88. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

89. Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010. Where the sale is set aside in ejectment the fact that the purchaser failed to plead his right to remuneration for improvements and taxes, and to recover the purchase money, does not estop him from claiming the same in a subsequent suit therefor in equity brought while he is still in possession. Suit held not to be one under Rev. St. 1899, §§ 3075, 3076, since nothing but improvements can be adjudicated under them. Id.

90. Where one by fraud procured from an administratrix an assignment of her bid on land at a sale thereof to pay debts, though the assignment could not be enforced, the assignee was held entitled to a lien on the land for the amount of a debt paid by her on procuring the assignment. Daniels v. Daniels [Ky.] 86 S. W. 1116.

91. Sale en gross of more than 160 acres may be cured by lapse of two years without objection. Code 1880, § 2693. Shannon v. Summers [Miss.] 38 So. 345.

92. Shannon v. Summers [Miss.] 38 So. 345. That one took in good faith from the fraudulent grantee is no protection. Id. Sale to himself through agent held fraudulent. Id.

93. Utah Rev. Laws 1888, § 4193, Rev. St.

By statute in Ohio the proceeds of the sale must be applied first to discharge the costs and expenses of the sale, and the percentum and charges of the representative thereon for his administration of the same, then to the payment of mortgages and judgments, and then to the payment of claims and debts in the order of their priority.[95] General costs of administration are not charges and expenses of the sale within the meaning of this act.[96]

§ 8. *Subjection of property in hands of heirs or beneficiaries to payment of debts.*[97]—At common law the heirs and devisees took the realty by descent, free from the debts of the ancestor, unless the latter expressly bound or charged them for the payment thereof.[98] This rule has, however, been generally abrogated so that the heir or devisee now takes by descent or devise, subject to all valid claims against the ancestor's estate,[99] and they, together with distributees and legatees, are liable to creditors to the amount of property received by them from the estate.[1] An heir or devisee, having entered as such, cannot acquire title to the lands descended or devised, as against the debts of the ancestor or devisor, by a claim of adverse possession as against the title descended or devised.[2] One who advances money to pay claims is not a "creditor of the deceased" entitled to sue the heirs in assumpsit.[3]

In the absence of a statute to the contrary, presentation of the claim to the representative is not necessary to enable the creditor to enforce such liability,[4] and

1898, § 2870, requires such actions to be brought within three years after the sale, and actions to set aside the sale within three years after the discovery of the fraud or other lawful grounds on which the action is based. Williamson v. Beardsley [C. C. A.] 137 F. 467. Statute runs during the minority of the complainant. Id. Suit by administrator for relief from mistake in description in deed of the land intended to be sold, and to recover possession of the excess not sold or intended to be sold and conveyed, and not attacking the validity of the sale actually made, is not a suit for the recovery of realty, and the five-year statute of limitations does not apply. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

94. Suit to set aside conveyances barred. Williamson v. Beardsley [C. C. A.] 137 F. 467. Where grounds of attack were matters of record and complainants had notice of the pendency of the administration proceedings sufficient to excite their attention and put them on guard, as to the course thereof, they are deemed to have actual knowledge of the facts therein contained, and cannot escape the imputation of laches because of their inactivity. Id. Fact that they were nonresidents does not change the rule. Id.

95. Rev. St. § 6165. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

96. Attorneys' fees, court costs of administration, and premiums due a surety company on the administrator's bond, are not included, and cannot be allowed prior to the claim of a mortgagee. The administrator assumes the risk of the fund realized being insufficient to pay the mortgage lien and these items of expense in addition. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

97. See 3 C. L. 1283.

98. Alderson v. Alderson's Guardian [Ky.] 87 S. W. 810, withdrawing former opinion, 26 Ky. L. R. 1260, 83 S. W. 1129. Heir liable only by virtue of statute. Clevenger v. Mathews [Ind. App.] 73 N. E. 161.

99. Takes it with all the burdens he left upon it. Alderson v. Alderson's Guardian [Ky.] 87 S. W. 810, withdrawing former opinion, 26 Ky. L. R. 1260, 83 S. W. 1129. Under Ky. St. 1903, § 2087, the only way to prevent creditors from subjecting decedent's lands to the payment of their claims is by a voluntary alienation by the heir or devisee after six months from the date of the death of the ancestor. Id. In equity, lands are regarded as a fund for the payment of debts, and the heirs or devisees as holding the same in trust for the creditors. Id. The chancellor may either subject the land as a trust fund, or, if it has been alienated, may take the proceeds for the payment of the ancestor's debts, or hold the heir or devisee personally liable to the extent of the value of the land received. Id. A devisee in possession holds subject to the equity of the creditors of the devisor to have land sold for the payment of his debts. Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

1. The receiver of a national bank may collect an assessment on stock owned by decedent from the distributees to the extent of the assets received by them, where the executor or trustee makes distribution with knowledge that the assessment has been ordered. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817, afg. 114 Ill. App. 422. Creditor whose claim does not become absolute until estate is closed may recover from distributees in equity. Rankin v. Big Rapids [C. C. A.] 133 F. 670.

2. Answer, in action to subject land devised to payment of debts alleging adverse possession, held not to set up title inconsistent with plaintiff's equity so as to raise an issue triable by jury as a matter of right. Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

3. Statute of Frauds, § 12. Calhoun v. Tangany, 105 Ill. App. 23.

4. Not necessary to enable them to resort to statutory remedy against heirs and devisees. Acton v. Shultz [N. J. Eq.] 59 A. 876.

where a claim does not arise until after the settlement of the estate, the creditor has a right of action against the heirs and distributees independent of and in addition to the statutory one.[5] In South Carolina a creditor's equity to subject land devised to the payment of his debts does not arise until his remedy against the executor has been exhausted and a return of nulla bona made,[6] and until this has been done, the heir's possession does not become hostile and adverse.[7] In Pennsylvania, however, a creditor who secures an adjudication of his claim and a decree against the executor awarding him his debt out of the personal estate cannot thereafter proceed against real estate in the hands of a devisee.[8]

Where complainant seeks relief as to the personal estate of the deceased, his remedy is at law and not in equity, unless some right of lien is made to appear.[9] It has, however, been held that the remedy of the receiver of a national bank to collect an assessment on stock from the distributees of a decedent's estate is in equity.[10]

The creditor must commence his action within the time prescribed by statute, unless it is practically impossible for him to do so.[11] If no time is fixed, he must act within a reasonable time.[12]

§ 9. *Rights and liabilities between representative and estate. A. Management of and dealings with estate.*[13]—The executor or administrator is chargeable with, and must account for, all the assets of the estate coming into his hands.[14] He

Not necessary to enable creditor whose claim does not become absolute until after estate is closed to recover from distributees in equity. Rankin v. Big Rapids [C. C. A.] 133 F. 670. Failure of a claimant of an annuity acquired by contract with the decedent to prosecute suit against the executor before his final discharge will not preclude him from proceeding in equity to charge the estate in the hands of a trustee who received it from the executor. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132.

5. Clevenger v. Mathews [Ind. App.] 75 N. E. 23.

6, 7. Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

8. He is concluded on the fact that there were assets. Reading Trust Co. v. Pennsylvania Trust Co., 26 Pa. Super. Ct. 599.

9. Where one has no lien on personal assets he cannot sue in equity against distributees to subject them or realty purchased with their shares to payment on bond on which deceased was liable. Acton v. Shultz [N. J. Eq.] 59 A. 876.

10. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817, afg. Potter v. Mortimer, 114 Ill. App. 422.

11. In such case has a right to do so thereafter independently of the statute. Clevenger v. Mathews [Ind. App.] 75 N. E. 23. Held that action for contribution could be maintained by nonresident surety on a note against the heirs and distributees of his cosurety though commenced more than two years after the settlement of the estate, notwithstanding a statute (Burns' Ann. St. 1903, § 2579) requiring actions by nonresident creditors against heirs and distributees to be brought within two years after settlement, where the petition shows that claimant was a nonresident and defendants were residents, and that he did not know of the nonpayment of the note or of the maker's insolvency until three years after the settlement of the estate, even though the note waived notice of nonpayment. Id.

12. Creditor whose claim does not mature until after estate is closed must sue distributees within reasonable time. Rankin v. Big Rapids [C. C. A.] 133 F. 670.

13. See 3 C. L. 1285.

14. Is chargeable in his account with the whole of the estate which may come into his possession at the value of the appraisement contained in the inventory. Code Civ. Proc. § 1613. In re Glanelli's Estate, 146 Cal. 139, 79 P. 841. There being a substantial conflict in the evidence, held that the court would not, on appeal, reverse an order disallowing certain items of the account of an executrix and charging her with a part of the estate not accounted for. Id. He will not be allowed to make any profit by the increase, nor to suffer any loss by the decrease or destruction, without his fault, of any part of the estate. Must account for excess, if he sells any part of the estate for more than the appraised value, and is not responsible for the loss resulting from the sale of any of it for less, if the sale has been justly made. Id. For moneys shown to have come into their possession. Wilbanks v. Crosno, 112 Ill. App. 503. Where bill sought to set aside deed of trust given by executrix and life tenant on ground that she had no such authority under the will, and to compel her to conduct the administration of the personalty under the supervision of the circuit court, and to charge herself with all the personalty of the testator, and decree required her to account as did a subsequent one after an appeal, held that the auditor had authority to include in the account any personalty shown to have belonged to testator at his death and to have come into the executrix's possession, though it had not been specifically mentioned in the first decree of the trial court or considered on appeal. Bauernschmidt v. Bauernschmidt [Md.] 60 A. 437. Executrix held properly charged with funds derived from sale of stock in corporation and funds received by her husband from deceased in his lifetime, and for stock received by

is not excused from doing so by reason of the fact that the decedent, at the time of his death, owed him a sum in excess of the value of the estate.[15]

The representative is required to act with the utmost good faith in dealing with the estate,[16] and is responsible for losses resulting from his want of reasonable diligence,[17] or his unauthorized acts or omissions.[18] Acquiescence of a beneficiary in the wrongful application of a trust fund releases the administrator and his sureties from liability therefor.[19]

An administrator is not chargeable, either in his individual or representative capacity, with the amount of a debt which he has never collected and which has

him. Id. Where owner transferred brewery to corporation composed of himself and his wife and children, who paid nothing for their stock, and it subsequently conveyed its property to a realty company formed by the brewer in which his children held merely sufficient stock to qualify them as incorporators, held that such property would be regarded in equity, in determining the assets of the estate, as the individual property of the brewer. Id. Evidence held to warrant finding that certain gold coin buried by testator had come into the possession of the executrix and that she should be charged therewith. Id. Item for money received from "political lease" of mine owned by decedent, held properly disallowed, there being some question as to whether executor had accounted for full amount received, or which he should have received, therefrom. In re Courtney's Estate [Mont.] 79 P. 317. Objection to account that certain personalty should have been charged to the administrator overruled, where it did not appear that it ever belonged to decedent, or came into the administrator's hands. In re Robinson, 45 Misc. 551, 92 N. Y. S. 967. Evidence insufficient to show that executrix had not accounted for all the property of the estate. Bramlett v. Mathis [S. C.] 50 S. E. 644. Where owner of possessory right in Indian lands operated ferry thereon, which, though conducted under periodical license, was regarded by the customs of the nation as appurtenant to the land, its operation by his widow and administratrix after his death, though under license granted in her own name, must be regarded as having been for the benefit of the estate, and she is chargeable with the income therefrom. Nivens v. Nivens [C. C. A.] 133 F. 39, rvg. 76 S. W. 114, 64 S. W. 604.

15. State v. Stuart [Mo. App.] 86 S. W. 471.

16. In re McDougald's Estate, 146 Cal. 196, 79 P. 875. An administrator who holds a judgment in his own name and also one in the name of the estate he represents is bound on a sale under the judgment to see that the land brings the highest possible price (Montgomery v. Black [Ark.] 86 S. W. 1006), and where the judgments are equal in priority, the proceeds of the sale must be divided pro rata between himself and the estate. (Id.).

17. Liable for improvidently disposing of debts and choses. Nance v. Gray [Ala.] 38 So. 916. In case he fails to promptly and diligently prosecute a suit in favor of the estate in accordance with the order of the court, the measure of the damages to which the estate is entitled is the loss, if any, which it sustained by reason thereof. McDowell v. First Nat. Bank [Neb.] 102 N. W. 615. Pleadings held insufficient to warrant holding the executor personally liable for the sum, with interest, that had been paid by the estate on a note on which decedent was surety, and which the executor failed to collect from the payee on the latter's releasing the principal. Id. Act of executors in paying claim of widow for property advanced by her to deceased after it had been rejected and had been established before a referee, held not to be fraudulent, collusive, or negligent, where they thereby kept her from contesting the will, though they did not raise the question of her competency to testify on the hearing before the referee, and their accounts were improperly surcharged with the amount thereof. In re Watson, 101 App. Div. 550, 34 Civ. Proc. R. 150, 92 N. Y. S. 195. The orphans' court has no jurisdiction to determine whether the executors were negligent in failing to make provision for the payment of legacies at the proper time, the appropriate remedy being by a bill in equity. Failed to provide for their payment at end of year out of surplus credited to deceased on books of corporation, which thereafter became insolvent. In re Woolsey's Estate [N. J. Eq.] 59 A. 463.

18. An administratrix who fails to list a mortgage, which she holds against realty belonging to the estate, and which secures a debt exceeding the value of the land, for assessment, but allows the land to be taxed as though unincumbered, is not entitled to credit for taxes paid by her on such realty in her representative capacity. Her duty, in her individual capacity, to list her mortgage interest, and taxes levied on that interest would be her individual debt. In re McDougald's Estate, 146 Cal. 196, 79 P. 875. Executors are liable for the loss resulting from breach of trust in making sale. Where one of two executors purchased securities of the estate at less than their value. Wilbanks v. Crosno, 112 Ill. App. 503. Not relieved from liability because sale is approved by the court. Id. Evidence insufficient to show fraud and wrongdoing on the part of the administratrix in regard to the personalty. Walker v. Walker [Iowa] 102 N. W. 435. Payment of annuities out of surplus income credited to decedent on books of corporation, before fully paying legacies, held, in view of the provisions of the will, not to be an improper use of the fund rendering the executors personally liable therefor. In re Woolsey's Estate [N. J. Eq.] 59 A. 463.

19. Estate of Koehnken, 6 Ohio C. C. (N. S.) 359.

never been established against the debtor.[20] By a statute in Rhode Island both the person and estate of an executor are exempted from execution for the debts and legacies of his testator unless he has committed waste.[21] The act does not apply to an action on a bond given by the executor as residuary legatee and conditioned to pay the debts and legacies.[22]

Executors are entitled to credit for money used in keeping up the market price of stock owned by testator and on which he had borrowed large sums, where the loans would have been called if any considerable depreciation had occurred, and injury would thereby have resulted to the estate, particularly where testator had a contract with another person to keep up the price in their joint interest, which the latter performed on his part.[23] So, too, they are entitled to credit for the repayment of moneys advanced by a corporation, in which decedent was largely interested, for the payment of pressing bills against the estate, even though it was indebted to the estate, where the will constitutes such indebtedness a fund which is not to be distributed except for certain specified purposes.[24]

The position of representative is one of trust and confidence and not one of profit.[25] In the absence of a provision to the contrary in the will, he cannot purchase property at his own sale either personally or through third parties.[26] Such a sale is not void.[27] but is voidable at the option of the heirs or others interested in the estate,[28] regardless of the adequacy of the consideration.[29] The fact that the sale was made under order of, and was subsequently approved by, the court, does not prevent its being set aside, where it is reported as having been made to a third party.[30] In such case the lien of a mortgagee of the purchaser, who took in good faith, is superior to that of one having a judgment against the heir.[31]

Neither the administrator of the estate nor his attorney may, for his personal use and profit, purchase an outstanding life estate in realty of which the adminis-

20. Cannot be charged with laches in failing to collect it until it is established that debtor owes it. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170.

21. Gen. Laws 1896, c. 218, § 24. Probate Court v. Adams [R. I.] 60 A. 769.

22. Probate Court v. Adams [R. I.] 60 A. 769.

23. In re Corbin, 101 App. Div. 25, 91 N. Y. S. 797.

24. Where, before executors received any funds, a corporation in which decedent was largely interested, paid certain pressing bills against the estate on the understanding that the sum so advanced was to be repaid, which was done as soon as the executors received any money. In re Woolsey's Estate [N. J. Eq.] 59 A. 463. Nor was the fact that the executors had not charged themselves with receiving the money ground for disallowing them credit therefor when they repaid it. Id.

25. Hence, one named as an executor in a will is not incompetent as a witness in a contest thereof. Standley v. Moss, 114 Ill. App. 612.

26. Comp. Laws, § 9095. Curtis v. Bremer [Mich.] 12 Det. Leg. N. 105, 103 N. W. 579. Statute does not apply where will expressly confers power on the executors to sell to one of their number. Id. Cannot purchase at sale under judgment owned by estates. Montgomery v. Black [Ark.] 86 S. W. 1006. Evidence held to show that the purchase was made by an agent of the administrator. Id. Evidence held to show that sale to pay debts was made with secret understanding that property should be reconveyed by purchaser to the administratrix. Walker v. Walker [Iowa] 102 N. W. 435.

27. Deed is not void and cannot be collaterally attacked. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

28. May be avoided by persons interested. Montgomery v. Black [Ark.] 86 S. W. 1006. Objection can only be raised by heirs at law or creditors. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. A judgment creditor of an heir cannot take advantage of irregularities in the sale or of the fact that the administratrix bought at her own sale, and therefore acquired only a voidable title. Cannot levy upon and sell land formerly belonging to the estate held by such voidable title. Williams v. Williams Co. [Ga.], 50 S. E. 52. Sale will be set aside on motion of any party interested. Walker v. Walker [Iowa] 102 N. W. 435. Where the administrator procured an unauthorized order to sell and sold to himself individually for an inadequate price, the heirs by afterwards petitioning for his discharge but not calling him to account or settling with him do not ratify his transaction; and hence may pursue the property into the hands of his grantees. Tucker v. Benedict [La.] 38 So. 142.

29. Montgomery v. Black [Ark.] 86 S. W. 1006.

30. Walker v. Walker [Iowa] 102 N. W. 435.

31. To that of heir's wife for alimony. Walker v. Walker [Iowa] 102 N. W. 435.

trator is trustee.[32] In case the attorney does so and afterwards sells the interest so acquired, the administrator is chargeable with and must account for the amount so realized.[33] Though the law does not absolutely prohibit the representative from purchasing the share of an heir or devisee, equity looks with disfavor upon such transactions, and, if attacked, they will not be upheld unless it clearly appears that the vendor was fully informed in regard to the value of the property and the nature of his interest therein.[34] If the administrator, through misrepresentations, purchases a share for less than its value, the sale may either be set aside entirely, or he may be compelled to make good the full value of the property purchased.[35] Statutes in some states provide that no administrator or executor shall purchase any claim against the estate which he represents.[36]

One may not in equity, by invoking his representative capacity, obtain to his exclusive use property to which he would not be entitled in his individual capacity.[37]

A representative who distributes the estate without citing a creditor in the accounting proceedings and procures an order for distribution by false allegations is personally liable for the amount of his claim.[38] So, too, a representative paying claims on ex parte orders,[39] or paying judgments rendered in the absence of necessary parties,[40] does so at his peril. A beneficiary who with knowledge receives benefit or who requests a payment mistakenly made in the belief that it was for the estate is liable to repay the representative; but not where he paid it as an advance on distribution.[41]

32. No right to purchase life estate of husband, where there are conflicting interests between the two estates. In re Robbins' Estate [Minn.] 103 N. W. 217.

33. In re Robbins' Estate [Minn.] 103 N. W. 217.

34. Sale will not be upheld if there was any misrepresentation or concealment. Cornish v. Johns [Ark.] 85 S. W. 764. Held that purchase by administrator of shares of minors for one-fourth of their value, through false representations made to their guardian, could not be upheld. Id.

35. Purchase by administrator from minor beneficiaries allowed to stand on his paying them the full value of their interests. Cornish v. Johns [Ark.] 85 S. W. 764.

36. Code Civ. Proc. § 1617. In re McDougald's Estate, 146 Cal. 191, 79 P. 878.

37. Huyler v. Dolson, 101 App. Div. 83, 91 N. Y. S. 794. Insured was induced to assign a life policy to a married woman through the fraud of herself and her husband. Thereafter he sued to set aside the transfer, but died pending the suit leaving a will whereby the husband was made executor and sole legatee. Held that the executor was not precluded from continuing the action because of his participation in the fraud, in the absence of a showing that there were no debts and consequently that he would be the only one to benefit by a recovery. Id. Burden is on defendant, in such case, to show that there are no debts. Id.

38. By falsely alleging under oath that her infant daughter was the only creditor. In re Gall [N. Y.] 74 N. E. 875.

39. An ex parte order to pay money in satisfaction of a lien which the administrator says exists does not determine its existence or validity and he pays at his own risk. Not a proceeding to test a claim of lien (Code 1892, § 1937). O'Bryan Bros. v. Wilson [Miss.] 38 So. 509.

40. If the next of kin are necessary parties to an action on a disputed claim, a judgment rendered thereon in their absence will not be effective against them and the administrator, in such case, will be liable for any improper distribution of the estate in paying the same. Riley v. Ryan, 103 App. Div. 176, 93 N. Y. S. 386, rvg. 45 Misc. 151, 91 N. Y. S. 952. Judgment was entered against administrator on a claim, from which he appealed, but he subsequently dismissed the appeal. Thereafter certain of the next of kin, alleging that the dismissal was brought about by the connivance of the administrator and the claimant, procured an order making them parties to the proceeding. Thereafter the administrator paid the judgment in full and procured its discharge. The next of kin then procured an order vacating the judgment and the report of the referee on which it was based, and the satisfaction of the judgment, and directing a new trial unless the appeal was reinstated. Held that latter order was unwarranted, no fraudulent connivance having been proved. If next of kin were necessary parties, judgment was not effective against them, and if not they could not complain of the omission to appeal. In any event, any improper distribution of funds could be regulated on final account. Id.

41. An executor who advances money to pay for improvements on land, which he knows belongs to decedent's daughter, as an advance payment upon and against the latter's distributive share of the estate, cannot recover the same in an action by the daughter against him for specific performance of an alleged gift of the property to her by decedent. Held error to exclude evidence that payments were so made. Neil v. Harris, 121 Ga. 647, 49 S. E. 773. But if he, at the request of the daughter, or with her knowledge and consent, makes such payment on behalf of the estate and believing that the

Though the revocation of his letters terminates the authority of the administrator, it does not relieve him from liability on account of acts done while in office, or the retention of assets of the estate after his removal.[42]

Executors de son tort.[43]—In some states anyone converting any property of the deceased before the granting of letters testamentary or of administration is made liable for double its value.[44]

(§ 9) *B. Representative as debtor or creditor.*[45]—As a general rule any indebtedness of an executor or administrator to his decedent is regarded as assets with which he is chargeable at its maturity as so much money in his hands.[46] It is generally held that this rule does not apply where the representative is insolvent at the time of his appointment and so remains during the course of his administration,[47] nor will it be applied so as to prevent the running of interest on such a debt evidenced by an interest-bearing obligation.[48]

The fact that decedent, at the time of his death, owes the administrator a sum larger than the value of the estate, is no excuse for his failure to inventory and account for all moneys received by him in his representative capacity,[49] but his remedy in such case is to present his claim to the probate court for allowance, and to have a special administrator appointed for the hearing.[50] An administrator and heir who agrees to rent decedent's lands and apply the proceeds on the amount due him from the estate should so credit his share of the rent as well as that of the other heirs.[51]

To apply on an individual debt to an estate a sum coming from the estate to the debtor as trustee is a misappropriation of estate funds, and the debt being for the price of land, the vendor's lien remains.[52]

If the widow, under an order to a bank authorizing her to do so, draws out deposits standing in decedent's name, she, if not entitled thereto as donee or as the beneficiary of a trust, will hold it as trustee for decedent at the time of his death, and, on her subsequent appointment as executrix, the claim of his representatives therefor is protected from the running of limitations in her favor in the same man-

property belongs to the estate, then he is entitled to reimburse himself, as executor, from the property, for the money so advanced. Directions in former decision held to have been misconstrued by trial judge. Id.

42. Bailey v. McAlpin [Ga.] 50 S. E. 388.

43. See 3 C. L. 1289. For a full discussion of who are executors de son tort, the rights and liabilities of such executors, and the effect of statutes abolishing the office, see note 98 Am. St. Rep. 191.

44. Rev. St. 1898, § 3824. Statute is penal and must be strictly construed. Dixon v. Sheridan [Wis.] 103 N. W. 239. Conversion after the appointment of a special administrator, but before the appointment of the general one, is not a conversion before the granting of letters of administration within the meaning of the act. Id.

45. See 3 C. L. 1290.

46. Sanders v. Dodge [Mich.] 12 Det. Leg. N. 137, 103 N. W. 597. Rev. St. § 6069. Jones v. Willis [Ohio] 74 N. E. 166. On executor's death before the estate is closed, his representative must account therefor the same as other property, whether it was included by decedent in his inventory or not. Id. Evidence held to show that an administrator was properly charged with interest on notes held by the estate of his decedent against him. Yost's Estate, 23 Pa. Super. Ct. 223.

47. Under Comp. Laws, § 9433, providing that the representative shall not be accountable for any debts due the deceased if they remain uncollected without his fault. Sanders v. Dodge [Mich.] 12 Det. Leg. N. 137, 103 N. W. 597.

48. A debt due the estate from one appointed executor by will does not upon his qualification become cash in his hands but continues a debt, and where evidenced by an interest-bearing obligation bears interest until he reports it as cash in his hands or distributes the same in a manner approved by the court. Phillips v. Duckett, 112 Ill. App. 587.

49. State v. Stuart [Mo. App.] 86 S. W. 471.

50. Rev. St. 1899, § 205. State v. Stuart [Mo. App.] 86 S. W. 471. The disputed amount due from an executor to the estate may, in Illinois, be determined by the probate court, either with or without the appointment of a special administrator to defend on behalf of the estate. Phillips v. Duckett, 112 Ill. App. 587.

51. Cauthen v. Cauthen, 70 S. C. 167, 49 S. E. 321.

52. Marshall v. Hall, 51 W. Va. 569, 42 S. E. 641.

ner and upon the same principle as applies to a debt from a representative to his decedent.[53]

(§ 9) *C. Interest on property or funds.*[54]—An administrator is properly charged with interest on a sum with which he is charged on the record with his consent as money which he should have put into his account and held as an identified fund and did not,[55] and also on a fund which he retained in his own hands after the assets of the estate had been ordered paid into court and, with the consent of the parties, transferred to the solicitors of the parties as custodians.[56]

All presumptions being in favor of the regularity of the management of the estate by the representative [57] the burden is on one alleging that he should be charged with interest as a penalty for willfully or negligently delaying the settlement of the estate to prove that he has done so.[58] He should not be charged with compound interest in the absence of any showing that he received compound interest on any moneys of the estate, or that he misappropriated any of the property of the estate.[59]

In Georgia the interest to be charged trustees, including executors and administrators, is fixed by statute at seven per cent. per annum, without compounding, for six years from the date of their qualification, and after that at six per cent. per annum, annually compounded.[60] Any trustee may relieve himself from this rule by returning annually the interest actually made, and accounting for the balance of the fund,[61] and any distributee may recover a greater interest by showing that the trustee actually received more, or that he used the funds himself to greater profit.[62]

Where the funds of the estate are deposited with a trust company which is also one of the executors, and it allows interest thereon at the usual rate allowed other customers, it cannot be charged with a higher rate on the theory that it is bound to account for all the profits made by it out of the estate.[63]

Interest may, in proper cases, be allowed the executor or administrator on ad-

53. Sprague v. Walton, 145 Cal. 228, 78 P. 645.

54. See 3 C. L. 1290. For liability of estate for interest on legacies not paid when due, see § 12, post.

55, 56. McIntire v. McIntire, 192 U. S. 116, 48 Law. Ed. 369.

57. In re Sylvar's Estate [Cal. App.] 81 P. 663.

58. Evidence held not to show that administrator willfully or negligently caused the delay. In re Sylvar's Estate [Cal. App.] 81 P. 663.

59. In re Castner's Estate [Cal. App.] 81 P. 991.

60. Civ. Code 1895, § 3498. Tippin v. Perry [Ga.] 50 S. E. 35. The charging of compound interest under this statute is not dependent upon misappropriation of assets, or fraud, misconduct, or negligence. Id. When beginning to charge compound interest, simple interest for six years at seven per cent. should be added to the fund and a new principal formed upon which the compound interest should be computed. Id. Where administrator made only five returns in 19 years, and the auditor calculated interest against him upon each separate receipt and in his favor on each separate disbursement, held not erroneous to overrule an exception of law to auditor's report merely alleging that he erred in not making the calculations of interest on "the balances as they appear in the several returns" of the administrator. Id. Under Civ. Code 1895, § 3497, no interest is to be charged either way for the first year, in the case of executors or administrators. Id. Under Civ. Code 1895, § 3496, in regard to funds coming into his hands after the first year, a reasonable time must be allowed the trustee in which to make investments before charging him with interest thereon, and disbursements should generally bear interest from some period anterior to the date of payment, according as he may have retained funds to meet them. Id. Time allowed by auditor before charging any interest held reasonable. Id. Where administrator, at time of his discharge, was allowed by the ordinary to retain, at four per cent. interest, an unclaimed fund in his hands belonging to the estate, and did so until his death, without adding to it the interest which had accrued thereon, his own administrator was not entitled, before being charged as such with interest upon funds received by him by virtue of his office, to have the total amount of such funds reduced by subtracting therefrom both the principal of such unclaimed fund and the interest which had accrued thereon at the time when he received it. Id. In the final settlement of the last named administrator, he was entitled to credit for the amount of the interest upon such fund which had accrued when he received it and which he paid to those who had established their legal right to the fund and the interest thereon. Id.

61, 62. Civ. Code 1895, § 3498. Tippin v. Perry [Ga.] 50 S. E. 35.

63. In re Moore's Estate, 211 Pa. 348, 60 A. 991.

vances made by him to the estate out of his own funds, where the making of such advances is necessary and results in benefit to the estate.[64] Such claims are not favored, however, and will be viewed with caution and examined with scrupulous care.[65]

(§ 9) *D. Allowance for expenses, costs, counsel fees, and funeral expenses.*[66]—The representative is entitled to an allowance for all necessary expenses incurred by him in the care, management, and settlement of the estate.[67] He is entitled to be reimbursed for reasonable attorney's fees and court costs necessarily incurred.[68] In some states the allowance is made directly to the attorney.[69] Money paid by an administrator to his attorney from funds of the estate is paid at the former's peril until the court has duly adjudicated his claim for an allowance for that purpose, after giving all interested parties an opportunity to be heard,[70] and the same is true of money paid by an administrator to himself.[71] In case he improperly pays fees to his attorney out of the funds of the estate, the latter will not be compelled to make restitution, but the administrator will be held personally liable therefor.[72]

If the representative acts in good faith, he will not be refused an allowance for attorney's fees and costs merely because he is unsuccessful in the suit in which the services were rendered.[73] He will not, however, be allowed attorney's fees for services which he should have performed personally,[74] nor attorney's fees

64. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

65. In the absence of a bill of exceptions showing the evidence on which it was made, held that the court on appeal could not say that the circumstances were not such as to justify the allowance made. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

66. See 3 C. L. 1292.

67. Bal. Ann. Codes & St. § 6312. Noble v. Whitten [Wash.] 80 P. 451. Though he receives no fee because no money has passed through his hands. Adamson v. Parker [Ark.] 85 S. W. 239. For expenses incurred in defending the estate from claims deemed unjust. Hampden Trust Co. v. Leary, 186 Mass. 577, 72 N. E. 88.

68. In re Arnton, 94 N. Y. S. 471. Fee for preparation of account and services in connection with the distribution held reasonable and proper. In re Castner's Estate [Cal. App.] 81 P. 991. Sum allowed and paid attorneys of executor for services in attempting to probate codicil discovered after probate of will held reasonable. Couchman v. Bush, 26 Ky. L. R. 1277, 83 S. W. 1039. Court held not to have abused his discretion in allowing $12,500 for attorney's fees for two and a half years' services. In re Davis' Estate [Mont.] 78 P. 704. Entitled to counsel fees for services in settling estate and in defending ejectment suit resulting in saving property for legatees and creditors. Evan's Estate, 24 Pa. Super. Ct. 151. Under 2 Bal. Ann. Codes & St. § 6312, allowing him all necessary expenses. Noble v. Whitten [Wash.] 80 P. 451. Costs of suit to recover assets alleged to belong to the estate, which he was authorized by the court to bring and in which he was unsuccessful. Ferguson v. Woods [Wis.] 102 N. W. 1094. An executor who, without objection by the other parties in interest, sues to construe the will of his testator which undertakes to exercise a power conferred on the latter by a former will, and who comes into possession of the property taken by his testator under such former will, is entitled to reasonable attorneys fees, though the court holds that the will does not execute the powers conferred on the testator by the former will and appointed an administrator with the will annexed for the first estate. Ketchin v. Rion [S. C.] 51 S. E. 557.

69. Claim of attorney of independent executrix and administratrix held properly allowed approved, and classified. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839. In proper cases allowances may be made directly to them instead of to the trustee. As where administrator has defaulted without paying them. Carpenter v. United States Fidelity & Guar. Co., 123 Wis. 209, 101 N. W. 404. The expenses incurred by the administrator in the management of the estate are in all cases his personal liabilities, but in proper cases necessary expenses may be made, by order of the court, a lien on the assets of the estate and provision may be made for its enforcement. Attorneys' fees for services beneficial to the estate are necessary expenses within this rule, and may be decreed to be a lien on application of such attorneys, where the administrator has defaulted without paying them. Id.

70, 71. In re Sullivan's Estate, 36 Wash. 2117, 78 P. 945.

72. Since he sustains no relation to the estate. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945.

73. McDowell v. First Nat. Bank [Neb.] 102 N. W. 615; Ferguson v. Wood [Wis.] 102 N. W. 1094.

74. Charges in an administrator's account for "drafting, inventory and appraisement" and for "drafting inventory" cannot be allowed as charges for legal advice and services, such drafting being mere clerical work which is imposed by law on the administrator and for which he is compensated by his commissions. Browning v. Richardson, 186 Mo. 361, 85 S. W. 518.

or expenses incurred in litigation carried on for his own benefit or for the benefit of those whose interests are adverse to the estate.[75] So, too, he cannot charge the estate with expenses incurred in advising with counsel whom he knows is at the time representing interests and demands antagonistic to the claims of the heirs, as such, and with respect to those very interests,[76] nor is he entitled to an allowance for a fee paid an attorney's clerk for engrossing the bill of exceptions therein, where the attorney is allowed a fee by the court.[77] In case the administrator is an attorney, he is not entitled to extra compensation for drawing his own ordinary papers in the conduct of the estate.[78]

An allowance to an executor for the amount paid to an accountant employed by him,[79] and an allowance to a stenographer employed on the executor's accounting, have been held proper.[80] The amount paid by the representative to a security company for his official bond is not ordinarily a proper charge against the estate.[81]

A trust fund is not chargeable with the expenses incurred by an administrator with the will annexed, into whose hands the trust property came on the death of the trustee named in the will, in procuring a bond, or with disbursements for the services of counsel in the matter of the administration.[82]

Statutes in some states authorize the appointment of an attorney to represent minor heirs and devisees who have no general guardian, and provide that he shall receive a fee to be fixed by the court and payable out of the funds of the estate as necessary expenses of administration.[83] Such acts have been construed to mean that such fee shall be payable out of the portion of the heir, devisee, or legatee represented by the attorney, and hence the latter's right thereto depends upon the existence of a fund or property belonging to such person.[84] Therefore the debts and general expenses of administration must first be paid.[85]

It has been held that a special administrator will not be reimbursed for expenses incurred in employing real estate and other agents to secure purchasers for the property of a debtor of the estate, though made in good faith and resulting in

75. Where the administrator pays claims before their allowance and has them assigned to himself individually, the estate is not interested in their classification, and the costs of litigation carried on by him with reference to such classification, apparently for his personal benefit, should be paid by him personally and not by the estate, it not appearing that he paid the claims out of his own money, or that the estate is not able to pay all claims. Felsenthal v. Kline, 214 Ill. 121, 73 N. E. 428. Not entitled to credit for an attorney's fee paid for services in collecting a claim which it is afterwards determined does not belong to the estate. Laughlin's Ex'x v. Boughner [Ky.] 84 S. W. 300. Cannot recover from the estate money advanced for court costs and attorney's fees for his own benefit, or for the benefit of those whose claims are adverse to the estate. Evidence held to show that executor failed to diligently prosecute suit against bank, of which he was president, so that he was personally liable for costs. McDowell v. First Nat. Bank [Neb.] 102 N. W. 615.

76. Cannot, in any case or in any manner, either by advice or otherwise, litigate any claim or demand of one legatee or heir at the expense of the estate. In re Davis' Estate [Mont.] 78 P. 704.

77. Clerk of attorney of special administrator. In re Bell's Estate, 145 Cal. 646, 79 P. 358.

78. Administrator who had been the agent and attorney of the intestate with reference to the property of the estate, held not entitled to allowance for attorney's services where the administration was not attended with any legal complications. Noble v. Whitten [Wash.] 80 P. 451.

79. Where will suggested the employment of an accountant. In re Arnton, 94 N. Y. S. 471.

80. In re Arnton, 94 N. Y. S. 471.

81. Incumbent on administrator to furnish his own bondsmen. Adamson v. Parker [Ark.] 85 S. W. 239.

82. Plaintiff held not estopped from objecting. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737. Where no costs are allowed accounting administrators, charge for printing on appeal cannot be allowed against the trust fund for which they were ordered to account, there being no basis for holding that the disbursement was incurred otherwise than in their personal interest. Id.

83. Code Civ. Proc. § 1718. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

84. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

85. Is inferior to claim of executor for advances and interest thereon. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

benefit to the estate,[86] nor for expenditures in procuring the examination of a mine in which the estate held stock, for the purpose of ascertaining its value,[97] nor for expenditures for a detective to watch the executors, who had been removed at her suit, because they had not turned over all the papers and she believed them dishonest, they never having refused to produce any paper when asked.[88]

There seems to be some conflict of authority as to whether the executor is entitled to an allowance for costs and counsel fees incurred by him in defending the will. Some courts hold that he is entitled to such allowance,[89] others that he is not,[90] unless the estate is materially benefited by his taking part in the litigation;[91] others that he is entitled to an allowance provided that the will has been probated before the contest is instituted;[92] and still others that he is not entitled to an allowance pending the trial, but that one may thereafter be made to him in the discretion of the court provided it appears that he has acted in good faith.[93]

Orders making an allowance to an administrator and his attorney for their services are void if made without notice to all interested parties, or a voluntary appearance on their part.[94]

The burden is upon contestant to show that payments made by the representative in the discharge of his duties are not a proper charge against the estate.[95]

86. Civ. Code, § 2273, providing for repayment to a trustee of unlawful expenditures which are of benefit to the estate, does not apply, § 2250 limiting its application to express trusts not including those of executors, administrators, or guardians. In re Bell's Estate, 145 Cal. 646, 79 P. 358.

NOTE. Liability of estate for broker's commissions: There seems to be a conflict of authority as to the liability of the estate for commissions of brokers or agents selling property. It is liable where the will expressly or impliedly permits their employment. Ingham v. Ryan, 18 Colo. App. 347, 71 P. 899; O'Brien v. Gilleland, 79 Tex. 602, 15 S. W. 681. If governing statutes exist, they, of course, control. See Danielwitz v. Sheppard, 62 Cal. 342; Shepard v. Shepard, 19 Fla. 300; In re Dunn, 8 N. Y. St. Rep. 766. In the absence of statute or a direction in the will, the representative seems to have the right to employ a broker under proper circumstances. See Day v. Codman, 39 N. J. Eq. 258; Armstrong v. O'Brien, 83 Tex. 635, 19 S. W. 268; Lewis v. Reed, 11 Ind. 239; Tucker v. Tucker, 29 N. J. Eq. 286. In some states the amount allowed brokers will be deducted from the representative's commission. See Jacobs v. Jacobs, 99 Mo. 427, 12 S. W. 457; Pomeroy v. Mills, 35 N. J. Eq. 442; Sloan's Estate, 7 Pa. Co. Ct. 377.—From note to In re Willard's Estate [Cal.] 64 L. R. A. 554.

87, 88. In re Bell's Estate, 145 Cal. 646, 79 P. 358.

89. Should be allowed for expenses incurred in proving the will, and in resisting an attack upon it by persons interested in preventing its allowance. Hampden Trust Co. v. Leary, 186 Mass. 577, 72 N. E. 88. Trust deed, to the provisions of which the will was made subject, held not to require such expenses to be paid out of the trust estate. Id. Sum allowed and paid attorneys of executor for services in attempting to probate codicil discovered after probate of will held a proper claim against the estate. Couchman v. Bush, 26 Ky. L. R. 1277, 83 S. W. 1039. Entitled to counsel fees, even though legatees had a share in calling in such counsel. McIntire v. McIntire, 192 U. S. 116, 48 Law. Ed. 369.

90. As a general rule the executor has no right to take sides in a controversy between two sets of beneficiaries as to the validity of the will, nor in a contest in which it is contended that the will is invalid and that distribution should be made under a prior will or under the intestate laws, and cannot charge the expense of so doing to the estate. In re Alexander's Estate, 211 Pa. 124, 60 A. 511.

91. As where, by the sustaining of the last will instead of a former one, the estate was enabled to secure the outlawed indebtedness of two of testator's sons as assets, by treating it as advancements. In re Alexander's Estate, 211 Pa. 124, 60 A. 511. He may take part in controversy where no appeal was taken from the order admitting the will until shortly before the time to do so would have expired, and in the meantime he had qualified and made a partial distribution of the estate and is entitled to attorney's fees. Id.

92. It is the duty of an executor, after the probate of a will, to protect it when assailed, and he will be allowed reasonable counsel fees to compensate the attorneys whom he may employ for that purpose; but he is not entitled to allowance, where will has never been probated and no letters have been issued. Tilghman v. France, 99 Md. 611, 59 A. 277.

93. Not entitled to counsel fees pending the trial of issues on a caveat to a will charging that its execution was procured by fraud and undue influence of the executor named therein (Kengla v. Randall, 22 App. D. C. 463); but after the trial if it appears that he has acted in good faith throughout, he may, in the discretion of the court, have an allowance therefor out of the estate whether the will be sustained or not. Id.

94. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945.

95. Evidence held insufficient to over-

Funeral expenses.[96]—There is conflict of authority as to whether the funeral expenses of a married woman are a charge against her estate.[97]

The courts will allow a reasonable sum to be expended for the erection of a monument over decedent's grave, even where the will makes no provision therefor.[98]

(§ 9) *E. Rights and liabilities of co-representatives.*[99]—Where one of two executors and trustees fails to qualify, the other, on his qualification, becomes vested with all the power and authority of a sole executor and trustee.[100] The acts of a regularly appointed administrator are valid, notwithstanding irregularities in the appointment of a co-administrator who acted with him.[101]

One executor is not liable for funds in the hands of his co-executor unless they subsequently come into his hands, or are dissipated with his consent or by reason of his negligence.[102]

One of two administrators may appeal from an order allowing claims, though his co-administrator does not consent thereto.[103] One of two executors made a defendant in an action by his co-executor merely because he refuses to join as plaintiff, and who is not mentioned in the judgment, is not an adverse party and need not be served with notice of a motion for a new trial or of appeal.[104]

(§ 9) *F. Compensation.*[105]—Matters relating to the compensation of testamentary trustees are treated elsewhere.[106]

In the absence of statute the representative is entitled to a fair compensation for the amount and character of labor performed and responsibility involved.[107] In many states the compensation of the representative is fixed by statute, and in such case he is generally allowed a certain percentage on all property passing

come presumption in favor of administrator's honesty. In re Cozine, 93 N. Y. S. 557.

96. See 3 C. L. 1294.

97. **In Maryland** the husband is chargeable with the funeral expenses of his wife and is bound to pay them, and they constitute no charge upon her separate estate, under Code, art. 45, § 21, providing that husband's liability for necessaries shall remain as at common law. Stonesifer v. Shriver [Md.] 59 A. 139. The same is true in regard to a tombstone for her grave. Id.

Note: It has been generally held that statutes creating the wife's statutory estate do not absolve the husband from his common-law obligations to provide suitable burial for the wife, and that he is not entitled to any credit on the settlement of his administration of her estate for such expenditures. Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; Staple's Appeal, 52 Conn. 425; Matter of Werringer's Estate, 100 Cal. 345, 34 P. 825. Rhode Island and Ohio, under their statutes, hold that a husband who administers upon his wife's estate, is entitled to be allowed for reasonable funeral expenses. Moulton v. Smith, 16 R. I. 126, 12 A. 891, 27 Am. St. Rep. 728; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814. The Massachusetts statute expressly declares the husband to be so entitled (Constantinides v. Walsh, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311), but before its adoption it was held otherwise (Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670).—From Stonesifer v. Shriver [Md.] 59 A. 139.

98. Regarded as funeral expenses. In re Koppikus' Estate [Cal. App.] 81 P. 732. Especially where the estate is solvent and five of six heirs consented to such expenditure. Phillips v. Duckett, 112 Ill. App. 587.

99. See 3 C. L. 1294.

100. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Where property is given to the two executors or the survivor of them in trust for specific purposes, and one refuses to qualify, the other becomes sole trustee and the court has no authority to appoint another person to act with him. Mullanny v. Mangle, 212 Ill. 247, 72 N. E. 385. Where two persons are appointed testamentary trustees and one renounces, the entire trust devolves upon the remaining one, and so long as he continues to act there is no vacancy. Mangle v. Mullanny, 113 Ill. App. 457.

101. Under Rev. Prob. Code, § 80, authorizing grant of letters to one or more of several classes of persons. Blackman v. Mulhall [S. D.] 104 N. W. 250.

102. Farmers' Loan & Trust Co. v. Pendleton, 179 N. Y. 486, 72 N. E. 508.

103. Under Comp. Laws, § 9386, providing that any administrator, executor, or creditor may appeal. Hammond v. Frazer [Mich.] 12 Det. Leg. N. 254, 103 N. W. 996.

104. Is impossible for him to be affected adversely by a new trial or a reversal. Sprague v. Walton, 145 Cal. 228, 78 P. 645.

105. See 3 C. L. 1295.

106. See Trusts, 4 C. L. 1727.

107. Three per cent. allowed on proceeds of sale of realty, less incumbrances, and same amount on personalty, there being no unusual services or responsibility. In re Moore's Estate, 211 Pa. 343, 60 A. 989.

through his hands.[108] In case the statute fixes a maximum, the amount to be allowed is, within the limit so fixed, discretionary with the court.[1] In states where the administrator is entitled to the possession of real estate, he is entitled to commissions on the appraised value thereof.[2] On the sale of realty subject to an incumbrance, he is only entitled to a commission on the balance of the price remaining after deducting the amount of the incumbrance.[3] An administrator of the estate of a deceased partner who administers on the partnership estate is entitled to his regular statutory commissions on partnership assets coming into his hands.[4] The representative is not entitled to commissions on claims collected by him which are afterwards held not to belong to the estate,[5] nor on the amount of a mortgage which is paid off and satisfied by giving the holder trust certificates secured by a new mortgage.[6]

In case the will provides for the payment by the executor of dividends on stocks directly to the beneficiaries of a trust created thereby instead of to himself as trustee, he is not entitled to dividends thereon in both capacities.[7]

Statutes in some states allow extra compensation for extraordinary services.[8] A trust company acting as executor is entitled to compensation for acts performed by it in pursuance of its ordinary business which are entirely outside its duties as executor.[9]

Where the will provides a specific compensation to an executor, he is not entitled to the statutory commissions unless he renounces such specific compensation.[10]

108. Kirby's Dig. § 134, gives him commission on all sums passing through his hands for his entire trouble and risk, and he is entitled to nothing if nothing passes through his hands, even though he may have been put to considerable trouble and annoyance in his preparation for the administration. Adamson v. Parker [Ark.] 85 S. W. 239. Under 1 Starr & C. Ann. St. 1896 [2d Ed.] p. 348, c. 3, § 133, they are entitled to a sum not exceeding six per cent. on the amount of the personal estate, and not exceeding three per cent. on money arising from the sale of realty, with such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable. Griswold v. Smith, 214 Ill. 323, 73 N. E. 400. See 116 Ill. App. 223. An executor who, without objection by the other parties in interest, sues to construe the will of his testator which undertakes to exercise a power conferred on the latter by a former will, and who comes into possession of the property taken by his testator under such former will, and holds the custody of the same until such suit is decided, is entitled to commissions on such property, though the court holds that the second will does not exercise the powers conferred by the first one, and appoints an administrator with the will annexed for the first estate. Ketchin v. Rion [S. C.] 51 S. E. 557. Under Bal. Ann. Codes & St. § 6314, is entitled to commissions on the whole estate accounted for by him. Noble v. Whitten [Wash.] 80 P. 451.

1. Allowance will not be increased on appeal unless there is a plain case of wrongful exercise of judgment. Griswold v. Smith, 214 Ill. 323, 73 N. E. 400. See 116 Ill. App. 223.

2. Noble v. Whitten [Wash.] 80 P. 451.

3. Not upon principal or capitalized amount of a ground rent which is an incumbrance on the property, and is included in the price of the realty sold out of which it is payable. In re Moore's Estate, 211 Pa. 343, 60 A. 989. Where deed recites less consideration than that expressed in contract of sale, and difference is caused by purchaser assuming a ground rent on the property, the executor is not entitled to a commission on the amount thereof. Id.

4. Entitled to five per cent. under Rev. St. 1899, § 223, providing that courts shall, in all settlements of executors and administrators, allow them that amount. Browning v. Richardson, 186 Mo. 361, 85 S. W. 518.

5. Not where he collects such a claim, denies the right of the owner to any part thereof, and only turns proceeds over to him after long litigation. Laughlin's Ex'x v. Boughner [Ky.] 84 S. W. 300.

6. Executors held not entitled to commissions on amount of mortgage which was paid off and satisfied by giving the holder trust certificates secured by a new mortgage. In re Moore's Estate, 211 Pa. 338, 60 A. 987. Held no such manifest error as to warrant reversal of finding that compensation of executors was reasonable and sufficient. Id.

7. Lamar v. Harris, 121 Ga. 285, 48 S. E. 932.

8. Attorneys' fees, court costs of administration, and premiums due a surety company on the administrator's bond, cannot be allowed out of the proceeds of a sale of realty to pay debts prior to the claim of a mortgagee, under Rev. St. § 6188, authorizing compensation for extraordinary services. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

9. Allowance for acting as trustee, arranging for loan, drawing papers, signing certificates, and acting as registrar, held reasonable. In re Moore's Estate, 211 Pa. 343, 60 A. 989.

10. Code Civ. Proc. § 2730. Where given in lieu of commissions must renounce it by

But this does not apply where the will expressly provides that such compensation shall be in addition to that allowed by the statute, in which case he is entitled to both.[11] So long as one remains an executor, he is entitled to the compensation provided by the will.[12] If the will provides for an annual stipend, deficiencies due to failure of income may be made up from excess income in other years.[13]

Commissions will generally, but not necessarily, be divided equally among several executors, or administrators.[14] In such case a gross sum should be allowed to all, and the court should not attempt to distinguish between their services, or determine how much each or any of them may have earned,[15] though in some states commissions must be apportioned among the representatives according to the services rendered by each.[16]

The representative may waive his statutory compensation,[17] and if his acts purport to be done gratuitously, no claim for payment can be founded on them at a later date.[18]

In some states the public administrator receives a salary and is required to pay all fees received by him into the county treasury.[19] In such case he is not entitled to retain the fees allowed him for services rendered after the expiration of his term of office, but such services will be deemed voluntary.[20] In other states he is entitled to the same commissions as an ordinary representative.[21]

Executors and administrators have no absolute right to commissions until they are determined upon and awarded by the proper court on a judicial settlement of their accounts,[22] and the assignment by an executor of his fees before they are earned is void as contrary to public policy.[23]

a written instrument filed with the surrogate. In re Sprague, 94 N. Y. S. 84

11. In re Sprague, 94 N. Y. S. 84.

12, 13. Marfield v. McMurdy, 25 App. D. C. 342.

14. Griswold v. Smith, 214 Ill. 323, 73 N. E. 400. See 116 Ill. App. 223.

15. Griswold v. Smith, 116 Ill. App. 223, app. dism'd 214 Ill. 323, 73 N. E. 400.

16. Code Civ. Proc. § 2730, provides that, where the estate is worth more than $100,000, and there is more than one representative, a full commission shall be allowed for each of them, not to exceed three, and the gross sum so allowed shall be apportioned among them according to the services rendered by each. In re McCormick, 94 N. Y. S. 1071; In re Arnton, 94 N. Y. S. 471. The number of executors or administrators to whom an allowance can be made under this section is the number who are such at the time of the judicial settlement, and not those who may have been such at any prior time, and who, for any cause, are no longer before the court as such. In re McCormick, 94 N. Y. S. 1071. Hence where three executors were named in the will and only two qualified, and one of them died before settlement, only one full commission can be allowed to the survivor. Id. Where there were two executors, both of whom took part in the work and shared in the responsibility, held, that commissions should have been equally divided between them. In re Arnton, 94 N. Y. S. 471.

17. McIntire v. McIntire, 192 U. S. 116, 48 Law. Ed. 369. Record must show an agreement to do so. Letters and other evidence held not to show waiver of fees. Noble v. Whitten [Wash.] 80 P. 451.

18. McIntire v. McIntire, 192 U. S. 116, 48 Law. Ed. 369. Where order was made by consent of all parties that assets should remain in the custody of the court and that the administrator should act without compensation, held, that he was not entitled to commissions, though the assets were restored to him under a subsequent order on his filing a new bond. Id.

19. Los Angeles County Laws 1897, c. 277, § 159, subd. 10, and §§ 215, 216, 217, control Code Civ. Proc. § 1618, providing that he shall receive the same compensation and allowances as are allowed to other administrators. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P. 861.

20. Cannot complain since he is entitled to state his accounts to the close of his term and procure a revocation of his letters under Code Civ. Proc. §§ 1726, 1735. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P. 861.

21. Under Rev. St. 1899, the public administrator is entitled to the same compensation for his services as may be allowed by law to executors and administrators, unless the court for special reasons allows a higher compensation. Browning v. Richardson, 186 Mo. 361, 85 S. W. 518.

22. Hence any allowance made for the services of one dying before that time is not measured by Code Civ. Proc. § 2730, but is in the discretion of the surrogate. In re McCormick, 94 N. Y. S. 1071. In exercising such discretion the surrogate should, however, follow the standard of the percentage upon receipts and disbursements fixed thereby. Id. Thus the amount received by the deceased executor which is afterwards turned over to those entitled to it, and the amount actually realized in cash up to his

Statutory commissions may be denied for misconduct.[24]

The approval of an executor's final report and the distribution of the estate does not debar him from his right to fees provided he asserts it during the term at which his final report is allowed.[25] On appeal from an order setting aside an executor's semi-annual account and revoking his letters, it will be presumed that, on final settlement of the estate he will be allowed proper compensation for his services, there being nothing in regard to the matter in the orders appealed from.[26]

(§ 9) *G. Rights and liabilities of sureties and actions on bonds.*[27]—The sureties on the representative's bond are only responsible for his faithful performance of the duties imposed upon him by law in his representative capacity.[28] They are liable for all breaches by him of its conditions,[29] including his failure to account for assets in his hands at the time of his removal,[30] and for the value of property obtained and converted by him under the mistaken belief that it belonged to the estate.[31]

As a general rule the sureties of a representative who is indebted to the estate are chargeable with the amount of the debt,[32] but in most states this does not apply where the representative is insolvent at the time of his appointment, and continues to be so until his discharge.[33]

death should be used as a basis for computing commissions at one-half rate for receiving. Id. Right depends upon the rendition of the services and the settlement of his account. Code Civ. Proc. § 2730. Executor not entitled to claim or be paid commissions until the will has been proved, letters testamentary issued, and his account presented to and passed upon by the surrogate. Oakeshott v. Smith, 93 N. Y. S. 659.

23. Oakeshott v. Smith, 93 N. Y. S. 659.

24. Denied for maladministration in paying claims which had not been proved. State v. Taylor [Mo. App.] 87 S. W. 7. Surrogate may deny them in his discretion, notwithstanding Code Civ. Proc. § 2730, providing that, on the settlement of his account, the surrogate must allow him the commissions fixed by law. In re Gall, 95 N. Y. S. 124. Administratrix deprived of all commissions and costs because of misconduct. Allowance by surrogate reversed. Id. Where no misconduct or improper management of the estate is shown, it is error to allow the executor only half his legal commissions and to charge him personally with costs, on the theory that he made out his account in the manner he did for the purpose of getting commissions to which he was not entitled. In re Dutcher, 102 App. Div. 410, 92 N. Y. S. 418.

25. Evidence held to show that he did not intend to waive right. No time being fixed for allowance, it may be made after approval of the final report as well as before. Griswold v. Smith, 116 Ill. App. 223, app. dism'd 214 Ill. 323, 73 N. E. 400.

26. In re Courtney's Estate [Mont.] 79 P. 317.

27. See 3 C. L. 1297.

28. Not responsible for misapplication of proceeds of insurance policies payable to the administrators for the benefit of the widow. Administrator takes fund as agent and trustee of widow and not as assets of the estate. Nickals v. Stanley [Cal.] 81 P. 117.

29. Evidence held sufficient to show a breach of an administrator's bond. American Bonding & Trust Co. v. United States, 23 App. D. C. 535. Evidence in action by administrator de bonis non against a former administrator and his sureties to recover money in the hands of such administrator on his removal, held to demand the verdict rendered, without reference to evidence illegally admitted. Bailey v. McAlpin [Ga.] 50 S. E. 388.

NOTE. Subrogation in favor of sureties: Sureties on bonds of executors and administrators are entitled to be subrogated to the rights of those whose demands they have met (Gowing v. Bland, 3 Miss. [2 How.] 813; Wernecke v. Kenyon, 66 Mo. 275; Cowgill v. Linnville, 20 Mo. App. 138), including the rights of creditors (Pierce v. Holzer, 65 Mich. 263, 32 N. W. 431), next of kin (Kennedy v. Pickens, 38 N. C. 147), and legatees (Pinckard v. Woods, 8 Grat. [Va.] 140).—From note to American Bonding Co. v. National Mechanics' Bank [Md.] 99 Am. St. Rep. 509.

30. Are just as much liable therefor as for his misappropriation of assets while in office. Bailey v. McAlpin [Ga.] 50 S. E. 388.

31. When administrator is sued therefor in his representative capacity and his liability is established, sureties are liable to the ordinary. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367. In action by donee of savings bank-book against administrator and his bondsmen for amount of deposit alleged to have been converted by him, petition held to sufficiently allege plaintiff's ownership. Id. Not necessary for her to plead writing by which she acquired ownership. Id.

32. Sanders v. Dodge [Mich.] 12 Det. Leg. N. 137, 103 N. W. 597.

33. Does not apply in Michigan under Comp. Laws, § 9433, providing that representatives shall not be accountable for any debts remaining uncollected without his fault. Sanders v. Dodge [Mich.] 12 Det. Leg. N. 137, 103 N. W. 597.

NOTE. Liability of surety for debt of insolvent representative: There is a conflict

A surety on the bond of an administrator of an insolvent estate who has been guilty of maladministration is liable to a creditor of the estate only for the difference between what he received and what he would have received but for the maladministration.[34]

A county administrator who has been appointed administrator of an estate and has not been required to give a bond in addition to that which he has given as county administrator, is liable upon the latter under the same circumstances and to the same extent as if the bond had been given in the particular case, and the remedies upon such bond are the same that would be allowed to those interested upon an ordinary administrator's bond.[35] So far as persons interested in the administration of estates vested in him are concerned, his bond is to be treated as one given for the faithful performance of his duties as administrator of each estate, and any person aggrieved by his conduct as administrator of a particular estate may bring suit thereon.[36] It is not necessary, in such case, that other persons who may have been aggrieved on account of his administration of other estates should be joined in the action.[37] A recovery in such action for a sum less than the full penalty of the bond does not exhaust all remedies thereon but persons interested in other estates who may be aggrieved by the administrator's conduct may bring other suits and recover other judgments until the full penalty in the bond has been exhausted.[38]

An administrator de bonis non may maintain an action against his predecessor and the sureties on his bond to compel them to account for property of the estate not turned over to him.[39] The same is true of a county administrator, who has been appointed administrator de bonis non of an estate, and he may call to account a former county administrator, who was appointed administrator of the same estate and removed, by suing him and the sureties on his official bond.[40] In a suit by the ordinary on such a bond for the use of the administrator de bonis non of an estate of which such county administrator has been administrator, the court will take judicial notice of the fact that he is the incumbent of such office.[41]

In some states it is not necessary, as a condition precedent to a suit on the bond, to establish against the principal either a liability in his representative capacity or a devastavit by him.[42] In others an action cannot be maintained against the sureties

of authority as to the liability of the sureties in such cases where the representative was insolvent at the time of his appointment and continues to be so until his discharge. They have been held liable in Massachusetts (Leland v. Felton, 1 Allen, 531; Kinney v. Ensign, 18 Pick. 232; Stevens v. Gaylord, 11 Mass. 256; Chapin v. Waters, 110 Mass. 195; Winship v. Bass, 12 Mass. 198), New Hampshire (Judge of Probate v. Sulloway, 68 N. H. 511, 44 A. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347), Alabama (Wright v. Lang, 66 Ala. 389), Ohio (McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. 231) and Maryland (Lambrecht v. State, 57 Md. 240). A contrary rule prevails in California (In re Walker, 125 Cal. 242, 57 P. 991, 73 Am. St. Rep. 40), Indiana (State v. Gregory, 119 Ind. 503, 22 N. E. 1), Kentucky (Buckel v. Smith's Adm'r, 26 Ky. L. R. 991, 82 S. W. 1001), New York (Baucus v. Stover, 89 N. Y. 1, afd. 107 N. Y. 624, 13 N. E. 939; Keegan v. Smith, 172 N. Y. 624), New Jersey (Harker v. Irick, 10 N. J. Eq. 269), Missouri (McCarty v. Frazier, 62 Mo. 263), Tennessee (Rader v. Yeargin, 85 Tenn. 486, 3 S. W. 178), Vermont (Lyon v. Osgood, 58 Vt. 707, 7 A. 5), Pennsylvania (Piper's Estate, 15 Pa. St. 533) and Michigan (Sanders v. Dodge [Mich.] 12 Det. Leg. N. 137, 103 N. W. 597).—From note to 61 L. R. A. 313; note to 51 Am. Dec. 521; 18 Harv. Law Rev. 394; 3 C. L. 1299; 1 C. L. 1118.

34. State v. Taylor [Mo. App.] 87 S. W. 7.

35, 36, 37, 38, 39, 40. Bailey v. McAlpin [Ga.] 50 S. E. 388.

41. Where it is alleged that he is ordinary, no averment as to his election and qualification is necessary. Bailey v. McAlpin [Ga.] 50 S. E. 388.

42. Civ. Code 1895, §§ 2536, 3398, 3501-3504. Suit by administrator de bonis non to recover funds not turned over by his predecessor on revocation of his letters. Bailey v. McAlpin [Ga.] 50 S. E. 388. Code 1863, § 2470, providing that no prior judgment establishing the liability of the administrator "or" a devastavit by him shall be necessary before suit against the sureties on the bond, is included in all subsequent Codes, including that of 1895 (§ 3398), with the exception that the word "or" is changed to "for." Held that the change will be deemed to be due to oversight, accident, or mistake, instead of an intention to change the law, and hence the rule stated in the text, which applied under the Code of 1863, applies under that of 1895.

of an executor or administrator for breach of the bond until the probate court has, by order or decree, fixed the liability of the representative.[43] In others a judgment must first be recovered against the representative, an execution issued, and a return of nulla bona made.[44] In the latter case such a judgment or decree is conclusive evidence of the debt as against the sureties.[45]

Actions on bonds must, of course, be brought within the time fixed by the statute of limitations.[46] No demand on the administrator or the sureties is necessary as a condition precedent to the owner's right to sue the sureties for the value of property obtained and converted by the administrator under the mistaken belief that it belonged to the estate.[47]

Plaintiff having alleged the execution of the bond and its breach need not, as against a general demurrer, allege its condition.[48] A petition alleging the administrator's failure to inventory and account for all the assets of the estate in his hands and the conversion of a part of them to his own use, states a cause of action.[49] A statement of claim against a surety on a bond given to secure the proper distribution of the proceeds of a sale of real estate must aver that the award made by the orphans' court and claimed by plaintiff was a portion of the proceeds of such sale.[50]

The exoneration of the administrator from personal liability on judgments where the estate was subsequently declared insolvent is immaterial and not a defense to his sureties when sued because of his failure to pay; in such a case the proper plea is want of assets.[51] While want of assets is a defense to suretyship, want of "sufficient assets" is not.[52]

In a suit by an administrator de bonis non against his predecessor, who had been removed, and the sureties on his bond, evidence showing that the principal had, during the time of his administration, received assets, and had, after his removal, failed and refused, upon demand, to deliver them to his successor, establishes a prima facie liability on the bond.[53] Admissions made by the legal representative of an estate, after his letters have been revoked, are inadmissible against the surety.[54] The return of the administrator charging himself with assets and crediting himself with payments and showing on its face a balance due by him to the estate, is prima facie evidence, both against him and his sureties, as to the amount in his hands appearing therefrom.[55] The liability of the sureties cannot be terminated by the filing of a void bond as a substitute for the original.[56] In states where a release of one of two or more joint debtors does not extinguish the obligation of any of the others, an order releasing a surety upon application of the heirs at law does not release a co-

Id. Rulings on this question in Henderson v. Levy, 52 Ga. 35, and Richardson v. Whitworth, 103 Ga. 741, will not be followed as they are in conflict with that in Morgan v. West, 43 Ga. 275. Id.

43. Nickals v. Stanley [Cal.] 81 P. 117.

44. Act Maryland, 1720, requiring that before an action be maintained on an administrator's bond, after recovery of judgment against the administrator, execution must have been returned nulla bona, is satisfied where return is made the day after issue upon the order of plaintiff's attorney. American Bonding & Trust Co. v. United States, 23 App. D. C. 535.

45. American Bonding & Trust Co. v. United States, 23 App. D. C. 535.

46. A distributee who is a nonresident infant at the time of distribution has five years after reaching his majority in which to enforce his right to a share of the estate by suit on the executor's official bond, under Ky. St. 1903, §§ 2521, 2550; Smith v. Hardesty, 26 Ky. L. R. 1266, 83 S. W. 646.

47. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367.

48. Condition prescribed by statute, and hence allegation of execution carried condition with it. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367.

49. Not necessary to allege that settlement and release relied on as a defense was obtained by fraud, but that is a matter for reply. State v. Stuart [Mo. App.] 86 S. W. 471.

50. Commonwealth v. Magee, 24 Pa. Super. Ct. 329.

51. Woodall v. Wright [Ala.] 37 So. 846.

52. Plea overruled. Woodall v. Wright [Ala.] 37 So. 846.

53, 54, 55. Bailey v. McAlpin [Ga.] 50 S. E. 388.

56. Elizalde v. Murphy, 146 Cal. 168, 79 P. 866.

surety.[57] Sureties of an administrator or trustee who wrongfully applies a trust fund with the acquiescence of the beneficiary are released from liability to the beneficiary.[58]

A bond given by an executor and residuary legatee to pay debts and legacies so as to relieve himself from the necessity of accounting is not invalidated because it contains a provision requiring him to account.[59] It is no defense to an action on such a bond that the executor is ready and willing to apply such assets as he has received to that purpose.[60] A legatee is not bound to obtain judgment against the executor before suing on the bond.[61]

§ 10. *Actions by and against representatives and costs therein.*[62]—The personal representative is the only person entitled to represent the estate as such in litigation.[63] His capacity in this respect is official and not personal.[64]

Upon the death of a party to an action, it may generally be revived by or against his executor or administrator,[65] and the exclusive remedy for proof of claims does not apply.[66] After the death of defendant has been suggested, and a motion has been made to revive the cause in the name of his administrator, the latter's appearance in filing an answer in which he alleges that he is the administrator, and that the cause has been revived in his name, is equivalent to a waiver of summons and a formal order of revivor.[67] Because his capacity is representative only, he is not a necessary party unless some interest or title is affected which he represents, but may be a proper one.[68] One of two co-executors alleged to have interests inimical

57. Code Civ. Proc. § 1543, has this effect, though § 1403 authorizes the release of a surety only on his own application. Elizalde v. Murphy, 146 Cal. 168, 79 P. 866.

58. Estate of Koehnken, 6 Ohio C. C. (N. S.) 359.

59. Given under Laws 1896, c. 220, § 3. Unnecessary or illegal conditions which are separable may be disregarded. Probate Court v. Adams [R. I.] 60 A. 769.

60. Such is not the legal condition of the bond. Probate Court v. Adams [R. I.] 60 A. 769.

61. Obligation to pay is absolute and amount is fixed by the will. Probate Court v. Adams [R. I.] 60 A. 769.

62. See 3 C. L. 1301.

63. There is no person in existence to bring an action in favor of the estate of a decedent, arising after his death, until an executor or administrator is appointed, and hence limitations do not begin to run until such appointment. Right of representative of deceased partner to compel surviving partner and representatives of another deceased partner to account. Stehn v. Hayssen [Wis.] 102 N. W. 1074. In Wisconsin the fact that there is no person in existence authorized to sue when the cause of action accrues cannot extend the time within which the action may be brought to more than double the period otherwise provided by law. Rev. St. 1898, § 4251. Id. Statute cannot be taken advantage of unless pleaded. Id.

64. An exemption from service of process of a nonresident who comes into a state as a witness, is personal and does not apply to a personal representative in his representative capacity. Linn v. Hagen's Adm'x [Ky.] 87 S. W. 763; Id. [Ky.] 87 S. W. 1101.

65. See Abatement and Revival, 5 C. L. 1.

66. A statute prohibiting the bringing of actions against executors or administrators by complaint and summons and requiring all claims against the estate to be filed in the clerk's office does not apply to actions commenced before the death of the deceased, nor prevent their prosecution by or against his representatives. Burns' Ann. St. 1901, § 2465; Newman v. Gates [Ind.] 72 N. E. 638. Where, in an action by a firm of attorneys, judgment was rendered for defendants on a counterclaim, and one of the plaintiffs died before an appeal was taken, his personal representative was a necessary party appellant, and if he is not joined, the appeal will be dismissed. Newman v. Gates [Ind.] 72 N. E. 638. See 67 N. E. 468.

67. Cleveland v. Cazort [Ark.] 83 S. W. 316.

68. See generally Parties, 4 C. L. 888, and titles treating of particular remedial rights. An administrator is not a necessary party to a suit to foreclose a mortgage on real estate of the decedent, but he is a proper party where the equity of redemption is of any value. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338. The representative of a deceased maker of a note is not a necessary party to a bill in equity by two other purported makers to have the same adjudged void on the ground that their signatures thereto are forgeries, and to restrain its collection (Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601), nor is the representative of a deceased guardian a necessary party to a suit by the ward on the guardian's bond. (Under Shannon's Code, §§ 4484, 4486, providing that where parties are jointly and severally bound on the same instrument, they may all, or any part of them, be sued in the same action. Brannon v. Wright, 113 Tenn. 692, 84 S. W. 612). In proceedings to enforce a mechanic's lien, where the owner gives a bond with sureties

to those of the estate cannot be joined as a party plaintiff in his representative capacity in a suit for the benefit of the estate, but should be made a party defendant in his individual capacity.[69] Though he may have, in the first instance, been made a defendant, if it appears at the trial that he really has no interest in the outcome of the litigation, he may, on the death of his co-executor after the case has been appealed, be substituted in his stead as the party entitled to represent the interests of the estate.[70] An administratrix suing the heirs at law to compel them to specifically perform decedent's contract for the sale of realty may join herself, in her personal right as one of the heirs, as a complainant.[71] A defendant to a bill for partition who becomes an administrator after it is filed cannot complain that he was not made a party in his official capacity, in the absence of an application therefor.[72]

Actions brought by or against one described as administrator or executor of a certain estate are generally presumed to be actions by or against him in his own right, the additional words being descriptio personae,[73] but this rule does not apply where it would be impossible under the pleadings for a judgment to be rendered for or against him individually, or for him to have a personal interest in the subject-matter of the proceedings,[74] nor where on appeal the case is tried as one against him in his representative capacity.[75] Where the will devises realty in trust to executors, a complaint containing a copy of the will, and showing that as executors defendants have accepted the trusts created by the will, is not demurrable for failure to add the words "as trustees" to the statement of the representative capacity of defendants in the caption.[76]

One suing as administrator can only recover for the use and benefit of the estate he represents, or, in certain cases, for the benefit of the next of kin of the decedent.[77] One suing a representative in his official capacity cannot amend so as to state a cause of action against him individually,[78] nor can one suing on a quantum meruit for

for the purpose of dissolving the lien, sells the property, and dies before judgment, and his estate has been settled, the time for presenting claims has passed, and there were no assets for his heirs, his administrator is a proper, but not a necessary, party to the suit. Where, in such case, administrator is dead and sureties are notified and appear, the case may be prosecuted to judgment without the appointment of an administrator de bonis non. Holmes v. Humphrey [Mass.] 73 N. E. 668.

69, 70. Quillian v. Johnson [Ga.] 49 S. E. 801.

71. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

72. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

73. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412.

74. Altgelt v. Elmendorf [Tex. Civ. App.] 84 S. W. 412. Where action was brought against administrator in his official capacity to recover money judgment against the estate, held that his designation in pleadings, assignments of error, and record generally as "defendant C. G. A., administrator," etc., could not be deemed as a designation of him in his personal capacity, and appeal could not be dismissed on ground that it was taken in his individual capacity on a judgment against him in his representative capacity. Id. A petition by "A., as independent executrix of E.," cannot be construed as the petition of A. in her individual right, where it again mentions her as a distinct party suing in her own right, thus showing an intention to proceed in both capacities. McKee v. Ellis [Tex. Civ. App.] 83 S. W. 880.

75. In action against administrator and sureties on his bond to recover proceeds of insurance policy alleged to belong to the widow and to have been wrongfully used in paying the debts of the estate, where defendant demurred solely as administrator and the judgment sustaining the demurrer ran in his favor solely as administrator, and he was not brought within the jurisdiction of the court in his individual capacity, and plaintiff's counsel in their brief treated the action as against him in his official capacity, held that action would on appeal be regarded as one against him in his official capacity only, and hence one against the estate, and judgment would be sustained if no cause of action was alleged against it. Nickals v. Stanley [Cal.] 81 P. 117.

76. Described only "as executors." Rowe v. Rowe, 92 N. Y. S. 491.

77. Cleveland, etc., R. Co. v. Pierce, 34 Ind. App. 188, 72 N. E. 604. One suing as administratrix of the estate of "Ferdinand N." A. cannot recover on a complaint alleging the wrongful death of "Fernando W." A. Not idem sonans. Id. The question of her right to do so is properly raised by demurrer to the complaint for want of sufficient facts to constitute a cause of action. Id.

78. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. In action against one as executrix, on contract made by her in her representative capacity, proceedings cannot be amended

services rendered decedent amend so as to seek a recovery on an express contract made with decedent's widow after his death.[79] If plaintiff sues as an administrator only, he cannot, in the absence of an amendment, be treated as having sued as trustee of an express trust.[80]

Where an administrator is, by order of court, made a party to a suit commenced by his decedent, no allegation of his official capacity is necessary.[81] A denial that plaintiff was duly appointed administratrix as alleged in the complaint raises the issue of jurisdiction, involving as it does the right of the court to issue the letters.[82] In Texas in order to put in issue the legal capacity of the representative to sue, defendant must deny the same under oath.[83]

The probate proceedings [84] and the letters are admissible to prove the authority of plaintiff to prosecute the suit,[85] and the production of letters is sufficient proof of capacity to sue in the absence of proof of want of jurisdiction in the court granting them.[86] Proof of capacity may be waived by appearance.[87] Where special letters are presented, limiting the power of the administrator to specific property of the intestate, his power will not be extended beyond them.[88]

An executor cannot join his individual claim for rent, as devisee, with a claim in his representative capacity for rent which had accrued during the lifetime of his testator,[89] nor can the grantee in a security deed join in the same action a suit against the widow of the deceased grantor to recover the land described in the deed, and a suit against the administrator of the grantor's estate to recover a judgment on the debt secured by the deed.[90] A complaint showing a good cause of action in plaintiff in his individual capacity and another in his representative capacity, both growing out of the same contract, and demanding specific performance and damages for a breach, is not demurrable.[91]

on appeal so as to allow judgment to be entered against her individually. Renwick v. Garland [Cal. App.] 82 P. 89.

79. One suing the widow who has taken possession of the estate as sole heir and without administration, on a quantum meruit for services for which deceased agreed to compensate him out of his estate, cannot amend by seeking to recover upon an express contract made with the widow after the husband's death to pay a given sum for such services. Moore v. Smith, 121 Ga. 479, 49 S. E. 601.

80. Sommer v. Franklin Bank, 108 Mo. App. 490, 83 S. W. 1025.

81. Noyes v. Young [Mont.] 79 P. 1063.

82. Under Code Civ. Proc. § 532, providing that if an allegation that a judgment of a court of special jurisdiction was duly given is denied, the party alleging it must show the facts conferring jurisdiction. Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 N. Y. S. 962.

83. Rev. St. 1895, art. 1265, cl. 2. Young v. Meredith [Tex. Civ. App.] 85 S. W. 32.

84. Where one's right, as community administratrix of the estate of herself and her deceased husband, to prosecute an action is put in issue, the probate proceedings appointing her are admissible. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379.

85. Held no error in admitting in evidence a paper purporting on its face to be letters of administration issued to plaintiff over the objection that it did not show on its face whether it was an original or a copy. Defendants at liberty to show by evidence that it was not a genuine document. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775.

86. Under Code Civ. Proc. § 2591, providing that letters granted by a court having jurisdiction are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed, or the letters are revoked. Shaw v. New York Cent. & H. R. Co., 101 App. Div. 246, 91 N. Y. S. 746. Letters admissible to show plaintiff's authority to sue though granted on a defectively verified petition. Id.

87. If an administrator, summoned as such, appears and makes a defense, and prosecutes error, there is sufficient evidence by admission of his capacity without formal proof. Squires v. Martin, 5 Ohio C. C. (N. S.) 313.

88. Taylor v. McKee, 121 Ga. 223, 48 S. E. 943. Where authority was limited to property in certain county in state in which decedent was domiciled, administratrix could not sue on note in another state in the absence of any allegation or proof that it was part of the assets she was authorized to administer. Id.

89. Well v. Townsend, 25 Pa. Super. Ct. 638.

90. Statutory action for recovery of real property is not an action ex contractu, and hence cannot be joined with one. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

91. Fact that causes of action are not separately stated and numbered is no ground for demurrer. Greene v. New York, O. & W. R. Co., 93 N. Y. S. 18.

An answer in a suit by a public administrator to recover property assigned to defendant by decedent before his death, alleging the assignment and that defendant was disposing of the property in accordance with the request of decedent made after such assignment does not estop him from alleging in a subsequent suit brought by the distributees to compel him to account for the property from relying on a defense of absolute ownership by virtue of the assignment.[92]

As a general rule an executor or administrator cannot maintain an action as such in the courts of any sovereignty other than that under which he was appointed and qualified without obtaining an ancillary grant of letters in the state where the action is brought,[93] but this does not apply to a case where the cause of action declared on is one involving an assertion of his own right rather than one of the deceased, or is one which has accrued directly to him through his contract or transaction and which was not originally an asset of the estate.[94] The rule has been changed by statute in many states.[95] The foreign representative is, however, generally first required to file an authenticated copy of his letters.[96] His failure to do so goes to his capacity to sue and is waived unless taken advantage of by demurrer, if it affirmatively appears on the face of the complaint, or by answer, if it does not so appear.[97] So, too, when incapacity because of nonresidence is apparent on the face of the complaint, it is waived unless taken advantage of by special demurrer, and when so waived cannot be taken advantage of after judgment in his favor.[98]

In the absence of a statute to the contrary, an executor or administrator cannot be sued in a state other than of his appointment, at least where he has taken no steps to recover assets there located,[99] nor can a foreign executor or administrator be substituted for a party who dies during the pendency of an action.[1]

92. Mussman v. Zeller, 108 Mo. App. 348, 83 S. W. 1021.

93. Unless its laws permit him to do so. Moore v. Petty [C. C. A.] 135 F. 668; Taylor v. McKee, 121 Ga. 223, 48 S. E. 943. A foreign administrator has no legal capacity to sue. Sommer v. Franklin Bank, 108 Mo. App. 490, 83 S. W. 1025. Foreign executor cannot sue to set aside fraudulent conveyances. Downey v. Owen, 98 App. Div. 411, 90 N. Y. S. 280.

94. In such case may sue in his personal capacity, and, if he sues as executor or administrator, the words so describing him may be regarded as merely descriptive, and rejected as surplusage. Moore v. Petty [C. C. A.] 135 F. 668. Thus he may sue on cause of action to recover, from agents employed by him, the proceeds of a sale of realty belonging to the estate. Id.

95. Arkansas: Under Kirby's Dig. § 6003, permitting a foreign administrator to sue in the courts of the state, a married woman who is competent to act as administratrix in the state of her appointment may maintain an action though she married subsequent to her appointment. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995.

In Georgia to authorize a foreign executor or administrator to sue it must appear that his decedent was, at the time of his death, domiciled in the state where letters testamentary or of administration were granted, and that no administrator or executor has been appointed in the state where the action is brought. Civ. Code 1895, § 3521. Taylor v. McKee, 121 Ga. 223, 48 S. E. 943.

In Illinois a foreign administrator may maintain an action for the unlawful death of his decedent. Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

South Dakota: Under Laws 1901, p. 206, c. 124, authorizing foreign administrators to sue as such under the same restrictions as are applicable to non-residents generally, a foreign corporation duly appointed administrator in another state, and which has complied with the laws relating to foreign corporations may do so. Germantown Trust Co. v. Whitney [S. D.] 102 N. W. 304.

96. Upson v. Davis, 110 Ill. App. 375. Must pending the action, file a properly authenticated exemplification of his letters with the clerk of the court, to become a part of the records. Civ. Code 1895, § 3522. Need not be filed before the judgment term. Taylor v. McKee, 121 Ga. 223, 48 S. E. 943. In the case of an administrator it need not be accompanied by an exemplification of the pleadings and judgment in the proceeding in which he was appointed, though the contrary is true in the case of a foreign executor. Civ. Code 1895, § 3318. Id. Must file a copy of his letters of administration in the office of the probate court of the county in which the action is brought. Gen. St. 1894, § 5917. Pope v. Waugh [Minn.] 103 N. W. 500.

97. Gen. St. 1894, § 5235. Held waived by failure to raise objection in the answer. Pope v. Waugh [Minn.] 103 N. W. 500.

98. Incapacity held waived. Sommer v. Franklin Bank, 108 Mo. App. 490, 83 S. W. 1025.

99. Courtney v. Pradt, 135 F. 818.

1. On death of defendant, court has no jurisdiction to revive action on contract

In New York an execution cannot issue upon a judgment for a sum of money against an executor or administrator in the representative capacity until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued.[2] To obtain such an order, the petitioner must show either that the representative has funds of the estate on hand applicable to the payment of the judgment which he refuses to apply, or that funds which should have been devoted to its payment have been misapplied.[3] If it appears that the assets, after payment of all sums chargeable against them for expenses and for claims entitled to priority as against the plaintiff are not, or will not be, sufficient to pay all the debts, legacies, or other claims of the class to which that of the plaintiff belongs, the sum directed to be collected by the execution must not exceed the plaintiff's just proportion of the assets.[4] On application being made to the surrogate for such an order, he may, in his discretion, require the representative to make an intermediate account.[5]

Costs and counsel fees.[6]—Costs and reasonable counsel fees, payable out of the estate, will be allowed for services rendered for the benefit of those who take the fund in litigation.[7] The costs of a contest between a devisee and an administrator concerning the right of the latter to continue the administration, which results in a revocation of the letters, are properly taxed against the administrator personally.[8] So, too, an executor is properly required to pay a portion of the costs of litigation resulting largely from personal claims advanced by him which are not sustained.[9] Where, on the death of complainant pending suit, her legatees, devisees, and executrix are substituted as complainants, no part of the costs should be taxed against the estate or the executrix.[10] The attorney's fees, costs, and expenses of an heir who successfully prosecutes an action for the removal of the executors, are not payable out of the estate, though he is afterwards appointed special administrator.[11]

In Georgia in an action to compel an administrator to make a deed of property sold by him at public sale, plaintiff is not entitled to recover the expenses of the litigation in the absence of allegations of stubborn litigiousness, bad faith, or a wanton disregard of plaintiff's rights.[12] In a suit to set aside a deed given by the executrix and life tenant and to compel her to account, where it is held that the deed passes

against his foreign executor, where none of the assets are within the state, and no ancillary letters have been issued. McGrath v. Weiller, 98 App. Div. 291, 90 N. Y. S. 420.

2. Code Civ. Proc. § 1825. In re Warren, 94 N. Y. 286.

3. In re Warren, 94 N. Y. S. 286.

4. Code Civ. Proc. § 1826. No preference can be given to a judgment creditor under this section. In re Warren, 94 N. Y. S. 286.

5. Code Civ. Proc. § 2725, subd. 1. In re Warren, 94 N. Y. S. 286. Where it appears that the fund held by the administrator consists of a part of the proceeds of a judgment against the government based on a French spoliation claim, and his answer expressly avers that there is no property in his hands applicable to the judgment, such an accounting should be ordered to enable the court to determine whether such fund is assets, or belongs to the next of kin. Id.

6. See 3 C. L. 1303. See, also, Wills, 4 C. L. 1863. For allowance to representative of amount paid by him for costs and fees, see § 9D, ante.

7. Rule applies only in favor of successful litigants. Smith v. McDonald [N. J. Err. & App.] 61 A. 453. Allowance made to counsel representing cousins and descendants of deceased cousins who defended fund against distribution to those held not entitled thereto, but not to those representing those claiming, but held not to be entitled to, a share therein. Id. Orphans' court has no authority to allow such fees. Id. Allowance of counsel fees to exceptants to the account of executors held proper where court charged executors with large sum, though its ruling was reversed on appeal. In re Woolsey's Estate [N. J. Eq.] 59 A. 463.

8. Where administrator stands upon improper judgment of probate court ordering payment to him of fees to which he was not entitled as a condition of revocation of letters. Adamson v. Parker [Ark.] 85 S. W. 239.

9. Phillips v. Duckett, 112 Ill. App. 587.

10. Clemens v. Kaiser, 211 Ill. 460, 71 N. E. 1055.

11. In re Bell's Estate, 145 Cal. 646, 79 P. 358.

12. Held that there were no such allegations of bad faith, stubborn litigiousness, and wanton disregard for the rights of the plaintiff as to entitle him to recover, either against the administrator personally or the estate, the expenses of litigation to compel the defendant to make a deed of property sold by him at public sale. Mallard v. Curran [Ga.] 51 S. E. 712.

certain property absolutely and only her life estate in certain securities belonging to the estate, and the decree refers the cause for an accounting, the court has power to make an allowance to an attorney rendering services in support of the deed.[13]

In Wisconsin costs in actions by or against representatives are chargeable against the estate, unless the court directs that they be paid by the representative personally, on account of his mismanagement or bad faith.[14]

In North Carolina, in a suit on a claim, no costs are recoverable against an executor, administrator, or collector unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which cases it is discretionary with the court to award the costs either against defendant personally or against the estate.[15] The burden is on plaintiff to bring himself within the exceptions.[16] Where there is a material reduction between the claim presented and the amount allowed at the trial, refusal to pay it is not regarded as unreasonable.[17]

§ 11. *Accounting and settlement by representatives. A. The right and duty.*[18]—As a general rule an administrator or executor can only be compelled to account by the courts of the state in which he was appointed,[19] but in case he removes a portion of the assets into a foreign state and there invests them, the equity courts of that state may require him to account therefor and decree their distribution.[20] Unexplained laches is a bar to the suit.[21]

Since an executor is a trustee for the benefit of those entitled to the decedent's property under the will, limitations do not begin to run against his liability to account therefor until he repudiates his trust by some act sufficient for the purpose.[22] If he relies on limitations he must allege in his answer both the requisite lapse of time and that such lapse occurred after his repudiation of the trust.[23]

The executor or administrator of a deceased representative is generally required to render a final account of the latter's administration within a certain time after his appointment.[24] In an action to compel the representative of a deceased executor to account for funds alleged to have come into the latter's hands in his official

13. Where, in suit to set aside deed given by executrix and life tenant and to compel her to account, it was held that deed passed certain property absolutely and only her life estate in certain securities, which were held to be the property of the estate, and decree referred the cause for an accounting, held that court had power, within the scope of the decree, to make an allowance to an attorney rendering services in support of the deed. Bauernschmidt v. Bauernschmidt [Md.] 60 A. 437. Better course to allow fee from income of securities which went to life tenant. Id.

14. Rev. St. 1898, § 2932. Ferguson v. Woods [Wis.] 102 N. W. 1094. Where he sued to recover property alleged to be assets of the estate, under express direction of the county court pursuant to Id. §§ 3811, 3813, held that costs were properly charged against the estate, though he lost his suit. Id.

15. Code, § 1429. Prima facie no unreasonable delay where suit was brought within fifty-two days after executor's qualification. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

16. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

17. Where reduced one-half. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

18. See 3 C. L. 1304.

19. Holzer v. Thomas [N. J. Eq.] 61 A. 154.

20. Bill by beneficiary held not demurrable. Holzer v. Thomas [N. J. Eq.] 61 A. 154. Bill for an accounting brought by beneficiary under a foreign will alleging that executrix had not accounted for the estate in the foreign state but had brought the assets into the state where the action was brought, and had there mingled them with those of another estate of which she was also executrix, in which complainant was also interested, and for which she had never accounted, and had used the assets of both estates in purchasing realty, and seeking an accounting and relief as to both estates, held not demurrable for misjoinder of causes of action, both accountings being necessary to the main relief prayed against the realty. Id.

21. If apparent on the face of the bill, it may be taken advantage of by demurrer. Holzer v. Thomas [N. J. Eq.] 61 A. 154. Held, that allegations of bill, if proved, would explain long delay apparent on the face of the bill. Id.

22, 23. In re Meyer's Estate, 98 App. Div. 7, 90 N. Y. S. 185.

24. Under Rev. St. § 6175a, must do so within six months. Jones v. Willis [Ohio] 74 N. E. 166. Must include therein as assets in his hands the amount of a debt owed by the deceased representative to his decedent. Id.

capacity, the contestants must show by competent proof the amount of the estate in the hands of the decedent as executor or trustee, and his representative is chargeable only for the amount thus found to have been in his hands.[25]

In order to have accounting as incident to other relief defendant must have had the estate as personal representative or in privity to him.[25]

In some states an executor who is also residuary legatee may relieve himself from the necessity of accounting by giving bond for the payment of the debts and legacies.[27]

(§ 11) *B. Who may require.*[28]—As a general rule any one interested in the estate may compel an accounting by the representative.[29]

The administrator de bonis non with the will annexed is the proper party to call on the administrator of a deceased executor to account for any funds belonging to the estate of the testator in the hands of the latter.[30]

(§ 11) *C. Scope and contents of account.*[31]—The account should be itemized,[32] and should ordinarily be accompanied by vouchers covering all expenditures.[33] No vouchers are necessary for interest paid to the widow in accordance with the provisions of the will.[34]

In case the representative is charged with rents collected and retained by one entitled to them under the will, he should also be credited with an equal amount.[35]

Beneficiaries cannot take advantage of the fact that executors, by mistake, charge themselves with a fund for which they are not liable to account.[36] The fact that credits allowed the public administrator in one of three estates which he represents would more properly have appeared in the settlement of another one of them is not prejudicial where the exceptors are the sole beneficiaries, in the same proportions, in both estates.[37]

The court is not precluded from settling the account because it does not show what property or estate is in the possession of the executor.[38]

25. Farmers' Loan & Trust Co. v. Pendleton, 179 N. Y. 486, 72 N. E. 508, rvg. 90 App. Div. 607, 85 N. Y. S. 1130, 75 N. Y. S. 294. In action by substituted trustee against the executrix of a deceased trustee for an accounting of the trust funds, judgment against her for full amount thereof cannot be sustained where it appears that she had no knowledge of such fund, and no books or papers of her testator from which to prepare such an account, and there is no finding that she received any part of the fund, or that the full amount thereof came into her hands. Id.

26. Denied where he took only representative's inheritance. Cole v. Cole [N. J. Eq.] 59 A. 895.

27. Gen. Laws 1896, c. 220, § 3. Probate Ct. v. Adams [R. I.] 60 A. 769. For discussion of liability on such bonds, see § 9G, ante.

28. See 3 C. L. 1305.

29. Code Civ. Proc. § 2727. Children of deceased testator have an interest by operation of law. In re Meyer's Estate, 98 App. Div. 7, 90 N. Y. S. 185.

30. Jones v. Wooten, 137 N. C. 421, 49 S. E. 915. In suit by legatees against administrator d. b. n. c. t. a. in which it was alleged that plaintiffs had requested defendant to require the administrator of the deceased executor to account but that he had refused to do so, held, that defendant's plea of account stated was a good plea in bar, and that it was error to order a reference before disposing of it. Id.

31. See 3 C. L. 1305.

32. Objection that account does not show whence or how certain items with which the executor charged himself were obtained held untenable, in view of the evidence and findings. In re Casner's Estate [Cal. App.] 81 P. 991. Account for amount paid attorneys held sufficiently itemized by giving the dates of the commencement and close of the services, and the gross amount paid therefor, where they were retained generally and represented the estate in all litigation for several years. In re Davis' Estate [Mont.] 78 P. 704.

33. Objection that there was no voucher for the payment of a certain note not alleged to have been made by the administrator, overruled, where the note as paid was introduced in evidence, and appears to have been satisfied and discharged in due course of administration. In re Robinson, 45 Misc. 551, 92 N. Y. S. 967. Objection that there was no voucher for payment of bill overruled, where testimony showed that it was duly presented and no objection made to it, and it was paid in due course of administration. Id.

34. In re Casner's Estate [Cal. App.] 81 P. 991.

35. In re Dutcher, 102 App. Div. 410, 92 N. Y. S. 418.

36. Where they act in good faith. In re Corbin, 101 App. Div. 25, 91 N. Y. S. 797.

37. Browning v. Richardson, 186 Mo. 361, 85 S. W. 518.

After an account is homologated except so far as opposed, the opponent may raise all questions involved in his rights as pleaded and may even amend if he does not change the issues.[39] When a rule to vacate letters is dismissed, the question cannot be determined on an opposition to the account, notwithstanding the opposition was grounded on the pendency of the rule.[40]

Intermediate accounts are only for the purpose of informing the court and the interested parties of the receipts and disbursements and changes in the property from time to time, and it is not necessary for each of them to contain a full inventory of the assets of the estate.[41]

(§ 11) *D. Procedure.*[42]—One who as administrator takes what does not belong to the estate may be required to answer for it either by direct action or by accounting.[43] On the judicial settlement of the representative's account, all persons interested in the estate, though not cited, are entitled to appear on the hearing and make themselves parties to the proceedings.[44] On final accounting it is not necessary to cite illegitimate relatives of decedent, or persons holding disputed assignments of interests in the estate.[45] In New York as a general rule, where application is made to the surrogate for permission to appear and file objections to the representative's accounts, he may examine into the question of whether the applicant is interested in the estate, and if necessary, send the issue to a referee, in proper cases.[46] But where he can see from the moving papers that a real question is presented, involving the right of the applicant and the other heirs and next of kin to participate in the distribution of a portion of the estate, he should reserve the question until the hearing of the account, when all interested parties will be present.[47] One who fails to appear in response to a citation, because she does not then know of her interest as heir, is entitled, on motion, to open her default, and to appear and litigate her claim.[48]

The report of the representative and an exception thereto stand as the complaint and answer of the respective parties, and the cause is to be tried upon the issue thus raised.[49] As a general rule an interested party desiring to contest the account is re-

38. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

39. Opposition to a charge for rents collected admits of a supplemental opposition that opponent paid taxes and made repairs. Succession of Sangfried [La.] 38 So. 593.

40. Succession of Thomas [La.] 38 So. 519.

41. Account held to sufficiently comply with Code Civ. Proc. § 2780 et seq. In re Davis' Estate [Mont.] 78 P. 704.

42. See 3 C. L. 1306.

43. The public administrator caused himself to be appointed dative testamentary executor of a succession, which had been closed by the sending of the heir into possession, and he, as such dative testamentary executor, took into his possession funds not belonging to that succession. Casey v. Abraham, 113 La. 581, 37 So. 484.

44. Code Civ. Proc. § 2728. In re St. John, 34 Civ. Proc. R. 279, 93 N. Y. S. 836. By § 2514, subd. 11, a person interested includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise, except as a creditor. Id. Includes next of kin whose right to share in the estate depends upon the determination of a disputed question as to the survivorship of three persons who perished in a common disaster. Id.; In re St. John, 93 N. Y. S. 841.

For discussion of remedy of distributee as to accounting of which he had no notice and on which he did not appear, see note, 63 L. R. A. 95.

45. In re Losee's Estate, 94 N. Y. S. 1082.

46. In re St. John, 34 Civ. Proc. R. 279, 93 N. Y. S. 836.

47. In re St. John, 34 Civ. Proc. R. 279, 93 N. Y. S. 836. Where the right of one of the next of kin to share in the estate depended on the determination of a disputed question as to the survivorship of three persons who perished in a common disaster, held, that his application for an order permitting him to appear and file objections to the executor's account should have been granted, without deciding on the motion his right to share in the estate. That question should have been reserved for decision on the accounting when all parties interested are present. Id. In re St. John, 93 N. Y. S. 841.

48. In re St. John, 93 N. Y. S. 840.

49. Spray v. Bertram [Ind.] 74 N. E. 502. Where exceptors alleged the existence of a written contract between all the next of kin making it improper to charge them with advancements, the administrator was not obliged to file a plea of non est factum to put them to their proof as to the existence of such contract. Id.

quired to file his exceptions thereto in writing, setting out specifically the grounds of his objections, and is limited on the hearing to the exceptions so presented.[50] The rule that in the absence of exceptions the court may inquire into any matter in the settlement of the account which may seem objectionable, and may pass judgment thereon does not apply to any matter by which it is sought to impose a penalty on the representative, nor to cases where the parties have appeared and made their objections in writing.[51]

In Wisconsin, whether the final account is contested or not, the county court must be satisfied of its correctness before allowing it, and must not allow it of course.[52] Where specific objections are filed, the burden is on the representative to justify the allowance.[53]

Beneficiaries cannot object to the accounts on the ground that they have received more than they are entitled to,[54] or because other beneficiaries have received less than they are entitled to.[55]

A par to a contest in the probate court, upon an administrator's account, is not entitled to a jury trial.[56]

Statutes disqualifying judges on account of prejudice have been held applicable to probate proceedings on motion to confirm the report of a referee on objections to an executor's account.[57]

The practice of raising purely legal questions by demurrer is not applicable to probate courts.[58]

The account itself is not evidence of contested items.[59]

The report and findings of a referee, to whom an account is referred for the purpose of examining it and the objections thereto and making report thereon, are merely advisory, and the court may modify, adopt, or disapprove them as he sees fit, or may take further testimony and make findings of its own on which to base its orders.[60] An exception to a report on the ground that the auditor erred in not allowing a specified credit is properly overruled, where it clearly appears from the report of the evidence that the representative is not entitled thereto.[61]

On appeal from the allowance of the administrator's account, where the appellant desires the administrator to produce books of account, he should procure a subpoena duces tecum or order to produce.[62] It is proper for the court on appeal to al-

50. Code Civ. Proc. § 1635. Administrator will not be charged with interest on funds deposited in private bank and used by proprietor thereof, where no such claim is made in written grounds of contest. In re Sylvar's Estate [Cal. App.] 81 P. 663. Claim that administrator should be charged with such interest held not supported by statement that he "has not accounted for all the estate of said deceased which has come to his possession." Id.

51. In re Sylvar's Estate [Cal. App.] 81 P. 663.

52. County court rule 15, § 6. Fitch v. Huntington [Wis.] 102 N. W. 1066.

53. Same is true on appeal to the circuit court. Fitch v. Huntington [Wis.] 102 N. W. 1066.

54. In re Casner's Estate [Cal. App.] 81 P. 991.

55. Because widow has not received all the interest which she was entitled to under the will. In re Casner's Estate [Cal. App.] 81 P. 991.

56. Clifford v. Gridley, 113 Ill. App. 164.

57. Code Civ. Proc. § 180, providing that no judge shall act in any proceeding where he is disqualified by reason of bias or prejudice in the matter, and providing for the filing of affidavits of prejudice. State v. Donlan [Mont.] 80 P. 244.

58. Hence on appeal from an order of the circuit court affirming an order of the probate court directing a partial distribution, made after hearing on a demurrer to a cross petition filed by the heirs, the case will be treated as though evidence had been offered in both of the lower courts to prove the facts alleged in the cross petition and had been excluded. Turner v. Burr [Mich.] 104 N. W. 379.

59. In re Shively's Estate, 145 Cal. 400, 78 P. 869.

60. In re Courtney's Estate [Mont.] 79 P. 317.

61. Exception of fact to the report of the auditor upon the ground that he erred in not allowing a specified credit claimed by the administrator in his returns. Tippin v. Perry [Ga.] 50 S. E. 35.

62. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548.

low amendments and additions to the account presented for settlement, in furtherance of justice.[63]

(§ 11) *E. The decree or order.*[64]—The settlement of the estate is completed by the settlement and acceptance of the administrator's final account.[65]

The order settling the account need not necessarily set forth the then condition of the estate, nor need it show the property and estate on hand, with its value.[66] The decree need not in any way affect the manner of the distribution of the estate, and hence it is not necessarily error to make such a decree pending an appeal from a decree of partial distribution.[67] A decree settling the balance due in the executor's hands on final accounting is not an exercise of the jurisdiction of the court to construe the will on application for distribution, and does not prevent the executor from subsequently claiming the right to turn over securities in payment of legacies instead of paying them in cash.[68] In Indiana a final settlement made without payment or provision for the payment of taxes is illegal, and may be set aside for the purpose of compelling their payment.[69] Upon the settlement of the accounts of the representative the court is required, in some states, to make an order for the payment of the debts, or for a dividend to the extent justified by the funds on hand.[70] On the incoming of an auditor's report leaving a fact in doubt, the account may be left open in the particulars affected till the question be adjudicated.[71]

Where some of a contestant's objections to the account are well founded as to material matters, his costs should be paid out of the estate.[72] Where the order settling the final account of a special administrator is modified on appeal by inserting items inadvertently omitted, the administrator is not entitled to costs where he did not call the attention of the lower court to the omissions.[73]

§ 12. *Distribution and disposal of funds.*[74] *Occasion and time for distribution.*[75]—After the payment of debts, any remaining personalty not specifically bequeathed is subject to distribution.[76] In the case of a will this should, unless otherwise directed or impracticable,[77] be accomplished within a year.[78] If there are debts,

63. Not confined to questions passed upon by the probate court, but the appeal brings up the whole account. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548. Fact that appellant's attorney was present in the lower court held immaterial where no appearance was entered and no rights waived. Id.

64. See 3 C. L. 1308.

65. Where part of land had been sold under order authorizing sale of all of it, such acceptance held to prevent sale of rest of it. Cole v. Jerman, 77 Conn. 374, 59 A. 425.

66. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

67. In such case, where on appeal from the order settling the account, the account rendered was not in the transcript, held that it would be presumed that it contained no account of any payment made under the decree of distribution, and hence that it was not shown that the court determined any matter that it did not have jurisdiction to determine at that time. In re Thayer's Estate [Cal. App.] 81 P. 658.

68. Orphans' court. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586. Power to construe for purposes of distribution given by Gen. St. p. 2391, § 151, must be exercised upon a proceeding for that purpose, on actual notice to all parties. Id.

69. Burns' Ann. St. 1901, § 2558. Cullop v. Vincennes, 34 Ind. App. 667, 72 N. E. 166.

70. Code Civ. Proc. § 1647. Held error to refuse to grant order for payment of debts, and to make order merely directing administrator to close the estate and have the proceeds thereof distributed among the creditors at the earliest possible date. In re Sylvar's Estate [Cal. App.] 81 P. 663.

71. Question of an election was doubtful. White's Estate, 23 Pa. Super. Ct. 552.

72. Personal imposition of costs authorized by Code Civ. Proc. § 2557, is punitive in character. In re Corbin, 101 App. Div. 25, 91 N. Y. S. 797.

73. In re Bell's Estate, 145 Cal. 646, 79 P. 358.

74, 75. See 3 C. L. 1308.

76. In re Stilphen [Me.] 60 A. 888.

77. A widow entitled to a fraction of the net income of the estate during a certain period is entitled to have the estate kept intact for the purpose of receiving such part. The executor cannot at the instance of a remainderman be compelled to sell the estate upon giving satisfactory assurance that the income would be paid. Marfield v. McMurdy, 25 App. D. C. 342.

78. In the absence of any provision in the will as to the time and manner of paying residuary legacies, the residuary legatee has, as a general rule, a right to insist that before the end of the first year after testator's death the executor shall, if possible, convert all the assets into money, pay the debts and

the representative ordinarily has no right to make distribution until final settlement and an order of distribution by the probate court.[79] Administrators may, however, vest in the distributees both title and possession of their respective shares of the property before an order of distribution,[80] and an unauthorized conveyance of the personalty to them, when subsequently approved by the court, vests title in them as of the date of the conveyance.[81] A decree of final distribution should not be made pending litigation involving property belonging to the estate.[82]

Partial distribution.[83]—In some states a partial distribution may be had before the administration is completed, where the estate is but little indebted, and the share of the applicant therefor may be allowed to him without loss to the creditors,[84] whether such conditions exist being a question of fact to be determined by the court upon a comparison of the value of the estate with the amount of the debts.[85] In determining the amount available for the payment of the petitioner's legacy, the court should not take into consideration the amount of the collateral inheritance tax to which the legacy is subject,[86] nor the amount required to erect tombstones where the executor is authorized by the will to resort to the realty for that purpose if necessary.[87] Before ordering a partial distribution prior to the expiration of the period of administration, the better practice is to require a written report from the representative.[88] The petition is properly denied where there is pending an application for the sale of the realty for the payment of the administration and funeral expenses.[89] A refunding bond may be dispensed with if the time for presenting claims has expired and all allowed claims have been paid, and the court is satisfied that no injury can result to the estate.[90] A bond given by a distributee during his lifetime is sufficient to protect the estate where after his death his share is paid to his executor.[91] The appearance of an executor on the hearing on petition for a

expenses, and hand over the clear residue to him. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

79. Where there are debts, the representative holds the estate in trust for their payment, and has no right to transfer choses in action to a residuary legatee until final settlement and order of distribution by the probate court. Broadwell v. Banks, 134 F. 470.

80. Burnes v. Burnes [C. C. A.] 137 F. 781. Judgment of probate court and contract held to have estopped parties thereto from claiming that title to stock did not vest in grantee. Id.

81. No debts. Burnes v. Burnes [C. C. A.] 137 F. 781.

82. Objection to jurisdiction of court to render decree of final distribution while litigation involving property belonging to the estate was pending held untenable, it appearing that all such litigation had been finally determined. Drasdo v. Jobst [Wash.] 81 P. 857. Evidence held to sustain finding that all debts had been paid except expenses of administration and funeral expenses. Id.

83. See 3 C. L. 1313, n. 32 et seq.

84. Code Civ. Proc. § 1661. In re Murphy's Estate, 145 Cal. 464, 78 P. 960. Petition for partial distribution following the language of that part of the statute declaring what must be made to appear before the petition can be granted, held sufficient as against the executrix. Id. Either a full or a partial distribution may be made prior to the expiration of the period of administration where it appears that there are sufficient assets to satisfy all demands against the estate, subject, however, to the giving of refunding bonds. Murdock v. Murdock, 111 Ill. App. 375.

85. In re Chesney's Estate [Cal. App.] 81 P. 679. Persons claiming property described in the inventory adversely to the estate are not creditors, and their claims should not be considered in determining the indebtedness. In re Dutard's Estate [Cal.] 81 P. 519.

86. Tax is not an expense of administration or a charge on the general estate, but is to be deducted from the amount payable to the legatee in satisfaction of his legacy. In re Chesney's Estate [Cal. App.] 81 P. 679.

87. In re Chesney's Estate [Cal. App.] 81 P. 679.

88. This course not imperative. Murdock v. Murdock, 111 Ill. App. 375.

89. Petition of legatee asking for distribution to him of share to which he is entitled properly denied. In re Koppikus' Estate [Cal. App.] 81 P. 733.

90. Code Civ. Proc. § 1663. In re Chesney's Estate [Cal. App.] 81 P. 679. Where only indebtedness consisted of a disallowed claim filed by the petitioner on which suit had been commenced, and executors had property of the estate many times greater in value than the amount of such claim, held not error to grant petitioner's application for payment of her legacy without requiring a refunding bond. Id. Court is not authorized to require bond in favor of executors or administrators when claims have become barred by the expiration of the statutory period. The claims then not presented are barred and cannot be paid, bond or no bond. Klicka v. Klicka, 105 Ill. App. 369.

91. Murdock v. Murdock, 111 Ill. App. 375.

partial distribution solely in his representative capacity gives him no standing to claim rights to which he is entitled as residuary legatee.[92]

Person entitled to receive payment or transfer of share.[93]—It is the duty of the representative to pay funds in his hands to those entitled thereto by law or to their assignees.[94] In the absence of a statutory provision to the contrary,[95] probate courts have as a general rule, no jurisdiction to determine controversies between heirs, devisees, legatees, or the next of kin and persons claiming under them;[96] but where it is shown that funds have been wrongfully included in the account as trust funds, or where title or ownership is in another person, jurisdiction may be assumed to avoid circuity of action.[97] When the distributee is under a guardian or committee regularly qualified, the guardian is entitled to payment.[98]

Contracts between the heirs and distributees, or between them and the representative, in regard to the distribution of the estate, will be enforced if otherwise valid.[99] In New York, where the person entitled to a legacy or distributive share is unknown, the statute provides that the distribution decree must direct the representative to pay the amount thereof into the state treasury for the benefit of those who may thereafter appear to be entitled thereto, and that the surrogate or the supreme court on petition of one claiming to be so entitled may, by reference, ascertain the rights of the parties interested and grant an order for payment of the money found to be due claimant.[1] The surrogate referred to must be deemed to be the one who has or had jurisdiction of the settlement of the estate, and no other surrogate may act in the matter.[2] Property turned over to trustees may be delivered direct by them to ultimate beneficiaries on cessation of the trust.[3]

Distribution need not always be in money; residuary legatees [4] and heirs may, if they so desire, take the residue of the personalty in kind.[5] Where an equitable

92. If he does not appear in his individual capacity, is concluded as legatee by the decree. In re Murphy's Estate, 145 Cal. 464, 78 P. 960.

93. See 3 C. L. 1311, n. 8, 9.

94. The wife of an heir who has a judgment against her husband for alimony cannot reach his share in an estate except by garnishment or other proper proceeding. Clifford v. Gridley, 113 Ill. App. 164. Where executors and trustees had written notice of the assignment of a legacy and notified their successor in the trust thereof, such notice inured to the benefit of the assignee, who had no notice of the substitution of trustees, and imposed on the substituted trustees the duty of ascertaining the facts by reasonable inquiry, or of making the alleged assignee a party to their accounting. Seger v. Farmers' Loan & Trust Co., 92 N. Y. S. 629.

95. Rev. St. c. 65, § 34, gives any one claiming under an heir at law the same rights as the heir in all proceedings in probate courts including rights of appeal. In re Stilphen [Me.] 60 A. 888.

96. In New Hampshire the probate court has no jurisdiction to determine the validity of an equitable assignment among the heirs (Crockett v. Sibley [N. H.] 61 A. 469), and hence a bill in equity will lie for that purpose (Id.).

In New York the validity of a disputed assignment of an interest in a decedent's estate cannot be determined by the surrogate (In re Losee's Estate, 94 N. Y. S. 1082); but he may act on an assignment, the validity of which is admitted (Id.).

Pennsylvania: As a general rule no one can claim in the distribution of an estate in the orphans' court except as creditor, legatee or next of kin. In re Moore's Estate, 211 Pa. 338, 60 A. 987; In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081.

97. Orphans' court held to have properly assumed jurisdiction to determine whether proceeds of sale of stock belonged to claimant or to the estate. In re Moore's Estate, 211 Pa. 338, 60 A. 987. Where it is claimed that deposits in the name of decedent in fact belong to her husband. In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081.

98. An administrator is bound to pay over to the committee of a lunatic accruing rents to which the latter is entitled under the will, and is not justified in refusing to do so until after his annual accounts have been submitted and approved. In re Cowen, 94 N. Y. S. 303.

99. See § 17, post.

1. Code Civ. Proc. § 2747. Kinneally v. People, 98 App. Div. 192, 90 N. Y. S. 587.

2. Kinneally v. People, 98 App. Div. 192, 90 N. Y. S. 587.

3. In re Garman's Estate, 211 Pa. 264, 60 A. 720.

4. See 3 C. L. 1313, n. 27 et seq. May consent to accept securities held for conversion under the general rule for settlement, or under special directions of the will. Such acceptance considered as practically a conversion and sale by the executor and a distribution of the proceeds. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

5. Under Rev. St. 1842, c. 159, §§ 5, 6, 7,

conversion takes place at testator's death by reason of a direction to sell realty, distribution should be made on the theory that the donation in the first instance was made in money.[6]

Procedure to obtain order for final distribution.[7]—If on the settlement of any account of an administrator or executor, there appears to remain in his hands property not necessary for the payment of debts and expenses of administration, and not specifically bequeathed, it is the duty of the court to determine who are entitled to the estate and their respective shares therein under the will or according to law, and to order the same to be distributed accordingly.[8] A decree directing distribution is void as to creditors not cited to appear.[9]

A final order of distribution, made in proceedings to administer the estate as intestate, is valid and binding upon the parties until set aside, notwithstanding the subsequent discovery of a valid will.[10] On the termination of a trust estate after the death of the executor, distribution should be made directly to the legatees without the appointment of an administrator de bonis non, where it appears from the account of the administrator of the deceased executor that all the debts of the estate have been paid.[11]

Suits for payment of shares or settlement.[12]—As a general rule legatees are not entitled to sue for the amount of their legacies until the court has made an order of distribution,[13] but where the executor is not required to give bond and dies before any account is due or filed, and all the testator's debts have been paid, the legatees may, on the failure or refusal of the executor's administrator to account for moneys charged against such executor's estate, sue such estate in equity for an accounting and to recover the amounts due them under the will.[14] An action to enforce a legacy as a lien on realty is not based on an instrument for the payment of money, and consequently plaintiff has the burden of proving nonpayment.[15] A legatee whose legacy is payable when the property is disposed of, and who is also one of the heirs at law and next of kin, may maintain a bill to compel the executor, to whom the property is given in trust for the payment of debts and legacies with a discretionary power of sale, to execute the trust by a sale and to distribute the balance among those entitled thereto.[16] The executor cannot set up that parties seeking

the heirs may, if they so desire, take the residue of the personalty in kind, rather than have it converted into money by the representative. Stevens v. Meserve [N. H.] 61 A. 420. Statute covers choses in action as well as goods and chattels. Id. A guardian may bind his ward by an agreement for a division of the property in kind. Id. Laws 1857, p. 1874, c. 1963, authorizing the court to direct the transfer of bonds, stocks, or other evidences of indebtedness to minor heirs or their guardians instead of giving them their share in cash, does not deprive the guardian of the right to consent to a division in specie without an order. Id. See, also, Guardianship, 3 C. L. 1569.

6. Nelson v. Nelson [Ind. App.] 72 N. E. 482. See Conversion in Equity, 5 C. L. 758.

7. See 3 C. L. 1312, n. 18 et seq.; 1309, n. 74 et seq.

8. Rev. St. c. 67, § 20, c. 65, § 7. In re Stilphen [Me.] 60 A. 888. Probate court has jurisdiction to determine whether legacy was specific one, and was consequently adeemed by failure of the fund out of which it was to be paid and therefore the balance in administrator's hands not otherwise disposed of went to the heirs as intestate property, or whether it was demonstrative, so that such fund was applicable to its payment. Need not be determined by a court of equity as a preliminary question. Id.

9. In re Gall [N. Y.] 74 N. E. 875.

10. Perkins v. Owen, 123 Wis. 238, 101 N. W. 415.

11. Act Feb. 24, 1834 (P. L. 78), providing for appointment of administrator d. b. n. c. t. a. on death of executor does not apply in such case, its object being merely to prevent circuity of action. In re Garman's Estate, 211 Pa. 264, 60 A. 720.

12. See 3 C. L. 1314, n. 41 et seq.

13. Jones v. Willis [Ohio] 74 N. E. 166.

14. Amount owed by executor to his testator and charged against his estate as assets in his hands. Jones v. Willis [Ohio] 74 N. E. 166.

15. Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028, afg. 90 App. Div. 585, 86 N. Y. S. 139.

16. A legatee whose legacy is to be paid when the property is disposed of, and who is also one of the heirs at law and next of kin, is entitled to maintain a bill to compel the executor, to whom the property was given in trust for the payment of the debts and

payment of their legacies have forfeited their right thereto by contesting the will.[17] In some states devisees, distributees, or creditors may, at any time after the qualification of the representative, institute suit for a settlement of the estate.[18] No allegation of fraud or mismanagement on the part of the representative is necessary.[19]

Adjustment of shares.[20]—Debts due by distributees,[21] advancements made to them by decedent,[22] and partial distributions or anticipations,[23] should be reckoned against their shares in order to equalize them; but an executor cannot as such make an offset against what he is to pay over as trustee.[24] In the absence of a definite understanding to the contrary, payments made to legatees on a partial distribution should be charged against their legacies instead of their share of the residue, and the liability of the estate for interest on the legacies thereby stopped.[25]

Interest on legacies.[26]—A legatee whose legacy is wrongfully withheld is entitled to recover interest thereon, though a judgment for the amount of the legacy and the interest will exceed the balance in the hands of the executor.[27] General legacies ordinarily draw interest at the legal rate after one year from the issuance of letters testamentary, unless there is something in the will to indicate a contrary intention.[28] This rule, however, deals only with interest given as compensation for the withholding of money and not with income earned, and hence does not apply to gifts in trust to pay income only to one for life or a term, so as to cut down the term of enjoyment for a year.[29] In such case, though the beneficiary is not, while the estate is in the hands of the executor, entitled to receive the income in quarterly or yearly instalments as the will directs, he is entitled to have the income then accruing, calculated at the average rate earned by the whole estate, added to the corpus of the fund.[30] In the absence of a provision in the will to the con-

legacies, with power to sell on such terms and at such time as should seem meet to him, to execute the trust by a sale, and distribute the balance, if any, to the heirs and next of kin, but is not entitled to partition of the lands divised, in which she has only the interest of a cestui que trust. White v. Crossman [N. J. Eq.] 61 A. 529.

17. Cannot litigate the claims of one set of legatees as against the others at the expense of the estate. In re Murphy's Estate, 145 Cal. 464, 78 P. 960.

18. Civ. Code Prac. §§ 428, 429. Faulkner v. Tucker, 26 Ky. L. R. 1130, 83 S. W. 579.

19. Faulkner v. Tucker, 26 Ky. L. R. 1130, 83 S. W. 579.

20. See 3 C. L. 1309, n. 79 et seq.; 1310, n. 87 et seq. See, also, post, § 17.

21. In settling the estate the representative is entitled to offset against the share of a distributee debts and obligations owed by him to deceased and contracted during the latter's lifetime. In re Robinson, 45 Misc. 551, 92 N. Y. S. 967. Evidence insufficient to show that advances made by decedent to her brother, for which she took his notes, were intended as gifts. Id. Money owing the testator by an heir or distributee should be deducted under the doctrine of detention or set-off. Wick v. Hickey [Iowa] 103 N. W. 469.

22. See post, § 17B.

23. Income received by decedent's son from his mother, who was administratrix of his father's estate. Evidence held to show that son had received more than he was entitled to, so that his widow was not entitled to anything further. Nivens v. Nivens [C. C. A.] 133 F. 39, rvg. 76 S. W. 114, 64 S. W. 604.

24. Executors have no right of retainer from income of trust funds to satisfy a judgment for costs against the beneficiary, though they are also trustees under the will. In re Knibbs' Estate, 45 Misc. 83, 91 N. Y. S. 697.

25. Legacies must be paid before there is any residue. McIntire v. McIntire, 192 U. S. 116, 48 Law. Ed. 369. Such application not objectionable as stopping the running of interest to the disadvantage of the legatees because the amount paid to one who is only entitled to a share in the residue is necessarily charged against his share thereof.

26. See 3 C. L. 1309, n. 83 et seq. Interest charged representative as a penalty, see § 9C, ante.

27. Legacy withheld after all the debts and the legacies have been fully paid. Berkemeier v. Peters [Mo. App.] 86 S. W. 598.

28. In re Schabacker, 94 N. Y. S. 80. Irrespective of whether the estate is fruitful or unproductive. Legatees not deprived of right to interest because legacies could not be paid in full until funds were received from sale of lands in foreign state. In re Erving's Estate, 92 N. Y. S. 1109. Do not bear interest before a year in the absence of a direction to the contrary. Webb v. Lines, 77 Conn. 51, 58 A. 227.

29. Webb v. Lines, 77 Conn. 51, 58 A. 227. Does not apply to case where under will life tenant is entitled to all income acruing after testator's death. In re Sprague, 94 N. Y. S. 84.

30, 31. Webb v. Lines, 77 Conn. 51, 58 A. 227.

trary, an executor who is given a fund in trust to pay the income to the widow is not bound to separate it as soon as practicable from the rest of the estate, so as to entitle the beneficiary, on his failure to do so, to legal interest rather than the actual income earned.[31]

If partial payments are made on legacies, each payment should first be applied to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as before.[32]

Legacies payable after the death of the life tenant bear interest from that time.[33] If payable out of the proceeds of a sale of the property of the estate, a reasonable time will be allowed in which to make the conversion, and interest will not be given until after the sale.[34]

If legacies are paid before they become due, proper deduction should be made for interest.[35]

Setting out and retaining funds and precedent interests.—Sufficient should be set apart from the residue of the estate to meet annuities given by the will,[36] which amount is subject to distribution according to the will when the annuities cease.[37]

Statutes in some states provide for the retention by the representative of sufficient assets to pay claims for the establishment of which actions are pending.[38] A petition for the retention of assets by an executor to pay a claim alleged to be due the petitioner and on which he subsequently brings suit must be filed before final settlement.[39] The claim specified in the petition must be substantially the same as that on which suit is subsequently brought.[40]

32. In re Erving's Estate, 92 N. Y. S. 1109,

33. Where will gives income to widow for life income as well as principal belong to children immediately on widow's death, and they are entitled to interest on principal, if it is retained after that time. In re Driskel, 100 App. Div. 171, 91 N. Y. S. 273.

34. Where realty is devised to executor after death of life tenant in trust to sell it and divide proceeds, and no time is fixed for execution of trust, a reasonable time will be allowed, and interest will only be allowed from the date of sale, there being no claim that the trustee arbitrarily or capriciously refused to sell. In re Schabacker, 94 N. Y. S. 80. Doctrine of equitable conversion at testator's death will not be applied so as to require interest to be paid on the legacies as though a sale had actually been made at that time. Id.

35. Suit to charge land with legacies. Mallery v. Facer, 181 N. Y. 567, 74 N. E. 487, rvg. 90 App. Div. 610, 85 N. Y. S. 1137.

36. Merrill v. Wooster, 99 Me. 460, 59 A. 596. Where legacies are left to testator's children with the condition that the widow shall have the income for life, it is the duty of the executor to set apart the amount thereof and keep it intact until the widow's death. Where executor died and widow was appointed administratrix, remarried, and died, leaving a will directing payment of such legacies, her second husband could not defeat the right of the children to their payment from the wife's estate, it appearing that there was sufficient cash realized from testator's estate, to have set aside the amount for the payment of the legacies immediately after his death. In re Driskel, 100 App. Div. 171, 91 N. Y. S. 273. Where expenses connected with the probate of the will and the administration of the estate which are properly chargeable to principal have been paid out of income, the proceeds of the sale of a bond of the estate are properly applied to the reduction of the amount due from principal to income. Townsend v. Wilson, 77 Conn. 411, 59 A. 417.

37. Is a part of the residuum and executor never parts with title thereto. Same rule applicable even if it is treated as a trust fund for the benefit of the annuitant. Merrill v. Wooster, 99 Me. 460, 59 A. 596.

38. Code Civ. Proc. § 2745, providing for the retention of a sufficient amount to pay claims for the establishment of which actions are pending, applies only to cases in which no distribution has been made before the pendency of such an action has been brought to the notice of the surrogate. In re Gall [N. Y.] 74 N. E. 875.

39. Downer v. Squire, 186 Mass. 189, 71 N. E. 534. Petition filed more than a year before executors filed their account, in which they charged themselves with a balance more than sufficient to meet the claim sued on, no account having been previously settled, held seasonably presented, though ex-

Refunding bonds.[41]—Where the will provides that the executrix shall not be required to give bond as such, she will not be required to give bond as life tenant.[42] In New Jersey if a decree barring action against the executor is made upon the settlement of the estate, he should take a refunding bond upon paying the distributive shares to those entitled thereto.[43]

Partition of realty among heirs and devisees.[44]—Partition of realty among adult heirs may be made under some statutes, or, if the premises are not divisible, a decree of sale may be entered, prior to the expiration of the period for probating claims against the estate.[45] In case a sale is ordered, the court should, on the coming in of the report, take additional proof and make such an order with reference to the distribution of the proceeds as will insure their application, so far as may be necessary, to the satisfaction of the claims of creditors against the estate.[46] A widow in possession of the homestead and having an unassigned dower interest in the rest of the realty cannot maintain an action for partition against her husband's other heirs.[47]

By statute in Missouri, no partition of devised lands can be had contrary to the terms of the will.[48] Under such statute the court has no jurisdiction to entertain a suit for partition of devised land instituted by persons expressly excluded from participation in the estate, or who have disposed of their interest, and the bringing of such suit does not exclude the jurisdiction of the probate court over the lands involved.[49]

In some states in case the realty may not be equitably divided among those entitled thereto, the probate court may order the same to be sold to pay specific legacies, if for the best interests of the estate and all parties concerned.[50]

ecutors, who were also trustees, had previously closed their accounts as executors on their books, so far as the administration of income was concerned, and had turned over the personal assets to themselves as trustees. Id.

40. Downer v. Squire, 186 Mass. 189, 71 N. E. 534. Where successor of trustee filed petition as such against executors of his deceased predecessor for retention of assets to pay claim on latter's bond conditioned on payment of the trust fund to his successor, held no objection to subsequent action by obligees on bond, who were also the beneficiaries of the trust, against the executors to recover the trust fund, that the action was not brought by the person filing the petition for retention of assets. Id.

41. See 3 C. L. 1313, n. 26. See, also, supra, "Partial Distribution," and see 3 C. L. 1313, n. 32 et seq.

42. Where the will provides that the executrix shall not be required to give bond as such, she will not be required to give bond as life tenant. McGuire v. Gallagher, 99 Me. 334, 59 A. 445.

43. Orphans' Court Act, § 78, (Laws 1898, P. 742). Acton v. Shultz [N. J. Eq.] 59 A. 876.

44. See 3 C. L. 1314, n. 47 et seq. See, also, Partition, 4 C. L. 898.

45. Watke v. Stine, 214 Ill. 563, 73 N. E. 793. Right given by Hurd's Rev. St. 1903, c. 106, § 1, not affected by fact that estate is not settled. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806. Under Civ. Code Prac. § 490, authorizing a court of equity to sell land owned jointly by two or more persons on the petition of either if the estate be in possession, and the property cannot be divided without materially impairing its value, may divide property held by heirs of an intestate and purchasers from them who hold vested present interests therein jointly with the unity of possession. In such case the possession of one is the possession of all, in the absence of any adverse claim by him. Stone v. Burge, 26 Ky. L. R. 1060, 83 S. W. 139.

46. Watke v. Stine, 214 Ill. 563, 73 N. E. 793; Hall v. Gabbart, 213 Ill. 208, 72 N. E. 806. Where administrator was made a party and the decree provided that the proceeds of the sale should be paid into court, held immaterial that time for presenting claims had not expired and that answer of administrator showed that there would not be sufficient personalty to pay the debts. Watke v. Stine, 214 Ill. 563, 73 N. E. 793.

47. Under Rev. St. 1898, § 3101, action can only be maintained by one having an estate in possession. Ullrich v. Ullrich, 123 Wis. 176, 101 N. W. 376. Laws 1899, c. 336, p. 613, and Laws 1903, c. 280, p. 442, do not change rule. Id.

48. Rev. St. 1899, § 4383, applies to case where will executed and proved in Ohio according to laws of Missouri and duly recorded in the latter state disposes of land therein. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

49. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.

50. Gen. St. 1894, §§ 4578, 4580, as amended by Laws 1901, c. 89, p. 91. Such power is incidental to the administration of estates. Kelly v. Slack, 93 Minn. 489, 101 N. W. 797. Evidence held sufficient to sustain finding that sale was necessary for best interests

The title of heirs who request and procure a sale of realty for the purpose of closing up the affairs of the administration passes to the purchaser by estoppel, and a stranger to the proceeding cannot impeach the sale on the ground that the probate court had no authority to order a sale for that purpose, especially after a long time has elapsed.[51]

§ 13. *Enforcement of orders and decrees by attachment as for a contempt.*[52]

§ 14. *Discharge of personal representatives.*[53]—The administration of a dead man's estate is never complete until all the assets have been turned over to those rightfully entitled to them.[54] An executor continues to be an executor so long as he has anything under the will to execute, even though the period of administration may have elapsed.[55] After such period has passed he is responsible to a court of equity for the performance of his trust, while during such period he is responsible to the probate court.[56] As to a consenting creditor, the administration closes when the administrator delivers all the property to the widow and heirs.[57] Notice of the administrator's application for a discharge need not be given to creditors who have not filed their claims.[58]

§ 15. *Probate orders and decrees.*[59]—Courts having charge of the administration of estates are usually held to be courts of general jurisdiction in regard to probate matters;[60] hence, their judgments and decrees are as binding on parties and their privies,[61] and until vacated, or reversed, set aside, or modified on appeal, as conclusive as to matters necessarily involved in their determination as those of any other court.[62] The existence of all facts necessary to give jurisdiction will be pre-

of all concerned and that realty could not be equitably divided, and order directing sale of all the land, including the undivided third interest of the husband who elected to take under the statute instead of under the will, held proper. Id.

51. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

52, 53. See 3 C. L. 1315.

54. Bristol Sav. Bank v. Holley, 77 Conn. 225, 58 A. 691.

55. Marfield v. McMurdy, 25 App. D. C. 342. Where the will provides for an annual stipend and the scheme of the will indicated an intention to continue the executorship for several years, it will continue after the expiration of the period of administration. Id. Rev. St. 1898, § 3850, providing that the county court may not extend the time for settling the estate beyond six years from the time of granting letters, does not have the effect of terminating the functions of the executor at the expiration of that time, but they continue until final settlement or until he is otherwise discharged where the nature of his duties and the matters involved in the settlement of the estate require a longer time. Lindemann v. Rusk [Wis.] 104 N. W. 119. Where no steps are taken to compel a termination of the proceedings in the county court, it will be presumed on appeal that a necessity existed for continuing the administration. Id.

56. Marfield v. McMurdy, 25 App. D. C. 342.

57. Barton v. Burbank [La.] 38 So. 150.

58. Boyle v. Boyle, 126 Iowa, 167, 101 N. W. 748.

59. See 3 C. L. 1316. The rules generally applicable to all orders and decrees are discussed in Former Adjudications, 3 C. L. 1476; Judgments, 4 C. L. 287; Motions and Orders, 4 C. L. 704.

60. See, also, § 2, ante, and title Jurisdiction, 4 C. L. 324.

In Arkansas the probate court is a court of superior jurisdiction. Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044.

In New Jersey the orphan's court is a superior court of general jurisdiction. Podesta v. Binns [N. J. Eq.] 60 A. 815.

In Texas county courts are courts of general jurisdiction as to probate matters. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379; Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025.

61. See Former Adjudication, 3 C. L. 1476. A decree on acounting directing the representative to turn over property in his hands to certain named beneficiaries is conclusive upon each party to the proceeding who was duly cited or appeared, and upon every person claiming under him. Code Civ. Proc. § 2743. Phalen v. United States Trust Co., 100 App. Div. 264, 91 N. Y. S. 537. Where the estate is directed to be distributed according to the provisions of a codicil, the decree is a bar to a suit by such a party for specific performance of a contract between him and testator whereby the latter agreed to make no distinction between his children in his will, and which it is alleged was violated by the codicil. Id. Proceedings for the appointment of an administrator are in rem, and a decree therein, if made after the notice and hearing required by the statute, is conclusive as to the facts adjudicated therein, even on interested parties who do not appear and have no actual notice of the proceedings. Finding that petitioner was the only surviving wife of deceased held conclusive against subsequent application of another alleging that she was his wife. In re Aldrich's Estate [Cal.] 81 P. 1011.

62. See, also, Former Adjudication, 3 C. L.

sumed until the contrary appears,[63] and such judgments cannot be collaterally at-

1476. In re Morris, 91 N. Y. S. 706; Blackman v. Mulhall [S. D.] 104 N. W. 250. Are conclusive only as to matters necessarily litigated. Allowance of claims is not binding on heirs. Milburn v. East [Iowa] 102 N. W. 1116. The unappealable order of the surrogate denying the motion of an executor to compel his attorney to pay money into court, on the ground that the circumstances were not such as to require punishment of the attorney and that the executor's remedy was in another direction, is no bar to an action by the executor to recover the money. Reilly v. Provost, 98 App. Div. 208, 90 N. Y. S. 591.

Grant of letters: Letters granted by court having jurisdiction are conclusive evidence of the authority of the persons to whom they are granted until the decree granting them is reversed, or the letters are revoked. Code Civ. Proc. § 2591. Shaw v. New York Cent. & H. R. Co., 101 App. Div. 246, 91 N. Y. S. 746. A decree granting letters of administration to one of two contesting relatives of deceased does not determine who is entitled to take as distributees of the fund. In re Morris, 91 N. Y. S. 706.

NOTE. Letters of Administration. How Far Evidence of Widowhood: Plaintiff's husband was killed in a wreck caused by the alleged negligence of a street railway company, and she, as administratrix, sued for damages. Defendants claimed that plaintiff was not the lawful wife of the deceased and, therefore, not entitled to damages under the statute and offered to show that deceased had a lawful wife living other than plaintiff. Held, that exclusion of such evidence was error. Phillips v. Heraty [Mich.] 100 N. W. 186.

The claim has been made that letters of administration are prima facie evidence of death and it was so held in Tisdale v. Connecticut Mut. Ben. Life Ins. Co., 26 Iowa 170, 96 Am. Dec. 136; Id., 28 Iowa, 12; but that such evidence is very weak may be rebutted by slight evidence. On the same state of acts with the same plaintiff the United States Supreme Court held in Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 Law. Ed. 314, that the granting of letters of administration afforded no legal evidence of death. The latter holding seems to be the correct one, for if otherwise it would open up an avenue of fraud in connection with life insurance policies that would be startling in its possible consequences. It would be easy to procure a policy for a large sum. In a year or two the person insured could disappear. Then letters of administration can be procured and the case is made. Similar unfortunate consequences will result in holding that granting letters of administration is conclusive evidence of widowhood. It might defeat the rights of heirs and the lawful widow and would be an easy way to forestall a prosecution for bigamy. Counsel for plaintiff relies on James v. Emmet Min. Co., 55 Mich. 347, as sustaining his position; the facts were similar to the principal case but the point decided was that the letters of administration were conclusive evidence of plaintiff's right to appear as plaintiff. But in the principal case counsel contended that said letters were conclusive also as to the fact of plaintiff being the lawful widow of the deceased at the time of his death and hence entitled to pecuniary compensation under the statute. Carpenter and Moore, J.J., dissent.—3 Mich. L. R. 159.

Order making allowance to widow: If not appealed from or set aside, is conclusive that she is the widow, and cannot be collaterally attacked on acounting by showing that she is not. In re Nolan's Estate, 145 Cal. 559, 79 P. 428. No appeal having been taken, order is res adjudicata in contest by creditor over classification of his claim. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

Decree barring claims not presented within time limited by notice to creditors. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. Executor cannot be estopped from setting it up, or be held to have waived presentation of claim under oath, in action at law. Id.

Settlement and allowance of accounts: The settlement of an account and the allowance thereof by the court, after due notice, is conclusive against all persons in any way interested in the estate, as to all matters involved which might have been disputed at the hearing, though no objection was in fact made. Code Civ. Proc. § 1637. In re McDougald's Estate, 146 Cal. 191, 79 P. 878. Where the acount required by Code Civ. Proc. § 1628, included an allowed claim in favor of the administratrix for the amount of a note secured by a mortgage on realty belonging to the estate, and was settled and allowed after due notice and without objection, the general creditors could not, on final settlement, contend that such claim was improperly allowed because purchased by the administratrix after her appointment and qualification in violation of Code Civ. Proc. § 1617. Id. If the probate court has jurisdiction of the parties and the subject-matter, its findings and judgment as to the amount of a debt owed by a deceased executor to his testator, and hence to be regarded as assets of the estate to be accounted for by such executor's administrator, are conclusive until reversed, modified, or otherwise adjudged erroneous. Jones v. Willis [Ohio] 74 N. E. 166. A decree of the orphan's court upon the first account of an executor is, as to residuary legatees, conclusive as to the fund being distributed. Does not determine that all subsequent distributions must be made upon the same theory. Stahl's Estate, 25 Pa. Super. Ct. 402.

Decrees on distribution: Adjudication of probate court that one is entitled to a distributive share is conclusive on the administrator. Drew v. Provost [Me.] 60 A. 794. Final order of county court settling estate, and ordering payment of attorney's fees, and imposing lien therefor on funds of the estate, is conclusive. Carpenter v. United States Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404.

63. California: On collateral attack all presumptions are in favor of an order making a family allowance. In re Nolan's Estate, 145 Cal. 559, 79 P. 428.

New York: Under Code Civ. Proc. § 2473, on collateral attack, where the necessary parties were cited or appeared, the jurisdic-

tacked [64] except for want of jurisdiction appearing on the face of the record,[65] or for fraud or collusion.[66]

tion of the surrogate to make an order is presumptively, and in the absence of fraud or collusion, conclusively established, by an allegation of the jurisdictional facts contained in a written petition or answer duly verified, used in the surrogate's court. The fact that the parties were duly cited is presumptively proved by a recital to that effect in the decree. Smith v. Blood, 94 N. Y. S. 667. Surrogate's court obtains jurisdiction by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties. An objection to a decree or other determination, founded upon an omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction, which actually existed, or the failure to take any intermediate proceeding required by law, is available only on appeal. Surrogate may allow such defect to be supplied by amendment. Code Civ. Proc. § 2474. Id.

North Carolina: Where it is admitted that the administrator of a deceased nonresident was regularly appointed, it will be presumed, on collateral attack, and in the absence of a showing to the contrary, that deceased left assets within the state and died within the county of the clerk making the appointment (Code, § 1374, subsec. 4), and hence that the clerk had jurisdiction and that the appointment is valid. Vance v. Southern R. Co., 1138 N. C. 460, 50 S. E. 860.

In South Dakota decrees of the probate court have same force and effect and subject to same presumptions as those of circuit court. Rev. Probate Code, § 26. Blackman v. Mulhall [S. D.] 104 N. W. 250. Need not recite the existence of facts, or the performance of acts upon which jurisdiction depends, but, except as otherwise provided, it is only necessary for them to contain the matters ordered or adjudged. Rev. Probate Code, § 322. Id. Where the order confirming a sale recites that the sale was legally made, it will be presumed in a collateral proceeding that the court had before it proof of compliance with all the statutory requirements, including those in regard to notice. Id. On collateral attack it will be presumed that a petition for appointment of administrator was in fact filed and notice thereof given, in the absence of an affirmative showing to the contrary. Id.

Courts of general jurisdiction: It will be presumed in a collateral proceeding that the circuit court making a decree directing the sale of land belonging to a decedent had jurisdiction of both the parties and subject-matter. Kelley v. Latonia Levee Dist. [Ark.] 85 S. W. 249. Recital in chancery decree of summons and service suffices as against collateral attack though files, etc., contain no citation or indication thereof. Shannon v. Summers [Miss.] 38 So. 345.

64. Blackman v. Mulhall [S. D.] 104 N. W. 250; Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. Within its jurisdictional limits, judgments of probate court import absolute verity the same as those of other superior courts (Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044), unless they show on their face want of jurisdiction (Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025).

In Minnesota import absolute verity to the same extent as those of other courts of superior jurisdiction, except as otherwise provided by statute. Cater v. Steeves [Minn.] 103 N. W. 885. Gen. St. 1894, § 4612, providing that a sale by the representative cannot be avoided by the heir on account of any irregularity in the proceedings, provided certain enumerated essentials appear, operates to take away the conclusive character of an order confirming a sale as to such essentials, so that whenever the record is silent or wanting in material particulars as to any of them the sale may be collaterally attacked within the time limited by statute. Id. Among other things such section requires it to appear that the representative gave notice of the time and place of sale as prescribed by statute, if the order of license so requires, and hence recitals in the order of confirmation that the requirements as to notice were complied with are not conclusive. Id.

Appointment of administrator: In a suit by a foreign administrator, the jurisdiction of the court appointing him cannot be attacked on the ground that his decedent was not a resident of the jurisdiction where administration was granted. Consaul v. Cummings, 24 App. D. C. 36. Judgment appointing administrator cannot be attacked by testimony contradicting the recitals contained in the letters of administration issued thereon. Presumed that recitals are true until set aside in proper court, and defendant cannot have letters ruled out in action by administrator on ground that it appears from plaintiff's evidence that the letters were illegally issued in that he did not take the oath or execute the bond before the ordinary who issued them. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775. A person not interested in the assets of the estate has no right to raise any question as to the legality of a judgment, regular on its face, appointing an administrator. If administrator relies for authority to sue on letters issued by a proper court and regular on their face, a judgment in such suit protects defendants against further suits by other representatives of the estate or others claiming an interest therein. Id. On appeal from an erroneous grant of dative letters to a tutor instead of appellant public administrator, the latter cannot collaterally attack the administrative acts done when no one else complains. Succession of Bossu [La.] 38 So. 878. Fact that no petition was filed cannot be taken advantage of in a collateral proceeding. Blackman v. Mulhall [S. D.] 104 N. W. 250. Though, under Rev. St. 1895, §§ 1880, 1881, the court has no authority to issue ancillary letters of administration c. t. a. more than four years after testator's death, their issuance thereafter is not wholly beyond the jurisdiction of the court so as to render the proceedings subject to collateral attack. Nelson v. Bridge [Tex.] 86 S. W. 7. A decree annulling a clause of the will appointing an independent executrix and appointing the same person administratrix with the will annexed cannot be

attacked in a contest by a creditor over the classification of his claim. Court has jurisdiction and order not void. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

Decrees barring claims: Decree provided for by Rev. 1898, p. 764, § 62, P. L. 1898, p. 740, § 70. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

Judgments allowing claims. James v. Gibson [Ark.] 84 S. W. 485. Instrument sued on held not a judgment allowing a claim but merely an account, and therefore open to collateral attack. Howell v. Brown [Ind. T.] 83 S. W. 170.

Sales of realty to pay debts. Podesta v. Binns [N. J. Eq.] 60 A. 815. Orders for sale of tract of land which has lost its homestead character and has become assets of the estate. Dignowity v. Baumblatt [Tex. Civ. App.] 85 S. W. 834. Finding that notice was properly published. Robbins v. Boulware [Mo.] 88 S. W. 674. Unreasonable delay in applying for order of sale not available in collateral proceeding where rights of innocent purchasers have intervened. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. The existence of an actual unpaid probated indebtedness gives the probate court jurisdiction to sell lands, and pass title so that the sale is not subject to collateral attack. Washington v. Govan [Ark.] 84 S. W. 792. The fact that, on a sale of lands to pay probated debts, the court permitted the widow, who purchased the land, to apply her unpaid dower allowance in personalty to the purchase price instead of paying cash, is, at the most, an error in the distribution of the proceeds, and does not affect the jurisdiction of the court to sell the lands, or render the sale void on collateral attacks. Id. Where it has been determined that realty purchased with pension money is subject to sale for payment of debts, widow and heirs cannot, in collateral proceeding, deny the title of an innocent purchaser on the ground that it is exempt, where they made no such claim before the surrogate. Smith v. Blood, 94 N. Y. S. 667. Where it appears that the surrogate had jurisdiction of the persons of those interested for the purpose of decreeing a sale and to confirm the sale, and no fraud or collusion is shown in either proceeding, the same cannot be collaterally attacked for failure to appoint guardian ad litem for minor heirs. Id. Judgment cannot be collaterally attacked for failure of petition to show that there were any valid debts which had been properly allowed, or because all of the realty was not described therein. Blackman v. Mulhall [S. D.] 104 N. W. 250. Finding that petition was presented by both administrators cannot be collaterally attacked where order of sale was made in name of both. Id. Recital in order for sale that all the proceedings required by law have been complied with is an adjudication that the prior proceedings were valid, and where some notice of sale was given, prevents its regularity or sufficiency from being collaterally attacked (Id.), or for failure to publish notice, for the required time (Id.), or for failure of the published notice of sale to require interested persons to appear and show cause why a sale should not be ordered (Id.).

Note: Where there is some notice of sale, an irregularity or the insufficiency thereof cannot be questioned in a collateral proceeding. Kerr v. Murphy [S. D.] 102 N. W. 687; Quarl v. Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Granger v. Judge of Superior Court, 44 Mich. 384, 6 N. W. 848; Levy v. Pilger, 59 Neb. 561, 81 N. W. 507; Goodell v. Starr, 127 Ind. 198, 26 N. E. 793; Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; Ballinger v. Tarbell, 16 Iowa, 491, 85 Am. Dec. 527; Bonsall v. Isett, 14 Iowa, 309; Darrah v. Watson, 36 Iowa, 117; Shea v. Quintin, 30 Iowa, 58; Applegate v. Applegate, 107 Iowa 312, 78 N. W. 34; Millard v. Marmon, 116 Ill. 649, 7 N. E. 468; Dowell v. Lahr, 97 Ind. 146. —From Blackman v. Mulhall [S. D.] 104 N. W. 250.

Judgment directing administrator to execute deed to property for which decedent had given bond for title cannot be impeached in trespass to try title by showing that description of land in judgment and deed was different from that in the bond. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025.

Widow's allowance: Order making allowance to one as widow cannot be collaterally attacked on acounting by showing that she is not. In re Nolan's Estate, 145 Cal. 559, 79 P. 428. Court may, however, hold that she is not the widow for purposes of distribution. Id.

Allowance of widow's dower in personalty and the extent of her dower in realty, and questions in regard to rents and alleged mismanagement and waste during administration are within the exclusive jurisdiction of the probate court and hence its rulings thereon are not open to collateral attack. Washington v. Govan [Ark.] 84 S. W. 792. Laches held a bar to raising such questions even on direct attack. Id. County court having canceled clause of will appointing independent executrix and having appointed the same person administratrix with the will annexed, a subsequent order making an allowance to the widow and minor children is valid and not open to collateral attack. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839.

Distribution and settlement: As to effect of decree on title to land see Critical Note, 3 C. L. 1489. Nonresident defendants, who fail to prosecute an appeal from the denial of their application for a retrial, cannot collaterally attack a judgment for distribution directing a sale of the property for mere errors not rendering it void and which could have been corrected on appeal. Smith v. Hardesty, 26 Ky. L. R. 1266, 83 S. W. 646. The final order of the county court settling the estate and ordering the payment of attorney's fees directly to the attorneys and imposing a lien in their favor on the funds of the estate is not subject to collateral attack in a proceeding against the administrator's bondsmen to recover for a defalcation. Carpenter v. United States Fidelity & Guaranty Co., 123 Wis. 209, 101 N. W. 404.

65. Blackman v. Mulhall [S. D.] 104 N. W. 250; Smith v. Blood, 94 N. Y. S. 667. The whole record may be introduced for the purpose of showing want of jurisdiction over the person or subject-matter. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868.

Letters of administration, for want of jurisdiction on the part of the surrogate to grant them. Code Civ. Proc. § 2473. McCarthy v. Supreme Court of Independent Order of Foresters, 94 N. Y. S. 876. Invalidity of letters is established in such case

An administrator seeking to get in rents and profits of land for the estate does not represent heirs and though by statute he may sometimes represent them he cannot be regarded as having done so when their interests were not considered or passed on by the court.[67]

In a former volume it was pointed out that a probate decree of distribution should not properly be res adjudicata as to real property titles except so far as to decide who is "entitled to take possession" from the personal representative in order to discharge him, or except the distribution is also endued with the statutory functions of a proceeding to settle titles, a power not ordinarily attributable to courts of probate.[68] This is just what would follow from the general rules of res adjudicata.[69] In a recent case where the effect of a probate decree to deliver property to the personal representative was discussed, an analogous result was reached.[70]

The right of the court to vacate or modify its orders or decrees depends upon the statutes of the various states, construed in the light of the fact that such courts are usually of record and of superior jurisdiction in their limited field.[71]

where the only jurisdictional fact stated in the petition for letters was that deceased was a resident of the county, and this fact is shown to be untrue on the trial of the collateral action. Id. The surrogate's jurisdiction cannot be upheld by proof of facts not before him or acted on by him when he made the decree. Id. Appointment of administrator d. b. n., where there was no vacancy. Hickey v. Stallworth [Ala.] 39 So. 267.

Sale of realty, where it is only authorized to pay debts, and the order of sale shows on its face that it was made to pay expenses of administration only and hence was void. Collins v. Paepcke-Leicht Lumber Co. [Ark.] 84 S. W. 1044. Order directing sale made by judge in vacation, where it was impossible to carry out terms of the will, may be collaterally attacked where it appears on its face that all parties in interest did not consent to the court's assuming jurisdiction as required by Civ. Code 1895, § 4855. Calla-way v. Irvin [Ga.] 51 S. E. 477. Validity of proceedings for sale may be attacked in collateral action to quiet title, where record of those proceedings shows that court had no jurisdiction because application for sale was not made by a creditor or other person interested in the estate, as required by Rev. St. 1899, § 150. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868.

66. James v. Gibson [Ark.] 84 S. W. 485. Fraud which will vitiate judgment allowing claim must be not alone in the original cause of action on which the judgment was obtained, but that practiced in the procurement of the judgment. Id. Even if defendants could collaterally attack judgment appointing administrator for fraud in procuring it, held that court properly instructed jury to find for defendant on this issue as there was no evidence of fraud. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775. A surrogate's decree granting letters of administration upon the estate of a nonresident may be collaterally attacked in a negligence action brought by the administrator on the ground of collusion and legal fraud in obtaining the letters. When such collusion and fraud appear, court is without jurisdiction to sustain the negligence action. Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 N. Y. S. 962. Letters of administration reciting that they were granted on the ground that deceased left property in the state, when in fact he left none, are legally fraudulent, though they further recite that such property was of no value. Id.

67. There is no adjudication as to them. Milburn v. East [Iowa] 102 N. W. 1116.

68. See Critical Note, 3 C. L. 1489. It has recently been held that where the statute authorizes the court on distribution of the estate to "declare the persons entitled thereto" and if it be assigned to two or more in common to make "partition and distribution" which "shall be conclusive," there is no doubt the decree is as binding on the coparceners as to titles as one out of chancery. Parkinson v. Parkinson [Mich.] 102 N. W. 1002. In so holding, the court carefully distinguishes a decision (Haddon v. Hemingway, 39 Mich. 617), that such a partition between heirs or devisees, though binding on their titles as necessarily adjudicated between them, was not binding on the executor as to the unnecessary question, what was his power under the will to sell the lands. Whether in absence of partition the decree is anything more than declaratory of ownership was expressly left unanswered. Id.

69. See Former Adjudication, 3 C. L. 1476.

70. The proceeding was one to compel the delivery of rent notes and a lease to him. The notes were ordered turned over but the decree was silent as to the lease wherein it was claimed to be an adjudication of the title to the leased property. The court held first, that the probate court could not in that proceeding decide title, second, that in adjudging the rent notes to the estate it did not follow that decedent owned the land whence the rents issued wherefore no decision of title could be implied. Milburn v. East [Iowa] 102 N. W. 1116.

71. In California the probate court cannot set aside an appealable order which has become final by failure to take an appeal therefrom or have the same set aside within the time allowed by law. Order making family allowance. In re Nolan's Estate, 145 Cal. 559, 79 P. 428.

In Illinois, the probate court may, at any time during the term of entry, amend, change, or vacate an order settling an estate and discharging the executors, as jus-

An infant distributee, who is one of the next of kin, is a proper party to a proceeding by a creditor for a modification of a decree of distribution.[72] In such a proceeding the representative cannot set up limitations to protect himself against his own fraud.[73]

If the probate court is a court of record, it may at any time amend its records for the purpose of making them conform to the facts and truth of the case.[74]

A decree of distribution has no effect as to property outside of the jurisdiction of the court rendering it as against a stranger in possession thereof.[75]

The full faith and credit rule applies to judgments of probate courts.[76]

The discovery of a valid will after the estate has been administered as intestate does not render such administration proceedings void for want of jurisdiction, but merely furnishes ground for the revocation of the letters of the administrator, and of all the acts of the court inconsistent with the terms of the will.[77]

§ 16. *Appeals in probate proceedings.*[78]—The jurisdiction of appellate courts[79] and the practice on appeal is regulated by the statutes of the various

tice may require it. Griswold v. Smith, 116 Ill. App. 223, app. dism'd, 214 Ill. 323, 73 N. E. 400. An executor m' ing to have such an order set aside for failure to allow him his fees is not required to give notice of his motion to the heirs and beneficiaries. Id. A final order settling the estate is not a consent order, so as to preclude its being set aside except for fraud, accident or mistake, where it is entered in the usual way, though it appears from the order that the parties consented to the approval of the report and the discharge of the executor. Id. Order allowing fees to executor and directing probate court to take such proceedings as might be necessary to secure repayment by legatees of sufficient sum to pay them, held not a personal judgment against the heirs. Id.

In Indiana the final settlement may be set aside on petition of a person interested in the estate, who did not appear and was not personally summoned to do so, showing illegality, fraud, or mistake in such settlement or in the prior proceedings in the administration of the estate affecting him adversely. Burns' Ann. St. 1901, § 2558. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130. Widow may have the settlement set aside for a failure to pay her allowance. Id. Petition by widow showing settlement without payment of her allowance, and that decree was procured by fraudulent statement that heirs had settled with her, and the taking of improper credit by the administrator and a wrongful application of assets which should have gone to pay her allowance held to state sufficient grounds for setting aside the settlement. Id. Need not allege that she has not lost or waived her right to the allowance. Id. The probate court had no power to modify its judgments or decrees after the expiration of the time for appealing therefrom, except when they were entered through a mistake of fact or a clerical error. Gen. St. 1894, § 4730. In re Phelps' Estate [Minn.] 101 N. W. 496.

72. Where it is claimed that the administrator is personally liable, and his surety is joined, an infant is properly made a party at the instance of the surety, though the surrogate cannot compel restitution by him. In re Gall [N. Y.] 74 N. E. 875.

73. Administratrix was served with notice of claim, but did not reject it, and no steps were taken to have it passed upon. She thereafter procured an order for distribution in which there was no mention of the claim, and in which she alleged under oath that her infant daughter was the only creditor. Claimant who had no notice of the proceedings, thereafter began suit against her on his claim which she contested for over five years, and which resulted in a judgment in his favor. In the meantime she had exhausted the estate. Held that, in a proceeding by the creditor to procure a modification of the decree of distribution brought more than 8 years after it was made, the administratrix could not set up limitations. In re Gall [N. Y.] 74 N. E. 875.

74. So as to include an order of notice of the appointment of the executors. Smith v. Whaley [R. I.] 61 A. 173. Such an order is not a judgment so as to preclude its amendment. Id.

75. In such case is not evidence as to the heirship of the distributees. Mace v. Duffy [Wash.] 81 P. 1053.

76. Decree of foreign court directing legacies to be paid out of property therein will control the imposition of inheritance taxes. In re Clark's Estate, 37 Wash. 671, 80 P. 267.

77. Under Rev. St. 1898, § 2443, giving the county court jurisdiction over the settlement of the estates of all deceased inhabitants or residents of the county, whether they die testate or intestate, and in view of Id. §§ 3815-3817, which contemplate such a situation and recognize as legal the acts of the administrator done prior to the revocation of his letters and provide for the continuation of the settlement of the estate. Perkins v. Owen, 123 Wis. 238, 101 N. W. 415.

78. See 3 C. L. 1320. See, also, Appeal and Review, 5 C. L. 121.

79. Illinois: Under 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3153, c. 110, § 90, a party to a probate proceedings can only remove it from the appellate to the supreme court if the judgment of the former be that the order, judgment, or decree of the lower court be affirmed, or if final judgment or decree be rendered therein in the appellate court, or its

states.[80] Statutes authorizing executors or administrators to appeal without giving bond do not apply to cases where the representative is acting in his own interest and adversely to the estate.[81]

judgment, order, or decree is such that no further proceedings can be had in the lower court, except to carry into effect the judgment of the appellate court. Griswold v. Smith, 214 Ill. 323, 73 N. E. 400. See 116 Ill. App. 223. Judgment of appellate court partly reversing and partly affirming judgment of circuit court allowing commissions to one of three executors, and remanding it with directions to ascertain and allow jointly the fees of the three executors, is not final, and will not be reviewed by the supreme court on writ of error. Id. In a proceeding to sell realty to pay debts, where it is admitted that decedent owned the land and there is no question as to the title, the freehold is not involved and hence an appeal lies only to the appellate court and not to the supreme court. Roberson v. Tippie, 215 Ill. 119, 74 N. E. 96.

In Kansas an appeal does not lie to the district court from an order of the probate court refusing to revoke letters testamentary or of administration. Gen. St. 1901, § 2994, provides only for appeal in case letters are revoked. Graves v. Bond [Kan.] 78 P. 851.

In Louisiana homologation of account is not appealable to supreme court unless fund for distribution exceeds $2,000 exclusive of interest, etc. Succession of Fullerton [La.] 38 So. 151. See, also, Appeal and Review, § 4C, 5 C. L. 140.

In Maryland an appeal from an order in proceedings on petitions alleging that the administrator has concealed assets or has omitted to return any part of the assets, under Code, art. 93, § 239, lies only to the circuit court of the county or to the superior court of Baltimore city. Id. § 240. Stonesifer v. Shriver [Md.] 59 A. 139. This does not apply where petition improperly combines an allegation as to the omission of assets with others matters over which the orphans' court has no jurisdiction, and the order deals with both subjects, but in such case an appeal lies to the court of appeals. Id.

In Pennsylvania an appeal from the decree of the orphans' court on any single claim not greater than $1,500 lies only to the superior court. Act May 5, 1899 (P. L. 248). In re Eslen's Estate, 211 Pa. 215, 60 A. 733. Where orphans' court disallows two distinct claims, one over and one under that amount, the supreme court will, on appeal to it, remit the consideration of the smaller one to the superior court and review the larger one. Id.

80. Time of appeal: In Indiana on appeal by any person other than the executor or administrator, growing out of any matter connected with a decedent's estate, the appeal bond must be filed within ten days after the decision complained of is made, unless, for good cause shown, the court to which the appeal is prayed shall direct the appeal to be granted on the filing of such bond within one year. Burns' Ann. St. 1901, §§ 2609, 2610. Action by nonresident to recover from residuary devisees and legatees upon an alleged liability of their testator is within the statute. Clevenger v. Mathews [Ind. App.] 73 N. E. 161. The mere fact that the trial court allowed plaintiff 30 days in which to file his bond and that he filed it within that time is insufficient to prevent dismissal, no application having been made to the appellate court for an extension of time. Id.

In Rhode Island under Gen. Laws 1896, c. 248, § 1, appeals to the supreme court from probate orders must be taken within 40 days next after the order or decree is made. Smith v. Whaley [R. I.] 61 A. 173.

Practice, etc. California: The judgment roll on an appeal from an order settling the accounts of an executor consists of the petition and account, and reports accompany the same, objections and exceptions thereto, if any, findings of the court, if any, and the order settling the account. In re Thayer's Estate [Cal. App.] 81 P. 658. Though the transcript on appeal from a decree settling the executor's final account includes a decree of partial distribution, notice of appeal therefrom, and a remittitur, they cannot be considered unless contained in a bill of exceptions as required by rule 29 (64 P. xii). Id. Hence court cannot pass upon the power of the superior court to make such decree pending an appeal from a decree of partial distribution. Id.

Maryland: In case of appeal from a final decree of the orphans' court, the other proceedings must be transmitted to the appellate court with the decree. Code, art. 93, § 251. Stonesifer v. Shriver [Md.] 59 A. 139. In such case all the depositions must be taken in writing and recorded. Code, art. 93, § 250. Decree cannot be sustained where, on appeal therefrom, no evidence appears in the record. Stonesifer v. Shriver [Md.] 59 A. 139. A proceeding in the orphans' court to rescind an order approving an administrator's account, and to require a restatement of such account, in which the administrator appeared in pursuance of an order to show cause, is plenary and not summary. Id. Hence appeal will not be dismissed for failure to give immediate notice of intention to appeal or because the evidence has not been reduced to writing and transmitted to the appellate court. Id.

Utah: The findings and order of the court making certain allowances for administrator's and attorney's fees, and offsetting a personal claim of the administrator against moneys coming into his hands, cannot be reviewed on appeal from an order allowing his report and final account, where the record does not contain any of the evidence relating to the matters in dispute. In re Reed's Estate, 28 Utah, 465, 79 P. 1049.

Wyoming: Where executor is erroneously removed solely on the ground of non-residence, which is admitted, it is not necessary for the supreme court to have all the evidence before it in order to reverse the judgment. Hecht v. Carey [Wyo.] 78 P. 705.

81. Burns' Ann. St. 1901, §§ 2609-2612, does not apply to an appeal by an administrator from orders requiring him to give a new bond and removing him for failure to do so.

Appeals are generally allowed from all final orders or decrees of the court having jurisdiction of probate matters,[82] and may be taken by anyone having an interest in the estate,[83] who is aggrieved thereby.[84]

Moore v. Bankers' Surety Co., 34 Ind. App. 633, 73 N. E. 607.

82. Section 124, Administration Act, relative to appeals from county courts in probate matters, allows appeals only from orders, final in their character. Van Sellar v. James, 113 Ill. App. 206. Whenever a bill or petition is filed in the orphans' court, whether or not the parties are cited to appear, the proceedings are plenary if they do in fact appear and answer. Stonesifer v. Shriver [Md.] 59 A. 139.

Orders and decrees held appealable: Judgment overruling motion to dismiss caveat to widow's application for an allowance. Mathews v. Rountree [Ga.] 51 S. E. 423. An order permitting resignation and cancellation of the bond on qualification of a successor. Succession of Broadway [La.] 38 So. 430. The disallowance of an opposition to letters where it was predicated alternatively on needlessness of administration and on opponent's preferential right to letters. Miguez v. Delcambre [La.] 38 So. 820. An order of the probate court vacating in part a previous decree of distribution. Gen. St. 1894, § 4665, subd. 9. In re Phelps' Estate [Minn.] 101 N. W. 496. Orders allowing fees of administrator and his attorney entered in the form of solemn judgments, and showing that they were entered after hearing evidence and making findings, and unqualifiedly directing payment of the sums allowed, which are found reasonable. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945. Decree in suit by executor against devisees to convene creditors and administer the assets for their payment, made on a report of debts by a commissioner, which decrees debts against the estate and subjects its land to their payment. Must be appealed from within two years. Trail v. Trail, 56 W. Va. 594, 49 S. E. 431.

Orders and decrees held not appealable: Supreme court cannot review allowance of amendment to caveat to widow's application for an allowance, since it is interlocutory and would not have finally disposed of the case if decided in favor of the excepting party. Civ. Code 1895, § 5526. Mathews v. Rountree [Ga.] 51 S. E. 423. An order by the circuit court upon appeal from the county court refusing to pass upon the merits of objections to a final account and finding that such account was not a proper account. Van Sellar v. James, 113 Ill. App. 206. Comp. Laws, § 669, authorizing appeals from orders, sentences, appeals or denials of probate judges, does not authorize an appeal from an order to produce for examination books and papers to be used in controversy over removal of executor and the settlement of his accounts, it not being final or decisive of the merits. Erwin v. Ottawa Circuit Judge [Mich.] 101 N. W. 537. A decree directing an executor to make return to the court of an order of sale of real estate for the payment of debts, granted upon his application, and upon confirmation of the sale to execute a deed to the purchaser, is interlocutory. Walker's Estate, 25 Pa. Super. Ct. 256. Where the statute enumerates the instances in which an appeal may be taken from the district court to the supreme court, orders or decrees not mentioned therein are not appealable. Orders refusing to vacate decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, not appealable under Code Civ. Proc. § 1722, subd. 3, as amended by Sess. Laws 1899, p. 146. In re Kelly's Estate [Mont.] 78 P. 579. Orders refusing to vacate, dissolve or modify appealable orders or judgments are not appealable in any event, unless right is specifically given. Id. The provisions of subd. 2 of such section, authorizing appeals from special orders after final judgment, does not apply to orders in probate proceedings except in so far as it is made applicable by other provisions of the statute. In re Kelly's Estate [Mont.] 79 P. 244. In an equitable action to subject lands devised to the debts of the testatrix against devisees in possession under the will, where the case has been referred to a master to hear and determine all equitable issues, and there has been a verdict of a jury on certain matters submitted to them, but there has been no order or judgment predicated thereon, an appeal is premature under Code Civ. Proc. § 11. Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72. Appeals will not ordinarily lie from discretionary orders. Where it only calls in question the selection of person appointed administrator pendente lite of decedent's estate and amount of security to be given. Davenport v. Davenport [N. J. Err. & App.] 60 A. 379. In New York the exercise of the surrogate's discretion in the allowance of commissions to a representative who has been guilty of misconduct is reviewable by the appellate division. Allowance by surrogate reversed. In re Gall, 95 N. Y. S. 124.

83. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205. Where, on application of the legatees for partial distribution, the executrix raises an issue of law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors, both the power of the executrix to comply with the order and the right to an immediate distribution are involved, and hence the executrix is interested both personally and on behalf of the creditors, and may appeal from an order directing such distribution. In re Murphy's Estate, 145 Cal. 464, 78 P. 960. Administrator is not an interested party and hence cannot sue out a writ of error to review the decree in a suit to remove a cloud from title to realty. Right is in the heirs. Strong v. Peters, 212 Ill. 282, 72 N. E. 369.

84. Gen. Laws 1896, c. 248, § 1. Smith v. Whaley [R. I.] 61 A. 173. Rev. St. c. 65, § 28. In re Stilphen [Me.] 60 A. 888. Code Pub. Laws, art. 50, § 60. Lee v. Allen [Md.] 59 A. 184. Code Civ. Proc. § 938. In re Steward's Estate [Cal. App.] 81 P. 728. Only those are aggrieved whose pecuniary interests are directly affected by the order or decree complained of, or, in other words, only those

Only such persons in such capacities as are affected by the order appealed from need be joined as appellees, not all who are interested in the estate.[85] The estate is not a necessary party to an appeal from an order directing an administrator to file a new bond and removing him for failure to do so.[86] The administrator is neither a necessary nor a proper party to an appeal from a judgment classifying approved claims against the estate.[87] Where the judgment or order entered on the administrator's report is favorable to the estate, but unfavorable to him individually, he should appeal therefrom in his individual and not in his representative capacity.[88] In such case the estate, by its administrator, should be made an appellee and should not be joined as appellant.[89] Notice of appeal from an order settling the account

whose rights of property may be established or divested thereby. Not every one who is dissatisfied, or who happens to entertain desires on the subject. In re Stilphen [Me.] 60 A. 888. Means a denial of some personal or property right, or the imposition on the party of a burden or penalty. Smith v. Whaley [R. I.] 61 A. 173.

An assignee of the distributive share may appeal from a decree directing distribution to a legatee, under Rev. St. c. 65, § 34, giving anyone claiming under an heir at law the same rights as the heir in all proceedings in probate courts, including rights of appeal. In re Stilphen [Me.] 60 A. 888.

Creditors may appeal from order permitting resignation of representative and cancellation of bond on qualification of his successor. Succession of Broadway [La.] 38 So. 430.

Executor may appeal from an order refusing to set aside an order approving his final account and to fix and allow his fees. Griswold v. Smith, 116 Ill. App. 223, app. dism'd 214 Ill. 323, 73 N. E. 400. Appeal properly taken from such order and not from order approving the final account, where no fees at all were allowed by the latter order, since it contained no adjudication personal to himself. Id.

Heirs: Where, on petition alleging that moneys deposited in the name of the deceased belonged to the petitioner, the heirs intervened, denying the allegations, they were entitled to appeal from a judgment that the petitioner owned the money, though the judgment entry did not refer to them in terms. In re Anderson's Estate, 125 Iowa, 670, 101 N. W. 510.

Trustee holding funds of an absentee may appeal from order refusing to revoke letters of administration on his estate, especially when it was made for purpose of vesting title to trust property in administrator. Lee v. Allen [Md.] 59 A. 184.

Representative held not to have right to appeal: Executrix not aggrieved by order, on petition for partial distribution, directing payment of legacies, though she claims that legatees have forfeited their rights under the will by contesting it. In re Murphy's Estate, 145 Cal. 464, 78 P. 960. In any event she is not entitled to litigate the question on appeal, where the order directing distribution has become final by failure of the legatees and devisees to appear or in any manner object thereto. Id. Administrator not aggrieved by order denying his petition to sell all of the realty, where enough of it was ordered sold to pay the expenses of administration (In re Steward's Estate [Cal. App.] 81 P. 728), Nor by decree directing him to pay to a legatee rather than to an heir, since he has no pecuniary or personal interests which can be affected by a decree of distribution of funds shown by his account to be in his hands, and no property rights which can be established or divested thereby (In re Stilphen [Me.] 60 A. 888). Where a claim is made before the auditor which no other creditor or claimant objects to and is allowed by the auditor and confirmed by the court, the executor cannot on appeal object to its allowance. May's Estate, 25 Pa. Super. Ct. 267.

A creditor is not aggrieved by an order of the probate court amending the record of its proceedings so as to include an order of notice of the appointment of the executors of the estate, required by Gen. Laws 1896, c. 212, § 32, for the purpose of limiting the time within which suits may be brought against them (Id. c. 218, §§ 8, 9). Only the representative could appeal from the order of notice. Smith v. Whaley [R. I.] 61 A. 173.

85. On appeal from the appointment of a dative testamentary executor, he need not be cited as executor, only as individual, and the succession need not be cited. Succession of Henry, 113 La. 787, 37 So. 756. Where creditors appeal from the allowance of a resignation and cancellation of the bond on qualification of a successor, the beneficiaries and other creditors of the succession are not necessary parties. Succession of Broadway [La.] 38 So. 430.

86. Estate itself is not a proper party to an appeal, and record did not show that a new administrator was appointed after removal of appellant. Appeal is in interest of appellant alone. Moore v. Bankers' Surety Co., 34 Ind. App. 633, 73 N. E. 607.

87. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

88. Where order of circuit court refused allowances asked by administrator, charged him with costs, and ordered allowance made him for services to be set off against a debt due from him to the estate. Moore v. Ferguson, 163 Ind. 395, 72 N. E. 126.

89. Rights as administrator and as individual are separate and distinct, and are adverse to each other. Appeal dismissed for failure to join administrator as appellee. Moore v. Ferguson, 163 Ind. 395, 72 N. E. 126. Burns' Ann. St. 1901, § 2546, permitting anyone interested in the administration of the assets of the estate to except to and contest the correctness of the representative's accounts, does not make exceptor stand for or

of an executor need not be served on a creditor whose claim has been allowed, but who does not appear and make himself a party to the proceedings,[90] nor on the attorneys of the executor, whose fees the order appealed from directs him to pay.[91]

An appeal from an order of final settlement deprives the probate court of jurisdiction over the estate pending its determination.[92]

In those states in which an appeal lies to a court of general jurisdiction, the matter is generally tried de novo,[93] the issues, however, being limited to those raised in the probate court.[94]

A court having appellate jurisdiction only can consider only questions raised and passed upon in the lower court,[95] except that fundamental errors may be raised at any time.[96] The usual presumption in favor of the proceedings in the lower court apply.[97]

All the findings and matters decided which enter into and are part of the order appealed from go up with it,[98] but matters subsequently decided [99] and recitals of facts previously decided and become conclusive will not be considered.[1]

represent the estate so as to change the rule. Id.

90. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

91. Not persons interested in the estate, and could not be parties to the proceedings settling the account. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

92. A probate court has no jurisdiction to adjudicate a claim filed therein while the estate is pending in the circuit court on appeal from a decree of the probate court settling the executor's accounts. In re Cassity [Mo. App.] 87 S. W. 595.

93. In Illinois appeals from the probate court are triable de novo, and their effect is to vacate the judgments appealed from. Klicka v. Klicka, 105 Ill. App. 369.

In Minnesota appeals from the probate to the district court are to be tried de novo in the latter court. Gen. St. 1894, § 4672. On appeal from order making allowance for support of widow and family, district court should determine allowance to be made in exercise of its own judgment. In re Strauch's Estate [Minn.] 104 N. W. 535.

In Texas issues on orders appealed from from the county to the district court will be tried de novo. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205. On appeal from a judgment classifying claims. Evidence otherwise admissible may be admitted, though not offered below. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

In Wisconsin on appeal from allowance of final account case is tried de novo in circuit court. Rev. St. 1898, § 4034. Fitch v. Huntington [Wis.] 102 N. W. 1066.

94. In Missouri the jurisdiction of the circuit court on appeal from a decree in the probate court settling the executor's accounts is limited to passing on the matters presented by the appeal; hence it cannot remand the case to the probate court to hear and determine a claim filed there pending the appeal. In re Cassity [Mo. App.] 87 S. W. 595.

In Texas the district court has appellate jurisdiction only in the administration of estates (Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205), and has no jurisdiction to order a sale of property, on an appeal from the county court from an order removing an administrator (Id.).

95. The supreme court has no original jurisdiction in the matter of the removal of executors, and can only consider grounds of removal passed upon by the lower court. Order erroneously removing executor on the sole ground of non-residence cannot be sustained because the evidence shows other grounds, notwithstanding a statute authorizing the supreme court in certain cases to render such judgment as the court below should have rendered. Hecht v. Carey [Wyo.] 78 P. 705.

96. That lien creditors do not object to an order authorizing the sale of land to pay debts, on the ground that the record fails to show that proper notice of the application for the order of sale was given or that there was no evidence of necessity for the sale, does not preclude them from objecting on appeal. Texas Land & Loan Co. v. Dunovant's Estate [Tex. Civ. App.] 87 S. W. 208. That mortgagees of a portion of the lands of an estate do not object to a sale of all the lands in bulk, at the time application for authority to sell was made does not preclude them urging on appeal that there was no evidence authorizing such sale. Id.

97. Where the court finds that an order fixing the fee of an attorney appointed to represent minor devisees and legatees having no guardian was duly made, given and entered, it will be presumed on appeal, in the absence of a showing to the contrary in the record, that all persons interested were duly notified of the application for the fixing of the fee. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072. Mere fact that there never had been any previous account filed by the executor does not conclusively establish want of such notice. Id.

98. A decree establishing due notice to creditors to present their claims which is embraced in a decree settling the executor's account and making final distribution is reviewable on appeal from the latter. In re Wilson's Estate [Cal.] 81 P. 313. Where there is only one fund out of which claims can be paid, which is insufficient to satisfy them all, and on a contest for priority in the county court a judgment is rendered so classifying the claims as to give one of them nearly the entire fund to the exclusion of the others, an appeal by one of the unsuc-

A reversal will not be ordered for errors not affecting the substantial rights of the parties.[2]

The right of the appellate court, on reversal of an order appointing an administrator, to itself make an appointment,[3] and, on reversal of a decree of distribution, to itself make distribution, depends on the statutes of the various states.[4] In Minnesota on appeal from an order making an allowance for the support of the widow and minor children, the district court should determine the allowance to be made in the exercise of its own judgment.[5]

Mandamus will lie to compel the probate court to set aside its order appointing one as ancillary administrator who is not of kin to decedent, and to grant letters to relators, there being no denial of the fact that the latter are decedent's next of kin and are otherwise qualified to act.[6]

§ 17. *Rights and liabilities between beneficiaries of estate. A. In general.*[7]—Contracts between the heirs, distributees, and legatees,[8] and between them and the

cessful claimants to the district court ipso facto brings up the entire case, with its subject-matter and all the parties contesting therefor. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

99. On appeal from an order settling the executor's account, the contention that the court erred in refusing to grant a motion to amend the findings of fact, which was made more than a month after taking the appeal, will not be considered. In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072.

1. Where it had already been determined, in the course of administration and in special proceedings for that purpose, what property was the separate property of deceased and what was community property, findings on application for distribution merely reciting the ultimate facts so previously found are not reviewable on appeal from the decree of distribution. Drasdo v. Jobst [Wash.] 81 P. 857.

2. Not for failure of the district court to pass upon the claim of one of the parties, where the ruling of the county court thereon was unquestionably correct. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436. The homologation will not be disturbed merely because the accountant applied to her claim as widow certain movables of small value at their appraised value instead of selling them, no loss to the estate having resulted. Succession of Peters [La.] 38 So. 690.

3. **In Louisiana** when on a devolutive appeal the appointment of one as dative administrator is reversed in favor of the public administrator, the court of review must of necessity make the appointment as it should have been, notwithstanding administration is practically complete and no good will result to the estate, but the burden of fees and commissions instead. Succession of Bossu [La.] 38 So. 878.

In Tennessee the circuit court, on appeal from order of county court appointing administrator, has no jurisdiction to make an appointment, or to revoke letters improvidently granted, but, on deciding in favor of appellant, should remand the cause for the issuance of letters by the county court. In re Wooten's Estate [Tenn.] 85 S. W. 1105. It has no power to consider the application of anyone not a party to the proceedings in the county court. Id.

4. In reversing an order of distribution in an action by an administrator to pay debts, the appellate court should either make the order of distribution or remand the case to the probate court with specific instructions as to the items to which the fund should be applied. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

5. In re Strauch's Estate [Minn.] 104 N. W. 535.

6. Court's action in such case is ministerial and involves no exercise of judicial discretion. State ex rel. Mitchell v. Guinotte [Mo. App.] 86 S. W. 884. The fact that evidence was required to show the relationship of relators to deceased and their residence did not convert the proceeding into a judicial investigation. Id. Probate court could not, by mere denial of relator's right to administer, convert the proceedings into a judicial inquiry, but must have been some foundation for such denial. Id. Statement of return that respondent heard witnesses whose evidence justified his action and which made it a judicial hearing involving judicial discretion, without stating and proving the import of such evidence, does not make a showing constituting a good defense to the writ. Id.

7. See 3 C. L. 1323.

8. Where the interests of creditors are not involved, the heirs may agree upon a division of the property, or they may adopt and make valid a distribution under what would have been void as a judicial proceeding. Williams v. Williams Co. [Ga.] 50 S. E. 52. Agreement by widow to a division, without consideration and made under a mistake of law as to her rights in the estate, may be set aside. Terry v. Logue [Ark.] 87 S. W. 119. Assignment by widow of her right to receive certain interest under the will in consideration of support for life held without consideration, where assignees were bound to furnish her such support under the terms of a deed to realty previously made by her to them. In re Castner's Estate [Cal. App.] 81 P. 991. Administrator with the will annexed held to have no power, either under the will or under a compromise agreement between the interested parties, to partition the realty among the residuary devisees, or to sell it for the purpose of dividing the proceeds among them, no sale being neces-

representative in regard to the distribution of the estate, will be enforced, if otherwise valid.[9] In case a consent division is made, each heir, without deed or further conveyance, acquires a perfect equity in the property set apart to him, and loses all interest in the part assigned to the other distributees.[10] A release of all claims on account of a legacy does not estop one from participating as heir in any portion of the estate as to which testator died intestate.[11] Where a conveyance of the interest of certain female heirs in decedent's land is void for failure of their husbands to join therein, their interest in the proceeds of the sale of the land for purposes of distribution and payment of debts should be charged with the amount received by them

sary for any other purpose, but he could only convey the same to them as tenants in common. Cronan v. Adams [Mass.] 75 N. E. 101. Evidence insufficient to show agreement or contract by legatee that her share of the estate should be applied as payment for certain land conveyed to her husband. Berkemeier v. Peters [Mo. App.] 86 S. W. 598. An agreement by the husband that estate of his wife shall be distributed in a certain manner in case her will is set aside is not contrary to public policy, though he is her executor. Is not an agreement to permit setting aside of the will. Crockett v. Sibley [N. H.] 61 A. 469. Agreement by husband with heirs of deceased wife to accept a specified sum in full of his rights in her estate, held to amount to an equitable assignment to the heirs of the rest of his interest. Id. Agreements by heirs of deceased wife that if will was set aside they would pay a specified sum to the husband and another sum to another person, and by husband to accept such sum in full of his rights and to pay certain specified legacies therefrom, held to constitute one contract, each being a consideration for the other. Id. Persons to whom the husband agreed to pay certain sums out of the share which he was to have in case the will was set aside, but who had no interest in the estate after it was set aside, are not necessary parties to a bill by the heirs to secure distribution in accordance with the agreement. Id. An agreement for the distribution of the estate in case the will is set aside is not enforceable until due administration has been had, though it becomes binding as soon as the will is set aside. The claims of the parties while unsatisfied, however, afford ground for equitable protection. Id. Where equity determines the rights of the parties under a contract, the probate court, on final settlement, must decree distribution in accordance with its views. Id. Agreement for settlement of litigation and division of estate held to entitle plaintiff to ten per cent. of the excess over a certain sum, though such excess consisted of income instead of principal. Chauvet v. Ives, 93 N. Y. S. 744. Where, after settlement of estate as intestate, the widow and mother of decedent, recognizing the possibility of a will being discovered which would give the mother an interest in the property, agreed that two parcels of realty should be conveyed to her by the widow in full satisfaction of any claim on her part, whether a will should be subsequently discovered or not, and this was done and mother gave receipt in full of all claims, held that such agreement was valid, and mother was estopped to claim that she was not bound thereby. Perkins v. Owen, 123 Wis. 238, 101 N. W. 415. Though the mother did not convey her interest in the land retained by the widow, her release amounted to an equitable conveyance of her rights therein, and entitles the widow to a decree in equity removing the cloud from her title. Id. Parol evidence is admissible to show that the word "claims" in the release refers to possible claims of the mother under the supposed will. Id. Where certain heirs at law of testator assigned an undivided third interest in their shares to another heir who agreed to employ and pay counsel and do all things necessary to secure the assignor's interests, it being understood that no further liability should exist against the assignors, the assignors are not necessary or proper parties to a suit to enforce a lien on their shares of the estate for services rendered by counsel in contesting the will under a contract with the assignee pursuant to the assignment, which could not, under its terms, create a charge against them personally, or against their unassigned interest in the estate. Ingersoll v. Coram, 127 F. 418. Neither is the principal legatee or his representative, on his decease, a necessary or proper party. Ingersoll v. Coram, 136 F. 689.

9. An agreement by an administrator that in case a transfer tax was not assessed he would divide the amount reserved for that purpose ratably among the heirs provided they would waive a formal settlement and execute a release so that he could obtain his discharge is his personal promise and not a promise as administrator, and, no tax having been assessed, neither the release nor a decree of discharge entered thereon is a defense to an action by one of the heirs for his share. Execution of release for purpose of enabling him to obtain a discharge is sufficient consideration for the promise. Thompson v. Thompson, 180 N. Y. 311, 73 N. E. 43, rvg. 88 App. Div. 618, 84 N. Y. S. 1148. No variance of the written release since claim is based on his personal promise and not his promise as administrator. Id.

10. Williams v. Williams Co. [Ga.] 50 S. E. 52. Where, pending an appeal by a sole legatee from a judgment setting aside the probate of the will, the matter was compromised and it was agreed that the will was to be established, and that the legatee should convey half the property to contestants on its division by commissioners, held that, until the execution of the conveyances by the legatee, he held title to the part set off to contestants in trust for them, so that his wife was not entitled to dower therein after his death. Allard v. Allard [Ky.] 86 S. W. 679.

11. In re St. John,. 93 N. Y. S. 840.

as the consideration for such conveyance.[12] A separation agreement between husband and wife whereby the latter releases all her interest in his property, in consideration of a payment to her of a part thereof, is enforceable against her after her husband's death.[13]

A contract to dispose of one's property in a particular way by will may be enforced against his heirs, devisees, or legatees.[14]

The omission of an executor to formally convey to the widow who remained in possession under a written agreement whereby she was to pay the debts of the estate and discharge the executor from liability does not affect the right of the widow to the property.[15]

Legacies abate ratably to pay the share of a widow electing to take against the will.[16] One who elects against a will devising land charged with unpaid purchase money takes the intestate share in the lands free of such incumbrance[17] though he elects after the devisee has assumed the charge.[18] The personalty is in such case exonerated from contribution[19] and the devisee is on a parity with specific legatees in this respect.[20] Forced contribution does not apply against specific devises to exonerate specific legacies.[21] A specific charge on a devise is not to be reckoned as a debt of the estate in finding the intestate share of one who renounces.[22]

The liability of heirs to contribute is pro rata.[23]

Family settlements.[24]—Compromises of conflicting claims by family settlements are encouraged by the courts, and they may not be avoided or disregarded for mere inadequacy of consideration, or except upon clear and convincing proof of grave fraud or mistake.[25] Children who do not claim from their father, but directly under the will of their grandfather, are not affected by a family settlement to which their father was a party.[26]

(§ 17) *B. Advancements.*[27]—Strictly speaking the word advancements is applicable only to cases of intestacy, and means moneys advanced by a parent to a child in anticipation of the latter's future share of his estate.[28] It is, however, employed by courts of equity in a broader sense to denote money or property advanced as a satisfaction pro tanto of a general legacy given by a parent or other person standing in loco parentis to a child or grandchild.[29] Whether moneys advanced to a legatee shall be considered as reducing his legacy is a question of intention.[30]

As a general rule if the purchase money for land is paid by the husband or father, and the legal title is taken in the name of the wife or child, the presumption

12. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734.

13. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623. See, also, Husband and Wife, 3 C. L. 1669.

14. See Wills, 4 C. L. 1863.

15. Agreement between executor and beneficiary turning over property to latter is equivalent to formal deed. Logan v. Bean's Adm'r [Ky.] 87 S. W. 1110.

16. Where stock was decreased one-third by widow's election to take against the will, the interest of the legatees in the remainder abates in proportion to their original holdings. In re Klenke's Estate [Pa.] 60 A. 167.

17, 18, 19, 20. Gordon v. James [Miss.] 39 So. 18.

21. All legacies must be entirely consumed. Gordon v. James [Miss.] 39 So. 18.

22. Gordon v. James [Miss.] 39 So. 18.

23. Hence assumpsit lies not. Calhoun v. Tangany, 105 Ill. App. 23.

24. See 3 C. L. 1315.

25. Adopted children held to have no equitable claim to have settlement, whereby they accepted certain stock, set aside after eleven years, and where they did not offer to return what they had received. Burnes v. Burnes [C. C. A.] 137 F. 781. Family settlement held not void for duress or fraud, nor would it be set aside because some of the parties signed it without reading it. Burnes v. Burnes, 132 F. 485.

26. Parrott v. Barrett, 70 S. C. 195, 49 S. E. 563.

27. See 3 C. L. 1324.

28. Code Civ. Proc. § 2733, Real Property Law (Laws 1896, c. 547), §§ 295, 296. In re Cramer, 43 Misc. 494, 89 N. Y. S. 469. The operation of the statute as to advancements can only apply where the decedent died intestate as to his property. Bullock v. Bullock, 3 Ohio N. P. (N. S.) 190.

29. In re Cramer, 43 Misc. 494, 89 N. Y. S. 469.

30. See Wills, 4 C. L. 1919.

is that such conveyance was intended as an advancement, and there is no implication of a resulting trust.[31] Such presumption, however, may be rebutted by proof of a contrary intention,[32] and parol evidence is admissible for that purpose.[33] No such presumption exists where the person paying the consideration is under no legal or natural obligation to support the person taking the title.[34]

The use of land which is enjoyed must be accounted for as an advancement.[35]

In the absence of statutory provisions to the contrary, the value of advancements is to be reckoned as of the time when they are made, unless the contrary appears from the terms of the conveyance.[36] This rule has been changed in many states so that the advancement is valued at what it would have been worth at the death of the decedent if no change had been made in the condition of the property.[37] Though the intention of the parent as to the equality of advancements is not conclusive, and will be disregarded if it is shown that he was mistaken, yet, where the facts were within his personal knowledge, and there was no interference with his judgment or attempt to influence it, some weight must be given to his conclusion that he had equalized the shares of those to whom the advancements were made.[38]

By statute in some states in order to constitute an advancement it is necessary either that the ancestor express in the gift or grant his intention that it be an advancement, or that he charge it in writing as an advancement, or that the child or other descendant acknowledge it in writing to be such.[39] Under such a statute parol evidence is inadmissible to show that the sum named in a note was intended as an advancement.[40] A loan from an ancestor to an heir may, with the latter's consent, be converted into an advancement by the ancestor, but in order to establish such fact it must be made to clearly appear that the ancestor expressed the intention to make the change, and that the heir acquiesced therein.[41] In case the ancestor receives such evidence of indebtedness as a bond or promissory note, the presumption is that it is a debt and not an advancement, and, while such presumption is not absolute, it can only be overcome by clear and satisfactory evidence.[42]

31. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453.

32. Such presumption, however, may be rebutted by evidence showing that, at the time of the conveyance, it was the intention that the wife or daughter should not take the beneficial interest. In such case a trust will result in the parent's favor. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. Evidence held to rebut presumption of intention to make advancement to daughter. Id. Purchase of land by husband in wife's name held advancement in absence of sufficient proof of contrary intention. Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453.

33. The question is one of intention, which may be shown by proof of antecedent or contemporaneous facts or acts, or of acts or facts occurring so soon after the purchase as to be fairly considered parts of the transaction. May be shown that it was not an advancement by proof of facts tending to show that it was not so intended. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. Presumption may be rebutted by clear and convincing parol testimony, or by proof of such acts and circumstances as clearly show a contrary intention. Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453. Parol evidence is admissible to rebut the presumption. Evidence held to disprove any presumption of gift to one whom deceased had promised to marry when his wife procured a divorce. Lufkin v. Jakeman [Mass.] 74 N. E. 933.

34. Is a resulting trust where married man takes title in name of woman to whom he was engaged to be married whenever his wife should obtain a divorce and leave him free to marry again. Lufkin v. Jakeman [Mass.] 74 N. E. 933.

34. Boblett v. Barlow, 26 Ky. L. R. 1076, 83 S. W. 145.

36. Eastwood v. Crane, 125 Iowa, 707, 101 N. W. 481.

37. Code, § 3383, adopts this rule. Increased value on account of improvements put upon the land by the heirs should not be considered. Eastwood v. Crane, 125 Iowa, 707, 101 N. W. 481.

38. Boblett v. Barlow, 26 Ky. L. R. 1076, 83 S. W. 145.

39. Cobbey's Ann. St. 1903, § 4937. Lodge v. Fitch [Neb.] 101 N. W. 338. Rev. St. 1898, § 3959. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678.

40. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678. It is also inadmissible irrespective of the statute as tending to contradict the plain terms of an unambiguous written contract. Id.

41. Lodge v. Fitch [Neb.] 101 N. W. 338.

42. Converts intended advancement into debt unless memorandum is made elsewhere

Money given as an advancement cannot afterwards be made a debt.[43] Advancements do not bear interest unless an intent that they shall is clearly expressed in the will.[44]

Hotchpot.[45]—Where advancements have been made in the lifetime of the parent, they must, on his death intestate, be brought into hotchpot by those who have received them, so that perfect equality may be obtained.[46] There is a conflict of authority as to whether or not this rule applies where those receiving the advancements have relinquished all further interest in the inheritance.[47] In determining the effect of such relinquishments, the law of the state where the property is situated controls.[48]

§ 18. *Rights and liabilities between beneficiaries and third persons.*[49]—If made for a legal consideration and without fraud, an assignment of one's interest in the estate of a decedent before the estate is settled and his right to a distributive share is established is valid and is a good defense to an action by the assignor against the administrator to recover the share adjudged to be due him as distributee.[50] In such case, though the adjudication of the probate court as to his right to such share is conclusive on the defendant, he may, for the purpose of meeting the charge of fraud in obtaining the assignment, prove circumstances tending to show that at the time of the assignment the assignor doubted his right to a share.[51]

One claiming title to property ordered distributed as assets of the estate of a decedent should sue in equity to prevent its being turned over to the estate, provided this has not already been done, rather than to recover it from the beneficiaries.[52]

In equity and good conscience, the debts of decedent should be paid out of his estate before it should be made to pay the individual debts of the heir or devisee,[53]

of its real character. Lodge v. Fitch [Neb.] 101 N. W. 338. Evidence insufficient to show that note executed by daughter and her husband to her father was intended as an advancement. Id.

43. Boblett v. Barlow, 26 Ky. L. R. 1076, 83 S. W. 145.

44. Stahl's Estate, 25 Pa. Super. Ct. 402.

45. See 3 C. L. 1326.

46. Mort v. Jones [Va.] 51 S. E. 220. Advancements should be brought into hotchpot and deducted from the shares of the heirs to whom they were made. Wick v. Hickey [Iowa] 103 N. W. 469.

47. See 3 C. L. 1326, n. 58. In Virginia the rule is unaffected by the fact that some of the heirs at the time of receiving their advancements entered into covenants with the parent relinquishing all interest in or claim to any portion of the estate then owned or thereafter acquired by the parent, and as to which he might die intestate. Mort v. Jones [Va.] 51 S. E. 220.

For discussion of right of one receiving an advancement and executing a release of his interest to share in after-acquired property, see note 65 L. R. A. 578.

48. Mort v. Jones [Va.] 51 S. E. 220. Adult children of owner of land in Tennessee and Virginia conveyed their expectancy to him in consideration of advancements. Such conveyances were inoperative in Virginia but effective in Tennessee. Held that in a suit for partition the Virginia court could not enjoin the infant heirs from setting up the deeds in the courts of Tennessee. Id. In such case the court should ascertain the amount of decedent's estate, wherever situated, and distribute the estate in Virginia without requiring the adults to bring their advancements into hotchpot, unless it shall be made to appear that such advancements added to their share of the estate in Virginia, exceeds the shares of the infant heirs in the entire estate, in which case they should be required to account for so much of such advancements to each of them as will produce equality. Id.

49. See 3 C. L. 1326.

50. Drew v. Provost [Me.] 60 A. 794. Quitclaim deed covering all the interest of an heir in the real estate of his ancestor carries such additional interest as the grantor may have by reason of advancements to other heirs. Dow v. Dow, 3 Ohio N. P. (N. S.) 125. Conveyance of half interest in that portion of an estate which should be finally distributed and alloted to plaintiff held not to include widow's allowance, which the grantee, in an accompanying contract, agreed to use his best efforts to secure. De Leonis v. Walsh, 145 Cal. 199, 78 P. 637.

51. Though court had adjudicated that assignor was husband of deceased at her death, record of his divorce from another woman after his marriage to decedent and before the assignment, held admissible as tending to show his belief that he was lawfully married to the other woman. Drew v. Provost [Me.] 60 A. 794. Evidence held to sustain verdict that there was no misrepresentation in procuring assignment. Id.

52. Deposit in bank. Fretz v. Roth [N. J. Eq.] 59 A. 676.

53. Alderson v. Alderson's Guardian [Ky.]

and hence a judgment creditor of the latter only acquires a lien on his interest in the estate after the payment of decedent's debts.[54] In North Carolina after the expiration of two years from the grant of letters, a purchaser for value of a devisee's interest takes good title even as against creditors of the testator of whose claims he has no notice.[55]

In the absence of a statutory provision to the contrary, property or money held by the executor or administrator in his official capacity cannot be reached by attachment or garnishee process in an action against the heir or legatee prior to an order of distribution.[56] In Illinois no assignment or transfer by an heir, devisee, or legatee, of his share of the estate in the hands of the representative, can operate to defeat a garnishment of the same unless the transfer is reduced to writing and filed with the clerk of the county court before the service of the garnishee process.[57]

The mere fact that a child would inherit real estate of the father in the event of the latter's death intestate does not invest the child with an interest therein which can be made the subject of sale or conveyance by him during the life of the father.[58]

In an action by distributees to impress a trust upon property in the hands of a third person, defendant may, under a general denial, avail himself of an assignment to him by decedent.[59]

Where the executor and residuary devisee takes land subject to the payment of certain legacies, and sells it and applies the proceeds to his own use and becomes insolvent, the legacies will be charged upon the lands so conveyed.[60] In such case the lien of the legacies should be charged on the various parcels of land in the inverse order of their alienation.[61]

87 S. W. 810, withdrawing former opinion, 26 Ky. L. R. 1260, 83 S. W. 1129.

54. Can only be enforced against share remaining due him after such debts are paid. Alderson v. Alderson's Guardian [Ky.] 87 S. W. 810, withdrawing former opinion, 26 Ky. L. R. 1260, 83 S. W. 1129. The assignment by devisees of their interests to secure judgments confessed by them does not put an end to the lien of a judgment against their testator so as to deprive the orphans' court of jurisdiction to sell the decedent's land for its payment. Ziegler v. Schall, 209 Pa. 526, 58 A. 912.

55. Code, § 1442. Francis v. Reeves, 137 N. C. 269, 49 S. E. 213. One who makes a loan to a devisee, secured by a trust deed on the land so devised, and on the faith of the devisee's title thereto, is a purchaser for value. Lender held to have no notice of debt. Id.

56. Executor is not creditor of heir until order of distribution is made, nor is it certain until that time that he is the custodian of any property belonging to such heir. Orlopp v. Schueller [Ohio] 73 N. E. 1012. Rev. St. 1892, § 5531, authorizing the service of process on public officers does not apply to or authorize service on an executor or administrator. Id. Fact that executor was made garnishee contrary to Gen. St. 1902, § 881, held not to make writ defective as against the principal defendant. Hatch v. Boucher, 77 Conn. 347, 59 A. 422. Judgment cannot be rendered against executors as garnishees before order of distribution has been made by county court. Hurd's Rev. St. c. 62, § 35. Rhodes v. Rhodes, 115 Ill. App. 335. See, also, Clifford v. Gridley, 113 Ill. App. 164.

57. Act of 1897. Rhodes v. Rhodes, 115 Ill. App. 335. Transfer of notes in full settlement of legatee's interest held in the nature of an assignment, and did not defeat garnishment where receipt was not filed until after service of process. Id.

58. Deed purporting to convey "expectancy" of grantors in land of their mother held void. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734.

59. Mussman v. Zeller, 108 Mo. App. 348, 83 S. W. 1021.

60. Mallery v. Facer, 181 N. Y. 567, 74 N. E. 487, rvg. 90 App. Div. 610, 85 N. Y. S. 1137. Where a part of the cash payment made by one of the purchasers has been applied to the papment of a prior lien and the balance is in the hands of the administratrix with the will annexed, subject to the order of the court, and she also holds the bond and mortgage given to secure the payment of the balance of the purchase price, the purchaser is entitled to credit for the full amount of such purchase price. Id. Where the executrix borrowed money giving a mortgage on one of the parcels subject to the lien of the legacies, and later conveyed such parcel subject to the mortgage, which the purchaser assumed and agreed to pay, a sum paid into court by the purchaser to apply on the mortgage belongs to the mortgagee as against him. Id.

61. Mallery v. Facer, 181 N. Y. 567, 74 N. E. 487, rvg. 90 App. Div. 610, 85 N. Y. S. 1137.

ESTATES TAIL, see latest topical index.

ESTOPPEL.

Scope of title.—Many common applications of the doctrine of estoppel are so closely related to other subject-matters that it is deemed best to treat them elsewhere; thus estoppel to claim that a corporation acted ultra vires or to aver want of authority in a corporate officer or agent,[56] to question the existence or scope of an agent's authority,[57] to deny partnership,[58] and the estoppel of a tenant to deny his landlord's title,[59] are elsewhere discussed.

§ 1. *In general. Kinds of estoppel.*[60]—Estoppels are usually classified as those arising from records, from deeds, and from matter in pais.[61] Where an estoppel is set up against an estoppel, the matter is set at large.[62] Estoppels are mutual and reciprocal and cannot be insisted on by one who is not himself bound thereby.[63]

§ 2. *Estoppel by record.*[64]—The doctrine of estoppel by record rests upon the rule that public official and judicial records import absolute verity. Estoppel by judgment is given separate treatment in Current Law,[65] and the doctrine of the conclusiveness of public records in general is based upon principles of evidence, and is not here discussed.[66] While one cannot be estopped to set up a decree in bar of a cause of action in a court of law,[67] a court of equity will in a proper case enjoin use of the decree for such purpose.[68]

§ 3. *Estoppel by deed.*[69]—Recitals in deeds and conveyances may operate as an estoppel against the parties to such deeds and in favor of those claiming in privity of title with them;[70] but such an estoppel cannot be invoked by a stranger

56. See Corporations, 5 C. L. 764.
57. See Agency, 5 C. L. 64.
58. See Partnership, 4 C. L. 908.
59. See Landlord and Tenant, 4 C. L. 389. A person entering upon land under title of another and with his permission is estopped to deny the title of the other, and a contract of leasing or renting is not essential to the creation of such an estoppel. Cobb v. Robertson [Tex.] 86 S. W. 746. While a tenant cannot dispute his landlord's title as of the date of his lease, he may show that it has been subsequently extinguished. Sherman v. Fisher [Mich.] 101 N. W. 572.
60. See 3 C. L. 1327.
61. See post, §§ 2, 3, 4.
62. Plaintiff sued for settlement of a partnership, and defendant pleaded settlement in bar of the suit; held, plaintiff was estopped to assert there had been a settlement, and defendant that there had not been one, and the two estoppels destroyed each other and set the matter at large. Chretien v. Giron [La.] 38 So. 881.
63. Chesapeake Lighterage & Towing Co. v. Western Assur. Co., 99 Md. 433, 58 A. 16.
64. See 3 C. L. 1327. Record of sale of land forfeited for non-payment of taxes under Code 1899, c. 105, estops the state from selling the land a second time for forfeiture under another title. State v. Jackson, 56 W. Va. 558, 49 S. E. 465.
65. See Former Adjudication, 3 C. L. 1476.
66. See Evidence, 5 C. L. 1301.
67. In an action at law on a claim against a decedent's estate, a decree under P. L. 1898, p. 740, § 70, barring all claims not duly verified and presented within the time specified by previous notice, is conclusive, and defendant cannot be estopped from setting up the decree or be held to have waived lack of verification of the claim. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.
68. Where the plea (see note above) sets up the decree barring creditors whose claims have not been duly presented, plaintiff may maintain a bill in equity to enjoin defendant from proving the decree in the suit at law, where it appears that lack of verification of the claim has been in fact waived by the defendant, and the claim recognized as just. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.
69. See 3 C. L. 1328.
70. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412. A party who accepts a deed describing the property as a certain lot in a certain addition which is shown by a plat referred to not to be a part of a street, is estopped to assert that the land so conveyed is a part of a street agreed to be dedicated. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19.

to the conveyance who is claiming by an independent and hostile title.[71] Thus, erroneous recitals in a patent from the government do not estop the grantee therein as against a stranger.[72] A recital of consideration does not estop the grantor from showing an abatement thereof,[73] nor the grantee from showing a consideration other than that recited,[74] unless the rights of third parties have intervened.[75] A trust deed by a husband and wife of land formerly conveyed to the husband by the wife by an unrecorded deed, such trust deed reciting that the trustees might reconvey to the wife on payment of the debt which the deed was given to secure, does not estop the husband to deny the ownership of the wife.[76]

One who conveys by warranty deed is estopped to assert title in himself thereafter;[77] hence a title subsequently acquired by such a warrantor inures to the benefit of his grantee[78] and those holding under such grantee.[79] But this rule does not operate when the subsequent title is acquired in a different representative capacity from that in which the prior title was held and conveyed,[80] nor when the instrument by which a transfer of title was attempted is wholly void.[81] The rule applies to married women where they are given full power over their separate property.[82] Beneficiary heirs, as well as heirs pure and simple, are bound by the warranty estoppel of those through whom they inherit by representation.[83] A grantor of property held as a homestead is estopped to claim title thereafter on the ground that his wife did not join in the deed,[84] unless the deed by the husband alone is wholly void.[85] The covenant of seizin in a purchase-money mortgage does not

71. In ejectment against a railroad, plaintiff was not estopped by reservation of certain land claimed by the road, in a mortgage given by plaintiff to a third person. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 N. E. 412.

72. McCorkell v. Herron [Iowa] 103 N. W. 988.

73. That a deed of an equity of redemption recites that the consideration is paid and covenants against incumbrances does not estop the grantor to show that the consideration was abated on account of the mortgage, so that the grantee was bound to indemnify him against the same. Lowy v. Boenert, 110 Ill. App. 16.

74. Recital of love and affection as consideration for deed does not estop grantee from showing a money payment equal to the value of the land as against persons claiming by sheriff's deed under judgment against the grantor. Miles v. Waggoner, 23 Pa. Super. Ct. 432. See, also, following article on Evidence, 5 C. L. 1301.

75. Where, in ejectment, defendant claims a homestead right, a conveyance by the defendant is shown, whereby the homestead right was lost, defendant cannot set up want of consideration rendering the conveyance void. Jasper County v. Sparham, 125 Iowa, 464, 101 N. W. 134.

76. Tyler v. Currier [Cal.] 81 P. 319.

77. A conveyance estops the grantor from later setting up title in himself, but if his wife did not join she would not be estopped to assert any contingent interest she had at the time. Cunningham v. Cunningham, 125 Iowa, 681, 101 N. W. 470.

78. Warrantor's title was defective; title subsequently acquired inured to grantee. Yock v. Mann [W. Va.] 49 S. E. 1019. Where one sells property of which he is not owner, any title which he may subsequently acquire inures to his vendee. City of New Orleans v. Riddell, 113 La. 1051, 37 So. 966. This rule operates, though the vendee sign as a witness the subsequent act of purchase, since signing as a witness is not ground for an estoppel. City of New Orleans v. Riddell, 113 La. 1051, 37 So. 966.

Note: For full discussion of this doctrine, see Tiffany, Real Property, § 456.

79. Title acquired by mortgagors subsequent to giving of mortgage containing covenant of seizin inures to benefit of mortgagees and those holding under them. People's Sav. Bank v. Lewis, 37 Wash. 344, 79 P. 932.

80. Lauve v. Wilson [La.] 38 So. 522. Rule not applicable where state sold as trustee for schools, and acquired afterwards as trustee for the general public in the drainage and reclamation of swamp lands. Id.

81. An assignment of a certificate of entry by a married woman in 1858, being of no effect under the law then existing, and conferring no rights on the assignee, did not cause a subsequently acquired title to inure to such assignee. Bland v. Winsor, 187 Mo. 108, 86 S. W. 162.

82. A married woman given, by Comp. St. Neb. 1903, c. 53, § 2, the same power over her separate property as a married man has over his, is estopped by covenants in a mortgage, in which she and her husband join, of property in which she has a vested life estate, to assert that an after-acquired title to the fee did not inure to the benefit of the mortgagee. Cooper v. Burns, 133 F. 398.

83. Chevalley v. Pettit [La.] 39 So. 113.

84. Mann v. Wilson [Tex. Civ. App.] 86 S. W. 1061.

85. A conveyance of a homestead without the wife's joinder is wholly invalid, and the warranty does not estop the grantor after the death of the wife. Bollen v. Lilly [Miss.] 37 So. 811.

estop the mortgagor from suing for breach of the covenant of seizin in the deed of his grantor.[86]

As a general rule a grantee named in a deed is not estopped to deny his grantor's title.[87] The estoppel exists only where there is an obligation to restore the possession in some event or upon some contingency.[88] A second mortgagee who does not assume the first mortgage is not estopped to deny its validity, even though it is excepted from the covenants of the mortgage he holds.[89] Hence a holder of a second mortgage taken subject to rights under a first mortgage, which is in fact void, is not estopped to assert it against the first.[90] A recital in a warranty deed that the premises conveyed are free and clear of all incumbrances, excepting certain named liens, is only a limitation of the covenant against incumbrances, and is not such a recognition of the liens as will estop the grantee from contesting their enforcement against the property conveyed.[91] A recital in a mortgage that the grantor therein has good title from the mortgagees estops the mortgagees from asserting want of title in the grantor as against his subsequent grantee.[92]

Estoppel arises against a grantee seeking to escape a street assessment when it appears that the assumption of that particular assessment constituted a part of the purchase price,[93] provided the deed specifies the assessment with sufficient particularity.[94]

The doctrine of estoppel by deed is applicable only when there has been a delivery; but a party may be estopped by his conduct to deny that there has been a valid delivery,[95] and thus became bound by the deed.

86. Reinhalter v. Hutchins, 26 R. I. 586, 60 A. 234.

87, 88. Oregon Short Line R. Co. v. Quigley [Idaho] 80 P. 401.

89. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012.

90. First mortgage was no part of consideration for second. Nicholson v. Aney [Iowa] 103 N. W. 201.

91. Stough v. Badger Lumber Co. [Kan.] 79 P. 737.

92. School trustees who accept a mortgage on property, reciting that the grantor therein has good title "from said trustees" and that the property is free from incumbrances, is estopped to set up 40 years thereafter against a grantee under the mortgagor that the latter had no title. Trustees of Schools of De Witt County v. Wilson, 215 Ill. 352, 74 N. E. 375.

93. Waldschmidt v. Bowland, 6 Ohio C. C. (N. S.) 99. Estoppel arises against a grantee who purchased after the resolution declaring the necessity for the improvement and the ordinance ordering the improvement were passed, but before the passage of the ordinance assessing the property. Id.

94. Estoppel does not arise against a grantee resisting a street assessment where the provision in the deed as to payment of a street assessment does not specify any particular assessment on any particular street. Waldschmidt v. Bowland, 6 Ohio C. C. (N. S.) 99.

95. Debtor conveyed land to son-in-law in violation of injunction in creditors' suit, but procured a reconveyance from the grantee, the deed being placed in escrow. A creditor on faith of this reconveyance redeemed the land from a prior execution sale. Held, son-in-law estopped to claim that his deed was not delivered with intent to pass title, the delivery in escrow being in fact void. Clark v. Harper, 215 Ill. 24, 74 N. E. 61. Plaintiff made a deed of land to her husband, but did not deliver it, and during her absence and without her knowledge the husband secured it and transferred the land, which came to defendant, through various mesne conveyances, in trust for a railway company. Improvements were made by the company during six months, and though plaintiff knew of them, she did not assert her title for three years, when she brought suit to quiet title. She was held to be estopped to deny the defendant's title. Baillarge v. Clark, 145 Cal. 589, 76 P. 268.

Note: A writer in the Michigan Law Review, commenting on the decision last cited, says: "The foregoing facts would strongly appeal to a court of equity, yet it is doubtful if a case for the application of the doctrine of estoppel by deed could arise where no delivery of the deed had been made. Bigelow, Estoppel [5th Ed.] p. 349; Nourse v. Nourse, 116 Mass. 101. For a party cannot be relieved in equity, by reason of an estoppel, any more than at law, from the effects of a positive rule of law. Nat'l Granite Bank v. Tyndale, Adm'r, 176 Mass. 547. And for more extreme facts than those of the principal case upon which a recovery was allowed and the application of estoppel denied, see Smith v. Ingram, 130 N. C. 100; Id., 132 N. C. 959, although the court did not commit itself as to whether relief in equity would be granted."—3 Mich. L. R. 482.

This criticism is obviously based upon an erroneous analysis of the facts and the opinion. There was no attempt to apply the doctrine of estoppel by deed, but the estoppel arose from the conduct of the plaintiff, and it was the fact of delivery which she was estopped to deny.—[Editor].

§ 4. *Estoppel in pais.*[96]—Briefly stated, the doctrine of estoppel in pais is that one cannot deny the existence of a state of facts which by his representations, silence, or misleading conduct he has induced another to believe, and to rely and act upon to his prejudice.[97] Though estoppels were formerly characterized as odious, and were said not to be favored,[98] the doctrine is now rather freely applied, both in courts of law and equity,[99] and when properly limited, is a salutary one.[1] It should be applied, however, only in cases where every element of an estoppel is made to appear.[2]

Elements.[3]—It must appear that the misrepresentations, silence or conduct of the party claimed to be estopped,[4] related to existing,[5] material facts;[6] that he had full knowledge of the truth,[7] or that it was his duty to know the truth;[8] and that

96. See 3 C. L. 1329.

97. An estoppel is, in substance, an admission by a party regarding the subject-matter; having admitted the fact, he cannot thereafter deny it, but is bound by his admission. Reinhalter v. Hutchins, 26 R. I. 586, 60 A. 234. The doctrine of equitable estoppel is founded upon principles of equity and justice and is applied so as to conclude a party who by his acts and admissions intended to influence the conduct of another, when in good conscience and honest dealings, he ought not to be permitted to gainsay them. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. One insisting on an estoppel must show that the other party has done something or represented something which has had the effect to deceive and mislead him and which would render it inequitable for the right of the other party to be now enforced against him. Huot v. Reeder Bros. Shoe Co. [Mich.] 12 Det. Leg. N. 98, 103 N. W. 569. Husband and wife conveyed wife's land as security for a loan, on the agreement to reconvey to the husband, neither understanding the contract. The land was so reconveyed. Held, wife was not estopped to assert the land was hers as against a creditor of the husband who became such after the conveyance to him. Id. Parties who have knowingly made false statements with the intention that another should rely thereon, such other having in fact relied thereon to his injury, cannot show the credulous confidence of such other as a defense. Miller v. John, 111 Ill. App. 56.

98. See Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713.

99. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. An estoppel by matter in pais may be set up as a defense to an action at law in the Federal courts. Courts of law have long recognized such estoppels and resort to equity is not necessary to assert them. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

1, 2. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713.

3. See 3 C. L. 1330, 1331, 1332.

4. Alleged representations held to have been made by a stranger and not to be binding on plaintiff. Campbell v. Flannery [Mont.] 79 P. 702. Declarations of the wife made in the absence and without the knowledge of the husband cannot raise an estoppel when his title to community property is involved. Bashore v. Parker, 146 Cal. 525, 80 P. 707. An attorney accepted a sum of money as proceeds of a sale of land in an orphans' court, but did so without knowledge of the facts and without the knowledge or authority of his clients, who did not receive the money. Held, his clients were not estopped to claim the land. Harrington v. Stivanson, 210 Pa. 10, 59 A. 268.

5. An estoppel cannot be based on a promise as to future action. A parol promise to lease realty, in reliance on which goods on premises were purchased, does not work an estoppel to deny validity of the promise under the statute of frauds. Dechenbach v. Rima, 45 Or. 500, 78 P. 666.

6. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554. Persons who testified under oath that they had no interest in a note would be estopped to assert any interest therein thereafter. Barber v. Stroub [Mo. App.] 85 S. W. 915.

7. Davis v. Neighbors, 34 App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554. A receipt to an administrator given as result of mistake held no basis for an estoppel. Hill v. Terrell [Ga.] 51 S. E. 81. Where a husband puts property purchased with his wife's money in his own name instead of hers, and she is ignorant of such fact, she is not estopped to assert title as against his creditors. Mayer v. Kane [N. J. Eq.] 61 A. 374. One who was induced by fraud to convey land in exchange for other land of less value held not estopped to set up the fraud by her statement made to a purchaser, who had knowledge of the fraud but had not yet paid for the land, that she was satisfied, it appearing that she was not fully informed of the facts and was relying on the advice of those who were defrauding her. Jordan v. Cathcart, 126 Iowa, 600, 102 N. W. 510. One who signs an instrument expressing satisfaction with an exchange of land, with knowledge of a deficiency in the quantity of land but without knowledge of the falsity of other material representations regarding the land, is not estopped to rescind the contract thereafter. Willey v. Clements, 146 Cal. 91, 79 P. 850. One who bought a horse sent his son to take possession. The seller told the son that title would be reserved in him until payment was made. Held, unless actual knowledge of this statement by the father was shown, he would not be estopped to deny it by acquiescence therein. Schenck v. Griffith [Ark.] 86 S. W. 850. Heirs held not to have had adequate knowledge of source of money

he intended that the other party should act upon facts so misrepresented,[9] though such intent may be implied, so that an actual intent to mislead and deceive is not essential.[10] It must further appear that the party relying on the estoppel was ignorant of the truth,[11] and that such ignorance did not arise out of his own

received by them to be estopped to deny validity of administrator's deed; nor was giving power of attorney to procure sale sufficient. Demars v. Hickey [Wyo.] 80 P. 521. Plaintiff accepted dividends on a claim against an insolvent, not knowing that its property had been used to realize assets, or that one claiming to be its agent had assumed to waive its rights or consent to a sale. Held, it was not estopped to claim the property. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43. A person represented to plaintiff that he owned the exclusive right to sell a certain newspaper in certain territory and induced plaintiff to buy the right. The newspaper company accepted plaintiff as its agent and sold him papers. Held, since the company had no notice of the contract or of the representations made to plaintiff, it was not estopped to deny that the third person had any rights. Fox v. Commercial Press Co. [Ky.] 88 S. W. 1063. Husband of intestate held not to have had such knowledge of transfer of stock by administrator as to be estopped to object to the administrator's account with reference to such transfer. In re Bayley [N. J. Eq.] 59 A. 215. Silence concerning title will not work an estoppel where the other party is himself aware of the title; nor where the owner is ignorant of his title; nor where with knowledge of his title he is ignorant of valuable improvements being made by others in ignorance of his title. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. Judgment creditor bought land at execution sale, and thereafter land was sold under execution against him, and he then caused a third sale under his judgment. Held, purchaser at second sale not having been a party to the motion or order for the third levy, was not estopped to assert title against the purchaser at the third sale. Ables v. Webb, 186 Mo. 233, 85 S. W. 383.

8. Want of knowledge in making the representation or inducing conduct is no excuse if it resulted from negligence or otherwise involves culpability. Failure of casualty company to learn true facts of case from its own attorneys before advising abandonment of an appeal, held not to excuse it from liability for judgment which it promised to pay. Globe Nav. Co. v. Maryland Casualty Co. [Wash.] 81 P. 826.

9. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554.

10. It is not necessary that the conduct relied on as creating an estoppel should be characterized by an actual intention to mislead or deceive. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. If the conduct is such as to reasonably lead one to rely upon it. Globe Nav. Co. v. Maryland Casualty Co. [Wash.] 81 P. 826. One who concealed leasehold interest estopped to set it up in opposing application for writ of assistance, though he had no evil intent. Strong v. Smith [N. J. Eq.] 60 A. 66. A person intending to convey land to his daughters, made measurements and indicated what he believed to be a boundary line, and designated the site of a house to be built thereon, and put up a fence. Held, he was estopped to assert that the line so indicated was the true line, even though he was innocent in making his representations, the other parties having relied and acted on them. Clark v. Hindman [Or.] 79 P. 56.

11. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554. A party setting up an estoppel must have been ignorant of the true facts. Carter-Battle Grocer Co. v. Rushing [Tex. Civ. App.] 85 S. W. 449. Plea insufficient to show estoppel where ignorance of the truth was not alleged. Bartholomee v. Lowell [Ind.] 72 N. E. 1030. Where there is neither concealment nor misrepresentation, but both parties have equal knowledge or means of knowledge, there can be no estoppel. Silver Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829. One who discovered the truth regarding ownership of a mortgage, and was not misled or prejudiced by representations or concealment of the true ownership could not rely on an estoppel. Parsons v. McCumber [N. D.] 103 N. W. 626. A married woman gave note and mortgage to secure husband's debt, but stated in mortgage and in an affidavit that debt secured was her own. Under the statute such a contract—to secure another's debt—was void. The mortgagee knew all the facts. Held, woman not estopped to set up the true facts showing the invalidity of the contract. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494. Plaintiff not estopped to rely on representation that property could be turned over to his possession within 30 days by accepting a deed which was expressly subject to a lease of the property, when he did not examine the deed at the time, and brought his action to rescind as soon as he discovered the fact. Thompson v. Hardy [S. D.] 102 N. W. 299. Where one of two contestants for office of clerk of school board executed a bond to the board to hold it harmless against loss by reason of paying him the salary, the board was not estopped to sue on such bond by allowing him to perform the services of the office, since he was not mislead, but knew all the facts. McLaughlin v. Board of Education of City of Covington, 26 Ky. L. R. 1126, 83 S. W. 568. A married woman is not estopped to claim the benefit of Burn's Ann. St. 1901, § 6964, making her contracts of suretyship void, by her affidavit that the loan was a joint one, the other party being fully informed as to the fact that she was a surety only, especially where the wife did not know the contents of the affidavit. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151. Where an attorney undertook to recover an estate for certain heirs, on shares, and at the time did not disclose the nature and extent of the estate, but the heirs were later fully informed in regard thereto and allowed the attorney to proceed, he expending money

negligence,[12] as from failure to consult an available public record;[13] but if failure to consult a record is induced by active conduct of the other party, it is excusable.[14] Again, it must appear that the party setting up an estoppel actually[15] and reason-

and time, they were estopped to assert that he did not disclose the facts, in a suit by him to enforce a lien for compensation. Adams v. Schmidtt [N. J. Eq.] 60 A. 345.

12. It should appear that such person had no knowledge, and did not have equal means of knowledge with the other party. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. It is essential that the person claiming to have been influenced by the conduct or declarations of another was not only destitute of knowledge of the facts, but was also destitute of any convenient and available means of acquiring such knowledge. Gallagher v. Northrup, 215 Ill. 563, 74 N. E. 711. Lender held to have been put on notice of invalidity of contract for homestead lien; hence borrower on faith of contract not estopped to set up its invalidity. Cooper v. Brazelton [C. C. A.] 135 F. 476. The fact that a cotenant in possession of property, who paid off a mortgage debt thereon, failed to attend a sale on execution of the other tenant's interest and notify the purchaser of his equity, does not estop him from enforcing his right to contribution from the purchaser who became his cotenant, his possession and the record being sufficient notice of his rights. Rippe v. Badger, 125 Iowa, 725, 101 N. W. 642. Husband and wife conveyed city property to son, he agreeing to reconvey to the wife. While title stood in the son he became surety on a replevin bond, and later a judgment was acquired against him on the bond. While the son had the paper title, tenants of the property paid rents to his mother. Held, mother not estopped to assert that property belonged to her at the time her son became surety, since inquiry of the tenants would have disclosed her equitable ownership. Gallagher v. Northrup, 215 Ill. 563, 74 N. E. 711.

13. Under modern registration laws a public record is an available, convenient and ready means of information as to all such questions touching title to realty as are required to be made matter of record. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382. Hence one who has recorded his title is not bound to give any other notice to anyone who assumes to deal with other parties in reference to such property; he may remain silent and passive. Id. A person will not be estopped merely by his silence and failure to disclose facts that may be ascertained by an examination of public records, when the situation is not such as to place upon him the duty of making known the truth. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. Where assignee of mortgage gave notice of his rights by recording his assignment, and thereafter a purchaser paid the debt to the assignor, the mere fact that the assignee waited two years did not estop him from enforcing the mortgage, where neither his silence nor any act or statement could have misled the mortgagor. Cornish v. Woolverton [Mont.] 81 P. 4.

14. The record of a deed will not preclude a reliance upon misconduct of the owner representing title in another. Brice v. Sheffield, 121 Ga. 216, 48 S. E. 925. If one becomes active his actions, declarations and conduct with reference to the title must not be such as to deceive or mislead a reasonable person, or deter, prevent, or dissuade him from examining the record and learning the true condition of the title. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382. If the situation is such that it is one's duty to speak, as where inquiries are made of him, or where, instead of merely remaining silent, he does some affirmative act which would naturally have the effect of misleading or deceiving one, then the mere fact that the truth can be ascertained by an examination of the records does not prevent the operation of the estoppel against him. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. One who gave a corporation an option on mining property and caused a notice to be posted thereon to the effect that the corporation was the owner, knowing that the employes would rely thereon, could not thereafter assert title against the employes when they were seeking to enforce liens against the property for their labor, even though his title was a matter of record. Eastwood v. Standard Mines & Milling Co. [Idaho] 81 P. 382.

15. There can be no estoppel unless the party alleging it relied on the representations and was induced thereby to act to his injury. Bashore v. Parker, 146 Cal. 525, 80 P. 707. The conduct, silence, or declarations relied on must have been in the presence of or made to a person known to have an interest in the subject-matter. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. There need not be an affirmative declaration by one party that he relied on the acts of the other, but such reliance may be inferred from the facts and circumstances. Defendants held to have relied on acts and declarations of plaintiffs relative to insurance on building and to have refrained from procuring additional insurance for that reason. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24. Defendant claimed rights in a mine by virtue of a contract with plaintiff, and had brought suit against a third person, to enjoin him from working the mine, in plaintiff's name, this being authorized by their agreement. Held, defendant was not estopped by such suit from asserting rights against plaintiff, since the latter was not misled by the suit in his name. Finlen v. Heinze [Mont.] 80 P. 918. Representations in a letter held not to create an estoppel when the one receiving it afterwards saw the writer and contrary representations were then made. Mace v. Duffy [Wash.] 81 P. 1053. Failure of creditor to enforce claim when prices of realty were high held not to estop him to enforce it after prices had fallen, since the debtor could have paid and so protected himself. Davis' Adm'x v. Davis [Va.] 51 S. E. 216. No estoppel in suit to enforce a mechanics' lien where one who purchased during the progress of the work did not act on state-

ably [16] relied upon the conduct, silence or representations of the other party, and was thereby misled [17] and induced [18] to so change his position [19] that he will suffer injury,[20] if a denial of the facts as represented to him be permitted.

ments or representations of the petitioner, none such being made. Billings Co. v. Brand [Mass.] 73 N. E. 637. A contractor assigned his contract, and told an employe who inquired as to his pay, to quit if dissatisfied. The assignee's agent told him the assignee would guaranty payment if he would continue to work. The employe, however, quit. Held, the assignee was not estopped to deny liability for compensation. Central Asphalt & Refining Co. v. Manning [Tex. Civ. App.] 82 S. W. 1055. A will devised a life estate to testator's daughter, the remainder share and share alike to her heirs. Before her death she and her children made a settlement dividing the land, and thereafter one of such children died. His children continued to use the land alloted to him as his heirs. Held, they were not estopped by such use to claim under the will, since the other parties interested could not have changed their position in reliance upon such conduct. Parrott v. Barrett, 70 S. C. 195, 49 S. E. 563. Agent of firm pointed out 70 acres belonging to plaintiff, a member of the firm, as a part of land a purchaser was buying. It did not appear that the land was represented as better in any way than that actually bought, and it appeared that the sale would have been made, though the misrepresentation had not been made. Hence the purchaser was not relying on the representation, was not prejudiced, and plaintiff was not estopped to claim title to the 70 acre tract. Lewis v. Brown [Tex. Civ. App.] 87 S. W. 794.

16. The conduct, silence or declarations must have been of a character such as would naturally have the effect of influencing the conduct of the other party. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. Silence of an assignee of a note when the payee assumes to act as owner by extending the time, while it may estop the assignee from asserting ownership at that time, does not estop him from asserting ownership subsequently, since the maker had no right to assume that the ownership of a negotiable note would remain unchanged. Loizeaux v. Fremder, 123 Wis. 1193, 101 N. W. 423. Where a contract of employment was for a specified term, with a provision for a further employment if services were satisfactory, mere failure of the employer to answer letters from the employe did not estop him from contending that the services were unsatisfactory, since he was under no duty to answer such letters, and the employe had no right to infer from the failure to answer them that his services were satisfactory. Carter & Co. v. Weber [Mich.] 101 N. W. 818. One cannot be held to have reasonably relied upon the assurance by another of authority to bind a minor in a sale of realty, nor upon a mere verbal assurance of authority as to one not a minor, where there was opportunity to know the truth, and no reasonable ground for not dealing with the owner of the realty in person. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. A husband is not estopped to claim property as community property by allowing the wife to use it in business, since a married woman is presumed to use the funds of the community when she engages in business. Bashore v. Parker, 146 Cal. 525, 80 P. 707. One seeking to extend an estate cannot base his claim on an estoppel by virtue of an oral agreement by a married woman, since he could not be misled by an agreement she had no power to make. Gilbert v. White, 23 Pa. Super. Ct. 187.

17. If no one is misled, the doctrine of estoppel does not apply. Harrington v. Stivanson, 210 Pa. 10, 59 A. 268. Delay of stockholders in bringing suit for dividends held not to amount to an estoppel, no showing being made that anyone was misled or injured by the delay. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796. Rev. St. 1898, § 4222, subd. 5, requires service of a notice of a claim for injuries in the manner required for service of summons. A claimant notified a railroad claim agent and the latter corresponded with him about the case, but did not indicate that no other notice would be required, and it did not appear that the claimant was in any way misled. Held, railroad not estopped to claim that no proper notice was served. Smith v. Chicago, etc., R. Co. [Wis.] 102 N. W. 336.

18. The substance of estoppel is the inducement to another to act to his prejudice. Distinction made between estoppel and ratification, the latter being defined as confirmation after conduct. Steffens v. Nelson [Minn.] 102 N. W. 871. Representations must have been believed and relied on, and must have induced action. Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704. One could not be estopped to claim damages for maintenance of a pool which was a nuisance unless the one maintaining it was induced to do so by such conduct. Missouri, etc., R. Co. v. Dennis [Tex. Civ. App.] 84 S. W. 860. Representations made or acts done subsequent to a change of position by the other party which they do not invite or influence, will not operate as an estoppel. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. Architect, superintendent, local secretary and president of Regents of Education held to represent that body so that acts and representations inducing those individuals to leave procuring of insurance to contractors instead of procuring it themselves could be relied on as an estoppel by the regents when sued for loss by reason of failure to have building insured. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24.

19. Must have acted. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554. Party relying on estoppel must have changed position or conduct. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430. Party relying on estoppel must have changed his position for the worse. Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704. One claiming an estoppel must show that he changed his position, reasonably relying on the conduct of the other, and that if the other be allowed to change

Illustrative applications of doctrine.[21]—Among the rules which have resulted from the application of the doctrine of estoppel in pais are: One who has been silent concerning facts which it was his duty to disclose[22] will not thereafter be

his attitude, the person relying on his conduct will be prejudiced. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244. A landowner who has built and improved ditches on his land through which water from another's land was drained, is not estopped to fill up a ditch on his land, when the other has taken no action in reliance on his former improvements. Schofield v. Cooper, 126 Iowa, 334, 102 N. W. 110. The fact that a citizen may have led city authorities to believe that he would not attack the validity of an ordinance providing for vacation of a street does not work an estoppel so as to preclude an attack by him on the ordinance before anything has been done under it. Coker v. Atlanta, etc., R. Co. [Ga.] 51 S. E. 481. Promise by defendant to pay judgment against him to an assignee of the judgment did not estop him to set up payment to the plaintiff without notice of the assignment, when the assignee had not changed his position in reliance on such promise. Work v. Prall, 26 Pa. Super. Ct. 104. A person is not estopped to claim property by having previously sworn that it belonged to another, unless the party against whom he claims has changed his position in reliance on the former sworn declaration. Greenberg v. Stevens, 114 Ill. App. 483. Where no interested party had changed his position or in any way relied on an alleged promise of a grantee in a deed to assume a mortgage, such grantee was not estopped to contend that he was not bound by the assumption clause because he had never seen the deed and it had not been delivered to him. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

20. Davis v. Neighbors, Ind. App. 441, 73 N. E. 151; Pierce v. Vansell [Ind. App.] 74 N. E. 554; Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713; Houghen v. Skjerheim [N. D.] 102 N. W. 311. By Code Civ. Proc. § 1848, the rights of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of some particular relation existing between them. Bashore v. Parker, 146 Cal. 525, 80 P. 707. That conduct relied on induced plaintiff to abandon an appeal was a sufficient showing of prejudice. Globe Nav. Co. v. Maryland Casualty Co. [Wash.] 81 P. 826. A statement in a petition for alimony that the husband owned certain property, held not to estop wife from later claiming the property, alimony not having been granted. Place v. Place [Mich.] 102 N. W. 996. A gas company is not estopped to deny the validity of a franchise provision for payments to a municipality for the privilege of using its streets, to which it has submitted for a period of years, when the city had no power to grant such use of the streets and hence has not parted with anything of value. City of Columbus v. Columbus Gas Co., 3 Ohio N. P. (N. S.) 293. Receipt of money by a bank from an attorney who had collected it on a note did not mislead or prejudice the sureties on the note, but was an advantage to the extent of the amount collected. Hence the bank was not estopped to deny the attorney's authority to collect for it. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968. Bank president allowed his son to overdraw, and bank agreed to look to trust deed of the son to satisfy its claims against him. Held, the bank was not estopped to recover from the president its loss sustained by his breach of trust. Western Bank v. Coldewey's Ex'x, 26 Ky. L. R. 1247, 83 S. W. 629. A vendee of land under a parol contract to sell, the rendition of services being the consideration, took possession in good faith and held it until after the vendor's death and until the claim for services was barred by limitations. Held, such facts did not constitute an estoppel precluding assertion of title by the vendor's estate. Terry v. Craft [Tex. Civ. App.] 87 S. W. 844.

21. See 3 C. L. 1330, 1331, 1332.

22. There can be no estoppel by silence unless there was a duty to speak. The rule that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent does not apply to a judicial sale so that a judgment creditor will be estopped to assert facts regarding the true ownership of the land sold if he fails to state them at the time of the sale. Brady v. Carteret Realty Co. [N. J. Err. & App.] 60 A. 938. But an adjudicatee at a tax sale who not only stands by without objection but by his acts and assertions shows he does not claim the property is estopped to thereafter assert a claim against the purchaser. In re Lafferranderie [La.] 37 So. 990. Failure to file a claim to property which has been levied on will not estop the true owner from asserting title against a purchaser at the sale, where the owner has done nothing tending to mislead the purchaser as to his relation to the property. Lawless v. Orr [Ga.] 50 S. E. 85. The true owner, though cognizant that a stranger to the title is having improvements made on the premises, is under no legal duty to give a materialman notice of his ownership; and when nothing has been done to mislead the materialman, the true owner is not estopped by silence to assert his ownership. Reaves v. Meredeth [Ga.] 51 S. E. 391. Failure of wife to deny statements made by husband in her presence adverse to her property rights will not estop her from thereafter asserting title to the property concerned. Thomas v. Butler, 24 Pa. Super. Ct. 305. Mere failure to reply to a written notice that one appointed as a valuer to fix the price of goods had refused to act, and that if the person notified did not appoint another the valuer willing to act would do so, does not amount to a consent to such an appointment by way of estoppel (Elberton Hardware Co. v. Hawes [Ga.] 50 S. E. 964), nor does the fact that a party to the contract of sale induced a valuer to refuse to act estop him to assert that he is not bound by an appraisal not made by valuers appointed according to the terms of the agreement (Id).

permitted to assert such facts to another's prejudice.[23] One who has recognized legal title in another [24] by inducing a third person to purchase from him,[25] or by

23. When a party has by his silence when, if ever, it was his duty to speak, naturally induced conduct on the part of his adversary, he will not be permitted to take advantage of any act or omission so induced, to the latter's disadvantage. Fair Haven & W. R. Co. v. New Haven, 77 Conn. 667, 60 A. 651. One who fails to respond when asked if a signature to a note purporting to be his was genuine is estopped thereafter to deny that it is genuine. Harmon v. Leberman [Tex. Civ. App.] 87 S. W. 203. A retiring partner who fails to give notice of the dissolution of the firm is estopped to deny liability for a debt contracted by the continuing partner in the name of the firm after such dissolution. Easton v. Wostenholm [C. C. A.] 137 F. 524. A party who permitted another to believe that a paper on which he relied had not been altered was estopped to deny the falsity of a representation that it had not been changed. Webster Realty Co. v. Thomas, 46 Misc. 139, 93 N. Y. S. 1077. In a suit against a city for damages for trespass to land, plaintiff's son testified for plaintiff but did not assert any claim of title to any part of the land or for damages. Held, he would be estopped thereafter to set up such claim. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142. Gas company notified a rival company before laying its mains and requested information as to position of its mains which was refused. Rival company had a representative on the ground who did not object to work being done. Held, rival company was estopped, in injunction suit, to object that mains being laid were not at the distance from its mains required by P. L. 1876, § 21. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750. Defendant, though informed that plaintiff was to finance certain work to be done for defendant by another who was to assign claims therefor to plaintiff, did not reveal an indebtedness due him from the one who was to perform the work. Held, in an action by plaintiff as assignee, defendant was estopped to set off such indebtedness. House v. Brilliant, 92 N. Y. S. 325. Bank received warehouse receipts for cotton as collateral for a loan and wrote to warehouse company to that effect. Company did not reply, though it had no cotton corresponding to receipts, which were in fact forged. Held, company liable for loss to bank on failure of the borrower, on theory of estoppel. Commercial Nat. Bank v. Nacogdoches Compress & Warehouse Co. [C. C. A.] 133 F. 501. Mortgagor is estopped, as against purchaser, to deny validity of sale, when he fails to give notice at the sale of his appeal from the order denying his application to correct the amount found due by the decree, and fails to except to the confirmation of the sale. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496. Specific performance of agreement to devise land, conveyed by complainant, denied, when complainant concealed and failed to assert her rights for ten years, her grantee and his widow having died, and the property having been devised to the widow's residuary legatees. Lozier v. Hill [N. J. Eq.] 59 A. 234.

24. One who has recognized land as a public street by bringing suit to enjoin work thereon, within the period of limitations, cannot thereafter claim the property by adverse possession. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. Heirs of a vendor of property having recognized the title of a subsequent holder in a judicial proceeding, and having given him quitclaim deeds were estopped to assert title to it thereafter. Hubbard v. Kansas City Stained Glass Works & Sign Co. [Mo.] 86 S. W. 82. Husband took title to property in his own name, giving his note. Wife had full knowledge of the deed, and of two mortgages given on the land. Held, she was estopped after sixteen years and after second mortgage was foreclosed to claim that land was bought with her money and title taken in husband's name by mistake. Duncansville Bldg. & Loan Ass'n v. Ginter, 24 Pa. Super. Ct. 42. A mother was in possession of land as co-tenant with her minor son, and purchased the land under a mortgage, later taking a sheriff's deed. Son, who knew the facts, failed to assert any claim as co-tenant for several years after coming of age. Held, he could not assert a claim against a remote grantee of his mother. Ryason v. Dunten [Ind.] 73 N. E. 74. One claiming a mortgage lien conveyed to a corporation of which he was president, with covenant against incumbrances. Thereafter the corporation, with the claimant's knowledge, gave a trust deed under which the property was sold, and the purchasers exercised ownership over it with claimant's knowledge. Held, he was estopped to assert his claim. Battery Park Bank v. Western Carolina Bank [N. C.] 50 S. E. 848. One who promises to convey land to his wife, and who uses money loaned the wife to pay off an incumbrance on his land, is estopped as against those relying on his promise and on his representations that title was in his wife, to assert title in himself. Clark v. Havard [Ga.] 50 S. E. 108. One who by his acts had recognized complainant's title to a half interest in certain land for many years, held estopped to claim legal title thereto against them under a deed of which they were ignorant. Dickson v. Sledge [Miss.] 38 So. 673. The grantee of such person who obtained a deed with knowledge of the facts, and also procured a deed of another portion, by what amounted to fraud, held estopped also to claim title. Id. If a wife vests her property in her husband and permits him to appear to the world to be the owner thereof, and he contracts debts in the course of his business while he is apparently such owner, she is estopped to deny, as against his creditors, that he was the owner. Mertens v. Schlemme [N. J. Eq.] 59 A. 808.

25. One who induces another to buy land which he himself claims, from a third person, and permits the purchaser to go on the land and improve it for three years, is estopped to assert his claim. Spears v. Conley [Ky.] 87 S. W. 1072. One who induced an-

standing by without objection while such other makes valuable improvements upon land,[26] cannot thereafter assert title in himself. Conversely, one who represents himself as owner cannot thereafter deny ownership in order to escape a liability accruing from such ownership.[27] One who has by his conduct treated a contract or transaction as valid [28] cannot thereafter assert its invalidity [29] and deny liability thereunder.[30]

other to purchase land from a third person is estopped thereafter to set up title in himself as against such purchaser, even though his title was of record at the time. Brice v. Sheffield, 121 Ga. 216, 48 S. E. 925. Owners of land who induce persons to purchase the same land from others are estopped to assert any rights in themselves when the purchasers relied on their conduct and were ignorant of the former conveyance. Virginia Iron, Coal & Coke Co. v. Roberts, 103 Va. 661, 49 S. E. 984.

26. A landowner who stood by and permitted a steam railway to be constructed over the land is estopped to maintain ejectment for the entry and is restricted to damages for injuries suffered. Warren & O. V. R. Co. v. Garrison [Ark.] 85 S. W. 81. Where a boundary line was agreed upon by adjoining owners, and one saw the other erect a building and make other improvements, and his successors acquiesced in the line for thirteen years, the one agreeing thereto and his successors were estopped to question the correctness of the line. Deidrich v. Simmons [Ark.] 87 S. W. 649. A vendor of land knew that the land described in the bond for title was not that which the vendee intended to buy, but allowed him to take possession and make improvements. Held, his heirs were estopped to deny knowledge of the facts to the prejudice of the vendee. Black v. Baskins [Ark.] 87 S. W. 647. Plaintiff made deed to husband but did not deliver it. He obtained it, and transferred to others. A subsequent grantee took title in trust for a railway company, which took possession of the land and made improvements. Plaintiff learned facts ten days after such possession was taken, and knew of improvements. Held, she was estopped to deny defendant's title three years thereafter. Baillarge v. Clark, 145 Cal. 589, 79 P. 268. Husband and wife made an oral contract for sale of their homestead, and the purchaser took possession, paid the price and made valuable improvements, all of which was known and consented to by the wife. Held, she was estopped to set up want of consent by her to a transfer of the homestead. Grice v. Woodwarth [Idaho] 80 P. 912. Statutes protecting married women's rights in homestead and prescribing manner of transferring homestead do not prevent operation of such acts as estoppel. Id. A landowner agreed in writing to allow use of right of way over his land in consideration of benefit to him, and allowed railway company to construct road and operate it seven years. Held, he was estopped to question the right to such use or disturb possession of the company. Robertson Mortg. Co. v. Seattle, etc., R. Co., 37 Wash. 137, 79 P. 610. A landowner who stands by and without protest sees a railroad constructed on his land is estopped thereafter to maintain an action of ejectment, or a suit for an injunction to prevent operation of the road. His remedy is an action for damages for his compensation. Kakeldy v. Columbia, etc., R. Co., 37 Wash. 675, 80 P. 205. One who has allowed a railway company to make a survey and construct its road and make other improvements on his land, should not be permitted to maintain ejectment or obtain an injunction so as to prevent operation of the road, to the prejudice of the public; but there is no objection to an action of ejectment, where execution on the judgment is stayed, pending ascertainment of the compensation to which the owner is entitled, and the effect of the judgment is merely to compel payment thereof. Slaght v. Northern Pac. R. Co. [Wash.] 81 P. 1062.

One who makes valuable improvements upon or by the use of another's property, in the face of opposition by the other, or with knowledge that he does not consent thereto, cannot invoke the doctrine of estoppel to protect him, upon the sole ground that the other did not prevent him from making the outlay. Southside Improvement Co. v. Burson [Cal.] 81 P. 1107. City held not to have recognized rights of property owners who had encroached on the street so as to be estopped to insist that sidewalks be removed to street line. Vorhes v. Ackley [Iowa] 103 N. W. 998.

27. Condemnation proceedings treated land as that of plaintiff and he accepted the award and gave a quitclaim deed. Held, he was estopped to deny that he had title at the time. Choate v. Southern R. Co. [Ala.] 39 So. 218. One who represents himself as owner of property and employs a broker to sell it cannot assert that he is not the owner when sued by the broker for his commission. Lopard v. Fritz, 45 Misc. 620, 91 N. Y. S. 5.

28. Assignor of judgment by allowing assignee to levy execution and receive the proceeds is estopped to question assignment. W. T. Rickards & Co. v. J. H. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239. Where the former owners of land, sold to the state for taxes, petitioned for a sale, they thereby induced the purchaser at the sale to believe that they had waived irregularities in the original sale and could not thereafter assert that such waiver was due to a mistake. Jackson v. Rowe, 94 N. Y. S. 568.

Acceptance of benefits: Beneficiaries who accept benefits of trustee's sale are estopped to set up want of power in the trustee and to recover the property, the proceeds received not being returned by them. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. Heirs who knowingly accept the proceeds of an unauthorized sale of land, full value being received, and no claim being made that they did not understand their rights, cannot thereafter go behind the sale

and assert an interest in the land itself. Knutson v. Vidders, 126 Iowa, 511, 102 N. W. 433. A person who causes his land to be sold for some purpose of his own under a judicial proceeding which turns out to be void, and receives and retains the proceeds of sale, cannot be heard to question its validity. He has made his election. Rhea v. Shields, 103 Va. 305, 49 S. E. 70. Corporation having appropriated and received benefit of consideration for notes given by it cannot deny authority to give notes. Peoria Star Co. v. Cutright, 115 Ill. App. 492. Plaintiff who obtained lumber on replevin writ estopped to say that writ was wrongly issued or executed, or to contradict the return of the marshal. Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479. Where one drainage district connects with another, it will be estopped to deny that some benefit accrued to its lands. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114. A father conveyed land to his son in consideration of support, and the son conveyed to his sister, with the father's consent, the sister undertaking to support and maintain the father. Held, the latter was estopped to assert that the son had defaulted, when the daughter supported him as she agreed. Brumback v. Chowning, 26 Ky. L. R. 917, 82 S. W. 974. Where a person in possession of land held himself out as owner and contracted with defendant for the removal of materials for the construction of a roadbed, and accepted a sum of money as full or partial payment, he could not thereafter, as assignee of the real owner, whose ownership had been concealed, sue for the conversion of the materials so used. Rogers v. Portland & B. St. R. Co. [Me.] 60 A. 713. Where a wife conveys her separate property without joining her husband as required by Rev. St. 1887, § 2498, and the purchaser receives, uses and consumes the property, he cannot set up non-compliance with the statute to defeat recovery of the price. Karlson v. Hanson & K. Saw Mill Co. [Idaho] 78 P. 1080.

29. One who has recognized the existence and validity of a contract, another having relied and acted upon such recognition, cannot thereafter deny its existence. Eau Claire Canning Co. v. Western Brokerage Co., 115 Ill. App. 71. Obligors in a bond having secured an advantage by having it treated as valid ought not to be relieved from liability by having it treated as invalid. Wall v. Mount, 121 Ga. 831, 49 S. E. 778. A bank which had a junior mortgage consented to the senior mortgagee's disposal of the property and application of the proceeds on the claim. Held, the bank could not attack the transaction. Atkins v. Boyle [Colo.] 80 P. 1067. Borrowers who by representations as to a building contract induced the lender to rely on it as valid, could not thereafter set up its usurious character; nor could they deny that a certain amount was due thereon, having previously represented such amount to be due. Cooper v. Brazelton [C. C. A.] 135 F. 476. Stockholders of a lessor corporation were allowed to buy stock in a third corporation, the value of which depended on the validity of the lease. Held, one who took stock in such third corporation, and sold it, could not thereafter assert the invalidity of the lease. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714. If a carrier by an unlawful discrimination carries goods at a rate lower than that which should have been charged, it cannot, after arrival of the goods refuse to deliver them until an additional charge is paid, and thus profit by its own wrong. Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585. A seller of goods obtained by fraud attached the property in an action for the fraud; thereafter a third person who had a prior claim against the buyer, also attached the property, relying on the seller's action; the seller was estopped to rescind the sale for fraud, thereby making the third person liable as a tort feasor. Gunnison v. Abbott [N. H.] 61 A. 589. A son conveyed land to his father and after the father's death sued to recover as heir. Held, by so affirming his deed, he was estopped to set up undue influence and want of consideration in a subsequent suit for cancellation of his deed, especially where he waited ten years after he had full knowledge of the father's claim and two years after his death. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. Where a lessee assigned his lease with the landlord's consent, he could not, in an action to recover rent, retain the proceeds of the assignment while the assignee retained possession, and at the same time plead fraud inducing the execution of the lease, to defeat a recovery of rent. Gilsey v. Keen, 93 N. Y. S. 783. A void judgment may support an equitable estoppel. Void foreclosure estops mortgagee as against purchaser. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849.

30. If all the members of a firm, with knowledge of the facts, consent to a purchase of merchandise as one by the firm, though it is in fact for the personal use of one member, the firm will be estopped to deny liability. Stewart v. Brubaker, 112 Ill. App. 408. One who has accepted an option to purchase realty and made a tender of the price and commenced a suit for specific performance is estopped to deny that he is bound by the agreement. Jones v. Barnes, 94 N. Y. S. 695. Where a corporation officer was employed by president to obtain business outside his duties as officer, and he was credited with commissions on business obtained, the corporation was estopped to deny liability for services so rendered. Hooke v. Financier Co., 99 App. Div. 186, 90 N. Y. S. 1012. A partnership sold out its business to another company and an agreement was drawn up whereby the parties "and their members" agreed not to engage in a similar business for ten years. This agreement was drawn up and signed by the chairman of the partnership. Held, he could not thereafter, in a suit to enjoin him from engaging in business, deny that the agreement bound him individually. Pittsburg Valve, Foundry & Construction Co. v. Klingelhofer [Pa.] 60 A. 161. One who gave note expressly providing for a lien, and who did not deny that the holder of the note had such lien, held estopped to deny the existence of the lien. Hamilton's Ex'r v. Wright [Ky.] 87 S. W. 1093. One who has signed and sworn to a certificate for a charter of a corporation for profit, which sets out a subscription for a certain number of shares, of a certain par value, is estopped

The doctrine that one assuming a certain position in a judicial proceeding is precluded from subsequently assuming a position inconsistent therewith, though not strictly one of estoppel, is closely related thereto.[31] The term "estoppel" is sometimes used to designate the equitable doctrine that where one of two innocent parties must suffer a loss, the loss should fall on the one whose conduct has induced or made it possible.[32]

Other applications of the doctrine[33] and cases wherein it was held inapplicable[34] are collected in the notes.

to deny liability for the shares as specified by setting up an agreement that he was to take a smaller number of shares, the remainder being intended as treasury stock. Greater Pittsburg Real Estate Co. v. Riley, 210 Pa. 283, 59 A. 1068.

31. See Election and Waiver, 5 C. L. 1078; Saving Questions for Review, 4 C. L. 1368; Appeal and Review, 5 C. L. 121. When one takes a position in a judicial proceeding, and a decree is made conformable thereto, and another party relies upon it and acquires property under the decree, he that takes such position is estopped from afterwards claiming contrary to such position to the prejudice of the other party. La Comte v. Freshwater, 56 W. Va. 336, 49 S. E. 238; Neal Loan & Banking Co. v. Chastain, 121 Ga. 500, 49 S. E. 618. A litigant is bound by his judicial admissions and cannot shift his position and claim the same amount first for services rendered to one interest and then to another. In re Immanuel Presbyterian Church, 113 La. 911, 37 So. 873. One who has assumed and successfully maintained a certain position in a cause cannot thereafter assume a position inconsistent therewith to the prejudice of one who has acquiesced in the position first taken. Rhea v. Shielde, 103 Va. 305, 49 S. E. 70. A party who has deliberately chosen his ground of defense and has been defeated thereon will not ordinarily be allowed to shift it so as to secure the benefit of another trial. Amendment to answer, tendered after trial had well progressed, not permitted when it set up a new defense. Barrett v. Kansas & Tex. Coal Co. [Kan.] 79 P. 150. A party who has agreed by counsel to certification of the shorthand notes of the evidence in a certain manner is estopped to thereafter assert that such certification is improper. Hofacre v. Monticello [Iowa] 103 N. W. 488. An administrator claimed that a bond and mortgage running to an estate were only indemnity for a judgment, and his contention prevailed and they were not included in the appraisal of the estate for the transfer tax. Held, he could not afterwards claim they were an absolute liability so as to have them deducted from the appraised valuation. In re Skinner's Estate, 94 N. Y. S. 144. Where the theory of an action against an agent as shown by pleadings and evidence is that the agent is personally liable, not having bound the principal, there can be no recovery upon the theory of damages for false assertion of authority. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796. A grantee returned his deed to the grantors before record and demanded rescission, and upon refusal by the grantors, brought suit for damages for deceit in which grantors disclaimed any interest in land. Held, in suit to quiet title by grantee, grantors were estopped to assert any interest in the land. Everett v. Stokes [S. D.] 103 N. W. 20. A lessee who during mortgage foreclosure proceedings conceals his interest in the property concerned, is estopped to assert it upon application of the purchaser at the sale for a writ of assistance. Strong v. Smith [N. J. Eq.] 60 A. 66. The fact that the purchaser is not injured by such concealment is immaterial, since the plaintiff in the foreclosure suit was injured because he could not make the lessee a party, not knowing of his interest. Id. Where a judgment creditor was represented at the sheriff's sale, and the sheriff returned a sale for "cash in hand," but it appeared at the hearing that only costs had been paid by a second mortgagee who was the purchaser, and the judgment creditor moved to confirm the sale, —held she was estopped to deny that her judgment had been satisfied to the extent of the bid returned by the sheriff. Fraser v. Sceley [Kan.] 79 P. 1081. After entry of an informal judgment for plaintiff, he procured the entry of a formal judgment. Held, he was estopped to assert that the time for an appeal should run from the informal judgment. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287. The advancement of certain arguments in defense of its use of its franchise by a street railway company in an action against it could not estop it from taking a position in seeking a continuance of the franchise inconsistent with such arguments. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

One who pleads a certain state of facts may become estopped to controvert them. Sworn complaint that a locus was a dedicated street estops assertion of title to it by adverse possession. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. An admission in an unsworn pleading, made under a mistake of fact, will not estop the pleader from setting up the contrary. Harris & Cole Bros. v. Columbia Water & Light Co. [Tenn.] 85 S. W. 897.

32. Pennypacker v. Latimer [Idaho] 81 P. 55. See Equity, 5 C. L. 1144.

33. One who makes a contract on behalf of himself and another is estopped to deny the other's interest, although the contract is in his name alone. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678. A guarantor who has been notified that his contract of guaranty has been accepted and that goods are being delivered upon the faith of it, and who encourages continued deliveries by positive statements, is estopped to assert that notice of acceptance of his guaranty was not given in time. American Radiator Co. v. Hoffman, 26 Pa. Super. Ct.

177. Estoppel arises against one seeking to enforce a covenant against the sale or manufacture of intoxicating liquor on the land conveyed, where he has encouraged a breach of the covenant. Mooter v. Whitman, 3 Ohio N. P. (N. S.) 141. If a landowner is indebted to a contractor in a sum equal to or greater than the amount of the lien of a materialman, the fact that the materialman is on the contractor's bond to save the owner harmless from mechanics' liens does not estop the materialman from enforcing his lien against the owner. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

Estoppel to deny representations: Defendant having induced plaintiff to act on supposition that certain conditions existed which would give plaintiff a right of subrogation to a lien, defendant was estopped to deny the existence of such conditions by virtue of a secret agreement with another. Anthes v. Schroeder [Neb.] 103 N. W. 1072. Where a defendant had denied that it had bought certain property from plaintiff, and plaintiff then sued as for a conversion, defendant was estopped to claim there had been a sale and that assumpsit was the proper form of action. Great Western Smelting & Refining Co. v. Evening News Ass'n [Mich.] 102 N. W. 286. A contractor who had furnished finishing material for a hotel had judgment giving him a lien on the realty and enjoining a levy on unused material on the ground that it was to go into the building. In other proceedings he also treated it as a part of the realty. Held, he was thereatfer estopped to claim it was personalty and that it did not pass by a sale of the land on execution. Potvin v. Denny Hotel Co., 37 Wash. 323, 79 P. 940. A shipper who has placed a certain valuation on his property for the purpose of procuring a certain rate is estopped thereafter to show a greater actual value when seeking to recover for a total loss; but actual value may be shown in case of a partial loss to show the proportionate part of the real value to which the shipper is entitled under the limitation clause. United States Exp. Co. v. Joyce [Ind.] 72 N. E. 865. In a bankruptcy proceeding begun in Arkansas, the alleged bankrupt swore that he was a resident of Colorado. The suit was commenced in Colorado at great expense and trouble. Held, the administrator was estopped to deny residence of the bankrupt in Colorado. Long v. Lockman, 135 F. 197. A proposal for insurance contained a certain rate and agent told insured that he need not keep the application, as a copy would be attached to the policy. Such copy contained a different rate. Insured, relying on agent's declaration, did not read policy. Held, insurer could not claim that policy rate controlled because insured had actual or implied notice of the change. Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co. [Mich.] 102 N. W. 975. A surety who represents himself as the owner of certain property above his debts and exemptions is estopped to claim such property exempt from the judgment obtained on the bond. McMahon v. Cook, 94 N. Y. S. 1018. Code Civ. Proc. § 1404, providing the manner in which such exemptions may be canceled, does not prevent such estoppel. Id.

Estoppel by acquiescence: Plaintiff and her grantor had planned a system of drainage and had acquiesced in the system many years. Held, plaintiff estopped to claim that defendant, a neighboring land owner, should take care of water from a pond in a different manner. Brown v. Armstrong [Iowa] 102 N. W. 1047. Man and woman married, both believing former husband of woman was dead. Later she obtained a divorce from the former husband, who was in fact living. The parties lived together as man and wife for 20 years. Held, in suit by wife to compel support, husband was estopped to deny that he had intended to marry the plaintiff. Chamberlain v. Chamberlain [N. J. Eq.] 59 A. 813. A party who proceeds to take possession of property under a written agreement for a contract, and fails to demand formal execution of the contract, and leads the other party to believe that such execution will not be demanded, is estopped to insist on such contract before an action may be maintained against him for failure to perform. Vicksburg Waterworks Co. v. Guffy Petroleum Co. [Miss.] 38 So. 302. Town supervisors who stood by and permitted street railway company to build railway at great cost could not months afterwards demand removal of road on ground that consent under which company acted was given by de facto supervisors. Jordan v. Washington & Canonsburg R. Co., 25 Pa. Super. Ct. 564.

Estoppel by articles of association: A corporation's articles of association declared that certain certificates constituted a part of the capital stock. Held, in a proceeding to determine liability for franchise tax, the construction of these certificates being in doubt, the corporation was estopped by the declaration of the articles to set up the contrary. People v. Miller, 180 N. Y. 16, 72 N. E. 525.

Estoppel to deny authority: Corporation which has accepted land bought by one of its officers cannot assert want of authority of the officer to promise a consideration in addition to that named in the deed. Windsor v. St. Paul, etc., R. Co., 37 Wash. 156, 79 P. 613 A vendee of a part of a tract of land authorized the vendor's agent to sell it with the rest of the tract to one who desired it all, and agreed to arbitrate his claim, and the subsequent purchaser had knowledge of this agreement Held, the first vendee was estopped to assert any claim against the second. Pollock v. Pegues [S. C.] 51 S. E. 514. One who accepted an unexpired liquor license, gave the required bond and carried on a liquor selling business, is estopped, in an action on his bond, to deny the authority of the agent who transferred to him the unexpired license. Faulkner v. Cassidy [Tex. Civ. App.] 87 S. W. 904.

Acceptance of payment "in full:" Where congress appropriates for the balance of a judgment "in full for the principal of judgment," acceptance of the amount appropriated constitutes an estoppel. Bloodgood's Case, 39 Ct. Cl. 69. One who accepts and retains the proceeds of a check given as payment in full for work done under a contract

Pleading and proof; questions of law and fact.[35]—An estoppel should be pleaded,[36] but if evidence of facts constituting it are admitted without objection, the defense is available, though not pleaded.[37] The facts constituting an estoppel

is estopped to deny that he has been paid in full. McGregor v. Ware Const. Co. [Mo.] 87 S. W. 981. See, also, Accord and Satisfaction, 5 C. L. 14.

Vendor of chattels estopped to set up title in himself unless acquired subsequent to sale. Deatz & Sterling's Case, 38 Ct. Cl. 355. See, also, Sales, 4 C. L. 1318.

34. Where in making a settlement items of extra work were not discussed, payment of contract price does not operate as an estoppel. McFerran's Case, 39 Ct. Cl. 441. The owners of land and of half a crop raised thereon allowed the crop to be shipped in the name of the husband of one of them. Held, they were not estopped, by holding him out as owner, to claim the crop, as against his attaching creditors. Monroe v. Mattox [Ky.] 85 S. W. 748. Where a claimant of land and his grantors had paid taxes, and a sale for taxes was void, he was not estopped to acquire the tax deed and set up title by adverse possession under the void tax deed. Carpenter v. Smith [Ark.] 88 S. W. 976. A lot owner who joins in a petition for grading of a street is not estopped to claim damages to his property resulting from the improvement. Dunn v. Tarentum Borough, 23 Pa. Super. Ct. 332. Agent for mortgagee sent interest which had not in fact been paid, and took an assignment of an interest coupon. Held, the mere fact that plaintiff at the time had notice of negotiations for payment of the mortgage did not estop it to claim the interest so advanced. Washington Loan & Trust Co. v. Ritz, 37 Wash. 642, 80 P. 174. By having accepted samples of water to be furnished by a water company, a city is not estopped to assert that the water actually furnished thereafter was not reasonably pure. Meridian Waterworks Co. v. Meridian [Miss.] 37 So. 927. A landlord who obtains a liquor license for rented premises is not estopped to assert that the tenancy is in another than the licensee. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791. City held not estopped to deny liability for injury caused by billboard in front of opera house in an area on private property inside the street line, the city having never exercised any control over it. Temby v. Ishpeming [Mich.] 12 Det. Leg. N. 114, 103 N. W. 588. A bank which held notes of the treasurer of a corporation, accepted a check signed by him as treasurer and applied it on his notes, according to his instructions. Held, the corporation could recover from the bank, though it waited four years, and though the transaction was disclosed by its passbook and the return of the canceled check soon after it occurred. Manhattan Web Co. v. Aquidneck Nat. Bank, 133 F. 76. Though a stockholder votes for the letting of a contract to other stockholders and directors, where he protests against the price afterwards fixed, he is not estopped to object to the recovery of compensation at the rate fixed by them against his objection. Booth v. Land Filling & Imp. Co. [N. J. Eq.] 59 A. 767. Mere silence and inaction of a street railway company while streets occupied by it were being paved, do not estop it to set up absolute want of power in the city to make a special assessment on it for street improvement, especially where the contract provided for payment by the city and abutters and no benefit accrued to the company from the paving. Louisiana Imp. Co. v. Baton Rouge Elec. & Gas Co. [La.] 38 So. 444. Taxpayers held not estopped to sue for injunction against collection of taxes, though they had been notified by publication of a report of the appraisal and of the time of a hearing to confirm such report, when a portion of the property had not been assessed as required by statute, and this fact was shown by the report. Tefft v. Lewis [R. I.] 60 A. 243. Pending an injunction restraining the announcement of the result of an election to annex a certain ward of Little Rock to North Little Rock, Little Rock granted a franchise to street railway company which proceeded to lay tracks in the annexed territory. Held, North Little Rock was not estopped to deny the validity of the franchise by failing to object to the improvements during the life of the injunction. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826. A wife joined a commissioner in executing a deed to a purchaser at a judicial sale, the deed reciting that she relinquished her rights in the premises. Her husband did not join in the deed. She was not guilty of fraud, nor did she mislead the purchaser or induce him to buy. Held, she was not estopped to claim her dower rights Lewis v. Apperson, 103 Va. 624, 49 S. E. 978. One who bought cotton raised in 1893 is not estopped to deny that the vendee had title to the land in 1890 such as to make a mortgage then given a lien on the 1893 crop. Karter v. Fields, 140 Ala. 352, 37 So. 204. Though a patent recites that the invention is an improvement upon another and prior one by the same inventor, his acceptance of it in that form does not preclude him from showing that the inventive idea was antecedent to it. Eck v. Kutz, 132 F. 758.

35. See 3 C. L. 1334.

36. Hill v. Terrell [Ga.] 51 S. E. 81; Word v. Marrs [Tex. Civ. App.] 83 S. W. 17; Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048; McCorkell v. Herron [Iowa] 103 N. W. 988.

37. Where testimony to facts relied on to show an estoppel is admitted without objection and rebutting testimony is produced on the other side, the estoppel may be relied on, though not pleaded. Standard Sanitary Mfg. Co. v. Arrott [C. C. A.] 135 F. 750. Where, in an action for goods sold and delivered plaintiff did not know he would have to rely on an estoppel to prove agency, and evidence of the facts was admitted without objection, he was entitled to the benefit of the facts so shown, though he had not pleaded an estoppel. Capital Lumber Co. v. Barth [Mont.] 81 P. 994. While estoppel in pais may be specially pleaded, this is not necessary, since evidence of such an

must be set forth with particularity and precision, and nothing can be supplied by intendment or inference,[38] and when there is ground for inference on intendment, it will be against and not in favor of estoppel.[39] The burden of proving estoppel is on the party alleging it,[40] and every element or essential fact must be made to appear by clear and convincing proof.[41] Proof of an equitable estoppel in a suit on a contract does not violate the rule that a written contract can be altered only by a contract in writing or by an executed oral agreement.[42] Whether certain facts constitute an estoppel is for the court; but the existence of such facts is for the jury if there is a conflict in the evidence.[43]

§ 5. *Extent of operation of doctrine of estoppel.*[44]—An estoppel operates against a privy of the party estopped.[45] Parties under disability are not estopped unless their conduct has been intentional and fraudulent.[46] Though there is a conflict, the weight of authority seems to be that the doctrine of estoppel is applicable to married women;[47] at least in those states where they have been given enlarged property rights.[48]

estoppel is admissible under the general issue. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

Contra: Even though an estoppel be shown by the evidence, it cannot be taken advantage of unless pleaded. Schofield v. Cooper, 126 Iowa, 334, 102 N. W. 110.

38. Bartholomee v. Lowell [Ind.] 72 N. E. 1030. When an estoppel is relied on as a defense in equity and is such that it can be pleaded, it should be alleged with particularity and certainty. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430.

39. Bartholomee v. Lowell [Ind.] 72 N. E. 1030.

40. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43.

41. Proof of acts constituting an estoppel must be clear. Houghen v. Skjervheim [N. D.] 102 N. W. 311. Claim of estoppel untenable because proof of essential elements was wholly wanting. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249. Evidence held not to show representations on which an estoppel could be based. Hase v. Schotte [Mo. App.] 84 S. W. 1014. An estoppel in pais must be made to appear by clear and convincing evidence and is only sanctioned in order to prevent perpetration of fraud and to promote justice. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430. Unless fraud is proved, an estoppel cannot be based upon acts or conduct of the party sought to be estopped, where such conduct is as consistent with honest purpose or with absence of negligence, as with their opposites. Standard Sanitary Mfg. Co. v. Arrott [C. C. A.] 135 F. 750. Evidence held insufficient to prove an agreement by which the owner of a patent would be estopped to claim title to a patent as against a company in which he held stock. Id. To create on estoppel against a city to prevent it from removing a stand from a street, it must appear that the city has abandoned control over the street for such a time as has induced the owner of the stand to believe that the street has been abandoned by the public; and that he has made permanent and valuable improvements or expenditures in reliance on such belief. City of Chicago v. Pooley, 112 Ill. App. 343.

42. Civ. Code, § 1287, not violated. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24.

43. In ejectment to recover land on which defendant had constructed building, jury properly instructed that if they found that plaintiff had consented to the construction of the building, he was estopped to deny location of line. Daley v. Wingert, 210 Pa. 169, 59 A. 982.

44. See 3 C. L. 1333.

45. An heir is bound by an estoppel of the ancestor. Spears v. Conley [Ky.] 87 S. W. 1072. Assignor of chattel mortgage being estopped by conduct to enforce it against subsequent mortgages for value, assignee is also estopped. May v. First Nat. Bank [Neb.] 104 N. W. 184.

46. Minors not estopped by accepting benefits of sale of land from setting up invalidity of sale, guardian having purchased for his own benefit. Cooper v. Burns, 133 F. 398.

47. Grice v. Woodwarth [Idaho] 80 P. 912.

Contra: A married woman cannot lose her land, whether separate estate or not, by estoppel by conduct (in pais) without actual fraud, even if by it. Yock v. Mann [W. Va.] 49 S. E. 1019. A married woman cannot be estopped by acts or representations of her husband (Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048), nor can she be estopped unless she is guilty of fraud (Id.).

48. Grice v. Woodwarth [Idaho] 80 P. 912. Married woman bound by estoppels in pais under Burn's Ann. St. 1901, § 6962. Ft. Wayne Trust Co. v. Sihler, 34 Ind. App. 140, 72 N. E. 494.

Note: A married woman is held, in relation to matters about which she is competent to contract, to the observance of that good faith in her dealings to which others are bound. Hence she may be estopped by her silence whenever it is her duty to speak. Grim's Appeal, 105 Pa. 375; Logan v. Gardner, 136 Pa. 589, 20 Am. St. Rep. 939; Schweitzer v. Wagner, 94 Ky. 458; Tracy v. Lincoln, 145 Mass. 357. It has been held that a married woman cannot be estopped by conduct unless it amounts to intentional or posi-

The doctrine of estoppel applies to states and public municipalities in litigation concerning property rights.[49] But neither the state[50] nor a public municipality[51] can be estopped by unauthorized acts of its agents. A state may be estopped by record.[52]

The doctrine of estoppel does not apply to a matter in the nature of a public right,[53] nor where property, and not a person, is to be charged.[54] One cannot be estopped to assert the invalidity of a wholly void assessment[55] or tax foreclosure proceeding.[56] Since jurisdiction cannot be conferred on a foreign tribunal by the application of the principle of equitable estoppel, one cannot be estopped to deny

tive fraud (Steed v. Petty, 65 Tex. 490), or at least unless her acts amount in law to fraud (Johnson v. Bryan, 62 Tex. 623; Louisville, etc., R. Co. v. Stephens, 96 Ky. 401, 49 Am. St. Rep. 303).

But if a married woman's contract relates to a matter concerning which her common-law disabilities continue, so that her contract is void for want of capacity or power to make it, the doctrine of estoppel cannot be invoked. Cook v. Walling, 117 Ind. 9, 10 Am. St. Rep. 17; Crenshaw v. Julian, 26 S. C. 283, 4 Am. St. Rep. 719. For full discussion of the subject, see note to Trimble v. State [Ind.] 57 Am. St. Rep. 169.

49. When a sovereign comes into court to assert a pecuniary demand against a citizen, the rights of the parties must be adjusted in accordance with settled principles applicable in controversies between ordinary parties. Walker v. United States, 139 F. 409. Thus, acts or omissions of its officers, authorized to represent and bind the United States in a particular transaction, within the scope of that authority, may, in a proper case, work an estoppel against the government. Marshal rendered accounts to government in good faith, which were audited by the proper officer, after which he was paid, he in turn paying his deputies. All this was done according to a long standing custom of the department. Held, the government was estopped, in a suit against the marshal after he had gone out of office, to assert the invalidity of payments to him and to recover overpayments. Id. Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional, and the subject-matter of the contract is not ultra vires, illegal, or malum prohibitum, and the facts are such, as against the corporation, as would estop an individual from setting up the unconstitutionality of the statute as a defense, the municipal corporation will also be so estopped. City so estopped where contract for public improvement was made and performed and the city accepted the benefits thereunder. City of Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515. The doctrines of estoppel and laches apply to counties the same as to individuals in respect to swamp lands held by a county. Palmer v. Jones [Mo.] 85 S. W. 1113. An ordinance providing for refunding bonds recited the existence of a legal indebtedness, and that bonds were properly issued. Held, the city was estopped by the recitals in the ordinance to assert nonliability because the original bonds were void. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex.] 86 S. W. 750. Where the trial court has for years allowed the corporation counsel to assume control of the calendar and delay trial of condemnation proceedings, the city is estopped to claim that application to have case set should have been made to the court rather than to counsel. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

50. State not estopped by acts of text book commission which were beyond their power. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829. In a suit to quiet title brought by the state, it may set up the invalidity of a tax title by which defendant claims, even though acts of its agents caused such irregularities. State v. Coughran [S. D.] 103 N. W. 31. Unauthorized act of land commissioner in issuing patents under veteran donation act for land which had already been allotted to the public school fund could not operate as an estoppel against the state. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

51. County not estopped by illegal agreement made by supervisors. People v. St. Lawrence County Sup'rs, 101 App. Div. 327, 91 N. Y. S. 948. City not estopped to deny liability for services rendered under contract with a special attorney when an ordinance prohibited such contract. Hope v. Alton, 214 Ill. 102, 73 N. E. 406, afg. 116 Ill. App. 116.

52. Record of sale of forfeited land under Code 1899, c. 105, bars a second sale by the state for forfeiture under another title. State v. Jackson, 56 W. Va. 558, 49 S. E. 465.

53. The fact that a relator was present at some meetings of drainage commissioners and acquiesced in the proceedings does not estop him from maintaining quo warranto to test the legality of the organization of the district. People v. Burns, 212 Ill. 227, 72 N. E. 374.

54. No estoppel by representations of defendants in mechanics' lien case. Bradley v. Gaghan, 208 Pa. 511, 57 A. 985.

55. Payment of instalments of a void special assessment by a predecessor in title of a property owner does not estop such owner from attacking the validity of the assessment. Carter v. Cemansky, 126 Iowa, 506, 102 N. W. 438.

56. A landowner is not estopped to attack the validity of tax foreclosure proceedings by appearing and bidding at the sale, if the proceedings are wholly void. Young v. Droz [Wash.] 80 P. 810.

the validity of a foreign decree of divorce.[57] In Texas a parol sale of real estate is upheld on the ground of estoppel if the facts constituting an estoppel are present,[58] as where the vendee makes improvements in reliance upon the parol sale, the vendor having knowledge thereof.[59]

The doctrine of estoppel has been applied in criminal law as well as in civil cases.[60] Thus, it has been held that a county officer who had himself selected a jury list and sworn to its legality is estopped to set up illegality on the ground that the grand jury was drawn from an irregular list when tried on an indictment for misfeasance in office.[61]

EVIDENCE.

Scope of article.—This article treats specifically of the competency of evidence, the competency of witnesses and the rules governing their examination being entirely excluded,[62] and questions of relevancy and sufficiency of evidence, except so far as they illustrate some general rule, being excluded to titles dealing with the particular subject or issue to which the evidence is addressed. Evidence in criminal prosecutions is also treated elsewhere,[63] though occasional holdings of undoubted general application have been included.

57. Percival v. Percival, 94 N. Y. S. 909.

58. Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893.

59. One who bought up several outstanding claims, bought one under a parol agreement, and thereafter made valuable improvements on the land. Held, though the purchaser did not rely exclusively on the parol sale, the vendor was estopped to claim against him. Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893.

60. See discussion in State v. Second Judicial Dist. Ct. [Mont.] 78 P. 769.

61. State v. Second Judicial Dist. Ct. [Mont.] 78 P. 769.

Note: "It has been held that if a person makes away with money which he has received upon his false representation that he is the agent of another and that he accepts the money for his alleged principal, he may be punished for the crime of embezzlement. State v. Spaulding, 24 Kan. 1. **Contra,** Moore v. State, 53 Neb. 831. As in the present case (State v. Second Jud. Dist. Court [Mont.] 78 P. 769), this result is reached on the ground that the prisoner is estopped to deny what he represented to be true. This reasoning can hardly be supported. The state should punish a person only for doing it an injury, and should conduct the trial in a legal and regular manner. Hence the false representation of a person which, if true, would result in his criminal liability, or his false statement that a certain procedure is legal, should not form the basis for the infliction of punishment; for, in the first instance, the injury for which he is being punished has not really been done, and in the second he is not in fact being legally tried. 12 Harv. L. R. 56."—18 Harv. L. R. 467.

62. See 3 C. L. 1335. See Witnesses, 4 C. L. 1943; Examination of Witnesses, 5 C. L. ——

63. See Indictment and Prosecution, 4 C. L. 1.

§ 1. *Necessity and duty of adducing evidence.*[64]—Facts admitted in the pleadings or on the trial [65] need not be proved.

(§ 1) *A. Judicial notice.*[66]—Courts take judicial notice of their own records and proceedings [67] in causes pending before them; [68] of public domestic statutes [69] and other official acts of the legislature; [70] of the adoption of a constitutional amendment; [71] of regulations [72] and official acts of the executive departments of the United States; [73] of public elections; [74] of who are public officers; [75] of the common-law powers of a notary; [76] of public surveys and boundaries of public municipalities; [77] of matters of common knowledge; [78] of general customs; [79] of well settled

64. See 3 C. L. 1335.

65. **Admissions of counsel upon trial** of civil suit may obviate necessity of proof of subject-matter of such admissions. Preston v. Davis, 112 Ill. App. 636; Everett v. Marston, 186 Mo. 587, 85 S. W. 540. Admissions of fact by an attorney only bind a client when distinct and formal and made for the express purpose of dispensing with proof of a fact on the trial. Hicks v. Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703. Informal admissions of an attorney at a former trial are not evidence against the client at a subsequent trial. Thus, where, in former action, attorney said he would take a nonsuit if facts were as defendant's witnesses said they were and after two persons had investigated, did take a nonsuit, the attorney's admissions were not binding on the client in a subsequent action. Id.

66. See 3 C. L. 1335.

67. Court in auxiliary proceeding in contempt may take judicial notice of records of main prior proceedings. Ferguson v. Wheeler, 126 Iowa, 111, 101 N. W. 638. Court took judicial notice of records of other cases between same parties in deciding whether to modify or reverse a judgment. In re Transfer Penalty Cases, 92 N. Y. S. 322. The supreme court will, in determining whether an appeal was taken in good faith, take judicial notice of a mandamus proceeding before it to compel the trial judge to settle a bill of exceptions. Gay v. Gay, 146 Cal. 237, 79 P. 885. Court of appeals took notice of its reversal of a judgment in favor of appellees, which controlled recovery in subsequent suit, and remanded the latter. Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 444.

68. Courts do not take judicial notice of their records and proceedings in other causes. Demars v. Hickey [Wyo.] 80 P. 521. Courts do not take judicial notice of the existence of judgments or decrees in cases other than the one then pending; decree in receivership proceedings is no exception. Allison v. Fidelity Mut. Fire Ins. Co. [Neb.] 104 N. W. 753.

69. Statutes of the state set up in declaration need not be proved. Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304. Acts of the legislature incorporating a railroad must be judicially noticed when properly pleaded. Chicago, etc., R. Co. v. Liebel [Ky.] 86 S. W. 549. Gen. Laws 1896, c. 26, § 15, provides that every act of incorporation shall be deemed a public act; hence an act incorporating a fire district for distribution of water will be judicially noticed, and construed. Foley v. Ray [R. I.] 61 A. 50. Supreme court will judicially notice that railroads have been assessed and have paid ad valorem taxes for previous years pursuant to Rev. Code 1892, § 3877. Gulf & S. I. R. Co. v. Adams [Miss.] 38 So. 348.

70. Proceedings entered on Senate Journal by which members were expelled judicially noticed under Code Civ. Proc. § 1875, subd. 3, providing for such notice of official acts of the legislature. French v. Senate of State, 146 Cal. 604, 80 P. 1031. Dates fixed by legislative enactment for beginning of sessions of superior courts of the state. Edwards v. State [Ga.] 51 S. E. 630. That legislature had twice sanctioned continuance of encroachments on public streets. Empire Realty Corp. v. Sayre, 95 N. Y. S. 371.

71. Adoption of constitutional amendment. Carmody v. St. Louis Transit Co. [Mo.] 87 S. W. 913.

72. Judicial notice taken of post office regulations which are a part of public records. Carr v. First Nat. Bank [Ind. App.] 73 N. E. 947.

73. Under Code Civ. Proc. § 3150, orders creating Missoula military reservation may be judicially noticed. State v. Tully [Mont.] 78 P. 760.

74. Courts will take judicial notice of prohibition election, and whether it was held under general local option liquor law, or a local act providing for such election. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

75. Supreme court judicially noticed that certain persons were not attorney general and state treasurer on a certain day, but that their successors had been elected and had qualified. State v. Board of State Canvassers [Mont.] 79 P. 402. State courts bound to take judicial notice of who are public officers of the state holding under commissions issued by the governor. Bailey v. McAlpin [Ga.] 50 S. E. 388. Judicial notice taken by supreme court that person signing decree appealed from was a county judge. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680.

76. Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290.

77. State courts take judicial notice of boundaries of counties and changes therein by the legislature, and of the governmental survey and districts thereby created. Stanford v. Bailey [Ga.] 50 S. E. 161. Supreme court judicially knows ranges and townships in counties. Brannan v. Henry [Ala.] 39 So. 92. Judicial notice taken that land in certain section was on Arkansas river, and that section was made fractional by meandering of river. Harvey v. Douglass [Ark.] 83 S. W. 946.

78. Common belief of people of state that vaccination is a preventive of smallpox. Vie-

or authenticated scientific,[80] geographical,[81] and historical [82] facts; and, since attorneys are officers of the court,[83] whether a certain person is a duly licensed attorney at law.[84] In the absence of a statute to the contrary,[85] the laws of another state,[86] special or private acts,[87] and municipal ordinances,[88] will not be judicially noticed. A voluntary report of a grand jury not made pursuant to the requirements of law will not be judicially noticed.[89] Appellate courts may judicially notice terms of lower courts,[90] but not their rules.[91] Akin to the doctrine of judicial notice but clearly to be distinguished therefrom is the inference by the court of ultimate from probative facts.[92]

(§ 1) *B. Presumptions and burden of proof.*[93]—The so-called conclusive presumptions, being mere rules of law, are not here treated; and only those disputable presumptions which are of wide application are discussed or illustrated.[94]

meister v. White, 179 N. Y. 235, 72 N. E. 97. Construction of ordinary horse street car. Kleffman v. Dry Dock, etc., R. Co., 93 N. Y. S. 741. Nature of game of ping pong and that ping pong balls are not toys. United States v. Strauss Bros. & Co. [C. C. A.] 136 F. 185. That certain land is held as military reservation by Federal government, under private purchase; but not of the metes and bounds of the land so used. Baker v. State [Tex. Cr. App.] 83 S. W. 1122. That the use of dynamite in constructing tunnel under populous city is inherently dangerous. City of Chicago v. Murdoch, 113 Ill. App. 656. That electricity is dangerous and that society recognizes the fact and acts accordingly. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613 That best spark arresters will not prevent emission of sparks from engines under certain conditions. Babbitt v. Erie R. Co., 95 N. Y. S. 429. That phosphate is mined in parts of Florida and is an article of transportation. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 652. That all taxes assessed are not collected until years after the assessment. State v. Mutty [Wash.] 82 P. 118. Judicially known that letters "N. P." after signature in acknowledgment are commonly used to signify "notary public." Leech v. Karthaus [Ala.] 37 So. 696. In action for infringement of patent, court will take judicial notice of conventional bushel basket. Roberts v. Bennett [C. C. A.] 136 F. 193. Judicial notice taken of intimate commercial relations between two ports, and inference drawn that highest wage at port of departure would not be less than lowest at port of destination. The Elihu Thompson, 139 F. 89. Court will not shut its eyes to common knowledge of character of improvements in business center of Chicago, and that large buildings are there erected under long term leases. Denegre v. Walker, 114 Ill. App. 234. Code Civ. Proc. § 1875, authorizing courts to take judicial notice of the true significance of English words and phases, enables them to assume judicial knowledge of common and current knowledge relating to automobiles. Ex parte Berry [Cal.] 82 P. 44.

79. John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050.

80. That 1-10 of grain of morphine taken every four hours could not poison a person. Laturen v. Bolton Drug Co., 93 N. Y. S. 1035. That overflows and floods are followed by disease and that swamps are detrimental to public health. Applegate v. Franklin [Mo. App.] 84 S. W. 347.

81. That Missoula military reservation is located in Missoula County. State v. Tully [Mont.] 78 P. 760. That the Passaic river is a tidal stream, the bed of which belongs to the state so far as the tide ebbs and flows. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

82. Judicial notice taken of fact that Maryland embraces territory which was a part of the original English colonies. Frank v. Gump [Va.] 51 S. E. 358.

83. Morrison v. Snow, 26 Utah, 247, 72 P. 824.

84. Weber v. Powers, 114 Ill. App. 411.

85. By Ark. Acts 1901, p. 164, no. 98, judicial notice is taken of laws of other states. Creelman Lumber Co. v. Lesh & Co. [Ark.] 83 S. W. 320.

86. Gunning System v. La Pointe, 113 Ill. App. 405; Clark v. Assets Realization Co., 115 Ill. App. 150; Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391; Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345; First Nat. Bank v. Nordstrom [Kan.] 78 P. 804; Savannah, F. & W. R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308.

87. Court cannot judicially know when local option laws, being special laws, are put in operation. Craddick v. State [Tex. Cr. App.] 88 S. W. 347.

Contra: In Connecticut, courts take judicial notice of all private acts. New York, etc., R. Co. v. Offield [Conn.] 60 A. 740.

88. City of New York v. Knickerbocker Trust Co., 93 N. Y. S. 937; Gibbs v. Manchester [N. H.] 61 A. 128. Supreme court cannot take judicial notice of two mile limit of city of Seattle. Town of West Seattle v. West Seattle Land & Improvement Co. [Wash.] 80 P. 549.

89. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75.

90. Appellate courts take judicial notice of terms of district courts. Accousi v. Stowers Furniture Co. [Tex. Civ. App.] 83 S. W. 1104.

91. Rules of court not judicially noticed by appellate court; recital of clerk in record that certain day was second day of term does not control. Edwards v. Warner, 111 Ill. App. 32.

92. See post, §§ 1B and 11.

93. See 3 C. L. 1337.

94. Note: The legislature has entire con-

A presumption of fact is simply an inference or conclusion logically deduced from known data.[95] A presumption of fact cannot be based upon another presumption of fact,[96] but must be an immediate inference from facts proved.[97] Inconsistent presumptions cannot spring from the same state of facts.[98] Whether a particular inference can be drawn from facts proved is a question of law;[99] which of two possible and proper inferences shall be drawn, and whether one inference defeats or answers another, is for the jury.[1] Among the presumptions of fact or logical inferences commonly recognized are the presumption that a state of facts once shown to exist will continue to exist[2] as long as is usual with things of that nature;[3] that the ordinary and usual course of business has been followed;[4] that a letter properly addressed,[5] stamped and mailed, and not returned, was received by

trol over rules of evidence subject only to constitutional limitations. (Applied to act of Congress which creates presumption in favor of report of interstate commerce commission). Tift v. Southern R. Co., 138 F. 753.

95. Western Maryland R. Co. v. Shivers [Md.] 61 A. 618.

96. Bycyznski v. Illinois Steel Co., 115 Ill. App. 326; Condon v. Schoenfeld, 214 Ill. 226, 73 N. E. 333; Tull v. St. Louis S. W. R. Co. [Tex. Civ. App.] 87 S. W. 910. The existence of a fact cannot be presumed from another fact which itself rests wholly on presumption. Williams v. Miles [Neb.] 102 N. W. 482.

97. No presumption can be drawn from a presumption; circumstantial evidence being relied on, the circumstances must be proved and not themselves presumed. Bube v. Weatherly Borough, 25 Pa. Super. Ct. 88.

98. Facts warranting inference of negligence cannot give rise to contrary presumption. Western Maryland R. Co. v. Shivers [Md.] 61 A. 618.

99, 1. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585.

2. Cohabitation, without marriage ceremony, commenced as meretricious, is presumed to continue such. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163. Incorporation of a bank, once admitted, is presumed to continue until contrary is shown. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080. Voting machines are presumed to remain unchanged between the close of election, when read by inspectors, and the time of an election contest. Trumbull v. Board of Canvassers of Jackson [Mich.] 12 Det. Leg. N. 255, 103 N. W. 993. Recital in deed of 1862 that grantor was a bachelor is presumptive proof that he was a bachelor in 1858, a deed of that year containing no statement as to whether he was married or single. Gibson v. Brown, 214 Ill. 330, 73 N. E. 573. Where no evidence of a change in the condition of an automobile between the time of its possession by defendant and examination by experts was introduced, the jury was warranted in drawing inference that condition had remained unchanged, and evidence of the expert examination was admissible without showing that the condition had remained unchanged. White Sew. Mach. Co. v. Phoenix Nerve Beverage Co. [Mass.] 74 N. E. 600.

3. Under Code Civ. Proc. § 3266, cl. 32, account shown to have been good and collectible are presumed to continue so. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

4. By Code Civ. Proc. § 1963, subd. 20. People v. Kelly, 146 Cal. 119, 79 P. 846. Presumed that bank did business in the usual way and that it did not buy paper of insolvent parties. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761. Evidence of clerk whose only knowledge came from presumption arising from his duties and usual course of business was admissible for what it was worth. Netherlands Fire Ins. Co. v. Barry, 93 N. Y. S. 164. Having testified that no report was sent in as to lights on a certain night, city electrician could testify that usual course was to send in a report when a light was out of order. People v. Kelly, 146 Cal. 119, 79 P. 846. Where contract is for delivery of goods f. o. b., it is prima facie presumed that weights are to be determined at place of delivery. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199. Where creditor takes notes from debtor payable at a future day, the law does not imply an agreement to give time until the maturity of the note. Hummelstown Brownstone Co. v. Knerr, 25 Pa. Super. Ct. 465. It is presumed that title to a package delivered to a carrier passes to consignee upon such delivery. Bank of Irwin v. American Exp. Co. [Iowa] 102 N. W. 107. In absence of any evidence, presumption would be that electric wires were fastened to insulators in usual way. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. The presumption arising from proof of custom cannot supply proof of substantive facts. When there was no proof of contests of lost affidavit in replevin, proof of custom in the clerk's office could not supply proof that in a particular case, the value of goods as stated therein was copied into the writ, and that clerk obtained knowledge from so doing. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011.

5. No presumption that letter addressed to 317 Main street, New York City, reached 317 Main street, Cincinnati. Westheimer v. Howard, 93 N. Y. S. 518.

6. Letter placed in mail box or general post office, properly addressed and prepaid, prima facie presumed to have reached destination. Phoenix Brewing Co. v. Weiss, 23 Pa. Super. Ct. 519. Presumption is that properly mailed letter or telegram properly given telegraph company for transmission was received by the addressee. Kibler v.

the addressee [6] in due course of the mail; [7] that one in possession of personalty is the owner; [8] that an owner of land is in possession; [9] that a person absent from home for seven years, and not heard from, is dead.[10] Identity of person is presumed from identity of name.[11] Other illustrations are given in the note.[12]

Suppression or spoliation of evidence warrants the presumption that, if produced, the evidence would be unfavorable to the party suppressing it; [13] and failure to call an available [14] witness [15] to rebut a prima facie showing made by the other party on a particular issue [16] warrants the inference by the jury that the testimony of the witness, if produced, would be unfavorable.[17] But this presump-

Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Account stated sent in customary way is presumed to have been duly received. Dick v. Zimmermann, 105 Ill. App. 615. Addressee presumed to have received notice duly mailed properly addressed and stamped; but presumption is rebuttable. Sherrod v. Farmers' Mut. Fire Ass'n [N. C.] 51 S. E. 910.

7. Disputable presumption that letter duly directed and mailed was received in regular course of mail. B. & C. Comp. § 788, subd. 24. Sloan v. Sloan [Or.] 78 P. 893. Mailing of letter raises prima facie presumption that it was received in due course by the person to whom it was properly addressed. Merchants' Exch. Co. v. Sanders [Ark.] 84 S. W. 786. Proof of the writing of a letter on a certain day and of its receipt by the addressee at the time it would have arrived in due course is sufficient to support a finding that it was mailed the day it was written. Campbell v. Beard [W. Va.] 50 S. E. 747. Proof of the receipt of a letter and the day on which it was written, dispenses with proof in detail of addressing, stamping and deposit in the mail, no objection being made to the form in which the evidence is introduced. Id.

8. Husband who had possession of money before and at time he deposited it in wife's name was presumptive owner. First Nat. Bank v. Taylor [Ala.] 37 So. 695. Possession of a negotiable instrument payable to order and properly indorsed is prima facie proof of bona fide holdership. Price v. Winnebago Nat. Bank, 14 Okl. 268, 79 P. 105.

9. An owner of land is presumed to be in possession until ousted by an actual occupant. Kreamer v. Voneida, 24 Pa. Super. Ct. 347. Presumption of possession follows proof of ownership. Ewers v. Smith, 98 App. Div. 289, 90 N. Y. S. 575.

10. Presumption of death arises where a person leaves his home and is continually absent therefrom for more than seven years, without any intelligence being received of his whereabouts. Policemen's Benevolent Ass'n v. Ryce, 115 Ill. App. 95. Mere absence of husband from home and failure to send word to family for sixteen years does not raise presumption of death when husband was known to have been living with another woman, having given up his former home. Donovan v. Twist, 93 N. Y. S. 990.

11. Code Civ. Proc. subd. 25, § 1963. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

12. Fact and date of baptism being shown, birth on a day prior thereto will be presumed. Collins v. German-American Mut. Life Ass'n [Mo. App.] 86 S. W. 891. It will be assumed that a traveler, bound to look and listen at a railway crossing, saw what he would have seen had he looked, and heard what he would have heard had he listened. Southern R. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053.

13. Patch Mfg. Co. v. Protection Lodge, No. 215, International Ass'n of Machinists [Vt.] 60 A. 74. Where a note is shown to have been destroyed, the jury may infer that it was a properly witnessed note on which an action could be maintained. Sullivan v. Sullivan [Mass.] 74 N. E. 608. Failure to produce available evidence to rebut adverse evidence warrants adverse presumption. Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501. Where, in action for injuries to infant, father refused to allow committee of physicians appointed by court to examine the child, and child was not produced in court, the father's claim as to serious injuries was greatly discredited. Houston Elec. Co. v. Lawson [Tex. Civ. App.] 85 S. W. 459.

14. Charge that jury could consider fact that defendant called no witnesses was erroneous, when it was not shown that any witnesses, not called by plaintiff, were available. Robinson v. Metropolitan St. R. Co., 92 N. Y. S. 1010.

15. Failure to produce available witnesses may be considered by jury. Levine v. Metropolitan St. R. Co., 78 App. Div. 426, 80 N. Y. S. 48. Where four persons were present where accident occurred, and only three were called, though fourth was available, it was proper for counsel to argue that if fourth had been called his testimony would have been unfavorable to adverse party. Lambert v. Hamlin [N. H.] 59 A. 941. Unfavorable inference is always to be drawn when an available witness is not called to testify to facts in dispute; failure of injured person to call examining physician is no exception. Crago v. Cedar Rapids, 123 Iowa, 48, 98 N. W. 354. Failure of defendant to produce an available witness, presumably favorable to him, who knows facts excusing defendant from liability if anyone does, warrants strong presumption that such facts do not exist. Anderson v. Cumberland Tel. & T. Co. [Miss.] 38 So. 786. Failure to call a witness said to have been present at a conversation is a strong circumstance, weakening the effect of testimony to the conversation. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 85 S. W. 28.

16. Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263; Condon v. Schoenfield, 114 Ill. App. 468; East St. Louis Connecting R. Co. v. Altgen, 112 Ill. App. 471.

17. There is no presumption arising from failure to call a witness, but the jury has

tion does not relieve the other party from introducing affirmative proof on the issue in question so far as he has the burden thereon.[18] Evidence tending to show efforts to produce witnesses,[19] or to show that certain persons would be incompetent to testify if produced,[20] or to otherwise explain their absence,[21] is admissible to rebut any unfavorable inferences which may be drawn from their absence. No unfavorable inference is to be drawn from failure to call a witness equally available to both parties,[22] or to call all the persons who could throw light on the questions at issue.[23] Efforts to suppress testimony must be shown by competent evidence.[24]

Among the presumptions indulged by courts on grounds of public policy are, the presumption that judicial proceedings have been regular;[25] that a court of record is one of general jurisdiction[26] and had jurisdiction of the parties and subject-matter in a given case;[27] that official acts and duties have been regularly performed,[28] in accordance with law;[29] that men are sane[30] and solvent,[31] and are

the right to draw any inference from the fact which they deem warranted. Kirkpatrick v. Allemannia Fire Ins. Co., 102 App. Div. 327, 92 N. Y. S. 466.

18. Instruction, fairly construed, held to correctly state the law. Patch Mfg. Co. v. Protection Lodge, No. 215, I. A. M. [Vt.] 60 A. 74. Suppression by one party of a document relied upon as evidence by the opposite party is not equivalent to an admission of the truth of the claim of the latter regarding its contents. Suppression does not dispense with the necessity of prima facie proof of the claim sufficient to sustain a judgment or decree. Stout v. Sands, 56 W. Va. 663, 49 S. E. 428. But when a prima facie case is made, and doubt is cast upon it by rebuttal evidence or otherwise, suppression of the document raises a strong inference against the party suppressing it, and determines the point in favor of the other party. Id.

19. Lichtenstein v. Case, 99 App. Div. 570, 91 N. Y. S. 57. Evidence that party had applied to street railway company for list of witnesses of accident and had been refused was admissible to account for failure to produce witnesses. Iaquinto v. Bauer, 93 N. Y. S. 388. Where, in action for non-delivery of telegram, it appeared from the evidence that the messenger, who testified on a former trial, was not present, evidence of defendant's efforts to procure his attendance was admissible to rebut the inference which jury might draw from his non-attendance. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695.

20. No unfavorable inference can be drawn from failure to call an attending physician as a witness, since information acquired by him to enable him to prescribe would be privileged under Rev. St. 1899, § 4659. Arnold v. Maryville, 110 Mo. App. 254, 85 S. W. 107. In action on liquor dealer's bond for allowing minor on premises, state could show that minor's mother was mentally unsound in explanation of its failure to put her on the stand to prove the alleged minor's age. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

21. Competent for plaintiff in personal injury case to explain absence of eyewitness to accident. Macon R. & Light Co. v. Mason [Ga.] 51 S. E. 569.

22. Reynolds v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 323.

23. Party could rely on her own testimony solely. Baldwin v. Brooklyn Heights R. Co., 99 App. Div. 496, 91 N. Y. S. 59.

24. An effort to suppress testimony cannot be shown by certificate of a notary who took the deposition of the witness that he refused to answer some of the questions, and refused to sign or swear to any of his answers. Reynolds v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 323.

25. Judicial proceedings of another state are presumed to have been regular. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Jurisdiction being shown, legal presumption favors regularity of subsequent proceedings. Broadway Trust Co. v. Manheim, 95 N. Y. S. 93.

26. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

27. Woodworth v. McKee, 123 Iowa, 714, 102 N. W. 777.

28. Records having been lost by fire, presumed that clerk duly recorded will and probate as required by law. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722. Presumption that city officers performed duties respecting walk applicable only when there is no evidence on subject. Miller v. Town of Canton [Mo. App.] 87 S. W. 96.

29. Presumption that commissioners filed report as required by law. In re Webster, 94 N. Y. S. 1050. County commissioners presumed to have acted within legal powers and county warrants presumed valid. Board of Com'rs of Greer County v. Gregory [Okl.] 81 P. 422. Presumed that tide land appraisers acted within their jurisdiction. Town of West Seattle v. West Seattle Land & Improvement Co. [Wash.] 80 P. 549. Council presumed to have provided for indebtedness by appropriate levies as required by Ball. Ann. Codes & St. §§ 1792, 1794, 1796. State v. Mutty [Wash.] 82 P. 118.

30. Presumption favors sanity and testamentary capacity. Gesell v. Baugher [Md.] 60 A. 481.

31. Solvency will be presumed rather than insolvency. Jensen v. Montgomery [Utah] 80 P. 504.

under no disability;[32] that they exercise ordinary care;[33] that their acts are legal,[34] within their rights,[35] and free from fraud;[36] and that death resulted from natural causes and was not voluntary.[37] The presumption that a public officer has done his duty cannot sustain his action when mandatory requirements of the law concerning the record of such action are disregarded.[38] The presumption that members of a corporation are citizens of the state where the corporation has its legal existence is indulged only to fix the status of a corporation as a litigant and does not obtain when the question is as to the citizenship of an individual suing in his own right.[39]

In the absence of proof of a statute, the common law is presumed to prevail in a foreign state,[40] providing such state was once subject to the laws of England.[41] In the absence of proof to the contrary, the laws of a foreign state are presumed to be the same as those of the forum;[42] but this presumption does not apply to statutory law.[43]

32. Absence of disability to sue is presumed, no disability being shown by evidence. Arnold v. Limeburger [Ga.] 49 S. E. 812.

33. No presumption that physician was negligent arises from fact of failure to effect a cure. Wohlert v. Seibert, 23 Pa. Super. Ct. 213.

34. Law presumes payments made by bankrupt were legal. Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14. Every presumption is against a violation of law by a usurious contract. Cameron v. Fraser, 94 N. Y. S. 1058. Presumed that one erecting a building complied with regulation requiring filing of plans, and that city consented to erection of building. Empire Realty Corp. v. Sayre, 95 N. Y. S. 371.

35. Presumption is that possession of one co-tenant is not adverse to other co-tenants. Coberly v. Coberly [Mo.] 87 S. W. 957.

36. Fraud will not be presumed. Jones v. Rogers [Miss.] 38 So. 742.

37. Prima facie presumption is that death was not by suicide. Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. Presumption that sane man will not commit suicide is rebuttable. Hardinger v. Modern Brotherhood of America [Neb.] 103 N. W. 74. Presumption is against suicide, but this presumption may be rebutted. Masonic Life Ass'n v. Pollard's Guardian [Ky.] 89 S. W. 219.

38. No record of selection of land to supply deficiency of school land. Lauve v. Wilson [La.] 38 So. 522.

39. That litigant is president of a corporation creates no legal presumption that he is a citizen of the same state as the corporation. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

40. Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132; Scholten v. Barber [Ill.] 75 N. E. 460; Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99; Frank v. Gump [Va.] 51 S. E. 358. Common law of contracts presumed to be in force in other state. Bailey v. Devine [Ga.] 51 S. E. 603. Common law presumed to prevail in Virginia as to bills of lading as evidence of contract. National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 A. 134. No statute of Pennsylvania being proved, prohibiting alienation of annuities, common law with reference thereto is presumed to prevail. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. Common law as to care required of carriers of passengers presumed to prevail in Alabama. Southern R. Co. v. Cunningham [Ga.] 50 S. E. 979. Common law presumed to prevail in Illinois as to liability of common carrier for passenger's baggage. Hubbard v. Mobile & O. R. Co. [Mo. App.] 87 S. W. 52.

41. See 3 C. L. 1338, n. 42, 43.

42. Gunning System v. La Pointe, 113 Ill. App. 405. Common law of another state presumed same as that of forum. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456. Common law of Rhode Island presumed same as that of Massachusetts on point in issue. Callender, McAustan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345. Law of England as to amount of interest on judgments presumed same as that of California. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053. Law of Nevada as to express trusts in realty presumed same as that of California. In re Dunphy's Estate [Cal.] 81 P. 315. Laws of Iowa as to effect of alteration in note on its negotiability presumed same as those of Kansas. First Nat. Bank v. Nordstrom [Kan.] 78 P. 804. Law of Iowa presumed identical with that of South Dakota as to effect of contract of extension in releasing surety. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. Missouri law as to transfer of note as collateral presumed same as that of Texas. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368. Law of Montana as to liability of wife on mortgage presumed same as that of Washington. Clark v. Eltinge [Wash.] 80 P. 556. In absence of proof, laws of other states presumed identical with those of Wisconsin as to forfeiture of property for taxes. Edleman v. Edleman [Wis.] 104 N. W. 56.

43. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456. Statutes of one state not presumed to exist in another. Eckles v. Missouri Pac. R. Co. [Mo. App.] 87 S. W. 99. In absence of proof it will not be presumed that statute of New Jersey limits age of persons who may take fraternal insurance. Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783. There being no common law on the subject, no presumption can be indulged as to the law of

The burden of proof [44] is always on the party asserting a fact as the basis of his action or defense,[45] and it never shifts during the progress of the trial.[46] The burden of adduction may, however, change according to the necessities of the case in overcoming evidence introduced by the other party.[47] Which party has the burden of proof on particular issues is to be determined from the pleadings [48] and the rules governing their construction.[49]

§ 2. *Relevancy and materiality.*[50]—Evidence which, if true, tends, within reasonable probabilities, to establish a matter in dispute, is relevant.[51] Evidence as

another state regarding issuance of certificates of incorporation of private corporations, or what officer is authorized to issue them, or who is the custodian of them when issued. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023.

44. Burden of proof on particular questions is treated in the topic dealing therewith. See 3 C. L. 1339.

45. In action of trespass to try title, where plaintiff relies on chain of title, a deed constituting a link therein having been lost, the burden is on him to prove execution of the lost deed. Garrett v. Spradling [Tex. Civ. App.] 88 S. W. 293. Instruction that burden of proof is on plaintiff erroneous where one issue is conceded by defendant, and defendant has burden on other. Swift & Co. v. Mutter, 115 Ill. App. 374. Under Civ. Code Prac. § 526, providing that the burden of proof is on the party who would be defeated if no evidence were introduced on either side, the burden is on the party against whom, if no evidence were introduced, such judgment would be rendered as would carry costs. Mattingly v. Shortell [Ky.] 85 S. W. 215.

46. Rupp v. Sarpy County [Neb.] 102 N. W. 242. Burden of proof in its technically proper sense does not shift so long as parties remain at issue on a proposition affirmed on one side and denied on the other. Appeal of O'Brien [Me.] 60 A. 880. Burden of proof on undue influence in will case does not shift from contestant to proponent because the person who draws the will or takes part in its preparation occupies a confidential relation to testator and receives a bequest. Id.

47. Thus, in negligence cases, if plaintiff's evidence conclusively shows contributory negligence, defendant is entitled to a peremptory instruction at the close of plaintiff's case. But if plaintiff's evidence does not show contributory negligence conclusively, defendant must introduce evidence, if he has pleaded contributory negligence, and has the burden of proof on that issue. Plaintiff must then overcome the weight of defendant's evidence on the issue. But the burden of proof does not in such case shift; only the weight of evidence and the burden of producing it. Rupp v. Sarpy County [Neb.] 102 N. W. 242.

48. A party who adds, or whose duty it is to add, a similiter, has the burden of proof. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622. Where defendant merely files general issue, instruction that burden of proof is on plaintiff is proper, even though defendant introduces evidence of fraud, an affirmative defense. Adams v. Pease, 113 Ill. App. 356. Where defendant set up cross-action and plaintiff replied by supplemental petition containing a general denial and matter in confession and avoidance, burden was on defendant to prove cross-action, and supplemental petition could not be taken as evidence for defendant as basis for directed verdict. Banderer v. Gunther Foundry Mach. & Supply Co. [Tex. Civ. App.] 87 S. W. 851. When defendant pleads non-joint liability the burden of proving joint liability is on plaintiff. Lasman v. Harts, 112 Ill. App. 82.

49. By Code Civ. Proc. § 1869, it does not devolve on a plaintiff to prove his negative allegations. Holmes v. Warren, 145 Cal. 457, 78 P. 954. Burns' Ann. St. 1901, § 367, requiring a denial of the execution of a written instrument to be under oath, does not change the burden of proof. Fudge v. Marquell [Ind.] 73 N. E. 895. Plaintiff need prove only facts necessary to constitute a cause of action; hence unnecessary allegations, anticipating a defense, denied by defendant, do not shift the burden of proof on such defense from defendant. Bell v. Pleasant, 145 Cal. 410, 78 P. 957.

50. See 3 C. L. 1339. Only the most general holdings are here given; as to relevancy of evidence to a particular issue, see title treating the subject-matter in issue.

51. Evidence is relevant if it has any legitimate tendency to prove any matter in issue. Healey v. Bartlett [N. H.] 59 A. 617. Questions adapted to elicit statements on which a legitimate argument can be based in support of a claim or defense are relevant. Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A. 499. Any fact is admissible which reasonably tends to throw any light on the subject-matter contested. Thus, jury entitled to know all circumstances surrounding parties with reference to property or transaction in issue, so that it may know which party's claims are true. Farmers' State Bank v. Yenney [Neb.] 102 N. W. 617.

ILLUSTRATIONS. Held relevant: In action for damages to land from locomotive smoke, etc., from tunnel, testimony as to effect of smoke, etc., on other lands similarly situated, is relevant. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. In action for fire from sparks from engine, evidence that cinders were found on roof of burned building day before fire is relevant. Gorham Mfg. Co. v. New York, etc., R. Co. [R. I.] 60 A. 638. To show brain injury as result of accident, it is competent to show mental condition before injury and after, up to time of trial. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024. Where two semaphores worked in unison, evidence that a red light shone on one track was relevant

on issue whether such light shone on adjacent track. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22. Evidence that defendants procured indemnity insurance against accidents in an elevator admissible as tending to prove control of elevator by them. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323. Evidence that railway employes worked on a mail crane admissible to show the railway company erected and maintained it. Western R. of Ala. v. Cleghorn [Ala.] 39 So. 133. Condition of two cars which collided may be shown on issue of speed of train. Elgin, A. & S. Traction Co. v. Wilson [Ill.] 75 N. E. 436. On issue of fraud in a sale, evidence of financial condition is admissible but should be confined to time of sale. Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131. Where fraud in procuring insurance on goods is charged, and false swearing after the fire, testimony as to value of goods based on what witnesses saw in the warehouse was relevant. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. On the issue of damage caused by burning over land, evidence of another owner that his land had been similarly burned over and was not permanently injured but improved, was relevant though the parcels of land were not shown to be similarly situated. Castner v. Chicago, etc., R. Co., 126 Iowa, 158, 102 N. W. 499. Whether railroad track had been worked so that tracks of steer had been obliterated relevant to show position of animal when struck and whether obliteration of tracks was intentional. Klay v. Chicago, etc., R. Co., 126 Iowa, 671, 102 N. W. 526. Whether witness ever heard defendant request plaintiff to do any work admissible in action for services based on implied contract. Grotjan v. Rice [Wis.] 102 N. W. 551. In action for breach of covenant permitting lessee to go on adjoining land to shore leased property, expert testimony that shoring of building from lessor's other land was unnecessary was relevant and material. Levy v. Tiger, 90 N. Y. S. 366. Evidence of hole in roadbed relevant where petition alleged that rail extended above ground, and earth was washed away from it. El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718. Letter containing statements of plaintiff inconsistent with claim in suit erroneously excluded. Lembeck v. Steifel [N. J. Err. & App.] 59 A. 460. In suit for cancellation of deeds for duress, evidence of condition of plaintiff mentally, immediately after the transaction in issue, was relevant. McClelland v. Bullis [Colo.] 81 P. 771. In proving noxious effects of odors, persons other than plaintiff may testify that they were nauseated and made sick by them, the court instructing that damages were recoverable by plaintiff only for his own sickness and discomfort. Fairbank Co. v. Bahre, 112 Ill. App. 290; Bowman v. Hartman, 6 Ohio C. C. (N. S.) 264. There being no evidence of a change in a testator's mental condition after arriving at maturity, evidence of condition thereafter and a reasonable time before has tendency to show capacity at time of execution of will. In re Wheelock's Will, 76 Vt. 235, 56 A. 1013. Deed admissible when description covered at least a part of the land described in the declaration in ejectment. Marsh v. Bennett [Fla.] 38 So. 237. Facts tending to show one's possession or finances may prove whether certain money or property came to him. Bank account admissible. Wright v. Davis, 72 N. H. 448, 57 A. 335. In action for injuries to child from electric wires, evidence of voltage carried in wires in city generally, of the effect of crossing, and in regard to insulation, was relevant on issues of negligence. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. Pipe line statements held relevant on issue of fraudulent representations as to flow of oil, though statements themselves were not shown to be correct. Barnsdall v. O'Day [C. C. A.] 134 F. 828. In action for excessive levy where plaintiff is allowed to show market value of property levied on, defendant may show relative amount realized from public judicial sale as compared with ordinary market value. Mills v. Larrance, 111 Ill. App. 140. Evidence that on former trial a witness had been asked to point out plaintiff, in the court room, and that she had failed to do so, was admissible on issue whether she knew him. International & G. N. R. Co. v. Boykin [Tex. Civ. App.] 85 S. W. 1163. Measurement by witness of place pointed out by prosecutor as place where crime was committed admissible. People v. Kelly, 146 Cal. 119, 79 P. 846.

Held irrelevant: In action by payee against maker of note, evidence of an indorsement is irrelevant. Burns v. Goddard [S. C.] 51 S. E. 915. In personal injury action against street railway company, evidence that no reports of the accident had been sent in by employes, and that company had not heard of it from anyone, is inadmissible. Guenther v. Metropolitan R. Co., 23 App. D. C. 493. Proof of doctor's bills inadmissible in personal injury action without proof of reasonableness of charges and of payment of the bills. Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601. Where letter of owner offering land at certain price was introduced, offered evidence in rebuttal that writer had nothing to do with land or its management, some time before the letter, irrelevant. Kaufman v. Pittsburg, C. & W. R. Co. [Pa.] 60 A. 2. In action to recover contract price for water furnished during a particular period, evidence of condition of reservoir and sufficiency of supply at a subsequent time is irrelevant. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353. Whether plaintiff's doctor bills had been paid wholly or in part was immaterial in personal injury action. Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34. Non-residence of a person in a village cannot be shown by proof that the same name is found in the directory of a city in a different part of the state, especially when date of directory is not shown. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49. Evidence of purchaser of a horse after its injury by a street car as to its condition, such condition not being connected with the injury, should have been stricken. Fisher v. New York City R. Co., 90 N. Y. S. 348. Testimony calling for comparison of corn on different tracts of land inadmissible, the tracts being shown to be dissimilar. Story v. Nidiffer, 146 Cal. 549, 80 P. 692. In action for death at a railroad crossing, evidence of number of other crossings within a half mile of place where decedent was struck

to collateral matters not pleaded [52] or otherwise placed in issue,[53] not relating to the transaction [54] or subject matter [55] in issue, and furnishing no legal inference as to

was irrelevant. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Introduction of lease from defendant to plaintiff erroneous in action against defendant for trespass for wrongfully foreclosing chattel mortgage. Tanton v. Boomgaarden, 111 Ill. App. 37. Ordinance providing where cars should stop at street intersections inadmissible to prove where a car should have stopped when turning a corner. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351. Ordinance restricting speed of trains inadmissible to prove contributory negligence of fireman on engine of one of two colliding trains, since such fireman did not have control of operation of train. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558. Where expert testified that a cave-in might occur in a properly timbered mine, evidence of causes that might produce a cave-in was properly excluded, it not being in evidence that any of such causes existed at the mine in question. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. Question as to rate of interest at which money could be invested for long term of years, too remote on question of damages, since rate changes. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. In action by consignor, who had sought to stop goods in transit, against a purchaser from the consignee, to recover the goods, a letter from the attorney of the consignee to such purchaser, demanding payment, is inadmissible. Delta Bag Co. v. Kearns, 112 Ill. App. 269. Whether a sum would have been paid by a beneficial association if dues had been paid on certain date, immaterial. Wells & McComas Council No. 14, Junior Order U. A. M. v. Littleton [Md.] 60 A. 22. Witness could not testify to condition of light at place visited by him without a showing that such place was that where the crime in question was committed. People v. Kelly, 146 Cal. 119, 79 P. 846. Inventory and appraisement of property in settlement of estate inadmissible to show acts of ownership over property by deceased in his lifetime. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739.

52. In general, evidence is admissible to prove facts pleaded and not admitted. Greenlee v. Mosnat, 126 Iowa, 330, 101 N. W. 1122. Testimony irrelevant because not responsive to allegations of complaint. Bowick v. American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276. Evidence that injuries were permanent inadmissible, such fact not being pleaded. Wallace v. New York City R. Co., 92 N. Y. S. 766. Where charge in personal injury action was only ordinary negligence, evidence of the arrest of the conductor and motorman after the accident was irrelevant. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. Where one party pleaded an agreed boundary line, and the other traversed the allegation, the latter could not show that the agreement was under a mistake, this being inconsistent with the pleading. Berry v. Evans [Ky.] 89 S. W. 12. The party pleading the agreement could show statements of the other relating to the agreement. Id.

53. Evidence relating to facts not made an issue is inadmissible. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. Evidence must be relevant to issues made. Mitchell Square Bale Ginning Co. v. Grant [Ala.] 38 So. 855; Provident Sav. Life Assur. Soc. v. King [Ill.] 75 N. E. 166. Only evidence tending to prove issues relevant. Henderson v. Henderson [Ind.] 75 N. E. 269. Evidence of time required by experienced shipper familiar with premises to remove goods is inadmissible when issue is time required by deputy sheriff and assistants. Commonwealth v. Middleby [Mass.] 73 N. E. 208. While only issue was whether defendant had backed out of agreement for exchange of lands, evidence of fraud inducing the making of the agreement was irrelevant. Blumberg v. Pecarsky, 23 Pa. Super. Ct. 568. Evidence is incompetent where tending to show negligence other than that alleged in the petition, or to establish a theory different than the one upon which the case is being tried. Welever v. Williams, 5 Ohio C. C. (N. S.) 407.

54. In action for false imprisonment in eleemosynary institution, evidence of the beating of others than plaintiff was irrelevant. Smith v. Sisters of the Good Shepherd [Ky.] 87 S. W. 1083. In action for conversion of logs evidence of attempts to steal logs belonging to others is inadmissible. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613. In action for dishonor of check, evidence of previous dishonor of another check was inadmissible. Sprowl v. Southern Nat. Bank [Ky.] 86 S. W. 1117. In suit to cancel conveyance, for fraud, evidence that plaintiff had since been defrauded of another lot by another person is inadmissible. Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450. Defense to action for price of stove being that it was worthless, evidence of a third person that he had also bought a stove of plaintiff which proved to be worthless was inadmissible. Lander v. Sheehan [Mont.] 79 P. 406. Evidence of other transaction with which defendant was not connected, irrelevant. Stone & Co. v. Mulvaine [Ill.] 75 N. E. 421. In suit to enjoin change of location of irrigation ditch over plaintiff's land, what defendants did on another's land was irrelevant. Vestal v. Young [Cal.] 82 P. 383. Evidence regarding an injury suffered in a prior accident, and consultation with a lawyer concerning it, inadmissible. City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431. In action for injuries from being shot, evidence that on a former occasion, unconnected with shooting difficulty, defendant showed witness how quickly he could draw a pistol was inadmissible. Johnston v. Wells [Mo. App.] 87 S. W. 70. Where incendiarism is defense in action on fire insurance policy, proof of fires other than that on which the action is based is irrelevant. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302. Where, in action on fire insurance policy, defense was that plaintiff set the fire, evidence tending to show that plaintiff had advised the burning of another stock in which he had an interest, and that the stock was in fact burned, was too remote, the incendiary origin of the second fire not being clearly shown. Pala-

facts in dispute [56] but tending rather to introduce collateral issues which the adverse party is not bound to be prepared to meet,[57] is usually excluded as too remote.[58] But whether evidence which is relevant, but only remotely so, shall be admitted or excluded, rests largely in the discretion of the court.[59]

On the issue of negligence, evidence of other similar accidents is inadmissible [60]

tine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. In civil assault and battery, evidence of former assaults of plaintiff is irrelevant to show that he only employed a physician when he intended to bring suit. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. Where vendee in fraudulent sale case said he borrowed money to pay for stock from a third person, a judgment against the third person, including his testimony in supplementary proceedings that he was penniless, was inadmissible for the creditors. Morimura v. Samaha, 25 App. D. C. 189.

55. Testimony regarding town meetings, and copies of records thereof, called to consider propositions to convey land other than that in suit, properly excluded. Dawson v. Orange [Conn.] 61 A. 101. Evidence that one part of beach had long been public property proves nothing as to ownership of another part. Id. An opinion of the New York court of appeals on the validity of a contract like the one in suit is inadmissible where the contract is to be performed in Indiana and must therefore be construed with reference to the law of the latter state. Lake Shore & M. S. R. Co. v. Teeters [Ind. App.] 74 N. E. 1014. In action on attachment bond, it is error to read to the jury the opinion of the appellate court in an appeal in the attachment suit, especially since it was admitted that the attachment was unsuccessful. State v. Parsons [Mo. App.] 84 S. W. 1019. Evidence of what an old inhabitant said regarding public rights to certain land properly excluded because not confined to the particular land concerned in the suit. Dawson v. Orange [Conn.] 61 A. 101.

56. On an issue whether goods were sold on the credit of a married woman or her husband, evidence that she had rented rooms was irrelevant. Hughes v. McHan, 121 Ga. 499, 49 S. E. 590. Value of water power at certain town irrelevant when not shown to be same as at mill in question. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. Whether one mule was sick is not proved by showing condition of others, the disease not being contagious. Moulton v. Gibbs, 105 Ill. App. 104. In action for damages from smoke coming from defendant's premises, evidence that others than plaintiff were annoyed is inadmissible. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323. In action by passenger for injuries, whether other passengers had complained of injuries and sent in claims were collateral and remote matters. Foss v. Portsmouth, etc., R. Co. [N. H.] 60 A. 747. Evidence of value of services is irrelevant when it appears there was an express contract specifying the price. O'Connell v. King, 26 R. I. 544, 59 A. 926.

57. Where a witness testified to a specific charge of immorality against a witness, testimony of the person said to have made the charge was held irrelevant, introducing a collateral issue. Hofacre v. Monticello [Iowa] 103 N. W. 488.

58. Award of damages in another condemnation proceeding held too remote. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81. Evidence of votes of town to appoint agent to sell stone on seashore too remote on issue of public or private ownership of a particular part of the beach. Dawson v. Orange [Conn.] 61 A. 101. Where plaintiff, in suit to determine adverse claims to realty, showed paper title by chain of recorded deeds to 1829, evidence of old inhabitants and former selectmen of town that they had never heard of claims of private ownership was held too remote to establish claims of the town that the property in question was a public beach. Id. Evidence that other members of a decedent's family had died from pulmonary tuberculosis held properly excluded as too remote on issue of whether decedent suffered from this disease. Dickinson v. Boston [Mass.] 75 N. E. 68.

59. Not all logically probative matter is entitled to be admitted as evidence. The admission or exclusion of matter of slight significance, or only remotely connected with the fact to be proved, rests to some extent, though not wholly, in the discretion of the court. Thus cost price of property may or may not be admissible on the issue of value, according to conditions of sale or other circumstances. Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061. On issue how plaintiff fell off steps, evidence of convictions for selling beer, to rebut denial of evidence that plaintiff did not sell it, held too remote. Lambert v. Hamlin [N. H.] 59 A. 941. In personal injury action, exclusion of evidence regarding cause of another fall on previous evening held proper exercise of court's discretion. Id. In action for breach of contract to deliver lumber on March 21, 1903, it was not an abuse of discretion to admit evidence of the value of lumber at place of delivery on March 7, 1903, and in May following. Nicola Bros. Co. v. Sperr Box & Lumber Co. [C. C. A.] 133 F. 914. There being no other way to identify a certain wood wagon behind which plaintiff was driving before a collision, and its height being an issue, testimony as to height of ordinary wood wagon in the city was competent. Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. In keeping irrelevant evidence out of the case the judge must have regard to the particular circumstances involved in the issue. Dawson v. Orange [Conn.] 61 A. 101.

60. On issue whether condition of railroad track was negligent, evidence of other similar accidents at the same place is inadmissible. Gregory v. Detroit United R. Co. [Mich.] 101 N. W. 546.

except to show notice;[61] and evidence of long use of a device[62] or existence of a condition,[63] without resulting injury or accidents, is also excluded. What is customary may be shown on the issue of negligence[64] but not to excuse negligence,[65] and evidence of an individual custom is incompetent.[66] To prove the existence of a dangerous condition at a particular time, proof of such condition before or after such time is admissible when it is shown that there has been no change.[67] Proof of a defective condition at places other than that where the accident in suit occurred is inadmissible.[68] Proof of repairs subsequent to the time of an injury is also inadmissible.[69]

61. Proof of previous accidents from the same cause is admissible to show knowledge of the dangerous condition. Previous accidents by falling into unguarded ash pit. Withers v. Brooklyn Real Estate Exch., 94 N. Y. S. 328. In action for injuries received in runaway caused by steam whistle evidence that a team had been frightened by the whistle on another occasion was admissible to show whistle in that place dangerous. Powell v. Nevada, etc., R. Co. [Nev.] 78 P. 978. Evidence that clips attaching shafts to wagon had broken on other occasions, to show notice to owner, must be confined to breaks before the accident in question. Schlesinger v. Scheunemann, 114 Ill. App. 459. Evidence as to the condition of a sidewalk subsequent to an injury caused thereby, or as to injuries subsequent to the one in suit, is not admissible to show knowledge. City of Chicago v. Vesey, 105 Ill. App. 191. Previous specific acts of negligence by engineer admissible to show incompetency and knowledge thereof by master. Conover v. Neher-Ross Co. [Wash.] 80 P. 281. Specific acts of negligence by a brakeman could be shown on issue of company's knowledge of his incompetency, it being also shown that the conductor knew of such acts and that it was his duty to report them. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. But it was reversible error to show that the brakeman had been out until 4 o'clock the night before he fell asleep while on duty, since knowledge of this fact by the company was not shown. Id.

62. Evidence that a particular device had been used a number of years without injury resulting therefrom, inadmissible. Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621.

63. Evidence that coal chute had existed in same condition five years and that no injury had occurred there is inadmissible on issue of negligence in locating it close to track. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. In action for injury on highway, evidence that others had driven over the place about the same time without trouble was inadmissible. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22.

64. In injury action caused by alleged defective chain, evidence of usual and customary manner of fastening bolt was admissible. Berg v. United States Leather Co. [Wis.] 104 N. W. 60. Evidence of customary way of placing team in unloading freight from cars, and that plaintiff conformed to custom, admissible on issue of contributory negligence. Bachant v. Boston, etc., R. Co. [Mass.] 73 N. E. 642. Evidence that it was customary to blow whistle at a certain curve admissible on issue of negligence in failing to require, by rules, engineers to whistle there. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477. Evidence of a custom of a railway company to notify regular trains of presence of work trains, admissible. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. On issue of delay in carriage of cattle between two points, evidence of the time taken to make the trip on other occasions was admissible. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938. On issue of negligent delay in cattle shipment, evidence of customary length of time consumed by a run between the two points is admissible. Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342. Custom of street railway company of allowing passengers to ride on running board competent on issue of negligence, though knowledge of the custom by person injured was not claimed. Stone v. Lewiston, etc., R. Co., 99 Me. 243, 59 A. 56.

65. That it was custom of other companies to put worn rails from main track on side track inadmissible on issue of negligence of defendant company. Chicago & G. T. R. Co. v. Kinnare, 115 Ill. App. 132.

66. Whether housemover always looked after electric wires himself. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

67. Evidence as to condition of defective switch eight days after accident not too remote when there was evidence that its condition had remained unchanged. Logan v. Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126. Condition of semaphore soon after railroad accident held competent in view of all the evidence. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558. Testimony of witness who examined a railroad crossing held to show that the condition of the crossing had not been changed since the accident in question, so that his description of it was relevant. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Evidence of condition of boiler a year or two before an accident was admissible when plaintiff said he would show condition had remained unchanged. Shea v. Pacific Power Co., 145 Cal. 680, 79 P. 373. Condition of railing on stairway day after accident inadmissible without showing there had been no change. Merchants' Loan & Trust Co. v. Boucher, 115 Ill. App. 101. Questions not tending to show repairs or changes but to show a condition of wires existing at the time of an accident, held proper. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386.

68. In action for death from crossed electric wires, evidence that defendant's wires were defective at other times and places is

Proof of similar independent transactions is usually inadmissible to show the nature or terms of an agreement,[70] except in the case of a written agreement distinctly referring to a previous transaction;[71] but may be admissible to show a conspiracy[72] or general scheme to defraud.[73]

To prove the value of realty, sales of other lands in the vicinity may be shown, if such lands are shown to be similar in character and location,[74] and if the sales are not too remote in time,[75] but mere offers are usually inadmissible.[76] Rental

irrelevant. United Elec. Light & Power Co. v. State [Md.] 60 A. 248. In action for injuries from electric wire, evidence of defective insulators at points other than that where injury occurred was inadmissible. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386. Evidence of condition of other places in city is admissible, not to show city's negligence, but to show plaintiff was not negligent in choosing route he followed. Hollingworth v. Ft. Dodge, 125 Iowa, 627, 101 N. W. 455.

69. Achey v. Marion, 126 Iowa, 47, 101 N. W. 435. Evidence of repairs to machine after an injury inadmissible to prove negligence. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. Evidence showing that four years after accident wooden railing on stairway had been replaced by iron railing, erroneously admitted. Merchants' Loan & Trust Co. v. Boucher, 115 Ill. App. 101. In action for damages for smoke, etc., allowed to escape from defendant's premises, evidence that smoke stacks were raised after commencement of action is inadmissible to prove negligence, but is admissible to show that lowness of stacks caused injury complained of. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323.

70. On issue of agreement to pay commissions on sales to certain customer, contract between parties relative to sales to another customer was inadmissible. Abrams v. Manhattan Consumers' Brewing Co., 90 N. Y. S. 425. In action for money had and received, receipt showing payment of money between strangers inadmissible. Vacca v. Martucci, 90 N. Y. S. 356. In action on note, whether plaintiff's agreement with defendant was different from that he usually made in such cases was irrelevant. Burns v. Goddard [S. C.] 51 S. E. 915. Evidence of what was done under similar contracts with other parties is sometimes admissible to show what the contract in issue is. Where deed to right-of-way provided for construction of "cattle or wagon pass" on plaintiff's premises, evidence that railway had built undergrade crossings for others who had similar contracts was admissible. Owens v. Carthage & W. R. Co., 110 Mo. App. 320, 85 S. W. 987.

71. Where there is evidence that in making a contract a previous transaction was distinctly referred to, evidence of the previous transaction is admissible. Sullivan v. Mauston Milling Co., 123 Wis. 360, 101 N. W. 679.

72. In a civil action based on conspiracy to defraud, evidence of subsequent like acts and transactions, closely allied in time, before the end of the conspiracy, is admissible to show the fraudulent character of the act in question. Wright v. Stewart, 130 F. 905.

73. Where the knowledge or intent of a person charged with fraud is in issue, evidence of other similar transactions is admissible, within reasonable limits. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765. Where defense to action on note was that indorsement was procured by a trick, evidence that others were tricked in the same way is admissible. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119. Where two sales were on the same day, made in the same manner, and to some extent between the same parties, evidence regarding one is admissible to show fraud in the other. Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131. Where fraud is basis of defense to written instrument, evidence of like fraud against a third person is inadmissible, in the absence of any claim of a general scheme to defraud. Guckley v. Acme Food Co., 113 Ill. App. 210.

74. Chicago, etc., R. Co. v. Rottgering, 26 Ky. L. R. 1167, 83 S. W. 584. Price obtained at fair public sale held competent evidence of value of corn. Mayberry v. Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401. The value of other similarly situated pieces of property as shown by sales or by the opinion of properly qualified witnesses, is admissible on the value of a particular price of property. Penobscot Chemical Fibre Co. v. Inhabitants of Bradley, 99 Me. 263, 59 A. 83. Evidence of purchases by witness of land in vicinity inadmissible without showing lands bought similar to defendant's in situation and otherwise. Kirby v. Panhandle & G. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 421, 88 S. W. 281. In condemnation proceedings, evidence as to what railroad paid for other tracts of land is irrelevant. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. When property to be condemned has no market value, market value of other property is irrelevant. Sanitary Dist. of Chicago v. Pittsburgh, etc., R. Co. [Ill.] 75 N. E. 248.

75. Price paid for land is admissible, if the time of purchase is not too remote. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521. Price at which other lots in neighborhood sold a reasonable time before land in question was taken admissible on value. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182. Sales of land in neighborhood of that to be condemned, a year or two before proceedings were instituted and before a drainage system had been completed, held irrelevant on value. Louisiana R. & Nav. Co. v. Xavier Realty [La.] 39 So. 1.

76. An offer for property is not admissible unless it is shown who made it, the knowledge of the person making it, and the good faith of the offer. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99.

value may be shown,[77] but not the amount of insurance carried,[78] nor the value as returned for taxation.[79] The cost of a railroad may be shown.[80] Whether, in proving the value of personalty, offers,[81] cost price,[82] selling price,[83] or market value,[84] may be shown depends, usually, on the remoteness, in time or place, of such evidence.

In civil cases, evidence of the good or bad character of one whose reputation is not made an issue, is almost universally excluded as irrelevant and immaterial;[85] but if a person's reputation is put in issue, evidence in regard thereto is admitted.[86]

Testimony, not otherwise relevant, is usually held inadmissible merely to show that other testimony is probable or improbable;[87] but where there is a conflict, evidence of collateral facts is sometimes admitted to show that testimony on one side is more reasonable than that on the other,[88] or to corroborate a witness.[89] If evidence is relevant and material, it is admissible, though its admission incidentally lets

77. Rental value of property may be shown, in condemnation proceedings. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182. But evidence of rent or net income from buildings on a lot is inadmissible to show value of lot exclusive of buildings. Springer v. Borden, 112 Ill. App. 168.

78. Evidence of the amount of insurance on property is not usually relevant on the issue of its value. Refusal of such evidence not reversible error. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374.

79. Rendition of property for taxation is no criterion of value. International & G. N. R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423. Assessment for taxes not controlling as standard of actual value. Thompson v. Williams [Md.] 60 A. 26. Tax lists inadmissible on value of land in condemnation proceedings. Suffolk & C. R. Co. v. West End Land & Improvement Co., 137 N. C. 330, 49 S. E. 350. Valuation for taxation of other property, or a valuation of the same property in previous years is inadmissible on the issue of its value. Penobscot Chemical Fibre Co. v. Inhabitants of Bradley, 99 Me. 263, 59 A. 83. Lessees return of property for taxation not conclusive on issue of value in condemnation proceedings. Sanitary Dist. v. Pittsburgh, etc., R. Co. [Ill.] 75 N. E. 248.

80. Cost of railroad as shown by amount of stock is admissible on its value, since it is presumed to be worth what it cost until the contrary is shown. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99.

81. Offer of $100 for dog two years before it was killed inadmissible in action for damages for its death. Southern R. Co v. Parnell [Ala.] 37 So. 925.

82. Price paid is competent on market value but is not conclusive. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. Cost price of furniture admissible to prove market value. Osmers v. Furey [Mont.] 81 P. 345. Cost price of goods admissible on value when destroyed by fire. Glaser v. Home Ins. Co., 93 N. Y. S. 524. Value of property when invoiced at another time and place is inadmissible on issue of value when destroyed, without a foundation showing such values the same, or showing the difference. Lundvick v. Westchester Fire Ins. Co. [Iowa] 104 N. W. 429.

83. Selling price is some evidence of value, and witness should have been permitted to give it on cross-examination. Farnsworth v. Miller [N. J. Law] 60 A. 1100. Where stock has no market value, evidence of what it sold for in a bona fide transaction is competent. Humphreys v. Minnesota Clay Co. [Minn.] 103 N. W. 338. Evidence of what personalty sold for in 1903 irrelevant in action for conversion which took place in 1901, there being no evidence that value was same in 1901 as in 1903. Alling v. Weissman, 77 Conn. 394, 59 A. 419.

84. In action against carrier for injuries to horses, evidence of market value at points other than their destination was irrelevant. Texas & P. R. Co. v. Stephens [Tex. Civ. App.] 86 S. W. 933.

85. Where issue was validity of deed, character of one who took acknowledgment is immaterial on issue of forgery. West v. Houston Oil Co. [C. C. A.] 136 F. 343. Character of plaintiff held not to have been put in issue so as to admit evidence of reputation for honesty. Mattingly v. Shortell [Ky.] 85 S. W. 215. Plaintiff's character is not put in issue by allegation in answer, and supporting proof, that he fraudulently converted $1,000 belonging to his firm. Gordon v. Miller [Mo. App.] 85 S. W. 943. Proper to exclude testimony that claimant against an estate, who testified in her own behalf, had another husband living when she married decedent, and that she was unchaste. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Evidence relating to moral character inadmissible to affect credibility. Camden & S. R. Co. v. Rice [C. C. A.] 137 F. 326. In trespass for assault and battery, evidence of defendant's reputation in the community as a peaceable, law-abiding man, is inadmissible. Coruth v. Jones [Vt.] 60 A. 814.

86. In assault and battery, defendant alleged he struck because he knew plaintiff was pugnacious and of a violent disposition. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381.

87. Brown v. Harris [Mich.] 102 N. W. 960.

88. Such evidence should be received with caution. Philips v. Mo, 91 Minn. 311, 97 N. W. 969. Impossibility of performance of an alleged agreement may be proved to show improbability that such agreement was made. McNamara v. Douglas [Conn.] 61 A. 368.

89. Circumstances surrounding certain conversation admissible to identify the time and show why witness remembered a certain statement was not made. Sexton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 617,

in other irrelevant matter;[89] but the effect of such evidence should be properly restricted by the court.[91]

§ 3. *Competency or kind of evidence in general.*[92]—Where one party introduces incompetent evidence, he cannot complain of the introduction by the other of similar evidence addressed to the same point.[93] The mere fact that evidence is cumulative does not justify its exclusion.[94] Certain evidence being competent, other evidence necessary to explain and render intelligible such material evidence is also admissible.[95]

§ 4. *Best and secondary evidence.*[96]—Evidence must, in general, be the best of which the nature of the case admits.[97] Under this rule, original written docu-

88 S. W. 348. Where evidence of a statement, made at the time of an accident is introduced, the other party may introduce evidence relating to an entirely different accident in order to show that such statement was made at that time and not at the time of the accident in issue. Texas & P. R. Co. v. Malone [Tex. Civ. App.] 13 Tex. Ct. Rep. 1018, 88 S. W. 389.

90. That evidence admissible as tending to prove allegations of the complaint tends also to prove wrongs not charged does not render it inadmissible. Objecting party must be satisfied with instructions limiting the effect of such evidence. Plourd v. Jarvis, 99 Me. 161, 58 A. 774. On the issue of knowledge by a witness of an approach to a walk where plaintiff was injured, and of its dangerous condition, the time when it was removed may be shown, though proof of a subsequent change is thus shown. Achey v. Marion, 126 Iowa, 47, 101 N. W. 435. Evidence of a conversation, to show admissions by a party, is competent though the witness incidentally repeats statements which he said at the time had been made to him by others. Fitzpatrick v. Tucker [Kan.] 78 P. 828.

91. Where evidence admitted upon the trial relates only to a single issue, the court, upon proper request, should instruct the jury to consider it only in the proper connection. Original petition properly restricted to issue of contradicting a party by showing inconsistent claims. Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085. Copy of record of vote in town meeting held properly restricted to proof of a particular issue in order to keep out irrelevant matters. Dawson v. Orange [Conn.] 61 A. 101. The court should by proper instructions, restrict evidence admitted for impeachment only, to that issue, and not allow its consideration as substantive evidence. Straight Creek Coal Co. v. Haney's Adm'r [Ky.] 87 S. W. 1114.

92. See 3 C. L. 1345. This section is intended to include only a few miscellaneous holdings not covered by the general rules treated in the following sections.

93. One party having introduced telegrams, other could put in other telegrams and letters relating to same matter. German-American Ins. Co. v. Brown [Ark.] 87 S. W. 135. Party cannot object to evidence as irrelevant which is introduced to rebut evidence which he has introduced. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. One cannot complain of evidence when he has himself introduced evidence of the same kind. Policeman's Benevolent Ass'n v. Ryce, 115 Ill. App. 95. One who elicits testimony from a witness cannot thereafter question the competency of the witness or the evidence so introduced. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866. Plaintiff having been permitted to give secondary rather than the best evidence, similar evidence by defendant to contradict plaintiff should have been received. McCormack v. Mandelbaum, 102 App. Div. 302, 92 N. Y. S. 425. Evidence cannot be complained of by a party who introduces other evidence to rebut that already in. Ehrhart v. Rork, 114 Ill. App. 509. Party introducing evidence of offers of compromise cannot complain of introduction of similar evidence by other party. Cook v. Lantz, 116 Ill. App. 472. Where evidence of assets of plaintiff in insurance case was shown, to show a motive for burning a stock for insurance, evidence in rebuttal to show solvency was proper. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. Defendant having shown conclusions from books, etc., too voluminous to be produced in court, plaintiff could contradict same by any evidence available to her. Provident Sav. Life Assur. Soc. v. King [Ill.] 75 N. E. 166. In action for damages to mill pond and race, a witness stated he was a former owner, held testimony on cross-examination that he sold to another was not objectionable as oral proof of sale. Neely v. Detroit Sugar Co. [Mich.] 101 N. W. 664. Expert opinion having been admitted on one side, the other side may have similar evidence on the same matters. Expert opinion on efficiency of certain features in electric light plant. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753.

94. Applied where testimony of additional expert was not given. Crago v. Cedar Rapids, 123 Iowa, 48, 98 N. W. 354.

95. Answer to question being competent as an admission, the question could be shown though it involved an opinion. Hayward v. Scott, 114 Ill. App. 531.

96. See 3 C. L. 1345.

97. The unwritten law of another state may be proved by parol evidence. Rieck v. Griffin [Neb.] 103 N. W. 1061. A witness may state whether a quarantine is being enforced in a certain town; the ordinance authorizing it is not the only evidence of the fact. Mitchiner v. Western Union Tel. Co., 70 S. C. 522, 50 S. E. 190. Sheet of paper containing record of minutes of stockholders' meeting, signed by secretary and bearing president's initials, admissible, when it was not shown that such record was tran-

ments,[98] books of account[99] and records,[1] are the best evidence of their contents; but

scribed into a book. Chott v. Tivoli Amusement Co., 114 Ill. App. 178. City clerk may testify that a claim for injuries had been presented and disallowed. Jewell City v. Van Meter [Kan.] 79 P. 149. Though a written order on an employer was given as payment on accident insurance policy, the reason why such order was not paid was admissible. Hagins v. Aetna Life Ins. Co. [S. C.] 51 S. E. 683. Testimony by a governor that he signed a bill inadvertently and immediately erased his name is the best evidence of want of approval as required by law, and does not vary or modify the language of a law. Commissioners of Allegany County v. Warfield [Md.] 60 A. 599. Testimony of certain witnesses that they were street commissioners at different times and that certain acts were done by them as such officers, was competent to prove such acts official. Conner v. Nevada [Mo.] 86 S. W. 256. A railroad president may testify to intention of the company to make certain improvements and the production of a record vote is not necessary to prove such intention. New York, etc., R. Co. v. Offield [Conn.] 60 A. 740. Writing is best evidence of its contents, but not best evidence of what one person told another as to its contents. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783. Record of deed in year of its execution best evidence to show mutilation of original and that parts thereof were missing. Senterfeit v. Shealy [S. C.] 51 S. E. 142. Contents of petition filed in a court of record in a county other than that where the trial took place should be proved by a certified copy of the record and not by parol. Parker v. Ballard [Ga.] 51 S. E. 465. A transcript of a witness' testimony on a former trial is the best evidence thereof. Where transcript was available, it was error to permit jurors in the case to tell what a witness' testimony was. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 909. A stenogographer's minutes of testimony on a former trial is not the best evidence thereof in the sense that the testimony of one who heard it is secondary. Weinhandler v. Eastern Brewing Co., 92 N. Y. S. 792. Bought and sold notes made by a broker in negotiating a sale are not the contract itself but are mere memoranda of its terms, admissible to prove it, in the absence of any entry upon the sales book of the broker. Eau Claire Canning Co. v. Western Brokerage Co. 115 Ill. App. 71. In forgery case, it was proper to ask school official how he signed school warrants, it not being shown to be possible to produce all the warrants, and the evidence relating to a collateral matter. Wooldridge v. State [Fla.] 38 So. 3.

98. Tax deed best evidence of recitals therein. Easton v. Cranmer [S. D.] 102 N. W. 944. Parol evidence of contents of **title bond** inadmissible, loss of bond not being shown. Comb's Adm'x v. Krish [Ky.] 84 S. W. 562. Printed copy of **contract** inadmissible, no attempt being made to produce original or show inability to produce it. Chicago, W. & V. Coal Co. v. Moran, 110 Ill. App. 664. Abstract of title inadmissible in registration proceeding in absence of proof that original **conveyances** abstracted were lost or destroyed or could not be produced, or that abstracts had been made in ordinary course of business. Hurd's Rev. St. 1903, c. 30, § 36, and c. 116, §§ 23, 24. Glos v. Talcott, 213 Ill. 81, 72 N. E. 707. Neither record in land office nor certified transcript thereof is original evidence, and neither is admissible without proof of loss or destruction of deed or certificate, although Kirby's Dig. § 3064, provides that existence of record may be shown by certified transcript. Carpenter v. Dressler [Ark.] 89 S. W. 89. An **assignment** of a bank account being in writing, oral evidence was incompetent to prove it. Robbins v. Bank of M. & L. Jarmulowsky, 90 N. Y. S. 288. Written **partnership agreement** not having been shown to have been lost or destroyed could not be shown by parol. Doll v. Hennessy Mercantile Co. [Mont.] 81 P. 625. **Agent's authority** being in writing, writing should be produced or its absence explained. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43. A **letter** introduced in evidence speaks for itself and the writer may not testify to his purpose in writing it. Clark v. Delaware, etc., R. Co., 138 N. C. 25, 50 S. E. 446. Letter press copy of **waybill** not best evidence. Texas & P R. Co. v. Lynch [Tex. Civ. App.] 87 S. W. 884. **Letters of administration** properly admitted over objection that there was nothing to show whether they were original or a copy, when they were apparently received as the original and objecting party did not show the contrary. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775. In absence of a showing that **viewers' report** was not reduced to writing, oral evidence of an agreement between them and the owner allowing the latter to maintain gates, was incompetent. Allen v. Hopson, 26 Ky. L. R. 1148, 83 S. W. 575. Copy of **answer** in another action not best proof of admission by defendant that it managed the car in question. Mandelbaum v. New York City R. Co., 90 N. Y. S. 377. **Original patent** or certified copy is best evidence of grant of land from the state. Butt v. Mastin [Ala.] 39 So. 217. Exemplification of patent in records in land commissioner's office is not competent evidence of patent, absence of patent not being explained. Carpenter v. Smith [Ark.] 88 S. W. 976. Transcript of record of land office incompetent to prove patent. Covington v. Berry [Ark.] 88 S. W. 1005; Boynton v. Ashabraner [Ark.] 88 S. W. 1011. Printed **offer of reward** incompetent, when it was not shown why original could not be produced. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

99. Accountant could not testify to book accounts, no foundation having been laid as provided by Nev. Comp. Laws, § 3522. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99. Improper to allow plaintiff to read memorandum taken from books. Engelman v. Anderson, 92 N. Y. S. 376. Alleged copies of book entries held secondary evidence. Bouldin v. Atlantic Ricemills Co. [Tex. Civ. App.] 86 S. W. 795. Statement of clerk as to what he found in a book in the office not the best evidence. Spencer v. Travelers' Ins. Co. [Mo. App.] 86 S. W. 899. Where results of

since only the best evidence available [2] is required to be produced, secondary evidence, such as oral testimony [3] or a duly authenticated [4] copy,[5] is admissible when the

engine inspections were first entered in a scrapbook, and memoranda made therefrom by a clerk were afterwards signed by the inspector, such memoranda were only secondary evidence of what was in fact done. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60.

1. Parol evidence of judgment of court for divorce is incompetent. Carhart v. Oddenkirk [Colo. App.] 79 P. 303. The court records are the best evidence to show by whom proceedings to revoke probate of will were dropped. Spencer v. Spencer [Mont.] 79 P. 320. In trespass for wrongful seizure and sale of property, plaintiff cannot show by constable what goods were sold; record should be produced. Mansfield v. Bell, 24 Pa. Super. Ct. 447. Admission of parol evidence of what defendant said before committing magistrate was error, when the evidence on such preliminary examination had been reduced to writing and the record filed with the clerk of the circuit court as required by law. Bell v. State [Miss.] 38 So. 795. Parol evidence incompetent to show schedule of freight rates on file with interstate commerce commission. Sloop v. Wabash R. Co. [Mo. App.] 84 S. W. 111. Best evidence of a recommendation by a Master Mechanics' Association of a certain kind of spark arrester is the record of the vote of the association and not the oral statement of a member. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025. Transcript of a lost record, filed in another court previous to the loss of the record, is the best secondary evidence of the contents of the original record. Southern R. Co. v. Seymour, 113 Tenn. 523, 83 S. W. 674. The record of the court where final judgment was rendered is the primary evidence of the contents of the entire record, regardless of the manner in which the court acquired jurisdiction. Thus, in case removed to Federal court, record of that court is best evidence. Id. Under Kirby's Dig. § 3064, making transcript of record of commissioner of state lands evidence of the facts therein stated, a certified transcript is evidence equal in dignity to the original. Boynton v. Ashabranner [Ark.] 88 S. W. 566. Parol evidence is inadmissible to prove probate proceedings in another state. A properly attested copy of the record is the only evidence thereof, under Code Civ. Proc. § 529. Mears v. Smith [S. D.] 102 N. W. 295.

2. When papers in divorce proceedings have been lost from files, docket entries and minutes of court are evidence of contents of the record. Given v. Given, 25 Pa. Super. Ct. 467. Contract and warrant of attorney having been taken from record, entries in continuance docket were admissible to prove contents of contract. Mulhearn v. Roach, 24 Pa. Super. Ct. 483. Lithograph copy of city map, of great age, used by city officials exclusively, admissible in evidence, where it appeared that the original, if there ever had been one, was lost, and the copy was the one kept in the city engineer's office. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

3. Contents of lost written instrument provable by parol. Richardson v. Morris, 26 Pa. Super. Ct. 192. Certificate for wolf bounties having been lost or destroyed, both its issue and contents could be shown by other evidence. Bickerdicke v. State, 144 Cal. 698, 78 P. 277. Where a judgment is in general terms and the pleadings in the case have been lost, parol evidence is competent to prove what the issues in the case were. Holford v. James [C. C. A.] 136 F. 553. Parol proof of contents of answer in another case is admissible where the answer itself is shown to have been removed from the files. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392. When a subsequent will is lost or cannot be produced, parol evidence is competent to show that it contained a clause revoking the former will. Williams v. Miles [Neb.] 102 N. W. 482. Record of county court is best evidence of delivery and acceptance of sheriff's bond, but parol evidence is admissible, after proper formation is laid, as where record is silent. Baker County v. Huntington [Or.] 79 P. 187. Contents of ballots wrongfully destroyed by election judges may be shown by parol. State v. Conser, 5 Ohio C. C. (N. S.) 119. When original deed is lost, and was not recorded, oral evidence is admissible to show its execution and what was conveyed by it. Carpenter v. Jones [Ark.] 88 S. W. 871. Evidence of circumstances attending execution of deed admissible to show execution, deed having been lost. Garrett v. Spradling [Tex. Civ. App.] 88 S. W. 293.

4. A copy of a lost paper is admissible when shown that it has been compared with the original and found correct. Lancaster v. Lee [S. C.] 51 S. E. 139. Where clerk testifies that he transcribed a deed, the record is admissible as a copy of the original, on proof of its execution, delivery and loss, even though the record has been held irregular because of noncompliance with registry laws. Lancaster v. Lee [S. C.] 51 S. E. 139.

5. Failure to produce original draft of alleged libel being accounted for, a printed copy as furnished the public is competent to prove its contents. Prewitt v. Wilson [Iowa] 103 N. W. 365. Transcript from court records containing copy of deed of trust, admissible after proof of loss and legal search for original, and proof of deed by subscribing witnesses not necessary. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428. Where recovery cannot be based on original instrument because of unauthorized alterations therein, but may be based on an unchanged duplicate, proof of the contract by an office copy of the unchanged original is competent when the adverse party fails to produce the duplicate on notice. Hayes v. Wagner, 113 Ill. App. 299. That a deed is not an ancient one does not preclude its proof by certified copy of the land records, where the parties to it are not parties to the cause, since it is presumed that grantors were in possession at the time of execution. Dawson v. Town of Orange [Conn.] 61 A. 101. **Existence of**

proper foundation has been laid by showing that the original has been lost or destroyed,[6] and that diligent but fruitless search has been made for it [7] by the proper person,[8] or that it is in the possession of the adverse party or his attorney, who has failed to produce it, after due notice to do so.[9] An alleged lost instrument must be proved to have been in existence and to have been duly executed.[10] Copies of copies

lost deed may be proved by record of it, though record is void because deed was not entitled to record, being improperly acknowledged. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188. **A curative deed** executed to cure defective acknowledgment of former deed which is lost, and the record of which is void, is competent evidence, though executed by a trustee without authority. Id.

6. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1. The burden is upon one seeking to introduce a copy of a telegram to show loss of the original. Bond v. Hurd [Mont.] 78 P. 579. Secondary proof of contents of notice of injury competent after proof of loss or destruction of notice itself. Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102. Proof of execution of trustee's deed, of its loss, and of search for it, held sufficient to admit secondary evidence of its contents. McCaugh v. Young [Miss.] 37 So. 839. Oral evidence of contents of release admissible after proof of due execution of release and of its loss. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

7. Clerk having testified to diligent but unsuccessful search for original report of commissioners, proof by certified copy was proper. In re Webster, 94 N. Y. S. 1050. Evidence as to search for spindle containing prescriptions for liquor held insufficient to warrant secondary proof of prescriptions. Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607. Where it is shown that the original had been delivered to the party seeking to introduce a copy, he must show that search has been made for it. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1. Mere proof that plaintiffs did not have original patent is not a sufficient predicate for admission of certified copy of extract from tract book of probate judge's office. Butt v. Mastin [Ala.] 39 So. 217. Under Hurd's Rev. St. 1903, c. 30, § 36, relating to admission of records of instruments, testimony that a party had delivered a contract to another, that it had been recorded, and that it was not in his possession is not sufficient foundation for introduction of the record. Baltimore & O. S. W. R. Co. v. Brubaker [Ill.] 75 N. E. 523.

8. Parol evidence is not competent to prove the existence and contents of an instrument of record until it is shown that search has been made for it by the person charged with the custody thereof in the place where by law it ought to be kept. Parol evidence improperly admitted to prove existence and contents of administrator's sale bond. Shannon v. Summers [Miss.] 38 So. 345. Loss of the original should be proven by the custodian if possible. Hence proof of search for a letter in the office of those with whom it was left by others than the custodians was not sufficient as a foundation for secondary proof. Alabama Const. Co. v. Meador [Ala.] 39 So. 216.

9. Exclusion of secondary evidence of contents of letter proper when no reasonable notice to produce original was given. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293. No demand being made upon addressees of telegram, who were in court, for the original, offer of a copy was properly refused. Brownlee v. Reiner [Cal.] 82 P. 324. Where policy is in defendant's possession and he has failed to produce it after notice to do so, secondary evidence of its contents is admissible. State v. Mann [Wash.] 81 P. 561. Where execution, record, and delivery by recorder to grantee of deed was proved, and on notice to produce it, attorneys announced it was not in their possession, the record of it was admissible. Uzzell v. Horn [S. C.] 51 S. E. 253. Original instruments being in counsel's hands at trial, and he failing to produce them when called upon, copies were competent. Wabash R. Co. v. Johnson, 114 Ill. App. 545. When a paper which, if in existence, must be under control of a party to the suit who must know that it is indispensable to his adversary, a notice to produce it is unnecessary. Dawes v. Dawes, 116 Ill. App. 36. Where effect of pleadings was to admit due execution of assignments, and copies had been attached to complaint at defendant's instance, and plaintiff proved demand on defendant for them, and inability to procure them, secondary evidence of such assignments was competent without further foundation in the complaint. City Bank of New Haven v. Thorp [Conn.] 61 A. 428. In action to recover for services rendered a county, the nature of the suit was equivalent to notice to defendant to produce the written claim which plaintiff had presented, since proof of such claim would be necessary. Hence, on failure to produce it, proof of its contents by parol was competent. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475.

10. A lost will not probated nor proved as required by statute is no evidence of title. Myar v. Mitchell [Ark.] 80 S. W. 750.

NOTE. Presumption as to execution: A lost deed, the contents of which have been established by parol testimony, is presumed to have been executed in conformity with law. Christy v. Burch, 25 Fla. 942, 2 So. 258. By one court it was intimated that a copy of a will would have been admitted to probate, had the proponent shown the correctness of the copy, by whom it had been made, or from who procured. Jacques v. Horton, 76 Ala. 238. In Fletcher v. Horne, 75 Ga. 134, the attorney who made a copy of the lost deed to exhibit in a bill in equity, was allowed to testify to the correctness of such copy, it being sustained. But in Carter v. Wood, 103 Va. 68, 48 S. E. 553, copies of the record and of a deed were

are inadmissible.[11] In the case of instruments executed in duplicate, each is primary evidence.[12] Hence a party who has lost his copy cannot prove its contents by parol where he has taken no steps to procure the production of the other copy.[13] Where a telegram is sent in reply to another the copy of the reply filed for transmission, and not the copy received by the addressee, is the original for the purpose of evidence.[14] Where weather conditions are exceptional, the impressions of witnesses may be given in regard thereto;[15] but reliable testimony concerning temperature can be expressed only in degrees as observed by the witness or recorded by signal service officers.[16]

Written evidence noticed to be produced should be presented at the hearing at the time it is called for by the noticing party.[17] Refusal then to produce is a ground of objection to the admission of the same writing, after secondary evidence of its contents has been offered because of such refusal, if the party who withheld it should then offer it.[18]

§ 5. *Parol evidence to explain or vary writings.*[19]—When a written contract imports on its face to be a complete expression of the whole agreement, it is presumed that the parties have introduced therein every item or term,[20] and that all prior negotiations[21] and contemporaneous oral agreements have been merged therein; hence the well settled rule that evidence of prior or contemporaneous oral agreements is inadmissible to vary or contradict the terms of a valid written instrument.[22] But this is the rule only when the writing is a complete, clear, and unam-

held insufficiently established as genuine to prove title in ejectment.—3 Mich. L. R. 243.

11. Copies from the book of conveyance of the clerk and ex officio recorder's office are copies of copies, and inadmissible. Ruddock Cypress Co. v. Peyret, 113 La. 867, 37 So. 858.

12. Norris v. Billingsley [Fla.] 37 So. 564. Carbon copy of letter made at same time and by same impression of type, admissible without laying foundation for its admission as a copy; but letter in question held not to have been shown such a carbon copy. Chesapeake & O. R. Co. v. Stock [Va.] 51 S. E. 161.

13. Norris v. Billingsley [Fla.] 37 So. 564.

14. Whether the copy of a telegram filed or the one received is the original depends upon whether the telegraph company is the agent of the sender or receiver. Bond v. Hurd [Mont.] 78 P. 579. The reply message as received must be considered a copy, and is admissible only when the proper foundation for secondary evidence has been laid, and its genuineness and authenticity has been shown. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005.

15, 16. Peterson v. Chicago, etc., R. Co. [S. D.] 102 N. W. 595.

17, 18. Merritt v. Jordan, 65 N. J. Eq. 772, 60 A. 183.

19. See 3 C. L. 1348.

20. Written contract signed by parties, conclusively presumed to contain all terms of agreement, and constitutes waiver of terms discussed but not included therein. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137. Agreements and understandings concerning representations made by one party are presumed to have been incorporated in the written contract and parol evidence is inadmissible to vary its terms. Butler v. Standard Guaranty & Trust Co [Ga.] 50 S. E. 132.

21. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19; Nielson v. Northeastern Siberian Co. [Wash.] 82 P. 292. Letters prior to execution of charter party properly excluded. United States v. Conkling [C. C. A.] 135 F. 508. Negotiations prior to sale merged in written contract. Spencer v. Huntington, 100 App. Div. 463, 34 Civ. Proc. R. 30, 91 N. Y. S. 561. Express warranty of machine in form of advertisements and letters cannot be read into subsequent written contract of sale. Cooper v. Payne, 103 App. Div. 118, 93 N. Y. S. 69. Proof of prior negotiations inadmissible to vary written order for goods so as to show a warranty respecting them. American Home Sav. Bank Co. v. Guardian Trust Co., 210 Pa. 320, 59 A. 1108. Previous conversations and negotiations leading up to policy of life insurance presumed to have been merged in written policy. Ijams v. Provident Sav. Life Assur. Soc., 185 Mo. 466, 84 S. W. 51. In the absence of fraud, accident, or mistake, all prior parol negotiations are, as a general rule, merged in the written contract. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957. No representation, promise, or agreement made or opinion expressed in previous conversations is admissible to contradict, explain, or modify the plain provisions and just interpretation of the writing. Id.

22. Wheaton v. Bartlett, 105 Ill. App. 326; Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; McConnell v. Pierce, 116 Ill. App. 103; Stone & Co. v. Mulvaine [Ill.] 75 N. E. 421; Gemmer v. Hunter [Ind. App.] 74 N. E. 586; Hill v. Maxwell [Kan.] 79 P. 1088; Carter & Co. v. Weber [Mich.] 101 N. W. 818; Apking v. Hoffer [Neb.] 104 N. W. 177; Orion Knitting Mills v. United States Fidelity & Guaranty Co., 137 N. C. 565, 50 S. E. 304; Stickney v. Hughes [Wyo.] 79 P. 922.

ILLUSTRATIONS. Miscellaneous contracts: Contract held complete and parol evidence inadmissible. Southwestern Teleg. & T. Co. v. Paris [Tex. Civ. App.] 87 S. W. 724.

Written contract to pasture and care for cattle. Brown & Co. v. St. John Trust Co. [Kan.] 80 P. 37. Oral agreement wholly inconsistent with written contract inadmissible. Halliday v. Mulligan, 113 Ill. App. 177. Absolute written agreement to pay for lamp cannot be varied by oral evidence that payment was conditioned upon buyer's satisfaction. Cluster Gaslight Co. v. Baker, 90 N. Y. S. 1034. Letters regarding return of beer kegs being explicit, and their directions having been agreed to, evidence of a custom to return kegs was inadmissible. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43. Parol evidence contradicting express terms and adding new terms excluded. Rucker v. Bolles [C. C. A.] 133 F. 858. Parol evidence inadmissible to enlarge scope of contract as written or give witness' construction of it, different from its terms. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903. Terms of accepted order cannot be varied by parol. Parsons v. Wentworth & Drew [N. H.] 59 A. 623. Admission of testimony to identify signer of contract as a partner did not make admissible evidence as to terms. Dunn v. Mayo Mills [C. C. A.] 134 F. 804. A warranty not expressed or implied from the terms of a written contract cannot be added by implication of law or parol proof. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. Written warranty of quality of engine cannot be enlarged by proof of subsequent oral warranty. Houghton Implement Co. v. Doughty [N. D.] 104 N. W. 516. A written submission of a dispute to arbitration and the written award cannot be enlarged by parol proof. Pinkstaff v. Steffy [Ill.] 75 N. E. 163. Where final letter in correspondence shows it was intended to embrace the entire contract as finally agreed upon, it is the only evidence of the contract; oral testimony as to negotiations, and other letters in the correspondence are incompetent to vary or contradict it, or to supply terms as to which it is silent. Grueber Engineering Co. v. Waldron [N. J. Err. & App.] 60 A. 386. Evidence of custom and usage admissible to explain and enlarge meaning of written contract, but has little if any bearing to establish a different contract which by mistake was not reduced to writing. John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050. An **instrument under seal** cannot be varied except by an instrument of the same dignity. Morehouse v. Terrill, 111 Ill. App. 460. Sealed instrument being complete and unambiguous, oral agreement that it was to be conditional cannot be shown. Bieber v. Gans, 24 App. D. C. 517. Where a written **contract of sale** referred to a catalogue for the warranty, parol evidence regarding the warranty was incompetent. Buchanan v. Laber [Wash.] 81 P. 911. When letters plainly showed all terms of sale contract, one party's understanding as to price could not be shown by parol. Fletcher v. Underhill [Tex. Civ. App.] 83 S. W. 726. Sale from sample could not be shown when written contract did not show it. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. Oral evidence that sale of beans was to be by sample held to contradict and vary written contract. Gardiner v. McDonough [Cal.] 81 P. 964. Where written contract of sale expressly stated there were no agreements outside the writing, evidence of contemporaneous oral agreement inadmissible. Tranter Davison Mfg. Co. v. Pittsburg Trolley Pole Co., 23 Pa. Super. Ct. 46. Where sale contract provided that electric generators were to have certain capacity, oral agreement relative to capacity different from contract could not be shown. Western Elec. Co. v. Baerthel [Iowa] 103 N. W. 475. Contract of sale, complete in itself, cannot be extended by parol proof of warranty as to how machine will do its work. Davis Calyx Drill Co. v. Mallory [C. C. A.] 137 F. 332. Written contract for sale of wire being based on terms of contract between defendant and third person, statements of salesman of third person before contract was made, in regard to weight of mile of wire inadmissible on amount of wire called for by contract. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. **Contract for sale of land** held clear and consistent, rendering oral evidence incompetent. Harmon v. Thompson [Ky.] 84 S. W. 569. City lots being sold by written contract, oral agreement to dedicate certain adjacent land to city for street could not be shown. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19. **Release** from liability for personal injury held complete and definite and alleged oral agreement by defendant to give plaintiff employment could not be shown. Rapid Transit R. Co. v. Smith [Tex.] 86 S. W. 322. Instrument acknowledging receipt of $100 in full of all demands for injuries held a contract, and parol evidence inadmissible to add an additional agreement. Lanham v. Louisville & N. R. Co. [Ky.] 86 S. W. 680. **Option** not being ambiguous, oral evidence of agreement to pay earnest money is incompetent. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Plain and unambiguous **power of attorney** cannot be explained by parol. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. Recital of bargain and sale and warranty of title in **chattel mortgage** cannot be contradicted by parol evidence to show mortgagor was not the owner. Beadleston & Woerz v. Furrer, 102 App. Div. 544, 92 N. Y. S. 879.

Deeds: Definite, unambiguous deeds of land are not an exception to the rule excluding parol evidence to vary the terms of instruments. Kruse v. Koelzer [Wis.] 102 N. W. 1072. Secret and undisclosed intentions of either party limiting effect of unconditional deed are incompetent. Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583. Where deed given in family settlement was unconditional an oral agreement whereby a certain person was to have use and occupancy of land for life could not be shown. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677. An express warranty against incumbrances and for peaceable possession cannot be contradicted by evidence of an oral agreement excepting a certain incumbrance. Patterson v. Cappon [Wis.] 102 N. W. 1083. Where conveyances by a mother are relied on as a partition, parol evidence is inadmissible to prove a condition that the values of the different portions were to be equalized. Spann v. Hellen [La.] 38 So. 248. Where deed is in usual form with complete warranty of title, parol evidence is inadmissible to prove an intention of the parties that timber on the land should not pass by the

biguous expression of the entire contract. Parol or extrinsic evidence, such as evidence of the circumstances surrounding execution of the instrument,[23] and of the conduct and acts of the parties before and after such execution,[24] is admissible to

deed. McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722. Where deed of married woman purports to convey title to husband unconditionally, statements of husband that he did not intend to take title unless he survived his wife are inadmissible. Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583. In an action of covenant the deed governs and the grantor cannot show by parol the grantee's knowledge of an incumbrance to defeat the covenant. Newburn v. Lucas, 126 Iowa 85, 101 N. W. 730. Absolute conveyance cannot be changed by proof of oral agreement whereby grantee was to devise to grantor, thus converting fee into life estate with reversion in grantor. Lozier v. Hill [N. J. Eq.] 59 A. 234. A deed expressing a consideration, and notes for a certain amount executed at the same time, held to constitute one transaction, the written evidence of which was on its face complete. Hence parol evidence of an agreement to bequeath the difference between the consideration for the land and the amount of the notes, was incompetent. Gemmer v. Hunter [Ind. App.] 74 N. E. 586.

Leases: If description in lease is applicable to land, evidence of conversation at time is inadmissible to vary it. Naughton v. Elliott [N. J. Eq.] 59 A. 869. Parol evidence of agreement that dwelling house and certain fields were not to be included in lease of farm on shares incompetent to change written contract. Thayer v. Gibbs [Mich.] 12 Det. L. N. 93, 103 N. W. 526. Lease expressly requiring tenant to make repairs on plumbing cannot be varied by showing prior oral agreement that landlord would put premises in perfect condition. Thomas v. Dingelman, 45 Misc. 379, 90 N. Y. S. 436. In suit for use and occupation of basement, lease under which other parts of building were occupied could not be extended by parol to include basement. Kraus v. Smolen, 92 N. Y. S. 329. Written lease providing for repairs by tenant cannot be contradicted by showing prior agreement that landlord was to make repairs. Daly v. Piza, 94 N. Y. S. 154, rvg. 45 Misc. 608, 90 N. Y. S. 1071. In action on written lease, breach of an alleged prior or contemporaneous oral agreement by the lessor to make additions to buildings cannot be shown. Morningstar v. Querens [Ala.] 37 So. 825. Where lease provided that lessee could erect such buildings as he deemed proper, and remove them on expiration of the term, parol evidence as to purpose for which land was leased is inadmissible. Cox v. O'Neal [Ala.] 37 So. 674. Agreement to pay rent for use of plantation held complete and clear, and oral agreement by one to repair fences could not be shown. Hightower v. Henry [Miss.] 37 So. 745.

Notes: Condition cannot be ingrafted on note by parol evidence of contemporaneous agreement. Berendt v. Ripps, 120 Ga. 228, 47 S. E. 595. Maker of note, in action thereon, cannot show an oral agreement whereby he was not to be liable thereon. Western Carolina Bank v. Moore [N. C.] 51 S. E. 79. Oral agreement to "knock off" interest for first year inadmissible, when note provided for interest at ten per cent. per annum from date. Tisdale v. Mallett [Ark.] 84 S. W. 481. Oral evidence inadmissible to show agreement to give a future credit on a note and that note was then to be for balance; since this evidence would change the note from one for a certain sum to one for a less sum. Knight v. Walker Brick Co., 23 App. D. C. 519. Parol evidence incompetent to show note for land conditional upon maker's receiving certain timber. Begley v. Combs [Ky.] 87 S. W. 1081. In action on absolute unconditional premium note, parol evidence of an agreement to deliver the policy in a given time, and breach of that agreement, is inadmissible to show failure of consideration. Civ. Code 1895, § 3675, (1) 5201. Union Cent. Life Ins. Co. v. Wynne [Ga.] 51 S. E. 389.

Contract of indorsement: Parol evidence incompetent to show indorsers were not to be liable as such. Second Nat. Bank of Beloit v. Woodruff, 113 Ill. App. 60. Liability of persons who sign note as indorsers cannot be varied by parol evidence, as of custom or usage of maker in regard to other notes of a like character. Harnett v. Holdrege [Neb.] 103 N. W. 277. Indorsement for collection, clear and unambiguous, cannot be contradicted by showing that indorsee owned two-sevenths of note in his own right. Smith v. Bayer [Or.] 79 P. 497.

23. Brannan v. Henry [Ala.] 39 So. 92. General character of the business of parties may be shown to explain terms used in their contract. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. Subject-matter, surrounding circumstances and conduct of parties, may be shown when contract is not clear. Dugan v. Kelly [Ark.] 86 S. W. 831. In case of ambiguity, evidence of subject-matter, relation of parties and surrounding circumstances is admissible to aid court in its interpretation of contract. L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462. Parol proof as to condition of subject-matter competent to show intent of parties in use of terms. Walker v. Johnson, 116 Ill. App. 145. Circumstances leading to passage of statute under which a contract was made admissible in evidence to aid in construction of agreement. Old Colony R. Co. v. Boston [Mass.] 75 N. E. 134. In action to recover toll paid, what was said by parties was admissible to show extent to which a receipt was accepted by the one making the payment. Ver Duyn v. Detroit & S. Plank Road Co. [Mich.] 12 Det. Leg. N. 522, 104 N. W. 612. In action for failure to deliver message, addressee may testify what he would have understood the message to mean, had he received it, to show that both parties understood it. Elam v. Western Union Tel. Co. [Mo. App.] 88 S. W. 115.

24. Subsequent acts and declarations of parties to contract to furnish ties held admissible to show construction placed on contract by the parties. Laclede Const. Co. v. T. J. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. What was said and done before and after

supply a term as to which the writing is silent,[25] and which is not supplied by implication of law;[26] to explain a latent[27] or patent[28] ambiguity; to identify the sub-

execution of lease admissible to show what was intended to pass and to identify subject-matter. Parish v. Vance, 110 Ill. App. 57. Where it is claimed that a deed was given by mistake as a part of a settlement, evidence of what was done pursuant to the settlement was admissible. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539. Where deed states it is given to replace a former lost deed, parol proof of situation and former dealings of parties is competent. Scaplen v. Blanchard, 187 Mass. 73, 72 N. E. 346. Where a contract, uncertain in its terms, has been partially performed, the court, in construction of it, will have recourse to the use and course of dealing of the parties, their conduct, and surrounding circumstances. Naughton v. Elliott [N. J. Eq.] 59 A. 869. Under Code Civ. Proc. § 1860, where a description in a contract of sale was uncertain, proof of occupation by the vendee, and of improvements, was admissible to identify the land. In re Garnier's Estate [Cal.] 82 P. 68.

25. Contract being silent as to terms of payment, oral agreement in regard thereto admissible. Allum v. Nolie, 25 Pa. Super. Ct. 220. Contract being silent as to time and manner of shipping live-stock, parol proof of custom to furnish independent train for ten carloads or more, when demanded, was competent. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Where paper contained an apparent admission by defendants, they could show circumstances attending execution of it though plaintiff was not present. Badanes v. Feder, 93 N. Y. S. 478. Where goods are to be transported over several lines, and the route is not designated in the contract, the presumption that it may be selected by the carrier may be rebutted by parol proof of a subsequent agreement as to the route. Steidl v. Minneapolis & St. L. R. Co. [Minn.] 102 N. W. 701. Where a writing reciting a delivery of goods purports to evidence a contract of agency rather than a sale, but does not give the terms of the agency, proof of a collateral oral agreement is competent to show that the goods could be returned upon the happening of certain contingencies. Sutton v. Weber [Iowa] 101 N. W. 775. Where application for insurance was inadmissible because not attached to policy, and policy did not contain basis rate of assessment, and by-laws did not show it, oral evidence and records of the company were admissible to show the general methods of showing rate, and the particular rate of the policy. Moore v. Bestline, 23 Pa. Super. Ct. 6.

26. Contract of agency held complete, one term being implied in law. Union Special Sew. Mach. Co. v. Lockwood, 110 Ill. App. 387. In absence of term in agency contract as to duration of relation, law presumed it was to last as long as both desired and terminate at will of either, upon notice given, hence parol evidence inadmissible. Id. Failure of a sale contract to state time and place of delivery does not make parol evidence admissible, since these elements are fixed by Code, §§ 1753-1754, in absence of express provisions. Gardiner v. McDonogh [Cal.] 81 P. 964.

27. A latent ambiguity, raised by parol evidence, may be explained by evidence of the same kind. As meaning of "Levi Jackson Home Place" used in sale contract. Jackson v. Hardin [Ky.] 87 S. W. 1119. An ambiguity may arise, not only from the face of the writing, but also from language, clear in itself, which leads to an absurd result when applied to situation with which it deals. In either case, the situation of the parties, the subject-matter, and surrounding circumstances, may be shown. Corbett v. Joannes [Wis.] 104 N. W. 69. While the general rule is that only latent ambiguities are explainable by parol evidence, under Georgia Civ. Code 1895, § 3325, either patent or latent ambiguities may be so explained. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743. Where there is a latent ambiguity in the description in a deed, evidence of the situation and condition of the land, the circumstances under which the conveyance was made, and the practical construction placed upon the deed by the parties, is admissible. Mayberry v. Beck [Kan.] 81 P. 191. Contract for sale of pine held to contain latent ambiguity in description rendering parol evidence competent to show which lot or area of timber on each of two tracts was intended to be sold. Kimball v. Waterman [N. H.] 61 A. 595. Where insurance policy by its terms expired at "noon" on a certain day, parol evidence was admissible to show that by a custom of the place of contract "noon" meant 12 o'clock midday, standard time, and not 12 o'clock sun time. Rochester German Ins. Co. v. Peaslee Gaulbert Co. [Ky.] 87 S. W. 1115. Where the description of land in proceedings to confirm a special tax and in application for judgment is shown to be inaccurate by extrinsic evidence, similar evidence is competent to explain the ambiguity. Harman v. People, 214 Ill. 454, 73 N. E. 760. Where contract was to supply railroad ties needed for 1899, parol evidence was competent to show that ties for a contemplated extension were intended. Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. Where check was indorsed over to executor as such and he receipted for it as a loan to the estate, parol evidence is admissible to show that the money was to be returned if not used for a particular purpose. Frick v. Shimer, 26 Pa. Super. Ct. 563.

28. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345. Oral evidence competent to explain figures and abbreviations used in mechanic's lien statement. Kneisley Lumber Co. v. Stoddard Co. [Mo. App.] 88 S. W. 774. To explain written contract uncertain as to price stipulated. Schmidt v. Turner, 5 Ohio C. C. (N. S.) 492. To show that "Boyo" used in sale contract meant a variety of "Bayous" beans and that "per 100" meant "per hundred pounds." Gardiner v. McDonogh [Cal.] 81 P. 964. Words "unless otherwise satisfied," found in mortgage, held ambiguous. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145. Following order, held ambiguous: "Please pay to * * * $300,

ject matter;[29] to show the actual relation of parties to the contract;[30] and, in general, to show the real intention of the parties at the time.[31]

the amount of my account. With all overplus on lumber when shipped." Bertig-Smythe Co. v. Bonsack Lumber Co. [Mo. App.] 86 S. W. 870. Contract for exchange of stock of merchandise for realty providing that stock was to be invoiced "as per following cost mark" was ambiguous. Webb v. Steiner [Mo. App.] 87 S. W. 618. Word "account" in written guaranty given by brokers indemnifying a customer against loss held to render writing ambiguous. Britton v. Marks, 93 N. Y. S. 828. Phrase "keep them out" in salesman's contract explainable by parol as referring to machines sent to dealers which salesman was to prevent return of and effect settlement for. Morrison Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016. Description in agreement to deed back "said piece of land, containing twenty-seven acres" may be made certain by parol evidence. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232. Where tax deed recited ownership of a tract of land by a certain person, parol proof was competent to aid description. Brannan v. Henry [Ala.] 39 So. 92. Correspondence between parties to charter party admissible to show meaning of phrase "say about 3,400 gross tons" used in shipper's agreement as to cargo to be furnished. Sewall v. Wood [C. C. A.] 135 F. 12. Words "merchantable lumber, mill run," used in lumber contract, being peculiar to lumber business in a certain vicinity and having no settled judicial meaning, are explainable by parol evidence. Barnes v. Leidigh [Or.] 79 P. 51. Where policy insured property "for a term of three years from Jan. 14, 1903, to Jan. 14, 1904," parol evidence was competent to prove which of the two terms indicated was intended by the parties. Traders' Ins. Co. v. E. D. Edwards Post No. 22, G. A. R. [Miss.] 38 So. 779. Method of payment of balance of price being ambiguous as set forth in contract, parol evidence was competent to show an agreement that such balance was to be paid out of profit of an enterprise referred to in the contract, and that no payment was to be made if there were no profits. Morrison v. Dickey [Ga.] 50 S. E. 178. Where signatures came between two parts of writing parol proof that writing was all one and that space for signatures had been made before writing was added did not vary or contradict writing. Cox v. Burdett, 23 Pa. Super. Ct. 346. Witnesses familiar with conditions at time could explain meaning of "tenement house" in clause in deed of 1873 restricting use of property and show whether it included modern apartment houses. Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241. Where contract provided for shipment of goods between certain dates as ordered by plaintiff according to its requirements, a conversation between plaintiff's officer and defendant's agent as to when goods would be needed was competent to explain contract. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Sheriff's bond held ambiguous and equivocal, rendering competent parol proof that it was intended as an additional bond to cover his duties as tax collector. Baker County v. Huntington [Or.] 79 P. 187. Written contract being incomplete and indefinite, parol evidence was admissible to show nature of agreement. Niles v. Sire, 94 N. Y. S. 586.

Held unambiguous: Building contract. Dugan v. Kelly [Ark.] 86 S. W. 831. Excepting clause in deed. Barrett v. Kansas & T. Coal Co. [Kan.] 79 P. 150. "Estate of F. Lawrence," used in sale contract to describe the vendor. Morrison v. Hazzard [Tex. Civ. App.] 13 Tex. Ct. Rep. 310, 88 S. W. 385. "Acceptable to the engineer" used in building contract. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351. Evidence regarding subject-matter and surrounding circumstances inadmissible if there is no ambiguous or equivocal term in contract. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. The term "pro rata," used in insurance, having been judicially construed, expert testimony as to its customary meaning is inadmissible. Home Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65. Extrinsic evidence is inadmissible to show that words "bodily heirs" in a deed were used to designate the grantee's children. Edins v. Murphree [Ala.] 38 So. 639. Contract to lease hotel premises, which provided that term should "commence as soon as vacated by present occupants" is not so indefinite as to admit parol evidence to show when delivery of premises was to be made. Rhodes v. Purvis [Ark.] 85 S. W. 235. Unambiguous note cannot be shown to have been an advancement by parol. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678. Contract for advertising held unambiguous so that parol evidence as to when publication was to begin was incompetent. Mail & Exp. Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. Contract for purchase of scrap iron held complete and unambiguous and evidence of collateral agreement excluded. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. Contract held to evidence an agreement to buy stock and not a mere option, and to be unambiguous, so that parol evidence was inadmissible. Edwards v. Capps [Ga.] 50 S. E. 943. Where a contract provided that lumber was to be measured and shipped, each party to pay one-half the cost of inspection "as per suggestion and oral verbal understanding, in other words, the lumber is to be measured at the mill," parol evidence is inadmissible to show manner of delivery. Oriental Lumber Co. v. Blades Lumber Co., 103 Va. 730, 50 S. E. 270. Instrument acknowledging receipt of $50 as first payment on price of realty, and reciting that balance was to be paid as soon as defendants furnished perfect title, and that they agreed to give a warranty deed on tender of price by plaintiff or assigns, held an unambiguous contract for sale, and oral evidence of a condition is inadmissible. Miller v. Smith [Mich.] 12 Det. Leg. N. 249, 103 N. W. 872.

29. Parol proof admissible to identify land described in contract as "Abbey Ranch." Hill v. McCoy [Cal. App.] 81 P. 1015. Parol evidence admissible to ascertain and explain subject-matter of written contract of

sale. Young v. Guess [La.] 38 So. 975. Parol evidence, explanatory of subject-matter of written contract, consistent with its terms and necessary for its interpretation is admissible. Cox v. Wilson, 25 Pa. Super. Ct. 635. Parol evidence admissible to show mortgaged property was a part of land referred to in a pending suit. Johnson v. McKay, 121 Ga. 763, 49 S. E. 757. Description of timber in deed being ambiguous, parol evidence was competent to show intention of parties as to what was to be conveyed. Ward v. Gay, 137 N. C. 397, 49 S. E. 884. Parol evidence competent to show what land was meant by term "Levi Jackson Home Place" used in contract of sale of land. Jackson v. Hardin [Ky.] 87 S. W. 1119. Where land is described, in instrument leasing and giving an option on it, merely as a certain person's "place," parol evidence is admissible to identify it. Wellmaker v. Wheatley [Ga.] 51 S. E. 436. Where grantee assumed "mortgages, liens, taxes and claims of any and every description," parol proof was competent to show what mortgages and claims existed and were assumed. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. Where a deed conveys property generally described as that "formerly occupied by" a certain company and "now occupied by" a certain other company, parol evidence is admissible to show what land had been occupied by the companies named. Georgia & A. R. Co. v. Shiver, 121 Ga. 708, 49 S. E. 700. Location of land from uncertain description in deed being impossible, resort will be had to the acts and conduct of the parties at and after the time when possession is given under the deed. Carney v. Hennessey, 77 Conn. 577, 60 A. 129. An ambiguity in the description in a deed may be explained by parol, and the deed as explained, may be made the basis of a claim. Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591. When a deed does not specify the particular appurtenant right alleged to have been conveyed by it, extrinsic evidence must be resorted to in order to establish it. Parol evidence admissible to identify particular water right appurtenant to land. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334. Parol evidence admissible to show that word "claims" as used in a release given in a settlement of an estate meant all possible claims under a supposed will which was not discovered until after the final settlement was made. Perkins v. Owen, 123 Wis. 238, 101 N. W. 415. Description of property in chattel mortgage being sufficiently definite to make the mortgage admissible, extrinsic evidence is competent to identify the property. Colean Implement Co. v. Strong, 126 Iowa, 598, 102 N. W. 506. Where bill of sale describes property as "complete sawmill" consisting of certain specified articles "together with equipment" and things pertaining thereto, and refers to chattel mortgage as source of title, parol evidence is competent to show whether sale included articles placed in mill after mortgage was given but before the sale. Edwards v. Wisconsin Inv. Co. [Wis.] 102 N. W. 575. Where writing attached to policy described property insured as a certain building "and addition," evidence that the addition was to be built after policy was issued, and of its value, did not vary, but helped explain the policy. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812.

Where a sufficient description is given in a contract to convey land, parol evidence is admissible to fit the description to the land (Powers v. Rude, 14 Okl. 381, 79 P. 89); but if there is no description, or an insufficient description, such evidence is inadmissible (Id.). Description in deed held sufficient to warrant admission of parol evidence to identify property. Hinton v. Moore [N. C.] 51 S. E. 787. A fatally defective description in an assessment for taxes, as where township and range numbers are omitted, cannot be aided or cured by parol. Paine v. Germantown Trust Co. [C. C. A.] 136 F. 527.

30. Parol evidence is competent to show true relation of parties to note. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459. Parol evidence admissible to show third person signed contract as surety. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. Note signed by partners individually may be shown to be partnership debt, discharged by discharge in bankruptcy. Young v. Stevenson [Ark.] 84 S. W. 623. Lease, though under seal, may be shown that of a partnership, though signed in the name of one partner. Woolsey v. Henke [Wis.] 103 N. W. 267. In suit on promissory note executed by corporation and indorsed by stockholders, minutes of the corporation and other attendant facts and circumstances were admissible to show intention. Somers v. Florida Pebble Phosphate Co. [Fla.] 39 So. 61. Where two persons sign a note apparently and presumptively as joint principals, parol evidence is admissible to show that one is surety for the other. Trammell v. Swift Fertilizer Works, 121 Ga. 778, 49 S. E. 739. Charter party leasing dredge to corporation was signed by corporation and also by president individually, but contained no reference to president's being a party. Held, evidence admissible to show that dredge owner refused to contract unless president also signed. Esselstyn v. McDonald, 98 App. Div. 197, 90 N. Y. S. 518.

31. Proof of surrounding circumstances competent to show what parties intended by words used in assumption clause. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. Where cattle were carried by special train and contract did not provide for time of delivery, extrinsic evidence was admissible to show understanding that cattle should arrive in time for next morning's market. Sloop v. Wabash R. Co. [Mo. App.] 84 S. W. 111. If a contract of sale of land is ambiguous as to whether the sale is in gross or by acre, parol evidence of the surrounding circumstances and situation of the parties, and their conduct, is admissible to show their intention. Newman v. Kay [W. Va.] 49 S. E. 926. Cross-examination of a witness as to the purpose for which a lease was given was not objectionable as tending to contradict or vary a writing. Richmond Ice Co. v. Crystal Ice Co., 103 Va. 465, 49 S. E. 650. The rule that parol testimony is not admissible to contradict or add to a written contract does not forbid inquiring into the object of the parties executing it. Cleveland, etc., Co. v. Consumers' Carbon Co., 5 Ohio C. C. (N. S.) 258. Oral declarations at or about time deceased gave order on bank to pay deposit to

Agreements collateral to the obligation imported by the written contract and not inconsistent therewith,[32] and subsequent agreements,[33] may be shown by parol. A mere receipt is always open to parol explanation;[34] hence recitals of consideration in written contracts are not conclusive,[35] and do not exclude parol proof of the real consideration[36] different from that expressed.[37] Failure of the consideration ex-

his wife admissible on his intention to make a gift. Sprague v. Walton, 145 Cal. 228, 78 P. 645. Declarations of grantor at time of execution of instrument admissible to show whether it was intended as an absolute deed or mortgage. Bell v. Pleasant, 145 Cal. 410, 78 P. 957. Where, in applying a contract to its subject-matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made, and of statements made in prior negotiations may be admitted to resolve the ambiguity and prove the real intention of the parties. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. [C. C. A.] 132 F. 957.

32. Written and oral contracts, while connected, may yet be distinct, each having appropriate and specific rights and remedies peculiar to itself. Proof of such a collateral agreement does not violate Civ. Code, art. 2276. Davies v. Bierce [La.] 38 So. 488. A distinct oral agreement may sometimes be shown in order to prevent use of the writing to accomplish a fraud. Corbett v. Joannes [Wis.] 104 N. W. 69. Parol evidence is competent to show oral contemporaneous agreement inducing execution of written agreement, and without which writing would not have been executed. Fidelity & Casualty Co. v. Harder [Pa.] 61 A. 880. It is competent to show a contemporaneous parol agreement without which the instrument would not have been executed, and that such agreement has been violated and the instrument used for a purpose other than agreed upon. Wheatley v. Niedich, 24 Pa. Super. Ct. 198. Oral evidence of contract to indemnify purchaser of mortgaged lands against judgment liens held not to contradict deed and release of land. Peterson v. Creason [Or.] 81 P. 574. Evidence admissible to show sheriff's deed was executed under an agreement that grantee was to hold legal title as mortgagee subject to redemption by payment of indebtedness. Foster v. Rice, 126 Iowa, 190, 101 N. W. 771. Where note, lease of right to sell machine, and oral agreement to deliver machine were all parts of one transaction, failure to deliver the machine could be shown to prove want of consideration for note, though lease was under seal. Burns v. Goddard [S. C.] 51 S. E. 915. Though loan was evidenced by writing, a pledge of a warehouse receipt was collateral, and a parol agreement that in case of sale of the pledged property the surplus over the present loan should apply on former notes could be shown. Lewis v. First Nat. Bank [Or.] 78 P. 990. Though chattel mortgage does not provide for delivery of property, oral evidence is admissible to show that the mortgagee took possession so as to become a mortgagee in possession. Brockway v. Abbott, 37 Wash. 263, 79 P. 924. Parol evidence admissible to show a written assignment of a mortgage was made with understanding that mortgage should remain in hands of a certain attorney for collection and foreclosure. Easton v. Woodbury [S. C.] 50 S. E. 790. Contract with initial carrier limiting liability for injuries to those occurring on its own line, not varied by proof of conversations with agent tending to show that the initial carrier would furnish its own cars for the through trip. Missouri, etc., R. Co. v. Foster [Tex. Civ. App.] 87 S. W. 879.

33. The terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by any subsequently executed contract, whether such executed contract be in writing or parol. Settlement of dispute and delivery of deed as a part thereof may be shown though there was a written memorandum, and transaction was within statute of frauds. Hill v. Maxwell [Kan.] 79 P. 1088. A conversation constituting a waiver of a term of a contract may be shown though it occurred between the execution of the original and the duplicate. Morehouse v. Terrill, 111 Ill. App. 460.

34. Lynn v. Bean [Ala.] 37 So. 515. Recitals of a receipt may be explained or contradicted by parol. Devencenzi v. Cassinelli [Nev.] 81 P. 41. A receipt is ordinarily satisfactory evidence of its recitals, but is always open to parol explanation. Fitzgerald v. Coleman, 114 Ill. App. 25. Parol evidence admissible to show what was covered by a receipt. Construing Code 1896, §§ 1805, 1806. Stegall v. Wright [Ala.] 38 So. 844. Evidence is admissible to show an address on a package different from that stated in the shipper's receipt, even though such receipt also contained the shipping contract. Cappel v. Weir, 92 N. Y. S. 365. A writing which acknowledges payment in part with cash and the remainder with notes "in full settlement of claim," is evidence of the extinguishment of the debt, and not a mere receipt; and testimony as to a separate agreement, whereby the creditor was to have the right in the event the notes were not paid to surrender them and proceed on his original claim, is not admissible. Fitch v. Gottschalk, 4 Ohio C. C. (N. S.) 240.

35. Recital of consideration in deed not conclusive. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. Recital of consideration of love and affection and $1 in deed does not estop grantee from showing by parol a money payment equal to value of land, as against persons claiming under sheriff's deed. Miles v. Waggoner, 23 Pa. Super. Ct. 432. Parol contract for sale of land having been executed and a deed given, the deed is conclusive evidence of the contract except as to consideration, which may be shown by parol. Tucker v. Dolan [Mo. App.] 84 S. W. 1126.

36. Noyes v. Young [Mont.] 79 P. 1063; Walker v. Johnson, 116 Ill. App. 145. As to what claims grantee assumed. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. Real con-

pressed may also be shown by parol.[38] But where the consideration, instead of being merely recited in the contract, is made one of its terms and conditions,[39] parol evidence is inadmissible.[40]

Parol or extrinsic evidence is admissible to show that a writing, purporting to be a contract, never became effective as such [41] owing to the breach or nonfulfillment of a condition precedent,[42] unless such condition is expressed in the writing.[43] It

sideration for conveyance. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. True consideration for life insurance policy, and that it was not paid may be shown by parol. Continental Casualty Co. v. Jasper [Ky.] 88 S. W. 1078. Parol evidence is admissible to show additional consideration for deed. Windsor v. St. Paul, etc., R. Co., 37 Wash. 156, 79 P. 613. Where instrument recites that maker of note received checks from payee, and contains an agreement for the transfer of stock by the maker, parol evidence is admissible to show consideration for such transfer. Cameron v. Fraser, 94 N. Y. S. 1058. Evidence that part of consideration for mortgage was contemporaneous oral agreement to extend time of payment of notes, admissible. Moroney v. Coombes [Tex. Civ. App.] 13 Tex. Ct. Rep. 527, 88 S. W. 430. Real consideration for deed of right of way may be shown to be location of station on adjoining land. St. Louis & N. A. R. Co. v. Crandall [Ark.] 86 S. W. 855. As between indorser and immediate indorsee, consideration may be shown by parol. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006. Written agreement being an original and not a collateral one, within the statute of frauds, it need not express consideration, but this may be shown aliunde. Dryden v. Barnes [Md.] 61 A. 342.

37. Real consideration for deed may be shown to be different from that expressed in the writing. Gemmer v. Hunter [Ind. App.] 74 N. E. 586. Grantee agreed to pay the taxes in addition to the consideration named in the deed. Henderson v. Tobey, 105 Ill. App. 154. Though check had words written across face "In payment of note of 15 Dec. '92," maker and indorser may show conditions and for what it was given. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803.

38. Full or partial failure of consideration may be so shown. Gaar, Scott & Co. v. Hill [Mo. App.] 87 S. W. 609. Parol evidence admissible to show failure of consideration of note. Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074. It may be shown by parol that consideration for note was bonds issued by the payee; that such bonds were actually the undertaking of the payee, and that performance of the undertaking was impossible. German-American Security Co.'s Assignee v. McCulloch [Ky.] 89 S. W. 5.

39. As where terms and conditions expressed on one side form the consideration for terms and conditions expressed on the other. Wellmaker v. Wheatley [Ga.] 51 S. E. 436.

40. Wellmaker v. Wheatley [Ga.] 51 S. E. 436.

41. Parol evidence is admissible in equity to show a collateral agreement that note and mortgage were not to be enforced, but were given as a convenience in bookkeeping. O'Brien v. Paterson Brewing & Malting Co. [N. J. Eq.] 61 A. 437. In an action to collect rent under a lease, evidence of a contemporaneous parol agreement is admissible to show that the lease was never to have any validity. Metzger v. Roberts, 5 Ohio C. C. (N. S.) 344. Witness to a deed may testify that an instrument is the one she witnessed, but that date, consideration, and property conveyed had been changed; such testimony does not contradict, but shows destruction of original deed. City of St. Joseph v. Baker [Mo. App.] 88 S. W. 1122.

42. Writing being silent as to condition precedent, circumstances, acts and declarations of parties could be shown. Donner v. Alford [C. C. A.] 136 F. 750. Written order for goods not contradicted by proof of oral agreement that order should not be binding until submitted to and approved by other member of firm. Pratt v. Chaffin, 136 N. C. 350, 48 S. E. 768. Lessee may show by parol that he signed lease and paid a month's rent upon the oral promise of lessor to repair premises before lease should take effect. Donaldson v. Uhlfelder, 21 App. D. C. 489. Where application for insurance and note for premium were given agent at same time, evidence was admissible, in action on the note, to show agreement that note was given as evidence of good faith and was not to be binding unless policy, when delivered, was satisfactory and accepted. Graham v. Remmel [Ark.] 88 S. W. 899. Parol evidence admissible to show an agreement whereby lightning rod contract was to be put into fire insurance policies, and that policies were never delivered. Keeler v. De Witt, 24 Pa. Super. Ct. 463. A contemporaneous parol agreement between parties to a chattel mortgage, though at variance with its terms, may be proved by a purchaser for value claiming against the mortgagee, if the agreement rendered the mortgage void as to him. Aleshire v. Lee County Sav. Bank, 105 Ill. App. 32.

A **deed,** absolute on its face, may be shown to have been intended as a **mortgage.** Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232. A deed in which grantor assumes mortgage may be shown to be itself a mortgage. Merriam v. Schmitt, 211 Ill. 263, 71 N. E. 986. Parol evidence is admissible to show a deed absolute on its face to be in fact a mortgage, but such evidence must be clear and unequivocal to warrant relief. Way v. Mayhugh [W. Va.] 50 S. E. 724.

Conditional delivery: Oral testimony is admissible to show that a written contract was not intended to be operative from its delivery but only on the happening of some future event. Agreement that note was not to be of force until life insurance policy should be received and accepted. Menden-

may also be shown that what purports to be a written obligation has been discharged by performance of a parol collateral agreement,[44] unless the parol agreement contradicts the writing.[45] Fraud in the inception of the contract,[46] or mutual[47] mistake[48] whereby the writing does not express the real agreement, may be shown by parol, and such evidence is also competent to show that a writing is a cover for usury, a penalty or forfeiture, or other illegal advantage.[49]

hall v. Ulrich [Minn.] 101 N. W. 1057. Parol evidence is competent to show nondelivery or a conditional delivery, and if the contract is not under seal, this may be shown though the instrument is in possession of the obligee or his assignee. Thus, parol evidence is competent to show delivery of note conditional and as security for performance of another agreement. Oakland Cemetery Ass'n v. Lakins, 126 Iowa, 121, 101 N. W. 778. Oral evidence showing conditional delivery of deed from father to daughter, and that condition precedent to vesting of title never happened, competent. Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. S. 911. But parol evidence is inadmissible to show that a deed delivered to the grantee and absolute on its face shall take effect only upon the performance of some condition or the happening of some contingency unexpressed therein, since in such case title vests by the legal effect of the terms of the grant. Whitney v. Dewey [Idaho] 80 P. 1117.

43. Parol proof is inadmissible to show conditions precedent when the instrument itself sets them forth. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

44. As where note was given to secure collateral agreement which was performed. Oakland Cemetery Ass'n v. Lakins, 126 Iowa, 121, 101 N. W. 778.

45. The rule that a written contract may be shown by parol to be a mere part performance of an entire verbal contract does not apply where the verbal contract is inconsistent with or contradicts the writing, or where the writing plainly purports to contain the entire contract. Corbett v. Joannes [Wis.] 104 N. W. 69.

46. McCarthy v. Woods [Tex. Civ. App.] 87 S. W. 405. Parol evidence admissible to show a written permit to locate a telegraph line was obtained by a fraudulent representation. Mason v. Postal Tel. Cable Co. [S. C.] 50 S. E. 781. Parol evidence is admissible to show that an indorsement in blank was induced by fraud. Nethercutt v. Hopkins [Wash.] 80 P. 798. Evidence that defendant was induced to execute written agreement by fraudulent misrepresentations as to consideration admissible. Machin v. Prudential Trust Co., 210 Pa. 253, 59 A. 1073. Fraud may be shown by parol, though facts shown are contrary to those stated in written application for membership in benefit society. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139. In determining whether release was free from fraud, correspondence preliminary to it was properly admitted as showing circumstances attending its execution. Kansas City, etc., R. Co. v. Chiles [Miss.] 38 So. 498. Oral misrepresentations inducing execution of a contract may be shown notwithstanding Civ. Code, § 1625, which provides that a written contract supersedes previous oral negotiations. Willey v. Clements, 146 Cal. 91, 79 P. 850. Written order for goods expressly excluded all agreements with agents not contained therein. Held, promise by an agent inadmissible to show failure of consideration, but admissible on issue of fraud. Patten-Worsham Drug Co. v. Planters' Mercantile Co. [Miss.] 38 So. 209. Evidence held not to show mistake or fraud in execution of notes, so as to make oral evidence admissible under exception to parol evidence rule. Poindexter v. McDowell, 110 Mo. App. 233, 84 S. W. 1133.

Effect of failure to read contract: One who signs a written contract is presumed to have read it and cannot show that he did not read and agree to its terms. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137. Where applicant failed to read application for insurance policy, he cannot by parol show that it does not contain provisions represented by the agent, where it purports to contain all the provisions of the policy. Vette v. Evans [Mo. App.] 86 S. W. 504. But where contract of shipment of cattle, limiting the carriers liability, was signed by the shipper hurriedly, after the cattle were loaded, without reading it, he was allowed to show the oral agreement with the carrier, notwithstanding the written contract. McNeill v. Galveston, etc., R. Co. [Tex. Civ. App.] 86 S. W. 32; Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 86 S. W. 47.

47. Alleged mistake by one party, whereby contract for sale of land did not express meaning of parties, held not to make parol evidence admissible. Harmon v. Thompson [Ky.] 84 S. W. 569.

48. Where there is an omission by mutual mistake, parol evidence is competent to supply it. Huber Mfg. Co. v. Claudel [Kan.] 80 P. 960. Parol evidence is admissible to show an omission from an instrument by mutual mistake. Beach v. Bellwood [Va.] 51 S. E. 184. Where there has been a defective attempt to put in writing the terms of an agreement actually made, parol evidence is admissible to show that fact, and to show what the real agreement was. Locke v. Lyon Medicine Co. [Ky.] 84 S. W. 307. Error in contract whereby trees intended to be conveyed with land were not in fact conveyed may be shown by parol. Pharr v. Shadel [La.] 38 So. 914. In equity it may be shown by parol that through mistake of both or either of the parties a contract does not express their real agreement. Somerville v. Coppage [Md.] 61 A. 318. In mechanics' lien suit, parol evidence admissible to show contract purporting to have been made Oct. 3, 1897, and filed Oct. 19, 1897, was in fact executed on Oct 18, and the date placed thereon was by mistake. Cutter v. Pierson, 26 Pa. Super. Ct. 10.

49. Word "rent" in land contract may be

The rule above discussed, excluding oral evidence to contradict or vary written contracts, is peculiarly applicable to those contracts which the statute of frauds requires to be in writing.[50] It applies not only to the original parties to a contract, but to parties subsequently acquiring rights thereunder.[51] It does not apply to a mere incomplete memorandum, not intended by the parties to contain or express their entire contract,[52] nor to instruments collateral to the issue.[53] Illustrative applications of the analogous rule excluding oral evidence to contradict or vary the recitals of public records,[54] of records of corporate proceedings,[55] of wills[56] and other writings,[57] are given in the notes.

§ 6. *Hearsay. A. General rules.*[58]—Unsworn statements out of court, by persons not parties to the action, are inadmissible,[59] and testimony based on hear-

shown to be a cover for excessive price. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

50. See Statute of Frauds, 3 C. L. 1527. Elements in contract for sale of land, required by statute of frauds, as proper description of land, cannot be supplied by parol. Morrison v. Hazzard [Tex. Civ. App.] 13 Tex. Ct. R. 310, 88 S. W. 385. An **advancement** cannot be proved by parol under Rev. St. 1898, § 3959. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678. **Boundaries** of land as shown by calls in patent cannot be changed by parol evidence of a statement of the surveyor before making the survey that he intended to begin at a certain monument. Ratliff v. May [Ky.] 84 S. W. 731. **Title to realty** cannot be shown by parol. Thus, declarations of one in possession that he had bought the land, or that it had been given him, incompetent. Swope v. Ward, 185 Mo. 316, 84 S. W. 895. One cannot lose vested title to land by oral admission that it is the property of another. Yock v. Mann [W. Va.] 49 S. E. 1019. Declarations of one not in possession but holding record title inadmissible to show she did not in fact have title but that it was in another. Fall v. Fall [Me.] 60 A. 718. Question as to what interest witness had in lands under discussion in town meetings, to which he testified, properly excluded, since that fact should be shown by documentary proof. Dawson v. Town of Orange [Conn.] 61 A. 101. On issue of ownership of a railroad, statement of a station agent that his company did not own it is incompetent. Black v. St. Louis, etc., R. Co., 110 Mo. App. 198, 85 S. W. 96. But in a petitory action, where plaintiffs claim as heirs of their father, and defendant by virtue of an adjudication to his vendor at judicial sale to settle succession of father of plaintiffs, parol evidence is admissible to show whether or not such adjudication was made. Landry v. Laplos, 113 La. 697, 37 So. 606.

Trusts in personalty may be created, and hence may be established by parol. Dawes v. Dawes, 116 Ill. App. 36.

51. Where third parties acquire interests in the subject-matter of contracts, and are recognized as parties thereto, parol evidence is not admissible to change the contract recognized as in force between the parties. Third person became interested in stock insured after policy was issued; held, contract between original parties could not be varied by parol. Johnston v. Charles Abresch Co., 123 Wis. 130, 101 N. W. 395.

52. Rule does not apply to memorandum signed and understood as a mere step in the negotiations. Schwarz v. Lee Gon [Or.] 80 P. 110. Where it appears parties did not intend writing to embody final and complete agreement, oral evidence is admissible to show terms on which writing is silent. Halliday v. Mulligan, 113 Ill. App. 177. Where a writing is manifestly incomplete and is not intended to embody all the terms of the contract between the parties, the terms omitted from the writing may be shown by parol. Davies v. Bierce [La.] 38 So. 488. A memorandum authorizing a clerk to pay fees to a bank is not a contract, and oral evidence is admissible to show disposition to be made of fees by the bank. Hopkins v. Harlin, 110 Mo. App. 465, 85 S. W. 642. A **railway ticket** is not the only evidence of the contract between a carrier and passenger, but parol evidence is admissible thereon. Pennsylvania Co. v. Loftis [Ohio] 74 N. E. 179.

53. In suit to recover share of proceeds of sale of options, alleged to have been fraudulently retained, parol evidence is admissible regarding the options and their contents. Ledford v. Emerson [N. C.] 51 S. E. 42. Where instrument did not purport to be a lease, premises being indefinitely described, and plaintiffs did not seek recovery thereon, but on entire agreement, defendants could show circumstances under which writing was made to show real agreement. Browder v. Phinney, 37 Wash. 70, 79 P. 5[illegible] On the issue whether deceased had transportation, evidence that his son found transportation in his pocket from a certain point to another is admissible and not objectionable as varying a contract by parol. Elgin, etc., R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109.

54. A recognizance is a debt of record and cannot be impeached by parol to show irregular acknowledgement. Commonwealth v. Gray, 26 Pa. Super. Ct. 110. Records and proceedings of a court of record are not open to oral attack as they are conclusively presumed to have been correctly made. Cook v. Penrod [Mo. App.] 85 S. W. 676. Where petition in condemnation proceedings described land, and it was adjudged condemned for use of railroad, parol evidence was held incompetent to show that the award was for the crop and not the land. Choate v. Southern R. Co. [Ala.] 39 So. 218. The recitals of legislative journals, or the presumptions which attach from their silence, cannot be contradicted by verbal

statements. Andrews v. People [Colo.] 79 P. 1031. Parol evidence is inadmissible to show that final action was taken by a board of equalization on an increase in assessment at a date after that shown by its record. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13. Parol evidence incompetent to contradict entries in justice's docket and make an otherwise void judgment valid. Pfeiffer v. McCullough, 115 Ill. App. 251. Parol evidence inadmissible to show purpose of vote of school district appropriating money. Brooks v. School Dist. of Franconia [N. H.] 61 A. 127. Order of commissioner's court authorizing and instructing plaintiff to act as counsel for county in a given case held clear and unambiguous, and parol explanation was inadmissible. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475.

Record held not contradicted: Where a particular order does not show there was an adjudication on the merits, parol evidence is admissible to show what was adjudicated. Langmuir v. Landes, 113 Ill. App. 134. Where settlement of former suit is relied on as bar to subsequent suit, parol evidence, not contradicting the record, is competent to show that prior suit and settlement related to a different transaction. Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626.

55. Where a resolution by a board of directors of a corporation is uncertain and indefinite, its terms may be explained by parol evidence relating to circumstances surrounding its passage, and the conduct of the corporate authorities before and after its passage. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

56. Parol evidence is inadmissible to show a testator meant one thing when he said another. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743. "Usual mining privileges," used in will, is clear and unambiguous and extrinsic evidence inadmissible. Allshouse's Estate, 23 Pa. Super. Ct. 146. Whom testator meant by "William Wilson's children" could be shown by parol, being a latent ambiguity. Miller's Est., 26 Pa. Super. Ct. 443. Recitals in an instrument that it is a will, that it has been signed as such by the person named as testator, and attested and subscribed by persons signing as witnesses may be contradicted by parol. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499.

57. Field notes of survey held ambiguous so that parol evidence was admissible to locate it. Wilkins v. Clawson [Tex. Civ. App.] 83 S. W. 732. A sheriff's formal and correct **return of** his **writ** cannot be overthrown by parol evidence. Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205. It may be shown by parol that a **certificate of acknowledgment** is false, and that there was in fact no examination or acknowledgment by the person signing. Chattanooga Nat. B. & Loan Ass'n v. Vaught [Ala.] 39 So. 215. Some courts admit testimony of a notary to impeach an acknowledgment taken before him, but such evidence is of little weight. Winn v. Itzel [Wis.] 103 N. W. 220. Testimony by notary that grantor did not express consciousness of the nature of the transaction and that another person lifted her hand and held it on the pen while he made her mark held admissible. Id. Provision of **railroad franchise** as to charging excessive fares (Railroad Law, § 39) being clear, extrinsic evidence was inadmissible to give it a different meaning. Byars v. Bennington & H. V. R. Co., 99 App. Div. 34, 90 N. Y. S. 736.

58. See 3 C. L. 1355.

59. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728. Where testimony is shown on cross-examination to be hearsay, it should be stricken if the motion relates only to the hearsay. Davis v. Arnold [Ala.] 39 So. 141.

Illustrations: Conversation, not in defendant's presence. Craddick v. State [Tex. Cr. App.] 88 S. W. 347; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005. Declarations of third person to defendant in plaintiff's absence. Joyner v. Early [N. C.] 51 S. E. 778. What witness heard father say about value of jewelry. Motton v. Smith [R. I.] 60 A. 681. Certain declarations of a deceased that he had received value for property sold. Babcock Print. Press Mfg. Co. v. Herbert, 137 N. C. 317, 49 S. E. 349. Memoranda of telephone communications. Jacobs v. Cohn, 91 N. Y. S. 339. Testimony by plaintiff of a statement to him by his physician, that his hand would have to be amputated. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. Explanation given witness by others as to cost marks. Sylvester v. Ammons, 126 Iowa, 101 N. W. 782. Statements of third person, entered on books by plaintiff. Mattingly v. Shortell [Ky.] 85 S. W. 215. Voluntary statement by a stranger to the suit, and presented as a writing that had been shown to one of the parties. Harmison v. Fleming, 105 Ill. App. 43. Receipt excluded as hearsay. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293. Conversation between witness and former legal advisor of testator inadmissible in will case. Lancaster v. Lancaster's Ex'r [Ky.] 87 S. W. 1137. Question whether certain alleged facts were not matters of common talk called for hearsay. Palatine Ins. Co. Limited, of Manchester, England v. Santa Fe Mercantile Co. [N. M.] 82 P. 363. That land in suit was generally known as that of a certain person incompetent on issue of ownership. Davis v. Arnold [Ala.] 39 So. 141. In action on implied contract for services, what plaintiff's father said to third persons about advice to his son was incompetent. Grotjan v. Rice [Wis.] 102 N. W. 551. Evidence that granddaughter had received word from third person that grandfather was dead is incompetent. Donovan v. Twist, 93 N. Y. S. 990. In abduction case, testimony as to what abducted child told witness defendants had promised child if she would go to them was hearsay. Baumgartner v. Eigenbrot [Md.] 60 A. 601. Where A. sells ties to B. subject to inspection and rejection, a report by C. to B., forwarded to A. showing inspection and rejections, is hearsay. Moultrie Lumber Co. v. Driver Lumber Co. [Ga.] 49 S. E. 729. In suit by wife for alienation of husband's affections, testimony by plaintiff as to statements made to the husband by defendant was hearsay and incompetent. Humphrey v. Pope [Cal. App.] 82 P. 223. On issue of ownership of household goods, testimony by assessor that husband told him of improvements in furnishing and added $500 to as-

say,[60] and not on the personal knowledge of the witness,[61] or which is conjectural,[62] is also excluded. Proof of the fact that a statement or inquiry was made is not

sessment was hearsay. Terry v. Clark [Ark.] 88 S. W. 987. In an action on life insurance policy, evidence that insured said he had taken insurance and paid premium by crediting the agent on his account, and that he told his son to credit the agent on the books, is incompetent as hearsay. Horine v. New York Life Ins. Co. [Ky.] 87 S. W. 274. Advertisements of an air brake, in the back of a book of instructions relating to the use and operation of the brake, are inadmissible to show distance in which train could be stopped with such brake. Illinois Cent. R. Co. v. Stith's Adm'x [Ky.] 85 S. W. 1173.

A **trade paper** containing the market value of an article of commerce has been held competent. Trade paper containing market value of hides in Chicago competent, when that city is shown to be the great market for that commodity. Kibler v. Caplis [Mich.] 12 Det. Leg. N. 57, 103 N. W. 531. Quotations from National Live Stock Reporter, showing sales of cattle at a certain market on a certain day, admissible on issue of damages to shipment of stock, plaintiff's cattle being shown to have been of the same grade as those described in the trade papers. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938.

Newspaper report on market value of stock is incompetent, it not being shown how the report was made up. Bunte v. Schumann, 92 N. Y. S. 806.

NOTE. Statements by interpreter: Testimony as to an interpreter's translation is hearsay as to the original statement. State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650; Wigmore, Evidence, §§ 668, 1810. This rule does not apply where the interpreter acts as the agent of those conversing, as where later one of them becomes a party to a suit, the statements being considered admissions. Commonwealth v. Vose, 157 Mass. 393, 17 L. R. A. 813; Sullivan v. Kuykendall, 82 Ky, 483, 56 Am. Rep. 908; Camerlin v. Palmer Co., 10 Allen [Mass.] 539; Greenleaf, Evidence [16th Ed.] §§ 162, p. 430j, 439e. But a formal interpreter is not necessarily an agent. Diener v. Diener, 5 Wis. 483. In the recent case of People v. Jailles, 146 Cal. 301, 79 P. 965, statements made by a witness through an interpreter were held admissible to discredit the witness, over the objection that they were hearsay. This case, while in line with a suggestion in People v. Sierp, 116 Cal. 249, is not within the above rule, and is directly opposed to earlier decisions of the same court. People v. Lee Fat, 54 Cal. 527; People v. Ah Yute, 56 Cal. 119; People v. Lee Ah Yute, 60 Cal. 95. The court should have held the evidence inadmissible, but refused to disturb the verdict, the testimony being harmless. 5 Columbia L. R. 326.—5 Columbia L. R. 474.

60. Illustrations: Testimony based on what other people told witness. King v. Bynum, 137 N. C. 491, 49 S. E. 955. Whether witnesses had heard of previous injuries or ailments of plaintiff in personal injury action. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. That there was a real estate man who would give a certain amount for land. Pichon v. Martin [Ind. App.] 73 N. E. 1009. What witness heard from others as to market value of cattle. Texas & P. R. Co. v. Crowley [Tex. Civ App.] 86 S. W. 342. Testimony regarding market value of cattle at a certain place, based wholly on information gained from others. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 13 Tex. Ct. Rep. 547, 88 S. W. 448. Testimony of witnesses that from inquiries of other persons they could not find that certain voters had been residents at the time of an election. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49. Testimony of policeman that street car conductor gave him a certain name as that of the motorman. Morris v. New York City R. Co., 91 N. Y. S. 16. Testimony as to value of property, based on figures and reports given witness by others, not shown to be correct. Steinmetz v. Cosmopolitan Range Co., 94 N. Y. S. 456. Information derived by a police officer from a third person as to amount of nitro-glycerine transported through street contrary to ordinance. Walter v. Bowling Green, 5 Ohio C. C. (N. S.) 516. Testimony based on recollection of what appeared in books, and not of the actual transactions, inadmissible. Sterling v. St. Louis, etc., R. Co. [Tex. Civ. App.] 86 S. W. 655. Improper to permit witness to testify to facts, knowledge of which she gained from what her husband told her. Stephens v. Herron [Tex. Civ. App.] 13 Tex. Ct. Rep. 334, 88 S. W. 849. On issue of insanity of testator, what a witness heard in the family as to insanity of his ancestors, and statements by his mother to a physician and letters by her, were inadmissible. Roche v. Nason, 93 N. Y. S. 565. Answers not based on personal knowledge, but pure hearsay, properly stricken from record. Lambert v. Hamlin [N. H.] 59 A. 941. Admission of testimony of witness that "they told me it [piano] was worth $400," reversible error. Jaeger v. German-American Ins. Co., 94 N. Y. S. 310.

61. Illustrations—held inadmissible: Testimony of witness who had no knowledge of weights of cattle except as gained from records. Texas & P. R. Co. v. Leggett [Tex. Civ. App.] 86 S. W. 1066. Testimony of witness in deposition in regard to contract held hearsay because not based on personal knowledge. Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A. 499. On issue of what articles of personalty were included in a contract of sale of a farm and personalty thereon, a list made by plaintiff on basis of another list made by a former occupant, was hearsay, and could not be used to refresh witness's memory. Dryden v. Barnes [Md.] 61 A. 342. Testimony based on book entries examined by witness, but not made by him, or in any manner authenticated, is hearsay. Rosenthal v. McGraw [C. C. A.] 138 F. 721. Conversation with defendant as to mental capacity of a deceased donor and an examination of him inadmissible. Downey v. Owen, 98 App. Div. 411, 90 N. Y. S. 280. Witness whose only knowledge of market value of stock is derived from newspaper report cannot tes-

objectionable as hearsay.[63] A fact incapable of direct proof, owing to lapse of time, may be established by proof of general opinion in the community,[64] and proof of the notoriety of a fact in the neighborhood is competent to show knowledge of such fact.[65] Reputation is admissible to prove the location of a boundary line only when it has its origin at a time comparatively remote and always ante litem motam,[66] and when it attaches to some monument of boundary or natural object, or is fortified and supported by some evidence of occupation and acquiescence tending to give the land in question some fixed or definite location.[67] The only reputation admissible to

tify thereto. Bunte v. Schumann, 92 N. Y. S. 806. Reading copied entries relating to transactions of which witness had no personal knowledge amounted to hearsay evidence. Rothenberg v. Herman, 90 N. Y. S. 431. General testimony not based on personal knowledge will not support a claim. Spring v. Markowitz, 98 App. Div. 324, 90 N. Y. S. 602. Testimony as to sales made in Europe, not based on personal knowledge, but on letters and telegrams from a representative there, held hearsay. Kirby Lumber Co. v. C. R. Cummings & Co. [Tex. Civ. App.] 87 S. W. 231. Testimony of witness who sold cattle but did not weigh them or see them weighed, and an account of sales, attached to witness's answers as to weights of cattle, held hearsay, it not appearing who weighed the cattle or made the account, and witness's knowledge being based on the account. Texas & P. R. Co. v. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065. Where court sustained objection to questions as to what frightened a horse, and remarked that it would be well to find out if witness knew, and counsel did not then attempt to lay a foundation, it was not error to sustain the objection. Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617.

Held competent: Proof of death may be by hearsay when not emanating from one whose interest is thereby subserved. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117. A witness whose knowledge is gained from market reports may testify to market value. Texas & P. R. Co. v. W. Scott & Co. [Tex. Civ. App.] 86 S. W. 1065. Witness may state what market value of cattle was on a certain day in Chicago, though he was not there all day, when he said he knew the market. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82. Testimony of witness as to market value of cattle on a certain day admissible so far as it was based on market report in a stock journal, but inadmissible so far as based on information gained from salesmen. St. Louis. etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938. Witness who had paid a freight rate several times, and had been told by agent what it was, qualified to testify to it. Texas Cent. R. Co. v. West [Tex. Civ. App.] 13 Tex. Ct. Rep. 552, 88 S. W. 426. Witness who has paid a certain freight rate, a number of times may testify to it from his own knowledge. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499. Man who accompanied shipment of cattle could testify to value per head when shipped and amount of damage per head en route. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530. Testimony of witness who said he had never been on engine, but had stood beside them at night and observed headlight, and that he could see up the track two hundred yards, competent. St. Louis, etc., R. Co. v. Shannon [Ark.] 88 S. W. 851. Witness, who examined a railroad crossing, held to have shown such knowledge that his testimony in regard to it was not objectionable as mere conjecture. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Testimony of certain persons that they had an option to buy cotton, but it was not in writing, was not hearsay. Western Union Tel. Co. v. L. Hirsch [Tex. Civ. App.] 84 S. W. 394.

62. What witness thought, no personal knowledge by him being shown is incompetent. Le Clair Co. v. Rogers-Ruger Co. [Wis.] 102 N. W. 346. Testimony that witness "supposed" certain persons to be his nieces and nephews, incompetent. Keith v. Keith [Tex. Civ. App.] 87 S. W. 384. After witness testified that he did not know what a certain person had done, a question whether he had any reason to believe such person had done a certain thing was improper, calling at most for conjecture. John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050.

63. Where the fact that a statement was made and was acted upon by a party becomes original and material evidence, the statement may be proved by any one present when it was made. Connelly v. Brown [N. H.] 60 A. 750. Evidence of inquiries made by plaintiff in trying to find residence of defendants, and information given him, held not objectionable. Wiley v. Shivel [Tex. Civ. App.] 84 S. W. 1100.

64. Where owing to lapse of time it was impossible to prove by direct evidence that a person, since deceased, had served in the Mexican war, the general opinion in the community where he lived and was known was admissible on the issue. Allen v. Halsted [Tex. Civ. App.] 87 S. W. 754.

65. Proof of the notoriety of a fact in the neighborhood of the party to be affected thereby is competent to bring knowledge home to him. Wright v. Stewart, 130 F. 905. General reputation among railroad men of incompetency of brakeman may be shown on issue of notice of incompetency. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

66. Hemphill v. Hemphill [N. C.] 51 S. E. 42. Recorded deed made in 1806 and map attached thereto properly admitted to identify certain premises and show strect line, because tending to show common belief in community at the time. Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677.

67. Testimony of one who had known land fifty years and knew reputation respect-

establish the fact of public ownership of land is that of a past generation.[68] Matters of pedigree may be proved by family repute,[69] or by regularly kept and properly authenticated church records.[70] But family repute is incompetent to prove possession of land by an ancestor.[71]

(§ 6) *B. Res gestae.*[72]—Contemporaneous or nearly contemporaneous acts or declarations, explanatory of the act, transaction, or condition which is the subject of controversy, and growing naturally therefrom, are admissible as a part thereof.[73]

ing it, that according to such reputation a division line ran along a certain ridge, was admissible. Hemphill v. Hemphill [N. C.] 51 S. E. 42.

68. Dawson v. Orange [Conn.] 61 A. 101.

69. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

70. A baptismal register of a church, in which entries are made by the officiating clergyman in the regular course of his duties, is admissible to prove the fact and date of baptism. Entries in church register, kept in Ireland, properly verified by parish priest, shown to be admissible in Ireland, held competent in Missouri. Collins v. German-American Mut. Life Ass'n [Mo. App.] 86 S. W. 891. Where baptismal record had been kept from time immemorial by the parish priest, entries therein were presumed to have been made by the priest whose duty it was to make it, and proof that entry was in his handwriting was unnecessary. Id. Church marriage records kept by priest, not required by law to be kept and not by statute made competent evidence, are inadmissible after the priest's death to prove a fact recited therein unless the entry is proved to be in the handwriting of the priest. Murphy v. People, 213 Ill. 154, 72 N. E. 779.

71. Civ. Code 1895, § 5177, allowing such evidence to prove descent, relationship, birth, marriage and death, has no reference to proof of such possession. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

72. See 3 C. L. 1357.

73. To be admissible as a part of the res gestae, declarations or acts must be connected with or grow out of the main or principal transaction which is the subject-matter of the litigation, and must tend to elucidate and explain such transaction. Leach v. Oregon Short Line R. C. [Utah] 81 P. 90. The test of res gestae is whether the declaration is a verbal act illustrating, explaining or interpreting other parts of the transaction of which it is itself a part. If it is a mere history of a past transaction, it is not res gestae. Chicago City R. Co. v. White, 110 Ill. App. 23; Boyd v. West Chicago St. R. Co., 112 Ill. App. 50. To be admissible as res gestae, declarations must accompany an act under investigation, or be so nearly connected therewith in time as to be free from all suspicion of device or afterthought. Civ. Code 1895, § 5179. Pool v. Warren County [Ga.] 51 S. E. 328. Events speaking for themselves through the instructive words and acts of participants are parts of the res gestae. Chapman v. Pendleton, 26 R. I. 573, 59 A. 928.

Illustrations—held competent: Statements on which credit was extended, and a subsequent denial of such statements, held admissible as part of res gestae. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748. Declarations of decedent, an osteopath, that he had strained his back while treating a patient and was in great pain, made a half hour after commencing such treatment, admissible as res gestae. Patterson v. Ocean Acc. & Guarantee Corp. 25 App. D. C. 46. Statement made by freight conductor to plaintiff, during transportation of cattle, when asked why he didn't get over the road, that he couldn't "get any where with this dummy" and that company should not have sent it out, competent as res gestae. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Where an injury, the coming of witnesses to the scene, and the account of how the injury occurred, given by the injured man to witnesses, were practically simultaneous, what he said was admissible as part of the res gestae. Muren Coal & Ice Co. v. Howell [Ill.] 75 N. E. 469. Admission of motorman a few seconds after a collision that he did not sound gong or stop car because the gong and brake were out of order, held competent as a part of the res gestae, since he did not have time to make a premeditated false statement. Lexington St. R. Co. v. Strader [Ky.] 89 S. W. 158. Declaration of alleged partner who bought goods, made at time of purchase, that he bought for the firm, is admissible as res gestae, to show actual contract. Beckwith v. Mace [Mich.] 12 Det. Leg. N. 124, 103 N. W. 559. Statements made by an insurance agent to his company as to moneys received by him, and admissions of indebtedness made during an attempt to settle, held to have been a part of transactions in which he was engaged as agent; they were therefore admissible as res gestae against his sureties in an action on his bond. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073. Declarations of a person showing the mental condition or intention at the time an act is done are competent. Declarations before and after a gift that intestate intended to give property to husband. Hagar v. Norton [Mass.] 73 N. E. 1073. Declarations of a witness in a will contest are competent, which tend to show the state of mind of the witness and her design and purpose in treating the testatrix as she did. Schoch v. Schoch, 6 Ohio C. C. (N. S.) 110.

Held incompetent: Evidence of a dream of plaintiff about his injured hand inadmissible. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. In a civil action for damages for assault and battery, the record of a trial and acquittal of defendant before a justice of the peace is inadmissible as a part of the res gestae. Stevens v. Friedman [W. Va.] 51 S. E. 132. On issue of damage to property from changing street grade, statements of contractor when he commenced the work were incompetent as res gestae. Swope v. Seattle, 36 Wash. 113, 78 P. 607.

Statements subsequent to the main transaction in issue,[74] relating to its cause or effect,[75] or merely narrating past events,[76] are usually excluded. But subsequent declarations may be competent if intimately connected with the transaction out of which they arise.[77] Declarations or exclamations of a mere spectator are inadmissible as res gestae.[78]

74. Exclamation of plaintiff when riding on a train some time after the injury complained of inadmissible to prove his neurasthenic condition. Union Pac. R. Co. v. Hammerlund [Kan.] 79 P. 152. In suit for damages caused by fire from sparks, what defendant's foreman said about refusing to take engine back into the field unless fixed so as to prevent escape of sparks was not res gestae. Quint v. Dimond [Cal.] 82 P. 310. In action for ejectment from train, statements of conductor to witness the day after the occurrence were inadmissible. Wieland v. Southern Pac. Co. [Cal. App.] 82 P. 226.

75. Statement of motorman almost immediately after street car collision that he lost control. Norris v. Interurban St. R. Co., 90 N. Y. S. 460. Statement by mate of vessel ten minutes after man fell down hatchway, that "hatch covers never did fit." The Saranac, 132 F. 936. Statement by foreman after injury to plaintiff and while plaintiff was confined from injury, made to plaintiff and to another, that he had forgotten to disconnect machinery. Baier v. Selke, 211 Ill. 512, 71 N. E. 1074. Statements by master of barge, sunk by collision with bridge, as to cause of accident, made at a subsequent time and a different place. The Maurice [C. C. A.] 135 F. 516. Statement of street car conductor to injured passenger as he was assisting him off the car after the injury, as to cause of sudden stopping of car. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. What miners said to mine boss forty-five minutes after accident. Wojtylak v. Kansas & T. Coal Co. [Mo.] 87 S. W. 506. What occurred between mine boss and workmen forty-five minutes after an accident to a miner. Id. Statements of section boss in mine day after injury. Straight Creek Coal Co. v. Haney's Adm'r [Ky.] 87 S. W. 1114. In action for fire from locomotive sparks, statements of conductor and engineer that fire from locomotive was the cause. Houston & T. C. R. Co. v. Laforge [Tex. Civ. App.] 84 S. W. 1072.

76. In action for death under intoxicating liquor law, declarations of deceased as to where he got whisky, while on the road. Horst v. Lewis [Neb.] 103 N. W. 460. Declarations of a testator relative to an agreement of co-suretyship between himself and defendant, made in his own interest and in defendant's absence. Chapman v. Pendelton, 26 R. I. 573, 59 A. 928. Testimony as to what witnesses heard an engineer say in explanation of circumstances under which deceased was killed held hearsay and of no probative force, though admitted without objection. Kemp v. Central of Georgia R. Co. [Ga.] 50 S. E. 465. Declarations of motorman, long after collision, as to his position in car and distance away of truck when first seen. Dorry v. Union R. Co., 93 N. Y. S. 637. Statements by plaintiff and defendant's agent after plaintiff had fallen in elevator, as to warning, and responsibility for accident. Simms v. Forbes [Miss.] 38 So. 546. Narrative of circumstances attending accident to passenger on alighting from train, given by him a half hour after he was hurt. White v. Southern R. Co. [Ga.] 51 S. E. 411. An account to defendant's agent the following day, reduced to writing by the agent. Id. Statement of deceased, a minute or more after the accident in which he received injury resulting in death, as to manner in which it happened. Boyd v. West Chicago St. R. Co., 112 Ill. App. 50.

77. The limit of time in regard to such declarations—how long before or after the act they are competent—is largely discretionary. Hagar v. Norton [Mass.] 73 N. E. 1073. Declarations of woman to her husband after she had fallen on walk and screamed and he had come to her, having been a little distance ahead, admissible as res gestae. District of Columbia v. Dietrich, 23 App. D. C. 577. Exclamation of plaintiff immediately after she fell from street car, "Yes; let the step down after I fall," competent as a part of res gestae, tending to show negligence in not letting down step in time. Hutcheis v. Cedar Rapids & M. C. R. Co. [Iowa] 103 N. W. 779. Statement of boy a few minutes after he was hurt, while crying and holding his arm, and in answer to question as to what had happened, that brakeman had kicked him off the train, admissible as res gestae. Dixon v. Northern Pac. R. Co., 37 Wash. 310, 79 P. 943. Exclamation of conductor and statement to brakeman a few seconds after accident, "My God! Go back and see if you can find Leach. The bridge knocked him off," held admissible. Leach v. Oregon Short Line R. Co. [Utah] 81 P. 90. Declarations of an injured person as to manner in which and place where she fell, made a half hour after she fell and while she was still suffering from the injury, held competent. Rothrock v. Cedar Rapids [Iowa] 103 N. W. 475. Statement of plaintiff, less than five minutes after accident, that he was badly hurt, held admissible as res gestae. Texas Cent. R. Co.v. Powell [Tex. Civ. App.] 86 S. W. 21.

78. In collision case, evidence by a spectator that he called to motorman, when car was pushing wagon, "Why don't you stop the car?" incompetent. Kuperschmidt v. Metropolitan St. R. Co., 94 N. Y. S. 17. Statements of a stranger, who was not found at time of trial, to a witness as to how a boy was hurt, inadmissible. Dixon v. Northern Pac. R. Co., 37 Wash. 310, 79 P. 943. Conversation after street car accident in which bystander reproached conductor for negligence is no part of res gestae. Chicago City R. Co. v. White, 110 Ill. App. 23. Witness who saw street car collision could not tell what he said to street car conductor when the car was stopped. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045.

Complaints [79] or natural expressions [80] of present [81] pain and suffering are competent, even though made subsequent to the time of the original injury.[82] But statements relating to the cause or nature of an injury or malady are inadmissible,[83] unless the absence of any motive for falsifying is shown.[84]

79. Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627; Birmingham R., Light & Power Co. v. Rutledge [Ala.] 39 So. 338. Plaintiff's wife could testify that after accident he complained of pain in his back and hips. Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34. Complaints of pain "in and about the groins." Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21. Evidence that witness had seen plaintiff frequently since accident and heard him complain of pains in the spine, held admissible. Kansas City, etc., R. Co. v. Butler [Ala.] 38 So. 1024. Parents of plaintiff properly allowed to testify to complaints by plaintiff showing natural symptoms and effects of injury and to the fact that plaintiff had not complained before the injury. Stevens v. Friedman [W. Va.] 51 S. E. 132. Testimony that plaintiff "seemed to be complaining some since accident, and spitting up blood," held, as a whole, proper, and not mere hearsay. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

80. Usual and natural expressions of physical and mental suffering, manifested at the time, are admissible as original evidence. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. Expressions of pain and complaints regarding it are admissible, though made to persons who are not medical experts. Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21. Exclamations, acts and demeanor of child could be shown to prove he was in pain. Boehm v. Detroit [Mich.] 12 Det. Leg. N. 397, 104 N. W. 626.

81. Evidence that plaintiff was complaining while at work, and finally had to quit, inadmissible because it was not shown that the complaints concerned present pain and suffering. Wells Fargo & Co. Exp. v. Bayle [Tex. Civ. App.] 87 S. W. 164. Witness statement that plaintiff "always complains of being sore through her lungs" fairly imports that complaints were related to present suffering. Howe v. Chicago, etc., R. Co. [Mich.] 103 N. W. 185.

82. Complaints of suffering three or four weeks after accident causing injury admissible. St. Louis S. W. R. Co. v. Haynes [Tex. Civ. App.] 86 S. W. 934. Testimony that about fifteen minutes after accident, injured man was sitting on the edge of the track, groaning and complaining, was competent. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Statements of facts fairly indicative of a relevant bodily condition of a declarant at the time of the declaration will be received as circumstantial evidence of the existence of that condition, though made a considerable time after the injury was received. Statement some hours after injury, "I am badly shaken up. No bones broken, old fellow; and it might have been worse," held competent. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688. Complaints of pain from injuries attributable to defendant's negligence during the time intervening between the time when the injuries were received and the death of the injured person are competent when confined to current conditions, narrations of past conditions or causes of present conditions being excluded. Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207; Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74.

83. Complaints or statements relative to physical condition or feeling made in answer to questions, descriptive or narrative in character and not a part of the res gestae, are incompetent. Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601. Statements of sick person to her physician as to how she was injured inadmissible for her husband in action by him for her death. Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440. Statements describing his sufferings made by plaintiff some months after his injury was received incompetent. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. Statement to physician by plaintiff that she fell on the ice on defendant's bridge inadmissible. Shade's Adm'r v. Covington-Cincinnati El. R. & Transfer & Bridge Co. [Ky.] 84 S. W. 733. Statements by injured man in response to questions made an hour after he was injured, a mile from the place of the accident, though he had not been unconscious during the interval, were incompetent. White v. Marquette [Mich.] 12 Det. Leg. N. 141, 103 N. W. 698.

Note: Evidence of statements of present physical suffering is generally admitted when the physical condition of the person making the statement is in issue, and evidence of statements of past suffering is generally excluded. State v. Fournier & Co., 68 Vt. 262. This rule is not universal, however, and in a few states no evidence of assertions of pain is admitted unless the assertions were made to a physician. Davidson v. Cornell, 132 N. Y. 228. In Massachusetts and a few other jurisdictions, evidence of statements of past suffering is admitted when the statements were made to a physician. Roosa v. Boston Loan Co., 132 Mass. 439. In the recent case of Cashin v. New York, etc., R. Co., 185 Mass. 543, 70 N. E. 930 [3 C. L. 1358, n. 32], a personal injury action, testimony by a witness not a physician was received that plaintiff had said, with his hands on his head, "Oh, if I could only get rid of these headaches." In this case, since the statement was not made to a physician, the admission of the evidence had to be rested solely on the ground that it was a statement of present suffering. Although no authority directly in point has been found, the court seems to have been justified in holding that it was admissible on that ground. The statement necessarily carried with it an idea of past suffering as proof of which the evidence would be inadmissible; but since it also clearly referred to present pain, it was not on that account objectionable.—18 Harv. L. R. 148.

84. Held incompetent: Exclamations of pain by plaintiff long after injury and after she had decided to bring suit were incompe-

(§ 6) *C. Admissions or declarations against interest,*[85] oral[86] or written,[87] are competent evidence against the declarant,[88] and similar admissions and declarations by one shown to be the agent of another,[89] accompanying and explaining acts

tent. McCormick v. Detroit, G. H. & M. R. Co. [Mich.] 12 Det. Leg. N. 326, 104 N. W. 390. Opinion of physician based in whole or in part on self-serving statement of party made with view of enabling physician to testify. Bates Machine Co. v. Crowley, 115 Ill. App. 540.

Held competent: Statements of an injured person to a physician at the time of his examination, to enable him to give proper treatment, are admissible as a part of the res gestae. Shade's Adm'r v. Covington-Cincinnati El. R. & Transfer & Bridge Co. [Ky.] 84 S. W. 733. In action by husband for death of wife, wife's declarations concerning her condition were admissible against him. Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440. Voluntary and spontaneous declarations of the deceased to those in attendance upon him as to the cause of his illness, due to poison, from which he was then suffering and soon died, are admissible as part of the res gestae, where the circumstances are such as to preclude the idea of premeditation or any motive for falsifying. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165. In personal injury actions, complaints made by plaintiff to attending physician are inadmissible as evidence unless made under such circumstances as to be equivalent to spontaneous and involuntary exclamations or outcries, groans, convulsive movements, and other physical manifestations of present pain and suffering. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. Testimony that plaintiff, in personal injury suit, "would bring her hand up to her side, and say her side hurt her, and that she had such pains in the hollow of her neck and back of her head" competent, the complaints being made before suit was instituted. McHugh v. St. Louis Transit Co. [Mo.] 88 S. W. 853. Declarations of a sick or injured person as to the nature, symptoms and effects of the disease or injury from which he is suffering at the time, are competent evidence in an action wherein the nature and cause of the malady are in question. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165.

85. See 3 C. L. 1359.

Held admissions against interest: Recognition by heir of widow's endowment rights is an admission that ancestor owned land at time of his death. Coberly v. Coberly [Mo.] 87 S. W. 957. Conduct of party indicating a belief in the weakness of his cause may be shown as an admission, subject to his explanation. Neece v. Neece [Va.] 51 S. E. 739. Admissions of decedent as to condition of her health when she applied for insurance admissible against executor in action on policy. Finn v. Prudential Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697. In election cases, voluntary admissions of persons whose names appear upon the poll lists that they voted but were not at the time residents are held admissible, though there is a conflict. By some courts voters are considered parties to the controversy. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49. An auditor's settlement of a tax collector's account is admissible both against him and his sureties, even though the settlement contains an item for which the sureties are not liable. Commonwealth v. Carson, 26 Pa. Super. Ct. 437. Assessment value of vessel, together with evidence that owner had appeared before commissioners and objected to first asseessment as too high and more than boat was worth, and had stated what he paid for it, and that assessment had then been lowered, competent as an admission. Gossage v. Philadelphia, B. & W. R. Co. [Md.] 61 A. 692.

Held not admissions: Acceptance of quitclaim deed of certain land not an admission of ownership by grantor of certain other land. Dougan v. Greenwich, 77 Conn. 444, 59 A. 505. Silence in court when another is testifying cannot be construed as an admission by one not a party to the action then being tried. Caseday v. Lindstrom, 44 Or. 309, 75 P. 222. Statement of boy of 17, after having lost a night's sleep, that grandfather was drinking and was crazy, was not an admission of his insanity and testamentary incapacity. Gesell v. Baugher [Md.] 60 A. 481. A mere opinion, not resting upon a knowledge of actual facts, is incompetent as an admission. Remark that girl must have left a faucet open incompetent. Aschenbach v. Keene, 92 N. Y. S. 764. Where parties submit claims to arbitration but agree that the finding of the arbitrator shall not be binding, such finding is inadmissible. Truax v. Bliss [Mich.] 102 N. W. 635. Proofs of death are competent on issue whether they were such as policy required; but incompetent on issue of cause of death, as affecting company's liability. Knights Templars' & Masons' L. I. Co. v. Crayton, 110 Ill. App. 648. Proofs of death not prepared by or under direction of beneficiary are not binding as admissions on her. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165.

Contra: Proofs of death admissible as admissions against interest in insurance cases. Houghton v. Aetna Life Ins. Co. [Ind.] 73 N. E. 592. Statements in preliminary proofs of death of insured admissible as admissions against interest of plaintiff but not conclusive. Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275.

86. Conversation admissible to show admissions by defendant that his cattle had damaged corn. Story v. Nidiffer, 146 Cal. 549, 80 P. 692. Conversation containing admissions improperly excluded, although occurring at a time after alleged misrepresentations on which action was based. Lefler v. Fox, 92 N. Y. S. 227. An offer to pay a certain sum for goods involves an admission of delivery of the goods and of their value up to the amount of the offer. Hopkins v. Rodgers, 91 N. Y. S. 749. Declaration by party against interest, tending to establish adverse party's claim, admissible. Fitzgerald v. Coleman, 114 Ill. App. 25. Where, after hearing that plaintiff's sheep had been killed, defendant killed his dog and said he "would kill no more sheep," such act and

declaration were competent as an admission against interest. Anderson v. Halverson, 126 Iowa, 125, 101 N. W. 781. Declarations of woman that she had sold a clock admissible, being against interest as tending to show she had no title. Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321. Declarations of a father tending to show a gift of land to his son admissible. Caldwell v. Caldwell, 24 Pa. Super. Ct. 230. Testimony on former trial containing admissions on point in issue improperly excluded. Hillman v. De Rosa, 92 N. Y. S. 67. In an action against a city and the water, light and power commission of the city, evidence of a conversation between the chairman of the commission and the city electrician, tending to show why power was not cut off from the wires on which plaintiff was working, was held admissible, though the conversation occurred after the injury. City of Austin v. Forbis [Tex. Civ. App.] 86 S. W. 29. An admission by a party against interest relating to any material matter may be proved without laying a predicate therefor. Contreras v. San Antonio Traction Co. [Tex. Civ. App.] 83 S. W. 870.

87. Written calculation of interest by decedent, found among his papers, used to show admission of liability. Yost's Estate, 23 Pa. Super. Ct. 223. In action for commissions by salesman, a letter, written by him admitting a mistake in use of samples by which sale was made was competent evidence against him. Schreiner v. Kissock, 91 N. Y. S. 28. On issue whether building was to be erected on leased premises by lessee and cost taken from the rent, letters from a co-lessor to the lessee, showing knowledge of the erection of the building and tending to show the agreement claimed by the lessee, were competent. Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481. Letter by owner to railroad representative offering to sell land at certain price admissible in condemnation proceedings as declaration against interest. Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2. Letter by plaintiffs to defendants, referring to mill as "your mill," competent as admission regarding an arrangement between them regarding the mill. Cox v. Burdett, 23 Pa. Super. Ct. 346. Letter written in course of negotiations competent to show intention, notice, and reason for punitive damages, in action for inducing breach of contract. Morehouse v. Terrill, 111 Ill. App. 460. Letter written by attorney of party to contract in answer to bill rendered admissible as tending to show that no claim of fraud had been set up at that time. McNamara v. Douglas [Conn.] 61 A. 368. The agency of a certain person in the transaction out of which the prosecution grew may be shown from statements that he was agent made in a publication of which defendant was the author. Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168. Book of railroad rules giving, among other things, heights of bridges, competent evidence. Doyle v. Illinois Cent. R. Co., 113 Ill. App. 532. Affidavit of person under whom defendant claimed interest in land, admitting that affiant did not own such interest, admissible, though affiant was dead, and though affidavit had been used in litigation to which defendant had not been a party. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

Pleadings as evidence: Either party may introduce as evidence the pleadings of the adverse party. Palmer Transfer Co. v. Eayes [Ky.] 85 S. W. 750. Pleadings in a case are before the court and jury and may be read and commented on to define the issues and show what is admitted without being formally introduced in evidence. Foley v. Young Men's Christian Ass'n, 92 N. Y. S. 781. Allegations of a reconvention or cross bill may be used as evidence by the plaintiff, but are not conclusive, and do not relieve plaintiff of the necessity of proving his case, the defendant having also filed defensive pleadings. Lewis v. Crouch [Tex. Civ. App.] 85 S. W. 1009. Pleadings in another suit admissible to prove that statute of frauds had been set up as a defense. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938. Unsworn answers not evidence of facts therein stated, but may be referred to to show grounds of defense. Mankey v. Willoughby, 21 App. D. C. 314. After the filing of an amended pleading, the original pleading is competent as an admission. Schultz v. Culbertson [Wis.] 103 N. W. 234. In such case evidence tending to show such original pleading to have been unauthorized is admissible. Thus, testimony of attorney that he drew answer without consulting client and on information furnished by third persons, admissible on weight of answer as admission. Schultz v. Culbertson [Wis.] 103 N. W. 234. Pleadings are admissible as evidence only against the pleader as admissions by him, and are open to explanation and rebuttal unless sworn to with knowledge of the facts. Potter v. Fitchburg Steam Engine Co., 110 Ill. App. 430. Allegations in a suit between two parties, if available at all to a third party, not a party to the suit in which they were made, are not conclusive admissions, but are open to explanation. Brown, Chipley & Co. v. Haigh, 113 La. 563, 37 So. 478. A pleader is not bound by the admission of a mere conclusion of law when the facts pleaded show such admission to be erroneous. Hensel v. Hoffman [Neb.] 104 N. W. 603. In a suit by an assignee of a mortgage to foreclose, the answer of the assignor, made a defendant, admitting the allegations of the bill, is admissible to prove the assignee's title. This is an exception to the general rule that the answer of one defendant is not admissible against another. Langley v. Andrews [Ala.] 38 So. 238.

88. But declarations of a person inadmissible in suit by him in a representative capacity. Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694.

89. Person held an agent of insurance company, so that his declarations were admissible against it. Prudential Fire Ins. Co. v. Alley [Va.] 51 S. E. 812. Agency being admitted, declarations of agent were admissible, though there was no evidence of agency. Nicola Bros. Co. v. Hurst [Ky.] 88 S. W. 1081. Declarations of one not shown to be an agent of party to suit are inadmissible against such party. Brounfield v. Denton [N. J. Err. & App.] 61 A. 378. Acts and declarations of one not shown to have authority as agent inadmissible. Phenix Nerve Beverage Co. v. Dennis & L. Wharf & Warehouse Co. [Mass.] 75 N. E. 258; Dexter v. Thayer [Mass.] 75 N. E. 223. Declarations of a former officer and agent at time when he had ceased to represent company inad-

then being done by him [90] while acting within the scope of his authority as agent,[91] are competent against the principal.[92] The existence of the agency [93] or the extent

missible against it. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334. Declarations and acts of agent are binding on principal only after prima facie case of agency has been established. Brittain v. Westall, 137 N. C. 30, 49 S. E. 54. Proof as to time of termination of agency being conflicting, material and relevant declarations of the agent during the entire term as to which there is evidence tending to show the existence of the agency should be received. Porter v. Adams, 115 Ill. App. 439. Where evidence authorized inference of agency, exclusion of representations by the agent was error. Romano v. Brooks [Ala.] 39 So. 213. Statements by person in insurance office, unidentified, and not shown to have authority to bind the company, held incompetent. Spencer v. Travelers' Ins. Co. [Mo. App.] 86 S. W. 899. Admissions or declarations of partner after dissolution of firm are inadmissible against co-partners. Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132. Statement of a son held not binding on his mother nor on her heirs, and inadmissible. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

90. Declarations of an agent are admissible against the principal only when accompanying an act within the scope of the agency, and so nearly connected therewith as to become a part of the res gestae. Turner v. Turner [Ga.] 50 S. E. 969. Statements by corporation's servant as to how horses were injured held mere narratives of past events and inadmissible as res gestae. Alden v. Grande Ronde Lumber Co. [Or.] 81 P. 385. Declarations of driver of wagon after injury to child, in absence of employer, inadmissible. Burke v. Borden's Condensed Milk Co., 98 App. Div. 219, 90 N. Y. S. 527. Statement of section foreman as to cause of accident inadmissible against defendant, because not res gestae, even though foreman was vice principal. Lee v. St. Louis, etc., R. Co. [Mo. App.] 87 S. W. 12. Statement of engineer in charge of steam roller, after accident to horse, not part of res gestae so as to be binding on employer. Hall v. Uvalde Asphalt Pav. Co., 92 N. Y. S. 46. Admission of town chairman of receipt of notice of injury on highway, not a part of the res gestae, is inadmissible against the town on issue of service of notice. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22. Statement of manager to plaintiff's wife, who came to collect wages after he was hurt, that it was not plaintiff's fault that he was hurt, not part of res gestae, and not binding on company. Alquist v. Eagle Iron Works, 126 Iowa, 67, 101 N. W. 520. In action by passenger for abusive language by brakeman, evidence that brakeman said to witness, some time after the occurrence, that he started to slap plaintiff, and wished he had, was inadmissible. Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175. Statement of servant while driving horses from a pasture that, if found there again, they would be scattered so that they would never be found, held inadmissible because relating to a future act, and not the act then being done. Waggoner v. Snody [Tex.] 85 S. W. 1134.

91. Declarations of agent admissible against principal only when res gestae, or when they accompany and are a part of an act performed by the agent on behalf of his principal within the scope of his authority. Chicago & E. I. R. Co. v. Keegan, 112 Ill. App. 338. Declarations held inadmissible. Burbank v. Hammond [Mass.] 75 N. E. 102. Conversation with agent inadmissible in absence of showing that it was in the course of his employment. Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601. Threats not brought home to a party and not shown to have been authorized by him inadmissible. Mabb v. Stewart [Cal.] 81 P. 1073. What station agent said after team was struck by engine incompetent. Bachant v. Boston & M. R. Co. [Mass.] 73 N. E. 642. Admissions of a cashier made on witness stand in action to which bank was not a party inadmissible against the bank. Harrison County v. State Sav. Bank [Iowa] 103 N. W. 121. Employe's statements as to character of principal's work, not made when employe was authorized to represent principal as to such matters, are incompetent against principal. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356. Alleged admissions of insurance adjuster who had no power to waive contract provisions inadmissible against company. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36. Evidence of admissions by engineer tending to show elevator machinery defective inadmissible, no authority of the engineer to represent defendant in making the statements being shown. Harkins v. Queen Ins. Co., 94 N. Y. S. 140.

92. Admissions of agent held competent against principal: General rule stated. Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 72 N. E. 1027. Correspondence between two agents. Ragsdale v. Southern R. Co. [S. C.] 51 S. E. 540. Letters signed by the agent as such. Id. Admissions of defendant's agent, made in conversation with plaintiff while acting in line of duty. Id. Statement of authorized agent when transacting business for principal regarding subject-matter of the transaction. Prussian Nat. Ins. Co. v. Empire Catering Co., 113 Ill. App. 67. Admission of authorized agent that certain abbreviation stood for firm name, and receipt containing such abbreviation. Campbell v. Emslie, 101 App. Div. 369, 91 N. Y. S. 1069. Conversations between injured servant—plaintiff—and one shown to represent the master. Flickner v. Lambert [Ind. App.] 74 N. E. 263. On issue of fraud and duress in procuring a release, evidence of what defendant's physician said and did before and after the paper was signed. Glisson v. Paducah R. & Light Co. [Ky.] 87 S. W. 305. There being some evidence of agency, letter signed by agent was admissible as tending to show by what authority he acted. Fulghan v. Carter [Ala.] 37 So. 932. Declarations of vice-president of corporation while occupying chair at meeting in president's absence, binding on corporation, even though made in absence of adverse party. Vincent v. Soper Lumber Co., 113 Ill. App. 463. Conversation between employe and foreman competent to show notice to foreman of ex-

of the agent's authority [94] cannot be shown by the declarations of the alleged agent,

istence of conditions subsequently causing injury. Bates Mach. Co. v. Crowley, 115 Ill. App. 540. In forcible entry and detainer action, statements by plaintiff's authorized agent made for and in behalf of plaintiff, tending to show plaintiff did not claim the land, are admissible. Bailey v. Blacksher Co. [Ala.] 37 So. 827. Statement of conductor in charge of train that he knew the condition of the engine, and knew he couldn't get far with it, admissible against defendant. Missouri, etc., R. Co. v. Russell [Tex. Civ. App.] 13 Tex. Ct. Rep. 591, 88 S. W. 379. Persons known as "general manager" and "general traffic manager" of railroad held to have such apparent authority that their statements were competent evidence against the railroad company. Choctaw, etc., R. Co. v. Rolfe [Ark.] 88 S. W. 870. Declaration of insurance company's supervisor of death claims relative to company's refusal to pay loss is not hearsay but competent proof on issue of waiver of proof of loss. Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132. Statement of telephone company manager while in performance of his duties as manager, that a certain wire belonged to his company admissible against the company. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148. Statement of bank cashier, who represented the bank, to the effect that a contract of indemnity was to be held in escrow by the bank until all the stockholders of a certain corporation had signed it, was admissible against the bank. Blair v. Security Bank, 103 Va. 762, 50 S. E. 262. Declaration of street commissioner in notice to property owner as to condition of sidewalk binding on city. Hofacre v. Monticello [Iowa] 103 N. W. 488.

Rule applied to other analogous relations.—Attorney and client: Application for continuance, made through attorney, containing admissions contradicting plaintiffs' testimony, admissible. Scott & Co. v. Woodard [Tex. Civ. App.] 13 Tex. Ct. Rep. 550, 88 S. W. 406. Letter written by attorney under mistake of fact containing advice to client, held not an admission binding on client. Klein v. East River Elec. Light Co. [N. Y.] 74 N. E. 495. Advice given by an attorney cannot be treated as an admission by the client, especially where the client does not act upon it. Id. Admission of indebtedness by attorney, unauthorized and not of record, not binding on client. Jefferson Bank v. Gossett, 45 Misc. 630, 90 N. Y. S. 1049. Failure of an attorney to answer letters held not an admission binding on the client rendering the letters admissible. Irwin v. Buffalo Pitts Co. [Wash.] 81 P. 849. The mere fact that counsel for plaintiff does not state sufficient facts in his opening statement does not warrant a directed verdict, such statement not containing admissions constituting a complete defense. Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 P. 308. Admission inserted in contract by attorney after its execution held not binding on client. Everett v. Marston, 186 Mo. 587, 85 S. W. 540.

Principal and surety: Admissions of a principal, made during the transaction of the business for which the surety is bound, become a part of the res gestae, and are admissible; but otherwise they are not. Admissions, made before contract by which surety is bound is made, are inadmissible against surety. Bailey v. McAlpin [Ga.] 50 S. E. 388. Admissions of a legal representative of an estate after his letters have been revoked are inadmissible against the surety. Id.

Co-conspirators: When a conspiracy has been shown to exist, in a civil action, the acts and declarations of each co-conspirator in furtherance of the fraudulent purpose, are regarded as acts and declarations of all concerned, and are competent evidence, though made in absence of others. Miller v. John, 111 Ill. App. 56. After evidence was in tending to show conspiracy to defraud creditors, declarations of bankrupt that certain property was his and he placed it in his wife's name to get it beyond reach of creditors, were competent. Sheeley v. Nolen [Tex. Civ. App.] 88 S. W. 524. Declarations of a conspirator are inadmissible against co-conspirators unless made in furtherance of a common design or unless they accompany an act then being done in furtherance of the design. In boycott case, declarations of a member of a union that he would go out, withdraw from the union and then return, held competent, as accompanying his act of going out, there being evidence of a conspiracy. Patch Mfg. Co. v. Protection Lodge No. 215 [Vt.] 60 A. 74. Declaration of co-conspirator after completion of criminal enterprise, relating to a past transaction, and not accompanying an act done in furtherance of the enterprise, is incompetent against other conspirators. Lederer v. Adler, 92 N. Y. S. 827. Unsworn declarations of an alleged conspirator having been admitted on the promise of the state's attorney to make the proper connection, and such connection not being made, it is error to refuse to strike such declarations from the record. Brennan v. People, 113 Ill. App. 361. Admissions by alleged conspirators after completion of purpose are admissible if confined to persons alone who made them, and consideration of them is excluded as against alleged co-conspirators. Lorenz v. U. S., 24 App. D. C. 337.

Guardian and ward: Admissions of guardian not binding on ward. Kidwell v. Ketler, 146 Cal. 12, 79 P. 514. Guardian's part in conversation inadmissible against incompetent ward. Hayden v. Collins [Cal. App.] 81 P. 1120.

Consignor and consignee: Admissions of bank officer, consignor of package of money held not binding on consignee of package. Bank of Irwin v. American Exp. Co. [Iowa] 102 N. W. 107.

93. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43; Sloan v. Sloan [Or.] 78 P. 893; Brounfield v. Denton [N. J. Err. & App.] 61 A. 378; Blair-Baker Horse Co. v. First Nat. Bank [Ind.] 72 N. E. 1027; Larson v. Centennial Mill Co. [Wash.] 82 P. 294.

94. Attorney's declarations inadmissible to show extent of his authority. West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

though an agent may himself testify to the fact of agency.[95] Self-serving,[96] ex parte[97] declarations are incompetent evidence for the declarant, or those in privity with him.[98] Silence or acquiescence of a person in whose presence statements are made is construed as an admission by him,[99] as is failure to deny [1] or present [2] claims. A portion of a declaration or other admission being introduced,

95. Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43; Aultman Threshing & Engine Co. v. Knoll [Kan.] 79 P. 1074.

96. Hayden v. Collins [Cal. App.] 81 P. 1120. Statements by plaintiff claiming rights in land in dispute inadmissible because self-serving. Spellman v. Rhode [Mont.] 81 P. 395. Proof of loss under fire policy is not evidence of the amount of loss but is admissible only to show that proof has been made as required. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Declarations of woman that she had not sold clock, being in her own interest, tending to show title in herself, and not made in adverse claimant's presence, incompetent. Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321. Self-serving declarations to attorney regarding execution of release inadmissible. Wojtylak v. Kansas & T. Coal Co. [Mo.] 87 S. W. 506. Where written statement by plaintiff was introduced, statements by plaintiff to another differing from the written statement, were held inadmissible in rebuttal because made to one who afterward became his attorney, and at a time when he was contemplating a suit. Vicars v. Gulf, etc., R. Co. [Tex. Civ. App.] 84 S. W. 286.

97. Ex parte statements by defendant, made in plaintiff's absence, inadmissible. Lynn v. Bean [Ala.] 37 So. 515. Ex parte affidavit attached to proofs of loss by fire, purporting to fix amount of loss, inadmissible. American Ins. Co. v. Walston, 111 Ill. App. 133. Testimony of officer before whom instrument was acknowledged that he understood from both grantors that instrument was to be a security for the debt of one of them, held a mere conclusion based on ex parte statements of the grantors. Henderson v. Brunson [Ala.] 37 So. 549. Representations of mortgagor to creditors that mortgage had been paid are not binding on the mortgagee when made in his absence and without his knowledge. Smith v. Leavenworth [Or.] 80 P. 1010. Declarations of municipal officer inadmissible to establish municipal right against one adversely interested, when made in latter's absence. Dawson v. Orange [Conn.] 61 A. 101. Declarations of maker of note to indorser at the time of procuring the indorsement, in the absence of the transferree of the note, inadmissible against the transferree. Meyer v. Foster [Cal.] 81 P. 402. A statement of an alleged partner, made in the absence of one against whom a suit is brought and after commencement of such suit, that he knew plaintiff ought to recover but hoped he would not because defendant could force him (the speaker) to pay, held inadmissible against the absent defendant. Bailey v. Fritz Bros. [Ark.] 88 S. W. 569. Rule of street railway company as to place of stopping cars inadmissible in favor of the company. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351. In determining value of railroad for taxation purposes, classification of expenses in the company books is in the nature of self-serving declaration. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99. Entries on the books of a delinquent treasurer will be treated as declarations in his favor merely and are not competent to disprove receipts given by him. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419. Report of an expert to his employe, though communicated to adverse party, is incompetent, being mere hearsay and a self-serving declaration. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356. Private survey inadmissible to show that certain government lands, when surveyed, will be included in a grant to a railway. United States v. Montana Lumber & Mfg. Co., 196 U. S. 573, 49 Law. Ed. 604. Application by an administrator for leave to sell land of plaintiff's intestate is inadmissible to prove a link in plaintiff's chain of title, by showing possession by such administrator. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691. In the absence of a rule of court to the contrary, an affidavit of defense cannot be introduced as evidence of the facts alleged. Kittanning Borough v. Kittanning Consolidated Nat. Gas. Co., 26 Pa. Super. Ct. 355.

98. Declarations of one in possession in favor of his own title are inadmissible in favor of those claiming under him. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235. Declarations of a lessor in his own interest are inadmissible for his lessee in an action between the lessee and the adjoining owner. Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 P. 542.

99. Declarations of physician after examining plaintiff, and in his presence, as to result of examination, competent against plaintiff. Kozlowski v. Chicago, 113 Ill. App. 513. On issue of acceptance of architect's plans, declarations of defendant's wife at the time the contract was being considered, coupled with defendant's acquiescence therein, were admissible against him. Hight v. Klingensmith [Ark.] 87 S. W. 138. Memorandum of contract dictated in presence of corporation manager and shown to be correct by stenographer, admissible against corporation, though unsigned. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

1. Rendition of bills and their retention without objection is some evidence of price agreed to be paid. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93. Failure to reply to letters or deny statements therein relating to matters in issue is evidence tending to show the truth of such statements. Richardson v. Southwestern Cotton Seed Oil Co. [Okl.] 81 P. 781.

2. Failure to assert a claim at a time and place when such assertion would be natural and proper is some evidence that the claim was an afterthought. Thus failure to present claim for damages to hack caused by hauling smallpox patients in final bill

the remainder is competent,[3] since an admission is to be considered as an entirety.[4] The party against whom an admission is introduced may explain it.[5]

Offers of compromise [6] and admissions of liability [7] made in the course of negotiations looking toward a settlement,[8] are excluded on grounds of public policy.

Declarations of a person in possession of land which qualify or explain the nature of his possession [9] are competent against a successor in interest.[10] The sub-

rendered city is an admission against the good faith of the claim. Nichols v. New Britain, 77 Conn. 695, 60 A. 655. Written submission of claims to arbitration admissible on existence of claim in suit, such claim not being included in written submission. Stock v. Crawford, 125 Iowa, 355, 101 N. W. 89. Verified tax schedules, made by a party, in which no return of note was made, competent on issue whether such party owned the note at the time the schedules were made. Fudge v. Marquell [Ind.] 72 N. E. 565.

3. Where part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other party. Code Civ. Proc. § 1854. Risdon v. Yates, 145 Cal. 210, 78 P. 641. A letter having been admitted, reply thereto is admissible. Hoggson & P. Mfg. Co. v. Sears, 77 Conn. 587, 60 A. 133. Under Code, § 4615. Robertson v. Vasey, 125 Iowa, 526, 101 N. W. 271. Portion of a conversation having been shown, details thereof may be shown in rebuttal. St. Louis S. W. R. Co. v. Frazier [Tex. Civ. App.] 87 S. W. 400. Robertson v. Vasey, 125 Iowa, 526, 101 N. W. 271. Where one witness testified to interview, another could testify in rebuttal and to contradict other witness, and admission of statement that party wanted to settle was not error. Hoggson & P. Mfg. Co. v. Sears, 77 Conn. 587, 60 A. 133. Where a conversation contained an admissible declaration, another statement in the conversation, explanatory of such declaration, is admissible. Smith's Adm'r v. Smith [Vt.] 61 A. 558. Declarations or admissions of a party inconsistent with present claims having been admitted, evidence explanatory of such admissions is always competent. Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481.

4. Account book kept by deceased executor held competent, if at all, as a whole; error to introduce only certain items. Curry v. Lanning, 94 N. Y. S. 535. Portion of answer showing admission of a killing held admissible without the rest of the answer. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Part of a sentence in an answer which admitted that death of plaintiff's decedent was caused by his coming in contact with overhead bridge admissible without the rest of the sentence. Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830.

5. Party against whom admissions have been introduced should be allowed to explain them. Bartley v. Comer [Tex. Civ. App.] 13 Tex. Ct. R. 816, 89 S. W. 82. He may state that he acted on advice of counsel when making statements, but cannot tell what the attorney told him. Id.

6. Evidence of overtures to compromise, and offers to settle inadmissible. Field v. Schuster, 26 Pa. Super. Ct. 82. Offers of compromise after suit has been threatened are incompetent. American Ins. Co. v. Walston, 111 Ill. App. 133. Error to refuse instruction that offer of settlement could not be considered as recognition of liability. Chicago City R. Co. v. Schuler, 111 Ill. App. 470. An offer made to compromise litigation is not an admission. Castner v. Chicago, etc., R. Co., 126 Iowa, 581, 102 N. W. 499. Where a letter containing a statement of loss, not showing on its face that it was an offer to compromise, is introduced, evidence tending to show it was intended as such an offer is admissible as affecting the weight of the letter as evidence. Id. Questions as to how soon plaintiff made an attempt to settle held not to relate to offer of settlement. Russell v. Brooklyn Heights R. Co., 93 N. Y. S. 433.

7. The only admissions made during an attempt at compromise which are competent evidence are distinct, unqualified admissions of independent facts, made, not as a part of the attempted settlement, but because they were facts. Admissions of liability held improperly admitted as evidence. Roome v. Robinson, 99 App. Div. 143, 90 N. Y. S. 1055.

8. The fact that parties have entered into negotiations to secure a compromise, and admissions or propositions made in the course thereof, are inadmissible for or against either party, in case the negotiations failed of their purpose. Georgia R. & Elec. Co. v. Wallace & Co. [Ga.] 50 S. E. 478. Evidence of an attempt to settle with a third person, injured in the same accident, is also inadmissible. Attempt to settle with driver of carriage, injured in collision, could not be shown in action by owner for damages to carriage and horses. Id. An acknowledgment of indebtedness unconnected with and unaccompanied by any unaccepted proposition of settlement or compromise is admissible. Statement "We owe it and ought to pay" made in interview between parties held competent. Miller v. Kinsel [Colo. App.] 78 P. 1075. If an offer is not shown to be a part of an attempt to settle, and is not accompanied by a caution that it is made as confidential and without prejudice, it is admissible. Chesapeake & O. R. Co. v. Stock [Va.] 51 S. E. 161.

9. The declarations in disparagement of title usually held admissible are those made by a declarant in possession which qualify or explain the nature of the possession. Fall v. Fall [Me.] 60 A. 718. Nature of possession, whether as tenant or owner. Field v. Field [Tex. Civ. App.] 87 S. W. 726. Declarations by one in possession of land are admissible to show the character of his possession and the intent with which possession was originally taken. Swope v. Ward, 185 Mo. 316, 84 S. W. 895. Claim of ownership of one in possession of land may be

ject-matter of the declarations must be capable of parol proof,[11] and the declarations must tend to establish such subject-matter.[12] Declarations of one in possession of personalty, explanatory of and characterizing his possession, are also admissible.[13] But declarations in disparagement of title by a former owner who has parted with his title are incompetent against any successor to the title.[14]

Where defendant pleads guilty in a criminal action, the plea and judgment are admissible as an admission in a civil action based on the same facts, but are not conclusive.[15] Hence defendant in the civil suit may show his entire statement to the court at the time he entered his plea of guilty in the criminal action.[16]

shown by his declarations while in possession. Henry v. Brown [Ala.] 39 So. 325. Declarations of one in possession of land are competent to show extent or nature of possession, though not to show title. Dibble v. Cole, 102 App. Div. 229, 92 N. Y. S. 938. Making a map of lands, and conveyances based on the map, are acts admissible to show extent of possession. Dawson v. Orange [Conn.] 61 A. 101. Declarations of a deceased grantor while in possession tending to show character of possession and whether he claimed adversely or in subservience to the title of another are competent. Emmet v. Perry [Me.] 60 A. 872. Declarations against interest as to boundaries admissible against one in privity of estate with declarant. Dawson v. Orange [Conn.] 61 A. 101. Declarations of husband that certificates and land located by them belonged to his wife admissible in suit between wife and persons claiming through execution sale against husband. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235. Proof of permission given by town official to camp on certain land held inadmissible as proof of an act accompanying and characterizing possession where it was not proved that permission was given as to the land in suit, nor that those seen camping were those to whom permission had been given. Dawson v. Orange [Conn.] 61 A. 101.

10. Declarations of a person under whom title is claimed are receivable against his successor, if admissible at all, on the theory that there is sufficient identity of interest to render statements of the former equally receivable with admissions of the latter. Fall v. Fall [Me.] 60 A. 718. To be competent against a tenant, the declarant must be the tenant's predecessor in title. Id. In action involving title to realty, letters of plaintiff's grantor acknowledging that defendant's grantor had an interest in the property were admissible. Costello v. Graham [Ariz.] 80 P. 336. A mortgagor and mortgagee are not so far in privity that naked declarations of the former are admissible to disparage title of the latter. Dawson v. Orange [Conn.] 61 A. 101. Oral declarations of a deceased mortgagor which have no relation to the res gestae or character or extent of his possession, many years after the mortgage was given are incompetent against the mortgagee when there is no identity of interest between the mortgagor and mortgagee. Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028.

11. Declarations which do not bear on quality of any possession of declarant, and have no reference to identity or location of boundaries or monuments, or to any matter concerning physical conditions or use, are incompetent. Fall v. Fall [Me.] 60 A. 718. Title cannot be shown. Dibble v. Cole, 102 App. Div. 229, 92 N. Y. S. 938. Declarations the sole purpose of which is to show that a title shown by the record did not in fact exist are incompetent whether declarant was in or out of possession, or is living or dead. Fall v. Fall [Me.] 60 A. 718.

12. Fall v. Fall [Me.] 60 A. 718.

13. Declarations of a debtor, who has sold goods but still retains possession, that he is the owner, admissible against the buyer to show the sale fraudulent as to creditors. Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657. Declarations of a defendant in execution up to the time of levy, and while he is in possession are admissible; but if the evidence as to his possession is conflicting, the jury should be instructed to disregard such declarations if they do not believe he was in possession. Smiley v. Padgett [Ga.] 50 S. E. 927.

14. Self-serving declarations of a grantor after he had conveyed, in disparagement of title conveyed, are inadmissible for himself or his subsequent vendee, or to rebut other declarations against interest. West v. Houston Oil Co. of Texas [C. C. A.] 136 F. 343. Self-serving declarations of grantor, after giving his deed, are incompetent against his grantee, or the vendees of the latter. Skidmore v. Smith [Ky.] 84 S. W. 1163. The vendor of property cannot, after the sale, prejudice the vendee's rights by any ex parte denial of the bona fides of the transaction. Glaucke v. Gerlich, 91 Minn. 282, 98 N. W. 94. In replevin suit, third party's title to property cannot be shown by his own unsworn declarations, after he has parted, or while he is parting, with possession. Vagts v. Utman [Wis.] 104 N. W. 88. But this rule does not render incompetent declarations of a grantor at the time of execution of an instrument to show whether it was intended as an absolute deed or mortgage. Bell v. Pleasant, 145 Cal. 410, 78 P. 957.

Declarations of a woman that she had sold her life estate in certain land inadmissible against one claiming as remote grantee from a third person. Kirkman v. Holland [N. C.] 51 S. E. 856.

15. Assault and battery. Plea of guilty not conclusive as to facts in civil action. Risdon v. Yates, 145 Cal. 210, 78 P. 641.

16. Risdon v. Yates, 145 Cal. 210, 78 P. 641.

Declarations of a person since deceased, made ante motam litem,[17] such as declarations respecting the boundaries of land,[18] form an exception to the hearsay rule. Declarations of a deceased against interest are competent under the rule as to admissions.[19]

§ 7. *Documentary evidence. A. In general.*[20]—Private writings are competent evidence [21] when their contents are relevant and material [22] and their authen-

17. Under Massachusetts Rev. Laws, c. 175, § 66, declarations of a deceased person made in good faith before commencement of the action, and upon the personal knowledge of the declarant, are competent. Nagle v. Boston & N. St. R. Co. [Mass.] 73 N. E. 1019. Such declarations are competent though made in answer to leading questions. Motorman's affirmative answer to question by conductor if he had orders to go to a certain place, over a single track, competent. Nagle v. Boston, etc., R. Co. [Mass.] 73 N. E. 1019. An offer of such declarations must show that they were made before commencement of the action. Flynn v. Coolidge [Mass.] 74 N. E. 342. Under St. 1898, c. 535 (Rev. Laws, c. 175, § 66), declarations of a deceased person after notice has been served on the city of a claim for injuries, as required by Rev. Laws, c. 51, § 20, but before an action is in fact commenced, are competent. Dickinson v. Boston [Mass.] 75 N. E. 68. From the fact that such declarations were admitted in evidence it will be inferred that the trial court found they were made in good faith. Id. Declarations of a testator to persons in his lifetime or contained in his will are admissible to contradict an oral claim for services against his estate, under Rev. Laws, c. 175, § 67. Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361. Entries by an agent in the course of his principal's business are admissible after the agent's death. Civ. Code 1895, § 3034, is merely declaratory of the common law and makes entries by an agent admissible only where, under established rules of evidence, declarations of a deceased person would be admissible. Turner v. Turner [Ga.] 50 S. E. 969. In action for death, declarations of decedent, and of his father, also dead, as to decedent's age, were competent. Travelers' Ins. Co. v. Henderson Cotton Mills [Ky.] 85 S. W. 1090.

18. Acts of owner, when upon it, pointing out monuments and location of line, and declarations made when no controversy existed, are competent on location of a boundary line after declarant's death. Emmet v. Perry [Me.] 60 A. 872. The declarations of a deceased person, disinterested at the time, respecting boundaries, are competent, even though they do not accompany and give character to some act affecting declarant's title. Declaration that a certain tree was a line tree admissible. Hathaway v. Goslant [Vt.] 59 A. 835. Declarations relating to boundaries of land, made ante litem motam by a disinterested deceased person are competent evidence. Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782. The fact that another person, who established the boundary is available as a witness does not make such declarations incompetent as not the best evidence. Id. Recitals in deed as to location of line inadmissible because of grantor's interest. Hemphill v. Hemphill [N. C.] 51 S. E. 42. Acts of a surveyor in marking a tree or placing a stone at the time of surveying a line are incompetent, as his declarations as to such acts would be, in the absence of proof of his death, or other proof making his declarations competent. Hill v. Dalton, 136 N. C. 339, 48 S. E. 784.

19. Declarations of a decedent against his pecuniary interest are admissible against a successor in interest, by Code Civ. Proc. § 1853. Declaration of decedent that certain property belonged to his mother, he being in possession for convenience sake, held admissible. Stoddard v. Newhall [Cal. App.] 81 P. 666. Declarations and entries of a person since deceased, against his interest, and not made with a view to pending litigation are admissible in any case. Massee-Felton Lumber Co. v. Sirmans [Ga.] 50 S. E. 92; Turner v. Turner [Ga.] 50 S. E. 969. If the declaration or entry contains statements both for and against declarant's interest, it is admissible only if those against interest preponderate over those for interest. Masse-Felton Lumber Co. v. Sirmans [Ga.] 50 S. E. 92. Such declarations or entries when admitted are evidence as to any fact stated therein which was within the knowledge of declarant or which it was his duty to know. Id.; Turner v. Turner [Ga.] 50 S. E. 969.

20. See 3 C. L. 1364.

21. Under Act May 11, 1881, P. L. 20, an application for insurance, not attached to policy, is inadmissible in evidence. Moore v. Bestline, 23 Pa. Super. Ct. 6. But this statute does not exclude the policy itself though the application is not attached. Id. By rule of court properly filed verified copies of account are admissible in evidence, and items not denied are admitted as true. Blair v. Ford China Co., 26 Pa. Super. Ct. 374.

22. Letter admissible to show promise to repurchase stock. Crandell v. Classen, 25 App. D. C. 5. Deed is admissible as prima facie proof of price paid, in action for damages to land. Sanitary District of Chicago v. Pearce, 110 Ill. App. 592. Leases of beach land by town competent to prove possession and claim by town of land in dispute. Murphy v. Commonwealth [Mass.] 73 N. E. 524. Certificates of redemption are proper evidence as to the amounts paid to redeem from tax sales. Arneson v. Haldane, 105 Ill. App. 589. Note found in room where a person is found dead from violence, in handwriting of deceased, giving directions as to burial, etc., is competent evidence on issue of suicide. Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402. A receiver's deed is admissible as a link in a chain of title though the party against whom it is offered was not a party to the proceeding in which the decree authorizing the sale was rendered. Phillips v. Collins-

ticity [23] and due execution [24] have been properly shown. Where one party produces a paper and there is found thereon an entry, memorandum, or indorsement favorable to his adversary, the latter may rely on the same as evidence without further proof of its genuineness.[25] A deed is admissible only when the description contained in it is legally sufficient,[26] and when title in the grantor therein is shown.[27] A void deed

ville Granite Co. [Ga.] 51 S. E. 666. The sale being under a consent decree, the fact that the receiver was not in possession of all the land at the time of the sale would not make the deed inadmissible. Id. Nor could the deed be collaterally attacked on the ground that an administrator bid off the property which was in part that of an intestate's estate. Id.

23. Letters inadmissible unless proved authentic. In re Ladue Tate Mfg. Co., 135 F. 910. Letter inadmissible to contradict witness, when he said he did not write it or authorize anyone else to write it. Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553. Evidence as to authorship of letters held sufficient. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225. Identity of anonymous letter held sufficiently shown to warrant its reception. Colbert v. State [Wis.] 104 N. W. 61. Letter written by defendant's wife by defendant's permission to write as she wished regarding the matter in issue admissible against defendant. Harmon v. Leberman [Tex. Civ. App.] 87 S. W. 203. A typewritten letter may have about it peculiarities which will enable one who has received several such letters, which he knows came from one whose typewritten signature is attached thereto, to identify such letter. Huber Mfg. Co. v. Claudel [Kan.] 80 P. 960. Handwriting and execution of letter need not be proved when letter is shown to be part of a correspondence relating to same subject, and was received in due course of mail. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667. Where letters are introduced as evidence only on collateral matters, proof of their receipt in due course, and that they were acted upon is sufficient proof of genuineness. Jones v. Cooke, 25 App. D. C. 524. Letters are admissible against one who signs them when shown to have been received by due course of mail in answer to letters written, addressed, stamped and posted to such person by the person who afterwards received the answer. Huber Mfg. Co. v. Claudel [Kan.] 80 P. 960. A letter written in behalf of a corporation, and signed by a person admitted by the corporation to be its general manager, undertaking to bind the corporation by a contract which the manager had implied power to make, is admissible against the corporation over the objection that it was not shown to have been written by one with authority. Raleigh & G. R. Co. v. Pullman Co. [Ga.] 50 S. E. 1008. A telegram, whether the original or a copy, must be shown to be genuine before it is competent evidence. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. Interlineation in deed correcting a word therein held not such a mark of suspicion as to warrant exclusion of the deed as evidence. Campbell v. Bates [Ala.] 39 So. 144. A paper styled "the itemized claim presented" by defendant "to the United States government," without an explanation as to how it came into court as an original and without showing authenticity as a copy, is incompetent. Bomgardner v. Swartz, 26 Pa. Super. Ct. 263. Under Rev. St. 1899, § 4241, the affidavit attached to a railroad lien, containing plaintiff's signature, being only means of authentication and connecting plaintiff with paper, must be read with lien, the whole being one instrument. Bagnell Timber Co. v. Missouri, K. & T. R. Co., 180 Mo. 420, 79 S. W. 1130. Where the validity of a private writing, purporting to have been signed by an agent in behalf of his principal, is questioned, it is inadmissible in evidence, without proof of the agent's authority. McClung v. McPherson [Or.] 82 P. 13. But admission of the writing without objection is an admission of the agent's authority. Id. Rules applied to notice to tenant to quit, signed by lessor's attorneys. Id.

24. Marriage certificate does not prove itself, but its authenticity must be shown. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225. Power of attorney inadmissible when signature of principal was not sufficiently proven. Schaffer v. Emmons, 92 N. Y. S. 993. Summons purporting to have been issued by justice in prior suit, unauthenticated and not certified, is incompetent. Chapman v. Duffy [Colo. App.] 79 P. 746. Unless tax receipt is made self-proving by statute, it must be proved the same as any other paper introduced in evidence. Chastang v. Chastang [Ala.] 37 So. 799. Deed of sale inadmissible when its execution had not been proved by extrinsic evidence. Succession of Sallier [La.] 38 So. 929. A corporate deed, without the corporate seal affixed, is inadmissible as a conveyance without proof that the persons signing it in corporate name were officers and had authority to execute it. Bale v. Todd [Ga.] 50 S. E. 990. Where witness admitted signing paper, it was properly admitted in evidence as his own. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443. Admission by maker of note that he had made it and it was "all right" held sufficient to warrant submission of the execution to the jury and to admit the note in evidence. Stewart v. Gleason, 23 Pa. Super. Ct. 325. Objections to deed of association obviated by evidence introduced later that the officers executing it had authority. Leech v. Karthaus [Ala.] 37 So. 696. Execution of a tax deed being proved, it is error to exclude it on the ground of want of acknowledgment. Marsh v. Bennett [Fla.] 38 So. 237. Proof by subscribing witness that deed was duly executed and delivered in his presence is sufficient to admit the deed in evidence. Crawford v. Verner [Ga.] 50 S. E. 958.

25. Entry on back of deed relied on to show deed given as security for usurious debt. McBrayer v. Walker [Ga.] 50 S. E. 96.

26. A deed is inadmissible if the description therein is so vague and indefinite that it is of no effect as a conveyance, or as

is admissible to show color of title, if it contains a legally sufficient discription of the land, without proof of execution.[28] Recitals in a private writing are evidence only against parties thereto and their privies.[29] Inquiry as to the origin, competency, or evidential value of a writing, more or less relied on by an opponent, does not make the contents of the writing evidence for the opponent.[30]

An ancient document, if it comes from proper custody and is itself free from fraud or invalidity, proves itself.[31] Recitals in such documents are presumptively true.[32] But recitals in an ancient deed that grantors are heirs of a former owner are not alone sufficient to prove the fact recited.[33]

Standard mortality tables are competent[34] when life expectancy is in issue.[35]

color of title. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691. A deed in which the description is wholly inadequate is inadmissible either as a conveyance or as color of title. Crawford v. Verner [Ga.] 50 S. E. 958. Description in deed held sufficient to identify land, and deed held admissible. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082. Description of land as one-fourth interest in definitely described lot is sufficient. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. A **state grant** is admissible without preliminary proof if the lot of land can be located by reference to the state survey of which the court takes judicial notice. Stanford v. Bailey [Ga.] 50 S. E. 161. A **power of attorney** to sell all the donors' lands situated in the state of Georgia is not inadmissible in evidence because not describing the lands by county, number and district. Lanier v. Hebard [Ga.] 51 S. E. 632.

27. A deed is inadmissible in evidence unless some title or spark of title is shown in the grantor. Jackson v. Gunton, 26 Pa. Super. Ct. 203. Where plaintiff's predecessor was shown to have owned the land in controversy admission of a deed to him, without showing title in the grantor in such deed, was not error. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739. To prove title by a chain from the commonwealth, an intermediate deed, not shown to be connected with the deed from the commonwealth, is inadmissible. Christ v. Boust, 26 Pa. Super. Ct. 543. Where deed conveys all of grantor's interest as heir of another, it is admissible for one claiming title from such grantor, since the latter's interest may be shown by other evidence. Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666.

28. Brannan v. Henry [Ala.] 39 So. 92.

29. Recitals in instrument purporting to substitute a new trustee held not evidence of death, resignation or removal of former trustee, as against strangers to the instrument. Leech v. Karthaus [Ala.] 37 So. 696. Recitals of facts in deeds are not evidence against a stranger. Jackson v. Gunton, 26 Pa. Super. Ct. 203. Recitals in a deed that grantors were heirs of a former owner are not competent evidence in favor of the persons making them and against strangers to the deed. Mace v. Duffy [Wash.] 81 P. 1053.

30. Where time book was objected to, and objection overruled, cross-examination regarding items therein did not make contents evidence for other party. Collins v. Carlin, 94 N. Y. S. 317.

31. Testimony of county clerk that certain resolution of supervisors came from a book in his office containing records for 1818, and that the older records were in his custody as clerk, held to render such record admissible without other proof. In re Webster, 94 N. Y. S. 1050. Record containing copy of certificate of clerk dated 1829 to report of commissioners on bridges filed 1819, the whole record being certified by town clerk in 1835, held to be an ancient document, and properly admitted. Id. Record of certificate from town minute book made in 1818 also properly received as ancient record. Id. Map showing division of estate, filed in 1802, admissible without proof of signatures of commissioners by whom it purported to have been made. Id. Deed thirty years old admissible without proof of execution, even if not recorded within statutory period. Campbell v. Bates [Ala.] 39 So. 144. Ex parte affidavits made forty years after the event cannot be regarded as ancient documents. The Brig Maria, 39 Ct. Cl. 39.

32. Recitals of pedigree in ancient deeds. Jackson v. Gunton, 26 Pa. Super. Ct. 203. Administrator's deed, over thirty years old, proved itself and its recitals. Dutton v. Wright [Tex. Civ. App.] 85 S. W. 1025. Recitals of heirship and widowhood in deeds over thirty years old are presumptively true, and are admissible against adverse claimants. Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409.

33. Deed purported to convey property for the party executing it and by him as attorney in fact for others as heirs of a former owner, and recited that the former owner was dead and that the grantors were his heirs. Such recitals were held insufficient to prove the facts, without proof of the relationship of the one making the recitals to the former owner, or of uninterrupted possession under the deed for such time as to render recitals therein presumptively true. Lanier v. Hebard [Ga.] 51 S. E. 632.

34. Virginia & S. W. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33. Carlisle and other standard mortuary tables are competent. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Standard life and annuity tables showing probable duration of life at different ages and present value of a life annuity are competent in an action for death. Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457, 59 A. 393. Standard mortality tables competent, proper foundation being laid by showing age and condition of deceased. Horst v. Lewis [Neb.] 103 N. W. 460.

35. Mortality tables admissible to show life expectancy of injured person, when

Books of science are not admissible to establish doctrines therein stated,[36] nor can the contents of such books be placed before the jury indirectly by incorporating the same in questions.[37]

Proof of handwriting.[38]—Any writing admitted or proved to contain the genuine writing or signature of the party is admissible as a standard of comparison,[39] though inadmissible for any other purpose.[40] But the court, in the exercise of its discretion in the matter, may exclude from the jury any irrelevant writing or paper which might influence their decision.[41] Comparison of the disputed and admittedly genuine writings may be made by experts in some states;[42] in others such comparison can be made only by the jury.[43] An expert who has several specimens of handwriting before him, may testify which is the normal handwriting of the writer, but may not give an opinion as to cause of the abnormality of the others.[44] A witness may be qualified to testify as to genuineness of handwriting by having seen the party write;[45] by having seen letters or documents shown to be in the handwriting which is the subject of controversy;[46] or by comparison of handwritings as an expert.[47]

there is evidence tending to show injuries permanent. Hyland v. Southern Bell Tel. & T. Co., 70 S. C. 315, 49 S. E. 879. Mortality tables inadmissible in personal injury case where permanent injury is alleged, unless there is evidence of the value of plaintiff's services or capacity to earn. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. Mortality tables inadmissible to show life expectancy for purpose of proving length of time during which plaintiff would have to climb steps after street in front of home had been graded down. Swope v. Seattle, 36 Wash. 113, 78 P. 607. Carlisle tables not to be considered unless jury found injuries permanent. Sanders v. Central of Georgia R. Co. [Ga.] 51 S. E. 728.

36. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

37. Error to relate facts relative to history of typhoid epidemic in Switzerland and ask witness if such statement was correct. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

38. See note in 3 C. L. 1377.

39. Common-law rule has been changed. Mississippi Lumber & Coal Co. v. Kelly [S. D.] 104 N. W. 265. An admittedly genuine lead pencil signature is competent as a standard of comparison. Groff v. Groff, 209 Pa. 603, 59 A. 65. Answer containing admittedly genuine signature held admissible as standard of comparison. Mississippi Lumber & Coal Co. v. Kelly [S. D.] 104 N. W. 265. Checks with indorsements thereon not shown to be in handwriting of party, inadmissible. Id. Unidentified signatures are inadmissible. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Where issue is whether will is a forgery or genuine, it is competent to introduce the disputed will in evidence for comparison with other written documents which have been proved to be genuine. Gurley v. Armentraut, 6 Ohio C. C. (N. S.) 156.

Signatures to records of commissioners' court inadmissible for purpose of comparing with signature to deed. Campbell v. Bates [Ala.] 39 So. 144.

40. Mississippi Lumber & Coal Co. v. Kelly [S. D.] 104 N. W. 265.

41. Mississippi Lumber & Coal Co. v. Kelly [S. D.] 104 N. W. 265. Where witness denied signing a paper containing statements, contradictory of his testimony, and on request wrote his signature on another paper in the presence of the jury, whereupon the first paper was offered entire for comparison of the signatures by the jury, it was held that such paper was inadmissible, entire, for that purpose, though the signature alone, if detached, would have been admissible. Jacobs v. Boston El. R. Co. [Mass.] 74 N. E. 349.

42. By provisions of P. L. 1895, 69. Groff v. Groff, 209 Pa. 603, 59 A. 65. Application for insurance, containing admittedly genuine signature, available as standard of comparison by expert, without being introduced in evidence. Abernethy v. Yeunt, 138 N. C. 337, 50 S. E. 696. Where specimen of handwriting is established as that of a certain person, a properly qualified witness may testify whether a record of a deed is in the same handwriting. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364.

43. At common law comparisons of genuine signatures with alleged spurious signatures is for the jury. Groff v. Groff, 209 Pa. 603, 59 A. 65.

44. Could not testify that writer's hand was guided. Colbert v. State [Wis.] 104 N. W. 61.

45. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866. Witness held competent to testify to handwriting though she had seen party write but once. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225. One who had seen defendant sign a receipt and write his name in a subscription book is competent to identify his handwriting in letters. Frank v. Berry [Iowa] 103 N. W. 358.

46. The party having been communicated with, or the writing having been adopted or recognized by him as his own. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866. Clerk in registry office, familiar with handwriting of deputy, qualified to testify whether a certain record was in the deputy's handwriting. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364. Chairman of county board of public instruction who had had op-

The proved signature of one witness to an instrument does not prove the signature of the other.[48] Handwriting may be proved by circumstantial evidence.[49] A witness should be permitted to examine documents in testifying to signatures contained therein.[50]

The Florida statute permitting a disputed writing to be compared with one proved to be genuine, and providing that the writings and the evidence of witnesses making the comparison may go to the jury or court,[51] applies to criminal as well as civil actions.[52] Under this statute, not only the genuine writings of the party whose signature is alleged to be forged, but also the genuine writings of the alleged forger, are admissible.[53]

(§ 7) *B. Books of account.*[54]—Original entries in books of account,[55] regularly kept in the usual course of business[56] and shown to be correct,[57] are compe-

portunities to become acquainted with handwriting of county superintendent could testify whether handwriting in certain warrants was that of accused, charged with forgery. Wooldridge v. State [Fla.] 38 So. 3. A stenographer and typewriter, who had studied penmanship, and was assistant to clerk of court, held qualified as handwriting expert. Abernethy v. Yount, 138 N. C. 337, 50 S. E. 696.

47. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866. Expert should not be allowed to give an opinion as to handwriting without a thorough examination. Colbert v. State [Wis.] 104 N. W. 61. Witnesses with long experience in handling and examining written papers may, as experts, testify whether one witness' signature was written in the same ink as the body of a will and the testator's signature, and which was the older writing. Savage v. Bowen, 103 Va. 540, 49 S. E. 668. Witness who said she had seen a signature on a lost will-fourteen years before, and had compared her recollection of it with proved signatures, and that signature on will was genuine. was not qualified to give such opinion. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866.

48. In re Burbank's Estate, 34 Civ. Proc. R. 247, 93 N. Y. S. 866.

49. It is not required that a witness testifying to the handwriting of a party should have seen him write, or have corresponded with him, but proof of handwriting may consist of ordinary circumstantial evidence showing a reasonable probability of the handwriting being that of the party whose handwriting it purports to be. Shaffer v. U. S., 24 App. D. C. 417.

50. A witness who has given testimony tending to show genuineness of signatures to notes in suit may properly refuse to testify to the genuineness of signatures on documents, not in evidence, when he is not permitted to examine the documents. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832.

Contra: In an action upon a promissory note, after denying the genuineness of the maker's signature, a non-expert witness was shown documents, apparently already in evidence, so covered as to leave visible only the signatures, and was asked whether the latter were genuine. Held, that the witness is not entitled to see the entire document before expressing an opinion. Groff v. Groff, 209 Pa. 603.

Note: "A witness to handwriting, whether expert or not, may on cross-examination be tested by writings which are properly in evidence or are admitted by the parties or the witness to be genuine. Whether he may be questioned as to writings not already in evidence is in conflict. Where the handwriting of an instrument is disputed, it has been held not error to require an expert to be shown the entire document. West v. State, 22 N. J. Law, 212, 240. The opposite result has been reached in the case of expert or non-expert witnesses examined as to signatures. Brown v. Woodward, 75 Conn. 261; Hoag v. Wright, 174 N. Y. 36. Contra. Insurance Co. v. Throop, 22 Mich. 146. If the signature only is disputed and the witness' knowledge is not limited to the alleged author's signature on a particular class of documents, the practice employed in the principal case seems unobjectionable. Generally, the question should rest with the discretion of the trial judge. It should be noticed that the decision of the precise question under discussion should not vary whether or not the court is one of those which allow witnesses to be tested by documents extrinsic to the issue."—18 Harv. L. R. 468, commenting on Groff v. Groff, 209 Pa. 603.

51. Minute book of school board containing writing of superintendent, charged with forgery, admitted for comparison with forged warrant. Wooldridge v. State [Fla.] 38 So. 3.

52. Rev. St. 1892, § 1121. Wooldridge v. State [Fla.] 38 So. 3.

53. Wooldridge v. State [Fla.] 38 So. 3.

54. See 3 C. L. 1366.

55. Page from order book competent. Norman Printer's Supply Co. v. Ford, 77 Conn. 461, 59 A. 499. Ledger used by defendant to refresh his memory while on the stand was admissible as a part of his cross-examination. Logan v. Freerks [N. D.] 103 N. W. 426.

56. A memorandum must have been made in the usual course of business. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60. Evidence that entries in books were made in the usual course of business is admissible. Norman Printer's Supply Co. v. Ford, 77 Conn. 461, 59 A. 499. An entry which is a mere recital of a past transaction is incompetent; the entry should be contemporaneous with transaction. Id. Books of account are admissible if the entries therein are original, and made contemporaneously with or about the time of

tent evidence of the facts of the particular transactions to which they relate.[58] Evidence explaining words or marks which constitute part of an entry is admissible with the entry.[59] Secondary entries are usually inadmissible [60] unless supported by the original memoranda.[61] In the case of entries made upon information reported by another acting in the line of his duty, there is a conflict as to the necessity of producing the person upon whose report the entry is made.[62] Memoranda or book entries

the transaction recorded, and if the one making them had personal knowledge of the fact recorded. Bouldin v. Atlantic Ricemills Co. [Tex. Civ. App.] 86 S. W. 795. The entries must be made in, and must relate to matters in the regular course of business, and matters not relating to the business and which are not properly the subject of book accounts, cannot be proved by such entries. Id. Private memoranda not made in pursuance of any duty owed by the person making them are inadmissible. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60. Memoranda by one watching a blackboard whereon arrivals of trains were noted, not made in ordinary course of business, nor as part of res gestae, nor because of a duty to make them, incompetent. Southern R. Co. v. State [Ind.] 75 N. E. 272.

57. Entries must be shown to have been true and correct when made. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531. Facts stated in memorandum must be shown to have been correctly entered at the time. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60. Account of sales of cattle held admissible over objection that it was hearsay and not made by party testifying, when it appeared that witness had compared it with memoranda made by him at the time and since destroyed, and that the account was found to be correct. Texas & P. R. Co. v. Birdwell [Tex. Civ. App.] 86 S. W. 1067. Book account in ledger admissible when agent of party introducing it testified she kept it, that the entries were true and correct, and made at the time of the transactions noted, and in the regular course of business. Richardson v. Benes, 115 Ill. App. 532. Reports to cattle inspectors, which were not public records required by law to be kept, and not established as genuine reports by a live stock agent, were improperly admitted. Dorr Cattle Co. v. Chicago & G. W. R. Co. [Iowa] 103 N. W. 1003. Records of weather observations, voluntarily made, and not verified by person keeping them, are inadmissible as private memoranda. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493. Where witness called to testify regarding entries in ledger said he did not make them or see them made, did not know they were correct, and suggested how they might be inaccurate, their admission was error. Hoogewerff v. Flack [Md.] 61 A. 184. Book of entries inadmissible against a party when shown to have been made by a third party, with whom the litigant had no connection or relation. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531. Statement of account inadmissible because not testified to as correct by plaintiff who made it out. Callaway v. Gay [Ala.] 39 So. 277.

58. Books of deceased surveyor competent to show amount of bark taken from trees on certain land, books containing original entries made for that purpose. Hagerty v. Webber [Me.] 61 A. 685. Entries in town treasurer's books under caption "Land Rent Long Beach," showing payment of rent to town for many years admissible to show claim and adverse possession of town. Murphy v. Com. [Mass.] 73 N. E. 524. Entries in memorandum book kept by agent competent evidence after his death to show extent and nature of business relations between him and his principal. Jewell v. Jewell's Estate [Mich.] 102 N. W. 1059. Hospital records are evidence only of facts necessarily within knowledge of person making the entry. Metropolitan Life Ins. Co. v. Moravec, 116 Ill. App. 271. Books showing cut and delivery of lumber at certain place excluded because not covering all the transactions in issue. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

59. Testimony that words "on contract," together with fact that a line drawn across other pages was not on a certain page, indicated conditional sale or lease, held admissible. Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A. 499.

60. A memorandum must be the original unless it is lost or its absence explained. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60. Entries not shown to be original; admission error. Hoogewerff v. Flack [Md.] 61 A. 184. Entry in a ledger of payment on a note not primary evidence. Eastham v. Patty [Tex. Civ. App.] 83 S. W. 885. Error to permit party to testify to recollection of payment on note from entry on last page of ledger, such ledger entry not being best evidence. Id. Book kept by plaintiff in which he entered names of men transported on certain dates, held competent up to date when names were so entered at once; but inadmissible as to dates on which names were entered there from way bills. Idol v. San Francisco Const. Co. [Cal. App.] 81 P. 665. A timebook made from other timebook kept by timekeeper who got time from workmen was inadmissible without proof of correctness by bookkeeper or men who gave reports of their time. Collins v. Carlin, 94 N. Y. S. 317.

61. It is first entries in daybooks, journals, pay rolls, stubs, etc., and not the secondary entries, that make them competent; and subsequent classifications into various accounts are not evidence in a party's favor except so far as substantiated by original entries, which control. State v. Nev. Cent. R. Co. [Nev.] 81 P. 99. Entries in hotel books regarding goods sold by cigar and bar departments, made from slips sent in by those departments, the bookkeeper having no personal knowledge of them, are incompetent, the original slips not being produced. Gould v. Hartley [Mass.] 73 N. E. 656.

62. Firemen's Ins. Co. v. Seaboard Air

are not the best evidence when witnesses are shown to have a distinct and independent recollection of the facts.[63]

Corporate records.—When the controversy is between stockholders, concerns their interests in the corporation, and involves the consideration of the acts of the corporation as affecting directly its status and indirectly their interests, the records and books are admissible, if authenticated, by showing that they are the records and books of the corporation and have been regularly kept as such.[64] But in a controversy between a private corporation and a stranger respecting title to property or other right directly in issue between them, such books and records are not admissible in favor of the corporation to prove that the acts therein recited were performed at the time and in the manner therein stated, except as memoranda in connection with the oral evidence of witnesses testifying from personal knowledge to such transactions.[65] After proof that certain corporate acts have been performed and written memorials thereof made in the form of resolutions or otherwise, the books and records are admissible to identify and prove the character and terms of such instruments.[66] Books of a corporation are prima facie identified when shown to have come from the proper custody and to be free from suspicion of fraud.[67] The trustee is the proper custodian of such books when the corporation has become bankrupt.[68]

Line R. Co., 138 N. C. 42, 50 S. E. 452. In some states it has been held that train sheets, upon which the time of arrival and departure of trains is entered by a dispacher upon information telegraphed by operators, are admissible upon the testimony of the dispatcher, without that of the operators, the dispatcher testifying that he entered thereon reports as sent him. Id. Where cattle weigher entered weights on slips which were sent to bookkeeper in regular course of business, and entered by him, his accounts, testified to be correct, are admissible to establish such weights, without the original slips or the testimony of the weigher, especially where, as in this case, the weigher could not be found. Atchison, etc., R. Co. v. Williams [Tex. Civ. App.] 86 S. W. 38. Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible when accompanied by the testimony of such subordinates that they are correct, combined with that of the person minuting the transactions that they were also truly noted. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60.

Note: See opinion in Firemen's Ins. Co. v. Seaboard Air Line Ry. Co., supra, for discussion and authorities on the proposition.

63. A memorandum cannot be read in evidence if the witness who made it remembers the facts without it. Morris v. New York City R. Co., 91 N. Y. S. 16. Books of account are not best evidence, when witness testifies from independent recollection. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082. Memorandum made by officer, though competent to refresh his memory, should not have been read by the court, not being competent as original evidence. Garber v. New York City R. Co., 92 N. Y. S. 722. A memorandum is of no evidentiary value unless it appears that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted it. Manchester Assur. Co. v. Oregon R. & N. Co. [Or.] 79 P. 60. Witness' memory of contents of policy of insurance is better evidence than a memorandum made by him, even though he must refresh his memory with the memorandum. State v. Mann [Wash.] 81 P. 561. Evidence of the value of property must be the individual opinion of witnesses, not a quotation from memoranda. Illinois Cent. R. Co. v. Seitz, 105 Ill. App. 89. Timebook excluded when officers who kept it were not called to testify. Conover v. Neher-Ross Co. [Wash.] 80 P. 281. Testimony of express agent who said he had no independent recollection and could only testify what his books showed, held admissible. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18. Preliminary evidence that a witness could not testify to the contents of a memorandum is unnecessary to make the memorandum admissible, when it shows on its face that such testimony could not be given, as where memorandum contained six hundred items. Meyers v. McAllister [Minn.] 103 N. W. 564. Refrigerator car report testified to by witness as made by him in usual performance of his duties and turned in in usual way, and to be correct, held admissible, provided witness had no independent recollection of facts; but this objection not being specifically raised, admission in evidence would not be reviewed on that ground. Naas v. Chicago, etc., R. Co. [Minn.] 104 N. W. 717.

64. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890. When witness admitted that a book had been identified and admitted by him as evidence of by-laws in a prior case in which he was counsel, the book was properly admitted in evidence. Wells & McComas Council v. Littleton [Md.] 60 A. 22.

65. Applied where two railroad corporations claimed a location of land adversely. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

66. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890.

67. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396.

68. When books are produced by trustee, it need not be shown that he received them

(§ 7) *C. Public records and documents.*[69]—Public records, required by law to be kept,[70] are competent evidence of facts therein stated.[71] A valid [72] record of an instrument required by law to be recorded is competent evidence of the contents of the instrument.[73] Records of courts,[74] of legislative bodies,[75] or administrative or executive branches of government,[76] are competent evidence, and are

from the proper custodian. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396.

69. See 3 C. L. 1367.

70. Voluntary weather observations, recorded daily for weather bureau, but not required, are inadmissible as records. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493. Where no law was proved relative to certificates of incorporation or their custody, a copy of articles of incorporation, certified by the secretary of state of Illinois, was inadmissible in Missouri. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023. One who has kept records of vital statistics for some years cannot testify in regard thereto unless it appears that the records were kept pursuant to a statute or a church or local custom. Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n, 93 N. Y. S. 575. If records are shown to have been kept pursuant to a foreign law, proof of such law must be made according to Code Civ. Proc. § 942. Id.

71. Records of vital statistics: Copy of death certificate placed on record according to requirement of law, reciting certain disease as cause of death, is evidence of that fact. National Council of Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40.

Records of weather bureau: Records of the federal weather bureau may be read in evidence by an officer of the department. Anderson v. Hilker [Wash.] 80 P. 848. Official records of meteorological observations required to be kept by public officers in performance of their duties are admissible. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493. Letter press copies of typewritten sheets, kept in Chicago office of weather bureau as records, the original sheets being sent to Washington, are competent evidence, being equivalent to sworn copy of a record, when introduced with testimony of officer in charge of bureau. Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553.

72. Deed acknowledged before a justice of California who had no official seal is not entitled to be recorded in Florida and hence is not evidence if recorded. Rev. St. 1892, § 1973. Norris v. Billingsley [Fla.] 37 So. 564. A copy of a void record is not admissible for any purpose. Where certificate of clerk did not show that subscribing witness to deed had been sworn, in proving execution, the acknowledgment was defective, and hence the deed was not entitled to record. The existence of such record could not be proved by certified copy. Wanza v. Trapp [Tex. Civ. App.] 87 S. W. 877. The record of a deed, void because the deed was improperly acknowledged and not entitled to record is admissible to establish existence of the deed when lost. Simmons v. Hewitt [Tex. Civ. App.] 87 S. W. 188. Though diligent search for original patent certificate was made, and its loss plausibly accounted for, but it appeared that no witness had ever seen the original, a certified copy of the record, of an instrument purporting to be such original, unsealed, and not entitled to record, was inadmissible. Arbuckle v. Matthews [Ark.] 83 S. W. 326.

73. Under Burn's Ann. St. 1901, § 3372, record of mortgage is competent and mortgage need not be produced. Embree v. Emmerson [Ind. App.] 74 N. E. 44. A power of attorney, executed like a deed subject to registry, may be recorded, and is admissible with the record of a deed executed pursuant to its terms, under the same rules governing the admissibility of the recorded deed. Flint River Lumber Co. v. Smith [Ga.] 49 S. E. 745. Where original deed showed that it had been mutilated and that a plat referred to therein was missing, the record of the deed and plat was admissible to show the missing portion. Senterfeit v. Shealy [S. C.] 51 S. E. 142. Abstracts of grants by another state, duly signed and certified as correct copies, containing proper descriptions, naming the grantees and giving the quantity of land, are competent evidence of title in that state. Marshall v. Corbett, 137 N. C. 555, 50 S. E. 210. Under Rev. St. 1899, § 3098, records and exemplifications of records and books, not pertaining to a court, are evidence when attested by the keeper of such records and books, and the seal of his office, if there be a seal. Florscheim & Co. v. Fry [Mo. App.] 84 S. W. 1023. Certified copy of certificate of designation of agent by a foreign corporation is competent and sufficient evidence of incorporation. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

74. Certified copy of tax judgment is prima facie evidence of facts recited therein. Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030. Transcript of proceedings before justice of peace admissible, in action for malicious prosecution, jurisdiction of justice being sufficiently made to appear. Kerstetter v. Thomas, 36 Wash. 620, 79 P. 290. Record in foreclosure action, commissioner's deed to plaintiff, writ of assistance and sheriff's return showing delivery to plaintiff, competent, as a part of plaintiff's record title, to show complete divestiture of title and possession of judgment debtor. Nathan v. Diersen, 146 Cal. 63, 79 P. 739.

75. Certain town votes setting out town's rights in beach land and showing acts of ownership and control competent to prove possession and claim of town to land. Murphy v. Com. [Mass.] 73 N. E. 524. Records of Newport having become dilapidated through capture by British in Revolutionary War, city council referred matter of copying them to a committee in 1855. There is no record of the committee's action, but the records were in fact copied in part and used officially for fifty years. Held, such copy was properly considered a public record, and a certified copy of the record of a vote therein was competent evidence. New York, etc., R. Co. v. Horgan, 26 R. I. 448, 59 A. 310.

76. On issue of service of a person as a

usually proven by transcript or copy,[77] though the originals are competent when produced.[78] Copies must be certified as required by law,[79] or otherwise duly authenticated.[80] Foreign records [81] and laws [82] must be proved in the manner pre-

soldier, copy of muster roll, certified by adjutant general as copy of instrument in his office, admissible under Rev. St. 1895, § 2308. Allen v. Halsted [Tex. Civ. App.] 87 S. W. 754. Accuracy of lithograph copy of maps being shown, and it appearing that copy had long been used by city in dealing with streets in question, copy was competent evidence. City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

77. Public records may be proven by duly certified copies thereof. Copy of death certificate. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40. By Rev. St. 1895, art. 2306, certified copies of the record of proceedings in the courts of the state, made under seal of the custodian of such record, are admissible in evidence. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894. Order confirming composition of bankrupt sufficiently proved by certified copy under Bankr. Act, § 21, subd. f. Mandell v. Levy, 93 N. Y. S. 545. See Bankruptcy, 5 C. L. 367.

78. If certified copies of departmental records are admissible under U. S. Rev. St. § 889, there is no good reason why orlginals should not be admitted. Lorenz v. United States, 24 App. D. C. 337. Application for pension, supportlng affidavit and indorsed wrapper attached thereto, being part of archives in the office and custody of controller, admissible to show war service of person. Allen v. Halsted [Tex. Civ. App.] 87 S. W. 754.

79. Certification of copy of judgment held sufficient where certificate was on separate sheet which was attached to copy of decree. Woodworth v. McKee, 126 Iowa, 714, 102 N. W. 777. Transcript of judgment admissible when clerk's certificate showed it to be "a full and complete copy of the complaint, answer, reply and judgment." Chicago, etc., R. Co. v. Grantham [Ind.] 75 N. E. 265. County clerk's certificate to copies of record held to comply with law. Glos v. Stern, 213 Ill. 325, 72 N. E. 1057. Certificate of copy of viewers' report held not to show on its face that record was incomplete. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Official records which should be certified by the county clerk are inadmissible when certified by the clerk of the county court, even though one person holds the two offices. Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030. The fact that the clerk's certificate to a copy of the delinquent tax list contained his conclusion as to what part related to the issues did not make it incompetent to prove the material fact shown by the list. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757. Where clerk copies a deed having a certificate of acknowledgment under official seal, the word "seal" written by the clerk in the copy is presumptively held to represent the seal of the officer taking the acknowledgment, and the copy is admissible. Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409. Affidavit of subscribing witness to will, being taken in open court, was admissible, though clerk's certificate was not authenticated by seal. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722.

80. A foreign judgment may be proved by an examined copy. Testimony of two witnesses that they had examined copy of judgment and compared it with original docket entries and found it correct, sufficient to prove the judgment. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

81. Court records of another state are competent when attested and certified in the manner required by law. Transcript of foreign judgment competent under Burns' Ann. St. 1901, § 458, though only the initials of the Christian names of the clerk and judge appear in their signatures to certificates. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Whether the record of a foreign decree is properly authenticated is a question for the trial court. Clark v. Eltinge [Wash.] 80 P. 556. The sufficiency of the certification of a foreign judgment is governed by the law of the forum. Illinois judgment held properly certified under Iowa Code, § 4646, regardless of Illinois law. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279. A transcript of a will and its probate in another state must not only be certified by the clerk, under seal of the court, as a correct transcript, but the presiding magistrate must certify that the attestation is in due form. Civ. Code 1895, § 5237. Conrad v. Kennedy [Ga.] 51 S. E. 299. Certified copies of record of proceedings in another state are inadmissible if the court did not have jurisdiction. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

82. The public seal of another state affixed to a copy of a written law of that state is admissible as evidence of such law. Rieck v. Griffen [Neb.] 103 N. W. 1061. Oral proof of Pennsylvania statute as to giving notice of protest is incompetent under Code Civ. Proc. § 942. Traders' Nat. Bank v. Jones, 93 N. Y. S. 768. By Civ. Code 1895, § 5231, the public laws of another state, as published by authority, may be proved by introducing the authorized publication, which will be judicially noticed as genuine. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. "Willson's Revised and Annotated Statutes of Oklahoma, 1903," made by statute presumptive evidence of laws of the territory, is admissible in Texas to prove such laws. Beard v. State [Tex. Cr. App.] 83 S. W. 824. Pamphlet purporting to contain insurance laws of state and to be printed by "state printers" does not purport to be printed by authority of the state so as to be admissible under the Texas statute. Northwestern Nat. Life Ins. Co. v. Blasingame [Tex. Civ. App.] 85 S. W. 819. Under Hurd's St. 1895, § 65, c. 24, pamphlet containing ordinance, purporting to have been published by authority of village trustees is competent evidence of the ordinance. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415. Nonexpert could not say whether records were kept in accordance with laws of a foreign country, since this involved proof of foreign laws in a manner other than that provided in Code Civ. Proc. § 942. Pirrung v.

scribed by law. Records, when used to prove facts contained therein, should be produced entire.[83] Persons who have searched records may testify that they do not contain certain entries;[84] but some courts hold that such testimony can be given only by the lawful custodian of the record.[85]

Official documents are competent to prove essential [86] but not incidental [87] facts recited therein, and are not competent if unauthorized.[88] The contents of an official document beyond the jurisdiction of the court may be proved by the deposition of the official custodian.[89] Courts of Louisiana receive the attestation of American consuls or commercial agents residing abroad as legal evidence of the attributes and official station or authority of magistrates and civil officers of foreign countries.[90]

(§ 7) *D. Proceedings to procure production of documentary evidence.*[91]—If timely [92] and legally sufficient [93] notice to produce documentary evidence is given,[94] or if a subpoena duces tecum or order to produce is asked for,[95] the court should order such evidence to be produced.[96] Refusal to produce unprivileged [97] documents

Supreme Council of Catholic Mut. Ben. Ass'n, 93 N. Y. S. 575.

83. Parts of records of classification of public lands being introduced, other parts were competent in rebuttal. Lynch v. U. S. [C. C. A.] 138 F. 535. Transcript of judgment held incompetent because only a part of the record to be proved. Southern R. Co. v. Seymour, 113 Tenn. 523, 83 S. W. 674.

84. That records did not show naturalization of certain person. Rev. St. 1898, § 4163, relative to proof of records by certificate of custodian, does not render such proof incompetent. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49. Town clerk after examination of records of marriages and deaths could testify that an alleged marriage and alleged death did not occur in a certain year. McPhelemy v. McPhelemy [Conn.] 61 A. 477.

85. Testimony of one not the custodian that he had examined files in office of secretary of state and had failed to find record of charter of certain corporation, held inadmissible. Cobb v. Bryan [Tex. Civ. App.] 83 S. W. 887.

86. Duly certified tax roll of a town showing lands assessed and names of those assessed as owners, competent evidence in statutory proceedings to exclude bonds from municipal organization under Acts 1903, c. 5197. Town of Ormond v. Shaw [Fla.] 39 So. 108.

87. Since viewers under Act Feb. 17, 1822, P. L. 35, have no power to fix width of road, the record of their report is not legal evidence of the width of the road. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Certificate of discharge of soldier from army, reciting his physical characteristics, is inadmissible to prove his size and height. Commonwealth v. Crowley, 26 Pa. Super. Ct. 124.

88. In Texas, a certificate of the secretary of state that a permit to a foreign corporation to do business in the state has been forfeited for nonpayment of taxes is not evidence of such forfeiture, since the statutes do not authorize such certificate. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

89. Kelly v. Moore, 22 App. D. C. 9.

90. When German official certifies to genuineness of signatures to power of attorney and American vice consul certifies to signature and seal of such official, his capacity and authority, the signatures to the power must be considered as proved. Rev. St. 1876, § 1436. Werner v. Marx, 113 La. 1002, 37 So. 905.

91. See 3 C. L. 1368.

92. Where in suit for injunction the time between sanction of the bill and return of the rule was less than 10 days, an order to produce books in less than that time was proper, it being impossible to give 10 days notice, and defendant having made no objection. Town of Adel v. Woodall [Ga.] 50 S. E. 481.

93. Notice specifying letters by insurance agent concerning loss, and letters by insured to agent concerning the desire for insurance and concerning the loss was sufficient. Home Ins. Co. v. Overturf [Ind. App.] 74 N. E. 47. A notice need not call for the production of a paper "from term to term;" if the trial occurs at a term subsequent to that for which notice was given, the party served is bound to produce the paper at such subsequent term. Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970.

94. Refusal to order production of letters proper where no exception or objection was taken, and no formal notice to produce was given, or showing made as to proof to be made. Winn v. Itzel [Wis.] 103 N. W. 220.

95. Administrator's books on appeal from probate court will not be ordered to be produced unless subpoena or order is asked for. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548.

96. Where a party does not respond to a notice to produce a writing, and the adverse party makes affidavit, or counsel states in his place, that he believes the writing to exist and to be under the control of the party, and that it is material, it is error for the court to refuse an order to produce the writing, under Civ. Code 1895, § 5253. Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970. The court will order the production of books shown to be material and essential to the full presentation of questions raised. Dun v. International Mercantile Ag., 133 F. 1004.

97. Reports made by conductors and motormen of accidents occurring along the line made to the claim agent of a street railway

renders the party guilty of contempt.[98] The Federal court has no power to order an examiner before whom documents and books have been produced under subpoenas duces tecum to remove such documentary evidence to another district for use in examining witnesses.[99]

§ 8. *Evidence adduced in former proceedings.*[1]—Testimony of a witness given on a former trial is admissible when the witness is dead,[2] or beyond the jurisdiction of the court.[3] There is a conflict as to the applicability of this rule in the Federal courts.[4] The issues and parties in the former proceeding must have been substantially the same as those in the subsequent trial.[5] A transcript of the former testimony is the best evidence of it,[6] if shown to be correct,[7] but oral testimony by one who heard it is admissible.[8] Testimony of a party on a former trial may be com-

company are not privileged and must be produced under a duces tecum issued in an action growing out of such accidents. Ex Parte Schoepf, 3 Ohio N. P. (N. S.) 93.

98. Where a witness served with a subpoena duces tecum testifies that he is unable to find the desired document, but the attorney for the party admits, when called to the stand, that the document is in court in his possession, the court has power to order him to produce it and to punish him for contempt if he fails to do so. Dunn v. New York Edison Co., 92 N. Y. S. 787.

99. Pepper v. Rogers, 137 F. 173.

1. See 3 C. L. 1369.

2. Code Civ. Proc. § 830, gives court no discretion to refuse to allow reading of testimony of deceased witness given on former trial. Wallach v. Manhattan El. R. Co., 94 N. Y. S. 575. Code Civ. Proc. § 830, authorizing reading of testimony of witness given on former trial, after death of witness, applies to experts. Id. Exception to denial of right to read testimony of expert given on former trial is not waived by calling another expert, even though the court customarily allows only one expert on a side. Id.

3. Statutes so providing, as Rev. St. Ohio, § 5242a, are merely declaratory of the common law. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Under Comp. Laws 1897, § 10142, a deposition used on trial may be used on an appeal or retrial, in the absence of any showing that witness, unable to attend when deposition was taken, is on the second trial able to be present. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Evidence by a witness on a former trial is admissible only where the witness has left the state permanently or for such an indefinite time that his return is contingent or uncertain. Southern R. Co. v. Bonner [Ala.] 37 So. 702. Testimony of a witness that he had seen the absent witness and that he said he was living in Texas is not a sufficient foundation for the admission of his former testimony. Id. Mere proof that diligent search has been made in the county by the sheriff and deputies for one who testified at the preliminary examination, is insufficient to warrant admission of his former testimony. Bardin v. State [Ala.] 38 So. 833.

4. The rule is properly applied in actions at law in the Federal courts, sitting in states where it is the law, when the witness is outside the district and more than one hundred miles from the place of trial. Rev. St. § 861, providing that the mode of proof shall be by oral testimony and examining witnesses in open court, with some exceptions, does not preclude application of such a state rule. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. But in another circuit it is held that the provisions of the revised statutes as to the mode of proof in Federal courts form a complete system, that every case must fall under the general rule or exceptions there specified and that no state legislation can add to or take from the methods of procuring evidence there provided. Diamond Coal & Coke Co. v. Allen [C. C. A.] 137 F. 705. Hence, where there was proof that a witness was 200 miles distant from the place of trial, but no proof that any effort had been made to procure his attendance nor that it was not practicable to obtain his testimony by deposition or otherwise as provided in Rev. St. §§ 863-867, his evidence given at a former trial was excluded. Id.

5. Evidence of deceased witness given in case where issues were practically the same, plaintiffs were the same, and defendant was assignor of present defendants. Martin v. Ragsdale [S. C.] 50 S. E. 671. Where conspiracy is charged in a contempt proceeding, evidence therein is admissible in a subsequent contempt proceeding involving the same conspiracy, which has continued meanwhile. Christensen v. People, 114 Ill. App. 40. Certified translation of shorthand reporter's notes of testimony of a witness held inadmissible when proceeding was not a "retrial" of that in which the testimony was given (Construing Iowa statute. See 91 N. W. 908). In re Wiltsey's Will, 122 Iowa, 423, 98 N. W. 294. Two suits being so connected in subject-matter as to be practically one, and having been consolidated, a deposition taken in one suit before consolidation was admissible in the consolidated suit, after the death of the witness. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390.

6. Error to permit jurors to tell what witness testified, when transcript was available. Estes v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 909. Question as to what a witness testified on a former trial, such witness not having testified on the present trial, improper. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046.

7. An unsigned, unverified transcript of testimony on a former proceeding, not shown to be correct, held inadmissible. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428.

8. The fact that the deceased witness'

petent as an admission against interest.[9] In the absence of anything in a stipulation as to facts limiting its use, it may be introduced in evidence in a subsequent trial of the same cause.[10]

The record of a coroner's inquest is inadmissible to show cause of death in another proceeding.[11]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*[12]—Mere conclusions of a witness[13] or the opinions of nonexperts on issues

testimony at the former trial was taken down officially in shorthand and transcribed in longhand does not make oral evidence, by one who heard the testimony, incompetent. Meyer v. Foster [Cal.] 81 P. 402.

9. Testimony on a former trial is competent as an admission against interest, though it does not contradict present testimony. Lush v. Incorporated Town of Parkersburg [Iowa] 104 N. W. 336.

10. Stipulation that certain person was seized and possessed of the land in dispute at his death. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739. A stipulation containing an admission is not limited to the first trial, but is in the case until the litigation is ended, and on a second trial, it may be read from the record of the preceding trial. Stemmler v. New York, 179 N. Y. 473, 72 N. E. 581.

11. Finding at coroner's inquest that deceased committed suicide, is inadmissible in action on life insurance policy, where suicide is the defense. Boehme v. Sovereign Camp Woodmen of the World [Tex.] 84 S. W. 422; Boehme v. Sovereign Camp of Woodmen of the World [Tex. Civ. App.] 85 S. W. 444; Kane v. Supreme Tent Knights of Maccabees of the World [Mo. App.] 87 S. W. 547.

Contra: Verdict or inquisition of coroner's jury competent evidence on issue of suicide. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. But depositions taken before coroner's jury are not competent. Id.

Note: For discussion and collection of authorities see note to Aetna Life Ins. Co. v. Milward [Ky.] 68 L. R. A. 285.

12. See 3 C. L. 1370.

13. Nonexperts are required to testify to facts within their own knowledge and not to opinions, inferences, and conclusions from facts. Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14; Illinois Steel Co. v. McNulty, 105 Ill. App. 594.

Held mere conclusion and inadmissible: Whether testator controlled, or was controlled by, his wife. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Whether price of stock was steady enough to withstand the putting of 18,000 shares on the market. Spinks v. Clark [Cal.] 82 P. 45. Whether there was anything unusual in the appearance of a mail crane at a railway crossing. Western R. of Ala. v. Cleghorn [Ala.] 39 So. 133. Whether or not car on which workmen were being carried was overcrowded. Chicago Terminal Transfer R. Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133; Chicago Terminal Transfer Co. v. O'Donnell, 114 Ill. App. 345. Whether it was possible to discover defect in plant previous to the accident. Village of Upper Alton v. Green, 112 Ill. App. 439. Whether witness could have told that a wheel of a certain size was revolving, under a certain condition of light. Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573. Whether there had not been previous attempts to break into dwelling. Osborn v. State, 140 Ala. 84, 37 So. 105. What witness could have seen if he had taken down the lids of a machine. Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573. Testimony that defendant acted as though he thought five or six men were after him. Bell v. State, 140 Ala. 57, 37 So. 281. That only baggage received on board ship was that shown by baggage list. Lunansky v. Hamburg-American Packet Co., 94 N. Y. S. 557. That witness did all in his power to get a message off. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. That certain securities were of doubtful value. Kelly v. Home Sav. Bank, 92 N. Y. S. 578. That administrator "did not speak very friendly" of certain persons. Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113. That witness thought deceased was near enough to hear a conversation. Hourigan v. Norwich, 77 Conn. 358, 59 A. 487. That testator was incapable of self-control, or self-government. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Opinion as to existence or nonexistence of a substantive fact is ordinarily incompetent. Cleveland, etc., R. Co. v. Alfred, 113 Ill. App. 236. Unless the testimony is the result of an actual experiment, a witness may not testify how far a "small object" at a certain point could be seen on a clear day. Ayers v. Wabash R. Co. [Mo.] 88 S. W. 608. Statements of brakeman held mere mental operations and conclusions regarding reasons for engineer's action. Southern R. Co. v. Bonner [Ala.] 37 So. 702. Word "authority" used in question as to powers of agent calls for conclusion. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43. Question to witness whether he was an expert on insanity held to call for conclusion. Braham v. State [Ala.] 38 So. 919. Testimony of general manager of railroad that company never consented to use of its track as a walk by persons not employes, incompetent. Gulf, etc., R. Co. v. Matthews [Tex.] 13 Tex. Ct. Rep. 244, 88 S. W. 192. Certain evidence held incompetent because containing statements of conclusions. Slater v. New York City R. Co., 94 N. Y. S. 395. Question whether any cement was ever stolen from certain company held too general and to call for conclusion. State v. Minck [Minn.] 102 N. W. 207. Question calling for comparison of values and not for a fact, properly excluded. Sylvester v. Ammons, 126 Iowa, 140, 101 N. W. 782. Testimony of nonexpert that before accident horse was worth about $200 and that after it he would not give $50, inad-

missible. Reid v. New York City R. Co., 93 N. Y. S. 533. Certificate of clerk containing only his conclusions as to contents of a record, held incompetent. Bickerdike v. State, 144 Cal. 698, 78 P. 277. Witness' answer to question regarding speed of car, that it would be hard to judge because the car had just started and could not have been running fast, excluded because a mere conclusion of fact based on another conclusion of fact. Birmingham R. Light & Power Co. v. Rutledge [Ala.] 39 So. 338. In action on bond, testimony of a witness that he would not have accepted the bond if he had known the facts shown by the proof, was inadmissible, the witness having had nothing to do with the acceptance of the bond. United States Fidelity & Guaranty Co. v. Blackley, Hurst & Co. [Ky.] 85 S. W. 196. In suit to enjoin location of cemetery, statements of witnesses that their land would depreciate in value because they would not and could not drink water off dead people, held mere opinion on issue whether water would be polluted. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. Admission of statement of witness as to what she thought her condition was, though an opinion, was not reversible error, where she had previously testified to all the facts. Chicago City R. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755.

Mental status: Witnesses are not permitted to testify to their motives, wishes, or mental status. Barnewell v. Stephens [Ala.] 38 So. 662. Purchaser of property may not give his conclusion as to whose efforts induced him to buy. Johnson v. Dysert [Kan.] 79 P. 652; Jenkins v. Beachy [Kan.] 80 P. 947. Testimony of plaintiff injured by collision that he looked and thought he would have plenty of time to cross the street, held competent on issue of his negligence. McCrohan v. Davison [Mass.] 73 N. E. 553. Where the intent is a material issue in the case, the party may be asked the direct question what his intent was at the particular time or with respect to the particular act in question. If circumstances tend to show an intent and notice thereof to the other party, such testimony is admissible; an undisclosed intention is inadmissible. Dunbar v. Armstrong, 115 Ill. App. 549. On issue of fraud as to creditors, buyer and seller properly allowed to testify directly to their intent in the sale. Hill v. Page, 95 N. Y. S. 465. The cognition of another is not a fact of which a witness may testify. Question to physician as to "what every experienced physician knows," improper. Braham v. State [Ala.] 38 So. 919. In an action on a life insurance policy, the defendant, in order to prove that the insured had committed suicide, sought to introduce in evidence the following declaration of the deceased made about an hour before his death: "Adolph, will you be as good a friend to my wife as you have been to me?" Held, that the declaration is not admissible. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305.

Note: "In most jurisdictions declarations of intention are admitted in proof of a subsequent act, where the declarations are made under circumstances precluding the idea of misrepresentation or bad faith, and so close to the act in point of time as to render it probable that the intention was carried into execution. Commonwealth v. Trefethen, 157 Mass. 180, 24 L. R. A. 235; Rens v. Northwestern, etc., Ass'n, 100 Wis. 266. In the present case the court, while not squarely rejecting this doctrine, refuses to apply it to a case where the statement does not expressly declare the alleged intention, but merely implies it. The soundness of this decision seems doubtful; for, once admitting that the intention is a relevant fact and that it may be proved by evidence of declarations, it is difficult to see why a statement should not be admitted, which under the circumstances could reasonably be interpreted as expressing such intention. In cases of murder and arson remote and obscure allusions to the act in contemplation are often admitted to show an existing disposition or design. State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State v. Gailor, 71 N. C. 88." 17 Am. Rep. 3.—18 Harv. L. R. 393, commenting on Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305.

Held statements of fact, and admissible: That temperature in room was "cold." Dahms v. Moore, 110 Ill. App. 223. Lander v. Sheehan [Mont.] 79 P. 406. How far wreckage had been dragged by car. Louisville & N. R. Co. v. Pearce [Ala.] 39 So. 72. How far engineer could see headlight of another engine when at a certain place. Southern R. Co. v. Bonner [Ala.] 37 So. 702. Whether witness (defendant) ever advised son to leave his wife. Leavell v. Leavell [Mo. App.] 89 S. W. 55. Testimony of plaintiff as to what he would have done if he had heard a whistle. International & G. N. R. Co. v. Davis [Tex. Civ. App.] 84 S. W. 669. Proof of the usage of term "winter season" in lumbering is proof of a fact. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866. Testimony of witnesses as to effect of polluted water on land and crops is testimony to facts. Watson v. Colusa-Parrott Min. & Smelting Co. [Mont.] 79 P. 14. When witness said he knew working condition of semaphore at certain time, a question what that condition was, called for a fact. Chicago & A. R. Co. v. Vipond, 112 Ill. App. 558. Witness may testify who was in actual possession of designated realty at a given time. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984. Witness who saw plaintiff immediately after his fall could testify that he found him senseless. Hyland v. Southern Bell Tel. & T. Co., 70 S. C. 315, 49 S. E. 879. Witness may state that there was no dynamite in his house when he left it without being an expert on explosives. Davis v. State [Ala.] 37 So. 676. Questions as to amount of cotton and value of melilotus destroyed by stock call for facts. Ryall v. Allen [Ala.]38 So. 851. Testimony that some of the passengers on a coach seemed to be drunk, and that they were rude and boisterous was testimony to facts. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 84 S. W. 270. Statement of damage to cattle from delay in shipment held not to involve a conclusion. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82. Proper to allow answer to question whether train was runing at usual rate after stopping at a railroad crossing. Southern R. Co. v. Bonner [Ala.] 37 So. 702. Question to witness who had talked to accused, whether he said any-

which are for the court [14] or jury,[15] or the subject-matter of which requires expert

thing irrational did not call for an opinion on his sanity. State v. Lyons, 113 La. 959, 37 So. 890. Question whether testator spoke of his brother "affectionately or otherwise" does not call for conclusion. Appeal of Spencer, 77 Conn. 638, 60 A. 289. Plaintiff in assault case may testify that she had her back cauterized for the ailment resulting from her injury. Hubbard v. Perlie, 25 App. D. C. 477. Question whether one's hand could be caught in gear of machinery held not to call for opinion, but to be a way of getting a description of a machine. Gomes v. New Bedford Cordage Co., 187 Mass. 124, 72 N. E. 840. Question to commissioner of public works whether he objected to use of dynamite by contractor in excavating tunnel does not call for conclusion. City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46. Testimony that witness could not get into car before he was hurt (by a pole), because the car was crowded, was not a mere conclusion. Indianapolis St. R. Co. v. Haverstick [Ind. App.] 74 N. E. 34. Statement that defendant "acknowledged" that he took horses at a certain valuation was not a conclusion on the issue of an agreement to pay a certain price. Hunter v. Davis [Iowa] 103 N. W. 373. In action for wrongful death, testimony of witness that, in his opinion, deceased was one of two men he saw walking on the track, was competent. Gulf, etc., R. Co. v. Matthews [Tex.] 13 Tex. Ct. Rep. 244, 88 S. W. 192. Question who was in "possession" of land at a certain date proper, "possession" being used in sense of "occupancy" and not of "seizin." Nathan v. Dierssen, 146 Cal. 63, 79 P. 739. Conductor may testify whether it was brakeman's duty to warn a passenger whom he sees about to do some act liable to result in injury to him. Long v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 1048. A witness may give an opinion as to the time between two facts where the time has not been measured by a timepiece, nor dates noted. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

14. Whether sender of message considered addressee liable for charges. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. Evidence of witnesses inadmissible on construction of instruments. Dorr v. Reynolds, 26 Pa. Super. Ct. 139. Opinion of witness as to what she meant by language used in letter incompetent. Mabb v. Stewart [Cal.] 81 P. 1073. Question held to call for opinion whether acts had resulted in surrender of policy or its invalidity. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200. Question as to effect of nonpayment of last dues in beneficial association, improper. Wells & M. Council No. 14 Junior Order U. A. M. v. Littleton [Md.] 60 A. 22. Possession being a question of law, statements of witness that a person was in possession and that he "seemed" to be in possession of certain property, inadmissible. Howell v. Simpson Grocery Co., 121 Ga. 461, 49 S. E. 299. Whether, under certain circumstances, a person would have been a beneficial or nonbeneficial member of an association. Wells & M. Council, No. 14, Junior Order U. A. M. v. Littleton [Md.] 60 A. 22. Whether witness knew of attempts to secure title to land called for opinion as to what would constitute such an attempt. Dawson v. Orange [Conn.] 61 A. 101. A witness, as an accountant, may summarize classified items in railroad books, leaving the effect to be given such items to the court. State v. Nevada Cent. R. Co. [Nev.] 81 P. 99.

15. Whether property was urban or rural. Philadelphia v. Dobbins, 24 Pa. Super. Ct. 136. That there was less danger in crossing a railroad track at a certain point than at another. Savannah, F. & W. R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. Whether train stopped long enough to allow passengers to alight. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445. That sidewalk was in a reasonably safe condition. Miller v. Canton [Mo. App.] 87 S. W. 96. Whether rule requiring work trains to flag regular trains was safe. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Whether one steering road engine had necessary knowledge and ability to steer safely. Johnson v. Highland [Wis.] 102 N. W. 1085. Conclusion of witness that her son was afflicted and needed medical attention. Valentini v. Metropolitan Life Ins. Co., 94 N. Y. S. 758. Question what defendants could have done improper, because calling for conclusion on negligence. Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458. Opinions inadmissible on incompetency of a servant. Purkey v. Southern Coal & Transportation Co. [W. Va.] 50 S. E. 755. Opinion of witness that guy rope anchor pulled out because not weighted heavily enough, inadmissible. Lounsbury v. David [Wis.] 102 N. W. 941. Questions held to call for conclusions as to negligence in handling cars, where they had already testified to facts. Cleveland, etc., R. Co. v. Osgood [Ind App.] 73 N. E. 285. Error to allow witness to say whether he willfully, negligently, or carelessly failed to watch and look after a fire. Sampson v. Hughes [Cal.] 81 P. 292. Engineer should state, when a witness, what he did to stop a train in order to avoid striking stock on the track, and not whether he did everything he could do. Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780, Agent could not testify whether he had authority to make a contract giving an injured employe $40 a month until he recovered. American Tel. & T. Co. v. Green [Ind.] 73 N. E. 707. Question whether dredge was delivered with intention of transferring title called for deduction which was for the jury. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. Offer to prove that defendant had right to command services of plaintiff and to discharge him held objectionable as offer to prove ultimate fact, issue being parties' relation. Bentley, Shriver & Co. v. Edwards [Md.] 60 A. 283. Statement in proof of death and coroner's jury's verdict that death was due to alcoholic poisoning held to have no probative force, because mere opinion based on same facts as were before jury. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165. Ownership of granite interest in land being in issue, witness could not testify that granite quarried on the land belonged to the one who had quarried it.

skill or knowledge,[16] are inadmissible. But the opinions of nonexperts are received in regard to such matters as value,[17] ownership,[18] sanity,[19] mental capacity,[20] and

Phillips v. Collinsville Granite Co. [Ga.] 51 S. E. 666. Where testimony of witness on preliminary examination was used to impeach him, and examining magistrate testified that witness did not give certain testimony before him, it was error to allow such magistrate to say that he remembered it because it had impressed him as unreasonable. Dyer v. State [Tex. Cr. App.] 83 S. W. 192.

Where descriptive language can put the facts before the jury adequately, opinion evidence is incompetent. Phladelphia v. Dobbins, 24 Pa. Super. Ct. 136. Opinion evidence inadmissible when facts and circumstances are such that they can be clearly detailed and described and the jury can readily form conclusions therefrom. City of Macon v. Humphries [Ga.] 50 S. E. 986. Witness' statement that horse, after accident, could not be used for same purpose as before, given without facts, inadmissible. Reid v. New York City R. Co., 93 N. Y. S. 533.

16. Driver who had no special knowledge of subject could not give opinion on strength of material used in clips which attached shafts to wagon. Schlesinger v. Scheunemann, 114 Ill. App. 459. Non-expert cannot give opinion on injured man's ability to work even though he knew him and lived near him. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 87 S. W. 164.

17. After testifying to facts, the opinion as to value or amount of damage is merely a matter of computation, and, by weight of authority, a witness may make such computation and present the result to the jury for what it is worth. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14. Witnesses who testified to conditions existing before and after a mill was built on a stream, could give opinions as to what rental value would have been if stream had remained unpolluted, and as to rental value during the time the stream was polluted. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882. A witness may testify what, in his opinion, his services would be worth but for his injuries. City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724. Opinion of party performing services is competent on their value. Duhme Jewelry Co. v. Hazen, 6 Ohio C. C. (N. S.) 606. Any person having sufficient knowledge of a stock of goods to speak intelligently of its value may give an opinion, the weight of which is for the jury. Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86. Estimates and opinions are competent on the question of deterioration in value of improvements on real property. Sydney Webb & Co. v. Daggett [Tex. Civ. App.] 87 S. W. 743. Witness who testified she knew cost of property and its value qualified to testify to value. Glass v. Buttner [Wash.] 81 P. 699. An opinion on value must be confined to the market value of the land as a whole but may state the grounds of his opinion. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482. An owner of property, though not an expert in real estate values, may testify to value of land and buildings before and after fire. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374. Real estate man who had no special knowledge of real estate values in a section of the city where land concerned was located, and who expressed an opinion contrary to the law as laid down by the court, which opinion might affect his view of the value, was properly held disqualified on the issue of damages in condemnation proceedings. Klous v. Com. [Mass.] 74 N. E. 330. After it was shown that the owner of a stock of goods was the manager of the business, that he knew their value, that they and the last inventory had been burned, and that he could not give the value of each item, an estimate in a lump sum was competent. Union Pac. R. Co. v. Lucas [C. C. A.] 136 F. 374.

As to damages: Witness may not state amount of damage to land caused by overflow. Owen v. Chicago, etc., R. Co. [Mo. App.] 83 S. W. 92. Statement that plaintiff had suffered damages in a named sum because goods levied on were kept in stock was a mere conclusion. Cross v. Coffin-Fletcher Packing Co. [Ga.] 51 S. E. 704. Answers to questions as to damage from overflow of land not improper where elements of damages were given, and amount not stated. Owen v. Chicago, etc., R. Co. [Mo. App.] 83 S. W. 92. Though it is not proper to allow witnesses to give the difference between the market value of land before and after an alleged injury thereto without first giving an estimate of such values, such practice is not reversible error. Parrott v. Chicago G. W. R. Co. [Iowa] 103 N. W. 352. Testimony of plaintiff that he thought he would be safe in saying his loss from spoiling of meat in poor refrigerator would equal $100, held not competent evidence of damages. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. Where question was whether road would make land better or worse and answer was that witness thought it would advance the price, evidence was held improper because too closely akin to opinion evidence on amount of damages. Pichon v. Martin [Ind. App.] 73 N. E. 1009. Opinion evidence as to consequences of certain threatened acts held competent, when from the nature of the case, it was the only evidence available. Patterson v. Johnson, 114 Ill. App. 329.

18. Ownership of personal property is a fact to which a witness may testify. In action for wrongful levy question "Whose property was that?" did not call for a conclusion. Rasco v. Jefferson [Ala.] 38 So. 246. Witness held qualified by personal knowledge of log marks to testify regarding ownership of logs. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259.

19. One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane. Where witness stated condition of person as he had observed it for six months, his conclusion that such person was not mentally competent to make a will, was admissible. Spencer v. Spencer [Mont.] 79 P. 320. Non-experts who have had opportunity to observe an accused may give an opinion as to his sanity. State v. Lyons, 113 La. 959, 37 So. 890. Non-expert may give opinion on sanity or insanity, detailing his opportunities for observation, and the weight of such opinion is for

other matters not requiring expert skill or knowledge,[21] when the witness is shown to be qualified [22] by his observation or familiarity with the subject of inquiry,[23] and when his opinion is accompanied by a statement of the facts on which it is based.[24]

the jury considering the opportunity for and accuracy of such observation. Howard v. Carter [Kan.] 80 P. 61. Non-expert witnesses who have observed acts and conduct of a person may give an opinion on his sanity after giving instances of his conduct. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024. Witness who had known defendant since childhood and had had several recent conversations with him could testify as to his sanity. Braham v. State [Ala.] 38 So. 919. While a witness who has testified to facts observed which created an impression on his mind may give an opinion on sanity, he may not give an opinion on the degree of mental incapacity, and whether the person observed was capable at the time of making a valid and binding contract. This is an issue of law and fact for the jury, under instructions from the court. Denver & R. G. R. Co. v. Scott [Colo.] 81 P. 763. Lay witnesses may, on issue of insanity, only characterize acts which they have observed and to which they testify; they cannot give opinions based on hypothetical facts. People v. Silverman, 181 N. Y. 235, 73 N. E. 980. Non-expert opinion as to sanity must be based on observed facts; but such opinion is competent without facts to show a continuation of normal or rational conditions. Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532. On issue of insanity, a witness may state whether defendant talked disconnectedly, but may not testify to "any other peculiarities" he noticed, since these peculiarities might not be relevant on insanity. Braham v. State [Ala.] 38 So. 919. Reporter who had not known defendant previously, but had interviewed him, not qualified to give non-expert opinion on insanity. Id.

20. A witness may give an opinion on mental unsoundness of a testator, based on facts within his knowledge. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. One who had long known a person, and had done business with him, could give opinion, with facts on which it was based, as to his mental condition. Field v. Field [Tex. Civ. App.] 87 S. W. 726. An opinion as to the testamentary capacity of an alleged testator is competent if based on observation of his habits, conduct, demeanor, conversation and acts, and if the testator's physical condition is not in issue; but when alleged incapacity is due to an exhausted physical condition, induced by illness or the approach of death, weakening the mental faculties, mere opinion evidence is incompetent. Struth v. Decker [Md.] 59 A. 727. Attorney who drew will and had known testator for fifteen years could compare mental capacity at time of execution of will and before that time. Id. Witness may give opinion based on his own observation of testator's conduct, the facts observed having also been testified to. In re Selleck's Will, 125 Iowa, 678, 101 N. W. 453. But facts testified to must be consistent with the opinion expressed. Opinions that a testator was incompetent held inadmissible where none of the facts testified to by witnesses were inconsistent with capacity or sanity. Hibbard v. Baker [Mich.] 12 Det. Leg. N. 384, 104 N. W. 399. Testimony of associates of a decedent, who had observed his habits, that they had seldom or never seen him drink or appear to be under the influence of liquor, competent to prove he was not an habitual or immoderate drinker. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165.

21. Non-experts may testify to experiments, observed by them, which were performed by an expert. Experiments to show direction in which timber is thrown by ripsaw. Krueger v. Brenham Furniture Mfg. Co. [Tex. Civ. App.] 85 S. W. 1156. Evidence of examination of flat cars made to test credibility of witness held properly admitted. Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507.

Speed of trains: Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367. Anyone of average intelligence who sees a moving car is qualified to express an opinion as to its speed. Blick v. Metropolitan R. Co., 22 App. D. C. 194. Person with whose vehicle a street car collided, and who testified that he was familiar with the speed of trains running twenty or twenty-five miles an hour, may state that car was running at about that speed. Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648. Ordinary witness who has given some attention to speed of trains and has some knowledge of time and distance may testify to speed of a train; his inexperience goes to the weight, not the admissibility of his testimony. Atchison, etc., R. Co. v. Holloway [Kan.] 80 P. 31. Witness who had observed and ridden on trains properly allowed to testify to speed of a train at a crossing. Borneman v. Chicago, etc., R. Co. [S. D.] 104 N. W. 208. One who has traveled and has observed the speed of trains may give an opinion on the speed of a train which he has observed. Gregory v. Wabash R. Co., 126 Iowa, 230, 101 N. W. 761.

Appearances of things: Wife may testify to external symptoms observed by her indicating injury and pain suffered by husband, though she may not generalize and give an opinion. Macon Railway & Light Co. v. Mason [Ga.] 51 S. E. 569. A witness may state result of his observations regarding the appearance or condition of things observed by him, when the facts cannot be reproduced and made palpable to the jury. Testimony of witness, a passenger on a street car, that another passenger, stepping on running board, "slipped" and fell, admissible. McCabe v. San Antonio Traction Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 576, 88 S. W. 387. Testimony that snowy place on walk looked as though someone had fallen there, competent. Rathbrock v. Cedar Rapids [Iowa] 103 N. W. 475.

22. [Qualification of experts, including qualification of witnesses to value, whom many courts treat as experts, is treated in section 9C, post.]

Qualification of non-experts to give opinions is for the court. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14; Braham v. State [Ala.] 38 So. 919. Qualifi-

(§ 9) *B. Subjects of expert testimony.*[25]—Expert opinion is admissible in regard to matters adequate knowledge of which presupposes special skill, experience, or investigation;[26] it is inadmissible regarding matters of common knowledge,[27] or

cation of non-expert to testify as to sanity of accused in homicide case is for court; weight and value of his opinion is for the jury. Shaffer v. U. S., 24 App. D. C. 417. Witness should not be permitted to testify to land values or damage to land until his competency has been shown by a proper preliminary examination. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996. Qualification of expert on real estate value should be shown before his testimony is received. Watkins Land Mortg. Co. v. Campbell [Tex.] 84 S. W. 424.

23. One not a surveyor may testify to measurements of a city lot made by him. Gunkel v. Seiberth [Ky.] 85 S. W. 733. Witness may tell within what time an act may be done, when he testifies from personal knowledge. Biggers v. Catawba Power Co. [S. C.] 51 S. E. 882. Not necessary to qualify physician as expert to admit his testimony to course of bullet, when he took part in autopsy and is giving result of his own observations. State v. Lyons, 113 La. 959, 37 So. 890. Non-experts who have had sufficient opportunity to observe may testify to condition of a certain person's health. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156. Witnesses may estimate depth of hole in street which they have seen but not measured. Miller v. New York, 93 N. Y. S. 227. Witness who knew situation could testify whether curve in track was such that it should be flagged when section men are at work. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477. Testimony as to switchman's duties when train was being made up unobjectionable when witness appeared to be testifying from personal knowledge. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. In action for damage to corn by hogs, testimony of plaintiff, a farmer, that he went over the field and observed and estimated the damage, made his estimate competent. Auckland v. Lawrence [Colo. App.] 78 P. 1035. Witnesses familiar with situation may testify how far a railroad track could be seen by a person standing at a certain point and under certain conditions. Chicago, etc., R. Co. v. Crose, 214 Ill 602, 73 N. E. 865. Statement that a railroad semaphore was in good working order at time of a collision not a conclusion when witness testified that he had been over crossing many times before the collision. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22. Witness who had ridden on car over a certain place very often could testify that noise and motion at time when wheels were off the track was not of the usual kind, the issue being whether conductor or motorman knew it was off. Beers v. West Side R. Co., 101 App. Div. 308, 91 N. Y. S. 957. Witnesses who notice that speed of train is unusually fast on approaching a depot are not discredited by fact that they are not familiar with management of railroad under way. Harvey v. Louisiana Western R. Co. [La.] 38 So. 859. Husband who had observed effects of injuries of wife on her effort to work could testify in regard thereto. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 13 Tex. Ct. Rep. 545, 88 S. W. 445. Non-expert may not testify to cause of flashes accompanying blowing out of fuse, he not having been present. Kight v. Metropolitan R. Co., 21 App. D. C. 494.

24. [Opinions on sanity or mental capacity especially must be accompanied by such facts. See cases above.—Ed.]

Proper for experts on value to state elements, such as rental value, location, character of improvements, etc. Watkins Land Mortg. Co. v. Campbell [Tex.] 84 S. W. 424. Witness could testify whether he could have crossed stream at a certain time, after stating fact on which he based his opinion. Machen v. Western Union Tel. Co. [S. C.] 51 S. E. 697.

25. See 3 C. L. 1373.

26. Horst v. Lewis [Neb.] 103 N. W. 460. Expert opinions are admissible in matters of science, special art or particular occupation, where persons inexperienced therein would be unable to reach a proper conclusion from a mere statement of the facts on which the expert opinion is based. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. How long tamarack timbers will remain sound in the ground. Rice v. Wallowa County [Or.] 81 P. 358. Qualified witnesses may testify to number of logs which could have been run and sawed per day by a certain mill. Fletcher v. Prestwood [Ala.] 38 So. 847. Experienced persons may give opinions on usual loss of weight in cattle during transportation. Atchison, etc., R. Co. v. Watson [Kan.] 81 P. 499. Expert testimony admissible to show delay of cattle train at junction point for two hours was not unreasonable. Chicago, etc., R. Co. v. Kapp [Tex. Civ. App.] 83 S. W. 233. Properly qualified witnesses may testify what would be a reasonable time for completion of transit of shipment of horses between two points. Texas & P. R. Co. v. Ellerd [Tex. Civ. App.] 87 S. W. 362. Writings evidencing put or call stock transaction, having no market value, expert testimony was admissible to show their value at a given time. Vroom v. Sage, 100 App. Div. 285, 91 N. Y. S. 456. Expert testimony on process of manufacturing kerosene from petroleum to show that gasoline is lighter and gives off vapor at a lower temperature is competent to aid the jury in determining what a substance sold as kerosene contained. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227. In action to recover for water supply to borough, expert may testify, on issue of sufficiency of supply, what amount is required per day in a town of the same size, no objection being then raised that all the people did not use water. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353. On issue of pedigree of colt, the opinions of persons familiar with the breed of horses by which the parties claimed the colt was sired, and their colts, are competent. Brady v. Shirley [S. D.] 101 N. W. 886. It is competent to prove by one acquainted with the habits and disposition of horses that a stallion is liable to jump over fences or break

out of pasture. Kittredge v. City of Cincinnati, 6 Ohio C. C. (N. S.) 646. Where agreement was to pay reasonable value of services, witnesses could testify to usual custom as to percentage paid, though no fixed custom was proved. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334. Captain of vessel, qualified as expert, could give opinion on whether he could have prevented a collision after he saw a projection in a bridge. Lambert v. La Conner Trading & Transp. Co., 37 Wash. 113, 79 P. 608.

Railroad construction and management: Experts may testify whether unblocked switch frogs are dangerous. Schroeder v. Chicago & N. W. R. Co. [Iowa] 103 N. W. 985. Distance within which street car can be stopped by brake. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169. Expert cannot state distance in which particular car could be stopped unless he has had experience with that or similar cars; but he may state that cars differently equipped could be stopped in a shorter distance. Columbus Ry. Co. v. Connor, 6 Ohio C. C. (N. S.) 361. Speed of train and distance in which it could be stopped not subject of expert testimony unless based on operation of cars and engines of similar construction and equipment. Wise Terminal Co. v. McCormick [Va.] 51 S. E. 731. Experienced railroad men could testify to conductor's duties and whether he ought to give a stop signal in switching before he knew a car to be switched was uncoupled. Pittsburgh, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Properly qualified witnesses may testify as to whether sparks or fire can leave fire box of engine without going through spark arrester; whether engines could be operated without small cinders escaping through smoke-stack; and to construction and efficiency of spark arresters on engines like those in question. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361. Experts may testify to condition of sparks or cinders thrown a certain distance, and whether live or burning sparks would have carried that far if engine emitting them was in proper order. Babbitt v. Erie R. Co., 95 N. Y. S. 429.

Machinery, construction, engineering: Whether insulator on pullover wire was safe. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386. Expert who had superintended erection of electric light plant could testify of his own knowledge to character of dynamo and how many lights it would furnish. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Whether steel plates used in building a vault should have been supported by set screws to protect workmen was for the jury, and expert testimony thereon was incompetent. Dolan v. Herring-Hall-Marvin Safe Co., 94 N. Y. S. 241. Experienced operative, who had described machine, could testify what a person would have to do in order to get his hand caught in it. Wofford v. Clifton Cotton Mills [S. C.] 51 S. E. 918. Miners may testify whether certain bent and broken timbers could have been used to prop up a roof in the mine. Kellyville Coal Co. v. Strine [Ill.] 75 N. E. 375.

Medical, scientific and other professional matters: Opinions of medical men are competent on matters within the range of their profession. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 13 Tex. Ct. Rep. 589, 88 S. W. 857. The fact that medical testimony as to the cause or effect of injury consists usually of opinions based on personal experience and the learning of the profession, and not of positive statements of fact, does not render it incompetent. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Opinion of physician as to cause of death should be confined to facts and should not extend to matters not requiring medical skill or knowledge. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. Physician may testify whether wounds about the head were sufficient to produce death. Horst v. Lewis [Neb.] 103 N. W. 460. Expert medical opinion, based on symptoms as shown by the evidence, is competent on issue whether a person was addicted to use of morphine. Buxton v. Emery [Mich.] 102 N. W. 948. Exclusion of question to physician whether child could show no symptoms of diphtheria one day and develop a fatal case the next was error. Purcell v. Jessup, 99 App. Div. 556, 91 N. Y. S. 165. Physician could testify whether persons unconscious with pneumonia ever rally and regain consciousness. Struth v. Decker [Md.] 59 A. 727. Testimony of physician that pain might possibly be referred to injury did not invade province of jury. Noller v. Wright [Mich.] 101 N. W. 553. A physician may testify to which of two accidents he attributes an injury, the circumstances surrounding each being fully shown. Jones v. American Warehouse Co., 137 N. C. 337, 49 S. E. 355. Medical expert in personal injury action may be asked either as to cause of plaintiff's condition, or conversely, as to effect of injuries such as he received. Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133. Physicians who had examined plaintiff's injured foot, could testify that in their opinion injury must have been caused by contact with uneven surface. Illinois Cent. R. Co. v. Smith, 111 Ill. App. 177. A physician may testify to the probable consequences of an injury. Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. Questions whether injuries to skull were "likely" to result in recurrent troubles or were "apt" to affect injuriously the other eye were proper. Faber v. C. Reiss Coal Co. [Wis.] 102 N. W. 1049. Whether cerebral meningitis would have been caused by injuries shown by evidence and stated in hypothetical case. Birmingham R. L. & P. Co. v. Enslen [Ala.] 39 So. 74. Where evidence showed child well before an accident, and presence of an abscess thereafter, testimony as to what might have caused the abscess was proper. Boehm v. City of Detroit [Mich.] 12 Det. Leg. N. 397, 104 N. W. 626. Physician may give opinion on whether injury was cause of disease or condition by which plaintiff was affected. Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26. Physician may give opinion whether injuries are slight or serious. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Physicians may give opinions on the temporary or permanent character of injuries and the probability or reasonable certainty of recovery. Klingaman v. Fish & Hunter Co. [S. D.] 102 N. W. 601. Physician properly allowed to state whether plaintiff would recover, or the injury was permanent. Kansas

when the facts can be intelligibly presented to the jury and are of such a nature that jurors generally are competent to form opinions and draw conclusions from them.[28] Expert opinion is inadmissible on issues of law.[29]

City, M. & B. R. Co. v. Butler [Ala.] 38 So. 1024. A practicing physician knowing the nature, extent and condition of the injury in its early stages may give an opinion as to whether or not it will be permanent. Citizens' Elec. R. etc., Co. v. Bell, 5 Ohio C. C. (N. S.) 321.

27. Whether keeping cows in connection with hotel is profitable. Smith v. Stevens [Colo.] 81 P. 35. Proper way to lift cable from one insulator pin to another on telephone pole. Meehan v. Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61. Whether land was injured by construction of tunnel whereby smoke was thrown over land, and noise and vibration from trains resulted. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. That certain items of expense, such as coal, were necessary operating expense of a railroad. State v. Nev. Cent. R. Co. [Nev.] 81 P. 99. That railway tunnel increased quantity of smoke at ends, over quantity there would have been if trains ran through open cut. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Question to master mechanic whether it was necessary to sound whistle at stated times to notify employes when to begin and leave work. Powell v. Nevada, C. & O. R. Co. [Nev.] 78 P. 978. Damages to property by change of grade crossing not subject for expert testimony. Ramschasel's Est., 24 Pa. Super. Ct. 262.

28. State v. Nev. Cent. R. Co. [Nev.] 81 P. 99. The opinion of experts should not be received if all the facts can be ascertained and made intelligible to the jury or if it is such as men in general are capable of comprehending and understanding. Opinion of machinist that certain machinery should have been safeguarded incompetent. National Bi uit Co. v. Nolan [C. C. A.] 138 F. 6. Opinion evidence is admissible only where, because of the complexity of the elements involved, it is impossible for the witness to detail all the circumstances which lead his mind to a particular conclusion. As what time would reasonably be required to perform an unusual task or special work, where all the elements or data for calculation could be successfully and intelligibly presented to the jury. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. Expert opinion **inadmissible** on question whether land was mineral or non-mineral. Lynch v. United States [C. C. A.] 138 F. 535. Whether a shaft was sunk on a vein of ore. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806. Whether train could be run safely over submerged track, when a freight train had preceded it. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Whether machinery was reasonably safe and suitable. Coe v. Van Why [Colo.] 80 P. 894. Who was responsible for securing of train, and what witnesses would have done under certain circumstances. Denver & R. G. R. Co. v. Vitello [Colo.] 81 P. 766. Whether cause of derailment was spreading of rails and defect in wheels of street car. Schutz v. Union R. Co., 181 N. Y. 33, 73 N. E. 491. Whether method adopted by boy of twelve of starting a belt operating machinery was dangerous. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362. Amount of damage to land caused by railway tunnel and consequent noise, etc., and smoke thrown on land. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Expert on mental condition of testator should not be allowed to state which of two other witnesses had better opportunity to judge of testator's condition. Lancaster v. Lancaster's Ex'r [Ky.] 87 S. W. 1137. Error to permit physician to testify that plaintiff's paralysis was due to injury received in street car accident, defense being that such condition was due to other causes. Taylor v. Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873. Where data could have been presented to jury, question what was a reasonable time to perform a certain act was for the jury. Allison v. Wall. 121 Ga. 822, 49 S. E. 831. Question to expert properly excluded because it involved an opinion on the credibility of witnesses. International, etc., R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423. Witness who had testified to facts could not tell whether a new contract was made. Foster v. Murphy & Co. [C. C. A.] 135 F. 47. Opinion of expert on the "judgment of other competent workmen" as to practicability of using guard on machinery, incompetent. Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527. Witnesses who testified fully to plaintiff's condition could not express opinion as to whether he was feigning. McCormick v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 326, 104 N. W. 390. In action for injuries to engineer caused by running into first section of train, it was improper to allow another engineer to testify as an expert, that, under same circumstances he would not have run into the first section. Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395. Police officers or others may not identify persons accused of crime from mere general descriptions which they have received. State v. Rutledge, 37 Wash. 523, 79 P. 1123. An expert cannot be asked whether the testator was capable of making such a will as good reason and a normal condition of mind would requre. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484.

Whether a contention of fact is such that expert testimony is required is largely discretionary with the trial court. Accounts held not so complicated as to require expert evidence. City of Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033.

29. The meaning of the phrase "net receipts" in the Illinois foreign insurance company law is a question of law on which the opinion of insurance experts is incompetent. National Fire Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377. It is not proper for a witness to classify a railroad's expenses for the purpose of showing which were properly considered in determining the value of the road for taxation purposes. State v. Nev. Cent. R. Co. [Nev.] 81 P. 99. Witness may not state that taxes ought not to be charged as operating expenses of road in determin-

(§ 9) *C. Qualification of experts.*[30]—Qualification of a witness to testify as an expert is a preliminary question,[31] addressed largely to the discretion of the trial court.[32] Special familiarity with the subject under investigation, experience, and professional skill and training, are the tests usually applied.[33] Expert capacity is a matter wholly relative to the subject of a particular question.[34]

ing value of road for taxation. Id. Witness may not state whether he considered certain language used by policeman profane, without giving the exact language used; whether it was profane, within the meaning of a law prescribing policemen's duties, being for the court. Lamb v. City of Brunswick, 121 Ga. 345, 49 S. E. 275. Where witness' opinion involved not only what could have been done in a certain time, but also what should have been done, it was inadmissible. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. The text of a foreign statute being before the court, its construction is for the court and the opinion of a lawyer of experience as to the consensus of opinion among lawyers in the sister state, as to its meaning, is inadmissible. Clark v. Eltinge [Wash.] 80 P. 556.

30. See 3 C. L. 1375.

31. Meyers v. McAllister [Minn.] 103 N. W. 564. It is improper to allow a witness called as an expert to testify, leaving his qualification to be determined on cross-examination. Dolan v. Herring-Hall-Marvin Safe Co., 94 N. Y. S. 241. The party calling the expert should show his qualification before his testimony is admitted. Id. Expert testimony on former trial, having been given without objection to qualification of witness, such objection was unavailing on reading of testimony at later trial after expert's death. Wallach v. Manhattan El. R. Co., 94 N. Y. S. 574. Objection that expert oculist was not qualified to testify to a pathological condition of the optic nerve, held untenable, his qualification having been conceded. State v. Lyons, 113 La. 959, 37 So. 890. Where witness was shown to be qualified to give opinion by cross-examination, the cross-examiner could not complain of the admission of his testimony. Speck v. Kenoyer [Ind.] 73 N. E. 896.

32. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362; Gila Valley, G. & N. R. Co. v. Lyon [Ariz.] 80 P. 337; I. L. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. Discretion properly exercised in allowing witness to testify as to values. Meyers v. McAllister [Minn.] 103 N. W. 564. Exclusion of expert testimony is not error where the qualification of the expert is left in doubt. Groff v. Groff, 209 Pa. 603, 59 A. 65. Whether a witness has such special knowledge or experience as to qualify him to give opinion evidence is a question of fact for trial court, and a ruling thereon is not reviewable on writ of error, if supported by legal evidence. Burns v. Delaware & A. Teleg. & Tel. Co. [N. J. Err. & App.] 59 A. 220.

33. Illustrations. Held competent: One who had been private secretary of government official for years, and then chief clerk in the office, held qualified to testify as to usage in office. Lorenz v. U. S., 24 App. D. C. 337. One who had cultivated cotton all his life, and who saw land in cotton the previous year could give his opinion on the amount of cotton it produced, though he did not know the exact amount. Baker v. Cotney [Ala.] 38 So. 131. In an action for damages for overflow of land caused by railroad, witnesses familiar with land and rainfalls were qualified to testify how water would flow if railroad were not there. Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738. Witness held to have had such knowledge of "dry murrain" and of conditions as to be qualified to testify that certain cattle, when shipped, were not affected with the disease. Ft. Worth & D. C. R. Co. v. Hagler [Tex. Civ. App.] 84 S. W. 692. Shipper of large experience who had shipped stock between two points for several years, could testify as to what was a reasonable time for the trip. McCrary v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 82. Machine operatives qualified as experts to testify whether machine was working properly at given time. Scarlotta v. Ash [Minn.] 103 N. W. 1025. Placer miner of long experience, but not shown to have had mining experience as to particular land in question, not qualified to testify as to its mineral character. Lynch v. U. S. [C. C. A.] 138 F. 535. Member of local health board who had had experience with several smallpox cases and knew fees charged in those cases was not qualified to testify to reasonableness of physician's fees in such a case. City of Lawrence v. Methuen [Mass.] 73 N. E. 860. Witness with fifteen years' experience in mercantile business competent to testify whether cost mark on goods was original mark. Sylvester v. Ammons, 126 Iowa, 140, 101 N. W. 782. Also whether stock was old or new, the marks appearing to be fresh. Id. And witnesses who were also familiar with stock, having invoiced it, could testify to difference between actual wholesale cost as inventoried, and the amount of the seller's invoice. Id. Witness held qualified by experience to testify to length of time timbers would remain sound in the ground. Rice v. Wallowa County [Or.] 81 P. 358. Hardware dealer qualified to state difference between materials put into building and those contracted for, though he got prices from wholesale catalogue, where it also appeared that list prices were the same in all such catalogues. American Bonding Co. v. Regents of University [Idaho] 81 P. 604. Quarrymen, experienced in blasting, qualified to testify to proper manner of doing such work. Lane Bros. & Co. v. Bauserman, 103 Va. 146, 48 S. E. 857. Qualification of experts on tunnel ventilation held sufficient, and their testimony admissible under pleadings. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Brakeman, also experienced in track construction could give opinion on whether track at certain place was defective and unsafe. Northern Alabama R. Co. v. Shea [Ala.] 37 So. 796. Experienced brakeman may give opinion on whether speed of train around a

curve was dangerous. Id. Engineer, long in the service and familiar with locality, qualified to testify what rate of speed was necessary to haul a train across a street and into yards. Baltimore & O. R. Co. v. Connell [C. C. A.] 137 F. 8. Practical railroad man, with three years' experience in construction and repair work on tracks qualified to testify to purpose and proper location of derailing switch. Smith v. Fordyce [Mo.] 88 S. W. 679. That a physician cannot testify to confidential communications does not disqualify him to give expert opinion, based on hypothetical facts, as to cause of injury of a patient whom he attended. Crago v. City of Cedar Rapids, 123 Iowa, 48, 98 N. W. 354. Osteopath, who had had experience in nervous diseases, qualified to testify to extent of injuries, though not a licensed practitioner. Macon Railway & L. Co. v. Mason [Ga.] 51 S. E. 569. Electricians held competent to give their experience and opinions as to effectiveness of certain insulators and their tendency to fall into disuse where formerly used. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. One who had been a waterman for twenty years, had knowledge of boats, and special knowledge of boat in question, competent to testify to boat's value. Gossage v. Philadelphia, etc., R. Co. [Md.] 61 A. 692.

Held incompetent: Witnesses not shown to have sufficient knowledge of subject to give opinions on effect of embankment on flow of water in stream. Gulf, etc., R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 67, 88 S. W. 452. One not shown to have any knowledge of a general custom in handling wires in house moving cannot testify thereon. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Qualification of witnesses to value: Witness with no knowledge of cost price or of value of jewelry incompetent to express an opinion on value. Motton v. Smith [R. I.] 60 A. 681. Witness held qualified to give opinion on value of furniture. Osmers v. Furey [Mont.] 81 P. 345. Witnesses held competent to testify to value of automobile. Paterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621. Experienced salesman who had inspected stock of goods could testify to their value. L. T. Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855. Witness engaged in business some years and has some knowledge of property destroyed qualified to give opinion on value of goods burned. Glaser v. Home Ins. Co., 93 N. Y. S. 524. Woman who did her own business, managed farm and bought and sold horses, qualified to give opinion on value of horse she claimed to own. Vogts v. Utman [Wis.] 104 N. W. 88. Opinion of treasurer of company competent on value of stock when there had been no sales. Aldrich v. Bay State Const. Co., 186 Mass. 489, 72 N. E. 53. Witnesses with long experiece in deals, involving value of broker's services in sale of railroad plants and corporations holding franchises were qualified to testify to value of such services in sale of electric light plant. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922. Saleswoman in dry goods store which handled millinery, who knew cost and value of millinery, and had assisted in invoicing, qualified to testify to value of millinery stock. Lundvick v. National Union Fire Ins. Co. [Iowa] 103 N. W. 970. Husband and wife may give opinions as witnesses concerning the value of their own household furniture. Lincoln Supply Co. v. Graves [Neb.] 102 N. W. 457. One who had worked on logs many years, knew the logs in question, and their value, could testify as to value, though he had not bought or sold logs. Rylander v. Laursen [Wis.] 102 N. W. 341. One who had worked in logging business some years, had learned general market value of pine lumber, and before testifying had learned market value from reported prices and sales made by him, was qualified to testify to market value. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259. Persons who knew value of freight terminal could testify as experts, though they did not know market value of other property in city. Sanitary Dist. of Chicago v. Pittsburgh, Ft. W. & C. R. Co. [Ill.] 75 N. E. 248.

Value of and damages to realty: One who shows familiarity with land in question may testify to its value before and after appropriation of right of way through it, basing his opinion on the facts to which he has testified, even though he is not familiar with land values in vicinity and knows of only one transfer. Consolidated Traction Co. v. Jordan [Ind. App.] 75 N. E. 301. Persons acquainted with market value of property in neighborhood are qualified to testify to such value of land damaged by change of grade. Schrodt v. St. Joseph [Mo. App.] 83 S. W. 543. One who only knew value of his wife's land and of one other tract was not qualified to testify to value of certain tract with or without shade trees. Ferguson v. Buckell, 101 App. Div. 213, 91 N. Y. S. 724. Market value of property injured by construction of a railroad through it does not require expert testimony, but all persons familiar with the property, who have formed an opinion, are competent witnesses. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996. A witness otherwise competent to testify to damage to land is not rendered incompetent by inability to state the items on which his calculation is based. Id. Witnesses familiar with value of lands in neighborhood, knew land in question, and nature of injury to it, competent to testify to value in action for damages for injury to it. McGroarty v. Lehigh Valley Coal Co. [Pa.] 61 A. 570. Resident witnesses who have knowledge of land, its location, uses, buildings, environment, and prices of sales in vicinity, and value placed on property by people there are qualified to testify to value of property to be condemned. Reed v. Pittsburg, etc., R. Co., 210 Pa. 211, 59 A. 1067. Persons who lived near land for many years, were familiar with its quality and improvements and knew of sales and prices in vicinity, held competent. Hope v. Philadelphia & W. R. Co., 211 Pa. 401, 60 A. 996. To testify to damages to land by construction of a railroad through it, a witness should have knowledge of the market value of the land before and after construction of the road, knowledge of location, area, quality, productiveness, extent and condition of improvements, manner in which road crosses, and value of other lands in vicinity. Id. One who had knowledge of only two rental contracts of land in vicinity, but was acquainted with property there and had had several years' experience as real estate agent, could

(§ 9) *D. Basis of expert testimony and examination of experts.*[35]—The opinion of an expert may be based directly on his personal knowledge of the facts or subject under investigation;[36] but it is usually elicited by means of a hypothetical question.[37] Such a question should hypothesize all the essential facts relating to the matter on which the opinion is sought,[38] which the evidence tends to show,[39] but

testify as to value of lot condemned. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182. On the issue of value of land, the opinions of persons residing near it and who have known it for some time, are competent evidence, though such persons are not real estate dealers and are not specially informed as to prices. Guyandotte Valley R. Co. v. Buskirk [W. Va.] 50 S. E. 521.

34. One who had been ironworker eighteen years but had been building vaults only five or six weeks was not qualified as to the proper manner of protecting workmen from falling of steel plates used in vault building. Dolan v. Herring-Hall-Marvin Safe Co., 94 N. Y. S. 241. Mine employe who had no knowledge of mine in question could not testify to the duties of employes from his knowledge of the customs and rules in other mines. Smith v. Hecla Min. Co. [Wash.] 80 P. 779. Estimate of market value of stock at place of destination inadmissible because based on knowledge of market at another place. Missouri, etc., R. Co. of Texas v. Allen [Tex. Civ. App.] 87 S. W. 168. Experienced hydraulic and mechanical engineers, familiar with production of power, but not familiar with values in vicinity, could testify to cost of producing power in a given place, but not to its value in the vicinity. Lakeside Mfg. Co. v. City of Worcester, 186 Mass. 552, 72 N. E. 81.

Members of different schools of medicine: Where it appears that a disease is ascribed to the same causes, and diagnosed the same, by different schools of medicine, members of one school are qualified, in an action for malpractice, to give opinions on the diagnosis made by a member of another (Grainger v. Still, 187 Mo. 197, 85 S. W. 1114); but members of one school cannot express opinions as to the treatment of a disease by a member of another, unless it appears that the treatment employed by the two schools is the same. Allopathic physicians held qualified to give opinions on diagnosis of disease by osteopath, but not on treatment of disease by him (Id.).

35. See 3 C. L. 1376. For examination of witnesses in general, see following article.

36. Physician's testimony, based on examination of injured child, competent. Boehn v. Detroit [Mich.] 104 N. W. 626. Question to physician whether pains claimed to exist were caused by or likely to result from injuries received, held to call for opinion based on his knowledge gained from treating the patient. Franklin v. St. Louis & M. R. R. Co. [Mo.] 87 S. W. 930. Questions put to a medical expert need not be hypothetical if the witness is personally acquainted with the facts. City of Chicago v. Lamb, 105 Ill. App. 204. General manager of corporation may testify as to solvency of concern at a given time without a prior disclosure of the facts on which he bases his opinion. Campbell v. Park [Iowa] 101 N. W. 861. Where the witness is an expert upon the matter as to which he is called to testify, he need not testify to all the facts on which his conclusion is based. Error to require physicians who attended patient and took part in post mortem to detail all the facts before giving opinion on cause of death. Morrow v. National Masonic Acc. Ass'n, 125 Iowa, 633, 101 N. W. 468.

37. Proper course is to state hypothetically the case which the party producing the witness thinks he has made and to ask an opinion based on such case. Elgin, A. & S. Traction Co. v. Wilson [Ill.] 75 N. E. 436. Error to permit physician to base opinion on evidence as he heard and construed it and gave it weight. Id. A hypothetical question should not purport directly to state or recite the evidence. Botwinis v. Allgood, 113 Ill. App. 188. Facts must be stated hypothetically, leaving jury to determine their truth or falsity. Netcher v. Bernstein, 110 Ill. App. 484. The purpose of a hypothetical question is to obtain the opinion of one entitled by superior learning or experience to speak and to express an opinion upon the state of facts which, for the purpose of his consideration, are to be received by him as true. Id.

38. Question calling for opinion, and stating no facts, improper. Mitchell Square Bale Ginning Co. v. Grant [Ala.] 38 So. 855. Questions calling for opinions upon a state of facts not known to witness, nor stated to him hypothetically, are improper. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227. Expert cannot say how far a sick mule might have been driven unless question hypothesizes the severity of its sickness. Moulton v. Gibbs, 105 Ill. App. 104. Questions improper because assuming facts not in evidence, and not containing sufficient facts on which opinion could be based. United Electric L. & P. Co. v. State [Mo.] 60 A. 248. Hypothetical question as to time and space within which street car could be stopped objectionable because not specifying condition of street and track at exact place, nor equipment for stopping car. Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. Opinion of roadmaster that train could be run over track submerged with water without danger, if run slowly, especially where freight train had preceded it, inadmissible, the condition on which opinion was based not being same as those actually existing at time of accident. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Experienced street car operatives may testify as to time and space in which street car, similar to one in question, under same circumstances, could be stopped. Meng v. St. Louis & Suburban R. Co., 108 Mo. App. 553, 84 S. W. 213. Where plaintiff testified that his condition at time of trial was the same as when his physician last examined him, a hypothetical question to the physician whether recovery was likely

should not assume facts not in evidence,[40] unless it is understood that such facts shall be made to appear,[41] or unless they are uncontroverted.[42] Questions should be clear and definite,[43] but are not objectionable because somewhat leading in character.[44] They should not call for speculative opinions.[45] One who has adopted and used a hypothetical question asked by his adversary cannot thereafter complain of the form of the question.[46] Testimony of a proper kind to show reasons

if plaintiff's condition was the same as when he last examined him, was proper. Kaiser v. St. Louis Transit Co., 108 Mo. App. 708, 84 S. W. 199. Question to expert, assuming facts proved with reference to construction of electric wires and asking an opinion as to whether such constructon was good, was proper. German-American Ins. Co. v. New York Gas & Electric L., H. & P. Co., 103 App. Div. 310, 93 N. Y. S. 46. After stating hypothetically the facts regarding an accident and resulting injury, it is proper to ask the expert, "Would you attribute such injuries to the accident stated in the question, or would such an accident be sufficient to produce such injuries." Netcher v. Bernstein, 110 Ill. App. 484. No objection having been made to expert opinion on ground that sufficient facts were not shown on which to base it, and no effort having been made to elicit such facts on cross-examination, the opinion will not be stricken at the close of the case. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

39. Question held substantially based on evidence and properly allowed. Boehm v. Detroit [Mich.] 104 N. W. 626. The question need not state all the facts in evidence if those stated are supported by some evidence. Botwinis v. Allgood, 113 Ill. App. 188. But it should be based on a theory each element of which is based on some evidence. Id. There being some evidence to establish every fact assumed in hypothetical question to doctor, it should have been allowed. Becker v. Metropolitan Life Ins. Co., 99 App. Div. 5, 90 N. Y. S. 1007. Facts stated in a hypothetical question must be those proven by the evidence. Carman v. Montana Cent. R. Co. [Mont.] 79 P. 690. The questions should include only such facts as the evidence will warrant the jury in finding. West v. Knoppenberger, 4 Ohio C. C. (N. S.) 305. Question to physician whether if plaintiff received injuries shown by the evidence, they caused the condition found by witness when he examined plaintiff, held proper. Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133. Question to medical expert held proper in form when based on facts as the examining party claimed they were shown by the proof; whether such facts were actually proven being for jury. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 13 Tex. Ct. Rep. 589, 88 S. W. 857. Question as to cause of ovaritis claimed to have been caused by injury from fall, held proper in form, facts assumed being shown by evidence. O'Neill v. Kansas City, 178 Mo. 91, 77 S. W. 64.

40. Braham v. State [Ala.] 38 So. 919. Physician may not give opinion on purely speculative data. Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304. Question as to value of services not based on manner of performance as shown by evidence is improper. Snyder v. Zeller, 113 Ill. App. 34. Physician having testified that he found an "old" scar, hypothetical question assuming that the scar resulted from recent injury in question was improper and no answer should have been allowed. Fitzpatrick v. New York City R. Co., 92 N. Y. S. 248. It is not proper to include in a hypothetical question to a physician the fact that plaintiff had a case pending at the time he made the declarations to his physician who was examining him. International & G. N. R. Co. v. Goswick [Tex.] 85 S. W. 785. Physician's testimony as to permancy of loss of hearing improperly admitted when there was no foundation for assumption that loss of hearing was due to injury in controversy. Lamm v. Metropolitan St. R. Co., 94 N. Y. S. 584.

41. A hypothetical question will not be stricken when facts assumed are subsequently proved. Pittsburg, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Hypothetical question only partly supported by evidence may be permitted, in court's discretion, on counsel's statement that wanting evidence will be supplied. Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304. While it is within the discretion of the trial court to permit a hypothetical question based on assumed facts to be asked, with the understanding that such assumed facts shall be made to appear in evidence later, the better practice is to require proof of facts on which such question is based in the first instance. McDonald v. Rhode Island Co., 26 R. I. 467, 59 A. 391. Not error to exclude question until foundation should be laid in evidence. Id.

42. Hypothetical question assuming fact not in dispute is proper. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922.

43. Hypothetical question to physician improper because confused and indefinite. McGinness v. Third Ave R. Co., 93 N. Y. S. 787.

44. Question whether it was not a fact that a shock such as plaintiff received usually affected women of her age, so far as their nervous organizations were concerned, for the rest of their lives, held proper. Edwards v. Burke, 36 Wash. 107, 78 P. 610.

45. Testimony of physician that a nervous or mental shock might have caused plaintiff's condition at time of trial incompetent. Newton v. New York, etc., R. Co., 94 N. Y. S. 825. Physician's statement that momentum and shock was "possible" to bring on nervousness should have been stricken. Lazarus v. New York City R. Co., 92 N. Y. S. 246. When physician is unable to give an opinion as to which of several possible causes was the reasonably certain cause of a condition, his opinion evidence was incompetent. Rayner v. Metropolitan St. R. Co., 94 N. Y. S. 632.

46. Netcher v. Bernstein, 110 Ill. App. 484.

for the opinion of an expert, already in evidence, is competent to give weight to his opinion and make it intelligibile.[47] A wide range of inquiry is permitted in the cross-examination of experts to test the accuracy [48] and extent [49] of their knowledge, and to show the elements of which their judgments are made up,[50] but such examination must be confined to issues in the case.[51] The court may, in its discretion, limit the number of experts to be examined by each side.[52]

§ 10. *Real or demonstrative evidence.*[53]—Real evidence is admissible if relevant.[54] Exhibition of wounds or injuries is usually permitted,[55] but exhibitions of the effect of injuries is held improper.[56] Photographs,[57] radiographs,[58] maps or

47. Expert having testified to damage to property by construction of elevated railroad, may testify to diminished salability of property along the road. Logan v. Boston El. R. Co. [Mass.] 74 N. E. 663.

48. Insanity expert properly cross-examined as to causes of insanity to test his knowledge. Braham v. State [Ala.] 38 So. 919. Where a physician testifying as an expert admits that a certain medical work is standard, he may be asked if it does not contain a certain statement, inconsistent with his testimony. Beadle v. Paine [Or.] 80 P. 903. Where a medical expert has testified to his original diagnosis of an injury, he may properly be cross-examined with a view of showing his original diagnosis incompatible with subsequent developments. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 13 Tex. Ct. Rep. 589, 88 S. W. 857.

49. The extent of the cross-examination of a witness testifying as one specially familiar with the subject-matter depends on the extent of knowledge or familiarity which the witness professes to possess. Witnesses who testified in effect that they could form a judgment as to the genuineness of a certain person's signature on sight of it, were properly cross-examined by placing the paper containing the signature in an envelope, allowing only the signature to be visible through an aperture, and asking an opinion as to its genuineness. Groff v. Groff, 209 Pa. 603, 59 A. 65.

50. Question to physician, who had testified to testamentary capacity, whether he would have been "willing" to make a contract with testator involving the amount involved in the will, at the time of its execution, held improper. Struth v. Decker [Md.] 59 A. 727. Expert on value in proceedings to condemn right of way over oil lands was properly allowed to testify on cross-examination in regard to matters which would influence him if a contemplative buyer, as that he would consider the number of wells which could be economically placed on the land, and ordinary losses therefrom, and the general relation of outlay to income. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961. But his statement that he would consider what "he could pay for it and have sufficient margin for speculation for at least five years" was improper. Id.

51. Physician testifying to extent of injuries, cannot be cross-examined as to professional opinions in other personal injury actions. Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

52. Limitation of experts on value of property to three held proper. Swope v. Seattle, 36 Wash. 113, 78 P. 607. See, also, Trial, 4 C. L. 1708.

53. See 3 C. L. 1380.

54. Pieces of rotten wood, identified as parts of ties, admissible on issue of negligence in leaving ties in roadbed when rotten. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 87 S. W. 395. Electric insulator or hanger, claimed to be defective, properly admitted in evidence. Warren v. City Elec. R. Co. [Mich.] 104 N. W. 613. Amputated hand preserved in fluid, and having a streak of ink on it, admissible to show where employe had his hand when hurt. Anderson v. Seropian [Cal.] 81 P. 521. In action for damages for pollution of water of stream, samples of sediment taken from the stream were competent evidence. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882. Clothes and razor of prisoner and section of wall with imprint of bloody hand held competent in murder case. State v. Miller [N. J. Err. & App.] 60 A. 202.

55. Felsch v. Babb [Neb.] 101 N. W. 1011. Exhibition of injuries held proper. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. If one party's experts make a physical examination of an injury while testifying, and give an opinion thereon, the other party is entitled to have his experts make a similar examination and give an opinion. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 86 S. W. 943.

56. Improper to have witness walk across floor and lift various articles to show effect of injuries, though error was not prejudicial in this case. Felsch v. Babb [Neb.] 101 N. W. 1011. Exhibition of injuries by plaintiff by walking across floor at request of jury not error, no objection being made, and injuries so exhibited being practically admitted. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84. Held not error to allow plaintiff, in personal injury action, to "walk the best he could" before the jury, where it was not shown that plaintiff feigned. Birmingham R. L. & P. Co. v. Rutlege [Ala.] 39 So. 338.

57. Photograph of accused admissible. Shaffer v. United States, 24 App. D. C. 417. Photographs, properly identified and connected with event they are intended to illustrate, are evidence of a very satisfactory and conclusive nature. City of La Salle v. Evans, 111 Ill. App. 69. Photographs of place of accident, shown to be correct representations, admissible, though taken without notice to other party. Hawkins v. Missouri K. & T. R. Co. [Tex. Civ. App.] 83 S. W. 52. Photograph of plaintiff two and a half years before he was injured, and one taken after the accident, representing the place where it occurred, admissible, their correctness and accuracy being shown. Houston & T. C. R.

plats[59] and models,[60] are competent evidence, when shown to be correct,[61] and to represent actual conditions[62] at the particular time in issue.[63] Permission to

Co. v. Cluck [Tex. Civ. App.] 84 S. W. 852. Photograph of real estate showing its condition before change of street grade is competent. Village of Grant Park v. Trah, 115 Ill. App. 291.

58. X-ray photographs are competent after proper preliminary proof of correctness and accuracy. Chicago & J. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796. X-ray photograph admissible when not shown to be actually misleading, even though it was admitted that such photogrphs are not infallible. Miller v. Minturn [Ark.] 83 S. W. 918. X-ray photograph competent to show position of bullet in body. State v. Matheson [Iowa] 103 N. W. 137. [See discussion and authorities in this case.—Ed.]

NOTE. X-ray photographs: "Photographs are generally recognized as a permissible mode of testimony when appropriate. A photograph must, however, be verified; not necessarily by the one who takes it, but by some one who can testify that it represents his idea of the subject. Greenleaf, Evidence, § 439h; People's Gaslight & Coke Co. v. Amphlett, 93 Ill. App. 194; Bedell v. Burky, 76 Mich. 435, 15 Am. St. Rep. 370; Miller v. Louisville R. Co., 128 Ind. 97, 25 Am. St. Rep. 416. Whether it is sufficiently verified is a preliminary question of fact for the trial judge, and not open to exception. Blair v. Pelham, 118 Mass. 420; McGar v. Borough of Bristol, 71 Conn. 652. But in this, as in other matters which may be left generally to the discretion of the trial judge, his discretion is not unlimited, and he is not at liberty to disregard the rules of law, by which the rights of the parties are governed. De Forge v. N. Y., etc., R. Co., 178 Mass. 59, 86 Am. St. Rep. 464. The discovery of the X-ray is comparatively recent. However, its utility and the reliability of its results are already so well known and established as scientific facts that courts ought to take judicial notice of them. Wittemberg v. Onsgard, 78 Minn. 342, 47 L. R. A. 141. And, although a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken. Bruce v. Beall, 99 Tenn. 303; Miller v. Dumon, 24 Wash. 648; Mauch v. Hartford, 112 Wis. 40; Jameson v. Weld, 93 Me. 345; City of Geneva v. Burnett, 65 Neb. 464, and note; Carlson v. Benton, 66 Neb. 486; De Forge v. N. Y., etc., R. Co., supra. It has been said that 'unless precluded by some rule or principle of law, all that is logically probative is admissible.' Thayer, Preliminary Treatise on Evidence, p. 265. It is the duty of courts to use every means for discovering the truth reasonably calculated to aid in that result. In the performance of that duty, every new discovery when it shall have passed the experimental stage, must necessarily be treated as a new aid in the administration of justice in the field covered by it. In that view, courts have shown no hesitation, in proper cases, in availing themselves of the art of photography by the X-ray process. See 1 Mich. Law Rev. 329; 56 Albany Law Journal 309." —3 Mich. Law Rev. 409, commenting on Chicago & I. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796, in which a skiograph was admitted to show condition of heart.

59. In suit for damages to injuries to land, map made after suit brought admissible to show land, effect of removal of lateral support, and location of railroad causing injury. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613. A map or plat of property admitted without objection and treated by parties as correct, cannot be contradicted by parol proof by the party introducing it. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19. Plat showing place of accident is not inadmissible because of memoranda thereon regarding distances and other data, where the subject-matter of such memoranda was not in issue. Chicago & A. R. Co. v. Pettit, 111 Ill. App. 172.

60. Admission of model of approach from street to sidewalk proper, where it was shown to be an exact reproduction except as to details which were explained. Lush v. Incorporated Town of Parkersburg [Iowa] 104 N. W. 336. Evidence tending to show that a model was a reproduction of a bridge in substantial features, the model was admissible. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078. Whether the model was a correct representation was for the jury, there being a conflict. Id.

61. Plat, stated by witness to be incorrect, is incompetent. City of Peru v. Bartels, 214 Ill. 515, 73 N. E. 755. Testimony of injured person that photograph of place of accident was correct, was sufficient to make photograph admissible. Accousi v. G. A. Stowers Furniture Co. [Tex. Civ. App.] 87 S. W. 861. Photograph of a building after an explosion competent when shown by a witness to be a correct representation. Huntington L. & F. Co. v. Beaver [Ind. App.] 73 N. E. 1002. Testimony of expert in X-ray photography that he was regularly engaged in taking such photographs, that he made the photograph in question, and that it was a correct representation, renders it competent. Chicago & I. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796. Testimony by another witness that it was not properly taken and was not correct did not make it necessarily incompetent. Id.

62. Photographs which show assumed or theoretical conditions are inadmissible. Photograph of men in assumed postures and things in assumed situations, to illustrate a contention as to how an accident occurred, held inadmissible. Babb v. Oxford Paper Co., 99 Me. 298, 59 A. 290. A photograph of a room other than that in question, used by the witness to locate objects in the room, is admissible as a demonstration made by the witness. Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573.

63. Photograph by an amateur, taken after two years, should have been rejected. City of Chicago v. Vesey, 105 Ill App. 191. Photograph, when shown to be correct, competent to show surroundings of place of accident though taken a year after the ac-

perform experiments in court is discretionary.[64] Evidence of experiments out of court is admissible when the experiments are shown to have been fairly and honestly made,[65] under conditions similar to those surrounding the occurrence in question.[66] The admission or exclusion of photographs or evidence of experiments is largely discretionary, the test applied by the court being relevancy,[67] and the tendency of such evidence to aid or mislead the jury.[68] To render competent evidence of an expert analysis or examination, it must be shown, first, that the thing analyzed or examined is identical with that which is the subject of inquiry,[69] and second, that the condition of the thing examined has remained unchanged between the time when it became a question and the time of the examination.[70] Comparison of real evidence is usually for the jury, but comparisons may be made by witnesses when inspection by the jury has become impossible.[71]

cident. Chicago, etc., R. Co. v. Crose, 113 Ill. App. 547. To be competent photographs should simply show conditions existing at the time in question. Babb v. Oxford Paper Co., 99 Me. 298, 59 A. 290. Photographs showing sidewalk just as it was when plaintiff fell there, except that ice thereon did not appear, were admissible. Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102. Photographs of place may be met by evidence of changes meanwhile. Achey v. Marion, 126 Iowa, 47, 101 N. W. 435. Photographs of scene of railroad accident incompetent when not shown to represent conditions just as they were at the time of the accident. Chicago, etc., R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865. Photograph of hole in street taken in October admissible in action for injury sustained preceding April, evidence showing photograph to be a correct representation of it as it was in April, except that the hole was then deeper. Miller v. New York, 93 N. Y. S. 227. Photograph of scene of wreck taken next morning before conditions had changed materially, admissible to show force of collision. Maynard v. Oregon R. & Nav. Co. [Or.] 78 P. 983.

64. See 3 C. L. 1381, n. 30; Trial, 4 C. L. 1708.

65. See 3 C. L. 1381, n. 32.

66. Chicago, etc., R. Co. v. Crose, 113 Ill. App. 547. Evidence of experiments inadmissible, conditions not being shown same as at time of accident. Merchants' L. & T. Co. v. Boucher, 115 Ill. App. 101. Experiments with a horse other than the one driven at time of accident to determine time required to turn and cross tracks could not be shown. Louisville R. Co. v. Hoskins' Adm'r [Ky.] 88 S. W. 1087. Experiment consisting in sending car round curve where accident ocurred at same speed, conditions not being shown same, was inadmissible. Zimmer v. Fox River Valley Elec. R. Co., 123 Wis. 643, 101 N. W. 1099. Evidence of an experiment by a witness to show that an unobstructed view of a track could be had from a certain point was properly excluded when not made under same conditions as existed at time of accident. Chicago & E. I. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865. Where death was caused by being thrown from engine on defective track, evidence of a run by the engine over the same track next morning was inadmissible, there having been changes both in the engine and track. Chicago City R. Co. v. Brecher, 112 Ill. App. 106. Evidence of experiments, performed by an expert, with a ripsaw, to show direction in which timber would be thrown when caught, held admissible, the conditions being shown to be similar to those existing at time of accident to plaintiff. Krueger v. Brenham Furniture Mfg. Co. [Tex. Civ. App.] 85 S. W. 1156. Observations from car as to distance at which switch could be seen held to have been made under substantially same conditions as those existing at time of collision. Elgin, A. & S. Traction Co. v. Wilson [Ill.] 75 N. E. 436. Testimony of witnesses who had made observations of distance they could see ahead on a track was admissible when conditions of their observations were less favorable than those surrounding plaintiff at the time. Northrop v. Poughkeepsie City & W. F. Elec. R. Co., 93 N. Y. S. 602.

67. If an experiment has any legitimate tendency to prove any matter in issue, it is relevant to that issue. Where issue was as to what testator heard at time of execution of will, evidence of an experiment by witnesses in same relative positions as testator and witnesses when will was executed and attested was relevant. Healey v. Bartlett [N. H.] 59 A. 617.

68. Whether photograph is properly verified, is fairly representative and will be useful, are questions addressed to court's discretion. Stone v. Lewiston, B. & B. St. R. Co., 99 Me. 243, 59 A. 56; Babb v. Oxford Paper Co., 99 Me. 298, 59 A. 290. To render evidence of an experiment legally admissible it must not only be relevant but must have a tendency to aid rather than to confuse jury, and whether it has such tendency is for the court. Healey v. Bartlett [N. H.] 59 A. 617. Experiment to test insulation of wire when wet and dry held too uncertain and misleading to warrant evidence of it. United Elec. L. & P. Co. v. State [Md.] 60 A. 248.

69. State v. McAnarney [Kan.] 79 P. 137.

70. Evidence of chemical analysis of alleged bloody clothes inadmissible where it appeared the clothes had been placed in a sack with other bloody articles and carried for a long distance before they were examined. State v. McAnarney [Kan.] 79 P. 137.

71. Evidence of a comparison by witnesses between spots on pieces of clothing and other pieces used by experts in analysis,

§ 11. *Quantity required and probative effect.*[72]—The weight of evidence[73] and the credibility of witnesses[74] are exclusively for the jury or trial court,[75] who may consider the interest or bias of the witness,[76] or the inherent improbability of testimony.[77] A preponderance of evidence, by which is meant the greater weight of evidence,[78] and not necessarily the greater number of witnesses,[79] is all that is required in civil cases.[80] Evidence need only satisfy the minds of jurors, not their

held competent. State v. Miller [N. J. Err. & App.] 60 A. 202.

72. See 3 C. L. 1381. Sufficiency of evidence as to particular issues is treated in the topic dealing with the particular subject-matter. Facts which evidence, or which, in accurate speech, constitute or form a predicate for a given right, cause of action, defense or duty, are assigned to such titles as treat of the particular matter. Consult also topics such as Appeal and Review, 5 C. L. 121, Directing Verdict and Demurrer to Evidence, 5 C. L. 1004; Discontinuance, Dismissal and Nonsuit, 5 C. L. 1011; New Trial and Arrest of Judgment, 4 C. L. 810.

73. Poppers v. Schoenfeld, 110 Ill. App. 408; Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536; Avery v. Stewart, 136 N. C. 426; 48 S. E. 775. Comparative weight of evidence for jury. Western Maryland R. Co. v. Shivers [Md.] 61 A. 618. Instruction erroneous as on weight of evidence. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. See Instructions, 4 C. L. 133. Weight and value of a deposition of a lawyer as to the law of another state is for the jury. Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952. Weight of evidence is for jury and trial court, and a verdict approved by the judge will very rarely be set aside on appeal. Buck v. Newberry, 55 W. Va. 681, 47 S. E. 889. Impeachment of a witness by proof of previous contradictory testimony does not wholly destroy his testimony; the weight to be given it is for the jury. East St. Louis Connecting R. Co. v. Altgen, 112 Ill. App. 471. Corroborated expert opinion estimating shortage in weight of bridge materials held properly followed by court, though another witness attempted to give actual weights. Modern Steel Structural Co. v. Van Buren County, 126 Iowa, 606, 102 N. W. 536.

74. Western Maryland R. Co. v. Shivers [Md.] 61 A. 618; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596. Various instructions on credibility of witnesses held erroneous. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415; Himrod Coal Co. v. Clingan, 114 Ill. App. 568. Error to ask one witness if another was not mistaken in his testimony. Braham v. State [Ala.] 38 So. 919. Opinion of witness that certain other witnesses would swear the truth inadmissible. Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440. Error to allow witness to characterize testimony of another as untrue. People v. Buckley, 91 App. Div. 586, 87 N. Y. S. 191. Expert cannot pass on relative merits of testimony of other experts. Lancaster v. Lancaster's Ex'r [Ky.] 87 S. W. 1137. Statement of plaintiff in deposition, contrary to testimony, not conclusive against him; it was for jury to say which statement was correct. Bond v. Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124.

75. Where, in suit on note, defendant testifies to facts constituting a good defense, and is corroborated by other facts and circumstances, but there is strong rebutting testimony, it is for trial court to decide to which side scales incline. Gottlieb v. Middleberg, 23 Pa. Super. Ct. 525.

76. Credibility for jury, who may consider bias or impartiality as shown by the evidence. Macon R. & L. Co. v. Barnes, 121 Ga. 443, 49 S. E. 282. Testimony of hired detectives should be received with caution. Carey v. State, 70 Ohio St. 121, 70 N. E. 955.

77. Testimony to that which is physically impossible should be rejected even if uncontradicted. Testimony of plaintiff that he did not see a handcar, though he had a full view of track and the car was directly in front of him, rejected. Chicago & A. R. Co. v. Vremeister, 112 Ill. App. 346. Verdict set aside because evidence supporting it was improbable. Lehn v. Central Crosstown R. Co., 92 N. Y. S. 301. A judgment based on testimony apparently given to supply a lack indicated by the court on a prior appeal, and which contradicts the parties' previous testimony and conflicts with the physical facts, will be reversed. McCarthy v. Interurban St. R. Co., 93 N. Y. S. 548.

78. Nickey v. Steuder [Ind.] 73 N. E. 117. Where witness who used bill of particulars in testifying could not distinguish items as to which he had personal knowledge from those as to which he knew nothing except on information and belief, his testimony could not support recovery. McCormick v. Gubner, 90 N. Y. S. 1073. Testimony of one expert that method of fastening wire rope in socket was improper cannot sustain finding of negligence when other experts thought it proper. McMullen v. New York, 93 N. Y. S. 772.

79. Heaton v. Hennessy, 112 Ill. App. 653; City of La Salle v. Evans, 111 Ill. App. 69; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; Marcotte v. Sheridan, 91 N. Y. S. 744. The number of witnesses is to be considered in determining where preponderance lies, but is not conclusive. Chicago City R. Co. v. Enroth, 113 Ill. App. 285. Evidence must be measured by weight and not alone by count. Slayden-Kirksey Woolen Mills v. Spring, 116 Ill. App. 27. Numerical weight of evidence as to value of legal services is not binding on a judge in making an allowance therefor, as he is himself capable of judging as to such services. Cochran's Guardian v. Lee's Adm'r [Ky.] 89 S. W. 145. That defendant's theory is supported by two witnesses and plaintiff's by one does not establish a preponderance in defendant's favor. Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259.

80. Marcotte v. Sheridan, 91 N. Y. S. 744. A slight preponderance is sufficient. Devine v. Ryan, 115 Ill. App. 498. Error in civil case to charge jury that plaintiff must make out his case to a moral and reasonable cer-

consciences.[81] Prima facie evidence means evidence sufficient to establish a fact unless rebutted,[82] and a prima facie case cannot prevail if rebutted or if the contrary is shown by competent proof.[83] To support an action depending wholly on circumstantial evidence, the circumstances must form a connected chain pointing to a single conclusion, or a number of independent circumstances pointing in the same direction or verging to a common center.[84] In civil as in criminal cases, a theoretical possibility, wholly unsupported by proof or probability, will not outweigh direct testimony which, to the ordinary mind, carries conviction beyond a reasonable doubt.[85] The inference of ultimate from probative facts is for the trier of the facts, though an expect opinion may have been given thereon.[86]

Evidence of a negative character is not to be given such probative value as positive or affirmative evidence;[87] but this rule does not warrant entire disregard of negative testimony by the jury.[88] Casual statements or admissions[89] and declarations of a deceased person,[90] are entitled to little weight; but written admissions are entitled to very considerable weight.[91] Solemn admissions of a party made in the course of a trial have the same effect as if contained in his pleadings.[92] Allegations in a pleading of one party introduced in evidence by his adversary are not conclusive.[93] A deposition has the same weight as though the witness was present testify-

tainty. Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839. If evidence proves the essential facts, this is sufficient; the jury has the right to draw reasonable inferences from facts found. Indianapolis, G. & F. R. Co. v. Hubbard [Ind. App.] 74 N. E. 535. Preponderance of evidence has reference to the quality of outweighing in convincing power. Instruction that it "was evidence which satisfies and convinces your minds and judgments" condemned. Grotjan v. Rice [Wis.] 102 N. W. 551. Jury should reconcile conflicts in evidence if possible, and if not, should render verdict for side on which evidence reasonably and clearly preponderates. Waller v. Wilmington City R. Co. [Del. Super.] 61 A. 874.

81. Birmingham R., L. & P. Co. v. Hinton [Ala.] 37 So. 635.

82, 83. Wathen v. Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781.

84. Fields v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 134.

85. Burns v. Ruddock-Orleans Cypress Co. [La.] 38 So. 157.

86. Court may take judicial notice of reasonableness of $50 as attorney fee for note on which $268.26 was due. Warnock v. Itawis [Wash.] 80 P. 297. In action to recover for attorney's services, the court cannot properly ignore its own knowledge as to compensation usually paid for such services. Gates v. McClenahan [Iowa] 103 N. W. 969. See, also, Cochran's Guardian v. Lee's Adm'r [Ky.] 89 S. W. 145, supra, n. 79.

87. Evidence that witnesses did not hear bell of engine ring as it approached crossing not of such value as affirmative evidence that the bell was rung. Northern Cent. R. Co. v. State [Md.] 60 A. 19. Testimony that witnesses heard car bell ring is of more weight than that of others who testified that they did not hear it. Faulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973. Testimony that witness did not notice or hear a bell ring is not of equal weight with positive testimony that it rang. Chicago & E. I. R. Co. v. Eganolf, 112 Ill. App. 323. Where one set of witnesses testify to an occurrence and another set swear that they had equal opportunity to know the fact, having had their attention directed thereto, and that the fact did not occur, the testimony of the latter set is not negative testimony. Grabill v. Ren, 110 Ill. App. 587. Where witnesses having equal opportunity with others testifying to the contrary to hear and know whether or not a gong was sounded, testify that it was not, their testimony is deemed affirmative. Chicago Consolidated Traction Co. v. Gervens, 113 Ill. App. 275. Where witnesses swear that they did not see one person strike another, but do not swear that no blow was struck, their testimony is negative. Grabill v. Ren, 110 Ill. App. 587.

88. Northern Cent. R. Co. v. State [Md.] 60 A. 19. Testimony of witnesses that they heard no bell ring is some evidence that no bell was in fact rung. Chicago & A. R. Co. v. Pulliam, 111 Ill. App. 305.

89. Grotjan v. Rice [Wis.] 102 N. W. 551. Verbal declarations are to be received with caution, but an oral contract to devise land must be proven in part by such declarations. Cherry v. Whalen, 25 App. D. C. 537.

90. Applied in suit to enforce oral contract to will property. Rosenwald v. Middlebrook [Mo.] 86 S. W. 200.

91. Instruction criticized as giving such evidence too little weight. Castner v. Chicago, B. & Q. R. Co., 126 Iowa, 581, 102 N. W. 499. Instruction erroneous because in effect permitting jury to disregard written admissions. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

92. Testimony of plaintiff when on the stand that conductor took hold of his arm and did not let go until commanded to do so by plaintiff. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783.

93. Defendant could not recover damages on allegations of answer introduced in evi-

ing in open court.[94] Standard mortuary tables are not binding on a jury; they may make their own estimate of life expectancy.[95]

Uncontradicted testimony of disinterested witnesses cannot be disregarded;[96] but the entire testimony of a witness may be disregarded if he has willfully sworn falsely to a material fact.[97] The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him, when it is self-contradictory, vague or equivocal.[98] But the mere fact of interest is not sufficient to discredit the witness.[99] Expert testimony is not conclusive.[100]

Evidence offered and admitted for a limited purpose, and facts found upon such evidence, cannot be used for another and totally different purpose.[101] Incompetent evidence, admitted without objection, is in the case for all purposes and must be given the same effect as if legally admissible;[102] but if admitted over a proper objection, it cannot on appeal be considered as evidence of the facts it tends to prove.[103]

dence by plaintiff. Masterson v. F. W. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227.

94. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

95. Based on age, health, habits, physical condition, and appearance of person. City of South Omaha v. Sutliffe Neb.] 101 N. W. 997. Mortality tables prepared for use in insurance matters are of little real aid in determining life expectancy in cases of wrongful death, especially in the case of colored persons; commissioner erred in following tables absolutely. The Saginaw, 139 F. 906.

96. Kapiloff v. Feist, 91 N. Y. S. 27; Spring v. Millington, 44 Misc. 624, 90 N. Y. S. 152.

97. See Witnesses, 4 C. L. 1943. But false testimony must relate to a material fact. Bickerman v. Tarter, 115 Ill. App. 278. And must have been willfully false. Himrod Coal Co. v. Clingan, 114 Ill. App. 568.

98. Southern R. Co. v. Hobbs, 121 Ga. 428, 49 S. E. 294; Steele v. Central of Georgia R. Co. [Ga.] 51 S. E. 438. Where a plaintiff testifies in his own behalf and there are material conflicts and contradictions in his testimony, he is not entitled to recover unless that portion of his testimony which is least favorable to his contention authorizes a recovery. Horn v. Peacock [Ga.] 49 S. E. 722. Testimony of motorman corroborated by three disinterested witnesses held to outweigh that of plaintiff which varied on direct and cross-examination and was only slightly corroborated by one witness. Orchard Stables v. Interurban St. R. Co., 91 N. Y. S. 330.

99. A court is not justified in refusing to believe a witness who gives the only testimony on a certain point merely because he was a party and interested. Williams v. Van Norden Trust Co., 93 N. Y. S. 821. The uncorroborated evidence of plaintiff alone may prevent a judgment in his favor from being disturbed as against the weight of the evidence. Doherty v. Metropolitan St. R. Co., 91 N. Y. S. 19.

100. Morrow v. National Masonic Acc. Ass'n, 125 Iowa, 633, 101 N. W. 468. Jury must consider expert testimony with other evidence, but is not bound by it. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665; Markey v. Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61; St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630. Jury sole judges of credibility of experts and may reject their testimony. State v. Lyons, 113 La. 959, 37 So. 890. Jury not bound to find in accordance with evidence of customary rate of payment as shown by witnesses. Walker Mfg. Co. v. Knox [C. C. A.] 136 F. 334. Jury not bound by opinion evidence on damage to land in condemnation proceedings. Heath v. Sheets [Ind.] 74 N. E. 505. If a jury takes the range of expert testimony alone on a question of damages, their verdict must be within the limits of the highest and lowest expert estimate. Denison v. Shawmut Min. Co., 135 F. 864. But the jury may disregard such testimony entirely and award no damages or only nominal damages. Id.

101. Fair Haven & W. R. Co. v. New Haven, 77 Conn. 667, 60 A. 651. Testimony on a former proceeding being introduced to contradict a witness, containing in fact contradictions, the court may disregard statements therein relevant to issues on the subsequent trial as having no probative force. Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852.

102. Eastlick v. Southern R. Co., 116 Ga. 48, 42 S. E. 499; Harnish v. Miles, 111 Ill. App. 105; Webb v. Sweeney, 32 Ind. App. 54, 69 N. E. 200; Healy v. Patterson, 123 Iowa, 73, 98 N. W. 576; M'Vey v. Barker, 92 Mo. App. 498; Struth v. Decker [Md.] 59 A. 727; Rapson v. Leighton [Mass.] 73 N. E. 540; Hatch v. Pullman Sleeping-Car Co. [Tex. Civ. App.] 84 S. W. 246; Western Union Tel. Co. v. L. Hirsch [Tex. Civ. App.] 84 S. W. 394. Incompetent evidence, admitted without objection, cannot be disregarded on motion for nonsuit; but its sufficiency is for the jury. Blowers v. Southern R. Co., 70 S. C. 377, 50 S. E. 19. Great importance may be attached to improper evidence admitted without objection, where proof of the fact sought to be established is unsatisfactory. Williams v. Hawley, 144 Cal. 97, 77 P. 762.

103. Mobb v. Stewart [Cal.] 81 P. 1073. Where evidence is admitted, subject to objection, the relevancy of which is to be shown by subsequent evidence, and such relevancy is not made to appear, evidence should be ruled out or treated as of no probative value. Lanier v. Hebard [Ga.] 51 S. E. 632.

EXAMINATION BEFORE TRIAL, see latest topical index.

EXAMINATION OF WITNESSES.

Scope.—This article treats generally of the rules governing the examination of witnesses, except those peculiarly applicable to the examination of experts, which are treated in the preceding article.[1] Matters pertaining to the impeachment of witnesses are elsewhere treated,[2] as are general questions of trial procedure, such as the exclusion of witnesses from the court room,[3] and performing experiments in the presence of the jury.[4] The proper manner of raising objections is also given separate treatment.[5]

§ 1. *General rules of examination.*[6]—The examination of witnesses is a matter resting largely in the discretion of the trial court. It is proper for the judge to question a witness,[7] provided such examination is fair and impartial, no opinion as to the facts or credibility of witnesses being disclosed, and no prejudice being aroused.[8] An improper question asked by the court is more effective to impress and mislead a jury than one asked by counsel.[9] Questions[10] and answers[11] should be clear and definite. Questions should not assume facts not in evidence[12] and should be so framed as to call for facts, not opinions.[13] Questions are properly refused that hypothesize the existence of supposed facts into which the policy of the law will not permit an inquiry.[14] The youth or inexperience of a witness justifies considerable latitude in the form of questions.[15] A witness may properly be allowed to give his testimony in narrative form without questions by counsel, when counsel

1. See Evidence, 5 C. L. 1301.
2. See Witnesses, 4 C. L. 1943.
3, 4. See Trial, 4 C. L. 1708.
5. See Saving Questions for Review, 4 C. L. 1368.
6. See 3 C. L. 1383.
7. State v. Knowles, 185 Mo. 141, 83 S. W. 1083.
8. Arkansas Cent. R. Co. v. Craig [Ark.] 88 S. W. 878; Grant v. State [Ga.] 50 S. E. 946; Johnson v. Leffler Co. [Ga.] 50 S. E. 488; Howard v. Territory [Okl.] 79 P. 773. In equity case, severe cross-examination of plaintiff was held not improper, where it did not appear that plaintiff was induced to testify to anything which he did not intend. Stelpflug v. Wolfe [Iowa] 102 N. W. 1130.
9. In negligence case, question by court as to what defendants could have done was prejudicial error. Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458.
10. Question held too general. State v. Minck [Minn.] 102 N. W. 207. Question whether it was not conductor's duty to know "exact spot" where cars had been left in switching before signaling engineer, held misleading. Virginia & S. W. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33. A question not being sufficiently definite and certain to indicate the materiality or relevancy of the desired testimony, the court is justified in sustaining an objection thereto. Spinks v. Clark [Cal.] 82 P. 45.
11. Answer of witness to question as to estimate of expenses, "I expect I have spent something near $30," held too uncertain and indefinite. Texas Portland Cement & Lime Co. v. Ross [Tex. Civ. App.] 81 S. W. 94.
12. White v. Boston, 186 Mass. 65, 71 N. E. 75. Question held improper because assuming a material fact not in evidence. Brannan v. Henry [Ala.] 39 So. 92. Question as to amount expended on lease in constructing three wells properly excluded where evidence showed only two wells had been constructed. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906. Assumption of an uncontroverted fact is not error. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200; Burnside v. Everett, 186 Mass. 4, 71 N. E. 82. A question on cross-examination of a witness for the state which assumes that a fact has been testified to, when such is not the truth, is improper. State v. Boice [La.] 38 So. 584.
13. Question whether there was any room in a car for other men improper; question should have been whether there was any vacant or unoccupied space in the car. Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345. As to what are conclusions as distinguished from statements of fact, see Evidence, ante, p. 1301.
14. As facts regarding action of grand jury in finding an indictment. Taylor v. State [Fla.] 38 So. 380.
15. State v. Sheets [Iowa] 102 N. W. 415.

so requests, if he is not permitted to state anything which is inadmissible.[16] A party should not be allowed to experiment with witnesses by offering incompetent evidence, and then be permitted to withdraw the testimony at the close of the trial, on finding it prejudicial or unavailing.[17] It is unprofessional and improper for counsel to seek to get collateral matters before the jury by suggestive questions to witnesses.[18] It is also improper for counsel, when merely surprised by a witness's testimony, to remark that he is an unwilling witness, and proceed to so conduct the examination as to show that he is unwilling.[19] One party cannot limit his adversary's method of making proof by offering to admit facts, during the examination of a witness.[20] The calling of interpreters,[21] permitting witnesses to illustrate testimony,[22] and the exclusion of questions calling for testimony that has already been given,[23] are matters within the court's discretion. When the court has limited the number of expert witnesses, a party who has examined all that he is entitled to cannot ask an expert opinion from one called as an ordinary witness.[24]

Leading questions.[25]—In general, leading questions, that is, those which suggest a desired answer,[26] are improper on the direct examination,[27] but such questions are usually permitted on cross-examination [28] or where a witness proves to be hostile.[29] Whether a question is leading depends on the circumstances attending the

16. The practice is to be commended rather than condemned. Horton v. State [Ga.] 51 S. E. 287.

17. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

18. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156. Voluntary statements by a party of incompetent matters and repeated attempts of counsel to get such matters before the jury, held ground for reversal. Robison v. Bailey, 113 Ill. App. 123.

19. O'Donnell v. People of Illinois, 110 Ill. App. 250.

20. Where physician was testifying to character of injuries and that death resulted, an offer to admit that death was caused by injuries received in collision did not render further examination of the witness improper. Terre Haute Elec. Co. v. Klely [Ind. App.] 72 N. E. 658.

21. Kozlowskl v. Chicago, 113 Ill. App. 513.

22. Permitting witnesses to illustrate testimony relating to a well with a paper cylinder, held not error. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Physician properly allowed to use skeleton in explaining nature of injury to plaintiff's ankle. Chicago & A. R. Co. v. Walker [Ill.] 75 N. E. 520.

23. Question calling for testimony that had already been given properly excluded. Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 N. W. 399. Court may properly refuse to allow repitition of testimony by a witness. Braham v. State [Ala.] 38 So. 919; Spinks v. Clark [Cal.] 82 P. 45; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

24. White v. Boston, 186 Mass. 65, 71 N. E. 75.

25. See 3 C. L. 1385.

26. Held leading: Fulgham v. Carter [Ala.] 37 So. 932. Question as to effect of road on land held improper as suggestive and explanatory. Pichon v. Martin [Ind. App.] 73 N. E. 1009. Whether substance of conversation with plaintiff was that she caused accident by her own negligence. Busch v. Robinson [Or.] 81 P. 237. Question held leading and anticipatory of a defense. Hayward v. Scott, 114 Ill. App. 531.

Held not leading: People v. Hodge [Mich.] 12 Det. Leg. N. 407, 104 N. W. 599. Question whether witness had at any time made a certain statement not leading. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36. Held not error to allow counsel to read description of land from deed and then ask witness if he knew the land, and what name it was known by. Senterfeit v. Shealy [S. C.] 51 S. E. 142. Question whether at time of sale of horse there was any agreemnt as to taking possession on default in payments, and what the agreement was, held not leading. Davis v. Millings [Ala.] 37 So. 737. Witness testifying as to contract, he may be asked as to whether or not the contract contains a certain term, the question being put with a view to bringing out the whole contract. Id. Question: "State, if you know, whether or not there was an inventory * * * and, if you say there was no invoice or inventory * * * whether you knew this fact at the time. Did you or did you not exact an inventory at that time * * * and if not, why not?" held not leading. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49. Question to officer who had testified to a confession whether or not defendant told him where he would find the meat, held not leading. Gibson v. State [Tex. Cr. App.] 83 S. W. 1119.

27. Engelking v. Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89.

28. Bell v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 558, 87 S. W. 1160. A more liberal rule prevails in cross-examination than in direct. Hayward v. Scott, 114 Ill. App. 531.

29. It is proper to permit leading questions to be put to a witness by the party calling him when it is apparent that the witness was called under a misapprehension as to what his testimony would be, and he proves to be hostile. Zilver v. Robert Graves Co., 94 N. Y. S. 714.

examination of the witness, and the fact that it is leading does not necessarily make it objectionable,[30] and the allowance of such questions is very largely discretionary,[31] especially in criminal cases [32] or where the witness is examined by written interrogatories.[33] Lack of knowledge of the English language is no ground for permitting leading questions to be asked, if the witness understands sufficiently to make intelligent answers.[34] Testimony adduced by leading questions will be considered if not objected to,[35] but an objection is not waived by permitting the witness to reiterate the suggested matter.[36] Leading questions are reversible error if the evidence, without the replies to such questions, is insufficient to support the verdict.[37]

Refreshing memory.[38]—A witness may refresh his memory from a memorandum made by him,[39] or under his direction,[40] at or near the time of the transaction in issue,[41] and while the facts of which it speaks were fresh in his mind; or from a memorandum or record made by another if read by or to him when the matter was fresh in his memory, so that he could depose that the writing correctly represented his recollection at the time.[42] By statute in Oregon, a memorandum must have been made by the witness himself, or under his direction.[43] Whether the memorandum was made by the witness or another, it must appear that he had personal knowledge of the facts; [44] it must also appear that the witness cannot testify with-

30. Shaffer v. U. S., 24 App. D. C. 417.

31. Colley v. Williams [Ga.] 50 S. E. 917; Phinazee v. Bunn [Ga.] 51 S. E. 300; Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934; Condon v. Schoenfield, 114 Ill. App. 468. A case will not be reversed because leading questions were allowed, no abuse of discretion appearing. Hollingsworth v. Ft. Dodge, 125 Iowa, 627, 101 N. W. 455.

32. Woodruff v. State [Neb.] 101 N. W. 1114; State v. Newman, 93 Minn. 393, 101 N. W. 499.

33. Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934.

34. Craddick v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 637, 88 S. W. 347.

35. Smith v. Brooks, 24 App. D. C. 75.

36. Ft. Worth & R. G. R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37.

37. Questions to plaintiff in action for damages for mental anguish caused by conduct of conductor held leading. Ft. Worth & R. G. R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37.

38. See 3 C. L. 1386.

39. Memorandum in witness' own handwriting properly used to refresh his memory. Heenan v. Forest City Paint & Varnish Co. [Mich.] 101 N. W. 806. Error to refuse to allow street car conductor to refresh his memory by use of written report at time of accident containing names and addresses of passengers who saw accident. Clark v. Union Traction Co. [Pa.] 60 A. 302.

40. Deputy sheriff may refresh his memory by use of copy of his own return on order of delivery of goods, the copy being written under his direction and supervision. Flohr v. Territory, 14 Okl. 477, 78 P. 565. In fire insurance case, treasurer of company under whose supervision an inventory of stock had been made a year before could use a verified copy of the inventory to refresh his memory in testifying regarding the stock and net profits. Wells Whip Co. v. Tanners' Mut. Fire Ins. Co., 209 Pa. 488, 58 A. 894.

41. Witness having testified that he made memoranda of log marks as he found them on logs, he was properly allowed to testify from such entries. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259. Memoranda made by foreman of lumber yard the day after a fire were admissible to refresh his memory on amount and value of lumber destroyed. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025.

42. Rule at common law. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60. Error to allow witness to refresh memory by use of memorandum which he had neither made nor seen made, and which he had not seen when the transaction was fresh in his memory and known at the time to be correct. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36.

43. B. & C. Comp. § 848. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60.

44. Witness could not refresh memory by book in which she merely copied entries from other slips, she having no other personal knowledge of facts. Kirschner v. Hirschberg, 90 N. Y. S. 351. Witness cannot read copied entries relating to transactions of which he has no personal knowledge. Rothenberg v. Herman, 90 N. Y. S. 431. Error to permit witness to read a report when no foundation was laid to show his recollection of the facts or correctness of report or who wrote it, it only appearing that it was taken at the time. Wittmann v. Wittmann, 110 Ill. App. 201. Memorandum made from register sheets and time slips made by others, and regarding which witness had no personal knowledge, improperly used by witness in testifying. Doyle v. Illinois Cent. R. Co., 113 Ill. App. 532. Not proper to allow witness to refresh memory from memoranda taken from book kept by another. Haish v. Dreyfus, 111 Ill. App. 44. Witness may refresh his memory from records made by him or known to be correct, but cannot merely recite the contents of such records if he has

out the use of such record or memorandum.[45] Some courts hold that a witness cannot testify with the aid of a memorandum, unless, after refreshing his memory therefrom, he can then testify from present remembrance,[46] or is willing to swear positively to the facts from the paper.[47] Others hold that where the witness swears positively that the memoranda or entries were made at the time according to the true facts, he may testify therefrom though such facts are not in his present remembrance;[48] and that in such case the memoranda are also admissible as a part of his testimony.[49] The memorandum used must be the original unless the original is lost or its absence explained.[50] A memorandum made for the purposes of the trial is not a sufficient basis for testimony.[51] It is not essential that a paper used by a witness should itself be competent evidence,[52] or that it should be produced in court.[53] It has been held proper to allow a witness to refresh his memory from books of account,[54] from testimony given on a former trial, correctly preserved,[55] from a memorandum made by an attorney and read to the

no personal knowledge of the facts. Texas & P. R. Co. v. Leggett [Tex. Civ. App.] 86 S. W. 1066. A memorandum cannot be wholly substituted for the recollection of the witness; the witness must have some present knowledge or recollection independent of the memorandum, and cannot testify wholly therefrom. Southern R. Co. v. State [Ind.] 75 N. E. 272.

45. If witness has present knowledge or recollection of facts, the memorandum is only secondary evidence. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60. Use of report of accident improper. Morris v. New York City R. Co., 91 N. Y. S. 16.

46. See Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356. A printed copy of testimony on a previous trial could not be used, when witness could not testify from his own recollection after refreshing his memory. Ragsdale v. Southern R. Co. [S. C.] 51 S. E. 540. No error in permitting witness to refresh recollection of figures by use of memoranda, his testimony being based on refreshed recollection and not on memoranda. Ascheim v. Levinsohn, 91 N. Y. S. 157. Witness properly allowed to refresh memory from testimony given on former trial where after doing so he could testify from recollection. State v. Aspara, 113 La. 940, 37 So. 883. A witness may use memoranda not made by himself, if after referring thereto, he can testify to the facts from memory. Memoranda of weights of cattle sold held proper to refresh memory of witness. Texas & P. R. Co. v. Birdwell [Tex. Civ. App.] 86 S. W. 1067.

47. Under Civ. Code, 1895, § 5284, witness may use a mortgage not prepared by himself. Shrouder v. State, 121 Ga. 615, 49 S. E. 702.

48. This is Wisconsin rule. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

49. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356. No error in introducing in evidence memoranda made from books, used by witness in testifying, where books were also in evidence. Morrison Mfg. Co. v. Bryson [Iowa] 103 N. W. 1016. Ledger used by witness in testifying was admissible as part of his cross-examination. Logan v. Freerks [N. D.] 103 N. W. 426.

50. Memoranda, made from original entries in shop book, afterwards signed by witness, could not be used. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60. Where it did not appear whether witness was refreshing his memory from original entries or copies of memoranda, and he had both before him, it was not error to refuse to strike his testimony. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. An original memorandum must be shown to have been lost or destroyed before a copy may be used by a witness to refresh his memory. Southern R. Co. v. State [Ind.] 75 N. E. 272.

51. Downs v. Downs [Iowa] 102 N. W. 491.

52. A witness may refresh his memory from memoranda of dying declarations, though the paper itself is inadmissible as evidence. State v. Teachey, 138 N. C. 587, 50 S. E. 232. See, also, Allwright v. Skillings [Mass.] 74 N. E. 944.

53. The fact that a witness has referred to a memorandum, made by him, having no present recollection of an event, and that the memorandum is not produced in court, does not render his testimony incompetent. Such memorandum may be referred to in or out of court, and need not be produced unless the court so orders. Loose v. State, 120 Wis. 115, 97 N. W. 526.

54. Express agent properly allowed to refresh his memory from express books to find what he did with a particular package. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19. Secretary of insolvent company properly allowed to refresh his memory by referring to policy register, applications, cash book and transfer book. French v. Millville Mfg. Co., 70 N. J. Law, 699, 59 A. 214. A witness may refresh his memory from books of account not put in evidence, and whether or not the books are competent as evidence. In this case many of the entries were in witness' own handwriting. Allwright v. Skillings [Mass.] 74 N. E. 944.

55. If a witness be reluctant or his memory be clouded, he may properly be examined by referring to his testimony on a former trial. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957. It is proper, if a witness is not hostile, to call his attention to testimony given on a former trial and permit him to refresh his memory from the minutes of such testimony. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922. Witness

adverse party,[56] from a newspaper report, recognized as an authority,[57] and from a copy of an indictment prepared and furnished under direction of the court.[58]

Responsiveness.[59]—If an answer is not responsive to the question,[60] it should, on motion, be stricken.[61]

§ 2. *Cross-examination.*[62]—The range of the cross-examination is largely discretionary with the trial court.[63] Repetition is properly prevented.[64] Examination in the nature of argument with the witness is improper.[65] Permission to re-cross-examine a witness is discretionary.[66] A party who has not availed himself of an opportunity to cross-examine a witness cannot complain on appeal.[67]

Greater latitude is allowed in the cross-examination of a party than in that of a mere witness.[68] Where a party is called by his adversary for cross-examination under the statute, whether the examination may be continued by his own counsel

may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at such trial, or a copy thereof. State v. Dean [S. C.] 51 S. E. 524.

56. Memorandum from which attorney for plaintiff testified, not open to objection that it was made without defendant's knowledge or consent, where attorney testified that he read it to defendant at the time, and that defendant assented to it. Crawford v. Abbey [Tex. Civ. App.] 79 S. W. 346.

57. Witness properly allowed to refresh memory on price of milk at given time with newspaper shown to be recognized by milkman as authority on price of milk. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

58. Flohr v. Territory, 14 Okl. 477, 78 P. 565.

59. See 3 C. L. 1387.

60. Where question as to gangways between piles of baled cotton was whether they were straight or "how were they," the object being to ascertain whether they were left in such condition that a fire could be readily discovered, an answer that they were usually straight but sometimes the cotton might fall off and block them a little was responsive. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

61. Beadle v. Paine [Or.] 80 P. 903.

62. See 3 C. L. 1387.

63. Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Smith v. State [Ind.] 74 N. E. 983; Henderson v. Henderson [Ind.] 75 N. E. 269; Carey v. State, 70 Ohio St. 121, 70 N. E. 955. No error to refuse to allow further cross-examination, no sufficient reason for such examination appearing. Brown v. Harris [Mich.] 102 N. W. 960. Discretion of court not abused by allowing and refusing to allow certain questions on cross-examination. Worrell v. Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988. Question as to value of land after construction of road, after witness had been cross-examined as to value in general, held properly excluded. Heath v. Sheetz [Ind.] 74 N. E. 505. Where counsel had fully cross-examined physician as to an examination by him of plaintiff, suing for damages for injuries, refusal to permit cross-examination as to his usual method of examination was proper. Pittsburg, etc., R. Co. v. Banfill, 206 Ill. 553, 69 N. E. 499. Questions carrying intimation that witness had pressed inquiries on deceased, when he was in a feeble condition, concerning the making of his will, and that her affection for deceased was merely mercenary, held improper cross-examination. Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105. Where both a notice of an appropriation of water rights, and the witness' testimony were before the court, it was proper to refuse to allow a cross-examination to show discrepancies between the two. Norman v. Corbley [Mont.] 79 P. 1059.

64. The court may properly limit cross-examination when the ground has already been covered more than once. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. The substance of questions having been included in former questions to which no objection was made, it was discretionary with court to allow them or not. Beadle v. Paine [Or.] 80 P. 903.

65. Especially where facts which were subject-matter of examination had been admitted. Brown v. Harris [Mich.] 102 N. W. 960.

66. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475.

67. Where party did not improve opportunity to cross-examine a party, and did not seek to reopen case for the purpose, he cannot complain on appeal. Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302. Where a party has had one opportunity to contradict a witness, refusal to allow such contradiction at a later time is discretionary. Brinkley Car Works & Mfg. Co. v. Cooper [Ark.] 87 S. W. 645.

68. Cross-examination of party regarding former similar transactions, tending to show his custom, held proper. Sullivan v. Mauston Mill. Co., 123 Wis. 360, 101 N. W. 679. Where witness is a party, a wider range of cross-examination is permitted. Winn v. Itzel [Wis.] 103 N. W. 220. Where extent and character of plaintiff's injuries are in dispute wide latitude allowed in cross-examination. Chicago Union Traction Co. v. Miller, 212 Ill. 49, 72 N. E. 25. In assault and battery brought on by dispute over money claims, cross-examination of plaintiff as to whether defendant had not paid his rent after the time in question was competent, tending to show plaintiff's claim for rent was not genuine. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. In action against railroad for killing stock, examination of plaintiff as to whether he had not been an agent of defendant and had been discharged, and

rests in the discretion of the court.[69] Where an adverse party is examined as to a transaction or conversation as to which he could not have testified in his own behalf, he is entitled to explain the entire conversation or transaction.[70]

When the defendant in a criminal case takes the stand, he may be cross-examined the same as any other witness.[71] Much latitude is also allowed in the case of prosecuting witnesses.[72]

Limitation to scope of direct examination.[73]—The cross-examination should be confined to matters connected with or related to matters brought out on the direct examination.[74] But where the direct examination opens up a general subject, the cross-examination may cover any phase of the general subject;[75] and an incident of

as to acts which caused the discharge, was proper to show bias. Houston, etc., R. Co. v. Wilson [Tex. Civ. App.] 84 S. W. 274.

69. Miller v. Carnes [Minn.] 103 N. W. 877.

70. Personal transaction with a decedent. In re Cozine, 93 N. Y. S. 557.

71. See Witness (Privileges of), 4 C. L. 1943. Under Kirby's Dig. § 3088, a defendant who takes the stand may be cross-examined the same as any other witness. Corothers v. State [Ark.] 88 S. W. 585. Defendant may be cross-examined as to an attempt to get prosecutrix out of the country so she would not testify against him. Id. Proper to subject defendant in criminal case to rigid and searching cross-examination. State v. Sheronk [Conn.] 61 A. 897. Defendant may be cross-examined as to conviction of assault and battery. Examination as to particulars of assault held harmless error. State v. Mount [N. J. Law] 61 A. 259. Extent of cross-examination of a defendant is discretionary. Corothers v. State [Ark.] 88 S. W. 585.

72. Cross-examination of prosecutrix for rape, who testified she was unconscious part of the time, held improperly restricted. Posey v. State [Ala.] 38 So. 1019.

73. See 3 C. L. 1388.

74. State v. Gray [Or.] 79 P. 53; Bill v. Fuller, 146 Cal. 50, 79 P. 592; Cheney v. Field, 114 Ill. App. 597; Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392; State v. Usher, 126 Iowa, 281, 102 N. W. 101; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Hathaway v. Goslant [Vt.] 59 A. 835; Johnston v. Charles Abresch Co., 123 Wis. 130, 101 N. W. 395; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. Cross-examination on matters not covered in direct examination is largely discretionary. State v. Lyons, 113 La. 959, 37 So. 890. Matters of defense, not touched on in direct examination, cannot be brought out on cross-examination. Story v. Nidiffer, 146 Cal. 549, 80 P. 692. Cross-examination of defendant's wife on matters not touched in her direct examination, and incriminative of defendant, held improper. Webb v. State [Tex. Cr. App.] 83 S. W. 394. Witness who had testified that lots were substantially at grade could not testify on cross-examination whether accident would have happened if lots had been brought to grade established by city. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493. Where direct examination had not referrd to mail crane, question on cross-examination whether there was anything unusual about it was properly excluded. Western R. of Ala. v. Cleghorn [Ala.] 39 So. 133. Where physician testified on direct examination only on removal of kidney by him, he could not be cross-examined as to his opinon of the cause of the degeneration of the kidney. Maurer v. Gould [N. J. Law] 59 A. 28. Witness cannot be asked concerning conversation not referred to in direct. State v. Brady [N. J. Law] 59 A. 6. A disinterested witness who has testified to defective mine timbering cannot be asked if he suggested to foreman that place was dangerous. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. There being no previous testimony as to contribution to a fund to abate a pool as a nuisance, cross-examination thereon was improper. Godwin v. Atlantic Coast Line R. Co., 120 Ga. 747, 48 S. E. 139. When witness had said he did not remember whether he had paid a certain charge on a telegram, a question whether he had paid charges on any other telegram was properly excluded. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. Under the "Federal rule" cross-examination of an adversary who takes the stand in his own behalf must be confined to matters brought out on the direct examination; under the "orthodox rule" much more latitude is permitted. Ayers v. Wabash R. Co. [Mo.] 88 S. W. 608. (See discussion and authorities in this case.)

75. Osburn v. State [Ind.] 73 N. E. 601; Henderson v. Henderson [Ind.] 75 N. E. 269. Where there was evidence as to insanity in defendant's family, witness was properly cross-examined as to whether defendant was or had been crazy. Bell v. State, 140 Ala. 57, 37 So. 281. Where witness testified that his relations with his step mother were friendly, cross-examination as to his conduct toward her was proper. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. After testifying to sinking of shaft in mine, and direction of vein so discovered, witness could be cross-examined fully in regard thereto to show the true direction of the vein. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806. Where banker testified that defendant and deceased both drew checks on a fund in his bank according to an agreement with him, he was properly cross-examined as to transactions between him and defendant and deceased relative to such fund. State v. Coleman, 17 S. D. 594, 98 N. W. 175. Doctor testifying that plaintiff had had no trouble but tuberculosis before her injury, could be asked, on cross-examination, his opinion as to the permanency of her injuries. Hofacre v. Monticello [Iowa] 103 N. W. 488. Where physician testified that a physician in the town

a transaction proved, and circumstances connected with it which qualify or destroy the effect of the testimony in chief, may be brought out on cross-examination.[76] That facts brought out on cross-examination tend to establish a defense is not a valid objection to the cross-examination when the facts so brought out are merely explanatory of matters testified to on the direct examination.[77] An explanation of previous statements is properly drawn out on the cross-examination.[78] A portion of a conversation [79] or of an account book [80] having been introduced on the direct, it is proper to show other relevant portions on the cross-examination. A party who desires on cross-examination to go outside the scope of the direct examination must make the witness his own.[81]

Limitation to issues.[82]—Cross-examination, not directed to the credibility of testimony, should be confined to issues in the case.[83]

Examination going to credibility of witness.[84]—It is always proper on cross-examination to interrogate a witness, within reasonable bounds, as to any matter of fact calculated to affect his credibility or the weight of his testimony,[85] and the

had an X-ray machine, it was proper cross-examination to ask him if it was the only one and if it was customary for physicians in the locality to have them. Beadle v. Paine [Or.] 80 P. 903. Where defendant charged with burglary in a house of ill-fame himself testified to his relations with inmates, his visits, and his approaching marriage, cross-examination on these subjects was proper. People v. Davis [Cal. App.] 81 P. 716. In action for support, where plaintiff testified to marriage with defendant, she could be asked on cross-examination if defendant had ever contributed to her support since the marriage. McPhelemy v. McPhelemy [Conn.] 61 A. 477. Witness having shown by statements in direct examination that he had dealt with one as another's agency, he could be cross-examined on that subject. Brownlee v. Reiner [Cal.] 82 P. 324.

76. Where plaintiff, suing for injury caused by automobile collision, called chauffeur to identify machine and testify to his employment by defendant, the fact that he was at the time running the machine for his own personal use, contrary to his employer's orders, could be shown on cross-examination. Quigley v. Thompson, 211 Pa. 107, 60 A. 506. Certain transaction being testified to on direct examination, what was said and done at the time could be shown on cross-examination. Harnish v. Miles, 111 Ill. App. 105. Where witness testifies to facts tending to show that mistake in telegram was due to carelessness of sender in dictating it, the adverse party may show on cross-examination that negligence was that of the sending operator. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129.

77. Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837. The fact that cross-examination of plaintiff regarding operation and use of saw by which he was injured might tend to show contributory negligence did not make it improper, being confined to matters touched on in direct examination. Beltz v. American Mill Co., 37 Wash. 399, 79 P. 981.

78. Proper to draw out on cross-examination explanation of what witness meant by statement made by him. Nichols v. New Britain, 77 Conn. 695, 60 A. 655.

79. Where direct testimony is as to certain conversations, cross-examination may bring out all of such conversations. In re Hayden's Estate [Cal. App.] 81 P. 668. Part of a conversation being elicited on direct, it is error to refuse to allow all relevant portions thereof to be shown on cross-examination. Adams v. Long, 114 Ill. App. 277. Where state shows a conversation, defendant may on cross-examination show all that was said in reference to the matters brought out by the state, but nothing more. Brahan v. State [Ala.] 38 So. 919.

80. A portion of defendant's account book having been offered in evidence on the direct examination, he was properly cross-examined as to other accounts therein. Devencenzi v. Cassinelli [Nev.] 81 P. 41.

81. Hampton v. State [Fla.] 39 So. 421.

82. See 3 C. L. 1390.

83. Mitchell Square Bale Ginning Co. v. Grant [Ala.] 38 So. 855; Snedecor v. Pope [Ala.] 39 So. 318; Bill v. Fuller, 146 Cal. 50, 79 P. 592. Cross-examination on immaterial matter improper. Quale v. Hazel [S. D.] 104 N. W. 215. Court may of its own motion exclude irrelevant questions on cross-examination. Wells v. Missouri-Edison Elec. Co., 108 Mo. App. 607, 84 S. W. 204. After cross-examination had brought out fact that witness was manager of a co-operative building company, it was proper to refuse examination as to character and purpose of company. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200. Where witness had admitted use of liquor to excess, refusal to permit questions whether he had taken "Keeley cure" or had "snakes" was proper. Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068. Cross-examination upon independent cases of the same character and about the same time as the principal case is not allowed. Physician, testifying to injuries, cannot be cross-examined as to professional opinions in other personal injury action. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 441, 71 N. E. 1050. Defendant in burglary should have been allowed to cross-examine state's witness as to customary manner of closing the doors. Adkinson v. State [Fla.] 37 So. 522.

84. See 3 C. L. 1391. See, also, Witnesses, 4 C. L. 1943.

85. Everything which will tend to rebut the fact testified to by a party to an action,

extent of such examination is necessarily left largely to the discretion of the trial judge.[86] Among the matters which such examination may properly cover are the relationship of the witness to the parties,[87] compensation of the witness,[88] his interest in the result of the suit,[89] his sincerity and honesty,[90] and his bias or hostility.[91] The character and previous life of the witness may be inquired into to some extent,[92] especially if the witness is the defendant in a criminal case;[93] and in some states

or dispute an inference that may be drawn from his direct testimony, is admissible on cross-examination. Perrin v. Carbone [Cal. App.] 82 P. 222.

86. Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

87. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613. Proper to ask witness if he was in employ of defendant. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856. Proper to show whether witness was in employ of party calling him, and whether he was paid to come and testify. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 89 S. W. 29. Allowance of questions to show relation of attorney and client between a witness and plaintiff's attorney held not an abuse of discretion. Birmingham So. R. Co. v. Lintner [Ala.] 38 So. 363. For whom impeaching witness acted in gaining information may be shown to show fact and manner of his interest. National Enameling & Stamping Co. v. Fagan, 115 Ill. App. 590. Proper to ask defendant's wife on cross-examination whether she had been hypnotized by defendant, where evidence tended to show he had great influence over her. State v. Exum, 138 N. C. 599, 50 S. E. 283. To show bias of witness, and close relation to defendant, testimony, on cross-examination, that had she lived with defendant in adultery, and believed he had a wife and child living, and that she had visited defendant in jail, was proper. Sexton v. State [Tex. Cr. App.] 88 S. W. 348. As affecting credibility of witness, facts could be brought out on cross-examination showing that action was being supported by a street railway company which was responsible in part for the accident in question. Iaquinto v. Bauer, 93 N. Y. S. 388.

88. Evidence that witness was paid for time taken to investigate an alleged illegal election, and that expenses of a trip were paid by one of the parties, proper on cross-examination. State v. Rosenthal, 123 Wis. 442, 102 N. W. 49. Whether witness had a conversation with a party relative to being paid if out of the state at time of trial could be inquired into. Hathaway v. Goslant [Vt.] 59 A. 835. What witness expected as compensation immaterial when no agreement to pay him anything was shown. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Where detective testified that he was paid by his agency and salary did not depend on conviction in cases on which he worked, it was not error to refuse to allow inquiry as to the amount of his salary. White v. State, 121 Ga. 191, 48 S. E. 941.

89. In action concerning ditch, witnesses may be tsked if they paid anything to discharge their ditches on another's land. Kennedy v. Murphy, 112 Ill. App. 607. Plaintiff might show on cross-examination that defendant expected the vendor to make good the expense of the litigation if plaintiff secured verdict. Coolidge v. Ayers [Vt.] 61 A. 40.

90. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

91. Questions tending to disclose animus or bias proper. Hampton v. State [Fla.] 39 So. 421. Cross-examination to determine bias or prejudice of witness held within proper limits. City of Guthrie v. Carey [Okl.] 81 P. 431. Hostility may be shown, but not whether it is justifiable. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613 Witnesses for state in homicide case properly cross-examined as to threats to take defendant's store and run him out, shortly before the killing. Ringer v. State [Ark.] 85 S. W. 410. Discretionary to allow witness' attitude on assault and battery in testing credibility on cross-examination. Commonwealth v. Middleby [Mass.] 73 N. E. 208. Question whether plaintiff had not brought assault and battery action because he had been compelled to pay for a cow was proper. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. Where physician was sent by defendant to examine plaintiff, it was proper to ask physician on cross-examination what defendant's attorney said to him when he was sent to plaintiff, in order to show bias. Birmingham R., Light & Power Co. v. Rutledge [Ala.] 39 So. 338. Offer to prove intimidation of witness properly excluded where it was apparently not made in good faith, but simply to prejudice the jury. Commonwealth v. Ezell [Pa.] 61 A. 930.

92. Extent of cross-examination as to previous life of witness discretionary. State v. Nergaard [Wis.] 102 N. W. 899. Rigid cross-examination of deputy oil inspector proper where his testimony should loose methods of inspection. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227. A witness who has testified to another's general reputation, cannot be asked whether he had not himself been impeached three times in a certain county. Hellard v. Com. [Ky.] 84 S. W. 329. Cross-examination as to whether witness supported his family, improper. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. Improper to ask impeaching witness which had the worst reputation, he or the witness whose reputation he had testified was bad. Newman v. Com. [Ky.] 88 S. W. 1089. Whether witness was not notorious person who had been tarred and feathered and run out of the country, improper. State v. Mann [Wash.] 81 P. 561. Marriage relations of two witnesses improper matter for cross-examination to test credibility. Flohr v. Territory, 14 Okl. 477, 78 P. 565.

93. Proper to cross-examine defendant, when a witness, as to business and occupation for three or four years preceding trial. Sexton v. State [Tex. Cr. App.] 88 S. W. 348.

indictment [94] or conviction of crimes [95] or offenses involving moral turpitude [96] may be shown. It is usually held that specific acts of immorality cannot be shown,[97] but some courts hold that such examination may be allowed in the discretion of the court.[98]

Previous contradictory statements may always be shown to impeach the witness.[99] In some states it is unnecessary to lay a foundation for proof of contradictory oral statements by inquiring on cross-examination whether he made the declarations of which it is proposed to offer proof;[1] but usually such foundation is required.[2] A witness cannot be cross-examined as to whether he made written statements inconsistent with his testimony unless the writing has been put in evidence, and has been shown the witness.[3] Further examination of the contents of the writing cannot then be made unless the witness admits the writing to be his.[4] Questions as to previous statements [5] or charges of crime [6] should definitely specify time and place.

A witness cannot be impeached by cross-examination as to irrelevant and collateral matters;[7] answers to questions calling for such matters are conclusive.[8] While the state cannot impeach its own witnesses, it is not bound by every statement

94. Defendant's witness properly asked whether there was a case pending against him. Hill v. Territory [Okl.] 79 P. 757.

95. Under Code Civ. Proc. § 2051, permitting conviction of witness of a felony to be shown, and § 17, that words used in singular include the plural, it was not error to show conviction of five felonies. People v. Kelly, 146 Cal. 119, 79 P. 846. Whether witness had been convicted of forcible trespass admissible to impeach him. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690. In prosecution for homicide, defendant may be asked by the state if he has been convicted of crimes in another state. Rev. St. 1899, § 4680. State v. Heusack [Mo.] 88 S. W. 21.

96. Indictments for adultery could be shown to affect defendant's credibility as a witness. Sexton v. State [Tex. Cr. App.] 88 S. W. 348.

97. Questions imputing want of chastity are improper. Knickercocker v. Worthing [Mich.] 101 N. W. 540. But such questions, put in the belief that they are competent, do not constitute reversible error. Id. Attempt to show witness, physician, had performed criminal operation, improper cross-examination. Flohr v. Territory, 14 Okl. 477, 78 P. 565.

98. How far party may go in cross-examination as to specific acts of immorality rests in court's discretion. Little Rock Vehicle & Implement Co. v. Robinson [Ark.] 87 S. W. 1029.

99. A paper shown a witness and admitted to have been signed by him may be read on his cross-examination, to show it contains statements contradictory to his testimony. Chicago City R. Co. v. Matthieson, 113 Ill. App. 246. When witness testifies he was drunk, it is proper to show what he said immediately after the time when he claims he was drunk. Sauter v. Anderson, 112 Ill. App. 580.

1. Villineuve v. Manchester St. R. Co. [N. H.] 60 A. 748.

2. A witness should be allowed to deny participation in conversations testified to by others. Emanuel v. Maryland Casualty Co., 94 N. Y. S. 36.

3. Villineuve v. Manchester St. R. Co. [N. H.] 60 A. 748.

4. Villineuve v. Manchester St. R. Co. [N. H.] 60 A. 748. Where witness testified that he did not write or authorize a letter, counsel may not read it to him, and ask him if he did not write it. Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553.

5. Bradley v. Gorham, 77 Conn. 211, 58 A. 698. And the question concerning such a statement put to the impeaching witness, should be substantially identical with the question first asked. Gormley v. Hartney, 105 Ill. App. 625.

6. Question on cross-examination of defendant whether he had not been charged with subornation of perjury should be made definite as to time. Stull v. State [Tex. Cr. App.] 84 S. W. 1059.

7. Bell v. State [Miss.] 38 So. 795. Questions for impeachment covering immaterial matters are properly excluded. Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 N. W. 399. Witness cannot be impeached as to testimony first drawn out on cross-examination. Bullard v. Smith, 28 Mont. 387, 72 P. 761. Defendant's agent being cross-examined as to a collateral and irrelevant statement, not brought out in direct examination, he could not thereafter be contradicted regarding the same. Simms v. Forbes [Miss.] 38 So. 546. While cross-examination on immaterial matters to affect credibility is largely discretionary, discrediting by innuendo instead of by competent evidence should not be allowed. Malone v. Stephenson [Minn.] 102 N. W. 372.

8. Denial by witness that he had been charged with larceny held conclusive. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690. Where a witness is asked on cross-examination whether he made a certain statement, not relevant to matters brought out on his direct examination, his denial that he made the statement is binding on the inquiring party. The Saranac, 132 F. 936.

made by them, but may explain the true facts by other witnesses,[9] and cross-examination of its own witnesses is allowable if they prove hostile and give testimony other than that expected.[10]

Questions which tend only to humiliate and degrade a witness, and not to show bias, are improper.[11] It is improper to read from a medical work in the cross-examination of a medical witness.[12]

As to probability of testimony.[13]—In testing the probability of testimony, previous acts or conduct of the witness, inconsistent with his testimony[14] or other facts inconsistent with those testified to,[15] may be shown. Questions designed to test the recollection of the witness are proper[16] and in the case of expert[17] and opinion evidence,[18] full cross-examination as to the knowledge of the witness and the

9. State v. Boice [La.] 38 So. 584.

10. State v. Moon [Kan.] 80 P. 597.

11. Question whether witness' daughter had two children of whom defendant's brother was the father, though daughter was unmarried, held improper. Adkinson v. State [Fla.] 37 So. 522.

12. Attempt to get medical work on insanity before jury without offering it in evidence, held improper. State v. Thompson [Iowa] 103 N. W. 377.

13. See 3 C. L. 1393.

14. Acts of witness inconsistent with his statements on direct examination may be shown in cross-examination as affecting credibility. Philadelphia v. Dobbins, 24 Pa. Super. Ct. 136. Where defendant, in homicide case, testified that he was shot at the night before the killing, cross-examination as to why he had not reported the fact to the authorities was proper. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

15. Where in action for pollution of stream a witness produced a sample of the water while on the stand, it was proper to ask him on cross-examination whether he did not know that the sewage in question was dumped into the stream above his ranch and above the place where he took the water. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14. Question to plaintiff as to ability to pay taxes if he had not paid other bills held proper cross-examination, in action for false imprisonment against a tax collector. Kerr v. Atwood [Mass.] 74 N. E. 917.

16. Children properly cross-examined as to occurrences in room where they were in order to test their credibility or the probability of their testimony. State v. Patchen, 37 Wash. 24, 79 P. 479. Telegraph operator having testified to the minute when he received a message, could be asked on cross-examination when he received a certain message for transmission the day before. Western Union Tel. Co. v. Merrill [Ala.] 39 So. 121. Conductor having testified that he was not sure of identity of man seen on his car, could be asked if he did not think it strange for a man to alight where he did. State v. Sherouk [Conn.] 61 A. 897.

17. Expert who testified that coupling of engine and dynamo was too short could be asked on cross-examination if room was large enough for longer coupling, though it was a fact that other rooms could have been added. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Where an expert testifies as to dangers apparent and appreciable in operating a given machine, he may be cross-examined as to whether he had learned what dangers could be known by a person of less than the average intelligence, such as plaintiff was. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874. Question to physician who testified testator was incompetent to make will, calling attention to internal evidence of will, and asking opinion thereon, held proper cross-examination, though question was not in technically proper form. Struth v. Decker [Md.] 59 A. 727. Where an expert has testified as to danger attending use of a given device, cross-examination going to the elements of his judgment and extent of his knowledge is proper. Carr v. American Locomotive Co., 26 R. I. 180, 58 A. 678.

18. Where witnesses testified to rental value of plant, full cross-examination as to elements of value should have been permitted. Sanitary Dist. of Chicago v. McMahon & Montgomery Co., 110 Ill. App. 510. Owner having testified to value of land, cross-examination as to what he paid, and what he received for parts of it, should have been permitted. Indianapolis & Cincinnati Traction Co. v. Shepherd [Ind. App.] 74 N. E. 904. Where witness gave opinion on value of horse before and after an injury it was proper to ask in cross-examination what he paid for the horse. Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061. Where witness testified to value, cross-examination to disclose his knowledge of one element of value, in order to weaken the effect of his opinion was proper. Union R. Co. v. Hunton [Tenn.] 88 S. W. 182. Witness having testified that defendant was drinking heavily on day of murder, it was proper cross-examination to ask what he had done to make witness believe he was drunk. Smith v. State [Ala.] 39 So. 329. Knowledge of a witness tending to discredit his estimate given of another's character, not reputation, may be shown on cross-examination. State v. Richards, 126 Iowa, 497, 102 N. W. 439. Witness who testifies to good reputation of defendant for truth and veracity may be asked if he has heard of a difficulty between defendant and a widow as to money matters. Leavell v. Leavell [Mo. App.] 89 S. W. 55. A witness who has testified to the good reputation for truth and veracity of a defendant, may be asked on cross-examination if he has not heard that defendant has been

elements of his opinion is proper. It may also be shown that the witness's testimony is a mere conclusion [19] or that he entertains opinions inconsistent with the facts to which he has testified.[20]

§ 3. *Redirect examination.*[21]—A witness may be re-examined as to matters brought out on cross-examination,[22] and while the court may, in the exercise of its discretion,[23] prevent a mere repetition of testimony already given,[24] such repetition is not necessarily prejudicial.[25] On redirect examination, the witness should be allowed to explain statements made on the cross-examination,[26] and where statements, acts, or conduct of the witness have been shown, it is proper on redirect examination to introduce explanatory matter tending to show such statements, acts, or conduct consistent with present testimony.[27] A witness should be re-examined as to matters brought out on his cross-examination at the close of such examination, and should not be called in rebuttal for that purpose.[28] The re-examination should be confined to matters brought out on cross-examination.[29]

charged with and indicted for subornation of perjury, but not that he married the woman he induced to swear falsely, in order to escape prosecution. Stull v. State [Tex. Cr. App.] 84 S. W. 1059. Where witness testified that brakeman's reputation for competency was good, and that he had heard of no complaints against him, it was proper cross-examination to show that witness had heard of the brakeman's allowing a car to go through a switch. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Also that witness had found him violating rules by talking to farmers outside the right of way, when he had been sent to flag a train. Id.

19. Where witness testifies to ownership, cross-examination going to show that his testimony was a mere conclusion was proper. Prussian National Ins. Co. v. Empire Catering Co., 113 Ill. App. 67.

20. It is proper on cross-examination to ask for opinions and conclusions of a witness to test him and show inconsistencies between such opinions and the facts. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285. Owner having testified to value of property in suit for damages, it is proper cross-examination to ask him what he will take for it. Chicago, etc., R. Co. v. Carr [Tex. Civ. App.] 13 Tex. Ct. Rep. 1020, 89 S. W. 35.

21. See 3 C. L. 1394.

22. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285.

23. The extent of re-examination is discretionary with the court. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285.

24. Proper to exclude, on redirect examination, an explanation of circumstances attending execution of written statement, where witness had had opportunity to make explanation before. Reynolds v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 323. Where physician had testified that there were no objective signs of injury, and was cross-examined, it was proper to refuse to allow redirect examination covering same ground. Finley v. New York City R. Co., 91 N. Y. S. 759.

25. Repetition of opinion given on cross-examination held not prejudicial. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285.

26. Marlow v. State [Fla.] 38 So. 653. It is proper on redirect examination to ask questions designed to afford the witness an opportunity of explaining answers given on cross-examination. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. On redirect examination witness may explain what he intended to convey by answers on cross-examination. State v. Lyons, 113 La. 959, 37 So. 890. Where a witness has given an erroneous impression of facts, he is entitled to explain himself while under examination, in the presence of the jury. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 84 P. 105.

27. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Where witness admitted leaving a place after a certain conversation wherein he was told to leave, it was proper to show on redirect examination how long after the killing, to which he testified, such conversation occurred. Bardin v. State [Ala.] 38 So. 833. Where claimant against an estate testified that she signed her husband's name to a certain note, she could, on redirect examination, explain the transaction to rebut presumption that she signed the notes in suit in the same way. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Where in action on note, plaintiff was cross-examined as to state of accounts between himself and defendant with a viw to showing satisfaction of note by sale of mortgaged property, it was proper to show other transactions as basis of note on redirect examination. Finch v. Mishler [Md.] 59 A. 1009. A contradicted witness is entitled to an opportunity to explain statements claimed to be inconsistent with his testimony after proof of such statements has been made, or the party calling him may re-examine him for the purpose of such explanation. Villineuve v. Manchester St. R. Co. [N. H.] 60 A. 748. Where an attempt is made to discredit a witness by showing a motive or interest influencing his testimony, he may show that he made statements similar to his testimony at a time when the alleged motive or influence did not exist. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984.

28, 29. Struth v. Decker [Md.] 59 A. 727.

§ 4. *Recalling witness for further examination.*[30]—Permitting a witness to be recalled for further examination is discretionary.[31]

§ 5. *Privileges of witnesses.*[32]—The privileges of witnesses, both as to the manner of examination and the matters as to which they may be examined, are elsewhere fully considered.[33]

EXCEPTIONS AND OBJECTIONS; EXCEPTIONS, BILL OF, see latest topical index.

EXCHANGE OF PROPERTY.

The general rules governing an exchange of property are the rules applicable to all contracts and are treated in appropriate topics.[34]

If time is not of the essence of a contract for the exchange of property each party has a reasonable time within which to comply with its provisions.[35] A substantial compliance is all that is required.[36] Original lack of mutuality may be supplied.[37]

One party to a fair exchange cannot recover property delivered under it, where the contract has never been broken;[38] but on failure of the owner of land to comply with the terms of the contract, the value of merchandise turned over to him may be recovered in an action for money had and received.[39] Where there is a breach of the covenant of warranty in one of the deeds to lands exchanged, the grantee has a lien on the land he conveyed for the damages he sustains.[40]

If induced by fraud, the defrauded party may maintain an action for damages,[41] or he may bring an action to rescind,[42] or he may rescind and recover the specific property parted with,[43] though the fraudulent representations were innocently

30. See 3 C. L. 1395, also title Trial.

31. Refusal to allow witness to be recalled for further cross-examination is discretionary. United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803. Allowing witness to be recalled to explain former testimony is discretionary. Piehl v. Piehl [Mich.] 101 N. W. 628. Allowing witness to be recalled for the purpose of laying a foundation for impeaching him is within court's discretion. Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

32. See 3 C. L. 1396.

33. See Witnesses, 4 C. L. 1943.

34. See Contracts, 5 C. L. 664; Fraud and Undue Influence, 3 C. L. 1520; Sales, 4 C. L. 1318; Vendors and Purchasers, 4 C. L. 1769. For remedies relative to such transactions, see Contracts, 5 C. L. 664; Specific Performance, 4 C. L. 1494.

35. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

36. A stipulation that the property shall not be incumbered is satisfied by the production of releases of incumbrances secured by an arrangement with the lienors to satisfy the liens out of the purchase price. Gibson v. Brown, 214 Ill. 330 73 N. E. 578. In an action to recover "boot money" paid, evidence held insufficient to show an agreement to trade back in case of dissatisfaction. Boire v. McDowell, 93 N. Y. S. 1091.

37. Where it is not mutual at the time it is made, but subsequent developments recognized by the party renders it mutual. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

38. Forbes v. Rogers [Ala.] 38 So. 843.

39. Proctor v. Stevens Land Co. [Minn.] 102 N. W. 395.

40. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

41. Joyner v. Early [N. C.] 51 S. E. 778. A refusal of one party to comply with the terms of a contract relieves the other of the necessity of keeping good a tender of a deed or preserving it unmutilated in order to maintain an action for damages. Cohen v. Parnass, 93 N. Y. S. 649.

42. Under Civ. Code, §§ 1282-1285, a suit to rescind a contract for the exchange of real property may be maintained on an offer to restore everything acquired and a tender of a deed of the real property acquired. Thompson v. Hardy [S. D.] 102 N. W. 299.

43. Joyner v. Early [N. C.] 51 S. E. 778. A party induced to exchange his land by false representations as to the title of the land he received may have rescission of his deed. Corbett v. McGregor [Tex. Civ. App.] 84 S. W. 278. Misrepresentations as to productiveness of the land and appurtenant water rights. Willey v. Clements, 146 Cal. 91, 79 P. 850. Evidence held to show that an exchange of realty for personalty was induced by fraud. Parker v. Anderson [Tex. Civ. App.] 85 S. W. 856. Evidence held to show false representations as to the value of land. Troutman v. Eggleston [S. D.] 104 N. W. 257.

Evidence insufficient to show that an exchange was induced by fraudulent representations. Spinks v. Clark [Cal.] 82 P. 45.

made;[44] but if the contract is executed, the fraud must be established by clear and satisfactory evidence.[45] The action to recover the specific property is at law,[46] and resort should not be had to a court of equity, unless for some special reason the remedy at law is unavailing or inadequate.[47] A rescission based on a demand for performance not made in good faith does not preclude the right to specific performance;[48] but where the evidence of one party shows him to be entitled to a rescission, the claim of the other party for specific performance is eliminated.[49]

EXCHANGES AND BOARDS OF TRADE.

Membership, rights and dealings.[50]—A membership on a board of trade is in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors.[51] Proceedings of a board of trade regularly engaged in an investigation of a complaint of a member, pursuant to valid by-laws will not be enjoined,[52] nor will the expulsion of a member for the violation of a valid rule.[53] Members can lawfully refuse to deal with a person who has been expelled from the association for his wrong doing.[54]

Property and contract rights of board.[55]—The quotations collected by a board of trade are property, and an unlawful use of them may be enjoined, even assuming that such statistics relate to unlawful transactions.[56] Contracts between boards of trade and telegraph companies which limit the communication of quotations collected by it are not in restraint of trade.[57] A by-law which prohibits members from doing business with a person expelled from the board for misconduct does not render it an illegal combination in restraint of trade.[58] Under the rules of the New York Stock Exchange, an indorsement of a member on a certificate of stock is a guarantee of the correctness of the signature of the party in whose name the stock stands.[59]

44. Du Bois v. Nugent [N. J. Eq.] 60 A. 339.

45. Wilson v. Maxon, 56 W. Va. 194, 49 S. E. 123. A litigant relying on the outstanding title of a third person to sustain his action or defense must fully establish such title by competent and sufficient proof. Id.

46. A verbal contract for the exchange of personal property may be rescinded by either party thereto for good cause, and a suit at law maintained for the restitution of the property. Wilson v. Maxon, 56 W. Va. 194, 49 S. E. 123.

47. Wilson v. Maxon, 56 W. Va. 194, 49 S. E. 123.

48. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

49. Bales v. Roberts, 87 S. W. 914.

50. See 3 C. L. 1397.

NOTE. Constitution and by-laws: It is essential to the validity of rules and regulations for the government of members that they be reasonable (Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495; Lewis v. Wilson, 121 N. Y. 284; Hibernia Fire Engine Co. v. Com., 93 Pa. 264), and not in conflict with the settled law of the jurisdiction (State v. Williams, 75 N. C. 134; Sewell v. Ives, 61 How. Pr. [N. Y.] 54), nor contrary to public policy (Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495), nor deny to a member the aid and protection of a court of justice in his legitimate operations (Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Rowe v. Williams, 97 Mass. 163; Heath v. President of Gold Exch., 7 Abb. Pr. [N. Y.] 54). And in order that rules be binding on a member, he must have given his consent thereto. White v. Brownell, 2 Daly [N. Y.] 329; Inhabitants of Palmyra v. Morton, 25 Mo. 593. See Helliwell, Stocks and Stockholders, § 203.

51. Hence a court may compel a bankrupt to execute papers necessary to effectuate a sale of a seat. In re Hurlbutt, Hatch & Co. [C. C. A.] 135 F. 504.

52. Board of Trade of Chicago v. Weare, 105 Ill. App. 289.

53. A rule prohibiting members from charging less than a specified commission is valid, if the commission is reasosnable, and the rule was enacted for the benefit of the board and its members. Dickinson v. Board of Trade of Chicago, 114 Ill. App. 295.

54. Such refusal was in accordance with the by-laws of the board and does not constitute an alleged boycott. Gladish v. Bridgeford [Mo. App.] 89 S. W. 77.

55. See 3 C. L. 1397.

56, 57. Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 49 Law. Ed. 1031.

58. Gladish v. Bridgeford [Mo. App.] 89 S. W. 77.

59. If such signature is not genuine, the broker is liable. Jennie Clarkson Home for Children v. Missouri, etc., R. Co. [N. Y.] 74 N. E. 571.

EXECUTIONS.

Scope of title.—This article relates only to the ordinary writ of execution or final process on a money judgment to enforce it by levy and sale.[60]

§ 1. *Definition.*[61]—A writ of execution is a process by which a final judgment of a court is carried into effect.[62]

§ 2. *Right to have execution.*[63]—A valid execution cannot issue upon a judgment which has been satisfied [64] or has become dormant.[65] A statutory provision that execution shall not issue within twenty-four hours after judgment is for the benefit of the debtor and may by him be waived by a proper agreement in writing made and filed in the case.[66] Whether such agreement is effectual as a waiver depends upon its construction, and this is for the court.[67] Under a statute authorizing issuance of execution on a justice's judgment within five years and requiring leave of court thereafter, the life of a judgment is not prolonged by the filing in the circuit court of a transcript of the judgment in the justice's court.[68] An order that a judg-

60. Procedure to aid execution is elsewhere discussed. See Civil Arrests (body execution), 5 C. L. 587; Creditors' Suit, 5 C. L. 880; Garnishment, 3 C. L. 1550; Supplementary Proceedings, 4 C. L. 1591. Writs in **execution of judgments not for money** are discussed in Assistance, Writ of, 5 C. L. 291; and in titles treating possessory actions, such as Ejectment (and Writ of Entry), 5 C. L. 1056; Trespass (to try title), 4 C. L. 1706; Forcible Entry and Unlawful Detainer (writ of restitution), 3 C. L. 1435; Quo Warranto (writ of ouster), 4 C. L. 1177; Replevin, 4 C. L. 1284.

The lien, dormancy and revivor of judgments are discussed in Judgments, 4 C. L. 287.

Compare Attachment, 5 C. L. 302; and for procedure for collection of judgments against representatives, receivers and fiduciaries, see Receivers, 4 C. L. 1238; Estates of Decedents, 5 C. L. 1183; Guardianship, 3 C. L. 1569; Trusts, 4 C. L. 1727.

61. See 3 C. L. 1397.

62. Cyc. Law Dict. "Execution;" 11 Am. & Eng. Enc. Law, 609.

63. See 3 C. L. 1398.

64. If a judgment has been fully satisfied, an execution issued upon it confers no authority on the officer, and a sale under it is void. Parker v. Crilly, 113 Ill. App. 309. A judgment is not satisfied by a levy and sale under execution if the purchase price is not paid. Hence second execution may issue thereon. Richardson v. Wymer [Va.] 51 S. E. 219.

65. An execution issued upon a dormant judgment is void. Denny v. Ross [Kan.] 79 P. 502. Under Rev. Codes, 1899, § 5500, providing that a judgment may be enforced by execution issued within ten years after its entry, execution cannot properly issue after that time, even though the judgment continues in force by virtue of the debtor's continuous absence from the state during the ten years. Weisbocker v. Cahn [N. D.] 104 N. W. 513. See, also, Judgments, 4 C. L. 287.

66. Washington Nat. Bank v. Williams [Mass.] 74 N. E. 470.

67. Agreement held to amount to waiver. Washington Nat. Bank v. Williams [Mass.] 74 N. E. 470.

68. Construing Justice Code, § 81, and Code Civ. Proc. §§ 329, 325. Phillips v. Norton [S. D.] 101 N. W. 727.

ment stand as security does not prevent the issuance of an execution thereon, nor operate as a stay,[69] and hence does not preserve the lien of a judgment after the expiration of a year, no execution having issued thereon.[70] The California statute providing that execution may issue by leave of the court upon motion after the expiration of five years after entry of judgment is valid, though no notice to defendants is provided for.[71] In New York leave to issue execution on a judgment five years after its entry is discretionary.[72] In an action by trustee process, where final judgment against the principal debtor has been entered, execution may issue thereon by special leave of the court while the action is still pending and undetermined as to the trustee.[73] A judgment entered against a partnership as a corporation, over a plea in abatement, cannot be enforced against the partners.[74] One who has assigned his judgment cannot thereafter issue execution.[75] Execution will not be summarily denied when the rights of the parties are in doubt and there is a legal remedy for a wrongful enforcement of the judgment.[76]

§ 3. *Stay and how procured.*[77]—Execution may be stayed where a petition in bankruptcy is filed before the day on which the sale is to be made.[78] It should not be stayed until a proceeding in equity to determine the amount of another person's claim on the fund has been disposed of;[79] but the proper practice in such case is to ask for a rule on plaintiff to show cause why leave should not be granted to pay the money into court to discharge the judgment.[80] A writ of supersedeas subsequent to the levy of an execution stays further proceedings but does not have the effect of restoring the personal property levied on to the defendant's possession or of impairing the lien created by the levy.[81] Under the Ohio statute permitting immediate collection of a judgment, though defendant has given bond for a stay of execution, the bond required of plaintiff should provide for interest on the amount to be collected, in case restitution is necessary.[82]

§ 4. *Procedure to procure issuance of writ.*[83]—Where notice of application for execution is required by law,[84] an order for execution without such notice is void.[85] The practice varies where execution is desired in a county other than that wherein the judgment was rendered.[86] Where execution against a decedent's estate is sought, the administrator may be required to make an intermediate account.[87]

69, 70. International Packing Co. v. Cichowicz, 114 Ill. App. 121.

71. Code Civ. Proc. § 685. Harrier v. Bassford, 145 Cal. 529, 78 P. 1038. Hence an order for execution without notice is valid in the absence of special circumstances rendering such order an abuse of discretion. Id.

72. Under Code Civ. Proc. § 1377. Schiller v. Weinstein, 94 N. Y. S. 764.

73. Leonard v. Sibley, 76 Vt. 254, 56 A. 1015.

74. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390.

75. Mawson v. Wermuth [N. Y.] 74 N. E. 829.

76. Where, pending an action against a bank in a Federal court, an assignee was appointed in a state court, and judgment was thereafter obtained in the Federal court, summary action denying execution was denied. Anglo-American Land Mortg. & Ag. Co. v. Cheshire Provident Inst., 134 F. 152.

77. See 3 C. L. 1398.

78. Discretion of court held properly exercised in refusing to vacate order of stay. Rothermel v. Moyer, 24 Pa. Super. Ct. 325.

79, 80. McManus v. Philadelphia, 211 Pa. 394, 60 A. 1001.

81. Rev. St. 1892, § 1272, changing the common-law rule is to be strictly construed. Thalheim v. Camp Phosphate Co. [Fla.] 37 So. 523.

82. Rev. St. § 6722. Haunts v. Lanman Co., 2 Ohio N. P. (N. S.) 405.

83. See 3 C. L. 1399.

84. Applications for execution under Code Civ. Proc. § 1391, as amended by Laws, 1903, c. 461, must be on notice. Neuman v. Mortimer, 98 App. Div. 64, 34 Civ. Proc. R. 164, 90 N. Y. S. 524. To judgment debtor and trustees of fund against which execution is sought. Sloane v. Tiffany, 34 Civ. Proc. R. 208, 93 N. Y. S. 149. Upon application for an order for execution against income from trust funds, the trustee is entitled to be heard. King v. Irving, 92 N. Y. S. 1094.

85. An order made in vacation without notice to the opposite party is void under Code, §§ 3834-3841. McConkie v. Landt, 126 Iowa, 317, 101 N. W. 1121.

86. In the absence of statutory requirements, a second or subsequent execution from the county wherein the judgment was rendered need not be recorded in the foreign execution docket. Steel v. Katzen-

§ 5. *Power to allow or issue writ.*[88]—A court has no power, in a statutory proceeding, to order execution for attorneys' fees, except as allowed by the statute.[89] A court has power to so control execution of its final processes as to prevent a wrong from being done.[90] Where execution issued by an appellate court is recalled and reformed to comply with an amended judgment, rights which have accrued under it will be saved.[91] In some states execution may be issued by a circuit court upon a judgment by a justice,[92] when a proper transcript of the justice's judgment has been filed with the clerk.[93]

§ 6. *Form and contents of writ.*[94]—Where a judgment is amended nunc pro tunc, the execution should recite the date of the original judgment.[95] The command to make costs of a proceeding in error must be expressed in the body of the writ, since such costs are not a part of the judgment of the lower court;[96] and if the judgment below has been already satisfied, the writ should be confined to such costs.[97]

§ 7. *Quashal of writ.*[98]—Notice of a motion to quash an execution is waived when a party appears generally to resist the motion without objection for want of notice.[99]

§ 8. *The levy. A. Leviable property and order of leviability.*[1]—The subject of exemptions is elsewhere treated.[2]

Equitable estates in land, though not subject to execution under the English common law,[3] are now subject to levy and sale in most jurisdictions,[4] if the estate is definite and certain;[5] but a mere right or interest which can only be asserted or

meyer, 5 Ohio C. C. (N. S.) 25. Where a judgment exceeding $100 is obtained before a justice of the peace in one county, and a transcript is filed in the prothonotary's office of that county, and then transferred to another county by exemplification, it is not a prerequisite to execution to file a certificate with the transferred judgment showing a return of "no goods" by a constable in the county where the justice's transcript was originally filed. Mougenot v. Vernon, 23 Pa. Super. Ct. 165.

87. In proceedings against an administrator for execution against property of the estate, the question whether there is property applicable to satisfaction of the judgment being in issue, the administrator may be required to make an intermediate account. In re Warren, 94 N. Y. S. 286. Such accounting held proper where question was whether judgment against government in French spoliation case was available. Id.

88. See 3 C. L. 1399.

89. Where a fine is assessed for violation of an injunction against the sale of liquor, but such fine is remitted by the governor, the court has no power to order execution for 10 per cent. of the fine as attorney's fee under the statute [Code, § 2429], authorizing as such fee 10 per cent. of the fine "collected." McConkie v. Landt, 126 Iowa, 317, 101 N. W. 1121.

90. King v. Davis, 137 F. 222.

91. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 144, 104 N. W. 691.

92. Code 1899, c. 50, § 118, allowing a transcript of a judgment of a justice to be filed in the office of a circuit court, and execution to be issued thereon, does not violate the constitutional provision requiring the amount for jurisdiction of the circuit court to exceed $50. Joseph Speidel Grocery Co. v. Warder, 56 W. Va. 602, 49 S. E. 534.

93. Execution void as between parties when only an imperfect abstract was filed, Code 1899, c. 50, § 118, not being complied with. Steringer v. John Mackie & Co. [W. Va.] 49 S. E. 942.

94. See 3 C. L. 1399.

95. Carter v. Smith [Ala.] 38 So. 184.

96, 97. Hopper v. Smith [N. J. Law] 60 A. 63.

98. See 3 C. L. 1400.

99. Steringer v. Mackie & Co. [W. Va.] 49 S. E. 942.

1. See 3 C. L. 1400.

2. See Exemptions, post, p. 1400; also Homesteads, 3 C. L. 1630.

3. Tucker v. Denico [R. I.] 61 A. 642.

4. St. 29 Car. 11, c. 3, § 10, has changed common-law rule in England. Tucker v. Denico [R. I.] 61 A. 642. In Rhode Island the statute adopting St. 29 Car. c. 3, § 10, has never been changed or repealed. Id. Hence in that state equitable estates are leviable. Id. Land held by an equitable title may be levied on and sold under a general execution in Kansas. Poole v. French [Kan.] 80 P. 997.

5. The interest of a purchaser at execution sale, after expiration of the period of redemption, but before execution of the sheriff's deed, is subject to levy and sale under execution. Pogue v. Simon [Or.] 81 P. 566.

An equity of redemption is subject to levy and sale under execution. Code 1896, § 1890. Carter v. Smith [Ala.] 38 So. 184. An equity of redemption, whether created by mortgage deed to the creditor or to a third person, with or without power of sale, may be sold under execution, under Code, § 450, subsec. 3. Mayo v. Staton, 139 N. C. 670, 50 S. E. 331.

enforced in a court of equity cannot be seized and sold under an execution at law.[6] A bare legal title to realty, uncoupled with a beneficiary interest, is not subject to execution.[7] A creditor can subject the estate of a cestui que trust if his claim is such that the beneficiary could himself enforce it against the trustee for the estate.[8] The interest of the grantor in a trust deed given as security is not leviable if the grantor has failed to demand conveyance of the legal title.[9] The reversion in lands which have been assigned as dower,[10] an undivided interest in a remainder in property devised to one for life, with unlimited power of disposition,[11] and a descendible, devisable and alienable estate in expectancy,[12] are subject to levy and sale.

The judgment creditor of an heir can levy on all the property belonging to the debtor but nothing more.[13] The distributive share of an heir in an undivided in-

6. Pogue v. Simon [Or.] 81 P. 566. Where land is conveyed to one person, who advances the consideration, under an agreement to convey to another on payment of the advancement, and the latter never holds legal title, his interest is not subject to sale. Holmes v. Wolford [Or.] 81 P. 819. Where title to land has never been in the judgment debtor but is held by another on a secret trust for such debtor, such land is not subject to levy and sale under an execution at law, but is an equitable asset of the judgment debtor which can only be reached by proper proceedings in a court of equity. Macfarlane v. Dorsey [Fla.] 38 So. 512.

NOTE. Leviability of Equitable Interests: "The rule thus established rests upon the assumption that an equitable interest in real property is an uncertain estate, which if it could be sold on execution issued on a judgment rendered in a law action, would produce a sum grossly inadequate in proportion to its real value; for most persons, in purchasing real property, insist upon a certainty of the title thereto, and, where there is a doubt in this respect, usually decline to invest their money. If a compulsory sale of such interest upon execution were permissible, there would be little or no competition in bidding. Few people desire to purchase a lawsuit, and the judgment creditor would probably secure the equitable estate for a nominal sum. In the interest of the debtor, and to afford purchasers of real property at an enforced sale thereof an equal opportunity with the judgment creditor, the rule adverted to has been adopted, requiring the latter first to establish the fact in a court of equity, in a suit instituted for that purpose, that the debtor's equitable estate in real property is subject to the payment of his demand, before such interest can be divested by a sale thereof upon execution. So long, therefore, as any substantial thing remains to be done by the debtor before his equitable estate in real property ripens into the legal title, such interest cannot be reached under an execution issued on a judgment in a law action, but to subject such estate to the payment of the creditor's demand, resort must be had to a court of equity to establish the right. In Pogue v. Simon [Or.] 81 P. 566, it was held that real property sold upon execution, the sale duly confirmed, and the time for its redemption having expired, though the sheriff's deed therefor had not been executed, was subject to levy and sale on execution issued on a judgment rendered against the purchaser of the real estate. The decision in that case proceeds upon the theory that, the time for redemption having expired, the purchaser of the real property had nothing substantial to do in order to establish his right, and therefore by operation of law, eo instante, on the expiration of the time limited, became the owner of the premises, which rendered the real property subject to seizure and sale on execution, though the deed evidencing the transfer of the title had not been executed. In that case there was nothing that could possibly be done by the original debtor, or those in privity with him, to defeat the right of the prior purchaser under the execution sale, who was entitled to a sheriff's deed; and for a failure to execute such instrument, mandamus would lie."—From opinion in Holmes v. Wolford [Or.] 81 P. 821.

7. Lee v. Wrixon, 37 Wash. 47, 79 P. 489.

8. Will gave all children equal rights and made one son trustee for incompetent daughter with power to pay income to her for life, and to give her a part of the estate if necessary for her support. Held, she had a beneficial interest subject to execution to satisfy a judgment for necessaries by an asylum to which she had been committed. Hopper v. Eastern Kentucky Lunatic Asylum [Ky.] 85 S. W. 1187. A trust deed providcd for application of the income of the property to certain purposes, and that surplus should go to pay a mortgage, and should be distributed to the grantor's children, and after the grantor's death, the property was to be held in trust for one of the children. Held, before the grantor's death and payment of the mortgage, such child had no leviable interest in the trust property. Hill v. Fulmer [Miss.] 39 So. 53.

9. The lien of the judgment against such grantor can be enforced only in a civil action. Mayo v. Staton, 139 N. C. 670, 50 S. E. 331.

10. At the instance of creditors of the husband's estate. Rusk v. Hill, 121 Ga. 378, 379, 49 S. E. 261.

11. Under judgment against the remainderman. Pedigo's Ex'x v. Botts [Ky.] 89 S. W. 164.

12. Purchaser will become owner of a future expectant estate, contingent upon events that may never happen. Higgins v. Downs, 101 App. Div. 119, 34 Civ. Proc. R. 85, 91 N. Y. S. 937.

13. He represents the debtor and takes the property as the debtor held it. Lippincott v. Smith [N. J. Eq.] 60 A. 330.

terest of the ancestor may be levied upon, though it has not been assigned;[14] but a judgment creditor of an heir cannot levy upon and sell land formerly belonging to the estate but held by a voidable title because of a purchase by the administratrix at her own sale.[15]

A creditor whose judgment is inferior to a mortgage cannot by a common-law execution subject property held by the mortgagee under a title voidable because purchased at his own sale under a power,[16] since the right to disaffirm such sale is personal to the mortgagor.[17]

A community homestead which has been set aside in a divorce proceeding for the wife and minor children is not subject to execution against the divorced husband.[18]

Wages [19] and the income from a trust fund [20] are leviable in New York under a judgment wholly for necessaries.

Property belonging to municipal corporations and used for public municipal purposes,[21] or held by charitable corporations in trust for the public [22] is exempt. Salary due a teacher in city schools cannot be seized under execution, since such seizure would in effect involve garnishment of a municipal corporation.[23] Property in the hands of a receiver [24] or assignee in insolvency [25] is not leviable.

A mere disclaimer of title by a judgment debtor does not defeat the rights of judgment creditors since the question whether title has passed so as to permit a levy and sale is to be determined from the evidence and law.[26]

(§ 8) *B. Mode of making levy.*[27]—Whether a levy has been effectually made depends upon the character of the property and the acts of the officer.[28] Careless-

14. Byerly v. Sherman, 126 Iowa, 447, 102 N. W. 157.

15, 16, 17. Williams v. Williams Co. [Ga.] 50 S. E. 52.

18. Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36.

19. Code Civ. Proc. § 1391, providing mode of procedure to collect judgment out of wages by special form of execution, applies to judgments acquired before passage of the act. Meyer v. Halberstadt, 44 Misc. 408, 89 N. Y. S. 1019. A claim for services as a surgeon is not subject to execution as wages under this section. Taylor v. Barker, 95 N. Y. S. 474.

20. Under Code Civ. Proc. § 1391, as amended by Laws 1903, c. 461, providing for execution against income from a trust fund upon a judgment for necessaries sold, execution will not issue on a judgment recovered in an action on another judgment. Neuman v. Mortimer, 98 App. Div. 64, 34 Civ. Proc. R. 164, 90 N. Y. S. 524. To authorize an order for an execution under such statute, it must also appear that no execution remains outstanding against the judgment debtor. Id. The act is not retroactive so as to apply to a trust created by will before passage of the act; if intended to be so retroactive, it is unconstitutional. King v. Irving, 92 N. Y. S. 1094; Sloane v. Tiffany, 34 Civ. Proc. R. 208, 93 N. Y. S. 149.

21. Property admitted to belong to a municipal corporation, and which is either in use for the public or held for future use for the public. Walden v. Whigham, 120 Ga. 646, 48 S. E. 159. Under Code 1896, § 2040, exempting from levy and sale property belonging to municipal corporations and used for municipal purposes, a stock of liquors in a municipal liquor dispensary conducted under Acts 1898-99, p. 108, is exempt, even though incidental profits may be received therefrom by the municipality. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016.

22. Property acquired under congressional grant for maintenance of library for use of members of corporation and public not subject to sale under execution for judgment for tort of corporate agent. Woman's Christian National Library Ass'n v. Fordyce [Ark.] 86 S. W. 417.

23. Flood v. Libby [Wash.] 80 P. 533.

24. It is error to award execution against a receiver. Malott v. Mapes, 111 Ill. App. 340.

25. Where, after passage of an insolvency act, judgment is entered on a bond secured by a mortgage executed prior to the act, and thereafter the debtor makes an assignment for creditors, the assignee may have the execution on the personalty set aside [construing Act June 4, 1901 (P. L. 404)], since he is entitled to the control and custody of the property of the assignor. This does not defeat plaintiff's preference, if he has one. Musser v. Brindle, 23 Pa. Super. Ct. 37.

26. Cole v. Bradner, Smith & Co., 111 Ill. App. 210.

27. See 3 C. L. 1401.

28. Sheriff held to have made and maintained effectual levy upon drug stock when he went to store and informed proprietor that he took charge under his writs, and then left a man in charge and shortly returned and had an inventory taken and thereafter remained in charge. Hereford v. Benton [Colo. App.] 80 P. 499.

ness of a sheriff in maintaining possession will not invalidate the creditor's lien unless the creditor was also negligent.[29] A levy on corporate stock is made on the shares as registered on the books of the corporation,[30] and in Indiana the sheriff is by statute given access to the books for the purpose.[31] After the sale the sheriff is authorized to transfer on the books the shares sold to the purchaser.[32] Where property part of which is claimed as a homestead is levied on, the homesteader has a right to designate the portion he desires to claim as his exemption, and if he is not given opportunity to make such choice, the sale is void.[33] In Illinois, it is not the duty of the officer to make the debtor's selection of articles as exempt, if the debtor fails to do so,[34] since one claiming an exemption must comply with the statute requiring him to make a selection.[35]

(§ 8) *C. Duty to make levy.*[36]

(§ 8) *D. Extent and adequacy of levy.*[37]—No more than is necessary to satisfy the execution should be levied on, and an excessive levy may avoid subsequent proceedings.[38] In directing a levy plaintiff may take into consideration the probable depreciation of the property levied upon when sold at forced sale, and levy upon sufficient property to realize the execution in view of such depreciation.[39]

(§ 8) *E. Conflicting levies and liens; priorities.*[40]—Except where the true owner is estopped from asserting title, the lien of a judgment only attaches to such interest as the judgment debtor actually has in the property levied on.[41] The creditor of an heir cannot by entry of judgment and levy against him, acquire a right to payment from the ancestor's lands in priority to the debts owing by the ancestor, subject to which the defendant heir took his estate.[42] One who advances money to another under an agreement that he is to hold the property purchased therewith until the advancement is repaid is at least a mortgagee or pledgee in possession, and though his contract is unwritten, his rights are superior to those of an execution creditor

29. Hereford v. Benton [Colo. App.] 80 P. 499.

30. Boone v. Van Gorder [Ind.] 74 N. E. 4.

NOTE. Leviability of stock and mode of levy: At common law, the right to levy execution upon shares of stock is denied. Shares are in the nature of choses in action, and choses in action, at common law, are not subject to levy of execution. Howe v. Starkweather, 17 Mass. 240; Van Norman v. Jackson Circuit Judge, 45 Mich. 204; Blair v. Compton, 33 Mich. 414; Foster v. Potter, 37 Mo. 526; Mooar v. Walker, 46 Iowa, 164. See, also, Slaymaker v. Bank of Gettysburg, 10 Pa. 373. With the multiplication of corporations which has taken place in recent years, however, and the immensely increased investment of money in corporate stocks, it has been frequently deemed expedient to enable creditors to subject this species of personal property to their legitimate demands, and statutes are now found in many of the states which provide, in more or less definite form, that shares of stock shall be deemed subject to levy of execution. Where statutes so provide, and at the same time direct the manner in which the levy shall be made, the requirements of the statute must be strictly followed in order that the levy may be valid. People v. Goss & P. Mfg. Co., 99 Ill. 355; Princeton Bank v. Crozer, 22 N. J. Law, 383, 53 Am. Dec. 254; Blair v. Compton, 33 Mich. 414; Howe v. Starkweather, 17 Mass. 240.—Helliwell, Stock and Stockholders, § 396.

31. Burns' Ann. St. 1901, § 735. Boone v. Van Gorder [Ind.] 74 N. E. 4.

32. Boone v. Van Gorder [Ind.] 74 N. E. 4.

33. Rev. St. 1899, § 3617. Kessner v. Phillips [Mo.] 88 S. W. 66; Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

34, 35. Johnson v. Larcade, 110 Ill. App. 611.

36, 37. See 3 C. L. 1401.

38. Where property worth $1,500 or $2,000 was levied on and sold under a tax execution for $17.81, and it appeared that defendant in execution had two other less valuable lots, and that the tract sold was capable of division, though a division would have impaired the value of the whole, the levy was held excessive and void, and the purchaser acquired no title. McKenzie v. Pound, 121 Ga. 708, 49 S. E. 689.

39. Mills v. Larrance, 111 Ill. App. 140.

40. See 3 C. L. 1401.

41. Owens v. Atlanta Trust & Banking Co. [Ga.] 50 S. E. 379. The lien of a judgment against one holding stock is inferior to an existing lien of the corporation for indebtedness of the stockholder by virtue of a by-law under Code 1895, § 2825, even though the execution plaintiff had no notice of such lien at the time of making his loan, securing judgment, or giving notice to the corporation under Civ. Code, 1895, § 5431. Id.

42. Lippincott v. Smith [N. J. Eq.] 60 A. 330.

of the purchaser.[43] The lien of a mortgage, duly recorded, is superior to that of a purchaser at execution sale against the mortgagor, under an execution issued after the registration of the mortgage.[44] In some states all the debtor's interest in realty passes by a duly recorded levy,[45] and creditors who have recorded their levy on property apparently belonging to the debtor have title superior to that of a grantee whose conveyance is unrecorded and of whose rights the creditors had no actual notice.[46] A constable who levies on property under an execution issued by a justice secures a lien prior to that of a sheriff who subsequently levies under execution issued by the circuit court.[47] The lien of an execution levied upon an indeterminate estate is lost by a conveyance by deed executed after the estate vested.[48] In Illinois the lien of a judgment ceases if execution is not issued thereon within a year; and a sale under execution issued after expiration of a year transfers no title as against bona fide purchasers before the issuance of such execution.[49]

A discharge in bankruptcy does not affect the lien of an execution levied on the bankrupt's property more than four months before the bankruptcy proceedings were instituted,[50] even though the judgment debt is proved as a claim secured by levy and a dividend based on the full amount of the judgment is paid thereon.[51] Nor is such lien affected by sale of the bankrupt's property in the bankruptcy proceeding.[52]

An execution and levy is entirely compatible with a continuing property right in the debtor sufficient at least for sale and transfer.[53] Where the debtor sells after execution and pays the debt, thereby satisfying the execution in full, his vendee acquires good title free from incumbrance.[54]

A levy upon a tenant's interest in a crop is valid as against the landlord's lien, if the crop is not removed from the premises,[55] but the landlord has such possessory rights therein as entitle him to prevent its removal and to maintain an action for the trial of the right of property in order to have the crop, if so removed, returned.[56]

(§ 8) *F. Relinquishment and dissolution of levy.*[57]

(§ 8) *G. Release of property on receipts or forthcoming or delivery bonds.*[58]—The forthcoming bond given by a claimant should be made payable to the levying officer and not to the plaintiff in execution.[59] But a bond may be defective in this respect and yet valid as a common-law obligation where it served the purpose for which it was given and effected a change of possession of the property from the officer to the claimant.[60]

43. Mitchell v. McLeod [Iowa] 104 N. W. 349.

44. Registration of mortgage is constructive notice to purchaser at subsequent execution sale. Howard v. Deens [Ala.] 39 So. 346.

45. Pub. St. 1901, c. 233, § 13. Butler v. Wheeler [N. H.] 59 A. 935.

46. Butler v. Wheeler [N. H.] 59 A. 935. Claim of creditors of the heir of one who was apparent owner, who have recorded their levy superior to claim of grantee under unrecorded conveyance. Id.

47. Miller v. Grady [Ark.] 88 S. W. 963.

48. Swerer v. Ohio Wesleyan University Trustees, 2 Ohio N. P. (N. S.) 333.

49. International Packing Co. v. Cichowicz, 114 Ill. App. 121.

50. Bassett v. Thackara [N. J. Law] 60 A. 39. A creditor who has reduced his claim to judgment and levied on a debtor's interest in property held in his wife's name, ten months before commencement of bankruptcy proceedings, is entitled to have a resulting trust in his favor established in equity, though he does not proceed in equity until after the bankruptcy. Tucker v. Denico [R. I.] 61 A. 642.

51. Bassett v. Thackara [N. J. Law] 60 A. 39.

52. Bassett v. Thackara [N. J. Law] 60 A. 39. See Bankruptcy, 5 C. L. 367.

53. Robinson v. Hart, 23 Pa. Super. Ct. 299.

54. Vendee's title to goods as against creditors whose executions issue after the sale by the debtor is complete. Robinson v. Hart, 23 Pa. Super. Ct. 299.

55. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct. R. 659, 88 S. W. 889.

56. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct. R. 659, 88 S. W. 889. See, also, Landlord and Tenant, 4 C. L. 389.

57, 58. See 3 C. L. 1402.

59. Civ. Code, 1895, § 4615. Wall v. Mount, 121 Ga. 831, 49 S. E. 778.

60. Having injured the plaintiff and benefited the principal in the bond. Wall v. Mount, 121 Ga. 831, 49 S. E. 778.

(§ 8) *H. Liability of officer for loss of property levied upon.*[61]

(§ 8) *I. Liability for wrongful levy.*[62]—Whether a seizure of goods under a writ was justifiable is a question of law.[63] An execution creditor is not liable for acts of the marshal in making a levy if he gave no specific directions regarding it.[64] A stranger whose property has been levied upon may maintain trespass, and, if the facts warrant, recover even vindictive damages,[65] or he may maintain trover or replevin;[66] but he cannot maintain both, and a successful resort to replevin bars a subsequent action of trespass.[67] Under a bond for the faithful discharge of his duties, an officer and his sureties are liable in damages for a levy on goods of one person under an execution against the goods of another.[68] But sureties of an officer are not proper parties to an action of claim and delivery against the sheriff, they not being in any way concerned in the seizure and detention of the goods.[69] Where the sheriff has sold the goods, the owner need not sue on the indemnifying bond but may sue to recover the property from the person then in possession,[70] and the sheriff is a proper party defendant in such suit.[71] One whose property has been sold under execution against another may recover its value at the time of the sale[72] with interest from that date.[73] In an action of claim and delivery by a mortgagee of goods wrongfully seized, where return of the goods cannot be had, the measure of damages is their value up to the amount of indebtedness, with accrued interest.[74] One against whom an execution has been wrongfully issued may recover damages for injuries to and use of property wrongfully withheld, even though he was engaged in an unlawful business, but he cannot recover a loss caused by an interference with such business.[75]

§ 9. *Claims of third persons and trial thereof.*[76]—The notice of a claim must be properly served on the officer[77] in due season,[78] and must properly describe the property claimed.[79] The object of the notice of ownership is to enable the sheriff to secure a proper indemnifying bond.[80] Hence, when that object is accomplished defects in the notice are immaterial.[81] No notice need be given by the true owner to the execution plaintiff.[82] Though one who claims property may interpose his claim

61, 62. See 3 C. L. 1402, and see Sheriffs and Constables, 4 C. L. 1442.

63. Claim and delivery action. Gallick v. Bordeaux [Mont.] 78 P. 583.

64. Milella v. Simpson, 94 N. Y. S. 464.

65. Harris v. Nelson, 113 Ill. App. 487.

66. Harris v. Nelson, 113 Ill. App. 487. Replevin lies by the true owner or person entitled to possession against the sheriff who has notice of the true ownership while in possession of the goods under the writ. Mitchell v. McLeod [Iowa] 104 N. W. 349.

67. Harris v. Nelson, 113 Ill. App. 487.

68. Frankenstein v. Cummisky, 92 N. Y. S. 708.

69. Gallick v. Bordeaux [Mont.] 78 P. 583.

70, 71. Mitchell v. McLeod [Iowa] 104 N. W. 349.

72. Where the constable, without manual seizure, wrongfully sells goods of the wife as property of the husband, and the purchaser pays his bid, takes a bill of sale, and leaves the goods on the premises, and there is no agreement between the purchaser and the husband or wife as to the sale or use of the goods, the wife may recover the value of the goods at the time of the sale. Mansfield v. Bell, 24 Pa. Super. Ct. 447.

73. Johnson v. Gillen [Mich.] 12 Det. Leg. N. 135, 103 N. W. 547.

74. Not value of property and amount of indebtedness with interest. Gallick v. Bordeaux [Mont.] 78 P. 583.

75. Where execution was wrongfully levied on stock of liquors of one who was selling without a license, a recovery for spoiling of beer and for use of building was allowed, but not for wages paid help. Young v. Stevenson [Ark.] 86 S. W. 1000.

76. See 3 C. L. 1403.

77. Though former proceeding to try a claim to property levied on was dismissed because a notice of the claim was not personally delivered to the constable, a second proceeding need not be dismissed when based on a second notice properly given. Goltra v. Tice [N. J. Law] 60 A. 757.

78. Evidence held sufficient to show that notice was on day of sale and in due time to stop the sale. Brown v. Petersen, 25 App. D. C. 359.

79. Where the constable levied on property by naming several articles of the same kind as so many of the same kind, a claimant may prove claims under a notice describing the property in the same manner, without particularizing the articles claimed. Goltra v. Tice [N. J. Law] 60 A. 757.

80, 81, 82. Mitchell v. McLeod [Iowa] 104 N. W. 349.

through an agent or attorney,[83] it must be made in the name of the principal as owner,[84] and an agent, having no interest in the property cannot interpose a claim in his own name as owner.[85] Failure to file a claim will not estop the true owner from asserting his title by an action of trover against the purchaser at the execution sale, such owner having done nothing to mislead the purchaser as to his relation to the property.[86]

The officer is not bound to deliver possession of goods to a claimant if the execution plaintiff furnishes a proper indemnifying bond.[87] In Georgia a sheriff cannot put a purchaser in possession of land sold by him when another is holding it adversely to the execution defendant before the judgment against the defendant.[88] But when the person in possession brings the purchaser into a court of equity in a suit to restrain the sheriff from putting him into possession, the purchaser may by answer and cross bill put in issue the title and right to possession of the land, and such answer and cross bill should not be stricken.[89]

To be successful upon the trial of the claim, the claimant must show title in himself [90] at the time the lien of the judgment attached.[91] He cannot defeat a levy by showing paramount title in a third person,[92] unless he also shows that he has acquired it.[93] Under the Alabama statute a superior equitable title or a lien paramount to defendant's title is as available to a claimant as the legal title.[94] If the claim is based on a mortgage or lien the affidavit must state the nature of the right.[95] Proof of possession of the land levied on by the defendant in execution since the judgment casts the burden on a claimant to prove his title;[96] and proof that personalty levied on was in a house on the defendant's premises is prima facie proof of his ownership.[97] The character of defendant's possession of land may be shown[98]

A court will not, upon motion of one not a party to the action, undertake to determine title to property levied upon.[99] Hence, where a motion to quash a levy is made by one not a party on the ground that the property levied on belonged to him and not the debtor, refusal to grant the motion for want of power, not appealed from, is not a judicial determination of the title so as to bar a subsequent suit to determine the adverse interest acquired under the levy.[1]

The relief granted on trial of the claim must be authorized by the pleadings.[2]

§ 10. *Appraisement.*[3]—In Kansas no appraisement of real estate sold upon execution is required even where such sale is expressed to be subject to a mortgage.[4]

83. Civ. Code 1895, § 4611. Rowland v. Gregg [Ga.] 50 S. E. 949.

84. Rowland v. Gregg [Ga.] 50 S. E. 949.

85. Though a factor may do so. Rowland v. Gregg [Ga.] 50 S. E. 949.

86. Lawless v. Orr [Ga.] 50 S. E. 85.

87. Under Code Civ. Proc. § 1220. Gallick v. Bordeaux [Mont.] 78 P. 583.

88, 89. Reaves v. Meredeth, 120 Ga. 727, 48 S. E. 199.

90. Evidence held to require verdict for claimant in trial of claim of title. Burkhalter v. Durden [Ga.] 50 S. E. 144. Evidence held to warrant finding that execution defendant owned property and that it was subject to levy. Smiley v. Padgett [Ga.] 50 S. E. 927.

91. Held, that if evidence showed a gift, from debtor to claimants, the date was not shown to be before the lien of the judgment attached. Donaldson v. Everett [Ga.] 50 S. E. 94.

92. Rowland v. Gregg [Ga.] 50 S. E. 949.

93. Bennett v. McKee [Ala.] 38 So. 129.

94. Under Code 1890, § 4141. Howard v Deens [Ala.] 39 So. 346.

95. Code 1896, § 4145. Bennett v. McKee [Ala.] 38 So. 129.

96. Claimant held to have shown perfect title in himself from the state. Rountree & Co. v. Gaulden [Ga.] 51 S. E. 346.

97. Bennett v. McKee [Ala.] 38 So. 129.

98. Rountree & Co. v. Gaulden [Ga.] 51 S. E. 346.

99, 1. Holmes v. Wolfard [Or.] 81 P. 819.

2. Where an execution is levied and a claim interposed, and the claimant files an equitable petition praying that in the event the property is found subject, the amount due on the execution be ascertained, offering to pay that amount, and the answer to such petition is purely defensive, a decree fixing an amount due by the execution defendant larger than the total amount due on the execution and charging the land therewith is not authorized by the pleadings. Austin v. Southern Home Bldg. & Loan Ass'n [Ga.] 50 S. E. 382.

3. See 3 C. L. 1404.

§ 11. *Execution sales. In General.*[5]—The sale must be for cash to the highest bidder,[6] and must be made by a person authorized by law to make it,[7] and at the place designated by the statute.[8] If the purchase price is not paid, the judgment is not satisfied and a second execution may issue.[9] When a plaintiff in execution becomes the purchaser of lands sold under it at his instance, the judgment is satisfied in whole, or in part to the amount of his bid;[10] and in the absence of fraud, imposition or surprise, he cannot repudiate the purchase nor resist entry of satisfaction because the defendant in execution had no title to or interest in the land.[11] But this rule does not apply to an incomplete sale not reported to or confirmed by the court,[12] and where the plaintiff purchases an equity of redemption, and the sale is never confirmed, he has the right to redeem from the mortgage as a judgment creditor.[13]

Rights and liabilities of purchaser.—An action for conversion lies against a purchaser who has knowledge of the ownership of a stranger.[14]

Since the sale must be for cash in Rhode Island, no action will lie against a bidder, who does not pay, for the amount of his bid.[15] In Pennsylvania, it is held that a purchaser who pays the amount required at the time of the sale, but fails to pay the balance when due is liable for the difference between the price paid by him and the smaller sum obtained at a second sale.[16] Whether notice to such purchaser that he will be held to his bid, or an immediate resale by the sheriff, is necessary to fix such liability, depends upon the terms of the sale as fixed by the notice.[17] Where

4. Armstead v. Jones [Kan.] 80 P. 56.

5. See 3 C. L. 1404.

NOTE. Applicability of statute of frauds to execution sales: Execution and sheriffs' sales are, by the great weight of authority, within the statute of frauds, and require some written memorandum to support them. Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Chapman v. Harwood, 8 Blackf. [Ind.] 82, 44 Am. Dec. 736; Gossard v. Ferguson, 54 Ind. 519; Pepper v. Com., 6 T. B. Mon. [Ky.] 27; Barney v. Patterson, 6 Har. & J. [Md.] 182; Fenwick v. Floyd, 1 Har. & G. [Md.] 172; Evans v. Ashley, 8 Mo. 177; Alexander v. Merry, 9 Mo. 614; Joslin v. Ervien, 50 N. J. Law, 39, 12 A. 136; Jackson v. Catlin, 2 Johns. [N. Y.] 248, 3 Am. Dec. 415; Elfe v. Gadsden, 2 Rich. [S. C.] 373; Rugely v. Moore, 23 Tex. Civ. App. 10, 54 S. W. 379; Remington v. Linthicum, 14 Pet. [U. S.] 84, 10 Law. Ed. 364. Compare Emley v. Drum, 36 Pa. 123; Nichol v. Ridley, 5 Yerg. [Tenn.] 63, 26 Am. Dec. 254. If the property is struck off to a purchaser who fails to pay, and a resale is made for a less amount to a second purchaser, an action will not lie against the first purchaser to recover the difference, unless there is a memorandum in writing. Baker v. Jameson, 2 J. J. Marsh. [Ky.] 547. But see Cogwill v. Worden, 2 Blackf. [Ind.] 332. The statute of frauds has no application to the enforcement of a penalty for not completing the contract of sale agreed upon, by making a bid at an execution sale. Lockridge v. Baldwin, 20 Tex. 303, 70 Am. Dec. 385.—From 102 Am. St. Rep. 242.

6. Gerardi v. Caruolo [R. I.] 61 A. 599.

7. Only a constable can execute a writ of execution issued by a justice. Mills' Ann. St. § 2668. Stacy v. Bernard [Colo. App.] 78 P. 615. Sale by a person to whom execution was given by constable void, since the constable had no power to appoint a deputy for the purpose. Id.

8. Statutes fixing the place of sale of lands are mandatory and a sale at any other place is void. Sale by United States marshal void if outside county in which land was situated, unless at place where Federal court, was sitting, at defendant's written request. Jones v. Rogers [Miss.] 38 So. 742.

9. Richardson v. Wymer [Va.] 51 S. E. 219. Where a party bids in land at a sale but does not pay any money and the sheriff does not indorse the executions as satisfied, they are not deemed satisfied and further proceedings thereon are not precluded. Andrews v. Scott, 113 Ill. App. 581.

10, 11, 12. McGaugh v. Deposit Bank of Frankfort [Ala.] 38 So. 181.

13. Code 1896, § 3510. McGaugh v. Deposit Bank of Frankfort [Ala.] 38 So. 181.

14. Where an execution purchaser was notified by the actual owner of the property sold as to his ownership, the fact that the execution defendant had remained in possession of the property as agent after a sale was immaterial on the issue of coversion by the execution purchaser. Sperling v. Stubblefield, 105 Mo. App. 489, 79 S. W. 1172.

15. Gerardi v. Caruolo [R. I.] 61 A. 599.

16. Hartman v. Pemberton, 24 Pa. Super. Ct. 222.

17. Notice provided that balance of purchase money must be paid to sheriff at his office within ten days from time of sale, without further demand by the sheriff. Held, a bidder who pays the money in hand and signs the bid, is not released because, upon informing the attorneys of the partles that he would not perfect the sale, he was not at once notified that he would be held to his bid. Hartman v. Pemberton, 24 Pa.

a defaulting purchaser acts under the belief that it is customary for the sheriff to give notice of liens, he is not entitled to be relieved of liability for his bid, no fraud or misrepresentation being shown.[16] An action against a defaulting bidder is properly brought in the name of the sheriff alone, but the introduction of a use plaintiff will not defeat the action.[19]

Under the Iowa statute providing that a purchaser at a sale may recover the amount paid if the property was not in fact subject to the lien of the judgment, and that fact was unknown to the purchaser,[20] knowledge of a claim that the property was exempt is not sufficient to defeat a recovery, if the purchaser did not know that it actually was exempt.[21] The right of the purchaser to recover is not affected by the fact that the sale is set aside at the instance of the owner,[22] and that the purchaser resisted the suit brought by the owner.[23]

Fees and costs.—An action by a sheriff for fees and costs is premature if brought before such costs have been taxed and allowed according to law.[24]

§ 12. *Return and confirmation of sale.*[25]—The return must sufficiently describe the land sold,[26] and must set out every vital jurisdictional fact relative to the sale;[27] but if it otherwise complies with the spirit of the statute and is substantially correct in form, it is sufficient.[28] A sheriff's formal and correct return cannot be overthrown by parol.[29] Where the return shows a sale to one person, the court cannot compel the officer to return that he sold to another.[30] But if a return is false, the party injured has his remedy against the officer and his surety.[31] A return on an execution sale of land, does not transfer title but merely gives the right to demand a deed.[32]

A sale of an equity of redemption in Alabama is not complete or valid so as to amount to a satisfaction of the judgment, in whole or in part, until it has been confirmed by the court.[33] On an ex parte application to confirm, the court cannot look beyond the report of the sale;[34] and if such report, on its face, shows that the proceedings were regular, it is the duty of the court to confirm the sale.[35] In such case. the order of confirmation settles no question of fact or proposition of law as against the owner of the property sold.[36] Although a sale will be set aside where fraud, mistake or surprise is shown,[37] mere irregularities in proceedings leading up to or in the conduct of the sale are cured by confirmation by a court of competent jurisdiction [38] and are not sufficient to render the sale invalid.[39]

Super. Ct. 222. Since the purchase money was to be paid without further demand, a notice to the sheriff that the sale would not be perfected is of no avail, and the sheriff is not bound to immediately re-expose the property to sale. Id. Where the second bidder signs the bid and pays the bond money, the sheriff need not offer the property for sale a third time the same day. Id. A defaulting bidder cannot avoid liability for loss caused by a lower bid at a subsequent sale on the ground that the sale was not made the succeeding month, where it appears that after allowing the time provided for payment of the balance, such sale could not be made the succeeding month. Id.

18, 19. Hartman v. Pemberton, 24 Pa. Super. Ct. 222.

20. Code, § 4034. Rosenberger v. Hawker [Iowa] 103 N. W. 781.

21. Purchaser held to have been ignorant of material facts, so that he did not in fact know the property was exempt. Rosenberger v. Hawker [Iowa] 103 N. W. 781.

22, 23. Rosenberger v. Hawker [Iowa] 103 N. W. 781.

24. Gen. Laws 1896, c. 247, § 17, and c. 295, §§ 13, 15, must be first complied with. Gerardi v. Caruolo [R. I.] 61 A. 599.

25. See 3 C. L. 1404.

26. Description held insufficient. Jones v. Rogers [Miss.] 38 So. 742.

27. Return of sale outside county where land was failed to state that sale was at such place by defendant's written request. Jones v. Rogers [Miss.] 38 So. 742.

28. Return—"and by returning this writ no other property found upon which to levy the writ"—held practically a return of nulla bona. Ables v. Webb. 186 Mo. 233, 85 S. W. 383.

29, 30, 31. Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205.

32. Jones v. Rogers [Miss.] 38 So. 742.

33. McGaugh v. Deposit Bank of Frankfort [Ala.] 38 So. 181.

34, 35, 36. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

37. Held v. Ebner [C. C. A.] 133 F. 156.

38. Answer alleging judgment, execution

§ 13. *Redemption.*[40]—To entitle a person to redeem, he must comply fully with the statutory requirements, or must show some valid reason for failure to do so in any particular.[41] Where the purchaser is absent from the state, a tender for the purpose of redemption must be made by payment of the money into court, on filing of the bill.[42] Where a purchaser resells portions of the land, the person seeking to redeem need not tender the amount required by law to each of the several owners, but may make a valid tender by paying the amount required into court for distribution.[43] An actual tender is unnecessary when the owners refuse any information as to improvements or other lawful charges.[44] It is a sufficient tender if the party to redeem makes diligent inquiry to ascertain the lawful charges, pays the charges he was able to ascertain into court and offers to pay all charges which may be ascertained under orders of the court.[45] The Alabama statute providing for a reference where parties cannot agree on the value of improvements has no application where one party remains outside the state and refuses to communicate with or accept any proposition from the party seeking to redeem.[46]

The assignee of a judgment creditor cannot redeem from an execution sale against the debtor, the right being personal to those named in the statute and non-assignable.[47] Since only the owner may redeem, a payment of the amount required by a third person and the giving of a receipt by the purchaser completes the redemption and revests title in the execution defendant.[48] Where an owner of land redeems but fails to file the purchaser's receipt with the clerk as he is permitted by law to do, a purchaser from the execution purchaser without notice of the owner's redemption, acquires a good title.[49] The owner may in such case reach the proceeds of the sale in the hands of the execution purchaser,[50] having given notice to the latter of his intention to stand upon his rights.[51]

A law extending the time of redemption is unconstitutional as to liens accruing before its enactment because it impairs the security in which the creditor has a vested right;[52] but a law reducing the interest rate upon a redemption is valid.[53]

§ 14. *Title and rights acquired under sale, and evidence thereof.*[54]—As in the case of other judicial sales, the rule of caveat emptor applies,[55] and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien attached.[56] Thus the sale passes no title when the property sold was not

sale thereon, confirmation thereof, and execution and recordation of marshal's deed, sufficiently alleges title. Heid v. Ebner [C. C. A.] 133 F. 156.

39. Heid v. Ebner [C. C. A.] 133 F. 156.

40. See 3 C. L. 1405.

41. Francis v. White [Ala.] 39 So. 174.

42, 43, 44. Absence of the purchaser or his vendee excuses a tender in person. Francis v. White [Ala.] 39 So. 174.

45. Allegations of bill to redeem held to show sufficient tender. Francis v. White [Ala.] 39 So. 174.

46. Code 1896, § 3517. Francis v. White [Ala.] 39 So. 174.

47. Under Code 1896, § 3510. Chambers v. Pollak [Ala.] 39 So. 316.

48, 49, 50. McMillan v. Bagby, 26 Ky. L. R. 1265, 83 S. W. 610.

51. Execution purchaser returned money paid to redeem, to the person paying it for the owner, and the owner wrote a letter asking about the transaction. McMillan v. Bagby, 26 Ky. L. R. 1265, 83 S. W. 610.

52. Welsh v. Cross [Cal.] 81 P. 229. St. 1897, p. 41, c. 44, amending Code Civ. Proc. § 702, by extending the time of redemption after sale to twelve months, does not apply to judgments existing at the time of its passage. Id.

53. It does not impair the security of the creditor nor affect injuriously the interest of the debtor. Welsh v. Cross [Cal.] 81 P. 29.

54. See 3 C. L. 1406.

55. Pullen v. Simpson [Ark.] 86 S. W. 801; Walkau v. Manitowoc Seating Co., 105 Ill. App. 130; Rippe v. Badger, 125 Iowa, 725, 101 N. W. 642.

56. Rippe v. Badger, 125 Iowa, 725, 101 N. W. 642. A purchaser buys at his own risk and takes the title of the defendant in execution as it is. Hartman v. Pemberton, 24 Pa. Super. Ct. 222. A creditor who acquires title to his debtor's real property by attachment and sale on execution is not a bona fide purchaser, but takes only such interest as the debtor had therein. Where debtor had only legal title, equitable title being in others, creditor acquired nothing by sale. Lee v. Wrixon, 37 Wash. 47, 79 P. 489. A judgment creditor is not a bona fide

subject to execution,[57] as where title was in another than the judgment debtor.[58] But the purchaser will be protected against outstanding equities of which he had no notice, actual or constructive, before the sale.[59] The levy of the execution on land as the property of the debtor and its sale and purchase as such are conclusive on the purchaser as to the debtor's interest,[60] and the judgment plaintiff is estopped to assert that the property sold was less than claimed by him.[61] A purchaser is chargeable with notice of facts disclosed by the record of the proceedings in the case which resulted in the judgment on which his rights are based.[62] The record of a prior mortgage is constructive notice to a purchaser, and he is bound by the facts disclosed by such record.[63] One who purchases an equity of redemption is subrogated to the rights and subject to the disabilities of the execution defendant.[64] He may maintain ejectment against the mortgagor and the latter will not be allowed to set up an outstanding title in the mortgagee to defeat the action.[65] But the purchaser cannot maintain such action against the mortgagee in possession.[66]

Rights to possession of realty.—A purchaser of realty at an execution sale is not entitled, as against the judgment debtor or his successor in interest, to possession of the property prior to the expiration of the period of redemption,[67] and is not entitled to have a receiver appointed before that time to care for the property.[68] When the right of redemption no longer exists, his possession and estate are complete, although the technical naked legal or record title remains in the judgment debtor until execution and delivery of the sheriff's deed.[69] Failure of a purchaser to demand possession is a valid reason for failing to deliver it.[70] Proceedings to secure possession of realty after sheriff's sale are statutory in Pennsylvania[71] and New York.[72]

purchaser. When he levies upon property under his execution he parts with nothing in exchange for his property, nor does he take it in satisfaction of a precedent debt. He has a lien upon the interest of the debtor only, and he must yield to every equitable claim which exists in third persons. Magerstadt v. Schaefer, 110 Ill. App. 166.

57. Woman's Christian Nat. Library Ass'n v. Fordyce [Ark.] 86 S. W. 417.

58. Where legal title and possession is in another than the debtor, the purchaser acquires no title. Magoffin v. San Antonio Brewing Co. [Tex. Civ. App.] 84 S. W. 843.

59. Purchaser not protected where inquiry of one in possession would have disclosed outstanding equities. Rippe v. Badger, 125 Iowa, 725, 101 N. W. 642. Where property is reduced to possession by sale to an execution creditor under his own execution, he takes it free of claims of which he had no notice, and can assign it free of said claims to one having notice of them; but a stranger with such notice cannot by becoming purchaser at the execution sale take the property discharged of the claims. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130. The rule that where plaintiff in execution, or his attorney, purchases at the sale for an inadequate price, he cannot be considered a bona fide purchaser, applies only where the purchaser claims to have purchased without notice of prior conveyance. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38.

60. Francis v. White [Ala.] 39 So. 174.

61. One who had treated certain lumber as a part of his realty in previous litigation was estopped to claim it was personalty, so that title to it did not pass upon sale of the realty under execution. Potvin v. Denny Hotel Co., 37 Wash. 323, 79 P. 940.

62. Hence he is deemed to have constructive notice of the fact that no execution has been issued on the judgment within a year after its rendition. International Packing Co. v. Cichowicz, 114 Ill. App. 121.

63. Hartman v. Pemberton, 24 Pa. Super. Ct. 222.

64, 65, 66. Carter v. Smith [Ala.] 38 So. 184.

67. Mau, Sadler & Co. v. Kearney, 143 Cal. 506, 77 P. 411. The purchaser is said to have an inchoate right to possession and title from the day of the sale, subject to be defeated by redemption until the period for redemption has expired. Pogue v. Simon [Or.] 81 P. 566.

68. Mau, Gadler & Co. v. Kearney, 143 Cal. 506, 77 P. 411.

69. The purchaser's interest when right of redemption has ceased to exist is subject to levy and sale under execution. Pogue v. Simon [Or.] 81 P. 566.

70. Francis v. White [Ala.] 39 So. 174.

71. A petition in a proceeding to secure possession of realty after a sheriff's sale is not subject to exception because of the absence of an allegation that respondent was in possession by title derived from defendant in execution, subsequently to the judgment on which the land was sold. Under Act June 16, 1836. Moore v. Moore, 23 Pa. Super. Ct. 73.

72. In the statutory summary proceeding to remove a defendant from property sold on execution against him, the defendant may show that the person procuring execution

The sheriff's deed.[73]—The sheriff is not bound to tender a deed before payment of the purchase money.[74] A deed will not be presumed to have been made unless the purchaser shows that he went into possession under the sale and continued in possession.[75] Where a sale of realty is made subject to the right of redemption, the issuance of a certificate of purchase is not a prerequisite to the execution of a sheriff's deed to the property sold.[76] Realty being sold subject to redemption, the sheriff in office when the right to a deed accrues is the proper person to make the deed.[77] The sheriff's deed as acknowledged is prima facie evidence of payment of the purchase money and of valid title in the grantees therein named.[78] But to authorize a recovery on such a deed in an action of ejectment, it must appear that there was a valid judgment, execution, levy, sale and deed, and that defendant had an estate or interest in the land subject to execution.[79] The deed relates back to and is controlled by the power conferred by the execution upon the officer making it.[80] Where part of the property levied on is claimed as a homestead, the deed need not recite that the debtor was given opportunity to designate the portion he desired to claim as his exemption, though such recital is essential in the officer's return.[81] Misrecitals in a deed will not defeat a recovery by the person holding it in an action of ejectment brought by him.[82] A deed which is void on its face cannot be reformed where the execution and proceedings thereunder contain the same imperfection.[83]

§ 15. *Legal and equitable remedies against defective or improper levy or sale.*[84]—A sale of land on execution issued from the circuit court on a justice's transcript is not subject to collateral attack on the ground that the justice's prior execution was not issued to the proper constable,[85] nor on the ground that the justice's prior execution was returned before the return day.[86] In Massachusetts the premature issuance of the execution renders it absolutely void, and hence open to collateral attack,[87] but the general rule is that it is a mere irregularity.[88]

Injunction against levy or sale.[89]—The issuance of an execution on a default judgment entered contrary to an understanding between the attorneys,[90] and the enforcement of an execution issued under a void order,[91] may be enjoined. A suit to restrain service of execution on the ground that judgment by confession was entered in another court by mistake will not lie until correction of the record has been made by the court having control of it.[92] Equity will not interfere in such case when the

did not at the time own the judgment. Under Code Civ. Proc. §§ 2242, 2244, allowing in such proceeding new matter constituting a legal or equitable defense. Mawson v. Wermuth [N. Y.] 74 N. E. 829.

73. See 3 C. L. 1406.

74. Hartman v. Pemberton, 24 Pa. Super. Ct. 222.

75. Jones v. Rogers [Miss.] 38 So. 742.

76, 77. Armstead v. Jones [Kan.] 80 P. 56.

78. Deed to firm not overthrown by proof of return showing sale to purchaser who was member of the firm. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

79. Carter v. Smith [Ala.] 38 So. 184.

80. Sheriff's deed reciting an execution directing seizure and sale of property of the C. M. Landon Milling Co., does not convey title to C. M. Landon's property even though it is shown by extrinsic proof that the latter owned the property and conducted his business in the former name, and that the judgment was on a note given by him. Landon v. Morris [Ark.] 86 S. W. 672.

81. Kessner v. Phillips [Mo.] 88 S. W. 66.

82. Armstead v. Jones [Kan.] 80 P. 56.

83. Landon v. Morris [Ark.] 86 S. W. 672.

84. See 3 C. L. 1408.

85, 86. Ables v. Webb, 186 Mo. 233, 85 S. W. 383.

87. Fact that it is issued within twenty-four hours after judgment contrary to Pub. St. 1882, c. 171, §§ 15, 16. Washington Nat. Bank v. Williams [Mass.] 74 N. E. 470.

88. 8 Enc. Pl. & Pr. 345.

89. See 3 C. L. 1408.

90. Where both attorneys understood a justice case was to be continued, but plaintiff himself had a default judgment entered, and defendant's attorney did not learn of it until too late to appeal, execution on the judgment should be enjoined. Gulf, etc., R. Co. v. Flowers [Miss.] 38 So. 37.

91. McConkie v. Landt, 126 Iowa, 317, 101 N. W. 1121.

92, 93. Hearn v. Canning [R. I.] 61 A. 602.

judgment would not have been entered but for negligence of the party or his attorney.[93] In a suit to restrain enforcement of a judgment, an allegation that plaintiff believes and is informed that defendant claims to own the judgment sufficiently alleges ownership.[94]

Equity will not enjoin a sale of land under execution issued on a judgment void on its face,[95] but an injunction is the proper remedy when the defect in the judgment must be shown by facts outside the record.[96] Existence of a meritorious defense is not essential if the judgment is without jurisdiction.[97] In the absence of fraud,[98] gross injustice, irremediable injury, or other ground of equitable jurisdiction, a court of chancery will not restrain a threatened sale under execution against one person of property claimed by another,[99] though the latter has filed a bill to quiet title.[1] A court of equity will never enjoin a levy upon and sale of personal property, unless it is of such peculiar and intrinsic value to the owner that its loss cannot be adequately compensated in damages.[2] The ordinary remedy is by an action of trespass or other appropriate action in a court of law.[3] An unregistered equitable owner of shares of stock may not restrain a levy and sale against the registered owner, where the levy and sale is of the stock as registered and transfers to the purchaser only the rights of the registered owner subject to the equitable rights of the unregistered owner.[4] Wrongful levy on books of a mercantile agency and threatened disclosure of their contents constitutes an irreparable injury, and such levy will be enjoined.[5]

Affidavits of illegality.—In Georgia, the sufficiency or validity of an execution or levy thereof may be tested by filing an affidavit of illegality, and until such affidavit is filed, an execution issued is a final process.[6] An execution against property described as that of a certain named person, "executor," is presumed, nothing else appearing, to be against such person individually as owner.[7] So, too, an affidavit of illegality wherein the same descriptive language is used, is presumed to be inter-

94. Phillips v. Norton [S. D.] 101 N. W. 727.

95, 96. Henman v. Westheimer, 110 Mo. App. 191, 85 S. W. 101.

97. Schiele v. Thede, 126 Iowa, 398, 102 N. W. 133.

98. Failure to execute judgments when creditors saw improvements being made by others on the property is not fraud. West Jersey & S. R. Co. v. Smith [N. J. Eq.] 60 A. 757.

99. West Jersey & S. R. Co. v. Smith [N. J. Eq.] 60 A. 757. Where property, legal title to and possession of which is in one person, is levied on as the property of another, the holder of the legal title is not entitled to an injunction to restrain the sale. The title acquired by the execution purchaser will not be a cloud on the real owner's title. Magoffin v. San Antonio Brewing Ass'n [Tex. Civ. App.] 84 S. W. 843.

Contra: The privilege of one whose real property is levied upon under an execution against another to make a motion in the case in which the execution was issued to release the property from such levy does not afford him an adequate legal remedy so as to preclude a right to an injunction to restrain the sale. Gale Mfg. Co. v. Sleeper [Kan.] 79 P. 648. Where it is clear that defendant in the judgment has no shadow of title or interest which can be sold, equity will restrain the sale in order to prevent the casting of a shadow on the title of the real owner. Barrell v. Adams, 26 Pa. Super. Ct. 635.

1. The sole question is whether certain judgments are valid liens against property claimed by another, and this is a legal, not an equitable, question. West Jersey & S. R. Co. v. Smith [N. J. Eq.] 60 A. 757.

2. Florida Packing & Ice Co. v. Carney [Fla.] 38 So. 602. Sale of shares of stock not enjoined, when it was not shown that property was of peculiar value or that irreparable damage would result. Boone v. Van Gorder [Ind.] 74 N. E. 4.

3. Florida Paking & Ice Co. v. Carney [Fla.] 38 So. 602.

4. Construing Burns' Ann. St. 1901, § 735. Boone v. Van Gorder [Ind.] 74 N. E. 4.

5. Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390.

6. Unless an execution issued upon foreclosure of a chattel mortgage be arrested by counter affidavit, it is final process. Ford v. Fargason, 120 Ga. 708, 48 S. E. 180. An execution issued on foreclosure of a laborer's lien. Moultrie Lumber Co. v. Jenkins, 121 Ga. 721, 49 S. E. 678. Affidavit taken by attorney representing affiant in resisting execution was void and did not convert the execution into a mesne process returnable into court. Id. Hence consideration of sufficiency of levy was properly refused and proceeding was properly dismissed. Id.

7. "Exec." following the name is merely

posed by such person individually as owner,[8] especially where it alleges that the property is held by him as an individual and not as executor for any estate.[9] Such affidavit should not therefore be dismissed on the ground that it shows that the affiant had no interest in the property at the time of the levy, and that only the executor of the estate referred to could interpose the affidavit.[10] The only persons authorized to file an affidavit as against an execution issued on foreclosure of a chattel mortgage are the mortgagor, his special agent or legal representative, and his creditors.[11] When such an execution is levied upon the mortgaged property and a claim is interposed thereto, the claimant, upon trial of the claim, cannot amend the same by alleging that the mortgagor is not indebted to the mortgagee nor introduce evidence tending to show it.[12] Where the ground of an affidavit of illegality interposed to the levy of a common-law execution is that it has been partially paid, the amount admitted to be due must be paid in order to stay the execution.[13] But where the ground of the illegality is that the execution has been fully paid, the sheriff is bound to accept it, and await the result of the trial of the issue so made.[14] If, upon trial, it should be proved that the execution has been only partially paid, the plaintiff would be entitled to a verdict that the execution proceed for the balance shown to be really due thereon and not for the amount apparently due from the execution itself.[15] When an affidavit of illegality is interposed to the levy and returned to a county court for trial, no notice of the time and place of hearing need be given to the party filing the affidavit.[16] Where an execution has been levied on the property of the principal debtor, he cannot resist it by an affidavit of illegality setting up that the judgment is void as against the sureties named as co-defendants therein.[17]

Setting aside the sale.[18]—A court may, before a deed has issued, set aside an execution sale and the certificate of sale, upon motion made before the time of redemption expires and upon notice to the purchaser and parties to the action.[19] A purchaser who has parted with his interest cannot complain of want of notice of a motion to vacate the sale.[20] Inadequacy of price is not alone ground for setting aside a sale;[21] but gross inadequacy, coupled with even slight evidence of irregularity or fraud, may be.[22] A sale of property previously conveyed by the debtor in fraud of creditors will not be set aside at the instance of the fraudulent grantee on the ground of inadequacy of price.[23]

§ 16. *Restitution on reversal of judgment.*[24]—Where payment of a judgment has been coerced by execution and the judgment is afterwards reversed and the suit

descriptive. Stephens v. Atlanta, 119 Ga. 666, 46 S. E. 872.

8, 9, 10. Stephens v. Atlanta, 119 Ga. 666, 46 S. E. 872.

11, 12. Ford v. Fargason, 120 Ga. 708, 48 S. E. 180.

13, 14, 15. Equitable Mortg. Co. v. Montfort, 121 Ga. 696, 49 S. E. 715.

16. Berry v. Jordan, 121 Ga. 537, 49 S. E. 607.

17. Levadas v. Beach, 119 Ga. 613, 46 S. E. 864.

18. See 3 C. L. 1407.

19. International Packing Co. v. Cichowicz, 114 Ill. App. 121. The court entering judgment by confession may upon a proper showing quash a writ of execution issued thereon, set aside a sale, and open the judgment, though the purchaser was not a party to the suit, where it appeared that such purchaser made the affidavit attached to the cognovit and deposed that he was the duly authorized agent of the plaintiff in such suit. Parker v. Crilly, 113 Ill. App. 309.

20. Real party in interest had actual notice and appeared. Bank v. Doherty, 37 Wash. 32, 79 P. 486.

21. Bank v. Doherty, 37 Wash. 32, 79 P. 486; McCoy v. Brooks [Ariz.] 80 P. 365; Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38.

22. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38. Note and mortgage for $2,400 sold for $110.20 and purchaser transferred to administrator of a mortgagor. Sale set aside. Bank v. Doherty, 37 Wash. 32, 79 P. 486. Where price was inadequate, and officer exceeded his authority by selling more property than was necessary, and refused to accept payment of the amount of the judgment and costs, sale set aside. McCoy v. Brooks [Ariz.] 80 P. 365.

23. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38.

24. See 3 C. L. 1408.

dismissed, the party paying has a right to restitution without regard to the merits of the suit or whether the dismissal operated as a retraxit,[25] and is entitled to interest on the amount paid from the time of the reversal.[26]

EXECUTORS AND ADMINISTRATORS; EXEMPLARY DAMAGES, see latest topical index.

EXEMPTIONS.

§ 1. *The right to exemptions generally.*[27]—Exemption laws should be liberally construed in favor of the debtor.[28] They have no extra territorial effect;[29] and relate to the remedy and not to the contract.[30] Hence when sued abroad, the debtor cannot claim the exemptions allowed by his domicile[31] even though his creditor also resides there if the debt has no situs at the domicile.[32] But it has been held that garnishee process in a state foreign to all the parties will not reach wages earned and exempt at the domicile.[33] An exemption from "execution" will include garnishment and other mesne process.[34] Being remedial, exemption laws may apply to existing judgments,[35] and an extension of the right does not impair contract obligations.[36] Where the constitution directs the passage of laws protecting "homestead and other property," a limitation of legislative power to such property is not implied[37] but its power is plenary.[38] A nonforfeitable exemption may be conferred despite a constitutional provision that a debtor may waive exemptions.[39] State exemptions are recognized in bankruptcy courts, but are enforced according to bankruptcy procedure.[40] The provision of the Bankruptcy act that the bankrupt may save his life insurance by paying its surrender value, if any, to the trustee, is to be read with the provision excepting exempt property and that adopting the state exemption laws; hence whatever life insurance policies are exempted by the state are beyond the trustee's control.[41]

25. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456. Where land is sold under judgment on a scire facias sur mortgage and on appeal without supersedeas the judgment is reversed, restitution is made only of the money or price for which the lands were sold. Proceeds of the sale, after deducting costs and liens discharged thereby, are to be distributed to defendant. Lengert v. Chaninel, 26 Pa. Super. Ct. 626.

26. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456.

27. See 3 C. L. 1408.

28. Their purpose is to protect the debtor's dependent family. Farmers' & Merchants' Bank v. Hoffman [Neb.] 96 N. W. 1044; Bank of Gulfport v. O'Neal [Mass.] 38 So. 630.

29. National Tube Co. v. Smith [W. Va.] 50 S. E. 717.

30, 31, 32. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209, with note. See, also, note 19 L. R. A. 577. Determined by the law of the state where debtor resides and is sued. Clark v. Eltinge [Wash.] 80 P. 556.

33. When the creditor, debtor and garnishee at the time of the creation of both debts are all residents and doing business in the same state, the exemption of wages is such an incident and condition of the debt from the employer that it will follow the debt if the debt follows the person of the garnishee into another state, and attach itself to every process of collection in any state, unless jurisdiction is obtained over the person of the principal debtor. Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391.

34. Code, § 493; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

35. Meyer v. Halberstadt, 44 Misc. 408, 89 N. Y. S. 1019.

36. Richardson v. Kaufman [Ala.] 39 So. 368.

37, 38. Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018.

39. Richardson v. Kaufman [Ala.] 39 So. 368.

40. Lipman v. Stein [C. C. A.] 134 F. 235; Burke v. Guarantee Title & Trust Co. [C. C. A.] 134 F. 562. See full treatment in Bankruptcy, § 16, 5 C. L. 396.

41. Construing Bankr. Act. §§ 6, 70a. Hol-

§ 2. *Persons who may claim.*[42]—Exemption laws are generally limited to certain classes such as head of families, laborers, etc.[43] The headship of a family and right of exemption may devolve on the wife by the husband's desertion [44] but his title endures.[45] Unless the statute is restrictive, nonresidents may avail of it.[46] One living on an Indian reservation is a resident of the state embracing it.[47] The right is personal to the debtor and is not assignable.[48]

den v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018.

42. See 3 C. L. 1409.

43. Jarboe v. Jarboe, 106 Mo. App. 459, 79 S. W. 1162.

Head of a family: Jarboe v. Jarboe, 106 Mo. App. 459, 79 S. W. 1162. A person furnishing a home for himself, his mother, two minor brothers and an invalid sister, and furnishing groceries and money for their support is the head of a family, within a statute fixing the amount of wages which shall be exempt. Id. A widower, who is living with his own mother, cannot be said to be a man of family, and entitled to the special exemption allowed to one with a family, because he contributes something toward the support of a stepchild, who has never been formally declared to be his own child, and who lives with her maternal grandmother. Kraft v. Wolf, 3 Ohio N. P. (N. S.) 105. A stepchild is not the child of her stepfather within the meaning of the act providing for exemption in lieu of homestead, unless so declared to be by the probate court under sections 3137a and 3139. Id.

Laborers: Schroeder v. Collins, 113 La. 778, 37 So. 722 A railroad switchman is a laborer under statutes exempting "laborers' wages" from seizure under execution. Schroeder v. Collins, 113 La. 778, 37 So. 722.

Note: In an exhaustive monographic annotation at 102 Am. St. Rep. 81, are collected the cases interpreting the various statutes allowing exemptions to "laborers," "mechanics," etc., and exempting "wages," "salaries," "earnings," etc., of such persons; also the cases falling under statutes providing for exemptions to "householders," "heads of families," etc. An extract from that note is appended.

Meaning of terms "wages" and "salary:" "The word 'wages' means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service or a fixed sum or a specified piece of work, that is, payment may be by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in the service, but it may also be determined by the work done. 'Wages' means compensation estimated in either way." Ford v. St. Louis, etc., R. Co., 54 Iowa, 728, 7 N. W. 126. See, also, Freeman, Executions, § 234; Swift, etc., Co. v. Henderson, 99 Ga. 136, 25 S. E. 27; Moore v. Heaney, 14 Md. 559; Hamberger v. Marcus, 157 Pa. 133, 27 A. 681, 37 Am. St. Rep. 719; Adcock v. Smith, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 812. In Fox v. McClay, 48 Neb. 820, 67 N. W. 888, it was held that the term "wages" also includes the idea not merely of one person working for another, but also that he shall work under the direction of the latter and not as an independent contractor. In South, etc., R. Co. v. Falkner, 49 Ala. 115, the court, in discussing the question said: "The act referred to provides 'that hereafter the wages of laborers and employes shall not be subject to garnishment or attachment except for public dues.' The president of a railroad company cannot be said to be a laborer or employe within this law. The term 'wages' indicates inconsiderable pay, without excluding 'salary'—which is suggestive of larger compensation for personal services. But its application to laborers and employes certainly conveys the idea of a subordinate occupation which is not very remunerative; one of not much independent responsibility, but rather subject to immediate supervision."

The distinction between wages and salary was also adverted to in Bell v. Indian Livestock Co. [Tex.] 11 S. W. 344, wherein it was said: "'Wages' are the compensation given to a hired person for service, and the same is true of 'salary.' The words seem to be synonymous, convertible terms, though we believe that use and general acceptation have given to the word 'salary' a significance somewhat different from the word 'wages' in this: that the former is understood to relate to position or office, to be the compensation given for official or other service, as distinguished from 'wages,' the compensation for labor. It is of little or no importance, however, in determining the question now being discussed whether the distinction here suggested be recognized or not. We have to deal with the phrase 'current wages,' without other limitation as to time or amount, and we think the exemption would apply without regard to whether the compensation be called 'wages' or 'salary.'"

In Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. Rep. 719, 27 A. 681, it was held that the difference between "wages" and "salary" was immaterial in determining the question of exemption. In McCormick Harvesting Mach. Co. v. Vaughn, 130 Ala. 314, 30 So. 363, it was held that wages, salary, or compensation for personal services was personal property within the meaning of the exemption laws. And in Magers v. Dunlap, 39 Ill. App. 618, it was held that the insertion of the words "for labor" in a note given to a physician for his services do not import that the consideration was wages as a laborer or servant within the meaning of the exemption laws.—From note to Tabb v. Mallette [Ga.] 102 Am. St. Rep. 94.

44, 45. She may claim the benefit of the exemptions but the husband's desertion does not transfer the title of his exempt property to his wife nor divest him of power to create a lien thereon. Farmers' & Merchants' Bank v. Hoffman [Neb.] 96 N. W. 1044.

46. Code, § 493, entitles non-resident. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209; Campbell v. Bennington, 4 Ohio C. C. (N. S.) 447.

47. Coey v. Cleghorn [Idaho] 79 P. 72.

§ 3. *Goods and other chattel properties exempted.*[49]—The statutes of the several states enumerate the articles which are exempt from execution. Most states exempt, in case there is no homestead or in addition thereto,[50] debtor's earnings for a certain period,[51] wearing apparel of debtor and his family,[52] articles used in conducting debtor's business,[53] necessary tools and implements of a mechanic or miner or other person necessary to carry on trade,[54] a certain amount of growing crops,[55] household furniture up to a certain value,[56] provisions and forage on hand necessary for home consumption for a certain period,[57] a seat or pew occupied by judgment debtor or the family in place of public worship, and a lot in a burying ground.[58] Many exempt moneys and benefits growing out of life insurance policies,[59] pension moneys, or that in which they are invested.[60] Property owned by municipal corporations for public purposes is exempt from execution.[61]

§ 4. *Debts and liabilities inferior or superior to right of exemption.*[62]—Purchase-money liens [63] and liens for rent or advances to mature a crop which is the subject of the levy,[64] are examples of liens made by statute superior to exemption. In some states, the exemption is only against contract debts.[65] The statutes of Missouri now provide that no property shall be exempt from an execution based on a

48. In re Sloan, 135 F. 873; Smith v. Blood, 94 N. Y. S. 667.

49. See 3 C. L. 1409.

50. See infra, this section, and as to exempt homesteads, see Homesteads, 3 C. L. 1630.

51. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173. Under provisions of Code N. C. § 493, providing that the earning of a debtor for his personal services for the sixty days next preceding shall be exempt from execution, such earnings are protected from seizure in garnishment. Id. Salary due school teacher in city schools. Flood v. Libby [Wash.] 80 P. 533.

See, also, annotation in section 2, ante.

52. Jackman v. Lambertson [Kan.] 80 P. 55.

53. O'Reilly v. Erlanger, 92 N. Y. S. 56. The question as to whether the articles are of the character claimed is for the jury. Id.

54. Williams v. Vincent [Kan.] 79 P. 121. A bowling alley is not exempt from seizure on execution as the tools or implements of the keeper's trade or business. Id. A person who is the head of a family and whose principal business is running a threshing machine is included in the phrase "or other person" as used in subd. 8, § 3018, Gen. St. Kan. 1901. Jackman v. Lambertson [Kan.] 80 P. 55. A threshing machine is an implement under subdivision 8, § 3018, Gen. St. Kan. 1901, and is exempt from execution when used for purpose of carrying on debtor's business. Id.

55. Shirling v. Kennon, 119 Ga. 501, 46 S. E. 630.

56. Williams v. Vincent [Kan.] 79 P. 121.

57. Bell v. Fox [Tex. Civ. App.] 84 S. W. 384.

58. Smith v. Blood, 94 N. Y. S. 667.

59. Holmes v. Marshall, 145 Cal. 777, 79 P. 534. Endowment is "life" policy within Laws 1897, p. 70. Flood v. Libby [Wash.] 80 P. 533; Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018. The same statute includes policies payable to debtor's "estate," "executors" or "assigns." Id.

Note: The court in Holden v. Stratton, 198 U. S. 202, 49 Law. Ed. 1018, calls attention to the fact that the Washington statute is more than ordinarily broad and therefore holds inapplicable precedents arising under the laws of other states.

60. Lands bought with such moneys. In re Stafford, 94 N. Y. S. 194. After the pensioner's death such land may be sold to pay his debts. Smith v. Blood, 94 N. Y. S. 667. The authorities are conflicting as to whether the exemption of pension moneys provided for by the Federal statutes operates to exempt also property purchased with pension. The weight of authority seems to be that it does not. This has been regulated in some states by statute. Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520. Iowa Code, § 4009, exempting property purchased with pension money, operates to exempt land paid for with pension money, and with the proceeds of a sale, after purchase of the land and coal rights therein, as such coal rights constitute an interest in the land, and are not merely the increase or produce desired from the land. Id.

61. Equitable Loan & Security Co. v. Edwardsville [Ala.] 38 So. 1016. A municipality in conducting a liquor dispensary under the Georgia statute is exercising a governmental function and the stock of liquors owned and carried by it in the dispensary constitutes property used for municipal purposes although profits may incidentally result to the municipality from the sale of such liquors, within the meaning of Code 1896, § 2040, exempting property belonging to municipal corporations and used for municipal purposes, from levy and sale under execution. Id.

62. See 3 C. L. 1411.

63. No property is exempt from a levy under a judgment for its purchase price. Liddell v. Jones [Ark.] 88 S. W. 961.

64. The landlord's special lien for rent upon the crops raised on the rented premises is superior to an exemption set apart in such crops under Ga. Civ. Code 1895, § 2866. Shirling v. Kennon, 119 Ga. 501, 46 S. E. 630.

65. Miller v. Minturn [Ark.] 83 S. W. 918. A judgment against a physician for unskillful treatment is not a debt by contract. Id.

judgment for alimony.[66] A husband who is divested of his headship of the family may nevertheless create superior liens on the exempt property.[67]

A waiver of exemptions in a judgment note makes the creditor stand prior to a trustee in bankruptcy in respect to the property.[68] In bankruptcy one who has a priorty by reason of a waiver of exemptions may be allowed his claim out of the proceeds of exemptions which have come into the trustee's hands though no levy was ever made by the creditor.[69]

§ 5. *Loss of exemption rights.*[70]—In those states where the terms of the statute are not decisive,[71] there is a conflict of authority as to whether exemptions may be waived or lost by estoppel.[72] In New York it is held that a statute prescribing a method does not exclude others.[73] It may be waived by failure to claim the right until after bona fide purchases intervene,[74] or by procuring one's acceptance as surety by misrepresentation as to nonexempt worth,[75] but inaction when there is no occasion to assert the right, is not a waiver,[76] nor is representation an estoppel if reliance thereon wrought no prejudice.[77] An assignment of the right to exemptions operates as an abandonment of that right.[78] An executory waiver will, however, protect the creditor when the debtor's estate is in bankruptcy.[79] Moneys "growing out" of life insurance do not lose that character by mere transfer into the custody of the beneficiary.[80] His creditors as well as those of insured are subject to the exemption.[81]

§ 6. *Selling or transferring exempt property.*[82]—Exempt property may be

66. Acts 1903, p. 240. Myher v. Myher [Mo. App.] 87 S. W. 116. On an execution levied before that act it was held that wages were so exempt. Jarboe v. Jarboe, 106 Mo. App. 459, 79 S. W. 1162, 3 C. L. 1411, n. 57.

67. Farmers' & Merchants' Bank v. Hoffman [Neb.] 96 N. W. 1044.

68. A Federal trustee in bankruptcy is not entitled to the bankrupt's exemption of $300, against a creditor who has attached the same by an attachment execution and served within four months prior to the bankruptcy, on a judgment waiving exemption. Sharp v. Woolslare, 25 Pa. Super. Ct. 251.

69. Where a lease to a bankrupt contained a waiver of exemptions, and the landlord proved his claim for rent before the referee, he was entitled to receive such rent as a prior claim out of the proceeds of property from which the bankrupt claimed his exemption, which was subject to distress for rent, though the landlord made no levy either before or after the filing of the bankruptcy petition. In re Sloan, 135 F. 873.

70. See 3 C. L. 1411.

71. Miller v. Almon [Ga.] 50 S. E. 993. Cannot waive exemption of $25 wages under Acts 1898-99, p. 37. Richardson v. Kaufman [Ala.] 39 So. 368.

72. McMahon v. Cook, 94 N. Y. S. 1018, and see 3 C. L. 1411.

73. N. Y. Code Civ. Proc. § 1404, providing that exemption of real estate may be canceled in a certain way, and that any other release or waiver of an exemption is void, does not prevent one from estopping himself to claim property as exempt. McMahon v. Cook, 94 N. Y. S. 1018.

74. Smith v. Blood, 94 N. Y. S. 667.

75. McMahon v. Cook, 94 N. Y. S. 1018. Fraud is not necessary to such an estoppel. Id.

76. Not lost by failure to claim when not requested to do so by the levying officer as provided by statute. Code 1892, § 1966. Bank of Gulfport v. O'Neal [Miss.] 38 So. 630.

77. By representing that a stranger was owner of defendant's exempt property whereby a levy was forborne, he does not waive his own exemption. It being leviable in neither event the creditor suffered no prejudice. Bank of Gulfport v. O'Neal [Miss.] 38 So. 630. Where it is shown that an attachment was levied upon certain personal property exempt by law from seizure under an attachment or execution proceeding, and at the time the levy was made the attached party disclaimed ownership and thereafter the attachment is discharged on motion and a second writ of attachment is issued and levied on all or part of the property originally levied upon, and at the second levy the property is claimed under the exemption laws of the state, held that under the facts in the case his first disclaimer did not waive his right to claim under the exemption laws. Coey v. Cleghorn [Idaho] 79 P. 72.

78. In re Sloan, 135 F. 873.

79. Thorp v. Woolslove, 25 Pa. Super. Ct. 251; In re Sloan, 135 F. 873. See, also, ante, § 4.

80, 81. Under Cal. Code Civ. Proc. § 690, subd. 18, providing for the exemption from execution of all "moneys, benefits, etc., growing out of life, insurance extends to the beneficiary and exempts insurance money received by a surviving wife from liability for her debts or debts of the deceased husband and the deposit by her of the money received from life insurance does not change its character or render it subject to execution. Holmes v. Marshall, 145 Cal. 777, 79 P. 534.

82. See 3 C. L. 1411.

conveyed free from liability for debts,[83] but the consent of the wife may be required.[84]

§ 7. *How the right is claimed and enforced.*[85]—The claim may be made in a proceeding to sell lands of a decedent which were purchased with exempt moneys.[86] In absence of statute it is the duty of the debtor to select such property as he claims to be exempt, and when no duty is imposed on the officer making the levy to make the selection for the debtor the latter waives his right to exemption if he fails to demand it,[87] but a selection is unnecessary where there can be no residue.[88] In Illinois the additional amount allowed to a married debtor residing with his family is not to be claimed by a "second" selection but should be included in one selection.[89] It is also essential that he deliver to the officer that which is renounced,[90] and if this be not done or an excessive amount be selected there is no exemption,[91] for the officer is not obliged to make a selection for the debtor.[92] In Georgia the absolute exemption of $300 must be judicially set apart.[93] Where a verified schedule is required it must be full and true.[94] In Washington the schedules of property and of exemptions may be in one paper.[95] Where property has, in bankruptcy, been set apart as exempt, the trustee has no title therein[96] and hence cannot be directed to take any action toward it for the protection of a creditor who has a special lien on it.[97] If exemptions are not allowed as claimed, the debtor may have the exemption set out of the proceeds.[98]

§ 8. *Recovery for selling exempt property or evading exemption laws.*[99]—The

83. Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520. Where a homestead was exempt from a judgment lien, its value in realty for which it was exchanged was exempt. Godfrey v. Herring [Ark.] 85 S. W. 232. Under Const. Va. 1902, § 191, which provides that a homestead exemption "shall not be claimed or held * * * in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration," held, in view of the Virginia decisions under the prior law, where there had been a conveyance by a head of a family, a reconveyance and claim of homestead in the property made prior to a decree setting aside the conveyance as fraudulent is sufficient to make the claim a valid one although creditor's suit to set aside conveyance for fraud was instituted prior to the reconveyance and was then pending. In re Allen & Co., 134 F. 620.

84. Threshing outfit. Jackman v. Lambertson [Kan.] 80 P. 55.

85. See 3 C. L. 1411.

86. Where in a proceeding to sell the lands of a decedent for the payment of debts, the widow and heirs at law, who had an opportunity did not assert an exemption on the ground that the property was purchased with pension money, as against an innocent purchaser, they could not in a collateral proceeding deny his title on the ground of exemption. Smith v. Blood, 94 N. Y. S. 667.

87. Williams v. Brown [Mich.] 100 N. W. 786.

88. The specific chattels exempted with all other chattels did not aggregate the amount given ($250) in lieu of the specific chattels. Bank of Gulfport v. O'Neal [Miss.] 38 So. 630.

89, 90, 91, 92. Johnson v. Larcade, 110 Ill. App. 611.

93. Under Civ. Code Ga. 1895, § 5914, in order for an exemption of $300 worth of personal property to be effective as against a general waiver of exemptions, the debtor must have such personal property set apart to him as exempt in the same manner that the homestead allowed him by the constitution is set apart. Miller v. Almon [Ga.] 50 S. E. 993, following Sasser v. Roberts, 68 Ga. 252.

94. Where the statute provides that when a debtor desires to claim his exemptions he shall prepare a verified schedule of his property which he claims as exempt, the debtor's claim of exemption of specific articles may be denied when he fails to fully disclose all his property in the schedule. Farris v. Gross [Ark.] 87 S. W. 633.

95. Ballinger's Ann. Codes & St. Wash. § 5255, providing that a debtor whose property is levied upon, who claims personal property as exempt, shall deliver to the officer an itemized list of all the property owned by him, and shall also deliver a list, by separate items of the property he claims as exempt is satisfied by a single list, where the debtor claims as exempt all his personalty. Wiser v. Thomas [Wash.] 80 P. 854.

96, 97. Claim of the creditor was for the purchase price of property. The law of the state gave no right of exemption against such debt. In re Seydel, 118 F. 207.

98. Where a bankrupt's property was sold by a receiver under order of court appointed the day after the petition was filed, and prior to the filing of the bankrupt's schedule, and he notified the receiver at the sale that he claimed his exemption, and specified the property from which he desired it allotted, he was entitled to claim his exemption from the proceeds of the sale of such property. In re Sloan, 135 F. 873.

99. See 3 C. L. 1412.

owner of exempt property wrongfully levied upon may recover the same by an action of replevin or sue the person making the levy for damages for the trespass.[100] A statutory bond given as one on a doubt as to defendants' ownership of chattels but defective in the amount of the penalty may be enforced for the debtor's benefit if exempt chattels are sold under it.[101]

EXHIBITIONS AND SHOWS.

A public exhibition is one to which the public generally are admitted, and the imposition of nonprohibitive conditions does not change its character.[1] The police power relative to the regulation of public exhibitions and shows extends to all shows whether an admittance fee is charged or not.[2] Statutory requirements relative to licenses must be complied with,[3] and cannot be evaded by fraudulent contrivances.[4]

Purveyors of public amusement must exercise ordinary diligence to furnish safe conveniences and surroundings for their patrons,[5] but are not liable for an injury caused by an act of a servant acting outside the scope of his employment.[6]

EXHIBITS; EXONERATION; EXPERIMENTS; EXPERT EVIDENCE, see latest topical index.

EXPLOSIVES AND INFLAMMABLES.

The mere use of explosives[7] in the manner in which they are ordinarily used[8] is not negligence, if proper care is taken to warn persons in the vicinity.[9] Thus, it is not negligence to keep gasoline in an unlocked storehouse,[10] nor to keep nonexplosive powder in a magazine in the woods a considerable distance from the road, though the door is open;[11] but where by statute it is unlawful to sell kerosene or gasoline below a specified test, a seller who vends an inferior article is liable for resulting injury.[12] The degree of care required of persons having control of dangerous explosives is the highest.[13] It must be commensurate with the dangerous nature

100. Johnson v. Larcade, 110 Ill. App. 611. See Replevin, 4 C. L. 1284; Sheriffs and Constables, 4 C. L. 1442. Compare Executions, 3 C. L. 1397.

101. Construing Code 1892, §§ 340, 1971, Bank of Gulfport v. O'Neal [Miss.] 38 So. 630.

1. Requiring purchasers of tickets to sign an application to become members of a club. Commonwealth v. Mack [Mass.] 73 N. E. 534.

2. Under the charter of Minneapolis free shows may be regulated by the common council. State v. Scaffer [Minn.] 104 N. W. 139.

3. Commonwealth v. Mack [Mass.] 73 N. E. 534.

4. A public boxing match is not deprived of its character as public by requiring ticket purchaser to sign an application for membership to an alleged club. Commonwealth v. Mack [Mass.] 73 N. E. 534.

5. Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783.

6. One injured by the careless dropping from an elevated band stand of a beer bottle; the use of beer by members of a band being beyond the scope of their employment. Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783.

7. It is not negligence to use dynamite in quarrying. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708. The mere fact that a signal torpedo is found on the ground at a railroad crossing does not show negligence on the part of the company. Obertoni v. Boston, etc., R. Co., 186 Mass. 481, 71 N. E. 980.

8. Leaving unexploded cartridges in old drill holes when new holes are to be drilled is not negligence in law. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708.

9. In an action by one injured by rocks being thrown by a blast on shore onto a boat on which the person injured was a passenger instruction relative to giving notice held not erroneous as implying a necessity of sending a messenger onto the boat to give notice. Smith v. Day, 136 F. 964.

10. So as to render the owner liable where some of it was purloined and used in starting a fire which consumed another's property. Bellino v. Columbus Const. Co. [Mass.] 74 N. E. 684.

11. The powder had become wet and would not explode. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170.

12. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227. Evidence insufficient to show a sale or storage of gasoline in violation of law. Weston v. District of Columbia, 23 App. D. C. 367.

13. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443. Evidence of negligence in the care of natural gas held a question for the jury. Olive Stove Works v. Ft. Pitt Gas Co. 210 Pa. 141, 59 A. 819.

of the article,[14] and is greater and more exacting as respects young children.[15] In the use of dynamite both master and servant must use a degree of care proportionate to the danger.[16] Persons in the vicinity of high explosives [17] and servants operating with them [18] must exercise a degree of care commensurate with the dangerous circumstances. One who owes no duty relative to the care of an explosive is not liable for injuries occasioned by negligence in the care of it,[19] and a master is not liable for an injury resulting from an explosion caused by the act of a servant beyond the scope of his employment.[20]

A town which operates a quarry for commercial purposes is liable for an injury resulting from negligence in blasting,[21] and a city which allows fire works in its public streets, constituting a public nuisance, is liable for resulting injuries,[22] though such exhibition is authorized by the municipal authorities.[23]

The keeping and disposition of large quantities of explosives or inflammables [24] and the handling of combustible, lubricating and fuel oils on the streets,[25] is subject to police regulation. A tax is an incident of regulation.[26]

14. Evidence held to show negligence in the care of dynamite. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443. The manufacturer of a machine that uses gasoline in generating power has only to exercise ordinary care. Talley v. Beever [Tex. Civ. App.] 78 S. W. 23. Evidence insufficient to show negligence in the manufacture of a gasoline pear burner. Id.

15. Mattson v. Minnesota & N. W. R. Co. [Minn.] 104 N. W. 443. Evidence held to show that children who were injured by dynamite they found in an exposed and unguarded place were not guilty of contributory negligence. Id. Evidence insufficient to show negligence in keeping non-explosive powder in an open magazine in a secluded place, where a child set fire to the powder and its clothes caught therefrom. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170.

16. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708. Instructions to a servant to "set his drills as far as possible from the old holes" is a warning and fulfills the master's duty. Id.

17. Whether one who went to watch a conflagration with notice that there was naptha in the vicinity of the fire, was guilty of contributory negligence held a question for the jury. Morrison v. Pittsburg etc., R. Co., 26 Pa. Super. Ct. 338. One is not guilty of contributory negligence in walking along a street three hundred feet from an extensive conflagration, though he knows that there is naptha in the vicinity of the fire; employes of the railroad company and members of the fire department being at work within thirty feet of the cars containing the naptha. Smith v. Pittsburg, etc., R. Co., 210 Pa. 345, 59 A. 1077.

18. One familiar with quarries who knows that dynamite is constantly used and that unexploded cartridges often remain in old drill holes, and who sets his drill within a few inches of one containing an unexploded cartridge without clearing the surface to ascertain its location is guilty of contributory negligence. Erickson v. Monson Consol. Slate Co. [Me.] 60 A. 708.

19. The Standard Oil Co. is not liable for injuries caused by an explosion of gasoline on the premises of one of its customers. Marples v. Standard Oil Co. [N. J. Law] 59 A. 32. A vendor of gasoline is not liable for injuries caused by an explosion caused by the escape of the liquid inside the building of the vendee, where an agent of the vendee was on watch to see that the inside appliances were all right. The servant of the vendor delivering the gasoline was at the receiving box outside the building. Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557. One who assisted to carry out a contract made by his son, loaned him tools and money, occasionally gave orders to the men, but never directed the use of dynamite, is not liable for damage caused by a blast. Page v. Dempsey, 99 App. Div. 152, 90 N. Y. S. 1019.

20. Where railroad employes after playing with a signal torpedo left it on the ground where it was picked up by a small boy who was injured by its explosion. Obertoni v. Boston & M. R. Co., 186 Mass. 481, 71 N. E. 980.

21. Duggan v. Peabody [Mass.] 73 N. E. 206.

22. Landau v. New York, 180 N. Y. 48, 72 N. E. 631. An extensive exhibition of fire works on a street where many people are assembled may be a nuisance, though not so at law. Id.

23. Landau v. New York, 180 N. Y. 48, 72 N. E. 631.

24. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. Ky. St. § 4224, imposing a tax on inflammable oils kept in large quantities, applies to any warehouse or other place where large quantities are kept. Id. The keeping of large quantities of oil "in bulk or tank" means oil stored in large tanks holding thousands of barrels. Ky. St. § 4224, imposing a tax on oils so kept. Id. The commissioners of the District of Columbia have power under Act of Cong. Jan. 26, 1887, to make and enforce a regulation requiring a license for the storage of gasoline in the city of Washington. District of Columbia v. Weston, 23 App. D. C. 363. Municipal corporations may adopt ordinances forbidding storage or transportation of nitroglycerine within municipal limits. Walter v. Bowling Green, 5 Ohio C. C. (N. S.) 516.

25. Ordinance providing that such oils should not be handled on the streets ex-

Ex Post Facto Laws; Express Companies, see latest topical index.

EXTORTION.[27]

Extortion is the corrupt demanding or receiving,[28] by a person in office,[29] of a fee for services which should be rendered gratuitously;[30] or when compensation is permissible, of a larger fee than the law justifies,[31] or a fee not yet due.[32] If money is extorted by color of office, it is immaterial whether the officer acted under a void or valid process.[33] In charging the offense at common law, no averment is required to charge the wrongful taking as a fee, or that it was to the officer's own use.[34] Evidence tending to show the obtaining of money, by color of office, without authority and right, is sufficient to go to the jury.[35] Where an officer exacts a fee for services for only a portion of which he was entitled to compensation, it will not be presumed, in the absence of contrary proof, that the fee exacted was more than reasonable compensation for the services for which he was entitled to pay.[36] Where in an action to recover the statutory penalty for charging an illegal fee, the illegal charge is proved by plaintiff and admitted by defendant, the court should give binding instructions against defendant.[37]

Under the Iowa statutes denouncing as a criminal offense a threat to accuse a person of a crime or offense with intent to extort money or a pecuniary advantage, the threatened accusation must be of a statutory offense.[38]

EXTRADITION.

§ 1. *International.*[39]—The complaint for the arrest and examination of an alleged offender, under the treaty with Great Britian, need not be drawn with the cer-

cept from tank wagons equipped with drip pans. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718.

26. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020.

27. See 3 C. L. 1414. See, also, Blackmail, 5 C. L. 422; Implied Contracts, 3 C. L. 1690 (recovery back of involuntary payments).

28. Under the Pennsylvania statute, an indictment charging, in effect, a conspiracy to extort is sufficient though neither the word "extort" nor "extorsively" appears therein. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. Count charging common-law conspiracy to extort held not objectionable for not alleging that payment of charges was not voluntary. Id.

29. Indictment describing defendants as "directors of public schools of the twenty-eighth ward of the city of Philadelphia" held sufficient. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. A special agent of the Federal land office, appointed under act June 4, 1897, c. 2 (30 Stat. 32), is not an officer of the United States within Rev. St. § 5481, defining extortion. United States v. Schlierholz, 137 F. 616.

30, 31. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

32. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. See other definitions of common-law offense, the same in substance in Hanley v. State [Wis.] 104 N. W. 57.

33. No defense that constables acted under void search warrant, for discharging which they extorted $75. Rev. St. 1898, § 4550. Hanley v. State [Wis.] 104 N. W. 57.

34. Complaint charging that defendants, as constables, "did conspire and did extorsively receive and take from the complainant, by color of their office, the sum of seventy-five dollars in money" for discharging a warrant then in their possession, held sufficient. Hanley v. State [Wis.] 104 N. W. 57. That the complaint unnecessarily alleges that the sum was obtained "as and for a fee" and the evidence fails to show the taking as for a fee, does not constitute a fatal variance. Id.

35. Hanley v. State [Wis.] 104 N. W. 57.

36. Construing Cobbey's Ann. St. 1903, § 9060, prescribing a penalty for exacting illegal fees. Shelbley v. Hurley [Neb.] 103 N. W. 1082.

37. Reversible error in action under Act May 26, 1897, P. L. 100, to submit to jury question whether law had been violated. Wilson v. Barrett, 24 Pa. Super. Ct. 68.

38. Under Code, § 4767, to threaten to charge vagrancy is not sufficient, that being neither a felony (Code, § 5093) nor a misdemeanor (§ 5094). State v. Dailey [Iowa] 103 N. W. 1008.

39. See 3 C. L. 1414.

tainty and exactness of an indictment,[40] but in construing such complaint the rule applied to complaints before local magistrates should govern.[41] The complaint need not charge the crime in the identical language of the treaty.[42] If the accused is held on competent legal evidence and if probable cause exists for believing him guilty of the offense charged, a commissioner is warranted in issuing a certificate to the executive for the surrender of the accused.[43] The existence of a malicious or other ulterior purpose cannot nullify extradition proceedings otherwise valid.[44] Since justices of the supreme court, circuit and district judges, and commissioners have concurrent jurisdiction to issue warrants, hear examinations, and commit, in extradition proceedings, the judgment of a commissioner in such a proceeding cannot be reviewed by a district court on a writ of habeas corpus.[45]

§ 2. *Interstate.*[46] *Origin of power.*—Interstate extradition is regulated by law and the power cannot be exercised by virtue of comity alone.[47] The governor of a state, in extradition matters, acts under the authority of the constitution and laws of the United States and not of the states,[48] and the decisions of the Supreme Court of the United States upon the subject of extradition between states are binding upon all persons and all courts.[49] When jurisdiction has attached under the Federal statute, substantial compliance with a state law controlling requisition is all that is required.[50] But it has been held that state legislatures have power to authorize extradition between the states, independently of the provisions of Congress upon that subject.[51] The principles governing international extradition have no application to cases of extradition between states of the Union.[52]

40, 41. In re Herskovitz, 136 F. 713.

42. A charge of "assault with intent to kill and murder" is within article 10 of the treaty with Great Britain authorizing extradition in cases of "assault with intent to commit murder." United States v. Piaza, 133 F. 998.

43. United States v. Piaza, 133 F. 998.

44. In re Herskovitz, 136 F. 713.

45. A commitment by a commissioner having jurisdiction, founded on testimony tending to show guilt of the accused, is sufficient as against such collateral attack. In re Herskovitz, 136 F. 713.

NOTE: The writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. Hence, as a general rule, if the committing officer had jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the officer in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish legal ground to hold the accused for the purpose of extradition, such decision cannot be reviewed as to the sufficiency of such evidence by any higher or other court. In re Luis Oteiza y Cortes, 136 U. S. 330, 34 Law. Ed. 464; In re Adutt, 55 F. 376; In re Vermaire, Fed. Cas. No. 16,915; Ex parte Van Aernam, 3 Blatchf. 160, Fed. Cas. No. 16,824. The court issuing the writ may inquire and adjudge whether the officer acquired jurisdiction of the subject-matter by conforming to the requirements of the treaty and the statute, and whether he exceeded his jurisdiction, and whether he had any legal and competent evidence of facts before him on which to exercise judgment as to the criminality of the accused, but the court is not to judge of the sufficiency of such evidence to warrant the conclusion reached, nor interfere with such conclusion even if, on a consideration of all of the evidence adduced, it would have reached a different conclusion. In re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8,772; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563.—From note in State v. Smith [Ala.] 100 Am. St. Rep. 37.

46. See 3 C. L. 1414.

47. Barriere v. State [Ala.] 39 So. 55. [See history of extradition in this country before the adoption of the constitution in the opinion in this case.—Ed.]

48. Ballinger's Ann. Codes & St. § 7016, requires prosecuting officer to investigate grounds of demand for a rendition warrant but imposes no duty on the governor, who may make his investigation in such manner and through such agency as he chooses, so long as he acts within the pale of the law. Gillis v. Leekley [Wash.] 80 P. 300.

49. Ex parte Dennison [Neb.] 101 N. W. 1045.

50. Rev. St. Ohio, § 95, requiring a requisition to be accompanied by an affidavit of the facts constituting the offense by one having knowledge thereof held substantially complied with. In re Polly, 3 Ohio N. P. (N. S.) 265. Warrant properly issued where affidavit accompanying requisition states positively the facts constituting the offense, under Rev. St. Ohio, § 95. Id.

51. The power to arrest and surrender a fugitive from justice is not dependent upon the Federal constitution, since it existed in the colonies prior to the adoption of that instrument. Ex parte Dennison [Neb.] 101 N. W. 1045; Barriere v. State [Ala.] 39 So. 55.

52. Knox v. State [Ind.] 73 N. E. 255.

The governor of the District of Alaska is authorized to demand fugitives from justice of the executives of the states and territories,[53] and his demand should be honored by them in a proper case.[54] The chief justice of the supreme court of the District of Columbia is charged with the same duties in extradition proceedings as are imposed on the governors of the states.[55]

Persons removable.—The term "charged with crime" includes persons accused and convicted, whose sentences have not been fully performed.[56] A person against whom a complaint of felony is filed before a committing magistrate is "charged" with crime within the meaning of the Federal constitution,[57] and congressional legislation authorizing extradition in such a case is constitutional.[58] One who, having committed a crime in one state, is found in another state, is a "fugitive from justice." [59]

Procedure.—Proceedings in extradition before a governor are summary in their nature.[60] The person demanded has no constitutional right to a hearing before the governor, and the Federal statute provides for none.[61] But the governor should, before issuing the warrant, be satisfied that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled; [62] that he is in fact a fugitive from justice,[63] and that there is probable cause to believe that at the time when it is charged that the crime was committed such person was within the state from which the requisition proceeds.[64] But in determining these questions the governor acts in an executive, not a judicial capacity, and any mode of proof satisfactory to him and tending to establish it satisfies the requirements of law.[65] Technical objections to an indictment or information will be disregarded in the removal proceedings; if it appears that a crime is substantially charged, removal will be granted.[66] If the issue of a warrant is authorized by the

53. 30 U. S. St. p. 1328, c. 429. Gillis v. Leekley [Wash.] 80 P. 300.

54. Governor of Washington is authorized to surrender a fugitive upon demand of governor of Alaska. Gillis v. Leekley [Wash.] 80 P. 300.

55. Hayes v. Palmer, 21 App. D. C. 450.

56. Hughes v. Pflanz [C. C. A.] 138 F. 980.

57. U. S. Const. art. 4, § 2, subd. 2. In re Strauss, 197 U. S. 324, 49 Law. Ed. 774.

58. Rev. St. U. S. § 5278. In re Strauss, 197 U. S. 324, 49 Law. Ed. 774.

59. Hughes v. Pflanz [C. C. A.] 138 F. 980.

60. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515.

61. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515. Under the Federal statute no hearing before the governor to whom the requisition is addressed and no notice to the person charged with crime is required as a preliminary to the issue of a warrant for his arrest and surrender. Rev. St. U. S. § 5278. Farrell v. Hawley [Conn.] 61 A. 502.

62. Ex parte Dennison [Neb.] 101 N. W. 1045. Pennsylvania indictment charging the obtaining of a signature to a written instrument by a false pretense with intent to cheat, etc., held to state an offense under the laws of that state. People v. Police Com'r, 100 App. Div. 483, 91 N. Y. S. 760.

63. Court below having found that person demanded was not a fugitive from justice, he was entitled to be discharged. Poor v. Cudihee, 37 Wash. 609, 79 P. 1105. No extradition can be allowed unless it appears that the accused is a fugitive from justice. Construing Crim. Code § 364 (Cobbey's Ann. Code, 1901). Ex parte Dennison [Neb.] 101 N. W. 1045.

64. Farrell v. Hawley [Conn.] 61 A. 502.

65. Farrell v. Hawley [Conn.] 61 A. 502. Strict common-law evidence is not necessary and no particular kind of evidence or mode of authentication is required by statute. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515. In view of rule that governor must decide upon evidence satisfactory to him whether a person demanded is substantially charged with crime and is a fugitive from justice, a Federal court will not interfere in an extradition case for mere irregularity therein. Ex parte Moebus, 137 F. 154.

66. Indictment presented in court having jurisdiction is probable cause to justify issue of warrant of removal of accused. Farr v. Palmer, 24 App. D. C. 234. Removal of party indicted for fraudulent use of mails under Rev. St. U. S. § 5480, can be refused only when, upon a broad and liberal construction of the indictment, it clearly appears that no offense against the United States is charged. Indictment held sufficient. Id. Sufficiency of affidavits on which larceny charges were based immaterial, charge having culminated in conviction. Hughes v. Pflanz [C. C. A.] 138 F. 980. Description of crime in requisition may be regarded as supplemented by descriptions in indictment and bench warrant made a part of the requisition. Hayes v. Palmer, 21 App. D. C. 450. Immaterial that indictment against accused in

governor, it is immaterial that he signed it in blank and that it was issued by his executive clerk in his absence.[67]

Review.—The legality of extradition proceedings may be reviewed in a habeas corpus proceeding.[68] In such proceeding the petitioner has a right to show that he was illegally restrained of his liberty and was detained under a void process.[69] A prima facie case that the prisoner is legally held is made out when the return to the writ of habeas corpus shows a demand or requisition for the prisoner made by the executive of another state; a copy of the indictment found or affidavit made before a magistrate, charging the alleged fugitive with commission of a crime, certified as authentic by the executive making the demand; and the warrant of the governor authorizing the arrest.[70] The rendition warrant is prima facie evidence of the existence of every fact which the executive must determine before issuing the warrant,[71] as of the fact that the person demanded is a fugitive from justice,[72] and the decision of the governor upon such questions upon evidence pro and con before him will not ordinarily be reviewed by the courts.[73] But where in a habeas corpus proceeding, the showing upon which the governor acted is made to appear, it is a question of law whether the person demanded has been substantially charged with a crime in the demanding state.[74] The court will not, however, inquire into the technical sufficiency

demanding state does not show indorsement as a true bill over signature of foreman of grand jury, especially where it conforms to statutory practice of that state. Id. Fact that requisition recites that accused "stands charged with the crime of gambling" and nothing more does not constitute fatal defect, "gaming" and "gambling" being used interchangeably in indictment, made a part of requisition. Id.

67. In re Polly, 3 Ohio N. P. (N. S.) 265.

68. Associate judge of Montgomery City court has jurisdiction to issue writ and review proceedings, and an appeal from his decision lies to the supreme court. Barriere v. State [Ala.] 39 So. 55.

NOTE. Review in habeas corpus proceeding: In order that a person may be lawfully held for extradition it must appear that there is a charge of crime against him in the state from which he is alleged to be a fugitive. There must also be a demand by the governor of that state for his arrest and detention. There must also be an indictment found in the state from which he has fled, or an affidavit made and a copy thereof certified by the governor, that he has committed a crime; that the prisoner is the person named for extradition and that he was in the demanding state when the crime was committed. These are jurisdictional facts necessary to a valid commitment of the alleged fugitive, and in habeas corpus proceedings, in extradition cases, although the court will not go into the merits of the case, it will go into the sufficiency of the papers before it and of the evidence to show such jurisdictional facts. Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173; Ex parte McKean, 3 Hughes, 23, Fed. Cas. No. 8,848. In habeas corpus proceedings in extradition cases, the writ cannot perform the office of a writ of review, and the court can inquire only as to the existence of the jurisdictional facts, the jurisdiction of the committing officer over the subject-matter and whether there was any legal evidence before him to support his judgment. If these facts exist the prisoner is not entitled to his discharge. In re Luis Oteiza y Cortes, 136 U. S. 330, 34 Law. Ed. 464; In re Adutt, 55 F. 376; In re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8,772; In re Clark, 9 Wend. [N. Y.] 212.—From note to State v. Smith [Ala.] 100 Am. St. Rep. 36.

69. Demurrer to petition held erroneously sustained. Barriere v. State [Ala.] 39 So. 55.

70. Barriere v. State [Ala.] 39 So. 55.

71. Warrant prima facie proof that person named in warrant is person held under it and accused of crime. Gillis v. Leekley [Wash.] 80 P. 300. If the proceedings, when produced, appear to be regular, the presumption arising from the warrant becomes conclusive evidence of the right to extradition. People v. Police Com'r, 100 App. Div. 483, 91 N. Y. S. 760.

72. Issuing of a warrant by the governor, with or without a recital that the person demanded is a fugitive from justice is sufficient to justify removal until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the governor. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515; Ex parte Dennison [Neb.] 101 N. W. 1045. Held, that presumption was not overcome in this case. Hayes v. Palmer, 21 App. D. C. 450. Where in a habeas corpus proceeding the accused refuses to introduce evidence on the question whether she was a fugitive from justice, she is concluded by the prima facie case made by the papers on which the governor acted in issuing the warrant. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515.

73. Ex parte Dennison [Neb.] 101 N. W. 1045.

74. Ex parte Dennison [Neb.] 101 N. W. 1045. Whether person demanded has been substantially charged with a crime is a question of law. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515.

of the indictment, this being for the courts of the demanding state to determine.[75] It will be held sufficient in the habeas corpus proceeding if it substantially charges a crime under the laws of the demanding state.[76] When it is conceded or conclusively proved that the person demanded was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground of a constructive presence only at that time, the court will discharge the defendant.[77] But if the evidence on the question is contradictory, the defendant will not be discharged, since his guilt or innocence will not be tried in the habeas corpus proceeding.[78] An averment of the petitioner that he was neither physically nor constructively present in the demanding state at the time of the commission of the alleged crime is unavailing, since it is presumed that the governor acting upon sufficient evidence before him found such averment untrue.[79] The objection that the identity of the prisoner with the person named in the rendition warrant has not been shown is not available when the issue of identity is not raised in the pleadings.[80]

Rights of extradited persons.—When a fugitive has been returned to a state, he may be lawfully held to answer for any crime committed by him against the laws of the state to which he has been returned, without regard to the offense named in the extradition papers.[81]

Refusal to admit a prisoner, held under extradition warrant, to bail, pending an appeal from an order in a habeas corpus proceeding remanding him to custody, is discretionary.[82] In Mississippi, the judges of the supreme court cannot, pending such an appeal, admit the prisoner to bail.[83]

FACTORS.

The relation of factor to consignor.[84]—A factor is one who as a business receives and sells consignments of goods, for a compensation,[85] and the fact that he sells upon a del credere commission does not make him a purchaser of the goods consigned to

75, 76. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515; People v. Police Com'r, 100 App. Div. 483, 91 N. Y. S. 760.

77, 78. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515.

79. This presumption held not met by anything in petitioner's pleadings, want of sufficient evidence not being set up in a reply. Farrell v. Hawley [Conn.] 61 A. 502.

80. Gillis v. Leekley [Wash.] 80 P. 300.

NOTE. Identity of Prisoner: On habeas corpus the question of the identity of the prisoner with the person named in the warrant of extradition is always open, and unless such identity is in some way established he is entitled to his discharge. Matter of Leary, 10 Ben. C. C. 198, Fed. Cas. No. 8161; In re White, 55 F. 54; Ex parte McKean, Fed. Cas. No. 8,848, 3 Hughes, 23; United States v. McClay, Fed. Cas. No. 15,660. Parol evidence is always admissible to show that there has never been any presence of the accused in the demanding state, and that he is not the person named in the warrant or indictment. Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173; Wilcox v. Nolze, 34 Ohio St. 520. A person arrested as a fugitive from justice on a warrant issued by the governor of one state based on an indictment found in that state is entitled to show, on habeas corpus, to prevent extradition from another state, that he was not in the former state at the time that the offense was alleged to have been committed, that he has never been there since, that he is not the person named in the indictment or warrant and that he is not a fugitive from justice. In re Mohr, 73 Ala. 503, 49 Am. Rep. 63.—From note in State v. Smith [Ala.] 100 Am. St. Rep. 38.

81. Knox v. State [Ind.] 73 N. E. 255. Citing many authorities.

82. Farrell v. Hawley [Conn.] 61 A. 502.

83. Decision of chancellor must be reviewed, if at all, by judges sitting as a court. Ex parte Wall [Miss.] 38 So. 628.

84. See 3 C. L. 1415.

Note: As to the general law of factors, see an excellent discussion in Clark & Skyles, Ag., pp. 1748-1857.

85. One who receives and takes actual possession of goods shipped to him as agent of the shipper for the purpose of sale is a factor within Code D. C. § 838, providing a punishment for embezzling factors. Green v. U. S., 25 App. D. C. 549.

Evidence sufficient to show the relation of consignor and factor. Rowland v. Gregg [Ga.] 50 S. E. 949. Evidence held to establish the relation of consignor and factor, so as to entitle the factor to recover for advances made. Coates v. Metcalf [Utah] 81 P. 900. One to whom goods are delivered to be by him delivered to a purchaser **is not a factor** so as to have a lien either at common law, or under the Maryland statute. Rowland v. Dolby [Md.] 59 A. 666.

him.[86] One may be both a factor and a broker. His rights and liabilities are governed by the capacity in which he acts in the particular transaction under inquiry.[87]

Rights and liabilities inter se and as to third persons.[88]—The rights and liabilities between factor and consignor are controlled by the terms of their contract.[89] A ratification of the violation of instructions precludes a consignor from setting up such violation as a defense to any liability to the factor.[90]

Title to the property consigned remains in the consignor until it is sold,[91] and the proceeds of sales belong to him;[92] but the factor has a qualified interest in them to the extent of his advances and commissions.[93] A factor in possession has apparent authority to sell and a bona fide purchaser gets good title as against the original owner.[94] The factor owes his consignor the duty of exercising ordinary diligence to sell at the best price obtainable and to render a true account of the sale.[95] He is not liable for loss of goods in his possession not the result of his negligence.[96]

The Minnesota statute requiring a grain factor to render a statement to the consignor within 24 hours after making a sale contemplates a sale valid as between all parties.[97] Hence a purchase by the factor himself is not a sale within this statute,[98] though it is customary for factors to make such sales,[99] and failure of the factor to make the required report of a sale of the goods to another at an advanced price over what he paid for them is a violation of the law.[100]

Lien.[101]—For advances made the law implies a lien, without agreement upon

86. By custom among live stock commission men, they assumed the risk of payment of the price by the purchasers. In re Taft [C. C. A.] 133 F. 511.

87. Green v. U. S., 25 App. D. C. 549.

88. See 3 C. L. 1415.

89. A notification to customers that they would be charged a commission on goods on which advancements had been made, whether such goods were shipped to them or not does not show an agreement to pay such commissions. Allen-West Commission Co. v. Hudgins & Bro. [Ark.] 86 S. W. 289. Where a factor seeks to recover a balance due for advances made, he must set out the account between himself and the consignor, showing sales made and prices received. Park v. Standard Spinning Co., 135 F. 860.

90. Where a consignor executes a note for advances made without objecting to the factors account or expressing dissatisfaction at his violation of instructions, such violation is no defense to an action on the note. Allen v. McAllister [Wash.] 81 P. 927.

91. He may recover it as against a receiver of the consignee. Williamson & Co. v. Prairie Queen Mill. Co., 111 Ill. App. 373.

92. Where such funds are kept separate from his general estate and can be traced, the consignor is entitled to them as against the creditors of a bankrupt factor. In re Taft [C. C. A.] 133 F. 511. In an action to recover the proceeds of a consignment of goods where the factor set up that plaintiff was not the owner but the goods were shipped in his name under a scheme to defraud, evidence held to show that plaintiff was the owner. Holden v. Maxfield [Minn.] 101 N. W. 955.

93. A factor who claims no interest in the proceeds of a sale may file a bill of interpleader, based on adverse claims. Byers v. Sansom-Thayer Commission Co., 111 Ill. App. 575. Factor held entitled to apply proceeds of consignments to his own benefit or to that of others for whom he was agent, and to whom the consignor was indebted. Norwood v. H. L. Laws & Co., 113 La. 812, 37 So. 764.

94. Where, after a sale to commission merchants was rescinded, the owner of the goods left them in his possession. Gardiner v. McDonogh [Cal.] 81 P. 964.

95. Bouldin v. Atlantic Rice Mills Co. [Tex. Civ. App.] 86 S. W. 795.

96. Death of horses. Hunter v. Davis [Iowa] 103 N. W. 373.

97. State v. Edwards [Minn.] 102 N. W. 697.

98. State v. Edwards [Minn.] 102 N. W. 697. A consignor is not estopped from repudiating a purchase by the factor himself, unless he acquiesces therein after being fully informed of the entire transaction, including a subsequent sale at a profit. Id.

99, 100. State v. Edwards [Minn.] 102 N. W. 697.

101. See 3 C. L. 1416.

NOTE: The factor's lien is a personal privilege of which he may avail himself or not as he pleases. It cannot be transferred, nor can question upon it arise between any but the principal and factor. Holly v Huggeford, 8 Pick. [Mass.] 73, 19 Am Dec. 303; Jones v. Sinclair, 2 N. H. 321, 9 Am. Dec. 75; Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Barnes Safe & Lock Co. v. Block Bros. Tobacco Co., 38 W. Va. 158, 45 Am. St. Rep. 846. It does not depend on contract, but is deemed to exist in all cases until a contrary presumption is established. Martin v. Pope, 6 Ala. 532, 41 Am. Dec. 66; Nagle v. McFeeters, 97 N. Y. 196; Gragg v. Brown, 44 Me. 157; Haebler v. Luttgin, 61 Minn. 315. It does not give him any right of ownership, but only the right to retain possession until his commissions and advances are paid. Jordon v. James, 5 Ohio, 88; United States v. Villalonga, 23 Wall. [U. S.] 35, 23 Law.

all goods in his hands which he has power to sell.[102] The right to a lien depends primarily on possession.[103] Hence a factor who has deprived himself of both actual and constructive possession has no lien.[104]

FACTORS' ACTS, see latest topical index

FALSE IMPRISONMENT.

§ 1. *What constitutes, persons liable, and justification.*[1]—False imprisonment consists of any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally or in one used only on a particular occasion, or by words and an array of force without bolts or bars, in any locality whatever.[2] There must be an interference with one's freedom of locomotion [3] and the restraint must be unlawful.[4]

One who merely states facts to public officials charged with the duty of taking action in the matter is not liable,[5] unless he instigates or takes active part in the execution of the warrant.[6] An officer who executes a warrant valid on its face [7] or who in good faith makes an arrest without a warrant is not liable; [8] but one who

Ed. 64; The Packet, 3 Mason, 334, Fed. Cas. No. 10,665. See Clark & Skyles, Ag. § 868.

102. Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376.

103. Rowland v. Dolby [Md.] 59 A. 666. A factor has a lien for his disbursements, commissions and advances on goods in his possession but not for advances made after transfer of possession to a purchaser. Ermeling v. Gibson Canning Co., 105 Ill. App. 196.

104. Where he has placed the goods in a warehouse and given the owner the receipt. Rowland v. Dolby [Md.] 59 A. 666.

1. See 3 C. L. 1417.

2. See Cyc. Law Dict. "False Imprisonment."

3. Where an officer invites a person to a police station for the purpose of interrogating him, and without any idea of then putting him under arrest, and there is no reasonable apprehension that force will be used in the absence of submission, and the person voluntarily accompanies the officer, there is no imprisonment. Gunderson v. Struebing [Wis.] 104 N. W. 149. Evidence as to whether one was imprisoned or not, held a question of fact. Id. Where an action is brought against a home for fallen women, evidence of plaintiff's previous depraved character is admissible on the question of the motive for her being willing to stay there and on the question of restraint. Smith v. Sisters of the Good Shepherd [Ky.] 87 S. W. 1083. Issues held properly limited to the question as to whether plaintiff's stay in an institution was voluntary or involuntary. The declarations of a judge who heard habeas corpus proceedings in which plaintiff was released are not admissible in an action for false imprisonment. West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

4. A complaint must allege that the warrant under which the arrest was made was invalid and that liberty was illegally restrained. Watters v. De La Matter, 109 Ill. App. 334. In determining the sufficiency of information pursuant to which an imprisonment is made, great latitude should be indulged in its favor. Gilbert v. Satterlee, 101 App. Div. 313, 91 N. Y. S. 960.

5. Love v. Halladay [Mich.] 102 N. W. 1027. One who merely prefers a complaint to a magistrate in a matter over which the later has general jurisdiction is not liable for false imprisonment for acts done under a warrant thereupon issued, though the magistrate had no jurisdiction over the particular complaint. Rush v. Buckley [Me.] 61 A. 774. If a complaint is sufficient to give the magistrate jurisdiction, the person making it is not liable. Gilbert v. Satterlee, 101 App. Div. 313, 91 N. Y. S. 960.

6. Under Rev. St. 1899, § 2750, one who makes a criminal complaint and induces a justice to issue a warrant without the sanction of the prosecuting attorney is liable for false imprisonment. Brueckner v. Frederick [Mo. App.] 83 S. W. 775.

7. Rush v. Buckley [Me.] 61 A. 774. A ministerial officer is bound to know the jurisdiction of the court which issues process to him; he is bound to know whether from constitutional or other reasons the court has jurisdiction over offenses of that nature, but he is not bound to inquire into a question of fact as to whether or not a city ordinance in relation to the subject-matter, concerning which the city is by statute authorized to pass ordinances, has been published as required by law. Id. A judgment imposing a fine and in default of payment thereof by the accused, that he work it out at hard labor on the streets, is as to the latter provision void, but it is in the nature of a warrant, and an officer who makes an arrest thereunder while acting in good faith is not liable for false imprisonment. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

8. Where he is authorized to arrest for

makes an unauthorized arrest without a warrant is. A judge of inferior jurisdiction who in good faith issues a warrant in excess of his jurisdiction is not liable for false imprisonment,[10] nor is he liable because of mere error or irregularity in proceedings before him,[11] nor because he reaches an erroneous decision;[12] but is if he entertains a proceeding wholly beyond his jurisdiction.[13] A state is not liable.[14] One who does not instigate or cause an imprisonment is not liable,[15] though the arrest is made by a special officer appointed at his instance.[16] A master is not liable for a false imprisonment caused by his servant outside the scope of his employment,[17] though the servant did the act with the intent to serve or benefit the master,[18] and a client is not liable for the unauthorized act of his attorney in causing an unlawful arrest;[19] but a client who stands by and sanctions what his attorney does is liable for the act of his attorney in unlawfully inducing a justice to issue a warrant,[20] and a carrier is liable for the false imprisonment of a passenger instigated by a servant who at the time is not actively engaged in furthering the carrier's business.[21]

Justification.[22]—That imprisonment was in accordance with the law is justifi-

drunkenness or disorderly conduct and has reason to believe the person arrested is guilty. Easton v. Com., 26 Ky. L. R. 960, 82 S. W. 996.

9. There had been no breach of the peace. Smith v. Dulion, 113 La. 882, 37 So. 864.

10. A magistrate who issues a warrant under a void ordinance is not liable. Gilbert v. Satterlee, 101 App. Div. 313, 91 N. Y. S. 960. Where he has jurisdiction of the general class of cases to which the proceeding in question belongs, but not of the particular offense because the ordinance making it an offense was not regularly enacted. Rush v. Buckley [Me.] 61 A. 774. Emery, J., dissenting.

Note: The court say in this case that there is a strong tendency that where a judge of an inferior court is invested with jurisdiction over the general subject-matter of an alleged offense—that is, has power to hear and determine cases of the general class to which the proceeding in question belongs—and decides, though erroneously, that he has jurisdiction over the particular offense of which complaint is made to him or that facts charged constitute an offensse, and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he should not be and is not liable in damages to a party injured.

11. Gardner v. Couch [Mich.] 100 N. W. 673.

12. In deciding whether or not a warrant should issue. Gardner v. Couch [Mich.] 101 N. W. 802.

13. A justice of the peace who imprisons a person in a proceeding coram non judice is liable in false imprisonment. McCary v. Burr, 94 N. Y. S. 675. A justice who issues a warrant not authorized by law is liable in false imprisonment where he sentences one thereunder, though under certain circumstances the proceeding might have been heard by him. Id.

14. The State Agricultural Society, is a department of the state government, and its officers and board of managers, as public officials, are exempt from liability for actions for false imprisonment. Berman v. Cosgrove [Minn.] 104 N. W. 534.

15. Evidence as to whether one charged with false imprisonment was guilty of instigating an arrest held a question for the jury. Gunderson v. Struebing [Wis.] 104 N. W. 149. In an action for false imprisonment, plaintiff must show that the defendant caused, authorized or instigated the proceedings leading to his imprisonment. Vara v. Quigley Const. Co. [La.] 38 So. 162.

16. One at whose request a special policeman is appointed for the protection of his premises is not liable for a false imprisonment committed by him where he never authorized the arrest and the special policeman in making it acted exclusively under powers conferred by his appointment. Samuel v. Wanamaker, 95 N. Y. S. 270. That an arrest was made by an officer as such and not as the agent of the defendant may be shown under a general denial. Schultz v. Greenwood Cemetery, 93 N. Y. S. 180.

17. A servant whose duty is to collect money for freight and sell tickets to passengers has no authority to cause the arrest of a person whom he suspects of having stolen money from his office. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816. Where an imprisonment is caused by a servant, his express or implied authority must be established by clear proof. Vara v. Quigley Const. Co. [La.] 38 So. 162. Authority to cause the arrest of persons for violating a labor contract is not to be implied in the employment of agents or clerks to run a commissary store and in connection therewith collect amounts due from the laborers to the master. Id.

18. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816.

19. West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

20. Brueckner v. Frederick [Mo. App.] 83 S. W. 775.

21. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135, afg. [Tex. Civ. App.] 82 S. W. 524. Evidence insufficient to show that the servant of the defendant carrier instigated the arrest complained of. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135, overruling [Tex. Civ. App.] 82 S. W. 524.

22. See 3 C. L. 1418.

cation,[23] but probable cause or absence of malice,[24] or that the imprisoned person is of bad character [25] is not, and that the operation of street cars is a nuisance does not justify the wholesale imprisonment of the motormen to prevent their operation.[26]

Damages.[27]—The measure of damages is the amount that will compensate the imprisoned person for injury sustained.[28] Punitive damages may be recovered if the imprisonment was malicious.[29] The sense of shame, mental suffering, humiliation and outrage is to be considered, whether it tends to increase [30] or diminish the amount recoverable.[31] For false imprisonment because of irregularity of proceedings, the amount of damages is a question for the jury.[32] If actual damages only are demanded, good faith of the person causing the imprisonment is not to be considered.[33]

§ 2. *The action to recover damages.*[34]—In New York a cause of action for false imprisonment and one for malicious prosecution may be united in one complaint, but not in a single count.[35] The complaint must show that the process under which the imprisonment was effected was void or irregular and unlawful.[36] Facts tending to show malice should not be pleaded unless as ground for special damage.[37] In an action for false imprisonment and malicious prosecution the plaintiff must show that the defendant acted maliciously and without probable cause.[38]

FALSE PERSONATION.[39]

An indictment charging that defendant represented himself to be the sheriff of a certain county, in that he pretended to be a certain named person, is not sustained by proof that he represented himself as sheriff, even though the person named was sheriff of the county, and though the allegation that he pretended to be such person was unnecessary.[40]

23. A tax payer imprisoned under Rev. Laws, c. 13, § 26, for refusal to pay taxes on demand and after diligent search made by the collector refuses to exhibit goods that may be taken on the warrant. Kerr v. Atwood [Mass.] 74 N. E. 917. As to whether a diligent search had been made held a question for the jury. Under Rev. Laws, c. 13, § 26, providing that a tax payer who refuses to pay taxes may be imprisoned if the collector after reasonable search cannot find sufficient goods upon which to levy, evidence as to whether the taxpayer had told the collector he had certain goods or pointed out goods to him is admissible on the question of reasonable search. Id.

24. Markey v. Griffin, 109 Ill. App. 212.

25. Evidence of bad character is inadmissible. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135.

26. The nuisance could have been abated by other means. Mumford v. Starmont [Mich.] 102 N. W. 662.

27. See 3 C. L. 1418.

28. Not such as will compensate the average man for injury he would sustain under the same circumstances. Mumford v. Starmont [Mich.] 102 N. W. 662.

29. Where one was arrested for failure to pay taxes, whether there was unnecessary delay in proceeding to jail or whether the prisoner was subjected to improper treatment held questions of fact. Kerr v. Atwood [Mass.] 74 N. E. 917. Evidence of cruel treatment held irrelevant. Smith v. Sisters of the Good Shepherd [Ky.] 87 S. W. 1083.

30. Mumford v. Starmont [Mich.] 102 N. W. 662. The imprisoned person may testify that he felt humiliated by the arrest. Id.

31. Where the imprisonment was for disorderly conduct, evidence that the imprisoned person was at the time keeping a house of prostitution is admissible. Texas Midland R. Co. v. Dean [Tex.] 85 S. W. 1135. Overruling [Tex. Civ. App.] 82 S. W. 524. Evidence that the plaintiff had often been imprisoned before on similar charges is admissible. Id.

32. The proceeding for the arrest of a person attempting to travel on a railroad train without paying his fare was not in accordance with the statute. Gen. Ry. Law, § 18 (2 Gen. St. p. 2671). Tidey v. Erie R. Co. [N. J. Err. & App.] 60 A. 954.

33. Texas Midland R. Co. v. Dean [Tex. Civ. App.] 82 S. W. 524.

34. See 3 C. L. 1418.

35. Under Code Civ. Proc. § 484. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

36. An allegation that plaintiff was duly arrested is insufficient, though malice be alleged. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

37. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

38. Sundmaker v. Gaudet, 113 La. 887, 37 So. 865.

39. Obtaining property by false personation, see False Pretenses and Cheats, post.

40. Butts v. State [Tex. Cr. App.] 84 S. W. 586.

FALSE PRETENSES AND CHEATS.

Elements of offense.[41]—A false pretense is a false and fraudulent representation or statement of a fact as existing or having taken place,[42] made with knowledge of its falsity,[43] with intent to deceive and defraud,[44] and which is adapted to induce the person to whom it is made to part with something of value.[45] Where a false token is used,[46] it must be one calculated to deceive, according to the capacity of the person to whom it is presented to detect its falsity under the circumstances.[47]

To constitute the crime of obtaining property by false pretenses,[48] such pretenses must have been relied on,[49] and property must have been obtained [50] by the defendant personally, or by a person designated by defendant to receive it for his benefit.[51] The owner must part with the property, intending to transfer both title and possession,[52] and the crime is not consummated until he has parted with both title to and control over the property.[53] If he intended to part with the bare possession only, the crime is larceny, and not cheating by false pretenses.[54] One who ob-

41. See 3 C. L. 1419.

42. State v. Seligman [Iowa] 103 N. W. 357. Statement that manufacturer had large order for garments from a responsible house, made in order to procure goods, held statement of an alleged existing fact. People v. Rothstein, 180 N. Y. 148, 72 N. E. 999.

Opinions: Indictment charging obtaining of money by sale of wheat falsely represented as a superior dry-weather variety, held not to state an offense, since the alleged representations were mere expressions of opinion. Curtis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 709, 88 S. W. 236.

43. State v. Seligman [Iowa] 103 N. W. 357. False pretenses must be knowingly made. Doxey v. State [Tex. Cr. App.] 84 S. W. 1061.

44. State v. Seligman [Iowa] 103 N. W. 357. Letter, claimed to have induced extension of credit, held not to have been intended for that purpose, and not such as was reasonably capable to induce prosecutor to part with money, having been sent for a different purpose, some time prior to the transaction complained of. Doxey v. State [Tex. Cr. App.] 84 S. W. 1061.

45. State v. Seligman [Iowa] 103 N. W. 357. False pretense must afford some reason why party was induced to part with property. Doxey v. State [Tex. Cr. App.] 84 S. W. 1061.

46. Use of confederate bill, under pretense that it was valid, held a false token, under Ky. St. 1903, § 1208. Commonwealth v. Beckett [Ky.] 84 S. W. 758.

47. Confederate bill, given in horse trade, held calculated to deceive person to whom it was presented. Commonwealth v. Beckett [Ky.] 84 S. W. 758.

48. A solicitor who induced a state agent to pay him $100 in advance as a part of his commission on a policy, by exhibiting an application therefor and inducing the agent to believe it was made in good faith, whereas the applicant had agreed with the solicitor that no premium should be paid, the whole plan being merely an advertising scheme, is guilty of the crime of obtaining money by false pretenses under Code, § 5041. State v. Seligman [Iowa] 103 N. W. 357.

49. The elements of the crime are false statements adapted to the fraudulent purpose, and money parted with on the faith of such statements. People v. Ward, 145 Cal. 736, 79 P. 448. Where defendant procured money on a worthless draft, held, under evidence, the jury could find that false pretense that draft had been "arranged for" was relied on by cashier, and that payment was not induced by trust and confidence in defendant. Semler v. State, 6 Ohio C. C. (N. S.) 393.

50. The gravamen of the crime is the obtaining of the property described. Bates v. State [Wis.] 103 N. W. 251.

51. Bates v. State [Wis.] 103 N. W. 251. The fact that a draft alleged to have been fraudulently obtained by defendant was made payable to him "to the use" of the person defrauded does not conclusively show that defendant was a mere trustee, but may be explained as a mere memorandum showing on whose account payment was made. State v. Wilson [Kan.] 80 P. 639.

52. State v. Loser [Iowa] 104 N. W. 337. The essence of the offense of obtaining money by false pretenses is in the fraudulent and false representations which result in securing the consent of the owner to part with the title as well as the possession of the property. State v. Anderson, 186 Mo. 25, 84 S. W. 946.

53. Held that where agent of party injured sent drafts through the mail, he did not part with title to or control over money in Wisconsin, where he mailed the drafts. Bates v. State [Wis.] 103 N. W. 251.

54. State v. Loser [Iowa] 104 N. W. 337. The essence of larceny is the taking and conversion of the property or money against the consent of the owner, with the intent to deprive him of it. State v. Anderson, 186 Mo. 25, 84 S. W. 946. Where prosecutor delivered $50 to defendant for the privilege of being employed thirty days in a certain bus-

tains property by falsely personating another commits the offense of obtaining property by false pretenses,[55] even though the one personated had no interest in the property so obtained.[56]

The offenses of larceny and of obtaining money by false pretenses are ordinarily separate and distinct,[57] so that an acquittal upon a charge of one does not bar a prosecution upon a charge of the other.[58]

The place of the crime.[59]—The crime is committed and must be prosecuted where the property was obtained.[60]

Statutory cheats, swindling, etc.[61]—The crime of presenting a false and fraudulent claim to a public officer is consummated when such claim is presented, and it is not essential that the claim should have been allowed and paid.[62] When persons conspire to cheat a man under color of a bet, and he deposits money as a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money, commit larceny even though afterwards they are made, by fraud, to appear to win.[63] But if the loser bets his money intending to part with its title and possession, the taking of it would not constitute larceny.[64] Under the New York statute, a false statement of an existing fact need not be in writing to constitute the crime of larceny by false representations;[65] but a representation of a purchaser's means or ability to pay must be written.[66] In Texas the crime of obtaining property under a false pretext is denominated theft.[67] Under this statute the crime is committed though the pretext used is illegal.[68]

iness, defendant agreeing to return the money at the end of that time if prosecutor was dissatisfied, and defendant refused to return the money on demand, the crime was larceny, since there was no intent to deliver possession of the money permanently. Id. Under similar facts, except that prosecutor advanced more money and took a supposed receipt which was in fact a bill of sale, held also crime was larceny, and not obtaining money by false pretenses. State v. Buck, 186 Mo. 15, 84 S. W. 951.

55. Under Vt. St. § 4960. State v. Marshall [Vt.] 59 A. 916.

56. State v. Marshall [Vt.] 59 A. 916.

57. As under Mo. Rev. St. 1899, §§ 1898, 1927. State v. Anderson, 186 Mo. 25, 84 S. W. 946.

58. Acquittal under larceny charge no bar to prosecution for obtaining money by false pretenses. State v. Anderson, 186 Mo. 25, 84 S. W. 946.

59. See 3 C. L. 1420.

60. Where drafts were drawn in Wisconsin and paid in Iowa the crime of obtaining money, if committed at all, was committed in Iowa. Bates v. State [Wis.] 103 N. W. 251. Where defendant represented himself as another in a letter written from New York to Vermont, and went to Vermont as the person he was personating, and there obtained a check, the offense was committed in Vermont. State v. Marshall [Vt.] 59 A. 916. The place of the theft of horses hired on a false pretext, with intent to appropriate them, is the place where possession was obtained, not where an attempt to sell them is made. Lewis v. State [Tex. Cr. App.] 87 S. W. 831.

61. See 3 C. L. 1420.

Swindling: Evidence held sufficient to show conspiracy between defendant and another to swindle complaining witness by means of a bet on a card draw. State v. Crawford [Minn.] 104 N. W. 295.

Presenting false claims: Sess. Laws, 1901, p. 205, § 4, relative to making false affidavits of claims for bounties, and Rev. St. 1887, § 6385, relating to the presentation of false and fraudulent claims, define separate and distinct offenses. State v. Adams [Idaho] 79 P. 398.

62. Construing Rev. St. 1887, § 6385. State v. Adams [Idaho] 79 P. 398. Evidence held sufficient to show presentation of false claim for coyote bounties. Id.

63. Rule applied in fraudulent foot-race scheme. Johnson v. State [Ark.] 88 S. W. 905.

64. So, if after one race, the prosecutor consented to leave his money up until a second race should be run, taking it would not be larceny. Johnson v. State [Ark.] 88 S. W. 905.

65. People v. Rothstein, 180 N. Y. 148, 72 N. E. 999.

66. Pen. Code, § 544. People v. Rothstein, 180 N. Y. 148, 72 N. E. 999.

67. Where one hires horses, representing that he is to drive to a certain place, and drives to another place and there attempts to sell them, he may be indicted under Pen. Code 1895, art. 877, relating to conversion of hired property, or under art. 861, relating to obtaining property under a false pretext. Lewis v. State [Tex. Cr. App.] 87 S. W. 831. If indicted under art. 861, it must be shown that the intent to appropriate existed at the time possession was obtained; if under art. 877, such intent need not be formed until after possession has been obtained under a contract of hiring. Id. Evidence held sufficient to support indictment under art. 861. Id.

68. Under Pen. Code, art. 861, a false pretext that in consideration of the money

Defenses.[69]—The fact that the fraud could be easily detected is no defense to a prosecution for presenting a fraudulent claim.[70] The injured person is not under the duty of ascertaining the truth or falsity of representations made to him even if he has means at hand for so doing.[71] One may be guilty of swindling by a pretended sale of property, even though the purchaser is not involuntarily dispossessed of the property sold him.[72]

The indictment.[73]—The indictment must of course show every essential element of the offense.[74] Thus, it must show that the pretenses or representations were false,[75] and were knowingly made,[76] and that the injured party was deceived thereby and relied thereon in parting with his property.[77] It must specify some person who was deceived or from whom property was obtained,[78] and must set out with certainty what property or other thing of value was procured by the defendant.[79] It need not allege whether the prosecutor parted with his money as a loan, gift, or otherwise,[80] and where the facts recited show that the false pretense or token used was capable of deceiving, an allegation to that effect is unnecessary.[81] In a prosecution for obtaining money by false pretenses by selling property incumbered by a mortgage under a representation that it was clear, the information need not show whether the mortgagee, described as a certain company, was a partnership or a corporation.[82] In such case, an allegation that the property was incumbered sufficiently alleges that the mortgage was unpaid.[83]

In Alabama, an indictment in the code form is not demurrable.[84] Under the Iowa statutes an indictment charging a conspiracy to injure the business, property, and rights in property of another, and also the overt act of cheating by false pretenses, is not bad for duplicity,[85] nor is it uncertain.[86] In Texas a false pretext by which property was obtained may be shown under an ordinary indictment for theft.[87]

obtained the county attorney would dismiss a prosecution against the person cheated, is sufficient. Lovell v. State [Tex. Cr. App.] 86 S. W. 758.

69. See 3 C. L. 1421.

70. Where false claim was for coyote bounties, the fact that the manufactured ears presented were easily found to be spurious was no defense. State v. Adams [Idaho] 79 P. 398.

71. Instruction to that effect properly refused. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 630, 88 S. W. 811.

72. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 630, 88 S. W. 811.

73. See 3 C. L. 1421.

74. An indictment charging defendant with making a written statement and account purporting to show assets and liabilities of his company, which he knew to be false, with intent to induce another company to intrust and advance money, held to state an offense under Crimes Act, § 175. State v. Turner [N. J. Law] 60 A. 1112.

75. An averment that defendant "did falsely and designedly pretend" the matter alleged, is a sufficient allegation of the falsity of the pretenses, and sufficiently negatives such matter. Commonwealth v. White, 24 Pa. Super. Ct. 178.

76. An allegation that representations were fraudulent, does not render unnecessary the allegation as to knowledge. Doxey v. State [Tex. Cr. App.] 84 S. W. 1061.

77. Stifel v. State, 163 Ind. 628, 72 N. E. 600.

78. Count charging obtaining of money from "H. P. Proctor & Son" is bad. Bates v. State [Wis.] 103 N. W. 251. To make such count good, it should charge that misrepresentations were made to, and property obtained from, the persons who composed the firm, though an allegation that they were co-partners might be proper to establish the agency of the one person dealt with. Id. Indictment held to charge the making of false pretenses to and obtaining property from one Elmer Dwiggins personally, and not as manager of a corporation, the title given being merely descriptive. State v. Seligman [Iowa] 103 N. W. 357.

79. Accusation under Acts 1903, p. 90, charging fraudulent procurement of "the sum of forty & 57-100 dollars, or the value thereof," held too vague and indefinite. Oglesby v. State [Ga.] 51 S. E. 505.

80. Commonwealth v. White, 24 Pa. Super. Ct. 178.

81. Commonwealth v. Beckett [Ky.] 84 S. W. 758.

82, 83. State v. Wilson [Kan.] 80 P. 639.

84. Indictment for obtaining money by a false representation of part ownership in a government certificate drawn under Code 1896, § 4923, form 48, Cr. Code 1896, p. 330, held sufficient. Johnson v. State [Ala.] 37 So. 937.

85. Construing Code, § 5059. State v. Loser [Iowa] 104 N. W. 337.

86. Conspiracy being the crime relied upon, the overt acts need not be alleged with great particularity. State v. Loser [Iowa] 104 N. W. 337.

87. Under Texas statute. Lewis v. State [Tex. Cr. App.] 87 S. W. 831.

Where a written instrument is the basis of the swindling, it must, in Texas, be set out in full in the indictment.[88] Under the statute denouncing as a crime the misinterpretation of the contents of a written instrument, an indictment charging that defendant represented a deed obtained by him as a mortgage will not be quashed on the ground that the parties intended the deed as a mortgage, and that, the property transferred being a homestead, it could be shown to be a mortgage by parol.[89]

Evidence; admissibility.[90]—In general, evidence tending to show a pretense,[91] its falsity,[92] and knowledge thereof,[93] and the fraudulent intent of the one making it,[94] is admissible if otherwise competent. On the issue of intent, other similar acts of the accused may be shown,[95] including acts subsequent to the one charged.[96]

Sufficiency of proof.—As in other cases, the corpus delicti must be proved by evidence independent of extrajudicial confessions or admissions of the defendant.[97] A slight variance between the allegations and the proof, which could not have been prejudicial to the defendant, will not warrant setting aside a conviction.[98] Proof of obtaining part of the money or property described will justify conviction.[99] Proof that property was obtained by means of a false pretense, other than the one charged, does not warrant conviction.[1] An allegation of obtaining money is not satisfied by proof of obtaining some other property, even so nearly the equivalent of money as evidences of money indebtedness or orders to pay money.[2] A charge of conspiracy

88. Letter, claimed to have induced extension of credit, should have been set out in full. Doxey v. State [Tex. Cr. App.] 84 S. W. 1061.

89. Pen. Code 1895, § 546. Lewis v. State [Tex. Cr. App.] 86 S. W. 1027.

90. See 3 C. L. 1421.

91. In a prosecution for sale of a lot falsely represented as belonging to defendant's accomplice, the deed from the accomplice to the purchaser, executed after payment of the money is admissible in evidence though not set out in the indictment. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 630, 88 S. W. 811. Where defendant referred the person defrauded to the book of a mercantile agency for the rating of the one he was falsely personating, the book is admissible in evidence as a representation. State v. Marshall [Vt.] 59 A. 916.

92. Where charge is larcency by obtaining property by false pretenses in making a sale of a business, evidence that amount of business immediately after sale was less than represented before the sale is admissible to show the falsity of the representations. Commonwealth v. Clancy, 187 Mass. 191, 72 N. E. 842. Where the charge was obtaining a loan on land by false pretenses, evidence that defendant overstated the value of the land was admissible as evidence of a material fact misrepresented. Bates v. State [Wis.] 103 N. W. 251.

93. Where there was evidence tending to show a conspiracy to obtain property by fraudulently selling businesses, evidence of other similar transactions by the conspirators is admissible, at least on issue of knowledge of the falsity of representations as to the volume of business. Commonwealth v. Clancy, 187 Mass. 191, 72 N. E. 842.

94. In a prosecution for representing a deed obtained as a mortgage, a sale by defendant to another may be shown; also the fact that the deed obtained by defendant was not recorded for seven months; also that defendant had said that he had a mortgage and had torn it up; and that he had offered to sell to another. Lewis v. State [Tex. Cr. App.] 86 S. W. 1027.

95. Where insurance solicitor was charged with obtaining money by a fictitious application for a policy, evidence of other similar transactions by him was admissible to show his fraudulent intent. State v. Seligman [Iowa] 103 N. W. 357. Where a conspiracy to cheat by a fraudulent bet is charged, evidence of other similar acts of the conspirators is admissible to show the fraudulent intent, and for this purpose an act subsequent to the one charged may be shown. Johnson v. State [Ark.] 88 S. W. 905.

96. Johnson v. State [Ark.] 88 S. W. 905. Letter written subsequent to obtaining check by false personation, asking for draft, admissible. State v. Marshall [Vt.] 59 A. 916.

97. People v. Ward, 145 Cal. 736, 79 P. 448. Corpus delicti held not shown, where only evidence of falsity of representations was by defendant's confession, uncorroborated by other proof. Johnson v. State [Ala.] 37 So. 937.

98. In a prosecution for obtaining money by selling mortgaged property under a representation that it was clear, an allegation that the mortgage had been assigned to and was owned by certain persons, held sufficiently sustained by proof. State v. Wilson [Kan.] 80 P. 639. A slight variance between the amount of the mortgage as alleged and proved is not fatal, as where amount alleged was $13,336.80; amount proved, $13,366.80. Id.

99. Bates v. State [Wis.] 103 N. W. 251.

1. Where charge was obtaining money on a draft by the false representation that defendant had funds in the bank drawn on, proof of a false representation that defendant had "arranged for" the draft with such bank did not warrant conviction. Semler v. State, 6 Ohio C. C. (N. S.) 393.

2. Proof of obtaining drafts does not sus-

to commit the crime of cheating by false pretenses is sustained by proof of conspiracy in the state where the charge is made, and proof of commission of the overt acts in another jurisdiction.[3] But it must be shown that the acts of the conspirators would have amounted to the crime of cheating by false pretenses, and not some other crime.[4] Thus, one indicted for conspiracy to cheat by false pretenses may not on that charge be convicted of a conspiracy to commit larceny.[5]

Verdicts.—Unless the verdict is responsive to the issue before the court[6] and is sufficient to show that defendant committed the crime as defined by the statute[7] it cannot sustain a judgment.

FALSE REPRESENTATIONS; FALSIFYING RECORDS; FAMILY SETTLEMENTS; FEDERAL PROCEDURE; FELLOW SERVANTS, see latest topical index.

FENCES.

Rights, duties and regulations.[8]—Agreements relative to the erection and maintenance of division fences must be made as required by statute,[9] and when there has been no legal division, the owner of animals which escape onto the land of an adjoiner is liable for damage done by them.[10] In Wisconsin, compliance with the statute requiring adjoiners to erect a division fence is a condition precedent to a

tain charge of obtaining money. Bates v. State [Wis.] 103 N. W. 251.

Note: The following cases are cited in Bates v. State [Wis.] 103 N. W. 251, as sustaining the proposition given in the text: Schleisinger v. State, 11 Ohio St. 669; Baker v. State, 31 Ohio St. 314; Commonwealth v. Howe, 132 Mass. 250; Commonwealth v. Wood, 142 Mass. 459, 8 N. E. 432; Queen v. Bradley, 26 U. C. Q. B. 13; People v. Haynes, 14 Wend. [N. Y.] 546, 28 Am. Dec. 530. Other illustrations of the necessity that money, as such, should actually pass from the hand of the defrauded person to that of the accused in order to support the charge of obtaining money, are given in the opinion. Thus, fraudulently obtaining consent to the entry of a judgment against a city is held not sufficient, although the judgment be afterward paid, and the money actually received by accused, without further misrepresentation (Commonwealth v. Harkins, 128 Mass. 79); procuring a pre-existing account to be receipted and balanced (Commonwealth v. Usner [Pa.] 6 Lanc. Law Rev. 121; Moore v. Commonwealth, 8 Pa. 260); or obtaining indorsement of credit on a note (Reg. v. Eagleton, 1 Jur. [N. S.] 944; State v. Moore, 15 Iowa, 412); obtaining a credit entry to one's account with his banker (Rex v. Wavell, 1 Moo. C. C. 224); obtaining transfers of accounts so as to result in a credit to the accused (Reg. v. Crosby, 1 Cox, C. C. 10; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103). Obtaining shipping receipt does not support charge of obtaining the goods (People v. Haynes, 14 Wend. [N. Y.] 546, 28 Am. Dec. 530); charge of obtaining property not supported by obtaining board and lodging (State v. Black, 75 Wis. 490, 44 N. W. 635).

3. State v. Loser [Iowa] 104 N. W. 337.

4. Such as larceny. Court should have distinguished between and defined both crimes. State v. Loser [Iowa] 104 N. W. 337.

5. State v. Loser [Iowa] 104 N. W. 337.

6. Where, under the indictment, a verdict that defendant was guilty of knowingly and designedly, by false and fraudulent representations or pretenses, defrauding a person of a sum less than $103, or less than $50, or was not guilty, was possible, a verdict finding him guilty "of the crime of felony, to wit, obtaining money by false pretenses," was void. People v. Small [Cal. App.] 82 P. 87.

7. A verdict finding "defendant guilty of the crime of felony, to wit, obtaining money by false pretenses," does not show the crime defined by Pen. Code, § 532. People v. Small [Cal. App.] 82 P. 87.

8. See 3 C. L. 1422.

9. Code, §§ 2356, 2361, provides that the division of partition fences for maintenance may be made by order of fence viewers or by written agreement, hence it cannot be made by a mere understanding between one landowner and the tenant of another. De Mers v. Rohan, 126 Iowa, 488, 102 N. W. 413. Evidence insufficient to show an agreement to build a division fence between one owner and the holder of a tax title (in dispute) of adjoining land. Hammond v. Tuttle [Mich.] 103 N. W. 178.

10. De Mers v. Rohan, 126 Iowa, 488, 102 N. W. 413.

Note: The authorities are in conflict as to whether an oral agreement dividing a line fence is within the statute of frauds. In the negative will be found: Ivens v. Ackerson, 38 N. J. Law, 220; Guyer v. Stratton, 29 Conn. 421. In the affirmative Osborne v. Kimball, 41 Kan. 187, 21 P. 163; Glidden v. Towle, 31 N. H. 147; Knox v. Tucker, 48 Me. 173, 77 Am. Dec. 233; Pityner v. Shinnick, 41 Wis. 676. See De Mers v. Rohan, 126 Iowa, 488, 102 N. W. 413.

right to recover damages for a trespass such fence was designed to prevent.[11] In Idaho a landowner is not required to fence against sheep or swine.[12]

The ordinance of the city of Newark prohibiting the erection of a fence over eight feet high is prospective only.[13] Hence one erected prior to its enactment cannot be destroyed under the ordinance giving the superintendent of buildings authority to remove any fence maintained contrary to the city ordinances;[14] and since certiorari will not lie to review his determination to remove it, the owner may restrain the threatened removal.[15]

Construction, maintenance and cost.[16]—Co-terminous owners may by agreement assume an obligation to maintain a line fence, each agreeing to keep up a designated part,[17] and the validity of such obligation is not affected by the fact that the agreement did not contemplate a lawful fence within the meaning of a statute on the subject.[18]

The measure of care required in maintaining a fence around a pasture to restrain stock is that which an ordinarily prudent man would exercise under like circumstances.[19] In Kentucky barbed wire cannot be used on division fences without the consent of both parties.[20]

In Indiana, adjoiners are required by statute to share the cost of maintaining a partition fence.[21] An action under this law to foreclose a lien for the erection of a partition fence is equitable.[22] If the plaintiff recovers, he is entitled to reasonable attorney's fees.[23]

An agreement by a railroad company with a landowner to maintain fences along the right of way in part consideration for the grant creates a covenant running with the land,[24] but is no defense to the contributory negligence of the landowner in turning animals into a field along the right of way when he has notice that the fence is out of repair.[25] A statute, valid when enacted, providing for the levy of taxes for the maintenance of fences, is not rendered void by a prospective constitutional

11. Walls v. Cunningham, 123 Wis. 346, 101 N. W. 696.

12. Spencer v. Morgan [Idaho] 79 P. 459.

NOTE. Duty to fence: At common law an owner of land is under no obligation to fence his land in order to keep the cattle of others from straying thereon. Rust v. Low, 6 Mass. 90. In some states the common law rule has been recognized as in force. Holladay v. Marsh, 3 Wend. [N. Y.] 143, 20 Am. Dec. 678; Thayer v. Arnold, 4 Metc. [Mass.] 589; Noyes v. Colby, 30 N. H. 143; Bonner v. De Loach, 78 Ga. 50; Webber v. Closson, 35 Me. 26, and in some states the rule has been confirmed by statute. Bulpit v. Matthews, 145 Ill. 345, 22 L. R. A. 55; Wells v. Beal, 9 Kan. 597; Hahn v. Garratt, 69 Cal. 146; Little v. McGuire, 38 Iowa, 560. In many states, however, this rule is no longer in force owing either to express legislation or as being inconsistent with the custom of the community to allow cattle to run at large (Merritt v. Hill, 104 Cal. 184; Delaney v. Erickson, 10 Neb. 492, 35 Am. Rep. 487; Clark v. Stipp, 75 Ind. 114; Pace v. Potter, 85 Tex. 473; Pruitt v. Ellington, 59 Ala. 454), and in some states the question as to whether an owner must fence against cattle is a matter under the control of the subdivisions of the state (Mathis v. Jones, 84 Ga. 804; Lammert v. Lidwell, 62 Mo. 188, 21 Am. Rep. 411). See 1 Tiffany, Real Property, p. 587.

13, 14, 15. Jackson v. Miller [N. J. Eq.] 60 A. 1019.

16. See 3 C. L. 1422.

17. If through the negligence of one to keep his portion in repair the animals of the other enter and do damage, he is liable. Collins v. Cochran, 121 Ga. 785, 49 S. E. 771.

18. Collins v. Cochran, 121 Ga. 785, 49 S. E. 771. By agreement they can take their fence, relative to the rights of each against the other, from under the operation of the statute. Id.

19. Kittredge v. Cincinnati, 6 Ohio C. C. (N. S.) 646. It is competent to prove by one acquainted with the habits and disposition of horses that a stallion is liable to jump over fences or break out of pasture. Id.

20. McKinney v. Thompson [Ky.] 86 S. W. 543.

21. Under Burns' Ann. St. 1901, § 6564, providing that fences used by adjoiners as partition fences shall be maintained and paid for as provided by the statute a complaint to recover the cost of maintaining such a fence is sufficient if it shows the fence to be a partition fence. Burck v. Davis [Ind. App.] 73 N. E. 192. And it is not necessary to allege that the plaintiff had performed his obligation to keep his portion of the fence in repair. Id.

22. Trial by jury may be denied. Burck v. Davis [Ind. App.] 73 N. E. 192.

23. Burns' Ann. St. 1901, § 6566. Burck v. Davis [Ind. App.] 73 N. E. 192.

24, 25. Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15.

provision subsequently enacted which, if it had been in force at the time, would have been in conflict with such statute.[26]

Crimes and penalties.[27]—In many states the willful destruction of another's fence is made a crime;[28] but in Texas, if one tears down a fence under mistake of fact, believing the fact to exist,[29] or if he pulls down a fence with permission of a co-owner of it or under belief that he has authority to do so, it is not a criminal act.[30]

FERRIES.

The establishment of ferries is an attribute of sovereignty.[31] A ferry franchise may, like any other franchise, be granted by special statute,[32] and the legislature is not deprived of its power to enact such a statute by a provision vesting the supervision of ferries in county commissioners.[33] Such a special law operates as a restriction on the general power of the county commissioners.[34] In Maine, the only proprietorship in a ferry is the franchise conferred by statute, and the party holding it has no common-law remedy against those who without right interfere with his profits.[35] In that state ferries may be established by county commissioners and when no person is found to keep them the town in which they are located must provide a person,[36] and where a town does provide a ferryman it is entitled to tolls and profits of ferriage[37] and has a right of action against those interfering with the ferry franchise and causing an appreciable loss of profits.[38] In Kentucky the sale or lease of a ferry franchise must be with leave of the county court,[39] and where another than the grantee of a franchise is operating the ferry and no lawful transfer of the franchise is made to appear, it is presumed that it is being operated under the authority granted by the franchise.[40] The Texas statute regulating the right of riparian owners to operate ferries is not affected nor restricted to streams wholly within the state by the statute providing for a system of retaliatory taxation on ferries over a state boundary stream.[41] A person operating a ferry without having procured a license as required by law cannot have a public road kept open for the benefit of his

26. McCullough v. Graham, 70 S. C. 63, 49 S. E. 1.

27. See 3 C. L. 1423.

28. In Georgia. Shrouder v. State, 121 Ga. 615, 49 S. E. 702. Where one pulls down a fence in which he has no interest though at the time the fence is not completed so as to inclose the land of the builder. State v. Hays, 110 Mo. App. 440, 85 S. W. 127. An information in the language of the statute for pulling down a fence is sufficient. State v. Gift [Mo. App.] 86 S. W. 593.

29. Where one pushed loose a couple of planks from a post so as to release a boat which up to that time had been used by the public generally and which the owner without notice had decided to exclude them from using. Giddings v. State [Tex. Cr. App.] 83 S. W. 694.

30. Bailey v. State [Tex. Cr. App.] 87 S. W. 700.

31, 32, 33. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

34. Under their general power they could not establish a ferry within the prohibited distance prescribed by the special law. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

35. His remedy is by § 6, c. 20, Rev. St. 1883. Inhabitants of Peru v. Barrett [Me.] 60 A. 968.

36, 37. Inhabitants of Peru v. Barrett [Me.] 60 A. 968.

38. Anyone has a right to keep boats for his own convenience but he has no right to transport persons and goods for hire. Inhabitants of Peru v. Barrett [Me.] 60 A. 968. Where a merchant controlled land on both sides of a river near the location of a ferry and maintained boats to transport goods and customers from one side to the other it was held an interference with the ferry franchise. Id.

39. A lease without such leave is void and the grantee of the franchise is liable for injury to a passenger on the ferry boat, the same as if the lease had not been made. Brooker v. Maysville & B. S. R. Co., 26 Ky. L. R. 1022, 83 S. W. 117. A statute authorizing a railroad company with power to own and operate ferries, to make contracts for the operation of its road does not authorize it to divest itself of a ferry franchise without regard to the financial liability of the alienee. Id.

40. Brooker v. Maysville, etc., R. Co., 26 Ky. L. R. 1022, 83 S. W. 117.

41, 42. Parsons v. Hunt [Tex.] 84 S. W. 644.

ferry,[42] and he may be enjoined from using land of a riparian owner for landing purposes where he has no valid permission or license from such owner.[43]

As soon as a ferryman signifies his assent to receive horses and vehicles upon his boat, his liability as a common carrier attaches,[44] and he is liable for injuries sustained because the boat is not in a proper condition for their reception.[45] If goods on a boat are in charge of their owner, the ferryman is liable only for negligence,[46] and where goods are lost because of the refusal of the person in charge of them to obey instructions of the ferryman, he is not liable though negligent in not having a rear guard rail on the boat.[47] A ferryman who makes no charge for transporting property is liable only for gross negligence;[48] but where under the contract of employment an employe's goods were to be transported free, the ferryman is as liable for their loss as if toll had been paid.[49] A city which operates a ferry as a common carrier is held to the liabilities and duties of carriers.[50] It must keep its boat in a fit condition for passengers traveling on it,[51] make reasonable provision for passage from the boat to the wharf by teams,[52] and is liable for injuries to goods occasioned by the negligence of its employes.[53]

Where a ferry though operated under a periodical license is an appurtenant to land, the profits belong to the owner of the land though the license is in the name of another.[54]

43. Parsons v. Hunt [Tex.] 84 S. W. 644. A continuing right to use land for the purpose of a ferry landing must be created by writing. Under Rev. St. 1895, art. 4798, providing that no estate of inheritance shall be conveyed except by writing. Id.

44. As soon as he directs the driver of a team to drive aboard. Wilson v. Alexander [Tenn.] 88 S. W. 935.

NOTE: Ferrymen are common carriers when they hold themselves out for general employment (Fisher v. Clisbee, 12 Ill. 344; Pomeroy v. Donaldson, 5 Mo. 36; Smith v. Seward, 3 Pa. 343; Wilson v. Hamilton, 4 Ohio St. 722; Hall v. Renfro, 3 Metc. [Ky.] 51; Albright v. Penn, 14 Tex. 290; May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135), and the fact that they are required to give bond and that their tolls are regulated by statute does not affect their liability as such (Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695). But if a ferryman merely employs his boat for the accommodation of persons who wish to employ him reserving the right to reject business offered he is not a common carrier. Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544. Like other common carriers he must have his boat in readiness for the accommodation of the public at all reasonable times. Golconda v. Field, 108 Ill. 419; Wallen v. McHenry, 3 Humph. [Tenn.] 245; Koritke v. Iryin, 100 Ala. 323, 13 So. 943, 21 L. R. A. 787. It is the duty of a ferryman to have a safe boat (Clark v. Union Ferry Co., 35 N. Y. 485, 91 Am. Dec. 66), proper appliances and skillful servants. Wyckoff v. Queens County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650; Dudley v. Camden & P. Ferry Co., 42 N. J. Law, 25, 36 Am. Rep. 501; Wilson v. Shulkin, 51 N. C. 375. He must provide lanterns for the boat. Blakely v. Le Duc, 19 Minn. 187. See Gillette v. Goodspeed, 69 Conn. 363, 37 A. 973. He must maintain proper railings and barriers to protect passengers and property. Evans v. Goodrich, 46 Minn. 388, 49 N. W. 188; Ferris v. Union Ferry Co., 36 N. Y. 312; Miller v. Pendleton, 8 Gray [Mass.] 547; Sturgis v. Kountz, 165 Pa. 358, 30 A. 976, 27 L. R. A. 390. He must provide proper fastenings for the boat. Richards v. Fusqua, 28 Miss. 792, 64 Am. Dec. 121; Albright v. Penn, 14 Tex. 290. He must provide adequate and safe approaches and passages. Patton v. Pickles, 50 La. Ann. 857, 24 So. 290; Polk v. Coffin, 9 Cal. 56; May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135; Osborn v. Union Ferry Co., 53 Barb. [N. Y.] 629; Magorie v. Little, 23 Blatchf. 399, 25 F. 627. See note to Rosen v. Boston [Mass.] 68 L. R. A. 153.

45. He is liable for the loss of a span of mules which while being driven aboard saw water negligently allowed to be on the floor of the boat and started to back and in doing so pushed the boat which was not tied, away from the shore, fell in and were drowned. Wilson v. Alexander [Tenn.] 88 S. W. 935. A teamster who drives aboard at the invitation of the ferryman is not guilty of contributory negligence though he knows that boat is not tied. Id.

46. Where a team in charge of a driver, who refused to unhitch them, backed off the boat into the river. Frierson v. Frazier [Ala.] 37 So. 825.

47. A teamster refused to unhitch his team during passage. Frierson v. Frazier [Ala.] 37 So. 825.

48, 49. Frierson v. Frazier [Ala.] 37 So. 825.

50. Townsend v. Boston, 187 Mass. 283, 72 N. E. 991.

51. Evidence that a passenger was injured by slipping on a piece of ice frozen to the deck establishes a prima facia case. Rosen v. Boston, 187 Mass. 245, 72 N. E. 992.

52, 53. Townsend v. Boston, 187 Mass. 283, 72 N. E. 991.

54. Where operated by the fee owners' administratrix after his death under a license in her own name it will be regarded as having been for the benefit of the estate. Nivens v. Nivens [C. C. A.] 133 F. 39.

FIDELITY INSURANCE; FILINGS; FINAL JUDGMENTS AND ORDERS; FINDING LOST GOODS; FINDINGS, see latest topical index.

FINES.[55]

The constitutional inhibition against imprisonment for debt has no application to fines or other pecuniary penalties lawfully inflicted for violation of law.[56] Though a municipal court, authorized by charter to impose two or more kinds of punishment for a violation of municipal ordinances, may impose an alternative sentence,[57] it has no power, in the absence of express legislative authority, to impose a fine, and enforce its collection by labor upon the public streets,[58] and a judgment of this kind is void.[59] Under a statute allowing ten per cent of any fine assessed in a certain proceeding as attorney's fees, where a fine assessed has been remitted by the governor on condition of payment of costs, and costs have been paid, no further sum can be assessed as attorney's fees.[60] In North Carolina, fines collected by municipal officers in prosecutions for violations of city ordinances, which are made misdemeanors by statute, must, under the constitution, go to the county school fund, and not to the city.[60] The mode of recovering fines is statutory in Rhode Island.[62]

FIRES.

§ 1. *Rights and duties respecting fires.*[63]—Fire is a dangerous agent, and when property of others is exposed to its destruction, it can only be rightfully set out after every reasonable precaution has been taken to prevent damage to such property.[64] The use of fire for proper purposes is lawful,[65] and no recovery can be had for injury caused by it in the absence of negligence,[66] which may, however, under certain cir-

55. See Criminal Law, 5 C. L. 883, as to extent of fine; Indictment and Prosecution, 4 C. L. 1, as to procedure for imposition.

56. Ex parte Diggs [Miss.] 38 So. 730. Miss. Acts 1894, p. 67, c. 76, provides for continued imprisonment of convicts in the county jail until the fine, costs and jail fees are paid, and that if not promptly paid, the convict shall work them out under the county contractor. Section 22 provides that a convict who has served his term may be released by paying the amount still due and reimbursing the contractor for clothing furnished him. Held, the act does not provide for imprisonment for debt, and a convict who has paid his fine, costs and fees, but has not reimbursed the contractor, may be lawfully restrained until the amount due him has been worked out. Id.

57. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

58. Judgment imposing fine "and in default" in payment within ten days, decreeing that accused work at hard labor on the streets, imposes a fine and provides for its enforcement, and is not an alternative sentence. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

59. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

60. Construing Code, § 2429, relating to illegal sale of liquors in violation of an injunction. McConkie v. Landt, 126 Iowa, 317, 101 N. W. 1121.

61. Construing Const. art. 9, § 5, and Code, § 3820. Board of School Directors of Buncombe County v. Asheville, 137 N. C. 503, 50 S. E. 279.

62. Under Gen. Laws 1896, c. 288, § 1, fines of upwards of $20 may be recovered by indictment; hence, a fine of $100 imposed under Laws 1896, c. 118, § 6, for polluting a water course, is so recoverable. State v. Providence Gas Co. [R. I.] 61 A. 44.

63. See 3 C. L. 1425.

64. The setting of fire to high stubble in a field in which are standing stacks of grain is actionable negligence where there is nothing reasonably calculated to prevent the fire being communicated to such stacks. Harris v. Savage [Kan.] 79 P. 113.

65. See 3 C. L. 1425, n. 40. Evidence that defendant had been warned of danger when he was burning prickly pear on another occasion is inadmissible on the question of negligence in allowing the fire which caused the damage complained of to spread. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626.

66. That a fire is started by a spark from a locomotive does not show conclusively that the fire originated on the right of way. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172. Evidence held to show negligence where one set fire on his own prem-

cumstances, be inferred from the mere fact that fire is set out.[67] If conditions are such as to render it intrinsically dangerous the mere setting out of fire is negligence,[68] regardless of the degree of care taken to keep it under control.[69] The degree of care required is that exercised by men of ordinary care and prudence, or by men generally engaged in the same or similar lines of business under the same or similar circumstances,[70] and not the degree exercised by men in the same or similar lines of business in any given locality.[71] The runing of a train at a high rate of speed is not, per se, negligence,[72] but may be negligence when taken in connection with other circumstances.[73]

One negligently setting out a fire is liable for all injury of which it is the proximate cause.[74]

Early statutes based on then existing conditions prohibiting the setting out of fires, in fields, prairies, woods, etc., have been rendered inapplicable by changed conditions in many localities,[75] and apply only to the conditions they were intended to remedy.[76]

ises and allowed it to spread to the lands of another. Cullen v. Bowen, 36 Wash. 665, 79 P. 305.

Note: An owner of land who sets a fire thereon is not liable for damages caused by its spreading in the absence of negligence (Sweeney v. Merrill, 38 Kan. 216, 5 Am. St. Rep. 734; Clark v. Foot, 8 Johns. [N. Y.] 421; Bennett v. Scutt, 18 Barb. [N. Y.] 347; Miller v. Martin, 16 Mo. 508, 57 Am. Dec. 242; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237), nor does the fact that it spreads to premises of another raise a presumption of negligence (Catron v. Nickols, 81 Mo. 80, 51 Am. Rep. 222; Lansing v. Stone, 37 Barb. [N. Y.] 15; Bryan v. Fowler, 70 N. C. 596); but in all such cases the burden is on one complaining to show negligence (Sturgis v. Robbins, 62 Me. 289; Bachelder v. Heagan, 18 Me. 32; Burbank v. Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400), and whether or not there was negligence is generally a question for the jury (Powers v. Craig, 22 Neb. 621; McCully v. Clarke, 40 Pa. 399, 80 Am. Dec. 584; Dewey v. Leonard, 14 Minn. 153).—See note to McNally v. Colwell [Mich.] 30 Am. St. Rep. 503.

67. See Railroads, 4 C. L. 1225. That a fire is set by sparks from a locomotive raises a presumption of negligence (Norfolk & W. R. Co. v. Fritts, 103 Va. 687, 49 S. E. 971; Swindell & Co. v. Alabama Midland R. Co. [Ga.] 51 S. E. 386), and casts the burden on the railroad company to show no negligence on its part (Southern R. Co. v. Johnson [Ala.] 37 So. 919). Fire caused by sparks from a locomotive is a prima facie proof of negligence, and throws upon the railroad company the burden of proof of approved appliances and careful handling. Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25.

Evidence sufficient to show that a fire was started by sparks from an old and defective locomotive. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046. To show that a fire was caused by sparks from a passing locomotive. Fields v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 134. To show that a fire originated by sparks from an engine thrown into combustible material negligently allowed to accumulate on the right-of-way. Elder Tp. School Dist. v. Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

It is negligence for a railroad company to permit combustible materials to accumulate on its right-of-way. Atlantic Coast Line R. Co. v. Watkins [Va.] 51 S. E. 172. A railroad company which negligently allows combustible material to accumulate on its right-of-way which is ignited and negligently allowed to escape is guilty of negligence. Pittsburg, etc., R. Co. v. Wise [Ind. App.] 74 N. E. 1107. To maintain its engines and spark arresters in a defective condition is negligence. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635. Where it is shown that a fire was caused by sparks from an engine, it is sufficient to show circumstances from which negligence may be inferred. It is not necessary to point out any specific act of negligence. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025. A finding that employe's who operate an engine were usually negligent in its operation authorizes a conclusion that they were negligent at the time the fire in question was started. Id.

68. Where combustible materials are littered throughout the country. Sampson v. Hughes [Cal.] 81 P. 292.

69. Instruction disapproved. Sampson v. Hughes [Cal.] 81 P. 292.

70. Instruction disapproved. Rylander v. Laursen [Wis.] 102 N. W. 341.

71. Rylander v. Laursen [Wis.] 102 N. W. 341.

72. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025.

73. Dryness of the season, etc. Norfolk & W. R. Co. v. Fritts, 103 Va. 687, 49 S. E. 971.

74. That the fire traveled over land of a third person before reaching the complainant is not too remote. Phillips v. Durham & C. R. Co., 138 N. C. 12, 50 S. E. 462. A complaint which avers that defendant negligently set fire to the house in which plaintiff resided and that plaintiff was burned and injured while escaping shows that defendant's negligence was the proximate cause of plaintiff's injuries. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635.

75. Rev. St. § 18, c. 38, does not apply to a fire kindled in a back yard for the pur-

One is only required to exercise the degree of care in seeking to preserve his property from destruction by fire that an ordinary man would exercise under like circumstances.[77] It is not contributory negligence for him not to keep his premises in such order that they are not in danger of catching fire,[78] nor is one guilty of contributory negligence in seeking to save one portion of his property while leaving another portion exposed to danger.[79]

The measure of damages[80] is the value of the property destroyed.[81] Where turf is injured, it is the difference in the value of the land immediately before and immediately after the fire, together with the market value of the growing crops.[82] In California, multifold damages can be recovered where fire is negligently set out and negligently allowed to spread.[83]

§ 2. *Remedies and procedure.*[84]—Recovery may be had by the party damaged.[85] One seeking to recover as against several for damages for negligently setting out fire may recover against all or any whose negligence is established.[86]

It must be established that the person charged with negligence set out the fire.[87] One may testify that he did not think there was any danger in leaving the fire where such opinion is connected with facts on which it is based,[88] but if unconnected with such facts, he may not.[89]

§ 3. *Fire districts and protection*[90]

FISH AND GAME LAWS.

§ 1. *Public control of fish and game.*[91]—The state has the right, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its limits,[92] and since fish and wild game are, until reduced to actual

pose of burning rubbish. McNemar v. Cohn, 115 Ill. App. 31.

76. The Georgia statute prohibiting the setting out of fires in "woods, lands or marshes," except between certain dates and after notice to proprietors likely to be affected by it, does not apply to a farmer who in the usual course of husbandry sets fire to weeds, brush and stubble. Acree v. State [Ga.] 50 S. E. 180.

77. Chicago, etc., R. Co. v. Willard, 111 Ill App. 225.

78. Phillips v. Durham & C. R. Co., 138 N. C. 12, 50 S. E. 462.

79. Chicago, P. & St. L. R. Co. v. Willard, 111 Ill. App. 225.

80. See 3 C. L. 1426. Evidence that grass had not grown on land burned over in October is inadmissible on the question of damages, where land was burned over the following March. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626.

81. Where **grain** burned would have been ready for the market in a very short time, evidence of the market value at the nearest market is admissible. Quint v. Dimond [Cal.] 82 P. 310.

82. Grass. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046.

83. Under Pol. Code, § 3344, proof of negligence in either instance will sustain a recovery. Sampson v. Hughes [Cal.] 81 P. 292.

84. See 3 C. L. 1427.

85. Under Code Civ. Proc. § 446, authorizing all persons having an interest in the subject of the action to join as plaintiffs, an insurance company which has paid the loss may join. Jacobs v. New York, etc., R. Co., 94 N. Y. S. 954.

86. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626.

87. Evidence that the owner of a building burned was seen leaving it in a hasty manner shortly before the fire broke out is relevant on the issue of the origin of the fire. Missouri, etc., R. Co. v. Jordan [Tex. Civ. App.] 82 S. W. 791. In an action on the theory that fire was started by a locomotive, evidence that intoxicated tramps were seen passing along the road and were heard to remark that they would sleep in the barn that was burned, is inadmissible. Id.

88, 89. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626.

90. See Municipal Corporations, 4 C. L. 737. Water districts and service, see Waters and Water Supply, 4 C. L. 1824.

91. See 3 C. L. 1428.

92. State v. Nergaard [Wis.] 102 N. W. 899. The provision of 97 O. L., 436, which prohibits hunting or shooting or having in the open air for such purpose any implements for hunting or shooting on any Sunday, does not abridge the right to keep and bear arms, and is within the police power for the protection of game. Walter v. State, 3 Ohio N. P. (N. S.) 13.

possession, incapable of absolute private ownership,[93] statutes regulating and restricting their capture are not violative of the constitutional provisions for the protection of personal and property rights.[94] Thus, the state has the unquestioned right to regulate the time, manner, and extent of taking fish from running streams, large lakes, and small lakes with outlets into other waters.[95] A legislature has power to declare fish nets set or used contrary to law a public nuisance, and to provide that they may be destroyed by wardens and executive officers,[96] and a statute which so provides is not unconstitutional on the ground that it deprives the citizen of his property without due process of law.[97] But statutes which make it unlawful for nonresidents to hunt or fish in the state at any season are unconstitutional because denying nonresident landholders equal protection of law, and depriving them of property rights without due process,[98] since the right of a landowner to hunt and fish on his own land, though qualified by the rights of the state, is a special property right.[99] An ordinance regulating the taking of fish in all lakes and streams of a certain county is not special legislation.[1] The regulatory power of the state may be delegated by the legislature to local boards having a mixed executive, legislative and judicial jurisdiction.[2]

Statutes prohibiting transportation of fish in quantities greater than those specified therein are a valid exercise of the police power;[3] but a state has no power to prohibit a common carrier from shipping or receiving for shipment, outside the state, fish or game taken beyond the limits of the state. Hence, a statute which prohibits the transportation "of any shad" beyond the state limits is void.[5] A statute regulating and restricting the taking of fish or game within a state does not infringe upon the power of Congress to regulate interstate commerce, even as to fish or game taken within the state for transportation to a point outside the state.[6]

While police regulations of one state do not apply to game in another, yet game taken in one state and brought into another becomes subject to such regulations of the latter as are reasonably necessary to the protection of its game.[7] The Minnesota statute prohibiting the sale of ruffled grouse within the state which, it is held, applies to all ruffled grouse, whether captured inside or outside the state,[8] and the New York

93. See post, § 3.

94. Such legislation does not violate Const. U. S. art. 14, nor Miss. Const. § 17. Ex parte Fritz [Miss.] 38 So. 722.

95. Ex parte Fritz [Miss.] 38 So. 722. Right of regulation held applicable to a lake eight or ten miles long, which has an outlet into the Mississippi during the wet season, sufficient to allow steamers to pass through, though the outlet sometimes ceases to flow during times of drought. Id. Ordinance of supervisors of De Sota county prohibiting catching of fish in any lake or stream of the county with any seine or net more than 75 feet long or six feet deep, or having meshes smaller than one inch, is a valid regulation under the power delegated to such board by the legislature. Id.

96. State v. French, 71 Ohio St. 186, 73 N. E. 216.

97. Rev. St. § 6968-2, as amended by 93 Ohio Laws, p. 303, is valid. State v. French, 71 Ohio St. 186, 73 N. E. 216.

98. Acts 1903, p. 306, is void because it violates Const. U. S. Amend. XIV. State v. Mallory [Ark.] 83 S. W. 955.

99. State v. Mallory [Ark.] 83 S. W. 955. See post, § 3.

1. Ex parte Fritz [Miss.] 38 So. 722.

2. In Mississippi, county boards of supervisors have executive, legislative and judicial functions, and the statute giving such a board power to regulate the taking of fish in the county is valid. Ex parte Fritz [Miss.] 38 So. 722.

3. Laws 1901, c. 358, § 22, as amended by Laws 1903, c. 437, § 20, is valid. State v. Nergaard [Wis.] 102 N. W. 899.

4. McDonald v. Southern Exp. Co., 134 F. 282.

5. Act S. C. Feb. 16, 1904, is unconstitutional. The act cannot be construed as restricted to shad taken within the state, in order to make it valid, since the legislature expressly refused to so restrict it. McDonald v. Southern Exp. Co., 134 F. 282.

6. The grant to Congress does not give it power to regulate production of commodities, though intended for sale outside the state where produced. Ex parte Fritz [Miss.] 38 So. 722.

7. Ruffled grouse taken in Wisconsin and sent into Minnesota becomes subject to the Minnesota statute prohibiting the sale of any ruffled grouse within the state. State v. Shattuck [Minn.] 104 N. W. 719.

8. Laws 1903, c. 336, § 45, construed. State v. Shattuck [Minn.] 104 N. W. 719.

statute prohibiting possession, sale, or transporation of brook trout in the state during the close season, which expressly applies to fish coming from without the state, as well as to fish taken within it,[9] are held valid.[10]

The relative location and the dimensions of fish traps and other appliances in the Columbia river are governed by statute.[11] The state oyster commission created in Washington in 1903 now has full control of the oyster reserves of that state.[12] In New York, the fish commissioners have no power to lease for shellfish cultivation lands under waters claimed by any town[13] or persons in certain counties, under colonial grant or legislative patent.[14] Town authorities in these counties have the power to grant or withhold fishing privileges.[15] Legislative authority to county commissioners to grant exclusive rights to plant oysters upon exhausted or barren oyster beds does not make the finding by such tribunal that a certain bed is barren or exhausted conclusive upon the courts in a direct proceeding to test the validity of a lease given under such authority.[16]

§ 2. *Offenses; penalties; prosecutions.*[17]—The construction of statutes penalizing violation of fish and game laws is treated in the note.[18] In an action by the state to recover a forfeiture, a preponderance of the evidence is all that is required to

9. Laws 1902, c. 194, § 141. People v. Booth & Co., 93 N. Y. S. 425.

10. The New York decision, People v. A. Booth & Co., 93 N. Y. S. 425, follows People v. Bootman, 180 N. Y. 1, 72 N. E. 505, and reverses People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272, for which see 3 C. L. 1429. The Minnesota statute does not interfere with interstate commerce, and does not violate the 14th amendment. State v. Shattuck [Minn.] 104 N. W. 719.

11. Laws 1899, p. 1997, c. 117. Gile v. Baseel [Wash.] 80 P. 437. Under the statute a lateral passageway is always measured at right angles to the course of the trap, and extends on each side of the trap either 900 or 2,400 feet, according to the location, and in all cases has a width equal to the width of the trap. Its course or direction is not affected by the direction of the shore line towards which the trap points, but is controlled entirely by the course of the trap. The end passageway only is affected by the shore line, and the statute does not affect the course of the end passageway, but only its width, which, in the Columbia can never exceed thirty feet, but may be any less distance. Id.

12. Laws 1903, c. 166, impliedly repeals Laws 1897, c. 107, providing for county boards of oyster land commissioners. State v. Ross [Wash.] 81 P. 725.

13. Evidence held to show claim of town of Flatlands under colonial grant. Denton v. Bennett, 102 App. Div. 454, 92 N. Y. S. 522.

14. Commissioners' power so limited by Fisheries, Game and Forest Law, § 198, as amended in 1895. Denton v. Bennett, 102 App. Div. 454, 92 N. Y. S. 522.

15. Laws 1868, c. 734, does not disaffirm the rights of the towns in this respect. Denton v. Bennett, 102 App. Div. 454, 92 N. Y. S. 522.

16. Laws 1901, c. 4960. State v. Gibson [Fla.] 37 So. 651.

17. See 3 C. L. 1430.

18. In **Idaho** it is a misdemeanor for any person or persons not the owners of a private pond, to sell or offer to sell, or to transport or receive, or to have in possession for any of such unlawful purposes, any fish protected by the statute. Laws 1905, p. 258. Defendant convicted for offering for sale and selling trout. State v. Dolan [Idaho] 81 P. 640.

Mississippi: So much of Code 1892, § 2128, as commits the judicial administration of the game laws to mayors and justices of the peace, whether the act be done in their respective districts or not, is void. Ex parte Fritz [Miss.] 38 So. 722. But since a violation of a county regulation regarding fish and game is made a misdemeanor, any person guilty may be prosecuted before any justice having local jurisdiction. Id.

Texas: Pen. Code 1895, art. 527 and art. 529p, both relate to and prescribe punishment for theft of oysters from oyster beds; the two are inconsistent, and hence art. 529p, being the later statute, repealed art. 527. Ragazine v. State [Tex. Cr. App.] 84 S. W. 832. Where the title to oyster beds has been made public by acts of the owner and by recordation of his papers, it is no defense to a prosecution of one for theft therefrom that the public had formerly taken oysters therefrom without objection, especially where one prosecuted had been warned that he was trespassing. Id.

Vermont: A deer which has no horns protruding through the skin so that they can be seen and ascertained to be horns is not a deer having horns, within the meaning of the Vermont statute prohibiting the killing of wild deer not having horns. State v. St. John [Vt.] 59 A. 826.

Wisconsin: Laws 1901, c. 358, § 23, providing that the law governing fish shipments from inland waters shall apply to shipments offered or received at any point within the state not situated on outlying waters, does not apply to a shipment begun at a point on outlying waters, even though the fish were previously sent there from a point inside the state. State v. Nergaard [Wis.] 102 N. W. 899.

establish the state's case.[19] In Wisconsin a district attorney may prosecute a violation of the fish and game law though the complaint, made by one styling himself a deputy warden, does not state that it is made on behalf of the state.[20] In such a prosecution the ordinary rules as to evidence[21] and questions of law and fact[22] govern.

§ 3. *Private rights in fish and game.*[23]—Wild game and fish (except in artificial lakes or in small ponds that are entirely landlocked)[24] are incapable, until actually taken, of absolute private ownership,[25] the title thereto being in the state in trust for all the citizens thereof.[26] Private ownership can be acquired only under such reasonable conditions and limitations as may be prescribed by the state in the exercise of the police power.[27] The state's ownership in fish and game, however, is not such a proprietary interest as will authorize a sale thereof, or the granting of special interests therein or license to enjoy,[28] but is solely for the purposes of regulation and preservation for the common use,[29] and is not inconsistent with a claim of individual or special ownership by the owner of the soil.[30] The owner of the soil has, by virtue of his ownership, a right to fish and hunt on his own lands,[31] and this right, though subordinate to the state's right to regulate and protect the interest of the public,[30] is nevertheless a special property right, in the enjoyment of which he is entitled to the protection of law.[33]

19. Action for forfeiture under Laws 1901, c. 358, § 22, as amended by Laws 1903, c. 437, § 20, prohibiting transportation of fish in greater than the specified quantities. State v. Nergaard [Wis.] 102 N. W. 899.

20. Action for forfeiture for shipment of larger amount of fish than that allowed by law. State v. Nergaard [Wis.] 102 N. W. 899.

21. In action for forfeiture for illegal shipment of fish from an inland lake, testimony of wardens that more fish was taken about that time from the lake in question than was necessary to supply the local demand, and that they knew of no shipments from other points to the town in question, was admissible. State v. Nergaard [Wis.] 102 N. W. 899.

22. Under the Wisconsin statute regulating shipments of fish from inland waters, the question whether the fish came from such waters is for the jury, if the evidence is conflicting. State v. Nergaard [Wis.] 102 N. W. 899.

23. See 3 C. L. 1431.

24. Fish in running waters, or in large bodies of water, or bodies connected with others, wherein migration is possible, cannot be privately owned. Ex parte Fritz [Miss.] 38 So. 722.

25. Ex parte Fritz [Miss.] 38 So. 722.

26, 27. State v. Shattuck [Minn.] 104 N. W. 719.

28, 29, 30, 31. State v. Mallory [Ark.] 83 S. W. 955.

NOTE. Rights of fishing and hunting incident to ownership of soil: Animals ferae naturae do not belong to the owner of the land on which they may be, but are his if captured or killed by him. Fish do not belong to the owner of land under the water if there is any mode of escape for them to other water. The owner of land has, however, the exclusive right of fishing thereover, except in the case of a grant of the shore by the state to an individual, in which case, as in the case of all waters covering land which belongs to the state, each member of the public has the right of fishing.

The owner of land has no right of property in animals ferae naturae, or wild animals, merely because they are upon the land. He may, however, acquire a qualified ownership in them, that is, an ownership while in his possession or control, by their capture, and an absolute ownership by killing them. The right of the landowner to such animals is so far exclusive, however, that other persons cannot, while upon such land as trespassers, acquire rights in the animals by capture or killing, and the animals so captured or killed become, it seems, the property of the landowner, unless another person had previously a qualified property in them.

Fish at large in a stream or other body of water are ferae naturae, and the right of property in them, so far as it can exist, is in the public, or in the state for the benefit of the public. They are, however, if lawfully captured or confined by an individual, or when contained in a private pond having no communication through which they can pass to other waters, the subject of a qualified ownership.

The ownership by an individual of land under nontidal waters, whether in the case of a navigable stream, a non-navigable stream, or a lake or pond, involves the exclusive right to fish in such water and to appropriate the fish when caught, unless this right has been granted to another person, constituting in him a right to a "profit a prendre." This right to take fish does not, however, involve the right to interfere with the passage of fish to other waters, as by the erection of dams or weirs, and the right must always be exercised in subordination to the right of navigation in the public.—Tiffany, Real Property, pp. 599, 560, 561. See cases there cited.

32. State v. Mallory [Ark.] 83 S. W. 955.

33. Acts 1903, p. 306, making it unlaw-

Fishery rights.[34]—A license to lay off an oyster and clam bed in waters of the state is not an interest in land.[35] Ownership of land whereon oysters are deposited is not a prerequisite to ownership of the oysters.[36] Hence, though one who plants or cultivates oysters on another's land is a trespasser, the owner of the land has no right to appropriate the oysters to his own use,[37] though he may compel the trespasser to take them up, or may remove them as a nuisance.[38]

ful for nonresidents to hunt or fish in the state violates Const. U. S. art. 14, since a nonresident landowner is thereby deprived of the enjoyment of his property, while a resident landowner is not; his property is thereby taken without due proces and he is denied the equal protection of law. State v. Mallory [Ark.] 83 S. W. 955.

Note: In this case (State v. Mallory, supra), appellee, a nonresident of Arkansas, owning land in that state, was indicted for taking fish and game on his own land in violation of Acts of 1903, p. 306, declaring it unlawful for any nonresident to hunt or fish at any season, and the law was held unconstitutional.

"It will be difficult to reconcile the authorities applicable to this state of facts. On the one hand it is held, and this doctrine is supported by a strong dissenting opinion in the principal case, that inasmuch as, at common law, the state had the right of ownership over wild fish and game and the common law has not been changed by statute, it is within the power of the state to make such regulations as it thinks fit. Geer v. Connecticut, 161 U. S. 519, 40 Law. Ed. 793; Organ v. State, 56 Ark. 267; Magner v. People, 97 Ill. 320. In McCready v. Virginia, 94 U. S. 391, 24 Law. Ed. 248, the Supreme Court upheld, as constitutional, a statute of Virginia forbidding nonresidents to plat oysters within the jurisdiction, deciding that the discrimination was based on the exclusive right of the state over waters, and that the statute was not within the provision as to equal protection of the laws. See, also, Peters v. State, 96 Tenn. 682, 33 L. R. A. 114. There is undoubtedly great weight in the above decisions, but in none of them was it decided that a man could not exercise the rights pertaining to ownership in his own land. In the principal case the court say: 'Nowhere do we find that in modern times has the absolute and unqualified ownership of such animals by the government, been exerted further than for the purpose of controlling the taking of the same, and, on the other hand, we find frequent denials of that right,' citing Bristow v. Cormican, L. R. 3 App. Cas. 641, 24 Moak. 431, where it was held that the crown has no de jure right to the soil or fisheries of an inland, nontidal lake. Other cases supporting this principle are: Venning v. Steadman, 9 Can. Sup. Ct. Rep. 206; Rowell v. Doyle, 131 Mass. 474; Payne v. Sheets, 75 Vt. 335; Brown v. Cunningham, 82 Iowa, 512, 12 L. R. A. 583; Burrows v. McDermott, 73 Me. 441; Priewe v. Improvement Co., 93 Wis. 534, 33 L. R. A. 645; Blades v. Hicks, 11 H. L. Cas. 621. These authorities establish the proposition that the state ownership over fish and game is not such proprietary interest as will authorize a sale thereof by the state or the granting of special interests therein, but is solely in trust for the public and for the purpose of regulation and preservation for the common use. We must concede that the state has merely a right to regulate fish and game to the extent of protecting the public, and that when a person has acquired a property right in land, such right ought not to be taken away under the guise of police regulation, and the discrimination made in this case between residents and nonresidents ought to be within the 'equal protection of the law' clause. See on this point Eldridge v. Trezivant, 160 U. S. 452, 40 Law. Ed. 490."—3 Mich. L. R. 405.

34. See 3 C. L. 1431.

35. One holding a license under Code §§ 3390-3392 is not a freeholder, and was properly rejected as a tales juror under Code, § 1733. State v. Young, 138 N. C. 571, 50 S. E. 213.

36. Vroom v. Tilly, 99 App. Div. 516, 91 N. Y. S. 51.

37. Plaintiff recovered where defendant took oysters planted on his lands by plaintiff, under a mistake as to the boundaries. Vroom v. Tilly, 90 App. Div. 516, 91 N. Y. S. 51.

38. Vroom v. Tilly, 90 App. Div. 516, 91 N. Y. S. 51.

Note. Following are comments on Vroom v. Tilly, supra:

"Whether property in oysters is governed by the general law of original acquisition and disseisin of chattels or by its special branch relating to wild animals has been a puzzling question. Oysters have been variously regarded as being analogous to; (1) animals ferae naturae; (2) inanimate personalty; (3) ferae naturae until taken and thereafter inanimate chattels; (4) emblements. See (1) McCarty v. Holman, 22 Hun. [N. Y.] 53; (2) State v. Taylor, 27 N. J. Law, 117; (3) Fleet v. Hegeman, 14 Wend. [N. Y.] 42; (4) Huffmire v. Brooklyn, 22 App. Div. [N. Y.] 406. This interesting case seems to test the nature of the property right. Whatever the status of adult oysters, the free-swimming form seems more nearly ferae naturae, and if such, when taken by a trespasser title would be in the owner of the land or privilege. Blades v. Higgs, 11 H. L. Cas. 621. Again, though the shells sown remain the plaintiff's personalty, it is difficult to say that the young oysters are the increase of such chattels. But see Grace v. Willets, 50 N. J. Law, 414. If the shells be regarded either as seed or as realty to which the oysters became attached, the defendant's case is even clearer. The analogy to animals ferae naturae seems the most helpful, but on whatever reasoning, the court might well have decided for the defendant."—18 Harv. Law. Rev. 472.

"Although the operations were under a statute, Laws of N. Y. 1887, c. 584, the de-

Under the Washington statute providing that a fishery locator who fails to construct his fishing appliance during the fishing season covered by his license shall be deemed to have abandoned his location, failure to construct a fishing appliance cannot be deemed an abandonment until the season has expired.[39] A fishery location which is invalid by reason of a prior conflicting location is not validated by expiration of the license under which the prior location was made, nor by a subsequent abandonment of such prior location.[40] Grantees of lands bordering the Columbia River, from the United States or the state of Washington, take such lands subject to the rights granted to the Yakima Indians by the treaty of 1859 to take fish "at all usual and accustomed places in common with the citizens" of Washington, and to erect "temporary buildings" to cure the fish so taken.[41] In Idaho a person or corporation may establish a private pond to propogate fish in water on premises of his own where food fishes do not naturally abound and may propogate and grow fish therein and sell the same.[42] Ponds constructed on streams which are natural spawning grounds, the fish grown in the private ponds being taken from the natural spawning grounds, are not private ponds within the meaning of the statute.[43]

The owner of fishing traps and other appliances may recover damages for their malicious and wanton destruction even though he is not lawfully occupying the stream, and though his appliances are a slight obstruction to navigation.[44]

FIXTURES.

§ 1. *Definition.*[45]—A fixture is an article which was a chattel, but which, by being physically annexed or affixed to realty, becomes accessory to it, and a part and parcel of it.[46] On petition to sell by a referee, a court of bankruptcy will not determine whether a certain structure is a fixture or personalty.[47]

cision is placed on common-law principles. Fish, the term including oysters (Caswell v. Johnson, 58 Me. 164), are animals ferae naturae (Bracton, 11, c. 1, s. 2; R. v. Hundson, 2 East P. C. 611; Brinkerhoff v. Starkins, 11 Barb. [N. Y.] 248; Treat v. Parsons, 84 Me. 520) and property in such is acquired by possession only. 2 Columbia L. R. 241; Sutter v. Van Derveer, 47 Hun. [N. Y.] 366; Moore's Hist. and law of Fisheries, 191. But unlike game, oysters having no power of locomotion, need not be under the control of the owner, nor on his land, to be in his possession. If a bed be properly placed and marked in the public waters of the state, a property in the oysters vests in the planter (Decker v. Fisher, 4 Barb. [N. Y.] 592; Moore's Foreshore, 164) which is as absolute as that in domestic animals or inanimate things. State v. Taylor, 3 Dutch. [N. J.] 117, 72 Am. Dec. 347; Grace v. Willets, 50 N. J. Law, 414. It attaches, seemingly, when the oysters are first appropriated, and is lost by direct abandonment or an act equivalent (Shepard v. Leverson, 1 Pen. [Pa.] 391) but not by merely placing or planting them on the land of another (Davis v. Davis, 72 App. Div. [N. Y.] 593; but see Brinkerhoff v. Starkins, supra. But in all these cases the owner's first possession was obtained rightfully. In the principal case, the plaintiff planted no oysters; he, as a trespasser, merely deposited shells on the land, and so trapped such spat as was floating over the land. Possession acquired by a trespasser gives no title. 5 Columbia L. R. 241."—5 Columbia L. R. 328.

39. Under Sess. Laws 1899, c. 117, § 9. Womer v. O'Brien, 37 Wash. 9, 79 P. 474.

40. Womer v. O'Brien [Wash.] 79 P. 474.

41. United States v. Winans, 198 U. S. 385, 49 Law. Ed. 1094. Though a Federal patent is absolute in form it can grant exemption from such treaty fishing rights. Id. Nor are those rights subordinate to the powers of the state of Washington over the lands, acquired when that state was admitted to the Union. Id.

42. Sess. Laws, 1905, p. 258. State v. Dolan [Idaho] 81 P. 640.

43. One selling trout from such a pretended private pond is guilty of a misdemeanor. State v. Dolan [Idaho] 81 P. 640, See supra, § 2.

44. Evidence held to show destruction by owners of steamboat wanton, and that navigation was not impeded by appliances; and that owner has substantially complied with law, hence defendants liable. Fowler v. Harrison [Wash.] 81 P. 1055.

45. See 3 C. L. 1432.

46. See Bronson, Fixtures, c. 1, where conflicting definitions are gathered and commented on.

47. In re Gorwood, 138 F. 844.

§ 2. *Annexation and intent.*[48]—The tests by which to determine whether a chattel annexed to the freehold retains its character as personalty or becomes a fixture are annexation, adaptability and intention.[49] An intention to make it a fixture

48. See 3 C. L. 1432.

NOTE. Tests for determining what are fixtures: The true criterion in testing whether an article is a fixture is (1) actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) intention of the party making the annexation to make a permanent accession to the freehold. The modern rule seems to be that the intention is of paramount importance, but the first and second requisites are by no means dispensed with. Annexation is the sine qua non of an article, in order that it be a fixture, but a physical annexation is not always, essential. Thompson v. Smith, 111 Iowa, 718, 82 Am. St. Rep. 541, and cases cited therein. Fuller-Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867; Baker v. McClurg, 198 Ill. 28, 92 Am. St. Rep. 261; Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860. The fact that chattels may be removed and sold for other purposes, or that they were not made with special adaptation to the building in which they are placed is not conclusive of the question whether they become fixtures; but such, and like facts are to be considered in deciding the question. Feder v. Van Winkle, 53 N. J. Eq. 370, 51 Am. St. Rep. 628. In Edwards & B. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, it is said the intention of the parties is the controlling consideration, and in McFarlane v. Foley, 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. Rep. 264, it is said there is no general test for determining whether or not an article personal in nature has acquired the nature of realty by being attached thereto. In each particular case regard is to be had to the chattel itself, the injury that would result from its removal and the intention in placing it upon the premises with reference to use or ornament. As to what the intention of the party making the annexation was is to be inferred from the nature of the article; the relation of the person making the annexation; the structure and mode of annexation; the purpose or use for which the annexation is made. In Knickerbocker, etc., Co. v. Penn, etc., Co., 66 N. J. Eq. 305, 58 A. 409, 105 Am. St. Rep. 640, the court says that "whenever chattels have been placed in and annexed to a building by their owner as a part of the means by which to carry out the purposes for which the building was erected or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become as between the owner and his mortgagee, fixtures, and as much a part of the realty as the building itself, and this is true, notwithstanding that such chattels may be severed from, and taken out of, the building in which they are located without doing any injury either to them or to it, and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be devoted to a use entirely different from that which was contemplated when the annexation was made." In determining between mortgagor and mortgagee whether erections are fixtures, the same rules prevail as between grantor and grantee. Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860.

49. Great Western Mfg. Co. v. Bathgate [Okl.] 79 P. 903.

Held to be fixtures: A ponderous machine weighing 37,500 pounds erected upon and fastened to a brick base with bolts, and to the adaptation of which the building was renovated, is a fixture within Rev. St. Ohio 1892, § 3184, giving a lien to one furnishing mill machinery. Pflueger v. Lewis Foundry & Mach. Co. [C. C. A.] 134 F. 28. A **heating plant,** money drawer, ticket box, opera chairs, curtains and scenery, gas pipes, electric switch boards and lights. Filley v. Christopher [Wash.] 80 P. 834.

Plumbing equipment. McMillan v. Leaman, 101 App. Div. 436, 91 N. Y. S. 1055. A number of summer residences were built on a piece of ground near the seashore. In these houses, the owner placed **window screens, gas logs, gas chandeliers and gas fixtures.** These were annexed to the buildings, but the annexation was such as to permit their removal without injury to the realty. Subsequently, the buildings became the property of another owner, who executed a bill of sale of "the personal property" therein. This bill of sale was executed on the same day on which the owner executed a mortgage of the real property. A dispute arose between the mortgage of the realty and the vendee of the personal property as to the ownership of the window screens, gas logs, gas chandeliers and gas fixtures. Held, that these articles were a part of the realty and had not passed by the bill of sale. Cunningham v. Seaboard Realty Co. [N. J. Eq.] 58 A. 819.

Note: This case, while in accord with previous holdings, in similar New Jersey cases, is in opposition to the great weight of authority. There are a few decisions, holding with this, that gas chandeliers and gas fixtures are a part of the realty and cannot be removed as personal property in opposition to the wishes of the real property's owner. Hayes v. Doane, 11 N. J. Eq. 84; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. [Ky.] 357, 83 Am. Dec. 475. But in the vast majority of cases, the courts and text writers agree that gas chandeliers and gas fixtures are personal property. Jarechi v. Philharmonic Soc., 79 Pa. 403, 21 Am. Rep. 78; Kirchman v. Lapp, 19 N. Y. Supp. 831; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Rogers v. Crow, 40 Mo. 91, 93 Am. Dec. 299; Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Capehart v. Foster, 61 Minn. 132, 52 Am. St. Rep. 582; Montague v. Dent, 10 Rich. Law [S. C.] 135, 67 Am. Dec. 572; Guthrie v. Jones, 108 Mass. 191; Wall v. Hinds, 4 Gray [Mass.] 256, 64 Am. Dec. 64; Vaughen v. Haldeman, 33 Pa. 522, 75 Am. Dec. 622; Shaw v. Lenke, 1 Daly [N. Y.] 487; Lawrence v. Kemp, 1 Duer [N. Y.] 363; Mc-

is essential,[50] but it may be read from the character,[51] and adaptability of the chattel,[52] or the circumstances under which it was annexed;[53] thus a building is prima facie a fixture;[54] but if it was the intention of the parties at the time it was built to regard it as personalty, it will be so regarded in law,[55] and a purchaser of the freehold with notice of its character acquires no right to it.[56] Whether physical annexation is necessary depends on the character of the chattel.[57] The injury that

Keage v. Hanover Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; Penn. Mut. Life Ins. Co. v. Thackera, 10 Wkly. Notes Cas. [Pa.] 104, 11 Wkly. Notes Cas. [Pa.] 391; Tyler, Fixtures, 402; Bronson, Fixtures, 258; 13 Am. & Eng. Enc. Law [2d Ed.] 666. There seem to be very few adjudications as to whether or not window screens, when attached to a house, are personalty or fixtures. As between mortgagor and mortgagee, they have been held to be personalty. Hall v. Law Guar. & Trust Soc., 22 Wash. 305, 60 P. 643, 79 Am. St. Rep. 935; Bronson, Fixtures, 297.—3 Mich. L. R. 165.

Held not to be fixtures: Gas appliances, such as pendants, chandeliers, brackets and globes, unless put in with the intention of making them a permanent part of the realty. Frank Adam Elec. Co. v. Gottlieb [Mo. App.] 86 S. W. 901. That they were put in by the owner of the building and remain after it is sold by him does not show such an intention. Id.

NOTE. Gas fixtures: There is a conflict of authority as to whether gas fixtures are realty or personalty. The following cases decisions treat gas chandeliers as fixtures and some of them hold that they are lienable articles: McFarlane v. Foley [Ind. App.] 60 N. E. 357, 87 Am. St. Rep. 264; Baum v. Covert, 62 Miss. 113; Stack v. Eaton Co., 4 Ont. L. R. 335; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. [Ky.] 357, 83 Am. Dec. 475. The next cases cited hold that whether such articles are fixtures depends on the intention of the owner to make them permanent. Erdman v. Moore [N. J. Law.] 33 A. 958; Central Trust Co. v. Hotel Co., 26 Wkly. Law Bul. 149; Funk v. Brigaldi, 4 Daly [N. Y.] 359; Monte v. Barnes, 70 Law. J. K. B. 225. The following cases hold that gas attachments are not, technically speaking, fixtures. McKeage v. Insurance Co., 81 N. Y. S. 38; Lawrence v. Kemp, 1 Duer [N. Y.] 363; Shaw v. Lenke, 1 Daly [N. Y.] 487; New York Life Ins. Co. v. Allison, 107 F. 179; Vaughen v. Haldeman, 33 Pa. 522, 75 Am. Dec. 622; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Chapman v. Insurance Co., 4 Ill. App. 29; Capehart v. Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582; Montague v. Dent, 10 Rich. Law [S. C.] 135, 67 Am. Dec. 572; L'Hote Co. v. Fulham, 51 La. Ann. 780, 25 So. 655; Hall v. Trust Soc., 22 Wash. 305, 60 P. 643, 79 Am. St. Rep. 935. See Frank Adam Elec. Co. v. Gottlieb [Mo. App.] 86 S. W. 901.

59. In a suit by a purchaser of premises to enjoin the removal of buildings by a tenant, it is permissible to show the understanding between the vendor and purchaser (plaintiff). Lynn v. Waldron [Wash.] 80 P. 292.

51. Machinery constituting a necessary part of a manufacturing plant which can be removed without material injury to the building, but not without seriously impairing the efficiency of the plant, is a fixture. Union Bank & Trust Co. v. Wolf Co. [Tenn.] 86 S. W. 310.

52. Where a chattel annexed to the realty is necessary to the enjoyment thereof and when detached loses its character and usefulness, it is a fixture. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920.

53. Ponderous machinery placed in a flouring mill held by a lessee under a lease for ninety-one years is a fixture. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920. Rails purchased by a street railway company under conditional sale and annexed to realty in which the company has no interest do not become part of the realty. Lorain Steel Co. v. Norfolk, etc., R. Co. [Mass.] 73 N. E. 646.

54. Adams v. Tully [Ind.] 73 N. E. 595. Buildings are not trade fixtures, though erected for the purpose of carrying on business. In re Long Beach Land Co., 101 App. Div. 159, 91 N. Y. S. 503.

55. Adams v. Tully [Ind.] 73 N. E. 595. An averment in a complaint in replevin for a building, that it is personalty, overcomes the presumption that it is realty. Such a complaint is good on demurrer. Id.

56. Where a house is personalty and belongs to a stranger to the title, no reservation in a deed by the fee owner to a purchaser with notice of its character is necessary. Adams v. Tully [Ind.] 73 N. E. 595.

57. Commercial **finishing material** not especially made for any building and available for use in any building is not a fixture where stored in a building. Blue v. Gunn [Tenn.] 87 S. W. 408. **Fencing timber** cut and piled on land is not a fixture, though cut for the purpose of building a fence on the land. Longino v. Wester [Tex. Civ. App.] 88 S. W. 445. In an action brought by the vendor of real estate to recover for the conversion of **cut stone and structural iron,** brought for the purpose of finishing an uncompleted house and lying in a lot sold to the vendee, it was held that the materials passed by the vendor's warranty deed of the lot. Byrne v. Werner [Mich.] 101 N. W. 555.

Note: Where chattels are actually joined to the freehold, though not so as to become an integral part of it, they are regarded as real or personal property, according to the intention evidenced by the acts of the parties. 2 Columbia L. R. 407. If the chattel be not physically connected as in the principal case, it is said to be constructively affixed, if there be a manifest appropriation of it to the land for a permanent purpose; it then passes with the realty by the rule of destination. Hackett v. Amsden, 57 Vt. 432; Conklin v. Parsons, 1 Chandler, 240; Patton, Malone & Co. v. Moore, 16 W. Va. 428, 37 Am. Rep. 789.—5 Columbia L. R. 250.

will result to the freeholder by removal and the value of the article after removal are circumstances to be considered, but are not controlling.[58] Manure made on agricultural land is a fixture.[59]

As between grantor and grantee,[60] mortgagor and mortgagee,[61] and a purchaser in possession under a contract to purchase,[62] the strict rule of the common law, that all chattels adapted to the use of the premises, whether physically [63] or constructively annexed to the realty, are fixtures, applies;[64] but as between landlord and tenant, the rule has been considerably modified in favor of the tenant.[65]

When a fixture by any cause is detached from the tenement of which it forms a part, it ceases to be a fixture.[66]

58. Filley v. Christopher [Wash.] 80 P. 834.

59. On land leased for agricultural purposes. Roberts v. Jones [S. C.] 51 S. E. 240.

60. As between grantor and grantee, all fixtures whether actually or constructively annexed to the freehold, pass with a conveyance of it. This includes trade fixtures. Wolff v. Sampson [Ga.] 51 S. E. 335, citing Bronson, Fixtures, § 44. Structures placed upon realty by the fee owner may be fixtures, though otherwise if put up by another under an agreement that they should retain their character as personalty. Ice-houses. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523.

61. As between mortgagor and mortgagee, annexations affixed by the owner before mortgage, of such character as are apparently calculated for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty. Hot water heating apparatus, tank and fixtures. Young v. Hatch, 99 Me. 465, 59 A. 950. Chattels attached to the realty by the owner thereof as a permanent improvement after the execution of a mortgage become realty and a part of the mortgage security. Great Western Mfg. Co. v. Bathgate [Okl.] 79 P. 903.

62. It is presumed that structures erected by purchaser under conditional sale are intended to be a part of the realty. Barn and fences erected by a vendee before he had paid in full and acquired title. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001.

63. Machinery adapted to the purpose of operating a grist mill becomes a part of the realty when it is attached thereto by nails, screws, bolts and cleats. Great Western Mfg. Co. v. Bathgate [Okl.] 79 P. 903.

64. Machinery which is a constituent part of a manufactory to the purposes of which a building has been adapted is a fixture, though not actually annexed. Great Western Mfg. Co. v. Bathgate [Okl.] 79 P. 903, following Voorhis v. Freeman, 2 Watts & S. [Pa.] 116, 37 Am. Dec. 490.

65. See post, Right to Remove.

Held not fixtures: A **steam boiler** attached by pipes screwed onto it, placed in a building by a tenant to replace an insufficient one, and with the intention of removing it when his term expires. McLain Inv. Co. v. Cunningham [Mo. App.] 87 S. W. 605.

Gas fixtures are personalty which may be removed by a tenant. Wolff v. Sampson [Ga.] 51 S. E. 335.

Engine, wooden oil well rig, tanks, casing, pipes, etc., necessary to the work of sinking oil wells, brought on land under a provision that they might be removed, do not become part of the realty and on forfeiture of the lease the tenant has a reasonable time within which to remove them. Gartland v. Hickman, 56 W. Va. 75, 49 S. E. 14.

Boilers, engines, shafting, pulleys, etc., placed in a building by a tenant, removable without material injury to the building, are trade fixtures. Bergh v. Herring-Hall-Marvin Safe Co. [C. C. A.] 136 F. 368. Where boilers are rented and annexed to the realty by a lessee of the realty who becomes bankrupt, the owner of the boilers may have equitable relief against the owner of the building who is seeking to defraud him of his rights by a sale of the premises to an innocent purchaser. Wetherill v. Gallagher, 211 Pa. 306, 60 A. 905.

Question of fact: Whether certain **shelving** was a fixture. Farnsworth v. Miller [N. J. Law] 60 A. 1100. Whether **planking** placed on a dock by a tenant was a fixture or a chattel, held a question of fact, the landlord having at one time told the tenant he could remove it and subsequently offered to pay him for it. Crerar v. Daniels; 209 Ill. 296, 70 N. E. 569.

66. Remains of machinery after a factory is burned valuable only as metal, cease to be subject to a lien of a mortgage on the premises. Folse v. Sheriff, 113 La. 915, 37 So. 875.

Note: The property in question was conceded to have been immovable by destination under the civil law. That it would have been a fixture by adaptation in other states, see Bond v. Coke, 71 N. C. 97; Voorhis v. Freeman, 2 Watts & S. [Pa.] 116, 37 Am. Dec. 490; Reyman v. Henderson, 98 Ky. 748; Fairlo v. Walker, 1 Bailey [S. C.] 540; Firth v. Loan & Trust Co., 122 F. 569. But in the majority of states greater weight is given to the intention of the parties and mode of annexation. 13 Am. & Eng. Enc. Law [2d Ed.] 608. In Otis v. May, 30 Ill. App. 581; Wilmarth v. Bancroft, 10 Allen [Mass.] 348; Goddard v. Bolster, 6 Greenl. [Me.] 427, 20 Am. Dec. 320; Rogers v. Gilinger, 30 Pa. 185, 72 Am. Dec. 694, and Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789, it was held that severance by act of God did not release property from the operation of a mortgage, because not done with the mortgagee's consent. In Wadleigh v. Janvris, 41 N. H. 503, 77 Am. Dec. 780; Hitchins v. Warner, 5 Barb. [N. Y.] 666, and Hamlin v. Parsons, 12 Minn. 108, 90 Am. Dec. 284, fixtures severed by the mortgagor without the mort-

By agreement or estoppel.[67]—The character of personalty may be impressed on annexed things. Hence, as between the parties, the character of plumbing equipment as personalty may be preserved;[68] but not as against a mortgagee or purchaser without notice.[69]

The right to remove.[70]—Chattels annexed by a tenant may be removed by him at any time prior to the expiration of his lease,[71] but not subsequent thereto,[72] unless he is a holdover tenant,[73] and fixtures removable under the conditions of a lease are not removable where the tenant remains in possession under a new lease not reserving such right;[74] but it is otherwise held in some jurisdictions,[75] though the new lease is taken from a subsequent purchaser.[76]

A tenant in under a lease providing for a right to remove structures may remove them,[77] but contrary to the general rule[78] it is held in New York that a right in a tenant to remove fixtures does not enlarge the right he would have at law to remove personalty.[79]

A disposed tenant is entitled to a reasonable time within which to remove fixtures,[80] and one who owns a house located on land of another has a reasonable time within which to remove it as against a grantee with notice of its character.[81] If the grantee has agreed, as part of the consideration of his deed, to give him a certain

gagee's consent were held to be still a part of the realty, while in Pope v. Garrard, 39 Ga. 471; Buckout v. Swift, 27 Colo. 433, and Gardner v. Finley, 19 Barb. [N. Y.] 317, it was held that severance by accident or act of God did change the fixture from realty to personalty. That a mortgage no longer covers buildings or machinery that have been removed by the mortgagor without the mortgagee's consent, see Harris v. Bannon, 78 Ky. 568; Verner v. Betz, 46 N. J. Eq. 256, 19 Am. St. Rep. 387; Davis v. Goodnow, 89 Mo. 271; Padgett v. Cleveland, 33 S. C. 339; Insurance Co. v. Cronk, 93 Mich. 49. The difference between the equitable and legal theory of mortgages has perhaps contributed to this lack of harmony among the decisions. It would seem, however, that in either case if removal would impair the security, the mortgagee should be entitled to injunction to prevent removal. Brady v. Waldron, 2 Johns. [N. Y.] 148; Emmons v. Hinderer, 9 C. E. Green [N. J.] 39; Verner v. Betz, 46 N. J. Eq. 256, 19 Am. St. Rep. 387.—3 Mich. L. R. 584.

67. See 3 C. L. 1433. One purchasing land with knowledge of one's right to remove fixtures thereon is by leasing such fixtures estopped to deny ownership in his landlord. Carper v. Risdon, 19 Colo. App. 530 76 P. 744. One who has regarded certain building material as a fixture in litigation in which its nature is adjudicated is estopped to assert that it is personalty. Potvin v. Denny Hotel Co., 37 Wash. 323, 79 P. 940.

68. By agreement that title shall not pass until it is paid for. McMillan v. Leaman, 101 App. Div. 436, 91 N. Y. S. 1055.

69. McMillan v. Leaman, 101 App. Div. 436, 91 N. Y. S. 1055.

70. See 3 C. L. 1433.

71. As between landlord and tenant, trade fixtures are personalty and may be removed before the expiration of the lease if it can be done without material injury to the premises. Cohen v. Wittemann, 100 App. Div. 338, 91 N. Y. S. 493; In re City of New York, 101 App. Div. 527, 92 N. Y. S. 8; Dreiske v. People's Lumber Co., 107 Ill. App. 285. Lessee of a theatre held to have a right to remove all property which had not become a part of the realty. Morris v. Pratt [La.] 38 So. 70.

72. Dreiske v. Peoples' Lumber Co., 107 Ill. App. 285.

73. A tenant who holds over from month to month does not lose the right to remove fixtures secured by his original lease. Lynn v. Waldron [Wash.] 80 P. 292.

74. Wadman v. Burke [Cal.] 81 P. 1012. A notice from a landlord to a tenant holding over that his lease might be continued for a certain period is not a new lease which destroys the right to remove fixtures secured by the original lease. Lynn v. Waldron [Wash.] 80 P. 292.

75. The acceptance of a new lease by a tenant without reservation of the right to remove trade fixtures previously placed on the premises is not an abandonment of the right to remove such fixtures. Bergh v. Herring-Hall-Marvin Safe Co. [C. C. A.] 136 F. 368.

76. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780.

77. Where such provision is omitted from the lease through fraud or mistake, the lease may be reformed. Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780.

78. See Bronson, Fixtures, §§ 28 et seq.

79. Refrigerating machinery, boilers built into a building, electric wiring, pipes, etc., are realty, though they could be taken out without material injury to the building. In re City of New York, 101 App. Div. 527, 92 N. Y. S. 8.

80. Bergh v. Herring-Hall-Marvin Safe Co. [C. C. A.] 136 F. 368. Where tenants are summarily ejected, a voluntary surrender of trade fixtures will not be inferred. Id.

81, 82. Adams v. Tully [Ind.] 73 N. E. 595.

time within which to remove it he may do so at any time within the period specified.[82] What is a reasonable time depends on the circumstances of each particular case.[83]

§ 3. *Title of third persons.*[84]—A contract is necessary to overcome the rule that structures erected by persons not the owners of land become part of the realty.[85] Chattels sold under conditional sale and annexed to realty become fixtures as to a mortgagee of the realty without notice of their character.[86] Permanent improvements placed on land by one with notice of the superior title of another cannot be recovered for,[87] though the person making the improvements through error of law believes his title superior.[88]

FOLIOING PAPERS, see latest topical index.

FOOD.

Validity and construction of statutes.[89]—Statutes prohibiting the sale of adulterated food products are valid.[90] An act of Congress prescribing the standard of milk sold in the District of Columbia cannot be held void on the ground that it is unreasonable and oppressive, no violation of the constitution being shown.[91] Under the police power, the legislature may prescribe how animals may be killed by their owner in order that they may be used for food,[92] and may confer jurisdiction on a court to restrain the violation of a statute prohibiting the sale of oleomargarine without a license.[93] The California statute requiring fruit packages offered for shipment to be stamped with a statement giving the county and locality where the fruit was grown, and providing for a fine and imprisonment for a violation, is not a proper exercise of the police power.[94] The New York statute prohibiting the sale of veal from animals less than four weeks old, and requiring all shipments of veal carcasses to have attached thereto a tag giving information as to the person who raised the calf, the shipper, the point of shipping, and the age of the calf, is within the police power. It is not unreasonable because requiring all veal shipments to be tagged regardless of legitimacy as an article of food, and it does not interfere with interstate commerce, though it is not expressly restricted to shipments within the state.[95]

Tort liability.[96]—No cause of action for death caused by eating food manufactured by defendant exists, if the food was not inherently dangerous, and there was no fraud, concealment, or implied invitation by defendant, and no privity between defendant and decedent.[97]

83. Gartland v. Hickman, 56 W. Va. 75, 49 S. E. 14.

84. See 3 C. L. 1433.

85. In re Long Beach Land Co., 101 App. Div. 159, 91 N. Y. S. 503.

86. Union Bank & Trust Co. v. Wolf Co. [Tenn.] 86 S. W. 310. A vendor of chattels under a conditional sale who does not record the same as required by law loses his rights as against bona fide mortgagee of realty of which such chattels have become a part. Great Western Mfg. Co. v. Bathgate [Okl.] 79 P. 903.

87, 88. Yock v. Mann [W. Va.] 49 S. E. 1019.

89. See 3 C. L. 1433.

90. Act May 29, 1901, P. L. 327, prohibiting sale of oleomargarine as butter is constitutional. Commonwealth v. Caulfield [Pa.] 61 A. 243.

91. In a prosecution for selling milk containing less than three and one-half per cent. of butter fat, defendant cannot show standard unreasonable. Wiegand v. District of Columbia, 22 App. D. C. 559.

92. Such legislation does not infringe property rights. State v. Davis [N. J. Law] 61 A. 2. See Animals, 5 C. L. 113.

93. Act May 29, 1901, § 9, P. L. 327, is valid. Commonwealth v. Andrews, 24 Pa. Super. Ct. 571.

94. St. 1903, c. 251, § 1, held unconstitutional as an unlawful invasion of personal liberty. Ex parte Hayden [Cal.] 82 P. 315.

95. Construing Agricultural Law, as amended by Laws 1902, c. 30, §§ 70e, 70f. People v. Bishopp, 94 N. Y. S. 773.

96. See 3 C. L. 1434.

97. No cause of action for death caused by eating mince pie made from mince meat put up by defendant. Salmon v. Libby, 114 Ill. App. 258.

Crimes; prosecutions.[98]—The removal of stamps and caution notices attached to renovated butter in original packages which are subjects of interstate commerce, is an offense against federal law,[99] and this offense is committed by a consignee who removes such stamps and notices from packages received from another state immediately upon their arrival.[1] Failure of a wholesale dealer in oleomargarine to pay the special tax required by act of Congress is a violation of the law in the nature of a criminal offense which may be prosecuted by information and indictment.[2] In New York, inspectors of city health departments may prosecute for sales of adulterated milk, notwithstanding the general powers given to the commissioner of agriculture to enforce food laws.[3] In such a prosecution, based on samples from a peddling can, it is not error to refuse to allow defendant to show the standard of a herd sample taken by the inspectors.[4] In a prosecution under the New York statute regulating the branding of food articles, it may be a question for the jury whether the words used are a sufficient characterization of the substances composing a mixture.[5] In a prosecution under an act prohibiting the sale of milk not of a certain standard the sole question is whether defendant sold milk that did not conform to the prescribed standard.[6]

A notice of appeal from a conviction for violation of a pure food law should conform to the statute.[7]

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

§ 1. *Civil rights and remedies. A. The cause of action.*[8]—A forcible entry on a peaceable possession [9] of real property [10] gives a cause of action, and it is not essential that possession should have existed for any definite length of time.[11]

To constitute an unlawful detainer there must have been a previous possession

98. See 3 C. L. 1434.

99. United States v. Green, 137 F. 179.

1. Oleomargarine Act, § 1, making renovated butter subject to state laws upon arrival in the state, does not deprive it of its interstate commerce character within the meaning of the penal statutes. United States v. Green, 137 F. 179.

2. Under Act Cong. Aug. 2, 1886, c. 840, § 4, 30 Stat. 209, which provides or a fine, but does not in terms make a violation a misdemeanor. United States v. Joyce, 138 F. 455. Indictment held not objectionable because it did not negative that defendant was selling his own products in stamped packages at the place of manufacture, within the statutory exception. Id.

3. Construing Agricultural Law, Laws 1893, c. 338. People v. Beaman, 102 App. Div. 151, 92 N. Y. S. 295.

4. Since the fact that the herd sample is no better than the peddling sample is not a bar to the criminal prosecution, though it is a bar to an action for a penalty brought, under Laws 1893, c. 338, by the commissioner of agriculture, by section 12 of such act. People v. Beaman, 102 App. Div. 151, 92 N. Y. S. 295.

5. Under Laws 1902, c. 214, § 80b, and Laws 1903, c. 524, held, under the evidence, a question of fact whether the word "honey" was properly used in branding an article of food. People v. Berghoff, 95 N. Y. S. 257.

6. For what purpose defendant had the milk on hand is immaterial. Weigand v. District of Columbia, 22 App. D. C. 559.

7. Under Laws 1902, p. 580, c. 183, § 16, notice filed with justice containing name of party appealing in the body of the notice held sufficient. State Board of Health v. McCue [N. J. Law] 60 A. 1094.

8. See 3 C. L. 1435.

9. Highland Park Oil Co. v. Western Minerals Co. [Cal. App.] 82 P. 228. Where a man armed with a deadly weapon enters and flourishes at and directs the occupant to leave, supplementing the demand with "jumpers have been known to lose a leg" the vacation is forcible and with a strong hand. Id.

Evidence insufficient to show an entry by violence. Spellman v. Rhode [Mont.] 81 P. 395.

10. One granted a privilege to maintain a stand for the sale of refreshments, etc., in a park, the place for the stand not being specifically designated, is not an occupant so as to render his forcible ejectment a forcible entry within Code Civ. Proc. § 2233. Becher v. New York, 102 App. Div. 269, 92 N. Y. S. 460.

11. One day is sufficient. Highland Park

in the plaintiff [12] and a present possession in defendant, accompanied by his refusal to surrender it on demand,[13] but if one in possession attorns to another, the latter may acquire an action for unlawful detainer;[14] and in Kentucky a tenant who fails to perform the conditions in a lease which provide for a forfeiture in case of failure to so comply is guilty of forcible detainer without demand for possession.[15] The action is available to any one against whom possession is unlawfully withheld,[16] and hence may be maintained by a lessee against his lessor,[17] but will not lie to recover possession of premises conveyed to the plaintiff as security for a loan.[18]

Damages.[19]—A plaintiff unlawfully holding over, entitled to reimbursement for sowing crops, must allege his damages in such manner that they can be definitely ascertained.[20] A prayer for multifold damages must be in consonance with the terms of the statute.[21]

Defenses.[22]—Abandonment by plaintiff subsequent to forcible entry is no defense,[23] nor can his acts after the entry work a defense by way of estoppel.[24]

(§ 1) *B. Procedure.*[25] The proceeding is designed to furnish a summary method for the obtention of possession unlawfully withheld,[26] and does not contemplate an investigation of secret equities between the parties,[27] nor of the title.[28] The possession, only, is involved,[29] hence the pendency of an action of ejectment is not a bar to forcible entry for the same premises,[30] and the judgment will not bar an action in ejectment.[31] A successful contestant before a land tribunal can maintain the action notwithstanding the unsuccessful party has instituted proceedings asking the Secretary of the Interior to re-open the case.[32]

The action being legal in its nature,[33] it is not competent to set up an equitable defense,[34] nor that the plaintiff had executed a deed to a third person which had

Oil Co. v. Western Minerals Co. [Cal. App.] 82 P. 228.

12. Where defendants were in possession at the time plaintiff's alleged possession began the action cannot be maintained. Barnewell v. Stephens [Ala.] 38 So. 662. One who has never had possession cannot maintain the action against an occupant not in possession by virtue of a contract with him. Aurner v. Pierce, 106 Ill. App. 206.

13. Preston v. Davis, 112 Ill. App. 636. Under Forcible Entry and Detainer Act, § 2, a landlord may maintain the action against his tenant who holds possession without right after the termination of the tenancy or notice to quit. Merki v. Merki, 113 Ill. App. 518. Evidence sufficient to sustain a judgment against a tenant holding over after notice to vacate. Thull v. Allen [Neb.] 101 N. W. 1024.

14. Barnewell v. Stephens [Ala.] 38 So. 662.

15. Andrews v. Erwin, 25 Ky. L. R. 1791, 78 S. W. 902.

16. Under Code 1892, § 4461, it may be maintained where one entered under an agreement to make certain payments in the nature of rent, the premises to be deeded to him when the entire amount was paid, where before payment of the entire amount the person in possession repudiates the contract. Clark v. Bourgevis [Miss.] 38 So. 187.

17. Floersheim v. Baude, 110 Ill. App. 536.

18. Aurner v. Pierce, 106 Ill. App. 206.

19. See 3 C. L. 1435.

20. An allegation that he had put in about forty acres at an expense not to exceed $4 per acre is insufficient. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

21. Under a statute allowing a recovery of treble rents damages cannot be awarded on a prayer for treble rents and profits. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

22. See 3 C. L. 1435.

23, 24. Spellman v. Rhode [Mont.] 81 P. 395.

25. See 3 C. L. 1436.

26. Spellman v. Rhode [Mont.] 81 P. 395.

27. Clark v. Bourgeois [Miss.] 38 So. 187.

28. See 3 C. L. 1436, n. 73, et seq. Clark v. Bourgeois [Miss.] 38 So. 187. Under Code Civ. Proc. the questions of title and right to possession cannot be investigated. Spellman v. Rhode [Mont.] 81 P. 395. The question of title is not in issue (Brown v. Slater, 23 App. D. C. 51), and evidence thereof is inadmissible (Spellman v. Rhode [Mont.] 81 P. 395). The question of title by adverse possession cannot be litigated. Weatherford v. Union Pac. R. Co. [Neb.] 104 N. W. 183. No proof of title is required. Stover v. Davis [W. Va.] 49 S. E. 1023.

29. Floersheim v. Baude, 110 Ill. App. 536; Clark v. Bourgeois [Miss.] 38 So. 187.

30. Merki v. Merki, 113 Ill. App. 518.

31. Swanson v. Smith, 25 Ky. L. R. 1260, 77 S. W. 700.

32. Smith v. Finger [Okl.] 79 P. 759.

33. See 3 C. L. 1436.

34. Defendant cannot set up an equitable title and have a deed declared a mortgage. Cottrell v. Moran [Mich.] 101 N. W. 561.

been lost or destroyed,[35] nor to show a mistake in the deed under which plaintiff claims.[36]

Jurisdiction [37] of the action is generally vested exclusively in courts of justices of the peace,[38] regardless of the amount involved.[39] In Indiana, by statute, if title is put in issue by verified plea, the justice is required to certify the cause to the circuit court.[40] Such answer deprives the justice of jurisdiction and if he refuses to certify the cause, the circuit court does not acquire jurisdiction by appeal.[41] In the South Carolina proceeding against a trespasser, a defendant who answers to the merits gives jurisdiction of the person.[42]

Parties.[43]—A trustee of an express trust may maintain the action without joining the persons for whose benefit it is brought.[46]

The statutory requirements [45] of notice to quit or demand for possession must be complied with,[46] and such notice must be given by one entitled to possession or his authorized agent or attorney [47] subsequent to the termination of contractual relations,[48] but may be waived if it is not an essential part of the procedure,[49] and need not be given if it would constitute a mere idle act.[50] In Kentucky if contractual relations terminate by limitation in the contract by virtue of which the occupant holds possession, no notice to quit is nesessary.[51]

Limitations [52] are governed by the statutes of the various states.[53] If the action is barred as against a grantor, it is likewise barred as against his grantee.[54] In Kentucky the action must be brought within two years from the date of entry.[55]

35, 36. Merki v. Merki, 212 Ill. 121, 72 N. E. 9.

37. See 3 C. L. 1436.

38. The supreme court of the District of Columbia does not have concurrent jurisdiction with the courts of justices of the peace in forcible entry and detainer actions. Brown v. Slater, 23 App. D. C. 51.

39. The statutory limit as to amount in justice courts does not apply. Mark v. Schumann Piano Co., 105 Ill. App. 490.

40. An answer denying that defendant ever held as tenant, but as equitable owner and that plaintiff's grantor held the legal title as trustee puts title in issue under Burns' Ann. St. 1901, § 1501. Deane v. Robinson, 34 Ind. App. 468, 73 N. E. 169.

41. Deane v. Robinson, 34 Ind. App. 468, 73 N. E. 169.

42. A trespasser served with a rule to show cause why he should not be ejected who appears and objects to the jurisdiction of the magistrate and on the overruling of the objection files a return. Lee v. Chaplin, 70 S. C. 561, 50 S. E. 501.

43. See 3 C. L. 1436.

44. A person executing a lease in his own name as owner. Houck v. Williams [Colo.] 81 P. 800.

45. See 3 C. L. 1436.

46. The statutory notice to vacate must be given before the action can be maintained. Smith v. Finger [Okl.] 79 P. 759. Under Wilson's Rev. & Ann. St. 1903, § 5089, the plaintiff must affirmatively show that it was given. Id.

A notice to quit in the form of a rule to show cause why he should not be ejected gives jurisdiction to the magistrate under Civ. Code 1902, § 2972, providing that if a trespasser on service of notice to quit fails to do so within five days a warrant may issue to eject him unless he gives bond for costs to one claiming to be the owner. Lee v. Chaplin, 70 S. C. 561, 50 S. E. 501; Cotton v. Johnson [S. C.] 51 S. E. 245.

47. A notice by one purporting to be attorney without proof of his authority is insufficient. Barnewell v. Stephens [Ala.] 38 So. 662. That the action is brought by an attorney does not show that he had authority to give the notice at the time it was given. Id.

48. Under Code 1896, § 2127, defining an unlawful detainer, a tenancy at will must be terminated prior to the statutory demand for possession. Barnewell v. Stephens [Ala.] 38 So. 662.

49. The notice required by B. & C. Comp. § 5755, is intended for the termination of contractual relations and not as a part of the procedure in forcible entry and detainer. Wolfer v. Hurst [Or.] 82 P. 20.

50. Where a tenant is in under a lease requiring him to quit on thirty days' notice, it is not necessary to give the statutory notice as a condition of rendering him guilty of unlawful detainer. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

51. Where it is terminated by breach of condition in a lease. Andrews v. Erwin, 25 Ky. L. R. 1791, 78 S. W. 902.

52. See 3 C. L. 1437.

53. If defendants attorned to plaintiff within three years before bringing the action, the defense of limitations is not available to them. Barnewell v. Stephens [Ala.] 38 So. 662.

54. Weatherford v. Union Pac. R. Co. [Neb.] 104 N. W. 183, disapproving Syl. 3 of a former report, 98 N. W. 1089, cited 3 C. L. 1437, n. 94.

55. An agreement to arbitrate the right to possession and a refusal to abide by the award does not constitute a new entry. Hord v. Sartain [Ky.] 86 S. W. 692.

Pleading.[56]—The complaint should definitely describe the premises in controversy,[57] and under some statutes must state all the requisites essential to the cause of action.[58] In an action for damages for forcible entry, all that need be alleged is that plaintiff was in peaceable possession.[59] An answer in such action which merely alleges that the relation of landlord and tenant never existed between the parties does not state a defense.[60] It is not competent to set up a counterclaim,[61] nor a cross-demand of any kind.[62]

Evidence.—Proof of a right to possession establishes a prima facie case.[63] In unlawful detainer, plaintiff must show that defendant's entry was by his consent.[64] In an action to eject a trespasser under the South Carolina statute, the defendant must show a bona fide claim of right to possession.[65] A charge of forcible entry by means of violence and circumstances of terror is not sustained by proof of a peaceable entry and a subsequent dispossession by force, threats, and menacing conduct.[66] A deed is not admissible as proof of title,[67] but is admissible as tending to show possession,[68] or the extent thereof.[69]

The judgment[70] should describe the premises so that they can be located without resort to extraneous aid.[71] It cannot be taken as confessed, but proof must be made.[72] Where a judgment is assailed for lack of jurisdiction to render it, all facts necessary to show want of jurisdiction should be alleged.[73]

Appeal[74] or other mode of review is controlled by the statutes of the various states.[75] A right of appeal is to be implied from a statute fixing the requirements of an appeal bond.[76] In Kansas the right of appeal lies, regardless of the amount involved.[77] In Kentucky the mode of reviewing the proceeding is provided by statute and is exclusive.[78] On an appeal from the county to the circuit court, a warrant

56. See 3 C. L. 1437.

57. So that they can be located without resort to extraneous aid. Preston v. Davis, 112 Ill. App. 636.

58. In a proceeding under Act April 3, 1830, to recover possession from a tenant for non-payment of rent. Hickey v. Conley, 24 Pa. Super. Ct. 388.

59. The nature of his interest or relationship existing between him and defendant need not be set forth. Mendelson v. Kitt, 92 N. Y. S. 127. Under Code Civ. Proc. § 2080, subd. 1, defining a forcible entry as one by any kind of violence or circumstance of terror, a complaint alleging that while plaintiff was in peaceable possession of certain lands defendant forcibly and without right entered and ejected him, is sufficient. Spellman v. Rhode [Mont.] 81 P. 395.

60. Is demurrable. Mendelson v. Kitt, 92 N. Y. S. 127.

61. Under Code Civ. Proc. §§ 690-692. Spellman v. Rhode [Mont.] 81 P. 395.

62. Mark v. Schumann Piano Co., 105 Ill. App. 490.

63. Floersheim v. Baude, 110 Ill. App. 536.

64. Bailey v. Blacksher Co. [Ala.] 37 So. 827.

65. Lee v. Chaplin, 70 S. C. 561, 50 S. E. 501.

66. Spellman v. Rhode [Mont.] 81 P. 395.

67. Since title cannot be inquired into. Bailey v. Blacksher Co. [Ala.] 37 So. 827.

68. Bailey v. Blacksher Co. [Ala.] 37 So. 827.

69. Barnewell v. Stephens [Ala.] 38 So. 662.

70. See 3 C. L. 1437.

71. Preston v. Davis, 112 Ill. App. 636.

72. The defendant is not required to plead. The plaintiff must prove his case. Smith v. Finger [Okl.] 79 P. 759.

73. A complaint to enjoin the enforcement of a judgment because rendered by a justice who was not a justice of the precinct in which the land was situated, must allege that there was a justice in such precinct. Rev. St. 1901, par. 2058, provides that if there is no justice in the precinct where the land is situated the action may be maintained before the nearest justice. Beam v. Parks [Ariz.] 80 P. 324.

74. Under Starr. & C. St. §§ 18, 19, ch. 57, a party desiring to appeal must, within five days from judgment rendered, apply to the trial court for an appeal and have the amount of the appeal bond fixed. Saxton v. Curley, 112 Ill. App. 450. The record of the justice in a proceeeding under the Act April 3, 1830, to oust a tenant for non-payment of rent must show everything required by the statute to confer jurisdiction. Hickey v. Conley, 24 Pa. Super. Ct. 388. Order reversing a judgment of a magistrate in a proceeding to eject a trespasser construed and held to direct another hearing and not a dismissal. Cotton v. Johnson [S. C.] 51 S. E. 245.

75. The proceeding in a county court to eject an intruder cannot be carried by appeal to the superior court. The remedy in such case is certiorari. Rigall v. Sirmans [Ga.] 51 S. E. 381.

76. Wolfer v. Hurst [Or.] 80 P. 419.

77. Burdsal v. Shields [Kan.] 79 P. 1067.

78. Under Civ. Code, § 463, the party who conceives himself aggrieved may file a trav-

may be amended to perfect the statement of the cause of action.[79] In Illinois the amount of the appeal bond may be increased in the discretion of the appellate court.[80] In Oregon the bond required on appeal from the justice's to the circuit is effectual on a further appeal to the supreme court.[81] A summary judgment against sureties as well as principals on an appeal bond in an action of this character is erroneous.[82]

§ 2. *Criminal responsibility.*[83]

FORECLOSURE OF MORTGAGES ON LAND.[84]

§ 1. *The general rights and defenses to foreclose and remedies available therefor.*[85] *Rights and defenses in general.*—There can be no foreclosure unless there is a real and legal debt[86] and a sum presently due[87] and unpaid,[88] and a subsisting

erse within three days after the finding. Civ. Code, § 714, authorizing the granting of a new trial on application made within ten days does not apply to proceedings in forcible entry. Swanson v. Smith, 25 Ky. L. R. 1260, 77 S. W. 700.

79. Witt v. Willis [Ky.] 85 S. W. 223.

80. Under the Forcible Entry and Detainer Act (Hurds' Stat. c. 57, § 19), the appellate court may require a new bond in a greater amount if it is necessary to secure the rights of the parties and dismiss the case for failure to furnish it. Brown v. Wagar, 110 Ill. App. 354.

81. B. & C. Comp. § 5754, requires a bond in twice the rental value of the property from rendition of the justice judgment until final determination. Wolfer v. Hurst [Or.] 80 P. 419.

82. Crow v. Williams, 104 Mo. App. 451, 79 S. W. 183.

83. See 3 C. L. 1437.

84. **The scope** of this title is self-expressed. It treats only of the "foreclosure of mortgages on land," not of other liens (see Liens, 4 C. L. 433; Vendors and Purchasers, 4 C. L. 1769; Chattel Mortgages, 5 C. L. 574), and not of the nature, validity, requisites, operation and effect of the mortgage (see Mortgages, 4 C. L. 677).

85. See 3 C. L. 1438, 1441-1443.

86. Excepting perhaps the case of a gift. It would lack consideration. Perkins v. Trinity Realty Co. [N. J. Eq.] 61 A. 167. Denied where founded on a debt incurred in whole or part under agreement in restraint of trade. Evans v. American Strawboard Co., 114 Ill. App. 450.

87. Evidence sufficient to show an amount due. Richardson v. Horton, 139 Ala. 350, 35 So. 1006.

A demand debt may be foreclosed at any time. Kebabian v. Shinkle, 26 R. I. 505, 59 A. 743.

88. Evidence insufficient to show payment. Douglas v. Miller, 102 App. Div. 94,

valid mortgage;[89] and plaintiff, when not the mortgagee, must prove interest in or ownership of the mortgage [90] and failing, will be defeated, even though a defendant's title to it is also doubtful.[91] Persons claiming adversely may show that the mortgagor never had title; [92] but the mortgagor cannot.[93] That the mortgagors are not the beneficiaries of a mortgage transaction is no defense.[94] Where it is pleaded in defense that mortgagor had surreptitiously obtained a deed and had no title, it will not be presumed that grantor was negligent in leaving it accessible.[95]

The condition of the mortgage must have been broken,[96] which most commonly occurs by default of payment of the principal or an instalment or part of it,[97] or interest, according to the terms of the mortgage or of subsequent agreements supplanting such terms.[98] To supplant them an extension must rest on consideration,[99] and it may be rescinded for fraud.[1] Default is not waived by failure to declare it at the earliest moment.[2]

An option to foreclose on breach of any covenant may be exercised immediately under a mortgage of a fee with warranty by mortgagors who owned a life estate only.[3] Extending time for payment of principal does not waive the right to fix default on subsequent nonpayment of taxes.[4] The filing of a bill to foreclose a trust deed is a sufficient declaration of an election to declare the note due before maturity.[5]

It will not be foreclosed at the instance of one who merely seeks to further a scheme of fraud,[6] but fraud lying back of the mortgage and going solely to a separate transaction is no defense,[7] nor is the single fact that after action brought the plaintiff in possession sold other property on which the debt was also secured.[8] The

92 N. Y. S. 514. A receipt and indorsements held to show a payment. Durkin v. Markus, 94 N. Y. S. 757.

As to what makes out discharge or payment, see generally Mortgages, 4 C. L. 677; Payment and Tender, 4 C. L. 955.

89. Evidence insufficient to show an extinguishment by mortgagee's purchase under an option thereto. Smith v. Leavenworth [Or.] 80 P. 1010. Evidence insufficient to show mortgage was inseparable from a contract for an illegal object [lobbying]. Reynolds v. Britton, 102 App. Div. 609, 92 N. Y. S. 2.

Whether the requisites of a valid mortgage are present presents a question properly referable to Mortgages, 4 C. L. 677, which see.

90, 91. Merager v. Madson [S. D.] 103 N. W. 650. Disavowal of ownership by ostensible mortgagee held to disprove title of plaintiff claiming by assignment. Id.

92. A good defense is made out by pleading that the answering deendants' ancestor made but did not deliver a deed to the mortgagor who surreptitiously obtained and re- under Rev. Civ. Code, 1903, § 974 must be dent and assistant secretary. Erickson v. by president and secretary, not vice presi- W. 210. Acknowledgment by corporation corded it simultaneously with the mortgage. Kay v. Gray, 24 Pa. Super. Ct. 536.

93, 94. State Mut. B. & L. Ass'n v. Batterson, 65 N. J. Eq. 610, 56 A. 703.

95. Kay v. Gray, 24 Pa. Super. Ct. 536.

96. To omit to perform what another voluntarily did is not a breach of condition. Provide burial under mortgage for support, etc. Davis v. Poland, 99 Me. 345, 59 A. 520.

97. On default by the mortgagor in payment of a part of the notes secured by the mortgage, the mortgagee is entitled on petition therefor, to a foreclosure for the amount due. Notes secured by deeds reciting that they shall be void if notes are not paid at maturity. Land v. May [Ark.] 84 S. W. 489.

98. There is no default on failing to pay interest at the stipulated place where it was in consequence of an agreement to call and collect it. Lawrance v. Ward, 28 Utah, 129 77 P. 229.

99. Sturgeon v. Mudd [Me.] 88 S. W. 630.

1. Concealment of the fact of other conflicting liens. Sturgeon v. Mudd [Mo.] 88 S. W. 630.

2. Nonpayment of taxes for ten days not waived in three years where mortgagee paid them. Lawler v. French [Va.] 51 S. E. 180.

3. King v. King, 215 Ill. 100, 74 N. E. 89.

4. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538. Clause as to taxes construed to include any falling due before principal. Id.

5. Holdroff v. Remlee, 105 Ill. App. 671; Noe v. Witbeck, 105 Ill. App. 502.

6. Scheme to cut off purchaser's rights under contract of sale. Weis v. Levy, 94 N. Y. S. 857.

7. The mortgagee is not defeated as a wrongdoer because in another transaction he in fraud of third persons got in the title and conveyed to mortgagors. Mortgage was for debt owing by mortgagors' husbands and fraud was on other creditors of husbands. Pitzele v. Cohn [Ill.] 75 N. E. 392.

8. Not unless the sale was disadvantageous or the proceeds were misapplied.

mortgagor's procuring an assignee to take the mortgage precludes the defense of duress.[9] The lender may foreclose for so much as he has loaned, despite his failure to loan as much as he agreed.[10] Foreclosure is not defeated by the fact that owing to a wife's nonjoinder in the mortgage it does not bind her.[11] The mortgagee may foreclose on the part he has retained despite the absence of a stamp on an assignment of an interest.[12]

The mortgagor may not defend when he no longer has any interest in the land and the mortgage bond has been released.[13] The mortgagor's trustee in bankruptcy may plead invalidity.[14] Unless the mortgage was within four months, a trustee in bankruptcy cannot obtain an injunction if the debt be not proved and he makes no tender.[15]

Accounting and amount due.—The foreclosure being to enforce a lien requires that the land be subjected only to what is equitably due on an accounting.[16]

Tender[17] must include stipulated attorney's fees if the condition allowing them has befallen.[18]

Presentation to debtor's estate.—This is necessary in some states in order to hold personal assets or to charge the general estate for a possible deficiency.[19] In California, if the mortgagor of a homestead be deceased, a claim must be first presented to his estate;[20] but as against portions of the premises not exempt as homestead, no previous presentation is necessary.[21]

Persons entitled to foreclose.—The creditor or mortgagee so long as he retains an interest in the debt[22] or in a part thereof,[23] or any one who has an interest in the debt as against the land which equity can recognize, may cause foreclosure.[24] Whether any of these may foreclose in a particular way or stand as parties is hereafter discussed.[25] Persons secondarily liable for the debt may foreclose pursuant to stipulations to that effect on producing the note and mortgage without any proof of payment.[26]

The remedies for foreclosure most common are sale under a power reserved in

Anglo California Bank v. Cerf [Cal.] 81 P. 1077.

9. Langley v. Andrews [Ala.] 38 So. 238.

10. Less v. English [Ark.] 87 S. W. 447.

11. Dever v. Selz [Tex. Civ. App.] 87 S. W. 891.

12. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341.

13. Evans v. Wilmer [Pa.] 60 A. 312.

14. Carlsbad Water Co. v. New [Colo.] 81 P. 34.

15. Parks v. Baldwin [Ga.] 51 S. E. 722.

16. See Mortgages, 4 C. L. 677, for the rules for adjusting equities between various parties.

17. See generally, Payment and Tender, 4 C. L. 955.

Besides wiping out a default, tender is either to save costs (see Costs, 5 C. L. 842), or to force a discontinuance (see post, § 6a) or to stop interest (see Interest, 4 C. L. 241).

18. Fees given if placed in hands of attorney are due as soon as he has received it before he has done anything towards collection. Easton v. Woodbury [S. C.] 50 S. E. 790. If the deed of trust provides for a solicitor's fee, a tender after suit begun must include the fee. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678.

19. See Estates of Decedents, § 6, 5 C. L. 1219.

20, 21. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

22. Creditor who has sold the debt cannot demand of trustee that he sell. Collier v. Doe ex dem. Alexander [Ala.] 38 So. 244.

23. The holder of a note given for earned interest is secured by the mortgage and may foreclose. Kleis v. McGrath [Iowa] 103 N. W. 371.

24. A guarantor who has taken an **assignment of the mortgage as security** may foreclose. Ruberg v. Brown [S. C.] 51 S. E. 96.

Co-mortgagor who is entitled to contribution: Where a mortgage covers property owned by two parties and one of them makes payments on the mortgage to the other, such a one is entitled to have the mortgage first enforced against the land of the other. Blackwell v. British-American Mortg. Co., 65 S. C. 105, 43 S. E. 395.

One who becomes subrogated to the mortgage and released it by mistake may foreclose. He loaned money in ignorance of borrower's insanity and at his request used it to discharge the mortgage debt. Doxey v. Western State Bank, 113 Ill. App. 442.

25. See post, §§ 2-5.

26. Iberia Cypress Co. v. Christen, 112 La. 448, 36 So. 490.

the mortgage [27] and equitable action or suit to enforce the lien.[28] In several states scire facias sur mortgage is available,[29] and executory process,[30] ejectment,[31] strict foreclosure,[32] and entry and possession,[33] are used in others. In many states two or more of these modes exist. The applicability of any of them in a particular case is hereafter discussed.[34] In equity the equitable remedies may be administered incidentally.[35] A trustee with power of sale will be relegated to it unless some impediment requires judicial foreclosure in equity.[36] The mere existence of other liens superior or inferior is no impediment unless they are so uncertain or conflicting as to deter bidders.[37] Neither is the fact that there will arise rights of subrogation.[38] The trustee having no power to assert a creditor's right to a marshaling of securities [39] cannot go to equity on such ground.[40] An instrument which is essentially a mortgage may be foreclosed as one though called a trust deed.[41] In Georgia the grantee in a security deed may concurrently [42] sue on the debt and sell the land and may sue for possession under the deed; [43] and the transferee of the debt may also sue thereon.[44] He being in equity also the owner [45] may sue to establish title necessary to the security deed and withheld by fraud,[46] and to that end to quiet or set aside other titles or claims thereof made in fraud.[47]

§ 2. *Foreclosure by scire facias, and by executory process.*[48] *Scire facias.*—The general rules of procedure are discussed in another topic.[49] A judgment by stipulation substantially adjusting rights of parties is valid.[50] A certificate of an amount due a defendant, the judgment and the right to execution thereon to such defendant in sci. fa. is bad, since he could not levy on his own land.[51] The proper return to scire facias on a mortgage which the sheriff has been unable to execute is nihil habet and not non est inventus.[52]

Executory process.—A fixed sum not payable on such terms as import a penalty, is so absolute in terms that executory process lies in Louisiana, though the amount may by terms be compounded in a commodity.[53] Executory process may go against the syndic of an insolvency to whom the equity of redemption has been ceded [54] and he may make all defenses.[55] On opposing a proceeding via executiva no injunction need be prayed if the opponent "not originally a party" but pretending to own the thing seized seeks to arrest the "order of seizure" and "regulate" its effect in what relates to it.[56]

§ 3. *Sale by trustee in deed or under power. A. Right and authority to sell.*[57] The trustee has such powers only as the deed gives and those properly implied thereto.[58] Unless so authorized in the deed, the trustee cannot delegate his power.[59]

27. Post, § 3.

28. Post, § 6. The modes in vogue in the several states are enumerated in 9 Enc. Pl. & Pr. 97.

29, 30. See post, § 2.

31, 32, 33, 34. See following sections.

34. See following sections.

35. If one holding a mortgage as collateral for his guaranty sues for reimbursement, he may in the same action as part of necessary relief foreclose. Ruberg v. Brown [S. C.] 51 S. E. 96.

36, 37, 38, 39, 40. George v. Zinn [W. Va.] 49 S. E. 904.

41. Langmaack v. Keith [S. D.] 103 N. W. 210.

42, 43, 44. Clark v. Havard [Ga.] 50 S. E. 108.

45, 46, 47. Clark v. Havard [Ga.] 50 S. E. 108. Allegations held sufficient to make out equity. Id.

48. See 3 C. L. 1438.

49. See Scire Facias, 4 C. L. 1415.

50. On scire facias of a mortgage from vendee to vendor which was to have been satisfied by reconveyance, a judgment by stipulation expressly limited to the land exonerating mortgagee and with execution stayed until release and surrender of the bond is valid. Evans v. Wilmer [Pa.] 60 A. 312.

51. When entered the reviewing court will set it aside while sustaining the judgment. Land Title & Trust Co. v. Fulmer (No. 1), 24 Pa. Super. Ct. 256.

52. In re Walsh [Del. Super.] 58 A. 945.

53. Iberia Cypress Co. v. Christen, 112 La. 451, 36 So. 491.

54, 55. Trezevant v. Levy's Heirs [La.] 38 So. 589.

56. Code Proc. arts. 395, 396. Brugier v. Miller [La.] 38 So. 404.

57. See 3 C. L. 1439.

58. George v. Zinn [W. Va.] 49 S. E. 904.

It is presumed that the trustee continues entitled,[60] and conveyance by the grantor to creditor is not a payment of a "mortgage" which extinguishes the title.[61] If the deed provides for the substitution by the beneficiary of another trustee in case the one named fails or refuses to act, a sale by a substituted trustee is invalid unless the original trustee has been first requested to make it;[62] but if substitution is warranted by absence of the trustee, no request need be made to fix a right to substitute as on a refusal.[63] The mortgagee's attorney in fact is not a "legal representative" of the mortgagee or holder within a clause for substitution of a trustee.[64] A corporation need not execute a substitution under its seal.[65]

If the name of a corporation in a security deed be mere description of the person of the grantee, neither the corporation nor its officers may sell,[66] and if the corporation acquires such title, the power cannot be exercised by one describing himself as its officer.[67]

There was no limitation in time on a proceeding to sell by advertisement in North Dakota until the act of 1901 extended the terms of that act applicable to actions.[68] Time run before that time is not to be reckoned.[69] The better rule is that unless the debt is extinguished, the mere bar of action in personam thereon does not bar foreclosure;[70] but in Arkansas a second and curative sale cannot be had after the debt is barred.[71]

In South Dakota where all assignments must have been first duly recorded, a record is void if defectively acknowledged.[72] In Mississippi a substitution of trustees is "recorded" when filed for record, and sale may be contemporaneous.[73]

In Georgia reconveyance is made in order to sell as against the debtor,[74] but is not necessary if there is neither defeasance clause nor bond to reconvey.[75] If the grantor is dead, it should be sold as property of his estate.[76]

(§ 3) *B. Notice.*[77]—If the character of notice of sale is provided in the mortgage, it must be strictly followed,[78] and when the power specifies advertisement in a particular newspaper that one or its identical successor must be chosen.[79] The ad-

The power of sale conferred upon trustees must be strictly followed or no title will pass by their deeds. Trustee represents both parties and has no powers except those named in the instrument. Davis v. Hughes [Tex. Civ. App.] 85 S. W. 1161.

59. Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182. Such delegation is not impliedly authorized by provisions as to how he shall act by "attorney in fact" if one becomes necessary, those words being referable to necessary ministerial acts. Id.

60, 61. Leech v. Karthaus [Ala.] 37 So. 696. The statute (Code 1896, § 1067), so providing, does not apply to deeds of trust. Id.

62. Can be no failure or refusal until after a request. Davis v. Hughes [Tex. Civ. App.] 85 S. W. 1161. Where deed named a principal and an alterative trustee, held that right to appoint substitute to make sale did not arise until after both had been requested to act, and sale was void. Id.

63. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751.

64. He could not appoint a new one instead of one deceased. Allen v. Alliance Trust Co., 84 Miss. 319, 36 So. 285. Sale was void. Id.

65. Brown v. British American Mortg. Co. [Miss.] 38 So. 312.

66, 67. Greenfield v. Stout [Ga.] 50 S. E. 111.

68. Laws 1901, c. 120, p. 152, amending Rev. Codes 1899, § 5200, subd. 2. Clark v. Beck [N. D.] 103 N. W. 755.

69. Clark v. Beck [N. D.] 103 N. W. 755.

70. See post, § 5, note citing Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

71. Ford v. Nesbitt [Ark.] 79 S. W. 793.

72. Langmaack v. Keith [S. D.] 103 N. W. 210. Acknowledgment by corporation under Rev. Civ. Code, 1903, § 974, must be by president and secretary, not vice president and assistant secretary. Erickson v. Conniff [S. D.] 101 N. W. 1104.

73. Brown v. British Am. Mortg. Co. [Miss.] 38 So. 312.

74, 75, 76. Greenfield v. Stout [Ga.] 50 S. E. 111.

77. See 3 C. L. 1439.

78. Where notice of sale in the name of the person making the sale is required, notice in the name of a deceased mortgagee is insufficient. Ford v. Nesbitt [Ark.] 79 S. W. 793.

79. Moore v. Dick, 187 Mass. 207, 72 N. E. 967. Evidence held to show that the semi-weekly and not daily edition succeeded the discontinued one specified. Id.

vertisement need not describe improvements erected by a subsequent tenant of the mortgagor not in privity to the mortgagee.[80]

(§ 3) *C. Sale and deed.*[81]—The trustee must faithfully follow the terms in the deed,[82] but it will be presumed he did so.[83] Where the manner and time of execution of a power of sale in a mortgage is fixed by stipulation, it is not necessary to the validity of the sale that it be made on the day fixed by statute for public sales.[84] A stipulation for sale after advertising for a time certain fixes the time of sale at the expiration of such period.[85] Sale of an excessive amount is bad.[86] Several tracts under one mortgage should not be sold en gross if one will pay out.[87] The Mississippi law against sales en masse of more than 160 acres may be waived [88] and a provision to that end in the trust deed is efficient.[89]

The deed need not recite the particulars of compliance with terms of the deed in making sale.[90]

(§ 3) *D. Costs and fees* [91] are those stipulated in the debt or prescribed by statute.[92]

§ 4. *Entry and possession or possessory action.*[93]—While ordinarily the mortgagee need not prove breach of condition to entitle him to enter and possess,[94] it is otherwise where in terms the mortgage contemplates continued possession in the mortgagor.[95] All the heirs and the widow of a deceased mortgagee must join in the possessory action,[96] and the breach of condition must be clearly and certainly alleged.[97]

§ 5. *Strict foreclosure* [98] is a harsh and drastic remedy, where the mortgagee is regarded as having only a lien and not the legal title, and will not be allowed if sale is a proper remedy.[99] It is proper where a mortgagee has in good faith gone into possession under a foreclosure defective for mistaken failure to implead an heir.[1] After a judgment establishing the right to redeem, time runs unless tolled by payment or otherwise.[2] A judgment establishing the interests in land as a mortgage and "debarring" the mortgagor "absolutely" in case of default is not to be construed as strict foreclosure.[3]

§ 6. *Foreclosure by action and sale. A. Right of action and nature of remedy.*[4]—The action in equity is ordinarily a second resort where legal remedies co-

80. Description in deed good. Kebabian v. Shinkle, 26 R. I. 505, 59 A. 743.

81. See 3 C. L. 1440.

82. Material departure avoids sale. McCaughn v. Young [Miss.] 37 So. 839.

83. McCaughn v. Young [Miss.] 37 So. 839.

84. Crawford v. Garrett, 121 Ga. 706, 49 S. E. 677.

85. Sale therefore need not be on a "public sales day." Crawford v. Garrett, 121 Ga. 706, 49 S. E. 677.

86, 87. Mays v. Lee [Ind.] 59 A. 848.

88, 89. Brown v. British Am. Mortg. Co. Co. [Mass.] 38 So. 312.

90. McCaughn v. Young [Miss.] 37 So. 839.

91, 92. See 3 C. L. 1440.

93. See 3 C. L. 1441. See, also, ante, § 1, notes 42-46.

94, 95. Must prove it where mortgagor covenated to support mortgagee "on the premises." Davis v. Poland, 99 Me. 345, 59 A. 520.

96. Davis v. Poland, 99 Me. 345, 59 A. 520.

97. Plea that mortgagor failed to bury mortgagee as provided in mortgage for support, held bad. Davis v. Poland, 99 Me. 345, 59 A. 520.

98. See 3 C. L. 1441.

99. Sale is not a proper remedy and hence it will lie to foreclose a vendee under a broken contract of sale of land, and in favor of the purchaser in possession under a senior mortgage which more than consumed the value of the land. South Omaha Sav. Bank v. Levy, 1 Neb. Unoff. 255, 95 N. W. 603.

Note: It is not allowed to a mortgagee against the owner of the legal title acquired before foreclosure. South Omaha Sav. Bank v. Levy, 1 Neb. Unoff. 255, 95 N. W. 603, cited 1 C. L. 18; Jefferson v. Coleman, 110 Ind. 515; Whitney v. Higgins, 10 Cal. 507, 70 Am. Dec. 748; Montgomery v. Tutt, 11 Cal. 190; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Shaw v. Heisey, 48 Iowa, 438; Boiles v. Duff, 43 N. Y. 469; McCaughey v. McDuffie, 141 Cal. XVIII, 74 P. 751, 3 C. L. 1441, n. 65, citing Flanagan Estate v. Great Cent. Land Co., 45 Or. 335, 77 P. 485.

1. Henthron v. Security Co. [Kan.] 70 P. 653.

2, 3. Bunn v. Braswell [N. C.] 51 S. E. 927.

exist;[5] but a statutory foreclosure by sale wholly void because of defects on its face is no defense,[6] and a mortgage to a partnership in which the names of the individual partners do not appear may be foreclosed in equity, though the designation of the mortgagees is insufficient to authorize its foreclosure at law.[7] The mortgage note and a subsequent note for interest may be brought into one action;[8] but a foreclosure suit being ex contractu cannot be joined with an action to recover land, a mixed action, analogous to ejectment.[9] Easements pre-existing the mortgage cannot be adjudicated,[10] even though in litigation when the mortgage was made.[11] A suit by a corporation to foreclose is not an action in relation to property "purchased, located or held" in the county, requiring filing of articles.[12] In equitable foreclosure, incidental relief will be administered according to equitable principles,[13] and foreclosure may be incident to other relief.

Jurisdiction.[14]—Jurisdiction rests on the situs of the land and not on personal service.[15] In Texas, one holding a mortgage on the land of a decedent may have his debt established and his lien foreclosed by a suit against the widow and children in the district court, it appearing that there is no administration, that the property is not worth more than the amount of the mortgage debt, and that there are no other debts against the estate or if there are that they are inferior to the mortgage.[16] A judgment for plaintiff in such suit stops the running of limitations against the mortgage debt.[17] The action is purely local, even though both parties are foreign and the mortgage is payable out of the state,[18] and a suit is properly brought in the county in which the property subject to the lien or any part thereof is situated.[19]

Limitations.[20]—The application of the statute of limitations has resulted in some conflict partly due to loss of the distinction between the various "actions" which spring from the debt and the lien.[21] The limitation applicable to sealed instruments accruing without the state does not apply even if the debt is there payable, because the action is on the lien and not on the debt.[22] The action in North Dakota being in personam [23] attracts to it the suspension of limitations on such actions during absence of the person against whom the cause of action shall accrue,[24] but the

4. See 3 C. L. 1441.

5. See ante, § 1.

6. The notice was prematurely dated, did not describe the land and was informal. Woodruff v. Coffman [Mich.] 103 N. W. 166.

7. Decree and sale not thereby rendered void. Carpenter v. Zarbuck [Ark.] 86 S. W. 299.

8. Klels v. McGrath [Iowa] 103 N. W. 371.

9. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

10, 11. Mayer v. Margolies, 95 N. Y. S. 204.

12. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

13. See generally, Equity, 5 C. L. 1144. The sale of infants' interests may be incidentally ordered in order to do complete equity. Infants' lands sold where there was danger of drainage assessments beyond their ability to meet. King v. King, 215 Ill. 100, 74 N. E. 89. May incidentally construe a will. Id. A lessor may intervene in a proceeding to foreclose the lessee's mortgage on the leasehold and pray cancellation where because of the custody of a receiver he could not maintain a possessory action for breach of condition against mortgages. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870, afg. 113 Ill. App. 332.

14. See 3 C. L. 1443.

15. Greenwood Loan & Guarantee Ass'n v. Williams [S. C.] 51 S. E. 272. The courts of the state within which the land is territorially included have jurisdiction and this fact cannot be challenged by general allegation. Islands held in New Jersey. Cook v. Weigley [N. J. Eq.] 59 A. 1029.

16. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

17. Debt not barred so as to prevent foreclosure of lien against interest of purchaser with notice. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

18. Wells v. Scanlan [Wis.] 102 N. W. 571.

19. Rev. St. 1895, art. 1194, subds. 12, 23, art. 1465, subds. 2, 4. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66. Rev. St. 1895, art. 1488, relating to the venue of actions for the appointment of receivers for corporations, does not apply to an action for the foreclosure of a trust deed in which a receiver is appointed. Id.

20. See 3 C. L. 1443; see, also, Limitation of Actions, 4 C. L. 445.

21. See post, note 31.

22. Wells v. Scanlan [Wis.] 102 N. W. 571.

23, 24. Paine v. Dodds [N. D.] 103 N. W.

absence of a mortgagee after he has parted with title is not within this rule;[25] neither does absence of the administrator[26] nor the want of an administrator of a deceased mortgagor toll foreclosure as to heirs.[27] But the absence of part of the heirs of the equity of redemption tolls foreclosure as to their shares.[28] Whether the action to foreclose may be barred while that on the debt still runs is much in conflict;[29] but North Dakota has adopted the affirmative view[30] held by the majority, and the further proposition that the outworking of equities arising from the fact that the land is a primary fund even as to an absent mortgagor does not require a suspension of the statutes during his absence.[31] Also the grantee may tack the time

931; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 95; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

25. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

26. Paine v. Dodds [N. D.] 103 N. W. 931.

27, 28. Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

29, 30. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

31. Paine v. Dodds [N. D.] 103 N. W. 931; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

NOTE. Can limitations run against foreclosure while suspended as to an action on the debt: The contrariety of opinion on this subject and the reasoning of the courts is very learnedly commented on in the opinion of Judge Engerud, in the case of Colonial & U. S. Mortg. Co. v. N. W. Thresher Co., from which we quote in substance. In that case the principal debtor absented himself from the state after disposing of all his interest in the land, whereupuon the question arose. The decisions may be divided into several classes.

Where the mortgage either conveys a defeasible estate in the land or the statute of limitations raises a presumption of payment: In this class belong the Illinois cases: Emory v. Keighan, 94 Ill. 543; Schifferstein v. Allison, 24 Ill. App. 294; Id., 123 Ill. 662, 15 N. E. 275; Banking Ass'n v. Bank, 157 Ill. 524, 41 N. E. 919; Jones v. Foster, 175 Ill. 459, 51 N. E. 862; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364. Of these the court points out that Richey v. Sinclair, 167 Ill. 184, was the only one in which there was mere absence of the mortgagor after parting with his estate, uncoupled with other features tolling the statute. It is sustainable because in Illinois the mortgage is defeasible only by extinguishing the debt, and as the debt was not extinguished by the bar, the mortgage could not be. The suggestion is made, however, that later legislation in Illinois may have destroyed the principles on which this conclusion is reached. In North Dakota the statute of limitations neither extinguishes obligations nor raises presumptions thereof, but merely bars the remedy, and a mortgage conveys no estate. Rev. Codes 1899, § 4699; Halloran v. Holmes [N. D.] 101 N. W. 310; Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518.

Where foreclosure is a proceeding in rem: In such states the absence of the mortgagor cannot toll the statute. Anderson v. Baxter, 4 Or. 105; Peters v. Dunnells, 5 Neb. 460.

Where the mortgage is not an estate in land and the statute does not raise a presumption of payment: Of this class of states, Texas, Kansas and Iowa hold that the mortgagor's absence after parting with all interest, nevertheless tolls the statute against foreclosure. Cases fairly representing the views of the Texas courts are Ewell v. Daggs, 108 U. S. 143, 27 Law. Ed. 682; Falwell v. Hening, 78 Tex. 278, 14 S. W. 613. From Kansas may be cited Waterson v. Kirkwood, 17 Kan. 9, and Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; and from Iowa, Clinton Co. v. Cox, 37 Iowa, 570; Brown v. Rockhold, 49 Iowa, 282; Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986; and Leeds Lumber Co. v. Haworth, 98 Iowa, 463, 67 N. W. 383, 60 Am. St. Rep. 199. Judge Engerud points out that the cases from these states are erroneous in principle and opposed to the majority, and states that they are fallacious in their reasoning; for while the mortgage is incident to the debt and survives until it is discharged, those courts overlook the fact that the bar of the remedy is entirely distinct from a discharge of the obligation. It is not true that when the personal liability for the debt has become merely unenforceable, its obligation is so destroyed that the functions of the mortgage terminate. The statute operates on the remedy only, and so it comes that personal liability may be unenforceable while the mortgage is yet enforceable, and conversely, foreclosure may be barred and action on the debt still maintainable. The principal Iowa case is Clinton County v. Cox, 37 Iowa, 570, in which the reasoning thus criticised is stated, and a similar reasoning is found in Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765. Duty v. Graham, 12 Tex. 427, 62 Am. Dec. 534. These cases, it is said assume that not only is the mortgage incident to the debt, but foreclosure is incident to the action to enforce personal liability. This reasoning, and the propositions upon which it rests, is in direct conflict with the overwhelming weight of authority. Joy v. Adams, 26 Me. 330; Thayer v. Mann, 19 Pick. [Mass.] 535; Richmond v. Aiken, 25 Vt. 324; Baldwin v. Norton, 2 Conn. 161; Pratt v. Huggins, 29 Barb. [N. Y.] 282; Fowler v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976; Colton v. Depew, 60 N. J. Eq. 454, 46 A. 728, 83 Am. St. Rep. 650; Demuth v. Bank, 85 Md. 315, 37 A. 266, 60 Am. St. Rep. 322; Arthur v. Screven [S. C.] 17 S. E. 640; Elkins

run in his favor to that run for grantor.[32] The reason given for these conclusions is that the remedies to foreclose and on the debt are distinct and the bar acts only on the remedy, not on the right.[33] Whether the bar of foreclosure by action does or does not carry with it foreclosure by sale, [34] an estoppel to plead it to a sale does not cut off a plea to the action.[35]

Where there has been a binding extension, time runs from the expiration thereof and not earlier defaults.[36] As to one who took under and subsequent to the mort-

v. Edwards, 8 Ga. 326; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Browne v. Browne, 17 Fla. 607, 35 Am. Rep. 96; Kendall v. Clarke, 90 Ky. 178, 13 S. W. 583; Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181; Insurance Co. v. Browne, 11 Mich. 265; Wiswell v. Baxter, 20 Wis. 680; Whipple v. Barnes, 21 Wis. 332; Lewis v. Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Bush v. White, 85 Mo. 339; Bank v. Guttschlick, 14 Pet. [U. S.] 19-30, 10 Law. Ed. 335; Eubanks v. Leveridge, 4 Sawy. 274, Fed. Cas. No. 4,544. It has been held that the two causes of action could not even be joined in the absence of a statutory provision to that effect. Ins. Co. v. Brown, 11 Mich. 265; Borden v. Gilbert, 13 Wis. 670; Stilwell v. Kellogg, 14 Wis. 461; Cary v. Wheeler, 14 Wis. 281; Faesi v. Goetz, 15 Wis. 231; Doan v. Holly, 25 Mo. 357, and 26 Mo. 186. The doctrine established by the foregoing cases is well stated by Judge Deady in Eubanks v. Leveridge. That case was tried in the Federal court in Oregon, and, of course, the decision of the supreme court of Oregon on the question involved was conclusive on the Federal court sitting in that state. The state court had held that an action to foreclose was not barred by the absence of the mortgagor after he parted with the title; because the action was in rem; but Judge Deady reached the same conclusions for reasons different from those of the state court. He said: "But I apprehend the true doctrine to be that the remedy upon the note and mortgage is, like the transaction itself, two-fold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker, upon which he can obtain a personal judgment for the sum due thereon. So the execution and delivery of the mortgage creates a lien upon the property included in it to secure the payment of the sum mentioned in the note, and, in case of a default in such payment, a suit may be maintained upon this 'sealed instrument,' the mortgage, to enforce such lien for the purpose of paying the debt. Notwithstanding section 410 of the Code provides that in a suit 'to foreclose a lien, where there is also a personal obligation for the payment of the debt,' in addition to the decree of foreclosure and sale, 'a decree may be given against the person giving the same for the amount thereof,' yet I apprehend that either the remedy upon the personal obligation or the mortgage may be pursued for the collection of the debt without reference to the other. . . . These authorities go to show that the holder of a note and mortgage has two distinct remedies for the collection of his debt, and that they exist and may be pursued independently of each other."

Summing up Judge Engerud continues: "The remedy on the personal obligation for the debt and that on the mortgage may, and often must, be pursued against different defendants and in divers jurisdictions. The remedy on the mortgage must be invoked in the jurisdiction where the property lies, and the time within which it must be commenced is governed by the law of that state. The only person or persons affected by that remedy are those who are interested in the property adversely to the mortgage. Those persons are the only necessary parties to such an action. It is against them that the cause of action for the foreclosure of the lien accrues. It is in their favor and for their protection that the statute operates. The acts or situation of the debtor who has no interest in the land clearly should not toll the statute in an action to which he is not a necessary party. It is clear that it is only he in whose favor and for whose protection the statute operates, who can waive or deprive himself of its benefits. Such is the reasoning of the courts of California, Washington, New York, Missouri and South Carolina, and we think those decisions are in accord with both law and common sense. Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 202, 5 P. 91; George v. Butler, 26 Wash. 456, 67 P. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396; Denny v. Palmer, 26 Wash. 469, 67 P. 268, 90 Am. St. Rep. 766; Bush v. White, 85 Mo. 339; Arthur v. Screven [C. C.] 17 S. E. 640; Fowler v. Wood, 78 Hun, 304, 28 N. Y. Supp. 976, aff. 150 N. Y. 584, 44 N. E. 1124. See, also, Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181." Compare Halloran v. Holmes [N. D.] 101 N. W. 310; Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518.

There is a dissenting opinion in Colonial & U. S. Mortg. Co. v. Northwest Thresher Co., wherein Judge Young dissents from the views expressed by Judge Engerud, on the ground that the words of the North Dakota statute suspending limitations during the absence "of the person against whom the cause of action shall accrue," by fair construction must include the person who created the obligation, to-wit, the mortgagor. An exhaustive discussion of the meaning of the words "cause of action" is given in the dissenting opinion.

32. Paine v. Dodds [N. D.] 103 N. W. 931.

33. Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

34, 35. Teigen v. Drake [N. D.] 101 N. W. 893.

36. White v. Krutz, 37 Wash. 34, 79 P. 495. Such agreement binds subsequent grantee and prolongs period as to him. Id.

gage, the statute is tolled by a timely suit against the mortgagor.[37] The action is not barred as to other lien holders until the original cause of action is barred.[38] It does not run against a mortgagee in possession.[39] The death of one mortgagor does not toll the statute as to the other.[40]

The defense of limitations may be interposed by the owner, though not a party to the mortgage.[41] A purchaser at judicial sale of an heir's undivided interest may plead the bar.[42] If the statute is tolled against the note, that against the mortgage also is extended.[43] By failure to implead all parties who have interests subject to the lien, the bar may arise as to them.[44] The first mortgagee cannot plead it against a second who does not contest the former's lien.[45]

Abatement.[46]—Transfer of premises does not abate the suit.[47] Revivor after death of mortgagor who had parted with title and was unnecessary party is unnecessary.[48] In case of the landowner's death before confirmation, the suit should be revived and not merely the decree.[49] In case of a transfer of plaintiff's right pendente lite, the action may in California be continued in plaintiff's name without substitution.[50]

Leave to sue.—In a suit against a receiver in his own court, it is presumed that leave was obtained.[51]

Discontinuance.—The action should be discontinued and the mortgage assigned on motion of the mortgagor's tenant in common who pays or tenders what is due.[52] The assent or dissent of other defendants is immaterial,[53] and their failure to receive notice of the motion is no concern of plaintiff.[54] Whilst the assertion by defendant of an adverse title might require dismissal,[55] a prior judgment lien is not such a title.[56]

(§ 6) *B. Parties and process. Parties plaintiff.*[57]—The complainant must be either the legal or equitable owner of the mortgage or the mortgage debt.[58] The real creditor is a "real party in interest" entitled under the codes to sue as plaintiff,[59] even if the nominal mortgagee might also be entitled as a "trustee" of an express trust.[60] A foreign corporation organized for the purpose of doing a trust business, and holding a trust deed of all the property of a telephone company in the state as security for its bondholders, may maintain a suit for the foreclosure of the lien and

37. The mortgagor's grantee was not served and afterwards set up title and pleaded the bar. Less v. English [Ark.] 87 S. W. 447.

38. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471.

39. One who bought in under a void sale. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

40. Hibernia Sav. & Loan Soc. v. Boland, 145 Cal. 626, 79 P. 365.

41. Blakeslee v. Hoit, 116 Ill. App. 83.

42. Hopkins v. Clyde, 71 Ohio St. 141, 72 N. E. 846.

43. MacMillan v. Clements, 33 Ind. App. 120, 70 N. E. 997.

44. Dowress held entitled to plead it in 1901, where her dower was not subjected to suit in 1877. Dubois v. Martin [Neb.] 99 N. W. 267.

45. Privilege is the debtor's. Tinsley v. Lombard [Or.] 78 P. 895.

46. See 3 C. L. 1443, n. 3-6.

47. So under Code, § 3476. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471.

48. Boatman's Bank v. First Nat. Bank [Kan.] 79 P. 125.

49. On the death of the mortgagor after the sale but before confirmation, it is proper to revive the action against his heirs under Civ. Code Prac. § 507, rather than to revive the judgment under § 407, subsec. 3. Montz v. Schabacher, 26 Ky. L. R. 1214, 83 S. W. 569.

50. Code Civ. Proc. § 385. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

51. Payson v. Jacobs [Wash.] 80 P. 429.

52, 53, 54. Simonson v. Lauck, 93 N. Y. S. 965.

55, 56. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

57. See 3 C. L. 1443.

58. As to the rights and interests in Mortgages, see Mortgages, 4 C. L. 677. The right to maintain an action on a note carries with it the right to foreclose a mortgage securing it. Mortgage is mere incident to the note. Barber v. Stroub [Mo. App.] 85 S. W. 915. Assignee may foreclose in Georgia in mortgagee's name to use. Montgomery v. King [Ga.] 50 S. E. 963.

59, 60. Anglo-Californian Bank v. Corf [Cal.] 81 P. 1077.

the appointment of a receiver, though it has never been granted permission to do business within the state.[61]

Parties defendant.—A trustee for security only with power to sell has no interest in the debt but only a mere legal title;[62] hence the creditor or his administrator is a necessary party.[63] The owner of the equity of redemption or his successors in estate, if recorded or in possession,[64] are indispensable to a suit to bar such equity. The holder of a senior lien is not a necessary party to a junior lienor's foreclosure,[65] but if it is sought to effect a sale of a clear title, all other lienors[66] or their legal representatives[67] or claimants or possible owners of an interest, must be joined.[68] A plea of conveyance is notice to complainant that new parties may be necessary.[69] In order to fix personal liability, all persons whom it is sought to charge must be joined. The administrator of the debtor is properly joined with mortgagors who did not personally owe the debt where the suit is to foreclose and also to establish the debt.[70] A mortgagor after conveyance is not a necessary party but is proper.[71] In Louisiana the wife and heirs of an insolvent community are not necessary parties to foreclosure of purchase price mortgage either in Louisiana or Federal courts.[72] Parties who are co-complainants need not be impleaded as defendants.[73]

New parties and intervention.[74]—Where the mortgagor is nonresident, an amendment of parties may bring in the one in possession[75] and the suit be continued except to adjudge personal debt.[76] Mere contract holders without interest in or lien on the property cannot intervene.[77]

The process[78] in Georgia does not issue as in ordinary actions, but by a rule nisi on the mortgagor to pay into court on or before the first of next term the

61. Suit is for benefit of bondholders. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

62, 63. Bryan v. McCann, 55 W. Va. 372, 47 S. E. 143.

64. The owner of the equity is necessary to pass title. If mortgagor's grantee is in possession or has recorded, he must be joined. Stough v. Badger Lumber Co. [Kan.] 79 P. 737. The title of a grantee, whose deed is recorded, is not affected by a sale on foreclosure of a prior trust deed to which he is not made a party. Cates v. Field [Tex. Civ. App.] 85 S. W. 52. The widow and heirs of mortgagor after they have been put into possession of his succession are necessary parties. Notice to administrator alone is insufficient. Barton v. Burbank [La.] 38 So. 150. Unrecorded grantees need not be joined if a statute provides otherwise, even though plaintiff knows of the grant. Code Civ. Proc. § 726. Hager v. Astorg, 145 Cal. 548, 79 P. 68. The rule is not relaxed where the mortgage was by a trustee to mortgagee's knowledge and the unrecorded deed was from the trustee to the cestui que trust. Id.

65. Not considered in aligning parties in Federal court. Boatman's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650. A prior mortgagee is not a necessary party to suit by a junior mortgagee to foreclose his lien. Garza v. Howell [Tex. Civ. App.] 85 S. W. 461.

66. Assignee of a junior mortgage not impleaded is not bound. Sherman v. Fisher [Mich.] 101 N. W. 572.

67. Junior lienors are not necessary when their trustee is impleaded and served. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770.

68. An administrator is not a necessary party to a suit to foreclose a mortgage on real estate of the decedent, but he is a proper party where the equity of redemption is of any value. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338. Necessary. Wife of mortgagor's grantee. Sloane v. Lucas, 37 Wash. 348, 79 P. 949. Not necessary. Grantors to trustees on a trust which was personal and did not attach to and run with the land. Thompson v. Price, 37 Wash. 394, 79 P. 951.

69. Licata v. De Corte [Fla.] 39 So. 58.

70. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643.

71. Greenwood Loan & G. Ass'n v. Williams [S. C.] 51 S. E. 272. As against subsequent grantees, the mortgagor is not a necessary party. Boatmen's Bank v. First Nat. Bank [Kan.] 79 P. 125.

72. Luria v. Cote Blanche Co. [La.] 38 So. 279.

73. MacMillan v. Clements, 33 Ind. App. 120, 70 N. E. 997.

74. See generally, Parties, 4 C. L. 888.

75, 76. Greenwood Loan & G. Ass'n v. Williams [S. C.] 51 S. E. 272.

77. Holders of service contracts with a mortgaged public service plant. Wightman v. Evanston Yaryan Co. [Ill.] 75 N. E. 502. Holders of irrigation contracts with mortgaged ditch company. Almeria Irr. Canal Co. v. Tzschuck Canal Co. [Neb.] 93 N. W. 174.

78. The general principles of process by summons or publication are treated in Process, 4 C. L. 1070.

amount due, which rule nisi is the process and must be published monthly for four months or served three months previously.[79]

(§ 6) *C. Pleading, trial, and evidence. Bill complaint or petition.*[80]—The bill must allege the mortgage, the debt, and all the particulars essential to the right to foreclose.[81] The facts making out a title need not be pleaded with the utmost particularity to avoid a conclusion of law.[82] Allegations must be made to overcome the presumption that a mortgagor's wife continued alive and has inchoate dower.[83] In Georgia the assignee of the mortgage may foreclose in the mortgagee's name to his own use [84] and since he declares on the mortgage and not the assignment need not attach a copy of the assignment.[85] A prayer for interest according to terms of the note from date is a good prayer for interest at the contract rate from complaint to judgment.[86] A bill for other equitable relief may be amended to pray foreclosure.[87] A failure to disclaim in the complaint all recourse to aught but the land of a deceased mortgagor, this being necessary in California, can be cuured by amendment,[88] but a filed statement of waiver in substance sufficient cures a denial of leave to amend.[89]

Demurrer, plea, or answer.[90]—A defendant with a junior interest may demur that parties necessary to make title good are not joined.[91] A party impleaded as having some interest inferior to the mortgage must, if he claims it, so answer and prove it.[92] Usury must be specially pleaded,[93] and an objection that there was no right to declare the entire amount due must be taken below.[94] A denial of genuineness of the mortgage must, under some of the codes, be sworn.[95] An allegation "that there never was any valuable or other legal consideration" is not a conclusion.[96] An answer alleging a conversion by the mortgagee or other parts of the security is defense as well as counterclaim.[97]

The plaintiff is not put to a denial of a merger where the allegations of a union of the fee and the mortgage in one person are inconclusive.[98]

Cross bills and supplemental bills.[99]—If a defendant impleaded to determine ownership of part of the mortgage debt as between him and a co-defendant files no cross complaint he can have no affirmative relief as against the mortgagor.[1] A pleading setting up a purchase of a share in the mortgaged premises and praying an adjustment of rights is a cross complaint if so treated, though not so called.[2]

79. Montgomery v. King [Ga.] 50 S. E. 963.

80. See 3 C. L. 1445.

81. What these are, see ante, § 1, and Mortgages, 4 C. L. 677. Indebtedness, default, and right to claim default for nonpayment of taxes held confessed by demurrer. Bill held to negative waiver of default. Garrett v. Simpson, 115 Ill. App. 62.

82. Allegation of petition that the deceased mortgagor "left no heirs or kindred of any kind or degree and that the property descended under the statute to her husband" is not a conclusion of law but is sufficient, it not being necessary to allege specifically that she left neither maternal nor patnernal kindred. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569.

83. Franklin v. Beegle, 102 App. Div. 412, 92 N. Y. S. 449.

84. 85. Montgomery v. King [Ga.] 50 S. E. 963.

86. Thrasher v. Moran [Cal.] 81 P. 32.

87. Plaintiff having sued to have deeds canceled should be allowed to amend so as to ask for foreclosure. Land v. May [Ark.] 84 S. W. 489.

88, 89. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

90. See 3 C. L. 1445.

91. Lack of allegations as to mortgagor's wife or her dower coupled with her nonjoinder is demurrable. Franklin v. Beegle, 102 App. Div. 412, 92 N. Y. S. 449.

92. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

93. Thayer v. Buchanan [Or.] 79 P. 343.

94. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

95. Damman v. Vollenweider, 126 Iowa, 327, 101 N. W. 1130; Ellis v. Hof, 123 Wis. 201, 101 N. W. 368.

96. First Nat. Bank v. Robinson, 94 N. Y. S. 767.

97. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137.

98. Answer simply alleged a "discovery" that "claims" to the fee and to the mortgage had been made by same person. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

99. See 3 C. L. 1445, n. 53, 54.

1. West v. Shurtliff, 28 Utah, 337, 79 P. 180.

If a supplemental complaint be necessary as to a grantee unrecorded when the suit began,[3] an amendment allowed by the court to bring him in may be so regarded.[4] A supplemental complaint does not introduce new matter relative to the priorities which reciting the proceedings and the decree of foreclosure asks the cancellation of liens for special assessments claimed by one of the parties which the original complaint alleged were void.[5]

Trial and hearing.[6]—A reference after a finding that something was due the mortgagee gives the referee no authority to find that money was due the mortgagor.[7]

Evidence.[8]—Plaintiff must make out his cause of action [9] by the ordinary rules of evidence.[10] Holders of negotiable mortgage bonds purchased in the open market are presumed bona fide unless it be shown that they were fraudulent in their inception.[11] The burden is on defendants to prove their plea of payment.[12] By a rule of some codes execution denied under oath puts the burden on complainant.[13] Identity of the notes must be proved by more than a mere correspondence in description.[14] In a suit by an assignee, the mortgagee's disclaimer filed therein is proof of complainant's title to the mortgage.[15] Recognition in the mortgage of the plaintiff by a name importing incorporation is proof of plaintiff's corporate character.[16] If the mortgage contains evidence of the debt it may be foreclosed without producing the bond,[17] and not every bond secured by the mortgage need be proved before decree of foreclosure, but each must be before the order to distribute its share of proceeds.[18] Certificate of redemption is proper evidence as to the amounts paid to redeem from tax sales.[19] In a second foreclosure to perfect one wherefrom the owner of the equity was omitted the liens sued on must be proved anew.[20]

(§ 6) *D. Decree or judgment.*[21]—The owner of an equity of redemption of mortgaged premises has an absolute right to have the amount due on a mortgage judicially determined before sale.[22] Solicitor's fees may be included in the decree and may draw interest therewith.[23] Interest should be included only to date of decree.[24] An award of "attorney's fees" sufficiently follows a prayer for "counsel fees." [25] Such fees stipulated for are a mere incident to the main action.[26] As against an estate, inclusion in the decree of counsel fees otherwise chargeable to the general assets is not harmful unless redemption was thus made more onerous.[27]

2. Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

3, 4. Greenwood Loan & G. Ass'n v. Williams [S. C.] 51 S. E. 272.

5. Citizens' State Bank v. Jess [Iowa] 103 N. W. 471.

6. See 3 C. L. 1446, n. 62, 63.

7. Such finding having been reported was set aside. Richardson v. Horton, 139 Ala. 350, 35 So. 1006.

8. See 3 C. L. 1445, n. 59 et seq.

9. See ante, § 1.

10. See Evidence, 5 C. L. 1301. The introduction in evidence of an original answer alleging an agreement to extend held to have proved the allegation of the amended answer of the same facts. Briggs v. Weeks, 98 App. Div. 487, 90 N. Y. S. 853. Amount of advances and supplies covered held well proved as against denials though mortgagee did not prove by books of account. Padgett v. Carter, 70 S. C. 480, 50 S. E. 182.

11. McVicar Realty Trust Co. v. Union R., Power & Elec. Co., 136 F. 678. See, also Negotiable Instruments, 4 C. L. 787.

12. Evidence insufficient to sustain burden as to certain items. Tisdale v. Mallett [Ark.] 84 S. W. 481.

13. Damman v. Vollenweider, 126 Iowa, 327, 101 N. W. 1130. Statutes attaching a presumption of genuineness to written instruments declared on if there be no sworn denial apply to mortgages. Ellis v. Hof, 123 Wis. 201, 101 N. W. 368.

14. Santee v. Day, 111 Ill. App. 495.

15. Langley v. Andrews [Ala.] 38 So. 238.

16. Recognized superior claim in "Anglo-Californian Bank Limited," which later sued. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

17. Bennett v. Edgar, 93 N. Y. S. 203.

18. Weed v. Gainesville, J. & S. R. Co., 119 Ga. 576, 46 S. E. 885.

19. Arneson v. Haldane, 105 Ill. App. 589.

20. Former record is not evidence. Stough v. Badger Lumber Co. [Kan.] 79 P. 737.

21. See 3 C. L. 1446.

22. State Mut. B. & L. Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

23. Healy v. Protection M. F. Ins. Co., 213 Ill. 99, 72 N. E. 678.

24. Laflin v. Gato [Fla.] 39 So. 59.

25, 26. Thrasher v. Moran [Cal.] 81 P. 32.

27. Bell v. Thompson [Cal.] 82 P. 327.

Where adverse claimants to the mortgage notes are foreclosing and stipulate for a hearing of both suits on the same proof but do not consolidate or cross implead necessary third persons, the court cannot, in the decrees, adjudicate the rival claims.[28] The record must contain enough facts pleaded to support the judgment.[29] Judgment may be entered nunc pro tunc.[30] A finding that one impleaded "claims" an interest is not one that he has an interest.[31] The decree after denying foreclosure may be retained to adjust collateral equities brought into the case.[32]

The validity of a mortgage having been adjudicated in a suit to foreclose it, it cannot thereafter be questioned in a collateral attack on the decree of foreclosure.[33] A junior lienor who asserts no right of redemption incurs no prejudice from a decree ordering sale and payment of expenses and prior liens and the turning into court of the surplus for distribution.[34] Reservation of judgment as to rights in surplus is not an adjudication against a claimant.[35] A court of equity will not set aside a decree of foreclosure until it has been found and adjudged that there is a valid defense to the court in which it was rendered, and if it finds a partial defense it will modify the decree or judgment pro tanto[36] and adjust the equities.[37] Stockholders in a mortgagor corporation who were not parties may have set aside a decree colluded at by the mortgagee and the president of the corporation.[38] They may sue in their own names under the usual rule when the officers refuse to act.[39] If error be made in transposing the order of liens, the remedy is by appeal and not in equity.[40] The decree cannot be reformed to include property mistakenly omitted from the mortgage.[41] Ancillary reformation should be decreed without attaching conditions operating to conclude rights not triable in the case.[42]

(§ 6) *E. Sale.*[43]—A decree of foreclosure is a prerequisite[44] unless some

28. Adjudging prospective surplus to original payee is bad when none could result unless a consolidation had been effected, and where parties necessary to holder's title are not in court. Kittler v. Studabaker, 113 Ill. App. 342.

29. Record held to show jurisdiction, also sufficiency of pleadings to support decree. Stull v. Masilonka [Neb.] 104 N. W. 188. Jurisdiction appears to support a default where the land was in the county, the notes were made by defendants, and there was an entry of default thus presuming due service. Twigg v. James, 37 Wash. 434, 79 P. 959.

30. Facts held not to show delay by plaintiff. Phelps v. Wolff [Neb.] 103 N. W. 1062.

31. He has, therefore, no interest shown on the record entitling him to question the amount recovered. Coy v. Druckamiller [Ind. App.] 73 N. E. 921.

32. A foreclosure of a leasehold and the intervention of the lessor to cancel the mortgage and forfeit the lease for breach of condition having brought the whole question into equity it is proper to disallow the forfeiture while cancelling the mortgage on condition that the lessee pay up and to retain the decree and thereafter forfeit the lease on failure to pay up and then adjust all the rights of parties. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870, afg. 113 Ill. App. 332.

33. Carpenter v. Zarbuck [Ark.] 86 S. W. 299.

34. Lockhaven Trust & Safe Deposit Co. v. United States Mortg. & Trust Co. [Colo.] 81 P. 804.

35. Easton v. Woodbury [S. C.] 50 S. E. 790.

36. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413.

37. Where the purchaser of a portion of mortgaged premises was unable to pay notes given for the purchase price and was in arrears for three years in succession before the land was sold under foreclosure, after which he consented to a rescission of the sale and became a tenant and paid rent to the receiver, held that it was not error, in proceedings to set aside the foreclosure decree and for an accounting, to direct a cancellation of the contract of sale. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413.

38. Whitney v. Hazzard [S. D.] 101 N. W. 346. They may do so despite the disallowance of a motion for such relief where evidence was later discovered. Id. One year after such evidence was discovered not laches. Id.

39. Whitney v. Hazzard [S. D.] 101 N. W. 346.

40. Nebraska Loan & Trust Co. v. Crook [Neb.] 103 N. W. 57.

41. Stewart v. Wilson [Ala.] 37 So. 550.

42. Reformation improperly refused as to the description of land where only the mortgagor's interest therein was doubtful. Jenkins v. Bailey [Ark.] 87 S. W. 1180.

43. See 3 C. L. 1447.

44. Want of finality in it because of pendency of appeal must be challenged else it is waived. State Mut. B. & L. Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

other practice is prescribed.[45] Where, after a decree for foreclosure pro confesso, the defendant claims the master to whom a reference was made to determine the amount due has made an erroneous report, and makes application for correction of the final decree before sale, the merits of such application should be passed upon before sale.[46]

An order of sale is not always regarded as essential,[47] but when so it must issue before the decree becomes dormant.[48] The requirement of a seal on writs of execution probably does not apply to orders of sale on a decree which unlike a money judgment contains within itself a precept to sell.[49] In such case the decree, not the order, affords the authority.[50]

The time of sale being fixed by the decree or by law is ipso facto designated by a vacation of a stay.[51] It is complainant's duty to bring on a sale if the decree is not satisfied.[52]

The selection of a trustee to sell is discretionary with the court.[53] Under the rules of the supreme courts of New York, a referee to sell will not be chosen on nomination of parties or their counsel; but such rules does not bind the county courts.[54]

The notice or advertisement must contain such particulars[55] as will enable bidders and persons interested to know the material facts of sale. It may be signed by the sheriff as such without stating of what county.[56]

The property to be sold must be confined to that actually included in the mortgage[57] or covered by the decree which may in one sale dispose of an entire tract or of several interests in order to do complete relief.[58]

The sale must follow the decree,[59] hence a sale en gross is void if the decree directs sale in parcels without provision for gross sale.[60] The fact that sale in parcels as the decree provided produced no bids will not of itself authorize sale en gross.[61]

In case of several tracts or liens, assets and securities will be marshaled if the equities thereto exist.[62]

45. In Kentucky if there be no attachment and bond there can be no sale until decree of foreclosure. Tipton v. Harris [Ky.] 87 S. W. 1074.

46. State Mut. B. & L. Ass'n v. O'Callaghan, 65 N. J. Eq. 738, 55 A. 1002.

47. An order of sale is not essential if sale may be made under the decree. Farm Land Co. v. St. Rayner [Neb.] 102 N. W. 610.

48. Five years. Dalgardno v. Barthrop [Wash.] 82 P. 285.

49, 50. Hager v. Astorg, 145 Cal. 548, 79 P. 68.

51. New day need not be set. Ayers v. Casey [N. J. Err. & App.] 61 A. 452.

52. A mortgagor who continues on the land undisturbed after a decree for foreclosure unless payment be made within a time certain is not required to move for dismissal of proceedings. Twelve years held not laches. Eakle v. Hagan [Md.] 60 A. 615.

53. Wood v. Grayson, 22 App. D. C. 432.

54. Supreme Ct. Rule 61. Finn v. Smith, 45 Misc. 240, 92 N. Y. S. 168.

55. In Kansas the notice published need not state that the decree ordered sale in parcels. Gen. St. 1901, § 4905, does not so provide. Fraser v. Seeley [Kan.] 79 P. 1081. The possession of a prior mortgagee satisfying his claim out of rents and profits is a "charge or lien" which must be declared if the property is to be sold subject to it. Code Civ. Proc. § 1678. Nesbit v. Knowlton-Hall Co., 45 Misc. 510, 92 N. Y. S. 761.

56. Farm Land Co. v. St. Rayner [Neb.] 102 N. W. 610.

57. Where land is mortgaged with an easement appurtenant, the servient land must not be sold. Wood v. Grayson, 22 App. D. C. 432.

58. Where several mortgages are due and all persons are in court, the entire tract may be sold though only the third mortgage covered the whole tract and the others covered different parts. Wood v. Grayson, 22 App. D. C. 432. A mortgagor who has but a life estate cannot object to sale of the remainder. Infants' remainder sold to prevent loss to them. King v. King, 215 Ill. 100, 74 N. E. 89.

59, 60, 61. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

62. In case of a prior lien on two tracts the junior encumbrancer of one of them cannot require marshalling unless enforcement against both tracts will impair his security. Staniels v. Whitcher [N. H.] 59 A. 934. Mortgagee of two tracts one of them foreign will not be required to proceed against the singly charged foreign one at the instance of the second mortgagee who took as such; neither on buying in is the second mortgagee a purchaser for value entitled to this relief. Sternberger v. Sussman [N. J. Eq.] 60 A. 195.

The sheriff may complete a sale pending when his term expires.[63]

A return that sale was at public auction implies that it was to the highest bidder,[64] and one by a sheriff that he "forthwith" filed an appraisement and "thereupon" published notice of sale shows that publication did not precede filing the appraisement.[65]

On confirmation.[66]—The owner of the equity of redemption and the junior lienors should be brought or heard.[67] While conflicting claims of title should not be determined on a motion to confirm, one who makes that question necessary to decision may not object.[68] Confirmation despite technical defects and irregularities is sometimes authorized where no loss or prejudice can be said to have resulted.[69] The burden of proving a fair price or other condition rebutting prejudice exists is on him who seeks confirmation.[70] To be relieved because of defective title the purchaser must either prove the defect or point it out in the record.[71] If the mortgagor fails to object on confirmation that sale was had pending appeal from the decree he is estopped.[72] When the purchaser has been in no way at fault for the defect and has not profited he should be indemnified at the cost of the exceptant who procures resale.[73]

Resale being discretionary,[74] it should appear that enough more will be realized above added costs to make resale beneficial.[75] It may properly be sustained when petitioners offer an advanced bid with security even though the evidence of inadequacy be conflicting.[76]

In Georgia after judgment on the debt is recovered there must be a reconveyance to the debtor [77] and a record thereof,[78] else the levy will be void.[79]

(§ 6) *F. Receivership in foreclosure* [80] is discretionary.[81] Ordinarily none should be ordered unless the security is deficient.[82] It is proper, though applicant's decree is all deficiency, a prior lien having exhausted the land.[83] A stipulated right

63. Ayers v. Casey [N. J. Err. & App.] 61 A. 452.

64. Fraser v. Seeley [Kan.] 79 P. 1081.

65. Farm Land Co. v. St. Rayner [Neb.] 102 N. W. 610.

66. See 3 C. L. 1448.

67. Polhemus v. Princilla [N. J. Eq.] 61 A. 263.

68. Mercer v. McPherson [Kan.] 79 P. 118.

69. Under statutes (Acts 1891, p. 24, § 1) requiring confirmation notwithstanding defects or irregularities in the advertisement if the officer shall certify that a fair price was realized, it cannot be said to have been harmless to a junior lien to fall short in this respect where too low a price was bid. Polhemus v. Princilla [N. J. Eq.] 61 A. 263. Evidence held to show that price was too low. Id.

70. On the certifying officer in New Jersey. Polhemus v. Princilla [N. J. Eq.] 61 A. 263. On exceptions by the purchaser to the confirmation of the sale where the mortgagor died after the sale but before confirmation, held that a mere allegation that the mortgagor left no heirs or kindred without proof of that fact, defendant having defaulted, and without proceedings against the unknown heirs under the statute, is not sufficient to protect the purchaser against the claims of such heirs. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569.

71. Title Guarantee & Trust Co. v. Fallon, 101 App. Div. 187, 91 N. Y. S. 497. Mere addition of the word "trustee" in conveyances to and from a remote grantee and allusion to a statute, establishing restrictive building line in a region not embracing the land are not defects. Id.

72. State Mut. B. & L. Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

73. Polhemus v. Princilla [N. J. Eq.] 61 A. 263.

74, 75. Merrill v. Ladendorf, 123 Wis. 140, 101 N. W. 385.

76. Montague v. International Trust Co. [Ala.] 38 So. 1025.

77, 78, 79. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

80. See 3 C. L. 1450.

81. Garrett v. Simpson, 115 Ill. App. 62.

82. Ruprecht v. Henrici, 113 Ill. App. 398; Schaeppi v. Bartholomae [Ill.] 75 N. E. 447. In a suit to foreclose, there being no receivership clause in the mortgage, a receiver pendente lite should not be appointed unless it clearly appears that the mortgagor is unable to meet any deficiency judgment, and that the property is not worth the amount of the incumbrance. Welche v. Schoenberg, 45 Misc. 126, 91 N. Y. S. 880. In actions to foreclose mortgages or trust deeds, the court may, where the security is weak or inadequate, appoint a receiver of the income or profits of the property covered in anticipation of the judgment and sale. Commercial Telephone Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

83. Ruprecht v. Henrici, 116 Ill. App. 583.

to collect and apply rents pending redemption does not prevent it.[84] In California a stipulation for receivership is not alone sufficient without the probability of a deficiency.[85] In Kentucky a receiver may in proper cases be appointed pendente lite when there is no attachment.[86] Receivership after sale is ordinarily allowable if a deficiency results without any express charge on rents and profits.[87] The defendant cannot have a receiver unless by cross bill he has made it probable that ultimately he will be entitled to relief.[88] A mere allegation that the premises are insufficient is bad as a conclusion.[89] Deficiency itself shows inadequacy of land as security.[90] A bond ought commonly to be exacted,[91] but failure to do so is not reversible error where the receivership was proper.[92] An appointment is not erroneous because it directs collection of rents whereas one property is paid up long in advance beyond the possible duration of receivership.[93]

The receiver has presumptively the same powers as a receiver pendente lite.[94] He is not bound by the mortgagor's separate oral agreement to furnish special facilities to a tenant.[95] A receiver in foreclosure is an officer of the court and not the agent of either party, and the mortgagee is not liable for his acts or omissions.[96] A tenant who does not attorn to a receiver is not in contempt unless he has had notice,[97] and when not made party the rent is recoverable from him only by separate action.[98]

(§ 6) *G. Costs, fees and expenses.*[99]—The costs and allowances are fixed by the rules for costs in equity, where no statute specially provides for them.[1] An administrator who successfully defended a claim of personal liability on notes executed for the estate is entitled to costs.[2] Statutory commissions on "money" in court are not allowable where no money passed through the officer's hands.[3] An account stated should be at the cost of bondholders if they required it.[4] The expense of sale set aside for want of a sale bond by the trustee will be charged to him if his failure was due to negligence, otherwise if he was prudent.[5] Any fees or expenses provided for by the note or mortgage are allowable if the conditions therein stated have occurred.[6] The fee provided by the note may be allowed on foreclosure of the mort-

84. A stipulated privilege to the trustee to enter, collect and pay over rents collected before expiration of redemption period held not to prevent receivership during that period, the decree postponing purchaser's right of possession to such period. Walker v. Kersten, 115 Ill. App. 130, citing Davis v. Dale, 150 Ill. 239.

85. Code Civ. Proc. § 564, makes it essential. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

86. Tipton v. Harris [Ky.] 87 S. W. 1074, citing Lee v. Newton [Ky.] 87 S. W. 789.

87. Walker v. Kersten, 115 Ill. App. 130.

88. A mere interlocutory petition does not suffice. Ruprecht v. Henrici, 113 Ill. App. 398.

89. Their value should be alleged. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

90. Receiver allowed for rents and profits. Ruprecht v. Henrici, 116 Ill. App. 583.

91, 92. Walker v. Kersten, 115 Ill. App. 130.

93. Mortgagor cannot complain and tenant has good legal defense. Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417.

94. Dow v. Nealis, 93 N. Y. S. 379.

95. Cold storage. Dow v. Nealis, 93 N. Y. S. 379.

96. He and his sureties are alone responsible for his failure to account for assets coming into his hands. Robinson v. Arkansas Loan & Trust Co. [Ark.] 85 S. W. 413.

97, 98. American Mortg. Co. v. Sire, 92 N. Y. S. 1082.

99. See 3 C. L. 1452.

1. See Costs, 5 C. L. 842.

2. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341.

3. A United States circuit clerk is not entitled to commissions under Rev. St. § 828, where a master pays over the money realized; and not for the custody and delivery of bonds, for they are not "money." Michigan Cent. R. Co. v. Harsha [C. C. A.] 134 F. 217.

4. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228.

5. Bond required by Acts 1900, c. 114, p. 128. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228. Under the state of the decisions a trust company which failed to give bond on making sale because it was so advised by counsel was not negligent, the law requiring it having later been judicially construed to apply to trust companies as well as individual trustees. Id.

6. An intervention by the mortgagee to claim the proceeds is a "suit" in which attorney's fees are "incurred" or "paid." Hayward v. Hayward [La.] 38 So. 424. A stipulation for fees for "collecting" warrants allowance, though suit to foreclose might not

gage.[7] The trustee who is also an attorney cannot be allowed the attorney's fee stipulated in event of foreclosure.[8] If another attorney is substituted he may recover [9] but only for what he did after substitution.[10] On a foreclosure by one having a pledgee's interest in the mortgage, he may recover attorney's fees, though foreclosure be ancillary to the main action.[11] Fees must be limited to what is reasonable.[12] The statutory extra allowance of 2½ per cent. on foreclosure given in New York does not depend on the "difficult" or "extraordinary" character of the case or on a defense thereto.[13] The notice customary in New York of application for the relief demanded in the complaint suffices for this allowance without further notice.[14]

(§ 6) *H. Effect of proceeding.*[15]—The decree fixes the right of all parties to the mortgage [16] and extinguishes it;[17] but does not adjudicate equities in the debt for or against strangers to the decree. Where various notes are secured by mortgage, and equitable foreclosure is sought in a partition proceeding to which both the mortgagor and mortgagee are parties, it cannot be maintained that a particular note secured by the mortgage, but upon which there is a surety, was merged in the finding in the suit in partition to which the surety was not a party.[18] It is not in rem and hence does not bind strangers to it.[19] The foreclosure of a junior mortgage cannot possibly affect the lien of a senior recorded mortgage,[20] and it is improper to direct the foreclosure of a senior mortgage in a suit to foreclose the junior mortgage to which the senior mortgagee is made a party, where the senior mortgage has not matured and is not in default;[21] for the junior mortgagee has only an equity of redemption.[22] An invalid foreclosure passes no title and does not extinguish the debt.[23] Such title and rights pass as were covered by the decree and the sale.[24] When the decree fixes the terms and amount for redemption, it must be concluded that the right to rents and profits during mortgagee's possession were fully adjusted.[25] It cannot be maintained that the fund realized on the mortgage was applied in whole or in part unequally to a particular note, inasmuch as under the common-law rule, the fund is applied in accordance with equitable principles if it be not applied in accordance with the intention of the parties, whether the payment be made voluntary or by operation of law.[26]

§ 7. *Defective foreclosures and avoidance thereof.*[27]—*Defects and irregularities* in procedure which do not reach some substantial basis of the court's jurisdiction, the decree [28] or the sale,[29] are not in general cause for avoidance. The terre

have been necessary. Langley v. Andrews [Ala.] 38 So. 238.

7. Note read "10 per cent.," mortgage read "reasonable fee." Langley v. Andrews [Ala.] 38 So. 238.

8. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584, citing Gray v. Robertson, 174 Ill. 242, 51 N. E. 248.

9, 10. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584.

11. Ruberg v. Brown [S. C.] 51 S. E. 96.

12. Two hundred and fifty dollars solicitor's fee for foreclosing trust deed for $6,000 while large was sustained where chancellor had allowed it on hearing. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678.

13. Code Civ. Proc. § 3253. Badger v. Johnston, 94 N. Y. S. 421.

14. Badger v. Johnston, 94 N. Y. S. 421.

15. See 3 C. L. 1451.

16, 17. Cannot thereafter be reformed nor can the decree for causes resting in the mortgage. Stewart v. Wilson [Ala.] 37 So. 550.

18. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145.

19. Lohmeyer v. Durbin, 213 Ill. 498, 72 N. E. 1118. **Contra.** See cases cited in annotation to section 6 A, Limitations (n. 31).

20, 21, 22. Garza v. Howell [Tex. Civ. App.] 85 S. W. 461.

23. Dever v. Selz [Tex. Civ. App.] 87 S. W. 891.

24. See post, § 8, Title and Rights, etc.

25. Meredith v. Lochrie, 126 Iowa, 596, 102 N. W. 502.

26. Moorman v. Voss, 3 Ohio N. P. (N. S.) 145.

27. See 3 C. L. 1448.

28. Decree not vacated because of mortgagor's liability to occasional dementia coupled with absence, of a committee for the suit. Team v. Bryant [S. C.] 51 S. E. 148. After a bill is taken as confessed by default, it will not be vacated because only one of the two notes alleged was in fact secured. Twigg v. James, 37 Wash. 434, 79 P. 959.

29. Omission of a seal of the court from

tenant sued in ejectment cannot complain of want of service on the mortgagor.[30] The return to a writ reciting erroneously that sale was to some other than the real purchaser may be corrected to show the truth.[31]

Grounds available after confirmation.—After entry of confirmation, the proceedings and sale being final, may be opened only on equitable grounds.[32] Finality is not postponed by leave to file additional pleadings trying the right to rents and profits.[33] The sale will not be set aside because the purchaser collected rents accrued before sale, the proper remedy being action.[34] Sale of property which the mortgage should have but did not cover is void;[35] but a sale will not be set aside because made for a slightly larger amount than that secured by the trust deed, where it does not appear that any fraud was practiced, nor that anyone was prevented from attending or bidding at the sale, nor that any injury was done to the owner.[36] Sale en gross is prejudicial to persons having separate interests in parcels who are thus disabled to separately redeem,[37] but is not usually ground for setting aside if no diminution of price resulted.[38] Neither the mortgagee nor the purchaser may complain of the order in which the separate interests subject to the mortgage were sold, they having been parties.[39] A mortgagee who has bid in and applied money paid to redeem cannot thereafter attack the sale as invalid and seek to set it aside.[40]

Fraud, accident or mistake.—The court should be liberal in opening a sale to promote equity in case of fraud, accident or mistake,[41] wherever a larger bid or less loss will result,[42] and especially where a senior lienor has bought in, and junior lien-

an order of sale which merely reiterated the decree is not fatal but merely erroneous, where the order was properly signed by the clerk and the decree was sealed. Hager v. Astorg, 145 Cal. 548, 79 P. 68. Mere irregularities in the published notice are disregarded. Farm Land Co. v. St. Rayner [Neb.] 102 N. W. 610. A failure to give the notice of sale required by law is a mere irregularity which is cured by confirmation. Cannot be made the subject of a collateral attack on the sale and confirmation. Carpenter v. Zarbuck [Ark.] 86 S. W. 299. Sale under trust deed will not be set aside, though consideration expressed in trustee's deed is less than two-thirds of the appraised value of the land, where the uncontradicted evidence shows that such recital is a mistake and that it was in fact sold for more than two-thirds of its value. Hamilton v. Rhodes [Ark.] 83 S. W. 351.

Held not curable: A sale made without notice cannot be cured in equity. Ford v. Nesbitt [Ark.] 79 S. W. 793. Sale on execution before reconveyance to debtor according to Georgia procedure. Benedict v. Gannon Theological Seminary [Ga.] 50 S. E. 162. Where there were six mortgages on five lots, each covering two to four of the lots but not all of them on the same lots, so that the same mortgages differed in rank as to different lots, a sale of only one lot subject to mortgages prior as to it but covering others as well was set aside as indefinite in amount where it did not appear whether the purchase was subject to all of the prior mortgages or only to a ratable portion. Roosevelt v. Schile, 95 App. Div. 524, 88 N. Y. S. 592.

30. He is concluded by having failed to make objection in the scire facias. Taylor v. Beckley [Pa.] 61 A. 79.

31. Diamond State Loan Ass'n v. Collins, 4 Pen. [Del.] 77, 60 A. 861.

32. See Judgments, 4 C. L. 287. Only for the ordinary grounds of mistake or accident. Clement v. Ireland, 138 N. C. 136, 50 S. E. 570.

33. Clement v. Ireland, 138 N. C. 136, 50 S. E. 570.

34. Bell v. Thompson [Cal.] 82 P. 327.

35. Stewart v. Wilson [Ala.] 37 So. 550.

36. Not invalidated because advances made to mortgagor's wife were included in the account which deed was given to secure, and constituted a small part of the amount for which the land was sold, though mortgagor's representatives could doubtless recover the excess. Hamilton v. Rhodes [Ark.] 83 S. W. 351.

37. Wife's share had been allotted to her and husband's share was encumbered by his separate judgment debt. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

38. Sale was at real estate exchange and was fair but counsel forgot the day. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. S. 605.

39. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

Note: The reason stated is the rule against collateral attack. But it may be observed that they would ordinarily have no interest entitling them to raise that question.

40. Mortgagor redeemed and resold before levy to satisfy deficiency could be made. Mallar v. Mallarian [Mich.] 101 N. W. 548.

41. Strong v. Smith [N. J. Eq.] 58 A. 301.

42. Lowness of bid and offer to advance same held sufficient where junior liens were unsatisfied and the owners of them were excusable in failing to be on hand at

ors seek relief.[43] The right may be lost by want of timely assertion,[44] or by the interposition of a bona fide purchaser.[45] Inadequacy of price alone is not sufficient,[46] provided due and legal notice of the time, terms, and place of sale has been given, and the sale has been conducted fairly and in accordance with the decree of the court making it,[47] unless so gross as to shock the moral sense;[48] but the sale may be set aside where the price is clearly inadequate, though not grossly so, and there are other circumstances rendering it inequitable to let it stand.[49] Sales will not be set aside at the instance of one who might adequately protect himself by redeeming.[50] Fraud in the decree or the sale,[51] especially if coupled with inadequacy of price,[52] is ground for avoidance.

Modes of attacking sale.—Before confirmation, if there be such a proceeding, the objections should be made on motion to confirm.[53] Otherwise the proper mode of attacking a sale voidable for irregularities is by bill to redeem.[54] Promptness is essential [55] or at least action within the period of limitation on land.[56] When vacation is not of right, conditions may be imposed.[57] The particulars of invalidity of

sale, the senior having bought in. Strong v. Smith [N. J. Eq.] 58 A. 301.

43. Strong v. Smith [N. J. Eq.] 58 A. 301.

44. Invalidity of mortgage in that scrivener filled blanks cannot be raised after ratification by making payments and by giving confirmatory mortgage. Carr v. McColgan [Md.] 60 A. 606.

45. See post, § 8, Title and Rights, etc., also see Notice and Record of Title, 4 C. L. 829.

46. See 3 C. L. 1448. Strong v. Smith [N. J. Eq.] 58 A. 301.

47. Cooper v. Ryan [Ark.] 83 S. W. 328. Will not be set aside for inadequacy of price under circumstances uncoupled with inequity, fraud or mistake. Hamilton v. Rhodes [Ark.] 83 S. W. 351.

48. Daggett Hardware Co. v. Brownlee, 186 Mo. 621, 85 S. W. 545.

49. Daggett Hardware Co. v. Brownlee, 186 Mo. 621, 85 S. W. 545. Sale set aside where property was sold for about a ninth of its value, and mortgagor was absent from the city and had no knowledge of the sale, because he believed it was to be postponed in accordance with his request, and within a few days thereafter tendered to the purchaser the amount of his bid, and tendered into court the amount of the debt. Id. Gross inadequacy of price caused by a failure to give sufficient notice of the land to be sold. Cooper v. Ryan [Ark.] 83 S. W. 328. Failure of notice of sale to name the block in which the lots were situated held to make it so ambiguous as to render it inefficient to carry out its purpose, and to warrant setting aside confirmation of sale, where price was grossly inadequate. Id.

50. Inadequacy of price realized for nonexempt land is no ground for setting aside sale at the instance of the owner who procured it to be first sold in order to protect his homestead also subject to the lien, for by redeeming and reselling he might avoid any loss to his homestead by applying the profit thus made. Especially is this true because there could be no further resort to the redeemed land under Gen. St. 1901, § 4949. Fraser v. Seeley [Kan.] 79 P. 1081.

51. Evidence in suit by grantee under second trust deed to have sale under first trust deed set aside on the ground of fraud and collusion held to show that sale was made at customary time and was in all respects fair and regular. New York Store Mercantile Co. v. Thurmond, 186 Mo. 410, 85 S. W. 333.

52. Allegations of unnecessary and misleading continuances of the sale, of fictitious bidding, and of inadequacy of price suffices. Kebabian v. Shinkle, 26 R. I. 505, 59 A. 743. Sale set aside where in furtherance of a scheme to necessitate resort to decedent mortgagor's realty his creditor who was executor and guardian suffered a default and then had the land bought in for his interest under the resultant foreclosure at an inadequate price. Coley v. Tallman, 43 Misc. 280, 88 N. Y. S. 896. Ignorance and incapacity of mortgagor, suppression of bids by purchaser's misrepresenting that he would bid full value, purchase at nominal price and forbearance to oust debtor after sale evidently because of fear that exposure might follow. Herring v. Sutton [Miss.] 38 So. 235. Where the land brought less than its worth and parties in interest were dissuaded from defending by complainant's misrepresentation, the decree should be opened. Marcole v. Hinnes [N. J. Eq.] 61 A. 975.

53. See ante, § 6 E.

54. Adams v. Carpenter, 187 Mo. 613, 86 S. W. 445.

55. Ten years' delay held laches. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770. Facts held to show unexcused delay amounting to laches. Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351. Action to set aside must be seasonabley brought. Six years not too late, the right of redemption being still alive. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

56. May be brought at any time before adverse possession is complete. Moore v. Dick, 187 Mass. 207, 72 N. E. 967.

57. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. S. 605. It is proper to make the order conditional on the giving of security that a responsible advanced bid shall result or prior liens be paid if one does not. Strong v. Smith [N. J. Eq.] 58 A. 301.

the sale should be alleged.[58] General allegations of fraud are insufficient.[59] If the defect be due to excusable mistake,[60] relief may be awarded by opening the decree in order to perfect proceedings,[61] or by strict foreclosure.[62] A bill by a personal representative to vacate a decree must allege a good defense in plaintiff, the estate or a person interested therein.[63] One attacking a sale by a substituted trustee must prove his allegation that the substitution was invalid.[64] The question whether the sale was fairly and faithfully conducted is for the chancellor on the evidence, and his finding will not be set aside on appeal in a suit to set aside the sale unless clearly wrong.[65] On hearing of motion to vacate sale, the merits of the unappealed decree will not be examined.[66] In an action assailing a foreclosure as void, a foreclosure anew and sale under it will be refused until the fact of invalidity of the former foreclosure is judicially established.[67]

Offer of equity by the person seeking avoidance is essential,[68] even, it is held, in case of a void foreclosure attacked by the mortgagor or his privies;[69] but the contrary has also been recently held.[70] A suit by the owner for relief is essentially a bill to redeem [71] and the doing of equity requires payment for improvements made and if rent has been charged on the enhanced value, interest on it should be countercharged.[72] It is proper to fix a shorter period for redemption than in a regular foreclosure.[73] Taxes paid under such a possession entitles the purchaser to a lien.[74]

Rights under invalid foreclosures by action.[75]—All that passes when the owner of the equity is not joined is an assignment of the liens adjudicated and the right to foreclose them.[76] A subsequent lienor or holder of the equity of redemption, who is not made a party to foreclosure proceedings against the original mortgagor, can only claim the right to redeem.[77] If the mortgagee buy in and enter in good faith under a void sale, he is a mortgagee in possession,[78] whether or not the mortgagor consents.[79] All defenses against liens are available to the owner in a second

58. Lawler v. French [Va.] 51 S. E. 180.

59. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770.

60. Ignorance of the existence of an heir held to be such. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

61. Bring in necessary parties. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

62. Henthorn v. Security Co. [Kan.] 79 P. 653.

63. Bell v. Thompson [Cal.] 82 P. 327.

64. Answer held sufficiently explicit in denial to put proof on complainant. Brown v. British Am. Mortg. Co. [Miss.] 38 So. 312.

65. Hamilton v. Rhodes [Ark.] 83 S. W. 351.

66. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. S. 605.

67. Sole heir of mortgagee sued purchaser and others and all others defaulted leaving fact confessed except as denied by purchaser's answer. Carraway v. Stancill, 137 N. C. 472, 49 S. E. 957.

68. Luria v. Cote Blanche Co. [La.] 38 So. 279. Junior claimants must do equity by paying. Alabama & V. R. Co. v. Thomas [Miss.] 38 So. 770. A mortgagor whose property has been sold under the power conferred by the mortgage cannot raise the question of the right of one standing in a trust relation to him under the mortgage to foreclose, without paying or offering to discharge the obligation secured by the mortgage. First Nat. Bank v. Waddell [Ark.] 85 S. W. 417. No attack on the purchaser's title on this ground in the pleadings and proof, the question cannot first be raised on appeal. Id.

69. Offer to pay amount due and interest. Stull v. Masilonka [Neb.] 104 N. W. 188.

70. No offer to do equity is necessary. Benedict v. Gammon Theological Seminary [Ga.] 50 S. E. 162.

71, 72. Sloane v. Lucas, 37 Wash. 348, 79 P. 949.

73. Ninety days given instead of a year. Sloane v. Lucas, 37 Wash. 348, 79 P. 949.

74. Dalgardno v. Barthrop [Wash.] 82 P. 285.

75. See 3 C. L. 1448.

76. Stough v. Badger Lumber Co. [Kan.] 79 P. 737.

77. Holders of subsequent mortgage and vendor's lien notes after sale to satisfy prior vendor's lien notes. Dickinson v. Duckworth [Ark.] 85 S. W. 82.

78. Void for want of parties heir to deceased owner of the equity of redemption. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625. Henthorn v. Security Co. [Kan.] 79 P. 653. Omission to join wife of owner. Sloane v. Lucas, 37 Wash. 348, 79 P. 949.

79. Investment Securities Co. v. Adams, 37 Wash. 211, 79 P. 625.

suit brought because of his omission from the first.[80] Where the purchaser at a void sale sues for subrogation, the allegation of good faith is essential.[81]

Rights under invalid exercise of power.[82]—The trustee's deed will pass title, even though the advertisement was not for as long as stipulated.[83] Invalid or irregular sale may be color of title to support adverse possession.[84] When a sale is void as made by an unauthorized delegate, only the debt is transferred.[85] The right to disaffirm a voidable sale is personal to the mortgagor [86] and his judgment creditor can neither assert it nor, assuming it to be void, levy on the land.[87] A deed pursuant to a curative sale will be upheld if fair.[88] In Kentucky, when it is forbidden to "foreclose" a mortgage, one who sells under a power of sale is in the same position as if he had enforced his lien as the law permits [89] and must account not for the selling price but for the real value of the land.[90] The mortgagor by acquiescing in a void foreclosure and recognizing the purchaser is not estopped as against the mortgagee.[91]

§ 8. *Title and rights of purchaser.*[92]—As a general rule a foreclosure decree and sale thereunder carry all the interest both of the mortgagor and mortgagee at the time the mortgage was executed,[93] and the interests and liens outstanding whose owners have been impleaded,[94] and will include accretions if the deed is broad enough.[95] In some states persons holding under unrecorded titles are bound, though strangers.[96] The purchaser's title is not affected by latent defects in a partition decree under which the title was derived.[97] Holders of tax titles or liens otherwise prior lose that right if having been parties they do not assert them.[98] No greater title or

80. Stough v. Badger Lumber Co. [Kan.] 79 P. 737. He is not estopped by a deed to him covenanting against incumbrances "except" the ones in suit; such does not recognize their validity. Id.

81. Griffin v. Griffin, 70 S. C. 220, 49 S. E. 561.

82. See 3 C. L. 1440.

83. Adams v. Carpenter, 187 Mo. 613, 86 S. W. 445. If the trustee sell without requisite notice, etc., his legal title may yet pass. Leech v. Karthaus [Ala.] 37 So. 696.

84. McCaughn v. Young [Miss.] 37 So. 839.

85. Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182.

86, 87. Unauthorized purchase by mortgagee under his own power of sale is voidable. Williams v. Williams Co. [Ga.] 50 S. E. 52.

88. Green v. Collins [Miss.] 38 So. 188.

89, 90, 91. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137.

92. See 3 C. L. 1448. Title and rights under defective sales, see ante, § 7.

93. Subsequent deeds of one of the grantors in trust deed held to pass no title. Hill v. Denton [Ark.] 86 S. W. 402. Grant of easements is junior. Caccia v. Brooklyn Union El. R. Co., 98 App. Div. 294, 90 N. Y. S. 582. Commissioner's deed on foreclosure of trust deed held to pass title of both of the grantors, though foreclosure decree was inaccurate in that it described the wife's interest as one of dower and homestead, where she was in fact a tenant by the entireties. Hill v. Denton [Ark.] 86 S. W. 402. If the mortgagor had but partial interest, no greater can be acquired. Sternfels v. Watson, 139 F. 505. Title of purchaser at sale under a foreclosure of mortgage cannot in the absence of fraud or collusion be impeached by the general creditors or the administrator of the deceased mortgagor, where the value of the property proves less than the mortgage debt. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338. Purchaser's title is good as against mortgagor's grantee served by publication. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671. Title of purchaser at sale under a foreclosure of mortgage cannot in the absence of fraud or collusion be impeached by the general creditors or the administrator of the deceased mortgagor, where the value of the property proves less than the mortgage debt. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

94. The mortgagor's lessee subject to both mortgages is inferior in right of possession to the second mortgagor, who has bought in under foreclosure of the first mortgage. Strong v. Smith [N. J. Eq.] 60 A. 66. A right of possession subject to the senior mortgagee is also subject to the junior mortgagee who buys in. Id.

95. Leonard v. Wood, 33 Ind. App. 83, 70 N. E. 827.

96. In California binds unrecorded grantee, though not a party (Code Civ. Proc. § 726). Hager v. Astorg, 145 Cal. 548, 79 P. 68. The assignee of a junior mortgage who has failed to record his assignment is foreclosed, though he was not made a party. His assignor who was party is presumptively the holder. Pinney v. Merchants' Nat. Bank, 71 Ohio St. 173, 72 N. E. 884. Purchaser is superior to unrecorded surrender of an easement. Dahlberg v. Haeberle [N. J. Law] 59 A. 92.

97. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

98. Ayers v. Casey [N. J. Err. & App.] 61 A. 452.

right passes than the decree professes to sell,[99] and redemption terms will not be construed as cutting off liens when there has been nothing from which to redeem.[1] If community lands be sold as a whole, a recital in the deed that "all right," etc., of the deceased husband is sold does not reduce the purchaser's estate to the husband's share.[2] The purchaser's title is subject to all liens given priority by the decree and terms of sale, even if not repeated in his deed.[3] The deed of trust is merged in decree and the purchaser's rights are measured thereby and by the statutes,[4] consequently a provision in the deed giving rents and profits during the period of redemption is of no avail,[5] and unless redeemed, he can have naught but a deed, though he bought on the strength of the trust deed.[6] A paramount title is unaffected by sale of the mortgaged estate even though the owners be joined.[7] Easements prior to the mortgage are not affected.[8] Others are junior.[9] The sale does not cover moneys due from eminent domain proceedings prior to sale,[10] and they may be followed and in equity subjected to unsatisfied liens.[11] In such a case a third mortgagee cannot, as against the purchaser under foreclosure of the second, throw the whole burden of an outstanding first mortgage on the land, leaving all the moneys to himself.[12] A deed pursuant to confirmation and approved in court is prima facie evidence of the truth of recitals therein of regularity of the advertisement and order for sale and the officer's authority.[13]

Sale under a power of sale in a junior mortgage has no effect on senior mortgages.[14] The assignee of the debt buying in on trustee's sale gets legal title and

99. The purchaser at a sale under a decree of foreclosure acquires only such interest in the property as is sold. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124. Decree held res adjudicata that purchaser took only undivided half and also that he could not recover rents and profits. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1. Is bound by a construction of the deed under which the mortgagor claims which is contained in such decree. On foreclosure of mortgage on mineral rights, purchaser cannot exercise any rights which the decree determines did not pass under the deed to the mortgagor. Duncan v. American Standard Asphalt Co., 26 Ky. L. R. 1067, 83 S. W. 124. The purchaser on foreclosure of a mortgage on a leasehold acquires all the rights of the lessee in the premises, and no more, the same as though the lease had been assigned to him. Where mortgage covered leasehold and also certain machinery to secure the purchase price of the latter which had been annexed to the soil by the lessee and had become a fixture, purchaser could not remove such machinery as against the owner of the realty, the sale having wiped out the debt and the right to treat it as personalty by virtue of its original character between the mortgagor and the mortgagee. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920.

1. A decree on petition, answers and cross-petitions and supplemental petition between mortgagor, mortgagees of differing rank and a judgment lienor, the latter having no service of the supplemental petition, gave effect to a settlement alleged in the supplemental petition by means of a conveyance to the senior mortgagee. It did not foreclose aught but the judgment lienor's right to redeem "as provided by law and within the time fixed by law." There being no redemption save from a sale, it was held, that the decree must have meant merely to declare priorities and to cut off the judgment lien only if in case of a subsequent sheriff's sale he should fail to redeem seasonably until then the lien continued. First Nat. Bank v. Campbell, 123 Iowa, 37, 98 N. W. 470.

2. Luria v. Cote Blanche Co. [La.] 38 So. 279.

3. Deed was subject "to all liens thereon." Welche v. Schoenberg, 45 Misc. 126, 91 N. Y. S. 880.

4. Schaeppi v. Bartholomae [Ill.] 75 N. E. 447.

5. Schaeppi v. Bartholomae [Ill.] 75 N. E. 447. Unless there has been a sequestration by receivership, the mortgagor takes rents and profits till redemption is barred, even though specifically pledged. Keeley Brewing Co. v. Mason, 116 Ill. App. 603.

6. Schaeppi v. Bartholomae [Ill.] 75 N. E. 447.

7. Remaindermen joined in foreclosure of mortgage on life estate. Pryor v. Winter [Cal.] 82 P. 202.

8. Crossing rights over a foreclosed railroad reserved in grant of right of way to it are not affected. Baltimore & O. S. W. R. Co. v. Brubaker [Ill.] 75 N. E. 523. Takes subject to easements good against mortgagor. Van De Vanter v. Flaherty, 37 Wash. 218, 79 P. 794.

9. Grant of easement held junior. Caccia v. Brooklyn Union El. R. Co., 98 App. Div. 294, 90 N. Y. S. 582.

10, 11. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

12. First lien will be apportioned between remaining land and the money. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017.

13. Ayers v. Casey [N. J. Err. & App.] 61 A. 452.

right to possession.[15] A trustee's deed executed as trustee conveys all his title, though it recites a foreclosure.[16] It is presumed that taxes, for nonpayment whereof foreclosure was had, were properly levied.[17] That the trustee was absent authorizing a substitution may be proved by inference.[18]

All fixtures pass [19] subject to the tenant's rights under a lease; crops go with the title till they are harvested.[20] As against a tenant who took while lis pendens was on, the crops go with the land.[21]

The purchaser has a right to possession as against the mortgagor's creditor in possession under a verbal agreement to secure the debt.[22] But a purchaser by parol from the owner of the equity, though without title, may for improvements made in good faith have an equitable lien for same declared and enforced.[23]

Lis pendens and bona fide purchasers.[24]—The doctrine of lis pendens applies to foreclosures [25] but one is a bona fide purchaser who bought at sale pending appeal from decree of foreclosure of which he had no notice save the filing of the notice of appeal three days before.[26] The mortgagee buying in and crediting his bid is a purchaser for value.[27] The purchaser who takes without knowledge of rights of an assignee of a junior lien, the record owner whereof was party, and when the assignment is not recorded is a bona fide purchaser.[28] The sale is not final until confirmed and no purchaser has the right to rely absolutely on the order directing the sale, and the fact that the agent of the court has pursued the terms prescribed in making the sale.[29] Fraud on the owner by the mortgagee does not affect a purchaser in good faith for value at the sale.[30] Nor does the fact that the sheriff, named to conduct sale in case of the trustee's refusal, sold without any request to the trustee.[31]

14. A mortgagee who has pledged senior mortgages may redeem from the pledgee while they stand in relation of pledgor and pledgee, despite the pledgee's bringing in under a junior foreclosure. Jennings v. Wyzanski [Mass.] 74 N. E. 347.

15. Collier v. Alexander [Ala.] 38 So. 244.

16. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 26 S. Ct. 25.

17. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538.

18. He had resided abroad and it was presumed he so continued. Ward v. Forrester [Tex. Civ. App.] 87 S. W. 751.

19. Under Sand. & H. Dig. § 5943, the purchaser acquired the rights of all the parties to the suit, both those of the mortgagor and of the mortgagee; and mortgage having covered machinery affixed to the soil prevented its becoming fixtures, but when lien on machinery was merged in decree the right to remove the machinery ceased. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920.

20. A tenant who enters under the owner of the equity after sale is not entitled to crops. Rev. St. 1899, § 4355 saves this right only in case of entry before sale. Nichols v. Lappin, 105 Mo. App. 401, 79 S. W. 995. Crops harvested after foreclosure title but before grantee's title from the purchaser belong to the purchaser or the tenant and not the grantee. Grantee cannot maintain trover. Standlick v. Downing [Vt.] 60 A. 657.

21. Tittle v. Kennedy [S. C.] 50 S. E. 544.

22. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538.

23. Schnelder v. Reed, 123 Wis 488, 101 N. W. 682.

24. See generally, Lis Pendens, 4 C. L. 466; Notice and Record of Title, 4 C. L. 829.

25. Kaston v. Storey [Or.] 80 P. 217. A purchaser from the mortgagee before deed but after sale while suit was pending to cancel the mortgagor's conveyance and quiet his title and while lis pendens was on is not bona fide without notice. Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953.

26. State Mut. B. & L. Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496. Sale made pending appeal from refusal to correct the decree in respect to the amount found due will not be set aside where the purchaser at the sale was a bona fide purchaser, having received no notice of the appeal. The sale was not set aside, even though the order denying the petition was reversed on appeal, after the sale had taken place. State Mut. B. & L. Ass'n v. O'Callaghan, 65 N. J. Eq. 738, 55 A. 1002.

27. Barrett v. Eastham Bros. [Tex. Civ. App.] 86 S. W. 1057.

28. Pinney v. Merchants' Nat. Bank, 71 Ohio St. 173, 72 N. E. 884.

29. Court not compelled to confirm sale conducted in prescribed manner, though he will generally do so. Cooper v. Ryan [Ark.] 83 S. W. 328. A purchaser at foreclosure sale who reads the decree reciting that the title is reserved until the sale is approved, and does not pay the purchase price until after an appeal has been taken from the order approving the commissioner's report, and has knowledge of the facts alleged to avoid the sale, is not a bona fide purchaser. Id.

30, 31. Adams v. Carpenter, 187 Mo. 613, 86 S. W. 445.

In Georgia the transferee of the note may gain a special lien on the land by suing to judgment on the note, then procuring a reconveyance, recording it and levying on the land.[32]

Purchases by beneficiary, trustee or the like.—The beneficiary may purchase at a sale under a trust deed where a third person is named as trustee.[33] One who had been the mortgagee's attorney is not disqualified to make a valid bid under a power if he no longer sustains that relation.[34] The assignee for creditors of the deceased mortgagor's heir has no title as trustee to land inherited after the assignment; and can buy in as assignee of the mortgage.[35] A pledgee of the mortgage and notes who forecloses and buys in takes title and need only apply the proceeds.[36] As administrator who buys in or his individual agent who buys in for him continues to hold as a trustee [37] subject to redemption by the estate.[38] A tenant in common who buys in does so constructively for his cotenants.[39] On a bid to set aside a sale under a power as one to a person in joint interest with the mortgagor, an inference against them may arise from failure to produce evidence explanatory of their relations.[40]

Agreements to permit redemption.—By agreement that the purchaser shall buy in and permit redemption, a mortgage may be created [41] or the title may be held in abeyance from the purchaser.[42]

A writ of assistance will go of right to aid a purchaser or any party entitled under the decree to possession,[43] and against all persons, whether parties to or bound by the decree or not, provided it is necessary in the doing of speedy justice to dispossess strangers.[44] It bears substantially the same relation to the decree as a writ of possession does to a judgment in ejectment.[45] It must be clear, though not so clear as were title to be settled, that a purchaser has acquired a lawful title.[46] A

32. All who thereafter derive title from the debtor are inferior. Maddox v. Arthur [Ga.] 50 S. E. 668.

33. Hamilton v. Rhodes [Ark.] 83 S. W. 351.

34. Evidence held to show cessation of the relation. Yarborough v. Hughes [N. C.] 51 S. E. 904.

35. Read v. Reynolds [Md.] 59 A. 669.

36. A mortgagee who has pledged mortgages with power in the pledgee to exercise a power of foreclosure by sale and buy in cannot have such a foreclosure set aside or redeem the land from the pledgee, but may require application of the proceeds to discharge the pledge. Jennings v. Wyzanski [Mass.] 74 N. E. 347.

37, 38. Smith v. Goethe [Cal.] 82 P. 384.

39. Ryason v. Dunten [Ind.] 73 N. E. 74. See, also, Tenants in Common and Joint Tenants, 4 C. L. 1672.

40. Yarborough v. Hughes [N. C.] 51 S. E. 904.

41. An agreement by a stranger to buy in and permit the debtor to redeem may set the parties to it in the relation of mortgagee and mortgagor. If fair, such a contract is valid. Yarborough v. Hughes [N. C.] 51 S. E. 904. If the purchase by a stranger be really for the debtor's interest, his retention of title may be shown to be a virtual mortgage. Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515. See, also, Mortgages, 4 C. L. 682.

42. An agreement to extend the time of redemption from a mortgage precludes the mortgagee from asserting title prior to the expiration of the period of extension. Horne v. Mullis, 119 Ga. 534, 46 S. E. 663.

43. Strong v. Smith [N. J. Eq.] 60 A. 66.

44. It is considered necessary against strangers in four cases (1), entry pendente lite under one of the parties (2), entry pendente lite as a trespasser (3), under the operation on his right or claim, of section 58 of the Chancery Act (4), where the stranger, if he has title conceals it and holds out his right as one subject to the suit, or makes it seem unnecessary to join him as a party. Strong v. Smith [N. J. Eq.] 60 A. 66. A lease neither acknowledged nor proved is not an "instrument which by any provision of law could be recorded;" and hence the lessee is not bound by the decree according to Chancery Act, § 58. Id. The brother-in-law of the owner of the equity is estopped to set up an unrecorded lease, though not a party, the owner having lived in the house in the brother-in-law's family and the facts having been concealed with full knowledge of the pending suit. Id. Such an estoppel being for the benefit of the complainant to whom purchaser succeeds, prejudice to the purchaser who invokes it is not essential. Id. Lack of fraudulent intent and ignorance that he would be bound do not protect such a lessee Id.

45. Strong v. Smith [N. J. Eq.] 60 A. 66.

46. The order for the writ settles nothing but the present right to possession. Strong v. Smith [N. J. Eq.] 60 A. 66.

writ of asistance against one claiming of right should issue only on notice.[47] It should not be executed against a person not named who is a stranger to it[48] and if done he is entitled to an order of restitution.[49]

Remedies to assert or protect title.—The purchaser takes a title and constructive possession of vacant property sufficient to support suit to quiet title.[50] As ancillary to its decree foreclosing a mortgage on lands adjoining but in different states, a Federal court may enjoin a party from attacking its decree and purchaser's title for want of diversity of citizenship which he had admitted there was[51] also from assailing it on the ground that such land as was in the foreign state belonged to the corporation there chartered and which was not party by name either to the mortgage or the suit[52] both objections being captious and not substantial.

§ 9. *The bid and the proceeds of foreclosure.*[53] *The bid is a contract* and the plaintiff bidding in will not be relieved from a mistake which was essentially of law[54] and particularly not to enable him to so arrange his bids as to consume the entire property.[55]

Bid money or deposit exacted as a condition of security and indemnity against loss as well as part payment should not be returned on a resale.[56] To enforce his rights in a deposit, as against a defaulting purchaser, the plaintiff, a junior lienor, must move to fix liability on the sale before senior mortgage is foreclosed or the deposit cannot be applied.[57] In such a case it is impossible to resell on the same terms, hence damage cannot be fixed for the default[58] and there is no contempt, for the original sale could not be completed,[59] hence the deposit should be returned.[60]

Accumulated rents collected by a receiver in foreclosure are part of the security and will be applied.[61]

Payment and distribution.—When a purchaser's lien is satisfied by a credit, others cannot object that naught was paid in cash but the costs.[62] Where bid money is impounded subject to complainant's demand, the bidder's direction to turn it over is a good payment.[63]

The application of payments will be according to law if there has been no agreement,[64] equally to all of the debts, or parts of the debts, or bonds or interest thereon,[65] which partake of the same security and are in the same rank. In the

47, 48, 49. Ray v. Trice [Fla.] 38 So. 367.

50. Keener v. Wilkinson [Colo.] 80 P. 1043.

51, 52. Mortgagor was a corporation chartered in both states and land laid on both sides of a boundary river. Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 Law. Ed. 1008.

53. See 3 C. L. 1451.

54, 55. By mistake he bid substantially on homestead property satisfying one lien and the non-exempt property was bid away from him on sale under sale for his other lien. Crawford v. Foreman [Iowa] 103 N. W. 1000.

56. Even if resale is a rescission, it does not release the right to indemnity. Smith v. Cunningham [N. J. Eq.] 61 A. 561.

57. This because there can then be no conveyance under the junior judgment. Nesbit v. Knowlton-Hall Co., 45 Misc. 510, 92 N. Y. S. 761.

58, 59, 60. Nesbit v. Knowlton-Hall Co., 45 Misc. 510, 92 N. Y. S. 761.

61. Ray v. Henderson, 110 Ill. App. 542. A mortgagee who sues for foreclosure is chargeable as mortgagee in possession from the date of the possession of a receiver appointing pending litigation, and is liable to account accordingly. Where receiver is appointed in suit to have certain deeds, reciting that they shall be void if notes referred to therein are not paid, canceled for nonpayment, and grantor amends so as to ask for foreclosure. Land v. May [Ark.] 84 S. W. 489.

62. Fraser v. Seeley [Kan.] 79 P. 1081.

63. A credit on the decree should be allowed where bid money impounded was bethe mortgagor who bid, ordered paid over to complainants' solicitors, though because of the impounding order payment was refused. It was the duty of the solicitors as much as defendant's to have the impounding order revoked, and failure to do so is imputed to complainant. Winants v. Traphagen, 66 N. J. Eq. 455, 59 A. 164.

64. Ray v. Henderson, 110 Ill. App. 542.

65. Where there are several bonds and interest over due on some, it should come in as an equal claim if not waived. Interest is not superior to principal. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228. And see 8 Am. & Eng. Enc. Law [2d Ed.] 13.

case of several liens of which the older cover only a portion of the security covered by the younger, the proceeds of the entire tract should be so apportioned as to limit the elder to that which they cover.[66] The plaintiff buying in cannot waive a direction pursuant to statute that taxes and assessments shall be first paid where that would simply enhance the burden on the equity redemption.[67] On paying over moneys realized from the judgment, a referee to sell should not exact refunding agreements against the event of a reversal.[68] It being his duty to pay over conformably to judgment,[69] an agreement to abstain therefrom pending appeal is void [70] and the violation of it will not be redressed.[71]

The beneficiary in a trust deed who purchases the land on foreclosure is only obliged to credit the amount of his bid less the expenses of the sale, on the debt, even though he subsequently sells the land for more than enough to pay the entire amount due.[72] On sale by a junior lienor pursuant to redemption, he having bid in, must be credited his lien, his costs, and what he paid to redeem.[73] The bid should not be credited when sale is vacated.[74]

The surplus belongs to the mortgagor and equity will follow it for him,[75] and those who get the equity of redemption and buy in at a fair price obtaining release of the surplus by fraud on the mortgagor, are liable for the bid without allowance for expenses.[76] The trustee should be allowed to retain from distribution a fund for contingent expenses likely to be incurred.[77] All charges as between co-owners should be adjusted before division.[78] Under the New Jersey act for the commutation of life estates in the surplus remaining on foreclosure by a payment in gross with the life tenant's consent, the wishes of the remainderman are not material.[79] On setting aside default in a surplus proceeding, the defaulting party should be charged with costs and witness fees incurred after his default and till the judgment, and with fees and charges for a new hearing.[80]

§ 10. *Personal liability and judgment for deficiency.*[81]—The repeal of a law allowing a deficiency judgment does not retroact on mortgages previously made.[82] All may be charged who would have been personally bound by the mortgage debt.[83]

66. Wood v. Grayson, 22 App. D. C. 432.

67. Shaw v. Youmans, 94 N. Y. S. 178.

68, 69, 70, 71. Finn v. Smith, 45 Misc. 240, 92 N. Y. S. 168.

72. New York Store Mercantile Co. v. Thurmond, 186 Mo. 410, 85 S. W. 333.

73. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

74. Greenwood Loan & G. Ass'n v. Williams [S. C.] 51 S. E. 272.

75. Followed through execution purchaser to his fraudulent grantee and to the latter's passive co-defendant who received benefits of the fraud. Johnston v. Reilly [N. J. Eq.] 59 A. 1044.

76. Johnston v. Reilly [N. J. Eq.] 59 A. 1044.

77. Real Estate Trust Co. v. Union Trust Co. [Md.] 61 A. 228.

78. One co-owner who was to be entitled to a share of surplus if any on payment of a sum should be adjudged that share subject to a retainer out of it of the sum agreed, where the other co-owners who made the agreement had sold before such payment. Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

79. Leach v. Leach [N. J. Eq.] 61 A. 562. In that state the wife has in lands deeded to her during coverture a life estate with remainder for life to the husband if he survive, then over to the issue in fee (citing Doremus v. Paterson [N. J. Eq.] 57 A. 548); hence she takes the sum in gross at once, the remainder of the surplus will be invested for the joint benefit of husband and wife while they both live and for his benefit for life if he survives her, and if not, the principal to be paid to her when he dies. Id.

80. Irving Sav. Inst. v. Smith, 100 App. Div. 460, 91 N. Y. S. 446.

81. See 3 C. L. 1449, 1450.

82. Daniels v. Mutual Ben. Ins. Co. [Neb.] 102 N. W. 458; Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

83. No deficiency can be enforced against a surety if his risk was enhanced by increasing the rate of interest. Evidence insufficient to show aught but a voluntary payment of more. New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916. An administrator who pursuant to an order of the court mortgages the real estate of his decedent is not liable for a deficiency judgment. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341. In Wisconsin a wife who separately derived no benefit from a note in which she joined with her husband is not liable. Lolzeaux v. Fremder, 123 Wis. 193, 101 N. W. 423.

Whether a wife is liable with her husband depends on the law of the place and time of creating the debt.[84]

There is no personal liability without an adjudication thereof,[85] nor until a deficiency arises after the sale of the property.[86] Hence the deficiency clause in a decree of foreclosure is not a final decree for a deficiency until the amount is ascertained by sale.[87] Rents and profits during time for redemption should not be off-set against deficiency if mortgagee was entitled to possession.[88] Jurisdiction over the person to support a deficiency judgment may be acquired by the original process in the foreclosure suit where, as formerly in Nebraska, the statutes allow such a judgment on the incoming of a report showing a deficiency.[89] Where, as in that state, the main decree simply adjudges the amount due and orders foreclosure, deficiency judgment being in personam, cannot be entered until return enabling the court to say what deficiency there was.[90] A foreign judgment of foreclosure on the land alone is entitled to full credit, though on published service [91] and if properly authenticated leaves it a question of law whether there had been a foreclosure.[92] When the deficiency judgment is declared on in a foreign state, errors averred to be therein will, as in other foreign judgments, be ignored,[93] and defenses not therein made are lost.[94] Such a suit is not one to revive a dormant judgment.[95] On application for deficiency judgment, a jury trial is not allowable, even if a legal defense is made.[96] One who assumed to pay and failed to defend, having notice, is charged by a deficiency judgment.[97] A mortgagee may treat the mortgagor, and his grantee who assumes the mortgage, both as principal debtors, and may have a personal joint and several decree against them.[98]

The deficiency judgment does not become a lien on other land until everything necessary to give it certainty has been done.[99]

§ 11. *Redemption.*[1]—The right to redeem from sale exists only by statute [2] or by terms of the decree, being distinct from the right of redemption from the mortgage.[3]

Statutes giving the right to redeem should be construed to allow it to any who have a substantial interest, whether parties or not.[4] The mortgagor may redeem a first lien,[5] and a lessee under him may do so as well.[6] Among others who may

84. Clark v. Eltinge [Wash.] 80 P. 556. Law presumed same as former, hence debt being for home was community and she was liable. Id.

85. Ridgely v. Abbott Quicksilver Min. Co. [Cal.] 79 P. 833. In California where the clerk is to "docket" such a judgment if a deficiency appears, he must await the rendering and the entering of the judgment by enrollment. See Code Civ. Proc. §§ 726, 671. Id., per Shaw, J.

86. Whitney v. Meister, 5 Ohio C. C. (N. S.) 271.

87. Thomson v. Black, 208 Ill. 229, 70 N. E. 318.

88. Clark v. Eltinge [Wash.] 80 P. 556.

89. Mortgagor having meanwhile departed, the state asserted invalidity of judgment for want of new personal service. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

90. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

91, 92. Clark v. Eltinge [Wash.] 80 P. 556.

93. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

94, 95. Defense of limitations. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

96. Daniels v. Mutual Ben. Ins. Co. [Neb.] 102 N. W. 458.

97. Cudaback v. Hay, 134 F. 120.

98. Arneson v. Haldane, 105 Ill. App. 589.

99. Sum so recovered must be docketed in figures. Code Civ. Proc. § 1246, construed with §§ 1250, 1627. French v. French, 94 N. Y. S. 1026.

1. See 3 C. L. 1452.

2. A statutory right applies only to subsequently executed mortgages. Comp. Laws 1897, § 3938. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806.

3. See 3 C. L. 1452, n. 86; see, also, Mortgages, 4 C. L. 677.

4. Statute naming legal owner (Gen. St. 1901, § 4945) does not exclude equitable owner. Mercer v. McPherson [Kan.] 79 P. 118. Purchaser in possession under parol sale superior to subsequent grantee with notice. Id.

5. Stockton v. Dillon, 66 N. J. Eq. 100, 57 A. 487.

6. Where a senior and junior mortgage have been foreclosed and the mortgagor procures one to advance interest, costs and the consideration for an assignment of the junior mortgage, thus staying the decree,

do so are a bona fide purchaser before foreclosure [7] and a rescinding grantor who was not a party.[8] Junior lienors may redeem as such only while they sustain that character.[9]

The amount of the decree with costs accrued or that due at the time of a tender [10] is necessary to redeem.

The time is generally statutory. In Illinois a junior lienor so recognized by the decress may redeem within one years; [11] but as to one omitted from decree and seeking the right by suit, the time is in the chancellor's discretion, six months being usually but not always allowed.[12] In that state a judgment creditor may redeem after twelve and within fifteen months, whether he be senior or junior to a junior lienor recognized in the decree, unless he has levied and gained a specific lien which puts him as an assignee of mortgagor on equality with the junior lienor.[13] The fact that, on a sale of decedent's realty to pay debts where only a sum sufficient to pay a mortgage on the property is realized, the equity of redemption is not sold in accordance with the order of the court, does not prevent the expiration of the statutory right to redeem at the expiration of a year from the date of the sale.[14] The period begins to run from judgment of foreclosure [15] and an interruption of it as to one separate parcel does not toll it as to others. By agreement, the time may be extended.[16] By consenting to a sale in fee without condition, limitation or restriction, the right may be waived.[17] A like result attends the acceptance of proceeds under a decree which does not allow redemption.[18]

The right to redeem cannot be enforced by trespass to try title [19] and must be pleaded in facts showing an equity to such relief.[20] A bill after the period must allege tender of the requisite security demanded by statute against waste and for interest.[21] An amendment setting up the bar of limitations and asking cancellation arises, it is said, out of the same transaction as a bill to redeem,[22] and if made as a first amendment and before time to plead has elapsed is allowable of course.[23]

the mortgagor can pay the decree but cannot keep it open to defeat or impair a bona fide leasehold which the assignee took as consideration for his advances. Stockton v. Dillon, 66 N. J. Eq. 100, 57 A. 487.

7. Licata v. De Cortę [Fla.] 39 So. 58.

8. The original mortgagor may redeem against any but bona fides, though he had conveyed and was not a party where he sues to cancel for fraud and impleads all parties. Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953.

9. After a sale on execution to the judgment creditor has passed beynd redemption, the judgment creditor is the real owner and as such, not as judgment creditor must redeem from a foreclosure of a senior mortgage. Bagley v. McCarthy Bros. Co. [Minn.] 104 N. W. 7. A holder of two simultaneous docketed judgments who sold under the larger one cannot, after time to redeem from his own execution sale has gone by, have any right under the smaller judgment to redeem from a foreclosure senior to both. The smaller judgment was under the circumstances either merged in the larger or entirely cut off by the sale. Id.

10. A decree on appeal held to have fixed as law of the case the amount necessary to redeem at the amount due with interest to original tender not to appellate decree. Farmers' & Traders' Bank v. Kelsay, 186 Mo. 648, 85 S. W. 538.

11. Illinois Nat. Bk. v. Trustees of Schools, 111 Ill. App. 189.

12. 60 days held too short. Rodman v. Quick [Ill.] 75 N. E. 465. The supreme court may on appeal extend the time without reversal if too short. 60 days extended by granting 90 days from decree above. Id.

13. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

14. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

15. Dalgardno v. Barthrop [Wash.] 82 P. 285.

16. Evidence held insufficient to show an agreement before time expired, by the certificate holder to permit redemption at any time. Becker v. Lough [N. D.] 103 N. W. 417. The time may be extended by agreement even if verbal. Taggart v. Blair, 215 Ill. 339, 74 N. E. 372. Evidence held insufficient to show an agreement in view of collateral circumstances. Id. Evidence held insufficient to establish a parol agreement to extend the statutory time to redeem from foreclosure. Norman v. Gunton, 127 F. 871.

17. King v. King, 215 Ill. 100, 74 N. E. 89.

18. Error cannot be assigned on such decree. King v. King, 215 Ill. 100, 74 N. E. 89.

19, 20. Must excuse apparent laches. Parks v. Worthington [Tex. Civ. App.] 87 S. W. 720.

21. Rev. St. 1899, §§ 4343, 4344, fixing terms on which redemption is allowed, must have been met. Sturgeon v. Mudd [Mo.] 88 S. W. 630.

Right to possession pending redemption.—Where at the time of execution and at the time of foreclosure the purchaser was allowed possession during time for redemption, a law to the contrary for an interim period is not applicable.[24] A purchaser of the realty of a decedent which is sold to pay a mortgage debt, who takes possession before the expiration of the time for redemption, is liable to the owners for the rents thereof.[25]

Title and rights acquired by redemption.—One who buys the owner's right to redeem, knowing of an outstanding contract by him to convey, is subject thereto if he redeems and revests title in himself.[26] In Oregon, where the property may be redeemed during a specified period, the purchaser's title is held to be defeasible and inchoate until time for redemption has passed [27] and redemption vests the title in the redemptor [28] subject to any judgments docketed against the owner of the equity of redemption pending time to redeem from the foreclosure and not merged in the foreclosure.[29]

A junior lienor who deposits the bid price to redeem nullifies the certificate of purchase and subrogates the redemptor to the right to sell under the decree.[30]

FOREIGN CORPORATIONS.[1]

§ 1. *Status, privileges, and regulation.*[2]—The domicile of a corporation is the state of its creation,[3] and it has no legal existence [4] or right to exercise its corporate franchise [5] outside of the limits of the jurisdiction creating it, except by the comity of other states,[6] it not being a citizen within the meaning of the constitutional provision securing to citizens of each state the privileges and immunities of the citizens of

22, 23. Construing Comp. Laws 1897, § 2685, subsecs. 32, 33, 60-62, 81. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806.

24. Laws 1897, p. 227, c. 87, not applicable. Clark v. Eltinge [Wash.] 80 P. 556.

25. Land sold to pay all the debts, but only enough realized to pay mortgage. Costigan v. Truesdell, 26 Ky. L. R. 971, 83 S. W. 98.

26. Alexander v. Goetz [Ala.] 37 So. 630.

27, 28. The property is restored to "the same condition as if no sale had been attempted." Kaston v. Storey [Or.] 80 P. 217, citing other Oregon cases and the statute B. & C. Comp. §§ 250, 427.

29. Purchaser pending foreclosure redeemed and thereupon judgment creditor of mortgagor levied as on land subject to his lien. Kaston v. Storey [Or.] 80 P. 217.

Note: An early case holding the same on a like interpretation of statute is Curtis v. Millard, 14 Iowa, 128, 81 Am. Dec. 460, with note.

30. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

1. Scope of article: This article treats of the status, powers, rights and liabilities of foreign corporations as such. For general corporation law, see Corporations, 3 C. L. 880; for taxation of foreign corporations, see Taxes, 4 C. L. 1605; for questions peculiar to foreign corporations of a particular kind, see Railroads, 4 C. L. 1181; Building and Loan Associations, 5 C. L. 478; Insurance, 4 C. L. 157; Indemnity, 3 C. L. 1698.

2. See 3 C. L. 1455. See, also, Special Article, Right to Transact Business; Comity, 3 C. L. 1459.

3. Such domicile is not changed by the establishment of branch agencies elsewhere. Philippine Sugar Estates Co.'s Case, 39 Ct. Cl. 225. Corporation created in Philippines under Spanish laws is a domestic corporation, though some incorporators are foreigners. Id.

4. Booth & Co. v. Weigand [Utah] 79 P. 570.

5. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Foreign corporations except interstate commerce corporations, and those organized for a Federal purpose, have no right to do business nor any right of existence out of the state of their creation, except as the legislature of the state into which they seek to migrate chooses to accord them. State v. Kansas Natural Gas Co. [Kan.] 81 P. 506.

6. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. See, also, special article, "Right to Transact Business; Comity," 3 C. L. 1459.

the several states.[7] Hence a state may exclude foreign corporations entirely or may admit them under such conditions as it deems proper,[8] so long as the conditions imposed are within constitutional limits,[9] and do not infringe upon the power of congress to regulate interstate commerce.[10] Thus, conditions requiring foreign corporations to consent to be sued in the state and providing a mode of service of process upon them,[11] and requiring the filing of evidence of incorporation, and other information, in the state,[12] and prohibiting the removal to the Federal court of suits instituted against them in state courts, under the penalty of revocation of the license to do business in the state,[13] are held valid. The rule of comity does not ex-

7. Attorney-General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467; In re Speed's Estate, 216 Ill. 23, 74 N. E. 809.

8. Prewitt v. Security Mut. Life Ins. Co., 26 Ky. L. R. 1239, 83 S. W. 611; In re Speed's Estate, 216 Ill. 23, 74 N. E. 809; Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703; Attorney-General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467; Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822; Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10; Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438, afd. 45 Misc. 316, 90 N. Y. S. 539. A state may exclude a foreign corporation entirely or exact such security for performance of its contracts with citizens as it deems proper to promote the public interest. National Council Junior Order U. A. M. v. State Council Junior Order U. A. M. [Va.] 51 S. E. 166.

9. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

10. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58. Conditions must not restrict or regulate interstate commerce in which the corporation may be engaged. Attorney-General v. Electric Storage Battery Co. [Iass.] 74 N. E. 467. Regulations imposing conditions on foreign corporations which in fact restrict their right to engage in interstate commerce are invalid. Greek-American Sponge Co. v. Richardson Drug Co. [Wis.] 102 N. W. 888. A foreign corporation which controls subordinate councils of a beneficial association within a state is not engaged in interstate commerce, and may be entirely excluded from the state. National Council Junior Order U. A. M. v. State Council Junior Order U. A. M. [Va.] 51 S. E. 166.

11. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Each state has power to prescribe mode of service by which corporations may be subjected to jurisdiction of domestic courts. Groel v. United Elect. Co. [N. J. Eq.] 60 A. 822.

12. Requiring evidence of corporate existence to be filed, place of business to be designated, and agent to accept service of process to be designated, are reasonable conditions. Booth & Co. v. Wleigand [Utah] 79 P. 570.

13. Ky. St. 1903, § 631, requiring insurance commissioner to revoke license of insurance company which removes a case against it without the consent of the other party, is valid. Prewitt v. Security Mut. Life Ins. Co., 26 Ky. L. R. 1239, 83 S. W. 611.

Note: Says a writer in the Columbia Law Review, commenting on Prewitt v. Insurance Co., supra: "In the leading case of Bank of Augusta v. Earle, 13 Pet. [U. S.] 519, 10 Law. Ed. 277, it was established that a corporation cannot exist outside the state in which it is incorporated, and, although its agents can act elsewhere, they can do so only with the consent of the state in which they act. Paul v. Virginia, 8 Wall. [U. S.] 168, 19 Law. Ed. 357; Hooper v. California, 155 U. S. 648, 39 Law. Ed. 297. Most states have found it advisable to impose conditions upon foreign corporations before admitting them, and insurance companies have been especially subjected to such regulation. In order to place them as much as possible upon the same footing as domestic corporations, they are frequently required to stipulate, as a condition precedent to obtaining a license, not to sue in, or remove any suit to, a Federal court, on the ground of diversity of citizenship, local prejudice, or other basis of Federal jurisdiction. In Home Ins. Co. v. Morse, 20 Wall. [U. S.] 445, 22 Law. Ed. 365, an agreement under such a statute not to sue in a Federal court was held unenforceable and the statute void as ousting the Federal courts of jurisdiction. It was held that although a state may admit upon condition, it may not make the condition repugnant to the Federal Constitution. Southern Pac. Co. v. Denton, 146 U. S. 202, 36 Law. Ed. 943; Blake v. McClung, 172 U. S. 239, 254, 43 Law. Ed. 432. Compare Allgeyer v. Louisiana, 165 U. S. 578, 41 Law. Ed. 832; McCall v. California, 136 U. S. 104, 34 Law. Ed. 391. This position was reaffirmed in Barron v. Burnside, 121 U. S. 186, 30 Law. Ed. 915, where a similar statute was held unconstitutional, and an agent who had been arrested for its violation was released. Commonwealth v. E. Tenn. Coal Co., 97 Ky. 238. * * * In the principal case, the court, following Doyle v. Cont. Ins. Co., 94 U. S. 535, 24 Law. Ed. 148, held that, while the statute imposing the condition might be void, indeed, a similar one had been so held by the same court (Commonwealth v. E. Tenn. Coal Co., 97 Ky. 238), nevertheless the commissioner could not be enjoined from revoking the license. * * *

"There can be no question that this position is strictly within the holding of the United States supreme court in Doyle v. Insurance Co., supra, and it seems that the latter case, although distinguished and questioned (Beale, Foreign Corp. § 122; Cable v. U. S. Life Ins. Co., 191 U. S. 288, 307, 48 Law. Ed. 188), is still law. It has been suggested, however, that the contrary result could have been more consistently reached in that case. The right to exclude does not include the right to admit upon

tend to such corporations as propose to do business prohibited by statutes or obnoxious to the policy of the laws of the state.[14] Thus, a state has power to exclude corporations belonging to a trust.[15]

Permits.—A permit granted a foreign corporation under one name inures to its benefit under a new name, if the change of name does not involve a change in its management or in the character of its business.[16] In a proceeding in the nature of quo warranto, brought by the state to oust a foreign corporation from the exercise of corporate franchises in the state, the court will not review the action of the state charter board in refusing to grant permission to the corporation to transact business in the state.[17]

License, excise, or franchise taxes[18] are imposed on foreign corporations in some states for the privilege of doing business, or having a place of business therein,[19] the amount being fixed by statute.[20] Whether a corporation is engaged in business

any condition. * * * In the absence of statutory provisions to the contrary, the consent of each state is presumed to exist by the common law of comity between nations. Bateman v. Service, L. R. 6 App. Cas. 386; Bank of Augusta v. Earle, 13 Pet. [U. S.] 519, 10 Law. Ed. 277; Williams v. Creswell, 51 Miss. 817; People v. Fidelity, etc., Co., 153 Ill. 25, 26 L. R. A. 295. This law is not discretionary with the court, but is found and administered as is any other principle of law. Story, Conflict of Laws [8th Ed.] § 35; 2 Morawetz Corp. [2d Ed.] § 962. An unconstitutional enactment being void, and no other statute having conferred authority on the agent of the state to act, it would seem to follow that the right of the insurance company to continue acting within Kentucky was protected by the common law, and the agent should be enjoined to prevent injury to rights already vested under former constitutional legislation. Niagara Fire Ins. Co. v. Cornell, 110 F. 816. This is not a denial of the absolute power of the state to exclude foreign corporations, but an insistence upon the right of a foreign corporation, once admitted, to remain until properly expelled."—5 Columbia L. R. 231.

14. Corporation organized to defend malpractice cases against physicians is engaged in professional business prohibited by Rev. St. § 3235, and is properly refused a certificate to do business in Ohio. State v. Laylin, 3 Ohio N. P. (N. S.) 185.

NOTE. "Tramp corporations:" There are two well-defined classes of tramp corporations whose admission the rule of comity does not require: (1) Where the state creating the corporation will not permit it to do business within its own boundaries (Railway Co. v. Board, 6 Kan. 245); (2) Corporations organized abroad in evasion or fraud of the laws or policy of the state where the corporation does business or of the state where the corporation is organized. See note in 24 L. R. A. 291; Hill v. Beach, 12 N. J. Eq. 31. But the mere fact that citizens of a state go into another state to incorporate and come back home to conduct business is not a badge of fraud. State v. Cook, 181 Mo. 596, 80 S. W. 929. To hold otherwise would be to discriminate in favor of citizens of a foreign state. 13 Am. & Eng. Enc. Law [2d Ed.] p. 486. On the subject of "tramp corporations," an interesting article appears in the 11 American Lawyer, p. 13. The case of State v. Cook, 181 Mo. 596, 80 S. W. 929, is a well considered opinion; thoroughly reviewing the legal history of tramp corporations. See, also, Clark & M. Priv. Corp. § 838; Cook, Corp. §§ 237-240; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Cincinnati Second Nat. Bank v. Lovell, 2 Cin. Sup. Ct. Rep. 397.—From 3 Mich. L. R. 161.

15. A foreign corporation which belongs to a trust formed to regulate or fix prices or rates is prohibited from doing business in Arkansas whether or not the trust to which it belongs attempts to regulate or fix rates or prices in that state. Under Act Jan. 25, 1905, an insurance company belonging to an insurance trust is guilty of conspiracy and liable to a penalty, if it transacts business in the state, even though the trust does not attempt to regulate rates of insurance in Arkansas. Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42. The statute which so provides is held constitutional. Id. The Texas anti-trust laws, providing that a foreign corporation violating their provisions shall forfeit its license to do business in the state, do not provide for a taking of the property of such a corporation without due process of law. National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 Law. Ed. 689; Southern Cotton Oil Co. v. Texas, 197 U. S. 134, 49 Law. Ed. 696. These laws as amended by Act of May 25, 1899, do not discriminate against foreign corporations, since discriminatory features of prior laws were removed by amendment of 1899. Id.

16. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 88 S. W. 512.

17. Action of state board pursuant to Gen. St. 1901, § 1263, is not so reviewable. State v. Kansas Natural Gas Co. [Kan.] 81 P. 506.

18. Taxation of foreign corporations in general is treated in Taxes, 4 C. L. 1605.

19. Under St. 1903, c. 437, § 58, the excise tax on capital stock is imposed for the privilege of having a place of business in the state, in the case of a corporation having such a usual place of business. Attorney-General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467.

20. St. 1903, c. 437, § 75, requires excise tax of one one-hundredth of one per cent. of par value of authorized capital stock, but

in the state, within the meaning of such a law, is to be determined by reference to the powers and privileges conferred on it by charter, and not solely by the actual business being done by it.[21] The Massachusetts statute, the language of which is broad enough to include every corporation which has a usual place of business in the state, is held not to apply to corporations maintaining such places of business solely for use in interstate commerce; but does apply to corporations using a place of business for interstate and also for other business;[22] and as so construed, is valid.[23] In New York the franchise tax is to be computed only on the amount of capital employed in the state, and not on the entire authorized capital stock.[24] In determining the amount of such capital, the value of a trade-mark used by it,[25] and the value of its good will, as estimated by the corporation itself,[26] may be considered. Stock of a foreign corporation invested in stock of a domestic corporation cannot be subjected to the license tax.[27] When a year has elapsed since a determination of the amount of a license tax, and the corporation has not meantime increased its stock, the comptroller has no authority to increase the tax on his own motion.[28] In Louisiana, a separate license may be exacted of a foreign insurance company by every municipality within whose limits it does an insurance business.[29] A company will not be relieved from liability for such a license by proof of payment to a particular city of a license based on business done by it throughout the state.[30]

Operation and construction of regulatory statutes.[31]—Statutes regulating corporations engaged in business in the state do not apply to corporations engaged solely in interstate commerce.[32] Whether, within the meaning of a regulatory statute, a foreign corporation is doing business in the state,[33] and whether it is en-

allows deduction of local property taxes, and limits amount in any one year to $2,000. Statute construed. American Can Co. v. Com. [Mass.] 73 N. E. 856.

21. Corporation organized in New Jersey to take title to certain New York realty, authorized to deal in realty anywhere in the United States, and to carry on other business incidental thereto and calculated to increase the profits of the corporation, dividends being paid on the income from New York realty, is liable to the tax imposed by Laws 1896, c. 908, §§ 181, 182. People v. Miller, 181 N. Y. 328, 73 N. E. 1102.

22. Corporation held not to use place of business solely for interstate commerce; hence subject to excise tax. Attorney-General v. Electric Storage Battery Co. [Mass.] 14 N. E. 467.

23. Construing St. 1903, c. 437, §§ 66, 67, 75, 58, and Const. c. 1, § 1, art. 4. Attorney-General v. Electric Storage Battery Co. [Mass.] 74 N. E. 467.

24. Under Laws 1896, c. 908, § 181, as amended by Laws 1901, c. 558, providing for license fee of one-eighth of one per cent. on capital stock employed in state. People v. Kelsey, 93 N. Y. S. 369; People v. Miller, 94 N. Y. S. 193.

25. People v. Kelsey, 93 N. Y. S. 971.

26. People v. Miller, 94 N. Y. S. 193.

27. People v. Kelsey, 101 App. Div. 205, 91 N. Y. S. 709.

28. Construing Tax Law, §§ 181, 195. People v. Kelsey, 93 N. Y. S. 971. Comptroller cannot arbitrarily review his own decision. People v. Miller, 94 N. Y. S. 193.

29. The operations of an agent obligated to secure business for one company exclusively constitutes a doing of an insurance business within the meaning of an ordinance levying a license. City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578.

30. "Payment to one other than the creditor does not extinguish the debt." City of Lake Charles v. Equitable Life Assur. Soc. [La.] 38 So. 578.

31. See 3 C. L. 1456.

32. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58.

33. [As to what constitutes a doing of business in the state within the meaning of statutes regulating service of process, see § 3, Service of Process, post.] Mining company which has offices in the state for use of officers and directors, but all of whose properties with which mining and smelting are carried on are in the state granting its charter, is not engaged in business in the state. Bradbury v. Waukegan & Washington Min. & Smelting Co., 113 Ill. App. 600. Illinois corporation had branch house in Kansas City, Mo., and had five men traveling in Kansas soliciting orders, and making settlements with local dealers, receiving their cash and notes, though the contract with the local dealer was approved at Kansas City. Held, corporation was doing business in Kansas, and could not sue without complying with statutes. Elliott v. Parlin & Orendorff Co. [Kan.] 81 P. 500. Furnishing materials for a building under a contract with the owner is not "doing business" in the state so as to require statutory certificate in order to sue on the contract under Laws 1892, c. 687, § 15. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808. Illinois publishing corporation which main-

gaged in state or interstate commerce,[34] must be determined from the facts of each particular case. Mere ownership of property,[35] or the institution and prosecution of an action,[36] is not doing business in the state. Foreign insurance companies which collect premiums, pay losses, make contracts of insurance, issue policies, and conduct and maintain insurance agencies in the state, are engaged in business therein.[37] A corporation of one state which sells goods in another through traveling agents,[38] making shipments either direct from the factory to the purchaser,[39] or to a local agent for distribution [40] or inspection,[41] is engaged in interstate commerce and need not comply with state laws regarding foreign corporations. But if goods are shipped to a local agent and held and offered for sale by him,[42] or if a contract for

tained agent in New York to solicit orders for advertisements, the orders being sent to Chicago for acceptance, and if accepted, the advertisements were published in the corporation's magazine published at Chicago. Held, Illinois corporation was not "doing business" in New York. American Contractor Pub. Co. v. Bagge, 91 N. Y. S. 73. An Ohio corporation with no place of business in New York but employing an agent there who sold goods in question under a written contract addressed to and accepted by the corporation in Ohio, held not to be doing business in New York. Hence, payment of license fee need not be alleged in action by it to recover for goods so sold. Harvard Co. v. Wicht, 99 App. Div. 507, 91 N. Y. S. 48. Foreign corporation which has not registered under Act April 22, 1874, cannot recover on a subscription to a fund for a butter factory, where the building was of large size, material was to be purchased in the state, labor was by residents, and machinery and equipment could be bought in the state; the corporation was doing business in the state. Chicago Bldg. & Mfg. Co. v. Myton, 24 Pa. Super. Ct. 16. Foreign corporation which owned land in state, leased it on shares, and assigned the rent, held not to be doing business in the state so as to be required to obtain a permit from the secretary of state. Wilson v. Peace [Tex. Civ. App.] 85 S. W. 31. Trust corporation taking property in Texas as trustee and undertaking management of it under terms of its deed and bond, services of various kinds being required, held to be doing business, and not merely holding property in trust, in the state. Commercial Telephone Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

34. Answer in quo warranto by the state held to show that corporation was engaged in transportation of oil and gas solely in Kansas and was not engaged in interstate commerce. State v. Kansas Natural Gas Co. [Kan.] 81 P. 506.

35. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527. Under Acts 1895, c. 81, § 1, providing that a foreign corporation desiring to own property or carry on business in the state shall first fille a copy of its charter with the secretary of state, and section 2, making it unlawful for such corporation to do business in the state before complying with section 1, the mere purchase of real estate was not doing business within the meaning of section 2, and was not unlawful; hence damages to the land by change of grade of street could be recovered by the corporation. Louisville Property Co. v. Nashville [Tenn.] 84 S. W. 810.

36. Within the meaning of Acts 1899, p. 18, c. 19, requiring copy of articles to be filed. Alley v. Bowen-Merrill Co. [Ark.] 88 S. W. 838.

37. North American Ins. Co. v. Yates, 116 Ill. App. 217.

38. A manufacturer or dealer in goods engaged in business in one state may send his agents into another state to solicit orders without complying with statutes of the latter state regarding foreign corporations doing business therein. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

39. A corporation, manufacturing machinery in Wisconsin, and selling it in Idaho upon orders taken there by its agents subject to its approval, the goods being shipped from the manufactory to Idaho pursuant to such orders, when approved, is not engaged in business in Idaho, within Rev. St. 1887, § 2653, as amended by Laws 1903, p. 49. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58. Such business is interstate commerce. Id. Foreign corporation sold materials through Texas agent and shipped them from factory in Ohio or from St. Louis. Transaction held interstate commerce and corporation could recover price, though it had not complied with Rev. St. 1895, art. 745, which applies only to corporations doing business in the state. De Witt v. Berger Mfg. Co. [Tex. Civ. App.] 81 S. W. 334.

40. Where a foreign corporation sells goods in a state through traveling salesmen and delivers goods so sold through a distributing agency maintained in the state, the agent having no power to sell but merely to deliver, it is not engaged in business in the state within meaning of Gen. Laws 1899, chapters 69, 70. Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

41. Goods were sold by a foreign corporation to a domestic concern and shipped to a local agent for inspection, and after inspection, delivered in same package to purchaser; held, transaction was interstate commerce, and foreign corporation could recover, though it had not filed articles with secretary of state as required by Rev. St. 1898, § 1770b. Greek-American Sponge Co. v. Richardson Drug Co. [Wis.] 102 N. W. 888.

42. Barnhard Bros. v. Morrison [Tex. Civ. App.] 87 S. W. 376.

labor and materials is made and performed in the state,[43] the corporation is held to be doing business therein.

State legislation granting powers, privileges or immunities to corporations must be construed as applying only to domestic corporations, unless the intent to make it applicable to foreign corporations is plainly expressed.[44] A statute, exempting from the operation of the transfer tax law bequests to charitable corporations, is not unconstitutional because it does not apply to bequests to foreign corporations.[45]

Foreign stock corporations doing business in New York are required to maintain a stock-book in the state.[46] A refusal by the agent in charge of such book to allow a proper person to inspect it[47] renders the agent and the corporation liable to a penalty,[48] which may be recovered by one who makes out a case strictly within the terms of the statute.[49]

Noncompliance with statutes; effect.[50]—Foreign corporations doing business in a state will be presumed to have assented to the conditions prescribed by law.[51] Noncompliance is not a cause for forfeiture of charter rights, unless so declared by statute,[52] especially where the violation of law is not willful or persistent.[53] Penalties must be reasonable in amount.[54]

Contracts of a foreign corporation which has not complied with the statutory requirements are generally held to be unenforceable, if the statute is mandatory and prohibitory.[55] Some courts, however, hold that, if the statute imposes a penalty for noncompliance therewith, it will be deemed exclusive of any other,[56] and that, in such case, noncompliance does not render the contracts of the corporation void, unless the statute expressly so provides.[57] The corporation cannot itself take ad-

43. A foreign corporation which contracts, through a resident agent for labor and materials for a building, and sends men and a superintendent into the state to perform such contract, engages in business in the state within Rev. St. 1895, art. 745, and is not engaged in interstate commerce. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

44. Act May 10, 1901, amending Act June 15, 1895, exempting from the transfer tax, bequests to charitable corporations, does not apply to bequests to foreign corporations. In re Speed's Estate, 216 Ill. 23, 74 N. E. 809.

45. Act May 10, 1901, does not violate Const. art. 9, §§ 1, 2, requiring taxation to be uniform. In re Speed's Estate, 216 Ill. 23, 74 N. E. 809.

46. Every foreign stock corporation having an office for the transaction of business in New York must keep a "stock book" in the state, and the book must be kept in the office of its transfer agent, if it has one. Tyng v. Corporation Trust Co., 93 N. Y. S. 928. Stock book held not to comply with statute. Fay v. Coughlin-Sandford Switch Co., 94 N. Y. S. 628.

47. The right to inspect such stock book carries with it the right to make extracts therefrom. Fay v. Coughlin-Sandford Switch Co., 94 N. Y. S. 628.

48. Stock Corp. Law, § 53. Tyng v. Corporation Trust Co., 93 N. Y. S. 928. The liability of the corporation for such penalty is not affected by the fact that the book does not contain every item required by law to be recorded. Id.

49. In an action to recover the penalty for refusal to allow inspection of the stock book, a complaint is fatally defective if it does not allege that defendant corporation was a "stock corporation" and was not a "moneyed or railroad" corporation. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225. Plaintiff cannot recover such penalty if he fails to prove by competent evidence that defendant is a stock corporation, and has an office for the transaction of business or a transfer agent in New York; that it is not a moneyed or railroad corporation; and that plaintiff is a stockholder. Hollister v. De Forest Wireless Tel. Co., 94 N. Y. S. 504.

50. See 3 C. L. 1458.

51. As provision for service of process on insurance commissioner. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

52. Failure of telephone company to file abstract of charter in each county where it had an exchange held not ground for forfeiture. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390.

53. Where failure to file charter abstract in counties was by mistake, which was corrected when discovered, there was no cause for forfeiture. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390.

54. Verdict of $8,000 as penalty for failure to procure permit to do business held excessive, where business was done in the state for only a short period. Finlay Brewing Co. v. People, 111 Ill. App. 200.

55. In Utah, statutes are mandatory. Booth & Co. v. Weigand [Utah] 79 P. 570.

56. Thompson v. National Mut. Bldg. & Loan Ass'n [W. Va.] 50 S. E. 756.

57. Code 1899, c. 54, § 30, does not make contracts of undomesticated concerns void. Thompson v. National Mut. Bldg. & Loan Ass'n [W. Va.] 50 S. E. 756.

vantage of its noncompliance for the purpose of avoiding liability under its contracts,[58] especially if it was lawfully engaged in business in the state, having a license, at the time the cause of action arose.[59] Noncompliance does not render the directors and stockholders liable as members of a co-partnership for debts contracted in the state.[60]

§ 2. *Powers.*[61]—A corporation which enters a state other than that of its domicile becomes subject to its laws,[62] which become a part of its charter privileges and immunities.[63] Its powers are those granted by its charter which it is allowed to exercise by public policy and law.[64] Foreign corporations have no other or greater powers or privileges than those exercised by domestic corporations of the same kind,[65] and they are subject to the same restrictions and regulations.[66] But it has been held that charter powers, not prohibited by positive laws, or contrary to public policy or against the interests of citizens, may be exercised by a foreign corporation, though such powers are denied similar domestic corporations.[67] In the absence of proof to the contrary, it will be presumed that there are the same limitations upon the powers of a corporation created in another state as are imposed by law on similar corporations in the state into which such corporation comes.[68] The exercise of powers granted to similar domestic corporations is conditioned upon domestication by compliance with statutory requirements.[69] A foreign trust company cannot, under the laws of New York, act as an executor in that state and administer the estate of a deceased testator.[70]

58. In re Naylor Mfg. Co., 135 F. 206.

59. Where, at the time the contract for an abstract to title was made, the abstract company was licensed to do business in the state, the fact that such license lapsed for a short time thereafter was no defense to an action for damages for an omission in the abstract, defendant having renewed its license at the time of the foreclosure of the omitted mortgage, and at the time when the action for damages was brought. Western Loan & Sav. Co. v. Silver Bow Abstract Co. [Mont.] 78 P. 774.

60. Corporation had not registered under Act April 22, 1874. Bond v. Stoughton, 26 Pa. Super. Ct. 483.

61. See 3 C. L. 1461.

62. The admission of a foreign corporation to do business in the state is a matter of comity and not of right, and a corporation which enters the state and undertakes to do business there becomes amenable to the laws of the state and subject to the jurisdiction of its courts the same as a private individual or domestic corporation. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390. Hence such corporation cannot complain of a law restricting or prohibiting its business because it is a monopoly and is in restraint of trade. Civ. Code 1902, § 2845, applies to foreign corporations. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455.

63. Under Rev. St. 1903, § 1471, and Rev. St. 1893, § 1499. State v. Virginia-Carolina Chemical Co. [S. C.] 51 S. E. 455.

64. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

65. Miller v. Monumental Sav. & Loan Ass'n [W. Va.] 50 S. E. 533.

66. Foreign building and loan associations cannot enjoy the special privileges enjoyed by domestic building and loan associations unless they comply with the statutes regulating the business of such domestic associations. Code 1899, c. 54, §§ 25-30. Miller v. Monumental Sav. & Loan Ass'n [W. Va.] 50 S. E. 533. Foreign building and loan associations must comply with laws governing domestic associations. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256. See article on Building & Loan Associations, 5 C. L. 478.

67. Foreign life insurance companies, authorized by charter to write employers' liability insurance, may write such insurance in Ohio, though domestic companies cannot. State v. Aetna Life Ins. Co., 69 Ohio St. 317, 69 N. E. 608.

68. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259. A foreign fraternal beneficial association is subject to limitations imposed on similar domestic corporations by Acts 1899, c. 115, §§ 1, 2, 3. Hence, an attempt to divert a benefit fund derived from assessments on its own members and appropriate it to pay a certificate or policy issued by another association with which it attempted to consolidate, is ultra vires and void. Id.

69. A telegraph company not domesticated under the laws of South Carolina cannot make entry upon lands under condemnation proceedings, since Code 1902, § 2211, applies only to domesticated companies. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675. A railroad corporation cannot exercise the right of eminent domain in Kentucky unless it has become a Kentucky corporation by organizing under its law. Under Const. Ky. § 211, a foreign railroad corporation must organize under Ky. St. 1903, § 763, to exercise the right; compliance with § 841 is not sufficient. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 F. 973.

70. Both because letters testamentary cannot be granted to an alien (Code Civ.

§ 3. *Actions by and against; jurisdiction of courts. Right to sue.*[71]—A foreign corporation cannot maintain an action based on business done in the state unless it has complied with statutory regulations;[72] but such compliance is not ordinarily a prerequisite to the maintenance of an action arising out of interstate business,[73] or based on a contract made outside the state,[74] or for the recovery of property owned in the state.[75] In some states, however, noncompliance is a bar to the maintenance of any action whatever,[76] and statutes which so provide are held not to be an unlawful restriction of interstate commerce.[77] The question what constitutes interstate commerce, and what a doing of business within the state, within the meaning of such statutes, has been already treated.[78] Compliance at any time before trial is sufficient.[79] The fact that a foreign corporation did not have a permit to do business in the state may be shown in an action on a judgment acquired by it in another state, and based on business done in the state wherein the action on the judgment is brought.[80] A foreign trustee corporation which has not complied with the statute may yet be permitted to sue as nominal plaintiff for the benefit of others,

Proc. § 2612) and because it is the policy of the state not to permit trust property to be taken outside the state. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

71. See 3 C. L. 1462.

72. A foreign corporation which has not complied with requirements of statute which would entitle it to do business in the state cannot maintain "any suit or action, legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort." Central Mfg. Co. v. Briggs, 106 Ill. App. 417. A foreign corporation cannot maintain an action in Kansas, based on business done in the state, without procuring the certificate required by law, and the statute requiring such certificate applies to actions commenced before its passage. Evidence to show non-compliance with Laws 1901, c. 125, § 3, admissible on motion to dismiss, though action was commenced in 1896. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

73. A corporation engaged solely in interstate commerce may maintain actions in the state without complying with the statutes regulating foreign corporations doing business in the state. Belle City Mfg. Co. v. Frizzell [Idaho] 81 P. 58; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

74. Statutes prescribing conditions on which foreign corporations may do business in the state do not prohibit such corporations from maintaining actions in the courts of the state upon contracts made in other states. New York corporation may sue in Minnesota on contract made in Kansas without complying with Gen. Laws 1899, c. 69, p. 68. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Failure of a foreign corporation to obtain the certificate required by Laws 1892, c. 687, could not bar an action by the corporation on a contract alleged to have been executed and delivered in another state, unless it is alleged that such corporation was doing business in the state. Onderdonk v. Peale, 93 N. Y. S. 505; Gen. Corp. Law, § 15, prohibiting maintenance of an action by a foreign corporation which has failed to file the certificate required by that section, does not apply to actions on contracts made outside the state. Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. S. 836. Hence an averment that such certificate was obtained is unnecessary in an application for attachment which does not show that the contract on which the action is brought was made within the state. Id. Laws 1896, c. 908, requiring foreign corporations to pay a license tax, does not prohibit maintenance of an action by an assignee of a foreign corporation. Hence an application for an attachment need not allege payment of the tax. Id.

75. Owning property and suing to protect rights therein is not doing business in the state. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527. The person retaining the property, having no contract relations with the corporation, cannot object when sued that the corporation is engaged in business in the state without complying with the statute. Id.

76. Under Rev. Civ. Code, §§ 833-835, foreign corporation must file articles and appoint agent for service before it can maintain an action in the state on any demand. Iowa Falls Mfg. Co. v. Farrar [S. D.] 104 N. W. 449. Hence an answer alleging noncompliance is a complete defense to an action to enforce a lien for materials furnished under a contract made in another state. Id.

77. Such statutes do not restrict transaction or enforcement of interstate business, but merely make use of the courts conditional upon performance of such acts as are required of domestic corporations. Iowa Falls Mfg. Co. v. Farrar [S. D.] 104 N. W. 449.

78. See ante, § 1, Operation and Construction of Statutes.

79. May do so after commencement of action. Filing statement and procuring certificate. Ryan Live Stock & Feeding Co. v. Kelly [Kan.] 81 P. 470.

80. Since it may be shown that plaintiff's original cause of action was not one on which he could have maintained an action in the state where suit on the judgment is brought. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

the trust deed providing for such action.[81] A foreign corporation which has furnished materials for a real estate improvement in New York may file a mechanic's lien therefor, though not authorized to do business in that state.[82]

In some states, a foreign corporation, in a suit based on business done in the state, must allege due compliance with the statutes;[83] but an objection that a complaint does not contain such allegation must be properly raised,[84] or it is waived.[85] In other states, compliance with law, and consequent capacity to sue is presumed,[86] and the burden is upon the defendant to allege and prove noncompliance,[87] and the defense is waived unless raised by a proper[88] plea in abatement.[89] In Texas, the certificate of the secretary of state that the right of a corporation to do business in the state has been forfeited is not evidence of such forfeiture.[90]

Liability to be sued.[91]—A foreign corporation doing business in the state and having agents located therein for that purpose, so that process may be served upon it,[92] may there be sued not only upon a cause of action arising in the state,[93] but also upon any transitory cause of action, whether originating in the state or

81. When bondholders could have sued in their own names. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

82. In accordance with Laws 1897, c. 418, § 3. New York Architectural Terra Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. S. 808.

83. Must allege and prove, in a suit based on business for which a permit is required, that such permit had been procured by it. St. Louis Expanded Metal Fire-proofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512. A complaint showing on its face that plaintiff had not procured a certificate of authority to do business in the state at the time of the making of the alleged contract, though it had paid the license tax, is demurrable for want of legal capacity to sue. Emmerich Co. v. Sloane, 95 N. Y. S. 39.

84. Failure in action on a contract made in the state, to allege due authority to transact business in the state by compliance with the statutes, is not available on a demurrer that the complaint does not state a cause of action. Portland Co. v. Hall, 95 N. Y. S. 36; Emmerich Co. v. Sloane, 95 N. Y. S. 39.

85. A failure to plead compliance with the statutes is waived by a defendant who answers with a general denial, upon information and belief, even as to its own incorporation. Harris Automatic Press Co. v. Demorest Pattern Co., 94 N. Y. S. 462.

86. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507.

87. Where a foreign corporation alleges in a suit by it that it was lawfully doing business in the state, the burden is upon the defendant to plead and prove incapacity to sue because of non-compliance with statutes. Defense of non-compliance not available when not set up in answer. Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796. Presumption is that law has been complied with; burden on a defendant setting up non-compliance when sued, to show violation of statute. Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

88. If non-compliance with statutes be relied on as a defense, defendant must specify in what particular the plaintiff has failed to comply with the law. Worrell v. Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988. A plea that a suit is illegally maintained because of non-compliance with the law at the time of entering into the contract in suit should allege that fact specifically and affirmatively aver that the corporation did business in the state. Peoria Star Co. v. Steve W. Floyd Special Ag., 115 Ill. App. 401. Where a plea in an action to recover the price of a machine sets out that the cause of action grew out of business done in the state by a foreign corporation which had no place of business in the state, as required by Const. Ala. art. 14, § 4, such plea is not demurrable on the ground that it shows that the transaction was interstate commerce. Keystone Mfg. Co. v. Hampton [Ala.] 37 So. 552.

89. Want of capacity to sue, because of non-compliance with statutes, must be set up by a plea in abatement, and is waived by pleading to the merits. Failure to appoint an agent to accept service of process, as required by Gen. Laws 1896, c. 253, and Pub. Laws, c. 980, must be set up by plea in abatement. Weaver Coal & Coke Co. v. Rhode Island Co-op. Coal Co. [R. I.] 61 A. 426.

90. Construing Rev. St. 1895, art. 749, and art. 5243, as amended by Laws 1897, p. 168, c. 120. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

91. See 3 C. L. 1462.

92. In Georgia, foreign corporations doing business and having agents in the state may be served in the same manner as domestic corporations. Reeves v. Southern R. Co., 121 Ga. 561, 49 S. E. 674; Hawkins v. Fidelity & Casualty Co. [Ga.] 51 S. E. 724.

93. When a foreign corporation comes within the boundaries of a sovereignty other than that of its creation, and there makes contracts and transacts business, it is there answerable for causes of action there arising, provided service is made upon the corporation in the manner prescribed by law. Reasons for rule discussed and authorities collected. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

elsewhere, and whether the plaintiff be a resident or nonresident,[94] provided the enforcement of the cause of action would not be contrary to the laws and policy of the state where such suit is brought.[95] In some states, statutes determine when actions may be maintained by residents [96] or nonresidents [97] against foreign corporations. A foreign corporation is entitled, when a personal judgment is sought against it, to present the question of jurisdiction by plea,[98] and no other appearance than that made by filing such plea is necessary in order that it may be heard.[99]

Service of process.[1]—Each state has the right to prescribe a mode of service of process upon foreign corporations which will subject them to the jurisdiction of its courts, provided, of course that such mode is not unreasonable or contrary to the principles of natural justice.[2] Usually, jurisdiction cannot be acquired for the pur-

94. Reeves v. Southern R. Co., 121 Ga. 561, 49 S. E. 674, overruling Bawknight v. Insurance Co., 55 Ga. 194. Railroad corporation doing business in Georgia suable by nonresident for injury to horse in Alabama. Id. Non-resident insurance company suable in Georgia on contract made outside the state, where insured died in Oklahoma Territory. Hawkins v. Fidelity & Casualty Co. [Ga.] 51 S. E. 724.

Note: "Aside from an authorizing statute, if service is lawfully made, suit in such an action is maintainable by a non-resident alien at the discretion of the court. Johnson v. Insurance Co., 132 Mass. 432; Steamship Co. v. Kane, 170 U. S. 100, 42 Law. Ed. 964. If the right to sue depends on citizenship, not residence, art. IV, § 2, of the Federal Constitution, extends it to all citizens of the United States. Railway Co. v. Nix, 68 Ga. 572, 580; Cole v. Cunningham, 133 U. S. 107, 113, 33 Law. Ed. 538; Barrell v. Benjamin, 15 Mass. 354. But where a statute (New York C. C. P. § 1780), limiting the right to residents irrespective of citizenship, is constitutional (Robinson v. Oceanic S. S. Co., 112 N. Y. 315, 2 L. R. A. 636), it would seem a non-resident citizen could not sue."—5 Columbia L. R. 471.

95. Enforcement of cause of action for tort to property not against state policy. Reeves v. Southern R. Co., 121 Ga. 561, 49 S. E. 674. Enforcement of accident insurance policy proper. Hawkins v. Fidelity Casualty Co. [Ga.] 51 S. E. 724.

96. Code Civ. Proc. § 1780, regarding actions by residents against foreign corporations, relates to the jurisdiction of the court and not to the cause of action; hence an objection that a complaint does not state a cause of action under that section is unavailing under a demurrer, unless it appears on the face of the complaint that the action is not one allowed by the section. MacGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. S. 591.

97. An action may be brought in North Carolina by a nonresident against a foreign corporation when the cause of action arose in the state, or the subject of the action is situated therein. Code, § 194. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173. Where property and place of business of a New Jersey corporation were located in North Carolina, and a contract between it and a salesman was made in North Carolina, and checks in payment were there drawn, though his services were performed in Virginia, courts of North Carolina were held to have jurisdiction of a garnishment proceeding in an action in the state against the salesman, the cause of action having arisen and the subject of the action being located in the state. Id. In determining whether a cause of action arose in the state, the allegations of the pleadings alone may be considered. Code Civ. Proc. § 1780, subd. 3. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816. An action for breach of contract may be maintained in New York by a nonresident against a foreign corporation if the breach occurred in the state, no matter where the contract was made. Id. Under D. C. Code, § 1537, an action by a nonresident corporation may be maintained against another nonresident corporation when the defendant has a place of business and is engaged in business in the district. Guilford Granite Co. v. Harrison Granite Co., 23 App. D. C. 1.

98, 99. Groel v. United Elec. Co. [N. J. Eq.] 59 A. 640.

1. See 3 C. L. 1464.

2. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822, citing numerous authorities.

3. [As to what constitutes a doing of business in the state within the meaning of other statutes, see § 1, Operation and Construction of Statutes, supra.] Colorado corporation, with no office in New York, though directors occasionally met there, and though it had a bank account there, held not to be engaged in business in New York. Honeyman v. Colorado Fuel & Iron Co., 133 F. 96. Insurance company held to have been doing business in North Carolina at time process was served on insurance commissioner, though it had ceased to solicit new business. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438. Under Shannon's Code, § 4546, providing that process may be served on any agent of a foreign corporation that is within the county where suit is brought, no matter what kind of agent he is, valid service cannot be made on a person merely retained as an attorney, the corporation having never transacted business in the state. Thach v. Continental Travelers' Mut. Acc. Ass'n [Tenn.] 87 S. W. 255. Under P. L. 1896, p. 307, though a course of action grew out of business other than that specified in the statement filed by the corporation with the secretary, service on the designated agent is sufficient to give the court jurisdiction. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822. A foreign corporation which organized and controlled another corporation in New Jersey, caused

pose of obtaining a personal judgment, unless the corporation was engaged in business in the state [3] at the time service was made,[4] and unless the person served was authorized to accept service,[5] and was one of the persons designated by the statute as those upon whom service may in such case be made.[6] Service upon an officer

it to issue bonds and stock, which it took, and also bought stock in other corporations, and took money from its stockholders, and guaranteed payment of its bonds by another corporation, was engaged in business in New Jersey within P. L. 1896, p. 307. Id. A foreign corporation is not "found" within a district within the meaning of U. S. Rev. St. § 739, for the service of process, when its president comes temporarily into the district on business of the corporation, such corporation having no office or place of business therein, and not having transacted any business there except that which the president came to transact. Territory v. Baker [N. M.] 78 P. 624. The fact that a railroad company organized under an act of Congress (29 St. at L. 622, c. 374) owned lands in New Mexico, and prosecuted trespass actions to protect such land, did not authorize service of summons on the president of the company while passing through the state on a train, in a personal action in which an attachment may be levied on property of the corporation in the state (assuming that the state law is applicable to a corporation organized under Federal law). Territory of New Mexico v. Baker, 196 U. S. 432, 49 Law. Ed. 540. Service on the treasurer of a foreign corporation in New York does not give a Federal court sitting in that state jurisdiction, when it is not at the time, and has never been engaged in business in the state. Kendall v. American Automatic Loom Co., 198 U. S. 477, 49 Law. Ed. 1133. Where property insured by a foreign corporation was located in New York, the loss was, by the terms of the policy, to be there adjusted, and the company was given the option, in case of loss, of payment, repairing or rebuilding, a cause of action for a loss arose in the state of New York, so that summons could be served in accordance with N. Y. Code Civ. Proc. § 432, subd. 3. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 Law. Ed. 810. Under N. Y. Code Civ. Proc. § 432, subd. 3, service of summons on a resident director of a foreign insurance company gives a Federal court sitting in New York jurisdiction, if the cause of action arose in the state and the company is doing business therein. Id. A foreign insurance company which regularly solicits business in New York insures property there, and sends agents there to adjust losses, is doing business in the state, so that a Federal court sitting in the state may acquire jurisdiction over it. Id.

Note: "The question what constitutes doing business by a foreign corporation is usually presented under a state statute imposing conditions thereon, the payment of a tax, for example, or the filing of a certificate of its financial condition. The natural meaning of the term is often variously warped and narrowed in accordance with the supposed intent of the legislature to avoid interference with some policy of the state or with interstate commerce. Commonwealth v. Standard Oil Co., 101 Pa. 119; 148; Coit & Co. v. Sutton, 102 Mich. 324, 25 L. R. A. 819. In that line of cases the temper of the courts is decidedly against the decision in Penn., etc., Ins. Co. v. Meyer, 197 U. S. 407, 49 Law. Ed. 810. People v. Gilbert, 44 Hun [N. Y.] 522; New Orleans v. Virginia, etc., Ins. Co., 33 La. Ann. 10. But here the question is whether the corporation has not done business in the state so that it may fairly be subjected to jurisdiction on proper service. The court is restrained by no adverse policy; it is rather encouraged to furnish domestic relief to domestic plaintiffs, and may well decide on the natural, though difficult, basis of fact. This distinction is not expressed in the cases, but, it is submitted, will avoid some of the confusion on the subject. Colorado Iron-Works v. Sierra Grande Mining Co., 15 Colo. 499."—18 Harv. L. R. 619.

4. Johnston v. Mut. Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

5. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438. Local "correspondents" of a foreign corporation which sends them market quotations to enable them to take orders for stock deals from customers, may properly be treated as agents for service of process, though their contracts expressly disclaim agency, where it appears that the "correspondents" are paid by commissions and the corporation is the party really interested in their transactions. Board of Trade of Chicago v. Hammond Elevator Co., 198 U. S. 424, 49 Law. Ed. 1111. Bank president who collected dues and charges and remitted same for building association, not as special agent but only as a part of his general banking business, and who ceased doing this after liquidation of association had commenced, was not an agent authorized to receive service for the association. Cooper v. Brazelton [C. C. A.] 135 F. 476.

6. Where plaintiff's attorney called at the office of the secretary of a foreign corporation and was informed by the clerk that all the officers were outside the state, and was given names of resident directors, he had used due diligence to obtain service on officers, and service on a director was sufficient, under the New York statute. Honeyman v. Colorado Fuel & Iron Co., 133 F. 96. Advertising solicitor for New Jersey paper, who had an office in New York, containing his own furniture, held not a "managing agent" within Code Civ. Proc. § 432, subd. 3. Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. S. 671. One who had been, but had ceased to be, a mere solicitor of applications in a company which sells sick, accident and funeral benefits, is not a "managing agent" within the meaning of the Ohio statute on whom service may be made. Spiker v. American Relief Soc. [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611. Rev. St. 1895, art. 1223, provides that citation may be served on the president or general manager or any local agent of a foreign corporation; hence, where service is

casually in or merely passing through the state is not valid.[7] The appointment of an agent to receive service cannot be revoked so as to defeat service in an action to enforce liability previously incurred,[8] no other agent having been designated in accordance with the statute,[9] and this is true even though at the time of service the corporation has ceased to do business in the state.[10] The appointment in the state of a second agent upon whom process may be served, and the filing of the certificate of such appointment as required by law, is an implied revocation of the authority of the former agent,[11] and is sufficient notice of such revocation to all persons interested.[12] Service should be upon the person designated by law at the time of instituting suit, regardless of a change in the law in that respect since the liability sought to be enforced was incurred.[13] Under the New York statute service on a cashier or managing agent is good only when the corporation has property in the state, or the cause of action arose there,[14] and when after the exercise of due diligence, the

on the general manager, it need not be shown that he was also a local agent. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

7. Service on a director of a foreign corporation casually in the state for a few days, when the corporation has no property, and is not engaged in business in the state of New York, does not give a Federal court sitting in that state jurisdiction. Remington v. Central Pac. R. Co., 198 U. S. 95, 49 Law. Ed. 959. Where service was on vice-president of Missouri corporation who was in New Jersey on private business, and was not sent or authorized by the corporation to go or to receive process, the New Jersey courts did not acquire jurisdiction. Puster v. Parker Mercantile Co. [N. J. Eq.] 59 A. 232. Service on officer of corporation temporarily in the state to hire an engineer is not a legal service on the corporation under Rev. St. c. 32, § 26. Schillinger Bros. Co. v. Henderson Brewing Co., 107 Ill. App. 335. In an action to recover a personal judgment against a foreign corporation, service on its secretary, while temporarily in the state, such secretary not having transacted the business out of which the action grew (Act No. 149, p. 188, of 1890) and the corporation having no property in the state, and not being engaged in business therein, is insufficient to support a judgment. Southern Saw Mill Co. v. American Hardwood Lumber Co. [La.] 38 So. 977.

8. Insurance company which had consented to service on insurance commissioner could not revoke his power to receive service in actions on policies previously issued. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438, afd. 45 Misc. 316, 90 N. Y. S. 539. See, also, Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10; and Lambert v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1059.

9. Service on a designated agent is good, though the corporation has, in writing, previously revoked the agent's authority, and sent a copy of the revocation to the secretary of state, no other agent having been designated under P. L. 1896, p. 307. Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822.

10. It is held, under the New Jersey statute requiring a foreign corporation doing business in the state to designate an agent upon whom service of process may be made, that the courts of that state may enforce their jurisdiction by process served upon the designated agent, whether the corporation is actually engaged in business in the state at the time of such service or not (Groel v. United Elec. Co. [N. J. Eq.] 60 A. 822), and the statute, as so construed, does not violate the constitutional requirement of due process of law (Id.).

11. Mullins v. Central Coal & Coke Co. [Ark.] 84 S. W. 477.

12. Service upon first agent after such revocation ineffective to give notice to corporation of suit against it. Mullins v. Central Coal & Coke Co. [Ark.] 84 S. W. 477.

13. Under Laws N. C. 1899, c. 54, § 62, providing for appointment of insurance commissioner to receive service of process on foreign insurance companies, process should be served on such commissioner in actions on policies issued when the law provided for service on the secretary of state. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438, afd. 45 Misc. 316, 90 N. Y. S. 539. As so construed, the law affects only the remedy, and does not impair the obligation of contracts, in the case of policies previously issued. Id. When a policy of insurance was taken in North Carolina from a New York company, the North Carolina statute provided for service of process on foreign companies by service on the secretary of state, but thereafter the insurance commissioner was substituted for the secretary of state by law, and the company complied with the law as changed. Held, such law and the compliance therewith were for the benefit of policy holders, and the holder in question who acquired judgment in North Carolina in an action in which service was on the insurance commissioner, could recover on such judgment in an action thereon in New York, even though the company had attempted to revoke the agency of the commissioner of North Carolina and had ceased to do business in that state. Woodword v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10.

14. Allegation in libel suit that paper containing libellous matter was "circulated throughout Jersey City and the state of New Jersey and other states of the United States" does not show that the cause of action arose in New York. Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. S. 671.

officers named in the statute cannot be found in the state.[15] A foreign corporation doing business in Georgia and having agents in the state for that purpose may be served in the same manner as domestic corporations.[16]

To sustain a default judgment, the return must show facts bringing the service as made within the terms of the statute.[17]

Limitations.[18]—A foreign corporation which has complied with the laws of a state, and which has been regularly and continuously doing business therein during the entire period required to bar an action, and during all that time has had an agent resident therein on whom personal service of process could be had, may avail itself of the statute of limitations of such state.[19]

§ 4. *Remedies of stockholders and creditors as against foreign corporations and their officers.*[20]—A court of equity should not take jurisdiction of a controversy relating to the internal management of a foreign corporation at the suit of a stockholder, when no question of public concern is involved,[21] especially where all the property of the corporation with which it carries on business is located in the state which granted its charter.[22] Courts have no jurisdiction to appoint a general receiver of a foreign corporation, or to enjoin it from exercising the powers granted by a sister state or foreign government.[23] But a receiver of assets of the corporation within the state will be appointed in a proper case.[24] Resident stockholders of a foreign corporation may maintain an action to protect their interests by enforcing a contract in favor of one foreign corporation against another corporation where such a cause of action could be maintained if the corporation of which they are stockholders was a domestic corporation.[25] It is held in New York that, at the suit of an officer, director, stockholder, or

15. Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. S. 671.

16. Civ. Code 1895, § 1899, is broad enough to apply to both foreign and domestic corporations. Reeves v. Southern R. Co. 121 Ga. 561, 49 S. E. 674.

17. Where both citation and return described person served merely as agent, a default judgment could not be sustained, as the return must affirmatively show service on "a local agent within the state." National Cereal Co. v. Earnest [Tex. Civ. App.] 87 S. W. 734. Where the statute permits service on the secretary of state, when no agent has been designated, the sheriff's return, in case of service on such official, must show that no agent has been designated. Court acquires no jurisdiction without such fact appearing, and default judgment may be set aside. Construing St. 1899, c. 94, § 1. Willey v. Benedict Co., 145 Cal. 601, 79 P. 270. A return which does not show such fact is not aided by the certificate of the secretary of state, attached to the summons as returned, that no agent had been designated. Such certificate is no proper part of the record to which the court must look in determining whether a default judgment should be set aside. Id.

18. See 3 C. L. 1465.

19. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. [N. D.] 103 N. W. 915.

Note: The weight of authority is said to sustain the rule given in the text. See Huss v. Railway Co., 66 Ala. 472; Lawrence v. Ballou, 50 Cal. 258; King v. National, M. & E. Co., 4 Mont. 1, 1 P. 727; Wall v. Railway Co., 69 Iowa, 498, 29 N. W. 427; Insurance Co. v. Duerson's Ex'r, 28 Grat. [Va.] 630; Turcott v. Railway Co. [Tenn.] 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768; City v. Railway Co. [Minn.] 48 N. W. 17; Pennsylvania Co. v. Sloan, 1 Ill. App. 364; Abell v. Insurance Co., 18 W. Va. 400. The courts of New York, Wisconsin, and Nevada hold that a foreign corporation is incapable of being present in a state other than that under whose laws it exists, and hence, under all circumstances, a foreign corporation is absent from all other states than that of its domicile. Consequently those courts hold that a foreign corporation comes within that provision of the statute of limitations which excepts absentees from its operation. Olcott v. Railway Co., 20 N. Y. 210, 75 Am. Dec. 393; Rathbun v. Railway Co., 50 N. Y. 656; Larson v. Aultman & Taylor Co. [Wis.] 56 N. W. 915, 39 Am. St. Rep. 893; Insurance Co. v. Fricke [Wis.] 74 N. W. 372, 41 L. R. A. 557; State v. Society [Wis.] 79 N. W. 220; Robinson v. Imperial, etc., Co., 5 Nev. 44.—From opinion in Colonial & U. S. Mortg. Co. v. Northwest Thresher Co., cited above.

20. See 3 C. L. 1463.

21, 22. Bradbury v. Waukegan & W. Min. & Smelting Co., 113 Ill. App. 600.

23. Acken v. Coughlin, 34 Civ. Proc. R. 200, 92 N. Y. S. 700.

24. Courts of a state wherein a foreign corporation is engaged in business have jurisdiction to appoint a receiver of assets of the corporation, at the instance of a stockholder, to preserve such assets for the benefit of creditors. Reusens v. Manufacturing & Selling Co., 99 App. Div. 214, 90 N. Y. S. 1010. In a suit for a receiver by creditors of a New Jersey corporation, the state of New Jersey could file a claim for a franchise tax. Holshouser Co. v. Gold Hill Copper Co. [N. C.] 50 S. E. 650.

25. Jacobs v. Mexican Sugar Refining Co.,

creditor of a foreign corporation, the courts of that state have jurisdiction to compel officers or directors of the corporation, over whom jurisdiction has been acquired by the service of process, to account to the corporation for property of the corporation in their hands, or which they have misapplied.[26] The court may, in a proper case, enjoin such officers or directors from disposing of property of the corporation in their hands until final judgment, or may appoint a receiver of the property in the state pending final judgment; but an order granting such injunction or appointing a receiver of such property can only be made when necessary to protect the corporation or its stockholders and creditors against an unlawful disposition of the property of the corporation during the pendency of the action.[27]

Since the claims of domestic creditors are preferred to those of foreign creditors,[28] a foreign receiver of a nonresident corporation cannot defeat the levy of an attachment or garnishment by a domestic creditor on property of the corporation in the state.[29] Thus, where domestic creditors of an insolvent foreign corporation have attached and seized under execution funds and property of the corporation situated in the state, an ancillary receiver will not be appointed to collect the funds and turn them over to the foreign receiver.[30] The courts of one state will not take jurisdiction of a suit by creditors of a foreign corporation to enforce a liability of citizens of the state where suit is brought under a statute of the sister state, which is the corporation's domicile, since the corporation cannot be brought into court, and it, as well as all the stockholders, should be made parties.[31]

FOREIGN JUDGMENTS.[32]

§ 1. *Recognition and effect.*[33]—The judgment of a court of competent jurisdiction of another state or of a foreign nation[34] is generally held to be conclusive and binding on other courts, and when properly proved, will be recognized as conclusive evidence of the facts adjudicated. As applied to judgments of foreign nations, the rule has some limitations, growing out of the rules of international com-

93 N. Y. S. 776. A suit by a stockholder of a foreign corporation in his own behalf and in behalf of other stockholders similarly situated, to have cancellation of a lease declared null and void is not brought for the benefit of the corporation, and hence the suit is not prohibited by Code Civ. Proc. § 1780, and the courts have jurisdiction. Id., 45 Misc. 180, 91 N. Y. S. 902, afd. 93 N. Y. S. 776.

26, 27. Acken v. Coughlin, 34 Civ. Proc. R. 200, 92 N. Y. S. 700.

28. Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. [Ark.] 87 S. W. 632; Clark v. Supreme Council of Order of Chosen Friends, 146 Cal. 598, 80 P. 931. Claim of New Jersey for franchise tax, through provable in receiver proceedings in North Carolina, will not be preferred to claims of domestic creditors of the New Jersey corporation, even though the New Jersey statutes declare that such tax shall be a preferred claim in case of insolvency. Holshouser Co. v. Gold Hill Copper Co. [N. C.] 50 S. E. 650.

29. Levy or service being before receiver has obtained possession of goods. Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. [Ark.] 87 S. W. 632.

30. Clark v. Supreme Council of Order of Chosen Friends, 146 Cal. 598, 80 P. 931.

31. Suit should be brought in Colorado to enforce liability of citizens of Maine as stockholders in a Colorado corporation, under a statute of that state. Abbott v. Goodall [Me.] 60 A. 1030.

32. See, also, Judgments, 4 C. L. 287; Former Adjudication, 3 C. L. 1476; Divorce, 5 C. L. 1026 (foreign decrees of divorce).

33. See 3 C. L. 1466.

34. In a personal injury action, a certified transcript of proceedings in Mexican courts, and the finding of such courts that the injury was the result of an accident, and that no culpability was attached to any one, was erroneously excluded; the record of such proceedings should have been admitted to show that plaintiff had no cause of action in Mexico where the injury was inflicted. Mexican Cent. R. Co. v. Chantry [C. C. A.] 136 F. 316.

ity.[35] As applied to judgments of sister states, the rule is absolute, under the construction placed upon the full faith and credit clause of the constitution, and the acts of Congress pursuant thereto,[36] the effect of which is said to be that in the courts of other states, the judgment of a court of a state is not impeachable except for fraud or want of jurisdiction,[37] is indisputable proof that it rests upon an unanswerable cause of action,[38] is conclusive evidence that the right to its enforcement is wholly unaffected by any laches or lapse of time which preceded its rendition,[39] and gives a right of action for its enforcement, subject to limitation and other laws of the forum, which regulate, but do not deny, unreasonably restrict,[40] or oppressively burden, the exercise of that right.[41] The same effect as to its finality must be given such judgment as would be given in the state where it was rendered.[42] Hence, to bring a decree or judgment within the rule, it must be conclusive where rendered,[43] and must be final in its nature.[44] A decree for future payments of alimony, which provides equitable remedies in the nature of execution for its enforcement, is not conclusive or final within the meaning of this rule.[45] The law of the state where the judgment is rendered must be shown in order that it may appear what effect is there given it.[46] In some states it is held that, in the absence of such proof, the court will presume that the laws of the state where the judgment was rendered, as to the faith and credit to be given it, are the same as its own;[47] in others it is held that the faith and credit to be given such judgment are to be determined by the rules of the common law, which is presumed to prevail there.[48] Such lack of jurisdiction as will defeat conclusiveness may be due to the lack of power of the court to deal with the subject-matter[49] or with the parties,[50] or to want of due notice to the per-

35. See note, "Conclusiveness of judgment rendered in foreign country," in 3 C. L. 1466.

36. Const. U. S. art. 4, § 1, and Act of Congress, May 26, 1790, 1 St. 122, c. 11; Rev. St. § 905.

37. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. Court of one state may inquire into jurisdiction of court of another state, and Federal court may inquire into jurisdiction of court of state wherein it is sitting, when its judgment is being considered. Cooper v. Brazelton [C. C. A.] 135 F. 476. Proceedings, judgments and decrees of the courts of another state may be inquired into to determine whether the court had jurisdiction of the subject-matter and parties. Field v. Field, 215 Ill. 496, 74 N. E. 443.

38, 39. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

40. Colorado three-months limitation statute applied to actions on foreign judgments held unreasonable and void. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

41. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

42. Thompson v. Williamson [N. J. Eq.] 58 A. 602. Judgment is entitled to same full faith and credit elsewhere as in state where rendered if the court had jurisdiction. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023. Judgment must be given same effect in other states as it has in the state where rendered. Levison v. Blumenthal, 25 Pa. Super. Ct. 55. If conclusive where rendered, it is conclusive everywhere. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. Kansas judgment rendered for defendant on plaintiff's opening statement given full value in Missouri, since in both states, a court has jurisdiction to enter judgment in such manner in a proper case. Tootle v. Buckingham [Mo.] 88 S. W. 619.

43. Page v. Page [Mass.] 75 N. E. 92.

44. Page v. Page [Mass.] 75 N. E. 92. Final order in supplemental proceedings in New York is a final decree or judgment conclusive in New Jersey. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. Objection that judgment is not final because it provides for subsequent taxation of costs by clerk untenable, especially where record showed taxation of costs entered thereon after date of judgment. Clark v. Barber, 21 App. D. C. 274.

45. Since such a decree is usually subject to modification by the court rendering it. Page v. Page [Mass.] 75 N. E. 92.

46. In order that full faith and credit may be given it. Baltimore & Ohio S. W. R. Co. v. McDonald, 112 Ill. App. 391.

47, 48. Old Wayne Mut. Life Ins. Ass'n v. McDonough [Ind.] 73 N. E. 703.

49. Since courts of one state cannot by decree affect title to realty in other states, a decree attempting to do so is entitled to no credit in the state where the land is situated. Courtney v. Henry, 114 Ill. App. 635. New York court held to have jurisdiction of debt recoverable in that state by a judgment debtor; hence could appoint receiver in supplementary proceedings. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

50. A receiver of a Minnesota corporation cannot enforce in New York a judgment for an assessment against a stockholder of a corporation acquired under Const. art. 10, and Laws Minn. 1899, c. 272, providing for

son against whom it is rendered,[51] or to fraud practiced on the court.[52] Proceedings of courts of general jurisdiction are presumptively regular and valid, and jurisdiction of such a court is presumed where no defect appears in the record,[53] and judgments against foreign corporations are no exception to this rule,[54] though it is said

enforcement of double liability of stockholders, when the stockholder was never a resident of Minnesota and did not appear in the proceedings in which the receiver was appointed and judgment for the assessment given. Converse v. Stewart,94 N. Y. S. 310. Court of Maryland held to have had jurisdiction of a garnishee by personal service on him while temporarily in the state; hence its judgment in the garnishment proceedings was entitled to full faith and credit in North Carolina, when pleaded in bar in an action on the debt in the courts of that state. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023. When Utah corporation "appeared" within the meaning of Rev. St. Utah, 1898, § 3334, and similar Illinois statute, and submitted to jurisdiction of Illinois court by pleading that it was sued in a wrong name, without objecting to the jurisdiction, it could not thereafter attack the Illinois judgment collaterally in a suit in Utah. Richardson & Boynton Co. v. Utah Stove & Hardware Co., 28 Utah, 85, 77 P. 1. Where in action on North Carolina judgments against a nonresident, insurance company, the judgment roll fully showed jurisdictional facts, including service of summons on insurance commissioner according to the statutes recited in the judgment roll, evidence of an attempted revocation of the authority of the commissioner could not show want of jurisdiction, since such revocation could not be made. Lambert v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1059.

51. A judgment rendered against a person without due notice to him is not entitled to credit and will not be enforced elsewhere. Where an apparently final judgment of dismissal was, without notice to defendant, stricken, and a judgment for plaintiff entered, such judgment was not enforceable in another jurisdiction. Karrick v. Wetmore, 25 App. D. C. 415. Notice of proceeding to an agent held sufficient. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. Nebraska court, having jurisdiction of subject-matter and parties in foreclosure action, had jurisdiction, under the law of that state, to enter a deficiency judgment after the return of the sale was made, though the defendant had then removed from the state, no notice of the entry of such judgment being by law required. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

52. Where party obtaining divorce practiced fraud on Nebraska court, its decree was held void and not binding on Illinois court. Field v. Field, 215 Ill. 496, 74 N. E. 443. Facts constituting fraud held not to be alleged in answer in action on judgment, and no evidence of fraud in the record. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279. Where, in a Nebraska suit, plaintiff served notice that his deposition would be taken in Ohio, and defendant went to Ohio and while there was served with a writ in a suit by plaintiff in Ohio, jurisdiction was not acquired in Ohio by fraud; hence Nebraska court is bound to recognize Ohio judgment, and refusing to do so on the ground that the fraud alleged by defendant, in an action thereon in Nebraska, is an equitable defense which would be good in Ohio, is a violation of the constitution. Jaster v. Currie, 198 U. S. 144, 49 Law. Ed. 988.

53. If want of jurisdiction of the subject-matter or parties does not appear from the transcript of the proceedings, the burden of proving it is on the person attacking the judgment. Want of jurisdiction not shown, where transcript showed judgment by a court of record, having a judge and clerk, and no other evidence was produced. Old Wayne Mut. Life Ass'n. v. McDonough [Ind.] 73 N. E. 703. A decree, if in the proper form, and in accordance with the statutes of the state where rendered, imports absolute verity and want of jurisdiction must be made to appear. Wisconsin court held to have had jurisdiction of parties in divorce suit under the statutes; hence decree of divorce conclusive on Minnesota court. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960. Montana foreclosure decree, rendered upon service by publication presumed to be in accordance with statutes of that state. Clark v. Eltinge [Wash.] 80 P. 556. Even though jurisdictional facts are not shown in the judgment roll, this presumption extends to due service of process; return of service on foreign corporation by leaving summons with insurance commissioner held good. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1052. Recitals in transcript of justice's judgment held to show justice had jurisdiction. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279. Recitals of jurisdictional facts in final order prima facie evidence of the existence of those facts. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. As that agent of corporation served was proper person to accept service. Id. Necessary jurisdictional facts being recited in order appointing receiver in supplementary proceeding in New York, the order was conclusive proof of the regularity and validity of the order. Id. Where it appeared that court had jurisdiction of subject-matter, and of defendant, by its general appearance, validity of service was immaterial; hence the admission of evidence outside the record, though unnecessary, was harmless, since the judgment could not be collaterally attacked. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1062. Where judgment roll showed that court, on preliminary motion to set aside service and dismiss, found that service was duly made on an authorized agent of a foreign corporation, and that he forwarded the summons served on him, and where final judgment recites that summons was duly served on defendant, the judgment is valid and must receive full faith and credit. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1048.

54. Judgment roll need not show that

in the Federal courts that somewhere in the record it must appear that the corporation was engaged in business in the state or appeared in the action.[55] The record, however, is not conclusive, and may be contradicted as to facts necessary to give the court jurisdiction.[56] There is no such favorable presumption if want of jurisdiction appears on the face of the record, and in such case the judgment is subject to collateral attack.[57] It will not be presumed that a judgment of a court of limited jurisdiction is valid [58] and facts essential to its jurisdiction must appear affirmatively on the face of the proceedings.[59] Facts disprobative of jurisdiction may be proved by parol.[60]

A court of one state is not bound by an adjudication of a court of last resort of another state when the highest court of its own state has previously adjudicated the identical issue between the same parties and reached a decision contrary to that of the foreign court.[61]

§ 2. *Matters adjudicated and concluded by foreign judgment.*[62]—If the court

foreign corporation was doing business in the state and that service of summons on it was in the statutory mode. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1052. It is not necessary to include in judgment roll statutes of foreign state which must be complied with in making service on agent of foreign corporation. Id. Allegation of complaint, as shown by record, that corporation was doing business in the state, is sufficient to show jurisdiction could be obtained over it in the state, compliance with law being presumed. Id. Hence it may also be presumed that corporation authorized service on insurance commissioner, as provided by statute, and that such service gave the court jurisdiction. Id.

55. Johnston v. Mutual Reserve Life Ins. Co., 93 N. Y. S. 1052.

56. If it be shown that facts do not exist giving jurisdiction of parties or subject-matter, the judgment will be held a nullity, even though necessary facts are recited. Cooper v. Brazelton [C. C. A.] 135 F. 476. It may be shown that an entry of appearance by an attorney was unauthorized. Evidence insufficient to show that attorney had authority or that his acts had been ratified. Prichard v. Sigafus, 93 N. Y. S. 152.

57. Want of jurisdiction of the parties. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960. Transcript of Ohio judgment held not to show jurisdiction of foreign corporation, service having been made on one not authorized by law to receive it. Spiker v. American Relief Soc. [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611.

58. Erwin v. Southern R. Co. [S. C.] 50 S. E. 778.

59. To make a judgment of an inferior North Carolina court in garnishee proceedings binding on the parties in an action in South Carolina, it must be shown that the court had jurisdiction of the debt and that the garnishee, a foreign corporation, had submitted itself to the courts of the state; that it was doing business therein, or was incorporated therein. Erwin v. Southern R. Co. [S. C.] 50 S. E. 778.

60. Want of jurisdiction of the person. Olson v. Mackolite Fire Proofing Co., 116 Ill. App. 573.

61. A garnishee obtained in Missouri a judgment canceling his contract and declaring he was not indebted to plaintiff's debtor, and thereafter such debtor, in a suit in New Jersey, obtained a judgment that the garnishee was liable on an implied contract for services. In the New Jersey suit the Missouri judgment was successfully pleaded against a count on the contract, but was not pleaded as against the count on an implied contract. Held, in a garnishment proceeding in Missouri, pending when the New Jersey decree was rendered, such decree would not be enforced, but the Missouri decree would be followed. Grimm v. Barrington [Mo. App.] 84 S. W. 357. Held, further, that the garnishee was not bound to plead in New Jersey the pending garnishment suit in Missouri, but was entitled to rely on the Missouri adjudication that he was not indebted to the plaintiff's debtor. Id.

Note: "This case seems questionable. The Missouri judgment was an affirmative defense similar to res adjudicata, and therefore, not having been pleaded to the second count in the New Jersey suit, the judgment on that count was correct. And no defense which with diligence might have been made in the suit can be an answer to an action elsewhere on the judgment. Snow v. Mitchell, 37 Kan. 636. But granting that the New Jersey court erred, by the general rule, full credit must be given the judgment of a sister state, except when rendered by a court without jurisdiction, or when a collateral attack would be valid in that state. See Barras v. Bidwell, 3 Woods [U. S.] 5. Mere irregularity such as affords ground for direct appeal is no defense. Milne v. Van Buskirk, 9 Iowa, 558. By the better view, the error here, if any, would appear to have been ground rather for appeal than for collateral attack, and no appeal having been taken, Missouri was bound to give credit to the judgment. Ex parte Boenninghausen, 91 Mo. 301; Buckmaster v. Carlin, 4 Ill. 104."—18 Harv. L. R. 544.

62. See 3 C. L. 1467; also Former Adjudication, 3 C. L. 1476.

NOTE: The effect as res judicata or as estoppel of a judgment of a court of another state is the same as that of a domestic judgment. Memphis R. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69; West Felicia R. Co. v. Thornton, 12 La. Ann. 736, 68 Am. Dec. 778; Mackee v. Cairnes, 2 Mart.

had jurisdiction, its judgment is conclusive, as between the parties,[63] on all questions of law and fact decided by it,[64] and as to all defenses to the cause of action which were or might have been made.[65] Alleged errors of the court will not be examined in an action on the judgment.[66] The character of the original cause of action may, however, be inquired into, and if it was one which could not have been maintained in the state in which suit on the judgment is brought, no recovery on such judgment can be had.[67]

[La. N. S.] 601; Mutual Nat. Bank v. Moore, 50 La. Ann. 1332, 24 So. 304; Whiting v. Burger, 78 Me. 287, 4 A. 694; Wernag v. Pawling, 5 Gill & J. [Md.] 500, 25 Am. Dec. 317; Taylor v. Bryden, 8 Johns [N. Y.] 173; Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615; Hall v. Mackay, 78 Tex. 248, 14 S. W. 615; Sayre v. Harpold, 33 W. Va. 557, 11 S. E. 17. Whatever might have been pleaded as a defense in the original action cannot be interposed as a defense to an action on the judgment. Drake v. Granger, 22 Fla. 348; Powell v. Davis, 60 Ga. 70; Snow v. Mitchell, 37 Kan. 636, 639, 15 P. 737; West, etc., R. Co. v. Thornton, 12 La. Ann. 736, 68 Am. Dec. 778; Harryman v. Roberts, 52 Md. 64; Green v. Sanborn, 150 Mass. 454, 23 N. E. 224; Greene v. Republic F. I. Co., 84 N. Y. 572; Goodrich v. Jenkins, 6 Ohio, 43; Norwood v. Cobb, 20 Tex. 588; Hall v. Mackay, 78 Tex. 248. Hence no plea or evidence can be permitted which seeks to relitigate the merits of the original controversy. Sammis v. Wightman, 31 Fla. 10, 12 So. 526; Powell v. Davis, 60 Ga. 70; McMahon v. Eagle L. Ass'n, 169 Mass. 539, 48 N. E. 339, 61 Am. St. Rep. 306; Peet v. Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Vaught v. Meador, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.—From note, "Judgments of the Courts of Other States," 103 Am. St. Rep. 304.

63. Defense that judgment was based on gambling transaction open to grantees of judgment debtor. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

64. Held res judicata: Record of foreclosure decree having been admitted in evidence, it was conclusive of the fact of foreclosure, and that fact was no longer in issue. Clark v. Eltinge [Wash.] 80 P. 556. Where in a proceeding for maintenance, in Massachusetts, the validity of the marriage was placed in issue, the decree of the court denying relief, on the ground that there was no marriage, was conclusive on that issue, in an action subsequently brought in New York by the wife to set aside a judgment obtained by the husband annulling their marriage. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231. Under Illinois Laws 1877, p. 115, a decree for separate maintenance of the wife can be granted only where the wife is living separate from the husband without her fault; hence an Illinois decree for separate maintenance is conclusive in a suit by the husband for divorce in California on the issue whether her separation was a willful desertion. Harding v. Harding, 198 U. S. 317, 49 Law. Ed. 1066. The fact that, after considerable evidence had been taken in the Illinois action, the husband filed a stipulation consenting to a decree, did not render it any the less res judicata, since a finding that the separation of the wife was without her fault, was embodied in the decree, and such finding was necessary before a decree could be given for her. Id. Such finding was also affirmed when the decree of the Illinois court was affirmed by the appellate and supreme courts of that state. Id.

Held not res judicata: Title of cattle held not to have been adjudicated by Kansas court in replevin action, where judgment was rendered for defendant on plaintiff's opening statement. Tootle v. Buckingham [Mo.] 88 S. W. 619. Where, in Pennsylvania suit, judgment was for defendants for costs, and plaintiff not having appeared, there was no trial on the merits, such judgment was not binding in trial on merits in New York. Levison v. Blumenthal, 25 Pa. Super. Ct. 55. When an order of sale by a bankruptcy court directed the assignee to sell simply "the interest of such bankrupt and of said assignee," an order refusing to set aside the sale for inadequacy of price and want of notice is not an adjudication of the bankrupt's interest, and a refusal to so treat it does not deny full faith and credit to the order of the bankruptcy court. Cramer v. Wilson, 195 U. S. 408, 49 Law. Ed. 256.

65. Leathe v. Thomas, 109 Ill. App. 434. A judgment duly proven cannot be impeached by showing that no indebtedness existed on which a judgment could properly be rendered. Illinois justice's judgment could not be impeached by defendant's testimony to that effect. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279. Defense that judgment was founded on gambling transaction not available in suit thereon in New Jersey, in the absence of proof that it could have been avoided on that ground in New York. Thompson v. Williamson [N. J. Eq.] 58 A. 602. That deficiency judgment by Nebraska court was barred by limitations of that state cannot be raised in suit on judgment in Oklahoma. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

66. Errors of Nebraska court, not involving jurisdiction, cannot be raised in suit on its deficiency judgment in Oklahoma. Blumle v. Kramer, 14 Okl. 366, 79 P. 215. Judgment of one state cannot be retried on the merits in an action thereon in another, if the court had jurisdiction; even if erroneous, decision is binding until reversed. Levison v. Blumenthal, 25 Pa. Super. Ct. 55. Order granting administration in foreign jurisdiction cannot be collaterally attacked on ground that administrator's decedent was not a resident of the jurisdiction. Consaul v. Cummings, 24 App. D. C. 36.

67. St. Louis Expanded Metal Fireproofing Co. [Tex. Civ. App.] 88 S. W. 512. In an action on a judgment obtained in another state by a foreign corporation, it may be shown by the defendant that the cause of action merged in such judgment arose out

§ 3. *Actions on foreign judgments.*[68]—Since execution will not issue on a foreign judgment, an action thereon is usually necessary to enforce it.[69] In such action, the laws of the forum relating to remedies control.[70] The complaint should show that the court rendering the judgment had jurisdiction,[71] and should show the value of the judgment.[72] It must be made to appear that the judgment sued on was in fact rendered against the defendant.[73] In the absence of contrary proof, a foreign judgment will be presumed to bear interest at the local rate.[74]

Since the full faith and credit clause of the constitution establishes a rule of evidence rather than of jurisdiction,[75] it is not violated by a statute which precludes an action on a foreign judgment by one foreign corporation against another because such action is not upon a cause of action which arose in the state.[76]

of business done in the state, and that the corporation has not complied with statutory regulations of the state. Id.

68. See 3 C. L. 1467.

69. NOTE. Mode of enforcing judgment: The granting to a judgment of each state the same faith and credit in every other state that it has in the state where rendered does not carry the right to enforce it by execution in any other state. The cause of action on which it is founded is by it established, and the matters litigated and determined are conclusively settled, but the enforcement in another state must generally be by an action in its courts to recover another judgment upon which execution may be there issued. While there may be other remedies, they must be such as are authorized by the law of the forum, and in no event can such remedy be by way of process issued in either state, nor by any proceeding taken in the courts of the state where the judgment was rendered. Nations v. Johnson, 24 How. [U. S.] 195, 16 Law. Ed. 218; Carter v. Bennett, 6 Fla. 214; Turley v. Dreyfus, 35 La. Ann. 510; Lamberton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 A. 127; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478; Elizabethtown S. I. v. Gerber, 34 N. J. Eq. 130; Bullock v. Bullock, 52 N. J. Eq. 561, 30 A. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; Bennett v. Bennett, 63 N. J. Eq. 306, 49 A. 501; McLure v. Benceni, 2 Ired. Eq. [N. C.] 513, 40 Am. Dec. 437.—From note, "Judgments of the Courts of Other States," 103 Am. St. Rep. 304.

70. The right of each state to legislate upon the remedy is not restricted by the Federal Constitution. Leathe v. Thomas, 109 Ill. App. 434.

Local **limitation statute** governs. Leathe v. Thomas, 109 Ill. App. 434. But Colorado three months' statute held unreasonable and void. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. Under the twelve-year limitation statute of Maryland, and N. Y. Code Civ. Proc. § 390a, an action in New York on a Maryland judgment, based on a cause of action accruing and thereafter belonging to a resident of Maryland, must be brought within twelve years after the original cause of action accrued in Maryland. Chesapeake Coal Co. v. Mengis, 102 App. Div. 15, 92 N. Y. S. 1003.

71. In an action on an English judgment, a complaint alleging that "said Queen's Bench Division of said High Court of Justice had jurisdiction of the subject-matter of said action and of the parties thereto" and that judgment "was duly given, made and entered in and by" said court, sufficiently alleges jurisdiction of the English court; and findings that the allegations of the complaint are true are sufficient to show jurisdiction. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053.

72. In an action on an English judgment, the value of the judgment is sufficiently alleged by an averment that on the date of the judgment its value was $7,055 in lawful money of the United States. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053.

73. Evidence insufficient to show whether corporation or firm, or if a firm, who composed the firm. Whitman v. Hitt [Ark.] 87 S. W. 1032.

74. English judgment presumed to bear interest at seven per cent. in California. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053. Interest was properly computed from the figures of the complaint when the findings were that the allegations of the complaint were true. Id.

75. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 48 Law. Ed. 225. See, also, note in 3 C. L. 1466, n. 46.

76. N. Y. Code Civ. Proc. § 1780, as construed by New York courts, is constitutional. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 48 Law. Ed. 225.

NOTE. When actions on foreign judgments may be maintained: An action may be maintained in each state on a judgment or decree rendered in another whenever it creates a personal obligation for the payment of money. Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Bullock v. Bullock, 57 N. J. Law, 508, 31 A. 1024. Nor is it within the power of a state to deprive a judgment creditor of his right to resort to its courts for the purpose of maintaining an action on his judgment. This has been attempted by statutes declaring that an action shall not be brought in a state against a resident thereof on a judgment recovered in another state on a cause of action barred by the statute of limitations of the former state when the action on the judgment was commenced. Such statutes were pronounced unconstitutional. Christmas v. Russell, 5 Wall. [U. S.] 290, 18 Law. Ed. 475; Keyser v. Lowell [C. C. A.] 117 F. 400; Dodge v. Coffin, 15 Kan. 283. This was because the judgment creditors were of a class having a right to resort to the courts of the state where they brought suit on their judgment, and, having such right, to deny them relief was to deny to their judg-

Proof of foreign judgments.[77]—Foreign judgments are provable by transcripts, if properly authenticated.[78] The sufficiency of the authentication is for the trial court,[79] and is to be determined by reference to the law of the forum.[80] An authentication of the judgment of a sister state in accordance with the provisions of the act of Congress is not the only method of proving such judgment in a suit thereon;[81] but proof may be made by a witness who has compared the copy offered in evidence with the original record entry thereof, or who has examined the copy while another person read the original.[82]

FOREIGN LAWS, see latest topical index.

FORESTRY AND TIMBER.

§ 1. *Protection and regulation of forests and trees.*[83]—In New York the commission of the forest preserve is given the care, control, and supervision of the forest preserve and has the actual possession and occupancy thereof.[84] A fish and game protector and forester in that state has no authority to sell as agent for the state, wood cut from the forest preserve, and a buyer from him acquires no title even as against one taking the wood without right.[85]

Statutes in some states provide a penalty for willfully and knowingly, and without the consent of the owner, cutting the trees of another.[86] In an action to recover the same, the burden of establishing want of consent is on the plaintiff.[87]

In Arkansas anyone desiring to cut any timber for certain specified purposes is required to have the land on which the same is situated surveyed by the county surveyor, and its metes and bounds marked and plainly established, unless the same

ment the faith and credit to which it was entitled in the state where rendered. If, however, a judgment creditor has no absolute right to resort to the courts of a state, it may by statute deny him the right to sue there on a judgment recovered in another state. Hence, a statute providing that an action against a foreign corporation may not be maintained by another foreign corporation or by a non-resident, except when the cause of action arose within the state, is not unconstitutional, though applicable to a judgment pronounced against a foreign corporation in another state. Anglo-American P. Co. v. Davis Provision Co., 191 U. S. 376, 48 Law. Ed. 228; Id., 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608. Doubtless, however, general laws prescribing the time within which causes may be enforced within a state may apply to judgments rendered in another state, provided always that a reasonable time is left to creditors within which to seek remedies on their judgments. Fields v. Mundy's Estate, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.—From note, "Judgments of Courts of Other States," 103 Am. St. Rep. 304.

77. See, also, Evidence, 5 C. L. 1301.

78. Transcript admissible though signatures of judge and clerk in certificates attached thereto contained only initials of their Christian names. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

79. Clark v. Eltinge [Wash.] 80 P. 556.

80. Authentication of transcript of Illinois justice's judgment held sufficient under Code, § 464. Morrison Mfg. Co. v. Rimerman [Iowa] 104 N. W. 279.

81. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 88 S. W. 512.

82. Copy so proved is admissible as an "examined copy" and is prima facie proof of judgment. St. Louis Expanded Metal Fireproofing Co. v. Beilharz [Tex. Civ. App.] 88 S. W. 512.

83. See 3 C. L. 1468.

84. Laws 1900, c. 20, § 220, p. 62. People v. Kelsey, 180 N. Y. 24, 72 N. E. 524. Is an occupant within the meaning of Laws 1896, c. 908, § 134, p. 842, requiring that, where land is sold for taxes, notice to redeem shall be given to the occupant before a deed is given, and where land is deeded to the state as part of the preserve subject to all previous taxes and tax sales, a purchaser at such a tax sale must serve such notice on the commission. Id.

85. No statutory authority, and no such authority will be presumed. Pashley v. Bennett, 95 N. Y. S. 384.

86. Code 1896, § 4137. Davis v. Arnold [Ala.] 39 So. 141.

87. Davis v. Arnold [Ala.] 39 So. 141. Evidence held sufficient to make the question of consent one for the jury. Id.

has already been surveyed and the boundaries thereof ascertained and known.[88] The owner cannot justify a failure to cause an official survey to be made by showing a previous unofficial one, unless the same is proved to be correct, nor unless the true boundaries are ascertained and known.[89] He is not, however, guilty of a violation of the act where he procures an unofficial survey, which is incorrect in that it is less favorable to him than a subsequent official one, and where he cuts no trees outside of the true boundaries.[90]

§ 2. *Logs and lumbering; booms and flotage.*[91]—Lumber operations on legally navigable streams involve public and private rights in such streams which are the subject of a separate article.[92] Such being in some degree a public occupation is subject to regulation.[93] Thus statutes in some states require copies of log marks to be filed with the surveyor general and, when so recorded, make them prima facie evidence of ownership of the logs bearing them.[94]

Growing timber is a part of the realty,[95] and deeds and contracts concerning it are governed by the laws applicable to that kind of property.[96] Title thereto may be transferred to and held by one not the owner of the land;[97] but contracts conveying it must be executed with the same formalities as are required in the conveyance of real estate.[98] An attempted parol conveyance confers on the grantees a mere license to enter upon the premises and cut and remove the growth,[99] which is revocable at any time,[1] and is revoked at the death of the grantor.[2] Acts done upon the land by the licensee after revocation, and without other lawful authority, render him liable as a trespasser.[3] The authority of an agent to grant such a license need not be in writing.[4]

88. Kirby's Dig. § 1988. Sawyer & A. Lumber Co. v. State [Ark.] 87 S. W. 431.

89, 99. Sawyer & Austin Lumber Co. v. State [Ark.] 87 S. W. 431.

91. See 3 C. L. 1468.

92, 93. See Navigable Waters, 4 C. L. 757.

94. Held proper to allow witness to testify as to marks on logs converted and as to his knowdedge of marks used by certain parties for the purpose of identifying them, without proof that such marks were recorded in accordance with the laws of Minnesota, in which state they were cut. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259.

95. See Emblements and Natural Products, 5 C. L. 1096. Neils Lumber Co. v. Hines, 93 Minn. 505, 101 N. W. 959; Hodsdon v. Kennett [N. H.] 60 A. 686; Hawkins v. Goldsboro Lumber Co. [N. C.] 51 S. E. 852; Van Doren v. Fenton [Wis.] 103 N. W. 228. Civ. Code, §§ 658, 660. Peterson v. Gibbs [Cal.] 81 P. 121. One who, for a valuable consideration, purchases standing timber from the owner of the land, acquires a vested interest in such land, provided the transfer is evidenced by a duly executed instrument, and, as against the vendor, is authorized to cut and remove the timber within the time limited by the contract for so doing. Neils Lumber Co. v. Hines, 93 Minn. 505, 101 N. W. 959. Contract for sale of standing trees is contract for sale of interest in land. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746; Brodack v. Morsbach [Wash.] 80 P. 275. Title to the land being in defendant, and the timber being a part of it, the burden of proving that he had parted with title to the timber and that plaintiff owned it was on him. Watson v. Gross [Mo. App.] 87 S. W. 104.

96. Hawkins v. Goldsboro Lumber Co. [N. C.] 51 S. E. 852.

97. Peterson v. Gibbs [Cal.] 81 P. 121.

98. Oral contract to sell it is void as a contract. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319. Cannot be conveyed by parol. Hodsdon v. Kennett [N. H.] 60 A. 686. Failure to allege that contract was in writing cannot be taken advantage of by demurrer, silence raising no presumption that it was in parol. Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S. E. 725. Receipt reciting parties to the contract, the price to be paid, and a description of the land, and signed by the owner, held a sufficient memorandum to constitute a valid contract for sale of timber within the statute of frauds (Pub. St. 1901, c. 215, § 1), though not stating the time within which timber must be cut and removed, where there was no agreement in that regard. Kidder v. Flanders [N. H.] 61 A. 675.

99. Hodsdon v. Kennett [N. H.] 60 A. 686. Though contract is void as a contract, it is good as a license, and timber cut before its revocation belongs to grantee. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

1, 2. Hodsdon v. Kennett [N. H.] 66 A. 686.

3. Defendants liable as trespassers for clearing lot after death of one of the grantors and notification by the other not to cut wood and timber. Hodsdon v. Kennett [N. H.] 60 A. 686.

4. Evidence held to show that agent had authority. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

Conveyances of standing timber are within the recording acts, and the usual rules in regard to the effect of recording them apply.[5] There can be no warranty of title to timber by parol,[6] nor is there an implied warranty of title on a parol purchase thereof.[7] A decree quieting title to land should protect the rights of one to whom the growing timber thereon has been conveyed by reserving and excepting such timber from its operation.[8]

One purchasing land with full knowledge of a previous sale of the timber thereon acquires no interest in the timber except a right to have it revert to him in case it is not removed under the contract of sale.[9] A promise by the grantor to secure a release and satisfaction of the timber contract cannot avail him as against the holders thereof.[10]

Contracts for the sale of growing timber showing an intent to separate it from the soil immediately, or within a reasonable time, are generally held to pass title to the timber upon the severance thereof and not before.[11] When, however, the intent is to buy growing trees and to allow them to remain upon the land and take its benefit by future growth, it is a sale of an interest in the land, passing title at once.[12] The general rule that the seller is deemed to have parted with title to the property when he permits the buyer to change its character by expending money and labor upon it applies.[13] Severance of the timber changes its character from realty to personalty, and the purchaser thereby takes actual manual control and possession of it.[14]

There is an apparent conflict of authority as to whether one purchasing growing timber under a contract limiting the time within which it must be removed loses title to all timber not removed within that time. It would seem, however, that the cases might be reconciled by regarding the question as one of intention to be determined from the terms of the contract itself.[15] A right of forfeiture for failure to re-

5. See Notice and Record of Title, 4 C. L. 829. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746. Option held to have ripened into valid contract when accepted, and hence it was entitled to be recorded and record was constructive notice to subsequent purchasers. Id. Evidence held to also show actual notice. Id. One purchasing land after the execution by the owner of an instrument conveying the timber thereon to a third person, which is not recorded, and who enters into possession prior to the cutting of the timber without actual or constructive notice of the sale, acquires a paramount interest in the timber. Neils Lumber Co. v. Hines, 93 Minn. 505, 101 N. W. 959.

6. Van Doren v. Fenton [Wis.] 103 N. W. 228.

7. Particularly when timber was not in the possession of the vendor. Rule in regard to implied warranties in sales of personalty not applicable. Van Doren v. Fenton [Wis.] 103 N. W. 228.

8. Peterson v. Gibbs [Cal.] 81 P. 121. In suit to quiet title, where it appeared that plaintiff owned land and defendant the timber, held error to grant a nonsuit, but plaintiff's interest should have been declared by the court. Id. See, also, Quieting Title, 4 C. L. 1167.

9. Brodack v. Morsbach [Wash.] 80 P. 275. His subsequent possession of the land as against purchasers of timber is not under "claim and color of title, made in good faith," as required by 2 Ball. Ann. Codes & St. § 5503, in order to confer title by adverse possession in seven years. Id. See. also, Chemical Charcoal Co. v. Smith [Miss.] 38 So. 232.

10. Brodack v. Morsbach [Wash.] 80 P. 275.

11. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. See, also, Sales, 4 C. L. 1318.

12. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

13. Buskirk Bros. v. Peck [Mo. Va.] 50 S. E. 432. Contract held to show an intention that title to timber should vest in vendee as cut down, subject to a lien thereon in favor of the vendor for the purchase money, reserved by a provision prohibiting removal before payment. Id.

14. Will not be presumed that he will go to expense of cutting and hauling it without acquiring at least an equitable interest therein. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

15. **In California** it is held that a sale of standing trees to be removed may be an absolute sale, the agreement to remove within a specified or reasonable time being merely a covenant, in which case the timber remains the property of the purchaser, though not removed within such time, the question in each case being one of intention. Peterson v. Gibbs [Cal.] 81 P. 121. Instrument whereby owners of land "grant, bargain, sell, and convey" all the timber on certain land, and give the vendees ten years in which to remove it, each party to pay half the taxes on the land during that period, and, in case it is not removed within

that time, the vendees to pay a yearly rental for the privilege of removing it thereafter, held to constitute absolute sale of timber, whether removed in ten years or not, only effect of failure to remove it being to render vendees liable for rent. Id. Evidence that vendors entered into contract relying on statements of vendees that they expected to commence work within three years, held not to affect contract or assist in its construction, it being unambiguous. Id.

In Georgia an instrument executed in the form of a deed conveying all the timber on a certain lot suitable to be manufactured into cross-ties, and providing that the contract shall expire after a certain time, does not pass to the purchaser the absolute title to the timber, but only gives him a license to use it for the purpose stated during the period specified. Johnson v. Truitt [Ga.] 50 S. E. 135. In the absence of a forfeiture clause in the contract, the purchaser does not forfeit his right to the timber or to ties manufactured therefrom by failure to remove it during the specified time. Id. He is, however, liable for any damages occasioned by his wrongful act in leaving it on the seller's land, and in trespass for entering on the land after the expiration of such time. Id. A provision that all the "timber" left on the land after the expiration of such time shall revert to the grantor will not be construed to include cross-ties manufactured from the timber, the word being used in other parts of the contract to mean growing trees and logs, and title to ties manufactured during such time passed to grantee absolutely. Id. General verdict for defendant in action to enjoin him from cutting timber held equivalent to finding that plaintiff had not removed the timber within a reasonable time, and therefore that all the trees, whether growing or lying on the ground, had reverted to the grantor, hence charge as to plaintiff's right to dead timber held harmless, if erroneous. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

Illinois: A provision requiring the removal of a certain amount of timber each year and in a specified order is to be treated as a covenant and not as a condition on which to base a forfeiture, and though the purchaser is liable in damages for its breach, he still owns the timber, and his property right therein cannot be forfeited or reclaimed by the seller, within the period fixed by the contract for the removal of all the timber. Where contract provides that at least eighty acres is to be removed each year and that the whole is to be taken off within five years, cannot be forfeited within five years. Walker v. Johnson, 116 Ill. App. 145. Held that, under the evidence, plaintiff, who purchased from the grantee, was chargeable with notice of the time limit in the original contract. Id.

Kentucky: A sale of the timber on a certain tract of land to be removed in a given length of time is only a sale of so much timber as is removed within that time. Under contract of sale providing that it is agreed that the vendee "is to have eighteen months from this date for the purpose of cutting, hauling, and removing" it. Jackson v. Hardin [Ky.] 87 S. W. 1119. The purchaser's right to timber ceases on the expiration of the time limited, and its removal by a subsequent purchaser of the land is no invasion of his rights. Instruction erroneous. Chestnut v. Green [Ky.] 86 S. W. 1122.

In Minnesota, one acquiring the right to "cut and remove" standing timber until a specified date does not forfeit the right to timber cut before such date by failing to remove it until after such date, nor does the title thereto revert to and become reinvested in the land owner under such circumstances, but the extent of the latter's remedy is a right to damages for trespass on, and occupation of the land after the expiration of the limitation. No implied condition that title shall revert if independent duty of removal is not strictly performed. Alexander v. Bauer [Minn.] 102 N. W. 387. Title to logs cut after the expiration of the time limited is, however, in the landowner, and he may recover the same. Id.

New York: Where contract provided that purchaser should draw all the timber off the lot on or before a specified date, "after which date he has no further right on said premises or in any timber left thereon," held, that all timber, logs or bark cut or uncut, remaining on the premises after such date, became the absolute property of the seller, and buyer ceased to have any further interest therein. McNeil v. Hall, 94 N. Y. S. 920. Seller was not required, in order to protect his rights, to forbid buyer to move his saw mill on the land after such date, until fully advised of such rights. Id.

North Carolina: A deed selling and conveying the timber of a certain size on a certain tract then standing or growing or which may be standing on such land during the period of fifteen years from and after the time when the grantees shall begin to cut and remove it, conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed. Hawkins v. Goldsboro Lumber Co. [N. C.] 51 S. E. 852.

Tennessee: A deed of land subject to a previous contract, whereby a third person was given the right to cut and remove trees thereon at any time within five years and under which he acquired no right to timber not removed within that time, passes to the grantee the title to all standing trees subject to be defeated only if they, or any of them, shall be cut and removed before the expiration of the time limit. Mengal Box Co. v. Moore [Tenn.] 87 S. W. 415. Under contract whereby owner of land gave and granted "permission to enter upon and cut and fell any and all cottonwood trees now standing and growing" upon a certain tract, "with the privilege of cutting and removing said cottonwood timber for a term of five years," with the exception that the grantee was to release all claim on at least two hundred acres each year, so that the same might be released or cleared, the title to all other kinds of timber to be retained by the grantor, the grantee to have the right of ingress and egress for his said term, "after which he is to have no right to cut any timber on said land," and to own all said timber "that he may cut and remove within said five years," and whereby the grantor warrants his title and agrees not

move timber within the time limited may be waived,[16] and the grantor cannot take advantage of a failure caused by his own acts.[17] Where one having a right to cut and remove trees for a specified period, and who has title only to those removed within that time, cuts trees both before and after a conveyance of the land and mingles and confuses the logs and fails to remove them within the time limited, the grantee in the deed may recover all of the logs under the doctrine of confusion of goods.[18]

If the contract fixes no time within which the timber must be cut and removed, the law will infer an intention to grant a reasonable time for that purpose,[19] and a subsequent purchaser with notice of the existence of the contract takes with notice of its terms in this regard.[20] What is a reasonable time must be determined by the facts existing when the contract was made.[21] This is a question for the jury,[22] and a witness cannot give his opinion in regard to the matter.[23]

As in the case of all other contracts, the minds of the parties to a contract for the sale or manufacture of timber must meet as to all its terms.[24] and its provisions must be definite and certain.[25] One may become bound by a contract to which he is

to give any one else permission to cut or remove timber within the five years, held, that the grantee acquired title only to such timber as he had both cut and removed before or by the expiration of the five-year limit, and, after the expiration of that time, had no right to either fell any trees, cut any logs, or remove them after being cut, or to remove logs previously cut. Mengal Box Co. v. Moore [Tenn.] 87 S. W. 415.

Washington: Though the sale of growing timber is a sale of an interest in land, upon the execution and delivery of the contract of sale the timber becomes personal property and the only interest which the vendees acquire in the land is an implied license to enter and remove the timber. Brodack v. Morsbach [Wash.] 80 P. 275.

16. Defendant held to have waived right to forfeit timber for failure to remove it from the land within the time specified by permitting it to be deposited in a gulch on another part of the land, and his subsequent refusal to permit plaintiff to remove it amounted to a conversion. Watson v. Gross [Mo. App.] 87 S. W. 104.

17. Where contract provides that in case vendee is prevented from removing timber during time limit by accident or misfortune unavoidable by him, he shall have a reasonable additional time, he is entitled to such additional time in case he is prevented from removing the timber by the vendor. Jackson v. Hardin [Ky.] 87 S. W. 1119.

18. Mengal Box Co. v. Moore & McFerrin [Tenn.] 87 S. W. 415. See, also, Accession and Confusion of Property, 5 C. L. 12.

19. Kidder v. Flanders [N. H.] 61 A. 675; Johnson v. Truitt [Ga.] 50 S. E. 135. No time being fixed in which to commence cutting, the grantee must commence within a reasonable time. Hawkins v. Goldsboro Lumber Co. [N. C.] 51 S. E. 852. Where deed conveyed all the timber above a certain size then standing on certain land or growing, or which might be standing thereon during period of fifteen years after time when grantees commenced to cut and remove it, held, that a further provision that "the time in which to begin to cut and remove said timber shall be and is not limited," should be rejected as indefinite and repugnant and because contrary to the intent and purpose of the parties as manifested by the entire instrument. Id.

20. Where contract fixes no time for removal of timber, and owner of land sells it, "reserving" to the purchaser of the timber the right thereto until a specified date, the grantee of the land cannot prevent the purchaser of the timber from removing it within a reasonable time. Kidder v. Flanders [N. H.] 61 A. 675.

21. In which to box and cut timber. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

22. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

23. Such testimony involves calculations as to what could be done, and as to what should be done, as a matter of law, and usurps the functions of the jury. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

24. See Contracts, 5 C. L. 664. Held no contract where plaintiff's acceptance of defendant's offer to sell timber contained a provision that he should have the use of the land for mill purposes. Lord v. Meader [N. H.] 60 A. 434. Defendant's letter acknowledging receipt of check for earnest money held not acceptance of plaintiff's offer to purchase timber with logging and mill privileges, and he having returned it within a reasonable time, there was no contract. Id. Agreement whereby defendant is to cut timber on plaintiff's land, and plaintiff's cruiser is to state what it is worth, which amount is to be the contract price, held a complete contract and not merely preliminary negotiations for a possible one. Tacoma Mill Co. v. Perry [Wash.] 82 P. 140.

25. See Contracts, 5 C. L. 644. Contract for sale of "a certain lot of timber situate on Rhodes Branch, about three miles from Williamsburg," held not void for vagueness and uncertainty, it being sufficiently definite to enable the parties to effectuate it to the extent of the timber actually delivered and received. Comes within maxim "that is certain which can be made certain." Bradford v. Huffman [Ky.] 88 S. W. 1057. Provision in contract for sale of land permit-

not a party by adopting it as his own.[26] The mere fact that a contract contains the words "agrees to sell" does not render it executory.[27]

The ordinary rules as to interpretation apply.[28] The contract should be construed according to its legal effect on the day it was executed, and not according to

ting vendees to "cut and remove portions of the timber now standing on said premises," held too uncertain for enforcement in a court of law, and could be binding on the parties only in so far as they mutually acted under it. Watson v. Gross [Mo. App.] 87 S. W. 104.

26. Defendant's contract for sale of land, provided that his vendees might "cut and remove portions of the timber" thereon, but that the same should remain defendant's property, and that the proceeds should be paid to him and credited on the purchase price. Held, that by a subsequent contract of cancellation, reciting sales of timber by the vendees to plaintiff and others, and providing that the latter might remove it within a certain time, defendant adopted the contracts of the vendees for such sales, and they thus became as effective in law as if he had made them himself, thus rendering it immaterial whether or not the vendees had authority to make them. Watson v. Gross [Mo. App.] 87 S. W. 104. Provision allowing vendees to cut and remove "portions of the timber" held too indefinite to show what portion they had a right to cut, and hence plaintiff who had no greater right or title, failed to establish title to timber outside of two-acre tract as to which his rights were ratified by the contract of cancellation. Id. Fact that defendant permitted him to deposit all timber cut by him in a gulch on another part of the land, held not a recognition by him of plaintiff's right to any of it cut outside of such tract, there being no evidence that he knew that any part of it was cut elsewhere. Id. Instruction predicated on the theory that, if defendant knew that plaintiff was appropriating timber in excess of that on the two-acre tract and made no objection, plaintiff was entitled to recover in an action for converting it, held error, since defendant was not, as against plaintiff, deprived of his title by failure to object. Id.

27. Contract for sale of timber held an executed one and to have passed title, though it contained the words "agrees to sell," where defendants paid full consideration at the time of the execution of the agreement. Brodack v. Morsbach [Wash.] 80 P. 275.

28. See Contracts, 5 C. L. 664. Where contract provided that defendant was to run and saw plaintiff's logs **"with all due diligence,** and as fast as water will permit," he was not excused from exercising due diligence by a further provision that the contract should terminate at the end of eight months, and was liable for damages caused by unreasonable delay, though the work was completed within the time limit. Fletcher v. Prestwood [Ala.] 38 So. 847. Defendant had no right to postpone the running and sawing of plaintiff's logs while he ran and sawed his own. Provision as to water refers to natural conditions, such as drouth and the like, bearing upon the supply of water in the ditch and wasteways, and does not cover the fortuitous breakings of defendant's dam. Id. Conveyance of **"timber suitable for turpentine and sawmill purposes,"** when considered with other provisions of the lease, held to include only timber suitable for both purposes, and hence not cypress timber. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164. Under contract for sale of logs providing that if they were not delivered by a certain date they should be scaled 10 per cent. for sap rot, and if not delivered by a later date they should be forfeited to the buyer, held, that forfeiture would not be enforced, there having been no delivery and no part of the purchase price having been paid, but they will be scaled 10 per cent. as provided and for any further deterioration. Daniel v. Day Bros. Lumber Co. [Ky.] 85 S. W. 1092. Sale of timber on tract owned by three persons jointly, which was described by its generally known name, and also by boundaries, held not to include timber on adjoining tract owned by one of the grantors individually, though the description by boundaries was broad enough to include it. Jackson v. Hardin [Ky.] 87 S. W. 1119. Contract held a sale of all the timber on a specified tract, a provision that the seller "agrees to deliver not less than 200,000 feet of all classes of timber above specified," merely establishing the minimum amount, and practically amounting to a guarantee that there would be at least that amount. Bradford v. Huffman [Ky.] 88 S. W. 1057. Contract for sale of lumber to be sawed from standing timber to be cut and paid for by measurement, the vendee agreeing that if it is not measured and inspected right, and if he does not furnish a man who will fairly comply with the contract, the sellers may resell, and also providing that the lumber is to be measured, inspected, and settled for by a third person, cannot be avoided by the sellers because such third person cannot furnish the money or inspect the lumber, where the vendee offers to have it fairly inspected and measured and to pay for it. Mills v. Stillwell [Ky.] 89 S. W. 112. Where written contract providing that scale made by the surveyor general when logs were loaded on cars should be binding on the parties was subsequently modified in writing so as to provide for delivery on skidways for a less price per thousand, without any reference as to scaling, held that, on conflicting evidence as to whether the parties orally agreed, at the time of the modification, that the scaling should be final or only prima facie, it was for the jury to determine what was the actual agreement. Nelson v. Mashek Lumber Co. [Minn.] 103 N. W. 1027. Defendant's assignor aquired a right to all timber and wood left on certain land after owner had removed all saw timber over a certain size, and was given 15 years in which to remove it, agreeing to remove from a certain number of acres each year. Custom was for vendor to take what timber he wanted, and

subsequent changes.[29] Parol evidence is admissible to show the meaning of trade terms.[30] The term timber, when applied to standing trees, generally means such as are suitable for use in the erection of buildings or for manufacturing purposes.[31] The term growth includes all the wood upon the land.[32] "Timber suitable for sawmill purposes" includes any timber ordinarily used for manufacture into lumber,[33] and the sale of such timber carries with it the right to use it for any purpose whatever.[34]

The sale may, of course, be set aside for fraud.[35] A purchaser of timber who discovers that the seller has no title is not required to tender the purchase price to him as a condition precedent to the right to sue for damages.[36] Neither party to a sale of logs is bound by a scale which is the result of fraud or gross mistake on the part of the scalers,[37] and such conduct is always open to investigation.[38] Any com-

then for vendee to take rest, irrespective of size. Subsequent conveyance by vendor to plaintiff contained no reservation of timber, but purchaser was told that failure to reserve it was an oversight, and that defendant was cutting when plaintiff bought with full knowledge of his rights and of the custom. Vendor had previously removed the saw timber and quit the land. Held, that defendant would not be enjoined from removing any saw timber which was of the specified size at the date of the contract. Chemical Charcoal Co. v. Smith [Miss.] 38 So. 232. Contract held an entire one, though it provided for treating different portions of timber in different ways. Snell v. Remington Paper Co., 102 App. Div. 133, 92 N. Y. S. 343. Contract held to require defendant to supply plaintiff with certain number of logs to be sawed and placed on board cars each year for five years at a certain rate per thousand, and that defendant failed to do so for three years. Id. Under contract whereby bank advanced money to mill owner to enable him to operate his mill, held that title to lumber and shingles manufactured therefrom was in the bank. Dennis v. Montesano Nat. Bank [Wash.] 80 P. 764. Purpose of provision that in case purchaser of timber fails to have it measured and to pay for it each month as cut and hauled, he shall forfeit all right and title to timber, whether cut or not, and all payments made on account thereof, is to prevent accrual of large indebtedness and cutting of large quantities of timber without paying for it, and vendor will be deemed to have waived forfeiture if he permits large quantities to be cut without such measurement and payment. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Under contract requiring second party "to keep a constant supply of logs on the skids sufficient to run the mill not to exceed 20,000 feet per day of 20 days each month, unless otherwise hindered by Providence," and requiring first party to run mill constantly at its full capacity as nearly as possible, held, that clause "not to exceed 20,000 feet," etc.; fixed maximum quantity of logs which party of second part could be required to keep on skids, and not quantity which other party was bound to remove from skids under implied covenant of the contract, but such implied covenant only required removal of quantity sufficient to run mill when run constantly at its full capacity as nearly as possible. Stephenson v. Collins [W. Va.] 50 S. E. 439. Two contracts between the same parties for the sawing of two lots of logs construed. Barker & S. Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

29. A conveyance in 1891 "of all the pine trees growing and being upon 4,900 acres of land, for sawmill and turpentine purposes," includes only those then suitable for those purposes and not those which by growth subsequently became so. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. Charge to the effect that right to cut timber could be exercised during the entire period covered by a "reasonable time," but that after all trees suitable for sawmill purposes had been cut, plaintiff could not return and remove timber which was not originally suitable, but had subsequently become so, held proper. Id.

30. To show the meaning of the terms "merchantable lumber, mill run" in a contract for the sale of lumber, they being peculiar to the lumber business, in which they are well understood. Barnes v. Leidigh [Or.] 79 P. 51.

31. Lord v. Meader [N. H.] 60 A. 434. Agreement to take all the "growth" on a certain lot held not an acceptance of an offer to sell all the "timber" thereon, in the absence of proof that the words were used synonomously by the parties. Id.

32. Lord v. Meader [N. H.] 60 A. 434.

33. In a lease held to include cypress timber, there being nothing in the lease to show that only pine was meant, and no evidence that it was given such a restricted meaning by the custom of the trade. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164.

34. If timber is in fact suitable for sawmill purposes, the purchaser may hew it into cross-ties. Gray Lumber Co. v. Gaskin [Ga.] 50 S. E. 164.

35. Sale set aside where defendants used artifice to prevent an investigation by plaintiffs as to the value of the timber, and induced them to accept their statements as to quantity and value by the most positive assurances of fair dealing, and thereby procured timber at much less than its actual value. Garr v. Alden [Mich.] 102 N. W. 950. See, also, Fraud and Undue Influence, 3 C. L. 1520.

36. Barnes v. Weikel Chair Co. [Ky.] 89 S. W. 222.

37. Robinson v. Ward [Mich.] 12 Det. Leg. N. 113, 104 N. W. 373.

38. Question of fraud held for the jury.

petent proof of any scale of the logs or the lumber manufactured from them tending to show the amount actually delivered is admissible.[39]

A contract for the sale of timber on land held adversely by the vendor's wife and children and on which he resides with them is not champertous, their possession not being adverse to him.[40]

Contracts relating to the purchase and sale of manufactured lumber,[41] and questions in regard to the measure of damages for breach of contracts in regard to timber are treated elsewhere.[42]

The owner [43] or one in rightful possession of logs may maintain replevin to recover them, or lumber manufactured from them, from one who wrongfully converts them, or from one purchasing them from the latter with good reason to believe that he has acquired them wrongfully.[44] Though the purchaser wrongfully intermingles lumber manufactured from them with other lumber, the owner is only entitled to his ratable proportion of the whole, if it is possible to make an apportionment.[45]

Until the identification by government survey of the odd numbered sections granted to the Northern Pacific Railroad along its line, the United States has such title in the timber growing thereon as to enable it to recover the value of timber cut and removed by the railroad company or its grantees.[46] A private survey is inadmissible in such a suit to show that when surveyed the land will be an odd numbered section, and therefore included in the grant.[47]

Injunction will issue in proper cases to restrain the unlawful cutting of timber.[48]

The general rules of pleading and evidence apply to actions on contracts in regard to timber,[49] and to actions for its conversion.[50] In an action for the conver-

Robinson v. Ward [Mich.] 12 Det. Leg. N. 113, 104 N. W. 373. Evidence of a fraudulent conspiracy between the logging contractor and the deputy scaling the logs held sufficient to justify submission of that issue to the jury. Nelson v. Mashek Lumber Co. [Minn.] 103 N. W. 1027.

39. Robinson v. Ward [Mich.] 12 Det. Leg. N. 113, 104 N. W. 373.

40. Barnes v. Weikel Chair Co. [Ky.] 89 S. W. 222. See, also, Champerty and Maintenance, 5 C. L. 565.

41. See Sales, 4 C. L. 1318.

42. See Damages, 5 C. L. 904. Allegation that plaintiff sold defendant standing timber to be sawed into lumber, and that, after plaintiff had moved and located his mill for that purpose, defendant prevented him from cutting the timber, whereby he was compelled to shut down his mill and lose the profits, held not demurrable on the ground that the damages were remote or speculative. Anderson v. Hilton & D. Lumber Co., 121 Ga. 688, 49 S. E. 725. One cutting timber belonging to another is only liable for nominal damages where it is as valuable when cut as uncut. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746.

43. Evidence in action of replevin for logs held to sustain verdict for plaintiff. Day v. Ferguson [Ark.] 85 S. W. 771. Award for piling, described in one of the writs and covered by the bond, held erroneous, where there was no evidence that plaintiff owned it. Id.

44. See, also, Replevin, 4 C. L. 1284. Evidence held to sustain finding that plaintiff was in lawful possession of logs and had a right to reclaim them in replevin, and motion for nonsuit properly denied. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259.

45. Plaintiff held only entitled to his ratable proportion and not to whole amount seized. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259. Evidence held not to support finding that defendant did not wilfully and indiscriminately intermix logs and lumber, and to justify court in changing it to a finding that he did. Id.

46. United States v. Montana Lumber & Mfg. Co., 196 U. S. 573, 49 Law. Ed. 604.

47. Act July 2, 1864, 13 St. at L. 367, c. 217, § 6, reserves right of survey to the government. United States v. Montana Lumber & Mfg. Co., 196 U. S. 573, 49 Law. Ed. 604.

48. See Injunction, 4 C. L. 96. Issues in Georgia when defendant is involvent, or the damages would be irreparable, or where plaintiff has perfect title to the land or the timber, or there exist "other circumstances" which, in the court's discretion, render it necessary. Civ. Code, §§ 4916, 4927, as amended by Acts 1899, p. 39. Gray v. Lumber Co. v. Gaskin [Ga.] 50 S. E. 164. Thus it may issue where the circumstances indicate that the trespasses are constantly recurring, and the defendant threatens to continue from day to day to cut timber. Id.

49. See Evidence, 5 C. L. 1301; Pleading, 4 C. L. 980. In action for damages for breach of contract to run and saw logs with all due diligence, witnesses who knew the capacity of defendant's mill and waterway could testify as to the number of logs that could have been run and sawed each day while plaintiff's logs were in readiness. Fletcher v. Prestwood [Ala.] 38 So. 847.

50. In an action for the conversion of

sion of logs, defendant cannot rely on the fact that plaintiff did not cut them within the time limits fixed by the bills of sale.[51] Evidence of the attempted conversion by defendant of logs belonging to others is incompetent.[52] In an action in tort for trespass in cutting timber, there can be no recovery of the purchase price on proof that the cutting was under a contract.[53]

Liens.[54]—One sawing logs under contract is a bailee of the logs and the lumber and has a common-law lien for sawing them, so long as he retains actual possession,[55] but he waives such lien by surrendering possession.[56]

Statutes in many states give a lien for labor performed in cutting and hauling logs,[57] and for boomage charges.[58]

In Maine a lien is given to persons performing labor in cutting, handling, or sawing spool timber, or in the manufacture of spool timber into spool bars and the piling of such bars.[59]

Though a part of the logs on which the lien is sought to be foreclosed have been converted into lumber before the commencement of the foreclosure suit, the lienor is entitled to foreclose on such of them as then exist;[60] but a foreclosure and sale should not be ordered where, at the time of the trial, the logs have all been cut up into lumber and otherwise disposed of, so that identification of them or their products is impossible.[61] In a suit to foreclose a lien on logs for boomage charges, the court may, in the exercise of its equitable powers, impress the lien on money

logs, it is proper for plaintiffs to show the number of logs put into the water, the number regularly accounted for to them, and the probable and possible chances of loss of logs in the regular course of business for the purpose of arriving approximately at the number converted. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613. Under the evidence, held that a charge that, if the jury believed defendant as to an interview with plaintiff, it would amount to an abandonment by plaintiffs of the logs alleged to have been converted, was sufficiently favorable to defendant. Id. In an action for conversion of logs, evidence held to sufficiently establish plaintiff's ownership for the purposes of the suit. Id. Witness held qualified to express opinion as to market value of logs converted and sued for. St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259.

51, 52. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 145, 103 N. W. 613.

53. Not in action under Ballinger's Ann. Codes & St. §§ 5656, 5657. Tocoma Mill Co. v. Perry [Wash.] 82 P. 140.

54. See 3 C. L. 1471.

55. Walker v. Cassels, 70 S. C. 271, 49 S. E. 862.

56. Waived where sawing had been completed, and plaintiff left ground without leaving any agent in charge, and plaintiff stacked lumber and used and sold part of it. Delivery destroys lien, and defendants are not liable for subsequent injuries to lumber. Walker v. Cassels, 70 S. C. 271, 49 S. E. 862.

57. Laborer hauling logs for one contracting with the owner to haul them is entitled to enforce a lien against the owner, where the latter had knowledge that he was hauling the logs and that he had not been paid, it being the owner's duty to retain sufficient money from the contract price to pay him. Allen v. Roper [Ark.] 86 S. W. 836. Affidavit held to set out substantially all the necessary facts. Id.

58. The evidence being conflicting, held that action of court in refusing to hold that amount charged for boomage services was excessive would not be disturbed on appeal. Gray's Harbor Boom Co. v. Lytle Logging & Mercantile Co., 36 Wash. 151, 78 P. 795. Evidence in action to foreclose lien for labor performed in securing logs by means of boom, held insufficient to show liability on the part of defendant. Cascade Boom Co. v. McNeeley Logging Co., 37 Wash. 203, 79 P. 793. In action to foreclose lien for boomage charges, held that, it appearing that there was no right to a lien, plaintiff was not entitled to recover the reasonable rental value of the boom, there being no basis for such recovery in the complaint and no evidence as to such value, and plaintiff having no right to a lien to secure its payment. Id.

59. Lien given by Rev. St. c. 93, § 53, takes precedence of other claims and continues for sixty days after such timber or bars arrive at the place of destination for sale or manufacture. Chamberlain v. Wood [Me.] 60 A. 706. In the case of spool bars, held, that the "place of destination for sale or manufacture" is the place where they are actually intended to be sold or manufactured into spools, and not the mill where one contracting to sell spool bars cuts them from the timber. Id.

60. Gray's Harbor Boom Co. v. Lytle Logging & Mercantile Co., 36 Wash. 151, 78 P. 795.

61. Fact that logs were not in existence does not require dismissal, but court may retain jurisdiction to distribute money retained and deposited in lieu of them and to enter personal judgment against defendant. Gray's Harbor Boom Co. v. Lytle Logging & Mercantile Co., 36 Wash. 151, 78 P. 795. Evidence held not to support finding that some of the logs were in existence at the time of the trial. Id.

withheld by the purchasers of the logs and paid into court, in lieu of the property.[62] By statute in Washington, no mistake or error in the statement of the demand or description of the property invalidates the lien unless the court finds that an innocent third party is injured thereby.[63]

FORFEITURES, see latest topical index.

FORGERY.[64]

Elements of offense.[65]—To constitute forgery there must be such a material false making or alteration[66] with intent to defraud,[67] of an instrument which is capable of being the basis of a right or liability,[68] as will give it the appearance of legal efficiency.[69] The instrument need not be such as, if genuine, would be legally valid;[70] it is sufficient if it is apparently valid and thus calculated to deceive.[71] Per contra, an instrument invalid on its face cannot be the subject of forgery.[72]

To constitute the crime of uttering a forged instrument, the defendant must have, with knowledge of its forged character,[73] asserted its genuineness, either di-

62. Boom company notified purchasers of its claims and they withheld enough to cover them from purchase price. Gray's Harbor Boom Co. v. Lytle Logging & Mercantile Co., 36 Wash. 151, 78 P. 795.

63. Ballinger's Ann. Codes & St. § 5944. Gray's Harbor Boom Co. v. Lytle Logging & Mercantile Co., 36 Wash. 151, 78 P. 795. Liens for boomage charges literally complying with the statute held sufficient as against the debtor. Id.

64. See Clark & M. on Crimes [2d Ed.] pp. 576-594.

65. See 3 C. L. 1472.

66. Erasing or altering a material part of a true instrument. An indictment under Ky. St. 1903, § 1185, is good, though alleging the forgery by a material alteration of the order. Commonwealth v. Walls [Ky.] 86 S. W. 684. Must be a material part. Wilson v. State [Miss.] 38 So. 46. Under Code 1892, § 1106, it is not forgery to alter the figures "$2.50" written in the upper right-hand corner of a draft so as to read "$12.50," the rest of the draft being left as it was. Id. See Clark & M., Crimes [2d Ed.] p. 583, § 395 (b). Or making a **false entry** in the record or accounts of a municipal corporation. People v. Herzog, 93 N. Y. S. 357.

67. Rev. St. 1887, § 7028. State v. Swensen [Idaho] 81 P. 379.

68. In New York in order to constitute forgery in the third degree, it is not necessary that by the entry a pecuniary demand or obligation be or purport to be created, increased, discharged or affected. Pen. Code, § 515. People v. Herzog, 93 N. Y. S. 357. A **school warrant** drawn upon the treasurer of a county, signed by the chairman of the board and countersigned by the county superintendent of public instruction imports such validity as to be made the subject of forgery. Wooldridge v. State [Fla.] 38 So. 3. **Check** drawn payable to the order of cash. Hale v. State, 120 Ga. 138, 47 S. E. 547. In the absence of a showing that property rights are involved, a **release of a landlord's lien on crop** is not. Williams v. State [Tex. Cr. App.] 85 S. W. 800.

Statutory extensions: Under a statute declaring a person guilty of forgery who knowingly utters a false or counterfeited letter, by which the sentiments, opinions, conduct, character, prospects, interests or rights of the person whose utterance the writing purports to be are misrepresented or otherwise injuriously affected, the false making of a **letter of introduction,** misrepresenting the identity of the defendant, constitutes the crime of forgery, although there is no injury to the person whose name is forged to the letter. People v. Abeel [N. Y.] 75 N. E. 307, afg. 100 App. Div. 516, 91 N. Y. S. 1107, afg. 45 Misc. 86, 91 N. Y. S. 699.

NOTE. Interpretation of statute: Such letters at common law were not subjects of forgery (Foulkes v. Com., 2 Rob. [Va.] 836); but only writings which if valid would impose some legal liability or be of some legal efficiency (Bish. Crim. Law, § 533; Rex. v. Ward, 2d Ld. Raymond, 1461; Case of Ames, 2 Me. 365). So, also, under statutes less comprehensive than that in New York. Waterman v. People, 67 Ill. 91. The principal case presents a liberal interpretation of a statute supplying a defect in the common law.—5 Columbia L. R. 325.

69. A. J. W. indorsing a school warrant payable to J. W. B. as follows: "J. W. B. by A. J. W." such indorsement, though fraudulent, does not constitute forgery. Wooldridge v. State [Fla.] 38 So. 3. One attesting a note as a witness, knowing that the maker's name is a forgery, is guilty of forgery. Shelton v. State [Ala.] 39 So. 377.

70. See 3 C. L. 1472, n. 32.

71. State v. Alexander, 113 La. 747, 37 So. 711.

72. Order apparently signed by married woman. State v. Alexander, 113 La. 747, 37 So. 711.

73. Commonwealth v. Bond [Mass.] 74 N. E. 293. Pen. Code, § 470. State v. Swensen [Idaho] 81 P. 379; Commonwealth v. Hall, 24 Pa. Super. Ct. 558; Commonwealth v. Hall, 23 Pa. Super. Ct. 104. Upon an indictment charging the defendant with forging, uttering and publishing in a single count, held error to charge that defendant could be convicted in the manner and form indicted re-

rectly or indirectly, by words or actions, for the purpose of getting money.[74] It is not necessary that his effort to pass it shall have proved successful,[75] nor that the person whom it was sought to deceive should in fact have been misled.[78] It is immaterial that defendant did not make the instrument.[77]

In most states, where the crime intended or offense attempted has been perpetrated, an indictment for an attempt will not lie.[78]

Defenses.[79]—Condonation or ratification is no defense.[80] In order to take the case out of the statute of limitations, it is not necessary to prove by direct evidence that the note was antedated.[81]

The indictment.[82]—In the absence of statute,[83] the general rule requires that there should be such a setting out of at least the material parts of the paper alleged to be forged or altered as will put the defendant upon notice of its contents;[84] but it is not necessary to set out the value of the instrument nor the amount for which the forgery was committed.[85] The writing being complete on its face and purporting to impose a liability, it is not necessary to aver extrinsic facts to show its validity or that another might be injured by it.[86] An information charging the crime in the language of the statute is sufficient.[87] An indictment for forgery must allege that the act was done with intent to defraud,[88] and one for uttering must allege scienter;[89] but the instrument being negotiable, it is not necessary that the indictment should allege an indorsement thereon.[90] The offenses of forging and uttering may be charged in one count;[91] but such joinder does not relieve the prosecution of the necessity of charging all the elements of each offense.[92] The allegations must be clear and definite.[93] As a general rule, the words "forge," "counterfeit" or

gardless of when the note was made or who made it, and regardless of whether defendant knew it was forged. Id. An instruction to convict if note was a forgery, held erroneous, there being nothing said as to whether the defendant forged the note or knew that it was forged. Id. See Clark & M., Crimes [2d Ed.] p. 591, § 399.

74, 75, 76, 77. Commonwealth v. Bond [Mass.] 74 N. E. 293.

78. Under Code 1892, § 974, an immaterial alteration of a draft does not constitute an attempt to commit forgery. Wilson v. State [Miss.] 38 So. 46.

79. See 3 C. L. 1473.

80. Wooldridge v. State [Fla.] 38 So. 3.

81. Commonwealth v. Hall, 24 Pa. Super. Ct. 558. Where note by its date was over five years old and the indictment charged that it was less than a year old, held, the question was one for the jury. Id.

82. See 3 C. L. 1473. See Indictment and Prosecution, 4 C. L. 1.

83. In New York the indictment need not set forth the forged instrument in words or figures, but a full and accurate description of it is sufficient. Code Cr. Proc. §§ 273, 275, 284, 290, construed. People v. Herzog, 93 N. Y. S. 357.

84. Taylor v. State [Ga.] 51 S. E. 326. An indictment for forging or fraudulently altering a teacher's license held insufficient, it merely calling the instrument a license and setting out as a legal conclusion that it authorized the holder to teach in the public schools of the state and receive pay therefor. Id.

85. State v. Alexander, 113 La. 747, 37 So. 711. Held not necessary to set out that a particular amount in money or goods of any particular quantity or value had been fixed in the order, falsely made, for the payment of goods. Id.

86. Shelton v. State [Ala.] 39 So. 377.

87. State v. Alexander, 113 La. 747, 37 So. 711.

88. State v. Swensen [Idaho] 81 P. 379. An information charging that defendant "did wilfully, unlawfully, feloniously and falsely forge and utter a bank check," and "did then and there utter the said bank check as true and genuine, with intent to defraud the said," etc., held fatally defective. Id.

89. Shelton v. State [Ala.] 39 So. 377. Pen. Code, § 470. State v. Swensen [Idaho] 81 P. 379. An information charging that defendant "did willfully, unlawfully, feloniously and falsely forge and utter a bank check," and "did then and there utter the said bank check as true and genuine, with intent to defraud the said," etc., held fatally defective. Id.

90. Commonwealth v. Bond [Mass.] 74 N. E. 293.

91. An indictment charging that the defendant did unlawfully, falsely and fraudulently make, utter and publish and cause to be made, uttered and published a certain written instrument is not bad for duplicity. Commonwealth v. Hall, 23 Pa. Super. Ct. 104.

92. State v. Swensen [Idaho] 81 P. 379. An information charging that defendant "did wilfully, unlawfully, feloniously and falsely forge and utter a bank check" and "did then and there utter the said bank check as true and genuine, with intent to defraud the said," etc., held fatally defective. Id.

93. An indictment alleging that the forged instrument is the usual and ordinary

"alter" are not indispensable to the validity of the indictment or information.[94] Foreign words [95] and ambiguities [96] in the instrument must be explained in the indictment, and statements in the latter must be connected with each other so as to show their true relation.[97] The indictment must not be contradictory within itself.[98]

Presumptions.[99]

Admissibility of evidence.[1]—Evidence as to the acts of defendant or his coconspirators at the time it was sought to pass the instrument,[2] and immediately thereafter,[3] is admissible. Evidence that another person once forged the same name is inadmissible in the absence of testimony connecting that other person with the forgery on trial or showing that the instrument in question was in the handwriting of such other person.[4] Subject to the application of the general rules of evidence, any evidence tending to show an intent to defraud is admissible.[5] An offense not charged furnishing a motive for one charged, all the facts can be shown.[6] An unauthorized payment of the forged instrument is not admissible.[7] Evidence of other forgeries is admissible as tending to show a general scheme to defraud.[8] There is no general rule for determining the competency of a witness to testify as to defendant's handwriting, but each case must depend largely upon itself.[9] A partner is

way by which the company is informed of the amount it owed its employees, held not defective in that if the instrument was made in the usual and ordinary way it was not subject to forgery. Joiner v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 614, 87 S. W. 1039.

94. Are not essentially necessary to every information under Rev. St. § 833. State v. Alexander, 113 La. 747, 37 So. 711. Held sufficient to charge the accused with having "falsely made" the instrument declaring it to be "an order for money or goods" and declaring further that that instrument was "falsely made" by the party charged, with the intention of defrauding some one. Id.

95. An indictment for the forgery of a check, "Pay to . . . breer $10.30. Jev rale 30-100 dollars," held bad for falling to explain the terms "breer" and "jev rale." McBride v. State [Tex. Cr. App.] 88 S. W. 237.

96. An indictment setting forth an instrument stating that when properly signed it would be paid by F. Treasurer, held insufficient for failure to contain allegations sufficiently explanatory with reference to F. Joiner v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 614, 87 S. W. 1039.

97. An indictment alleging that defendant was working the land of T. G. C. and that by the instrument forged (which was signed C. J. C.) it was intended to show that T. G. C. released his landlord's lien on the crop, and that by C. J. C. was meant T. G. C., held not to sufficiently connect the names of C. J. C. and T. G. C. Williams v. State [Tex. Cr. App.] 85 S. W. 800.

98. Where the indictment in the purport clause charges that the instrument is the act of a designated person, and the tenor clause shows that the instrument was signed by such person and another, the variance is fatal. Mayers v. State [Tex. Cr. App.] 85 S. W. 802. There being a variance between the purport clause and the tenor clause of the indictment in that the Christian name in the alleged forged signature was not the same, a check corresponding to one of the alleged signatures is inadmissible. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

99, 1. See 3 C. L. 1474.

2. On trial for conspiracy to pass a forged check, evidence of what a co-conspirator said when he attempted to pass the check held admissible as part of the res gestae. Knox v. State [Ind.] 73 N. E. 255.

3. In a prosecution for uttering a forged check, the officer who arrested defendant and observed his acts immediately after the defendant supposed that he had obtained the money, may testify thereto and also to declarations then made by the defendant. Commonwealth v. Bond [Mass.] 74 N. E. 293.

4. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

5. The omission of a duty by the county superintendent of public instruction to post a school warrant in a warrant registry book is competent evidence tending to show a fraudulent intent on his part, he being charged with the forgery of such warrants. Wooldridge v. State [Fla.] 38 So. 3. In a prosecution for forging the signature to a school warrant, the fact that the indictment also alleges that the defendant indorsed the warrant in the payee's name by himself as agent does not prevent the prosecution from asking the payee whether he authorized such indorsement. Id.

6. Where defendant's bankbook showed such frequent deposits, in excess of defendant's salary, as to tend to prove that defendant's motive for placing spurious notes to the credit of his employer at the bank was to cover or supply deficiencies in the employer's cash receipts due to defendants acts, held, the bankbooks were admissible. People v. Gaffey [N. C.] 74 N. E. 836.

7. Held error to permit witness to testify that the forged instrument was partly paid off after the indictment was found, there being no evidence that defendant authorized such payment. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

8. On a prosecution for forging a school warrant, it is competent to show that about the time of the alleged forgery other warrants were forged by the accused. Wooldridge v. State [Fla.] 38 So. 3.

9. In a prosecution for the forgery of a school warrant by the county superintend-

competent to testify to the handwriting of a co-partner who is absent from the state.[10] It is not allowable for either witnesses or juries to compare the handwriting of papers, not in evidence for other purposes, with the disputed writing or signature.[11] In Florida the statute providing for a comparison of handwriting covers not only the genuine writings of the party whose signature is alleged to be forged, but the genuine writings of the alleged forger.[12] The general rules as to parol evidence apply.[13] The date of the presentation of the forged instrument may be shown by parol, though it is contained in the books of the prosecutor.[14] Irrelevant evidence is inadmissible.[15]

Sufficiency of evidence.[16]—The guilt of defendant must be established beyond a reasonable doubt.[17] The sufficiency of evidence as to the identification of defendant,[18] and as to his having had the note in his possession,[19] is shown in the notes.

Trial.[20]—The proof must conform to the allegations in the indictment.[21] Facts not admitted must be proved.[22] The forged instrument being introduced in evidence and defendant's counsel being allowed to examine it, he should not be allowed to take it from the courthouse, at least in the absence of a showing of a necessity therefore.[23] General rules as to the cross-examination of witnesses apply.[24] Conclusion of guilt or innocence that should be drawn from the facts is for the jury.[25]

ent of public instruction, held, that the chairman of the county board of public instruction was competent to testify as to defendant's handwriting. Wooldridge v. State [Fla.] 38 So. 3. See Evidence, 5 C. L. 1301.

10, 11. Washington v. State [Ala.] 39 So. 388.

12. Wooldridge v. State [Fla.] 38 So. 3, in which the cases on comparison of handwriting are collected.

13. In a prosecution for the forgery of school warrants, held proper to ask the chairman of the county board how he signed school warrants, it not being apparent that it would be possible to introduce in evidence all the warrants which the witness had signed, and the question relating to a collateral matter. Wooldridge v. State [Fla.] 38 So. 3.

14. Such books may be resorted to only for the purpose of refreshing the prosecutor's memory. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

15. On the trial for the forgery of an order for merchandise, evidence as to other orders drawn by persons other than the one whose name is alleged to have been forged and as to whether the merchant had asked the defendant, before the latter's arrest, about an order brought by a child, held irrelevant. Washington v. State [Ala.] 39 So. 388.

16. See 3 C. L. 1475.

17. Commonwealth v. Hall, 23 Pa. Super. Ct. 104. An instruction that if the jury were not satisfied by the evidence beyond a reasonable doubt that the defendant altered the check in question, or caused it to be done, before he parted with the possession of it, it should find him not guilty, held correct. Goss v. State [Ark.] 84 S. W. 1035.

18. Where, in a prosecution for uttering a forged check, the prosecuting witness positively identified the defendant as the party who gave him the check, and his evidence was corroborated by another witness who was present when the check was cashed, and by the facts and circumstances surrounding the transaction, identification held sufficient to sustain a conviction. Mays v. State [Neb.] 101 N. W. 979.

19. Evidence that defendant had brought a civil action on a note similar to the one set out in the indictment, and a large number of witnesses testified to seeing the note and to declarations of the defendant that he had such a note, held sufficient to show that defendant had possession of the note. Commonwealth v. Hall, 24 Pa. Super. Ct. 558.

20. See 3 C. L. 1475.

21. An instrument "Tha is allright I have nothing to do with Jim par of his crope," constitutes in the absence of explanatory statements a variance from an indictment alleging, "That is all right I have nothing to do with Jim part of his crope." Williams v. State [Tex. Cr. App.] 85 S. W. 800. There being a variance between the purport clause and the tenor clause of the indictment in that the Christian name in the alleged forged signature was not the same, a check corresponding to one of the alleged signatures is inadmissible. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

22. Defense that check bore date of Sunday held of no avail, no evidence being offered to show that the day was Sunday. Commonwealth v. Bond [Mass.] 74 N. E. 293.

23. Miller v. State [Tex. Cr. App.] 87 S. W. 821.

24. In a prosecution for the forgery of a school warrant, the chairman of the county board of public instruction testifying that he never signed warrants in blank, held proper to exclude the further questions as to whether or not it was the custom for the chairman, or member of the board acting as chairman, to sign warrants in blank, with directions to be filled out afterwards. Wooldridge v. State [Fla.] 38 So. 3. Where accused's wife testified that some time prior to the date alleged in the indictment accused stated he was going away because he was not doing well where he was, held

Instructions.[26]—The defendant being indicted for forging and uttering, the jury should be instructed that if they could not convict for forgery they should inquire whether defendant could be convicted of uttering the forged instrument.[27] The evidence being positive, the defendant is not entitled to an instruction on the law of circumstantial evidence.[28] The accused is entitled to an instruction on his defense.[29] An instruction covering the same ground as those already given should be refused.[30]

Appellate review.[31]—Defendant's testimony nullifying the effect of objections, the latter will not be considered.[32] Though the count of an indictment for uttering a forged note is insufficient, the count for forgery being sufficient, and there being evidence tending to establish such offense, the verdict and judgment thereon will be referred to such count.[33]

FORMER ADJUDICATION.

To be distinguished from former adjudication are the doctrines that a decision of an appellate court is binding in all subsequent proceedings in the same case,[34] and that decisions on questions of law will be observed as precedents.[35]

§ 1. *The doctrine in general.—The doctrine of former adjudication is that whatever matters have been finally determined*[36] *on the merits,*[37] *in any action or*

improper for the state on cross-examination to elicit from her the fact that she had received letters from accused after he left, that such letters were signed "Sweetheart," and that after reading them she burned them. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

25. Commonwealth v. Bond [Mass.] 74 N. E. 293.

26. See 3 C. L. 1475.

27. Commonwealth v. Hall, 23 Pa. Super. Ct. 104. Such an instruction held not prejudicial. Usher v. State [Tex. Civ. App.] 81 S. W. 712.

28. Usher v. State [Tex. Cr. App.] 81 S. W. 712.

29. Defense being that accused had received the check from the alleged signer in payment of a gambling debt, it is error for the court to fail to submit such issue to the jury. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

30. An instruction to acquit unless the jury were satisfied beyond a reasonable doubt that defendant altered or caused the check to be altered before it left his hands, held to cover a requested charge to acquit if the jury were not satisfied that defendant altered the check or caused it to be altered before he parted with the possession thereof. Goss v. State [Ark.] 84 S. W. 1035.

31. See 3 C. L. 1476.

32. Objections to evidence introduced by the state showing flight or concealment will not be considered on appeal, defendant in his testimony admitting facts which show his flight or concealment in view of the probable discovery of the alleged forgery. Wooldridge v. State [Fla.] 38 So. 3.

33. Shelton v. State [Ala.] 39 So. 377.

34. See Appeal and Review, 5 C. L. 121.

35. See Stare Decisis, 4 C. L. 1512.

36. Must be final judgment: Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018. Order denying alleged widow's petition for homestead allowance based on her claim of widowhood is final. In re Harrington's Estate [Cal.] 81 P. 546. A judgment is conclusive as against one who took no appeal therefrom, though it was based on plaintiff's right to a certain fund in which it was subsequently determined that he had no interest. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Auditor's fee fixed by him in his report held res judicata, it not being excepted to within the required time, and the court refusing an application to file exceptions nunc pro tunc. McHenry v. Finletter, 23 Pa. Super. Ct. 636. Decree sustaining validity of patent and awarding a permanent injunction against infringement and referring the case to a master for an accounting as to damages and profits, held not conclusive as to validity of patent. Australian Knitting Co. v. Gormly, 138 F. 92. Distribution decree awarding life estate to devisee held to estop him from claiming different tenure. Parkinson v. Parkinson [Mich.] 102 N. W. 1002. See Special Article, 3 C. L. 1489. A guardian's settlement made without filing an exhibit of the account as required in case of final settlements is no more than an annual settlement and is not conclusive. May v. May [Mo.] 88 S. W. 75. Finding of jurisdictional facts by highway commissioners in proceedings for the organization of a drainage district held not final on quo warranto. McDonald v. People, 214 Ill. 83, 73 N. E. 444. Confirmation of report not based on appraisal required by law is without force as an adjudication. Tefft v. Lewis [R. I.] 60

A. 243. Appointment of a legatee as trustee of property pending a contest is not an adjudication that he is entitled to take the same under the will. Congregational Church of Chester v. Cutler, 76 Vt. 338, 57 A. 387. Under Code Civ. Proc. §§ 1490-1492, requiring different notices according to the value of the estate, a decree vacating a formal decree establishing due notice after publication for four months because of a doubt entertained by the court as to the value of the estate, and leaving such matter open for full consideration and full determination when the estate came to be closed, held not res judicata of the issue of the value of the estate. In re Wilson's Estate [Cal.] 81 P. 313. See 3 C. L. 1476.

Interlocutory rnlings not final: Rule to show cause. Sims v. Davis, 70 S. C. 362, 49 S. E. 872. Overruling a motion to quash an attachment is no bar to its renewal. Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.

Order in supplementary proceedings directing the payment of a debt owing to the judgment debtor is, if not appealed from, res judicata of the question of debtor's liability. Societa di Mutuo Socorso v. Mantel [Cal. App.] 81 P. 659.

Verdict or findings without judgment not final: Harnish v. Miles, 111 Ill. App. 105. Findings of fact and conclusions of law. Wilson v. Wilson [Wash.] 82 P. 154; Oklahoma City v. McMaster, 196 U. S. 529, 49 Law. Ew. 587. See 3 C. L. 1476.

Reservation of right to additional relief: Decree reserving right to seek additional relief on the foot thereof is final. Stout v. Stout [Va.] 51 S. E. 833.

A rnling on demurrer is not final: Is not binding at trial (Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607), unless a final judgment is entered thereon (Parrotte v. Dryden [Neb.] 102 N. W. 610).

Effect of appeal: Judgment from which an appeal is pending but which has not been superseded may be pleaded in bar. Collier v. Doe ex dem. Alexander [Ala.] 38 So. 244. See 3 C. L. 1476.

Appellate jndgments are as conclusive as any. Intermediate appellate court. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73. Kentucky court of appeals. Holtheide v. Smith's Guardian [Ky.] 84 S. W. 321. A judgment of remand by an appellate court is ordinarily not final. Blakeslie's Exp. & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135.

A void judgment is no bar: A judgment rendered void by a discharge in bankruptcy has no effect as a former adjudication. Gardiner v. Ross [S. D.] 104 N. W. 220. See 3 C. L. 1477.

Error does not prevent binding effect: Glass v. Shapard [Tex. Civ. App.] 83 S. W. 880. Errors, however grave, do not deprive the court of jurisdiction. Brown v. Schintz, 109 Ill. App. 598. It is of no importance whether conclusions, either of fact or law, are right or wrong. Hall v. City of Kalamazoo [Mich.] 12 Det. Leg. N. 500, 104 N. W. 689. Judgment in habeas corpus proceedings where the validity of an order of adoption was collaterally attacked, held conclusive. In re Clifford, 37 Wash. 460, 79 P. 1001. Where defendant failed to appear and the trial court failed to treat a counterclaim as withdrawn. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27. See 3 C. L. 1477.

37. Jndgment must be on the merits: Roberts v. Jones [S. C.] 51 S. E. 240; Armstrong v. Manatee County [Fla.] 37 So. 938; Levison v. Blumenthal, 25 Pa. Super. Ct. 55. Plea of res judicata held insufficient, it not showing that the former judgment was on the merits. Goff v. Wilburn, 25 Ky. L. R. 1963, 79 S. W. 232. Where there were several defenses, some of which did not go to the merits, it must clearly appear that the judgment was on the merits. Callaway v. Irvin [Ga.] 51 S. E. 477.

Refusal of leave to allow intervening petition is no adjudication of matters therein averred. Hamilton Nat. Bank v. American L. & T. Co. [Neb.] 100 N. W. 202. Judgment based on a **defect of pleading** is not on the merits. Langmuir v. Landes, 113 Ill. App. 134.

Denial of mandamus as an exercise of discretion or because there is an adequate remedy at law does not adjudicate the merits. Hoffman v. Silverthorn [Mich.] 100 N. W. 183. Judgment against an assignor suing for the assignee, on the ground that he had **no litigable interest** does not conclude the assignee as against the defendant. Tootle v. Buckingham [Mo.] 88 S. W. 619. The denial of a petition in a Federal court for leave to file a bill of review for newly discovered evidence showing fraud, held res judicata of petitioner's right to maintain a bill in a state court to set aside the decree for fraud, though the matter was decided on **ex parte affidavits.** Keith v. Alger [Tenn.] 85 S. W. 71. See 3 C. L. 1477.

Dismissal: Unless a dismissal be upon the merits (Dismissal of petition of trustee in bankruptcy in suit in state court to recover mortgaged property of the bankrupt held on the merits. Code Civ. Proc. Mont. § 1005, construed. In re Reynolds, 133 F. 585), or "with prejudice" (Hargis v. Robinson [Kan.] 79 P. 119), it does not constitute a bar (Durham v. Stubbings, 111 Ill. App. 10). Hence a dismissal without prejudice. Robinson v. American Car & Foundry Co. [C. C. A.] 135 F. 693; Wilson v. May Pants Co. [Miss.] 37 So. 813; Johnson v. Walker [Miss.] 39 So. 49. Suit to cancel patents. Southern Pac. R. Co. v. United States [C. C. A.] 133 F. 651. A proceeding under Ky. St. 1903, § 4297, to abolish gates erected across a public road, in which the relief sought is denied on the ground that the gates were not shown to have been erected under permission of the county court, and hence within the scope of the proceedings, is no bar to another proceeding brought for the same purpose, if the gate was in fact erected by permission of the county court (Allen v. Hopson, 26 Ky. L. R. 1148, 83 S. W. 575), or one because suit was prematurely brought (Nevills v. Shortridge, 146 Cal. 277, 79 P. 972). Action on an injunction bond (Tutty v. Ryan [Wyo.] 79 P. 920), or was not the proper form of action (Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815), does not bar a subsequent suit. Dismissal for failure to give surety for costs is no bar. Randolph v. Cottage Hospital of Des Moines [Iowa] 103 N. W. 157. Dismissal of a bill for want of equity does not bar an action at law on the same facts. Follett v. Brown, 114 Ill. App. 14. A general decree of dismissal in equity is presumptively on the merits and concludes all issues (Indian Land & Trust Co. v. Shoenfelt [C. C. A.] 135 F.

proceeding[38] *in a court having jurisdiction,*[39] *or before an officer or board exercising judicial functions,*[40] *are concluded by such adjudication and cannot again be litigated between the same parties*[41] *or their privies,*[42] *until the adjudication has been duly reversed, modified or otherwise adjudged erroneous.*[43]

484), but a judgment of dismissal for failure to prosecute presumptively does not involve the merits (Sanford v. King [S. D.] 103 N. W. 28). General dismissal in equity when the case is pending on pleadings and proof is conclusively presumed to be on the merits unless there is a reservation in the decree. Lykes v. Beauchamp [Fla.] 38 So. 603. See 3 C. L. 1477.

Discontinuance: Judgment is no bar as to subject-matter of counts discontinued. Crossman v. Griggs [Mass.] 74 N. E. 359. See 3 C. L. 1477.

Nonsuit: Plaintiff who takes a nonsuit after intervention is bound by the decree. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959. An adjudication that an action cannot be maintained because one of the necessary parties plaintiff was a foreign corporation, which had not complied with the laws of the state, held not res judicata. Harris & Cole Bros. v. Columbia W. & L. Co. [Tenn.] 85 S. W. 897.

On a **motion for judgment** and not for nonsuit, the trial court's finding that the evidence presented did not establish the case alleged is res judicata if the holding was correct. Campbell v. Flannery [Mont.] 79 P. 702.

Judgment of abatement for death of plaintiff is not on the merits. Stuber v. Louisville & N. R. Co., 113 Tenn. 305, 87 S. W. 411. See 3 C. L. 1478.

Judgment on demurrer is res judicata in so far as it is on the merits. Richmond Hosiery Mills v. Western Union Tel. Co. [Ga.] 51 S. E. 290. Demurrer being overruled, defendant is not entitled on the trial to benefit of defense set up therein. Sims v. Georgia R. & Elec. Co. [Ga.] 51 S. E. 573. Sustaining a demurrer to an amendment on the ground that it presents a new cause of action does not bar a suit on the subject-matter thereof. Butler v. Tifton, T. & G. R. Co., 121 Ga. 817, 49 S. E. 763. See 3 C. L. 1477.

Judgment on default: Judgment on plaintiff's proof, defendant failing to appear, held to bar defendant as to a counterclaim set up by him. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. [C. C. A.] 136 F. 27. This is true, though trial court should have treated counterclaim as withdrawn by failure to appear. Id. See 3 C. L. 1478.

Consent judgment: Order for judgment by consent held not conclusive. Cuccurullo v. Societa Italiana di Mutuo Soccorso di Brooklyn, 102 App. Div. 276, 92 N. Y. S. 420. See 3 C. L. 1478.

38. See 3 C. L. 1476, 1477.

Condemnation proceedings. Compton v. City of Seattle [Wash.] 80 P. 757.

Election contests: A count of ballots by the court at the request of the parties, in an election contest before answer, held not to create an estoppel. Hamilton v. Young, 26 Ky. L. R. 447, 81 S. W. 682.

Habeas corpus: In re Clifford, 37 Wash. 460, 79 P. 1001. See 3 C. L. 1478.

Probate proceedings: Final settlements of guardians, executors and the like are as conclusive as other judgments. May v. May [Mo.] 88 S. W. 75.

39. See 3 C. L. 1477. It is essential that the court have jurisdiction (Jensen v. Montgomery [Utah] 80 P. 504); establishment of claims in probate court (Jones v. Willis [Ohio] 74 N. E. 166), of the parties (Omaha Nat. Bank v. Robinson [Neb.] 102 N. W. 613), though the absence of a necessary party does not affect the conclusiveness of the judgment as to those before the court (Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686). A replication denying in general terms lack of jurisdiction and lack of identity of parties and subject-matter, held good on demurrer. United States v. Jacoby [Del. Super.] 61 A. 871. Decision of law court within its jurisdiction is binding in subsequent suit in equity. Attorney General v. Cent. R. Co. of New Jersey [N. J. Eq.] 59 A. 348; Hofmann v. Burris, 110 Ill. App. 348. Discharge of guardian after insufficient publication of notice is no bar. Griffin v. Collins [Ga.] 49 S. E. 827. An order in probate proceedings requiring surrender of a lease to the administrator does not adjudicate title to the leased premises. Milburn v. East [Iowa] 102 N. W. 1116. A decree in the state where mortgaged land is located canceling the mortgage is not an adjudication against a non-resident mortgagee served only by publication as to the right to recover the mortgage debt. Fitch v. Huntington [Wis.] 102 N. W. 1066.

40. See 3 C. L. 1477, 1478. Decision of Federal land department. Sanford v. King [S. D.] 103 N. W. 28. Civil service commission. People v. Snyder, 94 N. Y. S. 541. Confirmation of local assessment. Sheriffs v. City of Chicago, 213 Ill. 620, 73 N. E. 367.

Action of justice in ministerial capacity in eminent domain proceedings not res judicata. Sullivan v. Yazoo & M. V. R. Co. [Miss.] 38 So. 33. Proceedings of town council issuing warrant in favor of one whose sheep were injured by dog not conclusive against owner of dog who was not a party. Town of Richmond v. James [R. I.] 61 A. 54.

41. See 3 C. L. 1478, 1479. Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018; Delaney v. West [Tex. Civ. App.] 13 Tex. Ct. Rep. 419, 88 S. W. 275. A replication denying in general terms lack of jurisdiction and identity of parties and subject-matter held sufficient on demurrer. United States v. Jacoby [Del. Super.] 61 A. 871. See post, Persons concluded.

42. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; Schuler v. Ford [Idaho] 80 P. 219; Perkins v. Goddin [Mo. App.] 85 S. W. 936; Delaney v. West [Tex. Civ. App.] 13 Tex. Ct. Rep. 419, 88 S. W. 275; In re Harrington's Estate [Cal.] 81 P. 546. As to who are privies, see infra, this section, Persons concluded. See, also, 3 C. L. 1481, 1485.

43. Jones v. Willis [Ohio] 74 N. E. 166; Hargis v. Robinson [Kan.] 79 P. 119; In re Clifford, 37 Wash. 460, 79 P. 1001. A judgment which has been vacated and superseded cannot be pleaded in bar. Minor's Heirs v. City of New Orleans [La.] 38 So. 999.

FORMER ADJUDICATION — Cont'd.

Where suits are pending for the same cause in courts of concurrent jurisdiction, the first judgment rendered bars the other suit, without regard to which suit was first begun.[44] Orders made by a state court are not binding on a Federal court to which the cause is removed.[45] It is no objection to the conclusiveness of proceedings in a Federal court that those proceedings were not conducted according to the forms of practice obtaining in the state courts in similar matters.[46] An affirmance by agreement pursuant to division of opinion as in Florida and California concludes the parties, though it establishes no precedent.[47] As a general rule a judgment in ejectment is no bar to a second suit in ejectment between the same parties for the sale of the land.[48]

Persons concluded.[49]—All adversary parties to the action [50] or persons in privity with parties to the action [51] are bound by a final judgment on the merits rendered therein. To be a "party" one must have an interest in the subject-matter of the litigation.[52] In equity the adversary character of parties is determined by their respective claims upon the subject-matter rather than by their positions as parties plaintiff or defendant.[53] The term "privity" suggests mutual succession or relation to the same property or property right.[54] Privity to the estate is not necessarily

44. Boatman's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650. It is immaterial that the suit in which judgment was rendered was begun after that in which judgment is asserted as a bar. Church v. Gallic [Ark.] 88 S. W. 979; Place v. Rogers, 101 App. Div. 193, 91 N. Y. S. 912.

45. Ruling on interlocutory motion. Remington v. Central Pac. R. Co., 198 U. S. 95, 49 Law. Ed. 959.

46. Keith v. Alger [Tenn.] 85 S. W. 71.

47. State v. McClung [Fla.] 37 So. 51.

Note: Under the constitutions of these states the concurrence of a majority of the members of the appellate court is necessary to a decision. Florida Const. 1885, art. 5, § 4, as amended (Acts 1901, p. 361). Const. Cal. Jud. Dept. § 2. In construing these provisions the following California cases will be found valuable: Luco v. De Toro, 88 Cal. 26, 25 P. 983, 11 L. R. A. 543; Frankel v. Deidesheimer, 93 Cal. 73, 28 P. 794; Santa Rosa City R. v. Central St. R. Co., 112 Cal. 436, 44 P. 733.

48. Jamison v. Martin, 184 Mo. 422, 83 S. W. 750. A judgment in ejectment awarding possession of the land to plaintiff and decreeing that the sums paid by defendant should be a lien thereon, held more than a judgment in ejectment and hence a bar to ejectment by the defendant therein. Id.

49. See 3 C. L. 1485.

50. Order distributing fund in court concludes all parties as to their rights therein. Clifford v. Gridley, 113 Ill. App. 164. One contesting the application of an administrator to mortgage real estate, but abiding by the decision and taking her share of said realty when partitioned subject to the mortgage is estopped to question the regularity of the proceedings by which such mortgage was authorized. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341. In an action upon a lease to recover unpaid rent for a portion of the term, held, upon the record, the lessee and one of the joint owners of the premises leased are estopped from objecting to a recovery by a joint owner of the full amount due from the lessee, both joint owners being parties to the action. Forman v. Saunders, 92 Minn. 369, 100 N. W. 93. A distributee being a party to administration proceedings is charged with notice of recitals in a judgment discharging the administrator. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

51. See ante, this section.

52. Husband representing wife held to have no interest in subject-matter. Perkins v. Goddin [Mo. App.] 85 S. W. 936. One who is only indirectly interested in the litigation, and who is not made a party and who is not represented by a party to the record who represents his interests, but who comes forward and defends because it may ultimately benefit him so to do is not a party. Manufacturer of patented article assisting a purchaser in defending a suit for infringement held not a party. Australian Knitting Co. v. Gormly, 138 F. 92.

53. Where a creditor of a mortgagor sued the latter and his mortgagee claiming that a certain conveyance was fraudulent, held a judgment awarding the proceeds of the sale of the property to the mortgagee was binding in a subsequent suit between the mortgagor and mortgagee. Ellis v. Cole, 94 N. Y. S. 1031.

54. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. To constitute one privy in title so as to bind him by a former adjudication he must succeed, after the bringing of the action, to the interest of a party thereto in-

volved in such action. Minnesota Debenture Co. v. Johnson [Minn.] 102 N. W. 381. And see Parrotte v. Dryden [Neb.] 102 N. W. 610. Judgment in action to recover possession of a mining claim held res judicata as to the parties and their successors in interest as to their then existing rights. Lauman v. Hoofer, 37 Wash. 382, 79 P. 953.

ILLUSTRATIONS. Administrator and remaindermen and legatees: A judgment in an action of ejectment brought by the administrator of a decedent devising land to one for life with remainder over, held not binding on the remaindermen in a subsequent suit to quiet title instituted by them against the same defendant. Pryor v. Winter [Cal.] 82 P. 202. Establishment of a claim for assessments against the estate of a deceased stockholder concludes his distributees as to his ownership in an action against them for subsequent assessments. Rankin v. City of Big Rapids [C. C. A.] 133 F. 670. See, also, 3 C. L. 1481.

Assignor and assignee: Assignees of contract are in privity with assignor with respect to action to establish the contract. Butterly v. Deering, 102 App. Div. 395, 92 N. Y. S. 675. An assignee of a note and mortgage knowingly allowing the assignor to sue to foreclose the same in his own name is estopped, after judgment against the assignor, to sue thereon in his own name. Bailey & Son v. Wells, 68 S. C. 150, 46 S. E. 768. Judgment in a suit by the assignee of the lessor against the assignee of the lessee is not evidence as between the lessee and lessor. Broadwell v. Banks, 134 F. 470.

Attorney and client: An attorney, having a contract for a percentage of the recovery, who sues in the client's name on the entire cause of action and obtains a recovery as against a defense that the attorney is a part owner of the claim, is estopped by the judgment to assert against defendant that he was such part owner. American Cotton Co. v. Simmons [Tex. Civ. App.] 13 Tex. Ct. Rep. 343, 87 S. W. 842. See 3 C. L. 1481.

Bank depositors: A judgment against a bank on assigned claims of depositors is not res adjudicata in an action by plaintiff on assigned claims of other depositors. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13.

Building contractor and owner: A judgment in an action by a subcontractor against the principal contractor does not bar the owner from litigating the question with the principal contractor as to whether or not the work was done in accordance with the principal contract. Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054.

Note: This case must be distinguished from those wherein a city is held liable for negligence occuring through the fault or act of some third persons, and other cases of similar character. For a case dealing with this phase of the subject, see Hoppaugh v. McGrath, 53 N. J. Law, 81, 21 A. 106. This case is distinguished from Wagner v. St. Peter's Hospital [Mont.] 79 P. 1054, in the latter case.

Corporation and stockholders: Stockholders are bound by a judgment against the corporation in the absence of fraud or collusion. Gund v. Ballard [Neb.] 103 N. W. 309, citing Clark & M. Corp. § 800. Evidence held to show that judgment between corporation and its president was collusive. Id. See 3 C. L. 1481. See, also, p. 1485.

Covenantor and covenantee: One covenanting to save another harmless from a certain cause of action is not bound by a judgment against the covenantee, unless notified to come in and defend. Otherwise it stands merely as payment, and to make it material he must show that it was rightly made. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334.

Firm and members thereof: Judgment for defendant in a money action by an individual does not bar an action on the same debt by a firm to which he belongs. Figarra v. Saitta, 91 N. Y. S. 728.

Grantors and grantees: Vendee is not in privity with vendor. Subsequent suit against the latter does not affect the former. Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341; State v. Coughran [S. D.] 103 N. W. 31; Munnelly v. Barnes, 139 Ala. 657, 36 So. 763. Where suit was dismissed as to vendee held not bound by judgment that vendor was the owner of the land. Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278. A vendor is not bound by a judgment in ejectment against his vendee, he not being a party to the action nor allowed to participate in the defense. Bank of Winchester v. White [Tenn.] 84 S. W. 697. A grantor is not in privity with his grantee so as to be bound by a judgment against the latter on a covenant against incumbrances. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673. A grantee of a purchaser at an execution sale is in privity with the judgment. Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459.

Guardian and ward: Ward is bound by judgment against guardian. Cowling v. Nelson [Ark.] 88 S. W. 913. See 3 C. L. 1481, 1485.

Husband and wife: Husband representing wife is not in privity with her. Perkins v. Goddin [Mo. App.] 85 S. W. 936 (dicta).

Joint debtors: If the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor as a bar to the action. Armentrout v. S. H. Smith & Bros., 56 W. Va. 356, 49 S. E. 377.

Joint tort feasors: Where action is dismissed as to an alleged joint tort feasor on demurrer to his being joined, he is not bound by the judgment. City of Boston v. Brooks [Mass.] 73 N. E. 206.

Landlord and tenant and the latter's sublessees: A judgment against a tenant is not, so far as the title to the land is concerned, conclusive against the landlord, or those claiming under him, when he is not made a party to the action. Eldred v. Johnson [Ark.] 86 S. W. 670. A landlord who enters on removal of the tenant from the premises pending ejectment against him by a third person is not bound by the judgment in ejectment. King v. Davis, 137 F. 198. A sublessee is not bound by the judgment in a suit by the lessee against the lessor to terminate the lease. Wray-Austin Machinery Co. v. Flower [Mich.] 12 Det. Leg. N. 214, 103 N. W. 873. See 3 C. L. 1481.

Mortgagors and mortgagees and their

coincident with privity to the judgment.[55] While, strictly speaking, only parties or privies to parties to the action are bound by the judgment therein,[56] one may be bound, though not a party, where he has negligently failed to become a party,[57] or where he introduces the record and judgment in evidence in a subsequent case to which he is a party,[58] or where the judgment constitutes a link in a chain of title,[59]

grantees: One taking a mortgage on land pending a suit to determine the title thereto is in privity with the mortgagor. Johnson v. McKay, 121 Ga. 763, 49 S. E. 757. Mortgagee of a franchise cannot be deprived of security by a decree against the company annulling the franchise, entered in a suit begun after the mortgage was given, and to which the mortgagee was not a party. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661. Under Code Civ. Proc. § 726, the grantee in an unrecorded deed from a mortgagor is bound as to all matters necessarily adjudicated in a suit foreclosing the mortgage though he is not a party to such suit. Hager v. Astorg, 145 Cal. 548, 79 P. 68; Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 P. 315. Deficiency judgment against mortgagor is conclusive against his grantee as to validity of mortgage debt. Le Herisse v. Hess N. J. Eq.] 57 A. 808. Adjudication against railroad as to its liability to taxes held not to conclude its bondholders. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977. See 3 C. L. 1481, 1485.

Municipality and taxpayer: A judgment declaring a municipal assessment void is binding on the city in the absence of fraud or collusion though it was not a party. Otis v. City of St. Paul [Minn.] 101 N. W. 1066, following Willius v. City of St. Paul, 82 Minn. 273.

Officers and members of an unincorporated association are in privity. American Percheron Horse Breeders' Ass'n v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 136.

Parent and child: Judgment for defendant in an action by a widow for death of her husband under a civil damage act does not bar an action by her children. Stecher v. People [Ill.] 75 N. E. 501.

Parties to a contract to sell: A party in possession of land under contract to purchase is not in privity with the party who contracted to sell. Schuler v. Ford [Idaho] 80 P. 219.

Principal and surety: A surety is estopped as to an issue of payment by the principal by a judgment against the latter. Beh v. Bay [Iowa] 103 N. W. 119. Sureties on injunction bond not concluded by dissolution of injunction. McLennon v. Fenner [S. D.] 104 N. W. 218. Sureties who participated in defense of action against principal bound by judgment. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392.

Public officers and the public: Judgment against highway commissioners acting for the public binds all citizens. Sampson v. Com'rs of Highways, 115 Ill. App. 443. Judgment in suit against municipal officers held not to bar suit against municipality. Town of Adel v. Woodall [Ga.] 50 S. E. 481. See 3 C. L. 1481.

Purchasers at judicial sale: A grantee of a purchaser at an execution sale is in privity with the judgment. Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459. Judgment, for injuries to stock, recovered against receivers of railroad held not to bar subsequent action against a purchaser of the railroad at foreclosure sale. Kansas City So. R. Co. v. King [Ark.] 85 S. W. 1131.

Remainderman and life tenant: The remainderman is not bound by a decree in a suit between the life tenant and another by which the life tenant was held to take in fee simple. Downey v. Seib, 102 App. Div. 317, 92 N. Y. S. 431.

State and relator: The relator being the real party in mandamus, the judgment is conclusive as between him and respondent. Greenfield Gas Co v. Trees [Ind.] 75 N. E. 2.

United States and land patentees: Under Rev. St. U. S. § 2326, the government is not a party to a suit to determine adverse claims to land patents, and a judgment therein is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit. Butte Land & Inv. Co. v. Merriman [Mont.] 80 P. 675. See 3 C. L. 1485.

55. Judgment recitals of the establishment of a homestead are not admissible against grantees of a party. Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407.

56. Only binds the parties. Raftery v. Easley, 111 Ill. App. 413. Does not bind one not a party or in privity. Clark v. Durland, 93 N. Y. S. 249. A property right is not affected by the judgment in any suit to which the holder of such right was not a party of record. Busse v. Schaeffer [Iowa] 103 N. W. 947. Action of town council in issuing warrant for reimbursement of one whose sheep were injured by dog not binding on owner of dog who was not a party. Town of Richmond v. James [R. I.] 61 A. 54. Denial by county board of an application to have a road alleged to be established by user recorded as a public way does not conclude abutting landowners as to fact of establishment by user. McClaskey v. McDaniel [Ind. App.] 74 N. E. 1023. One who does not claim under either patent is not bound by order in interference proceedings. McCaslin v. Link Belt Machinery Co., 139 F. 393. One who being real party in interest undertakes the defense of a suit is bound by the judgment. Leathe v. Thomas, 109 Ill. App. 434.

57. Where a person not a party to an action will be liable to another who is a party if the latter's claim or defense shall fail, and such person has notice of the action and opportunity to participate therein in defense or maintenance of his position, he will be bound by the result the same as if he were a party to such action. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

58. Richardson v. Southwestern Cotton Seed Oil Co. [Okl.] 81 P. 781.

or where the proceeding is in rem.[60] These last two cases, however, may be related to the doctrine of privity. In order that a judgment shall be conclusive upon any particular person of a class "there must have been a previous formal act on his part in applying to the court, and an order therein making him a party to the action, so that his name should have appeared in some manner upon the record, or it must be shown that he had notice of proceedings and an opportunity to unite in them, of which he neglected or refused to avail himself."[61] One who conducts the defense for a party must do so openly to be bound by the decree.[62] One as to whom the action is dismissed is not concluded by a judgment subsequently rendered therein.[63] Parties are not precluded by a judgment where they assert and are sustained in a plea of privilege to be sued in another county than that in which suit is brought, and thereupon withdraw from the suit.[64] Plaintiff taking a nonsuit after an intervention is bound by the decree rendered between intervenor and defendant.[65] One represented in the action by an attorney is bound by the judgment.[66]

§ 2. *Adjudication as bar of causes of action or defense.*[67]—*As a general proposition, it is stated that to constitute a prior adjudication a complete bar to a cause of action or defense, there must concur identity of parties;*[68] *identity of subject-matter,*[69] *and identity of issues;*[70] *or the cause of action as it has been termed.*[71]

59. Chapman v. Greene [S. D.] 101 N. W. 351; Minnesota Debenture Co. v. Johnson [Minn.] 102 N. W. 381. Suit to determine adverse claims held not within rule. Id.

60. Adjudication in bankruptcy. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748. A summary proceeding to enjoin an insolvent corporation from the exercise of its franchises is in rem and the order therein fixes the status of the corporation. Pierce v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 58 A. 319. Foreclosure decree is not in rem but ex contractu and does not bind strangers. Lohmeyer v. Durbin, 213 Ill. 498, 72 N. E. 1118.

61. Pomeroy, Remedies & Remedial Rights, § 400. Holderman v. Hood [Kan.] 78 P. 838. A final judgment in a suit brought by a beneficiary of an express trust "on behalf of complainant and all other creditors likewise situated who desire to avail themselves thereof," held not to affect the rights of a beneficiary in the same situation as complainant, but who was without notice or knowledge of the pendency of the action. Id.

62. Suit for infringement of patent. Jefferson Electric L., H. & P. Co. v. Westinghouse Electric & Mfg. Co. [C. C. A.] 139 F. 385, afg. 135 F. 365.

63. Partition. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. Where action is dismissed as to an alleged joint tort feasor on demurrer to his being joined he is not bound by the judgment. City of Boston v. Brooks [Mass.] 73 N. E. 206. Action to foreclose the lien of street improvement being dismissed as to a vendee, he is not bound by a judgment that his vendor is the owner of the land. Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278.

64. Sawyer v. J. F. Wieser & Co. [Tex. Civ. App.] 84 S. W. 1101.

65. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

66. Evidence held to show that a party was represented in the former action by an attorney, and hence was bound thereby. Durrett v. Durrett [Ky.] 89 S. W. 210. Evidence held sufficient to show that defendant authorized the appearance in the former action and such decision was binding. Missouri, K. & T. R. Co. v. Allen, 67 Kan. 838, 73 P. 98.

67. See 3 C. L. 1479.

68. Harrison v. Ottman, 111 La. 730, 35 So. 844; J. M. Weatherwax Lumber Co. v. Ray [Wash.] 80 P. 775; Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018; Campbell v. Upson [Tex.] 84 S. W. 817; Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341; McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673; Hess' Estate, 27 Pa. Super. Ct. 498. Instruction given receivers on motion not res judicata in action by them against persons not parties to motion. Beardslee v. Ingraham, 94 N. Y. S. 937. Judgment in a suit by grandchildren of testator to enforce a trust deed executed by their father of lands set apart to him under partition deed between his mother and brothers and sisters, does not bar them from suing for general partition between themselves and their uncles and aunts under the will of their grandfather. Parrott v. Barrett, 70 S. C. 195, 49 S. E. 563.

Suit trying title to land held not to bar **claims of state,** the latter not being a party. Madden v. State, 68 Kan. 658, 75 P. 1023.

Sureties on injunction bond are not concluded by dissolution of injunction. McLennon v. Fenner [S. D.] 104 N. W. 218.

Minors not represented in partition proceedings and having no knowledge thereof held not estopped from asserting their rights against a third party purchasing the property. Underwood v. Deckard, 34 Ind. App. 198, 70 N. E. 383. Dismissal of suit to restrain removal of county seat no bar to similar suit by **other citizens.** Board of Sup'rs of Simpson County v. Buckley [Miss.] 38 So. 104. Judgment, for injuries to stock, recovered against receivers of railroad, held not to bar subsequent action against a **pur-**

chaser of the railroad at foreclosure sale. Kansas City Southern R. Co. v. King [Ark.] 85 S. W. 1131.

Adjudication of bankruptcy on the ground of having given a preference does not estop the creditor named in the petition as having been preferred from showing in a suit by the trustee to recover the alleged preference that the transaction did not constitute a preference. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748. The **discharge of a bankrupt** cannot be pleaded in bar of a creditor's bill to secure property fraudulently conveyed by the bankrupt, even though the facts in the bill were in issue in the bankruptcy court. Friedman v. Verchofsky, 105 Ill. App. 414. Where a suit is dismissed because one of the necessary parties plaintiff was designated as a foreign corporation, held not to bar a subsequent suit on the same cause of action, it being shown that the party in question was **designated a corporation by mistake of fact,** and was a partnership whose individual members joined as plaintiffs in the second suit. Harris & Cole Bros. v. Columbia Water & Light Co. [Tenn.] 85 S. W. 897.

Former criminal prosecution: Judgment in a criminal prosecution does not bar a civil action between defendant and a third person. Frierson v. Jenkins [S. C.] 51 S. E. 862. The trial and acquittal of a party charged, in a criminal complaint, with the construction of a nuisance in a navigable stream by a justice's jury, is no bar to a civil action to restrain the completion of the alleged nuisance. This is especially true where plaintiff was not the complainant in the criminal action. Small v. Harrington [Idaho] 79 P. 461. Acquittal on a charge of bigamy does not operate as an adjudication against the alleged second marriage to bar the wife in a civil suit based thereon. Frierson v. Jenkins [S. C.] 51 S. E. 862. See 3 C. L. 1479.

69. United States v. Jacoby [Del. Super.] 61 A. 871; Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018. Sureties on injunction bond are not concluded by dissolution of injunction. McLennon v. Fenner [S. D.] 104 N. W. 218. Determination in former action that promise sued on was never made bars recovery. Arnold v. Randall [Wis.] 102 N. W. 340. Divorce decree. Held, as to the property covered thereby, plaintiff's only remedy was by proceedings in the court rendering the same to enforce it, but as to property not covered thereby, plaintiff was entitled to sue at law in another action to recover the same. Jackson v. Jackson [Mich.] 98 N. W. 260. A recovery in an action of conversion against a sheriff in New York for unlawful seizure and sale of goods is no bar to an action of replevin to recover specific goods found in Pennsylvania, the goods sought to be recovered not being included in the bill of particulars in the conversion action. Levy v. Solomon, 207 Pa. 478, 56 A. 1007. Issuance of an order for sale of land by guardian to pay debts against opposition on the ground of indebtedness by the guardian because of mismanagement is conclusive against such mismanagement. In re Kimble [Iowa] 103 N. W. 1009. A decree ordering execution of lease by landlord on execution of rent notes by tenant does not bar an action for rent under the oral lease for occupancy pending the former litigation or a counterclaim for damages for failure to give possession at the time required by the oral lease. Harmont v. Sullivan [Iowa] 103 N. W. 951. See 3 C. L. 1480.

70. Bonanza Consol. Min. Co. v. Golden Head Min. Co. [Utah] 80 P. 736; Evans v. Woodsworth, 115 Ill. App. 202. Judgment in assumpsit held no bar to action of tort involving some of the same facts. Linder v. Rowland [Ga.] 50 S. E. 124. Judgment denying petition to vacate judgment for fraud is no bar to application to open it for irregularity. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221. An adjudication of the rights of the public to car service over a spur track is not binding after the track has been sold by the carrier to an individual. Oman v. Bedford-Bowling Green Stone Co. [C. C. A.] 134 F. 64. Order on habeas corpus to determine custody of children held res judicata in subsequent divorce suit. Dawson v. Dawson [W. Va.] 50 S. E. 613. Adjudication of bankruptcy on the ground of giving a preference does not estop creditor alleged to have received same from showing in a suit by the trustee to recover the alleged preference that the transaction did not constitute a preference. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748.

Divorce proceedings: Denial of divorce for cruelty and drunkenness, no bar to suit for separate maintenance for desertion and failure to support. Smith v. Smith [Ind. App.] 74 N. E. 1008. Decree for separate maintenance based on finding that wife is rightfully living apart from her husband bars husband's action for divorce for desertion. Harding v. Harding, 198 U. S. 317, 49 Law. Ed. 1066.

Rights under contracts: Defendant gave plaintiff a bill of sale for standing timber and plaintiff brought suit for breach of covenant owing to the failure of title as to a portion of the timber, and in such action a default judgment was taken and satisfied. Held, in a subsequent action of replevin for logs cut from the timber, that defendant was not barred from claiming that the bill of sale produced and relied on by plaintiff was a forgery. Metropolitan Lumber Co. v. McColeman [Mich.] 12 Det. Leg. N. 172, 103 N. W. 809. Judgment for defendant in a suit against a bank to cancel bonds held by the latter as collateral security does not bar a suit by a purchaser of the bonds at a sale of the collateral to enforce payment thereof and to foreclose a mortgage given for their security. Buckman v. Union R. Co., 45 Or. 578, 78 P. 748. Judgment for defendant in an action to have a contract declared a mortgage and to redeem therefrom is no bar to an action for specific performance of such contract as a contract of sale. Kaaterud v. Gilbertson [Minn.] 104 N. W. 763. A judgment for services against a defense that they were unskilfully performed is a bar to an action for damages by such unskillful performance. Goldberg v. Ziegler, 92 N. Y. S. 777. Judgment for seller against defense of breach of warranty bars suit for alleged breach. Miller v. Buckley [Miss.] 38 So. 99. See 3 C. L. 1480.

Rights affecting property: Judgment rendered on petitions for assessment of damages for injuries done to land by the erection of an elevated railway, brought under

Identity of parties.[72]—Identity of names is presumptive, but not conclusive, evidence of identity of persons.[73] That a party's sureties were joined with him in the former suit does not prevent identity of parties.[74] It is essential that the party sought to be bound by the former judgment must have appeared in both actions in the same capacity or character.[75]

Identity of cause of action.[76]—The test of the identity of causes of action is whether the same evidence will sustain both.[77]

Privies of a party.[78]

Scope of adjudication.[79]—If the parties and issues be identical, the adjudication is binding not only as to all matters actually litigated,[80] but as to everything which

Rev. Laws, c. 48, § 114, and chapter 111, §§ 112, 113, held not conclusive on equitable rights of a third mortgagee who had brought a bill for marshaling assets. Bates v. Boston El. R. Co., 187 Mass. 328, 72 N. E. 1017. Judgment in a suit to impress a trust on realty purchased by a husband in his own name with his wife's money, held not a bar to an action by the wife's administrator against the husband for conversion of the fund. Kraft v. Moore [Ark.] 89 S. W. 51. An award of past damages does not preclude a suit for an injunction to prohibit the further maintenance of the nuisance. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003. One by suing and recovering double damages for the wrongful construction of a dam is not thereby precluded from suing to abate the nuisance, created by the obstruction, under the equity powers of the court. Rev. St. 1899, § 8750, construed. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003. A judgment for plaintiff in an action for rent defended on the ground of constructive eviction does not bar an action for damages for eviction where the tenant did not abandon the premises till after the judgment for rent. Goldstein v. Asen, 91 N. Y. S. 783. A judgment for defendant on the issues of damage raised in a replevin action is res judicata in subsequent action by plaintiff in the replevin action against defendant therein to recover the same items of damages. Vulcan Iron Works v. Kent Lumber Co. [Wash.] 81 P. 913. A judgment for plaintiff in replevin by a mortgagee against the mortgagor settling the accounts between the parties pursuant to Kirby's Dig. § 6869, is a bar to a subsequent action on the account. Neal v. Brandon & Baugh [Ark.] 85 S. W. 776. See 3 C. L. 1479, 1480.

71. Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018. An action on coupons from a mortgage bond is not on the same cause of action as a former judgment on other coupons from the same bond. Schmidt v. Louisville, etc., R. Co. [Ky.] 84 S. W. 314. Cause of action for conspiracy in restraint of trade held different from that concluded by former judgment. John D. Park & Sons Co. v. Bruen, 139 F. 698. A cause of action for equitable relief from the consequences of accepting a void guaranty is essentially different from an action on the guaranty. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. Unsuccessful defense to petition to foreclose tax lien bars suit to vacate tax deed on ground which might have been raised. Napper v. Fitzpatrick [Mich.] 102 N. W. 642. Decree dismissing a bill to enjoin use of a corporate name is no bar to a suit for damages for appropriation of the corporate good will. Lindemann v. Rusk [Wis.] 104 N. W. 119. Suit for breach of covenant of warranty held barred by previous judgment for defendant in a suit for recovery on a mortgage and note given to secure the fulfillment of the covenant, for the same breach. Dime Sav. Bank v. McAleney [Conn.] 61 A. 476. There is a material difference between a suit brought for the settlement and distribution of an estate and a suit by the personal representative against a debtor of the estate requiring him to account for his indebtedness. Botto's Ex'r v. Botto, 25 Ky. L. R. 2130, 80 S. W. 174. Judgment in a suit by grandchildren of testator to enforce a trust deed executed by their father of lands set apart to him under partition deed between his mother and brothers and sisters does not bar them from suing for general partition between themselves and their uncles and aunts under the will of their grandfather. Parrott v. Barrett, 70 S. C. 195, 49 S. E. 563. See 3 C. L. 1480.

72. See 3 C. L. 1481.

73. Fowler v. Stebbins [C. C. A.] 136 F. 365.

74. Andreas v. School Dist. No. 4 [Mich.] 100 N. W. 1021.

75. Perkins v. Goddin [Mo. App.] 85 S. W. 936. Administrator held not bound as such by a judgment in a suit in which he, as an individual, represented his wife, she being a party thereto. Id. There must be identity to the quality of the persons for or against whom the claim is made. Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018.

76. See 3 C. L. 1481.

77. Kaaterud v. Gilbertson [Minn.] 104 N. W. 763.

78. See ante, § 1. See, also, 3 C. L. 1481.

79. See 3 C. L. 1482.

80. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. Where note given to secure performance of award of arbitrators was delivered to the prevailing party, and the other party sued for conversion, claiming that the arbitration was illegal and the defendant sought to sustain the arbitration, claiming that there was an indebtedness due him, held, a judgment in favor of plaintiff was res judicata of defendant's claim. Pickel Stone Co. v. Wall, 108 Mo. App. 495, 83 S. W. 1018.

Judgment overruling demurrer conclusive of right of action but not of measure of

might have been litigated under the issues as made.[81] The judgment does not ex-

damages. Richmond Hosiery Mills v. Western Union Tel. Co. [Ga.] 51 S. E. 290.

Dismissal on one ground does not affect other questions raised. Smith v. Town of Stoughton, 185 Mass. 329, 70 N. E. 195.

Denial of motion to open default judgment on one ground is no bar to a suit to set it aside on another. Everett v. Everett, 180 N. Y. 452, 73 N. E. 231.

Dismissal of proceeding to foreclose lien on the ground that the lien had been discharged by a bond is no bar to an action on the bond. Mertz v. Press, 99 App. Div. 443, 91 N. Y. S. 264. One who procures the **dismissal** of an appeal from an order establishing a highway **on the ground that appellant is not a party** cannot subsequently assert that appellant is estopped by the order. Kirkhart v. Roberts, 123 Iowa, 137, 98 N. W. 562.

Sustaining of demurrer to complaint is no bar to amended complaint supplying defects of original. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

Decree for sale held not to determine distribution of proceeds. Lengert v. Chaninel, 26 Pa. Super. Ct. 626.

Judgment in partition declaring the interests of the parties held binding in ejectment. Place v. Rogers, 101 App. Div. 193, 91 N. Y. S. 912. A decree that **a certain point** was beyond a boundary line without stating how far is not conclusive as to the line at other points. Wharton v. Harlan, 24 Pa. Super. Ct. 61. A **judgment that certain property was given** by plaintiff to defendant's predecessor in interest precludes plaintiff, when afterwards sued by defendant for rents and profits, from setting up by way of counterclaim a demand for the purchase price. Smith's Guardian v. Holtheide [Ky.] 84 S. W. 346. Judgment for defendant in an action to have title to land, the **purchase money** for which was **furnished by plaintiff,** vested in him held res judicata of an action to recover the purchase money furnished by plaintiff to intestate. Holtheide v. Smith's Guardian [Ky.] 84 S. W. 321.

Judgment for defendant in action on account stated does not bar suit on an item of the alleged account. Tuck v. Rottkowsky, 93 N. Y. S. 1112; Mincer v. Green, 94 N. Y. S. 15.

Confirmation of judicial sale is res judicata as to the limitations imposed by the deed. Corbett v. Fogle [S. C.] 51 S. E. 884. A judgment in an action of writ of entry does not establish the title of the petitioners to any **other land** than that described in the writ. In re Butrick, 185 Mass. 107, 69 N. E. 1044. Judgment in action involving possession of property held to involve **only real** and not personal property. Grim v. Griffith, 34 Ind. App. 559, 73 U. E. 197.

Judgment, in a suit to have a note canceled, in favor of the payee, held res judicata as to the maker's liability to an indorsee as against the payee in a subsequent suit in which the maker pleaded the same facts as had been previously alleged in the prior suit. Scott v. American Nat. Bank [Tex. Civ. App.] 84 S. W. 445. Judgment against **trustee** held to conclude him as to his **liability** as to full amount of claim and not merely as to the part as to which he was able to reimburse himself. In re Howard [C. C. A.] 135 F. 721. A judgment in an **action to completely settle a trustee's accounts** is final as to a claim that the trustee should be charged for certain misconduct. Hackney v. Hoover [Ky.] 87 S. W. 769.

A **judgment for defendant in replevin** is conclusive in an action on the replevin bond that the property was taken from defendant on the writ. Stafford v. Baker [Mich.] 12 Det. Leg. N. 393, 104 N. W. 321. A judgment in a **suit to set aside a fraudulent conveyance** is conclusive in garnishment against the grantee that the conveyance was fraudulent. Dodge v. Knapp [Mo. App.] 87 S. W. 47.

Judgment for defendant on a note for wages bars a suit for such wages except for the amount over the face of the note. Mack v. Logue, 23 Pa. Super. Ct. 160.

A judgment for a landlord in an action for possession does not conclude the tenant as to a set-off not pleaded. McMichael v. McFalls, 23 Pa. Super. Ct. 256. Judgment for plaintiffs in **action on a note secured by a mortgage** held to render res judicata a defense that the mortgagor had no power to execute the mortgage. Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459.

81. Long v. Lebanon Nat. Bank, 211 Pa. 165, 60 A. 556; Australian Knitting Co. v. Gormly, 138 F. 92; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; First Nat. Bank v. Gibson [Neb.] 104 N. W. 174; Greer v. Greer, 142 Cal. 519, 77 P. 1106; Ruckman v. Union R., 45 Or. 578, 78 P. 748; Peacock v. Iron & Steel Publishing Co., 114 Ill. App. 463. Condemnation proceedings. Compton v. Seattle [Wash.] 80 P. 757; American Cotton Co. v. Frank Heierman & Bro. [Tex. Civ. App.] 83 S. W. 845. Where the right to possession of a chattel is in controversy, the fact that the issues with reference to damages are withdrawn does not preclude a party from setting up any claim he may have as to possession. Id. Judgment against a bill in equity is conclusive as to all grounds, for the relief asked which might have been set up therein. Barnes v. Huntley [Mass.] 74 N. E. 318. A judgment in scire facias on a recognizance bars any defense which might have been made to the scire facias. State v. Boner [W. Va.] 49 S. E. 944. Money recovered by judgment cannot be recovered back by reason of any new right or claim. United States v. McConnaughey [C. C. A.] 135 F. 350. Claim which might have been asserted on an **accounting** cannot be set up against a party thereto. Barnes v. Huffman, 113 Ill. App. 226. Claim of **homestead** is barred by failure to set it up in an action where it would have been a defense. Hallman v. George, 70 S. C. 403, 50 S. E. 24. Defendant in a **suit to quiet title** is concluded as to every claim of title which he might have asserted. Chicago & S. E. R. Co. v. Grantham [Ind. Sup.] 75 N. E. 265. A **foreclosure decree** bars a tax title previously acquired by the mortgagor which he might have set up in the foreclosure suit. Ayers v. Casey [N. J. Err. & App.] 61 A. 452. A debtor who has had his day in court will not be heard after judgment, to attack

tend to defenses which could not have been set up,[82] but the unsuccessful use of a remedy supposed to be, but in effect not, appropriate to vindicate the right of a particular matter, either because the facts turn out to be different than plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy.[83] One failing to present the proper evidence in the first suit will not for that reason be permitted to relitigate the questions involved in a second suit.[84] Failure to plead an existing cause of action as a counterclaim when presented with an opportunity to do so does not operate to cancel or satisfy such cause of action.[85] The right of an innocent purchaser to full remuneration for his permanent improvements, for taxes paid, and the purchase price thereof, is not lost by failure to plead the same in ejectment against him.[86] An acquittal on a criminal charge bars an action by the government for a forfeiture on the same facts.[87] One cannot split his cause of action and have successive recoveries,[88]

the levy of the execution on the ground that his debt was infected with usury. Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620. A judgment for defendant in an **action for permanent alimony** and to set aside a deed as fraudulent on plaintiff's marital rights, held to bar a subsequent action for divorce, setting forth the desertion of the husband from the date alleged in the first action, and his failure to provide for her, and praying to have the deed set aside, in so far as it related to desertion, and to the claim that the deed was fraudulent. Greer v. Greer, 142 Cal. 519, 77 P. 1106. Where a bill by an executor to administer the assets of his testator for the payment of debts states that a person named **claims** a debt **against** the **estate** on a specific demand and such person is made a formal party, but does not prove his claim or appear, a decree allowing certain debts, but not his debts, and subjecting the estate's land to their payment, concludes him. Trail v. Trail, 56 W. Va. 594, 49 S. E. 431.

After a **decree for the sale of land** for the purposes of partition among heirs at law has been passed and enrolled and the land sold, an heir, who was a party to such proceeding, cannot contest the same by exceptions to the auditor's account or by petition on the ground that the property in fact belonged to his father and not to his mother as alleged, and that he was entitled to the same as his father's only heir at law. Rice v. Donald, 97 Md. 396, 55 A. 620. Nor was he entitled to intervene and claim the land as administrator of his father's estate, on the ground that his mother had converted his father's estate and invested a part of the proceeds therein. Id.

82. J. M. Weatherwax Lumber Co. v. Ray [Wash.] 80 P. 775; Holmes v. Wolfard [Or.] 81 P. 819. Where an execution was levied on property belonging to plaintiff, under a judgment against plaintiff's grantor, rendered in a suit to which plaintiff was not a party, the court having no power to vacate such levy on plaintiff's motion, its refusal to grant the same is no bar to a subsequent action by plaintiff to determine an adverse interest in the real estate acquired under such levy. Id. Does not apply to after-occurring facts. Bedford-Bowling Green Stone v. Oman, 134 F. 441. Grounds of objection to an ordinance. Lusk v. City of Chicago, 211 Ill. 183, 71 N. E. 878. An adjudication authorizing defendant railroad to cross plaintiff's tracks, held not conclusive of defendant's right to reduce the grade of the outer rail of plaintiff's track, so as to preclude plaintiff from suing to restrain defendant from so changing the grade. Southern R. Co. v. Washington, A. & Mt. V. R. Co., 102 Va. 483, 46 S. E. 784. A judgment establishing a mortgage in a suit to quiet title is not conclusive in a suit to foreclose such mortgage against the statute of limitations, unless it appears that such defense could have been raised in the former suit. Teigen v. Drake [N. D.] 101 N. W. 893.

83. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. See Election and Waiver, 5 C. L. 1078.

84. In re Harrington's Estate [Cal.] 81 P. 546.

85. Failure of purchaser to plead his right to rents and profits after day when deed should have been delivered as a set-off in an action for the purchase price, does not bar his action therefor. Ferguson v. Epperly [Iowa] 103 N. W. 94.

86. May subsequently maintain a suit in equity therefor. Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010.

87. United States v. Seattle Brewing & Malting Co., 135 F. 597.

Contra: An acquittal in a criminal prosecution for violating a town ordinance is not a bar to a subsequent civil action by the town to recover a penalty imposed for violating the ordinance. Town of Canton v. McDaniel [Mo.] 86 S. W. 1092. [In this case the court seems to have regarded the question of one of former jeopardy and to have overlooked the adjudicative force of the decree].

88. Morgan v. St. Louis & S. F. R. Co. [Mo. App.] 86 S. W. 590; Watkins v. American Nat. Bank [C. C. A.] 134 F. 36. One recovery for a permanent injury bars a suit for damages subsequently resulting. Archison, etc., R. Co. v. Jones, 110 Ill. App. 626. Recovery for death by wrongful act bars recovery for vehicle destroyed in same accident. Coles' Adm'x v. Illinois Cent. R. Co. [Ky.] 87 S. W. 1082. After recovery of principal, interest cannot be recovered in separate action. Gordon v. City of Omaha [Neb.]

unless he be unavoidably ignorant of the full extent of the wrongs received or injuries done,[89] or unless defendant consents thereto.[90] Whether defendant is unavoidably ignorant of the full extent of the injury would seem to be a question of fact.[91] Where damages are occasional and recurring, a party may sue as often as he suffers injury therefrom;[92] hence one recovery does not bar subsequent suits for continuing nuisance.[93] In Colorado a judgment rendered on a firm debt, where service is had on less than all the partners, is a bar to a subsequent action against the partners not served.[94] In Oregon a party may rely upon a legal defense without being thereby precluded from afterwards asserting his equitable title in an original suit.[95] A decree affirmed on appeal is res adjudicata on all matters determined by it and not merely on the one on which it was affirmed.[96]

§ 3. *Adjudication as estoppel of facts litigated.*[97]*—Though there be no identity of issues and subject-matter, an adjudication is conclusive in all courts*[98] *in suits between the parties*[99] *and their privies,*[1] *as to all matters in issue*[2] *and decided*[3] *or necessarily involved in the decision made.*[4]

99 N. W. 242. Counterclaim to amount of jurisdiction is a splitting which will bar suit for the remainder. Andreas v. School Dist. No. 4 [Mich.] 100 N. W. 1021. The right of a creditor having various claims against a corporation to exact payment from a stockholder is not such a single and indivisible demand that, by placing one such claim in judgment against the stockholder, he is precluded from proceeding against him upon the others. Manley v. Park, 68 Kan. 400, 75 P. 557.

89. Morgan v. St. Louis & S. F. R. Co. [Mo. App.] 86 S. W. 590, following Wheeler Sav. Bank v. Tracy, 141 Mo. loc. cit. 258, 42 S. W. 947, and limiting Kerr v. Simmons, 9 Mo. App. loc. cit. 377.

90, 91. Morgan v. St. Louis & S. F. R. Co. [Mo. App.] 86 S. W. 590.

92. Obstruction in stream causing overflow. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 86 S. W. 1052.

93. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

94. Mills' Ann. Code, §§ 235-240. Blythe v. Cordingly [Colo. App.] 80 P. 495.

95. Under B. & C. Comp. § 391, allowing an equitable defense by cross bill in actions at law. Clark v. Hindman [Or.] 79 P. 56.

96. Russell v. Russell (C. C. A.) 134 F. 840.

97. See 3 C. L. 1484. Brock v. Boyd, 211 Ill. 290, 71 N. E. 995; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; Carter v. Carter [N. D.] 103 N. W. 425; Schmidt v. Louisville, etc., R. Co. [Ky.] 84 S. W. 314.

98. In re Harrington's Estate [Cal.] 81 P. 546.

99. In re Harrington's Estate [Cal.] 81 P. 546. Order in administration suit does not bind creditors not parties. Fisher v. Southern L. & T. Co., 438 N. C. 90, 50 S. E. 592. Finding that scow was unseaworthy, in suit by assignee of owner of goods against the owner of the vessel, not binding by way of estoppel in action by owner of vessel against insurer of cargo. Chesapeake Lighterage & Towing Co. v. Western Assur. Co., 99 Md. 433, 58 A. 16. A judgment adjudging that an insolvent purchaser of a private bank was indebted to the seller is not an adjudication that the latter is not liable, to depositors of the bank, where the depositors were not parties to the proceedings. Johnson v. Shuey [Wash.] 82 P. 123. Decree of distribution held not evidence that certain persons were not heirs of decedent as against one not a party to the suit, though in the possession of property of the decedent lying beyond the jurisdiction of the court rendering the decree. Mace v. Duffy [Wash.] 81 P. 1053.

1. See ante, § 1, subd. "Persons concluded."

2. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; Ruckman v. Union R., 45 Or. 578, 78 P. 748; In re Harrington's Estate [Cal.] 81 P. 546. Judgment only binding as to matters within the issues. Cowling v. Nelson [Ark.] 88 S. W. 913; Bank of Visalia v. Smith [Cal.] 81 P. 542. Every matter found which was material and within the pleadings. In re Harper, 133 F. 970. Judgment in partition not binding as to land not described in petition. Cowling v. Nelson [Ark.] 88 S. W. 913. Assessment of benefits held not within issues in condemnation proceeding. City of Chicago v. McCartney [Ill.] 75 N. E. 117. A decree establishing a survey does not conclude the parties as to title. Krause v. Nolte [Ill.] 75 N. E. 362. A note introduced in evidence but not used as a set-off or counterclaim is not discharged by the judgment. Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891. A judgment against a charitable corporation does not conclude any question as to whether its property is subject to execution. Woman's Christian National Library Ass'n v. Fordyce [Ark.] 86 S. W. 417. Adjudication in bankruptcy concludes participating creditor as to bankrupt's residence. In re Hintze, 134 F. 141. Interlocutory order in foreclosure held not to adjudicate jurisdiction in foreclosure suit. Carly v. Boner [Neb.] 102 N. W. 761. Dissolution of injunction does not conclude sureties on injunction bond. McLennon v. Fenner [S. D.] 104 N. W. 218. Refusal to remove an executor for fraud in withdrawing appeal from judgment is conclusive against an application to vacate the judgment for the executor's fraud. Riley v. Ryan, 45 Misc. 151, 91 N. Y. S. 952. An order refusing to vacate an attachment upon an offer to deposit

stock as security in lieu thereof is not res judicata of the right to have the attachment dismissed in that defendant was not a resident. Brady v. Onffroy, 37 Wash. 482, 79 P. 1004. A judgment allowing a widow and minor children a year's support is conclusive only that she is entitled to the amount of the judgment if there be assets to pay it, and such judgment is no evidence that the administrator has sufficient assets of his intestate with which to pay it. Wood v. Brown, 121 Ga. 471, 49 S. E. 295. Decree of foreclosure of railroad bonds does not bar a stockholder's action to have the purchaser at foreclosure sale declared a trustee for stockholders. MacArdell v. Olcott, 93 N. Y. S. 799. Where suit against tenant for possession was decided in his favor on grounds not involving payment of rent, the judgment is not an estoppel as to whether rent was due. Cockerline v. Fisher [Mich.] 12 Det. Leg. N. 55, 103 N. W. 522. A judgment in habeas corpus awarding the custody of a child to its adoptive parents is res judicata as to the validity of the order of adoption in a subsequent proceeding between the same parties on the same facts to vacate the order of adoption. In re Clifford, 37 Wash. 460, 79 P. 1001. Decree stating heirship in a partition suit, such heirship not being in issue, is not conclusive in a subsequent suit involving other property. Stone v. Salisbury, 209 Ill. 56, 70 N. E. 605. A judgment in replevin under Rev. St. § 4965, for the forfeiture of infringing publications is not evidence that such publications were in defendant's possession in a subsequent suit for penalties for having the same in possession. Werckmeister v. American Tobacco Co., 138 F. 162. An adjudication that a will was procured by undue influence of the beneficiary does not conclude him as to the validity of a gift causa mortis from testator at about the time of the execution of the will. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548. A decree setting aside a conveyance for incapacity of the grantor is not admissible in favor of the defendant therein, in an action by him to set aside a subsequent conveyance of the same property. Bollnow v. Roach, 210 Ill. 364, 71 N. E. 454. Where, in an action on a bond given for the payment of alimony, plaintiff prayed judgment for the penalty of the bond and for damages, and a general denial was entered, and judgment rendered for the plaintiff for the penalty and damages, held the judgment for the penalty should be treated as surplusage, and hence the judgment did not merge the bond, so as to prevent subsequent action for further damages thereon. Burnside v. Wand, 108 Mo. App. 539, 84 S. W. 995. Where a husband, living on land owned by his wife, is served with notice of an ejectment suit, but the wife is not, and after judgment he comes into possession of a life estate by the death of his wife, the judgment in the ejectment suit is not an estoppel against him as owner of such life estate. King v. Davis, 137 F. 222.

3. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; Carter v. Carter [N. D.] 103 N. W. 425; Ruckman v. Union R., 45 Or. 578, 78 P. 748; Jensen v. Montgomery [Utah] 80 P. 504; Schmidt v. Louisville, C. & L. R. Co. [Ky.] 84 S. W. 314. Only those matters are concluded which were actually decided either expressly or by necessary implication. Hudson v. Remington Paper Co. [Kan.] 80 P. 568. In ejectment against a tenant, dismissal of a bill for want of equity held not to render the question of title res judicata. Eldred v. Johnson [Ark.] 86 S. W. 670. A judgment against a charitable corporation does not conclude any question as to whether its property is subject to execution. Woman's Christian National Library Ass'n v. Fordyce [Ark.] 86 S. W. 417. Decree vacating judicial sale on finding that title had not passed concludes the parties as to the question of title. International Wood Co. v. National Assur. Co., 99 Me. 415, 59 A. 544. Decree for partition is conclusive in a suit between the same parties for partition of other land as to matters on which complainant's title to both tracts rests. Legality of an adoption. Brack v. Boyd, 211 Ill. 290, 71 N. E. 995. Matters having been determined in a former suit they are not available as a defense in a subsequent suit. Bond v. Chapman, 34 Wash. 606, 76 P. 97. A judgment adverse to an alleged widow's application for a homestead, determining that she was not decedent's widow held res judicata of such issue in subsequent proceedings for distribution of the estate. In re Harrington's Estate [Cal.] 81 P. 546. Where after demand on a constable to apply certain money in his hands as the property of a judgment debtor, to plaintiff's execution, the constable impleaded the plaintiff in a proceeding in a justice court by the debtor to recover the money, a judgment therein awarding the fund to the debtor, is conclusive against the constable's liability in a subsequent proceeding for failure to apply such fund to the execution. Glass v. Shapard [Tex. Civ. App.] 83 S. W. 880. A judgment, in an action to recover an instalment payment, deciding that the order under which plaintiff claimed had been revoked is conclusive on the question in a subsequent suit by plaintiff for other instalments alleged to be due under the order. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73. Judgment in action to recover possession of a mining claim held res judicata as to the parties and their successors in interest as to their then existing rights. Lauman v. Hoofer, 37 Wash. 582, 79 P. 953.

4. Judgment for separate maintenance bars suit to annul marriage. Durham v. Durham, 99 App. Div. 450, 34 Civ. Proc. R. 141, 91 N. Y. S. 295. Decree of distribution under will bars action for specific performance of contract to bequeath. Phalen v. United States Trust Co., 100 App. Div. 264, 91 N. Y. S. 537. Order directing railroad to connect its line with that of another company is conclusive on duty to exchange cars. Hudson Valley R. Co. v. Boston, etc., R., 94 N. Y. S. 545. An offer in supplementary proceedings directing the payment of a debt owing to the judgment debtor held res judicata of the question of the debtor's liability. Societa Di Mutuo Socorso v. Mantel [Cal. App.] 81 P. 659. Judgment for principal based on agent's knowledge of illegality in the employment held conclusive on agent in subsequent action for breach of the contract of employment. People v. Mercantile Co-op Bank, 93 N. Y. S. 521. After a judgment validating an issue of municipal bonds

Matters concluded.[5]—The rule of res judicata applies as well to facts settled and adjudicated as to causes of action.[6] Estoppel by res judicata extends only to matters in issue,[7] but an issue being presented by the pleadings and urged by counsel without objection, the decision of the court is conclusive, though it was not necessary to the decision.[8] An undisturbed judgment is conclusive of the facts recited therein,[9] no change of facts or conditions being shown;[10] hence, an appellate judgment affirming the case on one point and reciting that the decision of the lower court on the other points is correct renders all such questions res judicata.[11] A judgment reciting only one of several issues, the issue recited being sufficient to support the judgment, it will be presumed, in the absence of other evidence, that the other issues were not passed upon.[12] A former decree including the subject-matter in controversy in a subsequent suit, while evidence therein, is of no binding force as to facts therein incorrectly stated and incompatible with each other.[13] In some states an adjudication in respect to the exempt character of property in a suit for taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years.[14]

§ 4. *Pleading and proof.*[15]—Ordinarily the defense of res judicata must be presented by plea[16] and unless so presented cannot be proved over an objection properly made[17] except where the former adjudication fully appears in the complaint or answer in which case it may be raised by demurrer.[18] Res adjudicata may,

an injunction will not lie to restrain the sale of the bonds on the ground that the notice of the election to authorize their issue was not published the statutory number of times. Roundtree v. Rentz, 119 Ga. 885, 47 S. E. 328. Beneficiaries of an estate held estopped from claiming that a provision of a will directing accumulations, and acts of executors in conformity therewith, were invalid. Thorn v. De Breteuil, 179 N. Y. 64, 71 N. E. 470. A judgment for plaintiff in an action wherein the complaint alleged five days peaceable and undisturbed possession by plaintiff of the land in dispute is conclusive in ejectment by plaintiff against defendant of the fact of plaintiff's peaceable and undisturbed possession for the specified five days and of the wrongfulness of defendant's entry. George v. Columbia & P. S. R. Co. [Wash.] 80 P. 767. Where defendant was personally served but defaulted and trial was had, verdict rendered, judgment entered against defendant and the property sold, held in an action by the purchaser to quiet title that the question whether defendant owed the plaintiff in the former action anything at the time of its commencement was res judicata. Lilly v. Eklund, 37 Wash. 532, 79 P. 1107.

5. See 3 C. L. 1487.

6. Union Pac. R. Co. v. Wyandotte County Com'rs, 69 Kan. 572, 77 P. 274.

7. See ante, this section, n. 2.

8. One who did not object to a decision on a particular issue, cannot object that the judgment is no bar because it was not proper to determine such issue. Dime Sav. Bank v. McAlenney [Conn.] 61 A. 476. If a matter could be and was determined it is immaterial that it need not have been. Slingluff v. Hubner [Md.] 61 A. 326.

9. Decree of distribution conclusive that fund distributed belonged to decedent. In re Morris, 91 N. Y. S. 706.

10. Union Pac. R. Co. v. Wyandotte County Com'rs, 69 Kan. 572, 77 P. 274.

11. Hall v. Kalamazoo [Mich.] 12 Det. Leg. N. 500, 104 N. W. 689.

12. Hudson v. Remington Paper Co. [Kan.] 80 P. 568. A judgment in a suit to remove a trustee, held not res judicata of plaintiff's right to contest the validity of a claim against her husband's estate. Hamilton's Ex'r v. Hamilton [Ky.] 84 S. W. 1156.

13. Partition decree. Cronkhite v. Strain, 210 Ill. 331, 71 N. E. 392.

14. Kentucky rule. Covington v. First Nat. Bank, 798 U. S. 100, 40 Law. Ed. 963.

15. See 3 C. L. 1488.

16. Thompson v. Vance, 111 La. 548, 35 So. 741; Bonanza Consol. Min. Co. v. Golden Head Min. Co. [Utah] 80 P. 736. Must be alleged in the case and cannot be raised by bill of review. Evans v. Woodsworth, 115 Ill. App. 202. The former judgment must be pleaded as a bar. Res adjudicata cannot be claimed under pleading disclaiming any bar. Smith v. McClain [Tex. Civ. App.] 87 S. W. 212. Plea only for purpose of recovering costs in former action insufficient. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

NOTE. Use of former judgment as evidence where it is not specially pleaded: While the universal rule is that a judgment must be specially pleaded before it can be admitted in evidence for the purpose of showing that the matter in issue is res judicata, still if a judgment in a former suit between the parties tends to disprove material facts stated by the plaintiff in his petition it may be admissible as legal proof. Glenn v. Priest [C. C. A.] 48 F. 19; Garton v. Botts, 73 Mo. 274; Krekeler v. Ritter, 62 N. Y. 372.—From Bonanza Consol. Min. Co. v. Golden Head Min. Co. [Utah] 80 P. 736. See, also, 3 C. L. 1488, n. 81, citing Werner v. Cincinnati, 23 Ohio Circ. R. 475; Smith v. Bean [Tex. Civ. App.] 82 S. W. 793.

17. Thompson v. Vance, 111 La. 548, 35 So. 741.

18. Holthcide v. Smith's Guardian [Ky.] 84 S. W. 321.

however, be shown under a plea of not guilty in ejectment.[10] The plea must show identity of issues [20] and parties,[21] and that the judgment was rendered on the merits.[22] A replication denying the elements of the former adjudication in general terms is good on demurrer.[23]

The burden is on the party setting up the plea of res judicata to prove it.[24] In determining the scope of the former adjudication the record [25] controls,[26] but the record being uncertain or ambiguous,[27] or having been destroyed,[28] the scope of the former adjudication may be shown by extrinsic evidence. All essential elements must appear in the record.[29] On appeal, the record being silent, the court will presume that the rights of the parties have changed so that a former suit will not operate as a bar,[30] or that the former proceeding was found to be void.[31] The former adjudication may be proved by admissions made in the subsequent suit.[32] The fact that one is not a party may be proved by the dismissal of an appeal, taken by him, upon that ground.[33] Identity of causes of action will not ordinarily be determined on the pleadings but the case will be sent to a master.[34] Where parties and relief demanded is not the same, the question of res judicata is for the court.[35] It is improper to quash a writ in ejectment on a rule to show cause based on a former adjudication.[36]

In Arkansas an appellee may move for a dismissal on the ground that since the appeal was taken a judgment has settled against appellant the rights asserted on appeal.[37]

FORMER CONVICTION OR ACQUITTAL, see latest topical index.

19. Bruner v. Finley, 211 Pa. 74, 60 A. 488.

20. Greenfield Gas Co. v. Trees [Ind.] 75 N. E. 2.

21. Pleading held insufficient to show that person sought to be charged was a party to former action. Brown v. Fisher [Ind. App.] 74 N. E. 632.

22. Armstrong v. Manatee County [Fla.] 37 So. 938. A plea that plaintiffs were defeated in a former action between the parties involving the same controversy, is insufficient since it does not show that they were defeated on the merits. Goff v. Wilburn, 25 Ky. L. R. 1963, 79 S. W. 232.

23. A replication denying in general terms lack of jurisdiction and lack of identity of parties and subject-matter is good on demurrer. United States v. Jacoby [Del. Super.] 61 A. 871.

24. To show that issues were within adjudication. Sanford v. King [S. D.] 103 Nev. 28. Where the defendant in the former suit asserted defenses not going to the merits, the burden is on one asserting an estoppel to show the grounds of decision. Callaway v. Irvin [Ga.] 51 E. 477. The issues in the two actions being different defendant in order to successfully interpose the plea of res judicata must prove that the matter has been determined in the former case. Hudson v. Remington Paper Co., [Kan.] 80 P. 568.

25 Order for judgment insufficient; judgment roll must be produced. Cuccurullo v. Societa Italiana, etc., 102 App. Div. 276, 92 N. Y. S. 420.

26. Must be tried solely on the record. Miller v. Buckley [Miss.] 38 So. 99. Evidence held to show former adjudication in Mexico. Mexican Cent. R. Co. v. Chantry [C. C. A.] 136 F. 316.

27. Parol evidence is admissible to show what was decided when the pleadings are general. Evans v. Woodsworth, 115 Ill. App. 202. If the record leaves it open to doubt as to what was litigated, there is no bar unless the uncertainty is removed by extrinsic evidence. Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

28. Where the pleadings have been destroyed, the issues may be shown by parol. Holford v. James [C. C. A.] 136 F. 553.

29. Record must show identity of parties. Campbell v. Upson [Tex.] 84 S. W. 817. Record in former suit, held not to show that plaintiffs in present suit were parties thereto. Id. Judgment roll must show that decision was on the merits. N. Y. Code Civ. Proc. § 1209. The court should examine the judgment roll in the former suit to see if decision was on merits. John D. Park & Sons Co. v. Bruen, 139 F. 698.

30. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

31. Bennett v. Roys, 212 Ill. 232, 72 N. E. 380.

32. Identity of subject-matter. Geisreiter v. McCoy [Ark.] 85 S. W. 86.

33. Kirkhart v. Roberts, 123 Iowa, 137, 98 N. W. 562.

34. So held where record of former action was not before the court. John D. Park & Sons Co. v. Bruen, 133 F. 807.

35. J. M. Weatherwax Lumber Co. v. Ray [Wash.] 80 P. 775.

36. Bruner v. Finley, 211 Pa. 74, 60 A. 488. Under Kirby's Dig. § 1227, providing that where an appellant's right of further prosecuting an appeal has ceased appellee may move for a dismissal. Church v. Gallic [Ark.] 88 S. W. 979.

FORMS OF ACTION.

This topic includes holdings of general application as to the distinctions between particular forms or kinds of actions; grounds for particular actions being excluded to the title appropriate to each action. The common-law forms of personal actions, now abolished in many states, will be found treated under appropriate heads.[1] The forms of actions merely, not the substance thereof, as regards the essential of the remedy, are abolished by the codes, hence we still have legal [2] and equitable [3] actions, which distinction is important, as it sometimes confers valuable rights; for instance, the right to a jury trial.[4] The distinction between actions arising ex delicto [5] and ex contractu [6] is often important in matters of procedure.[7] There may be mixed ac- The principal forms of real actions are treated under appropriate heads.[9]

The form of action is to be determined from the declaration,[10] and in determining such question, the prayer is of great weight, though the effect thereof may be waived by counsel.[11] Where a petition can be construed either as a suit ex contractu or ex delicto, the latter construction will be adopted.[12] An action at law may become one in equity by interpleading proceedings.[13]

1. See Assumptsit, 5 C. L. 297; Trespass, 4 C. L. 1698, etc.

2. An action to recover an award is one at law. Couch v. State [N. D.] 103 N. W. 942. Where, in ejectment, plaintiff claimed land under an execution sale, a defense that the property was the corpus of a spendthrift trust, in which the judgment debtor had been the beneficiary, but no affirmative relief was asked, held, action was one at law. Kessner v. Phillips [Mo.] 88 S. W. 66. An action to recover on a contract, in which the issue raised is the existence of the contract, is an action at law and cannot be changed to a suit in equity, against defendant's objection, by a mere assignment by plaintiff of his interest under the alleged contract, and making the assignees parties defendant. Butterly v. Deering, 102 App. Div. 395, 92 N. Y. S. 675.

3. An action to have an ordinance declared ultra vires and to have the town authorities enjoined from enforcing it, and alleging that by its enforcement plaintiff's property was injured, is a suit in equity. Riley v. Town of Greenwood [S. C.] 51 S. E. 532. An application to the district court by an executor or administrator for license to sell real estate is not an action in equity, but a special statutory proceeding. Bixby v. Jewell [Neb.] 101 N. W. 1026.

4. See Couch v. State [N. D.] 103 N. W. 942. See, also, Jury, 4 C. L. 358; and Equity, 5 C. L. 1144.

5. Where property converted has not been converted into money, and a suit is instituted to recover the property or its value, the action is ex delicto and not ex contracto. Southern R. Co. v. Born Steel Range Co. [Ga.] 50 S. E. 488.

6. A suit for damages based on an alleged breach of contract for the affreightment of goods is an action ex contracto. Seaboard Air Line R. Co. v. Hubbard [Ala.] 38 So. 750. Complaint alleging that defendant received of plaintiff, as his agent, certain sums of money for the use of the plaintiff, that plaintiff demanded payment thereof, but that no part thereof has been paid, and that there is "now due and owing" a certain sum, and demands judgment for a specified amount with interest, held, an action ex contracto. Starin v. Fonda, 95 N. Y. S. 379.

7. Counts in trespass quare clausum et de bonis and in trover are properly joined. Meloon v. Read [N. H.] 59 A. 946. Grantee in a security deed cannot join in the same action a suit against the widow of the deceased grantor to recover the land described in the deed, and a suit against the administrator of the grantor's estate to recover a judgment on the debt secured by the deed. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

8. Statutory action for the recovery of real property is a mixed action; being partly an action ex delicto, but mainly to recover possession of the land. It is in no sense an action ex contracto. Ramey v. O'Byrne, 121 Ga. 516, 49 N. E. 595.

9. See Ejectment, 5 C. L. 1056; Forcible Entry and Unlawful Detainer, 3 C. L. 1435; Waste, 4 C. L. 1823, etc.

10. Durham v. Stubbings, 111 Ill. App. 10.

11. Plaintiff's counsel stating that the action was one at law held to thereby waive his prayer for equitable relief. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956.

12. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E 727.

13. An action to recover a reward is not changed to one of equitable cognizance by the fact that other claimants have been permitted to intervene under Rev. Codes, 1899, § 5239; the rule is otherwise when a defendant against whom there are other claimants for the same debt interpleads such claimants and secures his own discharge, and pays the money into court pursuant to Rev. Codes 1899, § 5240. Couch v. State [N. D.] 103 N. W. 942.

FORNICATION.

Fornication was not a crime at common law,[14] and its definition must be found in the statutes of the various jurisdictions, many of which require that the illicit intercourse be habitual [15] or accompanied by cohabitation apparently matrimonial.[16]

Though the offense requires the concurrent act of two persons, either may be separately indicted.[17] If the indictment allege acts constituting the offense, it need not expressly characterize it.[18] Circumstantial evidence is sufficient.[19] Instructions misstating the offense charged or ambiguous in respect thereto have been held harmless.[20]

FORTHCOMING AND DELIVERY BONDS; FORWARDERS, see latest topical index.

FRANCHISES.

The rights and privileges here treated constitute a class entirely distinct from and independent of the corporate franchise.[21]

§ 1. *Definition and elements.*[22]—A franchise is a special privilege conferred by a government on individuals or corporations and which does not belong to the citizens of a country generally by common right.[23] A distinction must in some cases be made between the franchise and the acquisition of an easement or license necessary to its fulfillment.[24]

§ 2. *Grant of franchise and regulation of its exercise.*[25]—Except as limited by constitutional provisions, the power to grant franchises involving the use of public streets and places is vested in the legislature,[26] though it may, and frequently does, delegate such power to municipal corporations,[27] but such grant does not deprive the legislature of the right to exercise the authority itself if it wishes to do so,[28] and if it does, its delegate cannot grant a franchise inconsistent or in conflict with the legisla-

14. See Clark & M., Crimes [2d Ed.] 707.
15. Whether the acts proven were sufficient to show "habitual" intercourse is for the jury. State v. Sauls, 70 S. C. 393, 50 S. E. 17.
16. Such is the effect of the use of the word "cohabit" in defining the offense. State v. Williams [Minn.] 102 N. W. 722.
17. State v. Sauls, 70 S. C. 393, 50 S. E. 17.
18. In this case there was a possible ambiguity as to whether adultery or fornication was charged, but the indictment was held sufficient. Alexander v. State [Ga.] 50 S. E. 56.
19. That parties were seen in bed together sufficient. Seats v. State [Ga.] 50 S. E. 65.
20. Seats v. State [Ga.] 50 S. E. 65.
21. The word "franchise" is sometimes used in a restricted sense and sometimes as a generic term, which may include not only the right granted by the crown in England, or by the state in this country, to be a corporation, but the right to exercise certain rights or privileges of a public nature, which properly and in the first instance belonged to the royal prerogative. There is a clear distinction between "corporate franchise" and franchises or privileges which a corporation or individual may exercise. Western Union Tel. Co. v. Omaha [Neb.] 103 N. W. 84. For the law relating to corporate franchises, see Corporations, 5 C. L. 764.
22. See 3 C. L. 1495.
23. Cyc. Law Dict. p. 390. The right to operate a public ferry is a franchise. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.
24. See Govin v. Chicago, 132 F. 848, where the act incorporating the Chicago city railways is construed and the distinction between the terms "franchises," "licenses" and "contracts" as applied to such act is shown.
25. See 3 C. L. 1496.
26. So held as regards the general assembly. State v. Missouri & K. Tel. Co. [Mo.] 88 S. W. 41.
27. Cities of the fourth class have power to grant franchises to erect and maintain electric light and power plants therein. State v. Taylor, 36 Wash. 607, 79 P. 286.
28. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

tive grant.[29] The power of the municipality is limited by the terms of the grant from the legislature,[30] and is generally made conditional.[31] A municipality being annexed to another, its power to grant a franchise ceases.[32] A court granting a franchise in the absence of orderly and well-defined issues acts legislatively.[33] Franchises may be granted to individuals, or an individual, as well as to corporations, under a statute authorizing grants to "companies."[34] In the absence of constitutional provisions to the contrary, a franchise may be granted by special act,[35] and the grant may be made exclusive if the legislature so desires.[36] A franchise cannot be granted except by clear and explicit language or by implication equally clear,[37] and all rights not expressly granted are deemed reserved.[38] A grant by a municipality should generally be made by ordinance.[39] A franchise not being exclusive, it does not prevent the grant of another similar one.[40] The grantor may impose conditions on the use of the franchise,[41] which must be fully complied with within the statutory,[42] or, in the absence of a statute, a reasonable[43] time, and the fact that an

29. Act granting a special ferry franchise declaring that it should be unlawful for any person to establish a ferry within one and one-half miles thereof, held, county commissioners had no power to grant a permit for a ferry within the prohibited distance. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

30. Where legislative act provided that there must be no obstruction of navigation, and a city granted a street railway company the right to construct a tunnel under a river, the city might insist on a removal of the tunnel as an obstruction to navigation, though the city reserved no such right in granting the privilege. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. Where a statute provided that all franchises should be subject to such conditions as the legislature may deem it necessary to impose, the fact that a franchise granted to a street railway company by a municipality exempts the grantee from liability for street paving does not prevent the legislature from requiring that the company pave between its tracks and one foot outside thereof. Marshalltown L., P. & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005.

31. An extension of a street railway into or through a municipality being an original line, the notice prescribed by Rev. St. §§ 2502, 3739, is a prerequisite to the granting of a franchise. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583. Council obtains jurisdiction to grant a street railway franchise only by the production of consents from more than one-half the frontage. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. Under Railroad Law, § 102 (Laws 1892, p. 1405, c. 676), the consent of an existing railroad to the use of streets occupied by it by a competing company is not a condition precedent to the right of such competing company to obtain the consent of the municipal authorities to the use of such streets. Electric City R. Co. v. Niagara Falls, 95 N. Y. S. 73.

32. Where the announcement of a favorable result on a vote for the consolidation of two municipalities was forbidden by a temporary injunction, a franchise obtained from the municipality that was to be annexed to the other is void. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 826.

33. Probate court can grant franchise to telephone companies only by the exercise of judicial power applied to orderly and well defined issues, otherwise the grant is legislative and void. Gueen City Tel. Co. v. Cincinnati, 5 Ohio C. C. (N. S.) 411.

34. Act 1891, p. 297, c. 96, construed. Lowther v. Bridgeman [W. Va.] 50 S. E. 410.

35, 36. Ferry franchise. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

37. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111. Where none of the titles of several city ordinances granting street railway extensions indicated an intention to deal with the life of the original grant, held, an extension of the main grant could not be implied therefrom. Id.

38. Electric City R. Co. v. Niagara Falls, 95 N. Y. S. 73.

39. The granting of the right to use streets and alleys by village authorities otherwise than by ordinance is not illegal. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146.

40. A former franchise not being exclusive, held, mayor was not justified in refusing to sign an ordinance granting a similar franchise to another corporation on the ground that the other franchise had been previously granted. State v. Taylor, 36 Wash. 607, 79 P. 286. See, also, 3 C. L. 1498, n. 83, 84.

41. Condition in a franchise to a street railway company requiring it to obtain the consent of the county court for its right of way over a bridge, held a reasonable and enforceable condition precedent. Little Rock R. & E. Co. v. North Little Rock [Ark.] 88 S. W. 826. The Union Pacific Railroad Company is required to permit the trains of all roads terminating at the Missouri river at Omaha to use its bridge at that point up to the fair limits of capacity, and upon payment of reasonable compensation. Union Pac. R. Co. v. Mason City & Ft. D. R. Co., 26 S. Ct. 19.

42. Under P. L. 1901, § 514, in the absence of a showing of bad faith, a delay of less than two years in applying for consent of municipal authorities does not forfeit the right. Nanticoke Suburban St. R. Co. v. People's St. R. Co. [Pa.] 61 A. 997.

43. Where company had to obtain consent of county court, one month held not a rea-

application duly made for municipal consent is denied does not prevent a subsequent application within such time.[44] The franchise being exclusive, a second company may apply for the necessary municipal consent after its lapse by the expiration of the statutory time.[45] Additional conditions cannot be added by parol.[46] By accepting a franchise on condition, one becomes estopped to repudiate the condition [47] or to deny its reasonableness [48] or validity.[49] Except where the grant is invalid,[50] a franchise accepted and acted upon by the grantee becomes a contract,[51] which neither the grantor [52] nor the grantee [53] can abolish or alter without the consent of the other. A municipality is not bound by the act of an annexed municipality in issuing a franchise.[54]

A taxpayer cannot maintain a suit to prevent the granting of a franchise unless such franchise constitutes such a wrongful squandering or surrendering of the property or money of the city as will increase taxation.[55] One signing a petition for the granting of a franchise on a certain condition may sue to enforce the performance of the condition.[56]

The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders,[57] and this power may be conferred on a municipal corporation; [58] but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government.[59]

§ 3. *Powers and duties under franchises.*[60]—A franchise carries with it an implied obligation to fulfill all the purposes for which it was granted.[61] The obligations

sonable time. Little Rock R. & E. Co. v. North Little Rock [Ark.] 88 S. W. 826.

44, 45. Nanticoke Suburban St. R. Co. v. People's St. R. Co. [Pa.] 61 A. 997.

46. Byars v. Bennington & H. V. R. Co., 99 App. Div. 34, 90 N. Y. S. 736.

47. Commonwealth Electric Co. v. Rose, 214 Ill. 545, 73 N. E. 780.

48. In re Topping Ave., 187 Mo. 146, 86 S. W. 190.

49. Corporation accepting the benefits of an ordinance allowing it to use the streets of the city upon certain conditions is estopped to deny that such conditions were ultra vires. Jersey City v. North Jersey St. R. Co. [N. J. Law] 61 A. 95.

50. Where ordinance is not adopted in a statutory manner, there is no contract. City may subsequently change terms. So held where city availed itself of benefits of first ordinance. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820.

51. Street railway franchise. Virginia Passenger & Power Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995; Cleveland Elec. R. Co. v. Cleveland, 135 F. 368; Cleveland Elec. R. Co. v. Cleveland, 137 F. 111. Franchise granting water company the right to maintain pipes in the streets of a city. Farmers' L. & T. Co. v. Meridian Waterwowrks Co., 139 F. 661. Where village board by resolution granted the owner of a telephone company the right to use the village streets. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313. Where a municipality gave its consent to the construction of a railroad upon the condition that the railroad company pay an annual license fee for each car, held to constitute an obligation resting in contract to pay such fees. Jersey City v. Jersey City & B. R. Co. [N. J. Law] 59 A. 15.

52. Street railway franchise. Cleveland Elec. R. Co. v. Cleveland, 135 F. 368. Where village board by resolution granted the owner of a telephone company the right to use the village streets. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313. A license granted to a telephone company, under which money is expended and which is not abused, is not revocable at the pleasure of the municipality. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146.

53. Street railway franchise. Virginia Passenger & Power Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995.

54. Where the announcement of a favorable result on a vote for the consolidation of two municipalities was forbidden by a temporary injunction, the fact that a franchise was obtained from the municipality to be annexed and work done thereunder without objection from the annexing municipality, held not to estop the latter from asserting the invalidity of the franchise. Little Rock R. & E. Co. v. North Little Rock [Ark.] 88 S. W. 826.

55. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977.

56. Wright v. Glen Tel. Co., 95 N. Y. S. 101.

57, 58. State v. Missouri & K. Tel. Co. [Mo.] 88 S. W. 41.

59. State v. Missouri & K. Tel. Co. [Mo.] 88 S. W. 41. Kansas City ordinance held void. Id.

60. See 3 C. L. 1497.

61. Kent v. Common Council of Binghamp-

imposed will be construed with reference to the life of the franchise.[62] The grant is generally construed as carrying with it all incidental powers.[63] Particular duties depend upon the terms of the franchise, and being a contract, the general rules of contract interpretation are applied.[64]

§ 4. *Duration and extension of term.*[65]—A grant to a corporation without restriction is presumed to be for the life of the corporation.[66] The power to grant franchises being conferred on a municipal corporation without restriction, it has the power to limit the duration of the grant;[67] but a power to prescribe conditions on the exercise of the grant does not confer the power to determine the life of the grant.[68] A franchise giving a street railway corporation the right to extend its lines cannot exist after the expiration of its main franchise.[69] The fact that corporate grantees consolidate does not extend the duration of all the franchises to the date of the last expiring franchise.[70] A franchise may be renewed prior to the expiration of the original grant.[71] An ordinance renewing all the rights and privileges of a

ton, 94 App. Div. 522, 88 N. Y. S. 34. The use of a franchise granted for public purposes as a mere cover for a private enterprise is contrary to public policy. Brown v. Gerald [Me.] 61 A. 785, quoting from Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307.

62. Where street railway companies consolidated, held, the imposition of transfer obligations would not prolong the life of one of the franchises. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

63. That a street railway is forbidden to use its electricity for lighting does not preclude it from using the electricity to light the streets through which its cars run. So held where such lighting was ordered by town council. Cunningham v. Boston & W. St. R. Co. [Mass.] 74 N. E. 355.

64. Particular franchises construed [See, also, 3 C. L. 1498, n. 81]. Franchise requiring a street railway company to plank all crossings, the railroad must do so at its own expense. In re Topping Ave., 187 Mo. 146, 86 S. W. 190. A franchise requiring a street railway laying its tracks on unpaved streets to place a plank inside and outside of the rails does not require the company to "pave." West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. Words "cost of paving" held not merely to include the actual cost of the paving itself, but also the cost of the work necessarily preliminary to the laying of the same. Danville St. R. & L. Co. v. Mater, 116 Ill. App. 519. Franchise granted by a town to a street railway on the condition that only one fare be charged for a single passage over said road, held only to apply to fares charged for riding within the limits of the town. Byars v. Bennington & H. V. R. Co., 99 App. Div. 34, 90 N. Y. S. 736. A street railway ordinance requiring the company to keep a certain portion of the streets, in which its tracks were laid, in good condition and repair, held not to impose on the company liability to assessment for the laying of a water pipe outside of such repair limit. McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368. A telephone company agreeing to furnish service at a certain rate provided the subscribers furnished their own instruments, it is nevertheless entitled, if it desires, to furnish its instruments, but is not entitled to make an extra charge therefor. Wright v. Glen Tel. Co., 95 N. Y. S. 101. Telephone companies being granted the right to use streets do not thereby acquire the right to use parks or other public places outside of the streets. Id. Act 1859, incorporating Chicago city railways, held not to constitute a grant in praesenti by the legislature of streets designated by the city after it exercised its election to adopt and be governed by the provision of the act of April 23, 1875, as to which streets the railway companies' rights were regulated, by the city ordinances affecting the same. Govin v. Chicago, 132 F. 848. Act of 1859, as amended, incorporating the Chicago city railways constitute a grant to the companies named directly over the streets designated or to be designated, to the extent that the franchise granted was essential to the promotion of street railway facilities, and was not a mere grant to the city to in turn grant a franchise to the railways. Id.

65. See 3 C. L. 1498.

66. Govin v. City of Chicago, 132 F. 848.

67. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111. A municipal corporation in Ohio could so do prior to the passage of 75 Ohio Laws, p. 360, providing that the grant should not be for longer than 25 years. Id. **Ordinance** held to fix a uniform period for the termination of the franchise of a street railway line and its extensions, and to abrogate, by consent of both parties, any prior contract for a different date. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

68. Act of 1859, incorporating Chicago city railways, considered. Govin v. Chicago, 132 F. 848.

69. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111. Does not operate to extend the latter. Id. So held where the ordinance allowed the company to extend and double track a certain line. Id.

70. Street railways. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

71. A street railway company's franchise being extended, the franchise cannot be forfeited at the suit of an abutting property owner for the railroad's failure to complete the line within the time prescribed in the franchise before it was extended. Kent v. Common Council of Binghamton, 94 App. Div. 522, 88 N. Y. S. 34.

former franchise continues and renews rights not exercised at the passage of the renewing ordinance.[72]

§ 5. *Transfer of franchises and effect thereof.*[73]—An unlawful transfer cannot relieve the grantee from liability.[74] A public duty being imposed upon the grantee, it cannot relieve itself of that duty by leasing its property and franchises under a general legislative authority to lease.[75] In some states a lease to a foreign corporation is void.[76] Statutory provisions must be regarded.[77] What have been termed "secondary" franchises may be mortgaged.[78]

§ 6. *Revocation and forfeiture.*[79]—The franchises, other than the corporate one, of a foreign corporation, may be declared forfeited.[80] A franchise may be for-

72. Continues and renews the right of the grantee to lay street railway tracks on a portion of the territory covered by the original ordinance but not constructed at the passage of the renewing ordinance, notwithstanding the fact that such territory is not specifically named in the renewing ordinance. Akron v. Northern Ohio Traction & Light Co., 6 Ohio C. C. (N. S.) 445.

73. See 3 C. L. 1499.

NOTE. General rule as to the nontransferability of franchise: The cases are virtually in unison as to the doctrine that a transfer of franchises cannot be effected without the authority of the sovereign grantor. Richardson v. Sibley, 11 Allen [Mass.] 65, 87 Am. Dec. 700; Pennsylvania R. Co. v. St. Louis, etc. R. R. Co., 118 U. S. 290, 30 Law. Ed. 83; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Roper v. McWhorter, 77 Va. 214; Gue v. Tide-Water Canal Co., 24 How. 257, 16 Law. Ed. 625; Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Clarke v. Omaha, etc., R. Co., 4 Neb. 458; Black v. Delaware, etc., Canal Co., 24 N. J. Eq. 465; Ammant v. New Alexandria Turnpike Co., 13 Serg. & R. 210, 15 Am. Dec. 593; Gulf, etc., R. Co. v. Morris, 67 Tex. 692; Bruffet v. Great W. R. Co., 25 Ill. 353; Rogan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. St. Rep. 684; Abbott v. Johnstown, etc., R. Co., 80 N. Y. 27, 36 Am. Dec. 572; Brunswick G. L. Co. v. United G., F. & L. Co., 85 Me. 532, 35 Am. St. Rep. 385. The rule is the same whether the transfer is attempted to be made by a voluntary act, such as conveyance, mortgage, lease, consolidation, or by forced sale at the instance of the creditors of the holder of the franchise. Bayard's Appeal, 72 Pa. St. 453; James v. Pontiac Road Co., 8 Mich. 91; Randolph v. Larned, 27 N. J. Eq. 557; Leedom v. Plymouth R. Co., 5 Watts & S. 265; Wood v. Truckee Turnpike Co., 24 Cal. 474. The only courts which have declined to accept the above doctrine to the full extent are those of Main, Kentucky and Vermont: Shepley v. Atlantic, etc., R. Co., 55 Me. 395; Kennebec, etc., R. Co. v. Portland, etc., R. Co., 59 Me. 9; Bardstown, etc., R. Co. v. Metcalfe, 4 Metc. (Ky.) 1991, 81 Am. Dec. 541; Bank of Middlebury v. Edgerton, 30 Vt. 182; Miller v. Rutland, etc., R., 36 Vt. 452. The following reasons have been assigned by the courts as the foundation of the rule: (1) A franchise is a personal trust, and the state has therefore a right to declare who shall be the transferee of such trust. See Shepley v. Atlantic R. R. Co., 55 Me. 395, where this reason is considered and rejected. (2) A corporation enjoying public franchises is an agent of the state, and on the ordinary principles of agency is incapable of delegating its powers without the permission of its principal. Beman v. Rufford, 1 Sim. N. S. 569; Great Northern R. Co. v. Eastern Counties R. Co., 9 Hare, 306; Troy and R. R. Co. v. Kerr, 17 Barb. 581. (3) A grant of a public franchise is a contract between the state and the grantee, by which the latter undertakes to perform certain public duties, from the the performance of which he cannot release himself without the consent of the other contracting party. Thomas v. Railroad Co., 101 U. S. 83, 25 Law. Ed. 950. (3) The powers of the grantee of a public franchise, like other grantees of the sovereign, are strictly limited by the instrument of grant, and the existence of a power to alienate cannot be inferred in the absence of express statutory provisions. Thomas v. Railroad Co., 101 U. S. 82, 25 Law. Ed. 950. (5) Transfer of franchises may sometimes be illegal as tending to the establishment of monopolies. Brunswick G. L. Co. v. United G. F. & L. Co., 85 Me. 532, 35 Am. St. Rep. 385.—From note to Brunswick G. L. Co. v. United G., F. & L. Co., 35 Am. St. Rep. 385, 390.

74. Where a railroad having a ferry franchise unlawfully leased the same to a foreign corporation, held liable for injuries resulting to a passenger. Brooker v. Maysville & B. S. R. Co., 26 Ky. L. R. 1022, 83 S. W. 117.

75. Ryerson v. Morris Canal & Banking Co. [N. J. Law] 59 A. 29. Held, a canal company could not relieve itself of the duty to erect and maintain bridges over the canal by leasing its canal, with all its boats, property, works, appurtenances and franchises, to a railroad company. Id.

76. A railroad possessing no greater rights than an individual would have had if granted a ferry privilege under the general law cannot lease its ferry franchise to a foreign railroad corporation. Sess. Laws 1853-54, vol. 1, p. 358, c. 178, and Ky. St. 1903, § 1808, construed. Brooker v. Maysville & B. S. R. Co., 26 Ky. L. R. 1022, 83 S. W. 117. Acts 1865-66, p. 664, c. 755, does not alter the rule. Id.

77. Foreign corporation failing to conform with Kirby's Dig. § 6749, in leasing road held subject to have its rights forfeited. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559. Such act is not retrospective. Id.

78. Franchise granting water company the right to maintain pipes in city streets. Farmers' L. & T. Co. v. Meridian Waterworks Co., 139 F. 661.

79. See 3 C. L. 1499.

80. Kirby's Dig. §§ 6749, 6750, construed.

feited for a failure to perform the duties due the public.[81] Notice being required, it must be given.[82] Abandonment is a question of intention depending upon the facts of each case.[83] By accepting a new franchise, one may surrender the old.[84]

Where the grantee is in the exercise of the privileges conferred by the franchise, the remedy to set aside the latter as irregularly or fraudulently granted is by quo warranto at the suit of the state.[85] In quo warranto proceedings in courts of original jurisdiction, the right to trial by jury of issues of fact is a constitutional right.[86]

§ 7. *Taxation.*[87]—Franchises are taxable.[88] A legislative franchise giving the right to use city streets, the city cannot impose a tax or rental on such use.[89]

FRATERNAL MUTUAL BENEFIT ASSOCIATIONS.

Scope of title.—This title deals only with the law peculiarly applicable to fraternal and mutual benefit societies and their contracts of insurance. Matters relating to insurance companies, or insurance contracts generally, or which are common to all corporations or associations, are treated elsewhere.[1]

Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

81. That it is a lessee makes no difference. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

82. When street railway franchise provides that a failure to comply with its terms and conditions after twenty days' notice from the city council shall operate as a forfeiture of all rights and franchises granted, the failure of the grantee to lay a track in a portion of the territory covered by the franchise will not work a forfeiture of its rights in the absence of the notice required. City of Akron v. Northern Ohio T. & L. Co., 6 Ohio C. C. (N. S.) 445.

83. That street railway company operated only one car a day over a certain line, and in days of snowfall no car was operated, held not to show an abandonment of route. Forty-Second, etc., R. Co. v. Cantor, 93 N. Y. S. 943. Change of route held not to amount to an abandonment of the right to run street cars on a certain street. Id. Where a corporation had an electric light and telephone franchise, the fact that an act authorizing it to connect its telephone lines with those of other companies did not mention the electric light franchise shows no abandonment thereof. Brown v. Maryland Tel. & T. Co. [Md.] 61 A. 338.

84. Where a street railway company having an alleged unlimited franchise to operate a line on a certain street accepted the terms of a subsequent ordinance authorizing it to extend its line on such street, and to equip and operate such extension and all its tracks on such street for a period of twenty-five years, the acceptance of such ordinance operated as a surrender of its alleged unlimited franchise as to such street. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

85. And not by an equitable action at the suit of private parties. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977. See Quo Warranto, 4 C. L. 1177.

86. Louisiana & N. W. R. Co. v. State [Ark.] 88 S. W. 559.

87. See 3 C. L. 1499.

88. See Taxes, 4 C. L. 1605.

89. Memphis v. Postal Telegraph-Cable Co., 139 F. 707.

1. See titles Insurance, 4 C. L. 157; Cor-

§ 1. *Nature, organization and powers.*[2]—Fraternal beneficiary associations are limited in their powers by their articles and by-laws.[3] Their sessions may be held in states other than where incorporated, when organized to do business in such states.[4] Societies created by different states can consolidate only under concurrent legislation of such states, in which case there is a separate corporation in each state.[5]

Legislative control as to insurance.[6]—Beneficial societies are usually exempted from the provisions of the general insurance laws.[7] The exemption applies to foreign societies authorized to do business in the state.[8] The question of what mortuary rates fraternal insurance associations must adopt may be determined by the legislature.[9] Under the statutes of Alabama, a city can impose a license fee on mutual aid associations and provide a penalty for doing business without such license.[10]

Protection of ritual and individuality.[11]

Status of local lodges and relation to supreme body.[12]—The subordinate lodge is the agent of the society, not of the claimant, notwithstanding proofs of loss were forwarded through the secretary.[13] A local society of a mutual benefit association cannot by resolution sever its connection with the association and assume the payment of the benefit certificates of its members, such action being in violation of the constitutional provision against the impairment of the obligation of contracts.[14] Where a local lodge is required to collect a fund to be sent at stated intervals to the grand lodge, prior to such transmission the local lodge has a property right in such funds.[15] Matters relating to the winding up and dissolution of such associations are treated elsewhere.[16]

§ 2. *Foreign associations.*[17]—The statutes of the state of the association's

porations, 3 C. L. 880; Foreign Corporations, 3 C. L. 1455; Associations and Societies, 5 C. L. 292.

A few cases arising on contracts of insurance of the kind excluded are retained because of applicability of the rules laid down.

2. See 3 C. L. 1500.

3. The certificate of association in Illinois must contain a limitation as to the ages of applicants for membership, which is material and precludes the admission of persons not within such limitation. Fraternal Tribunes v. Steele, 114 Ill. App. 194.

4. Head Camp, Pac. Jur., Woodmen of the World v. Woods [Colo.] 81 P. 261.

5. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259.

6. See 3 C. L. 1500.

7. In Iowa, under Code, c. 9, tit. 9, § 1825. Held, that the provision of Code, c. 8, tit. 9, § 1812, estopping a company from the defense that insured was not in good health, when its own examiner certifies to his good health, has no application to fraternal associations. Smith v. Supreme Lodge Knights & Ladies of Golden Precept, 123 Iowa, 676, 99 N. W. 553. The Royal Arcanum is a fraternal order and exempt from the insurance laws of the state of Ohio, within the meaning of Rev. St. §§ 3631-11. Gilligan v. Supreme Council of Royal Arcanum, 5 Ohio C. C. (N. S.) 471, 26 Ohio Circ. R. 42.

8. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530; Pauley v. Modern Woodmen of America [Mo. App.] 87 S. W. 990.

9. The act of Washington, Laws 1901, p. 356, c. 174, making it necessary for subsequently formed associations to adopt assessment rates not lower than those indicated as necessary by a certain mortality table, held valid. State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 P. 500.

10. Acts 1894-95, p. 635, § 10; Act Dec. 13, 1900 (Acts 1900-1901, p. 538); Act Feb. 28, 1901 (Acts 1900-1901, p. 1921). City Council of Montgomery v. Shaddox [Ala.] 36 So. 369.

11, 12. See 3 C. L. 1501.

13. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156.

14. An association organized under How. Ann. St. c. 164. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746.

15. Conversion of the funds of such a lodge, though unincorporated, is an offense, under Rev. St. 1899, § 1918, making it embezzlement for an officer or member of such organization to convert its funds. State v. Knowles 185 Mo. 141, 83 S. W. 1083.

16. See Corporations, 3 C. L. 880; Receivers, 4 C. L. 1238. Where an ineffectual attempt was made by a foreign mutual benefit association to consolidate with an insolvent domestic association and take over its assets and certificates, a certificate holder of the latter could enforce his rights only through its receiver after he had recovered its assets. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259. A beneficiary whose claim had been approved had the right to attach funds of the association collected for the payment of claims generally, so as to acquire a lien which could not be defeated by the subsequent appointment of a receiver. National Park Bank v. Clark, 92 App. Div. 262, 87 N. Y. S. 185.

17. See 3 C. L. 1502.

domicile govern in the determination of its character.[18] In the absence of proof to the contrary, it will be presumed that a foreign beneficial association was created for the same purpose as similar associations under the laws of the state where it is doing business.[19] The statutes of the different states generally give foreign associations the right to be admitted, upon compliance with their terms,[20] and place them on the same footing as domestic associations;[21] and an exact correspondence with the classification of beneficiaries prescribed in the domestic statute is not required.[22]

§ 3. *Officers, agents, organizers, physicians, etc.*[23]

§ 4. *Members and discipline.*[24]—Beneficiary associations have the inherent power to expel a member for offenses affecting the life and integrity of the organization, by insubordination and resistance to the supreme law of the order.[25] Where the by-laws of a police relief association made a distinction between "active" and "retired" members of the force, the regulations of the police commissioners determined the status of the members.[26] Where a member, who is dissatisfied with a change of plan of insurance, elects to cancel his certificate and demand a return of the money he has paid, he is bound to pursue that remedy.[27]

Arbitration of disputes and claims.[28]—In order to preclude a member or beneficiary from resorting to the courts to enforce his contract with the association, there must be an express and specific contract shown for some other mode of settlement.[29] While a member, in controversies concerning the discipline or policy of the order, must resort to the method of procedure prescribed by the association, including the remedy by appeal,[30] yet, where a member claims money due on a contract of insur-

18. It is not sufficient to constitute a foreign association a beneficiary and fraternal society that it calls itself such and that it is authorized to do business in the state as such. Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986. Correspondence of the laws of Illinois, the domicile, and those of Missouri, where the corporation was doing business, as to the definition of a fraternal benefit society. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. A foreign fraternal beneficial association is a life insurance company under the laws of New York (Laws 1892, p. 1933, c. 690, art. 7). Within the meaning of the question as to whether applicant had ever been rejected by any insurance company or association. Alden v. Supreme Tent, Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104. A mutual beneficiary association organized under the act of Illinois of 1883 (Laws 1883, p. 104) and afterward reorganized under the act of 1893 (Laws 1893, p. 130) held to be an association doing business under the later act. Pauley v. Modern Woodmen of America [Mo. App.] 87 S. W. 990.

19. So held in Texas, under Acts 1899, p. 195, §§ 1, 2, 3. Whaley v. Bankers' Union of the World [Tex. Civ. App.] 13 Tex. Ct. Rep. 431, 88 S. W. 259.

20. The statutes of Ohio are mandatory upon the superintendent of insurance to issue the necessary certificate. Rev. St. §§ 3631-13, 3631-16. State v. Vorys, 69 Ohio St. 56, 68 N. E. 580.

21. Rev. St. Mo. 1899, § 1406. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. The statute of Kentucky (Ky. St. 1903, § 679), providing that all life policies referring to by-laws having any bearing on the contract, shall have a copy thereof attached to make them admissible in evidence, applies to foreign beneficial associations. Supreme Lodge K. P. v. Hunziker [Ky.] 87 S. W. 1134.

22. An Illinois association is not excluded merely because, in certain cases, a member may name a charitable institution as his beneficiary, which is not provided for in the Missouri statute. Pauley v. Modern Woodmen of America [Mo. App.] 87 S. W. 990.

23, 24. See 3 C. L. 1502.

25. Under by-laws providing for expulsion for publicly attacking or scandalizing the national council, a member may be expelled for publishing derogatory articles in newspapers, etc. Crow v. Capital City Council, 26 Pa. Super. Ct. 411.

26. Nickerson v. Providence Police Ass'n, 26 R. I. 40, 57 A. 1057.

27. He cannot file a bill to compel the company to continue operations under the original plan. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268.

28. See 3 C. L. 1503.

29. See 3 C. L. 1503, n. 52. The remedy provided within the Order of Foresters for collection of a benefit certificate must be exhausted before resort can be had to the courts. Supreme Court, etc., of Foresters v. Herlinger, 6 Ohio C. C. (N. S.) 28.

30. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307. A by-law prohibiting a resort to the civil courts for redress, until a member has exhausted every means of appeal in the order, under penalty of expulsion, is not void as an attempt to oust the courts of their jurisdiction. Held, that a member suspended and fined, under an invalid order entered by one of the tribunals of the society, could not resort to the civil courts until he had exercised the right of appeal authorized by the by-laws. McGuiness v. Court Elm City, No. 1, Foresters of America

ance, the right to resort to the law courts will not be abridged by the right of appeal to a higher tribunal of the society.[31] The tribunals of the order must afford a reasonably prompt hearing of claims.[32] While strict rules of procedure are not enforced in such tribunals, and the trials need not be conducted with absolute technical accuracy, the proceedings must be regular and conducted in good faith;[33] the accused must be accorded a full and fair hearing,[34] and a proper finding and judgment entered on the facts.[35] Notice of rejection of a claim must be given to the member personally.[36]

§ 5. *Membership and contract securing benefits.*[37] *A. Membership.*—A member may, at any time, with or without cause, terminate his membership in a voluntary benefit association.[38] Though formal provisions as to withdrawal of a member are not strictly complied with, the parties may waive strict compliance and cancel the policy by agreement.[39]

(§ 5) *B. Application for benefits.*[40]—As in all insurance, material misrepresentations in the application avoid the contract,[41] irrespective of whether the applicant knew of their materiality,[42] and where the answers in the application are made warranties, false statements vitiate the policy, whether material or immaterial;[43]

[Conn.] 60 A. 1023. The civil courts are always inclined to sustain the decisions of the judicial tribunals of beneficiary organizations, in the interpretation of their rules and regulations (Crow v. Capital City Council, 26 Pa. Super. Ct. 411), and their determination of controversies between grand and subordinate bodies must be accepted (Id.). Held that, under the by-laws, the directors were not constituted a tribunal to settle grievances of individual members, and members unlawfully suspended were not required to submit their claims to the directors before resorting to the courts. Moeller v. Machine Printers' Beneficial Ass'n [R. I.] 60 A. 591.

31. Brotherhood of Railway Trainmen v. Greaser, 108 Ill. App. 598. Where property rights in an association are involved, and not a mere question of discipline, a claimant is not obliged to exhaust the remedies by appeal within the association before bringing suit. Independent Order of Foresters v. Mutter, 105 Ill. App. 518. Where the action of a beneficial association in dropping a member from its rolls is grossly irregular and unjust, he may sue to recover sick benefits, notwithstanding a stipulation to submit his grievances to the tribunals of the association. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307. A member who has been deprived of sick benefits for violation of an invalid by-law is not required to submit the controversy as to his right to them to the standing committee for trying offenses against members. Loftus v. Division No. 7, Ancient Order of Hibernians [N. J. Law] 60 A. 1119. Beneficiary held not to have been precluded from resort to the courts by failure to appeal under the laws of the order. Wells & McComas Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22.

32. Where the by-laws provided that a claimant, whose benefit claim had been rejected, should not sue in the courts until after two appeals to the tribunals of the order, one of which tribunals convened only once in two or three years, such by-laws were unreasonable and invalid as a partial ouster of the jurisdiction of the courts. Kane v. Supreme Tent Knights of Maccabees of the World [Mo. App.] 87 S. W. 547.

33. Crow v. Capital City Council, 26 Pa. Super. Ct. 411.

34. Crow v. Capital City Council, 26 Pa. Super. Ct. 411; Loftus v. Division No. 7, Ancient Order of Hibernians [N. J. Law] 60 A. 1119.

35. Crow v. Capital City Council, 26 Pa. Super. Ct. 411.

36. Notice to the local secretary of the society is not notice to the member, notwithstanding proofs of loss may have been forwarded through such secretary. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156.

37. See 3 C. L. 1504.

38. When membership deemed terminated by resignation from lodge. Chaloupka v. Bohemian Roman Catholic First Central Union, 111 Ill. App. 585.

39. Facts held to constitute a cancellation and surrender of policy. Nelson v. Farm Property Mut. Ins. Ass'n [Iowa] 103 N. W. 966.

40. See 3 C. L. 1504.

41. Royal Neighbors of America v. Wallace [Neb.] 102 N. W. 1020; Supreme Lodge of Order of Columbian Knights v. McLaughlin, 108 Ill. App. 85. Where an applicant is informed that he cannot have insurance if either of his parents died of consumption, a false answer that they had not bars recovery whether it be deemed a warranty or a representation. Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982.

42. False statements made in the application, either through inadvertence, ignorance or mistake, avoid the certificate. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190.

43. Rupert v. Supreme Court U. O. F. [Minn.] 102 N. W. 715; Supreme Lodge of Order of Columbian Knights v. McLaughlin, 108 Ill. App. 85. Ga. Civ. Code 1895, §§ 2097, 2098. Supreme Conclave Knights of Damon v. Wood, 120 Ga. 328, 47 S. E. 940. Where

but a mere representation need be only substantially complied with and in matters material to the risk.[44] A fraudulent representation will always avoid the contract, even where it relates to an immaterial matter.[45] Answers which are merely expressions of opinion are warranties of the bona fide belief and judgment of the applicant;[46] but, though untrue, if made in good faith, will not avoid the policy.[47] Where the application is prepared by the company's agent without the assistance of the applicant,[48] or where the agent fails to disclose certain statements therein to an applicant whom he knows cannot read,[49] the applicant is not bound by the application. Where the intent to make the application a part of the contract clearly appears, the court will read it into the contract, whatever may be its phraseology;[50] but when the application is not made a part of the policy, the statements therein are not warranties.[51] The execution of a life policy waives a medical examination and an application on one of the regular forms of the association.[52]

A fraternal beneficiary association is a "life insurance company" within the meaning of the question in an application, "Has any life insurance company declined to grant a policy on your life, and, if so, why?"[53]

(§ 5) *C. Certificate.*[54]—As to signatures, delivery and receipt by the member, the certificate must correspond with the positive requirements of the laws of the association.[55]

the applicant warranted that he had not been under a physician's care within five years, whereas he had visited one nearly every day during that time for granulated eyelids. Brock v. United Moderns [Tex. Civ. App.] 81 S. W. 340. The use of the term "warranty" in the application, in relation to the answers given, is not conclusive that they are warranties, as against the tenor of the contract as a whole. O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688.

44. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139. Questions concerning the physical condition of the applicant, or anything that tends to shorten his life, do not invariably require absolute truth in answering. Rupert v. Supreme Court U. O. F. [Minn.] 102 N. W. 715. But the statement by the applicant that he is in good health, when he has knowledge of facts tending to show his affliction with a fatal disease, will be presumed to be fraudulent. Royal Neighbors of America v. Wallace [Neb.] 102 N. W. 1020. Evidence held sufficient to show the falsity of the answers to questions as to whether applicant had been subject to certain diseases. Smith v. Supreme Lodge Knights & Ladies of Golden Precept, 123 Iowa, 676, 99 N. W. 553; O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688.

45. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139. A misrepresentation renders the policy void for fraud, while noncompliance with a warranty operates as a breach of the contract. Supreme Lodge of Order of Columbian Knights v. McLaughlin, 108 Ill. App. 85. Where there is doubt as to whether it is required that the answers in an application should be literally true or only that they should not be willfully false, and the doubt was created by the society, the assured is relieved from the obligation of a strict warranty. O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688. Evidence held insufficient to sustain the allegation of misrepresentations as to the use of intoxicating liquors. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165. The purpose of questions in the application relative to the use of intoxicating liquors held to be to ascertain the extent of their use and that the insurer was not misled by the answers, though the insurer was not a total abstainer. Endowment Rank Supreme Lodge K. P. v. Townsend [Tex. Civ. App.] 83 S. W. 220.

46. Rupert v. Supreme Court U. O. F. [Minn.] 102 N. W. 715.

47. Royal Neighbors of America v. Wallace [Neb.] 102 N. W. 1020.

48. Bushnell v. Farmers' Mut. Ins. Co., 110 Mo. App. 223, 85 S. W. 103. Omissions by the agent of the insurer of answers made by the applicant are chargeable to the insurer. Home Circle Soc. No. 2 v. Shelton [Tex. Civ. App.] 85 S. W. 320. The fact that the agent who took the application was named a beneficiary does not affect the rule that omission by the agent of answers by the applicant does not invalidate the insurance. Id.

49. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

50. Blasingame v. The Royal Circle, 111 Ill. App. 202. Where a statute provides for the attaching of the application, or a copy thereof, to the policy, before it can be treated as a part of the contract, any waiver of liability contained in the application is not available to the order, unless it has been so attached. Ky. St. 1903, § 679, held applicable to fraternal insurance orders doing business on the lodge plan. Grand Lodge A. O. U. W. of Kentucky v. Edwards [Ky.] 85 S. W. 701.

51. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139.

52. Weber v. Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

53. Alden v. Supreme Tent, Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104.

54. See 3 C. L. 1505.

55. Contract of insurance held inoperative

(§ 5) *D. Nature and construction of contract.*[56]—The relation existing between the member and the association is a contractual one,[57] and the ordinary rules in regard to contracts apply.[58] The certificate, constitution, rules and regulations and the by-laws of a beneficial association constitute the contract between the association and its members.[59] The contract of insurance will be strictly construed against the company preparing it and liberally as against the insured.[60] Where the insurance contract consists of several different instruments, each one will be read and construed with reference to the others, so as to give the contract effect as a whole.[61] The materiality or immateriality of a fact in an insurance contract may depend upon the wording of the contract.[62] Words used in the contract, having a narrower meaning appropriate to the purpose, will not be given their broadest import, when that has no reference to good faith or hazard and leads to absurdity, or demands an impossibility.[63] In the absence of evidence, it will not be presumed that the statutes of another state contain any limitation as to the age of persons insurable in fraternal benefit associations organized in such state.[64] The contract, during the lifetime of the insured, is executory and conditional on both sides,[65] and as to the rights of the beneficiary,[66] but becomes fixed and absolute at the death of the insured.[67] A policy of life insurance, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated.[68] The contract of insurance is a contract of the state where it is finally consummated.

The construction of particular contracts will be found in the notes.[70]

where the certificate was neither delivered, received nor signed as required. Sterling v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 28 Utah, 505, 80 P. 375. A written acceptance of the certificate, by the member, held not requisite to its validity, under the by-laws. Sovereign Camp Woodmen of the World v. Brown [Tex. Civ. App.] 88 S. W. 372.

56. See 3 C. L. 1505.

57. The contract, whether certain or uncertain, is between the individual certificateholder and the association. Gilbert v. Washington Beneficial Endownment Ass'n, 21 App. D. C. 344.

58. See 3 C. L. 1506, n. 92. A mistake made by the association in setting out an article of its charter in the contract of insurance binds the association, where the insured acts in good faith thereon. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190.

59. Chevaliers v. Shearer, 6 Ohio C. C. (N. S.) 587.

60. O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688; Supreme Lodge of Order of Columbian Knights v. McLaughlin, 108 Ill. App. 85; Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. E. 190; Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

61. Sterling v. Head Camp, Pac. Jur., Woodmen of the World, 28 Utah, 526, 80 P. 1110. The application, whatever may be its phraseology, will be read into the contract, where such appears to be the intent of the parties. Blasingame v. The Royal Circle, 111 Ill. App. 202.

62, 63. Rupert v. Supreme Ct. U. O. F. [Minn.] 102 N. W. 715.

64. Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783.

65. Gilbert v. Washington Beneficial Endowment Ass'n, 21 App. D. C. 344.

66. Tisch v. Protected Home Circle [Ohio] 74 N. E. 188.

67. Gilbert v. Washington Beneficial Endowment Ass'n, 21 App. D. C. 344.

68. White v. Brotherhood of American Yeomen, 124 Iowa, 293, 99 N. W. 1071.

69. A certificate issued in Illinois to a resident of New York, to take effect only upon the execution of an agreement of acceptance indorsed thereon, is a New York contract, where the agreement is executed there. Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 49 Law. Ed. 1146.

70. A provision in a certificate that no benefits shall be due until disability ceases or the right to benefits has terminated, does not apply to a permanent total disability. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190. Stipulations with the relief department of a railroad company, that the bringing of suit for damages for death, or the payment by the company of damages for injuries or death shall operate as a release to the relief department, are valid. Baltimore & O. R. Co. v. Ray [Ind. App.] 73 N. E. 942. Under a by-law providing for a benefit, "if a member loses both feet, both hands or both eyes, thereby becoming totally disabled," it is not necessary that both feet or legs be actually severed from the body; it is enough if they be so badly injured that they cannot perform their functions. Theorell v. Supreme Court of Honor, 115 Ill. App. 313. The attendance of a physician at his office is sufficient to constitute "medical attendance;" attendance at

(§ 5) *E. Charter and by-laws as part of contract.*[71]—The charter,[72] constitution and by-laws of a fraternal order, as they exist at the time of making a contract of insurance, become, as a matter of law, a part of the contract.[73] A fraternal benefit society has the inherent power to adopt such by-laws as its charter permits, which cannot be taken away by its own constitution, so called.[74] A member of a fraternal order is presumed to know and understand its charter, constitution, by-laws, rules and regulations, and they are binding upon him;[75] but he cannot be charged with knowledge of the charter and by-laws before he becomes a member.[76] The construction given to the by-laws of a society by its officers is not binding on the courts.[77]

the patient's home is not necessary. Gilligan v. Supreme Council of Royal Arcanum, 5 Ohio C. C. (N. S.) 471, 26 Ohio Circ. R. 42. The rupture of a blood vessel, caused by heavy lifting, the party then suffering from arterial sclerosis, or hardening of the blood vessels, was not an accident, within the meaning of a certificate providing for indemnity in case of accidental injury. Niskern v. United Brotherhood of Carpenters & Joiners of America, 93 App. Div. 364, 87 N. Y. S. 640. The scope of the term "total disability," used in contracts of indemnity against injury by accident, considered and discussed. Order of United Commercial Travelers of America v. Barnes [Kan.] 80 P. 1020. Plaintiff who was able to take trips for his health held not entitled to sick benefits under a policy agreeing to pay an indemnity when the insured was entirely and continuously "confined in bed" and under a physician's care. Bradshaw v. American Benev. Ass'n [Mo. App.] 87 S. W. 46. Death received while retreating from an encounter, brought on by an assault committed by deceased himself, is not a death "in violation or attempted violation of any criminal law," within the terms of a policy exempting the company from liability in such cases. Supreme Lodge K. P. v. Bradley [Ark.] 83 S. W. 1055. A clause making the policy incontestable except as to representations in relation to age, occupation and use of alcohol, and another reducing the indemnity in case of suicide, are separate and in no wise affect each other. Childress v. Fraternal Union of America, 113 Tenn. 252, 82 S. W. 832. Where initiation is made by the by-laws a condition precedent to membership, a certificate can have no force until after initiation. The delivery of a certificate before initiation by the officers of a local lodge was beyond the scope of its authority and did not constitute a waiver. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. When a certificate, issued by a beneficial association to one of its members, provided that if the holder lose one of his hands by accident, he shall be paid one-fourth the face value of the policy from the benefit fund, and that "this certificate is issued subject to, and to be construed and controlled by the constitution, laws, rules and regulations of the order," the holder thereof is not entitled to recover for a permanent loss of one of his hands unless it be amputated at or above the wrist, where the constitution provides for payment only in such case, and this, notwithstanding the holder had no actual knowledge of such latter provision. Chevaliers v. Shearer, 6 Ohio C. C. (N. S.) 587.

71. See 3 C. L. 1507.

72. See special article By-Laws—Amendment as affecting existing membership contracts, 5 C. L. 496. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190.

73. Butler v. Supreme Council A. L. H., 93 N. Y. S. 1012; O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688; Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139; Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. The constitution of the general association as well as that of the constituent local society. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746. Constitution made a part of certificate. Sovereign Camp Woodmen of the World v. Hicks [Tex. Civ. App.] 84 S. W. 425.

74. The constitution of a fraternal benefit society has no greater force than its by-laws. Blasingame v. The Royal Circle, 111 Ill. App. 202, citing K. of P. v. Kutscher, 179 Ill. 340. A provision which appears as a clause in the "constitution" of an association may nevertheless be regarded only as a mere by-law in the established legal signification of that term. See the distinction between the "charter" of a corporation and its "constitution" pointed out in Supreme Lodge v. Knight, 117 Ind. 489, 3 L. R. A. 409. Burns v. Manhattan Brass Mut. Aid Soc., 102 App. Div. 467, 92 N. Y. S. 846. The state and Federal constitutions are "laws," within the meaning of the statute authorizing mutual benefit associations to make regulations for their government not contrary to the laws of the state or the United States. How. Ann. St. c. 164, § 4. Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746.

75. Sterling v. Head Camp, Pac. Jur., Woodmen of the World, 28 Utah, 505, 80 P. 375; Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190; Grand Lodge, A. O. U. W. v. Marshall, 31 Ind. App. 534, 68 N. E. 605; Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446. Especially when they are made a part of the benefit certificate. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. Where a local camp was disbanded, a member was charged with knowledge of the rules relative to transfer of membership to another camp, so as to retain his financial standing. Sovereign Camp Woodmen of the World v. Hicks [Tex. Civ. App.] 84 S. W. 425.

76. The payment of the fee and the delivery of the policy being contemporaneous acts, completing the membership, a member is not presumed to know that the contingent fee paid to the agent is greater than allowed by the charter and by-laws. Younghoe v. Grain Shippers' Mut. Fire Ins. Ass'n, 126 Iowa, 374, 102 N. W. 137.

77. Morey v. Monk [Ala.] 38 So. 265.

Amendments to the constitution or by-laws, or additions thereto, adopted after the making of the contract, do not enter into it, unless consented to by the member,[78] or authorized by the charter of the association.[79] The assent of a member to changes in the by-laws affecting the contract of insurance may be implied,[80] or may be given in advance by an agreement to be bound by by-laws subsequently enacted.[81] But such new by-laws must be reasonable,[82] in harmony with the general policy of the order,[83] and not in conflict with the general statutes.[84] A fraternal beneficiary society cannot under the reserved power to amend its laws, reduce the amount stipulated to be paid, without the consent of the certificate holder;[85] and where the association repudiates its contract by reducing the amount of the death benefit, a member may treat it as rescinded and recover the amounts paid as assessments, with interest thereon.[86] A change from the assessment to the old-line plan of insurance is not a change in the essential character of the corporation's business, and can be made over the protest of a minority of policy holders.[87] Nor does such a change constitute an impairment of the obligation of its existing contracts, where no attempt was made to repudiate such contracts and the assessments levied are not unreasonable.[88] By-laws operate prospectively only.[89] The intention to make them retrospective must be clear and undoubted;[90] and it will be presumed that an amendment to the

78. Butler v. Supreme Council A. L. R., 93 N. Y. S. 1012; National Council of Knights & Ladies of Security v. Dillon, 108 Ill. App. 183.

79. Member held bound by a subsequent amendment of the constitution and by-laws, limiting the right to name beneficiaries. Brinnen v. Supreme Council of Catholic Mut. Ben. Ass'n [Mich.] 12 Det. Leg. N. 147, 103 N. W. 603. The first trustees of a beneficial association have power to adopt a provision which concerns the conduct of its business, such as providing that the members shall not be entitled to share in the benefit fund for the loss of a hand, unless amputation at or above the wrist follows the injury. Chevaliers v. Shearer, 6 Ohio C. C. (N. S.) 587.

80. Surrender of a certificate and receipt of a new one, after an amendment to the by-laws, is an assent to the amendment. Breslow v. Southern Tier Masonic Relief Ass'n, 94 N. Y. S. 787. The acceptance of a reduced certificate, under a by-law scaling existing certificates, believing it to be binding, being a mistake of law, is binding on the member, in the absence of misrepresentation. Supreme Council A. L. H. v. Garrett [Tex. Civ. App.] 85 S. W. 27.

81. Theorell v. Supreme Court of Honor, 115 Ill. App. 313; Head Camp, Pac. Jur., Woodmen of the World v. Woods [Colo.] 81 P. 261; Modern Woodmen of America v. Wieland, 109 Ill. App. 340.

82. Theorell v. Supreme Court of Honor, 115 Ill. App. 313. A by-law destructive of the liability the society had assumed would be unreasonable. Modern Woodmen of America v. Wieland, 109 Ill. App. 340. If the laws are so amended as to make persons engaged in the liquor business ineligible, such persons already members must be given a reasonable time to abandon the business and withdraw their investments therein. Id.

83. Modern Woodmen of America v. Wieland, 109 Ill. App. 340.

84. A by-law, subsequently adopted, providing a shorter time for bringing actions than that prescribed in the statute of limitation in the absence of contract. Butler v. Supreme Council A. L. R., 93 N. Y. S. 1012.

85. A member cannot be held to have ratified such reduction, by the payment of a reduced premium, in the absence of proof that he knew such reduction was occasioned solely by the reduction in the indemnity to be paid. Smith v. Supreme Council, A. L. H., 94 App. Div. 357, 88 N. Y. S. 44. Or where the association refused to receive any greater assessments and he notified the association of his refusal to consent to the reduction. Supreme Council A. L. H. v. Champe [C. C. A.] 127 F. 541. Unless he delays so long as to mislead the association or prejudice its interests thereby. Lippincott v. Supreme Council, A. L. H., 130 F. 483; Clymer v. Supreme Council, A. L. H., 138 F. 470. Benefits cannot be reduced by amendment of by-laws, though power to amend is reserved and certificate provided that payment should be of such sum as by-laws prescribed. Evans v. Southern Tier Masonic Relief Ass'n [N. Y.] 75 N. E. 317.

86. He does not lose the right by delay, so long as he has done nothing to affirm the action of the association, or unless the position of the association has been altered to its injury by the delay; nor is he barred by a limitation in the by-laws, which, from its context, applies only to actions to recover on the certificate after the death of a member. Daix v. Supreme Council, A. L. H., 127 F. 374. Where, after the adoption of a by-law scaling all $5,000 certificates to $2,000, the holder of a $5,000 certificate returned it with a request for a new one for $2,000, she was not entitled to recover the premiums paid on the $5,000 certificate. Supreme Council, A. L. H., v. Lyon [Tex. Civ. App.] 88 S. W. 435.

87, 88. Iversen v. Minnesota Mut. Life Ins. Co., 137 F. 268.

89. National Council of Knights & Ladies of Security v. Dillon, 108 Ill. App. 183.

90, 91. Modern Woodmen of America v. Wieland, 109 Ill. App. 340.

by-laws of a mutual benefit society was not intended to affect a contract of insurance previously made.[91] A contract of insurance made in contravention of the charter is ultra vires,[92] and unenforceable, though performed in good faith by insured, and the association has had the benefit of it.[93] But a contract made in contravention of the by-laws is not absolutely void; for a mutual benefit association may waive compliance with its by-laws, and any provisions therein attempting to disable the organization from so doing are nugatory;[94] but a local lodge cannot do so.[95]

§ 6. *Dues and assessments.*[96]—Assessments can be made only as provided by the laws of the association.[97] The authority of the directors to make assessments cannot be delegated to the secretary.[98, 99] A member cannot be compelled to pay assessments after suspension or forfeiture.[1] The liability of a certificate holder in a beneficial endowment association to pay assessments terminates upon its insolvency and the commencement of proceedings to wind up its affairs.[2]

Notice.[3]—Where the constitution of a beneficial association provides what shall constitute an assessment and notice thereof, all members are bound thereby.[4] Before forfeiture for nonpayment of assessments can avail as a defense, it must appear that the member has been notified in the precise manner required by the rules;[5] and in the absence of any prescribed kind of notice to be given of an extra assessment, actual notice must be given to each member.[6]

§ 7. *Forfeitures and suspensions; reinstatement.*[7]—Fines and penalties imposed, if not illegal, immoral or against public policy, will be enforced.[8] Provisions

92. The admission of a person beyond the age limit. And the society, by the receipt and retention of dues and assessments, does not waive the right to contest a claim upon the certificate issued to such person. Fraternal Tribunes v. Steele, 114 Ill. App. 194; Supreme Ruling of the Fraternal Mystic Circle v. Wood, 114 Ill. App. 431. But an association is estopped from taking advantage of the fact that the insured was above the age limit, where such limit is not fixed in its organic law, and it was within the power of the association to determine insured's real age. Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783.

93. Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121.

94. Where an association always restored a member upon payment of three months' arrearages, it justified a member in believing his insurance still in force, although he was delinquent for a month's dues, and was a waiver of its by-laws to that extent. Cline v. Sovereign Camp Woodmen of the World [Mo. App.] 86 S. W. 501. Where the officers of the local camp visited the member while ill, obligated him, collected the premium and dues and delivered the certificate, with full knowledge of the condition of the insured, the association was liable on the certificate, notwithstanding a requirement of a by-law that the certificate should be delivered to the applicant while in good health. Sovereign Camp Woodmen of the World v. Dismukes [Miss.] 38 So. 351.

95. Where initiation is made a condition precedent to membership in the order, a local lodge cannot waive initiation by delivery of the certificate. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530. Where the constitution prohibits the initiation of members over fifty years of age, its officers cannot admit such person Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n, 93 N. Y. S. 575.

96. See 3 C. L. 1510.

97. Maximum assessment under the by-laws held to be only one sufficient to pay $10 a week for each member out of employment. Moeller v. Machine Printers' Beneficial Ass'n [R. I.] 60 A. 591. The burden of showing that an assessment was regularly levied is on the association. Supreme Council American Legion of Honor v. Haas, 116 Ill. App. 587; Farmers' Federation v. Croney, 106 Ill. App. 423.

98, 99. So held under similar laws applicable to mutual fire insurance companies. Code, § 1706, provides for the determination of assessments by the directors. Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co. [Iowa] 103 N. W. 207.

1. Johnston v. Anderson, 23 Pa. Super. Ct. 152.

2. Gilbert v. Washington Ben. Endowment Ass'n, 21 App. D. C. 344.

3. See 3 C. L. 1510.

4. Grand Lodge, A. O. U. W., v. Marshall, 31 Ind. App. 534, 68 N. E. 605.

5. Farmers' Federation v. Croney, 106 Ill. App. 423; United Brotherhood of Carpenters & Joiners of America v. Fortin, 107 Ill. App. 306.

6. Supreme Council American Legion of Honor v. Haas, 116 Ill. App. 587.

7. See 3 C. L. 1510.

8. A by-law providing for suspension, ipso facto, upon non-payment of an assessment, with deprivation of all benefits from the policy, held to be self-enforcing. Feiber v. Supreme Council, A. L. H., 112 La. 960, 36 So. 818. A provision that no death benefit shall be paid in case of death within ten days of reinstatement is reasonable. Anderson v. Alta Friendly Soc., 26 Pa. Super. Ct. 630. A by-law, adopted by a local division of an order, that any member receiving sick

in regard to them, however, will be construed in favor of the assured and, when possible, so as to prevent forfeiture;[9] but it is the duty of the court to declare a forfeiture upon facts that will admit of no other conclusion.[10]

For nonpayment of dues and assessments.[11]—An act within the apparent authority of the agent binds the company, where the other party deals with him in good faith;[12] but he cannot extend the time of payment when such authority is expressly denied by the laws of the association.[13] In the absence of any prohibition, the financial officer of a lodge may advance and pay the assessments of a member, under an agreement for reimbursement,[14] and he may receipt for payments of monthly dues, at the time of payment, or at any time thereafter.[15]

A provision that a failure to pay assessments on the day when due shall ipso facto work a suspension and forfeiture of all rights under the benefit certificate is valid and binding;[16] but forfeiture does not result, where the member has been prevented from payment by some act or omission of the order or its officers,[17] nor where the amount of the assessment was duly tendered.[18] The receipt of arrearages of dues, with full knowledge of all the circumstances, and the subsequent receipt of dues, estop a beneficial association from insisting on a forfeiture for such arrearages.[19] But an acceptance of a past delinquency does not estop from insisting on future delinquencies,[20] unless the association, by the adoption of a custom or the course of its conduct, has led its members honestly to believe that they will be received after the appointed day.[21] A policy cannot be canceled for nonpayment of an assessment ir-

benefits found absent from his home after 8 p. m. should be deprived of his benefits, held to transcend the power of the division in respect to sick benefits. Loftus v. Division No. 7, Ancient Order of Hibernians [N. J. Law] 60 A. 1119. A by-law providing that any member in arrears for four weeks' dues shall not draw any benefit until one month from the date of paying the deficiency is void for unreasonableness. Burns v. Manhattan Brass Mut. Aid Soc., 102 App. Div. 467, 92 N. Y. S. 846.

9. Supreme Council American Legion of Honor v. Haas, 116 Ill. App. 587; Farmers' Federation v. Croney, 106 Ill. App. 423.

10. Grand Lodge, A. O. U. W., v. Marshall, 31 Ind. App. 534, 68 N. E. 605.

11. See 3 C. L. 1511.

12. Plaintiff insured in mutual fire insurance company paid a contingent fee to the agent, greater than allowed by the charter and by-laws, on the understanding that he should be exempt from further payments during the first year. Younghoe v. Grain Shippers' Mut. Fire Ins. Ass'n, 126 Iowa, 374, 102 N. W. 137.

13. Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446.

14. Puls v. Grand Lodge A. O. U. W. [N. D.] 102 N. W. 165.

15. United Moderns v. Pistole [Tex. Civ. App.] 86 S. W. 377. Where the constitution provides that "all payments of dues and assessments shall be receipted for by stamps," a member's book showing such payments is controlling, as against the secretary's testimony that he is in arrears. Stand v. Griessman, 91 N. Y. S. 278.

16. It authorizes the forfeiture of the certificate without further action on the part of the society. Sovereign Camp Woodmen of the World v. Hicks [Tex. Civ. App.] 84 S. W. 425. Under a certificate providing for forfeiture for failure to pay the per capita tax when due, and assessments within 30 days of notice thereof, the mere failure to pay the per capita tax when due did not work a forfeiture, but there must be a failure to pay the tax, and an assessment within 30 days of notice of both. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470.

17. As where he was unable to find the secretary until after the expiration of the time, and he was then informed that the local camp had been disbanded. Sovereign Camp Woodmen of the World v. Hicks [Tex. Civ. App.] 84 S. W. 425; Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 86 S. W. 600.

18. Tender of dues and assessments held not sufficient, when made outside of the collecting officer's place of business, where he could not comply with the requirements of the association as to giving receipts, etc. Sterling v. Head Camp, Pac. Jur. Woodmen of the World, 28 Utah, 526, 80 P. 1110. Evidence as to whether payment of an assessment was tendered within the time required held to present a question for the jury. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 86 S. W. 600.

19. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307.

20. Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446.

21. Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446. Where there was evidence of an invariable course of dealing to waive the condition of forefeiture for nonpayment, defendant was held estopped to insist on a forfeiture. See Wagaman v. Security Mut. Life Ins. Co., 110 Mo. App. 616, 85 S. W. 117.

regularly made;[22] nor when the company has in its possession sufficient funds of the insured, paid as a contingent fee, to satisfy the assessment.[23] But where members engaged in hazardous occupations were required to pay an extra premium, an association was not required to apply, on such extra premium, a payment of a regular assessment paid before delinquent.[24] The burden of showing a forfeiture for nonpayment is upon the insurer.[25] Where, by the laws of the society, nonpayment of an assessment operates as a forfeiture, the member must elect, every time an assessment is made, either to pay within the time limited or suffer the penalty of loss of membership and benefits.[26] The mere announcement of a member that he will drop his insurance does not affect his status as a member, but he remains such until actual forfeiture has worked.[27] Acquiescence in a suspension for nonpayment of an assessment, though irregular, precludes a recovery on the certificate.[28] The enforcement of a law to insure prompt payment of assessment may be waived by the association;[29] but forfeiture is not waived, as a matter of law, by the issue of receipts for assessments and forwarding the amounts to the association, by its agent, in ignorance of the serious illness of the insured;[30] nor by a general call for assessment.[31] Courts of law will not ordinarily concern themselves with the question of the good standing of members, where the same depends on matters of morals, religion and the like,[32] but will do so where it depends on the payment of dues.[33]

Reinstatement.[34]—A member can be reinstated only in the manner provided by the laws of the association,[35] and only on the terms contained in the health certificate.[36] The "health certificate" necessary to reinstatement may be signed by an agent of the insured.[37]

§ 8. *The beneficiary. Designation.*[38]—Statutes in some states provide that payment of benefits may be made only to certain designated classes of beneficiaries.[39] In such case only persons belonging to such classes have an insurable interest in the

22. As where the organic act (Code, § 1706) provides for the determination of assessments by the directors and one was made by the secretary. Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co. [Iowa] 103 N. W. 207.

23. Younghoe v. Grain Shippers' Mut. Fire Ins. Ass'n, 126 Iowa, 374, 102 N. W. 137.

24. Head Camp, Pac. Jur. Woodmen of the World v. Woods [Colo.] 81 P. 261.

25. Supreme Council of Catholic Knights & Ladies of America v. O'Neill, 108 Ill. App. 47. Held, that the jury was justified in finding that defendant had not sustained the burden. Van Etten v. Grand Lodge A. O. U. W. [N. J. Law] 60 A. 210.

26. Grand Lodge, A. O. U. W. v. Marshall, 31 Ind. App. 534, 68 N. E. 605.

27. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470.

28. As where a member, through the alleged mistake of the financier of the local lodge, was prevented from paying his assessment, twice tendered, and afterward took no further steps to question his suspension or for reinstatement. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 86 S. W. 600.

29. Local agent held authorized to waive forfeiture. Wagaman v. Security Mut. Life Ins. Co., 110 Mo. App. 616, 85 S. W. 117.

30. Miller v. Head Camp, 45 Or. 192, 77 P. 83; Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446.

31. Pete v. Woodmen of the World, 5 Ohio C. C. (N. S.) 446, 26 Ohio Circ. R. 653.

32. See 3 C. L. 1512, n. 79.

33. Member held not to have been in good standing, on account of arrearages equal to 6 months' dues, although he was charged with a dollar for lottery tickets issued by the society. Kelly v. Court R. F. Phelan, No. 122, Foresters of America [Conn.] 60 A. 1022. The burden of proof that, before his death, a member had lost his good standing, is upon the society. United Brotherhood of Carpenters & Joiners of America v. Fortin, 107 Ill. App. 306.

34. See 3 C. L. 1510.

35. Sterling v. Head Camp, Pac. Jur. Woodmen of the World, 28 Utah, 505, 80 P. 375. A vote of the lodge taken during the lifetime of the member and payment of all matured assessments held essential to reinstatement under the by-laws. Butler v. Grand Lodge A. O. U. W., 146 Cal. 172, 79 P. 861. Payments requisite to reinstatement required to be made personally. Delaney v. Kelly, 92 N. Y. S. 1021, reversing decision in supreme court, trial term, ante p. 265.

36, 37. Anderson v. Alta Friendly Soc., 26 Pa. Super. Ct. 630.

38. See 3 C. L. 1513.

39. In Illinois, the act of 1883 (Laws 1883, p. 104) which permitted the issue of certificates for the benefit of legatees, was amended in 1893 (Laws of 1893, p. 130), restricting benefits to families, heirs, blood relatives, affianced husband or wife, or persons dependent. Loyd v. Modern Woodmen of America [Mo. App.] 87 S. W. 530.

life of the member, and they alone may receive death benefits.[40] Similar provisions, when found in the charter, constitution, by-laws or certificate, must also be regarded in the designation of beneficiaries.[41] In determining the eligibility of the beneficiary designated, as broad and comprehensive a meaning as possible will be given to the terms of the charter provisions.[42] Where the association pays the money into court, it waives the objection that the beneficiary was not within the class authorized by its laws, and such objection cannot be raised by a claimant of the benefit, as against the beneficiary.[43] A designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated.[44] Where neither the statutes, constitution nor by-laws of a benefit order provide for the designation of a beneficiary by will, such a designation is insufficient.[45] Precedence of beneficiaries may be determined by the organic law of the association, without formal designation by the insured.[46]

40. Where the statutes of the state (Rev. St. 1898, § 1955c, amd. by Laws 1899, p. 138, c. 101) authorized the association to designate who might be made beneficiaries and it permitted only "survivors" to be named, one who was not a relative was not a "survivor" and not entitled to the benefit. Grand Lodge of Wisconsin of Order of Hermann's Sons v. Lemke [Wis.] 102 N. W. 911. A niece of a deceased member's father's first wife, not made by will a legatee of the deceased, though named as beneficiary, was not entitled to the death benefit under Code, § 1824, providing that no certificate shall issue to one not "the husband, wife, relative, legal representative, heir or legatee." Smith v. Supreme Tent Knights of Maccabees of the World [Iowa] 102 N. W. 830.

41. Where payment under the certificate can be made only to a beneficiary named and no provision is made for payment in case of the beneficiary's death during the life of the insured, if no substitute has been named, the benefit fund lapses to the society upon the death of the member. Home Circle Soc. v. Hanley [Tex. Civ. App.] 86 S. W. 641. The by-laws may provide for the payment of benefits to the beneficiary's legal representatives, in case of his death before the death of the insured and no appointment of a new beneficiary. Anderson v. Supreme Council Catholic Benev. Legion [N. J. Eq.] 60 A. 759. A person who is not of the class for whose benefit a benefit society is authorized to issue a policy of insurance cannot legally be made a beneficiary in the policy, or demand the amount payable upon the death of the assured. Starr v. Knights of Maccabees of the World, 6 Ohio C. C. (N. S.) 473. A woman who has occupied the relation of wife for a period of twelve years in the honest belief that she was the wife of the man with whom she was living, which relation, however, was unlawful in that he had a wife living at the time from whom he had never been divorced, is a "dependent," within the meaning of the charter and by-laws of a benefit society, which authorizes the designation of dependents as beneficiaries in policies of insurace issued to their members, and is, therefore, as against the lawful wife or the heirs of the assured, entitled to the proceeds of a policy of insurance issued to him by the society without notice of such relation, in which she was referred to as his wife and designated as the beneficiary, notwithstanding the policy was issued after she discovered the unlawful relation referred to. Id. Proceeds of a policy payable to the members "widow or other heir" cannot be devised by him to one to whom he was married while he had a wife living. Tutt v. Jackson [Miss.] 39 So. 420.

42. Designation of "estate" as beneficiary in an association organized to render assistance to members in case of accident and to families and friends, in case of death, sustained, and payment to administrator instead of guardian of minor son approved. Compton's Estate, 25 Pa. Super. Ct. 28. Under charter provisions for the payment of benefits to the "widow, orphans, dependents or other beneficiary," and constitutional provisions for payment "to the member, wife, affianced wife, blood relations or persons dependent," a brother can be designated as beneficiary. Donithen v. Independent Order of Foresters, 23 Pa. Super. Ct. 442. The word "family," in the certificate of incorporation, held to include the mother of a member, as regards the designation of a beneficiary. Klee v. Klee, 93 N. Y. S. 588. The dependence upon a member of a fraternal benefit society to be his beneficiary need not be a complete dependence for support, but a regular and partial support is sufficient, as in case of a divorced wife receiving alimony. Martin v. Modern Woodmen of America, 111 Ill. App. 99.

43. Coulson v. Flynn, 181 N. Y. 62, 73 N. E. 507.

44. White v. Brotherhood of American Yeomen, 124 Iowa, 293, 99 N. W. 1071. Where the wife was made the beneficiary and was afterward divorced, but no change of beneficiary was made, although the member remarried, held, that the first wife was entitled to the benefit. Id. A statement in a certificate that the beneficiary is the wife of the member is descriptive of her relation to him and not a provision for payment to the widow only. Id.

45. In re Smith's Estate, 42 Misc. 639, 87 N. Y. S. 725.

46. Where the charter provided for payment primarily to a member of the immediate family of the deceased, and secondarily to others, and an unmarried man designated his father as his beneficiary, afterward marrying; held, that his widow was entitled to

Right to change beneficiary.[47]—The beneficiary named in the certificate is presumed to be entitled to the proceeds thereof,[48] but does not acquire, by that fact alone, a vested right therein.[49] The member may exercise the power of appointment without the consent of the beneficiary, and without any restriction other than such as may be imposed by the organic law, or the rules and regulations of the association.[50] Unless restricted by law of the state or association,[51] or unless the beneficiary has obtained a vested interest[52] or equity therein,[53] he may ordinarily change the beneficiary at will.[54] But he must do so in the manner prescribed by the laws of the association,[55] or by the contract of insurance.[56] An antenuptial agreement to make the wife a beneficiary is valid,[57] but must be in writing under the statute of frauds.[58] The right to change the beneficiary is sometimes given by statute,[59] in which case neither the insurer nor the beneficiary can prevent such change, if the proposed new beneficiary belongs to the proper class.[60]

The issuance of a new certificate naming a new beneficiary, with a waiver of the surrender of the old certificate, is an effectual cancellation of the latter, if the new beneficiary is eligible.[61]

Assignment of benefits.[62]—The insured may, by parol, assign a life insurance policy to one having an insurable interest in his life;[63] and a party who has such interest may have a lien on the beneficiary's expectancy for assessments paid.[64] The assignee of a policy as collateral security takes it subject to the rules and by-laws of the company.[65] Provisions in the by-laws prohibiting a member from assigning his certificate to secure a debt can be taken advantage of only by the society.[66]

Status of beneficiary.[67]

the benefit, although no change in beneficiary was made by deceased. Larkin v. Knights of Columbus [Mass.] 73 N. E. 850.

47. See 3 C. L. 1514.

48. Lide v. American Guild, 69 S. C. 275, 48 S. E. 222.

49. Carter v. Carter [Ind. App.] 72 N. E. 187. Where a member can change his beneficiary at will, the beneficiary has no vested right during the life of the member. Coleman v. Anderson [Tex.] 86 S. W. 730.

50. Carter v. Carter [Ind. App.] 72 N. E. 187. The inference of unnaturalness or improbability is not sufficient to show fraudulent inducements to change the beneficiary from an infant daughter to a full-grown brother. Broderick v. Broderick, 69 Kan. 679, 77 P. 534.

51. Grand Lodge A. O. U. W. v. O'Malley [Mo. App.] 89 S. W. 68.

52. See 3 C. L. 1514, n. 2.

53. Mere payment of assessments, in the absence of a contract that she is to receive the benefits, does not give the beneficiary such an equity in the certificate as to estop a member from changing his benficiary. But such beneficiary is entitled to reimbursement out of the benefits. Grand Lodge A. O. U. W. v. O'Malley [Mo. App.] 89 S. W. 68.

54. See 3 C. L. 1514, n. 2. Change of beneficiary from mother to wife subsequently married sustained, although the insured had another wife living, the second one being an innocent party. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225. The burden of proof is on the association to show the illegality of the marriage of the beneficiary to the deceased. Senge v. Senge, 106 Ill. App. 140.

55. When required to be in writing, a substitution, though intended and attempted, is not effectual unless reduced to writing. Pennsylvania R. Co. v. Warren [N. J. Eq.] 60 A. 1122. Held, that there was a substantial compliance in this case. Grand Lodge A. O. U. W. v. O'Malley [Mo. App.] 89 S. W. 68.

56. Sterling v. Head Camp, Pac. Jur. Woodmen of the World, 28 Utah, 505, 80 P. 375.

57. Carter v. Carter [Ind. App.] 72 N. E. 187, and cases cited.

58. Pennsylvania R. Co. v. Warren [N. J. Eq.] 60 A. 1122.

59. Ky. St. 1903, § 670. Lockett v. Lockett, 26 Ky. L. R. 300, 80 S. W. 1152.

60. Facts held sufficient to constitute a change of beneficiary, entitling plaintiff to the proceeds of the policy. Lockett v. Lockett, 26 Ky. L. R. 300, 80 S. W. 1152.

61. Klee v. Klee, 93 N. Y. S. 588. Evidence held to sustain a finding that the insured authorized the issue of a new certificate making a change of beneficiary. Superior Lodge, Degree of Honor, A. O. U. W. v. Philbin [Mo. App.] 87 S. W. 58.

62. See 3 C. L. 1514.

63. Lockett v. Lockett, 26 Ky. L. R. 300, 80 S. W. 1152.

64. Coleman v. Anderson [Tex.] 86 S. W. 730.

65. He is not entitled to notice of the time of payment of premiums required to be given to the insured. Franklin Life Ins. Co. v. American Nat. Bank [Ark.] 84 S. W. 789.

66. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057; Id. [Tex. Civ. App.] 86 S. W. 730.

Exemption of benefits from liability for debts.[68]—A designation in the certificate "Payable to estate," is not such a designation of a beneficiary as to make the sum exempt from execution under the statutes therefor, but it passes to the person who would take the personalty under the statute of distribution.[69]

§ 9. *Maturity and accrual of benefits. Incontestable clauses.*[70]—In the absence of any contrary provisions in the certificate, liability accrues thereunder at the time of the death of the member.[71] A clause making the policy incontestable and another reducing the indemnity in case of suicide were held to be separate and not affecting each other.[72]

Suicide [73] is not, as a rule, recognized as a ground of forfeiture of a policy of insurance, unless so expressly provided.[74] Provisions may be made in the contract of insurance for reducing the indemnity in case of suicide,[75] and also against any liability, although such provision is not directly authorized by the constitution and by-laws.[76] Suicide as used in by-laws limiting liability means voluntary and intentional self-destruction.[77] It does not include accidental self-destruction,[78] nor self-destruction where, at the time of the act the assured was so affected with insanity as to be unconscious of the act, or had not the power to resist the insane impulse.[79] But if the certificate or by-law provides for the avoiding of the certificate in case of self-destruction, whether sane or insane, there is a complete exemption from liability [80] by the acts of self-destruction.[81]

The legal presumption is always against suicide;[82] but the presumption is a rebuttable one and must yield to physical facts clearly inconsistent with it.[83] The burden of proving intentional self-destruction is on the association.[84] The verdict

67, 68. See 3 C. L. 1515.

69. Laws 1892, p. 2018, ch. 690, art. 7, § 238. In re Smith's Estate, 42 Misc. 639, 87 N. Y. S. 725.

70. See 3 C. L. 1515.

71. American Home Circle v. Schumm, 111 Ill. App. 316.

72. Childress v. Fraternal Union of America, 113 Tenn. 252, 82 S. W. 832.

73. See 3 C. L. 1516.

74. Supreme Council of Royal Arcanum v. Pels, 110 Ill. App. 409.

75. Childress v. Fraternal Union of America, 113 Tenn. 252, 82 S. W. 832.

76. Blasingame v. Royal Circle, 111 Ill. App. 202.

77. See 3 C. L. 1516, n. 29.

78. Clause in a policy with reference to self-destruction, "whether voluntary or involuntary, sane or insane," held not to apply to a case of death from the accidental discharge of a gun while being cleaned, if the insured had no intention of discharging it or of hitting himself. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648.

79. The phrases "commit suicide," "die by his own hand," "take his own life," or their equivalents, do not include the taking of one's own life when insane. Supreme Council of Royal Arcanum v. Pels, 110 Ill. App. 409. An intent to take one's life being a necessary element of suicide, where no immunity from liability in case of self-destruction other than suicide was provided for, the society was liable, in case of the self-destruction of the insured while insane. Mauch v. Supreme Tribe of Ben Hur, 100 App. Div. 49, 91 N. Y. S. 367.

80. Supreme Council of Royal Arcanum v. Pels, 110 Ill. App. 409; Tisch v. Protected Home Circle [Ohio] 74 N. E. 188.

81. Brown v. United Moderns [Tex. Civ. App.] 87 S. W. 357; Mauch v. Supreme Tribe of Ben Hur, 100 App. Div. 49, 91 N. Y. S. 367; Blasingame v. Royal Circle, 111 Ill. App. 202; Supreme Court, Knights of Maccabees v. Marshall, 111 Ill. App. 312; Supreme Court of Honor v. Buxton, 111 Ill. App. 187, following Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478. Where the by-laws precluded recovery in case of suicide, except when the authorities of the order were satisfied that the deceased, at the time of suicide, was of unsound mind, and had been reported to the supreme secretary as such, recovery could not be had, in the absence of any showing of such exception. Post v. Supreme Court, I. O. F. [Mich.] 12 Det. Leg. N. 241, 103 N. W. 841. Language held equivalent to a provision that death by self-destruction, whether sane or insane, avoids the policy. Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

82. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; Hardinger v. Modern Brotherhood of America [Neb.] 101 N. W. 983.

83. Hardinger v. Modern Brotherhood of America [Neb.] 103 N. W. 74; Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

84. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; National Union v. Fitzpatrick [C. C. A.] 133 F. 694. Held, that, under the circumstances of this case, reasonable minds might differ as to the question of suicide. Hardinger v. Modern Brotherhood of

of the coroner's jury is inadmissible to show suicide,[85] and so is a copy of a letter purporting to have been written by assured to his wife, the beneficiary in the certificate;[86] but a note found in the room where the deceased was discovered dead, in his handwriting, giving directions as to burial, etc., is competent evidence of suicide.[87] Where the evidence shows deliberate intention and preparation for suicide, it is the duty of the court to direct a verdict for defendant.[88]

§ 10. *Proofs of death or right to benefits.*[89]—The agent of a fraternal association, charged with the duty of receiving proofs of death, prima facie has the power to waive the presentation thereof by refusing to recognize any liability upon the part of his principal.[90] The preparation of death proofs by a local lodge officer is not a waiver of forfeiture for suicide.[91] Death will be presumed from absence of seven years from one's usual abode or resort, without any intelligence received within such time.[92]

§ 11. *Payments of benefits.*[93]—The disposition of the benefit fund must be made strictly in conformity with the constitution of the association.[94] The ordinary rules as to accord and satisfaction apply in the settlement of benefit claims.[95] Repayment of the amount paid in settlement of a claim on a benefit certificate is a condition precedent to a rescission of the settlement by plaintiff.[96] A settlement of a claim induced by fraud will be set aside.[97]

Interest.[98]—Where the beneficiary is named in the certificate, the sum recoverable is certain, proper proofs or demand have been made and payment refused, interest may be recovered on the certificate.[99]

America [Neb.] 101 N. W. 983; Id. [Neb.] 103 N. W. 74. Evidence that insured was found dead, with a discharged pistol by his side, raises a question for the jury of accidental death or suicide. Kane v. Supreme Tent Knights of Maccabees of the World [Mo. App.] 87 S. W. 547. Held that there was substantial evidence that the insured's killing of himself was accidental. Hunt v. Ancient Order of Pyramids, 105 Mo. App. 41, 78 S. W. 649. A finding that deceased did not commit suicide held to be manifestly against the weight of evidence. Supreme Court I. O. F. v. Mutter, 105 Ill. App. 518.

85. Kane v. Supreme Tent, Knights of Maccabees of the World [Mo. App.] 87 S. W. 547; Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107.

86. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107.

87. Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

88. Mason v. Supreme Court of Honor, 109 Ill. App. 10; Hardinger v. Modern Brotherhood of America [Neb.] 103 N. W. 74; Clemens v. Royal Neighbors of America [N. D.] 103 N. W. 402.

89. See 3 C. L. 1517.

90. United Brotherhood of Carpenters & Joiners of America v. Fortin, 107 Ill. App. 306.

91. Modern Woodmen of America v. Hicks, 109 Ill. App. 27.

92. Policemen's Benev. Ass'n of Chicago v. Ryce, 213 Ill. 9, 72 N. E. 764.

93. See 3 C. L. 1517.

94. Where the constitution provided for certain amounts to be paid on claims for total disability, resulting from certain physical injuries, and that all other claims should be considered only as addressed to the systematic benevolence of the order, persons not coming within those provisions could not maintain claims for total disability. Pool v. Brotherhood of R. Trainmen, 143 Cal. 650, 77 P. 661. Election of benefits, where the nature of the injury falls under two different provisions of the certificate, as a weekly benefit for loss of time, resulting from injuries through violent means leaving external marks, or a specified sum for the loss of a hand or foot. Fricke v. United States Indemnity Soc. [Conn.] 61 A. 431.

95. Where a beneficiary surrendered his policy and accepted a smaller amount than he claimed, writing on his surrender of the certificate the words "Receipt below given for $1,900 only," held not to be a protest affecting the legal effect of the surrender of certificate. Simons v. Supreme Council A. L. H., 178 N. Y. 263, 70 N. E. 776.

96. Held not to have been waived by the defendant. Slater v. United States Health & Acc. Ins. Co., 133 Mich. 347, 95 N. W. 89, 10 Det. Leg. N. 211.

97. Settlement induced by the company's representations that it had enacted a by-law reducing the amount payable under a benefit certificate, when it knew that such by-law had been declared void. Simon v. Supreme Council, A. L. H., 91 App. Div. 390, 86 N. Y. S. 866. The remedy of a beneficiary who is induced by false representations to settle his claim for a smaller amount than that to which he is entitled is in equity to set aside the receipt and for the cancellation of the policy and not at law to recover the amount paid. Stephenson v. Supreme Council A. L. H., 130 F. 491. The question of whether the beneficiary had been induced by fraud to release his claim, held to be one for the jury. Fraternal Army of America v. Evans, 215 Ill. 629, 74 N. E. 689.

98. See 3 C. L. 1518.

§ 12. *Procedure to enforce right to benefits.*[1]—Beneficiaries have no right of action against the association for fraudulently inducing the member to believe that it was able to pay all claims in full, under which belief he paid all assessments up to the time of his death.[2] Where a certificate is made payable to different beneficiaries, it does not create a joint demand in their favor and they should not be joined as plaintiffs in an action on the certificate.[3] A cause of action to recover sick benefits, payable during a member's lifetime, survives and may be brought by his administrator;[4] but an administrator cannot recover a death benefit fund made payable to the beneficiary, when the latter dies before the insured.[5] The venue of a cause of action on a certificate of membership in a fraternal benefit association is the county of the member's residence at the time of his death.[6] Where the contract of insurance provides that action must be brought thereon within a certain time after the rejection of the claim, notice of rejection must be given before the limitation begins to run.[7] Suit on an accident certificate is not premature because commenced before the expiration of the time for payment where the association disavowed liability before commencement of suit and after presentation of proofs.[8] Process may be served on a local agent.[9] An unincorporated fraternal beneficiary order cannot ordinarily be sued in the name by which it is commonly known but the suit must be brought against the individual members.[10]

The members of a voluntary benefit association are not personally liable for the debts of the association, unless they have in some way sanctioned them or made themselves liable.[11] Where the certificate is issued in the name of a separate and independent association, distinct from the parent society, it is the proper party defendant in an action to enforce payment.[12] Where a mutual insurance company, after loss, denied liability solely on the ground of failure to pay an assessment illegally levied, it could not, after suit brought and costs incurred by plaintiff, defend on the ground that defendant's policy had been canceled by the exercise of the discretion of the directors, as authorized by its charter.[13] In Missouri, to constitute the insured's misrepresentations an available defense to the insurer, it must be shown that the subject of his misrepresentation caused his death, and the premiums paid on the certificate must be deposited in court to be refunded.[14]

Pleading.[15]—It is not necessary for the plaintiff to either allege or prove such matters as appear in the application only. To be available as a defense they must be pleaded and proved by the defendant.[16] Breaches of warranties, representations

99. Grand Lodge Brotherhood of Locomotive Firemen v. Orrell, 109 Ill. App. 422. Interest is allowed on such certificates as on written instruments. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; Supreme Lodge, Knights & Ladies of Honor v. Rehg, 116 Ill. App. 59.

1. See 3 C. L. 1518.

2, 3. Conard v. Southern Tier Masonic Relief Ass'n, 101 App. Div. 611, 93 N. Y. S. 626.

4. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307.

5. In such case the benefit lapses to the society, if no substitute has been named. Home Circle Soc. v. Hanley [Tex. Civ. App.] 86 S. W. 641.

6. B. & C. Comp. §§ 44, 55. Hildebrand v. United Artisans [Or.] 79 P. 347.

7. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156.

8. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190.

9. Under B. & C. Comp. § 55. Hildebrand v. United Artisans [Or.] 79 P. 347. A former solicitor of applications in a benefit association held not to be "a managing agent," within the meaning of the Ohio statute as to service of process on foreign corporations. Spiker v. American Relief Soc. [Mich.] 12 Det. Leg. N. 143, 103 N. W. 611.

10. Where the members are too numerous a few may be made defendants to represent the interests of all. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307. But see Wells & McComas Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22.

11. Pearson v. Anderburg, 28 Utah, 495, 80 P. 307.

12. Delaney v. Kelly, 45 Misc. 286, 92 N. Y. S. 265.

13. Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co. [Iowa] 103 N. W. 207.

14. Rev. St. 1899, § 7891. Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

15. See 3 C. L. 1519.

16, 17. Supreme Lodge, Knights & Ladies of Glenwood v. Albers, 106 Ill. App. 85.

or statements in the application or policy must be pleaded specially.[17] Extension of time of payment under a benefit certificate should be pleaded in abatement and not in bar, where such extension was by a transaction extraneous of the certificate.[18] In an action on a life policy, where the answer is not verified, the contract as alleged stands confessed.[19] The allegation in an answer that the member committed suicide, whereby the certificate became void, is put in issue perforce the statute of Texas.[20] The general rules as to pleading apply.[21]

Evidence.[22]—Plaintiff in an action on a benefit certificate need not prove the statements in the application to be true,[23] nor show that the insured did not violate any of the provisions of the constitution and by-laws; those are matters of defense.[24] In an action to establish a trust in the proceeds of a life insurance policy, plaintiff must establish it by a preponderance of evidence.[25]—The burden is upon the society to show that its constitution has been amended in accordance with its provisions, before the amendment becomes competent evidence for the society.[26] The constitution and by-laws may be proved by a copy purporting to be published by the supreme council of the order,[27] by the admissions of the officers,[28] or by a showing that the association has recognized and operated under them.[29] Under the Kentucky statute, by-laws referred to in any life insurance policy and having a bearing on the contract, are inadmissible in evidence, unless a copy thereof is attached to the policy;[30] and the statute applies to a subsequently enacted by-law, though the certificate was issued prior to the statute.[31] To determine the eligibility of a stepson as a beneficiary, as a member of insured's family, evidence as to the family relation and surroundings, exercise of dominion over the household by the insured, and ownership of the house were admissible.[32] Nonexpert witnesses, having opportunities of observa-

18. American Home Circle v. Schumm, 111 Ill. App. 316.

19. Weber v. Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

20. Rev. St. 1895, art. 1193, declaring it unnecessary to deny any special matter of defense. Brown v. United Moderns [Tex. Civ. App.] 87 S. W. 357.

21. The complaint in an action on a membership certificate must show where the cause of action accrued, under B. & C. Comp. §§ 44, 55, relative to the venue of actions. Hildebrand v. United Artisans [Or.] 79 P. 347. Where the petition failed to allege the amount due under the certificate, but the amount could be gathered from the pleading, it was sufficient to support a judgment. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470. Affidavit of defense based on surrender, payment and cancellation of certificates held sufficient. Mitchell v. Monumental Mut. Life Ins. Co., 32 Pa. Super. Ct. 584. A defense that the insured did not comply with the provisions of the policy as to the payment of premiums, without specifying wherein there was noncompliance, was insufficient. Weber v. Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650. The plea nil debet puts in issue no fact and cannot be regarded as a defense; action of court in entering judgment on the pleadings approved. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013. Objection on the ground of variance between the proof offered and the averments of the declaration held properly overruled. Wells & McComas Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22.

22. See 3 C. L. 1519.

23. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209.

24. Lloyd v. Travelers' Protective Ass'n of America, 115 Ill. App. 39.

25. Evidence held not to show an agreement that a substituted beneficiary should hold the proceeds as trustee for the first beneficiary. Lide v. American Guild, 69 S. C. 275, 48 S. E. 222.

26. United Brotherhood of Carpenters & Joiners of America v. Fortin, 107 Ill. App. 306.

27. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

28. Book purporting to be a copy of the laws of one of defendant's affiliated associations held admissible as evidence, under the secretary's admission that, at a former trial, he had admitted it in evidence, though he could not say whether it was a copy of the laws. Wells v. McComas Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22.

29. Where it appears that a certain book contained all laws of the society and it had operated for a long time under such rules, the members were estopped from questioning the authority of the book. State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

30. Ky. St. 1903, § 679. Supreme Lodge K. P. v. Hunziker [Ky.] 87 S. W. 1134.

31. The statute may be complied with in regard to by-laws subsequent to the contract by tendering a copy within a reasonable time and offering to attach it. Supreme Lodge K. P. v. Hunziker, 87 S W. 1134.

32. Morey v. Monk [Ala.] 38 So. 265.

tion, may give their opinions as to the state of health of a member.[33] The application, the certificate to the original beneficiary, the surrender of the certificate, the issue of the certificate to the substituted beneficiary, the payment of assessments and proof of death, were all admissible as relating to the history of the insurance contract, and determining the right and title thereto.[34] Evidence that the applicant could not read or write and that the agent, knowing that fact, did not disclose to him certain material statements in the application, was admissible over objection that the application spoke for itself and was not denied.[35] Foreign records of vital statistics are inadmissible to prove the age of insured, in the absence of evidence showing whether they were kept in pursuance of a church custom or a statute requiring them.[36] The making of assessments may be shown by the records of the body authorized to make them,[37] or by direct and affirmative testimony.[38] An entry of payment of dues, in a receipt book of a subordinate lodge, by an officer authorized to receive payments of dues, may be taken by a jury as true, though such officer testifies that the entry was false and the payment was not made.[39] A failure to pay an assessment may be shown by the financial officer to whom payment should have been made.[40] The proper way to show suspension of a member is by the books and records of the branch of the society to which he belongs.[41] On an issue of the materiality of representations as to health, evidence that defendant society recently had the reputation of insuring applicants without regard to their health is admissible.[42] Cases involving the weight and sufficiency of the evidence are cited below.[43]

Trial and judgment.[44]—The ordinary rules as to trial and instructions apply.[45]

Defendant was not prejudiced by a failure of the court to specially find that answers relative to the use of liquor were warranties, when the death of the insured was not caused or superinduced by the use of liquors.[46]

A judgment entered by confession in favor of "Treasurer of Division No. 168, A. A. of S. R. E. of A." could be set aside on motion for insufficiency of the name of the party plaintiff; but an appeal to the conscience of the chancellor by rule to open the judgment waives the mere irregularity.[47] Proceedings in error to reverse a judgment against a fraternal benefit association must be commenced within 60 days after the rendition of judgment.[48]

33. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156.

34. Morey v. Monk [Ala.] 38 So. 265.

35. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

36. Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n, 93 N. Y. S. 575.

37. Supreme Council of Catholic Knights & Ladies of America v. O'Neill, 108 Ill. App. 47.

38. Supreme Council American Legion of Honor v. Haas, 116 Ill. App. 587.

39. United Moderns v. Pistole [Tex. Civ. App.] 86 S. W. 377.

40, 41. Supreme Council of Catholic Knights & Ladies of America v. O'Neill, 108 Ill. App. 47.

42. Home Circle Soc. No. 2 v. Shelton [Tex. Civ. App.] 85 S. W. 320.

43. Held, that the evidence did not support a finding of total disability. Order of United Commercial Travelers of America v. Barnes [Kan.] 80 P. 1020. Circumstances held not to show that the death was the result of the "involuntary" movements of deceased and therefore accidental. Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa, 436, 92 N. W. 53. The question as to whether the insured is "totally and permanently incapacitated from performing manual labor" is a question for the jury. Grand Lodge Brotherhood of Locomotive Firemen v. Orrell, 109 Ill. App. 422.

44. See 3 C. L. 1519.

45. Where the evidence as to the insured's being beyond the age limit is conflicting, it is error to direct a verdict. Dinan v. Supreme Council of Catholic Mut. Ben. Ass'n. [Pa.] 60 A. 10.

Instruction approved: As to question of health of applicant and attendance of physician. Wilson v. Royal Neighbors of America [Mich.] 102 N. W. 957.

Instruction disapproved: That an accidental cause is such as "may" happen by chance, as suggesting that chance is not always necessary. Smouse v. Iowa State. Traveling Men's Ass'n, 118 Iowa, 436, 92 N. W. 53.

46. Endowment Rank Supreme Lodge K. P. v. Townsend [Tex. Civ. App.] 83 S. W. 220.

47. Treasurer of Division No. 168. v. Keller, 23 Pa. Super. Ct. 135.

48. Under § 3580, Gen. St. 1901. Modern Woodmen of America v. Heath [Kan.] 79 P. 1091.

FRAUD AND UNDUE INFLUENCE.

§ 1. *Actual fraud.*[49]—Fraud consists of any deception or artifice used to circumvent, cheat or deceive another.[50] A false representation [51] or concealment [52] of a material [53] past or existing fact,[54] made by a party or his agent,[55] and relied and acted upon [56] by one who has a right to rely upon it,[57] to his damage,[58] is fraud. It is

49. See 3 C. L. 1520. See, also Deceit, 5 C. L. 953.

50. See Cyc. Law Dict. "Fraud."

It is fraud for an agent to conspire with another and enter into a secret transaction whereby the principal is defrauded. Pacific Lumber Co. v. Moffat, [C. C. A.] 134 F. 836. Where **artifice in a sale of standing timber** is used to prevent an investigation as to its value, and timber worth $4,000 is procured for $1,600, it will be set aside. Garr v. Alden [Mich.] 102 N. W. 950. **To induce one to sign an agreement** which omits a stipulation it was agreed to contain. Davy v. Davy, 98 App. Div. 630, 90 N. Y. S. 242. Where one is **induced by a fraudulent trick to indorse** a negotiable instrument. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119. Under P. L. 45, an act to prevent fraud upon hotel keepers where one **removes his baggage from a hotel with the intention of not paying his board bill.** Commonwealth v. Billig, 25 Pa. Super. Ct. 477. Sale under trust deed set aside because of gross inadequacy of price paid, mental incapacity of the grantor and the fact that the purchaser prevented competition at the sale by misrepresentations as to the amount he would bid. Herring v. Sutton [Miss.] 38 So. 235.

Held not fraud: A mere **intention by an insolvent purchaser of goods not to pay** for them. Reed v. Felmlee, 25 Pa. Super. Ct. 37. A **breach of contract** does not constitute fraud which will vitiate it. Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Where one who does not know the financial condition of a bank and gives a check thereon, **suggesting to the drawer that he leave the money in the bank until he needs it,** such suggestion does not show fraud on his part. Hubbard v. Pettey [Tex. Civ. App.] 85 S. W. 509. The purchase of stock by a company which desired control of the corporation, under an agreement with the stockholders as to the price if a majority of the stock could be acquired is not rendered fraudulent by the fact that the corporation pays a higher price for the stock of certain other holders. Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6. A mere error of judgment on the part of an executor is not fraud. In re Cunningham's Estate [Pa.] 61 A. 993.

51. Where a creditor was induced to settle with a debtor by false representations that the debtor could pay only 40 cents on the dollar, letters written to other creditors enclosing checks for 75 per cent. of their claims are admissible. George L. Storms & Co. v. Horton [Conn.] 59 A. 421.

Note. Subscriptions to stock under misrepresentation, see Helliwell, Stocks & Stockholders, §§ 81-85.

False representations **made in a prospectus by promoters of a corporation** respecting the value of property to be transferred by them to the corporation when organized, made for the purpose of getting subscriptions to the stock. Manning v. Berdan, 135 F. 159. Where goods are sold to a corporation on faith of a **false return of its assets and liabilities** filed pursuant to Pub. St. 1882, c. 106, § 54. Steel v. Webster [Mass.] 74 N. E. 686. Inducing one to cash a check by representations **that the maker had funds on deposit** in the bank upon which it was drawn. Hengen v. Lewis, 91 N. Y. S. 77. A **representation by a promoter** that property can be purchased for a certain price, entitles the subscriber, if such price includes commissions to the promoter, to rescind a note executed for his subscription. Hall v. Grayson County Nat. Bank [Tex. Civ. App.] 81 S. W. 762.

52. Where a married woman has abandoned her husband and conceals such fact when purchasing goods on his credit. Edward Malley Co. v. Button [Conn.] 60 A. 125.

53. HELD, MATERIAL FACTS: False representations that a company had been properly incorporated and misrepresentations **as to the condition of its business and value of its stock,** made to procure a conveyance of land in consideration of such corporate stock. Wagner v. Fehr, 211 Pa. 435, 60 A. 1043. Statements in a stock subscription contract **that certain patents were basic patents,** and it was proposed to acquire those patents, held representations of fact. American Alkali Co. v. Salom [C. C. A.] 131 F. 46. Where one represents to another that the first **may enter a syndicate on the same terms** as the latter. Hall v. Grayson County Nat. Bank [Tex. Civ. App.] 81 S. W. 762. **As to freight rates** by a carrier, which are relied on in purchasing coal to be shipped. . Texas & P. R. Co. v. Mugg [Tex.] 83 S. W. 800. False representations by one joint purchaser to another as to the **lowest price** the property could be purchased for. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419. That certain property **could be obtained possession of within 30 days** made to induce one to give up his farm so he could take possession of it, is one of fact. Thompson v. Hardy [S. D.] 102 N. W. 299. A statement by a party that he had recently **sold certain property for a certain amount,** made to induce an exchange of property. Id. That a **worthless medicine is a sure cure for hog cholera.** McDonald v. Smith [Mich.] 102 N. W. 668. False **statements by a salesman that he had not sold a line to any other merchant** in the town and did not intend to. Pratt v. Darling [Wis.] 103 N. W. 229. As

to the **amount of power engines and boilers will produce** held one of fact inducing a contract. American Cotton Co. v. Frank Heierman & Bro. [Tex. Civ. App.] 83 S. W. 845. An exchange of land accomplished by false representations **as to title** may be rescinded. Corbett v. McGregor [Tex. Civ. App.] 84 S. W. 278. **As to health** made in an application for life insurance. Home Circle Soc. No. 2 v. Shelton [Tex. Civ. App.] 85 S. W. 320. As to **fertility of soil.** Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. That a **trust deed is a first mortgage.** Kehl v. Abram, 112 Ill. App. 77. That **land is unincumbered.** Hahl v. Brooks, 114 Ill. App. 644. False representations that the property adjacent to a tract sold would be improved so that the value of the tract sold would be greatly enhanced. Troxler v. New Era Bldg Co., 137 N. C. 51, 49 S. E. 58.

A fraudulent representation **not material** to the risk will not avoid an insurance policy. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139.

54. Not of a future one. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903; Miller v. Fulmer, 25 Pa. Super. Ct. 106.

55. Evidence held to show that one who made false representations was the agent of the party charged. Willey v. Clements, 146 Cal. 91, 79 P. 850. One is responsible for false representations made by a person to whom he refers another. Corbett v. McGregor [Tex. Civ. App.] 84 S. W. 278. False representations made by one to whom a vendor refers a prospective purchaser are binding on him. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727.

56. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195; Spinks v. Clark [Cal.] 82 P. 45. To enable one to have set aside a contract induced by false representations. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445. Where a vendee relies on the false reading to him by the vendor of a deed. The clause making it subject to a mortgage being omitted. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727. A stockholder who before selling stock to a director causes an investigation of the affairs of the company to be made cannot be regarded as having relied on representations of fact affecting the value of the stock. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445.

Evidence sufficient to show that false representations were relied upon. Zeeman v. Saleburg, 25 Pa. Super. Ct. 423; I. L. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. Evidence held to show that a subscriber to corporate stock relied on false representations held out as material inducements. American Alkali Co. v. Salom [C. C. A.] 131 F. 46. Where one purchased machinery in a sunken hull and there was evidence that the water about the hull was roily, evidence as to whether representations as to the condition of the machinery were relied on held a question for the jury. McRae v. Lonsby [C. C. A.] 130 F. 17. Instruction on this point held to be warranted by the evidence. American Cotton Co. v. Frank Heierman & Bro. [Tex. Civ. App.] 83 S. W. 845.

Evidence insufficient: Where vendors refused offers until the vendee met their terms, misrepresentations as to the value of the land is no ground for setting aside the deed. Storthz v. Arnold [Ark.] 84 S. W. 1036.

57. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290.

One is entitled to rely on representations, though by the exercise of ordinary diligence he might discover their falsity. Hall v. Grayson County Nat. Bank [Tex. Civ. App.] 81 S. W. 762. It is no defense to say that the party defrauded might have discovered the falsity of the representations by the exercise of ordinary diligence. Buckley v. Acme Food Company, 113 Ill. App. 210. Representations must be such as to mislead a reasonably prudent man. Loose statements held insufficient. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195. An allegation in a complaint to reform a mortgage note, that plaintiff had confidence in his attorney who drew the note and was deceived by his use of a certain form of note, held sufficient to charge the attorney with fraud. Johnson v. Sherwood, 34 Ind. App. 490, 73 N. E. 180. The fact that a deed which the grantee has no opportunity to examine shows the property to be subject to an outstanding lease does not estop the grantee from relying on representations that possession can be had immediately. Thompson v. Hardy [S. D.] 102 N. W. 299. One may be entitled to rely on representations as to the contents of a written instrument and **sign it without reading it.** New Omaha Thomson-Houston Electric Light Co. v. Rombold [Neb.] 102 N. W. 475.

Where a confidential relation exists, one may be in the exercise of ordinary care in signing an instrument without reading it. Grim v. Griffith, 34 Ind. App. 559, 73 N. E. 197. As where one occupying a relation of trust to another contracts with him without disclosing information relative to the subject of the contract peculiarly within his own knowledge. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48.

Statements peculiarly within the knowledge of the maker relative to subject-matter of which the person to whom they are made is ignorant may be relied on. Watson v. Molden [Idaho] 79 P. 503. False representaitons that evidences of mining claims on public lands were those of claims long since abandoned. David v. Moore [Or.] 79 P. 415.

NOTE. Doctrine of reasonable inquiry: The defendant, falsely representing that it was the owner of a newly invented machine, by the use of which matches could be manufactured at one-fifth the cost and five times as rapidly as by any other known means; that the machine would do the entire work of making the matches; that it would place them in boxes, wrap the boxes in packages, pack them ready for shipment, print advertising matter on the boxes and, if desired, on each match; induced the plaintiff to contract for the purchase of shares of its stock. In a suit to rescind the contract and recover money paid under it, held that, as the representations were made concerning a complicated machine, the plaintiff was not bound to make inquiry as to their truth or falsity and was entitled to the relief prayed for. Mulholland v. Washington Match Co., 35 Wash. 315, 77 P. 497. The doctrine announced in this case is undoubtedly sound (Speed v. Hollingsworth, 54 Kan. 436; Faribault v. Sater, 13 Minn. 223; Cottrill v. Krum, 100 Mo. 397, 18 Am. St. Rep. 549), though the facts would almost seem to warrant an application of the rule, that where the exercise of ordinary prudence would have pre-

not essential that the maker have knowledge of the falsity,[59] unless affirmative relief is sought,[60] and he is liable if it is made recklessly, without knowledge of its truth or falsity.[61] It must relate to some matter of inducement to the transaction,[62] but need not have been made at the time the transaction was entered into.[63] It must be more than a mere expression of opinion.[64] Ordinarily a representation of law[65] or as to value[66] is a mere expression of opinion; but either may amount to one of fact under

vented deception, no relief will be given (Moore v. Turbeville, 2 Bibb [Ky.] 602, 5 Am. Dec. 642; Morrill v. Madden, 35 Minn. 493). The doctrine of caveat emptor does not apply to the purchase of the right to sell an invention (Heater Co. v. Heater Co., 32 F. 723), nor need the vendee inspect the public records to ascertain what is covered by a patent (David v. Park, 103 Mass. 501; Rose v. Hurley, 39 Ind. 77; McKee v. Eaton, 26 Kan. 226). Where, however, an opportunity is given the vendee to test a machine, and he relies on statements made by the vendor concerning such tests, he is bound thereby (Machine Works v. Meyer, 15 Ind. App. 385, 44 N. E. 193, 111 Mich. L. R. 161).

No right to rely: Representations that trees in an orchard are "sound, healthy, and fruitful" where the seller discloses the existence of scale, are not ground for rescission because of the scale. De Bois v. Nugent [N. J. Eq.] 60 A. 339. One who **signs an instrument without reading** it cannot set it aside on the ground of fraud, no representations to deceive her having been made. Powers v. Powers [Or.] 80 P. 1058. One signing a contract is conclusively presumed to know its contents and will not be permitted to show that he did not read it. Standard Mfg. Co. v. Hudson [Mo. App.] 88 S. W. 137. Fraud in the reduction of an agreement to writing is no defense where one with full opportunity signs without reading. Whiting v. Davidge, 23 App. D. C. 156. A person who can read is bound by an instrument he signs unless induced by fraudulent representations or conduct not to read the same. Barrie & Son v. Frost, 105 Ill. App. 187. A widow has no right to rely on **representations as to the validity of** her husband's **will** in the absence of a contest begun or threatened in connection with such representations. Whitesell v. Strickler [Ind. App.] 73 N. E. 153. That an **instrument plainly showing on its face** that it was a release was read in an indistinct manner to one able to read but who signed without reading it, thinking it was a receipt, does not show fraud. Hartley v. Chicago & A. R. Co., 214 Ill. 78, 73 N. E. 398.

58. One induced by fraud to sell his land for a fair price cannot complain. Storthz v. Arnold [Ark.] 84 S. W. 1036.

59. In equity (Tucker v. Osbourn [Md.] 61 A. 321), knowledge of the falsity is not essential to the rescission of a contract procured (Du Bois v. Nugent [N J. Eq.] 60 A. 339. Misrepresentations innocently made, if relied on are ground for relief in equity. Weise v. Grove, 123 Iowa, 585, 99 N. W. 191. A sale procured by false representations may be rescinded, though such representations were innocently made. Jesse French Piano & Organ Co. v. Nolan [Tex. Civ. App.] 85 S. W. 821.

Bnt see Hough v. Maupin [Ark.] 84 S. W. 717, holding that representations made by a building and loan association to a borrowing member which were true according to the terms of the contract are not fraudulent because such provisions are subsequently declared void by the courts, it not appearing that the corporation knew of such invalidity.

60. See Deceit, 5 C. L. 953; Cancellation of Instruments, 5 C. L. 500. Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58. Scienter must be alleged and proved where rescission is sought. Requisites to rescission for fraud. L. D. Garrett Co. v. Appleton, 101 App. Div. 507, 92 N. Y. S. 136.

61. Statements as to the health of a person. Obney v. Obney, 26 Pa. Super. Ct. 116. A vendor who permits a vendee to contract with him on faith of his representations must know that such representations are true. Jack v. Hixon, 23 Pa. Super. Ct. 453.

62. A representation to ignorant negro orphans that because of their circumstances a certain price would be paid for their land, though it would not sprout peas, is not. Storthz v. Arnold [Ark:] 84 S. W. 1036. Where a contract for the sale of goods stipulates "this sale is made on the representations herein expressed and no others," no other false representations can be shown in defense to the contract. Equitable Mfg. Co. v. Biggers, 121 Ga. 381, 49 S. E. 271.

63. Obney v. Obney, 26 Pa. Super. Ct. 122.

64. Mere promises and like expressions are not. McConnell v. Pierce, 116 Ill. App. 103. In letting a contract for the carriage of mails a representation that the service required but one horse, one wagon and one driver, is but an expression of opinion. Devers v. Sollenberger, 25 Pa. Super. Ct. 64. Representations by a book agent that his wares are nice books and such as children love to read are mere matters of opinion. Barrie v. Jerome, 112 Ill. App. 329. That certain machines are the best on the market. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. One is not entitled to rely on matters of opinion. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445. Representations that a contractor's bid was so low that no profit could be made is a mere expression of opinion. Worrell v. Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988. A statement by one about to be employed as advertising solicitor that he could turn certain patronage to his new employer construed as a mere statement of opinion, and not a fraudulent misrepresentation; hence contract could not be avoided on that ground. Weik v. Williamson-Gunning Adv. Co. [Mo. App.] 84 S. W. 144.

65. One is not entitled to rely on representations as to the law. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445. Not a mere opinion; a misrepresentation of law. First Nat. Bank v. Columbus Sav. & T. Co., 2 **Ohio** N. P. (N. S.) 525.

66. Oneal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. Not misrepresentations as to value where both par-

certain circumstances.[67] A false promise [68] made with no intention of performance,[69] or declaration of an intention not really entertained,[70] is not fraud. Fraud may result from silence when it is one's duty to speak,[71] especially if the parties stand in a fiduciary relation.[72]

§ 2. *Inferences from circumstances and condition of parties or from the intrinsic nature of the transaction.*[73]—Fraud may be inferred from the circumstances surrounding the transaction, as where one getting the better of a bargain stands in the more advantageous position,[74] or in a fiduciary relation.[75] The rule requiring a person standing in a fiduciary relation to another to show that transactions inuring

ties have equal means of ascertaining the true value. Cornish v. Johns [Ark.] 85 S. W. 764.

67. A misrepresentation of law where a purchaser is a lawyer and kinsman of the seller, besides being his attorney. Cornish v. Johns [Ark.] 85 S. W. 764. Where one to whom they are made is of feeble intellect and unfamiliar with the **value** of the subject in question. Culley v. Jones [Ind.] 73 N. E. 94.

68. See 3 C. L. 1520, n. 98. Promises by a salesman that he would not sell his line of goods to any other merchant in town. Pratt v. Darling [Wis.] 103 N. W. 229.

69, 70. Miller v. Fulmer, 25 Pa. Super. Ct. 106.

71. Mere silence on the part of a seller as to defects of which he knows the bidder is ignorant is not such fraud as would avoid the contract of sale; but silent acquiescence in the false statement of an auctioneer makes it a false averment of the seller, and the rule of caveat emptor does not apply. Disease of cattle. Dayton v. Kidder, 105 Ill. App. 107.

72. An agent for the purchase of a tract of land who joined with others in purchasing the same for speculative purposes stands in a fiduciary relation as to his associates in the purchase, and they may require him to refund a secret profit. Walker v. Pike County Land Co. [C. C. A.] 139 F. 609.

73. See 3 C. L. 1524.

Note: Relationship of parties in general. See Hammon on Contracts, § 142.

74. Evidence sufficient to show that a deed was procured by fraud, though signed without reading by **one shiftless and indolent** and susceptible of being easily overreached. Vollenweider v. Vollenweider, 216 Ill. 197, 74 N. E. 795. Release by father of damages for the death of his son, procured when he was **prostrated with grief and sorrow** held procured by fraud. Erickson v. Northwest Paper Co. [Minn.] 104 N. W. 291. Where an assignment of a bid on land was obtained for a mere fraction of its value and at a time the assignee was **laboring under an erroneous impression as to her rights.** Daniels v. Daniels [Ky.] 86 S. W. 1116. Evidence held to show that one **mentally weak** signed a deed on false representations that it was a lease. Snyder v. Arn, 187 Mo. 165, 86 S. W. 197. Where **ignorant woman** is taken advantage of by a shrewd business man in whom she has implicit confidence. Schaeffer v. Blanc [Tex. Civ. App.] 87 S. W. 745. Where the attorney of an illiterate woman procured an assignment of a cause of action by false representations as to the import of the papers. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. Deed by **aged and illiterate** grantors held procured by fraud. Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450. Where one deals with an **illiterate man, able neither to read nor write,** who makes his mark to an instrument, and there is evidence tending to show he did not understand the paper he executed, or that his signature was obtained by fraud, it is incumbent on the former party to show by a preponderance of evidence that the latter fully understood the object and import of the writing which he executed. Spelts v. Ward. 2 Neb. Uuoff. 177, 96 N. W. 56. False representations relative to the value of certain corporate stock made to a widow by one who had been the legal advisor of her dead husband, to secure an exchange of such stock. Tucker v. Osbourn [Md.] 61 A. 321. A **joint purchaser** must disclose the true purchase price of the property to be purchased. Failure to do so is fraud on his associate. Hinton v. Ring, 111 Ill. App. 369. Joint purchasers of property sustain a fiduciary relation toward each other. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419. That a **person mentally unsound** does an act which a person would not be likely to do unless he was unduly influenced is evidence of undue influence. Howard v. Carter [Kan.] 80 P. 61. Where an unconscionable bargain is procured from an **aged woman** who at the time was without advice of counsel. Hubert v. Traeder [Mich.] 102 N. W. 283. Gifts to one in a fiduciary relation will be set aside. In re Sperl's Estate [Minn.] 103 N. W. 502. Lease and deed of trust procured from a widow held the result of undue influence where persons whom she relied on induced her to believe that her property was subject to sale on execution. Kane v. v. Quillin [Va.] 51 S. E. 353.

Evidence sufficient to show fraud and undue influence where one in whom an ignorant woman reposed trust and confidence procured her to execute to him a deed of her property. Gatje v. Armstrong, 145 Cal. 379, 78 P. 872. To warrant the cancellation of a deed. Ryan v. Galvin [Or.] 80 P. 421. To show fraud and undue influence in procuring a deed. Winn v. Itzell [Wis.] 103 N. W. 220.

Evidence insufficient to show a fraudulent conspiracy by one in a confidential relation. Havana City R. Co. v. Ceballos [C. C. A.] 139 F. 538. To show undue influence in the execution of a deed by a self reliant woman 59 years old to her nephew on whom she was not dependent, and with whom she did not live. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. S. 601.

to his own benefit were fair and reasonable applies wherever fiduciary relations exist,[76] whether between attorney and client,[77] principal and agent,[78] guardian and ward,[79] parent and child,[80] husband and wife,[81] or those standing in other similar relations.[82] The mere fact of parental relation, however, does not raise a presumption of fraud and undue influence,[83] and transactions between parent and child, beneficial to the

76. Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. S. 917. Where parties stand in confidential relations, the burden is on a donee to show that the gift is not the result of undue influence. Reed v. Reed [Md.] 60 A. 621. The courts have made a distinction between transactions inter vivos, and those of a testamentary character in reference to undue influence; in transactions inter vivos where confidential relations exist between the parties, the law raises the presumption of undue influence and puts upon the donee, when the dominant party in the action, the burden of proof. In transactions testamentary, mere confidential relation raises no such presumption. Hutcheson v. Bibb [Ala.] 38 So. 754. See, also, 4 C. L. 1863.

77. Whiting v. Davidge, 23 App. D. C. 156. An attorney who, after his employment in a particular transaction ceases, continues to give his client confidential advice, is, in the absence of a distinct understanding that the relation has ceased to exist, subject to this rule. Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. S. 917.

78. Dealings between agent and subagent must be in entire good faith. Barnett v. Block [Minn.] 102 N. W. 390. Where an agent for the purchase of land purchases for himself, he is deemed to hold the property in trust for his principal. Johnson v. Hayward [Neb.] 103 N. W. 1058.

79. Where a guardian is made the beneficiary of his ward's will, undue influence is presumed. In re Cowdry's Will [Vt.] 60 A. 141. Evidence held to show fraud where a guardian secured his wards property on foreclosure sale for his own benefit. Coley v. Tallman, 95 N. Y. S. 339.

80. A gift by a father to a daughter who is caring for him during his disabling illness is presumptively made under undue influence. Slack v. Rees, 66 N. J. Eq. 447, 59 A. 466. A gift by a daughter to her stepmother, while the daughter was a member of the donee's family and treated as a daughter, which reserves no power of revocation and made without advice as to the effect of the conveyance will be set aside at the suit of the donor. Albert v. Haeberly [N. J. Err. & App.] 61 A. 380. Voluntary conveyance by a father to a daughter with whom he lived and on whom he was wholly dependent for physical assistance held procured by undue influence. White v. Daly [N. J. Eq.] 58 A. 929. Evidence held to show that a voluntary deed from parent to child was the result of undue influence. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. Conveyance from stepdaughter to step-father when she was but 18 years of age, for less than one-third the value of the premises, will be set aside. Eighmy v. Brock, 126 Iowa, 535, 102 N. W. 444. A deed from child to parent will be eyed critically by the court, but if made voluntarily and fully understood, it will be sustained. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106.

81. If the provision secured the wife by an antenuptial settlement is unreasonably disproportionate to the means of the intended husband, it raises a presumption of fraud. Yost's Estate, 23 Pa. Super. Ct. 183.

82. Transactions **between individuals and corporations of which they are the controlling officers** by which such individuals secure an unjust advantage may be avoided by the corporation. Burnes v. Burnes [C. C. A.] 137 F. 781. Between a **promoter and a corporation, he is promoting,** where, through a syndicate, a promoter purchased property to be sold to the corporation he was promoting and sold it to such corporation for more than it was worth without disclosing what was paid for it or other facts relative to it, the transaction could be rescinded. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

Mortgagor and mortgagee. Where a mortgagee obtains a release of the mortgagor's equity of redemption, he has the burden to show that the contract was fair and that he paid what it was worth. Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515.

Administrator and heirs. A purchase by an administrator of the interest of heirs for less than its value will be set aside. Cornish v. Johns [Ark.] 85 S. W. 764.

Nurse and patient: Where a nurse and friend receives from her patient a large part of his estate, she has the burden of showing no fraud. Knee v. McDowell, 25 Pa. Super. Ct. 641.

Brother and sister: In an action by a sister to set aside for want of consideration and fraud, a writing wherein she agrees to convey certain property to her brother, the burden of proof is on the brother. Goodhue v. Goodhue, 3 Ohio N. P. (N. S.) 225. A contract between brother and sister is not fraudulent where each acts with full knowledge of all the facts and on independent advice. Lozier v. Hill [N. J. Eq.] 59 A. 234. Where **brothers-in-law** are exceedingly intimate and one reposed trust and confidence in the other, a voluntary conveyance by one when he was physically incapacitated, though not mentally incompetent, to transact ordinary business, will be set aside. Irwin v. Sample, 213 Ill. 160, 72 N. E. 687.

Members of family: A purchaser of land from a member of his family who has just attained majority has the burden of showing it to be free from fraud. Jordan v. Cathcart, 126 Iowa, 600, 102 N. W. 510. Conveyance of land worth $4,500 for $600 to one of whose family the grantor was a member held void. Id.

83. In the absence of incompetency, fraudulent conduct or confidential relations, the parental relation does not raise a presumption against the validity of a gift from parent to child. Kennedy v. McCann [Md.] 61 A. 625. A deed from parent to child is not void merely because of the relationship. Powers v. Powers [Or.], 80 P. 1058. Evi-

child, are presumed free from fraud;[84] but if a confidential relationship exists, the party receiving the benefit of the transaction has the burden of showing that it was free from fraud.[85]

§ 3. *Remedies.*[86]—Fraud vitiates all contracts into which it enters as an inducing element.[87] A defrauded party may affirm the transaction and maintain an action for damages,[88] or he may sue in equity for rescission,[89] or he may rescind by his own act and bring action for what he parted with by reason of the fraud,[90] but he cannot retain the benefits of the contract and avoid his liabilities.[91] If he seeks to rescind by his own act, he must first offer to restore whatever he received by virtue of the contract,[92] unless it is worthless;[93] but such restoration is not a condition precedent to maintaining an action to rescind.[94] A fair offer to return and a demand for what he parted with, however, is sufficient.[95] A seller who elects to rescind may recover so

dence sufficient to rebut the presumption of improper influence in a deed from son to father. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106.

84. Evidence insufficient to show fraud or undue influence in a conveyance from parent to child. Rixey v. Rixey, 103 Va. 414, 49 S. E. 586.

85. Where a fiduciary relation exists between parent and child, a transaction without consideration is presumed the result of undue influence. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. A son who for a nominal consideration accepts a deed from an aged and infirm parent with whom he is living and taking personal care of, has the burden of showing that such deed was the parent's free act. Swanstrom v. Day, 93 N. Y. S. 192. A gift from mother to a son who is acting as her agent generally is presumptively procured by undue influence. Reed v. Reed [Md.] 60 A. 621.

Evidence insufficient to show that a gift from mother to son was the result of undue influence. Reed v. Reed [Md.] 60 A. 621. To show fraud or undue influence in procuring the execution of a deed. Brown v. Cole, 126 Iowa, 711, 102 N. W. 782. That an assignment of stock from child to parent was made by reason of the latter's parental control or for an inadequate consideration. Ripple v. Kuehne [Md.] 60 A. 464. Deed executed by an aged father to his son who was a lawyer and his legal advisor held not the result of undue influence, it appearing that the father desired to reward the son's wife for her care of him during his old age. Ball v. Ball, 214 Ill. 255, 73 N. E. 314. To show undue influence in procuring the execution of a deed. Brown v. Cole, 126 Iowa, 711, 102 N. W. 782. To show undue influence in the execution of a deed of trust where revocation was not sought for 20 years and after the death of the person who exercised the alleged undue influence. Dayton v. Stewart, 99 Md. 643, 59 A. 281.

86. See 3 C. L. 1526.

87. A condition in a contract of sale of goods that the purchaser shall inspect and give notice within five days if the goods do not comply with the warranty or otherwise the warranty shall be waived does preclude the purchaser after such time from showing a fraudulent substitution of the goods. Folkes v. Walter Pratt Co. [Miss.] 38 So. 224. One who acquires title to land by fraud and without consideration, acquires the bare legal title under constructive trust for the grantor. De Leonis v. Hammel [Cal. App.] 82 P. 349.

88. See Deceit, 5 C. L. 953. Kellenberger v. Meisner, 103 App. Div. 231, 93 N. Y. S. 44; Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728; John Silvey & Co. v. Tift [Ga.] 51 S. E. 748. It is optional. Burnes v. Burnes [C. C. A.] 137 F. 781; Joyner v. Early [N. C.] 51 S. E. 778. If a defrauded party at the time he discovers the fraud is unable to return the goods he received, he may recover compensation in damages for injury sustained. Rumsey v. Shaw, 25 Pa. Super. Ct. 386.

89. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. Under Civ. Code, § 2314 a ratification may be rescinded if made with an imperfect knowledge of the material facts of a transaction. Willey v. Clements, 146 Cal. 91, 79 P. 850.

90. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. He may rescind and recover what he has parted with. Kellenberger v. Meisner, 103 App. Div. 231, 93 N. Y. S. 44. Under Civ. Code, § 1691, the tender back of the consideration of a deed procured by fraud is a rescission. Green v. Duvergey, 146 Cal. 379, 80 P. 234. Rescind and recover his specific property. Joyner v. Early [N. C.] 51 S. E. 778; John Silvey & Co. v. Tift [Ga.] 51 S. E. 748.

91. Gilsey v. Keen, 93 N. Y. S. 783. When one is induced to convey land for cash and other land the value of which is fraudulently represented, he cannot retain the cash and compel the other party to take back the land at what he represented it to be worth. Kellenberger v. Meisner, 103 App. Div. 231, 93 N. Y. S. 44.

92. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728. A purchaser who elects to rescind must restore to the seller what he has received under the contract. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748. The contract is at an end when an offer to return the property is made after an election to rescind. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

93. If the goods received are entirely worthless, they need not be returned. Rumsey v. Shaw, 25 Pa. Super. Ct. 386.

94. Tender of the consideration received is not a condition precedent to the maintenance of an action to set aside a deed for fraud. Thorpe v. Packard [N. H.] 60 A. 432.

95. If his offer is refused, a strict and technical tender is not essential. Corse &

much of the property sold as is in the possession of the vendee,[96] and for the value of such goods as cannot be recovered, an action based on the theory of a conversion [97] or upon the implied contract [98] may be maintained.

A defrauded party must assert his rights without unnecessary delay [99] after discovery of the fraud,[1] and if he affirms [2] or refuses to exercise his election to disaffirm,[3] or waives [4] or ratifies [5] the fraud, he is bound by the terms of the contract.

Fraud practiced by one seeking relief upon him against whom relief is sought, relative to the subject-matter of the action, is fatal to his claim [6] unless relief is asked by one in a representative capacity,[7] or unless the parties are not in pari delicto, and the person seeking relief is comparatively the less guilty; [8] and where a

Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728.

96, 97, 98. John Silvey & Co. v. Tift [Ga.] 51 S. E. 748.

99. Long acquiescence in the binding effect of an instrument defeats a claim that its execution was procured by fraud. McConnell v. Pierce, 116 Ill. App. 103. A son who waits 9 years after he is fully advised and two years after the death of his father cannot have set aside for fraud a deed from himself to his father. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. Eight years' delay together with the death of the party charged with fraud. Ripple v. Kuehne [Md.] 60 A. 464. After a delay of seven years during which time a vendor received payments on the purchase price, the conveyance will not be set aside. Horn v. Beatty [Miss.] 37 So. 833. Relief must be sought promptly on the discovery of the fraud. Smith v. Bank of Lewisport [Ky.] 85 S. W. 219. Rescission must be made with reasonable promptness. Rumsey v. Shaw, 25 Pa. Super. Ct. 386. One who immediately on discovering fraud perpetrated on him tenders back what he received in the transaction and demands what he parted with is entitled to be placed in statu quo. Green v. Duvergey, 146 Cal. 379, 80 P. 234. One is not guilty of laches in seeking relief until he has or should have discovered the fraud. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48.

1. Action for relief on the ground of fraud must be brought within four years from the discovery thereof or of the discovery of facts indicative of fraud. Weckerly v. Taylor [Neb.] 103 N. W. 1065. Under Code Civ. Proc. § 318, actions to recover land procured by fraud and undue influence must be brought within five years after possession has been parted with. Page v. Garver, 146 Cal. 577, 80 P. 860. Under Ky. St. 1903, § 2519, limitations commence to run from the time the fraud by ordinary diligence should have been discovered. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761. One who has means at hand to discover fraud and such means would have been used by a person of ordinary diligence will not be heard to complain after twenty-three years, though he be illiterate. Boren v. Boren [Tex. Civ. App.] 85 S. W. 48. Code Civ. Proc. § 338, requiring actions for relief on the ground of fraud to be commenced within three years is inapplicable to an action to quiet title against a deed procured by fraud. De Leonis v. Hammel [Cal. App.] 82 P. 349.

2. Delay, silence, or retention of the benefits of the transaction for a considerable period after discovering the fraud is an exercise of the option to affirm. Burnes v. Burnes [C. C. A.] 137 F. 781.

3. Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445.

4. Fraud of an assignor of a note in inducing the assignee to take it by representations as to the solvency of the maker is waived where the assignee accepts payments on it with notice of the maker's insolvency. Miller v. Browning [Ky.] 89 S. W. 3. Fraud and misrepresentations, if any, in procuring contract, held waived by continuing work and accepting payment after knowledge thereof. Baltimore & A. R. Co. v. Jolly Bros. & Co., 71 Ohio St. 92, 72 N. E. 888. A son who deeds land to his father and after the latter's death sues to recover it as heir cannot thereafter maintain an action to cancel the deed for fraud and undue influence. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106.

5. One who after discovering that she had signed a deed under belief that it was a will, remained passive and accepts a paper from the grantee wherein he undertakes to care for her husband during his life ratifies the fraud by which the deed was procured. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. S. 601. A ratification or waiver of fraud precludes a recovery based thereon. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232. That some of the fraudulent representations inducing a transaction were ratified does not preclude relief on the ground of others. Willey v. Clements, 146 Cal. 91, 79 P. 850. One induced by fraud to execute a deed is not estopped thereafter to assail it because subsequent to the transaction she stated that she was satisfied. Jordan v. Cathcart, 126 Iowa, 600, 102 N. W. 510.

6. Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139.

7. An executor who is sole legatee of his intestate and who participated in a fraud whereby he was deprived of some of his property may maintain an action as executor to recover it, unless it is shown that he alone would benefit thereby. Huyler v. Dolson, 101 App. Div. 83, 91 N. Y. S. 794.

8. Where grantees take advantage of the weakness of the grantor and frighten him into conveying to them without consideration so as to escape liability in a suit on a pending bond. Sanford v. Reed [Ky.] 85 S. W. 213.

9. Where a woman who has great confidence in her attorney by his advice transferred her property to him, to put an obstacle in the way of certain creditors, she

confidential relation exists, the doctrine of pari delicto may not apply.[9] An intention to defraud a third person, however, is no defense.[10]

Equity has concurrent jurisdiction with law in cases of fraud.[11] Fraud which will defeat an action at law upon a sealed instrument is confined to fraud in the execution of the instrument.[12] For fraudulent representations as to collateral matters, relief may be had only in equity.[13]

The right to set up or complain of fraud is personal.[14] Relief from a fraudulent transaction may be had by heirs of the defrauded party.[15] A corporation may recover for a fraud against it, though the perpetrator is a stockholder.[16] In a suit attacking a transaction as fraudulent, a party in the fraud may be joined, though he has no interest in the suit.[17]

Pleading.[18]—Fraud as a defense must be pleaded,[19] and the facts constituting it be specifically alleged,[20] except in Kentucky,[21] and an averment, defective because in general terms, cannot be cured by a bill of particulars,[22] but general averments are sufficient as against an objection to the introduction of evidence thereunder.[23]

may nevertheless have such transfer set aside. Ingersoll v. Weld, 93 N. Y. S. 291.

10. That in executing a deed procured by fraud the grantor thereby intended to defraud another is no defense to an action to cancel it. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872. Especially where the remedy at law is not fully adequate. Bank of Montreal v. Waite, 105 Ill. App. 373.

11. That a party has an adequate remedy at law does not oust a court of equity of its concurrent jurisdiction. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86; Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139. The right of a vendee to recover a portion of the purchase price of land he was fraudulently induced to pay by a co-vendee and an agent is at law. Johnston v. Little [Ala.] 37 So. 592. A remedy at law exists where an exchange of land for a worthless consideration is induced by fraud. Creamer v. James, 116 Ill. App. 465. Fraud is available as a defense at law. American Alkali Co. v. Salom, 131 F. 46.

12. Such as misreading the instrument, the substitution of one paper for another, or other device or trickery, whereby one is induced to sign one instrument under belief that it is another. Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481.

13. Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481. In an action at law, a release introduced in evidence cannot be impeached for fraud not affecting the execution but going only to the consideration. Hartley v. Chicago & A. R. Co., 214 Ill. 78, 73 N. E. 398.

14. Not assignable. McConnell v. Pierce, 116 Ill. App. 103.

15. A deed procured by undue influence may be set aside by the heirs of the grantor after his death. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. A widow may maintain an action to recover land procured from her husband by fraud and undue influence. She is the real party in interest. Page v. Garver, 146 Cal. 577, 80 P. 860.

16. Old Dominion Copper Min. & Smelting Co. v. Bigelow [Mass.] 74 N. E. 653.

17. Johnston v. Little [Ala.] 37 So. 592.

18. See 3 C. L. 1527.

19. Fraud cannot be shown unless specially pleaded. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946.

20. Brian v. Merrill, 23 Pa. Super. Ct. 629; Miller v. Mutual Reserve Fund Life Ass'n, 113 Ill. App. 481; Newman v. Mercantile Trust Co. [Mo.] 88 S. W. 6; Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Not sufficient to allege fraud in general terms. Beadleston v. Furrer, 102 App. Div. 544, 92 N. Y. S. 879; Board of Com'rs of Howard County v. Garrigus [Ind.] 73 N. E. 82. A general denial does not raise the issue of fraud. Midler v. Lese, 45 Misc. 637, 91 N. Y. S. 148.

Complaint held sufficient in an action by stockholders against directors for fraud in the management of the corporation. Glover v. Manila Gold Min. & Mill. Co. [S. D.] 104 N. W. 261. A notice of a special defense accompaning a plea of the general issue detailing a false representation sufficiently pleads fraud. Smith v. McDonald [Mich.] 102 N. W. 738. Where an heir seeks to recover property of the ancestor on the ground that such ancestor was induced by fraud to marry defendant and convey property to him, an answer denying such allegation is sufficient on demurrer. Mott v. De Nisco, 94 N. Y. S. 380. In a complaint to rescind an exchange of land for false representations as to title, it is sufficient to allege the specific misrepresentation. Facts affecting title need not be set out. Corbett v. McGregor [Tex. Civ. App.] 84 S. W. 278.

Held insufficient: An allegation that a contract was procured by undue influence is a mere conclusion. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860. An allegation that a board of equalization arbitrarily added property to the assessment roll is insufficient. Ricketts v. Crewdson [Wyo.] 81 P. 1. Acts constituting fraud held not sufficiently pleaded. Barber Asphalt Pav. Co. v. Field [Mo.] 86 S. W. 860.

21. In Kentucky a general plea of fraud is good. It is said, however, that it is better practice to set out the facts and this may be required by motion to make more specific. Craft v. Barron [Ky.] 88 S. W. 1099.

22. Beadleston v. Furrer, 102 App. Div. 544, 92 N. Y. S. 879.

23. Howard v. Carter [Kan.] 80 P. 61.

Relief on the ground of undue influence cannot be had on an allegation of fraud.[24] Where pleaded as a defense and not as an equitable counterclaim for rescission, it cannot be used as a counterclaim, thought sufficient.[25]

Evidence.[26]—Fraud is never presumed. It must be established by one who asserts it.[27] It will not be imputed when the facts from which it is supposed to arise are consistent with honest intentions.[28] To entitle one to equitable relief, the proof must be clear and satisfactory,[29] but where relief is sought at law, only a preponderance of evidence is required.[30] It need not be so convincing as to amount to positive

24. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. S. 601. Inducing one to sign a deed in a belief that it is a will is not undue influence. Id.

25. In an action for rent. Gilsey v. Keen, 93 N. Y. S. 783.

26. See 3 C. L. 1523.

27. Anderman v. Meier, 91 Minn. 413, 98 N. W. 327; Briggs v. Brown, 23 Pa. Super. Ct. 163; Barrie v. Frost, 105 Ill. App. 187; Edwards v. Story, 105 Ill. App. 433. One who alleges fraud has the burden of proving it. Holden v. Maxfield [Minn.] 101 N. W. 955; Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622. One seeking to set aside a deed for fraud and undue influence has the burden of proof. Winn v. Itzel [Wis.] 103 N. W. 220.

28. Allen v. Riddle [Ala.] 37 So. 680. It is preferable, where it can be done, to trace a motive to an honest source, rather than to a corrupt one. Eickstaedt v. Moses, 105 Ill. App. 634.

29. Meyers v. Meyers, 24 Pa. Super. Ct. 603; Allen v. Riddle [Ala.] 37 So. 680.

Cancellation of a contract. First Nat. Bank v. Buetow, 123 Wis. 285, 101 N. W. 927. To set aside a written instrument. Smith v. Rust, 112 Ill. App. 84. Nothing but clear and satisfactory evidence can justify the falsifying of a mutual settlement of accounts. Fletcher v. Whitlow, Lake & Co. [Ark.] 79 S. W. 773.

Evidence insufficient to show fraud in procuring the execution of a deed. Brown v. Cole, 126 Iowa, 711, 102 N. W. 782. Evidence insufficient to show fraud in the execution of a deed. Leonard v. Fleming [N. D.] 102 N. W. 308. To justify a decree canceling a conveyance. Horn v. Beatty [Miss.] 37 So. 833. To show that a deed drawn by a reputable attorney was procured to be executed by a fraudulent representation that it was a will. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. S. 601. To show that the execution of a deed of trust was procured by fraud, though based on no consideration. Dayton v. Stewart, 99 Md. 643, 59 A. 281. That the release of a judgment was procured by fraud and collusion. Naretti v. Scully [C. C. A.] 139 F. 118. Facts relative to organization of a corporation held not to show actual fraud sufficient to avoid a deed to it. Minneapolis Threshing Mach. Co. v. Jones [Minn.] 103 N. W. 1017. **To rescind** a contract of sale. Schmitz v. Roberts, 26 Pa. Super. Ct. 472. To show fraud in a transaction between a person and his grandmother. Cornish v. Johns [Ark.] 85 S. W. 764. To show fraud where a deed was procured from a grantor whose mind was so weakened by the use of drugs that she was incapable of discerning fraud. Oxford v. Hopson [Ark.] 83 S. W. 942. Evidence insufficient to show fraud or undue influence in procuring the execution of a deed. Winn v. Itzel [Wis.] 103 N. W. 220.

30. American Hoist & Derrick Co. v. Hall, 110 Ill. App. 463. When one not a party to it asserts that it was executed with a design to defraud him. Meyers v. Meyers, 24 Pa. Super. Ct. 603. The fact of one's complicity in fraud must be established by a preponderance of evidence. Smith v. McDonald [Mich.] 102 N. W. 738. The proof must induce a reasonable belief that the execution of a release was procured by fraud. Chicago & A. R. Co. v. Jennings, 114 Ill. App. 622. Instructions relative to fraudulent representations approved. McKibbin v. Day [Neb.] 104 N. W. 752. Where a complaint charges two distinct acts of fraud, proof of either entitles plaintiff to recover. Edward Malley Co. v. Button [Conn.] 60 A. 125.

Evidence sufficient to show fraud in procuring a release of damages for personal injuries. New Omaha Thomson-Houston Elec. L. Co. v. Rombold [Neb.] 102 N. W. 475; Chicago, etc., R. Co. v. Cain [Tex. Civ. App] 84 S. W. 682. Proof that defendant had a facial blemish removed by a physician two years before making a contract to teach plaintiff how to cure disease by Christian Science held insufficient to show that at time of contract she was not an orthodox believer and hence was guilty of fraud in holding herself out as a teacher thereof. Meyer v. Knott [Mich.] 100 N. W. 907. To show fraud in the **sale of a grave stone.** Pioneer Granite Co. v. Reidy, 26 Ky. L. R. 1196, 83 S. W. 571. In the **purchase** of a shooting gallery outfit. Parker v. Anderson [Tex. Civ. App.] 85 S. W. 856. Proof that false representations were made to an agent is not a variance from an allegation that they were made to the principal. Sudworth v. Morton [Mich.] 100 N. W. 769.

Evidence insufficient to show fraud on the part of an **agent** in obtaining an option. Hughes v. Antill, 23 Pa. Super. Ct. 290. Defense of fraud in procuring contract for furnishing ties not sufficiently supported by evidence to require instruction in regard to it. American Surety Co. v. Choctaw Const. Co. [C. C. A.] 135 F. 487. False representations of the financial condition and prospects of a manufacturing corporation made to induce a purchase of corporate stock. Smith v. Bank of Lewisport [Ky.] 85 S. W. 219. That a sale of oil stock was induced by fraudulent representations. Spinks v. Clark [Cal.] 82 P. 45. Evidence held to show that false representations were made. Sudworth v. Morton [Mich.] 100 N. W. 769. As to the flow of oil wells, which was mostly hearsay, held insufficient to go to the jury. Jack v. Hixon, 23 Pa. Super. Ct. 453. That

proof.[31] Fraud may be proven by direct or circumstantial evidence,[32] and a liberal range of investigation is permitted.[33] Gross inadequacy of consideration in a transaction is evidence of fraud,[34] and delay in seeking relief is evidence that the transaction was not fraudulent.[35] Fraud cannot be established by evidence of similar acts of fraud in connection with other transactions,[36] unless such acts show a general scheme to defraud.[37] Evidence of the circumstances surrounding the transaction,[38] evidence tending to show the materiality of the misrepresentations,[39] and that they were false,[40] is admissible.

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a written guaranty was procured by false representations as to its nature. First Nat. Bank v. Buetow, 123 Wis. 285, 101 N. W. 927.

Evidence held for the jury in an action to recover the value of stock alleged to have been fraudulently sold. McNaughton v. Smith [Mich.] 99 N. W. 382. Whether a release of damages for personal injuries was obtained by fraud. Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196; Chicago, etc. R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Where a beneficial association induced a release of his claim by a member. Fraternal Army of America v. Evans, 215 Ill. 629, 74 N. E. 689. In procuring a conveyance. Flanigan v. Skelly, 89 App. Div. 108, 85 N. Y. S. 4. The question to be submitted to a jury is whether the specific acts constitute fraud and not whether a contract was procured by fraud. Pace v. Paducah R. & L. Co. [Ky.] 89 S. W. 105.

31. Instructions as to the degree of proof required held erroneous as requiring too high a degree of proof. McNaughton v. Smith [Mich.] 99 N. W. 382. Proof is sufficient if the facts and circumstances, taken together, concerning the transaction, satisfy the mind that fraud was perpetrated. Id. Repetition of false representations need not be proved, though alleged. Kehl v. Abram, 112 Ill. App. 77. Evidence held to show that false representations were made. I. L. Corse & Co. v. Minnesota Grain Co. [Minn.] 102 N. W. 728.

32. Tyler v. Davis [Ind. App.] 75 N. E. 3.

33. McKibbin v. Day [Neb.] 104 N. W. 752; Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58.

34. Property worth $2,000 procured for $500. Vollenweider v. Vollenweider, 216 Ill. 197, 74 N. E. 795. Four hundred and fifty dollars for land worth $800 is not so disproportionate that the deed will be set aside for fraud. Storthz v. Arnold [Ark.] 84 S. W. 1036. Evidence merely tending to show inadequacy of consideration for a release of damages is insufficient to show fraud. Mattoon G. & C. Co. v. Dolan, 111 Ill. App. 333.

35. Raises a presumption that the transaction was not fraudulent. Attorney General v. Central R. Co. of New Jersey [N. J. Eq.] 59 A. 348.

36. Proof that the person charged has been guilty on other occasions is insufficient. Price v. Winnebago Nat. Bank, 14 Okl. 268, 79 P. 105. Like acts of fraud perpetrated on another and not connected with the transaction in controversy are inadmissible. Buckley v. Acme Food Co., 113 Ill. App. 210. Evidence of similar representations made to other persons in procuring a sale of goods to her is not evidence that a married woman procured a particular sale on false representations of her husband's financial condition. Edward Malley Co. v. Button [Conn.] 60 A. 125. It is no answer to a charge of fraud in one transaction to show similar deceit in another. Sylvester v. Ammons, 126 Iowa, 140, 101 N. W. 782. Fraud cannot be established by evidence that the defrauded party had also been defrauded in another transaction by a different person. Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450.

37. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119.

38. Pioneer Granite Co. v. Reidy, 26 Ky. L. R. 1196, 83 S. W. 571.

39. Where an exchange of property is induced by false representations as to value, it is proper to show the value of the respective properties, though there was no allegations of such values. Thompson v. Hardy [S. D.] 102 N. W. 299. Evidence of the financial condition of a corporation immediately after a sale of stock alleged to have been procured by false representations as to its value. Campbell v. Park [Iowa] 101 N. W. 861.

40. Evidence that after a sale of stock alleged to have been procured by false statements as to its value, property in the company's plant represented to constitute part

§ 1. *Agreements not to be performed within one year.*[41]—No action may be maintained on any contract which is by its terms not to be performed within a year,[42] but if it can be so performed, it is immaterial that it may not be,[43] nor does the statute apply to contracts arising by implication of law.[44]

§ 2. *Promise to answer for debt or default of another.*[45]—A collateral agreement to answer for the debt, default or miscarriage of another must be in writing,[46] unless it is based on a new and substantial consideration.[47] To be within the statute, the promise must be collateral to the debt of another,[48] must be to a third person and not to the debtor,[49] nor does the statute apply to a mere novation.[50] Where the promisor has property or money in his hands to pay the debt,[51] or where the debt to be paid is his own,[52] or where the contract has been fully executed,[53] the stat-

of its assets was taken away by persons who claimed to be its owners, is admissible. Campbell v. Park [Iowa] 101 N. W. 861. Evidence of what pipe line statements showed is admissible on an issue of fraud based on representations as to production of oil lands, which pipe line statements show to be correct. Barnsdall v. O'Day [C. C. A.] 134 F. 828. In an action for damages for breach of defendant's agreement to teach plaintiff to cure disease by Christian Science, where defendant claimed that plaintiff was not a true and conscientious believer in that she had received material treatment from a physician, evidence of such physician as to what disease defendant had and for what he treated her held inadmissible. Meyer v. Knott [Mich.] 100 N. W. 907. On the issue as to whether cost marks on goods had been fraudulently raised, held proper to allow witness to testify as to the difference between the cost at wholesale on the entire stock as inventoried by them and the amount of the invoice furnished the seller. Sylvester v. Annons, 126 Iowa, 140, 101 N. W. 782.

41. See 3 C. L. 1527.

42. Graham v. Hiesel [Neb.] 102 N. W. 1010; Co-operative Tel. Co. v. Katus [Mich.] 12 Det. Leg. N. 187, 103 N. W. 814.

43. Osgood v. Skinner, 111 Ill. App. 606; Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864. Time of performance indefinite. Ayotte v. Nadeau [Mont.] 81 P. 145; Anderson v. Mt. Sterling Tel. Co. [Ky.] 86 S. W. 1119; Booher v. Anderson [Tex. Civ. App.] 86 S. W. 956. Agreement to pay all doctor bills may be terminated by death of promisee. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608. A parol contract covering real property which is for less than one year must none the less conform with other clause of the statute. Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934.

44. Higgins v. Evans [Mo.] 87 S. W. 973.

45. See 3 C. L. 1528.

46. Halsted v. Pelletreau, 101 App. Div. 125, 91 N. Y. S. 927; Reelman v. Grosfend [Mich.] 12 Det. Leg. N. 335, 104 N. W. 331; Netterstrom v. Gallistel, 110 Ill. App. 352; Caesar v. Kulla, 92 N. Y. S. 798; Halsted v. Pelletreau, 101 App. Div. 125, 91 N. Y. S. 927; Hunt v. Taylor [Ky.] 87 S. W. 290; Wray v. Cox [Miss.] 38 So. 344; Miller v. State [Ind. App.] 74 N. E. 260. The statute of frauds does not require that the consideration for the sureties undertaking be expressed in the bond. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488; Taylor v. Folz, 24 Pa. Super. Ct. 1.

47. Pizzi v. Nardello, 23 Pa. Super. Ct. 535; Scherzer v. Muirhead, 84 N. Y. S. 159; Bates v. Birmingham Paint & Glass Co. [Ala.] 38 So. 845; Peterson v. Creason [Or.] 81 P. 574; Adlam v. McKnight [Mont.] 80 P. 613. Forbearance insufficient. Consideration must move to guarantor. Gilman v. Ferguson, 116 Ill. App. 347. The promise of a contractor to pay one who has furnished material to a subcontractor is within the statute of frauds. Wilson v. Dietrich [N. J. Eq.] 59 A. 251; Nichols v. Dixon [Tex. Civ. App.] 85 S. W. 1051; Smith v. Burdett, 95 N. Y. S. 188. But see effect of statute requiring consideration to be expressed. Snyder v. Monroe Eckstein Brewing Co., 95 N. Y. S. 144.

48. Dryden v. Barnes [Md.] 61 A. 342; Swenson v. Stoltz, 36 Wash. 318, 78 P. 999; In re Dresser [C. C. A.] 135 F. 495; Runkle v. Kettering [Iowa] 102 N. W. 142.

49. Peters v. George [Cal. App.] 81 P. 1117.

50. Potter v. Greenberg, 24 Pa. Super. Ct. 505; Conly v. Hampton [Tex. Civ. App.] 13 Tex. Ct. Rep. 425, 87 S. W. 1171; Palmetto Mfg. Co. v. Parker [Ga.] 51 S. E. 714; Wattenbarger v. Hodges [Tex. Civ. App.] 85 S. W. 1013.

51. City of Tyler v. St. Louis S. W. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 173, 87 S. W. 238. Where a landlord and his tenant have a claim against the United States which they prosecute in the name of the landlord with a parol promise of division if successful, on collection, the landlord cannot set up that the promise was to pay the debt of another. Bomgardner v. Swartz, 26 Pa. Super. Ct. 263.

52. McCord v. Edward Hines Lumber Co. [Wis.] 102 N. W. 334; Bomgardner v. Swartz, 26 Pa. Super. Ct 263; Potter v. Greenberg, 24 Pa. Super. Ct. 502; Stromberg v. Loiacono, 45 Misc. 651, 91 N. Y. S. 46; Groesbeck v. Thompson Milling Co. [Tex. Civ. App.] 86 S. W. 346; Bates v. Birmingham Paint & Glass Co. [Ala.] 38 So. 845; Paul v. Wilbur [Mass.] 75 N. E. 63. Credit given to alleged guarantor. Long v. McDaniel [Ark.] 88 S. W. 964. A person using a corporation as a cloak for his own dealings is bound by his oral promise to pay its debt for it is in fact his own. Donovan v. Purtell [Ill.] 75 N. E. 334. As where the complaint alleged that defendant was indebted to plaintiff in a certain sum for goods sold and delivered to defendant's employes at its request and on contract between plaintiff and defendant.

ute has no application. A promise to make a collateral promise is within the statute.[54]

§ 3. *Agreements in consideration of marriage.*[55]—A parol promise to liquidate an indebtedness,[56] or other parol contract in consideration of marriage except mutual agreements to marry, is void.[57]

§ 4. *Representations as to character or credit of another.*[58]

§ 5. *Agreements with executors and administrators.*[59]—Agreements made by executors or administrators charging themselves personally with the debts of another must be in writing.[60]

§ 6. *Agreements with real estate brokers.*[61]—In New York, Pennsylvania, and some other states, a real estate agent has no right to recover a commission for his services unless authorized in writing.[62] But the statute has no application to agreements for the division of profits in joint ventures in realty transactions,[63] and such parol promises are good in the absence of a statute.[64]

§ 7. *Agreements respecting real property or an estate or interest therein.*[65]—Other than leases for not more than one year, no estate or interest in the land or any way relating thereto may be created, granted, assigned, surrendered or declared, unless by act or operation of law,[66] or by deed or conveyance in writing subscribed by the parties thereto,[67] or their duly authorized agent in writing.[68] To be within the statute, the contract must be one which transfers or creates some interest in land.[69] Thus an agreement to divide profits derived from land[70] or to erect a house,[71] or to enter into a partnership to deal in land, is not within the statute,[72] and so an oral agreement establishing a boundary line is enforceable.[73] An easement must be

Cauthron Lumber Co. v. Hall [Ark.] 88 S. W. 594.

53. Lasley v. Delano [Mich.] 102 N. W. 1063.

54. Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

55. See 3 C. L. 1528.

56. Weld v. Weld [Kan.] 81 P. 183; Austin v. Kuehn, 111 Ill. App. 506.

57. Antenuptial agreement. Pennsylvania R. Co. v. Warren [N. J. Eq.] 60 A. 1122. Marriage not such part performance as to take out of statute. Weld v. Weld [Kan.] 81 P. 183.

58. See 3 C. L. 1528.

59. See 3 C. L. 1529.

60. A promise by an executor to pay a real estate broker a commission for sale of lands is not within the statute, since it is not a contract chargeable against the estate but one for which he would be personally liable. Reynolds-McGinness Co. v. Green [Vt.] 61 A. 556.

61. See 3 C. L. 1528.

62. Can recover on parol contract of purchaser but not owner. Friedman v. Bittker, 45 Misc. 178, 91 N. Y. S. 896. The statute being penal in its nature must be strictly construed. Levy v. Timble, 94 N. Y. S. 3. Does not include commissions for purchase of a land contract. Id. Nor options. Hughes v. Antill, 23 Pa. Super. Ct. 290.

63. See infra, § 7.

64. Hancock v. Dodge [Miss.] 37 So. 711.

65. See 3 C. L. 1529.

66. See resulting trusts, infra, § 9. Where a lease must be in writing, a contract for a lease must be written. Ballinger's Ann. Codes, § 4568. Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934.

67. Sale of real estate. Keith v. Keith [Tex. Civ. App.] 13 Tex. Ct. Rep. 126, 87 S. W. 384.

68. This clause does not exist in some states. Gleadall v. Kenney, 23 Pa. Super. Ct. 576. Parol authority subsequently ratified by principal in writing. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

69. The following seem to be within the statute: A parol agreement by the beneficiary of a resulting trust, that the trustee should take the property absolutely on certain conditions, is void under the statute of frauds. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. Lease must be in writing, though not under seal. Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934. A contract to move a building to a new location and lease the same must be in writing. Id. A contract to redeem from unpaid taxes is within the statute. Henry v. Knod [Ark.] 85 S. W. 1130; Ball v. Harpham [Mich.] 12 Det. Leg. N. 303, 104 N. W. 353. Parol agreement to bequeath and devise. Dixon v. Sheridan [Wis.] 103 N. W. 239. Contract to purchase real estate. Schultz v. Kosbab [Wis.] 103 N. W. 237. A lien must be created by a written instrument. Tucker v. S. Ottenheimer Estate [Or.] 81 P. 360. Agreement to maintain a telephone in consideration of use of land is an easement within statute. Anderson v. Mt. Sterling Tel. Co. [Ky.] 86 S. W. 1119.

70. Location of mining claims and division of stores. Mack v. Mack [Wash.] 81 P. 707.

71. Ayotte v. Nadeau [Mont.] 81 P. 145.

72. Larkin v. Martin, 46 Misc. 179, 93 N. Y. S. 198; Garth v. Davis [Ky.] 85 S. W. 692.

73. Berry v. Evans [Ky.] 89 S. W. 12;

acquired by an express grant in writing,[74] and when given by parol such right amounts but to a mere license which may be revoked at any time;[75] but acts done under such a license are not illegal as to the executed part, and suit may be brought for the agreed consideration.[76]

§ 8. *Sale of goods.*[77]—All sales of goods, wares, and merchandise, above the value of fifty dollars,[78] are void unless part of the goods be delivered or earnest money be paid.[79] The statute has nothing to do with contracts for manufacture,[80] or contracts between partners for the dissolution of partnerships,[81] or the formation of joint ventures to deal in goods.[82]

§ 9. *Trusts.*[83]—An expressed trust is generally uninforceable unless it is in writing;[84] but the statute does not apply to constructive or resulting trusts which are created by operation of law,[85] or where a parol trust is fully executed.[86]

§ 10. *What will satisfy the statute. A. Writing.*[87]—A written agreement which will satisfy the statute may be gathered from letters, telegrams and writings concerning the subject-matter, so connected as to fairly constitute one paper,[88] but

Cheatham v. Hicks [Ky.] 88 S. W. 1093. There must be a dispute as to the true line. Mays v. Hinchman [W. Va.] 50 S. E. 823. But see Frazier v. Mineral Development Co. [Ky.] 86 S. W. 983.

74. Belser v. Moore [Ark.] 84 S. W. 219. Right to use a ferry landing. Parsons v. Hunt [Tex.] 84 S. W. 644. But not a substituted way for one previously existing. Thompson v. Madsen [Utah] 81 P. 160. Sale of standing timber. Ward v. Gay, 137 N. C. 397, 49 S. E. 884; Anderson v. Hilton & D. Lumber Co., 121 Ga. 688, 49 S. E. 725; Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319. Right to cut growing grass. Ross v. Cook [Kan.] 80 P. 38. Right to dig ore. Entwhistle v. Henke, 113 Ill. App. 572. Right to remove dirt. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

75. Howes v. Barmon [Idaho] 81 P. 48; Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989; Entwhistle v. Henke, 113 Ill. App. 572. Parol licensee a mere tenant at will. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544. To be a good license, agent giving permission need not have authority in writing. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

76. A parol sale of standing timber is good as to the part already cut. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319. An executed parol agreement may alter the terms of a written contract. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405. Parol lease partially performed. Recovery can be had for consideration less value of premises while occupied thereunder. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938. Parol sale of land not illegal and void. Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893. Where contract is not severable, the whole is unenforceable. Schultz v. Kosbab [Wis.] 103 N. W. 237.

77. See 3 C. L. 1530.

78. See 3 C. L. 1530, n. 97, 98, for variations in different states.

79. Taylor v. Godbold [Ark.] 88 S. W. 959; Hatch v. Gluck, 93 N. Y. S. 508.

80. Contract for purchase of shoes which were to be made as required. Held, a contract of sale and not of manufacture. Helmers, Bettman & Co. v. Nagel & Co. [Mo App.] 87 S. W. 61.

81. Division of assets. Mason v. Spiller, 186 Mass. 346, 71 N. E. 779.

82. Bogigian v. Hassanoff, 186 Mass. 380, 71 N. E. 789.

83. See 3 C. L. 1530.

84. Gallagher v. Northrup, 114 Ill. App. 368; McIntosh v. Green, 25 App. D. C. 456; Mellerio v. Freeman, 211 Pa. 202, 60 A. 735. Parol trust of personal property enforceable. In re Fisher's Estate [Iowa] 102 N. W. 797. The performance of an unenforceable trust cannot be objected to by creditors. Gallagher v. Northrup, 114 Ill. App. 368.

85. Constructive trust. Stahl v. Stahl, 214 Ill. 131, 73 N. E. 319; Parker v. Catron [Ky.] 85 S. W. 740; Shea v. Nilima [C. C. A.] 133 F. 209; Bomgardner v. Swartz, 26 Pa. Super. Ct. 263. A constructive trust arises where an agent appointed by parol takes property in his own name. Morris v. Reigel [S. D.] 101 N. W. 1086. Actual fraud must be shown to create a trust by implication of law so as to take it out of statute. Ammonette v. Black [Ark.] 83 S. W. 910. Parol trust in fraud of creditors may be set aside. Andrews v. Scott, 113 Ill. App. 581. Resulting trust. Lynch v. Herrig [Mont.] 80 P. 240.

86. Lasley v. Delano [Mich.] 102 N. W. 1063.

87. See 3 C. L. 1531.

88. Welsh v. Brainerd [Minn.] 103 N. W. 1031. Telegram and subsequent letter referring to it. Bonds v. Lipton Co. [Miss.] 37 So. 805. Unsigned deed and letter taken together. Collyer v. Davis [Neb.] 101 N. W. 1001. A signed but undelivered lease and a memorandum as to its contents will be construed as a lease. Charlton v. Columbia Real Estate Co. [N. J. Err. & App.] 60 A. 192. Separate papers must relate to each other. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005; Ferguson v. Trovaten [Minn.] 102 N. W. 373. An unsigned lease, with letter saying "enclosed we hand you lease," etc., held insufficient. Jewett v. Greisheimer, 100 App. Div. 210, 91 N. Y. S. 654. An option accepted by an agent of the vendee in a letter is a sufficient memorandum. Sutter v. Isabella Furnace Co., 210 Pa. 79, 59 A. 476.

the memorandum must describe the party and subject-matter so that it can be identified with reasonable certainty,[89] and be signed by the party to be charged or the parties thereto or their duly authorized agent,[90] and in many states, by statute or decision, the authority of an agent to execute an unsealed instrument must be in writing;[91] but subsequent written ratification may be made by the principal;[92] but the contract is binding where the agent so executes it as to bind himself.[93] In some states the consideration must be expressed in the instrument.[94] Where the entire contract must be in writing, the acceptance as well as the offer must be written.[95]

(§ 10) *B. Delivery and acceptance.*[96]—By its terms the statute does not apply where there is a delivery and acceptance of goods sold.[97]

89. Description held insufficient: Sale of realty described as "estate of G. Lawrence." Morrison v. Hazzard [Tex. Civ. App.] 13 Tex. Ct. Rep. 310, 88 S. W. 385. "Rec'd from K. $190 on land, § 25, Ts. 32, R. 2E, 160 acres" is insufficient for identification. Kurdy v. Rogers [Idaho] 79 P. 195. A telegram ordering "assorted goods," saying specifications will follow, is not, in absence of such specifications a sufficient memorandum. Fait Co. v. Anderson [Ark.] 88 S. W. 905.

Description held sufficient: Card of promisor endorsed "$7,500" does not satisfy the statutory requirements as to a writing as evidence of a promise of marriage. Austin v. Kuehn, 111 Ill. App. 506. "Received of X. $225 for locust at Oakwood" sufficiently describes sale of locust timber on an estate. Bayles v. Strong, 93 N. Y. S. 346. Contract for sale of cattle, giving price per pound, is good, though it did not give time or place of delivery. Darnell v. Lafferty [Mo. App.] 88 S. W. 784. "In consideration of $1,000, A. sold one-sixth interest in a saloon and half the fixtures. Lamb v. Hall [Cal.] 81 P. 288. Contract for sale of realty, giving description, sufficient for identification, conditions of sale, name of vendor and signatures. Ullsperger v. Meyer [Ill.] 75 N. E. 482. Receipt for sale of standing timber which gives neither time for cutting nor removal. Kidder v. Flanders [N. H.] 61 A. 675. Reference to real property by house and street number. Engler v. Garrett [Md.] 59 A. 649. "Hotel Duquesne property." Henry v. Block, 210 Pa. 245, 59 A. 1070. Receipt for purchase money of real estate, describing it. Id.

90. Undelivered deed is an insufficient memorandum. Collyer v. Davis [Neb.] 101 N. W. 1001. Delivery of a deed to a common agent with instructions not to deliver till signed, is a sufficient memorandum. Wisconsin & M. R. Co. v. McKenna [Mich.] 102 N. W. 281. Since an auctioneer acts at the instance of both parties, his memorandum is sufficient to satisfy the statute in case of a sale of real estate. Garth v. Davis [Ky.] 85 S. W. 692.

91. "I hereby authorize H. to bargain for sale of 47 acres known as the Abbey ranch . . . valued at $7,000, for which I agree to pay 5 per cent. . . . or the above-mentioned sum on any amount I may accept" a sufficient authorization. Hill v. McCoy [Cal. App.] 81 P. 1015. "I am glad you sold the 88 acres; now sell the 40" is not a sufficient authorization. Johnson v. Fecht, 185 Mo. 335, 83 S. W. 1077. A memorandum signed by one member of a firm binds the firm. Garth v. Davis [Ky.] 85 S. W. 692. Printed signature of agent is insufficient when not meant to be part of contract. Ferguson v. Trovaten [Minn.] 102 N. W. 373.

92. Memorandum of agent and letter from his employer canceling order, satisfy statute. Nebraska Bridge Supply & Lumber Co. v. Owen Conway & Sons [Iowa] 103 N. W. 122, withdrawing former opinion (98 N. W. 1024) cited in 3 C. L. 1530, n. 99; Id. 1531, n. 9. But see, Nebraska Bridge Supply & Lumber Co. v. Conway [Iowa] 98 N. W. 1024.

93. Where agent executes a contract for sale of goods for his principal whose name did not appear. Usher v. Daniels [N. H.] 60 A. 746. A lease made by an officer of a corporation for the latter where he was personally bound. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419. A written contract for the sale of real estate, made and signed by an agent in his own name and without disclosing his agency or the name of his principal, satisfies the requirements of the statute of frauds, and is binding on and may be enforced by the principal. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609. A mining lease signed by the agent so as to bind him alone is "signed by party to be charged." Brooks v. Cook [Ala.] 38 So. 641; Fordyce Round Bale Cotton Press Co. v. Seaver [Ark.] 85 S. W. 1126.

94. "Value received" is sufficient. White Sew. Mach. Co. v. Fowler [Nev.] 78 P. 1034. Though principal contract is dated one day before written guaranty, its execution will be regarded as a sufficient consideration of latter contract to satisfy the statute. De Reszke v. Duss, 99 App. Div. 353, 91 N. Y. S. 221. Need not appear in a guaranty contract which would be enforceable if in parol. Dryden v. Barnes [Md.] 61 A. 342.

95. Co-operative Tel. Co. v. Katus [Mich.] 12 Det. Leg. N. 187, 103 N. W. 814. Need not be in same instrument. Ferguson v. Trovaten [Minn.] 102 N. W. 373. A contract required by the statute of frauds to be in writing is sufficient if signed by one of the parties to be charged and accepted by the other. The bringing of a suit for specific performance by the party whose name has not been appended to the contract establishes its acceptance by him. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609. But see contra. Cowan v. Curran [Ill.] 75 N. E. 322. A written offer if accepted is sufficient memorandum of sale of goods to satisfy statute. In re Pettingill & Co., 137 F. 143.

96. See 3 C. L. 1532.

97. Acceptance of part of goods sufficient. MacEvoy v. Aronson, 92 N. Y. S. 724. The

(§ 10) *C. Part payment and earnest money.*[98]—Part payment for goods sold takes the sale out of the statute.[99]

§ 11. *Operation and effect of statute.*[1]—The English statute of frauds is entirely superseded by the later local legislative enactments,[2] and in case of conflicts between the statutes of different states, the statute of the state where the contract was made prevails.[3] Noncompliance with the statute of frauds save in the case of sales of goods and actions for commissions by real estate agents does not make the transaction void but merely unenforceable,[4] and where the contract is fully executed, it will not be set aside.[5] A court of equity will not permit the statute to be used as an instrument for fraud, and in extreme cases where the parties have so altered their position that damages will not give an adequate remedy, a constructive trust[6] or an equitable mortgage[7] or specific performance[8] will be decreed. To obtain this, it must be shown that there exists a fair contract,[9] followed by possession,[10] and that the vendee has so altered his position that damages will not be an adequate remedy.[11]

sale of three cases of canned tomatoes is not taken out of the statute by the delivery of three cans as samples, the bulk of the cases not being broken. Richardson v. Smith [Md.] 60 A. 612. Mere delivery for purposes of inspection does not take a sale out of the statute where the goods are returned as unsatisfactory. Hatch v. Gluck, 93 N. Y. S. 508. Where goods sent "f. o. b. Aberdeen, sight draft, Bill of Lading attached," there can be no delivery till payment, and statute not satisfied. Richardson v. Smith [Md.] 60 A. 612.

98. See 3 C. L. 1532.

99. Where there is a running account with a balance in favor of the purchaser, the sale of goods and crediting the same on the account is not within the statute. Lilly v. Lilly, Bogardus & Co. [Wash.] 81 P. 852.

1. See 3 C. L. 1532.

2. Ballinger's Ann. Codes & St. §§ 4517, 4518, 4568, 4567. Richards v. Redelsheimer, 36 Wash. 325, 78 P. 934.

3. Sale of goods in Illinois for delivery in Missouri. Missouri court holds the Illinois statute governs. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275. And see Conflict of Laws, 5 C. L. 610.

4. Barnett v. Block [Minn.] 102 N. W. 390; Cannon v. Castleman [Ind.] 73 N. E. 689. An action lies for the recovery of the consideration. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938; Schultz v. Kosbab [Wis.] 103 N. W. 237; Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893; Gallagher v. Northrup, 114 Ill. App. 368. A tenant on a partially executed farm lease may recover for work and labor. Brashear v. Rabenstein [Kan.] 80 P. 950. Vendee of a parol contract for the sale of land may recover back payments already made. Durham v. Wick, 210 Pa. 128, 59 A. 824. Where a contract for the sale of lands is fully executed, suit may be brought for recovery of the consideration. Tucker v. Dolan [Mo. App.] 84 S. W. 1126.

5. Lasley v. Delano [Mich.] 102 N. W. 1063; Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319; Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405. Marriage is not such performance as to enable one party of a contract made in consideration of marriage sue for the consideration for its performance. Weld v. Weld [Kan.] 81 P. 183. Where a father made an oral contract with his son that if he pay all his father's debts, buy in other property, and care for father for life, he could have his property, and the son fulfilled these conditions, on his death, the contract being fully executed, the statute of frauds does not apply. Hasenbeck v. Hasenbeck [Mo. App.] 85 S. W. 916. And see Waters v. Cline [Ky.] 85 S. W. 209. A parol modification of a written agreement fully executed is good. Denison v. Sawyer [Minn.] 104 N. W. 305. Where a person surrenders a child in consideration of a promise to care for the same, it is fully executed on her part and will be enforced. Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392.

6. Where one party uses the statute of frauds to unjustly enrich himself at the expense of another, specific performance will be decreed. Rowell v. Smith, 123 Iowa, 510, 102 N. W. 1. See cases cited under § 10, Trusts.

7. Foster Lumber Co. v. Harlan County Bank [Kan.] 80 P. 49.

8. Applies as well where contract is unenforceable because not to be performed within a year, as where one concerning real estate. Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561. Specific performance granted only to prevent fraud. Hartman v. Powell [N. J. Eq.] 59 A. 628; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. On the theory of equitable estoppel where an oral party wall agreement was in consideration of use of a stairway there is such execution as makes the statute inapplicable. Hardcastle v. Holmes [Kan.] 80 P. 962. Courts will enforce a parol contract where its avoidance would work fraud. Foster Lumber Co. v. Harlan County Bank [Kan.] 80 P. 49. Where the identity of the principal is shielded by agent, specific performance will not be denied. Cowan v. Curran [Ill.] 75 N. E. 322.

9. Ruff Brewing Co. v. Schanz, 114 Ill. App. 508. The minds of the parties must meet in a contract. Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893. An undisputed parol contract must be shown. Lay v. Lay [Ark.] 87 S. W. 1026.

10. Possession is necessary. Browder v. Phinney, 37 Wash. 70, 79 P. 598. Possession of which the owner had no knowledge in-

§ 12. *Pleading and proof.*[12]—A complaint need not set up that the contract is in writing,[13] but when it affirmatively shows the contract is oral when required to be in writing by the statute, demurrer will lie;[14] but advantage of this defect may be taken by motion for nonsuit.[15] Generally, to take advantage of the statute of frauds, it must be pleaded.[16] The defense of the statute being personal, cannot be raised by third parties.[17]

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sufficient. Wiley v. Whaley [Tex. Civ. App.] 85 S. W. 1165. The continued possession of a tenant as vendee is sufficient. Cross v. Johnston [Ark.] 88 S. W. 945; Veum v. Sheeran [Minn.] 104 N. W. 135. Where one in possession as co-tenant alleges a parol sale of the remaining undivided interest. Roberts v. Templeton [Or.] 80 P. 481; McKay v. Calderwood, 37 Wash. 194, 79 P. 629. Pier erected under mistake of fact on adjacent land. Evidence must be "demonstrative of plaintiff's right." Hartman v. Powell [N. J. Eq.] 59 A. 628.

11. Repairs of a sewer is not a sufficient consideration to found an action for specific performance of an easemment. Kommer v. Daly, 93 N. Y. S. 1021. Parol easement of use of stairway. Unless the plaintiff has parted with a valuable consideration, no specific performance. Howes v. Barmon [Idaho] 81 P. 48. Surrender of an option not sufficient consideration on which to found an action. Gates Land Co. v. Ostrander [Wis.] 102 N. W. 558. Where valuable improvements are made, it is generally held that damages will be inadequate. The cutting of grass insufficient to show possession or improvements. Ross v. Cook [Kan.] 80 P. 38. Excavation of a small quantity of dirt by vendee in possession does not constitute valuable improvements. Wisconsin & M. R. Co. v. McKenna [Mich.] 102 N. W. 281. Good faith in addition to payment of consideration and possession is insufficient. Valuable improvements must be shown. Terry v. Craft [Tex. Civ. App.] 13 Tex. Ct. Rep. 396, 87 S. W. 844. Minor improvements are insufficient. Wiley v. Whaley [Tex. Civ. App.] 85 S. W. 1165. Possession and valuable improvements are both necessary. Keith v. Keith [Tex. Civ. App.] 13 Tex. Ct. Rep. 126, 87 S. W. 384.

Held to be a sufficient ground for specific performance: Where plaintiff had paid purchase price and had possession and paid debts and bought an outfit, specific performance decreed. Lee v. Wrixon, 37 Wash. 47, 79 P. 489. Where defendant is insolvent, and there is a fair oral contract accompanied by possession and improvements, specific performance decreed. McKay v. Calderwood, 37 Wash. 194, 79 P. 629. Possession, caring for aged persons, and valuable improvements. Caldwell v. Drummond [Iowa] 102 N. W. 842; Hand v. Nix [Tex. Civ. App.] 13 Tex. Ct. Rep. 305, 87 S. W. 204; Cherry v. Whalen, 25 App. D. C. 537. Possession, part payment and a subsequent title bond are sufficient to give right to specific performance. Hubbard v. Kansas City Stained Glass Works & Sign Co. [Mo.] 86 S. W. 82. Possession and payment of portion of purchase money. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345. To give a foundation for specific performance, the contract must be executed in all its terms except as to the written memorandum. Gates Land Co. v. Ostrander [Wis.] 102 N. W. 558.

Facts held to be insufficient: Where a tenant continues in possession as vendee, pays taxes and pays $465 upon the $3,200 purchase price. Veum v. Sheeran [Minn.] 104 N. W. 135. Five years' case of parents and receipt of the net profits of a farm, coupled with residence thereon, does not show any damage to plaintiff to enable him to bring action for specific performance on a parol contract. Johnson v. Upper [Wash.] 80 P. 801.

12. See 3 C. L. 1534.

13. Anderson v. Hilton & D. Lumber Co., 121 Ga. 688, 49 S. E. 725; Carson Bros. v. McCord-Collins Co. [Tex. Civ. App.] 84 S. W. 391. But see, Hunt v. Taylor [Ky.] 87 S. W. 290.

14. Banta v. Banta, 103 App. Div. 172, 93 N. Y. S. 393; Hunt v. Taylor [Ky.] 87 S. W. 290.

15. Barr v. Satcher [S. C.] 51 S. E. 530. Judgment on the pleadings. Seamans v. Barentsen, 180 N. Y. 333, 73 N. E. 42.

16. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012; Levin v. Dietz, 94 N. Y. S. 419; New York Fire Proof Tenement Ass'n v. Stanley, 94 N. Y. S. 160. Though the statute of frauds was not pleaded at the first trial, it may be set up as a defense in the second. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938.

17. Barnett v. Block [Minn.] 102 N. W. 390; Cannon v. Castleman [Ind.] 73 N. E. 689.

§ 1. *The fraud and its elements.*[1]—A conveyance, the object, tendency or effect of which is to avoid some debt or duty due by or incumbent on the party making it, is fraudulent.[2] To avoid a deed for fraud, there must have been a design on the part of the grantor to prevent the application of the property conveyed to the satisfaction of his debts.[3] There must be a conveyance or transfer,[4] and creditors whose rights will be prejudiced[5] by the transfer.[6] The intent with which the conveyance is made is to be deduced from the circumstances surrounding the transaction.[7] If the property conveyed is of such a character as to have been exempt in the hands

1. See 3 C. L. 1535.

2. Purchase of its own stock by corporation: The purchase by a corporation, while insolvent, of shares of its own stock, is a fraud on its creditors and they can recover from the seller the amount paid by the corporation. Hall v. Alabama Terminal & Imp. Co. [Ala.] 39 So. 285.

Conveyance in contemplation of marriage: A conveyance by a father to a child by a former marriage, just before his second marriage, is not fraudulent as to the prospective bride if he retains a reasonable proportion of his assets, unless made for the purpose of defrauding the bride and accepted by the grantee with such understanding. Jones v. Jones, 213 Ill. 228, 72 N. E. 695.

Appropriation of firm assets to payment of individual debts of member is fraudulent per se and void as to creditors of the firm. Reynolds v. Radke, 112 Ill. App. 575; First Nat. Bank v. Follett [Colo. App.] 80 P. 147. A transaction by which one as **receiver takes charge of property of his debtor until the debt is paid** is fraudulent as to other creditors of such debtor. Davis v. Atkinson [Ark.] 87 S. W. 432. Any **device by which stock passes to a stockholder as fully paid, without payment in full,** constitutes the transaction fraudulent as to creditors of the corporation. As where property taken in payment is intentionally overvalued on the understanding that a portion of the stock shall be returned for distribution among the directors voting the purchase of the property, without payment by them. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Eq.] 60 A. 54.

3. Scott v. Thomas [Va.] 51 S. E. 829.

4. Where a vendor in a conditional contract of sale, on default by the purchaser in the terms of the contract, takes possession of the personal property and sells it to another, such sale cannot be fraudulent as to the creditors of the first vendee if the second purchaser did not induce the default of the first purchaser. No title passed at first sale. Kidder v. Wittler-Corbin Mach. Co. [Wash.] 80 P. 301.

5. A conveyance is not fraudulent as to one who is not and may never become a creditor of the grantor. Monroe v. Monroe, 26 Pa. Super. Ct. 51. A deed of trust by a woman in contemplation of marriage, she having no debts and not contemplating incurring any, is not invalid as to subsequent creditors. Newton v. Jay, 95 N. Y. S. 413.

6. A conveyance is not fraudulent as to a creditor whose debt is secured by a lien on the land conveyed. Barrell v. Adams, 26 Pa. Super. Ct. 635. Evidence held not to show an assignment in fraud of creditors. Briggs v. Brown, 23 Pa. Super. Co. 163.

7. Need not be proven by direct evidence. Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852. A conveyance for an inadequate consideration in connection with other circumstances held to show that it was made with a fraudulent intent. Bokel, Gwynn, McKeney Co. v. Costello, 22 App. D. C. 81. A conveyance by a husband to his wife pursuant to an oral agreement is not fraudulent as to creditors merely because within the statute of frauds, since executed, and in any event is not void but only precludes the maintenance of an action to enforce it, and such defense is personal to the parties to the contract. Cannon v. Castleman [Ind.] 73 N. E. 689. The intent of a grantor in a fraudulent conveyance as well as that of the grantee is to be deduced from the facts and circumstances and the result accomplished. California Consol. Min. Co. v. Manley [Idaho] 81 P. 50.

Insolvency of grantor: In an action to set aside a conveyance as being fraudulent, the plaintiff must allege and prove that at the time of the conveyance as well as at the time the suit was commenced, the grantor did not have enough property left, subject to execution, to pay his debts. Dinius v. Lahr [Ind. App.] 74 N. E. 1033; Cannon v. Castleman [Ind.] 73 N. E. 689. As to sufficiency of finding on this point, see Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. A member of a partnership may dispose of his individual property, without liability to the firm creditors, if at the time of the conveyance the partnership assets are sufficient to pay the firm debts. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70. A man is insolvent when he is unable to pay his debts as they mature, in the ordinary course of the business in which he is engaged. California Consol. Min. Co. v. Manley [Idaho] 81 P. 50. If a debtor has not sufficient property within the jurisdiction in which the debt was contracted and in which the property alleged to have been fraudulently conveyed is situate and in which the suit is brought, to pay his debts, he is prima facie insolvent. Id. Under P. L. N. J. 1896, p. 277, providing that every sale or conveyance made by a corporation in contemplation of insolvency shall be void as against creditors, the insolvency referred to denotes a general inability to meet pecuniary liabilities as they mature by means of either available assets or an honest use of credit. Empire State Trust Co. v. Trustees of Fisher & Co. [N. J. Err. & App.]' 60 A. 940. The fact that a grantor is insolvent at the time of the commencement of a suit to set aside a fraudulent conveyance raises no presumption that he was insolvent prior to such time. Dinius v. Lahr [Ind. App.] 74 N. E. 1033. Where a son was garnished on a judgment against his father and answered that prior to the recovery of the

of the grantor, its conveyance cannot be fraudulent;[8] but if the debtor exchanges exempt for nonexempt property and causes the title to the latter to be taken in the name of another, his creditors can subject it to the payment of their debts.[9] Choses in action may be the subject-matter of a fraudulent transfer;[10] but property held in trust cannot,[11] unless the owner of the legal title has obtained credit on the faith of his apparent ownership.[12] That the debtor held the property in trust for the grantee must be shown by clear and convincing proof in order to sustain the conveyance.[13] A strained and unreasonable construction will not be given to the language of a deed for the purpose of holding it fraudulent where there is no such intent apparent from a reasonable construction of such language.[14]

judgment the father assigned and transferred to him certain notes as gifts, and nothing was shown in the answer to indicate the father's insolvency at that time, and no issue was joined on the garnishee's answer, held, in effect, to invalidate the gift, that it was error to consider the father's testimony that he was insolvent at the time of making the gift, given in a former proceeding supplemental to the execution, to which the garnishee was not a party. Bolton v. Bailey, 122 Iowa, 729, 98 N. W. 560.

8. Gasser v. Crittenden [Mich.] 12 Det. Leg. N. 168, 103 N. W. 601; Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520.

Personal property: There can be no such thing as a fraudulent transfer of exempt personal property; the debtor may sell it and give the proceeds to his wife or invest it in a homestead for his family. Berry v. Ewen [Ky.] 85 S. W. 227.

Homestead: Gibson v. Barrett [Ark.] 87 S. W. 435; Reed Bros. v. Nicholson [Mo.] 88 S. W. 71; Isbell v. Jones [Ark.] 88 S. W. 593; Hinkle v. Broadwater [Ark.] 84 S. W. 510; Jolly v. Diehl [Tex. Civ. App.] 86 S. W. 965; Pullen v. Simpson [Ark.] 86 S. W. 801; Wilks v. Vaughan [Ark.] 83 S. W. 913. A debtor may use such of his means as his creditors have no lien on to improve a homestead, the title to which is in his wife, provided such improvement does not carry the area or value beyond the maximum exemption given by the constitution. Pullen v. Simpson [Ark.] 86 S. W. 801. Where the homestead is not exempt as to a debt owing for trust funds, an exchange of the homestead for other property, the title to which is conveyed to the debtor's wife, the latter land is subject to the claim of the creditors, since as to him it is fraudulent and without consideration. Godfrey v. Herring [Ark.] 85 S. W. 232.

9. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199. Where a debtor exchanges his homestead for other land which he does not occupy as a homestead and subsequently exchanges the last acquired land for other land which he has conveyed to his wife, the land, title to which is taken by the wife, is held in trust for the debtor, and his creditors can subject it to the payment of their debts. Osborne & Co. v. Evans, 185 Mo. 509, 84 S. W. 867.

10. Hall v. Alabama Terminal & Imp. Co. [Ala.] 39 So. 285.

11. A conveyance by a debtor, of property which he holds in trustee for another, to such other or a trustee for such other, is not fraudulent. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. Rep. 348, 87 S. W. 235. A voluntary conveyance by the holder of the legal title to the equitable owner is not fraudulent. Gehres v. Wallace [Wash.] 80 P. 273.

12. Where a husband has held the legal title to land for a long time and used and managed it for his own, it is prima facie his property and when just prior to the entry of a judgment against him he conveyed it to his wife under claim that it was her property, the burden is on the wife to show by clear and satisfactory evidence that she was the equitable owner. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703. Where a wife allows a husband to use her money as his own for a long period of time and thus to purchase property with it in his own name and to obtain credit on the faith of his being the owner of it. Davis v. Yonge [Ark.] 85 S. W. 90. Where a man purchases real estate in his own name with his wife's money and conveys it to her before his creditors acquire a lien thereon, the conveyance is not fraudulent as to the husband's creditors unless they have extended credit on the faith of his ownership or were misled by the record. Torrey v. Dickinson, 111 Ill. App. 524. A conveyance by a husband to his wife of land which she had previously conveyed to him with the understanding that he was to reconvey it to her when he went out of business is fraudulent as to creditors who had extended credit to him on the faith of his ownership, the contract for reconveyance not being recorded, and she paying no consideration for the reconveyance. Lavender v. Bowen [Iowa] 101 N. W. 760. Where the true owner of property invests another with title thereto and allows him to procure credit on the strength of his apparent ownership, a conveyance thereof by the debtor to the true owner is fraudulent. Gallagher v. Northrup, 114 Ill. App. 368.

13. A secret trust in favor of the wife of a debtor will not be enforced as against the husband's creditors except on the clearest and most convincing proof. The uncorroborated testimony of the husband is alone insufficient to establish an express trust in favor of his wife in land purchased by him in his own name against his creditors seeking to subject such land to the payment of the debts. Pickens v. Wood [W. Va.] 50 S. E. 818. Evidence held sufficient to support a finding that money conveyed was the property of the debtor and not held in trust by him. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

14. Bartles v. Dodd, 56 W. Va. 383, 49

Mortgages.[15]—The same principles of law govern in an action to set aside a mortgage as being fraudulent as obtain in actions to set aside fraudulent conveyances.[16] To impeach a chattel mortgage, it must be shown that both parties thereto designed to hinder, delay or defraud creditors.[17] If by any arrangement, express or implied, the mortgagee permits the mortgagor to continue in the sale of the mortgaged goods for his benefit, the mortgage will be invalid as against an attachment or execution creditor.[18] But it is valid as between the parties, and after the mortgagee has taken possession thereunder, as to third persons having no prior lien.[19]

Sales by a retailer of his entire stock at a single transaction.[20]—In some jurisdictions the statutes declare sales in bulk of stocks of merchandise to be fraudulent as to the sellers' creditors unless certain conditions are complied with.[21] The Wash-

S. E. 414. The placing of the title to property in the name of another under acts whose recitals do not correctly state the facts of the case, does not render such acts void or voidable, if no law has been violated and the cause of so doing was legitimate. Griffith v. Alcocke, 113 La. 514, 37 So. 47.

15. See 3 C. L. 1536.

16. Dinius v. Lahr [Ind. App.] 74 N. E. 1033. A provision in a deed of trust to secure the payment of bonds, that same should not be foreclosed until a designated number of the bondholders had so requested does not render the trust deed fraudulent as to the mortgagor's creditors. Hasbrouck v. Rich [Mo. App.] 88 S. W. 131.

Effect of mortgagee's fraud: Where a grantee takes a conveyance absolute on its face and attempts to set it up as a purchase when in truth it is a mere security for a debt, such conduct will, under most circumstances, be regarded as a fraud, and the grantee cannot even hold the property as security. Clark v. Harper, 215 Ill. 24, 74 N. E. 61.

17. Eickstaedt v. Moses, 105 Ill. App. 634. See, also, title Chattel Mortgages, 3 C. L. 682.

Mortgage for amount in excess of amount owing: No matter how small the excessive or spurious consideration may be in a mortgage, if the object of the parties in reciting more than the true consideration is fraudulent, it avoids the mortgage. Adams v. Pease, 113 Ill. App. 356.

18. Adams v. Pease, 113 Ill. App. 356. A mortgage which by its terms authorized a sale of a part of the mortgaged property in case it ceased to be useful in the business of the mortgagor, provided the proceeds of such sale were to be paid to the mortgagee or reinvested in new machinery or property which should be subject to the lien of the mortgage, is not fraudulent as to the creditors of the mortgagor. Hasbrouck v. Rich [Mo. App.] 88 S. W. 131. The fact that a chattel mortgage gave the mortgagor the right to retain possession of the mortgaged property and sell it at retail, the mortgagor agreeing by a contemporaneous oral agreement "to keep the stock up," is not invalid as to the mortgagor's creditors, though there was no agreement that the proceeds of sales should be applied to the mortgage indebtedness. Ward v. Parker [Iowa] 103 N. W. 104. The inclusion in a chattel mortgage of perishable property or eatables which would be consumed by the mortgagor, the mortgage by its terms requiring the mortgagor to replace the things so consumed and they bearing a slight proportion in value to the articles not perishable included in the mortgage, does not render it fraudulent as to creditors of the mortgagor. Bartles & Dillon v. Dodd, 56 W. Va. 383, 49 S. E. 414. See, also, title Chattel Mortgages, 3 C. L. 682.

19. Martin v. Sexton, 112 Ill. App. 199. The presumption of fraud which the statute raises against a mortgagee who fails to take immediate possession of the mortgaged property is not available to one who does not attach the property until after the mortgagee has taken actual possession of it. Fred Krug Brew. Co. v. Healey [Neb.] 101 N. W. 329.

20. See 3 C. L. 1537.

Note: Contrary to the conclusion reached in Block v. Schwartz, 27 Utah, 387, 76 P. 22, 101 Am. St. Rep. 971, cited 3 C. L. 1537, n. 19, these statutes have been held valid in John P. Squire & Co. v. Fellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; Neas v. Borches, 109 Tenn. 309, 71 S. W. 50; McDaniels v. Connelly Shoe Co., 30 Wash. 549, 71 P. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947. In Hart v. Roney, 93 Md. 432, 49 A. 661, such a statute was enforced, though its constitutionality was not passed upon, and in Fisher v. Herrman, 118 Wis. 424, 95 N. W. 392, the court assumed the validity of such a statute, but refused to pass on its constitutionality because the question was not before the court. These cases were commented on by the Utah court, but distinguished from Block v. Schwartz, supra, because the Utah statute, unlike those of Massachusetts or Washington, failed to exempt from its provisions persons acting in a fiduciary or official capacity, or under judicial process, and because none of the statutes of the other states, like that of Utah, made it a criminal offense by both the buyer and seller to act in making the sale in disobedience or disregard of the statutory provisions. In Young v. Commonwealth, 101 Va. 853, 45 S. E. 327, it was held in accord with the rule laid down in the Utah case that the only authority the state has to regulate or control private business grows out of its police power, and that these statutes in no wise pertain to the health, morals or safety. See note to Block v. Schwartz [Utah] 101 Am. St. Rep. 986.

21. Under Laws Wash. 1901, c. 109, where the purchaser of a stock of goods does not take or demand a statement of the names of the seller's creditors or the amount of in-

ington statute is for the protection of all creditors and not merely those who have given the seller credit for merchandise.[22] Such statutes apply to sales of the equipment of a boarding house,[23] but not to sales of fixtures.[24] The creditor cannot maintain a personal action against the purchaser, but must reduce his claim to judgment and procure a lien on the property claimed to have been fraudulently transferred.[25] The Indiana statute has been held to be unconstitutional.[26]

Consideration.[27]—Inadequacy of consideration is generally held to be evidence of fraud, but not necessarily conclusive.[28] The law presumes that all voluntary conveyances made by a debtor are fraudulent as to existing creditors,[29] provided the

debtedness due them, the sale is fraudulent and void as to the creditors of the seller. Olwell v. B. L. Gordon & Co. [Wash.] 82 P. 180. The New York law (Laws 1902, c. 528) is constitutional. Wright v. Hart, 103 App. Div. 218, 93 N. Y. S. 60.

22. What creditors protected: Laws Wash. 1901, c. 109, declaring fraudulent and void as to creditors sales of merchandise stocks in bulk unless the purchaser obtains a verified statement of the vendor's indebtedness and sees that the purchase price is applied to its discharge is intended for the protection of all creditors of the vendor and not merely creditors holding claims "for or on account of goods, wares and merchandise purchased on credit or on account of money borrowed to carry on the business. Eklund v. Hopkins, 36 Wash. 179, 78 P. 787.

23. Pierce's Wash. Code, § 5346, prohibiting the purchaser of "any stock of goods, wares or merchandise in bulk" from paying the vendor without procuring a verified list of the vendor's creditors and applying the purchase price to the payment of the claims is applicable to a sale in bulk of the goods, wares and merchandise used in conducting a boarding house and restaurant, and such a sale is invalid as to the vendor's creditors. Plass v. Morgan, 36 Wash. 160, 78 P. 784.

24. Fixtures: Laws Minn. 1899, c. 291, declaring that certain sales of any portion of a stock of merchandise not made in the usual course of business shall be deemed fraudulent as to the seller's creditors, unless an inventory is made and certain notice given to the seller's creditors, has no application to fixtures. Kolander v. Dunn [Minn.] 104 N. W. 371.

A cash register used in a saloon for the the purpose of making up and keeping the cash received from sales and not itself for sale, is not a part of the "stock of goods, wares, and merchandise" subject to attachment of the creditors of a vendor who sells his stock in bulk in violation of Law 1901, c. 109, requiring the vendor to give the purchaser a list of his creditors and requiring the purchaser to see that the purchase price is applied to the vendor's debts. Albrecht v. Cudihee, 37 Wash. 206, 79 P. 628.

25. Rothchild Bros. v. Trewella, 36 Wash. 679, 79 P. 480.

26. McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, reversing Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119, cited 3 C. L. 1537, n. 21.

27. See 3 C. L. 1537.

28. F. & M. Schaefer Brew. Co. v. Moebs [Mass.] 73 N. E. 858; Wahlheimer v. Truslow, 94 N. Y. S. 137. A finding that a conveyance was fraudulent held authorized by evidence that it was made the day before judgment was entered against the grantor, that it was for a grossly inadequate consideration and made to the grantor's sons. Morgan v. Boulton [Ky.] 85 S. W. 747. A sale of city warrants at a discount of 15 per cent. of their value, when it appears that the payment was to be made at the convenience of the purchaser, held fraudulent. Case v. McGill [N. J. Eq.] 60 A. 569. The action in rescission for lesion beyond moiety can be exercised by the creditor if the debtor has sold his property for a vile price. The law then permits the creditor to act where the debtor does not, even though his debt was contracted after the sale sought to be rescinded was entered into. Belcher & Creswell v. Johnson [La.] 38 So. 481. An assignment of a stock of merchandise to a corporation in consideration of the issuance to the seller of shares of the stock of the corporation is not fraudulent if the exchange is made for a fair value, since the stock is liable to the seller's creditors. Gardner v. Haines [S. D.] 104 N. W. 244.

29. See, also, post, Relation of Parties to Transaction. Bainbridge v. Allen [N. J. Eq.] 61 A. 706; Wilks v. Vaughn [Ark.] 83 S. W. 913; McKee v. West [Ala.] 37 So. 740.

North Dakota rule: Under the provisions of the North Dakota statutes regarding fraudulent conveyances, a fraudulent intent will not be conclusively presumed as a matter of law merely because the grantor was insolvent and the conveyance was made without consideration, since the question of fraudulent intent is one of fact. Such circumstances are evidence of the intent. Stevens v. Myers [S. D.] 104 N. W. 529.

Existing liabilities: A debt reduced to judgment subsequent to a voluntary conveyance executed by the debtor, if the debt merged in the judgment was contracted prior to the conveyance, is an existing liability within the purview of Ky. St. 1903, § 1907, which declares voluntary conveyances void as to "existing liabilities." Frazer v. Frisbie Furniture Co. [Ky.] 86 S. W. 539.

Burden of proving good faith: Where on a partition by agreement of the heirs of an estate, the share of a bankrupt is conveyed to his son, without any consideration, the burden is on the son to show that the transaction was free from fraud when attacked by the trustee of the bankrupt for the purpose of subjecting it to the bankrupt's debts. Wick v. Hickey [Iowa] 103 N. W. 469. Where one who is the real owner of land has it conveyed to another, without any consideration moving from such other therefor, creditors of the real owner may maintain a suit in the nature of a creditors' bill to subject it

debtor has not enough property remaining to satisfy his debts.[30] As to claims arising subsequent to the conveyance, it is incumbent on the creditor to show that it was made pursuant to an actual intention to defeat and hinder him.[31] A deed may be fraudulent in fact, although it is executed upon a valuable consideration.[32] If both parties participate in the fraudulent intent, the conveyance is void, though made for a valuable consideration.[33] A conveyance for a mere nominal consideration should be subjected to the same rules as are applicable to voluntary transfers.[34]

Retention of possession or apparent title.[35]—In many jurisdictions the statutes provide that mortgages [36] and sales of personal property shall be void as to subsequent purchasers and creditors, unless the mortgagee or purchaser takes immediate and continued possession of the property sold or mortgaged,[37] or the instrument is

to the payment of outstanding executions, though no return of nulla bona had been made. Andrews v. Scott, 113 Ill. App. 581.

30. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703. The mere fact that a debtor makes a voluntary conveyance of his property even if with an actual fraudulent intent, does not authorize the maintenance of a suit by his creditor to set aside the conveyance, unless after the transfer he did not retain sufficient property to meet his obligations. Ritchey v. McKay [Ind. App.] 75 N. E. 161.

Burden of showing continued solvency: As to existing creditors, a voluntary conveyance without actual fraud is not per se fraudulent. But when it shown to be voluntary, the burden is cast on the person seeking to sustain it to show that the grantor had ample means left to meet all his indebtedness. The fact that the grantor subsequently becomes insolvent, not produced by causes existing at the time of the conveyance will not affect the conveyance. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771. If there is no actual fraud as to present or future creditors and no indebtedness on the part of the grantor at the time of the conveyance, it is valid between the parties and as to all the world. McKee v. West [Ala.] 37 So. 740.

31. Bainbridge v. Allen [N. J. Eq.] 61 A. 706; Frazer v. Frisbie Furniture Co. [Ky.] 86 S. W. 539. See post, § 3, Who May Attack.—Subsequent Creditors. An assignment of a chose in action even without consideration is not presumptively fraudulent as to a creditor who becomes such subsequent to the conveyance. Weckerly v. Taylor [Neb.] 103 N. W. 1065. The rule which makes a voluntary conveyance constructively fraudulent as to an existing indebtedness cannot be stretched so as to make it apply to debts which are the successors of earlier debts contracted in the same course of business. A voluntary conveyance, in the absence of a fraudulent intent, is not void as to persons subsequently becoming creditors. Vreeland v. Rogers [N. J. Eq.] 61 A. 486. A voluntary conveyance by a man to his wife is not void as to subsequent creditors, if at the time of making it he was not indebted to the person seeking to have it set aside and he was under a moral obligation to convey it to her and there was no actual fraud. Farr v. Hauenstein [N. J. Eq.] 61 A. 147.

32. Zumbiel v. Zumbiel, 26 Ky. L. R. 1193, 83 S. W. 598. A conveyance which deprives a creditor of a right which would be legally effective had not the conveyance been made is fraudulent as to him and void, whether made with or without a valuable consideration. Conveyance hindered creditors though value was afterwards paid. Salzenstein v. Herrick, 105 Ill. App. 99. Under Bankruptcy Act, § 67e, in a suit by a trustee of a bankrupt to set aside a sale as being fraudulent, the purchase to be sustained must not only have been made in good faith, but for a present fair consideration. Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657.

33. Salemonson v. Thompson [N. D.] 101 N. W. 320. Where a grantor makes a conveyance for the purpose of defeating the claims of his creditors and the grantee, even though some consideration passed between the grantor and grantee knowingly assists in affectuating the fraudulent intent, or even has notice of such fraudulent intent, such grantee will be regarded as a participator in the fraud. "The law never allows a man to assist in cheating another." Clark v. Harper, 215 Ill. 24, 74 N. E. 61.

34. California Consol. Min. Co. v. Manley [Idaho] 81 P. 50.

35. See 3 C. L. 1538.

36. See title Chattel Mortgages, 3 C. L. 682.

37. State v. Stone [Mo. App.] 85 S. W. 950. Code Iowa 1897, § 2906. So held where purchaser under conditional sale resold goods to original vendor. In re Tweed [C. C. A.] 131 F. 355.

Conditional sales: In Pennsylvania the delivery of goods to another, under an agreement providing that the title shall not pass until the same are paid for, is void as to creditors of the vendor. If, however, the delivery is pursuant to a bailment and not a conditional sale, the title does not pass as to creditors. The essential character of the transaction will be regarded rather than the form. In re Tice, 139 F. 52. Under Statute of Frauds, Ill. § 7, providing that where the goods of a person shall by such person be left in the possession of another for a period of more than five years without demand therefor and suit brought to recover possession or the recording of the deed containing the contract of bailment or limitation of use of the property shall be void as to creditors and subsequent purchasers, one who has purchased from the person in possession, though all the purchase price has not been paid, is protected. Klinger v. Joseph Schlitz Brew. Co., 115 Ill. App. 358. Under Personal Property Law (Laws 1897, p. 511, c. 417, § 25), declaring a sale without change of possession conclusive evidence of fraud, un-

recorded.[38] In others the retention of possession merely raises a presumption of fraud which may be rebutted.[39] What constitutes an immediate change of possession must be determined by the situation [40] and nature of the property sold,[41] and the question is ordinarily one for the jury.[42] An assumption of such control over the property by the vendee as ought reasonably to indicate a change of ownership is sufficient.[43] If not susceptible of actual manual delivery, a symbolic delivery will suffice.[44] Retention of possession of real estate by the vendor is not prima facie fraudulent, but it is one of the badges of fraud.[45]

Reservation of benefits and resulting trusts.[46]—The reservation by a vendor of some right or benefit in the property sold or conveyed may or may not, in connection with all the facts and circumstances of the transaction, be sufficient to show that it was made with intent to hinder and delay the vendor's creditors.[47] Where the consideration for land is paid by one person and title taken in the name of another, the

less made in good faith, and making the question of intent one of fact, a verdict of the jury is conclusive. Hill v. Page, 95 N. Y. S. 465.

38. Retention of possession by the mortgagor does not make the mortgage fraudulent provided the mortgage is recorded pursuant to Code W. Va. c. 74, § 5. Bartles v. Dodd, 56 W. Va. 383, 49 S. E. 414. A contract whereby parts of a dredge, to be constructed by the vendor and sold to the United States, was, on payment by the government therefor, to become the property of the government, is not a conditional sale requiring the contract to be recorded in accordance with Virginia Code 1904, § 462, so as to vest the property in the government as against the creditors of the vendor. William R. Trigg Co. v. Bucyrus Co. [Va.] 51 S. E. 174. See, also, Sales, 4 C. L. 1318.

39. Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657. The mere withholding of a chattel mortgage from record without any agreement between the parties does not of itself make it fraudulent. Ward v. Parker [Iowa] 103 N. W. 104.

40. Where a bill of sale is made in one state and delivered to an attorney of the vendee, who at once proceeds to the state where the goods are situate and on his arrival takes possession, there is an immediate delivery and an actual and continued change of possession of the goods sold. First Nat. Bank v. Follett [Colo. App.] 80 P. 147. Evidence that purchaser put a former clerk of vendor in possession to act for him with other circumstances held to show a change of possession. Martin v. Sexton, 112 Ill. App. 199.

41. Merely measuring lumber in a lumber yard, but not marking it any way is not the taking of such possession as is contemplated by the statute. State v. Stone [Mo. App.] 85 S. W. 950.

42, 43. Schwab v. Woods, 24 Pa. Super. Ct. 433.

44. Where goods sold or mortgaged are incapable of actual manual delivery, a symbolic delivery is sufficient to transfer possession, when such is the intention of the parties. Springer v. Lipsis, 110 Ill. App. 109. The transfer by endorsement of a receipt of a warehouseman for goods stored with him, the receipt reciting that the goods should be delivered to the bailor or his endorsee, is a sufficient delivery of the goods to the endorsee to constitute a valid pledge of the goods as against the trustee in bankruptcy of the pledgor. Union Trust Co. v. Wilson, 198 U. S. 530, 49 Law. Ed. 1154.

45. Godfrey v. Herring [Ark.] 85 S. W. 232. Where one to whom another has conveyed property purposely withholds it from record for the purpose of allowing the grantor to procure credit on the strength of his apparent ownership, the conveyance will be deemed fraudulent as to person who subsequently extends credit to the grantor on the faith of his apparent ownership. Mere neglect to record would not, however, subject the land to the payment of the grantor's debts unless they became a lien before the recording of the conveyance. Robertson & Co. v. Columbus Ins. & Banking Co. [Miss.] 38 So. 100.

46. See 3 C. L. 1539.

47. A sale of goods with intent to hinder and delay the vendor's creditors, for a simulated consideration, the vendor reserving to himself benefits in the property sold, the vendee participating in the fraudulent intent is void as to the creditor. Schwarz, Rosenbaum & Co. v. Barley [Ala.] 38 So. 119. A conveyance made in good faith, pursuant to a contract entered into at the time when the grantor was solvent, is not void as to creditors unless made with intent to defraud them, though the grantor was insolvent at the time the deed was executed and it reserves a benefit to the grantor, where it also appears that the reservation is merely incidental and partial. Hunt v. Ahnemann [Minn.] 102 N. W. 376. A stipulation in an agreement for the transfer of property to secure payment of a debt due the transferee that any balance remaining after the payment of the debt shall be paid as the transferror may direct, does not render the agreement void as against creditors of the transferror, nor does an agreement between debtor and creditor, made after the assignment, that, if the debtor could sell the property for more than a certain sum, the debtor could have the difference. Nor will an agreement made at the time of assignment, that the residue of the proceeds after payment of the debt shall be returned to the assignor, of itself render the transfer fraudulent, so long as the property transferred bears a reasonable proportion to the debt provided for. In re A. L. Robertshaw Mfg. Co., 133 F. 556.

creditors of the person paying the consideration can subject it to the payment of their claims,[48] unless it appears that the debtor retains enough property in his own name to pay his debts.[49]

Intent.[50]—A conveyance must have been made with intent to defraud.[51] Fraud can never be presumed.[52] It may be shown by circumstantial evidence,[53] but need not be proven beyond a reasonable doubt.[54] If the suit is in equity, the verified answer will prevail unless overcome by the testimony of two witnesses, or one witness sufficiently corroborated.[55] The question of fraudulent intent is one of fact to be determined by the jury.[56] As to whether a sale is fraudulent, the buyer and seller may testify directly as to their intent.[57]

Fraud in the grantee and notice to him of fraud.[58]—A sale or conveyance is not fraudulent as to the seller's or grantor's creditors, so as to authorize a court of equity to set it aside, unless it appears that the grantee had notice,[59] or knowledge[60] of the

48. Watt v. Morrow [S. D.] 103 N. W. 45; Ansell v. Cox [W. Va.] 50 S. E. 806.

Personal property: A man cannot protect his chattels from execution by refraining from having them conveyed to himself when he buys them and causing them to be conveyed to some other person in trust for him while he takes possession. Such goods and chattels are leviable on a judgment of a court of law against the actual owner who is in possession. Kronson v. Lipschitz [N. J. Eq.] 60 A. 819.

49. Where a husband purchases land and has the title conveyed to his wife, the land as to the husband's creditors will be regarded as his unless the wife shows that he was solvent and able to make the gift. The burden is on her to prove such facts. Davis v. Yonge [Ark.] 85 S. W. 90.

50. See 3 C. L. 1539.

51. Evidence held to support a finding that a conveyance was a mere subterfuge made with intent to hinder, delay, and defraud the grantor's creditors. Smith v. Goodrich [Ark.] 87 S. W. 125; Durack v. Wilson, 94 N. Y. S. 232. Evidence held not to show that a transfer of personal property was made with intent to hinder, delay, and defraud creditor. Atlas Nat. Bank v. Abram French Sons Co., 134 F. 746; Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852; Blakemore v. Eagle [Ark.] 84 S. W. 637. Evidence held to require the submission to the jury of the question of whether or not an assignment of money due on a contract was fraudulent as to the assignor's creditors. White v. Gibson [Mo. App.] 88 S. W. 120. Evidence held sufficient to support a finding that a conveyance was not made with an intent to hinder and defraud creditors. Burton v. Mullenary [Cal.] 81 P. 544.

52. Wiggington v. Minter [Ky.] 88 S. W. 1082; Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633. While fraud can never be presumed yet it may be inferred from facts and circumstances shown and inferences deducible therefrom, based on the probabilities of human conduct. A reasonable degree of latitude is allowed in the admission of evidence to establish fraud, not only in the direct examination of witnesses but in their cross-examination. Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131.

53. Wiggington v. Minter [Ky.] 88 S. W. 1082. In an action by a trustee in bankruptcy to set aside a conveyance as fraudulent, evidence of another conveyance made at about the same time for an inadequate consideration is admissible on the question of fraud. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286.

54. Wiggington v. Minter [Ky.] 88 S. W. 1082.

55. Evans v. Evans [N. J. Eq.] 59 A. 564.

56. Tanner v. Eckhardt, 94 N. Y. S. 1013; Tyler v. Davis [Ind. App.] 75 N. E. 3. Where the evidence is not conflicting on the question of whether or not there has been actual and continued change of possession of a chattel sold, so as to comply with the statute declaring fraudulent and void sales not followed by such actual and continued change, the question is for the court. If, however, the evidence is conflicting, the question is one for the jury. Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292.

57. Hill v. Page, 95 N. Y. S. 465.

58. See 3 C. L. 1540.

59. White v. Glover, 23 App. D. C. 389. To impeach a conveyance for fraud, the fraudulent intent of both vendor and vendee must be shown. Edwards v. Story, 105 Ill. App. 433. A sale made by a debtor with intent to hinder, delay, or defraud his creditors is not void unless the purchaser had notice of the vendor's fraudulent intent. Jennings v. Frazier [Or.] 80 P. 1011.

What constitutes notice: A sale of goods made for their fair market value but with intent to hinder, delay or defraud the vendor's creditors, is fraudulent and void if the vendee had knowledge of such fraudulent intent on the part of the vendor or of such facts and circumstances as would have induced an ordinarily prudent man to make inquiry, which if prosecuted with reasonable diligence would have led to the discovery of the fraudulent intent. Williams v. Finlayson [Fla.] 38 So. 50. Evidence held to justify a finding that the grantee had notice of the grantor's fraudulent intent. Brite v. Guy [Ky.] 88 S. W. 1069. One purchasing property from an insolvent, who may be adjudged a bankrupt within four months, must exercise ordinary prudence and diligence to ascertain whether or not such insolvent can make a transfer of his property to him that will not be in violation of the bankruptcy law; if he fail to exercise such diligence, he cannot be held to be a good faith purchaser. In re Moody, 134 F. 628. Under Laws N. Y.

grantor's insolvency and purpose to defraud his creditors, unless otherwise provided by statute.[61] Where a conveyance is assailed as being fraudulent, the burden of proving the grantor's fraud [62] as well as the fact that the grantee took with notice of the grantor's intent, is on the party assailing the conveyance.[63] Where the purchaser pays a valuable consideration, the burden of proving knowledge or notice by the grantee of the grantor's fraudulent intent rests on the person attacking the sale or conveyance,[64] though if the conveyance is voluntary, such knowledge will be presumed;[65] but where a conveyance is shown to be fraudulent, the grantee has the burden of showing that he paid the consideration recited.[66]

1897 (Personal Property Law), § 29, the transfer is not void if taken by the purchaser for a valuable consideration and without notice of the grantor's fraudulent intent. Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852.

60. Knowledge and notice distinguished: In Massachusetts a purchaser is not liable for the fraud of the seller, if he be a purchaser for a valuable consideration, unless it be shown that at the time of the purchase he had knowledge of the fraud. Pierce v. O'Brien [Mass.] 75 N. E. 61. Where real estate has been sold for a fair consideration, a creditor attacking the transaction as fraudulent, must prove the insolvency of the vendor at the time, knowledge of such insolvency by the purchaser and the intent of the latter in buying to assist the former in defrauding his creditors. Rownd v. Davidson, 113 La. 1047, 37 So. 965.

Knowledge of trustee imputed to cestui que trust: Where one to whom a mortgage or trust deed is given, for the benefit of others, takes with knowledge of the mortgagor's fraudulent intent to hinder, delay or defraud his creditors, the knowledge is imputable to the principal or beneficiary of the mortgagee. Adams v. Pease, 113 Ill. App. 356.

61. Under Ball. Code Wash. § 4265, a sale by an insolvent corporation of all its assets and business to another corporation for shares of the capital stock of the purchasing corporation is fraudulent as to the creditors of the selling corporation and the creditors can subject the assets so conveyed to the payment of their claims, though the purchasing corporation had no knowledge of the indebtedness; no provision being made for payment thereof. Tacoma Ledger Co. v. Western Home Bldg. Ass'n, 37 Wash. 467, 79 P. 992.

62. Vreeland v. Rogers [N. J. Eq.] 61 A. 486; Clark Bros. v. Ford, 126 Iowa, 460, 102 N. W. 421; Thompson v. Williams [Md.] 60 A. 26. When there is nothing on the face of a deed indicating fraud, or some illegal or improper intent condemned by the law, the burden is on those attacking it to show either that it was not made upon a good consideration or that it was made with a frudulent intent on the part of the grantor to hinder, delay or defraud his creditors, and that this intent was known to or participated in by the grantee. Commonwealth Bank v. Kearns [Md.] 59 A. 1010. The burden is on the party attacking the conveyance to show the insolvency and fraud. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70. Where goods are taken by a sheriff under execution against the vendor of the person from whose possession they are taken and such person replevies them from the sheriff who defends on the ground that the sale by the debtor to the plaintiff in replevin was fraudulent, and it appears that the plaintiff paid a fair value for the goods and the circumstances are such as to preclude a presumption of fraud, the burden is on the sheriff to prove that the sale was fraudulent. Williams v. Finlayson [Fla.] 38 So. 50. Where a client in a suit assigned, by a writing regular on its face, "any verdict that may be recovered" in the suit to his attorneys, and a judgment creditor subsequently attaches the money in the hands of the defendant against whom the verdict was rendered, plaintiff averred in his petition that the assignment was not made in good faith. Under such circumstances the burden was on the petitioner to show fraud. Briggs v. Brown, 23 Pa. Super. Ct. 163. When the circumstances surrounding the transfer of property to the detriment of creditors are such as to lead to the inference that there has been a fraudulent intent, the onus of disproving fraud rests on the parties maintaining the validity of the transaction. Commonwealth Bank v. Kearns [Md.] 59 A. 1010.

63. Notice by grantee of grantor's intent. Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520.

64. The creditors then have the burden. Morimura v. Samaha, 25 App. D. C. 189. Where the payment of a valuable consideration is shown, the burden is on the complaining creditor to prove the existence of a fraudulent intent, and that such intent was known to the grantee of the conveyance assailed. Fraud is never presumed, but must be proven by the party asserting it, and it will not be imputed when the facts and circumstances from which it is supposed to arise may reasonably consist with honest intentions. Allen v. Riddle [Ala.] 37 So. 680. In order to set aside a conveyance as being fraudulent as to creditors of the grantor, the burden is on the complainant to show that the grantee participated in or had knowledge of the grantor's fraudulent intent. Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371. A creditor of the vendor, attempting to attach personal property on the ground that it had been sold in fraud of the vendor's creditors, cannot successfully attack the sale unless he can connect the vendee with the fraudulent intent. The burden of proving participation of the vendee in the fraudulent intent is on the person seeking to set aside the sale. First Nat. Bank v. Follett [Colo. App.] 80 P. 147.

65. A fraudulent conveyance, as between husband and wife, where no consideration is

Relationship of the parties.[67] —Sales and conveyances to near relatives and members of his household made by a debtor are looked on with suspicion and closely scrutinized,[68] and if voluntary, are prima facie fraudulent as to existing creditors.[69] The relationship of the parties is to be taken into consideration in connection with all the other circumstances of the transaction alleged to be fraudulent.[70] A conveyance, on full consideration, by a debtor to his wife, taken by the latter in good faith is not fraudulent as to the creditors of the husband.[71] A debtor cannot use his own funds for the improvement of his wife's land,[72] or the payment of incumbrances thereon, and if he does so, his creditors are entitled to a charge on such land to the extent of the funds so used.[73]

paid, will be set aside, although the wife had no notice of the fraudulent intent of the husband. Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. See, also, infra this section, subdivision "Consideration." A voluntary conveyance is invalid as to creditors without reference as to whether the grantee had notice of the grantor's fraudulent intent. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38.

66. Morimura v. Samaha, 25 App. D. C. 189.

67. See 3 C. L. 1541.

68. Wilks v. Vaughan [Ark.] 83 S. W. 913. Where a husband conveys to his wife in payment of an indebtedness owing her, property worth an amount greatly in excess of the indebtedness and retains no property with which to satisfy his other creditors, the wife will be presumed to have known that the husband made the conveyance with intent to defraud his creditors. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38. Where a transaction between husband and wife is sought to be impeached as fraudulent, it requires less proof to show fraud, and on the other hand, where a prima facie case of fraud is made, much stronger proof to show fair dealing than would be required if the transaction was between strangers. Pickens v. Wood [W. Va.] 50 S. E. 818. The fact that the grantor and grantee in a conveyance alleged to be fraudulent are relations is not of itself proof of fraud, yet it is a circumstance to excite suspicion and clearer and more convincing proof of good faith will be required than when the parties are strangers. Clark v. Harper, 215 Ill. 24, 74 N. E. 61. A conveyance by a husband to his wife, or between near relatives, the grantor being in failing circumstances, places the burden upon such grantee to prove the bona fides of the transaction, including proof that the consideration that passed between them was adequate. Wiggington v. Minter [Ky.] 88 S. W. 1082. Independent of statutory regulation, such as bankruptcy or insolvency proceedings, the law does not prohibit near relatives from giving preference to each other, when done bona fide, without fraudulent intent and upon proper consideration. Transactions between relatives will, however, be closely scrutinized. Commonwealth Bank v. Kearns [Md.] 59 A. 1010. A bare statement by a wife that a conveyance to her from her husband was in consideration of money she loaned him many years before is not sufficient to show that the conveyance was not fraudulent. Waters v. Merrit Pants Co. [Ark.] 88 S. W. 879.

69. See, also, supra, this section, Consideration. The burden is on the grantee to prove that a voluntary conveyance to near relative made shortly before entry of judgment was made in good faith. Wilks v. Vaughan [Ark.] 83 S. W. 913. A married woman may make her husband her agent for the management of her property, and he may perform ordinary and reasonable services for her without compensation, without subjecting her property to the claim of his creditors; on the other hand, if the agency is not bona fide, she cannot, under the guise of an agency, appropriate to herself the results of the time, labor and skill of her husband to the exclusion of his creditors. Property acquired by the husband, not clearly shown to have been the increase of the wife's property conveyed by him to her without consideration, is fraudulent and void as to his creditors, and will be set aside. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703.

70. An instruction reciting the single fact of the relationship of father and son, parties to a transfer, disconnected with the other facts in the case, and saying that no presumption arose therefrom, is erroneous. Merrill v. Merrill, 105 Ill. App. 5.

71. Osborn v. McCallum [Miss.] 38 So. 609. A wife may purchase at foreclosure sale property mortgaged by her husband, and such purchase is not void as to creditors of the husband, if she did not act fraudulently in the matter. Hesseltine v. Hodges [Mass.] 74 N. E. 319. Under Code Miss. 1892, § 2294, an unrecorded conveyance from a husband to his wife, which was made for full value and in good faith, is not fraudulent as to a creditor of the grantor who had become such subsequent to the conveyance and prior to its record, where such creditor did not acquire a lien on the property before the recording of the conveyance. Green & Sons v. Weems [Miss.] 38 So. 551. See, also, Notice and Record of Title, 4 C. L. 829. A conveyance by an insolvent to his wife in satisfaction of a debt owing to her will be sustained if no fraudulent purpose is shown. Clark Bros. v. Ford, 126 Iowa, 460, 102 N. W. 421.

72. An insolvent husband cannot use his means to improve his wife's property at the expense of his creditors, and when he does so the creditors have a charge on the wife's property to the extent of the husband's investment therein. Pullen v. Simpson [Ark.] 86 S. W. 801.

73. Where a husband uses his own money for the purposes of paying mortgage encumbrances on his wife's lands, the husband's

Preference to creditors.[74]—In the absence of statute, a debtor,[75] though he is insolvent,[76] has a right to prefer one creditor to the exclusion of others. The acceptance of payment of a debt from an insolvent debtor is not in itself a fraud on other creditors,[77] unless made with an intent to hinder and delay them.[78] Under the National Bankruptcy Act, preferences made by an insolvent, under certain circum-

creditor can subject the land to the payment of their claims to the extent of the payments so made by the husband. Delo v. Johnson, 110 Mo. App. 642, 85 S. W. 109. Where a husband after conveying land to his wife under circumstances which do not make it fraudulent, pays taxes and interest on a mortgage thereon, the creditors of the husband are entitled to a lien on the land so conveyed to the extent of the money so expended by the husband. Farr v. Hauenstein [N. J. Eq.] 61 A. 147.

Payment of life insurance premiums: Creditors of a decedent cannot recover from his widow premiums on life insurance in her favor paid by the husband where it is not alleged and proved that the premiums were paid in fraud of creditors or with any intent to injure or affect their rights in any respect. Citizens' Sav. Bank v. Landrum [Ky.] 86 S. W. 516.

74. See 3 C. L. 1524.

75. Bartles v. Dodd, 56 W. Va. 383, 49 S. E. 414; Thompson v. Williams [Md.] 60 A. 26; F. & M. Schaefer Brewing Co. v. Moebs [Mass.] 73 N. E. 858.

Preference to debtor's wife: The fact that the creditor is the debtor's wife does not change the rule. Schreeder v. Werry [Ind. App.] 73 N. E. 832; Tanner v. Eckhardt, 94 N. Y. S. 1013.

South Dakota statute: The common-law right of a debtor to prefer one creditor to another is expressly affirmed by statute in South Dakota, provided the preference is not made with an actual intent to defraud other creditors. Gardner v. Haines [S. D.] 104 N. W. 244.

Louisiana statute: Under La. Code Prac. art. 240, subd. 4, an unfair preference arises when a creditor receives an advantage over other creditors, knowing or having good reasons for knowing that the debtor was insolvent and such a preference is a constructive fraud. Bank of Patterson v. Urban Co. [La.] 38 So. 561.

76. Preferences by an insolvent debtor are not necessarily fraudulent. Wood v. Porter, 179 Mo. 56, 77 S. W. 762.

77. Pieter v. Bales, 126 Iowa, 170, 101 N. W. 865. The fact that the owner of property is in debt does not prevent his making a bona fide sale of any portion of it, and he may convey his property to his creditors in payment of their debts, provided it is done for a proper consideration and not with an intent to delay, hinder or defraud his other creditors or any of them. Commonwealth Bank v. Kearns [Md.] 59 A. 1010. The satisfaction of a debt due one creditor is not in itself a fraud on others. There must be a showing of some benefit beyond the discharge of the debt or some injury to other creditors besides the mere postponement of the debt preferred. Meyers v. Meyers, 24 Pa. Super. Ct. 603.

78. A debtor has a right to prefer a creditor, and a creditor to obtain a preference over other creditors, so long as it is not done to aid a debtor in hindering and delaying his creditors. Eickstaedt v. Moses, 105 Ill. App. 634.

In Pennsylvania an insolvent debtor may prefer one or more creditors, either by judgment, deed, or in any mode, except by assignment in trust, if his motive be an honest intent to pay the preferred debts, though the unpreferred creditors be delayed or wholly prevented from obtaining payment, and where the proceeds of the property were intended by both parties to be applied to the payment of particular debts of the transferror or vendor, there could be no inference from such sale or transfer that it was intended to delay or defraud unpreferred creditors. Though they were excluded by the preference of those particular creditors, so long as it is done without fraudulent design, and is a present application of the transferror's property to the payment of his debts, it is lawful. In re A. L. Robertshaw Mfg. Co., 133 F. 556.

79. See Bankruptcy, 5 C. L. 367. A mortgage executed pursuant to an oral agreement, entered into at the time the mortgagee made the loan, whereby the mortgagor agreed to give the mortgagee a lien on the property to be purchased with the money borrowed, made within four months of an adjudication and while the mortgagor was insolvent, is a preference within the meaning of Bankruptcy Act, § 60a. In re Dismal Swamp Contracting Co., 135 F. 415. Where more than four months prior to an adjudication of bankruptcy a debtor executed a transfer of certain personal property to his creditor, which was good as between the parties though not valid as to creditors, and subsequently and within four months of the adjudication the debtor executed a transfer which was valid as to third persons, the last transfer having merely perfected the creditor's pre-existing legal right, was not a preference within four months of the bankruptcy as contemplated by the Bankruptcy Act of 1898. Stewart v. Hoffman [Mont.] 81 P. 3.

Knowledge of luterest by person receiving payment: Under the Bankruptcy Act 1898, one who receives a payment by a debtor within four months of bankruptcy, does not receive a preference merely because he has some reason to suspect that payment to him was intended as a preference; he is bound only by the information he has at the time he receives payment and is not bound to trace up any suspicious circumstance. Blankenbaker v. Charleston State Bank, 111 Ill. App. 393.

Purchase for cash by creditor of debtor's assets: A creditor of an insolvent debtor gains no advantage over other creditors by buying the debtor's property at a fair valuation, paid in cash, and there is no fraud in such a transaction unless its purpose is to enable the insolvent to conceal or misappro-

stances, are recoverable by the trustee.[79] Sureties are creditors of their principal within the meaning of the bankruptcy act.[80]

§ 2. *Validity and effect.*[81]—As between parties, a conveyance made with intent to defraud creditors is valid,[82] and equity will not aid the grantor to recover the property so conveyed.[83] The rule has no application, however, where the grantor was induced to make the conveyance by the fraud and undue influence of the grantee and fear incited by him,[84] or the parties sustained confidential relations and were not in pari delicto.[85] It is valid as to all persons, other than creditors, claiming through the grantor.[86] It is void as to creditors,[87] and the grantee holds the title in trust for them.[88] A conveyance which is void under the state laws will be taken to be void within the purview of the bankruptcy act.[89]

§ 3. *Who may attack.*[90]—A trustee in bankruptcy is vested with title to property transferred by the bankrupt in fraud of creditors and may avoid any such transfer that a creditor might avoid, and may properly intervene in any creditor's suit for the recovery of such property.[91] Except as otherwise provided by statute,[92] only

priate or abscond with the proceeds. Lamb v. Hall [Cal.] 81 P. 286. In an action by a trustee in bankruptcy to recover the amount of an alleged preference, evidence held to require submission to jury of question of whether the person to whom made had "reasonable cause to believe that it was intended thereby to give a preference to him." Wetstein v. Franciscus [C. C. A.] 133 F. 900.

80. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286.

81. See 3 C. L. 1543.

82. A. Baldwin & Co. v. Williams [Ark.] 86 S. W. 423; Moore v. Mobley [Ga.] 51 S. E. 351.

83. Sanford v. Reed [Ky.] 85 S. W. 213. One who has conveyed his land to another for the purpose of removing it beyond his creditors cannot compel a reconveyance. Carson v. Beliles [Ky.] 89 S. W. 208. Equity will not enforce a reconveyance of land fraudulently conveyed for the purpose of placing it beyond the complainant's creditors though the grantee agreed to reconvey on repayment of money advanced by him to protect the grantor's interest in the property. McBrerty v. Hyde, 211 Pa. 123, 60 A. 507.

Heirs of grantor cannot recover. Bainbridge v. Allen [N. J. Eq.] 61 A. 706.

NOTE. Reconveyance of property conveyed to defraud creditors: The grantor, having conveyed property to escape a possible liability as surety on a bond sought a conveyance. Held, equity would not aid him. Massi v. Lavine [Mich.] 102 N. W. 665. The statute 13 Eliz. c. 5, against fraudulent conveyances, applies to contingent liability (Gannard v. Eslava, 20 Ala. 732, 741); hence to sureties (Bay v. Cook, 31 Ill. 337, 347). Such a conveyance is valid as between the parties (Proseus v. McIntyre, 5 Barb. [N. Y.] 424), but the courts generally will not entertain a suit to put the grantee in possession (Southern Ev. Co. v. Duffey, 48 Ga. 358; Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 53, 18 L. R. A. 511), for that would be executing the illegality (Mediaris v. Granberry [Tex.] 84 S. W. 1070; Harrison v. Thatcher, 44 Ga. 638). However, a conveyance may be had if (1) the grantor asks it in the interest of his creditors (Carll v. Emery, 148 Mass. 32, 12 Am. St. Rep. 515, 1 L. R. A. 618), or if (2) he conveyed under duress (Anderson's Adm'rs v. Merideth, 82 Ky. 565; Austin v. Winston [Va.] 1 H. & M. 32, 3 Am. Dec. 583; Bump, Fraudulent Conveyances [2d Ed.] 442), the parties not being in pari delicto (Sanford v. Reed [Ky.] 85 S. W. 213; 2 Pomeroy's Equity, 916. See, also, Hinsdill v. White, 34 Vt. 558).—5 Columbia L. R. 473.

84. Sanford v. Reed [Ky.] 85 S. W. 213.

85. Ingersoll v. Weld, 93 N. Y. S. 291.

86. See, also, § 3, Who May Attack. Fraudulent grantees may defend a suit to resist a claim for a mechanic's lien on the premises conveyed. Toop v. Smith, 181 N. Y. 283, 73 N. E. 1113. Where a debtor fraudulently conveyed his personal assets to a corporation and a receiver in bankruptcy had taken possession of the assets of the corporation and no reconveyance thereof had been made to the debtor, but the circumstances are such that the creditors of the corporation and the individual creditors of the debtor are entitled to the distribution of all of the same in payment of their claims, the debtor's wife is not entitled to the allowance of a homestead therein. Lazarus v. Steinhardt [C. C. A.] 133 F. 522. Such a deed conveys title as against persons not affected by the fraud, and persons other than creditors cannot set up the fact that the person pleading adverse possession is in under a fraudulent conveyance so as to prevent the statute running in his favor. Moore v. Mobley [Ga.] 51 S. E. 351.

87. See supra, § 1. Under Rev. Codes N. D. 1899, § 5052, a conveyance made with intent to hinder, delay or defraud the grantor's creditors, is valid as between the parties, but as to creditors is void, and the latter can attack it as though no conveyance had been executed. Salemonson v. Thompson [N. D.] 101 N. W. 320.

88. A. Baldwin & Co. v. Williams [Ark.] 86 S. W. 423.

89. Lavender v. Bowen [Iowa] 101 N. W. 760. See note on What Law Governs in Conflict of Laws, 5 C. L. 610.

90. See 3 C. L. 1543.

91. Shreck v. Hanlon [Neb.] 104 N. W. 193. Even though the transfer be made more than four months before filing the petition in bankruptcy. Friedman v. Ver-

such persons as are creditors at the time of an alleged sale can attack it as being fraudulent.[93] If, however, it is made with an actual intent to defraud prospective creditors, it may be avoided by them if they subsequently extend credit to the grantor.[94] A creditor who assents to the making of a transfer [95] or conveyance, cannot thereafter successfully attack it as being fraudulent as to creditors.[96] It cannot be impeached by the personal representative of the grantor.[97] In Massachusetts the holder of an unliquidated demand arising out of a contract is a creditor who may sue

chofsky, 105 Ill. App. 414. Under clause E of section 70 of the Bankruptcy Act, trustees in bankruptcy may avoid a mortgage made by a New Jersey corporation which the creditor of the corporation might avoid under section 64 of the New Jersey corporation act. Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co. [N. J. Err. & App.] 60 A. 940. The discharge of a bankrupt cannot be pleaded in bar of a creditor's bill to secure property fraudulently conveyed by the bankrupt, even though the facts in the bill were in issue in the bankruptcy court. Friedman v. Verchofsky, 105 Ill. App. 414.

92. Laws 1895, p. 165, authorizing the personal representatives of a deceased grantor in a fraudulent conveyance to set aside the fraudulent conveyance for the benefit of the creditors of the decedent and his heirs at law, is remedial and applicable to conveyances made before its enactment. Moore v. Waldstein [Ark.] 85 S. W. 416. Under Laws 1895, p. 165, heirs of a grantor in a conveyance fraudulent as to creditors of the grantor, may maintain an action to set aside such fraudulent conveyance where the grantee is also the executor of the deceased grantor and refuses to bring the suit or resign as executor. Id.

93. Riske v. Rotan Grocery Co. [Tex. Civ. App.] 84 S. W. 243. Where money voluntarily placed on deposit as bail under a charge in the police court is attached for debt, the petition is defective if it does not allege that the deposit was made in fraud of creditors and that the defendant was a debtor to plaintiff at the time the deposit was made. Bergin & Brady Co. v. Fraas, 3 Ohio N. P. (N. S.) 206. One not injured by a fraudulent conveyance cannot assail it. Gibson v. Honnett [Ark.] 82 S. W. 838. In an action by an assignee of a mortgage to foreclose, the mortgagor cannot set up that the assignment was fraudulent as to creditors of the mortgagee. American Guild of Virginia v. Damon, 94 N. Y. S. 985. Where a conveyance is alleged to be made in fraud of the rights of creditors, the creditors injured are those whose claims exist at the time of the conveyance. Only creditors having claims at the time the fraudulent conveyance is made can avoid it. Chicago Daily News Co. v. Siegel, 212 Ill. 617, 72 N. E. 810. An assignment of personal property though made with intent to defraud existing creditors is not voidable by one who subsequently became a creditor of the assignor with knowledge of the assignment. Donoghue v. Shull [Miss.] 37 So. 817.

94. A conveyance with an actual intent to put the property so that it could not be reached by creditors for debts which at the time he intended to contract and which he had reasonable ground to believe that he might not be able to pay, even if he did not then have that intention as to any particular debt or debts, is fraudulent and void, as to subsequent creditors. But such an intent would not be warranted by proof that the transfer was made with a design to settle property on his wife so as not to expose it to the hazard of future ventures. Mowry v. Reed, 187 Mass. 174, 72 N. E. 936. A conveyance fraudulent as against existing creditors at the time of its delivery may be avoided by subsequent creditors, under Rev. Laws Mass. c. 159, § 3, cl. 8. Woodbury v. Sparrell Print [Mass.] 73 N. E. 547. See, also, § 1, subd. "Consideration."

New York: If a conveyance is fraudulent as to existing creditors, it may also be attacked by a subsequent creditor. Wahlheimer v. Truslow, 94 N. Y. S. 137.

95. A creditor for whose benefit an assignment for the benefit of creditors was made and who acquiesced therein and consented thereto cannot subsequently claim that it was fraudulent as to him, though such might be the case as to other creditors. McAvoy v. Harkins [Wash.] 81 P. 77.

96. A creditor who knows of and assents to the conveyance of land by the debtor to the latter's wife cannot subsequently subject such land to the payment of his judgment on the ground that the conveyance was fraudulent. Mitchell v. Mitchell [Pa.] 61 A. 570.

97. NOTE. Right of personal representative to impeach: An administrator sued on a debt as due decedent's estate in which suit the defendant pleaded a written release by the decedent. Held, the administrator cannot impeach the release by showing that it was given in fraud of creditors. Hayes v. Frey [Nev.] 83 S. W. 772. At common law a conveyance in fraud of creditors was binding between the parties, and the representative was estopped from denying the validity of the decedent's acts. Burton v. Farinholt, 86 N. C. 260. But the creditors could proceed against the grantee as executor de son tort. Osbourne v. Moss [N. Y.] 7 Johns. 161, 5 Am. Dec. 252. By such a statute as exists in the jurisdiction of the principal case in many of the United States the representative has been declared a trustee for creditors and can recover property fraudulently conveyed as assets. Richardson v. Cole, 160 Mo. 372, 83 Am. St. Rep. 479; Keller v. Schaeffer, 29 Ohio St. 264, 23 Am. Rep. 741; Parker v. Flagg, 127 Mass. 28; Rozelle v. Harmon, 103 Mo. 339, 12 L. R. A. 187. There seems no good reason why he should not be allowed to impeach the transactions of intestate by showing fraud without the necessity of having the creditors first proceed in chancery.—5 Columbia L. R. 251.

to set aside a fraudulent conveyance.[98] Ordinarily the creditors must acquire a lien[99] on the property alleged to have been fraudulently transferred or conveyed, by attachment[1] or judgment,[2] as a prerequisite to the maintenance of a suit in equity to set aside the transfer. A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditor's suit to set aside an alleged fraudulent conveyance, without reducing the claims of creditors to judgment.[3]

§ 4. *Rights and liabilities of persons claiming under a fraudulent grantee.*[4]—A bona fide vendee can convey his title to one with notice of the fraudulent character of the original conveyance,[5] and a bona fide purchaser from the fraudulent grantee takes a good title,[6] but the property is subject to the claims of the creditors in the hands of a subsequent purchaser who is chargeable with notice of the fraud.[7]

§ 5. *Extent of grantee's liability.*[8]—If taken by the grantee with notice of the

98. A claim for loss of rent under a lease providing that in case the lease is terminated by reason of the default of the lessee, he shall be liable for loss of rent by reason of vacancy of premises or reletting at a reduced rental. Woodbury v. Sparrell Print Co. [Mass.] 73 N. E. 547.

99. See 3 C. L. 1544, n. 16. Bainbridge v. Allen [N. J. Eq.] 61 A. 706.

1. Attachment: The levying of an attachment affords to the plaintiff in attachment the footing requisite to enable him to maintain a bill in equity to set aside a fraudulent deed which impedes the operation of the writ. Where there was no appearance in the attachment suit and hence no personal judgment against the debtor, the fraudulent conveyance will be vacated only as to property attached. Bainbridge v. Allen [N. J. Eq.] 61 A. 706.

Marshaling of property attached: Where creditors attach property of a debtor which has been fraudulently conveyed and it appears that another has a valid lien on the property attached as well as other property on which the creditors have not secured an attachment, the lienholder will be required to apply the property not attached to satisfaction of his claim before resorting to the attached property. Jones v. Dulaney [Ky.] 86 S. W. 547. Where a creditor makes a general attachment of all of a debtor's property more than four months prior to bankruptcy proceedings against him, he is entitled to a special judgment against property claimed to have been fraudulently conveyed, as to creditors. After judgment and levy against such property, the question of whether or not it was fraudulently conveyed must be decided in a suit to which all necessary persons are joined as parties. American Agricultural Chemimcal Co. v. Huntington, 99 Me. 361, 59 A. 515.

2. Before he can attack a conveyance as fraudulent, the creditor must have reduced his claim to judgment so as to constitute a lien on the premises the conveyance of which is sought to be set aside. Chicago Bldg. & Mfg. Co. v. I. A. Taylor Banking Co. [Kan.] 78 P. 808. A judgment debtor fraudulently transferring his property, his judgment creditors may maintain a suit in equity to remove the obstruction without waiving their rights under the original judgment. Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237.

Statutory modification of rule: In the absence of a statute, a creditor without a lien, under ordinary circumstances, cannot maintain an action to set aside a fraudulent conveyance before recovering a judgment which would be a lien, but under Civ. Code, 1895, § 4937, a creditor may sue to set aside a conveyance and recover his judgment in one action. R. J. Booth & Co. v. L. Mohr & Sons [Ga.] 50 S. E. 173.

3. Shreck v. Hanlon [Neb.] 104 N. W. 193.

4. See 3 C. L. 1545. One not in pari delicto with parties to a fraudulent conveyance may fortify his own title by purchasing an outstanding lien which had been executed to defraud him. Hayward v. Smith, 187 Mo. 464, 86 S. W. 183.

5. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012.

6. A purchaser from a fraudulent grantee, who is himself a bona fide purchaser without notice, takes a good title as against the creditors of his grantor's grantor. The fact that the first grantor was insolvent and that the deed executed by such debtor was voluntary does not render the land subject to the first grantor's debts in the hands of a bona fide purchaser who did not know of the fact of the debtor being indebted nor of any facts which would put him on inquiry. McKee v. West [Ala.] 37 So. 740. The fact that a deed in a chain of title recites that it is given in consideration of the grantor's love and affection for the grantee, does not charge a subsequent purchaser with notice that the grantor in such a deed was indebted at the time of the execution of the deed so as to preclude his being a bona fide purchaser. Id. See, also, "Notice and Record of Title." An answer held to sufficiently allege that defendant was a bona fide purchaser from one whom it is claimed by complainant was a fraudulent grantee of complainant's debtor. Id. Where property which has been fraudulently transferred has been pledged by the transferee with a bona fide pledgee, a creditor who has successfully attacked the transfer is entitled to redeem from the pledgee, but not to a personal judgment in the first instance. Ingersoll v. Cunningham, 95 App. Div. 571, 88 N. Y. S. 711.

7. A subsequent purchaser from the grantor, who takes with notice acquires no title. New v. Young [Ala.] 39 So. 201; Maddox v. Reynolds [Ark.] 81 S. W. 603.

8. See 3 C. L. 1545.

grantor's fraudulent intent, the former cannot recover whatever he may have paid the grantor, nor hold the property as security therefor.[9]

§ 6. *Remedies of creditors.*[10]—A suit in equity may be maintained to subject any species of property, which is subject to execution and which has been fraudulently transferred or conveyed, to the payment of the grantor's debts.[11] Ordinarily equitable relief will not be awarded when the creditor has an adequate remedy at law.[12] In some jurisdictions where land has been fraudulently conveyed a creditor can levy on it and sell as though no conveyance had been made and bring suit to cancel the void deed after the sale.[13]

A suit to set aside a fraudulent conveyance cannot be maintained in a jurisdiction other than that in which the land is situate.[14] An action seeking relief from a fraudulent conveyance must be brought within the limitation period.[15] The run-

9. Where a conveyance is fraudulent as to creditors, the grantee cannot hold the property even to the extent of the consideration paid. Though good as between the parties it is void as to creditors. Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371. A conveyance of property by a debtor not made in good faith, but executed by the grantor and received by the grantee with intent to defraud creditors, is not relieved from the condemnation of the statute by the fact that it was given for a valuable consideration or to pay an honest debt and in such case the grantee cannot recover what he has paid the grantor. Salemonson v. Thompson [N. D.] 101 N. W. 320.

10. See 3 C. L. 1545.

11. Such a suit may be maintained as to a chose in action, though the creditor could also proceed by garnishment at law. Hall v. Alabama Terminal & Improvement Co. [Ala.] 39 So. 285. A judgment creditor, with the aid of equity, may reach any interest of his debtor, not exempt, which the debtor, with such aid, might himself reach. Weckerly v. Taylor [Neb.] 103 N. W. 1065. Under Gen. Laws R. I. 1896, c. 202, § 1, where a debtor causes property for which he pays the consideration to be conveyed to another, with intent to hinder, delay and defraud his creditors, it is to be treated as his own so far as his creditors are concerned from the time such conveyance is found to obstruct the creditor in the prosecution of his claim. Tucker v. Denico, 26 R. I. 560, 59 A. 920.

12. Where a judgment is a lien on land, the judgment creditor cannot maintain a suit in equity to subject the proceeds of a sale of such land to the execution, since he has an adequate remedy at law by an execution sale of the land. Davis v. Yonge [Ark.] 85 S. W. 90. Ordinarily in actions to set aside a conveyance, and subject the land to the payment of the grantor's debts, the court will not appoint a receiver or enjoin the transfer by the fraudulent grantee where it appears that the complainant has an adequate remedy at law as by attachment. R. J. Booth & Co. v. L. Mohr & Sons [Ga.] 50 S. E. 173.

13. Rutherford v. Carr [Tex.] 87 S. W. 815, overruling Id. [Tex. Civ. App.] 84 S. W. 659. The sale under execution cannot be set aside because of the inadequacy of the amount bid by the execution creditor. Clark v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 767, 89 S. W. 38. A creditor of one who has fraudulently conveyed his property under such circumstances as to render the conveyance void as to the creditor and who has sold under execution the property of the debtor standing in the name of the fraudulent grantee can maintain a suit in equity to set aside the conveyance, to put the complainant in possession and for an accounting. Tucker v. Denico, 26 R. I. 560, 59 A. 920.

Personal property: In Alabama a creditor can levy on goods and chattels in the hands of a fraudulent transferee thereof and a purchaser at execution sale takes a good title. Hall v. Alabama Terminal & Improvement Co. [Ala.] 39 So. 285.

14. West Point Min. & Mfg. Co. v. Allen [Ala.] 39 So. 351.

15. Statute of limitations: Under Batts' Ann. St. Tex. art. 3358, an action by creditors to set aside a deed as fraudulent as to the grantor's creditors must be brought within four years. Rutherford v. Carr [Tex. Civ. App.] 84 S. W. 659. If the grantee takes possession of the property and holds it adversely to all claimants for the full period of limitations, the creditors are barred of their right to subject it to the payment of their debts, but so long as he allows the debtor to hold possession or so long as he holds possession for the benefit of his grantor, and not adversely, the statute does not run against creditors. A. Baldwin & Co. v. Williams [Ark.] 86 S. W. 423. Must be brought within four years from the time the plaintiff learns of the same, or had the means of learning of the fraud. Weckerly v. Taylor [Neb.] 103 N. W. 1065. The statute of limitations on a cause of action in the nature of a creditor's bill to set aside a fraudulent transfer, does not begin to run until the return of an execution unsatisfied against the fraudulent grantor. It runs from such time and not from the time of the alleged fraudulent transfer. Watt v. Morrow [S. D.] 103 N. W. 45. Where the creditor sells under execution, before suit, the period within which the purchaser at execution sale can bring an action of trespass to try title against the fraudulent grantee is that fixed by the statute of limitations within which an action for the recovery of land may be brought since such is the effect of the action of trespass to try title and not the period within which an action to set aside the conveyance might be instituted. Rutherford v. Carr [Tex.] 87 S. W. 815.

ning of the statute is not tolled by the death of the alleged fraudulent grantor.[16] Decisions as to who are necessary or proper parties to a creditor's suit are referred to in the notes.[17] In pleading fraud the facts and circumstances from which the fraud may be inferred must be pleaded.[18] An allegation of the issuance of an execution and its return unsatisfied sufficiently charges the insolvency of the grantor.[19]

Evidence.—Where a conveyance is attacked as being fraudulent, the recitals of the deed are prima facie evidence of what the consideration was, upon which it was executed.[20] The assessed value of the land is not a controlling standard by which to ascertain its actual value.[21] Where the seller of goods retains possession after the time of an alleged sale to another, statements by the seller after such time that he was the owner of the goods are admissible in an action by a creditor to set aside the sale, to prove that the sale was fraudulent.[22] A judgment against the grantor is admissible against the grantee to show that the complainant is or was a creditor.[23] Where the conveyance alleged to have been fraudulent was to the debtor's wife, she can be compelled to testify in regard to it.[24]

Judgment.—Where several transfers are attacked as fraudulent and the setting aside of one will afford sufficient property to satisfy the plaintiff's claim, a court of equity may properly refuse to vacate them all.[25] Where the property consists of money, the court may render a personal judgment against the fraudulent transferee.[26]

FREEMASONS; FRIENDLY SUITS; FRIEND OF THE COURT; FUNDS AND DEPOSITS IN COURT; FUTURE ESTATE, see latest topical index.

GAMBLING CONTRACTS.

§ 1. *What constitutes a wagering contract.*[27]—A wagering contract is one which in effect stipulates that the parties shall gain or lose by the happening of an

16. Lesieur v. Simon [Neb.] 103 N. W. 302.

17. The right of a creditor to set aside a fraudulent conveyance descends to his personal representatives and not to his heirs and the creditor's executor may maintain an action to compel the grantee to apply the property to the payment of the grantor's debt. Coffinberry v. McClellan [Ind.] 73 N. E. 97. Where a debtor assigned a one-half interest in the assets of a firm of which he was the owner, the co-partner is not a necessary party to an action to set aside the assignment as being a preference, brought by the trustee in bankruptcy. Lamb v. Hall [Cal.] 81 P. 286. In an action to set aside a conveyance as fraudulent, the grantee being a non-resident, the grantee as well as the grantor are necessary parties and the controversy between the complaining creditor and the alleged fraudulent grantee is not separable so as to authorize the removal of the action to the United States circuit court. Palmer v. Inman [Ga.] 50 S. E. 86.

18. Weckerly v. Taylor [Neb.] 103 N. W. 1065. A bill charging an assignment by a debtor, failure of the assignee to qualify and discharge the trust and that assignment was made with intent to hinder and delay complainant, a creditor, held to state a cause of action. Pine Cone Lumber Co. v. White Sand Lumber Co. [Miss.] 38 So. 188.

19. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

20, 21. Thompson v. Williams [Md.] 60 A. 26.

22. Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657.

23. A judgment regularly rendered and entered by a court of competent jurisdiction is, in the absence of allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount, in an action by a creditor against an alleged fraudulent grantee of the judgment debtor to subject the property conveyed to the satisfaction of the judgment. Salemonson v. Thompson [N. D.] 101 N. W. 320.

24. **Witnesses:** In an action by creditors of a man to set aside gifts made to his wife as being fraudulent as to his creditors, the wife may be compelled to testify in regard thereto. She is not exempt on the ground that such transaction is a privileged communication. Wiley v. McBride [Ark.] 85 S. W. 84.

25, 26. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

27. See 3 C. L. 1546.

event in which they have no interest except the prospect of such gain or loss.[28] Such contracts are void at common law,[29] and are expressly declared so by the statutes of several states,[30] which define the elements of such contracts [31] and provide for a recovery of the consideration.[32] Speculative contracts are not necessarily gambling ones,[33] and are not rendered such by pledging the subject-matter of the contract for the purchase price,[34] and a contract for future delivery at a certain price of that which the seller does not own is not illegal.[35] A transaction, though a gambling one at its inception, may become valid if fully consummated by payment in full of the price and a delivery of the goods.[36] A contract of sale for delivery at a future date is valid only when the parties intend an actual delivery at the contract price.[37] The intention and purpose of the parties to the transaction determines its character.[38] If the intent is not to deliver but to settle upon the difference in market quotations, the contract is a wagering one.[39] The intent must be mutual.[40] The

Note: As to gambling contracts for purchase or sale of stock of corporations, see Clark & M. Corp. § 611; and as to validity of "futures," see Hammon, Cont. § 217.

28. Gambling contract: A transaction by which one assigns a policy on his own life in consideration of payment of a past due premium, the assignor to have the privilege of redeeming within ninety days or if he died within such period, the assignee to pay a small portion of the face of the policy to the heirs of the assignor, is a gambling contract. Quillian v. Johnson [Ga.] 49 S. E. 801.

Valid contracts: Hurd's Rev. St. 1903, p. 640, § 130, prohibiting options to buy or sell at a future time, stock in any company, applies only to contracts for options in the nature of gambling contracts and not to an agreement to pay a certain price for a certain number of shares five years from date of the contract. Kantzler v. Benzinger, 214 Ill. 589, 73 N. E. 874. A transaction whereby one party takes stock as temporary payment for property transferred, with the privilege of determining in the future whether he will retain the stock or require payment in cash, is not an option contract. Osgood v. Skinner, 111 Ill. App. 606. A sale by a broker at a price agreed upon between him and a manufacturer with whom he had a contract to take orders for goods is not a contract for an option to sell or buy at a future time. Tuthill Spring Co. v. Holliday [Ind.] 72 N. E. 872.

29. At common law, in order to render a contract a wagering one, both parties must have understood and agreed to the things which constituted it a wagering contract as a matter of law. Farnum v. Whitman [Mass.] 73 N. E. 473.

30. Under Hurd's Rev. St. 1903, c. 38, § 131, where the holder of a certificate of deposit indorses it to another in furtherance of a gambling transaction, the indorsement is void, and title remains in the holder. Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801. Const. art. 4, § 26, declaring void, contracts for the sale of shares of stock on margin to be delivered at a future day, applies to a contract whereby a broker purchases for another, stock, not intended to be delivered, a portion of the purchase price being paid, and the broker retaining the stock as security for the balance, the customer being credited with the stock and amount paid and debited with commissions, interest and balance of the purchase price. Stilwell v. Cutter, 146 Cal. 657, 80 P. 1071. A contract for the sale of cotton at a specified price to be delivered at a particular place on demand is void under Civ. Code 1902, § 2310, declaring void contracts for the sale of cotton for future delivery unless the seller is the owner or authorized by the owner, and a delivery is intended. Barr v. Satcher [S. C.] 51 S. E. 530.

31. A transfer of a certificate of deposit to aid in a gambling transaction is a gambling contract under Hurd's Rev. St. 1903, c. 38, § 131, and is void. Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801.

32. See Betting and Gaming, 5 C. L. 417.

33. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607. Contracts for the purchase and sale of stocks on margin are not illegal when there is a bona fide employment of a broker to make the purchase to be held for delivery on payment of the price. Ling v. Malcom, 77 Conn. 517, 59 A. 698.

34. A purchase of goods for sale on speculation is not rendered illegal by pledging the goods for the purchase price. Jennings v. Morris [Pa.] 61 A. 115.

35. Option to a purchaser to call for stock at a future date. Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 A. 607.

36. Stock purchased on margin but the buyer subsequently paid the full price and received the stock. Not within the prohibition of Cal. Const. art. 4, § 26. Conradt v. Lepper [Wyo.] 81 P. 307.

37. Beidler & R. Lumber Co. v. Coe Commission Co. [N. D.] 102 N. W. 880.

38. Dunbar v. Armstrong, 115 Ill. App. 549. Where, in an action to recover losses sustained in margin contracts, the defense of gaming contract is set up, the plaintiff must establish a prima facie real contract. Jacobs v. Cohn, 91 N. Y. S. 339.

39. Beidler & R. Lumber Co. v. Coe Commission Co. [N. D.] 102 N. W. 880; Hurd v. Taylor, 181 N. Y. 231, 73 N. E. 977. Contracts in which there is no intention of delivering the goods sold but the purpose of which is to settle on differences that may exist in the market price at the time of settling and of contracting, are gambling contracts. Dunbar v. Armstrong, 115 Ill. App. 549. A transaction in futures, if it is the intent of the parties only to pay or receive the difference between the contract and market price, without delivery of the subject of sale, is illegal. Jennings v. Morris [Pa.] 61

existence or nonexistence of an intention to deliver and receive the goods which are the subject of the contract is a question of fact,[41] to be determined from the circumstances attending the transaction,[42] the course of dealing between the parties,[43] the general nature of the business of the broker,[44] and the declarations of the parties.[45]

§ 2. *Rights and remedies of parties and their privies.*[46]—Criminal prosecutions for gambling, forfeitures and statutory recovery of losings are elsewhere treated.[47] Money advanced with the intention that it shall be used in a gaming venture ordinarily cannot be recovered back,[48] except such portion of it as has not been used.[49] A remedy for the recovery of money lost or advanced in gambling transactions has been prescribed by statute in several states.[50] Courts will not enforce a gambling contract,[51] and the courts of one state will not enforce a gambling contract made in another, though valid where made if it is in violation of the laws of the state where enforcement is sought.[52] But when a gambling contract has been executed and the money deposited to the credit of the winner, the depositary cannot, in an action against him to recover it, plead the illegality of the transaction through

A. 115. Evidence sufficient to show an intent that settlement should be made without actual delivery of the grain, in an action to recover money deposited as margins. Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

40. Where one through an agent procures a broker to purchase goods for future delivery, the fact that he intends a gambling transaction does not make it such as to the broker who contemplated a bona fide transaction. Hocomb v. Kempner, 214 Ill. 458, 73 N. E. 740. Question as to whether both parties to stock transactions understood that no delivery of articles bought and sold was intended, held properly submitted by the instructions. Paducah Commission Co. v. Boswell, 26 Ky. L. R. 1062, 83 S. W. 144.

41. Dunbar v. Armstrong, 115 Ill. App. 549.

42. It is not necessary to prove statements or declarations of the parties. Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

43. If it appears that numerous other contracts between the parties were mere wagers, the party relying on the validity of a particular contract has the burden to show that it was made with a view to actual delivery. Beidler & R. Lumber Co. v. Coe Commission Co. [N. D.] 102 N. W. 880. If the evidence is conflicting, the intent may be determined from the course of dealing. Jennings v. Morris [Pa.] 61 A. 115.

44. In an action to recover money deposited as margins in stock transactions, it is permissible to show the general nature of business of the brokers and that all orders were executed on the floor of the stock exchange. Allwright v. Skillings [Mass.] 74 N. E. 944. Evidence of the method of making delivery in the board of trade where a contract is consummated is competent on the nature of a contract which a broker asserts to be a bona fide transaction and the principal asserts a gambling transaction. Warehouse receipts tendered by the broker to the principal. Farnum v. Whitman [Mass.] 73 N. E. 473.

45. A broker may testify that there was no agreement between him and his principal that a contract should be settled by the payment of differences. Farnum v. Whitman [Mass.] 73 N. E. 473. Hurd's Rev. St. 1903, c. 38, § 132, providing that an action to recover money deposited as margins on option contracts must be brought within six months, does not render inadmissible evidence of statements made by a broker as to the manner in which business was conducted without actual delivery, though made more than six months prior to the action. Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

46. See 3 C. L. 1549.

47. See Betting and Gaming, 5 C. L. 417.

48. In re Arnold & Co., 133 F. 789. Under Code 1892, § 2117, declaring that contracts for futures shall not be enforced where no delivery was intended, one buying futures may not recover margins paid. Code, §§ 2114, 2116, providing for the recovery of money lost at gaming, does not apply. Isaacs v. Silverberg, Parry & Co. [Miss.] 39 So. 420.

49. In re Arnold & Co., 133 F. 789.

50. See Betting and Gaming, 5 C. L. 417. By express terms of the statute, money paid or property delivered pursuant to a gaming contract may be recovered if action is brought within six months. Quillian v. Johnson [Ga.] 49 S. E. 801. The action provided for by the California constitution for the recovery of margins lies against the broker, though he does not himself sell it to the customer, but purchases it from another on the customer's account. Stilwell v. Cutter, 146 Cal. 657, 80 P. 1071. Under Hurd's Rev. St. 1903, c. 38, § 132, an action to recover moneys paid for options to buy or sell grain must be brought within six months. Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

51. One to whom a certificate of deposit is transferred for the purpose of enabling him to enter into a gambling transaction cannot recover from the bank which issued the certificate. Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801. Bucket shop transactions. Overholt v. Burbridge, 28 Utah, 408, 79 P. 561.

52. Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801.

See note in Conflict of Laws, 5 C. L. 610, on the question what law governs.

which it was obtained,[53] nor can an agent of the winner hold the proceeds of a gambling transaction as against his principal.[54] A party seeking affirmative relief on gambling contract cannot be denied recovery because of the illegality if he establishes his case independently of the unlawful element.[55]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.*[56]

Game and Game Laws; Gaming; Gaming Houses, see latest topical

GARNISHMENT.[57]

§ 1. *Definition and nature of remedy in general.*[58]—Garnishment is purely a statutory remedy,[59] and is always ancillary to a principal suit which is either pending or determined,[60] and hence falls with such suit.[61] Where the principal defendant is not a resident of the state, service on him by publication is sufficient to support garnishment proceedings.[62] The remedy is purely legal and every case must

53. A bucket shop which acts as the agent of the buyer and seller in receiving the margins deposited. Overholt v. Burbridge, 28 Utah, 408, 79 P. 561.

54. Brokers who draw a draft for the winnings in a gambling transaction consummated through them cannot defeat liability on the draft because it is the proceeds of an illegal contract. Russell v. Kidd [Tex. Civ. App.] 84 S. W. 273.

55. The winner of share of stock may compel a transfer on the books of the corporation, though such stock might have been recovered by the loser, especially where the illegality is not set up as a defense. Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

56. See 3 C. L. 1550.

57. Includes not only garnishment, so-called, but equivalent proceedings locally designated as "trustee process," "factorizing process," etc.

Distinctions: While garnishment is a proceeding in the nature of an attachment (3 C. L. 1551, n. 24), it is to be distinguished from attachment as commonly used, and from the topic so entitled, in that it deals with the procedure at law to reach property or effects of a debtor in the hands of a third person. Garnishment after judgment must be distinguished from supplementary proceedings, the latter being essentially a process of discovery substituted by the codes for the equitable creditors' suit, and in no sense a levying or subjecting remedy. See Supplementary Proceedings, 4 C. L. 1591; Creditors' Suits, 5 C. L. 880.

58. See 3 C. L. 1550.

59. Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391.

60. Florida Cent. & P. R. Co. v. Carstens [Fla.] 37 So. 566; Adams v. Osborne [Mich.] 101 N. W. 220. A justice being without jurisdiction in the principal action, judgment in the garnishment proceedings is void. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182. He cannot acquire jurisdiction by garnishment of a debtor of the defendant in his county. Id. Under Rev. St. 1898, §§ 3712, 3713, 3716, 3718, 3723, a justice has no jurisdiction to try the issue of the garnishee's indebtedness on the latter's answer before completing service on the principal defendant who never appeared nor answered. State v. Pauli [Wis.] 104 N. W. 1007. Under Comp. Laws, §§ 716, 717, where officer is unable to serve summons, plaintiff is entitled to sustain the garnishment by suing out and serving an **alias summons** or an attachment. Adams v. Osborne [Mich.] 101 N. W. 220.

61. Where summons, alias summons and attachment, were returned not found, held, both action and garnishment proceeding fell. Adams v. Osborne [Mich.] 101 N. W. 220. By dismissing the main suit before judgment in the garnishment proceeding, both are finally determined. State Bank v. Thweatt, 111 Ill. App. 599. The power to vacate the dismissal or adjudge against the garnishee is wholly extinguished as soon as the statutory time (90 days) after judgment is elapsed. Id.

62. Holford v. Trewella, 36 Wash. 654, 79 P. 308.

be brought within the scope of the statutes on the subject,[63] and, while the statutory procedure must be strictly followed,[64] statutes giving the right are liberally construed for the advancement of the remedy.[65]

§ 2. *Grounds for garnishment and choses and properties subject.*[66]—The remedy being purely statutory, the question as to what property or indebtedness can be reached by garnishment is entirely a matter of statutory construction.[67] As a general rule only demands resting in contract and enforceable at law are garnishable.[68] The indebtedness should be presently owing [69] the defendant in the principal action [70] at the time the garnishee answers, though, as a general rule, a debt not payable or matured at such time may be reached by garnishment if the future liability is absolute.[71] Liabilities contingent at the time of the service of the writ,[72] such as money due on uncompleted building contracts,[73] are not garnishable. A debt due jointly to the principal defendant and another or others cannot be reached by garnishment in an action against such defendant alone,[74] and, under the extended rights given to married women in most states, the same rule applies to an indebtedness owing by the garnishee to a husband and wife.[75] The remainder interest of a pledgor in property pledged may be garnished in the hands of the pledgee.[76] In most states a garnishee cannot be charged on account of an indebtedness evidenced by outstanding, unmatured negotiable paper, unless such paper is delivered to him

63. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455.

64. State v. Pauli [Wis.] 104 N. W. 1007.

65. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455.

66. See 3 C. L. 1551.

67. Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391.

68. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385. The phrase "subject to garnishment" as used in Civ. Code Ga. 1895, § 4719, providing that if the court shall decide that the fund in the hands of a garnishee was subject to garnishment had the garnishment not been dissolved, the court shall then render judgment against the defendant and his securities, held to refer to such demands. Id.

69. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455. Under Code, § 364, judgment held not erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173.

70. Where the court found that a garnishee had admitted possession of money and property belonging to an intervener, but there was no finding or evidence that the garnishee had any money or effects of the debtor, a judgment in favor of the creditor, held erroneous. Groesbeck v. Thompson Milling Co. [Tex. Civ. App.] 86 S. W. 33. Money paid indemnitee to indemnify him against a claim held not garnishable in suit against claimant. Collins, Grayson & Co. v. Savannah, etc., R. Co. [Ga.] 50 S. E. 477. Where an agent of a foreign corporation was arrested and convicted and the foreign corporation procured a bond covering judgment and costs pending appeal, and sent money to the bondsmen to indemnify them, the corporation intending to continue the defense of its liability on the bond and not that the money should be applied as that of the agent, held, such funds were not subject to garnishment on behalf of the state for the payment of the judgment and costs assessed against the corporation's agent. Miller v. State [Tex. Civ. App.] 84 S. W. 844.

71. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455.

72. Simmons Hardware Co. v. Baker [Mich.] 12 Det. Leg. N. 132, 103 N. W. 529.

73. Where, under contract, nothing further was due until work was completed, held until work was completed sum due could not be garnished in a suit against the contractor. Simmons Hardware Co. v. Baker [Mich.] 12 Det. Leg. N. 132, 103 N. W. 529. Where contractor failed to complete building but promised to do so, agreeing with the owner that the price was not payable until it was completed, held, in the absence of an intent to defraud creditors, the owner could not be rendered liable as a garnishee in a suit against the contractor. Corsiglia v. Burnham [Mass.] 75 N. E. 253. Where a contract provided for payment when the work was done, the fact that defendant estimated the work done and made two payments therefor during the progress of the work, and had made a third estimate when the contractor abandoned the job, held, defendant was not indebted to the contractor. Gen. St. 1902, § 880, considered. Cunningham Lumber Co. v. New York, etc., R. Co., 77 Conn. 628, 60 A. 107.

74. Badger Lumber Co. v. Stern, 123 Wis. 618, 101 N. W. 1093.

75. Under Rev. St. 1898, §§ 2341, 2345, such indebtedness cannot be garnished in a suit against the husband alone. Badger Lumber Co. v. Stern, 123 Wis. 618, 101 N. W. 1093.

76. So held where corporate stock was pledged, and corporation quit business and distributed its property. Cooley v. Jones [Kan.] 80 P. 596. Where tenant placed crop in possession of his landlord as security for indebtedness due the latter. Groesbeck v. Evans [Tex. Civ. App.] 13 Tex. Ct. Rep. 659, 88 S. W. 889, modifying 83 S. W. 430.

or he is completely exonerated or indemnified from all liability thereon.[77] In West Virginia, choses in action, including shares of corporate stock, may be garnished.[78] In Massachusetts, the interest of a mortgagor in mortgaged personal property cannot be attached by trusteeing a bailee of that property who holds for the mortgagor.[79] Property exempt from execution is exempt from garnishment.[80] Statutes generally provide that wages shall, to a limited extent, be exempt from garnishment,[81] and the great weight of authority at this time is in favor of the proposition that the courts of one state will not deprive a nonresident wage earner of another state of the benefit of his exemptions.[82] In Illinois an assignment by a legatee of his legacy while the same is in the hands of an administrator or executor does not defeat the garnishment thereof until the assignment is reduced to writing and filed in the office of the clerk of the county court.[83]

§ 3. *Persons liable to garnishment.*[84]—The garnishee must have possession of property belonging to the debtor or be indebted to him,[85] and the latter, as a general rule, must have a right to maintain an action for the recovery of such property,[86] though this general rule is modified in favor of creditors when the money or property is held upon such trusts as constitute a fraud on creditors or to be void as against them.[87] A common carrier is not required to answer as garnishee as to property in its possession for transportation only, and which at the time the action is brought is in actual transit.[88] As a general rule, in the absence of statutory pro-

77. Where it is sought under Shannon's Code, §§ 5255, 5260, to garnishee the maker of a negotiable note, an answer by the latter that he did not know who held the note which had not yet matured, held sufficient to prevent judgment being rendered against him. Kimbrough v. Hornsby, 113 Tenn. 605, 84 S. W. 613.

78. Code 1899, c. 106, § 9. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392. See Helliwell, Stock & Stockholders, §§ 396-402.

79. Jenness v. Shrieves [Mass.] 74 N. E. 312.

Note: The only way in which the mortgagor's interest in such property so situated can be attacked is by attaching it as if it were unincumbered on a writ of summons and attachment under Rev. Laws, c. 167, § 69. Jenness v. Shrieves [Mass.] 74 N. E. 312.

80. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173. Consult Exemptions, 5 C. L. 1400.

81. Under Acts 1898-99, p. 37, amending Code 1896, § 2038, the garnishment must be dismissed where the answer of the garnishee discloses an amount not exceeding $25 to be due defendant as wages for the preceding month, although more than that amount has been earned by defendant during such month, and although the garnishment is issued on a claim in which the right of exemption has been waived. Ralls v. Alabama Steel & Wire Co. [Ala.] 39 So. 369.

82. Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391.

83. Act of 1897. Rhodes v. Rhodes, 115 Ill. App. 335. In this case executor took an equitable assignment of legacy before he had received letters testamentary, and paid for the same out of his own property. Id.

84. See 3 C. L. 1551.

85. Contract construed and held to constitute the principal debtor a cropper, hence he did not have a garnishable interest. Taylor v. Donahoe [Wis.] 103 N. W. 1099. Distinction between "cropper" and "tenant," see Agriculture, 5 C. L. 94.

86. Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 102 N. W. 20. An insolvent corporation gave its secretary its check accompanied by a communication stating that the money was assigned in trust for the benefit of certain creditors. The secretary cashed the check and deposited the proceeds to his own credit; one of the creditors who had not received his dividend sued the corporation and garnished the secretary, held, garnishment would not lie. Id.

87. Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 102 N. W. 20. Under Rev. St. 1898, § 2768, a bank with which a note and mortgage, fraudulently conveyed by a husband to his wife, is placed for collection and which receives a check therefor payable to its order is subject to garnishment by a creditor of the husband. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068.

88. Pittsburg, etc., R. Co. v. Cox [Ind. App.] 73 N. E. 120.

NOTE. Liability of carriers to garnishment: As a general rule carriers and corporations in general are held liable to garnishment with relation to debts and ordinary bailments under general statutes conferring the right to garnish persons indebted to the principal debtor. Baltimore & O. R. Co. v. Galhahue, 12 Grat. [Vt.] 655, 65 Am. Dec. 254; Michigan Cent. R. Co. v. Chicago, etc., R. Co., 1 Ill. App. 399; Bates v. Chicago, etc., R. Co., 60 Wis. 296, 50 Am. Rep. 369; Adams v. Scott, 104 Mass. 164. The liability of a carrier to garnishment on account of debts owing to or property held belonging to another depends, as in ordinary cases, upon its direct and immediate accountability to the creditor or owner. Baltimore & O. R. Co. v. Wheeler, 18 Md. 372. There is a conflict of authority as to whether property in the hands of a carrier in actual transit is

visions,[89] property or money held by the executor or administrator in his representative capacity cannot be reached by garnishment in an action against the heir or legatee before an order of distribution has been made.[90] A creditor cannot garnish property in the hands of an assignee for the benefit of creditors, he having assented to the assignment, even though it be fraudulent as to other creditors.[91] In a proceeding by a creditor of a corporate shareholder to subject his shares to the payment of his debt, the corporation in which the shares are held should be made garnishee.[92] In Minnesota a public corporation is subject to garnishment when it owes an ordinary debt to a third person.[93]

§ 4. *Rights, defenses and liabilities between plaintiff and garnishee.*[94]—A garnishment is, in effect, a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee, to recover the debt due to plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand.[95] Hence, the plaintiff is, as to the garnishee, substituted merely to the rights of his own debtor, and can enforce no claim against the garnishee which the debtor himself, if suing, would not be entitled to recover.[96] It is the duty of a garnishee who has money or other property subject to garnishment in his hands or within his control at the time of the service of the writ upon him, to exercise reasonable diligence to prevent the payment of such money or the delivery of such prop-

subject to garnishment; the weight of authority, however, denies the right. Bates v. Chicago, etc., R. Co., 60 Wis. 296, 50 Am. Rep. 369; Illinois Cent. R. Co. v. Cobb, 48 Ill. 402; Western R. Co. v. Thornton, 66 Ga. 300; Contra. Adams v. Scott, 104 Mass. 164, dist'g Clark v. Brewer, 6 Gray [Mass.] 320; Edwards v. White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213, and Bottom v. Clarke, 7 Cush. [Mass.] 487. Garnishment does not lie against personal property in the custody and possession of a common carrier, though his residence is within the state, if the transit of such property has commenced, and it has been carried outside of the county or state in which the writ is served (Illinois, etc., R. Co. v. Cobb, 48 Ill. 402; Montrose Pickle Co. v. Dodson, etc., Mfg. Co., 76 Iowa, 172, 14 Am. St. Rep. 213, 2 L. R. A. 417; Bates v. Chicago, etc., R. Co., 60 Wis. 296, 50 Am. Rep. 369; Michigan etc., R. Co. v. Chicago, etc., R. Co., 1 Ill. App. 399; Western R Co. v. Thornton, 60 Ga. 300), and the same rule has been held to apply, though the property is within the state at the time of the service of the writ (Stevenot v. Eastern R. Co., 61 Minn. 104, 28 L. R. A. 600). The right of stoppage in transitu is not impaired or extinguished by service of process of garnishment on the carrier. Chicago, etc., R. Co. v. Painter, 15 Neb. 394. Where property is in the possession of a common carrier, and its transportation is not yet begun, it is subject to garnishment if within the jurisdiction of the court issuing the writ. Landa v. Holck, 129 Mo. 663, 50 Am. St. Rep. 459; Stiles v. Davis, 1 Black [U. S.] 17 Law. Ed. 384. Similarly, it is held that a railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Cooley v. Minnesota, etc., R. Co. 53 Minn. 327, 39 Am. St. Rep. 609.—From notes to Stevenot v. Koch, 61 Minn. 104, 28 L. R. A. 600; Landa v. Holck, 129 Mo. 663, 50 Am. St. Rep. 459, 465, and National Bank v. Furtick [Del.] 69 Am. St. Rep. 99, 125.

89. Under Hurd's Rev. St. 1899, p. 836, c. 63, pp. 104, 105, c. 3, p. 1746, c. 148, executors or administrators are not subject to garnishment until the will is probated and letters testamentary are issued. It is immaterial that debt is owing absolutely and the garnishee has legally qualified as executor at the time of filing the answer. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455. Divorced wife may garnish administrator of former husband to secure payment of alimony. Clifford v. Gridley, 113 Ill. App. 164.

90. Orlopp v. Schueller [Ohio] 73 N. E. 1012. Rev. St. 1892, § 5531, do not alter this rule. Id.

Note: The case of Stratton v. Ham (decided in 1856) 8 Ind. 84, 65 Am. Dec. 754, seems to be the only case in conflict with the above rule. This case has been much criticized, and its doctrine almost universally repudiated in other jurisdictions. See Case Threshing Mach. Co. v. Miracle, 54 Wis. 299, 11 N. W. 580.—From Orlopp v. Schueller [Ohio] 73 N. E. 1012.

91. McAvoy v. Harkins [Wash.] 81 P. 77.

92. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392. Garnishment against corporations, see Clark & M. Corp. § 772.

93. Laws 1901, c. 96. Mitchell v. Miller [Minn.] 103 N. W. 716. This act (Laws 1901, c. 96) changes the rule announced in McDougal v. Board of Supervisors, 4 Minn. 184 (Gil. 130) which case is consequently overruled. Id.

94. See 3 C. L. 1552.

95. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173.

96. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173; Allen v. Gilman, McNeil & Co., 137 F. 136.

erty to such debtor by any agent of his,[97] and possession thereof by one for him is his possession.[98]

§ 5. *Rights, defenses and liabilities between defendant and garnishee.*[99]—It is the recognized duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the garnishment;[1] but this duty is discharged by pleading the judgment in the garnishment proceedings in bar to an action on the debt while there remains ample time in which the principal debtor may litigate the question of his liability in the court which rendered the judgment.[2] As a general rule, a garnishee is discharged from liability for credits paid by force of a valid [3] judgment in the proceedings, and such payment is a defense to a suit by the creditor or his representative.[4] The consent of a garnishee to a judgment impounding his debt to the principal debtor does not make the payment under the judgment voluntary, where he is absolutely without defense.[5] Statutes in some states provide for the delivery of exempt property to the principal defendant.[6]

§ 6. *Duties of a garnisheed agent to his principal.*—It is the duty of a branch bank, when served with garnishee process, to make the fact known within the shortest time reasonably practicable to the main bank, and to its branches, where it is known that the depositor whose funds have been garnisheed has an account with the other bank.[7]

§ 7. *Conflicting and hostile claims and liens.*[8]—The service of a process of garnishment does not create a specific lien in favor of the plaintiff upon the money or property in the garnishee's hands, but only creates such a lien as gives the plaintiff the right to hold the garnishee personally liable for it or its value.[9] The lien dates from the service of the writ of garnishment [10] and is subject to prior assignments,[11] unless the assignee files a disclaimer of interest.[12] The lien arises as a matter of law, and it is immaterial whether it is mentioned in the verdict or not.[13]

97. Binkley v. Clay, 112 Ill. App. 332. Where garnishee had time to stop delivery of draft, held liable. Id.

98. That the trustee's attorney has taken possession of the property does not relieve the trustee from liability therefor. Thompson v. Dyer [Me.] 62 A. 76.

99. See 3 C. L. 1553.

1, 2. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023.

3. Payment under a void judgment affords the garnishee no protection. Roberts v. Hickory Camp Coal & Coke Co. [W. Va.] 52 S. E. 182.

§ 4. Where an attaching creditor permitted property levied on to be sold on the purchaser agreeing to pay him the purchase price, and the purchaser was garnished as trustee of the attachment defendant, and, having been adjudged trustee on default, paid the judgment, held, in an action by the attachment creditor against the purchaser for the purchase money, that, the attachment having been satisfied out of other property, the plaintiff was a representative of the attachment defendant and under V. S. 1374, the trustee was discharged. Lamb v. Zundell [Vt.] 62 A. 33.

5. Does not prevent him from pleading such payment in bar to an action on the debt. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023.

6. Act May 11, 1901 makes it the duty of the employer upon the delivery to him of the affidavit provided thereby to pay at once to the employe all exempt wages then due, notwithstanding a writ of garnishment may have been served upon him; as a result, therefore, where the employe makes and delivers such affidavit, the whole burden of claiming and establishing the exemption of the employe is cast upon the employer. Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391. If he does not pay to such employe the exempt wages due him, and does not set up and prove such act and all other necessary facts, he cannot plead the judgment in the garnishment suit as a bar to a subsequent action by the employe brought to recover such exempt wages. Id.

7. Bank of Montreal v. Clark, 108 Ill. App. 163.

8. See 3 C. L. 1554.

9. Rev. St. 1899, § 3436. Dodge v. Knapp [Mo. App.] 87 S. W. 47.

10. See 3 C. L. 1554, n. 60.

11. Equitable assignee takes priority over subsequent garnishing creditors. Lutter v. Grosse, 26 Ky. L. R. 585, 82 S. W. 278; Kuhnes v. Cahill [Iowa] 104 N. W. 1025.

12. Chott v. Tivoli Amusement Co., 114 Ill. App. 178.

13. Where a verdict was rendered against a garnishee in a consolidated action to recover the debt by the garnishee's creditor and the garnishee. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390.

A garnishee voluntarily delivering the property to the sheriff, a judgment against him is not necessary to perfect the lien.[14] Though defendant be a nonresident and be served by publication, plaintiff does not lose his lien by taking a judgment against the defendant and the garnishee.[15] Garnishing creditors are entitled to priority in the order in which their garnishments are sued out,[16] and being sued out in different states, the question of priority will generally be left with the courts of the state in which garnishment papers were first issued.[17] Bankruptcy of the defendant renders all garnishment liens [18] on nonexempt property,[19] within four months prior to the filing of the petition in bankruptcy, void.

§ 8. *Jurisdiction and venue.*[20]—Jurisdiction to fasten choses of action by garnishee process depends upon the ability to serve the process of garnishment upon the debtor within the territorial jurisdiction of the court.[21] A foreign corporation is subject to the process of garnishment in any state in which it exercises its franchises and in which it holds property or credits of the debtor, which the latter might recover in a suit in such state.[22] Where the defendant in an attachment suit has not been served except by publication, has not appeared, and no property has been attached, a res in the hands or control of the garnishee is absolutely essential to the court's jurisdiction.[23]

§ 9. *Procedure to obtain writ; bond.*[24]—The proceedings by garnishment are special and in derogation of the common law, and must be strictly pursued in order to confer jurisdiction.[25] Defects in the affidavit may be waived by proceeding to trial.[26] In Wisconsin any number of garnishees may be embraced in the same affidavit and summons.[27] By appearing and interpleading, the garnishee may waive all requirements as to notice.[28]

14. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

15. Judgment against defendant is void as a personal judgment entered without jurisdiction. Code, § 364, construed. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173.

16. Lutter v. Grosse, 26 Ky. L. R. 585, 82 S. W. 278.

17. Where, in actions against the same defendant by different plaintiffs, garnishment papers are issued in Pennsylvania and placed in the hands of a sheriff, but, before served, garnishment papers are procured in West Virginia by the other plaintiff and served before the papers issued in Pennsylvania, held, as the question of priority involved the construction of a Pennsylvania statute, the matter would be left with the Pennsylvania courts. Prichard & Co. v. Critchlow, 56 W. Va. 547, 49 S. E. 453.

18. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385; Cavanaugh v. Fenley [Minn.] 103 N. W. 711. See Bankruptcy, 5 C. L. 367.

19. Does not affect exempt property. Sharp v. Woolslore, 25 Pa. Super. Ct. 251.

20. See 3 C. L. 1554.

21. Not on supposed situs of debt. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26. Where tangible property belonging to a resident or corporation of the state of the forum is garnished in a foreign state by proceedings taken in that state, the title of a receiver based on those proceedings can be asserted in the state of the forum. Id. If a debtor while temporarily within the state might be there sued on the debt by his creditor, he is liable to process of garnishment, no matter where the situs of the debt was originally. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023.

22. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173. Under Code, § 194, held, courts of North Carolina had jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought within the state. Id.

23. State Bank of Chicago v. Thweatt, 111 Ill. App. 599.

24. See 3 C. L. 1555.

25. State v. Pauli [Wis.] 104 N. W. 1007.

26. Personal service was had on the garnishee and he made disclosure without questioning the jurisdiction of the court, later when the garnishee was examined under the statute, defendant's attorney appeared specially for an intervener, and objected to the garnishee being sworn, because it had been shown by the disclosure that the intervener was interested and had had no notice of the proceedings. This objection was overruled. On trial the same counsel appeared for defendant and for the garnishee, and agreed that the intervener might become a party. Objection was thereafter made that the affidavit was defective; the defects were cured by amendment over objection, held, defects were not cause for direction of a verdict for the defendant. Sachs v. Norn [Mich.] 102 N. W. 983.

27. Rev. St. 1898, § 2853. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068.

28. Failure of a judgment creditor to institute supplementary proceedings under Code Civ. Proc. §§ 717, 721, 542, subd. 5, held

Bond.—The garnishee cannot recover on a bond running to the defendant alone.[29] Where a garnishment bond is given to two defendants, recovery may be had on the bond, though only one obligee sustains damage,[30] and under the code provision that actions must be prosecuted by the real party in interest, only those obligees who have an interest in the damages sought to be recovered must be joined as plaintiffs or be made parties to the suit.[31] It follows that in such an action it is not necessary to aver or prove that the garnishment has been discharged as against other obligees who have no interests in, and are not necessary parties to, the action.[32]

§ 10. *The writ and service thereof; return; notice to defendant.*[33]—The time for issuing the writ [34] and its issuance to another county [35] are regulated by statutes. In Pennsylvania, where corporate stock is in another name than that of the defendant in the judgment, no writ of "attachment" will issue for its seizure without being preceded by an affidavit and recognizance.[36] When a garnishee named in the original writ in foreign attachment has not been served, an alias writ may be issued for the purpose of carrying on the proceedings against the property which has already been indicated as its object; [37] but the plaintiff cannot by virtue of the alias writ take any property of the defendant which was not bound by the original writ.[38] An alias writ of foreign attachment which names as garnishees persons other than those mentioned in the original writ will be quashed, where it appears that the original writ has been served upon the garnishees therein named.[39] An appearance of the defendant for the sole purpose of having the alias writ quashed and of setting aside the judgment thereon will not have the effect of an appearance before judgment.[40] A court cannot quash a writ of foreign attachment on a motion based on the garnishee's affidavit that the defendant does not owe the debt demanded.[41] For the purpose of garnishing debts, a foreign corporation lawfully doing business in more than one state may be served with process under the laws of any of the states wherein it does business.[42] Service upon an agent of a corporation is sufficient.[43] By a general appearance the garnishee waives any irregularity in the process.[44] In Missouri the insufficiency of the service can only be raised by a plea in abatement or by a motion to quash the officer's return.[45] The rights of the parties under the process

not to preclude a bill of interpleader by a garnishee to determine to whom the debt should be paid. Water Supply Co. v. Sarnow [Cal. App.] 82 P. 689.

29. Plaintiff having given a bond under Civ. Code 1895, § 4708, and being defeated, the garnishee is not entitled to judgment on the bond against the plaintiff and his sureties, for costs incurred in answering the garnishment. Brunswick Bank & Trust Co. v. Delegal [Ga.] 50 S. E. 44.

30, 31, 32. Harrington v. Gordon [Wash.] 80 P. 187.

33. See 3 C. L. 1555.

34. Michigan: Where garnishment was begun by issuing a short summons, issuance of garnishment may precede the issuance of writs of attachment. Comp. Laws, §§ 731 and 745, are inapplicable. Adams v. Osborne [Mich.] 101 N. W. 220.

35. Arkansas: Under Kirby's Dig. §§ 4631-4634, 3705, a writ of garnishment may issue to another county from a circuit court on a justice's judgment filed therein. St. Louis, etc., R. Co. v. Bowman [Ark.] 88 S. W. 1033. Laws 1866-67, p. 157; Kirby's Dig. § 3707, is repealed by Acts 1889, p. 168. Id.

36. Corporate stocks standing in the name of a decedent and bequeathed by him to a person for life, and at her death to a defendant in a judgment, contingent upon his survival of the life beneficiary, cannot be attached during the interest of the life beneficiary, and prior to distribution, by summoning the executor as garnishee in an ordinary writ of attachment execution without the precedent affidavit and recognizance prescribed by § 32, Act June 16, 1836 (P. L. 755. First Nat. Bank v. Trainer, 209 Pa. 387, 58 A. 816.

37, 38, 39, 40. Glenny v. Boyd, 26 Pa. Super. Ct. 380.

41. Dempsey v. Petersburg Sav. & Ins. Co., 26 Pa. Super. Ct. 633.

42. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

43. Service upon special agent and adjuster of foreign fire insurance company held sufficient. Orient Ins. Co. v. Rudolph [N. J. Eq.] 61 A. 26.

44. Answering. Dodge v. Knapp [Mo. App.] 87 S. W. 47. This is especially true where answer states "that having been summoned as a garnishee in the above entitled cause, makes answer to the interrogatories of said plaintiffs as follows." Id. Plea of nulla bona. First Nat. Bank v. Trainer, 209 Pa. 387, 58 A. 816.

45. Under Rev. St. 1899, § 3451, providing that where the denial of a garnishee's an-

are fixed by the sheriff's return; if it be false he may ordinarily correct it,[46] but in any event he is liable for the truthfulness of his return and the consequences of a false return.[47] Where the garnishee voluntarily delivers the property to the sheriff, the lien on the property is not defeated because the sheriff fails to make return of such delivery, where he retains custody of the property under the writ.[48]

Notice [49] to the defendant in the principal case is generally required.[50]

§ 11. *Answer or disclosure and later pleadings or traverse.*[51]—No formal pleadings are required in garnishment proceedings.[52] The time for filing the answer is largely statutory.[53] The garnishee need not answer pending the determination of a motion to set aside a default;[54] if he answers immediately after the vacation of such default, it is sufficient.[55] By answering to the merits the garnishee appears generally,[56] and waives any objection to the fact that the interrogatories were not filed in time.[57] It is proper to set up in the answer facts showing that the suit is premature.[58] An averment by way of conclusion may be superseded by subsequent allegations.[59]

The usual formulary statement, even if under oath, that at the time of the service of the writ upon him, the person summoned as trustee did not have in his hands any goods, effects or credits of the principal defendant, is in the nature of a plea, to be sustained or overruled according to the evidence adduced in the disclosure or otherwise.[60]

The disclosure must be complete and explicit, containing statements of facts and not conclusions of law.[61] Every statement that the trustee desires to have considered as evidence must be direct, and, under the sanction of his oath, at least that he believes it to be true.[62] In making his disclosure, the trustee may refer to books, papers, etc., and thus make their contents part of his disclosure; but the reference must be so definite and specific that the court may know from the disclosure alone what is referred to.[63] He may refer to and adopt the statements of others made to him or in their testimony, but in such case he must make oath that such statements are true, or that he believes them to be true.[64] The disclosure is taken to be true,[65]

swer is replied to, the issues raised by the denial and reply are the sole issues to be tried; the sufficiency of the service of the garnishment cannot be raised by the garnishee's answer. Dodge v. Knapp [Mo. App.] 87 S. W. 47.

48, 47. Kemp v. Northern Trust Co., 108 Ill. App. 242.

48. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

49. That it is the duty of the garnishee to notify the defendant, see ante, § 5.

50. Quigley v. Welter [Minn.] 104 N. W. 236.

51. See 3 C. L. 1555.

52. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455.

53. One summoned as trustee of the principal defendant in an action should file his answer and submit to examination at the return term. Thompson v. Dyer [Me.] 62 A. 76. Under Civ. Code 1895, §§ 4551, 4709, in the superior court, the garnishee in all cases has until the first day of the second term after the service of the summons of garnishment in which to answer. Averback v. Spivey [Ga.] 49 S. E. 748. The same rule applies to the city court of Moultrie. Id. Default judgment should not be entered for failure to appear at the first term thereafter. Id.

54, 55. Averback v. Spivey [Ga.] 49 S. E. 748.

56. Dodge v. Knapp [Mo. App.] 87 S. W. 47.

57. May v. Disconto Gesellschaft, 113 Ill. App. 415.

58. Wheeler v. Chicago Title & Trust Co. [Ill.] 75 N. E. 455.

59. A statement in an answer that the garnishee is indebted to defendant upon a written contract whereby he agreed to pay a sum of money to defendant and another, held to supersede a prior averment by way of conclusion that the garnishee was indebted to defendant. Badger Lumber Co. v. Stern, 123 Wis. 618, 101 N. W. 1093.

60. Is not the disclosure. Thompson v. Dyer [Me.] 62 A. 76.

61. Thompson v. Dyer [Me.] 62 A. 76. Trustee's disclosure held insufficient. Id.

62, 63. Thompson v. Dyer [Me.] 62 A. 76.

64. Thompson v. Dyer [Me.] 62 A. 76. A sworn account by the trustee's agent is inadmissible unless the trustee makes such statement a part of his disclosure under his oath that he believes it to be true, or unless an issue has been formed by some appropriate allegation. Id.

65. With respect to the amount with which he should be charged. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737. Under Rev.

and judgment upon it is conclusive upon the plaintiff and the defendant.[66] If either of the parties desires to contest the truth of the disclosure, he should do so at the proper time by alleging and proving facts to the contrary.[67] In Maine a statement in a trustee disclosure is evidence and not an allegation under the statute.[68] The allegation which must be made to let in evidence other than the disclosure must be additional to, outside of, the disclosure proper.[69] When it is made to appear that before the service of the writ upon him the trustee had in his hands goods, effects and credits belonging to the principal defendant, he must fully and particularly account for all such if he would avoid being charged generally.[70] Failing to so do, he must be charged generally, the amount to be determined on scire facias, when he may make further disclosure and perhaps be relieved except from costs.[71] In most states a verified account being required, the affidavit must be made by the trustee,[72] and it is not in his power to confer authority upon any other person to make it.[73] A trustee cannot file a verified account after the statutory time.[74] The testimony of the garnishee, leaving it doubtful whether he had or had not moneys of the defendant in his hands at the date of the service of the writ, the case must be submitted to the jury.[75] Prohibition will not lie to restrain the court from proceeding further after entry of an order declaring a garnishee in default for want of disclosure, directing interlocutory judgment against him and referring it to determine the amount of the judgment,[76] nor will mandamus lie to compel the court to set aside such an order.[77]

Notice of the filing of the traverse must be given within the statutory time.[78] A mere suggestion of a possible claim of ownership need not be traversed.[79] An answer not traversed is taken to be true.[80]

§ 12. *Claims or interventions.*[81]—A claimant is entitled to notice of the proceedings,[82] and the garnishee is entitled to this protection.[83] Being notified, the claimant is bound to appear and interplead;[84] not being notified, he is not bound by the proceeding;[85] hence, in neither case is he entitled to an injunction restraining the collection of a judgment against the garnishee.[86] In some states the claim-

Laws c. 189, § 15, in the absence of a fraudulent purpose to defeat creditors, statements by the trustee being made under oath and responsive to the interrogatories are conclusive on the plaintiff. Corsiglia v. Burnham [Mass.] 75 N. E. 253.

66, 67. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737.

68. Rev. St. c. 88, §§ 30, 31, considered. Thompson v. Dyer [Me.] 62 A. 76.

69. Thompson v. Dyer [Me.] 62 A. 76. Held, that sworn statement of attorney in the form of a deposition was inadmissible in evidence for want of the statutory allegation by either party. Id.

70, 71. Thompson v. Dyer [Me.] 62 A. 76.

72. So held under Gen. Laws 1896, c. 254, §§ 10, 12, 13, 18-20, 22, 23, 25 and 29. Marshall v. Gray, 26 R. I. 517, 59 A. 744.

73. Marshall v. Gray, 26 R I. 517, 59 A. 744. Where affidavit was made by trustee's clerk, held, an affidavit by the trustee, subsequently filed, to the effect that the clerk was authorized to make the affidavit, did not validate the latter. Id.

74. Account required by Gen. Laws 1896, c. 254, § 10. Marshall v. Gray, 26 R. I. 517, 59 A. 744.

75. Klein v. Cohen, 25 Pa. Super. Ct. 621.

76, 77. Gorman v. Calhoun [Mich.] 12 Det. Leg. N. 139, 103 N. W. 567.

78. Under Acts 1897, p. 54 (Van Epp's Code Supp. § 6223), notice of the filing of a traverse to the answer must be given 10 days before the trial of the garnishment issue, held that, even if the court had power to postpone the trial to enable notice to be given, it would not do so where five months had elapsed between the filing of the traverse and the calling of the case for trial, no excuse for failing to give notice being offered. Sims v. Price [Ga.] 50 S. E. 960.

79. A statement in the garnishee's answer that it was "informed" that the property, which it admitted having received from the defendant, belonged to a third person, does not need to be traversed by plaintiff, where the property has been surrendered by the garnishee to the officer holding the attachment. Hatcher v. Hendrie Mfg. & Supply Co. [C. C. A.] 133 F. 267.

80. Bartlett v. Willis Mfg. Co., 106 Ill. App. 248.

81. See 3 C. L. 1556.

Evidence held to sustain a judgment in favor of an intervening claimant. Peterson v. Knuutila [Minn.] 102 N. W. 368.

82. Unless notified is unaffected by proceedings. Radzinski v. Fry, 111 Ill. App. 645.

83. Rev. St. c. 62, §§ 11, 12. Bartlett v. Willis Mfg. Co., 106 Ill. App. 248.

84, 85, 86. Radzinski v. Fry, 111 Ill. App. 645.

ant is entitled to take advantage of any defect in the pleadings of his adversary.[87] Garnishment and claim proceedings being collateral to the main suit,[88] a finding in favor of the claimant merely ascertains that his rights in the property are superior to those of the plaintiff under his garnishment, and does not authorize a judgment for the claimant against the garnishee for the property.[89] All claimants to the property being parties to the proceedings no interpleader is necessary.[90]

§ 13. *Dissolution of writ.*[91]—After the dissolution of the garnishment by the giving of a bond, the garnishee must respond to the defendant and cannot relieve himself of liability by paying the money into court.[92] The condition of the bond being for the payment of the judgment that shall be rendered in the garnishment proceedings, a judgment against the garnishee is a condition precedent to a judgment on the bond,[93] and such a condition refers to such a judgment as could have been rendered against the garnishee if the bond had not been given.[94] Where a fund obtained by void garnishment proceedings is in the hands of the clerk of the court, the court should direct such funds to be returned to the garnishee.[95]

§ 14. *Effect of pendency of other proceedings; stay, etc.*[96]—The fact that prior garnishment proceedings are pending against the garnishee, while ground for staying subsequent garnishment proceedings,[97] is not ground for discharging the garnishee in the subsequent proceedings.[98] A party sued for the same debt in two jurisdictions should generally, though not always, plead the pendency of a subordinate action like garnishment in the forum where the main action is pending or was first instituted.[99] The plaintiff and garnishee being the same party, he is not entitled to a stay of execution of a judgment entered against him in a counter suit brought by the defendant unless he pay the money into court.[1]

§ 15. *Trial, verdict and judgments, costs and execution.*[2]—A garnishee in an attachment suit may attack the proceedings had therein upon the ground that they are void.[3] Where plaintiff has a garnishment lien on a debt due defendant by the garnishee, it is not error in a consolidated action by plaintiff and the garnishee to recover such debt, to recite in the judgment against defendant that it was subject to the garnishment lien.[4] A garnishee moving to arrest judgment cannot take advantage of defects appearing on the face of the record in the case against the main defendant.[5]

The plaintiff recovering more than the garnishee admits by his answer to be due, he is generally entitled to costs.[6] Where a suit against a garnishee is consoli-

87. So held where, in accordance with Civ. Code 1895, § 4720, a claim was filed and a bond given to dissolve the garnishment. Civ. Code 1895, § 4723, construed. Gallaway v. Maxwell [Ga.] 51 S. E. 320.

88. Florida Cent. & P. R. Co. v. Carstens [Fla.] 37 So. 566.

89. Florida Cent. & P. R. Co. v. Carstens [Fla.] 37 So. 566. A judgment that the claimant do have and recover of and from the garnishee the property mentioned in both the garnishment and claim proceedings, held erroneous. Id.

90. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. W. 1068.

91. See 3 C. L. 1556.

92. Turner's Chapel African M. E. Church v. Lord Lumber Co., 121 Ga. 376, 49 S. E. 272.

93, 94. Klipstein & Co. v. Allen-Miles Co. [C. C. A.] 136 F. 385.

95. Yeiser v. Cathers [Neb.] 102 N. W. 612.

96. See 3 C. L. 1556.

97, 98. Prichard & Co. v. Critchlow, 56 W. Va. 547, 49 S. E. 453.

99. Grimm v. Barrington [Mo. App.] 84 S. W. 357. Where garnishee sued in Missouri to have an express contract with defendant canceled for fraud and prevailed, it being adjudged that she was under no liability to defendant, held, she was under no duty to plead the garnishment proceedings in a suit brought by defendant in New Jersey upon an alleged implied contract. Id.

1. Hanscom v. Chapin, 27 Pa. Super. Ct. 546.

2. See 3 C. L. 1556.

3. State Bank of Chicago v. Thweatt, 111 Ill. App. 599.

4. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390.

5. Union Compress Co. v. Leffler [Ga.] 50 S. E. 483.

6. Rev. St. 1898, § 2772. Eau Claire Nat. Bank v. Chippewa Valley Bank [Wis.] 102 N. Y. 1068.

dated with an action by the garnishee's creditors to recover the debt, and the garnishee fails to establish his denial of indebtedness in both suits, he is liable for the costs of both.[7] A trustee failing, without reasonable excuse, to file his answer and submit to examination within the required time, he is liable to the plaintiff for all costs afterwards arising in the suit, if the judgment in the action be for the plaintiff.[8] The allowance of costs is largely statutory.[9] In New York on discharge of the "attachment," the sheriff has no cause of action for poundage against the garnishee,[10] nor can he maintain an action or special proceeding to obtain possession of the property after the "attachment" is discharged;[11] but the "attaching" creditor's attorney is personally liable to the sheriff for his poundage.[12]

As a general rule interest does not begin to run against the garnishee until the entry of judgment in the original action.[13]

§ 16. *Appellate review.*—An order quashing a writ of garnishment and releasing the garnishee from further liability, with costs to defendant, is in effect a final judgment against plaintiff in the garnishment proceeding.[14] An appeal does not lie from a judgment charging a trustee, unless the case discloses that an issue was joined upon the disclosure of the trustee.[15] In Wisconsin it is competent for the principal defendant to appeal from a judgment against the garnishee.[16] General rules as to parties apply.[17]

GAS.

§ 1. *Gas franchises; powers and duties of corporations exercising them.*[18]—As against the state, a natural gas company, which is given power to exercise the right of eminent domain, and is a quasi-public corporation, may bury its pipe line in the public highway, where such use does not inconvenience, endanger, or obstruct public travel.[19] A statute providing that a corporation organized to supply gas to

7. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390.

8. Thompson v. Dyer [Me.] 62 A. 76.

9. Acts of April 22, 1863 (P. L. 527); June 11, 1885 (P. L. 107); and April 29, 1891 (P. L. 35), allowing costs to garnishees in attachment executions "issued out of any court of record in this state," do not apply to an alderman's court. Julius King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527. Where plaintiff appeals from an alderman's court and the court permits the garnishee to pay the fund into court less certain fees and costs taxed by the court at an amount stated, the plaintiff may after judgment and verdict in his favor object to the taxation of costs. Id.

10. Laws 1890, p. 940, c. 523, § 17, subd. 2, as amended by Laws 1892, p. 868, c. 418, construed. O'Brien v. Manhattan R. Co., 45 Misc. 643, 91 N. Y. S. 69. The service of the notice on the garnishee of the existence of the attachment under Laws 1892, p. 868, c. 418, and the giving of a certificate to the sheriff, reciting an indebtedness equal to the amount claimed in the attachment and its subsequent payment, does not change the rule. Id.

11. Code Civ. Proc. § 655, construed. O'Brien v. Manhattan R. Co., 45 Misc. 643, 91 N. Y. S. 69.

12. Gadski-Tauscher v. Graff, 44 Misc. 418, 34 Civ. Proc. R. 25, 89 N. Y. S. 1019.

13. Rev. St. 1898, § 2768, construed. Eau Claire Nat. Bank v Chippewa Valley Bank [Wis.] 102 N. W. 1068.

14. Recor v. St. Clair Circuit Judge [Mich.] 102 N. W. 643. Under Comp. Laws 1897, § 10,642 is reviewable by the supreme court on error, and hence mandamus does not lie to review such order and vacate the same. Id.

15. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737.

16. Rev. St. 1898, § 2765, considered. Badger Lumber Co. v. Stern, 123 Wis. 618, 101 N. W. 1093.

17. On appeal from a judgment rendered against plaintiff and in favor of an intervening claimant, neither the defendant nor the garnishee taking any part in the action, held, they were not necessary or material parties to the appeal. Peterson v. Knuutila [Minn.] 102 N. W. 368.

18. See 3 C. L. 1556. See, also, Franchises, 5 C. L. 1518.

19. Corporation organized under Gen. St. 1901, § 1366, to pipe and distribute gas for

several municipalities, and authorized to bury its mains in the streets of each of such municipalities for that purpose, may also occupy the streets of any of such municipalities with mains designed to carry gas from one to another, is valid, and authorizes the laying of mains of the size necessary for such purpose.[20] Where the act incorporating a gas company gave it the right to lay mains and conduct a lighting business in a certain township, its rights were not affected by a subsequent subdivision of the township.[21] A gas company is not entitled to maintain a suit to restrain a rival company from laying its mains in the streets in a manner other than that prescribed by the statute authorizing its incorporation, unless the plaintiff company can show special injury done or threatened.[22] Where plaintiff company has stood by while mains were being laid by defendant and has refused to disclose the location of its pipes when requested to do so, it will be estopped to object to slight deviations from the letter of the law.[23]

Obligation to supply consumers.[24]—A natural gas company occupying the streets of a city or town with its mains owes the duty of supplying to the owners or occupants of houses abutting on such streets, who have made the necessary arrangements and complied with the reasonable regulations of the company, such gas as they may require,[25] and the performance of that duty may be enforced by mandamus.[26] But a petition for a writ of mandamus for such purpose must directly allege compliance with the reasonable regulations of the company at the time of its refusal to furnish gas.[27] A petition for an injunction to restrain a company from shutting off the supply of gas to a consumer must show a contract to supply gas.[28] A gas company authorized to furnish gas for heating purposes only will not be enjoined from shutting off the supply of a consumer who uses the gas supplied for lighting purposes.[29] Where, in consideration of a grant of a right of way for a pipe line, a gas company agrees to supply gas to the grantor so long as the line is in operation, a removal of the pipe line from the grantor's premises will not be enjoined.[30] A gas company, under the New York statutes, may cut off a consumer's supply for failure to pay charges, though the consumer's deposit has not been used up by charges for gas supplied.[31]

§ 2. *Public regulation.*[32]—When a municipality, by ordinance, grants a gas company the right to use its streets, without prescribing a maximum charge or reserving power to thereafter regulate charges, and the company accepts such ordinance and expends large sums in reliance thereon, a contract between the municipality and company results, which cannot be impaired by subsequent ordinances limiting rates, not accepted by the company.[33] In California municipal corporations are authorized by the constitution to regulate charges for gas supplied through pipes laid in the street.[34] Cities of the fifth class may exercise this right though the legis-

light, fuel and power, has such right. State v. Kansas Natural Gas, Oil, Pipe Line & Improvement Co. [Kan.] 80 P. 962.

20. Act April 8, 1903 (P. L. 1903, p. 359), Public Service Corp. of New Jersey v. De Grote [N. J. Eq.] 62 A. 65.

21. Though none of original township remained. Public Service Corp. of New Jersey v. De Grote [N. J. Eq.] 62 A. 65.

22. Evidence held to show compliance with P. L. 1876, p. 316, § 21, by company laying mains, except at one point, and this single exception held not to constitute such irreparable injury as to warrant injunction. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750.

23. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. [N. J. Eq.] 61 A. 750.

24. See 3 C. L. 1557.

25, 26. Greenfield Gas Co. v. Trees [Ind.] 75 N. E. 2.

27. Petition held demurrable. Greenfield Gas Co. v. Trees [Ind.] 75 N. E. 2.

28, 29. Nairin v. Kentucky Heating Co. [Ky.] 86 S. W. 676.

30. Connersville Natural Gas Co. v. Moffett [Ind.] 73 N. E. 894.

31. Laws 1890, pp. 1148, 1149, c. 866, §§ 66, 68. Hewsey v. Queens Borough Gas & Elec. Co., 93 N. Y. S. 1114.

32. See 3 C. L. 1558.

33. City of Rushville v. Rushville Natural Gas Co. [Ind.] 73 N. E. 87.

34. Const. art. 11, § 11. Denninger v. Re-

lature has not acted,[35] and having by ordinance fixed a maximum rate, they have power to make a violation thereof a misdemeanor.[36]

§ 3. *Torts and crimes.*[37]—Natural gas companies are held to a degree of care commensurate with the dangerous character of the agency handled.[38] They are liable for damages or injuries caused by gas negligently allowed to escape from mains.[39] An abutting owner has a right of action against a gas company for the destruction of shade trees in front of his premises caused by gas escaping from the company's pipes in the street, after notice to the company.[40] His right to protect his special rights in such trees is not affected by the right of the city to protect its general rights.[41] A gas company required by law to place a street opened by it in as good repair as when opened is not under the duty of keeping the street permanently in repair.[42] Hence the notice of the time, place and cause of injury, required in actions for injury based on a violation of a duty to keep streets in repair, need not be given when the injury is caused by a trench left unfilled by a gas company.[43] Under a contract permitting the company's agent free access to the meter at reasonable hours, and providing that it might be removed, the company is not liable in trespass where its agent enters and removes the meter, without disturbance and without unnecessary force.[44]

Municipal corporations, authorized to fix maximum rates for gas, may make a violation of a regulating ordinance a misdemeanor, unless prohibited by general law.[45]

GENERAL AVERAGE; GENERAL ISSUE, see latest topical index.

corder's Court of Pomona, 145 Cal. 629, 79 P. 360.

35. Construing Const. art. 4, § 33, and St. 1883, p. 250, c. 49. Denninger v. Recorder's Court of Pomona, 145 Cal. 629, 79 P. 360.

36. Ordinance fixing maximum of $1.50 per 1,000 feet and making it a misdemeanor to collect or receive a greater charge, held valid. Denninger v. Recorder's Court of Pomona, 145 Cal. 629, 79 P. 360.

37. See 3 C. L. 1559. See, also, Explosives and Inflammables, 5 C. L. 1405.

38. Hartman v. Citizens' Natural Gas Co., 210 Pa. 19, 59 A. 315.

39. Sufficiency of evidence: Evidence as to odor of escaping gas previous to explosion, as to defects in mains, etc., held sufficient to show negligence and responsibility of company for explosion which wrecked house. Hartman v. Citizens' Nat. Gas Co., 210 Pa. 19, 59 A. 315. Evidence held sufficient to take case to jury in action for destruction of building and machinery caused by explosion of natural gas. Olive Stove Works v. Ft. Pitt Gas Co., 210 Pa. 141, 59 A. 819. Evidence that gas company knowingly allowed gas to escape from a defective main into an adjoining house where it caused an explosion is sufficient to take a case to the jury on the issue of negligence. Bandler v. People's Gaslight & Coke Co., 108 Ill. App. 187. Manager of natural gas company, who turned on street valve to let gas into house pipes, and then on discovering a leak, turned off the house valve but not the street valve, held negligent, and company held liable for explosion, though agency whereby gas was ignited did not appear. Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002.

Declaration in action against city for wrongful death by gas escaping from city main, held sufficient, though defective main was not shown particularly. City of Richmond v. Gay's Adm'x, 103 Va. 320, 49 S. E. 482.

Defenses: In action for death caused by gas escaping from main, it is no defense that gas escaped from main into abandoned sewer, and thence into decedent's house through a private pipe, instead of through a leak in the main to the house as alleged. City of Richmond v. Gay's Adm'x, 103 Va. 320, 49 S. E. 482. Whether decedent, killed by escaping gas, was guilty of contributory negligence, held for jury, there being evidence that gas had previously been noticed and decedent had made some effort to remedy defect. Id.

40, 41. Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108.

42. Construing Rev. Laws, c. 110, § 76. Seltzer v. Amesbury & S. Gas Co. [Mass.] 74 N. E. 339.

43. Rev. Laws, c. 51, § 20, does not apply to actions against gas companies. Seltzer v. Amesbury & S. Gas Co. [Mass.] 74 N. E. 339.

44. Hitchcock v. Essex & H. Gas Co. [N. J. Err. & App.] 61 A. 397.

45. Denninger v. Recorder's Court of Pomona, 145 Cal. 629, 79 P. 360. A gas corporation agent who collects more than the maximum charge for gas violates the ordinance of Pomona fixing the maximum and making it a misdemeanor to receive or collect a charge greater than such maximum. Id.

GIFTS.

§ 1. *Definitions and distinctions.*[46]—A gift is a voluntary transfer of property without consideration.[47] A gift causa mortis [48] must be made on apprehension of death, which must occur before revoking the gift,[49] and on condition that the gift is void in case of the donor's recovery.

§ 2. *Validity and requisites.*[50]—In order to constitute a valid gift either causa mortis or inter vivos, the gift must be absolute [51] with a clear intent on the part of the donor [52] to divest himself of title and dominion over the property.[53] There

46. See 3 C. L. 1560.

47. A gift of land which covers a part indebtedness is more than a gift in that it fulfills a legal obligation. Lee v. Wrixon, 37 Wash. 47, 79 P. 489.

48. Elements of gift causa mortis. Winslow v. McHenry, 93 Minn. 507, 101 N. W. 799; O'Brien v. Elmira Sav. Bank, 99 App. Div. 76, 91 N. Y. S. 364. A gift causa mortis is in the nature of a testamentary disposition and is governed by the same rules of law which govern wills, and declarations made by the donor at about the same time as the gift are admitted as a part of the res gestae to prove the gift. Dawson v. Waggaman, 23 App. D. C. 428. Distinction between a gift causa mortis and a legacy. Noble v. Gardner, 146 Cal. 225, 79 P. 883. Declarations made by a donor, near enough to the time of the execution of a gift causa mortis to be regarded as part of the res gestae of its execution are admissible in evidence to show his state of mind and his intention in the disposal of his property. Dawson v. Waggaman, 23 App. D. C. 428.

49. Where a son purchases land with money given by his mother, no trust results. Kennedy v. McCann [Md.] 61 A. 625. A promise to give the use of certain real estate during the lifetime of the donor and at his death to give the fee and which promise can be revoked at any time by the donor can be revoked by the guardian of the donor, the donor becoming non compos mentis. Buhler v. Trombly [Mich.] 102 N. W. 647.

50. See 3 C. L. 1560.

51. Carskaddon v. Miller, 25 Pa. Super. Ct. 47. A proimse to give is not equivalent to an actual gift and even in case of a gift of a parent to his minor children there must be some word or act to transfer the title from the donor to the donee. Donaldson v. Everett [Ga.] 50 S. E. 94.

52. Belknap v. Belknap [Iowa] 100 N. W. 115.

Presumption between husband and wife: Where a husband advances money to pay for real estate and the title is taken in the wife's name, it will be presumed that a gift to the wife was intended and not a trust in her husband's favor. O'Hair v. O'Hair [Ark.] 88 S. W. 945; Deuter v. Deuter, 214 Ill. 113, 73 N. E. 453. Where a husband deposits with his wife's earnings some of his own money and the wife subsequently makes additional deposits, a presumption arises, the husband never having claimed the money, that it was a gift to the wife. In re Klenke's Estate [Pa.] 60 A. 166.

53. Delivery by a father of a deed to a third person in favor of his son with the instruction to keep the deed until the grantor's death and then have it recorded disclosed the intent of the grantor to irrevocably divest himself of all dominion over the deed. Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775. Husband deposits money in a bank and takes certificate of deposit in the name of himself and wife. The husband dies never having given up possession of the certificate. In an action by an executor to recover the amount of the certificate of the wife, who had indorsed and obtained the money, held, that the evidence did not show a gift inasmuch as at no time before his death did the deceased release the dominion or control of the deposit. Winslow v. McHenry, 93 Minn. 507, 101 N. W. 799. Where shares of stock were assigned, but did not pass out of the control of the assignor and remained in the possession of her agent, held, that such assignment did not constitute a gift even though it was the evident intention of the assignor to make him a gift "causa mortis." Noble v. Garden, 146 Cal. 225, 79 P. 883. A mere savings bank deposit by the intestate in her own name as trustee for another who was a mere friend and over which deposit intestate exercised complete control during her life was not sufficient to establish a gift inter vivos. Nicklas v. Parker [N. J. Eq.] 61 A. 267. Where husband purchases chattel property as a gift to his wife and the title passes directly from the vendor to her, it is not necessary to have a writing acknowledged and recorded, pass between them to make such a gift valid. Interpretation of sec. 9, ch. 68, Ill. Statutes, in reference to such a gift. Groundenberg v. Groundenberg, 112 Ill. App. 615. Handwriting of a deceased wife on the back of securities "My property given into the hands of my husband and sold by him," did not show a gift of the securities by the wife to her husband. Gittings v. Winter [Md.] 60 A. 630. In an action by an executor to recover shares of stock standing in the name of the defendant where it appeared that they were in the possession of the testatrix at the time of her death and had been purchased by the defendant as her agent, evidence held not to establish a valid gift. Bowron v. De Selding, 94 N. Y. S. 292. Where the payee of a note retains possession of the note, but promises to give the amount to the maker at his death provided the maker keeps up the interest held not to be a valid gift as there was not the requisite delivery.

must be a delivery [54] with intent to immediately vest title [55] as near actual as the subject of the gift will permit; [56] conditional in a gift causa mortis and absolute in a gift inter vivos. Where the property is found in donor's possession on his death, clear and positive evidence of gift is necessary.[57] After delivery, it does not impair the validity of the gift that the property is returned to donor to keep it for donee.[58] The questions of intent and delivery are questions of fact and must be proved by a fair preponderance of testimony [59] and are invariably questions for the jury.[60] A

Trombly v. Klersy [Mich.] 12 Det. Leg. N. 349, 104 N. W. 419.

54. First Nat. Bank v. Taylor [Ala.] 37 So. 695. Where a depositor executed an instrument directing the bank treasurer to add the name of his niece as owner and creditor with the depositor of all the moneys deposited in the bank "with full authority for each or either of us or the survivor of us to draw out the whole or any part of such moneys or interest," held the form of account gave the niece a prima facie title which could not be destroyed in absence of evidence that the charge of account was made for some other purpose than to pass title. Hallenbeck v. Hallenbeck, 103 App. Div. 197, 93 N. Y. S. 73. Making the deed of land to purchaser's daughter and delivery to her at his direction is a sufficient execution of a gift to her of the land. Hulet v. Gates [N. D.] 103 N. W. 628. The presumption of delivery is stronger in case of deeds of voluntary settlement than in deeds of bargain and sale. Baker v. Hall, 214 Ill. 364, 73 N. E. 351; Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775. A gift of a check covering a deposit in a savings bank accompanied by the pass book constitutes a valid gift. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367. Delivery with words of gift of pass book which was subsequently kept in a place to which donor and donee both had access held sufficient gift of savings account. O'Brien v. Elmira Sav. Bank, 99 App. Div. 76, 91 N. Y. S. 364.

55. Deposit to a wife's credit, delivery of a bank book to her, and recognition of her ownership of the fund constitutes a gift to her. Wipficr v. Detroit Pattern Works [Mich.] 12 Det. Leg. N. 309, 104 N. W. 545.

Deposit in joint nomes of donor and donee, donor retaining pass pook, is not sufficient. Taylor v. Coriell, 66 N. J. Eq. 262, 57 A. 810. Agreement by husband and wife to merge their bank accounts into an account to them jointly or the survivor of them is executory and hence is not a gift inter vivos to the survivor. Augsbury v. Shurtliff, 180 N. Y. S. 138, 72 N. E. 927. A gift of a present joint interest in a money deposit, with absolute title if donee survived donor is valid. Kelly v. Home Sav. Bank, 92 N. Y. S. 578. Gift of deposit in name of donor. Bowron v. De Selding, 94 N. Y. S. 292. A gift inter vivos cannot be made to take effect in the future. Harris Banking Co. v. Miller [Mo.] 89 S. W. 629.

56. There is sufficient delivery to sustain a gift of a savings bank deposit where the depositor delivers the pass book accompanied by an order on the bank for payment of the amount of the deposit on production of the pass book, even though the depositor dies before presentation of the pass book and order. McGuire v. Murphy, 94 N. Y. S. 1005; Hill v. Escort [Tex. Civ. App.] 86 S. W. 367. A delivery of a check to the donee is sufficient though it was not cashed until after donor's death. Phinney v. State, 36 Wash. 236, 78 P. 927, cites In Gurnan's Appeal [Conn.] 39 A. 482; Polley v. Hicks [Ohio] 56 N. E. 809; Kimball v. Leland, 110 Mass. 325. A son holding a note against his mother secured by a mortgage directed a friend by letter to return the note to his mother and have the mortgage withdrawn, whereupon the son committed suicide. Upon the face of the note the word "paid" appeared above the son's signature. Held that actual delivery of the note and mortgage was not made and consequently no gift resulted. Wittman v. Pickens [Colo.] 81 P. 299. In order to constitute a valid gift of an insurance policy inter vivos from a wife to her husband, the change of beneficiary must be made before death. Littlefield v. Perkins [Me.] 60 A. 707. Where a boarder gave his landlady a note on going away saying if he did not come back it would be hers, the landlady could not retain it against the administrator of the donor. Hafer v. McKelvey, 23 Pa. Super. Ct. 202. Where a father brands cattle and records the brand for his infant children who are too young to be capable of accepting actual delivery of the same, it was held to satisfy the Texas statute which makes actual delivery essential to constitute a valid parol gift. Coke & Reardon v. Ikard [Tex. Civ. App.] 13 Tex. Ct. Rep. 232, 87 S. W. 869.

57, 58. Bowron v. De Selding, 94 N. Y. S. 292.

59. Strong v. Bridzer, 124 Iowa, 401, 100 N. W. 113[Schmitt v. Schmitt [Minn.] 103 N. W. 214; Cox v. State [Ga.] 52 S. E. 150; Robinson v. State [Fla.] 39 So. 465; Houston v. State [Fla.] 39 So. 468; Littlejohn v. State [Ark.] 89 S. W. 463; Petty v. State [Ark.] 89 S. W. 465; Turner v. Com. [Ky.] 89 S. W. 482; Martinez v. State [Tex. Cr. App.] 89 S. W. 642; Stanley v. State [Tex. Cr. App.] 89 S. W. 643; Garcia v. State [Tex. Cr. App.] 89 S. W. 647; State v. Bell [Del.] 62 A. 147; State v. Edmunds [S. D.] 104 N. W. 1115; State v. Gardner [Minn.] 104 N. W. 971. Where gift is proved by admissions of donor, the meaning of the language used is for the jury. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597. To establish a parol gift of land, there must be positive proof. Schmitt v. Schmitt [Minn.] 103 N. W. 214. Advancements made during the lifetime of the decedent will not be presumed to be intended as gifts. In re Robinson, 45 Misc. 551, 92 N. Y. S. 967. A plural wife may accept a gift of her husband's property or may acquire a title by adverse possession, but where such adverse possession is founded upon a parol gift the gift must be established by clear and convincing evidence. Raleigh v. Wells [Utah] 81 P. 908. A hus-

gift may be by parol except in case of gifts by a married woman [61] and gifts of real estate. But where the donee of real property enters into possession under a parol gift holding an open, continuous, and adverse possession, and makes valuable improvements, his position will not be disturbed.[62] In the absence of any express agreement to the contrary, the donee takes a gift of real property with the incumbrances free from any obligation on the part of the donor to remove the same.[63]

§ 3. *Fraud, undue influence, mistake, and incapacity.*[64]—A gift by an insolvent is usually deemed in fraud of his creditors.[65] Children as well as creditors may have a right to complain if property is disposed of to the prejudice of their legal rights by gratuitous disposition,[66] and as between the parties every valid gift must

band deposited money in bank in the name of his wife and also a signature card for the purpose of facilitating business in reference to the account. The signature in question read "Mrs. D. E. Taylor per C. E. Taylor." In an action by the widow to gain control of the fund, held, evidence insufficient to show delivery essential to a valid gift. First Nat. Bank v. Taylor [Ala.] 37 So. 695. Evidence considered on question as to whether a not was left with another for collection or a gift was intended. Wedding v. Wedding [Ky.] 87 S. W. 313. A gift of a bank deposit during the plaintiff's lifetime made by her father may be proved by parol. Hill v. Escort [Tex. Civ. App.] 86 S. W. 367. Evidence showed rather an attempted testamentary disposition of shares of stock than a valid gift either inter vivos or causa mortis. In re Bayley [N. J. Eq.] 59 A. 215. Where plaintiff's father was indebted to him at the time he placed a certain sum of money in the bank to the plaintiff's credit, it will be presumed in the absence of clear convincing evidence that the deposit was intended as a payment on the debt and not as a gift. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

60. Evidence held to show an advancement, not a gift. In re Reinoehl's Estate [Pa.] 61 A. 943. Delivery to donor's niece held to be a gift and not merely a bailment for safekeeping. Walker v. Hargear, 36 Wash. 672, 79 P. 472. Where defendant's mother by endorsement and delivery of a note executed by the defendant to her made a gift of it to him, the fact that the defendant's father had possession of the note at the time of his death would not of itself defeat the defendant's title acquired by the gift and whether indorsement and delivery by the defendant's mother constituted a valid gift was a question of fact for the jury. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784. In an ejectment suit, where the fact appears that the deed was of the wife's separate property and made in the husband's name, the burden is on the defendant to show that a gift was intended and not a trust. Intention is a question of fact for the jury. Carter v. Becker, 69 Kan. 524, 77 P. 264. Whether a mother in having her account in a savings bank made out in the names of herself and daughter "or the survivor of them" intended to and did give her daughter a joint interest with her with absolute ownership over the entire fund in case of survivorship is a question of fact for the jury. Kelly v. Home Sav. Bank, 92 N. Y. S. 578.

61. A married woman cannot give away her separate estate in land by a parol gift. Tannery v. McMinn [Tex. Civ. App.] 86 S. W. 640. Improvements made on the land by a donee of a married woman do not estop such married woman or her grantees from setting up the defense that her parol gift of the land was invalid on the ground of her coverture. Id.

62. In an action of ejectment by the heirs at law against a son of the decedent who claimed the land under a parol gift and had for a number of years held open and independent possession and had made improvements to greater value than the cost of the land. Held, under such conditions, that there was a valid gift notwithstanding the statute of frauds and perjuries and even though the gift was between parent and child. Caldwell v. Caldwell, 24 Pa. Super. Ct. 230. Possession of property by a son under an alleged parol gift must be definite and conclusive and not concurrent with the father, and the fact that the son has made valuable improvements will not be treated as sufficient evidence to support a gift because the relation between the parties prevents the inference which might otherwise arise from the fact. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404. Where a son accepted a parol gift of eighty acres of land from his father and entered on the premises, expended money on it, and built a dwelling house, held that, even though such a parol gift was void under the statute of frauds, the entry and occupation after the promise with knowledge of the father was such a part performance as to take it out of the statute and constitute a valid gift. Schmitt v. Schmitt [Minn.] 103 N. W. 214. Evidence necessary to establish a parol gift of land: "If a parol gift is established by a preponderance of the evidence, coupled with acts of possession and improvements, that would be sufficient to establish the right in the appellees." Field v. Field [Tex. Civ. App.] 87 S. W. 726. After a deed of gift was signed and acknowledged, the grantor made a manual delivery of the deed to the grantee who gave it to her brother to keep for her. The delivery was held to be complete, but it did not free the donee from the obligation of incumbrances. The donor gives only what he has to give. Fischer v. Union Trust Co. [Mich.] 101 N. W. 852.

63. Cribbs v. Walker [Ark.] 85 S. W. 244.

64. See 3 C. L. 1652.

65. See Fraudulent Conveyances, 3 C. L. 1535.

66. When rights of children are purely future, contingent and possible, and those of

be free from undue influence, fraud,[67] mistake,[68] and duress.[69] In Louisiana a statute limits the amount which may be given to one with whom donor lived in immoral relations.[70] A gift reducing the donor to penury has been held void.[71]

GOOD WILL.[72]

Good will is the well-founded expectation of continued public patronage.[73] It is the result of the employment of capital in some established line of business.[74] It augments the value and is an incident to the conduct of the enterprise.[75] It includes confidential information which in the natural course of events would divert business to the establishment to which it attaches.[76] It does not necessarily attach to the place where the business is carried on.[77] Good will as a commercial commodity does not exist except in business of a commercial nature.[78] Personal good will cannot be bought or sold.[79] A trading [80] or a banking corporation may have a good will.[81] A stockholder has no vendible interest in the good will of the corporation.[82] The good will of a business does not pass with a sale of it unless expressly mentioned,[83] or unless it passes as an appurtenant.[84] A sale of the good will of a firm forced upon a surviving partner by the administrator of a deceased partner does not preclude the survivor from competing with the purchaser or soliciting business from old customers.[85] Hence a sale of the good will by a surviving partner who had for some time since the dissolution of the firm carried on the business alone is not a sale of the

creditors are actually existing and the property of the parent was a pledge of the creditors at the time of the gift, the rights of the creditors will prevail. Griffith v. Alcocke, 113 La. 514, 37 So. 47. That a gift by a parent disables him to make equally large gifts to his other children gives them no ground to attack the gift. Kennedy v. McCann [Md.] 61 A. 625.

67. See Fraud and Undue Influence, 3 C. L. 1520.

68. See Mistake and Accident, 4 C. L. 674.

69. See Duress, 5 C. L. 1047.

70. A beneficiary of an insurance policy held to be entitled to only one-tenth of the amount of the policy, she having no insurable interest in the life of the deceased. The one-tenth being a gift which the assured was entitled to under the code which limits the donation of movables. New York Life Ins. Co. v. Neal [La.] 38 So. 485. A donation causa mortis in favor of one with whom the testator is living in open concubinage must at the instance of the heirs at law be reduced to one-tenth part of the value of the estate payable from the movables. Succession of Landry [La.] 38 So. 575.

71. Harris v. Wafer, 113 La. 822, 37 So. 768.

72. As to contracts not to engage in competing business, which are frequently incident to a sale of good will, see Contracts, 5 C. L. 664.

73. As defined by Civ. Code, § 992. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

74, 75. Lindemann v. Rusk [Wis.] 104 N. W. 119.

76. The servants of the seller will not be permitted to divert, by means of information acquired while so employed, business which in the natural course of events would have gone to the purchaser. International Register Co. v. Recording Fare Register Co., 139 F. 785.

77. The good will of a banking corporation may follow it wherever it sets up offices in the city. Lindemann v. Rusk [Wis.] 104 N. W. 119.

78. Acme Harvester Co. v. Craver, 110 Ill. App. 413.

79. Acme Harvester Co. v. Craver, 110 Ill. App. 413. In business of a professional nature it attaches to the person. Such part of it as does not is so small that equity will not regard it as a matter of sale. Id.

80. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

81. Lindemann v. Rusk [Wis.] 104 N. W. 119.

82. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. A sale by him does not preclude him from the enjoyment of any rights he might have enjoyed regardless of such sale. Id.

83. MacMartin v. Stevens, 37 Wash. 616, 79 P. 1099. The sale of the right to use one's own name in connection with one's business must be expressly stipulated and clearly shown. Blanchard Co. v. Simon [Va.] 51 S. E. 222. Evidence insufficient to show a sale of the good will of a business. Craver v. Acme Harvester Co., 209 Ill. 483, 70 N. E. 1047. A sale of good will and an agreement not to engage in the same line of business in the town so long as the purchaser conducts the business purchased is not violative of the common law or anti-trust statutes. Crump v. Ligon [Tex. Civ. App.] 84 S. W. 250.

84. Good will is an appurtenant and passes with a sale of a business and everything thereunto appertaining. Acme Harvester Co. v. Craver, 110 Ill. App. 413.

85. Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974.

partnership good will, but of his own.[86] The good will of a corporation whose charter has expired may be transferred within the period its directors are authorized to continue business to wind up its affairs,[87] and a misappropriation of it by them will be treated as a sale, voidable at the option of those beneficially interested, who may require an accounting.[88]

GOVERNOR, see latest topical index.

GRAND JURY.[89]

Constitution of juries; qualifications of jurors.[90]—Statutes requiring a certain number of persons to constitute a grand jury are mandatory;[91] but if the required number are impaneled and sworn, the fact that one is subsequently excused for incompetency does not invalidate the jury.[92] A statute requiring a jury list to be made from names on the assessment roll does not prescribe a property qualification for jurors but a mode of selecting them.[93] The qualifications of jurors in the Federal courts in each state are the same as the qualifications of jurors in the highest court of such state.[94] An opinion as to guilt which would disqualify a petit juror would disqualify a grand juror.[95] Stockholders in a corporation which defendant is accused of defrauding are not disqualified by interest to act as grand jurors in the consideration of the case.[96] Service as a grand juror at the previous term disqualifies in Georgia.[97]

Jury lists; summoning and impaneling of jury.[98]—Where statutes regulating the selection and organization of grand juries are specific and mandatory, they must be followed.[99] If statutes are merely directory, substantial compliance is sufficient,[1]

86. He is not obliged to account to the representatives of the deceased partner. Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974.

87. Lindemann v. Rusk [Wis.] 104 N. W. 119.

88. Lindemann v. Rusk [Wis.] 104 N. W. 119. The misappropriation of the good will of a defunct corporation by a director whose duty it is to wind up the corporate affairs is not a tort, but gives rise to an action for an accounting or for injury to the personal estate. Survives the death of the director. Id.

89. The qualifications of grand jurors are ordinarily the same as those of petit jurors, as to which, see Jury, 4 C. L. 358.

90. See 3 C. L. 1562.

91. Twenty-three in Maryland. State v. McNay [Md.] 60 A. 273.

92. State v. McNay [Md.] 60 A. 273.

93. Construing Oregon statutes. United States v. Mitchell, 136 F. 896.

94. Rev. St. U. S. § 800. United States v Mitchell, 136 F. 896.

95. Where on resubmission of an accusation, six jurors were the same as those who returned the first indictment and all said that they would vote to find defendant guilty on the evidence before presented, they were disqualified, though they said they could give a verdict on the evidence alone. State v. Bullard [Iowa] 102 N. W. 1120.

96. Foreman and another member stockholders, but no malice or other motive than sense of public duty was shown. State v. Turner [N. J. Law] 60 A. 1112.

97. Acts 1903, p. 83. McFarlin v. State, 121 Ga. 329, 49 S. E. 267.

98. See 3 C. L. 1563.

99. Where clerk failed to send to judges of election, with number of jurors to be drawn from ballot boxes, the form of oath to be taken by such judges, as required by St. 1893, § 3098 (6); and also made, prior to general election at which jurors were drawn, only a partial apportionment of jurors to different precincts, and directed jurors in certain precincts not to return jury lists, a grand jury drawn from lists so made was illegal. Sharp v. U. S. [C. C. A.] 138 F. 878. Where statute provided that names first drawn from jury box should constitute grand jury, and latter names petit jury for the term, and two grand jurors were improperly excused and their places filled by names thereafter drawn, the grand jury was illegal. Id.

1. Statutory requirements as to the time of issuing writs of venire facias for grand juries and the summoning of grand jurors are directory and substantial compliance

and mere irregularities, no matter how glaring, if untainted by fraud and corruption, do not vitiate the indictment.[2] Where the law requires the names of grand jurors to be placed in a box, and a certified list of the names placed therein made, court minutes showing a grand juror's name to have been drawn from the box are conclusive as to his competency, though his name does not appear on the certified list.[3] A law requiring jurors to be selected by commissioners appointed by the governor is not an unconstitutional infringement of the power of the judiciary.[4] Where the law provides that jury commissioners shall select from the tax lists and pollbooks the names to be submitted to the judges, from which the latter are to select jurors, the commissioners may select the preliminary names either from the tax lists or pollbooks,[5] and it is not improper for them to select names from lists furnished at their request from persons in the different election districts.[6] In Louisiana, the presence of two or more competent witnesses at a meeting of jury commissioners to select grand jurors and draw petit jurors is essential to the validity of the proceeding.[7]

The time at which a jury may be organized depends upon the statute.[8] A jury organized at a time when court could not be legally held is illegal, and an indictment by such a jury is void.[9]

The fact that more jurors are summoned than can be legally impaneled is immaterial and does not affect the legality of the grand jury.[10] The trial court is clothed with reasonable judicial discretion to excuse jurors,[11] and is not deprived of this authority by the enumeration in the statute of certain grounds for relieving jurors.[12] A grand juror who reports after the jury have been sworn and charged may or may not be sworn, in the discretion of the court, if there are enough jurors without him.[13] Temporary absence of a juror does not reduce the number of jurors so as to authorize the court to add new members.[14]

The district courts of Oklahoma possess common-law jurisdiction, and have power and authority to invoke the common-law method of summoning a grand jury, when no other provision is made by statute, or when the statutory provision is inadequate.[15]

Powers and procedure.[16]—It is generally held that a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge

therewith is sufficient. State v. Taylor [W. Va.] 50 S. E. 247.

2. Posey v. State [Miss.] 38 So. 324.

3. Washington v. State [Ga.] 50 S. E. 920.

4. Acts 1904, p. 954, c. 560, is valid. State v. McNay [Md.] 60 A. 273.

5. State v. McNay [Md.] 60 A. 273.

6. Plea in abatement bad for uncertainty which failed to allege that such lists were voluntarily furnished, and that the commissioners did not request the lists or make an examination of those submitted, and that the names of the two hundred persons selected were not on the tax lists or pollbooks. State v. McNay [Md.] 60 A. 273.

7. Act No. 135 of 1898, p. 218, § 4. State v. Feazell [La.] 38 So. 444.

8. Ky. St. 1903, § 2244, providing for summoning of jurors before the opening of a special term, is not mandatory, and a judge may summon a grand or petit jury after the opening of the term. White v. Com. [Ky.] 85 S. W. 753. In Indiana a circuit judge is authorized to impanel a grand jury at an adjourned term. Donahue v. State [Ind.] 74 N. E. 996.

9. Skinner v. State [Ala.] 38 So. 242.

10. United States v. Mitchell, 136 F. 896.

11. Excusing juror, who said he could not be impartial, proper, though his discharge was not asked for by anyone else. State v. Strait [Minn.] 102 N. W. 913. A juror may be discharged for cause by the court, and the possible or probable effect of the absence of such juror is not open to inquiry. Record showing discharge for cause is conclusive as to sufficiency of cause. United States v. Mitchell, 136 F. 896.

12. State v. Strait [Minn.] 102 N. W. 913.

13. United States v. Mitchell, 136 F. 896.

14. Indictment void where one of thirteen jurors was absent to attend a funeral, and court added three new members to the grand jury. Nordan v. State [Ala.] 39 So. 406.

15. Smith v. Territory, 14 Okl. 518, 79 P. 214.

16. See 3 C. L. 1563.

of some of its members.[17] It is not only the privilege but the duty of the grand jury to present all offenders, where the offense comes to their knowledge during the time of their service, and it is immaterial in what way the information is received.[18] In New York, it is held that a grand jury may, in the exercise of its inquisitorial powers, make a presentment or report, although an indictment cannot or does not follow it;[19] and such a report need not be stricken though a public official be designated as responsible for the matters criticised in the report.[20] A grand jury which has taken up a case but failed to indict has no power to continue it to the next term.[21] But a motion in arrest of judgment by one whose case has been thus continued is properly denied where he does not show that he has been prejudiced thereby.[22] A charge of murder may be referred to a grand jury after the accused has been indicted for manslaughter.[23] An objection that such reference was in the absence of accused is unavailing, when it does not appear that any juror of those that returned the indictment was disqualified, or that accused was prejudiced.[24] A grand jury organized from the list of a certain year may present a valid indictment, though the jury list for the succeeding year has been made and filed.[25]

When a state's attorney, though in attendance upon court, refuses to discharge his duties, the court has implied power to appoint another member of the bar to appear before the grand jury to advise them as to the law and to frame indictments.[26] In Missouri, the attorney general may properly perform such services when directed by the governor to assist a prosecuting attorney.[27]

The presence of a stenographer in the jury room during the deliberations of the jury is improper,[28] unless the employment of such outside stenographer is authorized by law.[29]

While a judge, in charging a grand jury, has authority to direct their investigations in special directions, he has no power to call attention to a particular individual.[30]

A witness before a grand jury may refuse to answer questions which would

17. In re Hale, 139 F. 496. Where a witness refused to answer and a presentment charging contempt was made to the court, and the court, after a hearing, ordered him to answer, the court's action was held equivalent to an express instruction to the jury to investigate the matter referred to in the presentment, and hence original lack of authority to investigate the matter was cured, and could not be availed of by the witness. Investigation under anti-trust act. Id.

18. Proper to present an offense disclosed incidentally in course of investigation of another wholly disconnected offense. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

19. Code Cr. Proc. § 260. Jones v. People, 101 App. Div. 55, 92 N. Y. S. 275.

20. Jones v. People, 101 App. Div. 55, 92 N. Y. S. 275.

21, 22. State v. Brown [Iowa] 102 N. W. 799.

23, 24. Nash v. State [Ark.] 84 S. W. 497.

25. Under Code Civ. Proc. § 245. State v. Second Judicial Dist. Ct. [Mont.] 78 P. 769.

26. Taylor v. State [Fla.] 38 So. 380. Hence a plea in abatement alleging that one not the state attorney performed such duties, though the state attorney was in attendance on court, but not alleging that the state attorney was ready and willing or offered to perform such duties, is subject to demurrer. Id.

27. It is the right and duty of the attorney general of the state, when directed by the governor to assist a prosecuting attorney under Rev. St. 1899, § 4940, to appear before the grand jury when required by them to examine witnesses and give advice, in accordance with § 2496. State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105.

28. In Missouri, a grand juror acts as clerk; hence it is improper to allow a stenographer not a member of the grand jury to be present during their deliberations. State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105.

29. The presence of a stenographer in the grand jury room during the deliberations does not invalidate its indictments, since the employment of such stenographer is authorized by Acts 1900-01, p. 308. Smith v. State [Ala.] 39 So. 329. In Washington, county commissioners have no power to appoint one not a member of the grand jury as a stenographer for that body, nor to employ the clerk appointed by that body from its own number as stenographer. Ball. Ann. Codes & St. §§ 342, 6810. Mather v. King County [Wash.] 82 P. 121.

30. Error for judge, charging relative to violation of liquor laws, to ask jury if they had never heard of a certain named person. Fuller v. State [Miss.] 37 So. 749.

tend to incriminate him, or may waive his privilege and testify; in the latter case, he is liable to prosecution for perjury if he testifies falsely.[31]

Effect of illegality in constitution or proceedings of juries.[32]—Absolute incompetency of any of the jurors who found an indictment renders it null and void,[33] unless it appears that a sufficient number concurred in presenting the indictment without the incompetent juror.[34] The illiteracy of one juror does not, in Maryland, invalidate an indictment.[35] Mere irregularities of procedure, not shown to have resulted in prejudice to the accused, are not sufficient ground for setting aside an indictment.[36] In the absence of contrary proof, the proceedings will be presumed to have been regular.[37]

Objections and waiver thereof; estoppel to urge.[38]—As to the manner of raising objections to the illegality of a jury or the proceedings, the practice varies. Incompetency or disqualification of jurors is usually raised by challenge [39] or plea in abatement.[40] A plea [41] or challenge [42] should be based upon a statutory ground. A plea in abatement setting up several claims, any one of which, if proved, would show that the grand jury was unlawfully constituted, is bad for duplicity.[43] A plea relating to irregularity in the constitution or organization of the grand jury must

31. State v. Faulkner, 185 Mo. 673, 84 S. W. 967.

32. See 3 C. L. 1562, 1563.

33. State v. Mercer [Md.] 61 A. 220.

34. That a juror was deaf and could not hear proceedings does not invalidate indictment under Code 1896, § 5039, requiring concurrence of twelve jurors, where it appeared there were seventeen jurors in all present. Smith v. State [Ala.] 39 So. 329.

35. Acts 1904, p. 954, c. 560, § 1, requiring jurors in Prince George's county to be able to read and write English, is not mandatory, and disqualification of a single juror is not fatal. State v. McNay [Md.] 60 A. 273.

36. Presence of unauthorized stenographer held not to invalidate indictment, no prejudice to defendant being shown. State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105. Absence of a juror is no objection available to a defendant if the absence was not during consideration of defendant's case. Id. Where the court, having excused certain jurors, selected certain bystanders to take their places, and increased the original number of jurors by two, such procedure was held not such error as to warrant reversal of conviction, no prejudice being shown, and the statutes regulating formation of grand juries being directory only. Posey v. State [Miss.] 38 So. 324. Where only one of the names of two eligible jurors was drawn from the box, and while such juror was absent from the county, the other, having a similar name, was summoned, though his name had not been drawn, the proceedings of the jury were not invalidated, there being no fraud or false personation by the juror so summoned. Taylor v. State [Fla.] 38 So. 380. Mere general objections that a Federal district attorney was prejudiced and bitter against defendant, worked up feeling against him, and was present in the jury room during the deliberations preceding the indictment, are insufficient to authorize setting the Indictment aside. United States v. Mitchell, 136 F. 896.

37. Where record shows a grand jury organized in the oyer presented indictments at the quarter sessions, it will be assumed in the absence of contrary proof that there was no justice of the supreme court then present at the court house. State v. Turner [N. J. Law] 60 A. 1112.

38. See 3 C. L. 1562.

39. Under Acts 1903, p. 83, a grand juror who has served at one term is ineligible to serve at the next succeeding term; such disqualification may be taken advantage of by challenge made or plea in abatement filed, in due time. McFarlin v. State, 121 Ga. 329, 49 S. E. 267.

40. Incompetency of a juror may be raised by a plea in abatement. State v. Mercer [Md.] 61 A. 220.

41. Under art. 36 of the Declaration of Rights, providing that religious belief shall not disqualify as a witness or juror a person otherwise competent, "provided he believes in the existence of God" and accountability to him, a plea to an indictment alleging that a juror was an atheist and infidel and did not believe in the existence of God "nor in the truths of the Holy Scriptures" is bad, presenting a false issue; belief in the Scriptures not being required. State v. Mercer [Md.] 61 A. 220.

42. The right of peremptory challenge either to the array or poll does not exist at common law, and hence such challenge obtains only for causes specified by statute, to be exercised by the persons therein named. Exclusion of two jurors held improper because at suggestion of prosecutor for territory, and not on statutory grounds. Sharp v. U. S. [C. C. A.] 138 F. 878. Rev. Code Cr. Proc. § 166, does not include ground that names properly placed on list were stricken by county commissioners and others substituted. State v. Shanley [S. D.] 104 N. W. 522.

43. Plea alleging that grand jury did not consist of twenty-three lawful jurors; that the two hundred persons from whom they were drawn were not legally selected; and that the law requiring jurors to be drawn by commissioners appointed by the governor is unconstitutional, is bad for duplicity. State v. McNay [Md.] 60 A. 272.

show in what the irregularity consists.[44] Objections which may be raised by challenge are usually held unavailable after the jury has been impaneled,[45] or an indictment found,[46] or a verdict by a trial jury rendered,[47] though a plea in abatement may be a proper mode of objecting if a sufficient reason for failure to act at the proper time is shown.[48] In some states, when defendant has not been held to answer before the finding of the indictment, the indictment will be set aside on motion on any ground which would have been a ground of challenge, to the panel, or to any juror.[49] Objections not going to the qualifications of jurors, but merely to the regularity of proceedings by which the grand jury is organized, cannot be raised by pleas in abatement.[50] Federal courts will be guided by state laws and the common law in ruling upon objections to the validity of a jury.[51]

A jury commissioner who by his own misconduct in office has rendered the making of a jury list irregular cannot assert the illegality thereof when called to answer a charge made against him by a grand jury selected from such list.[52]

Disclosure of secrets.[53]—Under statutes protecting grand jury deliberations from publicity, and prohibiting disclosure of the votes of jurors on indictments, a grand juror cannot testify as to the number of votes for an indictment,[54] nor whether an indictment was based on any evidence.[55] But the record of the proceedings before

44. Plea charging generally that no writ of venire facias was issued and served within the time and in the manner prescribed by the statutes (naming them) and that the body of men presenting the indictment did not constitute a legal grand jury, held insufficient. State v. Taylor [W. Va.] 50 S. E. 247.

45. Objections arising from mere matters of procedure must be presented before impanelment. Posey v. State [Miss.] 38 So. 324. A denial of a challenge to a grand jury panel will be sustained where it does not affirmatively appear that the challenge was made before the grand jury was sworn. Rev. Code Cr. Proc. § 173. State v. Shanley [S. D.] 104 N. W. 522. In Mississippi, a challenge for disqualification, whether from bias or personal incompetency, must be made before the jury is impaneled (Cain v. State [Miss.] 38 So. 227); the objection cannot be raised by motion to quash the indictment, even though defendant did not know that his case was to be investigated (Id.).

46. An accused, arrested on preliminary information and held to answer, waives objections to the selection and drawing of the grand jury, and cannot urge them after the return of the indictment. Under Iowa statutes. State v. McPherson, 126 Iowa, 77, 101 N. W. 738. Plea to indictment on ground that a grand juror had not resided in county six months properly overruled when it did not appear that accused did not have notice and opportunity to raise the question by challenge before the finding of the indictment. Edwards v. State, 121 Ga. 590, 49 S. E. 674. The objection that a grand juror was an alien cannot be raised by an objection to the indictment in a Federal court sitting in Oregon. Construing B. & C. Comp. §§ 1269, 1268, 965. United States v. Mitchell, 136 F. 896. As against an indictment purporting to have been returned by a legal grand jury, a motion to quash does not present any question concerning the qualifications of the grand jurors, or as to their having been regularly charged and sworn. Donahue v. State [Ind.] 74 N. E. 996.

47. Though a defendant is given no opportunity to challenge a grand jury, if he does not appear and request it, and makes no objection to the proceedings until after his conviction by the trial jury, he cannot raise the objection by a motion in arrest of judgment. State v. Brown [Iowa] 102 N. W. 799. An objection that certain members of the grand jury which presented an indictment were disqualified because of service at the previous term is ground for challenge propter defectum and must be made at the trial; it is too late when made after verdict. Phillips v. Brown [Ga.] 50 S. E. 361. Thus, objection is no ground for release by habeas corpus of the one convicted and sentenced. Id.

48. Where a plea avers that defendant had no knowledge or reason to believe an indictment would be presented, and excused nonaction, it was held to be sufficient and to have been filed in time. McFarlin v. State, 121 Ga. 329, 49 S. E. 267.

49. State v. Lamphere [S. D.] 104 N. W. 1038. Under Rev. Code Cr. Prac. S. D. §§ 263, 166, objections that the grand jury was illegally drawn, organized and impaneled; that there were not in the jury box the names of two hundred qualified jurors when the jury was drawn; and that, when six men failed to appear, the court gave the sheriff six names, and the persons so named served,—were not available on motion to set aside the indictment. Id.

50, 51. United States v. Mitchell, 136 F. 896.

52. The doctrine of estoppel is applicable to criminal proceedings. State v. Second Judicial Dist. Ct. [Mont.] 78 P. 769.

Note: See Criminal Law, 5 C. L. 884, for an extensive note on the application of the doctrine of estoppel to criminal cases.

53. See 3 C. L. 1563.

54. Nash v. State [Ark.] 84 S. W. 497.

55. State v. Faulkner, 185 Mo. 673, 84 S. W. 967.

a grand jury, and testimony of grand jurors and prosecuting attorney, are admissible as competent original evidence upon a trial in court to show immunity of accused from prosecution by virtue of his testimony before the grand jury.[56] A statute authorizing the employment of a stenographic reporter to take a record of grand jury proceedings, and requiring such reporter to take an oath to maintain secrecy regarding the grand jury proceedings, does not change the rule as to secrecy concerning such proceedings, nor authorize inspection of the record by any member of the public; nor does a person accused have a right to inspect such record in order to prepare for trial.[57] The record is not itself evidence of the facts reported, but is competent only as a memorandum to refresh the memory of witnesses who knew of the facts recorded at the time.[58]

GROUND RENTS, see latest topical index.

GUARANTY.

§ 1. *What constitutes guaranty.*[59]—A guaranty may be defined as a collateral promise to answer for the debt of another.[60] The promise must be collateral and the promisor must be liable only on default of the principal debtor, for otherwise if both principal and guarantor are liable, it ceases to be a contract of true guaranty and is one of suretyship.[61] There must be a subsisting and contemplated debt,[62] otherwise it is a contract of indemnity [63] or a novation,[64] or a primary debt on part

56. Held admissible in behalf of a defendant to show immunity from prosecution on account of his having testified before the grand jury, such exemption being claimed under Rev. St. 1898, § 4078, as amended by Laws 1901, p. 106, c. 85. Construing also Rev. St. 1898, §§ 2553-2555. Murphy v. State [Wis.] 102 N. W. 1087. Minutes of proceedings before grand jury admissible. Havenor v. State [Wis.] 104 N. W. 116.

57. Construing Laws 1903, p. 136, c. 90. Havenor v. State [Wis.] 104 N. W. 116.

58. Havenor v. State [Wis.] 104 N. W. 116.

59. See 3 C. L. 1564.

60. Contract construed to be collateral rather than original. Halsted v. Pelletreau, 101 App. Div. 125, 91 N. Y. S. 927. The parties may vary the relation of guaranty by the tenure of a special contract. Jackson v. Swart [N. Y.] 75 N. E. 226. A contract whereby if A would invest less than $500 in a certain corporation he would have the return of the money invested and twenty per cent. profit in a contract of guaranty within the statute of frauds. Hunt v. Taylor [Ky.] 87 S. W. 290. A contract of guaranty cannot be a renewal of a contract wherein the parties in the second instance were primarily liable. Lowry Nat. Bank v. Fickett [Ga.] 50 S. E. 396.

61. Sometimes termed an absolute guaranty. A guaranty of payment and collection by the assignor of a mortgage is an original promise. Loos v. McCormack, 46 Misc. 144, 93 N. Y. S. 1088. Contract for sale of cattle and liquidated damages followed by clause reading "We the undersigned guarantee the fulfillment of the above contract." Held since the obligation rests on no independent consideration it is a contract of suretyship rather than guaranty. Fields v. Willis [Ga.] 51 S. E. 280. An agreement to guaranty the payment of any balance due on a contract is an absolute guaranty. Ruberg v. Brown [S. C.] 51 S. E. 96. "If P fails to make payments aforesaid when due the undersign agree to make payment * * * as though primarily liable" is a contract of sureyship. American Radiator Co. v. Hoffman, 26 Pa. Super. Ct. 177. Where the promise of the guarantor is that "I will see you paid" it is a contract of guaranty and not absolute. Wray v. Cox [Miss.] 38 So. 344.

62. Agreement, if any, to be responsible for debts of subcontractors not an original promise, where persons furnishing materials, etc., treated subcontracor as their debtor until after he absconded. Miller v. State [Ind. App.] 74 N. E. 260. Where a married woman promised to pay for materials used in the improvement of her own property it is a guaranty if the creditor still gave the credit to her husband. Reelman v. Grosfend [Mich.] 12 Det. Leg. N. 335, 104 N. W. 331.

63. Wattenbarger v. Hodges [Tex. Civ. App.] 85 S. W. 1013.

64. Palmetto Mfg. Co. v. Parker [Ga.] 51 S. E. 714. To make a novation there must be mutual assent between the debtor, the cred-

of the alleged guarantor often termed "an original promise."[65] The promise must be to the creditor and not to the debtor,[66] and the debt must be of another,[67] and not founded on a consideration which subserved some purpose of the guarantor.[68] And where the guarantor obtains some substantial consideration or benefit for his promise on a quasi contractual theory, he is held to be absolutely liable and his promise original.[69]

§ 2. *Form and requisites of the contract.*[70]—In cases of guaranty, there must be a contract between the guarantor and the creditor[71] which must be accepted,[72] and notice thereof must be communicated to the promisee,[73] except when the giving of such notice is waived[74] or where the guaranty is absolute.[75] The consideration

itor, and the new promisor. Netterstrom v. Gallistel, 110 Ill. App. 352.

65. Where credit is given to the alleged guarantor and not to the debtor it is evidence that the contract is regarded as original. Cauthron Lumber Co. v. Hall [Ark.] 88 S. W. 594; Long v. McDaniel [Ark.] 88 S. W. 964.

66. Peters v. George [Cal. App.] 81 P. 1117.

67. A promise to pay one's own debt though it incidentally involves the payment of that of another is not a contract of guaranty. Runkle v. Kettering [Iowa] 102 N. W. 142; Potter v. Greenberg, 24 Pa. Super. Ct. 502. Where a person uses a corporation to cloak his own transaction, a guaranty of a debt of the corporation is in fact no more than a promise to pay his own debt. Donovan v. Purtell [Ill.] 75 N. E. 334.

68. McCord v. Edward Hines Lumber Co. [Wis.] 102 N. W. 334. A warranty of payment of a chose in action by the assignor is not a guaranty. Peterson v. Creason [Or.] 81 P. 574; Tyler v. St. Louis S. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 173, 87 S. W. 238; Swenson v. Stoltz, 36 Wash. 318, 78 P. 999. Where real estate agent to insure a sale and thereby earn commissions, promises the seller of real estate that he will see all the personal property thereon sold and accounted for is not a contract of guaranty. Dryden v. Barnes [Md.] 61 A. 342. Where the surety of a building contract who is a participant in the profits therefrom promises a payment to a subcontractor if he will continue with the work it is not a contract of guaranty. Pizzi v. Nardello, 23 Pa. Super. Ct. 535. Where a landlord and his tenant have a claim against the United States which they prosecute in the name of the landlord, his parol promise to pay a portion of the amount due if collected is not a promise to answer for the debt of another. Bomgardner v. Swartz, 26 Pa. Super. Ct. 263.

69. Where a creditor promises to withhold money in his hand to pay the debt of his debtor to another. Adlam v. McKnight [Mont.] 80 P. 613. Where an order by a contractor on the owner in favor of a subcontractor was accepted by the owner on condition that the contractor complete the work, and the latter subsequently abandoned the contract and was released therefrom, a subsequent oral agreement by the owner to pay the subcontractor the full value of his work if he will complete the same is an original undertaking and not within the statute of frauds. Reisler v. Sibermintz, 99 App. Div. 131, 90 N. Y. S. 967. Where the material man is given an order on the owner who promises to pay the same, it amounts to a novation and is not a contract of guaranty. Potter v. Greenberg, 24 Pa. Super. Ct. 505.

A promise by the owner to retain a sufficient amount from the contract price to pay a third person for materials furnished the contractor and used in the work, and to pay it to him when the work is completed, is an original promise not within the statute of frauds. Bates v. Birmingham Paint & Glass Co. [Ala.] 38 So. 845. Where a city pays a material man for materials furnished and to be furnished out of money to be paid its contractor, it is not a contract of suretyship or guaranty made ultra vlves for a city within the meaning of the state constitution. Albany v. Cameron & Barkley Co., 121 Ga. 794, 49 S. E. 798. Assumption of liability of a partner by remaining members of a partner by remaining members of a firm. In re Dresser [C. C. A.] 135 F. 495. A promise to pay an attorney for legal papers drawn for his use at the request of another. Paul v. Wilbur [Mass.] 75 N. E. 63. A promise by an owner to see the debt of a material man who has furnished materials paid is a contract of guaranty and not an original promise. Nichols v. Dixon [Tex. Civ. App.] 85 S. W. 1051; Wilson v. Dietrich [N. J. Eq.] 59 A. 251.

70. See 3 C. L. 1564.

71. A letter of recommendation considered and construed not to be a guaranty. Hughes & Co. v. Peper Tobacco Warehouuse Co. [N. C.] 51 S. E. 793.

72. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345.

73. Where guarantor knows the promise has been accepted, notice thereof is unnecessary. Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139. Complaint must either allege notice of acceptance or waiver thereof. Goff v. Janeway, 26 Ky. L. R. 1266, 83 S. W. 1038.

74. Where a guarantor has knowledge of the acceptance by the creditor and that goods are delivered on the faith thereof and encourages the delivery of such goods, he is estopped to deny that he has received notice of such acceptance. American Radiator Co. v. Hoffman, 26 Pa. Super. Ct. 177.

75. An absolute guaranty becomes affective as soon as acted upon and notice to guarantor is unnecessary. Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139. An absolute guaranty requires neither notice of acceptance or default. Ruberg v. Brown 51 S. E. 96.

of the original contract is sufficient to bind the guarantor where the guaranty is prior or contemporaneous therewith,[76] but a new consideration is necessary when it is subsequent thereto.[77]

By the statute of frauds, no action may be maintained on a contract of guaranty unless it be in writing.[78]

§ 3. *Operation and effect of guaranty.*[79]—A contract of guaranty is assignable only after breach,[80] except where the contract is general.[81]

Interpretation in general.[82]—A contract of guaranty will be strictly construed.[83]

Fixing default and liability of the guarantor.[84]—There must be a demand of payment on default of the principal debtor,[85] unless the liability is primary,[86] and in cases of a guaranty of collectibility, judgment and execution must first be had against the principal before liability of the guarantor.[87] Where he is given an op-

76. Delivery of goods held for payment in sufficient consideration for support of a contract of guaranty. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345. Where a guarantor is on the same paper and referred expressly to the original contract, it is regarded as part thereof and for the same consideration, though in fact signed after the principal contract. Klosterman v. United States Elec. Light & Power Co. [Md.] 60 A. 251. The contract and guaranty are substantially contemporaneous if executed only a day apart. De Reszke v. Duss, 99 App. Div. 353, 91 N. Y. S. 221.

77. Caesar v. Kulla, 92 N. Y. S. 798. A subsequent contract of guaranty is void in the absence of consideration moving to the promisor. Lagomarsino v. Giannini, 146 Cal. 545, 80 P. 698. Where one executes a guaranty supposing that it will subserve some interest of her own, it is a sufficient consideration, and whether it in fact will do so, is immaterial. Peck v. Peck [Wis.] 103 N. W. 5. In the absence of knowledge that a lien is filed, the promise of payment by the owner to a subcontractor of the debt of the contractor is without consideration. Snyder v. Monroe Eckstein Brewing Co., 95 N. R. S. 144. A contract of guaranty for payment of water rents in which no new consideration is given can only include rents accruing in the future. Moss v. Blyth, 92 N. Y. S. 294. Forebearance where no real claim exists. Stromberg v. Loiacono, 45 Misc. 651, 91 N. Y. S. 46. The subcontractor not being bound by the owner's acceptance of the order to complete the work at all hazards, his agreement to do so is a sufficient consideration for the owner's promise. Reisler v. Sibermintz, 99 App. Div. 131, 90 N. Y. S. 967. The interest of a real estate broker having a building for sale is ample consideration for his promise to pay for materials. Halsted v. Pelletreau, 101 App. Div. 125, 91 N. Y. S. 927. The promise of the owner to a subcontractor to pay the contractor's debt is without consideration. Smith v. Burditt, 95 N. Y. S. 188. A stipulation, in an attachment suit, between a mortgagee who had seized property and an attaching creditor of the mortgagor, whereby it was agreed that the property was to be delivered to the mortgagee, to be sold by him or the attaching creditor, the mortgage debt satisfied, and the surplus paid to the attaching creditor, is not a promise to answer for the debt of another, so as to be void because without consideration. Scherzer v. Muirhead, 84 N. Y. S. 159.

78. See 3 C. L. 1528; 5 C. L. 1552.

79. See 3 C. L. 1566.

80. Levy v. Cohen, 45 Misc. 95, 91 N. Y. S. 594.

81. Where the principal contract of A., to build a synagogue is assignable and general, the contract of guaranty thereof is general, and hence assignable. Levy v. Cohen, 92 N. Y. S. 1074. Under the statute providing in case of merger of banking corporations the assignee shall have all rights of the previously existing ones, a right exists to enforce a guaranty contingent at the time of the merger. Bank of Long Island v. Young, 101 App. Div. 88, 91 N. Y. S. 849.

82. See 3 C. L. 1566. See, also, 2 C. L. 146.

83. Jewett v. Griesheimer, 100 App. Div. 210, 91 N. Y. S. 654. While a contract of guaranty is to be narrowly construed and cannot be enlarged, the spirit as well as the letter is to be considered. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572. Where the contract is special, it will be interpreted according to the terms thereof, rather than by the general rules of contracts of guaranty. Jackson v. Swart [N. Y.] 75 N. E. 226.

84. See 3 C. L. 1566.

85. There can be no recovery from the guarantor of a void school warrant till it is presented to the town treasurer and payment refused. Rochford v. School Dist. No. 6 [S. D.] 103 N. W. 763. Where a contract for paving of streets provides that notice of default shall be given by the committee on streets, a notice given pursuant to a resolution of the common council by the city solicitor is sufficient where such notice has heretofore been accepted by the guarantor as sufficient. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

86. McCambridge & Co. v. O'Callaghan, 27 Pa. Super Ct. 199; Yeazel v. Harber Bros. Co., 106 Ill. App. 408. A guaranty of payment and collection by the assignor of a mortgage debt being an original promise on part of the latter, the assignee may proceed against either. Loos v. McCormack, 46 Misc. 144, 93 N. Y. S. 1088.

87. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93. Where there is an unrestricted guaranty, the creditor is not obliged to proceed against security given on the principal debt before suing the guarantor. Knickerbocker Trust Co. v. Coyle. 139 F.

portunity to defend, the guarantor is conclusively bound by a judgment against the principal debtor,[88] and is also liable for the costs of the suit.[89] A guaranty may be construed as "continuing" and not be limited to one act or default.[90]

Defenses and discharge of guaranty.[91]—A guarantor may offer as a defense to suit upon the collateral contract any personal or real defense he may have thereto,[92] and he may set up as a defense, that the principal contract has been altered since his guaranty thereof,[93] or that his remedy against the principal debtor has been impaired,[94] as by the extension of time [95] or release of the principal debtor,[96] though not where the promise of the alleged guarantor was that a modification of the original contract could be obtained.[97] Taking of notes from the debtor does not dis-

792. Where one is guarantor of payment of debt he cannot set up as a defense that foreclosure has not been had on the secured portion. Miller v. McLaughlin [Mich.] 12 Det. Leg. N. 501, 104 N. W. 777. A contract whereby it is recited that A. conveyed to B. certain property for $15,000 and guarantees that B. will realize thereon that amount with interest within two years after a bona fide sale for less, renders the guarantor liable for the difference. McCague Bros. v. Irey [Neb.] 103 N. W. 281.

88. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

89. Where one guarantees the collectability of amounts that may become due, he is also liable for costs in the suit to collect from principal. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

90. A. writes B. if he would guaranty payment of any goods C. might purchase. B. refused and later he offered in consideration of release of an order of goods to guaranty payment on goods C. might buy up to $300. Held, not a continuing guaranty. Callender, McAuslin & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345. A contract stating "I hereby guarantee the purchase account of M. for $1,500," is a guaranty not limited as to time, but merely as to amount. Frost v. Standard Metal Co., 116 Ill. App. 642. Where a guarantor guarantees the amount of a firm to a certain amount, the guaranty is a continuing one. Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139.

91. See 3 C. L. 1566.

92. A partnership may set up lack of authority of the member making a contract of guaranty. Powell Hardware Co. v. Mayer, 110 Mo. App. 14, 83 S. W. 1008. In the absence of the showing of a usage, a factor is not bound by a guarantee of his agent. Mahler-Wolf-Produce Co. v. Meyers, 4 Ohio C. C. (N. S.) 264. Alteration of the collateral written contract of guaranty. The insertion of the words "for value received" subsequent to execution is an alteration which will discharge the guarantor unless ratified. Peck v. Peck [Wis.] 103 N. W. 5. Fraudulent insertion of a clause in contract of guaranty before signature. Machin v. Prudential Trust Co., 210 Pa. 253, 59 A. 1073. Where the execution of a guaranty is alleged to have been procured by fraud, the evidence must be clear and conclusive to render it a valid defense. First Nat. Bank v. Buetow, 123 Wis. 285, 101 N. W. 927.

93. Where a contract of guaranty is changed without consent of the guarantor, the latter is discharged irrespective of the fact that the alteration was made after the liability became absolute, for the alteration makes a new contract other than that signed by the guarantors. Tolman Co. v. Hunter [Mo. App.] 88 S. W. 636. Where a party guarantees the payment of a contract for the purchase of one lot of land, he cannot be held liable for default of any part of a contract for the purchase of that piece and another for a lump sum. White Castle Lumber & Shingle Co. v. Le Blanc [La.] 38 So. 407. A guarantor of a lease for five years cannot be held for default in payment of a lease for year to year. Jewett v. Griesheimer, 190 App. Div. 210, 91 N. Y. S. 654. The question of whether a material alteration has been made is a question for the jury. Providence Mach. Co. v. Browning, 70 S. C. 148, 49 S. E. 325. Where a paving contract called for a two-inch layer of asphalt and repairs were made with a one-twelfth inch bedding and one inch binder, it is not such an alteration as to discharge the guaranty. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572.

94. A collateral agreement between the creditor and debtor whereby the former receives additional security will not discharge the guarantor. Providence Mach. Co. v. Browning, 70 S. C. 148, 49 S. E. 325.

95. American Iron & Steel Mfg. Co. v. Beall [Md.] 61 A. 629. To make an agreement between the creditor and debtor extending the time of payment of note on a discharge of the guarantor, there must be a valid consideration therefor; indulgence is insufficient. Providence Mach. Co. v. Browning, 70 S. C. 148, 49 S. E. 325.

96. Release of one surety discharges the other pro tanto. Wanamaker v. Powers, 102 App. Div. 485, 93 N. Y. S. 19. Where a surety and guarantor are each joint judgment debtor with the principal, the creditor under the code can release either of them. Symmes v. Cauble [S. C.] 51 S. E. 862.

97. On contract to pay the defendant for advertising by delivery of two automobiles and the balance in machinery, the defendant believing the advertiser would pay the entire contract in machinery, assigned same to the plaintiff with a written guaranty of payment in cash of all not paid in machinery. The advertiser insisted on performance of the contract as to the delivery of the automobiles. Held, that the contract between the plaintiff and the defendant was to cover this contingency and irrespective of the knowledge of the plaintiff of the rights of the advertiser, he was entitled to recover

charge the guarantor when such action was contemplated by the contract of guaranty,[98] or where the notes are mere evidence of the indebtedness.[99] In the absence of some stipulation, he cannot object that the creditor did not apply payments made by the debtor to his debt.[1] He may also offer as a defense that the creditor neglected to inform him of present or prior defaults of the principal debtor,[2] and that due diligence was not used on the part of the creditors in pursuing the debtor,[3] or in realizing on the security collateral to the debt,[4] and may set up also any real or equitable defense there may be to the primary contract.[5] When the guaranty is contingent, the promisor is liable only on the happening of the contingency and on default of principal debtor,[6] as where additional guarantors are to be obtained.[7]

§ 4. *Rights and remedies between guarantor and principal debtor.*[8]—When a guarantor pays the principal debt he becomes subrogated thereto.[9]

§ 5. *Actions on guaranty.*[10]—In many states in pleading a contract of guaranty it is necessary to allege in the complaint that it is in writing [11] and to set up the giving of notice of acceptance or waiver thereof.[12] The contract is governed by the law of the place of acceptance,[13] and in one action suit may be brought on the guaranty and for foreclosure on security given by the guarantor.[14]

the balance money. Bassford v. Fitzgerald, 138 F. 958.

98. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117.

99. Where as part of the consideration of a sale of property defendant was induced to assume the liability of the seller to plaintiff under an indemnity contract, held defendant was not discharged from liability by reason of plaintiff's act in accepting notes of the seller, who was insolvent, as mere evidence of his indebtedness, nor by plaintiff's failure to pursue his remedy against the seller. Wass v. Anderson [Conn.] 61 A. 433.

1. In the absence of any stipulation in the contract of guaranty, the debtor may apply payments made by the debtor to the guaranteed or unguaranteed portion of the debt. Wanamaker v. Powers, 102 App. Div. 485, 93 N. Y. S. 19. Where a guarantor gives a check to the husband and agent of the debtor who delivers it to the creditor who has actual knowledge of the transaction, the latter is obliged to apply such payment to the guaranteed contract. Bayer v. Lugar, 94 N. Y. S. 802.

2. That a debtor was already indebted to his creditor is no defense to an action on a contract of guaranty in the absence of inquiry on part of the guarantor. Wanamaker v. Powers, 102 App. Div. 485, 93 N. Y. S. 19.

3. A guarantor is not released by mere delay in performance if the contract rights are unchanged. American Radiator Co. v. Hoffman, 26 Pa. Super. Ct. 177.

4. A guaranty for payment of a deficiency due to sale of stock collateral to a loan is not binding if sale of stock is delayed two years after default, even where a request by guarantor had been made and refused. Chelsea Sav. Bank v. Slater [Conn.] 61 A. 65. Where land is conveyed to a trustee to secure a debt of the guarantor's husband, and later their joint property is released, the land is released. First Nat. Bank v. Waddell [Ark.] 85 S. W. 417.

5. The question of fraudulent misrepresentations by the creditor to the principal debtor is a good defense to an action on a guaranty and one for a jury. Foote v. Leary, 93 N. Y. S. 169. The guaranty of a note given for an illegal purpose is void where the note is void. Tandy v. Elmore-Cooper Live Stock Commission Co. [Mo. App.] 87 S. W. 614.

6. Where guaranty is of payment on failure of principal debtor to pay, suit is not a condition precedent to liability of the guarantor. Levy v. Cohen, 92 N. Y. S. 1074.

7. Where a guaranty is contingent upon securing co-guarantors, it cannot become fixed till the condition is complied with. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459. The defendant guaranteed a contract of employment made between his son and the plaintiff wherein it was provided that the employee should obtain a fidelity bond in some surety company approved by the plaintiff. This was not done. Held, to release the guarantor. Swift & Co. v. Jones, 135 F. 437.

8. See 3 C. L. 1567.

9. A guaranty of payment of a note with a stipulation of a right to take up the same on payment of the principal at the option of the guarantor gives no right over the note itself. Cunningham v. McDonald [Tex.] 83 S. W. 372.

10. See 3 C. L. 1567.

11. Hunt v. Taylor [Ky.] 87 S. W. 290. See Frauds, Statute of, 5 C. L. 1550. (Pleading and Proof).

12. Goff v. Janeway, 26 Ky. L. R. 1266, 83 S. W. 1038.

13. Since a contract of guaranty takes effect only on acceptance it will be construed according to the law of place of acceptance. Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345.

14. Where a contract of guaranty is secured by the assignment of a mortgage, action can be brought to foreclose the mortgage and recover on the contract. Ruberg v. Brown [S. C.] 51 S. E. 96.

GUARDIANS AD LITEM AND NEXT FRIENDS.

§ 1. *Necessity or occasion for a guardian ad litem or next friend*[15] exists whenever an infant is a party litigant;[16] but where a decree is clearly in favor of an infant, failure to appoint a guardian ad litem is not reversible error,[17] otherwise, however, if the decree is not clearly favorable to him.[18] No guardian ad litem need be appointed for an infant who has no interests to protect in an action.[19]

§ 2. *Qualification and appointment.*[20]—It is the duty of one suing an infant to have a guardian ad litem appointed for him.[21] A person who will properly safeguard the rights of the infant should be appointed.[22] The wishes of the infant, if he has reached the age of discretion, should be considered.[23] There is no legal objection to the mother of an infant on acccount of her sex.[24] The appointment should be by formal order.[25] The absence of such order, however, is not fatal where the fact of appointment appears by recitals or reference in the record.[26] In the appointment of a guardian ad litem, the procedure prescribed by law must be complied with.[27] An application made by a person other than the infant must show notice to his general or testamentary guardian or the person with whom the infant resides,[28] and he is not presumed to be living with his parent who makes the application from the mere fact that he is of tender age.[29] An irregularity in the proceedings does not render the appointment void,[30] nor is it ground for setting aside a decree

15. See 3 C. L. 1567.

Note: As to the right of insane persons to institute proceedings by next friend, see note to Isle v. Cranby [Ill.] 64 L. R. A. 513. A next friend is one who without being appointed guardian acts for the benefit of one not sui juris. Mackey v. Peters, 22 App. D. C. 341.

16. As an infant can only appear and defend by guardian ad litem, proceedings against him are usually fatally defective unless the record shows that a guardian ad litem was assigned him. Langston v. Bassette [Va.] 51 S. E. 218. A judgment against an infant defendant for whom no guardian ad litem has been appointed is void. Weaver v. Glenn [Va.] 51 S. E. 835. Independently of Clark's Code, § 181, the superior court has power to appoint a guardian ad litem for an infant devisee in proceedings for the sale of property to pay the testator's debts. Carraway v. Lassiter [N. C.] 51 S. E. 968.

17. Langston v. Bassette [Va.] 51 S. E. 218.

18. A decree finding a will valid is not favorable to an infant who would be sole heir if the will was decreed void. Langston v. Bassette [Va.] 51 S. E. 218.

19. A guardian ad litem for an infant husband of a devisee need not be appointed in proceedings to sell lands of the decedent. His wife had only a life estate and was represented. He had no interest. Carraway v. Lassiter [N. C.] 51 S. E. 968.

20. See 3 C. L. 1568.

21. A plaintiff in such case cannot object on appeal that no guardian ad litem was appointed. Coulson v. Coulson, 180 Mo. 709, 79 S. W. 473.

22. A near relative or close friend of the person for whom a guardian ad litem is appointed should be selected rather than a person nominated by the adverse party. Frieseke v. Frieseke [Mich.] 101 N. W. 632.

23. Where an infant 20 years of age objects to a certain person because he is likely to involve the estate in extensive litigation. In re White, 91 N. Y. S. 513.

24. Where the father is dead, the mother may be appointed tutrix ad hoc of infant defendants in a partition proceeding. Chevalley v. Pettit [La.] 39 So. 113.

25, 26. Crane v. Stafford [Ill.] 75 N. E. 424.

27. Under Code Civ. Proc. § 471, providing that the appointment must be made on the application of the infant if he is 14 years old, and applies within 20 days after personal service of summons, an appointment for an infant under 14, not served with summons, cannot be sustained under such section. Van Williams v. Elias, 94 N. Y. S. 611. Code Civ. Proc. § 452, authorizing application by one who has an interest in the subject of the action, does not authorize an appointment where the infant has a mere possibility of an interest. Id. Under County Court Rule 3, § 1, providing that persons under disability shall appear by general guardian or next friend, it is proper to appoint a guardian ad litem on a hearing of an application to appoint a general guardian for an incompetent. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224.

28, 29. Van Williams v. Elias, 94 N. Y. S. 611.

30. Affidavit omitted to state that the infant had no statutory guardian. Mullins v. Mullins [Ky.] 87 S. W. 764. Mere irregularity in the appointment will not invalidate a decree against an infant in a case heard at chambers, though the consent of the guard-

against an infant where he suffered no substantial injustice, especially where the rights of third parties have intervened.[31] A premature appointment may be cured.[32]

§ 3. *Powers and duties, rights and liabilities.*[33]—A guardian ad litem must take proper measures to safeguard the interests of the person for whom he is appointed.[34] It is his duty to be present when testimony is taken before a master in support of the cause of the adverse party,[35] and he is entitled to notice that such evidence is to be taken.[36] He has power to compromise a claim,[37] but he cannot bind the infant by submission to arbitration, though the submission be made by rule of court,[38] nor can he consent to the entry of judgment on the award.[39] He may interpose an affirmative defense.[40] His duties continue until final determination of the cause or termination of the minority of his ward, unless he is removed by the court.[41] In order to set aside a judgment against an infant in a cause where he was represented by guardian ad litem, fraud, collusion or error must be shown.[42]

In many states allowance of compensation is made by the court where the services are rendered; but in Kentucky, his allowance for the entire case must be

ian ad litem to a hearing at chambers was essential, the infant not having been prejudiced. Middleton v. Stokes [S. C.] 50 S. E. 539.

31. Middleton v. Stokes [S. C.] 50 S. E. 539.

32. Irregularity in appointing a guardian ad litem before summons issued is cured by issuance of summons the same day which was duly served on the infant and guardian ad litem. Carraway v. Lassiter [N. C.] 51 S. E. 968.

33. See 3 C. L. 1568.

NOTE. Power to contract for legal services: Where it is for the infant's benefit that counsel be employed, the guardian ad litem or next friend may do so. Glass v. Glass, 76 Ala. 368; Baltimore, etc., Co. v. Fitzpatrick, 36 Md. 619; Colgate v. Colgate, 23 N. J. Eq. 372. But see In re Johnstone, 6 Dem. [N. Y.] 355, holding that a guardian ad litem in a surrogate's court will employ counsel at his own expense. There is a conflict as to whether such guardian may contract for the services of an attorney. In Yourie v. Nelson, 1 Tenn. Ch. 614, it is held to be his duty to do so, but in Cole v. Superior Ct., 63 Cal. 86, 49 Am. Rep. 78; Houck v. Birdwell, 28 Mo. App. 644, an opposite view was entertained. —See note to Fletcher v. Parker [W. Va.] 97 Am. St. Rep. 1002.

34. Where alimony allowed was wholly inadequate because of failure of a guardian ad litem to make proper proof of the amount of the adverse party's property, a rehearing should be granted. Frieseke v. Frieseke [Mich.] 101 N. W. 632. Where the only evidence to sustain a divorce decree against an incompetent was introduced by improper leading questions not objected to by a guardian ad litem who was appointed on the nomination of the adverse party, a rehearing should be granted Id. A judgment against an infant in a cause in which his guardian ad litem made no attempt to protect his interests will not be allowed to stand. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

35, 36. Crane v. Stafford [Ill.] 75 N. E. 424.

37. A judgment or compromise will not be set aside unless it is unfair and inequitable to the minor. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

38. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

39. Purchasers at a judicial sale made pursuant to such an award and judgment are charged with notice that it is voidable. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227.

40. On an application by a guardian for authority to sell land of his ward to pay debts, a guardian ad litem may set up that there is no necessity for the sale, that the guardian had mismanaged the estate and should account. In re Kimble [Iowa] 103 N. W. 1009.

41. He may appeal from the judgment of the trial court. Staggenborg v. Bailey, 26 Ky. L. R. 188, 80 S. W. 1109.

NOTE. When power begins and terminates: The powers of a next friend commences with the suit; and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived a necessity therefor. Miles v. Boyden, 20 Mass. [3 Pick.] 213. His authority terminates with the judgment in the case (Davis v. Gist, Dud. Eq. [S. C.] 1), or with the minority of the infant (Lang v. Belloff, 53 N. J. Eq. 298, 31 A. 604).—From note to Fletcher v. Parker [W. Va.] 97 Am. St. Rep. 996.

NOTE. Right to appeal: A guardian ad litem may and should appeal whenever in his opinion it is necessary to protect his ward's interest (Sprague v. Beamer, 45 Ill. App. 17; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Tyson v. Tyson, 94 Wis. 225, 68 N. W. 1015), and leave of court is not necessary (Jones v. Roberts, 96 Wis. 427, 70 N. E. 685). Under a statute restricting the right of appeal to parties to a suit a guardian ad litem may be a party. Thomas v. Safe Deposit, etc., Co., 73 Md. 451, 21 A. 367. In Harlan v. Watson, 39 Ind. 393, it is held that such a guardian cannot appeal in his own name.—From note to Fletcher v. Parker [W. Va.] 97 Am. St. Rep. 1004.

42. The mere fact that the guardian ad litem did not introduce all the evidence is insufficient. Johnson v. Johnson [Tex. Civ. App.] 85 S. W. 1023.

made by the court wherein he was appointed,[43] and should be arrived at by a consideration of the character of the litigation, amount involved, labor performed and results achieved,[44] whether the services were rendered in the trial or appellate court.[45]

§ 4. *Procedure by or against next friend or guardian ad litem.*[46]—A proceeding in equity to annul a marriage contracted by a lunatic during his lunacy is properly instituted by his next friend, making his committee a party.[47] An infant should not be prejudiced by any act, default or admission on the part of his guardian ad litem.[48] A defect in a petition by an infant suing by his next friend because of failure to allege the due appointment of the next friend may be raised by answer.[49] An objection to a complaint by a next friend for an adjudged insane person which fails to allege that no guardian has been appointed or that if one has been appointed, why the action is not brought by him, must be made by special demurrer or plea in abatement,[50] but if the objection is raised by special demurrer and is not met by appropriate amendment, the action may be dismissed.[51] Where the father of a minor sues as his guardian ad litem and demands recovery for which he alone is entitled to maintain an action, he will be deemed to have emancipated his child in so far as the right to the recovery included in his child's action is concerned.[52]

GUARDIANSHIP.

The rights and liabilities of infants[53] and insane persons,[54] and of parents as natural guardians,[55] are elsewhere treated.

§ 1. *The occasion for guardianship*[56] exists whenever the state deems one necessary to the material or moral welfare of a person non sui juris,[57] notwithstand-

43. Staggenborg v. Bailey, 26 Ky. L. R. 188, 80 S. W. 1109; Cochran v. Lee's Alm'r [Ky.] 87 S. W. 769.

44. Staggenborg v. Bailey, 26 Ky. L. R. 188, 80 S. W. 1109.

45. Civ. Code Proc. §§ 38, 59, providing that a guardian shall be allowed a reasonable fee for his services, applies to services rendered either in the circuit or supreme court. Cochran v. Lee's Adm'r [Ky.] 87 S. W. 769. Where a guardian ad litem has taken an appeal, the lower court upon the filing of a mandate of affirmance may entertain a motion for an additional allowance for services rendered in the appellate court. Staggenborg v. Bailey, 26 Ky. L. R. 188, 80 S. W. 1109.

46. See 3 C. L. 1569.

47. Mackey v. Peters, 22 App. D. C. 341.

48. The court is bound to protect his rights, notwithstanding the failure of his guardian ad litem to do so. Parken v. Safford [Fla.] 37 So. 567. The fact that the guardian ad litem of minor proponents presents a claim for services in the contest to the court, and that the same is settled by the executors of a former will admitted to probate, does not estop the wards from appealing from the judgment denying probate of the will in contest. Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105.

49. Cohn v. Metropolitan St. R. Co., 182 Mo. 577, 81 S. W. 846.

50. Is not raised by general demurrer. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

51. Stanley v. Stanley [Ga.] 51 S. E. 287.

52. An item for medical attendance, medicine and nursing included in the demand for damages in an action for personal injuries. Donald v. Ballard, 34 Wash. 576, 76 P. 80.

53. See Infants, post.

54. See Insane Persons, post.

55. See Parent and Child, 4 C. L. 873.

56. See 3 C. L. 1569.

57. A statute authorizing the appointment of guardians for the persons and estates of minors having no guardian by will or deed

ing the fact that the ward has a natural guardian living;[58] but in order that a natural guardian may be deprived of the custody of his child, it must appear that he is unworthy of the trust.[59] The determination of whether occasion for a guardian exists resides in the appointing court,[60] and its decision is conclusive.[61] An adjudication of insanity by a court of competent jursdiction is a sufficient basis upon which to rest the appointment of a guardian by the court of his residence.[62] That a child may be given superior advantages is no occasion for the appointment of a guardian,[63] and though there is no occasion for the appointment of a guardian if one of his own motion is appointed, he and his sureties are estopped to deny the validity of the appointment.[64]

The jurisdiction [65] to appoint guardians is generally vested in probate courts [66] of the county in which the ward is domiciled.[67] For the purposes of guardianship,

is not a deprivation of the parents of such children of the rights, privileges or immunities secured by the Federal constitution. Wadleigh v. Newhall, 136 F. 941.

58. Parents have no right to the custody of their infant children, except subject to the paramount right of the state. Wadleigh v. Newhall, 136 F. 941. The superior court has jurisdiction to appoint guardians for minors after the death of the mother, though the father be alive. Russner v. McMillan, 37 Wash. 416, 79 P. 988.

59. The mere fact that he smokes cigarettes and drinks beer occasionally is insufficient, he being kind and indulgent and financially able to properly care for the child. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

60. The determination of this question is, in the first instance, submitted to the probate court, and ultimately, if appeal is taken, to the justice of the supreme judicial court sitting as a judge of the supreme court of probate. In re Dunlap [Me.] 61 A. 704. It is the duty of such justice to hear and determine whether the welfare of the child requires such guardianship. Id. Under Rev. St. 1898, § 3976; providing for the appointment of a guardian for one who is mentally incompetent to have charge of his own property, the circuit court on appeal from the county court from an order appointing a guardian may pass only on the necessity of a guardian. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224.

61. The decision of such justice is not a ruling of law, but is his judgment of the facts and of the necessity and propriety of his conclusions, and is not subject to exception. In re Dunlap [Me.] 61 A. 704.

62. Where a person has been adjudged insane in one county the court of another county in which he has acquired a residence may appoint a guardian without a sworn information showing him to be insane. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282.

63. That one who has no natural rights to the custody of a child is able to give it superior advantages is not ground for depriving a parent of its custody. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

64. Griffin v. Collins [Ga.] 49 S. E. 827.

65. See 3 C. L. 1570, n. 11 et seq.

66. In Idaho. In re Brady [Idaho] 79 P. 75.

67. Where a minor is without authority removed from his domicile to another county, the ordinary of the county to which he is removed has no jurisdiction to appoint a guardian in the absence of any choice by the minor making such county his domicile. Hayslip v. Gillis [Ga.] 51 S. E. 325. The court of the county of the husband's residence has jurisdiction to appoint a guardian for his wife on his death. Where the wife was confined in an asylum, the change of residence of the husband during such confinement changes hers. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282.

Note: The probate court of the county in which a minor's lands were located, the minor being domiciled in an adjoining county, issued letters of guardianship of the person and estate of the minor, and, upon application, made its order directing the sale of the minor's interest in the real estate situated in said county, under which the interest of the minor was sold. A guardian subsequently appointed by the probate court of the county in which the minor was domiciled brought an action of partition. Held, that the proceedings in the probate court in the county which was not the domicile of the minor were void, and that the guardian's deed was void as against the purchaser at such guardian's sale, and also void as against his grantee. Connell v. Moore [Kan.] 78 P. 164. The statutes of most of the states provide that the court having jurisdiction to appoint a guardian is that of the county of the ward's residence. Appointments made in disregard of this provision are usually held void. Estate of Taylor, 131 Cal. 181; The Modern Woodmen of America v. Heston as Guardian, etc., 66 Kan. 129. This, however, has not always been the case. Judge of Probate v. Hinds, 4 N. H. 464. The Kansas statute did not contain a special provision designating what probate court would acquire jurisdiction of the person and estate of minors. The decision of the court was based on the clear and reasonable inference drawn from the statute that the probate court having jurisdiction was that of the county in which the minor was domiciled, citing De Jarnett v. Harper, 45 Mo. App. 415; also that the legislature would not be presumed to act against the interests of minors.—3 Mich. L. R. 162. In New York the power to appoint different individuals as guardians of the estate and of the person resides only in the court. Under Code Civ. Proc. §§ 2822, 2827, such an appointment by a parent is void. In re Burdick's Estate, 95 N. Y. S. 206.

such courts are courts of general jurisdiction.[68] Jurisdiction once acquired is retained during the pendency of the guardianship,[69] and is not ousted by another appointment by a court of foreign jurisdiction,[70] nor by the assumption of jurisdiction by equity to correct fraud in the account of a guardian.[71]

§ 2. *The person of the guardian; his appointment, qualification and tenure.*[72]—In the selection of a legal guardian, the welfare of the ward is the controlling consideration,[73] but other circumstances should not be ignored.[74] The rights of the natural guardians [75] must be considered,[76] and if they are suitable persons,[77] they are entitled to be preferred,[78] and the mere fact that one entitled to a preference intends to remove the ward to a distant state is not ground for denying him the rights accorded by law.[79] Who is the more suitable person may be a question of fact.[80] The right of a natural guardian to the custody of his child is superior to that of an official guardian [81] or testamentary guardian appointed by his maternal parent.[82]

The statutory requirements essential to give jurisdiction to make an order of appointment must be complied with.[83] There must be a petition [84] in conformity to

68. See 3 C. L. 1570, n. 15 et seq. In a petition for the allowance and settlement of a guardian's account, it is not necessary to allege the steps taken in his appointment. In re Brady [Idaho] 79 P. 75, following and approving Clark v. Rossier [Idaho] 78 P. 358.

69. They retain jurisdiction for all purposes in connection therewith until the guardian's accounts are rendered and he is discharged. In re Brady [Idaho] 79 P. 75.

70. The unauthorized removal of the ward to another state or the appointment of a guardian by a court of foreign jurisdiction cannot oust the courts of the state of appointment of their jurisdiction. In re Brady [Idaho] 79 P. 75.

71. Wallace v. Swepston [Ark.] 86 S. W. 398.

72. See 3 C. L. 1569.

73. In re Dellow's Estate [Cal. App.] 82 P. 558. When the appointment of a guardian for a minor is asked. In re Dunlap [Me.] 61 A. 704.

74. In the selection of the committee of an incompetent, the welfare of the incompetent is the chief consideration; but if the committee must maintain intimate relations with the relatives of the incompetent, their interests and wishes should not be ignored. In re Cooper, 94 N. Y. S. 270.

75. On death of parents the grandparents, when next of kin, succeed to the infant's natural guardianship. Holmes v. Derrig [Iowa] 103 N. W. 973.

76. The fact that the natural guardian (grandparent), respectable and competent to care for a child, is not as financially able to care for it as a paternal uncle, is not ground for awarding its custody to the uncle. Holmes v. Derrig [Iowa] 103 N. W. 973.

77. It was proper to refuse to appoint a father as guardian who drank to excess, was engaged as a waiter in a saloon, and had furnished the children with liquor to such an extent that they had acquired a taste for it. Russner v. McMillan, 37 Wash. 416, 79 P. 988.

78. The natural parents are entitled to the custody of their minor children if they are suitable persons to be entrusted with their care, control and education. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

79. A father will not be refused custody of his child because he intends to take it to a distant state. Ex parte Davidge [S. C.] 51 S. E. 269. Where the paternal grandfather and maternal grandmother are each claiming the tutorship and the former lives in another state to which he proposes to remove the infant orphan. Succession of Oliver, 113 La. 877, 37 So. 862.

80. Where there is a conflict in the wishes of persons interested, a referee should be appointed to take testimony as to the proper person. In re Cooper, 94 N. Y. S. 270. On an issue as to the propriety of appointing a certain person guardian, evidence that one of his daughters had once been arrested for vagrancy is inadmissible, it appearing that such daughter had not been reared by him. Russner v. McMillan, 37 Wash. 416, 79 P. 988. Appointment of stranger in blood in preference to collateral relative sustained. In re Dellow's Estate [Cal. App.] 82 P. 558.

81. The claim of the father as natural guardian, to the custody of his child, is superior to that of an official guardian. Ex parte Davidge [S. C.] 51 S. E. 269. The appointment of a legal guardian does not deprive a father of his right to the custody of his child. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

82. A mother cannot by testamentary disposition deprive the father of his right to the custody of their minor child. Gilmore v. Kitson [Ind.] 74 N. E. 1083.

83. Under Comp. Laws, § 8710, authorizing the appointment of a special guardian by the probate judge upon such notice as he shall direct, an order of appointment showing that it was made without notice is void. Devereaux v. Janes [Mich.] 12 Det. Leg. N. 411, 104 N. W. 579. Rev. St. 1898, § 3976, requiring that an incompetent for whom a guardian is to be appointed be given notice of the hearing and be caused to attend if able, held to have been sufficiently complied with. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224.

84. A temporary guardian cannot be appointed where there is no petition for his appointment nor necessity for it. In re Barnes, 36 Wash. 130, 78 P. 783.

statutory requirements.[85] If the statute provides for but one guardian, the appointment of more is void.[86] Whether an order appointing a guardian is appealable,[87] and who may appeal from it, depends on the terms of the statute.[88]

A power in a surviving parent to appoint a testamentary guardian does not give such power to a parent who has been awarded custody of a child in divorce proceedings, the other parent being alive;[89] and though a married woman is by statute the joint guardian of her children with her husband, a mother who is the surviving parent is not their general guardian.[90]

One may be an equitable guardian, though the formalities essential to make him a legal guardian have not been complied with,[91] and one not legally appointed may become a de facto guardian.[92]

The authority of the guardian is terminated,[93] but he is not discharged [94] by the majority or death of the ward. The authority of a guardian of an incompetent terminated ipso facto by an adjudication of restoration to capacity.[95] In Indiana the marriage of a female ward to a man of full age terminates the authority of the guardian.[96]

Removal.[97]—A guardian may be removed at the instance of the infant or one representing him, or on the court's own motion.[98] The district judge, on removal of a curator of an interdict, has power to appoint some one to take care, temporarily of the person of the interdict and protect his property.[99] But he must at the instance of the undercurator convoke a family meeting to recommend a fit person as a permanent curator.[1] Where letters of guardianship are revoked, they cannot be

85. The fact that a petition for the appointment of a guardian for an insane person did not state the names of persons who would be affected by the appointment, with whom he resided or who had control of his property, as required by Rev. St. 1898, § 3976, does not affect the jurisdiction of the county court where these facts were disclosed by the record. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224. Proceedings under Code Civ. Proc. § 2323a, for the appointment of a committee of an insane person, held not void for want of personal service on the alleged lunatic. In re Maginn, 100 App. Div. 230, 91 N. Y. S. 814.

86. Under Rev. St. 1895, § 2589, providing that "only one guardian can be appointed for the person or estate," a sale by a guardian appointed while the minor had another lawful guardian of his estate is void. St. Paul Sanitarium v. Crim [Tex. Civ. App.] 84 S. W. 1114.

87. Under Rev. St. 1899, § 3535, an order of the probate court appointing a curator for the estate of an infant is not appealable. Looney v. Browning [Mo. App.] 86 S. W. 564. Notice of appeal from an order appointing a guardian for an incompetent held sufficient to give the appellate court jurisdiction. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224. Right to appeal from an order appointing a committee for an insane person held not precluded by partial compliance with such order. In re Maginn, 100 App. Div. 230, 91 N. Y. S. 814.

88. One who claims property of an incompetent by virtue of contract with him is a party aggrieved by the appointment of a guardian, and under Rev. St. 1898, § 4031, may appeal from the order. Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224.

89. In re Waring's Will, 94 N. Y. S. 82.

90. So as to be authorized under Code Civ. Proc. § 2746, to receive their distributive share on an accounting of their father's estate. In re Schuler's Estate, 94 N. Y. S. 1063.

91. An elder brother who was appointed guardian of minor members of the family and who assumed control of the family and supported them but never qualified as guardian. Alexander v. Hillebrand [Mich.] 12 Det. Leg. N. 238, 103 N. W. 849.

92. As where a mother dies leaving property to her child and his father and a stepmother assumes control of such property. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

93. His duty thereafter is limited to the making of a proper settlement of his trust. State Fair Ass'n v. Terry [Ark.] 85 S. W. 87. Notice to him of a petition for leave to file a bill to review a decree, an appeal from which was dismissed when the ward died pending such appeal, is unavailing. Id.

94. He is subject to the orders of the court appointing until his final accounting and discharge. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

95. Statutes construed. In re Scheuer's Estate [Mont.] 79 P. 244.

96. He stands in the simple relation of debtor towards her for the balance of her funds remaining in his hands, and an action to recover such funds is governed by the ordinary statute of limitations. Roberts v. Smith [Ind.] 74 N. E. 894.

97. See 3 C. L. 1571. Failure to file inventory, disregard of rules to do so and extravagant expenditures held **ground for removal.** Clay's Guardian v. Clay [Ky.] 89 S. W. 500.

98. Clay's Guardian v. Clay [Ky.] 89 S. W. 500.

99, 1. State v. King, 113 La. 905, 37 So. 871.

reinstated at a succeeding term as against the sureties.[2] In Ohio an order removing a guardian is not appealable.[3]

§ 3. *General powers, duties and liabilities.*[4]—The guardian is a mere protector of his ward's interests,[5] but he is a trustee and as such he is entitled to possession of the ward's property,[6] and is accountable for the administration thereof.[7] He is responsible for all property in his possession until his final discharge,[8] and in him alone is the right to defend such possession.[9] He may do any act relative to the property of the ward which a prudent man would do in the management of his own business.[10] He may with the approval of the chancellor waive a legal right which he might waive as an individual.[11] He may execute a discharge and satisfaction of a mortgage to him as such,[12] but he cannot without authority from the court release or compound demands due the ward,[13] nor surrender funds lawfully possessed,[14] nor can he make admissions to the prejudice of his ward.[15] The power to make contracts binding on the estate is strictly limited.[16]

2. Wallace v. Swepston [Ark.] 86 S. W. 398.

3. Does not affect a substantial right. North v. Smith, 5 Ohio C. C. (N. S.) 495.

4. See 3 C. L. 1571. See, also, § 5, post.

5. The question of jurisdiction of a Federal court where a minor is suing by his guardian is to be determined by the citizenship of the infant and not that of his guardian. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

6. An action for the recovery of possession of land and for compensation for use is properly brought in his name. Cole v. Jerman, 77 Conn. 374, 59 A. 425. Under Indiana statutes the guardian may enforce by suit collection of debts due the ward. Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229.

7. In re Estate of Toman, 110 Ill. App. 135.

8. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

9. Neither the ward during his life time nor his heirs after his death are necessary parties. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

10. Werber v. Cain [S. C.] 51 S. E. 123. A general guardian is justified in incurring expense in resisting the contest of a will appointing a testamentary guardian where there is reasonable ground to believe the will is valid. In re Brady [Idaho] 79 P. 75. Guardian of an Indian allottee who paid $2,000 in compromise of a claim of a right to enforce specific performance of a contract for a sale of the ward's allotment, held for the best interests of the estate and properly allowed. Terry v. Sicade, 37 Wash. 249, 79 P. 789. Repairs made by the curator on the buildings of an interdict, insurance and taxes paid, are allowed. Succession of Sangfried [La.] 38 So. 593.

11. Where publication of notice of judicial sales may be waived by the parties, a ward, by her guardian, may make such waiver, with the chancellor's approval, relative to a sale of realty in which he has an interest. Under Ky. St. 1903, § 14a. Hieatt v. Schmidt [Ky.] 84 S. W. 740.

12. Werber v. Cain [S. C.] 51 S. E. 123.

13. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648.

14. He cannot surrender money of his ward received from an insurance company without obtaining an order of court. Loyal Americans v. Edwards, 106 Ill. App. 399.

15. In an action in which minors appear by their guardian, his admissions are not binding on them. Kidwell v. Ketler, 146 Cal. 12, 79 P. 514; Hayden v. Collins [Cal. App.] 81 P. 1120; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648.

16. Fidelity & Deposit Co. v. Rich & Bros. [Ga.] 50 S. E. 338. The contracts specially allowed by law do not include a contract for the purchase and sale of goods on credit, even though they be for the use of the ward and properly classed as necessaries. Id. In Texas he may make a contract for the location of a land certificate. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. A covenant by a guardian to renew a lease for a second term is in excess of the power granted by section 6295, to lease for not more than three years, and is void; and to bring the lease within the provisions of section 6296, allowing longer leases by order of court, the petition should contain averments showing requisite conditions and the authority of the court. Globe Soap Co. v. Louisville & N. R. Co., 6 Ohio C. C. (N. S.) 496.

NOTE. Liability of estate of infant for attorney's fees: The plaintiff, an attorney, rendered services under a contract with a guardian of an infant's estate, being appointed attorney by an order of a court of record at the request of the guardian. The infant died before becoming of age and the plaintiff brought suit against the infant's estate for the reasonable worth of his services. Held, that he could not recover. McKee v. Hunt, 142 Cal. 526. A guardian cannot by his general contracts bind the estate of his infant ward, and even in equity the estate of the infant is not bound by a contract for necessaries made by the guardian. Reading v. Wilson, 38 N. J. Eq. 446. Where services have been rendered to an executor in the interests of his estate, a recovery cannot be had against the estate, but must be sought against the executor personally. Kowing v. Moran, 5 Dem. [N. Y.] 56. The liability of contracts made by guardians or executors is of such a personal character, that even though the contract be signed "as guardian," the guardian is not relieved of personal liability. Rollins v. Marsh, 128 Mass.

§ 4. *Custody, support, and education of the ward.*[17]—It is the duty of the guardian to see that his ward is properly supported even though it is necessary to use the principal of the estate.[18] The amount expended for the support of the ward should not exceed his revenues,[19] unless the best interests of the ward require it.[20] In Texas no payments by guardian for the support of his ward, out of the corpus of the estate, will be sustained unless an order directing the payment be first entered on the minutes of the court,[21] and failure to make such entry cannot be remedied by an entry nunc pro tunc.[22] In order to entitle him to credit for paying, on his own motion, from the income of the estate, the expenses of maintaining his ward, the income and expenses must run concurrently.[23] In Kentucky, however, if he makes advancements beyond the income, he is entitled to reimbursement from the surplus income for subsequent years.[24]

§ 5. *The ward's property, and administration thereof.*[25]—Contracts relative to the estate must be made under authority from the court,[26] and a nonjudicial opinion is no justification for a prejudicial act.[27] He must not surrender to the ward, property in his hands bound by a judgment against the ward.[28] In New Hampshire he may agree to a divison in kind of an estate in which his ward has an interest,[29] but if he does so without an order from the court he must show that he acted in good faith and with reasonable prudence and discretion.[30] A guardian must not permit the estate of his ward to be frittered away.[31] It is his duty to keep the funds of the estate invested in the securities prescribed by law.[32] When he is given discretionary

116. The rule holding the guardian personally liable and not allowing his contracts to hind the estate of his ward is based upon a sound rule of public policy. To allow a recovery in quasi-contract would impair the effect of this salutary rule.—5 Columbia L. R. 62.

17. See 3 C. L. 1571.

18. An account will not be disallowed where it was properly expended though another had contracted to care for the ward. In re Hayden's Estate, 146 Cal. 73, 79 P. 588. An order allowing a ward twenty years of age with an estate of $40,000, $400 for vacation expenses, held proper. In re White, 101 App. Div. 172, 91 N. Y. S. 513. Charge of an equitable guardian for the support of his wards held not excessive. Alexander v. Hillebrand [Mich.] 12 Det. Leg. N. 238, 103 N. W. 849. Allowance of $900 out of a ward's estate for her support held reasonable. Barnett's Adm'r v. Adams, 26 Ky. L. R. 622, 82 S. W. 406.

19. A family meeting should be held and the approval of the court obtained in order that an amount in excess of the revenues of his estate may be expended in support of an interdict. Succession of Sangfried [La.] 38 So. 593.

20. If the ward is of tender years and it is for his best interest the principal of his estate may be expended for his support. Commonwealth v. Lee [Ky.] 86 S. W. 990.

21. Under Sayles' Civ. Ann. St. 1897, art. 2630. Logan v. Gay [Tex. Civ. App.] 13 Tex. Ct. Rep. 361, 87 S. W. 852.

22, 23. Logan v. Gay [Tex. Civ. App.] 13 Tex. Ct. Rep. 361, 87 S. W. 852.

24. The advancements were such as the chancellor would have ordered made out of the corpus of the estate, if he had been applied to. Fidelity Trust Co. v. Rudtloff [Ky.] 89 S. W. 119.

25. See 3 C. L. 1572. See, also, § 3, ante.

26. Mere knowledge on the part of guardian that one from whom his ward derives title consented to the building of a street railway does not bind the ward. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. Where a ward whose land was subject to assessment for construction of a drainage ditch had no notice of the proceeding, but her guardian appeared, procured an assessment of damages and had the matter approved by the court it is presumed in a collateral proceeding that the ward was given notice of the proceeding to obtain approval of the guardian's action. Ross v. Wright County Sup'rs [Iowa] 104 N. W. 506.

27. The advice of a judge in vacation not given in the exercise of his judicial functions is no justification for a guardian's action which is prejudicial to his ward's estate. In re Kimble [Iowa] 103 N. W. 1009.

28. Where property of the ward in the guardian's hands is bound by a judgment against the ward, the guardian is liable if he surrenders the property to the ward without paying such judgment. Probate Court of Exeter v. Carr [R. I.] 61 A. 171.

29. Under Rev. St. 1842, c. 150, §§ 3, 17, a guardian who is present at the settlement of an estate in which his ward has an interest may bind the ward by an agreement for a division of the property in kind. Stevens v. Meserve [N. H.] 61 A. 420.

30. Stevens v. Meserve [N. H.] 61 A. 420.

31. A guardian who advances money to his ward without knowledge of the purpose for which it is to be used is not entitled to credit therefor in the judicial settlement of his account. In re Holscher's Heirs [Iowa] 101 N. W. 759.

32. See post, § 10.

powers relative to investments, only the care that would be exercised by a prudent man is required of him.[33] Authority to accept securities in settlement of claims due the ward is not authority to make investments in securities other than those prescribed.[34] A limitation on what he may invest in does not apply to securities taken in settlement of doubtful claims.[35]

The mere fact that on the death of a nonresident alien lunatic his property will escheat does not preclude his conservator from removing such property from the state,[36] and where such ward is a bona fide resident of a foreign state the conservator is not required to show that his best interests would be subserved by such removal.[37] Nor is the right precluded by the fact that such property is in the hands of a conservator appointed by the state in which the property is located whose management has been beyond criticism.[38]

§ 6. *Presentment and allowance of claims.*[39]

§ 7. *Judicial proceedings to sell property of ward.*[40]—An unauthorized sale of the ward's property passes no title,[41] and renders the purchaser liable in conversion [42] regardless of his good faith in the transaction.[43] A sale of the ward's property partly for the benefit of the guardian will be set aside.[44] That proceeds of a void sale are used for the support of the ward does not estop him from asserting the invalidity of the sale.[45] A purchase by the guardian is void, even though the proceeds of the sale are used for the support of the ward.[46] A right in the ward to set aside a sale [47] may be barred by limitations.[48] A sale of the ward's real estate can be ordered only when the personal property is insufficient for the education and maintenance of the ward,

33. Under Pub. St. 1901, c. 178, § 9, requiring that funds shall be invested in notes secured by mortgage or real estate to double their value only requires that the guardian in good faith determine that the land is of double the value of the notes at the time the loan is made. Stevens v. Meserve [N. H.] 61 A. 420.

34. A statute authorizing a guardian to accept securities in lieu of cash in the settlement of an estate in which his ward has an interest. Stevens v. Meserve [N. H.] 61 A. 420.

35. A statute requiring funds to be invested in notes secured by mortgages on real estate of twice their value does not apply to notes taken in settlement of doubtful claims in favor of the ward. Stevens v. Meserve [N. H.] 61 A. 420.

36, 37, 38. Langmuir v. Landes, 113 Ill. App. 134.

39, 40. See 2 C. L. 1573.

41. Letter by probate judge that guardian had removed with his wards into another state and had there been appointed guardian, held not to amount to a ratification of an unauthorized sale of promissory notes belonging to estate of ward, though it stated that it would so operate. Merchants' & Clerks' Sav. Bank v. Schirk, 5 Ohio C. C. (N. S.) 569. A ward who does not receive the proceeds of a sale of his land by a guardian unlawfully appointed may recover the land without making a tender of the price paid. St. Paul Sanitarium v. Crim [Tex. Civ. App.] 84 S. W. 1114.

42. Purchaser of securities from guardian. Merchants' & Clerks' Sav. Bank v. Schirk, 5 Ohio C. C. (N. S.) 569.

43. Good faith on the part of one purchasing securities from a guardian, the proceeds from which were misappropriated, is not material in an action against such party for recovery of the amount so lost, where it appears that the guardian was without authority to make the sale. Merchants' & Clerks' Sav. Bank v. Schirk, 5 Ohio C. C. (N. S.) 569.

44. Where a part of the proceeds were to be appropriated by the guardian members of whose family the ward's were. Parker v. Bowers [Tex. Civ. App.] 84 S. W. 380. A purchaser with notice will be allowed for improvements, taxes paid, and the portion of the purchase price used for support of the ward, but not for the portion appropriated by the guardian nor anything for attorney's fees in procuring the sale. Id.

45. Cooper v. Burns, 133 F. 398.

46. Under Nebraska Comp. St. 1903, c. 23, § 85, the fact that the proceeds are used for the support of the ward does not make the purchase for his benefit. Cooper v. Burns, 133 F. 398. A mortgagee under the guardian with notice of his source of title is not protected as an innocent purchaser. Id.

47. A license of the probate court, a sale evidenced by confirmation of the probate forum, and a conveyance resting thereon though irregular in form, is a sale within the statute. Brown v. Pinkerton [Minn.] 103 N. W. 897.

48. Gen. St. 1894, § 4611, limiting the time to five years for the heir or person claiming under him to bring suit to set aside a guardian's sale is retrospective. Brown v. Pinkerton [Minn.] 103 N. W. 897. This statute is one of repose and protects the purchaser where five years have elapsed since the guardianship terminated and the sale was made. Id. Where a conveyance was made by a guardian and its recitals attempt to give

or to pay debts against his estate.[49] The proceeds of such sales are not to be paid to the ward but should be paid out by the guardian under orders of the court, for the purposes for which the sale was made.[50] That a court has jurisdiction to order a sale in regular guardianship does not give it power to order such sale in a different proceeding.[51] The guardian of a minor co-tenant cannot sell the entire property because the interests of all are chargeable with common debts.[52] An authorized sale of a minor ward's interest in common does not operate as a partition of the property.[53] An order directing a sale may constitute an adjudication of the issue of the guardian's mismanagement where such issue is tendered in the proceeding.[54]

§ 8. *Actions and legal proceedings by and against guardians.*[55]—Actions against the guardian in his representative capacity are properly brought in the jurisdiction where the guardianship is pending.[56]

Where a ward is damaged personally the action should be brought in his name by his guardian.[57] The committee of an insane person should be made a party defendant in a proceeding by the lunatic's next friend to set aside a marriage contracted by him during his lunacy.[58]

The guardian's motives, beliefs, or desires in instituting an action are immaterial.[59]

An authorized action by the guardian relative to the ward's estate binds the ward as to everything that can be validly adjudicated therein.[60] Issues foreign to the cause of action cannot be adjudicated,[61] but where a guardian sues for possession of his ward's land and damages for the use of it, he may be entitled to enjoin a conveyance of it by the defendant to a third person.[62]

A guardian is not liable for costs in an action against him as guardian unless the action is a result of his negligence.[63]

§ 9. *Accounting and settlement.*[64]—The probate and chancery courts have concurrent jurisdiction in matters of guardianship and the ward has the unqualified right of electing the forum in which he will seek a settlement.[65] A final settlement

effect to the probate proceedings, it is a deed sufficient to put the statute in operation. Id.

49. Rev. St. 1895, arts. 2653, 2654. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871.

50. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871. Hence, in an action on a guardian's bond, a cause of action is not established by merely showing that none of the proceeds of a sale of land ever came into the hands of the ward. Id.

51. By a guardian not lawfully appointed. St. Paul Sanitarium v. Crim [Tex. Civ. App.] 84 S. W. 1114.

52. Broom v. Pearson [Tex.] 85 S. W. 790.

53. Long acquiescence in such sale by the other co-tenants does not give it such effect. Broom v. Pearson [Tex.] 85 S. W. 790.

54. Where on application by a guardian to sell his ward's land to pay debts, the ward sets up by his guardian ad litem and relatives, that the guardian is indebted to his ward's estate for mismanagement, an order directing the sale, and allowing the guardian reimbursement and compensation is an abdication of the issues of mismanagement. Final until appealed from. In re Kimble [Iowa] 103 N. W. 1009.

55. See 3 C. L. 1574.

56. Though the parties do not reside there nor is the land relative to which the action is brought located there. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

57. The infant sustained damage by reason of a carrier's failure to furnish him a ticket in time to reach home to attend his father's funeral. Illinois Cent. R. Co. v. Head [Ky.] 84 S. W. 751.

58. Mackey v. Peters, 22 App. D. C. 341.

59. In ejectment to recover the premises of his ward. Hayden v. Collins [Cal. App.] 81 P. 1120.

60. In partition, that partition cannot be had without great prejudice. Cowling v. Nelson [Ark.] 88 S. W. 913.

61. In an action by a ward against his guardian to partition land purchased by the guardian with the ward's money, a further sum owing the ward by the guardian cannot be adjudged a lien on his homestead. May v. May [Mo.] 88 S. W. 75.

62. Cole v. Jerman, 77 Conn. 374, 59 A. 425.

63. Where he took stock as collateral and shortly before suit against him to enforce payment of a balance of the subscription price he took the stock over individually, he is not liable for costs of defense unless he was negligent in taking the stock originally or in allowing it to stand in his name as guardian after taking it individually. In re Kimble [Iowa] 103 N. W. 1009.

64. See 3 C. L. 1574.

65. Hence, a final settlement made in the

stands upon the same footing as a judgment and is conclusive as to all proper subjects of the account included,[66] if made in accordance with statutory requirements,[67] but an intermediate accounting is only prima facie correct as to persons not necessary parties.[68] A decree of a probate court discharging a guardian may be set aside in equity if procured by fraud,[69] if assailed within the limitation period,[70] and the ward is not guilty of laches.[71] A final settlement may be vacated for failure of the guardian to turn over all the estate of his ward remaining in his hands.[72]

A guardian is not relieved of his duty to account because he stands in the relation of co-tenant to his ward.[73] Substantial compliance with statutes requiring the filing of intermediate accounts is sufficient.[74] A private settlement between guardian and ward will not be approved by the court unless clearly fair.[75] It is void if made prior to the termination of the guardianship,[76] and if made soon after is viewed with suspicion [77] and will not be permitted to stand unless the ward acted with full knowledge of all his rights.[78]

The statement of account [79] should be properly itemized [80] and challenged items proved,[81] but vouchers are not absolutely essential.[82]

probate court by a guardian before his resignation or removal and during the minority of the ward is void for want of jurisdiction. Matthews v. Mauldin [Ala.] 38 So. 849.

66. May v. May [Mo.] 88 S. W. 75. An order settling a final account is impervious to collateral attack as to all matters included in the report, but is not an adjudication of any matter not included in the settlement. State v. Petersen [Ind. App.] 75 N. E. 602. Where an order confirming a guardian's account is appealable and is not appealed, questions respecting it cannot be reviewed on an appeal from an order for a sale of the ward's land. In re Scheuer's Estate [Mont.] 79 P. 244. Decree striking off a surcharge after an examination of a restated account and the original evidence affirmed. Hortz's Estate, 26 Pa. Super. Ct. 489.

67. A settlement made without complying with a statutory requirement relative to the exhibit of his account is only prima facie evidence of the facts contained therein. May v. May [Mo.] 88 S. W. 75.

68. The approval of an intermediate report of a guardian, at an accounting to which heirs of the ward are cited to appear, is only prima facie evidence of its correctness as against them. In re Kimble [Iowa] 103 N. W. 1009. Facts held to show no ground for a surcharge of a guardian's account. Savage's Estate, 27 Pa. Super. Ct. 292.

69. On a prayer for general relief. Willis v. Rice [Ala.] 37 So. 507. A bill for an accounting alleging that the guardian had procured his discharge by fraud perpetrated on his ward is not demurrable because showing a settlement and discharge not sought to be vacated. Id. A bill for an accounting alleging that the guardian had obtained his discharge by fraud perpetrated on his ward is not demurrable because not showing that the ward was injured by the discharge. Id.

70. A bill to impeach for fraud, a decree discharging a guardian, is by analogy governed by the same limitations as bars a bill of review. Willis v. Rice [Ala.] 37 So. 507. A direct attack of a final account for fraud or mistake of fact may be made on the final settlement or within three years after such settlement has been acted upon. State v. Petersen [Ind. App.] 75 N. E. 602.

71. Where a ward's signature is by fraud procured to a paper consenting to the guardian's discharge, and thereafter within a reasonable time she repeatedly sought to have an accounting which he refused, and thereafter within the limitation period she filed a bill to set the discharge aside and for an accounting, she was not barred by limitations or laches. Willis v. Rice [Ala.] 37 So. 507.

72. Complaint held to state facts justifying the vacation of a final settlement, under Burn's Ann. St. 1901, § 2685. State v. Petersen [Ind. App.] 75 N. E. 602.

73. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

74. A statute requiring a guardian to file his account upon the expiration of a year from his appointment does not prohibit him from filing it sooner. In re Hayden's Estate, 146 Cal. 73, 79 P. 588.

75. Where in a private settlement the ward allowed his credit for advancements made without any knowledge of the purpose for which they were to be used. In re Holscher's Heirs [Iowa] 101 N. W. 759.

76. A receipt by a ward acquitting the guardian in full of all claims against him is not valid if signed before the termination of the guardianship though the ward be at the time of sound mind. Griffin v. Collins [Ga.] 49 S. E. 827.

77. A contract of settlement between a guardian and ward, made soon after the ward's majority and before a settlement of the guardian's accounts, is presumed void. Hall v. Turner's Estate [Vt.] 61 A. 763.

78. Where a ward soon after attaining majority accepts from his guardian and receipts for certain corporate stock in lieu of a legacy which he was entitled to receive in money, he is not precluded from recovering from the estate of his guardian the amount of the legacy where it does not appear that he knew the source of the stock. Hall v. Turner's Estate [Vt.] 61 A. 763.

79. A statement of account by a guardian held sufficient. In re Estate of Toman, 110 Ill. App. 135. An order allowing the accounts of a guardian of the estate held not

The ward is entitled to the income of his own estate.[83] A de facto guardian with whom the ward lives is entitled to credit for support and maintenance furnished him [84] unless such guardian be the parent of the ward.[85] A ward may have a review of his guardian's accounts after he attains majority.[86] A petition for an accounting must be filed within the period allowed by law.[87]

The estate of the ward cannot be amerced for the costs of a reference of a complicated account which it objects to.[88] A guardian who files an incorrect account may be liable for the costs of the audit.[89]

§ 10. *Rights and liabilities between guardian and ward.*[90]—A guardian cannot acquire for his own benefit the property of his ward irrespective of the question of actual fraud.[91] A fortiori, where the transaction is fraudulent.[92] He is chargeable with interest on funds which he negligently fails to invest [93] after he has had a reasonable opportunity to invest them,[94] but not after the termination of his guardianship.[95] A guardian who invests funds of his ward in his own name must account for the amount of such investment if it is unprofitable,[96] and if he uses his ward's funds in his own business without authority from the court, is chargeable with compound interest.[97]

objectionable on behalf of the guardian of the person on the ground that the objector had little or no opportunity to present his side of the controversy at the hearing. In re White, 101 App. Div. 172, 91 N. Y. S. 513.

80. Bills for medical services are sufficiently itemized where the amount, the person to whom paid, nature of services rendered, and date of payment, are given. In re Hayden's Estate, 146 Cal. 73, 79 P. 588.

81. He must sustain challenged items of his account with evidence or they will be rejected. Merritt v. Wallace [Ark.] 88 S. W. 876.

82. In stating the account of a guardian or other person acting in a similar capacity, it is error to exclude any item for the sole reason that there is no voucher in support of it, if the claimant of the credit has sworn to the disbursement, and the item is in itself not improper to be allowed. Corcoran v. Renehan, 24 App. D. C. 411.

83. Where in partition between a ward and his de facto guardian he was awarded a certain number of acres, on accounting, he is entitled to the rental value of such tract and not to a fractional portion of the rental of the entire property. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

84, 85. Watts v. Watts' Ex'x [Va.] 51 S. E. 359.

86. After a ward attains his majority he may have a review of his guardian's accounts and join the sureties on the guardian's bond. Engelcke v. Engelcke, 3 Ohio N. P. (N. S.) 88. The successor or wards of a guardian, who has become a nonresident after the approval of his account, may go into the common pleas for an accounting, and if anything is found due, may proceed upon the bond in the same action. Id.

87. A petition for an accounting by a tutrix is barred by the four-year statute. Civ. Code art. 362. Rhodes v. Cooper, 113 La. 600, 37 So. 527.

88. In re Gorman, 2 Ohio N. P. (N. S.) 667.

89. One who has acted as guardian for a long period of years without giving much attention to the estate of the ward and has not complied with the law relative to filing his accounts is, when he files an incorrect account upon citation after the ward's majority, liable for the costs of the audit. Miller's Estate, 24 Pa. Super. Ct. 32. Guardian held not chargeable with fees of witnesses called to contest his account. Savage's Estate, 27 Pa. Super. Ct. 292.

90. See 3 C. L. 1574.

91. Wester v. Flygare [Minn.] 103 N. W. 1020.

92. A fraudulent sale of the ward's realty to the daughter of the guardian will be set aside. Coley v. Tallman, 43 Misc. 280, 88 N. Y. S. 896; Coley v. Tallman, 95 N. Y. S. 339.

93. Where he was authorized to loan on real estate security and rejected the only application because of insufficiency of the security, but made no report until cited by the court 10 years later. Merritt v. Wallace [Ark.] 88 S. W. 876. Sayles' Civ. Ann. St. 1897, art. 2648, expressly provides that a guardian who neglects to loan or invest money when he may do so by the exercise of reasonable diligence, is liable for the highest legal rate of interest. Logan v. Gay [Tex. Civ. App.] 13 Tex. Ct. Rep. 361, 87 S. W. 852. By the express provisions of Ky. St. 1903, § 2035, a guardian who does not invest funds of the ward within a reasonable time is chargeable with interest. Commonwealth v. Lee [Ky.] 86 S. W. 990.

94. A guardian should not be charged interest on funds in his hands until he has had a reasonable opportunity to invest them. Corcoran v. Renehan, 24 App. D. C. 411.

95. A guardian is not chargeable with interest on money which he negligently fails to invest, after the termination of his guardianship. Logan v. Gay [Tex. Civ. App.] 13 Tex. Ct. Rep. 361, 87 S. W. 852.

96. A guardian who receives a legacy in money for his ward and mingles it with his own funds and invests it in his own name, is bound to account for it in money. Hall v. Turner's Estate [Vt.] 61 A. 763.

97. Glassell v. Glassell [Cal.] 82 P. 42.

A de facto guardian is subject to the same liabilities as one legally appointed.[98]

§ 11. *Compensation of guardian.*[99]—The measure of compensation for improvement of the ward's property with his own funds is the increased value imparted to the property.[1] He is not entitled to compensation for increase in value of the property of his ward owing to ordinary good husbandry,[2] but may be allowed therefor when caused by unusual development of the land.[3] A guardian who converts his ward's funds and is guilty of malfeasance is not entitled to compensation.[4]

§ 12. *Guardianship bonds.*[5]—A bond not executed as required by law may be good as a common-law bond.[6] Failure to discharge his trust and return an inventory as required by law [7] or to respond in an action to review his account,[8] constitute breaches of his bond, but failure to satisfy a judgment based on a contract not binding on the estate is not.[9] In Texas a conversion of the proceeds of a sale of realty is a breach of the general bond,[10] but in Pennsylvania it is not.[11] The surety cannot be held liable for loss of funds remaining in the hands of the guardian as trustee after a settlement and turning over to the wards of their property.[12] No liability on the bond attaches until a breach thereof has been judicially determined.[13]

Any material alteration [14] or transaction increasing the liability of the surety discharges him,[15] but the mere giving of a second bond will not discharge the sureties on the original.[16]

The sureties may be liable without an accounting,[17] and a citation to a guardian to settle an account of his guardianship is not indispensable to a right of action on his bond when circumstances make the citation impossible.[18] In Minnesota consent

98. Liable for compound interest on rents and profits of the ward received by him. Watts v. Watt's Ex'x [Va.] 51 S. E. 359.

99. See 3 C. L. 1575. Under Code Civ. Proc. §§ 2338, 2730, a committee of an insane person who receives principal of the estate which is not converted into cash is entitled to one-half commissions on the value of such principal. In re Notman, 93 N. Y. S. 82.

1. Not the amount actually expended. Bramlett v. Mathis [S. C.] 50 S. E. 644.

2. Bramlett v. Mathis [S. C.] 50 S. E. 644.

3. As by drainage. Bramlett v. Mathis [S. C.] 50 S. E. 644.

4. Glassell v. Glassell [Cal.] 82 P. 42. A guardian who accepts rebates from tradesmen is properly denied commissions. Savage's Estate, 27 Pa. Super. Ct. 292.

5. See 3 C. L. 1575.

6. A bond not good as a statutory bond because not signed by the principal. Code 1896, § 2282. Matthews v. Mauldin [Ala.] 38 So. 849.

7. Miller v. Kelsey [Me.] 60 A. 717. Failing to make a true inventory, conversion of the ward's property, etc., is a breach of the bond required by Rev. St. 1898, § 3981. Brehm v. United States Fidelity & Guaranty Co. [Wis.] 102 N. W. 36.

8. Engelcke v. Engelcke, 3 Ohio N. P. (N. S.) 88.

9. Fidelity & Deposit Co. v. Rich & Bros. [Ga.] 50 S. E. 338.

10. The surety is liable for a portion of the proceeds of a sale of realty, converted by the guardian. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871.

11. A surety on a general guardianship bond who has no notice that it was intended for any other purpose than that shown on its face is not liable for the misappropriation of the proceeds of a sale of the ward's lands. Commonwealth v. American Bonding Co. [Pa.] 61 A. 939, afg. 25 Pa. Super. Ct. 145.

12. Broomall's Estate, 27 Pa. Super. Ct. 475.

13. Failure of a guardian to make a proper settlement does not fix a liability upon either him or his sureties. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871.

14. Under a statute requiring a bond in double the sum of the personal property, the amount of the penalty must be filled in at the time it is executed. If filled in thereafter the bond is not binding on the obligors. Rollins v. Ebbs, 137 N. C. 355, 49 S. E. 341.

15. A receipt signed by the ward acquitting the guardian of all claims against him does not "increase the risk" of the sureties on the guardian's bond so as to release them. Griffin v. Collins [Ga.] 49 S. E. 827.

16. A second bond given by a guardian to entitle him to receive funds in another state will not supersede the original bond in the absence of statutory proceedings for discharge of the sureties. Miller v. Kelsey [Me.] 60 A. 717. Where a guardian gives a statutory bond and after a devastavit and prior to release of the sureties gives a common-law bond, the sureties on both bonds are liable. Matthews v. Mauldin [Ala.] 38 So. 849.

17. Where a guardian appointed in one state dies insolvent in another leaving no assets in the state of his appointment. Parker v. Dominick, 94 N. Y. S. 249.

18. Miller v. Kelsey [Me.] 60 A. 717. Where a guardian has absconded and converted the entire property of his ward. Id.

of the probate court is a necessary prerequisite to maintain an action against the surety on a guardian's bond.[19] The liability of the sureties is no greater than that of the principal.[20] A guardian may lawfully agree with his sureties to indemnify them against liability by keeping up a life policy payable to the ward.[21] In Kentucky if a county judge negligently accepts an insolvent surety, he is liable for loss sustained by reason of such insolvency.[22] The measure of his liability is whatever the ward would have been entitled to recover from the surety.[23]

A suit on a guardian's bond is an action at law.[24] A guardian and several sets of sureties may be joined.[25] An action may be maintained in the name of the party aggrieved, though the state is the obligee of the bond.[26] Circumstances may render joinder of the principal unnecessary.[27] A defense of laches [28] must be specially pleaded [29] if it does not appear that the sureties were prejudiced.[30] Where the guardianship relation is closed and the accounts adjusted by the probate court, a cause of action against the sureties for an amount due from the guardian accrues at once if there be some person capable of suing.[31] If there be no person capable of suing, the action is postponed.[32] An action by a ward against her former guardian and one surety, to falsify and surcharge the guardian's account does not toll the statute of limitations as against the heirs and administrator of a deceased surety.[33] An order of the ordinary revoking the guardianship made conditional on the guardian's making full settlement with the ward is not a bar to an action by the ward's administrator on the guardian's bond,[34] especially where statutory requirements were not complied with in obtaining the discharge.[35] County courts have no power except as provided by law to discharge sureties for misconduct of the guardian.[36]

19. Eaton v. Gale [Minn.] 104 N. W. 833.

20. They are entitled to a credit for payment of incumbrances on the ward's property, or for maintenance of the ward. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871. The surety is only prima facie bound by a judgment against the estate of the ward rendered in an action to which he was not a party. Fidelity & Deposit Co. v. Rich & Bros. [Ga.] 50 S. E. 338.

21. If upon the death of the guardian the ward receives from the proceeds of such policy a sum equal to that for which the guardian or his sureties would otherwise be liable, it is a satisfaction of the liability of the guardian's estate or of his surety. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871.

22. Under Ky. St. 1903, §§ 2017, 2018. Commonwealth v. Lee [Ky.] 86 S. W. 990.

23. Commonwealth v. Lee [Ky.] 86 S. W. 990.

24. Where questions of law and fact are submitted to an auditor and exceptions of fact are filed to his report, such exceptions should be submitted to a jury for determination. Griffin v. Collins [Ga.] 49 S. E. 827.

25. A bill by a ward against his guardian and several sets of sureties on his official bonds is not bad for misjoinder, multifariousness, and want of equity. Matthews v. Mauldin [Ala.] 38 So. 849.

26. See, also, as bearing on this, Shannon's Code, §§ 4494, 4486. Brannon v. Wright, 113 Tenn. 692, 84 S. W. 612.

27. Where the amount is liquidated, the guardian dead, and his estate insolvent, an action may be maintained against the sureties without joining the principal or exhausting his estate. Under Shannon's Code, §§ 4484, 4486, 4494. Brannon v. Wright, 113 Tenn. 692, 84 S. W. 612.

28. In Georgia, the period of limitations within which suit on a bond may be brought is 20 years. The effect of Civ. Code 1895, § 2565, is to provide that, in the absence of a full exhibit of the guardian's accounts and full knowledge by the ward of his rights, receipts by the ward in final settlement are prima facie binding on him only after the lapse of four years. Griffin v. Collins [Ga.] 49 S. E. 827. Claim for relief against the estate of a deceased surety held barred by laches. Surety had been dead 20 years and limitations had nearly run against the cause of action. Wallace v. Swepston [Ark.] 86 S. W. 398.

29. In an action on a guardian's bond, a defense of laches in compelling an accounting by the guardian must be pleaded where it does not appear that defendants were prejudiced by the delay. Cook v. Ceas [Cal.] 82 P. 370.

30. Three years and 2 months' delay in compelling a guardian to account does not raise a presumption that sureties on the guardian's bond were prejudiced thereby, limitations being 4 years. Cook v. Ceas [Cal.] 82 P. 370.

31. Under Mansf. Dig. §§ 4484, 4489, where the ward is a minor at the time his guardian was removed, he may sue on the bond within 10 years after attaining majority. Wallace v. Swepston [Ark.] 86 S. W. 398.

32. Limitations do not commence. Wallace v. Swepston [Ark.] 86 S. W. 398.

33. Wallace v. Swepston [Ark.] 86 S. W. 398.

34. Griffin v. Collins [Ga.] 49 S. E. 827.

35. Civ. Code 1895, § 2567, requiring pub-

In Massachusetts judgment may be entered after the death of the ward.[37] Technical error in the entry may be corrected in the supreme court by an entry nunc pro tunc.[38]

HABEAS CORPUS (AND REPLEGIANDO).

§ 1. *Nature of the remedy and occasion and propriety of it.*[39]—Habeas corpus is a civil proceeding [40] of common-law origin, having for its purpose the enlargement of persons under illegal restraint.[41] Under this writ the custody of minors [42] and insane persons [43] may be determined. The remedy is also variously used to review the trial and sentence of courts martial,[44] extradition,[45] and contempt proceedings,[46] proceedings under the Chinese exclusion act,[47] and frequently to let to bail.[48]

lication of four weeks' notice of the application of a guardian for letters of dismission was not complied with. Griffin v. Collins [Ga.] 49 S. E. 827.

36. Where statutory requirements are not complied with, an order discharging sureties is void and a new bond taken on such discharge is merely cumulative. Brehm v. U. S. Fidelity & Guaranty Co. [Wis.] 102 N. W. 36.

37. Under Rev. Laws, c. 149, §§ 20, 21, 29, 31, 33, a judgment of a guardian's bond in favor of a judge of probate is not void because of the death of the ward, at date of judgment, and failure to appoint an administrator. Donaher v. Flint [Mass.] 74 N. E. 927.

38. In an action on a guardian's bond, judgment for the penalty should be entered before reference to the assessor to ascertain the amount for which execution shall issue. Donaher v. Flint [Mass.] 74 N. E. 927.

39. See 3 C. L. 1576.

40. 3 C. L. 1576, n. 19. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188.

41. One who after conviction is illegally hired out by the constable to work out his fine and costs pending an appeal by him in habeas corpus proceedings is illegally restrained of his liberty. Ex parte Winford [Tex. Cr. App.] 85 S. W. 1146. One confined as an escaped convict is entitled to habeas corpus to try the question of identity unless there has been an adjudication thereon. In re Moebus [N. H.] 62 A. 170.

42. See 3 C. L. 1576, n. 24. Kirkland v. Canty [Ga.] 50 S. E. 90; Dawson v. Dawson [W. Va.] 50 S. E. 613. Paramount question is welfare of child (People v. Elder, 98 App. Div. 244, 90 N. Y. S. 703; Plahn v. Dribred [Tex. Civ. App.] 83 S. W. 867; State v. Martin [Minn.] 103 N. W. 888), but not as against parent in absence of affirmative showing of unfitness (Terry v. Johnson [Neb.] 103 N. W. 319). Children in public institutions. New York Foundling Hospital v. Gatti [Ariz.] 79 P. 231; Rule v. Geddes, 23 App. D. C. 31. Commitment of minor to wrong institution may be corrected by committing judge. and, therefore, no ground for discharge. People v. Superintendent of House of Refuge on Randall's Island, 46 Misc. 131, 93 N. Y. S. 218.

43. See 3 C. L. 1576, n. 20. In re Boyett. 136 N. C. 415, 48 S. E. 789; In re Palmer, 26 R. I. 486, 59 A. 746.

44. Courts martial being courts of inferior and limited jurisdiction, it must be made to clearly and affirmatively appear, in order to give effect to their judgments. that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that the judgment imposed was conformable to law. Hamilton v. McClaughry, 136 F. 445; Ex parte Townsend, 133 F. 74; In re Lessard, 134 F. 305.

45. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515; Gillis v. Leekley [Wash.] 80 P. 300; Ex parte Dennison [Neb.] 101 N. W. 1045; Farrell v. Hawley [Conn.] 61 A. 502; Barriere v. State [Ala.] 39 So. 55; Hayes v. Palmer, 21 App. D. C. 450. Bail refused. Ex parte Wall [Miss.] 38 So. 628. The regularity of the proceedings had before the extradition are not reviewable on habeas corpus. In re Letcher, 145 Cal. 563, 79 P. 65. It appearing that the prisoner is not a fugitive from justice he was discharged. Poor v. Cudihee, 37 Wash. 609, 79 P. 1105. Petition held not to state a case for Federal interference on the ground of irregularity in extradition proceedings. Ex parte Moebus, 137 F. 154. Under U. S. Rev. St. § 5270, vesting United States judges and commissioners with jurisdiction in extradition proceedings, judgment of commissioner cannot be reviewed on habeas corpus. In re Herskovitz, 136 F. 713.

46. In re Hale, 139 F. 496; Elliott v. U. S., 23 App. D. C. 456. Sufficiency of judgment. Ex parte Kruegel [Tex. Cr. App.] 86 S. W. 1020. Writ denied because error of court was appealable. In re Downey [Mont.] 78 P. 772. Failure of record to show jurisdiction. Ex parte Hoar, 146 Cal. 132, 79 P. 853. One attached for contempt in refusing to produce books and papers required by a committee of a municipal assembly is not entitled to release on habeas corpus on the

Where the petitioner is detained by virtue of some process of law, the only office of the writ is to try questions of jurisdiction;[49] hence, the remedy cannot be employed as a substitute for the writ of error, certiorari, or an appeal.[50] Wherefore mere irregularity cannot avail;[51] but where an order or judgment is absolutely void the writ may be invoked.[52] The remedy of one in custody under a void statute is habeas corpus.[53]

The suspension of the writ of habeas corpus prohibited by the Alabama Bill of Rights only gives him the right to demand that his case be investigated according to the usual mode of procedure in courts of justice.[54]

§ 2. *Jurisdiction.*[55]—The power of Federal courts to release by habeas corpus a person held in state custody contrary to the federal constitution or laws is unquestioned,[56] but the exercise of the power is accompanied with very great embarrass-

ground that the papers would criminate him, where no such claim was made at the time he refused to produce them. Ex parte Conrades [Mo. App.] 85 S. W. 150.

47. United States v. Ju Toy, 198 U. S. 253, 49 Law. Ed. 1040.

48. Farrell v. Hawley [Conn.] 61 A. 502; Ex parte Parker [Tex. Cr. App.] 88 S. W. 230; State v. Zummo [La.] 39 So. 442; In re Moss, 23 App. D. C. 474; Packenham v. Reed, 37 Wash. 258, 79 P. 786. Ex parte Wall [Miss.] 38 So. 628. There being sufficient evidence that the proof of guilt was evident and the presumption great, the refusal of a circuit court to grant bail will not be disturbed on habeas corpus. In re Tubbs [Mich.] 102 N. W. 626.

49. Errors not going to the jurisdiction of the court cannot be reviewed on habeas corpus. Smith v. Territory, 4 Ariz. 95, 78 P. 1035. Commitment for contempt. Ex parte McCown [N. C.] 51 S. E. 957. Habeas corpus is the proper remedy when the process upon which a convict is held was issued by a court having no jurisdiction of the case or person at the time of its issue (Tuttle v. Lang [Me] 60 A. 892), but an arrest without a warrant held not a jurisdictional defect (Hollibaugh v. Hehn [Wyo.] 79 P. 1044). If the indictment does not charge an offense known to the law, there is want of jurisdiction (Hyde v. Shine, 25 S. Ct. 760; Ex parte Harris [Miss.] 37 So. 505; State v. Johns [Ala.] 38 So. 755), but a prisoner will not be set at liberty because the complaint states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention (State v. Shrader [Neb.] 103 N. W. 276). Whether the indictment states the offense with sufficient particularity cannot be tried on habeas corpus. Ex parte Bunkers [Cal. App.] 81 P. 748. Sentence to imprisonment wholly void for lack of authority to sentence to the institution in question. Ex parte Allen [Mich.] 103 N. W. 209.

50. Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138; People v. Murphy, 215 Ill. 584, 72 N. E. 902; Welty v. Ward [Ind.] 73 N. E. 889. Habeas corpus to review judgment of conviction. In re Clark, 28 Utah, 268, 78 P. 475; Ex parte Bettis [Ala.] 37 So. 640; Ex parte Russell [Wash.] 82 P. 290. Uncertainty in a complaint as to the time charged cannot be raised on habeas corpus. Ex parte Childs [Cal. App.] 81 P. 667. That the offense was committed in a county other than the one named in the charge will not be considered on habeas corpus (Ex parte Terry [Kan.] 80 P. 586), nor will the writ lie to inquire into the legality of a warrant or commitment issued from a court of competent jurisdiction (Id.).

51. See 3 C. L. 1576, n. 27. Not mere irregularity but only illegality is open to question in habeas corpus. Towery v. State [Ala.] 39 So. 310. Where the conviction was proper but the sentence irregular, the sentence could not be reviewed. In re Butler [Mich.] 101 N. W. 630. Stay orders granted on defendants' motion after trial and sentence are not such an irregularity as to justify discharge on habeas corpus. People v. Murphy, 212 Ill. 549, 72 N. E. 905. Where a juror became ill and trial by consent proceeded with eleven jurors, habeas corpus is ineffectual to procure release of respondent. In re Shinski [Wis.] 104 N. W. 86. Former jeopardy or proceedings equivalent to an acquittal are matters for defense to a subsequent trial, and not ground for a discharge on habeas corpus. Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138. Errors committed by the court in contempt proceedings cannot be reviewed on habeas corpus proceedings. Perry v. Pernet [Ind.] 74 N. E. 609. Not to raise sufficiency of indictment where defendant pleaded guilty. People v. Hayes, 95 N. Y. S. 471.

52. Where certain members of grand jury who returned bill of indictment under which petitioner was convicted had served at a previous term of court, the conviction was illegal and petitioner was entitled to discharge. Phillips v. Brown [Ga.] 50 S. E. 361; Michaelson v. Beemer [Neb.] 101 N. W. 1007.

53. See 3 C. L. 1577, n. 30. Ex parte Kair [Nev.] 80 P. 463. But it is held that the constitutionality of a statute will not be determined in habeas corpus when the accused can test the statute on appeal. People v. District Ct. of Second Judicial Dist. [Colo.] 80 P. 888.

54. State v. Towery [Ala.] 39 So. 309.

55. See 3 C. L. 1578.

56. Ex parte Moebus, 137 F. 154. The decision of a state supreme court that a prisoner is not held in violation of the rights secured him by the U. S. Constitution is not binding on the Federal supreme court. Brown v. Urquhart, 139 F. 846. Officer of United States held in custody for an act done

ment, and should be so exercised with sound discretion and great caution,[57] and only where the judgment of the state court is not reviewable by appeal or writ of error.[58] Where a Federal court has before it a habeas corpus proceeding a state court will not entertain a like proceeding to change the custodian of the accused.[59] A writ of habeas corpus may be issued out of the Federal courts to inquire into the cause of a commitment under a civil as well as a criminal process.[60] A district court is without jurisdiction to review by habeas corpus proceedings the decision of a collector denying the right of a Chinese person to enter the United States, against his claim of citizenship, where he has taken no appeal from such decision to the secretary of commerce and labor.[61] And where an application after affirmance on appeal sets up only alleged citizenship, the writ should be denied, the finding of the commissioner being final.[62] Application should be made to the district rather than the supreme court in the absence of special circumstances.[63]

The writ will not issue to one outside the court's territorial jurisdiction.[64]

§ 3. *Petition.*[65]—A defect in a petition in that it was not attested and subscribed by two witnesses who were present at the delivery of the same, as provided by statute, may be cured by amendment.[66] A motion to quash admits the averments of the petition.[67]

§ 4. *Hearing on petition and issuance of writ.*[68]—Under a statute authorizing an application for habeas corpus to be made in term or vacation, a judge in vacation has authority to issue the writ and pass upon the application.[69]

§ 5. *The writ; service thereof; effect of writ.*[70]

§ 6. *Certiorari in aid of habeas corpus.*[71]—Petitions for habeas corpus are frequently accompanied by applications for certiorari as ancillary thereto, and both are awarded or denied together.[72]

§ 7. *Hearing and determination on return; judgment; costs.*[73]—The correctness of court records cannot be questioned on habeas corpus.[74] If the petitioner is legally in custody it is immaterial when the officer got his authority, even though after the writ issued, if the authority existed when the officer made his return to the writ.[75] Where the respondent claims to hold the petitioner under a judgment of con-

or omitted under authority vested in him by the laws of the United States. In re Deaken, 137 F. 680. Federal marshal committing homicide in performance of duty. State of W. Va. v. Laing [C. C. A.] 133 F. 887.

57. Ex parte Caldwell, 138 F. 487; Ex parte Rogers, 138 F. 961. Will not issue from Federal courts to interfere with administration of state laws unless rights secured by Federal constitution are infringed. Rogers v. Peck, 26 S. Ct. 87.

58. In re Dowd, 133 F. 747.

59. In re Lee Look, 146 Cal. 567, 80 P. 858.

60. Ex parte Caldwell, 138 F. 487.

61. Mok Chung v. U. S. [C. C. A.] 133 F. 166; Ex parte Fong Yim, 134 F. 938.

62. United States v. Ju Toy, 198 U. S. 253, 49 Law. Ed. 1040.

63. State v. McColley [La.] 39 So. 81.

64. See 3 C. L. 1578, n. 47. The supreme court of the District of Columbia has no jurisdiction in a habeas corpus proceeding against the secretary of the navy to inquire into the grounds of the detention of a person, not an inhabitant of the district, who it is claimed is unlawfully restrained of his liberty in a distant possession of the United States by or under the authority of a navy officer because such navy officer in the discharge of his duties resides in the district. McGowan v. Moody, 22 App. D. C. 148. Whether the writ will lie in such district against a person who having custody of another has removed the latter from the district before the issuance of the writ for the purpose of evading the process of the court but who may still have the power to produce him, **quaere.** Id. See discussion of this question by Justices Campbell and Cooley in In re Jackson, 15 Mich. 417.

65. See 3 C. L. 1578.

66. Commonwealth v. Keeper of County Prison, 26 Pa. Super. Ct. 191.

67. Willis v. Willis [Ind.] 75 N. E. 653.

68. See 3 C. L. 1578. See, also, 2 C. L. 158.

69. State v. Simmons [Mo. App.] 87 S. W. 35.

70. See 3 C. L. 1578. See, also, 2 C. L. 158.

71. See 3 C. L. 1578.

72. Hyde v. Shine, 25 S. Ct. 760.

73. See 3 C. L. 1578.

74. Remedy is to make application to lower court for correction of record. Hanley v. State [Fla.] 39 So. 149.

75. Ex parte Dye [Mont.] 79 P. 689. The fact that a foreign seaman was arrested by

viction by a military court martial, the burden rests on him to show that the judgment is based on some provision of positive law.[76] In the District of Columbia the return is required to be made not to the court simply but before the court or justice by whose order the writ was issued.[77]

Whether a court on habeas corpus may examine the evidence adduced before a committing magistrate for the purpose of reviewing the decision of the magistrate that probable cause for binding over existed has been questioned.[78] In the Federal courts it is settled that the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court will order a discharge,[79] and this seems to be the rule that obtains in the state courts.[80] After conviction, however, the rule is universal, that the evidence, either that submitted before the

an unauthorized person does not entitle him to his discharge; he should, on its appearing that he should be held, be remanded to the proper custody. Dallemagne v. Moisan, 197 U. S. 169, 49 Law. Ed. 709.

76. Hamilton v. McClaughry, 136 F. 445.

77. D. C. Code, § 1143. Elliott v. U. S., 23 App. D. C. 456.

78. The use of the writ of habeas corpus to test the sufficiency of the evidence upon which an information may have been based is disapproved in State v. Vasquez [Fla.] 38 So. 830.

79. Hyde v. Shine, 25 S. Ct. 760; Dimond v. Shine, 25 S. Ct. 766. Additional evidence of a Chinese person's citizenship cannot be taken on habeas corpus after decision of the immigration officers. United States v. Ju Toy, 198 U. S, 253, 49 Law. Ed. 1040. Mere contradictory evidence as to whether an extradited person was in the demanding state at the time of the commission of the crime will not entitle him to discharge, habeas corpus not being the proper proceeding in which to try disputed questions of alibi or guilt. Munsey v. Clough, 196 U. S. 364, 49 Law. Ed. 515.

80. Note: From time immemorial it has been declared that the proper function of habeas corpus is to test only questions of jurisdiction. Accordingly the rule is stated to be that the court or judge granting the writ may not and will not go behind the commitment, if that instrument be fair upon its face, to inquire into the proceedings leading up to the commitment. But while it is true that the court, where the petitioner is committed in process of execution, after trial, conviction and sentence, may not go behind the commitment to inquire into the regularity of the various proceedings, or the sufficiency of the evidence (Young v. Fain, 121 Ga. 737; Seller's Case, 186 Mass. 301; In re Smith, 4 Ariz. 95; People v. House of Mercy, 128 N. Y. 180; State v. Glenn, 54 Md. 572), or even where one has been committed for trial by a grand jury, the indictment by the grand jury being treated as the final action of a judicial body (In re Kennedy, 144 Cal. 634, 103 Am. St. Rep. 117, 67 L. R. A. 406); yet where one accused of crime is committed for trial by an examining magistrate, empowered as in most jurisdictions to commit only when it shall appear that an offense has been committed, and that there is probable cause to believe the accused guilty, in such case the determination of the magistrate is jurisdictional, and if made upon no evidence whatever, or even upon evidence insufficient to warrant the determination that probable cause exists, the magistrate's action will be reviewed, upon the matter being brought to the attention of the proper tribunal, and in the appropriate form (Ex parte Jones, 96 F. 200; Commonwealth v. Shortall, 206 Pa. 165, 98 Am. St. Rep. 759, 65 L. R. A. 193; In re Eberle, 44 Kan. 472; Ex parte Sternes, 82 Cal. 245; State v. Baeverstad, 12 N. D. 527, 97 N. W. 548; Ex parte West, 100 Ala. 65; In re Levy, 8 Idaho, 53, 66 P. 806; In re Snell, 31 Minn. 110; Cowell v. Patterson, 49 Iowa, 514; People v. Stanley, 18 How. Pr. [N. Y.] 179; In re Henry, 35 N. Y. S. 210, cited with approval in People v. Wells, 57 App. Div. [N. Y.] 140, 68 N. Y. S. 59; People v. Crane, 94 App. Div. [N. Y.] 397, 88 N. Y. S. 343; State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700). An examination of cases which apparently hold the contrary will disclose that they are cases where the court has been asked to weigh the evidence submitted before the magistrate. This as stated in the text is a misuse of the writ, since error on the part of the examining magistrate—where there is some competent legal evidence on which to exercise his judgment—in determining that the accused shall be put upon trial is not jurisdictional error (State v. Hayden, 35 Minn. 283; In re Balcom, 12 Neb. 316; Ex parte Willoughby, 14 Nev. 451). In State v. Scott, 43 La. Ann. 857, the question was not raised before the proper tribunal, the judge before whom the preliminary examination was had being at the same time the judge before whom the trial must be had and having jurisdiction of habeas corpus concurrent with the supreme court. In Appeal of Bion, 59 Conn. 372, 11 L. R. A. 694, the court refused to examine the evidence because the matter was not before the court in the proper form, namely, the ancillary writ of certiorari had not been sued out and the evidence, therefore, was not properly before the court. In Indiana no person may be discharged from an order of commitment for alleged want of probable cause. Davis v. Bible, 134 Ind. 108.

Ex parte Perdue, 58 Ark. 285, is sometimes cited to the proposition that the sufficiency of evidence is not open to review. But here the question upon which the evidence before the magistrate was given was whether a deed of trust by which a lien was alleged to have been created upon the property alleged to have been unlawfully removed, contained the name of the grantee, and the evidence the court on habeas corpus properly refused to review.

committing magistrate or at the trial, will not be examined on habeas corpus, the remedy being by writ of error or appeal.[81]

A habeas corpus proceeding to obtain the custody of a child being in the nature of a private suit, in which the public is not concerned, the judgment of a court having competent jurisdiction is a final order and when unappealed from is res adjudicata between the parties.[82] A return to a writ of habeas corpus for the possession of a child that the mother held the child by virtue of an alleged agreement between the parents is insufficient to overcome the force of a decree subsequently rendered by a court of competent jurisdiction awarding the custody of the child to the father.[83] No other relief can be granted than the release of complainant from unlawful custody.[84] Where, however, a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime before a court of competent jurisdiction, on a habeas corpus proceeding, he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him,[85] and where an illegal sentence was imposed, direction was given on habeas corpus that the applicant be taken from the chain gang and carried before the trial court for resentence.[86] Where one conditionally pardoned is arrested because of an alleged violation of the condition, the question of violation may be tried on habeas corpus brought by him for relief from arrest.[87] A question of fact which petitioner waives will be so assumed as to support the confinement.[88]

To assess the costs of habeas corpus proceedings, against a sheriff who has lawfully performed his duty when an order of discharge is entered thereon, is erroneous.[89]

§ 8. *Review.*[90]—A final order awarding custody of a child is appealable,[91] and it is held that since habeas corpus is a civil proceeding an order for discharge of a prisoner is appealable.[92] The erroneous discharge of a prisoner by a court of competent jurisdiction is not reviewable on certiorari.[93] Under the act of Congress, March 3, 1891, an appeal lies from the order of a Federal district judge denying a writ,[94] but ordinarily an appeal will not lie from an order dismissing a petition, the remedy in such case being by application to another judge.[95] The refusal of the lower court

81. Probable cause to bind over. Ex parte Knudtson [Idaho] 79 P. 641.
Sufficiency of the evidence to support a conviction. Smith v. Territory, 4 Ariz. 95, 78 P. 1035; Young v. Fain, 121 Ga. 737, 49 S. E. 731. On habeas corpus to review a commitment to an industrial school it will be conclusively presumed that all necessary facts were found, though no findings are indicated by the commitment. In re Phillips [Del. Super.] 59 A. 47.

82. Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077; In re Clifford, 37 Wash. 460, 79 P. 1001; Kirkland v. Canty [Ga.] 50 S. E. 90; Dawson v. Dawson [W. Va.] 50 S. E. 613.

83. Maddox v Barr [Fla.] 38 So. 766.

84. The action of the committing court in applying a deposit in lieu of bail to the payment of a fine cannot be reviewed. State v. District Ct. of Second Judicial Dist. [Mont.] 79 P. 409.

85. Michaelson v. Beemer [Neb.] 101 N. W. 1007.

86. Littlejohn v. Stells [Ga.] 51 S. E. 390.

87. Ex parte Alvarez [Fla.] 39 So. 481.

88. Identity of one imprisoned as an escaped convict. In re Moebus [N. H.] 62 A. 170.

89. Magerstadt v. People, 105 Ill. App. 316.

90. See 3 C L. 1579.

91. Mahon v. People [Ill.] 75 N. E. 768. Circuit court commissioner. State v. Martin, 93 Minn. 294, 101 N. W. 303. Under the Alabama Code (Code 1896, § 457), a judgment awarding petitioner custody of a minor child and adjudging costs against defendant, is appealable. Stewart v. Paul [Ala.] 37 So. 691.

92. Garfinkle v. Sullivan, 37 Wash. 650, 80 P. 188. An order of discharge upon a writ of habeas corpus is not a final order in the sense that an appeal or writ of error may be prosecuted thereon. Magerstadt v. People, 105 Ill. App. 316. But it is also held that in the absence of statutory provisions a judgment on habeas corpus proceedings either discharging or remanding the prisoner, cannot be reviewed on appeal. State v. Towery [Ala.] 39 So. 309.

93. State v. Simmons [Mo. App.] 87 S. W. 35.

94. Chapter 17, § 5, 26 Stat. 827. In re Marmo, 138 F. 201.

95. See 3 C. L. 1579, n. 83. Ex parte Billups [Tex. Cr. App.] 88 S. W. 347.

to quash a writ of habeas corpus is not a final judgment and cannot be reviewed on appeal or error.[96] An appeal by the United States marshal from an order of a lower court in habeas corpus proceedings discharging petitioner from custody may be prosecuted without an appeal bond.[97] Affidavits as to matters occurring at the trial of a writ of habeas corpus will not be considered by an appellate court in the absence of a bill of exceptions.[98] A prisoner set at liberty by habeas corpus may, upon reversal of the order by an appellate court, be remanded to the custody from which he was freed.[99]

HANDWRITING, PROOF OF; HARBOR MASTERS, see latest topical index.

HARMLESS AND PREJUDICIAL ERROR.

§ 1. *The general doctrine.*[1]*—Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,*[2] even though he has

96. Rigor v. State [Md.] 61 A. 631.
97. Palmer v. Thompson, 20 App. D. C. 273.
98. Maddox v Barr [Fla.] 38 So. 766.
99. State v. Shrader [Neb.] 103 N. W. 276.
1. See 3 C L. 1579.
2. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235; Jackson v. Gunton, 26 Pa. Super. Ct. 203; Vanderslice v. Donner, 26 Pa. Super. Ct 319; Simonds v. Georgia Iron & Coal Co., 133 F. 776; Earel v. Kickhofel, 114 Ill. App. 658; Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953. There must be such prejudice to appellant as cannot be remedied without a new trial. New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624. Must appear that substantial justice has not been done. Indianapolis, etc., R. Co. v. Hubbard [Ind. App.] 74 N. E. 535. If it appears from the entire record that the judgment is correct, it will not be reversed for technical errors. Boyce v. Augusta Camp, No. 7, 429 M. W. A., 14 Okl. 642, 78 P. 322. Whenever there is such a violation of established practice or principles in regard to the exercise of judicial authority as to seriously interfere with the efficiency of judicial instrumentalities to administer justice, the error is jurisdictional. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Decree awarding homestead is not prejudicial to a defendant who makes no claim as against the homestead. Miller v. Stuck, 69 Kan. 657, 77 P. 552. Plaintiff suing for change of grade held not prejudiced by ruling that in changing grade defendant was not taking, but merely damaging plaintiff's property. Swope v. Seattle, 36 Wash. 113, 78 P. 607. Defendant appellant technically entitled to judgment on pleadings. Keizer v. Remington Paper Co. [Kan.] 80 P. 570. Inclusion of attorney's fees in lieu of mortgage on foreclosure against executor. Bell v. Thompson [Cal.] 82 P. 327. Where the verdict is in favor of the plaintiff as to one defendant and against him as to the other, plaintiff cannot complain of errors affecting only the case against the defendant against whom he had judgment. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. Instructions. Reuss v. Monroe, 115 Ill. App. 10; Beck v. People, 115 Ill. App. 19. Errors in evidence are immaterial where substantial justice has been done. Schrodt v. St. Joseph [Mo. App.] 82 S. W. 543. Where the holders of bonds illegally issued by a municipality follow the fund, the municipality is not harmed by a judgment giving them title to a building erected with the funds instead of ordering it sold for their benefit where the property is not more valuable than the fund. Board of Trustees of Fordsville v. Postel [Ky.] 88 S. W. 1065.

So provided by statute: Burns' Ann. St. 1901, §§ 401, 670. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. Erroneous instruction will not reverse where judgment is right on merits. Indianapolis St. R. Co. v. Schomberg [Ind.] 72 N. E. 1041; Terre Haute & L. R. Co. v. Salmon, 34 Ind. App. 564, 73 N. E. 268. Instructions regarded as a whole. Indianapolis St. R. Co. v. James [Ind. App.] 74 N. E. 536. Statute does not extend to prejudicial errors in instructions and admitting evidence. Thuis v. Vincennes [Ind. App.] 73 N. E. 141. Rev. St. 1898, §§ 2829, 2830, 3068. Milwaukee Trust Co. v. Sherwin, 121 Wis. 468, 98 N. W. 223, 99 N. W. 229. Municipal Court Act (Laws 1902, p. 1583, c. 580), § 326. Lesser v. Adolph, 91 N. Y. S. 705. Rev. St. 1887, § 4231. White v. Johnson [Idaho] 79 P. 455. Ball. Ann. Codes & St. § 6535. State v. Everett Water Co. [Wash.] 80 P. 794. Const. § 147. Personal judgment against members of firm in suit to set aside fraudulent conveyance to them. Holmes Bros. v. Ferguson-McKinney Dry Goods Co. [Miss.] 39 So. 70. Civ. Code, § 134. Errors in refusing continuance and concerning disqualification of judge are immaterial where judgment follows directions given on prior appeal. Tye v. Tye, 26 Ky. L. R. 939, 82 S. W. 1005. No error in pleading can be considered on appeal unless it af-

fects the substantial rights of the parties. Ignored where judgment for right parties and not questioned, only issues presented were tried. Miller v. McConnell, 26 Ky. L. R. 181, 80 S. W. 1103. Error in failing to transfer action on note and to foreclose mortgage securing same to common-law docket because answer presented common-law defense, not cause for reversal, where evidence was insufficient to entitle defendant to go to jury thereon. Davis v. Case Threshing Mach. Co., 26 Ky. L. R. 235, 80 S. W. 1145. Refusal to compel election. Gregory v. New Home Sew. Mach. Co. [Ky.] 86 S. W. 529. Failure to file exhibit. Cabell v. Henderson [Ky.] 88 S. W. 1095. Overruling motion to make complaint more specific. Craft v. Barron [Ky.] 88 S. W. 1099. Rev. St. 1899, §§ 655, 659, 672, 865. Variance and defects in pleadings. Railroad killing stock. Litton v. Chicago, etc., R. Co. [Mo. App.] 85 S. W. 978. Rev. St. 1899, § 672. No judgment reversed for defect of process or mistake in name of party. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032. Rev. St 1899, § 865. Refusal of requested instruction. Brown v. St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310. Evidence in ejectment. Swope v. Ward, 185 Mo. 316, 84 S. W. 895. Statute cannot be invoked to aid harmful instruction on evidence in close case. Chambers v. Chicago, etc., R. Co. [Mo. App.] 86 S. W. 501. Variance. Rev. St. §§ 655, 798. Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 1119.

Right decision on wrong ground. Buster v. Wright [C. C. A.] 135 F. 947; Samberg v. American Exp. Co. [Mich.] 99 N. W. 879; Reynolds v. Smith [Fla.] 38 So. 903. Order granting new trial. Davis v. Dinnie [N. D.] 101 N. W. 314. New trial based on wrong ground. Ross v. Metropolitan St. R. Co., 93 N. Y. S. 679; Morelock v. Chicago, etc., R. Co. [Mo. App.] 87 S. W. 5 The opinion of the trial court, as distinguished from its findings and decision, is not a proper subject for an assignment of errors. Eureka County Bank v. Clarke [C. C. A.] 130 F. 325. A correct ruling striking out testimony cannot be complained of, though the reasons for asking for such ruling are not given. Sterling v. Detroit, 134 Mich. 22, 10 Det. Leg. N. 399, 95 N. W. 986. An order, general in its terms, sustaining a demurrer, will be affirmed if the plea was properly stricken for any of the reasons specified in the demurrer, though the bill of exceptions recites that it was stricken for a particular reason. Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933. Refusal to set aside a default judgment will not be reversed, though based on an erroneous ground, if the ruling in itself is correct. Scott v. Mutual Reserve Fund Life Ass'n, 137 N. C. 515, 50 S. E. 221. Sustaining demurrer to plea on wrong ground. St. Louis, etc., R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267.

Result reached was the only one sustainable. David v. Whitehead [Wyo.] 79 P. 19; Bowman v. Little [Md.] 61 A. 223; French v. French [C. C. A.] 133 F. 491; McDowell v. Jones, 116 Ill. App. 13; Hawke v. Kerr [Neb.] 101 N. W. 1023; First Nat. Bank v. Dye [Neb.] 102 N. W. 614; In re Owen's Estate [Neb.] 103 N. W. 675; Nickell v. Tracy, 100 App. Div. 80, 91 N. Y. S. 287; Johnston v. Coney, 120 Ga. 767, 48 S. E. 373; White v. Southern R. Co. [Ga.] 51 S. E. 411. Direction of verdict for defendant is harmless, though his plea is bad where plaintiff has made no case. Lucente v. Davis [Md.] 61 A. 622. Errors in instructions will not justify reversal where the verdict of the jury was one that the court might have directed them to find (Taylor v. McCumber, 105 Ill. App. 87; Greene v. Murdock [Cal. App.] 81 P. 993; Sanger v. Travis County Farmers' Alliance [Tex. Civ. App.] 84 S. W. 856), or if they could not have reasonably found otherwise (O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516; Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669). Incompetent evidence will not vitiate a verdict such that any other would have to be set aside. Feitl v. Chicago City R. Co., 113 Ill. App. 381. Where there can be no recovery, errors cannot prejudice. Supreme Court of Honor v. Buxton, 116 Ill. App. 447. Error in a charge of the court in a will contest not ground for reversal where it clearly appears that the will was a forgery. Gurley v. Armentraut, 6 Ohio C. C. (N. S.) 156. Errors are not available to plaintiff when upon the whole evidence he cannot recover. Muench v. The Standard Brewery, 113 Ill. App. 512. Decree for right party on merits. Strayer v. Dickerson, 213 Ill. 414, 72 N. E. 1085. Error in withdrawing case from jury is harmless where same result must have been reached on proper submission. Bennett v. Mutual Fire Ins. Co. [Md.] 60 A. 99. Errors in instructions. Moore v. Baltimore & O. R. Co., 103 Va. 189, 48 S. E. 887; State v. Stone [Mo. App.] 85 S. W. 950; Richmond, P. & P. Co. v. Allen, 103 Va. 532, 49 S. E. 656. Plaintiff not entitled to recover in any event, instruction placing burden on him of proving case beyond reasonable doubt is harmless. Wood v. Wyeth, 94 N. Y. S. 360. The admission in evidence of the record of a case which controls the one at bar is not prejudicial, though the judgment is not technically effective as an estoppel. Dunham v. Angus, 145 Cal. 165, 78 P. 557. Error in instructions on issue which court might have withdrawn. First Nat. Bank v. Follett [Colo. App.] 80 P. 147. Plea in recoupment not sustainable in any event; errors relating thereto are immaterial. Swindell & Co. v. First Nat. Bank, 121 Ga. 714, 49 S. E. 673. Where, on the whole case, no other verdict than that rendered could have been rightfully found, judgment will not be reversed on objections to instructions given and refused. Chesapeake & O. R. Co. v. Harris, 103 Va. 635, 49 S. E. 997; Markowitz v. Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351. Where the correct rejection of a transcript of a will and its probate from another state necessitates a nonsuit, errors in ruling on other evidence are immaterial. Conrad v. Kennedy [Ga.] 51 S. E. 299. Where nonsuit was properly granted, the admission of evidence that could not have changed the result is harmless. Steele v. Central of Ga. R. Co. [Ga.] 51 S. E. 438. To give the jury a form of verdict for plaintiff in whose favor it must be under the evidence and instruction is harmless. Seidel v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 77. Error in instructions and argument for plaintiff immaterial. Beatty v. Clarkson, 110 Mo. App. 1, 83 S. W. 1033. Errors in refusing declarations of law. Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commission Co. [Mo. App.] 84 S. W. 142. Denial of jury trial

properly saved his objection and excepted to the ruling,[3] and has regularly preserved it in the "record." [4] The policy of courts is against so doing.

The party must affirmatively show error apparent on the "record." [5] It must harm him rather than a co-party,[6] and must be one which he has not invited,[7] and which he can assail without inconsistency to his contentions made on the trial.

is immaterial where the evidence is such that the court would have been required to direct a verdict. Combs v. Burt & B. Lumber Co. [Ky.] 85 S. W. 227. Exclusion of evidence for defendant on measure of damages held harmless where verdict for plaintiff could not have been for less. Texas & P. R. Co. v. Sherrod [Tex. Civ. App.] 87 S. W. 363. Error in submitting an issue on which the evidence was insufficient to require submission is unavailable to the party having the burden of maintaining it. Franklin v. Boone [Tex. Civ. App.] 13 Tex. Ct. Rep. 93, 88 S. W. 262. Error in treating investment as a loan where recovery is for no more than the proof would warrant under the correct theory. Hanks v. Hanks [Ill.] 75 N. E. 352.

Held prejudicial: Errors at the trial will not generally prejudice a plaintiff whose petition was subject to general demurrer; but they may if the petition was amendable and objection is first made to it on appeal. Moore v. Boothe [Tex. Civ. App.] 87 S. W. 882. A judgment in favor of plaintiff in trespass to try title cannot be affirmed, notwithstanding other errors, on the ground that the evidence shows such prior possession in plaintiff as would entitle her to recover against defendant, who failed to show any title, where the evidence on such question was conflicting, and that issue was not submitted to the jury. Cobb v. Bryan [Tex. Civ. App.] 83 S. W. 887.

3. See Saving Questions for Review, 4 C. L. 1368, as to necessity for so doing.

4. See Appeal and Review, § 9, 5 C. L. 161 (perpetuation of proceedings for reviewing count).

5. The "record" must show the error; hence the party objecting must preserve therein enough to show it. See Appeal and Review, § 9, 5 C. L. 161 et seq.; § 13E, 5 C. L. 218 et seq. Gairdner v. Tate, 121 Ga. 253, 48 S. E. 907. Record must show that erroneous order was complied with or otherwise prejudiced appellant. Jenner v. Brooks, 77 Conn. 384, 59 A. 508. Must appear that something happened while juror was asleep that prejudiced appellant. Kozlowski v. Chicago, 113 Ill. App. 513. Where excessiveness of verdict is claimed, record must show it. Coy v. Druckamiller [Ind. App.] 73 N. E. 195. Sustaining objection to question cannot be said to be prejudicial where proposed answer is not shown. Bachant v. Boston & M. R. Co. [Mass.] 73 N. E. 642. Must appear that objectionable question was answered. Perrin v. Carbone [Cal. App.] 82 P. 222. In the absence of any showing that a person who was not the owner of land sold for taxes was in actual occupancy of it, alleged defects in the redemption notice served on him are immaterial. Barcroft v. Mann, 125 Iowa, 530, 101 N. W. 276. No showing that witness made prejudicial answer to erroneous question. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. Connection of evidence must be shown. Dawson v. Proctor [Colo. App.] 79 P. 303. Appeal on judgment roll alone. Miller v. Enterprise Canal & Land Co., 145 Cal. 652, 79 P. 439. In order to obtain a reversal, plaintiff in error must show both error and injury. No injury because claim of creditor not ranked above that of others where assets are sufficient to pay him. First Nat. Bank v. American Sugar Refining Co., 120 Ga. 717, 48 S. E. 326. Ruling allowing introduction of certain evidence is harmless where none such was introduced. City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724. A premature entry of an order of reference was harmless where no account was taken thereunder. Reager's Adm'r v. Chappelear [Va.] 51 S. E. 170.

6. Ottawa v. Hayne, 114 Ill. App. 21; Halloran v. Holmes [N. D.] 101 N. W. 310. Evidence affecting only coparty. Davenport v. Lines, 77 Conn. 473, 59 A. 603; Frazer v. Frisbie Furniture Co. [Ky.] 86 S. W. 539. Refusal to quash service on codefendant. Tyler v. Davis [Ind. App.] 75 N. E. 3. Others may not complain of a decree affecting only a receiver. Failure to provide for payment of his fees. Welsh v. Kelsey [Kan.] 79 P. 1081. Judgment creditor held not prejudiced by finding of interest of debtor which passed to another creditor. Lockhaven Trust & Safe Deposit Co. v. United States Mortg. & Trust Co. [Colo.] 81 P. 804. Not prejudicial to defendant in ejectment to charge that the verdict could not affect the rights of persons not parties. Lassiter v. Okeetee Club, 70 S. C. 102, 49 S. E. 224. Joint tort feasor against whom verdict and judgment were rendered cannot complain that verdict did not include the other defendant. Illinois Cent. R. Co. v. Clark [Miss.] 38 So. 97. Restriction of evidence to special purpose cannot harm a defendant to whose case the evidence is not applicable. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286. Joint defendant objects that suit was not dismissed as to his codefendant. Grand Pac. Hotel Co. v. Pinkerton [Ill.] 75 N. E. 427. Judgment against principal being correct, errors affecting only the sureties is immaterial. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285.

7. Refusal to direct to ignore immaterial evidence is not reversible where such evidence was admitted without objection or motion to strike. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280. Party cannot complain of evidence similar to that introduced by him. Ott v. Press Pub. Co. [Mash.] 82 P. 403; Policemen's Benevolent Ass'n v. Ryce, 115 Ill. App. 95; Merchants' Loan & Trust Co. v. Boucher, 115 Ill. App. 101. Further development of matter brought out by appellant's cross-examination. Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033; Stowe v. La Conner T. & T. Co. [Wash.] 80 P. 856. Where plaintiff invites a verdict for defendant if the jury regard him as entitled only to nominal damages, a verdict for defendant can-

The majority of courts presume prejudice from error once it is shown to exist,[8] and require the party defending against errors to show that no harm resulted.[9]

Errors which favor the party objecting are of course not ground for reversal,[10] nor are such as may be corrected without resort to a new trial.[11]

not be set aside if one for nominal damages could have been sustained. Langdon v. Clarke [Neb.] 103 N. W. 62. A judgment resulting from submission on a wrong theory will be reversed, though it might have been sustained on the correct theory and appellant invited the error. McManus v. St. Regis Paper Co., 94 N. Y. S. 932. Evidence brought out at suggestion of appellant's counsel. Hyland v. Southern Bell Tel. & T. Co., 70 S. C. 315, 49 S. E. 879. Matters brought out by defendant's own counsel. Bastardy case. Johnson v. Walker [Miss.] 39 So. 49. Issue submitted at appellant's request. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Defendant held not prejudiced by admission under limitations of pleading offered by it, for improper purpose. Texas & P. R. Co. v. Slaughter [Tex. Civ. App.] 84 S. W. 1085. Reply to defendant's argument. Illinois Cent. R. Co. v. Colly [Ky.] 86 S. W. 536. Incompetent testimony contradictory of other incompetent testimony. Fields v. Missouri Pac. R. Co. [Mo. App.] 88 S. W. 134; O'Neal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. A party cannot object to the range taken in cross-examining a witness on an immaterial matter where he first offered the witness and examined him on the same matter. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593. Appellant cannot complain that pleadings went to the jury containing a stricken count where his counsel declined appellee's offer to remove the objectionable count. Elgin, A. & S. Traction Co. v. Wilson [Ill.] 75 N. E. 436.

Instructions similar to those asked by appellant. Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858; Haxton v. Kansas City [Mo.] 88 S. W. 714; Farmers' Mut. Ins. Co. v. Cole, 4 Neb. Unoff. 130, 93 N. W. 730; Chicago & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758; Central R. Co. v. Sehnert, 115 Ill. App. 560; Town of Frostburg v. Hitchins, 99 Md. 617, 59 A. 49; Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; Bryce v. Burlington, etc., R. Co. [Iowa] 104 N. W. 483; Dodge v. Knapp [Mo. App.] 87 S. W. 47; O'Neal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. Instruction submitting mixed question of law and fact similar to one requested by appellant. People v. Griesbach, 112 Ill. App. 192. Parol lease for more than a year. Houck v. Williams [Colo.] 81 P. 800. Submission of issues requested by appellant. Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4. A party cannot claim on appeal that legal propositions charged at his own request were erroneous. Gulf & S. I. R. Co. v. Boswell [Miss.] 38 So. 43. Inconsistencies and contradictions in instructions caused by giving erroneous ones for appellant. Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982. Appellant cannot complain that court selected least favorable of two theories presented by him. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 87 S. W. 867. Instructions on issue first presented by appellant. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

8. This is a form of invited error. See 4 C. L. 1368. Appellant cannot contend that proof should have been made in a manner attempted and rejected because of his objection. Drainage Com'rs Dist. No. 2 v. Drainage Com'rs Dist. No. 3, 113 Ill. App. 114. Appellant who prevented introduction of evidence to prove certain fact cannot object that it was not proved. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727; Chicago Union Traction Co. v. Lundahl, 215 Ill. 289, 74 N. E. 155; Knudson v. Parker [Neb.] 96 N. W. 1010. Party cannot complain of rejection of evidence opposed to the theory he announces. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. Reversal will not be granted for misconduct of counsel where counsel for both parties are guilty. Culver v. South Haven & E. R. Co. [Mich.] 101 N. W. 663. Verdict for amount admitted by defendant to be due cannot be claimed to be excessive. Charlton v. Markland, 36 Wash. 40, 78 P. 132. Where a case has been tried on the theory that a certain issue was before the court, the point that the issue was not properly presented by the pleadings will not be considered. Parke & Lacy Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 P. 1065, 79 P. 71. Defendant procuring rejection of proper rule of damages cannot complain of adoption of next best. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856. Refusal of evidence material to issue eliminated at appellant's request. Trotter v. Angel, 137 N. C. 274, 49 S. E. 329. Similar errors in evidence committed by both parties. Schrodt v. St. Joseph [Mo. App.] 83 S. W. 543. Appellants cannot complain of the exercise of additional challenges by a third party made necessary by a situation brought about by appellant's attitude towards such third party. Will contest. Flowers v. Flowers [Ark.] 85 S. W. 242. The case must be tried on appeal on the issues raised below. Newton v. Russian [Ark.] 85 S. W. 407; Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79.

9. Union Pac. R. Co. v. Field [C. C. A.] 137 F. 14; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108; Lucas v. Stonewall Ins. Co., 139 Ala. 487, 36 So. 40; Callaway v. Gay [Ala.] 39 So. 277. Improper evidence which might have had a tendency to influence the jury. National Biscuit Co. v. Nolan [C. C. A.] 138 F. 6; Ft. Worth & R. G. R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37; McVey v. Barker, 92 Mo App. 498. The judgment will be reversed where illegal evidence has been admitted; and it cannot be said what effect it had on the jury. Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521. Instruction. Robinson v. Lowe, 56 W. Va. 308, 49 S. E. 250. An appellee invoking the statute must show by the record that substantial error did not prejudice appellant's rights. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828.

10. Texas & P. R. Co. v. Tracy [Tex. Civ. App.] 85 S. W. 833; Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73; Rooncy v. Woolworth [Conn.] 61 A. 366; Mason v. Gibson [N. H.]

60 A. 96; Osborne & Co. v. Waterloo [Mich.] 101 N. W. 801; Strickland v. Hutchinson [Ga.] 51 S. E. 348; Southwest Mo. Elec. R. Co. v. Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966; Schenck v. Griffith [Ark.] 86 S. W. 850; Darnell v. Lafferty [Mo. App.] 88 S. W. 784. An involuntary bankrupt is not prejudiced by a ruling that his liquor license is an asset of his estate. In re McGowan, 134 F. 498. Where a demurrer to an answer is overruled, defendant cannot successfully assign on appeal that the court erred in failing to carry back the demurrer and sustain it to the complaint. Minnich v. Swing [Ind. App.] 73 N. E. 271. Overruling of demurrer to complaint cannot be reviewed on an appeal by plaintiff. Rauh v. Oliver [Idaho] 77 P. 20. Only the questions decided adversely to a party are reviewable on his appeal. State Agricultural College v. Hutchinson [Or.] 78 P. 1028. Failure to apply statutory rule in measuring fish trap. Gile v. Baseel [Wash.] 80 P. 437. Where, in a suit to set aside a deed, the deed is held valid, any insufficiency in the pleadings to warrant a decree reforming the deed so as to vest a life estate in the plaintiff is harmless as to her. Powers v. Powers [Or.] 80 P. 1058. Dismissal where defendants were entitled to judgment is not prejudicial to plaintiff. Welch v. Northern Pac. R. Co. [Minn.] 104 N. W. 894.

Evidence prejudicial to appellee. Murdock v. Murdock, 111 Ill. App. 375; Bickerdike v. State, 144 Cal. 698, 78 P. 277; State Board of Education v. Makely [N. C.] 51 S. E. 784. Favorable answer over objection. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

Submission of issues: Defendant is not harmed by submission of issue which the court should have affirmed as matter of law. Mace v. Boedker & Co. [Iowa] 104 N. W. 475; Bryce v. Burlington, etc., R. Co. [Iowa] 104 N. W. 483. Defendant cannot complain of failure to submit a branch of plaintiff's case. Mitchell v. Pinckney [Iowa] 104 N. W. 286. Submission of issues unauthorized by the pleadings is harmless where the findings as made render the findings on the unauthorized issues immaterial. Spencer v. Spencer [Mont.] 79 P. 320.

Instructions favorable to party complaining. West v. St. Louis, S. W. R. Co., 187 Mo. 351, 86 S. W. 140; Texas, etc., R. Co. v. Reid [Tex. Civ. App.] 86 S. W. 363; Gray v. Moore [Tex. Civ. App.] 84 S. W. 293; Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664; Howard v. Terminal R. Ass'n, 110 Mo. App. 574, 85 S. W. 608; Easton v. Wostenholm [C. C. A.] 137 F. 524; Waters-Pierce Oil Co. v. Van Elderen [C. C. A.] 137 F. 557; Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264; Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780; Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505; Darr v. Donovan [Neb.] 102 N. W. 1012; Woolf v. Nauman [Iowa] 103 N. W. 785; Warn v. Flint [Mich.] 12 Det. Leg. N. 294, 104 N. W. 37; McAfee v. Dix, 101 App. Div. 69, 91 N. Y. S. 464; Houston & T. C. R. Co. v. Berry [Tex. Civ. App.] 84 S. W. 258; Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 85 S. W. 479; State v. Stone [Mo. App.] 85 S. W. 950; Town of Carton v. McDaniel [Mo.] 86 S. W. 1092. Instruction requiring that witnesses should have equal opportunities for observation is harmless to party whose witnesses had superior opportunities. Delaware, etc., R. Co. v. Devore [C. C. A.] 122 F. 791. Inconsistency between instructions will not reverse where one is correct and the other too favorable to appellant. Rogers v. Daniels, 116 Ill. App. 515; Wood v. Rio Grande Western R. Co., 28 Utah, 351, 79 P. 182; Tham v. Steeb Shipping Co. [Wash.] 81 P. 711; McHugh v. St. Louis Transit Co. [Mo.] 88 S. W. 853. Refusal to give a requested instruction less favorable than he was entitled to does not harm appellant. Bond v. Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124.

Verdicts and findings: Plaintiff is not prejudiced by finding in his favor on counterclaim. Harwood v. Breese [Neb.] 103 N. W. 55. Defendant cannot complain that verdict for plaintiff is too small. Heyman v. Heyman, 110 Ill. App. 87; Brazell v. Cohn [Mont.] 81 P. 339; Fourth Nat. Bank v. Frost [Kan.] 78 P. 825. Recovery on theory imposing lesser liability than the correct one is of no injury to defendant. Drainage Com'rs v. Drainage Com'rs, 113 Ill. App. 114. Finding that conveyance was mortgage cannot be complained of by grantor who claims it was in trust. Clemens v. Kaiser, 211 Ill. 460, 71 N. E. 1055. Where a mortgagee seeking foreclosure appeals from a decree granting it for an insufficient amount, the court's finding that limitations have not run against the mortgage is reviewable, though the mortgagor has not appealed since the tolling of the statute is an essential part of the mortgagee's case. Carr v. Carr [Mich.] 101 N. W. 550. Failure, in suit to prorate taxes, to find amount due city is harmless to plaintiff. Morrill v. Bosley [Tex. Civ. App.] 13 Tex. Ct. Rep. 529, 88 S. W. 519.

New trial: Reducing recovery without giving plaintiff the alternative of accepting new trial is not prejudicial to defendant. Shockley v. Tucker [Iowa] 103 N. W. 360. Plaintiff cannot complain of grant of new trial instead of judgment absolute for defendant. Sutherland v. St. Lawrence County, 93 N. Y. S. 958.

Judgment for less than contract liability cannot harm defendant. Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 A. 127. Judgment against appellant for too small a sum. Morrow v. Pike County [Mo.] 88 S. W. 99. On plaintiff's appeal from a decree granting him insufficient relief, the decree will not be disturbed in so far as it is favorable to him. Decree for specific performance on conditions. King v. Raab, 123 Iowa, 632, 99 N. W. 306. Defendant's appeal from decree for specific performance. Ruzicka v. Hotovy [Neb.] 101 N. W. 328. Review extends only to so much of a decree or judgment as is unfavorable to the party appealing. City of Waverly v. Bremer County, 126 Iowa, 98, 101 N. W. 874. Direction that each pay his own costs does not prejudice defendant when plaintiff has judgment for part of his demand. Freed Furniture & Carpet Co. v. Sorensen, 28 Utah, 419, 79 P. 564. Defendant cannot object to a decree following the prayer of his cross-complaint. Gumaer v. Draper [Colo.] 79 P. 1040. Entry of judgment against an attorney for money collected less compensation instead of for the whole amount cannot be complained of by him. McDonald v. State [Ala.] 39 So. 257. One erroneously adjudged to have title to

§ 2. *Triviality constituting harmlessness.*[12] *An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.*[13]—The weight or strength of the evidence may affect the importance of error.[14]

land cannot complain that person who had title was adjudged to have lien on it. Miller v. Wireman, 25 Ky. L. R. 2300, 80 S. W. 517. Garnishee defendant cannot complain that plaintiff's judgment is not large enough. Consolidated suits. Kothman v. Faseler [Tex. Civ. App.] 84 S. W. 390. Defendant cannot complain of a modification by the court of its own motion without notice of a judgment for contempt by remitting the fine. Davies v. State [Ark.] 84 S. W. 633.

11. See Appeal and Review, § 15, 5 C. L. 236 et seq. Remittitur of excessive damages, see Damages, § 6, 5 C. L. 904; post, § 3.

12. See 3 C. L. 1581.

13. Brauer v. Macbeth [C. C. A.] 138 F. 977. Error preventing recovery of nominal damages. Thomas China Co. v. C. W. Raymond Co. [C. C. A.] 135 F. 25; Langdon v. Clarke [Neb.] 103 N. W. 63; Fulghum v. Beck Duplicator Co., 121 Ga. 273, 48 S. E. 901; White v. Sun Pub. Co. [Ind.] 73 N. E. 890; Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910; Blackburn v. Alabama G. S. R. Co. [Ala.] 39 So. 345. Rule does not apply to libel. Von Schroeder v. Spreckels [Cal.] 81 P. 515. May be reversed where judgment for nominal damages would establish valuable right. Arkley v. Union Sugar Co. [Cal.] 81 P. 509. Error to direct verdict against plaintiff entitled only to nominal damages where costs of prior appeal depend on result. Goldzier v. Central R. Co., 90 N. Y. S. 435. Error involving amount less than necessary court costs in prosecuting action. Village of Morgan Park v. Knopf, 111 Ill. App. 571. Finding excessive in a trifling sum. Roesch v. Young, 111 Ill. App. 34. Error of $2.94. Underwood v. Whiteside County Bldg. & Loan Ass'n, 115 Ill. App. 387. Error of $3.25. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340. A defendant not aggrieved by the judgment as to its subject-matter, and appealing alone from the entire judgment for the evident purpose of having it reversed as an entirety is not entitled to a review as to costs awarded against himself. State v. Boyden [S. D.] 100 N. W. 761. Instruction on measure of damages involving slight error. Nebraska Bridge Supply & Lumber Co. v. Conway [Iowa] 103 N. W. 122. Allowing mother in child's action to state that she had spent $7 for medicine held immaterial under rule of De minimis. Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. An excess in the judgment, over the damages laid in the declaration, too small to give the appellate court jurisdiction, does not warrant reversal. Giboney v. Cooper [W. Va.] 49 S. E. 939. Error in allowing hypothetical question to plaintiff's witness where defendant's experts testified to practically the same matter. Difference of only five feet in estimating distance neither car might have been stopped. Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. Any error in allowing recovery on a contract, where the evidence shows the damage to have been coincidently caused by breach of it and another contract between the same parties is harmless. Southwestern Tel. & T. Co. v. Tarvin [Ark.] 84 S. W. 504.

Fifteen dollars damages, both parties having taken proof thereon, though pleadings did not claim damages. Smoot v. Wainscott [Ky.] 89 S. W. 176.

Held prejudicial: The reversal of a verdict for one cent in an action for personal injuries resulting in loss of time worth $800 is not prevented by Code Civ. Prac. § 341, providing that a new trial shall not be granted on account of the smallness of the damage in an action for an injury to the person or the reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained. Baries v. Louisville Elec. Light Co., 25 Ky. L. R. 2303, 80 S. W. 814.

14. In cases of conflict of evidence, the instruction must be correct, or the judgment cannot stand. Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113; Bloomington & N. R. v. Gabbert, 111 Ill. App. 147; Chicago House Wrecking Co. v. Durand, 105 Ill. App. 175; West Chicago St. R. Co. v. Moras, 111 Ill. App. 531. Where the evidence is unsatisfactory, the instructions must be correct. George Doyle & Co. v. Hawkins, 34 Ind. App. 514, 73 N. E. 200. Judgment cannot be upheld notwithstanding erroneous instructions where the court cannot say from the evidence and instructions that the verdict is right on the evidence. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288. Rulings on evidence will be closely scrutinized in close cases. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531; Weinhandler v. Eastern Brew. Co., 92 N. Y. S. 792. Rulings will be closely scrutinized where the conflict of evidence is serious. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40; Faulkner v. Snead [Ga.] 49 S. E. 747; Nashville, etc., R. Co. v. Brundige [Tenn.] 84 S. W. 805; St. Louis S. W. R. Co. of Texas v. Boyd [Tex. Civ. App.] 13 Tex. Ct. Rep. 233, 88 S. W. 509. Error in refusing amendment of creditor's bill is not available where complainant made no case entitling him to relief. Wilson v. Henry [Mich.] 100 N. W. 890. The strength of the evidence may diminish the importance of error. Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49. After three trials all resulting the same way, the court will be slow to reverse for slight inaccuracies or technical objections. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088. Erroneous charge held harmless by reason of unanimity of evidence. Michigan Sanitarium & Benevolent Ass'n v. Battle Creek [Mich.] 101 N. W. 855. Admission of merely irrelevant evidence is not available to defendant who offers no proof and the judgment is amply sustained by competent evidence. Waldner v. Bowdon State Bank [N. D.] 102 N. W. 169. Charge stating under what circumstances plaintiff can recover cannot prejudice where undisputed facts entitle him to recover. Parrott v. Chicago G. W. R. Co. [Iowa] 103 N. W. 352. Error in charging that it was defendant's duty to equip its engines with the "best approved" spark ar-

Cases applying these principles to errors or irregularities in process or appearance,[15] parties,[16] pleadings and formation of issues,[17] provisional and interlocutory

resters is not cured by uncontradicted evidence that they were so equipped, the fact not being expressly admitted. Bottoms v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 348. Instructions on care between passenger and carrier held prejudicial to plaintiff notwithstanding undisputed evidence of negligence of carrier. Lewis v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 378, 88 S. W. 489.

15. Defendants sued in wrong county not entitled to judgment for costs where a codefendant resides in county. Prewitt v. Wilson [Iowa] 103 N. W. 365. Affidavit for replevin failing to state value of each article. Boyce v. Augusta Camp, No. 7,429, M. W. A., 14 Okl. 642, 78 P. 322. General appearance to contest suit waives error in refusing to quash service. Eddleman v. Union County Traction & Power Co. [Ill.] 75 N. E. 510.

16. Nunc pro tunc order authorizing intervention by party. Bradley v. Bond [Md.] 61 A. 504. Where plaintiff on arriving at full age took charge of the suit himself, but no order was entered striking out the name of his next friend, and plaintiff had judgment for damages and costs, defendant was not prejudiced. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. Permitting additional party to be joined after commencement of suit. Jordan v. Greig [Colo.] 80 P. 1045. Where it appears that all parties in interest are not before the court in a bill of interpleader, reversal must follow. Chartiers Oil Co. v. Moore's Devisees, 56 W. Va. 540, 49 S. E. 449. If a decree is in favor of an infant defendant, failure to appoint a guardian ad litem for him is not error, but a decree finding a will valid does not favor him where, under the intestate laws, he would take the whole estate. Langston v. Bassette [Va.] 51 S. E. 218. Allowing assignee of execution to intervene on motion to retax costs and restrain collection by the sheriff of the execution is harmless as the sheriff would have been obliged to pay over to assignee on presentation of assignment. Ross v. Anderson [Tex. Civ. App.] 85 S. W. 498. Overruling of exceptions to petition for intervention is harmless where the only defense set up was one set up as well by the original defendant. Runge v. Jumbo Cattle Co. [Tex. Civ. App.] 87 S. W. 388. Noncompliance with statutory directions in taking judgment against nonresident is fatal. Garvey v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 646, 88 S. W. 873.

17. Error not affecting merits. Ray v. Baker [Ind.] 74 N. E. 619; Penn v. Trompen [Neb.] 100 N. W. 312; Hawkins v. Merchants' & Mechanics' Loan & Bldg. Ass'n [Ky.] 89 S. W. 197. Reversal will not be granted for multifariousness of the bill where the causes of action joined are not repugnant or inconsistent and the only loss or inconvenience to a defendant arises from the payment of costs which can be remedied by the decree on appeal. Hosmer v. Wyoming R. & Iron Co. [C. C. A.] 129 F. 883. An erroneous judgment on the pleadings cannot be said to be on trial of the merits. Bowen v. Woodfield, 33 Ind. App. 687, 72 N. E. 162. Misnaming demurrers by calling them "motions to strike." Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. Failure of answer to join issue is immaterial in view of amendments and trial as though all material averments were denied. American Shawl Co. v. Waldman, 92 N. Y. S. 367. Unnecessary averments in petition are not prejudicial where no evidence of them is offered. City of Eureka v. Neville [Kan.] 79 P. 162. Improper joinder of cause of action is not error where verdict was for defendant as to that cause. Lavanway v. Cannon, 37 Wash. 593, 79 P. 1117. Decision on question of departure in reply. Baldridge v. Leon Lake Ditch & Reservoir Co. [Colo. App.] 80 P. 477. Irregular proceeding in filing motion to strike and demurrer simultaneously. Enright v. Midland Sampling & Ore Co. [Colo.] 80 P. 1041. Omission to rule on unmeritorious demurrer. Langley v. Andrews [Ala.] 38 So. 238. Allowing filing of unnecessary pleas after testimony was concluded. King v. Battaglia [Tex. Civ. App.] 84 S. W. 839. Correction of clerical mistake of clerk of court from which record came on change of venue. Haxton v. Kansas City [Mo.] 88 S. W. 714.

Variance: Huey Co. v. Johnston [Ind.] 73 N. E. 996; Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 1119; Halloran v. Holmes [N. D.] 101 N. W. 310; Woodford v. Kelley [S. D.] 101 N. W. 1069.

Sustaining demurrer to pleading stating facts provable under general denial. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991; Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493; Central of Georgia R. Co. v. Larkins [Ala.] 37 So. 660; Western R. of Ala. v. Russell [Ala.] 39 So. 311; Shafer v. Fry [Ind.] 73 N. E. 698; Beasey v. High, 33 Ind. App. 689, 72 N. E. 181. Error in sustaining demurrer to answer setting up facts sufficiently pleaded in another answer. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40; Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100; Matthews v. Farrell, 140 Ala. 298, 37 So. 325. Sustaining demurrer to special paragraph of answer where complaint and general denial formed complete issue supporting verdict. Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132. A ruling improperly sustaining a demurrer to a special plea being harmless when made for that the matter pleaded is provable under the general denial, cannot be converted into available error by defendant by afterwards withdrawing the general denial and refusing to plead further. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181. Sustaining informal demurrer to insufficient answer. McDaniel v. Osborn [Ind. App.] 72 N. E. 601. Sustaining demurrer to counts alleging matters sufficiently averred in others. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. Error in sustaining general assignments of demurrers to pleas that could not be made good by amendment is harmless. Ryall v. Allen [Ala.] 38 So. 851.

Overruling demurrer. Rooney v. Gray, 145 Cal. 753, 79 P. 523; Butler v. Delafield [Cal. App.] 82 P. 260. Demurrer to plea of contributory negligence. Chambers v. Milner

proceedings,[18] continuances, adjournments, dismissal before trial, and the like,[19]

Coal & R. Co. [Ala.] 39 So. 170. To answer setting up facts shown by verdict or findings to be immaterial. Steeley v. Seward, 34 Ind. App. 398, 73 N. E. 139; Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991. Failure to specify reasons is harmless. British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A. 293. Failure to fix time for answer on overruling demurrer is harmless where defendant stood on his demurrer. Ullery v. Brohm [Colo. App.] 79 P. 180. Findings fully sustaining judgment regardless of affirmative defense to which demurrer was overruled. McNeilly v. McNeilly [Wash.] 80 P. 541. Overruling demurrers to affirmative defenses is harmless where action was properly dismissed. Soder v. Adams Hardware Co. [Wash.] 80 P. 775. Error in overruling exceptions to allegations not recovered on is harmless. Western Union Tel. Co. v. Siddall [Tex. Civ. App.] 86 S. W. 343.

Held prejudicial, where evidence is admitted in support of objectionable pleading and influenced the verdict. Edwards v. Kellogg, 121 Ga. 373, 49 S. E. 279; Provident Sav. Life Assur. Soc. v. Pruett [Ala.] 37 So. 700. Where certain replications to certain pleas were not proven beyond adverse inference, the error in overruling a demurrer to another replication to the same pleas was prejudicial, since it could not be known to which issues of fact presented by the replications the verdict was responsive. Continental Ins. Co. v. Parkes [Ala.] 39 So. 204.

Denial of plea: Rejecting special defense is not prejudicial where the evidence on which it was based is admitted under the general issue. Worrell v. Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988; Davis v. Hughes [Tex. Civ. App.] 85 S. W. 1161. Or under other pleas received. Merriman v. Cover [Va.] 51 S. E. 817.

Ruling on motion to strike: Overruling motion to strike out parts of an alternative writ of mandamus. Cheney v. State [Ind.] 74 N. E. 892. Striking paragraph setting up facts provable under others. Schnull v. Cuddy [Ind. App.] 74 N. E. 1030; Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490. The retention of surplusage in a petition as against a motion to strike it is not ground for reversal. Bankers' Union of the World v. Pickens [Kan.] 79 P. 148. Overruling of motion to strike special replication on ground that facts alleged were provable under the general replication is harmless. Shea v. Manning [Ala.] 37 So. 632. Refusal to strike improper averments of damages is harmless as defendant may protect himself by objections to evidence and requests for instructions. Vandiver & Co. v. Waller [Ala.] 39 So. 136; Woodstock Iron Works v. Stockdale [Ala.] 39 So. 335. Error in striking valid plea rendered immaterial by verdict. San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Refusal to strike part of replication to answer which had been abandoned. Strother v. McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650.

Amendment: Denial of amendment of complaint. Carstens v. Hine [Wash.] 81 P. 1004. Denial of application to amend plea is harmless where defendants were permitted to make full defense, and failed because defenses were not available on merits. Central Sav. Bank v. O'Connor [Mich.] 102 N. W. 280. New matter pleaded in a reply is constructively denied by the statute, and leave to amend an answer so as to put such matter formally in issue, although erroneous, is error without prejudice. Lininger & Metcalf Co v. Clark [Neb.] 103 N. W. 663. Amendment resulting in submission of case on unsustainable theory held reversible. Conversion of live stock by carrier. Olds v. New York, etc., R. Co., 94 N. Y. S. 924. Allowance after stating that it would be allowed unless prejudice shown. Cummings v. Weir, 37 Wash. 42, 79 P. 487. Refusal of immaterial amendment. Mahoney v. Crockett, 37 Wash. 252, 79 P. 933. Failure to amend as to substituted parties. Ellsworth v. Layton, 37 Wash. 340, 79 P. 947. Refusal to permit amendment of petition before answer. Stewart v. Winner [Kan.] 80 P. 934. Erroneously disallowing an amendment which if made would have left pleading fatally defective. Gould v. Glass, 120 Ga. 50, 47 S. E. 505. Will not inquire to propriety of proffered amendment where plaintiff has been properly nonsuited and the facts set up could not have changed the result. Bale v. Todd [Ga.] 50 S. E. 990. Allowance of amended petition setting up unnecessary fact. Freedom from contributory negligence. Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188.

Ruling on motion for more specific allegation. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827. Not prejudicial where recovery is not based on any objectionable part of the pleading. Helbig v. Gray's Harbor Elec. Co., 37 Wash. 130, 79 P. 612. Where defendant's motion is sustained in part and overruled in part, and thereafter an amended complaint is filed to which the motion was not renewed, no question as to the motion arises on defendant's appeal. Vincennes v. Spees [Ind. App.] 74 N. E. 277. Refusal to require defendant to file statement of grounds of defense. Driver's Adm'r v. Southern R. Co., 103 Va. 650, 49 S. E. 1000.

Election: Delay in compelling election between counts claiming single and treble damages on same state of facts. Hathaway v. Goslant [Vt.] 59 A. 835.

18. Failure to require bond where receiver was properly appointed. Walker v. Kersten, 115 Ill. App. 130. Granting injunction without notice. Pfeiffer v. McCullough, 115 Ill. App. 251. Appointment of receiver without notice. Wilkie v. Reynolds, 34 Ind. App. 527, 72 N. E. 179. Irregularity in transferring case from district to district. Finlen v. Heinze [Mont.] 80 P. 918. Overruling defendant's motion for order for physical examination of plaintiff. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 86 S. W. 943.

19. Refusal to dismiss for prematurity is not prejudicial after filing of amended complaint. Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190. Refusal to dismiss suit against feme defendants in homestead case against whom no personal judgment was rendered. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852. Refusal of continuance cannot prejudice where adversary admits facts to which absent witness would

the trial and course and conduct of the same,[20] formation and selection of the jury,[21] and rulings on demurrers to evidence and motions for directed verdicts,[22] are cited below.

The admission [23] or exclusion [24] of evidence which cannot have been efficient to

have testified. Kellyville Coal Co. v. Strine [Ill.] 75 N. E. 375.

20. If there be one good count, error in refusing to exclude others from jury is unavailable. Feldman v. Sellig, 110 Ill. App. 130; Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 504. Refusal to mark instructions as required by statute. Chicago Union Tract. Co. v. Olsen, 113 Ill. App. 303; Chicago Union Tract. Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022. Limiting time for argument. Hansell-Elcock Foundry Co. v. Clark, 115 Ill. App. 209. Limiting number of instructions. Chicago Union Tract. Co. v. Olsen, 211 Ill. 255, 71 N. E. 985. Submission before party had all his evidence in and without argument. In re Hayden's Estate, 146 Cal. 73, 79 P. 588. To make an order without a hearing is harmless where the only fact examinable on a hearing is admitted by the pleadings. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. In a suit upon an account defendant being allowed credit for everything claimed in his answer, and having no defense to the balance of the claim, held immaterial to him that suit was prosecuted on the equity instead of the lost docket. Gregory v. New Home Sew. Mach. Co. [Ky.] 86 S. W. 529.

21. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280; Hartshorn v. Illinois Valley R. Co. [Ill.] 75 N. E. 122; Kansas City, etc., R. Co. v. Ferguson [Ala.] 39 So. 348. The improper sustaining of a challenge to a juror for cause is harmless where an impartial jury was secured. Wells v. O'Hare, 110 Ill. App. 7; Decker v. Laws [Ark.] 85 S. W. 425; Felsch v. Babb [Neb.] 101 N. W. 1011. Overruling challenge for cause is harmless to one who did not use all his peremptories. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227. In equity cases jury findings are merely advisory and an assignment of error predicated on the calling of a jury and submitting questions of fact to them is without merit.. Lauman v. Hoofer, 37 Wash. 382, 79 P. 953. Showing of bias of juror held not sufficient to show prejudice from ruling. Graybill v. De Young, 146 Cal. 421, 80 P. 618. Insertion of irregularity in manner of summoning and constituting special jury not reviewable on error unless it appears that complaining party was injured thereby. Code 1887, § 3156, as amended by Act Feb. 27, 1894. City of Charlottesville v. Failes, 103 Va. 53, 48 S. E. 511. Unless the record shows that an objectionable juror was forced on the challenging party after his peremptory challenges were exhausted an assignment of error in this regard is not reversible error. National Bank of Boyertown v. Schufelt [Ind. T.] 82 S. W. 927; Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254.

22. Refusal to direct verdict on paragraph which the findings show was not the basis of the verdict. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045. Verdict held not to render ruling on motion for directed verdict erroneous. Sargent Co. v Baublis, 215 Ill. 428, 74 N. E. 455. Overruling a motion to direct a verdict for defendant for insufficiency of the petition is not error where leave is granted to amend. Petition failed to allege notice to city of claim. Jones v. Shelby County, 124 Iowa, 551, 100 N. W. 520.

23. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997; Bennett v. Donovan, 83 App. Div. 95, 82 N. Y. S. 506; Chicago Bldg. & Mfg. Co. v. Taylor Banking Co. [Kan.] 78 P. 808. The admission in evidence of an ordinance prohibiting the act resulting in the negligence complained of is not prejudicial. Garibaldi v. O'Connor, 112 Ill. App. 53. Privileged communications made to wife. Western Travelers' Acc. Acc. Ass'n v. Munson [Neb.] 103 N. W. 688. A ruling merely admitting records not afterwards read to the jury is not prejudicial. Michigan Paper Co. v. Kalamazoo Valley Elec. Co. [Mich.] 12 Det. Leg. N. 342, 104 N. W. 387. Introduction of further evidence of immaterial fact already proved without objection. Ramson v. Metropolitan St. R. Co., 78 App. Div. 101, 79 N. Y. S. 588. Failure to limit bearing of evidence admissible for particular purpose. Jackson v. Jackson, 100 App. Div. 385, 91 N. Y. S. 844. Written evidence not inducing construction of contract different from its provisions. Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 787. Photograph taken after change of circumstances. Macdonald v. O'Reilly, 45 Or. 589, 78 P. 753. Laws of another state made immaterial by conclusions of law. In re Dunphy's Estate [Cal.] 81 P. 315. Case completely made out by other evidence. Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. Evidence rendered irrelevant by failure of party offering it to file it as ordered. Boston Mercantile Co. v. Ould-Carter Co. [Ga.] 51 S. E. 466.

Immaterial evidence. Hunter v. Davis [Iowa] 103 N. W. 373; Gulbertson v. Hanson [Minn.] 104 N. W. 2; Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209; Kiley v. Lee Canning Co., 93 N. Y. S. 986; Madden & Co. v. Phoenix Ins. Co., 70 S. C. 295, 49 S. E. 855; Atchison v. Wills, 21 App. D. C. 548; Davis v. Alexander, 99 Me. 40, 58 A. 55; Parsons v. Wentworth [N. H.] 59 A. 623; Misner v. Strong, 181 N. Y. 163, 73 N. E. 965; Pichon v. Martin [Ind. App.] 73 N. E. 1009; Provident Sav. Life Assur. Soc. v. King [Ill.] 75 N. E. 166; Limberg v. Glenwood Lumber Co., 145 Cal. 255, 78 P. 728; Carolina Plumbing & Heating Co. v. Hall, 136 N. C. 530, 48 S. E. 810; Willims v. Mangum [Ga.] 50 S. E. 110; Tucker v. Colonial Fire Ins. Co. [W. Va.] 51 S. E. 86; Ragsdale v. Southern R. Co. [S. C.] 51 S. E. 540; Barstow Irr. Co. v. Black [Tex. Civ. App.] 86 S. W. 1036; Pecos River R. Co. v. Latham [Tex. Civ. App.] 88 S. W. 392; Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404; Tinsley v. Western Union Tel. Co. [S. C.] 51 S. E. 913. Not error for plaintiff to show demand and refusal of insurance company to pay loss though no waiver in case. Fire Ass'n of Phila. v.

the result is harmless.[25] For example, evidence which tended to prove a fact not necessary to the party's case,[26] or one conclusively disproved by other evidence,[27] or evidence erroneously admitted, tending to prove a fact admitted or sufficiently proved by other competent evidence.[28] Likewise the rejection of evidence of facts

Yeagley, 34 Ind. App. 387, 72 N. E. 1035. Expert evidence as to how a crack might come in a monument, there being none in the monument sued for. Peden v. Scott [Ind. App.] 73 N. E. 1099. Plaintiff against whom verdict was properly directed cannot complain of rejection of immaterial evidence which cannot be said to have prevented his proving facts necessary to his case. McGlothlin v. Meaux [Miss.] 38 So. 317. Where a mining company defends on the ground that an independent contractor was operating the mine and was liable for the injury, proof of a statement by one of its officers that a mine could be so operated and relieve the owner of liability is harmless. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779.

24. Storms & Co. v. Horton, 77 Conn. 334, 59 A. 421; Miller v. Boston & M. R. Co. [N. H.] 61 A. 360; Triggs v. McIntyre, 115 Ill. App. 257; Gerbrich v. Freitag, 213 Ill. 552, 73 N. E. 338; McCay Engineering Co. v. Crocker-Wheeler Elec. Co. [Md.] 60 A. 443; Chicago & E. I. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865; Wilcox v. Wilcox [Mich.] 102 N. W. 954; Reisler v. Silbermintz, 99 App. Div. 131, 90 N. Y. S. 967; Rountree & Co. v. Goulden [Ga.] 51 S. E. 346; Senf v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 887. Whether any other reason for act for which reason had already been given. Brownlee v. Reiner [Cal.] 82 P. 324. Fact sought to be proven by nonprivileged communications only remotely relevant. McKenzie v. Banks [Minn.] 103 N. W. 497. Exclusion of impeaching evidence is harmless where the finding is amply supported disregarding the evidence of the witness sought to be impeached. Finlen v. Heinze [Mont.] 80 P. 918. Rejection of X-ray photograph showing extent of plaintiff's injuries is harmless where jury found him negligent. Fraser v. California St. Cable R. Co. [Cal.] 81 P. 29. Appellant not entitled to recover in any event. De Galindo v. De Galindo [Cal.] 81 P. 279; Wilson v. Wilson [Wash.] 82 P. 154. Error in excluding impeaching evidence is harmless where no weight was attached to the evidence of the witness. Bringgold v. Bringgold [Wash.] 82 P. 179. Exclusion of evidence of denial of pregnancy and unchastity of plaintiff in bastardy, held unprejudicial. Johnson v. Walker [Miss.] 39 So. 49.

25. Collins v. Citizens' Bank & Trust Co., 121 Ga. 513, 49 S. E. 594. Award of damages may show that error was not prejudicial. Gasink v. New Ulm, 92 Minn. 52, 99 N. W. 624.

26. Evidence admitted. Justice v. Davis [N. J. Law] 59 A. 6; Loomis v. Connecticut R. & L. Co. [Conn.] 61 A. 539; Kelly v. Security Mut. Life Ins. Co., 94 N. Y. S. 601; Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 794, 89 S. W. 285; Ogle v. Hubbel [Cal. App.] 82 P. 217. Evidence to prove contract established by prior judgment. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93. A reviewing court will not reverse a judgment because of the incompetency of a question and answer, where the question and answer added nothing to the facts of the case. Green v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 497. Secondary evidence of immaterial fact. Notice to surety. Hohn v. Shideler [Ind.] 72 N. E. 575. Where in a suit by the state a proper demand by the attorney general is shown, evidence of a demand by a tax commissioner is harmless. McDonald v. State [Ala.] 39 So. 257. Error in admitting evidence of ratification of servant's act is harmless where master was liable without it. Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

Evidence rejected. Independent Coal Co. v. First Nat. Bank, 6 Ohio C. C. (N. S.) 225. Point not of substantial importance. Norman Printer's Supply Co. v. Ford, 77 Conn. 461, 59 A. 499. Evidence of efforts of an agent to carry through a sale of land is competent in a suit for recovery of a commission on the sale, yet the refusal of the court to hear such evidence does not constitute reversible error where the only duty of the agent under his contract was to produce a purchaser. Bowman v. Hartman, 6 Ohio C. C. (N. S.) 264. Exclusion of testimony offered to impeach testimony of witness to immaterial matter. Madler v. Pozorski [Wis.] 102 N. W. 892. Value of attorney's services where express contract and payment in full are found. Cunningham v. Springer [N. M.] 82 P. 232. Exclusion of evidence that broken engagemment of parties to bastardy suit had never been renewed, held not prejudicial. Johnson v. Walker [Miss.] 39 So. 49.

27. Shields v. Mongollon Exploration Co. [C. C. A.] 137 F. 539; City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299. Evidence supporting defense already litigated and decided adversely. Bond v. Chapman, 34 Wash. 606, 76 P. 97.

28. Finch v. Mishler [Md.] 59 A. 1009; Lawnsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 P. 904; Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209; Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025; Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225; Policemen's Benev. Ass'n v. Ryce, 213 Ill. 9, 72 N. E. 764; McPhelemy v. McPhelemy [Conn.] 61 A. 477; Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636; United States v. Brendel [C. C. A.] 136 F. 737; Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19; Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819; Cairncross v. Omlie [N. D.] 101 N. W. 897; Reupke v. Stubr & Son Grain Co., 126 Iowa, 632, 102 N. W. 509; Peck v. Peck [Wis.] 103 N. W. 5; Lansky v. Prettyman [Mich.] 12 Det. Leg. N. 120, 103 N. W. 538; Seitz v. People's Sav. Bank [Mich.] 12 Det. Leg. N. 96, 103 N. W. 545; Boehm v. Detroit [Mich.] 12 Det. Leg. N. 397, 104 N. W. 626; Radin v. Paul, 90 N. Y. S. 1072; Chamberlain v. Cuming, 99 App. Div. 561, 91 N. Y. S. 105; Dibble v. Cole, 102 App. Div. 229, 92 N. Y. S. 938; Beyer v. Isaacs, 93

otherwise established,[20] unless prejudice plainly appears.[30] Error in evidence is in-

N. Y. S. 312; Idol v. San Francisco Const. Co. [Cal. App.] 81 P. 665; Bacon v. Kearney Vineyard Syndicate [Cal. App.] 82 P. 84; Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830; Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124; Machen v. Western Union Tel. Co. [S. C.] 51 S. E. 697; Board of Levee Com'rs of Yazoo-Mississippi Delta v. Lee [Miss.] 37 So. 747; Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682; Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105; San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302; Field v. Field [Tex. Civ. App.] 87 S. W. 726; Allen v. Halsted [Tex. Civ. App.] 87 S. W. 754; Texas Cent. R. Co. West [Tex. Civ. App.] 88 S. W. 426; Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29. Error in admitting evidence is harmless where the same fact is proved by other witnesses without objection. Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. Expert evidence tending to prove a fact conclusively proved by ordinary witnesses. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Rebuttal testimony of facts developed by appellant as a witness on cross-examination. Dryden v. Barnes [Md.] 61 A. 342. Agency of certain person for a corporation. Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821. The alleged bankrupt not denying certain claims alleged as tending to show insolvency, and not cross-examining creditors with reference to books produced he is not prejudiced by the court's allowing such creditors to testify from memoranda taken from such books. In re McGowan, 134 F. 498; but see 137 F. 453, where case is reversed on other grounds. The evidence being already before the jury without objection, held immaterial whether or not objection was well taken when evidence was offered in rebuttal. Schmidt v. Turner, 5 Ohio C. C. (N. S.) 492. Competency of witness is unimportant where all facts he testifies to are established by other competent evidence. Jones v. Jones, 213 Ill. 228, 72 N. E. 695. Evidence that statute of another state is still in force is unprejudicial where appellant's evidence was insufficient to show its repeal. Hanrahan v. Knickerbocker [Ind. App.] 72 N. E. 1137. Incompetent evidence of uncontroverted fact. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739. Wife may testify to receiving letter from husband stating that he had left her, there being no dispute about the fact of desertion. Burton v. Mullenary [Cal.] 81 P. 544. Title and good faith in forcible entry. Highland Park Oil Co. v. Western Minerals Co. [Cal. App.] 82 P. 228. Nonpayment of judgment. Butler v. Delafield [Cal. App.] 82 P. 260. Hearsay evidence of fact sufficiently proved otherwise. Hyland v. Southern Bell Tel. & T. Co., 70 S. C. 315, 49 S. E. 879; Texas & P. R. Co. v. Crowley [Tex. Civ. App.] 86 S. W. 342. Both competent and incompetent evidence of declarations in travail of plaintiff in bastardy. Johnson v. Walker [Miss.] 39 So. 49. Question calling for opinion where facts are shown. Owen v. Chicago, etc., R. Co. [Mo. App.] 83 S. W. 92. Evidence additional to that sufficient to make prima facie case not controverted. City of St. Joseph v. Pitt [Mo. App.] 83 S. W. 544. Fact elicited by leading question. Northern Tex. Traction Co. v. Lewis [Tex. Civ. App.] 83 S. W. 894. Admission of handbill advertising sale and describing mules as two years old instead of three years old held harmless defendant admitting that he represented the mules to be two years old. Doyle v. Parish, 110 Mo. App. 470, 85 S. W. 646. Admission of plat to prove facts otherwise established. Pace v. Crandall [Ark.] 86 S. W. 812. Objectionable language held ineffective to strengthen previous testimony of same witness. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 87 S. W. 395. Demonstrative evidence of fact otherwise established. Id. Opinion evidence of value is harmless where there is competent evidence of much greater value than that found by jury. Sydney Webb & Co. v. Daggett [Tex. Civ. App.] 87 S. W. 743. Admission of defendant's servant of fact otherwise established. Missouri, etc., R. Co. v. Russell [Tex. Civ. App.] 13 Tex. Ct. R. 591, 88 S. W. 379. Opinion as to fact conclusively shown by physical facts. Sluder v. St. Louis Transit Co. [Mo.] 88 S. W. 648.

Error not cured: Where incompetent evidence is received over objection and exception, the error is not cured by allowing other like evidence to go in without objection. Merchants' Loan & Trust Co. v. Boucher, 115 Ill. App. 101. Not cured by certificate of judge that he would have excluded it on motion and that he had it not in mind when he directed the verdict. Rapson v. Leighton [Mass.] 73 N. E. 540. Permitting plaintiff in a personal injury suit to testify as to the number of his children and their ages is not rendered harmless by reason of the fact that he has previously, without objection, testified to the fact that he has children. Atchison, etc., R. Co. v. Ringle [Kan.] 80 P. 43.

29. Benning v. Horkan, 120 Ga. 734, 48 S. E. 123; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29; Chicago & A. R. Co. v. Walters [Ill.] 75 N. E. 441; Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; Dickinson v. Boston [Mass.] 75 N. E. 68; Consolidated Traction Co. v. Jordan [Ind. App.] 75 N. E. 301; Jacobs v. Queen Ins. Co., 123 Wis. 608, 101 N. W. 1090; Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207. Feldman v. Senft, 92 N. Y. S. 231; Lilly v. Eklund, 37 Wash. 532, 79 P. 1107; Dundon v. McDonald, 146 Cal. 585, 80 P. 1034; Meyer v. Foster [Cal.] 81 P. 402; Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363; Beaudrot v. Southern R. Co., 69 S. C. 160, 48 S. E. 106; Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740; Alexander v. McGaffey [Tex. Civ. App.] 88 S. W. 462; Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858. Written impeaching statement is harmless where verbal evidence offered for a like purpose is admitted. Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547. Presumption supplying proof. Nagle v. Hake, 123 Wis. 256, 101 N. W. 409. Jury found against claim notwithstanding clear proof on issue on which evidence was rejected. Lush v. Incorporated Town of Parkersburg [Iowa] 104 N. W. 336. Hostility of witness. Fischer v. Brady, 94 N. Y. S. 25. Ruling out of question already

nocuous in a trial of facts by the court, as in equitable actions, where it may be supposed he founded his decision solely on proper proofs.[31] Likewise where, as in equity, the verdict of the jury is merely advisory.[32] An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given,[33]

answered. Marshall v. Marshall [Kan.] 80 P. 629. Exclusion of evidence the substance of which has already gone to jury. Busch v. Robinson [Or.] 81 P. 237. Refusal to admit evidence of conceded claim of title by ancestor. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382. Historical treatise. Allen v. Halsted [Tex. Civ. App.] 87 S. W. 754. Fact testified to by opposite party. Gulf, etc., R. Co. v. St. John [Tex. Civ. App.] 12 Tex. Ct. Rep. 979, 88 S. W. 297.

30. Fact otherwise proven held not as broad as erroneously rejected question. Chicago Union Traction Co. v. Miller, 212 Ill. 49, 72 N. E. 25. Erroneous rejection of evidence to prove fact found against appellant is not cured by presence of other evidence. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323. Opposing evidence impeached. In re Blair, 99 App. Div. 81, 91 N. Y. S. 378.

31. Winn v. Itzel [Wis.] 103 N. W. 220; Gilmer v. Holland Inv. Co., 37 Wash. 589, 79 P. 1103; Carstens v. Hine [Wash.] 81 P. 1004; Grand Pac. Hotel Co. v. Pinkerton [Ill.] 75 N. E. 427; Humphreys v. Minnesota Clay Co. [Minn.] 103 N. W. 338; Pinkstaff v. Steffy [Ill.] 75 N. E. 163; Mead v. Mellette [S. D.] 101 N. W. 355; Currie v. Michie, 123 Wis. 120, 101 N. W. 370; Haish v. Dreyfus, 111 Ill. App. 44; Broderick v. O'Leary, 112 Ill. App. 658; Kittler v. Studabaker, 113 Ill. App. 342; Andrews v. Scott, 113 Ill. App. 581; Ranson v. Ranson, 115 Ill. App. 1; Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421; Rogers Grain Co. v. Shepherd, 116 Ill. App. 532; Kreiling v. Northrup, 215 Ill. 195, 74 N. E. 123; Godfrey v. Faust [S. D.] 101 N. W. 718; Mankato Mills Co. v. Willard [Minn.] 102 N. W. 202; Easton v. Cranmer [S. D.] 102 N. W. 944; Merager v. Madson [S. D.] 103 N. W. 650; Way v. Sherman [Mont.] 76 P. 942; German Sav. & Loan Soc. v. Collins, 145 Cal. 192, 78 P. 637; Lampkin v. Garwood [Ga.] 50 S. E. 171; Chicago, etc., R. Co. v. Halsell [Tex.] 83 S. W. 15; Parker v. Catron [Ky.] 85 S. W. 740; Jones v. Day [Tex. Civ. App.] 13 Tex. Ct. Rep. 308, 88 S. W. 424; Waters v. Merrit Pants Co. [Ark.] 88 S. W. 879. Unless it be of such kind and so forcible that it should work a different result from that reached by the trial court. Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124. Bill to remove cloud. Heintz v. Dennis [Ill.] 75 N. E. 192. The admission of improper evidence is to be deemed immaterial on appeal unless it clearly appears that but for such evidence the finding of the trial court would probably have been different. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. In considering findings of the trial court, on appeal, it will be presumed, unless the contrary clearly appears, that evidence taken under objection was given no weight. Id. Refusal to strike. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548. Errors in introduction of testimony ignored by referee. New York Floating Dry Dock Co. v. New York, 97 App. Div. 522, 90 N. Y. S. 166. Appeal from surrogate. In re Bradbury, 93 N. Y. S. 418. In Washington on appeal from judgment quieting title to and awarding possession of land, the supreme court tries the case de novo in so far as the findings have been excepted to. Will disregard any evidence it finds inadmissible so that error in the admission of evidence is not available to appellant. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982. Where review of questions of fact and law is authorized, findings will not be disturbed because of erroneous admission of evidence if the remainder of the evidence preponderates in favor of the findings. Hayes v. Buzard [Mont.] 77 P. 423; Van Behren v. Rettkowski, 37 Wash. 247, 79 P. 787; Law v. Seeley, 37 Wash. 166, 79 P. 606. Where the cause is tried de novo, the entire evidence will be looked to and the judgment sustained if supported by sufficient evidence notwithstanding error in admitting evidence or in refusing to grant a nonsuit. Hodges v. Price [Wash.] 80 P. 202. Evidence admitted for particular purpose. Rowe v. Johnson [Colo.] 81 P. 268.

32. California Elec. Light Co. v. California Safe Deposit & Trust Co., 145 Cal. 124, 78 P. 372.

33. Jones v. Shelby County, 124 Iowa, 551, 100 N. W. 520; St. Louis & S. F. R. Co. v. Honea [Tex. Civ. App.] 84 S. W. 267; Grotjan v. Rice [Wis.] 102 N. W. 551; Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co., 99 Md. 382, 58 A. 205; Coolidge v. Ayers [Vt.] 61 A. 40; Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200; Coruth v. Jones [Vt.] 60 A. 814; Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116; Wingate v. Johnson, 126 Iowa, 154, 101 N. W. 751; McCormick v. Johnson [Mont.] 78 P. 500. Error in requiring experts to detail all facts on which their evidence is based is harmless where all qualified and did it. Morrow v. National Masonic Acc. Ass'n, 125 Iowa, 633, 101 N. W. 468. Question as to matter outside the issues is harmless where the answer refers to matter within the issues. Jewell City v. Van Meter [Kan.] 79 P. 149. Witness declined to answer unless required because of confidential relations. Brazell v. Cohn [Mont.] 81 P. 339. Answer to question to expert matter of common knowledge. Lane Bros. & Co. v. Bauserman, 103 Va. 146, 48 S. E. 857; Jones v. American Warehouse Co., 137 N. C. 337, 49 S. E. 355. Nonresponsive answer to irrelevant question which might have been stricken on motion. Snedecor v. Pope [Ala.] 39 So. 318. Answer to leading question disclosing nothing not shown before. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440. The fact that the defendant was examined on a matter not at issue is not ground for a reversal of the judgment, where his answers did not prejudice him before the jury. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593. A question which was incompetent for the reason that it called for a conclusion is rendered harmless where the answer put the jury in possession of the facts upon which the witness based his opin-

or the lack of an answer.[34] Application of these doctrines to direct[35] and cross-examination,[36] and to the order of taking proof,[37] all of which are largely controlled by the discretion of the court,[38] and the reception of affidavits and depositions,[39] and to the admission of secondary evidence,[40] and to the rulings on motions to strike evidence,[41] are cited below. A few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[42]

ion. Duhme Jewelry Co. v. Hazen, 6 Ohio C. C. (N. S.) 606. Question asking for conclusion is harmless where answer did not give one. Chicago & A. R. Co. v. Walters [Ill.] 75 N. E. 441.

34. Farmers' Mut. Ins. Co. v. Cole, 4 Neb. Unoff. 130, 93 N. W. 730. Witness did not remember. Mitchiner v. Western Union Tel. Co., 70 S. C. 522, 50 S. E. 190.

35. In re Morey's Estate [Cal.] 82 P. 57. Directing defendant to appear again for examination on refusal to answer questions is harmless to plaintiff. Citizens' Nat. Bank v. Alexander, 34 Ind. App. 596, 73 N. E. 279. Not prejudicial to overrule objection to question not necessarily calling for incompetent answer. "What took place?" Mollineaux v. Clapp, 99 App. Div. 543, 90 N. Y. S. 880. Question to physician as to general effect of shock to woman. Edwards v. Burke, 36 Wash. 107, 78 P. 610. Short method of stating damages held not prejudicial. Red River, etc., R. Co. v. Eastin [Tex. Civ. App.] 13 Tex. Ct. Rep. 660, 88 S. W. 530. Permitting counsel to examine witness as to contents of written instrument without first producing it and allowing witness to examine it. McDonald Bros. v. Campbell [Minn.] 104 N. W. 760.

36. Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 N. W. 399; Backes v. Erickson [S. D.] 103 N. W. 21; Harrison v. Lakenan [Mo.] 88 S. W. 53. Not error to allow cross-examination of hostile witness. Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98. Exclusion of question on cross-examination on matter subsequently fully developed. Maurer v. Gould [N. J. Law] 59 A. 28. Undue latitude of cross-examination is harmless where facts developed might have been brought out by party making witness his own. Westfall v. Wait [Ind.] 73 N. E. 1089. Asking about defendant's accident insurance not material where the issue is merely the character and extent of plaintiff's injuries. Somers v. Jacobs, 91 N. Y. S. 332.

37. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209; Lambert v. La Conner Trading & Transp. Co., 37 Wash. 113, 79 P. 608. An exception to the admission of evidence will not avail on review, where it relates to the mode or order of proof rather than to the substance, and the plaintiff in error was not prejudiced thereby. Schoch v. Schoch, 6 Ohio C. C. (N. S.) 110. Introduction of rebuttal testimony during examination in chief. Alquist v. Eagle Iron Works, 126 Iowa, 67, 101 N. W. 520. Error in placing burden of proof. Winn v. Itzel [Wis.] 103 N. W. 220. Witnesses giving difference in values without stating values. Parrott v. Chicago Great Western R. Co. [Iowa] 103 N. W. 352. Allowing evidence of bias of witness before defendant brings out his material evidence by cross-examination. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. S. 43. Court allowed defendant to examine one of his witnesses before plaintiff opened his case. Such ought not to be allowed except by consent, but no harm was done here. Conant v. Jones, 120 Ga. 568, 48 S. E. 234. Allowing evidence on promise to show relevancy which was not done. El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718. Refusal to require plaintiff to offer all of a record is not prejudicial where defendant might have had it admitted had he offered it. Knapp v. Patterson [Tex. Civ. App.] 87 S. W. 391.

38. McAllin v. McAllin, 77 Conn. 398, 59 A. 413.

39. Not reversible error to refuse to strike out a deposition merely because deponent has appeared in court after its introduction. Flannery v. Central Brewing Co., 70 N. J. Law, 715, 59 A. 157.

40. Admission of photograph of injuries already exhibited to jury. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Secondary evidence of deed proved by objecting party in another case, the record of which is introduced. Benton v. Beakey [Kan.] 81 P. 196.

41. Refusal to strike answer to hypothetical question where facts assumed therein were subsequently fully proved. Pittsburgh, etc., R. Co. v. Nicholas [Ind. App.] 73 N. E. 195. Denial of motion to strike matter previously going in without objection. Hart v. Cascade Timber Co. [Wash.] 81 P. 738.

42. Held prejudicial. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 51 S. E. 129. Incompetent evidence as to changes in machinery ordered by factory inspector and as to composition of certain "trust," damages being excessive. McDonald v. Champion Iron & Steel Co. [Mich.] 12 Det. Leg. N. 208, 103 N. W. 829. Incompetent evidence of incompetency to make will, issue being competency to make gift subsequent to will. Downey v. Owen, 98 App. Div. 411, 90 N. Y. S. 280. Where the loan sued for is denied, evidence of another not sued for is prejudicial. Davis v. Reflex Camera Co., 93 N. Y. S. 844. Hearsay as to value. Jaeger v. German-American Ins. Co., 94 N. Y. S. 310. Rejection of evidence as not proper rebuttal where it was admissible in defense of counterclaim. Blaut v. Gross, 94 N. Y. S. 324. Erroneous admission of affidavit of defendant's counsel containing statement that defendant objected to placing cause on short cause calendar held reversible as tending to prejudice jury. Platzer v. North British & Mercantile Ins. Co., 94 N. Y. S. 488. Evidence in personal injury case of number and ages of plaintiff's children. Atchison, etc., R. Co. v. Ringle [Kan.] 80 P. 43. Testimony in action under civil damage act that plaintiff has children. Manzer v. Phillips [Mich.] 102 N. W. 292. Subsequent precautions to prevent similar injury. Titus v. Chicago, etc., R. Co. [Iowa] 103 N. W. 343. Though stated to be offered for another pur-

Improper argument,[43] or conduct of counsel [44] or party,[45] or interference with the right to open and close,[46] may be disregarded if without material effect on the result. The same is true of remarks by the court.[47]

Error in instructing the jury or refusing to do so is ground for reversal when the jury has been misled or it was efficient to the result declared in the verdict,[48] and

pose. Russell v. New York, etc., R. Co., 96 App. Div. 151, 89 N. Y. S. 429. Admissions of defendant's servant that would justify finding for plaintiff if competent. Dorry v. Union R. Co., 93 N. Y. S. 637; Wieland v. Southern Pac. Co. [Cal. App.] 82 P. 226; Redmon v. Metropolitan St R. Co., 185 Mo. 1, 84 S. W. 26; Illinois Cent. R. Co. v. Winslow [Ky.] 84 S. W. 1175. Offer to compromise. Georgia R. & Elec. Co. v. Wallace & Co. [Ga.] 50 S. E. 478. Expert evidence on capacity of plaintiff to make contract held prejudicial. Nashville, etc., R. Co. v. Brundige [Tenn.] 84 S. W. 805. Leading question. Ft. Worth, etc., R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37. Incompetent evidence which if competent would be conclusive is fatal. Chapman v. Greene [S. D.] 101 N. W. 351. Hearsay evidence appearing to have influenced the court. Gaither v. Lindsey [Tex. Civ. App.] 83 S. W. 225.

43. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585; Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024; Texas Cent. R. Co. v. O'Loughlin [Tex. Civ. App.] 84 S. W. 1104; West v. St. Louis S. W. R. Co., 187 Mo. 351, 86 S. W. 140. Reference to expenses of litigation. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22. A witness being accessible and not shown to be ill, the error in arguing that he is well, instead of not shown to be ill, is not prejudicial. Lambert v. Hamlin [N. H.] 59 A. 941. Sustaining objection to improper argument heals error. Chicago & J. Elec. R. Co. v. Herbert, 115 Ill. App. 248; Chicago & E. I. R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623; Schwartz v. McQuaid, 214 Ill. 357, 73 N. E. 582; City of Lexington v. Kreitz [Neb.] 103 N. W. 444; Ft. Smith Lumber Co. v. Cathey [Ark.] 86 S. W. 806; American Cotton Co. v. Simmons [Tex. Civ. App.] 87 S. W. 842. Amount of verdict held to show nonprejudice. Orscheln v. Scott, 106 Mo. App. 583, 80 S. W. 982.

Held prejudicial: Impropriety attempted to be cured by instruction and reduction of verdict. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2; Remey v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 368, 104 N. W. 420. Statements respecting special interrogatories. Himrod Coal Co. v. Beckwith, 111 Ill. App. 379. Prejudicial to allow plaintiff to close after defendant had waived. St. Louis, etc., R. Co. v. Vanzego [Kan.] 80 P. 944. Public interest in personal injury cases. St. Louis, etc., R. Co. v. Boyd [Tex. Civ. App.] 13 Tex. Ct. Rep. 233, 88 S. W. 509. Erroneous value of discovered peril. Kansas City Southern R. Co. v. McGinty [Ark.] 88 S. W. 1001.

44. Asking question imputing want of chastity held not prejudicial. Knickerbocker v. Worthing [Mich.] 101 N. W. 540. Attorney going to view with jury after stipulating not to. O'Connor v. Hogan [Mich.] 12 Det. Leg. N. 272, 104 N. W. 29. Prejudicial opening statement held cured. Warn v. Flint [Mich.] 12 Det. Leg. N. 294, 104 N. W. 37. Improper mode of questioning held not prejudicial. Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573. A judgment will not be reversed because of a proposition made in the presence of the jury to submit the case without argument, when agreed to by counsel without objection. Sullivan v. Padrosa [Ga.] 50 S. E. 142. Bringing in inadmissible demonstration evidence not calculated to excite sympathy. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Persistent attempts by attorney to show compromise held harmless, the evidence having been excluded. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275.

Held prejudicial: Bringing out insurance of defendant in casualty company. Stratton v. Nichols Lumber Co. [Wash.] 81 P. 831. Prejudicial conduct in opening and in attempting to get collateral matters before jury in evidence held not cured by sustaining objections. Pioneer Reserve Ass'n v. Jones, 111 Ill. App. 156; Illinois Cent. R. Co. v. Seitz, 111 Ill. App. 242; Mattoon Gas Light & Coke Co. v. Dolan, 111 Ill. App. 333. To ask in personal injury case whether defendant or some one else is defending the suit is prejudicial in a close case. Harry Bros. Co. v. Brady [Tex. Civ. App.] 86 S. W. 615.

45. Trembling in presence of jury. Chicago & J. Elec. R. Co. v. Spence, 115 Ill. App. 465.

46. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585.

47. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466; City of Guthrie v. Carey [Okl.] 81 P. 431; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. No prejudice can result from court's reading from a decision of the supreme court to sustain its refusal of defendant's point. Thomas v. Butler, 24 Pa. Super. Ct. 305. Disparaging remark concerning medical works. Foss v. Portsmouth, etc., R. Co. [N. H.] 60 A. 747. Criticism of both counsel. Feldman v. Senft, 92 N. Y. S. 231. Statement that evidence was improperly excluded. Richmond Ice Co. v. Crystal Ice Co., 103 Va. 465, 49 S. E. 650.

48. Robinson v. Lowe, 56 W. Va. 308, 49 S. E. 250; Southern Pine Co. v. Powell [Fla.] 37 So. 570. Instruction including elements of damage not proved. Gilmore v. Kane [N. J. Law] 60 A. 181. Erroneous instruction on element of damages held not rendered innocuous by lack of evidence to establish it. Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698. Instruction withdrawing issue as to which evidence conflicts. Hensel v. Hoffman [Neb.] 104 N. W. 603. Held prejudicial and misleading as authorizing inferences contrary to party's contentions. Netherlands Fire Ins. Co. v. Barry, 93 N. Y. S. 164. Instruction requiring finding on excluded evidence. Foley v. Zavier, 93 N. Y. S. 289. Charge on punitive damages is prejudicial where not warranted and the injury was aggravated. Macon R. & Light Co. v. Mason [Ga.] 51 S. E.

not otherwise.[49] The verdict and findings may indicate whether an erroneous in-

569. The presentation of two inconsistent theories one of which plaintiff cannot recover on without disregarding all of his evidence is error. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346. Measure of damages for delay in shipping cattle. Texas & P. R. Co. v. Nelson [Tex. Civ. App.] 86 S. W. 616. Loose instruction on damages held prejudicial where verdict perforce rests on opinion. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 87 S. W. 172. Instruction predicating defense on claim not set up by defendant. Unlawful detainer. McElvaney v. Smith [Ark.] 88 S. W. 981.

49. Elkins v. Metcalf, 116 Ill. App. 29; Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119; Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509; Kerr v. Atwood [Mass.] 74 N. E. 917; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300; Gillespie v. Ashford, 125 Iowa, 729, 101 N. W. 649; Sylvester v. Ammons, 126 Iowa, 140, 101 N. W. 782; Hunt v. Ahnemann [Minn.] 102 N. W. 376; Patterson v. Chicago, etc., R. Co. [Minn.] 103 N. W. 621; Gulbertson v. Hanson [Minn.] 104 N. W. 2; Jackman v. Eau Claire Nat. Bank [Wis.] 104 N. W. 98; Wilder v. Great Western Cereal Co. [Iowa] 104 N. W. 434; Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Minn.] 104 N. W. 560; McAfee v. Dix, 101 App. Div. 69, 91 N. Y. S. 464; Hackler v. Evans [Kan.] 79 P. 669; Peterson v. Seattle [Wash.] 82 P. 141; Heard v. Tappan, 121 Ga. 437, 49 S. E. 292; Macon & B. R. Co. v. Anderson, 121 Ga. 666, 49 S. E. 791; Brown v. St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310; Missouri, etc., R. Co. v. Kellerman [Tex. Civ. App.] 87 S. W. 401; Missouri, etc., R. Co. v. Penny [Tex. Civ. App.] 87 S. W. 718; Odin Coal Co. v. Tadlock [Ill.] 75 N. E. 332; Burns v. Goddard [S. C.] 51 S. E. 915; Walter Pratt & Co. v. Frasier & Co. [S. C.] 51 S. E. 983; Jackson v. American Telep. & Tel. Co. [N. C.] 51 S. E. 1015; Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. R. 794, 89 S. W. 285. Inconsistency. James v. Lyons Co. [Cal.] 81 P. 275. Inconsistency between charge and answers to points. Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293. Ignoring some issues. Mobile & O. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416. Instruction not pertinent. Foster v. Seattle Elec. Co., 35 Wash. 177, 76 P. 995; Chicago & A. R. Co. v. Walters [Ill.] 75 N. E. 441; Story v. St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992; Lackland v. Lexington Coal Min. Co., 110 Mo. App. 634, 85 S. W. 397. Slight inaccuracy in quoting testimony. Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632; Field v. Schuster, 26 Pa. Super. Ct. 82; Pryor v. Walkerville [Mont.] 79 P. 240. Error in not submitting the issue of negligence is harmless where contributory negligence is conclusively shown. Heying v. United R. & Elec. Co. [Md.] 59 A. 667. Refusal of instruction stating mere truism. Mack v. Starr [Conn.] 61 A. 472. A judgment should not be reversed for inadvertent expressions in the charge to which the attention of the trial court was not called and which evidently did not affect the verdict. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. The giving of an instruction correctly defining certain terms "as used in these instructions" is harmless though there are no instructions using such terms. "Ordinary risks of employment." Wells v. O'Hare, 110 Ill. App. 7. A charge as to facts excusing contributory negligence, although in the opinion of the court unnecessary, is not to the prejudice of the defendant if no contributory negligence existed. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8. Modification of charge on plaintiff's negligence held not prejudicial. Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527. Failure to instruct as to improper argument. Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589. Inadvertent assumption that paragraph of complaint to which demurrer had been sustained was still in case. Id. An erroneous charge on contributory negligence is harmless to defendant where there is no evidence of it. Indianapolis v. Cauley [Ind.] 73 N. E. 691. Instruction authorizing verdict for plaintiff if evidence only slightly preponderates in his favor. Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458. Failure to instruct as promised concerning evidence admitted for a particular purpose. Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102. Inadvertent use of "plaintiff" for "defendant," error being apparent. Reupke v. Stuhr & Son Grain Co., 126 Iowa, 632, 102 N. W. 509. Where judge used the word "plaintiff" instead of "plaintiff's intestate" but the jury could not have been misled. Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311. Definition of fraud substantially correct. McDonald v. Smith [Mich.] 102 N. W. 668. Where the charge is a complete and direct statement of the applicable rules of law, errors assigned on rejected instructions will not be considered. Pumorlo v. Merrill [Wis.] 103 N. W. 464. Verbal inaccuracy in instructions correct as a whole. Young v. People's Gas & Elec. Co. [Iowa] 103 N. W. 788. Instruction on ratification is harmless where authority is undisputed. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319. Reading pleadings instead of otherwise stating issues. German Ins. Co. v. Chicago & N. W. R. Co. [Iowa] 104 N. W. 361. Measure of damages for personal injury. Stowe v. La Conner Trading & Transp. Co. [Wash.] 80 P. 856; Prior v. Eggert [Wash.] 81 P. 929. One instruction argumentative. McCormick v. Parriott [Colo.] 80 P. 1044. Charge to find for defendant if settlement was "full and fair" is not prejudicial in absence of evidence questioning fairness of settlement. Irwin v. Buffalo Pitts Co. [Wash.] 81 P. 849. Ruling as to kind of money in which contract obligation must be discharged. City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299. The refusal to give special instructions on the question of contributory negligence will not be reviewed where, on plaintiff's own evidence, the court properly held as a matter of law that such negligence existed. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Judgment will not be reversed because the judge fails to instruct the jury on an essential point, if the proof on that point is so clear and conclusive that

struction was effective.[50] If, as in equitable issues, the verdict is merely advisory,

there can be no question that it was established. Parrish v. Huntington [W. Va.] 50 S. E. 416. Defendant cannot complain that the law of unavoidable accident was not correctly given to the jury where it was not entitled to any charge presenting that issue. Georgia, F. & A. R. Co. v. Lasseter [Ga.] 51 S. E. 15. Error in instructions on contributory negligence where there is no evidence of any. City of Macon v. Humphries [Ga.] 50 S. E. 986; Pressly v. Dover Yarn Mills [N. C.] 51 S. E. 69. Instruction inadvertently stating instead of twenty years as period of limitation, where correct time was elsewhere given. Love v. Turner [S. C.] 51 S. E. 101. Irrelevant charge. Richardson v. Atlantic Coast Line R. Co. [S. C.] 51 S. E. 261; Latour v. Southern R. Co. [S. C.] 51 S. E. 265; Sharpton v. Augusta & A. R. Co. [S. C.] 51 S. E. 553. Objectionable use of words "If you believe from the evidence." Merrell v. Dudley [N. C.] 51 S. E. 777. Charge slightly misleading. Vandiver & Co. v. Waller [Ala.] 39 So. 136. Failure to instruct that plaintiff must show a certain fact is not error where the fact was shown and undisputed. Thomson Bros. v. Lynn [Tex. Civ. App.] 81 S. W. 330. Instruction that a particular amount was reasonable is harmless where it is admitted that it was reasonable. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. Charge on city's actual knowledge of defect in street is harmless where evidence of constructive notice is sufficient. City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431. Instruction more likely to be construed in appellant's favor than otherwise. Gerhart v. Wabash R. Co., 110 Mo. App. 105, 84 S. W. 100. Where the instructions submit defendant's liability solely on the theory that it specially contracted to carry plaintiff's goods safely, an instruction in which it is assumed that defendant is a common carrier is harmless. Jaminet v. American Storage & Storage & Moving Co. [Mo. App.] 84 S. W. 128. Superfluous words. Reference to testimony of experts "and others" as to values. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. Instruction that plaintiff must prove fact not disputed and assumed to be true all through trial. Strahorn-Hutton-Evans Commission Co. v. Heffner [Ark.] 85 S. W. 784. Inaccurate instruction on care required of carrier of live stock. Houston & T. C. R. Co. v. Gray [Tex. Civ. App.] 85 S. W. 838. Reference to contributory negligence "as defined in other instructions," no definition being given, is harmless, that defense having been abandoned. Schroeder v. St. Louis Transit Co. [Mo. App.] 85 S. W. 968. Charge giving incorrect definition of negligence. Houston & T. C. R. Co. v. Everett [Tex. Civ. App.] 86 S. W. 17. Abstract definition of ordinary care. Houston & T. C. R. Co. v. Scott [Tex. Civ. App.] 86 S. W. 18. Charge giving amount to find for plaintiff if jury find for him is not error where amount is undisputed. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19. Where there was an express contract, and the jury so find, there is no harm in errors in charging what would be the rights of the parties under the contract to be implied in the absence of an express one. Texas, etc., R. Co. v. Reid [Tex. Civ. App.] 86 S. W. 363. Failure to charge on a fact established by uncontroverted testimony is not prejudicial to the party against whom such fact is properly found. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375. Inaccuracy in charge given on the hypothesis that the reinsurer issued the policy sued on is harmless. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491. Recital in instruction of immaterial uncontroverted fact. Spencer v. St. Louis Transit Co. [Mo. App.] 86 S. W. 593. Slight modification. Id. The court in Texas does not judicially know that dead horses are less valuable than live ones so as to render harmless an instruction on the measure of damages for injuries to horses in transportation. Texas & P. R. Co. v. Snyder [Tex. Civ. App.] 86 S. W. 1041. Error in instructions on contributory negligence is harmless to defendant where there was no evidence of any. Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79. Charge requiring carrier to dispatch goods "promptly" held harmless where negligent delay was undisputed. Texas & P. R. Co. v. Sheared [Tex. Civ. App.] 87 S. W. 363. General statement as to duty of common carriers held not error where the issue was properly submitted. Citizens' Elec. Co. v. Thomas [Ark.] 87 S. W. 427. Error in submitting a hypothesis unsupported by any evidence is harmless where the verdict is correct and based on a correct construction of the contract sued on. Woods v. Carl [Ark.] 87 S. W. 621. Broader instruction on negligence than facts required. Reynolds v. St. Louis Transit Co. [Mo.] 88 S. W. 50. Variance between instructions and petition held not prejudicial. Personal injuries. Williams v. Metropolitan St. R. Co. [Mo. App.] 89 S. W. 59. Refusal to instruct as to purpose of receiving evidence. Bartley v. Comer [Tex. Civ. App.] 13 Tex. Ct. Rep. 816, 89 S. W. 82. A special charge, to the effect that the jury are not to consider the statement of plaintiff's claim in his petition as evidence in the case, might well have been given, but its omission could not have misled the jury or prejudiced the rights of the defendant. Duhme Jewelry Co. v. Hazen, 6 Ohio C. C. (N. S.) 606.

50. Edward Malley Co. v. Button [Conn.] 60 A. 125; Kurstelska v. Jackson, 93 Minn. 385, 101 N. W. 606; Calbeck v. Ford [Mich.] 12 Det. Leg. N. 82, 103 N. W. 516; Modern Match Co. v. Baltimore & O. R. Co. [Mich.] 12 Det. Leg. N. 269, 104 N. W. 19; Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 P. 904; San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. Special finding may show that erroneous instruction was disregarded. Adams v. Pease, 113 Ill. App. 356; Southern I. R. Co. v. Norman [Ind.] 74 N. E. 896; Indianapolis St. R. Co. v. O'Donnell [Ind. App.] 73 N. E. 163; Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386. Smallness of verdict may show that instruction on measure of damages was harmless. Freeman v. Wright, 113 Ill. App. 159; Cheney v. Field, 114 Ill. App. 597; Pierce v. O'Brien [Mass.] 75 N. E. 61. Instruction erroneously allowing punitive damages. Bradford v. Taylor [Miss.] 37 So. 812. Assuming fact found by special verdict. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 73 N. E. 285. Refusal to instruct.

such error is presumptively harmless.[51] The fact that improper papers were before the jury while deliberating,[52] or that it was improperly recalled,[53] or that other irregularities occurred during the trial,[54] are not reversible if no harm resulted; nor are defects and irregularities in the verdict, findings, and conclusions of law,[55] or in

Huntington Light & Fuel Co. v. Beaver [Ind. App.] 73 N. E. 1002; City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724. Instruction as to nominal damages held harmless where jury allowed substantial recovery. Cummings v. Holt [Mass.] 74 N. E. 297. Refusal to give instructions on first count is cured by recovery on second. Madison Coal Co. v. Hayes, 215 Ill. 625, 74 N. E. 755. Finding of incapacity held to render harmless submission of issue of undue influence, where two issues were kept separate. In re Selleck's Will, 125 Iowa, 678, 101 N. W. 453. Instruction to find exemplary damages in such sum as would be just against defendant least culpable is harmless as to plaintiff where the jury found for one defendant. Love v. Halladay [Mich.] 102 N. W. 1027. Instructions dispersing with unanimimty are harmless when followed by a unanimous verdict. Shilling Mercantile Co. v. Elliott [Colo. App.] 79 P. 179. Erroneous instruction on contributory negligence is harmless where the jury find no negligence. Cannady v. Durham, 137 N. C. 72, 49 S. E. 50. Error in instruction on punitive damages is harmless where compensatory damages only are awarded. Spengler v. St. Louis Transit Co., 108 Mo. App. 329, 83 S. W. 312. Error in failing to limit the recovery to the amount claimed in the petition is harmless where the verdict is less. Edger v. Kupper, 110 Mo. App. 280, 85 S. W. 949.

Held prejudicial: Instruction authorizing punitive damages held not cured by size of verdict. Two thousand five hundred dollars for broken leg. Covington Saw Mill & Mfg. Co. v. Drexilius [Ky.] 87 S. W. 266. Error cannot be harmless where recovery greatly exceeds amount erroneous charge authorizes. Nelson v. Metropolitan St. R. Co. [Mo. App.] 88 S. W. 781. Where appellate court cannot determine on what issue verdict was rendered, erroneous instructions cannot be disregarded. Jennings v. White [N. C.] 51 S. E. 799.

51. 3 C. L. 1587, n. 37.

52. Pleadings. Powley v. Swensen, 146 Cal. 471, 80 P. 722; Elgin, A. & S. Traction Co. v. Wilson [Ill.] 75 N. E. 436. Deposition containing only one fact and that one not likely to have been forgotten. Fottori v. Vesella [R. I.] 61 A. 143. Photographs. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48.

Held prejudicial to give interrogatories to jury. Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719.

53. See 3 C. L. 1587, n. 39.

54. Where the court refuses an instruction as offered, it being clearly erroneous, his statement that he desires to modify it is not reversible error, though modification is prohibited by the statute. Chicago & E. I. R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623. Failure to submit correct special interrogatories to counsel before submitting to jury. Chicago City R. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458. Party held not prejudiced by vigorous cross-examination by judge in case tried to court. Stelpflug v. Wolfe [Iowa] 102 N. W. 1130. Allowing plaintiff to walk before jury after submission of case. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84. Irregular conduct on view. Wood v. Moulton, 146 Cal. 317, 80 P. 92. Conduct of jury on view held not prejudicial. Louisville, A. & P. V. Elec. R. Co. v. Whipps [Ky.] 87 S. W. 298. Leaving question of law to jury who find properly. Bedgood-Howell Co. v. Moore [Ga.] 51 S. E. 420. Failure of judge to sign charge. International & G. N. R. Co. v. Lucas [Tex. Civ. App.] 84 S. W. 1082. Order of opening case not strictly following statute. Rust v. Rust [Ky.] 84 S. W. 1152.

55. Krauskopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506; Bill v. Fuller, 146 Cal. 50, 79 P. 592. Failure to mark each paragraph of draft finding "Proven" or "Not Proven." Hazard Powder Co. v. Somersville Mfg. Co. [Conn.] 61 A. 519. Refusal to require more specific answer to interrogatory is harmless where defendant was not entitled to judgment. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552. Failure to find as to immaterial fact. Hohn v. Shideler [Ind.] 72 N. E. 575; Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. Refusal of findings not efficient to the result if made. Carstens v. Hine [Wash.] 81 P. 1004. Failure to find fact not requested and not necessary to support judgment. State v. Coughran [S. D.] 103 N. W. 31. Order awarding counsel fees to be paid to "plaintiff or her counsel." Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877. Failure to find as to count as to which there was no evidence. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354. Defendant is not prejudiced by treatment of findings answered "Doubtful" as favorable to him. Norman v. Hopper [Wash.] 80 P. 551. Conflict of findings. Butler v. Delafield [Cal. App.] 82 P. 260. Failure to find on special issue where general verdict was for defendant. Vaughn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 79 S. W. 345. Failure to find that answers in application for life insurance were warranties is harmless where court so treated them in disposing of the case. Endowment Rank Supreme Lodge K. P. v. Townsend [Tex. Civ. App.] 83 S. W. 220. An equity case will not be reversed because of an erroneous declaration of law by the chancellor, where the facts developed on the hearing support the finding and decree. Schibel v. Merrill, 185 Mo. 534, 83 S. W. 1069. Erroneous finding on immaterial fact. Gulf, etc., R. Co. v. Provo [Tex. Civ. App.] 84 S. W. 275. Failure to make specific findings covered by those made. Vestal v. Young [Cal.] 82 P. 381.

Held prejudicial: Finding against undisputed evidence. Boice v. McCormick, 94 N. Y. S. 892. Refusal in an action tried before the court without a jury to give a declaration of law stating the correct theory on which the cause should be determined. Edwards v. Carondelet Mill. Co., 103 Mo. App. 275, 83 S. W. 764.

the judgment and record,[56] of which the like is true. Thus, a wrong decision when no substantial right exists,[57] or when substantially equivalent to a right decision,[58] or error respecting matters immaterial to the cause of action,[59] is harmless.

Erroneous proceedings after judgment[60] or verdict,[61] or on proceedings for new trial,[62] or preparatory to review,[63] or on an intermediate review,[64] are discussed in the notes, all being governed by the rule that there will be no reversal if no prejudice.

§ 3. *Errors cured or made harmless by other matters.*[65]—*Error is also harmless if some subsequent condition has rectified it or has averted its prejudicial effect.*[66]—This may be done by the admission of evidence,[67] by striking out or exclud-

56. A judgment in replevin in terms awarding plaintiff the property and its value is harmless where no property was found and none seized under the writ. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722. Decree following bill not objected to as multifarious. Glos v. Stern, 213 Ill. 325, 72 N. E. 1057. Conclusions of law stating liability for greater sum than judgment rendered do not prejudice appellant. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000. Rendering judgment as of term which had expired. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357. Alternative judgment in claim and delivery case following remittitur of unauthorized damages. Osmers v. Furey [Mont.] 81 P. 345. That the verdict and judgment in a suit to enjoin the use of land for a certain purpose following the prayer erroneously includes land not intended to be so used cannot be availed of by defendant where the answer does not describe the land. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

57. Error in decreeing cancellation of notes and mortgage on defendant's cross bill is harmless where the judgment that plaintiff take nothing by his action is unassailable. Ray v. Baker [Ind.] 74 N. E. 619.

58. A reviewing court is not the place to raise for the first time a point for the technical purpose of securing a reversal of a judgment substantially just and correct. Newport & C. Bridge Co. v. Jutte, 6 Ohio C. C. (N. S.) 189.

59. New trial will not be granted in ejectment because of inaccurate ruling as to mesne profits where defendant prevailed. Benning v. Horkan, 120 Ga. 734, 48 S. E. 123. In Mississippi a decree in chancery will not be reversed on the ground merely that there was an adequate remedy at law. Under § 147 of the state constitution. Hancock v. Dodge [Miss.] 37 So. 711.

60. Entry of judgment in favor of true plaintiff by wrong christian name. Cleveland, etc., R. Co. v. Surrells, 115 Ill. App. 615.

61. Direction of verdict in all respects similar to one returned on same issue is harmless. Barber v. Dewes, 101 App. Div. 432, 91 N. Y. S. 1059.

62. A denial of a new trial on legal grounds ignoring a conscious duty to set the verdict aside as a matter of discretion is reversible unless the evidence demanded the verdict given. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

63. See 3 C. L. 1588, n. 48.

64. That one of the three judges of the appellate court had been previously objected to as prejudiced is harmless. Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371. On appeal from a decree of interpleader by one of two defendants, the fact that the court below in its opinion referred to the answer of the defendant not appealing is not reversible error, where there is sufficient in the bill and the answer of the defendant appealing to warrant the decree. Kellogg v. Mutual Life Ins. Co., 25 App. D. C. 36. Refusal to dismiss a writ of error as to certain of the defendants is not prejudicial to them, where plaintiff in error could have prosecuted the writ after such dismissal, and a reversal of the judgment as to him would have reversed it as to all the parties. Summerville v. King [Tex.] 83 S. W. 680.

65. See 3 C. L. 1588.

66. Admission of secondary evidence of contract offered by plaintiff if error is cured where defendant subsequently introduces the writing. Mulhearn v. Roach, 24 Pa. Super. Ct. 483. Erroneous exclusion of impeaching evidence is harmless where party offering it is a witness and does not deny the testimony of the witness sought to be impeached. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650. Technical defects in a summons are immaterial after a party has submitted to the jurisdiction of the court. Stryker v. Pendergast, 105 Ill. App. 413. Where the answer supplies an omitted and necessary allegation of the petition, the error in overruling a demurrer to the petition ceases to be reversible. Northwestern Nat. Life Ins. Co. v. Hare, 5 Ohio C. C. (N. S.) 348. The correctness of a ruling will not be inquired into if it is apparent that any error therein was cured by a subsequent ruling. Frey v. Vignier, 145 Cal. 251, 78 P. 733. Failure of cross complaint to allege material fact held cured by answer, failure to object to evidence and findings. Abner Doble Co. v. McDonald, 145 Cal. 641, 79 P. 369. Opening case after amendment. Jordan v. Greig [Colo.] 80 P. 1045. Erroneously sustaining a demurrer to part of a plea becomes harmless by making the part overruled a part of an amended plea. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

Not cured: Overruling demurrer because of limitations held not cured where no evidence was offered to toll statute. Hibernia Sav. & Loan Soc. v. Boland, 145 Cal. 626, 79 P. 365.

67. Cure of rulings on pleadings: Sustaining demurrer to proper pleading is harmless where the evidence admissible under it is admitted at the trial. New Kanawha

ing evidence,[68] by reinstating it,[69] by withdrawal of objections,[70] by proceeding with trial, of issues of fact after overruling of demurrer to evidence,[71] by instructions,[72]

Coal & Min. Co. v. Wright, 163 Ind. 529, 72 N. E. 550; Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048; Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 466. Averment of waiver of proof of loss on fire policy. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Proof of strikers allegations admitted. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765.

Excluded evidence afterward admitted. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227; In re Morey's Estate [Cal.] 82 P. 57; O'Connor v. Hogan [Mich.] 12 Det. Leg. N. 272, 104 N. W. 29; Hurd v. Fleck [Colo.] 82 P. 485; Worrell v. Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988; Hofacre v. Monticello [Iowa] 103 N. W. 488; Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264; Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650; Bycyznski v. Illinois Steel Co., 115 Ill. App. 326; Howe v. Morey [Mich.] 12 Det. Leg. N. 450, 104 N. W. 643; Strauss v. Brooklyn Heights R. Co., 85 App. Div. 613, 82 N. Y. S. 767; Hill v. McCoy [Cal. App.] 81 P. 1015; Anglo-Californian Bank v. Cerf [Cal.] 81 P. 1077; Spinks v. Clark [Cal.] 82 P. 45; City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724; Missouri, etc., R. Co. v. Jarrell [Tex. Civ. App.] 86 S. W. 632; McFarland v. Gulf, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 525, 88 S. W. 450. Excluded evidence in chief admitted on cross. Kellam v. Brode [Cal. App.] 82 P. 213. Pleading. West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565. Refusal to allow cross-examination of witness is harmless to party who afterwards calls him and examines him as to the matter. Hicks v. Harbison-Walker Co. [Pa.] 61 A. 958.

Not cured: Where ruling was never withdrawn or modified, the error is not cured by the fact that a part of the excluded evidence indirectly found its way into the record. Greenlee v. Mosnat, 126 Iowa, 330, 101 N. W. 1122. Court not having receded from position. Powers v. Metropolitan St. R. Co., 94 N. Y. S. 184.

Admitted evidence cured by later evidence: Competency of expert. Rice v. Wallowa County [Or.] 81 P. 358. Admitting deposition of witness who was in court is harmless where he was called to the stand and gave full explanation of it. Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 Law. Ed. 1057. Witness afterwards allowed to testify to objectionable fact without exception. Virginia & S. W. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33. Admission without objection of later testimony of same fact. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. Question calling for opinion of nonexpert held cured by drawing from same witness all facts. Dutro v. Metropolitan St. R. Co. [Mo. App.] 86 S. W. 915. Error in admission of evidence is not available where the same evidence is admitted elsewhere without objection. Gulf, etc., R. Co. v. Boyce [Tex. Civ. App.] 87 S. W. 395.

68. Hart v. Cascade Timber Co. [Wash.] 81 P. 738; Lee v. Dow [N. H.] 59 A. 374; Gray v. Central Minnesota Immigration Co. [Iowa] 103 N. W. 792; Blalock v. Clark, 137 N. C. 140, 49 S. E. 88; McKibbin v. Day [Neb.] 104 N. W. 752. Striking out incompetent evidence received over objection on a jury trial does not cure the error unless it appears that the jury was not affected by it. Chicago City R. Co. v. White, 110 Ill. App. 23.

69. Improper striking out held cured by subsequuent introduction of testimony to same effect. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

70. See 3 C. L. 1589, n. 54.

71. Baltimore & O. R. Co. v. State [Md.] 61 A. 189; Gilmer v. Holland Inv. Co., 37 Wash. 589, 79 P. 1103. Refusal of nonsuit may be cured by supplying evidence. Carey v. Hamburg-American Packet Co. [N. J. Law] 60 A. 179; Farnsworth v. Miller [N. J. Law] 60 A. 1100; Elmendorf v. Golden, 37 Wash. 664, 80 P. 264. The mere refusal to direct a nonsuit is not ground for reversal, if testimony coming in after the refusal presents a case for the verdict of the jury. Bostwick v. Willett [N. J. Law] 60 A. 398.

72. Curing erroneous evidence. Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116; Manzer v. Phillips [Mich.] 102 N. W. 292; Harrison v. Lakenan [Mo.] 88 S. W. 53; Lee v. Dow [N. H.] 59 A. 374; Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882; Lazier Gas Engine Co. v. Du Bois [C. C. A.] 130 F. 834; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; Devencenzi v. Cassinelli [Nev.] 81 P. 449; Dayvis v. Western Union Tel. Co. [N. C.] 51 S. E. 898. Admission of evidence that plaintiff in a personal injury case has a family is harmless if the court instruct that no damages are to be allowed on that account. Cleveland & S. W. Traction Co. v. Ward, 6 Ohio C. C. (N. S.) 385. Where a court distinctly instructs as to the elements to be considered in assessing damages for wrongful death, the introduction of evidence tending to prejudice the jury is harmless. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. Refusal to strike ordinance. Winkler v. Hawkes, 126 Iowa, 474, 102 N. W. 418. Striking out and instructions to disregard held curative, notwithstanding expression of opinion by court that evidence was admissible. Harkins v. Queen Ins. Co., 94 N. Y. S. 140. Curing refusal to strike. Negligence and incompetency of vice-principal. Dossett v. St. Paul & Tacoma Lumber Co. [Wash.] 82 P. 273. Where the charge restricts recovery to a sum less than he is entitled to under the law, errors in allowing proof of improper items of damage is harmless. Claudius v. West End Heights Amusement Co. [Mo. App.] 84 S. W. 354. Admission of prior oral contract merged in written one. Ft. Worth & R. G. R. Co. v. Hadley [Tex. Civ. App.] 86 S. W. 932.

Not cured. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56; Henne v. Steeb Shipping Co., 37 Wash. 331, 79 P. 938. Action for damages for operation of railroad near school house. Illinois Cent. R. Co. v. Trustees of Schools of Tp. 9 S., R. 2 W. 3d P. M., 212 Ill. 406, 72 N. E. 39. Condemnation by railroad. Simons v. Mason City & Ft. D. R. Co. [Iowa] 103 N. W. 129. Evidence on will contest. Weston v. Teufel, 213 Ill. 291, 72 N.

by taking the case or question from the jury,[73] by other corrective rulings or proceedings,[74] by verdict or findings,[75] by judgment,[76] or by remittitur of damages.[77]

E. 908. Contents of attempted codicil of will as showing value of services. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103, N. W. 574. Subsequent precautions to prevent similar injury. Russell v. New York, etc., R. Co., 96 App. Div. 151, 89 N. Y. S. 429. Evidence that deceased did not understand constitution of mutual benefit society. Sterling v. Head Camp. Pac. Jur. 28 Utah, 505, 80 P. 375. Unrecoverable elements of damage. Profits on cattle. Berg v. Humptulips Boom & River Imp. Co. [Wash.] 80 P. 528. Failure to instruct to disregard stricken testimony and submission of issue is prejudicial. Walsh v. Jackson [Colo.] 81 P. 258. Where the testimony legally before the jury did not warrant the verdict, error in admitting improper testimony is not cured by ignoring it in the charge. Dallas Homestead & Loan Ass'n v. Thomas [Tex. Civ. App.] 81 S. W. 1041. Error in admitting evidence on an immaterial issue cannot be held harmless where the court refuses to instruct that the question should not be considered. Perry v. Rutherford [Tex. Civ. App.] 13 Tex. Ct. Rep. 228, 87 S. W. 1054.

Rejection of evidence. Virginia & S. W. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33; Jones v. Oppenheim, 91 N. Y. S. 343.

Curing other parts of charge. Thomas v. Butler, 24 Pa. Super. Ct. 305; Central R. Co. v. Sehnert, 115 Ill. App. 560; Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982; Patch Mfg. Co. v. Protection Lodge No. 215, I. A. M. [Vt.] 60 A. 74; Hollingsworth v. Ft. Dodge, 125 Iowa, 627, 101 N. W. 455; Spring Valley Coal Co. v. Robizas, 111 Ill. App. 49; Serio v. Murphy, 99 Md. 545, 58 A. 435; American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572; West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Measure of damages. Chicago Union Traction Co. v. Miller, 212 Ill. 49, 72 N. E. 25. Instructions must be considered as a whole. Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 504; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; McAfee v. Dix, 101 App. Div. 69, 91 N. Y. S. 464; Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022; Senf v. St. Louis & S. R. Co. [Mo. App.] 86 S. W. 887; Commonwealth Elec. Co. v. Rose, 214 Ill. 545, 73 N. E. 780; Coal Belt Elec. R. Co. v. Kays [Ill.] 75 N. E. 498; McDonald v. Smith [Mich.] 102 N. W. 668; El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735; Arkadelphia Lumber Co. v. Posey [Ark.] 85 S. W. 1127; Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21; City of Gibson v. Murray [Ill.] 75 N. E. 319. Instructions submitting plaintiff's theories without mentioning defendant's held not erroneous, defendant's theories having been previously submitted. Jones-Pope Produce Co. v. Breedlove [Ark.] 83 S. W. 924. Charge correct as a whole. Killing intoxicated person on street car track. Taylor v. Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 1019. Burden of proof in negligence case. Rice v. New York City R. Co., 94 N. Y. S. 326. In suit for alienation of affections. Humphrey v. Pope [Cal. App.] 82 P. 223. Defendant held not harmed by reference to amount of damages claimed in declaration. Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400. Positive instruction to dismiss certain other portion of charge from minds. Rudberg v. Bowden Felting Co. [Mass.] 74 N. E. 590. Instruction assuming fact held cured. Baker v. Independence, 106 Mo. App. 507, 81 S. W. 501.

Not cured by subsequent charge in conflict therewith. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908; Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113; Rosenstein v. Fair Haven & W. R. Co. [Conn.] 60 A. 1061; Continental Casualty Co. v. Peltier [Va.] 51 S. E. 209; Mengis v. Fitzgerald, 95 N. Y. S. 436; Southern Kansas R. Co. v. Sage [Tex.] 84 S. W. 814; Heard v. Ewan [Ark.] 85 S. W. 240; Shepherd v. St. Louis Transit Co. [Mo.] 87 S. W. 1007; Sands v. Marquardt [Mo. App.] 87 S. W. 1011; City of Cleburne v. Gutta Percha & R. Mfg. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 108, 88 S. W. 300; St. Louis, etc., R. Co. v. Hitt [Ark.] 88 S. W. 911. Rule will not avail where charge as a whole does not correctly state the law. Nickey v. Dougan, 34 Ind. App. 601, 73 N. E. 288; Fletcher v. Eagle [Ark.] 86 S. W. 810. Measure of damages in condemnation by railroad. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116. Omission to include effect of contributory negligence in instruction stating elements of recovery not cured by subsequent charge on subject. Nickey v. Steuder [Ind.] 73 N. E. 117.

Curing refusal to charge: Refusal of instruction covered by others. Chicago City R. Co. v. Fetzer, 113 Ill. App. 280; Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443; Chicago City R. Co. v. Schmidt [Ill.] 75 N. E. 383; Kansas City, etc., R. Co. v. Matthews [Ala.] 39 So. 207; Cameron v. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Chicago Union Traction Co. v. Olsen, 113 Ill. App. 303; Sweet v. Western Union Tel. Co. [Mich.] 102 N. W. 850; Cutten v. Pearsall [Cal.] 81 P. 25; Birmingham R., Light & Power Co. v. Rutledge [Ala.] 39 So. 338; Birmingham, R., Light & Power Co. v. Livingston [Ala.] 39 So. 374; Yarborough v. Hughes [N. C.] 51 S. E. 904. The refusal to submit a certain issue is rendered harmless by an instruction prescribing the effect of the existence of the affirmative of such issue. National Cash Rgister Co. v. Hill, 136 N. C. 272, 48 S. E. 637.

Not cured. Dambmann v. Metropolitan St. R. Co., 180 N. Y. 384, 73 N. E. 59. Right of way of street car at intersection with street which at that point is a cul-de-sac. Rutz v. New York City R. Co., 95 N. Y. S. 345. Accord and satisfaction by payment in more valuable currency. City of San Juan v. St. John's Gas Co., 195 U. S. 510, 49 Law. Ed. 299.

Curing erroneous remarks of counsel. Lee v. Dow [N. H.] 59 A. 374; West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879; Day v. Ferguson [Ark.] 85 S. W. 771. Of court. Neumeister v. Goddard [Wis.] 103 N. W. 241; Cummings v. Weir, 37 Wash. 42, 79 P. 487.

Not cured: Reading previous decision of supreme court in same case held not cured by charge. Olney v. Boston & M. R. Co. [N.

H.] 59 A. 387. Prejudicial argument as to purpose of physical examination conducted by defendant. Remey v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 368, 104 N. W. 420.

73. Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119. Curing admission of evidence on issue withdrawn. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922. Ignoring of prior verdict setting part of the issues is cured by direction to find in accordance. Meloon v. Read [N. H.] 59 A. 946. Where the sole issue submitted was whether the landlord had waived his lien for rent, error in admitting evidence that a trustee in a trust deed of the crops had been paid becomes immaterial. Goodwin v. Mitchell [Miss.] 38 So. 657. Improper evidence held cured by submission. Texas & P. R. Co. v. Ellerd [Tex. Civ. App.] 87 S. W. 362. Incompetent evidence of fact not submitted to jury. Gulf, etc., R. Co. v. St. John [Tex. Civ. App.] 12 Tex. Ct. Rep. 979, 88 S. W. 297; McCabe v. San Antonio Traction Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 576, 88 S. W. 387. Erroneous ruling on pleading held cured by submission. International & G. N. R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515.

74. Reconsidering ruling on question put to witness. Caven v. Bodwell Granite Co., 99 Me. 278, 59 A. 285. Court refused to allow defendant's counsel to argue the question of want of consideration, but reconsidered and allowed the other counsel of defendant to argue the question. Farnsworth v. Fraser [Mich.] 100 N. W. 400. Disclaimer of recovery under erroneous evidence. Oliver v. Houghton County St. R. Co. [Mich.] 101 N. W. 530. Overruling demurrer for want of parties is cured by their being brought in. Harrison CoCunty v. State Sav. Bank [Iowa] 103 N. W. 121. Refusal of continuance held cured by subsequent continuance, giving defendant full opportunity to produce witnesses and counsel. People v. Greene, 94 N. Y. S. 477. Error in striking amended answer from files as filed without permission is cured by permission and filing subsequently had and trial on merits. Risdon v. Yates, 145 Cal. 210, 78 P. 641. Stipulation avoiding error in refusing amendment to pleading. South Side Imp. Co. v. Burson [Cal.] 81 P. 1107. Allowing amendment afterward withdrawn. Georgia R. & Elec. Co. v. Reeves [Ga.] 51 S. E. 610. Improper amendment of account held cured by disallowance of added items. Hardy v. Pecot [La.] 36 So. 992. Court refused to compel plaintiff to elect on which count he would proceed to trial, but it confined the proof to one count. Barton v. Odessa [Mo. App.] 82 S. W. 1119. One is not prejudiced by insufficient notice of contempt proceedings, where the judgment for the fine assessed against him is set aside. Davies v. State [Ark.] 84 S. W. 633. Withdrawal of objectionable remarks. Cane Belt R. Co. v. Crosson [Tex. Civ. App.] 87 S. W. 867.

Not cured: An oral statement by the judge during progress of the trial is not the equivalent of an instruction and will not cure the error of refusing a proper instruction on that point. Bloomington & N. R. Co. v. Gabbert, 111 Ill. App. 147. View by two jurors not cured by directing view by whole jury over objection of party. Buffalo Structural Steel Co. v. Dickinson, 98 App. Div. 355, 90 N. Y. S. 268. Sending jury and parties out to make a physical examination of plaintiff is not cured by the court's offer on exception after return to retire with them. Fordyce v. Key [Ark.] 84 S. W. 797. The approval of a report in partition signed by only two commissioners and a third person not appointed does not cure the error in failing to appoint three. Crane v. Stafford [Ill.] 75 N. E. 424.

75. Assignments affecting a count on which appellant had judgment will not be considered. McAllin v. McAllin, 77 Conn. 398, 59 A. 413. Errors going to the cause of action are cured by a verdict for a less sum than claimed. United States v. Coughanour [C. C. A.] 133 F. 224. Error in admission of evidence and instructions thereon is harmless where the findings dispose of the case on other issues. Northwestern Nat. Life Ins. Co. v. Blasingame [Tex. Civ. App.] 85 S. W. 819.

Cure of rulings on pleadiugs: The overruling of a demurrer to a replication becomes immaterial where defendant rejoins and the issues are found for plaintiff. Des Moines Life Ass'n v. Crim [C. C. A.] 134 F. 348. Error in ruling as to punitive damages is cured by verdict for defendant. Sellers v. Savannah, etc., R. Co. [Ga.] 51 S. E. 398. Refusal to compel election is harmless where recovery is had on only one cause of action. Douthitt v. State [Tex. Civ. App.] 87 S. W. 190.

Curing exclusion of evidence: Where the jury must have found either that the goods conformed to the contract or that defendant accepted them, the latter is not prejudiced by the exclusion of evidence to prove damages for failure of the goods to conform to the contract. Brown v. Harris [Mich.] 102 N. W. 960. Rejection of evidence and instructions as to set-off held harmless. Hunter v. Davis [Iowa] 103 N. W. 373. Where the jury find that defendant was not negligent, the exclusion of evidence that plaintiff had no notice of defects is harmless. Price v. St. Louis S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858.

Admitted evidence cured: Verdict against improperly admitted evidence. Fudge v. Marquell [Ind.] 72 N. E. 565; Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. Amount of verdict held to show that defendant was not prejudiced by erroneous evidence affecting measure of damages. Lynch v. U. S. [C. C. A.] 138 F. 535. Appellants' exceptions to evidence will be overruled, the trial court having found for them. Boston, etc., R. Co. v. Berry [N. H.] 60 A. 686. Note not recovered on. McDonald v. Smith [Mich.] 102 N. W. 668. Where the jury found against an alleged payment of a note sued on, the erroneous admission of certain evidence on such issue was harmless to plaintiff. Eastham v. Patty [Tex. Civ. App.] 83 S. W. 885.

Curing errors in charge: Leaving question of law to jury is harmless where they decided it right. Nickelson v. Cameron Lumber Co. [Wash.] 81 P. 1059. Where nominal damages only are awarded, error in evidence and instructions on actual damages is harmless. Crump v. Ligon [Tex. Civ. App.] 84 S. W. 250. Where the jury could not have found for defendant except on finding no negligence, error in charging on assumption of risk becomes harmless. Price v. St. Louis

HAWKERS AND PEDDLERS, see latest topical index.

HEALTH.[78]

§ 1. *Validity and construction of health regulations.*[79]—Reasonable regulations for the purpose of promoting the health of citizens are within the police power of the state,[80] and authority to make such regulations may properly be delegated to local bodies.[81] Thus, ordinances providing for the removal of garbage by a public contractor only,[82] smoke ordinances,[83] laws requiring compulsory vaccination,[84]

S. W. R. Co. [Tex. Civ. App.] 85 S. W. 858. A finding in terms of damages based on market value heals error in submitting reasonable value. Texas & P. R. Co. v. Prude [Tex. Civ. App.] 86 S. W. 1046. Erroneous instruction on damages for mental suffering in libel is harmless to plaintiff where the jury under proper instructions as to the effect of justification find a verdict for defendant. Ott v. Press Pub. Co. [Wash.] 82 P. 403.

Not cured: Smith v. Bayer [Or.] 79 P. 497.

Curing refusal to charge: Answer to special interrogatory may show immateriality of refused instructions. Wabash R. Co. v. Bhymer, 112 Ill. App. 225. The refusal of instructions relating to an issue found in appellant's favor will not be considered. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

76. Refusal of propositions of law correct in principle is hamless where a case is correctly decided on theory making the propositions immaterial. Saffer v. Lambert, 111 Ill. App. 410. Error in finding that plaintiff was entitled to costs is harmless where none were included in the judgment. Boland v. Ashurst Oil, Land & Development Co., 145 Cal. 405, 78 P. 871.

77. See Damages, § 6, 5 C. L. 929. Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; Great Northern R. Co. v. Herron [C. C. A.] 136 F. 49; Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13; Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116; Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418. Error in admission of evidence which could merely have effected the amount of the verdict may be so cured. Chicago City R. Co. v. Miller, 111 Ill. App. 446. Judgment for amount in excess of that laid in declaration. Finch v. Mishler [Md.] 59 A. 1009. Remittitur of amount claimed in cause of action not proved. Blum v. Edelstein [Colo. App.] 79 P. 301. Where no plea is filed by defendant and the judgment rendered for plaintiff is without objection except as to attorney's fees, such judgment will not be reversed if the amount of such fees is written off by plaintiff. Notice of intention to sue for attorney's fees not given as required by statute. Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525. Charge that plaintiff could recover for what he had paid for medical attendance, when there was no evidence that he had paid out anything. Howard v. Terminal R. Ass'n, 110 Mo. App. 574, 85 S. W. 608.

Not cured: Error in authorizing jury to allow exemplary damages cannot be cured by remittitur where the amount so allowed cannot be determined. Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 74 N. E. 738. Evidence too indefinite to form basis for remittitur necessitates reversal. Texas & P. R. Co. v. Frank [Tex. Civ. App.] 13 Tex. Ct. Rep. 236, 88 S. W. 383.

78. Compare titles, Adulteration, 5 C. L. 43; Food, 5 C. L. 1436; Cemeteries, 5 C. L. 557; Medicine and Surgery, 4 C .L. 636; Nuisances, 4 C. L. 839.

79. See 3 C. L. 1590. Public health as one of the foundations of the police power, see, also, Constitutional Law, 5 C. L. 619.

80. State v. Robb [Me.] 60 A. 874. Police power of state includes at least such reasonable regulations established directly by legislative enactment as will protect public health and safety. Jacobson v. Com., 197 U. S. 11, 49 Law. Ed. 643.

81. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643.

82. State v. Robb [Me.] 60 A. 874. It is not void as creating a monopoly, and being in restraint of trade, nor as providing for the taking of private property without due process, or without compensation. Id. Ordinance of city of Oakland, giving city exclusive charge of removal of garbage, exacting a fee therefor, the amount of which differs according to the kind of building from which garbage is removed—whether private dwelling or store, shop, or place of business—is within police powers conferred on cities by Const. art. 11, § 11. Ex parte Zhizhuzza [Cal.] 81 P. 955. The ordinance is not invalid for nonuniformity, and Const. art. 1, § 11, requiring laws of general application to be uniform in operation, has no application. Id. The exacting of a fee is not taking private property without compensation. Id.

83. Chicago smoke ordinance, applying to all chimneys and smoke stacks in the city alike, held not unconstitutional, though different chimneys serve a different number of fire boxes. Glucose Refining Co. v. Chicago, 138 F. 209.

84. Mass. Rev. Laws, c. 75, § 137, authorizing compulsory vaccination by local health boards when deemed necessary for public health, construed by highest state court to authorize compulsory vaccination of all inhabitants of a city where smallpox is prevalent and increasing, does not deprive citi-

laws excluding children not vaccinated from the public schools,[85] and eight-hour laws [86] are held valid as health regulations. In passing upon the validity of a compulsory vaccination law, courts will take judicial notice that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority.[87] Municipalities have power to enact and enforce such reasonable ordinances as may be necessary with respect to the speedy and orderly removal of dead animals, either by the owners, or on their default, by some other agency;[88] but an ordinance which, immediately upon the death of a domestic animal, and before it becomes a nuisance or dangerous to public health, deprives the owner of his property therein, and invests it in the public contractor, is a taking of private property without due process.[89] Health regulations of the legislature may properly be made applicable to cities of a certain class.[90]

The construction and operation of statutes and ordinances relating to the public health is discussed in the cases below.[91]

zens of personal liberty within the meaning of U. S. Const. 14th Amend. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643. The statute does not deny equal protection of laws by exception from its operation of children certified to be unfit for vaccination, though there is no such exception in favor of adults. Id. An adult cannot claim he is deprived of liberty by the law when he does not show with reasonable certainty that he is not a fit subject for vaccination. Id.

NOTE. Vaccination (From Jacobson v. Massachusetts, supra): "Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can any one confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. And the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 175, 50 L. R. A. 64; Morris v. Columbus, 102 Ga. 792, 30 S. E. 850, 66 Am. St. Rep. 243, 42 L. R. A. 175; State v. Kay, 126 N. C. 999, 35 S. E. 459, 78 Am. St. Rep. 691, 49 L. R. A. 588; Abeel v. Clark, 84 Cal. 226, 24 P. 383; Bissell v. Davison, 65 Conn. 183, 32 A. 348, 29 L. R. A. 251; Hazen v. Strong, 2 Vt. 427; Duffield v. Williamsport School Dist., 162 Pa. 476, 29 A. 742, 25 L. R. A. 152." See, also, note, 2 C. L. 176.

85. Laws 1893, c. 661, as amended by Laws 1900, c. 667, § 2, does not violate Const. art. 9, § 1, providing for free schools, nor Const. art. 1, §§ 1, 6, guarantying protection of rights, privileges and liberties. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97.

86. Ex parte Kair [Nev.] 80 P. 463. Such laws are more fully treated in Constitutional Law, 5 C. L. 619; and Master and Servant, 4 C. L. 536.

87. The legislature is entitled to choose between the two theories regarding the value of vaccination and its choice will not be reviewed. Jacobson v. Massachusetts, 197 U. S. 11, 49 Law. Ed. 643; Viemeister v. White, 179 N. Y. 235, 72 N. E. 97.

88. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265.

89. Ordinance providing for contractor to remove dead animals, and imposing on any other person removing such animals, held void. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265. Death of domestic animal does not terminate owner's property therein, and though he may be required to dispose of it so that it shall not become a nuisance, he cannot arbitrarily be deprived of his property therein; he is entitled to a reasonable time in which to remove it, and may remove it himself or by the agency of others, or his vendee may remove it. Mann v. District of Columbia, 22 App. D. C. 139.

90. P. L. 1901, 493, relating to examination and licensing of plumbers and regulating plumbing and drainage in cities of the second class, is valid. Beltz v. Pittsburg [Pa.] 61 A. 78, afg. 26 Pa. Super. Ct. 66.

91. Flue or chimney of apartment building, three feet by three feet, used only for private residences, held within operation of District of Columbia "smoke law," 30 St. at L. 812, c. 79. Duehay v. District of Columbia, 25 App. D. C. 434. That part of art. 14, § 9, of the police regulations of the District of Columbia, regulating the time and manner of removal of dead animals, has no extraterritorial force and does not apply where a carcass is carried outside the district, except when the removal is by the public contractor. Mann v. District of Columbia, 22 App. D. C. 138. Within the meaning of an ordinance restricting right to removal of "house offal" to the public contractor, "house offal" includes refuse food from the table, discarded victuals and swill consisting of such refuse, though undecayed; hence, an unlicensed person removing such refuse violates the ordinance. State v. Robb [Me.] 60 A. 874. Where a defendant was charged only with removing offal from the premises of others, the validity of that portion of the ordinance prohibiting persons from removing offal from their own premises was not in issue, and he could be held under the concededly valid portion of the ordinance. Id. Section 82 of the sanitary code of New York, prohibiting

Power to declare a nuisance per se what was not a nuisance at common law and may or may not be a nuisance in fact, can exist in a municipality only by virtue of a statute.[92] The creation of a nuisance, dangerous to the public health, may be enjoined.[93]

§ 2. *Health boards and officers.*[94]—The constitution,[95] appointment,[96] powers and duties,[97] and compensation[98] of local health boards and officers, are wholly statutory. Powers given by statute to a board of health cannot be delegated to a single health officer.[99]

§ 3. *Care and control of contagious or infectious diseases. Liability for expense.*[1]—Which local subdivision of the government is liable for such expense is fixed by statute.[2] One who has rendered services, or furnished supplies or the use of

the killing or dressing of any animal or meat in any market, is sufficient ground for enjoining a lease of lands deeded to Brooklyn for "market purposes," on which slaughter houses are to be built. Bird v. Grout, 94 N. Y. S. 127. Pen. Code 1895, art. 425, makes it unlawful for one to leave the carcass of a horse which died in his possession within fifty yards of a public road or highway. Held, the statute does not apply to a case where a horse died while turned loose in a pasture, not being in actual manual possession of owner at the time. Ogg v. State [Tex. Cr. App.] 87 S. W. 348. Violation of resolution of health board of town of Milwaukee prohibiting the bringing of refuse, garbage, etc., into the town, is a misdemeanor, and a justice has no jurisdiction to try a person charged therewith. Stoltman v. Lake [Wis.] 102 N. W. 920.

92. Hurd's Rev. St. 1903, p. 294, gives cities power to declare nuisances, and Chicago ordinance declaring issuance of dense smoke more than three minutes—six minutes in case of starting fires or cleaning boxes—a nuisance per se is valid. Glucose Refining Co. v. Chicago, 138 F. 209.

93. A smallpox hospital, established under 72 O. L., 77, as long ago as 1878, by a municipality, within the township but outside of its own corporate limits, at a distance of two hundred and fifty feet back from a public highway, will not be abated as a nuisance, although a large township schoolhouse has since been erected on the highway opposite hospital lot, and dwellings have also been built adjacent thereto. But the erection of an additional building directly opposite the schoolhouse, and within fifty feet of the highway upon which the hospital lot abuts, will be enjoined as a public nuisance where the purpose is to use said building for hospital purposes. Trustees of Youngstown Township v. Youngstown, 6 Ohio C. C. (N. S.) 498.

94. See 3 C. L. 1591.

95. Under Burns' Rev. St. 1901, § 6718, the mayor and common council of a city constitute the health board, where a city has no such board. City of Frankfort v. Irvin, 34 Ind. App. 281, 72 N. E. 652.

96. City of Little Falls, N. Y., had power on Feb. 9, 1904, to appoint a health officer to succeed one whose term expired the last day of that month. Construing city charter, and Laws 1903, p. 877, c. 383, § 20, and Laws 1904, p. 1234, c. 484, amending Public Health Law. People v. Ingham, 94 N. Y. S. 733. Since members of the board of health of the city of Oswego are city officers within Const. art. 10, § 2, they must be appointed in the manner prescribed by charter, and Laws 1893, p. 1501, c. 661, § 20, providing for filling of vacancies in city health boards by the county judge after thirty days is unconstitutional so far as it relates to Oswego. People v. Houghton [N. Y.] 74 N. E. 830, afg. 102 App. Div. 209, 92 N. Y. S. 661. Whether St. 1897, p. 464, c. 277, § 25, subd. 20, which confers such power expressly, is valid or not, county supervisors have power, under constitution and statutes of California, to appoint a health officer, and provide for his payment. Valle v. Shaffer [Cal. App.] 81 P. 1028.

97. Power of purchasing land and erecting and furnishing buildings for a new hospital in Jersey City held, under the facts, to have been vested in board of trustees appointed in accordance with P. L. 1902, p. 549, and not in board of health appointed under P. L. 1904, p. 343. Lamspon v. Jersey City [N. J. Law] 61 A. 513. Under Act March 30, 1903 (P. L. 115), a city of the third class may take title to land outside city limits and erect a hospital thereon for the care of contagious and infectious diseases, though manner of maintaining same and of taking patients to and from hospital is subject to reasonable regulations of township. City of Allentown v. Wagner, 27 Pa. Super. Ct. 485. Where council also constituted health board, chairman or council committee had power to employ nurse to care for patients in pesthouse, though such pesthouse was situated outside city limits. City of Frankfort v. Irvin, 34 Ind. App. 281, 72 N. E. 652.

98. Ky. St. 1903, § 2060, provides that health officers shall receive reasonable compensation. Hence fiscal court of county cannot fix a salary for such officer in advance and so limit the amount which he can recover from the county to $40 per year. Taylor v. Adair County [Ky.] 84 S. W. 299. Health commissioner whose duties and compensation are fixed by law cannot recover for alleged extra services which fall within the scope of his duties; nor can he hire himself to perform services not included in his duties. Sloan v. Peoria, 106 Ill. App. 151.

99. Under Ky. St. 1903, §§ 2055, 2057, county boards cannot delegate powers and duties to a single officer. Taylor v. Adair County [Ky.] 84 S. W. 290.

1. See 3 C. L. 1592.

2. City which has caused medical attention to be given a poor person who should have been cared for by county may recover

property, may recover the value thereof from the municipality liable for such expense,[3] provided such services were rendered or supplies or property furnished at the request of or under contract with one authorized to represent the municipality.[4] In the presentation and allowance of claims by individuals or municipalities, the statutory procedure must be observed.[5]

expense from county, one of the county commissioners having been notified of the action being taken by the city. City of Chester v. Randolph County, 112 Ill. App. 510. In Massachusetts, a municipality which has incurred expense in caring for an insolvent non-resident suffering from a contagious disease may recover therefor from the municipality where the patient has a legal residence, even though no isolation hospital was maintained. Haverhill v. Marlborough, 187 Mass. 150, 72 N. E. 943. Bill for medical services held reasonable and properly inclusive of services rendered during quarantine. Id. Expenses of policemen and cost of supplies for quarantined persons who were not ill not recoverable. Id.

3. City liable for expense of burying one who died of smallpox, though it was duty of overseer of poor to provide for poor persons. Frankfort v. Irvin, 34 Ind. App. 281, 72 N. E. 652. Though a city is not liable in tort for the unauthorized act of its health officer in taking possession of private premises for use as a pesthouse, such possession being obtained by a trick or trespass (Bodewig v. Port Huron [Mich.] 12 Det. Leg. N. 567, 104 N. W. 769), yet, where it is authorized to maintain a pesthouse, it is liable to the owner for the reasonable value of the use of the premises. Id. Where person sick with smallpox was sent to plaintiff's house, and he and plaintiff and her son and a physician were quarantined in the house, the secretary of the town board of health was authorized to direct plaintiff to care for the patient and physician, and the town became liable for her services rendered. Burns' Ann. St. 1901, § 6718. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13. Complaint for services held sufficient, after verdict. Id. But plaintiff could not recover for services rendered in caring for her son, who was thereafter taken sick and quarantined, it not appearing that she was indigent. Id. Where smallpox patient was not sent to plaintiff's house by board of health, but after going there, was quarantined, and thereafter plaintiff's furniture was destroyed to prevent the spread of the disease, the measure of plaintiff's recovery was the value of such furniture at the time it was taken and destroyed. Id. Under How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, No. 7, a claim for services of one employed as a quarantine watch is a proper claim against the county. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 91, 103 N. W. 585.

4. Petition pleading oral contract with board of health, for necessaries to be provided for a family quarantined on account of smallpox, held good against general demurrer. Meiley v. Columbus, 6 Ohio C. C. (N. S.) 398. Rev. St. 1898, §§ 1412, 1416, do not authorize health officer of town to employ physician to care for quarantined family afflicted with smallpox, at town's expense, without the approval of the board of health. Collier v. Scott [Wis.] 102 N. W. 909. In view of powers given county superintendent of health by Pub. Laws 1893, p. 172, c. 214, § 9, where he directed insolvent smallpox patient to be placed in a private pesthouse and requested plaintiff, a physician, to care for him, plaintiff could recover from county for services so rendered. Copple v. Davie County Com'rs, 138 N. C. 127, 50 S. E. 574. Under Code, § 1026, the board of health of a city under a special charter may employ its health officer to perform extra medical services in caring for smallpox cases. Dewitt v. Mills County, 126 Iowa, 169, 101 N. W. 766. That the person employed is a member of the city council does not make the employment illegal, since, under Code, § 1026, contracts by health boards do not have to be approved by the council. Id. Nor does section 943, prohibiting council members from becoming interested in contracts for "the corporation," apply, where the services rendered were at the expense of the county. Id. Sheriff, who has custody of jails and prisoners in county (Laws 1892, c. 686), since it is a misdemeanor to willfully expose a person suffering from a contagious disease (Pen. Code, § 434), is under the duty of removing a prisoner suffering from smallpox from a county jail to a suitable place until he has served his sentence. In re Boyce, 43 Misc. 297, 88 N. Y. S. 841. The rent of the place selected by the sheriff and the damages to the owner, the sheriff's act having been ratified by purchasing committee of county under Laws 1900, p. 685, c. 324, § 8, are proper claims against the county. Id. Town is not rendered liable because president and health board chairman of village assisted in removal of prisoner. Id. Under Burns' Ann. St. 1901, § 6718, a town is liable for expenses incurred only when acts done to prevent spread of disease are within the scope of the authority of the health board; hence an instruction authoriing a recovery for destruction of property by "officers" was erroneous. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13.

5. In Massachusetts expenses incurred previous to St. 1902, p. 156, c. 213, § 1, requiring approval of bill by health board of municipality of which demand is made, may be recovered, though there has been no such approval, the statute being wholly prospective. Haverhill v. Marlborough, 187 Mass. 150, 72 N. E. 943. Under How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, No. 7, an individual who has furnished supplies or rendered services in caring for an indigent patient may present his claim to the county, and it is not necessary that his claim be allowed and paid by the local health board, and presented by it to the county. Bishop v. Ottawa County Sup'rs [Mich.] 12 Det. Leg. N. 91, 103 N. W. 585. The person presenting such a claim is entitled to a hearing before the county board. Id. How. Ann. St. § 1647, as amended by Pub. Acts 1903, p. 6, No. 7, requiring local boards to keep itemized and separate accounts of expenses for each pa-

Negligence.[6]—A city is not liable in tort for negligent acts of its officers in caring for persons suffering from a contagious disease.[7]

HEARING; HEARSAY; HEIRS, DEVISEES, NEXT OF KIN AND LEGATEES; HERD LAWS, see latest topical index.

HIGHWAYS AND STREETS.[8]

§ 1. *Definitions and classifications.*[9]—A highway in the broad sense is a thoroughfare, either rural or urban,[10] but a statutory public highway is such only as comes within the express provisions of the statute,[11] as a way leading from town to town and not wholly within one town.[12] Not every strip of land over which certain

tient cared for and to render an account to county supervisors, held complied with where local board had an itemized account before it, and certified to it. Id. Under Code 1897, § 2570, where a local health board cares for smallpox patients who are unable to pay, the county being liable for the expense, the power to fix fees or charges is in the local board, and when it has approved a bill, it is the duty of the county board to order it paid as approved by such local board. Resner v. Carroll County, 126 Iowa, 423, 102 N. W. 148.

6. See 3 C. L. 1593.

7. No civil liability for death from smallpox brought on by exposure in pesthouse and by want of proper care while confined. Lexington v. Batson's Adm'r, 26 Ky. L. R. 363, 81 S. W. 264.

8. The scope of this topic, while broadly including all questions pertinent to the law of highways, excludes that of Dedication (5 C. L. 959); Easements (5 C. L. 1048); Eminent Domain (5 C. L. 1097); Public Works and Improvements (4 C. L. 1124), and Taxes (4 C. L. 1605).

9. See 3 C. L. 1594.

10. Public highways are arteries of communication and of intertraffic in the commodities of the county. State v. Kansas Natural Gas, Oil, Pipe Line & Improvement Co. [Kan.] 80 P. 962. A railroad company's right-of-way is not a highway within the Federal statute giving telegraph companies the power to construct their lines along post roads, etc. Act July 24, 1866 (14 Stat. 221). Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 49 Law. Ed. 312. The question as to the existence of a highway on the shore of navigable water prior to a grant of the locus in quo by the riparian commissioners is properly triable in a pending action at law rather than in equity. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348.

11. By virtue of Laws 1895, p. 550, c. 178, § 54, **an avenue on tide lands** platted by the appraiser is a public highway. Town of West Seattle v. West Seattle Land & Improvement Co. [Wash.] 80 P. 549. Chapter 215, p. 308, of Laws 1887, declared all **section lines** in certain counties **public highways,** but did not declare them open for travel. Hanselman v. Born [Kan.] 81 P. 192.

A private railroad is not a cartway as that term is used in the North Carolina statutes. Cozad v. Kanawha Hardwood Co. [N. C.] 51 S. E. 932.

A county boulevard may be within a statutory regulation respecting a "street in a city." Gen. St. p. 2882. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303.

Evidence held to show a public highway. Highbarger v. Milford [Kan.] 80 P. 633.

12. Guideposts on highways. State v. Swanville [Me.] 61 A. 833.

individuals and the public have a right to travel, even though the strip is laid out and kept in repair by the public authorities and serves as a means of communication between public highways, is therefore a street.[13] A sidewalk constructed on a highway is a separable part thereof intended especially for the use of pedestrians,[14] and its character as a sidewalk is not lost by the fact that there is no dividing line between it and the residue of the highway or that wagons are driven upon it in case of necessity.[15]

§ 2. *Establishment by dedication, prescription, or user.*[16]—Dedication[17] and acceptance by the public,[18] before withdrawal of the offer,[19] and the actual opening of the street upon the ground within the statutory period,[20] are requisite, unless dispensed with by statute.[21] Dedication may be express,[22] or may be implied from any acts which clearly manifest the intention to dedicate.[23] Acceptance may be in the statutory method,[24] or may be shown by the circumstances of public user,[25] or by the public authorities assuming control thereof.[26] Ordinarily it will be presumed

13. Hancock Avenue, Boston, is not legally a street. Perry v. Com. [Mass.] 74 N. E. 661. Evidence held to justify an assumption by the court that a certain way was a public street. Knight v. Kansas City [Mo. App.] 87 S. W. 1192.

14. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40. The sidewalks of the city of Washington extend from the curb line bounding the carriageway of the street, to the building line of the houses, even though a portion of this space be devoted to parking. Dotey v. District of Columbia, 25 App. D. C. 232. So, also, in Missouri. Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532.

15. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40.

16. See 3 C. L. 1594. See more detailed treatment in Dedication, 5 C. L. 959.

17. Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544. The evidence must show an intention to dedicate. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Oakley v. Luzerne Borough, 25 Pa. Super. Ct. 425.

18. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Oakley v. Luzerne Borough, 25 Pa. Super. Ct. 425; Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544. City may accept so much of the street as is within the corporation limits. Backman v. Oskaloosa [Iowa] 104 N. W. 347. Facts held to present a question for the jury whether the acts of the city officers were intended as and amounted to a repudiation of a dedication. Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

19. Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544; McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. Acceptance ten years subsequent to filing of plat not too late. Backman v. Oskaloosa [Iowa] 104 N. W. 347. Dedication may be revoked any time before acceptance. Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470.

20. Act of May 9, 1889 (P. L. 173) applies only to a town plat or plan of lots. Barnes v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84. A dedicated street becomes a public highway only to the extent to which it is actually opened and used. If opened after a delay of twenty-one years, the owner is entitled to damages. Oakley v. Luzerne Borough, 25 Pa. Super. Ct. 425.

21. Chap. 101, Rev. St. 1898. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33.

22. Under Code 1873, § 561, the acknowledgment and recording of a plat is equivalent to a deed in fee simple for the public use of a street indicated thereon. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

23. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33; Jeppson v. Almquist [Minn.] 103 N. W. 10; Heard v. Connor [Tex. Civ. App.] 84 S. W. 605; Florida East Coast R. Co. v. Worley [Fla.] 38 So. 618; McClaskey v. McDaniel [Ind. App.] 74 N. E. 1023; Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470; St. Louis & S. R. Co. v. Lindell R. Co. [Mo.] 88 S. W. 634. Implied dedication by plat. Indianola, Light, Ice & Coal Co. v. Montgomery [Miss.] 37 So. 958. The designation of a street as a boundary in a conveyance of land, whether opened or not, is a dedication of the street to a public use. Barnes v. Philadelphia, Newtown, etc., R. Co., 27 Pa. Super. Ct. 84. A provision in a deed for the maintaining of a roadway across the land, and then actually in use by the public, will be considered as for the benefit of the public. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390. When lots are sold with reference to a recorded plat, a dedication of the streets and alleys, as laid out in such plat, is perfected. Facts showed dedication of alley. Weiss v. Taylor [Ala.] 39 So. 519.

24. Code 1897, § 751. Backman v. Oskaloosa [Iowa] 104 N. W. 347.

25. Rev. St. U. S. § 2477. Laws 1903, p. 155, c. 103. Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262; Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470; McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33; Jeppson v. Almquist [Minn.] 103 N. W. 10; Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609.

26. McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. Road work by the city. People v. Wolverine Mfg. Co. [Mich.] 12 Det. Leg. N. 491, 104 N. W. 725; Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544; Connor v. Nevada [Mo.] 86 S. W. 256; Raymond v. Wichita [Kan.] 79 P. 323. Repairs. Paulsen v. Wilton [Conn.] 61 A. 61; Jeppson v. Almquist [Minn.] 103 N. W. 10. Question for the jury. Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609. When a city council, on rec-

that land dedicated for use as a street is accepted in its entirety;[27] but a municipality does not by accepting a part of the street shown upon a statutory plat, accept the entire street, nor by accepting the entire street accept other streets.[28] When a dedication to the public use and the opening of a street to public travel by the owner are followed by its actual use by the public highway, the right in the public may become complete and absolute within a much shorter period than that required for title by adverse possession.[29]

To establish a highway by prescription,[30] there must be notorious,[31] continuous,[32] adverse,[33] user by the general public,[34] under a claim of right,[35] of some defined way or track,[36] without substantial change,[37] for the full statutory period.[38] Except as provided by statute, the mere use of land as a road creates no presumption

ommendation of a board of public works, directs the improvement of a thoroughfare, there is a sufficient acceptance of dedicated land under Ky. St. 1903, § 2832. Steinacker v. Gast [Ky.] 89 S. W. 481.

27. Vorhes v. Ackley [Iowa] 103 N. W. 998. After an implied dedication of a street, it is not imperative that the city should immediately enter upon actual use of the street throughout its whole length and width. Lapse of ten years before full use of street does not deprive the public of its rights. Indianola Light, Ice & Coal Co. v. Montgomery [Miss.] 37 So. 958.

28. Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544.

29. Washington Borough v. Steiner, 25 Pa. Super. Ct. 392.

30. See 3 C. L. 1595.

31. Use must be such as to convey to an absent owner reasonable notice that a claim is made hostile to his title. Watson v. Adams County Com'rs [Wash.] 80 P. 201.

32. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874; Commonwealth v. Terry [Ky.] 86 S. W. 519; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Bleck v. Keller [Neb.] 103 N. W. 674; Washington Borough v. Steiner, 25 Pa. Super. Ct. 392. The use of land as a cattle lot, without obstructing it as a roadway is insufficient to break the continuity of adverse user. Power v. Dean [Mo. App.] 86 S. W. 1100. The placing by a railroad of gates across a crossing interrupted any right of way by prescription then accruing. Aiken's Adm'x v. New York, etc., R. Co. [Mass.] 74 N. E. 929. A mere judgment for land does not, as a matter of law, interrupt the statute of limitations in favor of one whose adverse claim began before the judgment. Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

33. Washington Borough v. Steiner, 25 Pa. Super. Ct. 392; Bleck v. Keller [Neb.] 103 N. W. 674; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Commonwealth v. Terry [Ky.] 86 S. W. 519. Admissibility of evidence to show adverse user. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. User by the public held not to have been adverse. Burnley v. Mullins [Miss.] 38 So. 635; Wills v. Reid [Miss.] 38 So. 793. Evidence held to show adverse user known to the fee owner. Raymond v. Wichita [Kan.] 79 P. 323. Prescription may run against one having a vendor's lien on the land. Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826. Maintenance of fence, though with gates, held to be sufficient assertion of owner's rights to prevent them being barred by the statute of limitation. State v. Cipra [Kan.] 81 P. 488. The report of the jury of viewers attempting to lay off the road across plaintiff's land held admissible to show a claim to the land, in connection with a plea of limitations. Wright v. Fanning [Tex. Civ. App.] 86 S. W. 786.

34. Bleck v. Keller [Neb.] 103 N. W. 674; Washington Borough v. Steiner, 25 Pa. Super. Ct. 392. User insufficient. Aikens' Adm'x v. New York, etc., R. Co. [Mass.] 74 N. E. 929.

35. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Bleck v. Keller [Neb.] 103 N. W. 674; Washington Borough v. Steiner, 25 Pa. Super. Ct. 392; Wills v. Reid [Miss.] 38 So. 793; Lieber v. People [Colo.] 81 P. 270. Use must be such as to convey to an absent owner reasonable notice that a claim is made in hostility to his own. Watson v. Adams County Com'rs [Wash.] 80 P. 201. A finding that the use was adverse, continuous and uninterrupted necessarily excludes the idea that it was permissive. City of Seattle v. Smithers, 37 Wash. 119, 79 P. 615. User by the public held not to have been under claim of right. Burnly v. Mullins [Miss.] 38 So. 635. User for 30 years raises the presumption of a grant, and the burden shifts to the party denying the right to prove that the use was permissive. Smoot v. Wainscott [Ky.] 89 S. W. 176.

36. Lieber v. People [Colo.] 81 P. 270; Bleck v. Keller [Neb.] 103 N. W. 674; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111. Fences and monuments are important in determining the width of the way acquired by prescription. Washington Borough v. Steiner, 25 Pa. Super. Ct. 392.

37. Bleck v. Keller [Neb.] 103 N. W. 674; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Gayle v. Rigg [Ky.] 86 S. W. 978.

38. Washington Borough v. Steiner, 25 Pa. Super. Ct. 392; Bleck v. Keller [Neb.] 103 N. W. 674; Southern Ind. R. Co. v. Norman [Ind.] 74 N. E. 896; Power v. Dean [Mo. App.] 86 S. W. 1100. Where the prescriptive period to establish the public right to a road is not fixed by statute, the longest period of limitations in actions for land will control. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. Under Ball. Ann. Codes & St. § 3846, a road used adversely for the period of limitation for quieting title to land is a public road, though never worked at public expense. City of Seattle v. Smithers, 37 Wash. 119, 79 P. 615. A highway existing for seven years over government lands reserved for school purposes is a public highway under

of public claim adverse to the owner. In some states twenty years use makes a road a public highway, regardless of its origin or the objection of landowners.[39] Mere proof of the use of unimproved prairie land for a long period of time but without evidence from which an intention to dedicate may be inferred is not sufficient to give a route so taken the character of a public highway.[40] The burden of proof is on those asserting a way by prescription, to establish that the owners were free from legal disability.[41] Statutory provisions as to public convenience and approval by the proper officials have no application to highways established by prescription.[42] A private way may by prescription become a public highway.[43]

§ 3. *Establishment by statutory proceedings.*[44]—Public officers have no other powers relative to the establishment of new roads than are granted by statute,[45] the directions of which must be strictly pursued,[46] but such provisions as pertain to private individuals alone may be waived by the parties interested.[47] The New York statute expressly provides the only conditions under which a highway of less than three rods in width may be laid out.[48]

Occasion or necessity for road.[49]—It must appear that the proposed road will be a public utility,[50] though not an absolute necessity.[51] Legislation authorizing the laying out of private roads is usually sustained against an attack on the ground that it involves a taking of private property for private use;[52] but the Maryland private road act has been declared unconstitutional.[53]

Application or petition[54] in the statutory form is necessary,[55] but failure to in-

the statutes of Washington. Ball. Ann. Codes St. § 3846. Peterson v. Baker [Wash.] 81 P. 681.

39. Denial by county commissioners to record such a way does not bar interested parties from an action to quiet title. McClaskey v. McDaniel [Ind. App.] 74 N. E. 1023. Under Burn's Ann. St. 1901, § 6762, an unexplained user of a highway by the public for 20 years or more will be presumed to have been under a claim of right. Southern Ind. R. Co. v. Norman [Ind.] 74 N. E. 896. In the absence of proof of intention to dedicate property to public use, the mere use of a passage by the public cannot supply a title or serve as the basis of prescription. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

40. Lieber v. People [Colo.] 81 P. 270.

41. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874; Wright & Vaughn v. Fanning [Tex. Civ. App.] 86 S. W. 786.

42. Paulsen v. Wilton [Conn.] 61 A. 61.

43. Township of Bolo v. Liszewski, 116 Ill. App. 135.

44. See 3 C. L. 1596.

45. The North Carolina highway commission created by Pub. Laws 1895, p. 223, c. 210, has no larger power in regard to opening cartways than is exercised by the boards having jurisdiction over such matters under the general laws. Cozad v. Kanawha Hardwood Co. [N. C.] 51 S. E. 932. There is no provision in the charter of Greater New York authorizing a proceeding to acquire and open as a street in the borough of Brooklyn, a pre-existing town highway. In re City of New York, 45 Misc. 162, 91 N. Y. S. 894.

As to the scope of jurors' or viewers' powers, see post, this section.

46. Cumberland Valley R. Co. v. Martin [Md.] 59 A. 714; Sewickley Tp. Road, 26 Pa. Super. Ct. 572; Grossman v. Patton, 186 Mo. 661, 85 S. W. 548. As to petition and amendments. Dickinson Tp. Road, 23 Pa. Super. Ct. 34. As to notice. Troxell v. Dick, 216 Ill. 98, 74 N. E. 694; City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329; Commissioners of Highways of McKee v. Smith [Ill.] 75 N. E. 396; Cornplanter Tp. Road, 26 Pa. Super. Ct. 29. As to jurors or viewers. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. As to report or return of jury or viewers. Sewickley Tp. Road, 26 Pa. Super. Ct. 572. As to payment. Cincinnati, etc., R. Co. v. Brossia, 5 Ohio C. C. (N. S.) 505. A property owner is entitled to an injunction to restrain the opening of a contemplated road over his land where there has been no valid condemnation of such land. Plowman v. Dallas County [Tex. Civ. App.] 13 Tex. Ct. Rep. 487, 88 S. W. 252.

47. Notice served on agent of property owner and representation by agent. Kothe v. Berlin Tp. Sup'rs [S. D.] 103 N. W. 657.

48. Laws 1890, p. 1191, c. 568, and Laws 1895, p. 296, c. 508, construed. In re Adolph, 102 App. Div. 371, 92 N. Y. S. 841.

49. See 3 C. L. 1596.

50. Evidence held to fairly sustain the verdict of the jury as to necessity and propriety of laying out highway. Krenik v. Cordova Sup'rs [Minn.] 104 N. W. 130.

51. Speck v. Kenoyer [Ind.] 73 N. E. 896. Sufficient that it be a public convenience, although especially conducive to the convenience of one or more persons over that of others. Heath v. Sheetz [Ind.] 74 N. E. 505.

52. Neal v. Neal [Ga.] 50 S. E. 929. Act of April 4, 1901, sustained. Dickinson Tp. Road, 23 Pa. Super. Ct. 34. See Eminent Domain, 5 C. L. 1104, n. 10.

53. Arnsperger v. Crawford [Md.] 61 A. 413.

54. See 1597, n. 53.

55. In Maryland the **length and location**

clude in the petition the name of one owner is not a jurisdictional defect where her agent in control was named in her stead,[56] and a petition is not fatally defective because it contains a prayer for relief beyond the power of the board to grant,[57] or because it asks for the establishment of more than one road.[58] Reasonable certainty in the description of the termini in the petition is requisite,[59] and it must show the statutory facts of necessity [60] but need not, unless the statute requires, state that the route described is the best.[61] In a proceeding to take the lands, the mode of construction need not be specified in the petition if the statute prescribing what it shall allege omits that.[62] Matters required by rule of court to facilitate practice may be supplied nunc pro tunc.[63]

Jurisdiction and notice.—Proceedings without jurisdiction cannot be validated by the judgment of a court,[64] but when jurisdiction has been clearly established, subsequent proceedings will be liberally construed,[65] and when proceedings are instituted in court which try the whole matter anew, previous proceedings may become immaterial.[66] In Iowa a popular vote is required only where roads and bridges are to be built in portions of the county apart from the swamp land district.[67] All interested parties are entitled to a hearing.[68]

of the proposed road need be stated only "as may be." Jenkins v. Riggs [Md.] 59 A. 758.

Qualifications of petitioners: Only two of the ten petitioners for a road in California need be taxpayers in the road district. Pol. Code, § 2681. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972. The signature of the owner of an undivided share of land, or the signature by a husband of his own name when the land belongs to his wife, though subsequently ratified by her, cannot be counted under the New Jersey statute. P. L. 1903, p. 145. Arnold v. Freeholders of Cumberland [N. J. Law] 60 A. 1132.

To whom presented: In Massachusetts, where the premises to be taken for a statutory private road are entirely within one town, the petition may be made to the county commissioners or the selectmen. Rev. Laws, p. 195, § 18. Eldredge v. Norfolk County Com'rs, 185 Mass. 186, 70 N. E. 36.

56. Kothe v. Berlin Tp. Sup'rs [S. D.] 103 N. W. 657.

57. Burn's Ann. St. 1901, § 6742. Harris v. Curtis, 34 Ind. App. 438, 72 N. E. 1102.

58. Chelan County v. Navarre [Wash.] 80 P. 845.

59. Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; Sisson v. Carithers [Ind. App.] 73 N. E. 924. Description in a general way, of the terminal points and the course of the proposed road is sufficient. Chelan County v. Navarre [Wash.] 80 P. 845. A petition under the Indiana statutes for the change of route of an existing highway must describe both the existing road and the route of the proposed road. Burn's Ann. St. 1901, § 6742. Scherer v. Bailey, 34 Ind. App. 172, 72 N. E. 472. Description held sufficient. In re Lee, 4 Pen. [Del.] 576, 60 A. 262; Quemahoning Tp. Road, 27 Pa. Super. Ct. 150. Description insufficient. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

60, 61. Petition held sufficient to show necessity and propriety of route. Kemp v. Polk County [Or.] 81 P. 240.

62. Code Civ. Proc. § 1244. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

63. Where a rule of court provides that a petition for the appointment of viewers shall be accompanied by a certificate of counsel, to the effect that the petition is in proper form and the prayer thereof is lawful, and that in the absence of such certificate viewers shall not be appointed, and the court appoints viewers on a petition unaccompanied by certificate of counsel, the court may subsequently permit the record to be amended by adding the certificate nunc pro tunc. Dickinson Tp. Road, 23 Pa. Super. Ct. 34.

64. Chelan County v. Navarre [Wash.] 80 P. 845; Troxell v. Dick, 216 Ill. 98, 74 N. E. 694; Cumberland Valley R. Co. v. Martin [Md.] 59 A. 714; Bickford v. Franconia [N. H.] 60 A. 98. The records of the proceedings of the county commissioners should show all facts essential to the validity of a proceeding to lay out and open a public highway. Heacock v. Sullivan [Kan.] 79 P. 659.

65. Jenkins v. Riggs [Md.] 59 A. 758. Notice to supervisors. Cornplanter Tp. Road, 26 Pa. Super. Ct. 29; Quemahoning Tp. Road, 27 Pa. Super. Ct. 150. Where two of the viewers signed the report, the fact that the third viewer does not sign till the return day does not vitiate the report. Act of May 8, 1889 (P. L. 129). Greenwood Tp. Road, 27 Pa. Super. Ct. 549. Proceedings of county court not open to collateral attack. State v. Miller, 110 Mo. App. 542, 85 S. W. 912. Reference in proceedings to road as "private" disregarded. Howard v. Schmidt [Kan.] 79 P. 142.

66. Proceeding under Pol. Code, § 2690. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

67. Laws 1852-3, p. 29, c. 13; Laws 1858, p. 256, c. 132. Nelson v. Harrison County, 126 Iowa, 436, 102 N. W. 197.

68. In Georgia an interested landowner may urge any legal objection to the establishment of a proposed new road. Atlanta & W. P. R. Co. v. Redwine [Ga.] 51 S. E. 724. The limitation required by Act of May 23, 1891 (P. L. 109) begins to run from the date of the notice contemplated by the Act of

Notice [69] to or service on [70] persons interested or entitled thereto [71] at some stage and in some form [72] is essential. It is the fact of service of a petition and not the proof thereof which is jurisdictional,[73] and proceedings are commenced so as to fix private rights from service and not from a public decision to institute the proceeding.[74] Notice is waived when all parties appear,[75] unless appearance is special.[76]

Viewing, locating, and assessing or recovery of damages [77] are often done by a body called "jurors," "viewers," "commissioners," etc. Their functions being purely statutory, vary in different states and proceedings.[78] Having acted, they must report within the time specified.[79] The report of viewers must contain a specification of matters committed to them such as width of the proposed road,[80] but need not in Pennsylvania show that the viewers met at the time and place designated,[81] or in Oregon that a road connecting one with a public road as located is on the most accessible or desirable route; but only that it is so laid as to do the least damage.[82] A material departure from the route designated in the petition is unauthorized.[83] It must appear that the viewers were qualified under the statute.[84] All should sign on or before return day.[85] The procedure authorized by statute for the assessment of damages must be followed.[86] In Oregon the county court cannot refuse to confirm the viewer's report on a private road of "public easement" on the ground that the

April 21, 1855 (P. L. 264). In re Whitby Ave., 22 Pa. Super. Ct. 526.

69. See 1598, n. 62.

70. Failure to post notices for hearing of objections. Hurd's Rev. St. 1899, p. 1475, c. 121, §§ 33, 34. Troxell v. Dick, 216 Ill. 98, 74 N. E. 694. Rev. St. 1899, § 5993. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. Notice of adjourned meeting is essential. Commissioners of Highways of McKee v. Smith [Ill.] 75 N. E. 396.

71. Act of May 2, 1899 (P. L. 176) does not require notice of a proposed opening and construction of a new road to be given to borough officers. Cornplanter Tp. Road, 26 Pa. Super. Ct. 29.

72. See Eminent Domain, 5 C. L. 1124.

73. Affidavit not being jurisdictional may be disregarded when showing defect of service which in fact did not exist. Krenik v. Cordova Sup'rs [Minn.] 104 N. W. 130.

74. That the board of public improvements authorized the city of New York to open a street prior to the taking effect of the 1897 charter had no effect on proceedings for such opening begun by service of application for appointment of commissioners, after the taking effect of the charter, so as to make the consolidation act, in force prior to the charter, applicable. In re Opening of 178th St., City of New York, 94 N. Y. S. 838.

75. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

76. Failure to post notices of adjourned meeting, held not to have been waived by objecting landowner's special appearance. Commissioners of Highways of McKee v. Smith [Ill.] 75 N. E. 396.

77. See 3 C. L. 1597.

78. In proceedings for laying out a highway, the jury are only authorized to consider benefits and damages as specially applied to the specific real estate over which the road is laid out. Pichon v. Martin [Ind. App.] 73 N. E. 1009. Road viewers have no power to fix the width of a road. Act of Feb. 17, 1822 (P. L. 35). Mans v. Mahoning Tp., 24 Pa. Super. Ct. 624. Under the road laws applicable to Lyconing County, one and the same set of jurors may vacate a portion of a township road, supply its place, widen the road throughout its length and assess the damages. Loyalsock Tp. Road, 26 Pa. Super. Ct. 219.

79. A failure of road viewers to report at the next term after their appointmment renders their proceedings void and those interested may consider the road opening as abandoned. Act of June 13, 1836 (P. L. 551). Sewickley Tp. Road, 26 Pa. Super. Ct. 572.

80. Contra: Sisson v. Carithers [Ind. App.] 73 N. E. 924. In Delaware the commissioner's return need not show what portion of the cost should be paid by persons who inclose the vacated portion of a road. In re Lee, 4 Pen. [Del.] 576, 60 A. 862.

81. Greenwood Tp. Road, 27 Pa. Super. Ct. 549.

82. Laws 1903, p. 269, § 20. Kemp v. Polk County [Or.] 81 P. 240.

83. An order describing a course as running "thence in a general westerly direction" is not a material variance from the petition showing the course to be in a southwest direction and partially in a southeast direction. Kothe v. Berlin Tp. Sup'rs [S. D.] 103 N. W. 657. Departure not a material one. Jenkins v. Riggs [Md.] 59 A. 758; Riggs v. Winterode [Md.] 59 A. 762.

84. Cumberland Valley R. Co. v. Martin [Md.] 59 A. 714. Jurors. Rev. St. 1899, § 5993. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329. In Delaware a road juror need not be a freeholder. In re Lee, 4 Pen. [Del.] 576, 60 A. 862.

85. Greenwood Tp. Road, 27 Pa. Super. Ct. 549.

86. In Pennsylvania viewers may be appointed to assess damages and benefits for the opening of a street before the actual physical opening at the established grade. Act of May 16, 1891 (P. L. 75). Winter Avenue, 23 Pa. Super. Ct. 353.

assessment of damages is inadequate where that fact does not appear on the face of the report but must be shown by evidence aliunde.[87]

In Massachusetts, an owner whose land has been taken for a highway cannot bring a petition for the recovery of damages until an entry has been made upon the land taken for the purpose of constructing the way.[88] A petition may be brought for the recovery of such damages at any time before the expiration of one year after such entry.[89]

The order locating a road should define it with certainty.[90] The record must show every fact material to the jurisdiction and not mere conclusions thereof.[91] Where the record does not show when the order appointing commissioners was made, it will be presumed to have been only after compliance with the statutory provision as to notice.[92]

Discontinuance and dismissal.—In the absence of statutory provisions to the contrary, a municipal corporation may discontinue condemnation proceedings at any time before the making of a final award in the nature of a judgment in favor of the property owners to be compensated.[93] Motions for involuntary dismissal must be proved if grounded on fact.[94]

Taking and compensation.[95]—The general principles of eminent domain and the cases illustrating them are discussed in a separate topic.[96] Statutes may provide that the damages shall not be paid until the land has been entered upon and possession thereof taken.[97] In general, one may withdraw his waiver of compensation for damages arising from the establishment of a public road by filing a claim for compensation before the establishment of the road,[98] but in Washington, the rights acquired by the public through a waiver of claim for damages stand upon the same footing as a right of way acquired by purchase or condemnation and can only be lost in the same manner.[99] A city may lay out, establish or acquire a street to cross a railroad right of way;[1] but an occupied right of way cannot be longitudinally taken,[2] though an abandoned right of way or roadbed is not so exempt,[3] and land belonging

87. Kemp v. Polk County [Or.] 81 P. 240, following Fanning v. Gilliland, 37 Or. 369, 61 P. 636, 62 P. 209, 82 Am. St. Rep. 758.

88. Rev. Laws, c. 48, § 13. Evidence held insufficient to show such entry, and petition held to have been prematurely brought. Everett v. Fall River [Mass.] 75 N. E. 946.

89. Rev. Laws, c. 48, § 28. Everett v. Fall River [Mass.] 75 N. E. 946.

90. Correction may be made by the court. Burn's Ann. St. 1901, § 6755. Sisson v. Carithers [Ind. App.] 73 N. E. 924; Sewickley Tp. Road, 23 Pa. Super. Ct. 170. That a proposed public highway was referred to as a "private road" in some parts of the proceedings is not fatal in a state where there could be no legal private road proceedings. Howard v. Schmidt [Kan.] 79 P. 142.

91. Commissioners of Highways of McKee v. Smith [Ill.] 75 N. E. 396.

92. In re Wood, 95 N. Y. S. 260.

93. In re Seventeenth St. [Mo.] 88 S. W. 45.

94. A motion to dismiss a petition to locate and change a highway which is not supported by any evidence will be overruled. Harris v. Curtis, 34 Ind. App. 438, 72 N. E. 1102.

95. See 3 C. L. 1599.

96. See Eminent Domain, 5 C. L. 1097.

Private property cannot be taken for a public road without just compensation: Interest to be included. In re Opening of 178th St. City of New York, 94 N. Y. S. 838. Where the mortgage security is impaired, the mortgagee is entitled to the award of damages so far as required to repair the impairment. Bolton v. Seamen's Bank for Savings, 99 App. Div. 581, 91 N. Y. S. 122. Benefits may be offset. Galbraith v. Prentice [Mo. App.] 84 S. W. 997; Heath v. Sheetz [Ind.] 74 N. E. 505; Speck v. Kenoyer [Ind.] 73 N. E. 896; Pichon v. Martin [Ind. App.] 73 N. E. 1009.

Setting off benefits: One who is actually benefited by the improvement is not entitled to damages when nothing is actually taken. Removing of building restriction is a benefit. In re City of New York, 94 N. Y. S. 146. Under Price's Code, § 5071, benefits may be assessed against a tract of land only when a part thereof has been taken for the highway. Quirk v. Seattle [Wash.] 80 P. 207.

97. Pub. St. 1882, c. 49, §§ 14, 69. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639.

98. Ashley v. Burt County [Neb.] 102 N. W. 272.

99. Carlson v. Spokane County Com'rs [Wash.] 80 P. 795.

1. St. Louis & S. R. Co. v. Lindell R. Co. [Mo.] 88 S. W. 634.

2. Crescent Tp. v. Pittsburg & L. E. R. Co., 210 Pa. 334, 59 A. 1103.

3. Where the railroad company had notice of an application to lay out a highway

to a railroad outside of the line of its road may be taken for a statutory private road, the new use not being necessarily inconsistent with the old one.[4] Under power to acquire land to protect a view oceanward from a beach sidewalk, a city may acquire land under the water and may open more than one street.[5] The county board may proceed against and make compensation to the party having possession and record title.[6] A purchaser of lands pending proceedings to appropriate the same for public use may prosecute a claim for damages for such appropriation in his own name when such compensation has been wholly denied his grantor.[7]

The measure of damages is the difference in value of the land with and without the highway.[8] Where commissioners act within their authority, their determination as to damages will not be overthrown unless it clearly appears that they have adopted an erroneous principle or have improperly moved in reaching their decision.[9] There is a taking when streets are projected across a railroad track and right of way.[10] Merely requiring of them observance of public regulations is none.[11]

Payment should be made in the manner prescribed.[12]

Property acquired.[13]

An appeal or other review [14] provided by law may be taken by any person interested,[15] under the conditions prescribed,[16] but the establishment of a highway by a board of county commissioners cannot be attacked collaterally,[17] nor can a proceeding become final be reached by appeal from refusal to reopen it.[18] A disqualification

over its abandoned roadbed, and made no objection at the time, it could not attack the adjudication in a collateral proceeding. Crescent Tp. v. Pittsburg & L. E. R. Co., 210 Pa. 334, 59 A. 1103.

4. Eldredge v. Norfolk County Com'rs, 185 Mass. 186, 70 N. E. 36.

5. Pub. Laws 1903, p. 318, § 53; Pub Laws 1904, pp. 347, 349, §§ 4, 8. Murphy v. Long Branch [N. J. Eq.] 61 A. 593.

6. Cedar County v. Lammers [Neb.] 103 N. W. 433.

7. Ashley v. Burt County [Neb.] 102 N. W. 272.

8. See Eminent Domain, 5 C. L. 1113. Pichon v. Martin [Ind. App.] 73 N. E. 1009.

9. In re City of New York, 94 N. Y. S. 146.

10. A railroad company is entitled to compensation for the construction of a street crossing and extension of a street over its right of way and track. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657. In the condemnation of a right of way across a railroad, the company is entitled to compensation for structural changes required and for the direct expense of maintaining a flagman, gates or cattle guards. Village of Plymouth v. Pere Marquette R. Co. [Mich.] 102 N. W. 947. City may show right of way by user. Chicago Terminal Transfer R. Co. v. Chicago [Ill.] 75 N. E. 499.

11. Village of Plymouth v. Pere Marquette R. Co. [Mich.] 102 N. W. 947.

12. Payment of costs and damages arising from the establishment of a county road should be made to the county treasurer, and not directly to the claimants. Cincinnati, etc., R. Co. v. Brossia. 5 Ohio C. C. (N. S.) 505.

13. See 3 C. L. 1599.

14. See 3 C. L. 1600. The judgment of the ordinary or county commissioners on objection to the establishment of a new road is reviewable by certiorari in Georgia. Atlanta & W. P. R. Co. v. Redwine [Ga.] 51 S. E. 724. The court of quarter sessions has the power to quash all proceedings in a road case down to and including an order to open, and an appeal from an order overruling that motion is in the nature of a certiorari and brings up the record for consideration of the superior court. Sewickley Tp. Road, 23 Pa. Super. Ct. 170. The court of quarter sessions has authority to review the findings of a road jury upon questions of fact, and therefore may receive testimony in support of exceptions filed to the report of the jury. Walnut St., 24 Pa. Super. Ct. 114.

15. One whose property is neither taken, damaged nor assessed is not a person affected by the proceeding who is entitled to an appeal under the Kansas City charter. In re Seventeenth St. [Mo.] 88 S. W. 45. Failure to appear after notice before the county commissioners in proceedings to vacate a road does not preclude appellant's from contesting the proceedings on appeal. Scherer v. Bailey, 34 Ind. App. 172, 72 N. E. 472.

16. The statutes of Maryland do not permit an appeal to the court of appeals from a judgment of the circuit court on an order granting a private road. Code Pub. Gen. Laws, art. 25, § 121. Arnsperger v. Crawford [Md.] 61 A. 413. Order establishing a county road requiring the payment of costs and damages forthwith as a condition precedent, in order to constitute error it must affirmatively appear that they were not so paid. Cincinnati, etc., R. Co. v. Brossia, 5 Ohio C. C. (N. S.) 505. Payment immediately prior to the time the order was made for the establishment and opening of such road is in substantial conformity with such an order. Id.

17. Phillips v. Hutchinson, 34 Ind. App. 486, 73 N. E. 159; State v. Miller, 110 Mo. App. 542, 85 S. W. 912.

18. One having notice of the proceedings

of one selectman to act does not wholly destroy jurisdiction and defeat appeal.[19] Where the use is public in its nature, the question as to the necessity for taking private property is in its essence legislative.[20] Such proceedings are appealable to the court having cognizance of actions involving title to land.[21] In some states, if properly requested, a review is a matter of right but re-review is discretionary.[22] In California if the award in proceedings before the supervisors is refused, they may direct the county attorney to bring suit and litigate the rights independent of their proceedings,[23] and in such suit their orders are conclusive and not reviewable.[24] In New Hampshire the judgment below is vacated by appeal.[25] The burden on appeal de novo remains on petitioners to show necessity and rests on remonstrants to prove each his individual damage.[26] Questions presented must have been properly challenged and excepted to below.[27] The point cannot be raised by appellees to avert error that a highway established by condemnation was in existence by grant.[28] Mandamus is proper in Texas to require the making and transmission of a transcript.[29] In Ohio a view anew does not put the county board to proceedings anew.[30]

Injunction.—A bill to restrain the proceeding must plead facts and not conclusions that it is void, and in the absence of the entire record, it cannot be said that there was lack of notice.[31]

To prove a statutory road, a completion of the proceedings must be shown.[32] The confirmation of a commissioner's report on the taking of land may be shown by circumstantial evidence.[33]

§ 4. *Boundaries and extent of way, ascertainment and resurvey.*[34]—A street

from the beginning, who has allowed the time for appeal to expire cannot secure a review by moving to strike off the order of confirmation and the appealing from the refusal of the court to grant his motion. Winter Ave., 23 Pa. Super. Ct. 353; Cornplanter Tp. Road, 26 Pa. Super. Ct. 20.

19. That one of the selectmen who originally decided the matter was disqualified is not a jurisdictional defect so as to preclude the court from taking cognizance of an appeal. Bickford v. Franconia [N. H.] 60 A. 98.

20. Speck v. Kenoyer [Ind.] 73 N. E. 896. The decision of a municipal corporation, that a street at a given point is necessary for the welfare of its inhabitants, will not be interfered with by the courts unless there is a palpable abuse of discretion or manifest injustice or oppression is shown. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657. Where a municipal board is vested with absolute discretion in the acquiring of land for highway purposes, its action will not be reviewed on certiorari. People v. McClellan, 94 N. Y. S. 1107.

21. The title to real estate is involved in proceedings to condemn land for a street, and hence the supreme court of Missouri has jurisdiction of an appeal in such proceedings. City of Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

22. Road law of 1836 does not make the right to review dependent upon the filing of exceptions to the report of viewers. Overfield Tp. Road, 25 Pa. Super. Ct. 5.

23, 24. Pol. Code, § 2690. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

25. Appeal vacates the judgment in the court below and the judgment in the appellate court is a distinct and original judgment. Bickford v. Franconia [N. H.] 60 A. 98.

26. An appeal to the circuit court from the order of the board of commissioners establishing a highway. Heath v. Sheetz [Ind.] 74 N. E. 505.

27. Failure to set out exceptions. Wabash Ave., 26 Pa. Super. Ct. 305; Quemahoning Tp. Road, 27 Pa. Super. Ct. 150. Objections held insufficient for indefiniteness. Sisson v. Carithers [Ind. App.] 73 N. E. 924. Qualifications of petitioners cannot be questioned on appeal. Krenik v. Cordova Sup'rs [Minn.] 104 N. W. 130.

28. Where a highway has been established by ordinary condemnation proceedings, the county commissioners cannot, on appeal from the award, defeat recovery by showing a previous congressional grant of a highway over the same route and an acceptance of such a **grant by the state legislature.** Howard v. Hooker [Kan.] 78 P. 847.

29. Certiorari will not lie to compel a county clerk to transmit to the district court a transcript of proceedings in connection with the opening of a road. McKinley v. Frio County [Tex. Civ. App.] 88 S. W. 447.

30. County commissioners are not required to proceed de novo after report of reviewers with reference to a proposed county road. Cincinnati, etc., R. Co. v. Brossia, 5 Ohio C. C. (N. S.) 505.

31. Carlson v. Spokane County Com'rs [Wash.] 80 P. 795.

32. Evidence held not to show existence of a street or other public use, expropriation never having been complete. Calhoun v. Faraldo [La.] 38 So. 551.

33. Mott v. Eno, 181 N. Y. 346, 74 N. E. 229.

34. See 3 C. L. 1600.

includes the whole of the land laid out for public use as a highway,[35] and hence comprehends both the roadway for vehicles and the sidewalk for pedestrians.[36]

The sole object of a resurvey is to ascertain the location of the road and its boundaries, precisely as these were established by the original survey,[37] and the statutory procedure must be followed.[38] The true public road is the one actually laid out on the ground.[39] Continued use of a highway for many years, recognition of monuments and acquiescence in boundaries cannot be overcome by indefinite and uncertain evidence.[40]

§ 5. *Alterations and extensions.*[41]—Vacating a portion of a street so as to narrow it is an alteration.[42] An alteration properly adopted after the new way is laid out, opened and made practicable,[43] operates to discontinue the old road.[44] A general authority to a municipality to lay out, widen, straighten or change streets includes power to construct a street crossing across a railroad track.[45] All facts essential to the conferring of jurisdiction to widen a road must affirmatively appear.[46] In New York the statutory notice to a highway commissioner of proceedings to alter a highway may be waived by that officer.[47] An owner of land abutting on a highway, the course of which it is proposed to change in order to avoid a dangerous railway crossing, may enjoin such change, where the injury which he will thereby suffer is different from or in excess of that which is suffered by the general public.[48] The damages resulting to abutting owners may be assessed by commissioners in charge of the widening of a street, though a change of grade be included in such alteration.[49] Whether county commissioners in making changes in streets acted under a statute providing for alteration or one providing for relocation of streets is to be determined from the petition, which measures their powers, and not alone from their intention.[50] An order of county commissioners accepting a relocated street does not

35. Bucher v. Northumberland County, 209 Pa. 618, 59 A. 69. In determining the width of an improved street to determine the proportion thereof chargeable against a street railroad, where the curb on each side thereof was constructed at the same time of said improvement, the curb is a part of the improved roadway, and should be computed. Urbana, M. & C. R. Co. v. Columbus, 3 Ohio N. P. (N. S.) 438. Land under a city bridge, which is owned by the city, and is used as a support for the bridge, and is not adapted to use as a street or highway, and has never been so used, cannot be regarded as a public street, and the city may lease it for any purpose not inconsistent with its use as a support for the bridge. Ricard Boiler & Engine Co. v. Toledo, 6 Ohio C. C. (N. S.) 501. Evidence held to show that a street alongside a river was the width of other streets not as wide as the space between the abutting lots and the river bank. Calhoun v. Faraldo [La.] 38 So. 551.

36. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40. Evidence held insufficient to show the land in question to be a street. Heck v. Greenwood Tel. Co. [Ind. App.] 73 N. E. 760. The term "street" in San Francisco City charter, art. 6, c. 2, § 16, includes sidewalk. Heath v. Manson [Cal.] 82 P. 331.

37. Caulkins v. Ward [Iowa] 103 N. W. 956.

38. Code, § 1520. Caulkins v. Ward [Iowa] 103 N. W. 956.

39. See 3 C. L. 1600. n. 90.

40. Town of Vernon v. Nicolal [Wis.] 103 N. W. 1111.

41. See 3 C. L. 1601. See, also, post, §§ 8, 9.

42. Lambert v. Paterson [N. J. Law] 60 A. 1131.

43. Where the route of a road is changed, the old road continues to be the public highway until the new is laid out, opened and made practicable. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

44. Jenkins v. Riggs [Md.] 59 A. 758.

45. Town of Poulan v. Atlantic Coast Line R. Co. [Ga.] 51 S. E. 657.

46. A mere resolution of a borough, upon which streets are represented, will not have the effect of widening or narrowing a street where the existing lines do not conform to those laid down on the plat. Washington Borough v. Steiner, 25 Pa. Super. Ct. 392. Borough ordinance held too indefinite to determine whether the center line of a street was changed or not. Bieber v. Kutztown Borough, 27 Pa. Super. Ct. 436.

47. Laws 1890, p. 1193, c. 568, § 83. In re Wood, 95 N. Y. S. 260.

48. Grinnell v. Portage County Com'rs, 6 Ohio C. C. (N. S.) 180.

49. Special proceedings for change of grade held not necessary. Laws 1901, p. 405, c. 466, tit. 4. In re White Plains Road of New York, 94 N. Y. S. 110. Plaintiff having made out a prima facie case for damages from alteration, a nonsuit is improper. Westbrook v. Baldwin County, 121 Ga. 442, 49 S. E. 286.

50. Petition held to show action under Rev. Laws, c. 48, § 12, relative to relocation, and not under §§ 1 and 52, relative to alteration. Bennett v. Wellesley [Mass.] 75 N. E.

affect the rights of a town in which the work is done to insist on the work being done to the satisfaction of its selectmen. The Massachusetts statute requiring the public authorities to erect permanent bounds at the termini and angles of all ways laid out by them, and providing a penalty for failure to do so, recoverable by the landowner, applies only to the laying out of ways and not the relocations or alterations.[51]

§ 6. *Change of grade.*[52]—The mere leveling of a rough road by making slight cuts and fills without making any general change in the height of the highway is not a change of grade.[53] Proceedings for a change of grade must be in strict compliance with the statute,[54] but one who is not in the assessing district cannot complain.[55] The actual grading can be done only by the municipal authorities in the manner prescribed by law.[56] In the absence of a statute giving a right of recovery therefor, damages suffered by an adjacent owner by reason of a change of grade cannot be recovered,[57] unless the damages were unnecessary,[58] nor will recovery be allowed if no injury would have resulted, had the abutter made his property conform to the grade.[59] However, statutes generally provide that on change of grade,[60] from that deliberately established by competent municipal authority in the prescribed manner,[61] or in New York by use alone, without formal adoption,[62] the abutter is

717. Town not affected by order under Rev. Laws, c. 48, §§ 54, 56. Livermore v. Norfolk County [Mass.] 75 N. E. 724. Liability of town to county for expense. Id. And see Towns, Townships, 4 C. L. 1685.

51. No recovery of penalty under Rev. Laws, c. 48, § 104, where old way was altered and widened. Harvey v. Inhabitants of Easton [Mass.] 75 N. E. 948.

52. See 3 C. L. 1601.

53. Laws 1892, p. 355, c. 182. Stenson v. Mt. Vernon, 93 N. Y. S. 309.

54. One who undertakes to change the grade of a street without the passage of the necessary ordinance becomes a trespasser. United N. J. R. & Canal Co. v. Lewis [N. J. Eq.] 59 A. 227. Failure of a city to follow the prescribed course of procedure constitutes legal ground for recovery of resulting damages. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706. The New York railroad commissioners have no authority to determine the liability of a town for change of grade. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412. Under the Pennsylvania statutes a city cannot require a landowner to cut down an embankment so as to make the grade of the footwalk in front of his premises conform to a change resulting from the city cutting down or filling up the cartway. Act of April 2, 1867 (P. L. 677). Chester City v. Lane, 24 Pa. Super. Ct. 359. Under Act of May 16, 1891, it is not necessary that the order of the court for the appointment of viewers should contain a direction in detail to comply with the requirements of the statute. Nicholson Borough, 27 Pa. Super. Ct. 570. Laws 1903, p. 1396, c. 610, is not unconstitutional. In re Borup [N. Y.] 74 N. E. 838.

55. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

56. Kittanning Borough v. Thompson, 211 Pa. 169, 60 A. 584. The establishment of a paper grade by a borough confers no right on a property owner to enter on a highway and change the natural grade thereof. Id.

57. Cummings v. Dixon [Mich.] 102 N. W. 751; Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412. Railroad Law 1897, p. 797, c. 754, § 63, providing that a municipal corporation may acquire or condemn land necessary to abolish grade crossings, does not impose on a town a liability to pay an abutter damages resulting from a change of grade of a highway. Smith v. Boston & A. R. Co., 181 N. Y. 132, 73 N. E. 679. In Massachusetts a slight change of grade by a street railway company, duly authorized, does not entitle the abutter to compensation. Rev. Laws, c. 51, § 15. Laroe v. Northampton St. R. Co. [Mass.] 75 N. E. 255.

58. Monarch Mfg. Co. v. Omaha C. B. & S. R. Co. [Iowa] 103 N. W. 493; Stillman v. Pendleton, 26 R. I. 585, 60 A. 234; Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

59. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493.

60. Comp. L. 1897, § 2784. Cummings v. Dixon [Mich.] 102 N. W. 751; Garvey v. Revere [Mass.] 73 N. E. 664. Laws 1892, p. 355, c. 182. Stenson v. Mt. Vernon, 93 N. Y. S. 309. Act of May 16, 1891 (P. L. 75) is constitutional. Nicholson Borough, Main St., 27 Pa. Super. Ct. 570. Code, § 785. Stevens v. Cedar Rapids [Iowa] 103 N. W. 363. P. L 1869, p. 673, § 3; P. L. 1889, p. 378. Newark v. Weeks [N. J. Law] 59 A. 901. St. 1890, c. 428, § 5; St. 1891, c. 123, § 1. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544.

61. Code, § 785. York v. Cedar Rapids [Iowa] 103 N. W. 790. A grade is established when corporate action is had to that end, and this usually—if not necessarily—is a matter of definite record. Cummings v. Dixon [Mich.] 102 N. W. 751. Under a statute allowing compensation when improvements have been made "according to the grade," it is not necessary that the building be exactly at grade or at any invariable elevation above or below it, construction with reference to the grade being sufficient. Code, § 785. Stevens v. Cedar Rapids [Iowa] 103 N. W. 363.

62. Stenson v. Mt. Vernon, 93 N. Y. S. 309.

entitled to compensation,[63] to the extent of the damage to his real property [64] and loss of rental,[65] for which the change of grade is the proximate cause,[66] with the benefits received offset in the computation of the award,[67] and an action under such a statute will lie, though the abutting owner voluntarily improves his property in accordance with the newly ordained grade before the city conforms the street thereto.[68] The mere joining in a request to have a street graded does not estop one from claiming compensation for injury to his property.[69] Abutting petitioning owners cannot be charged with the damages arising from a change of grade, under the Pennsylvania statute, unless it affirmatively appears that the change was in accordance with the plans specified in the ordinance regarding such change of grade.[70] Such rights do not run with the land.[71] The validity of an order allowing an appeal from the award of damages for change of grade, made by the commissioners of assessment, can be tried only on certiorari or other direct proceedings.[72]

§ 7. *Improvement and repair.*[73]—A municipality has the right to improve and grade its streets,[74] and under power to "otherwise improve any street," a city may condemn and order the removal of a sidewalk.[75] Except in case of fraud or a manifest abuse of discretion,[76] there is no remedy to control official discretion in the

63. Under St. 1890, c. 428, § 5, and St. 1891, c. 123, § 1, a tenant at will is entitled to the damages suffered by him irrespective of the rights of the landlord. Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544. An excessive award of damages may be set aside. Murray v. Newark [N. J. Law] 60 A. 38. Owner held to have waived his rights by deed and contract with the city. Tabor St., 26 Pa. Super. Ct. 175.

64. Code, § 785. York v. Cedar Rapids [Iowa] 103 N. W. 790. Measure of damages is the difference between value of property immediately before change of grade and immediately thereafter, less special benefits resulting. Garvey v. Revere [Mass.] 73 N. E. 664. May include compensation to plaintiff for delay in securing redress. Peabody v. New York, etc., R. Co. [Mass.] 73 N. E. 649. Admissibility of evidence and measure of damages. Seattle v. Home Missions of Methodist Protestant Church [C. C. A.] 138 F. 307; Village of Grant Park v. Trah, 115 Ill. App. 291. A change of grade of seventy-seven feet with slope banks on abutting property is a damaging of such property but is not a "taking" thereof. Compton v. Seattle [Wash.] 80 P. 757. Under Rev. Laws 1902, c. 111, § 153, providing the rule for assessment of damages in case of abolition of grade crossings, one whose land is not taken, but in front of whose house and only forty feet away a street is built fifteen feet high may recover damages. Hyde v. Fall River [Mass.] 75 N. E. 953.

65. P. L. 1869, p. 673, § 3; P. L. 1889, p. 378. Newark v. Weeks [N. J. Law] 59 A. 901; Peabody v. New York, etc., R. Co. [Mass.] 73 N. E. 649.

66. Nicholson Borough, Main St., 27 Pa. Super. Ct. 570; Whitehead v. Manor Borough, 23 Pa. Super. Ct. 314. After accepting an award of damages one cannot maintain an action of trespass for an additional flow of water upon his land which was an unavoidable result of the change of grade. Beach v. Scranton, 25 Pa. Super. Ct. 430.

67. Laws 1903, p. 1396, c. 610; Laws 1890, p. 1193, c. 568, §§ 83, 84. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412. Method of assessing benefits. Nicholson Borough, Main St., 27 Pa. Super. Ct. 570; In re Borup [N. Y.] 74 N. E. 838. Under Laws Wash. 1893, p. 194, c. 84, § 15, for a change of grade, only the excess of damages over benefits should be allowed the owner. Seattle v. Board of Home Missions of Methodist Protestant Church [C. C. A.] 138 F. 307. Improvements made possible by a change of grade and which may be paid for by special assessment against the property are not included as benefits. Garvey v. Revere [Mass.] 73 N. E. 664.

68. York v. Cedar Rapids [Iowa] 103 N. W. 790.

69, 70. Dunn v. Tarentum Borough, 23 Pa. Super. Ct. 332.

71. Grantee could not recover. Moore v. Lancaster [Pa.] 62 A. 100.

72. Murray v. Newark [N. J. Law] 60 A. 38.

73. See 3 C. L. 1603. Scope of this section is limited to the most general questions. See detailed treatment Public Contracts, 4 C. L. 1089; Public Works and Improvements, 4 C. L. 1124.

74. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493; Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

75. Rev. St. 1899, § 5989. Scott v. Marshall, 110 Mo. App. 178, 85 S. W. 98.

76. Wabash Avenue, 26 Pa. Super. Ct. 305. Laws 1890, p. 1179, c. 568, § 10; Laws 1895, p. 408, c. 606, confer on the highway commissioner authority to repair or rebuild a bridge only in case of an emergency. Livingston v. Stafford, 99 App. Div. 108, 91 N. Y. S. 172. Taking up brick walk in good repair and ordering cement walk relaid, though allowing other neighboring abutters to retain brick walk, the only object being to correct the grade and slope of the walk, held an abuse of discretion, and injunction would issue. Detmers v. Columbus, 2 Ohio N. P. (N. S.) 657. Sufficiency of complaint in an action based on collusion between contractors and public officials. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

ordering or completion[77] of such improvements as are authorized by law.[78] Plans and specifications referred to in a resolution for street improvement do not become a part of the resolution so that they must be published,[79] and a resolution ordering the improvement of an alley which sets forth the locality of the improvement, and how it is to be made, is sufficient without stating the width of the alley.[80] That a resolution of intention to improve a street includes work of various kinds upon other streets does not render it invalid.[81] A city is not liable for injury resulting to abutting property which is directly and necessarily incident to a proper and skillful construction of a street improvement,[82] but otherwise of negligence or willful trespass upon the abutting property,[83] or a failure to follow the statutory procedure,[84] and such an improvement as destroys one's right of access to his property entitles him to compensation.[85] A street improvement implies that the abutting property has received special benefits after the improvement is made.[86] By encroaching on private property in the improving of a street, the city acquires no title to such property.[87] In the making of improvements, it is for the highway commissioners to determine whether a road is or is not a public highway.[88] For the purpose of improving a highway, public authorities have a right to divert the natural course of surface water so as to impose upon the land of one person the servitude which naturally belongs upon the land of another,[89] and no liability arises from such an improvement in the ordinary manner without negligence,[90] but where water of considerable quantity is wrongfully diverted, the authorities may be restrained from continuing such diversion,[91] or damages may be recovered therefor by the owner of the property at the time the injuries were sustained.[92] Any act that is reasonably necessary to put or keep a street in "good repair suitable for the travel thereon" is "repairing" or "maintaining" the street.[93] A street may be repaired in sections or parts, and the property owners assessed to pay the cost thereof.[94]

77. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481; Jones v. Chicago, 213 Ill. 92, 72 N. E. 798. Discretion of municipal authorities as to manner, time, improvement or repair of sidewalk is not subject to judicial control in the absence of manifest abuse. Detmers v. Columbus, 2 Ohio N. P. (N. S.) 657. An officer acting in good faith cannot be held liable for an erroneous judgment in a matter submitted to his determination. Summers v. People, 109 Ill. App. 430.

78. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481. A city cannot be restrained from building a sidewalk at the expense of the abutting property owner on his failure to build it, though the board of public works had recommended that action be deferred for a year. Cuming v. Gleason [Mich.] 12 Det. Leg. N. 127, 103 N. W. 537.

79. St. 1885, p. 147, c. 153. Chase v. Trout, 146 Cal. 350, 80 P. 81.

80. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

81. San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 P. 1076.

82. City of Valparaiso v. Spaeth [Ind.] 74 N. E. 518. A city exercising care and skill in improving a street is not liable for the damages resulting therefrom. Davis v. Silverton [Or.] 82 P. 16. No damages are to be recovered when an original grading is lawfully performed. Haubner v. Milwaukee [Wis.] 102 N. W. 578.

83. Davis v. Silverton [Or.] 82 P. 16.

84. Haubner v. Milwaukee [Wis.] 102 N. W. 578.

85. Walsh v. Scranton, 23 Pa. Super. Ct. 276; Haggerty v. Scranton, 23 Pa. Super. Ct. 279.

86. Andrix v. Columbus, 3 Ohio N. P. (N. S.) 368. There can be no doubt that the improvement of a street with the Hallwood block confers a special benefit on the abutting property. Borger v. Columbus, 6 Ohio C. C. (N. S.) 401.

Contra: The improvement of a street does not ipso facto confer a special benefit upon the abutting property. Method of assessing damages and benefits considered. Borger v. Columbus, 6 Ohio C. C. (N. S.) 401.

87. Davis v. Silverton [Or.] 82 P. 16.

88. Sumners v. People, 109 Ill. App. 430.

89. Smith v. Eaton Tp. [Mich.] 101 N. W. 661; City of Valparaiso v. Spaeth [Ind.] 74 N. E. 518.

Contra: Schofield v. Cooper, 126 Iowa, 334, 102 N. W. 110.

90. Parsons Bros. v. New York, 95 N. Y. S. 131; Carroll v. Rye Tp. [N. D.] 101 N. W. 894; Beach v. Scranton, 25 Pa. Super. Ct. 430. Negligence. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493; Stillman v. Pendleton, 26 R. I. 585, 60 A. 234; City of Valparaiso v. Spaeth [Ind.] 74 N. E. 517.

91. Smith v. Eaton Tp. [Mich.] 101 N. W. 661.

92. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481.

93. Removal of dirt, rubbish and ashes.

§ 8. *Abandonment and diminution.*[95]—A municipality holds the streets, alleys and highways in trust for the public,[96] and cannot surrender the grant except as provided by statute;[97] nor can the rights of the public be lost by nonuser[98] or adverse possession,[99] but an easement of right of way may be lost by failure to comply with the express conditions of the grant.[1] A public street is a public franchise and is not such property as a corporation may take for its own use under the general power of eminent domain.[2]

§ 9. *Vacation.*[3]—In the absence of constitutional restrictions, the law-making power of a state may vacate a street or highway,[4] in the interests of the public welfare,[5] and this power may be delegated to a municipal corporation;[6] but the exercise of this delegated authority must be strictly within the statute.[7] By statute the proprietor of a platted town may vacate the town plat.[8] Where the vacation of a

Pub. St. c. 75, § 1; Laws 1893, p. 47, c. 59, §§ 1, 2. Connor v. Manchester [N. H.] 60 A. 436. The resurfacing of an asphalt pavement is a "repair" regardless of the cost. American Bonding Co. v. Ottumwa [C. C. A.] 137 F. 572. Authority to provide for "improving and maintaining" roads refers to work upon roads already constructed, which might be called either repairs, improvements or maintenance. Middle Valley Trap Rock Min. Co. v. Morris County Chosen Freeholders [N. J. Err. & App.] 60 A. 358. Mere maintenance of a highway by repairs is not a paving of it that will relieve the abutting property from the cost of subsequent improvements changing an ordinary road to a city street. In re East St. [Pa.] 60 A. 154.

94. Andrix v. Columbus, 3 Ohio N. P. (N. S.) 368.

95. See 3 C. L. 1605. See, also, post, §§ 9, 16.

96. City of Chicago v. Pooley, 112 Ill. App. 343.

97. City cannot abandon its streets nor convey them in whole or in part to private persons for private use. Pew v. Litchfield, 115 Ill. App. 13. A municipal corporation has no rights in the streets which can be sold to a gas company, and exactions from such a company whether for revenue or for other purposes are void. City of Columbus v. Columbus Gas Co., 3 Ohio N. P. (N. S.) 293. Landowner entitled to be heard on the question of **reducing** the **width** of a proposed road. Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262.

98. Town of West Seattle v. West Seattle Land & Imp. Co. [Wash.] 80 P. 549; People v. Rock Island, 215 Ill. 488, 74 N. E. 437. The statute of limitations does not run against a municipal corporation in respect to property held by it for public use. City of Chicago v. Pooley, 112 Ill. App. 343.

99. Contra in Minnesota prior to adoption of chap. 65, p. 65, Laws 1899. Haramon v. Krause, 93 Minn. 455, 101 N. W. 791; Town of West Seattle v. West Seattle Land & Imp. Co. [Wash.] 80 P. 549. Ordinarily the rule of adverse possession does not apply to a public corporation in the exercise of its governmental functions. Encroaching upon the street by planting trees and construction of fences and sidewalks. Vorhes v. Ackley [Iowa] 103 N. W. 998. In Illinois to estop a city from removing one's business stand from the street, it must appear that the city long withheld assertion of control over the street and the individual was thereby induced in good faith to believe that the street or sidewalk had been abandoned and also that on the faith of that belief and with the acquiescence of the public authorities he erected structures on the street of such lasting and valuable character that to permit the public to assert its title would entail upon him great pecuniary loss and sacrifice. City of Chicago v. Pooley, 112 Ill. App. 343.

1. Ellis v. Pelham, 94 N. Y. S. 103. But where a city has long refrained from opening an alley originally dedicated to the public, and it is in the peaceful possession of the fee owner, a stranger to the title is not authorized to destroy the inclosing fence. Haramon v. Krause, 93 Minn. 455, 101 N. W. 791.

2. South Western State Normal School, 26 Pa. Super. Ct. 99.

3. See 3 C. L. 1605. See, also, ante, §§ 5, 8.

4. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312. The release of the public right in a highway, involved in its discontinuance, is in its nature a legislative function which may be directly performed by the legislative agents of the state. Town of New London v. Davis [N. H.] 59 A. 369.

5. Highbarger v. Milford [Kan.] 80 P. 633. Chap. 188, p. 281, of Laws 1889, vacated all section-line roads not previously opened under the act of 1887. Hanselman v. Born [Kan.] 81 P. 192. Commissioners had authority to enter into an agreement to close and reconvey an old road upon the dedication of a new one. Riggs v. Winterode [Md.] 59 A. 762. Commissioner had authority to enter into an agreement to close and reconvey an old road upon the dedication of a new one. Id.

6. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312. By statute a city may pass an ordinance vacating certain streets to a railroad company on specified conditions. Gen. St. Neb. 1873, c. 9, and c. 11, § 83. Columbus v. Union Pac. R. Co. [C. C. A.] 137 F 869.

7. Hurds' Rev. St. 1903, p. 1897, c. 145, § 1. People v. Atchison, etc., R. Co. [Ill.] 75 N. E. 573; Sewickley Tp. Road, 23 Pa. Super. Ct. 170. City cannot vacate street except as provided by law. Pew v. Litchfield, 115 Ill. App. 13. Authority "to open, lay out, to widen, straighten, or otherwise change" streets within a city does not comprehend power to abandon a thoroughfare and open another. Coker v. Atlanta, etc., R. Co. [Ga.] 51 S. E. 481.

8. Chapter 84, P. 474, Laws 1862, Nichols &

street is discretionary with a city council, the courts will not interfere unless there be an abuse of discretion.[9] The legal vacation of a street is complete when the new plan from which it is omitted is confirmed.[10] A statute which in express terms vacates certain streets of an addition to a city, with a proviso that certain other streets shall not be affected by the act, does not vacate the entire addition nor detach the same from the city.[11] Where the power to vacate streets or public grounds is expressly granted by statute, only those who suffer a peculiar injury different from that of the general public may complain of the exercise of such power,[12] or recover damages,[13] and the right to recover may be barred by the statute of limitations.[14] The vacation of a public road is not an injury to the abutting landowner for which compensation must be made,[15] unless otherwise provided by statute;[16] but in Pennsylvania one purchasing with an implied covenant that a street shall remain open cannot, by the vacation of the street by municipal authorities, be divested of his right to have the space left open as a street.[17] An act of the legislature closing a street need not provide for compensation to the abutting owners where a general law covers all such cases.[18] The legislature on discontinuing a highway may transfer the public rights and title to the roadbed to the abutting owner in satisfaction or modification of his damages,[19] but can vest in abutting owners only such title to the roadbed as is owned by the public.[20] When a street is vacated the presumption is that the fee is in the adjacent owners and that the right of each extends to the middle of the way.[21] If the fee in the street was in the state or the city, the vacation of the street leaves the state or municipality, as the case may be, in possession of the property, to use it for any purpose they see proper,[22] but if the fee is in the adjacent landowner, then the street becomes again subject to use by such abutting owners without reference to the former rights of the public.[23] Changing the lines of a street by vacating a portion so as to narrow the street is an alteration, and the statutory notice of intention to vacate is necessary.[24] That individual voters may have a personal

Shepard Co. v. Cunningham, 16 S. D. 475, 94 N. W. 389.

9. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

10. Tabor St., 25 Pa. Super. Ct. 355; Butler St., 25 Pa. Super. Ct. 357.

11. Construing Laws 1877, p. 255, c. 196, relating to city of Emporia, Kansas. Atchison, etc., R. Co. v. Lyon County Com'rs [Kan.] 82 P. 519.

12. Certiorari not the proper remedy. Borghart v. Cedar Rapids, 126 Iowa, 313, 101 N. W. 1120; Highbarger v. Milford [Kan.] 80 P. 633. One who would suffer a special injury by the unauthorized closing of a street may maintain an action to enjoin such abandonment. Plaintiff held not estopped by his conduct. Coker v. Atlanta, K. & N. R. Co. [Ga.] 51 S. E. 481. The inconvenience suffered by neighboring property owners from the discontinuance of a street is not special and peculiar damage, but similar in kind to that suffered by the general public, though greater in degree. Hyde v. Fall River [Mass.] 75 N. E. 953.

13. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

14. Tabor St., 25 Pa. Super. Ct. 355; Butler St., 25 Pa. Super. Ct. 357.

15. P. L. 1891, § 75, does not confer rights to the contrary. Howell v. Morrisville Borough [Pa.] 61 A. 932.

Contra: Peace v. McAdoo, 92 N. Y. S. 368. Where a city instituted proceedings to determine the amount of damages due a claimant for closing a street, the order overruling objections to the petition was appealable. Petition held sufficient. In re City of Rochester, 102 App. Div. 99, 92 N. Y. S. 478.

16. Laws 1867, p. 1749, c. 697, § 3. Mitchell v. Einstein, 94 N. Y. S. 210. Under section 6 of local act of April 21, 1858 (P. L. 385), the jury may assess the damages to property injured against the city without assessing any benefits to other property owners. Penrose Ferry Avenue, 27 Pa. Super. Ct. 341.

17. Wickham v. Twaddell, 25 Pa. Super. Ct. 188.

18. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

19. Laws 1867, p. 1749, c. 697, § 3. Mitchell v. Einstein, 94 N. Y. S. 210.

20. Mitchell v. Einstein, 94 N. Y. S. 210.

21. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

22. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312; Mott v. Eno, 181 N. Y. 346, 74 N. E. 229. A vacation of street authorized by statute does not revest the title of land formerly occupied by the street in the abutting owner, and the property may be disposed of by the city for other purposes. Harrington v. Iowa Cent. R. Co., 126 Iowa, 388, 102 N. W. 139.

23. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 313; Barns v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84.

24. P. L. 1871, p. 848. Lambert v. Paterson [N. J. Law] 60 A. 1131.

interest in having one highway rather than another does not debar them from voting on the question of discontinuance.[25] That an application for discontinuance of a portion of a highway describes a larger part of the highway than the applicant on the hearing seeks to have discontinued does not render the application invalid.[26] A statute authorizing the discontinuance of a highway as "useless" means "practically useless" and not "absolutely useless." [27]

§ 10. *Street and highway officers and districts.*[28]—The legislature has power to regulate and delegate control of local road matters,[29] but the statutes conferring such authority on highway officials are to be strictly construed.[30] Mandamus is the appropriate remedy to compel the performance of the statutory duties of township officers relative to the opening of highways,[31] unless they are vested with discretion therein.[32] A highway commissioner cannot be compelled to incur expenses in repairing a bridge where there are no funds available for such purpose.[33] Whether persons are road officers or merely public employes in respect to road matters varies with the nature of their duties.[34] The careless and negligent discharge of a corporate duty by a city's officials and agents renders it liable for the proximate damages resulting therefrom;[35] but highway officers are not personally liable for damages arising to individuals from errors in discharge of their duties,[36] except in case of willful wrong.[37]

25. Town of New London v. Davis [N. H.] 59 A. 369.

26, 27. Laws 1890, p. 1193, c. 568, § 84. In re Trask, 45 Misc. 244, 92 N. Y. S. 156.

28. See 3 C. L. 1607. See, generally, Officers and Public Employes, 4 C. L. 854; Counties, 5 C. L. 857; Towns, Townships, 4 C. L. 1685.

29. The township commissioners have authority to legislate concerning the safe keeping of the highway. Act of April 28, 1899. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. In New Hampshire, when the city council legally vote an appropriation for repaving streets, the duty of carrying the vote into practical effect devolves upon the mayor and board of aldermen. Pub. St. 1901, c. 46, § 2; Id. c. 48, § 14; Laws 1899, p. 264, c. 29, § 3. Hett v. Portsmouth [N. H.] 61 A. 596. Upon the taking effect of chap. 215, p. 308, Laws 1887, it was the duty of the road overseer to open section line roads as provided by the general statutes. Hanselman v. Born [Kan.] 81 P. 192. By statute one person may hold both the office of chief of police and overseer of the streets. Mead v. State [Neb.] 103 N. W. 433. In California the county treasurer may receive money deposited with him as damages for laying out a road, though such deposit be not accompanied by a certificate of the auditor. Pol. Code, §§ 2689, 4145. Mariposa County v. Knowles, 146 Cal. 1, 79 P. 525. A Kentucky road overseer is entitled to financial compensation for his services only in those cases specified by statute. Ky. St. 1903, §§ 1840, 4310, 4315, 4344, 4346. Vaughn v. Hulett [Ky.] 84 S. W. 309.

30. In New York a town board is not called upon to act in case of repairs in an emergency until requested by the highway commissioner. Laws 1890, p. 1179, c. 568. People v. Early, 94 N. Y. S. 640. A township trustee is not justified in refusing to cause a road which has been adjudged to be a public utility to be opened, because he has not sufficient funds on hand at any one time to make all the necessary or desirable improvements. Welch v. State [Ind.] 72 N. E. 1043.

31. Welch v. State [Ind.] 72 N. E. 1043.

32. In Missouri the county road commissioner is vested with full discretion in relocating on permanent land a road on the bank of a watercourse rendered unsafe by the action of the water. Rev. St. 1899, § 9422. Filing of a plat of the road with the county court is not a prerequisite to valid proceedings. State v. Moniteau County Court [Mo. App.] 87 S. W. 1193. Under authority to keep public roads and highways clear of all impediments to easy and convenient passing and traveling, road commissioners are vested with a discretion to make reasonable regulations. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437. Highway commissioners have the right to remove obstructions in a highway, and a court of equity is not justified in restraining them in behalf of a trespasser, merely because they do not appear in the suit in their official capacity. Coudert v. Underhill, 95 N. Y. S. 134. When the county commissioners sit for the purpose of finally determining whether or not they will grant a proposed new road, they exercise judicial functions. Atlanta & W. P. R. Co. v. Redwine [Ga.] 51 S. E. 724. The powers conferred on the county commissioners of Reno county by Sess. Laws 1901, § 2, c. 297, p. 549, are directory and not mandatory. State v. Myers [Kan.] 80 P. 638.

33. People v. Early, 94 N. Y. S. 640.

34. See generally Officers and Puhlic Employes, 4 C. L. 854. In Washington the road supervisors are not county officers but are employes of the county commissioners. Laws 1903, p. 225, c. 119, § 12; Pierce's Code, §§ 7870, 7873. State v. Newland, 37 Wash. 428, 79 P. 983. In New Hampshire a highway agent is a public officer of the state and not a private agent of the town. Laws 1893, p. 25, c. 29, § 3; Laws 1897, p. 59, c. 67, § 1. O'Brien v. Derry [N. H.] 60 A. 843.

35. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

36. Repairing a bridge being discretionary

§ 11. *Fiscal affairs.*[38]—As in other tax proceedings, assessments for highway and street purposes must conform strictly to the statute authorizing them,[39] and the general rules in regard to taxation will apply.[40] Statutes frequently authorize municipalities to assess street railroad companies for the expense of paving between the tracks,[41] though a city may waive the right to make such assessment.[42] Where license

with the city officers, no liability attaches to them for injuries from failure to repair. Gray v. Batesville [Ark.] S. W. 295. A street commissioner is responsible only for reasonable care in the selection of men and materials which he supplies. Bowden v. Derby, 99 Me. 208, 58 A. 993. In Illinois highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they discharged their official duties to the public. Neville v. Viner, 115 Ill. App. 364.

37. Members of a highway board, who do not participate in or have knowledge of and do not ratify a trespass committed by the president and other members of such board are not liable for such trespass. Bright v. Bell, 113 La. 1077, 37 So. 976. In Massachusetts a superintendent of town streets is liable for injuries caused by the blasting of a rock only if he was personally negligent. Moynihan v. Todd [Mass.] 74 N. E. 367.

38. See 3 C. L. 1607.

39. Haag v. Ward, 186 Mo. 325, 85 S. W. 391. Certificate of contingency necessary to justify levy of sixty cents on each $100. Hurd's Rev. St. 1903, c. 121. People v. Cincinnati, etc., R. Co., 213 Ill. 503, 72 N. E. 1119. Where the commissioners levied a road tax and made the list, but there was no overseer of highways and no affidavit as required by statute, the levy was invalid. Hurd's Rev. St. 1903, c. 121. Cincinnati, etc., R. Co. v. People, 213 Ill. 558, 73 N. E. 310. Sufficiency of levy and proceedings under Hurd's Rev. St. 1903, chaps. 120, 121, considered. People v. Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315. Fallure of notice to specify on what streets sidewalks must be constructed. Denver v. Dunning [Colo.] 81 P. 259. Under Starr & C. Ann. St. 1896, p. 3597, c. 121, § 119, the certificate of tax levy need not state the amount required for road purposes. Illinois Cent. R. Co. v. People, 213 Ill. 174, 72 N. E. 1006. In Michigan a township board may impose a tax for a highway fund only when the electors have failed to do so after the matter has been brought to their attention. F. & F. Lumber Co. v. Thompson Tp. [Mich.] 103 N. W. 188. Under the Detroit city charter a tax deed is prima facie evidence of the regularity of the proceedings. Charter section 173. Lever v. Grant [Mich.] 12 Det. Leg. N. 224, 103 N. W. 843.

40. See generally Taxes, 4 C. L. 1605. That a city in improving a street unintentionally encroached upon private property does not so invalidate the proceedings as to constitute a bar to the collection of the assessment therefor against such owner. Davis v. Silverton [Or.] 82 P. 16. A provision in a paving contract requiring the contractor to keep the pavement in repair for a period of years does not render the contract absolutely void. Erie City v. Grant, 24 Pa. Super. Ct. 109. Irregularities in the levy of an assessment for street paving, of which no complaint was made before the city council, cannot be questioned in the courts of Iowa. Marshalltown Light, Power & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005. An appropriation of money for "permanent street improvements" may be sufficiently definite in view of all the circumstances. Hett v. Portsmouth [N. H.] 61 A. 596. The fact that abutting owners asked for an improvement and that the contract be awarded to a certain company may be taken as evidence of knowledge of the cost of the improvement and acquiescence therein, although it does not stop them from challenging the legality of the assessment. Borger v. Columbus, 6 Ohio C. C. (N. S.) 401. Contracts for road work, under which a supervisor is personally financially interested, contrary to the statute, are void as to the work done by the supervisor. Nelson v. Harrison County, 126 Iowa, 436, 102 N. W. 197. An abutting owner is not liable to a city for the cost of laying a sidewalk and curb in front of his property, unless he had previous notice to make such improvements. Pittsburg v. Biggert, 23 Pa. Super. Ct. 540; Chester City v. Lane, 24 Pa. Super. Ct. 359. Facts held to show that certain road work was "original construction" for which the abutters were liable. Heim v. Figg [Ky.] 89 S. W. 301. Under the New York statutes a county may issue bonds for the construction of a highway, to the amount of the county indebtedness thereon. Laws 1898, p. 218, c. 115, § 9; Laws 1892, p. 1746, c. 686. Ontario County v. Shepard, 100 App. Div. 200, 91 N. Y. S. 611. Under the New York charter one may after application of the city to open a street, at least before appointment of commissioners, make a voluntary conveyance to the city of his land in the street and become exempt from charges for opening of the residue of the street. Laws 1897, p. 355, c. 378, § 992; Laws 1901, p. 1184, c. 466. Westminster Heights Co. v. Delany, 95 N. Y. S. 247. In Indiana, contractors who have completed the construction of a road may mandamus the commissioners to bring about the payment of a balance due. Acts 1893, pp. 198, 199, c. 112, §§ 5, 6; Acts 1895, p. 147, c. 63. King v. Martin County Com'rs, 34 Ind. App. 231, 72 N. E. 616. In Missouri a judgment of damages arising from opening a road cannot be rendered against those petitioning for the road. Rev. St. 1899, § 9416. Galbraith v. Prentice [Mo. App.] 84 S. W. 997. In Pennsylvania, a borough may grade, pave and curb a street, or may ordain that a fund be raised by assessment upon the abutting properties of the costs and damages according to benefits. Act of May 16, 1891 (P. L. 71). Dunn v. Tarentum Borough, 23 Pa. Super. Ct. 332. In Arkansas four-fifths of the tax collected in cities of the first class can be expendeed on roads or streets in the city. Kirby's Dig. §§ 7351, 7358. City of Texarkana v. Edwards [Ark.] 88 S. W. 862.

41. Laws 1890, p. 1112, c. 565; Laws 1892,

money is appropriated for street improvements, it is not neeessary that the identical money be kept on hand or that the contractor see that such money is not used for other purposes.[43] The Maryland statute authorizing the furnishing of state aid for the construction of roads by counties and appropriating a certain sum annually therefor is not unconstitutional.[44] A special property road tax and a general tax levy for road purposes is not double taxation within the Idaho constitution.[45] Where a city works its streets from funds made up of commutation taxes collected under ordinance and street fines, the city is not working its street at the expense of the municipal treasury under the Mississippi statutes.[46] In Ohio the owner of street improvement bonds has no recourse against the individual lot owners.[47] A lien for street improvement assessments is paramount to a mortgage existing at the time the proceedings leading up to the construction of the improvements were in progress.[48] One may maintain against a town, an action upon a contract for a road machine, legally entered into by the highway commissioner,[49] but in Michigan a township is not primarily liable in assumpsit for a road machine purchased by highway commissioners pursuant to statute, the proper remedy being by mandamus to compel the levy and collection of a tax therefor.[50] In Illinois a town may at its option proceed under the cash or the labor system.[51] In Michigan the highway commissioner ascertains and apportions the labor tax.[52] The "alternative road law" of Georgia regulating road duty has been sustained.[53] Whether one convicted of failure to do road work was physically incapable of performing such duty is for the jury.[54] In Washington, a refund of a road tax may be recovered by the county if the work certified to by the supervisor has not in fact been done.[55] In an action for that purpose, the supervisor through whose fraud the refundship was made is not a necessary party defendant.[56] Limitations will not begin to run against such right of action until detection of the fraud by the county.[57] The action is one for money had and received and not one to recover a tax due.[58] The taxpayer cannot in such an action

p. 1404, c. 676, § 98. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87. A statute requiring street car companies to pave between the tracks is not unconstitutional as impairing the obligation of contract, though a city had granted a company a franchise exempting it from street paving. Marshalltown Light, Power & R. Co. v. Marshalltown [Iowa] 103 N. W. 1005.

42. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87.

43. Hett v. Portsmouth [N. H.] 61 A. 596.

44. Acts 1904, p. 388, c. 225; Const. art. 3, § 34. Bonsal v. Yellott [Md.] 60 A. 593.

45. Sess. Laws 1901, p. 78; Const. § 5, art. 7. Humbird Lumber Co. v. Kootenai County [Idaho] 79 P. 396.

46. Acts 1900, p. 153, c. 119. McComb City v. Pike County [Miss.] 38 So. 721.

47. Borger v. Columbus, 6 Ohio C. C. (N. S.) 401.

48. Chase v. Trout, 146 Cal. 350, 80 P. 81.

49. Laws 1890, p. 1179, c. 568; Laws 1896, p. 1120, c. 987. Acme Road Machinery Co. v. Bridgewater, 93 N. Y. S. 494.

50. Comp. Laws 1897, § 4194. Pape v. Benton Tp. [Mich.] 12 Det. Leg. N. 116, 103 N. W. 591.

51. The Act of 1883 established two systems (cash and labor) and gave each town an option under which plan it would act. Section 16, c. 121, Rev. St. and §§ 13, 14, of Act 1883, apply solely to towns under the cash system, and § 119 of Act of 1883, applies solely to towns under the labor system. Wilson v. Cedarville, 109 Ill. App. 316. A provision expressly limited to one system of levying and enforcing a tax under the road and bridge Act of 1883, may not by implication be extended to the other system. Id.; Kuntz v. Cedarville, 109 Ill. App. 330; Reed v. Chatsworth, 109 Ill. App. 332.

52. Perrizo v. Stephenson Tp. [Mich.] 12 Det Leg. N. 373, 104 N. W. 417. But such a tax cannot be assessed upon territory occupied by incorporated villages, yet the money tax to supply an insufficiency in the amount raised by the labor tax must be levied upon all property of the township, including that in any incorporated village within its boundaries. Comp. Laws 1897, §§ 4072-4. Id.

53. But Acts 1903, p. 106 is not applicable to Decatur County. Maxwell v. Willis [Ga.] 51 S. E. 416.

54. Moss v. State [Ala.] 39 So. 198.

55. Where a railroad company paid a road tax, and thereafter employed a road supervisor to work out the tax, and on receiving his certificate that the work was done, presented the same and was repaid by the county, the county could recover the refund on discovering that the work had not in fact been done, though the railroad company had no notice of the supervisor's fraud. Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716.

56, 57, 58, 59, 60. Walla Walla County v. Oregon R. & Nav. Co. [Wash.] 82 P. 716.

attack the validity of the tax.[59] The county is not estopped to bring such suit by the fact that the supervisor was guilty of fraud, since he acts in such case as the agent of the taxpayer and not of the county.[60]

§ 12. *Control by public, and public regulations.*[61]—The state has sole control of the highways,[62] and is therefore charged with the duty of providing avenues for public travel.[63] A state can give no power to invade private property rights even for a public purpose without the payment of compensation.[64] Though state control may be delegated,[65] municipalities possess only such power over streets as is granted by the legislature.[66] A city holds the streets in trust for the benefit of the public,[67] and may not by ordinance or otherwise abridge the right of the public to the free and unobstructed use of the streets,[68] or, in the absence of specific legislation for that purpose, authorize any individual to appropriate any part of the public thoroughfare permanently to his own use.[69] A city may properly make use of its streets for

61. See 3 C. L. 1608.

62. City of Texarkana v. Edwards [Ark.] 88 S. W. 862; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312; Farmer v. Columbiana County Tel. Co. [Ohio] 74 N. E. 1078; Peace v. McAdoo, 92 N. Y. S. 368; Paulsen v. Wilton [Conn.] 61 A. 61. Legislature held to have been authorized to pass Act Jan. 25, 1866, respecting streets previously taken for railroad purposes. City of Columbus v. Union Pac. R. Co. [C. C. A.] 137 F. 869. Streets of Memphis are public property over which the state of Tennessee has absolute control. City of Memphis v. Postal Tel. Cable Co., 139 F. 707. Except as limited by the state constitution the general assembly of Missouri has jurisdiction to grant franchises to be exercised in the streets of the cities or other public highways of the state. State v. Missouri & K. Tel. Co. [Mo.] 88 S. W. 41. Legislature may authorize the building of a railroad across or lengthwise of streets or alleys in an incorporated city. Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864.

63. Paulsen v. Wilton [Conn.] 61 A. 61.

64. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872.

65. The legislature can authorize structures in streets for business purposes, that without such authority, would, under the common law, be obstructions, and may delegate such authority to the board of rapid transit commissioners of New York. Turl v. New York Contracting Co., 46 Misc. 164, 93 N. Y. S. 1103.

66. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312; Taylor v. Dist. of Columbia, 24 App. D. C. 392. City of Memphis cannot tax telegraph lines erected under authority from the state. City of Memphis v. Postal Tel. Cable Co., 139 F. 707. The District of Columbia police regulation requiring the removal by individual citizens of snow and ice from certain sidewalks is void as unauthorized by congress. Coughlin v. District of Columbia, 25 App. D. C. 251. Kansas City cannot delegate to the city engineer certain powers relative to the building of sidewalks. Haag v. Ward, 186 Mo. 325, 85 S. W. 391. The Missouri county court has no authority to grant to a railroad the right to grade a private way in the construction of its line. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. In Kentucky the county court has no authority to grant the use of the streets to a telephone company. Ky. St. 1903, §§ 4306, 4679A. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126. Powers of park commissioners construed. Commonwealth v. Crowinshield, 187 Mass. 221, 72 N. E. 963. City has no power to legislate regarding telephones, rates, etc. Farmer v. Columbiana County Tel. Co. [Ohio] 74 N. E. 1078. The common council of the cities in Indiana have absolute dominion over the streets and other highways of the cities. Burn's Ann. St. 1901, § 3623. City of Valparaiso v. Spaeth [Ind.] 74 N. E. 518.

67. City of Valparaiso v. Spaeth [Ind.] 74 N. E. 518; Turner v. Degnon McLean Con. Co., 99 App. Div. 135, 90 N. Y. S. 948; Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831; In re City of New York, 45 Misc. 162, 91 N. Y. S. 894; City of Chicago v. Pooley, 112 Ill. App. 343. Public streets are dedicated for public use. Hontros v. Chicago, 113 Ill. App. 318.

68. Ordinance permitting trains to obstruct a crossing for thirty minutes held unreasonable. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831; Farmer v. Columbiana County Tel. Co. [Ohio] 74 N. E. 1078. An ordinance authorizing the conducting of a business upon the streets which constitutes a substantial and permanent obstruction to public travel is void. Pagames v. Chicago, 111 Ill. App. 590. A city has no power to create or even permit an obstruction to the highway. Pew v. Litchfield, 115 Ill. App. 13; People v. Atchison, etc., R. Co. [Ill.] 75 N. E. 573; City of Chicago v. Pooley, 112 Ill. App. 343. A city has no authority to grant the use of its streets to a "street fair." City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998.

69. City of Chicago v. Pooley, 112 Ill. App. 343; Domer v. District of Columbia, 21 App. D. C. 284; Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864; Farmer v. Columbiana County Tel. Co. [Ohio] 74 N. E. 1078. Pile of lumber. Smith v. Davis, 22 App. D. C. 298. A lease by the city to an individual of the streets or public ways of the city confers no authority upon the lessee to appropriate them to his own use. Labry v. Gilmour [Ky.] 89 S. W. 231. Under the Alabama constitution a municipal corporation cannot grant any exclusive privilege in its streets to any corporation so as to deprive itself of the right to revoke

some other purposes than for travel,[70] and may permit the use of the streets for public purposes or for public improvements;[71] but the grant of such a privilege must be in the manner prescribed by law.[72] The state may grant public franchises through streets of a city for it and other cities.[73] Inanimate objects occupying a street by permission of the municipal authority have as much right there as an individual lawfully using it.[74] Assent by a town to a use of its streets by a railroad company is merely an easement;[75] but where tracks are maintained in a highway under claim of legislative authority, municipal action directing their removal must be upon notice to the party asserting such claim.[76] Municipalities have power to enact and enforce reasonable police regulations with respect to streets,[77] such as limiting the speed of

the same and grant like privileges to another. Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 38 So. 1026. Estoppel does not lie against a gas company defending against an exaction in the form of payment to a municipality for the privilege of using its streets, to which it has submitted for a period of years. City of Columbus v. Columbus Gas Co., 3 Ohio N. P. (N. S.) 293.

70. Pew v. Litchfield, 115 Ill. App. 13.

71. Turner v. Degnon-McLean Contracting Co., 99 App. Div. 135, 90 N. Y. S. 948. In Missouri a city may authorize a street railway company to construct and operate its line on a public highway, though it crosses the tracks of another railway company. Const. art. 12, § 20. St. Louis & S. R. Co. v. Lindell R. Co. [Mo.] 88 S. W. 634. The moving of a building along a highway, after obtaining the statutory permit, is a use of the highway authorizing the cutting of electric wires in the necessary use of the street. Pub. St. 1882, c. 109, § 17. Richardson Bldg. Moving Co. v. Boston Elec. Light Co. [Mass.] 74 N. E. 350. "Street fair" is a nuisance. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998.

72. Highway regulation that should have been by municipal ordinance set aside because made by mere resolution. Essen v. Cape May [N. J. Law] 60 A. 1131. An individual may be entitled to erect telephone poles and wire in the street under a statute granting such rights to companies. Sowther v. Bridgeman [W. Va.] 50 S. E. 410. Presumption of agency in giving consent for an abutter to the building of a street railway arises after council has acted upon the consents. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. In Ohio the statutes require the consent of abutting owners to the construction or extension of a street railway in front of their premises. Id.

73. Where a gas company has the right to occupy the streets of a municipality with its mains to supply gas therein, the legislature may authorize occupancy with mains of a size necessary for distribution of gas to other municipalities whose streets it is also authorized to use. P. L. 1903, p. 359, is constitutional. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

74. Pole in street. Powell v. New Omaha Thomson-Houston Elec. Light Co. [Neb.] 104 N. W. 162.

75. City held estopped from objecting to a continued use of the street by the railroad company. People v. Rock Island, 215 Ill. 488, 74 N. E. 437.

76. United New Jersey R. & Canal Co. v. Jersey City [N. J. Err. & App.] 61 A. 460.

77. Stowe v. Kearney [N. J. Law] 59 A. 1058; Cook v. North Bergen Tp. [N. J. Law] 59 A. 1035; State v. Wightman [Conn.] 61 A. 56. No more of the police power of the state is presumed to be conferred upon a municipality than is expressly stated in the words of the grant. Taylor v. District of Columbia, 24 App. D. C. 392. An ordinance regulating the running of trains through cities must be reasonable, fair, impartial, and not arbitrary or oppressive. Burn's Ann. St. 1901, § 3541, cl. 42. Southern Ind. R. Co. v. Bedford [Ind.] 75 N. E. 268. May require safety appliances at street crossings. Pennsylvania Railroad Co.'s Case, 27 Pa. Super. Ct. 113. An ordinance requiring lot owners to lay sidewalks is a police regulation. Pittsburg v. Biggert, 23 Pa. Super. Ct. 540. Laws 1901, p. 136, c. 466, § 315, does not empower the police commissioner to prohibit the use of certain parts of streets to vehicles. Peace v. McAdoo, 92 N. Y. S. 368. The ordinance of the City of Atlanta declaring it to be unlawful to hold public meetings in the city streets without consent of the municipal authorities is not unconstitutional. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. The Chicago ordinance regulating the handling of kerosene and similar liquids upon the public streets has been sustained under Hurd's Rev. St. 1893, p. 291. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718. Designation of stand for drivers of public vehicles. Barnes v. District of Columbia, 24 App. D. C. 458. Insecure overhead signs. Ordinance held to be reasonable. State v. Wightman [Conn.] 61 A. 56. Municipal building restrictions must not be arbitrary and unreasonable in their application. Storck v. Baltimore [Md.] 61 A. 330. Ordinance requiring all drivers passing over bridges within municipal limits to keep on the right hand side, and forbidding passing around a vehicle going in the same direction while on the bridge, is a valid exercise of the power conferred upon council of section 2640. Platt v. Toledo, 6 Ohio C. C. (N. S.) 403.

Bill boards: An ordinance prohibiting signs or billboards on any street, boulevard or pleasure drive where three-fourths of the buildings are devoted to residence purposes, without the written consent of at least three-fourths of the residents and property owners on both sides of the street in the block where it is desired to erect such board, is unreasonable. City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1025. An ordinance forbidding the erection of bill

travel,[78] and regulating the use of vehicles to which the general public are unaccustomed,[79] and may require persons desiring to excavate in the street to obtain a permit,[80] and give security for the restoration of the highway to its natural condition.[81] A municipality may not tear down a structure built over an alley, in which the public has a mere right of way, unless such structure so far obstructs customary public travel as to be a nuisance,[82] which is for the courts to determine and not the municipal council.[83] The act of congress authorizing the erection of telegraph lines over post roads, and the statutes of most states granting the right to construct telegraph or telephone lines along the public highway, give the privilege of occupying city streets and alleys as well as rural roads,[84] but do not put such companies beyond municipal control with respect to the use of the highways,[85] and only those who are specially interested can complain that no provision was made for compensating the abutting owners.[86]

§ 13. *Rights of public use.*[87]—The ordinary traveler upon the highway has the right to use every portion of the highway, including the space between street car tracks, until it becomes necessary to yield the track to the cars.[88] A street railway company possesses a paramount,[89] but not an exclusive, right to that portion of the highway covered by their tracks.[90] Foot passengers and those driving wagons

boards on private property, merely because such boards are unsightly, is invalid. Bryan v. Chester [Pa.] 61 A. 894.

78. An ordinance providing a speed limit for any cart, wagon or other vehicle used to carry passengers, does not apply to street surface cars operated by electricity. Robinson v. Metropolitan St. R. Co., 92 N. Y. S. 1010. It is competent for a council to prescribe different rates of speed for different localities within its jurisdiction. St. 1902, p. 235, c. 315, regulating speed of automobiles throughout the state, does not abrogate city park regulations. Commonwealth v. Crowninshield, 181 Mass. 221, 72 N. E. 963. Where fast driving was not an offense at common law, and when made an offense by ordinance, the accused is not entitled to a jury trial under any provision of the Federal constitution. Bowles v. District of Columbia, 22 App. D. C. 321. 1 Stan. & C. Ann. St. 1896 (2d Ed.) p. 696, art. 5, § 63, cl. 21, authorizes that passage of an ordinance making it unlawful to drive at a greater speed than six miles an hour. United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081. One who controls the motive power of an automobile may be convicted of "driving" at an excessive speed. Commonwealth v. Crowninshield, 187 Mass. 221, 71 N. E. 963.

79. A county ordinance prohibiting the running of **automobiles** on country roads between sunset and sunrise is not so unreasonable as to be void in California. Ex parte Berry [Cal.] 82 P. 44. Chicago may regulate the speed of automobiles and require safety appliances, but cannot compel the taking out of a license for such vehicles for private use. City of Chicago v. Banker, 112 Ill. App. 94. Laws 1903, p. 163, § 4, does not require an automobile owner to procure a license in every county over the roads of which he desires to travel in his automobile. State v. Cobb [Mo. App.] 87 S. W. 551.

80. Stowe v. Kearney [N. J. Law] 59 A. 1058.

81. Ordinance held to apply to electric lighting company which was previously authorized to erect poles in the street. Cook v. North Bergen Tp. [N. J. Law] 59 A. 1035.

82, 83. Town of Frostburg v. Hitchins, 99 Md. 617, 59 A. 49.

84. Code 1873, § 1324; Laws of 19th Gen. Assem. c. 104, p. 100. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

85. American Tel. & Tel. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437. City may determine and designate the streets and alleys to be used for poles and wires of telephone and telegraph companies. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886.

86. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

87. See 3 C. L. 1610.

88. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444; Hellriegel v. Southern T. Co., 23 Pa. Super. Ct. 392; Ablard v. Detroit United R. Co. [Mich.] 102 N. W. 741; Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278; Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976. See, also, Street Railways, 4 C. L. 1556. The duty one owes a car approaching from the rear is to get off the track when informed of its approach. It is not negligence to drive a vehicle, with curtains down on sides and rear, upon the tracks of a street railway in a public street. Richmond Passenger & Power Co. v. Allen, 103 Va. 532, 49 S. E. 656.

89. Barringer v. Union Traction Co., 101 App. Div. 330, 91 N. Y. S. 386; Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282.

90. Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. S. 663; Ablard v. Detroit United R. Co. [Mich.] 102 N. W. 741; Foulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973; Kroder v. Interurban St. R. Co., 91 N. Y. S. 341; Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co. [N. J. Eq.] 59 A. 523; Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282; Hellriegel v. Southern Trac. Co., 23 Pa. Super. Ct. 392. The rights of the public to use the street and a street railroad company's to use their tracks are reciprocal. Riley v. Shreveport Traction Co.

have equal rights on the streets of a city.[91] A traveler has the same rights upon a street upon which a railroad company has been authorized to construct its tracks as the railroad company.[92] It is the duty of persons using a highway [93] for railroad purposes,[94] or a portion thereof as a railroad crossing,[95] or operating a street railroad,[96] or driving a team,[97] or an unbroken horse,[98] or propelling an automobile,[99]

[La.] 38 So. 83. Rights of a cab driver and a street car company at a street crossing are the same. Fisher v. Chicago City R. Co., 114 Ill. App. 217.

91. Richardson v. Davis & Co. [Minn.] 102 N. W. 868. Pedestrian struck by an automobile is not guilty of contributory negligence because he was standing in the roadway conversing with one who had there stopped his team to talk with him. Kathmeyer v. Mehl [N. J. Law] 60 A. 40.

92. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853; Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151, 73 N. E. 449.

93. Kennedy v. Consolidated Traction Co., 210 Pa. 215, 59 A. 1005.

94. Track laid in street. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853. An agreement between a city and a railroad, requiring the city to keep in repair that portion of a street occupied by the railroad does not release the railroad from its statutory duty to keep such streets in condition that the public could pass in safety. Laws 1850, p. 223, c. 140, § 28. Butin v. New York, etc., R. Co., 100 App. Div. 42, 90 N. Y. S. 909.

95. Wolf v. Washington R. & Nav. Co., 37 Wash. 491, 79 P. 997; Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862; New Orleans & N. E. R. Co. v. Brooks [Miss.] 38 So. 40. Evidence held to show the place to be a "street" crossing within the statute. Ray v. Chesapeake & O. R. Co. [W. Va.] 50 S. E. 413. Under § 5153, Rev. St. 1894, railroad companies must maintain the crossings in good condition for public travel and restore the whole width of the highway so as not to interfere with a free use thereof. Evansville & I. R. Co. v. Allen, 34 Ind. App. 636, 73 N. E. 630.

96. El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718; Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319; Kennedy v. Consolidated Traction Co., 210 Pa. 215, 59 A. 1005; Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co. [N. J. Eq.] 39 A. 523; Ahlard v. Detroit United R. Co. [Mich.] 102 N. W. 741; Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617; Murray v. St Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Fellers v. Warren St. R. Co., 26 Pa. Super. Ct. 31; Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444; Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. S. 663; Greene v. Metropolitan St. R. Co., 100 App. Div. 303, 91 N. Y. S. 426; Hellriegel v. Southern Trac. Co., 23 Pa. Super. Ct. 392. Car must not be operated with unnecessary noise likely to frighten horses. Georgia R. & Elec. Co. v. Blacknall [Ga.] 50 S. E. 92. Failure to sound warning of approaching car. Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278; Barringer v. United Traction Co., 101 App. Div. 330, 91 N. Y. S. 386. Street railway must anticipate lawful presence of persons on track. Indianapolis St. R. Co. v. Schmidt [Ind. App.] 72 N. E. 478. A motorman is bound to use a greater degree of care in approaching a street crossing. Fisher v. Chicago City R. Co., 114 Ill. App. 217. Until it becomes reasonably apparent that a person crossing the track will not clear the cars those in control of a train may assume that he had the ordinary faculties of sight and would leave the track before encountering danger. Louisville & N. R. Co. v. Lewis [Ala.] 37 So. 587. A motorman may presume that the driver of a wagon will use his senses in looking for cars. Markowitz v. Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351. Evidence held to justify a finding of negligence by motorman. Cicero & P. St. R. Co. v. Reiser, 115 Ill. App. 146. Care required on steep down grade or where tracks are wet and slippery. Foulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973. Admissibility of evidence to show negligence in operation of car considered. Columbus R. v. Connor, 6 Ohio C. C. (N. S.) 361. The proper construction of an ordinance limiting the speed of cars to fourteen miles, including stops, is that at the end of the run the average speed should not exceed that rate. Id. An instruction that greater care in operating cars is required in populous cities and crowded streets than in sparsely settled districts and streets having few travelers is erroneous as invading the province of the jury. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045. Evidence tending to show that the accident occurred in a populous city or crowded street is admissible. Id. A street railway company without being charged with a breach of duty or an unlawful obstruction of the highway, to allow its cars to stand upon its tracks for a reasonable length of time. Poland v. United Traction Co., 95 N. Y. S. 498. Highly charged electric wire down on the highway. Cleary v. St. Louis Transit Co., 108 Mo. App. 433, 83 S. W. 1029.

97. Question for the jury whether defendant so drove as to endanger the lives of others. Kleinhauer v. Shedd [Iowa] 102 N. W. 497; Foulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973; Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147; Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84; Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116; May v. Hahn [Tex. Civ. App.] 80 S. W. 262; Wells, Fargo & Co. v. Gunn [Colo.] 79 P. 1029. Liability arises for carelessly driving against a mare running at large in the streets contrary to ordinance. Ensley Mercantile Co. v. Otwell [Ala.] 38 So. 839. Negligence of truck driver for jury where plaintiff was struck by truck on crowded street just as plaintiff got off a street car. Schoeller v. Metropolitan Express Co., 95 N. Y. S. 744.

98. Conway v. Rheims, 95 N. Y. S. 119. A greater degree of care is required of one driving on the highway with a team of horses having a reputation for running

or other lawful purpose,[1] to act with due regard for the safety of others traveling,[2] in view of all the circumstances;[3] as in other cases, negligence of the person injured will bar recovery,[4] but he may take such chances as a person of ordinary care and

away than is required of the driver of horses known to be gentle and reliable. Lynch v. Kineth, 36 Wash. 368, 78 P. 923.

99. Murphy v. Wait, 102 App. Div. 121, 92 N. Y. S. 253; Trout Brook Ice & Feed Co. v. Hartford Elec. Light Co., 77 Conn. 338, 59 A. 405; Kathmeyer v. Mehl [N. J. Law] 60 A. 40; Indiana Springs Co. v. Brown [Ind.] 74 N. E. 615; Radnor Tp. v. Bell, 27 Pa. Super. Ct. 1; Banks v. Braman [Mass.] 74 N. E. 594; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

1. It is not negligence per se to lead a bear along a public street for a lawful purpose. Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281. The use of automobiles as means of conveyance on a public highway is not, as a matter of law, negligence. Indiana Springs Co. v. Brown [Ind.] 74 N. E. 615; City of Chicago v. Banker, 112 Ill. App. 94. Cycles of every kind are vehicles and subject to the law of vehicles as far as reasonably applicable. Fahrney v. O'Donnell, 107 Ill. App. 608. One riding a bicycle has a legal right upon the road. Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147; Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

2. Negligence for the jury. Wood v. Boston El. R. Co. [Mass.] 74 N. E. 298; New York Bread Co. v. New York City R. Co., 91 N. Y. S. 421; Blakelee's Express & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135; May v. Hahn [Tex. Civ. App.] 80 S. W. 262; Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319. Hellriegel v. Southern Trac. Co., 23 Pa. Super. Ct. 392. The violation of a speed ordinance is prima facie evidence of negligence. United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081. In Massachusetts an employer is liable for his servant's negligence causing death only in case the servant's conduct amounted to gross negligence. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472. Recovery will be allowed only where the negligence complained of was the proximate cause of injury. Louisville & N. R. Co. v. Lewis [Ala.] 37 So. 587.

3. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444.

4. Negligence for the jury. Ablard v. Detroit United R. Co. [Mich.] 102 N. W. 741; Richardson v. Davis & Co. [Minn.] 102 N. W. 868; Nadeau v. Sawyer [N. H.] 19 A. 369; Green v. Metropolitan St. R. Co., 100 App. Div. 303, 91 N. Y. S. 426; New York Bread Co. v. New York City R. Co., 91 N. Y. S. 421; Schleicher v. Interurban St. R. Co., 91 N. Y. S. 356; Heuber v. Consolidated Traction Co., 210 Pa. 70, 59 A 430; Foulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973; McCartney v. Union Traction Co., 27 Pa. Super. Ct. 222; Fellers v. Warren St. R. Co., 26 Pa. Super. Ct. 31; Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282; Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392; Murphy v. St. Louis Transit Co. [Mo.] 87 S. W. 945; Wells, Fargo & Co. v. Gunn [Colo.] 79 P. 1029; Dorr v. Schenck [Mass.] 73 N. E. 532; New Orleans & N. E. R. Co. v. Brooks [Miss.] 38 So. 40; Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319; O'Neill v. St. Louis Transit Co., 108 Mo. App. 453, 83 S. W. 990; Lee v. Foley, 113 La. 663, 37 So. 594; Murray v. St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Blakeslie's Express & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135; Wood v. Boston El. R. Co. [Mass.] 74 N. E. 298; Columbus R. v. Connor, 6 Ohio C. C. (N. S.) 361; Reid v. United Trac. Co., 26 Pa. Super. Ct. 55; Buscher v. New York Transp. Co., 94 N. Y. S. 798; Orchard Stables v. Interurban St. R. Co., 91 N. Y. S. 330; Martin v. Vare [Pa.] 61 A. 615; Kennedy v. Consolidated Traction Co., 210 Pa. 215, 59 A. 1005; West v. New York Transp. Co., 94 N. Y. S. 426; Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278; Furlong v. Metropolitan St. R. Co., 92 N. Y. S. 1008; Woolf v. Washington R. & Nav. Co., 37 Wash. 491, 79 P. 997. In approaching and crossing street car tracks, one must use reasonable care to avoid a collision. Fisher v. Chicago City R. Co., 114 Ill. App. 217. Contributory negligence for jury where plaintiff was run over by truck on crowded street, just after getting off street car. Schoeller v. Metropolitan Exp. Co., 95 N. Y. S. 744. A person is not guilty of contributory negligence in walking along a railroad track where the track is situated in a street. Rio Grande, etc., R. Co. v. Martinez [Tex. Civ. App.] 87 S. W. 853. A person rightfully using a railroad track as a thoroughfare may presume that trains will approach at a speed permitted by city ordinance and that the statutory meaning will be given. Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151, 73 N. E. 449. Instructions on contributory negligence at railroad crossing. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786. The negligence of a servant driving his master's wagon is chargeable to the master who is riding therein and is injured. Markowitz v. Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351. A child must exercise such a degree of care as is reasonably to be expected of one of her years. Young v. Small [Mass.] 73 N. E. 1019. One attempting to cross a street, and seeing a sleigh approaching, is not negligent in failing to watch the sleigh and keep out of its way, the street being otherwise unoccupied. McCrohan v. Davison [Mass.] 73 N. E. 553. Evidence held to fail to show plaintiff free from negligence. Perez v. Sanddrowitz, 180 N. Y. 397, 73 N. E. 228. It is the duty of the driver of a wagon when he sees that a car approaching a street crossing is likely to come into collision with his wagon to use reasonable diligence to stop or check his wagon. Ford v. Hine Brothers Co., 115 Ill. App. 153. Plaintiff negligent in attempting at night to cross street car tracks in an unimproved portion of the highway. Kalberg v. Seattle Elec. Co., 37 Wash. 612, 79 P. 1101. Attempt to drive from one side of a street to the other in front of a rapidly approaching car. Riley v. Shreveport Traction Co. [La.] 38 So. 83. It is not contributory negligence per se for a passenger on a crowded street cart to ride on the running board. Koontz v. District of Columbia, 24 App. D. C. 59. Plaintiff negli-

prudence, in the exercise thereof, would have taken under all the circumstances.[5] The common-law rule is that a person may travel the highway with a conveyance or loaded vehicle liable to frighten horses, yet he must while doing so exercise reasonable care to avoid accident and injury to others traveling along such highway.[6] To leave a horse in the street unhitched, or unattended contrary to ordinance is negligence per se,[7] and may also be so in fact.[8] The right of a merchant to leave his team standing in the street while merchandise is being unloaded therefrom must be exercised with due regard to the rights of others lawfully using the street.[9] One operating a gasoline engine near a highway must not be negligent in the muffling of the exhaust.[10] The Illinois statute regulating the speed and operation of automobiles on the highway is not unconstitutional.[11] One maintaining a coal hole in the sidewalk must exercise reasonable care in view of all the circumstances to protect the public,[12] and may be responsible for the negligence of a coal company making use of the opening.[13]

Law of the road.[14]—A city may by ordinance provide that vehicles going in a certain directions shall have the right of way.[15] A street car is not required to stop at street intersections for a funeral procession to pass, nor to give a funeral procession the right of way.[16] The custom of the road in America is for vehicles to

gent in driving onto street car track when his sight and hearing were temporarily impaired. Saltman v. Boston El. R. Co., 187 Mass. 243, 72 N. E. 950. Crossing in front of rapidly approaching car when not required to do so by emergency. Hornstein v. Rhode Island Co., 26 R. I. 387, 59 A. 71. Failure to get clear of car track. Randall v. Union R. Co. [R. I.] 59 A. 165. Collision with street car. Dages v. New York City R. Co., 91 N. Y. S. 29. Driving in front of a car without looking. Seele v. Boston & N. St. R. Co., 187 Mass. 238, 72 N. E. 971. To leave a horse and wagon in the stret in front of the store from which goods are being loaded into the wagon is not contributory negligence as a matter of law preventing a recovery for injury to the horse, caused by the reckless driving of another. Rohde v. Mantell, 992 N. Y. S. 5. Walking on tracks while intoxicated. Bugbee v. Union R. Co. [R. I.] 59 A. 165. Carelessly driving upon street car track without looking. Clcardi v. St. Louis Transit Co., 108 Mo. App. 462, 83 S. W. 980. A person about to cross a street railroad track in an incorporated city is not bound as a matter of law to stop, look and listen (Los Angeles Traction Co. v. Conneally [C. C. A.] 136 F. 104), though the rule may be otherwise in sparsely settled districts (Id.). In Pennsylvania one must stop, look and listen before crossing a street car track. McCartney v. Union Traction Co., 27 Pa. Super. Ct. 222. A teamster who needlessly drives upon the track must at reasonable intervals look back for approaching cars. Not sufficient to look back only after driving two hundred feet upon the track. Schleicher v. Interurban St. R. Co., 91 N. Y. S. 356.

5. Doherty v. Metropolitan St. R. Co., 91 N. Y. S. 19; Greene v. Metropolitan St. R. Co., 100 App. Div. 303, 91 N. Y. S. 426; Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976; Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617; Fellers v. Warren St. R. Co., 26 Pa. Super. Ct. 31. Where obstacles prevent observation, it is the duty of the pedestrian to delay crossing the track until proper observation can be made. Knoxville Traction Co. v. Brown [Tenn.] 89 S. W. 319. Attempting to cross the track of a street railway ahead of an approaching car is not negligence per se. Fisher v. Chicago City R. Co., 114 Ill. App. 217. It is not negligence to attempt to reach the sidewalk from the street at a place other than a street crossing. Rea v. Sioux City [Iowa] 103 N. W. 949.

6. Murphy v. Wait, 102 App. Div. 121, 92 N. Y. S. 253.

7. Healy v. Johnson [Iowa] 103 N. W. 92. Negligence for the jury. McCormack v. Boston El. R. Co. [Mass.] 74 N. E. 599. He who leaves a horse unsecured in the street must be presumed to have contemplated the possibility of its being frightened. Master liable for negligence of servant. Healy v. Johnson [Iowa] 103 N. W. 92.

8. Driver held negligent and his employer liable where he left the vehicle and team standing unhitched and unguarded in a frequented place and the team ran away inflicting injury on a third person. Zambelli v. Johnson & Son Co. [La.] 39 So. 501.

9. McCormack v. Boston El. R. Co. [Mass.] 74 N. E. 599.

10. Wolf v. Des Moines Elevator Co., 126 Iowa, 659, 102 N. W. 517.

11. Laws 1903, pp. 301, 302. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

12. Berger v. Content, 94 N. Y. S. 12; Ray v. Manhattan, Light, Heat & Power Co. [Minn.] 99 N. W. 782.

13. Ray v. Manhattan, Light, Heat & Power Co. [Minn.] 99 N. W. 782.

14. See 3 C. L. 1610.

15. Heuber v. Consolidated Traction Co., 210 Pa. 70, 59 A. 430; Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. S. 663. When such an ordinance exists, the jury should be clearly charged thereon. Kroder v. Interurban St. R. Co., 91 N. Y. S. 341; May v. Hahn [Tex. Civ. App.] 80 S. W. 262.

16. Foulk v. Wilmington City R. Co. [Del. Super.] 60 A. 973.

seasonably turn to the right on meeting,[17] or to the left on overtaking and passing, or that one should turn to the right when informed that another traveling in the same direction desires to pass him,[18] and this rule applies as well to bicycles as to other vehicles.[19] A pedestrian or light vehicles should give way, where it is possible, to floats and wagons.[20] There is no law of the road in Louisiana, but the courts take judicial notice of the custom there prevailing for vehicles to drive to the right.[21] That one traveler is violating the law of the road does not give to another the right to neglect the required precautions.[22] As in other cases, contributory negligence will bar recovery.[23] In taking the wrong side of the street, one assumes the risk of consequences which may arise from inability to get out of the way of a vehicle on the right side of the street,[24] but one may rightfully travel on the left hand side of the road if the opposite side is unsafe for travel.[25] The driver of a vehicle is presumptively at fault if he fails to turn to the right of the center of the wrought highway in meeting another,[26] but if the presumption be overcome, the fact that he may in a sense have been out of place does not place him beyond the protection of the law.[27] In an action for injuries received in a collision between a street car and a vehicle approaching each other at right angles, it was proper to charge that the question of the right or wrong side of the street did not enter into the case.[28]

§ 14. *Rights of abutters.*[29]—The dedication of a street must be presumed to have been for all public purposes,[30] present and prospective,[31] consistent with its use as a highway and not actually detrimental to the abutting real property;[32] but

17. Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116; May v. Hahn [Tex. Civ. App.] 80 S. W. 262; Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147; Indianapolis St. R. Co. v. Slifer [Ind. App.] 72 N. E. 1055.

18. Pub. St. 1901, c. 76, § 18. Nadeau v. Sawyer [N. H.] 59 A. 369.

19. Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. S. 116.

20, 21, 22. Lee v. Foley, 113 La. 663, 37 So. 594.

23. Indianapolis St. R. Co. v. Slifer [Ind. App.] 72 N. E. 1055.

24. Fahrney v. O'Donnell, 107 Ill. App. 608.

25. Indianapolis St. R. Co. v. Slifer [Ind. App.] 72 N. E. 1055. One is not negligent as a matter of law in driving on the left hand side of the street. Wood v. Boston El. R. Co. [Mass.] 74 N. E. 298.

26. Buxton v. Ainsworth [Mich.] 101 N. W. 817; Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147.

27. Buxton v. Ainsworth [Mich.] 101 N. W. 817.

28. Iaquinto v. Bauer, 93 N. Y. S. 388.

29. See 3 C. L. 1613.

30. Morris v. Montgomery Traction Co. [Ala.] 38 So. 834. A water company has a right to lay its pipes through a public street without paying compensation to any one. Jayne v. Cortland Waterworks Co., 95 N. Y. S. 227. A railroad company's right of way across a street is subject to the lawful uses of the highway and amongst them its use by a street railway. Pennsylvania R. Co. v. Inland Traction Co., 25 Pa. Super. Ct. 115. An owner of land who without protest sees a railroad constructed thereon is estopped thereafter to maintain ejectment or a suit to enjoin the operation of the railroad. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205.

31. The use of the streets must be extended to meet modern means of locomotion. City of Chicago v. Banker, 112 Ill. App. 94. The mere imposition of more railway tracks or the increased use of tracks beyond what may originally have been thought probable, resulting from the location of a depot on land acquired by it adjoining a street occupied by its track, does not constitute a nuisance. Oklahoma City & T. R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849.

32. The movement of street cars on their tracks in a highway is only a modification of the public use to which the highway was originally devoted. Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co. [N. J. Eq.] 59 A. 523. There is no limit to the use of a public street for the purposes of public travel thereon so long as such use does not interfere unnecessarily with the ordinary modes of travel and is not substantial impairment of private rights of property. Morris v. Montgomery Traction Co. [Ala.] 38 So. 834. In Kansas a gas company may, as against the state, bury its pipe line in the public highway, where such use does not inconvenience, endanger or obstruct public travel. State v. Kansas Natural Gas, Oil, Pipe Line & Imp. Co. [Kan.] 80 P. 962. Mere delay in travel suffered by a property owner by the laying of a railway track in the street is damnum absque injuria, where there is an outlet from his property along the street without crossing the track. Louisville & N. R. Co. v. Cincinnati, etc., R. Co., 3 Ohio N. P. (N. S.) 109. The right of action for damages to a landowner because of the construction of a railroad over his land belongs to him personally. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205. A fire escape may be such an obstruction to an alley and interference with the rights of others as to entitle an abutting

in Iowa, a vacated street may be appropriated by the city to other purposes inconsistent with its further use for public travel.[33] Every abutting owner has a property right in the maintenance of the highway in full use,[34] of which he can be divested only on due compensation,[35] though his rights are simply that the street, including the roadway and the sidewalk, shall not be obstructed so as to impair ingress or egress to his lot.[36] The right of abutters to use streets for other purposes is permissive only[37] though they may temporarily make reasonable use.[38] Some states hold that an abutting owner has a property right in the street opposite his premises,[39] and may use the land for any lawful purpose compatible with the full enjoyment of the public easement.[40] The maintenance of trees in a street for the purpose of ornament and shade is a proper street use,[41] but a city may remove trees when necessary to improve the street according to a general plan.[42] The public owes the same duty of lateral support to abutters as adjoiners do to each other.[43] The abutter's character

owner to an injunction restraining its continuance. Schmoele v. Betz [Pa.] 61 A. 525. Diamond switch for street cars. Rosenbaum v. Meridian Light & R. Co. [Miss.] 38 So. 321. Construction of double track street railway on northerly half of road and placing of poles close to street line does not constitute an additional servitude. Budd v. Camden Horse R. Co., 70 N. J. Law, 782, 59 A. 229. A reasonable use of the highway for the erection of telephone poles and wire under legislative authority is not an additional servitude. Lowther v. Bridgeman [W. Va.] 50 S. E. 410. Street railway not an additional servitude, though the city has but an easement. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711. That a railroad track was changed from narrow to standard guage and the trains became heavier is not an increase of servitude. Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 P. 205. Where a street car track constitutes an additional servitude, unless waived, the assessment and payment or tender of damages is a condition precedent to the right of the company to occupy the street (Strickford v. Boston & M. R. Co. [N. H.] 59 A. 367); but such a waiver does not preclude one from subsequently applying for an assessment of damages (Id.). The raising of a railroad track from a surface line on a street to an elevated structure is an increase of servitude. Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 Law. Ed. 872.

33. Harrington v. Iowa Cent. R. Co., 126 Iowa, 388, 102 N. W. 139.

34. Peace v. McAdoo, 92 N. Y. S. 368. A street having been dedicated to the public, a purchaser of property abutting thereon acquired a vested right to have it kept open and no acceptance of the dedication by the corporation was necessary. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. When a city negligently obstructs a street, it is liable to the abutting owner for the damages proximately resulting therefrom; but an action to recover such damages must be timely brought. Schleicher v. Mt. Vernon, 95 N. Y. S. 326.

35. Highbarger v. Milford [Kan.] 80 P. 633.

36. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711. A city sidewalk being a part of the street which the city has set aside for the use of pedestrians, an abutting proprietor has no more right therein than in the roadway. Id. For the condemnation of a walk, by a city in the exercise of power expressly conferred by statute, the owner of the walk is not entitled to compensation. Scott v. Marshall, 110 Mo. App. 178, 85 S. W. 98.

37. Vorhes v. Ackley [Iowa] 103 N. W. 998.

38. White v. Roydhouse, 211 Pa. 13, 60 A. 316; Friedman v. Snare & Triest Co. [N. J. Err. & App.] 61 A. 401. Depositing building materials in the street. Friedman v. Snare & Triest Co. [N. J. Err. & App.] 61 A. 401.

39. Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1008. Where a steam railroad track is constructed in a street upon which property abuts, but not in that part of the street opposite the lot lines of the property produced, and it can nevertheless be shown that such track is an interference with the access to said property—whether such facts are sufficient to maintain an action. Louisville & N. R. Co. v. Cincinnati, etc., R. Co., 3 Ohio N. P. (N. S.) 109. An abutting owner may recover from one who drove his cattle to drink from the highway ditch in front of such owner's property and there trampled the outlet of a private ditch. Van Roy v. Watermolen [Wis.] 104 N. W. 97. Removing sandstone from quarry within the limits of the highway. Town of Clarendon v. Medina Quarry Co., 102 App. Div. 217, 92 N. Y. S. 530.

40. Removing gravel from within limits of a county highway. Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956.

41. Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108; Dotey v. District of Columbia, 25 App. D. C. 232; Harlow v. Standard Imp. Co., 145 Cal. 477, 78 P. 1045. The illegal entry upon land and destruction of trees thereon renders the perpetrators guilty of trespass. Bright v. Bell, 113 La. 1078, 37 So. 976.

42. Rev. St. 1899, § 5960. Scott v. Marshall, 110 Mo. App. 178, 85 S. W. 98. A city may cut down or remove shade trees when the public officials deem it expedient or necessary. Ward v. District of Columbia, 24 App. D. C. 524. A property owner who plants trees upon a public highway does so subject to the right of the legislature to make such regulations as to improvement of the highway as will render it more convenient for public use. Sherman v. Butcher [N. J. Law] 60 A. 336.

43. Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34.

as such ceases when his land is taken by right of eminent domain;[44] but rights accrued previously to his alienation are his and do not run with the land.[45] Only the heirs of the grantor can exercise the right of re-entry given by a breach by the grantee of a condition that the land granted shall be used as a public road.[46] The sale of lots according to a recorded plan, showing streets and avenues, is constructive notice to subsequent purchasers of the existence of such streets and avenues.[47] An abutter may by mandamus compel the construction of a street within a reasonable time after it has been laid out.[48] A hotel keeper's rights in the adjacent street extend no further than to a reasonable occupation of the street by carriages of his own brought there for the use of his guests.[49]

Ownership of fee.[50]—It is the general rule that the dedication of land for a public highway confers a mere easement for public use as a highway,[51] and in the absence of anything to show the contrary, the title and legal possession of the owner or occupant of lands abutting upon a street presumably extend to the middle of the street.[52] At common law the conveyance of a lot bounded upon a street[53] or sold to a plat showing a street adjoining the lot,[54] in the absence of reservation,[55] gives title to the center of the street,[56] but a conveyance of lots bounded by the westerly line of a road leaves the fee of the road in the grantor.[57] In Colorado, unless the record of roads is such as to notify an intending purchaser of the existence of a road, the purchaser of land without actual notice of a road thereon takes his land free from the easement of the right of way.[58]

§ 15. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*[59]—The liability of towns for injuries caused by defective ways is created

44. One who has ceased to be an owner of property abutting on a street, his land having been condemned for a railroad right of way, has no standing in court to raise the question of the extension of the street across the railroad right of way. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86.

45. If the mistake of a city surveyor in giving a wrong grade line to a property owner, causing him to build at a greater elevation than he otherwise would have built, gave such owner a right of action against the city, such right would not run with the land so as to authorize a recovery by his vendee. Moore v. Lancaster [Pa.] 62 A. 100.

46. Mitchell v. Einstein, 94 N. Y. S. 210.

47. Wickham v. Twaddell, 25 Pa. Super. Ct. 188.

48. Rev. Laws, c. 48, § 92, does not require the completion of the street in two years after the right to possession accrues. McCarthy v. Boston [Mass.] 74 N. E. 659.

49. Barnes v. District of Columbia, 24 App. D. C. 458.

50. See 3 C. L. 1614.

51. Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956. Deed held to convey the fee. Mitchell v. Einstein, 94 N. Y. S. 210. Under a deed conveying "a perpetual easement for the purpose of a public levee or street only," the fee title remains in the grantor. Security Trust Co. v. Joesting [Minn.] 104 N. W. 830.

Contra: Acceptance by the public of a dedicated street gives the municipality the fee. Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544.

52. Friedman v. Snare & Triest Co. [N. J. Err. & App.] 61 A. 401; City of Houston v. Finnigan [Tex. Civ. App.] 85 S. W. 470. Laws 1847, p. 196, c. 203, vested the fee of the street in question, in the city of New York. Mott v. Eno, 181 N. Y. 346, 74 N. E. 229. Where there is nothing to control a deed describing land as situated on the side of a contemplated street, the grantee therein takes to the middle of the street. Everett v. Fall River [Mass.] 75 N. E. 946.

53. Barnes v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84; Mitchell v. Einstein, 94 N. Y. S. 210; Neely v. Philadelphia [Pa.] 61 A. 1096; Western Union Tel. Co. v. Krueger [Ind. App.] 74 N. E. 25.

54. In re South Western State Normal School, 26 Pa. Super. Ct. 99; Reichert Milling Co. v. Freeburg [Ill.] 75 N. E. 544; Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665; Florida East Coast R. Co v. Worley [Fla.] 38 So. 618. Rule applies, though plat be unrecorded. Nagel v. Dean [Minn.] 101 N. W. 954. Dedication of street by vendor is binding on those purchasing on instalment plan, though made after all amounts are paid but before deeds are executed. Tabor St., 26 Pa. Super. Ct. 167.

55. Plat held to show reservation of fee. Lever v. Grant [Mich.] 102 N. W. 848; Western Union Tel. Co. v. Krueger [Ind. App.] 74 N. E. 25. Where one who platted land reserved title to the fee of a strip along one avenue designated on the plat and afterward conveyed a portion of such strip to another, subsequent purchasers of lots abutting on the avenue acquired no easement over the portion so conveyed. Lever v. Grant [Mich.] 102 N. W. 848.

56. Western Union Tel. Co. v. Krueger [Ind. App.] 74 N. E. 25.

57. Mitchell v. Einstein, 94 N. Y. S. 210.

58. Lieber v. People [Colo.] 81 P. 270.

59. See 3 C. L. 1615.

by statute and is not to be extended by construction beyond the limits which a reasonable interpretation of the statute establishes.[60] Towns are required only to provide wrought ways of reasonable width and smoothness,[61] and country roads need not be kept in a condition suitable for travel for their entire width,[62] but a liability arises from leaving an unguarded danger in such close proximity to the traveled and prepared track that passengers using such track are in danger of falling therein while exercising ordinary care.[63] When a municipality is empowered to control and keep its streets in order, it is charged with a positive duty to do so,[64] which duty is a primary[65] and continuing one,[66] as to all actually existing highways,[67] of which the city cannot relieve itself by any act of its own,[68] and a county is not required to keep in repair a street within the limits of a city or borough and abutting the county building.[69] Where, pursuant to an ordinance, a street railway company agrees to pay a certain sum for use of streets, and to indemnify a city from any loss or damage resulting from any act or omission of the company, and to defend at its own cost any proceeding against the city growing out of any such act or omission, the rights of the city against the company, on the happening of a contingency contemplated by the agreement, are limited to those given by the contract;[70] thus, the city cannot maintain trespass on the case against the company to recover the amount of a judg-

60. Temby v. Ishpeming [Mich.] 12 Det. Leg. N. 128, 103 N. W. 588. Under a statute rendering a town liable for injuries from a "dangerous embankment and defective railing," one cannot recover for injuries received in a cut in the road. Miner v. Hopkinton [N. H.] 60 A. 433. A commissioner of highways owes no duty to an adjoining owner to provide for drainage of surface water; hence no action lies against a town under Laws 1809, p. 1177, c. 568, for his failure to keep the sluice under highway free from rubbish; the statute refers only to defects interfering with travel. Winchell v. Town of Camillus, 95 N. Y. S. 688. Under Laws 1890, p. 1177, c. 568, an action will lie against a town for damage resulting from a defective highway only when same neglect of the highway commissioner is shown. Id. In New Yor towns have no duties to perform relative to highways, such duties being imposed by law on commissioner of highways. Id.

61. Hammacher v. New Berlin [Wis.] 102 N. W. 489; King v. Ft. Ann, 180 N. Y. 496, 73 N. E. 481. No liability arises from injuries received in an unimproved portion of the highway. It is a matter of delegated legislative capacity as to how much of a highway shall be improved. Ruppenthal v. St. Louis [Mo.] 88 S. W. 612. When the city has exercised its discretion and determined to devote less than the full located width of the street to travel, the border line should be so indicated as to be apparent to a person using the street. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229.

62. Hammacher v. New Berlin [Wis.] 102 N. W. 489.

63. Temby v. Ispheming [Mich.] 12 Det. Leg. n. 114, 103 N. W. 588; Hammacher v. New Berlin [Wis.] 102 N. W. 489. Peg in the walk. Rea v. Sioux City [Iowa] 103 N. W. 949.

64. Duty to repair is commensurate with right of control. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40; Gillard v. Chester [Pa.] 61 A. 929; City of Muncie v. Hey [Ind.] 74 N. E. 250. District of Columbia has exclusive control of the Washington streets and sidewalks and is charged with the duty of keeping them reasonably safe. Coughlin v. District of Columbia, 25 App. D. C. 251; Ward v. District of Columbia, 24 App. D. C. 524; Dotey v. District of Columbia, 25 App. D. C. 232.

65. Brown v. Towanda Borough, 24 Pa. Super. Ct. 378.

66. City of Muncie v. Hey [Ind.] 74 N. E. 250.

67. Immaterial that title to some of the highway is not in the town. Paulsen v. Wilton [Conn.] 61 A. 61. A city is responsible for the condition of a highway which it has accepted and assumed control of. City of Newport News v. Scott's Adm'x, 103 Va. 794, 50 S. E. 266. Where a road is not a city street or highway and the city is under no obligation to repair it, the city is not liable for injuries resulting from its defective condition, notwithstanding a city official may have exercised some authority in respect thereto, unless it appeared that such action was by authority of the city. City of Chicago v. Hannon, 115 Ill. App. 183.

68. Coughlin v. District of Columbia, 25 App. D. C. 251; Torphy v. Fall River [Mass.] 74 N. E. 465; Hillyer v. Winsted, 77 Conn. 304, 59 A. 40; Lindstrom v. Pennsylvania Co. for Ins. on Lives & Granting Annuities [Pa.] 61 A. 940; City of Chicago v. McDonald, 111 Ill. App. 436; Miller v. Canton [Mo. App.] 87 S. W. 96. In Montana a city may by ordinance lawfully impose on the occupants of premises the duty of keeping the sidewalk free from ice and snow. City of Helena v. Kent [Mont.] 80 P. 258. A city cannot escape liability to see that a walk is repaired by serving an insufficient notice on the abutting owners to make such repairs. Heath v. Manson [Cal.] 82 P. 331.

69. P. L. 1895, p. 336; P. L. 1834, p. 537. Bucher v. Northumberland County, 209 Pa. 618, 59 A. 69.

70, 71. City of Pawtucket v. Pawtucket Elec. Co. [R. I.] 61 A. 48.

ment against the city.[71] A municipality is not an insurer of the safety of travelers upon the highway,[72] and is not bound to anticipate extraordinary emergencies,[73] but is required to exercise ordinary or reasonable care and diligence[74] to keep its streets and sidewalks in a reasonably safe condition[75] for the entire width,[76] for ordi-

72. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277; City of Nokomis v. Farley, 113 Ill. App. 161; King v. Ft. Ann, 180 N. Y. 496, 73 N. E. 481; Parrish v. Huntington [W. Va.] 50 S. E. 416; City of New Castle v. Kurtz, 210 Pa. 183, 59 A. 989; Village of Wilmette v. Brachle, 110 Ill. App. 350.

73. But must use such means as are available at the time to keep the street safe. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078; Rhine v. Philadelphia, 24 Pa. Super. Ct. 564; Ibbeken v. New York, 94 N. Y. S. 568.

74. Haxton v. Kansas City [Mo.] 88 S. W. 714; City of Chicago v. McDonald, 111 Ill. App. 436; Deland v. Cameron [Mo. App.] 87 S. W. 597; City of Nakomis v. Farley, 113 Ill. App. 161; Village of Wilmette v. Brachle, 110 Ill. App. 356; Wilson v. Ulysses Tp. [Neb.] 101 N. W. 986. Leaving abandoned car tracks in street held to be negligence. Cutcher v. Detroit [Mich.] 102 N. W. 629; Morris v. Interurban St. R. Co., 100 App. Div. 295, 91 N. Y. S. 479; Hornee v. District of Columbia, 21 App. D. C. 284; Pumorlo v. Merrill [Wis.] 103 N. W. 464. A distinction is to be made between the care required on a county road and that of a populous city. Foley v. Ray [R. I.] 61 A. 50; City of Muncie v. Hey [Ind.] 74 N. E. 250; City of Rock Island v. Gingles [Ill.] 75 N. E. 468; City of Mattoon v. Faller [Ill.] 75 N. E. 387; Ward v. District of Columbia, 24 App. D. C. 524; Farrell v. Plymouth Borough, 26 Pa. Super. Ct. 183; Ball v. Neosho [Mo. App.] 83 S. W. 777. Such care involves due regard not only to the size and depth of the depression complained of, but also to its form, as affecting the peril to which it exposes persons lawfully using the highway. Sumner v. Northfield [Minn.] 104 N. W. 686; Gillard v. Chester [Pa.] 61 A. 929. County liable for injuries from leaving its wagon in the road for several weeks. Duncan v. Greenville County [S. C.] 50 S. E. 776. City negligent in leaving an uncovered opening in the street, overgrown with grass, for six or eight months. Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188. "Water box" projecting above sidewalk not negligence on part of the city. North v. New Britain [Conn.] 61 A. 68; Dougherty v. Philadelphia [Pa.] 60 A. 261. For the jury to determine whether a city was negligent in failing to inspect a banner pole after its erection. Durfield v. New York, 101 App. Div. 581, 92 N. Y. S. 204. For the jury to determine whether a city was negligent in permitting a stone step leading to private premises and projecting under the street to remain in the sidewalk. Fischer v. St. Louis [Mo.] 88 S. W. 82. City held negligent in allowing large quantities of mud to accumulate and freeze on a sidewalk running close to an embankment. Strange v. St. Joseph [Mo. App.] 87 S. W. 2. The New York charter does not impose on the city the obligation to keep an unimproved street open for public travel from the instant the report of the opening was confirmed by the supreme court. Laws 1901, p. 406, c. 466, § 971. Parsons Bros. v. New York, 95 N. Y. S. 131. In Missouri it is the duty of a city and its officers to look for defects. Drake v. Kansas City [Mo.] 88 S. W. 689; Miller v. Canton [Mo. App.[87 S. W. 96.

75. City of Chicago v. McDonald, 111 Ill. App. 436; Miller v. Canton [Mo. App.] 87 S. W. 96; City of Nokomis v. Farley, 113 Ill. App. 161; Hopkins v. Williamsport, 25 Pa. Super. Ct. 498; City of Rock Island v. Gingles [Ill.] 75 N. E. 468; Wilson v. Ulysses Tp. [Neb.] 101 N. W. 986; O'Brien v. Derry [N. H.] 60 A. 843; Idlett v. Atlanta [Ga.] 51 S. E. 709. Water box in the sidewalk. Parrish v. Huntington [W. Va.] 50 S. E. 416; Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452; City of Paseagoula v. Kirkwood [Miss.] 38 So. 547; St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630; Haxton v. Kansas City [Mo.] 88 S. W. 714; Drake v. Kansas City [Mo.] 88 S. W. 689; McCabe v. Whitman [Mass.] 73 N. E. 535; City of Muncie v. Hey [Ind.] 74 N. E. 250; City of Vincennes v. Spees [Ind. App.] 74 N. E. 277; Nocks v. Whiting, 126 Iowa, 405, 102 N. W. 109; Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624; McCarthy v. Dedham [Mass.] 74 N. E. 319; Village of Wilmette v. Brachle, 110 Ill. App. 356; Walker v. Philadelphia, 211 Pa. 33, 60 A. 318. Temporary bridge. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078; City of Mattoon v. Faller [Ill.] 75 N. E. 387; City of Gibson v. Murray [Ill.] 75 N. E. 319; O'Dwyer v. Northern Market Co., 24 App. D. C. 81; Brassington v. Mt. Carmel Borough, 24 Pa. Super. Ct. 318; Torphy v. Fall River [Mass.] 74 N. E. 465; Coughlin v. District of Columbia, 25 App. D. C. 251; Ward v. District of Columbia, 24 App. D. C. 524; Dotey v. District of Columbia, 25 App. D. C. 232; Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532. The duty of a municipality is to keep the streets free from all obstructions of every kind, there being no difference in principal between a dangerous obstruction resulting from a hole or excavation and an equally dangerous obstruction resulting from matter thereon which is liable to cause one to slip and be injured. O'Dwyer v. Northern Market Co., 24 App. D. C. 81. Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452. That one of two adjoining flagstones in sidewalk is 2 1-2 or 3 inches lower than the other does not render the city liable for resulting personal injures. City of Chicago v. Norton, 116 Ill. App. 570. City not liable for injuries resulting from the maintenance of a billboard by a property owner on a space between the sidewalk and the building. Temly v. Ishpeming [Mich.] 12 Det. Leg. n. 114, 103 N. W. 588. Circular hole 2 to 2 5-8 inches in diameter is a defect in a sidewalk. Upham v. Boston, 187 Mass. 220, 72 N. E. 946. Water plug in the packing legally within the limits of the sidewalk. Dotey v. District of Columbia, 25 App. D. C. 232. Steep slope from sidewalk to roadway at crossing. City of Muncie v. Spence, 33 Ind.

nary travel,[77] by day or night,[78] by those using reasonable care,[79] or any use to which the street may be subjected, not in itself improper and illegal;[80] but in Nebraska, townships organized under the township act are not "municipalities" liable by statute, nor is a county liable except under the statutory conditions.[81] Unless there be an unlawful obstruction in the street,[82] a city is under no obligation to maintain street lights.[83] A city must use greater care in looking after a street much traveled and in use by pedestrians than if the street be little used.[84] That a city by special license permits an act unlawful under the ordinance does not relieve the city from resulting injuries.[85] Because of its failure to exercise its governmental power to prohibit the riding of bicycles on sidewalks, a city is not liable to one injured by being run into by a bicycle ridden thereon.[86] A municipality cannot escape liability from an obligation arising ex delicto on the ground that its indebtedness has reached the constitutional limit.[87]

(§ 15) *B. Notice of defect.*[88]—It is a general rule that the liability of a municipality for damages occasioned by defective street or sidewalks arises only upon notice to the proper officials,[89] express[90] or implied from the existence of such de-

App. 599, 71 N. E. 907. Sloping cross grade. Kaiser v. St. Louis, 185 Mo. 366, 84 S. W. 19. Uncovered catch basin in the highway. Veach v. Champaign, 113 Ill. App. 151.

76. Duty to keep street in safe condition is not limited to the traveled portion. Thuis v. Vincennes [Ind. App.] 73 N. E. 141. Sidewalk should be reasonably safe for entire width. Village of Wilmette v. Brachle, 110 Ill. App. 356. Including grass plot between constructed sidewalk and curb. Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532. That a small portion of the surface of a public sidewalk extends on private property does not affect the city's obligation to maintain such portion, its responsibility covering the construction in its entirety. Deland v. Cameron [Mo. App.] 87 S. W. 597. But in Illinois a city is not bound to maintain in a reasonably safe condition the full located width of a street. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229.

77. Miller v. Canton [Mo. App.] 87 S. W. 96; Idlett v. Atlanta [Ga.] 51 S. E. 709; Parrish v. Huntington [W. Va.] 50 S. E. 416. A city owes no private duty of care to a laborer upon the highway between whom and it no contract of employment exists. O'Brien v. Derry [N. H.] 60 A. 843. Rev. Laws, c. 51, § 18, authorizing a recovery for injures resulting from defects in highways, is inapplicable where the person injured was at the time of injury on his own premises. Dickinson v. Boston [Mass.] 75 N. E. 68.

78. City of Pascagoula v. Kirkwood [Miss.] 38 So. 547; Miller v. Canton [Mo. App.] 87 S. W. 96.

79. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277; City of Chicago v. McDonald, 111 Ill. App. 436; Johnson v. Highland [Wis.] 102 N. W. 1085. A city's duty is performed by keeping streets in reasonably safe condition for those who themselves exercise due care. City of Covington v. Lee [Ky.] 89 S. W. 493.

80. Runaway horse. Nocks v. Whiting, 126 Iowa, 405, 102 N. W. 109. Traction engine. Johnson v. Highland [Wis.] 102 N. W. 1085; Sumner v. Northfield [Minn.] 104 N. W. 686.

81. Wilson v. Ulysses Tp. [Neb.] 101 N. W. 986.

82. Stepping stone. Wolff v. District of Columbia, 198 U. S. 152, 49 Law Ed. 426.

83. Negligence cannot be imputed to a city for failure to light its streets, for that is a governmental function. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277. A city engaging in street lighting for the purpose of lessening its liability for defective streets is engaged in a private enterprise and liable for negligence in the management thereof. Dickinson v. Boston [Mass.] 75 N. E. 68.

84. Miller v. Canton [Mo. App.] 87 S. W. 96.

85. Discharge of fireworks. Walker v. New York, 95 N. Y. S. 121.

86. Ordinance held to neither affirmatively permit or prohibit bicycle riding on sidewalks. Rogers v. Binghamton, 101 App. Div. 352, 92 N. Y. S. 179. In South Carolina a city is not liable for injuries to a pedestrian on a sidewalk run over by a bicycle, though there is no ordinance prohibiting the use of sidewalks by bicycle riders. Civ. Code 1902, § 2023. Bryant v. City Council of Orangeburg, 70 S. C. 137, 49 S. E. 229.

87. Conner v. Nevada [Mo.] 86 S. W. 256.

88. See 3 C. L. 1618.

89. Lindstrom v. Pennsylvania Co. for Ins. on Lifes and Granting Annuities [Pa.] 61 A. 940; Hopkins v. Williamsport, 25 Pa. Super. Ct. 498; Drake v. Kansas City [Mo.] 88 S. W. 689; Ball v. Neosho [Mo. App.] 83 S. W. 777.

90. Warning to abutting owners by street commissioner to remove ice from walk held to show knowledge by the city. Hofacre v. Monticello [Iowa] 103 N. W. 488; Small v. Kansas City, 110 Mo. App. 721, 85 S. W. 627; City of Newport News v. Scott's Adm'x, 103 Va. 794, 50 S. E. 266. Knowledge of a defect in a walk by the sidewalk inspector may be notice to the city. Small v. Kansas City, 185 Mo. 291, 84 S. W. 901. Notice to police officer, who by custom is agent of city, of defect in street is notice to city. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6. In the absence of statute or ordinance in support thereof, a rule requiring policemen to note and when practicable remove defects in the streets, is irrelevant and immaterial to prove notice by the city of a defect known by its

fect so long or of such a nature that its officers are presumed to have notice thereof,[91] and have had a reasonable time to make the repairs.[92] That an officer whose duty it was to report to the proper authorities all defects in sidewalks did not regard a particular defect as requiring such notice does not relieve the municipality.[93] Notice is not requisite where the construction is improper or unsafe,[94] and notice of the particular defect causing the injury is not essential.[95]

(§ 15) *C. Sidewalks.*[96]—If the portion intended for foot passengers becomes unsuitable for that purpose and the public makes constant use of another part of the street between the curb and the lot line, the portion thus used is a sidewalk within the usual meaning of the term.[97] Towns need not construct sidewalks upon country roads,[98] and a municipality is not required to build sidewalks on all of its streets,[99] but where it has constructed a walk, or assumed control of a walk built by private enterprise,[1] a liability arises from failure to use ordinary care [2] to keep it in a

policeman. City of Cleveland v. Payne [Ohio] 74 N. E. 177. Five days actual notice to the trustee is requisite in Kansas, but actual knowledge is equivalent to the statutory actual notice. Erie Tp. v. Beamer [Kan.] 79 P. 1070. A charter provision that before an action may be maintained it must be shown that a written notice of the defective condition had been given to the common council is unconstitutional. MacMullen v. Middletown, 92 N. Y. S. 410.

91. Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452; Miller v. Canton [Mo. App.] 87 S. W. 96; Deland v. Cameron [Mo. App.] 87 S. W. 597; Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229; Campbell v. Boston [Mass.] 75 N. E. 96; City of Muncie v. Hey [Ind.] 74 N. E. 250; City of Ottawa v. Hayne, 214 Ill. 45, 73 N. E. 385; Miller v. New York, 93 N. Y. S. 227; Idlett v. Atlanta [Ga.] 51 S. E. 709; Ladrick v. Green Island, 92 N. Y. S. 622; Gillard v. Chester [Pa.] 61 A. 929; Small v. Kansas City, 185 Mo. 291, 84 S. W. 901; Ritschdorf v. St. Paul [Minn.] 104 N. W. 129; Walker v. Philadelphia, 211 Pa. 33, 60 A. 318. The law fixes no limit as to what is sufficient time for an obstruction or defect to exist in order to charge a muicipality with notice, and each case must be determined from its own facts. City of Ottawa v. Hayne, 114 Ill. App. 21. The period of time required to charge a municipality with notice of the existence of a defect in the street depends upon the location of the defect, whether in a densely populated part of the city, or upon a street infrequently used, and must, therefore, be determined from the circumstances of each particular case. Kittredge v. Cincinnati, 6 Ohio C. C. (N. S.) 646. Defect existing for two years. Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669. City presumed to have notice of car tracks left in street two and a half years after discontinuance of their use. Cutcher v. Detroit [Mich.] 102 N. W. 629. Negligent ignorance of a defect in a walk is equivalent to actual knowledge. Lorenz v. New Orleans [La.] 38 So. 566; City of Nokomis v. Farley, 113 Ill. App. 161. Notice will not be imputed to a city where the defect was such as to escape the observation of plaintiff who passed over it almost daily for 14 months. Byrne v. Philadelphia [Pa.] 61 A. 80. City presumed to have notice of a hole existing in a sidewalk for several months. City of Chicago v. Davies, 110 Ill. App. 427. Swinging gate. Dorner v. District of Columbia, 21 App. D. C. 284. Stones piled upon the highway insufficient length of time to charge defendant with notice. Hanney v. Wren, 93 N. Y. S. 827. Time insufficient to charge notice. Ibbeken v. New York, 94 N. Y. S. 568. For the jury to decide whether city should have known of defect. McCarthy v. Dedham [Mass.] 74 N. E. 319; Ladrick v. Green Island, 92 N. Y. S. 622; Allen v. West Bay City [Mich.] 12 Det. Leg. N. 70, 103 N. W. 514; Ritschdorf v. St. Paul [Minn.] 104 N. Y. 129; Nestle v. Flint [Mich.] 104 N. W. 406; City of Mattoon v. Faller [Ill.] 75 N. E. 387; Comerford v. Boston [Mass.] 73 N. E. 661; Campbell v. Boston [Mass.] 75 N. E. 96.

92. Drake v. Kansas City [Mo.] 88 S. W. 689; City of Mattoon v. Faller [Ill.] 75 N. E. 387; Wright v. Kansas City, 187 Mo. 678, 86 S. W. 452; Ball v. Neosho [Mo. App.] 83 S. W. 777; Strange v. St. Joseph [Mo. App.] 87 S. W. 2. Where a defect has existed for two years, it will be presumed that the city had sufficient time to repair. Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669. Six months held a reasonable time in which to repair. Knight v. Kansas City [Mo. App.] 87 S. W. 1192.

93. Village of Upper Alton v Green, 112 Ill. App. 439.

94. Cover to coal hole. Drake v. Kansas City [Mo.] 88 S. W. 689.

95. Where a walk was generally defective, a city with knowledge thereof may be liable for injuries resulting therefrom, though it did not have notice of the particular defect causing injury. Heath v. Manson [Cal.] 82 P. 331.

96. See 3 C. L. 1619.

97. Rea v. Sioux City [Iowa] 103 N. W. 949.

98. Hammacher v. New Berlin [Wis.] 102 N. W. 489.

99. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711.

1. McKnight v. Seattle [Wash.] 81 P. 998; Hillyer v. Winsted, 77 Conn. 304, 59 A. 40. Admissibility of evidence to show that city assumed control. Brown v. Towanda Borough, 24 Pa. Super. Ct. 378. Where a city constructs a crossing of stepping stones or permits them to be so laid with its acquiescence and invites the public to use the same as a crossing, the city becomes responsible for the condition thereof. Haxton v.

reasonably safe condition.[3] Regulation of the width of sidewalks is within the discretion of the town authorities.[4] An abutting owner who voluntarily constructs a walk from his premises to the street, a distance of a few feet, and invites the public to use it as a thoroughfare, must use ordinary care to keep the walk in proper condition.[5]

(15) *D. Barriers, railings, and signals.*[6]—A city must use ordinary or reasonable prudence to protect persons lawfully using the street and exercising reasonable care,[8] from falling into dangerous places,[9] and this liability exists, whether the city caused the defect or whether it was caused by a third person, provided the city had notice thereof either actual or constructive.[10] Where a city undertakes to alter, repair or improve its streets, it must use reasonable precautions to guard the public from injury, and if necessary may temporarily close the street to travel;[11] but a city is not liable for personal injuries caused by the neglect of a contractor employed by the county to place proper barriers about a walk in the process of construction.[12] Where a public street is in a dangerous condition, a failure to provide barricades therefor does not confer a right of action in favor of one who voluntarily goes into the danger, knowing its exact character and condition.[13] To relieve itself of statutory liability, a city must give proper notice that a public way is closed to travel,[14] and from a removal of the barriers, the public may infer that it is at liberty to enter

Kansas City [Mo.] 88 S. W. 714. A city is not liable for injuries received on a street sidewalk constructed without the consent or authority of a city and the condition of which was such as to plainly indicate that the sidewalk portion of the street had not been improved. Ruppenthal v. St. Louis [Mo.] 88 S. W. 612. Mere use by the public as for a footpath of a portion of a street that has never been thrown open to public use, cannot cast a responsibility upon a city. Id.

2. Bartley v. New York, 102 App. Div. 23, 92 N. Y. S. 82. Negligence of the city a question for the jury. Olin v. Bradford, 24 Pa. Super. Ct. 7. Duty to keep in a reasonably safe condition extends to a sidewalk which a municipality permits an abutting market house to use for market purposes and in such case more than usual care should be exercised. O'Dwyer v. Northern Market Co., 24 App. D. C. 81. The construction of an approach from a street to a sidewalk at a slope of one foot in seven is not negligence per se. Lush v. Parkersburg [Iowa] 104 N. W. 336. Nor is the laying of plank lengthwise instead of crosswise. Id. Where evidence showed injury caused by flagstone in walk one end of which was raised sufficiently to allow plaintiff's foot to go under it, that the condition had existed a month, that there were no guards or lights, and that one prior accident had occurred, the question of the city's negligence was for the jury. Dickerman v. Weeks, 95 N. Y. S. 714. Such defect cannot be held as a matter of law so slight as to relieve the city of responsibility for its continuance. Id.

3. Miller v. Canton [Mo. App.] 87 S. W. 96.

4. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711.

5. Marsh v. Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630.

6. See 3 C. L. 1620.

7. Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514; City of Vincennes v. Spees [Ind. App.] 74 N. E. 277; Seeton v. Dunbarton [N. H.] 59 A. 944; Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140. In the absence of actual notice, a city is not liable for the removal of an efficient danger signal shown to have been in place 153 minutes before the accident. McFeeters v. New York, 102 App. Div. 32, 92 N. Y. S. 79; Jones v. Boston [Mass.] 74 N. E. 295. Danger signal not necessary in day time for plainly visible excavation. City of Rock Island v. Gingles [Ill.] 75 N. E. 468. In addition to an electric light near a dangerous excavation in a street, there should be danger signals or barriers. City of La Salle v. Evans, 111 Ill. App. 69.

8. City not bound to anticipate extraordinary emergencies. Rhine v. Philadelphia, 24 Pa. Super. Ct. 564; Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140. Approach of a man on a bicycle not an extraordinary emergency. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. City held to have performed its duty in protecting all the usual and ordinary approaches to the place where the walk was torn up. City of Chicago v. McKenna, 114 Ill. App. 270.

9. Temly v. Ishpeming [Mich.] 103 N. W. 588; Hammacher v. New Berlin [Wis.] 102 N. W. 489; Seeton v. Dunbarton [N. H.] 59 A. 944; Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229.

10. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277.

11. Peterson v. Seattle [Wash.] 82 P. 141.

12. Wright v. Muskegon [Mich.] 12 Det. Leg. N. 122, 103 N. W. 558.

13. Village of Lockport v. Licht, 113 Ill. App. 613.

14. Jones v. Boston [Mass.] 74 N. E. 295; Torphy v. Fall River [Mass.] 74 N. E. 465. In Arkansas a city is not liable for injuries resulting from a failure of its servants to display a danger signal at night where a street was barricaded. Collier v. Ft. Smith [Ark.] 84 S. W. 480.

upon the street.[15] Signal lights must be sufficient to warn persons using the street of the existence of the obstruction;[16] but having provided them, the city will not unless it had notice, be liable for the consequences of their removal;[17] and where the law requires barriers, they must be sufficient to withstand any pressure to be reasonably anticipated.[18]

(§ 15) *E. Snow and ice.*[19]—In general a municipality is not liable for injuries arising from ice or snow on its walks or highway by reason of natural causes,[20] and not the proximate cause of injury,[21] but where by reason of travel or the action of the elements, it becomes worn or rounded into ridges uneven and irregular, due care on the part of the city may demand its removal;[22] or where ice is produced by artificial causes, and becomes dangerous to pedestrians, a city is liable for injuries resulting from a failure to remove the ice within a reasonable time after notice express or constructive;[23] and a liability may follow, though another irresponsible condition concur with the city's fault.[24] The diligence required in the removing

15. Torphy v. Fall River [Mass.] 74 N. E. 465.

16. Sufficiency of light for the jury to determine. Godfrey v. New York, 93 N. Y. S. 899; Jones v. Boston [Mass.] 74 N. E. 295. Agents of a city placed a barricade across a public street, which the city was repairing, and allowed the obstruction to remain over night without warning to the public by danger signal or otherwise. By reason of such obstruction and the failure to display a danger signal, the plaintiff was thrown from his horse and injured. Held, that the city was not liable. Collier v. Ft. Smith [Ark.] 84 S. W. 480.

Note: This decision is sustained by the courts of several states, which hold that the duty of a municipal corporation to keep its streets in repair and free from obstructions is of a governmental and public nature and that, in the absence of express statute, the corporation is not liable to an individual who suffers injury by reason of a negligent act or omission as to such duty. Arnold v. San Joss, 81 Cal. 618; Hewison v. New Haven, 37 Conn. 475, 9 Am. Rep. 342; Mitchell v. Rockland, 52 Me. 118; Detroit v. Blackely, 21 Mich. 84; Baxter v. Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84. The weight of authority, however, is, that by voluntarily accepting a special charter or by organizing under a general law, such charter or law giving the municipal corporation power to control the streets, the corporation impliedly contracts with the state to faithfully perform all the duties connected therewith; and that this contract enures to the benefit of every individual who is interested in its performance. Williams, Municipal Liability for Tort, § 71; Barnes v. District of Columbia, 91 U. S. 540, 23 Law Ed. 440; King v. Cleveland, 28 F. 835; City of Aurora v. Rockabrand, 140 Ill. 399; Senhenn v. Evansville, 140 Ind. 675; Stafford v. City Oskaloosa, 64 Iowa, 251; West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917; Pettengill v. Yonkers, 116 N. Y. 558; Van Vranken v. Clifton Springs, 86 Hun. [N. Y.] 67; Arthur v. Charleston, 51 W. Va. 132; Weightman v. Corporation of Washington, 1 Black [U. S.] 39, 17 Law. Ed. 521.—3 Mich. L. R. 490.

17. Where lantern was placed over projecting manhole in street which was being regraded, and notice of the removal of the lantern was not shown, the city was not liable for injuries resulting from a collision of a vehicle with such projection. Gedroice v. New York, 95 N. Y. S. 645.

18. The sufficiency of a railing or barrier is ordinarily a question of fact for the jury. Koontz v. District of Columbia, 24 App. D. C. 59.

19. See 3 C. L. 1620.

20. Warn v. Flint [Mich.] 104 N. W. 37; Templin v. Boone [Iowa] 102 N. W. 789; McCabe v. Whitman [Mass.] 73 N. E. 535. A city is not liable for injuries resulting from a mere slippery condition of the walk. City of Chicago v. McDonald, 111 Ill. App. 436; Garland v. Wilkes-Barre [Pa.] 61 A. 820. Pub. St. 1891, c. 76, § 2, making a town liable for damages happening from snow incumbering highways, was expressly repealed by Laws 1893, p. 49, c. 59, § 5. Miner v. Kopkinton [N. H.] 60 A. 433. The failure of a city to keep its sidewalks clear of ice and snow does not always render it liable to persons who may fall by reason thereof. City of Chicago v. McDonald, 111 Ill. App. 436.

21. Watters v. Waterloo, 126 Iowa, 199, 101 N. W. 871.

22. Templin v. Boone [Iowa] 102 N. W. 789. Peg in walk, surrounded by ice. Rea v. Sioux City [Iowa] 103 N. W. 949. Evidence held sufficient to justify submission to the jury. City of Omaha v. Lewis [Neb.] 103 N. W. 1041; Warn v. Flint [Mich.] 104 N. W. 37. City not presumed to have notice of ice discovered by only one in a thousand persons. Garland v. Wilkes-Barre [Pa.] 61 A. 820.

23. Hofacre v. Monticello [Iowa] 103 N. W. 488; City of Muncie v. Hey [Ind.] 74 N. E. 250. A municipality is liable for injury or loss resulting from an accumulation of ice in the street, where the nuisance thus created has existed for ten days and was caused by water escaping from a water pipe belonging to the city. City of Cincinnati v. Grebner, 7 Ohio C. C. (N. S.) 11. A municipality is liable for injuries resulting from slipping upon a bed of ice on a sidewalk caused by a flow of water in freezing weather, provided the city had notice thereof, actual or constructive. District of Columbia v. Frazer, 21 App. D. C. 154.

24. Templin v. Boone [Iowa] 102 N. W. 789.

of ice is the same, no matter how often the need of removal.[25] In general the duty of a municipality to remove ice and snow from the sidewalks cannot be shifted to individual citizens,[26] though in some states ordinances may require the abutting owner to remove ice and snow;[27] but an owner out of possession, whose sidewalks are in good repair, is not required to watch the walks to prevent the formation of ice thereon so as to make him liable for an injury caused by the sudden accumulation of ice.[28]

(§ 15) *F. Defects created or permitted by abutting owners and others. Joint and several liability.*[29]—No obligation to repair streets or sidewalks rests upon the lot owners at common law.[30] A city is liable for obstructions caused by others only when the city has had actual or constructive notice thereof.[31] That a defect was created in the highway without legislative authority does not relieve the town from liability for injuries resulting therefrom, where the town failed to repair within a reasonable time after notice.[32] If a city knowingly or through the culpable negligence of its officers employs incompetent persons, it is liable for the special damages occasioned thereby.[33] Where a municipal corporation gives a permit to obstruct a street, an absolute duty is imposed upon the corporation to see that the obstruction protects and guards those using the street.[34] A city is not liable for injuries resulting from the acts of an independent contractor except where the work necessarily constitutes an obstruction or defect in the street of such a nature as to render it unsafe or dangerous for the purpose of public travel unless properly guarded,[35] or

25. Hofacre v. Monticello [Iowa] 103 N. W. 488.

26. Coughlin v. District of Columbia, 25 App. D. C. 251. In Illinois a city cannot compel the owner or occupant of property to remove the snow from in front of such property. City of Chicago v. McDonald, 111 Ill. App. 436.

27. City of New Castle v. Kurtz, 210 Pa. 183, 59 A. 989. In Montana a city may by ordinance lawfully impose on the occupants of premises the duty of keeping the sidewalk free from ice and snow. City of Helena v. Kent [Mont.] 80 P. 258.

28. City of New Castle v. Kurtz, 210 Pa. 183, 59 A. 989.

29. See 3 C. L. 1621.

30. Krebs v. Heitmann, 93 N. Y. S. 542.

31. O'Dwyer v. Northern Market Co., 24 App. D. C. 81. A city is not liable for injuries resulting from an unlawful excavation in an alley made without knowledge of the city and the city not being negligent therein. Covington Saw Mill & Mfg. Co. v. Drexilius [Ky.] 87 S. W. 266. No liability rests upon a city for injuries from an excavation in a street made under charter rights by a railroad contractor who had not abandoned the work. Long v. Philadelphia [Pa.] 61 A. 810. The negligence of an abutting owner does not relieve a city of the duty to keep its sidewalks in repair. Campbell v. Boston [Mass.] 75 N. E. 96.

32. Foley v. Ray [R. I.] 61 A. 50.

33. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691.

34. Godfrey v. New York, 93 N. Y. S. 899. A city authorized an excavation under a public sidewalk, and the construction of a temporary bridge over the opening. Under the weight of a crowd, the bridge gave way. Held, in an action for the death of a person injured thereby, that there is no evidence to support a verdict against the city, but that it is a question for the jury whether the contractors who built the bridge were negligent in its construction. Coolidge v. New York, 99 App. Div. 175, 90 N. C. S. 1078.

Note: A city is under a duty to keep its streets in reasonably safe condition. While not an insurer, it must use due care, and this duty of care cannot be delegated. Village of Jefferson v. Chapman, 127 Ill. 438. Hence the city is liable for injuries due to the dangerous condition of highways obstructed by city works, though the danger is caused by the negligence of independent contractors. Storrs v. Utica, 17 N. Y. 104; City Council v. Cone, 91 Ga. 714. It is not liable for their negligence when it does not affect the condition of the way. Herrington v. Lansingburgh, 110 N. Y. 145. This duty being the basis of liability, the same reasoning applies where work is done in a street, for private persons under the city's license. Hayes v. West Bay City, 91 Mich. 418. In the principal case, since the city had notice that a dangerous opening had been made, a finding that the opening was negligently protected, no matter who was charged with the immediate duty of making the bridge safe, seems as conclusive against the city as against the contractor.—18 Harv. L. R. 470.

35. La Groue v. New Orleans [La.] 38 So. 160; Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. A city is liable for damages inflicted by its independent contractor when the work is performed in a manner inherently dangerous or when the work is done pursuant to a special franchise or charter power. Dynamite used in tunnel construction. City of Chicago v. Murdoch, 113 Ill. App. 656. A city is jointly liable with a contractor for any injury resulting to a traveler on the street from the

where the municipal authorities have the right and power to interfere so as to prevent what is being negligently done.[36] That at the time of accident a city contractor was under obligations to keep the street in repair is no defense in an action against the city for personal injuries.[37] An abutting owner is liable for any negligent act creating a dangerous defect or obstruction in a street or highway,[38] or a way which to his knowledge the public is rightfully accustomed to use;[39] but not for damages arising from unknown ordinary want of repair[40] arising after the lease of the property,[41] for then the tenant in general becomes responsible;[42] but the abutting owner is not liable for the negligence of an independent contractor.[43] Highways are for the convenience of the public; and persons using them for other purposes must use a reasonable care proportionate to the danger to travelers;[44] and where such use was in pursuance of municipal permission, no liability arises from injuries accidentally resulting therefrom;[45] but the user is not relieved from the exercise of care commensurate with the dangers apparent and to be presumed.[46] One who is injured by the negligence of two or more persons, he himself being free from negligence, may maintain an action against them jointly or severally,[47] and when such action is brought, a defendant cannot successfully defend on the ground that the negligence of another contributed to the injury.[48] To entitle a city to recover from the abutting owner a judgment rendered against the city for injuries from a defective walk, notice must have been given such owner of the pendency of the suit against the city.[49] The owner of a city lot occupied by a tenant is not liable to a city upon a verdict recovered against it for personal injuries by a fall on the ice in front of the

failure of the contractor to properly guard an obstruction left in the street by him. Godfrey v. New York, 93 N. Y. S. 899. The construction of a sidewalk being under a contract with county supervisors, and a city having no supervision or control over the work, such city was not liable for injuries resulting from negligence of the contractor in course of construction. Wright v. Muskegon [Mich.] 12 Det. Leg. N. 122, 103 N. W. 558.

36. Koontz v. District of Columbia, 24 App. D. C. 59.

37. Harvey v. Chester [Pa.] 61 A. 118.

38. Krebs v. Heitmann, 93 N. Y. S. 542; Hart v. McKenna, 94 N. Y. S. 216. A cellar door which is a part of the sidewalk must be maintained in a reasonably safe condition. Carson v. Mackin, 23 Pa. Super. Ct. 50. Cellar door and its casing projecting above level of sidewalk in which it was set. Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30. In action against the abutting owner for injuries or sustained from slipping on the icy sidewalk, evidence held insufficient to prove that icy condition was caused by water artificially conducted upon the walk, and not by water flowing there naturally or by melted snow on the walk. Hence plaintiff could not recover. Greenlaw v. Milliken [Me.] 62 A. 145.

39. Rooney v. Woolworth [Conn.] 61 A. 366 One who knowingly leaves his property open impliedly licenses its use by the public and assumes an obligation to keep it in reasonably safe condition Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

40. Lindstrom v. Pennsylvania Co. [Pa.] 61 A. 940.

41. Lindstrom v. Pennsylvania Co. [Pa.] 61 A. 940. Though the lessee covenants to keep in repair, the owner of a building is liable to a traveler injured by the falling of an eavestrough so defective at the time of the lease as to be a nuisance. Keeler v. Lederer Realty Corp., 26 R. I. 524, 59 A. 855.

42. Lindstrom v. Pennsylvania Co. [Pa.] 61 A. 940. Negligent act of the tenant in allowing ice to accumulate on a sidewalk contrary to a covenant in the lease. Wixon v. Bruce, 187 Mass. 232, 72 N. E. 978.

43. Massey v. Oates [Ala.] 39 So. 142.

44. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078; Godfrey v. New York, 93 N. Y. S. 899. One using a sidewalk for business purposes must keep the walk reasonably safe for persons passing thereon while in the exercise of ordinary care. Garibaldi v. O'Connor, 112 Ill. App. 53. Unguarded excavation in the street. Indianapolis St. R. Co. v. James [Ind. App.] 74 N. E. 536. Unauthorized construction of a blind ditch in an alley. Covington Saw Mill & Mfg. Co. v. Drexilius [Ky.] 87 S. W. 266. Defendant may call expert and other witnesses to show that a temporary passageway was erected with reasonable regard to the rights of the public. McDonald v. Holbrook, C. & D. Contracting Co., 93 N. Y. S. 920. An abutting owner is not under ordinary circumstances charged with the duty to render building materials in the street safe for persons who attempt to use it for their own purposes. Friedman v. Snare & Triest Co. [N. J. Err. & App.] 61 A. 401.

45. White v. Roydhouse, 211 Pa. 13, 60 A. 316.

46. Durfield v. New York, 101 App. Div. 581, 92 N. Y. S 204.

47, 48. Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. S. 663.

49. Chester v. Schaffer, 24 Pa. Super. Ct. 162.

premises, where the sidewalk was in good repair and the owner had no notice of its condition, of which the city had actual notice.[50] Where negligence is charged against the District of Columbia, a recovery will be allowed only where there is a plain and obvious neglect of duty on the part of the municipal agents.[51]

(§ 15) *G. Persons entitled to protection.*[52]—It will be presumed that all persons have a right to the reasonable use of the public highway.[53] One using a way in the exercise of her lawful right is entitled to the protection regardless of whether she is a licensee,[54] though a recent case holds against the majority that a child playing about building materials in a street is a trespasser.[55] A special policeman duly commissioned but in the pay of private persons for the sole purpose of guarding their property is entitled to protection as a traveler.[56] The use of a sidewalk by the owner of a lot for the purpose of communication with the street is equally legitimate and equally an ordinary use, as that of passing longitudinally along it.[57] When one reaches the street or what from the nature of the construction appears to be part of the street, he is entitled to the protecting care of the city.[58]

(§ 15) *H. Remote and proximate cause of injury.*[59]—The principle of proximate cause applies as well to injuries from defective highways as to other negligence cases,[60] and upon conflicting evidence the cause of an injury alleged to have resulted from a fall upon a defective sidewalk is for the jury.[61] To recover from a city, under the Massachusetts statute, the city's negligence must have been the sole culpable cause of injury.[62]

50. City of New Castle v. Kurtz, 210 Pa. 183, 59 A. 989.

51. Smith v. District of Columbia, 25 App. D. C. 370.

52. See 3 C. L. 1622.

53. Yates v. Big Sandy R. Co. [Ky.] 89 S. W. 108.

54. Rooney v. Woolworth [Conn.] 61 A. 366.

55. Plaintiff's infant child, between four and five years of age, was injured while playing on some iron girders piled on the street by the defendants in front of a factory which they were engaged in repairing. The girders were piled in a negligent manner. Held, that the defendants owed no duty to the child who was a mere trespasser. Friedman v. Snare & Triest Co. [N. J. Err. & App.] 61 A. 401.

Note: Two judges dissented and the decided weight of authority seems to be against the holding of the majority. In order to arrive at its conclusion, the court found it necessary to repudiate Lynch v. Nurdin, 1 Q. B. (Ad. & El. N. C.) 29, 41 E. C. L. 422, the leading English case in point. The Massachusetts court and the New Jersey court, in the present case, are the only tribunals in this country which have not confirmed Lynch v. Nurdin. Beach, Con. Neg. § 141; Edgington v. Burlington, etc., R. Co., 116 Iowa, 410. The case of Hughes v. Macfie, 2 H. & C. 744, 33 L. J. Exch. 177, much relied upon by the court is not in point, the opinion of Pollock (C. B.) being based on the contributory negligence of the plaintiff. In the principal case, the doctrine of contributory negligence is not invoked. Mangan v. Atterton, L. R. 1 Exch. 259, 4 H. & C. 388, 35 L. J. Exch. 161, which supports the present case, was virtually overruled by Clark v. Chambers, 3 Q. B. Div. 327. "Nothing worse than this (Mangan v. Atterton) as a specimen of judicial reasoning can be found in the reports." Beach, Con. Neg. § 139. The doctrine of the turntable cases would seem to be applicable: Where a child of tender years is injured, while playing on a turntable, through the negligence of the owners, by the great weight of authority the company is liable, even though the child was a trespasser. Sioux City, etc., R. Co. v. Stout, 17 Wall. [U. S.] 657, 21 Law. Ed. 745; Edgington v. Burlington, etc., R. Co. (above). See, also, 29 Am. & Eng. Enc. of Law [2d Ed.] p. 32, for other cases. An abutting owner placing materials upon the public highway in front of his premises is bound to exercise reasonable care to prevent injury therefrom to children of tender years. Rachmel v. Clark, 205 Pa. 314, 54 A. 1027; Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261; Price v. Water Co., 58 Kan. 551, 50 P. 450, 62 Am. St. Rep. 625; Bramson's Adm'r v. Lobert, 81 Ky. 638, 50 Am. Rep. 193.—From 4 Mich. L. R. 78.

56. Klopfer v. District of Columbia, 25 App. D. C. 41.

57. Schindler v. Schroth, 146 Cal. 433, 80 P. 624.

58. Open cellar way extending a foot into the sidewalk. Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140.

59. See 3 C. L. 1623.

60. Vander Velde v. Leroy [Mich.] 12 Det. Leg. N. 183, 103 N. W. 812; Watters v. Waterloo, 126 Iowa, 199, 101 N. W. 871; Rhine v. Philadelphia, 24 Pa. Super. Ct. 564; Marsh v. Giles, 211 Pa. 17, 60 A. 315; Menzies v. Interstate Pav. Co., 94 N. Y. S. 492; Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514; Hopkins v. Williamsport, 25 Pa. Super. Ct. 498.

61. City of Chicago v. Bush, 111 Ill. App. 638.

62. Block v. Worcester, 186 Mass. 526, 72 N. E. 77.

(§ 15) *I. Contributory negligence of person injured.*[63]—As in negligence cases generally, the negligence of the plaintiff contributing to the injury will bar recovery,[64] except as to infants of tender years,[65] the question being on a conflict of the evidence one of fact for the jury,[66] but for the court if the evidence be undisputed.[67] The existence of a walk is an invitation to passers-by to use it,[68] and in the absence of knowledge or warning to the contrary, one may assume that a walk or street is safe or reasonably so,[69] and need not be on the lookout for hidden dangers;[70] they

63. See 3 C. L. 1623.

64. Bussell v. Ft. Dodge, 126 Iowa, 308, 101 N. W. 1126; City of Beatrice v. Forbes [Neb.] 103 N. W. 1069; Morris v. Interurban St. R. Co., 100 App. Div. 295, 91 N. Y. S. 479. Mere carelessness does not prevent recovery, unless it be negligence. Lynch v. Waldwick, 123 Wis. 351, 101 N. W. 925; Bartley v. New York, 102 App. Div. 23, 92 N. Y. S. 82.

65. Parrish v. Huntington [W. Va.] 50 S. E. 416. Contributory negligence held not to be imputable of child of nine years, though having knowledge of defect in the walk. Lorenz v. New Orleans [La.] 38 So. 566.

66. Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617; Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446; Lynch v. Waldwick, 123 Wis. 351, 101 N. W. 925; Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669; Warn v. Flint [Mich.] 104 N. W. 37; Haxton v. Kansas City [Mo.] 88 S. W. 714; Deland v. Cameron [Mo. App.] 87 S. W. 597; Vander Velde v. Leroy [Mich.] 12 Det. Leg. N. 183, 103 N. W. 812; City of Lexington v. Kreitz [Neb.] 103 N. W. 444; Torphy v. Fall River [Mass.] 74 N. E. 465; Bussell v. Ft. Dodge, 126 Iowa, 308, 101 N. W. 1126; Templin v. Boone [Iowa] 102 N. W. 789; Godfrey v. New York, 93 N. Y. S. 899; Shane v. National Biscuit Co., 102 App. Div. 188, 92 N. Y. S. 637; Dougherty v. Philadelphia [Pa.] 60 A. 261; Block v. Worcester, 186 Mass. 526, 72 N. E. 77; Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102; Thuis v. Vincennes [Ind. App.] 73 N. E. 141; Nichols v. New Rochelle, 93 N. Y. S. 796; Campbell v. Boston [Mass.] 75 N. E. 96; Hensley v. Davidson Bros. Co. [Iowa] 103 N. W. 975; Ward v. District of Columbia, 24 App. D. C. 524; Lemman v. Spokane [Wash.] 80 P. 280; Morse v. New York Cent., etc., R. Co., 102 App. Div. 495, 92 N. Y. S. 657; Town of Winamac v. Stout [Ind.] 75 N. E. 158; District of Columbia v. Dietrich, 23 App. D. C. 577; City of Pontiac v. Grandy, 108 Ill. App. 466; Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, 71 N. E. 1015; Olin v. Bradford, 24 Pa. Super. Ct. 7; Farrell v. Plymouth Borough, 26 Pa. Super. Ct. 183. Where one goes upon a public stairway in the nighttime, which he knows to be out of repair, but is lighted by an electric lamp, and which he could not avoid without going three squares out of his way over partially improved streets, and when half way up, the lamp goes out, and while groping in the darkness he is injured, there is in his suit against the municipality for damages a question of fact for the jury as to contributory negligence, and to take the case from the jury is error. Puccini v. Cincinnati, 3 Ohio N. P. (N. S.) 362. Contributory negligence for jury where plaintiff caught foot in raised flagstone, on a dark street, opposite a building in course of construction. Dickerman v. Weeks, 95 N. Y. S. 714.

67. Ward v. District of Columbia, 24 App. D. C. 524; Powell v. New Omaha Thomson-Houston Elec. Light Co. [Neb.] 104 N. W. 162; Walker v. Philadelphia, 211 Pa. 33, 60 A. 318; Easton v. Philadelphia, 26 Pa. Super. Ct. 517; Conner v. Nevada [Mo.] 86 S. W. 256; Harvey v. Malden [Mass.] 74 N. E. 327. Mother not guilty of contributory negligence in death of child due to defective walk. City of Newport News v. Scott's Adm'x, 103 Va. 794, 50 S. E. 266. Driver's negligence, if any, held not imputable to a passenger in the same vehicle. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126. A presumption of negligence does not arise under a petition which alleges that the plaintiff was injured while walking on a sidewalk which was out of repair. Peat v. Norwalk, 3 Ohio C. C. (N. S.) 614.

68. City of Chicago v. Harris, 113 Ill. App. 633.

69. Bartley v. New York, 102 App. Div. 23, 92 N. Y. S. 82; Kaiser v. Hahn Bros., 126 Iowa, 561, 102 N. W. 504; Tiborsky v. Chicago, etc., R. Co. [Wis.] 102 N. W. 549; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Conner v. Nevada [Mo.] 86 S. W. 256; Campbell v. Boston [Mass.] 75 N. E. 96; Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669; Nichols v. New Rochelle, 93 N. Y. S. 796; Ward v. District of Columbia, 24 App. D. C. 524; Gillard v. Chester [Pa.] 61 A. 929; Templin v. Boone [Iowa] 102 N. W. 789; City of Pascagoula v. Kirkwood [Miss.] 38 So. 547; Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102; Godfrey v. New York, 93 N. Y. S. 899; Haxton v. Kansas City [Mo.] 88 S. W. 714; Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229; Village of Wilmette v. Brachle, 110 Ill. App. 356; Lemman v. Spokane [Wash.] 80 P. 280. Temporary bridge. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078. Not negligence for one upon a walk composed of three longitudinal planks to step on one of the outer planks or to step on a board covering a hole, not knowing it to be such. Pecor v. Oconto [Wis.] 104 N. W. 88.

70. Ward v. District of Columbia, 24 App. D. C. 524; Campbell v. Boston [Mass.] 75 N. E. 96; City of Beatrice v. Forbes [Neb.] 103 N. W. 1069; Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140; Drake v. Kansas City [Mo.] 88 S. W. 689. Pedestrian need not keep a constant watch of the sidewalk. Village of Upper Alton v. Green, 112 Ill. App. 439. The exercise of due care and caution does not require one walking at night on an ordinary city sidewalk to examine every step of the way, where there is no reason to suppose the walk is not in sound condition. City of Chicago v. Harris, 113 Ill. App. 633.

may rightfully cross the traveled roadway of a street at any point.[71] Knowledge of a defect may constitute contributory negligence,[72] and is presumptive evidence thereof;[73] but it is not negligence per se,[74] and a traveler is not precluded from following a way he knows to be defective;[75] or an alley instead of a street,[76] where he is justified in believing and does believe that by ordinary care he may pass in safety,[77] and he in fact does use such care.[78] Travelers must use reasonable[79] or ordinary care,[80] in view of all circumstances,[81] which is generally a question for the jury.[82]

71. Gillard v. Chester [Pa.] 61 A. 929.

72. Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30; Campbell v. Boston [Mass.] 75 N. E. 96; City of Muncie v. Hey [Ind.] 74 N. E. 250; City of Mattoon v. Faller [Ill.] 75 N. E. 387; Missouri & K. Tel. Co. v. Vandervort [Kan.] 79 P. 1068; Village of Wilmette v. Brachle, 110 Ill. App. 356. Evidence held not to justify a finding that plaintiff knew of the defect. Rainey v. Lawrence [Kan.] 79 P. 116.

73. Village of Lockport v Licht, 113 Ill. App. 613.

74. Lorenz v. New Orleans [La] 38 So. 566; City of Pascagoula v. Kirkwood [Miss.] 38 So. 547; Missouri & K. Tel. Co. v. Vandervoort [Kan.] 79 P. 1068; Erie Tp. v. Beamer [Kan.] 79 P. 1070; City of Beatrice v. Forbes [Neb.] 103 N. W. 1069; Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102; Templin v. Boone [Iowa] 102 N. W. 789; Rea v. Sioux City [Iowa] 103 N. W. 949; Arnold v. Waterloo [Iowa] 104 N. W. 442; City of Mattoon v. Faller [Ill.] 75 N. E. 387; City of Muncie v. Hey [Ind.] 74 N. E. 250; Bradley v. Spickardsville, 90 Mo. App. 416; City of Muncie v. Spence, 33 Ind. App. 599, 71 N. E. 907. A pedestrian's observance of a defect in a walk some days before the accident does not of itself raise a presumption of contributory negligence. Deland v. Cameron [Mo. App.] 87 S. W. 597. Previous knowledge of uncovered catchbasin in the highway held not negligence per se, where night was dark and plaintiff was attempting to board a street car. Veach v. Champaign, 113 Ill. App. 151.

75. Missouri & K. Tel. Co. v. Vandervort [Kan.] 79 P. 1068; Thuis v. Vincennes [Ind. App.] 73 N. E. 141; Bradley v. Spickardsville, 90 Mo. App. 416. A traveler is not required to go into the street when there is danger from passing cars and vehicles, to avoid passing over a defective walk. City of Pascagoula v. Kirkwood [Miss.] 38 So. 547.

76. The fact that a pedestrian might have used a safe street instead of a defectively paved alley does not excuse a city, since it is under the duty of keeping all streets and alleys used by the public in a reasonably safe condition. City of Covington v. Lee [Ky.] 89 S. W. 493.

77. Templin v. Boone [Iowa] 102 N. W. 789; Tuttle v. Clear Lake [Iowa] 102 N. W. 136; City of Beatrice v. Forbes [Neb.] 103 N. W. 1069; Arnold v. Waterloo [Iowa] 104 N. W. 442. People u sing public sidewalks may to some extent rely on the implied assurance that after the lapse of a sufficient time in which to make repairs, defects previously noticed have been remedied. Deland v. Cameron [Mo. App.] 87 S. W. 597. One who knows of the existence of a dangerous obstruction must exercise unusual care in approaching it. McDonald v. Holbrook, C. & D. Contracting Co., 93 N. Y. S. 920.

78. City of Mattoon v. Faller [Ill.] 75 N. E. 387; Rea v. Sioux City [Iowa] 103 N. W. 949; Thuis v. Vincennes [Ind. App.] 73 N. E. 141; City of Muncie v. Hey [Ind.] 74 N. E. 250; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Missouri & K. Tel. Co. v. Vandervort [Kan.] 79 P. 1068; Erie Tp. v. Beamer [Kan.] 79 P. 1070; Lemman v. Spokane [Wash.] 80 P. 280.

79. Must use their eyes and watch where they are going. Iseminger v. York Haven Water & Power Co., 209 Pa. 615, 59 A. 64; Byrne v. Philadelphia [Pa.] 61 A. 80; Ladrick v. Green Island, 92 N. Y. S. 622; Parrish v. Huntington [W. Va.] 50 S. E. 416; Dougherty v. Philadelphia [Pa.] 60 A. 261; Idlett v. Atlanta [Ga.] 51 S. E. 709. Not negligent. Bartley v. New York, 102 App. Div. 23, 92 N. Y. S. 82. Where a jury return special findings to the effect that the street crossing where the plaintiff was injured, while not manifestly unsafe, was nevertheless not safe, and the plaintiff knew of its condition, and could have avoided it but not easily, and the testimony supported these findings, a judgment in favor of the plaintiff will be reversed. City of Akron v. Keister, 6 Ohio C. C. (N. S.) 603.

80. Jewell City v. Van Meter [Kan.] 79 P. 149; Deland v. Cameron [Mo. App.] 87 S. W. 597; Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188. One injured on a defective sidewalk must show ordinary care was exercised to avoid the injury. Peat v. Norwalk, 5 Ohio C. C. (N. S.) 614.

81. Lemman v. Spokane [Wash.] 80 P. 280; Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446; Idlett v. Atlanta [Ga.] 51 S. E. 709; City of Pascagoula v. Kirkwood [Miss.] 38 So. 547; Persons with defective vision must use greater care than would be required of an ordinary person. Kaiser v. Hahn Bros., 126 Iowa, 561, 102 N. W. 504. Not necessarily negligent for a traveler to run along a sidewalk, upon a rainy night, with his head down and close to the building line. City of Ottawa v. Hayne, 114 Ill. App. 21. A man who rides a gentle horse with a halter only, and without saddle or bridle, is not as a matter of law guilty of such contributory negligence as will preclude a recovery for injuries caused by defects in a public street. Helbig v. Grays Harbor Elec. Co., 37 Wash. 130, 79 P. 612. Pedestrian stepping into a hole just as she emerged from a crowd. Becker v. Philadelphia [Pa.] 61 A. 942.

82. Lemman v. Spokane [Wash.] 80 P. 280; Tuttle v. Clear Lake [Iowa] 102 N. W. 136; Becker v. Philadelphia [Pa.] 61 A. 942; Arnold v. Waterloo [Iowa] 104 N. W. 442; Iseminger v. York Haven Water & Power Co., 209 Pa. 615, 59 A. 64; Patterson

Voluntary drunkenness, as a result of which a person is unable to use due care to protect himself, bars a recovery for injury caused by defective paving.[83]

(§ 15) *J. Notice of claim for injury and intent to sue.*[84]—It is frequently provided by statute or charter that no action shall be brought to recover for injuries unless notice thereof shall have been seasonably served [85] upon the proper officer; [86] but such statutes are not generally given a strict construction,[87] though substantial compliance is necessary.[88] A notice giving such information as enables the city to investigate the injury is generally sufficient,[89] if given in good faith and without intent to mislead and in fact not misleading.[90] A claim having once become barred by such a statute of limitations cannot be revived, even by consent of the municipal officers.[91] A city clerk is competent to testify that plaintiff's claim was presented to the city council and disallowed before the commencement of the action.[92] A charter provision prohibiting the payment of claims unless presented to and passed upon

v. Pittsburg, etc., R. Co., 210 Pa. 47, 59 A. 318. For the jury to determine whether plaintiff attempted to cross a street at an irregular place which the city had not put in use for pedestrians. Haxton v. Kansas City [Mo.] 88 S. W. 714. Ordinary care on the part of one injured by reason of a defective sidewalk may be shown by the circumstances of the occurrence and the conduct of the person injured. Village of Upper Alton v. Green, 112 Ill. App. 439.

83. City of Covington v. Lee [Ky.] 89 S. W. 493.

84. See 3 C. L. 1625.

85. Van Auken v. Adrian [Mich.] 98 N. W. 15. Code, §§ 3531, 3447. McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80. Rev. St. 1898, § 1339. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22. Laws 1895, p. 733, c. 394, § 345. Forseyth v. Oswego, 95 N. Y. S. 33. Plaintiff held not to have been so physically incapacitated as to excuse a failure to file notice of claim. Attempted service of notice after office hours of proper official held insufficient. Ehrhardt v. Seattle [Wash.] 82 P. 296. Such statutes have no application to an employe of the city injured in the discharge of his duties (Kelly v. Faribault [Minn.] 104 N. W. 231), or to a claim against a gas company for leaving a street in a defective condition (Seltzer v. Amesbury & S. Gas Co. [Mass.] 74 N. E. 339), or for the maintaining of a nuisance [Laws 1897, p. 453, c. 414.] (Gerow v. Liberty, 94 N. Y. S. 949), or for the negligent delay in constructing a sewer (Fagere v. Cook [R. I.] 60 A. 1067).

86. Acknowledgment of service by mayor held sufficient. McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80. Written notice left at the home of a selectman and presumably handed to him, held sufficient. McCarthy v. Dedham [Mass.] 74 N. E. 319.

87. Service on the proper clerk, though not at the meeting of the board, as specified by statute, and though the clerk failed to present the claim to the board, held sufficient. Dobson v. Oneida, 94 N. Y. S. 958.

88. Lyons v. St. Joseph [Mo. App.] 87 S. W. 588.

89. In Iowa notice need not state causes which produced injury. McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80; Pecor v. Oconto [Wis.] 104 N. W. 88; Nestle v. Flint [Mich.] 12 Det. Leg. N. 376, 104 N. W. 406; Strange v. St. Joseph [Mo. App.] 87 S. W. 2; Ritschdorf v. St. Paul [Minn.] 104 N. W. 129. In an action for the recovery of money for injuries from falling on a defective sidewalk, the description in the petition of the place where the accident occurred will not be construed as strictly as a description in an indictment. City of Toledo v. Willinger, 6 Ohio C. C. (N. S.) 641. A notice couched in such terms as to enable an ordinarily intelligent man to find the place and understand how and when the accident happened is sufficiently specific. Elson v. Waterford, 138 F. 1004. Alleged indefinite description of defect is not open to review unless attacked before verdict. Ball v. Neosho [Mo. App.] 83 S. W. 777. Notice not insufficient because it contained an offer to accept a certain sum of money "by way of compromise or settlement in order to avoid litigation." Bland v. Mobile [Ala.] 37 So. 843. Notice held sufficient under Rev. St. 1899, § 5724. Burnette v. St. Joseph [Mo. App.] 87 S. W. 589. Notice merely reciting that the injury was received "while walking on the sidewalk of the city at the intersection of" certain streets is insufficient under Rev. St. 1899, § 5724. Lyons v. St. Joseph [Mo. App.] 87 S. W. 588. Notice insufficient. Forseyth v. Oswego, 95 N. Y. S. 33.

90. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22; McCarthy v. Dedham [Mass.] 74 N. E. 319. Where different portions of the same street are known by different names, and the petition of one seeking damages on account of a fall on a defective sidewalk alleges that the accident occurred on this street, giving the name of one section thereof, whereas the accident is shown by the testimony to have occurred a few feet beyond the dividing line between the portion of the street named and that bearing another name, the variance is not such as will defeat recovery, where there is no claim that the municipality was misled thereby to its prejudice. City of Toledo v. Willinger, 6 Ohio C. C. (N. S.) 641.

91. Van Auken v. Adrian [Mich.] 98 N. W. 15. Facts held not to constitute a waiver of defects in plaintiff's claim. Forseyth v. Oswego, 95 N. Y. S. 33.

92. Jewell City v. Van Meter [Kan.] 79 P. 149.

by certain officials does not make such presentation a condition precedent to bringing suit for personal injuries.[93]

(§ 15) *K. Actions.*[94]—The general rule as to variance,[95] sufficiency of allegations,[96] and amendments, apply.[97]

Evidence.[98]—In an action for injuries from a defective walk, it is proper to admit evidence as to the character and time of repairs,[99] or photographs of a defective walk, exhibiting its exact condition except ice and snow,[1] or photographs showing the condition of a walk at the time of accident, though taken subsequently.[2] The general bad condition of the walk in the immediate vicinity of the place of accident,[3] and the condition of a walk at other times than that of the accident, may be shown as indicating knowledge by the city,[4] but that others had fallen at the same place is not admissible where barriers were placed after such preceding fall and the barriers remained at the time of plaintiff's injury.[5] Where the exact place of the accident is uncertain, evidence of the long continued defective condition of the sidewalk in question is admissible.[6] Evidence that other persons drove their teams safely over the place of accident about the same time should be excluded.[7] Where by stipulation a city admits that the alleged place of accident was under municipal control, the admission of evidence that after the injury the city notified the abutting owner to repair the defect is prejudicial.[8] A jury is not bound by the testimony of

93. 12 Sp. Laws 869. Hillyer v. Winsted, 77 Conn. 304, 59 A. 40.

94. See 3 C. L. 1626.

95. Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514; Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 613; O'Hey v. Commonwealth Title Ins. Trust Co., 27 Pa. Super. Ct. 137; Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437; McKnight v. Seattle [Wash.] 81 P. 998; Town of Cicero v. Bartelme, 114 Ill. App. 9. Under the Alabama statute a claim in court for $1,000.00 is a fatal variance when the claim filed with the city of Mobile as a condition precedent of bringing suit was for $500.00. Acts 1901, p. 2363, § 22. Bland v Mobile [Ala.] 37 So. 843.

96. In an action for injuries from a defective sidewalk, an allegation that the walk was condemned by ordinance is not prejudicial to the defendant, no proof being offered to sustain the averment. City of Eureka v. Neville [Kan.] 79 P. 162. Where an action is based only on the defective condition of walks, it is not necessary to plead ordinances which are desired to be used for evidential purposes. Bailey v. Kansas City [Mo.] 87 S. W. 1182. Declaration based on failure to keep the streets in a reasonably safe condition held not demurrable for want of facts. McCauley v. Greenville [Mass.] 37 So. 818. In an action to recover for personal injuries sustained by reason of an obstruction in a sidewalk, it is essential to allege that the place of accident was treated and controlled by the municipality as a public thoroughfare. Parrish v. Huntington [W. Va.] 50 S. E. 416. Plaintiff need not aver freedom from contributory negligence, it being a matter of proof for defendant. Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188. It is not error in a suit for damages for an injury from falling on a defective sidewalk to charge that the jury must find from a preponderance of the evidence that the plaintiff was without fault where there is evidence tending to show contributory negligence. Peat v. Norwalk, 5 Ohio C. C. (N. S.) 614. Allegations of negligence as to unsafe bridge held sufficient. City of Indianapolis v. Cauley [Ind.] 73 N. E. 691. Declaration for personal injury from a defective sidewalk held to subject to dismissal on demurrer. Idlett v. Atlanta [Ga.] 51 S. E. 709. Complaint based on failure to erect barriers held insufficient. City of Vincennes v. Spees [Ind. App.] 74 N. E. 277.

97. Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437; District of Columbia v. Frazer, 21 App. D. C. 154. Where there is no claim of a surprise, a complaint for personal injuries may be amended as to the date of th eaccident. Ladrick v. Green Island, 92 N. Y. S. 622. A complaint is not fatally defective for failure to set forth that the defect in a sidewalk relied on as a cause of action was the same defect as set out in a previous notice to the town, such a fault being subject to amendment. Elson v. Waterford 138 F. 1004.

98. See 3 C. L. 1627.

99. McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80.

1. Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102.

2. Miller v. New York, 93 N. Y. S. 227.

3. Pumorlo v. Merrill [Wis.], 103 N. W. 464; Miller v. Canton [Mo. App.] 87 S. W. 96. As also is evidence concerning the condition of the walk near the point of accident. McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80.

4. Hofacre v. Monticello [Iowa] 103 N. W. 488.

5. Vander Velde v. Leroy [Mich.] 12 Det. Leg. N. 183, 103 N. W. 812.

6. Nestle v. Flint [Mich.] 12 Det. Leg. N. 376, 104 N. W. 406; Perry v. Potsdam, 94 N. Y. S. 683.

7. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22.

8. Bailey v. Kansas City [Mo.] 87 S. W. 1182.

sidewalk experts.[9] Declarations by one made immediately after the receipt of painful injuries are admissible as part of the res gestae;[10] but statements of deceased made over a mile from the accident and an hour afterward in response to questions, he not having been unconscious, are not res gestae.[11] Witnesses may testify to the depth of a hole in a street, although they estimated the depth by mere visual observation.[12] A city ordinance prescribing the duty of street officers is admissible to show that complaint of a street's defective condition was made to the proper person.[13] The original notice of intention to sue having been lost, secondary evidence thereof is admissible.[14] The admission of proof of filing of notice when not required is not reversible error.[15]

§ 16. *Injury to, obstructions of, or encroachment on, street or highway.*[16]—There can be no rightful permanent use of a highway by individuals for private purposes, and such may be restrained,[17] though a temporary and reasonable use of the streets and walks for construction purposes is lawful,[18] in which case the city must require the work to be properly conducted,[19] and permissions to excavate in the street does not authorize the leaving of a dangerous obstruction in the highway.[20] An object which subserves the use of streets need not necessarily be considered an obstruction, though it may occupy some part of the space of the street.[21] The public

9. St. Louis v. Kansas City, 110 Mo. App. 653, 85 S. W. 630.

10. District of Columbia v. Dietrich, 23 App. D. C. 577. Declarations by one injured by falling on a defective sidewalk, made immediately upon her arrival at home and within half an hour of the accident, are res gestae. Rothrock v. Cedar Rapids [Iowa] 103 N. W. 475.

11. White v. Marquette [Mich.] 12 Det. Leg. N. 141, 103 N. W. 698.

12. Miller v. New York, 93 N. Y. S. 227.

13. City of Gibson v. Murray [Ill.] 75 N E. 319.

14. Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102.

15. City of Lexington v. Kreitz [Neb.] 103 N. W. 444.

16. See 3 C. L. 1628.

17. Show cases and bay windows constructed with permission of city. Forbes v. Detroit [Mich.] 102 N. W. 740; Dormer v. District of Columbia, 21 App. D. C. 284; Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864; People v. Atchison, T. & S. F. R. Co. [Ill.] 75 N. E. 573; Hayden v. Stewart [Kan.] 80 P. 43; City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998. A petition to restrain an interference with a road, describing the road with such certainty that its location was well understood and defendant was not misled, is sufficient. Smoot v. Wainscott [Ky.] 89 S. W. 176. Evidence held to show a railroad company's right to use a street for railway purposes restricted only by the right of the public to the reasonable use the street and the right of all persons not to have a nuisance imposed. Oklahoma City & T. R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849. A town owning the fee of a highway may determine that it shall not be used for any purpose other than of a highway and may order the removal of obstructions. Coudert v. Underhill, 95 N. Y. S. 134. There can be no prescription against the United States relative to the maintaining of a market upon a street in the District of Columbia. Taylor v. District of Columbia, 24 App. D. C. 392. Trees and shrubbery in the highway. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. Cornice extending over the highway. Wakeling v. Cocker, 23 Pa. Super. Ct. 196. Excavations into street for purpose of widening a river for private purposes. Wilkinson v. Dunkley-Williams Co. [Mich.] 103 N. W. 170. Ky. St. 1903, § 4297, does not authorize the abolition of gates which were erected across a road by the landowner at the time of dedication. Clarke v. Booth [Ky.] 87 S. W. 273.

18. People v. Atchison, T. & F. R. Co. [Ill.] 75 N. E 573; City Council of Augusta v Reynolds [La.] 50 S. E. 998. Abutting owner may encroach upon the right of the public to a limited extent and for a temporary purpose. Gassenheimer v. District of Columbia, 25 App. D. C. 179. What is a reasonable encroachment is a question of fact depending on all the circumstances. Id. Diamond switch of a street car track leaving 10.5 feet between a passing car and the curb on one side and 9.7 feet on the other side is not a material obstruction of a street or interference with the abutting owner's rights. Rosenbaum v. Meridian Light & R. Co. [Miss.] 38 So. 321. A hotel keeper may to a reasonable extent and in a reasonable manner use the street adjoining his premises to there station his carriages for the use of his guests only without being required to procure a license. Willard Hotel Co. v. District of Columbia, 23 App. D. C. 272. A temporary obstruction of a highway with the consent of the proper public authorities is not a nuisance. Malkan v. Carlin, 93 N. Y. S. 378.

19. Legislative authority to a municipality to construct a sewer in a public street does not exempt the municipality from the duty of exercising due care in performing the work. Koontz v. District of Columbia, 24 App. D. C. 59.

20. Foley v. Ray [R. I.] 61 A. 50.

21. Stepping Stone: Wolff v. District of Columbia, 196 U S. 152, 49 Law. Ed. 426.

has the right to the exclusive use of a street for public purposes, free from any permanent obstruction thereof for private purposes of any person,[22] and an encroachment or obstruction on a public street[23] or alley,[24] or the occupying of a considerable portion of the sidewalk, without authority, is a nuisance.[25] Abutting property owners cannot grant to private individuals the right to so occupy the street or sidewalk as to substantially and permanently obstruct travel thereon.[26] Where the damage or injury is common to the public, redress is properly sought by a proceeding in behalf of the public;[27] but one who is specially injured in a way not common to himself and the public at large may maintain an action for the obstruction of a public highway.[28] Heirs of owner of burial lot in cemetery adjoining a public thoroughfare, members of the family being buried in the lot, have a sufficient interest to maintain a bill for the removal of obstructions in the thoroughfare.[29] An adjacent owner sustaining special damage thereby may maintain a suit for damages or file a bill for an injunction to restrain the obstruction of the sidewalk,[30] and may re-

22. Garibaldi v. O'Connor, 112 Ill. App. 53. A violator of the law has no legal right to have a public road leading to his ferry kept open. Parsons v. Hunt [Tex.] 84 S. W. 644.

23. Town of West Seattle v. West Seattle Land and Imp. Co. [Wash.] 80 P. 549; Forbes v. Detroit [Mich.] 102 N. W. 740; Coker v. Atlanta K. & U. R. Co. [Ga.] 51 S. E. 481. Guy rope for a hanging banner fastened so as to endanger pedestrians. City of Ottawa v. Hayne, 214 Ill. 45, 73 N. E. 385. Defective coal hole in the sidewalk. Berger v. Content, 94 N. Y. S. 12. Street fair. City Council of Augusta v. Reynolds [Ga.] 50 S. E. 998. A building or other structure, or the placing of materials, such as lumber or coal for an unreasonable time or in an unreasonable manner upon a street or highway without the sanction of the legislature, is a public nuisance. Smith v. Davis, 22 App. D. C. 298. A hedge encroaching upon the highway is a nuisance and may be abated. Bright v. Bell, 113 La. 1078, 37 So. 976. The occupation of the middle of a street by a standing market wagon, obstructing the free passage of the street, is a nuisance. Sanford v. District of Columbia, 24 App. D. C. 404. Under pretext of removing obstructions from an alley, a municipality cannot remove a fence situated on private property not subject to a public easement. Riley v. Greenwood [S. C.] 51 S. E. 532. A fence may be maintained across land acquired under the New York charter for street purposes, but not yet opened to the public. Laws 1901, p. 406, c. 466, § 971. Parsons Bros. v. New York, 95 N. Y. S. 131. Obstruction of a street is a statutory nuisance in Illinois. Hurd's Rev. St. ch. 38, § 221, par. 5. Garibaldi v. O'Connor, 112 Ill. App. 53. Permanent obstruction of a public street is a public nuisance. Weiss v. Taylor [Ala.] 39 So. 519.

24. Harniss v. Bulpitt [Cal. App.] 81 P. 1022.

25. City of New York v. Knickerbocker Trust Co., 93 N. Y. S. 937; Dormer v. District of Columbia, 21 App. D. C. 284. The court will assume that a coal hole, existing in the sidewalk for 20 years, was constructed and maintained by permission of the proper authorities. Hart v. McKenna, 94 N. Y. S. 216. Ordinary carriage blocks or steps, shade trees, lamp posts, water hydrants, awning posts, telegraph and telephone poles, placed under proper regulations, are not obstructions within §§ 226, 229, Rev. St. D. C. Wolf v. District of Columbia, 21 App. D. C. 464.

26. Pagarnes v. Chicago, 111 Ill. App. 590; City of Chicago v. Pooley, 112 Ill. App. 343. Abutting owner cannot confer on a private citizen the right to use any portion of a public street to the exclusion of the public. Hontros v. Chicago, 113 Ill. App. 318.

27. City of New York v. Knickerbocker Trust Co., 93 N. Y. S. 937. In Washington a county or a road supervisor may sue to enjoin the obstruction of a highway. Lincoln County v. Fish [Wash.] 80 P. 435.

28. Forbes v. Detroit [Mich.] 102 N. W. 740; Guilford v. Minneapolis & St. L. R. Co. [Minn.] 102 N. W. 365; Harniss v. Bulpitt [Cal. App.] 81 P. 1022; Downing v. Corcoran [Mo. App.] 87 S. W. 114; Hayden v. Stewart [Kan.] 80 P. 43. Only those who suffer injury not common to the general public can maintain an action to either enjoin the permanent obstruction of a highway or recover damages therefor. Coker v. Atlanta, etc., R. Co. [Ga.] 51 S. E. 481. No one can maintain an action for the removal of a public nuisance, but the the public or some one who suffers special damage therefrom. Labry v. Gilmore [Ky.] 89 S. W. 231. Action to restrain erection of tramway denied where no damage shown. Turl v. New York Contracting Co., 46 Misc. 164, 93 N. Y. S. 1103. Holder of mortgage interest in the lots affected may sue. Wilkinson v. Dunkley-Williams Co. [Mich.] 103 N. W. 170; Tennessee Brewing Co. v. Union R. Co., 113 Tenn. 53, 85 S. W. 864. One may sue for damages to real estate resulting from an obstruction of a highway, though the legal title is held by another in trust for him. Yates v. Big Sandy R. Co. [Ky.] 89 S. W. 108. Petition held to state a cause of action. Heard v. Connor [Tex. Civ. App.] 84 S. W. 605. Sufficiency of petition considered. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827. Plaintiffs held to have shown sufficient title to maintain an action for excavating in the street. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

29. Weiss v. Taylor [Ala.] 39 So. 519.

30. Construction of platform in front of adjoining premises to load wagons. Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A. 21.

strain such acts without waiting until their actual commission.[31] One cannot legally carry on any part of his business in the public streets to the annoyance of the public.[32] Whether the use is reasonable or not is a question of fact, depending on circumstances. The Michigan statute authorizing the commissioner of highways to order the removal of fences encroaching upon the highway does not abrogate the common-law right of abatement of a nuisance by an individual,[33] and if special grievance be necessary, such grievance exists in the highway commissioner by virtue of his office.[34]

Civil liability.—Persons unlawfully obstructing a street or highway are liable for the proximate damages resulting therefrom,[35] but not where the use of the sidewalk was momentary and reasonable,[36] and contributory negligence will bar recovery.[37] The willful obstruction of a highway so as to show culpable indifference to the rights of travelers justifies the recovery of punitive damages.[38] It is the duty of those whose work necessarily makes dangerous a public street to give notice by means of proper signals, warnings or barriers.[39] One who undertakes to change the grade of a street without the passage of the necessary ordinance becomes a trespasser.[40] Contractors employed by a county are not liable for the removal of trees planted within a highway, when such removal is in the proper execution of the con-

31. Mere permission of board of estimates does not justify permanent obstructioin, under Baltimore City charter, §§ 7-11. Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A. 21.

32. Brauer v. Baltimore Refrigerating & Heating Co., 99 Ind. 367, 58 A. 21.

33. Laws 1881, p. 306, art. 243. Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609.

34. Neal v. Gilmore [Mich.] 12 Det. Leg. N. 540, 104 N. W. 609.

35. Defendant not shown to have created the proximate cause of injury. Ferracane v. Brooklyn Alcatraz Asphalt Co., 101 App. Div. 605, 91 N. Y. S. 866. Railroad street crossing. Evansville & I. R. Co. v. Allen, 34 Ind. App. 636, 73 N. E. 630. The placing of a dangerous obstruction on a sidewalk creates a liability for damages resulting therefor. White v. Keystone Tel. Co., 211 Pa. 455, 60 A. 998. One wrongfully placing obstructions in the highway must be responsible for accidents resulting therefrom. Telephone pole. Bevis v. Vanceburg Tel. Co. [Ky.] 89 S. W. 126. Authority to construct and operate a railroad track on a way within the city limits does not permit an interference with the adjacent owner's right of ingress and egress without compensation. Cincinnati, R. & M. R. Co. v. Miller [Ind App.] 72 N. E. 827. Horse frightened by refuse left in street by the defendant. McClure v. Feldmann, 184 Mo. 710, 84 S. W. 16; Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30. Negligence for the jury. Shane v. National Biscuit Co., 102 App. Div. 188, 92 N. Y. S. 637. Defendant not liable for injuries received from cart left in street. Lopes v. Sahuque [La.] 38 So. 810. Upon conflicting evidence, it is for the jury to say whether the piling of lumber in the street was negligently done or was the proximate cause of injury. Romano v. Seidel Furniture Mfg. Co. [La.] 38 So. 409. A railroad crossing gate, lawfully constructed within a highway, is not such an obstruction as renders the owner liable for injuries resulting from a collision therewith. Klein v. Missouri Pac. R. Co. [Mo. App.] 89 S. W. 75. It is prima facie unlawful for a railroad to place a handcar on a public highway. Southern Ind. R. Co. v. Norman [Ind.] 74 N. E. 896. A railroad company is responsible for injuries from negligently leaving a truck upon the sidewalk. Tiborsky v. Chicago, etc., R. Co. [Wis.] 102 N. W. 549. Where a railroad embankment obstructs a street affording access to business property, the owner may recover the resulting damages. Harrington v. Iowa Cent. R. Co., 126 Iowa, 388, 102 N. W. 139. A four foot embankment placed in a highway by a street railway company is such an obstruction as entitles the abutting owner to resulting damages. Yates v. Big Sandy R. Co. [Ky.] 89 S. W. 108.

36. Nail in plank beneath defendant's station. Hedenberg v. Manhattan R. Co., 91 N. Y. S. 68.

37. Attempting to drive over newly made road not yet open to the public. Shepard v. Bellew & Merritt Co., 101 App. Div. 257, 91 N. Y. S. 999. But a contractor is not required to anticipate that a sewer inspector would walk on the bracing beams of a subway tunnel. Dooley v. Degnon-McLean Contracting Co., 45 Misc. 593, 91 N. Y. S. 30.

38. Tutwiler Coal, Coke & Iron Co. v. Nail [Ala.] 37 So. 634.

39. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446; MacDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001. A contractor who injures a pedestrian lawfully using the street is liable as a trespasses therefor. Turner v. Degnon-McLean Contracting Co., 99 App. Div. 135, 90 N. Y. S. 948. Upon the removal of a light pole, it becomes the duty of the owner thereof to fill the hole so occasioned and to see that thereafter it remained filled so as not to render the street unsafe. Birch v. Charleston Light, Heat & Power Co., 113 Ill. App. 229. Under Rev. Laws, c. 110, § 76, gas companies are required only to leave the street in the same condition in which they found it. Seltzer v. Amesbury & S. Gas Co. [Mass.] 74 N. E. 339.

40. United New Jersey R. & Canal Co. v. Lewis [N. J. Eq.] 59 A. 227.

tract.[41] A market company occupying a sidewalk without authority must keep the walk clean and safely passable at all times so far as obstructions might be occasioned by the purpose to which it sought to devote the street.[42]

Crimes.—An indictment will lie in most states for obstructing a public highway,[43] but the owners of lots on both sides of a street which is not used by the public, but only for such owners' private purposes, may obstruct such street without liability to prosecution.[44] A person acting on the warrant of the county court in closing a road is protected by the warrant from a prosecution for obstructing the road.[45] The common-law remedy for the obstruction of public roads is still in force in Kentucky.[46] Where the penalty is claimed as the damages, an action for penalties for excavating in a street and a suit for damages resulting from the same cause are inconsistent.[47] In a prosecution for obstructing a highway established by statutory proceedings, the state must show that the owner had personal notice of the meeting of the viewers or that such notice was unnecessary;[48] but damages may be recovered for the obstruction of a highway used for the statutory period, without showing its establishment by statutory proceedings or judgment of the county court.[49] The inability of a defendant, because of backwater from a river, to remove an obstruction from a highway, is a matter of defense and must be pleaded to be available.[50] An action for injury to the bridges and highways of a town is properly brought in the name of the town.[51]

HOLIDAYS.[1]

Legal holidays are not dies non juridicus unless so expressly declared.[2] The prohibition of judicial business on a holiday does not prohibit the holding of an election.[3] In Minnesota public business may be transacted on a legal holiday if a necessity exists.[4] A holiday "for all purposes" is dies non juridicus,[5] and a half

41. Sherman v. Butcher [N. J. Law] 60 A. 336.

42. O'Dwyer v. Northern Market Co., 24 App. D. C. 81.

43. An animal tied to a stake in a public street for the purpose of grazing therein is an obstruction of such street, and the owner thereof is subject to punishment in Georgia. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732. Whether a fence is an obstruction of a public highway is a question for the jury. Township of Bolo v. Liszewski, 116 Ill. App. 135. Felling a large tree and allowing it to remain in the highway for three months. Commonwealth v. American Tel. & Tel. Co. [Ky.] 84 S. W. 519. Constructing a dam which caused water to obstruct the highway. Richardson v. State [Tex. Cr. App.] 85 S. W. 282. The occasional placing and using of a skid across a sidewalk is not within an ordinance declaring a penalty for constructing or placing any portico, porch, door, window, step, fence or any other projection, which shall project into the street. Gates & Son Co. v. Richmond, 103 Va. 702, 49 S. E. 965. Proof that an automobile licensed as a public vehicle stood in front of a hotel for two hours is not sufficient to sustain a conviction of the owner of the vehicle and proprietor of the hotel of unnecessarily obstructing the street. Gossenheimer v. District of Columbia, 25 App. D. C. 179. Evidence held sufficient to justify a refusual to grant a new trial. State v. Knotts, 70 S. C. 400, 50 S. E. 9. A material variance between the notice to remove an obstruction and the nature of the obstruction as proved on the trial is fatal. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111.

44. People v. Wolverine Mfg. Co. [Mich.] 12 Det. Leg. N. 491, 104 N. W. 725.

45. State v. Miller, 110 Mo. App. 542, 85 S. W. 912.

46. Not supplanted by Ky. St. c. 110. Commonwealth v. American Tel. & T. Co. [Ky.] 84 S. W. 519.

47. Hughes v. Arkansas & O. R. Co. [Ark.] 85 S. W. 773.

48. State v. Cipra [Kan.] 81 P. 488.

49. Leslie County v. Southern Lumber Co. [Ky.] 89 S. W. 242.

50. Commonwealth v. American Tel. & T. Co. [Ky.] 84 S. W. 519.

51. Town of Southeast v. New York, 96 App. Div. 598, 89 N. Y. S. 630.

1. See, also, Sunday, 4 C. L. 1589.

2. A trial and conviction on Good Friday is valid. Calhoun v. State [Ala.] 39 So. 378. Under Act June 23, 1897 (P. L. 188) labor day is not a nonjudicial day. Patterson v. Gallitzin Bldg. & Loan Ass'n, 23 Pa. Super. Ct. 54.

3. Transactions not within the statutory prohibition may be carried on. People v. Loyalton [Cal.] 82 P. 620.

4. Under Gen. St. 1894, § 7987, where parties to a cause stipulate to try it on a legal holiday, a decision of the justice based on convenience of the parties and saving of expense justified a holding that a necessity ex-

holiday for all purposes will be taken notice of in the computation of time within which judicial proceedings must be taken.[6]

HOMESTEADS.[7]

§ 1. *The right to homestead in general.*[8]—In its inception a homestead is a parcel of land on which the family resides and which is to them a home[9] and includes rights appurtenant thereto.[10] The exemption of the homestead from seizure and sale for the owner's debts is purely statutory[11] and statutes allowing the privilege are liberally construed in favor thereof,[12] the reason and spirit of such laws, rather than the letter thereof, being conserved.[13] Title to the homestead being in the husband, so long as he is alive the wife's interest is not an estate, but is simply a disability of the husband.[14]

§ 2. *Persons entitled.*[15]—In most states the head of a family or a householder with a family[16] is entitled to claim a homestead. In order that one may have a "family" he must be under legal or moral obligation to support the persons constituting the "family" and they must be dependent upon him for support.[17] To be a

isted. Fureseth v. Great Northern R. Co. [Minn.] 103 N. W. 499.

5, 6. Ocumpaugh v. Norton, 24 App. D. C. 296.

7. The doctrine of exemptions has already been treated; see Exemptions, 5 C. L. 1400. The present title has no relation to devises of the homestead (see Wills, 4 C. L. 1863), nor to the widow's quarantine (see Descent and Distribution, 5 C. L. 995; Estate of Decedents, 5 C. L. 1183). The effect of the bankruptcy of the homesteader on his homestead rights is treated in Bankruptcy, 5 C. L. 367.

8. See 3 C. L. 1631.

9. Palmer v. Sawyer [Neb.] 103 N. W. 1088.

10. Water rights, ditches, etc., held part of the homestead and exempt. Payne v. Cummings, 146 Cal. 426, 80 P. 620.

11. Osborne & Co. v. Evans, 185 Mo. 509 84 S. W. 867.

12. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Elliott v. Parlin & Orendorff Co. [Kan.] 81 P. 500.

13. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424.

14. Hunt v. McDonald [Wis.] 102 N. W. 318.

15. See 3 C. L. 1631.

16. In order to establish an estate of homestead under § 1 of the Homestead Act, three things must concur: (1) The person claiming the estate must be a householder; (2) he or she must have a family; (3) the premises claimed must be occupied as a residence. Stodgell v. Jackson, 111 Ill. App. 256.

17. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Stodgell v. Jackson, 111 Ill. App. 256; Sheeby v. Scott [Iowa] 104 N. W. 1139. Where an adult son, who was a drunkard and a gambler, lived with his mother who gave him $10 a week and board and allowed a third person a part of his board for caring for the son when disabled by the use of liquors or drugs, held, that a finding that the son was maintained by the mother, because of the natural obligation to her child, was justified, and the home was exempt as a homestead. Id. The homestead of a man residing thereon with his adult daughter held the homestead of a family in the absence of any showing that the father was under any obligation to pay for the daughter's services. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424. The fact that daughter after father's death filed a claim for services held not binding on a grantee of her brother. Id. Granddaughter living with and supported by grandfather held a member of the latter's family, though her father was living and able to support her. Adams v. Clark [Fla.] 37 So. 734. A minor nephew whom a householder has voluntarily assumed the obligation to support, and has supported, may constitute the fam-

member of a family, one must be such in good faith,[18] though it is immaterial that infant members thereof have parents living who are able to support them.[19] A wife is entitled to hold her lands as a homestead when they are occupied by her and her husband as such.[20]

An abandoned wife [21] *or family* [22] are entitled to claim a homestead.

§ 3. *Properties and estates in which homestead may be claimed. As dependent on nature of claimant's title.*[23]—The claimant or the one through whom he claims must have some title or interest sufficient to support a homestead in the property.[24] The right to a homestead may be based upon an equitable [25] or undivided [26] interest in land; but a tenancy at will is insufficient to support it.[27] In Virginia a homestead cannot be claimed in property a conveyance of which by the homestead claimant has been set aside as fraudulent.[28]

As dependent on use of premises.[29]—The use made of the land may determine its character as a homestead. The fact that part of the premises is rented [30] or used

ily, notwithstanding such nephew has a father living, physically able and legally responsible for his support. Stodgell v. Jackson, 111 Ill. App. 256. A widower, who is living with his own mother, cannot be said to be a man of family, because he contributes something toward the support of a stepchild, who has never been formally declared to be his own child, and who lives with her maternal grandmother. Kraft v. Wolf, 3 Ohio N. P. (N. S.) 105. A stepchild is not the child of her stepfather within the meaning of the act providing for exemption in lieu of homestead, unless so declared to be by the probate court under sections 3137a and 3139. Id.

18. Adams v. Clark [Fla.] 37 So. 734.

19. So held where householder voluntarily assumed the obligation to support a minor nephew. Stodgell v. Jackson, 111 Ill. App. 256. Grandfather supporting granddaughter. Adams v. Clark [Fla.] 37 So. 734.

20. Gibson v. Barrett [Ark.] 87 S. W. 435; Pullen v. Simpson [Ark.] 86 S. W. 801.

21. See 2 C. L. 212; also, 3 C. L. 1631. Where wife has been wrongfully deserted. Bartlow v. Bartlow, 114 Ill. App. 604.

22. Under Acts 1870-71, p. 97, c. 71, where a husband or father either absconds or leaves his family, the homestead is exempt in the hands of the latter. Ryther v. Blackwell, 113 Tenn. 182, 87 S. W. 260.

23. See 3 C. L. 1631. See 2 Tiffany, Real Prop. p. 1127, § 499.

24. Assignor of unearned wages cannot assert an exemption in lieu of homestead in the wages as they come due. Has no title thereto. Brooks Co. v. Tolman, 6 Ohio C. C. (N. S.) 137. Where a debtor fraudulently conveyed certain of his assets to a corporation, and such assets were seized by a a receiver of the corporation, held, debtor's wife was not entitled to the deduction of a homestead exemption from the proceeds thereof, which were insufficient to pay the debts. Lazarus v. Steinhardt [C. C. A.] 133 F. 522. Widow held to acquire no homestead rights in land occupied by her husband as a tenant at will. Jones v. Jones, 213 Ill. 228, 72 N. E. 695. The claim of a homestead through a decedent because he had acquired title by adverse possession is not supported where the evidence fails to show that he occupied the land, or any part of it, for 20 years after his conveyance of it. Id.

25. May be claimed by a mortgagor in the value of the land less the amount of the mortgage. Reed Bros v. Nicholson [Mo.] 88 S. W. 71. May be claimed in mortgaged property after foreclosure but before expiration of right to redeem. Foster v. Rice, 126 Iowa, 190, 101 N. W. 771.

26. A tenant in common is entitled to a homestead in land, owned jointly by himself and others, to the extent of his interest, not to exceed 200 acres. Griffin v. Harris [Tex. Civ. App.] 13 Tex. Ct. Rep. 538, 88 S. W. 493. The head of a family is entitled to a full 200 acre homestead with improvements out of a 400 acre tract in which he has an undivided one-half interest. Carroll v. Jeffries [Tex. Civ. App.] 87 S. W. 1050.

27. Jones v. Jones, 213 Ill. 228, 72 N. E. 695.

28. Under Const. Va. 1902, § 191, where there has been a fraudulent conveyance by the head of a family, a reconveyance and claim of homestead made prior to a decree setting aside the fraudulent conveyance is sufficient to make the claim a valid one as against general creditors, even though they have obtained an inchoate lien prior to the reconveyance and claim of homestead. In re Allen & Co., 134 F. 620.

29. See 3 C. L. 1632.

30. Where a husband and his wife occupied a block of land without reference to lot divisions, and used the entire block in connection with their home, as a garden and horse lot, the entire property held to constitute their homestead, though a small house on one of the lots was sometimes rented to a tenant. Gulf, etc., R. Co. v. Lewis [Tex. Civ. App.] 85 S. W. 817. Where the debtor 26 years before the trial of the cause established his homestead on a 40 acre tract, and during such time resided thereon with his family, the fact that the entire tract was brought within the limits of an incorporated town and a street run through it and on each parcel two or three houses were built, which houses, with rare exceptions, when rented, were rented in connection with the renting of the premises as farm land and occupied by the tenants, does not deprive the property of its homestead character. Mansur v. T. Implement Co. v. Graham [Tex. Civ. App.] 85 S. W. 308.

for business purposes [31] does not necessarily destroy its character as a homestead, there being no appropriation to the production of revenue as distinguished from the common uses, purposes and necessities of a home. It is not necessary that the claimant reside on the premises if they are used in connection with his residence,[32] even though the latter is rented.[33] It is immaterial that the use be for mere convenience and produce little or no revenue.[34]

As dependent on whether lands are rural or urban.[35]—The character of property as rural or urban often fixes the extent of the homestead right.[36] The question whether land is rural or urban is one of fact.[37] Whether land is located in a city, town or village does not depend upon the fact of incorporation.[38] It may come to be within the corporate limits of a town without losing its rural character, or it may be located within the limits of a town or village, and thus have the legal character of an urban homestead, although the town or village is not incorporated.[39] In some states the extent of the homestead right depends upon whether the property is within the platted portion of a city or not.[40]

As dependent on whether property is realty or personalty.[41]

Amount exempt.[42]—In some states the homestead right is measured by the value of the property.[43] If, at the death of the owner of a homestead, the allotment does not exceed the full limit of value allowed, a subsequent appreciation does not give creditors of the deceased a right to subject the excess to their claims.[44]

§ 4. *Claiming, selecting and setting apart of homesteads.*[45]—A homestead is constituted by the two acts of selection and residence in compliance with the terms of the law conferring it.[46] When these things exist bona fide, the essential elements

31. A 40 acre tract on which is situated a mill and gin used in support of the owner's family, and which is contiguous to a 160 acre tract comprising the owner's farm and home, is, as against creditors, part of the homestead. Carroll v. Jeffries [Tex. Civ. App.] 87 S. W. 1050.

32. The fact that the head of a family owns and resides on lots in an addition to a city beyond the corporate limits does not deprive other land owned by him and situated several miles distant, but used in connection with the lots for the purpose of a home, of its homestead character, in the absence of evidence that the lots on which the claimant resided were so surrounded by other residences as to have become a part of the town. Jolly v. Diehl [Tex. Civ. App.] 86 S. W. 965.

33. Where husband and wife lived on rented property which adjoined certain land inherited by the wife, and which she and her husband cultivated and used for pasture, the land was held to constitute a homestead. Holder's Adm'r v. Holder [Ky.] 87 S. W. 1100.

34. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946.

35. See 3 C. L. 1632.

36. **Michigan:** Two platted lots within the corporate limits of a city may be claimed as a homestead exemption, where such lots aggregate but 60 feet in width and are occupied by a dwelling house built in the center of the lots, a part being on each lot. Barkume v. Phelps, Brace & Co. [Mich.] 12 Det. Leg. N. 547, 104 N. W. 980.

37. Dignowity v. Baumlott [Tex. Civ. App.] 85 S. W. 834.

38. Burow v. Grand Lodge of Sons of Hermann [C. C. A.] 133 F. 708.

39. Burow v. Grand Lodge of Sons of Hermann [C. C. A.] 133 F. 708. Where a bankrupt resided in an unincorporated town of 275 inhabitants, certain lots called "Farm Lots" on a map kept in the county assessor's office, held rural property. Id.

40. Code, § 2978, as amended by Act 28th Gen. Assem. p. 89, c. 119, defining the extent of a homestead when the property is within a city or town plat, does not apply where the homestead is within the corporate limits of a city, but not within the platted portion thereof. Foster v. Rice, 126 Iowa, 190, 101 N. W. 771. Where the land was once platted for partition and as thus partitioned was platted by the county auditor for taxation, the plat made by the auditor does not constitute a city plat. Id.

41, 42. See 3 C. L. 1633.

43. **California:** Under Civ. Code, §§ 1237, 1260, there is no limit to a homestead except as to value, and a tract of 524 acres of contiguous land is, if properly selected and of less value than $5,000, exempt, though part of it was acquired by pre-emption and part as a desert claim, and though it was unfenced. Payne v. Cummings, 146 Cal. 426, 80 P. 620.

Illinois: Under the Act of 1857, the homestead right of a householder was the lot and building occupied as a residence, to the value of $1,000. Bechdoldt v. Bechdoldt [Ill.] 75 N. E. 557.

44. Moody v. Moody [Miss.] 38 So. 322.

45. See 3 C. L. 1633. The law relative to the claiming of exemptions in bankruptcy proceedings is treated in Bankruptcy, 5 C. L. 367.

of the homestead right exist.[47] Mere intention to make a certain tract of land a home at some future time is insufficient to impress it with a homestead character,[48] unless it be accompanied by physical acts manifesting such intention [49] and followed by occupancy within a reasonable time.[50] A person cannot at the same time have two homesteads nor can he have two places either of which at his election he may claim as his homestead.[51] In the absence of statutes requiring a written declaration the actual occupancy of the land as a dwelling place is a sufficient declaration of homestead,[52] and the effect of such occupancy cannot be changed by intention.[53] It is for the head of the family to designate and set apart the homestead,[54] and his homestead is that of the family.[55]

In some states in order to claim property as a homestead, a declaration describing the property so that it can be identified [56] must be filed. In Texas, the husband being the head of the family, it is not essential to the validity of such designation that it be signed by the wife, or, in the absence of fraud, that it be assented to or concurred in by her.[57] The fact that the designation is planned, prepared and executed at the instance of a mortgagee at the time the mortgage is given does not, in the absence of fraud, affect the validity of the mortgage, where all the land embraced in the designation was used at the time for homestead purposes.[58] A homestead may be established by a judicial decree.[59] Where a decree awarding a homestead provides for the fixing of the metes and bounds thereof, there is no legal segre-

46. Palmer v. Sawyer [Neb.] 103 N. W. 1088.

47. Palmer v. Sawyer [Neb.] 103 N. W. 1088. Where homestead claimant was the head of a family and lived on the land, 20 acres of which he had cultivated for nearly two years, and kept thereon his household furniture and farming tools and implements, held to constitute his homestead, he having no other land. Griffen v. Harris [Tex. Civ. App.] 13 Tex. Ct. Rep. 538, 88 S. W. 493. Where husband actually resided on land and his wife and children came each year to assist in its cultivaton, with the intention on her part to permanently occupy the land as a home as soon as she had earned sufficient money to pay off the purchase money, held to constitute a homestead. Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36. Under § 1 of the Homestead Act, the premises claimed must be occupied as a residence. Stodgell v. Jackson, 111 Ill. App. 256.

An allegation in a bill to redeem land from a mortgage sale that plaintiff was "living on said land with his family," held insufficient as an allegation that he was occupying the land as a homestead. Gentry v. Lawley [Ala.] 37 So. 829.

48. Hair v. Davenport [Neb.] 103 N. W. 1042; Johnson v. Burton [Tex. Civ. App.] 13 Tex. Ct. Rep. 317, 87 S. W. 181.

49. Hair v. Davenport [Neb.] 103 N. W. 1042; Home Bldg. & Loan Ass'n v. McKay [Ill.] 75 N. E. 569. Is insufficient in the absence of acts of preparation looking to its actual occupancy as a homestead. Johnson v. Burton [Tex. Civ. App.] 13 Tex. Ct. Rep. 317, 87 S. W. 181. Declaration of intention to a third person is not binding on a mortgagee having no knowledge thereof. Home Bildg. & Loan Ass'n v. McKay [Ill.] 75 N. E. 569. Fact that claimant spoke of redeeming a portion of the land on which his home was located, held insufficient to warrant a finding that the land was his homestead. James v. Mallory [Ark.] 89 S. W. 472.

50. Hair v. Davenport [Neb.] 103 N. W. 1042.

51. Hair v. Davenport [Neb.] 103 N. W. 1042. The head of a family, who has a homestead, cannot acquire a second homestead until the first has been abandoned or conveyed, or contracted to be conveyed, by a legal and valid instrument. Id. One cannot hold a rural and urban homestead at the same time. Johnson v. Calloway [Tex. Civ. App.] 87 S. W. 178.

52, 53. Hostetler v. Eddy [Iowa] 104 N. W. 485.

54. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946; Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36. The fact that at the time of marriage a woman was occupying her separate property as the homestead of herself and minor children does not prevent the husband, if he acts in good faith, from removing the family therefrom and acquiring another homestead. Duncan v. Hand [Tex. Civ. App.] 87 S. W. 233.

55. Homestead of husband is that of the wife. Canning v. Andrews [Tex. Civ. App.] 85 S. W. 22. Instruction that a man's place of residence is where his family resides held properly refused. Id.; Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36.

56. Where property was known as "G.'s ranch" and was so described in the declaration, an erroneous description of the legal boundaries held not to render the declaration insufficient. In re Geary's Estate, 146 Cal. 105, 79 P. 855.

57, 58. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946.

59. Decree stating that one had succeeded to homestead rights of grantor held to establish in the purchaser a homestead of his own. Bechdoldt v. Bechdoldt [Ill.] 75 N. E. 557.

gation of the homestead until it is so set out.[60] In Arkansas, claim and selection need not be made before sale on execution,[61] and the same applies to an additional selection increasing the homestead to the statutory limit.[62]

Where property claimed as a homestead exceeds the maximum area or amount, the person entitled to the homestead may make a selection of the proper amount, provided the same does not violate the rule against unreasonable or capricious selection.[63] Where the extent of the homestead is measured by acreage, it cannot be set apart out of an undivided interest in land.[64] In Nebraska, upon an application for the appointment of appraisers to set aside a homestead exemption, the homestead claimant may contest the question whether the value of the homestead exceeds the amount of the homestead exemption;[65] and if the court in such case finds that the value does not exceed the exemption, it should refuse to appoint appraisers.[66] As a general rule, it being possible, the homestead should be set out in the land,[67] and courts of equity are powerless to change this rule and order the homestead interest paid in cash.[68] Statutes generally provide the method for determining the value of premises claimed as a homestead.[69] In California appraisers being appointed and a vacancy occurring the court may fill the same without further notice [70] and either party may, in case the appointee is unfit, incompetent or disqualified, move the court to vacate the appointment or set aside the report of the appraisers.[71]

§ 5. *Liabilities superior or inferior to homestead.*[72]—In no state is the homestead exemption absolute, antecedent debts [73] and purchase money indebtedness [74] be-

60. Bringhurst v. Texas Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 128, 87 S. W. 893.

61. Under Kirby's Dig. § 3902, a debtor need not file a schedule in order to protect the homestead against a judgment or execution, but he may select and claim it after or before a sale on execution. Isbell v. Jones [Ark.] 88 S. W. 593.

62. May be done after conveyance and in a suit attacking such conveyance as a fraud on creditors. Wilks v. Vaughan [Ark.] 83 S. W. 913.

63. Grimes v. Luster [Ark.] 84 S. W. 223. A debtor may, though not residing upon an agricultural homestead, increase it to the maximum area, in order to protect a conveyance thereof from being fraudulent as to creditors. Wilks v. Vaughan [Ark.] 83 S. W. 913. Where a person is possessed of several parcels of land aggregating over 200 acres, all of which are used for the purpose of a home, he may designate any 200 acres thereof as his home. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946. Under Rev. St. 1899, §§ 3616, 3617, a wife is entitled to select the particular part of land conveyed to her by her husband, to avoid levy of execution, to the value of the amount of exemption which she will retain as a homestead. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

64. Before the owner of an undivided interest in land can claim a "pony homestead" out of the same he must have the land partitioned. Sims v. Sims [Ga.] 50 S. E. 937.

65, 66. France v. Hohnbaum [Neb.] 102 N. W. 75.

67. Where mortgaged land consisted of 160 acres and house was located on one of the 40's, held possible to set out homestead in kind. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

68. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

69. California: Under Code Civ. Proc. art. 2, c. 5, §§ 1474-1486, providing for the appraisement of a homestead in probate proceedings, it is error for the court after ordering a reappraisement, to confirm the report on the reappraisement, and to set aside the premises as a homestead without notice to the objecting creditor, or affording him an opportunity to be heard, and to further refuse to hear a direct application by him to be heard. In re McCarthy's Estate [Cal. App.] 82 P. 635. Under such statutes an ex parte report of the appraisers is not evidence of the value of the homestead in the hearing of the objections. Id.

Missouri: Under Rev. St. 1899, § 3617, where the land exceeds the homestead exemption, failure of the sheriff to appoint three disinterested appraisers to value and set apart the homestead and then levy execution on the remainder renders the sale void. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71. Whether property exceeds exemption can only be determined by commissioners appointed to value the land, and a court of equity has no power to determine the question. Id.

70. Civ. Code, §§ 1248, 1249. Harrier v. Bassford, 145 Cal. 529, 78 P. 1038.

71. Harrier v. Bassford, 145 Cal. 529, 78 P. 1038.

72. See 3 C. L. 1635.

73. Liability for breach of warranty. Anderson v. Kyle, 126 Iowa, 666, 102 N. W. 527. Under Code, § 2976, is liable for debts created at any time prior to its occupancy as a homestead. Whinery v. McLeod [Iowa] 102 N. W. 132.

74. Equitable purchase-money mortgage is superior to homestead rights. Foster Lumber Co. v. Harlan County Bank [Kan.] 80 P. 49. A purchaser's wife is not entitled to a homestead in property as against a vendor's lien. Matney v. Williams [Ky.] 89 S. W. 678. Secret intention of mortgagor to

ing generally, though not always,[75] superior to the right, while debts contracted subsequent to the homestead are not a lien thereon,[76] even in the hands of a grantee of the homestead claimant,[77] unless incurred in improving the premises.[78] In some states, in order to create a lien, the contract for such improvement must be signed by the wife.[79] In Kentucky land owned at the time the debt was created is exempt if occupied by the claimant as a homestead at the time it is sought to levy execution.[80] Land of a lunatic being sold under order of court, the question whether it is his homestead is to be determined by the status of the property at the time the order is made and the sale confirmed.[81] In some states the liability of a trustee for trust funds is superior to his homestead exemption.[82] Where the homestead claimant seeks equitable relief, the equitable maxim "he who seeks equity must do equity" applies.[83] In Iowa the homestead of a pensioner purchased and paid for with pension money is exempt.[84] An insolvent husband can use his means to improve his wife's homestead provided the value and area of the homestead is not thereby carried beyond the value and area permitted by law.[85] Liabilities discharged in bankruptcy cannot be proved against the homestead.[86] All rents and profits arising out of the homestead land, except those consumed while the homestead estate is in existence, belong to the owner of the realty out of which the homestead is carved.[87] In Texas provisions for attorney's fees are not enforceable against the homestead.[88] In California a

operate premises as a homestead does not affect the rights of a purchase-money mortgagee. Home Bldg. & Loan Ass'n v. McKay [Ill.] 75 N. E. 569. Trust deed given to secure a mechanic's lien note, the consideration of which was used to purchase a lot and erect a house thereon, held superior to a claim of homestead exemption. Const. art. 16, § 50, construed. Bayless v. Standard Sav. & Loan Ass'n [Tex. Civ. App.] 13 Tex. Ct. Rep. 225, 87 S. W. 872.

75. An insolvent debtor may successfully assert a claim of exemption as to a homestead purchased with the proceeds of nonexempt property, where there are no peculiar equities in favor of existing creditors. McConnell v. Wolcott [Kan.] 78 P. 848. The fact that a homestead has been sold and the proceeds used does not prevent the homestead claimant from acquiring another homestead with other funds, and such homestead will be superior to antecedent judgments. Id.

76. Sweet v. Lyon [Tex. Civ. App.] 88 S. W. 384.

77. The purchaser of a homestead takes unaffected by the lien of a judgment against the grantor. Howard v. Mayher [Tex. Civ. App.] 13 Tex. Ct. Rep. 49, 88 S. W. 409.

78. Robards v. Robards [Ky.] 85 S. W. 718. Under Const. art. 16, § 37, a mechanic's lien is superior to the homestead claim of minor children. Summerville v. King [Tex.] 83 S. W. 680.

79. Where it was not so signed, neither contractor nor those claiming under him could acquire a lien on the homestead. Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687.

80. Creditors of deceased who became such while she was unmarried and owned certain land, which thereafter became the homestead of herself and her husband, held not entitled to claim that land was not a homestead as against them. Holder's Adm'r v. Holder [Ky.] 87 S. W. 1100, following Nichols v. Sennitt, 78 Ky. 632 and Hensey v. Hensey's Adm'r, 92 Ky. 164, 17 S. W. 333, and overruling Park v. Wright, 25 Ky. L. R. 128, 74 S. W. 712.

81. Is not controlled by the fact that the records in the guardianship proceedings failed to show that property was adjudged a homestead. Triffen v. Harris [Tex. Civ. App.] 13 Tex. Ct. Rep. 538, 88 S. W. 493.

82. Under Const. 1874, art. 9, § 3, a judgment in favor of a beneficiary against a trustee for trust funds left with the latter is enforceable against the homestead. Godfrey v. Herring [Ark.] 85 S. W. 232.

83. In an action for the possession of land, defendant seeking to have the deed declared a mortgage, held, he could not claim a homestead exemption as against unsecured debts due the mortgagee. Hallman v. George, 70 S. C. 403, 50 S. E. 24.

84. Code, § 4010 does not apply where a pensioner purchased, with pension money, land which he had conveyed to his wife before it was occupied as a homestead. Whinery v. McLeod [Iowa] 102 N. W. 132.

85. Pullen v. Simpson [Ark.] 86 S. W. 801.

86. Groves v. Osburn [Or.] 79 P. 500. See Bankruptcy, 5 C. L. 367.

87. Rowan v. Combs, 121 Ga. 469, 49 S. E. 275, following Moore v. Peacock, 94 Ga. 523, 21 S. E. 144. After an imbecile, adult sole beneficiary of a homestead estate, dies, her guardian cannot maintain an action against one who retains the rents and profits of the homestead estate. Id. Where the legal title to the homestead is in the wife, she is entitled to the rents and profits thereof and to property purchased with such rents and profits and may hold the same against the creditors of the husband. Sharp v. Fitzhugh [Ark.] 88 S. W. 929.

88. Provision in a note secured by a mechanic's lien for improvements on a homestead. Cooper v. Brazelton [C. C. A.] 135 F. 476 Contract for erection of house on homestead giving an attorney's fee in case of the

mortgage upon a homestead cannot be enforced as against a surviving spouse unless a claim therefor has been duly presented to the administrator of the deceased homestead claimant;[89] but this rule applies exclusively to the property described in the mortgage, which is impressed with the character of the homestead.[90] In Kentucky an abandoned wife may appeal from a judgment disallowing her claim.[91]

The homestead being exempt from execution, no right is acquired therein by the levy of a writ of attachment and the foreclosure of the alleged attachment lien.[92]

Judicial and execution sales.[93]—The institution of supplementary proceedings does not prevent defendant from withdrawing his funds from the reach of his creditors by investing them in a homestead.[94] In Texas a forced sale is void.[95] In Missouri execution being levied on property in which a homestead is claimed, the sheriff must give the homesteader a fair opportunity to make his selection or a sale thereunder is void,[96] and the proceedings in respect thereto must be set out in the sheriff's return,[97] though they need not be contained in his deed.[98]

§ 6. *Alienation and incumbrance.*[99]—A homestead is not the subject of fraudulent alienation.[1] The conveyance may precede the claim and selection [2] so long as the statutory time of claiming and selecting yet runs.[3] Where the recited consideration in a deed by a husband and wife of their homestead is greater than that agreed to be and actually paid, the vendee is put upon inquiry and is guilty of constructive fraud rendering the deed a nullity, unless it be shown that the wife knew of and assented to the lesser sum as the consideration for the conveyance.[4] A wife being entitled to the homestead absolutely in case she survives her husband, a deed to the property executed to her by the husband alone, in consideration of her promise to preserve the property for the husband's brother after her death, conveys nothing.[5] In Texas a mortgage on a homestead is void [6] and subsequent abandonment of the premises as a homestead cannot give the instrument validity,[7] though covering both homestead and other property, it may be valid as to the latter.[8] Defective deeds may be rendered effective by curative acts.[9]

foreclosure of a mechanic's lien. Summerville v. King [Tex.] 84 S. W. 643, modifying 83 S. W. 680.

89. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

90. The fact that the mortgagee failed to prove his claim held not to deprive him of his right to foreclose the same, as against the property found in such probate proceedings not subject to homestead. Bank of Woodland v. Stephens [Cal.] 79 P. 379.

91. Under Civ. Code Proc. § 34, subsec. 4, providing that an abandoned wife may bring or defend any action which her husband might have brought or defended, where she intervenes in a suit claiming land as a homestead she may appeal from a judgment disallowing her claim. Stephens v. Stephens [Ky.] 85 S. W. 1093.

92. Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36.

93. See 3 C. L. 1637.

94. Does not give plaintiff a lien on the funds. McConnell v. Wolcott [Kan.] 78 P. 848. Supplementary Proceedings 4 C. L. 1591.

95. Art. 16, § 50, of the Const. protects the homestead from forced sale for the payment of all debts, hence the county court has no jurisdiction or power to order a sale of the homestead to pay the ordinary debts of the estate and a purchaser under such order acquires no title. Griffen v. Harris [Tex. Civ. App.] 13 Tex. Ct. Rep. 538, 88 S. W. 493.

96, 97. Rev. St. 1899, § 3617. Kessner v. Phillips [Mo.] 88 S. W. 66.

98. Kessner v. Phillips [Mo.] 88 S. W. 66.

99. See 3 C. L. 1637. See 2 Tiffany, Real Prop. p. 1132, § 499.

1. Wilks v. Vaughan [Ark.] 83 S. W. 913; Hinkle v. Broadwater [Ark.] 84 S. W. 510; Gibson v. Barrett [Ark.] 87 S. W. 435; Isbell v. Jones [Ark.] 88 S. W. 593; Sharp v Fitzhugh [Ark.] 88 S. W. 929; Jolly v. Diehl [Tex. Civ. App.] 86 S. W. 965; Reed Bros. v. Nicholson [Mo.] 88 S. W. 71. See, also, Osborne & Co. v. Evans, 185 Mo. 509, 84 S. W. 867. Where a debtor, immediately upon purchasing property, occupied the same with his children as a home, the fact that he was insolvent when he purchased the same, and on that account had the title conveyed to his children, with a life estate only in himself, does not affect his right of homestead as against a levy of execution subsequently made. Brown v. Rash [Tex. Civ. App.] 13 Tex. Ct. Rep. 783, 89 S. W. 438.

2, 3. Where conveyance was attacked as fraudulent held debtor could increase his homestead claim to the full statutory amount. Wilks v. Vaughan [Ark.] 83 S. W. 913.

4. Johnson v. Callaway [Tex. Civ. App.] 87 S. W. 178. Deed set aside. Id.

5. Loomis v. Loomis [Cal.] 82 P. 679.

6, 7, 8. Dignowity v. Baumblatt [Tex Civ. App.] 85 S. W. 834.

Necessity of consent of wife to conveyance or joinder therein.[10]—It is an almost universal rule that both the husband and wife must join in a deed or incumbrance of the homestead [11] and, if she does not, the vendor may maintain ejectment.[12] This rule does not prevail in the absence of some constitutional or statutory provision establishing it.[13] It is not necessary for a wife who has abandoned her husband to join in the deed,[14] and it has been held that an abandoned husband conveying the property is estopped from setting up title in himself on the ground that his wife did not join in the deed.[15] In some states the deed is valid as to any excess over and above the homestead exemption [16] and the invalidity of a mortgage given by the husband alone does not render the debt, which the mortgage is given to secure, illegal or unenforceable.[17] This protection given the wife must not be used for the purpose of perpetrating a fraud.[18] What she is unable to do directly, she will not be permitted to do indirectly by sale on partition.[19]

Acknowledgment of conveyance.[20]—In some states the wife's acknowledgment must be separate.[21]

Contracts to convey.[22]—As a general rule the wife must join in a contract to convey; [23] but, even when statutes so require, the principles of equitable estoppel have been held to render an oral contract to convey enforceable.[24] In an action to enforce specific performance of a contract to convey defendant alleging that the land was his homestead has the burden of proving such fact.[25]

§ 7. *Loss or relinquishment.*[26]—Abandonment is a question of fact for the

9. A trust deed on a homestead, though defective in that it does not conform to Kirby's Dig. § 3901, is valid under the curative act (§ 784) when signed by the wife and not in litigation when § 785 became effective. McDaniels v. Sammons [Ark.] 86 S. W. 997.

10. See 3 C. L. 1638.

11. Wife must join. Deeds. Gulf, etc., R. Co. v. Lewis [Tex. Civ. App.] 85 S. W. 817; In re Geary's Estate, 146 Cal. 105, 79 P. 855. Deed by husband to wife held void. Civ. Code, §§ 1242, 1243. Loomis v. Loomis [Cal.] 82 P. 679; Bollen v. Lilly [Miss.] 37 So. 811. Warranty clause creates no estoppel against vendor, even after wife's death. Id.; Moseley v. Larson [Miss.] 38 So. 234. Where a husband who was non compos mentis conveyed his homestead worth $4,000 for $500, his wife not joining in the deed, held, the conveyance was a fraud on the wife and void and that equity had jurisdiction to enjoin ejectment against her and to cancel the deed. Id. Mortgage. Bates v. Frazier [Ky.] 85 S. W. 757. Contract for improvements. Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687. Neither husband nor wife can dispose by sale or conveyance of a homestead right without the express consent of the other. Grace v. Grace [Minn.] 104 N. W. 969.

12. Bollen v. Lilly [Miss.] 37 So. 811.

13. A wife need not join in the conveyance of a homestead acquired before the enactment of Laws 1895, p. 185, rendering a husband incapable of conveying the homestead without joining his wife. Elliott v. Bristow, 185 Mo. 15, 84 S. W. 48.

14, 15. Mann v. Wilson [Tex. Civ. App.] 86 S. W. 1061.

16. Under Hurd's Rev. St. 1903, p. 944, c. 52, an attempt by a husband to convey the homestead without his wife joining in the execution of the deed conveys only the excess over and above the homestead of $1,000. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

17. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891.

18. Rev. St. 1887, §§ 2921, 2922, 3040, 3041, construed. Grice v. Woodworth [Idaho] 80 P. 912. Where purchaser under oral contract took possession, paid the purchase price and made valuable improvements, held contract would be enforced. Id.

19. Grace v. Grace [Minn.] 104 N. W. 969. A wife cannot, by leaving her husband, acquire the right to compel partition of her husband's homestead, in which she has an undivided half interest and which she occupied with him as a homestead. Id.

20. See 3 C. L. 1639.

21. Where there was no examination of the wife and no acknowledgment by her before the officer making the certificate of examination and acknowledgment such certificate is void. Chattanooga Nat. Bldg. & Loan Ass'n v. Vaught [Ala.] 39 So. 215.

22. See 3 C. L. 1639.

23. Under Code, § 2974, providing that the wife must join in contract to convey, held, where an unmarried man decided to divide small tract and sell portions but before doing so married, and took up his residence thereon and thereafter, his wife not joining, leased it with privilege of purchasing, held, such privilege was unenforceable. Hostetler v. Eddy [Iowa] 104 N. W. 485.

24. Where purchaser under oral contract took possession, paid the purchase price and made valuable improvements, held, contract would be enforced. Grice v. Woodworth [Idaho] 80 P. 912.

25. Steele v. Robertson [Ark.] 87 S. W. 117.

26. See 3 C. L. 1639. See 2 Tiffany, Real Prop. p. 1134, § 499.

jury [27] and must be proved by clear and convincing evidence [28] by the party alleging it.[29] Discontinuance of the use being coupled with an intention to return,[30] existing throughout the interval of absence,[31] does not work an abandonment; hence, an enforced temporary absence on account of the destruction of the dwelling house on the premises will not work an abandonment [32] unless continued for such length of time as to negative any intention to return.[33] The only inference that can be drawn from an attempt to trade one homestead for another is that of an intention not to abandon the homestead.[34] A void deed does not affect the claimant's rights.[35] Occupancy by a tenant at sufferance is the occupancy of the owner.[36] A wife, abandoning her husband, has no further interest in the homestead.[37] A statutory method of abandonment or waiver is generally exclusive.[38] The homestead right being acquired, the persons entitled to it cannot be divested by acts or influences beyond their volition.[39] In Georgia a homestead for the benefit of a family of dependent females

27. Macavenny v. Ralph, 107 Ill. App. 542. Where because of trouble with children by a former marriage, a homestead claimant moved from her homestead without filing a declaration of homestead, and before she returned she conveyed it to her husband to defraud creditors, held, there was an abandonment. New v. Young [Ala.] 39 So. 201. Where claimant had moved away, evidence examined and held insufficient to show that he retained his homestead rights. Steele v. Robertson [Ark.] 87 S. W. 117.

28. Elliott v. Parlin & Orendorff Co. [Kan.] 81 P. 500.

29. Canning v. Andrews [Tex. Civ. App.] 85 S. W. 22; Elliott v. Parlin & Orendorff Co. [Kan.] 81 P. 500.

30. Debtor held not to lose right by a temporary absence for the purposes of trade. Wilks v. Vaughan [Ark.] 83 S. W. 913. Where one left homestead and took his family to another place where he hoped to make enough money to be able to return and set up a shop in the place where the homestead was located, held no abandonment. In re Schulz, 135 F. 228. The fact that a husband on marrying left his homestead and lived with his wife on premises that constituted her homestead before marriage, held not to show an abandonment where he intended and had made preparations to return, but had not done so merely because he could not induce his wife to go with him. Canning v. Andrews [Tex. Civ. App.] 85 S. W. 22. Where debtor had left state with his family but apparently contemplated returning and using homestead, held, evidence was insufficient to show abandonment. Elliott v. Parlin & Orendorff Co. [Kan.] 81 P. 500.

31. Instruction that there was no abandonment if claimant intended to return at time of removal held erroneous. Lynch v. McGown [Tex. Civ. App.] 13 Tex. Ct. Rep. 543, 88 S. W. 894.

32. Newton v. Russian [Ark.] 85 S. W. 407.

33. Newton v. Russian [Ark.] 85 S. W. 407. Desertion of wife by husband within a few months after the enforced removal held not to constitute an abandonment. Id.

34. In re Schulz, 135 F. 228.

35. In re Geary's Estate, 146 Cal. 105, 79 P. 855.

36. Macavenny v. Ralph, 107 Ill. App. 542.

37. Mann v. Wilson [Tex. Civ. App.] 86 S. W. 1061.

38. Charleston State Bank v. Brooks, 109 Ill. App. 51. Under Civ. Code, § 1243, declaring that a homestead can be abandoned only by a declaration of abandonment or a deed by both husband and wife, a deed of part of a homestead by a husband to his wife is no abandonment. Payne v. Cummings, 146 Cal. 426, 80 P. 620. Under Code Civ. Proc. § 1474, providing that if the homestead is selected from community property it vests absolutely in the survivor on the death of the husband or wife, a conveyance of an undivided interest in a homestead made by a husband after the wife's death does not destroy the exemption as to a debt contracted before the conveyance and before the death of the wife. Id.

39. Palmer v. Sawyer [Neb.] 103 N. W. 1088. A debtor does not lose his right to the exemption where he continues to occupy the property as a home, though, by reason of death and removal of his family, he has no one living with him. Id. Failure of probate court to set aside homestead of lunatic is not a waiver of the exemption. Griffen v. Harris [Tex. Civ. App.] 13 Tex. Ct. Rep. 538, 88 S. W. 493.

NOTE. Is the continued existence of the homestead dependent upon there being a "family" dependent upon the claimant? Upon this point there is an irreconcilable conflict. This conflict in some instances is traceable to the different provisions of the statutes construed, and in other instances to the conception taken by the court of the intention of the legislature in the enactment of the statute. Those courts which look upon the statute as a statute of nurture, intended solely for the protection of the dependent members of the family from the improvidence of the head of the family, without any division, arrive at the conclusion that when the homestead has been selected, and the dependent members of the family for whose benefit it was created have ceased to occupy, the protection of the homestead ceases, because the reason for the protection has ceased. The leading cases supporting this theory of construction are Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Bank v. Cooper, 56 Cal. 539; Johnson v. Little, 90 Ga. 781, 17 S. E. 294; Cooper v. Cooper, 24 Ohio St. 488; Galligar v. Payne, 34 La. Ann. 1057; Hill v. Franklin, 54 Miss. 632; Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419. In opposition to this view is another line of decisions

ceases upon the death of the homestead applicant.[40] There being a constitutional inhibition against the fixing on the homestead of liens not thereby expressly permitted, declarations made while the property is in the actual use and occupancy of the family as a homestead cannot estop the homestead claimant from claiming his exemption,[41] though declarations made while the property is not so used may work an estoppel.[42] In South Carolina it seems that removal from the state may work an abandonment.[43] The execution of a new mortgage for the purpose of paying an old mortgage on the property does not divest the mortgagor of his homestead rights.[44] Where a homestead is sold on foreclosure and the deed is executed under an agreement by the grantee to hold the legal title as mortgagee, subject to redemption by the mortgagor, the equitable title acquired by the latter is a continuation of the previous homestead right.[45] A waiver of the exemption in a mortgage operates in favor of the mortgage creditor alone and does not inure to the benefit of others.[46] If the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption and the rights of other creditors are subordinate to the mortgage lien.[47] Pending bankruptcy proceedings, the holder of a

based on the hypothesis that the intention of the legislature in enacting the various homestead statutes was to protect the home and all its inmates from any business misfortune and financial adversity that might befall them; that the protection extends to the head of the family as well as to the dependent members. This theory leads to the conclusion that when a homestead has been selected by the head of a family he becomes invested with a right or estate in such homestead which cannot be defeated by the death or abandonment of the home by the other members of the family who occupied it at the time of its selection. The following are some of the leading cases supporting this view: Silloway v. Brown, 12 Allen [Mass.] 30; Kimbrel v. Willis, 97 Ill. 494; Stanley v. Snyder, 43 Ark. 429; Beckmann v. Meyer, 75 Mo. 333; Webb v. Cowley, 5 Lea [Tenn.] 722; Blum v. Gaines, 57 Tex. 119; Gallagher v. Smiley, 28 Neb. 189, 44 N. W. 187, 26 Am. St. Rep. 319; Stults v. Sale, 92 Ky. 5, 17 S. W. 148, 36 Am. St. Rep. 575, 13 L. R. A. 743.—From Palmer v. Sawyer [Neb.] 103 N. W. 1089.

40. Jones v. McCrary [Ga.] 51 S. E. 349.

Note: In this case the court considers all the Georgia cases bearing on this question, shows the conflicts that exist and reconciles them by classifying the beneficiaries. The court also states that it would seem more logical and consistent with former rulings that the dependence should be upon the property rather than the applicant, but holds that they are bound by the case of Towns v. Mathews. 91 Ga. 549, 17 S. E. 955.

41. Under Const. Tex. art. 16, § 50, a purported mechanic's lien on a homestead, given simply to secure a usurious loan of money, is void, notwithstanding recitals therein stating that it was given for labor and material advanced to the lender for improvements on the borrower's homestead. Cooper v. Brazelton [C. C. A.] 135 F. 476.

42. One filing a designation of homestead and occupying such land as a homestead and mortgaging other land cannot defeat the mortgage by subsequently claiming the mortgaged premises as a homestead. Pickett v. Gleed [Tex. Civ. App.] 86 S. W. 946.

43. Bailey v. Wood [S. C.] 50 S. E. 631.

NOTE. Removal to another state: The mere fact that a homestead owner has removed to another state does not seem to be regarded as of any special weight in determining whether he intended to abandon his homestead. The question whether the removal was intended to be permanent or temporary is determined in such case in the same manner as if the removal was to a place within the state. Willbanks v. Untriner, 98 Ga. 801, 25 S. E. 841; Benbow v. Boyer, 89 Iowa, 494, 56 N. W. 544. It was, however, held in an early Iowa case that such a removal to another state was prima facie evidence of abandonment. Orman v. Orman, 26 Iowa, 361. In most of the cases, in which the fact of removal from the state appears, the question of abandonment is treated in the same manner as if the removal were to some place within the state, the character of the removal being made to depend upon whether there was at the time an intent to return. In some states the right to a homestead exemption being dependent upon the owner being a resident of the state, the right may be lost by residence in another state (see Baker v. Leggett, 98 N. C. 304, 4 S. E. 37; Finley v. Saunders, 98 N. C. 462, 4 S. E. 516), but even in such cases it would be necessary to show intent in order to determine where the residence really is intended to be. The fact of the owner having removed to another state appears in the following cases: Caheen v. Mulligan, 37 Ill. 230, 87 Am. Dec. 247; Smith v. Kneer, 203 Ill. 264, 67 N. E. 780; Leonard v. Ingraham, 58 Iowa, 406, 10 N. W. 804; Perry v. Dillrance, 86 Iowa, 424, 53 N. W. 280; Kulmert v. Conrad, 6 N. D. 215, 69 N. W. 185; Roach v. Hackner, 2 Lea [Tenn.] 633; McClellan v. Carroll [Tenn. Ch.] 42 S. W. 185; Moore v. Smead, 89 Wis. 558, 62 N. W. 426.—From note to Burkhardt v. Walker [Mich.] 102 Am. St. Rep. 386, 410.

44. Such mortgage lien is superior to the rights of a judgment creditor of the mortgagor. France v. Hohnbaum [Neb.] 102 N. W. 75, rehearing overruled [Neb.] 104 N. W. 865.

45. Foster v. Rice, 126 Iowa, 190, 101 N. W. 771.

46, 47. In re Nye [C. C. A.] 133 F. 33.

note containing a waiver of the homestead right must enforce his rights in a court of equity [48] and, not proving his claim in the bankruptcy proceedings, he may have a special judgment against such exempt property.[49]

§ 8. *Rights of surviving spouse, children, heirs or dependents of homestead tenant.*[50]—The rights of the surviving spouse, children or dependents of the homestead claimant, are almost wholly statutory.[51] The widow of a head of a family

48. Has no remedy at law. Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150; Hudson v. Lamar, T. & R. Drug Co., 121 Ga. 835, 49 S. E. 735.

49. Amendment to pleading allowed. Wright v. Horne [Ga.] 51 S. E. 30. See Bankruptcy, 5 C. L. 367.

50. See 3 C. L. 1640. As to widow's quarantine, see Descent and Distribution, 5 C. L. 995; Estates of Decedents, 5 C. L. 1183.

51. Alabama: Under Code 1896, §§ 2069, 2071, where a decedent is survived by a wife and two minor children and his estate consits of other realty besides the homestead and is not declared insolvent, the widow and one child dying, the homestead rights inure solely to the surviving child during his minority. No interest therein can be sold to pay the debts of the deceased child. Hosea v. Davis [Ala.] 39 S. 315.

Arkansas [See 3 C. L. 1641, n. 54]: Under Const. 1874, art. 9, §§ 3-6, widow is entitled to the homestead of her deceased husband, if he was a resident of the state at the time of his death, for and during her natural life. His minor children are entitled to share it with her. Gates v. Solomon [Ark.] 83 S. W. 348. In an action of ejectment against a widow, an answer that defendant's husband at the time of his death was occupying the land as a homestead and that subsequent thereto defendant continued to occupy the same as a homestead, held to set up a good defense. Id. In such a case an answer by a child held demurrable for failing to show that she was a minor at the commencement of their action, or had a right to hold it as a homestead. Id. Under Const. art. 9, §§ 6, 10, and Sand. & H. Dig. § 3588, where a father dies leaving a widow and minor children and a homestead and thereafter the widow marries and acquires another homestead, on her death a minor child of the first marriage is entitled to a homestead in either the homestead of his father or his mother, to be selected by his guardian. Grimes v. Luster [Ark.] 84 S. W. 223.

California [See 3 C. L. 1641, n. 54]: The homestead being selected by the husband and wife during coverture and recorded it vests, on the death of either, absolutely in the survivor. This right is not waived by the filing of a petition to have the property set out to the surviving spouse as a homestead, nor does an order so doing effect the title of such spouse. Code Civ. Proc. § 1474. Saddlemire v. Stockton Sav. & Loan Soc., 144 Cal. 650, 79 P. 381. Complaint by children and heirs at law of deceased owner that they had been induced to sign a deed of trust on such property through fraud, held not maintainable, the widow not being made a party. Id. Where premises, selected by deceased in his lifetime from community property as a homestead do not exceed $5,000 in value at the time of their appraisal in probate proceedings, it is the imperative duty of the court to set them off to the widow on her petition. In re McCarthy's Estate [Cal. App.] 82 P. 635.

Georgia: A homestead for the benefit of a family of dependent females ceases upon the death of the homestead applicant. Jones v. McCrary [Ga.] 51 S. E. 349.

Illinois: [See 3 C. L. 1641]:Under the act of 1857, the homestead exemption continued for the benefit of the widow and family of the householder, some of them continuing to occupy such homestead until the youngest child should become twenty-one years of age and until the death of the widow. Bechdoldt v. Bechdoldt [Ill.] 75 N. E. 557.

Kentucky: The homestead of the wife continues after her death for the benefit of the surviving husband so long as he continues to occupy the land, although he has neither family nor children living with him. Holder's Adm'r v. Holder [Ky.] 87 S. W. 1100. In partition the fee-simple interest of infants should be laid off with respect to their rights, given by Ky. St. 1903, § 1707, to occupy the homestead of their deceased father during minority; that is to say, if the homestead is less than their fee-simple interest, the latter should be made to include the former, or if the homestead is of greater value than the fee-simple interest the latter should be included in the former. Campbell v. Asher [Ky.] 88 S. W. 1067.

Louisiana: A widow left in necessitous circumstances is entitled to the $1,000 homestead, though she does not live and has never lived in the state where her husband was domiciled and died. Succession of Duplin, 113 La. 786, 37 So. 755.

Minnesota: Where a widow, with children, remarries and the homestead is placed in her name, such homestead, in the absence of children or surviving issue of any deceased child by the second marriage, descends on her death to her husband for life with remainder to her children by the prior marriage. In re Poseng's Estate [Minn.] 104 N. W. 137.

Mississippi [See 3 C. L. 1641, n. 54]: Under Code 1892, § 1553, a surviving widow is entitled to continue to occupy the homestead as it existed in the lifetime of the husband irrespective of its value. Moody v. Moody [Miss.] 38 So. 322.

Missouri [See 3 C. L. 1641, n. 54]: There being no minor children, the widow is entitled to the exclusive possession of the homestead. Mahoney v. Nevins [Mo.] 88 S. W. 731. The fee of the homestead is liable to sale subject to the rights of the widow therein for the payment of debts of the deceased husband. Robbins v. Boulware [Mo.] 88 S. W. 674.

Montana: In the absence of children, the surviving spouse takes a fee to the homestead which he or she may convey giving the grantee a fee and the right to the use of water appurtenant thereto and the means

may prosecute any appropriate remedy to prevent interference with her homestead interest,[52] and, being under no legal disability, she must assert her cause of action within the period of limitation.[53] Being entitled to the exclusive possession of the homestead, she is entitled to all the rents, issues and products during the existence of her homestead estate,[54] including crops growing at the time of her husband's death.[55] A secret wife of a deceased mortgagor is not entitled to claim the mortgaged property as a homestead as against the mortgagee, the latter having been ignorant of the mortgage.[56] Where a creditor of an insolvent estate holding a vendor's lien on real estate refuses to file a claim but forecloses his lien, the widow is entitled to be subrogated to such creditor's rights as against the personal estate, and to the allowance of a homestead from the surplus arising on the sale of the real estate and from the pro rata share of the personal estate to which the lien creditor would have been entitled had he filed a claim against the estate.[57] The right of the survivor of a community to occupy the community homestead is a personal right, and not an estate in land which can be assigned or conveyed so as to vest the right to such use and occupancy in the assignee.[58] It follows that when the surviving wife sells her interest in a community homestead the homestead right terminates and the heirs of the deceased husband are entitled to possession of their interest in the property.[59] As an infant by marrying becomes a member of another family, he or she is generally deemed divested of his or her rights in the homestead of a decedent.[60] The manner of setting aside the homestead is largely statutory,[61] but, being exempt from forced sale to satisfy decedent's debts, no administration is necessary to render the exemption effectual in favor of his children.[62] Minor child-

of using the same. Bullerdick v. Hermsmeyer [Mont.] 81 P. 334.

Nebraska [See 3 C. L. 1641, n. 54]: A homestead of less value than $2,000 cannot be disposed of at an administrator's sale either for the discharge of incumbrances thereon or for the payment of debts against the estate of the decedent and a license granted by the district court purporting to authorize such a sale is absolutely void. Bixby v. Jewell [Neb.] 101 N. W. 1026; Brandon v. Jensen [Neb.] 104 N. W. 1054, following Tindall v. Peterson [Neb.] 98 N. W. 688. See 1 C. L. 1641, n. 54.

Texas: A surviving husband may sell the community homestead for the purpose of paying community debts. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891. Under Const. art. 16, § 37, a mechanic's lien is superior to the homestead claim of minor children. Summerville v. King [Tex.] 83 S. W. 680. The business homestead, upon the death of the husband, may be set aside to the wife to the exclusion of the minor children, and the latter cannot force partition and recover their interest until such homestead is abandoned or the widow dies. White v. Yates [Tex. Civ. App.] 85 S. W. 46. Under Rev. St. Tex. 1895, art. 2046, on the death of a person leaving unmarried daughters surviving and living with him at the time as part of his family, the homestead which he then occupied descended to and vested in such daughters and other surviving children free from the father's debts. Randolph v. White, 135 F. 875. Such art. 2046 is not repugnant to Const. Tex. art. 16, § 52. Id.

Wisconsin: Rev. St. 1898, § 2271, providing that the homestead shall descend free from all judgments and claims against the deceased owner, with certain exceptions, abrogates the right to a vendor's lien thereon. Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678.

52. McWhorter v. Cheney, 121 Ga. 541, 49 S. E. 603.

Note: Same rule seems to apply to the wife of the head of a family. Connally v. Hardwick, 61 Ga. 501; Eve v. Cross, 76 Ga. 693; Pritchett v. Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298.—From McWhorter v. Cheney, 121 Ga. 541, 49 S. E. 603.

53. McWhorter v. Cheney, 121 Ga. 541, 49 S. E. 603. Delay of eighteen years held to bar action based on fraud. Id. See Limitation of Actions, 4 C. L. 445.

54. Mahoney v. Nevins [Mo.] 88 S. W. 731.

55. So held where there were no minor children. Mahoney v. Nevins [Mo.] 88 S. W. 731.

56. Wife had never resided on premises. Hale v. Marshall [Mich.] 102 N. W. 658.

57. Whitmore v. Roscoe, 112 Tenn. 621, 85 S. W. 860.

58, 59. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

60. So held under Ky. St. 1903, § 1707, providing that unmarried infant children of a decedent shall be entitled to a joint occupancy of the homestead until the youngest arrives at majority. Jones v. Crawford [Ky.] 84 S. W. 568.

61. Under Comp. St. 1887, div. 2, § 134, the probate court could set aside a homestead to a surviving spouse either on petition or upon the court's or judge's own motion. Bullerdick v. Hermsmeyyer [Mont.] 81 P. 334.

62. Randolph v. White, 135 F. 875. County court has no jurisdiction of proceedings to

ren have no homestead right in any particular portion of the property of their deceased father until it is set aside to them by an order of court.[63] Upon abandonment of the property as a homestead by the widow and children the property generally descends to decedent's heirs at law.[64]

Election.[65]—Owing to the interest of minor children, statutes do not generally allow the homestead to be merged in dower.[66] A surviving spouse, having an undivided one-half interest in land, by electing to take a homestead in a designated part of the tract waives all right to the remainder thereof up to the value of the homestead.[67]

Rights of divorced parties.[68]—In divorce proceedings a homestead, which is community property, being set apart for the use of the wife and minor children it is not subject to sale on execution against the divorced husband,[69] and it is proper for the court in the decree of divorce to protect the wife and minor children in its use.[70] Where the homestead has been occupied by the husband and the wife intended to occupy it as soon as able, the homestead rights of the family are not affected by a decree of divorce, the homestead being community property and the custody of minor children being awarded the wife.[71]

Claim to reimbursement for expenditures.[72]

§ 9. *Exemption of proceeds of homestead or of substituted properties.*[73]—Land paid for in full with the proceeds of a homestead is homestead property and stands, as to exemption from sale, on the same footing as the original homestead,[74] though the conveyance of the new property be to the wrong person.[75] In the absence of notice, actual or constructive, of the homestead character of the substituted property creditors dealing therewith will be protected.[76] In some states the exemption follows the fund.[77] In Missouri the exemption of the proceeds of a sale of the homestead is confined to another homestead acquired therewith.[78]

§ 10. *Remedies and procedure. Remedies by suit or action.*[79]—In Wisconsin,

sell the homestead for the payment of the debts of the deceased owner's estate. Dignowity v. Baumblatt [Tex. Civ. App.] 85 S. W. 834.

63. White v. Yates [Tex. Civ. App.] 85 S. W. 46.

64. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

65. See 3 C. L. 1641.

66. Rev. St. 1899, § 3621, providing that if the homestead equals the dower right no dower shall be awarded the widow, has no effect to deprive her of her homestead interest under any circumstances, where she elects to take a child's part in lieu of dower. McFadin v. Board [Mo.] 87 S. W. 948.

67. Carroll v. Jefferies [Tex. Civ. App.] 87 S. W. 1050.

68. See 3 C. L. 1642.

69, 70, 71. Holland v. Zilliox [Tex. Civ. App.] 86 S. W. 36.

72, 73. See 3 C. L. 1642.

74. Johnson v. Thomason, 120 Ga. 531, 48 S. E. 137. Under Rev. St. ch. 52, § 6, exemption extends to lots purchased with proceeds of sale of homestead. Macavenny v. Ralph, 107 Ill. App. 542. The homestead being exempt its value in exchanged property is exempt. Godfrey v. Herring [Ark.] 85 S. W. 232.

75. Johnson v. Thomason, 120 Ga. 531, 48 S. E. 137. Where a judgment creditor, to whose lien a homestead was subject, acted as a receiver in selling the homestead and reinvesting the proceeds, taking a deed to himself as "trustee and receiver" to be held as a homestead for the use of the beneficiaries of the original homestead, with reversion to the estate of him from whose property the homestead had been set apart, held, creditor was not estopped from enforcing his judgment against the last mentioned land. Id.

76. Mortgagor of property received in exchange for a homestead will be protected, he having had no notice of its status. Ford v. Fargason, 120 Ga. 606, 48 S. E. 180. Where personalty was duly exempted and was used in raising a crop, the proceeds of which were invested in land, held mortgagee of latter, in the absence of notice, had a valid lien. Reed v. Holbrook [Ga.] 51 S. E. 720.

77. Where a wife parted with her interest in the homestead, on agreement that she should receive the proceeds in payment of a debt from the husband, a judgment lien creditor of the husband could not subject to his lien the vendor's lien notes given the wife. Howard v. Mayher [Tex. Civ. App.] 13 Tex. Ct. Rep. 49, 88 S. W. 409.

78. Where homestead was exchanged for wild land and this land exchanged for the land in controversy and neither the claimant nor his family ever occupied the wild land or the land in controversy as a homestead, the latter land is not exempt as a homestead. Rev. St. 1899, § 3623, construed. Osborne & Co. v. Evans, 185 Mo. 509, 84 S. W. 867.

79. See 3 C. L. 1643. Remedies in bank-

title to the homestead being in the husband, in a suit to enforce a mechanic's lien for work done under a contract entered into with the husband alone, the wife is not a necessary party.[80] An "appeal" from a clerk's grant of a supersedeas to the debtor in Arkansas will be regarded by chancery as a motion to quash the supersedeas and to proceed with sale [81] and should be heard.[82]

Remedies of creditors against excess.[83]—The homestead exceeding the statutory amount, the creditors are entitled to the excess,[84] and a levy of an execution on the property creates a lien on such excess.[85] In Colorado the fact that the value of the homestead exceeds the statutory amount does not entitle the creditor to possession, but the property must be sold and the amount of the exemption paid to the owner.[86] Statutes generally provide a method for determining the necessity of a sale.[87] Execution being levied on the premises, delay in having the excess determined may work an abandonment.[88]

HOMICIDE.

§ 1. *Elements of crime in general and parties thereto.*[89]—Responsibility for homicide exists, though the injury inflicted be not the sole cause of death, if it proximately contributes thereto,[90] and in like manner proximate causal connection between defendant's act and the infliction of the fatal wound is all that is required; [91]

ruptcy proceedings, see Bankruptcy, 5 C. L. 367.

80. If she fails to make application to intervene before judgment, she should not be permitted to have the latter vacated and be allowed to defend on the same grounds as those urged by her husband. Hunt v. McDonald [Wis.] 102 N. W. 318.

81, 82. An execution debtor filed a schedule of exemptions, and the clerk of the court, over the creditor's exceptions, issued a supersedeas, and from the clerk's decision the creditor "appealed" to the court. It was error for the court to dismiss the "appeal." Harris v. Henry [Ark.] 86 S. W. 666.

83. See 3 C. L. 1643.

84. In a proceeding to set aside a conveyance from a husband to his wife as fraudulent, the court is limited to a finding what part of the property belonged to the husband, and, it being used as a homestead, to directing that the land be valued, the homesteader be allowed to select his exemption, and the excess after paying the wife the amount due her, be subject to plaintiff's claim. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

85. Lean v. Givens [Cal] 81 P. 128. The levy creates a conditional lien to become absolute in the event it is determined in proceedings under Code Civ. Proc. §§ 1245-1261, that an excess exists, and a purchaser after the levy takes subject to the lien. Id.

86. In re Nye [C. C. A.] 133 F. 33.

87. Under Civ. Code, §§ 1245-1261, providing a plan whereby the excess of value over the exemption may be subject to sale on execution, the appraisers reporting that the property cannot be divided, there is no necessity for a notice of the hearing of the report. Lean v. Givens [Cal.] 81 P. 128.

88. The fact that there was sixteen months delay after the levy of an execution on a homestead before proceedings were taken under Civ. Code, §§ 1245-1258, providing a method for subjecting to execution the excess of value over the exemption, held not to show an abandonment; a part of the delay being explained by the pendency of a suit to enjoin the execution sale. Lean v. Givens [Cal.] 81 P. 128.

89. See 3 C. L. 1643.

90. Where the wound caused pneumonia, which caused death. State v. Wilson [La.] 38 So. 397. Where it was claimed that the immediate cause of the death was a disease resulting from a germ entering the wound. Bishop v. State [Ark.] 84 S. W. 707.

91. Where a party freed a lunatic's hand from an officer's grasp, thereby enabling the

but if the unlawful act or omission of defendant was merely a condition and not a cause of the death, he is not responsible.[92] That the injury was intended for another is immaterial.[93] General rules governing principals and accessories,[94] and the responsibility of conspirators, apply.[95] One who aids, abets or encourages another in the commission of a homicide is not relieved from criminal responsibility by fleeing from the scene of the difficulty before the fatal shot is fired.[96]

§ 2. *Murder*[97] is the unlawful killing of a human being with malice aforethought,[98] express or implied.[99] An actual intent to take life is not a necessary in-

lunatic to shoot the officer, he was held criminally responsible for the lunatic's act. Johnson v. State [Ala.] 38 So. 182.

92. Persons who assault another, for the purpose of robbing them, are not guilty of homicide, if he, in defending himself, kills a third person. Commonwealth v. Moore [Ky.] 88 S. W. 1085. See Clark & M. Crimes [2d Ed.] § 236, p. 317.

93. Where one shoots with intent to kill another, it is immaterial whether he sees or not the third person whom he kills. Gater v. State [Ala.] 37 So. 692; State v. Briggs [W. Va.] 52 S. E. 218.

94. Cortez v. State [Tex. Cr. App.] 83 S. W. 812; Rawlins v. State [Ga.] 52 S. E. 1. To constitute a person guilty of voluntary manslaughter as an aider or abettor, the killing must have been willfully and feloniously committed by his co-defendants or some of them, in a sudden affray or sudden heat or passion, without previous malice, and not in self-defense, and defendant must have been present aiding or abetting. Wheeler v. Com. [Ky.] 87 S. W. 1106. Accessories punished as principals in Pennsylvania, under Act of March 31, 1860 [P. L. 440] (Commonwealth v. Johnson [Pa.] 61 A. 246), in New York, under Pen. Code, § 29 (People v. Patrick [N. Y.] 74 N. E. 843), and in Colorado (Tuttle v. People [Colo.] 79 P. 1035). Where two defendants engaged in a difficulty with two others, one of whom is killed, the one who brought on the difficulty is guilty, although he did not shoot. State v. Gaylord, 70 S. C. 415, 50 S. E. 20.

95. Humphrey v. State [Ark.] 86 S. W. 431. Conviction of defendant of murder of prison guard, by a co-conspirator in an attempt to escape. People v. Eldridge [Cal.] 82 P. 442. Conviction of murder of one of thirteen prisoners who conspired to escape and during whose resistance to recapture an officer was killed. People v. Wood, 145 Cal. 659, 79 P. 367. Conspirator in a robbery resulting in a homicide, held to be a principal. Dean v. State [Miss.] 37 So. 501. Where several conspire to rob and one commits murder in the perpetration of the robbery, all are responsible. Andrews v. People [Colo.] 79 P. 1031. For the general principles relating to parties to crimes, see Criminal Law, 5 C. L. 883.

96. State v. Forsha [Mo.] 88 S. W. 746.

97. See 3 C. L. 1644.

98. Osburn v. State [Ind.] 73 N. E. 601. Definition of murder given in § 798, Dist. of Columbia Code, is simply the common-law definition. Hill v. U. S., 22 App. D. C. 395. Where one provokes a quarrel with another for the purpose of killing him and does kill him, he is guilty of murder. Kyle v. People, 215 Ill. 250, 74 N. E. 146. Malice is an essential ingredient of murder of the first and second degrees. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; State v. Brown [Del.] 61 A. 1077. Under Mills' Ann. St. § 1176, malice does not enter into the crime of murder when committed in the perpetration of robbery. Andrews v. People [Colo.] 79 P. 1031. Malice is the expression of a wicked and depraved heart and mind and of a cruel disposition (State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; State v. Brown [Del.] 61 A. 1077), and is not restricted to spite or malevolence towards the particular person slain (State v. Powell [Del.] 61 A. 966; State v. Brown [Del.] 61 A. 1077). Where defendant, though sincerely believing deceased had a few dollars of his money, shot him for refusing to surrender it, it showed he had an "abandoned and malignant heart." People v. Hill [Cal. App.] 82 P. 398.

99. Malice is implied when one seeks the difficulty in which provocation for passion was given. Noble v. State [Ark.] 87 S. W. 120. Where the killing is admitted and no circumstances of justification, excuse or mitigation appear, the law presumes that it was done with malice aforethought. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; State v. Powell [Del.] 61 A. 966. Robbery of deceased by use of a pistol and a subsequent killing of him to destroy evidence of robbery is cogent evidence of express malice. Martin v. State [Tex. Cr. App.] 83 S. W. 390. Malice is not a presumption of law but a question of fact for the jury. Zipperian v. People [Colo.] 79 P. 1018. The use of a deadly weapon raises a presumption of malice. State v. Byrd [S. C.] 51 S. E. 542; Brown v. State [Ala.] 38 So. 268. Especially the use of a deadly weapon against a vital part of the body. Commonwealth v. Gibson, 211 Pa. 546, 60 A. 1086. It is not presumed alone from the use of a deadly weapon, but its use is a circumstance from which the jury may imply malice. Territory v. Gutierez [N. M.] 79 P. 716. In Delaware all homicides with a deadly weapon are presumed malicious, and the burden of proof is on the accused to show the contrary. State v. Brown [Del.] 61 A. 1077. Pocket knives are not per se deadly weapons. Craiger v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 736, 88 S. W. 208. The mere fact that a wound inflicted by a weapon caused death is not conclusive that it was a deadly weapon. Id. Where malice or the want of malice is clearly shown, a presumption of malice does not arise from the killing. State v. Rochester [S. C.] 51 S. E. 685. The word "maliciously," as used in Mills' Ann. St. Rev. Supp. § 1209, is not applicable to the crime of murder by abortion, as therein defined. Johnson v. People [Colo.] 80 P. 133.

gredient in murder any more than it is in manslaughter.[1] But to justify a conviction of murder in the second degree under the Ohio statute, it must be affirmatively proved that the accused "purposely" killed the deceased,[2] while the existence of a specific intent to take life is in Arkansas the distinguishing characteristic of murder in the first degree.[3]

Degrees.[4]—In nearly all the states murder is now divided by statute into two or more [5] degrees, including in the first or more heinous degree all forms of premeditated or deliberate murder in general and specifically such murders as, from their nature, show deliberation and premeditation,[6] and all murder committed in the commission or attempt to commit certain felonies.[7]

Murder in the second degree is variously defined in different states, the intention being to include therein all murder not denounced as of the first degree.[8]

In those forms of murder which are specifically denounced as murder in the first degree, no actual intent to take life is necessary,[9] but ordinarily there must be deliberation and premeditation, though there need be no appreciable time between the formation of the intent to kill and the killing.[10] If a design to kill is formed in a mind excited by passion or disturbed by any inadequate cause, and cooling time has not elapsed, the homicide is not greater than murder in the second degree.[11] No motive is necessary if the fact of deliberate murder otherwise appears,[12] nor need a motive be shown, in a prosecution for murder, where the evidence is circumstantial.[13]

Attempts [14] are usually prosecuted as assaults with intent to murder.[15]

§ 3. *Manslaughter.*[16]—Manslaughter embraces all forms of criminal homicide from which malice or an intent to kill is absent.[17] Thus, it is manslaughter if the

1. State v. Brown [Del.] 61 A. 1077. Intent is immaterial in murder committed in the perpetration of robbery, under Mills' Ann. St. § 1176. Andrews v. People [Colo.] 79 P. 1031.

2. To show that he purposely inflicted the wound that caused the death, or that he purposely struck the deceased, from which stroke the deceased died, is insufficient. Munday v. State, 5 Ohio C. C. (N. S.) 656, 25 Circ. R. 712.

3. Petty v. State [Ark.] 89 S. W. 465.

4. See 3 C. L. 1644.

5. Third degree: Miera v. Territory [N. M.] 81 P. 586.

6. State v. Williams, 186 Mo. 128, 84 S. W. 924; Andrews v. People [Colo.] 79 P. 1031; Osburn v. State [Ind.] 73 N. E. 601; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; People v. Woods [Cal.] 81 P. 652; Commonwealth v. Johnson [Pa.] 61 A. 246. With express malice aforethought, that is, where the killing is done with a sedate, deliberate mind and formed design. State v. Brown [Del.] 61 A. 1077. Premeditation and deliberation must be shown. State v. Teachey, 138 N. C. 587, 50 S. E. 232. Where prisoners armed themselves with pieces of iron and beat the turnkey on the head. Commonwealth v. Dillen [Pa.] 60 A. 263. Where accused ran up to deceased and stabbed him. Commonwealth v. Dardaia, 210 Pa. 61, 59 A. 432. By poisoning. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070. In Pennsylvania, under Act March 31, 1860 (P. L. 382), the jury determines the degree. Commonwealth v. Fellows [Pa.] 61 A. 922.

7. State v. Brown [Del.] 61 A. 1077. Burglary. People v. Woods [Cal.] 81 P. 652. Where the homicide occurred within two minutes after a robbery and apparently to prevent detection. State v. Williams [Nev.] 82 P. 353.

8. Where the killing was done with implied malice, without any deliberate or formed design. State v. Brown [Del.] 61 A. 1077. Defined in § 1064, Comp. Laws 1897. Territory v. Gutierez [N. M.] 79 P. 716. Where the homicide was committed under the influence of a wicked and depraved heart and with a cruel and reckless indifference to human life. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Where one intentionally and premeditatedly kills another, while smarting under passion aroused by vile and insulting epithets spoken by deceased, he is guilty of murder in the second degree. State v. Williams, 186 Mo. 128, 84 S. W. 924.

9. See 3 C. L. 1645.

10. State v. Powell [Del.] 61 A. 966; State v. Daniel [N. C.] 51 S. E. 858; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; State v. Teachey, 138 N. C. 587, 50 S. E. 232.

11. Manning v. State [Tex. Cr. App.] 85 S. W. 1149.

12. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070.

13. State v. Adams, 138 N. C. 688, 50 S. E. 765.

14. See 2 C. L. 224.

15. See post, § 4.

16. See 3 C. L. 1645.

17. State v. Brown [Del.] 61 A. 1077; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; People v. Waysman [Cal. App.] 81 P. 1087. See definition in Pen. Code, § 64. Rentfrow v. State [Ga.] 51 S. E. 596. A

homicide is committed unintentionally in the commission of an unlawful act,[18] or in sudden combat,[19] or in the heat of passion[20] produced by reasonable provocation,[21] and before the lapse of reasonable cooling time.[22] Where one engaged in an unlawful act not in itself dangerous, without negligence, commits an unintentional homicide, it is a criminal offense only when the act is malum in se.[23] Voluntary manslaughter is the unlawful, intentional killing of another without malice,[24] and involuntary manslaughter is the killing of another in doing some unlawful act, but without intention to kill.[25] Where one, laboring under excitement because of slanderous remarks concerning female relatives, went to the slanderer and, in an attempt to kill him, killed his wife, he was guilty of manslaughter.[26] An essential element of voluntary manslaughter is passion on the part of the slayer.[27] An honest, though unjustified belief that the killing is necessary for self-protection may reduce the homicide to manslaughter.[28] Where an assault, neither intended or calculated to kill, is returned by violence disproportionate to the aggression, the

killing in a combat which engenders hot blood is not murder in the second degree, unless the elements of purpose and malice concur in the act, nor in the first degree, in the absence of premeditation. Osburn v. State [Ind. App.] 73 N. E. 601. Where, after a difficulty with deceased, defendant retires, but returns, if he does so for the purpose of provoking a difficulty with intent to kill, he is guilty of murder; otherwise, of manslaughter. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153.

18. Resistance to arrest. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. In an attempt to tar and feather deceased. People v. Cowan [Cal. App.] 82 P. 339. By refusal of medical care and attendance to one entitled to receive it from accused. State v. Sandford, 99 Me. 441, 59 A. 597. Criminal negligence of a medical practitioner. Hampton v. State [Fla.] 39 So. 421. Where defendant wantonly and recklessly drove his team on a highway and killed a bicyclist, it is no defense that he attempted to avoid the accident when it was too late. State v. Stentz, 33 Wash. 444, 74 P. 588. Rev. St. 1899, § 1825, declaring an attempt to cause an abortion, where death of neither child nor mother resulted, manslaughter, is to that extent invalid. State v. Hartley, 185 Mo. 669, 84 S. W. 910. One who, without intent to injure any one, fires carelessly in the direction of a crowd and thereby kills one, is guilty of involuntary manslaughter. Nolly v. State [Ga.] 52 S. E. 19.

19. Sullivan v. State [Miss.] 37 So. 1006. Altercation and mutual intent to fight will constitute "mutual combat" without exchange of blows. Pollard v. State [Ga.] 52 S. E. 149.

20. Passion caused by an insult to wife. Melton v. State [Tex. Cr. App.] 83 S. W. 822; Venters v. State [Tex. Cr. App.] 83 S. W. 832. A man has the right to resist an attempt by his father-in-law to get possession of his wife, and if, in the excitement caused by such attempt, he kills his father-in-law, the offense is only manslaughter. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341.

21. Chambers v. State [Tex. Cr. App.] 86 S. W. 752; Peel v. State [Ala.] 39 So. 251. The statute of Texas requires both passion and adequate cause. Hatchell v. State [Tex. Cr. App.] 84 S. W. 234. No slight assault can excuse the killing of an assailant, with a deadly weapon, so as to reduce the offense from murder to manslaughter. State v. Powell [Del.] 61 A. 966. Mere words, however abusive, opprobious or insulting, are not sufficient provocation. State v. Buffing-[Kan.] 81 P. 465; Petty v. State [Ark.] 89 S. W. 465; Scott v. State [Ark.] 86 S. W. 1004. The failure of a railroad official to give an employe a recommendation, and the putting of the employe's name on the black list, affords no sufficient provocation for killing him. Warner v. Com. [Ky.] 84 S. W. 742. The provocation must be great as to produce such a transport of passion as to render the person, for the time being, deaf to the voice of reason. State v. Brown [Del.] 61 A. 1077. Where a deadly weapon was used, the provocation must be great to reduce the homicide from murder to manslaughter. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

22. The provocation must arise at the time of the killing, but the jury may consider all the circumstances to make out the provocation at the time. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Where defendant renewed the difficulty and killed deceased after sufficient cooling time, the killing was not manslaughter. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 740, 88 S. W. 923.

23. Hunting on another's land without permission is merely malum prohibitum, under Laws 1901, p. 557, c. 410, and an accidental homicide, committed while so hunting, is not therefore criminal. State v. Horton [N. C.] 51 S. E. 945.

24. One who fires a shot in a careless, reckless manner, knowing that he cannot do so without hitting an innocent person, is guilty of voluntary manslaughter. Ringer v. State [Ark.] 85 S. W. 410; Scott v. State [Ark.] 86 S. W. 1004.

25. Ringer v. State [Ark.] 85 S. W. 410. Where the injuries were inflicted with the hands and feet, which are not deadly weapons. Thomas v. Com. [Ky.] 86 S. W. 694.

26. Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 339, 87 S. W. 143.

27. Rentfrow v. State [Ga.] 51 S. E. 596.

28. Allison v. State [Ark.] 86 S. W. 409.

character of the combat changes and if, without time to cool, the assailant kills the other, he commits only manslaughter.[29] Degrees of manslaughter in several states are referred to in the notes.[30]

§ 4. *Assault with intent to kill or do great bodily harm.*[31]—To constitute an assault with intent to murder, the circumstances must have been such that, had the one assaulted died from the injuries, the assailant would have been of murder.[32] In some jurisdictions the offense is defined as assault with a "dangerous" or "deadly" weapon.[33] In Louisiana "shooting at" another is a complete crime in itself.[34]

§ 5. *Justification and excuse.*[35]—Homicide is justifiable as committed in self-defense, where the accused, without having provoked the difficulty,[36] and without justification,[37] is assaulted in such manner that he in good faith believes,[38] and has reasonable ground to believe,[39] that he is in imminent danger [40] of death or great bodily harm,[41] and that no safe means of avoiding the same is open to him, except the kill-

29. Noble v. State [Ark.] 87 S. W. 120.

30. First degree: Defined in Crimes Act. § 12 (Gen. St. 1901, § 1997). State v. McAnarney [Kan.] 79 P. 137.

Third degree: Defined in §§ 4354, 4355, Rev. St. 1898. Kenney v. State [Wis.] 102 N. W. 907.

Fourth degree: Defined in §§ 4362, 4363, Rev. St. 1898. Schmidt v. State [Wis.] 102 N. W. 1071.

31. See 3 C. L. 1646.

32. Napper v. State [Ga.] 51 S. E. 592. There must have been a specific intent to kill. Reyes v. State [Tex. Cr. App.] 88 S. W. 245. The existence or nonexistence of an intent to kill may be inferred from the character of the assault, the want or use of a deadly weapon and the presence or absence of excusing or palliating circumstances. Brown v. State [Ala.] 38 So. 268. The specific intent must also be attended by malice aforethought. Carr v. State [Tex. Cr. App.] 87 S. W. 346. Under Rev. Pen. Code, § 285, one who shoots at, or actually shoots one person, with intent to kill another, is guilty of assault with intent to kill. State v. Shanley [S. D.] 104 N. W. 522. Under § 215, Criminal Code, an aggravated assault is committed when a serious bodily injury is inflicted. Mapula v. Territory [Ariz.] 80 P. 389. To reduce assault with intent to murder to aggravated assault, because of an insult to defendant's sister, the insult must not only have been the actuating cause, but defendant's mind must have been excited and incapable of cool reflection. Jones v. State [Tex. Cr. App.] 85 S. W. 5. Shooting at another with no intent to kill, but to frighten him, is merely assault and battery. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347; Ivory v. State [Tex. Cr. App.] 87 S. W. 699.

33. Club held dangerous weapon. State v. Edmunds [S. D.] 104 N. W. 1115.

34. Under § 792, Revised Statutes. State v. Fairbanks [La.] 39 So. 443, afg. State v. Brady, 39 La. Ann. 687, 2 So. 556.

35. See 3 C. L. 1647.

36. Wheeler v. Com. [Ky.] 87 S. W. 1106; Mackin v. People, 214 Ill. 73 N. E. 344; State v. Thrailkill [S. C.] 50 S. E. 551. One of the indispensable elements of self-defense is freedom from fault, and the law admits of no qualification of the requirement. Smith v. State [Ala.] 39 So. 329. But the burden is upon the state to show that the accused was not free from fault, after he has shown that, at the time of the killing, the necessary ingredients of the right of self-defense existed. Garza v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 720, 88 S. W. 231. It must be a wrongful, and not merely an innocent and accidental, provocation to bar the right of self-defense. Green v. State [Ala.] 39 So. 362; State v. Taylor [W. Va.] 50 S. E. 247. To render one guilty of provoking a difficulty, he must be shown to have used some language or done some act with that intent. State v. Garland, 138 N. C. 675, 50 S. E. 853; Pedro v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 721, 88 S W. 233. One who provoked a difficulty may defend himself against violence not justified by the provocation. Sams v. State [Ga.] 52 S. E. 18.

37. Mere words, however abusive and insulting, will not justify. State v. Buffington [Kan.] 81 P. 465. An affray does not justify one in shooting his antagonist after they have entirely separated and are moving apart. Holmes v. State [Wis.] 102 N. W. 321.

38. Holmes v. State [Wis.] 102 N. W. 321; Wray v. State, 5 Ohio C. C. (N. S.) 437; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

39. Allison v. State [Ark.] 86 S. W. 409; O'Neal v. Com. [Ky.] 85 S. W. 745; Green v. State [Ala.] 39 So. 362; Holmes v. State [Wis.] 102 N. W. 321; State v. Thrailkill [S. C.] 50 S. E. 551; Miller v. People, 216 Ill. 309, 74 N. E. 743; Mackin v. People, 214 Ill. 232, 73 N. E. 344; Wray v. State, 5 Ohio C. C. (N. S.) 437. Must act with reasonable courage. Turner v. Territory [Okl.] 82 P. 650.

40. Holmes v. State [Wis.] 102 N. W. 321; Miller v. People, 216 Ill. 309, 74 N. E. 743; Wray v. State, 5 Ohio C. C. (N. S.) 437. The criterion of apparent danger is as the situation is viewed from the standpoint of the defendant. Adams v. State [Tex. Cr. App.] 84 S. W. 231; Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S W. 1153; Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238. Where one assails another with a butcher knife, it is presumed that he intends to kill, and the person assailed is justified in shooting the assailant. Ivory v. State [Tex. Cr. App.] 87 S. W. 699.

41. O'Neal v. Com. [Ky.] 85 S. W. 745; Holmes v. State [Wis.] 102 N. W. 321; Kipley v. People, 215 Ill. 358, 74 N. E. 379; Miller v. People, 216 Ill. 309, 74 N. E. 743; State v. Thrailkill [S. C.] 50 S. E. 551; Mackin v. People, 214 Ill. 232, 73 N. E. 344; State v. Wray,

ing of his assailant.[42] One assailed, however, with felonious intent is not bound to retreat, but may stand his ground and if necessary kill his assailant,[43] although in

5 Ohio C. C. (N. S.) 437; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

42. Green v. State [Ala.] 39 So. 362; Mackin v. People, 214 Ill. 232, 73 N. E. 344; Wray v. State, 5 Ohio C. C. (N. S.) 437. One attacked must retreat, if he can safely do so, or use other reasonable means in his power to avoid killing his assailant. State v. Powell [Del.] 61 A. 966. A person on his own premises, attacked by one on a highway, must retreat if possible before killing his adversary. State v. Rochester [S. C.] 51 S. E. 685. Where defendant was a trespasser on the lands of deceased, it was his duty to retire from an assault by deceased. Turley v. State [Neb.] 104 N. W. 934.

43. Under Sand. & H. Dig. § 1649, defining the right of self-defense, although a man may stand his ground and refuse to retreat, he must do all he can to avoid the necessity of killing. Thomas v. State [Ark.] 86 S. W. 404. Where a man is without fault and an assault with intent to kill is made upon him, he is not required to retreat, but may stand his ground and kill his assailant, if necessary to save his life or avoid great bodily harm. State v. Blevins, 138 N. C. 668, 50 S. E. 763. But in case of an ordinary assault, even with a deadly weapon, he must retreat, if possible and safe, before killing his assailant. Id.

NOTE. Duty to retreat from felonious assault: Considerable currency has been given to a view contrary to that stated in the text by an eminent authority on criminal law (Prof. J. H. Beale in 16 Harvard L. R. 574). The position of Mr. Beale does not, however, seem to be sustained by either reason or authority. The question is admirably discussed in the latest judicial utterance on the subject (State v. Gardner [Minn.] 104 N. W. 971). Mr. Justice Jaggard says:

"The common-law doctrine of 'retreat to the wall' is thus referred to in a frequently quoted paragraph from Coke (3 Inst. 55): 'Some be voluntary, yet being done upon inevitable cause are no felony; as if A. be assaulted by B, and they fight together, and before any mortal blow is given, A. giveth back until he cometh to a hedge, wall, or other strait, beyond which he cannot pass, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony.' The rule on this subject has tended in some American jurisdictions to be enforced with strictness, in others to be largely modified, in accordance with changed conditions, and indeed to be positively relaxed. See State v. Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 598; Runyan v. State, 57 Ind. 80, 84, 26 Am. Rep. 52. In a leading case (Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733) after a review of the common-law authorities in consequence of this confusion in the later cases, the court, inter alia, said: 'The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm.' The supreme court of the United States approved of this rule and of Runyan v. State, supra, in 1894, in Beard v. U. S., 158 U. S. 550, 39 Law. Ed. 1086. In that case an angry dispute arose between Beard and three brothers, one of whom took a shotgun, and went with the others upon the premises of the accused for the purpose of taking away a cow in dispute. Beard returned to his home, taking with him a gun he was in the habit of carrying when absent from home, and finding the brothers on his premises ordered them to leave. This they refused to do. When the deceased got within a few steps of the accused, the latter warned him to stop, but he approached nearer, saying: 'Damn you, I will show you,' at the same time making a movement with his left hand as if to draw a pistol from his pocket. The accused struck him on the head with the butt end of his gun, and knocked him down, as a result of which he died. Mr. Justice Harlan said: 'The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon in such a way and with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury.' In Rowe v. U. S., 164 U. S. 546, 41 Law. Ed. 547, the defendant, a Cherokee Indian, had an altercation with the deceased at a hotel. After a quarrel at the supper table, the accused swore at the deceased and kicked him. The accused then leaned up against the counter, as if, according to his own testimony, he had abandoned the controversy. Immediately the deceased sprang at him, striking him with a knife, cutting him. Thereupon the accused shot and killed his assailant. The trial court charged in a carefully qualified way as to the duty of retreat. Mr. Justice Harlan, inter alia, said: 'The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm; and, under the circumstances, it was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the

fact he is mistaken as to the existence or imminence of the danger.[44] Under the

attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him." This accords with the general law on the subject. Harbour v. State, 140 Ala. 103, 37 So. 330. People v. Newcomer, 118 Cal. 263, 50 P. 405; State v. Chushing, 14 Wash. 527, 45 P. 145, 53 Am. St. Rep. 883; Babcock v. People, 13 Colo. 515, 22 P. 817; Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745; Cains' Case, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Commonwealth v. Selfridge (Mass. 1806) reported in volume 1, Horrigan & Thomp. Self-Def. 1; Pond v. People, 8 Mich. 150; People v. Macard, 75 Mich. 15, 40 N. W. 784; State v. Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; Willis v. State [Neb.] 61 N. W. 258, 25 Am. & Eng. Enc. Law [2d Ed.] 272, note 2.

"The rule of law in this state is not inconsistant with this conception of the duty to retreat so far as is involved in the case at bar. In State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70, Wilson, C. J., said, inter alia: 'It clearly appears that the defendant deliberately and intentionally shot the deceased, and from this the presumption is that it was an act of murder, * * * Where the party has not retreated from or attempted to shun the combat, but has, as in this case, unnecessarily entered into it, his act is not one of self-defense. The defendant by taking his gun and following after the deceased, without any previous provocation, such as the law will recognize as provocation for the use of a deadly weapon, showed conclusively that the homicide was not committed in self-defense, real or imaginary.' In approving this case in State v. Sorenson, 32 Minn. 118, 19 N. W. 738, in which the deceased rushed at the defendant with a club, Gilfillan, C. J., said: 'The law concedes the right to kill in self-defense, but only in extremity, and when no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If it was practicable, and so apparent to him, to repel the attempt by other means than by killing his assailant, he is bound to do so. And all the authorities are agreed that ordinarily, as an element of legal self-defense in cases of personal conflict, the party killing must escape by retreat, unless prevented by some impediment or by the fierceness of the assault.' The last-named case was approved in State v. Rheams, 34 Minn. 18, 24 N. W. 302, in which the deceased was unarmed and the defendant had a loaded revolver. In State v. Scott, 41 Minn. 365, 373, 43 N. W. 62, the evidence was such that no charge that the homicide was justified by self-defense, ignoring the circumstances of provocation by the defendant, would have been correct.

"The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction."

From an examination of the cases it would appear that the duty to retreat from murderous assault is maintained in Alabama (Gordon v. State, 129 Ala. 113); Delaware (State v. Talley, 9 Houst. 467); Iowa (State v. Donnelly, 69 Iowa, 369); New York (People v. Sullivan, 7 N. Y. 396; People v. Johnson, 139 N. Y. 358); Pennsylvania (Commonwealth v. Drum, 58 Pa. 9); and Vermont (State v. Roberts, 63 Vt. 139). The doctrine as stated in the text is upheld in the Federal Courts (Beard v. U. S., 158 U. S. 550, 39 Law. Ed. 1086; Rowe v. U. S., 164 U. S. 546, 41 Law. Ed. 547); Arkansas (La Rue v. State, 64 Ark. 144); California (People v. Lewis, 117 Cal. 186, 59 Am. St. Rep. 167); Colorado (Babcock v. People, 13 Colo. 515); Indiana (Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52); Kansas (State v. Hatch, 57 Kan. 420, 57 Am. St. Rep. 337); Kentucky (Buckles v. Commonwealth, 24 Ky. L. R. 571, 68 S. W. 1084); Louisiana (State v. Robertson, 50 La. Ann. 92, 69 Am. St. Rep. 393); Michigan (Pond v. People, 8 Mich. 150); Minnesota (State v. Gardner, 104 N. W. 971); Mississippi (McCall v. State, 29 So. 4003); Missouri (State v. Hudspeth, 150 Mo. 12; State v. Bartlett, 170 Mo. 658); Montana (State v. Rolla, 21 Mont. 582); Nebraska (Willis v. State, 43 Neb. 102); Nevada (State v. Kenned, 7 Neb. 374); North Carolina (State v. Blevins, 50 S. E. 763); Ohio (Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733); Oklahoma (Kirk v. Territory, 10 Okl. 46); Rhode Island (State v. Sherman, 16 R. I. 631); Washington (State v. McCann, 16 Wash. 249); West Virginia (State v. Clark, 51 W. Va. 457); Wisconsin (Perkins v. State, 78 Wis. 551). By statute in Texas the same rule obtains and has been declared by numerous decisions.

44. Wray v. State, 5 Ohio C. C. (N. S.) 437; Miller v. People, 216 Ill. 309, 74 N. E. 743. And whether the danger is real or apparent (Mackin v. People, 214 Ill. 232, 73 N. E. 344; Kipley v. People, 215 Ill. 358, 74 N. E. 379); nor is a person under such circumstances required to exercise "due care" or "circumspection" as to the manner of killing. Pen. Code, § 192, making death caused by the doing of a lawful act, without due caution or circumspection, involuntary manslaughter, is not a limitation on the right of self-defense. People v. Thomson, 145 Cal. 717, 79 P. 435. But the state may show in rebuttal that the defendant was too intoxicated to form such reasonable and well-grounded belief of danger. Miller v. People, 216 Ill. 309, 74 N. E. 743. Defendant's right of self-defense cannot be impaired by evidence that the pistol used by the assailant was unloaded, which fact was unknown to defendant. Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 692, 88 S. W. 221.

same limitations the right is extended to the defense of others,[45] and to the defense of one's habitation.[46] A father may protect his minor daughter from seduction and debauchery, even to the extent of homicide, where the criminal act is in progress or about to take place.[47] A blow inflicted accidentally on a bystander in repelling a felonious attack is in self-defense.[48] In repelling or resisting an assault, no more force may be used than is necessary for the purpose, or the person assailed becomes the aggressor.[49] Under the statutes of Texas a husband is justified in slaying a man caught in the act of adultery with his wife; and if he slays the adulterer on their first meeting after he learns of the offense, he can be convicted of manslaughter only.[50] One who seeks another to provoke a difficulty does not lose the right of self-defense, unless he does or says something which is calculated to, and does, arouse anger and provoke resentment;[51] and one who has voluntarily engaged in combat, or who has provoked a difficulty, may regain his right of self-defense by withdrawing from the fight in good faith,[52] either at his own instance or at the instance of a third party,[53] and notifying his adversary of his abandonment of his criminal design, in such a way as to manifest his good faith;[54] and if his adversary then follows him and kills him, not in necessary self-defense, the offense is at least manslaughter.[55] But one who retreats, shooting as he goes, cannot claim an abandonment of the fight merely because he retreated.[56] If one giving provocation is attacked with force disproportionate thereto, he is justified in resistance.[57] If the right of self-defense is once operative, it continues until all danger to life or the infliction of serious bodily injury has passed;[58] but where danger to life or serious intent to injure has passed, the right of self-defense ceases.[59] An officer cannot use a deadly weapon or take human life in enforcing the arrest of a misdemeanant, though without such force the wrongdoer may escape.[60] But an officer who meets with forcible resistance in making a lawful arrest, is not obliged to retreat, though he is not justified in taking life, unless the resistance is so violent as to put him in danger of death or great bodily harm.[61] An officer may, to prevent a felony, use a deadly weapon, if that is the only reasonably apparent method of doing so.[62] Homi-

45. Defense of a nephew. Carroll v. Com., 26 Ky. L. R. 1083, 83 S. W. 552. One may do for a person, against whom a felonious assault is about to be made, what such person could do for himself. Fletcher v. Com., 26 Ky. L. R. 1157, 83 S. W. 588. The right of self-defense of one acting in defense of another is not personal to him, but is the same as the right of the person in whose defense he was acting. Martinez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 462, 88 S. W. 234.

46. Young v. State [Neb.] 104 N. W. 867. In Illinois it is justifiable in the defense of habitation, property or person, against an attempt to commit a felony or violent entrance for the purpose of assault. Under Cr. Code, div. 1, § 148 (Hurd's Rev. St. 1899, c. 38). Hayner v. People, 213 Ill. 142, 72 N. E. 792.

47. Gossett v. State [Ga.] 51 S. E. 394.

48. State v. Mount [N. J. Law] 61 A. 259.

49. State v. Brown [Del.] 61 A. 1077. Excessive force resisting simple assault. Turley v. State [Neb.] 104 N. W. 934.

50. Orange v. State [Tex. Cr. App.] 83 S. W. 385.

51. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 297, 87 S. W. 151; Barstado v. State [Tex. Cr. App.] 87 S. W. 344. The mere pursuit of a person with intent to bring on a difficulty does not deprive the pursuer of the right of self-defense, where the pursuer, after coming up to the pursued, does no act calculated to provoke the difficulty. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 740, 88 S. W. 923.

52. Eby v. State [Ind.] 74 N. E. 890; Noble v. State [Ark.] 87 S. W. 120; State v. Gray [Or.] 79 P. 53.

53. Chambers v. State [Tex. Cr. App.] 86 S. W. 752.

54, 55. State v. Shockley [Utah] 80 P. 865.

56. Hellard v. Com. [Ky.] 84 S. W. 329.

57. Turley v. State [Neb.] 104 N. W. 934.

58. Where defendant shot deceased a third time, while he was arising from his fall caused by the second shot, he is not guilty of manslaughter merely because the last shot may have been unnecessary. Crow v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 632, 88 S. W. 814.

59. Crow v. State [Tex. Cr App.] 13 Tex. Cr. Rep. 632, 88 S. W. 814.

60. State v. Smith [Iowa] 103 N. W. 944. In such case it is no justification that the officer had been told that the deceased was a desperate character. Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512.

61. Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512; Commonwealth v. Crowley, 26 Pa. Super. Ct. 124.

62. The aiding of a prisoner to escape,

cide in attempting to make an unlawful arrest is governed by the law applicable to assault culminating in homicide by the original assailant.[63] In Georgia, the distinction between justifiable and excusable homicide has been abolished, and every homicide without guilt is classed as justifiable.[64]

Accidental homicide.[65]

§ 6. *Indictment or information.*[66]—Except in those states where statutory forms are prescribed,[67] indictments for homicide and murderous assault must be direct and certain [68] as regards the offense charged,[69] the time and place,[70] the weapon or means used,[71] the manner of its use,[72] the intent,[73] malice,[74] the assault, the person killed or assaulted,[75] and death as the result of defendant's act.[76] Defendant cannot complain of the failure of an indictment to set forth the offense in different forms, under different counts,[77] unless he is misled in making his defense, or is exposed to the jeopardy of another prosecution for the same transaction.[78] The sufficiency of several indictments or informations is noted below.[79] Variance to be fatal must be material.[80]

being a felony under Code, § 4896. State v. Smith [Iowa] 103 N. W. 944.

63. Coleman v. State, 121 Ga. 594, 49 S. E. 716.

64. Mixon v. State [Ga.] 51 S. E. 580.

65, 66. See 3 C. L. 1649.

67. For general rules see Indictment and Prosecution, 4 C. L. 1. If an indictment substantially follows the statute, it is sufficient. Schley v. State [Fla.] 37 So. 518. Indictment for murder in first degree sufficient under Mills' Ann. St. § 143. Andrews v. People [Colo.] 79 P. 1031. Form of indictment for murder held sufficient under form prescribed in Rev. Laws, c. 218, § 67, although not following that form. Commonwealth v. Snell [Mass.] 75 N. E. 75. Const. of Mass. Declaration of Rights, art. 12, requires only such particularity as may be of service to defendant in understanding the charge and preparing for defense; Rev. Laws, c. 218, § 67, prescribing form of indictment for murder, held constitutional. Id. Under Cr. Code 1902, §§ 130, 131, 132, an indictment for an assault with intent to kill and for carrying a concealed weapon must charge the carrying of such weapon in a special count. State v. Johnson, 70 S. C. 384, 50 S. E. 8. Code 1896, §§ 4906, 4911, expressly permits alternative allegations in indictments. Smith v. State [Ala.] 39 So. 329.

68, 69. State v. Shanley [S. D.] 104 N. W. 522.

70. Held that the indictment alleged that the murder was committed before the finding of the indictment and within the jurisdiction of the court. Commonwealth v. Snell [Mass.] 75 N. E. 75.

71. Allegations in the alternative, as to the means by which the homicide was committed must be construed as separate counts. Code 1896, §§ 4906, 4911. Smith v. State [Ala.] 39 So. 329. An indictment for homicide alleging the killing "by means and ways unknown to this grand jury" was not fatally defective. Donahue v. State [Ind.] 74 N. E. 996.

72. An allegation that defendant with a blunt instrument, the name and particular description of which were unknown, assaulted decedent and inflicted a mortal wound on the head, is sufficient. Commonwealth v. Snell [Mass.] 75 N. E. 75. An indictment against several joint participants in homicide need not allege which actually slew the deceased. Rawlins v. State [Ga.] 52 S. E. 1.

73. Under Code, § 4728, relative to killing by poison, indictment for homicide not objectionable for failure to allege a specific intent to kill. State v. Robinson, 126 Iowa, 69, 101 N. W. 634.

74. An indictment for murder by procuring a miscarriage, under Mills' Ann. St. Rev. Supp. § 1209, is sufficient without charging malice. Johnson v. People [Colo.] 80 P. 133.

75. That deceased was a human being is sufficiently implied from setting out the name of the deceased in the indictment. Sutherland v. State, 121 Ga. 591, 49 S. E. 781.

76. Indictment alleging that deceased "then and there instantly died" not defective, though evidence showed that he died the next day. State v. Reeder [S. C.] 51 S. E. 702.

77. As authorized by Rev. Code Cr. Proc., § 224. State v. Shanley [S. D.] 104 N. W. 522.

78. State v. Shanley [S. D.] 104 N. W. 522.

79. General principles: Sufficient averment of instrument and manner of death. Smith v. State [Ala.] 39 So. 329. Of death and means. State v. Sly [Idaho] 80 P. 1125. Of infliction of wound causing death. State v. Bailey [Mo.] 88 S. W. 733. Of killing before the finding of the indictment. Sutherland v. State, 121 Ga. 591, 49 S. E. 781. Information held sufficient. Barker v. State [Neb.] 103 N. W. 71. Where the first count of an indictment recited that it was presented by the grand jury of the proper county, a second count reciting that it was presented by "said jury" was not objectionable for failing to allege the county. Donahue v. State [Ind.] 74 N. E. 996. Indictment for causing death by procuring a miscarriage, under Mills' Ann. St. Rev. Supp. § 1209, is sufficient without negativing the justifications for miscarriage. Johnson v. People [Colo.] 80 P. 133. An information charging one as "F. T. Appleton" sustained. State v. Appleton [Kan.] 78 P. 445. Information insufficient for not alleging that the striking or wounding was done feloniously. State v. Williams, 184 Mo. 261, 83 S. W. 756.

Assault with intent to murder, etc: Suffi-

Included offenses[81] are sufficiently charged by an indictment for murder in the first degree,[82] or for assault with intent to murder,[83] and such an indictment will support a conviction of any degree of unlawful homicide or assault.[84]

§ 7. *Evidence. A. Presumptions and burden of proof.*[85]—Guilt must be proved beyond a reasonable doubt,[86] as to every essential ingredient of the crime;[87] but it is not necessary that all incidental or subsidiary facts be proved beyond reasonable doubt.[88] Homicide, when proved, is presumptively murder,[89] but only of the second degree,[90] the burden being on the state to prove premeditation and deliberation, and on the defendant to prove facts in extenuation, justification or ex-

cient allegation of time of commission of assault with intent to murder, and identification of person assaulted. Pearson v. State [Tex. Cr. App.] 86 S. W. 325. An indictment for an assault with intent to kill, in the words of the statute, need not set forth the means or instrument used, unless the killing was attempted by poisoning, drowning, etc., in violation of the statute. D. C. Code, § 803. Coratola v. U. S., 24 App. D. C. 229. An indictment charging an assault and the infliction of "certain mortal injuries," held sufficient to charge an aggravated assault under Cr. Code, § 215. Mapula v. Territory [Ariz.] 80 P. 389.

Manslaughter: An indictment of a physician for the death of a patient caused by gross negligence, carelessness or ignorance may be predicated on the general statute defining manslaughter. Rev. St. Fla. 1892, § 2384, as § 2392, relative to death caused by the intoxication of a physician not being intended to make the general law inapplicable. Hampton v. State [Fla.] 39 So. 421. Indictment held sufficient to support a conviction of murder. Chelsey v. State, 121 Ga. 340, 49 S. E. 258; State v. Voorhies [La.] 38 So. 964. Sufficient charge of willful murder under Ky. St. 1903, § 1149. Metcalfe v. Com. [Ky.] 86 S. W. 534. Sufficient charge of murder in first degree. State v. Niehaus [Mo.] 87 S. W. 473; Vasser v. State [Ark.] 87 S. W. 635. Indictment for murder by poisoning held sufficient. Nordan v. State [Ala.] 39 So. 406; State v. Robinson, 126 Iowa, 69, 101 N. W. 634. Indictment held sufficient, though slightly inaccurate. Newman v. Com. [Ky.] 88 S. W. 1089. Indictment not objectionable because "willingly" was used instead of "willfully." Daniels v. State [Ark.] 88 S. W. 844. Indictment, stating in language of Pen. Code 1895, art. 711, that the murder was committed with express malice, in the perpetration of robbery, held sufficient without setting forth the robbery. Oates v. State [Tex. Cr. App.] 86 S. W. 769. Sufficient allegation of premeditated design in indictment for murder in first degree. Webster v. State [Fla.] 38 So. 514. Indictment held sufficient to charge murder in first degree, under Pen. Code, § 352, although it failed to use the word "deliberately." State v. Hliboka [Mont.] 78 P. 965. It is not necessary that an indictment for murder charge that the accused was of sound memory and discretion at the time of the homicide. Hill v. U. S., 22 App. D. C. 395.

80. Immaterial variance in name in indictment. State v. Williams, 184 Mo. 261, 83 S. W. 756; State v. Niebekier, 184 Mo. 211, 83 S. W. 523. No material variance between affidavit charging offense and information. State v. Nave, 185 Mo. 125, 84 S. W. 1. Proof that deceased being terrified by defendant's burglarious entrance to her house fell into a well is fatally variant from an averment that defendant forcibly threw deceased into the well. Gipe v. State [Ind.] 75 N. E. 881.

81. See 3 C. L. 1650.

82. Ringer v. State [Ark.] 85 S. W. 410. An indictment for murder in first degree includes voluntary manslaughter. Allison v. State [Ark.] 86 S. W. 409. Under an indictment charging killing unlawfully and with malice aforethought, defendant may be convicted of manslaughter. Smith v. State [Ala] 39 So. 329.

83. Defendant may be convicted of assault. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347.

84. One charged with murder may be convicted of aggravated assault, if the indictment sets forth circumstances which constitute such an assault. Under Pen. Code, § 974, and § 215, defining aggravated assault. Mapula v. Territory [Ariz.] 80 P. 389.

85. See 3 C. L. 1651.

86. Some cases of homicide illustrating general principles are here stated, but for a full discussion see Indictment & Prosecution, 4 C. L. 1. Thomas v. State [Ark.] 86 S. W. 404; State v. Reeder [S. C.] 51 S. E. 702; State v. Teachey, 138 Ga. 587, 50 S. E. 232; State v. Harmon, 4 Pen. [Del.] 530, 60 A. 866. Reasonable doubt defined. State v. Powell [Del.] 61 A. 966. A reasonable doubt of guilt may exist, though there may not be a probability of innocence. Nordan v. State [Ala.] 39 So. 406. Where it appeared that the defendants went armed to deceased's home, a reasonable doubt as to which fired the fatal shot could not entitle both to acquittal. State v. White [N. C.] 51 S. E. 44.

87. Cook v. State [Miss.] 38 So. 110. Death of the person alleged to have been killed. State v. Williams [Or.] 80 P. 655. Malice must be so proved, but it may be proved by circumstantial evidence. State v. Harmon, 4 Pen. [Del.] 530, 60 A. 866. State not bound to prove that either the first or second mortal wound produced death, or where death results from the combined effects of both wounds, to prove that both shots were fired unlawfully. Wray v. State, 5 Ohio C. C. (N. S.) 437.

88. Osburn v. State, [Ind.] 73 N. E. 601.

89. State v. Powell [Del.] 61 A. 966; State v. Brown [Del.] 61 A. 1077. The law presumes that the killing was done with malice aforethought. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

90. See 3 C. L. 1651.

cuse.[91] No presumption of murder arises, however, from an admission of the killing where it is accompanied by declarations which if true show justification.[92] Where two persons are jointly indicted for assault with intent to murder, the conviction of one raises no presumption of guilt as to the other.[93] The auhorities are in conflict as to the burden of proof when insanity or other irresponsibility is pleaded, some holding that defendant has the burden of establishing his defense by a preponderance of evidence,[94] while others hold that the presumption of innocence, attending the accused throughout the trial, overthrows the presumption of sanity and puts on the state the burden of proving responsibility as an element of the offense, beyond a reasonable doubt.[95]

(§ 7) *B. Admissibility in general.*[96]—Proffered testimony must have a legitimate tendency to prove some material fact in issue.[97] Where it has such tendency, it is not to be rejected because remote or unconvincing,[98] except as to matters which are part of the res gestæ,[99] except where circumstantial evidence is resorted to, in

91. State v. Powell [Del.] 61 A. 966; State v. Brown [Del.] 61 A. 1077; Anderson v. State [Ga.] 50 S. E. 51; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Under § 155, c. 38, Hurd's Rev. St. 1903. Kipley v. People, 215 Ill. 358, 74 N. E. 379. So provided by Kirby's Dig. § 1765, unless justification is made apparent by the proof on the part of the prosecution. Cogburn v. State [Ark.] 88 S. W. 822. Justifiable homicide in defense of another, held not to have been established under Pen. Code, § 205. People v. Regan, 94 N. Y. S. 841. It is sufficient if defendant shows facts which raise in the minds of the jury a reasonable doubt as to his guilt. Tignor v. State [Ark.] 89 S. W. 96. Where the defendant pleads self-defense, the absence of any other probable means of escape must be shown by preponderance of evidence. State v. Thrailkill [S. C.] 50 S. E. 551; State v. Powell [Del.] 61 A. 966; State v. Reeder [S. C.] 51 S. E. 702.

92. Perkins v. State [Ga.] 52 S. E. 17.

93. Mixon v. State [Ga] 51 S. E. 580.

94. State v. Lyons, 113 La. 959, 37 So. 890. The rule is well settled in Kentucky that one charged with crime is presumed to be sane, until proved insane. Mathley v. Com. [Ky.] 86 S. W. 988; Allams v. State [Ga.] 51 S. E. 506. But where defendant has been shown to have been insane prior to the homicide, the burden is upon the state to show him sane at the time of the homicide. State v. Austin, 71 Ohio St. 317, 73 N. E. 218. Where it appears that the killing was with a deadly weapon and without excuse, it will be presumed, in the absence of evidence to the contrary, that defendant was capable of forming and entertaining the intent to kill. Gater v. State [Ala.] 37 So. 692.

95. State v. Usher, 126 Iowa, 281, 102 N. W. 101.

96. See 3 C. L. 1651.

97. Identification of defendants by deceased, as the men who shot him. State v. Roberts [Nev.] 82 P. 100. Evidence of physiân that he was so confident as to cause of death that he believed are autopsy would have confirmed his opinion, held admissible. Commonwealth v. Snell [Mass.] 75 N. E. 75. Fact of indictment returned against deceased held inadmissible to show his state of mind when approached by a police officer. Kipley v. People, 215 Ill. 358, 74 N. E. 379. Defendant may introduce evidence of the height and weight of his adversary to show disparity of physical strength. Commonwealth v. Crowley, 26 Pa. Super. Ct. 124. The manner of the commission of the crime, as by blows on the head with a stake from a hay-rack. State v. Bean [Vt.] 60 A. 807.

98. In the prosecution of a colored man, testimony of witness that she sold the revolver, with which the shooting was done, to a colored man, just prior to the killing, was material, though she failed to identify defendant as the purchaser. Smith v. State [Ind.] 74 N. E. 983. Evidence of threats made by deceased against "one of the defendants" excluded. Stafford v. State [Fla.] 39 So. 106. Where defendant testified that owing to his great love for his wife, the shock of learning of her infidelity caused epilepsy resulting in insanity, evidence was admissible that he married her out of a house of prostitution to prevent her testifying against him years before. Schissler v. State, 122 Wis. 365, 99 N. W. 593. Evidence that defendant had a dominating influence over members of a religious sect and so caused the treatment resulting in deceased's death. State v. Sandford, 99 Me. 441, 59 A. 597. Whether relevant testimony is too remote is a preliminary question for the court and will not ordinarily be revised. State v. Bean [Vt.] 60 A. 807.

99. Held admissible: Evidence of facts preceding and leading up to the fatal encounter. State v. Thrailkill [S. C.] 50 S. E. 551. Testimony as to a game of craps, which was the starting point of the difficulty and which defendant broke up 10 or 15 minutes before the killing. Hardison v. State [Tex. Cr. App.] 85 S. W. 1071. Evidence of related offenses on trial for homicide. State v. Bailey [Mo.] 88 S. W. 733. Facts and circumstances connected with the commission of the murder, though relating to another crime. State v. Adams, 138 N. C. 688, 50 S. E. 765. Testimony as to another robbery than that at which the homicide was committed. State v. Roberts [Nev.] 82 P. 100. Statements of the woman prior to her death from criminal abortion, as to the agreement between her and the accused. Johnson v. People [Colo.] 80 P. 133. Evidence that, when defendant fired on the assaulted party, defendant's half brother also

which ease a wide range is allowed,[1] and as to acts tending to show intent,[2] malice,[3]

fired and hit him. Fielding v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 618, 87 S. W. 1041. Where defendants killed two persons in the same continuous transaction, evidence of the shooting of the second, after the killing of the one mentioned in the indictment, was competent. Vasser v. State [Ark.] 87 S. W. 635. On trial of a wife for poisoning her husband, evidence of the soiled condition of his bedding during his last illness is admissible to rebut testimony that she was kind and attentive to him. People v. Bowers [Cal. App.] 82 P. 553.

Held inadmissible: Evidence of an assault by accused on another person previous to the homicide, at another time and place than that of the affray resulting in the death of deceased. Brom v. People, 216 Ill. 148, 74 N. E. 790. In a prosecution for homicide resulting from whipping defendant's own child, evidence of a previous similar killing and of cruel punishments inflicted on his children. Ackers v. State [Ark.] 83 S. W. 999. In a prosecution for felonious assault, evidence of previous difficulty between prosecutrix and defendant's brother, in which defendant took no part. State v. Ethridge [Mo.] 87 S. W. 495. Testimony that decedent said she had taken dyspepsia medicine and had been taken sick shortly thereafter was a mere narration of a past event and an opinion as to the cause of her pain. Boyd v. State, 84 Miss. 414, 36 So. 525.

Part of res gestae: Statement made by deceased as he fell from the shot. Marlow v. State [Fla.] 38 So. 653; Goodman v. State [Ga.] 49 S. E. 922. Circumstances following the homicide. Lyles v. State [Tex. Cr. App.] 86 S. W. 763. Evidence that, while deceased was lying on the ground where he fell when shot, he told witness that defendant shot him. Franklin v. State [Tex. Cr. App.] 88 S. W. 357. What the child of defendant said in delivering him a note, which the evidence tended to show came from deceased. Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212. Where defendant killed a sheriff in pursuit of him and two days later another sheriff, on prosecution for the second killing, evidence of the first was admitted. Cortez v. State [Tex. Cr. App.] 83 S. W. 812. On a trial for murder by poison, statement of decedent that she had taken medicine given her by her husband, the defendant, and it was killing her. Nordan v. State [Ala.] 39 So. 406. Testimony that defendant, at the commencement of the affair resulting in homicide, ordered deceased to throw up his hands. People v. Lee [Cal. App.] 81 P. 969.

Not part of res gestae: Statements of deceased made within a few minutes after the shooting. Vickery v. State [Fla.] 38 So. 907; State v. Stallings [Ala.] 38 So. 261. Statements made by accused, four or five hours after the assault, as to how she received certain wounds. Brittain v. State [Tex. Cr. App.] 85 S. W. 278. Conversation between deceased and his brother shortly after the shooting. Regnier v. Territory [Okl.] 82 P. 509.

1. Evidence that defendant had stated that he intended to kill another person in a manner corresponding to that of decedent's death was admissible. Commonwealth v. Snell [Mass.] 75 N. E. 75. Evidence of attempted suicide by accomplice held admissible. People v. Patrick [N. Y.] 74 N. E. 843. Not erroneous to admit evidence that accused was not, on the night in question, at one of a series of meetings he usually attended; to permit the physician of the jail to testify to wounds on the back of accused's hands; to permit evidence of coincidence between the hand of accused and a bloody hand-print on the wall; and to permit evidence of resemblance between spots on accused's clothing and others cut therefrom and tested by experts in determining whether they were blood spots. State v. Miller [N. J. Err. & App.] 60 A. 202.

2. Prior statements of defendant admissible to show intent and motive. State v. Bailey [Mo.] 88 S. W. 733. Evidence as to prior abortions produced by defendant admissible to show intent, in a prosecution for manslaughter in procuring an abortion. People v. Hodge [Mich.] 12 Det. Leg. N. 407, 104 N. W. 599. Evidence of prior threats of violence admissible to show intent. State v. Thompson [Iowa] 103 N. W. 377.

3. Threats by defendant to make deceased suffer for things he had done. State v. Cummings [Mo.] 88 S. W. 706. Where there was evidence that defendant harbored ill will against all the employes where his victim worked, evidence of prior threats to injure other employes besides the one assaulted was admissible. Holmes v. State [Wis.] 102 N. W. 321. Prior acts by defendant, exhibition of revolver and declaration that no one could run a bluff over him, held to indicate a frame of mind or disposition to commit crime. State v. Brown [Mo.] 87 S. W. 519. Self-defense being claimed, evidence that defendant had committed a bank robbery a few weeks before the killing, was admissible to account for the desperation of defendant when the officers appeared, one of whom was deceased. State v. Rudolph, 187 Mo. 67, 85 S. W. 584. Evidence of threats made by defendant to kill deceased are not rendered incompetent by nearness or remoteness to the time of the homicide. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Long course of ill-treatment of wife, to show malice and motive. Roberts v. State [Ga.] 51 S. E. 374. Also similar treatment of the husband by the wife. Campbell v. State [Ga.] 51 S. E. 644. A letter written by defendant, showing ill will toward deceased. State v. Exum, 138 N. C. 599, 50 S. E. 283. Where, on trial for murder in an affray between two defendants and two others, one insisted that the difficulty was brought on by one of the others, he should be allowed to show the threats of such other, to show his animus. State v. Gaylord, 70 S. C. 415, 50 S. E. 20. A prior assault by defendant upon deceased could be shown. Miera v. Territory [N. M.] 81 P. 586. A witness to a conversation between defendant and deceased could testify as to the fact of threats. State v. Allen, 111 La. 154, 35 So. 495. Evidence of bystanders, at a previous fight with deceased, not admissible against defendant. Gray v. State [Tex. Cr. App.] 83 S. W. 705. Threat by defendant to kill any officer who attempted to arrest him

or motive,[4] premeditation,[5] or admissions or confessions of guilt,[6] evidence of prior[7] or subsequent acts or declarations, is generally inadmissible.[8] Self-serving declara-

held inadmissible to show malignancy, it having no connection with the case. Earles v. State [Tex. Cr. App.] 85 S. W. 1. Where the homicide was in pursuance of a conspiracy to kill the entire family to which deceased belonged, and an effort was made to do so, threats by defendant against the father of deceased, who was not killed, are admissible. Rawlins v. State [Ga.] 52 S. E. 1. Bad feeling generally between the families of defendant and deceased may be shown, and the evidence need not he confined to bad feeling between defendant and deceased personally. Id.

4. On a prosecution of a husband for murdering his wife, the conditions under which he had recently married her and his declarations as to how long the marriage relation might last, were admissible to show motive. Nordan v. State [Ala.] 39 So. 406. Love letters found in defendant's possession held admissible, when jealousy was claimed to have been motive for killing. Mothley v. Com. [Ky.] 86 S. W. 988. On a trial for killing a certain person, everything done at the time and every part of the affair, including defendant's killing another person and shooting a third, is admissible to explain nature and motive of the act. Helton v. Com. [Ky.] 84 S. W. 574. Prior threats by deceased against defendant admissible as tending to show motive. Lee v. State [Ark.] 81 S. W. 385. Indictment presented by the grand jury prior to the homicide, charging defendant with larceny of cattle, held admissible to establish motive. Smith v. State [Fla.] 37 So. 573. Evidence that defendant had burglars' tools in his possession when pursued by the policeman who was killed, admissible to show defendant's motives. People v. Woods [Cal.] 81 P. 652. Evidence showing that defendant's mind was brooding on the motive for the crime admissible. State v. Bean [Vt.] 60 A. 807. To show motive for the killing, evidence that deceased had caused an information for burglary to be filed against defendant is admissible. Zipperian v. People [Colo.] 79 P. 1018. Where, to show a motive for the homicide, the fact of deceased's life being insured in favor of defendant was proved, it was error to exclude proof of the trifling value of such insurance, known to defendant. Jahnke v. State [Neb.] 104 N. W. 154. On trial of a wife for murder of her husband, evidence of undue intimacy between defendant with a certain man before and after the homicide is admissible. People v. Bowers [Cal. App.] 82 P. 553. Evidence of improper relations between defendant's stepdaughter and the person assailed admissible to show motive. Littlejohn v. State [Ark.] 89 S. W. 463.

5. Evidence that shortly before the homicide, defendant impressed on the mind of a woman living with him the peril of her making any disclosures against him, held to show premeditation of the killing. Commonwealth v. Snell [Mass.] 75 N. E. 75.

6. Statement by defendant that he would assume the blame and prove self-defense held competent as an admission. State v. White [Mo.] 87 S. W. 1188. The mere fact that the statements of accused were made while he was under arrest does not necessitate their exclusion. State v. Lyons, 113 La. 959, 37 So. 890; State v. Exum, 138 N. C. 599, 50 S. E. 283. Parts of defendant's testimony on a former trial are admissible as admissions. Miller v. People, 216 Ill. 309, 74 N. E. 743. But statements made by him as a witness before the coroner's jury, without being warned that he need not answer incriminating questions, are inadmissible. State v. Wescott [Iowa] 104 N. W. 341; Tuttle v. People [Colo.] 79 P. 1035. Testimony by accomplice as to conversations between him and defendant, in presence of defendant's counsel, admitted, the relation of counsel not being shown to exist. People v. Patrick [N. Y.] 74 N. E. 843.

Confessions are admissible when voluntary. Hintz v. State [Wis.] 104 N. W. 110; Van Dalsen v. Com. [Ky.] 89 S. W. 255. But not if made under the influence of threats. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 694, 88 S. W. 223. The voluntary character of confessions sought to be introduced in evidence is for the court to determine. Hintz v. State [Wis.] 104 N. W. 110. But may be left to the jury where there is conflict in the evidence and the court is in doubt. State v. Westcott [Iowa] 104 N. W. 341; Johnson v. State [Tex. Cr. App] 13 Tex. Ct. Rep. 694, 88 S. W. 223. The fact that accused was under an unlawful arrest when he confessed did not render the confession involuntary. State v. Westcott [Iowa] 104 N. W. 341. The suggestion of a theory of self-defense by an officer in eliciting a confession does not of itself exclude the confession. Id. All confessions are prima facie inadmissible, and a predicate must first be laid for their introduction. State v. Stallings [Ala.] 38 So. 261. Question of sufficient predicate for introduction of confession in evidence properly submitted to jury. Cortez v. State [Tex. Cr. App.] 83 S. W. 812. Sufficient predicate for introduction of evidence of confession. Smith v. State [Ala.] 39 So. 329; Green v. Com., 26 Ky. L. R. 1221, 83 S. W. 638; Reeves v. State [Tex. Cr. App.] 83 S. W. 803; Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Statements of defendant that she had done what she did because she did not want to be made a laughing stock of, held admissible as a confession. Fonseca v. State [Tex. Cr. App.] 85 S. W. 1069.

7. Hall v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 707, 88 S. W. 244; Campbell v. State [Ga.] 51 S. E. 644. Declarations showing animosity towards deceased, as well as threats to take his life. State v. Exum, 138 N. C. 599, 50 S. E. 283. Evidence of prior declaration of defendant that he would kill "any man who came around his woman's house," admissible. State v. Teachey, 138 N. C. 587, 50 S. E. 232. Declaration of defendant, before the homicide, that if deceased did not keep his stock out of defendant's pasture, lead was going to fly, was admissible. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. Where the declarations of a party are given in evidence against him, all

tions, whether made before [9] or after the homicide, are inadmissible.[10] The acts and declarations of defendant on being charged with the murder are always a pertinent subject of inquiry, but statements of deceased, which are neither res gestæ nor dying declarations, are inadmissible.[11] Acts, declarations or threats on the part of deceased, evidencing a purpose to commit suicide, are admissible, the defense being suicide;[12] but, in a prosecution for killing an alleged prostitute, expert testimony as to a tendency among prostitutes to homicide and suicide, is inadmissible to show such tendencies on the part of deceased.[13] The physician who made the autopsy may testify to the character of the wounds;[14] and medical experts may express their opinions as to the time when wounds were inflicted upon a person living at the time wounds were inflicted.[15] Photographs showing the nature and location of deceased's wounds before their appearance had been altered by surgical operations are admissible.[16] X-ray photographs, or sciagraphs, or radiographs, as they are variously termed, are admissible on the same basis as photographs.[17] One who is not a medical expert, but who assisted at the autopsy, may testify that the bullet passed through the heart and liver.[18] The length of time the victim is confined as a result of the wound is material to the issue as to whether or not there was an attempt to kill;[19] and on the question of the intent to take the life of the person shot, proof that, had the bullet spent its force in the direction it was discharged, the result would probably have been death, is competent.[20] On a trial for homicide by poisoning, the physician who attended decedent during her last illness may describe her condition and the nature and character of her suffering;[21] and may testify that an autopsy was held and a portion of decedent's stomach was sealed up in a jar and sent to a chemist,[22] and the

that he said upon the subject must be received and weighed. State v. Bean [Vt.] 60 A. 807. Evidence showing that defendant was not present at the time and place, where the state contended he bought the poison administered to deceased, is admissible. Williams v. State [Ga.] 51 S. E. 322.

8. Evidence as to actions within a few minutes after the homicide admissible. Gray v. State [Tex. Cr. App.] 83 S. W. 705. On trial for murder, evidence of conduct of defendant and that he intended to resist arrest is competent. State v. Marks, 70 S. C. 448, 50 S. E. 14. Boasts of the deed, made by defendant shortly after the killing, admissible. Cook v. State [Miss.] 38 So. 110. Statements of defendant during search for wife whom he was charged with killing. Reeves v. State [Tex. Cr. App.] 83 S. W. 803. Declaration of defendant, while in custody, that the killing was an accident, admitted, not as a confession, but as explanatory. Carwile v. State [Ala.] 39 So. 220. On the trial of persons jointly indicted for murder, the statements of one in his own defense, not under oath, cannot be taken against the others. Berry v. State [Ga.] 50 S. E. 345.

9. State v. Dean [S. C.] 51 S. E. 524. As to whether defendant said anything about whether or not he prayed for the recovery of deceased. State v. Sandford, 99 Me. 441, 59 A. 597. Certain statements, made by defendant prior to the homicide, about family troubles and decedent's endeavoring to keep his wife away from him, held not to be self-serving, but admissible to show defendant's state of mind. Cole v. State [Tex. Cr. App.] 88 S. W. 341.

10. A letter written by accused after the homicide, favorable to himself. Williams v. State [Ga.] 51 S. E. 322. Defendant's silence when accused of killing deceased. Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Exculpatory statement by accused to lay foundation for an alibi may be shown, to show sense of guilt, and it may also be shown to be false. State v. Aspara, 113 La. 940, 37 So. 883.

11. Smith v. State [Fla.] 37 So. 573. Statement after the shooting as to which shot struck him and as to who was to blame. Moore v. State [Miss.] 38 So. 504. Evidence of declaration of decedent relative to his assaulting a third person. Sanford v. State [Ala.] 39 So. 370.

12. Nordan v. State [Ala.] 39 So. 406.

13. Van Dalsen v. Com. [Ky.] 89 S. W. 255.

14. Cole v. State [Tex. Cr. App.] 88 S. W. 341. That, in his opinion, the wounds could not have been self-inflicted, and that the victim was sitting when the shot was fired. Miera v. Territory [N. M.] 81 P. 586. Or that the wounds must have been given with some blunt instrument. People v. Olsen [Cal. App.] 81 P. 676. Or by scissors, penknife, or something similar. Fletcher v. State [Ga.] 50 S. E. 360. As to the kind of weapon used and the distance from which the shot was fired. State v. Voorhies [La.] 38 So. 964.

15. Hampton v. State [Fla.] 39 So. 421.

16. State v. Roberts [Nev.] 82 P. 100; State v. Powell [Del.] 61 A. 966.

17. Admitted to show location of bullet in the body of the person alleged to have been shot by defendant. State v. Matheson [Iowa] 103 N. W. 137.

18. State v. Lyons, 113 La. 959, 37 So. 890.

19. Brown v. State [Ala.] 38 So. 268.

20. Ullman v. State [Wis.] 103 N. W. 6.

21, 22, 23. Nordan v. State [Ala.] 39 So. 406.

chemist who analyzed the contents, can identify the jar as the one sent him by the physician.[23] Where the facts proved disclosed willful and premeditated murder, evidence as to defendant's reputation for industry, his being intoxicated, the character of the frequenters of the saloon where the deed was done, and other incidents occurring months before, was immaterial.[24] Where the defendant, in a prosecution for murder, does not place his character in issue, the state cannot attack it.[25] Deceased's clothes,[26] when they serve to illustrate some point, solve some question or throw light upon the case,[27] and defendant's clothes,[28] diagrams of premises,[29] and the weapon used, may be introduced,[30] and testimony as to blood stains is competent;[31] also evidence as to blood found on the ground where the homicide occurred, where the same is pertinent to issues in the case.[32] On the trial of a convict for murder in resisting recapture, evidence of a conspiracy among the convicts, including defendant, is admissible to connect him with the homicide;[33] and articles found in the camp of the escaped convicts, belonging to defendant, were admissible to show that he was present at the killing of a officer.[34] In a prosecution for murder, where there is evidence of premeditation and deliberation, evidence that the killing was in the perpetration of robbery is admissible, though not alleged in the indictment.[35] In homicide, the verdict of the coroner's jury is inadmissible for any purpose.[36]

Only the acts and declarations of a co-conspirator can be used against another conspirator; and not until a predicate has been laid.[37] It is the province of the jury to determine whether the conspiracy has been proved.[38]

Justification.[39]—Previous altercations between defendant and deceased,[40] and their threats and statements of intentions in regard to each other, are admissible, the plea being self-defense;[41] but declarations of peaceful intent, made by deceased and

24. State v. Niehaus [Mo.] 87 S. W. 473.

25. Newman v. Com. [Ky.] 88 S. W. 1089. In a prosecution for assault with intent to murder, it was error to admit evidence of defendant's "bumming around town," associating with loafers, etc. State v. Thompson [Iowa] 103 N. W. 377.

26. Carroll v. Com., 26 Ky. L. R. 1083, 83 S. W. 552; Venters v. State [Tex. Cr. App.] 83 S. W. 832. Testimony as to certain holes in deceased's clothing was not incompetent on the ground that the clothing was the best evidence. Underwood v. Com. [Ky.] 84 S. W. 310.

27. Melton v. State [Tex. Cr. App.] 83 S. W. 822; Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203; Crenshaw v. State [Tex. Cr. App.] 85 S. W. 1147.

28. State v. Aspara, 113 La. 940, 37 So. 883. The fact that deceased bled freely, but no blood stains were found on defendant's clothes, creates no presumption that he did not commit the assault. People v. Jackson [N. Y.] 74 N. E. 565.

29. People v. Antony, 146 Cal. 124, 79 P. 858; State v. Cummings [Mo.] 88 S. W. 706.

30. A rifle. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. A stick. Taylor v. State [Fla.] 38 So. 380. A pistol found near the scene of the killing. State v. Aspara, 113 La. 940, 37 So. 883. A pole identified as found on the scene of the homicide. Roberts v. State [Ga.] 51 S. E. 374. Where the question is whether the fatal wounds were inflicted with the fist or a knife, it was proper to exhibit to the jury a knife taken from defendant. Osburn v. State [Ind.] 73 N. E. 601.

31. But where the garment of defendant on which blood was alleged to have been found had been put into a sack with deceased's bloody clothing, the result of the blood test was inadmissible. State v. McAnarney [Kan.] 79 P. 137. On defendant's garments found in wife's trunk. People v. Antony, 146 Cal. 124, 79 P. 858.

32. Cole v. State [Tex. Cr. App.] 88 S. W. 341.

33, 34. People v. Wood, 145 Cal. 659, 79 P. 367.

35. Powell v. State [Ark.] 85 S. W. 781.

36. State v. Coleman, 186 Mo. 151, 84 S. W. 978.

37. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041. Where there is evidence of conspiracy, evidence of acts and declarations of co-conspirators in furtherance of the common design is admissible against others. Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 339, 87 S. W. 143. Foundation held sufficient to admit proof of purchase of poison by defendant's sister. People v. Bowers [Cal. App.] 82 P. 553. Where there is a prima facie case of conspiracy to murder, acts and declarations of each conspirator in pursuance of the common object are admissible against all. Rawlins v. State [Ga.] 52 S. E. 1.

38. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 618, 87 S. W. 1041. The fact that, after a homicide, one defendant said to another, "Don't run," and that he attempted to escape with him, does not establish a conspiracy. State v. Marks, 70 S. C. 448, 50 S. E. 14.

39. See 3 C. L. 1656.

40. Hughes v. State [Miss.] 38 So. 33.

41. McKinney v. Carmack, 119 Ga. 467, 46 S. E. 719; Hughes v. State [Miss.] 38 So. 33; Dunn v. State [Ala.] 39 So. 147.

communicated to defendant, are admissible in rebuttal,[42] and evidence of a warning given defendant that it would be dangerous for him to go to the house of deceased is admissible.[43] But the particulars of a previous difficulty between accused and deceased are not admissible.[44] Evidence of the unchaste and immoral habits of deceased was held admissible, where defendant sought to reduce the homicide to manslaughter by showing that deceased committed adultery with defendant's wife;[45] but evidence of adulterous intercourse between defendant's husband and deceased was held inadmissible in extenuation or justification of the killing,[46] and evidence of attempts by deceased to obtain carnal intercourse with his daughter, though she was afterward married to defendant, is inadmissible to reduce the homicide to manslaughter.[47]

The general reputation of deceased for violence may be shown, where defendant had knowledge of it;[48] where there was doubt whether homicide was necessary in self-defense, to show that defendant may have reasonably believed himself in danger,[49] but not where defendant was the aggressor;[50] and the evidence as to defendant's reputation should be duly restricted;[51] and particular acts of violence[52] with which defendant was not connected[53] cannot be shown. But defendant can avail himself of some special act or communication by deceased to him, which indicated his dangerous character.[54] Deceased's habit of carrying weapons cannot be shown when there is no evidence of self-defense in the case;[55] but, the plea being self-defense, defendant has the right to show any fact tending to prove the good faith of his belief that he was in danger;[56] and, in rebuttal, testimony that, at the time of the difficulty, deceased was not armed, is competent.[57] The gentlemanly conduct of deceased on the night of the killing, however, especially if not known to defendant, should not be admitted in evidence.[58] That deceased was in rightful possession of the premises where the homicide occurred may be shown.[59] Unless the

42. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

43. State v. Rochester [S. C.] 51 S. E. 685.

44. Dunn v. State [Ala.] 39 So. 147; Sanford v. State [Ala.] 39 So. 370; Hughes v. State [Miss.] 38 So. 33.

45. Orange v. State [Tex. Cr. App.] 83 S. W. 385.

46. State v. Powell [Del.] 61 A. 966.

47. Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238.

48. Crow v. State [Tex. Cr. App.] 88 S. W. 814; Cole v. State [Tex. Cr. App.] 88 S. W. 341; State v. Thrailkill [S. C.] 50 S. E. 551; Commonwealth v. Tircinski [Mass.] 75 N. E. 261; State v. Hough, 138 N. C. 663, 50 S. E. 709. Evidence of uncommunicated threats made by deceased against defendant admissible to show that deceased may have been the aggressor. State v. Powell [Del.] 61 A. 966. Testimony as to whether from his reputation, deceased was a person likely to carry into execution a threat seriously made, was a mere opinion of the witness and incompetent. Long v. State [Ark.] 89 S. W. 93. But where deceased's bad character for violence and his enmity toward defendant and others who participated in the killing was notorious, evidence of threats made by deceased was admissible, though not shown to have been communicated to defendant before the killing. Wheeler v. Com. [Ky.] 87 S. W. 1106. Where the plea was self-defense, evidence that defendant shortly before the homicide went to a justice and, in the absence of deceased, asked to have him put under bonds to keep the peace, was inadmissible. State v. Atchley, 186 Mo. 174, 84 S. W. 984. Evidence that a year before the homicide defendant had said he wanted to make a reputation like his cousin's, who had killed two or three men, held inadmissible. Casteel v. State [Ark.] 83 S. W. 853.

49. Kipley v. People, 215 Ill. 358, 74 N. E. 379; Green v. State [Ala.] 39 So. 362. Where immediately before the shooting defendant was complaining of the violent character of deceased, evidence that he was delicate and sickly and as to the relative sizes of the two is admissible. Bearden v. State [Tex. Cr. App.] 83 S. W. 808.

50. Osburn v. State [Ind.] 73 N. E. 601.

51. To the community where deceased lived and to some reasonable time previous to and connected with the homicide. Lynch v. People [Colo.] 79 P. 1015.

52. State v. Thrailkill [S. C.] 50 S. E. 551.

53. State v. Dean [S. C.] 51 S. E. 524.

54. Cole v. State [Tex. Cr. App.] 88 S. W. 341.

55. State v. Exum, 138 N. C. 599, 50 S. E. 283.

56. Cole v. State [Tex. Cr. App.] 88 S. W. 341.

57. Moore v. State [Miss.] 38 So. 504. Evidence that after the homicide deceased had a closed knife in his pocket is admissible to rebut evidence that at the time of the shooting he had an open knife in his hand. Baysinger v. Territory [Okl.] 82 P. 728.

58. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153.

plea is self-defense, evidence as to whether deceased drank a good deal is not admissible.[60] Where an officer shot a misdemeanant fleeing from arrest, evidence in justification that he was a desperate character was inadmissible.[61] The character of deceased cannot be supported by the state until it has been attacked by defendant.[62]

Insanity and intoxication. Where the defense is insanity, a non-expert witness may testify as to facts bearing on the question of sanity, and characterize the acts which he testifies to as rational or irrational, but his opinion on the general question of sanity is inadmissible.[63] An expert in insanity may testify that certain symptoms could not all be present in the same person at the same time.[64] In Texas, evidence of temporary insanity from the recent use of intoxicating liquor is authorized.[65] Evidence of insanity caused by blows on the head, received some time before the homicide, may be rebutted by evidence as to the extent and nature of the injuries received.[66] Where insanity was not pleaded as a defense, and the evidence of deliberation and premeditation was undisputed, evidence as to defendant's feelings and condition on the day of the homicide was inadmissible.[67] The doctrine of moral insanity, which consists of irresistible impulse co-existent with mental sanity, has no support either in psychology or law.[68]

Harmless error[69] in the admission and exclusion of evidence is discussed below.[70]

59. And to that end a lease is admissible. Turley v. State [Neb.] 104 N. W. 934.

60. Smith v. State [Ala.] 39 So. 329.

61. Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512.

62. Melton v. State [Tex. Cr. App.] 83 S. W. 822.

63. People v. Spencer, 179 N. Y. 408 72 N. E. 461. Admissibility of evidence to prove insanity considered. Braham v. State [Ala.] 38 So. 919. Testimony as to the conduct of the accused before, after and at the time of, the act charged is competent on the issue of insanity. State v. Lyons, 113 La. 959, 37 So. 890.

64. People v. Sowell, 145 Cal. 292, 78 P. 717.

65. By art. 41, Pen. Code 1895. Hierholzer v. State [Tex. Cr. App.] 83 S. W. 836.

66. State v. McPhail [Wash.] 81 P. 683.

67. Handy v. State [Md.] 60 A. 452.

68. State v. Lyons, 113 La. 959, 37 So. 890.

69. See 3 C. L. 1658.

70. Error in admitting testimony to show malice is harmless when the conviction is of manslaughter. Moore v. State [Miss.] 38 So. 504. Statement by court to an expert that he could base his opinion, as to insanity, only on what evidence he deemed true was harmless where it was based on the hypothesis that it was all true. People v. Sowell, 145 Cal. 292, 78 P. 717. Admission of expert testimony that symptoms indicated strychnine poisoning. State v. Robinson, 126 Iowa, 69, 101 N. W. 634. Where a state's witness testified that she and deceased were good friends, error, if any, in refusing to permit defendant to ask witness if she was not a friend of deceased was harmless. Smith v. State [Ind.] 74 N. E. 983. The admission of testimony void of significance is harmless. State v. Bean [Vt.] 60 A. 807. Admission, on cross-examination, of declarations of defendant, when not prejudicial. Osburn v. State [Ind.] 73 N. E. 601. The refusal to allow the affidavit of an absent witness to be read was harmless, where the averments therein were general and could not have had any substantial effect on the jury. McQueen v. Com. [Ky.] 88 S. W. 1047. Certain evidence as to defendant's visiting certain women, though erroneously admitted, was not prejudicial, because immaterial. Cole v. State [Tex. Cr. App.] 88 S. W. 341.

Error cured by other evidence or striking out: Exclusion of expert's testimony held harmless, where a large amount of such evidence was admitted on the subject. People v. Patrick [N. Y.] 74 N. E. 843. Admission as part of dying declaration, of what deceased thought defendant thought about having shot him, harmless in view of defendant's testimony as to the same. People v. Sowell, 145 Cal. 292, 78 P. 717. The admission of an inadmissible confession, where subsequently an admissible confession is made substantially agreeing with the first. Andrews v. People [Colo.] 79 P. 1031. Where a witness finally did testify to facts which the court refused when leading questions were asked him. Hellard v. Com. [Ky.] 84 S. W. 329. Error in permitting a question to be asked may be cured by the answer. State v. Manderville, 37 Wash. 365, 79 P. 977; Gallegos v. State [Tex. Cr. App.] 85 S. W. 1150; Braham v. State [Ala.] 38 So. 919. Permitting witness to state the appearance of defendant's wife after the killing, it being the theory of the prosecution that she participated, the answer being "she looked all right." People v. Antony, 146 Cal. 124, 79 P. 858. Exclusion of question covering facts already admitted in evidence is harmless. Hellard v. Com. [Ky.] 84 S. W. 329; State v. Coleman, 186 Mo. 151, 84 S. W. 978. Where the court, after excluding questions, recalls the witness and gives permission to examine him, error is cured. People v. Spencer, 179 N. Y. 408, 72 N. E. 461. Where the widow of the murdered man, in answer to a question, said she had one child, which she afterward brought into court, and it was received in evidence, held harmless. People v. Rimieri, 180 N. Y. 163, 72 N. E. 1002. Error in

(§ 7) *C. Dying declarations*[71] are admissible on the trial of one charged with the killing of declarant, on a proper foundation being laid[72] as to such facts relative to the cause and extent of the injury received, as deceased would have been permitted to testify to, had he lived,[73] with so much of the statements of other persons present at the time as is necessary to make the declaration intelligible,[74] if made under a sense of impending dissolution,[75] though deceased did not at the time state that they were so made.[76] Whether one was rational at the time of making a dying declaration is not a subject for expert testimony.[77] The fact of there being eyewitnesses to a homicide does not preclude the reception of a dying declaration in evidence.[78] The wife of deceased is a competent witness to prove dying declarations made by him.[79] Where dying declarations have been reduced to writing and signed

admitting testimony may be cured by defendant's being allowed to explain. Helton v. Com. [Ky.] 84 S. W. 574. Cured by court ruling it out and instructing jury to disregard it. Rentfrow v. State [Ga.] 51 S. 7. 596; Allen v. Com. [Ky.] 82 S. W. 589; White v. Com. [Ky.] 85 S. W. 753. Error in admission not cured by subsequent exclusion. Flowers v. State [Miss.] 37 So. 814.

Held prejudicial: Secondary evidence of physical characteristics of deceased. Commonwealth v. Crowley, 26 Pa. Super. Ct. 124. It is error to permit the reading of extracts from a medical work on insanity to a witness on cross-examination and so get it indirectly before the jury. State v. Thompson [Iowa] 103 N. W. 377. Exclusion of evidence in rebuttal of dying declaration. Flowers v. State [Miss.] 37 So. 814. Refusal to permit defendant to show that his shirt was cut in front, where the evidence showed deceased had a knife in his hand and the plea was self-defense. Ellzey v. State [Miss.] 37 So. 837. Evidence of other crimes of defendant improperly admitted on trial for homicide. Shepherd v. Com. [Ky.] 85 S. W. 191.

71. See 3 C. L. 1658.

72. Smith v. State [Fla.] 37 So. 573; Ashley v. State [Miss.] 37 So. 960.

73. When only a general objection is made, it is admissible, although it contains statements as to prior threats. Commonwealth v. Spahr, 211 Pa. 542, 60 A. 1084. Soon after he fell, in the presence of respondent, deceased said: "Boys, I give you good-by—I am going to die—this man shot me and I must die, and I will die like a man." Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512.

74. A doctor's statement to a person dying from poison that her husband was under suspicion, was inadmissible in connection with the dying declaration of the decedent. Boyd v. State, 84 Miss. 414, 36 So. 525.

75. Lyles v. State [Tex. Cr. App.] 86 S. W. 763; State v. Teachey, 138 N. C. 587, 50 S. E. 232; State v. Roberts [Nev.] 82 P. 100; People v. Thomson, 145 Cal. 717, 79 P. 435; People v. Sowell, 145 Cal. 282, 78 P. 717; Commonwealth v. Spahr, 211 Pa. 542, 60 A. 1084. The state must show this to have been the case. State v. Daniels [La.] 38 So. 894. A prima facie case is all that is necessary to carry dying declarations to the jury. Anderson v. State [Ga.] 5 S. E. 46. Statement by deceased, the morning after the shooting, that his injuries were "mighty bad," admissible as part of predicate. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. Statements by deceased that he had accidentally shot himself are not admissible in the absence of a showing that they were made under apprehension of impending death. Scott v. State [Ark.] 86 S. W. 1004. Whether the person was conscious and realized that death was impending are issues of fact. Anderson v. State [Ga.] 50 S. E. 46. Finding of trial court that declarations were made under conviction of impending death will not be readily disturbed. Gipe v. State [Ind.] 75 N. E. 881.

Predicate held sufficient: State v. Roberts [Nev.] 82 P. 100; State v. Craig [Mo.] 88 S. W. 641; State v. Bordelon, 113 La. 690, 37 So. 603. Ante-mortem statement properly admitted as a dying declaration. State v. Bonar [Kan.] 81 P. 484. Where, before it was sworn to, deceased was informed by two surgeons that he could not live. Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512. Where deceased expressed belief in afternoon that he would not get well, grew steadily worse through the day, made declarations at midnight and died following morning, held, that declarations were properly admitted. Gipe v. State [Ind.] 75 N. E. 881. Declarant said she was going to die, being informed she was very sick, and her statement, when asked if she had taken anything herself (she having died from poisoning), "The Lord is my witness, I have taken nothing except what you gave me," was admissible as a dying declaration. Boyd v. State, 84 Miss. 414, 36 So. 525. Where he said the physicians said he could not live, and sent for his betrothed and told her he could not live, releasing her from the engagement, although he was delirious at times and under influence of opiates. Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 692, 88 S. W. 221. Evidence that defendant's wound was necessarily fatal and that just before death he stated he was nigh unto death and fully aware that it was approaching. State v. Brown [Mo.] 87 S. W. 519.

Predicate held insufficient: Ashley v. State [Miss.] 37 So. 960; Brown v. Com., 26 Ky. L. R. 1269, 83 S. W. 645; State v. Daniels [La.] 38 So. 894. Statement of deceased held inadmissible, it not appearing that he entertained a fixed belief of death impending and certain to follow immediately. Brom v. People, 216 Ill. 148, 74 N. E. 790.

76. Zipperian v. People [Colo.] 79 P. 1018.

77, 78. Lyles v. State [Tex. Cr. App.] 86 S. W. 763.

79. Bright v. Commonwealth [Ky.] 86 S. W. 527.

by the declarant, it is the best evidence and usually excludes verbal evidence, unless the absence of the written declaration is properly accounted for.[80] A written dying statement was not objectionable because in narrative form and not including the questions asked;[81] and the fact that the justice taking the declaration treated it as a criminal complaint is no reason for disregarding it as a dying declaration.[82] Dying declarations stand on no higher plane as evidence than does testimony of an ordinary witness, and their weight as evidence is solely a question for the jury;[83] and they may be impeached or contradicted by showing that deceased made contradictory statements.[84]

(§ 7) *D. Sufficiency.*[85]—In the footnotes are grouped cases on the sufficiency of the evidence to support conviction of murder generally,[86] murder in the first degree,[87] second degree,[88] manslaughter,[89] assault with intent to kill or murder,[90] to

80. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. Though an affidavit may not be admissible in evidence, it may be used by witnesses to his dying declarations to refresh their memory. State v. Teachey, 138 N. C. 587, 50 S. E. 232.

81. State v. Williams [Nev.] 82 P. 353.

82. Zipperian v. People [Colo.] 79 P. 1018.

83. People v. Thomson, 145 Cal. 717, 79 P. 435; Zipperian v. People [Colo.] 79 P. 1018.

84. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

85. See 3 C. L. 1659.

86. Chelsey v. State, 121 Ga. 340, 49 S. E. 258; Sims v. State, 121 Ga. 337, 49 S. E. 260; West v. State [Ga.] 49 S. E. 266; Taylor v. State, 121 Ga. 348, 49 S. E. 303; Anderson v. State [Ga.] 50 S. E. 51; Williams v. State [Ga.] 51 S. E. 322; Roberts v. State [Ga.] 51 S. E. 374; Allams v. State [Ga.] 51 S. E. 506; Clements v. State [Ga.] 51 S. E. 595; Everett v. People [Ill.] 75 N. E. 188; Schley v. State [Fla.] 37 So. 501; Flowers v. State [Miss.] 37 So. 814; Starke v. State [Fla.] 37 So. 850; Johnson v. State [Miss.] 37 So. 926; State v. Atchley, 186 Mo. 174, 84 S. W. 984; Newman v. Com. [Ky.] 88 S. W. 1089; State v. Roberts [Nev.] 82 P. 100. Sufficient to support a charge of infanticide. Fletcher v. State [Ga.] 50 S. E. 360. Where defendant's account for his possession of property of deceased was shown to be false, the jury was justified in discrediting all his testimony and finding him guilty of murder. People v. Jackson [N. Y.] 74 N. E. 565. Evidence insufficient as not excluding every reasonable hypothesis save of guilt. Young v. State, 121 Ga. 334, 49 S. E. 256. Evidence of wife poisoning held sufficient. State v. Blydenburgh [Iowa] 104 N. W. 1015. Circumstantial evidence held sufficient. Houston v. State [Fla.] 39 So. 468. Evidence of identity held sufficient. Cox v. State [Ga.] 52 S. E. 150. Evidence held to sustain conviction of principals and accessory before the fact of murder pursuant to conspiracy to kill an entire family. Rawlins v. State [Ga.] 52 S. E. 1. Evidence that defendant advised, aided and abetted the homicide held sufficient. Patterson v. State [Ga.] 52 S. E. 77.

87. Commonwealth v. Dardaia, 210 Pa. 61, 59 A. 432; Commonwealth v. Gibson, 211 Pa. 546, 60 A. 1086; Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070; State v. Daniel [N. C.] 51 S. E. 858; People v. Smith, 180 N. Y. 125, 72 N. E. 931; People v. Koenig, 180 N. Y. 155, 72 N. E. 993; People v. Rimieri, 180 N. E. 1002; People v. Totterman, 181 N. Y. 385, 74 N. E. 222; People v. Breen, 181 N. Y. 493, 74 N. E. 483; Green v. Com., 26 Ky. L. R. 1221, 83 S. W. 638; Young v. State [Tex. Cr. App.] 84 S. W. 822; Moore v. State [Ark.] 88 S. W. 946; Goley v. State [Ark.] 88 S. W. 952; Reyes v. State [Fla.] 38 So. 257; State v. Exum, 138 N. C. 599, 50 S. E. 283; Ubillos v. Territory [Ariz.] 80 P. 363; People v. Woods [Cal.] 81 P. 652; Barker v. State [Neb.] 103 N. W. 71. By poisoning. State v. Robinson, 126 Iowa, 69, 101 N. W. 634. Committed in an assault for the purpose of robbery. People v. Jackson [N. Y.] 74 N. E. 565; Vann v. State [Tex. Cr. App.] 85 S. W. 1064. Confession of defendant in the presence of three witnesses held sufficient to support verdict. Commonwealth v. Johnson [Pa.] 61 A. 246. Evidence not sufficient to warrant verdict of murder in first degree. People v. Raffo, 180 N. Y. 434, 73 N. E. 225; Dill v. State [Miss.] 38 So. 37.

88. Scott v. State [Tex. Cr. App.] 85 S. W. 1060; Hancock v. State [Tex. Cr. App.] 83 S. W. 696; Reeves v. State [Tex. Cr. App.] 83 S. W. 803; Frame v. State [Ark.] 84 S. W. 711; Johnson v. State [Tex. Cr. App.] 84 S. W. 824; White v. State [Ark.] 86 S. W. 296; Yancy v. State [Tex. Cr. App.] 87 S. W. 693; Charba v. State [Tex. Cr. App.] 87 S. W. 829; Thurman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1014; State v. White [Mo.] 87 S. W. 1188; State v. Cummings [Mo.] 88 S. W. 706; Daniels v. State [Ark.] 88 S. W. 844; Thomas v. State [Fla.] 38 So. 516; State v. Manderville, 37 Wash. 365, 79 P. 977; People v. Heart [Cal. App.] 81 P. 1018; People v. Fucarino, 93 N. Y. S. 689. Evidence of killing after apparently friendly altercation held to sustain conviction of murder in second degree. People v. Fitgerald [Cal. App.] 82 P. 555.

89. Kipley v. People, 215 Ill. 358, 74 N. E. 379; Goodman v. State [Ga.] 49 S. E. 922; Nelms v. State [Ga.] 51 S. E. 588; Grimes v. State [Ga.] 51 S. E. 721; State v. Rollins, 186 Mo. 501, 85 S. W. 516; Scott v. State [Ark.] 86 S. W. 1004; Bell v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 558, 87 S. W. 1160; Tetterton v. Com. [Ky.] 89 S. W. 8; Clemons v. State [Fla.] 37 So. 647; State v. Clayton, 113 La. 782, 37 So. 754. Voluntary manslaughter. Ward v. Com., 26 Ky. L. R. 1256, 83 S. W. 649; Perrymore v. State [Ark.] 83 S. W. 909; Underwood v. Com. [Ky.] 84 S. W. 310; Moseley v. Com. [Ky.] 84 S. W. 748. Evidence held sufficient to sustain conviction of

prove the corpus delicti,[91] cause of death[92] defendant's participation,[93] intent,[94] identity,[95] self-defense,[96] and insanity.[97]

Proof of the corpus delicti is always necessary,[98] but it may be proved by circumstantial, as well as direct, evidence.[99]

The sufficiency of evidence to identify defendant as the assailant of deceased is a question for the jury.[1]

A homicide having been proved, a confession is sufficient to support a conviction.[2] The weight of a confession as evidence is for the jury; all parts of it are not necessarily entitled to the same credit, but the jury can believe such parts as are deemed worthy of belief and reject the rest.[3] Corroboratory evidence is required, in case of confession, in Iowa.[4]

In most of the states corroboration of the testimony of an accomplice is required to convict.[5]

manslaughter. Robinson v. State [Fla.] 39 So. 465.

Third degree, under §§ 4354, 4355, Rev. St. 1898. Kenney v. State [Wis.] 102 N. W. 907.

Fourth degree, under Rev. St. 1898, §§ 4362, 4363. Schmidt v. State [Wis.] 102 N. W. 1071. Sufficient to show defendant guilty of manslaugter by aiding and abetting. State v. Cobley [Iowa] 103 N. W. 99.

90. Holmes v. State [Wis.] 102 N. W. 321; Mixon v. State [Ga.] 51 S. E. 580; Napper v. State [Ga.] 51 S. E. 592; Sanders v. State [Tex. Cr. App.] 83 S. W. 712; State v. Naves, 185 Mo. 125, 84 S. W. 1; Martinus v. State [Tex. Cr. App.] 84 S. W. 827; Watson v. State [Tex. Cr. App.] 89 S. W. 270; Taylor v. State [Fla.] 38 So. 380. Evidence of shooting with intent to kill officer attempting to arrest defendant for gambling held sufficient. Earl v. State [Ga.] 52 S. E. 78. Evidence of beating of old woman with club held to show intent to kill. Garcia v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 937, 89 S. W. 647. Circumstantial evidence of assault with intent to kill held sufficient against evidence of alibi. Stanley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 S. W. 643. Evidence held not sufficient. Reyes v. State [Tex. Cr. App.] 88 S. W. 245. Evidence sufficient to present questions for jury. State v. Shanley [S. D.] 104 N. W. 522. Evidence in a prosecution for assault with intent to kill held sufficient to show that defendants were guilty of aggravated assault. Hinson v. State [Ark.] 88 S. W. 947.

91. Evidence sufficient to establish the corpus delicti. State v. Heusack [Mo.] 88 S. W. 21; State v. Williams [Or.] 80 P. 655; People v. Wood, 145 Cal. 659, 79 P. 367; State v. White [Mo.] 87 S. W. 1188; State v. Henderson, 186 Mo. 473, 85 S. W. 576; State v. Westcott [Iowa] 104 N. W. 341.

92. Sufficient to support charge that deceased was killed by being beaten with a stick. Collins v. State [Tex. Cr. App.] 83 S. W. 806. Evidence held to show that decedent's death resulted from defendant's act. Casteel v. State [Ark.] 88 S. W. 1004.

93. Evidence held not to show that defendant, after provoking the quarrel, declined to participate further in the struggle. Kyle v. People, 215 Ill. 250, 74 N. E. 146.

94. Proof of assault with deadly weapon in such a way that, had it not been turned aside, it would have caused death, is sufficient evidence of intent. Ullman v. State [Wis.] 103 N. W. 6.

95. Evidence sufficient to establish identity of murderer. State v. Heusack [Mo.] 88 S. W. 21. Evidence held to require submission to jury of question of identity of defendant with assailant. State v. Williams, 36 Wash. 143, 78 P. 780; People v. Silverman 181 N. Y. 235, 73 N. E. 980.

96. Insufficient to establish right of killing in self-defense. State v. White [N. C.] 51 S. E. 44; Kipley v. People, 215 Ill. 358, 74 N. E. 379. Issue of self-defense not presented by evidence, under Rev. St. 1901, pars. 181, 182. Hicklin v. Territory [Ariz.] 80 P. 340. Evidence of killing of officer to avoid arrest held not to show self-defense. State v. Horner [N. C.] 52 S. E. 136. Evidence held sufficient against claim of self-defense. State v. Briggs [W. Va.] 52 S. E. 218.

97. Sufficient where the defense was insanity. People v. Ebelt, 180 N. Y. 470, 73 N. E. 235. Facts shown did not establish defense. State v. Lauth [Or.] 80 P. 660. Evidence sufficient to justify verdict of guilty, however eccentric defendant's conduct may have been. People v. Silverman, 181 N. Y. 235, 73 N. E. 980. Evidence sufficient to support finding of sanity. Schissler v. State, 122 Wis. 365, 99 N. W. 593.

98. The death of the person alleged to have been killed is a distinct ingredient and must be established. State v. Williams [Or.] 80 P. 655. An admission of defendant's counsel that deceased was murdered does not take the place of evidence. State v. Marx [Conn.] 60 A. 690.

99. State v. Westcott [Iowa] 104 N. W. 341. It must be established by direct testimony or presumptive evidence of the most cogent and irresistible kind. State v. Williams [Or.] 80 P. 655. Evidence that deceased was shot through body and died in a few moments is sufficient. People v. Wood, 145 Cal. 659, 79 P. 367. Finding of fragments of a human body, positively identified, and articles worn by the supposed victim, similarly identified, is sufficient proof. State v. Williams [Or.] 80 P. 655.

1. People v. Jackson [N. Y.] 74 N. E. 565.
2. Gallegos v. State [Tex. Cr. App.] 85 S. W. 1150.
3. State v. Powell [Del.] 61 A. 966.
4. Under Code, § 5491. State v. Westcott [Iowa] 104 N. W. 341.
5. The evidence of an accomplice should

In Connecticut, the requirement that no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses is satisfied, if there are two or more witnesses to different parts of the same transaction.[6]

It is enough to sustain the plea of self-defense, if, by any evidence a reasonable doubt is raised of the truth of any essential element of the charge.[7]

Evidence which, in any reasonable view thereof which the jury is entitled to take, justifies the verdict, is sufficient.[8]

§ 8. *Trial and punishment. A. Conduct of trial in general.*[9]—In New Jersey, a plea of not guilty on an indictment for murder is not inconsistent with a statement that defendant, upon arraignment, confessed the crime.[10] In Wisconsin, the trial of the special issue of insanity [11] and the general issue on the plea of not guilty, are but one trial of the action; [12] and under the statute providing for a summary inquisition in case of probable insanity,[13] it is not too late to demand such inquisition after trial on a special issue of insanty.[14]

Defendant's counsel cannot, as a matter of right, cross-examine a juror to determine the propriety of a peremptory challenge, after he has been declared qualified on examination by the court on his voir dire.[15] It is within the discretion of the court to send the jury out while accused's counsel argues questions of law to the court, the object being to enable the court to determine what issues should be presented to the jury; [16] also, to refuse to exclude the jury during a preliminary inquiry into the voluntary character of a confession.[17] In capital cases the jurors should not be permitted to separate, after being sworn, or associate with persons other than officers of the court.[18]

While it is the duty of the prosecution in a homicide case to present all the testimony of the material facts, whether adverse to the defendant or favorable to him,[19] the court in its discretion may limit the witnesses to be called.[20] It was not error for the court to receive certain evidence explaining the situation, while he and the jury were viewing the scene of the crime.[21] Comments of the court on evidence, favorable to defendant, are harmless.[22]

Where at least voluntary manslaughter was established, and some evidence tended to show murder, an improper argument, as to the burden of proof on defendant, was not prejudicial in view of a verdict of voluntary manslaughter only.[23]

be closely scrutinized; and if he appears to have willfully sworn falsely as to any material matter, his uncorroborated testimony cannot be sufficient to support a verdict of guilty in a murder case. Jahnke v. State [Neb.] 104 N. W. 154. Sufficient corroboration. Chancellor v. State [Ark.] 88 S. W. 880. Testimony of accomplice held sufficiently corrohorated under Code Cr. Proc. § 399. People v. Patrick [N. Y.] 74 N. E. 843.

6. Revision 1902, § 1508. State v. Marx [Conn.] 60 A. 690.

7. Zipperian v. People [Colo.] 79 P. 1018.

8. Holmes v. State [Wis.] 102 N. W. 321.

9. See 3 C. L. 1661. Only a few illustrative cases are retained, trial procedure in general being treated under the topics Indictment and Prosecution, 4 C. L. 1; Examination of Witnesses, 5 C. L. 1371; Jury, 4 C. L. 358.

10. P. L. 1898, p. 824, § 107, requires a plea of guilty to a charge of murder to be disregarded and a plea of not guilty entered. State v. Valentine [N. J. Err. & App.] 60 A. 177.

11. Under Rev. St. 1898, § 4699.

12. Schissler v. State, 122 Wis. 365, 99 N. W. 593.

13. Rev. St. 1898, § 4700.

14. Steward v. State [Wis.] 102 N. W. 1079.

15. Handy v. State [Md.] 60 A. 452.

16. Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212.

17. Hintz v. State [Wis.] 104 N. W. 110.

18. State v. Craighead [La.] 38 So. 28.

19. The fact that the state did not call as a witness, in a poisoning case, a physician who examined the body, is not prejudicial where the defendant had timely notice that he would not be called and she might call him if desired. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070.

20. Where all the facts have been disclosed, the court may reserve the testimony of another witness for the defense. Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512.

21. Underwood v. Commonwealth [Ky.] 84 S. W. 311.

22. People v. Cowan [Cal. App.] 82 P. 339.

23. White v. State [Ark.] 86 S. W. 284.

Where an indictment contains two counts, one charging murder with express malice and the other murder in perpetration of a robbery, the failure to submit the second count to the jury is an election by the state to stand upon the first.[24] It was not error for the court to refrain from contradicting a statement by defendant's counsel, in his opening to the jury, that, on his arraignment, defendant confessed the commission of the crime, when such contradiction was not requested.[25]

(§ 8) *B. Instructions.*[26]—Where the charge deals only with the facts in evidence, the narration of them in defendant's own words is not erroneous, because his story seems unreasonable or incredible.[27] The trial court may properly make a part of its charge extracts from the opinions of the courts of final resort on the questions of premeditation, deliberation and criminal intent.[28] The terms "self-defense" and "bring on difficulty," as used in the law of homicide, are self-explanatory and need not be specifically defined in instructions.[29] An instruction that, if the accused fled after the prosecutor was shot, such fact was a circumstance prima facie indicative of guilt, was proper.[30] Where there is evidence of guilt, a peremptory instruction for defendant is improper.[31] Instructions must not be argumentative,[32] and should tend to aid, not confuse[33] or mislead the jury,[34] and should cover the whole law governing the case.[35] Defendant's theory must be presented, when supported by the evidence,[36] and every degree of homicide of which a conviction might be had under the indictment and evidence should be submitted.[37] Where there is evidence

24. Martin v. State [Tex. Cr. App.] 83 S. W. 390.

25. State v. Valentine [N. J. Err. & App.] 60 A. 177.

26. See 3 C. L. 1661.

27. People v. Smith, 180 N. Y. 125, 72 N. E. 931.

28. People v. Breen, 181 N. Y. 493, 74 N. E. 483.

29. State v. Bailey [Mo.] 88 S. W. 733.

30. State v. Matheson [Iowa] 103 N. W. 137. Such an instruction held not erroneous as assuming flight of defendant. State v. Stentz, 33 Wash. 444, 74 P. 588.

31. Bright v. Com. [Ky.] 86 S. W. 527.

32. Instruction as to value of good character to defendant properly refused as argumentative. State v. Stentz, 33 Wash. 444, 74 P. 588. Instruction properly refused as argumentative. Carwile v. State [Ala.] 39 So. 220; Peel v. State [Ala.] 39 So. 251.

33. Starke v. State [Fla.] 37 So. 850. Requested charge as to self-defense properly refused because of omission of ingredients of self-defense. Peel v. State [Ala.] 39 So. 251; Smith v. State [Ala.] 39 So. 329.

34. State v. Lyons, 113 La. 959, 37 So. 890; Hampton v. State [Fla.] 39 So. 421. Charge as to reasonable douht properly refused as misleading. Bardin v. State [Ala.] 38 So. 833; Carwile v. State [Ala.] 39 So. 220. Where there was no evidence of criminal negligence, a charge that such negligence would supply the place of intent was calculated to mislead. Wolfe v. State, 121 Ga. 587, 49 S. E. 688.

35. French v. Com. [Ky.] 88 S. W. 1070. Instruction held erroneous because excluding a verdict of manslaughter. State v. Taylor [W. Va.] 50 S. E. 247.

36. Pedro v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 721, 88 S. W. 233; Greer v. Com. [Ky.] 85 S. W. 166; State v. Davis [W. Va.] 51 S. E. 230. An instruction which excluded from the consideration of the jury any other cause of death than arsenical poisoning, when the evidence showed defendant had given him antimony to cure him of drinking, as claimed, was erroneous. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070. Defendant entitled to charge that jury might consider fact of defendant's not killing his adversary when he could do so, in prosecution for assault and battery with intent to murder. McCaa v. State [Miss.] 38 So. 228. Where the evidence more cogently showed that the difficulty was brought on by deceased, defendant was entitled to a charge accordingly; Craiger v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 736, 88 S. W. 208. Instruction as to whether the gun, as used, was a deadly weapon was not required under the evidence. Yzaguirre v. State [Tex. Cr. App.] 85 S. W. 14. Where the evidence showed that deceased lived six months after the shooting and was able to visit his neighbors within two months, defendant entitled to have Pen. Code, 1895, arts. 651, 652 charged to the effect that the destruction of life must be complete by the act of another. Armsworthy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 697, 88 S. W. 215. Defendant entitled to have Pen. Code, art. 717 given in the charge, to the effect that the instrument or means used in a homicide is to be considered by the jury. Craiger v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 736, 88 S. W. 208. Instructions on deceased's having been a trespasser and defendant having undertaken to eject him properly refused. State v. Hargraves [Mo.] 87 S. W. 491.

37. State v. Hubbard [S. D.] 104 N. W. 1120. Where there is slight evidence of a lower degree of homicide than charged, defendant is entitled to an instruction thereon. State v. McAnarney [Kan.] 79 P. 137; State v. McPhail [Wash.] 81 P. 683; Allison v. State [Ark.] 86 S. W. 409; Ringer v. State [Ark.] 85 S. W. 410. Defendant not entitled to charge on negligent homicide in

of a mutual intent to fight, it is proper to submit the theory of mutual combat, though no blows were exchanged.[38] Where the charge as a whole substantially in-

the first and second degrees. Scott v. State [Tex. Cr. App.] 85 S. W. 1060.

Murder in second degree: No error in refusing to charge on murder in second degree, where the evidence demanded an acquittal or conviction of murder in first degree. State v. Henderson, 186 Mo. 473, 85 S. W. 576. Or where the evidence showed deliberate murder. State v. Niehaus [Mo.] 87 S. W. 473. Evidence in a prosecution for murder held to require the submission of the question of murder in second degree. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 694, 88 S. W. 223. Defendant entitled to instruction that, if they believed the evidence of defendant, the homicide could not be greater than murder in the second degree. Manning v. State [Tex. Cr. App.] 85 S. W. 1149.

Manslaughter: Defendant entitled to an instruction on manslaughter under the evidence. State v. White [N. C.] 51 S. E. 44; Gray v. State [Tex. Cr. App.] 83 S. W. 705. Where the evidence raises the theory of manslaughter, defendant is entitled to an instruction on the law of manslaughter as a defense to the charge of murder. Harrison v. State [Tex. Cr. App.] 83 S. W. 699; Hieronymus v. State [Tex. Cr. App.] 84 S. W. 708; Ackers v. State [Ark.] 83 S. W. 909; Venters v. State [Tex. Cr. App.] 83 S. W. 432; Nash v. State [Ark.] 84 S. W. 497; Thomas v. State [Tex. Cr. App.] 85 S. W. 1154; Stacy v. State [Tex. Cr. App.] 86 S. W. 327; Swain v. State [Tex. Cr. App.] 86 S. W. 335; Lundy v. State [Tex. Cr. App.] 87 S. W. 352; Green v. State [Miss.] 37 So. 646.

38. Pollard v. State [Ga.] 52 S. E. 149. Evidence of killing during altercation, proof of the circumstances not being clear, held to require charge on manslaughter. Martinez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 642. Evidence of killing of child by excessive correction by parent held to require submission of manslaughter. Ackers v. State [Ark.] 83 S. W. 909. Whenever a conviction of manslaughter is possible, both degrees thereof must be submitted. State v. Hubbard [S. D.] 104 N. W. 1120. Instruction on law of manslaughter properly refused under the evidence. Anderson v. State [Ga.] 50 S. E. 51; State v. Teachey, 138 N. C. 587, 50 S. E. 232; Lentz v. State [Tex. Cr. App.] 85 S. W. 1068; Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357; Charba v. State [Tex. Cr. App.] 87 S. W. 829; Warner v. Com. [Ky.] 84 S. W. 742; Davis v. State [Tex. Cr. App.] 83 S. W. 1112; Dean v. State [Tex. Cr. App.] 83 S. W. 816. The issue of manslaughter held not presented under the facts of the case. Ricks v. State [Tex. Cr. App.] 87 S. W. 1036. One carelessly handling a loaded pistol while intoxicated, which is exploded and kills a third person in an attempt to disarm him, not entitled to charge on involuntary manslaughter. Selby v. Com. [Ky.] 89 S. W. 296. An instruction on manslaughter should not be given where the evidence demands a verdict of murder or acquittal. Berry v. State [Ga.] 50 S. E. 345; McBeth v. State [Ga.] 50 S. E. 931; James v. State [Ga.] 51 S. E. 577. Or where the defendant, under the evidence, is either guilty of murder or not guilty by reason of insanity. Braham v. State [Ala.] 38 So. 919.

Aggravated assault: Defendant entitled to instruction that he was not guilty of an aggravated assault, unless the pistol, as used, was a deadly weapon. Hardin v. State [Tex. Cr. App.] 84 S. W. 591. On a prosecution for assault with intent to murder, defendant held entitled to charge on aggravated assault. Jackson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 710, 88 S. W. 239. Defendant under the evidence was entitled to instructions on aggravated assault. Cooper v. State [Tex. Cr. App.] 85 S. W. 1059. Where the state's evidence showed assault with intent to murder and defendant's self-defense, a charge on aggravated assault was properly refused. Johnson v. State [Tex. Cr. App.] 85 S. W. 812. Where defendant shot only to scare away one about to attack him, the court should have charged on aggravated and simple assault. Pastrana v. State [Tex. Cr. App.] 87 S. W. 347; Ivory v. State [Tex. Cr. App.] 87 S. W. 699.

Cooling time: Defendant entitled to instruction on cooling time. Cooper v. State [Tex. Cr. App.] 85 S. W. 1059. A charge on cooling time is not required, in a prosecution for assault with intent to kill, where the transaction is shown to have been a continuous one. Ivory v. State [Tex. Cr. App.] 87 S. W. 699.

Accidental killing: Defendant entitled to instruction on accidental homicide. French v. Com. [Ky.] 88 S. W. 1070; Casteel v. State [Ark.] 83 S. W. 953; Messer v. Com. [Ky.] 85 S. W. 722.

Insanity: Where the evidence justifies it, defendant, without request, is entitled to charge on the subject of temporary insanity from recent use of liquor, under Pen. Code 1895, art. 41. Hierholzer v. State [Tex. Cr. App.] 83 S. W. 836. Whether the fact that deceased had estranged the affections of defendant's wife, debauched her person and threatened defendant's life, if he interfered, created in defendant an emotional insanity so as to dethrone his reason, or whether it merely reduced the homicide to manslaughter, were question that should have been submitted to the jury. Shepherd v. Com. [Ky.] 85 S. W. 191.

Self-defense: When defendant seeks to justify his homicide on the plea of self-defense, he is entitled to have an instruction on the law of such defense. Young v. State [Neb.] 104 N. W. 867; Territory v. Gutierez [N. M.] 79 P. 716. But it is not error to refuse a charge on self-defense when there is nothing showing that defendant acted in self-defense, but contended that the killing was accidental. People v. Manning [Cal.] 79 P. 856. An instruction excluding self-defense erroneous, where an inference of self-defense may be drawn. State v. Hough, 138 N. C. 663, 50 S. E. 709. Defendant entitled, under the evidence, to a charge on the law of self-defense. Franklin v. State [Tex. Cr. App.] 88 S. W. 357; Armsworthy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 697, 88 S.

cludes requests, refusal to give them is not error.[39] In the footnotes are grouped holdings as to the correctness and propriety of instructions relating to the burden and degree of proof, [40] participation of defendant in the crime,[41] good reputation of defendant,[42] weight and effect of evidence,[43] presumption of innocence,[44] reasonable doubt,[45] malice and premeditation,[46] intent to kill,[47] degree and included offenses,[48]

W. 215; Fielding v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 618, 87 S. W. 1044; Gray v. State [Tex. Cr. App.] 83 S. W. 705; Boykin v. State [Miss.] 38 So. 725. Defendants theory of self-defense sufficiently presented. Brittain v. State [Tex. Cr. App.] 85 S. W. 278. Defendant entitled to charge on self-defense unconnected with one on provoking the difficulty. Carr v. State [Tex. Cr. App.] 87 S. W. 346. Defendant entitled to charge, that if he fired the first of three shots in self-defense, he was entitled to acquittal. Simpson v. State [Tex. Cr. App.] 87 S. W. 826. Defendant entitled to an instruction as to self-defense, that the burden is on the state to show that he was not acting in self-defense. State v. Usher, 126 Iowa, 281, 102 N. W. 101. Defendant not entitled under the evidence to an instruction on law of self-defense. Askew v. State [Tex. Cr. App.] 83 S. W. 706; Sanders v. State [Tex. Cr. App.] 83 S. W. 712; Underwood v. Com. [Ky.] 84 S. W. 310; Thurman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1014. Requested instruction as to self-defense properly refused as not adjusted to facts of the case. Jenkins v. State [Ga.] 51 S. E. 386; Jenkins v. State Id., 51 S. E. 598. Defendant held not entitled to instruction on the law of abandonment and right of self-defense. State v. Shockley [Utah] 80 P. 865.

Defense of another: Evidence held not to warrant an instruction on defendant's right and duty to prevent deceased from making violent assault on another. People v. Lee [Cal. App.] 81 P. 969.

Defense of property: Defendant not entitled to charge as to Pen. Code 1895, art. 680, authorizing defense of property. Dean v. State [Tex. Cr. App.] 83 S. W. 816.

39. State v. Dean [S. C.] 51 S. E. 524; People v. Eldridge [Cal.] 82 P. 442; Snelling v. State [Fla.] 37 So. 917; Napper v. State [Ga.] 51 S. E. 592; Starke v. State [Fla.] 37 So. 850; Jordan v. State [Fla.] 39 So. 155. Special requests properly refused, when covered by the general charge. State v. Aspara, 113 La. 940, 37 So. 883; Stafford v. State [Fla.] 39 So. 106; Bearden v. State [Tex. Cr. App.] 83 S. W. 808; Johnson v. State [Tex. Cr. App.] 84 S. W. 824; State v. Atcheley, 186 Mo. 174, 84 S. W. 984. Where the question of reasonable doubt is covered in the general instructions, it need not be repeated in other instructions. State v. Coleman, 186 Mo. 151, 84 S. W. 978.

40. Erroneous instruction as to burden proof on defendant in mitigation of offense or justification, under Kirby's Dig. § 1765. Cogburn v. State [Ark.] 88 S. W. 822. Instruction that the killing being proved, the burden of showing mitigation is on defendant, is proper. Petty v. State [Ark.] 89 S. W. 465.

41. An instruction as to the duty of one who believes in the efficacy of prayer to heal the sick, to apply the same in the case of one under his care, disapproved. State v. Sandford, 99 Me. 441, 59 A. 597.

42. Instructions that good reputation for peace and quietness might be sufficient to generate a reasonable doubt of guilt properly refused. State v. Stentz, 33 Wash. 444, 74 Pac. 588. Instruction on the question of good reputation of defendant approved. Id.

43. Not error to instruct jury that they may accept or reject expert testimony as they may any other. State v. Lyons, 113 La. 959, 37 So. 890. Instruction not objectionable as an invasion of the province of the jury. People v. Waysman [Cal. App.] 81 P. 1087. Instruction as to faith and credit to be given defendant's testimony unobjectionable. State v. Buffington [Kan.] 81 P. 465; People v. Hill [Cal. App.] 82 P. 398. Error to refuse a charge applying the same rules as to weight of evidence to dying declarations as to other testimony. People v. Thomson, 145 Cal. 717, 79 P. 435. Instruction as to weight of evidence of defendant's flight, after the homicide, approved. State v. Stentz, 33 Wash. 444, 74 P. 588. In a prosecution for assault with intent to murder, it was error to charge that circumstantial evidence "is to be regarded as direct and positive evidence of eyewitnesses." State v. Thompson [Iowa] 103 N. W. 377. In New Jersey a judge may give his own views to the jury with respect to the value of the testimony or the merits of the case. State v. Valentina [N. J. Err. & App.] 60 A. 177.

44. Statement that all the presumptions of law, independent of the evidence, are in favor of innocence, and that every person is presumed innocent until proved guilty, held sufficient. Everett v. People [Ill.] 75 N. E. 188.

45. Instructions on reasonable doubt approved. People v. Olsen [Cal. App.] 81 P. 676. Instruction on reasonable doubt, in language of Cr. Code Prac. § 238, approved. Tetterton v. Com. [Ky.] 89 S. W. 8. Instruction on reasonable doubt held misleading and erroneous. Hampton v. State [Fla.] 39 So. 421. If once fully covered it need not be repeated in every instruction. People v. McRoberts [Cal. App.] 81 P. 734; People v. Waysman [Cal. App.] 81 P. 1087. Not error, in charging at defendant's request that evidence of good character may create a reasonable doubt, to add that the weight of such testimony was for the jury to determine. People v. Jackson [N. Y.] 74 N. E. 565. A requested instruction as to reasonable doubt rendered unnecessary by another instruction. Everett v. People [Ill.] 75 N. E. 188.

46. Proper instruction on premeditation and deliberation. State v. Exum, 138 N. C. 599, 50 S. E. 283. Instruction as to space of time necessary for premeditation and deliberation held not erroneous. People v. Koenig, 180 N. Y. 155, 72 N. E. 993.

47. In a trial for malicious wounding with intent to maim, disfigure, disable or kill, under § 9, c. 144, Code 1899, an instruction which eliminates the intent is erroneous. State v. Davis [W. Va.] 51 S. E. 230. The presumption that one intends the nat-

murder,[49] manslaughter,[50] assault with intent to kill or murder,[51] self-defense,[52] de-

ural consequences of his acts does not justify the instruction in a second degree murder case, that the defendant intended to kill the deceased because he purposely inflicted the fatal blow. Munday v. State, 5 Ohio C. C. (N. S.) 656, 25 Ohio Circ. R. 712. Instructions on the question of intent to kill held erroneous. State v. Williams, 36 Wash. 143, 78 P. 780; Lynch v. People [Colo.] 79 P. 1015. Instruction on the necessity of union of act and intent held unobjectionable. People v. McRobert [Cal. App.] 81 P. 734. To charge the jury that, where the evidence shows that defendant purposely inflicted the fatal blow, evidence tending to show that he did not in fact intend to kill the deceased is material, is erroneous. Munday v. State, 5 Ohio C. C. (N. S.) 656, 25 Ohio Circ. R. 712.

48. Under Act Mar. 31, 1860 (P. L. 382), Penn., giving the jury a right to determine the degrees, it is error for the court to give a binding charge that the crime was murder in the first degree. Commonwealth v. Fellows [Pa.] 61 A. 922. Instruction as to degrees approved. State v. Harmon, 4 Pen. [Del] 60 A. 866. In a prosecution for murder, instructions held erroneous because of failure to inform jury as to all the degrees of homicide. State v. McAnarney [Kan.] 79 P. 137; State v. McPhail [Wash.] 81 P. 683. Instruction as to included offenses sustained. Held erroneous. Delaney v. State [Wyo.] 81 P. 792. In a prosecution for assault with intent to murder, the court in charging what offenses were included in the indictment should have defined them, or applied the law to the facts so that the jury might have understood the different offenses. State v. Thompson [Iowa] 103 N. W. 377.

49. Where the evidence clearly establishes murder, it is not error to confine instructions to that view of the case. Starke v. State [Fla.] 37 So. 850. Proper instruction as to murder. State v. Thrailkill [S. C.] 50 S. E. 551; State v. Adams, 138 N. C. 688, 50 S. E. 765; Marlow v. State [La.] 38 So. 653; Dunn v. State [Ala.] 39 So. 147; Martin v. State [Tex. Cr. App.] 83 S. W. 390; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; People v. McRoberts [Cal. App.] 81 P. 734; State v. Byrd [S. C.] 51 S. E. 542. Instructions held to state the law correctly. State v. Appleton [Kan.] 78 P. 445. Where the fact of murder was unquestionably established, it was not error to refer to the crime as murder, in the instructions. Dean v. State [Miss.] 37 So. 501. Not error to instruct the jury to find defendant guilty of murder if they find the elements of murder proved beyond reasonable doubt, although defendant may be found guilty of manslaughter under an indictment for murder. Kyle v. People, 215 Ill. 250, 74 N. E. 146. Charge including murder in both degrees, manslaughter and justifiable homicide, approved. Yancy v. State [Tex. Cr. App.] 87 S. W. 693. An instruction that, if defendant willfully prepared for the use of the scissor's blade with which he stabbed deceased, he was guilty of murder in the first degree, approved. State v. Jones [N. J. Err. & App.] 60 A. 396. Where the charge was full on the different degrees, but gave a form of verdict for the first only, it was not erroneous, under the evidence. People v. Woods [Cal.] 81 P. 652. Instruction that if the jury can satisfactorily and reasonably infer deliberation and premeditation, they are warranted finding defendant guilty of murder in first degree, is proper. State v. Brown [Mo.] 87 S. W. 519. A charge on murder in the first degree held proper under the facts in evidence. Ricks v. State [Tex. Cr. App.] 87 S. W. 1036. Where there is evidence to support both degrees, it is proper to submit both to the jury. State v. Williams, 186 Mo. 128, 84 S. W. 924. Where the indictment charged only murder in second degree, it was not error not to charge on murder in first degree. State v. Cummings [Mo.] 88 S. W. 706. Though murder in first degree is not to be submitted, it is not error to define express malice, it being necessary in order to define implied malice so as to submit question of murder in second degree. Chambers v. State [Tex. Cr. App.] 86 S. W. 752. Erroneous, as authorizing conviction of murder in case of assault with intent to inflict serious injury, without regard to essential element of death. Beaver v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 151, 86 S. W. 1020. In a prosecution for murder, an instruction on conspiracy held improper where there was no evidence of a common design. Humphrey v. State [Ark.] 86 S. W. 431. Charge too indefinite in its application of the law to the facts. Alareon v. State [Tex. Cr. App.] 83 S. W. 1115. Instruction as to murder by administering strychnine approved. Nordan v. State [Ala.] 39 So. 406. Proper instruction as to meaning of "deliberate" and "premeditated" in statute defining murder. Dunn v. State [Ala.] 39 So. 147. Charge not erroneous because of recognizing two names by which deceased was known. Thomas v. State [Fla.] 38 So. 516. Erroneous instruction as to conviction of one or both parties charged with murder. Sullivan v. State [Miss.] 37 So. 1006. Charge failed to clearly place before the jury the issues involved as to whether the homicide was murder, voluntary manslaughter or justifiable. Gossett v. State [Ga.] 51 S. E. 394. Charge held erroneous as depriving defendant of benefit of provocation or mitigating circumstances. Darden v. State [Ark.] 84 S. W. 507. Not error to give entire statute definition of murder in third degree, though some parts were irrelevant under the evidence. Miera v. Territory [N. M.] 81 P. 586. Or in first degree, as defined in Pen. Code, § 189. People v. Woods [Cal.] 81 P. 652. It is error to instruct the jury that the killing with a dangerous weapon is murder in the second degree, unless the jury believe the killing was without malice. Territory v. Gutierez [N. M.] 79 P. 716. Instructions in case of murder committed in resistance to recapture by convicts approved. People v. Wood, 145 Cal. 659, 79 P. 367. Not error to charge that the jury might inquire whether or not the accused had an opportunity to kill deceased. Anderson v. State [Ga.] 50 S. E. 46. Erroneous charges on law of murder. Vickery v. State [Fla.] 38 So. 907; State v. Rochester [S. C.] 51 S. E. 685; Cook v. State [Miss.] 38 So. 110. Defective charge as to murder in second degree. Harrison v. State [Tex. Cr. App.] 83 S. W. 699. Erroneous charge as to murder

in second degree. Swaln v. State [Tex. Cr. App.] 86 S. W. 335.

50. Instructions on the law of manslaughter approved. Moore v. State [Miss.] 38 So. 504; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; McDuffie v. State, 121 Ga. 580, 49 S. E. 708; State v. Kinder, 184 Mo. 276, 83 S. W. 964; Ray v. State [Tex. Cr. App.] 85 S. W. 1151; State v. Reeder [S. C.] 51 S. E. 702; Bell v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 558, 87 S. W. 1160. Proper instruction on law of voluntary manslaughter. Jenkins v. State [Ga.] 51 S. E. 386; Id. 51 S. E. 598. Charge as to assault as adequate cause to reduce homicide to manslaughter, in language of statute, is proper. Hatchell v. State [Tex. Cr. App.] 84 S. W. 234. Charge not objectionable as assuming that "metallic knucks" were deadly weapons. Clemons v. State [Fla.] 37 So. 647. Charge on manslaughter in fourth degree held substantially correct. State v. Brown [Mo.] 87 S. W. 519. Court did not err as to doctrine of reasonable fears, under Pen. Code 1895, § 71. Grimes v. State [Ga.] 51 S. E. 721. An instruction that accused was guilty of manslaughter, at least, justified by testimony. State v. Garland, 138 N. C. 675, 50 S. E. 853. Where there was evidence of accidental shooting, it was error to charge that upon the evidence, if believed, defendant was guilty of manslaughter at least. State v. Turnage, 138 N. C. 596, 49 S. E. 913. Not error to refuse to instruct the jury as to manslaughter on a prosecution under Mills' Ann. St. Rev. Supp. § 1209, defining murder by procuring miscarriage. Johnson v. People [Colo.] 80 P. 133. Where the evidence shows murder and no defense is attempted but an alibi, it is error to submit the question of manslaughter included in the indictment. Regnier v. Territory [Okl.] 82 P. 509. Sufficient definition of manslaughter as applied to facts in case. State v. Exum, 138 N. C. 599, 50 S. E. 283. Instruction on law of voluntary manslaughter justified by the evidence. Goodman v. State [Ga.] 49 S. E. 922. Not error to strike out of a requested instruction defining manslaughter, a paragraph including malice as an element. People v. Waysman [Cal. App.] 81 P. 1087. An instruction that if defendant was present aiding and abetting he was guilty of manslaughter, if the principal was justified by the evidence. State v. Cobley [Iowa] 103 N. W. 99. Where murder is clearly established, it is not error to charge that self-defeuse and manslaughter are not open for consideration. State v. Valentina [N. J. Err. & App.] 60 A. 177. And the court need not charge as to manslaughter. Commonwealth v. Gibson, 211 Pa. 546, 60 A. 1086. Under the evidence held improper to give the charge of manslaughter. Coleman v. State, 121 Ga. 594, 49 S. E. 716. Correct instruction as to heat of passion under sufficient provocation. Metcalfe v. Com. [Ky.] 86 S. W. 534. Instructions as to manslaughter committed in sudden passion not erroneous. Hancock v. State [Tex. Cr. App.] 83 S. W. 696. Proper charge as to cooling time after assault. Jones v. State [Tex. Cr. App.] 85 S. W. 5. Erroneous instruction on adequacy of cause for passion, so as to reduce the homicide to manslaughter. Earles v. State [Tex. Cr. App.] 85 S. W. 1. Erroneous charge on the question of manslaughter, where defendant killed deceased for an insult to defendant's wife. Melton v. State [Tex. Cr. App.] 83 S. W. 822.

51. Charges approved. Jordan v. State [Fla.] 39 So. 155; Holmes v. State [Wis.] 102 N. W. 321; Brown v. State [Ala.] 38 So. 268. Question of assault with a deadly weapon properly submitted to jury. State v. Archbell [N. C.] 51 S. E. 801. Erroneous instruction. Under Ky. St. 1903, § 1242. Greer v. Com. [Ky.] 85 S. W. 166. Charge held erroneous as referring a question of law to the jury. Brown v. State [Ala.] 38 So. 268. Erroneous instruction as to assault and battery with intent to kill. Montgomery v. State [Miss.] 37 So. 835; McCaa v. State [Miss.] 38 So. 228.

52. Where no aspect of the case required a consideration of the law of excusable homicide, it was not error to charge that the jury need not consider it. State v. Marx [Conn.] 60 A. 690; State v. Valentina [N. J. Err. & App.] 60 A. 177. It is proper to charge that the burden is on defendant to show circumstances justifying a resort to killing in self-defense, provided it is also charged that accused is entitled to the benefit of a reasonable doubt. State v. Jones [N. J. Err. & App.] 60 A. 396. A charge that self-defense is not justified unless the necessity is apparent as the only means of escaping destruction or grievous bodily harm, is not erroneous under the crimes act of New Jersey (§ 110, Rev. 1898, P. L. p. 825). Id. Where, if defendant's testimony was true, the right of self-defense was clearly established, an instruction that the necessity of taking life must be apparent, was not prejudicial on the theory that "apparent" was equivalent to "actual" or "real." Id. An instruction that, if defendant prepared for or provoked the assault, he could not set up the plea of self-defense, approved. Id. Instructions on self-defense held pertinent and correct. State v. Buffington [Kan.] 81 P. 465. Instructions on self-defense as a whole approved. State v. Manderville, 37 Wash. 365, 79 P. 977; State v. Gray [Or.] 76 P. 53. Instruction on self-defense approved. State v. Tooker [Mo.] 87 S. W. 487; State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; McKinney v. Carmack, 119 Ga. 467, 46 S. E. 719; Taylor v. State, 121 Ga. 348, 49 S. E. 303; Jenkins v. State [Ga.] 51 S. E. 598; Id., 51 S. E. 386; Snelling v. State [Fla.] 37 So. 917; Marlow v. State [Fla.] 38 So. 653; Yancy v. State [Tex. Cr. App.] 87 S. W. 693; Lee v. State [Ark.] 81 S. W. 385; O'Neal v. Com. [Ky.] 85 S. W. 745; State v. Price, 186 Mo. 140, 84 S. W. 920; Bishop v. State [Ark.] 84 S. W. 707; Kinman v. State [Ark.] 83 S. W. 344; Lentz v. State [Tex. Cr. App.] 85 S. W. 1068; Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238. Instructions on the law of self-defense as defined in Hurd's Rev. St. 1903, c. 38, §§ 148, 149, approved. Mackin v. People, 214 Ill. 232, 73 N. E. 344; Kipley v. People, 215 Ill. 358, 74 N. E. 379. But it is error to instruct, under said statute, that it must appear that the killing was "absolutely" necessary. Id. Error to refuse to charge that if defendant withdrew and his assailant advanced and gave him grounds for reasonable apprehension of great bodily injury, he had the right of self-defense. Eby v. State [Ind.] 74 N. E. 890. Instruction on resistance of assault made in the course of

fense of another,[53] provocation of difficulty,[54] resistance of arrest,[55] apprehension of danger,[56] imminence of danger,[57] duty to retreat, or avoid danger,[58] insanity,[59] intoxication,[60] accident,[61] punishment.[62]

a brawl justified by evidence. Kinman v. State [Ark.] 83 S. W. 344. Instruction on self-defense held not misleading. Taylor v. State [Ark.] 83 S. W. 922. Form of charge as to self-defense held proper under the circumstances of the case. Morris v. Com. [Ky.] 84 S. W. 560. Charge approved as sufficiently covering the subject of appearance of danger. Simpson v. State [Tex. Cr. App.] 87 S. W. 826. Charge on self-defense held to sufficiently submit the issue of apparent danger. Hardison v. State [Tex. Cr. App.] 85 S. W. 1071. Under the evidence a charge on the right of self-defense was warranted. Williams v. U. S. [Ind. T.] 88 S. W. 334. Instruction to consider relative strength and activity of parties properly refused where no evidence. People v. Fitzgerald [Cal. App.] 82 P. 555. Instruction as to self-defense by one bringing on the difficulty held proper under the evidence. Turner v. Com. [Ky.] 89 S. W. 482. Evidence of killing of officer to avoid arrest held to justify refusal to submit self-defense. State v. Horner [N. C.] 52 S. E. 136. Instructions as to whether defendant was justified in killing decedent held proper. McKinney v. Carmack, 119 Ga. 467, 46 S. E. 719. Charges on the law of self-defense held erroneous. State v. Castle, 133 N. C. 769, 46 S. E. 1; Zipperian v. People [Colo.] 79 P. 1018; Swain v. State [Tex. Cr. App.] 86 S. W. 335; Surrency v. State [Fla.] 37 So. 575; Nash v. State [Ark.] 84 S. W. 497; Boykin v. State [Miss.] 38 So. 725; Bardin v. State [Ala.] 38 So. 833; Barstado v. State [Tex. Cr. App.] 87 S. W. 344; Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 297, 87 S. W. 151; Crenshaw v. State [Tex. Cr. App.] 85 S. W. 1147; Wheeler v. Com. [Ky.] 87 S. W. 1106. Requested charge on self-defense properly refused. Smith v. State [Ala.] 39 So. 329. Requested instruction on the law of self-defense properly refused, on account of omission of "great" before "bodily injury" and "imminent" before "danger." Lynch v. People [Colo.] 79 P. 1015. Requested instruction on self-defense held incorrect, as omitting element of necessity; instruction as given approved. People v. Fucarino, 93 N. Y. S. 689. Instruction erroneously qualifying right of self-defense. Greer v. Com. [Ky.] 85 S. W. 166. Erroneous limitation of right of self-defense by a charge on provoking the attack. Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 692, 88 S. W. 221. Charge on self-defense held erroneous as being on the weight of evidence. Craiger v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 736, 88 S. W. 208. Error to instruct that self-defense can be availed of, only under certain circumstances which were not shown in the evidence, when defense is not predicated on self-defense. Sullivan v. State [Miss.] 37 So. 1006. Instruction that the jury should look at the facts from the defendant's standpoint as nearly as they were able is erroneous. Brownlee v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 621, 87 S. W. 1153. Charge in a case where defendant was justified in firing at one person and by accident shooting another, held defective in omitting requirement of due care. Ringer v. State [Ark.] 85 S. W. 410. Error to charge that defendant could not take life, unless apparently necessary to prevent the commission of a felony or to defend against loss of life or great bodily harm, in view of Cr. Code, div. 1, § 148 (Hurd's Rev. St. 1899, c. 38), permitting homicide in defense of habitation, etc. Hayner v. People, 213 Ill. 142, 72 N. E. 792. Charge denying the right of self-defense, in case defendant first assaulted deceased, held erroneous and prejudicial under the evidence. Carnes v. Com. [Ky.] 87 S. W. 1123. Where there was evidence that defendant was assaulted by two parties, in defining his right of self-defense, it was error to limit it to danger from one. Helton v. Com. [Ky.] 87 S. W. 1073.

53. Where defendant entered the difficulty, as shown by the evidence, merely to protect a friend, the court should have confined itself to a charge on his right to do so, and not have introduced the right of self-defense. Garza v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 720, 88 S. W. 231. Instruction as to defendant's right to defend his father properly given. Pratt v. State [Ark.] 87 S. W. 651. Erroneous charge as to right of defense of another. Stacy v. State [Tex. Cr. App.] 86 S. W. 327. Charge approved as according to defendant the same right to defend his brother as himself. McQueen v. Com. [Ky.] 88 S. W. 1047.

54. Evidence not sufficient to justify a charge on provoking the difficulty. Crow v. State [Tex. Cr. App.] 88 S. W. 814. Correct statement of law as to provoking difficulty. State v. Bailey [Mo.] 88 S. W. 733. Evidence sufficient to justify a charge on provoking the difficulty. Garza v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 720, 88 S. W. 231. In a prosecution for assault with intent to murder, evidence held sufficient to show that defendant was at fault in creating the situation of danger and to authorize an instruction on that phase of the case. Holmes v. State [Wis.] 102 N. W. 321. Held, that there was evidence to support an instruction that if defendant provoked a quarrel for the purpose of killing deceased and killed him maliciously, he should be found guilty of murder. Kyle v. People, 215 Ill. 250, 74 N. E. 146. Abstract instruction as to assault by "one" on "another" held misleading. Hayner v. People, 213 Ill. 142, 72 N. E. 792.

55. Error to charge jury so as to leave the impression that deceased's attitude was one of resistance to arrest. Commonwealth v. Crowley, 26 Pa. Super. 124.

56, 57. Charge approved. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

58. Charge approved. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Instruction as to an attack by deceased on defendant, a subsequent retreat in which defendant pursued and killed deceased held without support in the evidence. Hayner v. People, 213 Ill. 142, 72 N. E. 792. A charge that it was defendant's duty to "retire," if possible, was not equivalent to a charge that it was his duty to "retreat," and was prejudicial to that extent. Delaney v. State [Wyo.] 81 P. 792.

59. Instructions on defense of insanity ap-

Harmless error.[63]—An instruction more favorable to defendant than the law warrants cannot be complained of,[64] nor errors embraced in instructions requested by himself;[65] and erroneous instructions on the law of degrees greater than that of which defendant was convicted are harmless.[66] Erroneous instructions relative to malice in a prosecution for murder committed in the perpetration of robbery are harmless.[67] Where the court otherwise correctly charged as to manslaughter, defendant was not prejudiced by abstract propositions as to sufficiency of provocation for taking human life.[68] A refusal to give a misleading charge is not prejudicial.[69] An instruction that mere words or menaces do not of themselves constitute provocation for murder was not prejudicial on the theory that menaces implies an overt act.[70] Erroneous instructions on a defense as to which no issue is raised are harmless.[71] No prejudice results from an erroneous charge on a lower degree than the evidence suggests,[72] nor error in instructions as to a defense not proven.[73] An instruction submitting murder on a trial for an assault which did not produce death is so palpably wrong as to be harmless.[74] The charge is to be construed as a whole;[75] error in one instruction may be corrected by another instruction;[76] and defects therein are not prejudicial, if the instructions as a whole

proved. Roberts v. State [Ga.] 51 S. E. 374. No error in charge of which defendant could complain. State v. Lauth [Or.] 80 P. 660. Different instructions on defense of insanity held not erroneous, and inaccurate. Allams v. State [Ga.] 51 S. E. 506. Rev. St. 1898, § 4697, relative to the special issue of insanity, requires only that the question of insanity or reasonable doubt of sanity be submitted to the jury in some form. Steward v. State [Wis.] 102 N. W. 1079. Charge that defendant must have been without sufficient reason to know what he was doing, or not have had sufficient will power to govern his action, approved. Mathley v. Com. [Ky.] 86 S. W. 988. Requested instruction as to acquittal if defendant was of unsound mind properly refused. Osburn v. State [Ind.] 73 N. E. 601. Requested instruction, that proof of prior insanity throws upon state burden of showing that the crime was perpetrated during a lucid interval, properly refused. State v. Austin, 71 Ohio St. 317, 73 N. E. 218. Instruction on the question of insanity held erroneous. Steward v. State [Wis.] 102 N. W. 1079.

60. Instruction that if defendant's lack of reason arose alone from voluntary drunkenness and not from unsoundness of mind, the jury should not acquit, approved. Mathley v. Com. [Ky.] 86 S. W. 988. Instruction defining the instances in which drunkenness does, and does not, excuse crime justified by the evidence. White v. State [Ark.] 86 S. W. 296. Charge requested, as to time for sobering up, properly refused. Gater v. State [Ala.] 37 So. 692.

61. Instruction on defense that deceased met his death accidentally, approved. State v. Bean [Vt.] 60 A. 807. Erroneous instruction on defense of accidental shooting. State v. Matheson [Iowa] 103 N. W. 137.

62. Erroneous instruction to jury as to fixing the punishment. Hayner v. People, 213 Ill. 142, 72 N. E. 792.

63. See 3 C. L. 1668.

64. Chambers v. State [Tex. Cr. App.] 86 S. W. 752; Green v. Com., 26 Ky. L. R. 1221, 83 S. W. 638; Jordan v. State [Fla.] 39 So. 155. As to elements of self-defense. State v. Byrd [S. C.] 51 S. E. 542. An instruction on the subject of excusable homicide cannot be complained of by defendant, as outside of the evidence, when it is favorable to him. State v. Gray [Or.] 79 P. 53.

65. Clemons v. State [Fla.] 37 So. 647.

66. Vickery v. State [Fla.] 38 So. 907; Rawls v. State [Ga.] 52 S. E. 72. Instruction authorizing conviction on facts fatally variant from the indictment held not rendered harmless by conviction of a lower degree than that charged. Gipe v. State [Ind.] 75 N. E. 881.

67. Under Mills' Ann. St. § 1176, malice does not enter into that crime. Andrews v. People [Colo.] 79 P. 1031. But where the facts in the case are such that no presumption of malice arises from the killing, a charge to that effect is prejudicial. State v. Rochester [S. C.] 51 S. E. 685.

68. Hicklin v. Territory [Ariz.] 80 P. 340.

69. Allison v. State [Ark.] 86 S. W. 409.

70. Lynch v. People [Colo.] 79 P. 1015.

71. Cortez v. State [Tex. Cr. App.] 83 S. W. 812. Where defendant's counsel admitted that deceased was murdered, an intimation by the court, in his charge, that the admission was justified by the evidence, was harmless. State v. Marx [Conn.] 60 A. 690. Where insanity was the only real question, defendant was not prejudiced by the court's failure to charge expressly as to the presumption of innocence. Mathley v. Com. [Ky.] 86 S. W. 988.

72. An abstract instruction on self-defense and manslaughter. Vasser v. State [Ark.] 87 S. W. 635.

73. Rawls v. State [Ga.] 52 S. E. 72.

74. Pollard v. State [Ga.] 52 S. E. 149.

75. Part of a charge unduly restricting the test of insanity will not be held prejudicial, where the charge as a whole gives the jury the broadest latitude. Schissler v. State [Wis.] 99 N. W. 593.

76. Surrency v. State [Fla.] 37 So. 575; Clemons v. State [Fla.] 37 So. 647. An instruction which correctly defines manslaughter in the abstract, cannot be complained of

fairly and freely give the law on the subject.[77] Error in an instruction may be cured by the admission of evidence;[78] and errors may be cured by verdict.[79]

(§ 8) *C. Verdict.*[80]—The verdict must determine of what degree of unlawful homicide defendant is guilty.[81] In South Carolina, where it apears that an assault with intent to kill was committed with a deadly weapon concealed about the person, the jury must find a special verdict accordingly before defendant can be sentenced therefor.[82] A verdict of voluntary manslaughter where the evidence demands one of either murder or acquittal, is contrary to law.[83] A mere clerical error in the verdict, which does not render it unintelligible, will not vitiate it.[84] A verdict of guilty of murder includes a finding of guilt of manslaughter and a judgment thereunder may be so modified, under the facts, as to sustain a conviction of manslaughter only.[85] Where the verdict found defendant guilty of murder on the first count, and of carrying concealed weapons on the second count, judgment was properly rendered on the first only.[86] The verdict in a homicide case, which was brought in and read on Sunday in presence of the court, jury and defendant, the jury then being discharged, and which was entered by the court the next day in presence of the defendant, was proper, as he had an opportunity to poll the jury.[87]

(§ 8) *D. Punishment.*[88]—Where one pleaded guilty to an indictment for murder in the first degree, the presumption of innocence and reasonable doubt did not apply in proceedings before a jury to assess the punishment.[89] Where the court instructed the jury to fix the verdict and leave the punishment to the court, they being unable to agree on the punishment, the defendant was not prejudiced by a sentence for a shorter time than fixed by statute for the offense of which he was convicted.[90] Cases discussing excessiveness of punishment are mentioned below.[91]

as not applying the facts, where it is followed by another plainly applying them. State v. Brown [Mo.] 87 S. W. 519.

77. State v. Manderville, 37 Wash. 365, 79 P. 977; Starke v. State [Fla.] 37 So. 850; People v. Olsen [Cal. App.] 81 P. 676; People v. Waysman [Cal. App.] 81 P. 1087; State v. Kinder, 184 Mo. 276, 83 S. W. 964; State v. Exum, 138 N. C. 599, 50 S. E. 283.

78. Where the court instructed the jury to convict of murder, if defendant "counseled, procured or commanded the killing," without stating that such killing must of itself be murder, the error was rendered harmless by the admission of the record of the conviction of the person who did the killing, wherein he pleaded guilty of "murder." Johnson v. State [Miss.] 37 So. 926.

79. Where there was an acquittal of first-degree murder, the question whether a charge on express malice was too general is immaterial. Venters v. State [Tex. Cr. App.] 83 S. W. 832. Where defendant was convicted of manslaughter, he could not complain of instruction on murder. Tardy v. State [Tex. Cr. App.] 83 S. W. 1128. Nor of instruction on negligent homicide. Clifton v. State [Tex. Cr. App.] 84 S. W. 237. Nor of an instruction as to murder, when convicted of any lesser degree of homicide. State v. Craig [Mo.] 88 S. W. 641. Nor of an instruction on conspiracy, where defendant is not found guilty of conspiracy, but only of manslaughter. Moseley v. Com. [Ky.] 84 S. W. 748. Definition of express malice harmless, defendant having been convicted of manslaughter. Chambers v. State [Tex. Cr. App.] 86 S. W. 752. Where accused was convicted of murder, failure to instruct on manslaughter was not prejudicial. Nash v. State [Ark.] 84 S. W. 497. Where defendant was convicted of murder in the second degree only, he was not prejudiced by an instruction in the first. Thomas v. State [Ark.] 86 S. W. 404; Thurman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1014; Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 555, 87 S. W. 1036.

80. See 3 C. L. 1669.

81. Reyes v. State [Fla.] 38 So. 257; State v. Hubbard [S. D.] 104 N. W. 1120. Where the jury is required to find the degree and fail to do so, judgment will be reversed. Lyles v. State [Tex. Cr. App.] 86 S. W. 763.

82. Under Cr. Code 1902, §§ 130, 131, 132. State v. Johnson, 70 S. C. 384, 50 S. E. 8.

83. Berry v. State [Ga.] 50 S. E. 345; McBeth v. State [Ga.] 50 S. E. 931; James v. State [Ga.] 51 S. E. 577.

84. The assessment by the jury of the "punish," instead of "punishment." Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212.

85. Noble v. State [Ark.] 87 S. W. 120.

86. State v. Reeder [S. C.] 51 S. E. 702.

87. Sanford v. State [Ala.] 39 So. 370.

88. See 3 C. L. 1669.

89. Sullivan v. State [Tex. Cr. App.] 85 S. W. 810.

90. Taylor v. State [Ark.] 83 S. W. 922.

91. Under the statute of Vermont (U. S. §§ 4886, 2007), prescribing solitary confinement three months before execution, such confinement after the time fixed for execution, in case of reprieve, is a separate severe punishment to which defendant was never sentenced. Ex parte Rogers, 138 F. 961. The statute of North Dakota (§ 8246, Rev. Codes

HORSE RACING; HORSES; HOSPITALS; HOUSES OF REFUGE AND REFORMATORIES, see latest topical index.

HUSBAND AND WIFE.[92]

§ 1. *Disabilities of coverture in general; statutory relaxations.*[93]—The common-law disabilities of married women, arising from the doctrine of the unity of husband and wife, have been largely removed by statute.[94]

§ 2. *Mutual duties, obligations and privileges. A. Inherent in the relationship.*[95]—The obligations of the marriage relation are fixed by law and cannot be changed or avoided by contract between the parties.[96] The husband is entitled to custody of his wife.[97] The common-law liability of a husband to support his wife does not extend to supporting her outside the matrimonial home, reasonably chosen by him, unless he refuses to do so there, or she resides away therefrom by his con-

1899), relative to verdicts fixing punishment in excess of the law, being mandatory, it was error for the court to impose life imprisonment, where, upon a former conviction, the jury had fixed seven years' imprisonment. State v. Barry [N. D.] 103 N. W. 637. Code, § 4728, prescribing the punishment for murder in the first degree as death or life imprisonment, vests a large discretion in the court which will not be interfered with unless shown to have been abused. State v. Smith [Iowa] 103 N. W. 769. Sentence for murder in second degree committed in sudden quarrel under considerable provocation by deceased reduced from fifteen years to five years. Petty v. State [Ark.] 89 S. W. 465. Where the punishment is fixed at "not less than" a stated number of years' imprisonment, a sentence for any greater number is authorized. Baysinger v. Territory [Okl.] 82 P. 728.

92. Scope of title: The relationship created by marriage, and the rights and liabilities arising therefrom, are here treated The formation of the relation (Marriage, 4 C. L. 528), its dissolution (Divorce, 5 C. L. 1026), annulment (Marriage, 4 C. L. 528) and suit money in such proceedings or support by way of alimony (Alimony, 5 C. L. 101), are specifically treated in other articles. See, also, Parent and Child, 4 C. L. 873 (custody of children).

93. See 3 C. L. 1669.

94. See 3 C. L. 1670; also following sections, particularly § 2B, § 3E, § 7.

95. See 3 C. L. 1670.

96. Patterson v. Patterson, 111 Ill. App. 342.

97. He has right to resist with necessary force an attempt of her father to gain possession of her. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341.

sent.[98] Thus a husband is not liable for the support of his wife in an asylum for the insane to which she has been removed by due process of law, even though he himself initiated proceedings for her removal.[99]

(§ 2) *B. Contracts or other dealings.*[1]—At common law husband and wife cannot contract directly with each other, and this is still the rule except where changed by statute.[2] Where husband and wife may lawfully transact business as copartners, they may constitute a subpartnership as to a business in which the husband is a partner.[3] Where such a subpartnership exists, the wife may make a valid gift to her husband of her interest in profits derived from the first partnership by her husband;[4] and the use of profits so given to discharge a debt of the husband to his partner does not render the latter liable to the wife for the amount.[5]

Gifts.[6]—Whether a transaction between the parties amounts to a gift depends upon the facts.[7] Where the husband deposits money in a bank in his wife's name, a gift to her is presumed[8] in the absence of evidence showing a contrary intention.[9] Where the husband advances money to pay for land deeded to the wife, the advancement will be presumed to be a gift to the wife.[10] Where there is no evidence to

98. Richardson v. Stuesser [Wis.] 103 N. W. 261.

99. Richardson v. Stuesser [Wis.] 103 N W. 261.

NOTE. Liability of husband for the support of his insane wife while in asylum: The Iowa, Indiana and Nebraska decisions are to the effect that there is no common-law liability in cases of this kind. The County of Deleware v. McDonald, 46 Iowa, 170; The Board of Commissioners of Noble County v. Schmoke, 151 Ind. 416; Board of Commissioners of Marshall County v. Burkey, 1 Ind. App. 565; Baldwin v. Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850. In the New England states and a few others it is well settled that there is a common-law liability and such an action can be maintained. Rumney v. Keyes, 7 N. H. 571; Alna v. Plummer, 4 Greenl. [Me.] 258; Bangor v. Wiscasset, 71 Me. 535; Brookfield v. Allen, 6 Allen [Mass.] 585; Senft v. Carpenter, 18 R. I. 545, 28 A. 963; Wray v. Wray, 33 Ala. 187; Schelling v. County of Kankakee, 96 Ill. App. 432; Davis v. St. Vincent's Inst. for Insane [C. C. A.] 61 F. 277; Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259, overruling former decisions of the New York courts in Goodale v Brockner, 25 Hun. [N. Y.] 621; Norton v. Rhodes, 18 Barb. [N. Y.] 100. In California there is a statutory liability in such a case. Watt v. Smith, 89 Cal. 602, 26 P. 1071. In Nebraska such a statute placing a liability upon the husband for support of the wife while in a state asylum has been held unconstitutional as being a special tax. Baldwin v. Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850.—4 Mich. L. R. 74.

1. See 3 C. L. 1670.

2. In District of Columbia, a married woman cannot enter into co-partnership with her husband. Norwood v. Francis, 25 App. D. C. 463.

3. As where wife owns the business which is conducted by her husband, and he takes in a partner, who does not know of the wife's ownership. Morrison v. Dickey [Ga.] 50 S. E. 175.

4. Morrison v. Dickey [Ga.] 50 S. E. 175.

5. This would not constitute a use of her money to pay her husband's debt. Morrison v. Dickey [Ga.] 50 S. E. 175.

6. See 3 C. L. 1671.

7. Evidence held sufficient to sustain finding that personalty on farm was a gift to the husband from his wife. Carter v. Reeves [Ark.] 88 S. W. 976.

8. Where money of the husband was deposited in the wife's name and placed with her money there on deposit, she adding other sums, and the husband failed to object or claim the money, the presumption is that he intended to give the money to his wife. In re Klenke's Estate [Pa.] 60 A. 166. Money deposited in the name of the wife is prima facie hers, and where claimed by her husband after her death, the burden is on him to prove it is his property. In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081. Where husband places deposit in bank to wife's credit, and she has bankbook and signs all checks, the transaction is a gift of the money to her and he cannot avoid it, even though his purpose was to defraud his creditors. Wipfler v. Detroit Pattern Works [Mich.] 12 Det. Leg. N. 309, 104 N. W. 545.

9. The presumption that a bank deposit in the wife's name was a gift to her is not rebutted by the husband's leaving a cash legacy to another without other money to pay it. In re Klenke's Estate [Pa.] 60 A. 166. Where husband deposited money in wife's name but gave the bank a signature card which in effect was a direction to pay out money only on checks signed by him in her name, the transaction did not constitute a gift to the wife. First Nat. Bank v. Taylor [Ala.] 37 So. 695.

10. No promise by the wife to repay will be implied, nor will the land be impressed by law with a trust in the husband's favor. O'Hair v. O'Hair [Ark.] 88 S. W. 945. Where property is purchased by the husband in the name of his wife, the presumption is that the purchase money was intended as a gift or advancement, unless the contrary is shown. Hayes v. Horton [Or.] 81 P. 386. Where husband buys property and puts title in wife's name, there is a presumption (which is not conclusive) that it was intended as

rebut this presumption, there is no resulting trust in his favor.[11] To constitute a valid gift inter vivos of an insurance policy from a wife to her husband, the necessary change of beneficiary must be made during her lifetime.[12] A plural wife may accept a gift from her husband, and may acquire a title by adverse possession based on the gift, the same as though she were a stranger.[13] In Illinois, a gift of a chattel by a husband to his wife, title passing to the wife directly from the husband's vendor, is valid, without any writing.[14]

Antenuptial contracts.[15]—The rights and liabilities of the parties to such a contract depend upon its terms.[16] Marriage is a sufficient consideration to support an antenuptial contract[17] to convey land.[18] An antenuptial contract is not invalid by reason of the existence of a prior marriage of the husband, where the woman was ignorant of such marriage and of the fact that the wife was still living.[19] A marriage contract between the prospective husband and the parents of the parties whereby his parents agreed to make no distinction between their children in disposing of their estate is enforceable by the son in equity.[20] If the provision made for the wife in an antenuptial contract is unreasonably disproportionate to the husband's means, there is a presumption of a fraudulent concealment of facts which must be overcome by the husband or his representatives.[21] In Georgia, a marriage contract between a resident woman and a nonresident man, whereby the latter agrees that the wife's separate property shall remain such, is not within the statute requiring recordation of marriage contracts and settlements.[22]

Agreements for separation and separate support.[23]—Contracts for separation[24] or looking to a separation, and tending to promote it,[25] are contrary to public policy. But contracts for division of property and release of marital rights, made after a permanent separation, are not contrary to public policy, and will be sustained, if

an advancement to the wife. Hanks v. Hanks, 114 Ill. App. 526.

11. No resulting trust where title was placed in husband and wife. Hayes v. Horton [Or.] 81 P. 386.

12. Littlefield v. Perkins [Me.] 60 A. 707.

13. Elements of adverse possession did not exist in this case. Raleigh v. Wells [Utah] 81 P. 908.

14. Rev. St. c. 68, § 9, relative to chattel mortgages, where title remains in mortgagor, does not apply. Grondenberg v. Grondenberg, 112 Ill. App. 615.

15. See 3 C. L. 1671.

16. Antenuptial contract held merely a recognition of wife's rights in her separate property as they then existed, and not a transfer or conveyance of any interest to remaindermen. Bearden v. Benner, 136 F. 258. Antenuptial contract provided for conveyance of wife's separate property by husband and wife when deemed necessary. Wife conveyed to an innocent purchaser with husband's consent, but without his joining. Held, husband could be compelled in equity to join in deed to purchaser to protect his rights against the children. Id.

17. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

18. Agreement to marry constitutes valuable consideration for agreement to convey land. Pierce v. Vansell [Ind. App.] 74 N. E. 554.

19. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

20. Codicil found inconsistent with contract and contract enforced. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699.

21. Yost's Estate, 23 Pa. Super. Ct. 183. Agreement set aside and widow given one-third interest in husband's estate, where provision for her in agreement was grossly disproportionate to the value of his estate. In re Warner's Estate, 210 Pa. 431, 59 A. 1113.

22. Ga. Code 1895, § 2483. Bearden v. Benner, 136 F. 258.

23. See 3 C. L. 1672.

24. Contract for separate living is unenforceable. Patterson v. Patterson, 111 Ill. App. 342. Bond given in bastardy proceedings for payment of certain sum "unless prosecutrix and defendant shall live together as husband and wife" is not void as an agreement for separation. Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52.

25. Courts of equity will not enforce marriage contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and in the nature of things, tending to bring about such separation. Sawyer v. Churchill [Vt.] 59 A. 1014. Contracts for support of a kind to stimulate divorces, or discourage defenses in divorce suits, are against public policy. Silberschmidt v. Silberschmidt, 112 Ill. App. 58. **A contract releasing claims for alimony** in consideration of an agreement to pay allowances to support a child is not against public policy, though made pending a divorce action, where it is provided that the rights of the parties to a divorce shall not be

fair and free from fraud or duress,[26] and if based on a sufficient consideration.[27] But such contracts will be closely scrutinized by the courts.[28] There is no reason why a separation agreement, adjusting property rights of the parties should not be enforced after the husband's death.[29] While such an agreement is usually held enforceable only in equity,[30] it may properly be used in a probate court as a defense to an application by the widow for an allowance out of the husband's estate.[31]

The duty of the husband to support the wife is a sufficient consideration for his agreement to furnish her with separate support.[32] Such a contract is not a bar to a suit for separate maintenance, even though the wife expressly agrees not to bring such suit; and the bringing of suit is not a waiver of instalments due under the contract.[33] A change in the financial condition of the husband does not relieve him from liability under a separation agreement.[34]

A contract for jointure before marriage, or a contract in the nature of jointure after marriage, will not bar dower unless the wife expressly renounces her dower interest;[35] but this rule does not apply to a contract of separation.[36]

Conveyances; mortgages; contracts to convey.[37]—Conveyances from one spouse to the other directly are authorized in some states.[38] In others, where a husband conveys land directly to his wife, not in fraud of his creditors, she takes only the equitable title, the legal title remaining in the husband in trust for the wife.[39] In such case the husband cannot convey the legal title to another, or encumber it by deed of trust or otherwise.[40] On her death, the trusteeship of the husband ceases and legal and equitable title pass, by operation of law, to her heirs.[41] A subsequent deed by the husband, therefore, passes no title.[42] By operation of the Alabama Law of 1887, providing that property to which the wife becomes entitled after marriage is her separate property, where the husband conveys to the wife, prior to the adoption of the act, legal title to the property vests in her after the act, though prior thereto she had only the equitable title.[43] In West Virginia, a deed for realty by a married woman to her husband, while they are living together, in which the husband

affected by such contract. Ward v. Goodrich [Colo.] 82 P. 701.

A **contract contemplating an immediate separation** of a husband and wife, by which her future support is provided for, is valid, though made directly with each other. Patterson v. Patterson, 111 Ill. App. 342.

26. Hiett v. Hiett [Neb.] 103 N. W. 1051. Contract settling property rights, though not void, parties having already separated, set aside because induced by fraud, misrepresentation and intimidation practiced on the wife and because she did not know her legal rights. Richardson v. Richardson, 36 Wash. 272, 78 P. 920.

27. Where contract recited that wife released marital claims on payment of $300, a further provision that for "the same consideration" she assigned and released rights as widow in the husband's estate to his children by another wife, was held invalid as without consideration. Sawyer v. Churchill [Vt.] 59 A. 1014. An agreement whereby a wife relieves the husband from obligation under an order of the court for alimony pending a divorce action, and releases all claims for alimony, in consideration of his agreement to pay a certain weekly sum for support of her child until it arrives at a certain age, is supported by a sufficient consideration and is enforceable by the wife after the decree of divorce has been rendered. Ward v. Goodrich [Colo.] 82 P. 701.

28. Contract sustained where wife was represented by sons and sons-in-law in negotiations with husband, and there was no evidence of fraud, concealment or imposition. Hiett v. Hiett [Neb.] 103 N. W. 1051.

29, 30. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

31. Separation agreement held a bar to an allowance. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

32, 33. Patterson v. Patterson, 111 Ill. App. 342.

34. Chamberlain v. Cuming, 99 App. Div. 561, 91 N. Y. S. 105.

35, 36. Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

37. See 3 C. L. 1672.

38. Under Laws 1887, p. 667, c. 537, a husband may convey directly to his wife his interest in lands held by them as tenants by the entirety. Hardwick v. Salzi, 46 Misc. 1, 93 N. Y. S. 265.

39. Swiger v. Swiger [W. Va.] 52 S. E. 23. A deed by a husband direct to the wife creates a separate equitable estate in the wife, legal title remaining in the husband in trust for the wife. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868.

40. Swiger v. Swiger [W. Va.] 52 S. E. 23.

41, 42. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868.

43. Code 1896, § 2520. Milam v. Coley [Ala.] 39 So. 511.

does not join, passes no interest, legal or equitable, to the husband.[44] Conveyances and transfers from the wife to the husband will be closely scrutinized,[45] and will be set aside if based on an illegal consideration.[46] A wife may legally convey her realty to her husband through a third person, and the validity of the transaction is not affected by the fact that it was intended to give the third person security for a debt of the husband.[47]

§ 3. *Property rights inter se. A. In general.*[48]—Mere possession of personalty by one spouse is not conclusive as to ownership.[49] The presumption that personalty in the joint possession of husband and wife belongs to the husband is rebuttable, even as between them, by proof that the wife's funds paid for it.[50] The husband may be estopped to deny the wife's ownership of property acquired by joint effort.[51] The mere fact that the wife assists the husband in his business does not give her either a joint or separate interest in the business or compensation.[52] Where the wife takes the husband's earnings and pays family expenses, she does not become the owner of the surplus remaining after such expenses are paid.[53] When husband and wife, living together, have community of possession of property, legal title to which is in the wife, possession of the property will be referred to the title.[54] Hence possession of the husband is not adverse to the title of the wife, or evidence against such title.[55] Where a life tenant suffers land to be sold for nonpayment of taxes, his wife cannot, by becoming purchaser at the sale, acquire possession adverse to her husband so as to acquire title by limitation.[56] A married woman is not, by reason of her relation to her husband, prohibited from purchasing tax titles upon property which he holds as tenant of another.[57]

(§ 3) *B. Of husband in wife's property.*[58]—At common law, during the existence of a marriage, the husband had the legal control of all the property without regard to ownership.[59] The wife's personalty became the husband's property, if he elected to treat it as such,[60] by reducing it to his possession;[61] if he elected to treat it as belonging to the wife, he became a trustee only.[62] Earnings of the wife belonged to the husband, unless he had divested himself of them by some clear and distinct act, by which he held or engaged to hold them as trustee for the wife's separate use.[63] In the absence of a statute providing otherwise, the husband must first have

44. Smith v. Vineyard [W. Va.] 51 S. E. 871.

45. Owing to influence husband is supposed to exercise over wife. Womack v. Womack [Ark.] 83 S. W. 937.

46. Conveyance of property owned by the wife to the husband set aside when evidence showed only consideration was withdrawal of divorce suit by husband. Womack v. Womack [Ark.] 83 S. W. 937.

47. Third person retained a vendor's lien, to secure an existing debt. Hannaford v. Dowdle [Ark.] 86 S. W. 818.

48. See 3 C. L. 1673.

49. To determine the ownership of money, as between husband and wife, the source of the money and the circumstances attending the transfer of possession from one to the other must be considered. Fretz v. Roth [N. J. Eq.] 59 A. 676.

50. Greenberg v. Stevens, 114 Ill. App. 483.

51. As where husband treated property as belonging to wife, in bankruptcy proceeding. Womack v. Womack [Ark.] 83 S. W. 937.

52. Overbeck v. Ahlmeier, 106 Ill. App. 606.

53. Where such surplus was invested in land, and it was understood that the husband was eventually to take title, he could have his deed to her through another set aside; and her will did not operate on the land. Fretz v. Roth [N. J. Eq.] 59 A. 676.

54, 55. Anglin v. Thomas [Ala.] 37 So. 784.

56. Blair v. Johnson, 215 Ill. 552, 74 N. E. 747.

57. Kampfer v. East Side Syndicate [Minn.] 104 N. W. 290.

58. See 3 C. L. 1673.

59. Fretz v. Roth [N. J. Eq.] 59 A. 676.

60. Personalty inherited by wife. Leslie v. Bell [Ark.] 84 S. W. 491.

61. Evidence held not to show reduction to possession of wife's money invested in land. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

62. As where he invested wife's money in land and recognized land as hers. Leslie v. Bell [Ark.] 84 S. W. 491.

63. Law in New Jersey prior to Gen. St. p. 2031, § 4, giving married women their earnings as separate property. Small v. Pryor [N. J. Eq.] 91 A. 564. Money acquired by a wife from keeping boarders, and not in a business carried on by her alone sepa-

reduced his wife's lands to his possession before he might claim a life estate therein by right of marriage.[64] Consequently he could take no estate where her estate was subject to an outstanding one which postponed her legal right to possession.[65]

The subject of curtesy is elsewhere discussed.[66]

(§ 3) *C. Of wife in husband's property.*[67]—The widow's dower and homestead rights are fully treated elsewhere.[68]

(§ 3) *D. Estates in common, jointly, and as an entirety.*[69]—At common law, a tenancy by the entirety arises whenever an estate vests in two persons who are at the time when the estate vests husband and wife.[70] A conveyance to the husband and wife makes them tenants by the entirety, regardless of the source of the consideration;[71] but where it is shown by competent evidence that each spouse furnished

rate from her husband, used as part payment of an incumbrance on realty owned by them in common, inures to the husband's benefit. Mayer v. Kane [N. J. Eq.] 61 A. 374.

64. In Georgia, prior to the Code of 1863, marital rights of the husband did not attach to realty owned by the wife at the time of the marriage or acquired by her during coverture, unless she was in possession at the time or it was reduced to possession by him during coverture. Arnold v. Limeburger [Ga.] 49 S. E. 812. Under that Code, the law remained the same as to property acquired by the wife during coverture. Id. The right of a man, married prior to the married woman's act of 1866, to reduce to possession property of his wife, was not changed by that statute. Id.

65. The wife's possession during coverture was possession of the husband. Arnold v. Limeburger [Ga.] 49 S. E. 812. But where a wife, who owned a reversionary interest, subject to a dower right, lived on the land with the dowress, before and after her marriage, her possession was not such that marital rights of her husband attached before or after the death of the dowress, he never having reduced the reversionary interest to possession. Id.

66. See Curtesy, 5 C. L. 893.

67. See 3 C. L. 1674.

68. See Dower, 5 C. L. 1043; Homesteads, 5 C. L. 1689.

NOTE. Antenuptial conveyance by husband in fraud of wife's marital rights: The general rule is that a voluntary conveyance of real estate by a man on the eve of his marriage, unknown to his intended wife, and for the purpose of defeating the interest which she would acquire in his estate by the marriage, is fraudulent and void as to her. Collins v. Collins, 98 Md. 473, 57 A. 597, 103 Am. St. Rep. 408 (see, also, 3 C. L. 1673); Leach v. Duvall, 8 Bush [Ky.] 201; Beere v. Beere, 79 Iowa, 555, 44 N. W. 809; Pomeroy v. Pomeroy, 54 How. Pr. [N. Y.] 228. The conveyance must have been without the intended wife's knowledge and with intent to defeat her marital rights, and these facts must be shown by her when she attempts to avoid the deed. Beere v. Beere, 79 Iowa, 555, 44 N. W. 809; Smith v. Smith, 6 N. J. Eq. 515; Youngs v. Carter, 50 How. Pr. [N. Y.] 410; Murray v. Murray, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95. It has been held that a man who has contracted to marry a woman cannot, on the eve of his marriage, give away his property without the consent of his intended wife. Poston v. Gillespie, 5 Jones Eq. [N. C.] 258, 75 Am. Dec. 437. But the better rule is said to be that stated in Dudley v. Dudley (76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814), where it is held that an antenuptial deed is not necessarily fraudulent because not disclosed to the intended wife. Where the man represents himself as the owner of certain land as an inducememnt to marriage, his secret antenuptial conveyance is fraudulent as to the wife's rights. Dearmond v. Dearmond, 10 Ind. 191. A voluntary conveyance or settlement will not be held fraudulent unless made with intent to defraud the intended wife, and in contemplation of marriage, and pending an engagement. Gainor v. Gainor, 26 Iowa, 337. A conveyance is not a fraud upon a woman with whom the grantor was not acquainted at the time, though he afterwards marries her. Bliss v. West, 58 Hun, 71, 11 N. Y. S. 374. Deed prior to engagement valid. Estate of Coleman, 193 Pa. 605, 44 A. 1085.

If a deed is fraudulent as to the wife, her rights in the land are not affected by the deed. Hoch v. Rollins, 158 Mo. 182, 59 S. W. 232. She may have it set aside after marriage in a suit for maintenance of herself and child, the husband having deserted her. Murray v. Murray, 115 Cal. 266, 47 P. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.—See note to Collins v. Collins [Md.] 103 Am. St. Rep. 418, from which cases above are taken.

69. See 3 C. L. 1674.

70. In re Klenke's Estate [Pa.] 60 A. 166. In the absence of qualifying words in a devise or conveyance to a husband and wife, the presumption is that they take title by entirety. Booth v. Fordham, 100 App. Div. 115, 91 N. Y. S. 406. Conveyance to husband and wife makes them tenants by the entirety. Saxon v. Saxon, 46 Misc. 202, 83 N. Y. S. 191. Under Gen. St. 1895, c. 108, § 12, a grant to a husband and wife, not expressly declared to be in joint tenancy, creates an estate by the entirety. Wilson v. Frost, 186 Mo. 311, 85 S. W. 375. Where deed recited grant to husband and wife, the estate created was one by the entirety, though it was specified in the premises that husband and wife were each to have an undivided half interest. Id. Estates by the entirety existed in Kansas prior to Laws 1891, p. 349, c. 203, which abolished such estates. Hence, where husband and wife took title prior to 1891, the husband's vested estate was not divested by the statute, and on death of his wife, he took the whole. Holmes v. Holmes [Kan.] 79 P. 163.

71. Conveyance to husband and wife vests estate in entirety, nothing else appearing,

a part of the consideration and that the intention was to make them tenants in common, they will take as tenants in common, though the deed, through a mistake, makes them tenants by the entirety.[72] A tenancy by the entirety may exist in personalty as well as realty,[73] in choses in action as well as choses in possession.[74] At the death of either of such tenants, the survivor takes the whole,[75] and the rights of the survivor cannot be defeated by a testamentary disposition of the other.[76] A husband and wife who are tenants by the entirety occupy as tenants in common during their joint lives.[77] The weight of authority is that a divorce severs an estate by entirety and makes the former husband and wife tenants in common.[78] The husband cannot alone transfer title to land held by him and his wife jointly.[79]

In states where the common-law rule has been modified a conveyance to husband and wife makes them tenants in common, and not joint tenants.[80] Under statutes providing that husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person, a conveyance by the husband to himself and wife does not make them tenants by the entirety.[81]

(§ 3) *E. Wife's separate property.*[82]—Property inherited by or conveyed or given to the wife becomes her separate property.[83] The wife is entitled to rents and profits from property to which she holds legal title.[84] In Kentucky, an infant daughter loses a vested right in a homestead upon her marriage.[85]

Trusteeship of husband.—Where the husband invests the wife's money and takes title to the purchased property in his own name, a trust immediately arises in favor of the wife,[86] unless a gift by the wife to the husband was intended.[87] Such

regardless of whether one or both furnished consideration. Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210. Deed to husband and wife makes them tenants by the entirety, though husband purchased. Hayes v. Horton [Or.] 81 P. 386.

72. Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210.

73. Deposits in name of "Henry and Kate Klenke" and "Henry or Catherine Klenke" held by entireties. In re Klenke's Estate [Pa.] 60 A. 166.

74. In re Klenke's Estate [Pa.] 60 A. 166.

75. In re Klenke's Estate [Pa.] 60 A. 166. Where land is held by husband and wife as tenants by entireties, upon death of one, the survivor takes the whole. Chaplin v. Leapley [Ind. App.] 74 N. E. 546; Saxon v. Saxon, 46 Misc. 202, 93 N. Y. S. 191.

76. A husband has no power to devise land held by himself and wife as tenants by the entireties. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

77. Steenberge v. Low, 92 N. Y. S. 518.

78. Since divorce destroys unity of husband and wife. Hayes v. Horton [Or.] 81 P. 386.

79. Where husband and wife owned farm jointly, the husband could not by sale contract and will transfer the property to another at his death, but upon that event the wife acquired title free from any rights in the obligee and devisee of the husband. Hubert v. Traeder [Mich.] 102 N. W. 283.

80. In Kentucky, a deed to husband and wife makes them tenants in common and wife's heirs take an undivided half. Campbell v. Asher [Ky.] 88 S. W. 1067. In New Jersey a chose in action made to the husband and wife jointly during coverture is held by them as tenants in common, and not as joint tenants. Mortgage to husband and wife jointly. Aubry v. Schneider [N. J. Eq.] 60 A. 929.

81. Even where deed conveyed to parties of the second part for their joint lives, "the survivor to become absolute owner," and the words of conveyance were to such parties and "their heirs and assigns forever." Saxon v. Saxon, 46 Misc. 202, 93 N. Y. S. 191.

82. See 3 C. L. 1675.

83. Inherited personalty recognized as wife's separate property. Leslie v. Bell [Ark.] 84 S. W. 491. A married woman may acquire a right of property by gift, and is, as to such property, its owner. Battle v. Columbia, etc., R. Co., 70 S. C. 329, 49 S. E. 849. Land conveyed to wife by her father is her separate property under Va. Code 1904, p. 1139. King v. Davis, 137 F. 222.

84. So held of homestead in wife's name. Sharp v. Fitzhugh [Ark.] 88 S. W. 929.

85. Under Ky. St. 1903, § 1707. Jones v. Crawford [Ky.] 84 S. W. 568.

86. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. Rep. 348, 87 S. W. 235. Where the wife raised funds by mortgaging her separate property, and husband bought land with such funds under agreement that the land purchased was to be hers, and then takes title in himself, the wife has equitable title to the land as her separate estate. Sparks v. Taylor [Tex. Civ. App.] 13 Tex. Ct. Rep. 290, 87 S. W. 740. Where husband, in public records, described land bought with wife's inherited personalty as hers, and always treated it as hers, there was a resulting trust in her favor, and at her death, the land went to her son. Leslie v. Bell [Ark.] 84 S. W. 491.

87. If property is purchased with money belonging to the wife as her separate estate,

a trust does not arise where the wife is paid in notes of the husband,[88] nor where both spouses contribute to the purchasing fund, and the property purchased is taken for their joint use, the wife having full knowledge of, and approving, the transaction.[89] An agreement between husband and wife that land purchased with the wife's funds should be her separate estate in valid as between themselves and as against all others except bona fide purchasers.[90] An instrument attempting to convey a life estate to a married woman, when, under the law, she could not take legal title to realty, and making her husband her agent to manage the property conveyed, creates a trust in the husband for the benefit of the wife.[91] If the husband accepts the trust, as he may do by taking charge of the property, he waives his marital rights.[92]

§ 4. *Property rights under the community system. A. What law governs.*[93] (§ 4) *B. What property is community and what separate.*[94]—The presumption is that property acquired during the marriage is community property;[95] but this presumption may be overcome by proof that such property was paid for out of the separate funds of one of the spouses.[96] The interest acquired by a husband and wife under a contract for the purchase of land in which the husband is vendee is community property.[97] Property conveyed to the wife[98] and paid for with her funds[99] and property devised to her[1] during coverture becomes her separate property. In Louisania, permanent improvements made on land belonging to one of the spouses belongs to the owner of the land.[2] As relates to the right of the community, only the enhanced value of the property is taken into account, if due to the im-

and there is no satisfactory proof that a gift to the husband was intended, the husband or his estate must account to the wife for the principal at least. Small v. Pryor [N. J. Eq.] 61 A. 564. Evidence insufficient to show price was wife's separate property, or that husband took as trustee. Id.

88. Where husband took and used wife's money, she taking notes therefor, in the absence of an agreement by him to hold it in trust for her, such a trust would not be implied. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825.

89. In such case, husband is not mere trustee, and wife's money cannot be recovered from him after her death. In re Kreider's Estate [Pa.] 61 A. 1115.

90. Purchasers held to have had notice of wife's rights. Sparks v. Taylor [Tex. Civ. App.] 13 Tex. Ct. Rep. 290, 87 S. W. 740.

91, 92. Johnson v. Cook [Ga.] 50 S. E. 367.

93, 94. See 3 C. L. 1676.

95. Hoopes v. Mathis [Tex. Civ. App.] 13 Tex. Ct. Rep. 463, 89 S. W. 36. Where land is conveyed to the husband during the marriage, the presumption is that it was paid for with community property. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

Note: "Property acquired after marriage by either the husband or wife is presumed to be community property until it is shown to be separate property. Ballinger, Commun. Prop. §§ 17, 46, 67, 159-166; Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Shaw v. Hill, 20 La. Ann. 531, 96 Am. Dec. 420; Labbe's Heirs v. Abat, 2 La. 553, 22 Am. Dec. 151; Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626, and cases cited in note p. 636; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570; Castor v. Peterson, 2 Wash. 204, 26 Am. St. Rep. 854. Except in California, in the case of a conveyance in writing to the wife. Act March 3, 1893 (St. 1893, p. 71); Svetinich v. Sheean, 124 Cal. 216, 71 Am. St. Rep. 50.—Tiffany, Real Property, § 166.

96. Evidence held insufficient to prove that stock levied on as husband's property was bought with funds belonging to the wife. Hoopes v. Mathis [Tex. Civ. App.] 13 Tex. Ct. Rep. 463, 89 S. W. 36. Evidence insufficient to prove payment from husband's separate funds for property conveyed to him during marriage. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

97. Zeimantz v. Blake [Wash.] 80 P. 822.

98. A deed from the husband to the wife makes the property conveyed the wife's separate estate, though the deed does not expressly so provide. Jones v. Iumphreys [Tex. Civ. App.] 13 Tex. Ct. Rep. 684, 88 S. W. 403. Realty bought by the husband, partly with the wife's own funds, and conveyed to her, in consideration of her agreement to join him in a conveyance of other land which he desired to sell, becomes the wife's separate property. McKinney v. McKinney [Tex. Civ. App.] 87 S. W. 217.

99. Evidence held to show lot in wife's name was not paid for with community funds and was not community property; hence her deed not subject to cancellation. Guye v. Plimpton [Wash.] 82 P. 596.

1. Evidence sufficient to show married woman acquired title by devise during coverture. Hence property was her separate property under Civ. Code, § 162, and was not a part of the community. Bell v. Wyman [Cal.] 82 P. 39.

2. Succession of Meteye, 113 La. 1012, 37 So. 909.

provement.[3] In Texas, improvements on land which is the separate property of the wife, made by the husband out of community funds, will not be presumed to be a gift.[4] Rents and revenues derived from the wife's separate property become community property.[5] A cause of action for personal injuries sustained by the husband, after the parties have separated with the intention of remaining permanently apart, is community property.[6] The Louisiana statute making a cause of action for injuries to the wife her separate property is not retroactive.[7]

(§ 4) *C. Rights and powers as to, and liability of, community property.*[8]—Property, title to which is in the community, is under the absolute control and management of the husband.[9] Neither spouse can by will dispose of the community interest of the other.[10] A release of the husband's interest as vendee in a contract of sale is invalid unless the wife joins.[11] A statute providing that a husband cannot make a gift of community property unless the wife consent thereto in writing has no application to a gift of such property directly to the wife.[12] Declarations of the wife made in the absence and without the knowledge of her husband cannot raise an estoppel where his title to community property is involved.[13] When a married woman engages in trade, it is presumed to be with funds of the community.[14]

The Texas statute, providing that where one spouse becomes insane, and there are no children, the community property passes to the other, no administration or guardianship of the estate of the insane spouse being necessary, does not operate to transfer title to the community property where one spouse becomes insane,[15] but simply gives the sane spouse the same powers over the community property as are possessed by husbands generally during the marriage.[16]

A community debt or obligation, past or present, is a sufficient consideration for a joint note of the husband and wife.[17] On such a note judgment can be recovered against both, and the community property and separate property of both is liable to execution upon the judgment so recovered.[18] The wife is a necessary party to an action to foreclose a lien on community property,[19] and where she is not brought in until the statutory period for bringing the foreclosure action has expired, the court is without jurisdiction to give judgment against her.[20]

(§ 4) *D. Rights and powers as to, and liability of, separate property.*[21]—The wife and her paraphernal property are not liable for debts contracted by her husband as head of the community while managing its business as his own.[22] A

3. Proof held not to show enhancement in value by an improvement. Succession of Meteye, 113 La. 1012, 37 So. 909.

4. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432.

5. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

6. One-half the cause of action should go to the wife on her obtaining a divorce. Ligon v. Ligon [Tex. Civ. App.] 13 Tex. Ct. Rep. 365, 87 S. W. 838.

7. Act No. 68, p. 95, Laws La. 1902, amending Rev. Civ. Code 1870, § 2402, did not affect previously vested right of husband to sue for injury to wife. St. Louis S. W. R. Co. v. Purcell [C. C. A.] 135 F. 499.

8. See 3 C. L. 1677.

9. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

10. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282.

11. Such interest being community property. Zeimantz v. Blake [Wash.] 80 P. 822.

12. Civ. Code, § 172. Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272.

13, 14. Bashore v. Parker, 146 Cal. 525, 80 P. 707.

15. Under Rev. St. 1895, art. 2220, husband does not acquire title on insanity of wife so that he could dispose of it by will, he dying before the wife. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282. The statute does not affect the descent and distribution of the community property on the death of one of the parties. Rev. St. 1895, art. 2220 does not repeal art. 1696. Id.

16. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282.

17, 18. Lumbermen's Nat. Bank v. Gross, 37 Wash. 18, 79 P. 470.

19. Mechanic's lien. Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 P. 996.

20. Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 P. 996.

21. See 3 C. L. 1678.

22. Succession of Sangpiel [La.] 38 So. 554.

wife has a tacit lien or mortgage on property of her husband to the amount of her dotal property and her separate property acquired by lucrative title, which came into his possession and was used by him during coverture.[23] Hence, if the property is sold to satisfy claims of creditors, she is entitled to be paid the amount of her lien before the claims of creditors are satisfied.[24] Land which is the separate property of the wife cannot be sold to reimburse the community estate for improvements made thereon out of community funds.[25] But the husband's trustee in bankruptcy may recover judgment for the amount of the community funds so expended to be paid out of the proceeds of the sale of the improvements.[26] In order to charge the separate estate of the wife for taxes, insurance, and similar expenses, or for betterments, it must be made to appear with reasonable certainty that the amounts so expended were paid by the husband with funds of the community.[27]

(§ 4) *E. Succession to and administration of the community.*[28]—Where the equitable title to a homestead is vested in the community, but legal title is not acquired until after the death of one of the spouses, legal title then vests in the community and the heirs of the deceased spouse are entitled to one-half thereof.[29] In California, on death of the husband, one-half of the community property goes to the wife absolutely; the other half is subject to his testamentary disposition, and in the absence of a will, goes to his descendants.[30] In Louisiana, the surviving partner of the community is entitled to one-half the community, and is a usufructuary of the other half.[31] A widow in community is not obliged to give bond as usufructuary of community property inherited by her children, unless so required by the husband's will.[32] Where a widow claims and occupies certain property as her separate estate for the period of limitations after the husband's death, his heirs cannot recover it from her.[33]

Rights and powers of survivor.—The survivor may sell the community property to pay community debts.[34] The survivor of the community, qualified as such under

23, 24. Ilfeld v. De Baca [N. M.] 79 P. 723.

25, 26. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432.

27. Succession of Meteye, 113 La. 1012, 37 So. 909.

28. See 3 C. L. 1678.

NOTE. Descent of community property: "Upon the death of the wife, the husband has, in Louisiana and Texas, control of all the community property for the purpose of settling the community affairs (Stewart, Husb. & Wife, § 318; Verrer v. Lors, 43 La. Ann. 717; Brewer v. Wall, 23 Tex. 585, 76 Am. Dec. 76), and in California, Nevada and Idaho he takes all the community property as absolute owner (1 Stimson's Am. St. Law, § 3401; 6 Am. & Eng. Enc. Law, 345; In re Ingram, 78 Cal. 586, 12 Am. St. Rep. 90, note). With these exceptions, the half belonging to either the husband or wife descends to his or her heirs or descendants, subject to the payment of debts (1 Stimson's Am. St. Law, §§ 3402-3404; Ballinger, Commun. Prop. c. 8; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 7 Am. St. Rep. 129; Bennett v. Fuller, 29 La. Ann. 663; Robinson v. McDonald, 11 Tex. 385, 62 Am. Dec. 480), except when it has been disposed of by the will of the deceased (Ballinger, Commun. Prop. §§ 234, 240; Brown v. Pridgen, 56 Tex. 124; Hill's Estate, 6 Wash. 285). If there are no descendants and no will, the survivor, in some states, takes the half belonging to the deceased (See 1 Stimson's Am. St. Law, § 3403; Rev. St. Ariz. 1887, § 1467; Sayles' Civ. St. Tex. art. 2165; Hill's Gen. St. Wash. § 1481). The rights of dower and curtesy are incompatible with the theory of the community system, and have no recognition in the states where that system prevails, there being in some states a statute expressly so providing (Ballinger, Commun. Prop. §§ 10, 253).—Tiffany, Real Property, § 166.

29. Husband made homestead entry during wife's life but obtained patent after her death. Children took mother's share. Cox v. Tompkinson [Wash.] 80 P. 1005.

30. Under Civ. Code, § 1402, a contention that where a will was invalid, the wife took one-half absolutely, and one-third the remainder as heir, was held erroneous. In re Angle's Estate [Cal.] 82 P. 668.

31. Succession of Meteye, 113 La. 1012, 37 So. 909.

32. Succession of Glancey [La.] 38 So. 826.

33. Heidelberg v. Behrens [Tex. Civ. App.] 85 S. W. 1029.

34. Wife, after husband's death, has power to sell community property in consideration of payment of community debts by the grantee, and her contract binds herself and her children. Hughes v. Landrum [Tex. Civ. App.] 13 Tex. Ct. Rep. 787, 89 S. W. 85. A deed of trust by the husband on the community homestead after the death of his wife, to secure a community debt creates a valid lien on the homestead. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082.

the statute, cannot legally appropriate or dispose of property subject to a valid chattel mortgage without discharging the lien.[35] The right of the survivor of the community to occupy the community homestead is a personal right, and not an assignable estate in land.[36] Hence when a widow sells her homestead interest, her right thereto terminates and the heirs of her deceased husband are entitled to possession of their interest therein.[37] In Texas, upon death of the wife, the husband has the right to administer the community property for the payment of the community debts, without any supervision of the probate court.[38]

Accountability to heirs and creditors.[39]—On dissolution of the community by death of the wife, its creditors may proceed directly against the community property in the possession of the husband, contradictorily with him alone,[40] though administration upon the wife's estate be then pending, and even though the husband has himself voluntarily taken out letters upon his wife's estate.[41] Where the community is insolvent, neither the wife nor her heirs have any valuable interest therein.[42] Hence the heirs cannot complain that they were not made parties in a foreclosure suit wherein sale of property to pay the purchase price due from the community was decreed.[43]

Where a wife has paid a daughter during her lifetime for services rendered in the home, without objection by and with the tacit approval of the husband, the money paid being the earnings of the wife, the fund so created belongs absolutely to the daughter.[44] Where the surviving spouse has funds deposited in the name of an heir inventoried as funds of the community, he is not entitled to have the bank made a party to his action to liquidate the community, in order to have it withhold the funds deposited with it, without notice to the heirs and without a conservatory writ issued on bond.[45]

Community debts and claims.[46]—A debt incurred by the husband during the marriage is presumptively a debt of the community,[47] though he manages a community business as his own.[48]

(§ 4) *F. Dissolution of community.*[49]—A voluntary dissolution of the community is void, in Louisiana.[50] Though an agreement for such dissolution takes the form of a judgment rendered at the suit of his wife, and is followed by a notarial act of

Husband may sell community homestead, after wife's death, to pay community debts. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891. Surviving husband may settle community debt by assuming debt of his creditor, and by thereafter transferring the community homestead in settlement of the assumed debt. Id. The validity of this transaction was not affected by the fact that the husband and wife did not recognize validity of their marriage, and both repudiated its obligations. Id.

35. Embree-McLean Carriage Co. v. Johnson [Tex. Civ. App.] 85 S. W. 1021.

36, 37. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

38. If an administrator be appointed, he cannot interfere with husband's control and disposition of such property for such purpose. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205.

39. See 3 C. L. 1679.

40. Luria v. Cote Blanche Co. [La.] 38 So. 279. A creditor of the community, after the wife's death may sue the husband, and upon establishing the debt, may subject community property to its payment. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205.

41. Levy v. Moody & Co. [Tex. Civ. App.] 87 S. W. 205.

42. Luria v. Cote Blanche Co. [La.] 38 So. 279.

43. Decree rendered on bill and answer admitting facts alleged, which were true as shown by authentic act of sale and mortgage, held not void as consent decree. Luria v. Cote Blanche Co. [La.] 38 So. 279.

44. Husband cannot claim it is a part of the community after the wife's death. Succession of Meteye, 113 La. 1012, 37 So. 909.

45. The inventory was not binding on the heir. Succession of Meteye, 113 La. 1012, 37 So. 909.

46. See 3 C. L. 1679.

47. Dever v. Selz [Tex. Civ. App.] 13 Tex. Ct. Rep. 113, 87 S. W. 891.

48. The husband is regarded as head and master of the community rather than as the wife's agent, where he manages a community business as his own; and under such circummstances his debts are presumptively community debts. Succession of Sangpiel [La.] 38 So. 554.

49. See 3 C. L. 1679.

50. Code, art. 2427. Driscoll v. Pierce [La.] 38 So. 949.

settlement between the parties and renunciation by his wife, the wife may sue to have it set aside.[51] Prescription does not apply to such a suit.[52] Where the wife obtains a judgment of separation from bed and board and subsequently sues for partition of the community property and settlement of accounts, the burden is upon the husband to account for community property shown by his books to have been in his possession shortly before the dissolution of the community.[53] Community property having been in possession and enjoyment of the husband after dissolution of the community, he should account for revenues or be charged with interest on the wife's share from the date of his possession after the filing of a bill for separation.[54]

§ 5. *Liability for necessaries.*[55]—Where the parties are living apart, through no fault of the wife, the husband is liable for necessaries[56] furnished the wife[57] when he has not made other adequate provision for her.[58] He is not liable when the wife lives separately from him without cause and refuses to return at his request.[59] A general notice of unwillingness to furnish credit for necessaries bought by the wife cannot affect the husband's liability to one to whose attention such notice was not brought.[60] In Iowa, the property of both spouses is liable for necessaries.[61] In Georgia, it is held that where a married woman dies, leaving a husband surviving her, the husband, and not the separate estate of the deceased, is liable for the payment of the funeral expenses.[62]

51, 52. Driscoll v. Pierce [La.] 38 So. 949.

53. Burden on husband to explain $100,000 discrepancy between inventory and books. Hill v. Hill [La.] 39 So. 503.

54. Hill v. Hill [La.] 39 So. 503.

55. See 3 C. L. 1680.

56. Groceries furnished wife are necessaries for which husband is liable. Fischer v. Brady, 94 N. Y. S. 25. Domestic service, with proper attire for servants, may be necessaries, according to the station in life of the parties. Davidov v. Bail, 23 Pa. Super. Ct. 579. It is ordinarily a question of fact for the jury whether goods purchased by the wife and charged to the husband are necessaries. Expensive clothing. Levison v. Davis [Pa.] 61 A. 819. That husband and wife lived in house where she remained after his desertion is presumptive proof that the residence was suitable for her according to the husband's means. Sultan v. Misrahi, 94 N. Y. S. 519.

57. Evidence sufficient to sustain judgment for necessaries furnished defendant's wife and children. Marshall v. Curry, 23 Pa. Super. Ct. 143.

58. Husband held liable for meats supplied for his family, evidence not showing that he supported them adequately. Wentz v. McCann, 95 N. Y. S. 462. Where the wife remains in the husband's house after he has left it, and she has not forfeited her right to support and he has made no arrangement for such support, a seller of necessaries to her may recover from the husband. Sloane v. Boyer, 95 N. Y. S. 531. Husband who deserts wife and fails to provide home or support for her is liable for reasonable value of her board. Sultan v. Misrahi, 94 N. Y. S. 519. In case of a separation by mutual consent, the husband is liable for necessaries furnished the wife unless he can show that he has made other sufficient provision for her, or has placed himself in a situation which relieves him from liability. Bensyl v. Hughs, 109 Ill. App. 86.

59. Bensyl v. Hughs, 109 Ill. App. 86. Wife who, without cause, leaves husband and continues to live apart from him, cannot bind him for medical services for which she contracts. Morgenroth v. Spencer [Wis.] 102 N. W. 1086.

60. Sloane v. Boyer, 95 N. Y. S. 531.

61. On notes given by the husband for necessaries, judgment may be rendered against both husband and wife, since Code, § 3165 charges the property of both with liability for necessaries. Whinery v. McLeod [Iowa] 102 N. W. 132.

62. Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124.

Note: "It was the duty of the surviving husband at common law to provide a funeral for his deceased wife in keeping with his social position, and he was liable to third persons incurring expenses for this purpose. Jenkins v. Tucker, 1 H. Bl. 90; Bradshaw v. Beard, 12 C. B. (N. S.) 344; Ambrose v. Kerrison, 10 C. B. 776. An interesting question has been raised in several of the states as to the effect of the legislation creating separate property rights in married women upon the liability of the surviving husband for the funeral expenses of his deceased wife. The decisions are not altogether in harmony on this point, but the weight of authority seems to be that the surviving husband remains primarily liable as at common law, the liability being based upon the duty of the husband to furnish necessaries for the wife. Brand's Exr's v. Brand, 109 Ky. 326; Smyley v. Reese, 15 Ala. 90; Staple's Appeal, 52 Conn. 425. This liability is made in a few states to depend upon the solvency of the surviving husband. Galloway v. McPherson, 67 Mich. 546, 11 Am. St. Rep. 596; Scott's Estate, 15 Pa. Co. Ct. 67. In other jurisdictions the statutory provisions for the payment of decedent's debts, specifying funeral expenses, have been construed to apply to the estates of deceased married women. Buxton v. Barrett, 14 R. I. 40; McClellan v.

A plaintiff seeking to recover from the husband for necessaries supplied the wife while living apart has the burden of proving her separation justifiable.[63] In an action against the husband for necessaries furnished the wife, the wife is a competent witness.[64]

§ 6. *Contract rights and liabilities of husband as to third persons.*[65]—A deed by a husband alone conveys his interest subject to his wife's contingent dower right.[66] But nonjoinder of the wife in an option to sell land will not relieve the husband from the duty of performing, if performance by him is demanded, even though his wife refuses to join.[67] The husband cannot alone convey [68] or mortgage [69] the homestead. A deed of the homestead by the husband, for a grossly inadequate consideration, and at a time when he is insane concerning the wife's conduct and his duties toward her, is a fraud on the wife,[70] and equity has jurisdiction of a suit to enjoin ejectment by the fraudulent grantee, and to cancel the deed.[71]

Agency of wife for husband.[72]—The wife may be made the husband's agent and as such may bind him by her authorized acts.[73] Such agency will not be implied from the marriage relation,[74] but must be proved by other evidence.[75] The wife's unauthorized acts do not bind the husband.[76]

§ 7. *Contract and property rights and liabilities of wife as to third persons. A. Agency of husband for wife.*[77]—Agency of the husband for the wife will not be presumed, but must be proved.[78] Where such agency exists, the wife is bound by the husband's acts;[79] she is not bound by his unauthorized acts,[80] unless he has

Filson, 44 Ohio St. 184; 58 Am. Rep. 814; Constantindess v. Walsh, 146 Mass. 281, 4 Am. St. Rep. 311. This case [Kenyon v. Brightwell, supra] is of special interest from the fact that it raises the question for the first time in the state of Georgia and also from the fact that while the statutory provisions for the payment of decedent's debts in Georgia are very similar to those in Massachusetts, Rhode Island and Ohio, they are construed differently."—3 Mich. L. R. 238.

63. Buxbaum v. Mason, 95 N. Y. S. 539.

64. As in action for medical services to wife. Morgenroth v. Spencer [Wis.] 102 N. W. 1086.

65. See 3 C. L. 1680; see, also, special article, Agency Implied from Relation of Parties, 3 C. L. 101.

66. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734.

67. Hughes v. Antill, 23 Pa. Super. Ct. 290.

68. Deed of homestead by husband, wife not joining, is void. Moseley v. Larson [Miss.] 38 So. 234.

69. Mortgage on homestead by debtor alone, wife not joining, creates no lien on the homestead. Bates v. Frazier [Ky.] 85 S. W. 757.

70. $4,000 property sold for $500. Moseley v. Larson [Miss.] 38 So. 234.

71. Moseley v. Larson [Miss.] 38 So. 234.

72. See 3 C. L. 1681. See special article, Agency Implied from Relation of Parties, 3 C. L. 101.

73. Where wife signed receipt and he ratified her act, he was responsible for natural and probable consequences. Steffens v. Nelson [Minn.] 102 N. W. 871.

74. Fact of marriage relation does not alone show agency. McNemar v. Cohn, 115 Ill. App. 31. Wife has no authority to appear for husband to contest judgment in personam against him. Lawrence Co. Nat. Bank v. Gray, 23 Pa. Super. Ct. 62.

75. Evidence sufficient to go to jury on issue whether defendant's wife acted as his agent in employing plaintiff to care for defendant's mother. French v. Spencer, 23 Pa. Super. Ct. 428. Evidence held to show that wife acted as husband's agent in consenting to plaintiff's abandonment of an entire contract, and that the husband failed to repudiate the wife's act. Trawick v. Trussel [Ga.] 50 S. E. 86.

76. Where a wife contracts in her own name for the improvement of her husband's realty, the husband is not liable, if it does not appear that she was his authorized agent, or that he knew of the work being done, or adopted the contract. Thompson v. Brown, 121 Ga. 814, 49 S. E. 740. Payment by him for part of the work will not render him liable by ratification, the wife having acted in her own behalf, and not as agent. Id.

77. See 3 C. L. 1631. Also special article, Agency implied from relations, 3 C. L. 101.

78. Francis v. Reeves, 137 N. C. 269, 49 S. E. 213. Agency of husband to contract for removal of gravel from wife's land will not be presumed. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989. Evidence sufficient to show plaintiff's husband acted as her agent in contracting for removal of gravel from her premises. Douglas v. New York, etc., R. Co., 93 N. Y. S. 723. Whether husband and wife both agreed to be liable for lumber put into house or whether husband acted as wife's agent, held a question for jury. Reelman v. Grosfend [Mich.] 12 Det. Leg. N. 335, 104 N. W. 331.

79. Blind woman who entrusted correspondence relating to sale of land to her husband, and made the sale in his name, made him her agent and was bound by his

been guilty of fraud, which she has ratified.[81] Where the consideration of a debt reaches the wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her.[82]

(§ 7) *B. Contracts in general.*[83]—Where, by statute, married women are given power to own and control separate property as though unmarried,[84] their contracts with reference to such property are valid and enforceable by [85] and against [86] them. A married woman may recover under an express or implied contract for services rendered third persons, where such services are not performed as a part of duties owed the husband.[87] In Pennsylvania, a married woman may contract for

representations regarding boundaries. Lainhart v. Habbard [Ky.] 89 S. W. 10.

80. Husband, without express authority from wife, cannot bind her to apply her share of an estate to payment for land conveyed to him. Berkemeier v. Peters [Mo. App.] 86 S. W. 598. An action by a wife to recover damages for constructing a ditch on her land cannot be defeated by a parol license given by her husband four years before and two months before she acquired title. Neumeister v. Goddard [Wis.] 103 N. W. 241. In action against husband and wife for money judgment and to enforce a lien on lands inherited by the wife, a judgment entered by an agreement between the plaintiff and the husband, to which the wife was not a party and of which she had no knowledge, was not binding on her. Bates v. Burt & B. Lumber Co. [Ky.] 86 S. W. 550. Where prior to act Cong. June 1, 1896, § 3, giving married women in District of Columbia separate contractual rights, husband signed wife's name to articles of association in which he was a member, without her knowledge, she did not become liable on the stock, even though a dividend was placed to her credit, after the act, without her knowledge. Norwood v. Francis, 25 App. D. C. 463. Married woman is not estopped by acts or representations of her husband. Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048. The fact that the wife does not deny statements by her husband in her presence adverse to her property rights will not estop her from thereafter asserting title to the property referred to by his statements. Thomas v. Butler, 24 Pa. Super. Ct. 305.

81. A wife is not bound by unauthorized acts of her husband in relation to her real estate, unless he is guilty of fraud of which she reaps and retains the benefit after notice thereof and thereby ratifies the fraud. Caton v. Raber, 56 W. Va. 244, 49 S. E. 147.

82. Where husband was general manager of wife's farm, and bought fruit trees, and placed them on her farm, though she was not known in the transaction, the evidence was held sufficient to charge her as undisclosed principal. Pinkston v. Cedar Hills Nursery & Orchard Co. [Ga.] 51 S. E. 387.

83. See 3 C. L. 1681.

84. Under Rev. St. c. 68, a married woman may own and control her separate property as a feme sole. Gibson v. Kimmit, 113 Ill. App. 611.

85. Wife may loan her money to her husband and take and enforce his notes therefor. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825.

86. Under Burn's Ann. St. 1901, § 6960, a married woman may bind herself by contract to pay a broker for services rendered in connection with sale of her separate realty. Her liability for such services is not affected by her inability to convey without joining her husband in the conveyance. Isphording v. Wolf [Ind. App.] 75 N. E. 598. Statement in justice court for services rendered in procuring a purchaser for married woman's separate property held sufficient to show charge reasonable and that debt was incurred for her separate property. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375. In Florida, married women may own in their own right national bank stock, and may incur statutory liability for an assessment thereon. Christopher v. Norvell [C. C. A.] 134 F. 842. Under Act of Cong. June 1, 1896, § 3, married women in the District of Columbia may enter into contracts of co-partnership, and may become liable on stock owned by them in joint-stock associations. Norwood v. Francis, 25 App. D. C. 463. In an action on account against a married woman where defendant pleads coverture and plaintiff, in making his case, shows that fact to exist, he cannot recover without proof that the transaction upon which his action is based was had with reference to or with intent to bind, her separate property, estate or business. Bentley v. Bentley's Estate [Neb.] 101 N. W. 976.

87. Under Laws 1884, p. 465, c. 381, § 1, authorizing married women to contract and carry on separate businesses, and making her earnings for services, not done in pursuance of her duty owed her husband, her sole and separate property the wife may recover for services rendered a third person under an express or implied contract. Stevens v. Cunningham, 181 N. Y. 454, 74 N. E. 434. By Laws 1902, p. 844, c. 289, § 30, amending the domestic relations law, where a married woman or her husband seeks to recover for wages or compensation for work or services rendered by the wife, the presumption is that the wife alone is entitled thereto unless the contrary expressly appears. Id. Wife rendered services for another tenant in the house for six years, without interference by her husband, and not as a part of her own ordinary household duties. Held, she was entitled to recover therefor for her own benefit. Id. Since married women may contract (Burns' Ann. St. 1901, § 6960) and are entitled to their own separate earnings (§ 6975), a contract by a husband to furnish and care for a room in the house for the landlord is not

necessaries.[88] In Wisconsin, a married woman, living with her husband, has no power to contract to pay for family expenses not concerning her separate estate, even though the parties contemplated that payment was to be made out of her own property.[89] To constitute an abandonment by the husband, under the North Carolina statute authorizing an abandoned wife to bind her separate estate by her contracts, the husband need not have left the state;[90] nor is it necessary that the abandonment should have continued for the period sufficient to make it a ground of divorce, to give the wife the right to make such contracts.[91] In a suit to enforce a married woman's contract, the burden is on defendant to prove that her contract was one prohibited by law.[92]

(§ 7) *C. Contracts of suretyship.*[93]—In many jurisdictions married women cannot make binding contracts of suretyship;[94] in others, such contracts are valid.[95] The wife may in some states mortgage her separate property to secure her husband's debts.[96] It is held in Georgia that while a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, nor sell her property in extinguishment of his indebtedness,[97] yet her vol-

inconsistent with an independent contract between the wife and the landlord for special services to be rendered by her for him. Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724. Whether the wife in fact rendered certain services to the landlord in his illness under such an independent contract, or as part of her services as housekeeper for her husband, held, a question of fact for the jury. Id. Where a son contracts with his father to care for him in return for use of his farm, the son's wife cannot recover from the father's estate for services rendered as a part of household duties owed to her husband, but may recover for extra services performed during the father's illness, and rendered necessary by his weakness (wife being entitled to her separate earnings). Durr v. Durr, 26 Ky. L. R. 855, 82 S. W. 581. Wife of lessee of farm on shares cannot recover from owner for manual labor done on the farm for her husband, while the family relation existed, especially where she did not at the time expect compensation. Rathbone v. Rathbone, 23 Pa. Super. Ct. 297.

88. Proof that proceeds of married woman's note were used to send sick son to warmer climate does not rebut presumption of validity of note, as such use might be use for necessaries. Children's Aid Soc. v. Benford, 26 Pa. Super. Ct. 555.

89. Contract by wife with another to care for herself and husband unenforceable against wife's separate estate. In re Breed's Estate [Wis.] 103 N. W. 271.

90. Evidence sufficient to show abandonment under Code, § 1832. Vandiford v. Humphrey [N. C.] 51 S. E. 893.

91. Deed of land by wife alone, given for her support, held valid, though made before abandonment had become ground of divorce. Vandiford v. Humphrey [N. C.] 51 S. E. 893.

92. In action on promissory note of married woman, burden is on defendant to prove the contract was one prohibited by the Act of 1887. Children's Aid Soc. v. Benford, 26 Pa. Super. Ct. 555.

93. See 3 C. L. 1682.

94. By Burns' Ann. St. 1901, § 6964, a married woman's contract of suretyship is void as to her. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151. A mortgage executed by husband and wife upon realty owned by them as tenants by the entireties, to secure the individual indebtedness of the husband, is voidable not only as to the wife but as to the husband as well. Id. Under Act June 8, 1893, wife's contract of suretyship for husband would be void. Algeo v. Fries, 24 Pa. Super. Ct. 427. Wife cannot become surety; but burden is on one attacking a prima facie valid judgment against her to show she was a surety. Wilson v. Fitzgerald, 25 Pa. Super. Ct. 633. A married woman cannot bind herself for the debt or default of another except by deed or mortgage. Hazelton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456. Under Act June 8, 1893 (P. L. 344), a married woman may not become a guarantor or surety for another, and where the real object of a contract or transaction is to make her a surety for her husband, her liability is not enforceable, no matter what form the obligation takes, it being a mere device to evade the statute. Sibley v. Robertson [Pa.] 61 A. 426. Hence evidence tending to show an attempt to evade the statute is admissible in an action to enforce the wife's liability. Id.

95. A note executed in Illinois by a married woman as surety, she being domiciled in that state, and married women being permitted to make contracts of suretyship in that state, is enforceable in Indiana, where payable, though the statute of Indiana prohibits contracts of suretyship by married women. Garrigue v. Keller [Ind.] 74 N. E. 523.

96. In Texas, a married woman may, if joined by her husband, mortgage her property for any purpose, even to secure his personal debts. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476. In Arkansas a married woman may mortgage her separate property to secure her husband's debts, and if called upon to pay such debts, her husband being declared a bankrupt, she is entitled under the bankruptcy act to be subrogated to the rights of the creditor against the estate. In re Carter, 138 F. 846.

untary contract, by which she borrows money and gives her note and a mortgage on her property to secure payment, is enforceable against her, though the person with whom she contracts may know that she intends to use the borrowed money for her husband's benefit.[98] But this rule does not make her liable on a contract based on a mere colorable transaction, to which the lender is a party, the purpose of which is to make the wife her husband's surety.[99] In Kentucky, the statute expressly provides how a married woman may charge her estate as the surety of another, and unless the statutory method is followed, she is not bound.[1]

Whether a married woman is to be considered a principal or surety depends upon whether or not she or her estate receives the consideration on which the contract rests, and not on the form of the contract.[2] When husband and wife join in the execution of an obligation, they are prima facie joint debtors; there is no presumption that one is a surety for the other.[3] Where a trust deed of the wife's separate property is given to secure the husband's notes, the property becomes a surety for so much of the sum advanced as represents the individual or separate debt of the husband, but becomes primarily liable for such sums as are expended for the benefit of the wife's separate property.[4] An extension of the indebtedness by the husband alone discharges the wife's land to the extent that it stands as surety;[5] but does not discharge it as to the portion of the debt for which it is primarily liable.[6] Insolvency of the husband does not change the rule that an extension of an indebtedness by him alone discharges her property which stands as surety for the debt.[7]

(§ 7) *D. Conveyances, mortgages, contracts to convey, powers.*[8]—Under the modern married women's acts, a wife may convey[9] or contract to sell her separate property,[10] or give a trust deed thereof to secure her debts.[11] She may also, by contract, subject her property to an equitable lien.[12] Where the statute requires the

97, 98, 99. Johnson v. Leffler Co. [Ga.] 50 S. E. 488.

1. Wife's separate estate not bound where she merely signed her husband's note as surety. Bowron v. Curd [Ky.] 88 S. W. 1106.

2. Wife held surety where husband received all the consideration. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151. Where a wife, in order to obtain a loan on land legal title to which is in her husband, obligates herself to pay a judgment against him to which his apparent interest is subject, and thereby secures a release of the apparent incumbrance on the land, her obligation, even though the husband had no real interest in the land, was not invalid because an agreement to pay the debt of her husband nor was it without consideration. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124. Where legal title to property is in the husband, and husband and wife join in a mortgage to secure a note given by him, and the wife claims ownership of the property under an antenuptial contract, and that she is a surety and has been released by an extension of the time of payment without her consent, she must show that the mortgagee had notice of her ownership and suretyship, in order to have the property treated as surety. Creighton v. Crane [Neb.] 103 N. W. 284.

3. Algeo v. Fries, 24 Pa. Super. Ct. 427.

4, 5. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

6. As for sums paid for taxes on the land, and the debt subject to which the wife originally acquired the land. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

7. De Barrera v. Frost [Tex. Civ. App.] 13 Tex. Ct. Rep. 593, 88 S. W. 476.

8. See 3 C. L. 1684.

9. In South Carolina, since the constitution of 1868, a married woman has power to convey her realty, though the consideration be payment—not security—of her husband's debts. Bowen v. Day [S. C.] 51 S. E. 274.

10. A married woman may make a valid contract for the sale of her separate land, enforceable against her in equity, notwithstanding Code 1887, § 2502, providing that contracts of married women and their husbands may convey all the wife's interest, but that she shall not be bound by warranties therein, except those referring to her separate property. Dunn v. Stowers [Va.] 51 S. E. 366.

11. Act of 1887, giving married women power to alienate their lands with the assent and concurrence of their husbands, as evidenced by their joining in the conveyance, gave them power to give deeds of trust to secure their debts. Collier v. Doe [Ala.] 38 So. 244.

12. A court of equity may establish a lien on a married woman's separate estate, though based on a defective instrument. Adams v. Schmidtt [N. J. Eq.] 60 A. 345. Contract to establish married woman's title to certain property was not executed by

husband to join the wife in contracts relating to her realty, such joinder is essential to the validity of the contract,[13] in the absence of special circumstances.[14] Statutory requirements relating to the execution of married women's deeds must be complied with.[15] A woman who innocently contracts a marriage with a man who is already married has, so long as she acts innocently, all the property rights of a lawful wife, and hence may transfer her separate property, her husband joining, even though she is an infant at the time of such transfer.[16]

(§ 7) *E. Rights of creditors. Of wife.*[17]—The wife's separate property may be reached by her creditors under contracts respecting it authorized by law.[18] In some states her separate property is subject to a judgment for tort rendered against her.[19] In Maryland, a deed of trust by a husband and wife to pay all creditors of both conveys the separate property of each as well as their joint estates.[20] In Tennessee, a married woman's general estate may be subjected to payment of a judgment against her.[21]

Of husband.[22]—Liability of the wife for a debt of the husband is determined by the law of the place where the indebtedness was created.[23] But the only exemptions to which a married woman is entitled, if she be a debtor, are those given by the statutes of the state where she resides and is sued.[24] The wife's separate property is not subject to the husband's debts.[25] But if she allows the husband to use her

husband, nor was wife at the time living separate and apart. Contract assigned an interest in recovery to attorney. Held, attorney had an equity, in connection with establishment of legal title, and a court of equity would give him a lien. Id. A married woman who employs attorneys to procure a divorce has power to agree to execute a trust deed on certain realty, provided the title thereto is vested in her by the divorce decree, to secure a note given by her as compensation for their services. Patrick v. Morrow [Colo.] 81 P. 242. Such contract creates an equitable lien on the property, which attaches when title vests in her (Id.), and which is not defeated by a subsequent homestead claim. Id. Under Mill's Ann. St. § 2137, permitting the owner of a homestead to voluntarily mortgage it, entry of word "homestead" on divorce decree in clerk and recorder's office did not affect lien. Id.

13. Under Ky. St. 1903, §§ 506, 2128, husband must join, or must have first conveyed by separate instrument, otherwise wife's deed is void. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. Where the statute requires the husband to join in a duly acknowledged deed of the wife's separate realty, she has no power to make a parol gift thereof. Tannery v. McMinn [Tex. Civ. App.] 86 S. W. 640. A married woman's assignment of a certificate of purchase from the receiver of the land office, in 1858, was of no force, since at that time a married woman could not contract with reference to her property without joining her husband. Bland v. Windsor, 187 Mo. 108, 86 S. W. 162.

14. Where the husband is a nonresident, a deed of trust by the wife to secure her debts is valid, under the act of 1887, though he does not join therein. Collier v. Doe [Ala.] 38 So. 244. Since under Gen. St. 1902, § 591, an action may be maintained against a married woman for breach of her covenants in a lease of her own land, in which her husband does not join, such a lease will not be treated as void, especially where the husband by joining in a subsequent deed in which the lease is excepted from the covenants, evidences his election to treat the lease as valid. Winestine v. Ziglatzki-Marks Co., 77 Conn. 404, 59 A. 496. Under Gen. St. 1902, § 4042, declaring void conveyances by one ousted of possession, unless to the disseisor, where a married woman who has issue gives a lease of her land without joining her husband, and the lessee takes possession, and thereafter the husband and wife join in a deed of the land to another, the deed will be construed as conveying the reversion, but not the right of entry. Id.

15. In South Dakota, a married woman must acknowledge an instrument on a private examination, apart from her husband. Certificate reciting acknowledgment of deed on "a separate examination apart from" the husband, held to show sufficient compliance with Laws 1865-66, p. 95, § 521. Timber v. Desparois [S. D.] 101 N. W. 879.

16. Since marriage removes disability of minority. Barkley v. Dumke [Tex.] 13 Tex. Ct. Rep. 242, 87 S. W. 1147.

17. See 3 C. L. 1681.

18. See ante, § 7 B.

19. Magerstadt v. Lambert [Tex. Civ. App.] 13 Tex. Ct. Rep. 410, 87 S. W. 1068. See post, § 8.

20. Wife's separate property conveyed. Roberts v. Roberts [Md.] 62 A. 161.

21. Plaintiff obtained judgments against a husband and wife and executions were returned unsatisfied. Meantime the husband and wife gave a deed of trust of the wife's general estate to secure other debts. Held, that plaintiff could maintain suit to have the property sold to satisfy the lien of the trust deed and to have the surplus applied to payment of his executions. Piano Mfg. Co. v. Schell [Tenn.] 84 S. W. 807.

22. See 3 C. L. 1685.

23, 24. Clark v. Eltinge [Wash.] 80 P. 556.

25. Property in husband's hands belonging to wife cannot be taken for his debts. Magerstadt v. Schaefer, 110 Ill. App. 166.

property as his own, she cannot claim it as against creditors who have dealt with him as apparent owner, without notice of her rights.[26] This rule does not prevent her from claiming property paid for with her funds, title to which is placed in the husband without her knowledge or consent.[27] A married woman may make her husband her agent for the management of her property without thereby subjecting it to claims of his creditors,[28] and she is entitled, as against such creditors, to any increase in rents and profits or enhancement of the value of her property due to any reasonable contribution of his time, labor, or skill, in the course of his management;[29] but she cannot, under the guise of an agency, appropriate to herself, the results of the time, labor and skill of her husband to the exclusion of his creditors.[30] Property acquired by the wife subsequent to the extension of credit to her husband is not in any case liable for his debt.[31] The burden is upon a wife, claiming property against her husband's creditors, to prove that property claimed was in fact paid for out of her separate estate.[32]

In Montana, an inventory of the wife's separate property, filed in the county clerk's office, is prima facie evidence of her title and notice thereof to the world.[33] But the filing of such inventory is necessary to protect her property against her husband's debts only when it is in his exclusive possession, and his creditors deal with him on the credit of such property and without notice of her rights.[34] In Mississippi, business done by a husband with his wife's means is deemed to be on her account and for her use in the absence of a special contract to the contrary.[35] Hence

26. Wife who permits property belonging to her to pass under control of her husband cannot assert her ownership as against a trustee in bankruptcy. In re Hemstreet, 139 F. 958. When a wife allows her husband to use her money as his own, and to purchase property with it in his own name, and to obtain credit on the faith of his ownership, she will not be allowed to claim the property as against his creditors. Davis v. Yonge [Ark.] 85 S. W. 90. If a creditor receives money from the husband in payment of a pre-existing debt, without notice of the wife's ownership of the money paid over, the wife cannot compel the creditor to account. Tanner v. Lee, 121 Ga. 524, 49 S. E. 592. If a wife vests her property in her husband and permits him to appear to the world to be the owner thereof, and he contracts debts in the course of business while apparently such owner, she is estopped to deny as against his creditors, that he was the owner. Mertens v. Schlemme [N. J. Eq.] 59 A. 808. Hence husband's creditors may reach personalty bought by the wife with proceeds of realty apparently owned by the husband. Id.

27. As between a wife and her husband's creditors, she is entitled to a resulting trust in property taken in his name without her knowledge to the extent of her contribution from her separate property to the purchase price, and her expenditures for repairs, etc., in excess of her proportionate share thereof. Mayer v. Kane [N. J. Eq.] 61 A. 374.

28. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703; Magerstadt v. Schaefer, 110 Ill, App. 166; Id., 213 Ill. 351, 72 N. E. 1063; Gibson v. Kimmit, 113 Ill. App. 611. Whether husband carried on business as his own or as wife's manager held a question of fact. Magerstadt v. Schaefer, 110 Ill. App. 166. Stock owned by wife but registered in husband's name, not subject to his debts, judgments against him having been rendered before organization of corporations in which wife owned such stock. Id., 213 Ill. 351, 72 N. E. 1063.

29. Sharp v. Fitzhugh [Ark.] 88 S. W. 929. Husband may perform ordinary and reasonable services for wife without compensation, and creditors cannot complain. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703. Legitimate increase and growth of an investment of wife's property belongs to her, though investment is managed by her husband. Magerstadt v. Schaefer, 110 Ill. App. 166. Where husband and wife reside on land held by the wife under an executory contract of sale, which requires the wife to farm the land, the fact that the husband devotes his time and labor to the cultivation of the land does not prove that he has any interest in the crop so that mortgage thereon by him will create a lien. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

30. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703.

31. Chan v. Slater [Mont.] 82 P. 657.

32. Such claim must be established by clear and full proof. Rhinesmith's Case, 25 Pa. Super. Ct. 300. Where the husband manages his own and his wife's lands, and mingles the products, the burden is upon the wife, as between her and her husband's creditors, to show the amount of profits from her own land, and the manner in which it was expended. Sharp v. Fitzhugh [Ark.] 88 S. W. 929.

33. Civ. Code, div. 1, pt. 3, tit. 1, c. 3, §§ 221, 222. Chan v. Slater [Mont.] 82 P. 657.

34. Chan v. Slater [Mont.] 82 P. 657.

35. Code 1892, § 2293. Dean v. Boyd [Miss.] 38 So. 297.

the husband may subject crops raised on the wife's land to the payment of supplies used thereon.[36] A creditor who furnishes supplies to a husband for use on the wife's plantation does not, by taking security on property of the husband, waive his statutory right to proceed against the cotton raised on the plantation,[37] nor rights under a trust deed covering such cotton.[38]

The claim of a married woman against the estate of her insolvent husband stands on the same footing as the claim of any other creditor, and unless fraud is alleged, she need not prove absence thereof.[39] A wife does not become a preferred creditor of her husband by transferring to him property to hold as trustee and account to her for the proceeds, such agreement being private.[40] As against creditors, the wife of a bankrupt cannot prove against the estate a claim for wages earned by her while employed by him in his business.[41] Where a married woman, without request by her husband, but solely to protect her homestead interest, pays off an incumbrance on property given to secure the husband's debt, legal title to the property being in him, she is subrogated to the rights of the mortgagee.[42] But this does not give her the right to enforce a claim for the money advanced by her against general assets of her husband's estate.[43] A widow cannot be subrogated to the lien of a mortgage discharged in part with her separate means, in the absence of evidence showing a loan or gift to her husband intended or expected to be paid on the mortgage debt.[44]

Fraudulent conveyances.[45]—A conveyance to the wife of property used by the husband as his own, legal title standing in his name, is prima facie fraudulent as to his creditors,[46] and the burden is upon the husband and wife to show a consideration and want of fraud.[47] The relinquishment of dower and homestead rights on the part of the wife, on a sale of land by her husband, is a sufficient consideration to support a reasonable settlement upon her out of the proceeds of the sale.[48] Where land is purchased with the wife's funds, title being taken by the husband, a conveyance by husband and wife to a third person to prevent seizure of the property for the husband's debts is not a conveyance in fraud of creditors.[49] Creditors of the husband cannot complain of the conveyance of the homestead to the wife, even if it was bought with the husband's own funds.[50]

36. Cotton liable for supplies. Dean v. Boyd [Miss.] 38 So. 297.

37. Right given by Code 1892, § 2293 not waived. Dean v. Boyd [Miss.] 38 So. 297.

38. Dean v. Boyd [Miss.] 38 So. 297.

39. First Nat. Bank v. Harris, 56 W. Va. 345, 49 S. E. 252.

40. Mertens v. Schlemme [N. J. Eq.] 59 A. 808.

41. Neither the common law nor Wis. Rev. St. 1898, § 2343, giving wife her separate earnings, authorizes such claim. In re Winkels, 132 F. 590.

42. She has right to foreclose or trace proceeds of property and enforce equitable lien thereon. Charmley v. Charmley [Wis.] 103 N. W. 1106.

43. Charmley v. Charmley [Wis.] 103 N. W. 1106.

44. Hickey v. Conine, 6 Ohio C. C. (N. S.) 321, afg. 3 Ohio N. P. (N. S.) 209.

45. See 3 C. L. 1685.

46. Tarrey v. Dickinson, 213 Ill. 36, 72 N. E. 703.

47. Where a conveyance from a husband to a wife is attacked, the burden is upon them to show that there was an adequate consideration out of her separate property. Ilfeld v. De Bacca [N. M.] 79 P. 723. Where husband held legal title and managed property, and his skill and experience caused its increase, conveyances of it to his wife would be set aside at the suit of creditors, though the wife claimed that her property was used, where, except as to a few tracts clearly proved to belong to her, the evidence of her ownership and share in the business was unsatisfactory. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703; rvg. 111 Ill. App. 524. Evidence held sufficient to show a promise by the husband to reimburse wife for advances from her parents for family use, hence wife had good claim against husband and conveyance to her was not voluntary; nor did evidence show fraud, as against creditors, though husband was insolvent at the time. Clark Bros. v. Ford, 126 Iowa, 460, 102 N. W. 421.

48. Sale brought $5,000 and $400 was invested for the wife. Held reasonable, and, husband not being insolvent, conveyance was not in fraud of creditors. Davis v. Yonge [Ark.] 85 S. W. 90.

49. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. Rep. 348, 87 S. W. 235.

50. Sharp v. Fitzhugh [Ark.] 88 S. W. 929. A homestead, being exempt from attachment

(§ 7) *F. Estoppel.*[51]—Some courts hold that a married woman cannot be estopped by her conduct, unless she has been guilty of some act of fraud.[52] It is generally held that she cannot be estopped to deny liabilities which she cannot legally incur by voluntary contract.[53] But the doctrine of estoppel is frequently applied to married women,[54] especially in regard to matters wherein they are by law given full contractual rights.[55]

§ 8. *Torts by husband or wife or both.*[56]—The husband is liable for a tort committed by his wife while acting as his agent.[57] Statements by the wife in her husband's absence are inadmissible in a libel suit against him to show his alleged malice.[58] The wife is jointly liable with her husband for torts committed by her,[59] and her separate property may be subjected to a judgment rendered against her for her tort.[60]

§ 9. *Torts against husband or wife or both. A. Wrongs to the person.*[61]—For injuries to a married woman, two actions may lie: one by her to recover for damages resulting to her;[62] and one by the husband for loss of her services or society, and for expense resulting from her injury.[63] In some states, in an action by a wife to recover damages for personal injuries sustained by her, she may or may not, at her election, join her husband as co-plaintiff.[64] In an action by the husband, the

or execution, a conveyance thereof by the husband to the wife is not fraudulent as to creditors of the husband. Homestead of 160 acres, subject to mortgage, held not over $1,500 in value and hence exempt under Rev. St. 1899, § 3616. Reed Bros. v. Nicholson [Mo.] 88 S. W. 71.

51. Estoppel as against creditors, see ante § 7 E. See, also, title Estoppel, 5 C. L. 1285.

52. Harle v. Texas Southern R. Co. [Tex. Civ. App.] 86 S. W. 1048. To estop a married woman from asserting rights to land, she must have been guilty of some positive act of fraud, or of an act of concealment or suppression which in law would be equivalent thereto, which act, representation or concealment was intended to cause another to alter his position or condition, and has actually had that effect. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 13 Tex. Ct. Rep. 348, 87 S. W. 235. A married woman cannot lose her land, whether her separate estate or not, by estoppel in pais without actual fraud, if even by it. Yock v. Mann [W. Va.] 49 S. E. 1019.

53. Married woman cannot be estopped by parol agreement to an encroachment on her land. Gilbert v. White, 23 Pa. Super. Ct. 187. A married woman who employed an attorney to procure title to land before the act of 1889, giving married women the right to contract, did not become liable on her contract by retaining title to the land procured after the passage of the act. Dempsey v. Wells [Mo. App.] 84 S. W. 1015. A married woman cannot be estopped to claim the benefit of the Indiana statute prohibiting contracts of suretyship by married women, by her affidavit that a debt for which she gave security was a joint debt of herself and husband. Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151. Where, under statute, married woman can transfer land only by duly acknowledged deed in which her husband joins, she cannot be estopped to assert invalidity of a parol gift, even though her donee had placed valuable improvements on the land on the faith of the gift. Tannery v. McMinn [Tex. Civ. App.] 86 S. W. 640.

54. Where husband took title to land in his own name and gave a judgment note therefor, and afterwards gave two mortgages thereon, all with wife's knowledge, she was estopped to claim in foreclosure proceedings 16 years later that she paid for the land, title being taken in her husband's name by mistake. Duncansville Bldg. & Loan Assn. v. Ginter, 24 Pa. Super. Ct. 42.

55. Under Comp. St. Neb. 1903, c. 53, § 2, giving married women the same rights as to their separate property as married men have, a married woman who joins her husband in a mortgage of realty in which she has a vested life estate is estopped by covenants of warranty in the mortgage to deny that an after-acquired title inures to the mortgagee's benefit. Cooper v. Burns, 133 F. 398.

56. See 3 C. L. 1686.

57. McNemar v. Cohn, 115 Ill. App. 31.

58. Konkle v. Haven [Mich.] 12 Det. Leg. N. 234, 103 N. W. 850.

59, 60. Magerstadt v. Lambert [Tex. Civ. App.] 13 Tex. Ct. Rep. 410, 87 S. W. 1068.

61. See 3 C. L. 1686.

62. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. Within the meaning of Act La. No. 68, p. 95 of 1902, amending Rev. Civ. Code 1870, art. 2402, providing that damages for personal injuries to the wife shall be her separate property and not a part of the community, injuries to character and mental suffering resulting from a libel are personal injuries for which the wife may sue. Times-Democrat Pub. Co. v. Mozee [C. C. A.] 136 F. 761.

63. Declaration held to state cause of action for husband. Chicago & M. Elec. R. Co. v. Krempel, 116 Ill. App. 253. Code 1896, § 2521 does not prevent recovery for loss of consortium. Birmingham So. R. Co. v. Lintner [Ala.] 38 So. 363. Evidence is admissible to show that wife was still suffering from injuries at time of trial. Id.

64. This is West Virginia rule. Normile

marriage must be proved as a fact.[65] He may recover for loss of services and consortium without proof of their pecuniary value.[66] There can be no recovery for loss of services subsequent to the time of the trial, when there is no evidence as to future consequences of her injury.[67] A husband may properly join in one complaint, and in one count thereof, claims for damages resulting from injuries to his wife, and for damages to his property, all resulting from the single wrongful act of defendant.[68] A settlement by the wife, approved by the husband, bars recovery by him.[69]

The wife, in a suit by her, may recover the cost of medical attendance contracted for by her,[70] and for loss resulting from inability to attend to her own business affairs;[71] she cannot recover for time lost from her household duties and inability to perform them.[72]

Presentation by the wife alone of a claim for damages against a municipality for personal injuries sustained by her is sufficient to enable husband and wife to prosecute an action on such claim.[73]

(§ 9) *B. Criminal conversation and alienation of affections.*[74]—The right of a wife to the conjugal society and affection of her husband is a valuable property, for an injury to which she may maintain an action for damages in her own name.[75] Where, in a suit by the wife for alienation of her husband's affections, the husband intervenes and sets up a contract whereby the wife agrees to release all claims against others for alienating his affections, such contract being valid on its face, the wife will not be permitted to show that the contract was void as against public

v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030.

Note: "At common law the action to recover damages for personal injuries to the wife must be brought in the names of the husband and wife jointly, the cause of action being in the wife, and surviving to her in case of the death of the husband; but this common-law rule has in a large measure been abrogated by the various married woman's acts. A married woman is allowed to sue in her own name to recover damages for personal injuries to herself, where the ground of the action is her injury and suffering; and also the same rule applies in actions concerning her separate property; but in a few of the states the common-law rule in this respect has not been altered, and the wife is still required to join her husband as co-plaintiff. And, in most of the states where the common-law rule has been abrogated by permitting the wife to sue alone for personal injuries, it is held to be imperative, depriving the husband of any interest in the suit, and forbidding his joining therein; but in many of the states the statute is deemed permissive, and merely allows the wife to either sue alone or join her husband, at her election. Palmer v. Davis, 28 N. Y. 242; Draper v. Stouvenel, 35 N. Y. 507; Whidden v. Coleman, 47 N. H. 297; Cooper v. Alger, 51 N. H. 172; Corcoran v. Doll, 32 Cal. 82; Reinheimer v. Carter, 31 Ohio St. 579; Kennedy v. Williams, 11 Minn. 314 (Gil. 219); Gee v. Lewis, 20 Ind. 149; Kramer v. Conger, 16 Iowa, 434; Norval v. Rice, 2 Wis. 22; Barr v. White, 22 Md. 259."—From opinion in Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1031.

65. Tozier v. Haverhill & A. St. R. Co., 187 Mass. 179, 72 N. E. 953.

66. Value of wife's services need not be alleged or proved. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445. A husband may recover compensation for the loss of the aid, society and comfort of his wife, injured by another's negligence, without proof of the pecuniary value of her aid, comfort and society. Reagan v. Harlan, 24 Pa. Super. Ct. 27.

67. Birmingham So. R. Co. v. Lintner [Ala.] 38 So. 363.

68. Wife being injured in collision between engine and buggy, claims for damages to horse, buggy and harness were properly joined with claims for loss of wife's services and society, and medical expense. Birmingham So. R. Co. v. Lintner [Ala.] 38 So. 363.

69. Where wife settled claim for personal injuries and secured payment of doctor's and nurse's bill, and husband approved settlement, he could not thereafter sue for loss of wife's services, not having returned payments made. Savory v. North East Borough, 26 Pa. Super. Ct. 1.

70. Under Rev. St. 1899, § 4335, giving married women power to contract on their own behalf. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

71. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030.

72. Newell v. St. Louis Transit Co., 108 Mo. App. 530, 84 S. W. 195.

73. Under Seattle City charter, art. 4, § 29. Davis v. Seattle, 37 Wash. 223, 79 P. 784.

74. See 3 C. L. 1686.

75. Noxon v. Remington [Conn.] 61 A. 963. Where a married woman has a right to sue alone, she may maintain an action for the alienation of her husband's affections. Gregg v. Gregg [Ind. App.] 75 N. E. 674. Divorced wife may sue former mother-in-law for alienation of husband's affections. Id.

policy, and thus enabled to take advantage of her own wrong.[76] In a suit by the husband for alienation of his wife's affections, proof that plaintiff's wife was a prostitute both before and after her marriage is no defense unless knowledge of and consent to the wife's misconduct by the husband is shown.[77] That the husband watched his wife and left opportunities for misconduct in order to test her does not show consent to her misconduct.[78]

Pleading and proof.[79]—Where the action is against the parent of the alienated spouse, the complaint should allege that the acts charged were done maliciously, since the presumption is that a parent acts for the best interest of the child.[80] Circumstances in mitigation of damages must be specially pleaded.[81] When a conspiracy to alienate the affections of one of the spouses is charged, a conspiracy, cooperation or concert of action between the defendants must be proved.[82]

Evidence.[83]—Evidence tending to show that separation or alienation of affections was due to causes other than that alleged is admissible.[84] Evidence tending to show unhappy relations and want of affection between the spouses prior to defendant's interference is admissible in mitigation of damages.[85]

Damages.[86]—An action by a husband for alienation of his wife's affections is based on the loss of the consortium; loss of services is only one element of damage and is not essential to maintenance of the action.[87] In a suit by the wife for alienation of the husband's affections, she may recover for any losses which are of such a character that damages therefor are assessable by a jury.[88] Exemplary damages are also recoverable in a proper case.[89]

§ 10. *Remedies and procedure generally as affected by coverture.*[90]—The effect of the marriage relation on the competency of the parties thereto as witnesses is fully treated elsewhere.[91]

Right of action; parties.[92]—The right of action for injuries to the wife has been already treated.[93] In many states married women may now sue alone to enforce rights relating to their separate property.[94] A married woman may sue alone

76. Wife wished to show contract was pursuant to an agreement to withdraw certain charges in a divorce suit and substitute the charge of cruelty, the husband agreeing to make no defense. McAllen v. Hodge [Minn.] 102 N .W. 707.

77, 78. Frank v. Berry [Iowa] 103 N. W. 358.

79. See 3 C. L. 1687.

80. Gregg v. Gregg [Ind. App.] 75 N. E. 674.

81. Defendant could not show that character of plaintiff's wife was bad before marriage, not having pleaded that issue. Frank v. Berry [Iowa] 103 N. W. 358.

82. Leavell v. Leavell [Mo. App.] 89 S. W. 55.

83. See 3 C. L. 1687.

84. Humphrey v. Pope [Cal. App.] 82 P. 223. Evidence that plaintiff had $600 when married and had expended all but $40 in 2 1-2 years to support the wife, was admissible to show proper support, or to show that wife left because husband's money was gone and not on account of defendant. Frank v. Berry [Iowa] 103 N. W. 358.

85. Humphrey v. Pope [Cal. App.] 82 P. 223.

86. See 3 C. L. 1687.

87. Gregg v. Gregg [Ind. App.] 75 N. E. 674.

88. Gregg v. Gregg [Ind. App.] 75 N. E. 674. In fixing the amount of damages, the jury may consider loss of her husband's society and affection and of his support and protection, and the injury to her feelings caused by defendant's acts. Noxon v. Remington [Conn.] 61 A. 963. Instruction proper which confined damages to "what shall fairly seem pecuniary loss of plaintiff." Humphrey v. Pope [Cal. App.] 82 P. 223.

89. Gregg v. Gregg [Ind. App.] 75 N. E. 674; Leavell v. Leavell [Mo. App.] 89 S. W. 55.

90. See 3 C. L. 1688.

91. See Witnesses, 4 C. L. 1956.

92. See 3 C. L. 1688.

93. See preceding section and note thereunder.

94. Since under Burns' Ann. St. 1901, § 255, a married woman may sue alone where the action concerns her separate property, where a wife owned land on which her husband operated a quarry, she could join with him in an action to restrain flooding of the quarry. American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625. Prosecutrix in bastardy proceedings may sue in her own name, though married, on a bond given by defendant, the beneficial right therein being her sole and separate property within the meaning of Rev. St. 1898, § 2345. Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52. A married woman made beneficiary in a

in equity to establish a resulting trust in land, though her interest was acquired before the married women's act.[95] In Texas, a married woman cannot sue alone without alleging that her husband has failed or refused to sue for her or to join her in the suit.[96] In Kentucky, a deserted wife may bring or defend any action which her husband might bring or defend, with the same powers he would have.[97] In Washington, the wife may defend in all cases in which she is interested, whether sued with her husband or not.[98] In Louisiana, a married woman, though a minor, can, when aided and assisted by her husband, sue for the partition of property in which she is interested, without being authorized so to do by the judge, on the advice of a family meeting.[99]

A husband cannot sue to recover damages to his wife's separate property,[1] unless under a contract relating thereto made with him.[2] Where the husband, in the presence and with the consent of his wife, contracts for the construction of buildings on her land, he is entitled to sue in his own name for breach of the contract.[3]

Suits by one spouse against the other may be maintained on contracts between them,[4] or where their interests are adverse.[5] Thus, a husband may maintain a suit against his wife to settle property rights, and in such suit she has the same rights as any litigant would have.[6]

A valid judgment may be rendered against a married woman, though her husband is not made a party to the suit.[7]

Limitations.[8]—Where the disabilities of coverture have not been removed by

policy of insurance on the husband's life may maintain an action for damages for wrongful forfeiture of the policy by the insurer without joining her husband since, under Rev. St. 1899, § 2347, the policy is her separate property. Merrick v. Northwestern Nat. Life Ins. Co. [Wis.] 102 N. W. 593. Nor are husband and wife so united in interest in such case as to necessitate such joinder under Rev. St. 1898, § 2604.

95. Prewitt v. Prewitt [Mo.] 87 S. W. 1000.

96. Trespass to try title cannot be maintained by married woman without such allegation. Parks v. Worthington [Tex. Civ. App.] 13 Tex. Ct. Rep. 204, 87 S. W. 720.

97. Under Civ. Code Prac. § 34, subsec, 4, a deserted wife who intervenes in a suit, claiming homestead, may appeal from a judgment disallowing her claim. Stephens v. Stephens [Ky.] 85 S. W. 1093.

98. Where, in a replevin suit against a husband and wife, defendants answer jointly, alleging ownership, the wife, who has answered plaintiff's interrogatories, may defend, though a default judgment has been entered against the husband (construing 1 Ball. Ann. Codes & St. § 4490; 2 Ball. Ann. Codes & St. § 4827). Glass v. Buttner [Wash.] 81 P. 699. Hence judgment is properly entered against plaintiff where he fails to prove his case when called. Id.

99. Tobin v. United States Safe Deposit & Sav. Bank [La.] 39 So. 33.

1. Husband cannot, in action for injuries to personal property caused by explosion of gas meter in apartments, recover value of wife's wearing apparel, she being proper party to sue therefor. Gilligan v. Consolidated Gas Co., 94 N. Y. S. 273.

2. A husband may recover from a carrier for loss of and damage to his wife's separate property which was carried as a part of their common baggage. Withey v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 511, 104 N. W. 773.

3. As trustee of an express trust, or as agent for an undisclosed principal. Rev. St. 1899, § 541. Simons v. Wittmann [Mo. App.] 88 S. W. 791.

4. In Nebraska the common-law disability of husbands and wives to maintain suits at law against each other upon contracts between them has been removed by statute. Trayer v. Setzer [Neb.] 101 N. W. 989.

5. In an action on a bond given in a bastardy proceeding, the defendant, husband of the prosecutrix, is an adverse party, and suit by the wife would be authorized by Rev. St. 1898, § 2608. Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52.

6. Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

7. Execution on such a judgment will not be enjoined. Church v. Gallic [Ark.] 88 S. W. 307.

8. See 3 C. L. 1688.

NOTE. Limitations as between husband and wife: "The statute of limitations does not apply as between a husband and wife as a general rule. Collins v. Babbitt [N. J. Eq.] 58 A. 481; Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887. In Gudden v. Gudden's Estate, 113 Wis. 297, 89 N. W. 111, it was said that limitations do not run against a wife as between herself and husband so as to bar her claim against his estate for money loaned to him. But limitations run from the death of one of the spouses. Gracie's Estate, 158 Pa. 521, 27 A. 1083."—From note to Hopkins v. Clyde [Ohio] 104 Am. St. Rep. 749.

statute, limitations do not run against married women;[9] but where they are given the right to sue as though unmarried, limitations run against them the same as in other cases,[10] in the absence of an express exception in the limitation statute.[11] Where adverse possession commences against a woman during her minority, limitation begins to run against her upon her marriage.[12] Though the statute of limitations does not, in Wisconsin, run against a wife as to a cause of action arising from a transaction between the husband and wife,[13] it does run against her on a cause of action not so arising, and upon which the limitation statute commenced to operate before the parties became adversaries in repect thereto.[14]

§ 11. *Proceedings to compel support of wife.*[15]—A suit by the wife to compel the husband to furnish separate support and maintenance,[16] or for alimony, without divorce,[17] are authorized by statute in most jurisdictions. To warrant a recovery in such a proceeding it must appear that the husband has deserted the wife[18] or that the wife is justified in living apart.[19] The spouse first repudiating marital obligations must show justification and freedom from fault.[20] That the parties have been divorced is, of course, a good defense to the action.[21] A judgment for de-

9. Title by adverse possession for seven years cannot be built up against a married woman. Land. & H. Dig. § 4815. Harvey v. Douglass [Ark.] 83 S. W. 946. Limitation did not run against married women in favor of a grantee claiming under deeds void because of non-joinder of husbands. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. Under Acts 1899, p. 209, c. 78, in an action commenced before ratification of that act by a married woman formerly protected against the limitation statute by Code, §§ 148, 163, where adverse possession is the defense, the time relied on to constitute such possession does not include possession against a married woman prior to the act. Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919. Limitations can be established against married women only by proof that the statute commenced to run before their respective marriages, or that the bar has operated since the passage of the statute abolishing the disability of coverture. Broom v. Pearson [Tex.] 85 S. W. 790.

10. By Code, § 3155, a wife may maintain an action against her husband during coverture on a note given by him for a loan of money from her separate estate; hence limitations commenced to run on the note from the time the note was payable, and during his lifetime. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825.

11. No exception in Code, § 3447. In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825.

12. Disabilities cannot be tacked. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

13. Charmley v. Charmley [Wis.] 103 N. W. 1106.

14. Where statute commenced to run against mortgagee's right to foreclose before wife paid off the mortgage to protect her homestead right, thus becoming subrogated to mortgagee's right, it was not suspended as to her rights, by her coverture; but such rights were barred 20 years after the mortgagee's right to foreclose accrued under Rev. St. 1898, § 4220. Charmley v. Charmley [Wis.] 103 N. W. 1106.

15. See 3 C. L. 1688.

16. Illinois. Harris v. Harris, 109 Ill. App. 148. Act March 13, 1903 (P. L. 26), making desertion by husband a misdemeanor, does not supersede Act April 13, 1867 (P. L. 78) to compel contribution by husband to support of wife and children. Commonwealth v. Mills, 26 Pa. Super. Ct. 549.

17. Walker v. Walker[Iowa] 102 N. W. 435.

18. Evidence sufficient to show willful desertion by defendant in suit by wife for alimony. Walker v. Walker [Iowa] 102 N. W. 435.

19. Separate living of husband and wife will not be encouraged. Ross v. Ross, 109 Ill. App. 157. Wife justified in leaving husband where he called her vile names, accused her of unchastity, and abused her. Schoop v. Schoop, 115 Ill. App. 343. Mere incompatibility of temper, occasional outbreaks of temper, trivial differences, or slight moral obliquities do not justify separation. Ross v. Ross, 109 Ill. App. 157; Harris v. Harris, 109 Ill. App. 148. If husband's conduct is such as to endanger the wife's life, person or health, or such as will inevitably make her life miserable and life with him unbearable, and she herself is without fault, she is justified in living separate from him. Ross v. Ross, 109 Ill. App. 157. Statutory ground of divorce need not be shown by wife; course of conduct by husband necessarily rendering her life miserable is sufficient. Mellanson v. Mellanson, 113 Ill. App. 81. Wife having shown reasonable performance of her duty, the burden is on husband to show he left for reasonable cause. Bartlow v. Bartlow, 114 Ill. App. 604. The fact that the husband against his wife's wishes suffers the mother of his former wife to control the household affairs absolutely does not justify her living apart so that she can maintain a bill for separate support. Giese v. Giese, 107 Ill. App. 659. A wife may bar her right to a decree for separate maintenance by failure to perform her duties to her husband, or by misconduct on her part which contributes materially to the cause of separation. Harris v. Harris, 109 Ill. App. 148.

20. Chapman v. Chapman [Neb.] 104 N. W. 880.

21. No relief for wife, when it appeared parties were divorced, and she did not prove

fendant in a suit by the wife for divorce on the ground of cruelty and habitual drunkenness is not res judicata of the issues in a suit by the wife for separate maintenance on the ground of desertion and neglect to support because of drunkenness.[22]

Procedure is largely statutory.[23] The usual rules as to pleadings apply.[24]

Relief obtainable.—It is usually held that a periodical allowance, and not a lump sum, should be awarded.[25] In determining the amount of an allowance the condition of the parties at the place of residence of the husband, and the circumstances of each case, are to be considered.[26] In Indiana, the court may authorize the wife to lease or mortgage the husband's realty and apply the proceeds to the payment of her allowance.[27] In an action under the Iowa statute for alimony, plaintiff may have a sale of land in fraud of her rights set aside, and a decree for separate maintenance made a lien on her husband's interest in such land.[28] Under the Indiana statute providing for the recovery of a penalty from one who fraudulently marries a woman he has wronged to escape a criminal prosecution, and thereafter abandons her, the determination of the amount of the penalty is solely for the trial judge, though the trial is by jury.[29]

Effect of decree.—Where a wife, in an action for maintenance, secures a decree for periodical payments by the husband, and thereafter the husband obtains a divorce and a decree terminating his payments at a certain date, but the wife is granted a new trial, in the divorce proceeding, the decree requiring payments for her maintenance remains in force.[30] In Massachusetts, an order of a probate court on a petition for separate maintenance is conclusive in a subsequent action for divorce on all issues actually heard and determined.[31]

§ 12. *Crimes and criminal responsibility.*[32]—Desertion or abandonment of the wife is a crime in some states.[33] An information which fails to charge that ac-

the divorce granted was void. Bidwell v. Bidwell [N. C.] 52 S. E. 55.

22. Suit for maintenance under Burn's Ann. St. 1901, §§ 6977, 6978, not barred. Smith v. Smith [Ind. App.] 74 N. E. 1008.

23. Chancery court of New Jersey has no **jurisdiction** of a suit for support, by the wife, where neither party was a resident of the state when the bill was filed, and the matrimonial domicile was not in the state at the time of the neglect complained of. Divorce Act (P. L. 1902, p. 508, § 20, subd. 6. Dithmar v. Dithmar [N. J. Eq.) 59 A. 644. Under Divorce Act (P. L. 1902, p. 509) § 21, chancellor may in suit for support, on application before answer filed, order complainant to give a **bond for costs.** Id. In Illinois the right to a **jury trial** in a suit for separate maintenance is not absolute, but such trial may be granted or refused in the discretion of the court. Pike v. Pike, 112 Ill. App. 243. An **allowance to enable the wife to prosecute** the suit may be granted under some statutes. Illinois. Harris v. Harris, 109 Ill. App. 148. See, also, Alimony, 5 C. L. 101. All motions for allowances must, under the Illinois statute, be made in the wife's name, and must be made to her and not to parties whom she has employed. Harris v. Harris, 109 Ill. App. 148.

24. General allegation of desertion admits proof that desertion was without cause. Smith v. Smith [Ind. App.] 74 N. E. 1008. In suit for separate support by wife on ground of desertion and neglect because of drunkenness, a general denial by defendant will admit proof in denial of drunkenness, desertion and mistreatment and that plaintiff was living apart from defendant of her own will and without cause. Id.

25. Award of single sum, with execution thereon, improper. Chapman v. Chapman [Neb.] 104 N. W. 880. In absence of peculiar circumstances, award of lump sum is improper, under Civ. Code, §§ 137, 140. Kusel v. Kusel [Cal.] 8 P. 295. In suit for support under Burns' Ann. St. 1991, § 6979, court may properly order payment of a weekly allowance instead of a sum in gross. Smith v. Smith [Ind. App.] 74 N. E. 1008.

26. Harris v. Harris, 109 Ill. App. 148.

27. Burns' Ann. St. 1901, § 6980. Smith v. Smith [Ind. App.] 74 N. E. 1008.

28. Walker v. Walker [Iowa] 102 N. W. 435.

29. Construing Burn's Ann. St. 1901, §§ 7298a, 7298b, 7298c. State v. Richeson [Ind. App.] 75 N. E. 846. The action of the trial court in giving judgment for a certain amount cannot be reviewed on a motion for a new trial. Id.

30. Smith v. Smith [Cal.] 81 P. 411.

31. Where bill for separation alleged lewd conduct of husband, but not adultery, and court found that wife was justified in living apart, but that there was no cause for permanent separation, the order granting separate maintenance did not bar wife's suit for divorce for adultery. Harrington v. Harrington [Mass.] 75 N. E. 632.

32. See 3 C. L. 1689. Criminal responsibility of husband for neglect of wife, see note, 3 C. L. 1689.

33. Act Mar. 13, 1903 (P. L. 26), making

cused has willfully and without cause neglected and refused to maintain or provide for his wife is insufficient to charge wife desertion, under the Nebraska statute.[34] An information charging desertion of wife and child is not bad for duplicity, and a motion to require the state to elect on which charge it will prosecute will not lie.[35] The prosecution must be in the county where the parties resided at the time of their separation, and where the wife was still residing when the unlawful neglect or refusal of the husband to maintain and provide for her occurred, though the first act of separation occurred while the parties were temporarily in another county.[36] The state must prove that accused has means to support the wife and that he refuses without good cause to do so.[37] Whether the husband in fact neglected or refused to maintain or provide for the wife is for the jury, if the evidence is conflicting.[38] Evidence tending to show improprieties by the husband prior to the alleged desertion, and not connected therewith, is inadmissible.[39] The wife is a competent witness against the husband in a criminal proceeding against him for abandoning his family.[40]

In Illinois, a husband and wife cannot, between themselves only, be guilty of or indicted for conspiracy.[41]

A husband is competent to make an information charging his wife's paramour with adultery.[42]

Ice; Illegal Contracts; Immigration; Impairing Obligation of Contract; Impeachment, see latest topical index.

IMPLIED CONTRACTS.

This article treats only of the so-called quasi contracts implied in law. Contracts implied in fact, which are real contracts, are treated elsewhere.[43]

§ 1. *Definitions and distinctions.*[44]—Contracts may be implied in fact or in law. A quasi contract, or contract implied in law, exists independently of the intention of the parties and is founded upon the doctrine of unjust enrichment,[45] or

desertion a misdemeanor, does not supersede proceeding to compel support under Act April 13, 1867 (P. L. 78). Commonwealth v. Mills, 26 Pa. Super. Ct. 549.

34. Cobbey's Ann. St. 1903, § 2375a. Goddard v. State [Neb.] 103 N. W. 443. Information must clearly state that both the abandonment and defendant's neglect or refusal to maintain and provide for his wife were without good cause. Cuthbertson v. State [Neb.] 101 N. W. 1031.

35. Cobbey's Ann. St. 1903, § 2375a. Goddard v. State [Neb.] 103 N. W. 443.

36. Cuthbertson v. State [Neb.] 101 N. W. 1031.

37. Must prove he has property or earning capacity. Goddard v. State [Neb.] 103 N. W. 443.

38, 39. Cuthbertson v. State [Neb.] 101 N. W. 1031.

40. Under Acts 1903, p. 32. Wester v. State [Ala.] 38 So. 1010.

41. Being in law one. Merrill v. Marshall, 113 Ill. App. 447.

42. Commonwealth v. Barr, 25 Pa. Super. Ct. 609.

43. See contracts, 5 C. L. 664.

44. See 3 C. L. 1690.

45. Dame v. Woods [N. H.] 60 A. 744. A quasi contract, or contract implied by law as distinguished from one implied in fact, is an obligation imposed by law on a person notwithstanding the absence of an intention on his part to assume it, and, in many cases, in spite of his actual dissent. Story v. McCormick [Kan.] 78 P. 819. An implied promise is not, in fact, a contract, but is a disputable legal presumption, raised on consideration of equity and custom. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. In the case of services it may exist, even though the benefitted party had no intention to pay for them. (Id.); but when the relationship between the parties is such as to negative

upon an obligation of record,[46] or one imposed by custom or statute.[47] A contract implied in fact exists where an intention to contract is inferred from the acts and conduct of the parties.[48]

§ 2. *Work and labor or services and material furnished.*[49]—An express contract ordinarily excludes an implied one covering the same subject-matter, and hence one cannot recover on a quantum meruit for services rendered thereunder.[50] One suing on an express contract cannot recover on an implied one,[51] nor on a quantum meruit on proof of partial performance, though the proof may otherwise warrant it.[52]

any presumption of an intent to pay, the right to remuneration depends on whether or not there was an understanding that the services were to be rewarded, which may be established by direct testimony or gleaned from the facts, the question being one of intention, and the promise not being one implied in law in the strict sense. (Id.). Implied contracts are such as reason and justice dictate, and which the law therefore presumes that every man undertakes to perform. Thalman v. Capron Knitting Co., 100 App. Div. 247, 91 N. Y. S. 520. An implied contract may arise from the wrongful taking and use of the property of another, in which case the owner may waive the tort and sue in assumpsit, and there is no meeting of the minds. Harley's Case, 39 Ct. Cl. 105.

46. See Recognizance, 4 C. L. 1253; Judgments, 4 C. L. 287.

47. See Penalties and Forfeitures, 4 C. L. 963, and topics dealing with the subject matter of the obligation.

48. Arises from a meeting of the parties resulting in a wordless agreement. Harley's Case, 39 Ct. Cl. 105. Ordinarily there can be no implied contract without some agreement between the parties as to the subject-matter. To pay for good will of business. Acme Harvester Co. v. Craver, 110 Ill. App. 413. If such agreement is not formally expressed, may be presumed from facts and circumstances showing an intention. Id. Where plaintiff moved into a residence which had been connected with a water main, and annually paid the water company the required rental, held, that a contract would be implied between him and the company by virtue of which the latter undertakes to supply him with water sufficient for the ordinary purposes for which he has used it. Whitehouse v. Staten Island Water Supply Co., 101 App. Div. 112, 91 N. Y. S. 544. Contract was not to supply water at junction of service pipe with the main but to supply it at his house and to continue service as it had been rendered, and company was not excused because house was on an eminence so that the pressure was insufficient to cause the water to flow thereto. Id.

49. See 3 C. L. 1690.

50. Evidence as to the value of extra work not covered by the contract sued on inadmissible. Merriner v. Jeppson, 19 Colo. App. 218, 74 P. 341. A contract to pay a director or officer of a corporation will not be implied as against the corporation in favor of one who continues to serve it after expiration of a term of employment. Alston Mfg. Co. v. Squair, 105 Ill. App. 238. Where substantial performance of a building contract is not found, the general rule that an express contract excludes an implied one covering the same subject controls. Burke v. Coyne [Mass.] 74 N. E. 942. One for whom services are rendered under an express contract is not liable therefor on an implied one. Grimm v. Barrington [Mo. App.] 84 S. W. 357. Held that there was no implied contract to pay municipal employe extra compensation for overtime, but that, under the circumstances, he would be deemed to have rendered his services under an implied contract that his wages should cover any services in excess of a legal day's work. Grady v. New York [N. Y.] 74 N. E. 488, rvg. 100 App. Div. 515, 91 N. Y. S. 1096. One who has received and receipted for fixed wages for her services as domestic and nurse in the home of a decedent cannot, in an action against the latter's estate, recover compensation for alleged extra services in the absence of an express contract to that effect, or an agreement to provide for such compensation by a legacy. Grossman v. Thunder [Pa.] 61 A. 904. Services for nursing and otherwise caring for decedent during his lifetime held to have been rendered by plaintiff in pursuance of a contract entered into by her husband with him, so that she was not entitled to recover for them on a quantum meruit. Normile v. Osborne, 207 Pa. 367, 56 A. 937. One employed by a decedent at fixed wages as housekeeper cannot recover against his estate additional compensation for nursing in the absence of an express contract to that effect, or an agreement to provide for such compensation by a legacy. Piersol's Estate, 27 Pa. Super. Ct. 204. Where an express contract as to the price to be paid for services is shown, there can be no implied contract to pay what they are reasonably worth. Express contract controls. O'Connell v. King, 26 R. I. 544, 59 A. 926. For services as broker rendered under valid contract. Shropshire v. Adams [Tex. Civ. App.] 89 S. W. 448. Where jury found that work, labor and materials used in the construction of an electric railroad were furnished under a general authority to build the road, the recovery was not under a quantum meruit, and it was not error to admit evidence showing the amount actually expended for labor and materials. Radel v. Lesher, 137 F. 719. Issue as to whether construction of electric railroad was under express contract, or under general authority given by defendant which virtually made plaintiffs his agents, held properly submitted to the jury, where evidence as to conversation in which the arrangement was made was in direct conflict. Id.

51. See Contracts, 5 C. L. 664. For transportation of livestock. Evansville & T. H. R.

A quasi contract may have its origin in the part performance of a contract, the benefit conferred upon the defendant by the part performance and not the detriment incurred by the plaintiff being the basis of the recovery.[53] Thus one who has fallen short of full performance may nevertheless recover on a quantum meruit for any substantial benefit resulting to the other party,[54] and this rule has been applied in the case of improvements to the other party's property,[55] the sale of goods to him,[56] or work done for him.[57] So the innocent party may recover the reasonable value of his services where the other party repudiates the contract,[58] or prevents further performance,[59] or performance becomes impossible, where there is no guaranty of

Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148.

52. For services. Hunt v. Tuttle, 125 Iowa, 676, 101 N. W. 509. Suit by broker to recover commissions under contract by defendant to pay certain price if he obtained purchaser for entire tract of timber. Veatch v. Norman [Mo. App.] 84 S. W. 350. Not without an amendment. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

53. Any liability to pay for partial performance not beneficial to defendant rests solely on the special contract between the parties. Dame v. Woods [N. H.] 60 A. 744. Where services are from their very nature accepted from day to day as the work progresses, person to whom they are rendered will be liable to pay the fair price and value of the benefits resulting from partial performance, over and above the amount of damage sustained by the breach. Id. Held, that plaintiff could not recover on theory of quasi contract, where building in which he had contracted to install heating plant was burned before he completed the work, it not appearing that materials could not have been reasonably removed for a reasonable sum had they not been destroyed. Id.

54. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994.

55. Where a special contract is made for the erection of a building or other structure, and the contractor unintentionally fails to fully perform it by reason of unimportant variations, while he cannot recover on the contract itself, he may recover on an account annexed, for the value of the labor and materials, less any deductions necessary to complete the work, but not to exceed the stipulated price. Founded on doctrine that landowner should not be permited to avail himself of the added value to the property thus furnished without making just compensation. Burke v. Coyne [Mass.] 74 N. E. 942. Principle applies to petitions to enforce mechanics' liens where similar conditions are shown. Id. See, also, Building and Construction Contracts, 5 C. L. 455.

56. Complaint in action to recover purchase price of goods showing that plaintiffs had a lien on the goods before they were sold to defendant by the manufacturer, and that they abandoned such lien by allowing the goods to be delivered to defendants, who accepted them with knowledge of plaintiffs' relation to them and that they were entitled to the money to be paid therefor, held sufficient to raise the question of an implied promise by defendants to pay plaintiffs and was not demurrable for want of facts. Thalmann v. Capron Knitting Co., 100 App. Div. 247, 91 N. Y. S. 520.

57. Where defendant has breached contract for architects' services, fact that petition, alleging waiver of damages and asking only for reasonable value of what plaintiff has done, states the terms of the contract, does not make action one on the contract rather than on quantum meruit. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Petition in action by architects could not be construed as one on quantum meruit. Id. Though plaintiff has not performed his contract in strict accordance with its terms, yet if defendant accepts and uses what he has done he is answerable for the benefit received under an implied promise to pay therefor. Woodford v. Kelley [S. D.] 101 N. W. 1069. Where plaintiffs contracted to cut, bail and deliver hay owned by defendant, but failed to dellver all of it through no fault of either party, plaintiff was entitled to the reasonable value of the benefits resulting to defendant, less any payments for their labor and less any damages for their failure to fully perform. Id. There being no evidence as to reasonable value of hauling part of the hay to a certain station, held error to allow contract price therefor. Id. An action on quantum meruit may be maintained to recover for labor and materials furnished under a contract not completed on time. Building contract. Plaintiff need not introduce contract. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248.

58. See, also, Contracts, 5 C. L. 664. The refusal of an employer to pay an employe a share of the net profits of the business in accordance with the terms of the contract between them authorizes the employe to leave the service before the expiration of the contract period, and to collect the amount due him under the contract for the period of his actual employment. Evidence showed that employer did not object to his leaving. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386. On repudiation of contract of agency. Agent also has right to sue for damages for breach. Richardson Machinery Co. v. Swartzel [Kan.] 79 P. 660. Guilty party will not be permitted to set up the contract to defeat his recovery. Id. Acts and conduct of defendant, and denial of plaintiff's right to any remuneration for digging well unless water was struck, held repudiation of contract authorizing suit. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795.

59. Cann v. Rector, etc., of Church of Redeemer [Mo. App.] 85 S. W. 994. Where full performance is prevented by the act or default of the other party. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Contract price is the reasonable meas-

performance.[60] One may also recover the reasonable value of services rendered, or materials furnished under an ultra vires contract,[61] or a contract void under the statute of frauds.[62] The law will not, however, imply a promise to pay for services which are in derogation of public policy,[63] and there can be no recovery on a quantum meruit for services rendered under an illegal contract which are themselves illegal.[64]

Persons incapable of contracting are liable under an implied promise to pay for necessaries.[65] A parent deprived of the custody, control, and services of his child is not liable to third persons for necessaries furnished to it with knowledge of that fact.[65a]

From an account stated the law implies a promise to pay whatever balance is thus acknowledged to be due.[66]

ure of value, in the absence of evidence showing any loss or damage to the defendant. Id. A subcontractor who has been stopped in the performance of the work by disputes between the contractor and the owner may recover from the owner on a quantum meruit, where he has substantially performed. First Nat. Bank v. Mitchell, 46 Misc. 30, 93 N. Y. S. 231.

60. Where father employs one to care for his invalid child until latter's death, promising to give him a portion of his estate in payment, but father dies before the son, the employe has a claim on a quantum meruit against the father's estate for the value of the services performed before father's death. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Contract to bore well held subject to implied condition that both parties should be excused from their obligations in case its actual completion became impossible, there being no guaranty that water would be obtained. Poland v. Thomaston Face & Ornamental Brick Co. [Me.] 60 A. 795. Performance prevented by act of God. Where lessor was to furnish seed and implements, and lessee the labor, and crop was to be divided, and lessee died after crop was grown, but before it was gathered, his representative could recover on a quantum meruit his interest in crop, less the loss or damage caused by his death. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

61. See, also, Corporations, 5 C. L. 764; Municipal Corporations, 4 C. L. 720. Though contract by village for improvements was void because made when there were insufficient funds to pay for them on hand (Laws 1897, p. 411, c. 414, § 128), it is liable under an implied contract to pay for materials furnished and accepted thereunder from time to time, to the extent of the money on hand. Lines v. Otego, 91 N. Y. S. 785. Village accepting and using materials furnished under contract therefor made by its president is liable under implied contract to pay for them, though contract is void because not authorized by board of trustees. Id. Though an agreement by directors of a corporation to pay themselves for services rendered for its benefit is void, they may recover on a quantum meruit (Porch v. Agnew Co. [N. J. Eq.] 61 A. 721); but to support such a recovery there must be proof showing that claimant was employed by the company to do certain work, that he did it, and that he deserves to be paid therefor the sum which in the judgment should be awarded him (Id.) Evidence insufficient to support claim against insolvent hotel company. Id.

62. See, also, Frauds, Statute of, 5 C. L. 1550. See note, 2 C. L. 287, n. 11. One who has performed an agreement void under the statute of frauds will, where he cannot be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other has received, be adjudged compensation for what has been received by the other party under the contract, measured by the consideration which, by the contract, he agreed to as the value of what he received. Waters v. Cline [Ky.] 85 S. W. 209. Where plaintiff went to live with her uncle under parol agreement that, in return for her services, he would devise her a certain farm, erect buildings thereon, and give her a sum of money, she was entitled on his death without doing so, to recover value of land with sums agreed to be expended thereon, and to be paid to her. Id.

63. See, also, Contracts, 5 C. L. 664. Barngrover v. Pettigrew [Iowa] 104 N. W. 904.

64. Attorney and detective cannot recover for services rendered under a contract having for its object the procuring of a divorce for defendant. Barngrover v. Pettigrew [Iowa] 104 N. W. 904. In action to recover for work and labor, pleadings held not to conclusively show that it was performed in pursuance of an agreement in violation of the act of congress prohibiting the importation of foreign labor, and hence it was error to order judgment for defendant. Simon v. Haut [Minn.] 104 N. W. 129.

65. See Infants, 4 C. L. 92; Incompetency, 3 C. L. 1696; Insane Persons, 4 C. L. 126. Dance's Adm'r v. Magruder, 26 Ky. L. R. 220, 80 S. W. 1120. In an action for nursing and washing done for deceased by his sister during his last illness while he was incapable of contracting, the burden is on the estate to show that they were rendered gratuitously. Id. Evidence that services were performed held to justify recovery. Id. A lunatic asylum is entitled to recover on a quantum meruit for the keep of a lunatic, though the judgment of the county court committing the lunatic was void. Necessaries. Hopper v. Eastern Kentucky Lunatic Asylum [Ky.] 85 S. W. 1187.

65a. Father not liable for medical services furnished to child which a decree of divorce had awarded to the mother. Selfridge v. Paxton, 145 Cal. 713, 79 P 425.

As a general rule where one under no legal or moral obligation to do so renders services for another at his request or with his knowledge or acquiescence, the law raises an implied promise on the part of the latter to pay what they are reasonably worth.[67] There can, however, be no recovery for services rendered voluntarily

66. Action may be maintained thereon. Noyes v. Young [Mont.] 79 P. 1063. Account for services. Mattingly v. Shortell [Ky.] 85 S. W. 215. See, also, Accounts Stated and Open Accounts, 5 C. L. 25.

67. In the majority of cases contracts of this sort are implied in fact rather than in law, but they have all been treated here together for convenience. [Editor.]

Unless evidence shows that such was not consideration on which they were rendered. Blowers v. Southern R. Co., 70 S. C. 377, 50 S. E. 19. There are presumptions both of law and fact that services rendered during the last illness of a decedent and board and room rent furnished her are to be paid for, and no proof of an express contract to do so is necessary. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103 N. W. 574. There being no such relationship as to raise a presumption that services are rendered gratuitously, the implication of law that the parties contemplated compensation therefor, in the absence of affirmative evidence to the contrary, warranted the finding of an implied promise. Page v. Page [N. H.] 61 A. 356. If a person labors for another with the latter's knowledge and consent, no rate of compensation being fixed, and no express contract being made, or request to do the work being shown, the law presumes, in the absence of evidence to the contrary, that the one expected to receive and the other to pay compensation based on the reasonable value of the services. Grotjan v. Rice [Wis.] 102 N. W. 551. In such case the law also presumes that such services were rendered upon request, and if the services were accepted with knowledge that they were rendered in expectation that they would be paid for, the person accepting them is liable for their reasonable value. Held error to refuse requested instruction. Id. A special verdict finding that defendant by his conduct requested the services rendered and that plaintiff at the time expected pay therefor, and that defendant intended to so pay, sufficiently shows a contract. Brown v. Ricketts, 6 Ohio C. C. (N. S.) 215. The law usually implies a promise to pay on the rendition of meritorious services. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538; Stallings v. Ellis, 136 N. C. 69, 48 S. E. 548. If services are not gratuitous. Birch v. Birch [Mo. App.] 86 S. W. 1106. Unless relationship of parties forbids presumption. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. To pay for board, nursing, care, etc., where parties are in no manner related. Rogers v. Daniels, 116 Ill. App. 515. Evidence in action for services in effecting a compromise held to sustain finding that they were rendered under circumstances which gave defendant good reason to suppose that they were rendered as agent for the other party to the negotiations, and hence there was no implied contract to pay for them. Merrill v. Gunnison, 146 Cal. 544, 79 P. 67. Finding that services were not rendered at defendant's request means that there was neither an express or implied request, and sufficient without finding the person to whom they were rendered, or that they were rendered without expectation of remuneration. Id. Where agents exceed their powers by attempting to bind their principal by a contract for certain work at an unreasonable price in excess of the amount they are authorized to agree to pay, the party contracted with may recover a reasonable price for services and materials furnished by him and used by the principal. Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 A. 127. Services as overseer of farm by one distantly related to deceased held to raise implied promise to pay for them, and direction of verdict for defendant held error. Smith v. Park's Adm'r [Ky.] 84 S. W. 304. Evidence in action for extra work performed in laying rock foundation for intake pipe for waterworks, held to show that work was done under conditions justifying plaintiff in relying upon directions approved by the engineer, and to sustain verdict for plaintiff. Steele v. Ely [Minn.] 104 N. W. 566. Evidence on claim against estate of decedent for architect's services held to sustain finding that they were rendered under the individual employment of defendant and not under an employment by a corporation of which he was the president. Barnett v. Peper [Mo. App.] 89 S. W. 345. Evidence held to make out prima facie case for plaintiff in action for services rendered decedent. Larkins v. McGinley, 88 N. Y. S. 153. President of corporation who agrees to equip a college laboratory and in so doing receives material and labor from the corporation is personally liable to the latter on an implied promise to pay therefore. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. S. 443. Evidence held to show that plaintiff furnished three carriages for use at a funeral instead of six, as he claimed. Hummel v. Ackermann, 93 N. Y. S. 555. Fact that defendant received from relief committee money enough to pay for six carriages held not to defeat his defense that only three were furnished, where he offered to return excess to the committee. Id. In action for work, labor and services performed in manufacturing certain articles, evidence held insufficient to warrant the direction of a verdict for plaintiff on one count and sufficient to warrant it on another. Ullman v. Rothschild, 94 N. Y. S. 726. Where, on expiration of term of office of treasurer of corporation, he notifies directors that he cannot again serve for the same compensation and is re-elected without any settlement as to the terms of his salary and continues his services, he can recover their reasonable value. Stacy v. Cherokee Foundry & Mach. Works, 70 S. C. 178, 49 S. E. 223.

Note: In an action for money had and received, the law will not imply a promise to repay unless, ex aequo et bono, the defendant ought to refund. Moses v. Macferlen, 2 Burr. 1005; Bize v. Dickason, 1 T. R.

and with no expectation at the time they are rendered that they will be paid for, whether they are beneficial to the other party or not,[68] and a subsequent change of intention by the party rendering them does not alter the rule.[69] Hence it must not only appear that the services were valuable but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or, at least, that the circumstances were such that a reasonable man, in the same situation with him who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.[70]

There is also an implied contract on the part of one using plans prepared for him by another,[71] or using an invention belonging to someone else, to pay for them.[72] So, too, a corporation receiving property under contracts made by its promoters is liable for its value.[73]

One impliedly agreeing to do a piece of work impliedly agrees to do it in a

285; Brisbane v. Dacres, 5 Taunt. 143; Badeau v. U. S., 130 U. S. 439, 32 Law Ed. 997; Lemans v. Wiley, 92 Ind. 436; McFadden v. Wilson, 96 Ind. 253; Lockwood v. Kelsea, 41 N. H. 185; Franklin Bank v. Raymond, 3 Wend [N. H.] 69; Buel v. Boughton, 2 Denio [N. Y.] 91; Mayer v. Mayor, 63 N. Y. 455; Carson v. McFarland, 2 Rayle [Pa.] 118, 19 Am. Dec. 627; Falconer v. Smith, 18 Pa. 130. 55 Am. Dec. 611; Glenn v. Shannon, 12 S. C. 570; Goddard v. Town of Seymour, 30 Conn. 394; Foster v. Kirby, 31 Mo. 496; Orman v. North Alabama, etc., Co., 53 F. 470; Beach, Modern Law of Contracts, § 660; Pom. Eq. Jur. §§ 182, 1047; 1 Chitty on Pl. (16th Am. Ed. from 7th Eng. Ed.) p. 362, note.—From Daily v. Daviess County Com'rs [Ind.] 74 N. E. 977.

68. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150. Plaintiff held not entitled to recover from estate of her deceased brother for his board where no contract to pay it was shown and there was no evidence of an intention on his part to pay or on hers to receive it. Dance's Adm'r v. Magruder, 26 Ky. L. R. 220, 80 S. W. 1120. One cannot recover for labor voluntarily performed for another in the absence of an express or implied contract to pay therefor. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938. The mere fact that one renders services to another which are greatly to his advantage does not entitle him to compensation therefor in the absence of an employment. Held that even if contract employing attorney did not contemplate an appeal, and refusal to furnish appeal bond amounted to his discharge, he was not entitled to recover on quantum meruit for prosecuting appeal, he having no authority to take such appeal at the charge of defendants. Cavanaugh v. Robinson [Mich.] 101 N. W. 824. An implied contract does not arise from merely voluntary service. An employe of the government who allows his invention to be used by it for several years without saying anything in regard to compensation, and allows government officers to suppose that none will be demanded, cannot thereafter recover on an implied contract for its use. Harley's case, 39 Ct. Cl. 105.

69. Stockholder held not entitled to recover for services which were beneficial to corporation in view of his disclaimers of any intention to charge for them. Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

70. Attorney held entitled to recover from defendant for services in drawing up papers in reference to purchase of certain property, which he furnished to defendant at the request of a third person and which defendant used, plaintiff having no notice that the third person had agreed to furnish such papers. Paul v. Wilbur [Mass.] 75 N. E. 63. The law will imply a promise of payment for services rendered under circumstances warranting reasonable expectation on plaintiff's part that defendant would pay for them. Services in bringing about transfer of electric light plant. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922. The law implies a contract to pay for services of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made therefor. Evidence sufficient to show an implied contract on the part of decedent to pay for nursing rendered him by his nephew during his last illness. Lewis v. Lewis' Estate [Ark.] 87 S. W. 134.

71. Right to recover for use of plans for warships which were not adopted held to depend upon whether they contained novel designs, since, if there was nothing novel in them, there was nothing which defendant was not free to use. Lundborg's Case, 39 Ct. Cl. 23. Where, on transmission of plans for warships to navy department, claimant requested that, if rejected, they be returned as soon as possible, officers of that department had no right to retain them, but no recovery can be had for such retention in the absence of proof that damages were actually sustained by claimant. Id.

72. Where the government, by its proper officer, uses a patented article, acknowledging the right of the patentee thereto, an implied obligation will arise to pay for it. Government liable for use of patented method of calking vessels which it required contractors to use. Brook's Case, 39 Ct. Cl. 494.

73. See, also, Corporations, 5 C. L. 764. A telephone company which, after it is fully incorporated, receives a telephone exchange, additional lines, materials and tools. Streator Independent Tel. Co. v. Continental Tel. Const. Co. [Ill.] 75 N. E. 546.

good and workmanlike manner.[74] An implied contract upon a quantum meruit may be made to depend upon a contingency.[75]

In the absence of an agreement or understanding to the contrary, services rendered under an implied contract are entitled to compensation immediately upon their conclusion.[76]

Services by member of family.[77]—The ordinary legal presumption of a promise to pay for valuable services does not arise where the relationship of the parties affords evidence that payment was not contemplated, or that the labor was gratuitously performed.[78] In such case the law presumes that no compensation was intended or expected.[79] Thus, there is a presumption that services rendered by a child to his parent, or to one standing in loco parentis, while a member of his family, are gratuitous,[80] and this is true, even though the child has arrived at his majority,[81] though there seems to be a conflict of authority as to whether the rule applies where the child no longer resides with the parent as a member of his household.[82] A presumption of gratuity may also arise from a family relationship other than that of parent and child.[83] So, too, though the parties are related neither by blood or marriage, the circumstances may be such as to prevent the presumption of a promise to pay, as where one is taken into a family by adoption, or from motives of benevolence or charity,[84] or where it is shown that the services

74. Failure to comply with implied agreement to line water tank with copper in good and workmanlike manner, held to defeat plaintiff's right to recover for his services, and to give defendant right of action for damages. Schery v. Welstead, 93 N. Y. S. 466.

75, 76. Boogher v. Roach, 25 App. D. C. 324.

77. See 3 C. L. 1691.

78. Page v. Page [N. H.] 61 A. 356. Where plaintiffs were not members of decedent's family, and he did not stand in loco parentis with them, the presumption of an implied promise to pay them for services rendered him in his last sickness is not rebutted by the mere fact that he was their grandfather. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

79. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538.

80. Evidence of the family relationship is evidence that both parties understood that the benefit was gratuitously rendered, and, if not rebutted, gives rise to a conclusive presumption against a promise of payment, and prevents recovery in absence of showing of a contract in fact. Page v. Page [N. H.] 61 A. 356. Services of a son in caring for his father and mother and in looking after their business. Haberman v. Kaufer [N. J. Eq.] 61 A. 976.

81. Einolf v. Thompson [Minn.] 103 N. W. 1026. Conclusively presumed that services rendered by married daughter in caring for father during the last years of his life, are gratuitous, where there was no suggestion in complaint or in her evidence that she expected compensation. Stallings v. Ellis, 136 N. C. 69, 48 S. E. 548.

82. New Hampshire: No presumption that services rendered by son to his mother during her last illness were gratuitous, where they lived in the same house but as separate families, the son having a family of his own. Page v. Page [N. H.] 61 A. 356.

South Carolina: The mere fact that a mother and daughter are not living in the same household is not sufficient to overcome the presumption that services rendered by the latter to the former are gratuitous, though it may be considered in connection with other evidence tending to establish an implied contract to pay for them. Wessinger v. Robert, 67 S. C. 240, 45 S. E. 169. Services by daughter in caring for mother in last sickness held gratuitous, their nature not being such as to raise an inference that compensation therefor was contemplated. Id.

83. Though the parental relationship is absent, there may yet be a family relationship which creates the presumption of gratuity. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. Services rendered by one member of a family to another are presumed to be gratuitous, and in order to overcome such presumption, an agreement express or implied to pay for them must be shown. Birch v. Birch [Mo. App.] 86 S. W. 1106. Family is a collective body of persons living in one home, under one head or management. Id. Where decedent did not reside with plaintiff until he became so feeble as to require a nurse and then was removed to plaintiff's house not as a member of the family but for the purpose of being cared for and nursed, and was not dependent on her, and she was not under any obligation to support him, held that he was not a member of her family. Id. Services of sister of decedent in nursing her. Mayer v. Schneider, 112 Ill. App. 628. Where services are rendered by one member of a family to another, evidently prompted by affection, or in consequence of reciprocal and mutual obligations. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538.

84. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. Whether or not such a relation exists as interferes with the usual presumption of a promise to pay depends upon the

were merely such offices as one friend would perform for another in time of sickness or distress, either by the way of physical aid or in the comfort of personal companionship.[85]

The presumption of gratuitous services growing out of the relationship of the parties is not conclusive, but may be rebutted.[86] In some states there must, in such case, be proof of an express agreement,[87] while in others the agreement may be deduced from circumstances.[88] If the relationship begins while the claimant is a minor, and, after attaining his majority, he remains in the household and continues his work as before, there is no presumption that he is to receive wages for the subsequent work, unless the evidence warrants an inference that compensation was thereafter intended and expected;[89] but the burden devolves on claimant to prove an agreement to pay him.[90]

Right to recover for improvements made on lands of another.[91]—In equity an innocent purchaser of lands for a valuable consideration, without notice of any infirmity in his title is, on being ejected, entitled to full remuneration for his permanent improvements that add value to the lands, for taxes paid thereon, and the purchase price therefor, when such purchase price has gone to extinguish any lien or charge against the land created by law or by the owner, and the amount thereof is a lien on the land which the owner is bound to discharge before being

circumstances of each case. Id. One who takes a child into his home as a member of his family, not intending to charge the child therefor, cannot afterwards demand compensation for what was intended as a gratuity. Barnett's Adm'r v. Adams, 26 Ky. L. R. 622, 82 S. W. 406. Claimant held entitled to allowance for services rendered to decedent, who lived with himself and his wife after the death of her parents, in preserving the estate which she inherited from her father, the evidence showing that it was not the intention that they should be gratuitous. Id.

85. Evidence held to support finding that services rendered decedent in her last illness were gratuitous and without expectation of reward. Dallman v. Frank [Cal. App.] 82 P. 564.

86. Mayer v. Schneider, 112 Ill. App. 628; Stallings v. Ellis, 136 N. C. 69, 48 S. E. 548. Evidence in action by adult occupying position of daughter held to justify finding that presumption was rebutted. Einolf v. Thompson [Minn.] 103 N. W. 1026. Verdict held not so excessive as to require new trial. Id. Offer by defendant to prove that, after he destroyed his will, he still intended to make provision for plaintiff by his last testament and to treat her in all respects as his daughter, held inadmissible. Id. If evidence is of such a character as to overcome the presumption, then claimant is in same position as if services had been rendered to a stranger. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538. Declarations of testatrix held to show that it was the expectation of both parties that services rendered by claimant who, though never adopted, lived with deceased as a member of her family, should be paid for. Id.

87. No recovery for services of son in caring for his parents can be had in the absence of proof of an express contract sufficient to overcome presumption of gratuity. Haberman v. Kaufer [N. J. Eq.] 61 A. 976.

88. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719; Einolf v. Thompson [Minn.] 103 N. W. 1026; Stallings v. Ellis, 136 N. C. 69, 48 S. E. 548. Evidence held to authorize finding that both parties contemplated that services rendered by adult daughter to her father during his last illness should be paid for out of his estate after his death. Phinazee v. Bunn [Ga.] 51 S. E. 300. Though promise to pay is not implied from mere fact that children render services in nursing and caring for their infirm parents, it may be implied where the surrounding circumstances indicate that it was the intention of both parties that compensation should be made, and it is not necessary to show an express contract in all cases. Id. May be overcome by proof of either an express or implied agreement to pay, and implied contract may be proven by circumstances showing that both parties intended pecuniary recompense when services were rendered. Mayer v. Schneider, 112 Ill. App. 628. Both express and implied contract to pay for services of decedent's sister as nurse held to have been shown. Id.

89. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. Where plaintff was placed in defendant's family while a minor and continued to render domestic services after reaching majority, held, that her right to recover for services rendered after majority depended upon whether she was a member of the family before that time. If she was she could not recover, but if she was a servant, she could. Id. If a servant, clothing furnished her by defendant after her majority should be deducted in assessing her damages. Id.

90. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719.

91. See 3 C L. 1694, n. 63. See, also, Estates of Decedents, 5 C. L. 1183; Ejectment, 5 C L. 1056; Judicial Sales, 4 C. L. 321; Vendors and Purchasers, 4 C. L. 1769; Taxes, 4 C. L. 1605.

restored to his original rights in the land.[92] So, too, one who in good faith has made improvements under a parol purchase may be allowed in equity for their value with offset for rents and profits,[93] and interest may run on the judgment until a time for payment[94] with no offset for rents accruing after judgment.[95] But no recovery can be had by one who is not a bona fide purchaser,[96] except under such circumstances as would make it a fraud on his rights to allow the owner to take them without compensation.[97]

§ 3. *Moneys had and received and money paid.*[98]—The law implies a promise on the part of one having in his hands money which in equity and good conscience belongs to another to pay it.[99] So, too, whenever one person requests or allows

92. Purchaser at administrator's sale. Patillo v. Martin, 107 Mo. App. 653, 83 S. W. 1010. Plaintiff is not estopped by failing to plead his equity in the ejectment suit, to assert it in an independent proceeding while he is yet in possession of the land. Id. Since action included claim for taxes, held that it was not one under Rev. St. 1899, §§ 3075, 3076, relating to the recovery for improvements by an unsuccessful defendant in ejectment. Id.

93, 94, 95. Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

96. Not by one having notice of facts rendering his title inferior to another's, who by mistake of law regards his title as good. Yock v. Mann [W. Va.] 49 S. E. 1019. Tenant in common cannot recover as against his cotenants, where he acquires title through a purchase by which he supposedly acquired the entire title, and has full knowledge in respect to the conveyances purporting to divest them of their interest but which are fraudulent and void in law, merely because he relied on their sufficiency through mistake of law. German Sav. & Loan Soc. v. Tull [C. C. A.] 136 F. 1. A railroad company cannot recover compensation for improvements made by it on property upon which it has entered, pending its proceeding to condemn the same, upon the reversal of the final judgment in its favor, subsequently obtained in the action, and an adjudication against its right to condemn the land. Chesapeake & O. R. Co. v. Deepwater R. Co. [W. Va.] 50 S. E. 890. Son held not entitled to value of improvements put upon realty of father which he held by sufferance, the most of which were made after notice that the father would not give him the land. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404.

97. Owner must have allowed work to go on with knowledge of it, or have induced occupant to make improvements by some inequitable conduct, or have been guilty of laches in asserting his claim. Chesapeake & O. R. Co. v Deepwater R. Co. [W. Va.] 50 S. E. 890.

98. See 3 C. L. 1692.

99. Donovan v. Purtell [Ill.] 75 N. E. 334; Scott v. Ford, 45 Or. 531, 78 P. 742. Where plaintiff employed defendant as insurance solicitor and made certain weekly advances to him under a contract making them a first lien on commissions and renewals due or to become due him, and authorizing plaintiff to deduct them from any moneys received by him on premiums due defendant, held, that such advances did not create a debt on the part of defendant, and, on failure of the venture to prove successful, there was no implied promise to pay them. Arbaugh v. Shockney, 34 Ind. App. 268, 72 N. E. 668. County may recover from the county assessor the sum paid him for services rendered in excess of the per diem for the maximum number of days fixed by the statute for which he is entitled to compensation. Daily v. Board of Com'rs [Ind.] 74 N. E. 977. Implied contract on part of payee of note who receives money in payment of note, which in part belongs to another and was misappropriated by the maker to meet the note, to repay it. Porter v. Roseman [Ind.] 74 N. E. 1105. In action to recover rents and profits of land descended to plaintiff from his mother subject to his father's life interest, plaintiff held entitled to two-thirds of the difference between the rents collected by defendant and the sums reasonably expended by the latter for taxes, insurance, repairs, and commissions for collecting rents, with interest from the date of the final adjudication of title to the property. Smith's Guardian v. Holtheide [Ky.] 84 S. W. 346. An action upon the common counts for moneys paid is properly brought by the executor of a sister who, at her brother's request, took an assignmment of notes and a mortgage given by him to a third person, delivered the canceled notes to the brother, and satisfied the mortgage at his request, action on the notes being barred by limitations. Foster v. Gordon [Minn.] 104 N. W. 765. Held within the discretion of the court to allow informal pleading for money had and received to be amended into a count for moneys paid. Id. Plaintiff may recover money paid to defendant's employe to apply on rent of defendant's apartment, which employe then assumed, without authority, to rent to plaintiff, defendant not having ratified the agreement or made any other. McIntosh v. Kilpatrick, 94 N. Y. S. 1095. That a bank received the proceeds of a loan by plaintiffs to its debtor, made on the security of invalid bonds which it had delivered to the latter, does not render it liable to plaintiffs, in the absence of evidence that it or any of its officers knew that the amount received was a part of such loan, or that the bonds were deposited as security therefor, or that the bank had delivered the bonds for the purpose of enabling its debtor to borrow money on them. Thalman v. Importers' & Traders' Nat. Bank, 95 N. Y. S. 634. Plaintiff may recover money deposited by third person with defendant to pay for bricks to be delivered by plaintiff

another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request by the former to make the payment and a promise to repay, and the obligation thus created may be enforced by assumpsit.[1] Where a landlord is so lulled into securtity by a third person that he allows him to take possession of his tenant's crop without any effort to enforce his lien thereon, there is an implied promise on the part of such third person to pay the rent.[2]

One may recover money paid under a contract void under the statute of frauds,[3] or which the other party refuses to perform,[4] or which is subsequently abandoned by mutual consent,[5] or money not applied to the purpose for which it is paid,[6] or payments in excess of the amount due.[7]

to such third person, where defendant notified plaintiff before the bricks were delivered that he had the money for that purpose, though there was no privity of contract between them. McAvoy v. Com. Title Ins. Trust Co., 27 Pa. Super. Ct. 271. Action for money had and received will lie therefor. Id. Plaintiff may recover from defendant, in an action for money had and received to his use, a sum of money received by the latter, in settlement of account, to be returned to plaintiff for tickets which he had bought and did not use. Fottori v. Vesella [R. I.] 61 A. 143. Where the original amount paid by plaintiff had been reduced by deductions for commissions, plaintiff was only entitled to the amount actually refunded to defendant, with interest thereon to the date of trial. Id.

1. Defendant was jointly and severally liable on a note with plaintiff's intestate and a third person. On death of intestate and insolvency of third person before note was fully paid, defendant induced plaintiff, in his individual capacity, to sign with him a new note for the balance, which plaintiff was required to pay. Held, that plaintiff could recover half the amount paid. Bartlett v. Armstrong, 56 W. Va. 293, 49 S. E. 140.

2. Shealy & Bro. v. Clark, 117 Ga. 794, 45 S. E. 70.

3. See, also, Frauds, Statute of, 5 C. L. 1550. Tenant may recover on implied contract for improvements made on land under agreement that he should have it as long as it was for rent, where owner later notifies him that he cannot remain longer. Brashear v. Rabenstein [Kan.] 80 P. 950.

4. See, also, Contracts, 5 C. L. 664. On refusal of defendant to be bound by contract whereby it agreed to pay certain coupons attached thereto in accordance with a certain table, during the time in which plaintiff was making certain monthly payments, and its statement that it was going out of business, held, that plaintiff was entitled to recover the amounts previously paid by him thereon (Civ Code, § 1689, subd. 2), a return or offer to return the contract not being a condition precedent to commencing suit (Civ. Code 1691, subd. 2). McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090. Defendants contracted with plaintiff to allow him to conduct a saloon in connection with their restaurant business, plaintiff to make certain fixed payments and turn over a portion of his receipts, and defendants to pay him a percentage on liquor sold in the restaurant. Held, that where defendants repudiated the contract after plaintiffs had made several payments, and in an action on the contract set up the statute of frauds, plaintiff was entitled to recover the amounts paid by him, less the value of any benefit received from his use of the premises, the defendants, having avoided the contract by pleading the statute, not being entitled to set it up as a bar to such an accounting. De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938. Pleadings in former action held competent to show that statute had been set up. Id. Evidence that the privilege of conducting the restaurant was worthless unless defendants paid the percentage on liquor sold, held admissible on the question of the value of defendant's partial performance. Id. Where the contract is subsequently repudiated by the party to whom the advances are made. Murphy v. Dalton [Mich.] 102 N. W. 277. On breach of an executory contract for the sale of land, the vendee may recover the value of a stock of merchandise turned over to the vendor to apply on the purchase price, as for money had and received. Evidence held to sustain finding of breach. Proctor v. Stevens Land Co. [Minn.] 102 N. W. 395. Complaint held sufficient to permit recovery, though ground of rescission alleged was fraudulent representations as to title. Id. Plaintiffs may recover, in an action for money had and received, money paid to defendant on his statement that the flour purchased by them from him had been shipped, where the flour actually delivered was not in compliance with the contract, and plaintiffs refused to accept it, tendered it back, and demanded the flour called for, and it appears that defendant refused to return the money or deliver the flour contracted for. Bier v. Bash, 95 N. Y. S. 281. Where a town lays out a highway and agrees to construct it on condition that plaintiffs advance certain moneys toward payment for the work, which they do, they may recover it back, where the work is commenced, but abandoned before a passable way is constructed, regardless of whether the council had power to bind the town in the premises or not. If council had no power, the money was paid without consideration and hence may be recovered, and if it did have power, town broke contract and amount paid was a fair measure of damages. Valley Falls Co. v. Taft [R. I.] 61 A. 41.

5. See, also, Contracts, 5 C. L. 664. May be recovered under the common counts in assumpsit. Murphy v. Dalton [Mich.] 102 N. W. 277. Evidence held to sustain recovery. Williams v. Peterson [Minn.] 103 N. W. 722.

6. Defendant liable for money given him

Money paid or property delivered under an illegal executed contract cannot be recovered, where the parties are in pari delicto;[8] but money deposited with a third person to be used for an illegal purpose, but not actually so used, may be recovered.[9]

Money paid through the fraud or misrepresentation of the payee,[10] or of a third person, may be recovered,[11] even though it was to be used for an unlawful purpose,[12] and creditors in bankruptcy proceedings may invoke this principle by proving a demand for money had and received by the bankrupts to their use.[13] So, too, improper profits made by a contractor by substituting cheaper material than that specified may be recovered.[14] The fact that a creditor obtains payment from

by plaintiff with which to pay rent of premises occupied by her. Clark v. Jenness [Mass.] 74 N. E. 343. Where defendant agreed to settle suit for rent, which had been brought against plaintiff by a third person, for $50, and plaintiff surrendered to him receipts for that amount for money which she had previously paid him on account of a mortgage, it being agreed that receipts should be treated as money, and the amount represented by them should not be applied on the mortgage, held that, on his failure to settle the suit, she could recover the $50 in an action for money had and received. Id. Money paid under a contract and not used in accordance with its terms. Where defendant represented that mine could be bought for $60,000 and received $1,000 from plaintiff on the understanding that defendant should raise the additional sum necessary, but purchased the mine for $10,000 and kept $50,000 himself, held, that plaintiff, who had received his interest in the mine by reason of his interest in the corporation to which it was conveyed, could, on the theory of an affirmance of the purchase at the price actually paid, recover his proportion of the money not used in accordance with the contract. Barbour v. Hurlbut [Mich.] 100 N. W. 781.

7. Every payment presupposes a debt, and what has been paid without having been due, is subject to be reclaimed. La. Civ. Code, art. 2133 (2129). Drainage Commission v. National Contracting Co., 136 F. 780. Where dispute as to construction of contract for supplying electric power was submitted to arbitration under an agreement that plaintiff should continue to pay monthly bills pending the award, and award showed overpayment, held that, in action to recover such overpayment, the award and decree thereon were admissible to show what the contract was. Southern Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450.

8. Contract intended to facilitate the procuring of a divorce, it being one affecting the general public. Davis v .Hinman [Neb.] 103 N. W. 668. Money lost in betting on horse races cannot be recovered. In re Arnold & Co., 133 F. 789. See, also, Contracts, 5 C. L. 664. See, also, note, 2 C. L. 292, n. 54.

9. Claim therefor may be established in bankruptcy. In re Arnold & Co., 133 F. 789.

10. Where defendant obtained bankbooks from an incompetent by fraud and undue influence, and drew out the money and held it as cash, the incompetent's administrator might sue him for money had and received. (Hagar v. Norton [Mass.] 73 N. E. 1073); but an action for money had and received would not lie to recover the value of stocks obtained in the same manner which defendant caused to be transferred to him on the books of the company. Such action amounts to a conversion, but not a conversion into money (Id.). Where bank agreed with defendant to pay a third person's "checks for cattle," and the latter drew a sight draft payable to defendant which he knew included a sum which was not for cattle, and bank paid draft believing that whole amount was for cattle, held, that it could recover the amount in excess of that paid for cattle from defendant as for money had and received. First State Bank v. McGaughey [Tex. Civ. App.] 86 S. W. 55. May be recovered back under the common count for money had and received. Johnson v. Cate [Vt.] 59 A. 830. In action for money paid for property purchased by plaintiff of defendant for a firm for whom plaintiff acted as agent, where plaintiff's evidence tended to show that defendant falsely informed him that the firm had never paid for such property and that he having no knowledge to the contrary, and relying on such representations, paid defendant the amount claimed to be due, the question of voluntary payment was not involved. Id. It was immaterial, under such circumstances, that plaintiff had guarantied payment for the property. Id. Money deposited through false and fraudulent representations of material facts. In re Arnold & Co., 133 F. 789.

11. Amount of check made by plaintiffs to defendant at instance of third person, who secured check on the delivery to plaintiffs of a note made by him, and bearing the forged indorsement of defendant. Mulligan v. Harlam, 92 N. Y. S. 765. It is no defense in such case that defendant cannot be restored to his original position. Id. Evidence of defendant's good faith is inadmissible where there has been a demand before suit. Evidence as to conversations inadmissible. Id.

12. In re Arnold & Co., 133 F. 789. Persons advancing money to bankrupts on strength of false representations that they were earning sufficient profits to pay a stipulated weekly interest, that they were solvent and responsible, and had on hand sufficient money to pay all depositors the amount of their deposits, and that they did not pay dividends out of receipts, may prove their claims, though they knew that money was to be used in gambling. Id.

13. In re Arnold & Co., 133 F. 789.

14. Drainage Commission v. National Con-

a co-surety of his share of the debt by false representations that no part of the debt has been paid, where in fact the whole amount thereof has been paid by the other surety, does not entitle such co-surety to recover back his payment.[15]

Money paid under mistake of fact may be recovered,[16] provided it appears that the payor has not received the equivalent contemplated, and that it is against conscience for the payee to retain it,[17] and this is true, even though the former is guilty of negligence in making the payment,[18] unless the position of the payee has been changed to his prejudice toward the debtor in consequence of the payment.[19]

tracting Co., 136 F. 780. A public commission in charge of an improvement may recover improper profits made by a contractor, through substituting a cheaper material for that specified, in an action conditio indebiti, and is not confined to an action quanti minoris. Id. It is no defense to an action therefore that the contract has been executed (Id.), nor that the contractor lost money (Id.), nor that the contract was ultra vires (Id.), and the defendant is estopped to set up that the material furnished was as good as that specified (Id.).

15. Wash v. Sullvan & Co. [Tex. Civ. App.] 84 S. W. 368. Where plaintiff gave his note to defendant to secure the release of one of two co-sureties on a note due the latter, held, that he could not recover the amount thereof on learning, after he had paid his note, that the co-surety on defendant's note had paid it, since he had only performed his agreement, and it was defendant's duty to account to the co-surety for half the amount plaintiff had paid rather than to plaintiff. Id.

16. An executor who, as such, pays for repairs and improvements to property belonging to a third person at the request or with the knowledge of the latter, under the mistaken belief that it belongs to the estate, is entitled to be reimbursed therefor out of such property, but he cannot reimburse himself if he makes the payments as advances upon her share of the estate and recognizing her title to the property. Neil v. Harris, 121 Ga. 647, 49 S. E. 773. Plaintiff gave defendant money believing that he owed him a store account, and, the books not being accessible, defendant agreed to credit him with the amount due and return the balance, if any. It subsequently appeared that the debt which plaintiff sought to pay was owed by his mother, and defendant sued her and compelled her to pay it. Held, that plaintiff could recover the amount paid by him, no demand being necessary before suit. Sheppard v. Lang [Ga.] 50 S. E. 371. Evidence held to show that plaintiff received money in his individual capacity and not as officer of corporation. Id. Plaintiff held to have made out prima facie case, and court erred in granting nonsuit. Id. He who has paid through mistake, believing himself a debtor, may reclaim what he has paid. La. Civ. Code, art. 2302 (2280). Drainage Commission v. National Contracting Co., 136 F. 780. He who receives what is not due him, either through error or knowingly, obliges himself to restore it to him from whom he has unduly received it. La. Civ. Code, art. 2301 (2279). Word "knowingly" in this article means only with knowledge, and does not necessarily imply bad faith or wrongdoing, they being merely important as affecting the quantum of recovery. Id. Payments in excess of amount due. Truax v. Bliss [Mich.] 102 N. W. 635. Though dealings out of which transactions grew were gambling contracts, and defendant's account had been charged with commissions claimed by plaintiff for negotiating defendant's gambling contracts, aggregating more than the amount involved in the suit. Adler v. Searles & Co. [Miss.] 38 So. 209. Interest paid on a note and mortgage by defendant under the mistaken belief that he had acquired the legal title to the property on which the mortgage was a lien, may be recovered back as a counterclaim in an action on the note. Defendant assumed note and mortgage. Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22.

17. Both these facts must appear. Dickey County v. Hicks [N. D.] 103 N. W. 423. County held not entitled to recover money paid defendant for clerk hire, the amounts of which were erroneously included in defendant's monthly salary warrant instead of being paid directly to the clerks, it being stipulated and found that defendant paid the clerks sums in excess of the amounts received from the county, that the sums paid were the reasonable value of their services, that the services were necessary, and that the payments were accepted by the clerks as a complete discharge and satisfaction. Id. Award to county for overpayments on defendant's salary held proper. Id. Money paid under a mistake of fact, made in good faith and not arising from intentional neglect to inquire as to the real condition, may be recovered in indebitatus assumpsit, even though accompanied with a mistake or ignorance of law. Scott v. Ford, 45 Or. 531, 78 P. 742.

18. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761. Even though the party paying it inadvertantly overlooks the means of knowledge which he has at hand, if the party receiving the same is not entitled to it. Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615. Money paid by officer of trust company, which was trustee of an estate, to an attorney of a distributee upon his representation that he was still acting as such, where company had previously settled with the distributee under a decree of the orphans' court, at which settlement the attorney was present, made no objection to the order, and no demand for a fee from the fund paid, thereby waiving his right to one. Id.

19. Assignee for creditors of maker of note, which had been discounted by bank, paid the latter in full believing that estate

So, too, one may recover an item omitted by mistake from a settled account;[20] but money paid under mistake of law with knowledge of all the facts and in the absence of fraud, deceit or undue importunity cannot be recovered.[21]

Payments coerced under duress or unlawful compulsion may be recovered back,[22] but not money voluntarily paid under a claim of right and with full knowledge of the facts, even though such payment is made under protest,[23] nor money voluntarily paid in variation or change of a contract.[24]

Money paid to another for defendant's use cannot be recovered unless an express or implied request to make such payment is shown,[25] a mere voluntary payment being insufficient.[26]

was solvent. Later, in a settlement suit to which the bank was not a party, it was determined that estate was insolvent, and creditors who had been paid in full were ordered to refund. Held, that the assignee, not having notified the bank of these facts until limitations had run against the indorsers of the note, must bear the loss. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761.

20. Sale of cattle. Harman v. Maddy Bros. [W. Va.] 49 S. E. 1009.

21. Scott v. Ford, 45 Or. 531, 78 P. 742. Findings in action to recover money paid by executors held insufficient to show that it was paid under mistake of fact rather than of law, and hence not to support judgment for plaintiff. Id.

22. See, also, Duress, 5 C. L. 1047. Michel Brewing Co. v. State [S. D.] 103 N. W. 40. Payment under protest of an occupation tax after arrest but before trial in the police court, is involuntary, and may be recovered back if unwarranted, when made to escape the publicity and mortification of a trial, and where penalty might exceed the amount of the tax, and right of appeal from police court was not absolute. District of Columbia v. Chapman, 25 App. D. C. 95. One paying under protest back water rates illegally exacted may recover the same in assumpsit where city refused to furnish water unless payment was made. Chicago v. Northwestern Mut. Life Ins. Co. [Ill.] 75 N. E. 803. Threat by officers of musicians' union that, unless member paid illegal fine, he would be expelled, thus causing him to fear that, unless he paid it, he would be deprived of his means of earning a living, amounts to duress, entitling him to recover the fine which he paid under protest. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155. Right to recover illegal taxes paid under protest, see note 3 C. L. 1693, n. 45.

23. A mere threat to begin a criminal prosecution does not amount to legal compulsion so as to render involuntary a payment made to prevent it. Mere threat to prosecute and fine plaintiff for refusal to pay license tax for toll bridge does not render payment of such tax under protest involuntary so as to enable its recovery. Southern R. Co. v. Florence [Ala.] 37 So. 844. Payment made by purchaser of timber to release it from attachment by defendant claiming to be the owner of the land from which it was cut, in order to avoid expense of giving bond and employing counsel to defend the suit, held not paid under compulsion, and could not be recovered back, though defendant's claim was unfounded. Fitzpatrick v. Laconia Levee Dist. [Ark.] 85 S. W. 409. Pol. Code, § 3817, as amended by St. 1895, p. 333, c. 218, providing for redemption of realty sold to the state for delinquent taxes, is but an offer of the state to release its claims to the land on the terms mentioned, and, being accepted, the payment of penalties thereunder is voluntary and cannot be recovered, though the sale was void. Palomares Land Co. v. Los Angeles County, 146 Cal. 530, 80 P. 931. In an action to recover a sum paid under protest to redeem land from a sale on execution, complaint held not to show that sale was a cloud on plaintiff's title, and hence payment was a voluntary one. Maskey v. Lackmann [Cal.] 81 P. 115. Money paid by debtor to creditor to secure postponement of sale under decree of court and extension of time for him to prevent sale by payment of receiver's certificates held not paid under duress. Foster v. Central Nat. Bank, 93 N. Y. S. 603. Trustees of a dissolved charitable corporation which had no creditors, and to the property of which no one claimed title to reversion, could not recover back the proceeds of its property which they had voluntarily paid to the county treasurer in pursuance to the mandate of an alleged constitutional statute. Avila v. New York, 94 N. Y. S. 1132. The mere fact that a payment upon an illegal demand is made unwillingly and under protest, with notice that an action will be commenced to recover it back, does not render it compulsory so as to authorize its recovery. Michel Brewing Co. v. State [S. D.] 103 N. W. 40; Steffen v. State [S. D.] 103 N. W. 44 Payment by nonresident of taxes imposed by unconstitutional statute on nonresident wholesale liquor dealers, made because required by state officers as condition precedent to right of plaintiff to continue sale of liquors without subjecting himself to penalties prescribed by the statute, held voluntary and not made under duress. Michel Brewing Co. v. State [S. D.] 103 N. W. 40. None of the payments being made under honest belief on plaintiff's part that the law was valid, there was no mutual mistake of law by him and the officers of the state. Id.

24. Money paid by plaintiff for taxes which contract for management of property required defendants to pay. Seymour v. Warren, 93 N. Y. S. 651.

25. Hathaway v. Delaware County, 103 App. Div. 179, 93 N. Y. S. 436. Evidence in action for goods sold and work done held

Only the person who pays money through mistake or fraud or his assignee or one having an interest in the money can recover it.[27] A suit in assumpsit for money had and received to the plaintiff's use cannot be maintained against a mere servant or agent after he has paid over the money to his principal.[28]

Where payment of money has been enforced by execution upon a judgment or order of the court which is afterwards reversed or set aside, the law implies a promise to restore it to the party from whom it was exacted.[29]

If, without notice of another's claim thereto, a creditor receives money from his debtor in payment of a pre-existing debt, the true owner cannot thereafter compel him to account therefor.[30]

It has been said that to require proof of a fiduciary relation in establishing a case of money had and received is false in theory.[31]

In order to recover money deposited with another for a certain purpose, plaintiff must show that such purpose has been accomplished.[32] It is a complete defense to an action for money had and received that the money was paid under a contract and that the day for performance by defendant has not yet arrived.[33]

to support finding for defendant on the main issue and also on his cross complaint for money paid by him for the use of plaintiff at his request in installing mining machinery. Abner Doble Co. v. McDonald, 145 Cal. 641, 79 P. 369.

26. A mere voluntary payment of the liabilities of another, without his request, will not give an action in favor of the person making the payment. Hathaway v. Delaware County, 103 App. Div. 179, 93 N. Y. S. 436. Evidence held insufficient to show that any part of the money advanced by plaintiff was used to pay a debt of defendant. Id. One who voluntarily pays the debt of another, without his request or promise to repay, cannot recover the amount so paid. McGlew v. McDade, 146 Cal. 553, 80 P. 695.

27. Held, that turf association could not recover purse paid by one of its members to one winning a race through fraud, where claim was not assigned to it and it had no interest in the money under its by-laws. American Trotting Ass'n v. Reynolds [Mich.] 12 Det. Leg. N. 410, 104 N. W. 578. A suit for recovery of interest paid to a village treasurer on public deposits can be recovered only by a suit by an officer or officers authorized to care for or protect such funds. Nicholson v. Maile, 3 Ohio N. P. (N. S.) 201.

28. Not against tax collector who collects illegal tax and pays the same over to the county treasurer as required by statute. Craig v. Boone [Cal.] 81 P. 22.

29. Payment on execution not a voluntary one, though there has been no seizure of property. Chambliss v. Hass, 125 Iowa, 484, 101 N. W. 153. Restitution required where new trial was granted after appeal to, and affirmance by, supreme court. Id.

30. Evidence as to whether plaintiff had notice that money previously paid him by defendant's husband, and which was applied on the latter's debt, belonged to defendant, and hence should have been applied on note sued on, held to sustain finding for plaintiff. Tanner v. Lee, 121 Ga. 524, 49 S. E. 592.

31. Note: Cole v. Bates, 186 Mass. 584, 72 N. E. 333, cited 3 C. L. 1692, n. 31—affirms the rule.

But "to require a fiduciary relationship in a suit for money had and received does away with recovery under the doctrine of waiver of tort. Hudson v. Silliland, 25 Ark. 100; Knapp v. Hobbs, 50 N. H. 476. Where such fiduciary relationship exists, recovery is upon trust principles. In re Hallet's Estate, L. R. 13 Ch. Div. 696. The principal case is correct, however, in refusing recovery. The plaintff's relatonship with the bank, being that of creditor, he can still collect from it, since the defendant has not the defendant's money, but that of the bank, against whom only has a tort been committed. Moore v. Moore, 127 Mass. 22; Keener on Quasi-Contracts, p. 167. Recovery is allowed on the theory of ratification where one person presumed to act for another, but here the defendant claimed adversely. Vaughan v. Mathews, 13 Q. B. 187."—5 Columbia L. R. 249.

32. One who deposits money with a bank to be held by it to indemnify certain persons from liability as sureties on injunction bonds given by him can recover it back only by showing that such persons have been discharged from liability, or have forfeited their right to the indemnity. Complaint held not to state a cause of action on the fomer ground by alleging that an execution issued on a judgment rendered in the action against the depositor was returned satisfied, where it also shows that the return was subsequently amended to show that the execution was not satisfied, it not being alleged that the judgment was in fact paid (Cambers v. First Nat. Bank, 133 F. 975), nor on the latter ground by alleging that sureties joined in a conspiracy to defeat an appeal by plaintiff from the judgment by causing the withdrawal of the supersedeas bond given or procured by them, where such appeal would only have been effective if taken from a subsequent order denying a motion for a new trial, and it does not appear that he made any attempt to, or intended to, appeal therefrom (Id.).

33. Cannot maintain action where it appears that money was paid on a contract for a deed, and that time for delivery of deed has not yet arrived, on the ground that the

§ 4. *Use and occupation.*[34]—Since the right to recover for the use and occupation of real property always involves the relation of landlord and tenant, it is treated in that title.[35]

§ 5. *Torts which may be waived and sued as implied contracts.*[36]—Where one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort and charge the wrongdoer in assumpsit on the common counts as for goods sold, or money received.[37] So, too, the law raises an implied promise on the part of one selling property belonging to another to pay the proceeds to the owner,[38] and the latter may waive the tort, affirm the act, and sue for money had and received.[39] A commission merchant who, without notice of the mortgage, receives and sells mortgaged cattle sent to him for sale, without the knowledge or consent of the mortgagee, and in violation of the terms of the mortgage, and pays the proceeds, less his commission, to the consignor, does not derive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action on an implied contract.[40]

§ 6. *Remedies and procedure.*[41]—The action must of course be brought before the running of limitations against the claim.[42]

contract has been altered so as to reduce the size of the house to be conveyed. In such case can require delivery of deed called for at proper time, if alteration was made after she executed it, and if made before, and contract did not therefore express true agreement, she should sue in equity for its rescission. Joseph v. Isaac, 95 N. Y. S. 532.

34. See 3 C. L. 1694.

35. See Landlord and Tenant, 4 C. L. 389.

36. See 3 C. L. 1695.

37. As where defendant received and used plaintiff's money, and transferred to her worthless securities in a corporation organized for the transaction of his own private business and entirely under his control. Donovan v. Purtell [Ill.] 75 N. E. 334. Evidence held to justify refusal to direct verdict for defendant. Id. Defendant who obtained marble which he had not bought, under order on railroad company to deliver to him certain other marble. Teetzel v. Davidson Bros. Marble Co. [Neb.] 104 N. W. 1068. Complaint alleging that plaintiffs intrusted money to defendants to be used in securing bail for a third person, and that they were to return the same when such bail was exonerated, but that they refused to so return it, and converted it to their own use, held to state a cause of action ex contractu, instead of ex delicto, and recovery permitted under theory of money had and received under implied contract to repay it. Logan v. Freerks [N. D.] 103 N. W. 426. Held further, that it must be so treated in view of the answer and the issues thereby tendered. Id. There is an implied promise on the part of one who unlawfully and fraudulently deprives another of his money to repay it (Humbird v. Davis, 210 Pa. 311, 59 A. 1082), and the latter may waive the tort and sue him in assumpsit for money had and received (Id.). An action may be maintained by the injured party for his share of secret profits made by defendants who were jointly interested with them in the purchase of a mine and who acted as their agents in the transaction. Must account for benefits so obtained and share them with plaintiffs. Id. Evidence held sufficient to render defendants jointly liable. Id. Even where money or goods have been wrongfully taken from plaintiff, so that an action of tort will lie, yet, in all cases where defendant has received the benefits of the transaction, either by a sale or retention of the property converted, or in some other manner, plaintiff may waive the tort and sue in assumpsit. Yonkerman v. Fuller's Adv. Ag., 135 F. 613. Benefits paid by plaintiff to the defendant in ignorance of the true situation gives the plaintiff a right of action quasi ex contractu, whether or not defendant is guilty of fraud. Id. In an action to recover overpayments made to defendant under contract employing him as advertising agent, allegations in amended petition alleging that defendants rendered false accounts held immaterial. Id.

38. Jester v. Knotts [Del.] 57 A. 1094.

39. Horse. Jester v. Knotts [Del.] 57 A. 1094; Southern R. Co. v. Born Steel Range Co. [Ga.] 50 S. E. 488. Where the pleadings do not show that the property has been converted into money, an action to recover the value of the property is ex delicto. In such case justice court has no jurisdiction. Id.

40. Is liable in conversion. Greer v. Newland [Kan.] 78 P. 835.

41. See 3 C. L. 1695.

42. Suit on implied contract for services held barred. Boogher v. Roach, 25 App. D. C. 324. Count upon quantum meruit for services held barred under Civ. Code 1895, § 3768, where it appeared that more than four years elapsed after termination of services before suit was brought, during all of which time plaintiff was sui juris. Cooper v. Clayton [Ga.] 50 S. E. 399. Under Ky. St. 1903, §§ 2515, 2519, limitations on actions for the recovery of money paid by mistake begin to run from the time when the mistake should, by ordinary diligence, have been discovered. German Security Bank v. Columbia Finance & Trust Co. [Ky.] 85 S. W. 761. If action is brought after five years from making the mistake, plaintiff must allege and prove that he discovered it within five years before bringing suit, and could not,

In an action to recover money deposited to indemnify plaintiff's sureties on the ground that they have forfeited their right to indemnity by their acts and conduct, they are necessary parties defendant.[43]

An action on an implied promise follows the nature of the consideration, and as that is joint or several, so will the action be.[44]

The actions of assumpsit and for money had and received will lie where they have not been superseded by the code.[45] A complaint substantially in the form of the common count in assumpsit for goods sold and delivered and labor and work performed for a third person upon defendant's promise to pay therefor is sufficient under the New York code.[46] Under the North Carolina code an exception to a complaint that by its form it is for money had and received and, as such, cannot be maintained unless the money has been actually received by defendant, is untenable.[47] The usual rules of pleading apply.[48] A petition for recovery on an implied contract to pay the reasonable value of the services rendered is not fatally defective because it contains no averment of a promise to pay.[49] In Michigan in assumpsit for labor and materials furnished for the erection of a building, no sworn statement of the amount due laborers and materialmen need be filed where no liens for labor and matrials are pending and the time for filing them has passed.[50] A complaint to recover money paid for goods purchased, on the ground that the seller had no title, must allege that he had no title at the time of the sale.[51] One suing to recover for money paid to another's use must allege that it has not been repaid.[52] A count for money had and received and one on a note given in settlement of such claim are properly joined in the same complaint.[53] A petition on a quantum

by reasonable diligence, have discovered it sooner. Id. Claim of decedent's aunt for her care held barred by limitations and laches. Barnett's Adm'r v. Adams, 26 Ky. L. R. 622, 82 S. W. 406. Part of claim for caring for property which decedent inherited from her deceased father held barred by limitations. Id.

43. Cambers v. First Nat. Bank, 133 F. 975.

44. Humbird v. Davis, 210 Pa. 311, 59 A. 1082. Where agent is given money by several persons to purchase a mine, they may jointly sue him in assumpsit for their shares of secret profits made by him in the transaction, though their contributions to the fund were unequal. Id.

45. See Assumpsit, 5 C. L. 297.

46. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. S. 443.

47. Under Const. 1868, art. 4, § 1, and Code, § 133, abolishing forms of action, Code, § 233, prescribing the contents of the complaint, and § 550, providing that pleadings shall be liberally construed. Staton v. Webb, 137 N. C. 35, 49 S. E. 55.

48. See Pleading, 4 C. L. 980. A complaint for money had and received alleging that defendant was on a certain date indebted to a certain person in a specified sum for money had and received by defendant for his use and benefit with an allegation of an assignment of the claim to plaintiff and that the amount is unpaid is sufficient. Though not strictly in compliance with code provision that complaint shall consist of a statement of facts constituting the cause of action. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090. Defendant need not in the answer deny the allegations in any more specific language than that in which they are set forth in the complaint. Denial that defendant was indebted to person in question in sum alleged or any other sum for money had and received for his use or benefit, or upon any account at all, held sufficient. Id. Petition, when properly construed, held to have set forth but two causes of action, one on quantum meruit for value of services rendered by him to decedent's testator, and the other for breach of contract made by plaintiff's father with testator for plaintiff's benefit. Cooper v. Claxton [Ga.] 50 S. E. 399. Petition in action to recover overpayment on contract for electric power held sufficient. Southern Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450.

49. Brown v. Ricketts, 6 Ohio C. C. (N. S.) 215. Not ground for reversal, where from the whole record it appears that substantial justice has been done. Brown v. Ricketts, 5 Ohio C. C. (N. S.) 675. An agreement to pay being self evident from the facts found by the jury in a special verdict, judgment may be granted thereon. Id.

50. Morton v. Eaton [Mich.] 12 Det. Leg. N. 524, 104 N. W. 726. In assumpsit for labor and materials furnished for a barn, case held properly submitted to the jury. Id.

51. First Nat. Bank v. Columbia Sav. & Trust Co., 2 Ohio N. P. (N. S.) 525.

52. Failure of cross complaint for money paid for the use of plaintiff at his request to allege that the amount demanded had not been paid, held cured by answer denying the original indebtedness, by failure to object to evidence on that ground, and by the findings. Abner Doble Co. v. McDonald, 145 Cal. 641, 79 P. 369.

53. For money paid under void contract. Schultz v. Kosbab [Wis.] 103 N. W. 237.

meruit for services rendered for a decedent cannot be amended so as to recover on an express contract made with decedent's widow after his death to recover a given sum for such services.[54]

If the relation of the parties is such that a presumption of a promise to pay arises from the mere acceptance of beneficial work, the defendant has the burden of overcoming the presumption by proof that the work was done gratuitously, or for support and maintenance merely.[55] If the family or parental relation existed, the burden is on the claimant to show an agreement to compensate him for his work.[56] If the existence of such a relationship does not conclusively appear from closeness of kinship, the party asserting the status must prove it.[57] The burden is on one admitting the receipt of money intrusted to him for a specific purpose, to be repaid when such purpose was fulfilled, to show that he was thereafter authorized to retain it for a different purpose.[58]

In an action to recover land defendant may not give evidence of the value of improvements in the absence of a claim therefor in his answer.[59] In order to recover on an implied contract for materials furnished,[60] or for services, their value and the fact that they have not been paid for must be shown.[61] Plaintiffs cannot recover for the use of plans furnished under an invalid contract or a contract which they failed to perform in the absence of a showing that they were actually used,[62] or in the absence of proof of the fair value of the use.[63] The contract price is no proof of the fair value of the use.[64] A party who, in derogation of the statute of frauds, claims an interest in lands by virtue of a parol agreement, must prove it to the point of demonstration.[65] In an action for services in the operation of a machine, plaintiff is not entitled to the value of his services as a chemist, where it is not shown that only a chemist could operate such machine.[66]

In an action on an implied contract for services, any competent evidence tend-

54. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Petition held to allege cause of action on quantum meruit for services performed and not on contract. Id.

55, 56, 57. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719.

58. Logan v. Freerks [N. D.] 103 N. W. 426.

59. Caraway v. Moore [Ark.] 86 S. W. 993.

60. Proof as to reasonable value of materials furnished by plaintiff to third person at defendant's request held sufficient to go to the jury. Worthington v. Worthington, 100 App. Div. 332, 91 N .Y. S. 443.

61. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103 N. W. 574. Evidence as to what decedent said to him on subject of proposed codicil to her will held not to show valuation of services by decedent. Id. In action for work and labor, judgment for plaintiff in excess of plaintiff's estimate, which was the highest given, held erroneous, and judgment reversed on that ground and because against the weight of the evidence. Kassner v. Edsall, 92 N. Y. S. 288. In action for services of plaintiff's son, who was discharged after working under a void contract of apprenticeship, held, that plaintiff could not recover on evidence merely showing what was paid laborers for similar work, there being no proof that son's services were worth that amount. Fahlstedt v. Lake Shore Engine Works [Mich.] 12 Det. Leg. N. 152, 103 N. W. 588.

62. If individual members of county board learned anything from plans, held, no evidence that board received and used such information. Kinney v. Manitowoc County [C. C. A.] 135 F. 491.

63. Kinney v. Manitowoc Co. [C. C. A.] 135 F. 491. Cannot recover for retention of plans sent to navy department with request to return them, in absence of showing of damages. Proof of damages held too remote and speculative. Lundborg's Case, 39 Ct. Cl. 23.

64. Even if county board could be charged with use by individual members, contract price no proof of its value. Kinney v. Manitowoc County [C. C. A.] 135 F. 491.

65. Hartman v. Powell [N. J. Eq.] 59 A. 628. Evidence in suit to restrain owner of land from removing or interfering with pier and porch column placed on his land under alleged parol permission, held insufficient to support complainant's claim. Id.

66. Klein v. American Cigar Co., 95 N. Y. S. 756. In an action for services, materials, and expenses connected with the operation and construction of a machine, where it appears that plaintiff was to be paid for the materials under a special contract, and was to have his expenses, and the only evidence as to the value of his services was as to their value because of his being a chemist, and it did not appear that the services of a chemist were necessary to operate the machine, a general verdict in his favor will be set aside, where there is nothing to show upon what theory the jury found such verdict. Id.

ing to rebut the presumption that plaintiff expected to receive, and defendant to pay compensation, is admissible.[67] In an action for services rendered decedent during his last illness and for board and room rent, the relations of the parties and the circumstances under which the services were rendered may be shown.[68] Declarations of the decedent are admissible for the purpose of showing that services were rendered under an understanding or agreement that they were to be paid for.[69]

In case the services were rendered under a contract, it is generally held to be admissible to limit the amount of the recovery.[70] In assumpsit for extra work, specifications for the work done under the original contract are inadmissible.[71]

In an action for money had and received it is proper for plaintiff to prove by any competent evidence that the money in question or any part thereof has been paid to defendant, and for defendant to prove that it has not.[72] In an action at law by an executor to recover money retained by his attorney, where defendant shows that plaintiff allowed him to retain the money in payment for his services, plaintiff may show that he was induced to do so by deceit.[73]

67. Evidence as to whether a witness ever heard defendant request plaintiff to do any work. Grotjan v. Rice [Wis.] 102 N. W. 551. In action for services rendered in caring for deceased during his last illness, deed executed by decedent to plaintiff prior to rendition of services, and before it could be inferred that services sued for would be needed, and inferentially shown to have been given for a different consideration, held inadmissible. Birch v. Birch [Mo. App.] 86 S. W. 1106. In action for architect's services, survey of part of building for which services were rendered held inadmissible, where it does not appear by whom, or at whose request, or for what purpose it was made. Barnett v. Peper [Mo. App.] 89 S. W. 345.

68. Sum usually paid persons rendering service for hire, and ordinary charges for rooms and board held not necessarily controlling where friendship existed between the parties. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103 N. W. 574. Question as to whether services rendered decedent during period of two years before her death were rendered under a mutual understanding that they were to be paid for held for the jury under the evidence. Id. An implied contract by a parent to pay a child for services can only be proved by showing the circumstances and what the parties said and did in respect to their relations to each other. Wessinger v. Roberts, 67 S. C. 240, 45 S. E. 169.

69. Should be limited to that purpose. Luizzi v. Brady's Estate [Mich.] 12 Det. Leg. N. 59, 103 N. W. 574. Declarations of decedent as to her intention to pay her daughter for services. Wessinger v. Roberts, 67 S. C. 240, 45 S. E. 169.

70. Defendant may, in action for labor and materials furnished under contract not completed on time, set up the contract for the purpose of limiting the recovery to the contract price, less the amount of his damages caused by the delay. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248. Proof showing special agreement to pay same rates for labor and material as was paid for other work, held not a fatal variance from complaint on quantum meruit seeking to recover the reasonable value thereof, in view of defendant's answer, and under 2 Bal. Ann. Codes & St. § 4944, providing that no variance shall be deemed fatal unless it has misled the adverse party to his prejudice. Griffith v. Ridpath [Wash.] 80 P. 820.

71. Streator Independent Tel. Co. v. Continental Tel. Const. Co. [Ill.] 75 N. E. 546.

72. Evidence as to whether person alleged to have paid money to defendant was indebted to him under a certain contract, or on account of certain logging transactions. Le Clair Co. v. Rogers-Ruger Co. [Wis.] 102 N. W. 346. Action can be maintained only when defendant has received money which in equity and good conscience he ought to pay to plaintiff. In action by assignee of one of the partners in a joint enterprise to recover a claim belonging to the firm, alleged to have been paid to defendant, evidence held insufficient to show that defendant had collected or received any part of the debt in question. Id. In action to recover money paid under protest and in order to be relieved from certain suits, where plaintiff testified that he did not owe defendant anything, but had compromised his indebtedness, and given a note therefor which he had paid prior to the commencement of the suits against him, held, that plaintiff was entitled to introduce note. Grubbs v. Ferguson, 136 N. C. 60, 48 S. E. 551. Evidence that, after execution of note, defendant sued plaintiff on a debt, and had him arrested, held to have no bearing on issue whether note was final settlement between the parties, and its admission was error. Id. Under an allegation of the advancement of money to defendant for its use and benefit, a bond executed by defendant to plaintiff, reciting defendant's need of money, and its advancement by plaintiff, is admissible to show the nature of the transaction between the parties. Right to use bond in evidence if necessary not waived by election to stand on count for money lent rather than on count on bond given to secure its payment. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

73. Reilly v. Provost, 93 App. Div. 208, 90 N. Y. S. 591.

A suit upon a quantum meruit or implied contract, for services is not supported by proof of an express contract to pay a contingent fee therefor, which is champertous and which has been discarded and abandoned, and under which no compensation is claimed.[74] Recovery cannot be had under a complaint for moneys paid under duress where the proof offered and the judgment finally asked is for moneys paid under a judicial sale of property taken from the purchasers.[75]

The question whether a parental or family relationship existed may be one of fact or law according to the circumstances.[76] The question whether the evidence rebuts the inference that services are rendered with the expectation that they will be paid for is for the jury.[77] The question whether the facts as shown by the undisputed evidence create a liability, under the law, on the theory of an implied contract, is one of law for the court.[78]

A failure to find the value of services which have been held gratuitous is immaterial.[79]

IMPLIED TRUSTS; IMPLIED WARRANTIES; IMPOUNDING; IMPRISONMENT FOR DEBT; IMPROVEMENTS, see latest topical index.

INCEST.

Intercourse by one with the daughter of his deceased wife is incestuous where there is living issue of the marriage to continue the affinity between him and the wife's relations.[80] Though the facts would have justified a conviction of rape, it is none the less incest,[81] though in some jurisdictions a distinction is drawn by the statute between incestuous rape and incestuous adultery.[82] Counts for rape and incest based on the same act may be joined.[83] Knowledge of the relationship when not required by the statute need not be alleged.[84] Where the female did not consent,[85] or it has been said where she was under the paternal influence of defendant,[86] she is not an accomplice, though some courts decline to recognize any middle ground between ravishment and that voluntary assent which will make the woman an accomplice.[87] Testimony of a girl that she "had sexual intercourse" not a mere conclusion.[88] Evidence that the woman became pregnant and went to a distant place where defendant corresponded with her and sent her money is admissible.[89] Declarations of the woman when dying in child birth are not admissible.[90] Evidence of cruel treatment not connected with the sexual act is in-

74. Boogher v. Roach, 25 App. D. C. 324.

75. Foster v. Central Nat. Bank, 93 N. Y. S. 603.

76. Whether one taken into family while a minor was a servant or member of the family held for jury. Fitzpatrick v. Dooley [Mo. App.] 86 S. W. 719. Whether decedent was a member of plaintiff's family is a mixed question of law and fact for the jury. Birch v. Birch [Mo. App.] 86 S. W. 1106.

77. Question for jury whether services as transfer clerk were rendered under implied understanding that railroad would pay for them, where evidence for plaintiff shows that they were not rendered as a gratuity, but under a mistake on the part of plaintiff as to his rights. Blowers v. Southern R. Co., 70 S. C. 377, 50 S. E. 19.

78. Contract to pay for good will of business. Acme Harvester Co. v. Craver, 110 Ill. App. 413.

79. Dallman v. Frank [Cal. App.] 82 P. 564.

80. Tagert v. State [Ala.] 39 So. 293, collating and distinguishing the cases.

81. State v. Rennick [Iowa] 103 N. W. 159. Under Rev. St. § 7019. In that daughter was under age of consent, or was overcome by force and violence. Straub v. State, 5 Ohio C. C. (N. S.) 529.

82. Whidby v. State [Ga.] 49 S. E. 811.

83. Wiggins v. State [Tex. Cr. App.] 84 S. W. 821.

84. State v. Rennick [Iowa] 103 N. W. 159.

85. State v. Rennick [Iowa] 103 N. W. 159. And see note 3 C. L. 1696.

86. Straub v. State, 5 Ohio C. C. (N. S.) 529. See note on this point 3 C. L. 1695 n. 82.

87. Whidby v. State [Ga.] 49 S. E. 811.

88. Straub v. State, 5 Ohio C. C. (N. S.) 529.

89, 90. People v. Stison [Mich.] 12 Det. Leg. N. 104, 103 N. W. 542.

admissible where there is no evidence that the woman yielded from fear.[91] Other acts of intercourse are not admissible to rebut evidence that the prosecution was inspired by malice.[92]

INCOMPETENCY.

Scope of topic.—This topic treats only of incompetency to contract. Incompetency to execute a will is elsewhere treated.[93]

§ 1. *Mental weakness sufficient to constitute incapacity*[94] must be such that the person does not know what he is about and is incapable of appreciating the effect of his acts.[95] Hence one who comprehends the nature and effect of the transaction in which he is engaged is not incompetent.[96] Mere dullness of intellect,[97] weakness,[98] or imbecility of mind, or inability to act wisely or discreetly or to effect a good bargain is not enough.[99] The queston of incompetency is one of fact.[1]

§ 2. *Effect of incompetency on contracts.*[2]—As a general rule a contract entered into by an incompetent is voidable only,[3] though under certain circumstances it may be totally void.[4] The rule is the same, though the incapacity be the re-

91. Whidby v. State [Ga.] 49 S. E. 811, and see 3 C. L. 1696, n. 87.

92. Wiggins v. State [Tex. Cr. App.] 84 S. W. 821.

93. See Wills, 4 C. L. 1863.

94. See 3 C. L. 1696.

95. Intoxication to render one incompetent. Effect of intoxication on contract. Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695. In the absence of unfair advantage, the drunkenness which will relieve from a contract **must be such as deprives a party of his reason and understanding** (Spetz v. Howard, 23 Pa. Super. Ct. 420), and so complete that the party was unable to understand the nature and effect of the act in which he was engaged and the business he was transacting (Waldron v. Angleman [N. J. Law] 58 A. 568).

96. Not necessary that he understand the legal effect of the words employed in a deed. Moorhead v. Scovel [Pa.] 60 A. 13. Unreasonable and unjustifiable acts towards one's family does not show incompetency. Griesy v. Veldhouse [Iowa] 101 N. W. 741.

97. That a party is so intoxicated that he does not "fully" realize what he is doing is insufficient. Nance v. Kemper [Ind. App.] 73 N. E. 937.

98. To avoid a deed. Kirk v. Kirk [Ga.] 50 S. E. 928. Mere weakness of intellect from sickness or old age is insufficient. Moorhead v. Scovel [Pa.] 60 A. 13.

99. Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695.

Evidence insufficient to show incapacity in a grantor who executed a deed of gift. Moorhead v. Scovel [Pa.] 60 A. 13; Ice v. Ice, 26 Ky. L. R. 1065, 83 S. W. 135; Post v. Hagan [N. J. Eq.] 61 A. 566. To show mental incapacity in a **grantor 76 years of age** and in feeble health. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734.

Grantor 80 years of age, infirm and confined to his bed. Brown v. Cole, 126 Iowa, 711, 102 N. W. 782. To show **insanity** in a grantor. Griesy v. Veldhouse [Iowa] 101 N. W. 741.

Evidence sufficient to sustain a finding of incompetency on an inquisition of lunacy. In re Preston, 46 Misc. 46, 93 N. Y. S. 283. To show mental incapacity in a grantor. Parker v. Ballard [Ga.] 51 S. E. 465. A finding on an inquisition of lunacy that the alleged lunatic "is incompetent to manage his affairs, that incompetency manifests itself in foolish and irrational conduct concerning business affairs, failure to recognize his own handwriting, etc., is equivalent to a finding of imbecility. In re Preston, 46 Misc. 46, 93 N. Y. S. 283.

NOTE. Mental capacity to execute a deed is such a degree as enables the grantor to clearly understand the nature and consequences of the conveyance, and the fact that his mental powers are impaired, or that he is subject to a delusion, if this is not such as to influence him in making the conveyance, does not impair its validity. Burgess v. Pollock, 53 Iowa, 273, 36 Am. Rep. 218; Lindsay v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Blakely v. Blakely, 33 N. J. Eq. 502; Stewart v. Flint, 59 Vt. 144; Whittaker v. Southwest Virginia Improvement Co., 34 W. Va. 217; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97. See Tiffany, Real Prop. 1152 et seq.

1. Whether one was so drunk as to render him incompetent to contract is a question for the jury. Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695.

2. See 3 C. L. 1697.

3. A deed by an incompetent. Logan v. Vanarsdall [Ky.] 86 S. W. 981.

4. A conveyance of the homestead by the husband at a time when he is non compos as to his duty to his wife and mentally incom-

sult of the incompetent's own act.[5] Incompetency is not available as against subsequent bona fide purchasers.[6]

§ 3. *Remedies and procedure.*[7]—The continuation of normal or rational conditions in the mind of a person may be established by abstract testimony of nonexpert witnesses,[8] and a nonexpert after detailing the extent of his opportunities to deduce a correct opinion may give his judgment as to the sanity of another's mind.[9] Mental incapacity once shown to exist is presumed to continue.[10] This, however, is a rebuttable presumption and may be overcome by parol evidence.[11] An adjudication of incompetency creates no presumption that the condition existed previous to such adjudication.[12]

An incompetent who seeks to avoid his contract must rescind within a reasonable time after regaining his normal condition,[13] and must surrender the consideration received as a condition precedent.[14] On cancellation of a deed, the grantee should be placed in statu quo.[15] Limitations do not run against a right of action accruing to one by virtue of an act done by an incompetent while such condition exists.[16]

INDECENCY, LEWDNESS AND OBSCENITY.[17]

Prostitution.[18]—Evidence that a woman cohabits with one certain man does show her to be a prostitute.[19] Within the statute punishing one who procures or permits his wife to live in a house of prostitution, a house containing several rooms, each occupied by a prostitute as a place of prostitution for herself alone, is a house of prostitution.[20] "Virtuous female" in an indictment is sufficient under a statute relating to inveighing females "reputed virtuous" into houses of prostitution.[21]

petent to bind himself is void and equity will cancel it. Moseley v. Larson [Miss.] 38 So. 234.

5. A contract made by one so intoxicated as not to know the consequences is voidable, even though the intoxication is voluntary. Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 A. 959. Voluntary intoxication producing mental incompetency, invalidates a contract executed while the party was in such condition. Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695.

NOTE. Drunken persons as parties to relation of principal and agent: If a person at the time of entering into a contract, executing a deed, or appointing an agent, is so drunk as to be incapable of understanding the nature and effect of his act, the effect of his act is the same as if he were insane from any other cause, hence the appointment of an agent by a drunken person and acts done by the agent in pursuance of such appointment are no more binding on him than if entered into personally. Bush v. Buinig, 113 Pa. 310, 57 Am. Rep. 469; Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595. The fact that the principal was intoxicated when he made the contract does not render it void, but only voidable, and he may repudiate or ratify it when he becomes sober (Mansfield v. Watson, 2 Iowa, 111; Reinicker v. Smith, 2 Har. & J. [Md.] 421), or it may be ratified by his guardian, committee or representative (Broadwater v. Darne, 10 Mo. 277).—From Clark & Skyles, Ag., p. 46.

6. Logan v. Vanarsdall [Ky.] 86 S. W. 981.

Note: This is dictum and seems wrong in principle.

7. See 3 C. L. 1697.

8. Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532.

9, 10. Howard v. Carter [Kan.] 80 P. 61.

11. An adjudication of incompetency two years prior to the transaction in question creates only a rebuttable presumption of incompetency at the time of the transaction, which may be removed by parol. Logan v. Vanarsdall [Ky.] 86 S. W. 981.

12. A finding of incompetency on an inquisition of lunacy under Code Civ. Proc. § 2335, has no retroactive effect, and is not evidence that the person was incompetent some months previous. Swanstrom v. Day, 93 N. Y. S. 192.

13. On the ground of drunkenness. Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 A. 959. That one does not seek relief for five years is a circumstance to be considered. Griesy v. Veldhouse [Iowa] 101 N. W. 741.

14. Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 A. 959.

15. Should be given a lien for taxes on other moneys expended because of the conveyance, and charged with the rental value. Lawson v. Davis, 26 Ky. L. R. 1014, 82 S. W. 1010.

16. Howard v. Carter [Kan.] 80 P. 61.

17. See, also, Disorderly Houses, 5 C. L. 1025; Profanity and Blasphemy, 4 C. L. 1084.

18. See 3 C. L. 1697.

19. Van Dalsen v. Com. [Ky.] 89 S. W. 255.

20. People v. Mead, 145 Cal. 500, 78 P. 1047.

21. State v. Dickerhoff [Iowa] 103 N. W. 350.

Obscene words or publications.[22]—A female 21 years of age is not a "youth" within a statute relating to communications designed to corrupt the morals of youth,[23] nor is an ambiguous communication exhibiting no manifest indecency within the statute.[24]

Lascivious conduct.[25]—Under the California statute punishing lascivious acts which do not constitute any other crime and which tend to arouse the sexual desire of any child, the sex of the child is immaterial,[26] nor need it be alleged.[27]

INDEMNITY.

§ 1. *Definition and distinctions.*[28]—If the contract is to indemnify or save harmless from loss or liability only, it is an indemnity contract as that term is ordinarily used;[29] but if in addition it undertakes that a contract made by another shall be performed, it is in that respect guaranty.[30] Both may exist by terms of the same instrument.[31] From this it follows that, while guaranty is a collateral undertaking, a contract of indemnity is an independent agreement.[32] Where the indemnity is given against a class of casualties or for the protection of specific property it is generally called insurance.[33] The cases treating of the equitable right of indemnity as between co-obligors will be found in their appropriate titles.[34] Forthcoming and other bonds, though closely allied to indemnity, are treated elsewhere.[35] A covenant on the part of a lessee to pay taxes is not one of indemnity.[36]

§ 2. *The contract. Requisites and validity.*[37]—Like other contracts, the contract of indemnity is vitiated by fraud,[38] and must be based upon a valuable

Evidence held to sustain conviction of man and wife for enticing girl into house of prostitution. State v. Dickerhoff [Iowa] 103 N. W. 350.

22. See 3 C. L. 1697.

23. Edwards v. State [Tex. Cr. App.] 85 S. W. 797.

24. Writing requesting recipient to "stay with" writer after school held not designed to corrupt the morals of youth. Edwards v. State [Tex. Cr. App.] 85 S. W. 797.

25. See 3 C. L. 1698.

26, 27. People v. Curtis [Cal. App.] 81 P. 674.

28. See 3 C. L. 1698.

Laws regulating casualty and indemnity companies are discussed in the title Insurance, 4 C. L. 157.

29. Where it was necessary to complete buildings in order to make a second mortgagee secure, a bond given the latter to secure the performance of the building contract without unreasonable delay held to constitute a contract of indemnity. Burr v. Union Surety & Guaranty Co., 95 N. Y. S. 114.

30. Trinity Parish v. Aetna Indemnity Co., 37 Wash. 515, 79 P. 1097.

31. Building contractor's bond conditioned for "faithful performance of all conditions," etc. Trinity Parish v. Aetna Indemnity Co., 37 Wash. 515, 79 P. 1097. Defendant purchased certain lots, taking title in a trustee, who executed mortgages to secure deferred payments of purchase money. Defendant then entered into a contract with the trustee, thereby agreeing to pay the mortgages, interest, etc., and to indemnify the trustee for all loss on his part by reason of his having executed such mortgages, held, that the contract was not merely one of indemnity, but also bound defendant to pay the mortgage debt and could be enforced by the trustee's assignee. Hay v. Cudaback [C. C. A.] 139 F. 369.

32. Mortgagee agreed to indemnify a purchaser of a portion of the property mortgaged against judgment liens for a present consideration passing to the mortgagee. Peterson v. Creason [Or.] 81 P. 574. Cyc. Law Dict. "Guaranty."

33. See Insurance, 4 C. L. 157.

34. See Contribution, 5 C. L. 751; Suretyship, 4 C. L. 1595; Torts, 4 C. L. 1682.

35. See Attachment, 5 C. L. 302; Bonds, 5 C. L. 422; Executions, 5 C. L. 1384; Injunction, 4 C. L. 96; Replevin, 4 C. L. 1284, and the like.

36. Broadwell v. Banks, 134 F. 470.

37. See 3 C. L. 1698.

38. Where defendant was a native of Greece and at the time of entering into the contract had been in this country about five years and had "but an imperfect knowledge of the English language," but was "a man of good, shrewd business ability," and contract was fully explained to him by an attorney,

consideration.[39] Being an independent agreement, the contract is not within the statute of frauds.[40] The acceptance of the contract is an approval of it.[41] The validity of a bond given an unincorporated association is not affected by the fact that the personnel of the membership of such association is constantly changing;[42] but it may be enforced by those who are members of the association at any given time.[43]

§ 3. *Interpretation and effect of contract.*[44]—In the construction of the contract the intention of the parties governs.[45] Statements and representations

held no fraud. Waas v. Anderson [Conn.] 61 A. 433. And see Waring v. U. S. Fidelity & Guaranty Co., 24 App. D. C. 119.

39. Vendee waiving objections to goods and accepting same held a sufficient consideration. James v. Libby, 92 N. Y. S. 1047, rvg. 44 Misc. 210, 88 N. Y. S. 812, on other grounds. Where, as part consideration for the purchase of certain personal property replevied, defendant agreed to indemnify plaintiff, as surety on a forthcoming bond given in such suit, held, indemnity contract was founded on sufficient consideration. Waas v. Anderson [Conn.] 61 A. 433.

40. Peterson v. Creason [Or.] 81 P. 574.

41. Bond given lodge by one of its officers. Coombs v. Harford, 99 Me. 426, 59 A. 529. One who accepts and acts on an indemnity contract without objection is bound by the limitations in its terms, though it does not cover the risks contemplated by the obligee. Orion Knitting Mills v. U. S. Fidelity & Guaranty Co., 137 N. C. 565, 50 S. E. 304.

42, 43. Coombs v. Harford, 99 Me. 426, 59 A. 529.

44. See 3 C. L. 1699.

45. See 3 C. L. 1699, n. 42.

ILLUSTRATIONS. Contracts construed: A deposit by a tenant to secure the performance of the **conditions of lease** held not to apply to the tenant's obligation to surrender the premises at the end of the term. Wolf v. Dembosky, 95 N. Y. S. 559. Where defendant owned coal under land, the surface of which was owned by another, and conveyed the coal to plaintiff, giving an obligation to indemnify him for any damage resulting to the surface of the land by reason of **"skillful and careful mining,"** held, such contract did not impose on plaintiff the duty of leaving proper and sufficient supports for the surface. Youghlogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924. Complaint showing application of bank's funds by the cashier in payment of the latter's individual indebtedness held to state a cause of action on cashier's fidelity bond protecting bank from cashier's **fraud, dishonest or criminal acts.** Rankin v. Bush, 102 App. Div. 510, 92 N. Y. S. 866. Complaint showing misappropriation or embezzlement of bank's funds by cashier held to state a cause of action on latter's bond. Id. Vendor of sausages agreeing to indemnify vendee for any **claim** of too much fat made **by foreign purchaser,** held, could recover on such contract, the sausages being denied entrance into the foreign country. James v. Libby, 92 N. Y. S. 1047, rvg. 44 Misc. 210, 88 N. Y. S. 812. See 2 C. L. 1700, n. 51. Where defendant purchased tea of plaintiff to be sold at retail, plaintiff agreeing to give a building lot to every purchaser of a pound of tea who paid $2 extra for a deed, and defendant guarantied that **all** the lots owned by plaintiff **would be sold within three months,** held that, on expiration of the three months, plaintiff was entitled to recover of defendant $2 for each lot which it had failed to dispose of. Hathaway v. O'Gorman, 26 R. I. 476, 59 A. 397. A stipulation in a building contract that the last instalment due thereunder is to be paid when the building is surrendered free of all liens, requires an indemnitor, which gives an undertaking conditioned that the principal shall **faithfully comply with the terms of the contract,** to see that the building is surrendered free from liens. McKinnon v. Higgins [Or.] 81 P. 581. Contract indemnifying **county** and fiscal court **against loss,** the indemnitor is not liable for personal injuries resulting from a defective elevator in the county courthouse. Simons v. Gregory [Ky.] 85 S. W. 751. Contract indemnifying employer from **loss by larceny or embezzlement** of employe held not to cover debts due employer by employe for money borrowed. United States Fidelity & Guaranty Co. v. Overstreet [Ky.] 84 S. W. 764. One indemnifying an employer against any act of **fraud or dishonesty** on the part of an employee **in connection with the duties of his office or position,** held not liable for the price of a bill of goods bought of the indemnitee by the employe as an independent purchaser. Orion Knitting Mills v. U. S. Fidelity & Guaranty Co., 137 N. C. 565, 50 S. E. 304. Where plaintiff corporation sold defendant its business and defendant covenanted to save plaintiff harmless **from all claims, etc., on account of debts, contracts or engagements,** held, defendant was not liable for the salary of plaintiff's president, who acted as general manager after the sale, in the absence of any showing that plaintiff agreed to continue its business during the president's term or to retain him as manager after it ceased business. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. Where surety company becomes surety for builder on contract for erection of 21 houses and also becomes surety for owner on contract with third person to complete and sell fifteen of them, the two contracts are separate and distinct, and, where surety company completes the 21 houses on default of the contractor, the fact that the owner has failed to pay the builder the entire contract price does not authorize the company to foreclose a deed of trust on the fifteen houses, given it by the owner to secure performance of the second contract. An attempt to do so will be enjoined, the rights of the surety growing out of the failure of the owner to pay

made for the purpose of securing the contract will not be construed as warranties unless the language used is incapable of any other interpretation;[40] but the contract providing that any willful misstatement or suppression of fact by the indemnitee shall render the contract void, a mere belief on the part of an officer of a corporate indemnitee that it is immaterial whether the questions are answered truly or not does not render such answers immaterial.[47] "Willful misstatement" means any material false statement made voluntarily with knowledge of its falsity.[48] In the absence of mistake, fraud or ambiguity, the legal effect of the terms of the contract cannot be modified by extrinsic evidence of any preliminary negotiations or agreements, or as to how the parties understood the transaction.[49] By reference thereto, another contract may be made a part of the indemnity obligation.[50] A bond of indemnity, not stipulating how long it shall remain in force, but covenanting that so long as it shall so remain the obligor shall be paid an annual premium in advance, does not require the payment of the premium so as to continue the obligation, but leaves the obligee at liberty to decline to make payment, and thus put a period to the contract, so far as the rights of third persons are not affected.[51] The creditor acquires no interest in money[52] or security[53] given by the indemnitor to the indemnitee to protect the latter until the indemnitor becomes insolvent and a claim is made.[54] Where one covenanted not to sue one joint tort feasor the fact that he gave such joint tort feasor an indemnity bond does not change the character of the transaction to a release.[55] The execution of an indemnity bond may constitute an election to sue in assumpsit on prospective torts.[56] One giving a bond to a corporation in its corporate name is estopped to deny its capacity to sue.[57]

§ 4. *Actions on contract.*[58]—The contract being strictly one of indemnity, the indemnitee cannot recover thereon unless actual loss be shown,[59] though it

the contract price being left for the determination of a court of law. Mercantile Trust Co. v. Hensey, 21 App. D. C. 38.

46. Fidelity insurance. Guthrie Nat. Bank v. Fidelity & Deposit Co., 14 Okl. 636, 79 P. 102.

47. Fidelity insurance. Fidelity & Casualty Co. v. Bank of Timmonsville [C. C. A.] 139 F. 101.

48. Fidelity & Casualty Co. v. Bank of Timmonsville [C. C. A.] 139 F. 101. Instruction that bond was not avoided unless the misstatements were made "with intent to secure renewals of the bond," held erroneous. Id.

49. Orion Knitting Mills v. U. S. Fidelity & Guaranty Co., 137 N. C. 565, 50 S. E. 304.

50. Indemnity contract reciting that the principal had entered into a written agreement bearing a certain date, "in substance practically as follows," held to incorporate the principal's contract so as to render the indemnitor liable for a breach thereof. Ausplund v Aetna Indemnity Co. [Or.] 81 P. 577. Where a bond is conditioned for compliance with certain covenants of a specified lease, such covenants are as much a part of the condition of the bond as if set forth therein. McCullough v. Moore, 111 Ill. App. 545.

51. Fidelity & Deposit Co. v. Libby [Neb.] 101 N. W. 994.

52. Where the indemnitor pays money to the indemnitee to indemnify it against a claim made, the money belongs to the indemnitee. Cannot be garnished as belonging to the claimant. Collins, Grayson & Co. v. Savannah, F. & W. R. Co. [Ga.] 50 S. E. 477.

53. Mortgage given by debtor to protect his surety. Dyer v. Jacoway [Ark.] 88 S. W. 901.

54. Where mortgage was given by debtor to protect his surety, the latter may in good faith release the security after the debtor's insolvency and before claim is made. Dyer v. Jacoway [Ark.] 88 S. W. 901.

55. Robertson v. Trammell [Tex.] 83 S. W. 1098.

56. Where a street railway company executed a bond to indemnify a city against all loss, damage, etc., occasioned by the railway company, held, such bond determined the rights and liabilities between the parties and precluded the city from maintaining an action of trespass on the case to recover from the railway company the amount of a judgment rendered against the city for a defect in a street caused by the railway company's negligence. City of Pawtucket v. Pawtucket Elec. Co. [R. I.] 61 A. 48.

57. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073.

58. See 3 C. L. 1700.

59. Burr v. Union Surety & Guaranty Co., 95 N. Y. S. 114. Where parties agreed to a short period of limitations, held, such provision ran from date damage was suffered, though contract provided another date. Id. Indemnitee must prove that he paid a proper amount. Collins, Grayson & Co. v. Savannah, etc., R. Co. [Ga.] 50 S. E. 477. Where a mortgagee agreed to indemnify a purchaser

has been held that proof of the debtor's insolvency is sufficient to show loss,[60] and where the contract is against liability, proof of loss is unnecessary.[61] Limitations do not begin to run until loss is incurred.[62] Contract periods of limitations are generally held valid if reasonable.[63] Such provisions may be waived.[64] The liability of the indemnitor cannot be litigated in an action against the indemnitee,[65] and a bill in equity to compel the indemnitor to make payment direct to the creditor cannot be maintained unless the indemnitee has performed all conditions precedent to liability on the part of the indemnitor.[66] Under most contracts, prompt notice of loss is a condition precedent to recovery,[67] and in such case it is not necessary for the indemnitor to show that earlier notice would have been of material benefit to him.[68] This requirement may be waived.[69] Notice given an indemnitor to appear and defend a suit brought against the indemnitee imposes

of a part of the property against judgment liens, the purchaser's right of action on the contract held not to accrue until he was required to pay something in order to protect his title against such liens. Peterson v. Creason [Or.] 81 P. 574. In an action on the bond of a subcontractor to save the principal contractor harmless, a complaint that the subcontractor had incurred indebtedness which the principal contractor had been obliged to pay, and that the subcontractor had on demand refused to make reimbursement held not demurrable. Pacific Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772. See 3 C. L. 1700, n. 50.

60. Where one agreed to indemnify another from loss in purchasing shares of a corporation and the corporation after selling its property was indebted to the extent of $8,000 or $10,000 and had worthless judgments for about $9,000, held, an action was maintainable on the indemnity subject to the right of the indemnitor to a credit, if anything was left after payment of the corporate debts, to the extent of his pro rata part. Bonta v. Harvey [Ky.] 88 S. W. 1079.

61. Where one agreed to pay claim and hold another "free and harmless" from the debt, it is not necessary that the indemnitee should have been compelled to pay the debt by a course of legal proceedings. Forster, Waterbury & Co. v. Gregory, 107 Ill. App. 437.

62. Burr v. Union Surety & Guaranty Co., 95 N. Y. S. 114.

63. Where a building contract provided that the indemnitor might on breach of the contract complete the same and it undertook to so do, contract limitation period of six months after breach of contract held unreasonable. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577.

64. An indemnitor on a building contract assuming to complete the same held to waive a stipulation in the undertaking limiting the time within which an action might be brought to six months after breach. Ausplund v. Aetna Indemnity Co. [Or.] 81 P. 577. An indemnitor on a building contract by accepting from the owner final payments on the building contract and then permitting liens to be filed against the property, held to waive right to insist that action by owner to recover for damage caused thereby was not instituted within contract time. McKinnon v. Higgins [Or.] 81 P. 581.

65. A landlord's cause of action against an independent contractor for negligently causing damage to tenant's property cannot be litigated in a suit against the landlord by the tenant. Nahm v. Register Newspaper Co. [Ky.] 87 S. W. 296.

66. O'Connell v. New York, etc., R. Co., 187 Mass. 272, 72 N. E. 979.

67. An indemnity bond to secure the performance of a building contract without unreasonable delay, held mere delay did not entitle the surety to notice, but only when it appeared that the principal had violated his contract to complete the buildings without unreasonable delay. Burr v. Union Surety & Guaranty Co., 95 N. Y. S. 114. Where there was a month's delay in carrying out the contract and the surety was given notice within seven days after delay came to knowledge of indemnitee, held sufficient. Id. Under an indemnity bond insuring a corporation against larceny or embezzlement of an employe, and requiring notice immediately after the occurrence of act indemnified against shall come to the employer's knowledge, held, three weeks' delay by secretary and director of corporation, after knowledge of act in sending notice would bar recovery. National Discount Co. v. U. S. Fidelity & Guaranty Co., 94 N. Y. S. 457. Where notice of cashier's defalcation was given to indemnitor by telegraph immediately upon the fact being discovered, followed by a notice by mail about a week later, held, question whether defendant was given "immediate" notice was for the jury. Fidelity & Casualty Co. v. Bank of Timmonsville [C. C. A.] 139 F. 101. See 3 C. L. 1701, n. 72.

68. In an action on a bond indemnifying employer for embezzlement by an employe, held defendant need not prove that prompt notice might have helped toward the recovery of some of the loss, or affected its decision as to canceling the bond, or aided in bringing the offending employe to justice. National Discount Co. v. U. S. Fidelity & Guaranty Co., 94 N. Y. S. 457.

69. Where insurer in an employer's indemnity policy made no objection on the ground that notice was not promptly given, but tried to make a settlement with embezzling employe, and then made the indemnitee make a proof of loss and take steps for the criminal prosecution of the employe, held, failure to give prompt notice was waived. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80.

upon the former the duty of defending, and renders him liable for the result of the suit;[70] but in the absence of such notice, the indemnitor is not bound by the suit.[71] Notice by the attorney for the plaintiff in such suit to the attorney for the owner in another suit brought by the person injured against the owner is not such notice as will affect the owner.[72] If additional damages accrue, the complaint can be amended.[73]

In action on an employer's indemnity policy, the employe's entries, reports and statements made in the course of his duties in the guarantied employment are admissible against the indemnitor,[74] as are admissions of indebtedness made by the employe in the course of an attempted settlement.[75] Evidence that the employer had applied some of the employe's remittances on an indebtedness due from the employe prior to the giving of the bond is inadmissible unless it is shown what specific sums were so applied.[76] Statements of cashier and representative of indemnitee bank are admissible to show that contract was delivered in escrow.[77] In an action to recover money paid under an indemnity contract, evidence of the worthlessness of the indemnitor's security is inadmissible.[78] Cases dealing with the sufficiency of the evidence are shown in the notes.[79] The burden is on the indemnitor to show the falsity of any statements contained in the indemnitee's application.[80] The indemnitee must prove that the contract covered the act in question,[81] and that he paid a proper amount.[82]

§ 5. *Defenses.*[83]—Material misrepresentations will avoid the contract.[84] The fact that the employe by disobeying instructions renders the statements false is no defense.[85] That the contract was delivered in violation of an escrow agree-

70. Forster, Waterbury & Co. v. Gregory, 107 Ill. App. 437.

71. Busell Trimmer Co. v. Coburn [Mass.] 74 N. E. 334. Implied contract by property owner to indemnify city for injuries due to defective sidewalks. City of Chester v. Shaffer, 24 Pa. Super. Ct. 162.

72. City of Chester v. Shaffer, 24 Pa. Super. Ct. 162.

73. Pacific Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772.

74. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80; Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073.

75, 76. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073.

77. Blair v Security Bank, 103 Va 762, 50 S. E. 262.

78. Stone & Co. v. Mulvaine [Ill.] 75 N. E. 421.

79. In an action on an employer's indemnity policy, evidence held sufficient to warrant a finding of the embezzlement of the employe. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80. In an action on an indemnity bond to recover the value of personal property, evidence of the amount paid therefor by claimant and as to what the property was worth at the time of its purchase, which was near the time of conversion, held sufficient evidence of value to sustain a judgment for plaintiff. State v. Steele & Co., 108 Mo. App. 363, 83 S. W. 1023. Evidence, in an action on an indemnity bond for the value of property wrongfully taken on execution against claimant's husband, held sufficient to show that her claim to the property was bona fide. Id.

80. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80.

81. Where a bank cashier's fidelity bond covered only acts and defaults committed within 12 months next before the date of the discovery of the act or default on which the claim was based, held not to cover an alleged larceny of silver claimed to have been deposited in May, 1900, but not found in the bank's vaults when the cashier absconded in August, 1901, there being no evidence as to when the same was taken. Fidelity & Casualty Co. v. Bank of Timmonsville [C. C. A.] 139 F. 101.

82. Collins, Grayson & Co. v. Savannah, F. & W. R. Co. [Ga.] 50 S. E. 477.

83. See 3 C. L. 1701.

84. Misrepresentations by an employer to a fidelity insurance company as to the state of the accounts of his employe, the amount of cash the latter had on hand, and the amount of cash that would be in the hands of such employe, and as to when accounting would be had with him, are material, and if false, will avoid a policy of insurance issued on the strength thereof, especially where the employer agreed that such statements should be taken as conditions precedent and as a basis of the bond. Waring v. U. S. Fidelity & Guaranty Co., 24 App. D. C. 119. And see Waas v. Anderson [Conn.] 61 A. 433.

85. Where the application for an employer's indemnity policy stated that the largest amount of cash in the custody of the employe at any one time was about $50.00, and there was no evidence, in an action on the policy, that any larger amount had ever been allowed to come into the employe's hands until the time of his embezzlement, which was out of the ordinary course of events, the fact that the sum embezzled exceeded $50.00,

ment is a complete defense.[86] In an action on an employer's indemnity policy, defendant cannot rely on the falsity of statements in plaintiff's application unless such defense is pleaded.[87]

§ 6. *Measure of recovery.*[88]—The indemnitee yielding to an improper demand, the indemnitor is not liable for the amount thus improperly paid.[89] The indemnitee is generally entitled to recover reasonable attorney's fees.[90]

INDEPENDENT CONTRACTORS.[91]

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work.[92] The independence of the relation is not affected by the fact that no fixed price is agreed upon in advance for the work,[93] nor by a reservation by the employer of the right to supervise or inspect the work for the purpose merely of determining whether it is being done in accordance with the contract.[94]

The doctrine of respondeat superior has no application to the relation;[95] hence,

held no defense. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80.

86. Blair v. Security Bank, 103 Va. 762, 50 S. E. 262.

87. Goldman v. Fidelity & Deposit Co. [Wis.] 104 N. W. 80.

88. See 3 C. L. 1702.

89. Collins, Grayson & Co. v. Savannah, F. & W. R. Co. [Ga.] 50 S. E. 477.

90. Surety on indemnity bond held entitled to recover of the principal, under an indemnity contract between the two, a sum paid by it on account of the principal's default with reasonable attorney's fees. City Trust, Safe Deposit & Surety Co. v. Waldhauer, 95 N. Y. S. 222.

91. See 3 C. L. 1702. See special article Independent Contractors Under Employers' Liability Acts, 3 C. L. 1704.

92. Francis v. Johnson [Iowa] 101 N. W. 878; Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446; Larson v. Centennial Mill Co. [Wash.] 82 P. 294; Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127.

Illustrations: Painter employed to paint a house for a lump sum, no directions being given as to manner of doing work, was an independent contractor, and owner of house was not liable for damage caused by fire started by negligent use of paint burner. Francis v. Johnson [Iowa] 101 N. W. 878. Persons employed by owner of building to furnish materials and do the work in constructing floors and roofing in building, and who did such work according to their own method, not being under the direction or control of the owner, but responsible to him only for the result, were independent contractors. Miller v. Merritt, 211 Pa. 127, 60 A. 508. Teamster paid at a certain rate per foot for hauling timbers was not an independent contractor, and owner was liable for negligent piling of them in the street. Macdonald v. O'Reilly, 45 Or. 589, 78 P. 753. Person who agreed to make certain sewer excavation according to certain specifications, for an agreed sum, was an independent contractor. Kelly v. New York, 94 N. Y. S. 872. When driver of wagon was not subject to discharge by defendant, and was not under its control except that it could instruct him when to haul its product, he was not defendant's servant. Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322. Where compress company received cotton on its own platforms, and gave a receipt which the shipper exchanged for a bill of lading from the carrier, the compress company was not the agent or servant of the carrier, but an independent contractor, and the carrier was not liable for cotton lost by fire through negligence of the compress company in handling or storing it. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127 One who furnished labor and materials for church, he and his laborers being hired by the day, under a contract containing no specifications as to work, which was done under direction of a building committee, was not an independent contractor. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446.

Note: In Linehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287, the court said: "The absolute test is not the exercise of power of control but the right to exercise the power of control." The contrary has been held in Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 A. 32. The court in Goldman v. Mason City, 2 N. Y. Supp. 337, said that when one represents the will of the employer in the result of his work only and not as to the means, he is an independent contractor and not a servant. This would seem to be the better rule. Harris v. McNamara, 97 Ala. 181, 12 So. 103; Bennett v. Truebody, 66 Cal. 509, 6 P. 329, 56 Am. Rep. 117; Forsyth v. Hooper, 11 Allen [Mass.] 419; Knowlton v. Hoit, 67 N. H. 155, 30 A. 346; Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699.—3 Mich. L. R. 414.

93. One employed to unload boilers with his own men, under his direction, no orders or directions being received from employer's foreman, was an independent contractor. Galatia Coal Co. v. Harris, 116 Ill. App. 70.

94. Larson v. Centennial Mill Co. [Wash.]

an employer is not liable to third persons for negligent acts of the contractor or his servants.[96] But there are exceptions to this rule. Thus, the employer is liable where the work required to be done under the contract is inherently dangerous,[97] or involves acts which will constitute a nuisance, unless properly guarded against,[98] or involves a duty to the public or a third person,[99] or which will necessarily bring

82 P. 294. Right of general supervision reserved. Miller v. Merritt, 211 Pa. 127, 60 A. 508.

95. The doctrine of respondeat superior does not apply where the one sought to be held as master is without authority to direct the time or manner of doing the work or to select or direct the employes engaged thereln. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127. Where one contracts with another to do work which may be done in a lawful manner, and has no choice in the selection of the workmen, and no control over the manner of doing the work, except as to the result to be obtained, he will not be liable for acts of the contractor or his servants, as the doctrine of respondeat superior does not apply. Macdonald v. O'Reilly, 45 Or. 589, 78 P. 753.

96. Cameron Mill & Elevator Co. v. Anderson [Tex.] 81 S. W. 282; Galatia Coal Co. v. Harris, 116 Ill. App. 70. City not liable for act of independent contractor in allowing water to stand in street excavation. Kelly v. New York, 94 N. Y. S. 872. A company which was in fact the principal contractor for certain work, which was executed by it through another company, cannot escape liability for damages to a third person by claiming that the company actually doing the work was an independent contractor. American Contracting Co. v. Sammon, 6 Ohio C. C. (N. S.) 121. Owner of park not liable to spectator injured by rocket fired by servant of contractor employed to give exhibitions. Deyo v. Kingston, etc., R. Co., 94 App. Div. 578, 88 N. Y. S. 487.

Note: "It is a well-recognized rule of law that an employer is not liable for the acts of an independent contractor. King v. New York, etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37. On the other hand, one who invites others to come upon his premises must use due care to render them reasonably safe, and cannot avoid this duty by the employment of an independent contractor. Curtis v. Kiley, 153 Mass. 123. Hence, where the work is of a dangerous nature, the landowner must not only use reasonable care in the selection of the contractor, but he must also see that due precautions are taken to prevent harm. The ground of liability is not the negligence of the contractor, but that of the landowner in failing to keep his premises in a reasonably safe condition. Thompson v. Lowell, etc., R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345."—From 18 Harv. L. R. 144, commenting on Deyo v. Kingston, etc, R. Co., supra.

97. Cameron Mill & Elevator Co. v. Anderson [Tex.] 81 S. W. 282. As where city contracts for construction of underground tunnel, use of dynamite being necessary. Chicago v. Murdoch, 113 Ill. App. 656.

98. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446.

Note: When work is wrongful in itself, or if done in the ordinary manner must result in a nuisance, the employer is liable for injury resulting to third persons, although the work is done by an independent contractor. Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. Rep. 231; James v. McMinimy, 93 Ky. 471, 40 Am. St. Rep. 200; Davie v. Levy, 39 La. Ann. 551, 4 Am. St. Rep. 225; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Clark v. Fry, 8 Ohio St 358, 72 Am. Dec. 590; Ware v. St. Paul Water Co., 2 Abb. [U. S.] 261; City, etc., R. Co. v. Moores, 80 Md. 348, 45 Am. St. Rep. 345; Overton v. Freeman, 11 C. B. 867; Koch v. Sackman, etc., Inv. Co., 9 Wash. 405; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Congreve v. Smith, 18 N. Y. 79, 83; Cuff v. Newark, etc., R. Co., 35 N. J. Law, 17, 10 Am. Rep. 205; Moore v. Townsend, 76 Minn. 64; Spence v. Schultz, 103 Cal. 208; Darmstaetter v. Moynahan, 27 Mich. 188; Robbins v. Chicago, 4 Wall. [U. S.] 657, 679; 18 Law. Ed. 427; afg. Chicago v. Robbins, 2 Black [U. S.] 418, 17 Law. Ed. 298.—From note, Covington & Cincinnati Bridge Co. v. Steinbrock [Ohio] 76 Am. St. Rep. 399.

99. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446. Where because of the nature of the work the employer is under a duty to others to see that it is carefully performed, liability for negligence cannot be shifted to an independent contractor. Pony show operated at public resort. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81.

Note: If a party is under a duty to the public to see that work he is about to have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid liability in case the work is negligently done to the injury of another. Covington, etc., Bridge Co. v. Steinbrock, 61 Ohio St. 215, 76 Am. St. Rep. 375; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136; Lancaster, etc., Imp. Co. v. Rhoads, 116 Pa. 377, 2 Am. St. Rep. 608; Pickard v. Smith, 10 C. B. [N. S.] 470, 480; Meier v. Morgan, 82 Wis. 289, 33 Am. St. Rep. 39; Benjamin v. Metropolitan St. R. Co, 133 Mo. 274; Cabot v. Kingman, 166 Mass. 403, 406, 33 L. R. A. 45; Colgrove v. Smith, 102 Cal. 220, 27 L. R. A. 590; Spence v. Schultz, 103 Cal. 208; Norton v. St. Louis, 97 Mo. 537; Barrow, etc., Co. v. Kane, 88 F. 197; Barkman v. Pennsylvania R. Co., 89 F. 453. Compare Chicago, etc., Gas Co. v. Myers, 168 Ill. 139. So, if work is being done by contract, the contractee is liable for injury arising from the violation of his duty to third persons in the performance of the work. City, etc., R. Co. v. Moores, 80 Md. 348, 45 Am. St. Rep. 345.—From note, Covington & Cincinnati Bridge Co. v. Steinbrock [Ohio] 76 Am. St. Rep. 405.

See, also, Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; Wilbur v. White, 98 Me. 191, 56 A. 657; Boomer v. Wilbur, 176 Mass.

wrongful consequences, or that cannot be performed except under the right of the employer, who retains the right of access.[1]

It is the duty of those whose work necessarily makes dangerous a public street to give notice by proper signals, warnings or barriers to passers-by, unless the situation is such as to warn a person in the exercise of ordinary care without such precautions,[2] and this duty cannot be shifted by the employment of an independent contractor.[3] But a city is not liable for acts or negligence of a contractor if work on the streets or walks is done under a contract to which the city is not a party.[4]

A public [5] or quasi public [6] corporation is liable for a wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation which he could not have exercised independently of its charter;[7] it is not liable for a wrongful act of an independent contractor not exercising any special power derived from its charter.[8] A corporation which accepts and operates trains over a track constructed by a contractor is liable to an adjacent landowner for damages resulting from negligent construction of the track.[9]

An independent contractor owes his own servants the duties owed by a master to his employes,[10] and owes others working in the vicinity the duty of ordinary care to avoid injuring them.[11] The master of such other employes may pre-

482, 57 N. E. 1004, 53 L. R. A. 172; Lowell v. B. & L. R. Co., 23 Pick. [Mass.] 24, 34 Am. Dec. 33; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224, cited in 3 Mich. Law Rev. 414.

1. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446.

2. Plaintiff recovered for injury resulting from being struck by board whch fell from scaffold over sidewalk. Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446.

3. Where a contractor fails to properly guard an obstruction placed in the street under a permit from a city, the city and the contractor are jointly liable for resulting injuries. Godfrey v. New York, 93 N. Y. S. 899. "Independent contractor" rule does not apply where the contract necessarily involves obstruction of a highway, rendering it unsafe for travel. Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43. Where work to be done in a street necessarily obstructs and renders it dangerous, the one for whom the work is done cannot avert liability for negligence in doing it by proving that he let the work to a contractor. Boyd v. Chicago & N. W. R. Co. [Ill.] 75 N. E. 496. One who was authorized to make a street excavation was liable for injuries resulting from failure to properly light and guard it, though work was let to and was in charge of an independent contractor. Cameron Mill & Elevator Co. v. Anderson [Tex.] 81 S. W. 282.

A municipality cannot relieve itself indefinitely of its duty to keep its streets in proper condition, by contract with an independent contractor. City, and not contractor who had done work on streets, liable for injury resulting from a defect therein. Harvey v. Chester [Pa.] 61 A. 118.

4. Where sidewalk was built under contract with county supervisors, city was not liable for contractor's negligence. Wright v. Muskegon [Mich.] 12 Det. Leg. N. 122, 103 N. W. 558. Though city paid one-third expense of walk, it was not liable for negligence of contractor employed by property owner in placing an unsafe barrier on the walk. Thompson v. West Bay City [Mich.] 100 N. W. 280. That city supervised work of contractor building walk for property owner did not make it liable for contractor's negligence. Id. See, also, Highways and Streets, 5 C. L. 1645.

5. Independent contractor rule does not apply where an individual or corporation has work done pursuant to a special franchise or charter power. As where city undertakes to construct underground tunnel. Chicago v. Murdoch, 113 Ill. App. 656.

6. Railroad corporation. Boyd v. Chicago & N. W. R. Co. [Ill.] 75 N. E. 496. Railway, street railway and gas companies. Chicago Hydraulic Press Brick Co v. Campbell, 116 Ill. App. 322.

7. Construction of railroad on corporation's right of way is not an exercise of any of its charter powers or privileges. Boyd v. Chicago & N. W. R. Co. [Ill.] 75 N. E. 496.

8. Railway company not liable for injury to employe of subcontractor while shoveling gravel in a cut. Boyd v. Chicago & N. W. R. Co. [Ill.] 75 N. E. 496.

9. Gulf, etc., R. Co. v. Roberts [Tex. Civ. App.] 86 S. W. 1052.

10. Such as duty of furnishing reasonably safe appliances. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089. The independent contractor—and not his employer—is liable for injuries to his servants caused by his negligence. Contractor liable for injury due to defective material used in roofing, and to improper manner of doing work. Miller v. Merritt, 211 Pa. 127, 60 A. 508. See Master and Servant, 4 C. L. 533.

11. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089. A contractor is not liable for injuries to servants of an independent sub-

sume that the independent contractor will perform these duties,[12] and is not liable for a breach thereof.[13] The general employer owes the servant of an independent contractor only the duty of ordinary care to avoid injuring him.[14] An employer is not ordinarily liable for an injury to his own servant caused by negligence of a servant of an independent contractor;[15] nor is a master liable to his servants for a breach of duty owed by him to an independent contractor.[16]

Statutes imposing upon railway companies liability for injuries to employes caused by negligence of fellow-servants do not impose that liability upon an independent contractor of a railway company.[17]

INDIANS.

§ 1. *Who are Indians and what is their legal status.*[18]—Indian nations are clothed with the characteristics of a distinct political community and have the right and power to admit to citizenship in their tribe, members of other tribes[19] or to adopt persons of mixed blood,[20] and this right is not precluded by the fact that the share in the national lands and funds of persons previously admitted will be diminished.[21] Aliens so admitted are estopped to question the provisions of the constitution of the nation which was adopted prior to their being made mem-

contractor, if he is not shown to have been negligent in the selection of the subcontractor, or in furnishing material or otherwise. Larson v. Centennial Mill Co. [Wash.] 82 P. 294. Contractor employed to do mason work on building is under no duty to guard elevator shafts or clear away refuse from his work, in the absence of any contract stipulation; hence not liable to the servant of another contractor injured because such precautions were not taken. Thaney v. Friederick & Sons Co., 44 Misc. 134, 89 N. Y. S. 787.

12. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089.

13. As where a servant was injured through negligent use of unsafe appliance by employes of independent contractor, who had failed to procure available safe appliances. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089.

14. City held not liable for injury to servant of one employed by it to deliver sand. McMullen v. New York, 93 N. Y. S. 772. The owner of premises on which a contractor is erecting a building owes the contractor's employes the duty of ordinary care to avoid injuring them. Sack v. St. Louis Car Co. [Mo. App.] 87 S. W. 79. A general employer owes to the servant of a subcontractor the duty of due care to prevent injury by exposure to unusual dangers, not known to him. Plaintiff, servant of subcontractor of defendant on its elevated road, recovered for injury caused by trolley flying off wire when car was run too fast past the place where plaintiff was at work. Wagner v. Boston El. R. Co. [Mass.] 74 N. E. 919.

15. Loom operator injured through negligence of a servant of an independent contractor engaged in putting a sprinkler system in the plant. Held, master not liable. Smith v. Naushon Co., 26 R. I. 578, 60 A. 242.

16. Miller v. Moran Bros. Co. [Wash.] 81 P. 1089.

17. Priv. Laws 1897, p. 83, c. 56, construed. Avery v. Oliver, 137 N. C. 130, 49 S. E. 91.

See special article, "Independent Contractors under Employers' Liability Acts," 3 C. L. 1704.

18. See 3 C. L. 1706.

19. Aliens so admitted have an equality in the property and funds of the body politic. Delaware Indians' Case, 38 Ct. Cl. 234.

20. An Indian of **half blood** may become a member of an Indian tribe by adoption, and one so adopted has all the rights of a tribal Indian and is exempt from state taxation so long as his tribal relations continue. United States v. Heyfron, 138 F. 964. A **quarter blood Indian** who has most of his life resided with the Indians, married a member of the tribe and has been adopted by the nation, is entitled to the same rights as other members of the tribe. His property is exempt from state taxation. United States v. Heyfron, 138 F. 968.

21. Not as to the Cherokee nation by the fact that the share of the Delawares, admitted to the nation under the agreement of April 8, 1867, in the funds and lands of the nation will be diminished. Delaware Indian's Case, 38 Ct. Cl. 234.

bers of the tribe.[22] The 13th Amendment to the Federal Constitution freed slaves within the Indian nations;[23] but the freedmen did not by virtue of their emancipation become members of the trible, entitled to share in the tribal property.[24]

Indians are wards of the nation.[25] It is the public policy of the United States to guard Indian country and reservations against intrusion by white men.[26] The provisions of the United States statutes looking to the protection of Indians from intruders remain in force so long as tribal government exists.[27] Authority to deal with lands set aside for them is vested in congress, and it is not open for the courts to interfere with congressional regulations, though not deemed so beneficial as might be.[28] An Indian is not presumed incapable of making a valid contract,[29] and it is no defense to an action on his contract that he is an Indian and that all his property is exempt from execution.[30]

§ 2. *Federal and state government of Indians and their habitat.*[31]—When the United States grants to an Indian the privileges of citizenship and requires him to be subject to the civil and criminal laws of the state wherein he resides, it places him outside the reach of police regulations of congress,[32] and a sale of liquor to him cannot be punished by virtue of authority given congress by the commerce clause of the constitution.[33] The emancipation thus created cannot be set aside at the instance of the Federal government without the consent of the individual Indian and the state, and is not affected by the fact that lands granted to the Indian are subject to condition against alienation or the further fact that he is guarantied an interest in tribal or other property.[34] Agreements between a tribe and the United States apply only to Indians who participate in it.[35]

§ 3. *Tribal government subject to Federal dominion.*[36]—Congress has power to establish citizenship courts in an Indian nation.[37] A restriction upon the power of taxation by an Indian nation must be by express stipulation in the treaty.[38] The laws relating to real property of an Indian nation are to be found in the constitution and laws of the nation.[39] In the interpretation of laws adopted from another state for the government of Indian Territory, the opinions of the

22. Delaware Indians' Case, 38 Ct. Cl. 234.

23. Chickasaws. Choctaw Case, 38 Ct. Cl. 558.

24. Choctaw Case, 38 Ct. Cl. 558.

25. Naganab v. Hitchcock, 25 App. D. C. 200.

26. McCoy's Case, 38 Ct. Cl. 163.

27. Morris v. Hitchcock, 21 App. D. C. 565,

28. Naganab v. Hitchcock, 25 App. D C. 200.

29. That the maker of a note is an Indian who does not speak or write the English language and understands it imperfectly does not show that there was no meeting of the minds when he executed the note. Warnock v. Itawis [Wash.] 80 P. 297.

30. Action on his promissory note. Warnock v. Itawis [Wash.] 80 P. 297.

31. See 3 C. L. 1706.

32. In re Heff, 197 U. S. 488, 49 Law. Ed. 848. An Indian allottee under an act conditioning the allotment against alienation for 25 years, but granting the Indian the privileges of citizenship and subjecting him to state laws, is not subject to the police regulations of congress after receiving the first patent. Act Feb. 8, 1887 (24 St. at L. 388, c. 1191). Id.

33, 34. In re Heff, 197 N. S. 488, 49 Law. Ed. 848.

35. The agreement with the Nez Perce Tribe that allottees, whether under the care of an agent or not shall be subject for 25 years to all the Federal laws relative to the sale of liquor to Indians, does not apply to one who had previously received an allotment and had become subject to state laws. Ex parte Viles, 139 F. 68.

36. See 3 C. L. 1706.

37. Act Cong. July 1, 1902, c. 1362, pars. 31, 33, 32 Stat. 646-648, establishing a Choctaw and Chickasaw citizenship court for the purpose of determining citizenship in such tribes and providing the procedure therein, is constitutional. Wallace v. Adams [Ind. T.] 88 S. W. 308. Legislation authorizing the commission to the Five Civilized Tribes to determine citizenship in the five nations is valid. Dick v. Ross [Ind. T.] 89 S. W. 664.

38. The treaty of 1855 with the Chickasaws does not restrict the ordinary powers of taxation of such nation. Morris v. Hitchcock, 21 App. D. C. 565. The Act of the Chickasaw legislature imposing a permit tax on live stock within the nation owned by nonresidents, and declaring that nonpayment of such tax is detrimental to the peace and welfare of the nation is within the powers granted by treaty to such nation. Id.

39. Cherokees. Delaware Indians' case, 38 Ct. Cl. 234.

supreme court of the state are entitled to more than ordinary weight.[40] An approval by congress of an act passed by the legislature of an Indian nation, after its repeal by such nation, is not binding.[41] The court of claims has no jurisdiction to investigate an alleged improper use of the national fund by an Indian government,[42] nor to pass upon the rights of individual Indians in such fund.[43] The rights of the Chickasaw nation and Chickasaw freedmen must be determined by the treaty of July 10, 1866.[44] In a controversy between two Indian tribes, parol evidence is not admissible to vary the terms of a written contract between them.[45]

Persons and their property whose presence within a reservation is detrimental to the peace and welfare of the Indians may be removed,[46] and the exercise of discretion by the executive officers of the United States in such case is not subject to judicial review, especially when the removal is because of a refusal to pay a permit tax levied by the Indian nation.[47] An Indian nation is not a necessary party to a suit to restrain United States officers from removing from lands of the nation cattle of owners who refuse to pay a tax levied by the legislature of such tribe.[48]

The decree of the peacemaker's court of the Seneca Indians of New York is conclusive as to the facts determined.[49] The national council cannot award a new trial of a proceeding before such court without notice to one affected by the decree.[50] The decree may be enforced by a party to the proceeding.[51]

§ 4. *Indian lands and properties.*[52]—The country in which Indian title has not been extinguished is generally regarded as Indian country.[53] The territory derived from Mexico never was Indian country,[54] and was not made so by the extension over the Indians therein, the trade and intercourse laws.[55]

Nature of title.[56]—As a general rule, Indians acquire only a qualified interest in lands patented to them, but their deed constitutes color of title for the purpose of adverse possession.[57] Title to lands allotted under the "General Allotment Act" remains in the United States during the trust period.[58] A reservation, to In-

40. Laws relative to guardianship and protection of Indians adopted from the statutes of Arkansas. Morris v. Hitchcock, 21 App. D. C. 565.

41. Act of the Chickasaw legislatue adopting freedmen into the nation. Choctaw case, 38 Ct. Cl. 558.

42. Under the Act of Cong. June 28, 1898. Delaware Indians' Case, 38 Ct. Cl. 234.

43. Delaware Indians' Case, 38 Ct. Cl. 234.

44. Under this treaty they have no interest in tribal property. Choctaw Case, 38 Ct. Cl. 558.

45. Delaware Indians' Case, 38 Ct. Cl. 234.

46. The laws of the United States relative to intruders on the lands of the Chickasaw Nation and the power of the secretary of the interior to remove them have not been repealed. Morris v. Hitchcock, 21 App. D. C. 565. The unlawful grazing of cattle on the lands of an Indian nation which is detrimental to the peace and welfare of the Indians may be abated by the removal of the cattle if it cannot be abated by the removal of the owners Id.

47. Morris v. Hitchcock, 21 App. D. C. 565.

48. Act Cong. June 28, 1898, even if applicable in this court, applies only where title of property claimed by the tribe is involved. The tax is not the property of the tribe within the meaning of such statute. Morris v. Hitchcock, 21 App. D. C. 565.

49. Under the Indian laws of New York, the supreme court in enforcing a judgment of the peacemakers court cannot inquire into facts determined by the decree Jimeson v. Pierce, 102 App. Div. 618, 92 N. Y. S. 331.

50. One allotted dower by the decree of such court. Jimeson v. Pierce, 102 App. Div. 618, 92 N. Y. S. 331.

51. The widow of a Seneca Indian who was allotted dower by the peacemaker's court in partition proceedings is sufficiently a party to maintain an action to enforce the decree. Jimeson v. Pierce, 102 App. Div. 618, 92 N. Y. S. 331.

52. See 3 C. L. 1707.

53. Hayt's Case, 38 Ct. Cl. 455.

54. There was no Indian title to be extinguished. Hayt's Case, 38 Ct. Cl. 455.

55. Hayt's Case, 38 Ct. Cl. 455.

56. See 3 C. L. 1707. Laws 1889-90, p. 499, to enable Indans to sell lands on the Puyallup Reservation, includes in its title the provision removing the exemption from taxation. Goudy v. Meath [Wash.] 80 P. 295.

57. Murphy v. Nelson [S. D.] 102 N. W. 691.

58. The United States may recover for timber unlawfully cut by third persons from

dians, in a treaty, unless qualified, is equivalent to a grant in fee.[59] Rights in land secured by treaty survive the private acquisition of such land by grant from the United States or the state.[60] Such rights are not subordinate to the powers acquired by the state over such land on its admission into the union,[61] and patents to such land, though absolute in form, can grant no exemption from such rights.[62] A restriction against alienation in a deed from the United States to an Indian ward,[63] or to an Indian citizen,[64] is valid, and deprives the grantee of power to dispose of the property by will.[65] Whether a regulation of the executive department removes from the property patented to an Indian, the restrictions placed upon it depends largely on the departmental construction of such regulation.[66] A provision in a treaty that lands allotted shall be exempt from levy, sale and forfeiture is removed by a statute giving the Indians power to lease, incumber, grant or alienate.[67]

Where the United States under the provisions of an Indian treaty sells Indian lands, it occupies a position similar to that of a trustee.[68] If the treaty prescribes that the lands shall be sold in the manner that public lands are, the secretary of the interior has power to prescribe rules regulating such sale and the compensations of officials connected therewith.[69]

Whether the share or interest in that fund belonging to the ancestors of the Oneidas in Canada passed to the Oneidas remaining in New York, or whether it should remain in the treasury is a question.[70] The secretary of the interior has not power to determine who are entitled to share in this fund.[71] The United States should not pay it away until it is determined who is entitled to it.[72]

The Act of March 3, 1901, for the relief of the Sissiton and Wahpeton Indians, requires the court to ascertain the individual members of the bands who remained

lands allotted under the Act Feb. 8, 1887, c. 119 (24 Stat. 388). United States v. Gardner [C. C. A.] 133 F. 285.

59. The United States government by treaty reserved to the Indians a certain tract of land, reserving to designated individual Indians a fixed portion of such land, to be located subsequently. Later by a patent which restricted the power of alienation, the government defined these portions. Held, title passed by the treaty, making the restriction in the patent invalid, so that such restriction would not prevent the claiming of title by adverse possession against the individual Indians. Francis v. Francis [Mich.] 99 N. W. 14.

Note: The view that title passes to the Indians by treaty, Jones v Meehan, 175 U. S. 1, 44 Law. Ed. 49, though the portions were undetermined, may be supported on the theory that the Indians took as tenants in common in the proportion which the individual shares bore to the entire tract. Washburn Real Prop. [6th Ed.] § 879; Benn v. Hatcher, 81 Va. 25, 59 Am. Rep. 645, 4 Columbia L. R. 304. The patent by the government would act as a partition of the land. Benn v. Hatcher, 81 Va. 25, 59 Am. Rep. 645; Brown v. Bailey, 1 Met. 254. Coleman v. Doe, 12 Miss. 40. Accordingly, the case seems correct in holding that the Indians' title would be divested by the adverse possession.—25 Columbia L. R. 65.

60. Right secured to the Yakima Indians by the treaty of 1859 of "taking fish at all usual and accustomed places in common with citizens of the territory, and of erecting temporary buildings for curing them." United States v. Winans, 198 U. S. 371, 49 Law. Ed. 1089.

61. United States v. Winans, 198 U. S. 371, 49 Law. Ed. 1089.

62. Patents to lands bordering on the Columbia River. United States v. Winans, 198 U. S. 371, 49 Law. Ed. 1089

63. Jackson v. Thompson [Wash.] 80 P. 454.

64. The right of the United States to restrict the power of alienation of land patented is not affected by the fact that the patentee is an Indian citizen. Hitchcock v. U. S. 22 App. D. C. 275.

65. Jackson v. Thompson [Wash.] 80 P. 454.

66. Hitchcock v. United States, 22 App. D. C. 275.

67. After such statute goes into effect, the lands are subject to taxation. Goudy v. Meath [Wash.] 80 P. 295.

68. Must sell them for as large a sum as is practicable. Treaty 29th September, 1865, with the Osage Indians considered. Stewart's case, 39 Ct. Cl. 321.

69. Regulations as to compensation held authorized by law. Stewart's case, 39 Ct. Cl. 321.

70. Oneida Indians' Case, 39 Ct. Cl. 116.

71. Oneida Indians' Case, 39 Ct. Cl 116. He stands in the position of a trustee and may apply to the court to determine who are entitled to participate in the fund. Id.

72. Oneida Indians' Case, 39 Ct. Cl. 116.

loyal, and not the proportion of those who were loyal.[73] It is intended by the statute that distribution of unpaid annuities shall be only to loyal persons.[74]

Leases.[75]—A sublease by a lessee of an Indian, whose lease contains a condition against subleasing without the consent of the lessor and the approval of the secretary of the interior, is void.[76]

Actions against intruders.[77]—A sale by the sheriff of the improvements of a nonresident, under Act October 80, 1888, must be made for cash.[78] A purchaser at a void sale cannot recover, though the owner against whom the sale was made is an intruder.[79]

§ 5. *Rights and liabilities of others in Indian country dealing with Indians.*[80] The permit tax of the Creek nation is the annual price fixed by its laws for the privilege of conducting business within its borders by noncitizens. It is a condition to the exercise of the privilege.[81] The authority to enact these laws is one of the inherent and essential attributes of the original sovereignty of the nation.[82] The legal effect of such laws is to prohibit the conduct of business by a nonresident without paying the tax.[83] This tax is valid and has not been repealed,[84] and applies to all persons not members of the tribe,[85] and the secretary of the interior, Indian inspector, and Indian agent have authority to enforce the laws which prescribe it,[86] and to prevent their violation by closing the place of business of one who refuses to pay.[87] The enforcement of such laws without writ or other process than the law itself does not deny due process.[88]

§ 6. *Crimes and offenses by and relating to Indians.*[89]—The act of congress providing that state courts have no jurisdiction of the person of the accused or of the offense committed by one Indian against another in an Indian reservation applies only to Indians maintaining tribal relations.[90]

§ 7. *Indian depredations.*—The Indian Depredation Act of March 3, 1891, provides a remedy for depredations committed by Indians outside the Indian country.[91] The intent of the act is to hold responsible a tribe, band, or nation for depre-

73. Sisseton & Wahpeton Indians' Case, 39 Ct. Cl. 172.

74. Sisseton & Wahpeton Indians' Case, 39 Ct. Cl. 172. Indians who at times were loyal and at other times aided and abetted or encouraged depredations and massacres are to be regarded as wholly disloyal. Id.

75. See 3 C. L. 1708.

76. Reeves & Co. v. Sheets [Okl.] 72 P. 487.

77. See 3 C. L. 1709.

78. A sale on credit is void. Walker v. McLoud [C. C. A.] 138 F. 394.

79. Walker v. McLoud, 138 F. 394.

80. See 3 C. L. 1709.

81. Buster v. Wright [C. C. A.] 135 F. 947.

82. Did not have its origin in Act of Congress, treaty or agreement with the United States. Buster v. Wright [C. C. A.] 135 F. 947.

83. Buster v. Wright [C. C. A.] 135 F. 947.

84. Act May 27, 1902 (ch. 888, 32 Stat. 259), prohibiting the deportation of persons in lawful possession of land in any townsite, town or city in the Indian Territory, did not repeal the permit tax laws of the Creek nation, nor withdraw from the secretary of the interior and his subordinates power to close such places of business. Buster v. Wright, [C. C. A.] 135 F. 947.

85. The Creek agreement, ratified by the United States March 1, 1901 (ch. 676, 31 St. 861, §§ 10-16), nor the establishment of town sites within the territory of that nation, nor the sale of lots to noncitizens, nor the organization of towns and cities thereon, does not withdraw such lots, their owners or occupants from the operation of such laws. Nor does it withdraw such lots from the jurisdiction of the secretary of the interior to close the unlawful business. Buster v. Wright [C. C. A.] 135 F. 947.

86. Buster v. Wright [C. C. A.] 135 F. 947. The provisions of such act may be enforced by the secretary of the interior under departmental regulations. Morris v. Hitchcock, 21 App. D. C. 565.

87. By the secretary of the interior, his subordinates, Indian inspector and Indian agent. Buster v. Wright [C. C. A.] 135 F. 947.

88. Buster v. Wright [C. C. A.] 135 F. 947.

89. See 3 C. L. 1709.

90. A state court may punish a homicide committed by one Indian on another on a reservation where such Indians have no tribal organization, and the lands have been allotted to the Indians in severalty except a parcel retained for school purposes upon which the crime was committed. State v. Smokalen, 37 Wash. 91, 79 P. 603.

91. Prior to the treaty of October 7, 1863, with the Tabeguache tribe, it had no habitat, and it is no defense that a depredation was

dations of its members,[92] and if depredations were committed by Indians having no connection with a tribe, band or nation, no responsibility attaches to the United States;[93] but it is not necessary that the Indians committing depredation be directly from the Indian country. If they are within the jurisdiction of the United States and in a condition of amity, responsibility attaches.[94] Liability may arise out of a treaty, even though the Indian Intercourse Act of June 30, 1849, has not been extended to the Indian country.[95] The taking and destruction of property by refugee Indians in charge of military officers of the United States is not a depredation within the Act,[96] nor is a depredation committed against one who at the time was not a citizen of the United States,[97] nor is a depredation against an intruder.[98] The claim must be submitted in accordance with the regulations prescribed by the act,[99] and the petition must have been filed within three years after its passage.[100] If the depredation was committed prior to July, 1865, the petition for relief must have been filed at the time of the passage of the Act and evidence introduced in support thereof.[101] The rule that a suit in the name of a dead man is a nullity applies to cases under the act,[102] and such a suit cannot be revived in the name of his administrator after the limitation period prescribed.[103] The Tucker Act does not extend to cases when the cause of action is depredation for which a tribe is primarily liable.[104]

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committed on territory which subsequently became their reservation. Hayt's Case, 38 Ct. Cl. 455.

92. Bell v. The Dieguenos, 39 Ct. Cl. 350. The liability is primarily that of the depredator, the United States being liable merely as guarantors of the judgment recovered against the Indians. Vincent's Case, 39 Ct. Cl. 456.

93. Bell v. The Dieguenos, 39 Ct. Cl. 350.

94. Statutes and treaties relating to New Mexico construed. Pino's Case, 38 Ct. Cl. 64.

95. After the treaty of September 9, 1849, with the Navajos, they were liable for depredations. Pino's Case, 38 Ct. Cl. 64.

96. Wilson's Case, 38 Ct. Cl. 6.

97. Gagnon's Case, 38 Ct. Cl. 10; Mayer's Case, 38 Ct. Cl. 553.

98. Though the Indians committing the depredation were not members of the reservation when committed. McCoy's Case, 38 Ct. Cl. 163.

99. Butler's Case, 38 Ct. Cl. 167.

100. Gallegos v. Navajos, 39 Ct. Cl. 86. A case prosecuted against the wrong tribe until three years had expired cannot be maintained against Indians sought to be brought in by amendment. United States v. Martinez, 195 U. S. 469, 49 Law. Ed. 282.

101. A verified petition is not evidence of a depredation committed prior to July, 1865. Butler's Case, 38 Ct. Cl. 167.

102. Gallegos v. Navajos, 39 Ct. Cl. 86.

103. Though presented within the period by an attorney ignorant of the death. Gallegos v. Navajos, 39 Ct. Cl. 86.

104. Vincent's Case, 39 Ct. Cl. 456.

Scope of Topic.—This topic includes general criminal procedure from indictment to final judgment.[1] The substantive law of crimes[2] and procedure before indictment[3] are elsewhere treated, and matters of indictment, evidence and procedure peculiar to particular crimes are treated under titles appropriate to such crimes.

§ 1. *Limitation of time to institute.*[4]—Statutes of limitation are construed liberally in favor of the accused,[5] but do not run in favor of fugitives from justice.[6]

§ 2. *Jurisdiction.*[7]—There can be no jurisdiction of offenses committed beyond the boundary of the state,[8] except in case of offenses on boundary streams over which

1. See analytical index at head of topic.
2. See Criminal Law, 5 C. L. 883.
3. See Arrest and Binding Over, 5 C. L. 264.
4. See 4 C. L. 2.
5. The date of a note purporting to be forged does not necessarily show it to have been made at the time it bears date so as to bar prosecution. Commonwealth v. Hall, 24 Pa. Super. Ct. 558. In the District of Columbia, an indictment must be found within three years after commission of the offense (U. S. Rev. St. § 1044), and the grand jury must act upon the case of one committed or held to bail within nine months or he must be discharged (D. C. Code, § 939). United States v. Cadarr, 24 App. D. C. 143. Through the repetition of overt acts, conspiracy becomes a continuing offense and the statute of limitations operates accordingly. Lorenz v. U. S., 24 App. D. C. 337.
6. Concealment is as effectual as absence from the state. State v. Miller [Mo.] 87 S. W. 484.
7. See 4 C. L. 2.
8. Cattle straying across state line. Beat

both states have jurisdiction.[9] Objection to jurisdiction of the person is waived by contesting a criminal case on its merits,[10] and the jurisdiction of the court in which an information or indictment is found is not impaired by the manner in which the accused is brought before it.[11] Felonies are usually triable only in courts of general original jurisdiction, while jurisdiction of misdemeanors is frequently conferred on inferior courts.[12] Municipal and corporation courts are generally restricted in their jurisdiction to offenses committed within the corporate limits of the municipality,[13] and against the ordinances or by-laws thereof,[14] though they are sometimes given jurisdiction concurrent with ordinary justices of the peace.[15] The municipal court of Milwaukee county has exclusive jurisdiction of all misdemeanors in that county.[16] That the county judge of another county held a part of the term does not oust the jurisdiction,[17] and the circuit court of two counties of the same circuit may be in session at the same time.[18] Failure of the courts to sit at the place prescribed by state laws does not depart from due process under the Federal constitution,[19] but may nevertheless render the conviction void.[20] A person of the age of 16 is prop-

tie v. State [Ark.] 84 S. W. 477. An embezzlement takes place where the conversion occurs, and the courts of that state have jurisdiction. State v. Blackley, 138 N. C. 620, 50 S. E. 310. Bribery when begun by the mailing of a letter and completed by its receipt is triable where the letter was received. Benson v. Henkel, 198 U. S. 1, 49 Law. Ed. 919.

9. Mississippi river. State v. Seagraves [Mo. App.] 85 S. W. 925. See Clark & M. Crimes [2d Ed.] § 489.

10. State v. Browning, 70 S. C. 466, 50 S. E. 185.

11. Holden v. U. S., 24 App. D. C. 318. Where accused appeared in police court, pleaded not guilty, and waived trial by jury, a motion for a discharge was properly overruled which was based on objection that information was only a substitute for a former information for substantially the same offense, to which he had pleaded not guilty and demanded a jury trial. Id.

12. Justice and county court have concurrent jurisdiction of misdemeanors where the fine is under $200. Gray v. State [Tex. Cr. App.] 86 S. W. 764. The offense of deterring a witness from giving evidence in a felony case is a misdemeanor and within the jurisdiction of the St. Louis circuit court, though punishable by imprisonment in the penitentiary. State v. Foster, 187 Mo. 590, 86 S. W. 245.

13. Justice of the peace of Gloversville cannot issue warrant returnable to himself on complaint for cruelty to animals committed in another town. McCarg v. Burr, 94 N. Y. S. 675. In Alabama, a warrant charging the offense of presenting a pistol, sworn out before a justice of the peace of precinct 37 of Jefferson county, is properly made returnable before the criminal court of Jefferson county, and the latter court has jurisdiction. Acts 1894-95, p. 498, is valid and was not repealed by Acts 1900-01, p. 216, § 8. Lee v. State [Ala.] 39 So. 366. Mayor of town of Clinton held to have power under 20 St. at Large, p. 912, to call town wardens to his aid in trial of person accused of violating ordinance. Town of Clinton v. Leake [S. C.] 50 S. E. 541. Since Acts 1901, p. 1865, § 24, gives city court of Bessemer authority to issue warrants, it has authority to allow an amendment to an affidavit for a complaint made before a justice and returnable to the city court. Witherspoon v. State [Ala.] 39 So. 356. Municipal court held not to have had jurisdiction because record of case did not show a public offense, the charge being merely "drunk and disorderly." State v. Bates [Minn.] 104 N. W. 890. A breach of fish and game regulations is by statute a misdemeanor and any person guilty may be proceeded against before any justice having local jurisdiction. Ex parte Fritz [Miss.] 38 So. 722. A justice who has required accused to give bond for his appearance in the superior court and has bound witnesses to there appear, as prescribed by statute, has no further jurisdiction of the case. Cannot reverse his decision and adjudge the accused guilty of an offense within his jurisdiction. State v. Lucas [N. C.] 51 S. E. 1021. Under Ball. Ann. Codes & St. §§ 2722, 4683, a justice has jurisdiction to try a sane child between eight and sixteen years of age for the offense of disturbing a public school in violation of Laws 1903, p. 328, c. 156, § 12. State v. Packenham [Wash.] 82 P. 597.

14. Justices of the peace of the city and county of Denver have original and exclusive jurisdiction of all causes arising under the charter and ordinances of the city. May determine constitutionality of ordinances. People v. District Court of Second Judicial Dist. [Colo.] 80 P. 888. A provision in a city charter attempting to make its corporation court a state court may be void and the court still have jurisdiction to take cognizance of violations of city ordinances. Ex parte Levine [Tex. Cr. App.] 81 S. W. 1206.

15. Statutes cannot authorize police and city courts to impose greater penalties than justices of the peace may impose. Stone v. Paducah [Ky.] 86 S. W. 531.

16. Stoltman v. Lake [Wis.] 102 N. W. 920.

17. People v. Cox, 94 N. Y. S. 526.

18. State v. Pope, 110 Mo. App. 520, 85 S. W. 633. See 5 C. L. 872, n. 26, special note.

19. Rogers v. Peck, 26 S. Ct. 87.

20. Where an indictment is found, the defendant arraigned and a day set for trial, at a time not authorized by law, a judgment

erly triable by the court of general sessions of the peace in New York, and is not exclusively within the jurisdiction of the children's court.[21] The exclusion from the jurisdiction of the supreme court of the District of Columbia of cases "lawfully triable in any other court" refers only to other courts of the District,[22] and does not exclude cases which might be tried in another district.[23] The fact that defendant, at the time of his arrest, is serving out a part of a sentence, by anticipation, before trial for a misdemeanor, does not deprive another county of jurisdiction to try him for a felony before he has been tried for the misdemeanor and served out his sentence therefor.[24]

Offenses on Federal territory or against Federal laws are within the jurisdiction of the Federal courts, though there may be a concurrent jurisdiction. Likewise offenses by Indians on Indian reservations.[25]

Equity will enjoin criminal proceedings under a void municipal ordinance where property rights will be destroyed by its enforcement.[26] That defendant was called and testified before the grand jury which indicted him does not oust jurisdiction so that a writ of prohibition will lie to restrain the prosecution.[27]

Jurisdiction is not lost by release of defendant before trial on his own recognizance, though such proceeding is unauthorized.[28]

It is the usual practice in the administration of law to waive for the time being the trial of a misdemeanor in order that a felony charge may be investigated and tried.[29]

Transfer [30] to another court or another division of the same court for prejudice of the judge is provided for in some states, and provision is made for transfer of indictments to the county or district in which the proof shows the offense to have been committed;[31] nor is it an objection to such removal that it would prevent a "speedy trial" of the indictment in the district from which defendant removed.[32] In certain cases, indictments returned into the district court of Texas are transferred to the county court for trial.[33] Removal to the Federal court may be had where a Federal officer is prosecuted in a state court for an act done under color of his office, and in cases where the prisoner is denied any civil rights.[34]

of conviction is void. Walker v. State [Ala.] 39 So. 242.

21. People v. Superintendent of House of Refuge on Randall's Island, 46 Misc. 131, 93 N. Y. S. 218.

22, 23. Hyde v. Shine, 199 U. S. 62, 50 Law. Ed. —; Dimond v. Shine, 199 U. S. 88, 50 Law. Ed. —.

24. Russell v. State [Ala.] 38 So. 291. One who, having been arrested for a misdemeanor, is serving out a part of his sentence by anticipation in a convict camp, is within Code 1896, § 4521, and hence the president of the board of convict inspectors has the right to order his removal to another county to be there tried for a felony. Id.

25. After abandonment of tribal relations and allotment of lands in severalty, state laws apply. State v. Smokalem, 37 Wash. 91, 79 P. 603.

26. See 4 C. L. 3, n. 22. See Injunction, 4 C. L. 96.

27. People v. Davy, 94 N. Y. S. 1037.

28. People v. Harber, 100 App. Div. 317, 91 N. Y. S. 571.

29. Boone v. Riddle [Ky.] 86 S. W. 978.

30. See 4 C. L. 3.

31. An indictment is prima facie evidence of probable cause to remove to another jurisdiction for trial (Beavers v. Henkel, 194 U. S. 73, 48 Law. Ed. 882), and technical objections thereto will not be considered (Id.), nor can it be impeached by evidence that the grand jury did not have before it evidence sufficient to indict (Id.). The District of Columbia is a district of the United States, and the supreme court thereof a United States court within the statute authorizing removal of persons charged with crime to the district where the trial is to be had. Benson v. Henkel, 198 U. S. 1, 49 Law. Ed. 919; Hyde v. Shine, 199 U. S. 62, 50 Law. Ed. —. Such proceedings may be had, though there are indictments pending in the district from which removal was had, if the court having jurisdiction thereof consents. Beavers v. Haubert, 198 U. S. 77, 49 Law. Ed. 950.

32. Beavers v. Haubert, 198 U. S. 77, 49 Law. Ed. 950.

33. Sufficient if transcript show number of case. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18; Bell v. State [Tex. Cr. App.] 85 S. W. 805. Showing name of defendant also is not a variance. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18. Date on which district court adjourned need not be shown. Id.; Adams v. State [Tex. Cr. App.] 85 S. W. 1079.

34. Jurisdiction of Federal court attaches immediately on filing proper petition in state

§ 3. *Place of prosecution and change of venue.*[35]—Prosecution may be had in the county or state where the offense was consummated,[36] or where it was initiated, if a complete offense was there committed,[37] and the court of the county in which the indictment alleges the offense to have been committed has jurisdiction until it appears that the offense was committed in another court.[38] Statutes regulate the procedure where the fatal blow is struck in one county and death ensues in another.[39] Where statutory larceny, proved by false pretenses, is prosecuted by an indictment charging larceny, the venue must be laid in same county in which the accused had possession of the property.[40] Offenses committed on the high seas are triable in the district in which the offender is found or into which he is first brought,[41] and an offense on a river which is a boundary of a county is committed within the county.[42]

Change of venue.[43]—Statutes usually provide for change of venue upon proper application[44] and showing,[45] alike for the defendant[46] and the state.[47] The motion addresses itself to the sound discretion of the trial court,[48] and a counter showing is properly allowed.[49] Where the affiants on cross-examination are found to be

court, and nonpetitioning party may file record and move for remand immediately. Removal cannot be had for causes that may be redressed by the state court and on appeal from it to the supreme court of the United States. State of New Jersey v. Corrigan, 139 F. 758.

35. See 4 C. L. 3.

36. False pretenses. State v. Marshall [Vt.] 59 A. 916; Bates v. State [Wis.] 103 N. W. 251. A conviction of dealing in margins contrary to the statute may be had in the county where the orders were given and the money paid. Weare Com. Co. v. People, 111 Ill. App. 116. Libel is punishable in any courts into which the newspaper containing it was sent. State v. Huston [S. D.] 104 N. W. 451.

37. Embezzlement. Property being situate in another county. Higbee v. State [Neb.] 104 N. W. 74. Place of committing theft by hiring horses with intent to steal them. Lewis v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 523, 87 S. W. 831.

38. Prosecution in wrong county is no bar to another in the proper county. Statute authorizing transfer to proper county sustained. Welty v. Ward [Ind.] 73 N. E. 889.

39. First counts to obtain jurisdiction of defendant. Commonwealth v. Jones, 26 Ky. L. R. 867, 82 S. W. 643. Fraudulent proceedings in one county do not oust jurisdiction of other county. Hargis v. Parker [Ky.] 85 S. W. 704.

40. Commonwealth v. Friedman [Mass.] 74 N. E. 464.

41. Kerr v. Shine [C. C. A.] 136 F. 61.

42. Nickols v. Commonwealth [Ky.] 86 S. W. 513.

43. See 4 C. L. 4.

44. Must be supported by affidavits of two witnesses besides accused. State v. Swisher, 186 Mo. 1, 84 S. W. 911. Application presented after jurors had been examined on voir dire and trial begun is untimely. State v. Faulkner, 185 Mo. 673, 84 S. W. 967. After refusal of continuance but before plea and swearing of jury is not too late. Minniard v. Commonwealth [Ky.] 85 S. W. 187. Where the statute limits the state to one application, a withdrawn application does not count, though not withdrawn until after the decision was announced. White v. Commonwealth [Ky.] 85 S. W. 753; Jett v. Commonwealth [Ky.] 85 S. W. 1179. Where the application is not timely or conformable to a rule of the court, it may be denied. Maxey v. State [Ark.] 88 S. W. 1009.

45. When not error for a mayor to overrule a motion for a change of venue in a prosecution for keeping a place where intoxicating liquors are sold. Volk v. Westerville, 3 Ohio N. P. (N. S.) 241. Denied for prejudice where an equal number of witnesses testify as to prejudice and nonprejudice. State v. Rooke [Idaho] 79 P. 82. That the panel selected to try accused were in part those who had just convicted his codefendant is no ground for change. State v. Swisher, 186 Mo. 1, 84 S. W. 911. Prejudice of part of inhabitants of county not sufficient. Earles v. State [Tex. Cr. App.] 85 S. W. 1; State v. Parmenter [Kan.] 79 P. 123. Prejudice of judge must be towards defendant, not on account of his opinion on a question of law. Id. Change should be allowed because of local bias, it appearing that public and press alike and unitedly believed accused guilty and hated him. Embezzlement and perjury by bank president. People v. Georger, 95 N. Y. S. 790.

46. Change cannot be granted for local prejudice in Wisconsin where the offense is not punishable by imprisonment in the state prison. Hanley v. State [Wis.] 104 N. W. 57.

47. White v. Commonwealth [Ky.] 85 S. W. 753. Removal at suit of state cannot be had in South Dakota. In re Nelson [S. D.] 102 N. W. 885.

48. State v. Parmenter [Kan.] 79 P. 123; State v. Faulkner, 185 [Mo.] 673, 84 S. W. 967; Mount v. Commonwealth [Ky.] 86 S. W. 707; Andrews v. People [Colo.] 79 P. 1031. The discretion of the trial judge in refusing to grant a change of venue on the ground that accused cannot obtain a fair trial by an impartial jury will be interfered with only in case of manifest abuse of discretion. Rawlins v. State [Ga.] 52 S. E. 1.

49. State v. Parmenter [Kan.] 79 P. 123. Properly denied on equal showing. Jett v. Commonwealth [Ky.] 85 S. W. 1179; Mount v. Commonwealth [Ky.] 86 S. W. 707.

uninformed, the application is properly denied.[50] Statutory directions as to the order must be observed.[51]

The record and papers must be certified to the court to which the change is made, and timely filed in such court.

§ 4. *Indictment and information. A. Necessity of indictment.*[52]—At the common law and in the Federal courts, infamous crimes and felonies can be prosecuted only by indictment.[53] Several states have dispensed with the necessity of indictments in all cases,[54] and indictments have never been required in misdemeanors.[55] At the common law the finding of a coroner's jury was a sufficient accusation.[56] If seasonably demanded,[57] accusation by indictment in misdemeanors is allowed by some statutes.

(§ 4) *B. Finding and filing and formal requisites. Indictments.*[58]—Previous binding over or commitment of accused is not necessary,[59] and where an indictment is regularly found, and defendant pleads thereto and goes to trial on the merits, all defects and irregularities in the information, warrant, and proceedings before the magistrate must be held cured.[60] After indictment found, the charge may be again referred to the grand jury and an indictment for a higher degree returned.[61] It is not indispensable that the informer or prosecutor should have personal knowledge of facts necessary to convict.[62] The indictment must be found by the grand jury of the county or district in which the crime was committed,[63] and be returned in open court by them[64] at a term of the court for that county.[65] The grand jury must have been lawfully convoked.[66] If statutes merely direct the immediate recording of the organization of the grand jury,[67] it may be done at any time in term.[68]

50. Maxey v. State [Ark.] 88 S. W. 1009; Williams v. U. S. [Ind. T.] 88 S. W. 334.

51. The judge in Texas need assign reasons only for the change, not for changing to a distant instead of a near county. Ricks v State [Tex. Cr. App.] 13 Tex. Ct. Rep. 555, 87 S. W. 1036. Change to the nearest county is not necessary where the same objections exist there as in the county of the vicinage. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041.

52. See 4 C. L. 5.

53. State v. Nichols [R. I.] 60 A. 763.

54. State v. Guglielmo [Or.] 79 P. 577; Id. [Or.] 80 P. 103. The provision of the Federal constitution requiring indictment is a limitation on the Federal courts only. State v. Rudolph, 187 Mo. 67, 85 S. W. 584. Acts 1900, p. 144, amending an act creating the city court of Macon and denying to defendants in criminal cases within the jurisdiction of that court the right to demand an indictment by the grand jury, is constitutional. Moore v. State [Ga.] 52 S. E. 81. U. S. 1867, as amended by Laws 1898, p. 34, No. 46, and Laws 1904, No. 64, providing that state's attorneys may prosecute by information all crimes except those punishable by death or life imprisonment, is constitutional. State v. Stimpson [Vt.] 62 A. 14.

55. Jurisdiction of offense of beating an animal having been conferred on justice of the peace may be prosecuted by complaint. State v. Nichols [R. I.] 60 A. 763.

56. See 4 C. L. 5, n. 55.

57. For one charged under an accusation in the county court with a misdemeanor, to avail himself of the right to demand an indictment, he must make such demand in a writing signed by him. Pen. Code 1895, § 751. Shivers v. State [Ga.] 51 S. E. 596.

58. See 4 C. L. 5.

59. Record need not show motion in open court and leave granted to prefer indictment. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. See Arrest and Binding Over, 5 C. L. 264.

60. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

61. Nash v. State [Ark.] 84 S. W. 497.

62. Commonwealth v. Barr, 25 Pa. Super. Ct. 609.

63. Concurrence of 12 is necessary. Nash v. State [Ark.] 84 S. W. 497. Each separate count need not show that it was returned by the grand jury of the particular county. Donahue v. State [Ind.] 74 N. E. 996.

64. Where it appears by the record that a grand jury organized in the oyer has presented indictments in the quarter sessions, it will be assumed in the absence of proof to the contrary, that there was not any justice of the supreme court then present at the court house. State v. Turner [N. J. Law] 60 A. 1112.

65. Where the indctmet purports to have been found at an adjourned term and there is no showing to the contrary, it will not be presumed to have been found in vacation. Donahue v. State [Ind.] 74 N. E. 996. Regularity of term presumed. Frame v. State [Ark.] 84 S. W. 711.

66 De facto judge may do so. Walker v. State [Ala.] 38 So. 241. Court not sitting at a legal time cannot do so. Skinner v. State [Ala.] 38 So. 242.

67, 68. Though Code 1896, § 934, makes it the duty of the clerk to keep a record of each day's minutes and § 2641 requires them to be read each morning in open court, failure of the clerk to record the organization of a grand jury at the time a motion to

The caption is that entry of record showing when and where the court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors.[69] The indictment must commence and conclude[70] in the constitutional or statutory form, and be signed by the prosecuting officer,[71] and indorsed and signed by the foreman of the grand jury,[72] unless these are dispensed with by statute.[73] A recital of the oath of the grand jurors may be dispensed with.[74] Immaterial variances between preliminary information or complaint and the indictment founded thereon do not prejudice.[75]

The indictment being when filed a public record[76] may be supplied from copies competently proved if return of the original to the proper custodian is impossible.[77] The court may be compelled by mandamus from the court of last resort to do this.[78] The statute providing for supplying lost indictments does not apply to a case where an indictment is not returned by the appellate court on reversal.[79]

Information.[80]—An information must generally be preceded by a sufficient preliminary complaint,[81] examination,[82, 83] and commitment, and must be filed within the statutory period thereafter,[84] though technical exactness is not required in the

quash an indictment was made is not ground for quashing an indictment. Carwile v. State [Ala.] 39 So. 270.

69. Overton v. State, 60 Ala. 73, quoted with approval in Gater v. State [Ala.] 37 So. 692. Words "Spring Term, 1903," held not to constitute the caption. Gater v. State [Ala.] 37 So. 692. Words "Spring Term" in caption instead of "Fall Term", held a misprision and not to affect validity of indictment. Id.

70. Statutory conclusion of common-law indictment may be rejected as surplusage. State v. Bacon [R. I.] 61 A. 653.

71. Signature need not be written by district attorney's own hand. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. The attorney general may sign whenever required to prosecute criminal proceedings in any courts by the governor. State v. Bowles [Kan.] 79 P. 726. The district court is obliged to take judicial notice of the governor's order, and the attorney general's authority need not appear on the face of the indictment. Id.

72. Printed words "A true bill" signed by foreman are sufficient. State v. Harlan [Kan.] 81 P. 480. Failure to sign may be waived. McFall v. State [Ark.] 84 S. W. 479. Lack of signature is not fatal in Texas. Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270.

73. By statute in Texas, it is no objection to an indictment that it is not signed by the foreman of the grand jury. Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270.

74. State v. Guglielmo [Or.] 799 P. 577.

75. Information charging the setting up and maintenance of "a public or common nuisance in and upon a public highway" and indictment charging it to have been "in a common road or highway, for all citizens of this commonwealth to go, pass or travel at their will. Commonwealth v. Mock, 23 Pa. Super. Ct. 51. The accusation and commitment should be made broad enough to cover any possible phase of the case. Commonwealth v. Barr, 25 Pa. Super. Ct. 609. Technical accuracy not required in preliminary information. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

76, 77. State v. Circuit Court [S. D.] 104 N. W. 1048. Carbon copies which both the state's attorney and the clerk testified were in their belief true copies are sufficiently proved. Id.

78. State v. Circuit Court [S. D.] 104 N. W. 1048.

79. Martinez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 462, 87 S. W. 344.

80. See 4 C. L. 6.

81. State v. Wisnewski [N. D.] 102 N. W. 883. Imperfections are cured by examination and commitment. People v. Warner [Cal.] 82 P. 196. Affidavit cannot be taken before city attorney. Johnson v. State [Tex. Cr. App.] 85 S. W. 274. Complaint for malicious mischief need not show that it was made by a creditable person. Steinke v. State [Tex. Cr. App.] 86 S. W. 753. Variance between complaint and information as to date of offense is fatal. Smith v. State [Tex. Cr. App.] 86 S. W. 753. An information may be quashed for changing larceny of property in addition to that mentioned in the complaint and warrant. Clute v. Ionia Circuit Judge [Mich.] 102 N. W. 843. Complaint for bribes, held sufficient. Murphy v. State [Wis.] 102 N. W. 1087. "Mount" and "Mounts" held fatal. Harrison v. State [Tex. Cr. App.] 85 S. W. 1058.

82, 83. Loss of the complaint does not necessitate another examination, especially where defendant waived examination. In re Jay [Idaho] 79 P. 202. Whether the evidence was sufficient cannot be raised on habeas corpus after conviction. Ex parte Knudtson [Idaho] 79 P. 641. Warrant charging assault on ———— Bert is not variant from information naming him Joseph Burt. State v. Johnson [Kan.] 79 P. 732. Statutes may authorize the filing of an information without examination within specified time preceding a term of court. Rev. St. 1899, § 5273. Hollibaugh v. Hehn [Wyo.] 79 P. 1044. A statute authorizing judges of city courts to act as committing magistrate is valid in Utah. State v. Shockley [Utah] 80 P. 865.

84. See 4 C. L. n. 67.

complaint,[85] and all preliminary proceedings are presumed regular in the absence of a contrary showing.[86]

Verification or a supporting affidavit is generally necessary,[87] though failure to verify may be waived,[88] and the lack of it is not fatal if no objection is made on that ground,[89] and an information need not show on its face that it is based on the affidavit of a competent and reputable person.[90]

An information should commence and conclude in proper form.[91] It must be signed by the proper prosecuting officer.[92]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*[93]—Indictments and informations must clearly inform the accused of the nature and form of the accusation against him,[94] though it is a general rule and expressly provided by statute in many states that no information or indictment is insufficient for any imperfection in matter of form which does not prejudice substantial rights,[95] and an indictment is always sufficient which states the offense clearly and distinctly, in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended.[96] Statutes prescribing forms are unobjectionable where the forms meet these requirements,[97] and statutes providing for bills of particulars safeguard accused's rights in cases where indictments in general form are provided.[98] The words of an indictment should be given their ordinary and commonly accepted meaning.[99] One count may refer to

85. State Wisnewski [N. D.] 102 N. W. 883; State v. Moon [Kan.] 80 P. 597.

86. People v. Warner [Cal.] 82 P. 196.

87. State v. Gutke [Mo.] 87 S. W. 503; State v. Lee [Mo. App.] 87 S. W. 527; Johnson v. State [Tex. Cr. App.] 85 S. W. 274; State v. Kelly [Mo.] 87 S. W. 451. Not in Oregon. State v. Guglielmo [Or.] 79 P. 577; Id. 80 P. 103. May be added by amendment before trial. State v. Rollins, 186 Mo. 501, 85 S. W. 516; State v. Emerson [Mo.] 87 S. W. 469. Verification on information and belief is sufficient Hollibaugh v. Hehn [Wyo.] 79 P. 1044. Filing supporting affidavit held sufficient. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Venue need not be repeated in verification when on same sheet with caption. State v. Bailey [Mo.] 88 S. W. 733. The omission of the seal of the court to the jurat of the clerk is immaterial. State v. Forsba [Mo.] 88 S. W. 746. In Louisiana an information by the prosecuting attorney filed of his own motion need not be verified by special oath. State v. Smith [La.] 38 So. 202; State v. Smith [La.] 38 So. 204. See, also, 4 C. L. 6, n. 70 et seq. The official oath of office suffices unless the statute requires more, 10 Enc. Pl. & Pr. 451.

88. Goddard v. State [Neb.] 103 N W. 443; Hollibaugh v. Hehn [Wyo.] 79 P .1044.

89. State v. Tindall [Mo.] 87 S. W. 451.

89. State v. Emerson [Mo.] 87 S. W. 469.

90. State v. Guglielmo [Or.] 80 P. 103.

91. Must conclude "upon the oath" of the prosecuting attorney. State v. Coleman, 186 Mo. 151, 84 S. W. 978; State v. Atchley, 186 Mo. 174, 84 S. W. 984; State v. Dawson, 187 Mo. 60, 85 S. W. 526.

92. Signing with initials of Christian name is enough. State v. Brock, 186 Mo. 457, 85 S. W. 595. Signature of deputy held sufficiently ratified. State v. Guglielmo [Or.] 80 P. 103. Signature by deputy held sufficient. Murrey v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 475, 87 S. W. 349.

93. See 4 C. L. 7.

94. Unless the acts charged constitute either a felony or misdemeanor under the statutes, no crime is charged. State v. Dailey [Iowa] 103 N. W. 1008.

95. See 4 C. L. 7, n. 78.

96. Code, § 5280. State v. Finnegean [Iowa] 103 N. R. 155; State v. Dickerhoff [Iowa] 103 N. W. 350; State v. Nelson [Wash.] 8 P. 721; State v. Sly [Idaho] 80 P. 1125. Rev. Codes 1899, § 8047, subd. 7. State v. Erickson [N. D.] 103 N. W. 389. Section 408, div. 11, Cr. Code (Hurd's Rev. St. 1901). O'Donnell v. People, 110 Ill. App. 250. Code Cr. Proc. § 11. Act March 31, 1860. False pretenses. Commonwealth v. White, 24 Pa. Super. Ct. 178; Commonwealth v. Hall, 24 Pa. Super. Ct. 558. Conspiracy to commit a crime is sufficiently charged where the crime is described in the language of the statute or by its common-law definition. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. Deposit of noxious substances in river held sufficiently charged. State v. Providence Gas Co. [R. I.] 61 A. 44. Failure to follow the statutory form in charging murder is immaterial where the indictment sufficiently charge the offense. Commonwealth v. Snell [Mass.] 75 N. E. 75.

97. Commonwealth v. Snell [Mass.] 75 N. E. 75. The form of the indictment prescribed by Laws 1901, p. 58, c. 4930, § 8, for the illegal sale of intoxicating liquors, is not defective in that it does not inform the accused of the nature of the accusation made against him. Maesar v. State [Fla.] 39 So. 470.

98. Embezzlement. Commonwealth v. McDonald [Mass.] 73 N. E. 852.

99. Common-law words must be given their common-law meaning. United States v. Green, 136 F. 618.

matter in a previous count for the purpose of avoiding unnecessary repetition;[1] though the count referred to is defective,[2] and the caption and commencement of an indictment may be looked to for the purpose of showing in what court the indictment was found.[3]

Certainty.[4]—An indictment or information must be direct and certain as regards the party charged,[5] the offense charged,[6] the doing of the act,[7] and the particular circumstances of the offense charged, when they are necessary to constitute a completed offense;[8] and no necessary allegation can be aided by intendment or inference,[9] nor will conclusions of the pleader eke out defective allegations of necessary facts.[10] Every essential ingredient of the crime must be set forth,[11] with such particularity that the accused may not only know the particular charge against him, but may be able to plead the judgment in bar of a second prosecution;[12] but it is not necessary to aver that which appears from an instrument set out.[13] The means used to commit the offense should be stated where the degree of the offense depends upon

1. Where an indictment for conspiracy contains several counts, and the first count states the details of the conspiracy as matter of introduction, and the other counts refer to the "same scheme" as detailed in the first count, such reference will be held sufficient to import the introductory statement into each count, especially after verdict, no substantial right of the accused being violated. Lorenz v. U. S., 24 App. D. C. 337.

2. See 4 C. L. 7, n. 81, 82.

3. Donahue v. State [Ind.] 74 N. E. 996. The venue and that the crime was committed before the finding of the indictment. Commonwealth v. Snell [Mass.] 75 N. E. 75. Not for the purpose of making more certain any of the essential averments in the charging part. See 4 C. L. 7, n. 84.

4. See 4 C. L. 7.

5. His name need not be constantly repeated. The "said" or "aforesaid" may be used to designate accused when he has been once correctly described. State v. Eddy [Or.] 81 P. 941. Indictment for robbery held bad for failure to aver that accused used the force and violence charged. Id.

6. Larceny of crops by farm tenant. State v. Ashpole [Iowa] 104 N. W. 281. Indictment for whitecapping held uncertain. Bettis v. State [Tex. Cr. App.] 85 S. W. 1074. An indictment should not be quashed because of any defect in form, unless it is so vague and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to danger of a new prosecution for the same offense. Dickens v. State [Fla.] 38 So. 909. An indictment which informs the accused of the nature and cause of the accusation and so identifies the offense as to insure against a subsequent prosecution therefor is sufficient. Brister v. State [Miss.] 38 So. 678.

7. Under Rev. St. 1892, § 2893, where the omission of a word from an indictment is plainly a mere clerical misprision, and where the meaning is perfectly clear from the context, and consequently the accused is not misled or embarrassed in making his defense and is not exposed to substantial danger of a new prosecution for the same offense, an appellate court will not reverse a judgment of conviction because of such omission. Caesar v. State [Fla.] 39 So. 470. So held where word "did" was omitted before word "engage" in an indictment for illegally selling intoxicating liquors. Id.

8. The indictment must state directly all the material facts and circumstances embraced in the definition of the crime charged. Tyner v. U. S., 23 App. D. C. 324. False entry by bank officer. State v. Piper [N. H.] 60 A. 742. The means used to cheat and defraud need not be alleged, it being an offense at common law. State v. Bacon [R. I.] 61 A. 653. Requisites of indictment for conspiracy to defraud by use of mails stated. Miller v. U. S. [C. C. A.] 133 F. 337. An indictment for rape upon a female "under the age of 16 years, to wit, of the age of 14 years and upward," is not confusing. State v. Jones [Mont.] 80 P. 1095. Information for drunkenness in a public place must show that the place was public. Murrey v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 475, 87 S. W. 349. Following lottery statute suffices without setting out manner or means or what the lottery was State v. Miller [Mo.] 89 S. W. 377. It is not necessary in an indictment for knowingly renting a house with a view and expectation of the same being used as a gaming house that the name of the tenant should be averred. Bashinski v. State [Ga.] 51 S. E. 499. It is not essential in an indictment for bigamy to allege the time when and the place at which the prior marriage took place. Murphy v. State [Ga.] 50 S. E. 48.

9. State v Ashpole [Iowa] 104 N W. 281; State v. Eddy [Or.] 81 P. 941.

10. State v. Piper [N H.] 60 A 742. In an indictment for forging or fraudulently altering a teacher's license, it is necessary to set out the material facts thereof; and it is not sufficient to describe the instrument merely by calling it a license, and stating as a legal conclusion that it authorized the holder to teach in the public schools of the state and receive pay therefor. Taylor v. State [Ga.] 51 S. E. 326.

11. See 4 C. L. 8, n. 90.

12. Use of mails to defraud. Miller v. U. S. [C. C. A.] 133 F. 337.

13. Indictment framed under Pen. Code 1895, § 234, making it a felony to utter a forged order for money, goods or any thing of value, held, that the order forged, recited in the indictment, sufficiently showed

that fact,[14] but where the statute makes the particular kind of act punishable, that only need be stated. Indictments for attempts to commit a crime must aver both the intent and the overt act constituting the attempt.[15] To authorize cumulative punishment, previous convictions must be clearly alleged.[16] Where the crime can be committed only on certain territory, it must be clearly alleged that defendant's act was committed within the proscribed area.[17]

Bad spelling and ungrammatical construction[18] do not vitiate an indictment[19] where no prejudice results to the accused.[20]

Intent or knowledge.[21]—Where intent, malice,[22] or knowledge is not a statutory element of the offense,[23] or where the facts charged necessarily involve it,[24] it need not be averred. But where of the essence of the offense as defined in the statute, averment is necessary.[25] In charging attempts where the intent is the gist of the offense, it must be directly and certainly charged.[26] "Unlawfully" is not necessary where "knowingly, willfully and feloniously" are averred.[27] The use of "feloniously" in charging a misdemeanor does not vitiate the indictment.[28]

Venue[29] must be alleged, but beyond a mere showing that the offense was committed within the jurisdiction of the court, a specific averment of locality is not generally otherwise required.[30]

Surplusage[31] is a term applied to those nondescriptive averments in a pleading

the goods obtained to be of value, as against a motion in arrest of judgment. Battle v. State [Ga.] 50 S. E. 342.

14. An indictment for conspiracy need not set out the means by which the conspirators intended to accomplish their unlawful purpose. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75. An indictment for murder by means unknown is good. Donahue v. State [Ind.] 74 N. E. 996. Means of committing murder and location of wound held sufficiently alleged. Wound on head with blunt instrument. Commonwealth v. Snell [Mass.] 75 N. E. 75. In Florida, in homicide, the instrument, if known to the grand jury, must be described in the indictment (Houston v. State [Fla.] 39 So. 468), and if unknown it should be stated that the means, instruments and weapons are to the jury unknown (Id.)

15. Hogan v. State [Fla.] 39 So. 464. An indictment charging that the accused "did by force and against her will unlawfully attempt to ravish and carnally know the person of one A. a female person, by then and there unlawfully, by force and against her will, attempting to have sexual intercourse with her, the said A.," is fatally defective in failing to aver an overt act. Id.

16. General allegation not sufficient. Kinney v. State [Tex. Cr. App.] 84 S. W. 590. Where cumulative punishment is predicated or prior convictions of felony and prior convictions in other states are relied on, facts must be alleged showing such crimes to be felonies in the states where conviction took place Commonwealth v. Finn [Ky.] 86 S. W. 693.

17. See 4 C. L. 8, n. 94, and see Intoxicating Liquors, 4 C. L. 272.

18. See 4 C. L. 8.

19. Newman v. Commonwealth [Ky.] 88 S. W. 1089. Omission of "of" between words "goods and chattels" and name of prosecutor. Bennett v. State [Ark.] 84 S. W. 483. Omission of "and" from averment of year, and "said" before name. Pearson v. State [Tex. Cr. App.] 86 S. W. 325. Use of "is" for "his." Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159. Use of "willingly" for "wilfully" in indictment for murder. Daniels v. State [Ark.] 88 S. W. 844.

20. See post, § 15.

21. See 4 C. L. 8.

22. Murder by abortion. Johnson v. People [Colo.] 80 P. 133.

23. Knowledge of relationship in incest. State v. Rennick [Iowa] 103 N. W. 159.

24. Forgery. Commonwealth v. Hall, 24 Pa. Super. Ct. 558. Conspiracy. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75. Conspiracy to defraud. United States v. Stone, 135 F. 392.

25. Bribery. United States v. Green, 136 F. 618. Forgery. State v. Swensen [Idaho] 81 P. 379. Indictment for mayhem in blowing off another's hand with a cannon cracker held sufficiently to aver malice and willfullness. Neblett v. State [Tex. Cr. App.] 85 S. W. 813. In an indictment under Pen. Code 1895, § 219, par. 3, it is not necessary to allege that the act of trespass was done "willfully." Shrouder v. State, 212 Ga. 615, 49 S. E. 702. In prosecution for keeping dangerous dog, knowledge that dog was fierce and dangerous must be alleged and proved, but knowledge of attacks by the dog need not be. Tubins v. District of Columbia, 21 App. D. C. 267.

26. See 4 C. L. 8, n. 3.

27. State v. Miller [Mo.] 89 S. W. 377.

28. Brister v. State [Miss.] 38 So. 678.

29. See 4 C. L. 8.

30. Venue held sufficiently shown by caption. Commonwealth v. Snell [Mass.] 75 N. E. 75. State, being shown in margin, need not be repeated in body. State v. Hunt [Mo.] 88 S. W. 719.

31. See 4 C. L. 9.

which may be rejected without impairing its validity.[32] Such averments may be treated as merely useless and of no effect and need not be proved.[33]

Time.[34]—Where there is no statute of limitations barring the offense, it is unnecessary to state the day or even the year, but it is sufficient to aver generally that the offense was committed before the finding of the indictment,[35] and it is not necessary in any case to state the day on which the offense was committed, unless the day itself is of the essence of the offense,[36] or unless time is important to bring the offense within the operation of new or amended statutes or the like, and where an impossible date is given, it will be disregarded if the offense be one as to which there is no limitation and as to which the date is not important.[37] A continuing offense is properly charged as between certain dates.[38] It is not essential that an accusation for a misdemeanor charge the commission of the crime on the same day as that alleged in the warrant upon which the accusation is based.[39]

Avoiding statute of limitations.[40]—Where there is a statute of limitations applicable to the offense, there should be a sufficiently definite averment of time to

32. Allegations in an indictment, wholly foreign to any element in the offense charged, may be disregarded as surplusage, and need not be proved. Shrouder v. State, 121 Ga. 615, 49 S. E. 702. The rule is otherwise as to averments which are descriptive of some element in the offense, though more precise and detailed than is absolutely necessary. Id.

Illustrations: Indictment for perjury. State v. Mercer [Md.] 61 A. 220. Charge of assault in count for rape. James v. State [Wis.] 102 N. W. 320. A conclusion "against the form of the statute" is surplusage in an indictment for an offense at the common law. State v. Bacon [R. I.] 61 A. 653. Want of consent of female under age of consent. State v. Jones [Mont.] 80 P. 1095. An indictment charging that the accused in the nighttime did unlawfully, willfully and maliciously set fire to and attempt to burn a certain building owned by A. and occupied by B. as a dwelling house, sufficiently set forth an attempt to commit arson, even though it alleges more than is necessary. Kinchien v. State [Fla.] 39 So. 467. An averment in an indictment for violation of a statute relative to the carrying on of the business of putting up lightning rods, that defendant "sold" rods was mere surplusage. State v. Sheppard, 138 N. C. 679, 50 S. E. 231.

33. State v. Erickson [N. D.] 103 N. W. 389. Continuando alleging commission of offense on day certain and divers other days. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. "Suffer" and "allow" held surplusage in information alleging that defendant did suffer, allow and permit a minor to remain in his saloon. Botkins v. State [Ind. App.] 75 N. E. 298.

34. See 4 C. L. 9.

35. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615; State v. Gift [Mo. App.] 86 S. W. 593. Commission of offense before finding of indictment held shown by caption. Commonwealth v. Snell [Mass.] 75 N. E. 75. Indictment to replace one lost held bad for conflict of dates and uncertainty of limitations. Combs v. Commonwealth [Ky.] 84 S. W. 753. Where a date must be alleged, averment of the year as "one thousand nine hundred four" is sufficient. Pearson v. State [Tex. Cr. App.] 86 S. W. 325.

36. State v. Wissing, 187 Mo. 96, 85 S. W. 557. The exact date of the commission of the crime need not be set forth in the indictment except where time is a material element of the offense. Indictment for rape not demurrable because the day of the month is left blank. Cecil v. Territory [Okl.] 82 P. 654. On the trial of one indicted for breaking Sunday laws, evidence of any violation of the law prior to the finding of the indict- admissible. Seale v. State, 121 Ga. 741, 49 S. E. 740. Where a special presentment was returned at the November term, 1903, of the superior court of Jefferson county, which begins its sessions November 12, and charged that an offense was committed November 8, 1903, this was sufficient to show that the alleged date of the offense was prior to the return of the presentment. Edwards v. State [Ga.] 51 S. E. 630. The time of the alleged commission of an offense, as stated in the indictment or information, must not be shown on the face of such pleading to be subsequent to the return of the indictment or the filing of the information, but must appear to be anterior or prior thereto. Terrell v. State [Ind.] 75 N. E. 884. An indictment found Sept. 12, 1903, charging the commission of the offense on "July 12, 18903," held fatally defective. Id. Burns' Ann. St. 1901, § 1825, providing that no indictment or information shall be deemed invalid because it omits to state the time at which the offense was committed in any case in which time is not of the essence of the offense, nor for stating the time imperfectly unless time is of the essence of the offense, will not remedy the defect. Id. Date on which an unlawful sale of intoxicating liquor was made. State v. Burton, 138 N. C. 575, 50 S. E. 214.

37. See 4 C. L. 9, n. 18, 19. Where the information charged an offense on the 9th day of September and the state's attorney said in his opening statement that he expected to prove an offense in August, held not to make the date alleged an impossible one, and a motion to quash on such ground was properly overruled. State v. Willett [Vt.] 62 A. 48.

38. Living in adultery. State v. Nelson [Wash.] 81 P. 721. See, also, post, § 4 F.

39. Shivers v. State [Ga.] 51 S. E. 596.

40. See 4 C. L. 9.

show that the statute has not run.[41] Where it appears on the face of the indictment that limitations have run, facts avoiding the bar must be pleaded.[42]

Repugnancy [43] consists in two inconsistent allegations in the same count which destroy each other.[44] No contradictory or repugnant matters which may be rejected as surplusage will vitiate, nor is an indictment repugnant which conjunctively unites in a single count all the disjunctive elements recited in the statute defining the offense;[45] or the several causes which may operate to toll the statute of limitations.[46] Repugnancy between counts is not demurrable.[47]

Duplicity.[48]—A count that charges two separate and distinct offenses is bad,[49] and where the alternative words of the statute create separate offenses, they cannot both be used in the same count,[50] but a single count may state facts that show that a statutory offense has been committed by all the modes named in the statute,[51] and if two or more offenses arise from a single act or transaction, or are closely related, they may be joined in one count.[52] In some states means may be averred in the alternative,[53] but in Georgia this is held bad pleading.[54] Averments of the several times and places of a crime are not double if the act of offense is single.[55] Acts alleged as incidents or parts of the main offense charged do not render the indictment duplex, though in themselves sufficient to amount to a statutory offense,[56] and an information is not double when one of the offenses is insufficiently charged.[57]

41. See 4 C. L. 10, n. 21.

42. Facts held sufficiently alleged. State v. Miller [Mo.] 87 S. W. 484.

43. See 4 C. L. 10.

44. It is not a valid objection to an indictment charging a conspiracy to defraud persons unknown that it also discloses that defendants defrauded persons known. Miller v. U. S. [C. C. A.] 133 F. 337.

45. See 4 C. L. 10, n. 27.

46. State v. Miller [Mo.] 87 S. W. 484.

47. See 4 C. L. 10, n. 28

48. See 4 C. L. 17.

49. Commonwealth v. Hall, 23 Pa. Super. Ct. 104; Id., 23 Pa. Super. Ct. 232; Porter v. State [Tex. Cr. App.] 86 S. W. 767. Several offenses of disposing of crops by farm tenant. State v. Ashpole [Iowa] 104 N. W. 281. Selling chattel mortgaged property to two persons. Wood v. State [Tex. Cr. App.] 84 S. W. 1058.

50. See 4 C. L. 17, n. 61.

51. Desertion of wife and [or] children. Goddard v. State [Neb.] 103 N. W. 443. Where the statute makes two or more distinct acts connected with the same transaction indictable, each of which may be considered as representing a phase of the same offense, the different acts may be coupled in one court. Did make, utter and publish, and cause to be made, uttered and published. Commonwealth v. Hall, 23 Pa. Super. Ct. 104, Id., 23 Pa. Super. Ct. 232. An indictment charging conjunctively the commission of cognate offenses forbidden disjunctively in a statute is not duplex. State v. Providence Gas Co. [R. I.] 61 A. 44. Did keep and assist in keeping a nuisance. State v. Bush [Kan.] 79 P. 657. Larceny by stealing sheep, latter being a distinct crime. State v. Klein [Wash.] 80 P. 770.

52. Commonwealth v. Hall, 23 Pa. Super. Ct. 104, Id., 23 Pa. Super. Ct. 232.

53. See 4 C. 8, n. 95. In Alabama, the means by which a homicide was committed may be pleaded in alternative averments. Code 1896, §§ 4906, 4911. Smith v. State [Ala.] 39 So. 329. Indictment for murder in the second degree held not vague and uncertain because of alternative averments that accused killed deceased "by hitting him or by striking him with a hatchet, or with some blunt instrument to the grand jury unknown." Id.

54. Where an offense can be committed in more than one way, an indictment charging it as having been committed in one way or the other, in the alternative is bad. Indictment charging that accused did "unlawfully play and bet for money or other thing of value at a game of skin or other game played with cards" is bad as against a special demurrer. Haley v. State [Ga.] 52 S. E. 159.

55. "On" a certain day "and on" divers days between then and a later day and "on the" later day avers only one continuing offense. State v. Brown [N. D.] 104 N. W. 1112. Averring a nuisance in two buildings in the same curtilage is not double. Liquor nuisance. Id.

56. Commonwealth v. Hall, 23 Pa. Super. Ct. 104; Id., 23 Pa. Super. Ct. 232. An averment in an indictment for murder that accused "did make an assault" is not double. Baysinger v. Territory [Okl.] 82 P. 728. An indictment charging that the signature of the chairman of the board of public instruction to a school warrant was forged, and also that the name of the payee indorsed thereon, "J. W. B by A. J. W" was a forgery, is not bad for duplicity, the indorsement being made by A. J. W. and hence, even though unauthorized, was not a forgery. Wooldridge v. State [Fla.] 38 So. 3.

57. Commonwealth v. Hall, 23 Pa. Super. Ct. 232. Indictment alleging sale without license and sale in town which had voted no license. People v. Seeley, 93 N. Y. S. 982. Charge of arson is not bad, though it sets up facts amounting to a conspiracy were it not for the fact that defendants are husband

The statutory enumeration of offenses that may be joined in one indictment is exclusive.[58] An indictment is not duplex because it sets out the acts done in furtherance of the conspiracy charged,[59] nor because it charges a single crime against several,[60] nor because of the averment of a disjunctive oath in an assignment of perjury.[61]

Designation and characterization of the offense.[62]—In some states the crime must be designated by name if it has one, otherwise a brief description must be given.[63] In the absence of such a statute, a wrong designation or the absence of any designation in an otherwise sufficient indictment is immaterial.[64]

Statutory crimes.[65]—An indictment in the language of the statute or in terms substantially equivalent thereto is sufficient,[66] subject to the qualification, fundamental in the law of criminal procedure, that the accused is thereby apprised with reasonable certainty of the nature of the accusation against him.[67] If the words of themselves do not fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense,[68] or if the statute merely designates the offense by its common-law name,[69] an indictment following the statute will not suffice. An information for a statutory offense need not use the language of the statute if the facts stated set forth all the essentials of the offense,[70] but the facts alleged must bring the offense clearly within the statutory terms.[71] In California private statutes are sufficiently pleaded by reference to their titles and the dates of their passage.[72] Ordinances must be specially pleaded.[73]

and wife and could not conspire. State v. Mann [Wash.] 81 P. 561. Adultery and living in adultery. State v. Nelson [Wash.] 81 P. 721.

58. See 3 C. L. 17, n. 66, 67.

59. Several conspiracies to defraud and receiving money in furtherance of them. McGregor v. U. S. [C. C. A.] 134 F. 187; State v. Loser [Iowa] 104 N. W. 337.

60. Assault. State v. Johnson [Kan.] 79 P. 732. The stealing of articles belonging to two or more persons at one and the same time and place constitutes but one offense and may be so charged. State v. Clark [Or.] 80 P. 101.

61. Trevinio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 716, 88 S. W. 356.

62. See 4 C. L. 10.

63. Designation of offense by name given in marginal note to statute denouncing it is sufficient. United States v. Green, 136 F. 618.

64. State v. Nelson [Wash.] 81 P. 721.

65. See 4 C. L. 10.

66. Fence breaking. State v. Gift [Mo. App.] 86 S. W. 593. False personation of voter. Brennan v. People, 113 Ill. App. 361. Conspiracy. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75. Abortion resulting in death. Johnson v. People [Colo.] 80 P. 133. Liquor selling. Commonwealth v. Jarvis [Ky.] 86 S. W. 556. McCalman v. State, 121 Ga. 491, 49 S. E. 609. For robbery, in the language of form 77 Cr. Code 1896, p. 335. Toliver v. State [Ala.] 38 So. 801. Indictment for larceny following the language of Pen. Code 1895, § 155, held to sufficiently allege the stealing and to sufficiently describe the property. Patterson v. State [Ga.] 50 S. E. 489. An indictment for obtaining money under false pretenses being in the form prescribed by Code Ala. 1896, § 4923, form 48, Cr. Code 1896, p. 330, is sufficient. Johnson v. State [Ala.] 37 So. 937. In a prosecution for purchasing seed cotton in violation of law, an indictment following the terms of the statute held not subject to demurrer because of the failure to describe the land on which the seed cotton was grown. Bozemore v. State, 121 Ga. 619, 49 S. E. 701.

67. "Policy" need not be defined. State v. Cronin [Mo.] 88 S. W. 604.

68. An indictment under a statute must state all the circumstances which constitute the definition of the offense in the statute so as to bring the defendant precisely within it. State v. Dolan [W. Va.] 52 S. E. 181. False pretenses. Commonwealth v. White, 24 Pa. Super. Ct. 178. False entry by bank officer. State v. Piper [N. H.] 60 A. 742. Conspiracy. O'Donnell v. People, 110 Ill. App. 250. To render an indictment good because in the language of the statute it must state every element necessary to constitute the offense. The offense as stated must be complete in itself. Commonwealth v. Gregory [Ky.] 89 S. W. 477.

69. See 4 C. L. 10, n. 35.

70. Enticing female into house of prostitution. State v. Dickerhoff [Iowa] 108 N. W. 350. Running automobile without license. State v. Cobb [Mo. App.] 87 S. W. 551. Need not state circumstances of aggravation subjecting accused to greater punishment. See 4 C. L. 11, n. 37.

71. Allegation of "willful and unlawful" is insufficient under a statute denouncing "rudely" doing the act complained of. Fuller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 524, 87 S. W. 832. An indictment for a statutory offense need not state the time when the statute took effect. See 4 C. L. 11, n. 37.

72. City ordinances. Ex parte Childs [Cal. App.] 81 P. 667.

73. The charge of "keeping intoxicants

Exceptions and provisos.[74]—Where an exception is so engrafted in the enacting clause of a statute that the offense cannot be described without meeting and negativing the exception, it must be alleged in the indictment that defendant is not within the excepted class if insisted upon,[75] but where the exceptions and provisos appear in distinct or subsequent clauses, negation is not necessary.[76] When a proviso in a statute is in the nature of an exception and withdraws the case provided for from the operation of the act, an indictment founded on such act need not negative the proviso.[77]

Setting forth written or printed matter.[78]—The general rule is that unless there is a special reason therefor a written instrument may be described by its legal effect;[79] but a variance between the purport and tenor clauses in forgery is fatal.[80]

Principals and accessories.[81]—At the common law an accessory must be charged as such. In those states where the distinction between principals and accessories has been abolished, the ancient rule as to the necessity of charging accessories as such no longer prevails, and accessories may be prosecuted as principals.[82] An indictment which charges that one being absent at the time when the crime was committed did "procure, counsel and command" the person alleged as principal in the crime to commit the same, contains a sufficient charge against one indicted as an accessory before the fact.[83]

Designation of accused.[84]—An indictment must identify accused with certainty,[85] but one equally well known by two or more names may be indicted under either.[86] Aliases need not be repeated in subsequent portions of the indictment.[87] The omission of an averment of the residence of the defendant is not ground for quashing the indictment where it conforms in all other particulars with the prescribed statutory form, and the offense is plainly described.[88]

Designation of third persons.[89]—It is of no consequence that the name by which a third person is designated in the indictment is incorrect or is an assumed one, if it is the name by which he is generally known.[90] It is of no moment that he was

for sale within the limits of Ft. Valley, Ga.," in violation of an ordinance of that town, does not charge the commission of a crime punishable under the laws of the state. Little v. State [Ga.] 51 S. E. 501.

74. See 4 C. L. 11.

75. An information charging the sale of intoxicating liquors, without specifying the kind of liquors sold and without negativing the circumstances under which cider and wines, included in the words "intoxicating liquors," could lawfully be sold, is sufficient after a verdict of guilty; for it will be presumed the sale was found illegal. State v. Barr [Vt.] 62 A. 43.

76. Conspiracy to defraud. United States v. Stone, 135 F. 392. Abortion resulting in death. Johnson v. People [Colo.] 80 P. 133. An indictment for a violation of Pen. Code 1895, § 420, need not allege that the train for the running of which accused is charged to be responsible was not within any of the statutory exceptions to that section. Allegations to that effect are mere surplusage and need not be proven to warrant the conviction of the accused. Seale v. State, 121 Ga. 741, 49 S. E. 740; Jackson v. State, 88 Ga. 787; approved and reaffirmed 15 S. E. 905.

77. The defendant may show such fact by way of defense. State v. Burton, 138 N. C. 575, 50 S. E. 214.

78. See 4 C. L. 11.

79. See 4 C. L. 11, n. 45.

80. Mayers v. State [Tex. Cr. App.] 85 S. W. 802.

81. See 4 C. L. 11.

82. See 4 C. L. 11, n. 48, 49.

83. Rawlins v. State [Ga.] 52 S. E. 1.

84. See 4 C. L. 11.

85. Misspelling of the name is immaterial. See 4 C. L. 11, n. 53.

86. It is proper in the information to describe defendant by known "aliases" or "otherwise," etc., when not prejudicial to him but preferable to state a name with true name as unknown. State v. Howard [Mont.] 77 P. 50.

87. Moore v. State [Tex. Cr. App.] 83 So. 1117.

88. This was necessary only under the statutes requiring the pleading of additions and at the common law, where process of outlawry might lie. Tarver v. State [Ga.] 51 S. E. 501.

89. See 4 C. L. 11.

90. The indictment charged the accused with the offense of arson for that on a named day he did "set fire to the mill and machinery building in the city of Tifton of the Tifton Knitting Mills, same being a house." There was no demurrer. Held, that it was not error to allow the state to prove that the Tifton Knitting Mills was a corporation. George v. State [Ga.] 51 S. E. 504.

better known by another name.[91] Third persons incidentally referred to need not be named unless necessary to be proved or to inform accused of the nature of the charge.[92]

Description of money [93] need not be exact, and an averment of "current money" or "currency" is sufficient and is sustained by proof of any current money.[94]

Description and ownership of property.[95]—Description of property must be with sufficient certainty to enable the jury to say whether the chattels proved to have been the subject of the crime are the same as those referred to in the information and to enable the court to know judicially that the articles could have been the subject-matter of the offense charged.[96] Ownership must be correctly laid,[97] and property owned jointly or in common by several may be laid in all or either of them.[98]

(§ 4) *D. Issues, proof and variance.*[99]—All necessary averments must be proved as laid, including unnecessarily minute descriptions of necessary facts;[1] but an unnecessary description of an unnecessary fact need not.[2] Evidence must be restricted to the matters alleged in the indictment.[3] Immaterial variances will not reverse.[4]

Where it appears that the grand jury knew, or by the exercise of reasonable

91. See 4 C. L. 11, n. 57. In a prosecution for murder where the testimony shows that the person killed was unknown and called by the name alleged in the indictment, a conviction will not be set aside because there was testimony that the deceased was also known and called by another name. Thomas v. State [Fla.] 38 So. 516. Where one is convicted of having unlawfully lived with a woman who is known by two names, by one of which she is described in the indictment, the conviction will not be set aside because the other was in fact her real name. Whittington v. State, 121 Ga. 193, 48 S. E. 948. Misspelling of names is immaterial where they are idem sonans. See 4 C. L. 12, n. 58.

92. State v. Cooney [N. J. Law] 60 A. 60. Names of persons intended to be defrauded by conspiracy need not be stated if unknown to grand jury. Miller v. U. S. [C. C. A.] 133 F. 337.

93. See 4 C. L. 12.

94. "Lawful money" is satisfied by proof of bank notes. State v. Finnegan [Iowa] 103 N. W. 155.

95. See 4 C. L. 12.

96. State v. Sanders [N. D.] 103 N. W. 419. An indictment for simple larceny which charges the accused with stealing "one black and white male hog, of the personal goods" of a named person, sets forth a legally sufficient description of the stolen property. Harvey v. State, 121 Ga. 590, 49 S. E. 674.

97. "Blonging to" the United States is sufficient. Dimmick v. U. S. [C. C. A.] 135 F. 257. Mistake is immaterial in Kentucky if the offense is otherwise sufficiently described. Commonwealth v. Napier [Ky.] 84 S. W. 536. By statute in some states the separaae property of a married woman may be alleged to be owned by either her or her husband. See 4 C. L. 12, n. 66.

98. Commonwealth v. McDonald [Mass.] 73 N. E. 852.

99. See 4 C. L. 12.

1. Charge of stealing certain ounces of silver is not supported by proof of stealing certain spoon and fork blanks. State v. Nelson [R. I.] 60 A. 589.

2. See 4 C. L. 12, n. 72.

3. Where, in a trial for embezzlement, the prosecuting attorney has upon request furnished a bill of particulars of the several transactions which the state proposes to prove to maintain its case, the evidence should be restricted to such transactions. Young v. State, 6 Ohio C. C. (N. S.) 53. A deed by means of which a swindle was accomplished is admissible, though not set out in the indictment. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 630, 88 S. W. 811.

4. Criminal libel. Collins v People, 115 Ill. App. 280. Extortion. Hanley v State [Wis.] 104 N. W. 57. Use of force in rape under age of consent. State v. Sheets [Iowa] 102 N. W. 415. Variance in. Description of house burglarized held immaterial. State v. Cox [Wash.] 81 P. 848. That the indictment states that the victim "then and there instantly died," while the proof shows that death followed the day after he was wounded, is not a fatal error. State v. Reeder [S. C.] 51 S. E. 702. Under an indictment charging one with stealing "one double case silver watch," the variance was not fatal where it appeared that accused took from a jeweler's bench the case and works which had been separated. Patterson v. State [Ga.] 50 S. E. 489. In homicide the indictment alleging that the prisoner held the pistol in his right hand when he fired the fatal shot, proof that he held the pistol in his left hand does not constitute a fatal variance. State v. Bell [Del.] 62 A. 147. In arson an allegation of ownership in an indictment is sustained by proof of occupancy by the alleged owner under a claim of right. Harrell v. State, 121 Ga. 607, 49 S. E. 703. An indictment charging the accused with having disturbed divine service at "New Hope Methodist Church (colored)" is substantially supported by proof that the offense was committed at "New Hope African Methodist Episcopal Church," the same being a "colored" church known generally as the "New Hope Church," and not appearing to be incorporated. Edwards v. State, 121 Ga. 590, 49 S. E. 674.

diligence could have known, material facts stated to be unknown to them, there is a fatal variance.[5]

Time,[6] unless an essential ingredient of the offense charged,[7] is not material further than to avoid the statute of limitations,[8] and to prove that the crime was committed prior to the finding of the indictment,[9] and a conviction will not be disturbed because the offense was shown to have been committed on a day prior or subsequent to that alleged where defendant was not prejudiced;[10] but the date may be material in certain cases, as where alibi is relied on as a defense.[11]

Name or other description of accused or third person.[12]—The allegations and proof must correspond as to the owner of property stolen or embezzled,[13] though immaterial variances will not reverse.[14] That only a part of the alleged conspirators are shown to have benefited by the transaction is not a variance.[15]

(§ 4) *E. Defects, defenses and objections.*[16]—Formal defects, apparent of record,[17] or on the face of the indictment,[18] must be taken advantage of before plea,[19] or before the jury is sworn,[20] such defects being waived by plea[21] and cured by verdict.[22] For matters affecting the real merits, the remedy after trial, is by motion in arrest of judgment,[23] and no question as to the legal sufficiency of an indictment can be properly raised in a motion for a new trial.[24] Failure to move to quash or to arrest judgment does not waive a substantial defect, though apparent on the face of the indictment.[25] An indictment failing to charge a public offense may be first attacked on appeal,[26] but will not then be adjudged insufficient for every

5. If names of third persons intended to be defrauded were unknown and so stated it is enough. Miller v. U. S. [C. C. A.] 133 F. 337. Where an indictment alleges a sale to persons to the grand jury unknown, a contention that a sale cannot be shown to particular person is untenable. People v. Seeley, 93 N. Y. S. 982. Where a court charges homicide by a blunt instrument unknown to the grand jury, and the proof shows the means was known to the grand jury, there is a fatal variance. Smith v. State [Ala.] 39 So. 329.

6. See 4 C. L. 13.

7. Unless descriptive of the offense the time need not be proved as laid in the information. State v. Willett [Vt.] 62 A. 48.

8. State v. Brown, 37 Wash. 106, 79 P. 638; Commonwealth v. Powell, 23 Pa. Super. Ct. 370.

9. State v. Barnett, 110 Mo. 584, 85 S. W. 615; Commonwealth v. Powell, 23 Pa. Super. Ct. 370. Rape. State v. Osborne [Wash.] 81 P. 1096. Evidence held not suffcient to show offense before return of indictment. Wolf v. State [Tex. Cr. App.] 85 S. W. 1145. That offense was committed prior to indictment must be shown. Moore v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 701, 88 S. W. 228.

10. Green v. State [Tex. Cr. App.] 86 S. R. 332.

11. See 4 C. L. 13, n. 80.

12. See 4 C. L. 13.

13. Burglarized premises may be alleged in tenant or special owner. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 626, 88 S. W. 813.

14. State v. Rooke [Idaho] 79 P. 82. An allegation that the person injured is a corporation is supported by proof that it is a de facto corporation. Higbee v. State [Neb.] 104 N. W. 748. Where larceny from a corporation is charged, it is immaterial that the corporation did not in fact own the property. People v. Kellogg, 94 N. Y. S. 617.

15. Olson v. U. S. [C. C. A.] 133 F. 849. An instruction authorizing a conviction if defendant alone or jointly with others committed the crime is not broader than an indictment charging him alone. State v. Scullin, 185 Mo. 709, 84 S. W. 862.

16. See 4 C. L. 13.

17. State v. Brown [Iowa] 102 N. W. 799.

18. No signature by foreman. McFall v. State [Ark.] 84 S. W. 479.

19. Demurrer or motion to quash. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Exceptions which go merely to the form of the indictment should be made before the trial. Scandrett v. State [Ga.] 52 S. E. 160.

20. Act Mch. 31, 1860, § 11. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

21. Goddard v. State [Neb.] 103 N. W. 443; Territory v. Eaton [N. M.] 79 P. 713. Failure of record to affirmatively show that grand jury was directed by the court to investigate the subject. Oligschlager v. Territory [Okl.] 79 P. 913. A mere formal defect in an indictment is waived where defendant, without objection to the defects, pleads to the merits and goes to trial. Hampton v. State [Fla.] 39 So. 421.

22. Failure to file preliminary complaint. Steinke v. State [Tex. Cr. App.] 86 S. W. 753. Lack of verification. State v. Lee [Mo. App.] 87 S. W. 527. An indictment which alleges the offense as of a day after the finding of the indictment is bad on special demurrer but good after verdict. Spencer v. State [Ga.] 51 S. E. 294. Not ground for new trial. Scandrett v. State [Ga.] 52 S. E. 160.

23. Scandrett v. State [Ga.] 52 S. E. 160.

24. Moses v. State [Ga.] 51 S. E. 503.

25. See 4 C. L. 13, n. 90.

26. See post, § 14, Saving questions for review.

defect of substance for which a motion to quash will lie, and an objection that the indictment is duplex [27] comes too late on appeal. Where a prisoner has given bail to answer the charge, he cannot after indictment found raise by motion to quash any question touching the legality of his arrest.[28] The indictment is void if there was no legal grand jury.[29]

Motions to quash are addressed to the sound discretion of the trial court,[30] and a statutory enumeration of grounds of quashal has been held exclusive.[31] So where the code prescribes as ground for setting aside "any ground which" would be good cause to challenge the grand jury, statutory restrictions of the grounds of challenge are intended.[32]

Motion to quash an information lies for lack of verification,[33] but failure of the prosecuting attorney to spell out his full name in the body or signature of the information is no ground,[34] and a motion to set aside an information on the ground that it was not found, indorsed or presented as required by law, is not sufficient to draw in question the legality of the appointment of the deputy district attorney filing it.[35]

An indictment not based upon any testimony is subject to a plea in abatement,[36] and the court has inherent power to set aside an indictment found without evidence or upon wholly illegal and incompetent testimony, and where it is based in part on the testimony of defendant compelled to testify in violation of his constitutional rights.[37] The use of accused's wife as a witness before the grand jury is no ground for setting aside the indictment,[38] and the character of the evidence taken by the grand jury is considered only in exceptional cases.[39] Testimony of grand jurors is not competent to show the evidence or want of evidence upon which they based an indictment,[40] or to show that less than the necessary number voted for it;[41] but inspection of the minutes of the grand jury may be allowed for the purpose of moving to set aside the indictment on one of the statutory grounds.[42] A voluntary report by the grand jury will not be considered in determining the validity of an indictment rendered by it.[43] An indictment returned and presented to the court

27. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211; Commonwealth v. Shoener, 25 Pa. Super. Ct. 526.

28. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

29. A de facto judge sitting at a time when court could lawfully be held may convoke the grand jury and the indictment will be good (Walker v. State [Ala.] 38 So. 241), but one returned by a grand jury organized at a time when the court could not legally be held is void (Skinner v. State [Ala.] 38 So. 242).

30. Commonwealth v. Brown, 23 Pa. Super. Ct. 470; McGregor v. U. S. [C. C. A.] 134 F. 187.

31. Burns' Ann. St. 1901, §§ 1824, 1825, 1828. Donahue v. State [Ind.] 74 N. E. 996; People v. Steinhardt, 93 N. Y. S. 1026.

32. That the grand jury was "illegally drawn, organized and empaneled" that not 200 names were in the box, and that on the non-appearance of six out of eight the court designated certain to serve instead of ordering the sheriff to summon the number necessary, do not state any ground which would sustain a challenge to the panel or to any grand juror within Rev. Code Cr. Proc. § 263. State v. Lamphere [S. D.] 104 N. W. 1038. Supplying deficiency after grand jury is organized is not within Code 1896, § 5269. Nordan v. State [Ala.] 39 So. 406.

33. State v. Gutke [Mo.] 87 S. W. 503; State v. Lee [Mo. App.] 87 S. W. 527

34. State v. Brock, 186 Mo. 457, 85 S. W. 595.

35. State v. Guglielmo [Or.] 79 P. 577.

36. State v. Faulkner, 185 Mo. 673, 84 S. W. 967.

37. People v. Steinhardt, 93 N. Y. S. 1026.

38. State v. Brown [Iowa] 102 N. W. 799.

39. McGregor v. U. S. [C. C. A.] 134 F. 187. On the issue raised by a plea in abatement on the ground that no testimony was received on which to found it, the character of the evidence received is not examinable. State v. Faulkner, 185 Mo. 673, 84 S. W. 967. The court will not inquire into the character of the evidence that influenced the grand jury for the purpose of impeaching an indictment. Taylor v. State [Fla.] 38 So. 380. Held not error to refuse to permit a grand juror to be asked, "State whether or not the indictment in this case was ignored," and afterwards, without further testimony, this indictment was found. Id.

40. State v. Faulkner, 185 Mo. 673, 84 S. W. 967. See, also, Grand Jury, 5 C. L. 1591.

41. Nash v. State [Ark.] 84 S. W. 497.

42. People v. Steinhardt, 93 N. Y. S. 1026; Havenor v. State [Wis.] 104 N. W. 116; Murphy v. State [Wis.] 102 N. W. 1087.

43. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75.

in the usual manner, with the names of witnesses endorsed thereon, is presumed to have been found in the manner indicated by law, and this presumption is sufficient to support its regularity until rebutted by satisfactory evidence.[44]

The presence of unauthorized persons,[45] such as jurors improperly substituted,[46] or irregularity in summoning grand jurors, may be raised by motion to quash, and disqualification of individual jurors is ground in some states,[47] though not in others.[48] A failure to find indictment within the statutory time may be so reached.[49] On a motion to quash, it is, for the purpose of the motion, conceded or admitted by both parties to the cause that the time at which the offense is charged to have been committed is correctly stated.[50]

The joinder of distinct offenses in the same indictment can be reached only by motion to quash addressed to the sound discretion of the trial court, and not by demurrer or motion in arrest.[51] A demurrer will not reach objections which lie partly in facts not apparent on the face of the indictment.[52]

One good count to which the verdict and judgment respond is sufficient to sustain conviction,[53] and a demurrer [54] or a general motion to quash is properly overruled where there is one good count.[55]

44. State v. Faulkner, 185 Mo. 673, 84 S. W. 967.

45. Where there is nothing to show that the persons objected to were not witnesses other than the absence of their names from the indictment, a motion to have them indorsed and not a motion to inspect the minutes is the proper remedy. People v. Steinhardt, 93 N. Y. S. 1026. That an assistant district attorney was disqualified and appeared before the grand jury is no objection to the indictment. United States v. Mitchell, 136 F. 896.

46. Temporarily excusing without discharging grand juror gives no right to appoint one in his place, and it having been done, indictment is void where legal number (thirteen) was still present while he was absent. Nordan v. State [Ala.] 39 So. 406.

47. Indictment for attempting to defraud a certain corporation will not be quashed because jurors were stockholders. State v. Turner [N. J. Law] 60 A. 1112. Religious belief of juror. State v. Mercer [Md.] 61 A. 220. Where an indictment is set aside on demurrer and the same grand jury finds another, defendant is not entitled to dismissal for want of opportunity to challenge for bias arising out of the juror's former consideration of his case. DeLeon v. Territory [Ariz.] 80 P. 348. A motion to set aside the indictment for that accused had no opportunity to take advantage of the statute providing challenges to individual grand jurors is of no avail where it is not shown that any incompetent person was on the jury. Nash v. State [Ark.] 84 S. W. 497.

48. A motion to quash presents no question as to the qualifications of the grand jurors or as to their having been regularly charged and sworn. Donahue v. State [Ind.] 74 N. E. 996. An indictment will not be quashed because one person summoned as a member of the grand jury was not present when the other members were sworn, but came in while the judge was delivering his charge and was thereupon sworn, and the portion of the charge already read was repeated. Code 1896, § 5269, provides that the only objection that may be taken to the formation of the grand jury is that the jurors were not drawn in the presence of persons designated by law. Dunn v. State [Ala.] 39 So. 147.

49. The objection that an indictment was not found within 9 months after commitment or holding to bail as required by D. C. Code, § 939, is available by motion to quash an indictment before trial. United States v. Codarr, 24 App. D. C. 143; United States v. Hartman, 24 App. D. C. 156.

50. Terrell v. State [Ind.] 75 N. E. 884.

51. State v. Providence Gas Co. [R. I.] 61 A. 44.

52. A demurrer to an indictment on the ground that it shows "upon its face interlineations, alterations, substitutions, and changes from the form in which it was originally drawn" is not good, there being nothing to indicate that the alterations were made subsequently to the time the indictment was acted upon by the grand jury. Allen v. State [Ga.] 51 S. E. 506.

53. O'Donnell v. People, 110 Ill. App. 250; Chicago W. & V. Coal Co. v. People, 114 Ill. App. 75; Donahue v. State [Ind.] 74 N. E. 996; State v. Mount [N. J. Law] 61 A. 259; Pirscher v. U. S. [C. C. A.] 133 F. 526; Bates v. State [Wis.] 103 N. W. 251.

54. A general demurrer to an entire indictment containing one good and one bad count is properly overruled. Sutton v. State [Ga.] 50 S. E. 60.

55. Commonwealth v. Snell [Mass.] 75 N. E. 75. One good assignment in a single count for perjury will sustain refusal to quash. Foreman v. State [Tex. Cr. App.] 85 S. W. 809. Where a section of an ordinance contains several provisions and declares the violation of any one of them an offense, and prescribes the same penalty for all of them, and an information in a single count alleges breaches of all the provisions, it is error to quash the whole case, even if some of the provisions of such section are invalid; certain of them being valid. St. Louis v. Grafeman Dairy Co [Mo.] 89 S. W. 617.

The validity of the indictment in matters of substance may be inquired into in habeas corpus to ascertain the legality of an arrest on proceeding to remove an offender to another district for trial.[56]

(§ 4) *F. Joinder, separation and election.—Joinder of parties*[57] is entirely distinct from the question of joint or separate trials.[58] It is proper where the criminal act is conjoint.[59] Principals and accessories before the fact may be charged in the same indictment and in one count.[60]

Joinder and separation of counts.[61]—One cannot be indicted in one bill for several distinct and unrelated felonies,[62] and an attempt to commit a felony should not be blended in one count with an attempt to commit a misdemeanor;[63] but an indictment may contain several counts charging several offenses of the same nature [64] or arising out of the same transaction,[65] and it is customary to charge the offense in different forms in different counts to meet possible phases of the proof.[66] Any number of misdemeanors may be charged in one indictment.[67] Under the statutes of Indiana, a prosecution by affidavit and information may be on more than one count.[68] Where the statute allows means to be averred alternatively, each alternative averment must be construed as a separate count.[69]

Election.[70]—The object of an election, whether of counts or offenses, being to save the prisoner from embarrassment in his defense, it should, as a rule, be made before the prisoner is called upon to put in his evidence.[71] The special circumstances of a case may make it proper to defer election till the testimony is all in.[72] But then it should be made before summing up.[73] Where two offenses of the same nature are charged, it is discretionary whether the prosecutor shall be required to elect and at what stage of the proceedings;[74] but where each of several

56. United States v. Green, 136 F. 618.

57. See 4 C. L. 17.

58. See post, § 10a.

59. Participants in the crime of fornication may be indicted either jointly or separately. State v. Sauls, 70 S. C. 393, 50 S. E. 17. Cr. Code 1902, §§ 290, 292, defining "fornication" as intercourse with "each other" does not alter the rule. Id.

60. Rawlins v. State [Ga.] 52 S. E. 1.

61. See 4 C. L. 17.

62. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

63. Hogan v. State [Fla.] 39 So. 464.

64. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

65. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Under Pen. Code 1895, § 398, an indictment containing two counts, one charging the defendant with maintaining a gaming house, and the other with knowingly renting the house with the view and expectation of the same being used for gaming is not open to demurrer on the ground of misjoinder of separate and distinct offenses. Bashinski v. State [Ga.] 51 S. E. 499.

66. Larceny and embezzlement. People v. Kellogg, 94 N. Y. S. 617. Rape by force and statutory rape of child under age of consent. People v. Jailles, 146 Cal. 301, 79 P. 965. Defendant is not prejudiced by failure to set out the offense in different forms in different counts. State v. Shanley [S. D.] 104 N. W. 522. Rape and incest may be charged together. Wiggins v. State [Tex. Cr. App.] 84 S. W. 821. Burglary, larceny and receiving may be joined. State v. Richmond, 186 Mo. 71, 84 S. W. 880. Same offense committed in different ways. Murder. State v. Hargraves [Mo.] 87 S. W. 491.

67. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211.

68. Knox v. State [Ind.] 73 N. E. 255.

69. Where indictment charged killing by hitting or striking deceased with a hatchet or with some blunt instrument to the grand jury unknown, there were in effect three counts: the first charging a killing by hitting deceased with a hatchet, the second, by striking him with a hatchet; the third, charging a killing effected by some blunt instrument to the grand jury unknown. Smith v. State [Ala.] 39 So. 329.

70. See 4 C. L. 18.

71. State v. Barr [Vt.] 62 A. 43; State v. Willett [Vt.] 62 A. 48.

72. State v. Barr [Vt.] 62 A. 43, citing Pointer v. United States, 151 U. S. 396, 38 Law. Ed. 208.

73. State v. Barr [Vt.] 62 A. 48, citing Woodford v. People, 62 N. Y., at page 131, 20 Am. Rep. 464.

74. McGregor v. U. S. [C. C. A.] 134 F. 187; Knox v. State [Ind.] 73 N. E. 255; People v. Kellogg, 94 N. Y. S. 617; State v. Rollins, 186 Mo. 501, 85 S. W. 516; State v. Hargraves [Mo.] 87 S. W. 491; Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Whether the prosecution should be required to elect on which count a defendant should be prosecuted depends upon circumstances and is largely discretionary with the trial court. Lorenz v. U. S., 24 App. D. C. 337. The matter of election is ordinarily within the discretion of the court and no exception will lie to the action of the court if an election is compelled before the respondent is called

acts proved constitutes a distinct offense, election should be required.[75] Election between causes alleged to toll the statute of limitations cannot be compelled.[76] The motion must be specific,[77] and a motion to elect for duplicity comes too late after the jury is sworn. An election by the judge is sufficient,[78] and failure to submit a count is tantamount to an election to stand on the one submitted.[79]

(§ 4) *G. Amendments. Indictments,*[80] as a rule, cannot be amended in material matter except by the grand jury finding them.[81] Statutes of jeofails have relaxed the ancient rule as to matters of form,[82] but such statutes as a rule only authorize amendments after and not before the jury has been sworn, and then cannot avail to cure an indictment that fails to charge a public offense.[83] An amendment as to venue is allowed in Indiana.[84] No prejudice results from an unnecessary or immaterial amendment.

Informations,[85] being prepared and filed by the prosecuting attorney, who is always in court, may be amended either in form or substance[86] at any time,[87] saving the rights of the accused as to surprise, the necessity of preliminary examination, and the like.[88] Refiling after amendment is not necessary.[89]

(§ 4) *H. Conviction of lesser degrees and included offenses.*[90]—A verdict for a less crime may be found under an indictment for a greater of the same generic class,[91] the evidence supporting it[92] and the averments being sufficient to include

upon for his defense. So held in a prosecution for statutory rape where evidence of several acts of intercourse was properly in the case. State v. Willett [Vt.] 62 A. 48. The state cannot be compelled to elect upon which item it will rely for conviction, when the indictment charges the embezzlement of the aggregate sum on a particular day. Young v. State, 6 Ohio C. C. (N. S.) 53. Charges of larceny and larceny by embezzlement present an election. State v. Finnegean [Iowa] 103 N. W. 155. Several courts charging the same arson in different forms. Colbert v. State [Wis.] 104 N. W. 61. Two counts involving same facts. Higbee v. State [Neb.] 104 N. W. 748. Several counts for murder charging respectively all of defendants as principals and each of them as principal and the others as accessories. Tuttle v. People [Colo.] 79 P. 1035.

75. Kehoe v. Commonwealth [Ky.] 88 S. W. 1107; State v. Osborne [Wash.] 81 P. 1096. Rape. Schuette v. People [Colo.] 80 P. 890; Powell v. State [Tex. Cr. App.] 82 S. W. 516. The appropriate time to elect is at the close of the state's evidence. State v. Finch [Kan.] 81 P. 494. Election to rely on sale on a particular day is not defective because witnesses who testified to such transaction are not named, there being no evidence of any other transaction on the same day. State v. Durein [Kan.] 78 P. 152. Motion to compel election before evidence is introduced is out of time. State v. Wissing, 187 Mo. 96, 85 S. W. 557. Where evidence in prosecution for adultery showed only two separate and distinct opportunities for commission of the offense, the state should have been compelled to elect on which occasion it would rely. State v. Loftus [Iowa] 104 N. W. 906. Where on a trial under an information containing several counts charging the sale of liquors without a license, the state gave evidence showing the several offenses charged, held error to refuse at the close of the testimony to require the state to elect on which count it would rely for a conviction, though the court ruled that there could be a conviction of no more offenses than there were counts and charged that each offense must be found on the evidence relating to it. State v. Barr [Vt.] 62 A. 43.

76. State v. Miller [Mo.] 87 S. W. 484.

77. Notice for election between "counts" where two assignments of perjury are presented by a single count is properly overruled. Foreman v. State [Tex. Cr. App.] 85 S. W. 809.

78. Cox v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 107, 86 S. W. 1021.

79. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345; Hofland v. State [Tex. Cr. App.] 85 S. W. 798.

80. See 4 C. L. 18.

81. See 4 C. L. 18, n. 77.

82. See post, § 15.

83. Amendment as to place cannot be had if material. State v. Ham [N. J. Law] 60 A. 41.

84. Welty v. Ward [Ind.] 73 N. E. 889.

85. See 4 C. L. 18.

86. State v. Stevens, 68 Kan. 576, 75 P. 546. Weapons with which assault was made. State v. Johnson [Kan.] 79 P. 732. Verification may be added before trial. State v. Rollins, 186 Mo. 501, 85 S. W. 516; State v. Emerson [Mo.] 87 S. W. 469.

87. Before trial. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Amendments of substance not allowed after plea. State v. Bundy [Kan.] 81 P. 459. Verification cannot be added after verdict. State v. Gutke [Mo.] 87 S. W. 503.

88. Razee v. State [Neb.] 103 N. W. 438.

89. Verification. State v. Emerson [Mo.] 87 S. W. 469.

90. See 4 C. L. 18.

91. Conviction of breaking with attempt to commit larceny may be had on indictment for statutory breaking and entering with intent to commit larceny. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490. Indictment for robbery will sustain conviction of larceny from person. State v. Wasson, 126

it,[92] though the two crimes are statutory; the test generally applied being that the evidence to establish the greater offense would prove the lesser as a necessary element.[94] If under no theory of the case can defendant be convicted of a lesser offense than that charged in the indictment, a charge that he may be found guilty of a lesser offense is error, and a verdict of guilty of such lesser offense is contrary to law.[95] An indictment failing to charge the offense intended to be charged thereby may be sufficient on which to convict of an included offense.[96] The jury may convict of the lesser crime when authorized to do so by the instruction, though the evidence is amply sufficient to authorize a conviction of the greater.[97]

§ 5. *Arraignment and plea. Arraignment.*[98]—Arraignment and plea are necessary in most states,[99] though in some formal arraignment is no longer necessary where no prejudice results.

General pleas.[1]—The plea of guilty has the force of a verdict,[2] but amounts merely to an admission of record of the truth of whatever is well charged in the indictment.

Pleas in abatement and special pleas.[3]—After defendant has, upon arraignment, entered a plea of not guilty to the indictment, dilatory pleas cannot, as a matter of right, be filed,[4] and if filed without permission of the court, they may properly be stricken, on motion.[5] But the court may in its discretion permit the plea to the merits to be withdrawn, and dilatory pleas to be filed.[6] Matter of abatement is waived by general plea[7] or by otherwise proceeding on the merits.[8] The competency of individual grand jurors may be raised by plea in abatement,[9] and

Iowa, 320, 101 N. W. 1125; State v. Miller [Kan.] 80 P. 947. Where an indictment charges "wrongfully, fraudulently, and privately taking the property from the house and carrying it away with intent to steal the same," it was proper to instruct that defendant might be convicted of simple larceny. Patterson v. State [Ga.] 50 S. E. 489. Aggravated assault on charge of murder. Mapula v. Territory [Ariz.] 80 P. 389. Assault and assault and battery on indictment for assault with intent to rape. Sutton v. State [Ga.] 51 S. E. 316. On any indictment for murder, conviction of manslaughter may be had. State v. Hicks, 113 La. 779, 37 So. 753. Under an indictment in the Code form embracing all the degrees of homicide, a defendant may be convicted of manslaughter if the jury concludes the evidence warrants conviction for that offense. Smith v. State [Ala.] 39 So. 329. In a case where, if death had ensued, the defendant would not have been guilty of murder, he could not be convicted of assault with intent to murder; but if a conviction of the offense of stabbing, not in self-defense or under circumstances of justification, is warranted, he may be found guilty of that offense. Napper v. State [Ga.] 51 S. E. 592.

92. Included offenses need not be submitted where they find no support in the evidence. State v. Clough [Kan.] 79 P. 117.

93. An indictment for the malicious destruction of property of the value of $15 and upwards necessarily includes the misdemeanor of destroying property of less than that value. Dallman v. People, 113 Ill. App. 507.

94. See 4 C. L. 90, 91.

95. Berry v. State [Ga.] 50 S. E. 345.

96. Aggravated assault may be shown under indictment for assault to rape not showing sex of parties. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363.

97. People v. Green [Cal. App.] 82 P. 544.

98. See 4 C. L. 19.

99. State v. Cisco, 186 Mo. 49, 84 S. W. 863. Overruling of demurrer does not reinstate withdrawn plea. Territory v. Gonzales [N. M.] 79 P. 705.

1. See 4 C. L. 19.

2. Hollibaugh v. Hehn [Wyo.] 79 P. 1044

3. See 4 C. L. 20.

4, 5. Smith v. State [Ala.] 39 So. 329.

6. Where record showed that a motion to quash, a plea in abatement and a demurrer were passed on by the court, after a plea of not guilty, an objection that such pleas could not be considered because filed too late was held untenable. Smith v. State [Ala.] 39 So. 329.

7. A plea of not guilty waives disqualification of the justice. People v. Kuney [Mich.] 100 N. W. 596. The defendant waives his right to plead any matter in abatement by pleading in bar, but the court has discretion to allow the plea in bar to be withdrawn and the dilatory one entered. If in such case the plea of not guilty is withdrawn by leave of court, the plea in abatement must be received if sufficient. State v. Taylor [W. Va.] 50 S. E. 247.

8. Where a warrant charges defendant with forgery and a transfer of the instrument with intent to defraud and he waives preliminary examination thereon, his plea in abatement to an information setting forth more fully the facts on the ground of no preliminary examination is not good. State v. Shaw [Kan.] 82 P. 587.

9. Religious belief. State v. Mercer [Md.] 61 A. 220. Objections held not well taken. United States v. Mitchell, 136 F. 896. There is no error in overruling a plea in abatement

delay in prosecution is matter of abatement in Pennsylvania.[10] A plea in abatement must be certain to every intent [11] and should not be duplex,[12] and an objection on that ground may be taken by demurrer.[13] Though a plea in abatement is immaterial because grounded on that which denies any legal existence to the indictment, the state waives that by joining issue thereon.[14] Where a plea of not guilty is withdrawn and the special plea made instead is subsequently overruled, the plea of not guilty is not thereby reinstated but defendant should plead anew.[15] There is no reversible error in permitting a special replication in addition to a general replication to a plea in abatement, when the special replication puts in issue the sole material issue raised by the plea.[16] That a replication filed to a plea in abatement concludes with an offer "to verify" instead of "to the country" is immaterial after verdict.[17] When a plea in abatement and a plea to the merits are tried at the same term of the court, it is proper to present all the exceptions taken on the trial of either plea in a single bill.[18]

A plea of former acquittal or conviction [19] is necessary where that defense is relied on,[20] and must contain a complete record of the former conviction or acquittal,[21] must show that the offenses are identical,[22] and the accused must also prove that he is the same person who stood charged in the record.[23]

based on the ground that a member of the grand jury had not resided in the county for the period of six months, when it is not made to appear that the accused did not have full notice and opportunity to make the question by challenge before the finding of the indictment. Edwards v. State, 121 Ga. 590, 49 S. E. 674. That a member of the grand jury is disqualified may be set up by plea in abatement to the indictment, and the issue thus made is to be tried by a jury. McCue v. Commonwealth [Va.] 49 S. E. 623.

10. Skakel v. People, 111 Ill. App. 509.

11. State v. Taylor [W. Va.] 50 S. E. 247. Plea in abatement must be certain to certain intent in every particular. They must leave nothing to be supplied by intendment and no supposable special answer unobviated. Taylor v. State [Fla.] 38 So. 380. A plea in abatement to the effect that a certain attorney, without the procurement or consent and over the objection of the state attorney, was permitted to appear before the grand jury, held demurrable, it not alleging that the state attorney was ready and willing or offered to perform his duties. Id. A plea in abatement to the effect that the names of J. A. B. and J. P. B. were in the jury box, and though J. A. B. was drawn, J. P. B. was summoned and served on the grand jury, held bad on demurrer, in the absence of an allegation that the said J. P. B. falsely impersonated J. A. B., or fraudulently procured himself to be placed upon the grand jury, or that he was not known under the name of those who served as jurors. Id. A plea in abatement charging generally that no writ of venire facias was issued and served within the time and in the manner prescribed by law and that the body of men who professed to be the grand jury and which found the indictment did not constitute a legal grand jury, is insufficient. State v. Taylor [W. Va.] 50 S. E. 247. If the irregularity relied upon as a matter of abatement relate to the constitution or organization of the grand jury, the plea must show in what the irregularity consists, otherwise it will be lacking in an element of certainty. Id.

12. A plea in abatement alleging that the indictment was not found by a legal grand jury (1), because the grand jury did not consist of 23 lawful persons; (2), because the persons from whom it was drawn were not legally selected, and (3), because the act under which it was drawn is unconstitutional, is bad for duplicity. State v. McNay [Md.] 60 A. 273.

13. State v. McNay [Md.] 60 A. 273. A demurrer to a plea in abatement of an indictment on the ground of the illegality of the constitution of the grand jury admits the facts well pleaded in such plea, but not the legal conclusions of the pleader as to the competency of the particular juror or the illegality of the jury as a whole. Id.

14. Nordan v. State [Ala.] 39 So. 406.

15. State v. Brackin, 113 La. 879, 37 So. 863.

16. Taylor v. State [Fla.] 38 So. 380.

17. McCue v. Commonwealth [Va.] 49 S. E. 623.

18. Taylor v. State [Fla.] 38 So. 380.

19. See 4 C. L. 20.

20. Clement v. State [Tex. Cr. App.] 86 S. W. 1016; Cox v. State [Tex. Cr. App.] 86 S. W. 1017; Clement v. State [Tex. Cr. App.] 86 S. W. 1017.

21. Whitman v. State, 6 Ohio C. C. (N. S.) 134. This requirement is not met by the mere attaching of the transcript to the plea, and the overruling of the plea under such circumstances is not error. Id. Unless the former jeopardy is claimed to have occurred in a previous trial of the same case and record contains the facts, the plea must be interposed before entering upon a trial on the merits and set up all the facts upon which it is based. State v. White [Kan.] 80 P. 589.

22. Clement v. State [Tex. Cr. App.] 86 S. W. 1016; Clement v. State [Tex. Cr. App.] 86 S. W. 1017.

23. Whitman v. State, 6 Ohio C. C. (N. S.) 134.

§ 6. *Preparation for, and matters preliminary to, trial.*[24]—Allowance of bill of particulars is generally discretionary.[25] Service of a copy of the indictment a stated time before arraignment is generally required where defendant is in custody,[26] and in some jurisdictions service of a copy of the venire is required.[27]

§ 7. *Postponement of trial.*[28]—Postponement should be granted for lack of opportunity for preparation,[29] for absence of counsel,[30] for surprise,[31] and for inability of accused from illness to attend;[32] but not because accused is serving sentence under a prior conviction.[33] When the case is called for trial and a motion for a continuance is made, the judge has a discretion to either continue the case or postpone the same until a later day in the term.[34]

Continuance should also be granted for the absence of a witness,[35] but it must

24. See 4 C. L. 21.

25. Should be demanded before trial. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526.

26. No waiver by execution of bail bond where defendant was in custody when the indictment was returned. Brewin v. State [Tex. Cr. App.] 85 S. W. 1140. Failure to serve a copy of the indictment the statutory time before arraignment is waived by plea. Powell v. State [Ark.] 85 S. W. 781. Defect in copy served held not material. Allison v. State [Ark.] 86 S. W. 409.

27. It is not a compliance with Code 1896, § 5273, to serve on the defendant a copy of the venire containing the name of a person as a regular juror, one who had not been summoned. Carwile v. State [Ala.] 39 So. 220. The service on the defendant of a copy of a venire containing the name of a person not summoned is prejudicial error. Id. A defect in the copy of the venire served on the defendant is ground for quashing the venire. The rule that no objection can be taken to the venire except for fraud and that a mistake in the name of any person summoned is not sufficient grounds to quash does not apply. Id. That the initials only of the given name of two jurymen was given on the list served is not fatal. State v. Duperier [La.] 39 So. 455.

28. See 4 C. L. 21.

29. Helton v. Commonwealth [Ky.] 87 S. W. 1073. Forcing to trial on second day after arrest is error. Baldridge v. Commonwealth [Ky.] 88 S. W. 1076. No lack shown. State v. McCoy [Kan.] 79 P. 156; State v. Parmenter [Kan.] 79 P. 123. Not to permit search for impeaching witnesses, though the state's witnesses are "spotters" unacquainted in the neighborhood. Marmer v. State [Tex. Cr. App.] 84 S. W. 830. It is not an abuse of discretion to refuse to postpone a case to a later hour in the day, in order to allow counsel time to prepare a demurrer and plea, when no reason appears why such demurrer and plea were not prepared before the case was called for trial (Oglesby v. State, 121 Ga. 602, 49 S. E. 706), and when it appears that the matters upon which the plea was based could have been ascertained before the case was called, and that the court suspended the trial in order to allow counsel time to prepare the demurrer and plea, such refusal will not be held erroneous (Id.). Where it appeared that the accused violated a municipal ordinance for the previously announced purpose of testing its constitutionality, it was not error to refuse to continue the case made against him merely to give his counsel time to investigate the constitutional questions claimed to be involved therein. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793.

30. Jackson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 710, 88 S. W. 239. Postponement cannot be had to await return of counsel defendant has not employed. Magruder v. State [Tex. Cr. App.] 84 S. W. 587. Illness of counsel three days before trial and unsuccessful efforts to procure other counsel require adjournment. Kuehn v. State [Tex. Cr. App.] 85 S. W. 793. Denial in face of great local prejudice held error. Jett v. Commonwealth [Ky.] 85 S. W. 1179.

31. Defendant surprised at an election must show that he had a defense as to the elected date. Williams v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 620, 87 S. W. 1155.

32. No sufficient ground shown. State v. McCoy [Kan.] 79 P. 156. Where a motion is made to continue a criminal case upon the ground that the accused is physically unable to go to trial, and upon such question the testimony of medical experts introduced as witnesses is conflicting, the discretion of the trial judge in overruling the motion will not be controlled. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

33. Rigor v. State [Md.] 61 A. 631.

34. This is true when the term lasts longer than 30 days or not. Pen. Code 1895, § 961, does not alter the rule. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

35. Stacy v. State [Tex. Cr. App.] 86 S. W. 327; Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 150, 86 S. W. 1014; Blackburn v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 498, 87 S. W. 692; Kehoe v. Commonwealth [Ky.] 88 S. W. 1107. Continuence granted for absence of a witness that defendant stated would testify that the state's witness and not defendant committed the crime. Manuel v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 932, 89 S. W. 645. A material witness being within the jurisdiction of the court, but being too sick to attend the trial, the trial should be postponed. Caldwell v. State [Miss.] 37 So. 816. Where one of defendant's important witnesses was absent, and he had just learned of other witnesses, and the attorneys who had been appointed to defend him were able to render but little assistance, and were unable to find the attorney first employed, who had obtained valuable facts pertaining to the defense from persons whom accused had been unable to get into court, held, con-

appear that his testimony is competent and material,[36] credible,[37] necessary,[38] not merely cumulative [39] or impeaching,[40] the whereabouts of the witness [41] that diligence was exercised to procure his attendance or deposition,[42] and that there is some probability of procuring his testimony at the postponed trial.[43] Continuance is sometimes avoided by admitting the facts sought to be shown by the absent witness,[44] or that he will testify as averred in the affidavit for continuance,[45] or allowing the affidavit to be read as his deposition,[46] and where this is done, the state may object to the testimony as incompetent; but where the affidavit is admitted in lieu of a continuance, the prosecuting attorney should not attack it as false.[47]

An affidavit [48] must set out the expected testimony,[49] and show generally the facts upon which the court can determine the necessity of the continuance.[50] The application addresses itself in great measure to the discretion of the court,[51] and since the denial of a continuance is never reviewed until after trial, the reviewing court will take into consideration what there appeared.[52] Even if a motion to continue can be properly entertained in the absence of the accused, the judge is not required so to do.[53] If the absence is due to providential cause, this will be a sufficient answer to a rule nisi on a forfeiture of the bond.[54]

§ 8. *Dismissal or nolle prosequi before trial.*[55]—Dismissal is grantable for

tinuance should have been granted. Whit v. State [Miss.] 37 So. 809.

36. State v. Rooke [Idaho] 79 P. 82; Vann v. State [Tex. Cr. App.] 85 S. W. 1064.

37. Scott v. State [Tex. Cr. App.] 85 S. W. 1060. Testimony contradicting accused held not ground, as probably not true. Chapman v. State [Tex. Cr. App.] 85 S. W. 13; Yancy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 478, 87 S. W. 693; Kaylor v. State [Tex. Cr. App.] 85 S. W. 806.

38. Bearden v. State [Tex. Cr. App.] 83 S. W. 808. Matters readily provable by others. Pratt v. State [Ark.] 87 S. W. 651. Where necessity of sending to another state for character witnesses is not shown denial is proper. Allison v. State [Ark.] 86 S. W. 409.

39. Ray v. State [Tex. Cr. App.] 85 S. W. 1151; Ricks v. State [Tex. Cr App.] 13 Tex. Ct. Rep. 555, 87 S. W. 1036; Taylor v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 639, 87 S. W. 1039. Third or fourth application. Bearden v. State [Tex. Cr. App.] 83 S. W. 808. Testimony of witness to corroborate accused is not cumulative. Gathright v. State [Tex. Cr. App.] 85 S. W. 1076.

40. Cogdell v. State [Tex. Cr. App.] 74 S. W. 311. Refusal for impeaching evidence held error. Robbins v. State [Tex. Cr. App.] 83 S. W. 690.

41. Allison v. State [Ark.] 86 S. W. 409.

42. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 1036; Taylor v State [Tex. Cr. App.] 13 Tex. Ct. Rep. 639, 87 S. W. 1039; Williams v. U. S. [Ind. T.] 88 S. W. 334; Kipper v. State [Tex. Cr. App.] 77 S. W. 611; Roach v. State [Tex. Cr. App.] 84 S. W. 586. Facts must be shown on which diligence is predicated. State v. Johnson [Kan.] 79 P. 732. Mere issuance of process and return not found is insufficient. Yancy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 478, 87 S. W. 693; McQueen v. Commonwealth [Ky.] 88 S. W. 1047.

43. State v. Brooke [Idaho] 79 P. 82; Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 555, 87 S. W. 1036. Not error to refuse where witness is fugitive from justice. Vann v. State [Tex. Cr. App.] 85 S. W. 1064.

44. It is not error to refuse a continuance for want of the testimony of a witness where what such witness would testify to was admitted. Davis v. Territory [Okl.] 82 P. 507.

45. Where defendant, in a prosecution for an assault, had not been able to obtain compulsory process to secure the attendance of absent witnesses, and the facts sought to be proved by them were material to the issue of self-defense, held error to deny a continuance on the district attorney admitting that, if they were present, they would testify to the facts stated in the affidavits for continuance. Montgomery v. State [Miss.] 37 So. 835. Error in refusing a continuance is not cured by an admission of the district attorney that the witness, if present, would testify to the contents of the application. Caldwell v. State [Miss.] 37 So. 816.

46. State v. McCoy [Kan.] 79 P. 156; Woodring v. Territory [Okl.] 81 P. 631. Refusal held error. Mount v. Commonwealth [Ky.] 86 S. W. 707. Refusal to allow it read is harmless where the statements are vague and without substantial effect. McQueen v. Commonwealth [Ky.] 88 S. W. 1047.

47. Shepherd v. Commonwealth [Ky.] 85 S. W. 191. Cannot show that absent witness has been dead over a year. Darrell v. Commonwealth [Ky.] 88 S. W. 1060.

48. See 4 C. L. 23.

49. State v. Rooke [Idaho] 79 P. 82; State v. McCoy [Kan.] 79 P. 156.

50. State v. Cummings [Mo.] 88 S. W. 706.

51. Gardner v. U. S. [Ind. T.] 82 S. W. 704; State v. Cummings [Mo.] 88 S. W. 706; Mount v. Commonwealth [Ky.] 86 S. W. 707.

52. Refusal to grant a continuance because of absence of witnesses is not ground for new trial where it appears that all witnesses were brought into court at a postponed date. Rawlins v. State [Ga.] 52 S. E. 1.

53, 54. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

55. See 4 C. L. 24.

want of prosecution in the absence of good cause shown for the delay,[56] but the entry of a judgment of not guilty on a statement by the prosecuting attorney that he cannot make a case is unauthorized.[57] After dismissal regular in form, there can be no prosecution without a new indictment.[58] Where the grand jury has found a true bill, and subsequently in their general presentments recommend that the indictment be nol prossed, it is within the discretion of the court whether this recommendation will be followed.[59]

§ 9. *Evidence. Judicial notice.*[60]—Judicial notice is taken of the statutes,[61] and political subdivisions of the state, and the constitution of its courts,[62] and executive orders,[63] of the result of an election,[64] of the facts of science,[65] and the proceedings of the courts in the cause under investigation.[66] Judicial notice will not be taken of a report of a grand jury which is voluntary on its part and not made pursuant to any law providing therefor.[67]

Presumptions and burden of proofs.[68]—Generally speaking, conclusive presumptions and estoppels have no place in criminal proceedings for the purpose of establishing the body of the crime charged. Estoppels exist in certain cases, however,[69] and the jury may find facts by inference from other facts proven in the case,[70]

56. That the complaint has been lost and information thereof not communicated to prosecutor until a few days before the term and other duties of prosecutor are no ground. In re Jay [Idaho] 79 P. 202. Release on own recognizance after plea of guilty amounts to a dismissal. Grundel v. People [Colo.] 79 P. 1022. D. C. Code, § 939, providing that if the grand jury does not act within 9 months after a person is committed or held to bail, the prosecution shall be deemed abandoned, applies to a case where a charge was pending at the time of the passage of the act. United States v. Codarr, 24 App. D. C. 143. The discharge of an accused person on the ground that the grand jury did not act on his case within 9 months after he was held to bail is final, and bars a future indictment and trial. Id. The further prosecution of a criminal offense is not barred by the failure of the grand jury to act within nine months from the date when the accused was held to bail to await such action. D. C. Code, § 939. United States v. Cadarr, 197 U. S. 475, 49 Law. Ed. 842. The Federal general statute of limitations prescribes three years as the limitation for all offenses not capital. U. S. Rev. St., § 1044. Id. Statutes requiring discharge unless trial is brought on at the next term have no application to retrial after disagreement. State v. Lamphere [S. D.] 10 N. W. 1038. Hence a trial is speedy if brought on reasonably soon thereafter. Held reasonable where accused moved for change of judges at next term after disagreement but did not push his motion and was brought to trial at third term thereafter, having been on bail all the time without moving for earlier trial. Id. A discharge under D. C. Code, § 939, is error where an indictment is found within 9 months after the arrest and holding to bail, and a second indictment, merely amending the first and charging the same offense is found more than 9 months thereafter. United States v. Hayman, 24 App. D. C. 158.

57. Will not bar subsequent prosecution. Hall v. State [Tex. Cr. App.] 86 S. W. 765.

58. Judgment need not state reasons and motion need not be filed. Ex parte Isbell [Tex. Cr. App.] 13 Tex. Ct. Rep. 302, 87 S. W. 145.

59. Edwards v State, 121 Ga 590, 49 S. E. 674.

60. See 4 C. L. 24.

61. Notice is taken of a liquor statute applying only to certain counties and to the general operation of the local option law. Crigler v. Commonwealth [Ky.] 87 S. W. 276. The court has no judicial knowledge as to when local option laws are put in operation. Craddick v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 637, 88 S. W. 347.

62. Notice is taken of the judicial circuits and their boundaries and extent, the number of judges and the convening of terms of court. State v. Pope, 110 Mo. App. 520, 85 S. W. 633.

63. Notice is taken of an executive order requiring the attorney general to appear and prosecute indictments in a certain county. State v. Bowles [Kan.] 79 P. 726.

64. The courts will take judicial notice of the result of a prohibition election, whether the same was held under the general local option law or a local act providing for such election. Oglesby v. State, 121 Ga. 602, 49 S. E. 706, following Woodward v. State, 103 Ga. 498, 30 S. E. 522, and cases cited.

65. Judicial cognizance is taken that photography and radiography are proper means of producing correct likenesses. State v. Matheson [Iowa] 103 N. W. 137.

66. Matters which have occurred at a former trial of the same case. Richardson v. State [Tex. Cr. App.] 85 S. W. 282.

67. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75.

68. See 4 C. L. 25.

69. See 5 C. L. 884, n. 87. An inspector of elections cannot set up his own neglect to properly number ballots as invalidating them in defense of a prosecution for failing to count them. Commonwealth v. Tucker, 23 Pa. Super. Ct. 632.

70. State v. Adams [Idaho] 79 P. 398; People v. Kelly, 146 Cal. 119, 79 P. 846.

Any presumption indulged in construing a contract involved in a criminal case will be taken in favor of accused.[71] There is a presumption that a person intends all the natural, probable, and usual consequences of his own acts,[72] that the ordinary course of business has been followed,[73] that things have happened according to the ordinary course of nature and the ordinary habits of life,[74] and that a state of facts once shown to exist existed before and after[75] the time shown.

No presumption can be drawn from defendant's failure to call a witness of adverse interest.[76] Where defendant assists in procuring false testimony, or in concocting any other artifice tending to deceive or mislead, or make the fake appear to be true, the jury may consider such conduct to his disadvantage;[77] but a mere conflict among the suitor's witnesses is insufficient to support an inference of fraudulent methods.[78]

In every criminal prosecution the burden is on the government of proving beyond a reasonable doubt, by competent evidence, every essential ingredient of the crime charged.[79] This burden never shifts, and the defendant is entitled to have evidence tending to prove facts showing that he did not commit the crime considered by the jury with all the other evidence, and though it does not establish innocence, it may raise the reasonable doubt which must be removed before conviction can be had. This rule applies to good character[80] and self defense.[81] The authorities are in conflict as to the burden of proof where insanity or other irresponsibility is relied on as a defense; the rule in England and a majority of the states being that the burden is on defendant of establishing his defense;[82] at least by a preponderance of the evidence,[83] while the supreme court of the United States and the courts of many of the states have adopted the contrary rule, placing the burden on the government of proving defendant's responsibility as an element of

71. Keller v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 264, 87 S. W. 669.

72. State v. Merkel [Mo.] 87 S. W. 1186. Rule held not applicable where president of a corporation is prosecuted for embezzlement for misuse by the corporation of a third person's funds. State v. Carmean, 126 Iowa, 291, 102 N. W. 97. Party making a false affidavit in support of a fraudulent claim against the county will be presumed to have intended to defraud the county. State v. Adams [Idaho] 79 P. 398.

73. Code Civ. Proc. § 1963, subd. 20. People v. Kelly, 146 Cal. 119, 79 P. 846.

74. Code Civ. Proc. § 1963, subd. 28. People v. Kelly, 146 Cal. 119, 79 P. 846.

75. Code Civ. Proc., § 1963, subd. 32. People v. Kelly, 146 Cal. 119, 79 P. 846. If insanity of the accused is shown prior to the date of the homicide, the presumption is that such insanity continued and the burden is then on the state to show that at the time of the homicide the accused was of sound memory and discretion. Allams v. State [Ga.] 51 S. E. 506.

76. President of corporation prosecuting. People v. McGovern, 94 N. Y. S. 662.

77. Brown v. State [Ala.] 38 So. 268.

78. Brown v. State [Ala.] 38 So. 268. Where defendants announced "Not ready" owing to absence of witnesses, and prepared showings, which were admitted by the state, and after the trial had commenced, one of the witnesses for whom a showing had been made appeared, and the state was permitted to introduce the showing in evidence and contradict it by the witness, held, that defendant's conduct did not amount to a fraud upon the court nor authorize the course pursued by the state. Id.

79. State must show that limitations have not run. State v. Newton [Wash.] 81 P. 1002. Defendant presumed innocent until proved guilty. Montgomery v. State [Miss.] 37 So. 835.

80. No evidence of defendant's character being offered upon the trial, there is no presumption that it was either good or bad. Gater v. State [Ala.] 37 So. 692.

81. Zipperian v. People [Colo.] 79 P. 1018. Instruction placing burden of proving self-defense on defendant held fatal. State v. Usher, 126 Iowa, 281, 102 Mo. 101.

82. On a prosecution for homicide in the absence of evidence to the contrary, it must be presumed that defendant was capable of forming and entertaining the intent to take life (Gater v. State [Ala.] 37 So. 692), and the burden is upon defendant to at least create a reasonable doubt of his capacity in this respect (Id.). An instruction in a prosecution for homicide that if there was a reasonable doubt as to the sanity of accused, there should be an acquittal because of insanity is properly refused. Defendant must prove insanity. Braham v. State [Ala.] 38 So. 919.

83. State v. Humbles, 126 Iowa, 462, 102 N. W. 409; State v. Austin, 71 Ohio St. 317, 73 N. E. 218. Not error to charge in murder case, where defense of insanity was relied on, that burden was on accused to show "that at the time of the killing he was not of sound memory and discretion. He must show this not beyond a reasonable doubt,

the offense beyond a reasonable doubt. The presumption of innocence and reasonable doubt do not apply to proceedings before the jury to assess punishment on a plea of guilty.[84] Where defendant is under 14 years of age, the burden is on the state to prove capacity to commit crime.[85]

Relevancy and competency in general.[86]—Any fact is relevant which alone or in connection with other facts warrants an inference as to the issue on trial.[87] Hence a wide latitude is allowed as to evidence tending to show malice, motive, intent[88] and identity,[89] its remoteness going rather to its weight than its admissibility.[90] Evidence to support a theory that a person other than defendant was guilty is properly excluded as immaterial where there is nothing in the case to pertinently connect him with it,[91] and generally testimony tending to prove facts

but to the reasonable satisfaction of the jury, by a preponderance of the evidence." Allams v. State [Ga.] 51 S. E. 506.

84. Stullivan v. State [Tex. Cr. App.] 85 S. W. 810.

85. Singleton v. State [Ga.] 52 S. E. 156.

86. See 4 C. L. 26.

87. That accused was not at a meeting, one of a series, where he usually went and might have attended on the night of the crime, being absent from home, may be shown. State v. Miller [N. J. Err. & App.] 60 A. 202. Where an uncompleted conspiracy between defendant and a witness for the state is shown as a part of the state's case, an alibi for the witness may also be shown to anticipate argument that the witness committed the crime. State v. Bean [Vt.] 60 A. 807. In rape, the birth of a child to prosecutrix conclusively establishes the fact of intercourse and is therefore relevant. State v. Danforth [N. H.] 60 A. 839; Woodruff v. State [Neb.] 101 N. W. 1114. So in adultery. State v. Nelson [Wash.] 81 P. 721. Attempted abortion. Woodruff v. State [Neb.] 101 N. W. 1114. Pregnancy, birth of child and death of defendant's niece and his correspondence with her and furnishing funds, are all admissible on his prosecution for incest with her. People v. Stison [Mich.] 12 Det. Leg. N. 104, 103 N. W. 542. Where proof is made that accused was accomplice of another jointly indicted, a witness may testify that immediately after the robbery the joint defendant was in a room in witness's house with a person whose voice he recognized as that of accused. Commonwealth v. Kelly, 186 Mass. 403, 71 N. E. 807. In prosecution of a colored man for murder with a revolver, a witness may testify that he sold the revolver to a colored man the day before the murder, though he is unable to identify accused as the purchaser. Smith v. State [Ind.] 74 N. E. 983. Witness may state what a person at a distance seemed to be doing. Commonwealth v. Snell [Mass.] 75 N. E. 75. It is competent for prosecution to show the ordinary course of business of the city, where an inference arises therefrom that lights were burning at a certain place at a certain time. People v. Kelly, 146 Cal. 119, 79 P. 846. Measurements by others at a point stated by prosecutor to be site of crime. Id. That defendants' accomplices went under assumed names may be shown. Id. Existence of grand lodge may be proved to show relation of subordinate lodge in prosecution for embezzlement of funds intended for grand lodge. State v. Wise, 186 Mo. 42, 84 S. W. 954. Where on trial defendant claims that A. furnished the instrument of death, it may be shown that his attorney moved a continuance for the absence of a witness who would swear that B. furnished it. Ellington v. State [Tex. Cr. App.] 87 S. W. 153.

88. Pirscher v. U. S. [C. C. A.] 133 F. 526; Brittain v. State [Tex. Cr. App.) 85 S. W. 278. Prior threats are admissible on issue of intent. State v. Atkins [Vt.] 59 A. 826. Conversations of defendant showing brooding over deceased may be shown in support of theory of jealousy. State v. Bean [Vt.] 60 A. 807. Debt as showing motive for larceny. Dimmick v. U. S. [C. C. A.] 135 F. 257. Value of lands may be shown in prosecution for defranding the government of lands. Olson v. U. S. [C. C. A.] 133 F. 849. Course of business of corporation not of itself unlawful is not admissible to show intent of president to defraud. State v. Carmean, 126 Iowa, 291, 102 N. W. 97. Paternity of child may be admissible where motive for homicide is illicit intercourse. Gallegas v. State [Tex. Cr. App.] 85 S. W. 1150. Letters tending to show jealousy. Mathley v. Commonwealth [Ky.] 86 S. W. 988. Religious views of parties to homicide. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203. Evidence tending to show bad feeling between the father of accused and father of deceased is admissible on the question of motive. Rawlins v. State [Ga.] 52 S. E. 1. In cases of uxorcide, evidence tending to show a long course of ill treatment and cruelty on the part of the husband toward his wife, continung until shortly before the homicide, is admissible. Such evidence tends to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife. Roberts v. State [Ga.] 51 S. E. 374. Where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible, regardless of the date when the same was acquired. Bashinski v. State [Ga.] 50 S. E. 54; Bashinski v. State [Ga.] 51 S. E. 499.

89. Opportunity and familiarity of defendant with premises. People v. Davis [Cal. App.] 81 P. 716. Possession of skeleton keys by accused on trial for burglary. McCoy v. State [Tex. Cr. App.] 85 S. W. 1072.

90. Shipping away goods several days before fire. State v. Mann [Wash.] 81 P. 561.

91. Where there is no evidence that a third person was in the neighborhood in which the crime was committed, or that he was in a position to have committed the

from which no inference relative to any issue in the case can be legitimately drawn,[92] or which depend for their relevance upon other facts not offered or shown, are inadmissible,[93] though evidence of otherwise irrelevant facts may be received to rebut an inference arising indirectly from other facts apparent or in evidence.[94] Where a collateral transaction is relevant, the extent to which the particulars thereof may be inquired into rests largely in discretion.[95]

On the identity of the person who committed the crime, tracks made in the vicinity may be described, and their similarity to accused's shoes shown,[96] and evidence of trailing by bloodhounds is admissible where proper foundation is laid.[97]

crime, evidence of statements made by a third person that he was connected with the crime is inadmissible. Stanley v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 932, 89 S. W. 643. Evidence of the guilt of a crime must be derived from the facts and circumstances of such crime. One accused of robbery may not assail the reputation of another whom he asserts is the guilty party. Toliver v. State [Ala.] 38 So. 801. One accused of robbery may show that another person than himself was the guilty party. Id.

92. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041. On trial of a prosecution for assault with intent to murder a girl, her father cannot show that defendants' attentions to her were discouraged. State v. Thompson [Iowa] 103 N. W. 377. Defendant on trial for burglary is not prejudiced by refusal to go into the qualifications of a practitioner of medicine who has testified to treating a wounded accomplice at defendants' expense. State v. Richards, 126 Iowa, 497, 102 N. W. 439. Acts and declarations of accused which in no way corroborate prosecutrix or impeach him should not be shown. Hubert v. State [Neb.] 104 N. W. 276. One who has testified to the age of prosecutrix in rape cannot be asked as to the age of others in the family, it not appearing how it is material. People v. Colbath [Mich.] 104 N. W. 633. Terms of contract out of which grew dispute resulting in homicide. People v. Thomson, 145 Cal. 717, 79 P. 435. Defendant cannot show that he gave an assumed name. People v. Kelly, 146 Cal. 119, 79 P. 846. A police officer cannot testify that from the description given by the person robbed he set out to find accused as the person who did the deed. State v. Rutledge, 37 Wash. 523, 79 P. 1123. In a prosecution for attempting to bribe, evidence that accused had no money is inadmissible. Lee v. State [Tex. Cr. App.] 85 S. W. 804. Where the issue in a liquor case is defendant's ownership of the saloon, the state should not be permitted to introduce other indictments in which his ownership is averred. Custer v. State [Tex. Cr. App.] 86 S. W. 757. The state should not be permitted to show that while defendant was lying in jail awaiting trial he read law to find out how to fabricate a defense. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341.

93. Commonwealth v. Brown, 23 Ua. Super. Ct. 470. Condition of light at place not shown to be the place where robbery occurred, it being immaterial otherwise. People v. Kelly, 146 Cal. 119, 79 P. 846. Where there is no claim that defendant burned deceased's bed clothing because he was afflicted with a loathsome disease, evidence that he was so afflicted is not admissible to explain the burning. State v. Usher, 126 Iowa, 281, 102 N. W. 101. Where it is claimed that prosecutrix in statutory rape contracted a venereal disease from defendant, evidence that her mother's house bore a bad reputation is inadmissible, defendant not claiming the mother was a prostitute or that she gave her daughter the disease. James v. State [Wis.] 102 N. W. 320. Testimony as to bullet hole discovered in hub of wagon four or five days after homicide is inadmissible in the absence of evidence to show how it came there. Darden v. State [Ark.] 84 S. W. 507. Where the state's theory unsupported by evidence is that an attempted arrest grew out of defendant's relations with a girl, such relations are not admissible. Earles v. State [Tex. Cr. App.] 85 S. W. 1.

94. Where it appears that a letter purporting to have been written by deceased directing cremation of his body is a forgery, evidence that he had expressed a preference for cremation is inadmissible. People v. Patrick [N. Y.] 74 N. E. 843. An article claimed to have been taken from deceased by defendant and claimed by him to have been purchased at a 10 cent store may be shown to be worth $1.50. State v. Sherouk [Conn.] 61 A. 897. Where life insurance is shown as a motive for murder, it is error to exclude evidence that the policy was of little, if any, value. Jahnke v. State [Neb.] 104 N. W. 154. Where the prosecution shows a version of a transaction defendant may show his version of it. Thompson v. State [Tex. Cr. App.] 85 S. W. 1059. Where defendant introduced evidence tending to show insanity and that he had not been drinking for over a year, held, the state could prove in rebuttal that defendant had been drinking within the past year, and particularly on the day of the murder and several days before, and that when drunk his actions were similar to those shown to prove his insanity. Starke v. State [Fla.] 37 So. 850.

95. The particulars of a previous difficulty are incompetent in a prosecution for murder. Dunn v. State [Ala.] 39 So. 147. In a prosecution for homicide where the state itself introduces the previous difficulty, the defendant should be permitted to show the details and character of such difficulty. Brown v. State [Miss.] 37 So. 957.

96. People v. Wood, 145 Cal. 659, 79 P. 367. Similarity between bloody imprint of hand at scene of crime and accused's hand may be shown. State v. Miller [N. J. Err. & App.] 60 A. 202. Similarity of spots claimed to be blood. Id.

97. Denham v. Commonwealth [Ky.] 84 S. W. 538. See 3 C. L. 333, n. 67.

Where direct proof of a person's insanity has been given, it may be shown that there has been insanity in the family.[98] Unless evidence is illegal, it is no ground of objection to it that it is likely to prejudice the jury against defendant.[99]

Tampering with the state's witnesses[1] *or the jury,*[2] *flight of accused,*[3] concealment of name and identity,[4] resistance of arrest,[5] and attempts to escape[6] or commit suicide,[7] or to fabricate testimony,[8] and defendants conduct and demeanor while under investigation,[9] or immediately after the commission of the crime,[10] may be shown. Evidence of his voluntary surrender is not admissible except in rebuttal.[11]

Remoteness[12] or uncertainty of evidence, as a rule, affects its weight or credibility, and not its admissibility,[13] though evidence is sometimes rejected on the ground of remoteness or uncertainty.[14] As a general rule any evidence admissible against a principal is admissible against an accessory to show the guilt of the principal.[15]

Other offenses, convictions and acquittal[16] are not generally admissible.[17] Ex-

98. Order of proof not prejudicial. Commonwealth v. Johnson [Mass.] 74 N. E. 939.

99. Ellington v. State [Tex. Cr. App.] 87 S. W. 153.

1. See 4 C. L. 28. Woodruff v. State [Neb.] 101 N. W. 1114; Maxey v. State [Ark.] 88 S. W. 1009; Corothers v. State [Ark.] 88 S. W. 585. Threats to witness before crime may be shown. Commonwealth v. Snell [Mass.] 75 N. E. 75

2. Evidence which of itself, or taken in connection with other evidence in the case or offered to be introduced, would warrant a jury in finding that a party has corruptly tampered with jurors, is competent. Commonwealth v. Brown, 23 Pa. Super. Ct. 470.

3. See 4 C. L. 28. State v. Matheson [Iowa] 103 N. W. 137; Woodruff v. State [Neb.] 101 N. W. 1114; State v. White [Mo.] 87 S. W. 1188; McDonough v. State [Tex. Cr. App.] 84 S. W. 594. That one accused of rape left home immediately after the commission of the offense and that search was instituted for him is admissible. Dickey v. State [Miss.] 38 So. 776. No error to prove by witness who, when an officer, had seen accused in a room where gaming was going on, that when accused later saw witness in another city, he fled, though witness was not then an officer. Grant v. State [Ga.] 50 S. E. 946. An order forfeiting the bail bond is admissible as tending to show flight, but is not conclusive. State v. Kesner [Kan.] 82 P. 720.

4. McDonough v. State [Tex. Cr. App.] 84 S. W. 594; State v. White [Mo.] 87 S. W. 1188.

5. In homicide, evidence as to the conduct of defendant and that he intended to resist arrest is competent. State v. Marks, 70 S. W. 448, 50 S. E. 14.

6. Defendant taking the stand may be cross-examined as to efforts to break jail. Charba v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 519, 87 S. W. 829.

7. Accomplice. People v. Patrick [N. Y.] 74 N. E. 843.

8. Letter to physician who had examined prosecutrix in rape offering him $200 to swear to a statement therein contained. Dickey v. State [Miss.] 38 So. 776.

9. On the issue of insanity, the attitude and appearance of defendant while under scrutiny by an expert is material. Commonwealth v. Johnson [Mass.] 74 N. E. 939. Admission of evidence of mental perturbation on visiting house where homicide occurred held harmless error. Helton v. Commonwealth [Ky.] 84 S. W. 574. A denial by accused that he was in company of others known to be inculpated may show guilty consciousness. People v. Donnolly, 143 Cal. 394, 77 P. 177.

10. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025.

11. In homicide, where the only evidence as to flight was offered by defendant with his explanation thereof, held not error to exclude evidence of a voluntary surrender, offered by a witness for the defendant before the conclusion of the state's cause in rebuttal of a theory not then advanced. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

12. See 4 C. L. 28.

13. Admissibility is discretionary. State v. Bean [Vt.] 60 A. 807; State v. Danforth [N. H.] 60 A. 839. Witness not being able to positively identify defendant may state his opinion or belief. State v. Richards, 126 Iowa, 497, 102 N. W. 439. Shipping away goods several days before fire. State v. Mann [Wash.] 81 P. 561. Person not understanding foreign language well enough to speak it may state that he understood what was said. People v. Jailles, 146 Cal. 301, 79 P. 965. That a Mexican in the vicinity of the crime looked like defendant, but that all Mexicans looked alike to defendant, is admissible for what it is worth. Trevenio v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 566, 87 S. W. 1162.

14. Intimacy short of adultery of parties four or five years before. French v. State [Tex. Cr. App.] 85 S. W. 4. Identity of man and horse in dark. Pool v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 616, 88 S. W. 350.

15. Rawlins v. State [Ga.] 52 S. E. 1.

16. See 4 C. L. 29.

17. State v. Shockley [Utah] 80 P. 865; Shepherd v. Commonwealth [Ky.] 85 S. W. 191; Wesley v. Stte [Tex. Cr. App.] 85 S. W. 802; Driver v. State [Tex. Cr. App.] 85 S. W. 1056. Another assault by accused on another person. Brom v. People, 216 Ill. 148, 74 N. E. 790. Claimed forgeries in embezzlement case. People v. Peck [Mich.] 103 N.

ception is made, however, in the case of other offenses committed at the same time with the one on trial, when they are admissible under the familiar rule of res gestae,[18] and when they are so connected with the offense on trial as to illustrate it by way of supplying a motive,[19] or showing the intent with which it was committed, or show a system,[21] or defendant's identity,[22] they may generally be shown, and where unlawful sexual intercourse is under investigation, other acts of the parties may be shown to illustrate their inclination.[23] Evidence fairly admissible upon an issue in the case is not rendered inadmissible because indirectly showing the commission of another offense.[24] Former convictions are ordinarily not admissible except as impeachment.[25]

W. 178. That witness did not like defendant because "he had been getting away with cattle." State v. Lee [Or.] 79 P. 577. Allowing proof of continuance of highway obstruction until time of trial is error. Richardson v. State [Tex. Cr. App.] 85 S. W. 282. One charged with a crime cannot be convicted on suspicion, or by general reputation, or by proof that he is in the habit of committing offenses similar to that for which he is being tried. Hence evidence of distinct transactions within or without the statute of limitations is inadmissible. Bashinski v. State [Ga.] 50 S. E. 54. In larceny for cattle, held error to admit evidence that one other than prosecutor had claimed certain cattle found on the premises and that defendants had had an examination charged with the theft of such calves. Clampitt v. U. S. [Ind. T.] 89 S. W. 666. On the trial of one charged with the illegal sale of intoxicating liquors, it was error to admit evidence of such a sale by the accused more than two years prior to the date of the accusation, and to charge the jury that they might "consider these transactions as circumstances in arriving at a proper verdict." Erwin v. State, 121 Ga. 580, 49 S. E. 689.

18. Attempted murder of deceased's companion at same time. State v. Shockley [Utah] 80 P. 865; Helton v. Commonwealth [Ky.] 84 S. W. 574; Vasser v. State [Ark.] 87 S. W. 635. Abandoned plan to burglarize and steps taken before abandonment held admissible on murder trial. People v. Woods [Cal.] 81 P. 652. Robbery with assault with intent to murder. Denham v. Commonwealth [Ky.] 84 S. W. 538.

19. Conspiracy to defraud United States of public lands. Other entries. Olson v. U. S. [C. C. A.] 133 F. 849. It is not proper on trial for forgery to show that accused embezzled money and thereby supply a motive for the crime charged The fraudulent intent must be confined to the forgery and this was not. People v. Gaffey, 98 App. Div. 461, 90 N. Y. S. 706.

20. State v. Shockley [Utah] 80 P. 865. Prior assault. Miera v. Territory [N. M.] 81 P. 586. Other forgeries. Pirscher v. U. S. [C. C. A.] 133 F. 526. Moulds to make other counterfeit coins than those for counterfeiting which he is on trial. Bryan v. U. S. [C. C. A.] 133 F. 495. Similar advertising schemes to defraud. State v. Seligman [Iowa] 103 N. W. 357. Other attempts to rape. State v. Sheets [Iowa] 102 N. W. 415. Purchases of other stolen property. State v. Levich [Iowa] 104 N. W. 334. But proof of another offense is competent to show identity, intent, or scienter, or where the facts are all a part of a single chain of circumstantial evidence. Where murder was charged, and robbery was alleged motive, proof of finding two children wounded in the house, and the mother's body some distance away, was competent in a trial for murder of the mother. State v. Adams, 138 N. C. 688, 50 S. E. 765. In a prosecution for renting a room to be used for gaming purposes, it is competent to prove that more than two years before the finding of the indictment the tenant was well known as a gambler and that the apartment had a reputation as a gaming house. Bashinski v. State [Ga.] 50 S. E. 54.

21. People v. Kellogg, 94 N. Y. S. 617. Wigmore, Evidence, §§ 216, 305, 320. Liquor selling. Roach v. State [Tex. Cr. App.] 84 S. W. 586. False pretenses. State v. Marshall [Vt.] 59 A. 916. In a prosecution for seduction accomplished in part by hypnosis, evidence of accused's practice of the art on others may be received. State v. Donovan [Iowa] 102 N. W. 791. Union men, defendants, assaulting another nonunion man in the same manner the same night. State v. Bailey [Mo.] 88 S. W. 733. A similar crime, before or after the one under investigation, is admissible. Larceny by swindling. Johnson v. State [Ark.] 88 S. W. 905.

22. Robbery of another the same night. State v. Roberts [Nev.] 82 P. 100. Prior attempts to kill deceased in a different manner may be shown. State v. Bean [Vt.] 60 A. 807. Prosecutrix in rape may testify that conception, pregnancy and birth of a child followed and that defendant was father of the child. State v. Miller [Kan.] 80 P. 51.

23. Rape. State v. Cannon [N. J. Law] 60 A. 177; Schuette v. People [Colo.] 80 P. 890. Subsequent acts. Rape under age of consent. Woodruff v. State [Neb.] 101 N. W. 1114. Adultery and living in adultery. State v. Nelson [Wash.] 81 P. 721; French v. State [Tex. Cr. App.] 85 S. W. 4. **Contra.** Wiggins v. State [Tex. Cr. App.] 84 S. W. 821. Evidence of subsequent acts of intercourse is inadmissible in a prosecution for rape. Cecil v. Territory [Okl.] 82 P. 654.

24. State v. Franklin, 69 Kan. 798, 77 P. 588; State v. Rea [Or.] 81 P. 822. Plans to commit another murder by the same means, the same motive actuating both, may be shown. Commonwealth v. Snell [Mass.] 75 N. E. 75. In rape under age of consent, promises of defendant are not to be rejected because they prove seduction. Woodruff v. State [Neb.] 101 N. W. 1114. Assault on another at same time in prosecution for rape. Harmon v. Territory [Okl.] 79 P. 765. Where

Character and reputation.[26]—The character of the accused as reflected by his general reputation in the community in which he resides,[27] with reference to the traits relevant to the offense charged,[28] may always be put in issue by him by offering evidence that it is good, whereupon the contrary may be proved in the same manner by the state.[29] The character of third persons,[30] especially of witnesses in the case,[31] may be material.

Hearsay.[32]—Unsworn statements out of court by third persons are, unless within certain well known exceptions, inadmissible.[33]

self-defense is claimed, it may be shown that deceased and his party had a warrant for defendant for burglary, and previous crime may also be shown as basis for defendant's desperation. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

25. On the trial of bastardy proceedings, evidence that defendant had previously been tried under an indictment charging him with the seduction of the mother of the bastard child, and found guilty of the offense of fornication, is irrelevant and inadmissible. McCalman v. State, 121 Ga. 491, 49 S. E. 609. Evidence of a prior conviction of a similar offense, or of the pendency of an indictment charging a like offense, offered by the state, is incompetent to prove the charge made in the indictment under which defendant is being tried. Bashinski v. State [Ga.] 51 S. E. 499. Such evidence is hurtful, as giving the jury an opportunity to infer that the accused is a persistent violater of the law and is in all likelihood guilty of the specific charge then brought against him. Id.

26. See 4 C. L. 30.

27. Reputation several years before in another state cannot be shown. State v. Shouse [Mo.] 87 S. W. 480. Convict on trial is not entitled to show that he was a good prisoner. Character can be shown only by reputation. People v. Murphy, 146 Cal. 502, 80 P. 709.

28. Evidence of the previous good character of the defendant is always admissible in a criminal prosecution, but it should be confined to the trait of character at issue. State v. Moyer [W. Va.] 52 S. E. 30. Defendant's character for honesty is not in issue in prosecution for murder. Smith v. State [Ala.] 39 So. 329.

29. Good character cannot be rebutted by evidence of specific acts. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. Defendant's character cannot be assailed until he has attempted to sustain it. State v. Thompson [Iowa] 103 N. W. 377; State v. Lee [Or.] 79 P. 577; Newman v. Commonwealth [Ky.] 88 S. W. 1089. Cross-examination of defendant's character, witnesses as to specific acts of immorality is proper. State v. Richards, 126 Iowa, 497, 102 N. W. 439. Proof of good character as a man of peace is not sufficient to create a reasonable doubt of guilt. Carwile v. State [Ala.] 39 So. 220.

30. Character of defendant's parents irrelevant in murder case. Smith v. State [Ala.] 39 So. 329.

31. Dimmick v. U. S. [C. C. A.] 135 F. 257; Dunn v. Commonwealth [Ky.] 84 S. W 321; Newman v. Commonwealth [Ky.] 88 S. W. 1089. Character cannot be shown by specific instances. Mount v. Commonwealth [Ky.] 86 S. W. 707. Where a witness is shown to have been previously convicted of crime, the party producing him is entitled to show that he was pardoned. O'Donnell v. People, 110 Ill. App. 250. Defendant, when he testifies, is liable to be attacked as any other witness. Identity of person previously convicted held sufficiently shown to authorize receipt of record of conviction. Colbert v. State [Wis.] 104 N. W. 61. To discredit him as a witness, the state may show defendant's former conviction of a misdemeanor. Under Rev. St. 1899, § 4680. State v. Heusack [Mo.] 88 S. W. 21.

32. See 4 C. L. 31.

33. Examples. Not admissible: Letters written defendant by prosecutor's daughter before commission of offense to show conspiracy to charge defendant. State v. Royce [Wash.] 80 P. 268. Threats of decedent to kill defendant. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341. What someone told prosecutor in a swindling case in defendant's absence about title to property. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 630, 88 S. W. 811. Testimony that stolen property had been recently taken from witness' house by search warrant and witness told the officers defendant brought it there Pool v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 616, 88 S. W. 350. Who third person said he saw at the time of an assassination. Jett v. Commonwealth [Ky.] 85 S. W. 1179. That witness learned from another that defendant was one of the robbers. People v. Turner [Cal. App.] 82 P. 397. What some one else told witness what defendant said. Abrams v. Commonwealth [Ky.] 85 S. W. 173. The opinion of one as to his own age based on the statements of others not members of his family is hearsay. People v. Colbath [Mich.] 12 Det. Leg. N. 446, 104 N. W. 633. What another's analysis of liquor showed. Uloth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822. Evidence that an alleged eye witness told others that he saw defendant kill deceased is hearsay, where the witness while denying that he saw the homicide admitted stating that he had. Sutherland v. State [Ark.] 89 S. W. 462. Evidence of negotiations carried on by the father of defendant looking toward a settlement of the offense, the defendant not being connected with such negotiations, is hearsay. Cecil v. Territory [Okl.] 82 P. 654.

Not hearsay: Where a witness has stated that he saw blood on another's clothes at a certain time, he may also state that the other made a statement in regard to it, the statement not being shown. Ball v. Commonwealth [Ky.] 85 S. W. 226. Where defendant relied on an alibi claiming that on the night of the crime he was at his father's house, testimony of a witness that he informed defendant that a third person had

Admissions and declarations.[34]—Incriminating statements and admissions of defendant are admissible where made before or after the commission of the crime;[35] but self-serving declarations[36] are not generally admissible except in some instances, as showing the intent with which the act under investigation was done.[37] Where the intent of a party becomes a material issue, he may be asked what his intent was at the particular time or with respect to the particular act in question.[38] Statements in argument by defendant's attorney in another case cannot bind him.[39] Declarations by third persons with regard to defendant's guilt are not admissible, whether exculpatory or incriminating,[40] except that failure of defendant to deny the statements of others in his presence is sometimes taken as an admission of their truth;[41] but such evidence should be received with caution.[42] Dying declarations are admissible only in cases of homicide.[43] As a general rule, evidence of prior statements of a witness cannot be introduced to support or corroborate his testimony. The rule, however, has its exceptions and one of them is that when a

stated to witness that defendant's father had said to the third person that defendant was not at his, the father's, house that night, is not hearsay, though the statement made by the father to the third person and by him to the witness was made in the absence of defendant. Stanley v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 932, 89 S. W. 643.

34. See 4 C. L. 31.

35. State v. Miller [N. J. Err. & App.] 60 A. 202; State v. Swisher, 186 Mo. 1, 84 N. W. 911; State v. Bailey [Mo.] 88 S. W. 733; Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203; Hall v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 707, 88 S. W. 244; Commonwealth v. Bond [Mass.] 74 N. E. 293; Dunn v. Commonwealth [Ky.] 84 S. W. 321. Declarations must go to jury entire. State v. Bean [Vt.] 60 A. 807. Admission of statements out of court is not repugnant to the maxim that no person shall be compelled to be a witness against himself. State v. Inman [Kan.] 79 P. 162. Need not be voluntary where not in the nature of confessions. People v. Kelly, 146 Cal. 119, 79 P. 846; Tuttle v. People [Colo.] 79 P. 1035; State v. Royce [Wash.] 80 P. 268.

36. Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 634, 88 S. W. 361; Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Explanations by defendant of his possession of stolen property long before the accusation ought to be admitted. State v. Conroy, 126 Iowa, 472, 102 N. W. 417. Property in possession at time of arrest. Smith v. Territory, 14 Okl. 518, 79 P. 214. That he was afraid deceased would kill him. Taylor v. State, 121 Ga. 348, 49 S. E. 303. Question whether defendant on being asked what he did with amunition procured by him explained where he put it properly excluded as calling for a self-serving declaration. Littlejohn v. State [Ark.] 89 S. W. 463. A letter written by accused a day or two after the commission of the crime and containing statements favorable to himself is inadmissible in his own behalf. Williams v. State [Ga.] 51 S. E. 322. Self-serving declarations of accused inadmissible, though given by witness being examined by solicitor. Nelms v. State [Ga.] 51 S. E. 588.

37. State v. White [Vt.] 59 A. 829. Defendant's relation of his family troubles is admissible to show his state of mind. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341.

38. Dunbar v. Armstrong, 115 Ill. App 549.

39. Miller v. U. S. [C. C. A.] 133 F. 337.

40. In a prosecution for murder by means of abortion, testimony of a physician who treated deceased before her death as to his conclusion as to what ailed her based on her statements to him are inadmissible. Stevens v. People, 215 Ill. 593, 74 N. E. 786. Entries in corporation's books by its clerks and agents without personal knowledge of its president and secretary are not admissible to charge them with embezzlement. State v. Carmean, 126 Iowa, 291, 102 N. W. 97.

41. Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Conversation of others relative to the disposition of money secured by a burglary planned by defendant is admissible, it being in his presence. State v. Richards, 126 Iowa, 497, 102 N. W. 439. That defendant was compelled to remain silent while his co-defendant was probed by police does not render his statement inadmissible where defendant afterward admitted the same facts. Andrews v. People [Colo.] 79 P. 1031. Statement of prosecutrix in presence of defendant that "he had done something awful" to her. White v. State [Tex. Cr. App.] 85 S. W. 1140. A statement made by witness to defendant to which he made no answer is not admissible. Newman v. Commonwealth [Ky.] 88 S. W. 1089. While silence under accusation of crime cannot have the legal effect of the confession of guilt, it is nevertheless a circumstance to go to a jury on the question of his guilt or innocence. State v. Major, 70 S. C. 387, 50 S. E. 13. Declarations of guilt made in the presence of accused are admissible only for the purpose of showing conduct in connection with them evidencing guilt. People v. Turner [Cal. App.] 82 P. 397.

42. Phelan v. State [Tenn.] 88 S. W. 1040; State v. Swisher, 186 Mo. 1, 84 S. W. 911; Bloomer v. State [Ark.] 87 S. W. 438. Statement of defendant's mother in his presence held not admissible. State v. Ethridge [Mo.] 87 S. W. 495.

43. Not in incest, though the female died as the result of it. People v. Stison [Mich.] 12 Det. Leg. N. 104, 103 N. W. 542.

witness has been discredited by showing prior statements contradictory of his evidence, it may be shown that soon after the occurrence he made statements corroborative of his evidence.[44]

Confessions[45] are admissible,[46] though made while defendant is in custody,[47] but only when voluntary,[48] and made understandingly, without threat or inducement.[49] Where defendant is in custody, he must in some states be warned that whatever he says may be used against him,[50] but the warning need not be exactly contemporaneous with the confession.[51] Declaration designed to be self-serving is not subject to the rules relating to confessions.[52] The evidence being in conflict as to whether defendant was warned, or the statement was voluntary, the question is primarily for the judge, and ultimately for the jury.[53] A free and voluntary con-

44. Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357. Where a motive or outside influence of the witness is shown to discredit him, it may be shown that he made similar statements before the motive or influence arose. Commonwealth v. Brown, 23 Pa. Super. Ct. 470; State v. Bean [Vt.] 60 A. 807. Where it is claimed and argued by defendant that the prosecuting witness accused no one, it may be shown that she named accused immediately after the offense. Commonwealth v. Kelley, 186 Mass. 403, 71 N. E. 807.

45. See 4 C. L. 33.

46. State v. Castigno [Kan.] 80 P. 630. A confession of embezzlement, which is so lacking as to time or amount as to render it impossible to determine whether reference is made to sums received before or after a change in the statute covering the crime, is incompetent. Young v. State, 6 Ohio C. C. (N. S.) 53. It may be shown that defendant pleaded guilty below and afterward withdrew his plea. State v. Bringgold [Wash.] 82 P. 132. Payment made by defendant or his alleged accomplices to avoid prosecution for the theft under investigation is inadmissible. Armstead v. State [Tex. Cr. App.] 87 S. W. 824. Voluntary confessions of homicide are competent. Braham v. State [Ala.] 38 So. 919. Statements voluntarily made by accused concerning occurrences leading up to shooting held admissible as a confession, no inducements being offered or threats made. State v. Horner [N. C.] 52 S. E. 136.

47. State v. Miller [N. J. Err. & App.] 60 A. 202; Hooker v. State [Ark.] 86 S. W. 846; Folds v. State [Ga.] 51 S. E. 305. The mere fact that accused is in custody of an officer when he makes a statement does not make it inadmissible. State v. Smith, 138 N. C. 700, 50 S. E. 859. That he was in unlawful custody is immaterial. State v. Westcott [Iowa] 104 N. W. 341.

48. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 694, 88 S. W. 223. Confessions held voluntary. Hintz v. State [Wis.] 104 N. W. 110; Roszczyniala v. State [Wis.] 104 N. W. 113; State v. Westcott [Iowa] 104 N. W. 341; State v. Inman [Kan.] 79 P. 162. Statements by witness when called and sworn by coroner without being warned are not admissible. State v. Westcott [Iowa] 104 N. W. 341. Testimony of defendant at coroner's inquest not admissible, though not a confession, where he was not warned, and had no counsel. Tuttle v. People [Colo.] 79 P. 1035; People v. Kelley, 146 Cal. 119, 79 P. 846. **Contra.** State v. Finch [Kan.] 81 P. 494. Burden of showing voluntary character is on state. Confession held admissible where made in jail the day after defendant was whipped by the sheriff. Smith v. State [Ark.] 85 S. W. 1123. Confession held voluntary, though defendant was brought to prosecuting attorney's office and questioned. State v. Stibbens [Mo.] 87 S. W. 460. Before a confession can be considered in evidence, it must appear to have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. Pen. Code 1895, § 1006. Griner v. State, 121 Ga. 614, 49 S. E. 700. If induced by another, by hope of benefit or fear of injury, it is involuntary, although such inducement be held out by one person, and the confession be subsequently made to another who has no knowledge of such inducement, and who offers none himself. Id. Held error to refuse to so instruct. Id. Where there is evidence of a confession before the jury, it is for them to determine from all the evidence whether the confession was voluntary. Id.

49. Hammons v. State [Ark.] 84 S. W. 718. Advice by officer not to try to settle anything defendant was not guilty of. James v. State [Wis.] 102 N. W. 320. The suggestion of a defensive theory by the officer is a mere trick and not an inducement. State v. Wescott [Iowa] 104 N. W. 341. Statement of accomplice held not a confession procured by hope of reward. Cage v. State [Ark.] 84 S. W. 631. Where officer in charge of accused testified that he never made any threats against or promises to defendant, and offered him no inducements to make a statement, and that no one else did in his presence, he was properly allowed, against a general objection, to give defendant's statement that he struck deceased with a hatchet because deceased was beating him with a piece of wood. Smith v. State [Ala.] 39 So. 329.

50. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 568, 87 S. W. 1158. Warning held sufficient Fonseca v. State [Tex. Cr. App.] 85 S. W. 1069. Warning that statement may be used "for or against" accused is not sufficient. Adams v. State [Tex. Cr. App.] 86 S. W. 334.

51. Johnson v. State [Tex. Cr. App.] 84 S. W. 824.

52. Folds v. State [Ga.] 51 S. E. 305.

53. State v. Stibbens [Mo] 87 S. W. 460; State v. Mann [Wash.] 81 P. 561; State v.

fession is generally deserving of the highest credit.[54] A confession must be considered as a whole, but all of its parts are not necessarily entitled to equal credit; the jury may believe portions and disbelieve others.[55]

Acts and declarations of co-conspirators.[56]—Declarations of co-conspirators made after the conspiracy was formed, and in furtherance of it,[57] but not those before the conspiracy is formed,[58] or after the commission of the crime,[59] are contemplated by the conspiracy,[60] are admissible, though made in the absence of defendant.[61] There must, however, be independent evidence of the conspiracy.[62] Slight evidence is sufficient, its sufficiency in the first instance being a question for the court, and ultimately for the jury.[63] It is not error to admit evidence of the acts of alleged conspirators before the conspiracy is established,[64] on a promise to subsequently make it competent; but where declarations are admitted over objection, on the promise to show a conspiracy, and none is shown, they should be stricken.[65]

Res gestae.[66]—Exclamations or other statements made at the time of the offense, or so soon thereafter as to result from impulse rather than reflection are admissible, whether made by defendant,[67] the person injured,[68] or third persons,[69] and whether the person exclaiming would be a competent witness or not.[70] Like-

Inman [Kan.] 79 P. 162; Hintz v. State [Wis.] 104 N. W. 110; State v. Westcott [Iowa] 104 N. W. 341.

54, 55. State v. Powell [Del.] 61 A. 966.

56. See 4 C. L. 34.

57. State v. Dickerhoff [Iowa] 103 N. W. 350; Schutz v. State [Wis.] 104 N. W. 90; People v. Wood, 145 Cal. 659, 79 P. 367; Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 339, 87 S. W. 143. Possession of dynamite by conspirator to escape prison is admissible on trial of another for murder resulting from the attempt to escape. People v. Murphy, 146 Cal. 502, 80 P. 709. The admissions of a wife are admissible against her husband charged with aiding and abetting her, though they tend also to incriminate him. State v. Mann [Wash.] 81 P. 561. Acts, sayings and conduct of conspirators while the conspiracy was in progress and prior to the commission of the crime are admissible. Rawlins v. State [Ga.] 52 S. E. 1; Harrell v. State, 121 Ga. 607, 49 S. E. 703.

58. Miller v. U. S. [C. C. A.] 133 F. 337. Declarations and acts leading up to larceny by the device of inducing one to become stakeholder in a pretended foot race are admissible, though the acts evincing conspiracy occurred two days later State v. Ryan [Or.] 82 P. 703.

59. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 568, 87 S. W. 1158.

60. The act of a conspirator other than accused, after the commission of the crime, is admissible where the act was contemplated by the terms of the conspiracy to be performed after the perpetration of the crime was completed. Rawlins v. State [Ga.] 52 S. E. 1.

61. Knox v. State [Ind.] 73 N. E. 255; State v. Dickerhoff [Iowa] 103 N. W. 350; State v. Copeman, 186 Mo. 108, 84 S. W. 942.

62, 63. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041.

64. Evidence of the acts of an accomplice are inadmissible until the conspiracy is shown, but being introduced prior to such a showing, without objection, it will not be stricken out on motion, evidence tending to show a conspiracy having been subsequently introduced. Harrell v. State, 121 Ga. 607, 49 S. E. 703.

65. Brennan v. People, 113 Ill. App. 361.

66. See 4 C. L. 35.

67. People v. Lee [Cal. App.] 81 P. 969; Lyles v. State [Tex. Cr. App.] 86 S. W. 763. Defendant may show that before he knew any suspicion attached to him he stated the team he was accused of stealing was not his own but was hired. State v. White [Vt.] 59 A. 829. Explanations respecting stolen property in his possession at the time of his arrest are admissible, but not if the property was not in possession. Smith v. Territory, 14 Okl. 518, 79 P. 214. Question held not to clearly call for res gestae as to be error to overrule it. Misenheimer v. State [Ark.] 84 S. W. 494. Reply of defendant immediately after the shooting to inquiry why he shot deceased. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W 203

68. Rape. Thomas v. State [Tex. Cr. App.] 84 S. W. 823. Murder. Franklin v. State [Tex. Cr. App] 13 Tex. Ct. Rep. 641, 88 S. W. 357. "Boys, I am shot!" Sheehy v. Territory [Ariz.] 80 P. 356. Pursuit of prisoner by deceased crying "Police! Thief!" immediately before being shot. State v. Laster [N. J. Err. & App.] 60 A. 361. Pursuit of thief. Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 627, 88 S. W. 807. In homicide a declaration of the deceased "Oh Lord! my poor wife and children," made as he fell from the fatal wound, held admissible as part of the res gestae. Goodman v. State [Ga.] 49 S. E. 922. Statement 20 minutes after deceased took what accused gave as headache powders—"I took the medicine Walter (accused) gave me, and it is killing me. Run for a doctor"—is not dying declaration but is res gestae. Nordan v. State [Ala.] 39 So. 406.

69. A bystander's statement to deceased just before killing, "Keep your eyes open. That man is going to hurt you" is admissible as res gestae. Baysinger v. Territory [Okl.] 82 P. 728.

wise conversation[71] and contemporaneous acts and circumstances of the parties may be shown where they are part and parcel of the transaction under investigation.[72] The acts and declarations must be such that the events speak through the participants, and where the declarations are in narrative form,[73] or the acts are done, or the declarations made,[74] so far subsequent to the transaction as to permit reflection, they are inadmissible.[75] Where declarations are not precisely concurrent, their admissibility is in the sound discretion of the trial court.[76]

Expert and opinion evidence.[77]—Ordinarily, questions are objectionable which call for conclusions of the witness rather than facts, and testimony in the nature of conclusions and opinions is generally inadmissible.[78] An opinion or conclusion is permissible, however, where the nature of the facts on which it is founded makes it impossible to state them,[79] and exception is made with respect to matters presumably not within the experience of ordinary men but as to which certain learned persons have special knowledge.[80] As to such matters, any person shown to be of sufficient learning and experience[81] may give his opinion, based on facts in evidence;[82] or on his observation of the subject-matter,[83] or on a hypothetical ques-

70. Child incompetent to testify. Thomas v. State [Tex. Cr. App.] 84 S. W. 823.

71. Knox v. State [Ind.] 73 N. E. 255.

72. Other killing at same time and everything else done thereat. Helton v. Commonwealth [Ky.] 84 S. W. 574. Circumstances surrounding murder. Fonseca v. State [Tex. Cr. App.] 85 S. W. 1069; Lyles v. State [Tex. Cr. App.] 86 S. W. 763. Provocation for assault. Jones v. State [Tex. Cr. App.] 85 S. W. 5. Other assault at same time. Gray v. State [Tex. Cr. App.] 86 S. W. 764.

73. Mere narrative is not admissible as res gestae. Conversation of deceased with his brother immediately after the shooting. Deceased: "Do you know who did this?" Witness: "One of them was R." Deceased: "Yes and the other was 'L.'" Regnier v. Territory [Okl.] 82 P. 509.

74. Statements by accused four or five hous after assault are not res gestae. Brittain v. State [Tex. Cr. App.] 85 S. W. 278. Statements of accused before he left home on the trip that ended in homicide held inadmissible in his behalf because not a part of the res gestae. State v. Dean [S. C.] 51 S. E. 524. Statements by deceased made four, five or ten minutes after the fatal shooting, as to who shot him, are not res gestae when it is not shown what transpired between the time of the shooting and the time stated, so as to make it clear that the intervening circumstances and statements in question were all a part of the difficulty. Vickery v. State [Fla.] 38 S. 907. Declarations of a person shot, made four or five or ten minutes after the shooting, which do not appear to have been the product of or part of the difficulty, are not res gestae. Id.

75. Kearse v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 628, 88 S. W. 363.

76. State v. Dean [S. C.] 51 S W. 524. The admissibility of testimony as part of the res gestae being doubtful, it should be admitted and its weight and effect determined by the jury. Goodman v. State [Ga.] 49 S. E. 922.

77. See 4 C. L. 36.

78. Opinion whether deceased would be likely to carry threat into execution. Long v. State [Ark.] 89 S. W. 93. The mother of one accused of homicide cannot testify that accused went to see his brother because such brother was insane. Not competent on question of sanity of accused. Braham v. State [Ala.] 38 So. 919. Stating how the shoes of a man compared with certain tracks is not stating a belief that he made the tracks. Therefore does not invade province of jury. Turley v. State [Neb.] 104 N. W. 934.

79. Opinion of surveyor as to distance, and of one used to handling fire arms of the calibre of a revolver, may be taken, though they do not qualify as experts. State v. Laster [N. J. Err. & App.] 60 A. 361. Testimony of a girl that she "had sexual intercourse" not a mere conclusion. Straub v. State, 5 Ohio C. C. (N. S.) 529. A witness testifying as to insanity of accused may be asked as to whether he noticed anything "unusual, unnatural or peculiar about him." Braham v. State [Ala.] 38 So. 919. That on a given occasion a particular person appeared to be excited or did not so appear. Roberts v. State [Ga.] 51 S. E. 374. A witness may testify whether or not accused appeared to be surprised or angry. Whether defendant, accused of incest with stepdaughter, appeared surprised or angry when told of girl's condition. Tagert v. State [Ala.] 39 So. 293.

80. Whether the person murdered was rational when making a dying declaration is not the subject of expert testimony. Lyles v. State [Tex. Cr. App.] 86 S. W. 763. On trial for killing an alleged prostitute, expert evidence that prostitutes have a tendency to suicide is too remote. Van Dalsen v. Commonwealth [Ky.] 89 S. W. 255. Medical experts may express opinions as to when wounds were inflicted on a living subject. Hampton v. State [Fla.] 39 So. 421.

81. Physicians who have examined or treated accused or who have sufficient facts before them to make their opinion of value may give opinions as to his sanity. Commonwealth v. Woelfel [Ky.] 88 S. W. 1061. The question as to the competency of a witness to express are opinion on the question of insanity is one for the court. Braham v. State [Ala.] 38 So. 919.

82. Experts on insanity may be permitted to give opinions on facts in evidence and

tion,[84] though he cannot give his opinion as to the ultimate facts in the case.[85] Experts are not bound to state on direct examination the grounds or reasons for their opinions.[86] Nonexpert witnesses having an intimate acquaintance with the person under investigation may give their opinion as to his sanity,[87] though in most states they must give with their opinion on sanity the facts on which it is based.[88] Witnesses, whether expert or not, cannot state their opinion as to physical facts of which ordinary men can judge one as well as another.[89] In some states, only those papers can be used for a comparison of hands which are in the case for some other relevant purpose; but in others any genuine specimen [90] is admissible for comparison by experts.

Best and secondary evidence. Parol evidence to vary writing.[91]—The rule as to best and secondary evidence applies to criminal cases.[92]

observed by them instead of answering hypothetical questions. Commonwealth v. Johnson [Mass.] 74 N. E. 939.

83. Insanity. Commonwealth v. Johnson [Mass.] 74 N. E. 939. Experienced stockmen may state that in their opinion a certain colt belonged to a certain mare. Miller v. Territory [Ariz.] 80 P. 321. A physician may testify that deceased was shot sitting down and that the wound could not have been self inflicted. Miera v. Territory [N. M.] 81 P. 586.

84. A hypothetical question must not contravene the evidence, but need not embrace all the facts in evidence if full opportunity is given the adverse party to propound other questions based on the omitted facts. Betts v. State [Tex. Cr. App.] 89 S. W. 413.

85. Question held not improper. People v. Griffith, 146 Cal. 339, 80 P. 68.

86. Such wounds may be proper subjects for cross-examination. Commonwealth v. Johnson [Mass.] 74 N. E. 939.

87. A nonexpert who has not had previous acquaintance with the accused and had never seen him prior to an interview after his arrest is not competent to testify as to insanity. Braham v. State [Ala.] 38 So. 919. Where a person accused of homicide sets up insanity, one who has known him since childhood and had talked with him on recent occasions may testify as to his sanity. Id. One who interviews a person accused of homicide who has set up insanity may testify as to whether accused talked disconnectedly and appeared absent-minded. Not an opinion. Id.

88. Byrd v. State [Ark.] 88 S. W. 974. Nonexpert opinion on sanity should not be allowed without a statement of the facts on which based. Betts v. State [Tex. Cr. App.] 89 S. W. 413.

89. On a prosecution for killing a marshal, his stick being before the jury, they can determine, as well as a nonexpert, whether or not it was a deadly weapon. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. The opinion of a witness is not admissible when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form corect conclusions therefrom. Thomas v. State [Ga.] 50 S. E 64. It is not a question for medical experience how a moving body would fall when its momentum was opposed by impact of a fatal bullet. Turley v. State [Neb.] 104 N. W. 934.

90. The admission of papers irrelevant to the record for the sole purpose of creating a standard of comparison of handwriting should not be allowed except in cases where the papers are conceded to be genuine or are such as the opposing party is estopped to deny. State v. Seymour [Idaho] 79 P. 825. Neither witnesses nor juries may compare the handwriting of papers, not in evidence for other purposes, with a disputed writing or signature. Error to allow expert to compare an inventory with an alleged forged signature, and to admit inventory for that purpose only. Washington v. State [Ala.] 39 So. 388.

91. See 4 C. L. 38.

92. State v. McCoy [Kan.] 79 P. 156. That defendants when arraigned below pleaded guilty may be shown by oral testimony like any other confession. Record held sufficient. State v. Call [Me.] 61 A. 833. An entry in a family bible is not admissible where the person making it is alive and in court. State v. Miller [Kan.] 80 P. 51. Prosecutrix in rape may testify to her age, though her parents are in court, and give testimony in respect to the same matter. Id. Where a letter written by defendant to his wife while in jail, which he knew would be read by the sheriff, is in her hands, she not being compellable to testify or produce it, the sheriff may testify to its contents. De Leon v. Territory [Ariz.] 80 P. 348. Witnesses's memory as to what a paper contained is better evidence than his memorandum of it, though he has to refer to his memorandum to refresh his recollection. [State v. Mann [Wash.] 81 P. 561. Secondary evidence may be given of a paper in defendant's possession where he fails to produce it on notice. Id. Secondary evidence of lost pardon may be received. Yzaguirre v. State [Tex. Cr. App.] 85 S. W. 14. Proceedings on issuance of liquor license as evidence against licensee. State v. Barnett, 110 Mo. App. 592, 85 S. W. 613; Id., 110 Mo. App. 584, 85 S. W. 615; State v. Mulloy [Mo. App.] 86 S. W. 569. Where a neighbor at the request of illiterate parents recorded the birth of children from time to time on a piece of paper kept for that purpose and has been absent from the county for several years, the paper is admissible on the issue of age of a child thus recorded. State v. Neasby [Mo.] 87 S. W. 468. A statement written by a witness, or his attorney for him, a day or two before the trial not in presence of court or counsel, is not admissi-

Documentary evidence,[93] including records of judicial proceedings,[94] diagrams [95] and photographs,[96] if accompanied by proper authentication,[97] is admissible under the same rules applied in civil cases. Statutes providing for the use of depositions are common.[98] On a prosecution for violating a section of an ordinance, the entire ordinance may be admitted in evidence.[99] Where a commitment to the Industrial Home, endorsed with the approval of the circuit judge, without which it would be a nullity, is offered in evidence, the endorsement goes in with the commitment, though no special mention is made of it and an objection that it does not is hypercritical.[1]

Accomplice testimony [2] is competent when sufficiently corroborated to connect defendant with the commission of the crime,[3] but defendant should be allowed to probe an accomplice as to his expectation of favor from the prosecution.[4]

Demonstrative evidence and experiments.[5]—It is within the discretion of the trial court to admit evidence of experiments to illustrate transactions that have been testified to.[6] Instrumentalities claimed to have been used in the commission of the crime,[7] articles found in possession of accused,[8] and other articles and materials proper subjects of investigation,[9] are admissible when properly identified,[10] and defendant's [11] and deceased's clothes are admissible [12] if they illustrate or make perti-

ble for any purpose. Vasser v. State [Ark.] 87 S. W. 635.

93. See 4 C. L. 39.

94. Complaint below. State v. Bringgold [Wash.] 82 P. 132. Record of justice of the peace is not admissible on identification of third person without showing why justice or his successor was not produced. Junior v. State [Ark.] 89 S. W. 467. A journal entry is of the court's own records which it judicially knows and will receive without identification. State v. Kesner [Kan.] 82 P. 720.

95. State v. Cummings [Mo.] 88 S. W. 706.

96. Radiographs or X-ray photographs. State v. Matheson [Iowa] 103 N. W. 137. Photographs of decedent's wounds taken before their character was changed by surgical operation. State v. Roberts [Nev.] 82 P. 100.

97. Identification of complaint below held sufficient. State v. Bringgold [Wash.] 82 P. 132. Telegram held sufficiently identified with defendant. State v. Richards, 126 Iowa, 497, 102 N. W. 439. It is error to admit the signature and address of a letter claimed to have been written by defendant, the body of it having been destroyed, and then to allow the addressee to relate its contents, there being nothing but the signature to connect defendant with it. State v. Conroy, 126 Iowa, 472, 102 N. W. 417. Anonymous letter held sufficiently identified with defendant to justify its reception. Colbert v. State [Wis.] 104 N. W. 61.

98. People v. Ballard [Cal. App.] 81 P. 1040. Statute does not include testimony taken at former trial. Smith v. State [Tex. Cr. App.] 85 S. W. 1153. Prosecuting attorney held not entitled to object to deposition taken by stipulation and filed several days before trial. Seamster v. State [Ark.] 86 S. W. 434.

99. Where it will aid the jury in understanding the particular section. Weinberg v. Augusta, 116 Ill. App. 423.

1. People v. Kuney [Mich.] 100 N. W. 596.

2. See 4 C. L. 39.

3. An accomplice cannot corroborate himself. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041.

4. Person responsible for pregnancy of deceased in prosecution for murder by abortion. Stevens v. People, 215 Ill. 593, 74 N. E. 786.

5. See 4 C. L. 40.

6. State v. Bean [Vt.] 60 A. 807. Result of chemical and microscopic examination for blood held not admissible for carelessness in preserving material examined. State v. McAnarney [Kan.] 79 P. 137.

7. State v. Bean [Vt.] 60 A. 807; Osburn v. State [Ind.] 73 N. E. 601. Rifle used in homicide. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

8. Murder case. State v. Miller [N. J. Err. & App.] 60 A. 202; State v. Laster [N. J. Err. & App.] 60 A. 361; People v. Wood, 145 Cal. 659, 79 P. 367.

9. A bottle of "Tanto" may be so received on a prosecution for illegal liquor selling. State v. Olson [Minn.] 103 N. W. 727. Blood on the ground and deceased's wounds. Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341. Property seized on premises where liquor was unlawfully sold is admissible in evidence in prosecution for such unlawful sale, though the warrant for its seizure was illegal. State v. Krinski [Vt.] 62 A. 37.

10. Identification of hammer held sufficient from physical facts. State v. Sherouk [Conn.] 61 A. 897. Blood stained garment held not sufficiently authenticated. State v. McAnarney [Kan.] 79 P. 137. Trunk belonging to and used by defendant and wife, containing his garments. People v. Antony [Cal.] 79 P. 858. Money taken from wife admitted by defendant to be his. Id.

11. State v. Sherouk [Conn.] 61 A. 897. Trousers claimed to have been worn by defendant while committing rape held sufficiently identified. Roszczyniala v. State [Wis.] 104 N. W. 113.

12. Unnecessary admission held harmless. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

nent some phase of the oral testimony.[13] The manner of obtaining such evidence is immaterial.[14] Persons may be exhibited on the issue of resemblance,[15] and the injured person's wounds may be exhibited where such course serves any useful purpose in the case,[16] and photographs of deceased are competent.[17]

Evidence at preliminary examination or at former trial[18] is admissible at a subsequent trial, where the witness is beyond reach of the court,[19] is deceased, is insane, or otherwise unable to testify, or his whereabouts unknown,[20] or there is an issue raised as to whether he did not testify differently at such trial,[21] provided the testimony, if written, has been preserved in the manner prescribed by law and is properly identified, and defendant's testimony on a former trial may be admitted where he refuses to testify on the subsequent trial.[22] The constitutional right of confrontation is satisfied by confrontation at the previous hearing.[23] Testimony taken at the trial of another case against the same defendant,[24] or at the trial of another party,[25] or in a civil case,[26] is not admissible merely because the same facts are involved. The testimony before the grand jury is admissible in a proper case.[27] One who took down the testimony of an absent witness at the examination, and can state from present recollection that his report thereof is correct, may read such report in evidence.[28] Where the justice took down the testimony of a witness on a preliminary examination, the writing, and not the oral testimony, of the justice, was the best evidence on the trial, the witness having left the state.[29]

Quantity required and probative effect.[30]—The proof of guilt must be beyond all reasonable doubt [31] as to every element of the offense,[32] including its degree, de-

13. Admission is error where unnecessary. Crenshaw v. State [Tex. Cr. App.] 85 S. W. 1147.

14. Clothing of defendant. Roszczyniala v. State [Wis.] 104 N. W. 113. Pawn tickets for property stolen at burglary. State v. Royce [Wash.] 80 P. 268. Bottles of liquor admissible in prosecution for violation of liquor law, though seized without warrant. State v. Schmidt [Kan.] 80 P. 948.

15. A child born to prosecutrix in rape may be shown and its resemblance to defendant commented on. State v. Danforth [N. H.] 60 A. 839.

16. Held not prejudicial, though unnecessary. Simpson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 499, 87 S. W. 826.

17. Photographs of body of victim competent evidence in murder case. State v. Powell [Del. O. & T.] 61 A. 966.

18. See 4 C. L. 40.

19. Showing of diligence held insufficient. People v. Ballard [Cal. App.] 81 P. 1040. What witness since absented from state testified at preliminary hearing subject to cross-examination is by statute admissible when charge is the same. Code Cr. Proc., § 8, sub. 3, People v. Gilhooley, 95 N. Y. S. 636.

20. Proof that a witness who testified before the committing magistrate on the preliminary examination could not be found in the county of his residence by the sheriff does not authorize the introduction of the testimony taken at such preliminary examination. No sufficient predicate laid. Bardin v. State [Ala.] 38 So. 833.

21. Prior testimony of a witness in conflict with his testimony on the trial can be used only as impeaching evidence and not as substantive evidence of the crime. People v. Miner [Mich.] 101 N. W. 536. Error to read testimony purporting to be given before grand jury where it is not shown that it actually was given, or that it was read to the witness. Nash v. State [Ark.] 84 S. W. 497.

22. The reporter may testify to his statements at the former trial, but defendant in such case is entitled to draw out on cross as much of his testimony as he desires. Miller v. People, 216 Ill. 309, 74 N. E. 743.

23. Contra. Smith v. State [Tex Cr. App.] 85 S. W. 1153.

24. May be admitted by stipulation. State v. Williford [Mo. App.] 86 S. W. 570. Testimony of prosecutrix on seduction trial is admissible against same defendant indicted for her murder to prove same issues. Main issues need not be same. Nordan v. State [Ala.] 39 So. 406.

25. Contempt. Hunter v. District Court of Polk County, 126 Iowa, 357, 102 N. W. 156.

26. Libel. State v. Woods [Kan.] 81 P. 184.

27. The minutes of the grand jury if otherwise objectionable are admissible to establish accused's immunity from prosecution on matters about which he has testified. Havenor v. State [Wis.] 104 N. W. 116; Murphy v. State [Wis.] 102 N. W. 1087; People v. Steinhardt, 93 N. Y. S. 1026.

28. Petty. v State [Ark.] 89 S. W. 465.

29. Sanford v. State [Ala.] 39 So. 370.

30. See 4 C. L. 41.

31. Accused is presumed innocent until his guilt is proved to the satisfaction of the jury beyond a reasonable doubt. Scott v. State [Ga.] 50 S. E. 49.

32. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Wife desertion. Goddard v. State [Neb.] 103 N. W. 443. An admission in argument and shaping of the defense on the theory that deceased was murdered and that

fendant's identity,[33] the venue,[34] and that limitations have not run.[35] A reasonable doubt, however, that will prevent conviction must be actual and substantial,[36] and must be raised by the evidence and not by argument of counsel, and it is not required that each fact which may aid the jury in reaching a conclusion of guilt be clearly proved;[37] it is sufficient if on the whole evidence that the jury are able to pronounce that quiet is proved to a moral certainty, beyond a reasonable doubt, and the exclusion of all uncertainty is not necessary; but a probability of innocence is the equivalent of a reasonable doubt and requires an acquittal, and a conviction should not be permitted where all the testimony is consistent with innocence.[38]

Circumstantial evidence is usually sufficient to prove even the corpus delicti,[39] though where relied on the facts proved must be such as to exclude every reasonable hypothesis inconsistent with guilt.[40]

An extrajudicial confession must be corroborated by proof aliunde corpus delicti in order to support conviction;[41] but full proof is not required, and it may be proved by circumstantial evidence. Though a confession must be considered in entirety, the jury need not believe such portions thereof as seem unreasonable. Positive testimony is entitled to greater weight than negative.[42]

Proper proof of a prior conviction is by record of judgment, not by commitment.[43]

Though the testimony of an accomplice is viewed with suspicion,[44] it may be sufficient to convict, in the absence of a contrary statute,[45] though statutes requiring corroboration are usual.[46]

accused had nothing to do with it does not take the place of proof of the corpus delicti. State v. Marx [Conn.] 60 A. 690. That burglary was in nighttime. Keeler v. State [Neb.] 103 N. W. 64. The facts that a crime has been committed and that defendant had an opportunity to commit it are not sufficient. Corpus delicti sufficiently proved by the finding of the body lying face downward in a pool of blood, with wounds on the head and a bloody hatchet lying near him. State v. Heusack [Mo.] 88 S. W. 21. On the trial of one charged as an accessory, the guilt of the person charged as principal must be established beyond a reasonable doubt. The record of the conviction of the principal is prima facie evidence of his guilt. Rawlins v. State [Ga.] 52 S. E. 1.

33. Defendant's name held sufficiently proved. Magruder v. State [Tex. Cr. App.] 84 S. W. 587.

34. Venue held sufficiently shown. Burglary. Keeler v. State [Neb.] 103 N. W. 64. Homicide. Warner v. Commonwealth [Ky.] 84 S. W. 742. Larceny. Cage v. State [Ark.] 84 S. W. 631 Larceny Range cow. Armstrong v. Territory [Ariz.] 80 P. 319. Homicide near county boundry. State v. Hargraves [Mo.] 87 S. W. 491.

35. State v. Newton [Wash.] 81 P. 1002.

36. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

37. Osburn v. State [Ind.] 73 N. E. 601. Not necessary to establish each link to "entire satisfaction" of jury. State v. Blydenburgh [Iowa] 104 N. W. 1015.

38. State v. Seymour [Idaho] 79 P. 825.

39. Dimmick v. U. S. [C. C. A.] 135 F. 257; State v Westcott [Iowa] 104 N. W. 341.

40. Refusal of instruction held erroneous. Colbert v. State [Wis.] 104 N. W. 61; State v. Heusack [Mo.] 88 S. W. 21. Reversal where circumstantial evidence leaves doubt of guilt. Park v. State [Ga.] 51 S E. 317.

41. State v. Westcott [Iowa] 104 N. W. 341; People v. Ward, 145 Cal. 736, 79 P. 448. Confession may be considered with other evidence to prove corpus. Misenheimer v. State [Ark.] 84 S. W. 494.

42. State v. Murray [N. C.] 51 S. E. 775. After charging rule as to positive and negative testimony, not error to instruct that "rule does not apply when two parties having equal facilities for seeing or hearing, if one swears that it did occur and the other that it did not." Civ. Code, § 5165. Nelms v. State [Ga.] 51 S. E. 588.

43. State v. Howard [Mont.] 77 P. 50.

44. Jahnke v. State [Neb.] 104 N. W. 154.

45. Conviction may be had in Ohio of a felony upon the uncorroborated testimony of an accomplice. Straub v. Ohio, 5 Ohio C. C. (N. S.) 529. Discretionary with court in Wisconsin. Murphy v. State [Wis.] 102 N. W. 1087. Where the testimony of an accomplice has been impeached by an admission of perjury on a former trial, accused cannot be convicted upon his testimony alone unless corroborated by some fact connecting accused with the crime, other than the fact of its commission and the circumstances. State v. Pearson, 37 Wash. 405, 79 P. 985.

46. State v. Rooke [Idaho] 79 P. 82; Hill v. Territory [Okl.] 79 P. 757; Wright v. State [Tex. Cr. App.] 84 S. W 593; Eddens v. State [Tex. Cr. App.] 84 S. W. 828; McDaniel v. State [Tex. Cr. App.] 87 S. W. 1044; State v. Pearson, 37 Wash. 405, 79 P. 985. An inmate of a disorderly house is not an accomplice of one charged with keeping it. Stone v. State [Tex. Cr. App.] 85 S. W. 808. Corroboration held not sufficient Burglary. Cook v State [Ark.] 87 S. W. 1176. Corroboration held sufficient. Murder. Chancellor

A conspiracy to commit a crime may be shown by circumstances without direct proof of an agreement, and intent or knowledge may, and generally must, be proved by circumstances. Expert testimony is subject to the same tests, and is to be weighed and judged like any other. The absence of a motive may be considered, but where the commission of the crime by defendant is clearly proved, the fact that his motive is not shown is immaterial.[47]

Defendant's good character must be considered,[48] and good character alone may give rise to a reasonable doubt,[49] though in a plain case of quiet, good character cannot avail.[50]

Alibi involves the impossibility of defendant's presence at the scene of the crime at the time it was committed,[51] but evidence thereof raising a reasonable doubt of guilt is sufficient to demand an acquittal.[52]

In Connecticut, conviction involving death must be supported by at least two witnesses.[53]

A local custom cannot operate to suspend a criminal statute nor to overthrow the rules of evidence by which the commission of an offense is proved.[54]

§ 10. *Trial. A. Conduct of trial in general.*[55]—The trial must be on a lawful term day.[56] The general course and conduct of the trial,[57] including the nature and extent of examination[58] and cross-examination[59] of witnesses, and the order of taking proof,[60] and the exclusion of the jury during proceedings in which they

v. State [Ark.] 88 S. W. 880. It is not necessary that an accomplice's testimony should be corroborated in every material particular. Harrell v. State, 121 Ga. 607, 49 S. E. 703. The corroboration which the law requires is that the circumstances shall, independently of the testimony of the accomplice, connect the accused with the perpetration of the offense charged. Id. In a case of a felony where the evidence relied on for a conviction is that of an accomplice and circumstances corroborating his testimony, it is not error to charge that the corroborating circumstances, independently of the accomplice's testimony, should be such as lead to the inference of the defendant's guilt, and that grave suspicions raised by the circumstances would not be a sufficient corroboration of the accomplice's testimony to authorize a conviction. Id. An accomplice may be corroborated by the testimony of another whom it is urged is also an accomplice, the credibility of the latter's testimony being for the jury. People v. Gilhooley, 95 N. Y. S. 636.

47. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070.

48. Phelan v. State [Tenn.] 88 S. W. 1040.

49. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. Contrary instruction held fatal. Schutz v. State [Wis.] 104 N. W. 90.

50. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615. Less persuasive in rape. State v. Jones [Mont.] 80 P. 1095.

51. Evidence held not sufficient. Beck v. People, 115 Ill. App. 19.

52. Instruction so stating held proper. State v. Davs, 186 Mio. 533, 85 S. W. 354.

53. Two need not be to same facts. State v. Marx [Conn.] 60 A. 690.

54. Crockford v. State [Neb.] 102 N. W. 70.

55. See 4 C. L. 43.

56. A trial and conviction had on a day when the court is not legally in session is void. Walker v. State [Ala.] 38 So. 241.

57. Ruling on application for continuance. State v. Cummings [Mo.] 88 S. W. 706. Limitation of time to argue held not abuse of discretion. State v. Patchen, 37 Wash. 24, 79 P. 479. Limitation held too arbitrary. State v. Rogoway [Or.] 81 P. 234. Setting case for trial. State v. Sexton, 37 Wash. 110, 79 P. 634; State v. Brown, 37 Wash. 106, 79 P. 638. Not error to refuse to stop trial and investigate reading of newspapers by jurors where no affidavits are presented in support of counsel's application. Johnson v. People [Colo.] 80 P. 133. Rule excluding witnesses. Greer v. Commonwealth [Ky.] 88 S. W. 166; State v. Mann [Wash.] 81 P. 561. Refusal to allow defendant's counsel to take forged paper from court room is discretionary. Miller v. State [Tex. Cr. App.] 87 S. W. 821.

58. Expert on handwriting. Colbert v. State [Wis.] 104 N. W. 61. Leading questions. Woodruff v. State [Neb.] 101 N. W. 1114; State v. Miller [Kan.] 80 P. 51. The trial judge may question witnesses but it should be done in a spirit of fairness and to elicit the truth. Howard v. Territory [Okl.] 79 P. 773. Held prejudicial. State v. De Pasquale [Wash.] 81 P. 689. Refusal to remove shackles from defendant's witness while testifying is not prejudicial, he being a desperate character under sentence of death. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

59. State v. Sherouk [Conn.] 61 A. 817; Woodruff v. State [Neb.] 101 N. W. 1114.

60. Knox v. State [Ind.] 73 N. E. 255; Commonwealth v. Johnson [Mass.] 7 N. E. 939; State v. Seligman [Iowa] 103 N. W. 357; Steward v. State [Wis.] 102 N. W. 1079; State v. Waln [Idaho] 80 P. 221; Tetterton v. Commonwealth [Ky.] 89 S. W. 8; Trevinio v. State [Tex. Cr. App.] 13 Tex. Ct. App.] 13 Tex. Ct Rep 716, 88 S. W. 356. The order

are not interested,[61] is a matter very generally left to the sound discretion of the trial court. After a criminal case has been closed on both sides and the argument of counsel is being made, it is within the sound judicial discretion of the trial court to permit either the state or the defendant to introduce additional evidence in furtherance of justice;[62] and, unless an abuse of this judicial discretion is clearly made to appear, an appellate count will not disturb the ruling of the trial court either in granting or refusing such permission;[63] but after verdict and discharge of jury, it cannot be done.[64] Direct testimony should not be permitted to be produced in rebuttal unless there is some statement that it came to the knowledge of the party after the conclusion of the testimony.[65] A motion to permit and allow exceptions to all adverse rulings without announcement at the time is properly denied.[66] Proceeding with the trial in the absence of the official stenographer is not error where defendant is given opportunity to employ one, though he is unable to secure one.[67] Surrebuttal should be allowed, though the evidence would also have been admissible in chief.[68] When an answer to a question presents inadmissible evidence, the proper practice is by motion to have it stricken and have the jury directed not to consider it; the movant specifying his objections with the same particularity as if objecting to the questions.[69] The judge may question the witness on the stand in proper cases,[70] but this should not be done in such a manner as

in which evidence is allowed to be introduced must rest to a considerable extent in the sound discretion of the presiding justice. Williams v. State [Ga.] 51 S. E. 322. If the corpus delicti and the guilt of the defendant are both proved as the law requires, it will not furnish ground for a new trial that the court did not require the evidence to be introduced so as to divide it into two distinct parts, the first referring to the corpus delicti and the second to the defendant's connection with the crime. Id. Introduction of further evidence after motion for nonsuit. State v. Sexton, 37 Wash. 110, 79 P. 634. Reopening case and allowing reexamination of state's witness after his arrest for perjury. State v. Moon [Kan.] 80 P. 597. The court did not abuse its discretion in recalling a witness and asking him if he was armed on the occasion of the shooting and whether he remained to see the conclusion of the difficulty. Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212. In homicide, where fatal wounds were caused by some blunt, smooth and round instruments, a curtain pole found in an adjoining room was held admissible after the accused had closed his evidence. Roberts v. State [Ga.] 51 S. E. 374. If evidence tends to contradict, qualify, limit or explain matters brought out in the testimony produced by the defendant, the state may properly introduce such evidence in rebuttal (Starke v. State [Fla.] 37 So. 850), even though a witness for the defendant may have admitted on cross-examination, or may not have denied, the existence of the facts sought to be proved by the evidence so offered in rebuttal (Id.). In homicide it is discretionary with the court to allow evidence otherwise competent but not proper rebuttal testimony to be given in rebuttal. Braham v. State [Ala.] 38 So. 919. Intention to extort money by prosecution must be put to prosecuting witness direct before laying a foundation to prove such, it being admissible only as impeachment. People v. Delbos [Cal.] 81 P. 131. Admission of documents tending to show connection of one defendant with conspiracy, before proof of conspiracy, held not an abuse of discretion. Lorenz v. U. S., 24 App. D. C. 337.

61. Defendant cannot complain that a witness was punished for disobedience before the jury. Wright v. State [Tex. Cr. App.] 84 S. W. 593. Failure to require jury to withdraw during preliminary inquiry as to voluntary character of confessions. State v. Stibbens [Mo.] 87 S. W. 460. The exclusion of the jury during the taking of preliminary evidence is discretionary. Confessions. Hintz v. State [Wis.] 104 N. W. 110. Exclusion of jury during settlement of issues. Upton v. State [Tex. Cr. App.] 88 S. W. 212.

62, 63. Robinson v. State [Fla.] 39 So. 465.

64. Judgment and sentence vacated and case remanded, where after verdict and after discharge of jury, court admitted in evidence a paper claimed to be in accused's handwriting, which his wife had testified she signed. Raymond v. U. S., 25 App. D. C. 555.

65. Flowers v. State [Miss.] 37 So. 814. In homicide cases the defense being self-defense, dying declarations of the deceased that he was not the aggressor constitute direct testimony. Id.

66. State v. Bailey [Mo.] 88 S. W. 734.

67. Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 627, 88 S. W. 807.

68. Where dying declarations were admitted in rebuttal, held error to refuse to allow defendant to show a state of facts contrary to that testified to by the dying declarations. Flowers v. State [Miss.] 37 So. 814.

69. Dickens v. State [Fla.] 38 So. 909.

70. Grant v. State [Ga.] 50 S. E. 946, and see Examination of Witnesses, § 1, 5 C. L. 1371.

would tend to discredit the witness.[71] Where questions improper in form are asked by a juryman with the court's permission, failure of the court to interpose objections is not necessarily error.[72]

Conduct and remarks of judge.[73]—Remarks of the court intimating his opinion on the facts may be prejudicial,[74] but merely alluding to the importance of the case is not, provided the jury be properly instructed.[75] The court should not refer to defendant's privilege of testifying,[76] nor make remarks in his rulings that might tend to prejudice accused.[77] Trial judges should not permit private conversations with themselves by the prosecuting attorney or any one else upon an issue arising in the trial.[78]

Order and decorum [79] in the court room should be preserved, but unless breach thereof is shown to be harmful, it is not error.[80] Counsel should ordinarily move the court to act in such cases.[81]

Consolidation [82] in a proper case is provided for in some jurisdictions.[83]

Severance [84] is discretionary, unless a statute makes it of right, but must be asked before trial, and a motion therefor may be defeated by showing an agreement of the accomplice to turn state's evidence.[85] If there is not sufficient evidence to convict the accessory, it should be granted and the accessory tried first, in order that defendant may avail himself of the accessory's testimony.[86] A denial of the motion before change of venue is not res judicata.[87]

Inquisitions are provided in some states to try defendant's sanity.[88]

71. Where witness said he had been convicted of gaming once, it was held error for the judge to ask if he had not been convicted twice, and to then look in his docket and explain to the jury that witness had pleaded guilty once, and a second time had demanded an indictment. Grant v. State [Ga.] 50 S. E. 946.

72. State v. Crawford [Minn.] 104 N. W. 822.

73. See 4 C. L. 46.

74. O'Donnell v. People, 110 Ill. App. 250.

75. An introductory remark of the court as to the importance of the case because involving a matter of death or imprisonment held not to harm defendant, it appearing that in immediate connection therewith the judge impressed upon the jury the fact that they were as much under obligation to acquit an innocent man as to convict a guilty one. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

76. Miller v. People, 216 Ill. 209, 74 N. E. 743.

77. Remarks held not prejudicial. Date of burglary. Simon v. State [Wis.] 103 N. W. 1100. Sarcastic remarks to counsel. Vasser v. State [Ark.] 87 S. W. 635. Such remarks are not comment on facts. State v. Mann [Wash.] 81 P. 561. Refusal to receive plea of guilty of included offense, and entry of plea of not guilty, no statement being made thereof to the jury, is not prejudicial. Yzaguiere v. State [Tex. Cr. App.] 85 S. W. 14. It is prejudicial error for the trial court in denying a continuance to say in the presence of the jury that there has been much complaint about the failure to convict "these criminals" and that the court feared it was largely due to continuances. Fuller v. State [Miss.] 37 So. 749. Remarks of court during examination of a witness to the effect that a certain question was not in the case held not to express an opinion as to what had or had not been proved. Nelms v. State [Ga.] 51 S. E. 588. Prejudicial error was committed where the judge upon being asked to allow the accused to supplement his statement to the jury said: "Let him finish his statement. I never knew one of them to get through making his statement." Jenkins v. State [Ga.] 51 S. E. 386.

78. Such a conversation relating solely to a request for a temporary adjournment is not ground for reversal. Dickens v. State [Fla.] 38 So. 909.

79. See 4 C. L. 46, n. 1.

80. That while counsel for defendant was making his statement a woman in the court room burst out crying and sobbing loudly, but was immediately removed, is not ground for reversal, it not appearing who the woman was or that defendant was prejudiced. Clements v. State [Ga.] 51 S. E. 595.

81. Failure of the court to interpose of its own motion, in case of disorder by spectators at the trial, is not generally ground for reversal. Rawlins v. State [Ga.] 52 S. E. 1.

82. See 4 C. L. 18.

83. Rev. St. p. 1024 [U. S. Const. St. 1901, p. 720], construed. Dolan v. U. S. [C. C. A.] 133 F. 440; Olson v. U. S. [C. C. A.] 133 F. 849.

84. See 4 C. L 43.

85. Oates v. State [Tex. Cr. App.] 86 S. W. 769.

86. Perez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 453, 87 S. W. 350.

87. Codefendant stipulated for severance. Wallace v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 612, 87 S. W. 1041.

88. Demand at earliest opportunity after learning facts is soon enough. Steward v. State [Wis.] 102 N. W. 1079. A plea of insanity at time of trial or sentence must be

Disqualification of judges. Statutes providing grounds apply to criminal as well as civil cases.[89]

Appointment of counsel.[90]—The public prosecutor has a right to have associated with him an attorney to assist in the prosecution,[91] and the court may generally appoint assistants to the prosecuting attorney in special cases,[92] and special counsel may be employed by prosecutrix in bastardy cases.[93] In Pennsylvania the court has no authority to make an order on the county commissioners to pay a sum of money to defend a prisoner indicted for murder.[94] Successive allowances may be made for successive trials in New York, each being within the limitation.[95]

The witnesses[96] may all be sworn in a body at the beginning of the trial.[97] It is within the discretion of the trial court to refuse to allow all the witnesses to be sworn on voir dire before they are sworn as witnesses, as such course might seriously impede the trial. If the witness is not competent, it may be shown when he is called to testify.[98] In a proper case they may be excluded from the court room except while testifying.[99] When the witnesses have been placed under rule, it rests in the discretion of the court to allow one who did not retire from the court room to be examined;[1] especially is this true where the witness objected to was exempted from the rule by the court.[2] The state need not call all the eye witnesses,[3] nor produce all known evidence.[4] In some states names of witnesses may be endorsed on an information at the beginning of the trial when it satisfactorily appears to the court that the prosecuting officer could not have reasonably asked such permission earlier,[5] and witnesses whose names are not endorsed may be sworn in discretion.[6]

Defendant must be present[7] during the whole of a trial for felony,[8] but one who voluntarily absents himself during the progress of the trial can take no benefit

submitted to a jury in Arkansas. Ince v. State [Ark.] 88 S. W. 818. Scope of inquiry. Commonwealth v. Woelfel [Ky.] 88 S. W. 1061.

89. Judge formerly counsel for accomplice. People v. Haas, 93 N. Y. S, 790.

90. See 4 C. L. 44.

91. McCue v. Commonwealth [Va.] 49 S. E. 623.

92. Manner of entering order. Appointment discretionary. Colbert v. State [Wis.] 104 N. W. 61. Attorney for railroad held not disqualified. Id. That appointment was not made until after the jury was empaneled is immaterial where defendant does not show that his challenges would have been different had he known of the appointment before. State v. Cobley [Iowa] 103 N. W. 99. An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in a proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose. Blair v. State 101 N. W. 17. Not error for special counsel to open state's case. White v. Commonwealth [Ky.] 85 S. W. 753.

93. Harley v. Ionia Circuit Judge [Mich.] 104 N. W. 21.

94. Commonwealth v. Dillen [Pa.] 60 A. 263.

95. People v. Montgomery, 101 App. Div. 338, 91 N. Y. S. 765.

96. See 4 C. L. 44.

97. State v. Rooke [Idaho] 79 P. 82.

98. Vickery v. State [Fla.] 38 So. 907.

99. Request not urged as of right held not reviewable. State v. Armstrong, 37 Wash. 51, 79 P. 490; Greer v. Commonwealth [Ky.] 85 S. W. 166; State v. Mann [Wash.] 81 P. 561.

1, 2. Braham v. State [Ala.] 38 So. 919.

3. Homicide. Court may properly hold that testimony of certain witnesses may be re-received for defense, the facts all being show Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512. Defendant's motion to call witness for state held properly refused. Yancy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 478, 87 S. W. 693. Where eye witnesses are absent, but case can be made by circumstantial evidence, a continuance is not necessary. Scott v. State [Tex. Cr. App.] 85 S. W. 1060.

4. Refusal to direct prosecutor to produce alleged ex parte statements of witnesses is not error where the court suggested that a subpoena duces tecum be used. People v. Jackson [N. Y.] 74 N. E. 565.

5. State v. Rooke [Idaho] 79 P. 82; State v. Bailey [Mo.] 88 S. W. 733.

6. State v. Sexton, 37 Wash. 110, 79 P. 634; State v. Bundy [Kan.] 81 P. 459; State v. Henderson, 186 Mo. 473, 85 S. W. 576.

7. See 4 C. L. 45.

8. From impaneling of jury to charge, and during arraignment, receipt of verdict and sentence. Rev. Code Cr. Proc. §§ 244, 301, 350, 398, 437, 444. State v. Pearse [S. D.] 102 N. W. 222. Presence on application for continuance need not be shown. State v. Hall [Mo.] 87 S. W. 1181.

9. Darden v. State [Ark.] 84 S. W. 507; State v. McLain [N. D.] 102 N. W. 407. Presence may be waived during empaneling of jury. In re Shinski [Wis.] 104 N. W. 86.

therefrom,[9] and it being shown that defendant was present on a certain day, his continued presence on that day will be presumed in the absence of a showing in the record to the contrary.[10] Defendant on trial for murder, being a desperate character, may be closely and substantially guarded during the trial.[11] Defendant's personal presence is not necessary on application for a change of venue,[12] or when the names of persons constituting a special venire to try his case are drawn from the jury box and a venire issued therefor.[13] All communications between judge and jury must take place in open court in the presence of defendant.[14] The trial judge may recall the jury and deliver further legal and pertinent instructions if the prisoner is present at the time, or his absence is not brought about by any act of the court.[15]

The judge[16] *must be present* and in such a situation that he can see and hear all that transpires,[17] though momentary absence will not reverse where no prejudice is shown.[18]

(§ 10) *B. Arguments and conduct of counsel.*[19]—Counsel should not so conduct the government's case as to unfairly prejudice defendant.[20] The opening statement of counsel is not prejudicial, though he makes claims not substantiated by the testimony,[21] and the opening may properly be by special counsel employed to assist the commonwealth's attorney.[22] Beyond what is fixed of right,[23] the length of time for argument is discretionary. It is not error for the court to interrupt counsel for the purpose of correcting a misstatement.[24] Unwarranted or abusive speech and statements that may tend to influence the minds of the jurors outside and beyond the facts of the case should not be indulged,[25] but counsel has the right

10. O'Donnell v. People, 110 Ill. App. 250; State v. Pearse [S. D.] 102 N. W. 222; State v. Brock, 186 Mo. 457, 85 S. W. 595; Woodring v. Territory [Okl.] 81 P. 631.

11. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

12. State v. Blackman, 113 La. 768, 37 So. 719.

13. Starke v. State [Fla.] 37 So. 850.

14. Havenor v. State [Wis.] 104 N. W. 116. Procedure where jury disagree as to evidence of a witness. McKinney v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 638, 88 S. W. 1012.

15. Davis v. State [Ga.] 50 S. E. 376.

16. See 4 C. L. 45.

17. Carney v. State [Tex. Cr. App.] 85 S. W. 7; McLaughlin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 296, 87 S. W. 158.

18. Scott v. State [Tex. Cr. App.] 85 S. W. 1060.

19. See 4 C. L. 47.

20. Should not ask prejudicial questions in a manner that assumes their truth. State v. Coleman, 186 Mo. 151, 84 S. W. 978; Newman v. Commonwealth [Ky.] 88 S. W. 1089. Kissing baby born to prosecutrix in rape held not prejudicial. State v. Danforth [N. H.] 60 A. 839. Persistent questioning prejudicial, by insinuation, the witness denying. O'Donnell v. People, 110 Ill. App. 250. Allowing prosecutrix in seduction to state that she was a cripple. Neary v. People, 115 Ill. App. 157. Contemptuous expressions regarding defendant and his counsel. Harmon v. Territory [Okl.] 79 P. 765. Defendant discharging some of his witnesses on the strength of the county attorney's statement that he would not introduce any more evidence as to the intoxicating quality of liquors, it is error to allow the state to subsequently introduce evidence on this point. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711.

21. Failure due to a holding that the evidence alluded to was incompetent. Wray v. State, 5 Ohio C. C. (N. S.) 437.

22. White v. Commonwealth [Ky.] 85 S. W. 753. **Contra.** State v. Price [Mo. App.] 85 S. W. 922.

23. In Georgia counsel are entitled to 30 minutes for argument as a matter of right on trial for misdemeanor. Jones v. State [Ga.] 51 S. E. 312.

24. Not error for court to interrupt counsel when arguing that insanity might be inferred from atrocity and publicity of murder, and to tell the jury that such an inference would be unwarranted. Hill v. U. S., 22 App. D. C. 395.

25. Robbins v. State [Tex. Cr. App.] 83 S. W. 690; Pool v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 616, 88 S. W. 350; State v. Lockhart [Mo.] 87 S. W. 457. Charging defendant with unfaithfulness to his mother, being untrue to his religion and having disgraced his profession and citizenship. O'Donnell v. People, 110 Ill. App. 250. Comment on knife held not outside record. People v. McRoberts [Cal. App.] 81 P. 734. For prosecuting attorney to state that he knows defendant and knows he is not insane is prejudicial. Fort v. State [Ark.] 85 S. W. 236. Comments on race question held unprejudicial. Hooker v. State [Ark.] 86 S. W. 846. Counsel should not state what defendant's wife's testimony would have been had the state been permitted to call her, nor otherwise comment on failure to call her. State v. Shouse [Mo.] 87 S. W. 480. Prosecutor should not state what inadmissible evidence properly excluded on

to fully state his views as to what the evidence shows and as to the conclusions fairly to be drawn therefrom,[26] and discuss the credibility of the witnesses,[27] criticize or answer the argument of defendant's counsel,[28] and embellishment by figures of speech [29] or anecdote,[30] and persuasive arguments drawn from independent sources of learning, may be used,[31] and physical objects in evidence may be exhibited and commented upon,[32] the matter being one which in every case must be left to the discretion of the trial judge.[33] Detached portions of the stenographer's transcript should not be read.[34] A misstatement of the evidence by counsel is not fatal where no prejudice appears.[35] Incorrect and misleading statements of law uncorrected

objection would have shown. Tally v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 699, 88 S. W. 339. Evidence held to warrant argument objected to. Jenkins v. State [Ga.] 51 S. E. 598. Reference to defendant as an "incarnate devil" sustained where evidence showed deliberate and cold-blooded killing. State v. Meche [La.] 38 So. 152. Reference to prisoner as an outlaw, and argument to show he was such, held not prejudicial to prisoner, though improper. State v. Horner [N. C.] 52 S. E. 136. Remark of counsel, referring to a letter of defendant in seduction case, signed your "beast" friend, that it properly characterized defendant, held not improper, being a mere opinion as to his offense. Weaver v. State [Ala.] 39 So. 341. Reference to flight of defendant not in evidence is error. Jones v. State [Ga.] 51 S. E. 312. In larceny for cattle, held prejudicial error for the prosecuting attorney to argue to the jury that defendant should have brought a civil action against the prosecuting witness to have recovered the cattle in controversy, where he made no claim of ownership. Clampitt v. U. S. [Ind. T.] 89 S. W. 666. Remarks of counsel as to matters, evidence of which had been excluded, are improper. Sanford v. State [Ala.] 39 So. 370.

26. People v. Wolf, 95 N. Y. S. 264; State v. Armstrong, 37 Wash. 51, 79 P. 490; State v. Smokalem, 37 Wash. 91, 79 P. 603; State v. Harness [Idaho] 80 P. 1129; Vann v. State [Tex. Cr. App.] 85 S. W. 1064; Vasser v. State [Ark.] 87 S. W. 635; Maxey v. State [Ark.] 88 S. W. 1009; Harris v. State [Tex. Cr. App.] 85 S. W. 12. May urge that evidence is conclusive of guilt. People v. McRoberts [Cal.] 81 P. 734. That counsel's inference from the evidence was erroneous is not fatal. Osburn v. State [Ind.] 73 N. E. 601. Statement of prosecuting attorney to the jury of his belief that the defendant had committed similar crimes before held not improper, there being evidence in the case showing the probability of such fact. Straub v. State, 5 Ohio C. C. (N. S.) 529. Counsel may explain statements objected to. State v. Rooke [Idaho] 79 P. 82. Incompetent evidence going in without objection may be commented upon. Moore v. State [Tex. Cr. App.] 83 S. W. 1117; State v. Cummings [Mo.] 88 S. W. 706. Counsel may state that he never tried a case where the evidence was so strong. Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 301, 87 S. W. 147. Counsel may state that for cruelty and barbarity the crime was without parallel. Byrd v. State [Ark.] 88 S. W. 974. May include such legitimate inferences as may be drawn from the facts proven. Jenkins v. State [Ga.] 51 S. E. 386. Where state admitted statements by absent witnesses, it was proper for the solicitor to tell the jury that the state did not thereby admit that the statements were true, but only that the witnesses, if present, would so testify. Smith v. State [Ala.] 39 So. 329.

27. Inmates and habitues of house of ill fame. People v. Davis [Cal. App.] 81 P. 716. That defendants' witnesses were convicts may be emphasized. People v. Kelly, 146 Cal. 119, 79 P. 846. Allusion to defendant on trial for liquor selling as a "blind tiger man" and stating that such a man would swear to anything. Reese v. State [Ark.] 88 S. W. 841. Argument based on contradiction as to immaterial matter held error. Hinson v. State [Ark.] 88 S. W. 947.

28. "Playing to the galleries." Tetterton v. Commonwealth [Ky.] 89 S. W. 8. May state in answer that defendant did not dare put his character in issue. Moore v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 701, 88 S. W. 228. An interrogation in the argument of prosecuting counsel "Why don't you bring witnesses from the grand old county of Butler to impeach him," referring to a witness from such county whom counsel for accused stated in argument was unworthy of belief, was not improper. Involved no statement of fact. Bardin v. State [Ala.] 38 So. 833.

29. No prejudicial facts extrinsic to the record may be introduced in so doing. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

30. Relation of joke by solicitor in illustration of argument, and not as a fact, nor as evidence of any fact held proper. Peel v. State [Ala.] 39 So. 251.

31. Counsel may state that a score of murders have been committed in the county. Ball v. Commonwealth [Ky.] 85 S. W. 226.

32. General resemblance to defendant of child born of prosecutrix may be commented on. State v. Danforth [N. H.] 60 A. 839. Prosecutor may refer to presence of defendant's mother and other relatives. People v. Davis [Cal. App.] 81 P. 716. In homicide, where fatal wounds were caused by some blunt, smooth and round instrument, and a curtain pole found in an adjoining room was admitted in evidence, the solicitor general had the right in his argument to the jury, to contend that this pole was the weapon used by the murderer. Roberts v. State [Ga.] 51 S. E. 374.

33. State v. Danforth [N. H.] 60 A. 839.

34. Davis v. State [Miss.] 37 So. 1018.

35. Yancy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 478, 87 S. W. 693. Reference in the argument to testimony not introduced held not reversible error. State v. Williams [Nev.] 82 P. 353.

by proper instructions are prejudicial;[36] but argument otherwise bad may be excused by counsel's having provoked it.[37]

Counsel should not comment on defendant's failure to testify,[38] or to call his wife as a witness,[39] and such comment will require reversal, notwithstanding instructions to disregard it;[40] unless perhaps where evoked by defendant's counsel;[41] but legitimate argument on the failure of defendant who has testified, to explain certain facts, is proper.

Argument by defendant's counsel.[42]—The court may properly interrupt counsel in a statement to the jury of the effect on the evidence of the withdrawal of a count.[43] Refusal to allow defendant's counsel to read from a book during argument is not error where there is no avowal of what is intended to be read.[44] When during his argument counsel for accused started to read to the jury from a supreme court report and on objection being made, it was not error for the court while allowing the extract to be read in the presence of the jury to require that it be read to the court.[45] If an attorney assisting the public prosecutor keeps within proper bounds, he is not open to criticism before the jury.[46]

Improper argument may be cured[47] in most instances by withdrawal of the remark or by a proper charge or both.

Objection[48] should be made at the time.

(§ 10) *C. Questions of law and fact.*[49]—Questions of law are, theoretically at least, for the court,[50] and questions of fact for the jury.[51]

36. Statement of counsel that an affidavit of the testimony of an absent witness which had been admitted to avoid a continuance was not evidence but merely defendant's declaration is reversible error, the court having failed to charge the contrary. Martin v. Commonwealth [Ky.] 89 S. W. 226. Remarks of counsel as to duty of jury, outside the law and the evidence of the case, held no ground for new trial, in view of action taken by trial court. Ellis v. State [Ga.] 52 S. E. 147.

37. Where the remarks of the state attorney in addressing the jury appear to have been prompted by the previous conduct and remarks of counsel for the defendant, and the remarks objected to do not appear to have been prejudicial to the defendant, the ruling of the trial court in refusing to stop the state attorney is not erroneous. Reyes v. State [Fla.] 88 So. 257.

38. See 4 C. L. 48. State v. Swisher, 186 Mo. 1, 84 S. W. 911; Williams v. State [Tex. Cr. App.] 85 S. W. 1144; Tignor v. State [Ark.] 89 S. W. 96; Newman v. Commonwealth [Ky.] 88 S. W. 1089; Martinez v. State [Tex. Cr. App.] 85 S. W. 1066; Barnard v. State [Tex. Cr. App.] 86 S. W. 760. Record held not to show comment. People v. Warner [Cal.] 82 P. 196; Vasser v. State [Ark.] 87 S. W. 635; State v. Crawford [Minn.] 104 N. W. 295; State v. Smokalem, 37 Wash. 91, 79 P. 603. Conviction for arson in the third degree for burning a house for insurance, reversed because prosecuting attorney commented, after objection, as to what defendant might have, but did not, testify to. State v. Guinn, 174 Mo. 680, 74 S. W. 614.

39. State v. Shouse [Mo.] 87 S. W. 480; State v. Taylor [W. Va.] 50 S. E. 247.

40. Error held prejudicial notwithstanding prompt action by court, and there being three indictments on trial. Commonwealth v. Foley, 24 Pa. Super. Ct. 414.

41. That the prosecuting attorney in his argument referred to the failure of accused to take the stand, in reply to an argument of defendant's counsel, held not reversible error where the court instructed that such fact could not be considered against defendant. State v. Williams [Nev.] 82 P. 353.

42. See 4 C. L. 49.

43. Bryan v. U. S. [C. C. A.] 133 F. 495.

44. Warner v. Commonwealth [Ky.] 84 S. W. 742.

45. Godwin v. State [Ga.] 51 S. E. 598.

46. McCue v. Commonwealth [Va.] 49 S. E. 623.

47. See post, § 15.

48. See post, § 14.

49. See 4 C. L. 49.

50. Whether an offered witness understands the nature and obligation of an oath is a question for the court. Freasier v. State [Tex. Cr. App.] 84 S. W. 360. Hurd's Rev. St. 1903, c. 110, § 42, providing that on a trial to the court either party may submit written proposals to be held as law in the case does not apply to criminal cases tried to the court. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770.

51. Intent is for the jury. Whether one accused of stealing turpentine, took it under the honest belief that it was within his employer's land line. Dickens v. State [Ala.] 39 So. 14. The intention to defraud in embezzlement is a question for the jury. State v. Blackley, 138 N. C. 620, 50 S. E. 310.

Whether the acts of fornication proven were frequent enough to make the **crime habitual** is a question for the jury. State v. Sauls, 70 S. C. 393, 50 S. E. 17. Held no error in submitting to jury the question whether defendant's assault on his wife was **with a deadly weapon,** the weapon being a

The jury should apply the law as given by the court, whether it be for or against the prisoner,[52] and while the jury are the judges of the law to the extent that they have the right to acquit, however plain the case on the law, an instruction that the jury are the sole judges of the law is properly refused.[53] Whether a confession was voluntary is primarily for the court,[54] and ultimately for the jury.[55] The question of the admissibility of evidence on a preliminary inquiry as to the voluntary character of confessions is for the court.[56] Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the court.[57]

(§ 10) *D. Taking case from jury.*[58]—A peremptory direction to find a verdict of guilty is not allowable, and in some states directions for acquittal are not allowed;[59] but generally the court on proper request [60] should advise acquittal if there is no evidence [61] on which to base a conviction. When the state's evidence, if uncontradicted, would warrant a conviction, a motion to dismiss or direct an acquittal is properly denied,[62] and instructions amounting to an affirmative charge for the accused are properly refused where the evidence supports a verdict of guilty. Dismissal of a count does not operate to withdraw from the jury the evidence offered under it where admissible under the retained count to show intent.[63] A verdict may be directed on a special plea where there is no evidence to support it.[64] That the crime charged, if proved, was not committed in the state where accused was being prosecuted, is a matter of defense, to be shown by defendant, and cannot be raised by demurrer to the state's evidence.[65]

(§ 10) *E. Instructions. Necessity and duty of charging. Requests.*[66]—Instructions clearly informing the jury of the law on all the material issues in the

buggy trace 2 1-2 feet long and defendant being strong, while his wife was weak and sick. State v. Archbell [N. C.] 51 S. E. 801. Whether offense was committed **within the period of limitations** is a question of fact. State v. Newton [Wash.] 81 P. 1002.

Credibility of witnesses is a question for the jury. Jackson v. State [Fla.] 38 So. 599. The credibility of witnesses is a question for the jury subject to the revision of the court upon application for a new trial. Whipple v. State [Ga.] 51 S. E. 590. The weight and credibility to be accorded the testimony of accomplices is for the jury. State v. Faulkner, 185 Mo. 673, 84 S. W. 967. Whether a witness has been successfully impeached is a question for the jury. Powell v. State [Ga.] 50 S. E. 369. It is the province of the jury to determine whether or not a witness is mistaken in his evidence where his testimony conflicts with that of another witness. It is not permissible to ask one witness if another was not mistaken in his testimony. Braham v. State [Ala.] 38 So. 919. Whether defendants gave a reasonable and credible explanation of how they came into the possession of recently stolen property is a question for the jury. Jackson v. State [Fla.] 38 So. 599. If the proof of an **alibi** depends on the credibility of witnesses and weight of evidence, the jury are the sole judges as to whether such evidence raises a reasonable doubt. Caldwell v. State [Fla.] 39 So. 188.

52. State v. Taylor [W. Va.] 50 S. E. 247.

53. People v. Sanders [Mich.] 102 N. W. 959.

54. State v. Stibbens [Mo.] 87 S. W. 460.

55. State v. Stibbens [Mo.] 87 S. W. 460. Question is mixed one of law and fact. State v. Mann [Wash.] 81 P. 561. Need not be submitted when there is no conflict. State v. Inman [Kan.] 79 P. 162. The defendant is not prejudiced by submitting the question of voluntary character of confessions to the jury where the evidence conflicts. Hintz v. State [Wis.] 104 N. W. 110; State v. Westcott [Iowa] 104 N. W. 341.

56. Hintz v. State [Wis.] 104 N. W. 110.

57. Spires v. State [Fla.] 39 So. 181.

58. See 4 C. L. 49.

59. Discretionary where only evidence is that of an uncorroborated accomplice. Murphy v. State [Wis.] 102 N. W. 1087.

60. That the request used the word "instruct" instead of "advise" is immaterial. People v. Ward, 145 Cal. 736, 79 P. 448.

61. Held proper, in view of evidence, to refuse to direct verdict for one of several defendants on trial for conspiracy to defraud the United States by procuring sale of articles to it at excessive prices. Lorenz v. United States, 24 App. D. C. 337.

62. Several good counts and evidence to support one. State v. Terry [N. J. Law] 61 A. 148. That the testimony of the owner of stolen property is indefinite does not require a direction where other testimony is clear. Green v. State [Tex. Cr. App.] 86 S. W. 332.

63. Bryan v. U. S. [C. C. A.] 133 F. 495.

64. Murphy v. State [Wis.] 102 N. W. 1087.

65. State v. Blackley, 138 N. C. 620, 50 S. W. 310.

66. See 4 C. L. 50.

case must be given,[67] whether requested or not.[68] Requests proper to any peculiar feature of the case should be given,[69] and there is a duty to instruct as to the effect of a recommendation of mercy, though failure is not reversible in the absence of a request.[70] In misdemeanor cases it is only necessary to define the offense and state the punishment, unless further instructions are requested.[71] An instruction calling attention to accused's failure to explain suspicious circumstances is fatal,[72] and the authorities conflict as to the propriety of instructing, even on request, that no inference is to be drawn from accused's failure to testify.[73] A defendant is entitled to a charge that the jury cannot convict under an insufficient count.[74] The court need not select a single fact from those testified to and charge that such fact must be established by proof such as to exclude every reasonable hypothesis except defendant's guilt.[75] When the jury report inability to agree, it is error to refuse to charge that certain instructions given at defendant's request with the statement that they were abstract were material to the case.[76] In the absence of a request, an omission to instruct on the subject of weighing the testimony in cases of conflict is not ground for new trial,[77] nor is failure to instruct on impeachment of witnesses,[78] nor to charge upon the effect of evidence of good character.[79] Technical words should be defined.[80]

An instruction should not be given unless there is evidence on which to predicate it,[81] or the matter is in issue,[82] nor should mere abstract principles of law be

67. Failure held error. French v. Commonwealth [Ky.] 88 S. W. 1070. Rule falsus in uno held called for. State v. Swisher, 186 Mo. 1, 84 S. W. 911. Where there are two accomplices, a charge that one cannot corroborate the other is called for. Eddens v. State [Tex. Cr. App.] 84 S. W. 828.

68. It is the duty of the trial judge to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not. Young v. State [Neb.] 104 N. W. 867.

69. Refusal to instruct as to admissibility of confession in evidence held ground for a new trial. Griner v. State, 121 Ga. 614, 49 S. E. 700.

70. Mason v. State, 5 Ohio C. C. (N. S.) 647.

71. Clement v. State [Tex. Cr. App.] 86 S. W. 1016; Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 106, 86 S. W. 1018.

72. Tignor v. State [Ark.] 89 S. W. 96.

73. Not error. State v. Currie [N. D.] 102 N. W. 875. Not error to read statute to jury. State v. Wisnewski [N. D.] 102 N. W. 883.

74. Shelton v. State [Ala.] 39 So. 377.

75. State v. Adams, 138 N. C. 688, 50 S. E. 765.

76. Burton v. U. S., 196 U. S. 283, 49 Law. Ed. 482.

77. Campbell v. State [Ga.] 51 S. E. 644.

78. Steed v. State [Ga.] 51 S. E. 644.

79. Berry v. State [Ga.] 50 S. E. 345.

80. "Intoxicating liquor." Moth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822. Definition of "beating" held not prejudicial. State v. Manderville, 37 Wash. 365, 79 P. 977. "Pressing necessity" in charge on self-defense need not be defined in the absence of a request. Holmes v. State [Wis.] 102 N. W. 321. Not necessary to define "premeditation and deliberation" unless requested. State v. Armstrong, 37 Wash. 51, 79 P. 490. Not error to omit definition of "heat of passion" in absence of request. State v. Buffington [Kan.] 81 P. 465. "Feloniously" need not be defined. Metcalf v. Commonwealth [Ky.] 86 S. W. 534. "Self-defense" and "bringing on the difficulty" need not be defined. State v. Bailey [Mo.] 88 S. W. 733.

81. People v. Madina, 146 Cal. 142, 79 P. 842; Yzaguirre v. State [Tex. Cr. App.] 85 S. W. 14; State v. Rudolph, 187 Mo. 67, 85 S. W. 584; Thurman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1014; Bird v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 295, 87 S. W. 146; Stone v. State [Tex. Cr. App.] 85 S. W. 807. Where there is evidence from eye witnesses, no charge on circumstantial evidence is required. Aladin v. State [Tex. Cr. App.] 86 S. W. 327; Yancy v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 478, 87 S. W. 693. Instruction on conspiracy in murder case held improper. Humphrey v. State [Ark.] 86 S. W. 431. Charge on confession alone is not called for where there is abundant corroborating testimony. Ellington v. State [Tex. Cr. App.] 87 S. W. 153. Charge on confession is not required when there is none in the case. Fox v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 103, 87 S. W. 157. Reference to flight of defendant. Jones v. State [Ga.] 51 S. E. 312. An appellate court will not reverse a judgment of conviction for a violation of this rule, if it can say affirmatively, from a consideration of the entire record, that the defendant was not and could not have been injured by the error in giving such instruction. Starke v. State [Fla.] 37 So. 850. Not error to refuse an instruction correct in principle but inapplicable to facts in evidence. Connelly v. State [Neb.] 104 N. W. 754. No error in refusing to charge that character of accused is presumed to be good unless shown to be otherwise, when general character of accused was not attacked or put in issue. Mixon v. State [Ga.] 51 S. E. 580. That a witness is jointly indicted with the defendant does not render necessary instructions on the law with ref-

given.[83] Defendant's theory of the case supported by evidence should be given,[84] but the submission of defensive theories finding no support in the evidence is prejudicial.

Generally it is error to fail to charge all the necessary elements of the offense,[85] and all offenses included in the indictment,[86] and supported by the evidence.[87] Included offenses should not be presented where the evidence so excludes them that if the principal crime was not committed defendant is not guilty.[88]

erence to the corroboration of the testimony of accomplices, where there is no evidence to show that such witness was an accomplice. Davis v. State [Ga.] 50 S. E. 376.

82. The whole statutory definition of an offense may be read, though part of it is not in issue. Miera v. Territory [N. M.] 81 P. 586; People v. Woods [Cal.] 81 P. 652. Phase of self-defense held not in issue because of theory adopted by defense. State v. Mount [N. J.] 61 A. 259. Character of defendant need not be charged where the defense is insanity. People v. Griffith, 146 Cal. 339, 80 P. 68. Held not error under facts to fail to define the difference between larceny, false pretenses, confidence game, etc. State v. Copeman, 186 Mo. 108, 84 S. W. 942. Question of force, etc., need not be submitted where only count charging rape under age of consent is submitted. Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 355. Issue of alibi held not raised by testimony. State v. White [Mo.] 87 S. W. 1188. There is no call to charge on first-degree murder where the indictment only charges second degree. State v. Cummings [Mo.] 88 S. W. 706. The giving of an instruction not based on any theory of the case or evidence introduced is reversible error. People v. Roberts [Cal. App.] 82 P. 624. Where right of deceased and accused to be where they were at time of trouble was not in issue, an instruction as to right of public to use streets was properly refused. State v. Thrailkill [S. C.] 50 S. E. 551.

83. Necessity of outcry in rape occurring a quarter of a mile from another house. Misenheimer v. State [Ark.] 84 S. W. 494. A defendant is entitled to a concrete application of the law to the particular facts of a case, if he presents a timely written request to charge, but he is not entitled to an elaboration of the abstract law upon a single phase of the case to such an extent as will give it undue prominence. Harnell v. State, 121 Ga. 607, 49 S. E. 703.

84. Greer v. Commonwealth [Ky.] 85 S. W. 166; Richardson v. State [Tex. Cr. App.] 85 S. W. 282; Driver v. State [Tex. Cr. App.] 85 S. W. 1056; Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025; French v. Commonwealth [Ky.] 88 S. W. 1070; Messer v. Commonwealth [Ky.] 85 S. W. 722; Simpson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 499, 87 S. W. 826; Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 692, 88 S. W. 221. Charge on accomplice testimony required. Oates v. State [Tex. Cr. App.] 86 S. W. 769. Rule falsus in uno falsus in omnibus should be given when requested and applicable. State v. Waln [Idaho] 80 P. 221. Defense of character. Phelan v. State [Tenn.] 88 S. W. 1040. Where defendant shows himself to be the consort of prostitutes, an instruction on the effect of good character which assumes that his is fair is properly refused. People v. Davis [Cal. App.] 81 P. 716. Refusal to charge on circumstantial evidence and subsequent formation of intent to appropriate in larceny. Veasly v. State [Tex. Cr. App.] 85 S. W. 274. Charge on drunkenness required. White v. State [Ark.] 86 S. W. 296. Charges on manslaughter and self-defense held necessary under the evidence in a murder case. Stacy v. State [Tex. Cr. App.] 86 S. W. 327. Honest mistake in selling liquor believed to be unintoxicating. Moth v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 521, 87 S. W. 822. Charge on circumstantial evidence not required. Lewallen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 554, 87 S. W. 1159. Charge on confessions held required. Johnson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 694, 88 S. W. 223. The theory of voluntary manslaughter being presented by one view of the evidence, it is proper to instruct the jury upon the law bearing upon that grade of homicide. Jenkins v. State [Ga.] 51 S. E. 386.

85. Ignoring question whether defendant forged the note or knew it was forged, or caused it to be forged, or uttered and published it knowing it to be forged. Commonwealth v. Hall, 23 Pa. Super. Ct. 104. Reversible error to authorize conviction of murder without the necessary element of death. Beaver v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 151, 86 S. W. 1020. The necessity for a charge in a prosecution for perjury that a conviction cannot be sustained on the testimony of a single witness is not obviated by the fact that more than one witness testified to the perjury. State v. Rutledge, 57 Wash. 523, 79 P. 1123.

86. State v. Thompson [Iowa] 103 N. W. 377; Allison v. State [Ark.] 86 S. W. 409. State v. Franklin, 69 Kan. 798, 77 P. 588.

Under an information charging an offense consisting of different degrees, it is the duty of the court, if the evidence warrant, to instruct upon the law of an attempt to commit the crime charged. Charge on manslaughter need not be given in prosecution for statutory murder by abortion. Johnson v. People [Colo.] 80 P. 133. In Louisiana it is error to refuse to charge the jury in terms that the indictment being for murder they may convict of manslaughter. State v. Hicks, 113 La. 779, 37 So. 753.

87. State v. McAnarney [Kan.] 79 P. 137; State v. Williams, 186 Mo. 128, 84 S. W. 924. Notwithstanding plea of guilty. Jackson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 710, 88 S. W. 239.

88. Warner v. Commonwealth [Ky.] 84 S. W. 742; State v. Clough [Kan.] 79 P. 117; State v. Henderson, 186 Mo. 473, 85 S W. 576; Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159; Ricks v. State

Where testimony is admissible only on a particular issue, but is persuasive as to other matters, it is error to fail to limit it.[89]

Matters once covered by the charge need not be repeated,[90] and where the

[Tex. Cr. App.] 13 Tex. Ct. Rep. 466, 87 S. W. 345; State v. Niehaus [Mo.] 87 S. W. 473. Where the record is such that the defendant is either guilty as charged or not guilty, the court may properly so charge. State v. McPhail [Wash.] 81 P. 683; State v. Sanders [N. D.] 103 N. W. 419. Where accused was either guilty of murder or not guilty because of insanity, a charge on the law of manslaughter need not be given. Braham v. State [Ala.] 38 So. 919. The law of involuntary manslaughter not being involved in the case, the court properly refused to charge on the subject. Anderson v. State [Ga.] 50 S. E. 51. Failure to instruct on involuntary manslaughter not error where evidence did not authorize charge on that subject. Nelms v. State [Ga.] 51 S. E. 588.

89. Robbins v. State [Tex. Cr. App.] 83 S. W. 690; Dusek v. State [Tex. Cr. App.] 13 Tex. Cr. Rep. 882, 89 S W. 271. Impeaching testimony. Whitt v. Commonwealth [Ky.] 84 S. W. 340; Newman v. Commonwealth [Ky.] 88 S. W. 1089; Weaver v. Commonwealth [Ky.] 86 S. W. 551; Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357. Not eror to fail to limit impeaching testimony. Brittain v. State [Tex. Cr. App.] 85 S. W. 278. Not error to fail to limit evidence persuasive only to question on which admitted. Warner v. Commonwealth [Ky.] 84 S. W. 742. Charge on impeaching testimony is not required where there is no danger that it may have any other effect. Oates v. State [Tex. Cr. App.] 86 S. W. 769. Brown v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 89, 87 S. W. 159. Effect of statements made in defendant's presence. Phelan v. State [Tenn.] 88 S. W. 1040. Where two persons were jointly indicted as principals for the offense of assault with intent to murder, and were separately tried, and one was convicted, and on trial of the second evidence of conviction of the first was introduced, the court should have charged, on request, that the conviction of one created no presumption of guilt as to the other. Mixon v. State [Ga.] 51 S. E. 580. Where an indictment charged a killing by hitting or striking with a hatchet or a blunt instrument to the grand jury unknown, and the evidence showed that the means was a hatchet and was known to the grand jury, an instruction that defendant could not be convicted if the grand jury knew that the killing was done with a hatchet was properly refused, since it was applicable only to the last count, and was not limited to such count. Smith v. State [Ala.] 39 So. 329.

90. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070; Kyle v. People, 215 Ill. 250, 74 N. E. 146; Donovan v. People, 215 Ill. 520, 74 N. E. 772; Roszczyniala v. State [Wis.] 104 N. W. 113; State v. Rooke [Idaho] 79 P. 82; People v. Jailles, 146 Cal. 301, 79 P. 965; McCue v. Commonwealth [Va.] 9 S. E. 623; Pike v. State, 121 Ga. 604, 49 S. E. 680; People v. Roberts [Cal. App.] 82 P. 624; Nordan v. State [Ala.] 39 So. 406; Napper v. State [Ga.] 51 S. E. 592; Robinson v. State [Fla.] 39 So. 465; Snelling v. State [Fla.] 37 So. 917; Starke v. State [Fla.] 37 So. 850; McDuffie v. State, 121 Ga. 580, 49 S. E. 708; Patterson v. State [Ga.] 50 S. E. 489; Jordan v. State [Fla.] 39 So. 155; State v. Stanley [Iowa] 104 N. W. 284; State v. Dean [S. C.] 51 S. E. 524; State v. Armstrong, 37 Wash. 51, 79 P. 490; Sheehy v. Territory [Ariz.] 80 P. 356; Miera v. Territory [N. M.] 81 P. 586; Holland v. State [Ark.] 84 S. W. 468; People v. Conrad, 102 App. Div. 566, 92 N. Y. S. 606; Wright v. State [Tex. Cr. App.] 84 S. W. 593; State v. Atchley, 186 Mo. 174, 84 S. W. 984; Sanders v. State [Tex. Cr. App.] 85 S. W. 1147; Jones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217; State v. Gray [Or.] 79 P. 53; Goss v. State [Ark.] 84 S. W. 1035; Williams v. State [Tex. Cr. App.] 85 S. W. 1142; State v. Day [Mo.] 87 S. W. 465. Reasonable doubt. State v. Dunn [Wis.] 102 N. W. 935; People v. Clark, 145 Cal. 727, 79 P. 434; People v. McRoberts [Cal. App.] 81 P. 734; People v. Waysman [Cal App.] 81 P. 1087; State v. Coleman, 186 Mo. 151, 84 S. W. 978. Charge that each fact in chain of circumstances must be proved beyond reasonable doubt refused because already covered. State v. Blydenburgh [Iowa] 104 N. W. 1015. The court having given a proper charge on the subject of reasonable doubt, it is not error to refuse a requested charge that "to justify a jury in finding a verdict of unlawful homicide, in any of its degrees, against the defendant, each individual juror must be convinced from the evidence, for himself, that the defendant is so guilty." Snelling v. State [Fla.] 37 So. 917. Where the general charge required specific intent as one of the essentials of the offense, a special charge on the necessity thereof need not be given. Grant v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 274. It was not eror to refuse to charge as requested by counsel for accused on the subject of the sufficiency of circumstantial evidence to warrant a conviction, it appearing that the statute bearing on this subject was given in haec verba. Seats v. State [Ga.] 50 S. E. 65. Instructions held to fully cover requests to charge that "proof of the corpus delicti may be, but is not necessarily sufficient corroboration of a confession of guilt," and that "the law does not fix the amount of corroboration—the jury are the judges." Griner v. State, 121 Ga. 614, 49 S. E. 700. Refusal to give instruction on self-defense not error where court had of its own motion properly submitted the question. Connelly v. State [Neb.] 104 N. W. 754. The trial judge having instructed the jury in reference to the law applicable to the defense of insanity, and the amount of mental capacity necessary to commit the crime charged, held no error in failing to repeat the charge upon the subject of mental capacity, in immediate connection with his instruction that if the jury should find that the accused took the life of the deceased as charged and was at the time of such mental unsoundness as to be incapable of committing a crime, they should acquit him. Roberts v. State [Ga.] 51 S. E. 374. The judge was not bound to read Pen. Code 1895, § 76, to the jury, where the gen-

proper matters in such a request are properly covered by the general charge,[91] or are given after being corrected,[92] or the general charge is full and correct,[93] there is no error.

Requests must usually be in writing,[94] and should be tendered in time for opposing counsel to meet them.[95] Ordinarily, an incorrect request is sufficient to require a correct charge on a subject within the issues not already covered,[96] but an incorrect request need not be given as requested. A charge should not be refused because it ignores a count which is insufficient to support a conviction.[97] It is proper to refuse instructions which do not tend to enlighten the jury and hence are unnecessary.[98] The court may properly modify instructions requested before giving them,[99] but need not give a special request which requires qualification, limitation or explanation,[1] and where instructions are asked in the aggregate, or propositions are presented as one request, the whole may be refused if there be anything objectionable in any one of them.

A charge correct in itself cannot be attacked because it fails to present some other or further proposition, on which a proper request was not presented,[2] and generally, instructions more fully developing issues already presented in sufficient general terms, if desired, must be requested.[3]

eral charge presented the defense of justifiable homicide. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

91. Everett v. People [Ill.] 75 N. E. 188; Keeler v. State [Neb.] 103 N. W. 64; Murphy v. State [Wis.] 102 N. W. 1087; State v. Buffington [Kan.] 81 P. 465; Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Refusal to give a charge in the form presented is not exceptionable. Commonwealth v. Johnson [Mass.] 74 N. E. 939. Where the court charged the jury on the subject of reasonable doubt, a request to charge that a particular fact sought to be shown by the defense could create a reasonable doubt in the mind of the jury is properly rejected. Williams v. State [Ga.] 51 S. E. 322.

92. Rearrangement and separation into substantive points. State v. Buffington [Kan.] 81 P. 465.

93. Where the instructions given are correct and full, defendant is not harmed by the refusal of instructions asked. Tuberville v. State [Miss.] 38 So. 333.

94. Seale v. State, 121 Ga. 741, 49 S. E. 740.

95. Instructions requested by the state during defendant's closing argument which were not submitted to defendant's counsel may be refused. Boykin v. State [Miss.] 38 So. 725. The procuring of an instruction from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, is error, though on objection the state's attorney offered to permit defendant's counsel then to answer it. Montgomery v. State [Miss.] 37 So. 835.

96. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711.

97. Shelton v. State [Ala.] 39 So. 377.

98. People v. Hill [Cal. App.] 82 P. 398.

99. Pratt v. State [Ark.] 87 S. W. 651. A modification of a requested instruction which is merely explanatory and does not materially change the request is not ground for error. State v. Dean [S. C.] 51 S. E. 524. It is not error to give a requested charge subject to an instruction already given. State v. Gadsden, 70 S. C. 430, 50 S. E. 16.

1. Where a request is imperfect, the court may refuse it and need not revise it. State v. Duperier [La.] 39 So. 455. A request to charge two sections of the Penal Code is properly refused when the request refers to the numbers of the sections only, and the two sections are not applicable, standing alone, to the case. Grant v. State [Ga.] 50 S. E. 946. A request to give an instruction which is a copy of a headnote in another case where a certain instruction was held erroneous as applied to the facts of that case, is properly refused. Mixon v. State [Ga.] 51 S. E. 580. A request not being adjusted to the facts of the case should not be given. Jenkins v. State [Ga.] 51 S. E. 386. Requested instruction not adjusted to the facts of the case properly refused. Jenkins v. State [Ga.] 51 S. E. 598.

2. Holmes v. State [Wis.] 102 N. W. 321; Roszczyniala v. State [Wis.] 104 N. W. 113; State v. Coleman, 186 Mo. 151, 84 S. W. 978. It is not error to omit to instruct the jury on a given point of law, where counsel fails to request such an instruction. Wray v. State, 5 Ohio C. C. (N. S.) 437. Court need not contradict prosecutor's statement that defendant confessed unless requested. State v. Valentina [N. J. Err. & App.] 60 A. 177. Effect of recommendation to mercy. Mason v. State, 5 Ohio C. C. (N. S.) 647. Included offense need not be presented unless requested. People v. Modina, 146 Cal. 142, 79 P. 842. After proper instruction on province of jury, they need not be told they are the sole judges of the facts unless requested. State v. McPhail [Wash.] 81 P. 683.

3. State v. Rennick [Iowa] 103 N. W. 159; State v. Clough [Kan.] 79 P. 117; State v. Price, 186 Mo. 140, 84 S. W. 920; Vasser v. State [Ark.] 87 S. W. 635. If a charge is not plain, it should be called to the court's attention. Commonwealth v. Middleby [Mass.] 73 N. E. 208. Failure to charge the converse of a proposition already given is not error, no request therefor having been made.

A failure to mark propositions of law, either given or refused, is equivalent to a refusal.[4]

Submission of charge.[5]—Oral instructions are prohibited by statute or constitution in many states,[6] and in others the court on request is required to put his charge in writing.[7] Written instructions are properly sent out with the jury on request.[8] Failure of the judge to sign the charge is fatal in Texas.[9] That the judge in submitting an instruction calls upon the attorney who presented it to pronounce certain words, the judge calling the words after him as he charged the jury, is not equivalent to the attorney charging the jury.[10] The judge may, of his own motion and over the objection of either party, recall the jury and withdraw instructions improperly given, or give additional instructions which through oversight were omitted from the original charge.[11] Accused must be present.[12]

Form of instructions in general.[13]—Argumentative instructions should not be given,[14] and no matter should be given undue prominence,[15] as by repetition or otherwise.[16] Each instruction should embrace a complete proposition of law.[17]

State v. Byrd [S. C.] 51 S. E. 542. A party desiring more specific instructions should submit appropriate written requests therefor. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. If fuller instructions are desired, written requests should be made therefor. Davis v. State [Ga.] 51 S. E. 501. If a party desires a more elaborate presentation of the case than was made in the instructions given, he should prefer an appropriate request. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

4. Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75.

5. See 4 C. L. 54.

6. Charge on purpose of impeaching evidence need not be in writing. Metcalfe v. Commonwealth [Ky.] 86 S. W. 534. Omission of dollar sign in stating amount of fine is immaterial. Clement v. State [Tex. Cr. App.] 86 S. W. 1016; Porter v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 106, 86 S. W. 1018. An oral statement cautioning the jury against being swayed by passion or sympathy made preliminary to giving the written instructions is not a violation of the rule requiring instructions to be in writing. State v. Dewey [N. C.] 51 S. E. 937. Mere observations of the court as to the province of the court and jury do not violate the rule requiring instructions to be in writing. To tell the jury that they are the sole triers of the facts and that it is their duty to reconcile conflicting testimony, but that he would aid them as to any points of law. Id.

7. If taken down by stenographer, it is sufficient. Burris v. State [Ark.] 84 S. W. 723.

8. Green v. State [Ala.] 39 So. 362. If no request, not error to omit. State v. Bundy [Kan.] 81 P. 459.

9. Jones v. State [Tex. Cr. App.] 85 S. W. 1075.

10. Seats v. State [Ga.] 50 S. E. 65.

11. Patterson v. State [Ga.] 50 S. E. 489.

12. See ante, § 10A.

13. See 4 C. L. 54.

14. Braham v. State [Ala.] 38 So. 919. Jury may be instructed that counsel's statements are not evidence. Miera v. Territory [N. M.] 81 P. 586. Requested argumentative charges properly refused. Peel v. State [Ala.] 39 So. 251; Nordan v. State [Ala.] 39 So. 406. Remarks on intent and its proof held not argumentative, misleading, and suggestive. People v. McRoberts [Cal. App.] 81 P. 734. A charge that under the laws of this country the defendant has a right to carry arms and if the evidence fails to show that he was carrying on the day of the crime for an offensive purpose, he did no wrong in carrying it, is argumentative. Carwile v. State [Ala.] 39 So. 220. Charge as to how to weigh verbal admissions held argumentative. Id. The court charges that the law finds as full and complete vindication in acquittal of a defendant not proven guilty beyond a reasonable doubt as it does in a conviction of a man so proven guilty is argumentative. Id. The court charges the jury that their duty is as fully discharged when they request a man whose guilt is not proven beyond a reasonable doubt as it is when they convict a man whose guilt is so proven is argumentative. Id. In burglary an instruction giving illustrations as to what constitutes a breaking held not argumentative. Scott v. State [Ga.] 50 S. E. 49. A charge that the jury must try the case by the evidence and not by the jokes of counsel, and that the law is as much vindicated by turning loose the doubtfully guilty as by convicting the guilty, held properly refused. Brown v. State [Ala.] 38 So. 268.

15. Undue prominence held not given to defendant's act in inviting prosecutrix to ride with him. Donovan v. People, 215 Ill. 520, 74 N. E. 772. Remark of judge that his attention had been called to a certain matter which he had overlooked, preceding his charge on such matter—flight of accused—held not to have unduly emphasized the matter. Nelms v. State [Ga.] 51 S. E. 588; Nordan v. State [Ala.] 39 So. 406.

16. Singling out testimony of one witness. Schutz v. State [Wis.] 104 N. W. 90; State v. Jones [Mont.] 80 P. 1095. That the judge in submitting an instruction calls upon the attorney who requested it to pronounce certain words, the judge calling the words after him as he charged the jury, does not give undue emphasis to the contentions of such attorney. Seats v. State [Ga.] 50 S. E. 65.

Portions of the evidence should not be **singled out** and instructed upon. Braham v.

Instructions should be complete in themselves so far as they go and not adopt others by mere reference.[18] A charge which pretermits reference to material matters is properly refused.[19] Ambiguous,[20] confusing,[21] and misleading instructions should not be given.[22] A request addressed to the jurors individually is properly refused.[23] It is not necessary for the court to apply the law given in the charge to the facts of the case when the application is plainly apparent.[24] It is not error to shape the general charge upon the evidence alone, but at some stage of the charge the court should appropriately instruct the jury with reference to the prisoner's statement.[25] The charge is to be construed as a whole,[26] and deficiencies in one part may be cured by others,[27] but an instruction fundamentally wrong is not cured by another correct one in conflict therewith,[28] and where the instructions are irreconcilable on a material issue, they are erroneous regardless of which is right.[29] An instruction that purports to define the crime and omits necessary elements is not cured by another correct one.[30] An instruction correct in itself is not rendered erroneous by a fail-

State [Ala.] 38 So. 919. A charge that if the state has failed to prove a motive reasonably calculated to prompt accused to commit the crime, this is a circumstance in defendant's favor, singles out and gives undue prominence to one phase of the case. Carwile v. State [Ala.] 39 So. 220. A cautionary instruction against insanity being used as a means to evade the law held not to give undue prominence to one side of the case. Braham v. State [Ala.] 38 So. 919. "Did he have an opportunity to kill him? Look to all these things" [the circumstances] held not error. Anderson v. State [Ga.] 50 S. E. 46.

17. Blair v. Territory [Okl.] 82 P. 653.

18. State v. Taylor [W. Va.] 50 S. E. 247.

19. A charge in homicide on self-defense omitting reference to the duty to retreat. Bardin v. State [Ala.] 38 So. 833.

20. Requested elliptical charge properly refused. Peel v. State [Ala.] 39 So. 251.

21. State v. Davis [W. Va.] 51 S. E. 230. An instruction the tendency of which is to confuse the jury and which requires them to find as true many minute and immaterial matters specifically in order to reach a certain verdict is properly refused. Starke v. State [Fla.] 37 So. 850.

22. Homicide. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Where on a prosecution for selling intoxicating liquor to a minor the defense was that the wine was unfermented and not intoxicating held a charge that the courts will take judicial notice that fermented wines are intoxicating held so misleading as to require the grant of a new trial. Hall v. State [Ga.] 50 S. W. 59. There being nothing in the evidence of the statement of the accused which would authorize a finding that the act charged was brought about by his criminal negligence, a charge to the effect that criminal negligence would supply the place of intent is misleading. Wolfe v. State, 121 Ga. 587, 49 S. E. 688. Instruction considered in connection with the evidence held not misleading as not based on the charge laid in the indictment. Jordan v. State [Fla.] 39 So. 155. Abstract and misleading charge properly refused. Nordan v. State [Ala.] 39 So. 406. A misleading instruction is ground for a new trial. Wolfe v. State, 121 Ga. 587, 49 S. E. 688.

23. State v. Armstrong, 37 Wash. 51, 79 P. 490.

24. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

25. Roberts v. State [Ga.] 51 S. E. 374.

26. Junod v. State [Neb.] 102 N. W. 462; Roszczyniala v. State [Wis.] 104 N. W. 113; State v. McCoy [Kan.] 79 P. 156; State v. Manderville, 37 Wash. 365, 79 P. 977; Miera v. Territory [N. M.] 81 P. 586; Napper v. State [Ga.] 51 S. E. 592. Self-defense. Kipley v. People, 215 Ill. 358, 74 N. E. 379; State v. Gray [Or.] 79 P. 53. If instructions as a whole present the law correctly, the fact that excerpts standing alone would be subject to criticism is not ground for reversal. State v. Exum, 138 N. C. 599, 50 S. E. 283. Charge as to burden of proof though somewhat involved, harmless in view of the entire charge. Skrine v. State [Ga.] 51 S. E. 315. Instructions as a whole held to properly limit effect of incidental evidence of another crime. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 935, 89 S. W. 270. An instruction stating a generally correct proposition in general terms but which is erroneous in the case on trial may be cured by other correct instructions so specific in their terms that the jury could not be misled by the general instruction. State v. Lackey [Kan.] 82 P. 527.

27. State v. Sheets [Iowa] 102 N. W. 415; State v. Bjeckstrom [S. D.] 104 N. W. 481; Higbee v. State [Neb.] 104 N. W. 748; People v. Murphy, 146 Cal. 502, 80 P. 709; People v. Davis [Cal. App.] 81 P. 716; People v. Waysman [Cal. App.] 81 P. 1087.

28. State v. Price [Mo. App.] 85 S. W. 922.

29. Colbert v. State [Wis.] 104 N. W. 61. Erroneous instruction on presumption of intent flowing from act held not cured by instruction on necessity of proving intent. State v. Carmean, 126 Iowa, 291, 102 N. W. 97.

30. Higbee v. State [Neb.] 104 N. W. 748. Robbery. State v. Graves, 185 Mo. 713, 84 S. W. 904. Omission of uncontroverted point is immaterial. Prosecutor's ownership of property in robbery. People v. Kelly, 146 Cal. 119, 79 P. 846. Absence of statement that prosecutrix in rape must not be the wife of defendant is cured by another charge stating the correct rule where there is no claim of marriage. People v. Jailles, 146 Cal. 301, 79 P. 965.

Contra: Where the court attempts to set out all the material elements of a crime in

ure to charge some other appropriate instruction.[31] Excerpts from previous decisions may be read when applicable,[32] but their refusal is not error.[33] Bad grammar or spelling in written instructions is immaterial.[34] Instructions as to the form of verdict should give the opportunity to convict or acquit on any count.[35]

Invading province of jury, or charging on facts.[36]—Instructions must not invade the province of the jury,[37] or assume the existence of facts not admitted or undisputed,[38] though admitted or conceded facts may be assumed.[39] In many states

one instruction but omits one and covers it in another instruction, no error is committed. Blair v. Territory [Okl.] 82 P. 653.

31. Nelms v. State [Ga.] 51 S E. 588. A portion of the charge that is substantially correct, wherein a complete proposition is stated is not erroneous because it fails to embrace an instruction which would have been appropriate with that proposition. Rawlins v. State [Ga.] 52 S. E. 1.

32. People v. Breen, 181 N. Y. 493, 74 N. E. 483.

33. Philosophical discussion of expert evidence. Colbert v. State [Wis.] 104 N. W. 61.

34. Ussleton v. State [Tex. Cr. App.] 80 S. W. 21.

35. State v. Price [Mo. App.] 85 S. W. 922.

36. See 4 C. L. 55.

37. Lynch v. People [Colo.] 79 P. 1015. Where but one witness has been attacked by impeaching testimony it is not improper to specifically refer to that witness in charging on the effect of impeaching testimony. Stevens v. People, 215 Ill. 593, 74 N. E. 786. Must not charge on credibility of witnesses. State v. Wisnewski [N. D.] 102 N. W. 883. Weight of evidence. State v. Dunn [Wis.] 102 N. W. 935. Charge on credibility of witnesses held not objectionable. People v. Waysman [Cal. App.] 81 P. 1087. A charge on the absence of motive for murder is properly refused. Ince v. State [Ark.] 88 S. W. 818. If a charge, by failing to instruct on certain points, in effect withdraws from the jury an essential issue of the case, it is erroneous. Failure to instruct on right to defend self and domicile, error in homicide case. Young v. State [Neb.] 104 N. W. 867. A charge which invades the province of the jury with reference to the facts to be determined and the credibility of witnesses is error which is a ground for a new trial. Singleton v. State [Ga.] 52 S. E. 156. On a prosecution for homicide a charge that if defendant's intended victim was in a certain place and defendant could not see him, then defendant did not shoot at his alleged intended victim held properly refused as an invasion of the province of the jury. Gater v. State [Ala.] 37 So. 692. In a prosecution for homicide held not error to refuse to charge "that it is a matter of common knowledge that a man who is so drunk that he can scarcely walk cannot become perfectly sober in two hours, or in two hours and a half, without artificial aid of some description. Id. Held proper to refuse to charge that the photograph introduced in evidence in this case is not the picture of defendant where there was evidence from which the jury might have inferred the contrary. Russell v. State [Ala.] 38 So 291. In a prosecution for burglary held proper to refuse a charge "that if the jury believe the evidence, they must find the defendant not guilty." Id. In homicide a charge on self-defense held not to invade the province of the jury by stating what constituted the bringing on of the difficulty, and, taken in connection with other charges given did not constitute reversible error. Marlow v. State [Fla.] 38 So. 653. In a prosecution for statutory rape, where there was evidence tending to prove an alibi, the court properly refused to instruct that if the respondent had established his absence on the date named by the prosecuting witness on cross-examination as the date of the offense he was entitled to an acquittal. State v. Willett [Vt.] 62 A. 48. The alibi was not a special issue to be separately disposed of upon a consideration of the evidence bearing solely upon the dates. The question for the jury was whether, upon a consideration of the whole evidence, they were satisfied of respondent's guilt beyond a reasonable doubt. Id.

38. State v. Sheets [Iowa] 102 N. W. 415. Setting of fire in arson it being denied that the fire was set. Colbert v. State [Wis.] 104 N. W. 61. Instruction assuming that conviction must rest on circumstantial evidence is properly refused where there is also direct evidence. People v. Clark, 145 Cal. 727, 79 P. 434. In a prosecution for wife murder, an instruction permitting the jury to convict the defendant if they believed that he administered the poison himself or procured it to be done by another was error. Boyd v. State [Miss.] 37 So. 834. It is error to assume a fact prejudicial to the accused, concerning which there was no evidence. Boykin v. State [Miss.] 38 So. 725. Instructions which there is no evidence to sustain are properly refused. State v. Teachey, 138 N. C. 587, 50 S. E. 232. Where in a trial for bigamy the jury were not obliged under the evidence to believe that the first marriage took place in Florida, the court properly refused to instruct them, at the request of the accused, that before they would be authorized to convict them, it must appear that such marriage was in accordance with the law of that state. Murphy v. State [Ga.] 50 S. E. 48. A charge assuming that deceased picked up a brick or stick to defend himself from an assault by defendant is erroneous, where, at the time deceased picked up the weapon, defendant was being securely held by two men, and was unable to make an attack. Cook v. State [Mich.] 38 So. 110. In homicide, a charge that if deceased cursed defendant, and the latter, while under the heat of passion, aroused by the insult, secured a pistol, and killed deceased, he would be guilty of manslaughter, is not objectionable as being on the weight of the evidence and as assuming that defendant was in the heat of passion aroused by having been cursed by deceased. Moore v. State [Miss.] 38 So. 504. Where there is

the court is forbidden to charge on the weight of the evidence,[40] or comment on [41] or intimate its opinion on the facts,[42] but in the Federal courts and under the common law, comments on the evidence are usual.[43] In his charge the judge may define what are the elements going to make up an offense, and instruct the jury that if they find from the evidence that the facts constituting these elements are established, they may find the defendant guilty.[44] But the trial judge may not go from general to the particular, and so charge in reference to the testimony as to intimate whether the facts constituting the elements of the crime have or have not been established.[45] Facts to which a certain rule of law is to be applied may be stated hypothetically where proved beyond a reasonable doubt.[46]

a plea of "not guilty," an instruction that "there is no denial of the unlawful killing, but defendant sets up that he did not do it, that some other person did," is erroneous, as assuming that accused did not deny the unlawful killing. Vickery v. State [Fla.] 38 So. 907.

39. Ragazine v. State [Tex. Cr. App.] 84 S. W. 832; Bates v. State [Wis.] 103 N. W. 251. Court may state that "the state claims there is evidence to prove," etc. Holmes v. State [Wis.] 102 N. W. 321. That local option law was in effect may be assumed. Cantwell v. State [Tex. Cr. App.] 85 S. W. 18; Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 279.

40. Tally v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 699, 88 S. W. 339; Garlas v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 690, 88 S. W. 345. Charge stating purpose of admitting certain evidence is bad. Stull v. State [Tex. Cr. App.] 84 S. W. 1059. Instruction on recent possession of stolen property held bad. Neblett v. State [Tex. Cr. App.] 85 S. W. 17; Carson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1011; Gilford v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 498, 87 S. W. 698. Charge on poisoning held not on weight of evidence. Ellington v. State [Tex. Cr. App.] 87 S. W. 153. Instruction on circumstantial evidence held bad. Beaver v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 151, 86 S. W. 1020. Pen. Code, art. 717. Where the judge specifically mentioned certain, but not all the facts relied upon as justification for homicide, it was error. Craiger v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 736, 88 S. W. 208. An abstract charge that in determining the weight of the testimony of a witness, his intelligence, circumstances surrounding him, interest, likes, prejudices, and manner on the stand, may be considered, is not on the weight of evidence, where the jury are charged that they are the sole judges of the weight and credit to be given witnesses. Jordan v. State [Fla.] 39 So. 155. Charges that "if the jury believe the evidence" they must find defendant not guilty, or could not find him guilty of murder in the second degree, are on the weight of the evidence. Smith v. State [Ala.] 39 So. 329. A charge that a nonexpert's opinion on insanity was to have no weight unless based on facts testified to and unless the jury drew some opinion from such facts, held not erroneous in connection with rest of charge. Shaffer v. U. S., 24 App. D. C. 417.

Singling out witnesses: Proper to refuse requested charge that jury were at liberty to accept testimony of accused in preference to that of any other witness. State v. Thrailkill [S. C.] 50 S. E. 551.

A ruling on evidence is not a "charge" within this rule. Const. 1895, art. 5, § 26, providing that judges shall not charge in respect to matters of fact is not violated where a judge refers to evidence already adduced in ruling on the admission or exclusion of evidence. State v. Thrailkill [S. C.] 50 S. E. 551.

41. Charge that there is no evidence to justify verdict of included offense is not bad. State v. McPhail [Wash.] 81 P. 683. In homicide held no error in refusing to charge that the defendant had introduced evidence of his insanity at the time the alleged offense was committed, and that, if the jury believed from a preponderance of the evidence that at the time of the alleged offense the accused was insane they should acquit him. Roberts v. State [Ga.] 51 S. E. 374.

42. Charge that evidence of motive is of a weak and inconclusive character is an expression of opinion. Carwile v. State [Ala.] 39 So. 220. Instruction that warrant in bastardy proceedings and the entries thereon were in substantial compliance with the statute in such cases provided, held not an opinion. McCalman v. State, 121 Ga. 491, 49 S. E. 608. Charge, "the state contends," etc., held to amount to an intimation or expression as to what had been proved, and error. Nelson v. State [Ga.] 52 S. E. 20. A charge amounting to an expression or intimation as to what has or has not been proved is ground for a new trial. Id.

43. Largely discretionary in Pennsylvania (Commonwealth v. Wertheimer, 23 Pa. Super. Ct. 192), and New Jersey (State v. Valentina [N. J. Err. & App.] 60 A. 177). Larceny, defense of purchase of person believed to be owner. Commonwealth v. Cramer, 25 Pa. Super. Ct. 141.

44. Blumenthal v. State, 121 Ga. 477, 49 S. E. 597.

45. Civ. Code 1895, § 4334. Blumenthal v. State, 121 Ga. 477, 49 S. E. 597. Instruction: "In this case the articles pawned were pants, and the parties pawning them were negro girls. You can consider whether negro girls wear pants," held erroneous. Id.

46. Kyle v. People, 215 Ill. 250, 74 N. E. 146. In assault with intent to murder, a charge "Did defendant commit an assault upon [prosecuting witness] with a knife?" and answering it "There is evidence that he did," being the statement to the jury of an undisputed fact, and used as an hypothesis for a discussion of the case is not erroneous.

Submitting questions of law is error.[47]—Charge that if the evidence be equally balanced in the minds of the jury, they should lean to the side of mercy and acquit, is properly refused, as suggesting a duty which the jury do not have.[48]

Form and propriety of particular charges.[49]—Holdings as to the form and sufficiency of instructions as to burden and degree of proof,[50] presumption of innocence,[51] presumption of intent of natural and necessary consequences of act,[52] presumption arising from flight,[53] definitions and descriptions of the crime,[54] degree of crime, included offenses,[55] intent, and malice,[56] responsibility of principals and

Brown v. State [Ala.] 38 So. 268. Where the evidence tends to prove facts from which presumptions of guilt arise under established rules of evidence the court may bring such rules to the attention of the jury by instructions. State v. Taylor [W. Va.] 50 S. E. 247. Such instructions if properly framed, neither assume the existence of the facts from which the presumptions arise nor interfere with the province of jury as to the weight of evidence. Id.

47. A charge that, if it would only have been manslaughter in the first degree had the prosecuting witness died, the jury cannot find the defendant guilty of an assault with intent to murder, is erroneous in that it refers a question of law to the jury. Brown v. State [Ala.] 38 So. 268.

48. Russell v. State [Ala.] 38 So. 291.

49. See 4 C. L. 56.

50. State v. Dunn [Wis.] 102 N. W. 935; People v. Murphy, 146 Cal. 502, 80 P. 709; People v. Waysman [Cal. App.] 80 P. 1087; Tetterton v. Commonwealth [Ky.] 89 S. W. 8; Cox v. State [Tex. Cr. App.] 86 S. W. 1017. Objection to instruction that it was not necessary to prove guilt by the testimony of "the" witnesses, on the ground that it was an implication that eyewitnesses saw defendant commit the homicide, was hypercritical. State v. Heusack [Mo.] 88 S. W. 21.

51. Everett v. People [Ill.] 75 N. E. 188; People v. Jailles, 146 Cal. 301, 79 P. 965. Benefit of doubt as to motive and provocation of homicide held sufficiently charged. Ray v. State [Tex. Cr. App.] 85 S. W. 1151. Proper to refuse to charge that "it is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person. Mixon v. State [Ga.] 51 S. E. 580. A requested instruction that it is "better that 99 (that is an infinite number of) guilty persons should escape punishment than that one innocent person should be punished; and therefore it is far better that the jury should err in acquittal than err in convicting," held properly refused. McCue v. Commonwealth [Va.] 49 S. E. 623. If the judge charges the jury in substance that the law presumes defendant to be innocent, and the burden is upon the state to show his guilt, and that upon all of the testimony they must be fully satisfied of his guilt, he has done all that the law requires, the manner in which this shall be done being left to his sound discretion, to be exercised in view of the facts and circumstances of the particular case. State v. Adams, 138 N. C. 688, 50 S. E. 765.

52. People v. McRoberts [Cal. App.] 81 P. 734. Presumption affected by plea and evidence of intoxication. State v. O'Malley [N. D.] 103 N. W. 421.

53. State v. Matheson [Iowa] 103 N. W. 137; State v. Richards, 126 Iowa, 497, 102 N. W. 439.

54. An instruction defining manslaughter as applied to the facts of the case is sufficient without giving an abstract definition. State v. Exum, 138 N. C. 599, 50 S. E. 283. Where the indictment charged the murder of Chap Ford and the court instructed to convict if the evidence convinced the jury beyond a reasonable doubt that defendant was guilty, if deceased was sometimes called Chap Ford and sometimes called Chappel White, the charge is not erroneous because the indictment does not give the name of deceased as being Chap Ford alias Chappel White; there being evidence upon which to predicate the charge. Thomas v. State [Fla.] 38 So. 516. In defining a word the court need not use all the synonyms thereof. In a prosecution for the illegal sale of intoxicants a charge defining the word "administer" to mean "to give, supply or dispense," is not erroneous for failing to add the word "furnish." State v. Wilson [Kan.] 80 P. 565. Where in seduction the judge charged "that if defendant by promises of marriage or persuasion," etc., and his attention being called thereto he stated that if he said "or" instead of "and" it was a slip of the tongue and that the jury must find, under the charge in the indictment, that the female yielded because of promises of marriage and persuasion, held error was cured. Pike v. State, 121 Ga. 604, 49 S. E. 680.

55. Where no testimony was produced upon a trial at which the defendant was convicted of murder in the second degree from which the jury could with any reason have rendered a verdict for manslaughter, no reversible error is committed by giving an instruction confining the jury to a consideration of defendant's guilt with respect to the crime of murder. Starke v. State [Fla.] 37 So. 850. In a case where the evidence relied on by the state tends to show that the accused committed murder, whereas the statement of the accused and the evidence introduced in his behalf sustain his defense of justifiable homicide, it is error for the court to give in its charge the law relating to voluntary manslaughter, and a verdict finding the accused guilty of that offense cannot be upheld. McBeth v. State [Ga.] 50 S. E. 931.

56. People v. McRoberts [Cal. App.] 81 P. 734; People v. Waysman [Cal. App.] 81 P. 1087. It is improper to instruct "the law is that a man shall be taken to intend that which he does or which is the necessary consequence of his acts." Such intention is presumed but not imputed absolutely. State v. Taylor [W. Va.] 50 S. E. 247. Charge that

accessories,[57] definitions of reasonable doubt,[58] where any are necessary,[59] the issues

the state need not prove that the defendant knew that the goods were stolen held not misleading, the context and succeeding sentence showing that the court meant only that positive and direct evidence of such knowledge need not be adduced, but it might be inferred from circumstances. Blumenthal v. State, 121 Ga. 477, 49 S. E. 597. Omission of "feloniously" is not fatal. State v. Miller [Mo.] 89 S. W. 377.

57. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025; Armstead v. State [Tex. Cr. App.] 87 S. W. 824. A charge that there is no evidence of a conspiracy between defendant and his co-indictee is properly refused as calculated to confuse, there being evidence waranting the conclusion that they were confederates in the commission of the crime. Russell v. State [Ala.] 38 So. 291. Where there was evidence of a conspiracy to commit the crime, an instruction for acquittal unless accused fired one or more of the fatal shots, is properly refused. Bardin v. State [Ala.] 38 So. 833. Where there is evidence of a conspiracy, an instruction that it must be proved that defendant "and no one else" committed the crime is erroneous. People v. Roberts [Cal. App.] 82 P. 624.

58. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866; Keeler v. State [Neb.] 103 N. W. 64; Junod v. State [Neb.] 102 N. W. 462; People v. Murphy, 146 Cal. 502, 80 P. 709; Darden v. State [Ark.] 84 S. W. 507; Tetterton v. Commonwealth [Ky.] 89 S. W. 8; State v. Johnson [N. D.] 103 N. W. 565. Charge, "If you have a simple doubt, you are not to acquit, but it must become a reasonable doubt; that is, conformable to reason, which would satisfy a reasonable man, under all the facts and circumstances as testified to in this case," held misleading, confusing, and erroneous. Hampton v. State [Fla.] 39 So. 421. Requested charge that a reasonable doubt is "such a doubt as a juror would hesitate to act on in the most important business affairs of his own," held properly refused. Nelms v. State [Ga.] 51 S. E. 588. A requested charge that "a reasonable doubt is a doubt for which a reason can be given" is properly refused. Smith v. State [Ala.] 39 So. 329. Charge that if the jury have a fixed conviction of the truth of the charge, and are satisfied beyond a reasonable doubt, they must convict, that the doubt which will justify an acquittal must be actual and substantial and not a mere possible doubt; and that if the jury believe beyond a reasonable doubt that defendant is guilty they must convict, although they also believe it possible that he is not guilty—are correct. Brown v. State [Ala.] 38 So. 268. Defendant is not entitled to a charge that he should be acquitted "if a single mind of a single juror is not abidingly convinced" of his guilt. Russell v. State [Ala.] 38 So. 291. In homicide, a charge to convict if, after considering all the evidence, the jury "conscientiously" believe, beyond a reasonable doubt, that defendant is guilty, does not in its use of the word "conscientiously," prejudicially qualify the doctrine of reasonable doubt. Moore v. State [Miss.] 38 So. 504. A reasonable doubt entitling an accused to an acquittal is not a mere fanciful, vague, or speculative doubt, but a reasonable, substantial doubt, remaining in the minds of the jury after a careful consideration of all the evidence, and such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the circumstances of the case. State v. Bell [Del.] 62 A 147. It is not objectionable as requiring the jury to be able to state the reason or as requiring a reason based on the evidence to tell them that the doubt must be based on a reason arising from the evidence or want of evidence. Turley v. State [Neb.] 104 N. W. 934. A charge requiring an acquittal upon a failure of any one of the jurors to be convinced of the defendant's guilt beyond a reasonable doubt, is erroneous. Yeats v. State [Ala.] 38 So. 760. In a prosecution for homicide, an instruction that a reasonable doubt arising out of any part of the evidence will justify an acquittal, is misleading. Doubt must be predicated on all the evidence. Bardin v. State [Ala.] 38 So. 833. In a prosecution for homicide, it is error for the court to refuse to charge that there should be an acquittal if from the evidence there was a probability of innocence. Id. A charge that "before the jury can convict they must be satisfied to a moral certainty, not only that the proof is consistent with defendant's guilt but that it is wholly inconsistent with every other rational conclusion; and unless they are so convinced of defendant's guilt that they would be willing to act upon that decision in matters of the highest concern in their own affairs, they must find defendant not guilty," properly refused. Toliver v. State [Ala.] 38 So. 801. Charge erroneous for making "probability of innocence" equivalent to "reasonable doubt." Nordan v. State [Ala.] 39 So. 406. It is error to say "a probability * * * of innocence exists only when testimony showing" it is stronger than that showing guilt. Id. To "satisfaction beyond reasonable doubt" is good. "Reasonable" need not precede satisfaction. State v. Miller [Mo.] 89 S. W. 377. A reasonable doubt is not a mere fanciful, vague, or speculative doubt, but a reasonable, substantial doubt remaining after a consideration of all the evidence, and such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the facts and circumstances of the case. State v. Powell [Del.] 61 A. 966; State v. Brown [Del.] 61 A. 1077. A requested instruction that "by reasonable doubt is meant such doubt as would cause a man of average prudence to hesitate about a matter of his own of like importance to himself as the case on trial is to accused," held properly refused. McCue v. Commonwealth [Va.] 49 S. E. 623.

59. The term "reasonable doubt" need not be defined; it is self-explanatory and definitions usually tend only to confuse the jury. Nelms v. State [Ga.] 51 S. E. 588. Refusal to define "reasonable doubt" held not error where the definition, if given, would not have aided the jury. State v. Costa [Vt.] 62 A. 38.

of insanity,[60] intoxication,[61] self-defense,[62] alibi,[63] the purpose and effect of particular evidence,[64] rules for considering evidence in general,[65] and of particular kinds of evidence such as circumstantial evidence,[66] expert and opinion evidence,[67] evidence of character of defendant,[68] testimony of defendant,[69] admissions, confes-

60. Steward v. State [Wis.] 102 N. W. 1079; People v. Griffith, 146 Cal. 339, 80 P. 68; Mathley v. Commonwealth [Ky.] 86 S. W. 988. An instruction that the fact that a party is able to and did intelligently perform the duties required of him by his vocation or the business in which he was employed, is not incompatible with an unsound condition of the mind is erroneous. Starke v. State [Fla.] 37 So. 850. "Insanity is a mental disease. It does not mean eccentricity or peculiar action of the brain; it means a departure caused by disease of the brain. Mere temporary mania does not constitute insanity." Approved. Braham v. State [Ala.] 38 So. 919.

61. Commonwealth v. McDonald [Mass.] 73 N. E. 852; People v. Griffith, 146 Cal. 339, 80 P. 68. In a prosecution for homicide it is not error to refuse to charge that if the jury have a reasonable doubt as to whether, at the time of the killing, the defendant was so drunk that he could not form a willful, premeditated, deliberate and malicious design to take life, threats previously made by the defendant cannot be considered. Gater v. State [Ala] 37 So. 692.

62. It is not objectionable as requiring of defendant some proof of self-defense to charge that when competent evidence of self-defense "is introduced" the state must disprove it beyond a reasonable doubt. Turley v. State [Neb.] 104 N. W. 934.

63. Roszczyniala v. State [Wis.] 104 N. W. 113. Alibi, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission. Williams v. State [Ga.] 51 S. E. 322.

64. Corroborative evidence in rape. Woodruff v. State [Neb.] 101 N. W. 1114.

65. Requested charge that "if the jury cannot reconcile the evidence, and there is one theory of guilt, and the other is the innocence of defendant, and both are reasonable, then the jury cannot convict" held properly refused. Sanford v. State [Ala.] 39 So. 370. Instruction that positive testimony is entitled to greater weight than negative held authorized by evidence, and held not misleading. State v. Murray [N. C.] 51 S. E. 775. Charge that "there is no contradiction" where one "heard" and another "did not hear part" of conversation is misleading for omission of word "necessary" before "contradiction." Nordan v. State [Ala.] 39 So. 406.

66. Dimmick v. U. S. [C. C. A.] 135 F. 257; Everett v. People [Ill.] 75 N. E. 188; State v. Thompson [Iowa] 103 N. W. 377; People v. Olsen [Cal. App.] 81 P. 676; Colbert v. State [Wis.] 104 N. W. 61; Stockbridge v. Territory [Okl.] 79 P. 753. After charging that in order to convict upon circumstantial evidence the proof must exclude every reasonable hypothesis except that of guilt, there was no error in refusing to give a request that this rule should never be relaxed in a case involving life or imprisonment for life. Williams v. State [Ga.] 51 S. E. 322. A charge that "defendant cannot be convicted unless the evidence is inconsistent with any reasonable theory of innocence" is proper. Sanford v. State [Ala.] 39 So. 370. Charge that no matter how strong the circumstances, if they can be reconciled with the theory that another than defendant committed the crime, he should be acquitted is properly refused. Russell v. State [Ala.] 38 So. 291. The law of circumstantial evidence is not, without qualification, applicable in a case where the state proves a positive confession of guilt. Griner v. State, 121 Ga. 614, 49 S. E. 700. Held not error to fail "to charge the jury on the law of circumstantial evidence," or that, "to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. Id. An instruction that where the evidence is entirely circumstantial yet is not only consistent with the guilt of the accused but inconsistent with any other rational conclusion, it is the duty of the jury to convict though such evidence may not be as satisfactory to their minds as direct evidence, is erroneous. People v. Taggart [Cal. App.] 82 P. 396.

67. There was no error in refusing to charge that the jury were to consider the evidence of expert witnesses as they did that which fell from the lips of other witnesses and that the law permitted them to believe it in preference to other evidence, if there was conflict between the two; the request to charge leaving out of view any consideration of the credibility of the witnesses themselves, or their opportunity for knowing the facts to which they testified, or the nature of such facts. Williams v. State [Ga.] 51 S. E. 322.

68. People v. Jackson [N. Y.] 74 N. E. 565; Schutz v. State [Wis.] 104 N. W. 90; State v. Dunn [Wis.] 102 N. W. 935; Ellington v. State [Tex. Cr. App.] 87 S. W. 153; Phelan v. State [Tenn.] 88 S. W. 1040. Presumption of character. People v. Lee [Cal. App.] 81 P. 969. Instruction on general character of accused held substantially correct and not such as to mislead the jury into believing that proof of good character would generate a mere doubt of guilt which would not authorize acquittal. Nelms v. State [Ga.] 51 S. E. 588.

69. A charge that defendant is a competent witness on his own behalf, but the jury may weigh his testimony in the light of the interest he has in the result together with all the evidence in the case, is proper. Brown v. State [Ala.] 38 So. 268. Charge that accused was competent "but" [instead of "and"] the fact that he was testifying for himself might be considered is good. State v. Miller [Mo.] 89 S. W. 377. Instruction that in considering the testimony of the defendant, the jury may consider his manner

sions, and declarations,[70] and as to the credibility of witnesses,[71] as to the conduct of the jury's deliberations,[72] and unanimity,[73] as to their duty in arriving at a decision,[74] are collected in the notes.

(§ 10) *F. Custody of jury, conduct and deliberations.*[75]—While the court may in its discretion permit the jury to separate during the trial, if it decides to keep them together, the statute relating thereto must be complied with, and it is error to put them in charge of one not a proper officer.[76] Those sworn as jurors in a capital case should not be allowed to associate with members of the panel not yet sworn.[77] The jury should not be allowed to separate while deliberating on their verdict, under circumstances such that any harm could possibly come to defendant from the separation,[78] but in the absence of a showing of prejudice, temporary or slight separation will not reverse.[79] Allowing the jury to exercise on the street in charge of the sheriff is not fatal,[80] and casually taking the jury over the ground where the murder occurred is not reversible where no prejudice appears.[81] Communication with jurors during trial is improper,[82] and after retirement, fatal. Evi-

and probability of his statements and "if convincing and carrying with it a belief in its truth, act upon it; if not they may reject it" is proper. People v. Hill [Cal. App.] 82 P. 398.

70. Fox v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 103, 87 S. W. 157; State v. Stibbens [Mo.] 87 S. W. 460; McKinney v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 638, 88 S. W. 1012; Colbert v. State [Wis.] 104 N. W. 61; Roszczyniala v. State [Wis.] 104 N. W. 113. Where the court had charged that confessions of guilt should be received with great caution and that a confession alone, uncorroborated by other evidence, will not justify a conviction it is not error to refuse to instruct the jury that "evidence of confession is the weakest and least to be relied on of any evidence known to be competent to the law. Griner v. State, 121 Ga. 614, 49 S. E. 700. Charge on dying declarations is improper when what was received was not such but res gestae. Nordan v. State [Ala.] 39 So. 406. An instruction that evidence of admissions or statements made by accused should be received with caution if erroneous, held not prejudicial. People v. Hill [Cal. App.] 82 P. 398.

71. Schutz v. State [Wis.] 104 N. W. 90; People v. Jailles, 146 Cal. 301, 79 P. 965. Rule, falsus in uno, falsus in omnibus. Beck v. People, 115 Ill. App. 19; State v. Johnson [N. D.] 103 N. W. 565; Colbert v. State [Wis.] 104 N. W. 61; People v. Kelley, 146 Cal. 119, 79 P. 846. Purpose of impeaching evidence. Elkins v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 298, 87 S. W. 149. The charge should not refer to the credibility of defendant as a witness in such a manner as to convey the impression to the jury that the judge himself questioned the witness' credibility. Hampton v. State [Fla.] 39 So. 421. A charge that if any witnesses have made contradictory statements as to material facts, it may, in the discretion of the jury, create a reasonable doubt of the truth of the evidence of such witness, is properly overruled. Brown v. State [Ala.] 38 So. 268; overruling Gregg v. State, 106 Ala. 44, 17 So. 321 and Williams v. State, 114 Ala. 19, 21 So. 993. Requested charge that "if the jury do not believe the evidence they must find the defendant not guilty," held properly refused. Sanford v. State [Ala.] 39 So. 370. A charge that the jury are the sole judges of the credibility of witnesses and the weight that should be given their testimony is proper. Brown v. State [Ala.] 38 So. 268. Instruction that the entire testimony of any witness who has willfully testified falsely may be disregarded is erroneous. The false testimony must have been as to a material fact. Boykin v. State [Miss.] 38 So. 725. Charge to consider "feelings" and "relation" of witness to accused is proper on credibility as covering either animosity or good will. State v. Miller [Mo.] 89 S. W. 377.

72. It is proper to tell them they shall reason together to the end a lawful verdict may he reached each, however, holding his own opinion till convinced. People v. Richards [Cal. App.] 82 P. 691.

73. It is proper to refuse to charge for acquittal unless each of the jury was convinced by the evidence of the guilt of the accused. Bardin v. State [Ala.] 38 So. 833.

74. Charge that jury should take the law from the court and not from counsel held correct. Anderson v. State [Ga.] 50 S. E. 51. A statement by the court that the case "must be decided by a jury" was not a threat that he would detain them until they agreed and does not amount to coercion. Patterson v. State [Ga.] 50 S. E. 489.

75. See 4 C. L. 59.

76. Sutherland v. State [Ark.] 89 S. W. 462.

77. State v. Craighead [La.] 38 So. 28.

78. Separation after submission held fatal. State v. West [Idaho] 81 P. 107. Momentary separation of juror from his fellows, under circumstances showing no improper communication to him, held harmless in homicide case. Van Dalsen v. Commonwealth [Ky.] 89 S. W. 255.

79. Frame v. State [Ark.] 84 S. W. 711; Hooker v. State [Ark.] 86 S. W. 846; Ince v. State [Ark.] 88 S. W. 818; State v. Sly [Idaho] 80 P. 1125. Separation held waived. State v. Shuck [Wash.] 80 P. 444.

80. Young v. State, 6 Ohio C. C. (N. S.) 53, 26 Ohio C. C. 747.

81. Vasser v. State [Ark.] 87 S. W. 635.

82. Conversation between officer and juror held not fatal. State v. Smokalem, 37 Wash. 91, 79 P. 603. Letter given to juror

dence may be received only in court.[83] A copy of the charge may be sent out with the jury,[84] and in case of disagreement, the stenographer may be directed to read his notes of the evidence [85] or depositions; if they contain no excluded matter, they may be given to the jury to read.[86]

The jury should not discuss matters outside the evidence in the case,[87] or consult law books,[88] and discussion of defendant's failure to testify is fatal.[89] Misconduct of the members of the jury and of the officers who have them in charge may be ground for new trial.[90] Trivial misconduct after verdict was agreed on, though before it was reduced to writing, is no ground for new trial.[91] Entertainment or hospitality extended to jurors may be but in the absence of statute is not necessarily error.[92] It depends on the circumstances.[93]

Any conduct of the judge amounting to coercion of a verdict is fatal.[94] It is error when the jury report inability to agree for the court to inquire how they are divided, though the question does not involve an inquiry as to the side of which the majority incline.[95]

In all cases, capital included, the court may in its discretion discharge the

during trial held not fatal. State v. Rooke [Idaho] 79 P. 82. Allowing newspapers containing prejudicial matter to get to jury held fatal. People v. Chin Non, 146 Cal. 561, 80 P. 681; State v. Sly [Idaho] 80 P. 1125. For officer to describe to jurors how a verdict by lot was reached in another case is not reversible. Watson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 568, 87 S. W. 1158.

83. Conduct of juror in casually inspecting diagrams during recess held not fatal. People v. Antony, 146 Cal. 124, 79 P. 858. Conduct of prosecuting attorney during noon recess held prejudicial. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711.

84. When so requested. State v. Bundy [Kan.] 81 P. 459. Where charge in murder case is reduced to writing at defendant's request, it is not error to allow the jury to take out the written charge. Green v. State [Ala.] 39 So. 362.

85. If after retiring the jury disagree as to the testimony of certain witnesses, it is not error for the court, at the request of the jury, and in the presence of the accused and his counsel, to require the official stenographer to read the testimony in dispute and which was taken down by him while the witnesses were on the stand. Green v. State [Ga.] 50 S. E. 53.

86. Under Code 1896, §§ 1834, 5292, it was proper for the court to refuse to allow depositions, portions of which had been read to the jury, the remaining portions having been excluded upon objection, to be taken out by the jury. Smith v. State [Ala.] 39 So. 329.

87. Hambright v. State [Tex. Cr. App.] 84 S. W. 597. Other offenses. Robbins v. State [Tex. Cr. App.] 83 S. W. 690. Discussion after arriving at verdict held not fatal. Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Where something was said in the jury room about how the jury stood on a former trial, but it did not appear that any one stated whether a majority stood for conviction or acquittal, it was not ground for reversal. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

88. That the jury during their deliberations obtain and consult law books bearing on the case is not ground for disturbing the verdict unless prejudice is shown. Brister v. State [Miss.] 38 So. 678.

89. Held not fatal. Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Mere inquiry "why defendant did not testify" is not fatal. Parrish v. State [Tex. Cr. App.] 88 S. W. 231.

90. Where they engage in music and dancing, separate and make experiments on the testimony introduced. Smith v. State [Ga.] 50 S. E. 62. Facts of presence of bailiffs in the jury room, separation of one juror from his fellows for a few moments while under the observation of the trial judge and that jury were allowed to sleep in the court room at night held not prejudicial. Dickey v. State [Miss.] 38 So. 776. That a bailiff who was disqualified accompanied the jury to dinner is not ground for reversal where it does not appear that defendant was ignorant thereof and it does appear that the jury were in charge of a deputy sheriff and that the bailiff served only in his presence. Patterson v. State [Ga.] 50 S. E. 489.

91. Sheffield v. State [Tex. Cr. App.] 89 S.

92. U. S. 1232, making the treating of a W. 274.
juror by the person in whose favor a verdict is rendered ground for new trial, does not apply to criminal cases. State v. Costa [Vt.] 62 A. 38.

93. Where the jury told the sheriff they should want supper, and then returned a verdict before supper but ate the supper prepared at the expense of the state, there was no corruption or impropriety. State v. Costa [Vt.] 62 A. 38.

94. Bishop v. State [Ark.] 84 S. W. 707. Not error to ask what prospect there is of an agreement, it not appearing that the jury was urged to agree. Straub v. State, 5 Ohio C. C. (N. S.) 529; State v. Finch [Kan.] 81 P. 494. Keeping out 24 hours part of which was Thanksgiving day is not duress. Young v. State, 60 Ohio C. C. (N. S.) 53, 26 Ohio C. C. 747. Question of defendant's insanity at time of trial. Ince v. State [Ark.] 88 S. W. 818.

95. Burton v. U. S., 196 U. S. 283, 49 Law. Ed. 482.

jury and order a mistrial when necessary to attain the ends of justice;[96] but in capital cases the trial judge must find the facts fully and place them upon record, so that upon a plea of former jeopardy the action of the court may be reviewed.[97] An objection to continuing the trial with part of the same jurors after one has been excused because of sickness is one that may be waived by defendant.[98] When one juror is excused because of sickness after part of the evidence is in, a request to excuse the others is addressed to the discretion of the court.[99]

A verdict of the jury cannot be impeached by testimony of a juror.[1]

(§ 10) *G. Verdict.*[2]—Verdicts should be certain and import a definite meaning, free from ambiguity; if the meaning in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient.[3] Bad spelling or ungrammatical construction will not vitiate a verdict.[4] A general verdict of "guilty as charged" is sufficient as a rule,[5] and will be referred to such counts as were good;[6] but when an indictment contains two counts, one good and the other fatally defective, and a demurrer to the bad count was improperly overruled, a verdict of guilty cannot be sustained.[7] Where the jury attempt to set a description of the offense and it is not responsive to the indictment, it is bad,[8] and in murder the jury must find the degree.[9] Where the degree of crime depends on value, the value must be stated.[10] It is a matter of no importance who prepares the form of the verdict,[11] and irregularity in the form prepared in the jury room, it being moulded into proper form and recorded before the jury are discharged, is immaterial.[12] A verdict may properly find defendants guilty upon certain counts, not guilty upon others, and report

96. State v. Tyson, 138 N. C. 627, 50 S. E. 456. Where during trial one of the jurors became grossly intoxicated so that all efforts to render him fit for duty were unavailing, the court was justified in discharging the jury and ordering a new trial. Id.

97. State v. Tyson, 138 N. C. 627, 50 S. C. 456.

98, 99. Turner v. Territory [Okl.] 82 P. 650.

1. Brister v. State [Miss.] 38 So. 678.

2. See 4 C. L. 60.

3. Signature by foreman held sufficient. Keeler v. State [Neb.] 103 N. W. 64. Referring to count by wrong number. State v. Harlan [Kan.] 81 P. 480. A joint verdict against two assessing a fine is uncertain. Hines v. State [Tex. Cr. App.] 85 S. W. 1057. Verdict for larceny from person held good. State v. McGee [Mo.] 87 S. W. 452. "We find" instead of "we, the jury, find" is sufficient, and if the latter phrase be used, it is immaterial that "jury" is misspelled. Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270. "Assess the punishment at $40" omitting "fine of" is not fatally defective. State v. Jones [Mo. App.] 89 S. W. 360. A verdict "guilty, but innocently" is insensible and not the equivalent of a verdict of not guilty. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

4. Denham v. Commonwealth [Ky.] 84 S. W. 538; Ellington v. State [Tex. Cr. App.] 88 S. W. 361. Leaving out "the jury" from "we [ ] find defendant guilty." Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270. "Punish" for "punishment." Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212. The fact that the verdict, which intended to designate the place of confinement as the "penitentiary," spelled the word "peniteniary," and such word was copied in the judgment as "peniteniary," does not vitiate the verdict. Garcia v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 937, 89 S. W. 647.

5. Aladin v. State [Tex. Cr. App.] 86 S. W. 327. A general verdict is not rendered indefinite by surplusage in the indictment as where rape and assault are charged in a single count. James v. State [Wis.] 102 N. W. 320. "Guilty as charged," supplies lack of certain of statutory words elemental in crime. Lottery, "as a business" omitted. State v. Miller [Mo.] 89 S. W. 377.

6. Where count charging forgery was sufficient and count charging uttering of forged note was insufficient, and there was evidence to support the former, a verdict and judgment was referred thereto rather than to the insufficient count. Shelton v. State [Ala.] 39 So. 377.

7. Sutton v. State [Ga.] 50 S. E. 60.

8. A verdict of guilty of "intent to rape" will not support a judgment of guilty of assault with intent to rape. Donovan v. People, 215 Ill. 520, 74 N. E. 772. Verdict for aiding and assisting in maintaining a policy held bad. State v. Cronin [Mo.] 88 S. W. 604; State v. Miller [Mo.] 88 S. W. 607. "Guilty of embezzlement by bailee" instead of "as bailee" is defective. State v. Jones [Mo. App.] 89 S. W. 366.

9. Lyles v. State [Tex. Cr. App.] 86 S. W. 763; Reyes v. State [Fla.] 38 So. 257.

10. False pretenses. People v. Small [Cal. App.] 82 P. 87. Where the indictment states the value a general verdict is good. Receiving stolen goods. State v. Fink, 186 Mo. 50, 84 S. W. 921.

11. Prepared by clerk. State v. Klein [Wash.] 80 P. 770.

12. Denham v. Commonwealth [Ky.] 84 S. W. 538; Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490.

a disagreement upon others.[13] A verdict in a conspiracy case is not illogical or unjust because some of the defendants are let off with fines while others are given penitentiary sentences.[14] That the verdict was received by the judge in the absence of the clerk will not reverse, no prejudice being shown.[15] In North Dakota, where the jury return a proper verdict except that they fix punishment at an unauthorized term, the judge is required to receive the verdict and enter judgment for the highest or lowest penalty authorized by law.[16] Where the evidence excludes any other verdict than guilty, or not guilty, it is not error to refuse to submit forms of verdict for included offenses.[17]

Compromise verdicts are valid but not those reached by chance or lot.[18]

Amendment of verdict.—A court may at any time while the jury are before it or under its control require an amendment of a verdict in form so as to meet the requirements of the law.[19] When the jury returns a verdict of "guilty but innocently," the court may direct them to retire and return a verdict of guilty or not guilty.[20] On return of the jury with a general verdict, it is not error to send them out again at the request of counsel for the state with instructions to find as to defendant's plea of former acquittal.[21]

Receiving verdict.[22]—A verdict returned into open court is not complete until accepted by the court for record.[23] It is lawful to receive a verdict in a criminal case on Sunday.[24] That the court receives the verdict in ignorance of the absence of one of the jurors is not ground for declaring a mistrial when the verdict was reread and properly received after the juror took his seat.[25] A request that the jury be polled when they first report that they cannot agree is premature;[26] it should be made when the verdict is returned.[27]

§ 11. *New trial, arrest of judgment and writ of error coram nobis.*[28]—The harmful effect of error is elsewhere treated.[29]

The grounds.[30]—New trials should be granted only when the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had.[31] A new trial may be granted upon discovery that a juror was preju-

13. Dolan v. U. S. [C. C. A.] 133 F. 440.
14. O'Donnell v. People, 110 Ill. App. 250.
15. State v. Patterson [S. D.] 100 N. W. 162.
16. Rev. Codes 1899, § 8246. State v. Barry [N. D.] 103 N. W. 637.
17. State v. Clough [Kan.] 79 P. 117.
18. People v. Richards [Cal. App.] 82 P. 691. Cannot be impeached by juror's testimony that it was compromise between those jurors who favored higher degree and those who favored acquittal. Id.
19. State v. Godwin, 138 N. C. 582, 50 S. E. 277. Where jury returned a verdict of guilty of murder, held no error in judge asking them if they found defendant guilty of murder in the first degree and, upon receiving an affirmative answer, directing such a verdict to be drawn by the clerk and signed by the foreman, the jury being then polled. Reyes v. State [Fla.] 38 So. 257.
20. State v. Godwin, 138 N. C. 582, 50 S. E. 277.
21. Stone v. State [Tex. Cr. App.] 85 S. W. 808.
22. Presence of accused, see ante, § 10A.
23. State v. Godwin, 138 N. C. 582, 50 S. E. 277.
24. Rawlins v. State [Ga.] 52 S. E. 1. Where the verdict was brought in and read on Sunday in the presence of the associate judge, the sheriff, the jury, and defendant, and the jury was discharged, and judgment was regularly pronounced by the court the next day—Monday—the procedure was legal, since defendant had the same opportunity to poll the jury as he would have had on a juridical day. Sanford v. State [Ala.] 39 So. 370.
25. Patterson v. State [Ga.] 50 S. E. 489.
26, 27. Cable v. State [Miss.] 38 So. 98.
28. See 4 C. L. 61.
29. See post, § 15.
30. See 4 C. L. 61.
31. Violation of technical rules of procedure and evidence is not necessarily ground for new trial. State v. Crawford [Minn.] 104 N. W. 822. Where questions asked by a juryman were improper in form, but no objection was taken, and the same matter had already been brought out without objection, and the evidence clearly showed guilt of the accused, it was not error to refuse a new trial. Id. Where "N. J. White" appeared as the name of a grand juror on the indictment, and "Neal J. White" appeared on the panel furnished the prisoner and no inquiry was made as to the identity of such jurors, the fact that they were the same is not ground for new trial. Massey v. State [Ga.] 52 S. E. 78.

diced or disqualified,[32] for surprise,[33] for misconduct of counsel for the state,[34] or the jury,[35] for insufficiency of the evidence,[36] and for errors occurring at the trial.[37] That a sentence is excessive is not proper matter for a motion for a new trial,[38] nor is the fact that accused was improperly brought into court under an order of the judge.[39] That defendant's counsel was drunk is no ground where a recess was taken for that reason and defendant advised to procure other counsel.[40]

Newly discovered evidence [41] is one of the well recognized grounds,[42] but applications on this ground are regarded with disfavor,[43] and the applicant must satisfy the court that the proposed evidence is competent and material,[44] credible,[45] not merely cumulative,[46] impeaching or contradictory,[47] such as to probably affect

32. Ineligibility of a juror because of previous service in the same court during the same year is not cause for a new trial, even though the fact of his ineligibility was not known until after verdict and sentence. Hill v. State [Ga.] 50 S. E. 57.

33. Failure of defendant's counsel to attend. Jackson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 710, 88 S. W. 239. Not because of surprise at the introduction of testimony given at preliminary examination on the witness being absent. Petty v. State [Ark.] 89 S. W. 465.

34. Where solicitor general, after asking witness if he had not made a certain statement and the witness replied he had not, said to the witness in the hearing of the jury "I say that you did" is not cause for a new trial. Roberts v. State [Ga.] 51 S. E. 374.

35. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866. Giving letter to juror. State v. Rooke [Idaho] 79 P. 82. Separation. State v. West [Idaho] 81 P. 107. Conversation between juror and deputy sheriff having no relation to case is not ground. State v. Smokalem, 37 Wash. 91, 79 P. 603. Where juror did not hear statements alleged, there is no ground. State v. Rea [Or.] 81 P. 822. Discussing matters outside of evidence. Hambrigbt v. State [Tex. Cr. App.] 84 S. W. 597; Johnson v. State [Tex. Cr. App.] 84 S. W. 824. That the foreman of the jury, while the verdict was being received, asked the judge if the jury could find that the defendant be punished for a less term than her life, is not ground for new trial, there being nothing to show that the verdict was not regularly agreed upon. Campbell v. State [Ga.] 51 S. E. 644. An accused is entitled to a new trial if there is sufficient reason to believe the verdict against him was due to corruption of the jury. State v. Costa [Vt.] 62 A. 38.

36. Evidence being sufficient to support verdict, and no error of law being complained of, discretion of court below in refusing to grant a new trial will not be interfered with. Boaz v. State [Ga.] 51 S. E. 504; Williams v. State [Ga.] 51 S. E. 577. A motion for a new trial on the ground that the verdict is contrary to the law and the evidence should be sustained where the evidence fails to show in what county the alleged offense was committed. Kolman v. State [Ga.] 52 S. E. 82.

37. Error in holding that there had been no former conviction for the same offense is reached by motion for a new trial, not by motion to discharge accused from custody. State v. Lucas [N. C.] 51 S. E. 1021.

38. Mixon v. State [Ga.] 51 S. E. 580; Hill v. State [Ga.] 50 S. E. 57; Whittington v. State, 121 Ga. 193, 48 S. E. 948. The fact that at the same term of court at which accused was tried the judge imposed light fines upon persons charged with other offenses, and imposed upon accused a heavier fine, but within the limit of the statute, is not cause for new trial. Seats v. State [Ga.] 50 S. E. 65.

39. Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

40. Territory v. Clark [N. M.] 79 P. 708.

41. See 4 C. L. 62.

42. Adultery. French v. State [Tex. Cr. App.] 85 S. W. 4.

43. Van Meer v. Territory [Okl.] 79 P. 264.

44. State v. Danforth [N. H.] 60 A. 839; Hilscher v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 713, 88 S. W. 227. Evidence held not material on question of insanity. Rogers v. State [Vt.] 61 A. 489. Where the issue of insanity of defendant was not raised at the trial, newly discovered evidence of it is not material. Donohue v. State [Ind.] 74 N. E. 996.

45. Application founded on retraction of prosecutrix in rape refused. Lucia v. State [Vt.] 59 A. 1016. A motion to suspend an appeal and to take the evidence of a party who declines to make an affidavit, and for leave to move for a new trial on after-discovered evidence, will not be granted where it is shown that a witness has been discovered to whom a witness for the state had made a statement contradictory to his evidence. State v. Marks, 70 S. C. 448, 50 S. E. 14.

46. Smiley v. Territory [Okl.] 81 P. 433; People v. Davis [Cal. App.] 81 P. 716; Taylor v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 639, 87 S. W. 1039; Sexton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 617, 88 S. W. 348. Additional evidence of identity held not sufficient. May v. State [Vt.] 60 A. 1; State v. Stanley [Iowa] 104 N. W. 284; Turley v. State [Neb.] 104 N. W. 934; Steed v. State [Ga.] 51 S. E. 627.

47. State v. Danforth [N. H.] 60 A. 839; People v. Patrick [N. Y.] 74 N. E. 843; Smiley v. Territory [Okl.] 81 P. 433; Hilscher v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 713, 88 S. W. 227; State v. Leuth [Iowa] 103 N. W. 345; Glenny v. Territory [Okl.] 79 P. 754. Statement of accomplice that he had lied at the trial held not sufficient. Rogers v. State [Vt.] 61 A. 489; Grimes v. State [Ga.] 51 S. E. 721; Anderson v. State [Ga.] 50 S. E. 46; State v. Lackey [Kan.] 82 P. 527; People v. Fitzgerald [Cal. App.] 82 P. 555; Powell v. State [Ga.] 50 S. E. 369; McDuffie v. State, 121 Ga. 580, 49 S. E. 708. Newly-discovered

the result,[48] that the evidence can be produced on the new trial,[49] and that he could not by the exercise of proper diligence have procured such evidence [50] or other similar evidence [51] at the trial. Laches in applying may defeat the motion. Where the paramour of defendant in adultery has been acquitted, and it appears she will deny the adulterous intercourse, defendant is entitled to a new trial that he may avail himself of her testimony.[52]

A motion in arrest of judgment [53] lies only on account of some intrinsic defect apparent on the face of the record,[54] and the objection must of course be one that is not required to be made at the trial.[55] A motion in arrest on the ground of insanity at the time of trial or sentence is regarded as a motion to stay sentence.[56] The legal effect of a judgment sustaining a motion in arrest of judgment, based upon the ground that the indictment was defective, is that the indictment was void.[57]

A motion to set aside a judgment,[58] like a motion in arrest, must be predicated on some defect apparent on the face of the record, and differs from it only in the time at which it is made.

A writ of error coram nobis.[59]

Practice on motion.[60]—Time to move for new trial is generally regulated by statute,[61] and affidavits and briefs of evidence must be filed within the statutory or allowed time or they will not be considered or the motion will be dismissed.[62] Motions are addressed in great measure to the discretion of the court,[63] and the

evidence that two witnesses were present when the difficulty in question occurred and that a witness for the state was not present as he testified merely tends to impeach the credibility of such witness, and is insufficient to justify the granting of a new trial. Tuberville v. State [Miss.] 38 So. 333.

48. Van Meer v. Territory [Okl.] 79 P. 264; Harris v. State [Tex. Cr. App.] 85 S. W. 120. Evidence as to cause of death of deceased and evidence bearing on question of defendant's sanity held not sufficient. Rogers v. State [Vt.] 61 A. 489; Scott v. State [Ga.] 50 S. E. 49.

49. Williams v. U. S. [Ind. T.] 88 S. W. 334.

50. Knight v. State [Tex. Cr. App.] 85 S. W. 1067; Taylor v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 639, 87 S. W. 1039. Evidence to prove insanity in murder. Donahue v. State [Ind.] 74 N. E. 996. For counsel to state that they used due diligence is a mere conclusion. May v. State [Vt.] 60 A. 1. Where a continuance was refused for absence of witness, diligence not being shown, and the testimony appears to be material, new trial is allowed in Texas. Perez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 453, 87 S. W. 350; Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 631, 88 S. W. 809. Testimony of defendant's wife cannot be said to be newly-discovered. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702. Evidence of events that happened in defendants presence cannot be newly-discovered. Sexton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 617, 88 S. W. 348. A new trial will not be granted on the ground of newly-discovered evidence where such evidence consists of testimony which might have been discovered by the exercise of ordinary diligence. Davis v. Territory [Okl.] 82 P. 507. No new trial for alleged newly-discovered evidence known to movent during trial. State v. Stanley [Iowa] 104 N. W. 284.

51. If a party has knowledge of a fact, and the same can be proved at the trial by evidence, a new trial will not be granted on the ground that other evidence of the fact, claimed to be newly-discovered, has been found since the trial, unless the movent satisfactorily explains why he did not use the evidence in his control at the time of the trial. Goodman v. State [Ga.] 49 S. E. 922.

52. Adultery. French v. State [Tex. Cr. App.] 85 S. W. 4.

53. See 4 C. L. 63.

54. Motion in arrest is not the proper mode of raising the question of the sufficiency of the evidence to warrant conviction. Commonwealth v. Mock, 23 Pa. Super. Ct. 51. Variance between indictment and proof is not a good ground. State v. Nelson [R. I.] 60 A. 589. Under Mansf. Dig. § 2302, providing that the only ground upon which a judgment can be arrested is that the facts stated do not constitute a public offense within the jurisdiction of the court, motion in arrest of judgment on the ground that at the time of trial and verdict there was pending a former indictment charging the same offense was properly overruled. Clampitt v. U. S. [Ind. T.] 89 S. W. 666.

55. See post, § 14. Lack of verification cannot be so raised. State v. Lee [Mo. App.] 87 S. W. 527.

56. Ince v. State [Ark.] 88 S. W. 818.

57. Hill v. Nelms [Ga.] 50 S. E. 344.

58, 59, 60. See 4 C. L. 63.

61. Motion interposed when defendant called for sentence held in time. Bird v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 295, 87 S. W. 146.

62. State v. Cummings [Mo.] 88 S. W. 706.

63. State v. Danforth [N. H.] 60 A. 839; State v. Jones [Mont.] 80 P. 1095. Denial for disqualification of juror held proper on conflicting evidence. Fonseca v. State [Tex. Cr. App.] 85 S. W. 1069. The discretion of the trial court in refusing a new trial will not be controlled. Merritt v. State [Ga.] 50 S. E.

whole record as well as the moving affidavits considered.[64] Jurors cannot be allowed by their own testimony or declarations to impeach their verdicts,[65] but affidavits presented by the prosecuting attorney which set forth the misconduct and claim that it had no effect on the verdict are not within the rule.[66] Applications on the ground of newly discovered evidence must be supported by the evidence of the witnesses,[67] and an affidavit of defendant showing diligence.[68] The supreme court can appoint a referee to take the after-discovered evidence of a party who refuses to make an affidavit to be used in a motion to suspend an appeal in a criminal case, and for leave to move for a new trial.[69] Where the applicant relies on matters dehors the record, the application is based on affidavits but the evidence before the court is the testimony of the witnesses themselves.[70] In Georgia the motion is not made upon a settled case or bill of exceptions, but must affirmatively show the facts upon which the alleged error is predicated.[71] Where one convicted

926. No error in refusing new trial. Harris v. State [Ga.] 50 S. E. 926. Granting or refusing motion for new trial is discretionary with trial court and its action will not be reviewed by appellate court. Hill v. U. S., 22 App. D. C. 395. The ruling of the trial court upon the testimony produced in support and in denial of a ground in a motion for a new trial, alleging that one of the jurors was biased against the accused and had expressed an opinion that he was guilty before the trial will not be disturbed on appeal, the evidence being conflicting and there being nothing to show an abuse of discretion. Such questions are discretionary with trial judge. Starke v. State [Fla.] 37 So. 850. The finding of the trial court after passing on evidence submitted on the question presented by a motion for a new trial, that a juror was competent to serve, will not be disturbed, in the absence of a manifest abuse of discretion. Cox v. State [Ga.] 52 S. E. 150. No complaint being made that any error of law was committed on the trial, and the evidence relied on by the state for a conviction being sufficient to sustain the verdict of guilty, the appellate court will not undertake to control the exercise by the presiding judge of his discretion in refusing to grant a new trial. Turner v. State [Ga.] 51 S. E. 503. On motion for new trial on conviction for obstructing a neighborhood road, there being evidence tending to show that the obstructed road was a neighborhood road, a refusal of a new trial is not erroneous as a matter of law. State v. Knotts, 70 S. C. 400, 50 S. E. 9.

64. Van Meer v. Territory [Okl.] 79 P. 264.

65. People v. Murphy, 146 Cal. 502, 80 P. 709; Bearden v. State [Tex. Cr. App.] 83 S. W. 808. Affidavits are not admissible. Johnson v. People [Colo.] 80 P. 133. On ground that they misunderstood the instructions or to show reasons for agreeing to verdict. State v. Forrester [N. D.] 103 N. W. 625. Proof of statements of a juror, after rendition of the verdict, as to how it was rendered, is inadmissible for the purpose of impeaching the verdict. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 867. In Texas, misconduct of the jury can be shown by affidavits of the jurors. Code Cr. Proc. art. 817. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

66. People v. Chin Non, 146 Cal. 561, 80 P. 681.

67. State v. Neasby [Mo.] 87 S. W. 468.

68. Affidavits showing diligence, submitted on a motion for a new trial, not signed by one of defendant's attorneys of record, are insufficient. Tuberville v. State [Miss.] 38 So. 333. A new trial will not be granted on the ground of newly-discovered evidence unless the movent files an affidavit of his ignorance, before verdict, of the existence of such evidence. Grimes v. State [Ga.] 51 S. E. 721. After motion for new trial has been overruled and judgment and sentence pronounced, a motion in arrest of judgment will not be granted on affidavits containing statements of declarations of convict, and conversations with him, unsupported by an affidavit by the convict that he did not know at time of trial by whom such declarations could be proved. Hill v. U. S., 22 App. D. C. 395.

69. State v. Marks, 70 S. C. 468, 50 S. E. 14.

70. State v. Harmon, 4 Pen. [Del.] 580, 60 A. 866.

71. A ground in a motion for a new trial alleging error in allowing the prosecuting attorney to make a statement, in the presence of the jury, in reference to what he wanted to prove by a witness will not be considered, when it does not appear what such statement was. Peters v. State [Ga.] 52 S. E. 147. A ground in a motion for a new trial, alleging that the court erred in admitting certain evidence, will not be considered when the motion fails to show that any objection was made to such evidence upon the trial of the case, or, if stating that objection was made, fails to show what that objection was. Id. A ground of a motion for a new trial alleging error in the charge because it was confused and inapplicable to the theory of the defense should point out how such confusion would arise and why it was not applicable. Pollard v. State [Ga.] 52 S. E. 149. A ground of a motion for a new trial, complaining of the admission of evidence, which does not show that any objection thereto was made at the time of its admission, or what such objection was, is without merit. It is not enough to show that ground of objection existed at the time of the making of the motion. Brigman v. State [Ga.] 51 S. E. 504. A new trial will not be granted on the ground that illegal evidence was admitted, when it does not already appear from the motion that such evi-

of a criminal offense made a motion in arrest of judgment and a motion for a new trial, and insisted upon both motions, it was not error for the judge, over the objection of the movant, to first hear and decide the motion for a new trial, though the filing of the motion in arrest was prior to the filing of the motion for new trial.[72] And where, under such circumstances, a new trial was granted, it was not error to then dismiss the motion in arrest, as the effect of the grant of the new trial was to set aside the judgment.[73] Under a rule that the granting of a new trial places the parties in the same position as if no trial had been had, one convicted of manslaughter under an indictment for murder may be retried for murder.[74]

§ 12. *Sentence and judgment.*[75]—Sentence must be pursuant to the conviction,[76] must be within the jurisdiction of the court,[77] and must not exceed the penalty authorized by statute.[78] Defendant must be present when sentence is imposed.[79] The sentence must be clear and certain,[80] but may be in the alternative if alternative punishments are fixed by statute.[81] A sentence imposing two penalties in the alternative, one of which is unauthorized, is not void, but may be enforced as to the penalty which is authorized.[82] Unless statutes so require, sentence need not be pronounced during the term.[83] Sentence may be lawfully imposed to begin in the future on the expiration of a prior sentence imposed by another court of the same state.[84] A plea of insanity at the time of sentence demands a trial.[85] To order one confined without further process or trial on acquittal of a charge of crime by reason of insanity pursuant to statute is to deprive him of lib-

dence was in fact admitted. Anderson v. State [Ga.] 50 S. E. 46. When, in a motion for a new trial, error is assigned upon the exclusion of evidence offered to impeach a witness by proof of contradictory statements previously made, it should appear from the motion itself that the proper foundation for the introduction of such evidence was laid. McColman v. State, 121 Ga. 491, 49 S. E. 609. An assignment of error in a motion for a new trial that "the court erred in charging the law of conspiracy in said case, there being no evidence to sustain the same," is too general and indefinite to raise any question for decision. Steed v. State [Ga.] 51 S. E. 627. For the admission of evidence to be a ground of motion for a new trial, it must appear what ground of objection was urged to it at the time. It is not enough to state what the objection was at the time the new trial was asked. Wynne v. State [Ga.] 51 S. E. 636.

72, 73. Williams v. State, 121 Ga. 579, 49 S. E. 689.

74. Turner v. Territory [Okl.] 82 P. 650. An erroneous ruling that one convicted of manslaughter cannot on the granting of a new trial be retried for murder does not entitle the state to a new trial on the ground that he might have been convicted of a higher degree of crime. Id.

75. See 4 C. L. 65.

76. Where, under an indictment charging murder in one count and carrying concealed weapons in another, a verdict of guilty of murder, with a recommendation to mercy, and of guilty of carrying concealed weapons, was brought in, sentence was properly pronounced on the verdict under the first count only. State v. Reeder [S. C.] 51 S. E. 702.

77. The charter of the town of Ft. Valley (Acts 1882-83, p. 480) empowers the mayor to impose a fine not to exceed $50 for a violation of an ordinance of that town. Little v. State [Ga.] 51 S. E. 501.

78. See Criminal Law, 5 C. L. 883.

79. It is error to render judgment of imprisonment in any case in the absence of the defendant. State v. Dolan [W. Va.] 52 S. E. 181.

80. A sentence of imprisonment for a certain period "or until he shall be discharged according to law" is not uncertain. Chicago, etc., R. Co. v. Gildersleeve [Mo. App.] 89 S. W. 336.

81. A municipal court authorized by the charter to impose two or more kinds of punishment for a violation of the municipal ordinances may impose an alternative sentence (Williams v. Sewell, 121 Ga. 665, 49 S. E. 732), but has no power, in the absence of express legislative authority, to impose a fine, and enforce its collection by labor upon public streets (Id.). A judgment imposing a sentence that the accused pay a fine in a given amount, "and, in default of the payment of the same within ten days," that the accused work at hard labor on the streets, is void. Id.

82. Brown v. Atlanta [Ga.] 51 S. E. 507.

83. Where after conviction of defendant, the court adjourned the term without passing sentence, a succeeding circuit judge, presiding at a succeeding term may sentence the defendant so convicted at the previous term. State v. Knotts, 70 S. C. 400, 50 S. E. 9. It is not error to pass sentence after the judgment has been suspended and a term of court has intervened between the order, making suspension, and the term at which judgment is rendered. Champitt v. U. S. [Ind. T.] 89 S. W. 666.

84. Rigor v. State [Md.] 61 A. 631.

85. Ince v. State [Ark.] 88 S. W. 818.

erty without due process of law.[86] Statutes providing for indeterminate sentences,[87] and for increased punishment on subsequent conviction,[88] are discussed below. Judgment entry affirmatively showing that issue was joined on the plea of not guilty, it excludes any assumption that issue was joined on a plea in abatement.[89] A judgment for costs in which no amount is stated is not void.[90]

§ 13. *Record or minutes and commitment.*[91]—The record is conclusive,[92] but may be amended by the court,[93] though only on record evidence. The record must show every jurisdictional fact,[94] but the presumption of regularity of proceedings avails to aid a record not showing lack of jurisdiction,[95] and makes it ordinarily unnecessary to set forth matters of mere procedure,[96] though in some states considerable strictness is necessary in setting forth all essential proceedings.[97] Failure of the minutes to show necessary matters may be supplied by the judgment roll.[98] Unnecessary recitals in the commitment do not vitiate.[99]

Commitment[1] cannot issue after the adjournment of the term, or in case of conviction before a magistrate after the end of the session.[2] Commitment to the wrong reformatory does not entitle the prisoner to a discharge on habeas corpus.[3]

86. Brown v. Urquhart, 139 F. 846. **Contra.** Ex parte Brown [Wash.] 81 P. 552.

87. In the indeterminate sentence law of 1902 (Pen. Code, § 687a) the words "the minimum of which shall not be less than one year" cannot by construction be read to mean "more than one year" irrespective of the arguments that may be made to support such a construction. People v. Deyo, 181 N. Y. 425, 74 N. E. 430. An indeterminate sentence the minimum of which is within the letter of the law is not invalid because the commutation for good behavior may possibly reduce the maximum to less than the minimum. When the convict has earned his commutation and his maximum has been served with respect to it, he should be discharged whether the minimum has expired or not. Id.

88. A statute forfeiting a convict's good time for conviction of a subsequent offense within the term of his original imprisonment is valid. Ex parte Russell, 92 N. Y. S. 68. A law providing for an increase of punishment on subsequent conviction does not punish twice for the same offense. People v. Coleman, 145 Cal. 609, 79 P. 283.

89. Held no room for the application of the principle that the finding of the court was erroneous in failing to respond to the issue presented by the plea in abatement. Jackson v. State [Ala.] 37 So. 920.

90. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

91. See 4 C. L. 66.

92. Order of arraignment cannot be contradicted by ex parte affidavits. State v. Nelson [Wash.] 81 P. 721.

93. When judge of city court tries case without a jury and renders and announces judgment of guilty, but such judgment is not entered on the minutes, an order may be passed at the subsequent term, on notice to the accused, requiring the clerk to correct the minutes to show the judgment rendered. Merritt v. State [Ga.] 50 S. E. 925.

94. Must show a judgment. Plea of guilty is not sufficient. Ex parte Winford [Tex. Cr. App.] 85 S. W. 1146. The record is fatally defective if it omits the final judgment and order, and the omission cannot be supplied by the mittimus. Ryan v. People, 111 Ill. App. 484. Designation of offense as "assault in third degree" held sufficient. Ex parte Bartholomew, 94 N. Y. S. 512. If an accused charged with a crime and several prior convictions admitted the prior convictions the minutes of the plea should show them. People v. Noon [Cal. App.] 81 P. 746. Conviction must be supported by a valid indictment. Skinner v. State [Ala.] 38 So. 242.

95. See post, § 17F, Limitation of review to matters in the record. Ex parte Bartholomew, 94 N. Y. S. 512. Selection of jury. Moseley v. Commonwealth [Ky.] 84 S. W. 748. Where the record does not show that the offense was committed in that portion of the county over which the convicting court had not jurisdiction, no lack of jurisdiction is shown. State v. Hall [Mo.] 87 S. W. 1181. Will be presumed that bailiff was duly sworn before taking jury. Williams v. U. S. [Ind. T.] 88 S. W. 334.

96. Requests for special instructions need not be entered in the clerk's minutes. State v. Duperier [La.] 39 So. 455.

97. There can be no legal conviction for a felony unless the record shows that the jury which tried the case were duly sworn according to law. State v. Moore [W. Va.] 49 S. E. 1015. It will not suffice to say that the jury were elected according to law. Id. Where a person is convicted of a felony it must affirmatively appear from the record that the prisoner was present in court and entered his plea in person to the indictment against him; and it is reversible error if the record fails to show this. Id.

98. Order overruling demurrer to indictment. People v. Canepi, 181 N. Y. 398, 74 N. E. 473.

99. Recital of prior conviction and sentence showing reason why sentence is made to begin at future date. Rigor v. State [Md.] 61 A. 631.

1. See 4 C. L. 66. Under Kansas statutes, a justice of the peace has no power to commit a boy to the reform school. The mittimus must be made by a court of record. In re Stokes, 67 Kan. 667, 73 P. 911.

2. Tuttle v. Lang [Me.] 60 A. 892.

3. The committing court will correct the

§ 14. *Saving questions for review. Necessity of objection, motion, or exception.*[4]—Aside from objections to the jurisdiction, or the sufficiency of the indictment,[5] prompt objection and exception in the trial court is necessary to preserve the right to a review of the ruling complained of.[6] This rule is applied to allowing day to plead,[7] refusal of severance,[8] errors in selecting and empaneling juries,[9] disqualification of jurors,[10] swearing[11] and examination of witnesses,[12] requiring withdrawal of jury when proper,[13] rulings on the admissibility[14] or sufficiency of the evidence,[15] variance between indictment and proof,[16] remarks,[17] conduct,

error on proper application. People v. Superintendent of House of Refuge, 46 Misc. 131, 93 N. Y. S. 218.

4. See 4 C. L. 66.

5. Formal defects cannot be first raised on appeal. Commonwealth v. Schoen, 25 Pa. Super. Ct. 211. Sufficiency in homicide case can be raised at any time. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Failure of clerk to file supporting affidavit cannot be first raised on appeal. Id. Joinder of count's erroneously charging burglary in day time and night time not objected to below is no ground of reversal. Harris v. State [Tex. Cr. App.] 85 S. W. 12. Objection to sufficiency of indictment cannot be first raised on appeal. Baldridge v. Commonwealth [Ky.] 88 S. W. 1076.

6. An objection after both sides have rested that the prosecuting attorney should have stated his case before the testimony comes too late. State v. Harlan [Kan.] 81 P. 480.

7. State v. Sexton, 37 Wash. 110, 79 P. 634; State v. Brown, 37 Wash. 106, 79 P. 638.

8. Perez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 453, 87 S. W. 350.

9. Misenheimer v. State [Ark.] 84 S. W. 494; Starr v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 1023.

10. Incompetency of juror not first available on appeal. Turley v. State [Neb.] 104 N. W. 934. A new trial will not be granted on the alleged ground of disqualification of the jurors where it does not appear that the alleged facts disqualifying the juror was not known to the accused or his counsel at the time of trial. Rhodes v. State [Ga.] 50 S. E. 361.

11. If an accused, without objection, allows a witness to take the stand against him without being sworn, he cannot, after conviction, urge the failure to take the oath as ground of a motion for a new trial. Rhodes v. State [Ga.] 50 S. E. 361.

12. Colbert v. State [Wis.] 104 N. W. 61. When questions improper in form are asked and answered and no objection is made or exception taken, no error is saved which is subject to review by an appellate court as a matter of right. State v. Crawford [Minn.] 104 N. W. 822.

13. State v. Stibbens [Mo.] 87 S. W. 460.

14. State v. Rennick [Iowa] 103 N. W. 159; State v. Conroy, 126 Iowa, 472, 102 N. W. 417; People v. Wolf, 95 N. Y. S. 264; State v. Scullin, 185 Mo. 709, 84 S. W. 862; State v. Cummings [Mo.] 88 S. W. 706; Maxey v. State [Ark.] 88 S. W. 1009; State v. Lawrence [Nev.] 82 P. 614; Territory v. Eaton [N. M.] 79 P. 713; State v. Hays, 110 Mo. App. 440, 85 S. W. 127; Sanders v. State [Tex. Cr. App.] 85 S. W. 1147. Grounds of objection to the admissibility of evidence not made below will not be considered. Dickens v. State [Fla.] 38 So. 909. The objection that demonstrative evidence was wrongfully obtained cannot be first raised on appeal. Roszczyniala v. State [Wis.] 104 N. W. 113. An unresponsive statement cannot be objected to where no motion was made to strike it out, though the court previously, at a time when the question was not directly presented, had refused to rule that no evidence on that subject would be received. Booth v. U. S. [C. C. A.] 139 F. 252. Objection to evidence as secondary is waived by its admission without objection, so that there is no right thereafter to have it excluded. Ragazine v. State [Tex. Cr. App.] 84 S. W. 832. In order to review testimony on the ground that it was erroneously admitted, the record should show that there was a motion to have it stricken which was overruled and exception taken or that an instruction to disregard was asked, refused, and exception taken. Caldwell v. State [Fla.] 39 So. 188. Where counsel for the defendant began to make objection to certain evidence, but the court interrupted him by saying that he could bring out on cross-examination that the testimony was improper, and it did not appear that the objection was ever completed, or the ground stated, or any subsequent motion to rule out the evidence made, this furnishes no ground for a motion for a new trial. Williams v. State [Ga.] 51 S. E. 322. There being no objection to testimony and no motion to strike it out, an appellate court will not consider errors assigned therein. Reyes v. State [Fla.] 38 So. 257.

15. Kehoe v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 881, 89 S. W. 270. The sufficiency of evidence will be reviewed though there was no motion for peremptory instruction. Clyatt v. U. S., 197 U. S. 207, 49 Law. Ed. 726. Failure to establish the venue may be taken advantage of under a general assignment of error that the verdict is contrary to the law and the evidence, though no question on that subject was raised before the trial court. Brown v. State [Ga.] 51 S. E. 505.

16. An objection that the verdict found defendant guilty of burning A's barn when the indictment charged the burning of B's barn cannot be made for the first time on appeal. State v. Gadsden, 70 S. C. 430, 50 S. E. 16. One desiring to take advantage of a fatal variance must seasonably interpose objections during the trial and in the event of an adverse ruling assign it as a reason for a new trial. Bradley v. State [Ind.] 75 N. E. 873.

17. Where improper remarks of counsel for prosecution were objected to, and the trial court then interrupted and the remarks were discontinued, and no motion to discharge the jury was made by the defense.

and argument of counsel,[18] and instructions.[19] It is frequently required that the objection be also presented to the trial court by motion for new trial,[20] but an unsensible verdict need not be called to the attention of the trial court by motion in arrest in order to be available on appeal.[21] Matters first brought to the attention of the trial court by motion for new trial are not generally reviewable on appeal,[22] but statutes in some states authorize a general review of criminal cases, especially where the judgment is of death, irrespective of whether proper objection was made and exception saved at the trial.[23] Where motion for new trial is required, the overruling thereof must be excepted to.[24] Failure to sign the charge may be first raised by motion for new trial in Texas.[25] Failure to move an election, the court requiring it suo motu disentitles defendant on appeal to complain of improper joinder of counts.[26] Where defendant does not move a postponement to obtain evidence to contradict a surprise, he cannot have a new trial to present it as newly discovered.[27] An objection to the refusal to admit testimony upon which the court made no positive ruling, but postponed ruling until a later stage of the case, will not be reviewed where the attention of the court was not thereafter called to it.[28] Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made.[29]

and no ruling of the court asked, a judgment of conviction could not be reversed by the appellate court. Lorenz v. U. S., 24 App. D. C. 337.

18. State v. Williams, 186 Mo. 128, 84 S. W. 924; State v. Pierce [Mo. App.] 85 S. W. 663. Reading of defendant's testimony at former trial. Wheeler v. Commonwealth [Ky.] 87 S. W. 1106. That denunciation of defendant by the prosecuting attorney may be complained of on appeal attention of the court should be called thereto at the time. State v. Archbell [N. C.] 51 S. E. 801.

19. Glenny v. Territory [Okl.] 79 P. 754; People v. Woods [Cal.] 81 P. 652; State v. Bringgold [Wash.] 82 P. 132; Yzaguirre v. State [Tex. Cr. App.] 85 S. W. 14; Williams v. U. S. [Ind. T.] 88 S. W. 334. Error in misquoting testimony in instructions cannot be first complained of after conviction. Commonwealth v. Razmus [Pa.] 60 A. 264. Failure to charge, no request being made or exception taken. Delaney v. State [Wyo.] 81 P. 792. All instructions given upon the same subject should be considered together, and, when read in connection with each other, if no error appears, an exception based upon an isolated one will not avail, although standing alone, the one excepted to may be ambiguous. Starke v. State [Fla.] 37 So. 850. A verbal inelegancy in an instruction will not be considered where not excepted to. State v. Dewey [N. C.] 51 S. E. 937. If a ruling refusing to give a requested instruction is not excepted to at the time of the refusal, an assignment of error based on such ruling will not be considered by the appellate court. Thomas v. State [Fla.] 38 So. 516.

20. Refusal to reduce instructions to writing. Burris v. State [Ark.] 84 S. W. 723. Errors in instructions. State v. Merkel [Mo.] 87 S. W. 1186; Corothers v. State [Ark.] 88 S. W. 585. Errors in admission of evidence. State v. Atchley, 186 Mo. 174, 84 S. W. 984; Ince v. State [Ark.] 88 S. W. 818. Where an issue of fact has been tried by the jury and a verdict returned, a motion for a new trial is indispensable to appellate review. A verdict against a special plea in bar is not reviewable by direct exception assigning error that it is contrary to law and the evidence. Bashiniski v. State [Ga.] 51 S. E. 499. It is the duty of the defendant to bring to the attention of the trial court at the earliest possible moment any newly-discovered evidence which he may desire to introduce; and if he fails to so bring it to the attention of the trial court, an appellate court will not disturb the ruling in refusing a motion for a new trial based upon the grounds of such newly-discovered evidence. Robinson v. State [Fla.] 39 So. 463.

21. State v. Cronin [Mo.] 88 S. W. 604.

22. Error in selecting jury. Mount v. Commonwealth [Ky.] 86 S. W. 707. In Kentucky ruling on motion for new trial is not reviewable and accordingly error at the trial first raised by such a motion cannot be reviewed. Van Dalsen v. Commonwealth [Ky.] 89 S. W. 255. The motion for a new trial properly presents no ground other than that the verdict was contrary to law. Owen v. State [Ga.] 50 S. E. 64. Application for a new trial on the ground that there was not sufficient evidence to warrant a conviction embraces special assignment of error that the evidence showed that defendant simply acted as the agent of the buyer. Burden v. State, 120 Ga. 198, 47 S. E. 562.

23. The rule that the failure to except to the ruling of the trial court prevents the appellant from raising the same question on appeal may be waived when justice requires it. In re Moebus [N. H.] 62 A. 170.

24. Objection to the manner of drawing grand jurors is waived by failure to except to the overruling of a motion in arrest on that ground. Rodriguez v. U. S., 198 U. S. 156, 49 Law. Ed. 994.

25. Jones v. State [Tex. Cr. App.] 85 S. W. 1075.

26. State v. Richmond, 186 Mo. 71, 84 S. W. 880.

27. Knight v. State [Tex. Cr. App.] 85 S. W. 1067.

28. Whipple v. State [Ga.] 51 S. E. 590.

29. State v. Dolan [W. Va.] 52 S. E. 181.

Waiver of objection.[30]—An objection and exception timely made may be waived,[31] and an exception against invited error is unavailing.[32]

Sufficiency of objections.[33]—An objection to a question not improper in itself and which does not call for improper evidence should be overruled,[34] a motion to strike being the remedy when the answer is not responsive,[35] but such a motion is unavailing where the answer is responsive.[36] Objections must be specific,[37] an objection to several matters being insufficient if any of them is unobjectionable.[38] In order to have rulings on questions reviewed, the objector must make an offer on proof, on the trial, to show the relevancy of the questions.[39] An oral motion to strike testimony need not recite it if it clearly identifies it.[40]

Sufficiency of exceptions.[41]—Exceptions must be specific,[42] an exception cover-

30. See 4 C. L. 68.

31. Defendant waives objection to refusal to direct verdict at close of case for prosecution where he introduces testimony in defense. Trometer v. District of Columbia, 24 App. D. C. 242. An exception to a denial of a motion for a directed verdict is waived where accused introduces evidence in his own behalf. Green v. U. S., 25 App. D. C. 549. Testimony in his own behalf explanatory of evidence, improperly admitted, of another crime does not waive objection made to it. People v. Gaffey, 98 App. Div. 461, 90 N. Y. S. 706.

32. Invited error, see post, § 15, Harmless Error. Assumption of facts invited by counsel's avowal of them in denying others. That he "sold" lottery tickets. State v. Miller [Mo.] 89 S. W. 377. Invited by tendering same request. Turley v. State [Neb.] 104 N. W. 934. Failure to charge on a particular theory after stating that he did not desire an instruction on such theory. Steed v. State [Ga.] 51 S. E. 627.

33. See 4 C. L. 69. Sufficiency of evidence to show that the offense was committed in the state cannot be raised by demurrer to the evidence or request to charge the burden is on the state. Such fact is a matter of defense that may be shown upon a plea of not guilty. State v. Burton, 138 N. C. 575, 50 S. E. 214.

34. Dickens v. State [Fla.] 38 So. 909.

35. Motion to strike is necessary to reach unresponsive part of proper question though the question was objected to. Sheehy v. Territory [Ariz.] 80 P. 356; State v. Castigno [Kan.] 80 P. 630.

36. A motion to exclude evidence given in an answer which was responsive to the question though the evidence is not legal, will be denied when made by the party who propounded the question. Dickens v. State [Ala.] 39 So. 14. Where the record does not show that a statement made by a witness on cross-examination was not made in response to a question, an objection to the statement on appeal is unavailing. Carwile v. State [Ala.] 39 So. 220.

37. Maxey v. State [Ark.] 88 S. W. 1009. Incompetent, irrelevant, and immaterial, is not specific. State v. Nelson [Wash.] 81 P. 721. Objections to evidence not specified when it was offered will not be considered on appeal. Booth v. U. S. [C. C. A.] 139 F. 252. An objection to the competency of evidence does not go to the competency of the witness. State v. Brown [Iowa] 102 N. W. 799. An objection that defendant was not present when prosecutrix in rape made complaint urged as a ground for admitting the fact of complaint waives the error of admitting the details of the complaint. Donaldson v. People [Colo.] 80 P. 906. A general objection of incompetency of evidence is unavailing if it is admissible for any purpose. Johnson v. State [Tex. Cr. App.] 84 S. W. 824. Grounds must be stated. State v. Bailey [Mo.] 88 S. W. 733. One who does not state any ground of objection to the method of selecting a new jury after one juror has been excused cannot complain on appeal of the method adopted. Turner v. Territory [Okl.] 82 P. 650. Overruling a general objection to the admission of evidence and to which ruling no exception is taken is not error. State v. Lawrence [Nev.] 82 P. 614. A general objection to evidence cannot be sustained unless it is so manifestly illegal and irrelevant and apparently incapable of being rendered admissible in connection with other evidence. Braham v. State [Ala.] 38 So. 919.

38. Several instructions. Darden v. State [Ark.] 84 S. W. 507; Thomas v. State [Ark.] 86 S. W. 404. Improper reference in argument to an instruction that had not been given and certain competent evidence is not reached by a general objection to the argument and motion to strike the evidence. Powell v. State [Ark.] 85 S. W. 781. From a bill of exceptions reciting that the court was asked to give the following instructions, setting out a number of requests, it will be assumed that they were requested as a whole, and the court could refuse them all if any one was erroneous. Yeats v. State [Ala.] 38 So. 760. When only a part of an answer is not responsive, a motion to exclude the whole, is not proper. Tagert v. State [Ala.] 39 So. 293.

39. Starke v. State [Fla.] 37 So. 850. An exception to a refusal to admit evidence which does not show what answer was expected to the question objected to cannot be reviewed. Smith v. State [Ala.] 39 So. 329. Objection that deposition was taken without chance to cross-examine does not reach admissibility of particular answers. People v. Gilhooley, 95 N. Y. S. 636.

40. Osburn v. State [Ind.] 73 N. E. 601.

41. See 4 C. L. 70.

42. Where the exception does not show whether it is to a refusal to retire the jury or to the evidence it cannot be considered. Hall v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 707, 88 S. W. 244. Where an exception to evidence is that it is irrelevant and immaterial, the exception will be overruled unless the

ing several rulings being insufficient if any one is correct.[43] An exception is not well taken where counsel announces that he will except whichever way the court rules on his motion.[44]

§ 15. *Harmless or prejudicial error.*[45]—Generally speaking, a conviction will not be reversed for technical errors where substantial justice has been done[46] or because of error that resulted in no harm or prejudice to defendant,[47] though he has properly saved his objection and exception to the ruling. Prejudice is generally presumed from error,[48] though the presumption may be rebutted.[49] Errors favorable to defendant,[50] or affecting only his co-defendant,[51] or which he has invited,[52] or acquiesced in, are not reversible.

Trivial or immaterial error.[53]—An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.[54] The weight or

evidence is obviously irrelevant and immaterial under any state of the case. Underwood v. State [Tex. Cr. App. 85 S. W. 794; Ellington v. State [Tex. Cr. App.] 87 S. W. 153.

43. An exception taken to instructions as a whole is insufficient if there be one correct one. Osburn v. State [Ind.] 73 N. E. 601. An exception to the entire charge will not be considered unless the whole charge is subject to such exception. Powell v. State [Ga.] 50 S. E. 369.

44. Starr v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 1023.

45. See 4 C. L. 70.

46. Conviction proper on merits not reversed for incompetent testimony introduced with objection. People v. Du Veau, 94 N. Y. S. 225.

47. Commonwealth v. Philadelphia H. & P. R. Co., 23 Pa. Super. Ct. 235; Campbell v. State [Ga.] 51 S. E. 644. Defendant cannot complain of the striking out of inadmissible testimony, though the motion to strike was not seasonably made. Osburn v. State [Ind.] 73 N. E. 601.

So provided by statute. Code Cr. Proc. § 542. People v. Patrick [N. Y.] 74 N. E. 843; People v. Silverman, 181 N. Y. 235, 73 N. E. 980; People v. Seeley, 93 N. Y. S. 982. Code Cr. Proc. 1895, art. 723. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025. Pen. Code, § 1258. People v. Warner [Cal.] 82 P. 196. Defendant convicted of a minor offense sufficiently charged cannot complain of the insufficiency of the indictment to charge greater offense of which he was not convicted. State v. Miller [Kan.] 80 P. 947. A case having been fairly tried, overrefined distinctions or forced application of technicalities will not be indulged to defeat the result of the trial. Shaffer v. U. S., 24 App. D. C. 417. Errors which are not substantial do not warrant a reversal. McCue v. Commonwealth [Va.] 49 S. E. 623.

48. There can be no presumption that the missing page of an indictment contained only a charge of prior convictions so as to render conviction on such indictment harmless. People v. Noon [Cal. App.] 81 P. 746.

49. State v. Coleman, 186 Mo. 151, 84 S. W. 978.

50. People v. Clark, 145 Cal. 727, 79 P. 434; Gallegos v. State [Tex. Cr. App.] 85 S. W. 1150; Hilscher v. State [Tex. Cr. App.] 13 Tex. Ct. Reu. 713, 88 S. W. 227. Hearsay evidence. Abrams v. Commonwealth [Ky.] 85 S. W. 173. Abstract instructions allowing conviction of less degree of crime than evidence warrants. Vasser v. State [Ark.] 87 S. W. 635. Instruction that evidence will not support verdict of guilty on certain theory. Commonwealth v. Razmus [Pa.] 60 A. 264. Instruction on self-defense. Holmes v. State [Wis.] 102 N. W. 320; State v. Gray [Or.] 79 P. 53. Instruction conflicting with one that was in defendant's favor. State v. Jones [Mont.] 80 P. 1095. Instruction limiting prosecution to less time than indictment alleged. Foreman v. State [Tex. Cr. App.] 85 S. W. 809. Defendant cannot be prejudiced by the prosecuting attorney's refusal to prosecute on part of the charges. State v. Miller [Mo.] 87 S. W. 484. An instruction that the jury should convict if the crime was committed within three years prior to the date when the amended information was filed is not prejudicially erroneous. State v. Hunt [Mo.] 88 S. W. 719. In homicide where the sole defense was self-defense, and the jury convicted of manslaughter, a charge directing a conviction of manslaughter on facts which would have warranted a conviction of murder is not ground for reversal. Moore v. State [Miss.] 38 So. 504. Eliciting fact in murder trial that accused once apprehended thieves and delivered them to officers. State v. Gardner [Minn.] 104 N. W. 971.

51. A conspirator given a penitentiary sentence cannot complain that the verdict was illogical and unjust because letting the others off with a fine. O'Donnell v. People, 110 Ill. App. 250.

52. Improper argument invited by defendant. Dimmick v. U. S. [C. C. A.] 135 F. 257. Defendant cannot object to evidence he calls for on cross-examination. People v. Rimieri, 180 N. Y. 163, 72 N. E. 1002; People v. Astell, 94 N. Y. S. 748. Improper matters in dying declaration ruled out and afterwards read at defendant's request. People v. Thompson, 145 Cal. 717, 79 P. 435. Instruction containing language identical with one requested. State v. Bush [Kan.] 79 P. 657; State v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

53. See 4 C. L. 70.

54. Defect in defendant's copy of indictment. Allison v. State [Tex. Cr. App.] 86 S. W. 409. To refer in the instructions to prosecutrix in rape as "the little girl" is harmless. People v. Colbath [Mich.] 12 Det. Leg. N. 446, 104 N. W. 633.

strength of the evidence may affect the importance of error.[55] The rule that reversal will not follow non-prejudicial error has been applied to arraignment and plea,[56] selection of jury,[57] conduct of trial,[58] examination of witnesses,[59] admission [60] and exclusion [61] of evidence, and motions to strike evidence,[62] variance between indictment and proof,[63] conduct or remarks of court,[64] conduct, [65] remarks,[66]

55. Error in instructions held unimportant in view of the evidence. Murder. verett v. People [Ill.] 75 N. E. 188. Larceny. State v. Bjelkstrom [S. D.] 104 N. W. 481. Where the undisputed evidence shows defendant to be guilty and no other verdict could properly be rendered, the supreme court will not reverse a conviction for errors which did not bring about the result. Wistrand v. People [Ill.] 75 N. E. 891. Impeachment of witness by state held not prejudicial, defendant having admitted sufficient facts to warrant the conviction. Price v. State [Miss.] 38 So. 41.

56. That the accused who was jointly indicted with others was jointly arraigned with them after he had elected to sever upon trial is not ground for a new trial after a separate trial had been accorded him. Rawlins v. State [Ga.] 52 S. E. 1.

57. Ullman v. State [Wis.] 103 N. W. 6; People v. Warner [Cal.] 82 P. 196. Overruling challenge for cause is immaterial to one who does not use all his peremptories. Commonwealth v. Spahr, 211 Pa. 542, 60 A. 1084. The rule that the solicitor should challenge for the state before the juror is accepted by the defendant, being based entirely upon the practice of the court, a verdict will not be set aside for a technical violation of the rule which does not affect defendant's rights. State v. Harding, 70 S. C. 395, 50 S. E. 11. Statutory method of selecting a new jury after one juror had been excused for sickness not complied with. Turner v. Territory [Okl.] 82 P. 650.

58. When, after a proper preliminary examination as to their free and voluntary nature, confessions are adjudged competent and received in evidence, there is no room for any question touching the propriety of having conducted the preliminary examination in the presence of the jury. Griner v. State, 121 Ga. 614, 49 S. E. 700.

59. Smith v. State [Ind.] 74 N. E. 983. Improper admission on cross of declarations of defendant admissible on direct. Osburn v. State [Ind.] 73 N. E. 601. A new trial will not be granted on the sole ground that the court allowed the prosecuting attorney to ask leading questions. Taylor v. State, 121 Ga. 348, 49 S. E. 303.

60. State v. Danforth [N. H.] 60 A. 839; People v. Silverman [N. Y.] 73 N. E. 980; People v. Woods [Cal.] 81 P. 652; State v. Copeman [Mo.] 84 S. W. 942; Lyles v. State [Tex. Cr. App.] 86 S. W. 763; Bollen v. State [Tex. Cr. App.] 86 S. W. 1025; State v. Cummings [Mo.] 88 S. W. 706; State v. Bailey [Mo.] 88 S. W. 733; Maxey v. State [Ark.] 88 S. W. 1009; Cole v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 730, 88 S. W. 341. Where the defense is alibi, testimony by deceased's companion as to what he did after deceased was shot is harmless. State v. Roberts [Nev.] 82 P. 100. Evidence immaterial to the only issue not admitted. People v. Wolf, 95 N. Y. S. 264. Insignificant testimony in murder case. Trip of witness and defendant before crime. State v. Bean [Vt.] 60 A. 807. Proof that three notches were cut on pistol with which defendant killed three persons. Helton v. Commonwealth [Ky.] 84 S. W. 574. Evidence that deceased's widow had a child, and afterward bringing the child into court and offering it in evidence. People v. Rimieri, 180 N. Y. 163, 72 N. E. 1002. Permitting a witness over objection to answer a wholly irrelevant and immaterial question held harmless error. People v. Roberts [Cal. App.] 82 P. 624. Error in permitting a question to be answered over objection is harmless where the same question has been previously answered without objection. State v. Lawrence [Nev.] 82 P. 614. For an expert in medicine to detail correctly how the forces of nature would operate to cause the fall of one on being killed. Turley v. State [Neb.] 104 N. W. 934. Defendant cannot complain of questions asked a state witness by the state attorney, nor of the answers to such questions, touching matters not in dispute and which are immaterial to the issue. Wooldridge v. State [Fla.] 38 So. 3. Admission of evidence of other acts of intercourse between prosecutrix and defendant in a prosecution for rape, held harmless. State v. Oswalt [Kan.] 82 P. 586. Error, if any, harmless in admitting statement of accused that if he ever got out of the scrape (prosecution for rape), he would never get in jail again, and that he had served three years for killing a girl and never thought he would be back. State v. Smith, 138 N. C. 700, 50 S. E. 859.

61. Exclusion of immaterial evidence. Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212. Where the excluded question was immediately reasked and answered before objection made and sustained and the answer was not stricken there is no prejudice. State v. Patchen, 37 Wash. 24, 79 P. 479. Exclusion of evidence contradicting witness as to immaterial matter. Casteel v. State [Ark.] 88 S. W. 1004. Error in excluding evidence which was not such as could reasonably have influenced the verdict is harmless. Turner v. Territory [Okl.] 82 P. 650. The exclusion of a question asked prosecuting witness whether she brought the case herself or somebody got her to bring it held not prejudicial to defendant, especially where defendant's testimony varied little from that of prosecutrix. State v. Sauls, 70 S. C. 393, 50 S. E. 17.

62. Refusal to strike immaterial but unprejudicial evidence. People v. Kelly, 146 Cal. 119, 79 P. 846.

63. Variance in name of owner of burglarized building is immaterial where name of occupant is correctly charged in another count. Flanagan v. People, 214 Ill. 170, 73 N. E. 347.

64. People v. Astell, 94 N. Y. S. 748; People v. Modina, 146 Cal. 142, 79 P. 842; Vasser v. State [Ark.] 87 S. W. 635; State v. Eth-

and argument of counsel,[67] instructions,[68] custody, conduct and deliberations of jury.[69]

Cure of error.[70]—Error may be harmless because some subsequent condition has rectified it or has averted its prejudicial effect.[71] Thus the admission of improper evidence may be cured by afterwards excluding it,[72] or withdrawing it from the jury,[73] or permitting proof of other facts rendering it innocuous,[74] or suffi-

ridge [Mo.] 87 S. W. 495; Ince v. State [Ark.] 88 S. W. 818. Observation on circumstantial evidence on voir dire of juror. People v. Olson [Cal. App.] 81 P. 676. Mere inadvertent error by court in reciting evidence is not ground for reversing conviction where accused has counsel. State v. Murray [N. C.] 51 S. E. 775. Remarks made by the trial judge after verdict rendered held not ground for a new trial. Seats v. State [Ga.] 50 S. E. 65.

65. Reading inadmissible writing and asking question about it. State v. Coleman, 186 Mo. 151, 84 S. W. 978. Kissing baby born to prosecutrix in rape. State v. Danforth [N. H.] 60 A. 839. Offering incompetent evidence. Dimmick v. U. S. [C. C. A.] 135 F. 257.

66. Franks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 299, 87 S. W. 148.

67. Whit v. State [Ark.] 86 S. W. 284; Hooker v. State [Ark.] 86 S. W. 846; Smith v. State [Ind.] 74 N. E. 983. Reference to criminal history of county. People v. McRoberts [Cal. App.] 81 P. 734. Remarks concerning lynching of defendant. Id.

68. State v. Marx [Conn.] 60 A. 690; State v. Manderville, 37 Wash. 365, 79 P. 977; Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025; Nelson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 627, 88 S. W. 807. No reversal for slight inaccuracies in instructions fairly correct as a whole. Flanagan v. People, 214 Ill. 170, 73 N. E. 347. Inadvertent use of "him" for "her," the assault being in fact on a woman. Magruder v. State [Tex. Cr. App.] 84 S. W. 587. Rule for weighing testimony of witness testifying falsely. Beck v. People, 115 Ill. App. 19. It is not prejudicial error to fail to charge the jury in a criminal case as to the effect of a recommendation of mercy, where such an instruction was not requested. Mason v. State, 5 Ohio C. C. (N. S.) 647. Instruction correct in abstract but merely irrelevant. People v. Griffith, 146 Cal. 339, 80 P. 68. Mere abstract charge on manslaughter. Bell v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 558, 87 S. W. 1160. Failure to give in the charge the statute. Pen. Code, 1895, § 381, informing the jury of the specific offense of which accused was indicted or as to the distinction between fornication and adultery held harmless. Seals v. State [Ga.] 50 S. E. 65. An inaccurate instruction giving an abstract principle of law is not reversible error where the court subsequently gives full, clear and correct instruction on the law as applicable to accused's contentions. Allams v. State [Ga.] 51 S. E. 506. The fact that the trial judge inaccurately informed the jury that the accused was under indictment for fornication and adultery, when in fact the indictment charged fornication is harmless where the accused was not prejudiced. Seats v. State [Ga.] 50 S. E. 65. A charge as to the mode of ascertaining the intent while not strictly accurate is not ground for a new trial where the guilt of the accused clearly and unmistakably appears. Ham v. State [Ga.] 50 S. E. 342. Where, in an assault case, the victim did not die, but was present and testified, a charge to find defendant guilty of murder, if the jury so believed him guilty, was so manifestly inapplicable to the facts as to be harmless error. Pollard v. State [Ga.] 52 S. E. 149. Where an indictment charges and the evidence conclusively shows the commission of the completed act of concealment of birth, an instruction that a conviction could be had for an "attempt to conceal" is harmless. McLoud v. State [Ga.] 50 S. E. 145. Charge defining "direct" evidence, there being none and other parts of charge having correctly set forth the elements of the crime and the evidence. State v. Blydenburgh [Iowa] 104 N. W. 1015. Where a statement of the accused made during the trial demands the verdict, a new trial will be refused even though the charge of the court was not entirely correct. Carpenter v. State [Ga.] 50 S. E. 58.

69. Slight separation in burglary case. Flanagan v. People, 214 Ill. 170, 73 N. E. 347.

70. See 4 C. L. 74.

71. Van Meer v. Territory [Okl.] 79 P. 264. Error in holding certain counts sufficient is cured by acquittal on those counts. Knox v. State [Ind.] 73 N. E. 255. Error in denying defendant the privilege of proving the facts he alleges in support of a challenge to the panel is cured by subsequent withdrawal of the ruling, and defendant's declination. People v. Lee [Cal. App.] 81 P. 969. Where the judge instructed the jury, in case of any misconduct, not to make affidavits of the same, but two jurors did make such affidavits as provided by law, the erroneous instruction was harmless. Code Cr. Proc. art. 817, provides for such affidavits. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203.

72. An unresponsive answer promptly stricken out is not error. Simon v. State [Wis.] 103 N. W. 1100. The striking out of testimony of the state's attorney fortifying that of a witness does not cure the error in admitting such testimony. Flowers v. State [Miss.] 37 So. 814.

73. Dimmick v. U. S. [C. C. A.] 135 F. 257; Johnson v. People [Colo.] 80 P. 133; Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 301, 87 S. W. 147. Previous fire. Arson. People v. Wagner, 180 N. Y. 58, 72 N. E. 577. There are cases where the error is **not cured** by withdrawal. State v. Finch [Kan.] 81 P. 494.

74. Evidence of fact rendered innocuous by other evidence. People v. Kelly, 146 Cal. 119, 79 P. 846. Mental perturbation of defendant on visiting house where homicide occurred. Helton v. Commonwealth [Ky.] 84 S. W. 574. Refusal to permit a witness to state threats is harmless where he after-

ciently establishing or disproving the same fact by other unobjectionable evidence,[75] by instructions rendering it immaterial.[76] The improper exclusion of evidence may be cured by afterwards admitting the same,[77] or other evidence of similar effect. Error in allowing an improper question to be put may be cured by the answer,[78] or by a failure to answer.[79] Refusal to compel an election is cured by submission of a single count.[80] A verdict on an issue to which the error did not re-

wards states that there were none. Tetterton v. Commonwealth [Ky.] 89 S. W. 8.

75. Woodruff v. State [Neb.] 101 N. W. 1114; People v. Seeley, 93 N. Y. S. 982; State v. Mann [Wash.] 81 P. 561; Robbins v. State [Tex. Cr. App.] 83 S. W. 690; Misenheimer v. State [Ark.] 84 S. W. 494; Cage v. State [Ark.] 84 S. W. 631; Mathley v. Commonwealth [Ky.] 86 S. W. 988; Commonwealth v. Woelfel [Ky.] 88 S. W. 1061; State v. Minck [Minn.] 102 N. W. 207; Tones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 722, 88 S. W. 217. Opinion of witness that described wounds were caused by blunt instrument. People v. Olsen [Cal. App.] 81 P. 676. Allowing parol evidence of a statement that had been reduced to writing is harmless where the writing itself is afterwards introduced. State v. Usher, 126 Iowa, 281, 102 N. W. 101. Involuntary confession is harmless where a subsequent voluntary one shows the same facts. Andrews v. People [Colo.] 79 P. 1031. Incompetent proof of issuance of license to dramshop keeper is harmless where he admitted it below and his testimony below is shown. State v. Barnett, 110 Mo. App. 584, 85 S. W. 615. Statement of deceased that he was shot through the stomach is harmless, though not res gestae where it was the fact. State v. Roberts [Nev.] 82 P. 100. Rejection of witness' conclusion is harmless where he states all the facts. Richardson v. Campbell [Tex. Cr. App.] 85 S. W. 282. Parol proof of a matter which is presumptively true is no error. Burnett v. State [Ark.] 88 S. W. 956. Other evidence of same fact not objected to. Maxey v. State [Ark.] 88 S. W. 1009. Admission of irrelevant letters harmless error where same facts were proved by competent evidence or by evidence not objected to. Lorenz v. U. S., 24 App. D. C. 337. Erroneous cross-examination cured by eliciting same evidence later. People v. Richards [Cal. App.] 82 P. 691. Objections to evidence tending to show flight or concealment will not be considered on defendant subsequently admitting facts showing his flight and concealment. Wooldridge v. State [Fla.] 38 So. 3. The refusal to permit a witness to testify that five days after the homicide he saw bruises and contusions on the defendant's head, held not harmful, other undisputed evidence as to the bruises on defendant's head immediately after the killing having been admitted. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. Where a witness for the state states a fact in his testimony which accused admits to be true, an appellate court will not determine whether the trial court should have permitted certain questions on cross-examination, the object of which was to test the knowledge of the witness of the fact so admitted Wooldridge v. State [Fla.] 38 So. 3.

76. White v. Commonwealth [Ky.] 85 S. W. 753. Instruction to disregard stricken testimony. State v. Levick [Iowa] 104 N. W. 334. Withdrawing issue. McKinney v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 638, 88 S. W. 1012. Improper admission of evidence held cured by subsequent instruction to jury to disregard same. State v. Emblem, 56 W. Va. 678, 49 S. E. 554. In a prosecution for murder, error in the admission of hearsay evidence held not cured by a subsequent direction to disregard such testimony. Davis v. State [Miss.] 37 So. 1018. Error in the admission of testimony is cured by ruling it out and instructing the jury to disregard it. Rentfrow v. State [Ga.] 51 S. E. 596. Errors in the admission of evidence are cured by withdrawing it from the consideration of the jury. Rawlins v. State [Ga.] 52 S. E. 1.

77. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070; Hellard v. Commonwealth [Ky.] 84 S. W. 329; Collins v. State [Tex. Cr. App.] 84 S. W. 585. Assignments of error based on rulings of the court excluding questions propounded to a state witness on cross-examination will not be held erroneous when the witness is afterwards produced by the defendant and testifies fully as to the same matters. Marlow v. State [Fla.] 38 So. 653. Refusal to allow defendants to ask certain questions on cross examination cured, if error, when defendants asked same questions of witness when subsequently called as their own. Lorenz v. U. S., 24 App. D. C. 337. Where assignments of error are based on the refusal of the trial judge to allow a witness to answer certain questions, and it appears from the record that all said questions were substantially answered at a subsequent stage of the proceedings, such assignments of error will not be considered by the appellate court. Wooldridge v. State [Fla.] 38 So. 3.

78. People v. Kelly, 146 Cal. 119, 79 P. 846; People v. Antony, 146 Cal. 124, 79 P. 858; State v. Manderville, 37 Wash. 365, 79 P. 977; Stull v. State [Tex. Cr. App.] 84 S. W. 1059; Underwood v. State [Tex. Cr. App.] 85 S. W. 794; Fonseca v. State [Tex. Cr. App.] 85 S. W. 1069. Exclusion of question harmless where witness said he could not remember. State v. Jones, 125 Iowa, 508, 99 N. W. 179. On a defense of insanity in homicide, error in a hypothetical question allowed is harmless where the answer was that under the conditions stated a man might be either sane or insane. Braham v. State [Ala.] 38 So. 919. If there is error in asking an expert whether insanity can be simulated, an answer "I don't know" is harmless. Id.

79. Where a question is objected to and not answered, an assignment of error based thereon will not be considered. Marlow v. State [Fla.] 38 So. 653.

80. Hofland v. State [Tex. Cr. App.] 85 S. W. 798.

late cures the error.[81] Improper remarks,[82] conduct,[83] and argument [84] by the prosecuting attorney, may, if not too flagrant, be cured by prompt action of the court and instructions to disregard them,[85] and the same rule has been applied to an improper statement by the sheriff in open court.[86] Errors in the admission of evidence may be of such damaging character as not to be curable by ordinary corrective proceedings.[87] If after verdict it appears that a witness for the state testified without being sworn and that the defendant had no knowledge of such irregularity until after verdict, a new trial must be allowed, though the error was purely accidental.[88]

§ 16. *Stay of proceedings after conviction.*[89]—Except in capital cases, an appeal does not in some states stay execution unless a certificate of probable cause is obtained.[89a] A reprieve by the governor is not a "proceeding" nullified or suspended by pendency of Federal habeas corpus or appeal therefrom.[89b] A premature

81. Thomas v. State [Ark.] 86 S. W. 404. Unauthorized instruction on conspiracy is cured by verdict of manslaughter. Moseley v. Commonwealth [Ky.] 84 S. W. 748. Instruction submitting an offense not included in indictment. State v. Sheets [Iowa] 102 N. W. 415. Failure to instruct on manslaughter is not prejudicial to one convicted of murder in the first degree. Nash v. State [Ark.] 84 S. W. 497. Argument on murder not prejudicial to one convicted of manslaughter. Where all the evidence made a case at least of manslaughter. Whit v. State [Ark.] 88 S. W. 284. Conviction of second degree murder cures error in charging on first degree. Thurman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 147, 86 S. W. 1014; Ricks v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 555, 87 S. W. 1036; State v. Craig [Mo.] 88 S. W. 641. The correctness of a charge on a higher grade of offense than that of which the defendant has been convicted becomes immaterial. Vickery v. State [Fla.] 38 So. 907. Instruction relative to assault with intent to ravish where the jury convicted only of simple assault. People v. Green [Cal. App.] 82 P. 544. Where a charge was expressly confined to murder in the third degree, and the evidence did not tend to show a case of murder in such degree, and the verdict was for murder in the second degree, held immaterial whether charge was legally accurate. Marlow v. State [Fla.] 38 So. 653. An erroneous instruction is rendered harmless by a manifestly correct verdict. People v. Taggart [Cal. App.] 82 P. 396. In homicide the jury having returned a verdict of guilty of manslaughter, assignments relating to instructions of the judge on the subject of murder are immaterial. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. Consideration of a refusal to charge that "if the jury believe the evidence, they will find the defendant not guilty" is unnecessary where the jury found defendant guilty. Smith v. State [Ala.] 39 So. 329. The verdict being for voluntary manslaughter, a charge that if deceased was the aggressor it was not sufficient provocation for the homicide, held not harmful to the accused, even if not authorized by the evidence or his statement. Goodman v. State [Ga.] 49 S. E. 922. Error in the admission of testimony to show malice in homicide is harmless where the conviction is of manslaughter. Moore v. State [Miss.] 38 So. 504. Where instructions are confined to offenses of a less degree than one found by the verdict, and contain nothing that would lead the jury to misinterpret them or misapply the evidence, and there is evidence to sustain the verdict, that the charges as applied to offenses of a lesser degree were inaccurate is harmless. Jordan v. State [Fla.] 39 So. 155. Where defendant was convicted of murder in the first degree, failure to charge on the question of manslaughter is harmless. State v. Teachey, 138 N. C. 587, 50 S. E. 232.

82. People v. Woods [Cal.] 81 P. 652.

83. Harmon v. Territory [Okl.] 79 P. 765.

84. Smith v. State [Ind.] 74 N. E. 983; State v. Rooke [Idaho] 79 P. 82; State v. Dunn [Wis.] 102 N. W. 935. Improper argument may be objected to by motion for mistrial or for an instruction, and where an appropriate instruction is asked and given, a subsequent motion for mistrial should not generally be entertained. Rawlins v. State [Ga.] 52 S. E. 1. Held not error to refuse to grant mistrial on account of an improper remark of the solicitor general in his argument to the jury, he having expressly withdrawn it, and the court having instructed the jury not to consider it. Goodman v. State [Ga.] 49 S. E. 922.

85. Mount v. Commonwealth [Ky.] 86 S. W. 707; Pratt v. State [Ark.] 87 S. W. 651. Offer to charge on subject and declination held to waive prejudicial argument. White v. State [Tex. Cr. App.] 85 S. W. 1140.

86. The action of the sheriff in stating before the jury that the mother of the accused was in court with a revolver was cured by an instruction that the jury should not allow the incident to have any effect upon their minds. Rawlins v. State [Ga.] 52 S. E. 1.

87. Erroneous impeachment of material witness, the evidence being closed. Nash v. State [Ark.] 84 S. W. 497. Allowing proof of continuance of highway obstruction till time of trial. Richardson v. State [Tex. Cr. App.] 85 S. W. 282.

88. State v. Taylor [W. Va.] 50 S. E. 247.

89. See 4 C. L. 75.

89a. Certificate should be granted unless appeal is clearly frivolous. People v. Gallanar, 144 Cal. 656, 79 P. 378. Supersedeas does not result from a mere certificate of probable cause in North Dakota where accused has neither given bail nor applied to the circuit judge for stay without it. Rev. Codes 1899, §§ 8335, 8340. State v. Sanders [N. D.] 103 N. W. 419.

89b. U. S. Rev. St. § 766. Rogers v. Peck, 26 S. Ct. 87.

appeal from the refusal of a bill of particulars does not disable the trial court from proceeding with the case.[89c]

§ 17. *Appeal and review. A. Right of review.*[90]—Review is allowable only where expressly authorized by statute.[91] It is no part of the "due process of law."[92] The general rule is that an acquittal, however accomplished, is final, and that appeal or error on behalf of the government does not lie,[93] but in some states an appeal or error proceedings on behalf of the state are provided.[94] Where defendant is discharged on the ground that the proof is insufficient to warrant a conviction, the state has no right of appeal.[95] A sheriff has no right of appeal from the taxation of costs.[96] A person upon whom an alternative sentence has been imposed, and who voluntarily complies with that portion of the sentence which is legal, cannot thereafter have the judgment of conviction reviewed.[97]

(§ 17) *B. The remedy for obtaining review.*[98]—Statutory modes of review, such as appeal or error, must be pursued where provided and applicable, and not certiorari, prohibition,[99] or habeas corpus.[1] Federal habeas corpus reaches cases only where some fundamental right under the Federal constitution is invaded.[2] A dismissal on the ground of the want of jurisdiction is not such an assumption of jurisdiction as to require its review by appellate proceedings.[3] In such a case mandamus may be had to require the court to hear and determine the cause.[4] Criminal cases are reviewed by error and not by appeal in Illinois,[5] but in the absence of a motion to dismiss, an appealed case will be heard and determined as though pending on writ of error.[6] The circuit court in South Dakota cannot review by man-

89c. State v. Dewey [N. C.] 51 S. E. 937.

90. See 4 C. L. 76.

91. People v. Carroll, 93 N. Y. S. 926. The right of appeal is exclusively of statutory origin. Cain v. State [Ind. App.] 74 N. E. 1102. The right of the state to prosecute error exists only in cases as to which it is expressly provided. Mick v. State [Ohio] 74 N. E. 284.

92. McCue v. Commonwealth [Va.] 49 S. E. 623.

93. Directed verdict. People v. Hill, 146 Cal. 145, 79 P. 845. Error does not lie on behalf of the state to review the action of the common pleas in reversing a conviction before a justice of the peace. Mick v. State [Ohio] 74 N. E. 284.

94. Commonwealth v. Williams [Ky.] 86 S. W. 553. Where defendant's motion for a new trial is granted after conviction because of objections to the argument of the district attorney, the state has no right of appeal. Rev. Code 1892, § 39, construed. State v. Thompson [Miss.] 38 So. 321.

95. State v. Willingham [Miss.] 38 So. 334. Under D. C. Code, § 935, an appeal lies by the United States from an order of the D. C. supreme court quashing an indictment on the ground that more than 9 months elapsed between the holding of the accused to bail and his indictment by the grand jury. United States v. Cadarr, 24 App. D. C. 143; United States v. Hayman, 24 App. D. C. 158.

96. Beverly v. State [Tex. Cr. App.] 84 S. W. 589.

97. Certiorari sued by such person should be dismissed, and a judgment overruling the certiorari and dismissing the petition will not be disturbed. Brown v. Atlanta [Ga.] 51 S. E. 507. Even if the recorder could not properly state in his answer to the certiorari that the fine had been paid, a statement therein to this effect could be acted on by the superior court in the absence of a traverse of the answer or a denial of the facts therein stated. Id.

98. See 4 C. L. 76.

99. Writ of prohibition to prevent prosecution for violation of alleged invalid city regulation requiring individuals to keep walks free from snow and ice denied, where petitioner had been prosecuted in only one case and where he could have a review by writ of error if convicted. But held proper to suspend trials until validity of regulation was determined. United States v. Scott, 25 App. D. C. 88.

1. Welty v. Ward [Ind.] 73 N. E. 889; Commonwealth v. Keeper of County Prison, 26 Pa. Super. Ct. 191; Ex parte Knudtson [Idaho] 79 P. 641; Ex parte Terry [Kan.] 80 P. 586; Ex parte Russell [Wash.] 82 P. 290. Federal courts will not usually discharge a prisoner held under conviction by a state court where he has a remedy by appeal to the supreme court of the United States. In re Dowd, 133 P. 747. They allow the writ in discretion in such cases. Brown v. Urquhart, 139 F. 846.

2. Rogers v. Peck, 26 S. Ct. 87.

3. Where a circuit court dismisses an appeal from a municipal court on the ground that it had no jurisdiction, as no writ of error had been issued in the cause, it is not merely a determination of a question of final appellate practice in the circuit court, but such dismissal is a refusal to exercise a jurisdiction conferred by law. State v. Wills [Fla.] 38 So. 289.

4. State v. Wills [Fla.] 38 So. 289.

5, 6. Weare Commission Co. v. People, 111 Ill. App. 116.

damus the action of a committing magistrate in refusing to punish a witness for contempt.[7]

(§ 17) *C. Adjudications which may be reviewed.*[8]—The judgment must be a finality in the trial court.[9] Intermediate orders are not generally appealable,[10] except with final judgment.[11] An appeal from a void judgment of conviction will be dismissed.[12] A judgment of guilty of criminal contempt may be reviewed on error in Massachusetts.[13]

(§ 17) *D. Courts of review and their jurisdiction.*[14]—Appeals in felony cases lie only to the supreme court in Missouri, but an appeal taken to the wrong court will be transferred.[15] The limitations placed upon appeals to the New York court of appeals by the New York constitution have no application to criminal cases.[16] The supreme court of Florida has not appellate jurisdiction in cases of conviction of misdemeanor in criminal courts of record.[17] The Federal constitution or a treaty must be directly brought in issue to authorize a review in the supreme court of a judgment of the district court of Porto Rico,[18] but a motion in arrest because the grand jury was not selected as required by Federal law is one in which an act of congress is drawn in question.[19] A plea of immunity from arrest as a United States senator involves the Federal constitution and authorizes direct review by error from the district to the supreme court.[20]

(§ 17) *E. Procedure to bring up the cause.*[21]—Appeals are generally, though not universally,[22] matters of right on compliance with statutes granting them,[23] while writs of error,[24] certiorari, and the like, are grantable within the judicial discretion of the court or judge to whom the application is made, depending on the

7. Farnham v. Coleman [S. D.] 103 N. W. 161.

8. See 4 C. L. 76.

9. Refusal to quash writ of habeas corpus to bring accused from prison for trial is not a final judgment and cannot be reviewed on appeal on error. Rigor v. State [Md.] 61 A. 631. Until there has been a judgment finally disposing of the case in the trial court, the supreme court has no jurisdiction to pass upon an assignment of error complaining of the striking of a plea of former jeopardy filed by accused. McElroy v. State [Ga.] 51 S. E. 596.

10. Exception lies to the denial of a motion to quash an indictment. Commonwealth v. Hall, 23 Pa. Super. Ct. 104. Refusal to transfer a cause for disqualification of the judge affects a substantial right and is appealable. People v. Haas, 93 N. Y. S. 790. No appeal lies from refusal to appoint a referee to take depositions for use on motion to quash. People v. Carroll, 93 N. Y. S. 926. The appellate jurisdiction of the supreme court of Louisiana is confined to final judgments. Order refusing commission to inquire into sanity, made after judgment affirmed, not appealable. State v. Chretien [La.] 38 So. 27. A special appeal from an interlocutory order in a criminal case will not be allowed by the court of appeals of the District of Columbia except in a case of exigency. In re Gassenheimer, 24 App. D. C. 312. Such appeal denied when order was one denying a transfer of the case on the ground of prejudice of the judge as shown by his conduct in a former trial, when the case could have transferred only to a court presided over by a justice who was disqualified because he was prosecuting attorney when the indictment was found. Id.

11. An appeal from refusal of a bill of particulars can be taken only in case final judgment is against defendant. Cannot be taken at once. State v. Dewey [N. C.] 51 S. E. 937.

12. Walker v. State [Ala.] 39 So. 242.

13. Rev. Laws, c. 193, § 9, and c. 156, § 3. Hurley v. Commonwealth [Mass.] 74 N. E. 677.

14. See 4 C. L. 77.

15. State v. Oldenhage, 185 Mo. 618, 84 S. W. 873.

16. People v. Gaffey [N. Y.] 74 N. E. 836.

17. Walden v. State [Fla.] 39 So. 151.

18. Ground of motion in arrest that indictment "did not state an offense under the statutes of the United States" insufficient. Amado v. U. S., 195 U. S. 172, 49 Law. Ed. 145.

19. Criminal case. Rodriguez v. U. S., 198 U. S. 156, 49 Law. Ed. 994.

20. Burton v. U. S., 196 U. S. 283, 49 Law. Ed. 482.

21. See 4 C. L. 78.

22. Federal court will not allow an appeal from its refusal of habeas corpus to release one convicted in state court where the supreme court of the United States has already decided against the existence of a federal question. Ex parte Look, 134 F. 308.

23. A notice of appeal in which the name of the appealing party is inserted in the body thereof is sufficient. Statute requires notice to be signed by party. Laws 1902, p. 580, c. 183, § 16. State Board of Health v. McCue [N. J. Law] 60 A. 1094.

24. In Virginia it is the duty of the supreme court of appeals to deny a writ of error in a criminal case, when of opinion that the judgment is plainly right. Code § 3466 construed. McCue v. Commonwealth

showing made in the petition, assignments, or other necessary application.[25] The suing out of a writ of error or review is a new suit,[26] while an appeal is the continuation of the action, which is unaffected by legislation enacted during its pendency.[27] Summons in error may be waived by the prosecuting attorney,[28] but some notice of appeal is jurisdictional,[29] and it should show who appeals and that he has a right so to do,[30] and must be filed with the proper officer.[31] Review must be sought or taken within the time limited by statute,[32] but an appeal within time is not affected by the adjournment of court below before it was taken.[33] A clerical error in calling the judgment appealed from "an order" is immaterial.[34-37]

A recognizance on appeal [38] in the statutory form is necessary,[39] which in Texas must state the crime of which defendant was convicted,[40] the punishment inflicted,[41] except in case of misdemeanors,[42] place of holding court,[43] and the term to which the appeal is taken.[44] A defective recognizance cannot be supplied by a new one nunc pro tunc.[45]

(§ 17) *F. Perpetuation of proceedings in the "record." What must appear, and whether by record proper or bill of exceptions.*[46]—What must appear to authorize a review of particular errors is elsewhere treated.[47] Those matters which belong to the record proper must appear thereby,[48] and such matters need not be and cannot be otherwise shown;[49] but all matters not part of the record proper

[Va.] 49 S. E. 623. [In this case all the authorities on this point decided in Virginia since 1854 are collected].

25. The petition for a writ of error in Maryland must be accompanied by sufficient assignments of of error. Assignments held too vague for consideration. McCaddin v. State [Md.] 60 A. 474.

26. State v. Bringgold [Wash.] 82 P. 132.

27. An appeal filed Sept. 12, 1902, is not affected by the amendment to Acts 1901, p. 506, c. 247, § 78, approved March 9, 1903. Bailey v. State, 163 Ind. 165, 71 N. E. 655.

28. Nichols v. State, 71 Ohio St. 335, 73 N. E. 220.

29. State v. Salyers [Iowa] 103 N. W. 954; Mason v. State [Tex. Cr. App.] 87 S. W. 699.

30. Notice of appeal averring that "I, George B. McIntyre, Prosecuting Attorney of the 52nd. Judicial Circuit, have appealed," etc., held to sufficiently show that the state appealed. State v. Sutherlin [Ind.] 75 N. E. 642.

31. Under Burns' Ann. St. 1901, § 1962, providing that an appeal by the state in a criminal case shall stand for trial after filing the transcript and notices of appeal, requires that the notices be filed with the clerk of the appellate tribunal, and not with the clerk of the court from which the appeal was taken. State v. Sutherlin [Ind.] 75 N. E. 642.

32. Six months in criminal cases. § 1601, Cobbey's Ann. St. 1903. Kock v. State [Neb.] 102 N. W. 768. Judgment of superior court overruling certiorari affirmed when application for certiorari was too late. White v. State [Ga.] 51 S. E 505.

33. State v. Fairbanks [La.] 39 So. 443.

34, 35, 36, 37. People v. Canepi, 181 N. Y. 398, 74 N. E. 473.

38. See 4 C. L. 79.

39. Cain v. State [Ind. App.] 74 N. E 1102. Use of "in this court" for "in this cause" is not fatal. Cassens v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 708, 88 S. W. 229. A statement that defendant has "given notice of appeal to the county court" sufficiently states that he has appealed. Holland v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 640, 88 S. W. 361.

40. A recognizance stating the specific offense instead of merely calling it a misdemeanor is bad. Hart v. State [Tex. Cr. App.] 84 S. W. 592; Smith v. State [Tex. Cr. App.] 86 S. W. 333.

41. Hart v. State [Tex. Cr. App.] 84 S. W. 592; Smith v. State [Tex. Cr. App.] 86 S. W. 333; Thomas v. State [Tex. Cr. App.] 87 S. W. 353.

42. An appeal from a conviction of a misdemeanor will be dismissed, where the recognizance does not state the amount of punishment assessed against appellant. Code Cr. Proc. 1895, art. 887, considered. Martin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 642; Dove v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1028, 80 S. W. 646; Fortenberry v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1028, 89 S. W. 646.

43. Russell v. State [Tex. Cr. App.] 84 S. W. 589.

44. Smith v. State [Tex. Cr. App.] 78 S. W. 937.

45. Smith v. State [Tex. Cr. App.] 86 S. W. 333.

46. See 4 C. L. 78.

47. See post, this section.

48. The form of verdict prepared in the jury room has no significance and is no part of the record. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490. Where a cause is brought up from an alleged conviction and the record contains no copy of the judgment or recital of what it was, the appeal will be dismissed. Brown v. Territory [Okl.] 82 P. 647.

49. Mittimus cannot supply want of recital of final judgment. Ryan v. People, 111 Ill. App. 484. The supreme court of Georgia will not interfere with the order of the judge of the superior court refusing to sanction a writ of certiorari from a judgment

must appear by bill of exceptions or its equivalent,[50] and where there is no bill of exceptions,[51] or it is not properly in the record,[52] matters necessary to be presented thereby cannot be reviewed, only the record proper in such case being presented for review.[53] Journal entries control over recitals in the bill of exceptions.[54]

Making, settling and approving.[55]—The bill of exceptions or like memorial of the proceedings must be approved by the trial judge, and filed within the statutory or allowed period,[56] and the bill must show such facts.[57] The bill must be considered with explanations placed thereon by the judge and accepted by defendant.[58] It is no longer the practice in most states to make up the bills of exceptions during the progress of the trial. In some states provision is made for authentication by affidavit of bystanders if the judge refuses to sign.[59]

Under the Georgia practice, the motion for new trial,[60] when approved by the trial court, is used as a substitute for bill of exceptions, all matters set out in the motion being made of record by the approval.[61] The short bill of exceptions is

of conviction in a county court where the record fails to show that the petitioner filed the affidavit required by Pen. Code 1895, § 765. King v. State [Ga.] 50 S. E. 64. The appellant's "statement of the case on appeal" has no place in the record and will not be considered. State v. Dewey [N. C.] 51 S. E. 937.

50. Motion to quash. State v. Tooker [Mo.] 87 S. W. 487. Motion to quash based on facts outside the record proper. Commonwealth v. Mock, 23 Pa. Super. Ct. 51. Motion to disqualify judge. State v. Faulkner, 185 Mo. 673, 84 S. W. 967. Affidavits in support of motion for new trial for misconduct of juror. Osburn v. State [Ind.] 73 N. E. 601. Argument by prosecuting attorney. State v. Williams, 186 Mo. 128, 84 S. W. 924. Instructions. Osburn v. State [Ind.] 73 N. E. 601; State v. McCoy [Kan.] 79 P. 156. Ruling on challenge to array. Ullman v. State [Wis.] 103 N. W. 6. Limitation as to time to try case, and failure to compel witness to answer. Ramon v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 611, 87 S. W. 1043. In order that an appeal from county court be heard de novo in circuit, the evidence must be brought up by bill. Holmes v. Robertson County Court [Ky.] 89 S. W. 106. Affidavits and other papers, which are not a part of the record proper, cannot be considered by the appellate court, even though they are copied into the transcript, unless they are incorporated in the bill of exceptions. Reyes v. State [Fla.] 38 So. 257.

51. State v. Oldenhage, 185 Mo. 618, 84 S. W. 873. An unsigned bill of exceptions cannot be considered. Long v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 559, 88 S. W. 203,

52. Where the bill of exceptions has been stricken from the transcript, no errors assigned can be considered except those which have basis in the record proper. Lamb v. State [Fla.] 38 So. 906.

53. State v. Oldenhage, 185 Mo. 618, 84 S. W. 873; State v. Emerson [Mo.] 87 S. W. 469.

54. Time of entering plea. State v. Moon [Kan.] 80 P. 597. Entries required to be made in the record proper of the trial cannot be contradicted by the bill of exceptions. Date of trial and verdict rendered. Hanley v. State [Fla.] 39 So. 149. Cannot be questioned on habeas corpus. Id.

55. See 4 C. L. 80.

56. Bill to denial of new trial must be filed during term unless extended. State v. Miller [Mo.] 88 S. W. 607. Where the case comes up by strict bill of exceptions and the exceptions are not signed or sealed by the judge, affirmance must follow. State v. Leschine [N. J. Law] 60 A. 29. There must be an order filing it or making it part of the record. Holmes v. Robertson County Ct. [Ky.] 89 S. W. 106. Where the transcript on appeal shows that the bill of exceptions was not presented to the trial judge for authentication within the time allowed therefor after the expiration of the term of court, such bill of exceptions is a nullity. Lamb v. State [Fla.] 38 So. 906. The time within which a defendant granted "until" January 5th to have his bill of exceptions signed by the trial judge must do so expires midnight, January 4th. Richardson v. State [Ala.] 39 So. 12.

57. Authentication set out held sufficient, though not in language of statute. Case made. Hill v. Territory [Okl.] 79 P. 757. Papers filed with a so-called "skeleton bill" stricken. Battier v. State [Tenn.] 86 S. W. 711. Where it does not affirmatively appear that service of a bill of exceptions was made or waived after the certificate of the presiding judge was attached, the writ of error must be dismissed upon motion. Cooper v. State, 121 Ga. 578, 49 S. E. 707, following Bush v. Keaton, 65 Ga. 296.

58. Pool v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 616, 88 S. W. 350.

59. The statute permitting this is not available where the judge made a return unsatisfactory to appellant. Johnson v. People [Colo.] 80 P. 133; Moree v. State [Tex. Cr. App.] 83 S. W. 1117. Affidavit held not sufficient. McLaughlin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 296, 87 S. W. 158. The affidavit of three bystanders is necessary in Texas, one being insufficient. Taylor v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 639, 87 S. W. 1039.

60. See 4 C. L. 81.

61. The only special assignment of error in the motion for a new trial, being upon the admission of evidence and it not appearing from the motion what objection was made thereto, the assignment of error cannot be considered. Harris v. State [Ga.] 51 S. E. 596. Where an assignment of error depends on a recital of facts shown by a note of the

proper only when the judgment decree or verdict has necessarily been controlled by the ruling, order, decision or charge complained of.[62]

Where the marginal notes on *the transcript* are sufficient to serve the purpose intended, the appeal will not be dismissed because they are not as full as they ought to be.[63]

The statement of facts [64] must be approved and filed [65] within the statutory or allowed period.

Limitation of review to matters in the record.[66]—Except as to those jurisdictional matters which the record in most states is required to show,[67] the record is construed against the party alleging error,[68] and every reasonable presumption is in favor of the correctness of the proceedings below, and unless the record shows error this presumption will prevail,[69] and the certified record is conclusive as to matters contained therein.[70] Accordingly, to entitle appellant to review a ruling, it must

presiding judge and by another part of the bill of exceptions to be substantially incorrect, the assignment will be disregarded. Henderson v. State [Ga.] 51 S. E. 764. Ground of motion for new trial alleging error in admission of evidence but not setting out the evidence objected to will not be considered. Vinson v. State [Ga.] 52 S. E. 79. A motion for a new trial that is not approved by the trial judge will not be considered on appeal. Green v. State [Ga.] 50 S. E. 53.

62. Henderson v. State [Ga.] 51 S. E. 764.

63. State v. Sutherlin [Ind.] 75 N. E. 642.

64. See 4 C. L. 81.

65. Hall v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 707, 88 S. W. 244.

66. See 4 C. L. 82.

67. See ante, this section, The Record.

68. A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse and the other sustain the judgment, the latter will be adopted. Dickens v. State [Ala.] 39 So. 14.

69. Van Meer v. Territory [Okl.] 79 P. 264; Smiley v. Territory [Okl.] 81 P. 433; Mosely v. Commonwealth [Ky.] 84 S. W. 748; Johnson v. State [Ark.] 88 S. W. 906; Burnett v. State [Ark.] 88 S. W. 956. Where a sentence is imposed to begin in the future on the expiration of prior sentence imposed by another tribunal, it will be presumed in support of the judgment, there being no evidence to the contrary, that the court had before it the record of the prior conviction as a basis for its action. Rigor v. State [Md.] 61 A. 631. On appeal the judgment roll alone instructions will not reverse unless they would be erroneous under any state of the evidence. People v. Wong Fook Sam, 146 Cal. 114, 79 P. 848. Presumed that peremptory challenge was exercised by the state before juror was sworn in chief. Daniels v. State [Ark.] 88 S. W. 844. Presumed that overruled application for continuance was a second application. Sliger v. State [Tex. Cr. App.] 88 S. W. 243. On a silent record, allegel erroneous rulings cannot be reviewed. State v. Packenham [Wash.] 82 P. 597. On appeal from an order, regular on its face, committing one to the reform school, it is presumed, on a silent record, that all proceedings prior to the entry of the order were regular. Id. Errors not apparent from the bill of exceptions will not be considered. State v. Lawrence [Nev.] 82 P. 614. On appeal, no presumption of error will be indulged in to invalidate judicial action. It will be presumed that court's action in excusing member of grand jury after latter was impaneled was correct. Posey v. State [Miss.] 38 So. 324. It is presumed on appeal that the trial judge ascertained prior to the organization of the jury that the jurors possessed legal qualifications. Carwile v. State [Ala.] 39 So. 220. Where, on a trial for homicide, the state showed a previous difficulty between defendant and deceased, and the court refused to permit the defendant to show the details thereof, and, although the jury had retired, refused to hear what counsel was going to ask the witnesses, the state could not, on appeal, urge that defendant should not have the benefit of an assignment of error predicated on the refusal of the court to admit the offered evidence because the record did not show what the details thereof were. Brown v. State [Miss.] 37 So. 957. Record held to show no denial of right of counsel on preliminary hearing, accused having been informed of his rights and given opportunity and having proceeded at once to a hearing in order to plead guilty and be released on bail. People v. Gilhooley, 95 N. Y. S. 636. A motion for a new trial for denial of defendant's request to poll the jury is no proof of the denial of such request. Cable v. State [Miss.] 38 So. 98. An appellate court will assume that a question propounded to a witness was proper, until it is made to appear by a statement of the question in the record, objection thereto and exception taken to an unfavorable ruling thereon. Caldwell v. State [Fla.] 39 So. 188. Where the bill of exceptions has been stricken from the transcript of the record, the appellate court cannot consider assignments of error which have a basis only in the bill of exceptions so stricken. Bardwell v. State [Fla.] 38 So. 511. Whether or not a question asked a witness was proper held not ascertainable from the record, hence not open to review. Campbell v. State [Ga.] 51 S. E. 644. Assignments of error cannot be considered when there is nothing in the transcript upon which they can be predicated. Reyes v. State [Fla.] 38 So. 257.

70. Where the record shows that counsel consented to exhibits going to jury room, he cannot insist on appeal that he objected. People v. Rimieri, 180 N. Y. 163, 72 N. E. 1002.

affirmatively appear that such ruling was made,[71] or the proceeding had,[72] of which complaint is made, and such facts as show that it was error,[73] and the objection or exception must be shown,[74] with the grounds.[75]

Setting out evidence or statement of facts.[76]—A statement of facts or other showing of the evidence is necessary to a review of the sufficiency of the evidence,[77] admission of evidence,[78] examination of witnesses,[79] giving or refusal of instructions,[80] denial of new trial,[81] rulings on motions,[82] argument or conduct of counsel,[83]

Matters not contained in the bill of exceptions cannot be considered. Bill cannot be impeached by affidavit of counsel. Moree v. State [Tex. Cr. App.] 83 S. W. 1117. Affidavits attacking the statement of facts as incorrect cannot be considered where no jurisdictional fact is raised. Magruder v. State [Tex. Cr. App.] 84 S. W. 587. On appeal the copy of the indictment as it appears in the record imports absolute verity and the court cannot resort to anything dehors the record for the purpose of contradicting it. Terrell v. State [Ind.] 75 N. E. 884. If the copy of the indictment in the record does not correspond to the original, the correction should be secured by means of a certiorari. Id.

71. Showing that judge failed to sign instructions held sufficient. Jones v. State [Tex. Cr. App.] 85 S. W. 1075.

72. Misconduct of prosecuting attorney in argument must be shown by record to be available. State v. Price [Mo.] 84 S. W. 920. Review on theory that jurors smelled of bottles of liquor siezed from defendant's place refused because fact not shown of record. State v. Schmidt [Kan.] 80 P. 948. Exception to refusal of a new trial will not be reviewed where the record does not show any motion made. State v. Gadsden, 70 S. C. 430, 50 S. E. 16. The ruling of a trial court denying a motion to quash an indictment must be embraced in the record proper, in order that an appellate court may consider an assignment of error based thereon. Houston v. State [Fla.] 39 So. 468.

73. State v. Scholfield [N. D.] 102 N. W. 878; State v. Gearhart [N. D.] 102 N. W. 880. In the absence of statement of facts and bill of exceptions, questions of fact cannot be considered. Lewis v. State [Tex. Cr. App.] 80 S. W. 621. Unless the purpose of testimony excluded is obvious, the bill of exceptions should state it, that the court may intelligently pass on the objection to it. Upton v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 687, 88 S. W. 212. Evidence not shown to be not res gestae will not be reversed. Steinke v. State [Tex. Cr. App.] 86 S. W. 753; Gray v. State [Tex. Cr. App.] 86 S. W. 764.

74. Exceptions to instructions must appear. Ullman v. State [Wis.] 103 N. W. 6; Barker v. State [Neb.] 103 N. W. 71. Error in overruling motion for special venire. State v. Price, 186 Mo. 140, 84 S. W. 920.

75. Grounds of objection to evidence must be shown. Bollen v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 148, 86 S. W. 1025.

76. See 4 C. L. 84.

77. State v. Scholfield [N. D.] 102 N. W. 878; Red v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1031, 89 S. W. 275; Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1030, 88 S. W. 275; Jones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1030, 89 S. W. 275; Holman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1030, 89 S. W. 275; Price v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1030, 89 S. W. 416; Edwards v. State [Tex. Cr. App] 13 Tex. Ct. Rep. 1030, 89 S. W. 416; Curlin v. State [Tex. Cr. App.] 89 S. W. 416; Chumley v. State [Tex. Cr. App.] 89 S. W. 416; State v. Behan [La.] 38 So. 20; State v. Richardson, 113 La. 678, 37 So. 599; Bailey v. State [Tex. Cr. App.] 84 S. W. 588; Lovett v. State [Tex. Cr. App.] 84 S. W. 590; Erwin v. State [Tex. Cr. App.] 84 S. W. 590; Tignor v. State [Tex. Cr. App.] 84 S. W. 591; Hooks v. State [Tex. Cr. App.] 84 S. W. 592; Barre v. State [Tex. Cr. App.] 84 S. W. 592; Reeves v. State [Tex. Cr. App.] 84 S. W. 593; Ozee v. State [Tex. Cr. App.] 84 S. W. 598; Hixon v. State [Tex. Cr. App.] 85 S. W. 10; Jackson v. State [Tex. Cr. App.] 85 S. W. 10; Goynes v. State [Tex. Cr. App.] 85 S. W. 1073; Lockhart v. State [Tex. Cr. App.] 88 S. W. 350. Even in a capital case. Tanksley v. State [Tex. Cr. App.] 86 S. W. 753.

78. Adkins v. State [Tex. Cr. App.] 85 S. W. 17; Langran v. State [Tex. Cr. App.] 85 S. W. 273. Where the character or relevancy of evidence offered is not shown by the bill of exceptions, its rejection cannot be reviewed, unless it is clearly relevant. Richardson v. State [Tex. Cr. App.] 85 S. W. 282; Starr v. State [Tex Cr. App.] 13 Tex. Ct. Rep. 104, 86 S. W. 1023; Ellington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 634, 88 S. W. 361. A bill of exceptions to the exclusion of impeaching evidence must show what the witness whose impeachment is offered testified to. Hanna v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 472, 87 S. W. 702; Reyes v. State [Tex. Cr. App.] 88 S. W. 245; The refusal to rule out evidence cannot be considered where such evidence is not set out literally or in substance. Whittington v. State, 121 Ga. 193, 48 S. E. 948.

79. Exception to the overruling of a question cannot be considered in the absence of a showing as to what the answer would have been. Morris v. Commonwealth [Ky.] 84 S. W. 560.

80. Commonwealth v. Mock, 23 Pa. Super. Ct. 51; Jackson v. State [Tex. Cr. App.] 84 S. W. 827; Harris v. State [Tex. Cr. App.] 85 S. W. 1152; Ruiz v. State [Tex. Cr. App.] 88 S. W. 808. Instructions and evidence must appear. Commonwealth v. Mock, 23 Pa Super Ct. 51; James v. State [Wis.] 102 N. W. 320. Where the punishment assessed is such as to force the conclusion that the court charged upon the cumulative punishment authorized in case there have been prior convictions, and the indictment fails to sufficiently charge such convictions, review may be had without a statement of facts. Kinney v. State [Tex. Cr. App.] 84 S. W. 590. Oral charge of court not being set out, the correctness of a charge given at the request

and the statement or bill of exceptions must affirmatively show that it contains all that is necessary to review.[84]

(§ 17) *G. Practice and procedure in reviewing court. Assignments, abstracts, briefs, etc.*[85]—In some states, in criminal cases, all errors apparent on the record must be considered, though there are no assignments.[86] Generally, however, errors must be specifically assigned,[87] and a general assignment to several rulings,[88] or a ruling embodying several matters will be overruled if any of the matters were correctly disposed of. Unless apparent the assignment must show wherein the error consists,[89] and set out the matters complained of and the rule of law claimed to be violated.[90] An assignment of error is not defective because signed by the proper prosecuting attorney instead of the attorney general; though the latter had exclusive charge of the case after reaching the supreme court.[91] In some states neither brief nor argument is necessary; but the general rule is that in the absence of a brief, the court will look only to the jurisdiction of the court, the sufficiency of the indictment, and the regularity of the judgment,[92] and that exceptions and assignments[93] not referred to in the brief or argument will be treated as aban-

of the state cannot be reviewed. Weaver v. State [Ala.] 39 So. 341.

81. Commonwealth v. Mock, 23 Pa. Super. Ct. 51; Jackson v. State [Tex. Cr. App.] 84 S. W. 827; Day v. State [Tex. Cr. App.] 84 S. W. 829; Randolph v. State [Tex. Cr. App.] 85 S. W. 7; Thrash v. State [Tex. Cr. App.] 85 S. W. 273; Langran v. State [Tex. Cr. App.] 85 S. W. 803; Shaw v. State [Tex. Cr. App.] 87 S. W. 150. It should appear from the record that on the hearing of a motion for a new trial on the ground of newly-discovered evidence that the affidavits in support thereof were offered or read. People v. Fitzgerald [Cal. App.] 82 P. 555.

82. Denial of continuance. Parker v. State [Tex. Cr. App.] 84 S. W. 822; Hall v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 707, 88 S. W. 244; Martinus v. State [Tex. Cr. App.] 84 S. W. 827; Kuehn v. State [Tex. Cr. App.] 85 S. W. 793. If the application and affidavits are not abstracted, refusal will not be reviewed. Zipperian v. People [Colo.] 79 P. 1018. Action of the court in overruling a motion to quash will not be reversed where the bill of exceptions shows no evidence to support the averments of the motion. Smith v. State [Ala.] 39 So. 329.

83. Alleged improper statements in argument will not be reviewed unless objected to on the trial, and the statements and objections thereto are embodied in the bill of exceptions. Connelly v. State [Neb.] 104 N. W. 754.

84. The lack of an affirmative statement that the bill of exceptions contains all the evidence is not fatal if it clearly appears from the recitals that it does. Clyatt v. U. S., 197 U. S. 207, 49 Law. Ed. 726. An assignment based on refusal to find for accused on all the evidence need not be considered when the record does not purport to contain all the evidence. Tubins v. District of Columbia, 21 App. D. C. 267.

85. See 4 C. L. 84.

86. The court considers a case on its merits but warns counsel that it shall not be regarded as a precedent. People v. Peck [Mich.] 103 N. W. 178.

87. Review confined to exceptions and assignments. State v. Miller [N. J. Err. & App.] 60 A. 202. Where the grounds of objection to a charge are specifically pointed out it will be presumed there are no others to urge. Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 718, 88 S. W. 238. No assignments of error being based on exceptions shown by record, such exceptions need not be considered. Tubins v. District of Columbia, 21 App. D. C. 267.

88. Osburn v. State [Ind.] 73 N. E. 601. An assignment of error upon the admission of specified testimony is not well taken, when part of it is admissible. Murphy v. State [Ga.] 50 S. E. 98.

89. Territory v. Clark [N. M.] 79 P. 708. Assignment of error to overruling demurrer should indicate the grounds on which the demurrer was based. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526.

90. Assignments to rulings on evidence must set out questions or offers the ruling of the court thereon, and the testimony or evidence admitted if any, together with a reference to the page of the paper-book where the matter may be found. Commonwealth v. Powell, 23 Pa. Super. Ct. 370; McGregor v. U. S. [C. C. A.] 134 F. 187. Application and ruling on motion for bill of particulars must appear. Commonwealth v. Powell, 23 Pa. Super. Ct. 370. Assessments which do not refer to the page of the record will not be considered. People v. Sanders [Mich.] 102 N. W. 959. An assignment of error that "the court erred in giving in charge to the jury, as shown by the general charge of the court, which is of file and made a part of the record in this case, to which reference is prayed, the rules of law governing the rights of parties when engaged in mutual combat," is too general, vague, and indefinite to be considered. The charge excepted to should have been set out in the motion and specific error assigned thereon. Green v. State [Ga.] 50 S. E. 530.

91. State v. Sutherlin [Ind.] 75 N. E. 642.

92. Picklesiner v. Territory [Okl.] 79 P. 777. The rule is relaxed only in the interests of justice. State v. Sanders [N. D.] 103 N. W. 419.

93. O'Donnell v. People, 110 Ill. App. 250. An assignment of error not referred to in

doned unless the error is so glaring as to need no argument.[94] The assignment or brief should refer to the portion of the record where the error lies,[95] and point out the exact defect. It is improper to raise on oral argument points not discussed in the briefs.[96] Where no abstract of the evidence is filed in Iowa rulings on evidence will not be considered.[97]

Dismissal,[98] if timely moved,[99] will be granted for failure properly bring up the case,[1] or for want of jurisdiction [2] or delay in bringing argument,[3] or filing briefs,[4] and where accused flees from justice.[5] An appeal regularly taken will not be dismissed because no appearance has been entered or brief filed.[6] Appeal from the judgment on habeas corpus to admit to bail will be dismissed where appellant gives bail and is enlarged.[7] Dismissed appeals may be reinstated on proper application and showing.[8]

Hearing on review and rehearing.[9]—It was not error to hear the argument on certiorari, reserving judgment thereon and in the interval between the hearing and judgment, consider and dispose of affidavits submitted in support of the traverse to the answer of the trial judge.[10]

Interlocutory and provisional proceedings.[11]

(§ 17) *H. Scope of review.*[12]—Review is confined to matters made of record,[13] and properly assigned and argued,[14] and which have been preserved by necessary and proper objection and exception,[15] but some states have relaxed the rule

the brief of the plaintiff in error will be treated as abandoned. Tarver v. State [Ga.] 51 S. E. 501. Ground of motion for new trial alleging existence of newly-discovered evidence, not insisted upon, will be treated as abandoned. Williams v. State [Ga.] 51 S. E. 577; Lamb v. State [Fla.] 38 So. 906. Where one of the errors assigned is based on the overruling of a motion for a new trial, and said motion consists of a number of grounds, only such grounds as are argued will be considered. Spires v. State [Fla.] 39 So. 181.

94. Questions abandoned in the reply brief will not be considered. People v. Kelly, 146 Cal. 119, 79 P. 846. Where there are assignments of error in a criminal case which are not argued, but merely insisted upon in the brief of plaintiffs in error, the appellate court is not required to do more than read the record carefully in connection with such assignments of error, and if it discovers no glaring error prejudicial to the plaintiffs in error, under such assignments, the judgment will not be reversed because of such assigned errors. Jackson v. State [Fla.] 38 So. 599.

95. Commonwealth v. Powell, 23 Pa. Super. Ct. 370.

96. People v. Modina, 146 Cal. 142, 79 P. 842.

97. State v. Moore [Iowa] 103 N. W. 992.

98. See 4 C. L. 85.

99. Motions to strike parts of the record and to dismiss the appeal come too late after submission of the case. Standard Oil Co. v. Commonwealth, 26 Ky. L. R. 142, 80 S. W. 1150. Motion to dismiss for lack of affidavit of appeal is too late after submission on merits. State v. Miller [Mo.] 88 S. W. 607.

1. Paper book containing neither statement of question involved or assignments of error. Commonwealth v. Kreinbrook, 23 Pa. Super. Ct. 511. Assignments in petition for writ of error held too vague for consideration. McCaddin v. State [Md.] 60 A. 474. Failure to file transcript at proper time. State v. Caton [Kan.] 80 P. 938. Alteration of record. State v. Franceschi [Mont.] 81 P. 12. Whenever it appears that the clerk of the trial court has failed to transmit to the supreme court, within the time prescribed by law, the bill of exceptions and transcript, and that the plaintiff in error or his attorney "has been the cause of the delay by consent, direction or procurement of any kind," the writ of error will be dismissed. Civ. Code 1895, §§ 5571, 5572. Wilson v. State [Ga.] 52 S. E. 81. Plaintiff in error or her counsel, held under the facts, responsible for delay, and writ dismissed. Id.

2. Walden v. State [Fla.] 39 So. 151.

3. People v. Addes, 45 Misc. 314, 92 N. Y. S. 389.

4. Rule requiring dismissal for delay in filing brief not relaxed where excuse is press of other business. State v. Franceschi [Mont.] 81 P. 12 Failure to serve briefs on attorney general as required by statute though service has been made on county prosecutor. Wilhelm v. State [Wyo.] 81 P. 882.

5. State v. Scott [Kan.] 79 P. 126.

6. Figueroa v. Territory [Ariz.] 80 P. 328; Noftz v. Territory [Ariz.] 80 P. 329; Thornquist v. Territory [Ariz.] 80 P. 329.

7. Ex parte Elmore [Tex. Cr. App.] 88 S. W. 347.

8. An appeal dismissed for imperfect record will not be reinstated where no attempt has been made to perfect it. Cleveland, etc., R. Co. v. State [Ind. App.] 74 N. E. 1113.

9. See 4 C. L. 86.

10. Cobb v. State [Ga.] 51 S. E. 592.

11, 12. See 4 C. L. 86.

13. See ante, § 17F. State v. Cummings [Mo.] 88 S. W. 706.

14. See ante, § 17G.

15. See ante, § 14, Saving questions for review.

by requiring review of apparent error.[16] Where there is no bill of exceptions or other memorial of the proceedings required to be shown thereby, nothing is reviewed but the record proper.[17] Generally speaking an appeal from the judgment takes up all intermediate orders and rulings.[18] Review is restricted to the rulings below,[19] and to the theory on which the action below was based, but a correct decision will not be reversed because based on a wrong reason. Gratuitous questions are not decided and assignments involving questions that have been many times decided will not be considered or discussed.[21] After final judgment of conviction, the jurisdiction of the trial court cannot be questioned by an inquiry into the manner in which the accused was brought before it.[22] Whether accused could have had a fair trial is to be determined from the record on appeal from order denying change of place of trial.[23] The decision below is of great weight but not controlling.[24]

Rulings on matters within the discretion of the trial court, such as rulings on applications to change venue [25] or continue the case,[26] rulings on pleadings,[27] the course and conduct of the trial in general,[28] selection and qualifications of jurors,[29] rulings

16. In Pennsylvania, on conviction of murder in the first degree, the court reviews the law and the evidence to determine the justice of the conviction. Comonwealth v. Danz, 211 Pa. 507, 60 A. 1070. Rule relaxed in capital cases. Barker v. State [Neb.] 103 N. W. 71.

17. See ante, § 17F. Where the evidence taken on the trial is not used on the hearing of a motion for new trial it cannot be incorporated into the case made for consideration by the supreme court on appeal from the denial of the motion. Smiley v. Territory [Okl.] 81 P. 433.

18. The intermediate orders or proceedings forming part of the judgment roll on appeal are reviewable by the appellate division, including an order overruling a demurrer to the indictment and the court of appeals can review the determinations of such court. People v. Canepi, 181 N. Y. 398, 74 N. E. 473. Refusal to advise acquittal goes up and involves sufficiency of evidence. People v. Ward, 145 Cal. 736, 79 P. 448. Proceedings on a writ of review procured to inquire into proceedings before a justice do not go up on an appeal from a judgment entered on appeal from the justice in the same case. State v. Bringgold [Wash.] 82 P. 132

19. Matters not objected to at the trial nor made grounds of motion for new trial will not be considered. Williams v. U. S. [Ind. T.] 88 S. W. 334. Where a request for exclusion of witnesses was not urged as of right, there is no question for review. State v. Armstrong, 37 Wash. 51, 79 P. 490. Additional affidavits first presented on appeal will not be considered in reviewing propriety of denying continuance. State v. Cummings [Mo.] 88 S. W. 706. Evidence ruled out on defendant's objection will not be considered. Johnson v. State [Ark.] 88 S. W. 905.

20. Where defendant has been acquitted a review would be useless. People v. Hill, 146 Cal. 145, 79 P. 845. The jury having found defendant guilty of simple larceny, the question of larceny from the house was out of the case, and assignments relative to rulings on that subject will not be considered. Patterson v. State [Ga.] 50 S. E. 489.

21. Right of state to prosecute by information. Barker v. State [Neb.] 103 N. W. 71.

22. Rigor v. State [Md.] 61 A. 631.

23, 24. People v. Georger, 95 N. Y. S. 790.

25. State v. Faulkner, 185 Mo. 673, 84 S. W. 967; Andrews v. People [Colo.] 79 P. 1031; Mount v. Commonwealth [Ky.] 86 S. W. 707.

26. Gardner v. U. S. [Ind. T.] 82 S. W. 704; Mount v. Commonwealth [Ky.] 86 S. W. 707; State v. Cummings [Mo.] 88 S. W. 706; Seward v. State [Ga.] 50 S. E. 342. On appeal the court, in considering the denial of a continuance on the ground of the absence of a witness, cannot consider a copy of the subpoena issued for the witness and an affidavit that the witness was present in court during the trial, where such papers were obtained after the adjournment of the court and were not a part of the record. Whit v. State [Miss.] 37 So. 809. Refusal to grant a continuance on conflicting evidence as to the physical condition of accused will be reviewed only in case of abuse of discretion. Rawlins v. State [Ga.] 52 S. E. 1. Refusal to grant a continuance because of illness of counsel is discretionary and will be reviewed only for abuse of discretion. Id.

27. Motion to quash indictment. McGregor v. U. S. [C. C. A.] 134 F. 187. Refusal to quash on ground of want of previous binding over before preferment of indictment. Commonwealth v. Brown, 23 Pa. Super. Ct. 470. Refusal of bill of particulars. Commonwealth v. Powell, 23 P. Super. Ct. 370; Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Refusal of election. Knox v. State [Ind.] 73 N. E. 255; Tuttle v. People [Colo.] 79 P. 1035. Refusal of a bill of particulars is reviewable only for a gross abuse of discretion. State v. Dewey [N. C.] 51 S. E. 937.

28. Exclusion of witnesses. Greer v. Commonwealth [Ky.] 85 S. W. 166; State v. Mann [Wash.] 81 P. 561. Sending out papers with jury. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235. Unless abuse of discretion is shown, a trial court's refusal to permit experiments relevant to the issue to be made before the jury will not

on the primary admissibility of evidence,[30] examination of witnesses,[31] order of proof,[32] argument and conduct of counsel,[33] instructions commenting on the evidence,[34] refusal to direct a verdict,[35] imposition of costs on the prosecutor,[36] rulings on motions for new trial,[37] and the sentence, where within the maximum allowed by law,[38] will be reversed only in clear cases of abuse of discretion to the prisoner's prejudice.

On questions of fact, the findings of the trial judge will be sustained unless clearly erroneous.[39] Likewise, the verdict of the jury is conclusive on all issues of fact properly presented to it where the evidence is sufficient[40] or conflicts,[41] or

be interfered with. Spires v. State [Fla.] 39 So. 181.

29. State v. Lauth [Or.] 80 P. 660. Challenge to panel. Mosely v. Commonwealth [Ky.] 84 S. W. 748. No exception lies in Montana to the action of the court in sustaining a challenge for individual bias. State v. Jones [Mont.] 80 P. 1095. Excusing, over objection of defendant, a juror not in fact disqualified is not error. People v. Lee [Cal. App.] 81 P. 969. Finding of trial court that juror was not indifferent in the cause is not reviewable when supported by evidence. State v. Byrd [S. C.] 51 S. E. 542. Excusing juror to enable him to protect his property. Nordan v. State [Ala.] 39 So. 406.

30. Relevant evidence objected to as too remote. State v. Bean [Vt.] 60 A. 807; State v. Danforth [N. H.] 60 A. 839. Whether witness understands nature of an oath. Freasier v. State [Tex. Cr. App.] 84 S. W. 360 Whether baby's features are sufficiently developed so that its resemblance to defendant is entitled to weight. State v. Danforth [N. H.] 60 A. 839. Ruling out evidence of bias of witness. Commonwealth v. Ezell [Pa.] 61 A. 930.

31. Smith v. State [Ind.] 74 N. E. 983; State v. Miller [Kan.] 80 P. 51; Scott v. State [Ark.] 86 S. W. 1004; Corothers v. State [Ark.] 88 S. W. 585. Discretion of trial court in permitting leading questions will not be reviewed on writ of error. Reyes v. State [Fla.] 38 So. 257.

32. Knox v. State [Ind.] 73 N. E. 255; State v. Seligman [Iowa] 103 N. W. 357; State v. Waln [Idaho] 80 P. 221.

33. Argument. Commonwealth v. Ezell [Pa.] 61 A. 930. Act of prosecuting attorney in kissing baby born to prosecution in rape. State v. Danforth [N. H.] 60 A. 839. One hour on a side for case taking 3 days to try held too short. State v. Rogoway [Or.] 81 P. 234.

34. State v. Valentina [N. J. Err. & App.] 60 A. 177; Commonwealth v. Wertheimer, 23 Pa. Super. Ct. 192.

35. State v. Brown [N. J. Law] 60 A. 1117.

36. Commonwealth v. Kocher, 23 Pa. Super. Ct. 65.

37. State v. Danforth [N. H.] 60 A. 839; Ball v. Commonwealth [Ky.] 85 S. W. 226; Ince v. State [Ark.] 88 S. W. 818; Harris v. State [Ga.] 51 S. E. 596; Whipple v. State [Ga.] 57 S. E. 590; Owen v. State [Ga.] 50 S. E. 64. Newly-discovered evidence. May v. State [Vt.] 60 A. 1; People v. Patrick [N. Y.] 74 N. E. 843; Van Meer v. Territory [Okl.] 79 P. 264. Drunkenness of counsel. Territory v. Clark [N. M.] 79 P. 708. Denial of further time to prepare for argument. Commonwealth v. Ezell [Pa.] 61 A. 930. Misconduct of jurors. Johnson v. People [Colo.] 80 P. 133. Qualifications of jurors. State v. Lauth [Or.] 80 P. 660. Separation of jury. Frame v. State [Ark.] 84 S. W. 711.

38. State v. Bjelkstrom [S. D.] 104 N. W. 481.

39. Competency of witness claimed to be defendant's common-law wife. State v. Hancock [Nev.] 82 P. 95. Finding on preliminary showing of conspiracy to justify introduction of declarations of conspirators. Schutz v. State [Wis.] 104 N. W. 90. Finding on predicatory showing to admit confession. Roszczyniala v. State [Wis.] 104 N. W. 113; Hintz v. State [Wis.] 104 N. W. 110. Finding that money in possession of accused was part of that stolen by him will not be reviewed. Commonwealth v. McDonald [Mass.] 73 N. E. 852. Qualifications of juror raised by motion for new trial. State v. Lauth [Or.] 80 P. 660. The sufficiency of the evidence to justify the giving of an instruction cannot be inquired into on an appeal from a judgment if there is any evidence to support the instruction. People v. Durand [Cal. App.] 81 P. 672. The court's determination of the fact that a witness cannot be reached so as to admit his deposition is conclusive in the absence of abuse of discretion. People v. Ballard [Cal. App.] 81 P. 1040. Where a case is tried by a judge without a jury and the facts are not agreed upon and there is no special finding or request for such finding, the conclusion of the judge as to the facts stands as a verdict of a jury and cannot be revised on appeal. Witherspoon v. State [Ala.] 39 So. 356.

40. Osburn v. State [Ind.] 73 N. E. 601; Holmes v. State [Wis.] 102 N. W. 321; Mosely v. Commonwealth [Ky.] 84 S. W. 748; State v. Williams, 186 Mo. 128, 84 S. W. 924; White v. State [Ark.] 86 S. W. 296; Botkins v. State [Ind. App.] 75 N. E. 298; Eckart v. Territory [Okl.] 79 P. 755; People v. Heart [Cal. App.] 81 P. 1018; Miller v. Commonwealth [Ky.] 84 S. W. 581. Defendant's intent in removing baggage without paying bill. Commonwealth v. Billig, 25 Pa. Super. Ct. 477. Intent in larceny. Miller v. Territory [Ariz.] 80 P. 321. To reverse for insufficiency of the evidence the court in Illinois must be satisfied from a consideration of the whole case that there is a reasonable doubt of guilt. Flanagan v. People, 214 Ill. 170, 73 N. E. 347. Where the verdict is sustained by the evidence, it will not be disturbed. Thomas v. State [Fla.] 38 So. 516. If the evidence as given in the record is sufficient to support the verdict, and affords no ground for the opinion that the jury were governed by improper influences in arriving at their verdict, under assignment of

the verdict depends on the credibility of the witnesses,[42] even though the evidence be not of the most convincing kind,[43] or preponderates against the verdict,[44] especially where the verdict has been approved by the trial court;[45] though where it is evident that to sustain the verdict will not subserve the ends of justice, the binding force thereof will not avail to prevent reversal.[46] In several states the question of excessiveness of punishment is considered by the appellate court.[47]

(§ 17) *I. Decision and judgment of the reviewing court.*[48]—An equal division of judges makes an affirmance.[49] In Arizona three judges must concur to reverse a judgment, though only three are sitting.[50] Reversal generally necessitates remand for new trial, but if the error may be corrected by the appellate court, remand is not necessary,[51] and new trial is not necessary if the error is one that requires no retrial of the facts.[52] Where it appears that the sentence imposed is

error questioning the sufficiency of the evidence the judgment of the court below will be sustained. Jackson v. State [Fla.] 38 So. 599. Where no errors are made to appear and the appellate court is of the opinion that the evidence supports the verdict, a judgment of conviction will be affirmed. Tatum v. State [Fla.] 38 So. 601. Where there is evidence to support a verdict it will not be disturbed as being against the evidence if its propriety depends entirely upon the credibility of witnesses. Spires v. State [Fla.] 39 So. 181; Caldwell v. State [Fla.] 39 So. 188. Where in a prosecution for rape there was evidence authorizing a verdict of guilty, a conviction will not be reversed on the ground that the verdict should have been "not guilty," under all the competent evidence. Dickey v. State [Miss.] 38 So. 776. Where circumstantial evidence points strongly to the defendant as the guilty agent in causing the violent death of a party and is without any material conflict, an appellate court will not say that the jury were not warranted in concluding that the defendant was guilty beyond a reasonable doubt. Houston v. State [Fla.] 39 So. 468. Where there is evidence tending to show the accused guilty of the crime charged a conviction will not be set aside. State v. Major, 70 S. C. 387, 50 S. E. 13.

41. O'Donnell v. People, 110 Ill. App. 250; Territory v. Clark [N. M.] 79 P. 708; State v. Lortz, 186 Mo. 122, 84 S. W. 906. A conviction based on conflicting evidence will not be disturbed on the ground of insufficiency of evidence after a motion for a new trial has been denied. People v. Bowers [Cal. App.] 82 P. 553. A ruling on a motion for a new trial where the evidence is conflicting will not be disturbed unless the ruling involves an error of law or an abuse of discretion. State v. Lackey [Kan.] 82 P. 527. Though there is a conflict in the evidence, an appellate court will not reverse the case upon the weight of the evidence, nor for the reason that there is a conflict, nor for the reason that all persons might not draw the same inferences from the facts proved. Willlams v. State [Ind.] 75 N. E. 875.

42. Dimmick v. U. S. [C. C. A.] 135 F. 257; Howard v. Territory [Okl.] 79 P. 773; State v. Jones [Mont.] 80 P. 1095; State v. Mann [Wash.] 81 P. 561; State v. Bartlett [Iowa] 104 N. W. 285. The question of favor or prejudice of a witness is for the jury. Commonwealth v. Gibson, 211 Pa. 546, 60 A. 1086. A verdict supported by evidence will not be disturbed on appeal as being against the weight of evidence, where its propriety depends wholly upon the credibility of conflicting witnesses. Dickens v. State [Fla.] 38 So. 909.

43. State v. Ryan [Kan.] 80 P. 588. First degree murder. Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070.

44. The Indiana statute (Acts 1903, p. 341, c. 193, § 8) requiring the court to weigh the evidence and award judgment to the right party has no application to criminal cases. Knox v. State [Ind.] 73 N. E. 255. Number of witnesses is not controlling. Holland v. State [Ark.] 84 S. W. 468; Simpson v. State [Tex. Cr. App.] 85 S. W. 15; Crow v. State [Tex. Cr. App.] 85 S. W. 1057.

45. By refusal of new trial. Hill v. Territory [Okl.] 79 P. 757; Harmon v. Territory [Okl.] 79 P. 765. A verdict of guilty having been approved by the presiding judge and being supported by the evidence it will not be set aside on appeal. Rahilly v. State [Ga.] 51 S. E. 503.

46. State v. Newton [Wash.] 81 P. 1002.

47. Where persons equally guilty of the same crime were sentenced to different terms, the longer terms were reduced to equal the shortest. Keeler v. State [Neb.] 103 N. W. 64.

48. See 4 C. L. 89.

49. The court being equally divided on the question of jurisdiction of an appeal by the state in a misdemeanor case will reject it. State v. Charles [Ind. App.] 74 N. E. 1107; State v. Hani [Ind. App.] 74 N. E. 1107.

50. United States v. Peppers [Ariz.] 80 P. 335.

51. Where judgment was sentence to imprisonment in state's prison for eighteen months when it should have been in the county jail, and eleven months of the sentence have been served, defendant will be discharged as eleven months in the state prison is at least the equivalent of eighteen in the county jail. Commonwealth v. Fetterman, 26 Pa. Super. Ct. 569.

52. Reversal of conviction of murder in second degree may be accompanied by direction to sentence defendant for manslaughter, where the testimony of himself and his witnesses shows that to be his offense. Darden v. State [Ark.] 84 S. W. 507. Where an erroneous sentence has been imposed, the appellate court will reverse it and send

without authority of law, the accused will be discharged, notwithstanding the time within which the sentence might be corrected has long passed.[53] Where, in a conspiracy trial, there is a separate verdict and judgment as to each of the defendants, there may be an affirmance or reversal as to one, or any number, or all.[54] Formal reversal is sometimes granted where appellant has been deprived of a statement of facts without any fault on his part.[55] In Oregon if a conviction is reversed because the indictment was erroneously sustained on demurrer, a new trial will be ordered with discretion in the trial court to submit anew to the grand jury.[56] It has been said that it is better to dismiss one found guilty than to enforce an unauthorized statute.[57]

(§ 17) *J. Proceedings after reversal and remand.*[58]—Questions determined on prior appeal are the law of the case,[59] and the court on a subsequent appeal will not review errors reviewable by the former appeal unless raised in the trial court on the second trial.[60] Reversal because conviction was had on an indictment from which a page was missing and improved does not require dismissal of the indictment.[61] Trial of the case after reversal cannot proceed without the indictment, though it has not been returned from the court of appeals.[62] Where a misdirection arises from an erroneous assumption as to the manner in which the question was raised, the direction should be regarded as surplusage and its effect reached by the proper proceeding.[63]

§ 18. *Summary prosecutions and review thereof.*[64]—Prosecutions under municipal ordinances are generally regarded as civil in their nature rather than criminal, and may be founded on any oral or written accusation reasonably informing accused of the nature of the charge.[65] In some cases it is provided that injured persons must make complaint.[66] Where the affidavit was before a judge without jurisdiction, judgment will be arrested.[67] Affidavits and complaints in prosecutions for misdemeanors may be amended.[68] Trial by jury is not necessary,[69] the

the case back for another sentence, but will not reverse the conviction. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. The court may order a modification of the judgment appealed from instead of ordering judgment nunc pro tunc. State v. Barry [N. D.] 103 N. W. 637. Court may modify excessive sentence. State v. Wisnewski [N. D.] 102 N. W. 883; Junod v. State [Neb.] 102 N. W. 462; State v. Norris [Iowa] 104 N. W. 282; State v. Harness [Idaho] 80 P. 1129. Court can strike out imprisonment and affirm fine where imprisonment alone is error. Pressly v. State [Tenn.] 86 S. W. 378.

53. Derby v. State, 6 Ohio C. C. (N. S.) 91.

54. O'Donnell v. People, 110 Ill. App. 250.

55. Jackson v. State [Tex. Cr. App.] 85 S. W. 10.

56. Prisoner is not to be discharged as on a reversal without remand for new trial under B. & C. Comp. § 1486. State v. Eddy [Or.] 82 P. 707.

57. Derby v. State, 6 Ohio C. C. (N. S.) 91.

58. See 4 C. L. 90.

59. That particular instruction should not have been given. Selby v. Commonwealth [Ky.] 89 S. W. 296.

60. State v. Faulkner, 185 Mo. 673, 84 S. W. 967.

61. People v. Noon [Cal. App.] 81 P. 746.

62. Martinez v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 462, 87 S. W. 344.

63. Order to sustain demurrer may be complied with by dismissal of information. People v. Coronado, 144 Cal. 207, 79 P. 418.

64. See 4 C. L. 90.

Includes all prosecutions before inferior courts and not by common law jury on indictment or information.

65. City of Topeka v. Kersch [Kan.] 79 P. 681. Arrest without warrant and lack of complaint prior to arrest may be waived. Borough of North Plainfield v. Goodwin [N. J. Law] 60 A. 571. Information received by mayor and acted upon, held sufficiently filed, though not so marked. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496. It is presumed that the mayor of a town before whom a prosecution was had was within the territorial jurisdiction when the information before him was sworn to. Id. Prosecutions for violations of city ordinances may be prosecuted in the name of the city. City of Helena v. Kent [Mont.] 80 P. 258. The affidavit on which a prosecution is based is sufficient, though affiant's name does not appear in the body, it appearing at the end as the person making the oath. Schnair v. State [Tex. Cr. App.] 84 S. W. 592.

66. State v. Borham [Ohio] 74 N. E. 220.

67. Edmondson v. State [Ga.] 51 S. E. 301. The judge of the superior court of Macon has no jurisdiction to attest an affidavit as the basis of a prosecution in the city court. Id.

68. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496.

69. Stone v. Paducah [Ky.] 86 S. W. 531. May be waived. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496.

provision for jury trial on appeal being a sufficient compliance with the constitutional guaranty.[70] In Ohio a mayor of a city having no police judge has final jurisdiction and should not recognize to the court above a misdemeanor case of a kind not triable by jury.[71]

The record[72] must show all the legal requisites of a legal trial, conviction and judgment, including in some states the offense, the venue,[73] the names of the witnesses, the evidence, and the judgment.[74]

Review.[75]—The right to appeal is statutory.[76] Where a city seeks to prosecute for an offense committed outside its borders, prohibition will lie.[77] Where, in a peace warrant proceeding, one has been committed to jail in default of a bond requiring him to keep the peace, a writ of habeas corpus cannot bring into review alleged irregularities or errors of procedure in the trial before the committal court, or questions as to the sufficiency of the evidence upon which the applicant in the writ was committed.[78] Review usually goes from inferior criminal courts to the court of general jurisdiction and not direct to the supreme court;[79] but in Louisiana an appeal from the city court of Shreveport must go to the supreme court by terms of the constitution if there is either a law declared unconstitutional or a fine imposed above $300.[80] The constitutional provision for appeals from the mayor's or recorder's courts to the district courts for appeal de novo does not apply, the city court not being the same.[81] In the District of Columbia the proper time to give notice of an intention to apply for a writ of error in a case in the police court is when the first exception is taken, but the notice need not be repeated with each exception.[82] Undertaking on appeal cannot be exacted unless required by statute,[83] but must fully satisfy such statute.[84] The issuance of a writ of error is not always necessary to give a jurisdiction of an appeal properly taken from a judgment of a

70. City of Topeka v. Kersch [Kan.] 80 P. 29.

71. By force of Rev. St. § 1817, a mayor of a city in which there is no police court has final jurisdiction to hear and determine any prosecution for a misdemeanor where the accused is not entitled to trial by jury, and it is not the mayor's duty in such a case to require accused to enter into a recognizance to appear in a higher court, although the complaint is not by the party injured. State v. Borham [Ohio] 74 N. E. 220.

72. See 4 C. L. 91.

73. It is error to overrule a certiorari where the record fails to show that the venue was proved. Brown v. State [Ga.] 51 S. E. 505; Edwards v. State [Ga.] 51 S. E. 505.

74. That the judgment recites the fine in figures is immaterial. City of East Orange v. Richardson [N. J. Law] 59 A. 897.

75. See 4 C. L. 91.

76. Acts 1891, p. 92, ch. 4055, providing for an appeal from a judgment of conviction in any municipal or recorder's court, is not repealed or affected by revised statutes 1892. State v. Wills [Fla.] 38 So. 289. Section 1, of ch. 4021, p. 50, Acts 1891, secures the right to an appeal from a judgment of conviction in any municipal or recorder's court. The expression in § 2 (P. 51) "that such appeals shall be taken * * * in the same manner," etc., has reference to the manner prescribed by law for appeals in civil cases at the time the law took effect, to wit, May 19, 1891. Id. Rev. St. 1892, § 2969, does not take away this right. Id. Acts 1901, p. 1854, establishing Bessemer city court, giving supreme court right to review city court's finding of facts, applies to civil, not to criminal cases. Witherspoon v. State [Ala.] 39 So. 356.

77. City of Bardstown v. Hurst [Ky.] 89 S. W. 147.

78. Young v. Fain, 121 Ga. 737, 49 S. E. 731.

79. No direct writ of error lies to review judgment of city court of Sylvester White v. State [Ga.] 51 S. E. 505. The circuit court in Arkansas has jurisdiction of an appeal from a conviction before justice of the peace in a misdemeanor case. Maxey v. State [Ark.] 88 S. W. 1009.

80. Act No. 29, p. 34, St. 1900, is unconstitutional in giving appellate jurisdiction to district court. State v. Judge of First Dist. Ct., 113 La. 654, 37 So. 546.

81. State v. Judge of First Dist. Ct., 113 La. 654, 37 So. 546.

82. Tubins v. District of Columbia, 21 App. D. C. 267.

83. No undertaking is necessary on appeal from a justice judgment rendered under Pen. Code, § 2719. State v. District Court of Tenth Judicial Dist. [Mont.] 82 P. 663.

84. Where a person is charged with a crime before a justice of the peace and also sued in tort for the same offense, an appeal bond conditioned as provided in Code 1892, § 82, cannot be made to operate as an appeal bond in the criminal case. Redus v. Gamble [Miss.] 37 So. 1010.

municipal court.[85] To bring an ordinance before a reviewing court, it must be certified up by the mayor with the other evidence.[86] On appeals from summary convictions, the trial is usually de novo,[87] and amendments after appeal are usually allowed.[88] Where the proceedings below are oral, a transcript of the docket is sufficient to give the court jurisdiction on appeal.[89] Where a justice of the peace acts without jurisdiction, the court to which appeal is taken acquires none.[90] By appeal to the district court and trial on the merits, defendant waives any question of the legality of his arrest on view without warrant.[91] Where an offense is charged which the municipality had a right to forbid and there is a finding by the mayor that the defendant did violate an ordinance, a reviewing court is bound to presume that the mayor did not err in finding that an ordinance had been passed covering the offense charged, and cannot reverse the judgment unless error is shown.[92] It is not ground for dismissal of an appeal from a conviction before a justice that notice of such appeal was not served on the county attorney.[93]

Further review.—The judgment of the county court in Texas on appeal from an inferior court is final where the fine does not exceed $100.[94] No review is authorized in Arizona from the judgment of the district court on appeal from a justice.[95]

On certiorari.[96]—Judgment of guilty by confession,[97] and conviction on a complaint which fails to allege facts constituting one of the offenses within the court's jurisdiction may be reviewed by certiorari.[98] Statutory certiorari is allowable only when seasonably applied for [99] with a proper bond.[100] The petition must aver all the evidence necessary to explain error assigned in respect thereto.[101] If the clerk fails to issue the writ of certiorari before the term to which it is returnable, the plaintiff may, if there has been no laches on his part, move the court for an order directing the clerk to issue the writ;[102] without such order, the clerk has no authority to issue the writ subsequently to the term to which it was originally returnable.[103] Review is confined to valid and legally sufficient parts of the record.[104]

85. Acts 1891, p. 50, ch. 4021. State v. Wills [Fla.] 38 So. 289.

86. Esch v. Elyria, 7 Ohio C. C. (N. S.) 9.

87. City of Spokane v. Smith, 37 Wash. 583, 79 P. 1125. On setting aside the complaint, defendant may be held for trial on an information. State v. Bringgold [Wash.] 82 P. 132.

88. An information before a mayor charging a violation of a town ordinance may be amended after appeal. Town of Lovilia v. Cobb, 126 Iowa, 557, 102 N. W. 496. Statutes providing for amendment on appeal entitle defendant to demand a written accusation, though the complaint was oral below. City of Topeka v. Kersch [Kan.] 80 P. 29.

89. City of Topeka v. Kersch [Kan.] 79 P. 681.

90. Stoltman v. Lake [Wis.] 102 N. W. 920.

91. City of Topeka v. Kersch [Kan.] 79 P. 681.

92. Esch v. Elyria, 7 Ohio C. C. (N. S.) 9.

93. State v. District Ct. of Tenth Judicial Dist. [Mont.] 82 P. 663.

94. Kruegel v. State [Tex. Cr. App.] 84 S. W. 1064; Thomas v. State [Tex. Cr. App.] 87 S. W. 353.

95. Territory v. Moore [Ariz.] 80 P. 316.

96. See 4 C. L. 91.

97. City of East Orange v. Richardson [N. J. Law] 59 A. 897.

98. Denninger v. Recorder's Ct. of Pomona, 145 Cal. 629, 79 P. 360.

99. Where writ of error to review judgment of city court was dismissed in the supreme court, such proceeding being illegal, an application to superior court of circuit for a writ of certiorari to review such judgment was too late where more than 30 days passed between date of judgment and application for writ. White v. State [Ga.] 51 S. E. 505; dist'g Roach v. Sulter, 54 Ga. 458.

100. The bond required by Acts 1902, p. 105, where application is made for a writ of certiorari to a police court, is merely an appearance bond; and upon a judgment of such court being affirmed on certiorari, it is not lawful to enter judgment against the sureties on such bond for the amount of the fine imposed in the police court. Tucker v. Moultrie [Ga.] 50 S. E. 61.

101. Where complaint was made in a petition for certiorari that the trial court overruled objections to the testimony of named witnesses upon designated subjects, without setting forth, either literally or in substance, the testimony to which the objections were made, an assignment of error that the court erred in overruling such objections was not well taken. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793.

102. Walea v. State, 121 Ga. 585, 49 S. E. 710.

103. Walea v. State, 121 Ga. 585, 49 S. E. 710. A writ so issued will be dismissed. Id.

Points made in a petition for certiorari not verified by the answer of the trial judge present nothing for determination either by the superior or the supreme court;[105] it is proper practice for the court on suggestion of diminution to rule a further return.[106] The supreme court of Georgia will not consider, in lieu of a brief of the evidence, a transcript of the stenographer's notes of the testimony taken on the trial of the case, consisting of questions asked by counsel and the answers given by the witnesses and not approved by the trial judge.[107]

INDORSING PAPERS; INFAMOUS CRIMES, see latest topical index.

104. There being no approved brief of evidence in the record, other questions made by a motion for a new trial cannot be decided. George v. State [Ga.] 51 S. E. 504.

105. Little v. State [Ga.] 51 S. E. 501; Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793.

106. Showing jurisdictional facts. Borough of North Plainfield v. Goodwin [N. J. Law] 60 A. 571.

107. No agreement of counsel can avail to bring such a document to the attention of this court. Civ. Code 1895, § 5529. George v. State [Ga.] 51 S. E. 504.